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LAWYERS' REPORTS,

ANNOTATED.

MAINE SUPREME JUDICIAL COURT.

George W. BENNETT
v.
AMERICAN EXPRESS CO.

(....Me....)

1. **Seizure of property in the course of transportation** by an officer without any warrant or other legal process does not excuse the carrier for non-delivery.
2. **Common carriers are not included** in the provision of Rev. Stat., chap. 30, §12, imposing a penalty on "whoever . . . has in possession" between October 1 and January 1, more than the number therein specified of the carcasses of certain wild animals.
3. **A shipper's knowledge of directions to the carrier's agent** not to receive certain articles for transportation will not relieve the carrier from liability for their loss if their transportation is actually undertaken.

Notiz.—Liability of the carrier for goods in transit.

If the goods are delivered at the usual place of receiving goods for shipment, and the fact of their delivery is brought home to the carrier or his duly authorized agents, there can be no question as to the responsibility accruing to the carrier as far as the end of his route, for he is bound to keep the goods safely after delivery to him for transportation, as well as to carry them safely. *Dale v. Hall*, 1 Wils. 281; *Clarke v. Needles*, 25 Pa. 398; *Southern Exp. Co. v. Newby*, 36 Ga. 635.

But if the property is received upon the premises of the carrier, to wait further instructions before transportation, his liability is that of a houseman only, until the instructions are received. *O'Neill v. New York Cent. & H. R. R. Co.* 60 N. Y. 138; *Baron v. Eldredge*, 100 Mass. 455; *Rogers v. Wheeler*, 58 N. Y. 222. And see *Gilbert v. New York Cent. & H. R. R. Co.* 4 Hun, 378, 6 Thomp. & C. 662.

If the deposit of the goods on the premises of the carrier is a mere accessory to the carriage, that is, if they are deposited solely for the purpose of being forwarded to their destination without further orders, the responsibility of the carrier begins from the time they were so received; but when the property is deposited subject to the further orders of the consignor, the rule is otherwise, as just stated. *Wade v. Wheeler*, 3 Lans. 201, affirmed, 47 N. Y. 466; *Ladue v. Griffin*, 26 N. Y. 354; *Chase v. Washburn*, 1 Ohio St. 244; *Maving v. Todd*, 1 Stark. 72; *Michigan S. & N. J. R. Co. v. Shurtz*, 7 Mich. 515; *Blossom v. Griffin*, 13 N. Y. 539; *Hickox v. Naugatuck R. Co.* 31 Conn. 281; *Watts v. Boston & L. R. Corp.* 108 Mass. 463. See *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58.

Inquiry as to value.

It is the duty of the carrier to make inquiry as to the value of the goods delivered to him, and
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4. **The game laws of a State can give no authority to take carcasses of animals**, or parts thereof, while in the course of interstate transportation, away from a common carrier on the ground that the animals have been killed in violation of such laws.

(March 24, 1891.)

RESERVATION by the Supreme Judicial Court for Penobscot County for the opinion of the full court of an action brought to recover the value of the saddles of three deer alleged to have been lost while in defendant's possession for transportation. *Judgment for plaintiff.*

The facts are stated in the opinion.

Mr. F. J. Whiting for plaintiff.

Messrs. Barker, Vose & Barker, for defendant:

the consignor must answer at his peril; and if such inquiry is not made, and the goods are received at such valuation for transportation as is asked with reference to its bulk, weight or external appearance, the carrier is liable for the loss, irrespective of its value. *Gorham Mfg. Co. v. Fargo*, 45 How. Pr. 90, 3 Jones & S. 434.

Fraud, imposition or unfair concealment as to the contents or value of the goods will relieve the carrier of responsibility. *Phillips v. Earle*, 8 Pick. 138; *Orange County Bank v. Brown*, 9 Wend. 116; *Warner v. Western Transp. Co.* 5 Robt. 490; *Relf v. Rapp*, 3 Watts & S. 21.

Burden of proof.

If property has been delivered to the carrier or his duly authorized agents, and it has not been delivered by him to the consignee, this is prima facie evidence of negligence and liability. *Whitesides v. Russell*, 8 Watts & S. 44; *Van Winkle v. South Carolina R. Co.* 38 Ga. 38; *Davidson v. Graham*, 2 Ohio St. 141; *Peck v. Weeks*, 34 Conn. 152; *Stokes v. Saltonstall*, 38 U. S. 13 Pet. 181, 10 L. ed. 115; *Hastings v. Pepper*, 11 Pick. 41.

It is frequently difficult to show the loss or damage done in order to fix the liability of the carrier (see *Ringgold v. Haven*, 1 Cal. 108; *Midland R. Co. v. Bromley*, 17 C. B. 376; *Woodbury v. Frink*, 14 Ill. 279), and the burden of proof is cast upon him to show that the loss resulted from such causes as will exempt him from responsibility. *Chapman v. New Orleans, J. & G. N. Co.* 21 La. Ann. 224; *Levering v. Union Transp. & Ins. Co.* 42 Mo. 88; *Turney v. Wilson*, 7 Yerg. 340; *Baltimore & O. R. Co. v. Morehead*, 5 W. Va. 293; *Ewart v. Street*, 2 Bail. L. 181; *King v. Shepherd*, 3 Story, C. C. 356; *Winne v. Illinois Cent. R. Co.* 31 Iowa, 583; *Hall v. Cheney*, 38 N. H. 27; *Agnew v. Steamer Contra Costa*, 27 Cal. 425; *Tarbox v. Eastern Steam-*

Animals *feræ naturæ* when legally killed by a person, are absolutely his own.

2 Bl. Com. p. 408.

The saddles of deer were sufficiently delivered to the American Express Company at Newport, for immediate transportation.

Angell, Carr. §§ 129-147; *Koath v. Driscoll*, 20 Conn. 584; *Spade v. Hudson River R. Co.* 16 Barb. 888; Redf. Carr. § 96, p. 80. See also § 100, p. 82, as to the delivery at an unusual place.

A delivery is always sufficient if the proper servant of the company accept the goods to carry, whether any bill or entry in the books of the company is made or not.

Redf. Carr. § 101, p. 82, and cases cited.

Common carriers are insurers of all property intrusted to them, except against an act of God or an enemy of the government.

Plaisted v. Boston & R. Steam Nav. Co. 27 Me. 182; *Fillebrown v. Grand Trunk R. Co.* 55 Me. 462.

The American Express Company did not restrict its liability, as no notice was brought home to the plaintiff, or was assented to by him.

Fillebrown v. Grand Trunk R. Co. supra; *Buckland v. Adams Exp. Co.* 97 Mass. 125.

Carriers are compelled to solve claimant's right at their peril.

Redf. Carr. § 244, p. 197.

Allen had no right or authority to seize the deer saddles as he had no warrant or other legal process.

Me. Const. art. 1, § 5; U. S. Const. art. 14, § 1; *Allen v. Jay*, 60 Me. 188; *State v. Doherty*, Id. 509.

The saddles were not in the possession of the American Express Company within the meaning of section 12, chap. 80, Rev. Stat.

Redf. Carr. § 808, p. 226, and cases cited.

Also such could not be the fact because it would be in violation of the Interstate Commerce Law.

U. S. Const. § 8, spec. 8.

Common carriers cannot select what they may carry or what they may refuse, but are bound to take all which offer.

Redf. Carr. § 100, p. 82; *Dwight v. Brewster*, 1 Pick. 50; *Pomeroy v. Donaldson*, 5 Mo. 36; *Hale v. New Jersey S. N. Co.* 15 Conn. 539; *Avinger v. South Carolina R. Co.* 29 S. C. 265.

When the box of deer saddles was taken by the defendant Company for transportation out of the State, and transportation began, they became subjects of commerce, and were governed by the laws of the United States.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715; *The "Daniel Ball"*, 77 U. S. 10 Wall. 557-565, 19 L. ed. 999-1002; *Pacific Coast S. Co. v. Board of Railroad Comrs.* 18 Fed. Rep. 10; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 288; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 847.

Foster, J., delivered the opinion of the court:

It is undisputed that the plaintiff was lawfully possessed and the owner of the saddles of three deer, which were legally killed under the laws of this State; that the same were closely boxed in good condition for shipment, and delivered by the plaintiff onto the platform of the Maine Central Railroad Company at Newport Station, plainly marked to the consignees in Boston. The defendant's agent was notified that the box was left for transportation, and thereupon he delivered it into the defendant's car, on the

boat Co. 50 Me. 339; *Cameron v. Rich*, 4 Strobb. L. 108; *Bazin v. Steamship Co.* 3 Wall. Jr. 229.

If it is satisfactorily shown that the loss arose from one of the excepted causes, such as flood or fire, the carrier is relieved of liability without proving affirmatively that he was guilty of no negligence. *Memphis & C. R. Co. v. Reeves*, 77 U. S. 10 Wall. 176, 19 L. ed. 909.

The proof of such negligence, if the negligence is alleged to exist, rests on the party asserting it. *Farnham v. Camden & A. R. Co.* 55 Pa. 59; *Western Transp. Co. v. Downer*, 78 U. S. 11 Wall. 129, 20 L. ed. 160; *Colton v. Cleveland & P. R. Co.* 67 Pa. 211, 5 Am. Rep. 424; *Patterson v. Clyde*, 67 Pa. 500; *Kansas Pac. R. Co. v. Reynolds*, 8 Kan. 683; *Childs v. Little Miami R. Co.* 1 Cin. S. C. (Ohio) 480; *Clark v. Barnwell*, 53 U. S. 12 How. 272, 13 L. ed. 965; *Lamb v. Camden & A. R. & T. Co.* 46 N. Y. 271, reversing 2 Daly. 454. See *Westcott v. Fargo*, 63 Barb. 849, 6 Lans. 319, affirmed, 61 N. Y. 542; *Lewis v. Smith*, 107 Mass. 334.

The principle established.

It is conclusively established as a principle of law in this country that a carrier, in the absence of a special contract, express or implied, for the safe carriage of goods to their destination, is only bound to carry safely to the end of his line, and there duly deliver to the next carrier in his route. *Michigan Cent. R. Co. v. Myrick*, 107 U. S. 102, 27 L. ed. 325; *Knight v. Providence & W. R. Co.* 13 R. I. 572; *Piedmont Mfg. Co. v. Columbia & G. R. Co.* 19 S. C. 358; *Detroit & B. C. R. Co. v. McKenzie*, 48 Mich. 609; *St. Louis Ins. Co. v. St. Louis v. T. H. & I. R. Co.* 104 U. S. 146, 26 L. ed. 679; *Harris v. Grand Trunk R. Co.* 15 R. I. 371; *Clyde v. Hubbard*, 88 Pa. 358; 13 L. R. A.

Goldsmith v. Chicago & A. R. Co. 12 Mo. App. 479; *Crawford v. Southern R. Asso.* 51 Miss. 222.

The question of the first carrier's liability beyond his own line depends upon the inquiry whether he in any form assumed or held himself out to the public as assuming any responsibility beyond the terminus of his own route. *St. Louis Ins. Co. v. St. Louis v. T. H. & I. R. Co.* 104 U. S. 146, 26 L. ed. 679.

They are only answerable for the ordinary and proximate consequences of neglect, and not for those that are remote and extraordinary. *Morrison v. Davis*, 20 Pa. 171.

This is also decided by the Supreme Judicial Court of Massachusetts. Owing to defective machinery, goods did not arrive for six days after they were due, and then were destroyed by a flood. The court said: "The negligence of the carrier was remote; it had ceased to operate as an active, efficient and prevailing cause as soon as the wool had been carried beyond Syracuse, and therefore cannot subject the carrier to a responsibility for an injury to the property resulting from a subsequent inevitable accident, which was the proximate cause by which it was produced." *Denny v. New York Cent. R. Co.* 13 Gray, 487.

In a case decided by the supreme court of New York, where the liability of the carrier was maintained and the damage was occasioned by a flood, the decision was placed expressly upon the gross neglect of the company. *Michaels v. New York Cent. R. Co.* 30 N. Y. 575.

Though the proximate cause may be occasioned by inevitable accident, the carrier is still bound to use care and diligence. Yet no greater foresight

arrival of the train, but no receipt or bill of lading was ever given to the plaintiff. Upon the arrival of the train at Augusta, the saddles were seized by a game-warden, and by him removed from the defendant's car, without any search-warrant or other legal process, and without objections from the defendant Company or its agents, and have never since been delivered either to the consignees or the Express Company.

Upon the facts thus stated, the defendant's liability is fully established. The plaintiff's ownership of the property, its delivery to the defendant for transportation, and its acceptance for that purpose, and its non-delivery to the consignees, are prima facie evidence of negligence. The burden is therefore upon the defendant to show facts exempting it from liability. *Little v. Boston & M. R. Co.* 66 Me. 241.

The property of the plaintiff, while in the hands of the defendant as common carrier, *in transitu*, was seized by an officer without any warrant or other legal process. Nor does it appear that any was ever obtained. The officer was therefore a mere trespasser, and the defendant was liable, under the rule of the common law, in the same manner as if it had allowed any other trespasser to take the property out of its custody. *Edwards v. White Line Transit Co.* 104 Mass. 163. As against the plaintiff, the seizure was of no more validity than a trespass by an unofficial person. There has never been any adjudication from any tribunal that the property seized was contraband, or other than the lawful property of the plaintiff. The common carrier is not relieved from the fulfillment of his contract, or his liability as

such carrier, any more than if the loss had occurred from fire, theft, robbery or accident. He stands in the relation of insurer, where, as in this case, no special contract is shown, and upon grounds of public policy is liable for all losses resulting from accident, trespass, theft or any kind of unlawful disposition of the property intrusted to him to carry, excepting only such as arise by the act of God or public enemies. *Adams v. Scott*, 104 Mass. 166; *Kiff v. Old Colony & N. W. R. Co.* 117 Mass. 598; *Fillebrown v. Grand Trunk R. Co.* 55 Me. 482.

In the case of *Edwards v. White Line Transit Co.*, *supra*, it was held that, while the carrier was not liable in trover for conversion of the property, he was nevertheless liable on his contract or obligations as common carrier, where the officer seizing the property was a trespasser. "The owner may, it is true," says the court, "maintain trover against the officer who took the property from the carrier; but he is not obliged to resort to him for his remedy. He may proceed directly against the carrier upon his contract, and leave the carrier to pursue the property in the hands of those who have wrongfully taken it from him."

But the defendant claims exemption from liability in this action on the ground that the property was put into its possession fraudulently; that having had in its possession, and transported during the year, after the first day of October, and before the time when this property was delivered to it, three deer from Newport Station, to places beyond the limits of the State, it directed its agents not to receive for transportation any deer or parts thereof, and that this fact was known

of extraordinary perils is expected of him than of other men, and no greater penalty visited for his failure. When he discovers himself in peril the law requires of him ordinary care, skill and foresight. This is defined to be the common prudence which men of prudence and heads of families usually exhibit in matters that are interesting to them. It means, as difficulties increase in great danger, great care is the ordinary care of a prudent man. *Morrison v. Davis*, 20 Pa. 171.

If one uses the precautions which a reasonable man would use under the circumstances, he is not responsible for omitting other precautions which are conceivable, even though if he had used them the injury would certainly have been avoided. *Shearn & Redf. Neg. 7.*

A common carrier is bound safely to carry the goods to their destination, unless prevented by some cause arising from irresistible force, over which he has no control and which cannot be guarded against by the watchful exertion of human skill and prudence. *The Niagara v. Cordes*, 62 U. S. 21 How. 24, 16 L. ed. 46; *Gordon v. Buchanan*, 5 Yerg. 71; *Oakley v. Port of Portsmouth & R. U. S. Packet Co.* 34 Eng. L. & Eq. 530.

No matter what degree of prudence may be exercised by the carrier and his servants, although the defusion by which it is baffled, or the force by which it is overcome is inevitable, yet, if it be the result of human means, the carrier is responsible. *McArthur v. Sears*, 21 Wend. 193; *Proprietors of Trent Nav. Co. v. Wood*, 3 Esp. 127; *Campbell v. Morse*, 1 Harp. 466; *Charleston & C. S. R. Co. v. Bacon*, 12, 22; *The Niagara v. Cordes*, 62 U. S. 21 How. 24, 16 L. ed. 46. See *Read v. Spaulding*, 30 N. Y. 630.

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Denny v. New York Cent. R. Co., 13 Gray, 451, is not against these cases, because the court there held that when the damages by flood occurred, the defendants no longer held the goods as common carriers.

It is for the carrier to show any modification of the responsibility. See also *Chamberlain v. Western Transp. Co.* 45 Barb. 218; *The Niagara v. Cordes*, 62 U. S. 21 How. 24, 16 L. ed. 47; *Elliott v. Roswell*, 10 Johns. 7; *Richards v. London & S. C. R. Co.* 7 C. B. 892.

The moment a faulty negligence begins, the carrier becomes an insurer against the consequences therefrom, both ordinary and extraordinary. *Davis v. Garrett*, 6 Bing. 716; *Bell v. Reed*, 4 Binn. 127; *Hart v. Allen*, 2 Watts. 114; *Williams v. Grant*, 1 Conn. 462; *Crosby v. Fitch*, 12 Conn. 410.

Of seizure by judicial process.

In a case decided in England at *not prius*, by Lord Ellenborough, in 1808 (*Goelling v. Higgins*, 1 Campb. 451), a vessel had been detained and condemned in Jamaica for a breach of Revenue Laws; but on appeal the condemnation was reversed. It was held that the master was liable for a loss caused by the delay, the court saying: "You have an action against the officers. The shipper can only look to the owner or master of a ship." This last proposition is clearly wrong. We do not find the case cited in any late English work on Carriers, and it is no doubt regarded as bad law. But in a late case in Massachusetts it was held that, in a suit against a common carrier for non-delivery of goods, it is no defense to say that they were taken from the carrier by an officer under an attachment against anyone who was not their owner. *Edward v. White*

by report to the plaintiff before he delivered the box to the defendant's agent.

Notwithstanding these facts may all be true, they constitute no defense to this action. The Statute invoked by the defendant (Rev. Stat. chap. 30, § 12) is as follows: "Whoever kills, destroys, or has in possession between the first days of October and January more than one moose, two caribou, or three deer, forfeits one hundred dollars for every moose, and forty dollars for every caribou or deer, killed, destroyed, or in possession in excess of said number; and all such moose, caribou or deer, or the carcasses or parts thereof, are forfeited to the prosecutor. Whoever has in possession, except alive, more than the aforesaid number of moose, deer or caribou, or parts thereof, shall be deemed to have killed or destroyed them in violation of law."

The defendant claims that under this Statute it could not lawfully take any more deer, or parts thereof, into its possession for transportation before the following January.

But we cannot adopt such a construction of this Statute as would make it apply to common carriers. Such construction as claimed by the defendant would make it unlawful for the carrier to transport, between the first days of October and January, the carcasses of moose, caribou or deer lawfully killed before the first day of October. Laying aside all constitutional questions, for the present, in relation to the doctrine of interstate-commerce, it is sufficient to say that it was not the intention of the Legislature so to apply it. The Statute, like many others, may in general terms be broad enough to embrace corporations as well as natural persons within its prohibition. But its construction

must be such as was evidently intended by the Legislature. That intention, to some extent, may be ascertained by taking into consideration the evil sought to be remedied. Such was the decision of this court in its construction of the section following the one now under consideration. *Allen v. Young*, 76 Me. 80. In that case it was held that the transportation of the hide or the carcass of a deer from place to place in this State is not unlawful if the deer was killed at a time when it was lawful to do so, notwithstanding the Statute in express terms provides that whoever carries or transports from place to place the carcass or hide of any such animal, or any part thereof, during the period in which the killing of such animal is prohibited, shall forfeit the sum of \$40. Certainly that language is as broad, comprehensive, and imperative as that of the Statute invoked in this case. Yet the court aptly remarked that it could see no possible motive for making such transportation a crime. To the same effect was the decision in *State v. Beal*, 75 Me. 289. "The meaning of the Legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the Legislature proceeded, from the end in view, or the purpose which was designed." *United States v. Freeman*, 44 U. S. 3 How. 557, 565, 11 L. ed. 724, 728; *Holmes v. Paris*, 75 Me. 559, and authorities there cited.

The box was delivered to and received by the Company. No information was asked concerning its contents, and none given. If the plaintiff knew by report, when he delivered the property to the defendant, that its agents had been directed not to receive any deer or parts thereof, yet there was no limitation of the Company's responsibility by

Line Transit Co. 104 Mass. 159. See *Lawson*, Carr. § 18.

Seizure by judicial process, of property in transportation, not brought about by any laches or connivance of the carrier, and of which prompt notice is given, is one of the implied exceptions in the carrier's contract as to liability for non-delivery. *The M. M. Chase*, 37 Fed. Rep. 708.

It is settled that the bailee may defend against the claim of the bailor, by showing that the goods have been taken from him by legal process. And in a note he adds: "If this defense were not valid, it might compel the party to resist the acts of a public officer in the discharge of his duty, which the law will never do." 2 Redf. Railroads, 158.

In New York, where the property was forcibly seized by a constable, on a complaint that the property had been stolen, the court said: "But my associates not passing upon the question whether the property was delivered to the true owners, desire to put this case upon the doctrine that the common carrier is exonerated from his obligation to his bailor, where the property of the latter is taken from him by due legal process, provided the bailor is promptly notified of such taking. . . . The judgment of the supreme court should therefore be affirmed. All affirm on the ground that when the property is taken from the carrier by legal process, and he gives notice thereof, he is discharged." *Bliven v. Hudson River R. Co.* 38 N. Y. 408.

In this same case, the supreme court, it was held that "the bailee must assure himself, and show the court that the proceedings are regular and valid, but he is not bound to litigate for his bailor, or to

show that the judgment or decision of the tribunal issuing the process, or seizing the goods, was correct in law or in fact. This is the rule as to bailees in general, and it includes the case of common carriers." *Bliven v. Hudson River R. Co.* 38 Barb. 191.

In a case where goods were seized on attachment, the court held: "If goods are taken from a bailee or carrier by authority of law, in any case coming within these exceptions, there is no doubt that it is a good defense to an action by the bailor or shipper, for a non-delivery." *Van Winkle v. United States Mail S. S. Co.* 37 Barb. 122.

In Vermont, where goods in the hands of a wharfinger were seized under legal process, the court held that if they were taken from the wharfinger or warehouseman, by lawful process, the wharfinger or warehouseman can protect himself in a suit brought against him by the owner. *Burton v. Wilkinson*, 18 Vt. 186.

In order, however, that such seizure may be a legal excuse for the non-delivery of the goods, it must be shown that the proceedings or process under which it was made by the officer was legal and valid, and that it empowered him to make it; for if it was void because issuing from a court having no jurisdiction, or for any other reason, and conferred no such authority, he would be a mere trespasser, and the carrier would be no more obliged to submit to his acts under it than to those of any other wrong-doer. *Savannah, G. & N. A. R. Co. v. Wilcox*, 48 Ga. 432; *Bliven v. Hudson River R. Co.* 38 N. Y. 408; *Edwards v. White Line Transit Co.* 104 Mass. 159. See *Hutchinson*, Carr. § 400.

special contract, or such knowledge brought home to this plaintiff and assented to by him, as would be necessary to limit such responsibility. *Killebrow v. Grand Trunk R. Co.*, 55 Me. 462. "A carrier may limit his responsibility for property intrusted to him," says Bigelow, *Ch. J.*, in *Buckland v. Adams Exp. Co.* 97 Mass. 125, "by a notice containing reasonable and suitable restrictions, if brought home to the owner of goods delivered for transportation, and assented to clearly and unequivocally by him. It is also settled that assent is not necessarily to be inferred from the mere fact that knowledge of such notice on the part of the owner or consignee of goods is shown. The evidence must go further, and be sufficient to show that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties, according to which the service of the carrier was to be rendered."

It is undoubtedly the right of the carrier to require good faith on the part of those who deliver goods to be carried, or enter into contracts with him. The degree of care to be exercised, as well as the amount of compensation for the carriage of property, depends largely on its nature and value; and no fraud or deception should be used which would mislead the carrier as to the extent of his duties or the risks which he assumes. But we fail to see any such evidence of fraud or deception in this case as would exonerate these defendants.

This property was lawfully the property of the plaintiff. It was delivered to and accepted by the defendant Company for transportation to a point beyond the limits of this State. Their liability as common carriers held them to a strict fulfillment of their obligation in relation to the property in their charge. That obligation was not merely to transport the property in this State, but to a point outside of its limits in another State. It had lawfully commenced to move as an article of commerce from one State to another. From that moment it became the subject of interstate commerce, and, as such, was subject only to national regulation, and not to the police power of the State. The same is unquestionably true in relation to whatever agency or instrumentality may be used as the means of transporting such commodities as may lawfully become the subject of purchase, sale or exchange, under the commerce clause of the Constitution of the United States. The transportation of the subject of interstate commerce, where it is such as may lawfully be purchased, sold, or exchanged, is without doubt a constituent of commerce itself, and is protected by and subject only to the regulation of Congress. *The "Daniel Ball,"* 77 U. S. 10 Wall. 557, 565, 19 L. ed. 999, 1002; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 463, 485, 31 L. ed. 700, 707; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 288; *Weldon v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715; *Leisy v. Hardin*, 185 U. S. 100, 24 L. ed. 128.

Defendant to be defaulted, damages to be assessed ad nisi prius.

Peters, Ch. J., and Libbey, Emery, Haskell and Whitehouse, JJ., concur.
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John S. ELLIOT, Exr. etc., of Sarah H. Jenks, Deceased,
v.

Mary T. FESSENDEN et al.

(....Me....)

A "relative" is one connected with the testator by blood and not by marriage only within the meaning of Rev. Stat., chap. 74, § 10 giving lineal descendants the share of a relative of the testator, who is a devisee if he dies before the testator.

(March 12, 1891.)

REPORT by the Supreme Judicial Court for Cumberland County for the opinion of the Law Court of a suit brought by the executor of the last will of Sarah H. Jenks, deceased, to obtain a construction of such will and instructions as to the disposition of funds in his hands. The will gave, *inter alia*, a legacy of \$1,000 to Marcia G. Lord, and the residue of the estate to "John Patten, of Bath, his heirs and assigns, to his and their own use forever." The will was dated November 28, 1885, and testatrix died July 20, 1887.

Marcia G. Lord was a sister of Caleb S. Jenks, husband of the testatrix. She died before testatrix, leaving as her only heir a daughter, Annie Louise Lord, one of the defendants in this suit.

John Patten, the residuary legatee, after the death of his first wife, married a sister of testatrix, who also died March 80, 1862, leaving no issue. Patten died February 24, 1887, leaving as his only heirs John O. Patten and Clara Patten Goodwin, children of a son by his first wife.

Neither Patten nor his grandchildren were blood relatives of testatrix. The grandchildren were made parties defendant.

The answer stated that testatrix was for over fifty years a member of John Patten's family

NOTE.—The term "relation" defined.

It has long been settled that, in the construction of wills, the word "relation" or "relatives" includes those who are entitled as next of kin under the Statute of Distributions. *Bouvier, Law Dict.* 15th ed. title *Relations*, and the cases there cited.

"A gift to one's relations does not, *prima facie*, refer to husband, wife, or marriage connections, but to those only of one's blood." *Schouler, Wills*, § 537, and cases.

A grandson's widow is not entitled under a devise to grandchildren, nor does a gift to children extend to children by affinity. 3 *Jarman, Wills*, 5th ed. 121, 151, and *Bigelow's notes*.

These rules may be varied by the context of a will showing different intention. It has been held in the State of Maine that a husband could be regarded as an heir to his wife, but that doctrine was overruled in *Lord v. Bourne*, 63 Me. 368.

The more common use of the term expresses kindred of blood or affinity, though properly only the former is embraced. Hence, in strict technical sense, it does not include husband and wife, but may include any and every relation that exists in social life, if literally taken; but it has long been settled that a bequest to "relations" applies to those who, by virtue of the Statute of Distributions, would take the property as next of kin. *Esty v. Clark*, 101 Mass. 28; *Handley v. Wrightson*, 60 Md. 206; *Anderson's Law Dict.* title *Relation*.

and never made any compensation for the services so obtained; that testatrix always insisted on the mutual use between herself and the members of John Patten's family of the appropriate address of blood relationship; that the property left by testatrix was received by her by gift from John Patten or his son, Gilbert E. R. Patten, father of John O. and Clara Patten, and that testatrix fully intended that said John O. and Clara should succeed their grandfather John in the title to her residuary estate.

Messrs. Baker, Baker & Cornish for defendants John O. Patten and Clara Patten Goodwin.

Messrs. Nathan Cleaves, Henry B. Cleaves and Stephen C. Perry, for the defendants, next of kin and heirs at-law:

It is the general rule of law that a devise or legacy to one who dies before the testator becomes void.

Ballard v. Ballard, 18 Pick. 48; *American Law of Administration*, p. 984, § 435, and cases cited.

The only exception to this general rule of law is created by statute.

Rev. Stat. chap. 74, § 10.

The word "relative" in that Statute applies to persons in the line of consanguinity, and not to those connected by marriage.

3 Wins. Exrs. 1004; 2 Jarman, Wills, 666; *American Law of Administration*, 936; *Ennis v. Pentz*, 8 Bradf. 385. See also *Mailland v. Adair*, 3 Ves. Jr. 281; *Worsley v. Johnson*, 3 Atk. 761; *Moses v. Allen*, 81 Me. 288; *Estate of Pfeuth*, 48 Cal. 649; *Esty v. Clark*, 101 Mass. 36; *Prather v. Prather*, 58 Ind. 141; *Cleaver v. Cleaver*, 89 Wis. 96; *Keniston v. Adams*, 6 New Eng. Rep. 547, 80 Me. 294.

The insertion in the bequest to John Patten of the words "his heirs and assigns, to his and their use forever," does not enlarge the rights of the descendants of John Patten. These words do not indicate that it was the intention of testatrix that they should take by substitution, and in case of the legatee's death before the testatrix, those taking by representation are not entitled to what the person they represent never had.

Kimball v. Story, 108 Mass. 384; *Dickinson v. Purvis*, 8 Serg. & R. 71; *Barnet's App.* 104 Pa.

342; *Maxwell v. Featherston*, 83 Ind. 339; *American Law of Administration*, § 434, p. 936, and cases there cited.

Walton, J., delivered the opinion of the court:

This is a suit in equity, instituted by the executor of the last will and testament of Sarah H. Jenks, asking the court to determine the construction of the will, and whether certain legacies therein mentioned lapse, or go to the lineal descendants of the legatees, the legatees themselves having died before the testatrix. Generally, if a legatee dies before the testator, the legacy lapses. But to this rule there is an exception in favor of relatives. "When a relative of the testator, having a devise of real or personal estate, dies before the testator, leaving lineal descendants, they take such estate as would have been taken by such deceased relative if he survived." Rev. Stat. chap. 74, § 10.

The word "relative," in this section of the Statute, has already been defined by the court. It means one connected with the testator by blood,—a blood relation. It does not include within its meaning one connected with the testator by marriage only. So held in *Keniston v. Adams*, 80 Me. 290, 6 New Eng. Rep. 547. And such is generally held to be its meaning, when used in similar statutes, although it may sometimes be used in a more extended sense. *Esty v. Clark*, 101 Mass. 36.

Such being the law, the conclusion is inevitable that the bequests to John Patten and Marcia G. Lord, mentioned in the will of Sarah H. Jenks, are void. They both died before the testatrix. And, being connections of hers by marriage only, they were not relatives within the meaning of the law, and their legacies lapsed; and the residuum of the estate, after paying all other legacies and the expenses of administration, must be paid to the heirs-at-law of the testatrix. Costs, including reasonable counsel fees, are allowed to all the parties to this suit, to be paid by the executor out of the assets of the estate, and charged in his administration account.

Decree accordingly.

Peters, Ch. J., and *Virgin, Libbey, Haskell and Whitehouse, JJ.*, concur.

MISSISSIPPI SUPREME COURT.

KANSAS CITY, MEMPHIS & BIRMINGHAM R. CO., *Appt.*,

Sable RILEY.

(....Miss....)

For refusing to accept the remaining part of return ticket on the return trip where the return coupon was taken through mistake by the conductor on the first trip, and ejecting the passenger for refusal to furnish any

other ticket or fare, the carrier may be compelled to pay damages.

(June 1, 1891.)

APPEAL by defendant from a judgment of the Circuit Court for Lee County in favor of plaintiff in an action brought to recover damages for the alleged wrongful ejection of plaintiff from defendant's train. *Affirmed.*

The facts are stated in opinion.

Messrs. Wallace Pratt and J. W. Buchanan, for appellant:

If it was the rule of the Railroad Company for its conductors not to recognize tickets of this character, then, unless this court holds that such a rule was unreasonable, the Rail-

NOTE.—See notes to *McGowen v. Morgan's L. T. R. & S. Co. (La.)* 5 L. R. A. 817; *McKay v. Ohio River R. Co. (W. Va.)* 9 L. R. A. 132; *Peabody v. Oregon R. & Nav. Co. (Or.)* 12 L. R. A. 823.
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road Company is not guilty of any wrong by the action of the second conductor.

McKay v. Ohio River R. Co. (W. Va.) 9 L. R. A. 132, citing *Ross v. Wilmington & W. R. Co.* 106 N. C. 168; *Frederick v. Marquette, H. & O. R. Co.* 37 Mich. 342; *Townsend v. New York Cent. & H. R. Co.* 56 N. Y. 295; *Hufford v. Grand Rapids & I. R. Co.* 53 Mich. 118; *Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill. 499; *McClure v. Philadelphia, W. & B. R. Co.* 34 Md. 532; *Shelton v. Lake Shore & M. S. R. Co.* 29 Ohio St. 214; *Downs v. New York & N. H. R. Co.* 36 Conn. 287; *Petris v. Pennsylvania R. Co.* 43 N. J. L. 449; *Yorton v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 234; *Bradshaw v. South Boston R. Co.* 135 Mass. 407; *Hall v. Memphis & C. R. Co.* 9 Fed. Rep. 585.

Mears, Blair & Stribling for appellee.

Cooper, J., delivered the opinion of the court:

On or about the 3d of September, 1889, the plaintiff with her husband purchased from the agent of appellant at Myrtle two tickets for transportation over appellant's road to Blue Springs and return, Myrtle and Blue Springs being stations on appellant's road. These tickets were handed to the conductor on the train running from Myrtle to Blue Springs, and by accident and mistake he returned to the passenger the wrong part of the tickets, giving to them that portion which called for transportation from Myrtle to Blue Springs, which he should have kept, and retaining that portion calling for passage from Blue Springs to Myrtle, which he should have returned to the passenger. The plaintiff went from Blue Springs to Sherman, another station on appellant's road, and on the 6th of September, being desirous of returning to Myrtle, she purchased a ticket from Sherman to Blue Springs, and for the journey from that place to Myrtle tendered that portion of the round-trip ticket from Myrtle to Blue Springs that had been returned to her by the conductor on the 3d, but this ticket the conductor refused to accept, because it entitled the bearer to transportation from Myrtle to Blue Springs, but not from Blue Springs to Myrtle. The plaintiff had not before noticed the mistake that had been made by the other conductor, but then explained to the conductor of the train upon which she was traveling how it had occurred, and insisted upon her right to be carried on the ticket. But this he declined, and informed the plaintiff that she must either pay train fare, buy a ticket at Blue Springs when the train should reach that point, or leave the train at that point. The plaintiff and conductor testified to about the same facts as to what transpired until the train reached Blue Springs, at which point the conductor stated that plaintiff and her husband left the train upon his refusal to carry them on the tickets they then had, while the plaintiff testified that the conductor spoke to her in an angry manner, and took her by the arm to put her off the train. At all events, the plaintiff left the train at Blue Springs with her husband, and there remained until the following day, and brings this suit for damages against the appellant. The jury awarded her damages in the sum of \$300, and from a judgment for that sum the defendant appeals.

12 L. R. A.

The decisions are in direct and palpable conflict upon the liability of a common carrier for failure to transport a passenger under the circumstances named. In New York, Michigan, Illinois, Maryland, Ohio, Wisconsin, Connecticut, New Jersey, Massachusetts and North Carolina, it seems to have been decided that the ticket presented by the passenger is the only evidence of his right to travel upon the train which can be recognized by the conductor; and that if, by reason of the negligence of other servants of the carrier, a wrong ticket has been given to the passenger, or the right ticket has been given to him, but erroneously taken from him, the passenger's right of action is for the wrong thus committed; and that he may not insist upon his right to travel on the wrong ticket, or without it, where it has been taken up, and recover damages for the refusal of the carrier to permit him to do so; and that the carrier may lawfully eject him from its train, using no more force than is necessary for that purpose. The authorities in support of this rule are found in the brief of counsel for appellant. On the other hand, it is held in Georgia and Indiana that the passenger is entitled to travel according to his real contract with the carrier, where the mistake in giving the proper ticket, or in taking up a proper one held by the passenger, is caused by the negligence of the servants of the carrier.

In a more recent case in Michigan than those cited by appellant's counsel,—*Hufford v. Grand Rapids & I. R. Co.* 64 Mich. 631,—the plaintiff had applied and paid for a ticket from Manton to Traverse City. The agent gave him a ticket previously issued for a ride from Sturgis to Traverse City. There was evidence tending to show that the ticket had been canceled by conductor's marks for a ride between Sturgis and Walton, and the trial court instructed the jury that "if they believed the ticket was punched, indicating to the conductor by the punch-mark that it had been used before between Grand Rapids and Walton, that would be evidence of an infirmity in the ticket, and the plaintiff would not be entitled to insist upon that ticket being received." This instruction was held to be erroneous, the court saying: "When the plaintiff told the conductor on the train that he had paid his fare, and stated the amount he had paid to the agent who gave him the ticket he presented, and told him it was good, it was the duty of the conductor to accept the statement of the plaintiff until he found out it was not true, no matter what the ticket contained in words, figures or other marks." The most remarkable thing about this decision is that it was made in the same case, upon the same facts, and between the same parties as that reported in 53 Mich. 118, in which in an opinion delivered by *Judge Cooley*, it was held that, as between the conductor and the passenger, "the ticket must be conclusive evidence of the extent of the passenger's right to travel." There is a class of cases somewhat analogous to the present one, in which, by a uniform course of decisions, so far as we are informed, it is held that the conductor must accept the statements of the passenger. We refer to those cases in which different rates are charged for one who has procured a ticket and one who pays upon

the train. It is held that as a condition precedent to the exercise of this right to charge higher train rates, and to expel one refusing to pay them, a reasonable opportunity should be given by the carrier to the passenger to procure the ticket required, and that one to whom no such opportunity has been afforded, and who for refusing to pay the higher rate is expelled from the train, may recover damages therefor. *Hutchinson*, Carr. § 571, and authorities in *note 2*; *Forsee v. Alabama G. S. R. Co.* 68 Miss. 66.

Without determining more upon this disputed question than is necessary for the decision of the case before us, it is sufficient to say that where, as here, the ticket in the hands of the passenger supports and confirms the truth of his statement, and no possible injury can result to the carrier by the conductor's accepting and acting thereon, he must so act, or refuse at the peril of inviting an action for damages against his principal if the statement

be true. We do not decide that a person holding a ticket from Myrtle to Blue Springs has a right to ride from Blue Springs to Myrtle; but no real injury could result to the carrier in recognizing such right, for the distance is the same, and in the usual course of business as many trains pass in one direction as the other. What we do decide is that a passenger holding and attempting to use such ticket, under the circumstances disclosed in this record, and explaining to the conductor how the mistake occurred by which the ticket, read in the wrong direction, makes such a reasonable and probable showing as entitles him to be dealt with as a passenger, and therefore that any regulation of the carrier authorizing the conductor of its trains to disregard such statement is unreasonable, and need not be submitted to by the passenger.

We find no error in the record for which the judgment should be reversed, and it is affirmed.

INDIANA SUPREME COURT.

Joseph W. ENGLISH, *Appl.*,

v.

George S. DICKEY.

(....Ind....)

1. **The twenty days' limitation** of the time "to adjourn or continue the trial" of an election contest under Rev. Stat. 1881, § 4761, begins when the board has first convened and organized to enter upon the investigation, although the trial does not begin at that time.
2. **Intervening Sundays cannot be excluded** from the twenty days limited for an election contest where the rule for computation of time is fixed by a statute requiring the first day to be excluded and the last included, unless it is Sunday.
3. **The adjournment of an election contest** at the request of the contestor to a day beyond the time limited by statute for the investigation absolutely discontinues the proceeding, and even the consent of the parties cannot keep it alive longer.
4. **Discontinuance and dismissal** are synonymous terms.

(April 28, 1891.)

APPEAL by contestant from a judgment of the Circuit Court for Decatur County in favor of contestee in a proceeding instituted to contest the validity of contestee's alleged election to the office of sheriff of Decatur County. *Affirmed.*

The facts are stated in the opinion.

Mr. J. S. Scobey for appellant.

Mr. S. A. Bonner for appellee.

McBride, J., delivered the opinion of the court:

The appellant and the appellee were opposing candidates for the office of sheriff of Decatur County at the general election in November, 1890. The board of canvassers declared the appellee elected, and thereupon the appellant instituted this proceeding to contest the election. The necessary preliminary steps having been taken, the auditor of the county issued and caused to be served on the board of county commissioners a notice convening them in special session on the 4th day of December, 1890, to try such proceeding; and also issued and caused the service on the contestee of notice, as required by section 4760, Rev. Stat. 1881.

At the time fixed the board of commissioners

NOTE.—*Election contests, trial, practice in Indiana.*

The law vests the county board with jurisdiction over election contests, and their decision that an insufficient affidavit is good will be binding unless appealed from. *Curry v. Miller*, 42 Ind. 320.

The ballots cast, when legally preserved and properly identified, are the primary and original evidence by which the result is to be determined. *Reynolds v. State*, 61 Ind. 302.

Where a witness is called to prove that he cast a ballot for contestor, the ticket if found is the best evidence of the fact; if not found, then he may state for whom he did vote. *Wheat v. Ragsdale*, 27 Ind. 182.

Computation of time, Sunday excluded.

In computing the time for which a notice is to be 13 L. R. A.

given, the last day, if Sunday, is excluded. *Gage v. Davis* (11), 11 West. Rep. 612.

In the computation of time upon service of notice of trial, the day of service is excluded, and the first day of the term included. *State v. Weld*, 39 Minn. 426; *Thrower v. Brandon*, 99 Ala. 406.

Sunday is to be excluded in computing the time for a motion for a new trial. *Cattell v. Dispatch Pub. Co.* 3 West. Rep. 843, 88 Mo. 356.

In computing the time for the commencement of a proceeding in error, the first day is to be excluded and the last day included. *Smith County Comrs. v. Labore*, 37 Kan. 480; authorities cited in *Wright v. Manns*, 9 West. Rep. 297, 111 Ind. 422.

Computation of time. See *Seward v. Hayden*, 5 L. R. A. 844, 150 Mass. 158; *Merritt v. Mora*, *Ona & Co. (Pa.)* 11 L. R. A. 724, 44 Fed. Rep. 369.

convened, the parties, contestor and contestee appeared in person and by counsel and such steps were taken from time to time as carried the cause to the 22d day of December, 1890, which time was set for the commencement of the trial proper. On the 22d day of December, 1890, the parties appeared and the contestor moved for a postponement of the cause to Friday, December 26, 1890, which motion was sustained.

The record entry of this motion and of the order postponing the cause, is as follows: "Comes now the contestor by his attorney and in person, and asks that the hearing of the cause at issue be postponed until Friday, December 26, 1890, to which the contestee interposes no objections, and which was accordingly done."

On the 26th day of December, 1890, the board again convened, the parties appeared, and the contestee moved the court to discontinue the cause, for the reason that more than twenty days had elapsed since the board of commissioners were called to try and determine the same. The board sustained the motion. The contestor thereupon appealed to the circuit court. In the circuit court the motion to discontinue was renewed and sustained by the court. The court thereupon rendered judgment confirming the contestee in his office, and against the contestor for costs.

The contestor in his appeal to this court assails the action of the court below upon two grounds: (1) that the court erred in sustaining the motion to discontinue; (2) that the court erred in rendering judgment against the appellant for costs.

Whether the motion to discontinue the cause was rightly sustained or not depends upon the construction to be given to sections 4760 and 4761, Rev. Stat. 1881. The two sections in question are as follows:

"4760. When such statement is filed with the auditor, he shall issue a notice to the board of county commissioners to meet at the courthouse at a designated time, not less than ten, nor more than twenty, days thereafter, to try such contested election, and shall issue a notice to the contestee to appear at the time and place specified in the notice to the commissioners; which, with a copy of such statement, shall be delivered to the sheriff of the county, who shall, within five days thereafter, serve the same on the contestee, by delivering to him a copy of such notice and statement, or leaving a copy thereof at his last usual place of residence.

"4761. The auditor, at the request of either party, shall issue subpoenas, which shall be served by the sheriff. Such board of commissioners shall try and determine such contest, and shall have power to compel the attendance of witnesses, to swear and examine the same, to punish contempts as other courts, to adjourn or continue the trial from time to time, not exceeding twenty days altogether; to make the necessary orders for the payment of costs, and to coerce the payment of the same, and shall be governed in such trial by the rules of law obtaining in circuit courts. And if it be proven that any other person than the contestee has the highest number of legal votes, such board shall declare such person elected, and certify the same to the proper officer."

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The controversy between the parties is over the twenty days' limitation contained in section 4761. Appellant's position is that it is not an absolute limitation, but is merely directory, and applies solely to the trial proper, after the cause has been submitted and the parties have commenced the introduction of testimony; while the appellee contends that it is mandatory, is an absolute limitation and embraces the entire proceeding, beginning with the day when the board is convened and organized to enter upon the investigation, and that when twenty days have elapsed the board has no longer jurisdiction to proceed. But little authority has been cited bearing upon this question, and we are inclined to think the authorities are somewhat meager. Indeed, we not only know of no case wherein the precise question has been decided, but no authority has come to our attention wherein the questions decided have sufficient analogy to make them of much value as authority, except as they serve to indicate the rule by which to construe the statute. The policy of the law seems to be to compel prompt action in hearing and disposing of contested elections.

The learned author of *McCrory on Elections* places much emphasis on this. He says: "A statutory provision, requiring notice of contest to be given within a given time from the date of the official count, or from the declaration of the result, or the issuing of the certificate of election or the like is peremptory; and the time cannot be enlarged. . . . And it may be added that there is the strongest reason for enforcing this rule most rigidly in cases of contested elections, because promptness in commencing and prosecuting the proceeding is of the utmost importance; to the end that a decision may be reached before the term has wholly or in great part expired." § 392.

Again: "The courts should require the parties to speed the cause, so that the official term which is in dispute may not expire, either in whole or in large part, before the final decision is reached." § 390.

Again: "There is, however, a very strong reason for requiring any such amendment to be made instant, and for bringing an election case to a prompt and speedy trial and determination, and it is this: The subject matter of the controversy is daily growing less and of less importance and value. The office is usually for a short term of one or perhaps several years only, and if the 'law's delays' are to be allowed in those as in other cases, the term would often expire before a decision could be reached." § 407.

Again: "As we have already seen, there are strong reasons for requiring the parties to an election contest to use great diligence in preparing for an early trial." § 408.

Of similar tenor is § 431.

The case of *Bull v. Southwick*, 2 N. M. 321, was an election contest. The Statute limited the time within which answers should be filed. Answers were filed within the time limited; but afterward, and after the expiration of the time limited, the contestee asked leave to file additional answers. The court said: "It is also my opinion that the very object of the Statute in regard to the pleading and practice in contested election cases is to afford, and at the same time compel, the observance of a

speedy mode for conducting and terminating such cases. . . . These statutory provisions as to the time of filing and serving the notice of contest, answer and reply, are in effect Statutes of Limitation, taking from the judge all discretion as to extending the time. In my opinion this is one of the most salutary of our statutory laws. Experience has demonstrated that without some such compulsory mode as to the time of making up issues and their trial in contested election cases, subterfuges and delays might and would be successfully resorted to, so that a final determination could not be reached before the term of office would expire."

This case is followed and its interpretation of the statute is approved in *Vigil v. Pradt* (N. M.) 20 Pac. Rep. 795.

These authorities may aid us in determining the legislative intent, as it will be presumed the law-making power, in the enactment of a given statute, had in view settled rules of construction and intended that it should be construed in the light and line of the settled and uniform policy of the law, as relating to the subject matter of the Statute in question. Sutherland, Stat. Const. §§ 287-289, 333 *et seq.*

We conclude, therefore, that the Legislature intended by the limitation to compel a speedy determination of cases of this character.

It is a part of the common experience of those connected with courts, of which we must take notice, that the delays of litigation as a rule precede the trial proper of causes, and that after a cause is submitted and the hearing of testimony commenced it usually proceeds without interruption. It is before that time that the party desirous of delay employs his arts. If, therefore, the Legislature intended by this provision of the Statute to prevent delay, it is improbable that they would enact a time limitation applying only to that part of the procedure least liable to abuse by delay. If it was intended that the limitation should apply to only a portion of the procedure, we think it would probably have been applied to the steps preceding that time. In our opinion, it was the intention of the Legislature that the entire time given to the consideration of a contested election case by the board of county commissioners should be twenty days altogether. They are notified by the auditor to meet in special session for that purpose, and the limitation is intended to indicate the entire length of the special session which they may thus hold. The notice issued to them is that they meet at a designated time "to try such contested election."

Convened and organized in obedience to such notice, they constitute a special tribunal, having no authority except to try and decide that particular case; and, within the meaning of the Statute, the trial commences as soon as they are convened and organized and the parties appear before them. If the limitation applies only to the actual hearing of testimony, almost the last act in the drama, their session may be protracted indefinitely. This may be done, not necessarily by reason of any indifference or desire for delay on the part of the board; but the skill and ingenuity of counsel, by the use of dilatory practices, may find it possible to secure such delays as would indefinitely pro-

long the proceeding. If the limitation does not apply to the entire proceeding, there is no limit fixed by the Statute for the length of the session of such tribunal. This would be of itself so unusual and exceptional that, unless forced to it, we could not adopt such a construction of the Statute. The board of county commissioners, convened for any other purpose, have the limit of their sessions clearly fixed. Even the courts of record of the State, courts having general jurisdiction, all have fixed terms; and the circumstances under which they may continue in session beyond the time fixed are clearly specified.

Section 284, Elliott's Supplement, provides as follows: "That if, at the expiration of the time fixed by law for the continuance of the term of any court, the trial of any cause shall be progressing, said court may continue its sitting beyond such time and require the attendance of the jury and witnesses, and transact and enforce all other matters which shall be necessary for the determination of such cause; and in such case the term of said court shall not be deemed to have ended until the cause shall have been fully disposed of by the court."

While not deciding the question, because not necessary to a decision of this case, it is possible that if the trial of a contested election case was progressing at the expiration of the twenty days, this Statute might apply and operate to extend the term until it could be finally disposed of. Such a continuance, however, which may be called a continuance or extension of the term by necessity, would be a very different thing from that which was attempted in this case. Here a special tribunal, created and convened for a special purpose, with the period of its duration limited to twenty days, was convened and entered upon the discharge of its duties on the 4th day of December. On the 22d day of December, two days before its existence must terminate by operation of law, the party at whose instance it was convened, who invoked its creation that it might adjudicate upon his rights, asks that the cause may be continued two days beyond the legal limit of the existence of the tribunal. His request is granted and an order of that character is made, continuing the cause to the 26th day of December. When that time arrives, the court no longer exists. It had ceased to exist two days before, and the law had made no provision for its resuscitation. It was no longer in the power of the parties, even by agreement, to give it life and again clothe it with jurisdiction. When the board again assumed to meet on the 26th day of December, it had no legal existence as a court for the hearing of that cause; and no motion to discontinue the cause was necessary. There was nothing to discontinue, as the cause died with the court. What the effect of an order continuing the cause to a day beyond the term would be if made by the court, over the objection of the contestor, we need not consider, as no such question is before us. What we do decide, however, is that when the contestor himself, before the expiration of the term, without assigning any reason therefor, voluntarily asks and obtains a postponement which carries the cause two days beyond the

time when the term would end by operation of law, he thereby discontinues his contest.

Appellant insists, however, that if the limitation of twenty days is to apply to the entire term, in the computation of the time Sundays are to be excluded. He cites no authority in support of this proposition, and we know of none. The rule for the computation of time in such cases is fixed by section 1280, Rev. Stat. 1881, and is that the time shall be computed by excluding the first day and including the last, and if the last day be Sunday it shall be excluded. This of course includes intervening Sundays.

Appellant also argues that the court had no power to order a discontinuance of the cause, as there is no such thing as a discontinuance known to our practice. Discontinuance and dismissal are synonymous terms. *Thurman v. James*, 48 Mo. 235.

It is, however, not at all material what term was used. The case was at an end.

The judgment of the Circuit Court for costs was in accordance with § 4765, Rev. Stat. 1881, and was right.

Judgment affirmed, with costs.

NEW YORK COURT OF APPEALS.

Croft C. CARROLL, *Resp't.*,
v.
Clayton E. SWEET, *Appt.*

(.....N. Y.....)

1. A check taken for an antecedent debt is conditional payment only in the absence of an agreement to the contrary.
2. The holder of a check is under obligation to an indorser thereon to present it for payment not later than the next day after its date.
3. Delay in presenting a check at the drawer's request, whereby its collection becomes impossible because of his insolvency, op-

rates as payment up to the amount of the check in favor of an indorser who has transferred it to the holder on account of an antecedent debt.

4. Lack of money of the drawer in a bank to meet a check, where he would have provided for it or paid it if payment had been insisted upon, does not relieve the holder, who has taken it from an indorser on an antecedent debt, from his obligation to present it, or prevent his failure to do so until collection becomes impossible from operating as payment to the amount of the check.

(June 2, 1891.)

A PPEAL by defendant from a judgment of the General Term of the Superior Court

NOTE.—*Within what time check should be presented.*

It is well settled that presentment of a check or draft on a bank the day after it is drawn is in season (*Merchants Bank v. Sploor*, 6 Wend. 443), and the same case holds checks and drafts to be subject to the same rule (*Mohawk Bank v. Broderick*, 13 Wend. 123; and where the facts are not disputed, the use of due diligence is a question of law for the court. *Bryden v. Bryden*, 11 Johns. 187; *Kelty v. Second Nat. Bank of Erie*, 52 Barb. 328.

Where a draft sent to a bank for collection is presented by it and the drawee's check taken in payment thereof, and the draft surrendered, it is the duty of the bank to present such check for payment on the same day, if it can be so presented by the exercise of reasonable diligence; and if the check would have been paid if presented on that day, but is not good on the next, through the failure of the maker, the drawers of the draft are discharged, and the bank is liable to its depositors for its failure to collect it. *Meadville First Nat. Bank v. Fourth Nat. Bank*, 18 Hun, 322; 1 Wait, Law and Pr. 772; and see *Smith v. Miller*, 48 N. Y. 171, 3 Am. Rep. 690, 53 N. Y. 545; *Burkhalter v. Second Nat. Bank of Erie*, 48 N. Y. 328, 40 How. Pr. 324.

In the absence of agreement or special controlling circumstances, it is the right of the drawer of a check to expect its presentment for payment at latest within banking hours on the day following the day of its delivery to the payee, provided the bank on which it is drawn be in the same place where the payee resides or does business; if the bank be not in such place, then the check must be put in due course for presentment, either by being duly mailed to the drawee or by being deposited for collection with a bank, according to the ordinary custom for such business in that place. *Weddington v. Schlenker*, 1 Nev. & M. 540, 4 Barn. & Ad. 725; *O'Brien v. Smith*, 66 U. S. 1 Black, 99, 17 13 L. R. A.

L. ed. 64; Taylor v. Sip, 30 N. J. L. 264; *Ritchie v. Bradshaw*, 5 Cal. 223; *Wear v. Lee*, 2 West. Rep. 450, 87 Mo. 365; *Schoolfield v. Moon*, 9 Heisk. 171; *Syracuse, B. & N. Y. R. Co. v. Collins*, 57 N. Y. 641; *Kelty v. Second Nat. Bank of Erie*, 52 Barb. 328; *Himmelmänn v. Hotaling*, 40 Cal. 111; *Oswain v. Browninski*, 6 Bush. 457; *Strong v. Kink*, 35 Ill. 9; *Bleford v. First Nat. Bank of Chicago*, 42 Ill. 238; *Smith v. Miller*, 48 N. Y. 171; *Smith v. James*, 20 Wend. 122; *Moule v. Brown*, 4 Bing. N. C. 266; *Veazie Bank v. Winn*, 40 Me. 63; *Cromwell v. Lovett*, 1 Hall, 56; *Simpson v. Pacific Mut. L. Ins. Co.*, 44 Cal. 139.

But the holder does not obtain extra time for presentment by depositing the check in his bank for collection. If the payee of the check receive it on Monday and deposit it in his bank, presentment must still be made in the same place, or the check forwarded to any other place where the drawee's bank is, by the payee's bank, during banking hours on Tuesday. *Alexander v. Burchfield*, 1 Car. & M. 75, 7 Man. & G. 1061.

What is an ordinary mode of presentment.

When the defendant, instead of sending the note to an agent or correspondent at the drawee's bank for presentment, sent it by mail directly to the bank where it was payable, it will be considered an ordinary method of transacting such business, and the defendant is bound only to adopt the ordinary mode. This method is sanctioned in England, in the cases of *Heywood v. Pickering*, L. R. 9 Q. B. 423; *Prideaux v. Criddle*, L. R. 4 Q. B. 461; *Buffey v. Bodenham*, 16 C. B. N. S. 236; *Hare v. Hentley*, 10 C. B. N. S. 65; and in this country in *Shinsey v. Bowery Nat. Bank*, 50 N. Y. 435. See *Indig v. Brooklyn Nat. City Bank*, 80 N. Y. 100.

A check or draft must be presented within a reasonable time. *Werk v. Mad River Valley Bank*,

for the City of New York affirming a judgment of the Trial Term in favor of plaintiff in an action to recover the amount alleged to be due on account, in defense of which defendant pleaded the delivery of the indorsed check of a third person. *Reversed.*

The facts are stated in the opinion.

Mr. H. E. Losey, with *Mr. John W. Bartram*, for appellant:

The plaintiff was guilty of laches in dealing with the Woodruff check. When he accepted the check he assumed the duty of causing proper demand of payment to be made, and notice of non-payment to be duly given to the defendant as indorser.

Even as against the maker of the check, it was the duty of the payee or holder to cause demand to be made at the bank on the day of its date or the following day.

Cromwell v. Lovett, 1 Hall, 56; *Murray v. Judah*, 6 Cow. 484; *Smith v. Miller*, 48 N. Y. 171; *Burkhalter v. Second Nat. Bank*, 42 N. Y. 588.

As against the defendant as indorser, the plaintiff owed a still stronger duty to cause immediate presentment to be made and notice of dishonor given, even though the maker of the check never had funds in the bank to meet it.

Mohawk Bank v. Broderick, 13 Wend. 134, 10 Wend. 304; *Little v. Phenix Bank*, 2 Hill, 425; *Murray v. Judah*, *supra*; *Darnall v. Morehouse*, 45 N. Y. 64; *Harbeck v. Craft*, 4 Duer, 122; *Dan. Neg. Inst.* § 1590; *Morse, Banks &*

Banking, p. 280; *Alexander v. Burchfield*, 7 Man. & G. 1061.

By reason of the plaintiff's neglect to make due demand and give due notice of the dishonor of the check in question, he discharged the defendant from all liability, either upon the check or upon the indebtedness for which it was transferred to the plaintiff.

See *Smith v. Miller*, 48 N. Y. 171, 53 N. Y. 545; *Dan. Neg. Inst.* § 1597; *Commercial Bank of Albany v. Hughes*, 17 Wend. 98.

The mere insolvency of the drawee or acceptor of a draft is no excuse for neglecting to present it for payment.

Jackson v. Richards, 2 Cal. 343; *Meadville First Nat. Bank v. Fourth Nat. Bank*, 24 Hun, 241; *Clift v. Rodger*, 25 Hun, 39; *People v. Cromwell*, 102 N. Y. 477, 484; *Copper v. Powell*, Anth. N. P. 68, 71, 74, and notes.

Mr. Charles E. Hughes for respondent.

Andrews, J., delivered the opinion of the court:

The indorsement and transfer by the defendant to the plaintiff of the check of Woodruff operated as provisional payment only of so much of the antecedent debt owing by the defendant to the plaintiff. There was no agreement that it should be taken in absolute satisfaction of the debt, and in the absence of such an agreement the intendment of law is that it was conditional payment only. *Hill v. Beebe*, 18 N. Y. 566; *Bradford v. Fox*, 38 N. Y. 289.

The debt remained until discharged by pay-

8 Ohio St. 301; *Veazie Bank v. Winn*, 40 Me. 60; *Woodin v. Frazee*, 6 Jones & S. 190.

What is a reasonable time depends upon the circumstances of each particular case. *Knott v. Venable*, 42 Ala. 188; *Walsh v. Dart*, 23 Wis. 334; 1 Wait, *Law & Pr.* 773.

When a check is considered stale or overdue.

A check is considered stale or overdue, so as to allow of equitable defenses, whenever the delay in presentment has been so long that, in the light of the surrounding circumstances, it is sufficient to arouse the suspicions of a reasonably prudent man and put him upon inquiry. This may be taken as a reliable statement of the present law, notwithstanding it is claimed by one authority (*Thompson, Bills*, 118) that a check is "never overdue."

It is impossible to state the precise period of time at which a check is said to be "overdue." The conclusion in each case is determined by due consideration of the special circumstances surrounding the parties. Thus, in the light of some circumstances, a check is overdue when there was a delay in presentment of two and a half years (*Skillman v. Titus*, 23 N. J. L. 36); one year (*Lancaster Bank v. Woodward*, 18 Pa. 367); fourteen months (*Cowing v. Altman*, 71 N. Y. 426); five months (*First Nat. Bank of Newton v. Needham*, 20 Iowa, 249); five days. *Down v. Halling*, 4 Barn. & C. 330, 6 Dow. & B. 445, 2 Car. & P. 11.

On the contrary, it has been held that a check is not overdue, and may still be negotiated free from equitable defenses, where there has been a delay of one month (*Lester v. Given*, 8 Bush, 367); ten days (*Ames v. Meriam*, 98 Mass. 294); eight days (*London & County Bkg. Co. v. Groomer*, L. R. 8 Q. B. Div. 286); six days (*Rothschild v. Corney*, 9 Barn. & C. 288); four days (*First Nat. Bank of Rochester v. Harris*, 106 Mass. 514); one day. *Himmelmanner v. Hotelling*, 40 Cal. 111. See *Tiedeman, Com. Paper*, § 446, 13 L. R. A.

Reasonable time on checks.

The rule of what is a reasonable time in presenting checks for payment is regulated largely by the rules that obtain in cases of bills and notes. Thus, it has been held that presentment is timely if made on the second day after its date (*Prideaux v. Criddle*, L. R. 4 Q. B. 455); or on the fourth day, when it was received at a distance in the country, too late to reach the bank on that day, and subsequent delay was occasioned by the holder's inability to leave his business in order to make a deposit in the local bank (*Freiberg v. Cody*, 55 Mich. 109); so a delay of four days in remitting and returning a check, according to the original understanding of the parties, was excusable (*Woodruff v. Plant*, 41 Conn. 344); or a delay of five days (*Werk v. Mad River Valley Bank*, 8 Ohio St. 301); or, in case of a check payable at the drawee's bank, situate in another State, a delay of six days (*Bridgeport Bank v. Dyer*, 19 Conn. 186; *Taylor v. Wilson*, 11 Met. 44); or even a delay of forty days, under peculiar circumstances of distance, bad weather, roads, etc. (*Brown v. Olmsted*, 50 Cal. 162).

In general, the time required to send a check to a distant place for payment must be reasonable (*Stephens v. McNeill*, 26 Barb. 651); and it is sometimes held that, as against the drawer of a check, any time for presentment is reasonable if the drawer is not injured by the delay. *Elting v. Brinkerhoff*, 2 Hall, 459; *Puroell v. Allemong*, 22 Gratt. 739; *Planter's Bank v. Merritt*, 7 Helak. 177; *Smith v. Jones*, 2 Bush, 103; *Hovess v. Austin*, 35 Ill. 396.

So if the bank on which a check is drawn suspends payment the next day before the close of banking hours, it would be a sufficient excuse for not presenting the check, although the holder resides in the vicinity. *Syracuse, B. & N. Y. R. Co. v. Collins*, 3 Lans. 29. See *Randolph, Com. Paper*, § 1104.

ment of the check or by such dealing with the check by the plaintiff as would, in judgment of law, convert what was originally a provisional payment into an absolute one. The check was dated August 22, 1887, and was drawn on the Asbury Park National Bank, and was, on the same day, indorsed and delivered by the defendant to the plaintiff at the place where the bank was located. The plaintiff, on accepting the check, assumed as between himself and the defendant an obligation to present the same to the bank for payment within the time prescribed by the law-merchant, that is to say, not later than the next day after its date, and if refused to protest the same and give notice of non-payment. *Smith v. Jones*, 20 Wend. 192. It was not presented until the 31st of August, nine days after it was received by the plaintiff. The defendant was, by such delay, discharged from liability as indorser of the check, irrespective of any question of loss or injury. Presentment in due time, as fixed by the law-merchant, was a condition, upon performance of which the liability of the defendant as indorser depended, and this delay was not excused although the drawer of the check had no funds, or was insolvent, or because presentment would have been unavailing as a means of procuring payment. *Mohawk Bank v. Broderick*, 10 Wend. 304; *Gough v. Staats*, 13 Wend. 549.

A different rule obtains as between the holder and drawer of a check. As between them, presentment may be made at any time, and delay in presentment does not discharge the liability of the drawer, unless loss to him has resulted. *Little v. Phenix Bank*, 2 Hill, 425.

The action here is not upon the indorsement of the defendant, but upon the original indebtedness. If the discharge of the defendant's liability as indorser discharges also his liability as debtor for the original debt, the judgment must on that ground be reversed. In *Hamilton v. Cunningham*, 2 Brock. 350, Chief Justice Marshall considered the effect of the neglect of the holder of a bill to give due notice of dishonor, whereby prior parties thereto were discharged, upon the liability of a debtor for the debt for which the bill was drawn. After showing that the authorities in which the debtor had been held discharged proceeded upon the theory that he had sustained an actual loss, he reached the conclusion that the true principle is "that if a bill be received as provisional payment, the omission to give due notice of its dishonor deprives the creditor of his action on that bill, but does not compel him to take it in absolute payment, or deprive him of his action on the original debt further than damage has been sustained actually or in legal supposition by the debtor." See also *Gallagher v. Roberts*, 2 Wash. C. C. 191; *Flieg v. Sleet*, 43 Ohio St. 53.

I am not sure that this doctrine is reconcilable with expressions in the opinion of this court in *Smith v. Miller*, 43 N. Y. 171, 52 N. Y. 545. That was an action to recover a debt for which the defendant had drawn his draft on J. K. Place & Co., and forwarded it to the plaintiff, the creditor. It was presented on the same day it was received to the drawees, and the plaintiffs received therefor the drawees' check on a bank and surrendered the draft. The check was not presented to the bank until the next day, when payment was refused, the

drawer, meanwhile, having failed. The check would have been paid if it had been presented on the day it was given, which might have been done. The plaintiffs did not demand a return of the draft, and it was not protested, nor was any notice of non-payment given to the drawees. The court rendered judgment for the defendant on two grounds: *first*, that in the absence of proof of demand and refusal and notice to the drawees, according to the usual course, there could be no recovery upon the draft or upon the indebtedness upon which it was given; and, *second*, on the ground of negligence in failing to present the check on the day on which it was given. The last ground stated was, upon the facts, a satisfactory basis for the judgment, and the same principle was applied upon similar facts in *Meadville First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320.

In the view we take of the present case, it is unnecessary to inquire whether the cases cited from this and other courts are in conflict, or, if so, which class of cases stands upon the better reason. The court, in this case, directed a verdict for the plaintiff, and in this, we think, there was error. It cannot be doubted that if there was evidence tending to show that the delay in presenting the check to the Asbury Park Bank prevented its collection, or from which the jury might find that the whole or any part of the debt owing by the drawer of the check to the defendant, for which the check was given, was lost by reason of the delay in the presentment or by dealings between the plaintiff and the drawer, in respect to the check, without the assent of the defendant, the case should have been submitted to the jury. To the extent of the injury the law would treat the omission to make due presentment as tantamount to payment.

The facts most favorable to the defendant need to be stated. Woodruff, the maker of the check, was, when the check was given, conducting a hotel at Asbury Park, and the parties to the action were guests at his house. The defendant was indebted to the plaintiff for dentistry work, and the former, who resided in New York, had loaned money to Woodruff for which the check was given, and on the same day the defendant received the check he delivered it to the plaintiff on his debt. Woodruff had an account with the Asbury Park National Bank. On the day of the date of the check the bank charged to his account a demand note held by the bank against him for \$500, but, so far as appears, without any notice to Woodruff, and this rendered his bank account overdrawn. Woodruff was in embarrassed circumstances, but was in the daily receipt of about \$600 from his business. He used part of the receipts for current expenses, without depositing them, and between the 22d and 31st of August he deposited about \$900 in the bank to the credit of his account, and the inference is that it was applied in part to pay the \$500 note and in part to pay current checks drawn by Woodruff.

On the 22d of August, the day on which Woodruff's check to the defendant is dated, and after it had been indorsed to the plaintiff by the defendant, Woodruff, who had been informed of the transfer, requested the plaintiff to accommodate him by holding the check a

few days, stating as a reason that he was pressed in the payment of his accounts, to which request the plaintiff assented. He asked the plaintiff to let him know when he wished to use the check, as he would then proffer it. Woodruff testified that he had money in his office sufficient to pay the check, and would have paid it at any moment had payment been insisted upon; that he was in the receipt of about \$800 a day, and that he redeemed a number of other checks which went to protest at this time; that two or three days after the conversation of the 22d of August, he spoke to the plaintiff again, and the plaintiff informed him that he had sent the check west. Woodruff said to him that he regretted it very much, as he wished to make provision for the check.

The cashier of the bank testified that there were no funds to meet the check, and that it would not have been paid if it had been presented any time after the 22d of August.

On August 31, Woodruff, who was behind in his rent, was dispossessed from the hotel premises and his business was closed, and he then was and now is insolvent. It may be conceded that the only obligation upon the plaintiff as between him and the defendant, was to present the check at the bank for payment within the time prescribed by law, and if payment was refused to have the same protested and notice of non-payment to the defendant. If he had performed this duty the defendant would have been apprised of the default, and he would have had an opportunity to take such measures as he could to secure payment from Woodruff.

One of the objects of requiring prompt notice to be given to indorsers and other parties secondarily liable on commercial paper in case of default, is that they may have an opportunity to secure themselves. Checks are supposed to be drawn against funds of the drawer, and prima facie where it is shown that the drawer's account was not good the inference of injury from non-presentment would be rebutted.

But where, as in this case, it is shown that the maker of the check was solicitous that it should be paid, that he had the means of payment at command, and would have provided for or paid the check if payment had been insisted upon, that the holder was apprised of the facts, and for the accommodation of the maker refrained from presenting the check, and presentation was delayed until open insolvency of the maker occurred, and he became, by the change of circumstances, unable to provide for the check, it cannot be said, we think, that there was no legal evidence of injury to be submitted to the jury.

The plaintiff, instead of taking the usual course, undertook to deal with the maker of the check, in disregard of his primary obligation to the defendant. It was for the jury to pass upon the circumstances, and to find whether the conduct of the plaintiff imposed a pecuniary injury upon the defendant. To the extent of such injury the law adjudges that the debt of the plaintiff has been paid.

The judgment below should be reversed, and a new trial granted, with costs to abide the event.
All concur.

NEW YORK COURT OF APPEALS (3d Div.).

Anson HEATH, *Resp't.*,

v.

Jefferson S. HEWITT, *App't.*

(.....N. Y.....)

A conveyance to the "heirs" of the grantor's son, who has children then living, reserving to him a life estate after life estates in the grantor and another, is a present grant of the fee to the children.

(June 2, 1891.)

NOTE.—Who are "heirs."

The primary meaning in the law of the word "heirs" is the persons related to one by blood, who would take his real estate if he died intestate, and the word embraces no one not thus related. It is not strictly proper to designate persons who succeed to the personal estate of an intestate. The proper primary signification of the words "next of kin" is those related by blood, who take personal estate of one who dies intestate, and they bear the same relation to personal estate as the word "heirs" does to real estate. The word "heirs" and "next of kin" would not ordinarily be used by any testator to designate persons who were not related to him by blood. *Tillman v. Davis*, 95 N. Y. 17.

The word "heirs" at common law is required to be used in limiting a fee simple, where the estate is acquired by conveyance *inter vivos*. And no equivalent words, which indicate the intention of the grantor to convey an absolute right to the property, will suffice. If the conveyance be not made to one and his heirs, the grantee will take only an estate for his life, notwithstanding the estate is limited L. R. A.

APPREAL by defendant from an order of the General Term of the Supreme Court, Fifth Department, reversing a judgment in favor of defendant entered in the Cayuga County clerk's office upon the report of a referee in an action brought to recover real estate. *Affirmed.*

Statement by Parker, J.:

Appeal from an order of the General Term of the Supreme Court, Fifth Department, reversing a judgment entered upon the report of a referee dismissing plaintiffs' complaint. This action was brought to recover one equal undi-

vided by such phrases as, "to A forever," or, "to A and his successors," or to his children or issue or assigns, and the like. An express direction that the grantee is to have a fee-simple estate will not supply the place of the word "heirs."—Co. Lit. 8 b; 2 Prest. Est. 3, 8; 4 Kent, Com. 6, *note*; 1 Spence, Eq. Jur. 139; *Sedgwick v. Laffin*, 10 Allen, 480; *King v. Barns*, 13 Pick. 24; *Adams v. Rose*, 30 N. J. L. 511; *Clearwater v. Rose*, 1 Blackf. 137; *Foster v. Jolce*, 3 Wash. C. C. 498; 1 Washb. Real Prop. 88.

But if the estate be acquired by devise or by legislative grant the technical word "heirs" is not necessary. The intention to create a fee-simple estate may in such cases be manifested by any other words or forms of expression. *Rutherford v. Greene*, 15 U. S. 2 Wheat. 199, 4 L. ed. 218; *Bridge-water v. Bolton*, 6 Mod. 109; *Newkirk v. Newkirk*, 2 Cal. 345; *Jackson v. House*, 17 Johns. 281; *Godfrey v. Humphrey*, 18 Pick. 537; *Baker v. Bridge*, 12 Pick. 27; 2 Bl. Com. 108; 1 Washb. Real Prop. 85.

On the other hand, if the word "heirs" appears from the context of the will to have been used by the testator as a word of purchase, it will be given

vided eleventh part of certain lands described in the complaint. The plaintiff asserted title by virtue of the following instrument:

"This indenture, made this twenty-eighth day of April, one thousand eight hundred and forty six, between Benjamin Heath, of Locke, Cayuga County, N. Y., of the first part, and the heirs of Warren Heath, of the same place, to be equally divided among them, of the second part, witnesseth, that the said party of the first part, for and in consideration of two hundred and fifty dollars, does grant, bargain, sell, confirm, unto the said party of the second part, and to their heirs and assigns forever, all that certain piece or parcel of land situate on lot No. thirty-three, in the Township of Locke, bounded as follows. On the north and west by lands owned by the heirs of Salmon Heath, deceased, on the south and southwest by the center of the highway, and on the east by lands owned by the said Benjamin Heath, containing about thirteen acres of land, being the same premises deeded to the said party of the first part by Harvey Heath and wife, as by reference to said deed (book 77, p. 619) will more fully appear, excepting and reserving to myself the whole use and absolute control of the said premises during my natural life; and in case my wife, Naamah, should outlive me, to her during her natural life, and after her decease to my son, Warren, during his natural life. And further, this conveyance is made subject to a certain judgment rendered in favor of Jonas Rude, of two hundred and fifty dollars, the amount of which judgment the said Warren hereby agrees to pay, together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, excepting the reserves above men-

tioned, to have and to hold: the said premises above described to the said party of the second part, their heirs and assigns forever; and the said party of the first part for his heirs does covenant, grant, promise, and agree to and with the said party of the second part, his heirs and assigns, the above-bargained premises against all and every person or persons whatsoever lawfully and equitably claiming or to claim the whole or any part thereof forever to warrant and defend. In witness whereof, the said party of the first part has hereunto set his hand and seal, the day and year first above written. *Nota Bene*, 3d space from top, the words 'the heirs,' interlined before signing; also, 3th space from bottom the words, 'excepting the reserves above mentioned.'

his
"Benjamin X Heath, [L. s.]"
mark.

Warren Heath was a son of Benjamin Heath, the grantor, and at the date of the instrument had eight children, among whom was the plaintiff. Thereafter three children were born to him, and at the time of the commencement of this action all of his children were living. After the death of Benjamin Heath and his widow, Warren Heath entered into possession of the land described in the deed, and so continued until January 23, 1868, under claim of title as life tenant under the instrument granted. On the day last named Warren Heath and his wife, for a valuable consideration, quitclaimed all their right, title and interest in and to such premises to Harvey Heath. March 1, 1871, Harvey Heath and wife, by a warranty deed, conveyed said lands to Jefferson S. Hewitt, the defendant in this action, who subsequently went into possession

that construction, and the devisee will take only a life estate, while his heirs will take a contingent remainder, notwithstanding that ordinarily the rule in *Shelley's Case* would make it a fee-simple estate in the first devisee. *Ulrich's App.* 86 Pa. 390, 27 Am. Rep. 707; *Niedeman, Real Prop.* § 37.

Where a conveyance was made to one, as trustee for his wife and her "present heirs," the words "present heirs" were words of description as to who were to take under the conveyance, and were equivalent to saying the children she had then; and the wife and such children took as tenants in common. *Chem-Carley Co. v. Purcell*, 74 Ga. 487.

In the civil law the word "heir" denotes a universal successor in the event of death, he who actively or passively succeeds to the entire property or estate, rights and obligations of a decedent and occupies his place. *Black, Law Dict.* title *Heir*, 565.

The term "heir" has several significations. Sometimes it refers to one who has formally accepted a succession and taken possession thereof; sometimes to one who is called to succeed but still retains the faculty of accepting or renouncing, and it is frequently used as applied to one who has formally renounced. *Mumford v. Bowman*, 26 La. Ann. 417.

In *Brown v. Lyon*, 6 N. Y. 419, lands were devised to Olive Hall, "to have and to hold to the said Olive during her life, and then to descend to the heirs of her body, and to their heirs and assigns, forever;" and it was held that these words would have, but for the statute, created an estate tail, and by force of the statute the same abolishing all estate tail. Olive Hall, the grantee named, took a fee.

So in the case of *Schoonmaker v. Sheely*, 3 Denio, 13 L. R. A.

490, the words used in the habendum clause defining the estate of the devisee were "to have and to hold," describing the lands, "unto my said son B. during his natural life, and after his decease to his heirs and to their heirs and assigns, forever," and the same conclusions were reached. That it was the intention of the grantor to create an estate tail in his sister Louisa F. is supported by the following cases: *Grout v. Townsend*, 3 Denio, 385; *Vanderheyden v. Orandall*, 2 Denio, 19; *Van Rensselaer v. Poucher*, 5 Denio, 35; *Lott v. Wyckoff*, 2 N. Y. 355; *Barlow v. Barlow*, 2 N. Y. 385; *Seaman v. Harvey*, 15 Hun, 75; *Coe v. Dewitt*, 23 Hun, 438.

When a testator uses the word "heirs," as applied to the descendants of a living person, the general rule of the construction is that he intends the children of such person. *Carr v. Booth*, 4 Moore & P. 822; *Darblow v. Beaumont*, 1 P. Wms. 229, 3 Bro. P. C. 60; *Goodright v. White*, 2 W. Bl. 1010; *Stimms v. Garrot*, 1 Dev. & B. Eq. 593; *Bowers v. Porter*, 4 Pick. 197; *Campbell v. Rawdon*, 18 N. Y. 419; *Heard v. Horton*, 1 Denio, 168.

It is well established that when the grantees in a conveyance are mentioned and described as the children of "A," it is sufficiently certain to make the grant valid, for by the use of that term reference is made to a class of persons in *ess*, and they can be identified by proper proof. The case of *Umfreville v. Keeler*, 1 Thomp. & C. 423, is not hostile to the views which we entertain on this proposition and is an authority in support of them. *Rivard v. Giesenhof*, 35 Hun, 247.

All the works on the law of tenure unite in this proposition, that *prima facie* the word "heir" is to be taken in strict legal sense; but if there be a plain demonstration in the deed that the grantor used it

thereof under said deed, and so continued up to the time of the trial of this action. The referee found, as a conclusion of law, that the deed from Benjamin Heath to "the heirs-at-law of Warren Heath," who was living, was void for uncertainty as to who were the grantees, and directed judgment to be entered dismissing the complaint with costs.

Mr. S. Edwin Day, with **Mr. H. Greenfield**, for appellant:

The alleged deed was void. Warren Heath was living.

In consequence of the maxim *nemo est hæres viventis*, an immediate grant to the heirs of A is void.

4 Cruise, Dig. title xxxii. chap. 3, § 17 (vol. 3, ed. 1808, *37); 1 Devlin, Deeds, p. 162, § 185; *Rizard v. Gienhof*, 35 Hun, 247; *Morris v. Stephens*, 46 Pa. 200; *Hall v. Leonard*, 1 Pick. 27.

The grant was by its terms "immediate," though the grantor undertook to reserve a life estate in the premises to himself, for his own life, and to others for their lives.

Ives v. Van Auken, 84 Barb. 566; *Hornbeck v. Westbrook*, 9 Johns. 78.

A deed takes effect upon delivery only. Delivery implies acceptance, some act on the part of the recipient.

Jackson v. Phipps, 12 Johns. 418.

There was no proof of its actual delivery, nor was there a presumption of delivery.

Gifford v. Corrigan, 7 Cent. Rep. 277, 105 N. Y. 223; *Fisher v. Hall*, 41 N. Y. 416.

Mr. W. E. Hughitt, with **Mr. W. W. Hare**, for respondent:

A most liberal construction will be given a deed in order to carry out the intention of the grantor.

Jackson v. Blodgett, 16 Johns. 172; *Kilmer v. Wilson*, 49 Barb. 86; *Tucker v. Meeks*, 52 N. Y. 638.

The surrounding circumstances will be looked into to aid in getting at the grantor's intention.

French v. Carhart, 1 N. Y. 96; *Bennett v. Culver*, 97 N. Y. 256; *Coleman v. Beach*, 97 N. Y. 554.

The deed recognizes Warren Heath as then living, and therefore does not use the term "heirs" in its usual sense, but as meaning his heirs apparent (his children).

Head v. Horton, 1 Denio, 165; *Vannorsdall v. Van Deventer*, 51 Barb. 137.

This is a future estate, within the meaning of the Statute, and it is not now necessary that it follow a preceding estate.

Rev. Stat. chap. 1, title 2, pt. 2, §§ 13, 30; *Moore v. Littlel*, 41 N. Y. 75; *Sheridan v. House*, 4 Keyes, 569.

Parker, J., delivered the opinion of the court:

Appellant's contention is that, inasmuch as Warren Heath was living, a grant to his heirs was void for uncertainty, as there were no persons in being who could take under that description. It is essential to the validity of a grant that the parties be named in the deed, or so plainly designated as to distinguish them with certainty; and it is asserted that, as there were no heirs of Warren Heath at the date of the deed, "because no one can be heir during the life of his ancestor" (Broom, Legal Maxims, *522), the grantees were neither named nor designated. Our attention is called to the rule laid down in Cruise's Digest (title 29, chap. 8), where it is said to be "a rule of the common law that no inheritance can vest, nor any person be the actual, complete heir of another, till

in a different sense, such different sense may be assigned to it. 16d.

The word "children" in its primary and natural sense is a word of purchase, but the words "heirs," and "heirs of the body" are, in their primary and natural sense, words of limitation and not of purchase. Schoonmaker v. Sheely, 8 Denio, 490; *Re Sanders*, 4 Paige, 268, 8 L. ed. 448.

Kent says the term "heirs" must be used as a mere description of one or more individuals, or a new import given to it by superadded or engrafted words of limitation varying its sense and operation, in order to make it a word of purchase. 4 Kent, Com. 222.

A gift, by will, of personal property to the "heirs" of any person in the event of his death is a gift to those who, if such person died intestate, would succeed to his personal property according to law unless the "heirs-at-law" is the person "designated" in the will to take the personal property. *Holloway v. Holloway*, 5 Ves. Jr. 390; *Vaux v. Henderson*, 1 Jac. & W. 388, note; *Gittings v. McDermott*, 2 Myl. & K. 66; *Jacobs v. Jacobs*, 18 Bear. 657; *Low v. Smith*, 3 Jur. (N. S.) pt. 1, p. 344; *Doody v. Higgins*, 2 Kay & J. 72; *Re Porter's Trust*, 4 Kay & J. 188; *Re Philip's Will*, L. R. 7 Eq. Cas. 151; *Finlayson v. Tatlock*, L. R. 9 Eq. Cas. 356; *Re Steven's Trusts*, L. R. 15 Eq. Cas. 110; *Wingfield v. Wingfield*, L. R. 9 Ch. Div. 658; *Oroom v. Herring*, 4 Hawks, 899; *Freeman v. Knight*, 2 Ired. Eq. 72; *Eddings v. Long*, 10 Ala. 203; *Corbitt v. Corbitt*, 1 Jones, Eq. 114; *Soudder v. Van Arsdale*, 18 N. J. Eq. 109; *Houghton v. Kendall*, 7 Allen, 7; *Sweet v. Dutton*, 109 Mass. 589; *De Beauvoir v. De Beauvoir*, 8 H. L. Cas. 524; *Re Rootes*, 1 Drew & S. 288; *Clark v. Cordis*, 4 Allen, 466. See 13 L. R. A.

note to *Johnson v. Supreme Lodge K. of H.* 8 L. R. A. 732, 53 Ark. 255.

A recent authority on the subject thus states the law: The fact that a grantee is not described by name will not affect the validity of a deed, if the designation or description be sufficient to distinguish the person intended from the rest of the world. Thus, where a conveyance was made to Margaret W. Pitcher and her children, and to their heirs and assigns forever, it was declared that the number of children *in esse* could be ascertained, and the maxim would apply, *ad certum est quod certum reddi potest*. The court held that she and her children *in esse* took as tenants in common. *Hamilton v. Pitcher*, 58 Mo. 334.

A deed to "P or her heirs" was held good. *Hogan v. Page*, 69 U. S. 2 Wall. 607, 17 L. ed. 864; *Ready v. Kearsley*, 14 Mich. 225.

A deed is valid which is made to the heirs-at-law of a person deceased. *Boone v. Moore*, 14 Mo. 420; *Shaw v. Loud*, 12 Mass. 447. And see *Thomas v. Marshfield*, 10 Pick. 384.

But a deed made to the living heirs of a person, without specifying the names of the heirs so called, is void, because it is left in uncertainty who are to have the benefit of the conveyance. *Morris v. Stephens*, 46 Pa. 200; *Winslow v. Winslow*, 52 Ind. 8; *Hall v. Leonard*, 1 Pick. 27.

A deed conveying property is not void for uncertainty if it can be shown who were intended, and that they were in life, and capable of taking at the time the deed was executed. *Hogg v. Odom*, *Dudley* (Ga.) 186.

In that case the conveyance was to the children of Nancy Jones. Devlin, Deeds, § 184.

the ancestor is previously dead,—*nemo est hæres cipientis*." In *Hall v. Leonard*, 1 Pick. 27, a grant of land to the heirs of A. B. was held to be void, and in a discussion of the question the court said: "No case has been found to support a grant to a man's heirs, he being living at the time of the grant." So in *Morris v. Stephens*, 46 Pa. 200, a conveyance by a grantor to "the heirs of his son Andrew," who was then living, was held to be void for uncertainty. In *Huss v. Stephens*, 51 Pa. 282, the grantor of the deed under consideration was also the grantor in the instrument before the court in *Morris v. Stephens*, *supra*. In the *Morris Case* the deed described the grantees as heirs of Andrew Lautz, Jr., and the consideration expressed was one dollar in money and "the natural love and affection which the grantor hath for said heirs;" while in the *Huss Case* the grantees were described in the same manner, but the consideration expressed was one dollar and "the natural love and affection he hath for his grandchildren;" the difference in the two cases being that in the latter the word "grand-children" in the consideration clause appears in the place of the word "heirs" in the former. In the first case the deed was held to be void for uncertainty. But the second was declared to constitute a valid grant, because the word "grandchildren" defined what he meant by the use of the word "heirs" in describing the grantees. It enabled the court to ascertain that the word "heirs" was not used in its technical sense, but that by it the grantor intended to describe the children of Andrew Lautz, Jr. In *Rivard v. Gienhof*, 35 Hun, 247, the court asserted the general rule that a grant "to the heirs" of a living person is void for uncertainty. And in *Umfreville v. Keeler*, 1 Thomp. & C. 486, the court recognizes the doctrine of the cases cited, but held that a deed to "E. U., wife of A. U., and her heirs, the children of said A. U." was valid, and operated to pass title to the children, because it was manifestly the intention of the grantor to confine the interest conveyed to the children of the parties named, notwithstanding the use of the word "heirs." The legal and well-understood meaning of the word "heir" is, the one upon whom is cast an estate of inheritance, upon the death of the owner; and it follows that this person is uncertain until death occurs, for until that event it can never be known to whom the estate will fall. Hence the doctrine of the cases referred to, and which, so far as we have observed, stand unquestioned. If, then, the word "heirs" in this instrument be held to have been employed in its technical sense, it would follow that the deed should be declared void for uncertainty. The courts of this State do not appear to have been called upon in the case of a deed to determine whether, in the light of other facts appearing in the deed, and the circumstances surrounding its execution, the word "heirs" may not be construed as meaning children of such living person, if it appears that such was manifestly the intention of the grantor. But in the construction of wills the question has been considered. In *Heard v. Horton*, 1 Denio, 166, the testator, after making sundry bequests and devises, and, among others, to his son J. B. H., devised the residue of his real

estate without words of perpetuity to his son J. H., on condition that he should pay his debts; and added that, if J. H. should die without issue, at his decease the real estate should be equally divided among the heirs of his son J. B. H. It was held that the words "heirs of J. B. H.," he having children living at the time of making the will, sufficiently designated these children as the executory devisees, though J. B. H. was himself then living, he being referred to in the will as a living person. Judge Beardsley, in delivering the opinion of the court, said: "Where the will recognizes the ancestor as living, and makes a devise to his heir, *eo nomine*, this shows that the term was not used in the strictest sense, but as meaning the heir apparent of the ancestor named." Now, in this case, Warren Heath was living at the time of the making of the deed, which fact sufficiently appears in the deed, because the grantor reserved to him a life-estate in the lands sought to be conveyed; and he had children living, among whom was the plaintiff in this action. In *Van Norden v. Van Deester*, 51 Barb. 137, the devise was to the legal heirs of his (testator's) brother A., deceased, and to the legal heirs of his sister M., deceased, and to the heirs of his brother-in-law W. V. At testator's death, W. V. was still living. It was held that the word "heirs," in so far as it related to the heirs of his brother-in-law W. V., was used as synonymous with the word "children," for the will assumes that he was then living; that the children of W. V. were entitled to take, and that the estate became vested in them immediately upon the death of the testator. These cases were cited with approval in *Cushman v. J. J. Fox*, 59 N. Y. 149, in which the rule is laid down that to the word "heirs" must be given the ordinary legal meaning, unless it appears that the testator used the word in other than the primary legal sense, in which event courts should give effect to the intention of the testator. If it be said that both in England and in this country the courts have more generally supported indefinite forms of transmissions by will than by grant, because in the case of wills they are intended to go into effect at a future time, and to provide for future and uncertain events, not only for individuals named, but also for described classes of donees, to be ascertained by evidence at the death of the testator or afterwards, while in the case of the present conveyance the very nature of the act excludes the necessity of indefiniteness, it may be answered that this difference is not of moment in determining whether the particular rule of construction adopted in the cases cited is applicable here. The determination made was that, if from the whole will it was manifest that in using the word "heirs" the testator meant "children" the court should so construe it, and thus give effect to the intention of the testator. But the Statute also requires the court to give effect to the intent of the grantor in making the conveyance before us, if it may be done consistently with the rules of law. It provides that, "in the construction of every instrument creating or conveying or authorizing the creation or conveyance of any estate or interest in lands, it shall be the duty of courts of justice to carry into effect the in-

tent of the parties, so far as such intent can be collected from the whole instrument, and is consistent with the rules of law." 1 Rev. Stat. Edmond's ed. p. 690, § 2. As the intent of the parties is to govern in grants as well as wills, there seems to be no basis on which to found a distinction between them as to the interpretation to be given to the word "heirs," if in the one case as in the other it appears that it was not the intention of the grantor or testator to use it in its ordinary legal sense. We are then to ascertain whether the grantor intended by the words "the heirs of Warren Heath" to designate and describe the children of Warren Heath as his grantees. It has been determined in many cases that the word "heirs," notwithstanding its primary and well-understood meaning, is susceptible of more than one interpretation. *Heard v. Horton*, *Vannorsdall v. Van Decenter*, *Cushman v. Horton*, *supra*. And in determining which must be here given we may look at the surrounding circumstances existing when the contract was entered into, the situation of the parties, and the subject matter of the instrument. *French v. Carhart*, 1 N. Y. 96; *Coleman v. Beach*, 97 N. Y. 545-553. At the date of the instrument Warren Heath had eight children, who were also the grand-children of Benjamin Heath, the grantor. Warren Heath was not only living, but the deed distinctly recognizes that fact, in that: *first*, it recites that the "conveyance is made subject to a certain judgment rendered in favor of Jonas Rude of \$250, the amount of which

judgment the said Warren hereby agrees to pay;" and, *second*, the instrument undertakes to reserve "the whole use and absolute control of the said premises . . . to my son Warren during his life."

These facts bring the question before us within the rule laid down in *Heard v. Horton* and other cases cited *supra*, that when a will recognizes the ancestor as living, and makes a devise to his heir in that name, it shows that the term was used as meaning the heir apparent of the ancestor named; or, as stated in the *Vannorsdall Case*, that the word "heirs" was used as synonymous with the word "children." That he intended to describe the children of his son Warren as his grantees is further supported by the fact that the grant is by its terms immediate, the grantor undertaking to reserve a life estate in the premises to himself and to others for their lives. The conveyance was not to Warren Heath for life, and, after his death, to his heirs, but it constituted a present grant to persons whom the grantor designated as the heirs of Warren Heath, with an attempted reservation for the benefit of Warren, and the only persons answering that description in any sense in which the word is employed, whether technically or popularly, would be the children of Warren.

The order should be affirmed, and judgment absolute rendered against the appellant, with costs.

All concur, except **Bradley and Haight, JJ.**, not sitting.

TEXAS SUPREME COURT.

Joseph NALLE, *Appt.*,

v.

M. PAGGI.

(....Tex....)

The sale of a lot on which half of a party-wall is standing is a use of the wall by the owner within the meaning of his contract to pay half its value when he used the wall.

(May 26, 1891.)

APPEAL by defendant from a judgment of the District Court of Travis County in favor of plaintiff in an action brought to recover defendant's proportion of the cost of a party-wall. *Affirmed*.

The facts sufficiently appear in the commissioner's opinion.

Messrs. Walton, Hill & Walton, for appellant:

The petition does not allege a breach of the contract, which it sets out as the foundation of the suit; there being no allegation of an express or implied contract on the part of Nalle to use the wall, his act in parting with it was not a breach of the contract set up, and the court erred in not sustaining his exceptions to the petition.

NOTE.—See note to *Harbor v. Evans* (Mo.) 10 L. R. A. 41. Also *Fowler v. Saks* (D. C.) 7 L. R. A. 649, and *Nalle v. Paggi* (Tex.) 1 L. R. A. 83, 13 L. R. A.

As to construction of the contract, see opinion on former appeal.

Hamilton v. Glascock (Tex.) 1888.

As to conditional contracts or promises upon contingency, see—

Rowlett v. Lane, 43 Tex. 274; *Carlisle v. Hooks*, 58 Tex. 421; *Oliphant v. Woodburn Coal & Min. Co.* 63 Iowa, 332; *Hall v. Los Angeles County* (Cal.) May 18, 1887; *Lorillard v. Silver*, 86 N. Y. 578, 35 Barb. 132; *Ray v. Hodge*, 15 Or. 20; 1 Pothier, Obl. pp. 127 (marg. p. 48) 201, Evans, *note d*.

As to party-wall contract, see—

Cole v. Hughes, 54 N. Y. 444, 13 Am. Rep. 618.

Whether any implied contract arises in case of party-wall built without agreement, see—

Tiedeman, Real Prop. § 620, *note 3*; 3 Wait, Act. & Def. 710.

The court not having found that defendant Nalle agreed either expressly or impliedly to build or otherwise use the wall, and not having found that said Nalle was bound under the agreement not to sell his lot, the fact of sale and consequent inability on the part of Nalle to use the wall constitutes no breach of the contract found by the court as the basis of its judgment.

Messrs. Sheeks & Sheeks for appellee.

Marr, J., filed the following opinion:

The statement of the case is taken from the brief of appellant: "Appellee brought this

action originally against appellant and George Schuworth for the recovery of half the value of a party-wall. He recovered judgment against both, which judgment, on appeal, was reversed by this court. The case having been referred to and decided by commissioners of appeals on agreement of parties (*Nalle v. Paggi* (Tex.) 1 L. R. A. 83), appellee dismissed as to Schuworth, and amended his petition so as to charge Nalle alone on alleged contract to pay for half the party-wall. Trial by the court resulted in judgment, March 15, 1889, against appellant for \$627.30, half the value of the wall and interest. The court filed findings of fact and conclusions of law. Appellant had exceptions noted, and gave notice of, and perfected appeal."

That portion of plaintiff's petition challenged by the exceptions interposed by appellant, and overruled in the court below, is as follows:

"That on or about the said 4th day of August, 1875, the defendant and the petitioner made and entered into a parol contract by which it was agreed that petitioner might build a wall, to be a partition wall, on the line between their two tracts of land so owned by them as aforesaid; that in so doing he might extend the foundation thereof one foot upon the land of defendant, and should extend one foot upon the land of petitioner, so as to have one half of the foundation and wall upon the land of defendant, and one half thereof on the land of petitioner, and that as soon as defendant desired to use said wall he would pay one half of the value thereof to the petitioner."

The objection to the petition, as made by the defendant, is that Nalle was only to become liable in the event that "he desired to use said wall;" and the petition fails to show the happening of this contingency. The petition, however, further alleges elsewhere "that afterwards, to wit, in October, 1888, the defendant sold and conveyed his part of the lot to one George Schuworth, who has improved the same, and who began to use said partition wall at that time, has been ever since, and still is, using the same as the vendee of defendant, and thereby rendered it out of his (defendant's) power to use said wall himself, though he and his said vendee derived the full benefit thereof."

There is no need of considering the several assignments of error separately, or the action of the court upon the demurrers apart from the conclusions of law. There is but one question presented, and to be determined, in our estimate of the record. Do the facts as alleged and proven show the liability of the appellant to pay for one half of the cost or value of the partition wall erected by the appellee? The findings of the court are as follows: "(1) In 1875, plaintiff and defendant, Nalle, owned adjoining lots on Pecan Street, in the City of Austin, and in that year plaintiff built a partition wall upon the division line between said lots, as alleged in his petition, one half on his, and the other half on Nalle's lot, which wall was and is worth \$1,000. (2) The wall was placed over on Nalle's lot by plaintiff on an understanding or agreement had between them that when Nalle used the wall he would do what was right about it in the way of compensating plaintiff; he (Nalle) then expecting to build a house on his lot. This understand-

ing was had before the foundation was finished. (3) In October, 1884, Nalle sold his lot to one Schuworth, who knew the wall was over on his lot, and, while he was still owing Nalle \$1,500 on the lot, Paggi made known to him his claim for building half of the wall, and he refused to pay for it, and Nalle has also refused to pay for it. In 1884, after his purchase, Schuworth built a house upon the lot, using about thirty feet of the partition wall as one side of his house. Conclusions of law: On appeal from a former judgment in this case, it was held, on the same state of facts as above found, that Schuworth was not liable, and plaintiff had dismissed as to him. As to the liability of defendant, Nalle, this court holds, upon the facts, that as the plaintiff erected the partition wall upon the understanding that Nalle would do what was right about it when he used it, and as Nalle, after the completion of the wall, sold the lot, and put it out of his power to use it, and in the power of another to get the benefit of said wall without paying plaintiff for it, therefore Nalle is bound to pay plaintiff one half of its value, or the sum of \$500, and, as his liability rose when he sold the lot in 1884, this sum should draw interest at eight per cent from January 1, 1885."

Appellant contends that, upon the facts found by the court below, it should have rendered judgment in his favor, because, he says, as it was optional with him to use the wall, and as he never builded on the lot, nor used the wall as contemplated by the agreement, the contingency in which he would become liable to make compensation for one half of the wall has not yet arisen. To this we cannot accede, but, on the contrary, concur in the conclusions of the district court. When the wall was erected, or rather being erected, Nalle agreed with Paggi to "do what was right about it in the way of compensating him" whenever the former should use the wall; and we think a use of the wall by appellant at some time was undoubtedly contemplated. Here, then, is an express agreement or promise to pay, conditional only upon the use of the wall by Nalle in any way. The wall was erected with his consent, and for at least his prospective benefit, and was placed as much on his land as on that of the appellee. His liability did not necessarily, as we think, depend upon the erection of a building by him on his own lot, connected with the wall, although that undoubtedly would have been a use thereof. His vendee, however, has made such use of a part of the wall. By selling his lot to another, carrying with it the right to use the wall, or at least depriving himself of such right, the appellant effectually put it out of his power to build to the wall, or use it in any other mode. By his own voluntary act he thus put it out of his power to make any direct use of the wall as originally contemplated, and therefore prevented the happening of the contingency in which he was to make compensation even if we suppose that the sale of the lot was not a use of the wall. Where a party thus renders impossible the performance of the contract upon his own part, to the detriment of the other contracting party, there can be no doubt of his liability under the contract, and that a right of action against him immediately ac-

crues. *Phillips v. Herndon*, 78 Tex. 378; *Dugan v. Anderson*, 36 Md. 567, 11 Am. Rep. 509. It would be unconscionable to allow one of the parties to a contract to receive the benefits thereof, and then repudiate it with impunity. But we are further of the opinion that the sale of the lot by the appellant to Schuworth, carrying with it one half of the wall erected by the appellee at his own expense for the joint benefit of both lots, was a use of the wall by Nalle, within the meaning of the contract, and thereby fixed his liability. It must be supposed that he was paid for his interest in the wall, or took that into consideration, when he conveyed to Schuworth. He had agreed to do "what was right" when he should use the wall. The right thing to do was to pay one half of the value thereof to Paggi. This he did not do, though he has used the wall, and reaped some of the benefits, as we must presume, of its erection. The wall having been built partly on Nalle's land with his consent, and thus made a part thereof, to his benefit, with an expectation upon the part of Paggi that he would be compensated proportionally, a promise to do so upon the part of Nalle might be implied under the circumstances, were there no express agreement to that effect,

particularly as he not only got the benefit of the wall himself, as we have seen, but, by the sale of the lot, authorized Schuworth to use the wall, and the latter has made the very use thereof which appellant contends was originally contemplated. *Qui facit per alium facit per se*, quoted by the appellee, might well be applied. We have carefully examined the facts, and read with interest the brief and argument for appellant, but have been unable to discover any principle of law applicable to the case that would justify the conclusion that his liability to make compensation has never arisen. We are of the opinion that upon the plainest principles of justice, and according to the authorities, appellant would be liable to the appellee to the extent determined by the district court, either upon his express agreement or promise, or, if necessary to support the judgment below, upon such promise to pay as might be legally implied from the acts and understanding of the parties under the circumstances of the case. *Vide Richardson v. Tobey*, 121 Mass. 457; *Huck v. Flentye*, 80 Ill. 258; *Day v. Caton*, 119 Mass. 514.

We conclude that the judgment ought to be affirmed.

Adopted by Supreme Court, May 29, 1891.

MASSACHUSETTS SUPREME JUDICIAL COURT.

BAXTER NATIONAL BANK

v.

Peter S. J. TALBOT.

(....Mass....)

The right to show that the obligation growing out of an indorsement of a promissory note is not absolute, but depends

upon a collateral oral agreement, relates to the nature and validity of the contract and not to the remedy, and is governed by the *lex loci contractus*.

(June 27, 1891.)

EXCEPTIONS by defendant to rulings of the Superior Court for Middlesex County

NOTE.—Parol evidence as affecting indorsement.

While it is elementary law that parol evidence is incompetent to vary the terms of a written instrument, still it is equally well settled that, as between the original parties to commercial paper, such proof is admissible as will have a tendency to establish the character in which an indorser intended that he should be bound; and proof of this intention will counteract the prima facie presumptions which the law indulges with reference to the paper. *Riley v. Gerrish*, 9 Cush. 104; *Sylvester v. Downer*, 20 Vt. 365; *Owings v. Baker*, 54 Md. 82; *Nurre v. Chittenden*, 55 Ind. 465; *Pierce v. Irvine*, 1 Minn. 390; *Strong v. Riker*, 16 Vt. 555; *Quin v. Sterne*, 26 Ga. 224; *Good v. Martin*, 95 U. S. 95, 34 L. ed. 943.

Note takes effect from delivery.

Like a deed or other written contract, a promissory note takes effect from delivery, and, as the delivery is something that occurs subsequently to the execution of the instrument, it must necessarily be a question of fact when the delivery was made. Parol evidence is therefore admissible to show when that took place, as it cannot appear in the terms of the note. 2 Taylor, Ev. 6th ed. 1001; *Hall v. Casenove*, 4 East, 477; *Cooper v. Robinson*, 10 Mees. & W. 694.

Presumptions are seldom, if ever, conclusive, at least when applied to commercial paper, except in favor of subsequent bona fide holders for value, before maturity and without notice. As between 13 L. R. A.

the original parties to the paper, parol evidence is competent to explain the contractual relation and the equities it involves. *Smith v. Morrill*, 54 Me. 48; *Mendenhall v. Davis*, 72 N. C. 150; *Ross v. Espy*, 66 Pa. 481; *Maxwell v. Van Sant*, 46 Ill. 58.

The principle above cited obtains in cases of blank indorsement of a non-negotiable note. *Jacques v. McKnight*, 28 N. J. L. 92, note.

By statutory provision, in Georgia, all blank indorsements are subject to explanation by oral evidence as between the immediate parties to the paper. Code, § 3808.

But there is a formidable array of authority to the effect that blank indorsements of commercial paper are perfected contracts in writing, and cannot be varied or altered by the interposition of parol proof. *Stack v. Beach*, 74 Ind. 51; *Day v. Thompson*, 65 Ala. 268; *Charles v. Denis*, 42 Wis. 56; *Schnell v. North Side P. Mill Co.*, 89 Ill. 561; *Barnard v. Gaslin*, 23 Minn. 192; *Barry v. Morse*, 3 N. H. 132; *Bank of Albion v. Smith*, 77 Barb. 490.

The principle is that all previous and contemporaneous negotiations and undertakings are merged in the writing and its legal import. The undertaking of an indorser may be either limited or enlarged at the time it is entered into, by express terms, at the pleasure of the indorsers. But if no such terms are expressed in the indorsement, the law fixes the character of the undertaking, and it cannot be varied by parol. *Bank of Albion v. Smith*, *supra*.

made during the trial of an action brought to enforce defendant's alleged liability as indorser of certain promissory notes, which resulted in a verdict in favor of plaintiff. *Sustained.*

The facts sufficiently appear in the opinion.

Messrs. Gaston & Whitney, for respondent:

There was no objection to the evidence by which the oral agreement was sought to be proved except so far as the oral agreement itself was claimed to be inadmissible. The ruling was as to the materiality of the thing sought to be proved, and not as to the manner in which the respondent sought to prove it.

See *The Galano and Maria*, L. R. 7 Prob. Div. 137, 144, 149.

The indorsement of the respondent was made and took effect and was to be performed in the State of Vermont. The obligation, interpretation and effect of said contract and the liability of the respondent under it, were therefore to be determined by the law of Vermont.

Williams v. Wade, 1 Met. 82; *Bank of Illinois v. Brady*, 3 McLean, 268; *Powers v. Lynch*, 3 Mass. 77; *Trimby v. Vignier*, 1 Bing. N. C. 151; *Burrows v. Jemino*, 2 Strange, 733; *Shoe & Leather Nat. Bank v. Wood*, 8 New Eng. Rep. 118, 142 Mass. 563.

What may and may not be shown.

The entire contract is the writing as understood, delivered and received, and it is to be gathered from the language, usages, course of business and relation of the parties. *Byles, Bills*, 155.

So, one who indorses commercial paper in blank is precluded from showing, even in a suit by his indorsee, that the indorsement was sans recourse. *Mason v. Burton*, 54 Ill. 346; *Skinner v. Church*, 36 Iowa, 21; *Campbell v. Robbins*, 29 Ind. 271; *Charles v. Dennis*, 42 Wis. 55.

On the other hand, it is competent to show a contemporaneous written agreement as evidence to the fact that the indorsement was intended to be without recourse. *Davis v. Brown*, 94 U. S. 423, 24 L. ed. 204.

So an indorser cannot show, in an action against his immediate indorsee, that his indorsement was made merely for the purpose of transfer. *Dunn v. Ghost*, 5 Colo. 124.

Generally speaking, an indorser may prove, as against his immediate indorsee, that a blank indorsement was made for the purpose of collection. *Downer v. Chesebrough*, 33 Conn. 39; *McWhirt v. McKee*, 6 Kan. 412.

Some of the authorities maintain that parol evidence is inadmissible to control the construction of an irregular indorsement as against bona fide purchasers for value; that such evidence is only admissible as between immediate parties to the transaction. *Houston v. Bruner*, 39 Ind. 383; *Browning v. Merritt*, 61 Ind. 423; *Schneider v. Schiffman*, 20 Mo. 571.

In Missouri, it is also held to be admissible against an indorsee after maturity. *Seymour v. Farrell*, 51 Mo. 95.

But the better opinion is that, in every case where the signature on the back is in an ambiguous position, and the meaning can only be definitely ascertained by parol evidence, then parol evidence is admissible to prove its true character, even against a purchaser for value, for he can reasonably be charged with notice of this ambiguity. *Greengough v. Smend*, 3 Ohio St. 413; *Thacher v. Stevens*, 46 Conn. 561. See *Bay v. Simpson*, 63 U. S. 22 How. 341, 13 L. R. A.

It is inconceivable that the respondent is to be subjected to loss and to be held liable on a different contract from that which he actually made, because the plaintiff bank has brought suit in a jurisdiction where the law governing blank indorsements is different from that where the present contract was made.

See *Williams v. Wade*, 1 Met. 82. See also *Vermont State Bank v. Porter*, 5 Day, 316; *Koster v. Merritt*, 32 Conn. 246; *Denny v. Williams*, 5 Allen, 1; *Van Cleef v. Therasson*, 3 Pick. 12; *Dunn v. Welsh*, 62 Ga. 241.

Mr. Melvin O. Adams, for plaintiff:

The ruling of the court, that the *lex fori* must govern the case; that as all the evidence of the alleged agreement between plaintiff and defendant tended to prove that the same was oral, evidence of such oral agreement was inadmissible and immaterial upon any of the issues, was correct.

As to the *lex fori*, see—

Hoadley v. Northern Transp. Co. 115 Mass. 304-307; *Downer v. Chesebrough*, 33 Conn. 39; *Bain v. Whitehaven & F. J. R. Co.* 3 H. L. Cas. 1; *Leroux v. Brown*, 12 C. B. 801.

As to the evidence of such oral agreement, see—

Adams v. Wilson, 12 Met. 138; *Hanchet v. Birge*, Id. 545; *Underwood v. Simonds*, Id. 275, 277; *Wright v. Morse*, 9 Gray, 337.

16 L. ed. 280; *Good v. Martin*, 95 U. S. 95, 24 L. ed. 343; *Cavazos v. Trevino*, 73 U. S. 6 Wall. 773, 18 L. ed. 813; *Frank v. Lillienfeld*, 33 Gratt. 377; *Denton v. Peters*, L. R. 5 Q. B. 475.

Exceptions to the general rule.

There are a few exceptions to the general rule. The exceptions are principally of three classes:

First, it is always competent to show by parol evidence that the indorsement was made without consideration, as, for example, that it was made for the accommodation of the indorsee. *Breneman v. Furnas*, 90 Pa. 186; *Hamburger v. Miller*, 48 Md. 325; *Morris v. Faurot*, 21 Ohio St. 155; *Cole v. Smith*, 29 La. Ann. 551; *Davis v. Morgan*, 64 N. C. 570; *Lovejoy v. Citizens Bank*, 23 Kan. 331; *Kirkham v. Boston*, 67 Ill. 599; *McCool v. Biggs*, 2 Hill, 121; *Denniston v. Bacon*, 10 Johns. 198; *Foster v. Jolly*, 1 Crompt. M. & R. 708.

Subsequent failure of consideration may be shown by parol evidence, as well as by an original want of consideration. *Smith v. Carter*, 25 Wis. 233.

So can partial failure or want of consideration be proved by parol evidence. *Cook v. Cookrill*, 1 Stew. (Ala.) 475.

It can also be shown that the consideration was certain payments to be made by the indorsee, the liability upon the indorsement being conditional upon making these payments. *Scammon v. Adams*, 11 Ill. 575; *Wood v. Matthews*, 73 Mo. 477.

Secondly, it may be shown that the indorsement was made in trust to the indorsee for the purpose of carrying out some purpose of the indorser, as his agent, or as a trustee. Thus, for example, it can be shown that the indorsement was made "for collection" only. *Lawrence v. Stonington Bank*, 6 Conn. 521; *Dale v. Gear*, 38 Conn. 15, 39 Conn. 89; *Lewis v. Dunlap*, 72 Mo. 178; *Smith v. Childress*, 27 Ark. 338; *Ricketts v. Pendleton*, 14 Md. 320; *Hamburger v. Miller*, 48 Md. 325; *Hill v. Ely*, 5 Serg. & R. 363; *Manley v. Boycot*, 2 El. & Bl. 46; *Martin v. Cole*, 3 Colo. 114; *Downer v. Chesebrough*, 33 Conn. 39. But see *Chaddock v. Vanness*, 35 N. J. L. 521; *Johnson v. Ramsey*, 43 N. J. L. 279.

But it is not possible, on the other hand, to show

Morton, J., delivered the opinion of the court:

The plaintiff seeks to recover in this suit from the defendant as indorser on five promissory notes and to reach and apply in payment of them the interest of the defendant in a partnership of which he is a member. The notes were made by the Esperanza Marble Company, and were indorsed in blank by it and the defendant and two other parties, and were all made payable at what we assume to be the plaintiff Bank in Rutland, Vt. This suit is against the defendant alone. The respondent in his answer claims that his indorsement was made and took effect as a contract in the State of Vermont and that by the law of that State his obligation depended, as between the plaintiff and himself or any other party taking the notes with notice, upon the understanding or agreement between the bank and himself in regard to said indorsement, and that his indorsement was in fact made subject to an oral agreement with the plaintiff set out in his answer, which he has fully performed. At the time the respondent offered testimony tending to prove the alleged oral agreement. The court received it *de bene*, and at the conclusion of all the testimony ruled that the *lex fori*, and not the *lex loci contractus*, must govern the case; that the oral agreement and the evidence tending to prove it were inadmissible and immaterial and could not be considered

by the jury. The respondent excepted to this ruling and the question before us is as to its correctness.

The testimony introduced by the plaintiff tended to show the following, among other facts in regard to his indorsement of the notes in suit. In January, 1887, the plaintiff Bank had over-due notes which it had discounted for the Esperanza Marble Company of New York, but which had its usual place of business in Rutland. Part of these notes were indorsed by respondent. The plaintiff also held a mortgage on certain property in New York as collateral to these notes, but found it inconvenient to attend to its collection and requested the respondent to attend to it in its behalf, and it was orally agreed between the respondent and the plaintiff that the mortgage should be assigned to the respondent and that he should collect the same and pay over the proceeds to the Bank. It was also orally agreed that the notes held by the Bank against the marble company should be surrendered to it and new notes given by it therefor, which should be indorsed by the respondent and the other two parties whose names are on the notes in suit, and that the notes should be renewed from time to time as they fell due, the renewals being indorsed by the same parties, until the total amount collectible on the mortgage had been received and paid over by the respondent to the plaintiff Bank. It was further orally

by parol evidence that an indorsement, expressed to be "for collection," was intended to pass title (*White v. Mfrs Nat. Bank of Georgetown*, 102 U. S. 668, 26 L. ed. 260; *Leary v. Blanchard*, 48 Me. 268; *Canton First Nat. Bank v. McCann*, 4 Ill. App. 250; *Armour Bros. Bkg. Co. v. Riley County Bank*, 30 Kan. 193; *Book County Nat. Bank v. Hollister*, 21 Minn. 385; *Third Nat. Bank v. Clark*, 23 Minn. 263; as an escrow upon an express condition not yet performed (*Chaddock v. Vanness*, *supra*; *Bell v. Ingestre*, 12 Q. B. 317; *Goggerley v. Cuthbert*, 3 Bos. & P. 170; *Wallis v. Littell*, 11 C. B. N. S. 390; *Ricketts v. Pendleton*, 14 Md. 320), or to enable a transfer for any other special purpose. *Pollock v. Bradbury*, 8 Moore, P. C. 227; *Bell v. Ingestre*, 12 Q. B. 317; *Adams v. Jones*, 12 Ad. & El. 455; *Dale v. Gear*, 38 Conn. 105; *Hamburger v. Miller*, 48 Md. 325; *Scammon v. Adams*, 11 Ill. 578; *Chaddock v. Vanness*, 25 N. J. L. 520; *Mendenhall v. Davis*, 73 N. C. 150; *Iredell County Comra. v. Wason*, 88 N. C. 308; *Girard Bank v. Comley*, 2 Miles, 405; *Patterson v. Todd*, 18 Pa. 423; *Patten v. Pearson*, 57 Me. 428; *Lynch v. Goldsmith*, 64 Ga. 42; *Hardy v. White*, 60 Ga. 455. But see, *contra*, *Lee v. Pile*, 37 Ind. 107; *Dunn v. Ghost*, 5 Colo. 124.

Parol evidence is not admissible to show this fact in a suit by a bona fide holder. *Lewis v. Dunlap*, 72 Mo. 174; *Stapler v. Burns*, 43 Ga. 382; *Meador v. Dollar Sav. Bank*, 56 Ga. 605.

Thirdly, it may always be shown by parol evidence that the indorsement was procured by fraud, accident or mistake. *Kirkham v. Boston*, 67 Ill. 590; *Lewis v. Dunlap*, 72 Mo. 178; *Hamburger v. Miller*, 48 Md. 325; *Hill v. Ely*, 5 Serg. & B. 363; *Breneman v. Furniss*, 90 Pa. 188; *Tiedeman, Com. Paper*, § 274. See note to *Kulenkamp v. Groff* (Mich.) 1 L. R. A. 504.

Lex loci contractus.

A promissory note made and signed in another State, and payable there, although sent by mail to the payee in Massachusetts, is executed in and to be governed by the law of the other State. *Shoe* 13 L. R. A.

& *Leather Nat. Bank v. Wood*, 3 New Eng. Rep. 118, 142 Mass. 567.

The principle is also well settled that a voluntary conveyance of personal property, good by the law of the place where it was made, passes title where-soever the property may be situated. *Hoyt v. Thompson*, 19 N. Y. 224.

The rule is laid down in *Edgerly v. Bush*, 61 N. Y. 203, by *Folger, Ch. J.*, as follows: "The law of the domicile of the owner of personal property, as a general rule, determines the validity of every transfer made of it by him."

It may be affirmed, as a general proposition, that the validity of a contract relative to negotiable paper is, in all instances, determined by the law where it is made. *Armour v. McMichael*, 36 N. J. L. 92, 94; *Cotheal v. Blydenburgh*, 5 N. J. Eq. 17; *Woodruff v. Hill*, 116 Mass. 810; *McDougald v. Rutherford*, 30 Ala. 352.

Commercial paper is governed by the same rules applicable to other contracts, in so far as it is placed within the law prevailing within the jurisdiction where it is uttered. The law of that jurisdiction governs the contract, provided it is not against the public morals or policy of the particular State where it is to be enforced. See *Byles*, Bills, 402; *Story*, Conf. L. § 242.

Where a written contract is complete, the place of its delivery is, in legal contemplation, the place where it was made. *Freese v. Brownell*, 35 N. J. L. 226; *Campbell v. Nichols*, 33 N. J. L. 81; *Hyde v. Goodnow*, 3 N. Y. 226; *Second Nat. Bank v. Smoot*, 2 MacArth. 371.

The delivery completes the contract, and controls the date, as well as the mere place of drawing the instrument. *Hyde v. Goodnow*, *supra*; *Connor v. Donnell*, 55 Tex. 167; *Findlay v. Hall*, 12 Ohio St. 610.

As to the incompetency of parol evidence to vary the terms of a written contract, see notes to *Diven v. Johnson* (Ind.) 3 L. R. A. 306; *Bulkeley v. Devine* (Ill.) 3 L. R. A. 390; *Ferguson v. Rafferty* (Pa.) 6 L. R. A. 23.

agreed that the respondent should not be liable on his indorsements beyond the amount which he might receive on account of the mortgage and fail to pay over to the plaintiff, and that he should be held liable on his indorsements only to secure the performance of his agreement to collect and pay over on account of the mortgage. The agreement thus made was carried out. The over-due notes of the marble company were surrendered to it and new notes indorsed by the respondent and the other parties taken in their stead. These have been renewed from time to time, the renewals being indorsed by the same parties, and the notes in suit are renewals of said original notes. The notes have all been made payable to the plaintiff Bank in Rutland and the respondent's indorsement upon all of them was made and took effect as a contract made in Vermont. The mortgage was assigned to the respondent and he has paid over to the plaintiff Bank all money which he has collected under it.

At the trial the jury found by direction of the court that the notes in suit were made payable in the State of Vermont, and that respondent's indorsement was made and took effect as a contract in that State.

It is apparent that if the *lex fori* is to govern the respondent cannot avail himself of the oral agreement entered into between the plaintiff and himself. *Adams v. Wilson*, 12 Met. 138; *Wright v. Morae*, 9 Gray, 837. We do not think, however, that it should govern. It is clear that in all that relates to the contract itself, to its nature and validity and interpretation, the law of the place where it is made governs. *Shoe & Leather Nat. Bank v. Wood*, 142 Mass. 563, 8 New Eng. Rep. 118; *Milliken v. Pratt*, 125 Mass. 374; *Carnegie v. Morrison*, 2 Met. 381; *Nichols v. Mase*, 94 N. Y. 160; *Buzzell v. Cummings*, 61 Vt. 213; *Forepaugh v. Delaware, L. & W. R. Co.* 128 Pa. 218, 5 L. R. A. 508; *Liverpool & Globe W. Steam Co. v. Phoenix Ins. Co.* 129 U. S. 453, 32 L. ed. 796; *Fonseca v. Cunard S. S. Co.* 153 Mass. —, 12 L. R. A. 840.

And the law of the place where the contract is made is without any express assent or agreement of the parties incorporated into and forms a part of the contract. Their contract is presumed to be made with reference to the law of the place where it is entered into, unless it appears that it was entered into with reference to the law of some other State or country. *Washington Cent. Nat. Bank v. Hume*, 128 U. S. 207, 32 L. ed. 376; *Chapin v. Dabson*, 78 N. Y. 74.

A contract valid in the State or country where it is made will be enforced even in a State or country where it would be invalid, provided it be not there contrary to public policy or morals. *Parsons v. Trusk*, 7 Gray, 473; *Milliken v. Pratt* and *Forepaugh v. Delaware, L. & W. R. Co. supra*.

On the other hand, it is equally clear that in all that relates to the procedure for enforcing the contract the law of the forum controls. *Shoe & Leather Nat. Bank v. Wood* and *Carnegie v. Morrison, supra*; *Hoadley v. Northern Transp. Co.* 115 Mass. 804.

Thus the form in which and the parties by or against whom the action shall be

brought, the competency of the evidence offered to establish the alleged cause of action, whether the cause of action is barred by the Statutes of Limitation, whether a party can maintain an action in his own name or is obliged to use that of another, whether a contract is negotiable, and whether it is to be sued on as a specialty or a simple contract, with many other similar things, have been held to be matters affecting the remedy and therefore to be governed by the *lex fori*. *Pearson v. Dwight*, 2 Mass. 84; *Orr v. Amory*, 11 Mass. 25; *Foss v. Nutting*, 14 Gray 484; *Leach v. Greene*, 116 Mass. 584; *Drace v. Rice*, 180 Mass. 410; *Hoadley v. Northern Transp. Co.* 115 Mass. 804; *McOless v. Burt*, 5 Met. 198; *Richardson v. New York Cent. R. Co.* 98 Mass. 85; *Downer v. Chesborough*, 86 Conn. 39; *Lerou v. Brown*, 12 C. B. 801; *Stoneman v. Erie R. Co.* 52 N. Y. 429.

It is sometimes difficult to decide whether the question raised in a given case relates to the nature and validity of the contract or to the remedy upon it. We think in the present instance it relates to the former and not to the latter. The respondent claimed that under the laws of Vermont his obligation growing out of his indorsements was not an absolute one, but depended as between the parties upon the oral agreement or understanding, if any, between them at the time when he placed his name upon the notes. The respondent further claimed that when he placed his name upon the notes he did so under an oral agreement with the plaintiff Bank by the terms of which his indorsement was only to be regarded as security for the payment by him to the Bank of the money that he might collect on the mortgage which was assigned to him. Assuming, as we must for the purposes of this case, that the law of Vermont was as stated by the respondent, the testimony offered by him bore clearly upon the nature and validity of the contract between himself and the Bank. The respondent could not show what the agreement was in any other way than that in which he offered to show it. It was not an attempt on his part to vary a written contract, because under the laws of Vermont the indorsement did not of itself constitute an absolute contract; but in order to determine what the contract was it was necessary to ascertain what agreements or undertakings were entered into at the time of and in connection with and as part of the indorsement. If there were none, then the contract between the plaintiff and respondent was the usual contract growing out of a blank indorsement. If there were such undertakings or agreements, then they entered into and formed a part of the contract of indorsement. The evidence was rejected, not because it would have been incompetent to prove the facts which it was offered to establish had the contract been valid in this State, but on the ground that it related to a matter affecting the remedy. Back of all questions of remedy, however, lies the question of the contract itself, and we think the evidence should have been allowed as bearing upon that fact. See *Williams v. Wade*, 1 Met. 82; *Potters v.*

Lynch, 3 Mass. 77; *Trimbey v. Vignier*, 1 Bing. N. C. 151; *Burrows v. Jemino*, 2 Strange, 733; *Shoe & Leather Nat. Bank v. Wood*, *supra*; *Watson v. Campbell*, 38 N. Y. 153; *Dunn v. Welsh*, 62 Ga. 241; *Forepaugh v. Delaware, L. & W. R. Co. supra*.

The plaintiff objects that there was no issue framed upon the laws of Vermont. But the ruling of the court rendered such an issue immaterial; besides an issue could at any time have been framed in the discretion of the court if satisfied that justice required that it should be done or the court could hear and pass upon the question itself. *Atlanta Mills v. Mason*, 120 Mass. 244.

Exceptions sustained.

BANK OF NORTH AMERICA, *Appt.*,
v.
Frederick H. RINDGE.

(....Mass....)

An action to enforce the liability of a stockholder under the laws of another State, in which the corporation was organized

NOTE.—Effect of statutory enactment:

The liability of stockholders in a corporation of a foreign State, or of one of the United States, must be determined by the laws of that State. *Hutchins v. New England Coal Min. Co.* 4 Allen, 560; *Jones v. Sisson*, 6 Gray, 288; *Penobscot & K. R. Co. v. Bartlett*, 12 Gray, 244; *Blackstone Mfg. Co. v. Blackstone*, 18 Gray, 438.

That the statutes of a State do not operate with extraterritorial force will be conceded. How far they should be enforced, beyond the limits of the State which has enacted them must depend on several considerations, as whether any wrong or injury will be done to the citizens of the State in which they are sought to be enforced, whether its own laws will be contravened or impaired, and whether its courts are capable of doing complete justice to those liable to be affected by their decrees. *New Haven Horse Shoe Nail Co. v. Linden Spring Co.* 3 New Eng. Rep. 560, 143 Mass. 349.

Although in *Aultman's Appeal*, 98 Pa. 505, the courts of Pennsylvania apparently took full jurisdiction over an Ohio corporation and its stockholders, to enforce the liability of the stockholders under the Statutes of Ohio, yet the Massachusetts courts have uniformly declined such an exercise of jurisdictional power. See *Erickson v. Nesmith*, 15 Gray, 221; *Haley v. McLean*, 12 Allen, 438; *Smith v. Mutual L. Ins. Co. of New York*, 14 Allen, 336; *New Haven Horse Shoe Nail Co. v. Linden Spring Co. supra*; *Post v. Toledo, C. & St. L. R. Co.* 4 New Eng. Rep. 221, 144 Mass. 341.

A general statute imposing liability for corporate debts upon stockholders is not considered as imposing a penalty, but as recognizing an obligation arising upon contract. *Norris v. Wrenschall*, 34 Md. 432; *Erickson v. Nesmith*, 46 N. H. 371; *Corning v. McCullough*, 1 N. Y. 47; *Coleman v. White*, 14 Wis. 701.

When a statute confers a right and imposes a liability, without providing a distinct remedy the common law supplies an adequate remedy by giving to a party an appropriate action. But it is equally well settled that when a statute confers a right and prescribes a remedy, that remedy and that only can be pursued. *Knowlton v. Aukley*, 8 Osh. 97; *Pollard v. Bailey*, 97 U. S. 20 Wall. 527, 22 L. ed. 378; *Jessup v. Carnegie*, 80 N. Y. 441.

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and judgment has been rendered against it but no proceedings taken against him, cannot be maintained in a State where the corporation has no place of business when the parties, although both nonresidents, do not reside in the same State, and neither of them resides in the State where the corporation was organized.

(June 27, 1891.)

APPEAL by plaintiff from a judgment of the Superior Court for Suffolk County in favor of defendant in an action brought to enforce defendant's alleged liability as a stockholder of the Haddam State Bank, for unpaid and uncollectible debts of the Bank. *Affirmed.*

The facts are stated in the opinion.

Mr. Henry S. Dewey, for plaintiff:

By the almost unanimous decisions of the courts of the several States, and of the federal courts, this action may be maintained.

Cook, Stock & Stockholders, 2d ed. § 223, and cases cited, especially *Flash v. Conn*, 109 U. S. 371, 27 L. ed. 966; *Cuykendall v. Miles*, 10 Fed. Rep. 342; *Andress v. Bacon*, 38 Fed. Rep. 777; *Lowry v. Inman*, 46 N. Y. 119; *Corning v. McCullough*, 1 N. Y. 47; *Paine v.*

When the liability contended for is in the nature of a penalty imposed by the statute of one State, it cannot be enforced in another. *Haley v. McLean*, 12 Allen, 438; *Bird v. Hayden*, 1 Robt. 383; *Derriekson v. Smith*, 27 N. J. L. 168; *Plymouth First Nat. Bank v. Price*, 38 Md. 487; *Gale v. Eastman*, 7 Met. 14; *State v. John*, 5 Ohio, 217; *Cable v. McCune*, 26 Mo. 371; *Lawler v. Burt*, 7 Ohio St. 341; *Dane v. Dane Mfg. Co.* 14 Gray, 438; *Merchants Bank v. Bliss*, 1 Robt. 361.

One State will not enforce the penal laws of another.

Mr. Cook, in his late work on *Stock and Stockholders*, at § 218, says: "It is settled law that one State will not enforce the penal legislation of another State. *Story, Conf. L. §§ 620-621*; *Wharton, Conf. L. § 853 et seq.*; *Rorer, Interstate Laws*, 143, 146.

"Penal laws are strictly local, and cannot have any operation beyond the jurisdiction of the country where they were enacted." *Sooville v. Canfield*, 14 Johns. 336.

Consequently, it is a general rule that the courts of one State will enforce a statutory liability of stockholders created in another State, only when that liability is held to have arisen from contract. If it is penal, it can never be enforced out of the State by which it is created. *Lowry v. Inman*, 46 N. Y. 119; *Patteson v. Baker*, 34 How. Pr. 180; *Union Iron Co. v. Pierce*, 4 Biss. 327; *Howell v. Mangelsdorf*, 33 Kan. 194.

When the Statute of Limitations is relied upon as a defense, it becomes material to settle whether the liability is of a penal nature or whether it arises *ex contractu*. In the former case the statute is generally shorter. A statutory liability when it is a liability in contract and not a penalty may, under the proper limitations, be enforced in an action in the federal courts. *Flash v. Conn*, 109 U. S. 371, 27 L. ed. 966.

And, in general, a creditor of a corporation whose shareholders are by statute made personally liable for its debts, may maintain a suit to enforce this liability wherever he can obtain jurisdiction over the necessary parties. The right to bring such an action, provided it does not seek to enforce a penalty, will not, it is believed, be denied in any State to the inhabitants of any other State, if there is jurisdiction of the proper parties defendant. *Ault-*

Stewart, 33 Conn. 516; *Grand Rapids Sav. Bank v. Warren*, 53 Mich. 557; *Hodgson v. Cheever*, 8 Mo. App. 321; *Woods v. Wicks*, 7 Lea. 40; *Awtman's App.* 97 Pa. 505; *Tinker v. Van Dyke*, 1 Flipp. 532.

In proper cases, the courts of this Commonwealth are open to parties in controversies arising out of the statutory liability of stockholders in foreign corporations.

Post v. Toledo, C. & St. L. R. Co. 4 New Eng. Rep. 221, 144 Mass. 341.

Morris. Hutchins & Wheeler, for defendant:

No proceeding at law or in equity will lie to enforce the individual liability for corporate debts imposed upon officers and stockholders by the laws of another State in which the corporation is established.

Smith v. Mut. L. Ins. Co. of New York, 14 Allen. 336, 342; *Erickson v. Nesmith*, 15 Gray, 221, 4 Allen. 233; *Halsey v. McLean*, 12 Allen, 438; *New Haven Horse Nail Co. v. Linden Spring Co.* 2 New Eng. Rep. 580, 142 Mass. 349; *Post v. Toledo, C. & St. L. R. Co.* 4 New Eng. Rep. 221, 144 Mass. 341.

In the enforcement of the Kansas law there will arise the question of the priorities of the claims of different creditors of the corporation.

In some States the creditor first bringing suit has priority.

Ingalls v. Cole, 47 Me. 530; *Thebus v. Smiley*, 110 Ill. 816.

In Missouri the creditors rank in the order in which they have respectively obtained judgment.

State Sav. Assn. v. Kellogg, 63 Mo. 540.

And it is generally held that a bill in equity will lie on behalf of all the creditors against the corporation and all the stockholders to secure a ratable division of the amounts due from the different stockholders among the creditors, and that in such a suit the creditors will be enjoined from prosecuting independent suits, and no priority among the creditors will be recognized.

Chicago v. Hall, 103 Ill. 842; *Eames v. Dorris*, 102 Ill. 850; *Pfohl v. Simpson*, 74 N. Y. 187; *Wright v. McCormack*, 17 Ohio St. 86. See Thompson, Liability of Stockholders, §§ 420-426; 2 Morawetz, Priv. Corp. 2d ed. § 897.

If such a suit were pending in Kansas, and this defendant had been served with process therein, how could he protect himself from paying more than the statute liability? No injunction by the court in Kansas could affect the plaintiff, a resident of New York.

Colt v. Partridge, 7 Met. 570.

man's App. 98 Pa. 505; *Sackett's Harbor Bank v. Blake*, 3 Rich. Eq. 225; *Woods v. Wicks*, 7 Lea. 40; *Plymouth First Nat. Bank v. Price*, 33 Md. 487; *Ex parte Van Riper*, 20 Wend. 614; *McDonough v. Phelps*, 15 How. Pr. 372; *Lowry v. Inman*, *supra*; *Bank of Virginia v. Adams*, 1 Pars. Sel. Eq. Cas. 324. See also *Paine v. Stewart*, 33 Conn. 516; *Bond v. Appleton*, 8 Mass. 472; *Healy v. Root*, 11 Pick. 230; *Gale v. Eastman*, 7 Met. 14; *Erickson v. Nesmith*, 15 Gray, 221, 4 Allen. 233, 46 N. H. 371; *Hutchins v. New England Coal Min. Co.* 4 Allen. 530; *Halsey v. McLean*, 12 Allen. 438; *Smith v. Mutual L. Ins. Co. of New York*, 14 Allen. 336; *Bateman v. Service*, L. R. 6 App. Cas. 396.

When the suit is maintainable, the construction placed upon the statute of the State in which the corporation exists, by the courts of that State, is, as a general rule, controlling, and will be followed by the courts of the State where the suit to enforce is brought. *Jessup v. Carnegie*, 80 N. Y. 441; *Chase v. Curtis*, 113 U. S. 452, 28 L. ed. 1038. See also *Hunt v. Hunt*, 72 N. Y. 236; *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. ed. 544; *Elmendorf v. Taylor*, 23 U. S. 10 Wheat. 152, 100, 6 L. ed. 239, 232; *Shelby v. Guy*, 24 U. S. 11 Wheat. 367, 6 L. ed. 400; *South Ottawa v. Perkins*, 94 U. S. 260, 267, 24 L. ed. 154, 157; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 57; *Leavenworth County Comrs. v. Barnes*, 94 U. S. 70, 24 L. ed. 68; *Adams v. Nashville*, 95 U. S. 19, 24 L. ed. 260; *Edmwood v. Marcy*, 92 U. S. 239, 23 L. ed. 710.

The extent of that liability and the mode in which it shall be enforced, and the position in which the stockholders are placed, must be determined by the laws of the State creating the corporation, and by a tribunal that can control the conduct and action of the corporation. *New Haven Horse Shoe Nail Co. v. Linden Spring Co.* 2 New Eng. Rep. 580, 142 Mass. 349.

When statute is not penal.

A statute is not penal which provides that all stockholders shall be liable to an amount equal to that of their stock until the whole of the capital stock fixed and limited by the company shall have been paid in, and a certificate thereof shall

have been filed. *Cuykendall v. Miles*, 10 Fed. Rep. 342.

When Statute of Limitations applies.

Suits at law or in equity by creditors of a corporation to enforce the liability of stockholders under a state statute are governed by the Statute of Limitations of the State, and a liability, to be enforceable, must be in compliance with the condition applicable to it under the legislative Acts and judicial decisions of the State which creates the corporation and imposes the liability. *Andrews v. Bacon*, 38 Fed. Rep. 777; *Fourth Nat. Bank of New York v. Franklyn*, 120 U. S. 747, 30 L. ed. 826.

Where the supreme court of the State has construed the statute relating to corporate liability, and held that the remedies which it provides are exclusive, this decision is controlled in the federal courts, as it is not in conflict with the Constitution, laws or treaties of the United States. *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. ed. 544, and cases cited; *Post v. Kendall County Suprs.* 105 U. S. 667, 28 L. ed. 1204; *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178; *Jessup v. Carnegie*, 80 N. Y. 441.

If the right to an independent personal action against the stockholder cannot be maintained in the State of the domicile of the corporation, it cannot be maintained in another State. *Lowry v. Inman*, 46 N. Y. 128; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Patteson v. Baker*, 34 How. Pr. 180; Thompson, Liability of Stockholders, § 80, and cases cited.

Comity as applied to the enforcement of a foreign law.

The laws of foreign States do not operate or have force in another State *ex proprio rigore*, but only *ex comitate*. The courts of a State where the laws of a foreign State are sought to be enforced will use a sound discretion as to the extent and mode of exercising this comity. They will not suffer foreign laws or statutes to work injury or injustice upon their own citizens, nor permit their tribunals to be used for the purpose of affording remedies which are denied to parties in the jurisdiction of the State that enacted the law, and which tend to operate with hardship on their own citizens and subjects. *Erickson v. Nesmith*, 15 Gray, 221.

C. Allen, J., delivered the opinion of the court:

The plaintiff is a corporation of the State of New York. The defendant is a resident of California, who owned fifty shares of stock in the Haddam State Bank, a corporation of Kansas. The plaintiff recovered judgment in Kansas for \$5,343 and costs against the Haddam State Bank, and took out execution thereon, but could find no property of the Bank whereon to levy, and so the execution was returned unsatisfied. No steps were taken in Kansas to charge the defendant as a stockholder in the Bank, but he being found in Massachusetts, the plaintiff brings this action against him here seeking to charge him personally for the judgment against the Bank to the amount of the par value of his shares therein, namely \$5,000. This is sought to be done by virtue of the laws of Kansas, respecting which the averment in the declaration is as follows. "And the plaintiff further says, that by the laws of the State of Kansas if any execution shall have been issued against the property or effects of a corporation, except a railway or religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment, and such plaintiff may maintain an action at law against any one or more of the stockholders of such corporation to recover a debt due to the corporation." The declaration was returned to, and we have to determine whether the plaintiff states a case upon his declaration.

The declaration does not in terms set forth any statute of Kansas, nor show to what extent the laws of Kansas above set forth are statutory, or rest merely in judicial decisions. It is to be regretted that we are not at liberty to determine the case upon an examination of the Statute of Kansas, with the assistance of any construction which may have been put upon it by the courts of that State. But we must take the case as the parties present it to us.

The question can hardly be considered as an open one in this Commonwealth. This court has often declined to exercise jurisdiction to enforce a liability imposed upon stockholders in corporations established in other States under statutes of those States. In *Post v. Toledo, C. & St. L. R. Co.*, 144 Mass. 341, 245, 4 New Eng. Rep. 221, it is said: "This court does not take jurisdiction of a suit to enforce this liability of stockholders in a foreign corporation, not because it would be a suit to enforce a penalty, or a suit opposed to the policy of our laws, but because it is a suit against a foreign corporation which involves the relation between it and its stockholders, and in which complete justice only can be done by the courts of the jurisdiction where the corporation was created." See also *New Haven Horse Shoe Nail Co. v. Linden Spring Co.* 142 Mass. 349, 358, 2 New Eng. Rep. 580, and cases cited.

The case at bar furnishes a strong illustration of the propriety of this course. If the plain-

tiff, as a creditor of the Kansas corporation, without obtaining any previous judgment in Kansas establishing the defendant's liability as a stockholder, can maintain an action directly and in the first instance against him in Massachusetts, for the purpose of charging him as a stockholder under the qualified liability set forth in the declaration, then it would follow that the plaintiff might also institute a similar action against him in California or in any number of other States where service upon him could be obtained. The plaintiff might also institute similar actions for the same debt in different States against other stockholders. In such case it is probable that a judgment against one stockholder without satisfaction would be no bar to actions against others; but it is obvious that the defendants in such actions might be put to great inconvenience in ascertaining, and indeed might find it practically impossible to ascertain, what steps the plaintiff might have taken against other stockholders in other States. A dishonest creditor might possibly recover several times over against different stockholders in different States, before they respectively could ascertain the facts. Likewise, the defendant, if compelled to pay under a judgment recovered in one State, would find it difficult if not impossible to enforce contribution from other stockholders residing elsewhere. Moreover, if the plaintiff might maintain such actions against the defendant and against other stockholders in different States, until he should finally recover satisfaction, other creditors of the Kansas corporation might also do the same. If every creditor of a Kansas corporation which has no property with which to respond to a judgment obtained by such creditor against it in Kansas, may therefore, without any further proceedings in that State to charge the stockholders, maintain an action against every stockholder in every State of the Union where service can be obtained, and pursue such action until satisfaction is obtained from some stockholder in some State, it is obvious that a large amount of litigation might ensue, under which substantial justice as among the stockholders could not be worked out. The liability of the stockholder, as set forth in the declaration, is not a general liability for all the debts of the corporation. The execution against the stockholder which can be issued in Kansas in the action against the corporation, as set forth in the declaration, is only "to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon." Probably by the true construction of the Statute the action at law to charge stockholders, which is given as an alternative remedy, would be limited to a like amount as the execution; though according to the averment of the declaration the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment, without any other limitation being expressed. The present plaintiff does not contend that it can recover against the defendant the full amount of its judgment, but only the par value of the defendant's stock in the Bank. The liability sought to be enforced is a strictly limited one. It seems to us that a bona fide, or at any rate a compul-

sory, payment to one creditor would discharge a stockholder to that extent from liability to others; and a payment of the full par value of his stock would, according to the view which has been expressed by this court, be a full discharge (*Halsey v. McLean*, 12 Allen, 442), though as to this other courts might hold otherwise. *Fowler v. Robinson*, 31 Me. 189; *Grose v. Hill*, 36 Me. 22.

There is no averment in the declaration that the defendant has not thus been discharged from liability, and perhaps this is not necessary, as it would be more properly a matter of defense. But in case of several actions in different States, questions of priority of the claims of creditors might arise, upon which the decisions of the courts of the different States might not be uniform, and thus the defendant might be held liable more than once, and even a compulsory payment might not avail to protect him, as is shown by the cases cited by the defendant. Moreover, the defendant might by way of set-off present claims which he holds either against the corporation in Kansas, or against the creditor who sues him, and different decisions in respect to his right of set-off might be made in different States.

These considerations are suggested to illustrate the practical difficulty of enforcing a liability such as that set forth in the declaration, in other States than that where the corporation is established, in such a way as to secure substantial justice. This difficulty is far greater in cases where no steps have been taken in the State where the corporation is established, to ascertain and determine the amount of

each stockholder's liability. There the whole amount of debts can be ascertained, and the proper proportion assessed upon each stockholder; or his liability can be otherwise determined, in a manner which will avoid many of the objections which exist against the maintenance of actions like the present. We remain satisfied with the conclusions heretofore reached by this court, that such an action under the circumstances which appear here, ought not to be entertained in this State. Limiting our decision to the facts now before us, it is this: that a resident of the State of New York cannot maintain in the courts of this State an action against a resident of the State of California, to establish his personal liability as a stockholder of a corporation organized in the State of Kansas, and having no place of business in this State, for a debt of that corporation to the plaintiff under laws of Kansas, such as are set forth in the declaration, providing for a certain special and limited liability on the part of stockholders, when no judicial proceedings have been taken in Kansas to ascertain and establish the liability of the defendant as such stockholder.

Whether the same result might not be reached on the ground that the subsidiary liability of stockholders such as is set forth, is matter of remedy only, and does not follow the stockholder outside the State, there being no averment of a different construction of the statute by the Kansas courts, we need not consider. *Brown v. Eastern State Co.* 184 Mass. 590.

Judgment for the defendant affirmed.

MISSOURI SUPREME COURT.

William H. F. SMITH, *Appt.*,

v.

Charles R. BURRUS, *Respnt.*

(....Mo.....)

1. The malicious prosecution of a civil suit without probable cause is actionable, al-

though defendant is not arrested or his property attached.

2. The voluntary dismissal of a civil suit is not as matter of law prima facie evidence of malice in its institution.

3. The doctrine of reasonable doubt as to guilt of the alleged crime has no application in an action for malicious prosecution of a suit

NOTE.—General rules relating to malicious prosecution.

Probable cause which will justify a criminal accusation, is defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense with which he is charged. *Munns v. Dupont*, 3 Wash. C. C. 37; *Foshay v. Ferguson*, 2 Denio, 617; *Bacon v. Towne*, 4 Cush. 218.

Adjudged cases are found, decided by the American courts, which seem to follow the English rule, and deny the right of action based upon a civil action, which has been maliciously prosecuted without the instance of either arrest or attachment; but recent authorities announce the more reasonable rule and decide that such an action is maintainable. *McCardle v. McGinley*, 36 Ind. 538, 44 Am. Rep. 362; *Whipple v. Fuller*, 11 Conn. 583; *Closon v. Staples*, 42 Vt. 209; *Bustin v. Bank of Stockton*, 66 Cal. 123, 56 Am. Rep. 77; *Vanduzor v. Linderman*, 10 Johns. 106; *Pangburn v. Bull*, 1 Wend. 345; *Cox v. Taylor*, 10 B. Mon. 17; *Woods v. Fennell*, 13 Bush, 69; *Warbourg v. Smith*, 11 Kan. 554; *Payne v. Don-*

egan, 9 Ill. App. 566; *Johnson v. Meyer*, 36 La. Ann. 333; *Hoyt v. Macon*, 2 Colo. 113; *Hall v. Leaming*, 31 N. J. L. 321, 36 Am. Dec. 213.

Where an action has been commenced maliciously without probable cause, and the defendant has been arrested at the instance of the plaintiff, or his property attached, or he has been injured in any special manner, such proceedings, although in the nature of a civil suit, are sufficient to base an action for malicious prosecution. *Mayer v. Walter*, 64 Pa. 233; *Sledge v. McLaren*, 29 Ga. 64; *Bump v. Betts*, 19 Wend. 421; *Watkins v. Baird*, 6 Mass. 506; *Lawrence v. Hagerman*, 56 Ill. 68; *Stewart v. Cole*, 46 Ala. 646; *Henderson v. Jackson*, 9 Abb. Pr. N. S. 226; *Cox v. Taylor*, 10 B. Mon. 17; *Savage v. Brewer*, 16 Pick. 453; *Farley v. Danks*, 4 El. & Bl. 498; *Austin v. Debnam*, 3 Barn. & C. 189; *Hayden v. Shed*, 11 Mass. 500; *Spengler v. Davy*, 15 Gratt. 381; *Closon v. Staples*, 42 Vt. 209.

The onus is upon the plaintiff to prove both the want of probable cause for the prosecution instituted against him, and malice on the part of the defendant. If he failed to prove either of these facts, the action necessarily abates. *Besson v.*

for slanderous words charging a crime. A preponderance of evidence is sufficient to make out a case for either party.

4. False statements concerning a candidate for office are not included within the privilege of discussing his character and fitness.

(June 29, 1891.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Marion County in favor of defendant in an action brought to recover damages for the alleged malicious prosecution of a civil action brought by defendant against plaintiff. *Reversed.*

Statement by **Sherwood, Ch. J.:**

Action for malicious prosecution. Burrus brought suit against Smith for slander, alleging that the latter had charged him with stealing horses; but, after Smith had been thus put to the trouble and expense of employing counsel to defend the suit, Burrus, as he admitted in his answer, voluntarily dismissed the suit he had brought, and when on the witness stand testified: "I dismissed the suit voluntarily, because I wanted to." It appeared in evidence on the trial that, at the time the charges were made by Smith, Burrus was running for justice of the county court in the Eastern District of Scotland County; and the charges were made by Smith, who himself lived in that district, to other voters; and that affidavits were read by others implicating Burrus as an accomplice with one Mayfield in larcenous operations in regard to horses. Mayfield, shortly be-

fore the election came off, was convicted and sentenced for five years to the penitentiary. There was testimony adduced at the trial which certainly had a strong tendency to show that the charges made by Smith were not unfounded, and there was some testimony of a contrary effect. The instructions, so far as necessary, will be quoted and noticed in the opinion. The jury found for the defendant, hence this appeal.

Messrs. S. W. Birch and Harrison & Mahan, for appellant:

The voluntary discontinuance of his suit against plaintiff Smith is *prima facie* evidence of the malice of defendant Burrus.

Burhans v. Sanford, 19 Wend. 417, and cases cited; *Garrison v. Pearce*, 3 E. D. Smith, 255.

Plaintiff Smith had the right to discuss the honesty and integrity of Burrus with the voters of the Eastern District of Scotland County, and to give them such information as he possessed as to his qualities and his fitness for the office of county judge. By offering himself as a candidate a man offers his character for discussion and investigation; he should be held and considered as putting his character in issue so far as respects his qualifications for the office.

Cooley, Torts, p. 217; Townshend, Slander & Libel, 8d ed. § 247, p. 478, and § 241; *Com. v. Clap*, 4 Mass. 169; *Com. v. Odell*, 3 Pittsb. 449; *Odgers, Libel & Slander*, § 236; *State v. Baleh*, 31 Kan. 465; *Kimball v. Fernandez*, 41 Wis. 329; *Marks v. Baker*, 28 Minn. 162; *Barr v. Moore*, 87 Pa. 385; *Hunt v. Bennett*, 19 N. Y. 178.

Southard, 10 N. Y. 236; *Foshay v. Ferguson*, 2 Denio, 617.

Proof of malice will not excuse or supply the want of proof of want of probable cause, neither can the want of probable cause be inferred from proof of malice, although malice may be inferred from the want of probable cause. *Sutton v. Johnstone*, 1 T. R. 493, 544; *Wheeler v. Nesbitt*, 65 U. S. 24; *How*, 544, 16 L. ed. 765; *Heyne v. Blair*, 62 N. Y. 19; *Cook v. Walker*, 30 Ga. 519; *Dickinson v. Maynard*, 20 La. Ann. 66; *Ganea v. Southern Pac. R. Co.* 51 Cal. 140; *Glaze v. Whitley*, 5 Or. 164; *Wilms v. Knox*, 5 S. C. 474; *Harkrader v. Moore*, 44 Cal. 144; *Dietz v. Langatt*, 63 Pa. 284.

Action lies in cases of arrest.

Thus an action will lie where a civil suit is maliciously and without probable cause begun by the arrest of the party defendant (*Collins v. Hayte*, 50 Ill. 387, 99 Am. Dec. 621; *Burhans v. Sanford*, 19 Wend. 417; *Watkins v. Baird*, 6 Mass. 508, 4 Am. Dec. 170; *Plummer v. Dennett*, 6 Me. 421, 20 Am. Dec. 316; *Turner v. Walker*, 3 Gill & J. 377, 23 Am. Dec. 229; for maliciously and without cause instituting proceedings in bankruptcy against another (*Chapman v. Pickersill*, 2 Wils. 145; *Johnson v. Emerson*, 25 L. T. N. S. 337; *Whitworth v. Hall*, 2 Barn. & Ad. 695; *Farley v. Danks*, 4 El. & Bl. 493; *Brown v. Chapman*, 3 Burr. 1438; for maliciously attaching the party's property. *Preston v. Cooper*, 1 Dill. 589; *Williams v. Hunter*, 3 Hawks, 545, 14 Am. Dec. 597; *Wood v. Weir*, 5 B. Mon. 544; *McCullough v. Grishobber*, 4 Watts & S. 201; *Walsey v. Thies*, 56 Mo. 89; *Fullenwider v. McWilliams*, 7 Bush, 389; *Spengler v. Davy*, 15 Gratt. 381; *Hayden v. Shed*, 11 Mass. 500; *Lindsay v. Larned*, 17 Mass. 190; *Pierce v. Thompson*, 6 Pick. 198; *Nelson v. Danielson*, 82 Ill. 545; *Shaver v. White*, 6 Munf. 110, 8 Am. Dec. 730.

Where an attachment is wrongfully sued out on 18 L. R. A.

grounds untrue in fact, actual damages may be recovered, though there was probable cause. *Carothers v. McIlhenny Co.* 63 Tex. 139; *Bear v. Marx*, 63 Tex. 298.

And giving a bond of indemnity as required by statute does not defeat the action. *Lawrence v. Hagerman*, 56 Ill. 68, 8 Am. Rep. 674.

The defendant cannot justify or mitigate the wrongful attachment of goods by showing that he offered to return the property on the next day in the same condition. *Carpenter v. Dresser*, 72 Me. 377, 39 Am. Rep. 337.

And it is no defense that defendant, before taking out the attachment, heard that some other creditor was going to attach (*Carothers v. McIlhenny Co. supra*), even though there was an indebtedness and ground for a suit. *Tomlinson v. Warner*, 9 Ohio, 108; *Spaids v. Barrett*, 67 Ill. 290, 11 Am. Rep. 10; *Savage v. Brewer*, 16 Pick. 453, 28 Am. Dec. 255; *Fortman v. Bottler*, 8 Ohio St. 548, 72 Am. Dec. 606; *Herman v. Brookerhoff*, 8 Watts, 240.

The question of probable cause, when there is no conflict in the evidence, no disputed facts nor any doubt upon the evidence, or the inferences drawn from it, is one of law for the court and not of fact for the jury. It is said in *Besson v. Southard*, 10 N. Y. 236, that if the facts which are adduced as proof of want of probable cause are controverted, if conflicting testimony is to be weighed, or if the credibility of witnesses is to be passed upon, the question of probable cause should go to the jury with proper instructions as to the law. In such cases it is a mixed question of law and fact. The rule laid down in *Masten v. Deyo*, 2 Wend. 424, is expressly approved by *Jewett, J.*, in that case. *Heyne v. Blair*, 62 N. Y. 19.

For further discussion of this subject, see notes to *Antcliff v. June* (Mich.) 16 L. R. A. 621, and *Pope v. Pollock* (Ohio) 4 L. R. A. 255.

The language or communication used by plaintiff Smith is privileged. "It was upon a proper occasion, from a proper motive, and made in good faith upon reasonable and probable cause."

Briggs v. Garrett, 2 Cent. Rep. 364, 11 Pa. 404, 25 Am. L. Reg. N. S. 498, and note; *Express Printing Co. v. Copeland*, 64 Tex. 354, 24 Am. L. Reg. N. S. 640, and note; *Mott v. Dawson*, 46 Iowa, 538; *Crane v. Waters*, 10 Fed. Rep. 619; Newell, Defamation, Slander and Libel, § 138, p. 535.

Smith's communication was only to the voters, and only for the purpose of giving in good faith what plaintiff believed to be truthful information, and only for the purpose of enabling such voters to cast ballots more intelligently. It clearly is a privileged communication.

State v. Balch, supra; *Sweeney v. Baker*, 13 W. Va. 160; *White v. Nicholls*, 44 U. S. 3 How. 266, 11 L. ed. 591; *Brow v. Hathaway*, 95 Mass. 239; *Klinck v. Colby*, 46 N. Y. 427; note to *Munster v. Lamb*, 23 Am. L. Reg. N. S. 22; L. R. 11 Q. B. Div. 538; *Palmer v. Concord*, 48 N. H. 211; *Mott v. Dawson*, supra; *Boys v. Hunt*, 60 Iowa, 251.

The court erred in giving the instructions which require the jury to find "beyond a reasonable doubt," and that the "same evidence must be adduced by plaintiff as would be necessary to convict the defendant upon an indictment for horse stealing." This issue should be decided as in other civil cases, according to a preponderance of the evidence, and the reasonable probability of its truth.

Marshall v. Thames Fire Ins. Co. 48 Mo. 586; *Rothschild v. American Cent. Ins. Co.* 62 Mo. 356; *Edwards v. Knapp*, 97 Mo. 432.

Meers. R. D. Cramer, John C. Moore and McKee & Jayne for respondent.

Sherwood, Ch. J., delivered the opinion of the court:

1. At the outset of the examination of the case at bar we are met by the preliminary question whether the facts stated in the petition constitute a cause of action. This point under our Code of Civil Procedure is always open to examination even in an appellate court, and, like the jurisdiction of the court over the subject matter of the action, is never waived, and may be taken advantage of for the first time on appeal. Rev. Stat. § 2047; *Sweet v. Maupin*, 65 Mo. loc. cit. 72; *McIntire v. McIntire*, 90 Mo. loc. cit. 473; *Walker v. Bradbury*, 57 Mo. 66.

The authorities are in conflict as to whether a petition states a cause of action, which merely alleges that a civil action, brought and prosecuted maliciously and without probable cause, has been terminated in favor of the defendant; many of the authorities maintaining that no cause of action exists unless such civil process be accompanied by arrest of the person or seizure of the property, and that the plaintiff in such original action, in contemplation of law, is sufficiently punished by the payment of costs. This view has received the sanction of *Judge Cooley*, *Torts*, 2d ed., 217 et seq., and cases cited.

But there are numerous and able decisions 13 L. R. A.

in opposition to this view, and it is difficult to combat the force of the reasoning they employ. It is difficult to see why the right of a plaintiff, who, as defendant, has been sued in a civil action maliciously and without probable cause, and who has been put to great expense in consequence thereof, should be altered or at all affected merely by the incident of his property having been attached or his person seized; for, in either case, the damage, the expense, and costs of defending a suit, whether instituted by *ca. sc.* or attachment, or by civil summons, would be the same, and it is clear that the recovery of costs would not, under our practice, reimburse him for his attorney's fees, something which and other incidental expenses he does recover under the English practice. The cases on both sides of this subject have been extensively collated and exhaustively reviewed by John D. Lawson, in 21 Am. L. Reg. N. S. 281, 353, and the conclusion reached that the better doctrine is that which allows an action to be maintained as well where property etc., has not been seized as where it has. The authorities also are well reviewed in 14 Am. & Eng. Encyclop. Law, title *Malicious Prosecutions*, p. 32 et seq., and notes. Besides, this court in *Brady v. Ervin*, 48 Mo. 533, adopted the view that an action for malicious prosecution may be maintained where the original action was begun by civil summons alone.

2. Of its own motion the court gave instruction No. 1: "The court, on plaintiff's behalf, of its own motion, instructs the jury that if they find from the evidence that the defendant's suit against the plaintiff this defendant's charge of slander was false, and that said suit was instituted with malice, and that said suit was also instituted without probable cause, and that this plaintiff was damaged thereby, the jury will find for the plaintiff in an amount not exceeding the amount claimed in this plaintiff's petition. If the jury find that this defendant's charge of slander was false, then the proof of want of probable cause, being the proof of a negative, may be made out by a slight evidence, but malice is not to be necessarily inferred from the want of probable cause. Malice is the intentional doing of a wrongful act without just cause or excuse [and the jury are instructed that, under the pleadings in this case, it is admitted that defendant, Burrus, voluntarily instituted and voluntarily dismissed said slander suit of *Burrus v. Smith*, and the court further instructs the jury that such voluntary dismissal of said slander suit is in this cause prima facie evidence of malice on the part of defendant, Burrus.] Attention will now be directed to that portion of that instruction which is inclosed in brackets. Instruction No. 1, asked by the plaintiff, but refused him, is to the same effect, and as to that portion of the instruction, of course, the plaintiff would have no right to complain. We do not regard either instruction as asserting the law on this point. In the Law of Torts (2d ed. pp. 214, 215), it is said by *Judge Cooley*: "The burden of proving that the prosecution was malicious is also upon the plaintiff. If a want of prob-

able cause is shown, malice may be inferred; but the deduction is not a necessary one, and the mere discontinuance of a criminal prosecution, or the acquittal of the accused, will establish for the purposes of this suit neither malice nor want of probable cause. But, if an arrest is made in a civil suit which is afterwards voluntarily discontinued, the discontinuance has been held to furnish prima facie evidence of a want of probable cause."

If the discontinuance of a criminal prosecution, instituted by the defendant, and discontinued at his instance, be evidence which establishes neither malice nor want of probable cause, it is difficult to see how the voluntary discontinuance of a civil action instituted by the defendant can cut a wider swath. "Prima facie evidence of a fact," says *Mr. Justice Story*, "is such evidence as, in judgment of law, is sufficient to establish the fact, and, if not rebutted, remains sufficient for the purpose." *Lilienthal's Tobacco v. United States*, 97 U. S. loc. cit. 268, 24 L. ed. 905, and cases cited. The portion of the instruction heretofore referred to, therefore, in effect told the jury that the voluntary dismissal of the civil action begun by defendant made out a case for the plaintiff, without more; but this was not the law. The instructions, therefore, referred to, were tantamount to saying that the mere discontinuance of the action for slander was sufficient, in and of itself, to make out a case of malice on his part; but, as already seen, this is not the law. As *Judge Cooley* says, the deduction of malice from a want of probable cause is not a necessary one. Of course, malice may be inferred from the want of probable cause, and from the voluntary dismissal of the original civil action; but such inference is one of fact, and one for the jury, under appropriate instructions, to draw.

8. In regard to the words used by plaintiff which gave origin to the suit for slander, the court instructed the jury: "And, to warrant the jury in finding that the said alleged language was true, the same evidence must be adduced by plaintiff as would be necessary to convict the defendant upon an indictment for horse stealing, and if the jury believe from the evidence that plaintiff uttered the said words of and concerning defendant, and entertain a reasonable doubt of defendant's guilt of the crime imputed to him in said words, the jury should find a verdict for defendant. By a 'reasonable doubt' it meant a substantial doubt, based on and arising from the evidence, and not a mere possibility of defendant's innocence." This view of the law, though sustained by the case of *Polston v. See*, 54 Mo. 291, by a divided court, was unanimously overthrown in the case of *Edwards v. Knapp*, 97 Mo. 432; and the now generally prevalent modern doctrine established that, in all civil actions, a preponderance of the evidence is sufficient to make out a case for either litigant. Besides, in actions of this sort, such an instruction is wholly out of place. Whether a party is suing or sued for malicious prosecution, the absolute guilt of the particular individual is not at all a controlling issue. Absence of malice and probable cause are the governing factors,

and constituent elements of the forensic contest.

4. The remaining point to be discussed is whether the court should have given instruction No. 4, asked by plaintiff, but refused by the court, which was the following: "If the jury believe from the evidence that defendant Burrus was a candidate for the public office of county judge in and for the Eastern District of Scotland County, Mo., at the general election of the year 1884; and if the jury further believe from the evidence that the character, honesty and fitness of said Burrus to fill such public office was relevant to the candidacy of said Burrus, and necessary to be known by the voters and constituents of said Burrus at said general election, for their own interest and protection; and if the jury further find from the evidence that the language shown by the testimony in this case to have been used by Smith about Burrus was so used by said Smith to some of the voters and constituents of said Burrus at said general election, and to none other, in a private oral discussion of the character and honesty and fitness of said Burrus to fill such public office; and that said language was so used in good faith, for the purpose of giving such voters and constituents relevant and proper information for their own interest and protection; and that said language was so used by said Smith in said Eastern District of Scotland County, after said Burrus had been nominated for said public office, and before said general election in said eastern district; and that said Smith was a voter at said general election in said eastern district,—then the court instructs the jury that such language so used by said Smith is privileged; that said Smith had the right to so use the same; and that defendant, Burrus, did not have reasonable and probable cause for bringing said suit for slander against plaintiff, Smith."

There is a conflict of authority on the question whether such an instruction should be given in instances like the present; but, as this case is one of first impression in this State, we are free to adopt that rule which we regard as best comporting with the proper preservation of the rights of individuals, good government, social order, justice and sound reason. The correct rule, we take it, is that expressed by the Supreme Court of Massachusetts in *Com. v. Clap*, 4 Mass. 183, where *Chief Justice Parsons*, speaking for the court, said: "When any man shall consent to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office; and publications of the truth on this subject, with the honest intention of informing the people, are not a libel; for it would be unreasonable to conclude that the publication of truths which it is the interest of the people to know should be an offense against the law. For the same reason the publication of falsehood and calumny against public officers or candidates for public offices is an offense most dangerous to the people, and deserves punishment, because the people may be deceived, and re-

ject the best citizens, to their great injury, and it may be to the loss of their liberties." This expression of the law was cited approvingly in *Wheaton v. Beecher*, 66 Mich. 307, 9 West. Rep. 890, an action for libel, with plea of privileged communication regarding a candidate for a public office; and Sherwood, J., in delivering the opinion of the court, said: "The libel in this case was not privileged. It is true the plaintiff was a candidate for appointment to the office of comptroller of the City of Detroit, but this did not license the defendant, or any other person, to vilify, falsify and calumniate the character of the plaintiff for honesty, integrity and morality. There is no doubt that when a man in this country becomes a candidate for an office, elective or appointive, his character for honesty and integrity, and his qualifications and fitness for the position, are put before the people, and are thereby made proper subjects for comment, and that publications of the truth in regard to the candidate are not libelous; and it is equally true that the publication of falsehood against such candidate is wrong, and deserves to be punished." *Bronson v. Bruce*, 59 Mich. 467, was also an action for libel on a candidate for a public office, and the claim of privilege was also interposed; but Champin, J., as the organ of the court, said: "The electors of a congressional district are interested in knowing the truth, not falsehoods, concerning the qualifications and character of one who offers to represent them in Congress; and it is the right and privilege of any elector, or person also having an interest to be represented, to freely criticise the act and conduct of such candidate, and allow, if he can, why such person is unfit to be intrusted with the office, or why the suffrages of the electors should not be cast by him. But defamation is not a necessary and indispensable concomitant of an election contest." "To hold that false charges of a defamatory character, made against a candidate, are privileged as matters of law, if made in good faith, and that the party making them is absolutely shielded against liability, it seems to me is a most pernicious doctrine. It would deter all sensitive and honorable men from accepting the candidacy to office, and leave the field to the profligate, the unprincipled and unworthy; to men who have no character to lose, no reputation to blemish. It could scarcely be expected that any man, worthy of the position, would consent to stand for an office, and have his reputation tarnished, his good name scandalized, in the face of the whole community, if such doctrine as this is to prevail. Besides, under the guise of assisting the people to select a fit man, the voters are deceived by falsehood, and induced to withhold their support from the maligned candidate, and so two wrongs are perpetrated,—one upon the candidate, the other in misleading the voter." At an early day in Tennessee the same question arose, and a similar ruling was made; Overton, J., remarking: "Slander is no more justifiable when spoken of a man with a view to his election than on any other occasion. Unhappy, indeed, would be any people when, in

the exercise of one right, you destroy as important a one. Let his talents, his virtues, and such vices as are likely to affect his public character be freely discussed but no falsehoods be propagated." *Brewer v. Weakley*, 2 Overt. (Tenn.) 99. The same view of the law prevails in West Virginia, where Green, P., delivering the opinion of the court, said, in speaking of the degree of freedom with which the character of a candidate for public office may be treated, said: "As this right of criticism is confined to the acts or conduct of such candidate, whenever the facts which constitute the act or conduct criticised are not admitted, they must, of course, be proven. . . . His talents and qualifications, mentally and physically, for the office he asks at the hands of the people, may freely be commented on in publications in a newspaper, and, though such comments be harsh and unjust, no malice will be implied, for these are matters of opinion, of which the voters are the only judges; but no one has a right by a publication to impute to such candidate, falsely, crimes, or publish allegations affecting his character falsely." *Sweeney v. Baker*, 18 W. Va. 183. The same rule prevails as to the conduct of a public officer as that relating to a candidate for office, as the authorities show; and in regard to what are privileged communications respecting the former class, *Folger, Ch. J.*, said: "We are of the opinion that the official act of a public functionary may be freely criticised, and entire freedom of expression used in argument, sarcasm, and ridicule upon the act itself; and that then the occasion will excuse everything but actual malice and evil purpose in the critic. We are of the opinion that the occasion will not of itself excuse an aspersive attack upon the character and motives of the officer, and that, to be excused, the critic must show the truth of what he has uttered of that kind." *Hamilton v. Reno*, 81 N. Y. 126. The doctrine here asserted is also prevalent in Illinois. In *Reurick v. Wilcox*, 81 Ill. 77, Craig, J., said: "While the qualifications and fitness of a candidate for office might properly be discussed with freedom by the press of the country, we are aware of no case that goes so far as to hold that the private character of a person who is a candidate for office can be destroyed by the publication of a libelous article in a newspaper notwithstanding the election may be attended with that excitement and feeling that not unfrequently enters into our elections. . . . The law required appellee, as the publisher of a journal, to publish facts, and not libelous articles. The character and reputation of appellant was as sacred, and as much entitled to protection, when a candidate for office, as at any other time." The same doctrine is announced in other States, and we regard it as the better one, especially in this day and age, when in heated political campaigns the "rattling tongue of noisy and audacious" slander, and what *Lord Mansfield*, in *Rex v. Wilkes*, 4 Burr. 2562, calls "that mendax infamia from the press," sorely need to have placed upon them some fetter, some check, some curb which shall be able, in some degree at least,

to restrain them within something like legitimate boundaries, and something like a decent regard for private character. Within these bounds of legitimate discussion all that is necessary to say and proper to say respecting the actions and qualifications of candidates

or public officers may legitimately be said, without descending into the sinks and cesspools of vituperation.

For the errors aforesaid the judgment should be reversed, and the cause remanded.

All concur, except Barclay, J., absent.

CONNECTICUT SUPREME COURT OF ERRORS.

Nora J. PORTER *et al.*, *Appts.*,

v.
Edward G. WOODHOUSE.

Julia H. ROBERTSON *et al.*, *Appts.*,

v.
SAME.

(59 Conn. 563.)

1. No delivery of a deed, either absolute or conditional, can be made without parting at the time with the possession of it, and with all power and control over it by the grantor for the benefit of the grantee.
2. Warranty deeds made by way of gift, which are in a box with money and bank books, are not delivered by the grantor, when expecting to die, by giving the box to another person saying that "the names of the persons who are going to have the houses are on the deeds, and if I live I will talk further about the contents of the box; but don't you open it until after my funeral."

(December 15, 1890.)

APPEAL by complainants from a judgment of the Superior Court for Hartford County in favor of defendants in actions brought to compel defendant to deliver to complainants two deeds to real estate, left for delivery after her death by the grantor, Julia A. Hinman, deceased. *Affirmed.*

The facts are stated in the opinion.

Messrs. Charles E. Perkins, Horace Cornwall and Samuel F. Jones, for appellants:

There is no specific form of words required in such cases to vest the title. The rule of law is, that it must appear from the acts and words of the grantor that she intended that the grantees should have the deeds after the death of the grantor. It is not even necessary that the deeds should be actually delivered to the grantees or to anyone for them; it is enough if they are so placed that they, or some other person for them, can get the deeds after the death of the grantor.

Less evidence is required in cases of gift, and where no rights of creditors or others are affected.

See *Robinson v. Taylor*, 42 Fed. Rep. 810; *Woodward v. Camp*, 22 Conn. 457; *Ward's App.* 35 Conn. 168; *Merrills v. Swift*, 18 Conn. 257; *Fisher v. Hall*, 41 N. Y. 416; *Burkholder v. Casad*, 47 Ind. 422; 1 Devlin, Deeds, § 262; *Stevens v. Hatch*, 6 Minn. 76; *Hinson v. Bailey*, 78 Iowa, 544; *Hill v. Hill*, 119 Ill. 242; *Jones v. Loveless*, 99 Ind. 817; *Owen v. Williams*, 13 West. Rep. 35, 114 Ind. 179; *Stanisford v. Stanisford*, 3 L. R. A. 299, 97 Mo. 281; *Doe v. Knight*, 5 Barn. & C. 671.

In some cases it has been held that the delivery of the deed must be such as to place it beyond the control or power of the grantor to retake it if he so desired, but such is not the rule in this State.

Belden v. Carter, 4 Day, 66; *Stewart v. Stewart*, 5 Conn. 817.

Messrs. Buck & Eggleston, for appellees: Delivery is as essential to make a deed valid and effectual as the signing.

Co. Litt. 85 b, 86 a, 171 b.

Even a court of equity will not interfere to give effect to a deed not delivered, but considers it as being inchoate or imperfect.

Alsop v. Swathel, 7 Conn. 508.

To constitute a delivery the grantors must part with the possession and legal control of the instrument, with the intent to give effect to the instrument and transfer the title to the estate.

3 Washb. Real Prop. 5th ed. 299, and cases cited.

The act and intent must concur.

Merrills v. Swift, 18 Conn. 261; *Shurtleff v. Francis*, 118 Mass. 155.

There is no doubt that a deed may be delivered to the grantee, to take effect presently, or to a third person as trustee for the use of the grantee, to be delivered to the grantee upon the happening of a future event, such as the death of the grantor.

Belden v. Carter, 4 Day, 79; *Alsop v. Swathel* and *Merrills v. Swift*, *supra*.

It must be delivered for the use of the grantee.

Elsey v. Metcalf, 1 Denio, 323; *Young v. Young*, 80 N. Y. 424; *Woodward v. Camp*, 22 Conn. 459.

NOTE.—Gifts causa mortis and inter vivos.

A gift of a savings bank book from husband to wife *causa mortis* is not valid without delivery; although in her possession, that is not sufficient to pass the property. See *Drew v. Hagerty* (Me.) 3 L. R. A. 230.

The validity of gifts *causa mortis*. See notes to *Wahls's App.* (Pa.) 1 L. R. A. 535; *Crawford's Case* (N. Y.) 5 L. R. A. 71; *Beaver v. Beaver* (N. Y.) 6 L. R. A. 403.

A gift by an aunt, to her nephew, of certain

money which was shortly before and perhaps at the time in possession of the donee, as her agent, is a valid and complete gift *inter vivos*. See *Miller v. McMechen* (W. Va.) 6 L. R. A. 515, and note.

Where one confined to his bed by a fatal sickness instructs another to whom he has intrusted keys of a private box in a bank vault to extract certain money therefrom and label it separately as the property of a third person and deliver it to him, it is a valid gift *causa mortis*. See *Devol v. Dye* (Ind.) 7 L. R. A. 459, and note.

Andrews, *CA. J.*, delivered the opinion of the court:

These are two cases tried together and depending on the same facts. The defendant is the executor of the will of Mrs. Julia Hinman, late of Hartford, deceased. The complaint prays that two deeds now in the possession of the defendant be delivered, one to the said Nora J. Porter, and the other to the said Julia Robertson. The only question in the case is, whether on the facts found these deeds were so delivered as to pass the title. The facts are as follows:

Mrs. Julia Hinman, in her lifetime, and until her death, owned two houses in Hartford, in one of which she lived. She died on the 10th day of June, 1888, aged eighty-two years. Several years before her death she made a deed of one of these houses to Mrs. Porter, and at another time a deed of the other house to Mrs. Robertson. They were warranty deeds in form and were expressed to be for a valuable consideration. They were signed, sealed, witnessed and acknowledged. All the requisites of a formal execution were complete and each was filed on the back with the name of the grantee. Nothing was paid for them; they were in fact deeds of gift. The grantees never knew until after the death of Mrs. Hinman that they had been made. These deeds were placed by Mrs. Hinman in a box in which she kept her will, her bank books, her policies of insurance, and other papers of like kind, and in which she had also a bag containing \$1,000 in gold. The box was concealed in a closet in her bedroom. During the last year of her life a Mrs. Harriet Elliot lived with her and was her only companion and attendant. Previous to the 10th day of April, 1888, Mrs. Hinman had told Mrs. Elliot that she had deeded away the two houses, but had refused to tell her to whom. On that day Mrs. Hinman fell, and was so severely injured that she feared she was going to die. On the morning of the 11th she told Mrs. Elliot where the box was, and requested her to bring it out. Mrs. Elliot did so and placed it on the bed. Mrs. Hinman then said to Mrs. Elliot, "Take that box into your lap. I put it into your possession. My private papers are in that box and a bag of gold containing \$1,000. My will is in there and the deeds of these two houses. I told you before that I have deeded away these houses; on the deeds are the names of the persons who are going to have the houses." She then told Mrs. Elliot to take charge of the box and put it back into the closet, and told her where the key to the box was; and that if she did not live she wished her (Mrs. Elliot) to speak to E. G. Woodhouse, the defendant, and request him to read her will after the funeral. Then, after some further directions about the box, she closed the conversation by saying: "I have said enough, so that you will know what to do with the box in case I should die. If I live I will talk further about the contents of the box. But don't you open it until after my funeral." After this conversation, Mrs. Elliot took charge of the box, but so far as appears never opened it until the day of Mrs. Hinman's funeral. In conversations subsequent to this one, Mrs. Hinman spoke about the bag of gold in the box, and of the provisions of her will, but never

spoke about the deeds. Mrs. Hinman died about midnight of June 10, 1888. From the morning of the preceding day to the time of her death she was in a dying state and in a deep stupor, during which she observed nothing and said nothing, except that at about nine o'clock in the forenoon she suddenly exclaimed, "Call Robinson! Call Robinson! there are those two deeds, one is for Julia Robertson, and one is for Nora Porter." No Robinson was there at the time and no one of that name had been in attendance upon her. Mrs. Elliot and a nurse, Mrs. Wright, were there, but Mrs. Hinman was not conscious of their presence or of what she was saying.

The delivery of a deed implies a parting with the possession and a surrender of authority over it by the grantor at the time, either absolutely or conditionally; absolutely, if the effect of the deed is to be immediate and the title to pass or the estate of the grantee to commence at once; but conditionally, if the operation of the deed is to be postponed or made dependent on the happening of some subsequent event. A conditional delivery is and can only be made by placing the deed in the hands of a third person to be kept by him until the happening of the event of which the deed is to be delivered over by the third person to the grantee. But it is an essential characteristic and an indispensable feature of every delivery, whether absolute or conditional, that there must be a parting with the possession of the deed and with all power and control over it by the grantor for the benefit of the grantee at the time of the delivery. *Prutsman v. Baker*, 30 Wis. 644. The delivery of a deed is as essential to the passing of the title to the land described in it as is the signing of it or the acknowledgment. It is the final act without which all other formalities are ineffectual. To constitute a delivery, the grantor must part with the legal possession of the deed and of all right to retain it. The present and future dominion over the deed must pass from the grantor. And all this must happen in the grantor's lifetime. *Younge v. Guilbeau*, 70 U. S. 3 Wall. 636, 18 L. ed. 263; *Cook v. Brown*, 34 N. H. 476; *Fisher v. Hall*, 41 N. Y. 421; *Jackson v. Leek*, 13 Wend. 105; *Fay v. Richardson*, 7 Pick. 91; *Alsop v. Swinthal*, 7 Conn. 508; *Hoboken City Bank v. Phelps*, 34 Conn. 108; 2 Kent, Com. 439; *Bouvier, Law Dict. Delivery*.

Upon the facts above recited, the superior court rendered judgment for the defendant and dismissed the complaint. We think that judgment was clearly right, for the reason that Mrs. Hinman never intended to and never did part with the legal control over the deeds. The box in which the deeds were was in the charge of Mrs. Elliot, as the servant and agent of Mrs. Hinman, and so remained until after Mrs. Hinman's death. The deeds were never taken out of the box till after her funeral. Mrs. Elliot never knew till that time the names of the grantees. She had never received any directions as to the deeds of such, apart from the other contents of the box. It is not and cannot be claimed that Mrs. Hinman parted with the possession of the box itself, or the control over the bag of gold, or of her bank books, or of her will, or of her insurance poli-

cles. Yet these were in the box with the deeds, and she parted with the possession and control of these just as much as she did with the deeds. The deeds were never separated from the other contents of the box. The conversation, on the morning of April 11, clearly shows that Mrs. Hinman did not intend at that time to part with the control of the contents of the box. She intended to give further directions in regard to them. Her closing words were, "If I live I will talk further with you about the contents of the box." That further talk she never had, and so her intent as to the deeds remained undisclosed. Mrs. Elliot was never made the custodian of the deeds for the benefit of the grantees. She at all times held them in the same way that she held the other things in the box, as the agent of Mrs. Hinman.

In reference to the conversation just mentioned, the superior court has found that Mrs. Hinman's sole purpose in the transaction was to give Mrs. Elliot information of the existence and contents of the box. It is claimed by the defendant that by such finding the superior court has left nothing for the examination of this court, for the reason that it excludes all intent on the part of Mrs. Hinman to transfer the title to the grantees named in the deeds. This may be true, but we do not place our decision upon it. The delivery of a deed includes not only an act by which the grantor parts with the possession of it, but also a concurring intent on the part of the grantor that it shall vest the title in the grantee. As we are satisfied that Mrs. Hinman never did any act by which she parted with the possession of the deeds for the benefit of the grantees, the question of her intent becomes immaterial.

There is no error in the judgment of the Superior Court.

In this opinion the other Judges concurred.

Re John M. CLAYTON.

(60 Conn. 510.)

1. Requiring a person convicted of intoxication to make a disclosure under

NOTE.—Refusal to testify, or to answer particular questions.

It may safely be laid down, as a general rule, that the refusal of a witness to testify at all, or to answer particular questions, pertinent to the issue, put to him either in a proceeding before the court itself or before a subordinate officer duly empowered by the court to take his deposition or conduct his examination, is a contempt of such court, provided always the court have jurisdiction of the controversy or proceeding in which the witness is required to give his evidence. *Re Allen*, 18 Blatchf. 371; *Whitcomb's Case*, 120 Mass. 118, 121; *La Fontaine v. Southern Underwriters Assn.* 83 N. C. 133; *Stuart v. Allen*, 45 Wis. 153, 161; *Rex v. Almon*, Wilms. 243, 269; *Ex parte Doll*, 7 Phila. 595. See *Rapalje*, *Contempts*, § 65.

The right of a witness to answer is a personal privilege; his right to exercise it rests in his own discretion; he uses it at his peril. *Heardt v. Wetmore*, 2 Robt. 697; *Southard v. Raxford*, 6 Cow. 255; *People v. Bodine*, 1 Denio, 231; *People v. Lohman*, 3 Barb. 214.

The supreme court of New York has held that a 18 L.R. A.

oath, when, where, how and from whom he procured the intoxicating liquor, does not violate the constitutional provisions as to due process of law, equal protection, or right of trial by jury; nor is it against public policy.

2. Commitment for contempt in refusing to make a disclosure as required by law is not a deprivation of liberty without due process of law.

3. The utility of a disclosure required by statute from one convicted of intoxication, as to when, where, how and from whom he obtained the intoxicating liquor, which disclosure is to be turned over to the State's attorney, cannot be questioned by the convict or the court as an excuse for a refusal to make the disclosure.

(December 15, 1900.)

A PPEAL by petitioner from a judgment of the Superior Court for Hartford County refusing to release him from imprisonment in the Hartford jail, to which he had been committed for contempt of court. *Affirmed.*

The facts are stated in the opinion.

Messrs. George P. McLean and Austin Brainard, for appellant:

If the law is unconstitutional, all proceedings under it are void, and Clayton was unlawfully committed.

Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; *Herrick v. Smith*, 1 Gray, 49; *Riley's Case*, 2 Pick. 173; *Re Payson*, 23 Kan. 757.

If the law is, in its operation, unreasonable and unjust, it is the duty of the court to declare it void.

Goshen v. Stonington, 4 Conn. 225; *Welch v. Wadsworth*, 30 Conn. 155; *State v. Wordin*, 6 New Eng. Rep. 752, 56 Conn. 226.

This Statute is void: (1) in that it deprives the person committed of the right to trial by jury, as guaranteed by section 21 of article 1 of the Constitution of Connecticut; (2) it deprives the person committed of his liberty without due course of law.

The liberty of the person in custody is at once placed at the discretion or caprice of the presiding judge. The judge determines the truth or falsity of the disclosure offered, the validity and good faith of the reasons assigned for making no disclosure, pure questions of fact, involving in their determination the lib-

witness was not compelled to answer any question, the truthful answer to which would have a tendency to implicate the witness in a criminal charge, or expose him to a penalty. *Burns v. Kempshall*, 24 Wend. 360.

The court is to determine whether the answers he may give could directly or indirectly criminate him, by furnishing evidence of his guilt, by his own admission; even if it only established one fact out of many, which, taken together, would be sufficient to warrant his conviction, his privilege should be allowed. If the court holds that the answer might in any way criminate the witness, the witness is not to be compelled to explain how he would be criminated by such answer. *Re Tappin*, 9 How. Pr. 394; *Curtis v. Knox*, 2 Denio, 341.

And also where answers to a question would have disgraced the witness, the privilege may be pleaded and must be allowed by the court. *People v. Mather*, 4 Wend. 250; *Cowen & Hill's notes to Phil. Ev.* 521; 1 Barr. Ev. 244; 1 Greenl. Ev. 454; *Lohman v. People*, 1 N. Y. 379; *affirming 3 Barb. 214.*

Refusal to answer a proper question in the examination before a referee is punishable as for a con-

erty of the citizen, and he can have neither formulated charge, nor counsel, nor witnesses, nor appeal, nor adjournment, that he may establish his right to credence and liberty.

If this law is left to operate in a single case, or in any view of its application, no relief can be possible in any case. How can a person secure release on habeas corpus where the record discloses no error and his only hope is to reverse a finding of fact clearly within the discretion of the court below.

Douglas v. Wickwire, 14 Conn. 491; *Fox v. Hoyt*, 12 Conn. 491; *State v. Bloom*, 17 Wis. 521; *Stewart's Case*, 1 Abb. Pr. 210; *Church, Habeas Corpus*, 373, 481.

A legislative enactment is not necessarily "the law of the land," nor is a court in proceeding under such enactment necessarily proceeding according to "due course of law" as those words are used in our Constitution.

See *Cooley*, Const. L. pp. 433-435, and notes; *Camp v. Rogers*, 44 Conn. 291.

Acts interfering with constitutional rights in a way similar to the law in question have been adopted in only one State in the Union, and that Act has been already declared unconstitutional by the Supreme Court of the State.

Ex parte Grace, 12 Iowa, 208.

The Statute is in violation of the 14th Amendment of the United States Constitution in that it deprives the prisoner of the equal protection of the law in subjecting him to inquiries under summary proceedings and penalties to which other citizens who procure liquor are not liable.

San Mateo County v. South Pac. R. Co. 7 Sawy. 517; *Cooley*, Const. Lim. p. 13.

This Statute makes that a contempt which is not a proper subject of contempt.

Rapalje, Contempt, p. 82, and cases there cited.

tempt. *Lathrop v. Clapp*, 40 N. Y. 328, affirming 23 How. Pr. 423.

A witness may be punished for refusal to answer a material or competent question, although he attended the examination and was sworn without a subpoena. *People v. Marston*, 18 Abb. Pr. 257.

A witness duly subpoenaed, refusing to testify before a notary public for no other reason than because he is instructed by his attorney not to answer may be committed by the notary for contempt. *Re Merkle*, 40 Kan. 27.

Under the Georgia Code the proprietor or publisher of a newspaper is a competent witness in a criminal prosecution for libel therein; and he may also be punished for contempt of court as any other witness refusing to testify. *Pledger v. State*, 7 Ga. 242.

Refusal of a witness to answer proper questions before the grand jury, and again when brought into court, assigning no reason, is a contempt for which he may be ordered to pay a fine and to stand committed until he shall appear and answer said questions, or until the further order of the court. *Re Harris*, 4 Utah, 5.

But where a judgment debtor was asked as to the amount and value of an incumbrance on his property six months before the examination, it was held that such question was not necessarily within his power to answer, and an answer in substance that he was unable to give the information asked for was not necessarily evasive, or a refusal to comply with the order requiring him to answer the question; for it did not look to a discovery of
3 L. R. A.

A police regulation, summary in its nature and directly interfering with the right of personal liberty, must have a definite object clearly attainable, and that object must be undeniably in the interest of public order and safety. If its purpose is in the line of investigation, it must obviously be confined to crimes actually committed, and dangers imminent and well defined.

Tiedeman, Pol. Power, pp. 1-16; *Lakeview v. Ross Hill Cemetery Co.* 70 Ill. 192; *State v. Noyes*, 47 Me. 189.

Messrs. William Hamersley and Francis H. Parker, for appellee:

The Statute in question is a police regulation designed in the words of *Judge Cooley*, "to preserve the public order, and prevent offenses against the State."

Cooley, Const. Lim. p. 706.

Its particular purpose is to prevent violations of the Liquor Laws. It is in aid of and supplementary to the general laws regulating the sale of intoxicating liquors, and is part and parcel of the Liquor Laws of the State.

State v. Brennan's Liquors, 25 Conn. 278; *State v. Wilcox*, 42 Conn. 364; *State v. Thomas*, 47 Conn. 546.

Our statutes authorize the bank commissioners, railroad commissioners and insurance commissioner to make investigations, summon witnesses and examine them, and provide for punishments by commitments for contempt or otherwise, when witnesses refuse to testify.

Gen. Stat. §§ 1837, 2359, 2396, 2430; *Noyes v. Byrbee*, 45 Conn. 382.

The Act in question requires the person who has been convicted of drunkenness to disclose certain facts that are peculiarly within his knowledge, which facts the Legislature has determined should be disclosed for the public good. He stands simply in the place of a wit-

property, but to a discovery of incumbrances. *Wicker v. Dresser*, 14 How. Pr. 465.

The refusal of a witness to answer a question not pertinent to the issue is not a contempt. *Ex parte Zeehandelaar*, 71 Cal. 238.

Courts should exercise great care in compelling witnesses to answer questions where the witness claims the privilege, and has brought himself within the rule, as it is a matter exclusively between the court and the witness. The opposite party cannot object. He has no right to insist upon the privilege, and require the court to exclude it on that ground; as the witness has the right to waive his privilege, and if ordered to testify, he may refuse and be committed. *Cloyes v. Thayer*, 3 Hill, 564; *Thomas v. Newton*, 1 Mood. & M. 48, note c; *Treat v. Browning*, 4 Conn. 408; *Southard v. Rexford*, 6 Cow. 259; *Cowen & Hill's notes* to Phil. Ev. 784 b; *Forbes v. Willard*, 54 Barb. 520.

When a witness is directed by a referee before whom he is examined to answer a question, and he refuses to answer, he is guilty of contempt, provided the question is a proper one. *Lathrop v. Clapp*, 40 N. Y. 328, affirming 23 How. Pr. 423.

No appeal lies from a judgment imposing a penalty for contempt of court. *Teller v. People*, 7 Colo. 451.

Power of court to punish.

The power which the court possesses of punishing disobedience of its mandates is one of the safeguards for the due administration of justice. It is a necessary attribute of the court. The Statute

ness before an investigating officer, and is treated as witnesses in like proceedings are lawfully treated. He may be compelled to testify, but not against himself.

Const. art. 1, § 9. U. S. Const. 5th Amend.

Witnesses who refuse to testify are committed for contempt by the courts.

Com. v. Willard, 22 Pick. 476; *People v. Kelly*, 24 N. Y. 74.

Witnesses who refuse to testify in preliminary investigations authorized by statute have always been punishable by commitment for contempt, and were so punishable when our Constitution was adopted.

Goddard v. State, 12 Conn. 448; *Merriman v. Bryant*, 14 Conn. 205; *Seeley v. Bridgeport*, 3 New Eng. Rep. 580, 58 Conn. 1.

Punishment by commitment to jail of persons guilty of contempt, including witnesses refusing to testify, was part of the "law of the land," or the "due course of law," at the time of the adoption of our Constitution.

Gen. Stat. 1808, pp. 231, 372; *Eilenbecker v. Plymouth County Dist. Ct.* 184 U. S. 31, 38 L. ed. 801; *Cartwright's Case*, 114 Mass. 288; *Midlebrook v. State*, 48 Conn. 257; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616.

As there can be no trial of the person interrogated, he is not denied a trial by jury by the Statute.

Waldo v. Spencer, 4 Conn. 71, 78.

But if the commitment of the person required to disclose by this Statute can in any sense be said to be a punishment for drunkenness, then the Statute is still constitutional; because the crime of drunkenness is one of those petty offenses always tried by single magistrates in our State before the adoption of the Constitution, and therefore not affected by that instrument.

Gen. Stat. 1808, p. 241; *Cott v. Boes*, 12

Conn. 258; *Goddard v. State*, 12 Conn. 448, 454; *Curtis v. Gill*, 34 Conn. 54; *Beers v. Beers*, 4 Conn. 585; *Weed's App.* 35 Conn. 455; *State v. Worden*, 46 Conn. 889; *Clinton v. Bacon*, 56 Conn. 506; 1 Stevens, History Crim. Law, 122; 3 Stevens, History Crim. Law, 268.

The 14th Amendment to the Constitution of the United States does not restrict or conflict with the police power of the States.

Barbier v. Connolly, 118 U. S. 31, 28 L. ed. 923, and note; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 258.

All liquor legislation not in regulation of interstate commerce is within the police power of the States.

License Cases, 46 U. S. 5 How. 504, 12 L. ed. 256; *Bartemeyer v. Iowa*, 85 U. S. 18 Wall. 129-141, 21 L. ed. 929-938; *Foster v. Kansas*, 112 U. S. 205, 28 L. ed. 630; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205; *LaCroz v. Fairfield County Comrs.* 49 Conn. 591.

Carpenter, J., delivered the opinion of the court:

The complainant was convicted of intoxication, and was required to disclose, under the Act of 1889, chap. 187,* "under oath, when, where, how, and from whom he procured the liquor by which his intoxication was produced." He refused "to make such disclosure." Thereupon the magistrate (the judge of the Police Court of Hartford) before whom the trial was had proceeded "to commit the ac-

*That statute provides that if a person be found guilty of intoxication, and refuses on request of the prosecuting officer to disclose under oath when, where, how and from whom he procured the liquor by which his intoxication was produced, the magistrate before whom the trial was had shall commit him to the county jail for contempt of court. [Rep.]

declares it, and, in so doing, gives no new power, but merely defines and limits an ancient rule of the common law. To allow such offenders immunity for their misconduct would be a practical surrender of a trust which has been confided to the judiciary by the people for their own protection and benefit. *Negus v. Brooklyn*, 1 N. Y. Civ. Proc. 471.

The power of a court to punish for an alleged contempt of its authority, though undoubted, is in its nature arbitrary, and its exercise is not to be upheld, except under the circumstances and in the manner prescribed by law. It is essential to the validity of proceedings in contempt, subjecting a party to fine and imprisonment, that they show a case in point of jurisdiction within the provisions of the law by which such proceedings are authorized, for mere presumptions and intendments are not to be indulged in their support. *Batchelder v. Moore*, 42 Cal. 412.

Power to punish for contempt is a judicial and not a legislative one. *Kilbourn v. Thompson*, 108 U. S. 188, 28 L. ed. 377; *Happy v. Mosher*, 48 N. Y. 313; 2 Bancroft, Hist. U. S. 414; 3 Bancroft, Hist. U. S. 56, 101; 1 Bl. Com. 160-168; 1 Hallam, Const. Hist. 224, 225.

"The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice," the Supreme Judicial Court of Massachusetts well said, in *Cartwright's Case*, 114 Mass. 280, 288, "is inherent in courts of chancery and other superior courts as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of 13 L. R. A.

the land, within the meaning of Magna Charta and of the 12th article of our Declaration of Rights." The Declaration of Rights here referred to was that which formed part of the Constitution of Massachusetts, and contained the prohibition, inserted in most of the American Constitutions, against depriving any person of life, liberty or estate, except by the judgment of his peers or the law of the land. So in *Cooper's Case*, 32 Vt. 233, 237: "The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied, because it is necessary to the exercise of all other powers." Without such power, it was observed in *Easton v. State*, 39 Ala. 522, the administration of the law would be in continual danger of being thwarted by the lawless. To the same effect are *Watson v. Williams*, 36 Miss. 344; *Johnston v. Com.* 1 Bibb, 568; *Clark v. People*, 1 Ill. 266; *Com. v. Dandridge*, 3 Va. Cas. 408; *Ex parte Hamilton*, 51 Ala. 66; *Redman v. State*, 28 Ind. 212; *People v. Turner*, 1 Cal. 153; *State v. Morrill*, 16 Ark. 388; and numerous cases cited in note to *Clark v. People*, 1 Ill. 266, in 12 Am. Dec. 178. See also *Queen v. Lefroy*, L. R. 8 Q. B. 184.

Due process of law.

The principles involved in this caption have received extended treatment in the following cases: *People v. O'Brien*, 2 L. R. A. 235, 111 N. Y. 1; *Chauvin v. Valiton*, 3 L. R. A. 194, 8 Mont. 451; *Jensen v. Union Pac. R. Co. (Utah)* 4 L. R. A. 724; *Re Gannon (R. I.)* 5 L. R. A. 308.

caused for contempt of court to the common jail" for ten days. On a writ of habeas corpus he was brought before a judge of the superior court. The sheriff's return set out the proceedings in the police court, and the mittimus issued thereon. The complainant demurred to the return, because, he says, the Statute under which the proceedings were had is obnoxious to constitutional provisions. The judge overruled the demurrer, and the complainant appealed.

Provisions for disclosures by persons found intoxicated or arrested for intoxication first appeared in the Statute of 1854, and have since remained there, with some changes from time to time. Until 1889 disclosures were at the option of the prisoner, and could only be made before conviction; and, upon being fairly made, they contemplated the discharge of the intoxicated person. The Statute of 1889 made a radical change. It provides for disclosures only after conviction, does not discharge the prisoner, and the disclosure is made compulsory. Whether this Act is a substitute for the Statute previously existing, or is in addition thereto, is not now a material question.

The first ground of demurrer is that the Statute "is a deprivation of the right to a trial by jury, as provided by section 21 of article 1 of the Constitution of Connecticut." This objection misconceives the nature and character of the proceeding before the police court. The appellant was not then before the court as a defendant in a criminal prosecution. That had been his position; but upon his conviction that was changed, and he became, so far as this case is concerned, merely a witness. He was in no sense on trial,—no one was,—and therefore was not in jeopardy. The proceeding was not judicial, but ministerial. For more than a century and a half we have had upon the statute-book a law authorizing the grand jurors in the several towns to meet and advise and inquire into the offenses that had been committed, with power to summon and examine witnesses, and, if need be, to punish for contempt. Gen. Stat. § 91. This proceeding is but an extension of the same power to other officers for the same general purpose, namely, the protection of society, by preventing crime through the detection and punishment of offenders. The magistrate acting in an administrative, and not in a judicial, capacity, the witness being in no jeopardy, and exposed to no detriment, provided he testifies fairly, this section of the Constitution is not applicable.

The second ground of demurrer is that "such a commitment on said Statute is a deprivation of liberty without due process of law, as forbidden by section 9 of article 1 of the Constitution of Connecticut." Punishment for contempt by a court or other tribunal duly au-

thorized is "due process of law" within the meaning of the Constitution. The right and duty of the State to protect its jurisdiction and dignity by punishing for contempt, in proper cases, through its officers, is the sacred right of self-defense.

The third ground of demurrer is that "the matter made a contempt of court by the Statute is not a proper contempt, and it is incompetent for the Legislature to suspend or abrogate the prisoner's constitutional prerogatives by making such refusal a contempt, and providing a summary commitment therefor, since the refusal is entirely disconnected with any proceeding pending before the court, and has no relation whatever to the dignity or duty of the court, or to the administration of justice in any present or future case." This objection rests entirely on the assumption that the testimony of the prisoner, when obtained, will be of no use; in effect, that the Statute is a mere wanton exercise of power. But this assumption is not well founded. The Statute provides that the testimony shall be certified and forwarded to the State's attorney. Its utility is a matter for the Legislature to determine, and it has done so. It is not for the appellant or the court to say that the information is of no value, and has no relation "to the administration of justice in any present or future case."

The fourth ground of demurrer is that "the Statute is in violation of the 14th Amendment to the United States Constitution, in that it deprives the prisoner of the equal protection of the law in subjecting him to inquiries under summary proceedings and penalties to which other citizens who procure liquor are not liable." All offenders against law or good morals are liable to be subjected to some inconveniences from which others are exempt. Of those so offending some will be detected and made to suffer such inconveniences, while others may escape. It was not the purpose of this amendment to place all such offenders upon an equal footing.

There is one error assigned that does not seem to be raised by the demurrer, namely, that "the court erred in ruling and holding that the Statute is a valid statute, not contrary to public policy and natural justice." Perhaps we have sufficiently answered this; but we will add that it is the duty of all good citizens, when legally required so to do, to testify to any facts within their knowledge affecting public interests; and no one has a natural right to be protected in his refusal to discharge this duty. Public policy does not forbid, but, on the contrary, often requires, legislation to facilitate the administration of justice.

We find no error in the judgment appealed from.

In this opinion the other Judges concurred.

VERMONT SUPREME COURT.

George H. FITZGERALD *et al.*

GRAND TRUNK R. CO. of Canada.

(....Vt....)

1. An agreement by a common carrier to give one shipper a favor and advantage over others by a rebate is illegal at common law.
2. Contracts concerning interstate transportation must be regarded as made upon the basis and with the understanding that changes in the law applicable to them may be made by Congress, and there is no vested right in the law as it exists at the time they are made.

(May 5, 1891.)

EXCEPTIONS by plaintiff to a ruling of the Essex County Court in favor of defendant directing a *pro forma* judgment in its favor upon an agreed statement of facts in an action brought to recover rebates alleged to be due to plaintiff under a shipping contract. *Judgment affirmed.*

The statement of facts set out, in 1886 plaintiffs agreed to furnish defendant 170 car-loads of lumber to be freighted, in consideration of which agreement defendant promised to pay plaintiffs \$6 per car-load; that defendant was to receive for transporting such lumber \$38 on each car-load, which was the regular tariff rate between the points to which the contract related; that before the commencement of this suit plaintiffs had furnished to defendant 170 car-loads of lumber and had fully performed their agreement; that relying upon said agreement, and to carry out and fulfill the same, plaintiffs had purchased said 170 car-loads of lumber and hauled the same to Island Pond, the designated place of shipment, prior to January 1, 1887; that 97 car-loads of said lumber were delivered to and carried by defendant subsequently to April 5, 1887, on which the agreed \$6 per car-load had not been paid.

Further facts appear in the opinion.

Mr. Laforrest H. Thompson, with **Mr. Z. M. Mansur**, for plaintiffs:

The Interstate Commerce Act is not retroactive and does not either prohibit or release the defendant from performing its contract.

Dubuque & S. C. R. Co. v. Richmond, 86 U. S. 19 Wall. 584, 22 L. ed. 173.

Courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the Legislature.

Chew Heong v. United States, 112 U. S. 536, 28 L. ed. 770; *United States v. Heth*, 7 U. S. 3 Cranch, 399, 2 L. ed. 479; *Sedgw. Stat. and Const. L. 2d ed.* 160-173; *Cooley, Const. Lim.* 4th ed. 76; *Sturgis v. Hull*, 48 Vt. 307; *Chicago & A. R. Co. v. Chicago, V. & W. Coal Co.* 79 Ill. 121;

Dubuque & S. C. R. Co. v. Richmond, 86 U. S. 19 Wall. 584, 22 L. ed. 173.

So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that commerce shall be free and untrammelled.

Brown v. Houston, 114 U. S. 622, 29 L. ed. 257.

Hence parties were free to make such contracts as they chose in matters relating to interstate commerce prior to the Interstate Commerce Act, and if Congress had intended it to cover existing contracts, it would have said so in express terms.

Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691.

There is nothing in said Act which prohibits a shipper from obtaining the most favorable terms he can make with the carrier; and if the rate for transportation obtained by him is less than that charged by the carrier for the same services to the public generally, the special and favorable contract thus obtained is not void as to the shipper securing the reduced rate, but under said Act every other shipper has a right to have his goods carried upon like favorable terms.

See *London & N. W. R. Co. v. Evershed*, L. R. 3 App. Cas. 1029, 24 Moak. Eng. Rep. 630.

The contract is valid at common law.

Menacho v. Ward, 27 Fed. Rep. 529; *Barendale v. Eastern Counties R. Co.* 4 C. B. N. S. 61; *Branley v. South Eastern R. Co.* 12 C. B. N. S. 63; *Fitchburg R. Co. v. Gage*, 12 Gray, 398, 399; *Spofford v. Boston & M. R. Co.* 128 Mass. 328.

Congress has no power except such as has been expressly granted to it, or such as is necessary or proper for carrying into execution the powers specified, and those vested by the Constitution in the government, or some department or officer thereof.

McCulloch v. Maryland, 17 U. S. 4 Wheat. 405, 4 L. ed. 601.

The principle that Congress cannot abrogate or impair existing contracts seems to be recognized.

Union Pac. R. Co. v. United States, 99 U. S. 700, 25 L. ed. 501; *Dubuque & S. C. R. Co. v. Richmond*, *supra*.

Mr. George N. Dale, with **Mr. Ossian Ray**, for defendant:

No common-law case approves of different terms or rates of carriage to different shippers under circumstances precisely alike as exist in this case.

Root v. Long Island R. Co. 4 L. R. A. 381, 114 N. Y. 300; *Chicago & A. R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 593; *Vincent v. Chicago & A. R. Co.* 49 Ill. 83; *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 407, 13 Am. Rep. 457; *State v. Delaware, L. & W. R. Co.* 48 N. J. L. 55, 57 Am. Rep. 543; *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188; *Shipper v. Pennsylvania R. Co.* 47 Pa. 388.

NOTE.—As to the law regulating unjust and inequitable discrimination on the part of common carriers, as against individual shippers, see *Pensacola & A. R. Co. v. State*, 3 L. R. A. 661, 25 Fla. 310; *Root v. Long Island R. Co.* 4 L. R. A. 381, 114 N. Y. 13 L. R. A.

800, and *Cleveland, C. C. & I. R. Co. v. Closser* (Ind.) 9 L. R. A. 754.

As to the judicial interpretation of the Interstate Commerce Act, see *note to United States v. Toser* (Mo.) 2 L. R. A. 444.

A carrier has no right to charge a lower rate to one than to another, although his charges to others are reasonable.

Chicago & A. R. Co. v. People, 67 Ill. 11, 16 Am. Rep. 599; *People v. Chicago & A. R. Co.*, 55 Ill. 111; *Chicago & N. W. R. Co. v. People*, 56 Ill. 365; *Hays' Case*, 12 Fed. Rep. 809; *Scotfield v. Lake Shore & M. S. R. Co.* 1 West. Rep. 812, 43 Ohio St. 571; *Messenger v. Pennsylvania R. Co.* 37 N. J. L. 581; *Sandford v. Catawissa W. R. Co.* 24 Pa. 378; *Emlen v. Lehigh Coal & Nav. Co.* 47 Pa. 78; *Shipper v. Pennsylvania R. Co.* supra; *United States Exp. Co. v. Backman*, 29 Ohio St. 144.

The prohibition of *ex post facto* laws was aimed at criminal cases.

Cummings v. Missouri, 71 U. S. 4 Wall. 277, 18 L. ed. 356.

This law in this case does not affect the paying or acceptance of rebate on cars shipped before its passage. It relates to facts occurring since, and having no relation whatever to acts done before.

See *Kring v. Missouri*, 107 U. S. 227, 27 L. ed. 509; 2 Bancroft, History of the Constitution, 213.

Nor can it be truly asserted that Congress may not, by its action, indirectly impair the obligation of contracts, if by the expression be "meant rendering contracts fruitless, or partially fruitless."

Legal Tender Cases, 79 U. S. 12 Wall. 547, 20 L. ed. 311. See *Hepburn v. Curtis*, 7 Watts, 300; *Schenley v. Com.* 36 Pa. 57.

Powers, J., delivered the opinion of the court:

The agreed facts, in substance, are that prior to the passage of the Interstate Commerce Act the defendant promised to pay the plaintiffs a rebate of \$6 upon each of the 170 car-loads of lumber which the plaintiffs were to deliver to the defendant for transportation from Island Pond to points in Massachusetts; and that the usual charges made to all shippers for such freight to such designation was \$38 per car-load; that prior to April 5, 1887 (the day on which the Interstate Commerce Act took effect), the plaintiffs had delivered 78 car-loads for transportation as aforesaid, and after that date, had delivered the remaining 97 car-loads, all of which the defendant had carried to its destination; that the defendant has paid the \$6 rebate to the plaintiffs on the 78 car loads, and this suit is brought to recover such rebate on the 97 car-loads. The plaintiffs have in all respects fully performed their contract, and the sole question is, Can they recover the rebate on the lumber delivered for transportation according to the contract, after said April 5? It was suggested in argument that it did not affirmatively appear but that the \$6 rebate was allowed to all other patrons of the defendant shipping lumber to the same points, and so no discrimination was made in the contract in the plaintiffs' favor. But this is not the fair construction of the agreed facts, and the counsel on both sides have argued the case upon the theory that this rebate was a favor and advantage given the plaintiffs, and not enjoyed by other patrons.

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Many sound reasons might be urged in support of the proposition that Congress, upon those principles of justice and equity which underlie all law, cannot pass a law which will destroy or impair the obligation of existing contracts, except in bankruptcy and other instances specially enumerated in the Constitution. The Federal Constitution expressly prohibits the passage of such laws by the States, but is silent respecting the power of Congress so to do. But, whatever may be said upon that question, it is not involved in this case. The agreed case is that, "unless the plaintiffs' right to recover is barred" by the Interstate Commerce Act, the plaintiffs are to recover. That right of recovery is not barred if Congress, in the passage of the Interstate Act, exceeded its power. It exceeded its power if it impaired the obligation of an existing contract. This is the syllogism that the argument upon this branch of the case is reduced to. The obligation of a contract in law is that element of duty or promise which a party can be compelled to perform. If performance cannot be compelled, there is no legal obligation in the contract. The contract in question, as it stood when made and down to April 5, 1887, is to be tested by the principles of the common law. At common law, common carriers were held to be persons who exercised their calling for the public good, upon equal terms, and with the same facilities to all their customers. They could not lawfully exercise their calling by granting advantages to one customer which they denied to another, but were held to the duty of serving all alike. Their calling is one public in its nature, and the common law exacted of them a strict impartiality in their dealings with the public. If the plaintiffs could transport their lumber to market for \$6 per car-load less than their neighbors, they would very soon have a monopoly of the business. Many cases might be cited to show that, at common law, all such special terms and favoritism are illegal. *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 407, is a representative case in which Beasley, Ch. J., states the doctrine of the common law with great clearness and force. See also *Audenried v. Philadelphia & R. R. Co.* 68 Pa. 370; *McDuffee v. Portland & R. R. Co.* 52 N. H. 430; *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188; *Pierce, Railroads*, 498.

This contract, then, at the common law, had no legal binding force, so long as it was executory,—no obligation which could be enforced, and therefore no obligation which the Interstate Commerce Act could either impair or destroy. The Interstate Act, therefore, did not, in its operation upon this contract, disturb any vested rights, because no legal rights were vested when the contract was made. So long as the parties to the contract executed it, each was safe from any liability to the other by reason of such performance. In such cases the law leaves the parties just where they leave themselves.

In this case it is to be noted that the contract called for a transportation of the lumber through three States. Such carriage, therefore, is commerce between the States, within

the meaning of article 1, § 8, of the Federal Constitution. Such commerce is solely regulated by Congress, and, when parties make contracts to engage in interstate commerce, they are held to do so upon the basis and with the understanding that changes in the law applicable to their contracts may be made. There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal, nor vested right in the omission to legislate upon a particular subject which exempts a contract from the effect of subsequent legislation upon its subject matter by competent legislative authority. *Cooley, Const. Lim.* 284, 574; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 214, 6 L. ed. 606; *State v. Holmes*, 38 N. H. 225. The power to regulate commerce between the States is one given expressly in the Constitution to Congress. The Interstate Act was

called into being by reason of the making of contracts like the one at bar. Unjust discrimination was one of the chief evils in transportation which Congress attempted to end by this Act, and we see no reason why the Act could not as properly put an end to a contract already working the mischief as to prohibit the making of one in the future. The case, then, comes to this. The plaintiffs seek to enforce a contract which is prohibited by law. The doctrine is elementary that, whenever the plaintiff is compelled, in order to make out his case, to show the illegal contract, he cannot recover. Here the rebate of \$6 is the illegal feature of this contract. This rebate is the precise thing sued for. The plaintiffs are compelled to prove that the defendant made an illegal promise to pay as the gist of their right to recover. Such promise is not enforceable.

Judgment for defendant affirmed.

MINNESOTA SUPREME COURT.

Frank G. PETERSON, *Recept.*,

v.

Joseph H. MAYER, *Appt.*

(....Minn.....)

***An employee who was hired from month to month, at a stipulated salary payable at the end of each month, whose duty was to collect and receive the moneys of his employer, habitually, and during all of the several months that he remained in the service, embezzled the moneys of**

***Head note by MITCHELL, J.**

NOTE.—Entire contract must be performed before wages can be demanded.

It has been held, in England, that if a party hired for a certain time so conduct himself as to justify his discharge, he shall forfeit the current salary even for the time for which he has served. *Turner v. Robinson*, 5 Barn. & Ad. 789. See also *Lilley v. Elwin*, 11 Q. B. 742; *Baillie v. Kell*, 4 Bing. N. C. 638; *Amor v. Fearon*, 9 Ad. & El. 551; *Beach v. Mullin*, 34 N. J. L. 343.

To justify a discharge, there must be, on the part of the servant, either moral misconduct, pecuniary or otherwise, willful disobedience, or habitual neglect. *Callo v. Brouncker*, 4 Car. & P. 518.

But this doctrine has been denied in more recent cases, and it is now held that misconduct may be sufficient to justify a discharge, although it does not include moral turpitude. *Smith v. Thompson*, 8 C. B. 44; 3 Wait, Act. and Def. 600.

A servant who leaves his master's service before the expiration of the month, without excuse and by his own willful fault, can recover nothing for the portion of the month for which he has worked. *Nelichka v. Esterly*, 29 Minn. 146.

Where a servant, whose wages are due and payable periodically, as quarterly, monthly or weekly, refuses to serve in the manner contracted for, or is rightfully discharged at any intervening period between the days when his wages are due, he can recover nothing for that portion of time during which he has served since the last periodical payment of wages. *Beach v. Mullin*, 34 N. J. L. 343.

When a servant is discharged for legal cause, he cannot recover for services rendered under the contract. *Spain v. Arnott*, 3 Stark. 366.

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his employer which came into his hands in the course of his employment. *Helvi*, that he was not entitled to recover anything for his services, the contract for each month being an entire one, to wit, to serve an entire month for an entire sum, and he having failed to perform his contract for any one month because of his breach of the implied condition that he would serve his employer honestly.

(July 1, 1891.)

A PPEAL by defendant from a judgment of the Municipal Court of St. Paul in favor

When a servant, whose wages are due periodically, refuses to perform his part of the contract, and so conducts himself that the master is justified in discharging him, he is not entitled to be paid any wages for that portion of time during which he has served since the last periodical payment of wages; that is to say, if a servant, whose wages are only due yearly, is rightfully discharged before the expiration of the year, he could recover nothing for services rendered previous to such discharge; and the same principle would apply to the case of a quarterly, monthly or weekly hiring. In any of such cases, if the servant fail to perform his part of the contract, or be rightfully discharged at any intervening period between the days when his wages are due, he can recover nothing. This is upon the principle that the contract was an entire contract, and the performance of the services for the whole time agreed upon was in the nature of a condition precedent to his right to recover any wages. *Smith, Mast. and Serv.* 113.

The propositions of law thus stated are supported by the following cases: *Turner v. Robinson*, 6 Car. & P. 15; *Ridgway v. Hungerford Market Co.* 3 Ad. & El. 171; *Lilley v. Elwin*, 11 Q. B. 742, 755, 757; *Turner v. Mason*, 14 Mees. & W. 112; *Libhart v. Wood*, 1 Watts & S. 265; *Singer v. McCormick*, 4 Watts & S. 266.

The principle is stated in similar language in 2 Parsons, Cont. 40, and 2 Smith, Lead. Cas. § 43.

Dishonesty of servant defeats right to wages.

In most cases full and faithful performance by plaintiff of his entire contract is a condition precedent to any recovery. *Wood, Mast. & Serv.* 167.

of plaintiff in an action brought to recover salary alleged to be due plaintiff for services rendered to defendant. *Reversed.*

The facts are stated in the opinion.

Mr. A. E. Bowe for appellant.

Messrs. Henry Johns and R. L. Johns, for respondent:

A servant whose wages are due periodically, even though employed for a definite time, and who is rightfully discharged, may nevertheless recover for the periods of service already completed.

Taylor v. Laird, 1 Hurlst. & N. 267; *Button v. Thompson*, 38 L. J. C. P. 225; *Smith, Mast. and Serv.* p. 195; *White v. Atkins*, 8 Cush. 367; *Newman v. Reagan*, 63 Ga. 755.

A contract for hiring at so much per month is a hiring by the month—if nothing is said as to the term of service.

Beach v. Mullin, 34 N. J. L. 343.

Servant's contracts, though for a specified time, are deemed apportionable, and a servant who has been discharged for cause is still entitled to recover for the work actually done.

14 Am. & Eng. Encyclop. Law, p. 793; *Lawrence v. Gulkifer*, 38 Me. 532; *Jones v. Jones*, 2 Swan, 605; *Massey v. Taylor*, 5 Coldw. 447.

Respondent may recover for services performed during the fractional part of a month in which he was discharged, less such damages as appellant sustained by reason of his tortious act.

Taylor v. Paterson, 9 La. Ann. 251; *Green v. Hulst*, 22 Vt. 188; *Murdock v. Phillips Academy*, 12 Pick. 244; *Carroll v. Welch*, 26 Tex. 147; *Jenkins v. Long*, 8 Md. 132; *Robinson v. Sanders*, 24 Miss. 391; *Swift v. Harriman*, 30 Vt. 607.

Mitchell, J., delivered the opinion of the court:

The allegations of the complaint are that

the plaintiff performed labor and work for defendant for seven and a fraction months at an agreed sum per month, payable at the end of each month. The answer admits the employment at the sum alleged for each and every month that plaintiff should work for defendant, and that the plaintiff worked the length of time stated, but alleges, by way of defense, that during all the time of his service the plaintiff stole and appropriated to his own use large sums of defendant's money which came into his hands in the course of his employment, and that, as soon as defendant discovered the fact he discharged the plaintiff from his service. Upon the pleadings, therefore, the contract must be taken to have been a hiring by the month or from month to month, the wages being due and payable at the end of the month. Judgment having been ordered for plaintiff on the pleadings, it must be taken as true, as alleged in the answer, that during all of the time of plaintiff's service, viz., during each and every one of the months that he was in defendant's employment, he was constantly engaged in embezzling his employer's money. While the whole services were not performed under one entire contract, yet, as to each and every month by itself, the contract was an entire one, viz., to work an entire month for an entire price. A contract to pay a certain sum for a month's service is as entire in its consideration as is a contract to pay a certain sum for a single chattel. *Beach v. Mullin*, 34 N. J. L. 343. Therefore, to entitle plaintiff to recover the specified wages for any one month, he must have substantially performed the contract of service for that month. According to the settled doctrine of this court, had plaintiff, before the expiration of the month, abandoned the

§ 84, 156, § 81, 201, § 103; *Bixby v. Parsons*, 49 Conn. 422.

Fidelity is a condition precedent, whenever an agent seeks compensation from his principal. See *Henderson v. Hydraulic Works*, 9 Phila. 100.

There can be no part recovery for part performance. *McMillan v. Vanderlip*, 12 Johns. 167.

Where the performance of work and labor is a condition precedent, to entitle the party to recover a fulfillment must be shown. *Wolfe v. Howes*, 20 N. Y. 322.

Conditions precedent have always been, and still are, strictly enforced by the courts of New York, and complete performance in precise accord with the contract insisted upon. See *Smith v. Brady*, 17 N. Y. 166-168.

The burden is on the plaintiff to aver and prove a fulfillment of a condition precedent. *Oakley v. Morton*, 11 N. Y. 30.

Flagrant acts of dishonesty or crime which seriously affect the master's interest, continued during his service, might well be regarded as a bar to the recovery of wages, although the amount received and fraudulently appropriated might be far less than the amount fixed by the contract. *Turner v. Kouwenhoven*, 1 Cent. Rep. 267, 100 N. Y. 115.

In *Spotswood v. Barrow*, 5 Exch. 110, it was held that where a servant employed to collect moneys for his master retains a part of the money when it has come into his hands, and does not pay the same over, he has broken his contract, may be discharged by his master, and can recover no wages even for previous services rendered. And the same was held in *Blencarn v. Hodges Distillery Co.* 16 L. T. 13 L. R. A.

N. 8. 606, although the servant, after using the moneys for himself, made them up afterwards, and although his failure to pay over other moneys was caused by mere carelessness or forgetfulness. And see *Turner v. Robinson*, 6 Car. & P. 15.

It is not the discharge that bars plaintiff's recovery, but plaintiff's misconduct. This is readily and conclusively shown by the familiar principle that, although there be a discharge before the time of service has expired, yet, where the discharge was wrongful, &c., where there was no misconduct by the servant to justify the discharge, the servant can recover. *Perry v. Dickerson*, 36 N. Y. 350.

The following cases sustain the principle that where the contract is an entirety the recovery of damages for its breach is not allowed, unless it appears that the conditions precedent have been duly performed. *Ketchum v. Everton*, 18 Johns. 359; *Stephens v. Beard*, 4 Wend. 604; *Thorpe v. White*, 13 Johns. 53; *Jennings v. Camp*, 13 Johns. 94; *Lantry v. Parks*, 8 Cow. 63; *Marsh v. Ruleson*, 1 Wend. 514; *Paige v. Ott*, 5 Denio, 406; *Champlin v. Rowley*, 18 Wend. 187; *McKnight v. Dunlop*, 4 Barb. 38; *Pratt v. Gulkick*, 13 Barb. 267; *White v. Hewitt*, 1 E. D. Smith, 366; *Sickels v. Pattison*, 14 Wend. 267; *Baker v. Higgins*, 21 N. Y. 397; *Cunningham v. Jones*, 20 N. Y. 496; *Bonesteel v. New York*, 22 N. Y. 162; *Smith v. Brady*, 17 N. Y. 173; *Reab v. Moor*, 19 Johns. 337; *Tompkins v. Dudley*, 25 N. Y. 272; *Kettie v. Harvey*, 21 Vt. 301; *Whitley v. Murray*, 34 Ala. 155; *Angie v. Hanna*, 23 Ill. 439; *Olmstead v. Beale*, 19 Pick. 523; *Aaron v. Moore*, 34 Mo. 79; *Miner v. Bradley*, 23 Pick. 457. See also note to *Keedy v. Long* (Md.) 5 L. R. A. 759.

service without excuse, and by his own willful fault, he could have recovered nothing for the portion of the month he worked, because he would not in such case have performed his contract. *Nelichka v. Esterly*, 29 Minn. 146; *Kohn v. Fandel*, 29 Minn. 470. The same result would have followed, and on the same ground, had the defendant during the month, for good and sufficient cause, discharged the plaintiff from his service. But it was an implied condition of the contract that plaintiff should serve the defendant faithfully and honestly. Although only implied, this was as much a part of the contract as was the express condition as to the time of service, and the breach of the one was just as much a failure to perform the contract as would have been a breach of the other, and the consequences in both cases would be the same. Indeed, if there is any case of non-performance of an entire contract which should prevent a recovery, it is where a servant has been habitually embezzling his master's money which came into his hands in the course of his employment; for, in such cases, not only is the breach the result of positive dishonesty, but it goes to the very root of the subject matter of the contract of service. To allow the dishonest servant to recover the value of his services, less what the master can show by direct and positive proof (often impossible) he had stolen, would neither subserve the ends of justice nor tend to promote common honesty. *Libhart v.*

Wood, 1 Watts & S. 265. Of course substantial, and not exact, performance, accompanied with good faith, is all the law requires in the case of any contract to entitle a party to recover on it. Although a plaintiff be not absolutely free from fault or omission in every particular, the court will not turn him away if he has in good faith made substantial performance, but will enforce his rights on the one hand, and preserve the rights of the defendant on the other, by permitting a recoupment. *Leeds v. Little*, 42 Minn. 414; *Elliott v. Caldwell*, 43 Minn. 357, 9 L. R. A. 52.

Neither is the rule which we have applied to the present case to be extended so far as to forfeit wages already earned on a contract already fully performed and at an end. For example, in this case, had the plaintiff faithfully and honestly served the defendant during all of the first seven months, his wages for which were fully earned, they would not be forfeited by a breach of the contract for the seventh month. But in the present case, according to the answer, the plaintiff, whose duties included the constant and daily receipt of defendant's moneys, failed to perform his contract for any month, having willfully and dishonestly violated it in a most substantial and essential matter. Hence he never earned his wages for any of the months he was in defendant's service.

Judgment reversed.

MISSOURI SUPREME COURT.

Bernard FATH, by Next Friend, *Respt.*,

TOWER GROVE & LAFAYETTE R.,
Appt.

(...Mo....)

1. An ordinance requiring the conductor and driver of a street-car to keep a

vigilant watch for all vehicles, and persons on foot, especially children, and stop the car in the shortest time and space possible on the first appearance of danger to them, is valid, under a charter which gives power to make ordinances not inconsistent with the general law, and to license and regulate the construction and operation of street railroads.

2. Failure to observe the degree of care in running a street-car which is re-

NOTE.—Scope and effect of municipal ordinances.

A street railway company by accepting a franchise from a municipal authority obligates itself to perform all the conditions precedent required in the grant and to comply strictly with such contractual matters as were stipulated for at the time it received its charter. *Pacific R. Co. v. Leavenworth*, 1 Dill. 303; *Northern Cent. R. Co. v. Baltimore*, 21 Md. 93; *Jersey City & B. R. Co. v. Jersey City & H. R. Co.*, 20 N. J. Eq. 61, 300; *Indianapolis & C. R. Co. v. Lawrenceburg*, 34 Ind. 304; *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, 24 L. ed. 734; *Detroit v. Detroit City R. Co.*, 76 Mich. 521. See *Fink v. St. Louis*, 71 Mo. 62.

Although the proposition that the Legislature of a State is alone competent to make laws is true, yet it is also settled that it is competent for the Legislature to delegate to municipal corporations the power to make by-laws and ordinances, with appropriate sanctions, which, when authorized, have the force, in favor of the municipality and against persons bound thereby, of laws passed by the Legislature of the State (*Hell v. Lowell*, 4 Allen, 407; *Brick Presby. Church v. New York*, 5 Cow. 538; *St. Louis v. Boffinger*, 19 Mo. 13, 15, per Gamble, J.; *St. Louis*, 13 L. R. A.

Louis v. Manufacturers Bank, 49 Mo. 574; *Jones v. Firemen's Fund Ins. Co.*, 2 Daly, 307; *McDermott v. Metropolitan Board of Police Dist. 5*, Abb. Pr. 422; *Mason v. Shawneetown*, 77 Ill. 533; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 508, 24 Am. Rep. 756; *State v. Tryon*, 39 Conn. 183; *Indianapolis v. Indianapolis Gas Light & Coke Co.*, 66 Ind. 386, citing text; *Bearden v. Madison*, 73 Ga. 184; *St. Johnsbury v. Thompson*, 59 Vt. 300; *Starr v. Burlington*, 45 Iowa, 87; 1 Dillon, Mun. Corp. § 308.

The terms "by-law," "ordinances," and "municipal regulation" have substantially the same meaning, and are defined to be "the laws of the corporate district, made by the authorized body, in distinction from the general law of the State." They are local regulations for the government of the inhabitants of the particular place. *State v. Lee*, 29 Minn. 451-453 (1882) and cases, *Vanderburg, J.*; *Anderson*, Law Dict. 738.

The words "ordinances" and "by-laws" are synonymous. *Bills v. Goshen*, 3 L. R. A. 261, 117 Ind. 221.

Liability of street-car company for injury to pedestrians.

For injuries occasioned by negligence, street rail-

quired by a valid ordinance imposing a penalty therefor renders a street-car company, which has undertaken to obey ordinances in consideration of the right to use the public streets for its tracks, liable to a person who is injured in consequence, although such degree of care may be higher than that which would otherwise be required by law.

(June 20, 1891.)

TRANSFER from the St. Louis Court of Appeals of an action appealed to that court from the St. Louis Circuit Court, which was brought to recover damages for personal injuries alleged to have resulted from defendant's negligence, and in which a judgment had been entered in favor of plaintiff. *Reversed.*

Statement by Sherwood, J.:

Action by infant, seven years of age, through next friend, for injuries received by the former in consequence of coming in contact with one of the defendant Company's cars, which was alleged to have happened by reason of the negligence of that Company, and also because of its negligent failure to observe the requirements of subdivision 4, § 1246, art. 6, Rev. Ord. 1887, of the City of St. Louis. This was the substance of the petition.

Said subdivision 4 reads as follows:

"Fourth. The conductor and driver of each car shall keep a vigilant watch for all vehicles and persons on foot, especially children, either on the track or moving towards it, and on the first appearance of danger to such persons or vehicles the car shall be stopped in the shortest time and space possible." Section 1251 of the same article provides that "any person, corporation, company, or co-partnership, or the president, superintendent, or manager thereof, violating or failing to comply with any of the foregoing provisions of this article, except as otherwise provided

for, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be fined not less than \$5 nor more than \$500."

The answer of the defendant was substantially a general denial, as well as the following: "Defendant . . . charges the fact to be that the boy, Bernard Fath, sustained certain injuries at the time alleged, which injuries were caused by his own acts and conduct, in this: that while one of defendant's cars was moving along Columbus Street, in the City of St. Louis, in a usual and lawful manner, said child, without the knowledge of defendant's driver, suddenly and unexpectedly, carelessly, and negligently, ran up to and against the moving car in such manner as to cause it to fall across the track upon which said car was moving; that the driver of said car at the time observed proper care and diligence in the discharge of his duties, and was not guilty of any negligence in the premises. The defendant says that the injuries, if any, sustained by said child . . . were caused by the improper acts and negligent conduct of said child as aforesaid, and by the negligence of said child's parents in permitting said child to be upon the public streets without the care or control of an older person, and were not caused by the negligence or fault of this defendant, or any of its agents or servants." The evidence on behalf of plaintiff tended to show that the plaintiff, Bernard Fath, was a boy between four and five years old when he was injured; that on the 26th day of July, 1884, between 6 and 7 o'clock, and when it was still daylight, said Bernard was on Columbus Street, near Carroll, in the City of St. Louis; that he was either upon defendant's tracks, or approaching same, as one of defendant's cars moved northwardly along Columbus Street; that the driver of defendant's car either did or by the exercise of

way companies are liable, as others are, upon common-law principles, and no more so. *Louisville & P. R. Co. v. Smith*, 2 Duvall, 556, 558; 2 Borer, Railroads, 1434.

As street-cars are no more dangerous to pedestrians in the street than carriages, omnibuses, or any other vehicle drawn by horses, no more care can be required of street-railway companies in the management of their cars and horses in the street than is required of the driver or owner of any other vehicle, viz., ordinary care. *Pendleton St. R. Co. v. Shires*, 18 Ohio St. 255; *Pendleton St. R. Co. v. Stallman*, 22 Ohio St. 1, 30; *Baltimore City Pass. R. Co. v. McDonnell*, 45 Md. 534, 538; *Unger v. Forty-Second St. R. Co.* 11 N. Y. 497; *Gilligan v. New York & H. R. Co.* 1 E. D. Smith, 453, 457.

Where a party is situated on a street, where he has a legal right to be, in passing over it, it is the legal duty of the driver of a car approaching him to make a vigilant use of his senses to discover whether the party is in a position of peril, and to control the movement of his car, so far as possible, to avoid injury to him. *Watson v. Broadway & Seventh Ave. R. Co.* 6 N. Y. S. R. 536.

One driving horses along the streets of a city is bound to anticipate that passengers on foot may be at the crossings, and to take reasonable care not to injure them; if he fails to look out for them, or when he sees, does not, so far as in his power, avoid them, he is chargeable with negligence. *Murphy v. Orr*, 34 N. Y. 14.

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The driver of a vehicle in the streets of a city is bound to be vigilant to discover anyone exposed to danger, and if he fails to look in the direction in which he is going and an accident happens in consequence, he is chargeable with negligence. The driver of a street-car is not excused from the performance of this duty by the necessity of making change for a passenger. *Hyland v. Yonkers R. Co.* 15 N. Y. S. R. 824.

If the deceased child exercised due care, and the injury was caused solely by the negligence of defendant's driver, the defendant was liable without regard to the question whether it was negligence in the parents to let the child go with so young an attendant. Nor would negligence upon the part of so young a child as the deceased, when there was no negligence upon the part of the parents or the attendant, absolve the defendant from liability. *Ihl v. Forty-Second St. & C. St. F. R. Co.* 47 N. Y. 317.

An infant, when suing in his own behalf for injuries to his person arising from the negligence of others, must be free from the imputation of negligence on his part tending to produce the damages sought to be recovered. The rule is the same, whether the action be by an infant or an adult. *Burke v. Broadway & Seventh Ave. R. Co.* 40 Barb. 529. See notes to *People v. Newton* (N. Y.) 3 L. R. A. 175; *Rupard v. Chesapeake & O. R. Co.* (Ky.) 7 L. R. A. 314.

proper care and diligence could have seen the boy, and that he was in danger, and could have stopped the car in time to prevent the accident, but that he negligently and carelessly ran against him, resulting in personal injury.

Plaintiff's testimony was conflicting as to the extent of the accident,—whether a wheel dragged between the brake-rod and the front wheel until the car was stopped,—but the evidence tended to show that he was knocked down, bruised, and injured; that there were no bones broken; but that he sustained substantial injuries, and suffered pains, and was laid up in bed for a period of time, and still showed some effects of the injury, in the way of stiffness, nervousness, etc. Plaintiff also offered in evidence the fourth clause aforesaid.

The defendant objected to the introduction of the ordinance on various grounds; among them, that "said fourth clause of said ordinance is not a lawful rule governing diligence or negligence in this State; that the same is illegal and void, and against the law of the land; and because the city had no right or authority to enact the same." But the court overruled said objection, and said ordinance was admitted.

The evidence on the part of defendant tended to show that, owing to some local disturbance of a trifling character, a crowd of men, women, and children had gathered on the sidewalk in front of a house on the east side of Columbus Street; that the plaintiff, Bernard, was in the crowd; that, as the car came along, a policeman suddenly scared and scattered the crowd; that the children ran in various directions; that plaintiff ran obliquely in a northwestern direction without looking ahead; that he struck the car between the mule and the dash-board; that he fell, and was caught by the brake-rod and dragged along, but that the car was stopped in time to prevent the front wheel from passing over him; that the driver of defendant's car acted with great promptness and diligence in stopping the car, and that he could not have become aware of the dangerous approach of plaintiff earlier than he did. The jury found a verdict for the plaintiff in the sum of \$600, and there was judgment accordingly, and on appeal to the St. Louis Court of Appeals that judgment was reversed and the cause remanded; but one of the judges of that court deeming that decision contrary to the decision of this court in *Liddy v. St. Louis R. Co.*, 40 Mo. 506, the cause has been transferred here in conformity with section 6, art. 6, of the Constitution.

Sections 20, 23, and 25, art. 9, of the Constitution require that the charter of the city shall be in harmony with and subject to the Constitution and laws of Missouri.

Section 26, art. 8, of the City Charter also declares: "The mayor and assembly shall have power within the city by ordinance not inconsistent with the Constitution or any law of this State or of this charter, . . . (3) to establish, open, vacate, alter, widen, extend, pave, or otherwise improve and sprinkle all streets, avenues, sidewalks, . . . and to regulate the use thereof; . . .

(5) to license, tax, and regulate . . . street-railroad cars, livery and sale stables, hackney carriages, private carriages, barouches, buggies, wagons, omnibuses, carts, drays, and other vehicles, and all other business, trades, avocations, or professions whatever; (10) to impose, collect, and enforce fines, forfeitures, and penalties for the breach of any city ordinance. (11) To grant to persons or corporations the right to construct railways in the city, subject to the right to amend, alter, or repeal any such grant, in whole or in part, and to regulate and control the same as to their fares, hours, and frequency of trips, and repair of their tracks, and the kind of rails and vehicles."

And sections 1 and 2 of article 10 of the charter provide that "the municipal assembly shall have power, by ordinance, to determine all questions arising with reference to street railroads in the corporate limits of the city, whether such questions may involve the construction of such street railroads, granting the right of way, or regulating and controlling them after their completion; and also shall have power to sell the franchise or right of way for such street railroads to the highest bidder, or, as a consideration therefor, to impose a *per capita* tax on the passengers transported, or an annual tax on the gross receipts of such railroad, or on each car; and no street railroad shall hereafter be incorporated or built in the City of St. Louis except according to the above and other conditions in this charter, and in such manner and to such extent as may be provided by ordinance." "The assembly shall have power to regulate the time and manner of running cars, and the rates of fare on street railroads now or hereafter to be built, and the sale of tickets and exchange thereof between the several companies, and to tax the property of street-railroad companies in such manner as may be provided by law."

That charter also contains this provision: "All ordinances in force at the time this charter and scheme go into operation, not inconsistent therewith, shall remain in full force until altered or repealed by the assembly." Section 1, art. 16. The ordinance in question was enacted December 27, 1859. Section 20, art. 12, of the Constitution also makes provision that "no law shall be passed by the General Assembly granting the right to construct and operate a street railroad within any city, town, village, or on any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad; and the franchises so granted shall not be transferred without similar assent first obtained."

Messrs. Hitchcock, Madill & Finkelnburg, for appellant:

Clause 4 of section 1246 of article 6 of the Revised Ordinances of 1887 of the City of St. Louis is void in so far as it undertakes to fix a standard of diligence or liability for negligence in civil suits at common law against street railway corporations,

Fifth v. Tower Grove & L. R. Co. 39 Mo. App. 447.

The ordinance in question requires defendant's servants in every case of danger to accomplish the utmost physical possibility which can be attained in stopping a car under any circumstances; a measure of diligence not required of a carrier even towards a passenger, much less in respect of a stranger.

Dougherty v. Missouri R. Co. 97 Mo. 647, 667; *Doss v. Missouri, K. & T. R. Co.* 59 Mo. 27, 34.

The care incumbent on railroad companies after discovering the perilous condition of a person on the track is ordinary or reasonable care.

Dunkman v. Wabash, St. L. & P. R. Co. 10 West. Rep. 896, 95 Mo. 282; *Guenther v. St. Louis, I. M. & S. R. Co.* 14 West. Rep. 735, 95 Mo. 286; *Fricks v. St. Louis, K. C. & N. R. Co.* 75 Mo. 595; *Whalen v. St. Louis, K. C. & N. R. Co.* 60 Mo. 823; *Brown v. Hannibal & St. J. R. Co.* 50 Mo. 461.

A city ordinance cannot change the common-law liabilities of a civil nature between private parties, nor fix a new standard of negligence as a basis for an action on the case.

Heeney v. Sprague, 11 R. I. 456; *Philadelphia & R. R. Co. v. Erwin*, 89 Pa. 71; *Vandyke v. Cincinnati*, 1 Disney (Ohio) 532; *Flynn v. Baltimore Canton Co.* 40 Md. 312; *Kirby v. Boyleston Market Assn.* 14 Gray, 249; *Jenks v. Williams*, 115 Mass. 217.

The right of a municipality to regulate the use of its streets by railways does not authorize it to change the fundamental rules of law governing the liabilities of a civil nature—neither to increase nor to diminish them. Ordinances must be in harmony with the general laws of the State.

St. Louis R. Co. v. South St. Louis R. Co. 72 Mo. 70.

Messrs. A. R. Taylor and David Goldsmith, for respondent:

Liddy v. St. Louis R. Co., 40 Mo. 506, rendered within a few years after the adoption of the ordinance, has been tacitly recognized as establishing its liability.

McCarthy v. Cass Ave. & F. G. R. Co. 10 West. Rep. 831, 92 Mo. 536; *Dunn v. Cass Ave. & F. G. R. Co.* 98 Mo. 652; *Lamb v. St. Louis, C. & W. R. Co.* 33 Mo. App. 489.

A similar question has recently been presented in *Hays v. Gainseville St. R. Co.*, 70 Tex. 602, and the same view was there taken in regard to it.

Our Constitution makes a license to street railway companies dependent solely upon the will of the town or city in which it is to be exercised.

Mo. Const. art. 12, § 20.

The granting power may attach to the grant any limitation, qualification or obligation, consistent with the duties which it owes to the people at large.

Fath v. Tower Grove & L. R. Co. 39 Mo. App. 450; *Merr v. Missouri & P. R. Co.* 4 West. Rep. 592, 85 Mo. 676; *Bergman v. St. Louis, I. M. & S. R. Co.* 4 West. Rep. 594, 88 Mo. 684.

Sherwood, J., delivered the opinion of the court:

Though the subdivision of the ordinance under discussion has been in existence for over thirty years, its legal validity has never

been adjudicated by this court, though incidentally touched upon in several instances. *Liddy v. St. Louis R. Co.* 40 Mo. 506; *McCarthy v. Cass Ave. & F. G. R. Co.* 92 Mo. 536, 10 West. Rep. 831; *Dunn v. Cass Ave. & F. G. R. Co.* 98 Mo. 652.

In *Liddy's Case* the validity of the ordinance was not raised in any manner in the trial court, and of course any utterances in this court on the subject are not possessed of authoritative value. The same may be said of the other cases cited, which went off principally on the insufficiency of the testimony on which to base verdicts for the plaintiffs. The point in hand, the legal validity of the ordinance, is therefore *res integra*, so far as adjudications of this court are concerned.

Nor does the case of *Hays v. Gainseville St. R. Co.*, 70 Tex. 602, cited for plaintiffs, discuss or pass upon the status of such an ordinance; its validity is simply assumed. Proceeding, then, to inquire into the validity of the ordinance, it may be admitted, at the outset, that it is beyond the power of a municipal corporation by its legislative action directly to create a "civil duty enforceable at common law;" for this is an exercise of power of sovereignty, belonging alone to the State. This position is fully sustained by the authorities cited on behalf of the defendant. But if we may assume, as seems to be the case from the powers conferred on the city by the provisions of its charter, as well as by section 20 of article 12 of the Constitution, already quoted, that the defendant Company was allowed to lay its tracks upon the streets of the city upon conditions of yielding obedience to the municipal ordinances then or thereafter to be enacted, thereby entering into contractual relations with the city; if this has been done, and the ordinance quoted has been violated by the defendant Company, resulting in injury, as the petition alleges,—then these questions arise: What is the result of such violation, and what, if any, the liability of the defendant, and to whom liable, and the nature and extent of its liability in consequence of such violation? Now, if the case in hand arose upon a statute, and contractual relations had been entered into between the defendant Company and the city, whereby the former had engaged with the latter to perform a public duty in consideration of the benefits to be derived from laying its tracks and operating its road on the streets of the city the authorities seem to be unanimous in expression that a breach of the public duty thus created, resulting in injury to any person, would render the defendant Company liable to such person for the injury thus received.

The principle here asserted is of ancient date, and is announced in the early case of *Mayor of Lyme Regis v. Henley*, 1 Bing. N. C. 222, citing earlier cases, where it is said that where a matter of public and general concern is involved, "and the king, for the benefit of the public, has made a certain grant imposing certain public duties, and that grant has been accepted, we are of opinion that the public may enforce the performance of those duties by indictment, and the individuals peculiarly injured, by action."

In *Goshen & S. Turnp. Co. v. Sears*, 7 Conn. 86, it was ruled that the turnpike company, by accepting the charter of incorporation, making the road, and receiving tolls of passengers, became bound to keep the road in repair; and, where a traveler was injured by reason of failure of the company to repair its road, he was held entitled to recover.

To the same effect, see *Wilson v. Susquehannah Turnp. R. Co.*, 21 Barb. 68, and cases cited. In *Conrad v. Trustees of Ithaca*, 16 N. Y. 158, and *Hickok v. Trustees of Plattsburgh*, reported in the same volume, 161, note, the principle under discussion is thus formulated by Selden, J.: "That whenever an individual or corporation, for a consideration received from the sovereign power, has become bound by agreement, either express or implied, to do certain things, such individual or corporation is liable, in case of neglect to perform the agreement, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by such neglect. In all such cases the contract made with the sovereign power is deemed to inure to the benefit of every individual interested in its performance." This, Judge Selden says, is the basis of *Henley's Case*, and of the series of the English cases upon which that case was decided. Sustaining the like view, see *Adsit v. Brady*, 4 Hill, 630; *Robinson v. Chamberlain*, 84 N. Y. 389; *Fulton F. Ins. Co. v. Baldwin*, 37 N. Y. 648; *Johnson v. Belden*, 47 N. Y. 130.

In *Willy v. Mulledy*, 78 N. Y. 310, it was ruled that where, by the charter of the city, an absolute duty is imposed upon the owners of tenement houses to have places of egress to the roofs, and also to have fire-escapes upon such houses, this duty is for the benefit of the tenants; and for a breach thereof causing damage, a tenant may maintain an action against his landlord; Earl, J., remarking: "In Comyn's Digest, Action upon Statute (F), is laid down as the rule that 'in every case where a statute enacts or prohibits a thing for the benefit of a person he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.'" "

In the Law of Torts, it is said by the distinguished author: "If the duty imposed is obviously meant to be a duty to the public, and also to individuals, and the penalty is made payable to the state or to an informer, the right of an individual injured to maintain an action on the case for a breach of the duty owing to him will be unquestionable." Cooley, Torts, 784.

Upon these authorities, if the defendant Company had gained the franchise of the use of the streets of the city through a contract made with the State on certain conditions, either express or implied, and injury had resulted to anyone by reason of the contracting company failing to comply with such conditions, it is clear that a recovery could be had by such person, notwithstanding that a pecuniary penalty could also be inflicted by fine for the same breach of public duty. *Parker v. Barnard*, 185 Mass. 116, and cases cited.

In the case at bar, should not the same 18 L. R. A.

principle dominate as to the contract in question and the duty assumed? And would not the consequences of the breach of that duty result in a like liability to a person injured by such breach, as well in this instance as in those already cited? It seems that an affirmative answer must be returned in this case as well as in any other; for here all the constituent elements of such liability exist, if the supposition with respect to the defendant Company accepting the existing and future ordinances as a condition of laying its tracks and running its cars on the streets of the city be true, to wit, the agreement, the consideration therefor, and the public duty to be performed as a consequence of such agreement; and under the terms of the Constitution, and of its charter, it is not to be doubted that the municipal authorities *pro hac vice* represent the sovereign power of the State, nor that the duty thus enjoined is none the less a public duty because the area of its performance is circumscribed within the boundaries of the municipality conferring the franchises. Sustaining this position are these authorities: *Hayes v. Michigan Cent. R. Co.* 111 U. S. 228, 28 L. ed. 410; *Mason v. Shaveneetown*, 77 Ill. 583; *Siemers v. Eisen*, 54 Cal. 418; *Bott v. Pratt*, 83 Minn. 323, and cases cited.

And it would seem that the municipal authorities had plenary power to enact the ordinance in question, at least so far as to provide a penalty for its breach. This being provided for, and the ordinance accepted by the defendant Company as a condition and as a consideration for the granting of the franchise, the result of a breach of such ordinance, causing injury to an individual, should be that already indicated; for it must be obvious that the ordinance in issue was for the benefit of all those who have occasion to use the streets of the city.

But it is said that "a city ordinance cannot change the common-law liability of a civil nature between private parties, nor fix a new standard of negligence for an action on the case." This may be true if the ordinance is to be construed as having the direct effect of changing a rule of the common law. But it must be remembered that "consent of parties shall alter the form and course of the law." *Dormer's Case*, 5 Coke, 40. And no obstacle is seen in the way in this case why the city should not be able, as a consideration of granting the franchise, to require an enhanced degree of care on behalf of street-car companies,—a degree of care certainly better suited to the crowded streets of cities than the rule of ordinary care, which the defendant Company so strenuously invokes. Surely there is nothing in such an ordinance, or the charter which supports it, lacking harmony with the Constitution and laws of this State. It is true the ordinance may not have a greater direct effect than to authorize the imposition of the prescribed penalty on a defaulting company; but the other consequences attend as inseparable incidents of a breach of duty, resulting in injury to an individual for whose protection the ordinance was clearly designed.

The case at bar is clearly distinguishable

from that of *Heaney v. Sprague*, 11 R. I. 456, and other similar cases; for there the principle of a liability arising from the breach of contractual relations, whether express or implied, is distinctly recognized, as well as the principle that where the duty is merely one for the benefit of the municipality, or of the public at large, and not distributively to the public as composed of individuals, there the only recovery is the statutory penalty. Under this view, the ordinance in question was clearly admissible in evidence. On the theory already approved, evidence should also be introduced in connection therewith to show the contractual relations entered into between the defendant Company and the city, and the breach of duty consequent

thereon; but at any rate the cause was improperly tried, inasmuch as the instructions given at the instance of the plaintiff and of the defendant were confusing and conflicting; the one for the former exacting the highest degree of diligence of the defendant's driver, while the instruction for the defendant only required the driver of the car to exercise diligence according to the common-law standard, —reasonable or ordinary care. For the reasons announced the judgment of the *St. Louis Court of Appeals*, reversing that of the *Circuit Court*, should be affirmed, and the cause remanded to the former court, to be proceeded with in conformity hereto.

All concur, except *Barclay, J.*, absent.

INDIANA SUPREME COURT.

STATE of Indiana, *ex rel.* Simeon T. YANCEY, *Appt.*

v.
Nelson J. HYDE.

(....Ind....)

1. The title of an Act which states that it is to abolish one office and create another is not defective on the ground that it does not do what it purports to do, by reason of the facts that the new office is the same as the old one, except in name, and that the Act was passed for the purpose of vacating the old office, of which there was an incumbent, in order to make a place for some other person.
2. The power of the Legislature to abolish an office and create another with similar duties in order to provide a place for a certain person is not limited by a constitutional provision that officers may be impeached or removed in such manner as may be prescribed by law.
3. The determination of the Legislature in abolishing an office and creating a new one that the change of duties or burdens is sufficient to make the latter a different office cannot be reviewed by courts provided the Act is otherwise valid.
4. The power to appoint a state supervisor of oil inspection may be conferred upon the state geologist by the Legislature under Const., art. 15, § 1, authorizing appointments to offices not otherwise provided for in that Constitution to be made as "prescribed by law."

(June 18, 1891.)

A PPEAL by relator from a judgment of the Circuit Court for Marion County in favor of defendant in an action brought to determine defendant's right to the office of state supervisor of oil inspection. *Affirmed.*

The facts are stated in the opinion.

Moers, A. J. Beveridge, D. H. Chase, DeWitt C. Justice, J. W. Vesey, O. H. Bogue, A. L. Brick, J. G. Engle, Bear & Bear and Faris & Hamill for appellant.
Moers, J. B. McCullough, L. P. Harlan and A. G. Smith for appellee.

Coffey, Ch. J., delivered the opinion of the court:

The facts in this case, as they are disclosed 13 L. R. A.

by the information, are that on the 8th day of November, 1889, the relator was appointed to the office of State Inspector of Oils for the State of Indiana by the governor, and was duly commissioned to hold his office for the period of two years from that date. He qualified on the 11th day of the same month, and entered upon the discharge of the duties of the office, and has ever since continued to discharge such duties. On the 13th day of March, 1891, the governor appointed the relator to the office of state supervisor of oil inspection for this State, and issued to him a commission to serve for the period of four years from that date, and on the 24th day of the same month, he qualified as such officer. In the month of March, 1891, whether before or after the appointment of the relator does not appear, *Sylvester S. Gorby*, the state geologist, appointed the appellee to the office of state supervisor of oil inspection, under the terms of an Act of the General Assembly passed in 1891. Under this appointment the appellee qualified and entered upon the discharge of the duties of said office. No commission was issued by the governor to the appellee, nor does it appear that the commission last above mentioned issued to the relator was attested by the secretary of state, or that the seal of the State was thereto attached.

This action was commenced by the appellant in the Marion Circuit Court to determine the right to the office; and to an information setting forth the above facts the court sustained a demurrer. The propriety of this ruling presents the question for our consideration.

The last session of the General Assembly passed an Act containing the following title: "An Act Creating the Office of State Supervisor of Oil Inspection, Prescribing the Duties thereof, Providing for the Appointment of such Supervisor, Abolishing the Office of Chief of the Division of Mineral Oils and State Inspector of Oils, Repealing all Laws Inconsistent therewith and Declaring an Emergency."

The Act creates the office of state supervisor of oil inspection, and provides that immediately upon the taking effect of the Act, the

state geologist shall appoint a skilled and suitable person, a resident of the State, not interested in any way in manufacturing, dealing or vending any illuminating oils manufactured from petroleum, as state supervisor of oil inspection, whose term of office shall be for the term of four years from the date of his appointment. In case of a vacancy at any time, the Act requires the state geologist to fill the same. The State supervisor of oil inspection is subject to removal at any time by the state geologist for any neglect or violation of duty enjoined by law. The Act requires the supervisor to appoint deputies, and provides that he and his deputies shall in all respects perform the duties heretofore required by law of the chief of division of mineral oils and his assistants, or state inspector of oils and his deputies; and that they shall receive therefor the same fees and compensation provided by law for the chief of the division of mineral oils and his assistants, or state inspector of oils and his deputies. The state supervisor is required to make a report to the state geologist on the second Monday of January in each year of the inspections made by him and his deputies during the preceding year. He and his deputies are required to comply with the law in force pertaining to the inspection of oils.

The second section of the Act reads as follows: "The office of state inspector of oils as created by section 3 of 'an Act providing for the inspection of all kinds of oil that shall be used for illuminating or combustible purposes, regulating the sale of such oils, providing for certain appointments and removals to be made by the governor, defining what shall constitute certain misdemeanors, prescribing penalties, repealing certain laws and containing other matters properly connected therewith,' approved April 11, 1881, as well as the office of chief of the division of mineral oils, created by section 6 of 'An Act establishing a department of geology and natural resources of the State of Indiana and providing for a director of the department; abolishing the department of geology and natural history and the office of state geologist connected therewith; abolishing the offices of mine inspector and state inspector of oils; repealing all laws or parts of laws conflicting with any of the provisions of this Act, and declaring an emergency,' passed over the governor's veto, and in force February 26, 1889, are hereby abolished; and all the duties and requirements now and heretofore devolved by law upon such officers shall be performed by the state supervisor of oil inspection."

The Act repeals all laws and parts of laws inconsistent with its provisions and contains an emergency clause.

It is contended by the appellant that this Act is unconstitutional for the reasons:

First. That the same is in conflict with the provisions of § 19, art. 4, of the Constitution, which reads as follows: "Every Act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title."

Second. That the General Assembly has no 18 L. R. A.

power, under the Constitution, to confer on the state geologist the right to appoint to the office in controversy.

Third. That the Act is in conflict with the provisions of § 8, art. 6, of the Constitution, which reads as follows: "All state, county, township and town officers may be impeached, or removed from office, in such manner as may be prescribed by law."

The construction to be placed upon § 19, art. 4, *supra*, we regard as settled by the ably written opinion in the carefully considered case of *Hingle v. State*, 24 Ind. 28. Expressing regrets that the cases upon the subject of the construction of this constitutional provision were in conflict, the court, after a careful review of the cases, reached the conclusion that the mischiefs intended to be prevented by this section were two, namely:

"First. The passage of any Act under a false and delusive title which did not indicate the subject matter contained in the Act; a trick by which members of the Legislature had been deceived into the support of measures in ignorance of their true character.

"Second. The combining together in one Act of two or more subjects having no relation to each other; a method by which members, in order to procure such legislation as they wished, were often constrained to support and pass other measures obnoxious to them, and possessing no intrinsic merit."

The same ruling was made in the case of *Farbach v. State*, 24 Ind. 77.

Had the General Assembly passed a separate Act entitled "An Act Abolishing the Office of Chief of the Division of Mineral Oils and State Inspector of Oils," containing the provisions found in the Act before us, no one would doubt that the office previously held by the appellant was abolished, and that the title was sufficiently broad to cover the Act. So, if it had passed a separate Act entitled: "An Act Creating the Office of State Supervisor of Oil Inspection, Prescribing the Duties thereof, Providing for the Appointment of such Supervisor," followed by the provisions upon that subject found in the Act before us, it could not be doubted that a new office had been created, the mode of his selection prescribed and his duties fixed, and that the title of such Act was sufficient. Indeed, we do not understand the counsel for appellant as contending that the Act in question is not covered by the title, but the contention is that the Act does not, in fact, do what it purports to do. The argument is that an office consists of duties to be performed, services to be rendered, directions to be followed and emoluments to be received, and not in a name; and that, for this reason, the Act does not abolish one office and create another.

Many definitions of an office are set out in the able brief filed on behalf of the appellant; but we deem it unnecessary to set them out or to analyze them in this opinion; for, assuming that the essence of an office consists of duties to be performed, services to be rendered, directions to be followed and emoluments to be received, we do not think it follows that the General Assembly, by the Act under consideration, did not abolish one

office and create another. In considering statutes it is our duty to ascertain, if possible, the intention of the legislative body; and when that intention is ascertained, it is our duty to enforce it, unless it violates some provision of the Constitution. The case of *State v. Wiltz*, 11 La. Ann. 439, is not in point here, for in that case it was expressly held by the court that the Legislature did not intend to abolish one office and create another and the decision turns upon the question of the legislative intent. Here there is no doubt as to the intention of the Legislature. As we understand the brief for the appellant, it is conceded that it was the intention to vacate the office held by the appellant with a view of making a place for some other person, and this the Legislature undertook to do by abolishing the office held by the appellant and creating one to be filled by an appointment made by the state geologist. This, we think, was the plain intention; and this, we think, the Legislature has done, unless there is some provision in our Constitution which prohibits such legislation. It is perfectly plain, we think, that there is now no office known as the chief of division of oil inspection; nor is there any office known by the name of the state inspector of oils; but it is equally as plain that there is an office known as the office of state supervisor of oil inspection.

Offices are neither grants nor contracts, nor obligations which cannot be changed or impaired. They are subject to the legislative will at all times, except so far as the Constitution may protect them from interference. *Coffin v. State*, 7 Ind. 157.

"Offices created by the Legislature may be abolished by the Legislature. The power that creates can destroy. The creator is greater than the creature. The term of an office may be shortened; the duties of the office increased and the compensation lessened by the legislative will." *Gilbert v. Board of Commrs.* 8 Blackf. 81; *Ellis v. State*, 4 Ind. 1; *Walker v. Dunham*, 17 Ind. 488; *Walker v. Poelle*, 18 Ind. 264; *Jeffries v. Rouse*, 63 Ind. 592.

In the case of *Walker v. Poelle*, *supra*, the term of Mr. Walker as state printer had been shortened by an Act of the Legislature. His second point in the case was that the Legislature did not possess the power to shorten his term of office, and upon this subject the court said: "Upon the second point, as to the power of the Legislature to make such enactments, we do not propose to spend much time. We suppose, as the office was created by that body, that it is, in this particular, under its control."

The power of the Legislature to shorten the term of a statutory office, so as to affect an incumbent, once conceded, it is not difficult to see that there is no limit to such power. If it may shorten the term of a three years' office to two years, it may fix the term at one year or at one hour. In other words, the length of time a particular person shall hold is absolutely within the discretion of the Legislature.

It is not claimed that there is any constitutional provision restraining the Legislature

in this matter, except § 8, art. 6, above set out. In our opinion, it is not the purpose of this section to control legislative action upon the subject we are now considering. It was no doubt foreseen by the constitutional convention that some officer of the kind named might prove unfaithful to his trust, and the purpose of this provision was, we think, to enable the Legislature to pass such laws as would authorize his removal, by legal process, whether such office was created by statute or by the Constitution then under consideration. The effect of the Act we are now considering was to put an end to the appellant's term of office and to provide a new mode of selecting someone to discharge, at least some, if not all, of the duties theretofore discharged by the appellant; and that, too, whether the office of state supervisor of oil inspection is to be regarded as a new office or an old office under a new name. The intention to produce this result is plain, both from the title of the Act and from its provisions. In order to end the appellant's term of office, we do not think it was necessary to abolish the office held by him. As it is a statutory office, it was within the power of the Legislature to end the term of the incumbent at any time, and make provision for the selection of a successor.

But we think the appellant is in error in his position that the office of supervisor of oil inspection is an old office under a new name. We think it is in fact what it purports to be, a new office. It is true that the general duties to be performed by the incumbent of this office are the same as those performed by the appellant, but it cannot be said that no new duty is imposed. The imposition of public duties, to be compensated by emoluments received by the person performing such duties, generally constitutes a public office; but it is not true that a public office may not exist without the imposition of duties or the receipt of emoluments, as plainly appears by reading the Constitution, the provisions of which we are now considering. No duties are prescribed or emoluments fixed as to many of the offices made in the Constitution; but it cannot be said that, for this reason, the constitutional convention failed to create the office, or that the Legislature could, by a repeal of the Statutes since passed, fixing the duties and emoluments, abolish the offices created by the Constitution, to which no duties are attached or emoluments fixed by that instrument.

The term of office in this case is changed from two to four years; the mode of selection is changed and the incumbent is subject to removal at the will of the state geologist. As to the number of new duties to be performed or new burdens imposed which would be necessary to make a new office, we do not deem it necessary to inquire, as the Legislature has determined that those imposed in this case are sufficient for that purpose. With that determination we have no right or power to interfere, provided the Act is otherwise valid.

And this brings us to a consideration of the question as to whether the General Assembly may confer upon the state geologist

the power to fill the office in question by appointment. It is earnestly contended by the appellant that the General Assembly possesses no such power, and in support of his contention he relies principally upon the case of *State v. Hyde*, 121 Ind. 20. That was an action commenced by the State, *ex rel.* Yancey, against Hyde to determine the right to the office of chief of the division of mineral oils. Each of the parties claimed the office under an appointment made by the director of the department of geology and natural resources of the State of Indiana. Mr. Collett, from whom Yancey received his appointment, had been appointed and commissioned by the governor, while Mr. Gorby, from whom Hyde received his appointment, had been elected by the General Assembly. The question at issue was as to which, if either, of the two claimants was entitled to the office. This incidentally involved the question of the power of the General Assembly to create and fill, by its own election, the office of director of the department of geology and natural resources; and the question of the power of that officer to appoint the chief of the division of mineral oils. It was held, first, that the General Assembly did not possess the power, under our Constitution, to create and fill, by its own election, the office of director of the department of geology and natural resources, and second, that such officer had no power to fill, by appointment, the office of chief of the division of mineral oils.

Whatever difference of opinion existed among the members of the court, as then constituted, as to the power of the General Assembly to create and fill an office in nowise connected with its legislative duties, there was no division of opinion as to the unconstitutionality of so much of the law then under consideration as attempted to confer on the director of the department of geology and natural resources the power to appoint the chief of the division of mineral oils. The reasons for holding this provision unconstitutional were fully set forth in the dissenting opinion filed at the time by Elliott, *Ch. J.*

The conclusion reached that there was no valid Act of the Legislature attempting to confer on the director of the department of geology and natural resources the power to appoint the chief of division of mineral oils, it must be plain to everyone that the question as to whether the Legislature could or could not confer such power was not involved in the case. The conclusion that the power to fill the office then in controversy resided in the governor was correct, whether § 5152, Rev. Stat. 1881, was to be regarded as in force, or whether it was to be regarded as having been repealed by subsequent legislation; for, if in force, it expressly conferred such power on the governor; and if repealed, there was an absence of statutory provisions upon the subject, and it became the duty of the governor to fill the office under his constitutional duty to see that the laws were faithfully executed. The laws upon the subject of inspecting oils could not be executed without an officer to execute them; and

if the office was vacant, it was the duty of the governor, in the absence of some other mode prescribed by law, to fill it by appointment. As to whether the argument of the learned judge who wrote the opinion in the case of *State v. Hyde* is sound or otherwise, we do not stop to inquire, for the reason that the conclusion reached, holding that the power to appoint to the office then in controversy belonged to the governor, was so clearly right that the process of reasoning by which the conclusion was reached is wholly immaterial. The argument of the judge who writes an opinion is never to be confounded with the principle of law decided by the court.

In the later case of *State v. Gorby*, 123 Ind. 17, Mr. Gorby claimed the office of director of the department of geology and natural resources by virtue of an election by the General Assembly, while Mr. Collett claimed the same office under an appointment made by the governor of the State. The case involved the question as to whether the General Assembly of the State had the power, under our Constitution, to create an office in nowise connected with its legislative duties, and reserve to itself the right to fill such office by its own election. It was sought by Mr. Gorby to sustain the action of the General Assembly under the provisions of § 1, art. 15, of our State Constitution, which reads as follows: "All officers whose appointments are not otherwise provided for in this Constitution shall be chosen in such manner as now is, or hereafter may be, prescribed by law." It was held that this provision conferred upon the General Assembly the power to provide the manner in which certain state officers might be chosen, but that there was a broad distinction between providing the manner in which an officer might be chosen and in making the choice. In reaching this conclusion, the court relied, in some degree, upon the case of *State v. Kennon*, 7 Ohio St. 546, in which it is said that the distinction between the power to direct the manner, the mode of doing an act and doing the act itself, is almost too clear to admit of demonstration. Assuming that the office then in question was an administrative state office, the incumbent of which was charged with the duty of administering a department of the state government, it was further held that such incumbent, under our Constitution, should be elected by the people, and that it was the duty of the governor of the State to fill such office by appointment until an election could be held. Having reached this conclusion, it was, perhaps, unnecessary to a decision of the cause that anything more should have been said; but it was thought necessary to a proper understanding of the opinion delivered that some of the officers contemplated by that section of the Constitution should be named. In that case it was said by the court, in relation to offices of the nature of the one now under consideration: "In the creation of these and kindred offices, it is within the power of the General Assembly to provide by law that such offices may be filled either by election or by appointment, and when to be filled by appointment it need not provide that such ap-

pointment shall be made by the governor. Such appointments, if the law so provides, could doubtless be made by the governor of the State, or by anyone or more of the administrative state officers." What was said of officers other than the one involved in the case, being beyond the actual controversy between the parties to the suit, was, of course, of no binding force; but it is of value, as it tends to index the mind of the court, in a matter illustrative of the actual adjudication. In this case, however, we are met squarely with the question as to whether the General Assembly possesses the power to confer on the state geologist the legal right to appoint to the office involved in this suit. If it possesses such power, the judgment of the circuit court must be affirmed; otherwise, it must be reversed.

The solution of the question presented for decision depends upon the nature of the office, and the construction to be placed upon this provision of our State Constitution.

The office is not an administrative state office, whose incumbent is charged with the administration of a separate department of the state government. The duties to be performed are such as pertain purely to the police. It is an office, therefore, which may be filled by appointment, and as the appointment of the incumbent is not provided for in the Constitution, the case falls clearly within the provisions of § 1, art. 15. That section applies to such officers only as may be appointed, and for whose appointment no provision is made in the Constitution. As the incumbent to the office in question may be appointed, and as no provision is made in the Constitution for his appointment, the General Assembly has the power to provide, by law, for the manner of his selection. It has the power to provide that such office shall be filled by popular election, or that it shall be filled by appointment. While the appointment to office is generally the exercise of an executive or administrative function, we do not think it must, of necessity, be made by the chief executive; for, by the terms of § 1, art. 8, of the Constitution, the executive department of the State includes the administrative. Of course, it was not the intention that any administrative state officer should perform any duty properly and necessarily belonging to the governor of the State; but it was, we think, the intention that such officers should have the power to perform such duties as should be required of them by law, in the administration of the state government, where such requirement in nowise conflicted with

the powers delegated to the governor alone.

The appointment to office being generally the exercise of an executive or administrative function, the power must be conferred upon some executive or administrative officer; but the state geologist is an administrative state officer elected by the people. The appointment to the office in controversy here by the state geologist is certainly a manner or mode of selecting an officer for whose appointment no provision is made by our Constitution. Nor does such mode of selection in any manner infringe upon the prerogatives of the governor of the State. There are many appointments conferred by the Constitution upon the governor which can in no manner be affected by legislation. The rule upon that subject is stated by Judge Cooley in his valuable work on Constitutional Limitations as follows: "The authority that makes the laws has large discretion in determining the means through which they shall be executed, and the performance of many duties which they may provide for by law they may refer either to the chief executive of the State, or, at their option, to any other executive or ministerial officer, or even to a person specially designated for the duty. What can be definitely said on this subject is this: that such powers as are specially conferred by the Constitution upon the governor, or upon any other specified officer, the Legislature cannot require or authorize to be performed by any other officer or authority; and from those duties which the Constitution requires of him he cannot be excused by law. But other powers or duties the executive cannot exercise or assume except by legislative authority; and the power which in its discretion it confers, it may also, in its discretion, withhold, or confide to other hands." Cooley, Const. Lim. 6th ed. 138.

The office involved in this controversy does not belong to the class which must of necessity be filled by the governor; but it is an office created by statute, largely under the control of the Legislature which created it, and falls within the constitutional provision which confers upon the General Assembly the power to prescribe the mode or manner of selecting its incumbent.

In our opinion, the Statute now under consideration is not subject to the constitutional objections urged against it, and for that reason, the circuit court did not err in sustaining the demurrer to the information in this cause.

Judgment affirmed.

MICHIGAN SUPREME COURT.

Henry C. PENNY, Admr., etc., of Philinda Hurlbut, Deceased,

vs.
Jerome CROUL, Appt.

(....Mich.....)

1. "The opposite party" whose testimony is excluded by Pub. Act 1885, pp. 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

157, as to matters equally within the knowledge of a deceased person, in a suit by the heirs, assigns, devisees, legatees or personal representatives of the latter, means the opposite party in interest, and does not include an executor who has no personal interest in the controversy, which is simply one between the estates of two deceased persons.

2. One interested in the result of a suit

which is in effect between the estates of two deceased persons although brought against an executor individually, because of a right to share in the estate of one of the deceased persons, is excluded by Pub. Acts 1885, pp. 154, 157, as an "opposite party," from testifying to facts equally within the knowledge of the other deceased person, although the witness is not a party on the record.

3. A person sued individually for bonds received from another may show that he received them from the latter as the property of her husband's estate, of which he was executor, as against a claim by her administrator that they belonged to her by gift from the testator.

(*Champlin, Ch. J., and McGrath, J., dissent from propositions 1 and 2.*)

(July 28, 1891.)

APPEAL by defendant from a judgment of the Circuit Court for Wayne County in favor of plaintiff in an action brought to recover the value of certain bonds alleged to have been delivered by plaintiff's intestate during her lifetime to defendant for safe keeping and by him retained. *Reversed.*

The facts are fully stated in the opinions.

Mr. F. A. Baker, with *Messrs. Cutcheon, Stellwagen & Fleming*, for appellant:

In applying statutes like the one under consideration in this case, courts should and do regard not the nominal parties but the real parties, whose interests are involved in the issue.

See *Howard v. Patrick*, 88 Mich. 795; *Duryea v. Granger's Estate*, 10 West. Rep. 568, 66 Mich. 598; *Bachelor v. Brown*, 47 Mich. 366; *Youngs v. Cunningham*, 57 Mich. 154, 155; *Mundy v. Foster*, 81 Mich. 321; *Downey v. Andrus*, 48 Mich. 72; *Wood v. Lenawee Circuit Judge*, 84 Mich. 521.

An executor against whom, personally, an action is brought for property which he has accounted for as executor, can raise the same questions by way of defense that could have been raised by or for the estate had the suit been brought against him as executor.

Patterson v. Dushane, 6 Cent. Rep. 927, 115 Pa. 384; *Gray v. Whitney*, 81* Pa. 332; *Swank v. Phillips*, 4 Cent. Rep. 461, 118 Pa. 482; *Stuckey v. Bellah*, 41 Ala. 700.

In a suit against an administrator, a person, although not a party to the suit, but interested in the result of the case, is not competent to prove statements made by the administrator's intestate, which tend to diminish the rights of the decedent.

Drew v. Simmons, 58 Ala. 468; *Key v. Jones*, 52 Ala. 238, 247; *Louis v. Euston*, 60 Ala. 470; *McOrary v. Rash*, 60 Ala. 374; *Meier v. Thie-man*, 7 West. Rep. 141, 90 Mo. 434; *Soeding v. Bonner & Z. I. Co.* 35 Mo. App. 349.

A party made defendant in form but who is plaintiff in interest, will be considered as plaintiff, and held incompetent if called by plaintiff.

Redman v. Redman, 70 N. C. 257; *Weinstein v. Patrick*, 75 N. C. 344.

The *cestui que trust* is not a competent witness under a statute somewhat like ours, although not a party to the suit.

Gabbett v. Sparks, 60 Ga. 582. See also *Wright v. Jackson*, 59 Wis. 539, 577; *Hall v.*

Hamblett, 51 Vt. 589; *Removal Cases*, 100 U. S. 457, 25 L. ed. 598.

While this suit is in form against Jerome Croul, it is in effect against the estate of Chauncey Hurlbut, deceased. Defendant is the mere agent of the estate and not a party to the suit, unless an heir or legatee. The case might well be entitled *The Estate of Philinda Hurlbut, Deceased, v. The Estate of Chauncey Hurlbut, Deceased.*

Duryea v. Granger's Estate, 10 West. Rep. 568, 66 Mich. 599.

If the real defendant and the opposite party within the meaning of the Statute is the estate of Chauncey Hurlbut, deceased, then the executor, not being an heir or legatee, is a competent witness as to such matters.

Ibid.

Plaintiff could at his own election bring the suit against the executor personally, or in his representative capacity.

Simpson v. Snyder, 54 Iowa, 557; *Scott v. Key*, 9 La. Ann. 213; *De Valengin v. Duffy*, 89 U. S. 14 Pet. 232, 10 L. ed. 457; *Steele v. McDowell*, 9 Smedes & M. 198; *Conger v. Atwood*, 28 Ohio St. 134; *Knox v. Bigelow*, 15 Wis. 415; *Clapp v. Walters*, 2 Tex. 130, 7 Am. & Eng. Encyclop. Law, 845, note 3.

Mr. William H. Wells for appellee.

Morse, J. delivered the opinion of the court:

I am satisfied that the defendant, Jerome Croul, was a competent witness in this case. It was admitted upon the argument by plaintiff's counsel, as it conclusively appears from the record, that the defendant had not converted the bonds in question in this suit to his own individual use; that he took possession of them for the estate of Chauncey Hurlbut, deceased, and has always held them for said estate. It appears that on his first step as executor of Chauncey Hurlbut's estate he inventoried these bonds as the property of such estate, and has ever since accounted to the Probate Court of Wayne County for them and the interest accruing upon them. There is no disguising the issue in this suit. It is really a contest between the estates of Philinda and Chauncey Hurlbut for the ownership of these bonds. With such contest Jerome Croul has no concern, save as executor of the latter estate; and he has and claims to have no personal interest in the subject matter of the suit. This is admitted by the counsel for plaintiff, and yet it is gravely asserted as a matter of law that the plaintiff has a right, by planting his action against Croul individually, not only to apparently change the whole outward face of the contest, but to so shape the conduct and issue upon the trial as to shut out the testimony of Croul as an "opposite party," and, as a consequence thereof, to recover a large sum of money from him personally out of a transaction in which it is admitted he acted as executor, and not for himself, and which he is not allowed to explain, though fraud is charged against him as such executor. There is no excuse for this course, because by the action of Croul the bonds or their proceeds have not been lost to plaintiff's intestate or her heirs. The estate of Chauncey Hurlbut is amply sufficient to pay the judgment in this case twice over.

When we come to examine the question whether or not Mrs. Williams was a competent witness for the plaintiff, it will be plainly apparent why this suit was planted against Jerome Croul individually, and not against him as executor. By making him individually the party defendant the plaintiff has succeeded, under the interpretation of the Statute, to which I shall soon refer, by the court below, in proving his case by the principal heir of Mrs. Hurlbut, and closed the mouth of Croul against denial of her story. If this is a correct construction of the Statute, then it is capable of being made the instrument of the most outrageous injustice, when its enactment was intended to prevent fraud and injustice; and it opens a way by which the estates of deceased persons may be more easily robbed than if no such statute existed; and that, too, by the testimony of those whom the Statute intended to debar from giving evidence in their own behalf of facts equally within the knowledge of the deceased. The Statute, as it now exists, having been frequently amended since its first enactment, reads as follows: "When a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees or personal representatives of a deceased person, the opposite party, if examined as a witness on his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person: . . . provided, that whenever the words 'the opposite party' occur in this section it shall be deemed to include the assignors or assignees of the claim, or any part thereof, in controversy." Pub. Acts 1885, pp. 158, 157. It is evident that this Statute is intended to reach the real party in interest, and not a mere nominal party, who is not interested in the result of the allowance or disallowance of the claim against the estate of a deceased person, except as it becomes his duty as executor or administrator to prosecute or defend a suit in which the estate is interested. The proviso was attached in 1885, no doubt, for the express purpose of preventing the practice which prevailed under the Statute before such amendment of assigning the claim against the estate of a deceased person, and then the assignor being sworn as a witness to prove it. The proviso not only cuts off this method of evading it, but also goes further, and also prohibits the assignee from testifying who, in the absence of a fraudulent intent to evade the law in taking the assignment, would be the person to be benefited by the allowance of the claim. It will thus be seen that the Legislature intended not only that the party owning the claims should not be permitted to testify to the matters equally within the knowledge of the deceased person, but also to prevent any evasion of the Statute. It was in this view of the Statute that we held in *Duryea v. Granger's Estate*, 66 Mich. 508, 10 West. Rep. 568, that an administratrix, if not interested in the estate as heir or otherwise, was not the "opposite party" mentioned in the statute, and against whom its prohibition runs,—citing the fact that in *Howard v. Patrick*, 38 Mich. 795, the administratrix was held within the Statute, for the reason that she was also an heir to the estate of her intestate. It was said in *Duryea v.*

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Granger's Estate that the suit might well have been entitled "*The Estate of Joseph Granger, Deceased, v. The Estate of Edward Granger, Deceased.*" And in this case now under consideration it might well be entitled "*The Estate of Philinda Hurlbut, Deceased, v. The Estate of Chauncey Hurlbut, Deceased,*" as the real controversy is without doubt between these two estates. And while it is necessary that these two estates should be represented by the respective executors as nominal parties, that persons may be before the court, the real contest is none the less between the estates of the deceased persons, in which the executors have no personal interest, and are affected only as they represent the estate. Notice also the language of the Statute, "the opposite party, if examined as a witness on his own behalf," clearly indicating that he is not to be permitted to testify "in his own behalf"—in other words, in his own interest—as against one whose lips are closed by death. In the suit which we are considering, the claim against the defendant was established by the testimony of Mary Ann Williams, who was a niece and heir of Philinda Hurlbut, and Margaret Williams, a daughter of Mary Ann Williams. It appeared clearly from their evidence, before the plaintiff closed his case, that Croul took possession of the bonds and held them as the executor of Chauncey Hurlbut's estate. Margaret Williams testified that Mrs. Hurlbut called for her bonds, and wanted Croul to bring them back to her. That Croul put her off for a while, and then said: "Those bonds were never calculated for you. They belong to Chauncey Hurlbut's estate;" and that she could not prove that they belonged to her. It was not claimed by any of plaintiff's witnesses that Croul was trying to get any personal benefit from these bonds; and it was apparent when the plaintiff rested, that Croul was not the real defendant, but only nominally so, because he had been sued in his individual name; that the real defendant was the estate of Chauncey Hurlbut. The defense then showed the proceedings in the probate court,—the filing of the inventory by Croul, in which these bonds were placed as the property of Chauncey Hurlbut's estate; and Jerome Croul's accounts as executor, in which he accounted to said estate for the interest upon the bonds. It was also shown that there had been no distribution of the assets of the estate, and that Philinda Hurlbut, in her lifetime, and October 1, 1885, gave him the following receipt for the interest upon the bonds, by such receipt recognizing that he held them as executor of her husband's estate: "Received, Detroit, October 1, 1885, from Jerome Croul, 40 coupons of \$10 each, \$400, cut from four per cent U. S. bonds belonging to the estate of Chauncey Hurlbut, deceased. Philinda Hurlbut." But when Mr. Croul attempted to state the conversation with Mrs. Hurlbut by which he became possessed of the bonds, or any material circumstance connected with his possession or holding the same, equally within the knowledge of Mrs. Hurlbut, he was prevented from testifying, under the ruling of the court that he was the "opposite party" mentioned in and intended by the Statute, and therefore incompetent to give evidence of any fact equally

within the knowledge of plaintiff's intestate. The ruling of the court was erroneous.

Another important question arises in the case: Was Mary Ann Williams a competent witness on behalf of the plaintiff to any facts equally within the knowledge of Chauncey Hurlbut, deceased? She is an heir of Phillinda Hurlbut, and, as such, interested in the result of the suit. The nominal plaintiff is the administrator of Mrs. Hurlbut's estate, but Mrs. Williams is one of the real parties to the litigation. I think she comes clearly within the intent of the Statute. This suit, as heretofore shown, is really a controversy between two estates. Neither Penny, the administrator of Mrs. Hurlbut, nor Jerome Croul, who is defending as the executor of Chauncey Hurlbut, can be said to be an "opposite party." The real parties are the opposite parties, and Mrs. Williams is one of them. The case of *Wright v. Wilson*, 17 Mich. 192, referred to in the brief of plaintiff's counsel, does not touch this case; and *Pendill v. Newberger*, 64 Mich. 290, 12 West. Rep. 47, also cited to sustain the competency of Mrs. Williams as a witness, is not applicable. In the last case, a son and heir-at-law of a deceased party was held not disqualified to testify to a conversation between his deceased father and the defendant. The defendant was living. Had he been dead, and the suit being defended by his executor or administrator, the case would be in point. As it is, it has no relevancy to the issue here. I do not deem it necessary to cite adjudications from other States. This is a question depending upon our own Statutes, and I think has been settled by our own court. In *Howard v. Patrick*, 88 Mich. 795, and *Duryea v. Granger's Estate*, 66 Mich. 593, 10 West. Rep. 568, the reasoning of the opinions would preclude Mrs. Williams from testifying to facts equally within the knowledge of Chauncey Hurlbut, upon the ground that she is an "opposite party" as against his estate. In the first case the testimony of Mrs. Howard was rejected. She was an heir of the estate, as well as administratrix. The question was mooted whether Mrs. Evans, a sister of Mrs. Howard, and equally with her an heir-at-law of her father, was a competent witness under the Statute. It was passed, however, without decision, because it was shown that Mrs. Evans had assigned her interest in the claim, and had no interest in the result of the suit. This was before the amendment precluding an assignor from giving evidence. In *Backelder v. Brown*, 47 Mich. 866, the real party, who was defending the suit, brought by an executor upon a promissory note, was held to be the real party in interest, and therefore the "opposite party" of the Statute, within its meaning and intent, although he did not appear upon the record as a party to the suit.

In keeping with this principle, that the court should look at the real and not the nominal parties in a cause, is the case of *Wood v. Lenawee Circuit Judge*, 84 Mich. 521, where the question to be considered was an amendment changing the names of parties to a suit. It was there held that the heirs were the real parties to be benefited by the litigation, and that therefore the substitution of the names of

such heirs for the name of the administrator was admissible. It was also held in *Youngs v. Cunningham*, 57 Mich. 153, *Mr. Justice Charnlin* writing the opinion, which was concurred in by all the members of the court, that B. F. Cunningham, although not a party to the record, was not a competent witness to testify to facts equally within the knowledge of George Cunningham, deceased, whose wife and children were defending in ejectment, because B. F. Cunningham had executed to the plaintiff, Youngs, a warranty deed of the land in question. The court said: "He was under covenant to sustain the title, and the suit was in effect his suit to try the title to the land. If not within the express letter, he comes within the meaning of the Statute, and is precluded thereby from testifying to facts equally within the knowledge of the deceased." In *Mundy v. Foster*, 81 Mich. 821, in a suit in chancery by a husband to have a trust deed of his deceased wife declared void, and in which the trustees named in such deed were the party defendants, in speaking of the husband's evidence the court said: "When he assumed to testify to the verbal agreement [with his wife], his possession, if not literally within the terms of the Statute against admitting a surviving party to a transaction to testify in certain cases (Comp. Laws 1871, § 5068), was clearly within its policy; and in my judgment he was not a proper witness to prove the making of the contract." It will be noticed that the Statute since then has been broadened and made more far-reaching by amendments, all of which amendments have been on the road to reach the real parties in interest, and to preclude them from testifying to facts equally within the knowledge of the dead person, whose estate is sought to be depleted by such testimony in the interest of the party offering it. The court erred in permitting Mary Ann Williams, an heir-at-law of Mrs. Hurlbut, to give evidence of conversations between Chauncey Hurlbut and his wife, and between said Hurlbut and the witness.

It is argued that the plaintiff had a right to plant this suit against Jerome Croul individually; that the action is one of bailment, and that it is doubtful if Croul could dispute the title of his bailor; but in any event the estate of Chauncey Hurlbut could not be bound by the result of this suit. The right to plant this suit against Jerome Croul individually may be conceded, but the right to maintain it depends upon the facts and circumstances proven in the case. In our opinion, it must be conceded that Jerome Croul had the right to show that he received these bonds of Phillinda Hurlbut, of her own free will and consent, and on the understanding that he received them by virtue of his being appointed one of the executors under the will of Chauncey Hurlbut, and as the property of said estate; and that he has the right to come in and defend as such executor, and to maintain and prove by competent testimony that the bonds never belonged to Phillinda Hurlbut or her estate, but have ever been, and now are, the property of Chauncey Hurlbut and belong to his estate,—and the estate will be bound in such case by the result of the litigation. In *Hillman v. Schwenk*, 68 Mich. 297, 12 West. Rep. 661, and *Hillman v. Schwenk*, 68 Mich. 301, a similar case, the

executor of an estate was permitted to indemnify the defendant and assume the defense of a suit brought upon a promissory note; and it was held by so doing the estate would be bound by the result; and, further, that in such case the plaintiff would be precluded from testifying to facts equally within the knowledge of the deceased, although the maker of the note was the person sued and the defendant of record. The issue in those cases was similar to the issue in this. The plaintiff claimed to have obtained the note from the testator by purchase before his death. The executor defended upon the ground that there was no such purchase. Here the claim to the bonds is that they were a gift. The executor's defense is that there was no gift. In the *Hilman v. Schwenk* Cases the defendants had no interest in the result except to pay the note to whom it might be found to belong; and in this case Jerome Croul individually has and claims no interest in these bonds. His only concern is to account to the owner of them. The defense that he is making is the defense of Jerome Croul as executor, which it would have been his duty to have made had the bonds been in the hands of a third person and such third person had been made a defendant in this suit instead of Croul. He could have stepped in, had the third person been sued, and defended as the executor of Chauncey Hurlbut, under the authority of *Hilman v. Schwenk*, and under every principle of law and justice; and we know of no reason why he cannot equally and as well defend as executor in case the suit is planted against him individually, instead of being brought against another, when the issue is the same, to wit: Do the bonds belong to the estate of Philinda Hurlbut, or to the estate of Chauncey Hurlbut?

The judgment of the court below must be reversed, and a new trial granted, with costs of this court to defendant.

Long and Grant, JJ., concur with Morse, J.

Champlin, Ch. J., dissenting:

The plaintiff is the administrator of the estate of Philinda Hurlbut, deceased, and as such brought this suit in assumpsit against the defendant to recover the value of forty United States government bonds, which plaintiff claims the deceased in her lifetime placed in defendant's hands for safe keeping, to be redelivered to her on demand; and that she demanded them and he refused to deliver them to her, but claimed that they were the property of the estate of Chauncey Hurlbut, deceased, of which he was executor. Chauncey Hurlbut, at and prior to July 4, 1885, was the owner of the bonds in question. He had in 1879 made a will, which was, after his decease, admitted to probate, in which he gave his wife his horses, carriages, household furniture, and \$10,000 absolutely, and the income of the estate for her life. After her death a few small bequests were to be paid, and the residue of the estate went to trustees for the perpetual benefit of the Detroit Water-Works. *Penny v. Croul*, 76 Mich. 471, 5 L. R. A. 868.

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and his will was admitted to probate October 18, 1885. He left Philinda Hurlbut, his wife, surviving him, and no child. Jerome Croul and Philinda Hurlbut were appointed executors, and they qualified; but Philinda Hurlbut never took any part in the execution of the trusts of the will, or in the administration of the estate. She died October 4, 1886, intestate, and the plaintiff in this suit was appointed administrator of her estate. Mrs. Hurlbut had no children. Her father and mother died before she did. Mary Ann Williams is her sister, and Margaret Williams is a daughter of Mary Ann. It is claimed on the part of the plaintiff that Chauncey Hurlbut, on the 4th day of July, 1885, gave to his wife, Philinda, forty United States government bonds of the denomination of \$1,000 each, and accompanied the gift by immediate personal delivery, in the presence of Mary A. Williams and Margaret Williams; and upon the trial of this cause the plaintiff introduced testimony to establish such gift *inter vivos*. One of the witnesses produced to establish the facts upon which the plaintiff relies for a recovery is Mrs. Mary Ann Williams; and her competency to testify in the cause under the Statute presently mentioned is challenged by defendant. The plaintiff also claims that after Mr. Hurlbut's death the defendant, Croul, was at the house of the widow, and was informed by her of the gift to her of the aforesaid bonds, and that defendant, Croul, represented that it was very dangerous to keep such bonds in the house,—that there was danger of their being murdered,—and offered to take care of the bonds by placing them in a safe, and promised, if Mrs. Hurlbut would do so, that she might cut off the coupons, and that he would deliver them to her whenever she demanded them; and thereupon she delivered them to him for safe-keeping. The exact date at which this occurred is not given by the plaintiff's witnesses. Margaret Williams testified that it was after the probate of the will. Mrs. Williams also thinks it was after the will was proved, but is not certain that it was not before. Mr. Jerome Croul testified that he received the bonds in suit on the 14th day of September, 1885, as the property of Chauncey Hurlbut, and that he had always held them as the property of Chauncey Hurlbut; that they were received by him from Mrs. Hurlbut, in the presence of John Lund. The witness Alexander McArthur testified in behalf of the plaintiff that he had a conversation with the defendant about four months after the funeral of Chauncey Hurlbut, in which Croul said that "he had got forty thousand dollars in bonds of the old lady; and I asked him how he done that, and he said, 'I got them for safe-keeping,' and that 'she never would smell of them again.'" Mr. Croul was sworn in his own behalf, and testified that Mr. Lund was present when he received the bonds from Mrs. Hurlbut; but Lund was not called to dispute or contradict the testimony given by plaintiff's witnesses as to what transpired on that occasion. The fact that October 1, 1885, Mrs. Hurlbut signed a receipt for \$400 for the coupons in which Croul had inserted the statement, "Cut from four per cent U. S. bonds belonging to the estate of Chauncey Hurlbut, deceased," was not conclusive that those bonds

belonged to the estate of Chauncey Hurlbut. If the bonds were Mrs. Hurlbut's individual property, she was entitled to the interest; and likewise was she entitled if they belonged to the estate, as the will gave her the whole income during her lifetime. The defendant was permitted to introduce any evidence which he had to show that the bonds belonged to the estate of Chauncey Hurlbut at the time of his death, and this receipt was competent testimony to be considered as tending to show that the bonds belonged in fact to the Hurlbut estate. Defendant, Croul, offered to testify fully to the interview with Mrs. Hurlbut when he received the bonds from her, but it was excluded under the Statute. It is error to suppose that, if Penny, as the administrator of the estate of Mrs. Hurlbut, had brought this action against Croul as executor of the last will of Chauncey Hurlbut, deceased, he would have been a competent witness to testify to facts which, if true, were equally within the knowledge of the deceased, Mrs. Hurlbut. The Statute is not based upon the interest or disinterestedness of a party who seeks to testify as a witness, but upon the injustice and impropriety of permitting a party to an action with a representative of a deceased party testifying at all to matters within the knowledge of the deceased, whose executor or administrator has brought or is defending the suit. The mere fact that he is sued as executor would not permit him in a court of law to open his mouth to testify to facts which the other party could not testify to, because his mouth is sealed by death. The law never intended such an absurdity. If it had intended to make an exception in favor of the opposite party, who should chance to be appointed executor or administrator, it would have so declared. There is no more reason for repealing the plain provisions of the Statute by judicial fiat in favor of executors and administrators than there is in favor of any other disinterested parties; and the law makes no exception in favor of disinterested parties. While the Statute has been construed as embracing within its spirit the real as well as nominal parties to a suit, no well-considered case has made an exception of the parties to the record. This will be apparent from a review of our decisions upon that section of the Statute.

In the case of *Downey v. Andrus*, 48 Mich. 65, all the cases to that time were reviewed. In *Eccard v. Brush*, 48 Mich. 8, a suit against executors and trustees, held, that complainant could not testify to matters equally within the knowledge of the deceased. In *Rayburn v. Mason Lumber Co.*, 57 Mich. 273, held, that the opposite party cannot be permitted to testify to matters equally within the knowledge of a deceased officer of the company sued, nor of a deceased partner in a suit against a partnership. In *Poster v. Hill*, 55 Mich. 540, the bill was filed by the widow and some of the heirs of a deceased person against another heir to set aside a deed executed by the deceased in his lifetime on the ground that it had been obtained by fraud and forgery. Held, that the parties were excluded from testifying as to matters equally within the knowledge of the deceased. In *Schrats v. Schrats*, 35 Mich. 485, it was held that the Statute applies where the

knowledge which the deceased had was proved through letters passing between the parties; and it was held, further, that counsel had a right to cross-examine, to ascertain fully with reference to such matters testified to, which were equally within the knowledge of the deceased party, and might then move to strike out the whole of such testimony because incompetent under the Statute. The testimony elicited on cross-examination is the testimony given in behalf of the party calling the witness. In *Brown v. Bell*, 58 Mich. 58, it was held that this Statute did not apply to proceedings to probate a will on the ground that until the will was probated there was no representative of the deceased, and no one who could be called an opposite party to such representative. The same was held in *Schofield v. Walker*, 58 Mich. 96. In *McChintock's App.*, 58 Mich. 155, it was held that proceedings upon distribution of the estates of deceased persons did not come within the section of the Statute, and that all the heirs might be compelled to testify; that it was in effect a suit between the distributees, who each represented his own interest. In *McMillan v. Bissell*, 63 Mich. 66, 5 West. Rep. 706, the bill was filed by the executors of the last will of Hugh Moffat, deceased, against the daughter and son-in-law of the deceased. The daughter was the residuary legatee of one share he had left, and the son-in-law was also a legatee, so far as the share should be applied to an indebtedness due from him to the estate. Held, that they could not testify to any fact equally within the knowledge of the deceased while living. In *Stackable v. Stackable's Estate*, 65 Mich. 515, 8 West. Rep. 812, it was held that a married woman, who had a husband living, who had boarded the deceased, was not entitled to the money due for board, and could not present it as a claim against the estate without an assignment from her husband; and that she was an assignee within this Statute, which precludes assignees from testifying to facts within the knowledge of the deceased party. In *Rufum v. Porter*, 70 Mich. 628, 14 West. Rep. 896, the bill was brought against a purchaser from the heirs of a deceased person. Held, that he was not a competent witness. In *Hillman v. Schwenk*, 68 Mich. 298, 12 West. Rep. 661, held, that the testator's personal property vests in the executor for the purpose of administering the estate; and, where suit was brought upon a note which the defendant claimed belonged to the deceased party at his death, and the executor indemnified the defendant, and took upon himself the defense of the suit, the plaintiff was disqualified from testifying; and held, also, that legatees and devisees did not represent the estate in the prosecution or defense of suits. In *Taylor v. Bunker*, 68 Mich. 258, 12 West. Rep. 565, plaintiff brought suit against an administrator. Held, that the testimony was not rendered admissible by the fact that other parties were present and had knowledge of the matters testified to equally with the deceased. In *Hood v. Olin*, 68 Mich. 165, 12 West. Rep. 503, the plaintiff claimed title to certain property as mortgagee under a mortgage by one Nead, and brought a replevin against the firm of Ware & Olin. During the pendency of the suit Ware died. Held, that the statute did not prevent Nead from testify-

ing to matters equally within the knowledge of Ware or the firm. *Bassett v. Shepardson*, 52 Mich. 5, announces the general doctrine. In *Singer Mfg. Co. v. Benjamin*, 55 Mich. 330, the action was replevin, brought against the defendant individually. Held, that defendant in replevin, under a plea of the general issue, could show that plaintiff had no right to possession when suit was commenced, and for this purpose could show that he was special administrator of a deceased person, who was the owner of goods at the time of his death; and, having shown that he defended in a representative capacity, a witness, who had been agent of the plaintiff corporation, was excluded from testifying to matters which, if true, were equally within the knowledge of the deceased, and which knowledge the witness acquired while he was agent. In *Hillman v. Schwenk*, 68 Mich. 297, 13 West. Rep. 661, held that, in a suit brought to recover upon a note made payable to a person since deceased, indorsed by said deceased in his lifetime, and which note it was claimed belonged to the deceased at the time of his death, and had been improperly obtained by the plaintiff, and where a legatee was assuming the defense, this fact did not prohibit the plaintiff from testifying as to matters equally within the knowledge of the deceased. In *McCutcheon v. Loud*, 71 Mich. 438, plaintiff made a contract with one Gay, who was trustee for a firm of which he was a member. Gay died. Held, that plaintiff could not testify to the contract made with Gay, as the suit was brought against and defended by the surviving partners. *Lautenschlager v. Lautenschlager*, 80 Mich. 290, 291, was a proceeding to probate what was claimed to be a will, and it was held that the statute did not apply to such proceedings. In *Wilson v. Wilson's Estate*, 80 Mich. 472, Eliza Wilson presented a claim before the commissioners on claims in the estate of Helen Wilson, deceased. Held, that a daughter of the claimant was a competent witness to testify to matters equally within the knowledge of the deceased. In *Lake v. Nolan*, 81 Mich. 115, it was held, in a controversy between an alleged grantee and a widow claiming her dower right, that the Statute did not apply. In *Barker v. Hebbard*, 81 Mich. 267, after the trial defendant died, and upon the second trial the plaintiff offered to introduce a stenographer's minutes of what plaintiff swore to on the first trial. Held, excluded by the Statute. *Jackson v. Cole*, 81 Mich. 440. This was not a suit wherein the representative of the decedent is a party to the record. Plaintiff sued defendant upon a claim against him, assigned to her by her husband in his lifetime. Held, that she was a competent witness to testify to the assignment. *Lytle v. Chicago & W. M. R. Co.*, 84 Mich. 298, held that testimony of a party is admissible as to matters equally within the knowledge of an agent of a corporation, since deceased, if such matters testified about were also within the knowledge of any surviving officer or agent of the corporation.

There certainly is nothing in these authorities to support the contention that Croul is a competent witness to testify to matters which were equally within the knowledge of Philinda Hurlbut, because he claims these bonds as an

executor of the estate of Chauncey Hurlbut, deceased.

If this reasoning is to prevail, which is claimed by the defendant's counsel, we have a case prosecuted and defended by the representatives of deceased persons, where the Statute says the opposite party shall not be permitted to testify, and yet where they both can testify. The estate is not supposed to be in possession of facts about which it can speak, even if permitted to by the Statute. I always supposed that the estate of a deceased person is the property left by the person upon his death, and that the legal title to personal property vested in the executor or administrator, and that the person having the legal title to the property is the real party in interest. It is said that executors are merely agents of the estate, and not parties to the suit. If mere agents, and not parties, then death would have no effect to abate the suit; the party would be still before the court. But, as I read the Statute, an agent, though sued, is not exempt from the prohibition of the Statute. An agent may possess knowledge of facts which were equally within the knowledge of the deceased, and, if sued by a representative of the deceased as a party, he could hardly be permitted to testify to such matters by showing that he was an agent. Indeed, the deceased may have been his principal, and the suit may have arisen out of that relation. The case of *Duryea v. Granger's Estate*, 60 Mich. 599, 10 West. Rep. 568, is relied on to support the contention that Croul is a competent witness. The case was not reversed upon that ground. Two of the judges merely concurred in reversing, without assenting to the reasons given for the reversal. That was a case of a claim presented against the estate of a deceased party. This is not. Counsel for the defendant says in his brief that this "case may well be entitled '*The Estate of Philinda Hurlbut, Deceased, v. Estate of Chauncey Hurlbut, Deceased*.'" There is no principle of pleading or practice which will authorize a cause to be so entitled, even if it had been against Jerome Croul, executor of the estate of Chauncey Hurlbut, deceased. Cases should be entitled with the names of the parties to the suit. In a suit brought by an executor or administrator, the administrator or executor is the party, and not the estate. The parties to the suit determine how the papers in the suit should be entitled, but the entitling never determines who are the parties. It would be a novel way to determine who is "the opposite party" under the Statute by entitling papers in the suit in any particular name. Would a declaration which commenced with "The Estate of Philinda Hurlbut, plaintiff in this suit, files this declaration against the estate of Chauncey Hurlbut in a plea of," etc., bring any parties before the court? Is there any rule of pleading heretofore discovered that would sanction such pleading? Yet, in order to evade the Statute, and build up a fictitious construction, the estate must be invested with an entity, and called a party to the suit, to let in the representatives of the deceased to testify, when the Statute plainly forbids it. Where the suit is between representatives of deceased parties the Statute prohibits both of those representatives from testifying; yet, under this construction, by a strange metamor-

phosis,' both can testify simply by calling the suit one between two estates. Croul, as executor, is not a mere nominal or disinterested party. If the property belongs to him as executor, he is really the party possessed of the legal title. Does the Statute permit him, even if he is so invested with the legal title, and is seeking to defend it, to testify to facts which were in the knowledge of the deceased party, who, in her lifetime, claimed to own the property, and whose administrator is seeking to recover it for her, and whose title Croul is disputing?

Before proceeding to the determination of the competency of the witnesses, it is necessary to consider the character in which the parties to this suit stand before the court. It is claimed that the question of the competency of the witnesses should be considered as if the suit was instituted against Jerome Croul in his representative capacity as executor of the last will of Chauncey Hurlbut. But I do not accede to this proposition. According to his own testimony, he must have received these bonds in his individual capacity, before he was appointed executor, and before the will was admitted to probate. If the bonds were the property of Philinda Hurlbut, it can make no difference how he regarded them. It is possible that she might, after he had collected the avails from the United States, and turned them in to the estate, maintain an action for money had and received against him as executor, so as to be reimbursed out of the assets of the estate. *De Valengin v. Duffy*, 39 U. S. 14 Pet. 288, 10 L. ed. 457; *Baring v. Putnam*, 1 Holmes, 281; *Conger v. Atwood*, 28 Ohio St. 134. The general rule is that, where the executor does some act or makes some promise after the decease of the testator, he is chargeable in his individual capacity, and not as executor. The exception is limited to cases where the transaction which constituted the cause of action arose in the lifetime of the deceased. Such is not this case. The transaction which constitutes the cause of action here arose after the decease of Chauncey Hurlbut, and is based upon a contract of bailment between Jerome Croul and Philinda Hurlbut. As a general rule, a bailee cannot dispute the title of the bailor, but it is a defense to an action brought against him by the bailor for non-delivery of subject bailed that it was taken by or delivered to a person having paramount title and right of possession. In such case the burden of proof is upon the bailee. In this case Jerome Croul, the individual, and Jerome Croul, as executor of the last will of Chauncey Hurlbut, deceased, are two distinct persons in the law. One represents Jerome Croul, the individual, and the other represents the estate of Chauncey Hurlbut, deceased. It was just as competent for him to show in defense for not delivering these bonds that they belonged to him as executor, as it would have been to show, if such had been the fact, that they belonged to the Preston National Bank. Although that defense was open to him, and he was not shut out from it in this case, yet he, as executor, was no more a party to the suit than would the Preston National Bank have been had he sought to show that he had delivered the bonds to it on demand, and that it had the paramount title and right to the possession thereof. The important issue in the suit was,

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In whom was the paramount title? and this should be borne in mind in testing the competency of the witnesses to testify in this cause. The plaintiff, as administrator of the estate of Philinda Hurlbut, claimed the paramount title, which was delivered through an executed gift of the bond by Chauncey Hurlbut to Philinda Hurlbut. The defendant claims that the paramount title was in the executor of the last will of Chauncey Hurlbut. Individually he made no claim to the bond, but denied his liability as bailee. Neither in this suit did the estate of Chauncey Hurlbut claim the bonds. Jerome Croul individually made the claim that he had delivered the bonds to the executor of Chauncey Hurlbut's estate. The Statute referred to reads as follows: "That when a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness on his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person." 2 How. Stat. § 7545. This suit is prosecuted by plaintiff as the representative of Philinda Hurlbut, deceased, against Jerome Croul in his individual capacity; and, as he is the opposite party, he is excluded by the plain terms of the Statute. A judgment in this case will not bind the assets of the estate of Chauncey Hurlbut in the hands of the executor, and cannot be collected by the plaintiff out of such assets. He was therefore not a competent witness to testify to matters equally within the knowledge of Philinda Hurlbut. *Yerkes v. Blodgett*, 48 Mich. 211; *Downey v. Andrus*, 43 Mich. 65; *Bassett v. Sheperdson*, 52 Mich. 8.

Bachelder v. Brown, 47 Mich. 366, is cited as supporting the contention of the defendant. That case holds that where an executor brings suit upon negotiable paper, and a third person claims the paper, and takes upon himself the defense of the suit upon that ground, such third person is deemed an opposite party to the executor, and cannot testify to facts which, if true, must have been within the knowledge of the deceased. We adhere to the principle there asserted. It shows that, if it were true that the third party here, viz., Jerome Croul, as executor, and representing the estate of Chauncey Hurlbut, claims the bonds, and has taken upon himself, as such executor, the defense of the suit, he is not a competent witness to testify to any facts which, if true, were equally within the knowledge of Mrs. Hurlbut. The mistake which it seems to me the counsel for the defendant make is the assumption that Jerome Croul is not the real party defendant, when in point of fact and law he is. As before stated, if he could have been made liable as executor (which is at least doubtful), the plaintiff having elected to proceed against him individually, he is bound by the election, and defendant must respond in damages, unless he, as an individual, can show he has delivered the bonds to a person who has a title paramount to that of the administrator. Mrs. Williams was a competent witness for the plaintiff. The suit was not defended by the personal representatives of a deceased party. This disposes of the errors assigned. The defendant was permitted to introduce any competent testimony tending to show

that the bonds in question belonged to the estate of Chauncey Hurlbut, and also that he had always treated them as belonging to the estate; that he had included them in his inventory, and had accounted for both principal and interest to the estate. The estate is not yet closed, and if he has acted under a mistake of fact it is presumed it may be rectified. The court instructed the jury that the plaintiff must establish the fact claimed by him that the bonds in question were given by Mr. Hurlbut to his wife, Philinda Hurlbut, and delivered to her, by a preponderance of evidence, and that the

burden of proof was upon the plaintiff upon that issue; and in conclusion he said: "If you believe from all the evidence that these bonds, at the time Mr. Hurlbut died, were found in the house, and given to Mr. Croul after his death,—were not the property of Mrs. Hurlbut,—then your verdict will be for the defendant. If you find from the evidence that it was the property of Mrs. Hurlbut at the time of Mr. Hurlbut's death, then your verdict will be for the plaintiff." I think the judgment should be affirmed.

McGrath, J., concurs with Champlin, Ch. J.

NEW YORK COURT OF APPEALS (2d Div.).

† William H. CROSSMAN *et al.*, *Appts.*,
v.
UNIVERSAL RUBBER CO. of New York,
Reapt.

(....N. Y....)

1. An election of remedies is not made by attachment and bill in chancery based on

fraud in procuring credit on a purchase by an insolvent corporation so as to defeat an action on subsequently maturing purchase-money notes, as the remedies are not inconsistent, being in each instance for the recovery of price.

2. To prevent abatement of an action on purchase-money notes, it may be shown that a prior attachment and bill in chancery for the recovery of the debt had been respectively discontinued and unproductive.

NOTE.—The law as applied to the election of remedies.

Mr. Bigelow, in the fifth edition of his well-known work on Estoppel (1860), concisely states the law applicable to the doctrine of election: "A party cannot, either in the course of litigation or in dealing *in pais*, occupy inconsistent positions. *Strosser v. Ft. Wayne*, 100 Ind. 443, 452; *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187; *Moshier v. Frost*, 110 Ill. 206; *Lehman v. Clark*, 85 Ala. 109; *Rabittie v. Orr*, 85 Ala. 185; *Espy v. Comer*, 80 Ala. 338; *Jones v. Clouser*, 14 West. Rep. 283, 114 Ind. 887. Upon that rule election is founded; 'a man shall not be allowed,' in the language of the Scotch law, 'to approbate and reprobate.' *Oiting Re Cheesham*, L. R. 31 Ch. Div. 466, 473; *Chitty, J.* And where a man has an election between several inconsistent courses of action, he will be confined to that which he first adopts. *Steinbach v. Relief F. Ins. Co.* 77 N. Y. 498; *Fields v. Bland*, 81 N. Y. 239; *Scholey v. Rew*, 90 U. S. 23 Wall. 331, 23 L. ed. 99; *Rodermund v. Clark*, 46 N. Y. 354; *Morris v. Rexford*, 18 N. Y. 552. See *Meyer v. Clark*, 45 N. Y. 238; *Succession of Monette*, 26 La. Ann. 28; *Weedon v. Landreaux*, Id. 729; *Connihan v. Thompson*, 111 Mass. 370; *Watson v. Watson*, 128 Mass. 182; *Lilley v. Adams*, 108 Mass. 50; *Sloan v. Holcomb*, 29 Mich. 156; *Kunzie v. Wixom*, 39 Mich. 384; *Walsh v. Varney*, 38 Mich. 73; *Thompson v. Howard*, 31 Mich. 309; *Stoddard v. Cutcompt*, 41 Iowa, 230; *Lee v. Templeton*, 78 Ind. 315. The election, if made with knowledge of the facts, is in itself binding,—it cannot be withdrawn without due consent; it cannot be withdrawn though it has not been acted upon by another by any change of position." *Kinney v. Kiernan*, 49 N. Y. 164; *Syme v. Badger*, 22 N. C. 706; *Mendenhall v. Mendenhall*, 8 Jones, L. 237; *Jones v. Gerock*, 6 Jones, Eq. 180; *Yorkley v. Stinson*, 97 N. C. 236, 240; 1 Bigelow, *Fraud*, 426.

What is conclusive evidence of election.

The case of *Conrow v. Little*, 5 L. R. A. 693, 115 N. Y. 357, 353, is to the effect that the commencement of the action, where all the facts are known, is conclusive evidence of an election. There must be a time when the election of the parties should be considered final, and that time is determined by the commencement of an action to enforce a particu-

lar remedy. It was also held that the discontinuance of such an action was immaterial. It was the fact that the plaintiffs once elected their remedy, and acted affirmatively upon such election, that determined the issue. After that the option no longer existed, and it was of no consequence, therefore, whether the plaintiffs did or did not make their choice effective. 2 *Herman, Estoppel*, 1172, § 1045.

Any decisive act of the party, with knowledge of his rights and of the fact, determines his election in the case of conflicting and inconsistent remedies. *Sanger v. Wood*, 3 Johns. Ch. 416, 1 L. ed. 668.

In *Mattlage v. Poole*, 15 Hun, 556, it was held, in substance, that where a vendor sells goods to the agent of an undisclosed principal, he may elect whether he will sue the agent for the price of the goods or the principal, but that he cannot have a recovery against both, and that where he has prosecuted the one to judgment he can have no recovery against the other.

In *Bank of Beloit v. Beale*, 34 N. Y. 473, the plaintiff had prosecuted his action, in which he affirmed the act of his agent, and stress was laid upon that fact. *Davies, Ch. J.*, cited *Lloyd v. Brewster*, 4 Paige, 537, 3 L. ed. 551, in which the like fact existed and was made the basis of the decision, and *Leonard, J.*, cited the case of *Morris v. Rexford*, 18 N. Y. 552, where the plaintiff had replevied his goods.

In *Wright v. Kitterman*, 4 Robt. 704, 1 Abb. Pr. N. 8, 423, it was held by the Superior Court of the City of New York that the pendency of an action on a contract for goods sold and delivered will not prevent the bringing of an action for the conversion of the same goods; that the plaintiff may have two remedies in such a case, and an adjudication brought to obtain either, whether for or against him, may be a bar to the other; but at any time previous to such an adjudication, he may discontinue the first action and proceed with the second.

Something more than the mere bringing of a suit is necessary to make the election final and conclusive, and to constitute it the act must be a clear and affirmative one, changing the relations of the parties to the subject matter, and which the party making the election cannot retract without the other's consent. *Deens v. Dunklin*, 33 Ala. 47; *Bennett v. Goldthwait*, 109 Mass. 494.

(April 21, 1891.)

APPEAL by plaintiffs from a judgment which had been entered, in accordance with an order of the General Term of the Superior Court for the City of New York, after it had considered exceptions ordered to be heard before it in the first instance, upon a verdict which the judge holding the Trial Term had directed to be returned in favor of defendant in an action brought to recover the amount alleged to be due on a promissory note. *Reversed.*

Statement by Bradley, J.:

Appeal from judgment entered pursuant to order of the General Term of the Superior Court of the City of New York, denying new

Where a party takes legal steps to enforce a contract, this is a conclusive election not to rescind on account of anything then known to him. *Conrow v. Little*, 5 L. R. A. 698, 115 N. Y. 387.

There are many cases where the fact of bringing suit to enforce one of two inconsistent remedies has been held an election, although the suit has not proceeded to judgment. One class of those cases is where the plaintiff has realized some benefit from the suit by means of a provisional remedy therein, or otherwise, as in *Morris v. Rexford*, 18 N. Y. 552, where, in replevin, the plaintiff obtained a redelivery of his goods; or in *Butler v. Hildreth*, 5 Met. 48, where the plaintiff secured his demand by an attachment of property.

It is said in an instructive note to the case of *Smith v. Hodson*, 4 T. R. 211, in 2 Smith, Lead. Cas. 7th Am. ed. p. 198, that "whatever may be the rule in other cases, there can be no doubt that when the ground taken in a suit is prejudicial to the other side by cutting off from a good defense, or precluding a recovery on a valid cause of action, it will preclude the person who adopts it from shifting his ground subsequently to the injury of his opponent. . . . The principle applies wherever an attempt is made to gain an inequitable or unfair advantage by presenting the same matter in different and inconsistent aspects. . . . and furnishes the true explanation of most of the cases examined in this note."

The right to rescind a contract for fraud must be exercised immediately upon its discovery, and any delay in doing so or the continued employment, use and occupation of the property received under the contract will be deemed an election to affirm it. *Strong v. Strong*, 3 Cent. Rep. 48, 102 N. Y. 60.

One cannot experiment upon a contract void for fraud by trying to enforce it with knowledge of the fraud, and that result being unsatisfactory seek at last to rescind it. *Acer v. Hotchkiss*, 97 N. Y. 395.

When a party has elected to sue upon a written contract as it is, and has been defeated, he is bound by that election, and cannot thereafter bring an action to reform the contract. *Steinbach v. Relief F. Ins. Co.* 77 N. Y. 498.

Adopting one of several remedies is a waiver of others.

A vendor of goods on a sale and delivery upon cash terms, if he fails to get payment, may consider the delivery absolute and rely on the responsibility of the vendee, or he may disaffirm or reclaim his property. But he cannot do both of these things. The remedies are not concurrent, and the choice between them once being made, the right to follow the other is forever gone. The law 18 L. R. A.

trial, and directing judgment on verdict in favor of the defendant. The plaintiffs, partners doing business in the firm name of W. H. Crossman & Bro., in the City of New York, about the 1st of May, 1888, sold and delivered to the defendant, a corporation of the State of New York, a quantity of goods, at the price of \$9,309, for which the defendant gave them its three promissory notes of date May 5, 1888, payable to the order of the plaintiffs. This action was brought upon the one of them made for \$3,166 61, payable at four months. The defense alleged is that before any of the notes matured the plaintiffs, by bill in chancery in the State of New Jersey, and by attachment in the supreme court of that State, had taken proceedings founded upon alleged fraud in the purchase by the defendant, and that by so doing

tolerates no such absurdity as a seizure of goods by a person claiming that he has never sold them, and an action by the same person, founded on the sale and delivery of the same goods, for the recovery of the price. In peculiar circumstances a party may take either one of these courses, but having rightfully made his choice, the right to follow the other is extinct and gone. *Littlefield v. Brown*, 1 Wend. 404, 7 Wend. 454, 11 Wend. 487; *McElroy v. Mancius*, 13 Johns. 121; *Sanger v. Wood*, 3 Johns. Ch. 418, 422, 1 L. ed. 668-670; *Junkins v. Simpson*, 14 Me. 364; *Butler v. Miller*, 1 N. Y. 496.

A common carrier contracts with his passenger to carry him safely and to treat him respectfully, and if this contract is broken, and the passenger has sustained personal injury through the negligence or wrongful act of the carrier, or his agents or servants, the injured party may, at his election, proceed as for a tort, and recover according to the principles pertaining to that class of actions as distinguished from actions on contract. *Baltimore C. P. R. Co. v. Kemp*, 61 Md. 619, 48 Am. Rep. 134.

Where common-law remedy is available.

It may be laid down as a general rule that when a statute prescribes a new remedy the plaintiff has his election either to adopt such remedy or proceed at common law. Such statutory remedy is cumulative, unless the statute expressly, or by necessary implication, takes away the common-law remedy. *Miles v. O'Hara*, 1 Serg. & R. 32; *Boaz v. Heister*, 6 Serg. & R. 30; *Almy v. Harris*, 5 Johns. 175; *Farmer's Turnp. R. Co. v. Coventry*, 10 Johns. 349; *Colden v. Eldred*, 15 Johns. 220; *Booker M'Robert*, 1 Call. 243; *Bearcamp River Co. v. Woodman*, 2 Me. 404; *Fryeburgh Canal v. Frye*, 5 Me. 38; *Baltimore v. Howard*, 6 Harr. & J. 383; *Coxe v. Robbins*, 9 N. J. L. 384; 8 Chitty, Pr. 180.

If a party resist a recovery against him in a court of law upon a portion of his defense, where he had full knowledge of the whole defense, and where, by due inquiry and ordinary efforts, he could have obtained the proof, he is, like other litigants in similar cases, bound by the election, and is deemed to have waived the grounds of defense so omitted to be made. *Hempstead v. Watkins*, 6 Ark. 317.

But an unsuccessful effort to plead equitable defenses at law will not bar the defendants of relief in equity. *Nelson v. Dunn*, 15 Ala. 501.

And although the defendant in an action at law be able to prove that his signature to a writing obligatory was obtained by fraud, and thus to defeat the action, yet it is competent for him, at his election, to suffer judgment to go against him, and to apply to a court of equity for relief. *Brittin v. Crabtree*, 20 Ark. 309. See note to *Terry v. Munger* (N. Y.) 8 L. R. A. 216.

the plaintiffs had made an election of remedy inconsistent with that of this action. The trial court held that such defense was established, and directed a verdict for the defendant. Upon that subject it appears that the defendant was engaged in business in New Jersey; and that on the 1st of August, 1888, the plaintiffs instituted a proceeding by attachment in the supreme court of that State against the property of the defendant, and that a few days after the plaintiffs filed a bill in chancery in that State against the defendant, as an insolvent corporation, alleging its insolvency, and its indebtedness to the plaintiffs for goods obtained from them; and that the delivery of the goods to it was brought about by fraud, in that the president of the defendant represented to the plaintiffs that the Company was perfectly solvent, by which the plaintiffs were induced to deliver the goods, and take the promissory notes, which they "bring into court and tender themselves willing to surrender, under the direction of the court;" that such representations were untrue, as the corporation was then insolvent, and known by such president to be so; and added that they "repudiate the contract, and would take back the materials delivered, if it were possible to do so;" and the prayer for relief was that a receiver be appointed and injunction issue. A receiver was appointed, whose duty it was to take possession of all the property of the defendant in the State of New Jersey, with a view to the ultimate distribution of the proceeds among its creditors, as provided by the Statute of that State relating to proceedings against insolvent corporations. As the defendant did not answer the bill, its insolvency may be assumed.

Mr. Carlisle Norwood, Jr., for appellants:

An election of remedies in personal actions is only the formal expression of an election of rights. The election of rights is in every case the exercise of the choice open to a party and the remedy selected is merely the expression of the choice made. In every case the courts have held the party to his choice, because his action on making it so affected the rights of the other party that an abandonment of such election to assert some different right would, in consequence of the first choice, be a prejudice to the party against whom such election of rights had been asserted, by cutting him off from a good defense, or precluding a recovery on a valid cause of action.

R. 1 Rol. 726, Z. 15 (Rolle, Abr. p. 726, line 15).

The expression in Comyn's Dig., *Election C. 2*, cited by Earle, J., in *Fowler v. Bowery Sav. Bank*, 4 L. R. A. 145, 118 N. Y. 450: "If a man once determines his election, it shall be determined forever," refers solely to "an election between a remedy by real action and a remedy by personal action," in a certain class of cases. *Equitable Co-op. F. Co. v. Hersee*, 33 Hun, 177.

In personal cases, a party does not have to abide by his first or other choice of a remedy.

Comyn, Dig. *Election, C. 2*, citing Co. Litt. 146, a, p. 178.

Where the courts have held that a party was bound by his "election of remedies," the term 13 L. R. A.

was misused, and in all the cases the courts intended nothing more than that he was bound by an election of rights, to which he gave expression, and of which election of rights he furnished evidence by the remedy or form of action invoked to enforce his rights.

See *Kinney v. Kiernan*, 49 N. Y. 168; *Moller v. Tuska*, 87 N. Y. 166; *Conrow v. Little*, 5 L. R. A. 693, 115 N. Y. 387; *Equitable Co-op. Foundry Co. v. Hersee*, 4 Cent. Rep. 189, 108 N. Y. 26; *Hays v. Midas*, 104 N. Y. 602.

Mr. Benjamin Estes, for respondent:

The plaintiffs have elected their remedy in the actions in New Jersey. They have disaffirmed and repudiated the notes over there and got their remedy, and now seek to affirm what they entirely disaffirm in the other actions. This they cannot do. The course they have pursued in the courts of New Jersey is a perfect bar and defense to this action. It is not merely matter in abatement.

The doctrine of pleading the pendency of a former suit in abatement has no application. The suits are not for the same cause.

Terry v. Munger, 8 L. R. A. 216, 121 N. Y. 162, 167-171; *Conrow v. Little*, 5 L. R. A. 693, 115 N. Y. 387, 393, 394; *Morris v. Rexford*, 18 N. Y. 556, 557; *Moller v. Tuska*, 87 N. Y. 166, 169; *Rodermund v. Clark*, 46 N. Y. 357; *Kennedy v. Thorp*, 51 N. Y. 176; *Fowler v. Bowery Sav. Bank*, 4 L. R. A. 145, 118 N. Y. 450; *Embree v. Hanna*, 5 Johns. 101.

Any decisive act of the party, with knowledge of his rights and of the facts, determines his election in the case of conflicting and inconsistent remedies.

Sarger v. Wood, 3 Johns. Ch. 416, 1 L. ed. 666; *Littlefield v. Brown*, 1 Wend. 398, 11 Wend. 467; *Beach v. Tuch*, 47 Hun. 536.

Powers v. Benedict, 88 N. Y. 605, 610, merely holds that where goods had been sold to a fraudulent vendee, the vendor might disaffirm the contract of sale, issue a writ of replevin for all the goods and take such as could be found and reclaimed, and for the rest he might prove a claim in bankruptcy against the fraudulent vendee for the value of such as could not be reclaimed.

Bradley, J., delivered the opinion of the court:

The question arises whether the proceedings taken by the plaintiffs in the courts of New Jersey constituted an election of remedy inconsistent with that which they seek to enforce by this action upon the note taken by them for a portion of the consideration of the sale of the goods, which was the subject of those proceedings in that State. Those proceedings were taken there with a view to the collection of the purchase price of the goods sold, and such price is represented by the notes. The rule is well settled that, when a party has elected to adopt and has pursued one of two inconsistent remedies, he is not permitted to afterwards avail himself of the other. In Comyn's Digest, *Election*, it is said: "If a man once determines his election, it shall be determined forever; as, if an obligation delivered to the use of A be refused when he is first informed of it, he cannot afterwards accept it." And the same author adds: "But where an election is of several remedies, if he chooses one he may afterwards

have the other in personal cases, as where he has election of several actions." It is the inconsistency of the remedy sought with that he has before adopted and pursued which determines the right of a party as between them; and this, as the consequence, is founded upon the principle that the other party may otherwise be in some manner prejudiced in respect to a defense or cause of action by the abandonment of the one and resort to the other of such remedies. But whether or not that is the effect is not the subject of inquiry. In the case where a party may resort either to an action upon contract or in tort, the election between them concludes him. And the question has more frequently arisen where a purchase of property is obtained by fraud. Then, after the seller has elected to rescind the sale, and has proceeded for the purpose of recovery of the property or for its conversion, he denies to himself the right to abandon that remedy, and seek to recover in affirmance of the sale; and the effect is the same when his election is effectually made to prosecute for recovery of the purchase money with knowledge of the fraud. He then has lost his right to rescind the sale and reclaim the property. *Moller v. Tuska*, 87 N. Y. 166; *Conrow v. Little*, 115 N. Y. 887; *Terry v. Munger*, 121 N. Y. 162, 8 L. R. A. 216. And the same rule is applicable to other cases, where there are two existing and substantially inconsistent remedies. Then the adoption and pursuit of one of them excludes from the party the benefit of the other. *Rodermund v. Clark*, 46 N. Y. 354; *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 4 L. R. A. 145; *Kennedy v. Thorp*, 51 N. Y. 174; *Littlefield v. Brown*, 1 Wend. 398.

But that incompatibility is not applicable to the present case. The attachment proceeding in New Jersey was instituted and had in affirmance of the sale of the goods to collect the purchase money, and the purpose of the suit in chancery there was the same. Neither was founded upon rescission of the contract of sale. Pursuant to the Statute of that State under which the bill was filed, providing for proceedings by creditors of insolvent corporations, domestic and foreign, the plaintiffs filed their bill, and caused the appointment of a receiver of the property of the insolvent defendant. It is true that in the bill they alleged fraud on the part of the defendant in making the purchase, and offered to surrender the notes under the direction of the court. But reference must be had to the nature of the bill, in view of its purpose, and of the Statute under which it was filed, to determine the character of the suit. It is seen that it was founded upon the debt arising out of the sale and purchase of the goods, and instituted to collect the purchase money. The consideration of the sale was what the plaintiffs sought to recover, and the attachment proceeding and the chancery suit were in the nature of proceedings *in rem* for that purpose. It cannot, therefore, properly be said that the plaintiffs sought to or did avoid the contract of sale; but that they did, for the purpose of an earlier remedy to obtain the purchase money, seek, by reason of the alleged fraud, to be relieved from the credit given. This did not have the effect to otherwise impair the contract of sale. *Weissand v. Siechel*, 4 Abb. App. Dec. 595, *3 Keyes, 320. In the suit and proceedings there, as in

the action here, the purpose was to recover or collect the price for which the goods were sold. So far there is no inconsistency of remedy. The credit was there sought to be repudiated for the fraud, because the stipulated time of payment had not then expired. This action was brought after the expiration of that time, and is founded upon the promise of the defendant, furnished by its note, to pay such amount of the purchase money. The giving of the notes was not a payment, but their apparent effect was a suspension of the right of action to recover it. If the plaintiffs had recovered in assumpsit upon the implied promise to pay for the goods the amount of the purchase price, they would have been required to surrender the notes. But this they did not do, and they still hold the note in question. In effect, it is an express promise to pay so much of the purchase money. It is not seen how the remedy by this action is inconsistent with that founded upon the implied promise to pay for the goods; the practical effect is the same, and both proceed upon the affirmance of the sale. While the action upon the note is not consistent with the repudiation and proceeding in disregard of the credit in the courts of New Jersey, the incompatibility in practical effect had relation to the time of application of remedy, and not substantially to its nature or purpose. The conclusion follows that the defense cannot effectually rest upon the doctrine of election of remedies, as those pursued in the New Jersey courts were not inconsistent in their purpose and effect with that of this action. But relief from that defense does not necessarily enable the plaintiffs to recover here. When it appeared, as alleged, that the plaintiffs had taken the proceedings by attachment, and in the chancery suit in that State, their pendency there presumptively operated by way of abatement of the present action, else the plaintiffs may have had the means of twice collecting the same debt against the defendant. *Embree v. Hanna*, 5 Johns. 101. The plaintiffs, however, if the facts permitted, may have shown that those proceedings had been discontinued, or, as they did not charge the defendant personally with the debt, that neither of them was effectual to produce any fund to apply upon their claim, or that they could be productive of a sum applicable to it, sufficient partially only, and to what extent, to satisfy it. The plaintiffs offered to prove that the attachment proceeding had been discontinued; also offered evidence in relation to proceedings founded upon the chancery suit, with the view, as claimed, of making it appear that nothing had been, or could by them, as creditors of the defendant, be, realized by such proceedings; and that such suit was unproductive, through the action of the receiver, for such purpose. Those facts were essentially important, and, if permitted to prove them, it must, for the purposes of the question here, be assumed that they would have been shown by evidence legitimate for that purpose.

The exclusion of the evidence so offered was error, and for that reason the judgment should be reversed, and a new trial granted, costs to abide the event.

All concur, except **Vann and Brown, JJ.**, absent

ALABAMA SUPREME COURT.

HIGHLAND AVENUE & BELT R. CO.,

Appt.,

v.

Margaret A. BURT.

(....Ala....)

Stopping a train drawn by a dummy engine with no regular stopping place for a reasonable time on a request to stop is not the full measure of the conductor's duty, but before starting he must see that no passenger is in the act of alighting, or in a position that will be perilous if the train starts.

(June 8, 1891.)

A PPEAL by defendant from a judgment of the Circuit Court for Jefferson County in favor of plaintiff in an action brought to re-

cover damages for personal injuries alleged to have resulted from the negligence of defendant's servants. *Affirmed.*

Plaintiff was a passenger on one of defendant's trains drawn by a dummy engine. She told the conductor her destination and when the cars stopped there she attempted to get off and was injured. Plaintiff claimed that when the cars stopped she proceeded to alight without delay and that the cars started too soon, throwing her to the ground. Defendant claimed that the cars stopped a reasonable time to allow passengers to alight, that several did alight in safety and that before the conductor signalled to go ahead he looked to see if anyone else wished to get off and failed to see plaintiff, who was alighting from the opposite side of the car.

NOTE.—*Duty of railway conductors in stopping and starting trains.*

It is the duty of railway officials and agents to give passengers at its stations reasonable notice of the starting of its trains (Central R. & Bkg. Co. v. Perry, 58 Ga. 461, 66 Ga. 746), and to give its passengers in its trains due notice of the approach of the train to its stations, in order that the passengers who are to leave the cars may prepare to alight. Dawson v. Louisville & N. R. Co. (Ky.) 11 Am. & Eng. R. R. Cas. 134. See Patterson, Railway Accident Law, § 267.

Degree of care required of carrier.

The highest degree of care and skill is required in the transportation of passengers. Washington & G. R. Co. v. Varnell, 98 U. S. 479, 25 L. ed. 238; George v. St. Louis, Iron Mt. & S. R. Co. 34 Ark. 623, 1 Am. & Eng. R. R. Cas. 294; Delaware, L. & W. R. Co. v. Dailey, 37 N. J. L. 523; Brunswick & A. R. Co. v. Gale, 56 Ga. 822; Baltimore & O. R. Co. v. Wightman, 29 Gratt. 431; Mackoy v. Missouri Pac. R. Co. 18 Fed. Rep. 236; Jamison v. San José & S. C. R. Co. 55 Cal. 563, 3 Am. & Eng. R. R. Cas. 350; Pittsburgh & C. R. Co. v. Pillow, 78 Pa. 510; Pennsylvania Co. v. Roy, 103 U. S. 451, 25 L. ed. 141, 1 Am. & Eng. R. R. Cas. 225.

Where, after coming to a full stop, and while passengers were alighting, the train was suddenly moved without warning, it is immaterial whether the motion was backward or forward. The fact that a passenger injured under such circumstances was intoxicated would not relieve the company from liability. Such intoxication would have a bearing upon the question of contributory negligence. Millman v. New York Cent. & H. R. R. Co. 6 Thomp. & C. 585, 4 Hun, 409, 66 N. Y. 642.

Length of stoppage.

A railway company has not discharged its duty to its patrons or relieved itself from liability to them until it has stopped at the end of their journey a reasonable time for them to get off the train in safety. Jeffersonville, M. & L. R. Co. v. Parmelee, 51 Ind. 42; Keller v. Sioux City & St. P. R. Co. 2 Minn. 173.

It is the duty of a railway company, at a time when passengers are getting out of the cars, after an announcement by the conductor that ten minutes would be given for refreshments, to permit the cars to stand still. Sauter v. New York Cent. & H. R. R. Co. 6 Hun, 448.

Railway trains are bound to stop at stations a reasonable length of time to enable passengers to get on and off. Swigert v. Hannibal & St. J. R. Co. 13 L. R. A.

75 Mo. 475, 9 Am. & Eng. R. R. Cas. 322; Wabash, St. L. & P. R. Co. v. Rector, 104 Ill. 293, 9 Am. & Eng. R. R. Cas. 264.

Signals.

It is the imperative duty of a railroad company, through its proper agents, to give reasonable signals of the departure of its trains from its stations, and they should be such signals as would ordinarily attract the attention of passengers and others interested in the movements of the train. Should a passenger needlessly loiter about a railway station, and neglect to board a train, then the company, as regards such passenger, is only bound to exercise ordinary diligence; and it is the duty of the passenger to use caution in observing signals which might be given by the agents of the company. Perry v. Central R. Co. 66 Ga. 746.

Starting of train.

The fact that the conductor of a train about to leave a station is induced by the conduct and conversation of a person on the station platform to believe that he does not intend to take passage on the train will not relieve the company from liability for injuries received by such person in consequence of the conductor's starting the train without giving him time to get on, provided the conductor actually sees him attempting to board the train when he gives the signal to start. Swigert v. Hannibal & St. J. R. Co. 75 Mo. 475, 9 Am. & Eng. R. R. Cas. 322.

A carrier is liable for injuries to a passenger in alighting from a train, caused by the starting of the train with a jerk without giving sufficient time to alight in safety. Texas & P. R. Co. v. Miller, 11 L. R. A. 395, and note, 79 Tex. 78.

He must provide safe means of access to and from its stations for the use of passengers, and passengers have the right to assume that the means provided are reasonably safe. Delaware, L. & W. R. Co. v. Trautwein, 7 L. R. A. 485, 52 N. J. L. 169; Murphy v. Rome, W. & O. R. Co. 32 N. Y. S. R. 361.

A railroad company is bound to use a high degree of skill and vigilance to guard against accidents to its passengers. Palmer v. Delaware & H. Canal Co. 117 N. Y. 170.

The duty of common carriers with respect to the transportation of persons and property is independent of contract. Delaware, L. & W. R. Co. v. Trautwein, *supra*.

Duty of carrier to land passengers safely. See notes to Missouri Pac. R. Co. v. Northam (Tex.) 3 L. R. A. 308; Walker v. Vicksburg, S. & P. R. Co. (La.) 7 L. R. A. 111.

The court charged the jury as follows:

"It was the duty of defendant, on reaching the stopping place at St. John's Church, to stop the dummy a reasonable length of time for plaintiff to alight, and the plaintiff's duty, when it stopped, to alight with reasonable diligence; that when it stopped, if the conductor went to the car in which plaintiff was, to help the passengers off, and if during such reasonable time given for passengers to alight plaintiff was up and in the act of alighting, it was the duty of the conductor to know it, and not start the train while she was in the act of alighting; that if the train stopped a reasonable length of time for the plaintiff to alight, and at the expiration of such time she was still in her seat, and not in the act of getting off, then the conductor had the right to turn his attention away from the car to the engineer, and to signal the engineer to go ahead, and if thereafter plaintiff arose, and attempted to alight, and fell, the defendant is not liable, unless the conductor or engineer actually knew she was trying to get off, and, so knowing it, could, by the exercise of reasonable care, have prevented her fall." The defendant requested the court to give the following written charges, which were refused: (1) "That, if the train stopped a sufficient time to allow the plaintiff time to get off, then the defendant was not guilty of negligence in its management." (2) "That if the jury believe that the car stopped at St. John's Church a sufficient time for plaintiff to alight, and the conductor, without knowing of the intention of plaintiff to alight there, and without knowing or seeing that she was in the act of alighting, started the train, then the defendant would not be guilty of negligence, and plaintiff would not be entitled to recover." (3) "If the jury believe from the evidence that the train came to a full stop at the place where the plaintiff wished to alight, and remained there long enough for two ladies in another seat of the car to alight therefrom safely, then, on the undisputed evidence, as to the character and construction of the car in which plaintiff was riding, this was a reasonable time for the car to stop for the plaintiff to alight." (4) "That if the jury believe from the evidence that the train of the defendant was stopped at St. John's Church for a reasonable time for plaintiff to have alighted from the car, then after this time the conductor was not required to be on the lookout for the plaintiff to alight." (5) "That, under the evidence in this case, the train stopped at St. John's Church a reasonable time for plaintiff to alight."

Mr. Alexander T. Loudon for appellant.

Mr. Richard H. Fries for appellee.

Coleman, J., delivered the opinion of the court:

The plaintiff sued to recover damages for personal injury alleged to have been sustained in consequence of the negligence of the defendant by moving forward the train upon which she was a passenger while she was in the act of alighting, and before she had reasonable time to get off. We regard the law with respect to the duty to be exercised by ordinary railroads for the safety of passengers getting on and off their trains as well settled. 18 L. R. A.

When a train of an ordinary railroad is brought to a stand-still at the proper and usual place for receiving passengers, and for permitting passengers to alight, and remains stationary for a reasonably sufficient length of time for this purpose, the duty of the trainmen in this regard has been performed; but, while the performance of this duty may relieve the trainmen from the further duty of seeing and knowing that the passengers are on or off, as the case may be, even this would not excuse from culpability, if those in charge of the train in fact saw or knew that its movement would probably imperil a passenger in the act of getting off or on the train, and, in disregard of the peril, caused the train to move, and thereby inflict injury. *Montgomery & E. R. Co. v. Stewart* (Ala.) 8 So. Rep. 711, and cases cited; *Birmingham U. R. Co. v. Smith*, 90 Ala. 68; *Central R. & Bkg. Co. v. Miles*, 88 Ala. 262.

The law has also been well settled in regard to the duty of the driver or the person in charge of a horse car operated for the carriage of passengers. In the latter case, it is the duty of the driver to await a sufficient length of time to enable passengers to alight in safety by the exercise of reasonable diligence, and, in any event, to see and know that no passenger is in the act of alighting, or is otherwise in a position which would be rendered perilous by a movement of the car. If he fail in these respects, and injury results from such failure, his employer is liable. 90 Ala. 63, *supra*. The reasons for applying a different principle in the case of ordinary railways and horse cars are fully stated in 90 Ala. *supra*. The case of *North Birmingham St. R. Co. v. Calderwood*, 89 Ala. 247, was one in which the passenger cars were drawn by a dummy engine. Plaintiff testified in that case that she gave the notice to stop by pulling the bell strap, and upon this signal being given the train stopped. It was in evidence that, by a rule of the company, passengers were required to motion the conductor when they wished to get off. This much of the evidence is stated to show that the rules of the company in regard to stopping, applicable to ordinary railroads, having regular stations, did not apply, but its management for the convenience of passengers in regard to stopping was somewhat similar to that of street horse cars; that is, the train would stop, on being signaled to that effect by the passenger, at any place where a municipal ordinance did not prohibit it. After laying down the general rule applicable to ordinary railways, that the stoppage required was for a time reasonably sufficient to enable the passengers to conveniently alight, the court in 89 Ala., *supra*, added that "the duty of keeping a diligent lookout rested on the engineer and conductor, to see that a premature start of the train, such as might endanger her safety, should not be negligently made." Where dummy engines are used for the transportation of passengers, and conductors are in the control of the cars, and there are no regular stopping places or stations for receiving and putting off passengers, and the conductors are not informed in advance where the passengers desire to alight, and cannot know how many are expected to alight when the motion or signal is given to

stop, and the rules and conditions for governing such engines and cars for carrying passengers are not such as to invoke the principles which prevail in ordinary railways, the presumption does not arise that the duty of the conductor is performed by merely stopping a reasonable length of time, sufficient to enable passengers to get on or off, but, in such cases, the same measure of duty is required as that imposed upon the driver of a horse-car; that is, he shall inform himself by looking and seeing how many passengers desire and intend to alight, and in any event, to see and know that no passenger is in the act of alighting, or in a position which would be rendered perilous by putting the car in motion. If after stopping and waiting a reasonable time for passengers to get off, the conductor places himself in a position where he can see and know, and there are no indications that others have any desire or intend to alight or get on, the conductor may then cause the car to move; and if passengers, after this, attempt to get on or off, without further notice to the conductor, and he has no actual knowledge of their intention and position, they do so at their peril, and not at the peril of the carrier. The first and second charges requested by defendant relieved the conductor of the duty to take any precaution or steps to inform himself as to whether plaintiff was in the act of alighting at the time he signaled the engineer to go forward. We are

not prepared to hold "that a sufficient time to allow the plaintiff to get off" comes up to the rule declared in repeated decisions of this State, where we have held "that the train must await a sufficient length of time to enable passengers to alight in safety by the exercise of reasonable diligence" or "to conveniently alight." The charges asked to this effect were calculated to mislead in respect to the time the train was required to await. The court was not authorized to charge the jury, as a matter of law, that, because two other ladies had alighted with safety, the car had stopped a reasonable time. This may have been matter for legitimate argument before the jury, but did not authorize the legal conclusion. The plaintiff's testimony tended to show that she arose for the purpose of getting off as soon as the train stopped, and that she continued to move in that direction until she was thrown off by the sudden movement of the car. The same objection obtains against the fifth charge. This charge also invades the province of the jury. The fourth charge may assert the principle applicable to ordinary railroads, but does not apply to dummy engines, under the facts proven in this case. The charges given to the jury by the trial court are in accord with the views of this court heretofore expressed.

Affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

James BURT

v.

ADVERTISER NEWSPAPER CO.

(....Mass.....)

1. Free and open comment and criticism upon the acts of a person which are matters of public concern are privileged.
2. The privilege of discussion as to the acts of public persons does not extend to the making of false statements of fact.
3. Reasonable cause to believe a libelous charge to be true is no defense for its publication.
4. Evidence in a libel case that the libel has been published before is not admissible in

mitigation of damages, except where defendant's libel refers to and professes on its face to be based on the former one.

5. Where one charged with fraud in the New York custom house admits that sugar was valued there lower than in Boston, and claims that the Boston polariscope gives too high a valuation, evidence that it does not is admissible.
6. Damages from publication of a libel cannot be enhanced by the republication thereof by other persons even if there was a general probability of its republication.

(June 20, 1891.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought to

NOTE.—Fair criticism of public men allowable.

The public conduct of a public man is matter of public interest, and may be discussed with the fullest freedom. It may be made the subject of hostile criticism, provided the language of the writer be kept within the limits of an honest intention to discharge a public duty, and is not made a means of promulgating slanderous and malicious allegations. The question for the jury is whether the writer has transgressed the bounds within which comments ought to be confined; or whether it was made the opportunity for gratifying personal vindictiveness and hostility. *Seymour v. Butterworth*, 3 Fost. & F. 372; *White v. Nichols*, 44 U. S. 3 How. 267, 11 L. ed. 591; *Moore v. Butler*, 48 N. H. 161; *Forward v. Adams*, 7 Wend. 234; *Cook v. Hill*, 3 Sandf. 341; *Van Wyck v. Guthrie*, 4 Duer. 268; *Van Wyck v. Aspinwall*, 17 N. Y. 13 L. R. A.

190. See *Campbell v. Spottiswoode*, 3 Best & S. 776; *Smith v. Tribune Co.* 4 Bias. 447; *Snyder v. Fulton*, 34 Md. 123, 6 Am. Rep. 814; *Aldrich v. Press Printing Co.* 9 Minn. 133; *Powers v. Dubois*, 17 Wend. 63; 4 Field, *Lawyers' Briefs*, § 524.

The official conduct of men in public life, and the fitness and claims of candidates for official station, are fair subjects for review and criticism in the public prints, and such honest criticism, although it be unfriendly and severe, can give no occasion for the suggestion that it proceeds from unworthy or indirect motives. *Hart v. Townsend*, 67 How. Pr. 88.

Judges and text-book writers furnish plentiful definitions of what constitutes a libel, with varying shades of difference. They all agree that a malicious publication, tending to expose a person to ridicule, contempt, hatred, degradation of character, is libelous. 2 Addison, *Torts*, 306; *Bergmann v.*

recover damages for the publication of an alleged libel which resulted in a verdict in favor of plaintiff. *Sustained.*

The facts sufficiently appear in the opinion. *Messrs. A. Hemenway and H. N. Sheldon*, for defendant:

The Byrne report and affidavits were, by reference, incorporated into the alleged libels. Accordingly this report and these affidavits should have been admitted in evidence as really a part of the articles complained of.

Cook v. Hughes, Ryan & M. 112; *Van Vactor v. Walkup*, 46 Cal. 124, 134; *Darby v. Ouseley*, 1 Hurlst. & N. 1, 11; *Morehead v. Jones*, 2 B. Mon. 210; *Rez v. Lambert*, 2 Campb. 398; *Weaver v. Lloyd*, 1 Car. & P. 296; *Thornton v. Stephen*, 2 Mood. & Rob. 45; *Hedley v. Barlow*, 4 Fost. & F. 227; *Nash v. Benedict*, 25 Wend. 645; *Gould v. Weed*, 13 Wend. 12; *Hotchkiss v. Lothrop*, 1 Johns. 286; *Scripps v. Foster*, 41 Mich. 742; *Thompson v. Boyd*, Mill. 80; *Young v. Gilbert*, 93 Ill. 595; *Child v. Homer*, 13 Pick. 503.

This evidence was competent upon the question of damages, to show that defendant had made its publications in good faith and without any actual malicious intention.

Blackburn v. Blackburn, 3 Car. & P. 146, 4 Bing. 395; *Jellison v. Goodwin*, 43 Me. 287; *Hotchkiss v. Porter*, 80 Conn. 414; *Fry v. Bennett*, 28 N. Y. 324; *Stanley v. Webb*, 21 Barb. 148; *Brown v. Wright*, 6 La. Ann. 253.

The defendant's offer was not, as in *Lothrop v. Adams*, 133 Mass. 471, 477, to show that reports were in circulation against the plaintiff, unknown to the defendant before the publication, but to show public documents published and circulated by the United States government, containing the same charges as the libels and weightier charges of the same character, and made in terms the express ground and foundation of its statements.

Whitney v. Janesville Gazette, 5 Biss. 330; *Willoner v. Hill*, 72 N. Y. 36; *Reynolds v. Tucker*, 6 Ohio St. 516; *Hatfield v. Lasher*, 81 N. Y. 246; *Larrabee v. Minnesota Tribune Co.* 36 Minn. 141; *Duke v. State*, 19 Tex. App. 14.

These articles were privileged. If any of them were privileged, or if any of the charges made against the plaintiff were privileged, then the issue as to these was whether they were published without malice, in good faith, and in the honest belief of their truth; and the evidence offered was competent upon that issue.

Bradley v. Heath, 12 Pick. 163; *Remington v. Congdon*, 2 Pick. 310; *Swan v. Tappan*, 5 Cush. 104; *Lavler v. Earle*, 5 Allen, 22; *Atwill v. Mackintosh*, 120 Mass. 177.

It was competent for the defendant to put in such testimony as this in mitigation of damages.

Cooke v. O'Brien, 2 Cranch, C. C. 17; *Wetherbee v. Marsh*, 20 N. H. 561; *Minesinger v. Kerr*, 9 Pa. 312; *Galloway v. Courtney*, 10 Rich. L. 414; *Eriston v. Cramer*, 54 Wis. 220; *Taylor v. Church*, 8 N. Y. 452; *Huson v. Dale*, 19 Mich. 17; *Weed v. Bibbins*, 32 Barb. 315; *Burt v. McBain*, 29 Mich. 260, 268.

The damages may be swollen by proof of actual or express malice; whether this is or is not contended to exist, they may be mitigated by affirmative evidence of the defendant's good faith and freedom from actual malice.

Scripps v. Reilly, 38 Mich. 10; *Trus v. Plumley*, 36 Me. 466; *Haight v. Hoyt*, 50 Conn. 583; *Doe v. Roe*, 32 Hun, 638; *Symonds v. Carter*, 32 N. H. 458.

The measure of damages depends in a large degree upon the motives which actuated the defendants in making the publication, and the circumstances under which it was made.

Caldwell, J., in *Erber v. Dun*, 12 Fed. Rep. 526.

Express malice aggravates the wrong done by the utterance of slanderous words.

Bigelow, Ch. J., in *Markham v. Russell*, 12 Allen, 578, 575.

In such case the degree of malice would properly measure the damages.

Coffin v. Coffin, 5 Mass. 1, 6, 44.

Though the presumption of legal or technical malice is conclusive so far as concerns the maintenance of the action, yet such evidence as was offered by this defendant is competent to reduce the amount of the damages.

Lick v. Owen, 47 Cal. 252; *Marks v. Baker*, 28 Minn. 162; *Hewitt v. Pioneer Press Co.* 23 Minn. 178; *Storey v. Early*, 86 Ill. 461; *Shipp v. Story*, 68 Ga. 47; *Edgar v. Newell*, 24 U. C. Q. B. 215; *Cook v. Barkley*, 2 N. J. L. 169. See *Carpenter v. Bailey*, 53 N. H. 590; *Eriston v. Cramer*, 54 Wis. 220, 225; *Stow v. Converse*, 4 Conn. 18.

Everyone has a right to comment on matters of public interest and general concern, however severely, provided he does so fairly and with an honest purpose.

Henwood v. Harrison, L. R. 7 C. P. 606, 621; *Wason v. Walter*, L. R. 4 Q. B. 93, 94; *Miner*

Jones, 94 N. Y. 51-64; *Byrnes v. Mathews*, 12 N. Y. S. R. 74.

When anyone consents to be a candidate for a public office, he must be considered as putting his character in issue, so far as respects his fitness and qualifications for the office; and publications of the truth on this subject, with the honest intent of informing the people, are not libelous. *Com. v. Clap*, 4 Mass. 108; *Com. v. Odell*, 3 Pittsb. 449.

The editor of a newspaper may lawfully publish the fact that a person has been arrested, and upon what charge. *Usher v. Severance*, 20 Me. 9; 4 Wait, Act. and Def. 306.

The cases are uniform in holding that if the words used are capable of a construction which will make them actionable it presents a question for the jury, even though they are also capable of an innocent construction. It is only when the language is incapable of a construction injurious to the plaintiff that the court is justified in withholding it from the jury. *Sanderson v. Caldwell*, 45 N. Y. 400; *Patch v. Tribune Assn.* 38 Hun, 368; *Purdy v. Rochester Print. Co.* 96 N. Y. 372; *Townshend, Slander and Libel*, § 23.

The assertion of a libel either by insinuation, irony, question or allusion, is the same as if asserted directly in terms. *Folkard's Starkie, Slander and Libel*, 181, 182; *Gibson v. Williams*, 4 Wend. 320; *Byrnes v. Mathews*, 12 N. Y. S. R. 74.

For further annotation on this subject, see *notes* to *Morey v. Morning Journal Assn.* (N. Y.) 9 L. R. A. 631; *Price v. Conway* (Pa.) 8 L. R. A. 193; *Sillars v. Collier* (Mass.) 6 L. R. A. 680; *Hayes v. Press Co.* (Pa.) 5 L. R. A. 643; *Byam v. Collins* (N. Y.) 2 L. R. A. 120; *Park v. Detroit Free Press Co.* (Mich.) 1 L. R. A. 540.

v. Detroit Post & T. Co. 49 Mich. 358; *Kelly v. Tinsling*, L. R. 1 Q. B. 699.

Surely, a discussion of the public matters directly affecting the threatened commercial prosperity of Boston and its vicinity, and weighty beyond everything else to all good citizens, must be privileged.

Wason v. Walter, L. R. 4 Q. B. 93, 94; *Kans v. Muleaney*, 2 Ir. C. L. Rep. 402; *Campbell v. Spottiswoode*, 3 Best & S. 769; *Harle v. Cathcrall*, 14 L. T. N. S. 801.

Whoever fills a public position renders himself open to public discussion, and must accept an attack as a necessary though unpleasant appendage to his office.

Parmiter v. Coupland, 6 Mees. & W. 108; *Seymour v. Butterworth*, 3 Post. & F. 376, 377; *Kelly v. Sherlock*, L. R. 1 Q. B. 686, 689; *Hedley v. Barlow*, 4 Post. & F. 234.

Even the local interest of the inhabitants of Boston, to avoid the unfair diversion of its business to New York, would alone be sufficient to call for the application of this rule.

Cox v. Feeney, 4 Post. & F. 13; *Purcell v. Bowler*, L. R. 2 C. P. Div. 218; *Harle v. Cathcrall*, *supra*; *Crane v. Waters*, 10 Fed. Rep. 619; *Press Co. v. Stewart*, 12 Cent. Rep. 275, 119 Pa. 584; *Davis v. Duncan*, L. R. 9 C. P. 396.

Plaintiff's conduct having been made the subject of investigation by the government, and the result of that investigation, with the evidence which supported it, having been published and circulated broadcast by the national government, and acted upon by the removals of officers, and then brought into the domain of national politics, these matters and the plaintiff's connection therewith become fit subject of comment.

Kelly v. Tinsling, L. R. 1 Q. B. 699, 701; *Smith v. Higgins*, 16 Gray, 251, 252; *Gott v. Pulsifer*, 123 Mass. 235, 238; *Barrows v. Bell*, 7 Gray, 301, 313; *Gassett v. Gilbert*, 6 Gray, 94, 97; *Moore v. Butler*, 48 N. H. 161; *Palmer v. Concord*, 48 N. H. 211; *Ormsby v. Douglass*, 37 N. Y. 477; *Adcock v. Marsh*, 8 Ired. L. 360; *White v. Nicholls*, 44 U. S. 3 How. 266, 11 L. ed. 591.

Nor will the mere use of strong terms of condemnation, such as robbery, swindle or conspiracy, and the like, in an otherwise privileged statement, take away that character.

Klinck v. Colby, 46 N. Y. 427; *Atwill v. Mackintosh*, 120 Mass. 177, 182.

There has been here no attack upon the personal character of the plaintiff; nothing has been said of him except in connection with his public acts, nor without adequate and more than adequate support in official publications or official records.

Morrison v. Belcher, 3 Post. & F. 614; *Carr v. Hood*, 1 Campb. 355, *note*; *Tabart v. Tipper*, Id. 351; *Alderson, B., in Galkerscole v. Miall*, 15 Mees. & W. 319, 340; *Campbell v. Spottiswoode*, 3 Best & S. 769, 776.

For any republication not actually privileged, however innocently made, the plaintiff can recover full compensation from the publisher thereof, and therefore he cannot recover from defendant.

Stevens v. Hartwell, 11 Met. 542; *Kenney v. McLaughlin*, 5 Gray, 3; *Watkin v. Hall*, L. R. 3 Q. B. 396; *McPherson v. Daniels*, 10 Barn. 13 L. R. A.

& C. 263, 269; *DeCrespigny v. Wallerley*, 5 Bing. 392; *Sims v. Joerria*, 14 Wis. 663; *Bowler v. Chichester*, 26 Ohio St. 9; *Fitzgerald v. Stewart*, 58 Pa. 343; *Prime v. Eastwood*, 45 Iowa, 640; *Larkins v. Tarter*, 8 Sneed, 681; *State v. Butman*, 15 La. Ann. 166; *Cade v. Redditt*, Id. 492; *State v. Derry*, 4 West. Rep. 92, 20 Mo. App. 552; *McDonald v. Woodruff*, 2 Dill. 244; *Clifford v. Cochrane*, 10 Ill. App. 570; *Bransletter v. Dorough*, 81 Ind. 527; *Mason v. Mason*, 4 N. H. 110; *Lewis v. Niles*, 1 Root, 346; *Austin v. Hanchet*, 2 Root, 148; *Kennedy v. Gifford*, 19 Wend. 296; *Inman v. Foster*, 8 Wend. 602; *Tervilliger v. Wands*, 17 N. Y. 54, 57; *Hampton v. Wilson*, 4 Dev. L. 468.

The utterer of a slander is not responsible for unauthorized repetition of it by others.

Shurtliff v. Parker, 130 Mass. 293; *Hastings v. Stetson*, 126 Mass. 329; *Prime v. Eastwood*, 45 Iowa, 640, 644.

Messrs. R. M. Morse, Jr., and F. J. Stimson, for plaintiff:

The documents excluded would not have been privileged to the defendant newspaper even if only copied in full. They were not even privileged to Byrne himself.

Sheckell v. Jackson, 10 Cush. 25; *Cowley v. Pulsifer*, 187 Mass. 392; *Clark v. Binney*, 2 Pick. 112, 117; *A. C. Freeman's note on Libel*, 15 Am. St. Rep. 842, 847, 848.

Comments by newspapers, even on public documents or matters which are privileged, must be fair and upon a question of public interest.

Lothrop v. Adams, 183 Mass. 471, 475, 483, pl. (6); *Fraser, Libel*, art. 13, p. 19, *note 1*; *A. C. Freeman, Newspaper Libel (note to 15 Am. St. Rep. 818, 864)*.

The matter or thing commented on must be a fact, not another libel, as here.

Fraser, Libel, pp. 20, 21; *Campbell v. Spottiswoode*, 3 Best & S. 778.

These articles cannot be considered fair comments; nor is the honesty of the plaintiff, a private citizen, matter of public interest.

Clark v. Binney, 2 Pick. 118.

These articles, therefore, original with the defendant newspaper, were not themselves privileged to it.

Cowley v. Pulsifer, 187 Mass. 394, 395.

Reports, rumors, etc., claimed to be sources of information, are not admissible in libel suits, even in mitigation of damages.

Peterson v. Morgan, 116 Mass. 350; *Mahony v. Belford*, 132 Mass. 396; *Alderman v. French*, 1 Pick. 1, 18; *Clark v. Munsell*, 6 Met. 373, 389; *Kenney v. McLaughlin*, 5 Gray, 3, 7; *Watson v. Moore*, 2 Cush. 133, 140; *Fraser, Libel*, p. 49.

Particularly is it so when defendant reiterates the libel by a plea in justification.

Wolcott v. Hall, 6 Mass. 514, 518; *Bedwell v. Swan*, 3 Pick. 377.

It is no defense, even if defendant believed the report true.

Clark v. Brown, 116 Mass. 504, 507; *Fraser, Libel*, p. 20; *Parkhurst v. Ketchum*, 6 Allen, 406.

Nor are they admissible to disprove malice. *Peterson v. Morgan*, *Alderman v. French*, *Bedwell v. Swan* and *Clark v. Munsell supra*.

So, even although evidence of subsequent defamation was admitted to prove malice.

Redwell v. Swan, supra.

Conductors of the public press are not, in the absence of a statute to that effect, entitled to peculiar indulgence and especial rights and privileges.

Shekell v. Jackson, 10 Cush. 27.

Holmes, J., delivered the opinion of the court:

In this case there must be a new trial. We shall state the grounds on which we come to this conclusion and shall discuss such of the rulings as dealt with questions which are likely to come up again. Some matters not likely to recur we shall pass over. The first question which we shall consider is raised by the presiding judge's refusal to rule that the articles were privileged. The requests referred to each article as a whole. Each article contained direct and indirect allegations of fact touching the plaintiff and highly detrimental to him; charging him with being a party to alleged frauds in the New York custom house. Some or all of these allegations we must take to be false. Therefore the ruling asked was properly refused.

We agree with the defendant that the subject was of public interest and that in connection with the administration of the custom house the defendant would have a right to make fair comments on the conduct of private persons affecting that administration in the way alleged. But there is an important distinction to be noticed between the so-called privilege of fair criticism upon matters of public interest and the privilege existing in the case, for instance, of answers to inquiries about the character of a servant. In the latter case a bona fide statement not in excess of the occasion is privileged although it turns out to be false. In the former what is privileged, if that is the proper term, is criticism not statement, and however it might be if a person merely quoted or referred to a statement as made by others, and gave it no new sanction, if he takes upon himself in his own person to allege facts otherwise libellous, he will not be privileged if those facts are not true.

The reason for the distinction lies in the different nature and degree of the exigency and of the damage in the two cases. In these, as in many other instances, the law has to draw a line between conflicting interests both intrinsically meritorious. When private inquiries are made about a private person, a servant for example, it is often impossible to answer them properly without stating facts, and those who settled the law thought it more important to preserve a reasonable freedom in giving necessary information than to insure people against occasional unintended injustice, confined as it generally is to one or two persons. But what the interest of private citizens in public matters requires is freedom of discussion rather than of statement. Moreover the statements about such matters which come before the courts are generally public statements, where the harm done by a falsehood is much greater than in the other case.

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If one private citizen wrote to another that a high official had taken a bribe no one would think good faith a sufficient answer to an action. He stands no better certainly when he publishes his writing to the world through a newspaper; and the newspaper itself stands no better than the writer. *Shekell v. Jackson, 10 Cush. 25, 26.*

The distinction to which we have referred has been brought out more clearly in England than it has been in our own decisions. Thus in *Davis v. Shephard, L. R. 11 App. Cas. 187, 190, Lord Herschell* says: "It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct. In the present case the appellants in the passages which were complained of as libellous, charged the respondent, as now appears without foundation, with having been guilty of specific acts of misconduct, and then proceeded on the assumption that the charges were true, to comment upon his proceedings in language in the highest degree offensive and injurious; not only so, but they themselves vouched for the statements by asserting that though some doubt had been thrown upon the truth of the story, the closest investigation would prove it to be correct. In their lordship's opinion there is no warrant for the doctrine that defamatory matter thus published is regarded by the law as the subject of any privilege." *Popham v. Pickburn, 7 Hurlst. & N. 861, 898; Le Pay v. Burnside, L. R. 4 Ir. 556, 565, 566; Campbell v. Spottiswoode, 3 Best & S. 769, 779; Walker v. Brogden, 10 C. B. N. S. 65; Reg. v. Flowers, L. R. 44 J. P. 377, 378; Negley v. Furrow, 60 Md. 158; Hamilton v. Bno, 81 N. Y. 16; State v. Schmitt, 49 N. J. L. 579, 586, 8 Cent. Rep. 626; Doiston v. Cramer, 57 Wis. 570; Scripps v. Foster, 41 Mich. 742, 746; Shekell v. Jackson, supra.*

The foregoing language is applicable to the case at bar. The defendant in all the articles makes statements of fact on its own behalf, and in the second fairly may be understood to intimate that the private sources of information alleged by the words "we say this on authority," apply not merely to the existence of corruption in the New York custom house but to the plaintiff's connection with it. The articles published by the defendants so far as they contained false statements were not privileged.

We should add, however, with reference to another trial that there was evidence that some of the charges in the articles were true, and so far as the jury might find them to be so, inasmuch as the matter under discussion was a matter of public concern, the defendant would be justified not only in making those charges, but in free and open comment and criticism in regard to them.

The next question, the first which is raised by the bill of exceptions, is whether the court below rightly excluded a letter from the secretary of the treasury of the United States and an *ex parte* report on the same subject made to the treasury department containing similar charges against the plaintiff

coupled with evidence that the writer of the articles had these documents before him and believed the statements contained in them. The evidence was offered to show that the defendant acted in good faith and as it is commonly said to negative express malice, in support of its plea of privilege, also as bearing on damages, and generally for any purpose for which it might be admissible.

We already have considered how the defendant stands in respect of privilege. It is said that the report tended to prove that the defendant had reasonable cause to believe the charges to be true, and that it tended to show that the plaintiff was less damaged than he otherwise would have been by reason of the fact that similar charges had been made and published before. As to the former of these suggestions it is enough to say that it is not a justification that the defendant had reasonable cause to believe its charges to be true. A person publishes libelous matter at his peril. *Watson v. Moore*, 2 Cush. 133, 140; *Parkhurst v. Ketchum*, 6 Allen, 406; *Clark v. Brown*, 116 Mass. 504, 507.

Then as to damages. The damages recovered are measured in all cases by the injury caused. Vindictive or punitive damages are never allowed in this State. Therefore, any amount of malevolence on the defendant's part in and of itself would not enhance the amount the plaintiff recovered by a penny, and reasonable cause to believe the charges or absolute good will would not cut it down.

Watson v. Moore, *Parkhurst v. Ketchum* and *Clark v. Brown*, *supra*. Apart from the Statute (Pub. Stat. chap. 167, § 80) and possibly from privilege the defendant's motives and intent are totally immaterial. Its liability is the usual liability in tort for the natural consequences of a manifestly injurious act.

See *Capital & Counties Bank v. Henty*, L. R. 7 App. Cas. 741, 787. No doubt there might be cases, especially of slander, where it is impossible photographically and phonographically to reproduce the overt act complained of where the defendant's motive would afford an inference as to the character of the act and the impression made by it. No doubt a manifestation of malevolent motives might enhance damages under our rule allowing damages for injured feelings. *Mahoney v. Belford*, 132 Mass. 893, 394; *Hastings v. Stetson*, 130 Mass. 76, 78; *Markham v. Russell*, 12 Allen, 573. See *Ford v. Ford*, 143 Mass. 577, 579; *Leonard v. Allen*, 11 Cush. 241. But there is nothing of that sort in this case. *Watson v. Moore*, 2 Cush. 133, 140; *Clark v. Munsell*, 6 Met. 373, 388.

As a general proposition the defendant cannot show that the plaintiff's damages are less than they otherwise would have been because the charge has been made and published before. *Mahoney v. Belford*, 132 Mass. 893; *Peterson v. Morgan*, 116 Mass. 350, and cases cited; *Alderman v. French*, 1 Pick. 1, 18. See *Scott v. Sampson*, L. R. 8 Q. B. Div. 491; *Hatfield v. Lasher*, 81 N. Y. 246, 249, 250.

But with reference to what we shall have to say concerning the fourth count, it should be added that probably a different rule would apply if the defendants' publication professes on its face to be based upon other pub-

lications which are referred to, and the fact is so.

The last ground on which it was argued that the report should have been admitted was that it was made a part of the libel by reference. We are of opinion that the articles with the exception of that set out in the fourth count do not refer to the report in such a way as manifestly on their face to need the report in order to explain them. The report was laid before us by agreement of counsel.

It is a very long document which it would have been useless to read through to the jury, and from such inspection as we have been able to make does not in any way explain, qualify or mitigate the expression used by the defendant. On the contrary, its only effect could be to raise either a belief or a strong suspicion that the defendant's charges were true. For that purpose it was of course incompetent, and therefore as a practical matter the only effect of allowing it to go in would have been an injustice to the plaintiff.

But the article set out in the fourth count stands somewhat differently from the others. This refers to the report in terms and then proceeds to say that the affidavits in the report and the later affidavits denying the former, when marshaled together, make a terrible indictment against the plaintiff; that the new affidavits evidently are intended to shield him; and implies that the public, on reading the two sets, will believe the former. The jury, if they should compare the documents, might agree with the inferences of the defendant, and to that extent might find the allegations of the article to be true. Under this count alone the report should have been admitted, for the above reason and with reference to the damages, as we have stated earlier.

Another exception is to the exclusion of evidence that the polariscope used in the Boston custom house did not give too high a valuation. One evidence of fraud in the New York custom house was that sugar was valued lower there than in Boston. The plaintiff admitted the fact and gave as one reason for it that the Boston examiner overestimated the quartz plate by which he tested his instrument. He gave this reason when attempting to secure the removal of the Boston examiner from New York after the latter had been sent there to reform the alleged New York practices. The evidence offered tended to prove the existence of the fraud and perhaps that the plaintiff knew of its existence and should have been admitted.

The court was asked to rule that the plaintiff could not recover for repetitions of the defendant's libels by others, and several other rulings tending in the same direction were asked.

The court instructed the jury as follows: "One who publishes a libel is not responsible for the publication of it by others; that is to say, he is not responsible for the injurious act of another. But there is a general principle which runs through all tort cases, which is generally stated in this way: That a man is presumed to intend the natural and probable consequences of his acts, and that

instruction therefore should be qualified in that way. He is not responsible for the injurious acts of another in publishing, but he is under obligations to the plaintiff to take into account and into consideration what will be the natural and probable consequences of his act in putting a libel into circulation. To that extent he is responsible, and only to that extent." The general proposition laid down is correct, no doubt if rightly understood, and it was applied to libel, under what circumstances and with what meaning does not appear, in *Miller v. Butler*, 6 Cush. 71. But if applied to libel or slander without further explanation it is likely to be misleading, and when put as a qualification of the ruling asked hardly can fail to be so.

The meaning which naturally would be conveyed to the jury is that, although a particular republication cannot be recovered for, damages may be enhanced by the general probability of unlawful republications. This is not the law. Wrongful acts of independent third persons not actually intended by the defendant are not regarded by the law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts any more than a particular act by this or that individual. *Hastings v. Stetson*, 126 Mass. 329, 331; *Shurtliff v. Parker*, 130 Mass. 293, 296; *Hayes v. Hyde Park (Mass.)* 12 L. R. A. 249; *Leonard v. Allen*, 11 Cush. 241, 246.

Exceptions sustained.

NEW YORK COURT OF APPEALS.

Francis C. LAWRENCE, *Reept.*,

METROPOLITAN ELEVATED R. CO. et al., Appts.

(...N. Y....)

The use of a house as a place of prostitution does not affect the liability for depreciation of its value from the construction and operation of an elevated railroad in the street in front of it.

(June 2, 1891.)

A PPEAL by defendants from a judgment of the General Term of the Court of Common Pleas for the City and County of New York, affirming a judgment of the Special Term in favor of plaintiff in an action brought to recover damages for injuries to his property by reason of the construction and operation of an elevated railroad in the street in front of them, and to enjoin the further operation of the road. *Affirmed.*

The facts are stated in the opinion.

Messrs. Julien T. Davies and Brainard Tolles, for appellants:

Entirely irrespective of the illegality of the use, the fact that the premises during the period in question were applied to a use with which the elevated railroad did not interfere, was of the highest relevancy.

Tallman v. Metropolitan Elec. R. Co. 8 L. R. A. 173, 121 N. Y. 119; *Henderson v. New York Cent. R. Co.* 78 N. Y. 423; *Coltrick v. Swinburne*, 8 Cent. Rep. 701, 105 N. Y. 503.

The rule of damage is the impairment of the rental value of the premises to the time of the

commencement of the action, and the impairment must be determined with reference to the condition in which the premises were when the road was built and with reference to the uses for which the premises were then rented or to which they could have been put in the condition they were in.

Greene v. New York Cent. & H. R. R. Co. 65 How. Pr. 154.

If the use is illegal the law cannot recognize any such thing as damages from interference with it.

Kane v. Johnston, 9 Bosw. 154; *Sherman v. Fall River I. W. Co.* 5 Allen, 213; *Jaques v. Bridgeport H. R. Co.* 41 Conn. 61.

In a case where the law refuses damages for an interference with the unlawful use of property, equity will not intervene to prevent such an interference by injunction. The maxim is, that he who doeth iniquity shall not have equity.

Francis, *Maxims of Equity*, p. 7; *Sykes v. Beadon*, L. R. 11 Ch. Div. 170; *Regby v. Connot*, L. R. 14 Ch. Div. 482; *Smith v. White*, L. R. 1 Eq. 626.

Messrs. Henry A. Forster and John A. Weeks, Jr., for respondent:

Even if the house had been disreputable that would not have justified the defendant in taking an easement in it and damaging it greatly without compensation.

Ely v. Niagara County Suprs. 36 N. Y. 297; *McKeon v. See*, 4 Robt. 469; *Blodgett v. Syracuse*, 36 Barb. 526.

Andrews, J., delivered the opinion of the court:

The judgment awarded to the plaintiff

NOTE.—The rule in condemnation proceedings.

The true rule, the only rule, which will do equal justice to all parties is to determine what will be the effect of the proposed change upon the market value of the property. The proper inquiry is, What is it now fairly worth in the market, and what will it be worth after the improvement is made—following *Bronson, J. (Re Furman Street, 17 Wend. 649)*. The rule is itself approved in many subsequent cases, and in the *Albany Northern R. Co. v. Lansing*, 16 Barb. 71, it is said: "They" (the commissioners) 18 L. R. A.

"were to consider how the taking of the land . . . would affect the residue of the owner's land. Would it leave that residue in an inconvenient unmarketable shape? If so, this fact might properly be taken into the account in determining the amount of compensation. Thus, if the land to be taken should lie between the owner's house and the highway, the amount of compensation should be vastly more than for the same quantity of land, equally valuable in itself, but situated in some remote part of the owner's premises." *Henderson v. New York Cent. R. Co.* 78 N. Y. 423.

damages in the sum of \$2,150 for loss in the diminution of rents of premises in Amity Street in the City of New York, owned by the plaintiff between April 28, 1882, and the time of the trial, occasioned by the construction of the elevated railway in the street, and also awarded an injunction against the further maintenance of the structure, unless the defendant should pay to the plaintiff the sum of \$4,000, which was found to be the permanent depreciation in the value of the plaintiff's property by reason of the maintenance and operation of the defendants' road, upon the assumption that the street should continue to be used for the railway. The defendants do not assail these findings, nor question the measure or character of the relief granted by the judgment, except upon a single ground. Evidence was given tending to show that prior to the construction of the elevated railway, and from time to time subsequent thereto during the period for which loss of rents was claimed and awarded, the house on the premises was let by the plaintiff to tenants, and was by them used as a house of prostitution; the plaintiff, during the whole period for which damages were claimed, lived abroad, and the premises were placed in the charge of a real-estate agent, who let them for the plaintiff.

The evidence on the part of the plaintiff tended to show that the construction and operation of the railway in Amity Street had resulted in making the locality less desirable for residence purposes, and that, in consequence, the owners of tenant-houses on the street were obliged, in order that they should be occupied, to let them to an inferior class of tenants, for brief periods, and at a reduced rent. The plaintiff's agent rented the house in question to such tenants as applied, and, among others who occupied the house for a part of the period for which damages were awarded, were persons who used the house for disreputable purposes. It is not claimed that the house was let for the purpose of being used as a house of prostitution; and, while there is some evidence tending to show that the plaintiff's agent had notice that in some cases the house was so used, and that he renewed leases after such notice, there is an entire absence of any evidence that the agent in any way affirmatively aided, abetted, or countenanced such use, or that the rent was fixed with any reference thereto. The locality seems to have steadily deteriorated in the character of its inhabitants since the construction of the railway.

The defendants' counsel requested the trial judge to find that the plaintiff's house was used as a house of prostitution to the knowledge of the plaintiff's agent, and also that, for the purposes for which it was used, the acts of the defendants had caused no diminution in the rental value. The court refused these requests as irrelevant, and an exception was taken. Exceptions to the refusal to find these facts present the only questions upon which the defendants rely for a reversal of the judgment.

The principle that courts will not lend their aid to enforce any claim repugnant to

justice, or bottomed upon an illegal transaction, or give relief contrary to good morals or public policy, is familiar, and is founded upon the most obvious policy. The rule is most frequently invoked in cases on contract. Where a party seeks to enforce a contract obligation the consideration of which is illegal, or which provides for the performance of an illegal or criminal act, the case is plain.

There is a class of cases, however, where the contract sued upon appears to have some relation to an illegal transaction, or in a sense to spring out of it, where the courts have had difficulty in determining whether the contract fell within the principle. The sale of smuggled goods, or the sale of goods which the vendor knew were purchased to be smuggled, doing nothing to aid or in furtherance of the illegal purpose beyond the bare act of sale, are exceptions.

The general doctrine in these and like cases was very exhaustively considered in the opinions on the argument and reargument in *Tracy v. Talmage*, 14 N. Y. 162, 210. In the present case the plaintiff is not seeking to enforce an illegal contract, nor, indeed, any contract at all. His claim is based upon a trespass, whereby he has been prevented from receiving rents from his house which he would have received except for the unauthorized use of the street by the defendants, and to restrain the further continuance of the trespass, except on condition of compensation being made for the injury to the inheritance. The fact that the house had been used as a house of prostitution did not enter as an element into the award of damages, nor could that fact be properly considered. If the plaintiff had sought to enhance the damages on the ground that the rental value of the house as a house of prostitution had been depreciated by the construction of the railway, and the award had been based upon that consideration, the defendants would have had just ground of complaint. If the fact had been found that the acts of the defendants did not diminish the rental value of the house as a house of prostitution, it would not show or tend to show that the plaintiff had not been injured in the amount awarded by the court. The testimony showed that the railway had diminished, by the amount awarded, the rents which would have been realized for the ordinary use of the property. We are of opinion that the requests to find were properly refused. They were based upon a misapprehension of the doctrine that courts will not enforce immoral or illegal claims. The particular use of the house had nothing to do with the injury suffered by the plaintiff, but the injury was wholly independent of such use. The occupation of the house as a house of prostitution was no justification of the injury of which the plaintiff complains. The plaintiff is not seeking to enforce any claim founded upon such occupation. The judgment neither sanctions nor encourages such use. It awards damages which the plaintiff has sustained, however the house may have been occupied. The case of *Ely v. Niagara County Supra.*, 36 N. Y. 297, is quite analo-

gous. It was there held that it was no defense to the liability of a county for the destruction of the plaintiff's house by a mob that the house was kept by her as a bawdy-house, and a resort for thieves and criminals.

The findings requested were irrelevant, and the judgment should therefore be affirmed.

All concur.

Re Application for Ancillary Administration upon ESTATE OF James D. PROUT, Deceased.

(....N. Y.....)

A bond for double the value of the personal estate in the State, as in the case of principal administration, may be required under Code Civ. Proc., § 2699, on granting ancillary administration, where the security already given in the place of principal administration is insufficient, although that section provides that the bond may in the discretion of the surrogate be in such a sum "not exceeding twice the amount which appears to be due from the decedent to residents of the State" as will secure resident creditors. The section is intended to allow, but not to require, a smaller bond than in ordinary cases.

(June 2, 1891.)

A PPEAL by Hannah M. Prout from an order of the General Term of the Supreme Court, Second Department, affirming an order of the Surrogate for Kings County, requiring her to give a bond in twice the amount of the full value of the personal estate of James D.

Prout, deceased, situated in New York State, as a condition of his granting her ancillary letters of administration upon such estate. *Affirmed.*

The facts sufficiently appear in the opinion. *Mr. William J. Groo*, for appellant:

On granting ancillary letters of administration the surrogate cannot require a bond exceeding twice the amount which appears to be due creditors in this State.

Re Musgrave, 5 Dem. 427; *Moyer v. Weil*, 1 Dem. 71; *Evans v. Schoonmaker*, 2 Dem. 249; *McEvoy's Estate*, 8 Law Bull. 81; *Lynes v. Cooley*, 1 Redf. 405, 14 Abb. Pr. 461.

Mr. G. H. Crawford for respondent.

Andrews, J., delivered the opinion of the court:

The question turns upon the power of the surrogate to require an administrator's bond in double of the value of the personal estate, in this State, of James D. Prout, who, at the time of his death, was a resident of New Jersey, as a condition to the grant of ancillary administration. The personal estate of the decedent, at the time of his death, consisted of personal effects of the value of about \$2,500, in New Jersey, and of stocks and securities of the value of about \$40,000, deposited with a safe deposit company in the City of Brooklyn. On the first day of August, 1889, letters of administration were issued by the Probate Court of New Jersey to the widow of the decedent upon her petition setting forth that the personal estate of the decedent in that State did not exceed the

NOTE.—Code provisions as to letters testamentary.

The New York Code of Civil Procedure, § 2699, relating to the grant of ancillary letters testamentary or of administration, authorizes a surrogate, upon the issuance of such letters, to fix the penalty of the official bond in his discretion, except that he cannot require any larger penalty than twice the amount which appears to be due to resident creditors. *Evans v. Schoonmaker*, 2 Dem. 249.

The Code requires that an administrator with the will annexed shall give security (§ 2645). It also gives to any person interested in the estate the right to insist that the bond given shall be in the full amount required by law, and with sufficient securities, and not only in an amount large enough to secure the separate interest of such person (§ 2697). *Re Weeks' Estate*, 1 N. Y. Civ. Proc. 165.

Although Code Civ. Proc., §§ 2645, 2697, literally require an administrator with the will annexed to give a bond in a penalty "not less than twice the value of the personal property of which the decedent died possessed," etc., yet, where he is also an administrator *de bonis non*, those provisions are to be construed as fixing the minimum penalty of his bond at the value of the property left unadministered. *Sutton v. Weeks*, 5 Redf. 333.

Section 2697 confers upon the surrogate no authority to accept less security than double the value of the personal property of the deceased, exclusive of such claim, or to issue letters limiting in any way the administrator's authority over that property. *Re Malloy*, 1 Dem. 421.

Origin of the law requiring administration bonds.

The English Statute (21 Henry VIII. chap. 5, § 3; 22 & 23 Car. II. chap. 10, § 1), requiring bond to be given to the ordinary upon committing administration of the goods of any person dying intestate, is 13 L. R. A.

incorporated into the statutes of every State in the Union. 1 Woerner, Administration, § 249.

The law in the several States is uniform on this point, requiring the administrator, whether with the will annexed, *de bonis non*, temporary or permanent, to give bond, with two or more sufficient securities, in a sum at least double the value of such personal property as may come into his possession belonging to the estate of the decedent; with the exception of Louisiana, where the minimum is fixed at "one fourth beyond the estimated value of the movables and immovables, and of the credits comprised in the inventory exclusive of bad debts" (Civ. Code, art. 1048), and Mississippi, where it must equal the value of the personal estate at least. *Miss. Code 1880, § 1965.*

In Pennsylvania, an administration where no bond is given is by statute declared void (Act March 15, 1832, § 27), and there, as well as in South Carolina, the register or ordinary neglecting to take the administration bond is liable for all damages; and although the damages do not appear to result from the neglect, yet the law will presume so. *Boggs v. Hamilton*, 2 Mill. (S. C.) 381. See 1 Woerner, Administration, § 249.

Statutory regulation of the subject.

In most of the American States statutory provision exists by virtue of which a testator may relieve his administrator or executor from the necessity of giving a bond by incorporating words to that effect in some recital of the will, and his wishes in this regard will be respected, unless it satisfactorily appears that there is danger of a fraudulent misappropriation or waste of the decedent's property, in which case the court will interfere and direct the execution of an appropriate bond. This rule is enforced in the following States: Alabama (Code 1880, §§ 2024, 2025); California (Code Civ. Proc. §§ 1388, 1396);

sum of \$2,500. The administratrix, on the granting of the letters, executed her bond with sureties in the penal sum of \$5,000 to the surrogate of Monmouth County, New Jersey, where the decedent resided, conditioned to account for the personal estate of the intestate "in the State of New Jersey," which has or shall come to her hands. The petitioner did not disclose in her petition the fact that there was any other personal estate of the decedent beyond what was in his actual possession in that State at his decease. On the first day of April, 1890, the widow, who with her infant child had become a resident of Brooklyn, applied to the surrogate of Kings County by petition, for ancillary letters of administration, the petition setting forth, among other things, the granting of the letters in New Jersey, and that the decedent left personal estate in Kings County of the value of about \$40,000, and that one Moses P. Prout, of Brooklyn, is or claims to be a creditor of the decedent, and that there was no other person claiming to be creditor known to the petitioner. The surrogate thereupon issued a citation to creditors of the decedent, and on the hearing Moses P. Prout presented affidavits to the effect that the decedent was indebted to him in the sum of \$7,871.73, with interest; that the decedent, at his death, was the owner of securities to the amount above mentioned, deposited in a safe deposit company in Brooklyn; that the only security given by the administratrix was the bond of \$5,000, and that she had no pecuniary responsibility apart from her in-

terest as widow in the estate of the decedent. The surrogate made an order that ancillary letters be granted to the widow, on condition that she should give a bond, with sureties, to be approved by the surrogate, in a penalty of double the value of that part of the personal estate of which the deceased died possessed, which at his death was within the County of Kings.

The administratrix appeals from the order on the ground that the surrogate had no power to require a bond upon the application for ancillary letters, in a penalty exceeding twice the amount of the debts owing by the intestate to creditors within the State. This question depends upon the true construction of section 2699 of the Code of Civil Procedure. That section is as follows:

"Upon the return of the citation the surrogate must ascertain, as nearly as he can do so, the amount of debts due, or claimed to be due, from the decedent to residents of the State. Before ancillary letters are issued the person to whom they are awarded must qualify, as prescribed in article fourth of this title for the qualification of an administrator upon the estate of an intestate; except that the penalty of the bond may, in the discretion of the surrogate, be in such a sum, not exceeding twice the amount which appears to be due from the decedent to residents of the State, as will, in the surrogate's opinion, effectually secure the payment of those debts; or the sums which the resident creditors will be entitled to receive from the persons to whom the letters are issued, upon

Colorado (Gen. Laws 1883, § 3519); Connecticut (Gen. Stat. 1883, § 542; double the amount of debts); Illinois (Rev. Stat. 1865, p. 195, § 7); Kansas (Dangler's Stat. 1865, chap. 37, §§ 3, 4); Kentucky (Gen. Stat. 1887, p. 597, § 4); Maine (Rev. Stat. 1883, chap. 64, § 9); Mississippi (Rev. Code 1880, § 1932); Missouri (since November 1, 1879) (Rev. Stat. 1879, § 12); Nevada (Comp. Laws 1873, §§ 553, 559); Ohio (Rev. Stat. 1880, §§ 5995, 5997); Oregon (Code 1887, § 1038); Rhode Island (Pub. Stat. 1882, chap. 184, § 14); Tennessee (Code 1864, §§ 3003, 3005); Texas (Rev. Stat. 1883, art. 1869, 1869); Vermont (Felton v. Sowles, 57 Vt. 332); Virginia (Code 1887, § 2642); West Virginia (Kelley's Rev. Stat. 1873, chap. 146, § 7), and Wisconsin, Rev. Stat. 1878, §§ 3794, 3795.

In England, and in several of the American States, the bond is dispensed with. Illustrations of this rule are found in the statutes of the following States: Florida (Dig. 1881, p. 79, § 11, p. 80, § 12); Georgia (Code 1882, § 2447); Louisiana (Civ. Code, art. 1677); New York (Code Civ. Proc. § 2538; Demarest's Estate, 1 N. Y. Civ. Proc. Rep. 302); North Carolina (Rev. Code 1883, § 1515); Pennsylvania (Brightly's Purd. Dig. 1883, p. 510, § 21, p. 511, § 23), and South Carolina, Rev. Stat. 1873, p. 448 *et seq.*

In every case, when a complaint is made to a surrogate that the circumstances of a person appointed executor are so "precarious" as not to afford adequate security for his due administration of the estate (2 Rev. Stat. 72, § 18), it must depend upon its own peculiar features and circumstances, of which the surrogate is the appropriate judge. *Shields v. Shields*, 40 Barb. 67.

Nor has an administrator appointed in another State any authority here: but it seems that a voluntary payment to an administrator so appointed would protect the party. *Williams v. Storrs*, 6 Johns. Ch. 383, 2 L. ed. 143.

13 L. R. A.

The power conferred by law upon executors and administrators cannot accompany their persons beyond the bounds of the sovereignty which has conferred it. *Miller v. Fwer*, 27 Me. 509, 46 Am. Dec. 622.

Each of the sureties in the official bond of an administrator, etc., must be worth at least the penalty of the bond over all debts, liabilities and property exempt from execution. Where such a surety has become insufficient, since qualification, the surrogate's court may require a new or additional surety. *Sutton v. Weeks*, 5 Redf. 353.

Each administrator accounts for the property in his hands, before the tribunals of the State or sovereignty from which his authority emanates. *Vaughan v. Northup*, 40 U. S. 15 Pet. 1, 10 L. ed. 699; 2 Kent, Com. 431; *Story*, Conf. L. § 513; *Banta v. Moore*, 15 N. J. Eq. 97.

There can be no propriety in requiring security to be given in the State of the intestate's domicile for funds, to which the administrator, by virtue of the grant of administration in one State, has no title, for the due administration of which he has already given security in a foreign jurisdiction, and over which the tribunals of another sovereignty exercise legitimate control. *Lewis v. Grogard*, 17 N. J. Eq. 425.

Whether the executor's pecuniary responsibility, his habits and business, and other facts bearing upon the permanence and certainty of his circumstances, all considered, render the funds safe in his hands, is the main point to be ascertained. *Cotterell v. Brook*, 1 Bradf. 153.

The question for the surrogate is: Is it safe to put this estate in the hands of the person named as executor? Can he be trusted to administer it faithfully and honestly, as directed by the will? *Martin v. Duke*, 5 Redf. 600. See note to *Williams v. Storrs*, 6 Johns. Ch. 383, 2 L. ed. 143.

an accounting and distribution, either within the State or within the jurisdiction where the principal letters were issued."

If the surrogate had power to impose, as a condition to the granting of letters ancillary, that the administratrix should give a bond to secure the whole fund which might come to her hands by virtue of such letters, the imposition of the condition was a discreet exercise of such power. The general rule in this and other States requires that the administrator should give security in double the value of the personal estate of an intestate before assuming the administration. The actual location of the personal estate, or of the securities by which it is represented, is not, under our statute, material in determining the amount of the bond in a case of purely domestic administration, for the rule that personal property is deemed to follow the person of the owner fixes the legal possession in the intestate at his place of residence—wherever, in fact, the property may be. Where the administrator has properly qualified and assumed the administration in the State of the domicile, he is invested with power to receive the debts owing to the intestate, and take possession of the securities, and give proper acquittances wherever the debtors or securities may be, whether within or without the State.

But where a debtor or the securities are in a foreign jurisdiction, and are not voluntarily paid or surrendered to the administrator of the place of the domicile of the intestate, the courts of the foreign jurisdiction will not enforce the recovery of the debts or securities, upon his application, until he has procured ancillary letters or a new administrator has been authorized under the laws of the place where assets may be. It is unnecessary to enter into the reasons of this rule. They are familiar and the rule has been frequently recognized. See *Parsons v. Lyman*, 20 N. Y. 108; *Despard v. Churchill*, 58 N. Y. 192; *Re Hughes*, 95 N. Y. 55.

The unquestioned rule of the common law that the succession to and the distribution of the estate of an intestate is governed by the law of the domicile, makes security there taken on the granting of letters of administration covering the whole personal estate of the intestate an adequate protection to all parties interested, and where ancillary letters are applied for in another State or jurisdiction there would not seem to be any necessity that additional security should be required were it not for another principle almost universally recognized, that the claims of creditors living in a jurisdiction where ancillary letters are sought, are entitled to have their just rights in the assets of the intestate secured by a proper bond as a condition of granting the application. To this end security is usually required to be given by the applicant for ancillary administration enforceable in the tribunals of the place for the protection of creditors therein residing. The course of legislation in this State upon the subject of ancillary administration and the security required may be briefly stated. The Revised Statutes enacted that "every person appointed administrator" should give a bond

in a penalty not less than twice the value of the personal estate of which the deceased died possessed. Provision was made for granting letters on the application of foreign executors or administrators where persons not inhabitants of this State shall die leaving assets here (§ 81). There was no provision exempting persons applying for ancillary letters, from the operation of the general rule declared in section 42, and it would seem that they, as well as domestic administrators, were required to give a bond in a penalty twice the value of the property upon which administration was sought. Section 2699, of the Code of Civil Procedure undertook to define the practice on the application for ancillary administration, which was left much at large under the Revised Statutes. In construing the section the various conditions to be provided for may justly be considered. There might be domestic creditors entitled to protection. The assets in this State might be less or more than sufficient to provide for the rights of citizens here. Or, again, there might be no creditors. Ancillary letters may become necessary to enable the administrator or executor to recover assets by hostile proceedings out of the jurisdiction where the principal letters were issued. It is contended on the part of the appellant that on an application for ancillary letters under section 2699 no security can be required in any case exceeding twice the amount of claims of domestic creditors, and that the discretion of the surrogate is only to be exercised within this limit. It is evident that this construction would, in the present case, defeat the general policy which requires an administrator to give adequate security for the whole estate which may come to his hands. The security given in New Jersey was limited to the sum of \$5,000, double the value of the personal estate of the intestate in his actual possession there, taking no account of the much larger amount in this State, and this course seems to have the sanction of the New Jersey courts. *Lewis v. Grogard*, 17 N. J. Eq. 425.

The contention of the appellant, if sustained, would enable the administratrix to take into her possession \$40,000, in securities belonging to the estate, without any security except a bond not exceeding double the amount of the debt of \$7,305, alleged to be due to Moses P. Prout. It may be then that the primary purpose of section 2699 was the protection of domestic creditors. The citation is required to be issued to creditors only (§ 2698). The Legislature may have assumed that proper and adequate general security would be exacted by the law of the place of the principal administration. But, although the language of section 2699 is vague, we think it is capable of a construction which will subserve the general policy of the law. The Legislature in this section first declares a general rule, that before ancillary letters are issued, the person to whom they are awarded must qualify as provided in the fourth article of the title for the qualification of an administrator upon the estate of an intestate. Referring to the fourth title, it is found that section 2667

prescribes as one of the acts to be done by an administrator, to qualify him for the office, that he shall execute a bond in a penalty not less than twice the value of the personal property of which the intestate died possessed, subject to certain exceptions, one of which is that with the consent of all the next of kin of the intestate, the bond may, upon notice being given to creditors, be limited to twice the amount of their debts. The exception in section 2699 was, we think, intended to give the surrogate a discretion to modify the general rule declared in the preceding clause, and to accept a bond less in amount than that prescribed in ordinary cases of administration, if by reason of adequate security having already been given, additional security for the protection of the general interests was not, in his judgment,

required, or where the next of kin had consented to waive security, and in a case of domestic creditors, where their protection was the only interest involved, to prescribe a limit, beyond which security should not be exacted.

It is somewhat difficult to so construe the language. But the solicitude with which courts guard the rights of infants and persons standing in the relation of beneficiaries of trusts, and the uniform policy in respect of security required of administrators, justify the court in going to the verge of construction in order to protect parties so situated, and to carry out the general policy of the law.

We think the order should be affirmed.

All concur.

VIRGINIA SUPREME COURT OF APPEALS.

NORFOLK & WESTERN R. CO., *Pf.*
in Err.

COMMONWEALTH OF VIRGINIA.

(....Va....)

A state statute prohibiting freight trains running on Sunday between sunrise and sunset except with livestock or perishable freight, or to complete a trip which can be finished before 9 A. M., is invalid as a regulation of commerce so far as it applies to interstate freight trains.

(Lacy, J., dissents.)

(June 25, 1891.)

ERROR to the Circuit Court for Pulaski County to review a judgment affirming a judgment of the County Court imposing upon

defendant a fine for an alleged violation of the Sunday Laws. *Reversed.*

Statement by Lewis, P.:

ERROR to judgment of the Circuit Court of Pulaski County, rendered March 25, 1891, affirming a judgment of the County Court of that county against the Norfolk & Western Railroad Company in a prosecution for a misdemeanor. The indictment was for running a train of cars on Sunday, contrary to the Act of March 19, 1884, now carried into section 3801 of the Code. That Act forbids the running of trains between sunrise and sunset on a Sunday, except such as are used exclusively for the relief of wrecked or disabled trains, or for the transportation of the United States mails, passengers, live-

NOTE.—State law cannot regulate interstate commerce.

Transportation is essential to commerce, or rather it is commerce itself; and every obstacle to it, or burden laid upon it by legislative authority, is regulation. *State Freight Tax Cases*, 82 U. S. 15 Wall. 232, 21 L. ed. 148; *Ward v. Maryland*, 79 U. S. 12 Wall. 418, 20 L. ed. 449; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543; *Chy Lung v. Freeman*, 95 U. S. 275, 23 L. ed. 550.

It was said in *Henderson v. New York*, *supra*, to "be clear from the nature of our complex form of government, that whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied it may be to powers conceded to belong to the States." Substantially the same thing was said by Marshall, Ch. J., in *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23.

As illustrating how far the Supreme Court of the United States has gone in defining "commerce between the States" as used in the constitutional provision on that subject, see *The "Daniel Ball" v. United States*, 77 U. S. 10 Wall. 557, 19 L. ed. 909; *Hall v. DeCuir*, 95 U. S. 438, 24 L. ed. 547. See also *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238.

A question to be determined is this, Does transportation upon a railroad passing through more States than one, or from a point in one State to a point in another, constitute commerce; and, if so, is it commerce between the States? That such trans-

portation is commerce, and commerce between the States, has been uniformly held both by the Supreme Court of the United States and by the supreme courts of a number of the States. *State Freight Tax Cases*, 82 U. S. 15 Wall. 231, 21 L. ed. 168; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Hannibal & St. J. R. Co. v. Huen*, 95 U. S. 465, 24 L. ed. 527; *Hall v. DeCuir*, 95 U. S. 438, 24 L. ed. 547; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Western U. Teleg. Co. v. Texas*, 105 U. S. 464, 26 L. ed. 1088; *Head Money Cases*, 112 U. S. 591, 23 L. ed. 801; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 203, 29 L. ed. 161; *Stone v. Farmers L. & T. Co.* 116 U. S. 383, 99 L. ed. 645; *Pickard v. Pullman S. Car Co.* 117 U. S. 43, 29 L. ed. 768.

Any regulation by a State of the charges for the transportation of goods from one State to another is a regulation of interstate commerce, and a violation of the Federal Constitution. *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244; *Mobile & O. R. Co. v. Sessions*, 28 Fed. Rep. 592, and note; *State v. Chicago & N. W. R. Co.* 70 Iowa, 162.

A statute prohibiting corporations engaged in transporting goods or passengers between different States from limiting their liability as common carriers by contract is not a regulation of commerce among the States. *Hart v. Chicago & N. W. R. Co.* 69 Iowa, 485.

For further annotation upon this subject, see notes appended to the following cases. *State v. Wiggin* (N. H.) 1 L. R. A. 56; *People v. Budd* (N. Y.) 5 L. R. A. 559; *Cleveland, C. & I. R. Co. v. Closser* (Ind.) 9 L. R. A. 754; *State v. Winters* (Kan.) 10 L. R. A. 616.

stock, or articles of such perishable nature as would be necessarily impaired in value by one day's delay in their passage. Section 5258, Rev. Stat. U. S., however (not noted in the indictment), makes every railroad in the country, operated by steam, an agency of commerce for the transportation, among other things, of "freights on their way from one State to another State." There was a motion to quash the indictment, on the ground that it was not sufficiently certain,—that is to say, that, even admitting the charge in the indictment to be true, the defendant was not necessarily guilty of any offense under the laws of the land; which motion was overruled, whereupon the defendant pleaded not guilty. The facts were argued at the trial, and are as follows: That on Sunday, the 21st day of September, 1890, the defendant, by its agents and employes, ran over the New River Division of its Road, in Pulaski County, after 9 o'clock in the morning, and before sunset, a train of cars loaded with coal and coke, which was being transported from Bluefield, a station on defendant's road, in the State of West Virginia, into and through Virginia, and that said train was being run only for the transportation of said coal and coke. The defendant demurred to the evidence, whereupon the jury conditionally assessed the fine of \$50. The county court overruled the demurrer, and rendered a judgment for the fine assessed, which judgment was afterwards affirmed by the circuit court.

Mears, Phlegar & Johnson and Brown & Moore for plaintiff in error.

Mr. R. Taylor Scott, Atty-Gen., for the Commonwealth.

Lewis, P., delivered the opinion of the court.

The defendant's contention on the merits in the trial court, and here, is that the Statute upon which the indictment was founded is, so far as it applies to a case like the present, repugnant to the Constitution of the United States, which gives to Congress the power to regulate commerce among the several States. The precise propositions contended for on this point are: (1) That the Act of Transportation mentioned in the proceedings was commerce between the States; (2) that such commerce is, as to all matters that admit of uniformity of regulation, subject only to congressional regulation; (3) that section 3601 of the Code is a regulation of commerce; and (4) that, as such, it cannot be applied to interstate commerce, or to the train in question. It is an historical fact, well known, that to secure uniformity and freedom in commercial intercourse, and, with that view, to establish a single government empowered to regulate commerce, was the chief consideration that led to the formation and adoption of the Federal Constitution. Accordingly, that instrument ordains that "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Art. 1, § 8. The power thus conferred, as the Supreme Court of the United

States has repeatedly decided, is complete and exclusive. It is the unlimited power, in other words, to prescribe rules by which commerce shall be governed, and to determine how far it shall be free and untrammelled. Any attempt, therefore, by a State to regulate foreign or interstate commerce is the attempted exercise of a power which has been surrendered by the States, and granted exclusively to the national government. It is an attempt to do that which Congress alone is authorized to do, and hence is a nullity. As was said in *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 537. "Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the Constitution to Congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive." And in a subsequent part of the same opinion it was said that transportation is not only essential to commerce, but that it is commerce itself, and that every obstacle to it, or burden laid upon it, by legislative authority is regulation. See also *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *McCall v. California*, 133 U. S. 104, 34 L. ed. 391.

"It cannot be too strongly insisted upon," said the court in *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, "that the right of continuous transportation from one end of the country to the other is essential, in modern times, to that freedom of commerce from the restraints which the States might choose to impose upon it that the commerce clause of the Constitution was intended to secure; and it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States, which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the State within whose limits a part of the transportation must be done could impose regulations concerning the price, compensation or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce." And in a still more recent case it was remarked that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694. There is, indeed, what has been termed a kind of neutral ground which may be constitutionally occupied by the State, so long as it interferes with no Act of Congress. Thus, where the subject is local in its nature or sphere of operation, such as the establishment of highways, the construction of bridges over navigable streams, the regulation of harbor pilotage, the erection of wharves, piers and docks, in these and other like cases, which are considered as mere aids rather than regulations of commerce, the State may act until Congress supersedes its authority, but where the subject is national in its character, admitting

of uniformity of regulation, such as the transportation and exchange of commodities between the States, Congress alone can act upon it. The case of *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 299, 13 L. ed. 996, is sometimes cited as an authority to the contrary; that is, for the proposition that, in the absence of congressional action, a State may regulate interstate commerce within its own territorial limits. But this statement is broader than the decision justifies; for it was expressly said in that case that "whatever subjects of this power are in their nature national, or admit of only one uniform system or plan of regulation, may be justly said to be of such a nature as to require exclusive legislation by Congress." And in the very recent case of *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, known as the "*Original Package Case*," where the subject is fully considered, Mr. Chief Justice Fuller, in delivering the opinion of the court, used the following language: "The power to regulate commerce among the States is a unit, but, if particular subjects within its operation do not require the application of a general or uniform system, the States may legislate in regard to them with a view to local needs and circumstances until Congress otherwise directs; but the power thus exercised by the States is not identical in its extent with the power to regulate commerce among the States. The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws, and laws in relation to bridges, ferries, and highways, belongs to the class of powers pertaining to locality, essential to local intercommunication, to the progress and development of local prosperity, and to the protection, the safety, and welfare of society, originally necessarily belonging to, and upon the adoption of the Constitution reserved by, the States, except so far as falling within the scope of a power confided to the general government." But these powers, it was said, "though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power." And in the same case the principle was again announced, as it had often been before, that the transportation of passengers or of merchandise from one State to another is in its nature not local, but national, and therefore admitted of but one regulating power.

These authorities, which are only a few of many that might be cited to the same effect, are sufficient to show the invalidity of legislation by the States in regard to subjects of commerce which are in their nature national, no matter what may be the avowed object of such legislation, and that nothing is gained by calling it the "police power." The subject was elaborately discussed, and with his accustomed force, by Mr. Justice Miller, in *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543, where it was declared that, however difficult it may often be to distinguish between one class of legislation and another, it is clear, from our complex form of govern-

ment, that whenever the statute of a State invades the domain of legislation which belongs exclusively to Congress it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the States. In *Dannal & St. J. R. Co. v. Husen*, *supra*, it was said: "We admit that the deposit in Congress of the power to regulate foreign commerce, and commerce among the States, was not a surrender of that which may properly be denominated 'police power.' What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health and safety. . . . But whatever may be the nature and reach of that power," it was added, "it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the national government." Nor does it matter, in such a case, that Congress has not acted; for it is now settled that the silence of Congress is not only not a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. "Hence," as was decided in *Leisy v. Hardin*, following many previous decisions, "inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled." In *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 894, the court in an opinion by Mr. Justice Lamar, said: "Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transaction, it is subject to the regulation of Congress." It is also a well-established principle that an article of commerce transported from one State to another is protected by the Constitution against interfering state legislation until it has mingled with, and become a part of, the common mass of property within the latter State; and, if this be so, a *fortiori* is it protected while in transitu. *Brown v. Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128. Tested by these principles, which are axiomatic, it is clear that the judgment complained of is erroneous.

That the transportation of the coal and coke mentioned in the proceedings was an act of

commerce, national in its character, is too plain to admit of doubt; and it is equally clear that the legislation in question, in so far as it extends to a case like the present, is unwarranted and void. A Statute which forbids the running of interstate freight trains between sunrise and sunset on a Sunday is, by its necessary operation, no matter what its professed object may be, a regulation of commerce. At all events, it is an obstruction to interstate commerce, which, for the purposes of the present case, amounts to the same thing, for, in any view, it is an invasion of the exclusive domain of Congress, and therefore void. To say that the State may, in the exercise of her police powers, enforce by statute the observance of the Sabbath, not as a religious duty, but as a day of rest, is no answer to the constitutional objection here raised. The validity of such legislation, when not in conflict with a higher law, is acknowledged by all, and its wisdom and propriety denied by none, certainly not by this court. But when, in a case like the present, it contravenes the Constitution of the United States, the latter must prevail, because it is "the supreme law" in all matters relating to the regulation of interstate commerce. Such a statute, if passed by Congress, so far as it concerns foreign or interstate commerce, would be valid, not, however, as the exercise of police power, but as a regulation of commerce; and the reason which would make such legislation valid as an Act of Congress makes it invalid as an Act of a State Legislature. As to the effect of the Statute in question, if sustained, upon the commercial interests of the country, we need not stop to inquire. It is enough to say that, to the extent indicated, it is not valid. In *Henderson v. New York*, *supra*, it was decided that, whatever may be the nature and extent of the police power of the State, "no definition of it and no urgency for its use, can authorize a State to exercise it in regard to a subject matter which has been confined exclusively to the discretion of Congress by the Constitution." This principle was reaffirmed in *Leisy v. Hardin*, where it is said that such a subject matter is not within the police power of a State, unless placed there by congressional action; and the observations of Mr. Justice Matthews in *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465, 31 L. ed. 700, were quoted in the opinion, to the effect that, in view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several States of the Union, it cannot be supposed that the Constitution or Congress have intended to limit the freedom of commercial intercourse among the people of the several States. The fact, if it be a fact, that the statute in question was not intended as a regulation of commerce, does not, we repeat, affect the case. There may be no purpose, it has been held, upon the part of a Legislature, to violate the Constitution, and yet a statute, enacted under the forms of law may, by its necessary operation, injuriously affect rights secured by the Constitution, in which case the statute, to that extent, must be declared void. *Brimmer v. Robman*, 189 U. S.

78, 34 L. ed. 863. This is merely stating in different form the proposition affirmed in the *Henderson Case*, namely, that, in whatever language a statute may be framed, its constitutional validity must be determined by its natural and reasonable effect,—a proposition that would seem to be incontrovertible. In the last-mentioned case, a statute of New York which required the master or owner of every vessel landing passengers at the Port of New York from a foreign country to give a bond in a prescribed penalty for each passenger so landed, as an indemnity against any expense to be incurred by the State or city for the support of such passengers, was held void, as being a regulation of commerce, although it was sought to be sustained as a police regulation to protect the State against the influx of paupers; the practical result of the statute being to impose a burden upon all passengers so landed from a foreign country. So, in the case of *Ohy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550, a similar statute of California, intended to prevent the introduction of lewd women into that State, was held void, as going beyond the necessity of the case, and amounting, in its practical operation, to a regulation of foreign commerce. Upon the same principle, statutes prohibiting the introduction of intoxicating liquors into the State enacting them have been held to be infringements of the commerce clause of the Constitution, and not valid police regulations to guard against the evils of intemperance. And numerous illustrations of the same principles are to be found in the adjudged cases, all of which show that when, in the attempted exercise of the police power, no matter upon what grounds it is sought to be exercised, the action of a State comes in conflict with a power vested exclusively by Constitution in Congress, such attempt is a nullity; and the present case comes within this principle.

The power of the State to enforce observance of the Sabbath as a police regulation stands upon no higher footing than her power to guard against the evils of vice or intemperance, or of imported pauperism, or infectious diseases. In either case the nature and extent of the power is exactly the same, and there is no principle for holding otherwise. Our attention has been called, in this connection, to *State v. Baltimore & O. R. Co.*, 94 W. Va. 783, wherein a "Sunday Law," so called, similar to the one we are considering, was upheld, under circumstances resembling those of the present case. The court in that case admitted that the transportation between the States is commerce between the States, and that such commerce is necessarily under the exclusive control of Congress; but it denied that non-action by Congress is equivalent to a declaration that such commerce shall be free and untrammelled, and upon that ground sustained the statute *in toto*. As to the last proposition, we have already shown by the cases referred to—some of them decided since that case was decided—that the rule is otherwise, and, after a careful examination of the case, we find nothing in it to raise a doubt that the rule has been rightly settled.

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The judgment must therefore be reversed, and the defendant discharged from further prosecution under this indictment, which ought to have been quashed.

Lacy, J., dissenting:

This is a writ of error to a judgment of the Circuit Court of Pulaski County, rendered at the March Term, 1891, when the circuit court affirmed the judgment of the county court, rendered at the February Term, 1891, of said county court, where the plaintiff in error was convicted for a violation of the Sunday Laws of this Commonwealth, and adjudged to pay a fine of \$50. It is admitted that the said plaintiff in error openly violated the law of the State, upon the ground that it is in violation of the Constitution of the United States, because it is an interference by the State with the subject of commerce among the States; that the Constitution of the United States provides (art. 1, § 8) that the Congress shall have power to regulate commerce with foreign nations, and among the States, and with the Indian tribes. Our Code provides that "if a person, on a Sabbath day, be found laboring at any trade or calling, or employ his apprentices or servants in labor or other business, except in household or other work of necessity or charity, he shall forfeit \$2 for each offense. Every day any servant or apprentice is so employed shall constitute a distinct offense." Code Va. § 3799. This plaintiff in error is a domestic corporation, domiciled within the State of Virginia, holding its chartered rights under the grant of the State, whose charter, by its express terms, provides that it may be altered, modified or repealed by any future Legislature as may think proper. Id. § 1240. The absolute prohibition against laboring at its calling being, in the legislative mind, inexpedient in its application to this or other domestic corporations, the Legislature, in 1884, enacted a statute which modified the general law, and excepted such trains as were loaded with passengers and perishable freight, and which suffer injury by delay, and provided as follows: "No railroad company, receiver, or trustee controlling or operating a railroad shall, by any agent or employé, load, unload, run or transport upon such road on a Sunday any car, train of cars or locomotive, nor permit the same to be done by any such agent or employé, except when such cars, trains or locomotives are used exclusively for the use of wrecked trains, or trains so disabled as to obstruct the main track of the railroad, or for the transportation of the United States mail, or for the transportation of passengers and their baggage, or for the transportation of live-stock, or for the transportation of articles of such perishable nature as would be necessarily impaired in value by one day's delay in their passage: provided, however, that, if it should be necessary to transport live-stock or perishable articles on a Sunday to an extent not sufficient to make a whole train-load, such train-load may be made up with cars loaded with ordinary freight." Section 3802 provides that "the word 'Sunday,' in the preceding section, shall be con-

strued to embrace only that portion of the day between sunrise and sunset; and trains *in transitu* having started prior to twelve o'clock on Saturday night may, in order to reach the terminus or shops of the railroad, run until nine o'clock the following Sunday morning, but not later." Section 3803 provides the penalty, which is immaterial in this case; the fine assessed not being in violation thereof. These sections constitute our Sunday Laws, not very stringent, it must be admitted, as far as railroads are concerned; its extreme liberality in the privileges to labor on the Sabbath accorded therein suggesting the thought that, when the law was drawn, the railroads in some form stood by consenting; but how this is I have no information. However that may be, the law is now obnoxious to the railroad in question, and in some localities the lower courts have refused to enforce the law.

The question now to be inquired into is, What is the nature of this law? Is it an Act to regulate commerce with foreign nations, or among the States, or with the Indian tribes? And does it thus invade the granted powers of the Congress, under the Constitution of the United States, and conflict with them? If so, it cannot be upheld. It certainly was not so intended. Nothing is said about commerce nor about transportation between the States. It is absolutely limited in its operation to the State of Virginia. It is to be found in the chapter of our Code entitled "Of Offenses against Morality or Decency; Protection of Religious Meetings." The section which precedes it is entitled "Profane Swearing and Drunkenness, how Punished." The section which succeeds it is entitled "Sale of Intoxicating Liquors on Sunday, how Punished." The next is, "Disturbance of Religious Worship, how Punished." It is intended as an exercise of the police power of the State, in the interest of morality and decency, and that is what I think it is. It is no part of the province of Congress, under its granted powers, to enact police laws for the regulation of such affairs within a State; and if this State may not enact, for the protection of its citizens, police laws for the observance of the Sabbath day, we must ever remain practically without such. I think I am sustained in this view by the decision of the courts of this country, both state and federal; and I will briefly proceed to consider this. Commerce consists of the various agreements which have for their object facilitating the exchange of the products of the earth, or the industry of man, with the intent to realize a profit. Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation of persons and property, as well as the purchase, sale and exchange of commodities. The power conferred upon the Congress by the above clause is exclusive, so far as it relates to matters within its purview which are material in their character, and admit of a requisite uniformity of regulation affecting all the States. That clause was adopted in order to secure uniformity against discriminating

state legislation. State legislation is not forbidden in matters either local in their operation, or intended to be mere aids to commerce, for which special regulations can more effectually provide, such as harbors, pilotage, beacons, buoys and other improvements of harbors, bays and rivers within a State, if their free navigation be not thereby impaired. Congress, by its inaction in such matters, virtually declares that until it deems best to act they may be controlled by the State. *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238 (opinion of Mr. Justice Field). In the case of *Sherlock v. Alling*, 98 U. S. 99, 23 L. ed. 819, the same learned justice said: "In supposed support of this position, numerous decisions of this court are cited by counsel to the effect that the States cannot by legislation place burdens upon commerce with foreign nations or among the several States." Upon an examination of these cases, it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between places was required to be conducted. In all the cases the legislation condemned operates directly upon commerce, either by way of tax upon its business, license upon its pursuits in particular channels, or conditions for carrying it on. Thus, in the *Passenger Cases*, reported in 48 U. S. 7 How. 445, 12 L. ed. 770, the laws of New York and Massachusetts exacted a tax from the captains of vessels bringing passengers from foreign ports for every passenger landed. In *Pennsylvania v. Wheeling & B. Bridge Co.*, reported in 54 U. S. 13 How. 518, 14 L. ed. 249, the statute of Virginia authorized the erection of a bridge which was held to obstruct the free navigation of the river Ohio. And in all the other cases, when legislation of a State has been held to be null for interfering with the commercial power of Congress,—as in *Brown v. Maryland*, 25 U. S. 12 Wheat. 425, 6 L. ed. 680; *Taa Cases*, 79 U. S. 12 Wall. 204, 20 L. ed. 870; and in *Walton v. Missouri*, 91 U. S. 275, 23 L. ed. 847,—the legislation created in the way of tax, license or condition a direct burden upon commerce, or in some way directly interfered with its freedom; and it may be said generally that the legislation of a State not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land, or engaged in commerce, foreign or interstate, or in any other pursuit. Judge Cooley says, in his work on Constitutional Limitations (p. 723): "The line of distinction between that which constitutes an interference with commerce and that which is a mere police regulation is sometimes dim and shadowy, and it is not to be wondered at that learned jurists differ when endeavoring to classify the cases which arise. It is not doubted that Congress has the power to

go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions, if it shall be deemed advisable; and that to whatever extent ground shall be covered by these directions the exercise of state power is excluded.

Congress may establish police regulations as well as the States, confining their operations to the subjects over which it is given control by the Constitution. But as the general police power can better be exercised under the supervision of the local authorities, and mischiefs are not likely to spring therefrom so long as the power to arrest collision resides in the national courts, the regulations that are made by Congress do not often exclude the establishment of others by the State covering very many particulars. Moreover, the regulations of commerce are usually, and in some cases must be, general and uniform for the whole country; while in some localities state and local policy will demand peculiar regulations with reference to special and peculiar circumstances." In the late case of *Cardwell v. American R. Bridge Co.*, 113 U. S. 205, 28 L. ed. 959, after citing the earlier cases, the court said that they illustrate the general doctrine, now fully recognized, that the commercial power of Congress is exclusive of state authority only when the subjects upon which it is exerted are national in their character, and admit and require uniformity of regulations affecting all the States; and that when the subjects within that power are local in their nature or operation, or constitute mere aids to commerce, the States may provide for their regulation and management until Congress interferes and supercedes their action. I will cite as an illustration of my view of this subject yet another decision of the Supreme Court of the United States upon this subject, which applies to a through line of railway, and is much in point. In the case of *Stone v. Farmers L. & T. Co.* 116 U. S. 307, 29 L. ed. 636 (one of the *Railroad Commission Cases*), that court said: "There can be no doubt that each of the States through which the Mobile & Ohio R. R. passes incorporated the Company for the purpose of securing the construction of a continuous line of interstate communication between the Gulf of Mexico, in the south, and the Great Lakes, in the north. It is equally certain that Congress aided in the construction of parts of this line of road, so as to establish such a route of travel and transportation; but it is none the less true that the corporation created by each State is, for the purposes of local government, a domestic corporation, and that its railroad within the State is a matter of domestic concern. Mississippi may govern this corporation as it does all domestic corporations, in respect to every act, and everything within the State which is the lawful subject of state government. It may, beyond all question, by the settled rule of decision of this court, regulate freights and fares for business done exclusively within the State; and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi.

So it may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. In this way it may certainly require the company to fence, etc., as much of its road as lies within the State, to stop its trains at railroad crossings, to slacken speed while running in a crowded thoroughfare, to put its tariffs and time-tables at proper places, etc. This company is not entirely relieved from state control in Mississippi, simply because it has been incorporated by, and is carrying on business in, the other States through which its road runs. While in Mississippi it can be governed by Mississippi in respect to all things which have not been placed by the Constitution of the United States within the exclusive jurisdiction of Congress. It is not enough to prevent the State from acting that the road in Mississippi is used in aid of interstate commerce. Legislation of this kind, to be unconstitutional, must be such as will necessarily amount to or operate as a regulation of business without the State as well as within." See also *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352; *Chicago & A. R. Co. v. People*, 105 Ill. 657; *Hae v. Grand Trunk R. Co.* 14 Fed. Rep. 401; *Iowa v. Chicago, M. & St. P. R. Co.* 33 Fed. Rep. 391; *Chicago, M. & St. P. R. Co. v. Becker*, 32 Fed. Rep. 849. And as to the right of the State to regulate the charge for taking on through cars—"switching" as it is called—by a state commission it was held to have no reference to interstate commerce, in the case of *Chicago, M. & St. P. R. Co. v. Becker*, *supra*. And again it was held in *State of Iowa v. Chicago, M. & St. P. R. Co.* 33 Fed. Rep. 391, that, even if such switching be an act of interstate commerce, such regulation is valid, as it does not refer to the carriage of freight outside the State. And, again, it was said by the Supreme Court of the United States in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, that the power to prescribe regulations to protect the health of the community, and to prevent the spread of disease, is incident to all local municipal authority, however much such regulations may interfere with interstate commerce. The Interstate Commerce Act itself, passed February 4, 1887, and amended March 2, 1889, when Congress subjected to its control all common carriers engaged in continuous interstate or international transportation of passengers or property, was held not to include the carriage or handling of passengers, by rail or otherwise, when such carriage or handling is performed wholly within a State. *Ex parte Koehler*, 30 Fed. Rep. 867. This is the result of all the decisions of the federal courts. If the Act in question only applies to and operates upon transportation within the State, it is immaterial that the company operated on is part of an interstate line. It must not only affect commerce, but it must affect commerce with foreign nations, or among the States, or with the Indian tribes. But, if the Act is one done in the exercise of a police power, it is within the legitimate and unchallenged do-

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main of the State; such as to regulate concerning the public health, public peace and morality and decency.

Now, what is this police power, and where does it reside? It is defined to be the authority to establish, for the intercourse of the several members of the body politic with each other, those rules of good conduct and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a corresponding enjoyment by others, and is usually spoken of as the authority or power of police. This is a most comprehensive branch of sovereignty, extending, as it does, to every person, every public and private right, everything in the nature of property, every relation in the State, in society, and in private life. The power vested in the Legislature to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances as they shall judge to be for the good and welfare of the Commonwealth, and for the subjects of the same. The exercise of this power, at least, has been left with the individual States, and cannot be taken from them, and exercised wholly or in part under legislation of Congress. *Cooley, Const. Lim.* 715; *United States v. Dewitt*, 76 U. S. 9 Wall. 41, 19 L. ed. 593.

Quarantine and health laws of every description, proper regulations for the use of highways, and the general right to control and regulate the public use of navigable waters are unquestionably with the State under the police power. Indeed, the police power of a State, in a comprehensive sense, embraces its whole system of internal regulations by which the State seeks, not only to preserve the public order, and to prevent offenses against the State, but also to establish for the intercourse of citizen with citizen those rules of good manners which are calculated to prevent a conflict of rights. Judge Cooley says, in the American constitutional system the power to establish the ordinary regulations of police has been left with the States individually, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress; so decided, as we have seen, in *United States v. Dewitt*, 76 U. S. 9 Wall. 41, 19 L. ed. 593. Neither can the national government, through any of its departments or officers, assume any supervision of the police regulations of the States. The State may also, under this power, says the same learned author, regulate the grade of railways, and prescribe how and upon what grade railway tracks may cross each other; and it may apportion the cost of making the necessary crossings between the corporations owning the roads; and it may establish regulations requiring existing railways to ring the bell or blow the whistle of their engines immediately before passing highways at grade, or other places when their approach might be dangerous to travel, or to station flagmen at such or any other dangerous places. The Legislature has power by general laws, from time to time, as the public exigencies may require, to regulate corpora-

tions in their franchises so as to provide for the public safety. This is held to be a mere police regulation. *Galena, C. & U. R. Co. v. Loomis*, 13 Ill. 548. But certain powers directly affecting commerce may sometimes be exercised, when the purpose is not to interfere with congressional legislation, but merely to regulate the time and manner of transacting business with a view to facilitate trade, secure order, and prevent confusion. *Vanderbilt v. Adams*, 7 Cow. 351, where Woodworth, J., states very clearly the principles on which police regulations are sustained in such cases.

We have said that the laws to prevent the desecration of the Sabbath came properly under the police power of the State. Judge Cooley says, on this subject, the statute for the punishment of public profanity requires no further justification than the natural impulses of every man who believes in a Supreme Being, and recognizes His right to the reverence of His creatures. The laws against the desecration of the Christian Sabbath by labor or sports are not so readily defensible by arguments, the force of which will be admitted by all. The laws which prohibit ordinary employments are to be defended either on the same ground which justifies the punishment of profanity, or as establishing sanitary regulations, based upon the demonstration of experience that one day's rest in seven is needful to recuperate the exhausted energies of body and mind. Judge Cooley, speaking of those laws enacted to prevent desecration of the Sabbath, says they are not unconstitutional as a restraint upon trade and commerce. There can no longer

be any question, if any there ever was, that such laws may be supported as regulations of police. *Specht v. Com.* 8 Pa. 312; *Bloom v. Richards*, 2 Ohio St. 387; *Ex parte Andrews*, 18 Cal. 678; *Ex parte Bird*, 19 Cal. 130. Upon this subject of the Sabbath day observance, I have found none but state decisions in a great multitude of cited cases. It does not appear to have been ever, so far as my investigation has gone,—which has been somewhat limited, and not thorough,—a matter of decision with the federal courts, so far as the States are concerned. And I believe there is no probability that Congress will ever assume the right to regulate the observance of the Sabbath day in the States. If, however, it should ever do so, I do not doubt that the American Congress will protect the American Sabbath day from unnecessary desecration, by whomsoever it is essayed. Nor do I doubt that, if the Supreme Court of the United States should have this question under consideration, it would hold, as my view is, that the Sunday Laws of this Commonwealth are within the police powers of the State, and, moreover, that they in no wise affect interstate commerce, but, being limited in their operations to the State, whatever effect they have upon the through line of transportation outside of the State, it is no more than is proper, and in no way an interference with the granted power of the Congress. It is to be regretted, as it is a federal question, that it cannot go up to the Supreme Court of the United States, and be settled there. Holding the views I do, I am constrained to dissent from the opinion of the majority

UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF MISSOURI.

Mary E. DOZIER

FIDELITY & CASUALTY CO. of New York.

(48 Fed. Rep. 444.)

Sun-stroke or heat prostration is not a bodily injury "sustained through external, violent and accidental means" within the meaning of an insurance policy covering such injuries, but expressly excluding liability for "any disease or bodily infirmity."

(June 3, 1891.)

ACTION to recover the amount alleged to be due on a policy of accident insurance on demurrer to petition. *Demurrer sustained.*

Statement by Philips, J.:

This is an action on an accident insurance policy. The assured, Willoughby L. Dozier, on the 26th day of April, 1890, took out a pol-

icy of insurance in the defendant Company, which, by its terms, would expire on the 26th day of April, 1891. The assurance was "against bodily injuries sustained through external, violent, and accidental means." It did not cover "any disease or bodily infirmity." The insured was, by occupation, a supervising architect. The petition, by his wife, the named beneficiary, alleges that the assured, while in the discharge of his ordinary avocation, and without any voluntary exposure on his part, came to his death on the 28d day of June, 1890, "by sun-stroke or heat prostration." To this petition the defendant demurs, on the ground that petition does not state facts sufficient to constitute a cause of action, in that it shows on its face that the alleged injury was not accidental, within the meaning of the policy.

Messrs. Warner, Dean & Hagerman for defendant in support of the demurrer.

Messrs. Peak, Yeager & Ball, for petitioner, *contra*:

Insanity is not a disease, and one afflicted with insanity was as much the subject of an accident as if he had fallen from the top of a house.

North America Acc. Ins. Co. v. Crandal, 130 U. S. 527, 30 L. ed. 740.

NOTE.—For various notes on the subject of accident insurance, see *Union Mut. Acc. Assn. v. Frohard* (Ill.) 10 L. R. A. 333; *Sheanon v. Pacific Mut. L. Ins. Co.* (Wis.) 9 L. R. A. 685; *Paul v. Travelers Ins. Co.* (N. Y.) 3 L. R. A. 443; 13 L. R. A.

There are more of the elements of an accidental nature in sun-stroke than in insanity.

An accident is "an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause or is an unusual effect of a known cause, and therefore not expected; chance, casualty, contingency, happening by chance or unexpectedly; taking place not according to the usual course of things; casual, fortuitous."

North American L. & Acc. Ins. Co. v. Burroughs, 69 Pa. 48.

The killing of a person by lightning is an accident.

Hutchcraft v. Travelers Ins. Co. 87 Ky. 800.

A stroke of the sun's heat is as unexpected and as accidental to the party who receives it as a stroke of lightning. As at least throwing some light upon the question, see—

United States Mut. Acc. Asso. v. Barry, 181 U. S. 100, 33 L. ed. 60, 23 Fed. Rep. 712; *McGlinchy v. Fidelity & C. Co.* 80 Me. 261.

Phillips, J., delivered the opinion of the court:

The question to be decided is whether or not death resulting from sun-stroke, or heat prostration comes within the means of injury insured against. This precise question does not appear to have been passed upon by any American court, but it is not too much to say, perhaps, that it may be regarded as settled in the negative in England by the opinion of Chief Justice Cockburn in *Sinclair v. Maritime Passenger's Assur. Co.*, 3 El. & El. 478. The policy there assured against "any personal injury from, or by reason or in consequence of, any accident which should happen to him upon any ocean, sea, river, or lake." The assured was master of the ship Sultan, and in the course of his voyage he arrived in the Cochin River, on the southwest coast of India, and in the usual course of his vocation he was smitten by a sun-stroke, from the effect of which he died. On full consideration, it was held that his death must be considered as having resulted from a natural cause, and not from accident, within the meaning of the policy. The policy there did not, as here, contain the words "external, violent," and yet the learned chief justice held that the term "accident," as used in the policy, involved necessarily some violence, casualty, or *vis major*. He says: "We cannot think disease produced by the action of a known cause can be considered as accidental. Thus disease or death engendered by exposure to heat, cold, damp, the vicissitudes of climate, or atmospheric influences, cannot, we think, properly be said to be accidental, unless, at all events, the exposure is itself brought about by circumstances which may give it the character of accident. Thus, by way of illustration, if, from the effects of ordinary exposure to the elements, such as is common in the course of navigation, a mariner should catch cold and die, such death would not be accidental; although if, being obliged by shipwreck or other disasters to quit the ship, and take to the sea in an open boat, he remained exposed to wet and cold for some time, and death ensued therefrom, the death might properly

be held to be the result of accident. It is true that, in one sense, disease or death through the direct effect of a known natural cause, such as we have referred to, may be said to be accidental, inasmuch as it is uncertain beforehand whether the effect will ensue in any particular case. Exposed to the same malaria or infection, one man escapes, another succumbs. Yet diseases thus arising have always been considered, not as accidental, but as proceeding from natural causes. In the present instance, the disease called 'sunstroke,' although the name would at first seem to imply something of external violence, is, so far as we are informed, an inflammatory disease of the brain, brought on by exposure to the too intense heat of the sun's rays. It is a disease to which persons exposing themselves to the sun in a tropical climate are more or less liable, just as persons exposed to the other natural causes to which we have referred are liable to disastrous consequences therefrom. The deceased, in the discharge of his ordinary duties about his ship, became thus affected, and so died."

According to this high authority, a disease produced by a known cause cannot be considered as accidental. This conclusion has been accepted as authoritative by text-writers. Bliss, *Ins.* § 399; May, *Ins.* 3d ed. § 519. If sun-stroke or heat prostration is properly classified among diseases, it is expressly excepted from the operation of this policy. It is discussed in works on pathology under the head of diseases of the brain. Niemeyer, in his work on Practical Medicine (vol. 2, pp. 181, 182), treats of it under the head of diseases of the brain. He asserts that the investigations and experiments of so renowned a specialist as Obernier have entirely exploded the once common notion that sun-stroke, or insolation, depends upon hyperæmia of the brain, induced by the action of the sun's rays on the head. The rays of the sun are not essential to it. "It is now known that in this disease there is a serious derangement of the heat-producing function, and a great rise in the bodily temperature, which, in extreme case, may reach 109 degrees or 110 degrees Fahr." And he concludes that, while nothing is yet known of the anatomical lesions upon which sun-stroke depends, yet "the disorder has a definite material basis." A standard Encyclopædia (Britannica, vol. 22, p. 666) terms it a "disease," and prescribes its methods of treatment. From this and other standard works we collate the following facts: That it is a term applied to the effects upon the central nervous system, and through it upon other organs of the body, by exposure to the sun or to overheated air. "Although most frequently observed in tropical regions, this disease also occurs in temperate climates during hot weather. A moist condition of the atmosphere, which interferes with the cooling of the overheated body, greatly increases the liability to suffer from this ailment." The common notion that sun-stroke or "heat prostration," as it is termed in the petition, comes like a stroke of lightning from a piercing ray of the sun, is utterly at fault. It affects persons frequently during

the night. It often results from overcrowding in quarters, as in the case of soldiers in barracks, and to persons in poorly ventilated rooms. Also persons whose employment exposes them to heat more or less intense, such as laundry workers and stokers, are apt to suffer from this in hot seasons. "Causes calculated to depress the health, such as previous disease, particularly affections of the nervous system, anxiety, worry or overwork, irregularities in food, and, in a marked degree, intemperance, have a predisposing influence; while personal uncleanness, which prevents, among other things, the healthy action of the skin, the wearing of tight garments, which impede alike the functions of heart and lungs, and living in overcrowded and insanitary dwellings, have an equally hurtful tendency." Longmore, in his reports of cases occurring in the British army in India, where it is quite prevalent, attributes it much to the foul air and badly ventilated quarters, and he also speaks of its pathological conditions. In all its forms, ranging from "heat syncope" and "heat apoplexy" to "ardent thermic fever," it is subjected to medical treatment as a disease, and its fatality is estimated at 40 to 50 per cent. With what propriety for accuracy, therefore, can this malady be termed an accident, any more than cholera, small-pox, or yellow fever, or apoplexy? It may be an accident that a person is exposed to it, but the conditions under which the human system may be affected by it certainly belong to natural causes, which may reasonably be anticipated, as they come not by chance. The "accident," as used in the policy, is presumed to be employed in its ordinary, popular sense, which means "happening by chance;" "unexpectedly taking place;" "not according to the usual course of things." So that a result ordinarily, naturally, flowing from the conduct of the party cannot be said to be accidental, even where he may not have foreseen the consequences.

It is not deemed essential to a vindication of the correctness of the conclusion reached to review the various American decisions illustrating the application of the term "accidental" employed in such policies further than to note the palpable distinction between them and the case at bar. Death by drowning is accidental, as there is present the *vis major*, external and violent, producing asphyxia, and in the act producing the injury there is something unforeseen, unexpected, and unusual. May, Ins. § 516.

In *United States Acc. Assn. v. Barry*, 131 U. S. 100, 33 L. ed. 60, the assured, after two other persons had jumped from a platform five feet from the ground with safety, also jumped therefrom, followed, as to him, with serious consequences, producing a stricture of the duodenum, from which death ensued. In that case the deceased intended to, and thought that he would, alight safely, and it was a question for the jury to say whether or not it was an accident that he did not. The court says: "If the death is such as follows from ordinary means voluntarily employed in a not unusual or unexpected way, it cannot be called a result

effected by accidental means; but if in the act which precedes the injury something unforeseen, unexpected, unusual occurs, which produces the injury, then the injury has resulted through accidental means."

In *United States Mut. Acc. Assn. v. Newman*, 84 Va. 52, the assured was found dead in his bed in the morning, caused evidently by inhaling coal gas. The case turned upon the question whether or not this gas was a poison or poisonous substance, within the meaning of the exception contained in the policy. The controversy among the experts was as to whether death resulted from carbonic oxide or carbonic acid, and as to their resultant poisonous power, both causing death by suffocation. Such a death clearly came within the term "accidental," and it was left to the jury to determine whether or not carbonic oxide is poisonous within the meaning and intent of the words "poison" and "poisonous" as used in the policy. This course was pursued by the court in view of the conflict in the testimony as to whether such gases were strictly "poisonous" in the ordinary acceptation to be imputed to such term in the policy. These cases do not present the question of an accident, and disease as in the case at bar. In *Bacon v. United States Mut. Acc. Assn.*, 123 N. Y. 304, it was held that death resulting from a malignant pustule, caused by the infliction upon the body of diseased animal matter containing bacillus anthrax, is death from disease, and not within the terms of an accident policy similar to the one under consideration. It was likened to what is called "wool sorter's disease," because it happens to people who handle wool and hides, such as tanners, butchers and herdsmen. Although the medical experts admitted that this species of malady belonged to pathology, yet they attempted to except this instance from the classification of disease by defining it as a "pathological condition, and succumbing of the body to the infliction of this particular poison." But the court held that a pathological condition "means neither more nor less than a diseased condition of the body," and therefore, as the policy expressly excepted bodily infirmity or disease, there could be no recovery. The court says: "No abrasion of the skin is needed to produce the contact of the bacilli, and what follows from such contact seem to be as plainly a disease as in the case of small-pox or typhoid fever."

Sun-stroke seems to be recognized by the courts in New York as a disease. In *Ikona v. World Mut. L. Ins. Co.*, 6 Thomp. & C. 364, the contention was as to whether the court should take judicial cognizance of the fact that sun-stroke was "a serious disease," within the terms of the policy. There seemed to be no question made that it was not a disease, but whether the fact of its seriousness should be left to the determination of the jury. Courts may take cognizance of facts generally known and recognized in nature, science and history. They will take notice of processes in art and science, the results of which are matters of common knowledge. *Brown v. Piper*, 91 U. S. 37, 23 L. ed. 200. They will take notice of the

art of photography, and its production of correct likenesses. *Underhook's Case*, 78 Pa. 340; *Coxens v. Higgins*, 1 Abb. App. Dec. 451. Also, that coal oil is inflammable. *State v. Hayes*, 78 Mo. 318.

So should courts take notice that fever in its multiform grades is a disease, and I apprehend, in view of the universal assignment of apoplexy in pathology among the diseases of the brain, that it would not be seriously questioned that courts in trials before juries may assume it to be a bodily disease.

It is suggested in argument by the learned counsel for plaintiff that at some time anterior to the issuance of this policy the defendant's policies contained an express exception against injury by sun-stroke, and that in its circulars distributed at the time

the policy in question was issued it asserted that practically all the old conditions had been expunged from its policies. It is therefore argued that this was tantamount to an assurance on its part that sun-stroke would thenceforth be regarded by it as expressed within the terms "external, violent, and accidental." What the facts are touching this assertion the court cannot know, and what the law arising thereon may be the court is not required on this issue to say, as no such facts appear in the petition. The court can look alone to the petition in passing on the demurrer. The demurrer admits only such facts as appear on the face of the petition, and such as are well pleaded.

It results that *the demurrer is sustained.*

MARYLAND COURT OF APPEALS.

Samuel D. HELFRICH, *Appt.*,

CATONSVILLE WATER CO.

(....Md....)

(June 16, 1891.)

The right of the owner of land bordering on a stream to use it as a pasture in a reasonable way is not affected by the fact that the waters are thereby made unfit for use, although the water-works of an incorporated company have been established lower down to supply the public with water from that stream.

APPEAL by defendant from a decree of the Circuit Court for Baltimore County enjoining him from permitting cows or other animals to enter or stand in, or defoul the waters of, a stream from which plaintiff supplied the inhabitants of Catonsville with water for domestic purposes. *Reversed.*

The facts are stated in the opinion.

Argued before Alvey, *Ch. J.*, and Irving, Robinson, Bryan, Briscoe, Miller, Fowler and McSherry, *JJ.*

NOTE.—Pollution of waters.

A person has a right to use a stream as it passes through his lands for all reasonable purposes, and in the manner in which such streams are usually enjoyed. *Carhart v. Auburn Gas Light Co.* 2 Barb. 307, 308; *Radcliff v. Brooklyn*, 4 N. Y. 22; *Thomas v. Brackney*, 17 Barb. 654, 656-659; *O'Riley v. McChesney*, 3 Lane. 278; *Snow v. Parsons*, 3 Vt. 428, 431-432; *Pitts v. Lancaster Mills*, 18 Met. 116; *Cary v. Daniels*, 8 Met. 473, 477; *Jacobs v. Alford*, 43 Vt. 303.

The question whether his use of the stream is a reasonable one, under the circumstances, is one of fact. *O'Riley v. McChesney*, *supra*; *Hay v. Cohoes Co.* 2 N. Y. 159; *Tremain v. Cohoes County*, 14 162; *Thomas v. Brackney*, *supra*; *Houss v. Hammond*, 29 Barb. 89; *Sampson v. Hoddinott*, 38 Eng. L. & Eq. 241; *Merritt v. Brinkerhoff*, 17 Johns. 204; *Pollitt v. Long*, 58 Barb. 20; *Crosley v. Lightowler*, L. R. 2 Ch. App. 478; *McCallum v. Germantown Water Co.* 54 Pa. 40; *Crosby v. Beasey*, 49 Me. 339; *Marley v. Shultz*, 29 N. Y. 346; *Angell, Watercourses*, 6th ed. 1307, § 234, note 1; *Cotton v. Pocasset Mfg. Co.* 13 Met. 429; *Russell v. Scott*, 9 Cow. 279; *Baldwin v. Calkins*, 10 Wend. 169; *Holman v. Boiling Spring B. Co.* 14 N. J. Eq. 235.

The question whether a particular use of the water of a stream by one owner is consistent with the rights of other owners on the stream below is generally one of fact for a jury. In the absence of a right by prescription or grant the test is whether the particular use, under the circumstances, is a reasonable one (*Prentice v. Geiger*, 74 N. Y. 341); as such owner has the right to enjoy the continuous flow of the stream, to use its force, and to

make limited and temporary appropriation of its waters. These rights are held in common with all others having lands bordering upon the same stream; but his enjoyment must necessarily be according to his opportunity, prior to those below him, subsequent to those above. It follows that all such rights are liable to be modified and abridged in their enjoyment by the exercise by others of their own rights; and, so far as they are thus abridged, the loss is *damnum absque injuria*. The only limit that can be set to this abridgment through the exercise by others of their natural rights is in the standard or measure of reasonable use. *Gould v. Boston Duck Co.* 13 Gray, 442; *Haskins v. Haskins*, 9 Gray, 390; *Tourtellot v. Phelps*, 4 Gray, 370, 376; *Thurber v. Martin*, 2 Gray, 304; *Pitts v. Lancaster Mills*, 18 Met. 150; *Wadsworth v. Tiltonson*, 15 Conn. 386; *Springfield v. Harris*, 4 Allen, 494; *O'Riley v. McChesney*, 49 N. Y. 672.

The riparian owners of lands adjoining fresh water, non-navigable streams, take title, *ad usque flum aque* (to the thread of the stream), and thereby acquire the right as incident to such title to the usufructuary enjoyment of the undiminished and undisturbed flow of such water. "Fresh rivers of what kind soever do of common right belong to the owners of the soil adjacent," is the expressive language of the common law, and is of universal application. *Clinton v. Myers*, 48 N. Y. 511, 7 Am. Rep. 373; *Chenango B. R. Co. v. Paige*, 33 N. Y. 173, 33 Am. Rep. 407; *Smith v. Rochester*, 32 N. Y. 463. See notes to *Barton v. Union Cattle Co.* (Neb.) 7 L. R. A. 487; *Chapman v. Rochester* (N. Y.) 1 L. R. A. 290; *Columbus & H. Coal & Iron Co. v. Tucker* (Ohio) 13 L. R. A. 577; *Brown v. Cunningham* (Iowa) 12 L. R. A. 563.

Messrs. Luther M. Reynolds and George E. Willis for appellant.

Messrs. Edwin J. Farber and John I. Yellott, for appellee:

The appellee, as riparian owner along the stream in question, claims the right to have the water come to it in its pure and natural condition.

Wood, Nuisances, 1888, § 427, p. 500; High, Inj. 1890, §§ 794, 798; Pom. Remedial Rights, 1887, § 8; Angell, Watercourses, 1877; Kerr, Inj. § 378, p. 393; *Woodyear v. Schaefer*, 57 Md. 8.

Equity will protect this right by injunction.

High, Inj. 1890, §§ 794, 795, 798 and cases; Kerr, Inj. §§ 377, 378, p. 392, and cases; *Clowes v. Staffordshire P. W. Co.* L. R. 8 Ch. App. 142; *Lockwood County v. Lawrence*, 77 Me. 297; *Red River Rolling Mills v. Wright*, 30 Minn. 251; Gould, Waters, § 219; *McCallum v. Germantown Water Co.* 54 Pa. 53; *Holsman v. Boiling Spring B. Co.* 14 N. J. Eq. 335.

1. By preventing a constantly recurring grievance which cannot be otherwise prevented.

Adams, Eq. 312; *Belknap v. Trimble*, 3 Paige, 601, 3 L. ed. 290; *Weber v. Gage*, 39 N. H. 186; *Merrifield v. Lombard*, 18 Allen, 18; *Cadigan v. Brown*, 120 Mass. 494; *Clark v. Stewart*, 56 Wis. 154; *Woodward v. Worcester*, 121 Mass. 245; *Harris v. Mackintosh*, 133 Mass. 280; *Webb v. Portland Mfg. Co.* 3 Sumn. 189; *Woodyear v. Schaefer*, 57 Md. 1.

A probable nuisance, if in some degree it at present exists, and is expected to increase, is good ground for injunction.

Goldsmid v. Tunbridge Wells I. Comrs. L. R. 1 Ch. App. 349.

2. Where the injury is irreparable.

By an irreparable injury is meant one for which there is no adequate remedy at law.

Gould, Waters, 1888, § 508; *Lockwood County v. Lawrence*, 77 Me. 312; *Cansfield v. Andrew*, 54 Vt. 1; Kerr, Inj. §§ 198, 199; *Holsman v. Boiling Spring B. Co.* 14 N. J. Eq. 343, and cases cited; Dan. Ch. Pr. 1858, § 2; Story, Eq. Jur. §§ 926, 927.

The appellant in this case cannot discolor or make muddy the waters of the stream to the injury of the appellee's use, business or betterments.

Clowes v. Staffordshire P. W. W. Co. L. R. 8 Ch. App. 125.

Appellant cannot otherwise pollute or befoul it to the detriment or damage of appellee's business.

Holsman v. Boiling Spring B. Co. 14 N. J. Eq. 335; *McCallum v. Germantown Water Co.* 54 Pa. 40. See also Angell, Watercourses, § 136, and cases; Gould, Waters, § 544, and cases; *Lockwood County v. Lawrence*, 77 Me. 297; *Lewis v. Stein*, 16 Ala. 219, and cases; *Wood v. Sutcliffe*, 2 Sim. N. S. 146; *Silver Spring B. & D. Co. v. Wonskuck*, 13 R. I. 615; *Pennington v. Brinsop Hall Coal Co.* L. R. 5 Ch. Div. 769.

No one has a right to use water through his land so as to foul it or render it corrupt or unhealthy, and unfit to be used by the landowner below for domestic purposes.

McCallum v. Germantown Water Co. 54 Pa. 40.

Nor can he use it so that producing no apparent, sensible effect, yet his use would be such as to disgust the senses.

13 L. R. A.

Wood, Nuisances, § 427, p. 500; *Woodyear v. Schaefer*, 57 Md. 1; *Baltimore v. Warren Mfg. Co.* 59 Md. 96.

All acts done by a man on his own land whereby the rights of his neighbor in water are injuriously affected, may be considered together as nuisances relating to water.

Kerr, Inj. 1871, § 377.

The appellee cannot commit, or permit any act to be committed, in his user of the water, which will amount to a public nuisance.

Whatever is injurious to a large class of the community, or annoys that portion of the public that necessarily comes in contact with it, is a public nuisance at common law. Wood, Nuisances, § 17, note 1, § 18, p. 500, § 427, and cases cited; *State v. Taylor*, 29 Ind. 517; *Hackney v. State*, 8 Ind. 494, 495, and cases; *People v. Cunningham*, 1 Denio, 524.

And especially can the appellant permit no use to be made of the water which will be injurious to or endanger public health.

High, Inj. 1890, § 798, p. 609, and cases; *Goldsmid v. Tunbridge Wells I. Comrs.* L. R. 1 Eq. 163.

Nor can the appellant use his lot as a stockyard or barnyard to the damage of the appellant and the discomfort of the public.

Barclay v. Com. 25 Pa. 505.

Whether the use exercised by the appellant is a natural use as claimed by him or otherwise, it is subject to, and must not infringe, the rule "*sic utere tuo ut alienum non laedas*."

3 Kent, Com. 440; Angell, Watercourses, § 195; Shearm. & Redf. Neg. § 729, p. 618; *Tyler v. Wilkinson*, 4 Mason, 400; *Ferres v. Knipe*, 28 Cal. 344; *Learned v. Tsengman*, 65 Cal. 334; *Arnold v. Foote*, 12 Wend. 331.

It must be a reasonable user taking into consideration all the surrounding circumstances.

Red River Rolling Mills v. Wright, 30 Minn. 249; *Lockwood County v. Lawrence*, 77 Me. 297; *Arnold v. Foote*, *supra*; *Davis v. Getchell*, 50 Me. 604; *Ferres v. Knipe*, *supra*; *Pennington v. Brinsop Hall Coal Co.* L. R. 5 Ch. Div. 772.

Why should the appellee be forced to obtain by condemnation that which it already has a right to without it, to wit: The right to pure water, which the appellant seeks to deprive appellee of by his action or the action of his cattle, whose nuisances he can easily obviate or guard against?

Lewis v. Stein, 16 Ala. 214.

Bryan, J., delivered the opinion of the court:

The Catonsville Water Company was incorporated by the Act of 1886, chap. 100. It was chartered for the purpose of enabling it to supply with pure water the inhabitants of Catonsville and the adjoining portion of Baltimore County. In pursuance of its charter, it has acquired a tract of land, and constructed at large expense a dam and reservoir, water-works, mains, and pipes, and is engaged in supplying a large number of people with water for drinking and other necessary purposes. A pure, clear, natural stream of fresh water flows through and along the land of Samuel D. Helfrich, and through the land of the Water Company, which is situate about 140 perches further down the stream, and is the principal source of supply.

for the purposes of the Company's business.

A bill of complaint was filed by the Water Company, on the equity side of the Circuit Court of Baltimore County, in which it was alleged that Helfrich permitted a large number of his cows to enter said stream and stand therein, and that they dropped their excrement, dung, and filth into its waters, and greatly polluted and befouled them; and that in consequence of such deposits, when the stream flowed through the Water Company's land and supplied its works, the purity of the water was greatly impaired, and it was rendered unhealthy and unfit for drinking purposes. On these grounds an injunction was prayed and granted restraining Helfrich from permitting cows or other animals to enter or stand in the stream, and to drop or deposit therein any excrement, dung, or filth, or in any manner to pollute or befoul it. The injunction, as granted, also prohibited the erection of a hydraulic ram; but, as we shall see, this question is not now presented by the record. After answer and testimony, the court, on final hearing, made the injunction perpetual so far as it related to the pollution of the stream, and dissolved it as to the erection of the hydraulic ram. The defendant appealed to this court.

Helfrich's lot is on the south side of the Frederick Turnpike, about one mile west of the Village of Catonsville, and about half a mile from the Water Company's property. The lot has been used by the owner as a pasture for his cows, and, so far as the evidence shows, it seems to be well adapted for such a purpose, being well provided with shade, grass, and water. Helfrich, at the time the injunction was issued, owned six cows, and it appears that he used his lot for the purpose of pasturing them in the way a proprietor, under ordinary circumstances, might reasonably use his own property. The question seems to be whether his rights have been in any way abridged or diminished by the incorporation of the Water Company and the construction of its works.

The rights of riparian owners are well understood, and there is a general concurrence of opinion in the courts as to the manner in which they must be exercised. The law on this subject is strictly in accord with the common sense and general convenience of mankind. The owner of land has a right to the use of a stream of water which flows through it for all useful and reasonable purposes. This use is not an easement, but is an incident to his property in the soil; a necessary, inherent, and inseparable portion of his ownership. But there is an equality of right in other riparian owners above and below him on the same stream; and, from the necessary conditions of the case, they must not use the water to the prejudice of each other's rights. Hence difficult questions frequently arise; not as to the ascertainment of the principle of decision, but as to its application to interests which are in collision. It is laid down in general terms that every owner has the right to enjoy the stream of water which flows through his land in its

natural state, without diminution to its flow, quantity, or purity. It is also held with like generality of statement, that any defilement or corruption of the water which prevents its use for any of its reasonable or proper purposes is an infringement of the rights of riparian owners which will entitle them to a remedy suited to the nature of the case.

But all abstract rules are subject to considerable modification when they are applied to the exigencies of human life. The right to the use of a stream of water in its natural purity cannot override other co-equal and co-existing rights; it must certainly yield to those of a more absolute and unqualified character. The tillage of the soil and the tending of flocks and herds were the earliest occupations of the human race. The husbandman soweth his seed and gathereth the harvest to furnish us with food; and the flocks and herds bring forth their increase for our use. It would be most unnatural and unwise to put any unnecessary restrictions on those pursuits which furnish the world with the means of subsistence. We must confess that the right of a man to cultivate his own fields, and to pasture his cattle on his own land, is of an original and primary character, and that it would be oppressive to interfere with the free exercise of it, except under a necessity caused by grave public considerations. The washings from cultivated fields might, and probably would, carry soil and manure into streams of water, and make them muddy and impure. And so the habits of cattle according to their natural instincts would lead them to stand in the water and befoul the stream. But, nevertheless, the owners of the land must not lose the beneficial use of it. The inconveniences which arise from the pollution of the water by these causes must be borne by those who suffer from them. The ordinary requirements of domestic life diminish the purity of the atmosphere; but as long as these causes are within the limits of reason and necessity the law recognizes no ground of complaint against them. The reasonable and proper exercise of acknowledged right by one man may, and often does, work annoyance and loss to another; but rights cannot be forfeited for this reason.

So far as we can see from the record, there was nothing unreasonable or unusual in the way in which the cattle were pastured in this lot. If Helfrich had wantonly or recklessly befouled the water of the stream, or had harassed the Water Company or injured its business by an immoderate and excessive exercise of his acknowledged rights, he would justly have been responsible for his conduct. But nothing of this kind can be justly attributed to him. He seems to have used his pasture as all men, time out of mind, have done in like cases. We are not unmindful of the vast number of cases where persons have been enjoined from committing nuisances in running streams, and from depositing or permitting to be deposited in them noxious, deleterious, or unwholesome matter, and from any unlawful or unreasonable thing which impairs the legitimate use of

of the water by riparian owners. Nor have we overlooked the numerous cases where it has been held that certain kinds of manufacturing establishments have infringed the vested rights of such owners. Our opinion is placed on the distinct ground that Helfrich was using his pasture lot in a reasonable manner, and that he had a right so to use it. His right was not in any way abridged by the incorporation of the Water Company and

the establishment of its works. And it was not in the power of the Legislature to abridge it. It is a right of property protected by the declaration of rights. The Water Company has power, under its charter, to acquire the water-right by making due compensation to the owner, and not otherwise.

The decree of the Circuit Court must be reversed, and the bill of complaint dismissed.

ALABAMA SUPREME COURT.

Ex Parte W. P. HURN.

(...Ala....)

1. **Mandamus cannot be issued to compel a court to hear and determine a motion which it has already overruled.**
2. **Money can be taken from a prisoner under arrest only when there is probable ground for believing that it is connected with the offense charged or may be used as evidence on his trial.**
3. **An officer may be garnished for money which he has taken from the debtor under arrest where a statute makes property in his hands subject to legal process, if the arrest was made in good faith and there is probable ground for believing the money to be connected with the offense or useful as evidence on the trial of the prisoner.**

(June 16, 1891.)

NOTE.—Mandamus defined.

The writ of mandamus is a remedy to compel any person, corporation, public functionary, or tribunal to perform some duty required by law, where the party seeking relief has no legal remedy, and the duty sought to be enforced is clear and indisputable. *Knox County Comrs. v. Aspinwall*, 22 U. S. 21 How. 539, 16 L. ed. 206.

The office of the writ is to compel action—the doing of something which the public or some person is interested in having done, and which it is the duty of some other person to do; and it cannot be used as a preventive remedy. *Legg v. Annapolis*, 42 Md. 203.

The writ of mandamus is only issued to prevent a failure of justice, and where there is no other clear and adequate remedy to enforce the performance of the duty. *Arrington v. Van Houton*, 44 Ala. 384; *State v. Guerrero*, 12 Nev. 106; *Reading v. Com.* 11 Pa. 193; *Com. v. Allegheny County Comrs.* 16 Serg. & R. 317; *Fitch v. McDiarmid*, 26 Ark. 432; *State v. McCrellus*, 4 Kan. 250; *Runion v. Latimer*, 6 S. C. 126; *Rice, Colo. Code Proc.* § 307.

Its issuance is discretionary.

The writ of mandamus is a prerogative writ resting in the sound discretion of the court. Such a discretionary power will not be exercised by the court to accomplish injustice and wrong. *Tapping, Mandamus*, chap. 2, § 6.

Though the granting or refusal of the writ of mandamus is said to be discretionary as distinguished from a writ of right, it is not an absolute or arbitrary discretion, but is controlled by well-defined legal rules, and its exercise is reviewable in this court. *People v. Syracuse Common Council*, 78 N. Y. 56; *People v. Rome, W. & O. R. Co.* 4 Cent. Rep. 197, 108 N. Y. 95. 13 L. R. A.

APPPLICATION for a writ of mandamus to compel the Montgomery City Court to hear and determine a motion made to procure the restoration to movant of certain money which had been removed from his person by an officer who arrested him on a criminal charge. *Denied.*

The facts are stated in the opinion.

Messrs. Moore & Finley for petitioner.

Messrs. Lomax & Tyson, for respondent:

Mandamus is not the proper remedy in this case, because the facts show that the respondent did hear and determine the motion, and the petitioner has an adequate remedy by appeal.

Ex parte Reed, 78 Ala. 548; *Ex parte Garland*, 42 Ala. 565; *Ex parte Echols*, 39 Ala. 700; *Ex parte Putnam*, 20 Ala. 592; *State v. Williams*, 69 Ala. 311.

Money in possession of the defendant in attachment may be levied on, if the levy can be made without a trespass.

Barnett v. Bass, 10 Ala. 951; 1 *Wade*,

The writ shall not be issued in any case where there is a plain, speedy and adequate remedy in the ordinary course of law. It shall be issued upon petition and affidavit on the application of the party beneficially interested. *Cal. Code Civ. Proc.* § 1086; *N. Y. Code Civ. Proc.* § 207.

When mandamus will not lie.

Mandamus is the appropriate remedy to set the machinery of the courts to which it is addressed in motion, but it will not direct the performance of any particular judicial act. The subordinate tribunal will be left free to give its best judgment. The scope and province of the writ is to prevent a failure of justice from delay or refusal to act, when addressed to a court acting judicially. *State v. Lafayette County Ct.* 41 Mo. 222; *Trainer v. Porter*, 45 Mo. 338.

Nor will it lie to correct the errors of inferior tribunals by annulling what they have done erroneously. *Dunklin v. Dunklin County Dist. Ct.* 23 Mo. 453; *Ex parte Koon*, 1 Denio, 644; *People v. Judges of Dutchess C. P.* 20 Wend. 658; *Chase v. Blackstone Canal Co.* 10 Pick. 244.

Mandamus will not lie to compel an inferior court to declare an election void (*State v. Judge of 9th Judicial Circuit*, 18 Ala. 805); or to vacate an order suppressing a deposition (*Ex parte Elston*, 25 Ala. 72); or to compel a judge of a district court to try a cause transferred by him to the circuit court (*Francisco v. Manhattan Ins. Co.* 36 Cal. 283); or to compel a judge to sign a bill of exceptions, which is not in accordance with his judgment of the facts (*Shepard v. Peyton*, 12 Kan. 616; *People v. Jameson*, 40 Ill. 95; *Jameson v. Reed*, 2 G. Greene, 394; *State v. Noggle*, 18 Wis. 390); or to compel a court to correct errors of judgment by annulling what they have done, or to guide their discretion (*Dunklin v. Dunk-*

Attachm. § 261; *Dolby v. Mullins*, 3 Humph. 457, 39 Am. Dec. 180.

And by statute in Alabama, such money in the hands of a sheriff or other officer is subject to attachment.

Code 1886, § 2950; *Pruitt v. Armstrong*, 56 Ala. 806; 2 Wade, Attachm. p. 847.

The arresting officer had the right to search his prisoner and take the money from him; this being true, the separation of said money from the person of Hurn, the petitioner, was legal, and there was no trespass committed, and if the money was found in the possession of the sheriff after such legal separation, it was liable to attachment or garnishment.

Chastong v. State, 83 Ala. 29; *Terry v. State*, 90 Ala. 635; 1 Wade, Attachm. § 180; *Olosson v. Morrison*, 47 N. H. 489; *Spaulding v. Preston*, 21 Vt. 9; *Drake*, Attachm. 6th ed. 193; *Bejnynderv. Lee*, 44 Iowa, 101.

Motion made prior to return term of the writs of attachment and garnishment, addressed to the discretion of the court, was not the proper procedure, and was premature.

Ala. Code 1886, §§ 2029-2078, 2094, 2090, 2981, 2982, 2998. See also *Matthews v. Ansley*, 31 Ala. 20.

Coleman, J., delivered the opinion of the court:

The petitioner, Hurn, having been arrested on the criminal charge of fraudulently obtaining goods on a credit, was searched by the officer making the arrest, who took from him \$1.124.40 found concealed in his clothing. The prisoner and the money were delivered to the sheriff of the county. An attachment, having been sued out against the defendant, Hurn, was placed in the hands of the sheriff,

and by him levied upon the money in his possession. This was followed by a writ of garnishment executed by the coroner of the county upon the sheriff. The attachment and garnishment suits were made returnable to the City Court of Montgomery. The sheriff, as garnishee, filed his answer, setting up the facts and circumstances under which he came in possession of the money, paid the money into the court, and prayed "that all proper issues and orders be made up under the direction of the court, in order that it might be ascertained to whom the money should be paid."

The defendant Hurn moved the court for an order that the money be restored to him, "upon the grounds that his person had been searched in violation of law, and the money wrongfully, illegally, and violently taken from his person." The suit by attachment, and upon which the garnishment issued, was still pending and undisposed of at the hearing of the motion. The court refused to permit movant to introduce affidavits in support of the facts stated in his petition, and made the following order: "April 14, 1891. Motion overruled, (1) because the court is without jurisdiction; (2) because the facts set out in the motion present an issue to be decided by the jury in the trial of the attachment suit." From this order overruling the motion, the petitioner applies to this court for a mandamus "upon the grounds that the court refused to hear and determine the motion," etc.

In *Ex parte Redd*, 78 Ala. 549, it was declared that the coercive process of mandamus is proper when an inferior court refuses to proceed to judgment in a case in which the

In County Dist. Ct. 23 Mo. 440; or to do an act lying entirely within its discretion (*Sinnickson v. Corwine*, 26 Md. J. L. 311; *Louisville v. Kean*, 18 B. Mon. 9; or to secure a revision of the judgment of the court. *Little v. Morris*, 10 Tex. 268; *People v. Judge of Detroit Sup. Ct.* 32 Mich. 190.

Where a judge has determined that under the statutes of the State he is disqualified from hearing a cause, a mandamus does not lie to make him reverse that decision and to hear the cause. *State v. Van Ness*, 15 Fla. 817.

Some of the decisions in the foregoing cases rested upon the ground that there was other specific and adequate remedy for the relator, which is always, as we have seen, sufficient to defeat an application for a mandamus. On this ground a mandamus will always be refused. *Ex parte Newman* 81 U. S. 14 Wall. 152, 20 L. ed. 877; *Mansfield v. Fuller*, 50 Mo. 338. See 4 Wait, Act. and Def. 373.

Mandamus will not control the discretion of public officers. *Dalton v. State*, 1 West. Rep. 753, 43 Ohio St. 652; *State v. Shaw*, 1 West. Rep. 221, note, 43 Ohio St. 324; *People v. Knickerbocker*, 1 West. Rep. 373, 114 Ill. 539; *Dechert v. Comm.* 4 Cent. Rep. 760, 113 Pa. 229.

It will not lie to compel the performance of duties or acts necessarily calling for the exercise of judgment and discretion. *State v. Police Jury*, 39 La. Ann. 759.

Even though the judgment is plainly erroneous, the subordinate court having passed upon the question pending before it, its decision, if erroneous, is a judicial error, which is not the province of a mandamus to correct. *Judges of Onelda C. P. v. People*, 18 Wend. 79; *Carliaga v. Dryden*, 29 Cal. 307; *Ex parte Whitney*, 36 U. S. 18 Pet. 404, 10 L. ed. 221; 13 L. R. A.

Warren County Ct. v. Daniel, 2 Bibb, 873; *Stout v. Hopping*, 17 N. J. L. 471; *Reg v. Blanshard*, 18 Q. B. 318; *Foster v. Redfield*, 50 Vt. 285; *Ex parte Koon*, 1 Denio, 644; *Ex parte Ostrander*, Id. 679.

Nor will it be granted to reverse the decisions of inferior courts upon matters properly within their judicial cognizance. *Bank of Columbia v. Sweeney*, 28 U. S. 1 Pet. 567, 7 L. ed. 265; *Ex parte DeGroot*, 73 U. S. 6 Wall. 497, 18 L. ed. 887; *Ex parte Newman*, 81 U. S. 14 Wall. 152, 20 L. ed. 877; *Ex parte Perry*, 102 U. S. 183, 26 L. ed. 48; *Ex parte Des Moines & M. R. Co.* 103 U. S. 794, 26 L. ed. 461; *Ex parte Gilmer*, 84 Ala. 234; *Ex parte South & North Ala. R. Co.* 65 Ala. 590; *Lewis v. Barclay*, 86 Cal. 213; *State v. Kenosha Circuit Ct. Judge*, 3 Wis. 809; *State v. Wright*, 4 Nev. 119; *Stout v. Hopping*, 17 N. J. L. 471; *Little v. Morris*, 10 Tex. 268; *Potter v. Todd*, 73 Mo. 101; *Williams v. Judge of Cooper County C. P.* 37 Mo. 225; *Blecker v. St. Louis Law Comr.* 30 Mo. 111.

While the writ is sometimes granted to compel the allowance of an appeal, it will not lie to compel subordinate courts to reinstate appeals which they have dismissed. Such dismissal, whether made in accordance with a rule of practice of the inferior court not unlawful in itself, or done in the exercise of a judicial discretion, is held equally beyond control by mandamus, and the party aggrieved will be left to his writ of error. *Sinnickson v. Corwine*, 26 N. J. L. 311; *Wells v. Stackhouse*, 17 N. J. L. 355; *Com. v. Philadelphia County Judges*, O. P. 3 Binn. 273. But see, *contra*, *Freas v. Jones*, 16 N. J. L. 358; *Adams v. Mathis*, 18 N. J. L. 310; *Ten Eyck v. Farlee*, 16 N. J. L. 348; *Detroit & B. P. R. Co. v. Wayne Circuit Judge*, 27 Mich. 304; *High, Extr. Legal Rem.* 2d ed. § 247. See note to *State v. Kansas City Ct. of App.* (Mo.) 3 L. R. A. 476.

law makes it his duty to act. This court compels judgment, but will not control it. In *Ex parte Schmidt*, 62 Ala. 254, it was held that the writ would lie to compel the execution of ministerial duties in all proper cases, but would not be awarded to order or direct what judgment shall be rendered in any given case; nor can its powers be invoked to correct any error in the final judgment or decree of an inferior court. In such cases there is an adequate remedy by appeal. *Ex parte Echols*, 39 Ala. 700; *Ex parte State Bar Assn.* (Ala.) 2 L. R. A. 134.

In the case of petitioner, the court overruled the motion. The motion has been disposed of by judicial action of the court. Whether the court erred in the order overruling the motion, or in not receiving in evidence the affidavits offered in support of the petition, or whether the reasons assigned by the court for overruling the motion are sufficient, cannot be reviewed on an application for the writ of mandamus. Such questions are revisable only by appeal. The remedy by appeal seems to have been resorted to in the cases cited by appellant. Both parties have argued the case upon its merits, and in view of such intimation from counsel, it may not be improper to consider the real question involved in the case. It is the law that the levy of an attachment procured by trickery, fraud, or trespass will be held to be invalid, and the officer who makes a levy by such means exposes himself to an action in damages. *Waples*, Attachm. 180. An officer cannot forcibly take property from the person of a defendant, and if a levy is effected by force, fraud, or violence of any kind, it is generally held void. 1 *Wade*, Attachm. § 130; *Mack v. Parks*, 8 Gray, 517; *Folmar v. Copeland*, 57 Ala. 589; *Street v. Sinclair*, 71 Ala. 110.

In *Drake on Attachment* (§ 506) it is said: "An officer, under criminal process against a person, arrested and took from him money and property found in his possession. The officer was summoned to answer as garnishee of the prisoner. It was held that the officer was exempt from garnishment."

The text here quoted from *Drake on Attachment* refers to two decisions from Massachusetts: *Robinson v. Howard*, 7 Cush. 257, and *Morris v. Penniman*, 14 Gray, 220. An examination of these decisions shows that they were based upon a statute of the State which provided that no person should be adjudged a trustee "by reason of any money in his hands as a public officer, and for which he is accountable to the defendant as such officer." In another section of the Massachusetts Code it is declared that money collected by the sheriff by force of legal process in favor of the defendant in the trustee process could not be reached by trustee proceedings. These statutes have been brought forward, and may be found in the Massachusetts Statutes of 1882 (p. 1055). The case of *Zurcher v. Magee*, 2 Ala. 263, is to the same effect as the Massachusetts decisions holding money in the hands of the sheriff, collected by him, to be "in the custody of the law. Since the decision in 2 Ala., *supra*, was rendered, the law has been changed by statute (Code 1886, 13 L. R. A.

§ 2950); and now money in the hands of the sheriff or other officer may be attached, and as was held in *Prestitt v. Armstrong*, 56 Ala. 810, the law as declared in 2 Ala. no longer prevails. The law as cited from *Drake, supra*, and the cases cited from Massachusetts, being based upon a statute of that State different from the statute of this State, cannot be regarded as authority upon the question.

The case of *Olosson v. Morrison*, 47 N. H. 438, is very much in point. In that case the deputy-sheriff, having arrested the plaintiff on a complaint for larceny, searched him, and took from his person a watch and chain and money; and on the next day, while this money was in his possession, it was attached by the party who had made the criminal charge, and also by another creditor. The New Hampshire statute provides that "any officer who shall find any implement, article, or thing, kept, used, or designed to be used in violation of law, or in the commission of any offense, in the possession of or belonging to any person arrested, or liable to be arrested, for such offense or violation of law, shall bring such implement, article, or thing before the justice or court having jurisdiction of the offense, who shall make such order respecting their custody or destruction as justice may require." The court held that a due regard for his own safety on the part of the officer, and also for the public safety, would justify a search and seizure of any deadly weapon he might find upon the prisoner, and hold them until he was discharged, or otherwise properly disposed of, and further held the sheriff might seize any money or other articles of value found upon the prisoner, by means of which, if left in his possession, he might procure his escape, or obtain tools or implements or weapons with which to effect his escape. The court further held that the validity of the attachment depended upon the bona fides or the mala fides of the search and seizure of the property; that, if this was done in order to effect a levy, it would be invalid; but if done with a due regard to the public safety, and to secure the safety of the prisoner only, then the separation of the property from the person of the defendant was lawful, and it would then be subject to attachment as property not found upon the person. Whether it was bona fide or not was a question for the jury, under all the evidence.

In the case of *Spanulding v. Preston*, 21 Vt. 9, the sheriff arrested one Russell on a charge of counterfeiting, and took from his person a lot of German silver, and held it under the order of the state attorney. He was sued by one Preston, who claimed to be the owner of the property by purchase. The court (Redfield, J.) held that the sheriff was not liable for a trespass. Much is said in this opinion not applicable to the case at bar, and is cited as an authority as to the right and duty of the sheriff to search and take from a prisoner property found on his person. In *Waples on Attachment and Garnishment* (p. 181) the principle is laid down that, if the plaintiff in attachment is not an instigator or co-worker with the officer in obtaining an unauthorized and illegal levy, he ought not

to lose the benefit of an attachment, and that the circumstances of each particular case must determine whether the official wrongdoing was such as to invalidate the levy.

In the case of *Gile v. Devens*, 11 Cush. 61, 62, the court recognized the distinction in cases where unlawful means were used for the purpose of seizing the property, and the seizure was effected by those means, and in cases where the levy was in no way connected with or effected through the unlawful act of the officer. In *Hitchcock v. Holmes*, 48 Conn. 528, the court recognized the rule that a levy could not be effected by a trespass, but held that an officer with a writ of attachment in his possession, who was invited by a servant, not knowing the purpose of the officer in calling, to enter a dwelling-house, was lawfully in, and authorized to make a levy upon such household goods as were liable to satisfy the attachment.

In the case of *Pomroy v. Parmlee*, 9 Iowa, 140, the facts as stated in the opinion were as follows: Plaintiffs sued out a warrant in Scott County upon a criminal charge against the defendant, and, at or about the same time, a writ of attachment. The sheriff, with E. S. Pomroy and a deputy, followed the defendant, and overtook him in Poweshiek County, and there arrested him, and took possession and control of a trunk of the defendant, and, against the objection of the defendant carried the defendant and the trunk back to Scott County. After getting back to Scott County, where the sheriff was authorized to levy the attachment, it was levied upon \$1,069 of money found in the trunk. The court held that it was settled that a valid seizure, service, or execution cannot be obtained through means rendered unlawful by fraud or violence. That, "under the shadow of the criminal process, the name and pretense of a civil writ was used to bring the property to a place where the letter might be levied upon it." It is clear that the court concluded from the facts in this case that the criminal process was used for the purpose of effecting a levy, and, in accordance with the general principle that a levy effected by fraud or violence will not be upheld, declared that the attachment, if thus obtained, was illegal.

In the case of *Reifensnyder v. Lee*, 44 Iowa, 101, the facts were that Lee had stolen five head of cattle, and sold them to the plaintiff for \$162. The owner recovered the cattle, and plaintiff had Lee arrested for the larceny, and the officer making the arrest took from his person both money and a watch. Plaintiff then sued Lee, and had the officer who held possession of the property garnished. The defendant, Lee, moved the court to discharge the garnishee, and dissolve the attachment, on the ground that the money and the watch were unlawfully and forcibly taken from him. The trial court granted the motion; and, on appeal, the supreme court held that the object of the pursuit and capture of Lee was not to obtain possession of the money and watch in order to subject it to legal process, but for the purpose of bringing him to punishment for his crime. The conclusion of the court was that the money and watch were lawfully taken from the

possession of Lee, and, being rightfully, in the possession of the officer, were subject to the process of garnishment. The court declared, in this case, it was usual and proper for officers, upon the arrest of felons, to subject them to search, and take from them articles found upon their persons, and suggested, as an additional thought, "that there was ample ground for holding that the money taken from Lee was the money received from the sale of the cattle." The principles of law declared in this case are directly applicable to the facts of the present case, but this decision seems to have been materially qualified by a later decision in the same State, in the case of *Commercial Exch. Bank v. McLeod*, reported in 65 Iowa, 665.

The Code of Iowa (§ 4212) provides: "He who makes an arrest may take from the person all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken, to be disposed of according to law." In construing this section of the Code, the court held that the officer making the arrest was not precluded thereby from taking from the person of the prisoner other property than "offensive weapons," but that he might search him and take from him all property which might be used by the prisoner in effecting his escape. The court held, however, in this latter case (65 Iowa, 665), that if the money and property found on the prisoner had no connection with the arrest or the crime charged, and was not to be used as evidence in the prosecution, "the personal possession of the sheriff should be regarded as the personal possession of the prisoner, and the money and property should be no more liable to attachment than if it was in the prisoner's pocket;" and, on an application for rehearing, the court re-affirmed that "the possession of the officer was the possession of the defendant,—citing, in support of the principle: 1 Archb. Crim. Pl. 34, 35; Wharton, Crim. Pl. § 61; 1 Bishop, Crim. Proc. §§ 210-212, and *Patterson v. Pratt*, 19 Iowa, 858. We have been unable to find the reference in 1 Archb. Crim. Pl. sustaining the proposition. In Wharton, Crim. Pl., *supra*, § 60, it is declared: "Those arresting a defendant are bound to take from his person any articles which may be of use as proof in the trial of the offense with which the defendant is charged. These articles are properly to be deposited with the committing magistrate, to be retained by him, with the other evidence in the cause, until returned to the prosecuting officers of the State. They should carefully be preserved for the purposes of the trial, and after its close be returned to the person whose property they lawfully are." Section 61: "The right of the arresting officer to remove money from the defendant's person is limited to those cases in which the money is connected with the offense with which the defendant is charged. Any wider license would be a violation of his personal rights. When money is taken in violation of this rule the court will order its restoration to the defendant. That where property is identified as stolen, or is in any way valuable as proof,

it may be sequestered, is plain." 1 Bishop, Crim. Proc., §§ 210, 211, is to the same effect, and in section 212 it is stated that the officer "holds all such property, whether money or goods, subject to the order of the court, and in proper circumstances he will be directed to restore it, in whole or in part, to the prisoner." Both these authorities, it will be seen, limit the right to take money from the prisoner to cases in which the money is in some way connected with the offense charged, or to be used as evidence on the prosecution. Whether the officer would be held guilty of a trespass if, on the trial, it appeared that the officer was mistaken in believing that the money was connected with the offense, or material as evidence, is not stated, or whether the money, while in the possession of the officer, was subject to attachment at the suit of creditors, is not discussed or declared.

The common-law rule declared by Wharton and Bishop, *supra*, seems to conflict with the state decisions which we have quoted, in so far as they declare it to be the duty of the arresting officer to search and take from the person of the prisoner money or other property which might be available in effecting his escape. It is stated by Mr. Wharton, and sustained by his references, that at common law, "if the property is identified as stolen, or is in any way valuable as proof, it may be sequestered, is nevertheless plain." If, under this rule, the property is sequestered, or deposited in court, or held by the officer, to be used as proof on the trial, and, while thus held, a creditor attaches it, what are the rights of the attaching creditor? At common law, and perhaps without statute, the money or property would be *in gremio legis*, not subject to attachment, and entirely under the control of the court. After the prosecution is ended, at common law, the court could and ought to direct "that it be restored, in whole or in part, to the prisoner, according to the circumstances." In many States, property thus held was regarded *in gremio legis*, and therefore not subject to attachment. See 2 Ala., *supra*, and authorities cited. We understand this to be the reason and extent of the rule as declared by Bishop and Wharton.

The facts of the case of *Patterson v. Pratt*, 19 Iowa, 358, are as follows: One Dunn, having lost \$200, sued out a search-warrant against Pratt. Under this warrant, Pratt was arrested, and \$485.12 found on his person, which was taken from him and delivered to the magistrate. While the money was in the hands of the justice of the peace, the plaintiff, Patterson, had it levied on by the sheriff to satisfy an execution in his favor, and also summoned the justice to answer as garnishee. The garnishee paid the money to the clerk of the court. The statute of Iowa in regard to garnishing money or a fund in the hands of an officer, or in court, is very similar to section 2950 of this State. The court (Dillon, J.) held: "The appellant argues that the statute contemplates a fund which has come into court legitimately by civil process, or by consent of the execution debtor. In our opinion, a fund may prop-

erly find its way into court without the consent or volition of the party from whom it was obtained. . . . Persons may not unwarrantably make use of the machinery of criminal law to accomplish private ends.

But we see no evidence of the abuse of the law, in the case at bar, by any party, much less by the appellee. . . . It is not shown that this was a scheme between Dunn and appellee to get hold of the money of the appellant. The charge against Pratt is not shown to have been false or fabricated." After distinctly recognizing the principle declared in *Riley v. Nichols*, 13 Pick. 270, and other authorities, that "no lawful thing procured upon a wrongful act can be supported," held that the fund was lawfully in court, and subject to garnishment.

Upon principle, property subject to the payment of a debt may be levied upon by the proper officer, if the levy can be effected without trickery or fraud, or a trespass calculated to provoke a breach of the peace. *Barnett v. Bass*, 10 Ala. 954, and authorities *supra*. The garnishment in this case was regularly executed by the coroner upon the sheriff, who had possession of the money. There is no evidence to show that the defendant was arrested for the purpose of obtaining a levy, or that the criminal charge against him was false or fabricated. The important question, then, is, Was the sheriff authorized to search the defendant, and take from his person the money, either for the purpose of using it as evidence on the criminal prosecution, or to prevent the prisoner from using the money to effect his escape?

Our Statute (Code, § 4745) provides: "When a person charged with a felony is supposed by the magistrate before whom he is brought to have upon his person a dangerous weapon, or anything which may be used as evidence of the commission of the offense, the magistrate may direct him to be searched in his presence, and such weapon or other thing be retained, subject to the order of court in which the defendant may be tried." Section 4218 of the Code of Iowa provides that "he who makes the arrest may take from the person all offensive weapons which he may have on his person." It was held in the latter State that this section did not preclude the sheriff from taking from his person money or other property which might be used in effecting an escape. The Supreme Court of the State of New Hampshire, construing a somewhat similar statute, we have seen, declared the same rule; and the duty and right of the sheriff in this respect has been recognized in other States. The Constitution of the State of Alabama (art. 1, § 6) provides "that the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizures or searches; and that no warrant shall issue to search any place, or to seize any person or thing, without probable cause, supported by oath or affirmation."

In commenting on article 4 of the Constitution of the United States, which prohibits unreasonable searches and seizures, in the case of *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, Mr. Justice Bradley, deliver-

ing the opinion, quoted with approbation from *Lord Camden*, as follows: "By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing.

If he admits the fact, he is bound to show, by way of justification, that some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant.

According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is trespass." These are the principles which protect every citizen of this government in the enjoyment of his personal liberty, his home, and his property, and no other "can abide the pure atmosphere of a government of political liberty and personal freedom."

This court in *Chastang v. State*, 83 Ala. 30, referring to the opinion of *Justice Bradley*, declared: "We indorse and approve everything said therein." The statute law provides for the issuance of search-warrants, but specifies on what grounds they are to be issued, and only on probable cause, supported by affidavit, naming the person, and particularly describing the property and place to be searched. Code, §§ 4727-4729. The search and seizure in the present case were not made under these statutory provisions. Section 4745 of the Code we have quoted above, and which provides that when a person is charged with a felony, and is supposed to have a dangerous weapon, or anything which may be used as evidence of the commission of the offense, he may be searched, and such weapon or thing may be seized and retained subject to the order of the court in which the defendant is to be tried. The question as to the dangerous weapon does not arise in this case. That part of the statute which authorizes the seizure and retention of "anything which may be used as evidence" on the prosecution is a mere statutory enactment of the common law. At common law the arresting officer had the right to remove money from the defendant's person; but this right was limited to cases in which the money was connected with the offense, or to be used as evidence. See *Wharton, supra*; *Bishop, supra*, and the cases cited in support of the text.

We are aware of the responsibility of sheriffs for the safety of prisoners, and their liability for escapes suffered by them or their deputies; but we can find no warrant, either in the common law or statute, for taking money from the person of the prisoner, unless it is connected with the offense charged, or to be used as evidence on his trial. If this right exist in the officer, as an absolute right to prevent escapes, he could, upon the arrest of a person charged with a trivial misdemeanor or disorderly conduct, strip him

of all his personal effects. It is no answer to say the officer would not do it. The question is, Has he the right, by virtue of his authority to arrest, also to search and seize, except in cases authorized by the common law or by statute? "It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

After a careful examination of the Constitution, prohibiting unreasonable searches and seizures, the common law, the statutes, and authorities, we hold that it is the duty of an officer, having no other authority than the right to make the arrest, to search the party arrested, and seize and remove from him any dangerous weapon found on his person; and he may also seize any money, or anything connected with the offense, or which may be used as evidence against him on the prosecution, and retain the money or thing until turned over to the State's attorney, or paid into court to abide the result of the trial; that an officer acting in good faith, in the execution of his duty, and proceeding upon probable grounds for believing that the money or thing is connected with the offense charged, or may be used as evidence, on the trial, may search and take from the defendant arrested by him on a criminal charge money found on his person, and he will not be liable in damages for a trespass, although it may turn out that the money or thing was not in fact connected with the offense, or could not be used as evidence of the commission of the offense, that the money or thing seized by the officer, under the foregoing limitations, during the time it is in his hands, or if paid into court, is not in the possession of the defendant, but it is thereby sequestered, and subject to attachment or garnishment, under section 2950 of the Code, that if the arrest was made not in good faith, or if the money or thing is seized without probable grounds for believing that it is connected with the offense, or useful as evidence on the trial, the levy made, under such circumstances, is invalid; or, if procured by trickery or fraud on the part of the attaching creditor, the levy will be held invalid; and the officer making the levy, if he knows of the fraud, and person procuring it to be done by such means and for such purposes, will be liable to a suit for damages. We believe these principles consistent with the personal liberty of the person arrested, as secured to him by the Constitution of the State, and concede to the officer all the authority given to him by the common or statute law. We know of no law which will prevent a creditor from having the property of his debtor levied upon to satisfy his debt, when it can be done without committing a trespass, or by fraud or violence. At common law, the property in the hands of an officer was regarded *in gremio legis*, and not subject to process; but by statute it is subject to legal process. The return of the court to the rule *nisi* shows that the prosecution and attachment suits against the movant are undecided, and are pending in court. Whether, under the principles declared in the foregoing opinion the money is subject to the attach-

ment and garnishment, depends upon the evidence to be introduced on the trial and the garnishing creditor has a right to his day in court, and to have a jury pass upon the facts.

In any view we take of the case, the application for mandamus must be denied.

Mandamus denied.

MARYLAND COURT OF APPEALS.

Patrick O'BRIEN, *Appt.*,
v.

BALTIMORE BELT R. CO.

(....Md....)

1. Authority to construct a railroad or any part thereof in a tunnel in a city street on the terms and conditions and in the mode fixed by ordinance, includes authority to construct portions of it in an open cut where the ordinance so directs; and even without special authority the right to construct a tunnel would include the right to make properly graded approaches.

3. The mere depreciation in the value of the lot of an abutting owner who does not own the fee of the street, by the construction of a railroad therein and his deprivation of the full use of the street, but without any

invasion of or physical interference with his lot or any obstruction of his access thereto, is not a taking of his property within the meaning of the constitutional provision as to compensation for property taken.

(June 17, 1891.)

A PPEAL by plaintiff from a decree of the Circuit Court of Baltimore City dismissing his bill filed to enjoin defendant from laying its tracks in a street in front of his lots. *Affirmed.*

The facts are stated in the opinion.

Argued before Alvey, *Ch. J.*, and Robinson, Bryan, McSherry, Fowler and Briscoe, *JJ.* Messrs. Isidor Rayner, Thomas R. Clendinning and George R. Willis, for appellant;

NOTE.—*Implied grants.*

When the use of a thing is granted, everything essential to that use is granted also. Such right carries with it the implied authority to do all that is necessary to secure the enjoyment of such easement. *Prescott v. White*, 21 Pick. 341, 32 Am. Dec. 266; *Prescott v. Williams*, 5 Met. 429, 39 Am. Dec. 668, and cases cited; *Pomfret v. Ricroft*, 1 Saund. 323, note 6; *Hammond v. Woodman*, 41 Me. 177; 66 Am. Dec. 219.

When a right is granted, either by an individual or by a statute, the means of securing the right are also granted by implication. *Carruth v. Grassie*, 11 Gray, 211, 71 Am. Dec. 707.

Easement.

Thus when a man grants a close inaccessible except over his own land, he impliedly grants a right of passing over that land. Otherwise the grantee could derive no benefit from the grant. The same rule of construction would govern a reservation out of lands granted. *Co. Litt. 56 a.*; *Liford's Case*, 11 Coke, 52; *Lord Darcy v. Askwith*, Hob. 284; *Clark v. Cogge*, Cro. Jac. 170; *Howton v. Freatson*, 8 T. R. 56; *Morris v. Edgington*, 8 Taunt. 23; *Gayety v. Bethune*, 14 Mass. 55.

Nothing will pass as incident to the grant, except it be necessary to the enjoyment of the principal thing granted. Hence the grantee of a close surrounded by the grantor's land is entitled to a convenient way over the grantor's land. He may select a suitable route for his way, but in doing it he must regard the interest and convenience of the owner of the land. *Nichols v. Luoe*, 41 Mass. 102.

Nothing passes which is not appurtenant to the land granted and directly necessary to its enjoyment. *Leonard v. White*, 7 Mass. 6; *Coleman's App.* 62 Pa. 232.

Thus the grant of trees standing on land of the grantor gives the right to enter and take them, and a sale of personal property gives a right to enter and remove it. A grant of the right to lay pipes carries the right to enter and repair them. *Pomfret v. Ricroft*, 1 Saund. 321.

By the same principle a way of necessity is created over the grantor's remaining land when there is no other access to the granted premises. *Pierce* 13 L. R. A.

v. Belleek, 18 Conn. 321; *Lawton v. Rivers*, 2 McCord L. 446; *Crossley v. Lightowler*, L. R. 2 Ch. App. 486; *Alley v. Carleton*, 20 Tex. 78; *Pingree v. McDuffie*, 56 N. H. 306.

The necessity which will raise an implied easement varies with the nature of the property and of the easement. *Covel v. Hart*, 56 Me. 520.

It is a question of presumed intention. If the servitude is a burdensome one, only strict necessity will raise the implication. Great convenience alone will not give a way of necessity (*Dodd v. Burchell*, 1 Hurst. & C. 121; *Brigham v. Smith*, 4 Gray, 297; *Smith v. Knard*, 2 Hill, L. 648); and the way will cease when the necessity ceases. *Lide v. Hadley*, 58 Ala. 627; *Viall v. Carpenter*, 14 Gray, 126.

So, if the purposes for which the land is granted are inconsistent with the exercise of the easement, it will not exist. *Seeley v. Bishop*, 19 Conn. 128.

What is called necessity is only a circumstance called in to explain the intention of the parties. *Nichols v. Luoe*, 24 Pick. 102; *Collins v. Prentice*, 15 Conn. 39; *American Co. v. Bradford*, 27 Cal. 366; 2 Wait, Act. & Def. 668.

The grant of power being in derogation of common right is not to be extended by implication, and the act conferring the power must be strictly complied with. Statutes granting these powers are not to be construed so literally or so strictly as to defeat the evident purpose of the Legislature. They are to receive a reasonably strict and guarded construction, and the powers granted will extend no further than expressly stated, or than is necessary to accomplish the general scope and purpose of the grant. *Re New York & H. R. R. Co. v. Kip*, 46 N. Y. 546.

Whether a right of way is embraced in a deed, is always a question of construction, having reference to its terms not only, but to extrinsic facts also, and to the practical incidents connected with the grantor, and with the use of the land, at the time of the conveyance. The law gives such a construction to the conveyance, as an incident or appurtenance, that such incidents or appurtenances are included in it. In such cases the intention of the parties is to be learned from those facts. *Huttemeler v. Albro*, 18 N. Y. 51, 52; *Ogden v. Jennings*, 66 Barb. 301.

The taking and use of the street by appellee will take away the value of appellant's property, substantially, and inflict serious and permanent injury.

Beckett v. Midland R. Co. L. R. 1 C. P. 241, 3 C. P. 81.

This is forbidden by the Constitution.

Md. Const. art. 8, § 40.

The right of the appellant as an abutting owner to the use of the street, and for access to and from his lot and house, is property within the meaning of the Constitution.

Baltimore & P. R. Co. v. Reaney, 42 Md. 117; *Gardner v. Newburgh*, 2 Johns. Ch. 162, 1 L. ed. 383; *Eaton v. Boston C. & M. R. Co.* 51 N. H. 504; *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166, 20 L. ed. 557; *Baltimore v. Appold*, 42 Md. 442; *Baltimore & O. R. Co. v. Boyd*, 63 Md. 825; *Phipps v. Western Maryland R. Co.* 66 Md. 819; *Cumberland v. Willison*, 50 Md. 138.

An injunction is a proper remedy.

Roman v. Strauss, 10 Md. 98; *Western Maryland R. Co. v. Owings*, 15 Md. 199; *Baltimore v. Gill*, 81 Md. 876; *Shipley v. Baltimore & P. R. Co.* 84 Md. 386; *Baltimore & O. R. Co. v. Straus*, 87 Md. 287; *New Central Coal Co. v. George's Creek C. & I. Co.* 87 Md. 587; *Pumphrey v. Baltimore*, 47 Md. 153; *Piedmont & C. R. Co. v. Speelman*, 67 Md. 260; *Pratt v. Buffalo City R. Co.* 19 Hun. 30; *Abendroth v. New York Elev. R. Co.* 23 Jones & S. 417; *People v. Vanderbilt*, 26 N. Y. 287, 28 N. Y. 306; *Henderson v. New York Cent. R. Co.* 78 N. Y. 423; *Williams v. New York Cent. R. Co.* 16 N. Y. 109; *Dillon, Mun. Corp.* 661; *Thompson, Proper Remedies*, 245; *Union Pac. R. Co. v. Hall*, 91 U. S. 355, 23 L. ed. 432; *Kavanagh v. Mobile & G. R. Co.* 78 Ga. 271; *Columbus & W. R. Co. v. Witherow*, 82 Ala. 190; *Foster, Fed. Prac. p. 809, § 215*; *Northern Pac. R. Co. v. Burlington & M. R. Co.* 2 McCrary, 208; *Missouri, K. & T. R. Co. v. Texas & St. L. R. Co.* 10 Fed. Rep. 497.

A steam railroad would be considered an additional servitude, easement or burden upon a street, because inconsistent with the ordinary and reasonable use of a street, while the use by a horse railroad is decided not inconsistent, because not permanent or exclusive.

Hiss v. Baltimore & H. P. R. Co. 53 Md. 251; *Hedges v. Baltimore U. P. R. Co.* 58 Md. 608; *Baltimore & O. R. Co. v. Boyd*, 63 Md. 325.

The right of an abutting owner to use the street is property which is taken within the meaning of the Constitution, by the grant of such privileges as are claimed by defendant, and the injury and right to a remedy is the same whether the abutting owner owns the fee of the street or not, and cannot be taken without compensation.

Jefferson, M. & I. R. Co. v. Esterle, 18 Bush, 608; *Lackland v. North Missouri R. Co.* 81 Mo. 181; *Central Branch U. Pac. R. Co. v. Twine*, 28 Kan. 385; *Central Branch U. Pac. R. Co. v. Andrews*, 30 Kan. 590; *Theobald v. Louisville, N. O. & T. R. Co.* 4 L. R. A. 735, 66 Miss. 279; *Burlington & M. R. Co. v. Reinhardt*, 15 Neb. 279; *Haynes v. Thomas*, 7 Ind. 98; *Rensselaer v. Leopold*, 106 Ind. 29; *Crawford v. Delaware*, 7 Ohio St. 480; *Cincinnati & S. G.* 13 L. R. A.

A. St. R. Co. v. Cumminsville, 14 Ohio St. 524.

In New York it has repeatedly been decided that the interest of an abutting owner was property, and that it was a taking when the use was permanent.

Abendroth v. New York Elev. R. Co. 23 Jones & S. 417; *Story v. New York Elev. R. Co.* 90 N. Y. 122; *Lahr v. Metropolitan Elev. R. Co.* 6 Cent. Rep. 371, 104 N. Y. 268; *Abendroth v. New York Elev. R. Co.* 11 L. R. A. 684, 122 N. Y. 1; *Kane v. Metropolitan Elev. R. Co.* 11 L. R. A. 640, 125 N. Y. 164; *Duyckinck v. New York Elev. R. Co.* 125 N. Y. 710; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62; *Stone v. Fairbury, P. & N. W. R. Co.* 68 Ill. 394; *Adams v. Chicago, B. & N. R. Co.* 39 Minn. 286; *Lamm v. Chicago, St. P. M. & O. R. Co.* 10 L. R. A. 268, 45 Minn. 7; *Pumpelly v. Green Bay M. Canal*, 80 U. S. 13 Wall. 166, 20 L. ed. 557.

Messrs. William A. Fisher, John K. Cowen, W. Irvine Cross and Hugh L. Bond, Jr., for appellee:

The rulings of the courts on this subject are not uniform, but the following may be stated as the result of the authorities:

1. The great weight of authority is that if the abutting owner does not own the fee of the street, then its occupancy by a railroad company, under legislative authority, is not the taking of any of his private property within the meaning of the constitutional provision, which requires condemnation proceedings to be instituted before such property can be taken.

2. Many authorities hold that a street can be used by a railroad company, although the fee of it may be in the abutting owner, and that such a use is not only not a taking of property within the meaning of the constitutional provision, but the abutting owner is not entitled to consequential damages for such occupancy of the street.

3. A very few authorities hold that a lot owner on a public street, whether he has the fee in the bed of the street or not, has such a peculiar interest therein that the construction of a steam railroad upon the street is a taking of his property within the meaning of the constitutional provision.

4. Other cases hold that the occupancy of a public street by a railroad company, under legislative sanction, is a legitimate and lawful use of the street, but it is not to be presumed that the railroad company is to be exempt from liability for special damage to the property of an abutting owner.

A rule of law opposed to and inconsistent with the "property doctrine," as stated in proposition 8, will be found stated in—

Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62, 81 Am. Rep. 806; *Fulton v. Short Route R. Transfer Co.* 85 Ky. 640, 7 Am. St. Rep. 619; *Bradley v. New York & N. H. R. Co.* 21 Conn. 294; *Indiana, B. & W. R. Co. v. Eberle*, 9 West. Rep. 206, 110 Ind. 642, 32 Am. & Eng. R. R. Cas. 220; *Dwenger v. Chicago & G. T. R. Co.* 98 Ind. 158, 20 Am. & Eng. R. R. Cas. 26; *Spencer v. Point Pleasant & O. R. Co.* 23 W. Va. 407, 20 Am. & Eng. R. R. Cas. 125; *Arbene v. Wheeling & H. R. Co.* 5

L. R. A. 871, 33 W. Va. 1, 40 Am. & Eng. R. R. Cas. 284; *Central Branch U. P. R. Co. v. Andrews*, 30 Kan. 590, 14 Am. & Eng. R. R. Cas. 248; *Ottawa, O. C. & C. G. R. Co. v. Larson*, 2 L. R. A. 59, 40 Kan. 801, 36 Am. & Eng. R. R. Cas. 163; *Kansas, N. & D. R. Co. v. Cuykendall*, 43 Kan. 284; *Iron Mountain R. Co. v. Bingham*, 4 L. R. A. 622, 87 Tenn. 522, 38 Am. & Eng. R. R. Cas. 444; *McQuaid v. Portland & V. R. Co.* 18 Or. 237, 40 Am. & Eng. R. R. Cas. 308; *Richardson v. Vermont Cent. R. Co.* 25 Vt. 465; *Hatch v. Vermont Cent. R. Co.* 25 Vt. 49; *Gottschalk v. Chicago, B. & Q. R. Co.* 14 Neb. 550, 14 Am. & Eng. R. R. Cas. 157; *Crowley v. Davis*, 68 Cal. 460, 20 Am. & Eng. R. R. Cas. 25; *Hamlin v. Chicago & N. W. R. Co.* 61 Wis. 515, 20 Am. & Eng. R. R. Cas. 70; *Higbee v. Camden & A. R. & Transp. Co.* 20 N. J. Eq. 435; *Philadelphia & T. R. Co's Case*, 6 Whart. 25; *O'Connor v. Pittsburgh*, 18 Pa. 187; *Houston v. T. Cent. R. Co. v. Odum*, 53 Tex. 343, 2 Am. & Eng. R. R. Cas. 508; *Gulf, C. & S. F. R. Co. v. Graves (Tex.)* 10 Am. & Eng. R. R. Cas. 199; *Mulholland v. Des Moines & A. W. R. Co.* 60 Iowa, 740, 10 Am. & Eng. R. R. Cas. 99; *Stetson v. Chicago & E. R. Co.* 75 Ill. 74; *Peoria & R. I. R. Co. v. Schertz*, 84 Ill. 135; *Denver & S. F. R. Co. v. Domke*, 11 Colo. 247, 36 Am. & Eng. R. R. Cas. 155; *Nottingham v. Baltimore & P. R. Co.* 3 MacArth. 517; *Dixon v. Baltimore & P. R. Co.* (D. C.) 3 Am. & Eng. R. R. Cas. 201; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 106 U. S. 817, 27 L. ed. 789.

As to the general rule, compare *Ohio Northern Transp. Co. v. Chicago*, 99 U. S. 635, 23 L. ed. 386, with *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 638; *Currier v. New York West Side Elev. P. R. Co.* 6 Blatchf. 487.

The doctrine that the owner of a lot abutting on a street has an interest in the soil of the street, which amounts to property within the meaning of the constitutional provision that private property shall not be taken for public use without compensation, was first announced and adopted by the Supreme Court of Ohio in *Crawford v. Delaware*, 7 Ohio St. 459.

Minnesota has adopted the same rule in *Adams v. Chicago, B. & N. R. Co.* 1 L. R. A. 493, 39 Minn. 286, 13 Am. St. Rep. 644.

New York in *Story v. Elev. R. Co.* 90 N. Y. 123; *Lahr v. Metropolitan Elev. R. Co.* 6 Cent. Rep. 371, 104 N. Y. 268, and *Abendroth v. New York Elev. R. Co.* 11 L. R. A. 694, 122 N. Y. 1, applied this doctrine to elevated roads; while in *Radcliff v. Brooklyn*, 4 N. Y. 195, the doctrine was held inapplicable to the case of a city changing the grade of the street. Moreover, and in *Fobes v. Rome, W. & O. R. Co.* 8 L. R. A. 453, 121 N. Y. 505, the court decided that a "steam railroad company, which, under license from the city authorities lays its tracks upon the surface of a street, is not liable for damages resulting from a reasonable use thereof to the easement of an abutting lot owner, who does not own the fee of the street.

In Maryland the court holds that an ordinary charter or enabling Act is not to be construed as conferring on a chartered company the State's immunity from liability for consequential damages.

Baltimore & P. R. Co. v. Reaney, 42 Md. 117.

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The distinction between the doctrine by which right of action is accorded for consequential damages and the rule of law under which the owner of property is protected by injunction from a taking of his property for public use, is illustrated by a comparison of the *Reaney Case* with *Baltimore v. Appold*, 43 Md. 442.

Even in Illinois, where the Constitution requires compensation to be made for property damaged as well as for that taken, the courts have been obliged to construe the provision as giving a right of action for damages merely, and not as entitling a landowner to an injunction to restrain the construction of the road, because consequential damages might thereby ensue to his property.

Stetson v. Chicago & E. R. Co. 75 Ill. 74; *Peoria & R. I. R. Co. v. Schertz*, 84 Ill. 135; *Denver & S. F. R. Co. v. Domke*, 11 Colo. 247, 36 Am. & Eng. R. R. Cas. 155. See also *Hutton v. London & S. W. R. Co.* 7 Hare, 259.

Alvey, Ch. J., delivered the opinion of the court:

The court below passed its order refusing the injunction upon consideration of the allegation, of the bill and the exhibits filed therewith, without reference to the answer of the defendant, which had been previously filed. The answer was properly before the court, and the defendant was entitled to have it considered, if material, in determining the question whether the injunction should issue. *Lynn v. Mount Savage Iron Co.* 84 Md. 624; *Adams, Eq.* 358, and *notes*. We entirely agree, however, with the learned judge below, that, without regard to the answer, the bill fails to present a case for an injunction.

The plaintiff is the owner of a lot of ground, with improvements thereon, situate on the east side of Howard Street, between Camden and Lee Streets, and conducts there the business of a livery stable. Howard Street, at this place, is 82½ feet wide, and the plaintiff is only an abutting proprietor on the street, with no estate in the bed thereof, but, as abutting owner of property on the east side of the street, he claims to be entitled to the full, free and unobstructed use of the entire width of the street as one of the public highways of the city. The defendant Company was incorporated under the General Railroad Incorporation Law of the State for the purpose of constructing and operating a railroad through parts of Baltimore City and parts of Baltimore County, and, finding it necessary to tunnel a part of the way through the city, the Company applied to the General Assembly of 1890 for authority to construct such tunnel, and that authority was given by the Acts of 1890, chap. 139. By the first section of that Act it is provided that the Company "shall be authorized to construct its railroad, or any part thereof, in such tunnel, under such ordinance or ordinances as may be passed by the mayor and city council of Baltimore relating to the route of said railroad through the City of Baltimore, and the mode, terms and conditions of the building and construction of said railroad within said city." Immediately after the passage of this Act the mayor and city council of Baltimore, by special ordinance, des-

ignated the route of the road, and made elaborate provisions in regard to the mode, terms and conditions of the construction of the road through the city. By the first section of the ordinance is defined the route of the road; and, as it affects Howard Street, it is provided that it shall run from a certain point "in a northerly direction to the western side of Howard Street, between Montgomery and Lee Streets; thence along, in, and occupying the western route half of Howard Street, parallel with the eastern line of said street, and distant therefrom forty feet, measured from said eastern building line to the eastern limit of said railroad, to the south line of Camden Street,—said railroad, from where it intersects the west line of Howard Street to its intersection with the south line of Camden Street, to be depressed within a wall cut; thence along and under Howard Street by a tunnel to the northerly side of Richmond Street; thence, etc. And in a proviso to the same section of the ordinance it is required "that all open cuts in any street, lane or alley in the city authorized to be built under the provisions of this ordinance shall be protected on both sides by a granite coping at least two feet high, with neat iron rail on top." The plaintiff charges in his bill that the defendant Company intends to proceed forthwith in the construction of its roadway, and to dig up the west half of the bed of Howard Street in front of his property on the east side of that street to a depth of from ten to twenty-four feet below the present surface of the street; that said plan is known as an "open cut;" and that, when said open cut is made, Howard Street, between Lee and Camden Streets, will be forever destroyed as a public highway, to the extent of said open cut, and will be devoted, to that extent, to the exclusive use of the Railroad Company. The plaintiff denies the authority of the mayor and city council to grant to the railroad company any such exclusive right to the use of the streets of the city, and insists that such use will create a new and additional servitude on the bed of the street, which the mayor and council have no right to impose; but, even if such new and additional servitude be rightfully imposed, it is insisted that the use of the bed of the street can only be availed of by the Railroad Company upon paying to the abutting lotowners just compensation for such use. The plaintiff further charges that no condemnation proceedings have been taken, and none are contemplated; nor is it contemplated by the Railroad Company that any compensation whatever shall be made to the plaintiff or other abutting lotowners who will be affected by this open cut in the bed of the street. He therefore charges that if the defendant Company is allowed to proceed in the manner it proposes, without first making just compensation, it will be in violation of section 40 of the third article of the Constitution of this State, and also in violation of the 14th Amendment of the Constitution of the United States; and he therefore prays that the defendant may be enjoined in the use of the street until just compensation is made for what he alleges will be a serious

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injury to his property. It is not charged or in any way claimed that the plaintiff will be deprived of or seriously hindered in the right of access to his property from the street by the making of the cut; nor is it alleged or shown that the foundations of the plaintiff's buildings, abutting on the street, will be in any manner undermined or impaired by the cut proposed to be made in the street. The street, after the cut is made, will still remain, in front of the plaintiff's property on the east side of the cut, about forty-one feet wide. There is no question, therefore, presented here as to the right of the plaintiff to compensation for obstructing access to his property from the street; nor is there any pretense that there will be any physical invasion of his private property abutting on the street. The foundation of the right to relief asserted by the plaintiff is the fact that he is an abutting owner of property on the street, and the making of the open cut will deprive him of the use of that part of the street as at present enjoyed by him.

1. The first contention urged on behalf of the plaintiff is that the Acts of the General Assembly of 1890, chap. 139, in conferring special authority upon the defendant Company to construct its railroad in a tunnel within the limits of the city did not confer authority to construct any part of such road by way of open cuts in the streets; and that the mayor and city council exceeded their authority in attempting to confer power upon the Company, by ordinance, to construct any part of its road in the streets of the city by way of open cuts. But, if we recur to the terms of the grant of power by the Legislature to the mayor and city council, it will at once appear that the power granted was ample to justify the ordinance that was passed. The mayor and city council were authorized to designate by ordinance the route of the road, and also to prescribe the mode, terms and conditions of its construction. The right to prescribe the mode and conditions of its construction certainly embraced the power to authorize, by ordinance, the making of any part of the road by open cuts, if found to be proper and necessary in the construction of the road on the route designated. But, apart from the special terms of the Statute, the Company was authorized to construct such part of its road in a tunnel as should be found necessary; and the grant of that power carried with it, by reasonable implication, all that is necessary and proper for the exercise of the power. Properly graded approaches are indispensable to the use of a tunnel as part of a railroad, and therefore the power to make such approaches must exist. In *Ohio Northern Transp. Co. v. Chicago*, 99 U. S. 640, 25 L. ed. 338, the Supreme Court of the United States said that the grant of power by the Legislature to build a bridge or construct a tunnel carried with it, of course, all that was necessary for the exercise of the power. And in the case of *Dodge v. Essex County Comrs.*, 3 Met. 890, *Chief Justice Shaw* laid down the principle as being unquestionable that "an authority to construct any public work carries with it an authority to use the

appropriate means. An authority to make a railroad is an authority to reduce the line of the road to a level, and for that purpose to make cuts, as well through ledges of rock as through banks of earth." It is plain, therefore, that there is no foundation for this first contention of the plaintiff.

2. The next question, and that which is the principal question of the case, is whether the plaintiff, being only an abutting owner on the east side of Howard Street, with no freehold or leasehold estate in the bed of the street, has such an interest therein, by reason of his abutting proprietorship, as to entitle him to be compensated therefor by the Railroad Company before using the street; such compensation to be ascertained and rendered in the manner and according to the provision of the fortieth section of the third article of the Constitution of this State; or, to state the question in a more concise form, whether the use of the street by the Railroad Company in the manner proposed, and under the conditions stated, would be such taking of the private property of the plaintiff as is forbidden by the Constitution of this State, except upon payment of just compensation first being made. The Constitution of this State (§ 40, art. 8) declares that the Legislature shall enact no law authorizing private property to be taken for public use without just compensation, to be agreed upon by the parties or awarded by a jury, being first paid or tendered to the party entitled to such compensation. As will be observed, this constitutional provision does not profess to declare what rights shall be regarded as property; but the thing of which the party is deprived must be private property, and it must be taken for a public use. Nor does the Constitution declare what shall constitute a taking, within the meaning of the inhibition. These are questions of definition left to be fixed by a just construction of the terms employed. There would seem to be no question of the right and power of the Legislature of the State, through the agency of the municipal government, to change and alter the grades of existing streets from time to time, and as often as may be deemed proper, without liability being incurred by the agents doing the work, to the abutting owners of property, for the mere consequential damages that may be suffered by reason of the changed condition of the streets. In many cases the damage suffered from such changes in the grades of streets is very serious, and may even considerably affect the value of property; but yet, if the work be done with due care to avoid unnecessary injury to the abutting property, and there be no physical invasion thereof, the damage suffered is without remedy. In such cases, the work having been done by legal authority, and for municipal purposes, it is said the private damage or annoyance occasioned thereby must be suffered, in order to advance the public good. *Reaney's Case*, 42 Md. 117; *Willison's Case*, 50 Md. 188; *Ohio Northern Transp. Co. v. Chicago*, 90 U. S. 635, 25 L. ed. 836; *Vanderlip v. Grand Rapids*, 78 Mich. 522; 2 Dill. Mun. Corp. 3d ed. §§ 989, 990; *Cooley*, Const. Lim. 6th ed. pp. 666-668. But this

reasoning, applicable to the case of the change of grades and the improvements of streets for municipal purposes, does not apply in the case of the grant of power to change the grade of and occupy the street with steam-railroad tracks by a railroad company having no connection with the municipal government. In such case a different principle applies, and the rights of individual property owners are in no respect subordinated to the rights of the railroad company. While the right in the State to grant the power to a railroad company, to occupy the street is unquestionable, by virtue of its power to control all the public highways of the State, the adjoining lot-owners are not without redress for any substantial injury sustained to their property rights that may be produced by reason of the construction or operation of the railroad in the street. As said by the Supreme Court of the United States in *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 331, 27 L. ed. 789, 744, when speaking of legislative authority to a railroad company to bring its tracks within the municipal limits of Washington City: "Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private right of others, and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred."

But, notwithstanding the Railroad Company may be liable on common-law principles, the question still remains to be answered, Will the cutting and use of the street, as proposed by the Railroad Company, be the taking of private property, in respect of the rights of the plaintiff as abutting lot-owner, within the meaning of the Constitution? As already stated, it is not charged that there will be any invasion of or physical interference with any part of the plaintiff's lot in the construction of the road. The most that he claims for is that he will be deprived of the full use of the street as it now exists, and that his property will be depreciated in value by the construction of the road. This, however, is but an injury, to whatever extent it may be suffered, of an incidental or consequential nature. The construction of the railroad being authorized by competent authority, it cannot be treated as a public nuisance; and no right of action can arise against the Company before it is known whether, and to what extent, damage may be sustained by the construction of the road in the bed of the street. In such case as this, therefore, it would seem to be clear, both upon principle and authority, that there is no such taking of private property for public use as is contemplated by the Constitution of the State; and hence there is no ground for any preliminary proceeding by way of condemnation. *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62; *Cooley*, Const. Lim. 6th ed. chap. 15, pp. 666-681, and the cases there collated; *Elliot, Roads and Streets*, 155-162.

The counsel for the plaintiff have strongly pressed upon the court the propriety of adopting and following the principles applied in the *Elevated Railroad Cases*, decided by the Court of Appeals of New York. But without saying whether those decisions should be accepted or not in like cases occurring here, this case does not call for the application or rejection of the doctrine applied in those cases. The doctrine of the *Elevated Railroad Cases* of New York, as summarized by the Supreme Court of the United States in the recent case of *New York Elec. R. Co. v. Fifth Nat. Bank*, 185 U. S. 440, 84 L. ed. 234, is this: "An elevated railroad erected in and over a street pursuant to the statutes of the State, and with due compensation to the owners of property taken for the purpose, is a lawful structure. The owners of land abutting on a street have an easement of way and of light and air over it, and, through a bill in equity for an injunction, may recover of the elevated railroad company full compensation for the permanent injury to this easement, but in an action at law cannot, without the defendant's acquiescence, recover permanent damages, measured by the diminution in value of their property, but can recover such temporary damages only as they have sustained to the time of commencing the action." It thus appears that the exercise of equity jurisdiction in those cases was founded largely upon the inadequate remedy at law, as administered in the courts of New York. But here there is no such ground for equitable interposition; the laws of this State furnishing adequate remedy by action at law for any injury that may be suffered by the plaintiff.

There can be no question as to the power of the Legislature of the State, in providing for the construction of the railroad of the defendant through the city, to require compensation to be made to persons whose property may be injuriously affected by changes made in the grades of the streets, or by any other appropriation of them, though the property affected may not be taken, within the meaning of the Constitution. Hence the Acts of 1890, chap. 139, authorized the mayor

and city council of Baltimore, by ordinance, to designate the route, and to prescribe the mode, terms and conditions of the construction of the road within the city. And by the special ordinance, passed in pursuance of the Statute, among the terms and conditions prescribed, in the second section thereof it is provided that the said Company shall also pay and be liable for the actual damage sustained by any and all property abutting on that part of any square, street, lane or alley of which the grade shall be so changed, by reason of any such change of grade in any of the squares, streets, lanes or alleys of the city occasioned by the construction of said railroad; said damages to be recovered in the same manner as provided by section 169, art. 23, of the Code Pub. Gen. Laws." And again, by section 12 of the Ordinance, section 169 of article 23 of the Code is thereby expressly declared to be applicable to the building of said railroad, for the injuries done to private property by the location and construction of said railroad, etc. Section 169 of article 23 of the Code Pub. Gen. Laws, referred to (codified from the Act of 1876), declares that "every railroad company laying down any such track or tracks upon any such public street, road, alley or other public ground shall be responsible for injuries done to private property by such location, lying upon or near to such public ground, which may be recovered by civil action brought by the owner or owners, at any time within two years from the completion of such track or tracks, before the proper court." By the acceptance of the Acts of 1890, chap. 139, and the ordinance passed thereunder, the Railroad Company became bound by the terms and provisions thereof; and the legal remedy thus provided would seem to be ample to protect the plaintiff in his rights, though his case be not within the provision of the Constitution, and that is made so, even if he were without remedy by the common law.

For the reasons assigned this court is of opinion that the order of the court below should be affirmed, and that the bill be dismissed. **Bryan, J.**, dissents.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

ELECTRIC IMPROVEMENT CO. v. CITY & COUNTY OF SAN FRANCISCO.

(45 Fed. Rep. 598.)

1. An ordinance prohibiting the suspension of electric wires over or upon

the roofs of buildings is within the legitimate police powers of a city, where such suspension of these wires is extremely dangerous, both as being liable to originate fires and as obstructing the extinguishment of fires otherwise originated.

2. Public officers may be authorized by ordinance to remove dangerous electric wires suspended over or above buildings where the owners fail to do so after notice to remove them.

NOTE.—The term "police power" defined.

It is much easier to perceive and realize the existence and sources of the police power than to mark its boundaries, or prescribe limits to its exercise. *Com. v. Alger*, 7 Cush. 84.

This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the

life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. *Slaughter-House Cases*, 83 U. S. 13 Wall. 36, 21 L. ed. 395.

"It extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State; . . .

(March 30, 1891.)

SUIT to enjoin defendants from enforcing an ordinance providing for the removal of electric wires suspended over or upon the roofs of buildings in San Francisco. *Injunction denied.*

The ordinance was as follows:

"Order No. 2163. Prohibiting the suspension of electric wires over or upon the roofs of buildings, etc. The people of the City and County of San Francisco do ordain as follows:

"Section 1. It shall be unlawful for any person, company, or corporation to run or suspend or stretch over or across, or upon the top or roof, or any portion of the top or roof, of any building in the City and County of San Francisco, any wire used for the purpose of conducting electricity, or an electric current, or for any purpose whatsoever.

"Sec. 2. It shall be unlawful for any person, company or corporation to keep or maintain over, or across, or upon the top or roof, or any portion of the top or roof, of any building in the City and County of San Francisco, any wire used for the purpose of conducting electricity or an electric current, or for any purpose whatsoever, for more than ten days after such person, company or corporation shall have received notice in writing, signed by the chief engineer of the fire department of said City and County,

to remove the same; and each and every day subsequent to the ten days after such prescribed notice shall have been given, any maintenance or keeping of any wires hereinabove prohibited shall constitute a new and separate violation of this ordinance.

"Sec. 3. It shall be unlawful for any person, company or corporation to attach to, or suspend from, or support upon any building in the City and County of San Francisco any wire used for the purpose of conducting electricity, unless the same be attached, suspended, or supported for the purpose of supplying to the owner or the occupant of such building, or to the owner or occupant of some part thereof, electric light or electric power, or telephone or telegraph service.

"Sec. 4. It shall be unlawful for any person, company, or corporation to run or suspend or stretch or keep or maintain upon any pole or other support erected in or upon the streets or in or upon any street in the City and County of San Francisco any electric-light wire or any wire used to conduct electricity or an electric current for the purpose of producing electric light or motive power unless such person, company, or corporation shall have heretofore obtained, or shall hereafter obtain, permission of the board of supervisors of said City and County so to do.

"Sec. 5. The provisions of this ordinance shall not apply to any building occupied in his or its business, by any person, company,

and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the State. Of the perfect right of the Legislature to do this no question ever was, or, upon acknowledged general principles, ever can be, made, so far as natural persons are concerned." *Thorpe v. Rutland & B. R. Co.* 27 Vt. 149.

No exposition has been given of this power more thorough and satisfactory, or more often quoted with approval, than that announced in *Com. v. Alger*, 7 Cush. 53, 85, in which it is defined to be "the power vested in the Legislature by the Constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same."

It is the power by which the health, good order, peace and general welfare of the community are promoted. *Webber v. Virginia*, 103 U. S. 348, 26 L. ed. 566.

The States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of their people. *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 683, 27 L. ed. 445.

The police power of a State extends to all matters which concern its internal regulation. It embraces those which affect the lives, limbs, health, comfort and welfare of all in their persons and their property. It subjects both persons and property to those restraints and burdens which are necessary in order that the general comfort and welfare may be secured. It prescribes the modes in which it is reasonable that each shall use and enjoy his own property, in order that others may be guarded in the reasonable use and enjoyment of theirs, and thus prevents a conflict of rights, by determining what uses and enjoyments by each are consistent with 13 L. R. A.

those to which others are entitled. *Cooley, Const. Lim. chap. 14; Com. v. Barse*, 123 Mass. 545.

What is a legitimate exercise of this power.

No doubt it is entirely competent for the city authorities, unless they are bound by some absolute contract permitting the poles and wires to stand as they are, to have them removed and put an end to such unsightly obstructions. There must be a power somewhere, to cause their removal, and to regulate and control the manner in which telegraph lines shall enter or pass through a city. *Mutual Union Telegr. Co. v. Chicago*, 16 Fed. Rep. 309.

Notwithstanding telegraph lines may be an instrument of commerce, a municipal corporation has the right to determine how, in what manner, and upon what condition a telegraph company shall enter and pass through it for the purpose of allowing the citizens of the country to communicate by telegraph one with another. *Mutual Union Telegr. Co. v. Chicago*, 16 Fed. Rep. 309; 2 Dillon, Mun. Corp. § 698, note.

As illustrative of the general powers conferred upon municipal corporations, the courts decide that they may prohibit the throwing of heavy or dangerous articles from the upper stories of buildings into the streets or open spaces near them, where persons are in the habit of passing; and may, when not inconsistent with general or special legislation applicable to the municipality, establish fire limits, and prevent the erection therein of wooden buildings. *Charleston City Council v. Elford*, 1 McMull. L. 234; *Brady v. North Western Ins. Co.* 11 Mich. 425; *Douglass v. Com.* 2 Rawle, 262; *Wadleigh v. Gilman*, 12 Me. 408; *Vanderbilt v. Adams*, 7 Cow. 348, 352, per Woodruff, J., *arguendo*; *Charleston v. Reed*, 27 W. Va. 681; *King v. Davenport*, 98 Ill. 305; *Baumgartner v. Hasty*, 100 Ind. 575; *Klingler v. Bickel*, 10 Cent. Rep. 381, 117 Pa. 324; *Knoxville v. Bird*, 12 Lea, 121; *Pye v. Peterson*, 45 Tex. 312.

or corporation engaged in selling or furnishing or supplying electric lights or electric power, or engaged in conducting or carrying on a telephone or telegraph business; nor shall they apply to any wire erected and used exclusively for fire alarm and city and county purposes.

"Sec. 6. Any person violating any provision of this ordinance shall be guilty of a misdemeanor, and shall be punished by a fine not exceeding \$500, or by imprisonment in the county jail not more than six months, or by both fine and imprisonment.

"Sec. 7. If any person, who has heretofore run or suspended or stretched, or who shall hereafter run or suspend or stretch, over, or across, or upon the top or roof, or any portion of the top or roof, of any building in the City and County of San Francisco, or who shall hereafter keep or maintain any such wire over or across or upon the top or roof, or any portion of the top or roof, of any building, in said City and County, shall fail to remove the same within ten days after the receipt of a written notice to do so, signed by the chief engineer of the fire department of said City and County, then it shall be lawful for the said chief engineer of the fire department, and he is hereby authorized and directed, to cause such wire to be removed."

Messrs. Haggin & Van Ness and George C. Gorham, Jr., for complainant.

Messrs. Estee, Wilson & McCutcheon, with *Messrs. Langhorne & Miller*, for defendant.

In order to hold a law to be unreasonable, the unreasonableness must appear upon its face, and must exclude the possibility of reasonableness.

Ex parte Shrader, 38 Cal. 281; *Ex parte Smith*, 38 Cal. 707; *Ex parte Delaney*, 43 Cal. 480; *Ex parte Moynier*, 65 Cal. 83.

But the question of reasonableness or unreasonableness is not before and cannot be considered by this court.

Barbier v. Connolly, 118 U. S. 23, 28 L. ed. 923; *Sorn Hing v. Crowley*, 118 U. S. 703, 28 L. ed. 1145.

The cases cited by complainant, viz., *Atlantic City W. W. Co. v. Consumers W. Co.* 44 N. J. Eq. 427; *Gale v. Kalamazoo*, 23 Mich. 344; *Newton v. Belger*, 3 New Eng. Rep. 722, 143 Mass. 598; *East St. Louis v. Wehrung*, 50 Ill. 29; *Horn v. People*, 26 Mich. 221; *Re Frazee*, 6 West. Rep. 140, 63 Mich. 396, 6 Am. St. Rep. 310; *Hudson v. Thorne*, 7 Paige, 263, 4 L. ed. 148; *Tugman v. Chicago*, 78 Ill. 405,—do not support its contention.

The discretion which the ordinance vests in the chief engineer of the fire department is neither arbitrary nor unreasonable, nor does it vest him with the power to oppress one or to favor another.

Ex parte Bickerstaff, 70 Cal. 35; *Ex parte Fiske*, 72 Cal. 125; *Ex parte Hoover*, 30 Fed. Rep. 51; *Barbier v. Connolly*, *supra*; *Watertown v. Mayo*, 109 Mass. 315; *Ex parte Nightingale*, 11 Pick. 163; *Ex parte Casinello*, 62 Cal. 538; *Ex parte Moynier*, *supra*; *Vanderbilt v. Adams*, 7 Cow. 851; *Gregory v. Bridgeport*, 41 Conn. 76; *Com. v. Robertson*, 5 Cush. 488; 13 L. R. A.

Brady v. Northwestern Ins. Co. 11 Mich. 425; *Alexander v. Greenville*, 54 Miss. 659; *Hine v. New Haven*, 40 Conn. 478; *Western Union Teleg. Co. v. New York*, 8 L. R. A. 449, 38 Fed. Rep. 552.

If this court should hold that any person could run electric wires over the tops of houses, it would place the control of such wires beyond the reach of the municipality, and place in the hands of irresponsible persons the power to work almost untold injury.

The granting of such privileges as that which complainant claims the right to exercise is within the control of the municipality.

Jackson County H. R. Co. v. Interstate Rapid Transit R. Co. 24 Fed. Rep. 206; *Saginaw Gas Light Co. v. Saginaw*, 28 Fed. Rep. 529; *Chicago Mun. Gas Light & F. Co. v. Lake*, 27 Ill. App. 346; *Citizens Nat. Gas & Min. Co. v. Elwood*, 14 West. Rep. 92, 114 Ind. 332; *Stilwell v. Buffalo Riding Acad.* 4 N. Y. Supp. 415.

No man may so use his own property as to endanger the life or property of another, and it would not only have been within the power, but it would have been the duty, of the chief engineer of the fire department, in the absence of any ordinance authorizing him so to do, to remove from the tops of houses the wires of complainant, and all other wires of a similar nature.

Omnibus R. Co. v. Baldwin, 57 Cal. 160; *Moore v. Board of Comrs. of Pilots*, 32 How Pr. 184; *Hart v. Albany*, 9 Wend. 570; *Meeker v. Van Rensselaer*, 15 Wend. 397; *Harvey v. De Woody*, 18 Ark. 252; *Wier's App.* 74 Pa. 230.

Sawyer, J., delivered the opinion of the court:

Without discussing the question at large, I shall content myself with a brief announcement of my conclusions in this case. After a careful consideration of the questions involved, I am satisfied that "Ordinance No. 2163, prohibiting the suspension of electric wires over or upon the roofs of buildings," etc., is a valid ordinance passed within the legitimate police powers of the city under the authority of the State. In *Bartemeyer v. Iowa*, 85 U. S. 18 Wall. 188, 21 L. ed. 932, *Mr. Justice Field* says that the dissenting judges in the *Slaughter-House Cases* "recognized the power of the State in its fullest extent (the police power), observing that it embraced all regulations affecting the health, good order, morals, peace and safety of society, and that all sorts of restrictions and burdens were imposed under it; and that when these were not in conflict with any constitutional prohibition, or fundamental principles, they could not be successfully assailed in a judicial tribunal." So, in *Butchers Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.*, 111 U. S. 747, 23 L. ed. 585, the court, quoting from *Chancellor Kent*, says: "Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building of combustible materials, and the burial of the dead, may all be interdicted by the law in the midst of dense population, on the general and rational principle that every person ought to so use his property as not to injure

his neighbors; and that private interests must be made subservient to the general interests of the community."

In *Barbier v. Connolly*, 118 U. S. 27, 28 L. ed. 923, and *Soon Hing v. Crowley*, 118 U. S. 703, 28 L. ed. 1145, the court distinctly holds, upon a much milder case of danger than this, that the Fourteenth Amendment in no respect interferes with or limits the exercise of this police power. The exercise of no other branch of this power is more important than that which protects, or seeks to protect, the public safety of a great city, like San Francisco. That the stretching of these wires over buildings in the manner practiced, as shown by the evidence, no one, I think, can doubt after reading the affidavits, is extremely dangerous, both as being liable to originate fires, and as obstructions to the extinguishment of fires otherwise originated. Indeed, the danger is a matter of common knowledge. We might almost as well require strict proof of the danger of storing gunpowder, or dynamite, in, under, upon or about our houses. Even if these wires can be so put up and insulated as to be safe, in the mode suggested by one of the complainant's witnesses, Prof. Keith, it has not been done. The professor himself does not claim that they are, now, safe. The danger is of a character cognate to that of gunpowder. There is doubtless a difference in the degree of the danger, but the consequences are liable to be far more widespread and calamitous. Should a raging fire occur, originated by the electric current or otherwise, these dangerous wires might so obstruct the efforts of the firemen, to extinguish it, as to result in the destruction of the entire city. It is certainly competent, under the police powers of the State, to suppress such dangerous erections, in the interests of the common safety of the community. Who can say, in view of the constant and perpetual menace, that the provisions of this ordinance are unreasonable? Is it unreasonable because the remedy against the great public and private nuisance is prompt, and efficient, when no other remedy is certain to be equally so? We know not how soon a calamity from this source may come upon us. It may be while

we are litigating the question. If one should store a large quantity of gunpowder or dynamite among the buildings in the midst of the city, would a like remedy be deemed unreasonable, or inadmissible, or void, as not being due process of law? The fact is, the gunpowder has no right to be there. It is a standing and dangerous menace to the neighborhood, which anyone affected by the nuisance has a right to abate. And when it is so extended as to become a public menace and nuisance, the public officers, especially, when specifically authorized to do so, can lawfully abate it. And such a constant and continuous menace and nuisance in a less degree, perhaps, it is manifest, these wires erected as they appear to be, are. They have no more right to be there than gunpowder. The only wonder is that owners of buildings in view of the recognized danger will permit their use for such purposes. True, the supervisors cannot make an article dangerous by simply declaring it to be so, when in fact it is not. But the practice, as it now prevails, against which this ordinance is directed, is shown to be dangerous, and, we, ourselves, all know it to be so. There can be no successful disputing of the fact. The order is general and applicable to all. If it is not enforced as to all, it ought to be, and the chief of police declares his purpose to enforce it in all cases that come to his notice. I see no good reason to believe that it was passed for the purpose of discrimination in favor of another company, as claimed, or that it is intended to be so enforced. I do not think it violates any provision of the national Constitution. I regret to be obliged, by this decision, to affect, so seriously, the interests of the enterprising parties who are endeavoring to supply our citizens with electricity for the various purposes to which it is now applied. But I cannot decline to administer the law as I find it, for the safety and security of the lives and property of the citizens of San Francisco.

In accordance with the conclusions which I have reached, *an injunction must be denied, and it is so ordered.*

RHODE ISLAND SUPREME COURT.

Bartholomew FANNING

James H. CHACE,

(....R. L....)

Words which merely impute a criminal intention to another, such as, that "He is going

to start a house of ill-fame, so sign a protest against him," are not actionable.

(June 13, 1891.)

ACTION brought to recover damages for an alleged slander. On demurrer to the declaration. *Demurrer sustained.*

NOTE.—*What constitutes criminal intent.*

To constitute crime there must be a joint operation of act and criminal intent, or criminal negligence. *Desty*, Am. Crim. Law, § 5, citing *Allen v. State*, 52 Ala. 298; *Miles v. State*, 58 Ala. 390; *Yoes v. State*, 9 Ark. 42; *Ross v. Com.* 2 B. Mon. 419; *People v. Harris*, 29 Cal. 679; *People v. White*, 34 Cal. 188; *State v. Will*, 1 Dev. & B. L. 121; *Long v. State*, 28 Ga. 507; *Slattery v. People*, 76 Ill. 218; *Walker v.* 13 L. R. A.

State, 8 Ind. 290; *Gates v. Lounsbury*, 20 Johns. 427; *Com. v. Morse*, 2 Mass. 138; *Torrey v. Field*, 10 Vt. 353; *Hopkins v. Com.* 60 Pa. 10. See 1 *Bishop*, Cr. L. 6th ed. § 204; 3 *Greenl. Ev.* § 12.

And they must concur in point of time. *Morse v. State*, 6 Conn. 9; *State v. Weston*, 9 Conn. 528; *State v. Will*, 1 Dev. & B. L. 121; *State v. Roper*, 3 Dev. L. 478; *Long v. State*, 12 Ga. 298; *Kelly v. Com.* 1 Grant. Cas. 484; *People v. Cogdell*, 1 Hill, 94; *People v. An-*

The facts sufficiently appear in the opinion. *Measrs. James M. Ripley and George A. Littlefield*, for defendant, in support of the demurrer:

It is not sufficient to prove words which amount to a mere intention to commit a crime not evidenced by any overt act.

Ogders, Slander & Libel, p. 120; 1 *Starkie*, *Slander*, pp. 20, 54.

"You will steal," or "I believe you will steal," were held not actionable, as being only an expression of the speaker's opinion and charging no crime committed.

Bays v. Hunt, 60 Iowa, 251.

It has been universally held not actionable to charge a man with a mere intention to commit a crime.

Crafts v. Brown, 8 Bulst. 167; *Murrey v. —*, 2 Bulst. 206; *Seaton v. Cordray*, Wright (Ohio) 101; *Cornelius v. Van Slyck*, 21 Wend. 70; *McKee v. Ingalls*, 5 Ill. 30; *Kirksey v. Fike*, 29 Ala. 207; *Harrison v. Stratton*, 4 Esp. 218; 1 Vin. Abr. 440, p. 9.

derson, 14 Johns. 294; *State v. Ferguson*, 2 McMull. L. 502; *People v. Reynolds*, 2 Mich. 423; *State v. Braden*, 2 Overt. (Tenn.) 66; *State v. Smith*, 2 Tyler, 372. And see *Norton v. State*, 4 Mo. 461; *Ransom v. State*, 22 Conn. 183; *State v. Conway*, 18 Mo. 321.

An act unlawful in itself may sometimes be punishable because of a criminal intent connected with it. *Fairlee v. People*, 11 Ill. L. See *Rex v. Horner*, *Cald*, 235.

Every crime contains two elements: the criminal act and the criminal intent; the former consisting of those external actions or omissions which the law prohibits; the latter of that evil and malicious will which finds expression in the criminal act. See *Bl. Com.* 20; *Broom, Com. Law*, 847; 1 *Bishop, Cr. L.* 6th ed. § 306; 1 *Hale, P. C.* 15.

Although the essence of every offense is the wrongful intent with which it is done, and without which it cannot exist (*Stein v. State*, 37 Ala. 123; *Roseberry v. State*, 50 Ala. 160; *People v. Lohman*, 2 Barb. 213; *Sturges v. Matland*, *Anth.* 153; *Com. v. Ridgway*, 2 Ashm. 247; *Riley v. State*, 16 Conn. 47; *State v. Carland*, 3 Dev. L. 114; *Cummins v. Spruance*, 4 Harr. (Del.) 315; *Walker v. State*, 8 Ind. 290; *State v. Bartlett*, 30 Me. 132; *United States v. Pearce*, 2 McLean, 14; *State v. Gardner*, 5 Nev. 377; *The William Gray*, 1 Palma, 18; *State v. Hawkins*, 3 Port. (Ala.) 461; *State v. Nicholas*, 2 Strobb. L. 373; *United States v. Buzzo*, 65 U. S. 18 Wall. 123, 21 L. ed. 513; *Case of Le Tigre*, 3 Wash. C. C. 507; *See 1 Bishop, Cr. L.* 6th ed. § 287; 1 *Greenl. Ev.* § 13; 3 *Greenl. Ev.* 6th ed. § 13; 1 *Russell, Crimes*, 84; yet some overt act is necessary to constitute crime (*State v. Wilson*, 30 Conn. 500; *Com. v. Clark*, 6 Gratt. 675; *Rendolph v. Com.* 8 Serg. & R. 308; *Lovett v. State*, 19 Tex. 174; *Torrey v. Field*, 10 Vt. 368; *Miles v. State*, 56 Ala. 390; *Statterly v. People*, 76 Ill. 218; *Fowler v. Padgett*, 7 T. B. 509; as mere intent is not punishable. *Allen v. State*, 52 Ala. 396; *Yoes v. State*, 9 Ark. 42; *United States v. Riddle*, 9 U. S. 6 Cranch, 31, 3 L. ed. 110; *Ross v. Com.* 2 B. Mon. 417; *Com. v. Morse*, 3 Mass. 123.

It is the intent which determines the criminality of the act. See *Roseberry v. State*, 50 Ala. 160; *Reg. v. Prince*, L. R. 2 Cr. Cas. 154, 1 Am. Crim. Rep. 15; *Broom, Crim. Law*, 871.

And when acts are criminal only when performed with some specific design, this specific design enters into the nature of the act itself, and is called the specific intent (see 1 *Bishop, Cr. L.* 6th ed. § 288), and must be proved (*McKay v. State*, 44 Tex. 43; *Simpson v. State*, 59 Ala. 1; *White v. State*, 68 Ind. 586; *Roberts v. People*, 19 Mich. 401; *United States v. Learned*, 1 Abb. U. S. 433; *People v. Potter*, 5 Mich. 13 L. R. A.

Words in order to be held slanderous *per se* as touching and concerning one in his office, business or occupation, must impeach either his skill or knowledge or his official or professional conduct in his own particular business. *Ogders, Slander & Libel*, p. 65.

In order to hold words of this class actionable, they must have a direct tendency to injure the plaintiff in his particular business.

Angle v. Alexander, 7 Bing. 119; *Lumby v. Allday*, 1 Crompt. & J. 301; *Brayne v. Cooper*, 5 Mees. & W. 249; *Sibley v. Tomlins*, 4 Tyr. 90; *Ruel v. Tatnell*, 29 Week. Rep. 172.

If the imputation complained of is not a charge of crime or of business incapacity, then it is nothing worth considering. It does not appear that plaintiff's damage is the direct result of the defendant's words. The damage must be the natural, immediate and legitimate consequence of the words which the defendant uttered, and a consequence which the defendant knew, or ought to have known, would follow from his words.

1; *Whiteford v. Com.* 6 Rand. 722; *Bivens v. State*, 11 Ark. 455; *State v. Gillick*, 7 Iowa, 237; *State v. Dowd*, 19 Conn. 387; *People v. Sanchez*, 24 Cal. 17; *Hill v. People*, 1 Colo. 451; *Rex v. Woodfall*, 5 Burr. 2061. See 1 *Bishop, Cr. L.* 6th ed. § 736, beyond a reasonable doubt. *Mullins v. State*, 37 Tex. 337; *State v. Stanton*, 37 Conn. 421.

Charge of mere purpose to commit a crime is not actionable.

If the words only imply the purpose or intention on the part of the person spoken of to commit a crime, or describe him as possessing a disposition, or as wanting moral qualities which would prompt him to commit the crime, or amount to an allegation that, if opportunity offers, he would commit it, they are not actionable *per se*. *Bays v. Hunt*, 60 Iowa, 251.

To charge a person with intent to commit a crime is not actionable. *McKee v. Ingalls*, 5 Ill. 30; *Wilson v. Tatum*, 8 Jones, L. 300; *Seaton v. Cordray*, Wright (Ohio) 101; *Newell, Defamation, Slander & Libel*, 112.

The mere intention to commit a crime, without an attempt by some overt act, is no offense. *Weed v. Bibbins*, 38 Barb. 515.

It has been said the cases are uniform on the point that for an imputation of evil inclinations or principle no action lies, unless it affects the plaintiff in some particular character, or produces a special damage. 1 *Starkie, Slander & Libel*, 24; *Harrison v. Stratton*, 4 Esp. 218; *Townsend, Slander & Libel*, § 162.

Not every unfounded imputation of crime is actionable; and it is for the jury to determine whether the words were spoken in good faith in prosecuting an inquiry as to a suspected offense, and, if so, whether they were uttered in stronger language, or in a more public manner than was necessary. *Padmore v. Lawrence*, 11 Ad. & El. 360; *Tempest v. Chambers*, 1 Stark. 67; *Heming v. Power*, 10 Mees. & W. 564; *Harper v. Harper*, 10 Bush, 447; 5 *Wait, Act. & Def.* 732.

No action can be based upon a mere suspicion or opinion, which does not import any express or precise imputation of guilt (*Hodgson v. Scarlett*, 1 Barn. & Ald. 243; *Harrison v. King*, 4 Price, 46), nor accuses an individual of crime, no other person being present (*Forco v. Warren*, 15 C. B. N. 8. 306; *Sh. Mill v. Van Deusen*, 13 Gray, 304; *Desmond v. Brown*, 33 Iowa, 13; *Halle v. Fuller*, 5 Thomp. & C. 712, 2 Hun, 519), or none who understood the language in which the words were uttered. *Lyle v. Clason*, 1 Cal. 561; *Broderick v. James*, 3 Daly, 461; *Wait, Act. & Def.* 732.

Odgers, Slander & Libel, p. 308.

The special damage complained of, in order to ground an action of slander, must be the direct result of the defendant's words, not even the result of those words combined with other causes.

Odgers, Slander & Libel, pp. 321, 322; *Sterry v. Foreman*, 2 Car. & P. 592; *Miller v. David*, L. R. 9 C. P. 118; *Hoey v. Felton*, 11 C. B. N. S. 142; *Vicars v. Wilcocks*, 8 East, 1; *Haddon v. Lott*, 15 C. B. 411; *Ashley v. Harrison*, 1 Esp. 48.

Mr. George J. West for plaintiff.

Tillinghast, J., delivered the opinion of the court:

This is an action of trespass on the case for slander. The declaration, to which the defendant demurs, sets out that the plaintiff is a licensed retail liquor dealer in the City of Providence, and has been such for a long time. That, anticipating a renewal of his license for the year 1890-91, he made large purchases of liquors in advance, and also refitted and refurnished his saloon at large expense. That the defendant, well knowing the premises, but intending to injure him, the plaintiff, and prevent him from again procuring a license for the carrying on of his said business, in the presence and hearing of divers good citizens, uttered, declared and published the following false, scandalous and malicious words of and concerning the plaintiff, viz.: "He [meaning the plaintiff] is going to start a house of ill fame [meaning a house to be kept for the purposes of prostitution], so sign a protest against him [meaning the plaintiff];"—meaning and intending thereby that said plaintiff was going to start a house to be kept and maintained for the purposes of prostitution; and that said plaintiff ought not to be granted a license to carry on the business of retail liquor dealer as he desired, in accordance with his application on file in the office of the license commissioners in said city, and to therefore sign a written remonstrance protesting that said plaintiff ought to be refused a license, which said defendant then and there presented to said people. The declaration further sets out that, in consequence of the uttering and publishing of said words by the defendant, the majority of persons owning the greater part of the land within 200 feet of the said saloon, or who were occupants of it, signed a remonstrance protesting that license should not be granted to the plaintiff to carry on said business, whereupon said license commissioners refused to grant such license, and were rendered unable to grant the same; and alleging special damage.

The principal ground urged in support of the demurrer is that the words complained of, since they do not amount to an imputation of the commission of an offense, but only to a charge of an intention to commit one, are not actionable either *per se*, or from having caused special damage. The main question raised by the demurrer therefore is this, viz.: Are words actionable which merely impute a criminal intention to another? We think this question must be answered in the negative. Words which falsely charge a per-

son with the commission of a criminal offense are actionable upon the familiar ground that they may endanger him by subjecting him to the penalties of the law, and render him infamous in the community. But the charge, in order to be obnoxious to the law, must be of an offense actually committed or attempted,—a punishable offense,—and not of an offense existing in contemplation or intention merely; for the law does not take cognizance of one's intentions merely, however malicious or wicked they may be, but only takes cognizance thereof when coupled with and giving significance to his acts. So that, in order to render one's intent of any importance in the eye of the law, it must be combined with his act. It therefore follows that, as mere intent to commit a crime is not a violation of the law, and hence not punishable, to accuse one of having such an intent is not to accuse him of any crime or offense. The language which the plaintiff complains of as being slanderous is this: "He is going to start a house of ill fame." This language, if indeed it is anything more than the expression of an opinion on the part of the defendant, does not amount to a charge of any crime or offense, or even of an attempt to commit one. That such a charge is not actionable is one of the few things in the Law of Slander which is evidently settled beyond controversy. The law upon this point is well stated in the American Encyclopædia of Law (vol. 13, p. 353) as follows: "Words which merely impute a criminal intention, not yet put into action, are not actionable. Guilty thoughts are not a crime. But as soon as any step is taken to carry out such intention, as soon as any overt act is done, an attempt to commit a crime has been made; and every attempt to commit an indictable offense is, at common law, a misdemeanor, and in itself indictable. To impute such an attempt is therefore clearly actionable."

In *Cornelius v. Van Slyck*, 21 Wend. 70, 71, the court, in speaking of the sense in which the words should be taken, says: "Where they plainly import a charge of mere intention to do a criminal act, or only amount to an assertion that the plaintiff will do it at a future time, they are not actionable." In *Seaton v. Cordray*, Wright (Ohio) 101, the court says: "An action may be sustained for charging another with being a thief, or with having stolen, but not for imputing a mere intention to steal, or with having an evil disposition. The foundation of the slander is that the charge, if true, would subject the accused to infamous punishment; an evil disposition, without act, cannot so subject anyone." See also *Townsend, Slander & Libel*, 3d ed. 161; *McKee v. Ingalls*, 5 Ill. 80; *Harrison v. Stratton*, 4 Esp. 218; *Wilson v. Tatum*, 8 Jones, L. 300; *Stoner v. Audley*, Cro. Eliz. 250; *Dr. Poe's Case*, cited in *Murray v. —*, 2 Bulst. 206; 1 Vin. Abr. 440; *Odgers, Slander & Libel*, 57; *Sillars v. Collier*, 151 Mass. 50, 53, 54, 6 L. R. A. 680.

But the plaintiff contends, in support of his declaration, that any defamatory or disparaging words spoken of another, which cause special damage, are actionable. While we cannot subscribe to quite so broad a

statement of the law as this, yet we think that the proposition is substantially correct; that is to say, that false, defamatory words spoken of another are either actionable *per se*, or by reason of having caused special damage. We do not think, however, that the words relied on in the declaration are defamatory, within the legal meaning of that term. To defame another by language is to harm or destroy his good fame or reputation, or to disgrace or calumniate him. In order to have this evil effect, however, it is evident that the language used concerning him must relate to his conduct or character as they now are or have been in the past, and not be the mere opinion of the speaker as to what they will be at some indefinite period in the future. In other words, that language which amounts to a mere assertion of opinion as to

what will be the future conduct or character of another is not actionable; but that it is only actionable when it relates to what the person now is, or has been in the past, or to what he is doing or attempting to do, or has done or attempted to do in the past; that is, when it relates to something actual, instead of something which is merely imaginary or conjectural. The character of a man is what he now is, and not what he may be at some future time. Among the multitude of different forms of expression found in the books which have been held to be actionable we have been unable to find any case, nor have we been referred to any, in which language, analogous to that relied on in the plaintiff's declaration has been held sufficient to maintain an action for slander.

Demurrer sustained.

CALIFORNIA SUPREME COURT.

Minnie SPECT, *Resp't.*,

v.

Lou G. SPECT, *App't.*

(....Cal....)

A mortgagee in possession does not lose his rights as such by the fact that his right of action for his debt has become barred by the Statute of Limitations, and he can still resist any action to deprive him of his security.

(March 25, 1891.)

APPEAL by defendant from a judgment of the Superior Court for Colusa County in favor of plaintiff in an action brought to recover possession of certain real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. B. F. Howard and S. G. Tomkins, for appellant:

It should be imposed as a condition to plaintiff's obtaining relief that she first satisfy defendant's lien.

Booth v. Hoskins, 75 Cal. 271.

Messrs. H. M. Albery and W. G. Dyas, for respondent:

The mortgage does not provide for the possession of the land in controversy, by the mortgagee. A mortgage, to entitle a mortgagee to possession, must so provide.

Smith v. Smith, 80 Cal. 336; *Raynor v. Drew*, 72 Cal. 309; Civ. Code, § 2927.

Harrison, J., delivered the opinion of the court:

The defendant in her answer to a complaint in ejectment, which was in the ordinary form, denied all its allegations, and, "for a separate and equitable defense to plaintiff's action, and for the purpose of obtaining equitable relief herein," alleged that in October, 1875, Jonas Spect, who was then the owner

and in possession of the demanded premises, conveyed the same to one Montgomery; that in October, 1876, said Jonas Spect borrowed from the defendant the sum of \$2,200, and executed to her his promissory note therefor; that on the 2d day of January, 1877, he procured said Montgomery to convey the demanded premises to her, and that at the same time, and as a part of the same transaction, an agreement was entered into between herself and said Jonas Spect declaring that said conveyance was made as security for the payment of said promissory note; "that by virtue of said conveyance from Montgomery, and said agreement, and by the consent of said Jonas Spect, defendant took possession of the demanded premises, and has ever since remained and is now in actual possession of the same, claiming them as her own: that no part of said \$2,200 has ever been paid, principal or interest, but the whole thereof is now due and unpaid, amounting to \$5,682;" and prayed judgment that plaintiff's complaint be dismissed. The action was tried by the court, and judgment rendered for the plaintiff. The court made findings of the facts alleged in the complaint, and incorporated therein the following statement with reference to the equitable defense set up in the answer: "The court declines to find on the fact whether or not defendant has a mortgage lien on the premises in controversy, for the reason that the court is of the opinion that it is not necessary for the disposition of the issues involved in this case to find upon that matter, this being an action of ejectment, and the only question involved being the right to the possession of the premises described in plaintiff's complaint." The defendant has appealed directly from the judgment, and presents as a ground for its reversal that the court failed to find upon the issues presented by her equitable defense.

Inasmuch as the court gives as its reason

NOTE.—Mortgagee in possession, rights of. If a mortgagee obtains possession in any lawful or peaceable mode he may retain it as against the mortgagor, or any person claiming under him sub-
13 L. R. A.

sequent to the mortgage, until the mortgage debt is paid, although no action is allowed by statute to recover possession. See *note* to *Cook v. Cooper* (Or.) 7 L. R. A. 273.

for not making findings upon these issues that such findings were immaterial, we must assume that evidence was introduced at the trial sufficient to support the allegations, and therefore the rule announced in *Himmelman v. Henry*, 84 Cal. 104, had no application. If the facts alleged by the defendant constitute a defense to the cause of action set forth in the complaint, they presented material issues upon which the court should have made findings, and a failure to do so was error which will require a reversal of the judgment.

The court does not find by what means the plaintiff became the owner of the demanded premises, but, as it is alleged in the equitable defense above named that Jonas Spect was the owner at the time he made the conveyance to Montgomery, we must assume that the plaintiff's title is derived under him, and is therefore subject to whatever incumbrance was created by the foregoing facts in favor of the defendant, and that the plaintiff can assert no greater rights to the premises than could Jonas Spect himself, were he the plaintiff herein. It may also be assumed, although it does not appear in the record that such point was presented to the court below, that the defendant's right of action upon the debt for which this mortgage was given to her was barred by the Statute of Limitations. The question to be determined is, "Can a mortgagor, who has placed his mortgage in possession of the mortgaged premises, maintain ejectment against him while the debt for which the mortgage was given remains unsatisfied, even though an action by the mortgagee for the recovery of the debt is barred by the Statute of Limitations?"

Section 2927 of the Civil Code declares that "a mortgage does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage, but after the execution of the mortgage the mortgagor may agree to such change of possession without a new consideration." The right of the mortgagee to take possession of the mortgaged premises does not depend upon the Statute. The mortgagor could at all times, even by a parol agreement, give to his mortgagee this additional security. *Fogarty v. Sawyer*, 17 Cal. 589; *Eduarda v. Wray*, 11 Biss. 251. In taking such possession the mortgagee does not thereby acquire any estate in the land, or obtain for his mortgage any higher character or any different or greater protection than it would otherwise have possessed. In any action to enforce the mortgage, or to collect the debt for which it was given as security, the mortgagee has no additional rights by reason of the fact that he is in possession of the mortgaged premises with the consent of the mortgagor. Such possession does, however, give him rights in addition to those conferred by the mortgage. It is an additional security for the debt, which he is entitled to retain in accordance with the terms under which it was received. This right to retain the possession of the land is not coincident with a right to foreclose his mortgage, or

dependent upon such right, but depends solely upon the existence of the debt. The possession of the land is a special security for the debt, distinct and separate from the mortgage, which has been conferred by an act of the debtor, and the right to retain the same is independent of and distinct from any right springing from the mortgage.

A mortgage is defined by section 2920 of the Civil Code to be "a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession." The use of the term "hypothecate" signifies that possession is not an incident of the mortgage, and that the fact of possession is entirely distinct from the contract of hypothecation. When, therefore, in addition to the contract of hypothecation, the debtor gives to his creditor the possession of the mortgaged premises, he thereby, in addition to the mortgage which he has executed, pledges to him the land also as security for the debt, and confers upon him such rights as are incident to a pledge.

The common law recognized this species of landed security. It was there called *radium vitrum*, as distinguished from the *radium mortuum*. This is defined by Chancellor Kent to be: "When the creditor takes the estate to hold and enjoy it without any limited time for redemption, and until he repays himself out of the rents and profits. In that case the land survives the debt, and when the debt is discharged the land by right of reverter returns to the original owner." 4 Kent, Com. 137, 2 Bl. Com. 157; Co. Litt. 205a. The holding of the land in pledge is like the holding of any other pledge. Until the debt is repaid the owner of the pledge cannot recover it from the creditor. The holder of personal property given as security for a debt is entitled to retain the same from the owner until the debt is satisfied, even though the Statute of Limitations has barred all right of action to recover the debt. *Jones v. Merchants Bank of Albany*, 4 Robt. 221. Under the same principle the mortgagee in possession is entitled to retain such possession until the debt is paid. "The mortgagee's right, being in possession, to defend himself against an ejectment by the mortgagor, is but a right to retain the possession of the pledge for the purpose of paying the debt. Such a right is but the incident of the debt, and has no relation to a title or estate in the lands." *Kortright v. Cady*, 21 N. Y. 364. "On the same principle that the party who holds goods in pledge for a debt may retain these goods, even after an action at law upon such debt has been barred, the party who has got rightful possession of land mortgaged may retain possession thereof until his debt is paid, although he can bring no action to enforce the debt." *Henry v. Confidence G. & S. Min. Co.* 1 Nev. 622. In *Dutton v. Warschauer*, 21 Cal. 625, it is said: "When possession is taken by the mortgagee after condition broken by consent of the mortgagor, it will be presumed, in the absence of clear proof to the contrary, to be with the understanding that the mortgagee is to re-

ceive the rents and profits, and apply them to the payment of the debt secured. There is, indeed, no other good reason why the mortgagee should be let into possession in preference to any other party, and, unless a limitation to the period of possession is fixed at the time, it will be considered as extending until the satisfaction of the debt. Having thus entered, the mortgagee can hold against the mortgagor and all others until such satisfaction is obtained."

The rights which grow out of the relations existing between mortgagor and mortgagee, as well as the remedies for the enforcement and protection of those rights, are of equitable origin, and are to be determined by the principles of equity, whether the right be asserted or the remedy sought in an action at law or in equity. These principles, when once established, become the guidance of courts of law as well as of equity, even in those countries where the tribunals of law and equity are distinct. It was said by Lord Redesdale: "The distinction between strict law and equity is never in any country a permanent distinction. Law and equity are in continual progression, and the former is constantly gaining ground upon the latter. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next." Section 807, Code Civil Proc., declares: "There is in this State but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs." While all distinctions in the form of actions are abolished, yet the principles upon which the rights of parties are to be determined remain to guide the judgment of the court. Courts look to the substantial rights of the parties for the purpose of determining the remedy to which they are entitled, irrespective of the form of the complaint under which the remedy is sought. Whenever a mortgagor seeks a remedy against his mortgagee which appears to the court to be inequitable, whether it be to cancel the mortgage as a cloud upon his title (*Booth v. Hawkins*, 75 Cal. 271), or to enjoin a sale under the power given by him in the security (*Grant v. Burr*, 54 Cal. 298), or to recover from the mortgagee the possession of the mortgaged premises, the court will deny him the relief he seeks, except upon the condition that he shall do that which is consonant with equity. In accordance with these principles, it is a settled rule that a mortgagor cannot maintain ejectment against his mortgagee until the debt is paid. *Phyfe v. Riley*, 15 Wend. 248; *Hubbell v. Moulton*, 58 N. Y. 225; *Fee v. Singely*, 6 Mont. 596; *Roberts v. Sutherland*, 4 Or. 220; *Cooke v. Cooper*, 18 Or. 142; 7 L. R. A. 273; *Frink v. Le Roy*, 49 Cal. 814; *Tallman v. Ely*, 6 Wis. 244; *Brinkman v. Jones*, 44 Wis. 512; *Sahler v. Signer*, 44 Barb. 614; *Madison Ave. Baptist Church v. Oliver St. Baptist Church*, 78 N. Y. 82; *Den v. Wright*, 7 N. J. L. 212; *Wells v. Van Dyke*, 109 Pa. 235; *Duke v. Reed*, 64 Tex. 705; 1 Jones, Mortg. § 715.

The debt is not satisfied or paid by mere lapse of time. The Statute of Limitations

is a bar to the remedy only, and does not extinguish, or even impair, the obligation of the debtor. It is available in judicial proceedings only as a defense, and can never be asserted as a cause of action in his behalf, or for conferring upon him a right of action. It is to be used as a shield and not as a sword. "It has never been held that the expiration of the statutory time for bringing an action to recover a debt, or to enforce any personal obligation, operated either as an extinguishment or payment. Such a result cannot be derived from the language of our Statute, the reason or policy of the law, or the decisions of courts in this State or elsewhere." *Grant v. Burr*, 54 Cal. 301.

The mortgagee, after the mortgage debt has been barred by the Statute of Limitations, cannot, by any affirmative proceedings on his part, invoke the aid of the court for the collection of the debt; but, if the mortgagor has placed him in the possession of the land mortgaged, he does not lose the right thus conferred upon him, and can resist any action by the mortgagor to deprive him of this security.

In *Frink v. Le Roy*, 49 Cal. 814, a decree of foreclosure and sale of the mortgaged premises was entered in 1859. Thereupon Le Roy, one of the mortgagees, took possession of the premises under an agreement between the parties that he might do so, and apply the rents to the satisfaction of the judgment. In 1870, Frink, who had succeeded to the interest of the mortgagor in the premises, brought an action in ejectment against Le Roy for their recovery. Le Roy, in his answer, by way of equitable defense, set up the mortgage, the judgment foreclosing the same, and the agreement under which he had taken possession. To this defense the plaintiff pleaded the Statute of Limitations. Upon an appeal from the judgment in favor of the plaintiff, the supreme court held that the Statute of Limitations had no application, and that Le Roy's right to remain in possession under the agreement was not affected by it, saying that "the equity of Le Roy to be maintained in possession until satisfaction of the debt is not lost from the fact that for upwards of ten years he has been in the actual possession of that of which he is now sought to be deprived." In *Hubbell v. Moulton*, 58 N. Y. 225, it was held that the mortgagor could not maintain an action in ejectment against the mortgagee for the mortgaged premises, even though he could prove at the trial that the mortgagee had received from the lands sufficient rents and profits to satisfy the debt; that such receipt did not *ipso facto* satisfy the mortgage and discharge its lien, but was in the nature of an equitable set-off to the amount due upon the mortgage debt; and that until after a judicial determination had been had upon an accounting in equity, and the application of these receipts decreed by the court in satisfaction of the debt, the mortgage was not satisfied. Section 346, Code Civil Proc., provides that "an action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the

mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage." If the mortgagor could maintain ejectment against his mortgagee, after the debt for which the mortgage was given had become barred by the Statute of Limitations, he would have no need to bring an action to redeem the mortgage; and, if the mortgagee had maintained an adverse possession of the mortgaged premises for five years after the breach of some condition of the mortgage, such adverse possession would be a complete defense to the action of ejectment. Mere lapse of time does not constitute adverse possession, but, if the mortgagor could maintain

ejectment as soon as the right of action upon the debt was barred by the Statute of Limitations, the provisions of this section would be meaningless.

It follows, from a consideration of the principles which we have herein stated, that the equitable defense alleged by the defendant was, if sustained by proofs, sufficient to defeat the plaintiff's right of recovery; and that the failure of the court to make findings upon the issues so presented was error, for which the judgment must be reversed; and it is so ordered.

We concur: *Beatty, Ch. J.; McFarland, J.; Sharpstein, J.; Paterson, J.; De Haven, J.; Garritte, J.*

Petition for rehearing denied.

NEBRASKA SUPREME COURT.

George J. VOLLAND, *Plff. in Err.*,

Joseph BAKER.

(....Neb.....)

- *1. In an appeal from the county court to the district court there may be claimed by an amended petition an amount of damages equal to that which could have been recovered in the county court.
2. The vendee of a chattel purchased by negotiable note, transferred to third party, may recover on vendor's warranty, though the note has gone to judgment at law, and not paid.
3. The instructions given and refused examined, and held properly given and refused.
4. Evidence examined, and held to support the verdict.

(July 1, 1891.)

ERROR to the District Court for Webster County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged breach of warranty of the soundness of certain horses. *Affirmed.*

The facts are stated in the opinion.

Messrs. Dilworth, Smith & Dilworth for plaintiff in error.

Mr. J. N. Rickards, for defendant in error:

It is no objection to a petition that the amount of damages has been increased, provided there is not a departure and provided the increase does not go beyond the jurisdiction of the court from which appeal was taken.

Union Pac. R. Co. v. Ogiley, 18 Neb. 688.

Plaintiff in error filed his answer to the petition and thereby waived the objection if it was otherwise good.

School Dist. No. 36 v. McIntis, 14 Neb. 50; *Waters v. Reuben*, 16 Neb. 101.

If the note had been sold then the vendee could recover without paying it.

Aultman v. Jett, 49 Wis. 488; *Long v. Clapp*, 15 Neb. 490; *Dunbar v. Briggs*, 18 Neb. 885.

The insolvency of the vendee is immaterial.

*Head notes by COBB, Ch. J.

18 L. R. A.

Thoreson v. Minneapolis Harvester Works, 29 Minn. 841.

The fact that the buyer of a warranted article gives his note for it, which has not been paid when he brings his action upon the warranty, does not affect the extent of his damages, neither is the sum which the buyer is entitled to recover for breach of warranty limited by the price which he paid or agreed to pay for the article warranted.

Frohreich v. Gammon, 28 Minn. 476.

It was not necessary that the vendor knew the warranty made by him was false.

Dunbar v. Briggs, 18 Neb. 97.

Cobb, Ch. J., delivered the opinion of the court:

This action was originally brought September 10, 1886, in the county court of said county, by Joseph Baker against George J. Volland, claiming that on March 22, 1884, he purchased a team of horses of the defendant for \$850, which defendant warranted to be sound and free from disease; that he thoroughly relied on said warranty, and believed the same to be true, and alleged that said representation and warranty were false and untrue in that one of said horses had a disease akin to glanders, commonly called "button farcy," and was of no value, and to the damage of the plaintiff to the amount of \$175. That on account of the disease of said horse it was communicated to another horse of his, without any neglect or fault of his, and the same was damaged to the sum of \$100. That he lay out the use of said horses, and incurred necessary expenses in attempting to doctor and cure the same, in the sum of \$100; and that he has incurred damages in all to the sum of \$375. That he gave said Volland his note for the sum of \$850, payable March 1, 1885, and that before the maturity of said note the said G. Volland sold the same to Benjamin F. Smith, and that said Smith recovered a judgment in the County Court of Webster County for the sum of \$437.50 and \$11.50 costs, and that said judgment is in full force and effect. The case being appealed to the district court, the

defendant in error filed his petition, setting forth the same state of facts, but claiming \$300 damages by reason of the disease being communicated to other horses, and claimed \$100 damages for expenses in doctoring said horses. In the district court the plaintiff in error filed a motion to strike out of the petition in the second cause the sum of \$100, for the reason the same was not claimed in the county court; and also to strike out the fourth item of damages, for the reason that the same was not claimed in the county court,—which motion was overruled. The plaintiff in error also filed answer, admitting that the defendant in error purchased the horses for the sum of \$350, but denied that the horses were warranted in any manner; and further alleged that the note given for the horses was transferred to B. F. Smith, and that said B. F. Smith recovered a judgment in the County Court of Webster County for the sum of \$497.50 and \$11.50 costs; and that an execution was issued on said judgment and returned “No goods;” and that said judgment remains in full force and wholly unpaid; and that defendant in error had never paid anything on said note or the judgment; and that said defendant in error, Baker, and the party signing said note as surety, were insolvent, and nothing could be collected from them. The case was tried to a jury, who returned a verdict for the defendant in error and against the plaintiff in error for the sum of \$275, with interest at 7 per cent from March 24, 1885; total principal and interest, \$345.58. The motion for a new trial was overruled, and the cause brought to this court on the following errors: *first*, that the district court erred in refusing to strike out the fourth item of damage in the plaintiff's petition, for the reason that no such claim was tried in the county court; *second*, that the court erred in refusing to give instruction No. 1, asked for by the plaintiff; *third*, that the court erred in giving instructions Nos. 1, 2, 3, 4, and 5.

The first error assigned is overruled, for the reason that it has been held, and is a settled rule, that, “where an action is brought in the county court and appealed, an amended petition in the district court may claim an amount of damages equal to that of the jurisdiction of the county court.” *Union Pac. R. Co. v. Ogilvy*, 18 Neb. 688. The amendment embracing the fourth item of damages is an extension of the original claim merely, and within the jurisdiction of the county court. It could have been made there, and was competent to be made on appeal.

The second error is that of the refusal of the court to instruct the jury that “the plaintiff could not recover unless they found that he had paid the value of the horse, or the agreed price thereof.” The promissory note of the plaintiff having gone to a second holder, and having gone into judgment at law, it is not clear that the court should have enforced this rule. In the case cited as a precedent,—that of *Aultman v. Jett*, 42 Wis. 488,—there is a clear intimation that if the notes had been sold the vendee could have recovered. Cole, J., in the opinion, said: “There is, however, no evidence that the

notes have been transferred; and, in the absence of all proof upon the point, the presumption is that they are still held by the plaintiff. If the notes still belong to the plaintiff, they cannot be treated as payment of the contract price, unless it was so agreed at the time.” This rule had been adopted in the courts of Wisconsin, and was adhered to; but Ryan, Ch. J., took occasion to say “that, if the question of payment were a new one in this court, he could not concur in the rule; and that his opinion was, when one contracts a debt, and presently gives his note or other obligation for the amount, it ought to be considered a payment, unless there be express agreement to the contrary.”

In the case of *Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb. 210, cited as precedent, the reason the recovery must be limited to the amount paid is that the warranty was in writing, and by its terms the vendee's damages were limited to the amount paid on the contract of sale.

In the action of *Dunbar v. Briggs*, 13 Neb. 332, suit was brought in the District Court of Gage County on the defendant's promissory note for \$900 in payment for thirty-nine head of Texas horses, diseased, which infected other horses, and on which note there was a recovery in full. This judgment was reversed on error. The damages were not limited by contract, but the warranty of soundness was questioned, and testimony on that point improperly overruled.

In the case of *Long v. Clapp*, 15 Neb. 417, it was laid down that, “in addition to the general measure of damages, the law in some cases imposes upon a party injured from another's breach of contract or tort the active duty of making reasonable exertions to render the injury as light as possible. Where this duty has been found to exist, the labor and expense involved in its performance are chargeable to the party liable for the injury thus mitigated.” This rule seems to be directly apposite to the recovery by the defendant in error on the veterinary surgeon's account for services. Beyond this, there can be no contention as to the measure of damages in the court below, if the jury were not misled as to the price of the diseased horse and the value of the colt lost from infection. The testimony does not indicate that they were so misled. As to the general principle that the buyer of a horse, or the purchaser of a patented machine, both warranted, has right of action under the warranty, and a counterclaim for breach of warranty, whether the purchase was by cash or promise, or whether the vendee be solvent or insolvent, can hardly be questioned in this State. The assumption is that, an execution having been returned against a judgment debtor unsatisfied for want of goods and chattels, is not Q. E. D. that he would remain insolvent, and never pay his creditors; for by industry and good luck he may become solvent, and discharge his pecuniary obligations. That fact, of itself, was to be considered by the vendor preceding this transaction.

Nor is the proposition in this case confined to the judicial practice of this State.

In *Thoreson v. Minneapolis Harvester Works*,

29 Minn. 341, it was held: "In an action to recover damages for breach of warranty in the sale of a chattel a recovery may be had, although the vendee had not paid the purchase price, but had given his promissory notes therefor, which are still unpaid." Prior to this decision, the Supreme Court of Minnesota had held in the case of *Frohreich v. Gammon*, 28 Minn. 476, that "the fact that the buyer of a warranted article gives his note for it, which has not been paid when he brings his action upon the warranty, does

not affect the extent of his damage. Neither is the sum which the buyer is entitled to recover for breach of warranty limited by the price which he paid or agreed to pay for the articles."

From a careful reading of the evidence, and from the fair and impartial instructions of the court, we are not able to find reversible errors in the trial in the court below.

The judgment of the District Court is affirmed.
The other Judges concur.

WASHINGTON SUPREME COURT.

J. Gardner KENYON, *Appt.*,

Robert KNIPE *et al.*

(....Wash.....)

A purchaser of lots according to a plat showing them bounded by a definite line at a specified distance from the front boundary acquires no riparian rights in lands covered by tide-water at the rear of such lots, at least where the plat shows an alley and other lots beyond such line.

(*Stiles, J., dissents.*)

(June 2, 1891.)

APPEAL by complainant from a decree of the District Court for King County in favor of defendants in a suit brought to enjoin the maintenance by defendants of a wharf in tide-water in front of complainant's premises. *Affirmed.*

The facts are stated in the opinions.

Mr. J. B. Howe, with Messrs. D. O. Finch, E. C. Hughes and J. Gardner Kenyon, in propria persona, for appellant:

A. A. Denny, as owner of a certain donation land claim abutting on the navigable waters of Elliott Bay, was exclusively possessed of the riparian rights incident to the bank.

Lake Superior Land Co. v. Emerson, 38 Minn. 406; *Brunswick v. Union Depot & St. R. & Transp. Co.* 31 Minn. 297; *Hanford v. St. Paul & D. R. Co.* 7 L. R. A. 729, 43 Minn. 104; *Lyon v. Fishmonger's Co.* L. R. 1 App. Cas. 663; *Barlow v. Wingate*, 3d Jud. Dist. of Wash. Terr.; *Cass v. Loftus*, 5 L. R. A. 684, 89 Fed. Rep. 784; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 504, 19 L. ed. 986; *Shirley v. Bishop*, 67 Cal. 543; *Musser v. Hershey*, 42 Iowa 362; *Delaplaine v. Chicago & N. W. R. Co.* 43 Wis. 226; *Lackland v. North Missouri R. Co.* 81 Mo. 181; *Tivnicum Fishing Co. v. Carter*, 61 Pa. 21; *Hayden v. Long*, 8 Or. 244; Gould, Waters, §§ 142-149; Gould & Tucker's U. S. Rev. Stat. § 2396; *East Omaha Land Co. v. Jefferies*, 40 Fed. Rep. 386; *Menasha Wooden Ware Co. v. Lawson*, 70 Wis. 600; *Reerson v. Waacca*, 44 Minn. 247; 2 Parsons, Cont. 7th ed. § 503, notes 2 and 3.

Appellant, by deed executed by said Denny and wife, in pursuance of said instrument of

NOTE.—*Map, when controlling in the description of a deed.*

Where a recital of the deed makes special reference to some particular map, plat, or tracing for the monuments, courses and distances of the realty conveyed, such map, plat or tracing becomes a part of the deed of conveyance by which the limits of the property conveyed may be determined. *Thomas v. Patten*, 13 Me. 329; *Kennebec Purchase Proprs. v. Tiffany*, 1 Me. 219; *Shirras v. Caig*, 11 U. S. 7 Cranch, 43, 8 L. ed. 265; *Farnsworth v. Taylor*, 9 Gray, 162; *Davis v. Rainsford*, 17 Mass. 207; *Stetson v. Dow*, 16 Gray, 374; *Fox v. Union Sugar Ref. Co.* 109 Mass. 232; *Chamberlain v. Bradley*, 101 Mass. 191; *Birmingham v. Anderson*, 40 Pa. 503; *McCausland v. Fleming*, 63 Pa. 36; *Spiller v. Scribner*, 36 Vt. 247; *Ferris v. Coover*, 10 Cal. 423.

Where a plan is referred to in a deed, as containing a description of an estate, the courses, distances and other particulars appearing upon the plan are to be as much regarded in ascertaining the true description of the estate, and the intent of the parties in making it, as if they had been expressly recited and enumerated in the deed. *Morgan v. Moore*, 3 Gray, 319; *Lunt v. Holland*, 14 Mass. 149; *Davis v. Rainsford*, *supra*; *Parker v. Bennett*, 11 Allen, 383; *Murdock v. Chapman*, 9 Gray, 156.

Independent of statutory regulation, the law is well settled that "where a deed refers to a map or plan, its lines, courses, etc., are to be regarded as 13 L. R. A.

expressly mentioned in the deed, whether actually annexed or not." 2 Hillard, Real Prop. 366, § 106; *Davis v. Rainsford*, 17 Mass. 211; *Lunt v. Holland*, *supra*; *Doe v. Cullum*, 4 Ala. 576; *Thomas v. Hatch*, 3 Sumn. 180; *Thomas v. Patten*, 13 Me. 329; *Blaney v. Rice*, 30 Pick. 62; *Harris v. Maxwell*, 4 Dev. & B. L. 242; *Llewellyn v. Jersey*, 11 Mees. & W. 133; *Taylor v. Parry*, 1 Man. & G. 604; *Otis v. Moulton*, 30 Me. 205; *Heaton v. Hodges*, 14 Me. 66; *Magoun v. Lapham*, 21 Pick. 135; 1 Greenl. Cruise, Real Prop. 223.

Where lots are conveyed with express reference to a recorded plat, evidence to control, or in any way affect the plat, is inadmissible in ejectment. If there was any error or mistake in this reference by way of description of the premises, the remedy was in chancery, to reform the deed. *Jones v. Johnston*, 59 U. S. 18 How. 150, 15 L. ed. 330.

So long as that remained unreformed, the description of the lot by reference to the plat was conclusive upon the parties. It is not material that the plat recorded did not conform to the requirements of the Statute. The title passed by the deed, whether the plat conformed or not. *Ibid.*

A map made for, and mentioned in, the deeds of the respective parcels from the former owner of the whole premises under which the plaintiff and defendants respectively derive their title, is properly received in evidence, for the purpose of showing the actual location of that line. *Kingsland v. Chittenden*, 6 Lans. 15.

sale, became owner of the legal title to said bank lots and possessed of all the riparian rights which said A. A. Denny, at the time he was owner of said bank lots, had as incident to said bank.

Lake Superior Land Co. v. Emerson, Hanford v. St. Paul & D. R. Co., Lyon v. Fishmonger's Co. and Barlow v. Wingate, supra.

Denny could not sever the riparian rights from the ownership of the bank, and when Denny sold and plaintiff acquired title to the bank, Denny parted with all riparian rights and privileges incident to the bank, and appellant acquired the same.

Lake Superior Land Co. v. Emerson, 38 Minn. 406; Brunswick v. Union Depot St. R. & Transp. Co. 31 Minn. 297; Hanford v. St. Paul & D. R. Co. 7 L. R. A. 722, 43 Minn. 104; Lyon v. Fishmonger's Co. L. R. 1 App. Cas. 662; Barlow v. Wingate, 2d Jud. Dist. Wash. Terr.; Musser v. Hershay, 42 Iowa, 362; Phillips v. Rhodes, 7 Met. 322; Delaplaine v. Chicago & N. W. R. Co. 42 Wis. 226.

Appellant, as owner of bank lots abutting on the navigable waters of Elliott Bay, is now exclusively entitled to the right of erecting and maintaining wharves, piers and other like structures upon his said lots and extending said wharves and piers to the deep waters of Elliott Bay.

Laws of Washington, 1854, p. 357; Wash. Terr. Code, § 3271; Case v. Loftus, 5 L. R. A. 684, 39 Fed. Rep. 784; Lake Superior Land Co. v. Emerson, Brunswick v. Union Depot St. R. & Transp. Co., Hanford v. St. Paul & D. R. Co., Lyon v. Fishmonger's Co. and Barlow v. Wingate, supra.

The title of Denny extended only to high-water mark of the waters of Elliot Bay, and his attempt to plat lots, blocks, streets and alleys below that line was a nullity and no one could acquire any right by such void act.

Lake Superior Land Co. v. Emerson, supra; Pollard v. Hagan, 44 U. S. 8 How. 212, 11 L. ed. 565; Brunswick v. Union Depot St. R. & Transp. Co. and Barlow v. Wingate, supra; Shively v. Parker, 9 Or. 505.

Neither appellant, appellees nor A. A. Denny himself could be bound by said plat except so far as the same was a part of said Denny's donation claim, because no person could be bound by such void and vain act.

Cleveland v. Choate, 77 Cal. 73; Barlow v. Wingate, supra; Jones v. Johnston, 59 U. S. 18 How. 150, 15 L. ed. 320; Gould, Waters, p. 541; Euge v. Appalachicola O. C. & F. Co. 25 Fla. 656; Ricard v. Williams, 20 U. S. 7 Wheat. 109, 5 L. ed. 410; Shively v. Parker, supra.

Appellant is not estopped by said attempted platting of the sea by Denny from claiming as owner of bank lots all the riparian rights incident to such bank lots.

Lake Superior Land Co. v. Emerson, 38 Minn. 406; Hanford v. St. Paul & D. R. Co. 7 L. R. A. 722, 43 Minn. 104; Lyon v. Fishmonger's Co. L. R. 1 App. Cas. 662; Barlow v. Wingate, 2d Jud. Dist. Wash. Terr.; Welles v. Bailey, 4 New Eng. Rep. 841, 55 Conn. 292.

Appellees have not and could not have any title to alleged lots 5 and 8 because they are below the ordinary high-water mark of the waters of Elliott Bay, a navigable arm of the 13 L. R. A.

sea, where there could be no presumption of title.

Pollard v. Hagan, 44 U. S. 8 How. 212, 11 L. ed. 565; Barlow v. Wingate, supra.

The obstructions complained of by appellant are situated in front of appellant's bank lots, below the line of ordinary high tide in the navigable waters of Elliott Bay, between the appellant's bank lots and the deep waters of said bay, and are therefore nuisances causing special and irreparable damage and injury to appellant and his said property.

Case v. Loftus, 5 L. R. A. 684, 39 Fed. Rep. 784; Lake Superior Land Co. v. Emerson, Lyon v. Fishmonger's Co. and Barlow v. Wingate, supra; Shirley v. Bishop, 67 Cal. 543.

Mr. Andrew Woods, with Messrs. Thomas Burke and C. H. Hanford, for appellees:

The right of a shore owner to wharf out and build warehouses and to collect wharfage, etc., is a valuable franchise and may be sold like any other species of property, and is severable from the upland.

Hanford v. St. Paul & D. R. Co. 7 L. R. A. 722, 43 Minn. 104; Miller v. Mendenhall, 8 L. R. A. 89, 43 Minn. 95; Providence Steam Engine Co. v. Providence & S. S. B. Co. 12 R. I. 348; Simons v. French, 25 Conn. 845; State v. Sargent, 45 Conn. 368; New Haven S. B. Co. v. Sargent, 50 Conn. 199; Ladies' Seamen's Friend Soc. v. Halstead, 58 Conn. 144; Parker v. West Coast Packing Co. 5 L. R. A. 61, 17 Or. 510; Norcross v. Griffiths, 65 Wis. 599; Henry v. Newburyport, 5 L. R. A. 179, 149 Mass. 582; Storer v. Freeman, 6 Mass. 485; Porter v. Sullivan, 7 Gray, 441; Mayhew v. Norton, 17 Pick. 357; Barker v. Bates, 13 Pick. 255; Saltonstall v. Proprietors of Long Wharf, 7 Cush. 195; Com. v. Alger, 7 Cush. 53; Valentine v. Piper, 22 Pick. 85; Deering v. Proprietors of Long Wharf, 25 Me. 51; Gould v. Hudson River R. Co. 6 N. Y. 522; Yates v. Milwaukee, 77 U. S. 10 Wall. 497, 19 L. ed. 964; Gould, Waters, § 169; 2 Dane, Abr. 699-701.

The riparian rights of the original owner of the upland can be transferred to any owner of upland, in connection with which the said riparian rights can be used and enjoyed, though the tide land does not directly abut upon the upland of the latter owner.

Lake Superior Land Co. v. Emerson, 38 Minn. 406; Hanford v. St. Paul & D. R. Co. 7 L. R. A. 722, 43 Minn. 104; New Haven S. B. Co. v. Sargent, Barker v. Bates, Miller v. Mendenhall, State v. Sargent, Ladies' Seamen's Friend Soc. v. Halstead, Providence Steam Engine Co. v. Providence & S. S. B. Co. and Henry v. Newburyport, supra.

When such a law as Act of 1854 is acted upon by the riparian owner or his grantee, it invests him with certain rights and with a license to erect and maintain wharves, warehouses, etc., to such an extent as does not interfere with public rights, and this license, when executed, becomes irrevocable.

New Jersey Z. & I. Co. v. Morris Canal & Bkg. Co. 1 L. R. A. 183, 44 N. J. Eq. 398; Miller v. Mendenhall, 8 L. R. A. 89, 43 Minn. 95.

By platting the upland and the shore beyond the line of ordinary high tide, and by selling the same in lots, A. A. Denny showed his in-

tion to reserve his riparian rights, and to sever them from the land adjoining the shore.

Simons v. French, 25 Conn. 346; *Parker v. West Coast Packing Co.* 5 L. R. A. 61, 17 Or. 510; *Peck v. Providence Steam Engine Co.* 8 R. I. 353; *Barker v. Bates*, 13 Pick. 255; *Hall v. Whitehall W. P. Co.* 4 Cent. Rep. 222, 103 N. Y. 129; *New Haven S. B. Co. v. Sargent*, 50 Conn. 199; *Norcross v. Griffiths*, 65 Wis. 599.

The effect of surveying and platting of land by the owner into lots, defining streets, alleys, etc., and the sale of lots under such plat, is equivalent to an immediate and irrevocable dedication to public use of all streets and alleys, binding upon both vendor and vendee.

2 Dillon, Mun. Corp. 2d ed. § 640; *Peck v. Providence Steam Engine Co.* 8 R. I. 351; *People v. Lambert*, 5 Denio, 1.

If the deed to the appellant is valid, it is merely a conveyance of two town lots, according to a plat; without the plat the deed is void and unintelligible, and the plat must be considered as a part of the deed.

8 Washb. Real Prop. 4th ed. pp. 428, 429, §§ 54, 55; Gould, Waters, p. 343; *Peck v. Providence Steam Engine Co. supra*.

When lands are purchased and conveyed in accordance with a plat, the purchaser will be restricted to the boundaries as shown by the plat.

Trustees of Schools v. Schroll, 9 West. Rep. 741, 120 Ill. 509; *McCormick v. Huse*, 78 Ill. 863; *Miller v. Mendenhall*, 8 L. R. A. 89, 43 Minn. 95; *Providence Steam Engine Co. v. Providence & S. S. B. Co.* 12 R. I. 348; *Peck v. Providence Steam Engine Co. supra*; *Hanford v. St. Paul & D. R. Co.* 7 L. R. A. 722, 43 Minn. 104; *Barker v. Bates, supra*; *Clarke v. Providence*, 1 L. R. A. 725, 16 R. I. 337; *Hall v. Whitehall W. P. Co.* 4 Cent. Rep. 222, 103 N. Y. 129; *Simons v. French*, 25 Conn. 346; *Wood v. Comrs. of West Boston & C. Bridges*, 122 Mass. 394.

The alley between lots 6 and 7 and lots 5 and 8, all his interest in which had been dedicated by A. A. Denny to the public, became a public street, and has been for years, and now is, used as such, and the center line of this alley bounds the land and all interest of the appellant to the westward.

Miller v. Mendenhall and Peck v. Providence Steam Engine Co. supra; *Codman v. Winslow*, 10 Mass. 146; *Banks v. Ogden*, 69 U. S. 2 Wall. 57, 17 L. ed. 818; *Parker v. Taylor*, 7 Or. 435; *Burbach v. Schweitzer*, 56 Wis. 386.

Even if the appellant ever had any rights beyond the two lots purchased by him, he must, by his long-continued failure to assert any claim to the tide land to the westward, and by his silence for so long a time, be deemed to have acquiesced in the conveyance to and the possession of said land by the appellees and their grantors; and after many and costly improvements have been put upon said land, with his knowledge, and while he is silent, he is now estopped from setting up any claim in himself to such land, or to any interest therein.

8 Washb. Real Prop. 4th ed. p. 75; Bigelow, Estoppel, pp. 452, 453, 459; Herman, Estoppel, pp. 1082, 1083; *Brewster v. Baker*, 16 Barb. 613; *Carr v. Wallace*, 7 Watts, 394; *Adams v. Rockwell*, 16 Wend. 295; *Henson v. Westcott*, 82 Ill. 224.

13 L. R. A.

Hoyt, J., delivered the opinion of the court:

The discussion in this case has extended over a broad range. Nearly every question connected with the subject of tide or shore lands, and the rights of riparian or littoral proprietors thereto, has been ably briefed and argued by counsel for the respective parties. Also the questions growing out of the making and recording of town plats, and the effect of the same, have been likewise presented. The conclusions to which we have come as to this second matter will make it unnecessary for us to decide the questions presented by the former, and, as they have been lately considered by this court in cases where a decision thereof was necessary, we shall here say nothing in regard thereto.

The facts, so far as they are necessary to the decision of this case, are substantially as follows: Arthur A. Denny made and recorded his plat of an addition to the City of Seattle, upon which certain lots, streets and alleys appeared, and were sufficiently described to show the intention of the maker of the plat in regard thereto. It nowhere appeared upon such plat where the line of ordinary high tide was. On the contrary, so far as could be gathered therefrom, all the territory covered by said plat was upland. As a matter of fact, however, the line of ordinary high tide so crossed said plat that a portion of lots 6 and 7, hereinafter mentioned, were above the line of ordinary high tide, and the remainder of such lots, and all of lots 5 and 8, together with the alley dividing the same, were below such line. After the making and recording of said plat the said Denny sold and conveyed to plaintiff herein lots 6 and 7, in block B, of said plat, after which said Denny sold and conveyed lots 5 and 8, in said block, and said defendants, by mesne conveyances, became possessed of the title thereby conveyed. Under said last-named conveyance from Denny, possession was taken and improvements made on said lots 5 and 8, and the alley dividing those lots from the lots of plaintiff was planked over and used as a street several years before the commencement of this action. Under these circumstances we do not think it lies in the mouth of the plaintiff to object to such improvements as being an infringement upon his rights as a littoral proprietor. The effect of the plat made by Mr. Denny was to separate the tract thereby covered into distinct lots having definite, ascertained boundaries, and into streets and alleys as marked upon said plat, and to vest in the public such streets and alleys for the purposes therein designated. That such would be the effect as to such streets and alleys if the territory covered was upland, and owned by said Denny, is conceded, but it is contended that, as he had no title to the land below the line of ordinary high tide, his plat, so far as it purported to cover such lands, was absolutely void for any and every purpose. With this contention we cannot agree so far as Mr. Denny himself is concerned. It is perhaps true that as to anybody having rights adverse to him such would be the effect, but it does not lie in his mouth

to say that that which he has made of record is a nullity. He is estopped by the making of such plat from alleging its invalidity, and so far as he is concerned would not be heard to complain of the use by the public of the territory covered by streets and alleys, especially after the same had been taken possession of and improvements thereon made. This being the condition of Mr. Denny, and his relation to the title of the lots bounded and described in said plat, we think that one purchasing lots from him, by reference to said plat, could acquire no better title than he had. Of course, if one could acquire title independent of or adverse to that represented by Mr. Denny at the time of the making of the plat this reasoning would not obtain; but such is not the condition of plaintiff. Whatever title he has he obtained from Mr. Denny, and we think it elementary that under the circumstances of this case he could get no better title than that of his grantor. A deed conveying property by reference to a plat, or map thereof, adopts such plat or map as a part of such deed, and one purchasing thereunder becomes bound by the boundaries of the lot purchased as they appear on said plat or map. Applying this rule to the case at bar, it will be seen that the plaintiff herein did not purchase lots bounded by tide-water, but those bounded by a definite and defined line 120 feet from the front of said lots, so that the lots he purchased were bounded and concluded on the one side by Front Street, and on the other side by the alley next westerly thereof, and we think he is estopped by such fact from claiming any rights beyond such boundaries as against the rights of the public in said alley, and of those in possession of the lots beyond such alley. Unaided by such plat, his deed is uncertain and void. Aided by it, it becomes a valid deed, but of a lot with definite boundaries, and he must be bound thereby. It follows that the plaintiff is not entitled to the relief prayed for, and the decision of the lower court in so holding must be affirmed, and it is so ordered.

Dunbar and Scott, JJ., concur.

Anders, Ch. J.: I concur in the result.

Stiles, J., dissenting:

Both parties in this case assumed that the riparian right of wharfage existed when the action was commenced. Substantially their only difference on that subject was that the appellant took the position that such rights were not severable from the ownership of the upland excepting by a conveyance clearly showing that to be the purpose of the grantor. The appellee, on the other hand, claimed that any deed describing upland, or upland and shore land, by metes and bounds, though the high-water mark in either case should be the actual boundary, was sufficient for the severance of the right of wharfage and access to the sea from the upland. From the opinion of the court it does not appear clearly, as the fact was, that the land owned by Denny constituted a mere strip of some forty feet in width between Front Street on the east and the line of mean high water on the west. This strip seems to have been a rem-

nant left after the original plat of lands owned by Denny had been filed, and which he thereafter undertook to subdivide into lots. His plat was in the usual form, and had nothing upon it which indicated that there was any navigable water embraced within its limits. To the westward of the line of high water, and 120 feet from Front Street, he noted on his plat what appeared to be an open strip, but without any designation upon it that it was to be an alley, and to the westward of that other lots were noted, and numbered the same as those which embraced the upland. Kenyon met Denny in Olympia, before the former had ever seen the plat, and spoke to him about the purchase of some of his "water lots." Denny told him he would reserve him two. Afterwards, in pursuance of this conversation, Denny executed to Kenyon a conveyance of lots 6 and 7 in one of these platted blocks. Across these lots, from north to south, the meander line extended. It does not appear whether Kenyon had at any time seen Denny's plat. Kenyon went into possession of the two lots by his tenant, and erected upon the lots, and extending therefrom over the shore some 60 feet, a building on piles, and used the building thus erected to the time of the commencement of this suit. The appellee took from Denny a quitclaim deed of lots 5 and 8 on the same plat, which lots were immediately to the westward and in front of the lots of the appellant. The appellee thereafter (and just when is not discernible) extended southward from other lots, in the same block which he had purchased from Denny in like manner, a wharf over the area of lots 5 and 8. This action was brought to abate what appellant conceived to be both a public and a private nuisance in front of his lots and of his building and premises. I am unable to understand upon what principle, in the light of the decision of this court in the case of *Eisenbach v. Hatfield*, 2 Wash. —, 12 L. R. A. 682, the position is now taken that the appellant's main contention was not a good one. In that case it was decided: *first*, that a riparian owner now has no rights whatever as against the State or its grantee or licensee beyond the boundary of his land; and, *secondly*, that the Act of 1854 was merely a permissive license which is not available unless it had been taken advantage of by the shore owner before the adoption of the Constitution. This ruling denies any claim that Denny might have had that he had any right whatever beyond his shore line, excepting as a licensee, under the Act of 1854. He took no advantage of that license, and had no title, interest or claim whatever in the waters or the soil beneath them beyond the line of his land at the time he filed his plat. His plat, therefore, was utterly void for every purpose as to all that part of it which extended beyond the upland; and now to say that, notwithstanding he was not the owner of any land beyond the water line, nevertheless he could, by the mere filing of a plat, exercise an authority which would not only dedicate a street or alley out in the water, but also reserve to himself a title or a right still fur-

ther in the water, which he could convey to a grantee by a quitclaim deed, is incomprehensible to me. It was not decided, nor do I think it was intended to be intimidated, in the case of *Eisenbuch v. Hatfield*, that the owner of upland, who had availed himself of the Act of 1854 by erecting a structure in the nature of a wharf from his land into the water, could not prevent a mere stranger, such as was the appellee, who confessedly acquired no title whatever from Denny, from creating a nuisance in front of him towards the deep water. The effect of this decision is to say that Denny, by his mere plat, could set aside the Act of 1854, and, while giving to Kenyon more than the Act of 1854 contemplated up to the west line of his lots, could absolutely deprive him from going therefrom to the deep water. In a word, this court, having rejected all forms of riparian rights, now concedes to a shore owner prior to the Constitution rights which have never been conceded to him outside of Rhode Island and Minnesota, where he is said to have substantially the whole title to deep water.

I think the court is entirely mistaken as to the effect of such a plat. Section 2328 and following sections of the Code do not say who may make or file a plat of a town, but simply provide that whoever shall thereafter lay off any town shall, previous to the sale of any lots, record a plat, and that the effect of such a plat shall be to all intents and purposes the same as a quitclaim deed. Now, it is the first principle of platting, that the one who plats must be the owner in fee of the land platted. Says Angell on Highways (§ 132): "Dedication is an appropriation of land to some public use, made by the owner of the fee," and in section 134: "A primary condition of every valid dedication is that it shall be made by the owner of the fee." Herman on Estoppel (§ 1143), says: "A primary condition of every valid dedication is that it shall be made by the owner of the fee, or of an estate therein." In *Lee v. Lake*, 14 Mich. 12, Judge Cooley said: "The plat put in evidence was made by Brooks and Crane at a time when they do not appear to have had any interest in the land, and if the execution [of the plat] had been in all respects in due form it could not have had the effect which the Statute gives to plats executed and acknowledged under its provisions. The Statute then in force provided for the making, acknowledging and recording of town plats by the proprietors, and it is impossible to give the peculiar statutory effect of a present conveyance to a plat made by persons who at the time had no title to convey, even though they may have afterwards become the owners. And as the Healing Act of 1850 was confined in its scope to imperfect acknowledgments, it could not give effect to a plat which no acknowledgment could have made effectual at the time it was made." This decision was concurred in by Judges Christiancy and Campbell.

The case of *Hoole v. Atty-Gen.*, 22 Ala. 190, is considered a leading case upon this subject, and therein the court held not only that it must be the owner of the fee who could

make a lawful dedication which the State even could take advantage of, but that if the land, at the time of the attempted dedication, was covered by a mortgage, the mortgagor could not dedicate without the acquiescence of the mortgagee.

In *Baugan v. Mann*, 59 Ill. 492, which was an injunction to prevent one who held title under Sprague, who, it was alleged, had dedicated an alley in the rear of appellee's premises, it was said: "The evidence fails to show title in Sprague. Unless he owned the fee he could make no dedication to public use. A primary condition of every valid dedication is that it must be made by the owner of the fee." In *Porter v. Stone*, 51 Iowa, 373, the court said: "The party who lays out a town-site, the effect of which is to donate to the public streets, alleys and public grounds, must of necessity have some title to the property to be affected by his act. A grant to the public is not established by simply showing that a town-site has been laid out. The party claiming benefits of a grant must go further, and show the title of the party laying out the town, and thus undertaking to make the grant." In *Leland v. Portland*, 2 Or. 47, where the question was whether a dedication of land in front of the City of Portland, between the Willamette River and the westerly side of the street, which was made before September 27, 1850, was of any validity, the court said: "The next question presented is, Did the court below err in refusing to instruct the jury that a dedication of the property in question, to be binding, and to divert the title from the donor to the public, must have been since the 27th day of September, 1850? I regard this question as settled by the case of *Loomis v. Parrish*, 62 U. S. 21 How. 290, 15 L. ed. 80, which case arose on the question of the dedication of the levee in the same City of Portland, and by these same proprietors of a town-site, and was governed by the same considerations in this respect as govern this case, where it was held that a dedication made prior to Act of September 27, 1850, was void for want of any title in the donors at the time of dedication, the title then being in the United States." In England the rule has been the same, the leading case being *Wood v. Veal*, 5 Barn. & Ald. 454, where it was held that a tenant for ninety-nine years could make no dedication to the public, nor could anyone else excepting the owner in fee.

The latest case upon this subject, and one which is almost exactly the same as the case at bar, is that of *Ruge v. Apalachicola Oyster C. & F. Co.*, 25 Fla. 656. It seems that the original plat of the City of Apalachicola, located on the bay of that name, showed an open space, which was denominated on the plat "Florida Promenade," and it was contended by the owner of land in the neighborhood that the dedication of the promenade carried with it the right to the public to have the waters of the bay in front kept clear of all obstructions. The court said: "The dedication of the promenade by the Apalachicola Land Company was more than fifty years ago. What right had the company to make a ded-

ication extending into the bay? Even if the promenade reached the bay, the company had no right in the submerged lands thereof, and could not dedicate these. Admitting that accretions to the soil of the promenade had become a part of it, that was a contingency which did not authorize the dedication of lands under the water in front of the promenade."

Denny's plat was good to the water's edge. Beyond that it was void. Even Denny himself was not estopped to say as much. In such cases there is no question of estoppel. The real question is, Do the facts show a dedication either statutory or common law?

Hayes v. Livingston, 34 Mich. 394. Having had absolutely no title, or shadow, or claim of title, the maker of the plat was free to deny it at any time, and so could any of his grantees of the upland, although their deeds purported to convey something which had an existence. Perhaps, on the whole case, the judgment of the court is right, however, as there was evidence tending to show laches on the part of Kenyon in prosecuting his suit for injunction until the structures he complained of had been erected and used for a considerable period, and on this ground I can concur.

INDIANA SUPREME COURT,

Board of SCHOOL COMMISSIONERS of the City OF INDIANAPOLIS *et al.*, *Appts.*,
v.

STATE of Indiana, *ex rel.* Theodore SANDER.

(...Ind....)

The teaching of the German language in "any school of a township, town, or city," which is required by Rev. Stat. 1881, § 4497, on demand of the parents or guardians of twenty-five or more children, cannot be restricted by the board of school commissioners of a city to schools of certain grades, but may be compelled in any place in the city where a public school is taught with its complement of teachers and scholars.

(*McBride and Olds, JJ., dissent.*)

(June 23, 1891.)

A PPEAL by defendant from a judgment of the Circuit Court for Marion County in favor of relator in a proceeding instituted to compel the making of provision for the teaching of the German language in School No. 22, in the City of Indianapolis. *Affirmed.*

The facts are stated in the opinion.

Messrs. Duncan & Smith for appellants.

Messrs. L. B. Swift and W. P. Fishback for appellee.

Miller, J., delivered the opinion of the court:

This was a proceeding by mandate to compel the Board of School Commissioners of the City of Indianapolis to introduce the German language as a branch of study into School No. 22, upon the demand of parents and guardians of children in attendance upon that school.

The action was predicated upon § 4497, Rev. Stat. 1881 (Acts 1869, p. 40), which reads as follows: "The common schools of the State shall be taught in the English language; and the trustee shall provide to have taught in them orthography, reading, writing, arithmetic, geography, English grammar, physiology, history of the United States, and good behavior, and such other branches of learning and other languages as the advancement of pupils may require and 13 L. R. A.

the trustees from time to time direct. And whenever the parents or guardians of twenty-five or more children in attendance at any school of a township, town or city shall so demand, it shall be the duty of the school trustee or trustees of said township, town or city to procure efficient teachers and introduce the German language as a branch of study into such schools; and the tuition in said schools shall be without charge: provided, such demand is made before the teacher for said district is employed."

The verified petition for the alternative writ alleges, in substance, the following facts: That one of the schools of the City, under the management of said Board of School Commissioners, is a school known as Public School No. 22. That the school year of the City extends from September in each year to June of the following year. That before any teachers for said school were procured or employed for the coming year, the parents and guardians of one hundred and twelve children in attendance at said school petitioned and demanded of the appellant Board that it procure and employ efficient teachers and introduce the German language, as a branch of study, into said school for the coming school year. That said Board refused to grant said demand, but went on and employed teachers to teach all the other branches required by law in said school, and still other branches not required by law; but all the time refused to provide for teaching the German language in said school. The petition to the Board was set out in full with the names of the children and wards. This suit was begun June 21, 1890.

To this the appellants answered, that, prior to the filing of the demand for the teaching of German, said Board, having considered the grading of the Indianapolis schools and the course of instruction therein, and the teaching of German therein, and the employment of teachers therefor, and what branches required by the advancement of pupils should be taught in addition to the statutory branches, all, in connection with the revenues, had determined that German should be taught, and could be efficiently taught for the last seven years of the twelve years' course of said Indianapolis schools;

that the revenues of the Board would not permit the teaching of German to a greater extent, and the Board had determined to employ teachers for the last seven years of the course; that the Board had graded the schools; that it had erected buildings in various parts of the City convenient of access to pupils, and had so arranged that pupils in lower grades could attend school nearer home, while those in higher grades, being older and fewer in number, attended at buildings more remotely located; that the number of pupils attending in the last seven years of the course was 5,346, and would be greater the coming year; that the estimated revenue for the coming year would be \$252,973, of which amount \$210,000 would be required for tuition under the present plan of the Board; that Public School No. 22 had been erected upon these principles, and that for many years no pupils advanced beyond the fifth year of the school course have attended or been taught in said school building; that none of the pupils mentioned in the petition for teaching German in said school No. 22 have advanced to the sixth grade, and therefore they are not entitled to enter classes where German is taught; that as soon as said pupils reach the sixth year they will go to buildings where German is taught, and may there study it; that with the revenue at command there is no other feasible method of grading the schools of Indianapolis.

To this answer the appellee replied, that for many years the City has been subdivided for general school purposes by the Board by erecting school buildings throughout the City to which children living near have been assigned for attendance according to the grades taught; that whatever have been the grades taught it has been the custom of parents and guardians to file petitions for the teaching of German like the petition filed with the complaint for the teaching of German in public school No. 22; that the Board has complied with said petitions and has introduced the German language accordingly; that until the recent refusal of the Board, it was supposed by the community that it would continue such compliance; that at a meeting of the Board in June, 1890, it had, on motion, refused to provide for any teaching of the German language in any of the schools of said City during the coming school year; that 2,000 children desired to study the German language, but under the plan of the Board, as described in the answer, only 300 of these could do so; that the Board, while refusing to provide for teaching the German language, proposed to provide for teaching the following branches not required by law, at an expense out of the school revenues, as follows:

Music, \$13,000; drawing, \$16,000; manual training, \$1,300; physical training, \$3,000; chemistry, \$1,000; physics, \$2,000; Greek, ; book-keeping, \$500; geometry, \$1,000; English literature, \$2,000; general history, \$500; algebra, \$3,000; Latin, \$1,000; training school for teachers, \$1,500; civil government, \$800; rhetoric, \$2,000; botany, \$500.

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That physical training is a new branch of study which the Board intends to introduce for the coming school year; that if the teaching of German were provided for by the Board wherever demands like the one in the complaint have been made, the same would cost not to exceed \$10,000 for the coming school year; that the number of pupils in the grades comprising the first five years of the schools during the past year was 11,941, and will be greater during the coming year.

To this reply the appellants demurred for want of facts; the demurrer was overruled and exception taken. After trial a judgment was entered directing the mandamus to issue. The appellants appealed, and the only error assigned is that the court erred in overruling the demurrer to the reply.

The claim is made by the appellee that the only question presented by the record is as to the power of the appellants, in their discretion, to refuse to introduce the study of the German language into any of the public schools of the City, notwithstanding the filing of a proper petition therefor by the requisite number of parents and guardians. This claim is founded upon the allegation in the reply, that at the meeting of the Board held in June, 1890, a motion, providing for the teaching of German in all the schools of the City in which proper petitions were filed for the same, was voted down, and a motion made to provide for the teaching of the language, as set forth in the defendant's answer, was not finally acted upon; followed by the averments that "said defendants have refused to provide for any teaching of the German language in any of the schools of said City during the coming school year."

The appellee insists that the reply shows that the appellant refused to comply in any manner with the mandate of the Statute to introduce the language as a study into the public schools; and that therefore the court did not err in overruling the demurrer to the same.

To give the language quoted the force and effect claimed for it by the appellee would be to eliminate from the case the only question about which the parties litigant disagree; for the appellants admit that, upon the filing of a petition by the parents and guardians of the requisite number of children, the Statute imperatively requires the language to be taught in the schools.

The answer to which this reply was filed alleges that, in May, 1890, the Board determined to provide for the teaching of German in some of the grades and schools in the City; and that they would do so without any order of the court. The meeting of the Board, at which the motion was made to employ teachers and provide for the introduction of the language into the public schools, was held in June. This action was commenced in the same month and the reply filed on the 11th of July; the schools were not to begin until September following. There is no express negation of the facts alleged in the answer, that the Board intended to make provision for German in the schools before the opening of the school year.

We understand the allegations of the reply referred to, when read in connection with the answer, to mean that the Board had at that meeting refused to provide for its introduction; and not that they would not do so prior to the opening of the schools in September, in the manner determined upon at their May meeting. The purpose of the action was to compel the defendants to introduce the study in a particular school; all the allegations of the petition for a mandate referred to that school; the theory of the relator confined him to that position. The judgment of the court was in accordance with that theory, and by it the defendants were commanded to employ efficient teachers and introduce the language as a branch of study into that particular school, no order being made with reference to the other schools of the City.

This case is to be determined by the answer to the question: What did the General Assembly mean by the use of the words "any school" when it said, in the Act approved May 5, 1869: "And whenever the parents or guardians of twenty-five or more children in attendance at any school of a township, town or city shall so demand, it shall be the duty of the school trustee or trustees of said township, town or city to procure efficient teachers and introduce the German language as a branch of study into such schools."

The position of the appellee is, that the parents and guardians of more than twenty-five pupils in attendance upon public school No. 22, having at the proper time filed the requisite petition, it became the duty of the Board of School Commissioners to provide for its teaching in that particular school, no matter what arrangements may have been made to have it taught in other schools and to other scholars.

The position of the appellant is, that while the filing of the petition makes it incumbent upon the Board to have the language taught in the schools of the City, they may, in their discretion, determine in what schools, to what grades of pupils, and for what length of time it shall be taught; and that when they have provided for its teaching in some of the schools of the City, convenient of access to the grades in which the language is assigned, they have fully complied with the law, and cannot be compelled to have it taught in public school No. 22.

In arriving at a correct solution of the question involved, it is instructive to note, in a general way, the origin and growth of the legislation upon the subject under consideration. For many years prior and subsequent to the adoption of our present Constitution, the selection of teachers and designation of the studies to be taught in the public schools were under the exclusive control of school meetings, composed of the patrons of each school. The first legislative recognition of specific studies was in the Act of March 4, 1853, which provided that no person should be licensed to teach in the public schools unless they possessed "a knowledge of orthography, reading, writing, geography and English grammar."

In section 150 of the Act of 1853, which 13 L. R. A.

is the rudiment of the section under which this action was brought, it was enacted that "the common schools shall be taught in the English language: provided, however, that schools may teach other languages in addition to the English as a branch of education."

In the Act of March 6, 1865, it was provided that "the common schools of the State shall be taught in the English language; and the trustee shall provide to have taught in them orthography, reading, writing, arithmetic, geography, English grammar and good behavior; and such other branches of learning and other languages as the advancement of the pupils may require and the trustee from time to time direct. And the tuition in said school shall be without charge."

This remained the law until the Act of May 5, 1869, *supra*, was enacted.

The first question is, omitting for the present all consideration of the effect of subsequent legislation, to determine if possible the legislative intent in the enactment of this Amendment of May 5, 1869, in which, after adding physiology and history of the United States to the required studies, the conditional provision was made for the teaching of the German language.

The Act of 1865, which was amended, required seven named branches of learning to be taught, and other studies and languages, at the option of the school trustees. It was, under that Act, within the power of the school trustees, if they so desired, to have physiology, history of the United States and the German language taught in the public schools. The object of the Amendment was to compel the teaching of physiology and history of the United States, and to withdraw the German language from the list of purely optional languages that might be taught at the discretion of the trustees, and place it conditionally in the list of required studies. By this legislation, the law-making power discriminated in an emphatic manner in favor of the teaching of the German over that of any other language. This Amendment was doubtless brought about by the fact that we had then, as now, a large population speaking the German language, who desired that their children should receive instruction in that language. Taking into consideration the course of legislation and the circumstances under which it was enacted, we are, if possible, to determine from the reading of the Act in what schools the Legislature intended the language should be taught.

The rule of construction to be adopted is provided by Statute, and is as follows:

Rev. Stat. 1881, § 240: "The construction of all statutes of this State shall be by the following rules, unless such construction be plainly repugnant to the intent of the Legislature or of the context of the same statute."

"First. Words and phrases shall be taken in their plain or ordinary and usual sense. But technical words and phrases, having a peculiar and appropriate meaning in law, shall be understood according to their technical import."

As the Act under consideration does not contain technical words or phrases, relating

to the disputed question, having a peculiar meaning in law, we must take the words used in their "plain, ordinary and usual sense." In townships, towns and cities in which but a single school is taught, the solution of the question is easy; the trouble arises in towns and cities in which the schools are taught in many schoolhouses placed in different localities, the whole being under one management and control.

While the question may not be entirely free from doubt, we have arrived at the conclusion that the words "any school," as used in this Statute, mean and designate any place where a public school is taught, with its complement of teachers and scholars. Such we believe to be the ordinary and usual meaning of the word "school;" and that this construction is necessary to give effect to the object intended in its enactment. Such, indeed, seems from the reply to have been the construction placed upon the Act by the appellants and their predecessors in control of the city schools for many years prior to the year 1890. By the terms of this Act, the introduction of no other study into the public schools is made to depend upon the demand or request of the patrons of the school; but on the contrary, it has been the evident design of the Legislature to establish, as far as possible, a uniform course of study throughout the whole State.

We take it that the exception to the course of legislation was, primarily, for the benefit of parents and guardians who desired their children and wards to receive instruction in this language; and that a construction that would defeat this purpose ought not to be entertained if it can be avoided. We are of the opinion that the Legislature contemplated that the parents and guardians of the children in attendance upon a school who would demand the introduction of the German language would do so for the purpose of enabling their children and wards to engage in its study, and not for the purpose of enabling some other children and other wards of another grade and in attendance upon a school taught in some other schoolhouse to receive such instruction. In this case, the parents and guardians of 112 pupils in attendance upon public school No. 22 asked to have the German language taught in that school, with the undoubted motive of having their children and wards engage in its study. In answer to this request the appellants say, in effect: "We will not have this language taught in this school and to your children and wards attending it, but will introduce the study in some other school in some other part of the City, and to some other pupils." We regard this as a strained and unnatural construction of the words of the Act, utterly subversive of the purpose of its enactment. If the position of the appellants is the correct one, a petition by the parents and guardians of twenty-five pupils in attendance upon any one of the many public schools in the City of Indianapolis will cause the introduction of the German language into the schools of the City, as effectually and fully as if it had been petitioned for in each school by the requisite number of parents and guardians. We need

not characterize a construction that leads to such a result.

Four years after the passage of this Act providing for the introduction of German into the public schools, when petitioned for, the Legislature passed the Act of March 3, 1871, which is in force only in the City of Indianapolis. By this Act, the control of the public schools, which prior to that time had devolved upon the school trustees, was transferred to the Board of School Commissioners. Among the other duties of their office, they were authorized: "First. To district the City for the purpose of electing school commissioners therein; and also to subdivide the City for general school purposes. Seventh. To establish and enforce regulations for the grading of, and course of instruction in the schools of the City, and for the government and discipline of such schools." Rev. Stat. 1881, § 4460.

Section 8 of this Act (Rev. Stat. 1881, § 4463) continues in force within the City all of the general school laws of the State which are not inconsistent with the provisions of this Act. Among the general provisions of the school laws thus continued in force is the following: "The persons listed in each of such towns and cities shall be considered as forming but single school districts therein, distinct from the townships in which they are situated."

It is earnestly contended by the appellants that, inasmuch as all the schools of a town or city form but a single school district, in which the school commissioners may assign the pupils to such school as they choose; and as they are given authority, in their discretion, to "establish and enforce regulations for the grading of and course of instruction in the schools of the City," they may determine in what schools and to what grades of the pupils the German language may be taught. We do not think that the Act of 1871 either repeals or modifies the sections of the Act of 1869 under consideration. In fact, we do not regard the provision authorizing the grading of the pupils as greatly enlarging the authority of the school officers in that respect. The power of the School Commissioners to establish and enforce regulations for grading the schools and regulating the course of study must be exercised subject to the dominant law of the State. The grant of a power which is a mere permission, not a command, to grade the schools or establish a course of study cannot be held to authorize the school commissioner to disregard a positive and specific law of the State.

While the City of Indianapolis does, for the purpose of the enumeration and listing of school children, and for many other purposes, constitute a single school district, it can hardly be said to have but one school. The mere statement of the proposition would seem to be sufficient. The Act of 1871 authorizes the School Commissioners to subdivide the City for general school purposes. The pleadings show that they have subdivided the City for school purposes and erected school buildings in different parts of the City, and assigned pupils to, and numbered them as, different schools. This makes

them as effectually and distinctly different schools as those in a country township.

The appellants say in their answer that they have considered the subject of the study of German in connection with their resources; and that with their available resources they cannot provide for the teaching of German for any greater length of time than seven years out of the twelve-year course.

We are of the opinion that the allegations contained in the answer showing want of funds are fully met by the reply. The answer shows that the appellants had on hand, unappropriated, over \$40,000 more than would be required for tuition upon the system of grading and plan of employment of teachers as adopted by the Board. The reply says that it will cost only \$10,000 to provide for instruction in the German language wherever demanded. This is a complete reply to this portion of the answer. But the reply goes further and shows that in the estimated expense of running the schools, as set forth in the answer, there is included a sum in excess of \$60,000 for teaching music, drawing, manual training, physical training, chemistry, physics, Greek, book-keeping, geometry, English literature, general history, algebra, Latin, training school for teachers, civil government, rhetoric and botany. None of these studies are named in the Statute as required studies; but their teaching is provided for under the general direction for the teaching of "such other branches of learning and other languages as the advancement of pupils may require and the trustee from time to time direct." Under this Statute, we hold that it is incumbent upon the school authorities to provide for the teaching of those studies that are expressly named and provided for, and that they cannot appropriate the school funds for the teaching of optional studies, and then say that they cannot comply with the requirements of the Statute for want of funds.

We do not desire that this construction of this section of the Statute shall be understood as a curtailment of the enlarged discretion given the Board of School Commissioners in the control, grading and management of the public schools, except in so far as it may be necessary to give full force and effect to the legislative enactment.

The Board of School Commissioners is a quasi corporation possessing by necessary implication such powers as are, or may be, necessary to carry out the purpose for which it was created; but these powers must be exercised subject to the paramount laws of the State. With reference to the Act under consideration, we are of the opinion that when the requisite demand is made, it becomes the duty of the Board of School Commissioners to introduce the German language, as a study, into the particular school where it is demanded, and that, upon their refusal, they may be compelled by mandate to act in the matter; that they have no discretion to refuse, but must act. When they have introduced the study, they are, while acting in good faith and in the reasonable discharge of their official duties, the exclusive judges of the manner in which it is taught, and the extent

to which it shall be studied; whether, for instance, by the teachers in charge of the school, or by some other efficient teacher who gives instruction in a number of schools. They are the judges who are to decide how much or how little instruction is given, provided it be taught simply as a branch of study. The Statute says, in a manner so positive and emphatic that it cannot be misunderstood, that the common schools of the State shall be taught in the English language, and any board of trustees or school commissioners or other school officers who, under guise of the provisions of this Act, should have a school taught in the German language would be guilty of misappropriating the school funds, and become liable therefor on his official bond.

We are met with the argument that by this construction, the German language, as a study, has an advantage over every other study, and that to do so is inexpedient and unjust. We did not enact this Statute, and it is no part of our duty to pass upon its expediency. That was for the Legislature. Our duty is to construe, not to criticize. We are not, however, apprehensive that the fears expressed in argument will be realized. We have no doubt but that the Board of School Commissioners, in its wisdom, will be able to devise means by which the law will be carried out in good faith, without serious interference with the grading of the schools.

We are, in this case, not called upon to decide, and do not decide, that the language shall be taught in each school-room, and it would be improper to express an opinion upon that subject. Neither can we judicially take notice that the German language may not, like good behavior, which is one of the required studies, or like music or physical training, which are optional ones, be taught in any grade without interference with other studies.

In our opinion, the court did not err in overruling the demurrer to the reply.

Judgment affirmed.

McBride, J., dissenting:

In my opinion, a fair statement of the precise question involved and decided in this case is as follows:

The necessary preliminary steps having been taken, the German language was introduced as a branch of study into the schools of the City of Indianapolis. The Board of School Commissioners of the City (corresponding to the boards of school trustees of other cities and towns in the State) assuming that this branch of study was thereafter to be dealt with precisely as any one of the other nine required branches, graded the schools accordingly, and assigned it its place in the course of study, as they assigned a place to English grammar, to arithmetic and to other branches. By the course of study thus fixed, the study of the German language commenced with the beginning of the sixth year, and continued thereafter during the remaining seven years of the course.

None of the pupils in School No. 22 were advanced beyond the fifth year; and were con-

sequently not sufficiently advanced to be assigned to the grades in which German was taught.

The answer, or return to the alternative writ of mandate, avers that the Board had taken under consideration the subject of teaching the German language, and had decided that "the last seven years of the course of instruction was the period in which the German language, as a branch of study, could be most efficiently taught, with the means under the control of said Board of School Commissioners; . . . that it is the intention, and has at all times been the intention of said Board of School Commissioners, to provide for the efficient teaching of the German language as a branch of study for all pupils attending the schools of said City, who have advanced in their studies to the beginning of the sixth year of the course of instruction, and to provide efficient teachers to that end; . . . that as soon as said pupils" (in school No. 22) "have advanced to the beginning of the sixth year in the course of instruction, as prescribed by the Board of School Commissioners, and thus entitled to be admitted to classes or grades wherein the German language is taught, they will be admitted into such grades in other buildings in which such grades and the German language are taught; which buildings have been provided convenient of access to such pupils."

These facts do not seem to be controverted. The appellee in this case, assuming that the Board had no discretion in the matter, as to that study, at least, but must provide for teaching it in that particular school, and to that particular grade regardless of the system of grading and course of study, and regardless of the age and acquirements of the pupils attending there, brought this suit to compel them to break up their system of grading and teach the German language to the particular pupils who were instructed in School No. 22. The contention of the appellee cannot be sustained without adjudging that, while the Legislature has assumed to intrust the management of the schools of the City to certain officers, elected by the people because of their assumed fitness, and acting under the sanction of an official oath, and has said in express terms that they are authorized "to establish and enforce regulations for the grading of, and course of instruction in the City," as to at least one study they have given to those officers no independent authority whatever; and although their deliberate judgment may be, that the best interests of the schools require the teaching of that study only to certain grades, and to pupils who have reached a certain degree of proficiency, they may be compelled by the strong arm of the courts to change the course of study at the demand of persons who are charged with no duty or responsibility; and who, while they may be as well or better informed and qualified to pass on such questions as the members of the Board, may, on the other hand, know as little of the management of schools as a babe does of logarithms.

With all due respect to my associates, this is a fair statement of the interpretation

given to the law by the majority opinion herein, after giving due weight to every attempted limitation. Indeed, by every rule of logic, notwithstanding the attempt to limit the question decided, it goes much further; and, as I will hereafter show, undermines every vestige of authority to grade and to establish and maintain any systematic course of instruction in graded schools.

Counsel for appellee, in their brief, denounce the power which the Legislature has intrusted to school officers, to grade schools and regulate their course of study as: "the pretended bulwark behind which the pedagogic martinet exercises his petty tyranny, and school boards here and there carry a high and unlawful hand."

The decision of this case leaves but little if anything remaining of that "bulwark," although, under its shelter, the public schools of Indiana have reached a degree of efficiency second to the schools of no other State, and of which the people of the State are justly proud. It involves the determination of questions of the highest importance to the people of the State, not because it is of special importance to the people generally what is done in school No. 22, in the City of Indianapolis, but because its decision involves the determination of principles which cannot be confined in their application to school No. 22, nor alone to the schools of that City, but reach and affect every graded school in the State. If the effect of the opinion of the majority of the court could be limited to that particular school, or even to that City, I would hardly feel justified in dissenting. But in this country few questions concern more nearly the common interests of all the people than those affecting our common-school system, and anything, the tendency of which is to impair its efficiency or seriously imperil any of its essential features, demands earnest protest and opposition from all who are placed where they may be held responsible therefor.

The law gives to the school officers of every school corporation in the State authority to establish and maintain graded schools. The powers thus conferred upon school corporations outside of the City of Indianapolis do not differ in any material particular from those possessed by the school corporations of that City. At all events, it will not be claimed that less extensive powers are conferred upon that City than upon other cities and towns in the State.

The statute prescribing the studies which shall be taught is precisely the same as applied to all the public schools of the State. That which the Board of School Commissioners of Indianapolis may be compelled to do by mandate, by way of changing its course of study and system of grading, the board of school trustees of every city and town in the State may be compelled to do.

It may be well to consider, first, the nature of the power conferred upon school officers where they are authorized to establish and maintain graded schools.

What is a graded school? The Century Dictionary defines it: "A school divided into different departments, taught by differ-

ent teachers, in which the children pass from the lower departments to the higher as they advance in education."

At page 235 of the Annual Report for 1877 of the United States Commissioner of Education, such a school is defined as "an arrangement of pupils according to their age and capacity to study certain things."

The establishment and maintenance of a graded school, therefore, involves not only the grading of the pupils according to age, capacity or acquirement, but the adoption of a course of study and of rules for the advancement of pupils from grade to grade as they advance in acquirement. The nature and extent of the power possessed by school officers to direct and control the course of study in the schools in their charge has been many times considered by this court and the courts of other States.

The case of *State v. Webber*, 108 Ind. 81, 6 West. Rep. 249, was a case involving the power of the school board to add music to the list of prescribed studies, and to suspend from the school those who refused to pursue that study. The court held that the making of a rule of that character was an exercise of the discretionary power possessed by the board, and denied mandamus to compel the re-admission of a pupil suspended for refusal to comply with it. In the course of the opinion, the court said: "It was competent, we think, for the trustees of the school City of Laporte to enact necessary and reasonable rules for the government of the pupils of its high school, directing what branches of learning such pupils should pursue, and regulating the time to be given to any particular study, and prescribing what book or books should be used therein. . . . The power to establish graded schools carries with it, of course, the power to establish and enforce such reasonable rules as may seem necessary to the trustees in their discretion, for the government and discipline of such schools, and prescribing the course of instruction therein. Where such trustees may have established a system of graded schools, or such modification of them as may be practicable within their respective corporations, they are clothed by law with the discretionary power to prescribe the course of instruction in the different grades of their public schools. The important question arises, Which should govern the public high school of the City of Laporte as to the branches of learning to be taught and the course of instruction therein, the school trustees of such city, to whom the law has confided the direction of these matters, or the mere arbitrary will of the relator without cause or reason in its support? We are of opinion that only one answer can or ought to be given to this question. The arbitrary wishes of the relator in the premises must yield, and be subordinated to the governing authorities of the school City of Laporte, and their reasonable rules and regulations for the government of the pupils of its high school."

Upon the question of the discretionary power possessed by the school officers in the management of the schools placed in their

charge, the authorities overwhelmingly support the doctrine above laid down.

In *Guernsey v. Pitkin*, 82 Vt. 224, the following language is used by Redfield, Ch. J.: "But in regard to these branches which are required to be taught in the public schools, the prudential committee and the teachers must of necessity have some discretion as to the order of teaching them, the pupils who shall be allowed to pursue them, and the mode in which they shall be taught. If this were not so, it would be impossible to classify the pupils."

In *Ferriter v. Tyler*, 48 Vt. 444, the court says: "It stands out so plain as not to be matter for debate, even if it be not expressly conceded, that schools, in order to realize the intent of the Constitution in their behalf, must be subjected to system and order under established rules."

In *Donahoe v. Richards*, 38 Me. 879, it is said: "If the right to direct the course of instruction and the books to be used is given, the right to enforce obedience to the determining power must manifestly exist, or the determination will be ineffectual. It would be more than idle to grant this power to direct if anyone can set at naught the action of the committee."

In *Roberts v. Boston*, 5 Cush. 198, it is said: "The power of general superintendence vests a plenary authority in the committee to arrange, classify and distribute pupils, in such a manner as they think best adapted to their general proficiency and welfare."

In *Houghkins v. Rockport*, 105 Mass. 475, the Supreme Judicial Court of Massachusetts says of a statute which says that school officers "shall have the general charge and superintendence of all the public schools in town," that "this general power by necessary implication includes the power to make all reasonable rules and regulations for the discipline, government and management of the schools."

To the same effect are the cases of *Sewell v. Board of Education*, 29 Ohio St. 89; *Fertich v. Michener*, 111 Ind. 472, 9 West. Rep. 394; *King v. Jefferson City School Board*, 71 Mo. 628, 36 Am. Rep. 499, and many other cases that might be cited.

The case of *Trustees of Schools v. People*, 87 Ill. 308, 29 Am. Rep. 55, is one of a line of cases opposing the principle laid down in *State v. Webber*, *supra*, in so far as affects the right of the parent to elect what studies in the prescribed course may, and what may not, be pursued by his child, it being there held that the parent may thus elect. To the same effect are *Morrow v. Wood*, 35 Wis. 59 (which is probably the leading case taking that view); *Rulison v. Post*, 79 Ill. 567, and some other cases. These cases, however, while holding that a pupil cannot be compelled to pursue a certain study against the will of the parent, expressly recognize and declare the right to classify and grade, and that there can be no interference by the parent with that right. While the parent may say that his child shall not be required to pursue certain studies, as to such studies as the child does pursue, he must conform to the established rules, and must take them in

the order, in the classes and in the manner prescribed by the school officers.

In *Trustees of Schools v. People, supra*, it is said: "Under the power to prescribe necessary rules and regulations for the management and government of the schools, they may, undoubtedly, require classification of the pupils with respect to the branches of study they are respectively pursuing, and with respect to proficiency and degree of advancement in the same branches. . . . All regulations or rules to these ends are for the benefit of all, and presumptively promotive of the interests of all. No parent has the right to demand that the interests of the children of others shall be sacrificed for the interests of his child, and he cannot, consequently, insist that his child shall be placed or kept in particular classes, when by so doing others will be retarded in the advancement they would otherwise make; or that his child shall be taught studies not in the prescribed course of the school. . . . The rights of each are to be enjoyed and exercised only with reference to the equal rights of all others."

And in *Morrow v. Wood, supra*, it is expressly stated that "the parent did not propose to interfere with the gradation or classification of the school, or with any of its rules and regulations, further than to assert his right to direct what studies his boy should pursue that winter;" that is, that he should be allowed to omit a certain study and thus stay out of certain of the established classes. If the opinion of the majority of the court in this case should stand as declaratory of the law, it will be unique, as being the first and only case under a statute which confers on school officers general power over and control of the public schools to declare the right of the parent instead of the school officer to control the gradation and classification of the pupils. It is against all the authorities, and, in principle expressly overrules *State v. Weber, supra*.

Power to establish and maintain graded schools has been possessed by the school officers of this State for more than thirty-five years; the Act of March 5, 1855 (1 Gav. & H. Stat. 542), containing this provision: Sec. 8. . . . They may also establish graded schools, or such modification of them as may be practicable."

The Act of March 6, 1865 (1 Davis, Stat. 778), contains the following: "Section 14: The trustees shall take charge of the educational affairs of their respective townships, towns and cities. . . . They may also establish graded schools, or such modification of them as may be practicable; and provide for admission into the higher departments of the graded school from the primary schools of their township such pupils as are sufficiently advanced for such admission."

The law which authorizes the establishment of graded schools by necessary implication carries with it the power to establish and enforce all necessary and reasonable regulations for grading such schools, and for establishing a course of instruction therein; to assign to each study its place in the course and to prescribe reasonable rules for

the progression of pupils from grade to grade. In addition to this, the Act of March 3, 1871, confers express authority in the following terms: "To establish and enforce regulations for the grading of and course of instruction in the schools of the City, and for the government and discipline of such schools." Rev. Stat. 1881, § 4460, cl. 7.

The Statute authorizing the introduction of the German language as a branch of study was enacted May 5, 1869. It declares in express terms that when introduced, it is "as a branch of study." Rev. Stat. 1881, § 4497.

This was necessarily done in view of existing laws, authorizing the establishment of graded schools, with the attendant power to regulate the course of study, assigning to each branch of study its appropriate place. As a branch of study, it is like the other branches of study prescribed by the same Act, subject to similar regulation by the school officers. To hold otherwise would be to hold that by the Act of May 5, 1869, there was an implied repeal of the Statute giving power to grade to school officers in so far as this one branch of study is concerned. It is, of course, too well settled to require citation of authorities that repeals by implication are not favored, and that the two statutes must, if possible, be construed *in pari materia* so that full force and effect can be given to each. Again, by what rule of construction can it be said that when the Legislature two years later conferred power to establish regulations for the grading and course of instruction in the schools of the City, it intended to and did except one branch, and deny to the school board any control over it? Indeed, as I understand the position and argument of appellee's counsel, it is that the duty is imperative to provide for the teaching of all of the studies prescribed by the Statute in each grade. In this they are at least logical, and if they are right, the power to grade schools and establish a course of study is reduced to a very attenuated shadow, as each person whose children are attending a given school, who wishes them to be taught in any one of the required studies placed in grades in advance of that to which they belong, can compel a change in the course of study for his accommodation. The separate and individual opinion or caprice of the parents will be substituted for the judgment of the officer, while the order and system of the school-room will give place to anarchy.

The attempt to limit the application of the principle declared to the one study is ineffectual. It is made to turn on a question of verbal criticism, by which process the conclusion is reached, that by the words "any school" as used in section 4497, *supra*, is meant the particular building or room, with its complement of teachers, pupils, etc., which chances at the time to be occupied by the pupils whose parents have presented the petition, whether the building contains those belonging to only one out of many grades, or, like the ordinary district school, contains those of all grades in one room.

The further conclusion is also reached, that school No. 22, although shown to contain only certain pupils belonging to certain of

the lower grades in the city school system, is a separate and distinct school within the meaning of the law. This process of examination of the Statute is entirely too microscopic to afford a solution to the problem. The Legislature, in the enactment of this law, was prescribing a general rule, intended to govern all the schools of the State. In perhaps the majority of the towns of the State one large building, containing many rooms, accommodates all the grades; the pupils starting in the primary room and passing in time from room to room, as they pass from grade to grade. Suppose, while we find this condition existing in a given town, that in a neighboring town we find, instead of one large building, many small ones, each separate from the others; each with its complement of teachers and pupils, and each accommodating a single grade. With promotion, its pupils pass from building to building, as they pass from grade to grade. By the rule of construction thus adopted one town has a single school and the other has many schools. In the town with the single large building, the parents of twenty-five children attending that school can, upon petition, have the German language introduced as a branch of study, while in the other, although the parents of many times that number petition for it, unless at least twenty-five of them are in one of the buildings they cannot have it. If the requisite number of children are found only in one of the buildings, they can have the study introduced into that building and grade, and in none of the others. Did the Legislature intend any such thing? It was evidently the intention that a much broader view should be taken. The child, when it enters a graded school, does not enter it with a view to completing its education in a single grade; but expecting that, as intellect develops and additional acquirement comes, it shall pass from grade to grade, from room to room or, if you please, from school to school. It is, of course, unfortunate that many pupils are unable to complete the course, and in that way are deprived of the instruction which can only be given to them in the later years of the course. For this, no remedy can be devised. It is true of all studies which in the course prescribed lie beyond the point where they drop out. Under any system of grading which will give time for efficient instruction, some studies must wait while others are being taken. To require children of primary grades to pursue simultaneously all of the required studies would be to impose on their untrained intellects an unreasonable and unjustifiable tax. It is upon this that all systems of grading are based, with a view to the gradual development and unfolding of the child's mental powers. There can be no forcing of this development. The task of devising the best means of accomplishing this end the law has entrusted to the school board. It was undoubtedly the legislative purpose, in authorizing the introduction of this branch of study, to give opportunity to acquire a practical knowledge of it. How could this be accomplished if, when it was petitioned for by the requisite number of persons, it was

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not thereupon to be placed in the course with other studies and provision made for continued and progressive instruction in it? In this case is it expected that the pupils in school No. 22 will acquire a practical knowledge of that study in the brief time they will remain in that grade?

It is manifest that in that short time they could at best acquire but a slight and superficial knowledge of the rudiments of the language, which could be of no practical value whatever. We cannot think that this is what the Legislature had in view.

In the course of instruction prescribed by the appellant seven years are devoted to that study. That is, the course of instruction in that study extends over that time. When the parents of school No. 22 asked to have it introduced in that room did they expect that when, in a few months promotion carried their children to other grades, instruction in that language would end? When the Legislature provided for the admission of that study into schools on petition, it certainly meant that it should come in as a branch of study not in a given grade, but in the school, viewing the school as an entirety from the time the pupil entered it until he left. It certainly meant to leave the question as to when and where it could be most efficiently taught to the officers entrusted with the management of the schools, as they entrusted to them similar discretion with reference to all other studies. And when these officers show the adoption of a plan, providing for the thorough teaching of this study to all the school children as soon as they reach a certain grade, and that to this end they have provided buildings convenient of access to all, is it just or fair to characterize this as a proposition to teach the study only to some other children in some other part of the City?

Much false reasoning in this case comes from considering it as a question of adding a particular study to the course instead of adding an additional study. Suppose this statute, instead of providing for the introduction of the German language, provided for the introduction in precisely the same manner of some of the higher branches of mathematics; strike out the words "German language," and insert instead, algebra, or trigonometry or geometry, would anyone seriously insist that the Legislature meant that when a petition was presented by the requisite number of persons for its introduction as a branch of study, the Board would not only be required to admit it, but might, on demand, be compelled to provide for teaching it to the primary grades? Suppose the last Legislature had amended the law by additional proviso in precisely the same words, except that it had called for the introduction of the Hebrew language; a large, intelligent and useful class of our citizens would have special interest in such a law. Indeed, the great mass of our people, believing that the Hebrew Scripture is the Word of God, would have special interest in such a law. If the reasoning in the opinion of the majority of the court is sound, the Board of School Commissioners would not only be compelled to admit it as a branch of study,

but would be powerless to determine where in the course of study it should be taught, and might on demand be compelled to provide for teaching it in the primary grades. All the reasoning as applied to the German language would apply with equal force to the Hebrew language, or to the Italian or French, or the language of Sweden.

I do not question the power of the Legislature to limit the control of school officers in the management of schools. It has created these officers and conferred such powers as they have. Notwithstanding the fact that time has demonstrated the wisdom of their course, and that the large measure of discretion vested in those officers has been a potent factor in the magnificent development of our school system, the power which created can destroy them, or may in any manner curtail their power. It is not here a question of legislative policy, but of the construction of a legislative Act. Although, indeed, if one interpretation given to this Act by counsel for appellee in argument could be correct, there might be a question of legislative power. I refer to the construction which would view this law as enacted for the benefit of Germans. As a branch of study, there can be no objection to the introduction of the German language into our schools. It is a noble language, of a great people. It is not only commercially advantageous to our children to be able to use it, but it introduces them to a literature singularly rich and strong. But neither Germans, French, English, nor those of any other foreign nationality can, as such, have any rights in our public schools; and any legislation attempting to recognize or confer any such right would be void.

Our Constitution, providing for a system of common schools, contemplates a school system for the education of the children of American citizens only, and such an education as will fit them for the duties of American citizenship. That which has made the German emigrant so welcome an addition to our population is the readiness with which he becomes Americanized, and the sincerity of their devotion to their adopted country has been sealed in blood on many battle fields. As American citizens, their rights in our common schools are the same as if they were native born. But the doors of the common school can only legally open to those of foreign blood when they renounce their alien allegiance and pledge fidelity to the United States. I cannot think that the Legislature intended by this action to introduce the race question into our schools, or to recognize the principle that any other key than that of American citizenship should, under any pretense, open the schoolhouse door. Sound public policy demands the emphatic declaration that in this country and under our flag

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there is room for but one nationality,—where all have common interests and should have one common language.

In my opinion, the German language is, by virtue of the petition presented and the demand made, one of the required studies in the City of Indianapolis; but that, as such, it stands upon precisely the same footing as all the other required studies, and should be given its proper place and fair proportion of the time in the course of instruction; that while the Board of School Commissioners could be compelled by mandate to admit it to the course, if they refused, their discretion could not, and cannot be further controlled.

Mandate will not lie to control or direct the exercise of a discretionary power by a public officer. *State v. Demaree*, 80 Ind. 519; *Madison v. Smith*, 83 Ind. 502; *Jelley v. Roberts*, 50 Ind. 1; *Burnet v. Wabash & E. Canal*, 50 Ind. 251; *Mitchell v. Wiles*, 59 Ind. 364; *Fort Wayne v. Cody*, 43 Ind. 197; *Brinkmeyer v. Evansville*, 29 Ind. 167; *Michigan City v. Roberts*, 34 Ind. 471.

Mandate will lie to compel an officer to act, but not to control the manner of his acting except to discharge a duty specifically enjoined by law. See cases above cited, and also *State v. Demaree*, 80 Ind. 519; *Indianapolis v. Patterson*, 33 Ind. 157.

This is the rule as applied to school officers equally with other public officers. *State v. Andrews*, 108 Ind. 31, 6 West. Rep. 249; *Fertich v. Michener*, 111 Ind. 472, 9 West. Rep. 394; *Braden v. McNutt*, 114 Ind. 211, 13 West. Rep. 798.

If the discretion of the School Board can be controlled in the matter of this particular study, it can be as to all of the prescribed studies; and there is necessarily subordination of the power of the School Board in grading, to the will of each individual parent who has a child in attendance in the school. This practically destroys it.

The difference between the views entertained by the majority of the court and my opinion, briefly stated, is this: As they construe the law, a petition and demand will only require the admission of the study of the German language to the particular building in which the petitioners' children are at the time instructed, and to no other part of the school; and the Board of School Commissioners are powerless to say where that shall be; while, as I construe the law, when the petition is presented and the demand is properly made, that language must be placed in the course with the other required studies for the equal benefit of all, and that the school officers have the same power to assign it its place in the course that they have over any other study.

For the foregoing reasons, I cannot concur in the opinion of the majority of the court.

Olds, J., concurs in this opinion.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Inhabitants of EASTHAMPTON

v.

HAMPSHIRE COUNTY COMMISSIONERS.

(....Mass....)

Express authority is not absolutely necessary to justify the taking of a strip of land from a schoolhouse lot for a townway.

(September 24, 1891.)

RESERVATION by the Supreme Judicial Court for Hampshire County (Knowlton, J.) for the opinion of the full court of a petition for a writ of certiorari to quash proceedings of the County Commissioners in laying out a townway. *Petition dismissed.*

The case sufficiently appears in the opinion. **Mr. David Hill** for petitioners.

Mr. W. G. Bassett for respondents.

Holmes, J., delivered the opinion of the court:

The short question before us is whether county commissioners can take a strip of land from a schoolhouse lot for a townway. Taking the strip will injure the lot considerably for school purposes, but will not prevent its use, so far as appears. We must assume that the way is necessary, and, if it be material, we must assume that taking this strip is reasonably necessary for the way, whoever may be the final judge on the latter question when it is raised.

The case thus presented lies in the doubtful region between two extremes which are free from doubt. Ordinarily a highway or railroad could not be laid out longitudinally over a previously established railroad or highway by virtue of general statutory powers or without special authority from the Legislature. *West Boston Bridge v. Middlesex County Comrs.* 10 Pick. 270, 272; *Springfield v. Connecticut River R. Co.* 4 Cush. 68, 71; *Boston & M. R. Co. v. Lowell & L. R. Co.* 124 Mass. 368, 371. On the other hand, in the absence of special regulations and by virtue of a general authority to lay out such roads, necessary crossings could be made. When we come to more difficult cases we draw little aid from the varying statements of general principles under which authority will be implied to take land for a second public use. *Boston & A. R. Co. v. Boston*, 140 Mass. 87, 89, 1 New Eng. Rep. 94; *Providence & W. R. Co. v. Norwich & W. R. Co.* 138 Mass. 277, 279; *Boston & M. R. Co. v. Lowell & L. R. Co.* 124 Mass. 368, 370; *Wellington Petitioner*, 16 Pick. 86, 105.

We must consider the relative importance and the necessities of the two uses generically, the extent of the harm to be done, accept any light that history may throw, and make up our minds under all the circumstances of the particular case as best we can. To put cases nearer to the present and lying between the two extremes which we have mentioned, it would be a strong thing to say that without

special circumstances county commissioners or other like officers acting under general powers could lay out a highway through a public reservoir so as to ruin it. See *State v. Montclair R. Co.* 85 N. J. L. 328; and as further examples on this side, *Re Boston & A. R. Co.* 53 N. Y. 574; *Prospect Park & C. I. R. Co. v. Williamson*, 91 N. Y. 552. On the other hand, if a tract of land were held for public purposes, which was so broad that it was impracticable to go around it and which could be crossed without serious harm by the edge of a stream that flowed through it, it well might be held lawful for the way to cross it. See *Wood v. Macon & B. R. Co.* 68 Ga. 539.

The proviso of our Act of 1884, chap. 187, § 1, the original of Pub. Stat., chap. 82, §§ 29, 30, implies very clearly that any "railroad or other public easement already located" through a graveyard was located lawfully. The law seems to be different in Connecticut. *Evergreen Cemetery Assn. v. New Haven*, 43 Conn. 234. When it is considered that very large tracts of land often are appropriated to school purposes (see Statute October 3, 1782, 1 Mass. Spec. Laws, 33, 34; March 23, 1784, 1 Spec. Laws, 72; March 11, 1791, 1 Spec. Laws, 303; November 17, 1792, 1 Spec. Laws, 399; March 3, 1801, 2 Spec. Laws, 423), it is impossible to accept an unqualified rule that no part of such land can be taken for a way under any circumstances without an express enactment. In the only case which we have found precisely parallel to this it was held that the strip was lawfully taken from the school lot. *Rominger v. Simmons*, 88 Ind. 453. See also *Indiana Cent. R. Co. v. State*, 3 Ind. 421, 425.

The converse case of an attempt to place a schoolhouse within the limits of a highway is by no means so strong. Apart from any comparison of the two public uses, usually there can be no necessity for the selection of such a place, since there is a much greater freedom of choice as to where a schoolhouse shall be put than where roads shall run. But to show the views which have prevailed in Massachusetts we quote the following:

"November 9, 1702. The motion presented in writing by Nathl. Byfield and Ebenezer Brenton, Esqrs., for a resolution of this question, viz.: whether the setting up a court-house or schoolhouse in the street of any town within this Province where the street is so wide as to leave not less than twenty-five feet clear for passage on each side of sd. edifice, be not allowable within the true meaning and intent of the Act entitled 'An Act to Prevent Incroachments upon Highways, Streets, etc.' and of the proviso in the said Act,—was returned from the representatives with the concurrence of that House to the Resolve past thereon by the board on the 4th curr. to wit,—

"Resolved, that the above building, being a public use, and within the reason of the proviso in the said Act, and that the erecting of the same shall be accounted by this court no breach of the said Act which resolve is

consented to J. Dudley. From Records of the governor and council, VII., 291, in 1 Prov. Laws, 363."

The Act in question was the Act of 1698, chap. 2. Very plainly schoolhouses were not

saved by the proviso, but they were read in by the foregoing resolve. If the present case had been presented we think the answer would have been more unhesitating still.

Petition dismissed.

OREGON SUPREME COURT.

George W. HAHN, *Respt.*,

v.

BAKER LODGE, No. 47, A. F. & A. M.,
Appt.

(....Or....)

***1. Grants of rooms or apartments in a building, like leases of the same, must be construed according to the intention of the parties, and with reference to the subject matter upon which they operate.**

2. Where the language of the grant does not purport to convey an estate or interest in the land or building, or any portion of it, but only a certain room located in such building, namely, "the middle room or hall of the upper story," carefully distinguishing by its provisions the room granted from other rooms, and contains no stipulation as to rebuilding in case of fire or other casualty, and such building is destroyed by fire, and the identity and existence of the room as such were extinguished, there was nothing remaining upon which the conveyance could operate, and the rights of the defendant terminated.

3. If an easement for a particular purpose is granted, when the purpose no longer exists there is an end of the easement.

(June 24, 1891.)

APPPEAL by defendant from a decree of the Circuit Court for Baker County in favor of complainant in a suit brought to enjoin

*Head notes by LORD, J.

NOTE.—Conveyance, sale of part of building conveys a mere easement.

When a building is so constructed that one part of it is made tributary to the other, on a sale of that part of it which is tributary the natural presumption will be, in the absence of an express agreement to the contrary, that the purchaser takes the part he buys subject to such use by the other part as the mechanical arrangement of the building imposes. *Mayo v. Newhoff*, 13 N. J. L. J. 179.

Where the owner of two stores containing but one flight of stairs sold the store in which there were no stairs, and described it by metes and bounds, the conveyance did not carry with it the right of way of necessity over the flight of stairs. *Stillwell v. Foster*, 6 New Eng. Rep. 649, 80 Me. 338.

When the owner of an entire estate makes one part of it visibly dependent for the means of access upon another, and creates a way for its benefit over the other, and then grants the dependent part, the other part becomes subservient thereto, and the way constitutes an easement appurtenant to the estate granted, and passes to the grantee as accessorial to the beneficial use and enjoyment of the granted premises. *National Exch. Bank v. Cunningham*, 46 Ohio St. 575.

13 L. R. A.

defendant from interfering with complainant's property, and to recover damages for such interference. *Affirmed, except as to so much of the decree as awarded damages.*

The facts are stated in the opinion.

Messrs. Hyde, Johns & Olmstead and T. C. Hyde for appellant.

Messrs. Williams & Wood, for respondent:

The conveyance by deed or demise of an upper story in a building vests in the grantee no interest in the soil, and with the destruction of the premises his estate terminates.

Harrington v. Watson, 11 Or. 145; *Stockwell v. Hunter*, 52 Mass. 448-455; *Graves v. Berdan*, 26 N. Y. 499; *Winton v. Cornish*, 5 Ohio, 478; *Shawmut Nat. Bank v. Boston*, 118 Mass. 127-181; *Ainsworth v. Ritt*, 88 Cal. 90; *Kerr v. Merchants Exch. Co.* 3 Edw. Ch. 315, 6 L. ed. 672; *Thorne v. Wilson*, 9 West. Rep. 45, 110 Ind. 325.

When the estate is destroyed to which an easement is appurtenant the easement is extinguished.

Gayetty v. Bethune, 14 Mass. 49; *Ballard v. Butler*, 30 Me. 94; *Mussey v. Union Wharf Proprs.* 41 Me. 34; *Hancock v. Wentworth*, 43 Mass. 446; *National G. M. W. Co. v. Donald*, 4 Hurlst. & N. 8, 16; *Allen v. Gomme*, 11 Ad. & El. 759; *Henning v. Burnet*, 8 Exch. 187; *Washb. Easem. & Serv.* 3d ed. pp. 654-657; *3 Toullier, Droit Civil*, 522.

A mutual easement, as a party-wall, is extinguished if the wall be destroyed without any act of either party, as by fire.

Grants of apartments in a building must be construed according to the intention of the parties and with reference to the subject matters, which are rooms or apartments, specifically designated by numbers or otherwise. *Kerr v. Merchants Exch. Co.* 3 Edw. Ch. 315, 6 L. ed. 672, followed in *Austin v. Field*, 7 Abb. N. S. 34, 1 Sheld. 213; *Hilliard v. New York & C. G. Co.* 41 Ohio St. 666.

A cellar, room, etc., may pass by their own terms and nothing more, and where land is not mentioned no land passes. *Doe v. Burt*, 1 T. R. 701; *Penruddock's Case*, 5 Coke, 100.

The owner of land can convey it, or the profits of it, in such parcels as he thinks proper; he can grant the right to occupy a room in the third story, to occupy a second story, a room in the first story, or the cellar or part of the cellar; but by such grants the land does not pass, although the land is necessary to sustain those parts of the house. *Winton v. Cornish*, 5 Ohio, 477; *Kerr v. Merchants Exch. Co.* 3 Edw. Ch. 315, 6 L. ed. 672; *Rowan v. Kelsey*, 4 Abb. App. Dec. 127, 2 Keyes, 597.

An annexation to the freehold, impossible of separation from the building erected thereon,—as a second story erected upon the building,—must be regarded as the right to a mere use, and not of an interest in the land; and upon such a grant the mere proprietary interest in the real estate cannot

Sherred v. Cisco, 4 Sandf. 480; *Partridge v. Gilbert*, 15 N. Y. 601; *Heartt v. Kruger*, 9 L. R. A. 135, 121 N. Y. 886.

Lord, J., delivered the opinion of the court:

This is a suit in equity, brought by the plaintiff to restrain the defendant from interfering with certain alleged rights in certain premises claimed by the plaintiff. The facts out of which the question presented for our consideration arose are substantially these: The plaintiff was the owner of a certain lot in Baker City, upon which was erected a two-story building, the middle room or hall in the upper story of which was owned by the defendant, and used as a lodge hall, and, as appurtenant thereto, it owned an easement as a means of ingress and egress. The room owned by the defendant, being a middle room, had front and rear walls and two lateral walls. A fire occurring, the whole building was substantially destroyed. The roof, floors, joists, windows and doors were totally consumed by the flames; and at the same time the rear and front walls were entirely destroyed to their foundation, and only a portion of the lateral walls remained, which were fire-cracked, shaky, and unfit for use. So far as relates to the second story, only a portion of the lateral walls were left above the second story, and as they stood they were unsafe, and practically useless for rebuilding purposes. The other walls were destroyed, so that the middle room in the second story, used as a hall by the defendant, and its foundations, were practically destroyed by the conflagration, and its identity lost or extinguished. While there is some conflict in the evidence, there is none upon which to base the contention that there was any sufficient portion of the lateral walls remaining to preserve the identity of the middle room, or that such portions as remained were sufficiently safe for rebuilding purposes as they stood. The practical de-

duction from the evidence, considered as a whole, leaves no doubt that the middle room in the upper story, owned by the defendant, was wholly destroyed, and that the building itself was substantially destroyed. Upon this state of facts, the inquiry is, Had the defendant the right which it undertook to exercise, and which this suit is brought to enjoin, of rebuilding the walls for the purpose of reconstructing an upper story, and recreating a middle room, to be used as a lodge hall in the place of the one destroyed by the fire? By its conveyance the defendant had granted to it what was known and styled as the middle room of the upper story of the building, and an easement of ingress and egress. There is no provision in it, or right given to the defendant, in case of the destruction of the upper story by fire, or of the building, itself to rebuild it. It does not, in terms, grant or convey the land, and does not purport to grant or convey the building, but only the middle room or hall in the upper story, and without any stipulation as to rebuilding in case of fire. It seems to us that conveyances of this kind, like leases of apartments in buildings, must be construed according to the intention of the parties, and with reference to the subject matter upon which they operate. As applied to a lease, the doctrine of the law is, when it is not the intention to grant any interest in the land further than is necessary for the enjoyment of the room leased, that when such room is destroyed there is nothing upon which the demise can operate, and that the lease terminates with the destruction of the thing leased. *Harrington v. Watson*, 11 Or. 143. The application of this doctrine is well illustrated in the case of *Stockwell v. Hunter*, 11 Met. 448, in which this question was carefully considered. In that case the lessor of a three-story building leased the cellar or basement to a tenant for five years, and the other stories to other tenants; but the lease contained no stipulation as to rebuild-

be recovered. *Thorne v. Wilson*, 9 West. Rep. 45, 110 Ind. 235; 2 Washb. Real Prop. 23.

The right which one proprietor has to some profit, benefit or lawful use out of or over the estate of another proprietor, is merely an easement. *Ritger v. Parker*, 8 Cush. 145.

So the grant of a right to have and to hold a second story to a building for the use of a lodge is an easement. 2 Washb. Real Prop. 23.

No estate can be created of mere space of air above ground; and though property in a room may be conveyed (*Brooke, Abr. Demand*, 20; Year Book 5 Hen. VIII., p. 9); yet, if the foundation fail, the property goes; it ceases with the thing itself. *Jackson v. Buel*, 9 Johns. 238; *Jackson v. May*, 16 Johns. 184.

So if a church is burned, the right to a pew therein is gone. *Freligh v. Platt*, 5 Cow. 494.

A distinction is made between the lease of a house and the lease of an apartment therein. In the former case the lease carries with it the land whereon the house stands; in the latter case it does not. Thus, where a cellar was leased, and the building was destroyed by fire, it was held that the lessee had no right to roof in the space he had formerly occupied. *Winton v. Cornish*, 5 Ohio, 477.

The interest of the occupier of a room in a building is peculiar; he has simply the right of

occupation, and a destruction of the building ends that right. *Kerr v. Merchants Exch. Co.* 3 Edw. Ch. 315, 6 L. ed. 672; *Graves v. Berdan*, 29 Barb. 100; *Smith v. St. Phillips Church*, 10 Cent. Rep. 473, 107 N. Y. 610; *Tenant v. Goldwin*, 1 Salk. 300.

A destruction of the house in the absence of covenants to repair terminates the tenancy. *Ainsworth v. Ritt*, 38 Cal. 90; *Chamberlain v. Godfrey*, 50 Ala. 524; *McMillan v. Solomon*, 42 Ala. 356; *Rowan v. Kelsey*, 18 Barb. 490.

If the building is destroyed, no right of possession in any part of the lot remains in any of the former occupants. *Pearce v. Colden*, 8 Barb. 527.

At the expiration of a lease of land, an action of ejectment for the lot alone, by metes and bounds, lies against parties occupying separately the different stories of the building, as joint trespassers on the land, in using it to uphold the building, and plaintiff is not bound to elect against which one he will proceed. *Pearce v. Ferris*, 10 N. Y. 285.

Extinguishment of easement.

An easement is one of the rights of property which may be extinguished or destroyed. See *Hancock v. Wentworth*, 5 Met. 446; 1 Rolle, Abr. 934; 2 Fournel, *Traité de Voisinage*, 405; 3 Toullier, *Droit Civil*, 522; Washb. Easem. 701.

ing in case of fire, and it was held that the destruction of the building terminated the lessee's rights in the premises. It was put upon the ground that such lease of distinct rooms or apartments do not carry any interest in the land beyond that connected with the enjoyment of the particular room; that the room was the thing leased; and that the destruction of the thing leased necessarily terminated the lessee's interest therein. The real question in all such cases, as it must be in the case at bar, is whether the intention of the parties, collected from the whole instrument, was to grant any estate in the land. The language in the conveyance precludes the idea that it was the intention to grant the building, or any portion of it, but only a certain room located in that building ("the middle room or hall of the upper story"), which is the principal thing granted, and which is identified by description to distinguish it from other rooms.

As the conveyance does not purport, in terms, to grant any estate or interest in the land, and as the provisions of the conveyance carefully distinguish the room granted from other rooms of the building, and as it contains no stipulation to rebuild in case of fire or other casualty, there is nothing to be taken by implication to justify us in holding that any grant of an estate in the land was intended. It is not doubted that there may be a freehold interest in a part of a building. 1 Washb. Real Prop. 18. Nor do we wish to be understood as holding that the sale of an interest in a building may not be a sale of an estate or interest in the subjacent soil. What we are trying to indicate is that, by the terms of the interest, it is the middle room or hall of the upper story which was granted to the defendant, and not a part of the building; that the defendant did not acquire any right of ownership in the building, or any part of it, but in the room or space inclosed by that part of the building which was described and identified as the middle room or hall of the upper story. This it owned; and so long as it existed, and its identity was preserved, the defendant had the right to its enjoyment. But when the fire destroyed the building, and the identity of the room and its existence as such were extinguished and at an end, there was nothing remaining upon which the defendant's conveyance could operate, and its rights at once terminated. In *Thorne v. Wilson*, 110 Ind.

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325, 9 West. Rep. 45, where a committee on behalf of the order of freemasons had granted the right to construct a second story upon a building erected by the owner of the land, "to have and own said second story for their use perpetually," it was held that they did not acquire any proprietary interest in the freehold of which such second story became a part. In construing the instrument, the court says: "It is evident that the instrument relied on by the appellant does not convey an interest in the land;" and then adds: "For it is quite clear that, if the buildings should be totally destroyed, the rights of the appellants, and of their grantors as well, would at once terminate." As the instrument grants the defendant no estate in the land, and contains no stipulation of the right to rebuild in case of destruction by fire or other casualty, it would seem to be plain that it was the intention of the parties, collected from their agreement and its subject matter, that the agreement, and the relation created by it, should terminate with the destruction of the building.

The remaining question is whether the easement for the purpose of ingress and egress was extinguished by the destruction of the building. The facts show that such easement was granted for the particular purpose of affording ingress and egress to the building. Without it the principal thing (the room granted) would be practically useless. It was essential and necessary for the enjoyment of the room, and was granted on account of it. Nor is it of any use, within the purposes of the grant, without the existence of the room. In such case, the general rule, as stated by Mr. Washburn, is that, "if an easement for a particular purpose is granted, when that purpose no longer exists there is an end of the easement." Washb. Easem. pp. 654, 657. When the reason and necessity for the easement ceased, within the intent for which it was granted, as it did when the building was destroyed by fire, it would logically result there was an end of the easement.

For these reasons we think there was no error upon the legal questions presented by this record, but that *the damages awarded are not justified by the facts under the circumstances, and that the decree awarding them must be disallowed, but in all other things affirmed*, and so it is ordered.

CONNECTICUT SUPREME COURT OF ERRORS.

John D. YALE
v.
WEST MIDDLE SCHOOL DISTRICT.

(59 Conn. 489.)

A child living with a domiciled resident and taxpayer of a school district as a member of his family, with the expectation on the part of all parties interested that this relation will continue permanently, although she has never been formally adopted and may not have a domicile in the technical sense of that term in the district, has a "residence" in that district for school purposes and cannot be compelled to pay tuition as a non-resident.

(November 19, 1890.)

APPEAL by defendant from a judgment of the Superior Court for Hartford County restraining it from interfering with the attendance of a certain child upon the public schools of the district. *Affirmed.*

The facts are stated in the opinion.

Mr. Charles E. Gross for appellant.

Mr. T. M. Maltbie, for appellee:

It is the undoubted right of a father or guardian to fix the residence of a minor at some place other than his own residence or domicile.

A guardian has the same power over his ward that a parent has over his child. He has the custody of his person, and may appoint the place of his residence.

Holyoke v. Haskins, 5 Pick. 26. See also *Kirkland v. Whately*, 4 Allen, 462.

Residence for school purposes differs entirely from the fixed and permanent residence necessary to gain a settlement.

Milton School Dist. No. 1 v. Bragdon, 23 N. H. 507; *Brentwood School Dist. No. 2 v. Poland*, 55 N. H. 508; *State v. Thayer*, 74 Wis. 48.

NOTE—Common-school privileges are regulated by statute.

The right to be educated in the common schools of the State is one derived entirely from legislation, and as such is subject to such limitations as the Legislature may, from time to time, see fit to make. It is not a constitutional right. *Dallas v. Foeltick*, 40 How. Pr. 249.

An inhabitant cannot claim for his children the absolute right to select such a school for them as he pleases, in disregard of the regulations of the board of public instruction. *People v. Easton*, 13 Abb. Pr. 159.

The board of public instruction have the power, in their discretion, to adopt regulations for the admission of pupils, by which the assignment of children between schools affording equal advantages shall be determined; but if they should unlawfully exclude a child from a school, the remedy would be by action. *Ibid.*

Domicil, how determined.

The domicile is the habitation fixed in any place with an intention of always staying there, while simple residence is much more temporary in its character. *New York v. Genet*, 4 Hun, 487.

A minor may have, for school purpose, a residence other than that of his parents. *State v. Thayer*, 74 Wis. 48.

Domicil is but the established, fixed, permanent residence of an individual or a family. 13 L. R. A.

In determining questions of residence and domicile and change therein, the intention of the parties concerned is the all-important consideration.

Clinton v. Westbrook, 38 Conn. 12.

Andrews, Ch. J., delivered the opinion of the court:

The plaintiff is, and has been since May, 1887, a domiciled resident and taxpayer in the defendant School District. Ada Austin, a child of thirteen years, has been during all that time living with him as a member of his family. She attended school in said District. The defendant presented to the plaintiff a bill for her tuition, and threatened to exclude her from attending the school unless such bill was paid. The plaintiff thereupon preferred the present complaint to the superior court, praying that the District be enjoined from interfering in any manner with the attendance of the said Ada Austin at the school. The superior court granted the injunction, and the defendant has appealed to this court.

The defendant insists that it has the right to require tuition to be paid for the schooling of the said Ada, for the reason that she did not so reside in or belong to the School District that she could be enumerated as a person within school age residing therein. This claim implies—what was directly admitted by the counsel for the defendant—that if she might lawfully be enumerated in the District then she was entitled to attend school there without paying tuition. The said Ada is a niece of the plaintiff's wife. She was born in the State of Illinois, where her parents then resided. Her parents now reside in Missouri, and have never resided in this State. The plaintiff and his wife have no

or ordinary dwelling-place or place of residence of a person, as distinguished from his temporary and transient, though actual, place of residence. It is his legal residence, as distinguished from his temporary place of abode; or his home, as distinguished from a place to which business or pleasure may temporarily call him. *Salem v. Lyme*, 20 Conn. 74; *Black, Law Dict.* title, *Domicil*.

Every person must have a domicile somewhere; and he can only have one domicile at one and the same time. Every person has a domicile of origin, which he retains until he acquires another; and the one thus acquired is in like manner retained until he acquires a third domicile. The existing domicile always continues until another is acquired. So by the acquisition of another, the former domicile is relinquished. *Abington v. North Bridgewater*, 23 Pick. 170; *Thorndike v. Boston*, 1 Met. 242; *Kilburn v. Bennett*, 3 Met. 199.

The domicile of origin arises from birth or connections. The domicile of a minor follows that of his father, and remains until he acquires another, which he cannot do until he becomes an adult. *Andrews v. Herriot*, 4 Cow. 518, note 2.

A domicile is defined to be the place where a person has fixed his habitation, without any present intention of removing therefrom. *Putnam v. Johnson*, 10 Mass. 488; 1 *Bouvier, Law Dict.* 480.

It is defined by Webster to be a place of permanent residence either of an individual or a family.

children. In 1882 the child, then being six years old, came to live with the plaintiff, who then resided in Winchester in this State, upon an arrangement between the plaintiff and his wife on the one hand and the parents of the child on the other, that she should live with the plaintiff and his wife so long as they should live, unless she should sooner by marriage or otherwise make a home for herself. Pursuant to that arrangement she has ever since resided with the plaintiff, and he has had the entire actual control over her, caring for her in all respects as though she was his own child. In May, 1887, the plaintiff removed from Winchester to Hartford, purchased a lot within the school district, built a house thereon, and has since that time resided there with his family, which consists only of himself, his wife, and the said Ada; and he has no intention of changing such residence. It is the expectation and the intent of the said Ada, and of her parents, and of the plaintiff and his wife, that she shall continue to live with the plaintiff and his wife as their own child so long as they shall live. The plaintiff and his wife have never formally adopted her according to the Statute regulating the adoption of children.

It is the claim of the defendant that no child can be properly enumerated in any school district as belonging thereto, so as to be entitled to instruction in its schools without tuition, unless such child has a legal residence in the sense of domicile therein, or is an apprentice to a master residing there, or is a pauper and so a ward of the public. It is not pretended that the child Ada is an apprentice and she certainly is not a pauper.

It is quite possible that the facts in this case do not show that the minor child in question had a domicile in the defendant District in the technical meaning of that term. Domicile in that sense is the actual or constructive presence of a person in a given place, coupled with the intention to remain there permanently; and as a minor cannot

exercise an independent intent in this matter, a minor can have no domicile other than that of the parent or guardian. But the facts do show that she had a residence there in the ordinary and popular meaning of the word. She is and has been for some time actually there. Her own intent is to remain there permanently. The intent of her parents and of Mr. and Mrs. Yale is that she shall remain there permanently; so that the will of all the persons who have any authority to control the intent of this minor concurs with her own in this respect. All the elements necessary to constitute residence are present. The house of the plaintiff is her home. She did not come into the District for the purpose of obtaining instruction in its schools. She came there because her home was with the plaintiff and he removed to Hartford from Winchester; and because her home is with the plaintiff she expects to remain in Hartford permanently. We think this is residence sufficient for school purposes, and that Ada Austin belongs to the West Middle School District and ought to be enumerated there.

A construction so narrow and technical as is claimed by the defendant would seriously impair the usefulness of the School Laws and would defeat various provisions of the Statute. The State is interested to have all the children educated in order that they may become good citizens. Experience has demonstrated that it costs the public much more to support one ignorant or vicious person than to educate many children. On the simple ground of economy the State cannot afford to permit any child to grow up without being sent to school. The School Laws recognize this fact and their provisions are framed accordingly. If any child is actually dwelling in any school district, so that some person there has the care of it, and is within the school age, not incapable by reason of physical infirmity of attending school, and is not instructed elsewhere, then that child must go to the public school. Section 18 of the General Statutes provides that "public

Chancellor Kent says, the place where a man carries on his established business, or professional occupation, and has a home and permanent residence, is his domicile. 2 Kent, Com. 2d ed. 431, note c.

Domicile is defined to be "a residence at a particular place, accompanied with positive or presumptive proof of continuing it an unlimited time." A person being at a place is *prima facie* evidence that he is domiciled there; but it may be explained and the presumption rebutted. *Re Wrigley*, 8 Wend. 142; 2 Kent, Com. 431, note c; *Marsh v. Hutchinson*, 2 Bos. & P. 229, note, per Lord Thurlow.

To effect a change of domicile there must be intention and act united. The *forum originis* or domicile of nativity, remains until a subsequent domicile is acquired *animo et facto*. 2 Kent, Com. 431, note c.

If a party removes from his domicile, with an intention of returning, he does not lose his domicile; as he can have acquired one nowhere else. 1 Bouvier, Law Dict. 490.

So if a person leaves the place of his domicile temporarily, or for a particular purpose, and does not take up a permanent residence elsewhere, he does not change his domicile. *Granby v. Amherst*, 13 L. R. A.

7 Mass. 5; *Lincoln v. Haggod*, 11 Mass. 352; *Harvard College v. Gore*, 5 Pick. 370; *Sears v. Boston*, 1 Met. 250; *Cadwalader v. Howell*, 18 N. J. L. 138; *Wilton v. Falmouth*, 15 Me. 479; *Thorncliffe v. Boston*, 1 Met. 242.

To constitute domicile there must be actual residence and personal presence in a place, and an intention of making it the home of the party. *Thorncliffe v. Boston*, 1 Met. 245; *Sears v. Boston*, 1 Met. 251; *Wayne v. Greene*, 21 Me. 357; *Leach v. Pillsbury*, 15 N. H. 137; *State v. Daniels*, 44 N. H. 383; *Boardman v. House*, 18 Wend. 512; *Hegeman v. Fox*, 31 Barb. 475; *Henrietta Twp. v. Oxford Twp.* 2 Ohio St. 32; *McClery v. Matson*, 2 Ind. 70; *McKown v. McGuire*, 15 La. Ann. 637; *Horne v. Horne*, 9 Ired. L. 99; *Foster v. Hall*, 4 Humph. 346; *McIntyre v. Chappell*, 4 Tex. 187.

But residence and domicile are not interchangeable terms, as a man may reside in one place and have his domicile in another. *North Yarmouth v. West Gardiner*, 58 Me. 207; *Hamden v. Levant*, 59 Me. 537; *Alston v. Newcomer*, 42 Miss. 186; *Briggs v. Rochester*, 10 Gray. 337; *Bell v. Pierce*, 51 N. Y. 12; *Tazewell County Suprs. v. Davenport*, 40 Ill. 197; *Hallett v. Bassett*, 100 Mass. 170; *Feld, Lawyer's Briefs*, 506. See note to *Warren v. Board of Registration* (Mich.) 2 L. R. A. 203.

schools shall be maintained, . . . and such schools shall be open to all children over four years of age in the respective districts, without discrimination on account of race or color." Section 2102 that "all parents and those who have the care of children, shall . . . cause such child to attend a public day school regularly during the hours and terms while the public schools in the district wherein such child resides are in session, or elsewhere to receive thorough instruction during said hours and terms in the studies taught in said public schools." And section 2103, that "each week's failure on the part of any person to comply with the provisions of the preceding section shall be a distinct offense punishable with a fine not exceeding five dollars." In other sections particular provisions are made that the conduct of parents, or others having the care of

children, shall be inspected, so that all children shall attend school; that children whose parents do not send them to school may be removed from the care of their parents; and that truant children shall be arrested and sent to school, and that habitual truants may be sentenced to any house of reformation or to the reform school. All through these sections the expression "those having the care of children," is used as exactly equivalent to parents or guardian. And nowhere is it indicated that the duty to send children to school, or the duty of the district to furnish instruction, depends on anything other than the residence of the child. All distinction between domicile and actual residence seems to be carefully excluded.

There is no error in the judgment appealed from.

In this opinion the other Judges concurred.

MICHIGAN SUPREME COURT.

PEOPLE of the State OF MICHIGAN

v.

John JOHNSON, Appt.

(....Mich....)

1. Being intoxicated and yelling on the public streets of a village in such a manner as to disturb the good order and tranquillity is a breach of the peace.

NOTE—"Breach of the peace" defined.

In *Desty's American Criminal Law*, § 91, the rule is laid down that every person who, without authority of law, disturbs the peace and security of the public, or who commits any act which tends to provoke or excite others to a breach of the peace, is guilty of a misdemeanor; and all acts tending to disturb the public peace are indictable at the common law. It is not necessary that the peace be actually broken to lay the foundation to such a proceeding. If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required. *Ware v. Loveridge*, 73 Mich. 488.

A breach of the peace is "a violation of public order—the offense of disturbing the public peace. An act of public indecency is also a breach of the peace." *Galvin v. State*, 6 Coldw. 294.

The term "breach of the peace" is generic, and includes riotous and unlawful assemblies, riots, affray, forcible entry and detainer, the wanton discharge of fire-arms so near the chamber of a sick person as to cause injury, the sending of challenges and provoking to fight, going armed in public without lawful occasion, in such manner as to alarm the public, and many other acts of a similar character. The wanton discharge of fire-arms in the public streets of a city is well calculated to alarm the public, and cause them to be apprehensive of individual safety; and I think the judge was entirely correct when he instructed the jury that such act constituted a breach of the peace. *People v. Bartz*, 53 Mich. 485.

By "peace," as used in the law in this connection, is meant the tranquillity enjoyed by citizens of a municipality or community where good order reigns among its members. It is the natural right of all persons in political society, and any intentional violation of that right is "a breach of the 13 L. R. A.

2. An officer has no authority to make an arrest without a warrant, for a breach of the peace committed when he was out of sight on another street 150 feet away, although the disturbance was heard by him.

3. A conviction for resisting an officer in arresting the defendant for breach of the peace without a warrant cannot be sustained on appeal by the claim that defendant was liable to arrest for being intoxicated in a public street.

peace." It is the offense of disturbing the public peace, or violation of public order or public decorum. Actual personal violence is not an essential element in the offense. *Davis v. Burgess*, 54 Mich. 514.

Examples of the offense.

The following examples of the offense are from *Desty's American Criminal Law*, § 91: "Riding or going armed with dangerous or unusual weapons (*State v. Huntly*, 3 Ired. L. 418. See 4 Bl. Com. 149; 2 Bishop, Cr. L. 6th ed. § 540; driving a carriage through a crowded street at a rate of speed such as to endanger the safety of pedestrians (*United States v. Hart*, 3 Wheel. C. C. 304, Pet. C. C. 380; entering on land by force, and throwing out a person who has a naked possession (*Higgins v. State*, 7 Ind. 549. See 2 Bishop, Cr. L. 6th ed. § 538; 2 Archb. Crim. Pr. 380; 4 Bl. Com. 148); spreading false news to create discord between persons high in office (see Bl. Com. 149; 2 Inst. 229; 3 Inst. 98); false and pretended prophecies, with intent to disturb the peace and terrify the people. See 4 Bl. Com. 149. The offense of a common brawler may be committed by mere epithets used in the heat of private quarrel, if so public as to disturb the peace of the neighborhood. *Com. v. Foley*, 99 Mass. 497. Counseling or advising a breach of the public peace is a misdemeanor. *Com. v. Willard*, 39 Mass. 476. So, conspiring to make a breach of the peace is an offense. *Clifford v. Brandon*, 2 Campb. 358. An infant over fourteen years of age may be guilty of a breach of the peace. *Bullock v. Babcock*, 3 Wend. 91. See 4 Bl. Com. 22; 1 Hale, P. C. 20. All parties engaged in a breach of the peace are principals."

To a complaint for beating a drum within the compact part of the town, without orders from a military officer, it is no defense to show that the act was done in the performance of religious worship, in accordance with a sense of religious duty

(May 21, 1891.)

EXCEPTIONS by defendant to rulings of the Circuit Court for Mackinac County made during the trial of a prosecution against him for resisting an officer, which resulted in a verdict of guilty. *Reversed.*

The facts are stated in the opinion.

Mr. James J. Brown, for appellant:

There was no breach of the peace committed. *People v. Bartz*, 53 Mich. 495; *Davis v. Burgess*, 54 Mich. 514; *Ware v. Loveridge*, 75 Mich. 492; *Robison v. Miner*, 13 West. Rep. 471, 68 Mich. 549.

The offense was not committed in the presence of the officer, so as to authorize him to arrest respondent without a written warrant from a magistrate.

People v. Bartz, *supra*.

The law does not look with favor on arrests made without a warrant, and it cannot be justified if the person arrested was not engaged in a breach of the peace, as for example, in fighting, or in a riot, or about to escape after having committed a felony.

Pinkerton v. Verberg, 7 L. R. A. 507, 78 Mich. 580.

Messrs. Adolphus A. Ellis, Atty-Gen., and P. N. Packard, Pros. Atty., for the People.

Champlin, Ch. J., delivered the opinion of the court:

Main Street, in the Village of Naubinway, Mackinac County, runs east and west. A street runs north from Main Street, upon which is located the house of one Bruce. Between 9 and 10 o'clock of the 28th day of December, 1890, as the respondent, John Johnson, and one McAllister were walking along Main Street, Johnson "shouted" or "whooped" in a loud voice twice. The shout was heard by Frank Murray who was marshal

of the village, and who was at the time standing upon the door-step of Mr. Bruce's house. He started towards Main Street, and proceeded down that street until he came to Johnson and McAllister, and asked, "Who done that hollering?" and McAllister replied that it was Johnson, and he then arrested him for it, and attempted to take him to the jail or lockup. Johnson resisted, and Murray used his club, and sent for Deputy-sheriff Lull, whereupon they handcuffed Johnson, and dragged him to the jail. It is not necessary in this action to describe or comment upon the conduct of Murray while taking his prisoner to the jail, and after they arrived there. The prosecuting attorney filed an information against Johnson "for resisting the officer, Frank Murray, while in the lawful execution of the duties of his office in attempting to arrest him, the said Johnson, for then and there being drunk, intoxicated, disorderly, and yelling, and disturbing the public peace, in the public streets of the Village of Naubinway, in the presence of him, the said Frank Murray, he, the said Frank Murray, being then and there engaged in his lawful attempts to maintain, preserve, and keep the peace," etc. Upon trial Johnson was convicted. There was a conflict of testimony as to what occurred at the time of the arrest, but in the rulings here made we have taken the testimony of the people as that upon which the conviction must stand if it can be supported. By Murray's testimony he was over 150 feet away, and upon another street, when he heard the shout. There is no testimony showing that he was in sight of Johnson and McAllister, nor that he knew who it was who shouted, but based his arrest upon the statement of McAllister that it was Johnson. There was not any riot, noise, or disturbance when he reached them. No other persons are shown to have been upon

*and that no actual disturbance of the public peace resulted from it. *State v. White*, 2 New Eng. Rep. 367, 64 N. H. 48; *State v. Priest*, 2 New Eng. Rep. 367, 64 N. H. 48.

An ordinance prohibiting any person or association from marching through the streets with musical instruments, or singing or shouting, without first having obtained consent of the municipal authorities, is null and void as interfering with equal rights of citizens and not being a reasonable regulation of streets. *Re Frazee*, 6 West. Rep. 140, 68 Mich. 396.

A city ordinance imposing a penalty of fine and imprisonment when any person shall make any noise, riot, disturbance or improper diversion is construed to mean unreasonable noise of a nature disturbing to the community. *State v. Cantieny*, 34 Minn. 1.

A charge of the court instructing the jury as follows: "When the natural and legitimate consequences of obscene or vulgar language, or of cursing or swearing, would be to disturb the inhabitants of a place, then you are instructed that, in law, it would be used in a manner calculated to disturb the inhabitants of such place," is erroneous, as it is an invasion of the province of the jury. *McCandless v. State*, 21 Tex. App. 411.

Where evidence was held insufficient to support conviction for disturbing peace by cursing in public place, see *Williams v. State*, 21 Tex. App. 256.

An indictment for disturbing religious worship "by talking and laughing" and by indecent gest- 18 L. R. A.

ures, is not bad for duplicity. It charges but one offense, the words "by talking and laughing" being mere surplusage. *State v. Bledsoe*, 47 Ark. 233.

A complaint for drunkenness must specifically state the place where the defendant was seen intoxicated. To state the name of the city or town is not sufficient. *State v. McLoon*, 33 New Eng. Rep. 172, 78 Me. 420.

The averment, in an indictment, that the defendant did "unlawfully engage in a prize fight with the said J. K.,—to wit, did then and there enter a ring, commonly called a 'prize ring,' and did then and there, in the said ring, strike and bruise the said J. K.," does not show that both parties engaged in the fight, and is not a sufficient allegation of the offense to sustain a conviction. *Sullivan v. State*, 67 Miss. 346.

Two or more persons fighting by agreement in a public place are guilty of an affray. An affray is distinguished from a riot in not being premeditated. *Supreme Council O. O. F. v. Garrigus*, 1 West. Rep. 861, 104 Ind. 183.

A complaint that a person applied to another a profane epithet at the latter person's residence does not charge a violation of a municipal ordinance providing for the conviction of all persons who shall make, aid, etc., any improper noise, riot, or breach of the peace on the streets, highways, or elsewhere within the city. *State v. Camden*, 52 N. J. L. 289.

A count in an indictment is deemed sufficient

Main Street when Murray first accosted Johnson and McAllister. He had no warrant for the arrest of either Johnson or McAllister. Under the facts above stated two questions are raised: (1) Did Johnson, by the act of "shouting" or "whooping" in the public street of the village when on his way home, accompanied by McAllister, at the time of night stated, commit a breach of the peace? (2) If yes, was the offense committed in the presence of the officer, Murray?

We have had occasion to define the substance and nature of this offense in the following cases: *Quinn v. Heisel*, 40 Mich. 576; *Way's Case*, 41 Mich. 299; *People v. Barts*, 53 Mich. 495; *Davis v. Burgess*, 54 Mich. 514; *Robison v. Miner*, 68 Mich. 549; *Ware v. Loversidge*, 75 Mich. 492.

In general terms the offense is a violation of public order, a disturbance of the public tranquillity, by any act or conduct inciting to violence, or tending to provoke or excite others to break the peace. Each case where the offense is charged must depend upon the time, place and circumstances of the act. The circuit judge instructed the jury that "to be intoxicated and yelling on the public streets of a village in such a manner as to disturb the good order and tranquillity of that village would be an act of open violence, and would be a breach of the peace, which, if committed in the presence of an officer, would justify him in making the arrest." This was a correct statement of the law, and was applicable, under the testimony in this case. *Hawley, Arrest*, p. 88; *Moseley v. State*, 23 Tex. App. 409; *State v. Lafferty*, 5 Harr. (Del.) 491; *Bryan v. Bates*, 15 Ill. 87; *State v. Freeman*, 86 N. C. 688; *City Council v. Payne*, 2 Nott & McC. 475; *State v. Bowen*, 17 S. C. 58.

2. Was the offense committed in the pres-

ence of the officer, Murray, so as to authorize him to make the arrest without a warrant? To restate the facts: Johnson was not in the view of the officer. He did not know who it was that raised the shout. He arrived at the place after the occurrence, and inquired, "Who done that hollering?" and was told by McAllister that it was Johnson, and he then arrested him. At that time Johnson was not engaged in making any noise or disturbance. At the time the officer heard the shout he was over 150 feet away, upon another street. It was not in his presence, and when he arrived there was perfect tranquillity. To authorize an arrest without a warrant the offense must be committed in the presence of the officer, and the arrest must be made immediately. The officer did not act upon his own knowledge, but upon information he had gained by inquiries from McAllister. If he could make the arrest under such circumstances without a warrant, then there is no reason why he could not have made it the next day, or a week after, upon inquiry and information that Johnson was the person whom he heard shouting. *People v. Barts*, 53 Mich. 493, is cited as supporting the proposition that the offense was committed in the presence of Murray. The facts in that case were different from the facts in this. In that case the officer who made the arrest saw the flash made when the pistol was discharged, heard the report, and saw the respondent Bartz, and pursued and arrested him. Bartz had not been out of sight of the officer from the time he discharged the pistol until the officer overtook and arrested him.

It is claimed by counsel for the people that Johnson, being intoxicated in a public street, was liable to be arrested therefor without warrant, under section 1, Act No. 4, Pub. Acts 1887, and section 2693, How.

which charges that respondent "quarreled . . . by cursing . . . and calling . . . opprobrious names, . . . which carriage . . . had the effect . . . to disturb the public peace," although there was no allegation of malicious or criminal intent. *State v. Archibald*, 4 New Eng. Rep. 112, 59 Vt. 548.

Under a statute providing that a person who disturbs the public peace by tumultuous and offensive carriage, etc., shall be punished, etc., the sufficiency of a count charging that respondent broke the public peace "by his tumultuous carriage" is doubted. *Ibid.*

A conviction may be had for approaching the dwelling-house of another, and using abusive, insulting, or obscene language in the presence or hearing of his family, although defendant was at the time on his own premises and used the words in ordinary conversation, without the intent of being overheard by others. *Mullens v. State*, 82 Ala. 42.

A conviction may be had for disturbing religious exercises on proof that defendant willfully and intentionally engaged in a fight, without justification or necessity, at or near a place where people were engaged in worship, even though he did not provoke the difficulty or strike the first blow. *Goulding v. State*, 82 Ala. 48.

A conviction for disturbing a religious congregation cannot be had upon a special verdict that defendant engaged in a fight near a church, and that the audience was not disturbed except by the sensational report that there was a fight. *State v. Kirby*, 108 N. C. 772.

Threatening in an angry manner to "slap hell out 13 L. R. A.

of a person" if he did not "dry up," and to kill him if he got up out of his chair, is not tumultuous or offensive conduct when not done in the immediate presence or hearing of such person's family. *Brooks v. State*, 67 Miss. 577.

The uttering, by a speaker at a public meeting, of expressions of sympathy for the condemned anarchists who had been executed for murder, with a glorification of their deeds and an incitement to murder the officers for discharging a public duty, is a misdemeanor under the New York Unlawful Assemblage Act. *People v. Most*, 29 N. Y. S. R. 97.

An indictment charging that defendant "unlawfully did make use of violent, abusive and insulting language towards and about one . . . in his presence and hearing, which language, in its common acceptance, was calculated to arouse to anger him, the said . . . and cause a breach of the peace," sufficiently charges the offense without particularizing the abusive language. *Moore v. State*, 50 Ark. 25.

The fact that a woman, in whose hearing obscene language is used, is herself in the habit of using such language can in no case constitute a justification, but may mitigate the offense. *Golson v. State*, 86 Ala. 601.

Insulting and abusive language used towards one in the immediate presence of his family may be a breach of the peace at common law. *Ware v. Loversidge*, 75 Mich. 488.

For recent decisions on the subject of "arrest for misdemeanors without warrant," see note to *State v. Hunter* (N. C.) 8 L. R. A. 529.

Stat. But this position is one taken in this court for the first time. The case was tried below upon the charge and theory that Murray made the arrest for a breach of the peace. The officer made the arrest for that offense, as is apparent from his inquiry of Mr. McAllister. He did not inform Johnson that he arrested him for being intoxicated, and does not testify that he was intoxicated. McAllister is the only one who testified that Johnson was intoxicated, and that he was

taking him home. The judge put the case to the jury upon the theory that the arrest was made for committing a breach of the peace, and the people will not be permitted, after trial and conviction of respondent upon that theory, to change ground, and claim that he was arrested for being intoxicated under the Act cited.

The judgment must be reversed, and the prisoner discharged.

The other Justices concurred.

VERMONT SUPREME COURT.

Austin T. FOSTER

v.

D. C. STEVENS.

(...Vt....)

1. A corporation of another State "is taxed by such State for all its stock" within the meaning of Rev. Laws, § 270, so as to relieve stockholders in Vermont from a tax on their shares, when it is subject to an annual tax assessed according to the amount of its paid-up capital.

2. A foreign country is "another State," within the meaning of Rev. Laws, § 270, exempting stockholders in Vermont from a tax on their shares of a foreign corporation if the stock is taxed where the corporation is situated.

(May 9, 1891.)

EXCEPTIONS by plaintiff to rulings of the Orleans County Court, made during the trial of an action brought to recover damages for the alleged conversion of certain personal

property, which resulted in a verdict in favor of defendant. *Reversed.*

Defendant justified as collector of taxes for the Town of Derby under a tax warrant, issued to him by the town treasurer. Plaintiff claimed that the tax-list was invalid because certain shares of stock in the Eastern Townships Bank of Sherbrooke, in the Province of Quebec, were listed against him, when such shares were exempted from taxation by Rev. Laws, § 270.

Further facts appear in the opinion.

Mr. Laforrest H. Thompson, with Mr. C. A. Prouty, for plaintiff:

To justify the taking of plaintiff's property by defendant as tax collector, he must have a legal warrant and a legal tax.

Clove Spring Iron Works v. Cone, 56 Vt. 604; Rowell v. Horton, 57 Vt. 31; Hughes v. Vail, Id. 42.

The Eastern Townships Bank stock owned by plaintiff was exempt from taxation, and plaintiff's grand list was rendered illegal by putting this stock into it by the listers.

Rev. Laws, § 270.

NOTE.—Taxation of capital of corporation.

The capital of a corporation means all the property belonging to it, whether tangible or intangible, which must be valued as capital for the purpose of taxation. *Porter v. Rockford, R. I. & St. L. R. Co. 78 Ill. 561; Pacific Hotel Co. v. Lieb, 88 Ill. 602.*

The term "capital stock," as used in the Statute, does not refer to or embrace shares, but is intended to embrace the property of the corporation subject to taxation. *Ottawa Glass Co. v. McCaleb, 81 Ill. 561.*

It is the aggregate sum paid in or to be paid in by the shareholders, with the addition of the profits after deduction of losses. *People v. Tax Comrs. 23 N. Y. 219.*

The Legislature may rightfully provide for taxing the capital stock of a corporation instead of the shares, and require the corporation to pay the tax, leaving it to deduct the same from the dividends. *Ottawa Glass Co. v. McCaleb, 81 Ill. 566.*

The capital of a corporation and its shares of stock are distinct properties, and a tax levied upon the property of one is not in a legal sense levied upon the property of the other. *Belo v. Forsyth County Comrs. 82 N. C. 415; Jones v. Davis, 35 Ohio St. 474.*

When the capital stock is taxable, the shares of stock are exempt from taxation in the hands of stockholders. *Republic L. Ins. Co. v. Pollak, 75 Ill. 293.*

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The exemption of the one will not necessarily exempt the other. *Memphis v. Farrington, 8 Bart. 589.*

The capital stock is usually the representative of the property of the corporation, and such property is the representative of the capital stock, and for purposes of taxation it is represented by whatever it is invested in. *New London Sav. Bank v. New London, 20 Conn. 117; New Haven v. City Bank, 31 Conn. 108; Bridgeport v. Bishop, 38 Conn. 187; Toll Bridge Co. v. Osborn, 35 Conn. 7; Rome R. Co. v. Rome, 14 Ga. 275; Augusta v. Georgia R. & Bk. Co. 28 Ga. 651; Auditor of Floyd County v. New Albany & S. R. Co. 11 Ind. 570; Conwell v. Connorsville, 15 Ind. 150; Cumberland M. R. Co. v. Portland, 37 Me. 444; Bangor & P. R. Co. v. Harris, 21 Me. 533; Gordon v. Baltimore, 5 Gill, 281; Baltimore v. Baltimore & O. R. Co. 6 Gill, 298; Tax Cases, 12 Gill & J. 117; Salem Iron Factory Co. v. Danvers, 10 Mass. 515; Amesbury W. & C. Mfg. Co. v. Amesbury, 17 Mass. 461; Boston & S. Glass Co. v. Boston, 4 Met. 187; Boston, W. P. Co. v. Boston, 9 Met. 199; Hannibal & St. J. R. Co. v. Shacklett, 30 Mo. 558; Mutual Ins. Co. of Buffalo v. Erie County Suprs. 4 N. Y. 442; Smith v. Exeter, 37 N. H. 556; Fitchburg R. Co. v. Prescott, 47 N. H. 62; Bank of Cape Fear v. Edwards, 5 Ired. L. 516; Jones v. Davis, 35 Ohio St. 477; Bank of Commerce v. McGowan, 4 Lea, 703.*

The capital stock of a foreign corporation doing business within the State is liable to taxation. *Com. v. Gloucester Ferry Co. 98 Pa. 105.*

When this section speaks of the corporation being taxed in such State for all its stock, by stock it must mean the capital or capital stock of the corporation, which is entirely distinct from the shares of stock.

Cooley, Taxn. 169; 1 Desty, Taxn. 353.

The word "State" is sufficiently broad in its meaning to include the States of our Union and all foreign States.

2 Rapalje & Lawrence Law Dict. title State.

Act 45 Vict., chap. 22, imposes a tax upon the capital of banks, and hence upon their capital stock.

Messrs. Dickerman & Young, for defendant:

The shares of stock in the Eastern Townships Bank, owned by residents of Derby, are taxable in Derby.

Rev. Laws, §§ 267, 268.

The tax assessed against and paid by said bank under the Law of the Province of Quebec, chap. 22, p. 106, Acts of 1882, is a franchise tax.

Tennessee v. Whitworth, 117 U. S. 129, 29 L. ed. 880-882; *New Orleans v. Houston*, 119 U. S. 265, 30 L. ed. 415; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 580.

This tax imposed by the Statute of Quebec is neither imposed upon the shares of the individual stockholders, nor upon the property of the corporation, but is a tax upon the corporation itself.

See *Minot v. Philadelphia, W. & B. R. Co.* 85 U. S. 206, 21 L. ed. 896; *Provident Sav. Inst. v. Massachusetts*, 78 U. S. 611, 18 L. ed. 912; *Com. v. Hamilton Mfg. Co.* 12 Allen, 296; *Com. v. New England S. & T. Co.* 13 Allen, 391; *Pratt v. Street Comrs. of Boston*, 139 Mass. 559; *Monroe County Sav. Bank v. Rochester*, 37 N. Y. 365.

Even if this tax is held to be a tax upon the capital owned and controlled by the corporation, it does not then become a tax on the shares owned by the stockholders.

Van Allen v. The Assessors, 70 U. S. 3 Wall. 573, 18 L. ed. 229; *People v. New York Tax Comrs.* 71 U. S. 4 Wall. 244, 18 L. ed. 344; *Provident Sav. Inst. v. Massachusetts*, 78 U. S. 6 Wall. 611, 18 L. ed. 912; *Louisville First Nat. Bank v. Kentucky*, 76 U. S. 9 Wall. 853, 19 L. ed. 702; *Bradley v. Illinois*, 71 U. S. 4 Wall. 459, 18 L. ed. 433; *Lionberger v. Rouse*, 76 U. S. 9 Wall. 468, 19 L. ed. 724; *Van Slyke v. Wisconsin*, 78 U. S. 11 Wall. —, 20 L. ed. 240; *Evansville Nat. Bank v. Britton*, 105 U. S. 322, 26 L. ed. 1053; *Minot v. Philadelphia, W. & B. R. Co.* 85 U. S. 18 Wall. 206, 21 L. ed. 895, 896.

The shares held by stockholders are distinct from the capital stock of the corporation, and the taxation of both is not double taxation.

Sturges v. Carter, 114 U. S. 511, 29 L. ed. 240-242; *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 880; *Farrington v. Tennessee* and *New Orleans v. Houston*, *supra*.

This distinction was not created by Congress in the National Banking Acts. These Acts and the decisions above cited only carry out the law as promulgated by the United States Supreme Court in 1819 in the case of *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 316, 4 L. ed. 579-609.

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This distinction, for the purpose of taxation, between the capital of the corporation owned and controlled by it and the interest of the shareholder owned and controlled by him, is also clearly made in—

Springfield v. Springfield First Nat. Bank, 4 West. Rep. 353, 87 Mo. 441; *Lionberger v. Rouse*, 43 Mo. 67-79; *St. Louis Bldg. & Sav. Assn. v. Lightner*, 42 Mo. 421; *First Nat. Bank of Hannibal v. Meredith*, 44 Mo. 500; *State Bank of Virginia v. Richmond*, 79 Va. 118; *New Orleans v. State Nat. Bank*, 34 La. Ann. 892; *New Orleans v. New Orleans Canal & Bkg. Co.* 32 La. Ann. 104; *New Orleans v. New Orleans & St. L. R. Co.* 27 La. Ann. 414; *Allegheny County v. McKeesport Diamond Market*, 123 Pa. 164; *Pittsburgh's App.* Id. 374; *McKeen v. Northampton County*, 49 Pa. 519; *Whitwell v. Northampton County*, Id. 526; *Lycoming County v. Gamble*, 47 Pa. 106; *Dwight v. Boston*, 12 Allen, 316; *Com. v. Hamilton Mfg. Co.* 12 Allen, 298-310; *Pratt v. Boston Street Comrs.* 139 Mass. 559; *Davenport Nat. Bank v. Equalization Board*, 64 Iowa, 140; *Raleigh & G. R. Co. v. Wake County Comrs.* 87 N. C. 411; *Utica v. Churchill*, 33 N. Y. 161-287. See also *Queen v. Arnaud*, 9 Q. B. N. S. 806; *Glenn v. Dodge* (D. C.) 3 Cent. Rep. 283; *Dewing v. Perdicaries*, 96 U. S. 193, 24 L. ed. 655; *Wheelock v. Moulton*, 15 Vt. 519.

Double taxation does not mean a tax upon the same thing in different States. It only applies to two taxes upon the same thing by the same authority.

Dwight v. Boston, *supra*.

And taxation in another State, directly or indirectly, has not been held by this court to exempt from taxation here, unless the letter of the law clearly makes it exempt.

Bullock v. Guilford, 59 Vt. 516; *Catlin v. Hull*, 21 Vt. 152; *St. Albans v. National Car Co.* 57 Vt. 68.

So in New Jersey, in *State v. Newark*, 25 N. J. L. 815.

A surrender of the power to tax, when claimed, must be shown by clear and unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power.

Delaware Railroad Tax, 85 U. S. 207, 21 L. ed. 888; *Minot v. Philadelphia, W. & B. R. Co.* 85 U. S. 206, 21 L. ed. 895; *Southwestern R. Co. v. Wright*, 116 U. S. 231, 29 L. ed. 626; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 580; *West Wisconsin R. Co. v. Trempealeau County Suprs.* 93 U. S. 595, 23 L. ed. 814; *Tucker v. Ferguson*, 89 U. S. 22 Wall. 527, 23 L. ed. 805; *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 882; *People v. Davenport*, 91 N. Y. 574-586; *Read v. Yeager*, 2 West. Rep. 240-242, 104 Ind. 195; *People v. Illinois Cent. R. Co.* (Ill.) 6 West. Rep. 725.

In the exemption, as found in Rev. Laws, 270, "shares of stock" first line, "stock" second line and "stock" last line, must be held to mean the share or interest owned by the individual, and not the capital owned and controlled by the corporation. If there could be any doubt when looking to this clause alone, there cannot be when it is compared with the Act of 1857 and the Act of 1858.

Pratt v. Boston Street Comrs. 139 Mass. 559-563.

Tyler, J., delivered the opinion of the court :

The most important question that arises in the case is whether or not the plaintiff's Eastern Townships Bank stock is taxable in this State. Rev. Laws, § 267, requires that all real and personal estate, except as otherwise provided, be set in the list at 1 per cent of its value in money on the first day of April of the year of its appraisal. Section 288 provides that shares of stock in bank shall be set in the list like other personal estate, to the owner thereof, in the town where he resides, if he resides in this State. Therefore this property should bear its proportion of the burden of taxation unless it falls within the exemption of the second division of § 270, Rev. Laws, which is as follows: "Shares of stock in a corporation situated in another State, when all the stock of such corporation is taxed in such State to the holders, whether residing within or without such State, or when the corporation is taxed in such State for all its stock." It appears by the agreed statement that the plaintiff's shares of stock were not taxed in Canada. The law of the Province of Quebec imposes a direct tax upon banks and certain other corporations, and takes no notice of the individual shareholders for the purpose of taxation. Act 45 Vict., chap. 22, is entitled "An Act to Impose Certain Direct Taxes on Certain Commercial Corporations." Section 1 enumerates the corporations which shall annually pay the several taxes specified in section 3, in order to provide for the exigencies of the public service, and includes banks in the enumeration. Section 3 reads: "The annual taxes imposed upon and payable by the commercial corporations mentioned and specified in section 1 of this Act shall be as follows: (1) Banks. (a) Five hundred dollars, when the paid-up capital of the bank is five hundred thousand dollars or less than that sum; one thousand dollars, when the paid-up capital is from five hundred thousand dollars to one million dollars; and an additional sum of two hundred dollars for each million or fraction of a million dollars of the paid-up capital from one million dollars to three million dollars; and a further additional sum of one hundred dollars for each million or fraction of a million dollars of the paid-up capital over three million dollars. (b) An additional tax of one hundred dollars for each office or place of business in the cities of Montreal and Quebec, and of twenty dollars for each office or place of business in every other place."

The above Act was passed by the Legislature of the Province of Quebec, May 27, 1882, and was operative upon the Eastern Townships Bank, which was located in Sherbrooke, in that Province, and doing business there with a capital of \$1,500,000. This bank has been taxed and has paid its taxes each year since the passage of the Act, in compliance with its requirements. No question can now be raised but that the Legislature had authority to pass the Act. It derived its power to legislate from the British North American Act of 1867, by which the Dominion of Canada was formed. That Act provides that in each province the Legislature may exclusively make laws in relation to matters coming within the classes of

subjects enumerated; that is to say, "direct taxation within the province, in order to the raising of a revenue for provincial purposes." This authority of the Legislature and the rights of the government to collect taxes under the Act, was contested by certain banks and other corporations in several suits, which finally passed by appeal to the privy council of England, where it was held, sustaining the decree of the Queen's Bench, that the tax imposed was not a tax upon any commodity which the banks dealt in and could sell at enhanced prices to their customers; that it was not a tax on their profits nor upon their several transactions; but that it was a tax of a direct lump sum, assessed by simple reference to their paid-up capital and their places of business. The plaintiff, in the year 1888, was a resident and taxpayer in the Town of Derby, in this State, and the owner of 100 shares of stock in this bank, which the listers of that town set to him, with his other personal estate, in the grand list, so that the same was assessed for taxes that year. The question is whether the payment of the annual tax by the bank to the Canadian government brings the case within the exemption provided by our Rev. Laws, § 270, above quoted. There are but three kinds of taxation to which corporations can be subjected, namely: upon their real and personal property, upon their franchises, and upon their capital stock. A reference to the Canadian Statute shows that this tax was imposed upon corporations, without any reference to the amount or value of their property, or its use, capacity, or productiveness. It is almost equally clear that it was not designed as a franchise tax,—a tax upon the privilege of carrying on business under corporate organizations within the province. Generally, when the latter tax is imposed, means are adopted to ascertain the value of the franchise, as indicated by the amount of business done by the corporation taxed. In this case the Provincial Legislature graduated its taxation of corporations, not according to the value of their corporate franchise, nor the amount of their business, but solely according to the amount of their paid-up capital. "Capital" and "capital stock" are in legal intentment synonymous, and are used in legislative Acts as equivalent terms, though strictly not of the same meaning. It is said in 1 Desty, Taxation, 858, that "capital" and "capital stock" are in legal intentment synonymous, and are used in legislative Acts as equivalent terms, though strictly not of the same meaning; that "capital stock" means, not shares of stock either separately or in the aggregate, but it is intended to designate the property of the corporation subject to taxation, not in separate parcels, but in a homogeneous unity. In *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 830, somewhat different language is used. Chief Justice Waite speaks of the money paid in by subscribers for the shares of the capital stock as constituting the capital of the corporation, although the stock created by such subscription and payment was the property of the several holders of the shares; also of the aggregate of the subscriptions making the aggregate of the stock, and each subscriber owning that part of the stock which his shares represent. He says that, as capital, it belongs to the cor-

poration, but as stock it belongs to the holders of the shares into which the capital is divided. In that case the capital stock of the railroad company was exempt by its charter from taxation, and it was held that the shares were for that reason also exempt.

Courts and law-writers doubtless mean the same thing. They only differ in forms of expression. Though the capital stock of a corporation is produced by the payment of subscriptions for shares, the aggregate of shares and capital stock are not identical. When the capital is divided into shares and sold, the corporation ceases to be the owner of them. They then become the private property of the individual holders, while the money paid for them becomes the property of the corporation,—its casual or capital stock, with which to transact the business for which it was organized. Shares and stock are thus closely related. The court said in *Louisville First Nat. Bank v. Kentucky*, 76 U. S. 9 Wall. 358, 19 L. ed. 701, that shares, in their aggregate totality, are sometimes called the "capital stock" of a bank, though a different thing from its moneyed capital. Cooley, Taxn. 169, says: "So a tax on the shares of stockholders in a corporation is a different thing from a tax on the corporation itself, or its stock, and may be laid irrespective of any taxation of the corporation, when no contract relations forbid." Upon this ground the Supreme Court of the United States, in the cases referred to by defendant's counsel, has held that shares of stock in a corporation may be taxed although a tax has been laid upon the entire capital.

Counsel for the plaintiff concede that "shares of stock" and "capital stock" are not one and the same thing, and that it is within the power of the Legislature to lay a tax upon both; but they contend that, as the value of the shares depends upon the amount and value of the capital, a tax upon the latter is in effect a tax upon the former; that the amount of the dividends is necessarily diminished by the amount

of the tax paid upon its capital stock. By the term, "all its stock," which is employed in section 270 of our Statute, is not meant the aggregate of shares into which the capital stock of a corporation is divided, but the moneyed capital which was produced by the payment by the stockholders for their shares. "Taxes" are defined as being the enforced proportional contribution of persons and property levied by the authority of the State, for the support of government and for all public needs. By the laws of the Province of Quebec, the entire capital stock of the Eastern Townships Bank was made to contribute its proportion of the expense of supporting the government under which it existed and transacted business. The question before us is not what the Legislature of this State had the power to do in respect to the taxation of shares held by our citizens in a foreign corporation when the capital stock of the corporation has been taxed in the State in which it is located. We are to construe our Statute as it stands; and it seems to us that the only reasonable construction to be given it is that it was intended to provide for such a case as this; that, the capital stock of this corporation having borne its proportion of the public burden in one jurisdiction, its shares held here are exempt from taxation. We think the word "State" employed in the Statute should be construed to mean a foreign State as well as one of the United States. The Statute was enacted for the relief and benefit of stockholders; therefore, upon the reason of the law, shares of stock in a foreign corporation should be exempt as well as those in a corporation located in one of the States of this Union. The view that we have taken of the first question in the case renders it unnecessary to consider the other questions presented in the exceptions.

Judgment reversed, and judgment for the plaintiff to recover the value of the property, as appears in the agreed statement, with interest.

INDIANA SUPREME COURT.

John O. HENDERSON, State Auditor, *App't.*,

Board of COMMISSIONERS OF the State
SOLDIERS & SAILORS MONUMENT.

(....Ind....)

1. An appropriation of a certain sum for a state soldiers' and sailors' monu-

ment by an Act requiring bonds from commissioners that the cost shall not exceed that sum with donations and contributions can be used only for the structural work of the monument, and not to pay the compensation and expenses of commissioners, secretary, and architect, or expenses of advertising for, and procuring, the design, or for other incidental expenses authorized by the Act.

NOTE.—Appropriation of state revenues.

Whether an appropriation shall or shall not be made is a legislative question over which the judicial department has no supervision or control. *Smith v. Myers*, 7 West. Rep. 80, 109 Ind. 1; *State v. Haworth*, 7 L. R. A. 240, 128 Ind. 462; *Wilson v. Jenkins*, 19 N. C. 6; *Goddin v. Crump*, 8 Leigh, 154; *Burch v. Earhart*, 7 Or. 58; *Franklin v. State Board of Examiners*, 23 Cal. 173; *People v. Pacheco*, 27 Cal. 173.

Separate resolutions of each branch of the Assembly authorizing payments cannot amend or 13 L. R. A.

vary the provisions of a statute making appropriations. *Rice v. State*, 36 Ind. 47.

To an appropriation nothing more is requisite than a designation of the amount and the fund out of which it shall be paid. *People v. Brooks*, 16 Cal. 49.

A direction in a statute to the proper officers to pay money out of the treasury upon a given claim, or for a given object, may, by implication, include in the direction an appropriation. *Ristine v. State*, 20 Ind. 328.

Setting apart so much of the county revenue as is necessary to pay the cost of repairs provided for

2. A sufficient appropriation is made by an Act expressly authorizing expenses to be incurred and directing that they shall be paid when it is taken in connection with the general statute authorizing the auditor of the State to "draw warrants on the treasurer for all moneys directed by law to be paid," etc.

(June 12, 1891.)

APPPEAL by defendant from a judgment of the Circuit Court for Marion County in favor of petitioners in a proceeding instituted to compel defendant to transfer certain expenses from the account to which he had charged them and charge them against the general fund in his hands for the payment of current expenses. *Affirmed.*

The facts are stated in the opinion.

Mr. A. G. Smith for appellant.

Meers, W. E. Niblack and **A. J. Beveridge** for appellees.

McBride, J., delivered the opinion of the court:

This was an application by the appellees, the Board of Commissioners of the State Soldiers' and Sailors' Monument, for a writ of mandate against the appellant, as Auditor of State. The controversy can be best stated by quoting the complaint, which is brief, and, omitting prefatory matter, is as follows:

"Your petitioners, George J. Langsdale, Thomas W. Bennett, Mahlon D. Manson, Geo. W. Johnston and DeWitt C. McCollum, respectfully say that they constitute the Board of Commissioners of the State Soldiers' and Sailors' Monument, provided for by the Act known as 'An Act to Provide for the Creation of a State Soldiers' and Sailors' Monument

or Memorial Hall or Monument and Memorial Hall Combined, According to the Discretion of the Trustees in This Act Provided for, and Declaring an Emergency,' approved March 3, 1887; that said Board of Commissioners, soon after its organization, proceeded to erect a Soldiers' and Sailors' Monument, as provided in said Act, at an estimated cost not exceeding two hundred thousand (\$200,000) dollars, the amount appropriated by said Act; that the sum of ninety-nine thousand and four hundred and forty-one dollars and eleven cents (\$99,441.11) has been expended in structural expenses upon said monument, and that contracts are outstanding for additional work to be performed upon, and material to be used in the erection of, said monument, to meet and discharge which the further sum of ninety thousand nine hundred and eighty-two dollars and sixty cents (\$90,982.60) will be required; that other sums of money have been expended, as incidental expenses, by said Board of Commissioners in the discharge of their duties, which have devolved upon them, no part of which incidental expenses has been applied in payment of the structural expenses hereinabove referred to, and which your petitioners are advised and believe are not properly payable out of the amount appropriated by the Act for the erection of the monument in question, as follows:

For payment of architects, including plans and model,	\$10,348.35
For Commissioners' <i>per diem</i> , traveling and hotel expenses	\$8,879.82
For engineering	15.00
For experts	1,404.25
For attorneys' services	165.00
For office and miscellaneous expenses	1,892.23

by the statute is a sufficient appropriation made by law within § 10 of the Act of April 8, 1885, p. 129. *State v. Johnson*, 3 West. Rep. 692, 105 Ind. 468.

Where the State has made an appropriation to meet an obligation an officer whose duty it is to draw a warrant upon the fund set apart by statute may be coerced into a performance of that duty. *Gray v. State*, 72 Ind. 567.

But where there is no statute making the appropriation no action lies against officers of the State. *Georgia v. Stanton*, 73 U. S. 6 Wall. 50, 18 L. ed. 721; *Hans v. Louisiana*, 24 Fed. Rep. 55.

But the justice of a claim, though apparent and unquestioned, does not authorize a mandamus to issue to the state auditor to compel him to issue his warrant, nor the treasurer of state to pay the same where no money is set apart for such purpose by an appropriation made by law. *State v. Porter*, 89 Ind. 287; Ind. Const. art. 10, § 195.

An Act of the Legislature recognising a claim against the State as valid, and providing for its payment, prevents the claim from becoming barred by the lapse of time. *Corkings v. State*, 1 Cent. Rep. 77, 99 N. Y. 491.

Enforcement of obligations incurred by State.

A State has no constitutional power to annul or impair a valid contract entered into by it. *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87, 3 L. ed. 162; *Terrett v. Taylor*, 13 U. S. 9 Cranch, 43, 3 L. ed. 650; *Trustees of W. & E. Canal Co. v. Beers*, 67 U. S. 2 Black. 448, 17 L. ed. 327; *Davis v. Gray*, 83 U. S. 16 Wall. 203, 21 L. ed. 447; *Hall v. Wisconsin*, 103 U. S. 5, 26 L. 13 L. R. A.

ed. 302; *People v. Platt*, 17 Johns. 195; *Montgomery v. Kasson*, 16 Cal. 189; *State v. Barker*, 4 Kan. 379.

The government is as much bound by a contract duly made by its authorized officers in its behalf, or by alternatives offered it under a contract, when once exercised, as is any private citizen. *Fowler v. United States*, 3 Ct. Cl. 43; *Allen v. United States*, Id. 91. See also *Cooke v. United States*, 12 Blatchf. 43; *United States v. Bostwick*, 94 U. S. 53, 66, 24 L. ed. 65, 66.

In entering into a contract a State lays aside its attributes of sovereignty and binds itself substantially as one of its citizens under his contract, and the law which measures individual rights and responsibilities measures with few exceptions those of the State. *Hartman v. Greenhow*, 102 U. S. 672, 26 L. ed. 271; *Polindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185; *Keith v. Clark*, 97 U. S. 454, 24 L. ed. 1071; *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 790; *Gray v. State*, 72 Ind. 567; *State v. Cardozo*, 8 S. C. 71; *People v. Canal Comrs. 5 Denie*, 401; *Penitentiary Co's Nos. 2 & 3 v. Nelms*, 71 Ga. 301; *Lowry v. Francis*, 2 Yerg. 584; *Grogan v. San Francisco*, 18 Cal. 590.

But a State may defeat the enforcement of its contract, for a State cannot be sued (*Hans v. Louisiana*, 24 Fed. Rep. 55); and it may fail to make the necessary appropriation to meet its obligation. *State v. Porter*, 89 Ind. 260; *May v. Rice*, 91 Ind. 546; *Rice v. State*, 95 Ind. 33.

If there is no appropriation the courts are powerless to assist a party to enforce his contract against the State. *Ristine v. State*, 20 Ind. 328; *State v. Ristine*, Id. 346; *Newell v. People*, 7 N. Y. 84; *Sunbury & U. R. Co. v. Cooper*, 33 Pa. 278.

For secretary's salary	1,817.25
For printing and stationary	1,401.77
For superintendence	2,265.50
For advertising	795.11
For removal of Gov. Morton's Monument out of the way	208.25

Making a total of 29,187.58

"Your petitioners say that said several sums of money are merely incidental expenses; that no part of them are structural expenses; but notwithstanding the fact that said sums are purely and solely incidental expenses, they have nevertheless been paid by the treasurer of state upon warrants issued by the Auditor of State, and against and in the face of the repeated request of said Board of Commissioners not to do so, and their repeated protest against so doing, have been by said Auditor of State charged to and against the fund of two hundred thousand (\$200,000) dollars created and set apart by the above-recited Act, for the erection of a soldiers' and sailors' monument, known as the 'Monumental Fund;' that they, said petitioners, have demanded of John O. Henderson, who is the present Auditor of State, that he shall transfer the several sums, all of which are purely incidental expenses, from said monument fund, and charge the same to and over against the general fund in the hands of the treasurer of state, for the payment of current expenses, and that the said John O. Henderson has failed and refused, and still fails and refuses, to comply with their said demand either in whole or in part or in any respect.

"Wherefore, your petitioners pray that an alternative writ of mandate shall be issued and directed to the said John O. Henderson, requiring him to so transfer said several sums of money so paid and classified, as merely incidental expenses, from said monument fund, and to charge the same to and over against what is known as the general fund in the state treasury, as above stated, or else to show cause why he shall not or ought not to do so, and will ever pray.

"William E. Niblack,

"Albert J. Beveridge,

"Attorneys for Petitioners.

"George J. Langsdale, one of the above-named petitioners, being duly sworn, says that he is the president of said Board of Commissioners of the State Soldiers' and Sailors' Monument, and that he is fully conversant with the facts and matters set out in the foregoing petition; and that the matters and things alleged in the foregoing petition are true, as he is informed and verily believes.

"George J. Langsdale, President.

"Subscribed and sworn to before me, a notary public in and for the County of Marion, State of Indiana, this 20th day of April, 1891.

"(Seal) Eva Edwards, Notary Public."

The appellee appeared, waived the issuance of an alternative writ of mandate and demurred to the petition on the ground that it did not state facts sufficient to entitle the petitioner to an alternative or peremptory writ of mandate. The demurrer was over-

ruled and the appellant, excepting to the ruling, declined to plead further. Judgment was rendered, awarding a peremptory writ of mandate, and from such judgment this appeal is prosecuted.

The questions presented call for a construction of the Act approved March 3, 1887, known as the State Soldiers' and Sailors' Monument Act. Acts of 1887, 80; Elliott's Supp. § 2048.

The appellee insists that the sum of \$200,000 appropriated by that Act was intended by the Legislature to be devoted solely to the structural expense of erecting the monument; that no part of it was to be used for the payment of incidental expenses, and that all incidental expenses are to be paid from the general fund in the state treasury. The appellant's contention is, that the sum appropriated was intended to cover the entire amount to be paid by the State toward the erection of the monument, and that there is no appropriation of any other sum for the payment of incidental expenses.

The provisions of the Act in question are substantially as follows:

"Section 1. The sum of two hundred thousand dollars . . . is hereby appropriated, out of any moneys in the treasury not otherwise appropriated, for the purpose of erecting a State Soldiers' and Sailors' Monument, said appropriation to be used in connection with such other funds as have already been or may hereafter be donated and contributed for that purpose."

Section 2 provides for the appointment of five commissioners, prescribes their oath of office, requires them to each give bond in the sum of \$5,000 for the faithful performance of their duties; and further conditioned that the cost of the monument shall not exceed the appropriation, with donations and contributions, fixes their compensation at four dollars per day and traveling expenses and provides for the filling of vacancies.

Section 3 prescribes certain of their duties, locates the monument in Circle Park in the City of Indianapolis, and authorizes the making of certain contracts with the city.

Section 4 requires the Commissioners to prepare, select or adopt a design for the monument, to advertise for plans, designs and specifications; to offer a premium of \$1,000 for the best, and \$500 for the second best design, with authority to reject any and all designs offered and to advertise as often as may be necessary to procure suitable designs and plans, and authorizing them to employ experts to examine all plans and test all estimates submitted.

Section 5 authorizes the letting of contracts for the work and prescribes the manner of paying the contractors.

Section 6 prescribes the material to be used in the erection of the monument, and requires the architect to give bond, with sureties, in the penal sum of \$10,000, "conditioned that said plans shall be perfect and complete for the purpose designed and intended, and that the monument shall be fully completed and finished as a whole, and in every part, for and within the price and cost estimated and fixed by such architect; and which price or cost

shall be stated in his proposition or submission of plan and specification."

This section also forbids the making of any change in the plans or specifications which will increase the aggregate cost of the monument so as to exceed the cost prescribed in the Act.

Section 7 authorizes the appointment of a secretary, prescribes his duties, and fixes his compensation at \$75 per month.

Section 8 authorizes the commissioner to employ a superintendent, whose duties and compensation they are authorized to fix.

Section 9 forbids members and officers of the Board to have any interest in any contract connected with the erection of the monument, and prescribes penalties.

Section 10 makes the architect whose plans are accepted the supervising architect, requires of him a bond as such supervising architect, and provides for his compensation.

The case of *Campbell v. State S. & S. Mon. Comrs.*, 115 Ind. 591, involved the construction of this Act. It was there held that it was the intention of the Legislature that the entire sum of \$200,000 appropriated should be devoted, so far as used at all, to the structural work of the monument, and that all incidental expenses, such as are involved in this case, must be paid from the general fund in the state treasury, and that there was sufficient in the Act to operate as an appropriation, authorizing the Auditor of State to draw warrants on the treasurer of state to pay the same. That case is vigorously attacked by the appellant, and we are asked to overrule it. It is manifest that if *Campbell v. State S. & S. Mon. Comrs.* was correctly decided, it is decisive of the case now before us. After careful consideration of the question, we are of the opinion that the conclusion reached in *Campbell v. State S. & S. Mon. Comrs.* was correct.

Section one of the Act appropriated \$200,000 for the purpose of erecting a monument. Section 4 provides for advertising for plans and specifications for a monument to cost not exceeding that amount. The commissioners and architect each and all give bond that it shall not exceed in cost that amount. If the incidental expenses are all to be deducted from the \$200,000, how can the board of commissioners or the architect act safely and intelligently in the preparation and acceptance of plans and specifications? If they understand that a certain definite sum is available for structural work, they have a tangible basis upon which to calculate. The Act compels the incurring of certain incidental expenses, the amount of which is necessarily uncertain. No one can tell in advance what events may occur to delay or prolong the prosecution of the work, or how much time the Commissioners may have to give to it. It cannot be foretold how often they may have to advertise for plans and specifications before such plans will be submitted as will meet the requirements. Nor could they tell in advance how often they might be compelled to employ experts to assist in the selection of plans and test estimates. Already incidental expenses have been incurred and paid amounting to more

than \$29,000. It is not claimed that any of these were not necessary to the proper prosecution of the work. It is not possible to foretell how much time will still be required for the completion of the work; and, as a consequence, how much additional must be paid for salaries and other incidental expenses.

When the commissioners advertised, inviting plans and specifications, upon what basis were architects invited to make their estimates? Did the Legislature intend to say to them, "First guess on the probable amount of the \$200,000 which will be absorbed in incidental expenses, and bind yourself with sureties in the penal sum of \$10,000 that your guess is right?"

To give to the Act the construction contended for by the appellant would be to hold that the Legislature required at the hand of the commissioners and architects very unreasonable, if not impossible, things; but, if the intention of the Legislature was that the \$200,000 should be devoted alone to the structural work, the commissioners could easily select a design and let a contract for the erection of a monument within the limits named.

The case of *State House Comrs. v. Whittaker*, 81 Ind. 297, is in point. The Legislature appropriated \$2,000,000 for the building of a new state house, and limited the entire cost to \$2,000,000. The provisions of the two Acts are very much alike; indeed, the Act providing for the erection of the monument is in many of its provisions, and in some entire sections, literal copies of the Act providing for the erection of a new state house, which will be found in the Acts of the Special Session of 1877, page 68. Like the Act now in question, that Act not only in express terms limited the cost of the building to \$2,000,000, but also required the giving of bonds, both by the commissioners and by the architect. The bond required of the commissioners was conditioned that the cost of the building should not exceed \$2,000,000, and the bond required of the architect was conditioned that the building should be "fully completed and finished as a whole, and in every part, for and within the cost and price estimated and fixed by such architect." The court held that the sum of \$2,000,000 might be expended in the construction of the new state house; and that in addition thereto, all incidental expenses, such as salaries, traveling expenses of the board, compensation of architect, secretary and superintendent, rents, etc., might be paid out of the fund denominated the new "state house fund;" but that such expenses should not be deducted from the \$2,000,000 which might be expended in what might strictly be called the construction of the building.

So, in this case, we hold that the sum of \$200,000 appropriated for the erection of the monument can only be expended in the actual structural work, and that no part of it can properly be expended in the payment of merely incidental expenses.

Counsel for appellant insists that the case of *State House Comrs. v. Whittaker*, *supra*, is not authority because a special tax was levied for the collection of a special state

house fund, while there is no special monument fund. This cannot affect the question, as the application of the sum limited for the erection of either structure is not made to depend upon the amount of money belonging to any special fund. The board of state house commissioners were limited to the expenditure of \$2,000,000 in the erection of the state house, without regard to the amount realized from the special tax levied for that purpose.

The question remains, Is there an appropriation authorizing the Auditor of State to draw warrants on the treasurer of state for the payment of the incidental expenses?

In *Campbell v. State S. & S. Mon. Comrs.*, *supra*, the court said: "It is true, as claimed, that no money can be rightfully drawn from the treasury except in pursuance of an appropriation made by law, but such an appropriation may be made impliedly, as well as expressly; and in general as well as in specific terms. The use of technical words in a statute making an appropriation is not necessary. There may be an appropriation of public moneys to a given purpose without in any manner designating the act as an appropriation. It may be said, generally, that a direction to the proper officer or officers to pay money out of the treasury on a given claim, or class of claims, or for a given object, may by implication be held to be an appropriation of a sufficient amount of money to make the required payments,"—citing *Ristine v. State*, 20 Ind. 328.

It is possible, as claimed by the appellant, that the language above quoted was outside of the question before the court in that case. It however states the law correctly and we fully approve and adopt it.

The eighth subdivision of section 5611, Rev. Stat. 1881, authorizes the Auditor of State to "draw warrants on the treasurer for all moneys directed by law to be paid out of the treasury to public officers, or for any other object whatsoever, as the same may become payable." The Act providing for the erection of the monument expressly authorizes the incurring of each of said several items of incidental expenses, and directs that the same shall be paid. We think there is a sufficient appropriation to make it the duty of the appellant to draw warrants for the payment of the same. For a very full discussion of what constitutes an appropriation of money, see the case of *Carr v. State*, 127 Ind. 204, 11 L. R. A. 370.

The judgment of the Marion Circuit Court is affirmed, with costs.

SUMNER et al., Appts.,

v.

William J. DARNELL.

(...Ind....)

1. A deed to certain persons "commissioners of W. County, and their successors

in office for the use of said county" accepted by an entry upon the county records as a deed "to and for the use of" said county, gives the legal title to the county and not to the commissioners, where there was no statute designating their corporate name and style.

2. Removal of a county seat, fifty-six years after its location on land conveyed for such use, does not make a total failure of the consideration which will cause a reversion to the grantor.

3. A conveyance "for the use of" a county "in consideration of the seat of justice having been permanently established" at a certain place, is not on a condition subsequent that the county seat remain there and no reversion is worked by removal of the county seat.

(April 3, 1891.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Wayne County in favor of defendant in an action brought to recover possession of certain real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. Julian & Julian for appellants.

Messrs. Fox & Robbins for appellee.

Miller, J., delivered the opinion of the court:

This was an action by the appellants against the appellee to recover certain real estate in Centerville, Wayne County. The complaint was in four paragraphs. A demurrer was sustained to the second paragraph, and cause put at issue by answer in denial. The errors assigned in this court relate only to the overruling of a motion made by the appellants for a new trial, and on exceptions to the conclusions of law upon the special findings of fact. The motion for a new trial was predicated upon the alleged insufficiency of the evidence to sustain the finding. We have read the evidence carefully, and find that it fully and without conflict sustains the finding of facts made by the court. The special finding, omitting description of real estate, is as follows, viz.: "Having been requested by the plaintiffs in said cause to make a special finding of facts herein, and conclusions of law thereon, now find: That William Sumner was a resident of Centerville, Wayne County, Ind., from the year 1813 to the year 1840, at which last-named date he removed to Hamilton County, Ind., where he died intestate in the year 1868; that he left surviving him as his sole heirs four children, the plaintiffs in this suit, and Thomas Sumner, who died in 1883, leaving, surviving him, — Sumner, his wife; that between the years 1813 and 1820 the said William Sumner was the owner in fee simple of — acres of real estate in the Town of Centerville, and in the vicinity thereof, and was interested in the development of the town; that prior to the year 1816 the county-seat of said Wayne County was fixed at Salesbury; and subsequently, by an Act of the General Assembly of the State of Indiana approved December 21, 1816, it was

NOTE—Conditions in deed for land must be express and certain.

Conditions in a deed of land are not to be raised 13 L. R. A.

by inference or argument. *Rawson v. Uxbridge School Dist.* No. 5, 7 Allen, 125.

To bind the heirs or assigns to the performance

enacted that, from and after the 1st day of August, 1817, the seat of justice in and for said county should be removed to and permanently fixed in the Town of Centerville, in said county, and on the 1st day of August, 1817, said seat of justice was, pursuant to said Act, removed to said Town of Centerville; that afterwards, to wit, on the 18th day of May, 1819, the said William Sumner being the owner of the following real estate, to wit, . . . did, in consideration of the seat of justice having been permanently established in the Town of Centerville, within and for said county, and for no other consideration, execute to Thomas J. Warman, Enos Grave, and Beah Butler, the commissioners of said county and their successors in office, for the use of said county forever, a warranty deed for the same; that said deed was duly recorded on the 18th day of May, 1819, in the recorder's office of said Wayne County, Ind., in Deed Record B, page 140; that on the — day of August, 1820, the new court-house at Centerville was completed and accepted by the said county commissioners of said county, and by them taken possession of, and on said date they consented to be entered their approval and acceptance of the deed of said William Sumner of May 18, 1819, in the record of their proceeding of said date, in the following words, to wit: 'William Sumner produced a deed for the public square in the Town of Centerville given by said Sumner and wife to and for the use of Wayne County, which deed was recorded in Book B, page 140, which deed was approved and accepted by the board.' That said real estate so conveyed by the said Sumner and wife to said county commissioners was thenceforward continuously used by said county for the purpose of a public square until the year 1873, at which date the county seat was removed from said Town of Centerville to the City of Richmond; that on the 7th day of March, 1874, the commissioners of said county, for a valuable consideration, sold and conveyed the west half of the

same to one Sabra Jones, which deed was recorded in the recorder's office of Wayne County, Ind., in Deed Record 59, page 480, and on the 15th day of June, 1874, for a valuable consideration, they sold and conveyed the east half of the real estate to the said Sabra Jones, which deed was recorded in the recorder's office of Wayne County, Ind., in Deed Record 59, page 478; that said Sabra Jones took possession of said real estate on said dates, respectively, and that, after various transfers by deeds duly executed and recorded, the following part of the real estate included in the land conveyed by said William Sumner to the said county commissioners by deed of May 18, 1819, was conveyed on the 4th day of March, 1884, to defendant William J. Darnell, who now holds possession of the same; that said deed was duly recorded in the recorder's office of said Wayne County, Ind., in Deed Record No. 80, at page 121; that prior to the commencement of this suit the plaintiffs demanded of the defendant the possession of the same." And, as a conclusion of law on the foregoing finding of facts, the court finds for the defendant. Proper exceptions were taken to the foregoing conclusions of law by the plaintiff, and this presents for our consideration the question discussed by counsel in their elaborate briefs.

The conclusions of law deduced by the court from the special findings are assailed upon several different grounds, one of which is the claim that, inasmuch as the deed was to "Thomas J. Worman, Enos Grave, and Beah Butler, commissioners of Wayne County, and their successors in office, for the use of said County of Wayne," it gave to the commissioners the legal title to hold as trustees, and limited the county to the mere use of the premises; and that by the removal of the county-seat the use was lost and forfeited, and the title vested *eo instante* in the grantor or his heirs. As we construe the grant, it was in legal effect and contemplation a conveyance to the county. Nothing in the lan-

of a condition subsequent, the condition must expressly mention them. *Page v. Palmer*, 48 N. H. 385.

Words used in a deed will not be construed as a condition subsequent when any other reasonable construction can be given them. *Wier v. Simmons*, 55 Wis. 637.

The words "provided always, and this deed is upon the express condition" (*Hammond v. Port Royal & A. R. Co.* 15 S. C. 10), or "shall indemnify and save harmless," are necessary to express a condition subsequent. *Michigan State Bank v. Hastings*, 1 Doug. 225.

A deed, to a town, of land "for a burying place forever" does not convey an estate upon a condition subsequent. *Rawson v. Uxbridge School Dist.* No. 5, *supra*.

A conditional estate must be clearly and unequivocally indicated by express terms in the grant. *Ibid*.

So on a condition that grantee shall forever maintain a line fence, a neglect to do so after death of the grantee will not forfeit the land. *Emerson v. Simpson*, 43 N. H. 475.

A deed conveying land upon condition that no building or erection shall ever be made on the land except dwelling-houses, and outhouses for the same, shows merely by description what rights
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passed to grantee and what were retained by grantor, and that subsequent purchasers could not erect the prohibited buildings. *Fuller v. Arms*, 45 Vt. 400.

Where no time is fixed within which the conditions were to be performed, the law will allow a reasonable time. *Ellis v. Kyger*, 7 West. Rep. 749, 90 Mo. 600.

A party insisting on a forfeiture of an estate for breach of condition must bring himself clearly within its terms. *Foris v. Renshaw*, 49 Ill. 425.

Establishment of county seat.

A statute providing that the county seat of a county should be permanently established at a certain place, upon the fulfillment of certain prescribed terms and conditions, is not a contract, but the public law relating to a public subject, with respect to which a prior Legislature has no power to bind a subsequent one. *Newton v. Mahoning County Comrs.* 100 U. S. 548, 25 L. ed. 710.

Where the county erects a court-house on land conveyed to it, the removal of the county seat does not divest the county of its title, nor evidence its intent to abandon the property or to use it for other purposes. *Poltevent v. Hancock County Suprs.* 58 Miss. 810.

guage used indicates a design on the part of the grantor to vest the legal title in the commissioners and their successors as individuals, to act as trustees, rather than as the agents of the county, or to impose upon them any duties or obligations other than those required of them as public officers. The statute in force at that time did not, as does the present one, designate the corporate name and style to be assumed by boards of commissioners (Act approved December 17, 1816), and the form used in this deed was at that time commonly used in conveying property to corporations and quasi corporations in this State. It is significant, also, that the entry made upon the county records by the board of commissioners in accepting the deed was for a deed "to and for the use of Wayne County." See also *Corder v. Payette County Comrs.* 16 Ohio St. 353; *Hayward v. Davidson*, 41 Ind. 212.

Another position taken by the appellants is stated in their brief as follows: "But this is not all we rely upon. The total failure of the consideration of the Sumner deed itself worked a loss of the county's claim, and gave to the Sumner heirs the right to assert their title to the square, independent of the condition subsequent." No authority is cited in support of this position, and we know of none that will sustain it. The duration or stability of the title to land does not ordinarily depend upon the certainty or stability of the consideration paid for it. But, independently of the legal question involved, the finding informs us that the county-seat remained at Centerville from the 1st day of August, 1817, until the year 1873, long after the grantor had removed from the county. We may reasonably suppose that, if the location of the county-seat at Centerville was of advantage to the grantor, he must have received some of the benefits during the half century it remained there, and that consequently there was not an entire failure of consideration. *Hunt v. Beeson*, 18 Ind. 380; *Jeffersonville M. & I. E. Co. v. Barbours*, 89 Ind. 375.

The remaining and principal contention of the appellants is that the conveyance of the land to or for the use of the county was conditioned in the seat of justice of Wayne County remaining permanently at Centerville, and that its removal to Richmond caused the land to revert to the appellants as the heirs of the grantor. The rule of strict construction applicable to conditions subsequent, usually expressed in the words, "conditions subsequent are not favored in law, and are construed strictly," is elementary, and does not require the citation of authorities. A condition subsequent that will defeat an estate created by a deed must be fairly expressed in the deed itself. The words used must create the condition. The court will not supply it, if the parties fail to express it. The rule is stated in 2 Devlin on Deeds, as follows: "Sec. 976. Parol condition. Aside from the question of a reformation of a deed in cases where clauses have been omitted by mistake, it is certain that, in an action to recover property conveyed by deed on the ground that a condition on

which it was made has not been performed, the deed must speak for itself, and a condition cannot be ingrafted upon a deed absolute in form by parol evidence. The ingrafting of a contemporaneous condition in a deed will, in a proper action, be allowed only on clear evidence of fraud, accident, or mistake." A condition may be created by any words which show clear, unmistakable intention on the part of a grantor to create an estate on condition, regard being had to the whole of the deed in which they occur. The word "condition" need not be used, but words importing a condition must be used or plainly inferred from the instrument and the existing facts. *Tiedeman*, Real Prop. § 272; *Labree v. Carleton*, 53 Me. 213; *Rawson v. Uxbridge School Dist. No. 5*, 7 Allen, 125; *Packard v. Ames*, 16 Gray, 327; *Episcopal City Mission v. Appleton*, 117 Mass. 327; *Paschall v. Passmore*, 15 Pa. 307; *Wier v. Simmons*, 55 Wis. 642; *Raley v. County of Umatilla*, 15 Or. 172; 2 Washb. Real Prop. 5th ed. 2. It appears from the finding, *supra*, that in the year 1816 the General Assembly passed an Act fixing the seat of justice for Wayne County permanently at Centerville from and after the 1st day of August, 1817, and that pursuant to the Act, on that day, it was removed to Centerville; that afterwards, on the 18th day of May, 1819, the lands in controversy were conveyed by a general warranty deed to the commissioners "for and in consideration of the seat of justice having been permanently established in the Town of Centerville, within and for said county, . . . for the use of said County of Wayne." No other words from which any condition, limitation, or right of re-entry by the grantor or his heirs can be inferred are expressed in the conveyance, or in the subsequent entry made by the board of commissioners accepting the deed. The cases cited by appellants' attorneys, and principally relied upon to show that this deed was conditioned on the seat of justice remaining at Centerville, will be examined in their order. The first one is *Stanley v. Colt*, 72 U. S. 5 Wall. 119-163, 18 L. ed. 502, 508. This was an action to recover, for breach of condition, a tract of land devised by the plaintiff's ancestor to an ecclesiastical society in which the property was devised to the society, "to be and remain to the use and benefit of said Second or South Society, and their successors, forever." Then comes the condition or limitation upon the devise: "Provided, that said real estate be not ever hereafter sold or disposed of, but the same be leased or let," etc. The court held that there was not a condition subsequent, using these words: "Our conclusion is that the construction urged by the plaintiff of the will, importing a condition, a breach of which forfeits the devise, is not well founded." The next case cited is *Hunt v. Beeson*, 18 Ind. 380. In this case a lot was donated by the proprietor of a town for a "tan-yard; and was used as such from 1834 to 1858. The court held that it was donated upon a condition subsequent, the condition evidently being the erection of a tan-yard on the lot, and not the perpetual maintenance of the same; for the court held that the con-

dition was fully performed, and that the property did not revert upon its subsequent sale and appropriation to other purposes. The case of *Indianapolis P. & C. R. Co. v. Hood*, 66 Ind. 580, was a conveyance of some lots to the company "for a site for the depot of said railroad at Peru, . . . to have and hold the premises . . . for the purposes aforesaid." The statement of the use and condition was much stronger than is contained in the deed under consideration, and it does not support the position of the appellants. We do not feel called upon to extend the rule in favor of conditions subsequent beyond that indicated in this case. The case of *Scott v. Stipe*, 12 Ind. 74, is not well reported, but as explained in *Scanlin v. Garvin*, 46 Ind. 275, does not sustain the appellants' contention; for it is said that the grant was upon condition that a church should be erected on the lot, and that it should "forever thereafter be used as a house of worship." Also see *Cook v. Leggett*, 88 Ind. 211. The case of *Warren v. Lyon City*, 22 Iowa, 351, was a suit by the grantor, who dedicated land for a "public square," to enjoin the city from leasing or selling the same. The case is not in point. In *Henderson v. Hunter*, 59 Pa. 385, the condition expressed in the grant to a church was, "so long as they use it for that purpose, and no longer, and then to return back to the original owner."

We are unable to find that any of the cases cited by appellants sustained their theory of this case. In *Heaston v. Randolph County Comrs.*, 20 Ind. 383, the conveyance was to "the board of trustees of the county seminary of Randolph County, and their successors in office, forever, to have and to hold the premises aforesaid, with all the appurtenances, to the only proper use, benefit, and behoof of said 'board of trustees, for the use of said seminary forever.'" It was claimed that this created a condition subsequent, and that, the premises having ceased to be used as a seminary, the grantor was to receive the land. The court held that the corporation received an unconditional title, which was not defeated by the alleged failure to use the premises for the purposes of a seminary, or by using them for other purposes, that there was nothing in the deed that imports a condition; and that if the grantor intended that the property conveyed should only be used for a seminary edifice, or, in case it should be used otherwise, that the estate should be forfeited and revert the condition should have been expressed or fairly implied. In *Seebold v. Shiller*, 84 Pa. 133, land upon which a court-house and jail had been erected was conveyed to the commissioners by name, and their successors in office, "in trust for the use of the said county, in fee simple." The county was subsequently divided, the seat of justice removed, and trustees appointed to sell the lots. Held, that there was no reverter. In *Adams v. County of Logan*, 11 Ill. 386, a landowner proposed that, if the county-seat should be located at Pottsville, he would give land for a court-house and other county purposes. The proposition was accepted, and the General Assembly passed 18 L. R. A.

"An Act to Locate Permanently the Seat of Justice of Logan County," and it was located at Pottsville. Subsequently the county-seat was removed. It was held that the grantor was without remedy. The suit was to recover the money rather than land, but it was held that the deed was unconditional. In *Harris v. Shaw*, 13 Ill. 456, land was conveyed to commissioners, by name, and their successors in office, for the use of a county forever, in consideration of one dollar, and that the county-seat had been located on the premises. The county-seat was afterwards removed, and the grantor sued to recover the land. It was held that there was no condition, and that he could not recover. The citation of authorities to this effect might be greatly extended, but we will refer to the following: *Raley v. County of Umatilla*, 15 Or. 172; *Portland v. Tervoilliger*, 16 Or. 465; *Coffin v. Portland*, 16 Or. 77; *Columbia First M. E. Church v. Old Columbia Pub. G. Co.* 103 Pa. 608; *Paschall v. Passmore*, 15 Pa. 807; *Rawson v. Uzbridge School Dist. No. 5*, 7 Allen, 125; *Packard v. Ames*, 16 Gray, 327; *Crane v. Hyde Park*, 135 Mass. 147; *Solier v. Trinity Church*, 109 Mass. 1; *Board of Suprs. v. Patterson*, 56 Ill. 111; *Lave v. Hyde*, 39 Wis. 347; *Wier v. Simmons*, 55 Wis. 637; *Brown v. Caldwell*, 23 W. Va. 187; *Southard v. Central R. Co.* 26 N. J. L. 14; *Barrie v. Smith*, 47 Mich. 181; *Gage v. School Dist. No. 7*, 64 N. H. 232, 4 New Eng. Rep. 284; *Page v. Palmer*, 48 N. H. 387; *Morrill v. Wabash, St. L. & P. R. Co.* 96 Mo. 174; *Thornton v. Trammell*, 39 Ga. 202.

It is questionable whether the appellants would be entitled to a recovery if the deed contained a condition subsequent. It appears from the finding that the county-seat remained at Centerville from 1817 to 1878, a period of fifty-six years, and that this suit was brought more than seventy years after the location of the seat of justice at Centerville. It may fairly be presumed that the grantor at the time he executed the deed to the commissioners owned other property, the value of which he expected would be enhanced by the location of the county-seat, or that he had other interests to be subserved thereby. If so, we may also infer that he received during his lifetime, and while a resident of Wayne County, the substantial benefit of his donation. In *Hunt v. Beeson*, 18 Ind. 380, it was held that the maintenance of a tan-yard for the period of twenty-four years was a substantial compliance with the condition contained in the conveyance. In *Mead v. Ballard*, 74 U. S. 7 Wall. 290, 19 L. ed. 190, a conveyance, upon condition that an institute "shall be permanently located upon said lands," was complied with by the location of the institution thereon August 9, 1848, and its remaining there until 1857. In *Jeffersonville M. & I. R. Co. v. Barbour*, 89 Ind. 375, the use for thirty-three years of lands granted "expressly for the use and purpose of depot grounds," and providing that if not used for that purpose it should revert to the grantors, was held to be a performance of the condition, so as to prevent a forfeiture. We find no error in the record.

Judgment affirmed.

STATE of Indiana, *ex rel.* John WORRELL,
Appt.,
v.

Bruce CARR, State Auditor.

(....Ind....)

1. Payment of salary with full knowledge of the facts, to one who had previously been acting as a *de facto* officer, and who attempted to retain the office after the qualification of the officer *de jure*, is no defense to a claim for the salary by the officer *de jure*, at least where the latter has also been performing the duties of the office.

2. A provision in an Appropriation Act that the salary for a certain office shall be paid to a certain person named, and none other, and a statute providing a penalty for paying it to any other person than the one named, are absolutely void as attempts to exercise judicial powers by declaring who is the legal officer entitled to the salary.

(June 18, 1891.)

APPEAL by relator from a judgment of the Circuit Court for Marion County in favor of defendant in a proceeding brought to compel defendant to draw a warrant on the state treasurer in favor of relator for the amount of the salary which relator alleged he had earned as chief of the bureau of statistics. *Reversed.*

The facts are stated in the opinion.

Olds, J., delivered the opinion of the court:

The relator filed his petition in this case, asking that a writ of mandate issue against the appellee, the Auditor of State, compelling him to draw his warrant on the treasurer of state in favor of the relator for the sum of \$2,500, the amount alleged to be due the relator as his salary as chief of the bureau of Indiana statistics. Issues were joined on the complaint and a trial had. There were demurrers filed to the paragraphs of answer

and overruled and exceptions reserved. Errors are assigned on these rulings. On proper request, there was a special finding of facts and conclusions of law stated by the court. The conclusions of law were excepted to by the appellant and a proper assignment of error.

The questions presented and discussed relate to the right of the relator to the salary alleged to be due him and his right to have a writ of mandate issue compelling the Auditor of State, the appellee, to draw his warrant on the treasurer of state in favor of the relator for the sum due him. No question is presented and discussed as to the regularity of the proceedings or as to the proper parties being before the court.

The facts found by the court show that, on the 31st day of May, 1889, the relator, John Worrell was appointed and commissioned chief of the Indiana bureau of statistics by Alvin P. Hovey, governor of the State of Indiana; that at the time of his appointment, he was a resident voter of the State, of legal age, and in every way eligible to hold the office, and on the day of his appointment he took the oath of office, which was indorsed on the back of his commission, and filed a copy thereof in the office of the secretary of state, and in every way qualified as such officer; and on the same day appellee was notified of the relator's appointment and qualification; that after the relator's appointment he applied for office room in the state capitol, to be occupied by him as the chief of the Indiana bureau of statistics, and was assigned a room for that purpose by the Auditor of State, which room was independent and removed from a room occupied by William A. Peelle, Jr., and said relator Worrell has been doing work and performing the duties as the chief of the bureau of statistics independent of work performed by said Peelle from May 31, 1889, to November 19, 1890.

NOTE.—Office and officer.

An office is a public employment conferred by the government. It embraces the ideas of tenure, duration, emolument, and duties. *Foltz v. Kerlin*, 2 West. Rep. 671, 106 Ind. 221; United States v. Hartwell, 73 U.S. 6 Wall. 385, 18 L. ed. 880.

Everyone appointed to perform a public duty, and who receives compensation, is a public officer. *Foltz v. Kerlin*, *supra*; *Henly v. Lyme*, 5 Bing. 91, citing *Case of Wood*, 2 Cow. 30, *note*; *People v. Brooklyn*, 77 N. Y. 508.

An office is the right to exercise a public function or employment, and to take the fees and emoluments belonging to it. *Hamlin v. Kassafier*, 13 Or. 466.

A public officer is bound to perform the duties of his office for the compensation fixed by law. *Bartch v. Cutler* (Utah) July 12, 1890, citing *Evans v. Treanton*, 24 N. J. L. 764; *Territory v. Carson*, 7 Mont. 417; *Jones v. Grant County Supra*, 14 Wis. 34; *Fawcett v. Woodbury Co.* 55 Iowa, 154; 1 Dillon. Mun. Corp. 315.

An office is void as to the officer *de facto* himself, though valid as to strangers. *State v. Dierberger*, 7 West. Rep. 185, 60 Mo. 369.

Acts of a *de facto* officer are void as to himself, unless he is also officer *de jure*, but are good if for the benefit of strangers or the public. *Andrews v. Portland*, 4 New Eng. Rep. 780, 70 Me. 494; *Adam v. 18 L. R. A.*

Mengel (Pa.) 7 Cent. Rep. 185; *Green v. Burke*, 23 Wend. 420; *People v. Nostrand*, 46 N. Y. 375; *People v. Hopson*, 1 Denio, 574. See *Pooler v. Reed*, 73 Me. 129; *State v. Carroll*, 38 Conn. 449; *McVeany v. New York*, 80 N. Y. 192; *Dolan v. New York*, 66 N. Y. 274; *Nichols v. MacLean*, 2 Cent. Rep. 500, 101 N. Y. 526; *McCue v. Wapello County*, 56 Iowa, 668; *People v. Potter*, 63 Cal. 127.

Officers *de facto* and *de jure* distinguished.

A person in possession of an office may be an officer *de facto*, while some other person may be the officer *de jure*, though there cannot be an officer *de jure* and an officer *de facto* both in possession at the same time. *Carll v. Rhener*, 27 Minn. 266; *Steinback v. State*, 38 Ind. 489; *Cronin v. Gundy*, 16 Hun, 524. See *Brown v. Lunt*, 37 Me. 423; *State v. Brown*, 12 Minn. 538; *Wilcox v. Smith*, 5 Wend. 231; *People v. Peabody*, 6 Abb. Fr. 228; *People v. Cook*, 8 N. Y. 67; *Plymouth v. Painter*, 17 Conn. 585; *Re Boyle*, 9 Wis. 264; *Morgan v. Quackenbush*, 22 Barb. 72.

An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. *Rex v. Bedford Level*, 6 East, 356.

He is one who exercises the duties of an officer under color of an appointment or election to that office. *Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574.

At the time relator Worrell was appointed, commissioned and qualified as chief of the Indiana bureau of statistics, said office was held and occupied, and the duties thereof were being performed, by one William A. Peelle, Jr., a person who was eligible to fill the office, who held said office under and by virtue of an election thereto by the fifty-third, fifty-fourth and fifty-sixth General Assembly of the State of Indiana, and was commissioned under said first two elections by Governors Porter and Gray, which commissions set out the elections and certified thereto; that Governor Hovey refused to issue to said Peelle a commission under the election of said Peelle to said office, by the fifty-sixth General Assembly; that Peelle claimed and had no other title to said office except as herein above found, said office being vacant except as so occupied and claimed by Peelle and Worrell.

The findings further show that Worrell demanded of Peelle possession of the office immediately after his appointment and qualification, and Peelle refused to surrender it, and that Worrell immediately commenced quo warranto proceedings against Peelle for the possession of the office, which were twice appealed to the supreme court and reversed, and were not disposed of until after the state election in 1890, at which election Peelle was duly elected to said office, and was commissioned by the governor and qualified as such officer; and on Peelle's motion, supported by proof of his election, the quo warranto proceedings were dismissed; that during all of the time Peelle continued to occupy the apartments as he had previous to Worrell's appointment, and retained the archives of the office, collected information and made records the same as he had done prior to Worrell's appointment; that the salary of the chief of the bureau of statistics is \$1,800 a year, and there is money in the treasury

of the State of Indiana subject to be paid out on warrants of the Auditor of State, for the payment of the salary of said chief; that relator has, prior to the commencement of this suit, demanded of the appellee that he draw a warrant in relator's favor for his salary, and since November 4, 1890, he has made demand upon the appellee that he draw such warrant for the sum of \$2,550, said sum to be paid to him as salary from May 31, 1889, to November 1, 1890, and presented itemized and qualified bills therefor as required by law, and appellee has refused to draw such warrant; that on October 31, 1889, appellee drew his warrant on the treasurer of state in favor of William A. Peelle, Jr., demand having been made by said Peelle for the sum of \$750 as salary, or by way of compensation as chief of the Indiana bureau of statistics from May 31, 1889, to November 1, 1889; otherwise said appellee has not drawn his warrant on the treasurer of state in favor of any person for the salary of said office.

There is a further finding in regard to the provisions of the laws appropriating the amount for the salary of such office, and a provision that it should be paid to Peelle as such chief. On the foregoing facts, the court stated as a conclusion of law that relator was not entitled to a writ of mandate as prayed in his petition.

The Act of the Legislature approved March 29, 1879, creating a state bureau of statistics, made it the duty of the bureau to collect, systematize, tabulate and present in biennial reports statistical information and details relating to agricultural, manufacturing, mining, commerce, education, labor, social and sanitary condition, vital statistics, marriages and deaths; and the permanent property of the productive industry of the people of the State. The first section of this Act provides that the department is established for the collection and dissemination

An officer *de facto* is not entitled to the salary attached to the office. *Andrews v. Portland*, 4 New Eng. Rep. 780, 79 Me. 484.

One claiming a salary must prove his legal title to the office; and an officer *de facto*, and not *de jure*, cannot maintain an action for salary. *Romero v. United States*, 5 L. R. A. 69, 24 Ct. Cl. 331.

Payment of salary to a *de facto* officer without authority is no defense against a claim, for payment by the officer *de jure*. *Williams v. Clayton* (Utah) March 8, 1889. See *Andrews v. Portland*, 4 New Eng. Rep. 780, 79 Me. 484.

If a *de facto* officer has abandoned the office, the rightful incumbent may sue for salary. *Nichols v. MacLean*, 2 Cent. Rep. 500, 101 N. Y. 526.

The rule against collaterally impeaching the title of an officer *de facto* does not apply when the officer himself seeks to recover compensation. *Phelon v. Granville*, 1 New Eng. Rep. 578, 140 Mass. 386, citing *Fowler v. Bebee*, 9 Mass. 231; *Buckman v. Ruggles*, 15 Mass. 180. See notes to *State v. Peelle* (Ind.) 8 L. R. A. 228; *State v. Lewis* (N. C.) 11 L. R. A. 105.

Officer de jure entitled to the salary.

Where an officer is in possession of an office *de facto*, the officer *de jure* is the one who has the lawful right to the office; and who has either been ousted or has never taken possession. *Hamlin v. Kassafer*, 15 Or. 458.

The city cannot deduct money earned by a marshal during the time he was prevented from performing his duties. *Andrews v. Portland*, 4 New Eng. Rep. 780, 79 Me. 484.

The city marshal *de jure* of Portland, Maine, being willing to perform his duties, but prevented by the city authorities, is entitled to the salary while the office is filled by an officer *de facto*. *Ibid*.

See *Dolan v. New York*, 68 N. Y. 274; *McVeany v. New York*, 80 N. Y. 185; *Fitzsimmons v. Brooklyn*, 3 Cent. Rep. 690, 102 N. Y. 536.

A *de jure* officer can recover from an intruder damages, generally measured by the salary received by the intruder. *Nichols v. MacLean*, 2 Cent. Rep. 500, 101 N. Y. 526; *People v. Nolan*, 2 Cent. Rep. 459, 101 N. Y. 539, citing *Dolan v. New York*, 68 N. Y. 274; *Lawlor v. Alton*, 8 Ir. C. L. Rep. 160; *Glascok v. Lyons*, 20 Ind. 1; *Douglass v. State*, 31 Ind. 429; *People v. Miller*, 24 Mich. 458; *People v. Smyth*, 28 Cal. 21; *Sigur v. Crenshaw*, 10 La. Ann. 297; *United States v. Addison*, 73 U. S. 6 Wall. 291, 18 L. ed. 919.

When appropriation of state fund unnecessary.

If the salary of a public officer is fixed and the times of payment prescribed by law, no specific annual appropriation is necessary. *Reynolds v. Taylor*, 43 Ala. 420; *Nichols v. Comptroller*, 4 Stew. & P. 157; *Thomas v. Owens*, 4 Md. 189; *Green v. Purnell*, 13 Md. 328; *State v. Hickman* (Mont.) Feb. 15, 1890; *State v. Weston*, 4 Neb. 215.

of information hereafter provided, by biennial printed reports to the governor and Legislature of the State, and it provides for the appointment of the chief by the governor. Acts 1879, p. 193.

Some amendments have been made to this Act by an Act passed in 1888. Elliott's Supp. § 1852. An attempt was made to change the method of selecting the chief and provide for his election by the General Assembly; and by an Act in 1889 (Elliott's Supplement, §§ 1854 to 1862, inclusive), some additional duties were added, and it was made the duty of the chief to transmit one copy of the biennial report to each county and state officer. The duty of the bureau is to gather such information as is required by the law, systematize it and publish it in proper printed reports, and to disseminate such information by printed reports of all such information collected and distribute them to the Governor of the State, the General Assembly and to each state and county officer of the State. There is no law providing that any public records shall be kept of such information save the printed reports. The benefit to be derived on account of such a bureau is through the publication and distribution of the biennial reports. It is provided that head-quarters for the bureau shall be furnished by the State.

The findings of fact show that the relator Worrell had been assigned and provided office rooms by the Auditor of State in the state house. There was nothing to prevent him from discharging the duties of the office, collecting and systematizing the information contemplated by the law and publishing the same in printed reports, and distributing them with the same efficiency and to the same extent as if Peelle had surrendered the apartments occupied by him previous to that time, and the findings of fact show that Worrell did discharge the duties of the office in compliance with the law. It is true, there is a finding that Peelle was in possession of the archives and records of the office. What the archives and records were that he was in possession of the findings do not show. The law makes no provision whereby such officer is required to keep any public records or anything else to be kept in connection with, and belonging to the office, there to remain as the property of the State, which the outgoing officer would be required to turn over to his successor. The findings of fact show that Worrell was eligible to the office; that he was duly appointed, commissioned and qualified as such officer; that the appellee, the Auditor of the State, had notice at the time of his appointment and qualification; that he made application to the Auditor of State for apartments and the Auditor of State assigned him apartments for head-quarters of the bureau; and that he occupied them and discharged the duties of the office. It is further found that Peelle retained the apartments formerly occupied by him, and continued to act, or assumed to act, as chief, and collect information the same as he had done before; but the findings show that he had no title to such office except through a pretended election by

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the General Assembly. In the adjudication in the quo warranto proceedings, the main question in this case was settled by the decisions of this court on appeal. *State v. Peelle*, 121 Ind. 495, and *State v. Peelle*, 124 Ind. 515, 8 L. R. A. 228.

By these decisions between these same parties, the law was settled that the statute authorizing the election of a chief of the bureau of statistics by the General Assembly was unconstitutional and void, and that the election and commission of Peelle gave to him no title to the office, and that the governor was authorized to appoint to fill the vacancy until the office was filled by an election. Under these decisions, the facts found in this case show that Worrell was, during the time from his appointment and qualification up to the date of the election and qualification of Peelle as his successor, the *de jure* officer; not only the *de jure* officer, but in possession of and discharging the duties of the office. When he was appointed by the governor and qualified, he became the *de jure* officer; and when he was assigned quarters by the Auditor of State in the state capitol to occupy as head quarters for the bureau and discharge the duties of the office, he was equipped in full to discharge all the duties incident to the office, and he did discharge the duties from thenceforward until his successor was elected and qualified. Being a *de jure* officer and in possession of and discharging the duties of the office, under all authorities, he is entitled to the salary. Indeed, the later and better reasoned cases hold that the salary is an incident to the office, and belongs by law to the person holding the legal title to the office, and that he can sue and recover it regardless of the fact, whether he is occupying and discharging the duties of the office or not, if he is willing to do so; but is kept out by another, who is claiming to act as an officer *de facto*. This would seem to be the true theory; though it is not necessary to go to that extent in this case, as, under the facts found, Worrell was not only the *de jure* officer, but was in fact in possession and discharging the duties of the office during the time for which he claims salary. It is true, the State and the public are interested in having a public office filled; and when one holds an office though without title, and acts as an officer *de facto*, and keeps out the *de jure* officer, and while so in possession discharges the duties of the office, the public good demands that the acts of such *de facto* officer, in so far as they affect third parties or the public, be declared valid; but there is no valid reason for declaring that, as between the *de jure* and *de facto* officer, the *de facto* officer is entitled to the salary; or that he, by excluding the *de jure* officer, can prevent him from recovering the salary; or for holding that when one charged with the duty of paying the salary when, with knowledge of all the facts, he pays to the *de facto* officer, he shall be released from paying to the *de jure* officer, the disbursing officer cannot be sued or compelled to pay a *de facto* officer. When the *de facto* officer sues for his salary he brings in question the title to the office,

and he cannot recover without establishing his legal right and title to the office. To hold that a payment by a distributing officer to a *de facto* officer exonerates him from liability to the *de jure* officer for the salary, but stimulates irresponsible persons to cling to an office without even a shadow of title, and exclude the lawful occupant with a view of recovering the salary of the lawful occupant to the office; but under the facts in this case, we are not required to go to the extent of holding that the *de jure* officer out of possession can recover his salary notwithstanding another is occupying and discharging the duties of the office as an officer *de facto*; for in this case the facts found show Worrell to have been an officer *de jure* in possession of the apartments assigned to him by the proper officer, the Auditor of State, and discharging the duties of the office so that the headquarters of the bureau of statistics of the State of Indiana were, both in law and in fact, in the apartment in the capitol building set apart for occupancy by Worrell, the legally appointed, commissioned and qualified chief of the bureau of statistics; and, as it seems to us, it would be a travesty on justice to hold that Worrell, under such a state of facts, could be deprived from recovering his salary, or that the Auditor of State could refuse to draw a warrant, or the treasurer of state refuse to pay a warrant for his salary; notwithstanding Worrell is the lawful officer in possession, but on account of Peelle continuing to occupy rooms theretofore occupied by him, and to gather statistics; after it was held by the Supreme Court of Indiana that the law under which Peelle claims to have been elected is unconstitutional and void, and the commissions issued in pursuance of such elections gave him no title to the office. Indeed, the facts found show that Peelle terminated the quo warranto proceedings by abandoning any claim to the office by virtue of his pretended election by the General Assembly, and set up his title to the office by virtue of his election by the people and his commission and qualification thereunder; dismissing the case upon the grounds that, after his election and qualification he was the legal chief of statistics, and no judgment of ouster could be rendered against him.

The appellee had full knowledge of Worrell's appointment and qualification; he assigned him apartments to occupy as such officer; he knew that he was in possession of the office, as he had assigned him the apartments in the state capitol which he occupied.

Worrell is entitled to recover the full amount of his salary, and to have a warrant drawn on the treasury by the Auditor of State for the amount, unless the provision of the law naming Peelle as the chief to whom the salary is to be paid prohibits the payment to the legal officer; and this we will now consider.

As we have seen, Peelle was not the legal officer, and Worrell was the legal officer in possession of the office, discharging the duties of the office. The proposition contended for is that, notwithstanding Worrell was the legally appointed and qualified officer discharging the duties of the office, for which

a salary is fixed, and to which the legally qualified officer is entitled as an incident to the office, that the Legislature can make an appropriation to pay the salary which Worrell has earned, and to which he is entitled, and without any legal authority to do so, name Peelle as such officer, chief of the bureau of statistics, and appropriate an amount to pay the salary of the chief and provide it should be paid to Peelle and none other; and such a clause in a law would be valid, providing for the payment to Peelle the salary earned by and due to Worrell. The statement of the proposition carries with it the fallacy of it. That such a provision is invalid seems too clear to admit of discussion. It is directly appropriating a salary due to one and which is the property of one for the benefit of another.

By an Act of the General Assembly approved March 11, 1889, there is appropriated "for all of the expenses of the bureau of statistics authorized by law, including the salary of the chief of said bureau, of all assistants, all traveling and office expenses, including all blanks, stationery and postage to be paid out on the itemized and qualified bills of the chief of the bureau of statistics \$11,000; for the year ending October 31, 1889, the sum of \$4,000." Stopping with this provision of the law, no complications could arise. It expressly provides that the several sums shall be paid out "on the itemized and qualified bills of the chief;" but there follows, in a separate clause of the Act, a provision in the law providing that "the several sums so appropriated by this Act for said bureau of statistics shall be paid to William A. Peelle, Jr., chief of said bureau, elected by this General Assembly, or to his successor in office appointed pursuant to an Act of the General Assembly in case of the death, removal from the State or resignation of said William A. Peelle, Jr., and to no other person or persons."

It is evident that this provision was inserted in the law, not with a view of paying the salary to Peelle regardless of the fact as to whether he was the legal chief of the bureau or not, for the appropriation is made with a provision that it shall be paid out on the itemized account of the chief. The clause relating to Peelle evidently was inserted upon the theory that he was the legal officer. Certainly, no legislative body would so far forget their duties and obligations to the State as to endeavor to elect an officer without authority of law, and endeavor to forestall any effort on behalf of the legally elected officer to recover the office or discharge its duties by placing the appropriation in such condition as that the salary belonging to the legal officer, and incidental expenses of the office could not be recovered by the legally elected or appointed and qualified officer. To hold that the General Assembly intended to provide that the person chosen by the General Assembly shall have the office, right or wrong, and shall receive the salary, or, at least, that no other person, though legally entitled thereto, shall receive the salary or draw the sum so appropriated for running such office and department of

the government would be attributing improper motives to its members. Courts should not impugn the motives of legislators, and it would be impugning their motives to hold that they intended by the provisions of this law to declare the person the General Assembly elected to this office should have the salary and draw the amount appropriated, though the election is illegal and he may have no right to the salary or the money, notwithstanding another has been lawfully elected or appointed and qualified and become the lawful chief of said bureau. Certainly such was not the intention of the Legislature, and the act would be absolutely void if it was. The legislative department has the right, and it is its duty, to make appropriations for the payment of salaries and the expense of running the various departments of the state government. Whether salaries might not in some instances be recovered without an appropriation it is not necessary to decide; but it is certain that there is no authority to go through the formality of electing an officer to an office then in existence, though the election be void, and appropriating funds to pay the salary of the legal officer, and providing that such sum shall be paid to the officer having no title to the office. To enunciate such a doctrine would be to hold that the Legislature might convene and choose persons to fill all of the state offices, and appropriate money to pay the salary of the legal officer, and then declare that in such instance it shall be paid to the person so chosen by the Legislature to fill such office, and to none other.

The Constitution provides that no person charged with official duties under one department of State shall exercise any of the functions of another. Art. 3, § 1.

The part of the law making an appropriation to pay the salary of the chief and to pay the expenses of the bureau is the exercise of a legislative function; but that portion which declares that the said sum shall be paid to Peelle is an attempt to exercise judicial powers by declaring who is the legal chief of the bureau of statistics and entitled to the salary, and such provision is absolutely void. There is a like provision in the law relating to other officers in charge of state institutions. Sec. 4 of the Act—Elliott's Supp. § 2239—provides that "if the Auditor of State shall draw his warrant for any of the sums herein named when the person to whom the same are payable are designated or named herein; or if the treasurer of state shall pay any of said sums, or any part thereof except to such persons herein named, he shall be guilty of a felony," etc.

What we have said in regard to the provision of the law relating to the naming of Peelle as the person to whom the amount shall be paid is equally applicable to this. It is, in effect, in the first instance, an attempted adjudication as to who the legal officers are, and then an effort to enforce the judgment by providing a penalty for disobeying it. The legal officers are entitled to their salaries and money appropriated for conducting a department of state or a public institution should be drawn by the officer

legally entitled to receive it; and not by any certain person regardless of whether he has been legally elected or is in possession of the office or not; and it is not within the province of the Legislature to declare in an appropriation bill who are or who are not the legally elected officers of any department. They probably may provide against the paying out of the money to any person other than the legally qualified and acting officer or officers, and subject the officer to a penalty for paying the same to any other than such officer or officers; but it cannot adjudicate as to who are the legal officers, and provide that payment shall be made to them and none other.

The conclusion we have reached is well supported by the most recent and well-reasoned cases; although there is still some irreconcilable conflict in the authorities, particularly in the earlier cases.

In *Andrews v. Portland*, 79 Me. 484, 10 Am. St. Rep. 280, it was held that a *de jure* officer might recover his full salary from the city notwithstanding another had been in possession of the office and kept the *de jure* officer out, and the salary had been paid to the person acting as an officer *de facto*; the city having notice that the officer *de jure* claimed he was illegally deprived of the office, that the city was not entitled to credit for what the *de facto* officer earned by his personal services. In that case the court says: "A *de facto* officer has no legal right to the emoluments of the office, the duties of which he performed under color of an appointment, but without legal title. He cannot maintain an action for the salary. His action puts in issue his legal title to the office and he cannot recover by showing merely that he was an officer *de facto*. In *Nichols v. MacLean*, 101 N. Y. 526, 2 Cent. Rep. 500, 54 Am. Rep. 780, the court says: 'It is abundantly settled by authority that an officer *de facto* can, as a general rule, assert no right of property, and that his acts are void as to himself, unless he is also an officer *de jure*.' In *Harris v. Jays*, Cro. Eliz. 699, the doctrine is tersely stated as follows: 'The act of an officer *de facto* when it is for his own benefit is void, because he shall not take advantage of his own want of title which he must be cognizant of; but when it is for the benefit of strangers or the public, who are presumed to be ignorant of such defect of title, it is good.'

In a note by the Hon. A. C. Freeman to this case, in the American State Reports, in speaking of the cases holding that the payment to the *de facto* officer is a good defense to an action by the *de jure* officer, he says: "These decisions have been placed partly upon the ground that the officer *de jure* had no property rights in the office, and partly upon the ground that this right to the salary or emoluments of his office was not dependent upon the office, but upon the actual performance of his services as a public official; and further, that while there was an officer *de facto* in actual possession of the office, the disbursing officers were not entitled to consider the question of who ought to be in such possession; nor to question the title in any other way than by a proceeding in quo

warranto. It is believed that none of these grounds are well taken; and most courts which yet maintain the general rule have substantially admitted in subsequent cases that the grounds for it did not in fact exist. In the first place, it is now well settled that an officer *de facto* is not entitled to the salary of the office, and that although he may faithfully discharge its duties, he cannot maintain any action against the city or county for the compensation to which he would be entitled if he were an officer *de jure*.

In the next place, if he has in fact received the emoluments of the office, he has no right whatever to retain them, and he may be compelled to account therefor to the officer *de jure* in any appropriate form of action.

If a judgment of ouster has been entered against an officer *de facto*, and salary is thereafter paid to him, the officer *de jure* may maintain an action therefor against the city or county notwithstanding such payment.

If no part of the salary has been paid during the incumbency of an officer *de facto*, the officer *de jure*, although he performed none of the duties of the office, may maintain an action against the city and county for the salary and emoluments thereof." Mr. Freeman concludes by saying: "Hence the principal case and cases in California and Tennessee maintain the doctrine against the weight of authority, but in harmony, we think, with judicial principle, that the payment of the salary to an officer *de facto* in no way impairs the right of the officer *de jure* to recover such salary from the city, county or other public body charged with the duty of making its payment."

Numerous authorities are cited in support of the doctrine as stated by Mr. Freeman, and we think it lays down the proper rule. See also *People v. Smyth*, 28 Cal. 21; *Carroll v. Siebenthaler*, 37 Cal. 193; *People v. Oulton*, 28 Cal. 44; *Memphis v. Woodward*, 12 Heisk. 499; *Matthews v. Copiah County*, *Supra*. 53 Miss. 715; *McCue v. Wapello County*, 56 Iowa, 698; *Glasecock v. Lyons*, 20 Ind. 1; *Douglass v. State*, 31 Ind. 429.

Judge Cooley, in a very able dissenting opinion in the case of *Auditors of Wayne County v. Benoit*, 20 Mich. 176, holds that the payment of salary to a *de facto* officer is not a defense to an action by the *de jure* officer, and this is in harmony with all general principles of the law. The *de jure* officer is entitled to the possession and emoluments of the office, and he is unlawfully kept out of it by an intruder. It is inconsistent with all principles of justice and equity that such intruder and unlawful occupant shall have the emoluments for the length of time he can continue in possession, or that the person from whom the salary is due, when he has knowledge of the facts, can set up as a defense the fact that a *de facto* officer is in possession of the office and depriving the *de jure* officer of the possession of the office; though, as we have heretofore stated, it is unnecessary to go to this extent in this case; as Worrell, in addition to being a *de jure* officer, was occupying apartments set apart to him by the State, and was dis-

charging the duties of the office as well and as fully as he could in any other place, so that he was both a *de jure* and *de facto* officer. As regards this case, there was an appropriation made to pay the salary of the chief of the bureau of statistics; that money is in the treasury. The only method by which Worrell, who is such *de jure* officer, can recover his salary is by a proceeding in mandate compelling the Auditor of State to draw a warrant on the treasurer for the amount. The Auditor refused to draw his warrant and Worrell instituted this suit. The facts found show the money in the treasury; that Worrell is the *de jure* officer; that immediately upon his qualification he was assigned quarters by the Auditor of State; that he has discharged the duties of the office.

The only possible or pretended defense urged is that Peelle, who had been acting as a *de facto* chief prior to Worrell's appointment, continued to occupy the apartments which he had theretofore occupied, and to gather statistics and do as he had before done, not having any title to the office, and that the appellee had, with full knowledge of all the facts, paid to Peelle \$750 of salary. These facts constitute no defense to Worrell's action for mandamus to compel the payment of his salary. Worrell was entitled to his mandate, and the circuit court erred in its conclusions of law.

Judgment reversed, with instructions to the court below to restate its conclusions of law stating that Worrell is entitled to a mandate as prayed for for the full amount of salary due him, \$2,550; and to render judgment accordingly.

Elliott, J.:

I concur in the conclusion reached in the opinion of the court solely upon the ground that the controversy as to the particular office in dispute is settled by the prevailing opinion delivered in the cases between the claimants to the office on former appeals. Accepting those decisions as the law of the particular controversy, as the court is bound to do, it must follow that Worrell is the rightful officer; and that, as the rightful officer, he is entitled to the compensation attached to the office. The case, in the form it has assumed, is unique; and cannot, as I suppose, be deemed a precedent justifying the inference that a state disbursing or distributing officer must, at his peril, decide a controversy between rival claimants to a public office. This I say because the doctrine of the prevailing opinions on former appeals is that Peelle did not have and could not have, any title to the office; and upon these decisions the Auditor of State could have acted without incurring any risk; inasmuch as the entire controversy as to the right to the office concerned matters of law, and not of fact. In saying this I do not mean to be understood as receding from the opinions heretofore expressed upon the principal question; for I here simply yield to the doctrine declared by the court in its former decisions.

TENNESSEE SUPREME COURT.

Julius COOK, *Pff. in Err.*,

STATE of Tennessee.

(....Tenn.....)

1. An Act requiring a voter to place a mark opposite the name of each candidate voted for by him does not conflict with Tenn. Const., art. 4, § 1, as imposing the requirement of education on the part of the voter in addition to the constitutional requirements.
2. Act March 11, 1890, to provide for purity of elections, is not in conflict with Tenn. Const., art. 11, § 8, as class legislation, because it applies only to counties of 70,000 and cities of 9,000 population.
3. An Act to provide for the purity of elections, which does not prevent an elector from casting his vote fairly, does not interfere with the privileges and immunities of the citizens so as to conflict with U. S. Const., Amend. 14.
4. The commissioners and registrars of election which Tenn. Act March 11, 1890, provides shall be appointed by the governor and the commissioners respectively, are not county officers within Tenn. Const., art. 11, § 17, providing that no county office shall be filled otherwise than by the people or the county court.

(June 6, 1891.)

ERROR to the Criminal Court for Shelby County to review a judgment convicting defendant of violating the provisions of a statute designed to secure the purity of elections. *Affirmed.*

The Act in question passed March 11, 1890, chap. 24, provided a system of election whereby the names of all candidates should be printed on one ticket and the voter should make a cross-mark opposite the name of the candidate voted for, while in a compartment closed from the view of other voters. In providing for the registration of voters the Statute provides that three commissioners of registration shall be appointed by the governor for each county, and that registrars of election shall be appointed by such commissioners.

Further facts appear in the opinion.

Messrs. L. B. Eaton and Charles Eaton for plaintiff in error.

Mr. George W. Pickle, Atty-Gen., for the State.

Turney, Ch. J., delivered the opinion of the court:

Plaintiff in error was indicted for removing ballots, aiding electors in making their ballots, instructing them how to vote, etc., was convicted, and has appealed. His defense is the unconstitutionality of the Act of the Legislature passed March 11, 1890, chap. 24, entitled "An Act to Provide more Stringent Regulations for Securing the Purity of Elections in this State, and Applicable to Counties Having a Population of over Seventy Thousand," and cities of over nine thousand, inhabitants, computed by the census of 1890, or which may hereafter have such numbers by any subsequent federal census, 13 L. R. A.

etc. The attack is mainly on the grounds that the Act violates art. 4, § 1, and art. 11, § 17, of the Constitution; it being argued that under the first ordinance there can be no restriction or qualification of the right to vote, except the condition of the payment of a poll-tax, and that the law in question requires an educational qualification, in that it imposes upon the elector the duty of being able to select for himself the name or names of the candidates for whom he desires to vote. If these requirements violate the letter or spirit of art. 4, § 1, the law is a nullity. To determine this the section must be construed as a whole. The provisions that every male citizen of the age of twenty-one, etc., shall be entitled to vote; that there shall be no qualification attached to the right of suffrage, except that each voter shall have paid his poll-tax; that the General Assembly may enact laws to secure the freedom of elections and the purity of the ballot-box,—must consist together.

The proposition that the Statute before us adds to these qualifications that of education is comprehensive, and involves more or less refinement of the term "educational." "Education" is a broad term, and includes all knowledge, if we take it in its full, and not in its legal or popular, sense. Whatever we learn by observation, by conversation, or by other means, away from what has been implanted by nature, is education. In fact, everything not known intuitively and instinctively is education, but not in the sense we must understand the objection to this Act. The convention of 1870, in a spirit of conservatism appropriate to the times, prepared and presented the Constitution, which was adopted by the people. That Constitution gives, as we have seen, the elective franchise, with the qualifications named. It is certain that, at that time, there was much misgiving and apprehension as to the future of the State, and all felt the necessity of such constitutional provisions as would, if rightly construed, preserve in its integrity a republican form of government for the State. It is evident the framers of the Constitution did not intend, by its conference of the right to vote, to ignore an educational qualification in all respects. It fixes the age at twenty-one, with a citizenship of the United States, and twelve months' residence in the State, and six months' in the county. The age was fixed as one of maturity, at which period the law presumed the proposed voter to have sufficiently ripened in mental power to determine for himself the soundness or unsoundness of the measure upon which he is called to vote. Citizenship of the United States is a prerequisite, as fixing such interest in the welfare of the federal government as supposes a study of and acquaintance with its governmental policy, and so is a residence in the State and county, as well as to become acquainted with the character and capacity of the men who might ask office. These restrictions are terms of educational probation. A foreigner, if in the United

States, and in any State and county, for any number of years, however long, before becoming naturalized, must still reside in the county six months after naturalization before he is entitled to vote. *State v. Clokey*, 5 Sneed, 486. A native citizen or resident of any county cannot remove to another, however short the distance of removal, and be entitled to vote in the latter, until he shall have been a resident citizen thereof for the period of six months. All this is to acquaint and identify him with the wants and interests of the people with whom he proposes to live.

It is, from these clearly-defined constitutional requirements, manifest that the framers of the Constitution did not contemplate an indiscriminate and ignorant exercise of the elective franchise, but guarded against it as far as they could then see it. Having done this, they naturally concluded the future might develop mischiefs that would not fall within the defined guards, and, to make sure of protection in such emergencies, they granted to the General Assembly the power to enact laws to secure the freedom of elections and the purity of the ballot-box. The purpose of the law before us is to require the voter to cast his own ballot; to do away, as far as possible, with the illegal practice of voting oftener than once, existing in some quarters of the State; and to defeat bribery, duress and corruption at the polls. The law is plain and simple in its provisions. Every voter, however illiterate, can always find a friend to himself, or some one candidate, who will read and explain the law and the manner of its observance. Ballots and cards of instruction are always at hand. The names of the candidates are printed, and with little effort the unlettered voter can soon become as well acquainted with the printed name of his candidate as with his face, and with easy readiness place his cross (X) opposite that name, and fold his ticket as required. The argument of inconvenience is as nothing compared to the rights intended to be protected by that inconvenience, and the pulling, pushing, and bribery of ignorant men before and at elections. The inconvenience to a part of the community must yield to the good of the whole. The law presumes the voter expresses the choice of his judgment by his ballot. No man, learned or unlearned, can have a choice without being first informed. If, then, information is required as to any part of the right and duty of voting, why not as to all? The Constitution surrounded the right of suffrage with some inconveniences, and authorized the Legislature to attach more. In the exercise of its power, the Legislature must be reasonable and just, not imposing impossible or oppressive conditions, else its legislation will be void.

That the law applies only to counties of 70,000 and cities of 9,000 inhabitants does not impeach its validity.* All counties and

cities that have or may hereafter have the designated population are embraced. It applies to all parts of the State, and each county and city may come within its provision. This principle has often been applied by this court, holding that similar legislation was not class. The Statute in nowise infracts the 14th Amendment to the Constitution of the United States. Article 4, § 4, of the instrument, guarantees to every State in the Union a republican form of government. No government can be republican that fails to secure the purity of elections. By these terms of the United States Constitution the Legislature of each State has the organic authority for the passage of such laws as will secure that purity, and it cannot be urged that such laws abridge the privileges or immunities of the citizens. In the matter of voting, the only privilege one has is to cast his vote fairly, and not interfere with others by fraud, force, or duress. His privileges are personal. Whatever may be necessary to carry out the sections of the two Constitutions cited is within the power of the Legislature for adoption. It may employ every legislative means, however vigorous, to accomplish the ends contemplated by the framers of the constitutions. The Legislatures are, as a rule, the judges of the measures to be adopted, and their necessity. The power to regulate and reform is theirs. They are presumed to know the condition and wants of the State.

The commissioners and registrars named in the Act are not county officers, in contemplation of art. 11, § 17, of the Constitution, which ordains: "No county office created by the Legislature shall be filled otherwise than by the people or the county court." They merely constitute the machinery by which the law is operated. They are more in the nature of judges or inspectors of elections. In speaking of the statutes requiring the county court to make appointments of judges of elections, *Judge Milligan* said: "This provision of the Statute, we apprehend, is merely directory, and whether the appointment is made by the county court, by the sheriff, or coroner, as the case may be, by and with the advice of three justices, or an equal or less number of justices or respectable freeholders, the result is the same. The object of the Statute is to secure just and competent inspectors, and when that end is attained, without prejudice to the contestant, it constitutes no ground for declaring the election void. Were the law held otherwise, and a strict conformity in all respects to its letter exacted of every officer holding popular elections, it would result in interminable contests about unsubstantial formalities, and end in the practical denial of the right of the people to choose their own officers." *McCraw v. Harralson*, 4 Coldw. 42. The officers recognized by this Act being so nearly akin to and closely associated with those of judges and inspectors of elections, the holding of *Judge Milligan* applies with full force. Such officers had three sources of appointment, and none of election, and therefore were not county officers, in the sense of the provision

*Const., art. 11, § 8, provides that the Legislature shall not pass any law granting to any individuals "rights, privileges, immunities, or exemptions, other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law."

of the Constitution. We so hold as to the officers mentioned by this Act.

The judgment of the Criminal Court, holding the Act to be constitutional, is affirmed.

William KATZENBERGER, *Plff in Err.*,
v.

Leopold LAWO.

(.....Tenn.....)

1. A train propelled by a small engine called a "dummy," although exclusively engaged in carrying passengers, whether run within or without the limits of a municipality, is a "railroad" train within the meaning of a statute prescribing regulations to be observed by railroads for the avoidance of accidents.

2. An ordinance prohibiting railroad steam whistles to be blown in a city is a nullity so far as it conflicts with the general law of the State requiring whistles to be blown as signals to persons on the track.

(May 7, 1891.)

ERROR to the Circuit Court for Shelby County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's failure to comply with the statutory requirements as to precautions for the avoidance of accidents. *Affirmed.*

The facts are stated in the opinion.

Messrs. Gantt & Patterson for plaintiff in error.

Messrs. R. G. Brown and Bolton Smith, for defendant in error:

The presumption is not lightly to be indulged that the Legislature has by implication repealed, as respects a particular municipality, or as respects all municipalities, laws of a general nature elsewhere in force throughout the State.

Dillon, Mun. Corp. § 88. See also *Seibold v. People*, 86 Ill. 33.

A municipal corporation can pass no ordi-

nance which conflicts with any general statute in force.

Dillon, Mun. Corp. § 329.

The grant of power to the taxing district of Shelby County to "permit and regulate the passage of cars" is in reality nothing more than authority to further regulate such matters by imposing such additional restrictions upon railroads as the greater danger of passage through a thickly populated district calls for.

Rogers v. Jones, 1 Wend. 287; *State v. Welch*, 86 Conn. 215.

It is utterly impossible to operate a dummy line without greatly obstructing and rendering more dangerous other business and travel usually seen and always allowable on a public highway.

Street R. Co. v. Doyle, 88 Tenn. 750.

Where a road is operated by steam and by the general public also, the two uses are almost, if not wholly, inconsistent with each other, so that taking the highway for a railroad will nearly supersede the former use to which it had been legally appropriated.

Springfield v. Connecticut River R. Co. 4 Cush. 68.

Following out the reasoning in the *Doyle Case*, the statutory precautions required of the commercial railways for the protection of the life and property of the citizen are equally demanded of a dummy line.

Lurton, J., delivered the opinion of the court:

By a collision on one of the streets of Memphis, between a wagon driven by Lawo and a dummy train of street-cars, he sustained such bodily injuries as have resulted in judgment for \$3,000 against plaintiff in error, who, as receiver, was operating the railway at the time. The circuit judge charged the jury that the statutory precautions required to be observed by railroads, and contained in subsection 4, § 1298, Tenn. Code (Mill. & V.), applied to the movement of all railway trains upon the streets of Memphis, and that a dummy line was a "railroad" within the meaning of this provis-

NOTE.—Statutory provisions to prevent accidents on railroads.

In proportion to the danger must be the degree of diligence to which railroad companies are held in the protection and preservation of human life in operating their roads. *Louisville & N. R. Co. v. Connor*, 9 Heisk. 20.

The statute makes no exception and tolerates no excuses; its language is "every railroad company." *Nashville & C. R. Co. v. Thomas*, 5 Heisk. 266; *Collins v. East Tennessee & V. R. Co.* 9 Heisk. 843.

It should be rigidly short of requiring absolute impossibilities. *East Tennessee, V. & G. R. Co. v. Scales*, 2 Lea, 693.

For if any obstruction appears on the road so suddenly that it is impossible to comply with all the statutory requirements after it could and ought to have been seen by the lookout, the company will not be liable. *East Tennessee, V. & G. R. Co. v. Swaney*, 5 Lea, 119, 123; *East Tennessee, V. & G. R. Co. v. Scales*, 2 Lea, 688; *Louisville & N. R. Co. v. Stone*, 7 Heisk. 471.

But if there was sufficient time after it ought to have been seen by the lookout, the company will be liable. *East Tennessee, V. & G. R. Co. v. White*, 13 L. R. A.

5 Lea, 540; *Nashville & C. R. Co. v. Thomas*, 5 Heisk. 266; *Louisville & N. R. Co. v. Connor*, 9 Heisk. 20; *Hill v. Louisville & N. R. Co.* Id. 827.

An engineer has no right to presume that a man upon the track will step off on the approach of a train, but he should give the alarm the instant he sees him on the track. *Hill v. Louisville & N. R. Co.* 9 Heisk. 823.

Ordinance cannot conflict with state law.

A municipal ordinance which conflicts with a state law on the same subject is void. Rule applied as to various subjects. See *New York v. Nichols*, 4 Hill, 209; *Thompson v. Mt. Vernon*, 11 Ohio St. 688; *Adams v. Albany*, 29 Ga. 58; *Sill v. Corning*, 15 N. Y. 297; *Cincinnati v. Gwynne*, 10 Ohio, 190; *Wood v. Brooklyn*, 14 Barb. 425; *Markle v. Akron*, 14 Ohio, 586; *Thomas v. Richmond*, 79 U. S. 12 Wall. 349, 20 L. ed. 453.

Yet a corporation may, in some cases, consistently with general law, further regulate by ordinance subjects already regulated by statute. 1 Dillon, Mun. Corp. 376, citing *Huddleson v. Ruffin*, 6 Ohio St. 604; *Rogers v. Jones*, 1 Wend. 237; *State v. Welch*, 86 Conn. 215.

ion. Each of these propositions has been assigned as error. Counsel have urged very forcibly that when, by legislative and municipal consent, a railroad has been laid longitudinally upon the streets of a city, it is not practicable to observe the requirements of the statute in reference to stopping the train whenever any person, animal, or other obstruction appears on the road; that, under such circumstances, a railway is lawfully upon the street; and that to construe the statute as applicable when thus upon the streets, will prevent any movement of trains, inasmuch as at all times persons, animals or other obstructions will be upon the road, and within observation of the lookout upon the locomotive. The statute was enacted for the purpose of preventing accidents. It prescribes precautions which, so far as they relate to the duty of watching the track, and the duty of avoiding collision with persons or animals on the track, are identical with the common-law duty of diligence. *Tipton v. Railroad Co.* 90 Tenn. —; *East Tennessee, V. & G. R. Co. v. Pratt*, 85 Tenn. 13.

If these precautions are observed the Statute relieves the company of responsibility. If it fails to observe them, the statute imposes liability. All other questions out of the way, the rule would be the same, regardless of the Statute. With respect to the burden of proof, and the effect of contributory negligence, the Statute changes the rule of common law. If there be any strength in this argument, it would practically repeal the Statute, for the same difficulty in literally observing it will be found to exist between country stations, the track in the daytime being very generally used as a walkway. Practically, it is unnecessary to stop the train when an object appears on the track, save in a very few instances. The Statute only requires it when necessary, and experience demonstrates that this necessity seldom arises. The track is generally cleared by signals, and no liability arises from failure to stop, unless such failure has resulted in an accident. What the common law would impose as ordinary care, when necessary to avoid injury to the property of another, or an accident to a person upon the track, is not so difficult of accomplishment, when embodied in legislation, as to authorize a construction suspending it when the necessity for its observance is most necessary.

When a railroad is longitudinally upon the street of a city, the danger of accidents is obviously increased. Under such circumstances, there should be a corresponding increase of diligence. The railway is upon the street of its own volition. The economical acquisition of the right of way has been regarded as of greater benefit than the dangers incident to a road so placed. But the use of the street by the railway is not exclusive. The public have equal rights. To say that, under such circumstances, the Statute should be held inoperative, would be to say that the Legislature intended that it should not apply just where the probability of accidents is greatest. It will doubtless be found necessary, where a road is upon the street of a city, to so regulate the speed that the train

can be stopped within a short distance, in case of necessity. A train pulled by a small engine called a "dummy," although exclusively engaged in carrying passengers, is a "railroad," within the meaning of the Statute prescribing precautions to be observed by railroads. The evil intended to be remedied pertains as much to this sort of railway as to the ordinary railroad of commerce.

In the case of *Street R. Co. v. Doyle*, 88 Tenn. 747, we had occasion to consider the resemblance and difference between the dummy line and the commercial railway. For the reason then stated, we think the statutory precautions against railroad accidents apply to dummy lines, whether run within or without the limits of a municipality.

The third assignment of error is for the refusal of the court to charge the jury that, under the ordinances of the City of Memphis, the blowing of a whistle by a railway engine was a misdemeanor, and that, therefore, the statutory precaution of blowing the whistle when a person or animal appeared on the road, need not be observed within the city limits. There was no error in this. By the Act creating the present government, in force in the City of Memphis, power was given the municipality "to permit and regulate the laying of railroad tracks of iron, and the passage of railroad cars through the taxing district, and to remove such railroad track if it obstructs travel, or does not conform to the laws of the taxing district; and to make all suitable and proper regulations in regard to the use of the streets for street-cars, and to regulate the running of the same, so as to prevent injury or inconvenience to the public." Acts 1879, chap. 84, p. 100. Under this authority the municipality has enacted an ordinance regulating the running of trains through the city. It seems wise and salutary in the main. Among other things prohibited is the blowing of the steam-whistle. In place of this, the bell is required to be rung, and watchmen are required to be stationed at street crossings. The ordinances of this municipality are of no authority where they conflict with the general law of the State. So far as this ordinance conflicts with Code (Mill. & V.), § 1298, prescribing precautions against accidents, this ordinance is a nullity. The authority given in the Act creating the taxing district, and which we have quoted, gives no authority to suspend, alter or change the general statutes of the State regulating the running of railroad trains. To support the contention of counsel as to this last request, we have been referred to Patterson on Railway Accident Law. This author does say, concerning statutory signals, that, "of course, the railway may excuse its non-performance of the statutory duty by showing that the duty was, on this particular occasion, omitted within the bounds of a municipality whose ordinances, lawfully enacted, forbade the giving of signals within its limits." § 168. The author cites the case of *Pennsylvania Co. v. Hensil*, 70 Ind. 569. This case seems to support the text. But, on looking to the Code of Indiana regulating the giving of signals at road crossings, it is found that the Act

provides "that nothing therein contained shall be so construed as to interfere with any ordinance or by-law that has been or may be passed by any city or town, regulating the management or running of engines or trains within such city or town." Ind.

Code 1881, § 2178. We have no such exception made in our Statute. The other request refused had been substantially given, and the fifth assignment is overruled.

Judgment affirmed.

CALIFORNIA SUPREME COURT.

J. M. GESSNER, *Recept.*,
v.
Aaron PALMATER, *Appt.*

(....Cal....)

1. A vendor who, in accordance with the contract of sale, retains title to the property until the purchase-money notes are paid, has a lien on the property for a security of the debt, within the meaning of a statute forbidding an attachment where the debt is secured by mortgage or lien.
2. The assignee of a note given on the purchase of land by contract which leaves the title in the vendor until the note is paid is entitled to the benefit of the vendor's lien and cannot attach the land as a creditor without security.

(McFarland, J., dissents.)

(May 14, 1891.)*

*A decision was reached in this case and an opinion handed down on July 23, 1890, affirming the order of the superior court. A rehearing was subsequently granted and the court afterwards reached the conclusion stated in the opinion given herewith. [Rep.]

NOTE.—Vendor's lien.

The grantor's lien exists in several of the States. *Champion v. Brown*, 6 Johns. Ch. 308, 402, 2 L. ed. 183, 164; *White v. Williams*, 1 Paige, 502, 2 L. ed. 731; *Fish v. Howland*, 1 Paige, 20, 2 L. ed. 545; *Warner v. Van Alstyne*, 3 Paige, 513, 3 L. ed. 253; *Shirley v. Congress Sugar Ref. Co.* 2 Edw. Ch. 505, 6 L. ed. 488; 3 Pom. Eq. 253.

Alabama: *Foster v. Trustees of the Athenæum*, 3 Ala. 302.

It may be enforced although the debt is barred by the Statute of Limitations. See *Flinn v. Barber*, 61 Ala. 530; *Bissell v. Nix*, 60 Ala. 281; *Chapman v. Lee*, 64 Ala. 483; *Shorter v. Fraser*, 64 Ala. 74. But see *Linthicum v. Tapscott*, 28 Ark. 297.

California: Where in a deed conveying land there was a reservation in express terms to grantor of a lien to secure the payment of a note given for part of the purchase price, such lien is more than a vendor's lien; it is an equitable mortgage which passes with the assignment of the promissory note. *Dingley v. Bank of Ventura*, 57 Cal. 467.

Georgia: *Marine & F. Ins. Bank v. Early*, R. M. Charit. 279.

Kentucky: *Greenup v. Strong*, 1 Bibb, 500; *Voorhies v. Instone*, 3 Bibb, 253; *Oulton v. Mitchell*, 4 Bibb, 229; *Bubank v. Poston*, 5 T. B. Mon. 237.

Maryland: *Ridgely v. Carey*, 4 Harr. & McH. 167; *White v. Cassanave*, 1 Harr. & J. 106; *Ghiselin v. Ferguson*, 4 Harr. & J. 522.

New York: 3 Pom. Eq. 263; *Champion v. Brown*, *supra*; *Garson v. Green*, 1 Johns. Ch. 308, 1 L. ed. 181; *Fish v. Howland*, *Warner v. Van Alstyne*, and *Shirley v. Congress & S. Sugar Ref. Co.* *supra*.

It will be enforced where a note had been given for the unpaid purchase money on which a judgment at law had been first obtained by the vendor 13 L. R. A

A PPEAL by defendant from an order of the Superior Court for Los Angeles County refusing to dissolve an attachment which was alleged to be illegal because the debt sought to be collected was secured by lien. *Reversed.*

Section 537, Code Civ. Proc., provides that in an action on a contract for the payment of money, plaintiff may have the property of defendant attached, unless the debt is secured by mortgage or lien.

The facts are stated in the opinion.

Mr. Winslow P. Hyatt for appellant.

Messrs. Del Valle & Munday for respondent.

Paterson, J., delivered the opinion of the court:

This is an appeal from an order denying a motion to dissolve an attachment. The motion was made on the ground that the note upon which the action was brought was given to Webster, plaintiff's assignor, in part payment for certain land purchased from him by defendant; that Webster had a vendor's lien as security for the payment of the note; that the lien passed to plaintiff

before filing his bill. *Ford v. Smith*, 1 McArth. 593; *Ten Eick v. Simpson*, 1 Sandf. Ch. 247, 7 L. ed. 316. Ohio: *Williams v. Roberts*, 5 Ohio, 35; *Mayham v. Coombs*, 14 Ohio, 423; *Follett v. Reese*, 20 Ohio, 546. Virginia: *Graves v. McCall*, 1 Call, 414; *Hundley v. Lyons*, 5 Munt. 342.

North Carolina: *Henderson v. Stewart*, 4 Hawkes, 256; *Howlett v. Thompson*, 1 Ired. Eq. 399.

Effect of taking note.

Taking vendee's note does not discharge the lien. *Fish v. Howland*, 1 Paige, 30, 2 L. ed. 549.

It is not waived or destroyed by giving a receipt in full for the purchase price, or by a recital to that effect in the deed, nor by the grantee giving his own personal security—bond, note, or bill—for the price. *White v. Williams*, 1 Paige, 502, 2 L. ed. 721.

The lien is not absolutely extinguished by the assignment of the note, where the liability of the vendor continued upon the note, by reason of the indorsement, but was in a sort of abeyance, and might be revived by the vendor, after he should have paid the note on his liability as indorser. *Richards v. Leaming*, 27 Ill. 431, 81 Am. Dec. 240; *Baum v. Grigsby*, 21 Cal. 172, 81 Am. Dec. 154. See *Briggs v. Hill*, 6 How. (Miss.) 332; *Brush v. Kinsley*, 14 Ohio, 20; *Wellborn v. Williams*, 9 Ga. 89; *Smith v. Smith*, 9 Abb. Pr. 420.

If the vendor indorses the note and is afterwards obliged to take it up at maturity, upon failure of the vendee to pay, the lien revives and takes effect as if no assignment had been made. *Kelly v. Payne*, 18 Ala. 371; *Turner v. Horner*, 29 Ark. 440; *White v. Williams*, 1 Paige, 502, 2 L. ed. 721; *Lindsey v. Bates*, 42 Miss. 357; *Cotton v. McGehee*, 54 Miss. 510; *Rogers v. James*, 33 Ark. 77; *Scott v. Mann*, 36 Tex. 157.

by the assignment of the note, and, being thus secured, an attachment was improper. The affidavit filed in support of the motion states that the defendant purchased certain land from Webster under a contract which provided for payment of the purchase price by installments, and that at the time and place of making said contract for the sale and purchase of said lot of land, and as part of the said contract, the defendant executed and delivered to Webster the promissory note sued on, and that Webster still holds, against the defendant, the contract giving him the right to purchase. There is, perhaps, no subject of equity jurisprudence discussed in the books upon which there is a greater diversity of opinion than exists in relation to the origin, nature, and effect of a vendors' lien, against whom and in whose favor it avails, and how it may be discharged or waived. *Hammond v. Peyton*, 34 Minn. 581. The various definitions given and principles applied to it by the courts, are hopelessly irreconcilable; and, if we take the expressions found in decisions and text-books without observing the distinction between the lien implied by law in favor of a vendor who has parted with the legal title and taken no security for the purchase money, and the security which the vendor has while he holds the legal title under an unexecuted contract for the conveyance of lands upon payment of the purchase money, there will appear to be great confusion and inconsistency. The former, the implied lien, is properly known as a "vendors' lien." It is the creature of courts of equity, founded upon the equitable presumption that where the vendor has parted with his title and taken no security for the payment of the purchase money, the parties

intended that the property itself should remain as a pledge for the payment of the purchase price of the land. The lien thus created by implication is not a specific, absolute charge upon the property; it is personal to the vendor, and does not pass by a transfer of his claim for the purchase money. The fee is in the purchaser, and he may defeat the lien by a conveyance to a bona fide purchaser for value. *Sparks v. Hess*, 15 Cal. 186; *Baum v. Grigsby*, 21 Cal. 172; *Lehnendorf v. Cope*, 122 Ill. 383, 11 West. Rep. 618. The latter is improperly designated as a vendors' lien. Where the vendor holds the legal title under an unexecuted contract for the conveyance of the land upon payment of the purchase money, the transaction shows upon its face that he holds it as security. The vendee cannot prejudice that title, or in any way divest it, except by performance of the act for which the vendor holds it. The vendor's security is something stronger than a mortgage, because the legal title is retained as security. *Stevens v. Chadwick*, 10 Kan. 418. It has been called an "imperfect" or "equitable" mortgage, which is more appropriate term than "vendors' lien." *Moore v. Lackey*, 58 Miss. 85. In many of the best-considered cases, including *Sparks v. Hess*, *supra*, it is treated as if it had the similitude of a mortgage, subject to foreclosure in the same way a mortgage is foreclosed. There is no necessity for any lien by implication. Where the title is not to pass until the vendee pays the purchase price, the land is by express contract held in pledge for such payment, and the notes and contract may be considered as an instrument in the nature of a mortgage. It is a lien by contract, is an incident to the debt, and the assignee of notes given for the

When an assignment is made for the benefit of a third person there is no particular equity in his favor; but when for the security or payment of his own debt the equity continues, the assignee in such case holds the lien as well for the benefit of the assignor as for himself; he is subrogated to all his equities. *Jones, Mort.*, § 216; *Carlton v. Buckner*, 28 Ark. 66; *Crawley v. Riggs*, 24 Ark. 563; *Plowman v. Riddle*, 14 Ala. 109.

Vendors' lien cannot be assigned.

In the following States it can be transferred by neither assignment nor subrogation:

Arkansas: *Shall v. Biscoe*, 18 Ark. 142, 162; *Williams v. Christian*, 23 Ark. 255; *Hutton v. Moore*, 26 Ark. 382, 390; *Jones v. Doss*, 27 Ark. 518; *Carlton v. Buckner*, 28 Ark. 66; but an assignment as collateral security is permitted. *Blevins v. Rogers*, 32 Ark. 258; *Crawley v. Riggs*, 24 Ark. 563; *Carlton v. Buckner*, 28 Ark. 66.

California: *Baum v. Grigsby*, 21 Cal. 172; *Williams v. Young*, 21 Cal. 227; *Ross v. Heintzen*, 36 Cal. 313; *Lewis v. Covilland*, 21 Cal. 178.

Georgia: *Wellborn v. Williams*, 9 Ga. 80; *Webb v. Robinson*, 14 Ga. 216.

Illinois: *Small v. Stagg*, 95 Ill. 39; *Wing v. Goodman*, 75 Ill. 159; *Moshier v. Meek*, 80 Ill. 79; *Carpenter v. Mitchell*, 54 Ill. 126.

Maryland: *Dixon v. Dixon*, 1 Md. Ch. 220; *Iglehart v. Armiger*, 1 Bland. Ch. 519; *Schneely v. Ragan*, 7 Gill & J. 120; *Wellborn v. Williams*, 9 Ga. 80.

Mississippi: *Rutland v. Brister*, 63 Miss. 683; *Pitta v. Parker*, 44 Miss. 247; *Lindsey v. Bates*, 42 Miss. 397; but if grantor is compelled to take up the note as-

signed, the lien revives in his favor. *Stratton v. Gold*, 40 Miss. 778. See *Perkins v. Gibson*, 51 Miss. 699.

Missouri: *Pearl v. Harvey*, 70 Mo. 180; *Adams v. Cowherd*, 30 Mo. 458.

New York: *White v. Williams*, 1 Paige, 502, 2 L. ed. 721.

Ohio: *Brush v. Kinsley*, 14 Ohio, 20; *Horton v. Horner*, 14 Ohio, 437; *Jackman v. Hallock*, 1 Ohio, 318; *Tierman v. Beam*, 2 Ohio, 883.

Contrary view.

In the following States the lien may be assigned with the debt:

Alabama: A transfer of the debt carries the lien (*Simpson v. McAllister*, 56 Ala. 228; *Wells v. Morrow*, 38 Ala. 125; *White v. Stover*, 10 Ala. 441); but if the grantor assigns the notes for the debt "without recourse," or in any other manner which cuts off all his own liability thereon, the lien is held not to pass. *Bankhead v. Owen*, 60 Ala. 457; *Barnett v. Riser*, 63 Ala. 347; *Walker v. Carroll*, 65 Ala. 61.

Indiana: *Nichols v. Glover*, 41 Ind. 24; *Johns v. Sewell*, 33 Ind. 1; *Wiseman v. Hutchinson*, 20 Ind. 40; *Kern v. Hazlerigg*, 11 Ind. 443.

Kentucky: *Broadwell v. King*, 3 B. Mon. 449; *Honore v. Bakewell*, 6 B. Mon. 67; *Ripperdon v. Cozine*, 8 B. Mon. 465; *Kenny v. Collins*, 4 Litt. 299; *Eubank v. Poston*, 5 T. B. Mon. 297; *Edwards v. Bohannon*, 2 Dana, 99; *Johnston v. Gwathmey*, 4 Litt. 317.

Tennessee: *Ekridge v. McClure*, 2 Yerg. 84. See *Durant v. Davis*, 10 Heisk. 628; *Thorpe v. Dunlap*, 4 Heisk. 674.

Texas: *De Bruhl v. Maas*, 54 Tex. 484; *White v. Downs*, 40 Tex. 225; *Watt v. White*, 33 Tex. 421.

purchase money, like the assignee of a note secured by mortgage, is entitled to the benefit of the security. *Avery v. Clark*, 87 Cal. 619 (filed February 6, 1891); *Wright v. Troutman*, 81 Ill. 374; *Adams v. Cowherd*, 30 Mo. 460; *Lowery v. Peterson*, 75 Ala. 109; *Bradley v. Curtis*, 79 Ky. 327; *McClintic v. Wise*, 25 Gratt. 448; *Lagow v. Badollet*, 1 Blackf. 419; *Dingley v. Bank of Ventura*, 57 Cal. 471. There are a few decisions to the contrary, some of which inveigh against the rule, and, emanating, as they do, from highly respectable authority, are entitled to careful consideration; but they bear evidence of a departure from sound legal rules, and will be found generally to have been influenced by decisions in cases where the legal title had passed to the vendee, thus overlooking the distinction we have attempted to point out, and which is paramount always in determining questions of this kind. The authorities preponderate very decidedly in favor of the view we have expressed. 2 Jones, Liens, § 1119, note.

The provisions of our Civil Code, §§ 8046, 3047, apply to the vendor's lien proper, and not to the security held by a vendor under an unexecuted contract for the sale of land. There has been, and still exists, a great conflict of decision among the American courts, not only as to the nature of the security of the implied lien, but as to whether it could be assigned, and what act of the vendor would amount to a waiver of the lien. *Perry*, Tr. 4th ed. § 828, note 4. The notes of the code commissioners, and cases cited by them under the sections above referred to, show that it was intended to settle this conflict by express enactment. Ann. Civil Code, §§ 3045, 3046, notes; *Avery v. Clark*, *supra*.

We are not called upon in this case to say whether the purchaser of a negotiable note for value, without notice of the security held by a vendor of real estate under an unexecuted contract, would have the right to a writ of attachment. The affidavit, on motion to discharge the writ herein, stated that plaintiff "purchased the note sued upon in this action with full knowledge that the same was given as collateral to and identical with the debt secured by said contract and the lien on said real estate." The note having been secured originally by the vendor's lien, and plaintiff having taken it with notice of that fact, it was his duty to state in his affidavit for the writ "that such security has without any act of the plaintiff, or the person to whom the security was given, become valueless." Such is the requirement of the Statute. Section 538, Code Civil Proc. The affidavit upon which the attachment was issued states that the payment of the sum claimed "has not been secured by any mortgage or lien upon real or personal property." The affidavit filed by defendant in support of his motion to discharge the writ states facts showing that the note was originally secured. No counter-affidavit was filed by plaintiff. The attachment was improperly issued, and therefore the motion should have been granted.

18 L. R. A.

The order is reversed, with directions to discharge the attachment.

We concur: **Beatty, Ch. J.**; **De Haven, J.**; **Garoutte, J.**; **Harrison, J.**

McFarland, J.:

I dissent, and adhere to the views expressed in the former opinion. 24 Pac. Rep. 608. I cannot subscribe to the doctrine that the owner in fee of land, who simply agrees to convey it upon the payment to him of certain money evidenced by a promissory note, is in the same position as one who conveys the land and takes back a mortgage; or that if, in the former case, he merely assigns the promissory note, the assignee of the note has a lien on the land. If the latter can enforce such a lien, he must be able to release it. But how could he release it? It could be released only by conveying the land to the vendee, but how could he convey that which he hath not? If, after the assignment of the note, the vendor should convey the land to the vendee, what then would be the condition of the supposed lien of the assignee of the note? The whole doctrine must rest on the untenable proposition that the assignment of a negotiable promissory note is a conveyance in fee of land.

I know that some of the recent text-writers speak of such a case as bearing "a strong similitude to that of mortgagee and mortgagor," and say that, although it "is often spoken of in the cases as a vendors' lien," yet, in their opinion, such language is "a misuse of terms;" and that, although "it has been said, in English and American decisions, that the vendors' lien may arise before conveyance as well as after," yet that this saying "confounds legal notions which are essentially different." But, in my opinion, those "English and American decisions" correctly state the law, and tend to prevent confusion. In this State *Sparks v. Hess*, 15 Cal. 194, is the leading case on the subject. In that case the court says: "This is not a suit to enforce a vendors' lien after conveyance executed, but to enforce such lien when the contract of sale remains unexecuted;" and that, while the position of the vendor is "in some respects" like that of a mortgagee, it is in other respects different. "The vendor is at liberty to ask either a decree directing performance, and in case of refusal a sale of the premises, or a decree barring the right of the vendee to claim a conveyance under the contract." Throughout the whole case the right of the plaintiff is treated as and called a "vendors' lien;" and there is no doctrine better established than that a vendors' lien is not assignable. In the case at bar there was no conveyance of the legal title from the owner of the land (Webster) to the assignee of the note; and, in my opinion, the mere assignment of the note carried no title to the land, and no vendors' lien, nor any lien at all. But, in my opinion, a vendor's right is too shadowy to be a lien, within the meaning of the Attachment Law.

OHIO SUPREME COURT.

PENNSYLVANIA CO., *Pff. in Err.*,

v.

Jacob LANGENDORF.

(48 Ohio St.....)

- *1. It is not negligence per se for one to voluntarily risk his own safety or life in attempting to rescue another from impending danger.** The question whether one so acting should be charged with contributory negligence in an action brought by him to recover damages for injuries received in attempting the rescue, is one of mixed law and fact, and should be submitted to the jury upon the evidence, with proper instructions from the court.
- 2. While one who rashly and unnecessarily exposes himself to danger cannot recover damages for injuries thus brought on himself, yet, where another is in great and imminent danger, one who attempts a rescue may be warranted by surrounding circumstances in exposing his limbs or life to a very high degree of danger; and in such cases he should not be charged with the consequences of errors of judgment resulting from the excitement and confusion of the moment.**
- 3. In such cases, if the rescuer does not rashly and unnecessarily expose himself to danger, and is injured, the injury should be attributed to the party that negligently or wrongfully exposed to danger the person who required assistance.**

(May 5, 1891.)

ERROR to the Circuit Court for Lucas County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

Statement by **Bradbury, J.:**

The defendant in error recovered a judgment against the plaintiff in error in the Court of Common Pleas of Lucas County for damages resulting from an injury received by him while rescuing a child of tender years, who had fallen in front of an advancing freight train of the plaintiff in error. This judgment was affirmed by the circuit court, and thereupon these proceedings were brought to obtain a reversal of the judgments of both courts.

*Head notes by the COURT.

NOTE.—Negligence; assuming risk, to save human life; not contributory negligence.

A person who steps upon a railroad track in a humane effort to save others from danger from an approaching train cannot be held a trespasser. *Spooner v. Delaware, L. & W. R. Co.* 115 N. Y. 22.

Where there is a sudden emergency, allowing but little time for deliberation, and the life of a fellow creature is in danger, it does not follow, as a matter of law, that in encountering danger to rescue life a person is necessarily guilty of want of reasonable care. *Buel v. New York Cent. R. Co.* 31 N. Y. 314. 13 L. R. A.

Any further statement of facts necessary to understand the questions decided will be found in the opinion.

Mr. E. W. Tolerton, for plaintiff in error: No one can recover for an injury or loss which he himself has contributed to occasion. *Hott v. Wilkes*, 3 Barn. & Ald. 311; *Corwin v. New York & E. R. Co.* 13 N. Y. 42; *Evansville & C. R. Co. v. Hiatt*, 17 Ind. 102.

It was the duty of the court to say to the jury that, as a matter of law, it was a rash act for the plaintiff to throw himself upon the track, knowing that a train was coming, with his back towards the train, and without any attempt to look or observe it. The law will impute negligence to the act "if made under such circumstances as to constitute rashness in the judgment of prudent persons."

Eckert v. Long Island R. Co. 43 N. Y. 502.

If plaintiff could have, by the use of ordinary care, prevented the child from going upon the track in the first place, or might have, by the use of ordinary care, followed the child across the track, and prevented it from returning to a place of danger, then it was his duty to do so, and his neglect to do so, and his omission to act until the child was in extreme peril, was an act of negligence which bars his right to recover.

Evansville & C. R. Co. v. Hiatt, *supra*.

Messrs. Bissell & Gorrill for defendant in error.

Bradbury, J., delivered the opinion of the court:

The defendant in error, in June, 1885, while passing along one of the streets in East Toledo, stopped at a point where the track of the railway of plaintiff in error crossed the street, and engaged in conversation with a woman who had in charge two children, one an infant in arms, the other a girl about four years old. The plaintiff in error had constructed a safety-gate at this point, and during the greater part of the day kept there a watchman to close the same when trains were approaching, as a warning to travelers. The accident that caused the injury occurred about 7 o'clock in the evening, or a little later, but while it was yet light. The watchman had finished his day's labor, and gone away, and the gate was raised (or open), though the street was, perhaps, as extensively used at that hour as at any other part of the day. A local freight train was past due, and

A person with a view to his own self-preservation may take a risk upon himself, short of mere rashness and recklessness, even if it was not the wisest and most prudent course under the circumstances. *Mayo v. Boston & M. R. Co.* 104 Mass. 137.

What is ordinary or reasonable care is usually to be determined by the judgment and experience of the jury, and not of the judge. *Gaynor v. Old Colony & N. H. Co.* 100 Mass. 208. See *Lane v. Atlantic Works*, 107 Mass. 104; *Rexter v. Starin*, 73 N. Y. 601.

Mere error of judgment in case of danger is not contributory negligence. See *note to Louisville, N. A. & C. R. Co. v. Lucas* (Ind.) 6 L. R. A. 195.

approaching at a higher rate of speed than that prescribed by the ordinances of the city. The defendant in error and the nurse were engaged in conversation at a point from which the approaching train was in view for a considerable distance, though exactly how far away it could be seen is left in some doubt. The little girl, while her nurse and defendant in error were conversing, wandered across the railroad track, and, seeing or hearing the approaching train, became excited by the sight or noise or both, and by clapping her hands and other manifestations of surprise and delight, attracted the attention of her nurse certainly, and, probably, that of the defendant in error also. The nurse excitedly called the child to her, and while crossing the railroad track in obedience to the call it tripped and fell in front of the rapidly approaching train, whereupon the defendant in error, observing its imminent peril, sprang to its rescue, caught it in his arms, and leaped onward, but was struck by the locomotive before he could pass beyond its reach, and received the injuries of which he complains. That the safety-gate was raised, and the watchman absent, was not disputed at the trial, so far as the record discloses; and the evidence is amply sufficient to warrant the jury in finding that the train was being run at an unlawful rate of speed, so that in both these particulars the negligence of the Railroad Company was established. It is contended, however, that the negligence of the Railroad Company should have related to the party injured, and that the jury, in passing upon the case of the defendant in error, should not have taken into consideration the rights of the rescued child, but should have confined itself to considering the relations existing between him and the Railroad Company; and in this connection the plaintiff in error requested the court of common pleas to charge the jury as follows: "The plaintiff's right to recover depends entirely upon the fact that the defendant was guilty of negligence in its relations to this plaintiff. The jury, in deliberating upon your verdict, must not consider the rights of the child. This action has nothing to do with her rights. The sole questions here are, Was the defendant guilty of negligence which caused the plaintiff's injuries? and Was the plaintiff himself guilty of contributory negligence?" This request was properly refused. Negligence does not usually relate to anyone in particular, and does not in any case so relate unless there is some special duty owing to the individual affected by the negligent act or omission. In the case under review the Railroad Company owed no special duty to either the rescuer or the rescued that it would not have owed to any individuals similarly situated. The obligation was to the public generally; and any person who, without fault on his part, received an injury in consequence of its failure to discharge this obligation, may recover from it compensation therefor. No other relation is necessary, where the obligation is to the public, than that the one by its negligence has caused injury to the other without the latter's fault. It is also objectionable in

another particular,—that of requiring the jury to ignore the rights of the child. It is true that the child in its relations to the Railroad Company might have a right of action for injuries received by it, and yet no right accrue to the defendant in error for those received by him in the same accident. The circumstance that the child had a right of action could not be conclusive that the defendant in error had one also, though the same blow of the locomotive injured both, for the negligence of the latter might contribute to the result in a manner to defeat his recovery, while no negligence could be imputed to the child. If it was the object of this request to impress upon the minds of the jury the proposition above stated, that the rights of action of the child and its rescuer against the Railroad Company were distinct, the language selected was not well chosen. The phrase: "The jury, in deliberating on your verdict, must not consider the rights of the child. This action has nothing to do with her rights"—was well adapted to mislead the jury into the belief that the imminent danger of the child, and its right to be rescued therefrom, were to be excluded from their consideration. This view would have defeated the recovery, for the very ground upon which the defendant in error founded his claim was that the imminent peril of the child warranted the risk he assumed in undertaking its rescue.

This brings us to the consideration of the main question. Plaintiff in error contends that it was negligence *per se* for the defendant in error to throw himself in front of a moving train in his effort to rescue the child from danger. The petition of the plaintiff below discloses that he received the injury of which he complained by voluntarily passing in front of a moving train to rescue a child who had fallen in front of it; therefore, if such an act is negligence *per se*, the petition disclosed that the negligence of the plaintiff below contributed to the injury, and he was not entitled to maintain an action therefor. The same question was raised by an exception taken to the following part of the charge of the court: "It appears that the plaintiff was struck by the engine and injured while in the act of passing across the track and rescuing a little child from danger and saving its life. To hold the Railroad Company responsible in damages for this injury it must be shown (1) that the child was in danger of being run over and injured by the approaching engine, and that such danger was caused or created by the negligence of the Railroad Company; and (2) that in making the effort to rescue the child the plaintiff was not guilty of contributory negligence. These are questions of fact which it will be your duty to determine from the evidence. . . . If you find that the peril to which the child was exposed was caused by such negligence of the Company, you will then inquire whether the plaintiff, in passing across the track and attempting to rescue the child, was guilty of contributory negligence. The law will not impute negligence to an effort to preserve human life, unless made under such circumstances as to

constitute rashness in the judgment of prudent persons. . . . If he believed, and had good reason to believe, that he could save the life of the child, without serious injury to himself, the law will not impute to him blame for making the effort." Plaintiff in error insists that the court of common pleas, instead of leaving the question, as it did, to the jury, to say whether the act of the defendant in error, under all the circumstances, and according to the rules laid down by the court, was or was not negligent, should have told them that to pass in front of a rapidly moving train, as it was admitted the defendant in error did, even to rescue from danger a child of tender years, was in law an act of negligence that defeated his right of recovery. It is said that the defendant in error voluntarily assumed the risk, that the danger attending his act was apparent; and that, however commendable his conduct may have been when viewed from the stand-point of humanity, the law will grant no relief for an injury thus brought upon himself. It is apparent that the defendant in error was under no legal obligation to rescue the child. If he had chosen to stand by and permit the approaching train to run over and kill the child, he would have violated no rule of law, civil or criminal. Therefore what he did in the matter was a voluntary act in the sense of that term that he was under no legal obligation to perform it. That, however, is not a conclusive test of the question. To entitle one to relief for the consequences of the negligence of another it is by no means necessary that the party injured should have been at the time in the discharge of any duty whatever. His rights in this respect are perfect when he is in the performance of any lawful act, and even, in some instances and in some States, when the act is in some respects not strictly lawful. The act of the defendant in error was not only lawful, but it was highly commendable; nor was he in any legal sense responsible for the emergency that called for such prompt decision and rapid execution. The negligence of the Railroad Company in having no watchman at this public crossing, and the unlawful rate of speed at which the train was running towards it, to which may, perhaps, be added that of the nurse in charge of the child, were the causes of its extreme danger. There was but the fraction of a minute in which to resolve and act, or action would come too late. Under these circumstances it would be unreasonable to require a deliberate judgment from one in a position to afford relief. To require one so situated to stop and weigh the danger to himself of an attempt to rescue another, and compare it with that overhanging the person to be rescued, would be in effect to deny the right of rescue altogether if the danger was imminent. The attendant circumstances must be regarded; the alarm, the excitement, and confusion usually present on such occasions; the uncertainty as to the proper move to be made; the promptness required; and the liability to mistake as to what is best to be

18 L. R. A.

done, suggest that much latitude of judgment should be allowed to those who are thus forced by the strongest dictates of humanity to decide and act in sudden emergencies. And the doctrine that one who, under those or similar circumstances, springs to the rescue of another, thereby encountering even great danger to himself, is guilty of negligence *per se*, is supported by neither principle nor authority.

In *Evansville & C. R. Co. v. Hiatt*, 17 Ind. 102, language is used by the judge in deciding the case, which, to some extent, supports the doctrine, but the decision was not placed upon that ground, and what the learned judge said in that connection may be regarded as *obiter dictum*. The doctrine is repudiated by the text-writers and all the other cases that come to our notice. In *Eckert v. Long Island R. Co.*, 43 N. Y. 502, it was held that "the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under circumstances constituting rashness in the judgment of prudent persons." In that case the rescuer lost his life in throwing a small child from the track of an approaching train, and a judgment in favor of his administrator for damages resulting from his death was affirmed by the court of appeals. The resemblance between that case and the one before us is very striking. This doctrine has received the sanction of the courts of last resort in Massachusetts and Missouri. *Linnahan v. Sampson*, 126 Mass. 506; *Donahoe v. Wabash, St. L. & P. R. Co.* 83 Mo. 560; *Beach, Contrib. Neg.* p. 45, § 15; *Wharton, Neg.* § 314; *Pierce, Railroads*, 329. The doctrine that one is not necessarily chargeable with contributory negligence because he adopted a course of action that imperiled his safety, or even his life, finds support in other courts. *Carroll v. Minnesota Valley R. Co.* 14 Minn. 57; *Pennsylvania Co. v. Roney*, 89 Ind. 453; *Cottrill v. Chicago, M. & St. P. R. Co.* 47 Wis. 634. We think the court of common pleas did not err in leaving it to the jury to determine from all the circumstances surrounding the defendant in error at the time he sprang to the rescue whether the act was rash or not, and in saying to them that, if they found it was not rash, then it did not constitute contributory negligence. It is difficult, if not impossible, to lay down in advance a rule by which to determine the extent to which one may risk his safety or his life in emergencies of this character, and not be charged with rashness; but the emergency may be such as to warrant the assumption of a high degree of risk, and one so situated may rightfully expect his acts to be construed in the light afforded by all the circumstances that impelled him to their commission, and that he would not be charged with contributing to his own injury, so as to defeat a right of action, because the result showed that the risk he assumed was greater than in the excitement of the moment he had contemplated, or in some other respect his judgment had been faulty.

Judgment affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

William H. HILL
v.
O. F. JEWETT PUBLISHING CO.

Llewellyn POWERS

SAME.

(....Mass.....)

1. The forgery of the necessary signature of the treasurer to certificates of stock by the president of a corporation whose only authority as to the issue of certificates is to sign them does not make the corporation liable therefor to holders who took them in private and personal transactions with the president.
2. A corporation is not negligent in permitting its president to continue in office and have access to its certificate book and seal so as to make it liable for his act in issuing forged certificates of stock by reason of his former misconduct in pledging his own shares to another person in violation of an agreement to pledge them to his associates in the corporation.

(June 24, 1891.)

R EPORT by the Supreme Judicial Court for Suffolk County (Morton, J.) for the opinion of the full court of two actions brought to establish the alleged rights of plaintiffs as stockholders in defendant corporation, in which verdicts had been directed in favor of defendant. *Judgment on the verdicts.*

NOTE.—Corporation not liable for misfeasance of its officers.

A stockholder in a bank cannot maintain an action against the directors for their misfeasance in delegating the whole control of its affairs to the president and cashier, who waste and lose the capital, the injury being to the corporation direct and only remotely to the stockholders. *Smith v. Hurd*, 13 Met. 371.

Where a person had notice that the surrender and transfer of certificates of stock were prerequisites to the lawful issue of new stock, and accepted the new certificate without assuring herself that such prerequisites had been complied with, she is not an innocent holder of the stock. *Moore v. Citizens Nat. Bank of Piqua*, 111 U. S. 156, 28 L. ed. 885. See *Allen v. South Boston R. Co.* 5 L. R. A. 716, 150 Mass. 200.

Where one buys a certificate of corporate stock not under seal of the corporation and not signed by the person whom he knows is its president, he cannot be said to be an innocent purchaser. *Byers v. Rollins*, 13 Colo. 22.

In such case if the party fails to investigate the title to the stock, he is affected with notice of whatever he might have discovered upon making proper inquiry. *Farrington v. South Boston R. Co.* 5 L. R. A. 849, 150 Mass. 406.

A pledge to a bona fide pledgee of fraudulently issued certificates of corporate stock is not a pledge of shares of stock, but simply of a right to receive indemnity for the fraudulent acts of the officers in issuing the spurious shares. *Kisterbock's App.* 127 Pa. 601.

Damages to a holder of shares of stock fraudulently issued by corporate officers should be measured by the market value of valid stock at the time 13 L. R. A.

The case sufficiently appears in the opinion. *Messrs. Robert M. Morse, Jr., and Charles E. Hellier*, for plaintiffs:

These cases must be governed by *Allen v. South Boston R. Co.* and *Craft v. South Boston R. Co.* 5 L. R. A. 716, 150 Mass. 200.

It was held, in both cases, that the plaintiffs could recover.

See also *Titus v. Great Western Turnp. R.* 61 N. Y. 237; *New York & N. H. R. Co. v. Schuyler*, 84 N. Y. 30; *Bridgeport Bank v. New York & N. H. R. Co.* 80 Conn. 231; *Willis v. Philadelphia & D. R. Co.* 6 W. N. C. 461; *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Eq. (Pa.) 180.

The only cases where the corporation has been held not liable to holders for value of certificates fraudulently issued by an officer of the corporation are—

Farrington v. South Boston R. Co. 5 L. R. A. 849, 150 Mass. 406; *Moore v. Citizens Nat. Bank of Piqua*, 111 U. S. 156, 28 L. ed. 885.

The ground of the decisions in these cases was the same, namely, that the fact that the certificates were newly issued in the name of the party who took them as collateral security for a private loan to the officer who issued them put the person so taking them upon inquiry as to whether a former certificate had been surrendered, in accordance with the provision on the face of the certificate received.

The gist of the plaintiffs' cases lies in the negligence of the defendant corporation, which has permitted a fraud to be perpetrated to the

when the corporation refused to recognize the corporate shares as valid. *Allen v. South Boston R. Co.* 5 L. R. A. 716, 150 Mass. 200.

Negligence; responsibility for proximate or direct consequences.

A defendant is not answerable for anything beyond the natural, ordinary and reasonable consequences of his conduct. *Bennett v. Lookwood*, 20 Wend. 226; *Craih v. Petrie*, 6 Hill, 523; *Vedder v. Hildreth*, 2 Wis. 427.

Where the wrongful act of one person merely affords an opportunity or occasion for the illegal acts of another, the injury in such cases is too remote. *Cuff v. Newark & N. Y. R. Co.* 35 N. J. L. 82; *Scholes v. North London R. Co.* 21 L. T. N. S. 835.

An original, wrongful or negligent act is not to be regarded as the proximate cause where some new agency, not within the reasonable contemplation of the negligent actor, has intervened to bring about the injury. *Seale v. Gulf, C. & S. F. R. Co.* 65 Tex. 274; *Gilliland v. Chicago & A. R. Co.* 2 West. Rep. 129, 19 Mo. App. 411.

If one's fault happens to concur with something extraordinary and not likely to have been foreseen he will not be answerable for the unexpected result. *Fairbanks v. Kerr*, 70 Pa. 86; *People v. Albany*, 5 Lans. 524; *McGrew v. Stone*, 58 Pa. 496. See notes to *Louisville, N. A. & O. R. Co. v. Lucas* (Ind.) 6 L. R. A. 194; *Read v. Nichols* (N. Y.) 7 L. R. A. 182; *Smith v. Kanawha County* (W. Va.) 8 L. R. A. 82.

The damage for which recovery may be had must always be the natural and proximate consequence of the act complained of. *Vedder v. Hildreth*, 2 Wis. 427; *Walker v. Ellis*, 1 Sneed, 515; *Ehrgott v. New York*, 96 N. Y. 264; *Wilay v. West Jersey R. Co.* 44 N. J. L. 247.

detriment of the plaintiffs; and the mode in which the fraud has been accomplished is immaterial, except so far as it may bear on the notice to the plaintiffs or their reasonable care.

Shaw v. Port Philip & O. Gold Min. Co. L. R. 13 Q. B. Div. 103; Machinists Nat. Bank v. Field, 126 Mass. 345; Re Bahia & S. F. R. Co. L. R. 3 Q. B. 584.

A corporation is estopped to deny the validity of certificates issued in proper form under the seal, and duly signed by the officers authorized to issue certificates, if they are held by persons who took them for value, without knowledge or notice that they had been fraudulently issued.

Allen v. South Boston R. Co. supra; Boston & A. R. v. Richardson, 185 Mass. 473; Machinists Nat. Bank v. Field, supra; Pratt v. Taunton Copper Co. 123 Mass. 110; Moores v. Citizens Nat. Bank of Piqua, 111 U. S. 156, 28 L. ed. 885; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 80; Holbrook v. New Jersey Zinc Co. 57 N. Y. 616; Shaw v. Port Philip & C. Gold Min. Co. supra. See also Holden v. Metropolitan Nat. Bank, 188 Mass. 48.

The plaintiffs were under no legal obligation or duty to investigate the validity of the certificates received by them, or to question Jewett's title to the same.

Salisbury Mills v. Townsend, 109 Mass. 115.

It is not necessary to the conveyance of the legal title to a certificate of stock to record the transfer of the shares in the books of the corporation; the delivery of the certificate with an assignment thereof is sufficient.

Loring v. Salisbury Mills, 125 Mass. 150; Stone v. Hackett, 12 Gray, 281; Eames v. Wheeler, 19 Pick. 444.

Messrs. Samuel J. Elder and William Cushing Wait, for defendant:

Plaintiff's certificates being forgeries are not the contracts of the Company; and no implied contract can be raised to issue new ones in their places. To have complied with plaintiffs' demands would have been to over-issue the stock of the corporation, which it could not be compelled to do.

Allen v. South Boston R. Co. 5 L. R. A. 716, 150 Mass. 200, 207; Bishop v. Balkis Consolidated Co. L. R. 25 Q. B. Div. 77; British Mut. Bkq. Co. v. Charnwood Forest R. Co. L. R. 18 Q. B. Div. 714.

A corporation is estopped to deny the validity of certificates issued in proper form under its seal, and duly signed by the officers authorized to issue certificates, if they are held by persons who took them for value without knowledge or notice that they had been fraudulently issued.

Allen v. South Boston R. Co. supra.

In these cases the certificates were not "duly signed by the officers authorized to issue certificates," and they were taken under circumstances which put the taker upon inquiry and which affect him with notice of all that he could have learned by inquiry.

Farrington v. South Boston R. Co. 5 L. R. A. 849, 150 Mass. 400.

Shaw v. Port Philip & O. Gold Min. Co. L. R. 13 Q. B. Div. 103, the only case in which a corporation has been held liable for a fraudulent issue of stock where the certificates have not been signed by the proper officers, is readily 13 L. R. A.

distinguished from the present. A declaration to create an estoppel must be made "by a party whose duty it was to know and state the truth and be relied upon by one who had no other means of information or was justified in relying upon such declarations.

Hambleton v. Central Ohio R. Co. 44 Md. 551.

C. Allen, J., delivered the opinion of the court:

The by-laws of the defendant corporation provide that "each stockholder shall be entitled to a certificate of stock under the seal of the corporation, and signed by its president and treasurer." The certificates taken by the respective plaintiffs each called for these two signatures and purported to bear them. The plaintiffs were therefore apprised of the necessity for two signatures. In point of fact, however, the certificates did not bear the signature of the treasurer, his name having been forged by the president. There was no special provision in the by-laws, giving the president anything to do in respect to the issuing of certificates of shares, except a requirement that he should sign all such certificates. Transfers were to be recorded by the clerk. The purchaser named in a transfer so recorded was entitled to a new certificate upon producing the transfer to the treasurer, and delivering to him the former certificates. There was no actual or ostensible authority in the president to issue certificates. He was only to sign them. The certificates taken by the plaintiffs were invalid for want of the two signatures required by the by-laws.

But the plaintiffs contend that the defendant is nevertheless bound to make the certificates good, or responsible for their being bad, on the ground that it was negligent in permitting Jewett to remain president of the corporation, in view of his previous known misconduct, and to have control of its certificate book and seal, and that the cases fall within the principle that where one of two innocent persons must suffer a loss from the fraud of a third, the loss must be borne by the one whose negligence enabled the third person to commit the fraud.

In order to reach this conclusion, it must be made to appear that the frauds and forgeries of Jewett were such natural and probable results of his continuance in the office of president of the corporation that the defendant ought to have anticipated and guarded against them, and also that the plaintiffs on their part exercised due diligence and precaution in accepting the certificates from him.

In the absence of any previous misconduct on Jewett's part, it could hardly be maintained that there was any negligence on the part of the corporation in keeping its seal and book of certificates of shares where the president could have access to them, so as to be able to remove blank certificates from the end of the book and impress the corporate seal upon them. We are not aware that it is customary for corporations in this country to keep their seals or books of certificates in such a way that access to them can only be had when two or more officers are present.

The chief safeguard in respect to the certificates is the necessity of two signatures. And accordingly when one who has had confidence reposed in him has availed himself of his opportunity to commit a fraud upon others by means of forgery, it has usually been held in England that the loss was not a natural or probable result of the confidence thus reposed, even though it showed carelessness, and that it was too remote to be properly chargeable upon those who were thus careless in reposing the confidence. *Bank of Ireland v. Eans' Charities*, 5 H. L. Cas. 889; *Staple of England v. Bank of England*, L. R. 21 Q. B. Div. 160, 176; *Swan v. North British Australasian Co.* 2 Hurlst. & C. 175, 189. See also *Vagliano v. Bank of England*, L. R. 23 Q. B. Div. 103, 117, on appeal, L. R. 23 Q. B. Div. 243, 255, 263.

The plaintiffs rely much on *Shaw v. Port Philip & C. Gold Min. Co.*, L. R. 13 Q. B. Div. 103, which in many of its general features much resembles the present case, but with certain differences. In that case the secretary of the defendant Company issued a certificate of shares, with the name of a director forged by himself. The person to whom it was issued bought shares on the market, through a broker, who received a transfer signed by the secretary, accompanied by what purported and in all respects appeared to be a regularly issued certificate of those shares. These were deposited at the company's office, with the request for the issue of a new certificate, in the usual way. The new certificate was issued, in the usual form by the secretary, but the signature of a director, which was required, was forged. It was a part of the regular and authorized duty of the secretary to receive and examine transfers and certificates of shares, to have transfers registered, to procure the preparation, execution and signature of certificates, with all requisite and prescribed formalities, and thereupon to issue them to the persons entitled to receive them. Moreover, the Company, after the issue of the certificate, paid a dividend thereon, by check signed by the secretary and two directors. The decision of the case, which was not heard before the court of appeal, was placed on the ground that the Company had made it the duty of the secretary to procure the preparation, execution and signature of certificates with the prescribed formalities, and thereupon to issue them to the person entitled to receive them. The principal fact upon which the decision turned is wanting in the case before us. The president of the defendant corporation was not the proper officer to issue certificates, and the certificates which the plaintiffs received did not come from the office of the defendant in regular course of business, but they were received by the plaintiffs under private and personal transactions between themselves and Jewett, the president.

The plaintiffs, however, contend that the previous and known misconduct of Jewett had been such that it distinguishes the present case from others, and that by reason thereof the defendant should be held responsible for his acts. This misconduct consisted 13 L. R. A.

in pledging his shares to Evans & Co. when he had agreed to pledge them to his associates in the corporation. According to the original understanding when the corporation was formed, Estes & Lauriat subscribed and paid for the whole of the stock, but there was an agreement under which Jewett was to have the option of buying one half of the stock at a certain price at any time within one year. Jewett was president of the company, and Jackson, one of the firm of Estes & Lauriat, was treasurer. In the absence of the two senior members of the firm, Jewett elected to take his half of the stock, but stated that he could not very easily pay for it then, and Jackson consented to issue the certificates to him with the understanding that he was to give his notes for them, and that the firm would hold the stock as collateral. The stock was accordingly issued to Jewett, who took it, and did not pledge it to the firm, but afterwards pledged it to Evans & Co. There is no distinct statement how it happened that Jewett was allowed to take away the certificates, instead of pledging them on the spot to the firm; nor how soon afterwards he pledged them to Evans. Apparently confidence was reposed in him, and at any rate there is nothing to show that any steps were taken to compel him to pledge the shares to the firm according to his promise. What Jackson did in consenting to the issue of the stock to Jewett without retaining them in pledge was within his power as a member of the firm.

On the whole, we find nothing to show that the corporation or its other members had reason to suppose from what Jewett had done that he would be likely to issue forged certificates of shares, if allowed access to the certificate book and seal of the corporation; and accordingly it is not to be held responsible for his criminal fraud, as for an act made possible by its negligence.

In the cases heretofore determined by this court, where a corporation was held responsible for the fraudulent issue of shares, the certificates were in fact signed by the proper officers whose signatures were required, and there was carelessness on the part of the president in leaving certificates signed in blank by himself with the treasurer, and also carelessness on the part of other officers of the Company. *Allen v. South Boston R. Co.* 160 Mass. 200, 5 L. R. A. 716.

In each case the entry must be—
Judgment on the verdict.

COMMONWEALTH OF MASSACHUSETTS

v.

Henry S. BROWN.

(....Mass....)

The agent of a common carrier is chargeable with aiding and abetting in

NOTE.—Aiders and abettors of crime are all principals.

Anyone who counsels, aids or abets in the commission of any offense may be charged, tried and

bringing intoxicating liquors into a city to be sold illegally, where, knowing or having reasonable cause to believe, that the purchaser intends to sell them illegally, he habitually delivers them to him either personally or by his subordinates, although he does not know that the liquors were ordered until they came, and neither has nor could have anything to do with the transportation until they are brought to the city.

(May 22, 1891.)

EXCEPTIONS by defendant to rulings of the Superior Court for Middlesex County made during the trial of an indictment charging defendant with bringing into Lowell certain intoxicating liquors having reasonable cause to believe that they were intended to be

sold in violation of law, which resulted in defendant's conviction. *Overruled.*

The facts sufficiently appear in the opinion. *Mr. Walter I. Badger* for defendant. *Mr. A. E. Pillsbury, Atty-Gen.,* for the Commonwealth.

Morton, J., delivered the opinion of the court:

The defendant in this case was charged with bringing into the City of Lowell certain intoxicating liquors, having reasonable cause to believe that the same were intended to be sold in said city in violation of law. It was agreed at the trial that the City of Lowell granted no licenses at the time named in the complaint. It is well settled that one

convicted in the same manner as if he were the principal. *State v. Shenkle*, 38 Kan. 43. See also *State v. Cassidy*, 12 Kan. 560; *State v. Brown*, 21 Kan. 50; *State v. Mosley*, 31 Kan. 355.

Everyone present, actually or constructively, when a crime is being committed, who advises, aids or abets its commission, is a principal. *United States v. Gooding*, 25 U. S. 12 Wheat. 400, 6 L. ed. 693; *United States v. Wilson*, 1 Bald. 104; *United States v. Kelly*, 2 Sprague, 88; *Com. v. Campbell*, 7 Allen, 541; *People v. Woodward*, 45 Cal. 293; *Ward v. Com.*, 14 Bush, 233; *Kessler v. Com.*, 12 Bush, 18; *King v. State*, 21 Ga. 321; *Hawkins v. State*, 13 Ga. 322; *Boyd v. State*, 17 Ga. 194; *Smith v. People*, 74 Ill. 144; *Williams v. State*, 47 Ind. 568; *Goff v. Prime*, 28 Ind. 196; *State v. Shelleby*, 8 Iowa, 477; *Shannon v. People*, 5 Mich. 71; *Strang v. People*, 24 Mich. 1; *State v. Ricker*, 29 Me. 84; *State v. Davis*, 23 Me. 403; *State v. Phillips*, 24 Mo. 475; *Reg. v. Lynch*, 26 U. C. Q. B. 208; *Reg. v. McMahon*, Id. 195; *Simpson v. State*, 5 Yerg. 356; *Reg. v. Wallis*, 1 Salk. 336; 2 Archb. Crim. Proc. 945; *Hately v. State*, 15 Ga. 346; *Dean v. State*, 26 Ind. 496; *Com. v. Knapp*, 9 Pick. 496; *State v. Cheek*, 18 Ired. L. 114; *State v. Lymburn*, 1 Brev. 397; *Baker v. State*, 12 Ohio St. 214; *Welch v. State*, 3 Tex. App. 413; *Wells v. State*, 4 Tex. App. 25; *Floyd v. State*, 12 Ark. 43; *Reg. v. Howell*, 9 Car. & P. 437; *Reg. v. Tracy*, 6 Mod. 173; 4 Bl. Com. 24; 1 Hale, P. C. 233; 1 Russell, Crimes, 9th ed. 49; 1 Wharton, Crim. Law, 8th ed. 206.

A person present and encouraging, consenting, aiding, or advising another person to place an obstruction on a railroad track, is as guilty as the latter. *State v. Douglass*, 44 Kan. 618.

This case was, however, reversed on rehearing. See *State v. Douglass*, *supra*, where it was held that mentally consenting to the commission of a crime, where no expressed consent either by word or act is given, does not make the person consenting guilty of any offense, following *Clem v. State*, 33 Ind. 413; *State v. Cox*, 65 Mo. 29; *White v. People*, 81 Ill. 333; *State v. Hildreth*, 9 Ired. L. 440, 61 Am. Dec. 399; 1 Wharton, Crim. Law, § 211, a, d.

Persons who are incapable personally of committing a certain crime may be punished as principals if they take part as aiders and abettors, although there is no reference to them in the statute describing the offense. *United States v. Stevens*, 44 Fed. Rep. 132; *United States v. Bayer*, 13 Nat. Bankr. Reg. 403; *Boggs v. State*, 34 Ga. 275; *State v. Sprague*, 4 R. I. 257; *Rex v. Potts*, Russ. & R. 353. *Audley's Case*, 3 How St. Tr. 401; *Rex v. Gray*, 7 Car. & P. 164; *Reg. v. Crisham*, Car. & M. 187.

Parties co-operating are all principals.

Where two persons are jointly indicted, one for the murderous act, and the other for aiding, abetting, assisting, etc., both are principals. *State v. Anderson*, 5 West. Rep. 420, 89 Mo. 512. 13 L. R. A.

It is immaterial which of two parties co-operating in the commission of the offense inflicts the wound, as the law imputes the injury done by one as the act of the other. *State v. Payton*, 7 West. Rep. 131, 90 Mo. 220. See *State v. Blan*, 69 Mo. 318; *State v. Anderson*, 5 West. Rep. 420, 89 Mo. 312; 2 Wharton, Homicide, § 338; *State v. Dalton*, 27 Mo. 14.

So a blow inflicted by one is a blow by all participants; each is deemed agent of all, and his acts are the acts of all. *McGinnis v. State*, 31 Ga. 235; *Patton v. State*, 6 Ohio St. 467; *Fonts v. State*, 7 Ohio St. 471; *Clawson v. State*, 14 Ohio St. 234; *Hutting v. State*, 17 Ohio St. 583; *King v. State*, 21 Ga. 221; *Lewis v. State*, 33 Ga. 131; *People v. Woody*, 45 Cal. 239; *Brister v. State*, 28 Ala. 107; *State v. Anthony*, 1 McCord, L. 265.

Procuring commission of crime.

One who acts through another, even if that other be himself incompetent to commit the offense as from insanity or infancy, is a principal. *Berry v. State*, 10 Ga. 511; *Blackburn v. State*, 23 Ohio St. 146; *State v. Leonard*, 41 Vt. 585; *Rex v. Giles*, 1 Moody, C. C. 166; *Reg. v. Tyler*, 3 Car. & P. 616; *Reg. v. Manley*, 1 Cox, C. C. 104; *Reg. v. Palmer*, 1 Leach, C. C. 102; *Russell, Crimes*, 53; 4 Bl. Com. 23; 1 Hale, P. C. 19; 1 Wharton, Crim. Law, 8th ed. § 212; *Fost. 340*; 1 East, P. C. 118; 1 Hawk. P. C. chap. 31, § 7.

So one who acts through the medium of an innocent agent is principal in the crime. *Com. v. Hill*, 11 Mass. 136; *Adams v. People*, 1 N. Y. 173; *State v. Fulkerson*, Phill. L. 233; *People v. Peabody*, 26 Wend. 472; *Collins v. State*, 3 Helsk. 14; *Reg. v. Michael*, 9 Car. & P. 358; *Reg. v. Maseau*, Id. 678; *Reg. v. Clifford*, 2 Car. & K. 201. See 1 Wharton, Crim. Law, 8th ed. 161.

One employing an agent to assist in the execution of a criminal act is equally guilty. *McKee v. State*, 9 West. Rep. 839, 111 Ind. 373; 1 Wharton, Crim. Law, 247.

All are principals in misdemeanors.

At common law all are principals in misdemeanors (*Green v. State*, 13 Mo. 382; *Stipp v. State*, 11 Ind. 62; 1 Wharton, Crim. Law, 8th ed. § 223), as in the illegal sale of liquors. *Com. v. McDonald*, 151 Mass. 527; *Com. v. Major*, 6 Dana, 205.

Inciting, encouraging, and aiding another to commit a misdemeanor is itself a misdemeanor. *Jones v. Surprice*, 4 New Eng. Rep. 294, 64 N. H. 243.

Upon the trial of a complaint charging the keeping intoxicating liquors for illegal sale, where there is evidence that defendant and another purchased liquor, placed it in bottles and took it to the fair grounds, where it was drunk by various persons who paid money for the same, the case was properly submitted to the jury. *Com. v. Murphy*, 147 Mass. 523. See note to *Butler v. People* (Ill.) 1 L. R. A. 311.

who aids another in committing a misdemeanor is equally guilty with one who actually commits it (*Com. v. Ray*, 8 Gray, 441; *Com. v. Drew*, 3 Cuah. 279; *People v. Erwin*, 4 Denio, 129; *United States v. Gooding*, 25 U. S. 12 Wheat. 475, 6 L. ed. 698; *Com. v. Gannett*, 1 Allen, 7; *Reg. v. Greenwood*, 16 Jur. 390), and this rule has been applied in this State to statutory offenses arising under the Liquor Law, so called. *Com. v. Galligan*, 144 Mass. 173, 3 New Eng. Rep. 801; *Com. v. Murphy*, 145 Mass. 250.

In the present case there was no testimony directly connecting the defendant with the transportation of the liquors which he was charged with bringing into the City of Lowell. The next question is whether there was any evidence tending to show that he aided or abetted in any way in bringing them into that city. And we think there was such evidence.

The defendant was the agent in Lowell of the New England Despatch Company, which was a common carrier between Boston and Lowell and other places. He drove one of the wagons in Lowell and hired and had charge of the other drivers there. In the ordinary course of the business of the company some of the goods carried by it to Lowell were received and transported in the following way: Customers in Lowell wrote their orders which were enclosed in sealed envelopes directed to certain parties in Boston, and sent or brought them to the company's office in Lowell. Sometimes the defendant took them and sometimes others in the office, but generally the cashier. These orders were put into a messenger's box in the office and were taken by the messenger to Boston and there delivered to the various parties to whom they were directed. Another person, a driver, in the company's employ at Boston, called at the various places for the goods thus ordered and collected and delivered them to the baggage master of the Boston & Maine Railroad, who placed them in the baggage car under the charge of one of the company's Lowell messengers and on the way to Lowell they were checked off by the messenger on the way bills accompanying the goods. Neither the defendant nor any of the employes knew the contents of the orders and the way bills did not describe the contents of the packages. When the goods arrived at Lowell they were delivered to the employes of the company, of whom the defendant was one, and they delivered them to the parties ordering them.

The liquors in question were brought into Lowell by the company in the ordinary course of business as thus described, but the defendant had no personal knowledge that they had been ordered or were to be received at Lowell till they were in the company's office at Lowell and none of the other employes at the Lowell office knew of it till the messenger checked off the packages containing them after the train had left Boston. There was evidence tending to show that a part of the liquors described in the complaint were marked "B Club" and that the defendant told one of the government witnesses that liquors marked "B Club" were to be delivered to

such persons in Lowell as should be designated by a man named Bartlett in Lowell; and a short time prior to the 8th of September, 1890, the day named in the complaint, liquors marked "B Club" on the boxes of which were the company's tags had been found in places in Lowell where liquors were illegally sold. There was also evidence that the defendant knew or had reasonable cause to believe that a portion of the liquors in question were intended to be sold in Lowell in violation of law and that the express company had previously brought intoxicating liquors into Lowell with such knowledge or with reasonable cause to believe that it was to be sold. It also appeared that the defendant had been before cautioned by police officers at Lowell not to deliver liquor to illegal dealers therein and had replied that he was not doing different from other express companies and was not doing as much as some of the others. It further appeared that teams under defendant's direction had been delivering liquors constantly since the first of May and he stated in the course of his testimony that he had to see that things went on right, that he had charge of the teams and drove some himself; that he first took charge after the goods reached Lowell and that he meant he wasn't bringing so much beer as the rest of the companies.

Upon this evidence it was clearly competent for the jury to find, as they must have found under the instructions of the court, that the despatch company undertook the business of transporting intoxicating liquors to Lowell indiscriminately as a general and habitual practice where it knew or had reasonable cause to believe that the same were intended to be used in violation of law. And the jury must have further found, as they were also justified in doing under the instructions of the court, that the defendant knew that such was its course of business and knowingly assisted and aided in the same by his own acts and that the liquors in question or a part of them were brought into Lowell in pursuance of such general course of business in which the defendant so participated, and were in fact illegally transported, and that defendant performed a necessary part of the machinery in carrying on this illegal business.

The defendant cannot excuse himself on the ground that he did not know that the order was sent from Lowell for the liquors in question or that he did not know they were coming from Boston until they were received at the company's office in Lowell or that he did not himself bring them or manually aid in bringing them from Boston to Lowell, and could not have forbidden or controlled their transportation from Boston to Lowell. When the liquors arrived at Lowell he knew or had reasonable cause to believe that they were intended for sale in Lowell in violation of law. He had reason to know from the course of the business that they had been brought to Lowell from Boston pursuant to an order from a dealer in Lowell to a dealer in Boston. And he knew that when they arrived at Lowell both the shipper in Boston and the orderer in Lowell expected that he would aid in for-

warding them to their destination in Lowell. He himself expected to do this and to do it as one step in the transportation from the vendor in Boston to the purchaser and illegal seller in Lowell. In the strict sense of the words; therefore, he was aiding in bringing into Lowell intoxicating liquors with reasonable cause to believe that they were to be there sold in violation of law. He was one link in the chain of transportation from the shipper in Boston to the illegal seller in Lowell and he knowingly and voluntarily occupied that position. It was not necessary that he should know at every moment and

every step what everyone else did who was engaged in aiding or abetting or committing the misdemeanor. So far as he was concerned all that was necessary was that it should appear that he knowingly aided in the commission of the misdemeanor charged. If he did he was liable. *Reg. v. Swindall*, 2 Car. & K. 280.

For these reasons a majority of the court think that there was no error in the instructions and that the defendant's requests were rightly refused.

Exceptions overruled.

IOWA SUPREME COURT.

MT ZION BAPTIST CHURCH *et al.*,
Appts.,

H. A. WHITMORE *et al.*

(....Iowa....)

1. The majority of the members of a Baptist Church, although it is independent

in government, have no power to divert the church property to the propagation of doctrines contrary to Baptist articles of faith and church covenants; and on attempting to do so they may be enjoined from interfering with the proper use and control of the property by the minority.

2. The decision of a Baptist council on the joint call of both factions of a Baptist Church, which agree to accept it as final,

NOTE.—Ecclesiastical law; church doctrines, by what law governed.

The doctrine of a religious congregation, adherence to which is a condition of membership, must be determined by its rules, constitution, or by laws. *East Norway Lake N. E. L. Church v. Halvorson*, 42 Minn. 508.

The church, or spiritual body, as to its doctrine, government and worship, is to be governed and regulated by its own peculiar rules. *White Lick Quarterly Meeting v. White Lick Quarterly Meeting*, 39 Ind. 158; *Chase v. Cheney*, 58 Ill. 538, 11 Am. Rep. 104. See *Gibson v. Armstrong*, 7 B. Mon. 481; *Bouldin v. Alexander*, 82 U. S. 15 Wall. 131, 21 L. ed. 69; *Watson v. Garvin*, 54 Mo. 353; *Hale v. Everett*, 53 N. H. 9, 16 Am. Rep. 82; *Connitt v. Reformed Prot. Dutch Church of New Prospect*, 54 N. Y. 551; *Reformed Prot. Dutch Church v. Bradford*, 8 Cow. 457; *Dieffendorf v. Canajoharie Ref. Cal. Church*, 20 Johns. 12; *Ferraria v. Vasconcelles*, 31 Ill. 25; *Brunnenmeyer v. Buhre*, 32 Ill. 183; *Happy v. Morton*, 33 Ill. 306; *Field v. Field*, 9 Wend. 394; *Gaffey v. Greer*, 38 Ind. 122.

In the case of *Gable v. Miller*, 10 Paige, 627, 4 L. ed. 1118, the learned chancellor doubted the soundness of his former decisions, but his decree was reversed by the highest court in this State, by a vote of fourteen to three. *Chase v. Cheney*, *supra*; *Miller v. Gable*, 2 Denio, 492.

The decision of a religious judicatory as to what is consistent with a particular doctrine is conclusive on civil courts. *East Norway Lake N. E. L. Church v. Halvorson*, *supra*.

Whether any civil tribunal in the State could interfere to prevent the majority of the corporators in a religious society from introducing changes in the doctrines or modes of worship in their churches as they might deem expedient; where all religions are not only tolerated, but are entitled to equal protection by the principles of the Constitution,—*quære*. *Miller v. Gable*, 2 Denio, 523.

Religious doctrines will be examined by civil courts, when rights of property depend on adherence to them, only so far as to determine the fact of adhering to or teaching them; but no attempt will be made to determine their abstract truth or

falsehood. *East Norway Lake N. E. L. Church v. Halvorson*, *supra*.

If a majority adhere to the organization and doctrines, they represent the church. *Bouldin v. Alexander*, *supra*.

Those who remain faithful to their allegiance to the church and its doctrines are its "rightful members." See note to *Finley v. Brent* (Va.) 11 L. R. A. 214.

An expulsion of the majority by the minority is a void act. *Bouldin v. Alexander*, *supra*.

Church property; title, in whom vests.

The title to church property of a divided congregation is in the faction in harmony with its own law and ecclesiastical laws, usages, customs, and principles. *McRoberts v. Moudy*, 1 West. Rep. 325, 19 Mo. App. 28; *Roshi's App.* 69 Pa. 462.

An organized church cannot be divested of its property, even by a majority of its members, until disbanded or disrupted according to custom. *McRoberts v. Moudy*, *supra*; *Venable v. Coffman*, 2 W. Va. 330.

Money raised for a specific purpose by a congregation does not vest absolutely in either bishop or priest, but belongs to the congregation; and trustees appointed by the congregation to receive it. *Amish v. Gelhaus*, 71 Iowa, 170.

A conveyance to trustees for the use of a religious society executes a legal estate in the congregation itself. *Fernald v. Seibert* (Pa.) 5 Cent. Rep. 711; *Brendle v. German Ref. Cong. of Jackson Twp.* 33 Pa. 415; *Griffitts v. Cope*, 17 Pa. 96.

A conveyance to trustees of a religious society, without naming them, or any of them, vests the title in the corporation named in the deed, and not in any individuals. *Keith & P. Coal Co. v. Bingham*, 97 Mo. 196.

A majority of seceders cannot carry the church property into a separate connection. See *Gable v. Miller*, 10 Paige, 627, 4 L. ed. 1118; *Den v. Bolton*, 12 N. J. L. 236.

An Act providing for the contingency of a division of a religious society, the majority to decide to which branch the congregation shall thereafter belong, is void so far as it diverts the trust property from the intended uses. See note to *Finley v. Brent* (Va.) 11 L. R. A. 214.

that the doctrines taught by the majority faction are not in harmony with the teachings of the denomination, is conclusive and may be adopted by a court as the basis of its action in giving the control of the church property to the other faction.

(June 1, 1891.)

A PPEAL by complainants from a decree of the District Court for Van Buren County in favor of defendants in a suit brought to enjoin defendants from unlawfully using certain church buildings and records and from interfering with complainants' use of the same. *Reversed.*

The facts are stated in the opinion.

Morris, Craig, McCrary & Craig and Sloan, Work & Brown, for appellants:
The Mt. Zion Baptist Church was incorpo-

rated December 13, 1851, and at the time of its organization adopting the articles of faith and covenant published in the minutes of the Des Moines Baptist Association in the year 1848. The Church thus organized cannot be converted into a different church, even though the Church to which it is changed had subsequently the same faith.

First Constitutional Presby. Church v. Congregational Soc. 23 Iowa, 568.

That cannot be done inside of the Church by a majority which they could not do, by trying to transfer the church property to a different denomination.

2 Wait, Act. & Def. 262; *Hale v. Everett*, 53 N. H. 9, 16 Am. Rep. 82; *Kinkaid v. McKee*, 9 Bush, 535; *Schnorr's App.* 67 Pa. 138, 5 Am. Rep. 415.

Where a schism has occurred in a church organization each party may alternate in the weekly use of the church. *Bowden v. McLeod*, 1 Edw. Ch. 588. 6 L. ed. 257.

Distinction between church and corporation.

There is a distinction between the church and the corporation. A church is an integral part of the corporation, or rather it is the corporation in its spiritual capacity. *Hardin v. Second Bapt. Church*, 51 Mich. 132. See *Lawyer v. Cipperly*, 7 Paige, 281. 4 L. ed. 156; *Robertson v. Bullions*, 11 N. Y. 243; *Belport v. Tooker*, 29 Barb. 256; *Burrell v. Associate Ref. Church*, 44 Barb. 232; *Miller v. Gable*, 2 Denio, 402; *Ferraria v. Vasconcelles*, 31 Ill. 26; *Calkins v. Cheney*, 22 Ill. 463; *Keyser v. Stansifer*, 6 Ohio, 363; *Shannon v. Frost*, 3 B. Mon. 258; *Gartin v. Penick*, 5 Bush, 110, 9 Am. L. Rev. N. S. 210; *Forbes v. Eden*, L. R. 1 H. L. Sc. App. 563.

Where there is a schism in a religious society, though the existence of the peculiar faith or doctrines of either branch may be incidentally involved in an inquiry relative to the rights of property, all that the court can do is to enforce the observance and execution of an ascertained trust. *Hale v. Everett*, 53 N. H. 71; *People v. Steele*, 2 Barb. 397.

Where property is conveyed to a religious society to promote the teachings of particular religious doctrines, and the funds are attempted to be diverted to the support of different doctrines, chancery under its general jurisdiction over trust will interfere for the purpose of carrying out the intention of the donors. *Robertson v. Bullions*, 9 Barb. 128.

From the early days of Christianity Unitarian and Trinitarian have always been deemed antagonistic systems, and the courts have decided that funds given to support the teaching of the one of them are misemployed and perverted when applied to support the teaching of the other, and have redressed such misemployment. *Atty-Gen. v. Pearson*, 3 Meriv. 363, 7 Sim. 290; *Shore v. Atty-Gen.* 9 Clark & F. 355; *Atty-Gen. v. Shore*, 11 Sim. 562; *Atty-Gen. v. Wilson*, 16 Sim. 210; *Atty-Gen. v. Drummond*, 1 Connor & L. 219, 1 Dru. & W. 368; *Atty-Gen. v. Hutton*, 7 Ir. Eq. 612, 614; *Miller v. Gable*, 2 Denio, 422, 548; 2 Story, Eq. § 1191, a.

Courts will examine into proceedings of religious bodies with indulgence, and will suppose their proceedings done in conformity with existing rights, rather than in gross usurpation of authority. *Mason v. Muncester*, 22 U. S. 9 Wheat. 445, 6 L. ed. 131.

In determining the question of legitimate succession of a religious society, where a separation has taken place, a court will adopt the rules of such society and enforce its polity in the spirit and to the effect for which it was designed. *Rottmann v. Bartling*, 22 Neb. 375.

Where the Constitution is silent as to the interpretation of certain books adopted by it, in respect to which honest differences of opinion arise, civil courts will not hold that adherence to either interpretation *ipso facto* dissolves membership. *East Norway Lake N. E. L. Church v. Halvorson*, 43 Minn. 508.

Jurisdiction of civil courts over religious associations.
Rights of property or of contract, of religious organizations, are under the protection of the law, and the actions of their members subject to its restraints. *Watson v. Jones*, 80 U. S. 13 Wall. 679, 20 L. ed. 699.

Courts having no ecclesiastical jurisdiction cannot revise or question ordinary acts of church discipline. Their only jurisdictional power arises from the conflicting claims of the parties to the church property and the use of it. *Ibid.*; *Christ Church v. Phillips*, 5 Del. Ch. 429.

Civil courts will interfere with churches or religious associations only when rights of property and civil rights are involved. *Grimes v. Harmon*, 35 Ind. 213; *Ferraria v. Vasconcelles*, 31 Ill. 40; *Dieffendorf v. Canajoharie Ref. Cal. Church*, 20 Johns. 12; *German Ref. Church v. Seibert*, 3 Pa. 291; *Shannon v. Frost*, 3 B. Mon. 258; *Gartin v. Penick*, 5 Bush, 110, 9 Am. L. Rev. N. S. 210; *Forbes v. Eden*, L. R. 1 H. L. Sc. App. 563.

Where there is a schism in a religious society, though the existence of the peculiar faith or doctrines of either branch may be incidentally involved in an inquiry relative to the rights of property, all that the court can do is to enforce the observance and execution of an ascertained trust. *Hale v. Everett*, 53 N. H. 71; *People v. Steele*, 2 Barb. 397.

Where property is conveyed to a religious society to promote the teachings of particular religious doctrines, and the funds are attempted to be diverted to the support of different doctrines, chancery under its general jurisdiction over trust will interfere for the purpose of carrying out the intention of the donors. *Robertson v. Bullions*, 9 Barb. 128.

From the early days of Christianity Unitarian and Trinitarian have always been deemed antagonistic systems, and the courts have decided that funds given to support the teaching of the one of them are misemployed and perverted when applied to support the teaching of the other, and have redressed such misemployment. *Atty-Gen. v. Pearson*, 3 Meriv. 363, 7 Sim. 290; *Shore v. Atty-Gen.* 9 Clark & F. 355; *Atty-Gen. v. Shore*, 11 Sim. 562; *Atty-Gen. v. Wilson*, 16 Sim. 210; *Atty-Gen. v. Drummond*, 1 Connor & L. 219, 1 Dru. & W. 368; *Atty-Gen. v. Hutton*, 7 Ir. Eq. 612, 614; *Miller v. Gable*, 2 Denio, 422, 548; 2 Story, Eq. § 1191, a.

Courts will examine into proceedings of religious bodies with indulgence, and will suppose their proceedings done in conformity with existing rights, rather than in gross usurpation of authority. *Mason v. Muncester*, 22 U. S. 9 Wheat. 445, 6 L. ed. 131.

In determining the question of legitimate succession of a religious society, where a separation has taken place, a court will adopt the rules of such society and enforce its polity in the spirit and to the effect for which it was designed. *Rottmann v. Bartling*, 22 Neb. 375.

Where the Constitution is silent as to the interpretation of certain books adopted by it, in respect to which honest differences of opinion arise, civil courts will not hold that adherence to either interpretation *ipso facto* dissolves membership. *East Norway Lake N. E. L. Church v. Halvorson*, 43 Minn. 508.

Jurisdiction of civil courts over religious associations.
Rights of property or of contract, of religious organizations, are under the protection of the law, and the actions of their members subject to its restraints. *Watson v. Jones*, 80 U. S. 13 Wall. 679, 20 L. ed. 699.

Courts having no ecclesiastical jurisdiction cannot revise or question ordinary acts of church discipline. Their only jurisdictional power arises from the conflicting claims of the parties to the church property and the use of it. *Ibid.*; *Christ Church v. Phillips*, 5 Del. Ch. 429.

In case of the division of a religious corporation, the title to the church property will remain with those who retain their connection with, and conform to the usages and discipline of the organization with which they have been connected, although they may constitute only a minority.

2 Wait, Act. & Def. 263, citing *Winebrenner v. Colder*, 43 Pa. 244; *Schnorr's App. supra*; *Newburgh Assoc. Ref. Church v. Theological Sem. Trustees*, 4 N. J. Eq. 77; *Cincinnati M. E. Church v. Wood*, 5 Ohio, 288; *Ferraria v. Vasconcelles*, 23 Ill. 456; *Lewis v. Watson*, 4 Bush, 228; *Boulbin v. Alexander*, 82 U. S. 15 Wall. 131, 21 L. ed. 69.

When property is conveyed to a religious corporation to promote the teaching of particular religious doctrines, and the funds are attempted to be diverted to different doctrines, it is the duty of chancery to interfere.

Miller v. Gable, 3 Denio, 492; *Roshi's App.* 69 Pa. 462, 8 Am. Rep. 275; *Rottmann v. Bartling*, 22 Neb. 375.

Equity will award the possession of the property to those who are the true adherents to the doctrines, teachings and faith of the church, and enjoin the seceders from the true faith of the church from in any manner interfering with them therein.

Schnorr's App., *Roshi's App.* and *Rottmann v. Bartling*, *supra*; *Kniskern v. Lutheran Churches of St. John and St. Peter*, 1 Sandf. Ch. 439, 7 L. ed. 888; *Grimes v. Harmon*, 35 Ind. 198; *State v. Farris*, 45 Mo. 183; *Kisor's App.* 62 Pa. 428; *Henderson v. Hunter*, 59 Pa. 385; *Feisel v. First German Soc. of M. E. Church*, 9 Kan. 592; *McKinney v. Griggs*, 5 Bush, 401.

If the trust was created for the benefit of those adhering to a particular denomination, courts of law will accept and follow the determination of the proper ecclesiastical tribunals as to who are adhering and in subordination to that denomination.

First Constitutional Presby. Church v. Congregational Soc. 23 Iowa, 567; 2 Wait, Act. & Def. p. 256; *Harmon v. Dreher*, 1 Speers, Eq. 87; *Chase v. Cheney*, 58 Ill. 509, 10 Am. L. Reg. N. S. 295; *German Reformed Church v. Seibert*, 3 Pa. 291; *McGinnis v. Watson*, 41 Pa. 9; *Connitt v. Reformed Prot. Dutch Church*, 4 Lans. 339, affirmed 54 N. Y. 551; *Lucas v. Case*, 9 Bush, 297.

The holders of the legal title to church property are regarded in a court of equity as holding it in trust for the maintenance of the faith and worship of the organization, and any diversion of it to another use is so far a breach of trust as to demand the interposition of the court.

Harmon v. Dreher and *Kniskern v. Lutheran Churches of St. John & St. Peter*, *supra*; *Atty-Gen. v. Pearson*, 3 Meriv. 353; *Baker v. Fales*, 16 Mass. 487; *Stebbins v. Jennings*, 10 Pick. 127; *Watson v. Jones*, 80 U. S. 13 Wall. 680, 20 L. ed. 666.

Messrs. Wherry & Walker, for appellees:

If there be a difference of opinion between the plaintiffs and defendants as to what the Bible teaches with reference to sanctification, and the defendants are in a majority and plaintiffs a minority, according to Baptist 13 L. R. A. 1

practice and usage there is but one remedy, namely: "They may retire and find a home in some other church; or they may organize themselves into a new one."

Hiscox, Baptist Church Directory, p. 58, note 6; *First Constitutional Presby. Church v. Congregational Soc.* 23 Iowa, 568.

The council had no power to render any judgment of any kind. If it is claimed to be anything more than merely advisory, then it is not such a tribunal as the practice of the Baptist Church authorizes.

Hiscox, Baptist Church Directory, pp. 129-181, notes 1, 10; "The Baptist Church Manual" by Dr. J. M. Pendleton.

The investigation of a dispute between members of a church, by a committee, according to church regulations, though applied for by both parties and attended by both, can have no effect upon their legal rights and the award of the committee is not evidence in a court of law.

2 Wait, Act. & Def. p. 266.

The legal tribunals of the State have no jurisdiction over the church or its members. It is not the province of courts of justice to decide or to inquire what system of religious faith is most consistent, or what religious doctrines are true or what are false in any case.

2 Wait, Act. & Def. p. 256; *Chase v. Cheney*, 58 Ill. 509, 11 Am. Rep. 102; *Hartford First Bapt. Church v. Witherell*, 3 Paige, 296, 3 L. ed. 159; *Lawyer v. Cipperly*, 7 Paige, 281, 4 L. ed. 156; *Robertson v. Bullions*, 9 Barb. 64; *Dieffendorf v. Canajoharie Ref. Cal. Church*, 20 Johns. 12; *German Ref. Church v. Seibert*, 3 Pa. 291; *Shannon v. Frost*, 3 B. Mon. 238; *Gartin v. Penick*, 5 Bush, 110; *State v. Hebrew Congregation "Dispersed of Judah"*, 80 La. Ann. 205, 53 Am. Rep. 218; *State v. Farris*, 45 Mo. 183; *Lucas v. Case*, 9 Bush, 297.

The civil courts will not revise the acts or decisions of churches or religious societies upon ecclesiastical matters, but will interfere only when civil or property rights are involved.

Sale v. First Reg. Bapt. Church, 63 Iowa, 26; *Bird v. St. Mark's Church*, Id. 568; *Fadness v. Braunborg*, 78 Wis. 257.

Granger, J., delivered the opinion of the court:

The Mt. Zion Baptist Church was organized in October, 1842, and incorporated in December, 1851, and is located at Bonaparte, in Van Buren County. In 1852 it became the owner of lots 10 and 11, in block 12, in Bonaparte, and has erected buildings thereon for the use of the society, including a church and parsonage. The articles of association provide that "the articles of faith and church covenants published in the minutes of the Des Moines Baptist Association in the year 1848 shall be the articles of association adopted by this church, together with such rules of order as we may, from time to time, adopt, and the same is hereby adopted." In 1885, because of the teachings of one Aura Smith and his brother, of an experience or condition of "sanctification by a second experience," or "sinless perfection," there were differences of opinion and trouble among the members of the Church. The pastor of the Church, Rev. C. L. Custar, one H. A.

Whitmore and others, were regarded as adherents of the doctrine thus taught, and placed under charges of heterodoxy, with a request that a council of ministers and deacons be convened to hear and adjust the complaints. The persons thus charged were, at a regular meeting of the church, without trial or investigation, exonerated from the charge by a motion for that purpose. This action was had on the 7th of January, 1888. On the 4th of February thereafter charges were preferred against J. D. Israel, L. H. Mills, J. H. Murphy, Mrs. Troutman, and Mrs. Cox, who were of those opposing the alleged new doctrines. The charges were: "(1) for disregard of authority; refusing to submit to the requirements of the Church; setting aside the authority and majority of the Church in its actions and rulings; (2) for contention and strife; causing division; being leaders of evil; destroying the peace of the Church; attempting to divide the Church; (3) for false witness, testifying to things known to the Church to be entirely false, against Bro. C. L. Custar and other members of the Church in good standing." There was no trial upon the charges, but the Church proceedings show as follows: "The charges are of such a nature as to require immediate action, and motion to exclude the parties named from the fellowship of the Church carried." The record from this forward recognizes two "factions" in the Church, one designated as the "Whitmore faction," and the other as the "Israel faction;" and they are so generally spoken of in the record and arguments, the Whitmore faction being largely in the majority. On the 6th of June, 1888, the Israel faction about fifteen in number, assembled at the house of Mr. Israel, and, because of the difficulties existing in the Church, caused by the false doctrines being taught in the Church by the "former pastor, Rev. Custar, and other members of the Church, . . . namely, sanctification, a second blessing, especially to be sought for, and sinless perfection, and by using unscriptural discipline," decided that they constituted "the true and original Baptist Church of Bonaparte;" and it is this organization, with certain of its members, that are parties plaintiff for and on behalf of those having a common interest; the defendants being H. A. Whitmore and others, for and on behalf of those "associating and acting with them." The Israel faction, after deciding that it was the Church, called to its service as pastor Rev. J. L. Cole, and sought the possession and use of the church building and property then in the possession of the Whitmore faction, which was refused. On the 1st of August, 1888, a council of seven Baptist ministers assembled at Bonaparte, at the joint call of the two factions, and the following is the record of the matters to be submitted to it:

"The statement of reasons for calling the council was read by the minority, of which the following is a synopsis: '(1) That two brothers, William and Aura Smith, being professedly ministers of the gospel, came into our midst early in 1885, preaching the doctrine of entire sanctification and sinless per-

fection, inviting all professing Christians to seek this experience, and ridiculing Christians who failed to accept this invitation, and finally urging those who did accept this invitation to attend holiness prayer meetings. That Brother C. L. Custar, a former pastor of this Church, and several members of this Church followed after these Smith brothers, and accepted the aforesaid doctrine. (2) That Brother Custar taught this doctrine from the pulpit of this Church. That a holiness prayer meeting was organized in the spring of 1885, and carried on till May, 1888. That members of this Church professed entire sanctification, neglecting the regular meetings of this Church for holiness meetings. That this doctrine became a means of disturbance and alienation of feeling among the members. (3) That the teaching and acceptance of this false doctrine has been a cause of the difference of opinion and of the action of a minority in organizing the new body and claiming to be the real Bonaparte Baptist Church. [Signed] J. D. Israel and others.

"Reasons for calling a council were read on behalf of the majority party; of which the following is a copy: 'The Bonaparte Baptist Church organized the council to examine its faith and practice; its faith with reference to the doctrine of sanctification; its practice or discipline with regard to the exclusion of certain members of the church, who have since formed another organization, and claim to be the original and true Bonaparte Baptist Church. We want to know if we have so far departed from the faith once delivered to the saints that we can no longer be recognized as a regular missionary Baptist Church. We desire to know wherein we have wronged those whom we have excluded, that we may confess the same, and do all in our power to repair the broken walls of our beloved Zion. [Signed] H. A. Whitmore, C. L. Custar, Com.'"

J. D. Israel and H. A. Whitmore as "leaders," and on behalf of their respective factions, signed the following: "For the sake of peace and harmony, and for the glory of our common Lord, it is hereby agreed that the findings and recommendations of this council shall be accepted as final, and in the fear of and by the help of God, we will carry them out in spirit as well as in letter. [Signed] J. D. Israel, H. A. Whitmore."

Each party selected a person to conduct the examinations in its behalf, and the record states that the examination was "thorough, satisfactory, and conducted in good spirit." Revs. Cole and Custar were appointed to receive the decision of the council "on behalf of their parties, respectively," and afterwards the council unanimously returned the following findings: "(1) We find that the doctrine of entire sanctification, taught by the Smith brothers, Miss Romack, and confessedly also by Bro. C. L. Custar, in the Church is not in harmony with the teachings of the Baptist denomination which deny instantaneous sanctification, the so-called second blessing, and sinless perfection. We hold to a true spirituality in our churches; to a high standard of Christian living; to progressive attainment

and growth in grace. On the other hand, we hold that the doctrine of entire sanctification is subversive of the very end sought; destructive of the peace of our churches, in some instances destroying the churches themselves; and should be avoided as a deadly error. We are rejoiced at the noble stand taken by Bro. C. L. Custer in confessing his error in respect to this doctrine, and we trust that juster views of scripture teaching on this point may prevail in this Church and community. (2) The council recommend that the teaching of the above erroneous doctrine of second experience or entire sanctification be taught in this Church no more, forever; and that the teaching of it in this Church or permitting it to be taught in the Church is a just cause for church discipline. (3) We find that the exclusion of the three members of the choir was justifiable and regular, and we recommend to the young ladies that they make suitable acknowledgment to the Church. (4) We find that the exclusion of J. D. Israel, L. H. Mills, Jas. Murphy, Mrs. C. O. Troutman, and Mrs. J. W. Cox was hasty and unjustifiable. We recommend that the action of the Church in excluding them be at once rescinded."

At a regular meeting of the Church August 19, 1898 (both factions, as we understand), the decision of the council was on motion accepted, and the action of the Church in expelling J. D. Israel and others on the 4th of February was rescinded. At a meeting of the Church on the 10th of September, 1898, the Church annulled its action of August 19, and again, on the 3d of November, it took action on the findings of the council separately, and rejected numbers 1 and 2, being those with reference to the doctrine of sanctification. The petition recites the substance of the foregoing, and contains averments that the defendants and those associated with them have departed from the faith and practice of the Baptist Church, and are using the church building and records for the benefit and promotion of doctrines and a faith contrary to and in violation of the faith, covenants, and practice of the Baptist denominations, to maintain which the said Church was organized and the buildings erected. The relief sought is that the defendants be restrained from interfering with the plaintiff in the free use of the church buildings and property for their legitimate use as a place of worship and teaching the doctrines of the denomination.

The answer puts in issue the allegations of the petition that the defendants have departed from the faith and practice of the Baptist Church, and are using the church property or records for a purpose in violation of the teachings and doctrines of the denomination, and deny that the plaintiffs are denied the free use thereof for any legitimate purpose. The council found the doctrine of "entire sanctification," as taught by Smith brothers, was "not in harmony with the teachings of the Baptist denomination," but "subversive to the very end sought," and "destructive of the peace" of the churches. The correctness of this doctrine as a rule of faith and observance in the Baptist

Church was in dispute between the factions. It was not, as indicated by appellees' argument, a question of the truth or falsity of the doctrine on scriptural authority, but was it in accord with, or subversive of, the covenants and practice of the Baptist Church, with the limitations imposed by its articles of association? This was a purely theological question, and a council of theologians from that church was a proper tribunal to determine such a question, and was so recognized and agreed upon by the parties. It is, however, contended by appellees that they are not bound by this finding of the council, and we notice their reasons, or at least some of them. Much stress is laid upon the fact that each Baptist society is an independent body, with no higher ecclesiastical authority for its control; that its form of government is congregational where a majority govern; and that it is within itself "a little republic." It should be in mind that it is the distinctive character of the Baptist Church government that is relied upon to make it an exception, and free it from the generally expressed rule of law, by which a minority of an association may claim its property against a majority seeking to divert it from its legitimate use. A quotation from appellees' argument will indicate clearly the objection to be met. It is said: "Yes, we repeat again if this Church or any other Baptist church desires to change its 'articles of faith' or belief, it may do so, if a majority of its members concur therein. If it desires to change to a Mormon church it may do so, and no person or persons, no man or body of men, either civil or ecclesiastical, has any right or power to interfere. It owes no allegiance to any man or body of men, except a majority of its own members. It has no creed except the Bible, and the right of its own members to interpret that according to the dictates of their own consciences. If a majority of the members of that Church believe the Bible to teach a certain doctrine, then that is 'Baptist doctrine,' because that Church has the right and the power to determine for itself what the Bible teaches, and no other church or churches has any right to interfere therein. The Baptists, as a denomination, have no creed. There is no such thing as a one Baptist church with one Baptist creed or belief. All there is of 'Baptist creed' consists in the right of each separate church to interpret the Scriptures for itself, and to say for itself what it believes the Scriptures to teach. There are as many 'Baptist churches' as there are several societies or congregations. There are as many 'Baptist denominations or creeds' as there are several societies or congregations which have given expression to their belief of what the Scriptures teach." Afterwards follows the conclusion: "We conclude, then, if there be a difference of opinion between the plaintiffs and defendants as to what the Bible teaches with reference to sanctification, and the defendants are in a majority and plaintiffs a minority, according to Baptist practice and usage there is but one remedy, namely, 'they may retire, and find a home in some other church; or they may organize

themselves into a new one." This exclusiveness of government within the strict lines of ecclesiastical authority may be conceded; but we are constrained to doubt that any writer, either upon ecclesiastical or civil law, where a controversy involved the right of a minority of an association to have its property devoted to the purpose for which it was given or granted, has laid down a rule so broad. As we think these statements and the conclusion lay at the foundation of other errors into which appellees have fallen, a brief consideration of them, and some rules of law, will render a consideration of many questions unnecessary.

Let it be understood at the outset that we are not adjudicating the right of any person to a religious belief or practice, nor are we to determine the truth or falsity of the doctrine of "sanctification," or "sinless perfection." Upon authority so general as to be beyond question it is held that property given or set apart to a church or religious association, for its use in the enjoyment and promulgation of its adopted faith and teachings, is by said church or association held in trust for that purpose, and any member of the church or association, less than the whole, may not divest it therefrom. The following cases more or less directly sustain the rule, and are but a few of the many bearing on the question: *Kniskern v. Lutheran Churches of St. John & St. Peter*, 1 Sandf. Ch. 439, 7 L. ed. 888; *Atty.-Gen. v. Pearson*, 3 Meriv. 353; *Baker v. Fales*, 16 Mass. 487; *Stebbins v. Jennings*, 10 Pick. 172; *Hale v. Everett*, 53 N. H. 9; *Lawyer v. Opperty*, 7 Paige, 281, 4 L. ed. 156; *Hartford First Bapt. Church v. Witherell*, 8 Paige, 296, 8 L. ed. 159; *Harrison v. Hoyle*, 24 Ohio St. 254; *Fidd v. Field*, 9 Wend. 401; *Gable v. Miller*, 10 Paige, 627, 4 L. ed. 1118, 2 Denio, 493; *Ginnanti M. E. Church v. Wood*, 5 Ohio, 284; *Happy v. Morton*, 83 Ill. 398; *Lawson v. Kobenson*, 61 Ill. 407; *Dublin Case*, 38 N. H. 459; *Watson v. Jones*, 80 U. S. 13 Wall. 679, 20 L. ed. 666; *Fadness v. Braunborg*, 78 Wis. 257; *First Constitutional Presby. Church v. Congregational Soc.* 23 Iowa, 567.

The Mt. Zion Baptist Church came into possession and ownership of the property it now holds under a profession of faith and practice limited by the "articles of faith and church covenants published in the minutes of the Des Moines Baptist Association in the year 1848," which we understand to accord with the teachings of the Baptist denomination. These articles of faith and church covenants, and the teachings with which they accord, are a limitation on the trust or use to which the property may be applied. Nice distinctions or shades of opinion on doctrinal points or practice do not merit the interference of a court of equity, and it is only when the departure from the faith is so substantial as to amount to a diversion of the property from the trust purpose that courts will interfere. The council selected by the parties declared, in effect, the doctrines taught by Smith brothers to be a deadly error, and destructive of the peace of the Church. Treating this finding for the present as legitimate and true for the purposes

of the case, and the situation is that property given and devoted to the promotion of the Baptist Church is being used for its destruction. Appellees' contention because of their claims for the distinctive or independent character of the Baptist Church by which a majority may, without limitation, govern, would permit this result. They take the Scriptures as the only limitation upon or authority over the power of the church, both as to spiritual and material affairs, within the church; and wherein the members may differ the majority control, without reference to the original purposes of their association. The error of appellees in their claim for the "independency" of the majority in a Baptist church lies in a mistaken conception of what should be understood by "government." The power of the majority to govern is derivative, and the source of derivation limits the power. The organization gave birth to the Church, and a power to govern the Church. The Church is Baptist because of the faith and covenants that make it so. It is not the faith and covenants that need or are to be governed, but the members in the enjoyment and fulfillment of the same. The power to govern the Church gives no power to change the Church or the faith and covenants that fix its character. The property of this Church is the common property of all its members, and each has such an interest therein that he may insist that it shall be devoted to the religious faith for which it was given. The manner of the application is delegated to the judgment of a majority of the members of the Church, but there is no delegation of authority to the majority to apply it to the advancement of a church of another faith by a direct transfer, or by changing the faith of a majority of the members of the Church. It is when such an attempt is made that a court of equity will interfere to protect the rights of a minority in having the trust property applied in accord with the original intent. In *Schnorr's Appeal*, 67 Pa. 188, it is said: "When the founders or donors have clearly expressed their intention that a particular set of doctrines shall be taught, or a particular form of worship and government maintained, it is not in the power of individuals having the management of the institution at any time to alter the purpose for which it was founded." In the same case it is further said: "In church organizations those who adhere and submit to the regular order of the church, local and general, though a minority, are the true congregation." *Kosh's App.* 60 Pa. 462; *Rottmann v. Bartling*, 22 Neb. 376.

If perchance a bare majority of some Baptist church should determine, on scriptural authority, their right to a plurality of wives; and, against the protests of a minority, devote the property of the church to the advocacy and practice of such a doctrine, under the claim of appellees that the church "owes no allegiance to any man or body of men," civil or ecclesiastical, except a majority of its members," the only redress of the minority would be to retire from the church, and leave the property to the majority for such a purpose. Such a surrender of civil rights is without support on any principle of natural

justice, and we believe without the sanction of any judicial tribunal. We, of course, treat and understand the arguments and claims of parties as to the law to be applicable to the property interest of a church, for it is the only question involved in this suit.

It is said in *Schnorr's Appeal*, in a very similar connection, that "the guaranty of religious freedom has nothing to do with the property. It does not guarantee freedom to steal churches." The thought, with no intent or reason to impute a criminal or dishonest purpose in this case, is not without application to the marvelous freedom from interference claimed for a majority in a Baptist church, because of a congregational or independent form of government. It is further said in the same connection that such freedom "secures to individuals the right of withdrawing, forming a new society with such creed and government as they please, raising from their own means another fund, and building another house of worship; but it does not confer on them the right of taking the property consecrated to other uses by those who may now be sleeping in their graves."

Mt. Zion Baptist Church was organized in 1842, and prospered, without dissension, till 1885, when this new doctrine, which had not before been taught or recognized in the Church, was introduced. With its introduction began trouble, resulting in a division of the Church upon religious faith as justified by the Bible. Not alone the finding of the council, but the record on other grounds, leads to the conclusion that at the organization of the Church and long after it was not thought of as a doctrine of faith or belief in the Church. The newness and singularity of the doctrine in that Church and community seemed to render it one for especial teaching and information, leading to the holding of "holiness meetings;" and the truth of such religious experience was in dispute among professing Christians, and especially in the Baptist Church. Copious citations from the Scriptures and from religious treatises are made in support of a doctrine of sanctification which it is neither our province to deny nor affirm. It is likely true that one purpose of these citations is to show that the sanctification, the teaching of which the council found to be a deadly error, was not that taught by defendants, but that it was a doctrine of sanctification in accord with the teaching of the Baptist Church, which fact will be hereafter noticed.

It is urged that the findings of the council are without force, and not binding upon the defendants or on this court, because the church knows no tribunal except the church itself, and hence the action of the council is void. But has not this independent body a right to act for itself,—to agree upon a lawful method of adjusting any differences it may have? Where is the power to gainsay its right to do so? We do not hold, for it is not our province, that for the purpose of church observance the findings of the council are obligatory. Such is purely a matter of ecclesiastical direction and authority; but

the ecclesiastical question there determined, as to the fact of the doctrine taught by Smith brothers being error against the faith of the Church, we think is conclusively settled, and that it may be shown in the civil courts, in matters of which they take jurisdiction, when material to the question at issue. A reference to the reasons for calling the council shows this doctrinal question to have been in dispute, and the majority recognized itself as a party to a controversy on a doctrinal question, the settlement of which was for the "sake of peace and harmony, and for the glory of our common Lord." It was by common consent a method of settling the creed of the Church, and their acts in this respect, being of all the members, are as available in the civil courts to protect property rights as are their acts at the organization of the Church in fixing its creed and character. It will be observed that we are not holding that the recommendations of the council are of like effect, nor are we attaching legal signification to them. They do not go to the conditions that fix property rights with which we deal. After the majority has recognized itself a party to a controversy that should be settled in the interest of peace and harmony, the claim that it should itself sit in judgment to determine the controversy is somewhat novel. The minority lay at the door of the majority the charge of heresy. The majority say: "We constitute the Church. All power is vested in the Church, and hence in us. We determine that the charge is false." This is the precise claim made by appellees as to the power of a majority, and it is the precise action taken by appellees as a majority in Mt. Zion Baptist Church, after which the council was called, the action of which it would now repudiate. In view of this, the claim of the majority that "if it desires to change to a Mormon church it may do so, and no person or persons, no man or body of men, either civil or ecclesiastical, has any right or power to interfere," is not strange. The position leads to this: Consider the majority of a particular Baptist church as guilty of the grossest violations of and the widest departure from the church covenants and faith. Being accused by the minority, the accused sit in judgment, which it declares in its favor, and then pleads the judgment it declares as conclusive of its innocence, because no other man or body of men has authority to interfere. However such a rule may serve in purely ecclesiastical relations, we unhesitatingly say the civil law will not adhere to it where the result is to divert trust property from its proper channel.

But it is said the council did not find that defendants believed or taught the doctrine of sanctification as taught by Smith brothers, and it is true that it is not in terms so found, although the inference is quite conclusive. If it was so found, the same reasons would not exist for our treating it as conclusive as in case of the doctrinal point before discussed. The inquiry as to the conduct of the defendants involves that before and after the proceedings of the council, and becomes a fact for us to find from the evidence. The

evidence, independent of the finding of the council as to the extent the doctrine was believed and taught except as to a few, including the pastor, who at or before the sitting of the council confessed his error, would leave us in serious doubt on this question but for what transpired after the sitting. On the 19th of August the Church (including the defendants) accepted the action of the council in pursuance of their agreement, and to this and the subsequent action of the Church we attach much importance in determining the fact. The council had only found that the particular doctrine of sanctification taught by Smith brothers was error, and the acceptance of the finding reached to no other doctrine. The recommendation that it be taught no more in the Church was only the "above erroneous doctrine." On the 10th of September the Church by action annulled its action of August 19, and again November 3, by further action, it rejected the action of the council as to said finding and recommendations, and accepted it in other respects. Thus it is seen that the majority organized as a church has in effect declared its adherence to the erroneous doctrine, and refused to abide by the recommendation that it should not be further taught in the Church. If the doctrine taught by Smith brothers was not that entertained by defendants, why reject the finding that it was error? If it was not the intention to teach it in the Church, why reject the recommendation that it should not be further taught? This conduct of the majority, in the light of other facts, is quite conclusive, to our minds, of both its belief in the doctrine and its purpose to teach it in the Church. But as a reason for the action of the Church in repudiating the findings it is said: "The church had no right to sign the agreement, because it cannot delegate its authority, and the signing of the agreement was disloyalty to Christ, and a surrender of the cardinal principle of Baptist practice, namely, church independence." There is a seeming inconsistency between the language and conduct of the majority in this respect. The disloyalty to Christ appears to have been in making the agreement to abide by the action of the council, because of a surrender of principle. But the majority rejects part of the findings of the council and accepts other parts, one of which was favorable to it. We do not see how to sustain appellees' claim, except upon the theory that the disloyalty in making the agreement depended on the character of the findings under it, which we do not think would be claimed. It is again said: "For the defendants to have accepted these findings would have been for them to admit, not that they were teaching or intending to teach any such doctrine, but that C. L. Custar, their former pastor, to whom they had given a letter of recommendation to a sister church, had been teaching the doctrine of sinless perfection." But Rev. Custar was present at the meeting of August 19, when the church accepted the action of the council, and took his letter of dismission at that time, and took part in the proceeding, favoring the acceptance; and

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the findings, which he was a committee of the majority to receive, show that he had been confessedly a teacher of the same doctrines as Smith brothers, and confessed his error. How can we, in the light of such a record, accept the claim of the majority that in rejecting the finding and recommendation they were acting in the interest of the pastor? Other claims are made, as that the parties were by the council required to sign the agreement which was wrong, but nothing in the record shows but that it was not entirely voluntary as to all parties. It is further said that the action of a council is only advisory, and that it is never binding. The rule, as claimed, has the support of ecclesiastical authorities, but the agreement in this case made it more as to its effect on the property interests of the Church. It is a question entirely different from that pertaining to conscience, or the general rules for church government, as to which the authorities cited have especial reference. It should be kept in mind, to avoid misapprehension, that we have only treated the findings of the council as conclusive in so far as, by an agreement of the entire body of the Church, it determined a dispute as to its former faith or creed. We reach the conclusion upon the facts in the case that the majority have made a substantial departure from the original faith and covenants of the Church, and have diverted the property from the purpose for which it was given or granted.

In *App. v. Lutheran Congregation*, 6 Pa. 201, it is said: "It is the duty of the court to decide in favor of those, whether a minority or majority of the congregation, who are adhering to the doctrine professed by the congregation, and the form of worship in practice, as also in favor of the government of the church in operation, with which it was connected at the time the trust was declared." See also *McGinnis v. Watson*, 41 Pa. 9; *Sutter v. First Reformed Dutch Church*, 42 Pa. 508.

In deciding who is entitled to control the Church property where there is such a division, we must look to the situation when the dispute began. In *Roshi's Appeal*, citing the above authorities, it is said: "The title to the church property of a divided congregation is in that part of it which is acting in harmony with its own law; and the ecclesiastical laws, usages, and principles which were accepted among them before the dispute began are the standard for determining which party is right."

Thus aided by authority upon the facts as we find them, we are not in doubt as to our duty. The minority, when pressed from the Church by the departure of the majority, having the church organization, were justified in taking measures by organization to preserve the identity of the Church and its property interests, and under the law were entitled to its use and control. It is only by placing it there that the trust will be observed, and the cause is remanded to the district court for a decree to that effect.

Reversed.

NEW YORK COURT OF APPEALS (2d Div.).

Phoebe A. GREENE, *Resp't.*,

v.

Peter COUSE, *App't.*

(....N. Y.....)

A defendant in ejectment is not estopped to set up adverse possession by the fact that his grantor after setting up the same defense in a prior action had settled it by buying the plaintiff's title and giving his notes for the purchase price, and that the same plaintiff has brought a second action after a default in payment of the notes.

(Haight and Parker, JJ., dissent.)

(June 26, 1891.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Fourth Department, affirming a judgment of the Circuit Court for Delaware County in favor of plaintiff in an action brought to recover possession of certain real estate. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. James R. Baumes, for appellant:

Alex. Couse having acquired the title in fee by adverse possession to the lot in question, could not impair or lose it by the contract relied on by plaintiff under the "Statute of Fraudulent Conveyances and Contracts Relating to Lands."

4 Rev. Stat. 8th ed. 2589, § 6; *Wiseman v. Luckeinger*, 84 N. Y. 37, 88; *DeLancey v. Ganong*, 9 N. Y. 27.

When a party shows he has a legal title to

land, it cannot be taken from him by evidence that he has said he had no title to it.

Stuyvesant v. Toppkins, 9 Johns. 62, 63, affirmed in court of errors, 11 Johns. 569-572; *Kentor v. Dimmick*, 46 Barb. 160, 161; *Jackson v. Cary*, 16 Johns. 805, 806; *Jackson v. McVey*, 15 Johns. 237; *Jackson v. Shearman*, 6 Johns. 19-21; *Baldwin v. Brown*, 16 N. Y. 363; *Jackson v. Long*, 7 Wend. 170-172.

A party in possession of lands may be permitted to protect himself against litigation by buying in claims made by others, without invalidating his legal rights or subjecting himself to any allegiance to others. By acknowledging the title of another he is not estopped from subsequently disclaiming holding under such title if the original entry was not under the person in whom the title is acknowledged; nor is any other person deriving the possession from such tenant estopped by such acknowledgment.

Herman, Estoppel, 2d ed. 1295, § 1159; *Jackson v. Leek*, 12 Wend. 105; *Jackson v. Spear*, 7 Wend. 403; *Jackson v. Given*, 8 Johns. 137-139; *Sparrow v. Kingman*, 1 N. Y. 242, 252-254; *Bigelow v. Finch*, 11 Barb. 498, 500; *Jackson v. Smith*, 13 Johns. 403, 413; *Jackson v. Parker*, 9 Cow. 86; *Glen v. Gibson*, 9 Barb. 634, 640; *Bain v. Matteson*, 54 N. Y. 663-666.

One holding adversely, or otherwise, may purchase an outstanding title to support his own, whether he doubts the validity of his previous title or not, and such purchase or purchases will not affect the right or title under which such purchaser previously claimed to hold.

NOTE.—Defenses in actions of ejectment.

Whatever shows that the plaintiff is not entitled to the immediate possession of the premises claimed constitutes a good and valid defense in an action to recover the possession. *Hunter v. Trustees of Sandy Hill*, 6 Hill, 407.

Adverse possession must be pleaded. It cannot be shown under the general issue. *Hanse v. Mead*, 27 Hun, 162.

Defendant may interpose any equitable defense, such as an estoppel. See *Miller v. Platt*, 5 Duer, 222; *Crary v. Goodman*, 12 N. Y. 286; *Chase v. Peck*, 21 N. Y. 561.

But to avail himself of such defense, it must be pleaded. *Raynor v. Timerson*, 46 Barb. 518; *Blair v. Claxton*, 18 N. Y. 529.

The common-law rule excludes all defenses in ejectment, except those that are legal; and this rule is recognized in the federal courts. *Singleton v. Touchard*, 66 U. S. 1 Black. 342, 17 L. ed. 50; *Robinson v. Campbell*, 16 U. S. 3 Wheat. 212, 4 L. ed. 272.

But in various States equitable defenses may, under statutes, be made to the action; and not only may an equitable defense be set up, but equitable relief demanded on the part of the defendant, against the plaintiff. See *Wait, Act. & Def.* §§ 74, 88; *Requa v. Holmes*, 26 N. Y. 338; *Smith v. Tome*, 68 Pa. 158; *Fisher v. Moollok*, 13 Wis. 321; *Hayden v. Stewart*, 27 Mo. 286; *Newsome v. Williams*, 27 Ark. 632; *Meador v. Parsons*, 19 Cal. 294; *Willis v. Wozencraft*, 22 Cal. 807.

In several States, by virtue of the statute, every defense, legal or equitable, may be proved under the general denial. *Vanduyne v. Hepner*, 45 Ind. 451, 589; *Franklin v. Kelley*, 2 Neb. 79, 113, 115.

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In some States the defense of the Statute of Limitations may even be relied upon in this action under a general denial. *Nelson v. Brodhead*, 44 Mo. 506; *Bledsoe v. Simms*, 53 Mo. 305, 307.

But it cannot be in other States, whose Codes expressly require the Statute to be pleaded. *Orton v. Noonan*, 26 Wis. 672.

An equitable defense to the action, must however, as it seems, be specially pleaded. *Stewart v. Hoag*, 12 Ohio St. 623; *Lombard v. Cowham*, 34 Wis. 486, 491.

Defendant in ejectment may successfully plead title acquired by adverse possession, fully matured after warrant and survey, but before patent issued to the warrantee, or those claiming under him, whether a patent has been subsequently granted or not. *Patten v. Scott*, 10 Cent. Rep. 727, 118 Pa. 115.

It is not indispensable that the plaintiff in an action of ejectment should show a perfect indefeasible estate in fee simple, to authorize a recovery against one who can establish no legal right either of property or possession. *Lewis v. Goguette*, 3 Stew. & P. 184.

But possession should not be ousted without a clear title in the other party, especially when it has been upheld by the state tribunals. *Preston v. Bowmar*, 19 U. S. 6 Wheat. 580, 5 L. ed. 336.

And a plaintiff in ejectment who has no title whatever cannot recover, though he sue for the use and benefit of another who has the title. *Brooking v. Dearmond*, 27 Ga. 58.

But a defendant in ejectment who shows no title to the lands in dispute cannot take advantage of technical imperfections in the plaintiff's title (*McAlister v. Williams*, 1 Overt. (Tenn.) 107; *Zeringue*

Northrop v. Wright, 7 Hill, 477, 480, 495; *Burhans v. Van Vandt*, 7 Barb. 92, 102; *Jackson v. Newton*, 18 Johns. 355; *Marble v. McMinn*, 37 Barb. 615; *Parker v. Merrimack River L. & C. Props.* 3 Met. 91; *Oscens v. Myers*, 20 Pa. 184; *Bannon v. Brandon*, 34 Pa. 263; *Brandon v. Bannon*, 38 Pa. 63; *Lodge v. Patterson*, 8 Watts, 74; *Caperton v. Gregory*, 11 Gratt. 505; *Ridgeway v. Holliday*, 59 Mo. 444; *Cannon v. Stockton*, 36 Cal. 535; *Hayes v. Martin*, 45 Cal. 559; *Blight v. Rochester*, 20 U. S. 7 Wheat. 535. 548, 5 L. ed. 516-519; *Chapin v. Hunt*, 40 Mich. 595; *Tobey v. Secor*, 60 Wis. 310, 312, 313; *Singer Mfg. Co. v. Tillman* (Ariz.) June 10, 1890; *Griffith v. Smith* (Neb.) June 18, 1890; *Giles v. Pratt*, 2 Hill, L. 489.

An offer to buy out a hostile claim will not estop the party making such offer from asserting title by adverse possession previously acquired.

Furlong v. Cooney, 72 Cal. 322; *Frick v. Simon*, 75 Cal. 337; *Pacific Mut. L. Ins. Co. v. Stroup*, 63 Cal. 150; *Riggs v. Riley*, 12 West. Rep. 744, 118 Ind. 208.

The agreement of March 5 was rescinded long before the commencement of the action.

The Bradstreets refused to convey according to its terms, and such refusal gave Cause the right to assent to the rescission and to treat the agreement as abandoned.

Hubbell v. Pacific Mut. L. Ins. Co. 1 Cent. Rep. 78, 100 N. Y. 47; *Lawrence v. Taylor*, 5 Hill, 107, 114, 115; *Morange v. Morris*, 3 Keyes, 48; *Graves v. White*, 87 N. Y. 463, 466; Gerard, Real Estate, 8d ed. 492, and cases cited; *Cross v. Beard*, 26 N. Y. 96; *Starbird v. Barrone*, 38 N. Y. 237.

The rule in such event would be to restore the respective parties to their rights as they existed prior to the making of the contract.

v. Williams, 15 La. Ann. 76; and when the plaintiff in ejectment shows a connection between his title and the title of the person in whose name he sues, it will be considered that he is authorized to use the name of the latter in the action. *Adams v. McDonald*, 29 Ga. 571.

Of course, it cannot avail the plaintiff anything to show that some third person has a better right to the premises in dispute than the defendant, unless he can connect himself in some way with the title of such third person; and the same rule will apply to the defendant in an action of ejectment. See *Bailey v. March*, 3 N. H. 274; *Enfield Props. v. Permit*, 3 N. H. 512; *Tyler, Ejectment and Adverse Possession*, chap. 4, p. 74.

As the law now stands any equitable defense may be interposed in a proceeding at law to recover the possession of real estate. Not only so, but in actions strictly legal, the defendant may have positive or affirmative relief for matter purely equitable, in a case properly stated, by way of a counterclaim or cross-demand. *Rosier v. Van Dam*, 16 Iowa, 173, 173.

The general doctrine in actions of ejectment is that the plaintiff must recover upon the strength of his own title and cannot rely upon the weakness of the defendant's claim. And if the case depends upon the legal title, the defendant may show an outstanding title in some third party, and need not show that he holds it himself or that his possession relates to it; but it must usually appear in such a case that this outstanding title existed at the time of the commencement of the suit, and was one on which the holder could recover, if he assert his right under it. *Love v. Simms*, 22 U. S. 9 Wheat. 13 L. R. A.

Battle v. Rochester City Bank, 8 N. Y. 86, 91; *Harris v. Hiscock*, 91 N. Y. 845.

Messrs. W. & G. W. Youmans, for respondent:

One who has recognized the title of plaintiff, by offering to purchase of him, cannot set up adverse possession.

Jackson v. Britton, 4 Wend. 507.

An offer to purchase lands by a party having the title does not impair or affect his right. Such offer, however, by a party bars the defense of adverse possession.

Ibid. See *Jackson v. Oroy*, 12 Johns. 427;

Jackson v. Cuedden, 2 Johns. Cas. 353.

As the plaintiff in ejectment must recover on the strength of his own title, it logically follows that the defendant may resist his suit by any title, either held by himself or outstanding, which will show that the plaintiff lacks an element which is essential to his right to recover.

Green v. Scarlett, 8 Grant, Cas. 238; 3 Wait, Act. & Def. p. 109, and cases there cited.

Potter, J., delivered the opinion of the court:

The action is ejectment, and was brought to recover possession of an undivided one-twelfth part of the premises described in the complaint. The answer was a denial of the complaint; also title in the defendant; also title in the defendant arising from adverse possession of the premises for more than twenty years and a counterclaim. The premises as claimed in the complaint consist of 100 acres in the N. W. corner of the E. ¼ of Great lot No. 24, Evans' Patent, in Delaware County. It was stipulated by the defendant, for the purposes of this appeal, that the plaintiff showed title in himself as one of the heirs-at-law of Martha Bradstreet, de-

553, 6 L. ed. 149; *Henderson v. Tennessee*, 51 U. S. 10 How. 311, 13 L. ed. 484; *Raynor v. Timerson*, 46 Barb. 518; *Green v. Scarlett*, 3 Grant, Cas. 228; *Townsend v. Downer*, 38 Vt. 183; *Atkins v. Lewis*, 14 Gratt. 30; *Dickinson v. Collins*, 1 Swan, 516; *Sharp v. Johnson*, 22 Ark. 79; *Roe v. Baxter*, 33 Ga. 81; *Cohnelly v. Doe*, 3 Blackf. 320; *Stuart v. Dutton*, 59 Ill. 91; *Nixon v. Porter*, 38 Miss. 401; *McDonald v. Schneider*, 27 Mo. 405; *Masterson v. Cheek*, 33 Ill. 72; *Sutton v. McLeod*, 29 Ga. 539. But see *Perkins v. Blood*, 36 Vt. 273; *Field, Lawyer's Briefs*, § 44.

Adverse possession is made out by the co-existence of two distinct ingredients: the first, such a title as will afford color; and, second, such possession under it as will be adverse to the right of the true owner; and whether these two essentials exist is, in all cases, a question of law, to be determined by the court, though the facts upon which they are founded are for the finding of the jury. *Baker v. Swan*, 32 Md. 355; *Dixon v. Cook*, 47 Miss. 220. See *Washburn v. Cutter*, 17 Minn. 361.

To determine what acts are sufficient to constitute an adverse possession, attention should be given to the character of the property, to discover the object of owning it, and the uses to which it would ordinarily be applied, that the mind with which it was possessed, as well as the mind with which such possession was acquiesced in, may be the better understood. *Corning v. Troy I. & N. Factory*, 44 N. Y. 577; 6 Wait, Act. & Def. 437. See notes to *Illinois Cent. R. Co. v. Houghton* (Ill.) 1 L. R. A. 213; *Gage v. Hampton* (Ill.) 3 L. R. A. 512; *Erck v. Church* (Tenn.) 4 L. R. A. 641; *Cramer v. Clow* (Iowa) 9 L. R. A. 772; *Baker v. Oakwood* (N. Y.) 10 L. R. A. 387.

ceased, to an undivided one twelfth of the premises in question, except as such title may have been defeated by the adverse holding of the defendant herein, and his predecessors, or parted with by force of the agreement of date March 5, 1875, hereinafter set forth. The plaintiff proved and read in evidence an instrument of which the following is a copy: "Received from A. Couse his note of \$400 for the purchase price, with costs of suits, of an undivided two-thirds interest in 100 acres in the northwest corner of Great lot 24, Evans' Patent, known as the 'Wild Lot,' and being the same premises claimed to have been occupied by the said Couse for some years past; and I agree to forward to said Couse by mail, within ten days, a deed therefor. W. Youmans, Attorney for Bradstreet Heirs. Dated Delhi, N. Y., March 5, 1875,"—proved that the land therein mentioned was that in dispute; also gave evidence that the note had not been paid, and the recovery of a judgment upon the note which had not been paid. The defendant examined his grantor at considerable length to prove the defense of adverse possession of the premises, and that the defendant entered into the possession under a deed from his father, Alexander Couse, in 1882, who entered into the possession of the premises in 1849, under a deed from his father, Peter Couse, Sr., who some years before entered into possession under a written title from Joseph Nutter, and that such occupation had been continuous for over forty years, and none of the occupants had entered into possession under plaintiff, or anyone from whom plaintiff derived title, and was proceeding with the examination of other witnesses upon that subject, when the court ruled as follows:

"The Court. I think I must stop this evidence. You must make some other defense than the Statute of Limitations, or I must direct a verdict against you. The more I think of this question, the more I think the Statute of Limitations cannot prevail here." Defendant's counsel duly excepted to such ruling and decisions. "The court rules that under the contract of March 5, 1875, and the note of \$400 given therefor, and the various stipulations and contracts in connection with that, this defendant has lost his right to avail himself of the adverse possession of himself and of his predecessors, and declines to receive any further evidence of occupation and of adverse possession by the defendant and his predecessors." To which ruling and decision the defendant's counsel duly excepted.

After some additional evidence upon the part of the plaintiff in relation to a subsequent arrangement as to the time and condition of delivery of the deed and payment of the purchase price the court directed a verdict for plaintiff, to which defendant excepted. When the defendant was thus precluded from giving further evidence on the subject, that already given tended to prove title by adverse possession in the defendant's grantor at the time such instrument of March 5, 1875, was made. And there was presented a question of fact for the jury in that respect; and title so established may be as

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effectual as that created in any other manner for the purposes of remedy or defense founded upon it. *Barnes v. Light*, 116 N. Y. 34, and cases there cited. Upon this state of facts the question is presented whether the defendant should have been precluded or estopped from proving the defense of title to the premises by adverse possession. The plaintiff and Alexander Couse, at the time such contract was made, respectively claimed to be the owner of the premises; and for the purposes of the question it may here be assumed that Alexander Couse and his grantor had been in the actual and continuous possession of the premises for forty or more years, and the plaintiff, and those under whom she claimed, had not during that period, if ever, been in the actual possession, and that the said defendant, nor any of his grantors, had ever entered into or retained possession of the premises with any permission of or privity with the plaintiff or her predecessors in title. In the absence of any of these relations the defendant and his grantors owed no duty or obligation to the plaintiff, and was therefore at liberty to fortify his title or purchase peace at any price and of whomsoever he chose. If, however, the adverse possession of the defendant's grantor, and those under whom he entered and claimed, had not ripened into a title at the time the contract of March, 1875, was made, the right to assert the continuance thereafter of such possession to perfect and support title as against the plaintiff would have been defeated by it. I am aware of the rule that where a lessee or vendee enters into possession of premises under a lease or contract he cannot, while he remains in possession, dispute the title of the lessor or vendor, but this case is lacking in the essential element which creates such estoppel. Neither the defendant nor his grantors entered into the possession by any manner of consent or contractual relation with the plaintiff or her ancestors or grantors. The rule in relation to estoppel does not apply "where, at the time of the purchase, the vendee is in as owner, claiming title, and his entry was not under the vendor." *Glen v. Gibson*, 9 Barb. 634-640.

Where a man is in possession of land as owner, having title, he is at liberty to purchase the land over again as often as claimants shall appear who are not in possession, and thus quiet such claims and fortify his title, without being estopped from disputing the title of such subsequent vendors, should it afterwards become necessary for him to do so." *Jackson v. Leek*, 12 Wend. 105; *Bain v. Matteson*, 54 N. Y. 666. Even in a consummated purchase the grantee in fee may purchase in an outstanding title hostile to his grantor, and fortify his own defective title. *Kenada v. Gurdner*, 3 Barb. 589. In *Watkins v. Holman*, 41 U. S. 16 Pet. 54, 10 L. ed. 885, it is said by the court in discussing such relations that "the relation of landlord and tenant in no sense exists between vendor and vendee." *Judge Bronson*, in delivering the opinion of the court in *Osterhout v. Shoemaker*, 3 Hill, 513-518, says: "The grantee takes the land to hold for himself, and to dispose of it at his pleasure. He

owes no faith or allegiance to the grantor, and he does him no wrong when he treats him as an utter stranger to the title."

These views lead to the conclusion that the exceptions before mentioned were well taken, and require a new trial.

Judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur, except Haight and Parker, *JJ.*, dissenting, and Follett, *Ch. J.*, not sitting.

Haight, J., dissenting:

This is an action of ejectment to recover an undivided one-twelfth part of the lands described in the complaint. The defense is adverse possession. It appears by the stipulation of the parties that "the plaintiff showed title in herself, as one of the heirs-at-law of Martha Bradstreet, deceased, to an undivided one twelfth of the premises in question except as such title may have been defeated by the adverse holding of the defendant herein and his predecessors, or parted with by force of an agreement between W. Youmans, attorney for the Bradstreet heirs, and Alexander Couse, dated March 5, 1875." It appears that on the 2d day of January, 1874, one Alexander Couse was in possession of the lands in question, and that on that day the plaintiff, with others, known as the "Bradstreet heirs," brought actions through W. Youmans, their attorney, against him, in ejectment, for the lands in question; that thereafter, and on the 5th day of March, 1875, an agreement was entered into between the parties, by which the actions were settled and discontinued, he agreeing to purchase the interests of the plaintiffs in the premises at a stipulated price, giving his note therefor, and they agreeing to deliver him a deed therefor within ten days. This agreement was subsequently modified so as to provide that the deed should be delivered upon the payment of the note. The note, although long past due, has never been paid. It further appears that on the 7th day of February, 1882, Alexander Couse quitclaimed the lands in question to his son, the defendant in this action, who thereupon entered into possession, and now claims to hold the same adversely to the plaintiff. The question thus presented for review is as to whether he can avail himself of that defense.

I shall not question the doctrine that one holding adversely, and defending upon that ground, may purchase of a third person an outstanding title to support his own, whether he doubts the validity of his previous title or not, and that such purchase will not affect his right to defend under his claim of adverse possession. But a very different question is presented by the facts under consideration. As we have seen, the plaintiff's record title is conceded. In 1874 she brought an action in ejectment to recover the possession of the premises, or of her interest therein, and that action was settled and discontinued, the defendant therein agreeing to purchase her interest in the premises. By such settlement and agreement the defendant in that action not only admitted and recognized her title and right to recover, but also waived his right or claim of adverse posses-

sion, and his possession in the premises thereafter must be deemed to be under the contract of purchase. By such agreement the plaintiff was induced to discontinue her action, and thus forego the establishing of her title by judicial decree. This action was brought eight years afterwards, and if the defendant is now permitted to avail himself of the defense of adverse possession he may now be able to prove and establish that which he could not have done eight years ago. He may thus be permitted to establish a defense, in consequence of the agreement and a breach thereof, which could not have been maintained had the settlement and agreement not been made. This cannot be allowed under the well-settled principles of estoppel. The agreement placed the plaintiff in a position where she could not maintain an action to oust the defendant's grantor until he had made a breach in his contract to purchase. The defendant gets no greater or better title than his father had, and if the defense was not available to the father it would not be to the son. There is no claim of fraud or deception in making the contract.

Sedgwick & Wait, in their treatise on "Trial of Title to Lands," at section 317, say: "When a person in possession of lands covenants with another to pay him for the land, he thereby acknowledges the title of the vendor, and is estopped from setting up an outstanding title or title in himself unless he can show that he was deceived or imposed upon in making the agreement."

In *Jackson v. Ayers*, 14 Johns. 224, where the defendant was in possession of land, and had agreed with the plaintiff to purchase and pay him therefor, it was held in a subsequent action of ejectment that the defendant was estopped from setting up a title by adverse possession in himself. In the case of *Jackson v. Britton*, 4 Wend. 507, it was held that, while an offer to purchase land by a party having title does not impair or affect his right, it, however, bars the defense of adverse possession. In *Corning v. Troy I. & N. Factory*, 34 Barb. 485-489, Hogeboom, *J.*, in delivering the opinion of the court, says: "Nor could they during the same period continue an adverse possession previously commenced. By taking a lease from the De Freests they acknowledged their title and right to convey. They held under this title, and recognized it as the true title. They must be deemed to have waived any previous imperfect rights which they had already acquired under a prior incipient adverse possession. The doctrine of cumulative disabilities does not apply. The defendants are prevented from setting up during this period an adverse possession, not for the reason that they could not purchase an outstanding title for the purpose of perfecting their right or quieting their possession, but because by taking a lease from the De Freests they have placed the latter under a disability, in a position where they cannot take proceedings to oust the defendants, and of course where the Statute of Limitations should not be permitted to run against them. It would seem, therefore, entirely clear that, as this lease did not expire until 1852, the defend-

ants cannot avail themselves of the defense of adverse possession." In *Jackson v. Cueden*, 2 Johns. Cas. 353, the defendant wrote a letter to one Mary Clark the plaintiff's lessor, in which he offered to purchase of her lands of which he was then in possession. Subsequently, and in an action of ejectment, he offered to give evidence of more than twenty years' adverse possession in himself. This was excluded by the trial judge. On review it was held that the letter of the defendant was sufficient prima facie for the plaintiff to recover; that while the defendant was not precluded from showing that he grounded his letter on a mistake, he was precluded from setting up adverse possession or the Statute of Limitations; that the acknowledgment in his letter takes away the Statute. See also *Jackson v. Spear*, 7 Wend. 401; *Fosgate v. Herkimer Mfg. & Hydraulic Co.* 12 Barb. 352-356; *Tompkins v. Snow*, 63 Barb. 525-533; *Jackson v. Walker*, 7 Cow. 637-642; *Sayles v. Smith*, 12 Wend. 57; *Ingraham v. Baldwin*, 9 N. Y. 45-47; *Smith v. Babcock*, 36 N. Y. 167, 168; *McMath v.*

Teel, 64 Ga. 595; *Garlington v. Copeland*, 83 S. C. 57-67; 7 Am. & Eng. Encyclop. Law, 32, title, *Estoppel*.

As we have seen, the suits were settled and discontinued, and this furnished a good consideration for the agreement which thenceforth became binding upon the parties. Their rights were fixed by it, and the party in default cannot now go back and litigate questions that were disposed of in the settlement. Again, it appears that an action was brought upon the note given by Alexander Couse, and that he interposed the defense that it was given for the purchase price of the lands in question, and that the plaintiff had committed a breach of the contract in failing to deliver the deed in accordance with the terms of the contract. Upon this issue the plaintiff had judgment, thus forever disposing of the facts that the contract of purchase was made, and that there was no breach thereof on the part of the plaintiff.

The judgment should be affirmed.

Parker, J., concurs.

CONNECTICUT SUPREME COURT OF ERRORS.

Samuel P. DAVIS, *Appt.*,

TOWN OF SEYMOUR.

(59 Conn. 531.)

1. **Claims in different counts against a town for injuries to sheep under Gen. Stat. § 3752, not being based on contract, cannot be united to make up the amount necessary to give jurisdiction to the court of common pleas.**
2. **A mere statutory obligation to pay money does not raise an implied contract to pay it. The liability depends on the statute itself.**

(December 15, 1890.)

APPPEAL by plaintiff from a judgment of the Court of Common Pleas for New Haven County erasing from the docket his action brought to recover compensation for sheep which had been killed by dogs. *Affirmed*.

The facts are stated in the opinion.

Mr. Verrenice Munger, for appellant:

Section 812, Gen. Stat., permits the adding together of the different claims in case of implied contracts. Wherever, therefore, the law will imply a contract to pay a sum of money then this Statute applies.

Section 3752 creates the liability to pay certain sums of money. When the exact amount has been ascertained in the way pointed out by the Statute then the law implies a promise to pay it.

Pom. Rem. & Rem. Rights, § 512, p. 552; 1 Am. & Eng. Encyclop. Law, 386.

An implied contract is co-ordinate with duty, and whenever it is certain that a man ought to do a particular thing the law supposes him to do that thing.

Anderson, Law Dict. pp. 86, 248, 527; 2 Bl. Com. 159; 1 Wait, Act. & Def. 373.

Where it is the duty of a defendant to do an act, the law implies a promise to fulfill it.

13 L. R. A.

Bailey v. New York Cent. & H. R. R. Co. 89 U. S. 22 Wall. 639, 22 L. ed. 849; *Seeca v. True*, 53 N. H. 698; Anderson, Law Dict. p. 537; *Farwell v. Rockland*, 62 Me. 296; *Bath v. Freeport*, 5 Mass. 326; *Waller v. Bank of Kentucky*, 3 J. J. Marsh. 201; 1 Chitty, Cont. 11th Am. ed. p. 87.

A liability imposed by statute is no greater than a common-law liability. In either case the duty to discharge it is the same. When, therefore, the Statute creates a debt, or gives to a party the right to demand from another a sum of money, the law raises an implied promise to pay it.

See 1 Comyn, Dig. p. 187.

The Statute in question does not provide a remedy to enforce the liability created by it. Under such circumstances the common law provides the remedy.

Hartford & N. H. R. Co. v. Kennedy, 12 Conn. 517; 1 Swift, Dig. *585.

If no form of action is prescribed by the Statute, debt is the proper remedy. In this State, in such cases, an action, called an action on the Statute, will also lie.

1 Swift, Dig. *585, 586.

At common law debt would lie to recover money due, "upon simple contracts, express or implied, whether verbal or written, and upon contracts under seal; or of record, and on statutes by a party aggrieved."

1 Chitty, Pl. 106; 1 Swift, Dig. p. 572.

If debt would lie, so would assumpsit.

1 Chitty, Pl. 106.

The law implies a promise, "where a liability to indemnify is imposed by Statute."

1 Swift, Dig. *398. See *Milford v. Com.* 3 New Eng. Rep. 781, 144 Mass. 64; *Pawlet v. Sandgate*, 19 Vt. 623; *Bell v. Burrows*, Bull. N. P. 129; *Rann v. Green*, Cowp. 474; *Hillsborough County v. Londonderry*, 43 N. H. 452; *Metropolitan R. Co. v. District of Columbia*,

123 U. S. 1, 88 L. ed. 261; *Haigh v. United States Bldg. L. & L. Asso.* 19 W. Va. 792; *Shepherd v. Hills*, 11 Exch. 55; *Kellogg v. Union Co.* 12 Conn. 15; 1 *Walt, Act. & Def.* 371; *Childs v. Harris Mfg. Co.* 68 Wis. 231.

Messrs. Wooster, Williams & Gager, for appellee:

The amount of damage or matter in demand, as stated, is clearly and positively below the sum of \$100, and therefore below the jurisdiction of the Court of Common Pleas.

Hunt v. Rockwell, 41 Conn. 51; *Camp v. Stevens*, 45 Conn. 92.

The counts could not be added together so as to bring the case within the jurisdiction of the court.

Nichols v. Hastings, 35 Conn. 546; *Camp v. Stevens*, *supra*; *Denison v. Denison*, 16 Conn. 38; *Denton v. Danbury*, 48 Conn. 368.

Andrews, J., delivered the opinion of the court:

This action was brought to the Court of Common Pleas in New Haven County, under Gen. Stat., § 8753.* The complaint contains three counts. The first one alleges that on a day named certain sheep of the plaintiff, worth \$12, were killed by dogs within the Town of Seymour, and that he gave notice, and afterwards proved to the satisfaction of the selectmen, that the damage done to them thereby was \$12; and the count concludes "that, by force of the Statute in such case made and provided, said Town became liable to pay to the plaintiff and a right of action had accrued to the plaintiff to recover from said Town, the amount of said damage." The second and third counts are in form exactly like the first. The second alleges a killing of sheep on another day, and that the damage was \$77. The third alleges a killing on still another day, and lays the damage at \$24. The complaint claims damages to the amount of \$150. The court of common pleas has jurisdiction only when the demand exceeds \$100. On motion by the defendant that court erased the case from the docket for want of jurisdiction, and the plaintiff has appealed to this court.

It was decided in *Denison v. Denison*, 16 Conn. 38, that the combining of the claims in several counts would not give jurisdiction to a court, where the claim in the separate counts, taken each by itself, was not sufficient for that purpose. This ruling has been followed in numerous cases since, among which are *Nichols v. Hastings*, 35 Conn. 546; *Hunt v. Rockwell*, 41 Conn. 51, and *Camp v. Stevens*, 45 Conn. 92. The plaintiff does not deny the force of these decisions, but he seeks to avoid their application to this case. He says that each of the counts in the complaint sets forth facts from which the law implies a contract, and that any number of contracts may be joined, and the amounts claimed in all may be added together, for the purpose of conferring jurisdiction. Gen. Stat. § 812. If the plaintiff when he brought the action

believed as he now professes to believe, it is somewhat singular that he did not frame his complaint accordingly. The complaint declares that the Town is liable by direct force of the Statute, and says nothing about any contract. But does the law imply a contract from the facts stated in any of the counts? A contract is a promise made on a consideration. Without a consideration there can be no contract, express or implied. There must be a subject matter in respect to which there has been a meeting of the minds of the parties. A contract involves an offer and an acceptance. One party expresses his readiness to be bound to the performance of something concerning the subject matter, and the other party expresses his acceptance of that readiness. This is the meeting of their minds which is essential to the making of a contract. Where there is a consideration, such offer and acceptance is a contract. It is true that many times there is such a condition of facts that the law will imply, sometimes an offer by one party and sometimes the acceptance by the other, and so supply an element necessary to the completion of a contract which otherwise might be wanting.

The expression "implied contract" is perhaps open to objection, in that it seems to admit that an entire contract in all its parts may be implied. The parties to a contract can never be implied, nor the subject matter, nor the consideration. These must be shown. But the promise which is necessary to complete a contract may be implied. Thus in *1 Swift, Dig. p. 182*, it is said: "The term 'implied contract' is generally used to denote a promise which the law, from the existence of certain facts, presumes that a party has made." And at page 397 the cases in which the law implies a promise are brought together and arranged under six heads. The sixth is, "where a liability to indemnify is imposed by statute." The plaintiff claims that, wherever a statute or the common law imposes a duty or an obligation to pay money, there the law implies a promise to perform that duty or pay that money. This claim cannot be maintained. Neither a statute nor a rule of law alone raises an implied promise. There must always be the fact of a consideration outside of and in addition to the Statute or the rule of law; and the promise is implied rather from the consideration than from the Statute. The Statute or the rule establishes the duty, but the consideration raises the implied promise to perform that duty. The authorities cited by the plaintiff illustrate this perfectly. Take the citation from *Pomeroy, Remedies and Rem. Rights*, § 518. The example there given is from *Metcalf on Contracts*, and is as follows: "A husband is bound to support his wife, and if he wrongfully discards her any person may furnish support to her, and recover pay therefor from the husband. In an action of assumpsit, the furnishing of the support must be alleged to have been by the plaintiff at the request of the husband, and a promise by the husband must also be alleged. But proof of the actual facts supports both the allegations. The husband, being by law liable to pay, is held to have

*That Statute provides that when any person shall sustain damage to his sheep, by reason of their being killed or injured by dogs, he shall inform the selectmen of the town in which the damage is done, who shall estimate the amount of the damage, which shall be paid by the town. [Rep.]

made both the request and the promise." pp. 208, 204. The furnishing the supplies to the wife is the consideration from which the law raises the promise to perform the legal duty. The citation from 1 Swift, Dig. 397, is to the same effect. It is that where an indemnity is imposed by a statute there the law implies a promise. The example that explains this rule is given at page 488, that "it is the foundation of suits brought by one town against another, or by an individual against a town, to recover expenses incurred in the support of a pauper." The support of the pauper is the consideration. Where one town has been compelled to expend money in the necessary support of a pauper who belongs to another town, there is an implied promise by the latter town to pay the former one, because the former has paid money which the latter ought to have paid. To be sure, without the Statute there would be no duty to perform. But the existence of a duty does not of itself raise any implied promise to perform it. There being a consideration for a promise in addition to the duty, the conditions exist from which the law presumes a promise to have been made. If the law implies a promise from a statute liability alone, to whom is such promise made? Who can sue upon it? The law requires a hus-

band to support his wife. If he wrongfully discards her, is there an implied promise to her? Could she bring a suit? Each town is required by statute to support its paupers. A is a pauper belonging to the Town of Seymour. Is there an implied promise to A? Could he sue the Town? If he could not, who could? Take another case. A statute says that every person who steals the property of another shall pay the owner treble its value. Suppose the plaintiff's sheep had been stolen, and he should bring an action for the treble value. Would he, or could he, sue on an implied promise? Or suppose that the thief had been sentenced to pay a fine; that would be a statute liability of the most emphatic kind. Is it so that there is an implied contract on the part of the thief to pay the amount of the fine? Questions of this kind might be multiplied. But these are sufficient to show that the plaintiff's contention cannot be sustained. In the present case the Town is liable, if liable at all, by the direct force of the Statute. The elements of a contract are not set forth in the complaint, and do not exist in the case.

There is no error in the judgment appealed from.

The other Judges concurred.

VIRGINIA SUPREME COURT OF APPEALS.

M. J. DAY, Admr., etc., of Burr Garland,
Deceased, et al., Appts.,

v.

John F. SLAUGHTER, Admr., etc., of Samuel Garland, Sr., Deceased, et al.

(...V...)

1. A gift by will of the use of the profits of a plantation to a person "under his super-

intendence," but not to be "bound for his past debts or for future debts and liabilities other than decent and comfortable support," does not give him any absolute property in the profits, but he holds them as trustee for the remaindermen except as to what he needs for "decent and comfortable support;" therefore such profits cannot be reached by his creditors.

2. A valid trust for the support of a person may be created which shall be free from his debts and liabilities.

NOTE.—*Creator of estate may qualify its enjoyment by annexing conditions and limitations.*

A testator is under no obligation to provide for payment of the debts of devisee; he may condition his bounty as suits himself, if he violates no rule of law. He may provide that the estate shall cease upon bankruptcy of the donee, or upon filing of a creditor's suit to subject the estate to the debt of the first donee. *Bramhall v. Ferris*, 14 N. Y. 41.

A party may settle property on another in such manner that it cannot be alienated, and creditors and assignees cannot take it, or he may annex a proviso that on alienation or bankruptcy it shall shift over to a third person. 1 *Perry*, Tr. 8 388, citing *Re Muggeridge's Trusts*, *Johns*, (Bnr.) 625; *Keasley v. Woodcock*, 3 *Hare*, 185; *Joel v. Mills*, 3 *Kay & J.* 458; *Large's Case*, 2 *Leon*, 82; *Churchill v. Marks*, 1 *Coll.* 441; *Sharpe v. Cosserat*, 20 *Beav.* 470; *Shoe v. Hale*, 18 *Ves. Jr.* 404; *Lewes v. Lewes*, 6 *Sim.* 304; *Cooper v. Wyatt*, 5 *Madd.* 482; *Lookyer v. Savage*, 2 *Stranger*, 947; *Yarnold v. Moorhouse*, 1 *Russ. & M.* 384; *Stephens v. James*, 4 *Sim.* 499; *Ex parte Oxley*, 1 *Ball & B.* 257; *Rochford v. Hackman*, 9 *Hare*, 475; *Ex parte Hinton*, 14 *Ves. Jr.* 598; *Stanton v. Hall*, 2 *Russ. & M.* 175.

A spendthrift trust in which the grantor is himself the sole beneficiary for life, with power to dispose of the trust property at death, leaving neither

the income nor the corpus of the estate subject to his debts, cannot be upheld. *Ghormley v. Smith*, 11 *L. R. A.* 568, 189 *Pa.* 564.

The donor of the income of a trust fund to a person for life may qualify the gift by a provision that the right to receive the income shall be inalienable, and it will suffice if the intention to so make it can be clearly gathered from the instrument construed in the light of the circumstances. *Slattery v. Watson*, 7 *L. R. A.* 398, 151 *Mass.* 206; *Broadway Nat. Bank v. Adams*, 133 *Mass.* 170; *Baker v. Brown*, 5 *New Eng. Rep.* 904, 146 *Mass.* 390.

Where so much of the income of a trust fund is given to a person as shall be necessary for his support, his right thereto is in its nature inalienable and cannot be reached by his creditor. *Slattery v. Watson*, *supra*. See *Perkins v. Hays*, 3 *Gray*, 406; *Pope v. Elliott*, 8 *B. Mon.* 56; *Holdship v. Patterson*, 7 *Watts*, 547.

The interest and dividends of real estate, or personal property held in trust, may be enjoyed by the beneficiary without liability for his debts. *Nichols v. Eaton*, 91 *U. S.* 716, 23 *L. ed.* 264.

Limitation in trust estates.

A trust may be so limited that it shall not take effect unless the beneficiary is free from debt, or that his estate shall cease upon his becoming in-

(April 30, 1891.)

A PPEAL by defendants from a decree of the A Circuit Court for the City of Lynchburg in favor of plaintiff in a suit brought to recover the amount alleged to be due from Burr Garland, deceased, to the estate of Samuel Garland, Sr., deceased, out of the surplus profits of an estate in which Burr Garland had an interest. *Reversed.*

The facts are stated in the opinion.

Messrs. William J. Robertson and Edward S. Brown for appellants.

Mr. E. C. Burks, for appellee:

If the intention of the testator was to bequeath by way of remainder to Mrs. Morris and her children what of the profits of the estate had not been expended by B. Garland for his support, such bequest would be void for uncertainty.

May v. Joyner, 20 Gratt. 692; *Missionary Soc. of M. E. Church v. Calvert*, 32 Gratt. 357; *Carr v. Effinger*, 78 Va. 197; *Cole v. Cole*, 79 Va. 251; *Blair v. Muse*, 83 Va. 238.

The doctrine of *Brandon v. Robinson*, 18 Ves. Jr. 433, that "if property is given to a man for his life the donor cannot take away the incidents of a life estate" (alienability being one of the incidents), is the firmly established English doctrine; and the same doctrine prevails in all of our States, except two, in which the question has been decided.

Gray, Restraints on Alienation, §§ 184-277.

The doctrine has been recognized in Virginia.

Nickell v. Handly, 10 Gratt. 336; *Hulme v. Tenant*, 1 Lead. Cas. Eq. 4th Am. ed. 766; *Nixon v. Rose*, 12 Gratt. 429.

Mr. J. Singleton Diggs, also for appellee:

solvent and shall thereupon vest in another; but the *cestui que trust* cannot hold and enjoy his interest entirely free from the claims of creditors. *Nichol v. Levy*, 73 U. S. 5 Wall. 433, 18 L. ed. 696; *Hallett v. Thompson*, 5 Paige, 563, 3 L. ed. 340; *Bramhall v. Ferris*, 14 N. Y. 41; *Easterly v. Kaney*, 38 Conn. 18; *Dick v. Pitchford*, 1 Dev. & B. Eq. 480. See *White v. Thomas*, 8 Bush, 661; *Marshall v. Rash*, 5 Ky. 112.

Property may be given to a man until he shall become bankrupt, and in such case, neither the man nor his assignee can have it, beyond the period limited; but if it is given to a man for life, the donor cannot take away the incidents of a life estate. *Brandon v. Robinson*, 18 Ves. Jr. 429; *Oldham v. Oldham*, L. R. 3 Eq. Cas. 404; *Shee v. Hale*, 13 Ves. Jr. 404.

An interest in property held in trust for a person during life, under a will providing that no part of it shall be assignable or in any way liable to be taken for his debts, is not property which can lawfully be sold, assigned or conveyed, or be taken on execution. *Billings v. Marsh (Mass.)* 10 L. R. A. 764.

A clause in a will diverting property upon alienation alone will embrace only the voluntary acts of the party, and will not apply to transfers by operation of law, as by bankruptcy. *Lear v. Loggett*, 2 Sm. 479, 1 Russ. & M. 690; *Wilkinson v. Wilkinson*, 38 Ves. 626; *Whitfield v. Prickett*, 2 Keen, 608.

If a fund is devised to trustees with directions to pay the income to testator's son during his life, free from the claims of creditors, income which accrues prior to a decision of the court of last resort authorizing its application to his debts, does not apply to debts which accrue after such decision. *Bull v. Kentucky Nat. Bank (Ky.)* 13 L. R. A. 37.

If there is a clause against anticipation, an as-
13 L. R. A.

B. Garland's power of disposal, as to all the profits, was ample and absolute, so that if testator had intended and attempted to convey the surplus, not used and consumed by him, to Mrs. Morris, etc., it would have been clearly void.

Carr v. Effinger, 78 Va. 197; *Cole v. Cole*, 79 Va. 251.

Messrs. Kirkpatrick & Blackford and R. G. H. Dean also for appellees.

Hinton, J., delivered the opinion of the court:

This is the sequel to the case of *Garland v. Garland*, reported in 84 Va. 181.

As the case was then presented, it appeared that Wm. H. Garland, executor of Burr Garland, deceased, had brought a suit in the proper court in Mississippi to settle the administration accounts of his testator as administrator *c. t. a.* of Samuel Garland, Sr., deceased; that the court in Mississippi ascertained the amount due to be \$64,130.88, and decreed that the domiciliary executor, the said Wm. H. Garland, should pay the same to John F. Slaughter, who had qualified in Virginia as administrator *de bonis non, c. t. a.*, of the said Samuel Garland, Sr. Burr Garland died in Virginia in December, 1869. On his death there was found in the hands of John T. Merrell, in Lynchburg, Va., the sum of \$1,421.52, which was the remains of a sum of money said Burr Garland had deposited with him on call, and subject to his (Burr Garland's) order. It also appeared that when Burr Garland died he was in possession of certain conveyances or assignments to himself from several legatees of the said

signment of arrears already accrued and not of future income is good. *Re Stulz's Trusts*, 4 DeG. M. & G. 404.

A declaration in a will establishing a trust fund the income to be paid annually to a person for life, and not to be subject to the debts of the beneficiary, will not take it out of a statute making trust estates subject to the debts of the beneficiary, where the beneficiary is given power to dispose of the principal by will. *Haycraft v. Bland (Ky.)* 9 L. R. A. 590.

Where a will gives a beneficiary an unrestricted interest in the income of a fund during his life, he may, in the absence of statutory prohibition, alienate as a whole or in part, before the time fixed for its payment. *Caldwell v. Boyd*, 7 West. Rep. 403, 100 Ind. 447; *Martin v. Davis*, 82 Ind. 38; *Wood v. Wallace*, 24 Ind. 226; *Farmers & M. Sav. Bank v. Brewer*, 27 Conn. 600; *Perry, Tr.* 338; *Story, Eq. Jur.* 974, 1044.

Trustees may be clothed with discretion.

A will devising property in trust to pay such part of the proceeds to another as in the discretion of the trustee he may think best, does not vest in the beneficiary such an estate as may be subjected to the payment of his debts. *Marshall v. Rash*, 37 Ky. 116; *White v. Thomas*, 8 Bush, 662; *Davidson v. Kemper*, 79 Ky. 5.

The trustees may be clothed with a discretion as to the amount of income which they shall apply to the use of the beneficiary. *Keyser v. Mitchell*, 67 Pa. 473; *Rife v. Geyer*, 59 Pa. 393; *Shryock v. Waggoner*, 36 Pa. 420; *Brown v. Williamson*, 36 Pa. 338; *Syrick v. Hetrick*, 13 Pa. 488; *Shankland's App.* 47 Pa. 112; *Girard L. Ins. & T. Co. v. Chambers*, 46 Pa. 486; *Norris v. Johnston*, 5 Pa. 237; *Vaux v. Parke*, 7 Watts & S. 19; *Fisher v. Taylor*, 2 Rawle, 38; 2 Pom. Eq. 537.

Samuel Garland, Sr., who were children of Nicholas Garland, a brother of the testator, of the legacies given to them in the will of Samuel Garland, Sr. Slaughter being unable, by reason of Burr Garland's insolvency, to make the money decreed by the Mississippi court in that State, and, finding these assets in Virginia, brought suit in Virginia to enforce the Mississippi decree. To that suit Charles Y. Morriss, administrator with the will annexed of Burr Garland, deceased, and Mary Garland, his surety, were made defendants.

Upon this state of facts, this court held that the decree of the Mississippi court must be accepted as final and conclusive evidence of the fact and amount of indebtedness by Burr Garland, the Mississippi administrator of Samuel Garland, to Samuel Garland's estate. And further, that the decree of that court did not undertake to distribute it, nor to decree who are entitled to receive it under Samuel Garland's will, but decreed it to be paid over to the Virginia domiciliary executor, to be by him distributed to those entitled, according to the declared intention of the testator; "but this decision is without prejudice to any right of action which Paulina B. Morriss may have in this or in an independent suit." When the case got back to the circuit court the plaintiff filed his amended bill, making Paulina B. Morriss and her children parties.

After the case had been matured for hearing, on application for an order directing accounts, the court proceeded to construe the ninth clause of the will of Samuel Garland, Sr., upon the true construction of which the present controversy must turn.

That clause is in these words:

"9th. My favorite brother, B. Garland, raised by me, and long a resident of Mississippi, is, and has for a long time past been, embarrassed in debt by losses of trade in 1837, and liabilities as surety for others. It might be unsafe to devise property to him absolutely. I therefore set apart in trust in the hands of my executor, for the benefit of my said brother, either of my plantations in Hinds County, called 'Barrens' or 'Tudor Hall,' whichever he may choose, and forty slaves in families—say about twenty-five hands, balance heads of families, children, and house servants—to be selected out of the stocks in both places; mules, horses, stock, etc., sufficient for the cultivation of the place so selected by him, with provisions, house and kitchen furniture, plantation tools, etc., oxen, hogs, etc., to make a complete estate. The profits of the estate is set apart for his (B. Garland's) use, under his superintendence. But neither the estate nor profits shall be bound for his past debts or for future debts and liabilities, other than decent and comfortable support. At his death all the property in this clause is to pass to Charles Y. Morriss, in trust, to the separate use of his wife, Paulina B. Morriss, and her children."

The circuit court was of opinion, and decreed, "that the estate of the said Burr Garland, in the profits set apart by the said clause for the use of the said Burr Garland,

became and was, under the law, and by virtue of said will, his absolute estate, and, as such, liable not only for such debts as might be contracted for his decent and comfortable support, but for all his debts; and the said profits did not, nor did any part thereof, pass under the said will to the said Charles Y. Morriss, in trust, for the separate use of the said Paulina B. Morriss and her children, nor did they, or either of them, acquire any estate or interest therein under the said will."

This, however, is not, in our opinion, the interpretation to be put upon the clause of the will now under review. Burr Garland, as the very first words of this clause of the will say, was the favorite brother of the testator, by whom he had been reared. He had become so involved in debt, by reason of losses in business, doubtless occasioned by the financial panic of 1837, and by liabilities incurred as surety for others, that it appeared to the testator practically impossible for him ever to free himself from this load of debt.

In this condition the testator saw that an absolute gift or devise of property to him would be of no service to him, but would, in effect, be a gift of so much property to his creditors, who had not the slightest claim upon the testator. He therefore endeavored, by a carefully devised trust, to protect his brother in his declining years from penury and want, by giving him the mere right to "a decent and comfortable support" out of the profits of an estate, the legal title to which, as well as to the profits, he is careful to confer upon the trustee. And, having made this provision for his brother—a provision strictly limited to the use of so much of the profits as was necessary for "a decent and comfortable support"—and having declared that neither the estate nor profits shall be bound for his past debts or liabilities, or for future debts incurred on any other account, he gives all the property in this clause (clearly meaning the estate and any surplus profits) over to Charles Y. Morriss, in trust, to the separate use of his wife, Paulina B. Morriss, and her children.

Now, this being the purpose of the testator, too clearly manifested to require any verbal criticism upon the mere words of the will, the only remaining inquiry is, whether this intention shall be allowed to prevail or, to express the same idea differently, whether there is any rule of the court of chancery in this State which defeats it.

On behalf of the appellees, it is insisted that the testator, by his will, gave to Burr Garland the profits therein mentioned absolutely, and that the exemption of the profits from liability for Burr Garland's debts is void, because they say that it is a fundamental doctrine of the English chancery, and that the same rule prevails in America, that no such estate can be deprived of the incident of alienability or liability for the debts of the owner.

But this argument seems to me to be beside the mark. In this case the devisee and legatee, Burr Garland, did not take any absolute property in the profits of the estate which he might have assigned or aliened; but, on the contrary, he acquired the mere,

although exclusive, right to a preception of so much of said profits as would furnish a decent and comfortable support for himself, and this was so qualified and limited as to fence out all his creditors except those who furnished him supplies for his support. Had he undertaken to expend these profits in any other way he would have been guilty of a breach of trust, for there was in the eye of a court of equity as complete a trust in him to apply these profits in this one direction as there was in the trustee to hold the legal title. And while he (Burr Garland) took this qualified right, which we think it is a misnomer to call property, the remaindermen took a vested remainder in all the surplus or unexpended profits.

It is admitted that its exact question has never been decided in Virginia, although several cases have arisen in this State where the trusts were held to be blended, and therefore that donee had no interest that was divisible from the other *cestuis que trust*, and therefore no property that could be subjected to his debts.

But in *Nickell v. Handly*, 10 Gratt. 886, Judge Samuels, delivering the opinion of the court, said: "There is nothing in the nature or law of property which could prevent the

testatrix, when about to die, from appropriating her property to the support of her poor and helpless relations; nothing to prevent her from charging her property with the expense of food, raiment and shelter for such relations. There is nothing in law or reason, I conceive, which should prevent her from appointing an agent or trustee to administer her bounty.

But the question has been carefully considered by the Supreme Court of the United States in the case of *Nichols v. Eaton*, 91 U. S. 716, 23 L. ed. 254, and by the Supreme Judicial Court of Massachusetts in the case of *Broadway Nat. Bank v. Adams*, 138 Mass. 170, and in each case it was held that there was nothing in the doctrines of the American chancery which prohibits a trust like the present.

The reasoning of these cases commends itself to our judgment, and fully establishes the validity of this trust.

The decrees of the court below being in conflict with these views, must be reversed, and the cause must be remanded for further proceedings to be had in accordance with this opinion.

Decree reversed.

Petition for rehearing overruled.

TEXAS SUPREME COURT.

PULLMAN PALACE CAR CO., *Appt.*,
v.
A. L. SMITH.

(....Tex....)

1. A sleeping-car company is liable for the mistake of its servants in awakening passengers in its car and causing them to get off at a water tank half a mile from the depot in the dark and rain, where they were left by the train, and the consequent exposure resulted in serious damage to them.

2. A witness's testimony that she knows of nothing else which could have caused her illness except the exposure, on which her husband's action for damages is based, is admissible in connection with the details of her exposure and sickness.

3. Evidence of the amount of plaintiff's salary and the number of weeks that he lost is admissible in an action for damages, expressly claiming loss of time as an element of the damage.

4. A physician's statement as to what a person told him about her exposure as the basis of his opinion as to the cause of her sickness is not inadmissible on the part of the plaintiff in an action for damages sustained from the exposure.

5. Error in charging on the rule of contributory negligence is not prejudicial to defendant, where there is no evidence of plaintiff's negligence.

6. The obligation to awaken and noti-

fy a passenger in time for him to prepare safely and comfortably to leave the train at his destination is directly involved in his contract for the use of the sleeping berth.

(December 12, 1890.)

APPEAL by defendant from a judgment of the District Court for Kaufman County in favor of plaintiff in an action brought to recover damages for injuries, losses and expenses caused by the negligence of defendant's servants in causing plaintiff and his wife to leave defendant's car at the wrong place. *Affirmed.*

Messrs. Percy Roberts and R. P. Willing for appellant.

Messrs. Shelton F. Leake and Word & Charlton, for appellee:

It was legitimate for Mrs. Smith to testify, if she knew, the cause of her illness, and her testimony, "that she knew nothing else that could have caused her illness, except the exposure to which she was subjected on the morning she left the car of defendant at Terrell," was proper.

St. Louis, T. & A. R. Co. v. Burns, 71 Tex. 481.

The time lost by plaintiff in attending his sick wife was certainly an element of damage; and the value of that time could best be estimated by what it was really worth to him.

Howard Oil Co. v. Davis, 76 Tex. 685.

The testimony of the physician was proper.

Houston & T. O. R. Co. v. Shafer, 54 Tex. 648; 1 Greenl. Ev. 14th ed. § 440, pp. 530, 531.

NOTE.—Railroad companies liable for acts of their agents and servants. See note to *Cincinnati, I. & C. R. Co. (Ind.)* 6 L. R. A. 241.
13 L. R. A.

Liable for injuries resulting from misconduct of their servants. See note to *Dillingham v. Anthony* (Tex.) 3 L. R. A. 624.

Contributory negligence, to defeat a recovery, must contribute to the injury.

Houston & T. O. R. Co. v. Smith, 52 Tex. 183.

It was the duty of the agents in charge of the Pullman Palace Car to notify passengers when and where to get off. The agents in charge of the car having put Mrs. Smith off before she reached Terrell Station, and at such time and place and under such circumstances as that she was injured thereby, the Pullman Car Company is liable for such damages, if any, as she sustained.

Pullman P. Car Co. v. Pollock, 69 Tex. 120; *Memphis & L. R. R. Co. v. Stringfellow*, 44 Ark. 322, 51 Am. Rep. 598; *Texas & P. R. Co. v. Garcia*, 62 Tex. 288; *Gulf, C. & S. F. R. Co. v. Greenlee*, Id. 844.

Henry, J., delivered the opinion of the court:

This suit was brought by the appellee against the Pullman Palace Car Company, a corporation, to recover damages. The petition alleges that plaintiff and his wife engaged passage on a train of the Texas & Pacific Railway Company to Terrell, in this State; that, being such passengers, they, at a point in the State of Louisiana, applied to the defendant corporation for, and obtained from it, berths on the Pullman sleeping-car, which was run in connection with the train on said railway; that shortly after entering said sleeping-car, plaintiff and his wife retired, and were asleep; that, under the rules and regulations of defendant, and by common usage and practice, defendant's agents in charge of said corporation were bound to awake plaintiff and his wife in time to enable them to dress and get off the train at Terrell, the place of their destination, and that they relied on them to do so; that said agents went to sleep and neglected their duty; that when said train reached the water-tank, about one-half mile east of the passenger depot at Terrell, which it did about 5 o'clock in the morning of February 5, 1889, it was stopped for the purpose of taking on a supply of water, and for other purposes, and that this fact was known or should have been known to defendant's agents; that, when said train had stopped at said water-tank, defendant's said agents awoke plaintiff and his wife, and told them that they were at the depot, and to hurry off; that said agents caused plaintiff and his wife to get off of said car at said water-tank; that in the excitement and rush incident to the announcement that the train was at Terrell, and that all must hurry off, plaintiff's wife was pushed and shoved off and down the car-steps to the ground, some three feet in distance; that his wife had no time to properly dress herself; that it was a cold and damp morning; that the ground and grass were wet from recent rains; that as soon as plaintiff and his wife were off the train, and before they had learned of the mistake, and that the depot had not been reached, the train moved off and left them standing in the rain, mud, and cold; that plaintiff and his wife were strangers in Terrell, and did not know where the depot and hotels were situ-

ated; that it was so dark as to make it impossible to move with discretion; that they were forced to remain standing at the water-tank for a great while in the rain, mud, and cold; that plaintiff's wife was greatly frightened, and was made sick by the exposure; that she was confined to her bed and unable to care for herself for more than five weeks; that plaintiff was forced to provide medical aid for her, and pay therefor; that plaintiff was forced to remain away from his home, which was in the State of Louisiana, and his business, to give his attention to his wife, for more than two weeks, and suffered much mental anguish on account of his wife's condition; that his wife suffered greatly, and that her health was permanently impaired because of the premises.

We think that the petition states a good cause of action, and that there was no error in overruling defendant's demurrer. Judgment was rendered in favor of the plaintiff on the verdict of a jury for \$1,185.

The wife of plaintiff gave her deposition as a witness, detailing very fully the circumstances of her exposure and sickness. and, in reply to a question, said: "I know of nothing else that could have caused my illness except the exposure to which I was subjected on the morning when I got off the train." There was no error in overruling defendant's objection to this evidence. The plaintiff, on his examination as a witness, made the following statement: "I was getting a salary of \$1,250 per annum, eight months' school, as professor in the state normal, and lost three weeks in attending my wife, which it was necessary for me to do." The defendant objected to the evidence, and now assigns error on its admission, upon the ground that it was irrelevant. One of the elements of damages stated in the plaintiff's petition was loss of his own time while attending and nursing his wife. Evidence tending to prove that issue cannot be considered irrelevant. We find no error in the action of the court in permitting the physician who attended Mrs. Smith during her illness to state what she told him while he was treating her, about her exposure at the place where she left the train, in connection with his own opinion as to the cause of her sickness. The statement was made as the basis of the doctor's opinion, and not as independent evidence to establish the fact of exposure; even had the latter been the purpose, it would furnish no ground for the reversal of the judgment, as both the wife and the husband had, as witnesses, themselves fully stated every fact upon the subject, and there was no opposing evidence with regard to the circumstances attending their leaving the train, and the exposure that followed it.

Appellant complains of the following extract from the charge of the court: "If defendant's agent was guilty of negligence to the plaintiff's damage, and plaintiff or wife were also guilty of negligence, which contributed to the injury or damage, the defendant cannot be held liable for such damage or injury, unless it has been shown that the negligence of defendant's agent was the direct and proximate cause of the damage."

Abstractly considered, this charge was erroneous. It relieved the plaintiff from the effect of the contributory negligence of himself and his wife, if such negligence had existed. The record, however, contains no evidence whatever tending to show negligence upon the part of the plaintiff or his wife at the time the wrong was committed, and therefore no charge upon contributory negligence was called for or proper. The charge as given could not prejudice defendant, under the proof. While it is true that the contract for carriage was with the Railroad Company, and not with the defendant, and that the Railroad Company was under obligations to plaintiff, as a carrier, for which it would have been liable to him for damage if it had failed in its duty, it still remains to be said that the defendant also owed certain duties to the passengers. *Pullman P. Car Co. v. Pollock*, 69 Tex. 190; *Pullman P. Car Co. v. Matthews*, 74 Tex. 654.

The evidence shows that the Pullman car was hauled by the Railroad Company, and that the porter and conductor on the sleeping-car were the servants, and under the control, of the Sleeping-Car Company. The record contains no evidence with regard to rules, regulations, or usages relating to the transportation of passengers on such cars. It does show that the defendant, and not the

Railroad Company, received the compensation for and undertook to furnish the sleeping accommodations, and that they at least were under the exclusive control of the defendant. Whatever may be the duty of the Railroad Company with regard to notifying its passengers, including such as may be in the sleeping-car, of its arrival at the station to which they are destined, we are not able to conclude that the servants of the defendant owe no such duty to the sleeping passenger; on the contrary, we think that the obligation to awake and notify the passenger in time for him to prepare to safely and comfortably leave the train at the point of his destination is directly involved in the contract for the use of the sleeping-berth. In this case, the servant of the defendant assumed the discharge of that duty, and from that fact, as well as the failure of the defendant to introduce any evidence explaining what the duties of its servants were or as to what are the usages and rules in force on its cars, it may properly be presumed that the servant of defendant was acting within the scope of his employment. There can be no doubt that the negligent discharge of the duty resulted in damage to the plaintiff.

The judgment is affirmed.

Petition for rehearing overruled.

RHODE ISLAND SUPREME COURT.

Charles Sidney SMITH *et al.*, Comrs. of
Sinking Fund,

v.

Orin WESCOTT *et al.*, Comrs. of North
Burial Grounds.

(.....R. L.....)

**Municipal officers to whom, as such,
money has been given in trust, under au-**

thority of a statute, have no vested right therein which prevents the Legislature from transferring the trust to other officers, and this rule is not changed by the fact that the trust is private in its nature, and not one recognized as charitable.

(May 2, 1891.)

A PPLICATION by the Commissioners of the
Sinking Fund of the City of Providence for

NOTE.—Municipal corporation may take and administer property in trust for charitable uses.

A city as a corporation is capable of taking in trust devices and bequests for charitable uses, and may carry into effect such devices and bequests. *Perin v. Carey*, 65 U. S. 24 How. 465, 16 L. ed. 701.

As to the capacity of municipal corporations to take by devise, they stand upon the same ground as natural persons. *Chambers v. St. Louis*, 29 Mo. 462; *Perin v. Carey*, *supra*.

Such corporations, unless especially restrained, are capable of taking property, real and personal, in trust for purposes germane to the purposes and objects of their institution. *Jackson v. Hartwell*, 8 Johns. 422; *Phillips Academy v. King*, 12 Mass. 546; *Pickering v. Shotwell*, 10 Pa. 27; *Chambers v. St. Louis*, *supra*; *Philadelphia v. Elliot*, 3 Rawle, 170; *McDonogh v. Murdoch*, 56 U. S. 15 How. 37, 14 L. ed. 732, 8 La. Ann. 171; *Bell Co. v. Alexander*, 2 Tex. 360; *Columbia Bridge Co. v. Kline*, Bright, Pa. 380; *Miller v. Lerch*, 1 Wall. Jr. 20; *Webb v. Neal*, 5 Allen, 576; *Green v. Rutherford*, 1 Ves. Sr. 468; 2 Dillon, Mun. Corp. 535.

They may hold property in trust under a will for charitable uses, and may be compelled to execute such trust. *Peynado v. Peynado*, 82 Ky. 5.

They may take and hold property in trust in the same manner and to the same extent as a private

person, even though the trust is not strictly within the scope of the direct purposes of their charters. *McDonogh v. Murdoch*, *supra*.

The law against perpetuities has no application to such devices and bequests. *Perin v. Carey*, *supra*.

On the contrary, courts of equity will protect such gifts and prevent alienation of the lands devised for charitable purposes. *Hillam's Case*, Duke, 80, 375; *Mayor of Bristol v. Whitton*, Id. 81, 377; *Mayor of Reading v. Lane*, Id. 81, 361; *Christ's Hospital v. Grainger*, 1 Macn. & G. 460; *Griffin v. Graham*, 1 Hawks, 130; *State v. Gerard*, 2 Ired. Eq. 210; *Lewis, Perpetuities*, 684.

A bequest to a town in trust in perpetuity for the benefit of the poor of the town, not confined to those for whose support the town is under a statutory liability, is invalid for want of an ascertained beneficiary. *Poedick v. Hempstead*, 11 L. R. A. 715, 125 N. Y. 551; *Holland v. Alcock*, 11 Cent. Rep. 361, 108 N. Y. 312.

Legislative power over their administration of trusts.

The laws which establish and regulate municipal corporations are not contracts. They may be repealed or altered at the will of the Legislature, except so far as the repeal or change may affect the rights of third persons acquired under them. *Bos-*

a writ of mandamus to compel the transfer to them by the Commissioners of the North Burial Grounds of said city of certain funds held by the latter in trust to be applied to the care of burial lots and memorials to the dead. *Writ granted.*

The facts are stated in the opinion.

Mr. Nicholas Van Slyck for petitioners.

Mr. Cyrus M. Van Slyck for respondents.

Stiness, J., delivered the opinion of the court:

In the year 1861, by Pub. Laws R. I., chap. 367, of March 8, 1861, the General Assembly authorized gifts by deed or will to the Commissioners of the North Burial Grounds in the City of Providence, and their successors in office, for the purpose of constituting a fund to be held in perpetual trust, and the income thereof to be applied to the care of burial lots and memorials to the dead, as set forth in the instrument creating the trust. The Commissioners were directed to make investments of the trust property, to keep accounts, apply the income, and to make detailed reports to the municipal court of the city. At the January Session, A. D. 1889, by Pub. Laws R. I., chap. 781, of April 25, 1889, the General Assembly directed the Commissioners of the North Burial Ground to pay over to the Commissioners of the sinking funds of the City of Providence the perpetual care funds held by them, with such as should thereafter come to them, and changed the duty of investing the same from the Commissioners of the Burial Ground to the Commissioners of the Sinking Fund, the former to continue to receive and apply the income as before. Upon demand of the petitioners for payment to them, under this Act, of the perpetual care funds, the respondents refused to make the payment, upon the claim that they hold said funds as trustees under said chapter 367; and that chapter 781, so far as it directs the payment of the funds held prior to its passage, is inoperative, because the title had vested in them as trustees.

The question now comes before us on a petition for mandamus. The argument of the respondents is that chapter 367, and the Acts of the individuals making trust gifts under it, constitute a grant or executed contract; and that the later Act, changing the custody of

the fund and duty of investment, is within the meaning of the clause in the Constitution which prohibits the passage of a law impairing the obligation of a contract. They refer to *Fletcher v. Peck*, 10 U. S. 6 Cranch, 67, 8 L. ed. 162, and *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629, in support of their position. These two noted cases are of undoubted authority, to the effect that vested rights, under an unrestricted grant to an individual or private corporation, when a law is in the nature of a contract, cannot be devested by a subsequent change or repeal of the law, because this would impair the obligation of an executed contract. The case before us is quite different, for it does not affect an individual or private corporation. The respondents are not here in defense of private vested rights, but as officers of a public municipal corporation, claiming certain rights, under a statute, as incidental to their office. As individuals, they can lay no claim to the administration of the fund, but only as Commissioners of the North Burial Ground. If one should go out of office, his title would be at an end. Hence they stand in the same relation to the fund that the city itself would if it were the trustee, in its own name, instead of its officers and agents. In regard to the power of the Legislature to alter or repeal a grant, a marked distinction has always been observed between private and public grants. Following the cases cited above, it has become settled that an unrestricted grant to an individual or private corporation becomes, when accepted, a contract which is beyond legislative control. It has also become settled that special powers conferred upon a municipal corporation or its officers are not vested rights as against the State. But questions have arisen with reference to the right of a municipal corporation to be a trustee, and also of the right of the State to control it, when it is acting as such. The leading case of this country upon the subject was *Vidal v. Girard*, 43 U. S. 2 How. 127, 11 L. ed. 205, where it was held that a municipal corporation, when authorized by law, may take and hold property in trust; and so the donation in the well-known will of Stephen Girard to the City of Philadelphia, in trust for charitable purposes, was sustained. In 1869 the management of this trust was, by Act of the Legislature, taken away from the city, and committed to a board of directors of

sier Police Jury v. Shreveport, 5 La. Ann. 661; Louisiana State Bank v. New Orleans Nav. Co. 3 La. Ann. 294; Reynolds v. Baldwin, 1 La. Ann. 162; Haynes v. Municipality No. 2, 5 La. Ann. 700; Egerton v. Municipality No. 3, 1 La. Ann. 435; Board of Liquidators v. Municipality No. 1, 6 La. Ann. 21.

It is within the power of the Legislature to divest a municipal corporation of the power to administer a trust and to appoint or provide for the appointment of new trustees independent of the corporation, and vest in them the management of such trusts. *Philadelphia v. Fox*, 64 Pa. 169; *Montpelier v. East Montpelier*, 20 Vt. 21.

Since the Legislature cannot alienate any part of its legislative power it cannot therefore by legislative Act or contract invest any municipal corporation with an irrevocable franchise of government over any part of its territory. *Philadelphia v. Fox*, 64 Pa. 169.

The doings between municipal corporations and 18 L. R. A.

the Legislature are in the nature of legislation rather than compact, and subject to all legislative conditions named, and therefore to be considered as not violated by subsequent legislative changes. *East Hartford v. Hartford Bridge Co.* 51 U. S. 10 How. 511, 13 L. ed. 518; *New Orleans v. Hoyle*, 23 La. Ann. 740; *Trustees of Schools v. Tatman*, 13 Ill. 80.

As to the power of a municipal corporation to administer a public charity, see notes to *Cary Library v. Bliss* (Mass.) 7 L. R. A. 765; *Cottman v. Grace* (N. Y.) 3 L. R. A. 147.

What are public charities. See notes to *Fire Ins. Patrol v. Boyd* (Pa.) 1 L. R. A. 417; *Cottman v. Grace*, *supra*; *Stratton v. Physio-Medical Institute* (Mass.) 5 L. R. A. 33; *Bullard v. Chandler* (Mass.) 5 L. R. A. 105; *State v. Ladies of the Sacred Heart* (Mo.) 6 L. R. A. 84.

Municipalities as trustees. See note to *Cottman v. Grace*, *supra*.

city trusts. This action of the Legislature was contested, but was upheld in *Philadelphia v. Fox*, 64 Pa. 169, upon the ground that a municipal organization, trustees of a charity, cannot set up a vested right to maintain such organization in the form in which it was when the trust was created, and prevent the State from changing it as the public interests may require. These cases determine the right of a municipal corporation to act as a trustee, when duly authorized, and also the right of the Legislature to divest the corporation of such rights, and to commit the administration of the trust to others. The same right has been recognized in other cases. *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *Girard v. Philadelphia*, 74 U. S. 7 Wall. 1, 19 L. ed. 53; *Montpelier v. East Montpelier*, 29 Vt. 12. Upon the authority of these cases, Judge Dillon, in his work on Municipal Corporations (§§ 30, 437), lays it down as unquestioned law that a municipal body may both act as trustee, and also be divested of a public trust, at the will of the Legislature.

But it may be urged that a trust for the care of one's private burial lot is not within this rule, because it is not a public charitable trust. This court has held (*Kelly v. Nichols*, 17 R. I. 105), that such a trust is a private, and not a charitable trust. Nevertheless the General Assembly, in 1853, specially authorized towns to receive and hold funds in trust for that purpose, which authority still continues, and, as has been stated, gave a like authority to the Com-

missioners of the North Burial Ground in 1891. If, when the trust is for a recognized charitable purpose, a municipal corporation, in its capacity as trustee, is subject to the will of the Legislature, *a fortiori* we think it is clear that it is equally subject in case of a private trust which it can only hold by authority of the Legislature; and, if the administration of the trust can be taken from the hands of the municipal corporation itself, certainly its officers and agents can hold under no stronger claim. If the respondents' position is correct, the city is bound to continue the office of Commissioners of the North Burial Grounds in order to support the trust. We think this could hardly have been contemplated by the donors of the funds, but rather in making the gifts, in the words of Judge Sharswood, in *Philadelphia v. Fox*, *supra*, "they must be held to have done so with the full knowledge that the trustee so selected was a mere creature of the State,—an agent acting under a revocable power." Our conclusion, therefore, is that the Legislature had power to change the custody of the funds from the respondents to the complainants. In reaching this conclusion we have taken the case as presented, without regard to the last section of chapter 867, which provides that the Act shall be subject to all future Acts in amendment or repeal thereof, although we see no reason why this section might not be regarded as conclusive of the question before us.

Petition granted.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Patrick DEMPSEY

v.

James CHAMBERS.

(....Mass....)

Ratification by one of acts which another has, without authority, per-

formed, as his servant and for his benefit, will make him answerable for the latter's negligent acts which were so connected with the employment that he would have been liable for them as master if the latter had been his servant when committing them.

(September 3, 1891.)

NOTE.—General rules applied to ratification.

The ratification must be entire, or not at all; the principal is not permitted to ratify in part, and to reject in part. *Southern Exp. Co. v. Palmer*, 48 Ga. 35; *Cochran v. Chitwood*, 59 Ill. 53; *Widner v. Lane*, 14 Mich. 124; *Krider v. Western College*, 31 Iowa, 547; *Billings v. Morrow*, 7 Cal. 171; *Hardeman v. Ford*, 12 Ga. 205; *Menkens v. Watson*, 27 Mo. 163; *Henderson v. Cummings*, 44 Ill. 325; *Coleman v. Stark*, 1 Or. 115.

A ratification of a part of an authorized transaction of an agent, or of one who assumes to act as such, is a confirmation of the whole. *Farmers Loan & Trust Co. v. Walworth*, 1 N. Y. 423; *Fowler v. Trull*, 1 Hun. 409, 3 Thomp. & C. 522; *Krider v. Western College*, 31 Iowa, 547; *Menkens v. Watson*, 27 Mo. 163; 1 Walt. Act. & Def. 238.

Ratification of the unauthorized act of another operates upon the act ratified as if authority to do the act had been previously given, except where the rights of third parties have intervened. It is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made. *Cook v. Tullis*, 35 U. S. 18 Wall. 338, 21 L. ed. 323, Field, J.; *Marsh v. Fulton County*, 77 U. S. 10 13 L. R. A.

Wall 684, 19 L. ed. 1043; *Norton v. Shelby County*, 118 U. S. 451, 30 L. ed. 189.

It is not allowed by law, when the act ratified is itself forbidden at the time of ratification. *McCracken v. San Francisco*, 16 Cal. 591; *Bird v. Brown*, 4 Exch. 799; *Lord Audley's Case*, Cro. Eliz. 590, Moore, 457; *Margaret Podger's Case*, 9 Coke, 104a; *Cook v. Tullis*, 35 U. S. 18 Wall. 332, 21 L. ed. 333.

If a principal ratifies that part of a transaction which favors him, he ratifies the whole. *Gaines v. Miller*, 111 U. S. 305, 28 L. ed. 466.

It is a rule in the law of agency, that when the unauthorized act of the agent is done in the execution of a power conferred in a mode not sanctioned by its terms and in excess or misuse of the authority given, ratification by the principal is more readily implied from slight acts of confirmation. *Harrod v. McDaniels*, 126 Mass. 415.

It is an adoption of an unauthorized transaction by the party beneficially interested. *Schwartz v. Weber*, 6 N. Y. S. R. 838.

It is said that a distinction exists between the classes of cases to which this principle applies. Where the original act was one merely voidable in its nature, the principal may ratify the act of his agent, although it was unauthorized. But where

EXCEPTIONS by defendant to rulings of the Superior Court for Essex County (Thompson, J.) made during the trial of an action brought to recover the value of a plate glass window alleged to have been broken by the negligence of defendant's servant, which resulted in a judgment in favor of plaintiff. *Exceptions overruled.*

The facts are stated in the opinion.

Mr. W. S. Knox, for defendant:

Even if the acts of McCulloch in receiving the order for the coal and undertaking to fill it were fully ratified by the defendant with knowledge of his negligence, the defendant would not be liable for the negligence under the fact found that McCulloch was not the servant or agent of the defendant at the time his negligent act caused the injury.

Coomes v. Houghton, 102 Mass. 211.

Messrs. J. P. Sweeney and H. R. Dow, for plaintiff:

A subsequent ratification is equivalent to a prior authority, and renders the principal liable for all the acts of the agent, tortious or otherwise, done in the regular course of business, as fully as if he had originally given him direct authority in the premises.

Story, Ag. 9th ed. § 239; *Olement v. Jones*, 12 Mass. 60.

When a party assumes to act for another without any authority whatever, if that other subsequently ratifies his act he makes him his agent.

Y. B. 7 Hen. IV. p. 35; *Hagedorn v. Oliver-son*, 2 Maule & S. 485; *Rogers v. Kneeland*, 10 Wend. 218; *Kelley v. Munson*, 7 Mass. 319.

If the principal accepts the proceeds or benefits of the unauthorized act of the person assuming to act for him he is precluded from denying the latter's authority.

Woodbury v. Larned, 5 Minn. 339; *Gibson v. Norway Sav. Bank*, 69 Me. 579; *Veazie v. Williams*, 49 U. S. 8 How. 134, 12 L. ed. 1018.

The demand made upon the plaintiff for the proceeds and profits of the unauthorized acts of McCulloch, on the ground that the plaintiff "owed" the defendant for the coal, is a ratification; for a claim of debt would not, on any other ground, be maintainable.

Story, Ag. 9th ed. § 259, note 1, and cases cited.

A ratification can only be effectual between the parties when the act is done by the agent avowedly for or on account of the principal, and not when it is done for or on account of the agent himself, or some third person.

Condit v. Baldwin, 21 N. Y. 219, 225; *Watson v. Swann*, 11 C. B. N. S. 755; *Wilson v. Tumman*, 6 Man. & G. 236; *Farmers L. & T. Co. v. Walworth*, 1 N. Y. 433, 444; *Commercial & C. Bank v. Jones*, 18 Tex. 811.

And this is the distinction which must be made between the case at bar and the case of *Coomes v. Houghton*, 102 Mass. 211.

Holmes, J., delivered the opinion of the court:

This is an action of tort to recover damages for the breaking of a plate-glass window. The glass was broken by the negligence of one McCulloch, while delivering some coal which had been ordered of the defendant by the plaintiff. It is found as a fact that McCulloch was not the defendant's servant when he broke the window, but that the "delivery of the coal by [him] was ratified by the defendant, and that such ratification made McCulloch in law the agent and servant of the defendant in the delivery of the coal." On this finding the court ruled "that the defendant by his ratification of the delivery of the coal by McCulloch became responsible for his negligence in the delivery of the coal." The defendant excepted to this ruling and to nothing else. We must assume that the finding was warranted by the evidence, a majority of the court being of the opinion that the bill of exceptions does not purport to set forth all the evidence on which the finding was made. Therefore the only question before us is as to the correctness of the ruling just stated.

If we were contriving a new code to-day we might hesitate to say that a man could make himself a party to a bare tort in any case merely by assenting to it after it had been committed. But we are not at liberty to refuse to carry out to its consequences any

that act was void, as in case of a forgery, it is said no ratification can be made, independent of the principle of estoppel. *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546.

The meaning of ratification is, and always has been, the adoption of an act purporting to be done, or, at least, done in fact, on behalf of the ratifier. Y. B. 30 Edw. I. 128; 7 Hen. IV. 34, 35, pl. 1; *Anon-ymous*, Godbolt, 109, pl. 129; *Wilson v. Tumman*, 6 Man. & G. 236.

The mere silence of the owner, after his property has been taken by a trespasser, will not in law amount to a ratification and adoption of the unlawful act. *Thompson v. Craig*, 16 Abb. Pr. N. S. 82; Story, Ag. § 251; 2 Kent, Com. 12th ed. 616, note 1; *Wilson v. Tumman*, *supra*; *Watson v. Swann*, 11 C. B. N. S. 756.

As a general rule, the principal has the right to elect whether he will adopt the unauthorized act or not. But having once ratified the act, upon a full knowledge of all the material circumstances, the ratification cannot be revoked or recalled, and the principal becomes bound as if he had originally authorized the act. Story, Ag. § 250; Paley, Ag. 13 L. R. A.

Lloyd's ed. 171; 3 Chitty, Com. Law. 197; *Bouvier, Law Dict. title Ratification*.

The general doctrine that one may, by affirmative acts, and even by silence, ratify the acts of another who has assumed to act as his agent, is illustrated by many cases to be found in the books, and set forth by all the text-writers upon the law of agency. Story, Ag. § 251a; 2 Greenl. Ev. §§ 66, 67; 2 Kent, Com. 616; *Thompson v. Craig*, 16 Abb. Pr. N. S. 28; *Wilson v. Tumman*, *supra*; *Watson v. Swann*, 11 C. B. N. S. 756.

But the doctrine properly applies only to cases where one has assumed to act as agent for another, and then a subsequent ratification is equivalent to an original authority. One may wrongly take the property of another not assuming to act as agent, and sell it in his own name and on his own account, and in such case there is no question of agency, and there is nothing to ratify. The owner may subsequently confirm the sale, but this he cannot do by a simple ratification. His confirmation must rest upon some consideration upholding the confirmation, or upon an estoppel. *Workman v. Wright*, 33 Ohio St. 405.

principle which we believe to have been part of the common law simply because the grounds of policy on which it must be justified seem to us to be hard to find and probably to have belonged to a different state of society.

It is hard to explain why a master is liable to the extent that he is for the negligent acts of one who at the time really is his servant acting within the general scope of his employment. Probably master and servant are "feigned to be all one person" by a fiction which is an echo of the *patria potestas* and of the English frank pledge. *Byington v. Simpson*, 134 Mass. 169, 170; *Fitzh. Abr. Corone*, pl. 428. Possibly the doctrine of ratification is another aspect of the same tradition. The requirement that the act should be done in the name of the ratifying party looks that way. *New England Dredging Co. v. Rockport Granite Co.* 149 Mass. 381, 382; *Fuller & Trimwell's Case*, 2 Leon. 215, 216; *Sext. Dec. 5, 12*; *De Reg. Jur. Reg. 9*; *Dig. 43, 26, 13*; *Dig. 43, 16, 1, § 14*, glossa. and cases next cited.

The earliest instances of liability by way of ratification in the English law so far as we have noticed were where a man retained property acquired through the wrongful act of another. *Y. B. 30 Edw. I. 128* (Rolle, ed.); 38 Lib. Ass. 223, pl. 9; *S. C. 38 Edw. III. 18*, 12th ed. IV. 9, pl. 23; *Plowd. 8 ad fin. 27, 31*; See *Bracton*, 158 *b*, 159 *a*, 171 *b*.

But in these cases the defendant's assent was treated as relating back to the original act, and at an early date the doctrine of relation was carried so far as to hold that where a trespass would have been justified if it had been done by the authority by which it purported to have been done, a subsequent ratification might also justify it. *Y. B. 7 Hen. IV. 34*, pl. 1. This decision is qualified in *Fitzh. Abr. Bayllys*, pl. 4, and doubted in *Bro. Abr. Trespass*, pl. 86; but it has been followed or approved so continuously and in so many later cases that it would be hard to deny that the common law was as there stated by *Chief Justice Gascoigne*. *Anonymous*, *Godbolt*, 109, 110, pl. 129, 2 Leon. 196, pl. 246; *Hull v. Pickering*, 1 Brod. & B. 282; *Muskett v. Drummond*, 10 Barn. & C. 153, 157; *Buron v. Denman*, 2 Exch. 167, 178; *Secretary of State in Council of India v. Kamachee Boye Sahaba*, 18 Moore, P. C. 22, 86; *Cheetham v. Manchester*, L. R. 10 O. P. 249; *Wiggins v. United States*, 3 Ct. Cl. 412.

If we assume that an alleged principal by adopting an act which was unlawful when done can make it lawful, it follows that he adopts it at his peril and is liable if it should turn out that his previous command would not have justified the act. It never has been doubted that a man's subsequent agreement to a trespass done in his name and for his benefit amounts to a command so far as to make him answerable. The *ratihabitio mandati comparatur* of the Roman lawyers and the earlier cases (*Dig. 46, 8, 12, § 4*; 43, 16, 1, § 14; *Y. B. 30 Edw. I. 128*), has been changed to the dogma *equiparatur* ever since the days of *Lord Coke*, 4 Inst. 317; See *Bro. Abr. Trespass*, pl. 118; *Co. Litt. 207 a*; *Wingate Max. 124*; *Com. Dig. Trespass*, 13 L. R. A.

chap. 1; *Eastern Counties R. Co. v. Broom*, 6 Exch. 314, 326, 327, and cases hereafter cited.

Doubts have been expressed, which we need not consider, whether this doctrine applied to the case of a bare personal tort. *Adams v. Freeman*, 9 Johns. 117, 118; *Anderson and Warborton, JJ.*, in *Bishop v. Montague*, Cro. Eliz. 824.

If a man assaulted another in the street out of his own head, it would seem rather strong to say that if he merely called himself my servant and I afterwards assented, without more, our mere words would make me a party to the assault, although in such cases the canon law excommunicated the principal if the assault was upon a clerk. *Sext. Dec. 5, 11, 23*. Perhaps the application of the doctrine would be avoided on the ground that the facts did not show an act done for the defendant's benefit (*Wilson v. Barker*, 1 Nev. & Man. 409, 4 Barn. & Ad. 614; *Smith v. Looz*, 42 Mich. 6), as in other cases it has been on the ground that they did not amount to such a ratification as was necessary. *Tucker v. Jerrie*, 75 Me. 184; *Hyde v. Cooper*, 26 Vt. 552.

But the language generally used by judges and text-writers and such decisions as we have been able to find is broad enough to cover a case like the present when the ratification is established. *Perley v. Georgetown*, 7 Gray, 464; *Bishop v. Montague*, *supra*; *Sanderson v. Baker*, 2 W. Bl. 832; 3 Wils. 309; *Barker v. Braham*, 2 Bl. 866, 868; 3 Wils. 368; *Badkin v. Powell*, Cowp. 476, 479; *Wilson v. Tushman*, 6 Man. & G. 286, 242; *Lewis v. Read*, 18 Mees. & W. 834; *Buron v. Denman*, 2 Exch. 167, 188; *Bird v. Brown*, 4 Exch. 786, 799; *Eastern Counties R. Co. v. Broom*, 6 Exch. 314, 326, 327; *Roe v. Birkenhead*, L. & O. J. R. Co. 7 Exch. 36, 44; *Ancona v. Marks*, 7 Hurlst. & N. 696, 695; *Condit v. Baldwin*, 21 N. Y. 219, 225; *Exum v. Brister*, 85 Miss. 391; *Galeston, H. & S. A. R. Co. v. Donahoe*, 56 Tex. 162; *Murray v. Lovejoy*, 2 Cliff. 191, 195. See *Lovejoy v. Murray*, 70 U. S. 8 Wall. 1, 9, 18 L. ed. 129-131; *Story*, Ag. §§ 455, 456.

The question remains whether the ratification is established. As we understand the bill of exceptions McCulloch took on himself to deliver the defendant's coal for his benefit and as his servant, and the defendant afterwards assented to McCulloch's assumption. The ratification was not directed specifically to McCulloch's trespass, and that act was not for the defendant's benefit if taken by itself, but it was so connected with McCulloch's employment that the defendant would have been liable as master if McCulloch really had been his servant when delivering the coal. We have found hardly anything in the books dealing with the precise case, but we are of opinion that consistency with the whole course of authority requires us to hold that the defendant's ratification of the employment established the relation of master and servant from the beginning with all its incidents including the anomalous liability for his negligent acts. See *Coomes v. Houghton*, 102 Mass. 211, 213, 214; *Cooley*, Torts, 128, 129. The ratification goes to the relation and

establishes it *ad initio*. The relation existing, the master is answerable for torts which he has not ratified specifically, just as he is for those which he has not commanded and as he may be for those which he has expressly forbidden. In *Gibson's Case*, Lane, 90, it was agreed that if strangers as servants to Gibson but without his precedent appointment had seized goods by color of his office, and afterwards had misused the goods and Gibson ratified the seizure, he thereby became a trespasser *ad initio*, although not privy to the misusing which made him so. And this

proposition is stated as law in Com. Dig. *Trespass*, chap. 1; *Elder v. Benita*, 2 Met. 599, 605.

In *Coomes v. Houghton*, 102 Mass. 211, the alleged servant did not profess to act as servant to the defendant and the decision was that a subsequent payment for his work by the defendant would not make him one.

For these reasons in the opinion of a majority of the court the exceptions must be overruled.

Exceptions overruled.

KANSAS SUPREME COURT.

HENDERSON

v.

Charles M. HOVEY, State Auditor.

HUBBELL

v.

Solomon G. STOVER, State Treasurer.

(....Kan.....)

*1. No money can be drawn from the treasury of the State, except in pursuance of a specific appropriation made by law.

2. Where the Legislature has made a specific appropriation of \$2,000 for the compensation of the secretary, stenographer, and other officers of the State Senate during the sitting of the Senate for an impeachment trial, neither the auditor nor Treasurer of State has the authority to allow or pay any compensation for such officers in excess of said specific amount so appropriated.

(July 9, 1891.)

APPLICATIONS for writs of mandamus to compel the State Auditor and Treasurer to audit and pay certain claims for services rendered by employes of the Senate during an impeachment trial. *Refused.*

*Head notes by HORTON, Ch. J.

NOTE.—Preliminaries necessary to the withdrawal of public funds.

Authority for paying out the public money should be found in some law. One claiming to draw money out of the treasury of the county or the State should be able to point to a law that clearly authorizes the expenditure. *Kennedy v. Seamans*, 60 Ga. 612; *Maxwell v. Cumming*, 58 Ga. 284; *Houston County v. Kersh*, 82 Ga. 255.

Under La. Const., art. 58, the general appropriation bill may embrace several items or objects of expenditures of public moneys, but all other appropriations shall be made by separate bills each embracing but one object. *Klein v. State Treasurer*, 43 La. Ann. 174.

When the Legislature has clearly indicated its will as to a claim which is to be paid out of the general fund in the state treasury, the constitutional requirement as to appropriation by the legislative department is satisfied, and no particular form of words is essential to make the appropriation valid. *Humbert v. Dunn*, 84 Cal. 57.

Cal. Stat. 1889, 421, providing that each member of the examining commission of rivers and harbors shall receive a salary of \$2,400 per annum, payable 13 L. R. A.

The facts are stated in the opinion.

Mr. Chester I. Long for applicants.

Mr. J. N. Ives, Atty-Gen., for defendants.

Horton, Ch. J., delivered the opinion of the court:

These proceedings have been commenced in this court by mandamus to enable certain persons, who were employes of the Senate, acting as a court of impeachment, to recover their compensation for their services. The State Treasurer, in one case, has refused to register and countersign the warrant issued by the Auditor and has refused to recognize it. In the other case, the Auditor of State has refused to audit the claim of the employe, and has also refused to issue any warrant for his services. The court has examined the various provisions of the Statute which have been referred to. The claim is first made that under section 3, chap. 25, Sess. Laws 1891, the Senate had authority to transfer, from the appropriation made to it of \$8,000 for the *per diem* and mileage of its members, any balance not necessary for the pay of its members. They passed a resolution transferring a portion of the \$8,000 for the secretary, stenographer, and other officers of the Senate. The conclusion of the

monthly, and his traveling expenses while engaged in the performance of official duties, to be paid out of any money in the state treasury not otherwise appropriated, constitutes an appropriation without further action of the Legislature, within Cal. Const., art. 4, § 22, providing that no money shall be drawn from the state treasury except in consequence of appropriations made by law. *Ibid.*

An appropriation is "made by law" when it plainly declares what the amount of compensation shall be; and no legislative appropriation is necessary in such a case to authorize payment from the public treasury. *State v. Hickman*, 8 L. R. A. 408, 9 Mont. 370.

Under Mo. Const., prescribing the conditions and proceedings incident to the payment of money out of the state treasury, a reappropriation of an unused balance of a former appropriation is upon the same footing as the original appropriation, as to the necessity of stating the object for which such reappropriation is made. *State v. Seibert*, 90 Mo. 122.

In Nebraska, the appropriation made by the Legislature, where there is no provision limiting particular cases to a shorter period, extends to the end of the first fiscal quarter after the adjournment

court is, after giving the matter as much attention as it has been able to do in the time allowed, that section 3 of chapter 25 is a specific appropriation for the various amounts for the purposes therein named. For instance, there is no general appropriation for any amount to pay the whole expense of the trial. There are specific appropriations only. First, for the *per diem* and mileage of members of the Senate, and the president thereof, while sitting as a court of impeachment, \$8,000 is given. There is a specific appropriation for the compensation of the secretary, stenographer, and other officers of the Senate of \$2,000 only. Had the Legislature, as it had the power to do, simply provided that \$27,500 or any other general sum, was appropriated to pay the expenses of the trial, such an amount could be drawn out for that purpose. Section 3 of said chapter 25 reads as follows: "To pay the expenses incidental to the trial of Judge Theodosius Botkin, who has been impeached by the House of Representatives of high misdemeanors in office, there is hereby appropriated the following sums, or so much thereof as may be necessary, to wit: For *per diem* and mileage of the members of the Senate and president thereof while sitting as a court of impeachment, \$8,000; *per diem* and mileage of the board of managers of the House of Representatives and counsel and stenographer, to be appointed by said board, \$1,500; compensation of secretary, stenographer, and other officers of the Senate, \$2,000; for service of process, \$1,000; *per diem* and mileage of witnesses, \$15,000." Now, if the State Senate had the right to transfer from the \$8,000 any balance thereof for the compensation of its officers or employés, it had the same right, under said section 3, to transfer it for the purpose of paying counsel or anyone else employed in the trial. The Constitution of the State ordains that "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." Section 24, art. 2. Upon an examination of section 3, we find that specific appropriations

were made for several distinct and separate purposes, and this court has no authority to make any change in that section; and, the Legislature having specified the particular amounts for the several purposes, they can be used for those purposes, but those only.

It is next argued that if section 3 of chapter 25 cannot furnish money for these employés, they ought to be paid from the general appropriation for the expenses of the Legislature, under section 1 of said chapter 25. The cardinal rule of construction is that the intention of the Legislature must control, and, where there is appropriated a certain sum of money for the pay of members of the Legislature, and its officers and clerks, the ordinary conclusion would be that they are to apply to both Houses of the Legislature and its officers, while in session as a Legislature, and not while one body thereof is acting as a court of impeachment. Section 2 of said chapter 25 provides "that the pay warrants for the members of the Legislature for the last ten days of service shall not be drawn by the Auditor of State until three days after the expiration of the fifty days of regular session, or upon the final adjournment of the Legislature previous to the date herein fixed." We think that the proper construction of said section 3 is that the Legislature intended to make a specific appropriation for the expenses of the impeachment trial of Judge Botkin, and did not intend that any other moneys should be used for that trial than those appropriated in said section 3. In carrying out the intent of the Legislature, we must hold that there is no money appropriated to pay any compensation for the officers or employés of the Senate during the trial of Judge Botkin, excepting the specific sum of \$2,000. It may be possible that the Legislature intended that \$2,000 should be the limit of the expenses for those purposes, and, having appropriated \$2,000 only, this court cannot now say that the employés should be paid out of some other appropriation, or that more should have been appropriated. The

of the next regular session. *State v. Babcock*, 22 Feb. 22.

Public moneys.

No moneys can be paid from the treasury, except in pursuance of an appropriation by law, nor unless within two years after such appropriation; and every law making or continuing, etc., an appropriation, must distinctly specify the sum and the object. Const. 1846, art. 7, § 8.

A two-thirds vote of each branch of the Legislature is required to render valid appropriation bills. Const. 1822, art. 7, § 9; Const. 1846, art. 1, § 9; 1 Abb. R. Y. Dig. 227.

While it is customary to use the words, "there is hereby appropriated the sum," etc., in bills appropriating money for the payment of salary and other expenses of the government, it is not essential to the validity of an appropriation that those words, or any of them, should be used if the Legislature has clearly designated the amount and the fund out of which it is to be paid. *Humbert v. Dunn*, 84 Cal. 57.

The limitation that "no money shall be drawn from the treasury but in consequence of appropriations made by law" is taken literally from the Constitution of the United States. Its object is to

secure to the legislative department of the government the exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government. 2 Ops. Atty-Gen. 670.

To the legislative department of the government is intrusted the power to say to what purpose the public funds shall be devoted in each fiscal year, and, as stated before, when the Legislature has clearly indicated its will as to the claim which is to be paid, and the fund from which it is to be paid, the constitutional requirement is satisfied, and no particular form of words is essential to make the appropriation valid. *Proil v. Dunn*, 80 Cal. 220.

An appropriation of the money to a specified object would be an authority to the proper officers to pay the money, because the auditor is authorized to draw his warrant upon an appropriation, and the treasurer is authorized to pay such warrant, if he has appropriated money in the treasury. And such an appropriation may be prospective; that is, it may be made in one year, of the revenues to accrue in another or future years,—the law being so framed as to address itself to such future revenues. *Justine v. State*, 30 Ind. 223. See note to *Henderson v. Soldiers & S. Mon. Comrs.* (Ind.) 12 L. R. A. 100.

State Treasurer and the Auditor must act in accordance with the specific appropriation named in said section 8.

It is further urged that the auditor should be required to issue his warrant whether there is any balance of the specific appropriation remaining in the treasury or not. An examination of the provisions of the Statute in regard to the duty of the auditor clearly shows that the auditor must take notice of what money has been appropriated for any specific purpose, and when that amount has been fully exhausted by claims presented and audited, he has no authority to allow or audit other claims, and issue warrants therefor. See paragraphs 6582, 6597, 6676, Gen. Stat. 1889. The warrant issued by the Auditor was not, in our opinion, issued in conformity with the provisions of said chapter 25. The Treasurer properly refused to recognize it. The Auditor has no right, in the absence of

a sufficient appropriation, to issue warrants generally, to be provided for by some future Legislature. Considering all the terms of chapter 25, we cannot find our way clear to allow this writ. "The laborer is worthy of his hire," and it is very unfortunate that provision was not fully made by the late Legislature for the payment of all the expenses of the impeachment trial. They provided that \$2,000 should be appropriated for the officers or employes of the senate during the trial, and, until further action is taken by the Legislature, no more than \$2,000 can be used to pay these parties. We cannot order the payment of the amounts prayed for, as this court cannot change the Statute.

The writs of mandamus in both cases will be denied. We regret this result, but we do not make the laws; we only interpret them. All the Justices concur.

MAINE SUPREME JUDICIAL COURT.

John A. MORSE *et al.*

v.

Warner MOORE.

(.... Me....)

1. A contract to deliver ice of a certain described quality and thickness is an express warranty that the ice when delivered shall be of such quality and thickness.
2. Acceptance of merchandise under an executory contract of sale warranting it to be of a certain quality does not necessarily terminate the obligation of the vendor; but it is evidence of complete performance or of waiver, the conclusiveness of which is to be determined from all the circumstances of the case.
3. The vendee in a contract to sell and deliver at a certain place for shipment ice of a specified quality and thickness, who does not see the ice until it reaches its destination, and who then immediately notifies the vendor that it is not according to contract, may set up its inferiority in defense of an action for its price, although he receives, stores and attempts to dispose of it.

(May 26, 1891.)

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Sagadahoc County made during the trial of an action brought to recover the contract price of certain ice alleged to have been sold and delivered to defendant, which resulted in a verdict for plaintiffs. *Sustained.*

The facts sufficiently appear in the opinion. *Messrs. C. E. Littlefield and A. S. Littlefield* for defendant.

Mr. A. N. Williams, for plaintiffs:

Where the articles bargained for under an executory contract are to be delivered at a place certain named therein, the place of de-

livery is the place where the purchaser must exercise his right of rejection or acceptance of the articles tendered.

Defendant having received the ice on board his vessels at Water Cove without complaint, and carried it away, could not exercise the right of rejection at Richmond, Va., or at any other place.

Brownlee v. Bolton, 44 Mich. 218; 2 Benjamin, Sales, Corbin's ed. p. 916; *Pease v. Copp*, 67 Barb. 182. See also Benjamin, Sales, chapter on Acceptance; *Lincoln v. Gallagher*, 4 New Eng. Rep. 141, 79 Me. 189.

Defendant could not receive the ice and accept it, and then defend on the ground that it was not of the quality required under the contract.

Norton v. Dreyfuss, 7 Cent. Rep. 785, 106 N. Y. 90; *Brown v. Foster*, 11 Cent. Rep. 291, 108 N. Y. 887; *Parks v. O'Connor*, 70 Tex. 877; *Coplay Iron Co. v. Pope*, 10 Cent. Rep. 711, 108 N. Y. 232; *Smith v. New Albany Rail Mill Co.* 50 Ark. 31; *Sprague v. Blake*, 20 Wend. 61.

When the contract is in writing, an additional warranty, not expressed or implied by its terms, that the article is fit for a particular use, cannot be added either by implication of law or by parol proof.

Whitmore v. South Boston Iron Co. 2 Allen, 52; Chitty, Cont. 450; *Dutton v. Gerriah*, 9 Cush. 89; *Chanter v. Hopkins*, 4 Mees. & W. 399; *Ottawa B. & F. Glass Co. v. Gunther*, 81 Fed. Rep. 208; Benjamin, Sales, Corbin's 4th Am. ed. §§ 985-988.

Peters, Ch. J., delivered the opinion of the court:

The controversy in this case grows out of an agreement between plaintiffs and defendant, made and delivered in this State, which runs as follows: "This agreement, made and entered into this seventh day of January, 1888, by and between Morse & Sawyer, of Bath, Maine, of the first part, and Warner Moore, of Richmond, Va., of the second part, witnesseth:

NOTE.—Effect of acceptance of goods under contract of sale. See note to *Jones v. McEwan* (Ky.) 12 L. R. A. 399.

13 L. R. A.

"That the said parties of the first part, for and in consideration of the sum of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, do hereby sell and agree to deliver at their wharves at Water Cove (Cape Small Point, opposite Burnt Coat Island, as seen in Coast Chart No. 8, from four to six miles west of Seguin Island and light-house), Maine, after the ice has become twelve inches in thickness, of good quality, during the months of January or February, 1888, two thousand tons of good, clear, merchantable ice, not less than twelve inches in thickness, to be weighed by a sworn weigher, with all the proper fitting material necessary for the voyage included, at the price or rate of forty cents per ton of two thousand pounds. Each cargo to be paid for on presentation of sight draft or note for thirty days or sixty days, as may suit party of second part, for the amount accompanying bill of lading and weighers' certificate of said cargo. Cakes to be twenty-two by thirty inches."

The ice delivered under this contract was shipped to Richmond, Va., where the defendant resides, to be sold in that market to his customers. It was to be paid for according to its weight and quality at the port of shipment in Maine, any deterioration of the article during transit being at the risk of the purchaser.

The first question submitted to the jury was whether the ice had been accepted by the defendant or not, and that was decided in favor of the plaintiffs.

That brought up the question whether, having accepted the ice, the defendant could rely on a breach of the warranty of the quality of the ice to reduce the claim of the plaintiff, who sues in this action of *indebitatus assumpsit* for the contract price; the defendant alleging that the ice was not, at the time and place of delivery in Maine, of the quality called for by the contract.

The judge presiding, being of the impression that such a defense might be admissible in case of an executed agreement containing warranty, but not where the agreement is executory, ruled out the defense as a matter of law. It is to be noticed that the ruling was without qualification, admitting of no inquiry into the circumstances in which the ice was accepted. It determines that an acceptance in a case of this kind (in the absence of fraud, of course) absolutely terminates the obligation of the vendor. The judge further ruled that "when the defendant took [that is, by a hired carrier] the property and carried it away the property passed to him."

Our examination of this question leads us to the conclusion that the position of the defendant was well taken, and that the alleged defense should have been permitted to him.

That there is a warranty or a condition precedent amounting to warranty in the contract, there can be no doubt. Such a warranty will be found to be variously characterized in the books as executory warranty, a condition precedent amounting to warranty, is the nature of warranty, with the effect of warranty, equal to warranty, and the like. It is immaterial, for present purposes, wheth-

er it be regarded as an express warranty or an express condition implying warranty, as the effect must be the same. One kind within its limit is not a more potential ingredient in a contract than the other, the difference between them being only in the style of agreement to which they may be annexed. An express warranty may be also special, however. It is now well settled by the authorities generally—our own cases included—that a sale of goods by a particular description of quality imports a warranty that the goods are or shall be of that description; a warranty which becomes a part of the contract if relied upon at the time by the purchaser. *Bryant v. Crosby*, 40 Me. 9; *Randall v. Thornton*, 43 Me. 226; *Hillman v. Wilcox*, 30 Me. 170; *Gould v. Stein*, 149 Mass. 570, 5 L. R. A. 213, and cases cited. Here there is a clear description of both the kind and quality of the ice,—the quality to be merchantable.

It was conceded at the trial that the position relied on by the defense would be legitimate were it an executed, instead of executory, contract that contained the warranty. Why should there be the difference? Certain early New York cases, which will be further considered hereafter, by which the rule given at the trial is more or less supported, give as a reason for the rule that in an executory contract any article of a particular quality may be tendered in the performance of the contract, and the vendee must see if the article agrees with the terms of the contract, while in an executed sale the agreement is that a particular article actually delivered possesses the quality stipulated for. This undoubtedly expresses correctly the distinction between the classes of contract, but it does not impress us that there should be such an essential difference in their effect. The reason is not palpable why the vendee in the one case more than in the other should have to see that he receives only merchantable articles when a delivery is made. It seems inconsistent that the warranty, which is a part of either contract, should terminate at delivery in one contract, and not in the other. Each vendor makes virtually the same warranty, and the two vendors at the point of delivery would appear to stand upon common ground. The seller in an executory contract agrees to do what the seller in an executed contract has already done. When he tenders the articles that he has agreed to deliver, such articles become particularized and identified; and he then represents that such particular and identified articles possess the quality stipulated for by his executory agreement. The terms of the contract of sale become the terms of the sale. The condition precedent becomes a warranty. Prof. Wharton (Whart. Cont. § 564) expresses the idea in these words: "A substantial, though partial (defective), performance of a condition precedent, followed by acceptance on the other side, transmutes the condition precedent into a representation (implying warranty), not barring a suit on the contract, though leaving ground for a cross-action for damages."

Executory and executed contracts are very much alike in the elements that enter into

them. There are executory steps in all executed contracts. A bargain precedes the sale. If there be a warranty, that is usually first a part of the bargain, and afterwards of the sale. So in an executory contract the warranty is part of the agreement of sale, and at delivery a part of the sale. Many contracts commonly spoken of as executed contracts are really wholly or partially executory. All orders for goods, whether for present or future delivery, are of an executory nature. All sales by sample are such. The author of *Smith's Leading Cases* (8th ed. vol. 1, pt. 1, p. 839) says in discussing this distinction: "Where the vendor agrees to sell goods of a certain kind, without designating or referring to any specific chattel, the contract is essentially executory, whether it purports to be a present transfer or a mere undertaking to deliver at a future period, and the right of property does not pass until the merchandise is delivered to or set apart for the purchaser." Every contract is executory on the one side or the other until the party has done what he has agreed to do.

The fact of acceptance, however, as a matter of evidence, may have great weight on the question of satisfactory or sufficient performance. In the first place, it raises considerable presumption that the article delivered actually corresponded with the agreement. In the next place, it is some evidence of a waiver of any defect of quality, even if the article did not so correspond; evidence of more or less force according to the circumstances of the case. If the goods be accepted without objection at the time or within a reasonable time afterwards, the evidence of waiver, unless explained, might be considered conclusive. But if, on the other hand, objection is made at the time, and the vendor notified of the defects, and the defects are material, the inference of waiver would be altogether repelled. But acceptance accompanied by silence is not necessarily a waiver. The law permits explanation, and seeks to know the circumstances which induced acceptance. It might be that the buyer was not competent to act upon his own judgment, or had no opportunity to do so, or declined to do so as a matter of expediency, placing his dependence mainly, as he has a right to do, upon the warranty of the seller. Upon this question the facts are generally for the jury, under the direction of the court.

The law of waiver more commonly applies to things that are not essential to a substantial execution of the contract; often such as relate to the time, place, or manner of performance, or that affect merely the taste or fancy, perhaps, and are such departures from literal performance as do not bring loss or injury upon the purchaser. *Baldwin v. Farnsworth*, 10 Me. 414; *Lamb v. Barnard*, 16 Me. 364.

We think the rule invoked by the defendant a just one. Speaking generally, it is the safer rule for both buyer and seller. The opposite rule imposes on either of them very great responsibility and risk. It might be ruinous to a vendee, who is in urgent need of an article, not to accept it, although

even much inferior in quality to the description contained in the contract. Certainly it should not be considered a hardship to a seller to require of him a compliance with his contract, or damages for his non-compliance.

The present case illustrates the justness of the rule, if the facts are proved as the defendant alleges them. The plaintiffs agreed to deliver ice, which they warranted should be good, clear, and merchantable. Two cargoes were loaded for shipment to a southern port. Defendant furnished the vessels, though they were probably chartered by the plaintiffs on the defendant's account. There is nothing in the charge of the judge, in the exceptions, or on briefs of counsel, intimating that the defendant ever saw the ice, either by agent or personally, until it arrived in Virginia, or that he was notified to be present, or knew of the delivery at the time of it. It would seem to be a rather stringent construction of the contract that the defendant must watch the loading of the cargoes, upon the penalty, if he failed to do so, of having to pay full price for whatever defective ice might be delivered behind his back, after he had taken for his protection, and paying for it in the consideration of the contract, an agreement of warranty in such positive terms. Still it may be that the plaintiffs could legally refuse to deliver the ice unless the defendant after notice should be present to receive it. The cargoes, after reasonable passages, arrived in a very unmerchantable condition. There was no lack of objection or protest from the defendant. He wrote repeatedly, and telegraphed the plaintiffs, expressing his disappointment, and asking their advice as to the disposition of the ice. But no satisfactory answer came. What should he do? There was no possibility of reshipment, nor could the ice be preserved in that climate without the protection that his own ice-houses would afford for such purpose. Storage in any ordinary manner could not possibly save the property. He stored the ice, and sold it by enterprising expedients as rapidly as possible. He alleges that it was late spring ice, of poor texture, and in proximately worthless condition when shipped from Maine. If that can be shown by witnesses and in court at the home of the plaintiffs, it would seem to be an injustice if the defendant is not permitted to make the defense.

Mr. Benjamin (Benjamin, Sales, 3d Am. ed. p. 888), in allusion to the buyer's remedies after receiving possession of the goods, says he has three remedies against the seller for breach of the warranty of quality: *first*, the right to reject the goods if the property in them has not passed to him; *second*, a cross-action for damages for the breach; *third*, the right to plead the breach in defense to an action by the vendor, so as to diminish the price. These remedies are mentioned without any distinction between kinds of sales. The propositions are general, without any intimation that the procedure does not apply to warranties in executory sales. In the text such a distinction is not even noticed. In the notes to the text, however, it is re-

marked by the American editor that there are New York decisions inconsistent with the rule stated in the text. The first of these remedies—that of rejecting the goods—seems especially applicable to executory and inapplicable to executed sales, because it precedes acceptance, while in executed sales there has been acceptance, and the title has passed. It is only in executory contracts and contracts that are merely *prima facie* executed that the title has not passed.

Mr. Benjamin states further that the buyer's remedies are not dependent on his return of the goods, nor is he bound to give notice to the vendor; "but," he adds, "a failure to return the goods or complain of the quality raises a strong presumption that the complaint of defective quality is not well founded." Prof. Parsons, in the text and notes of his work on Contracts, lays down the same legal propositions that Mr. Benjamin does, making not a word of allusion to there being any difference in the application of them between sales executed and sales executory. He also states that if the buyer accepts goods inferior to such as are stipulated for, his continued possession without complaint will be a presumption against him on the question of damages. Parsons, *Cont.* 6th ed. *591, and notes.

Mr. Smith, in *Leading Cases*, in notes to the case of *Chandel v. Lopus* (8th ed. vol. 1, pt. 1, p. 294), discusses and fully indorses the same rules, as deducible from the authorities, and he and the editors in the last American edition of that work cite and compare a great many of the decided cases on the subject, and they give no recognition to a distinction between executed and executory contracts in the application of such remedies. We quote a few passages from their comments: "When specific property is referred to, still, if the reference be through the medium of a sample, the contract will be so far executory as to fail of effect unless the bulk of the commodity corresponds with the sample." "Nor will his [buyer's] right to indemnity or compensation necessarily end on his acceptance and use of the goods with full knowledge of the defect, but he will be entitled to bring suit on the contract, and receive damages for the breach of the implied engagement that the bulk of the commodity should correspond with the sample exhibited at the time of the sale."

In the case at bar there was an ideal or descriptive sample,—a description equivalent to the exhibition of a sample. There can be no doubt that, if the vendee may bring an action of his own on the contract, he can as well defend against an action brought upon the contract by the vendor. "The right of the vendee to rely on the breach of warranty, or a failure to comply with the terms of an executory contract, as a defense to an action for the purchase money may now be regarded as established in England and in most of the courts in this country." "The course of decision at the present day tends towards the position that a partial failure of consideration may be given in evidence in mitigation of damages, even when the original contract remains in full

force, and the suit is expressly or impliedly founded upon it." "In the case of *Withers v. Greene*, 50 U. S. 9 How. 218, 18 L. ed. 109, the Supreme Court of the United States receded from the ground taken in *Thornton v. Wynn*, 25 U. S. 12 Wheat. 183, 6 L. ed. 595, by holding that a partial failure of consideration, growing out of fraud or breach of warranty, may be set up as a defense to an action brought by the vendor. The same rule applies to sales under an executory contract or by sample, and the buyer may rely on the deficiency of value resulting from the failure of the property sold to correspond with the terms of the contract as a reason why he should not be compelled to pay the price in full. *Mondel v. Steel*, 8 Mees. & W. 858; *Babeock v. Trice*, 18 Ill. 420; *Dailey v. Green*, 15 Pa. 118."

We are unable to find in the English cases much support for any discrimination in the application of the above doctrine between sales executed and sales executory, although very many of the modern English cases arise out of sample sales and other contracts of an executory nature. The principal support for it is found in some of the New York cases and in those of a few other States that have followed the lead of the New York court in this respect. There are cases which hold to a modification of some of these forms of remedy, having no bearing, however, on the decision of the present case. Some courts have held that a rejection or rescission is not allowable if the goods tendered are of the kind or species contracted for, even though the quality be inferior; but in this State the doctrine of rescission in cases of warranty has been fully established. *Marston v. Knight*, 29 Me. 341. In a few cases there is a leaning towards the doctrine that an acceptance becomes a waiver after a long-continued acquiescence on the part of the vendee. 1 Smith, *Lead. Cas.* 8th ed. pt. 1, pp. 324, 326, 330, 363 *et seq.*

It is noticeable that in the more modern English cases the courts have preferred to regard executory contracts as based upon a condition precedent, rather than upon warranty. No essential difference of remedy follows from it, though a different style of pleading may be apposite. Instead of a breach of warranty and a suit upon warranty, it becomes, on the new idea, a failure to perform a condition precedent and a suit on the contract. In *Leading Cases*, before cited, the commentator expresses the theory in an alternative way in these words: "The right of a vendee to rely on a breach of a mere warranty, or a failure to comply with the terms of an executory contract, as a defense to an action for the purchase money, may now be regarded as established in England, and in most of the courts in this country." But the editor at the same time says (p. 334) that "such cases have generally proceeded on the ground of an express or implied warranty. See, also, in 2 Smith, *Lead. Cas.* pt. 1, the discussion under case of *Cutter v. Powell*, at pages 18, 20, 22 *et seq.* Mr. Benjamin inclines to the view taken in the English cases, quoting Lord Abinger as deprecating the prevalent habit of treating a condition precedent as a

warranty. Other writers incline favorably towards the views of Lord Abinger as expressed by him in the case of *Chanter v. Hopkins*, 4 Mees. & W. 399, although admitting that the prevailing theory continues the other way.

The length of this opinion reasonably precludes further discussion of points that may be regarded as merely theoretical. Whether, in the present case, it be a condition or a warranty, and that might be at the election of the defendant to determine as he pleased, we think the defense set up to the action should have been heard upon the ground of a breach of condition, or of warranty, or upon both grounds.

The main question for our decision has not been the subject of much discussion in our own State, although the principle involved has been acted on in a great number of instances, and there have been judicial expressions and rulings affecting it. In *Folsom v. Mussey*, 8 Me. 400, it is allowed that evidence of consideration may be received in actions between parties to a contract, to reduce the damages. In *Herbert v. Ford*, 29 Me. 546, the doctrine is approved. *Rogers v. Humphrey*, 89 Me. 382, directly applies to the present facts. It is there held that "when a party seeks to recover payment for articles delivered under a special contract which he has not fully performed, the damages suffered by such breach may legally be deducted in the same suit." The case of *Peabody v. Maguire*, 79 Me. 572, 5 New Eng. Rep. 694, in its effect sustains the same principle. It is there decided that in a conditional sale the mere fact of delivery by the vendor without performance by the vendee, nothing being at the time said about the condition, might afford presumptive evidence of the waiver of the condition, but that the fact may be explained and controlled, and whether it be a waiver of the right of title or not would be a question of fact to be ascertained from the testimony. So in the present case, whether acceptance be a waiver of the full performance of the condition precedent or not is likewise a question to be settled upon testimony. The position of parties is reversed in the two cases, but the principle is the same.

The first case in this country, except a Maryland decision to the same effect, and perhaps the leading case in the recognition of the principle that affirmation of quality establishes warranty, is *Hastings v. Lovering*, 2 Pick. 214, where oil then in Nantucket was sold to be delivered in Boston in ten days, the vendor describing the same to be "prime winter oil." That was in fact as much of an executory contract as is the one under discussion, although not in form such. The point was taken in the trial that the contract, although executory, was settled by a bill of parcels given at delivery, the executory agreement having no further effect; but the court overruled the position. The case is effective on the present question as showing that acceptance has no greater effect as an estoppel in executory than in executed sales. Other Massachusetts cases bear, either directly or indirectly, upon the question. In none of them is there any judicial utterance indicating

that executory and executed sales do not, on this question, stand alike. *Perley v. Balch*, 28 Pick. 283; *Dorr v. Fisher*, 1 Cush. 274; *Henshaw v. Robins*, 9 Met. 88; *Mizer v. Coburn*, 11 Met. 559; *Morse v. Brackett*, 98 Mass. 205. Several Connecticut cases that are often cited as supporting the theory that description imports warranty, and that the defendant may recoup damages for a breach of contract if the vendor brings a suit, were cases of executory contracts or sales. *McAlpin v. Lee*, 13 Conn. 129; *Kellogg v. Denslow*, 14 Conn. 411. And of the same character is the leading case in the Supreme Court of the United States on the same question. *Lyon v. Bertram*, 61 U. S. 20 How. 150, 15 L. ed. 848. In that case the vendor was to deliver a cargo of flour within three weeks, the price to be according to the inspection to be made at delivery. The contract was in form a sale, but in effect a contract for future sale and delivery. The same deduction may be made from the cases of so many of the States that the rule may be fairly characterized as general; and the same result is producible from the English cases.

The New York court held in earlier cases that warranty in an executory contract did not in ordinary circumstances survive delivery and acceptance. But the doctrine grew up from the theory of law, maintained for a great while by that court, that description of quality is not a warranty of quality. In *Leading Cases*, before cited, it is said, in distinguishing the New York theory from that of Massachusetts and Pennsylvania: "The authorities in New York assume that calling a thing by a particular name, or designating it as of a certain quality, is no evidence of a warranty or contract that it should be as described." Certainly a thing cannot survive that does not exist. *Wilde, J.*, in *Henshaw v. Robins*, 9 Met. 90, declared upon that ground that the authorities in New York were without influence upon the question of effect of acceptance in Massachusetts, saying: "Opposed to these authorities are the cases in New York; but these were determined on the assumption that there was no warranty, express or implied, and they therefore have no bearing on the question as to the effect of the inspection of the goods sold by the purchaser."

The last-named rule of the New York cases was found to be so much at variance with the authorities elsewhere that in the case of *White v. Miller*, 71 N. Y. 118, all previous cases which held that warranty did not follow from description of quality were overruled; and, as a natural, if not necessary, consequence thereof, the tendency of that court seems in later cases to have been progressive towards the adoption of the other rule, that acceptance in cases of executory sales with warranty does not preclude the vendee from afterwards claiming damages against the vendor for a breach of the warranty, if the court has not already arrived at that point. There are late cases in that State, of express warranties, the doctrine of which seems to completely vindicate the position of the defendant in the present case, even should he be obliged to stand or fall upon the interpretation of the law of his

contract according to the New York authorities. In *Brigg v. Hilton*, 99 N. Y. 517, 1 Cent. Rep. 307, and in *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, it is declared that an express undertaking to deliver in the future articles of a certain quality was an express warranty of such quality when the articles were afterwards delivered,—a warranty that survived an acceptance of the articles delivered; and that the rule would be the same whether the goods were in existence at the time of contract of sale or were to be manufactured.

Upon the authority of these cases the contract in the case at bar contains an express warranty. An express undertaking to produce a thing is an express warranty of the thing produced.

Exceptions sustained.

Walton, Virgin, Libbey, Haskell, and Whitehouse, J.J., concurred.

Re William DEAN, Petitioner to be Admitted to Citizenship.

(....Me.....)

1. **While a court, to have cognizance of applications for naturalization** or to receive declarations of intention under the federal statute, must possess common-law jurisdiction, it is not necessary that it have all the common-law jurisdiction that pertains to all classes of actions, but merely that it exercise its powers according to the course of the common law.
2. **A court, to have jurisdiction of applications for naturalization** or to receive declarations of intention under the federal statute, must, in addition to possessing a seal, have a clerk distinct from the judge, charged with the

duty of keeping a true record of its doings and afterwards of authenticating them.

3. **A court in which the judge thereof is charged with the duty of keeping its records**, which must be authenticated by him, though having a recorder charged with the duty of keeping such records when requested by the judge, is not a court having a clerk within the federal statute regulating naturalization, and has no power to receive a declaration of intention to become a citizen.

(May 29, 1891.)

EXCEPTIONS by petitioner to rulings of the Supreme Judicial Court for York County (Whitehouse, J.), upon a petition by an alien praying for admission to citizenship, which resulted in the dismissal of the petition. *Overruled.*

The facts are stated in the opinion.

Mr. W. F. Lunt, for petitioner:

The term "common-law jurisdiction" means jurisdiction to try and decide causes which were cognizable by the courts of law, under what is known as the common law of England.

People v. McGowan, 77 Ill. 644, 20 Am. Rep. 256.

The Act establishing the court makes it a court of record. This is within the legislative power.

Const. art. 6, § 1.

The Legislature having a right to create and establish a court, certainly has a right to define its legal status.

United States v. Lehman, 39 Fed. Rep. 49.

At common law, the court has the characteristics of a court of record.

Bouvier, Law Dict. title *Court of Record*; *Rapalje & Lawrence*, Law Dict. title *Court of Record*; *Woodman v. Somerset County*, 37 Me. 29.

NOTE.—Naturalization of aliens; jurisdiction of state courts.

Congress may confer judicial powers on state courts (*Houston v. Moore*, 18 U. S. 5 Wheat. 27, 5 L. ed. 25); and there can be no doubt of the rightful jurisdiction of the state courts in such cases, until extinguished by some Act of Congress. *State v. Penney*, 10 Ark. 621; *Com. v. Fowles*, 5 Leigh, 743; *Re* ——— 7 Hill, 141; *Re Clark*, 18 Barb. 444; *Prigg v. Pennsylvania*, 41 U. S. 16 Pet. 622, 10 L. ed. 1091; *Ex parte Knowles*, 5 Cal. 304.

The court of criminal correction, having exclusive jurisdiction of all misdemeanors, under the laws of the State, committed in the City of St. Louis, and which is expressly declared to be a court of record, is a court of common-law jurisdiction, within the meaning of the Act of Congress conferring power on courts to naturalize aliens. *United States v. Lehman*, 39 Fed. Rep. 49.

Congress intended to confer the power of naturalization on all courts of record of the several States that have power to administer justice under and in accordance with that system of jurisprudence known as the common law. *Re Conner*, 20 Cal. 96; *People v. McGowan*, 77 Ill. 649.

Process of naturalization.

The process of naturalization in the mode prescribed by the Act of Congress is a judicial act (*Spratt v. Spratt*, 20 U. S. 4 Pet. 393, 7 L. ed. 897; 13 L. R. A.

Morgan v. Dudley, 18 B. Mon. 714), and must be exercised by the court itself. *Re Clark*, 18 Barb. 444.

It is only the preliminary application of an alien declaring his intention under oath which is regarded merely as ministerial, and may be done before the clerk of the court as well as before the court itself. Act of May 26, 1824; *Re Butterworth*, 1 Woodb. & M. 323. See Conkling, U. S. Ct. Practice, 497.

Naturalization papers.

Where a certificate of naturalization is granted by a court of competent jurisdiction, evidence is inadmissible to show that it was improperly granted or was obtained by false and perjured testimony. *Behrensmeier v. Kreitz* (Ill.), Jan. 21, 1891.

Where such papers are not issued upon the order of any court, but made out and delivered by a county clerk or justice of the peace, they are void. *Ibid.*

But a misnomer contained therein does not vitiate the certificate, as the true name may be shown by parol evidence; and a certificate including the names of two persons, although informal, is not invalid. *Ibid.*

Parol evidence is not admissible to prove that a foreigner has been naturalized. Upon the question whether he is a voter, a certified copy of the record of the court in which he was naturalized is required. *State v. O'Hearne*, 2 New Eng. Rep. 785, 58 Vt. 718.

No one will contend that our statutory courts, although they may not have all the jurisdiction possessed by the old common-law courts of England, are none the less for that reason courts with common-law jurisdiction.

Morgan v. Dudley, 18 B. Mon. 693, 68 Am. Dec. 735; *Re Conner*, 39 Cal. 98, 2 Am. Rep. 427; *People v. McGowan*, *supra*; *State v. Whittemore*, 50 N. H. 245; *Gladhill, Petitioner*, 8 Met. 168; *Ex parte Cregg*, 2 Curt. 98; *United States v. Power*, 14 Blatchf. 223; *Ex parte Tweedy*, 22 Fed. Rep. 84; *United States v. Lehman*, 39 Fed. Rep. 49; 2 Wharton, Digest International Law, 346.

Mr. H. H. Burbank, contra:

The Biddeford Court has no clerk or a person other than the magistrate presiding in the court, whose duties are such as to make him in effect a clerk or prothonotary, within the provisions of § 2165, U. S. Rev. Stat.

Ex parte Cregg, 2 Curt. 98.

The office of recorder in the Biddeford Municipal Court is that of vice-judge.

Laws 1855, chap. 151, § 5.

In *Re Langtry*, 81 Fed. Rep. 879, *Mr. Justice Field* expressed doubts of the legality of a declaration of intention made before the clerk of the United States Circuit Court in San Francisco, away from his office and outside the court-house, but in *Andres v. Arnold*, 6 L. R. A. 238, 77 Mich. 85, by the Supreme Court of Michigan, it was held that it was not necessary that such declaration should be made in the office of the clerk; but 30 Central Law Journal, 53, says that the opinion of the dissenting judge to the contrary appears unanswerable.

Whitehouse, J., delivered the opinion of the court:

This is an application by an alien seeking to become a citizen of the United States. As evidence of the previous declaration of his intention to be naturalized, required by the Act of Congress, the applicant produced a copy of a declaration made by him January 24, 1888, before Edwin J. Cram, recorder of the Municipal Court of the City of Biddeford, attested by "Edwin J. Cram, Recorder." Under the federal statutes, only those courts that are authorized to naturalize are authorized to receive and record this declaration of intention. The question here presented, therefore, is whether the Municipal Court of Biddeford was a court of competent authority, under the laws of the United States, to admit aliens to citizenship. The presiding judge ruled that it was not, and for that reason dismissed the petition.

The Federal Constitution confers upon Congress the power "to establish a uniform rule of naturalization." In the exercise of this authority, Congress enacted the Statute of April 14, 1802, prescribing the conditions of naturalization. By that Act the preliminary declaration might be made on oath or affirmation "before the supreme, superior, district, or circuit court of some one of the States." Then follows this provision in the third section of the Act: "And whereas, doubts have arisen whether certain courts of record in some of the States are included within the description of district or circuit

courts, be it further enacted that any court of record in any individual State having common-law jurisdiction, and a seal and clerk or prothonotary, shall be considered a district court, within the meaning of this Act." In section 2165 of the last revision of the United States statutes, the courts thus authorized to naturalize aliens are specified and described as follows: "A circuit or district court of the United States, or a district or supreme court of the territories, or a court of record of any of the States having common-law jurisdiction and a seal and clerk."

1. Was the Municipal Court of the City of Biddeford, January 24, 1888, a "court of record, having common-law jurisdiction," within the meaning of the Act of Congress of April 14, 1802?

Section 1 of chapter 151 of the Public Laws of 1855, and Acts amendatory thereof, establishing the Municipal Court of Biddeford as constituted January 24, 1888, provide that it "shall be a court of record, with a seal; and said court shall consist of one judge, to be appointed, qualified, and hold his office according to the Constitution; and shall exercise concurrent jurisdiction with justices of the peace and quorum over all matters and things, civil and criminal, within the County of York as are by law within the jurisdiction of justices of the peace and quorum in said county; and original jurisdiction concurrent with the supreme judicial court in all civil actions in which the debt or damages shall not exceed the sum of one hundred dollars; and shall have original jurisdiction concurrent with the supreme judicial court over crimes, offenses and misdemeanors committed in said county which are by laws punishable by fine not exceeding twenty dollars, and by imprisonment in the county jail not exceeding three months."

Section 4 provides that "it shall be the duty of the judge of said court to make and keep the records of said court, or cause the same to be made and kept, and to perform all other duties required of similar tribunals; and copies of the records of said court, duly certified by the judge, shall be legal evidence in all courts."

Section 5 is as follows: "The judge shall appoint a recorder, who shall be a justice of the peace and of the quorum, duly qualified, who shall be sworn by said judge, and who shall keep the records of said court when requested so to do by said judge; and, in case of absence from the court-room or sickness of the judge, or whenever requested by him so to do, or when the office of judge shall be vacant, the recorder shall have and exercise all the powers of the judge, and perform all the duties required in this Act of the judge, and generally shall be fully empowered to sign and to issue all processes and papers and do all acts as fully, and with the same effect, as the judge could do were he acting in the premises; and the signature of the recorder, as such, shall be sufficient evidence of his right to act instead of the judge, without any recital of the Act hereinbefore named, authorizing him to act. When the office of judge is vacant, the recorder shall be entitled to the fees; in all

other cases he shall be paid by the judge." Chapter 247 of the Special Laws of 1887 provides that the judge shall receive an annual salary of \$1,400, which shall be in full for all his services and the services of the recorder.

The "court of record" required by the federal statute is not simply a tribunal that has a recording officer and seal, and in fact keeps a permanent record of its proceedings; for the probate court and the court of the county commissioners would fulfill all of these requirements, and yet neither of these tribunals is deemed to be technically a court of record. It must be an organized judicial tribunal, having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of the common law. It is distinguishable from the case of a justice of the peace on whom personally certain judicial powers are conferred by law. *Gladhill, Petitioner*, 8 Met. 168; *Anderson, Law Dict.*

Two centuries ago, in the case of *Groenvelt v. Burnell*, 1 Salk. 200, *Chief Justice Holt* said: "Whenever a power is given to examine, hear, and punish, it is a judicial power, and they in whom it is reposed act as judges; and whenever there is jurisdiction erected with power to fine and imprison, that is a court of record, and what is there done is matter of record." Blackstone adopts this statement, adding that the proceedings of a court of record are enrolled for a perpetual memorial; and then distinguishes a "court not of record" as one that can "hold no plea of matters cognizable by the common law, unless under the value of forty shillings, nor of any forcible injury whatever." 3 Bl. Com. 24. Thus in *Woodman v. Somerset County*, 37 Me. 38, *Chief Justice Shepley* says: "A court of record is one which has jurisdiction to fine or imprison, or one having jurisdiction of civil cases above forty shillings, and proceeding according to the course of the common law." It was a distinguishing feature of it that at common law its judgments were reviewable only by writ of error. Accordingly in *Gladhill, Petitioner, supra*, *Chief Justice Shaw* says of the Police Court of Lowell in 1844: "We are of opinion that it is a court of record, coming within the description of the Act of Congress. It possesses all the characteristics of a court of record. Section six directs the keeping of a fair record. It is not necessary to decide here whether a justice's court is a court of record. The point is left undecided in *Smith v. Morrison*, 22 Pick. 430. That a writ of error will lie on a justice's judgment is well settled, and the object of a writ of error is to remove a record. It will not lie to a judgment of a probate court, because not technically a court of record. Probably the result may be, from an examination of all the statutes regulating the jurisdiction of justices of the peace, that their courts will be regarded as courts of record for some purposes, but not in all respects. But we think the decision in this case does not depend upon the legal character of the courts held by justices of the 18 L. R. A.

peace. Many powers are vested in the police court of Lowell not conferred on justices of the peace; its constitution is different and its mode of proceeding is different. That this court exercises a common-law jurisdiction there is no doubt; it is authorized to hear and determine all complaints and prosecutions in like manner as justices of the peace, and has jurisdiction of all civil suits and actions cognizable by a justice of the peace." In *Ex parte Cregg*, 2 Curt. 98, *Judge Curtis* says: "We see no sound reason to doubt that the police court of Lynn was a court of record having common-law jurisdiction." But it was held that the court did not have a clerk, and therefore did not possess authority to naturalize. To the same effect was the decision in *State v. Whittemore*, 50 N. H. 245, holding that the police court of Nashua was a court of record having common-law jurisdiction, but, not having a clerk, did not have jurisdiction over applications for naturalization. See also *Wheaton v. Fellows*, 23 Wend. 375, and *Hutkoff v. Demorest*, 103 N. Y. 368, 4 Cent. Rep. 778.

But does the Municipal Court of Biddeford have "common-law jurisdiction" to the extent contemplated by the federal statute? With respect to this inquiry, it is proper to remark that we have no national common law in the United States, distinct from that adopted by the several States, each for itself, except so far as the history of the English common law may be involved in the interpretation of the Federal Constitution. The judicial decisions, the usages and customs, of the respective States determine to what extent the common law has been introduced. What is common law in one State may not be so considered in another. *Wheaton v. Peters*, 33 U. S. 8 Pet. 658, 8 L. ed. 1079; *Smith v. Alabama*, 124 U. S. 478, 31 L. ed. 512. It must also be remembered that we have no state courts in this country deriving their existence from the common law. They are all established either by the provisions of the organic law or by legislative enactment. Their jurisdiction is not uniform. Some of them have only a special jurisdiction limited as to amounts or subjects in controversy. Of this character are the superior courts of this State; yet it would not be questioned that they have "common-law" jurisdiction. "By 'suits at common law,' in the Constitution," says *Judge Story* in *Parsons v. Bedford*, 28 U. S. 8 Pet. 443, 7 L. ed. 785, "is meant not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined in contradistinction to those where equitable rights alone were recognized and equitable remedies administered."

Courts of "common-law jurisdiction" are such as "exercise their powers according to the course of the common law. It was not meant that they should have all common-law jurisdiction over every class of subjects, including all civil and criminal matters. If so, few courts could be found in this country having the requisite common-law jurisdiction." *People v. McGowan*, 77 Ill. 644. So also in *Re Conner*, 39 Cal. 98, the

court says: "The term 'common-law jurisdiction' is capable of no other meaning than jurisdiction to try and decide causes which were cognizable by the courts of law under what is known as the 'common law of England.' The Act does not require that courts shall have all the common-law jurisdiction which pertains to all classes of actions. It is enough if it has 'common-law jurisdiction.'" Again, in *United States v. Power*, 14 Blatchf. 223, the court says: "The statute of the United States does not require of courts, authorized to entertain applications for naturalization, that they shall have all the jurisdiction possessed by any court of law. If the court may exercise any part of that jurisdiction, it is within the language of the statute, and its meaning as well." To the same effect is *Morgan v. Dudley*, 18 B. Mon. 693. See also *People v. Pease*, 30 Barb. 588; *Ex parte Burkhardt*, 16 Tex. 470, and *Mills v. McCabe*, 44 Ill. 194.

2. It is admitted that the Municipal Court of Biddeford had a seal; and assuming, without deciding, that it was a court of record, having common-law jurisdiction, within the meaning of the Act of Congress, did it also have a clerk, within the meaning of the federal statute? The language of this statute seems to imply that there may be courts of record having common-law jurisdiction, and a seal, without a clerk, and that such courts are not embraced by the terms of the Act. And this is the construction which it has received from eminent judicial authority. The court must have a clerk distinct from the judge; not necessarily an officer denominated "clerk," but a permanent "recording officer, charged with the duty of keeping a true record of its doings, and afterwards of authenticating them." Shaw, *Ch. J.*, in *Gladhill, Petitioner, Ex parte Cregg*, and *State v. Whittemore, supra*. The court contemplated by the Act of Congress has an organized existence. It is impersonal. The judge is one of the constituent parts of the organization; the clerk is another and a separate and an independent element. The essential function of the clerk is to make and keep the records, and give them legal verification by his attestation and the use of the seal.

By those sections of the Act establishing the Municipal Court of Biddeford, above quoted, the responsible duty of making and keeping the records of the court is imposed upon the judge and not upon the recorder. There is no duty of making and keeping the records imposed upon the recorder by law. He is to keep the records of the court only when requested so to do by the judge. Furthermore, the recorder of this court cannot authenticate by his attestation any copies

of records "made and kept" by the judge, or kept by himself at the request of the judge. Only such copies of the records as are "duly certified by the judge shall be legal evidence in all courts." The authority to appoint a recorder was conferred upon the judge, not for the purpose of creating a fixed and permanent clerical office distinct and separate from that of the judge, but primarily to provide for the judge a substitute who should be empowered to act in his stead in the contingencies named in the Act. "His signature as recorder is sufficient evidence of his right to act instead of the judge." When thus acting in a judicial capacity, exercising the powers and performing the duties of the judge, the recorder is the court, and must personally make, keep, and authenticate the records of the court. The recorder's court has no clerk other than the recorder himself. Accordingly, in the attestation of the copy of William Dean's declaration of intention, the signature of "Edwin J. Cram, Recorder," by the very terms of the Act, is presumptive evidence that he was acting instead of the judge in some of the contingencies named in the Act.

The process of naturalization, in the mode it is required to be performed by the federal statutes, is a judicial act. *Spratt v. Spratt*, 29 U. S. 4 Pet. 393, 7 L. ed. 897. And "the importance and value of this privilege of citizenship, which is conclusively and finally bestowed by the act of the court having jurisdiction, should prevent us from allowing less than its full weight to any requirement by Congress which tends to restrict this power to those tribunals which may be supposed most competent to exercise it. Certainly, there would seem to be no propriety in intrusting to a court which, in the exercise of its common-law jurisdiction, cannot pass finally on any matter of law or fact affecting property to the amount of one dollar, to make a final decision upon all questions of law or fact involved in an application for this great right, so as to make an absolute and unimpeachable grant of it." Curtis, *J.*, in *Ex parte Cregg*, above cited.

We are accordingly of opinion that the Municipal Court of the City of Biddeford, January 24, 1888, did not have a clerk, within the intent and meaning of the federal statute, and therefore had no jurisdiction over applications for naturalization, and no authority to receive and record the declaration of intention made by William Dean. The application for admission to citizenship was properly dismissed.

Exceptions overruled.

Peters, Ch. J., and **Walton and Virgin, JJ.**, concurred; **Libbey and Haskell, JJ.**, concurred in the result.

NORTH DAKOTA SUPREME COURT.

James C. CLARK, *Respt.*,

v.

James O. SULLIVAN, Impleaded, etc., *Appt.*

(.....N. Dak.....)

* A surety jointly bound with his principal may, independently of statute, offset against such joint indebtedness his individual claim against the creditor in such joint indebtedness, where both the creditor and the principal are insolvent.

(July 16, 1891.)

APPEAL by defendant Sullivan from an order of the District Court for Morton County sustaining a demurrer to his counterclaim in an action brought to enforce the joint liability of the sureties on an appeal bond. *Reversed.*

The facts are stated in the opinion.

Messrs. Louis Hanitch and B. W. Shaw, for appellant:

The facts alleged in the answer are sufficient to justify the allowance of the set-off upon equitable grounds.

Hobbs v. Duff, 38 Cal. 597-629; *Howard v. Shores*, 20 Cal. 282; *Pomeroy, Remedies & Remedial Rights*, § 761; *Lindsay v. Jackson*, 2 Paige, 581, 2 L. ed. 1088; *Simson v. Hart*, 14 Johns. 63; *Gillespie v. Torrance*, 25 N. Y. 806; *Smith v. Felton*, 43 N. Y. 419; *Seligmann v. Heller Bros. Clothing Co.* 69 Wis. 410; *Becker v. Northway*, 44 Minn. 61.

Mr. H. G. Voss, for respondent:

The obligation on the bond is joint and not joint and several, and no several judgment can be rendered in the action.

Comp. Laws, §§ 3425, 3574, 4901; *Kelly v. Van Austin*, 17 Cal. 564.

The term "counterclaim," as employed in our Code, includes both "set-off" and "recoupment."

Estee, Pl. § 3364.

The first essential of a counterclaim is, that it "must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action."

*Head note by CORLISS, Ch. J. |

Comp. Laws, § 4915; *Thalheimer v. Crow*, 13 Colo. 397; *Matteson v. Ellsworth*, 28 Wis. 258.

The Code permits defendant to plead such matters as would defeat the plaintiff's right to recover in the action—such as pleas in bar or that the defendants did not execute the bond—but all new matter must be pleaded under the counterclaim.

Bliss, Code Pleading, 366.

The defense counterclaim or set-off, whether legal or equitable, must be one in favor of a defendant and against a plaintiff between whom a several judgment may be had in the action.

Roberts v. Donovan, Dec. 28, 1885; *Wood v. Brush*, 72 Cal. 224.

Aside from the Statute the general doctrine in equity, as to set-off, is the same as at law, and separate debts cannot be set off in equity any more than at law against joint debts.

Jackson v. Robinson, 3 Mason, 138; *Murray v. Toland*, 3 Johns. Ch. 569, 1 L. ed. 719; *Dale v. Cooke*, 4 Johns. Ch. 11, 1 L. ed. 746; *Elde v. Laswell*, 2 Blackf. 349; *Hove v. Sheppard*, 2 Sumn. 409; *Robbins v. Holley*, 1 T. B. Mon. 191; *Robbins v. McKnight*, 5 N. J. Eq. 648; *Davis v. American L. Ins. & T. Co.* 4 Edw. Ch. 307, 6 L. ed. 888; *Birdsall v. Fischer*, 17 Minn. 108; *Story*, Eq. Jur. § 1437.

Defendants' liability on the appeal bond was fixed and the bond forfeited as soon as judgment was rendered on the appeal in the court below.

Wood v. Derricksen, 1 Hilt. 410; *Murdock v. Brooks*, 38 Cal. 604.

If it be true that Sullivan bought this worthless judgment against an insolvent for practically nothing after his liability on the appeal bond became fixed, with a full knowledge of Clark's insolvency, for the purpose of using the same as a set-off, certainly a court of equity would grant him no relief.

Case v. Cannon, 23 La. Ann. 112.

Before a court of equity will invoke its powers and grant relief not attainable at law, natural and inherent equity must be shown.

Duncan v. Lyon, 3 Johns. Ch. 354, 1 L. ed. 646; *Flanders v. Chamberlain*, 2 Mich. N. P. 132; *Gordon v. Lewis*, 2 Sumn. 143.

NOTE.—Surety may offset joint indebtedness where insolvency exists.

A solvent surety for a hopelessly insolvent principal is entitled to set off his claim for payment of such debt against debts due from him to the insolvent. See *Merwin v. Austin*, 7 L. R. A. 84, and note, 58 Conn. 22.

A surety may in equity avail himself of all existing claims in favor of the principal, where the latter is insolvent; but proof of the insolvency is essential to the right. *Schlick v. Hazard* (Sup. Ct.) 35 N. Y. S. R. 264; *Levy v. Steinbach*, 43 Md. 217; *Marshall v. Cooper*, 43 Md. 60; *Chance v. Isaacs*, 3 Edw. Ch. 264, 6 L. ed. 423.

Equity, whenever necessary to prevent irredeemable injustice, will allow a set-off although the debts are not mutual, as where a joint debt is a mere security for the separate debt of the principal. *Wulschner v. Seils*, 87 Ind. 76; *Brewer v. Norcross*, 17 N. J. Eq. 219; *Hoffman v. Zollinger*, 39 Ind. 461; *Keightley v. Walls*, 27 Ind. 13 L. R. A.

304, 24 Ind. 205; *Stevens v. Songer*, 14 Ind. 342.

In cases of joint credit given on account of individual indebtedness, or where the joint debt is a mere security for the separate debt of the principal, the equity is obvious and a set-off will be allowed. *Carter v. Compton*, 79 Ind. 41; *Coevrose v. Cosby*, 36 Ind. 515; *William v. Noble*, 3 Meriv. 566; *Dale v. Cooke*, 4 Johns. Ch. 11, 1 L. ed. 746; *Blake v. Langdon*, 19 Vt. 436; 2 *Story*, Eq. Jur. § 1437; *Van Wagener v. Paterson*, G. L. Co. 23 N. J. L. 283.

Afcoort of equity has power to permit an equitable set-off in cases not within the statute, if, from the nature of the claim or the situation of the parties, justice cannot be obtained by a cross-action; even though the debt of the complainant to the defendant is not due if the defendant is insolvent. *Rothschild v. Mack*, 43 Hun. 75; *Gay v. Gay*, 10 Paige, 309, 4 L. ed. 1015; *Smith v. Fox*, 48 N. Y. 674; *Davidson v. Alfaro*, 80 N. Y. 660; *Shipman v. Lansing*, 25 Hun. 290.

If Clark is insolvent and possesses less than \$1,500 of personal property, the money due to him on this appeal bond could not be applied to the satisfaction of the Fairbank, Morse & Co's judgment and to allow Sullivan to circumvent the Exemption Laws is a fraud upon Clark and the Exemption Laws of this State.

Smith v. Hill, 8 Gray, 572.

Corliss, Ch. J., delivered the opinion of the court:

The demurrer of plaintiff to counterclaim of defendant Sullivan having been sustained, he challenges by this appeal the ruling of the trial court in this respect. It is not pretended that the answer does not state a good cause of action in favor of defendant Sullivan and against the plaintiff; but it is insisted by plaintiff that, as the plaintiff's cause of action is a joint debt of defendant Sullivan with his co-defendant King, and as the claim sought to be offset against it is the debt of the plaintiff to the defendant Sullivan alone, it is not the proper subject of counterclaim; that Sullivan must sue upon it in an independent action. The complaint states a cause of action arising out of the execution of an undertaking on appeal by Mead as principal and the two defendants herein, King and Sullivan, as sureties, followed by the affirmance of the judgment appealed from. The claim set forth in the answer is a judgment recovered against the plaintiff, Clark, by Fairbanks, Morse & Co., which was assigned to defendant Sullivan before the commencement of this action. The liability of the two sureties on the undertaking is joint. No words expressing a several liability appearing on the face of the instrument, it was the joint, and not the joint and several, obligation of the parties executing it. *Wood v. Fisk*, 63 N. Y. 245; 1 Parsons, Cont. 11; 1 Story, Cont. § 58; 1 Pom. Eq. Jur. § 409; *Pickersgill v. Lahens*, 82 U. S. 15 Wall. 140, 21 L. ed. 119.

Statutory enactment in this State has left this rule unaltered, where at least one of the parties liable upon the obligation is a mere surety. Comp. Laws, §§ 8425, 8574.

The counterclaim, therefore, cannot be sustained under the Statute. The statutory counterclaim "must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action." Comp. Laws, § 4915. See *Roberts v. Donovan* (Cal.) 9 Pac. Rep. 180; *Wood v. Brush*, 72 Cal. 224.

No several judgment against the defendant Sullivan could be rendered. Had plaintiff failed to make his co-defendant, King, a party, this defect of parties would have abated the action as thus commenced, the defect being legally brought to the attention of the court by demurrer or by answer, according as the defect might or might not appear upon the face of the complaint. Although only one of two joint debtors is served, the judgment must be against both jointly, to be enforced against their joint property and the separate property of the defendant served. Comp. Laws, § 4901, subd. 1. The plaintiff having no right to a several judgment against defendant Sulli-

van, the latter could not, therefore, under the Statute, offset his separate claim against the plaintiff. But we may look elsewhere for the proper rule to govern this question. The right to offset a claim is recognized by equity independent of any statute. We are very clear that the facts alleged in the answer bring this case within this principle of equity jurisprudence. The defendant avers the insolvency of the plaintiff. This creates an equity, for it is unconscionable that the plaintiff should insist that the defendant pay him, and then leave the defendant powerless because of plaintiff's insolvency to enforce his (defendant's) claim against the plaintiff. But a further equity appears. Defendant alleges the insolvency of his principal in the undertaking. Therefore not only will he be without the ability to collect his judgment from the plaintiff, but he will be without ability to reimburse himself out of his principal, who should save him from all loss. It would not be creditable to an enlightened administration of justice to deny the operation of this equitable rule under these facts, which appeal so strongly to the conscience. It is well established that the surety, when sued upon the joint obligation of himself and his principal, may offset the separate claim of the latter against the plaintiff in case of insolvency. *Coffin v. McLean*, 80 N. Y. 560; *Becker v. Northway*, 44 Minn. 61.

Certainly this court would be open to the criticism of sacrificing substance to form if it refused to allow the surety to set off his own separate demand against the plaintiff when the latter is insolvent. May he reach out, and, seizing without assignment, interpose this principal's claim as an offset, and yet is he powerless, under the same circumstances, to plead his own demand as a counterclaim? Had defendant Sullivan been principal, his claim, upon the favorable consideration of a court of equity, would have been trifling when compared with that high claim to the favor of equity which all the adjudications agree is the peculiar property of a surety. One of the very elements of the law is that he is a favorite of a court of equity; and yet, as a principal debtor, Sullivan could have offset this separate claim against the plaintiff under the Statute without showing any equity, because he would have been severally as well as jointly liable to plaintiff on the undertaking under our Statute, and therefore a several judgment between him and plaintiff could have been rendered. But as surety, the favorite of the court, with strong equities pleading in his behalf, he may not, it has been decided, in this case, even under an equitable rule, have the same measure of relief and justice. The doctrine on which that decision must rest can have no place in the more advanced system of jurisprudence; which, unlike the old system,—before equity achieved its memorable triumph, ere reform in procedure had supplanted technical rules,—subordinates in large measure every other consideration to the accomplishment of justice. It is true that it sometimes has been thought that insolvency was not sufficient to create such an equity as would warrant a departure from

the statutory rule. See 2 Smith, Lead. Cas. pt. 1, p. 353, and cases. But the doctrine of *Lindsay v. Jackson*, 2 Paige, 581, 3 L. ed. 1088, commends itself with greater force to the reason and the conscience of man. Said Chancellor Walworth, in this leading case: "There is a natural equity that cross-demands should be offset against each other, and that the balance only should be recovered. This was the rule of the civil law, and it is now adopted and preserved as the law of those countries where the principles of the civil law prevail. . . . By the common law of England, however, this natural equity was not allowed or enforced in the courts of law, but each party was left to recover his demand in a separate action. As a general rule the court of chancery followed the rule of law; and after the Statute had permitted set-offs to a certain extent in suits at law, this court also adopted and acted on that principle. But the courts of chancery, even before the Statute, recognized the principle of natural equity, and acted upon it, in cases where the law could not give a remedy in a separate suit in consequence of the insolvency of one of the parties." To same effect are *Smith v. Felton*, 43 N. Y. 419; *Seligmann v. Heller Bros. Cloth. Co.* 69 Wis. 410; *Becker v. Northway*, 44 Minn. 61; *Coffin v. McLean*, 80 N. Y. 560; *Davidson v. Alfaro*, Id. 660; *Hiner v. Newton*, 30 Wis. 640-644; *Hobbs v. Duff*, 28 Cal. 597-629.

We are not called upon to decide on this appeal whether it was proper for the defendant to urge his equity by answer, or whether he should not have filed his complaint in equity to enforce his equitable set-off. Nor are we asked to determine whether he should have waited until the recovery of judgment against him in this action, and then by motion or by action had one judgment set off against the other. Only the question of right has been discussed on this appeal. What is the proper procedure has not been touched. It might be well in passing, however, to refer

to the fact that in New York, where the provisions of the Code relating to this question are the same as in this State, the practice, as apparently sanctioned by the courts, has been to insist upon this equity by answer. *Coffin v. McLean*, 80 N. Y. 560; *Smith v. Felton*, 43 N. Y. 419. This is true of Minnesota also, but the Statute there was somewhat different. *Becker v. Northway*, 44 Minn. 61. See also *Dempsey v. Rhodes*, 93 N. C. 120. But see *Duff v. Hobbs*, 19 Cal. 646.

It was contended on the oral argument that equity would not decree the offsetting of defendant's judgment against plaintiff's claim because the plaintiff's claim was exempt; that, in effect, this would be the seizure of his exempt property to pay a judgment against him. The point is not without force, but it is not involved on this appeal, as there is nothing to show that plaintiff has not a large amount of property in excess of his exemptions. An insolvent may own a large estate. No cases were cited on this point. An investigation of it has brought to light the following decisions, which we cite for the benefit of counsel without further comment: *Puett v. Beard*, 86 Ind. 173; *Temple v. Scott*, 8 Minn. 419 (Gil. 806); *Curlee v. Thomas*, 74 N. C. 51; *Duff v. Wells*, 7 Helsk. 17; *Wilson v. McElroy*, 53 Pa. 82.

It was also said that no equity could arise in favor of defendant, because he purchased the judgment he now seeks to offset with knowledge of plaintiff's insolvency, and for the express purpose of using the judgment as an offset, and that plaintiff paid practically nothing for it. These facts do not appear on the face of the answer to which plaintiff has demurred. A reply embracing them would, if sustained by proof, or demurred to, raise this question. We do not decide it now.

The order appealed from is reversed, plaintiff to have ten days after the remittitur is filed in which to reply to defendant's offset.

All concur.

OHIO SUPREME COURT.

Salathiel BETZ, *Plff. in Err.*,
v.

Charles M. SNYDER, Assignee, etc., of James N. Hape.

(....Ohio St....)

*1. A mortgage of real property, which has not been deposited for record with the recorder of the proper county, before an assignee of the property, is not a valid lien upon the property, as against the assignee or the creditors, nor does it become so by being subsequently recorded.

*Head notes by the COURT.

NOTE.—Legislative control over Recording Acts.

It is in the power of the State Legislature to pass Recording Acts, by which the elder grantee shall be postponed to a younger if the prior deed is not recorded within a limited time; and the power is the same whether the deed is dated before or after the Recording Act. Though the effect of such an Act is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law violating the obligation of contracts. *Jackson v. Lamphire*, 28 U. S. 3 Pet. 280, 7 L. ed. 679, 13 L. R. A.

signment of the property by the mortgagor for the benefit of his creditors takes effect, is not a valid lien upon the property, as against the assignee or the creditors, nor does it become so by being subsequently recorded.

2. Such assignment takes effect, as to all persons, from the time of its delivery to the probate court in the county in which the assignor resided at the time of its execution. It is not necessary that it be also filed for record with the recorder of deeds.

Primary object of these enactments.

The object of all Registry Laws is to impart information to parties dealing with property respecting its transfers and incumbrances, and thus to protect them from prior secret conveyances and liens. *Patterson v. De La Ronde*, 75 U. S. 8 Wall. 222, 19 L. ed. 415.

The sole purpose of Registry Laws is to protect subsequent purchasers against prior and unrecorded conveyances. In the absence of such laws prior grantees and mortgagees are superior in right,

(June 16, 1891.)

ERROR to the Circuit Court for Columbiana County to review a judgment reversing a judgment of the Court of Common Pleas establishing a mortgage as a valid lien upon the property of James N. Hape, and directing its payment out of the proceeds of such property in the hands of an assignee for the benefit of his creditors. *Affirmed.*

Statement by *Williams, Ch. J.*:

On the 1st day of December, 1885, James M. Hape executed a mortgage, on all of his real estate situated in Columbiana County, to Salathiel Betz, to secure an indebtedness of \$3,000 due in one year, with 6 per cent interest. Josephine M. Hape, the wife of the mortgagor, joined in the execution of the mortgage. On the 21st day of December, 1885, the mortgage was delivered to the recorder of the county for record, and was duly recorded. On the 16th day of December, 1885, said James M. Hape, who then resided in Columbiana County, made an assignment for the benefit of his creditors to Charles N. Snyder. The deed of assignment, which embraced all the property, real and personal, of the assignor (including that mortgaged to Betz), was executed, attested, and acknowledged in conformity to the requirements of the Statute relating to conveyances of real estate, and was filed in the probate court of the county on the 17th day of December, 1885, when the assignee qualified, and entered upon the execution of his trust. He

thereafter filed his petition in the probate court of that county, to have the validity and priority of the liens determined, and the property sold. Betz, who was made a party defendant, filed an answer, setting up his mortgage, and asking for its payment out of the proceeds of the sale. The cause, after having proceeded to judgment in the probate court, was appealed to the court of common pleas, where it was submitted upon an agreed statement of facts, substantially as above stated, upon which that court adjudged the mortgage to be a valid lien, and ordered the amount found to be due on it to be paid out of the proceeds of the sale, before any distribution to the general creditors. This judgment was reversed by the circuit court, which held that, as the mortgage was not filed for record until after the deed of assignment was filed in the probate court, it was invalid as against the assignee, and not entitled to preference over the general creditors. Whether there was error in that judgment is the question presented to this court.

Messrs. Wallace & Billingsley, for plaintiff in error:

An unrecorded mortgage is a lien as against an assignee of the mortgagor in trust for the benefit of creditors; he is neither a creditor nor purchaser for value.

Mellons' App. 32 Pa. 121.

The statutes of Pennsylvania as to the recording of mortgages are substantially the same as ours.

1 Brightly, *Purd. Dig.* § 122, p. 588.

as they are in time, and will be protected as against subsequent deeds and mortgages. *Reeves v. Hayes*, 95 Ind. 544. See *Ely v. Scofield*, 35 Barb. 330; *James v. Morey*, 2 Cow. 246.

The acknowledgment and registry of the mortgage are not necessary to its validity, as between the original parties; nor would an entire omission to record the power affect the sale as between them. *Jackson v. Colden*, 4 Cow. 178. See *Jackson v. Dubois*, 4 Johns. 216; *Bergen v. Bennet*, 4 Cal. Cas. 17, 18.

There is no case holding that a mortgage to secure future advances, or the liability to be incurred by future indorsements, must be recorded to protect the mortgagee against subsequent judgments. *Thomas v. Kelsey*, 30 Barb. 275.

The policy of the Registry Law is that the title and all that affects it should be disclosed by the public records, and upon the theory that it is thus shown, the rule obtains that a purchaser may rely upon the title as it appears of record, and that he will be protected against unrecorded conveyances, outstanding equities, secret liens and conditions of which he has no notice. *Williams v. Jackson*, 107 U. S. 478, 27 L. ed. 529; *Testart v. Belot*, 31 La. Ann. 795; *Quick v. Milligan*, 108 Ind. 419, 58 Am. Rep. 49; *Hathorn v. Maynard*, 65 Ga. 168; *Connecticut Mut. L. Ins. Co. v. Talbot*, 12 West. Rep. 299, 113 Ind. 373, 3 La. St. Rep. 655; *Newton v. McLean*, 41 Barb. 285; *Cogan v. Cook*, 22 Minn. 137; *Ramey v. Jones*, 41 Ohio St. 685; *Harrington v. Erie County Sav. Bank*, 2 Cent. Rep. 170, 101 N. Y. 237; *Pancake v. Cauffman*, 5 Cent. Rep. 205, 114 Pa. 113; *Bailey v. Myrick*, 50 Me. 171; *Farmers & M. Nat. Bank v. Wallace*, 45 Ohio St. 152; *Columbia Bank v. Jacobs*, 10 Mich. 349; *Hart v. Farmers & M. Bank*, 38 Vt. 252; *Hoyt v. Jones*, 31 Wis. 899; *Newhall v. Burt*, 7 Pick. 157; *Ashbrook v. Roberts*, 82 Ky. 298; *Hulett v. Mutual Ins. Co.* 4 Cent. Rep. 767, 114 Pa. 142; *Wright v. 13 L. R. A.*

Laesiter, 71 Tex. 640; *Roll v. Rea*, 11 Cent. Rep. 262, 50 N. J. L. 266; *Doherty v. Stimmel*, 40 Ohio St. 294; *Kearnes v. Hill*, 21 Fla. 135.

Registry of mortgage as notice.

Equitable estates and interests, as well as legal, are embraced within the intent and operation of the Recording Acts. *Digman v. McCollum*, 47 Mo. 372; *Tarbell v. West*, 86 N. Y. 287. See *Doyle v. Teas*, 5 Ill. 202; *Alexander v. Webster*, 6 Md. 869; *Alderson v. Ames*, 6 Md. 52; *General Ins. Co. v. United States Ins. Co.* 10 Md. 817; *Wilder v. Brooks*, 10 Minn. 50; *Dickinson v. Glenney*, 27 Conn. 104; *Russell's App.* 15 Pa. 319; *Boyce v. Shiver*, 38 S. C. 515; *Siter v. McClanahan*, 2 Gratt. 230; *Johnson v. Stagg*, 2 Johns. 509; *Hunt v. Johnson*, 19 N. Y. 281; *Stoddard v. Whiting*, 46 N. Y. 627; *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *Beilas v. McCarty*, 10 Watts. 13; *Neligh v. Michener*, 11 N. J. Eq. 539. *Contra*, *Doswell v. Buchanan*, 3 Leigh. 365; *Lewis v. Baird*, 3 McLean, 58; *Grimstone v. Carter*, 3 Paige, 421, 3 L. ed. 214, 2 Pom. Eq. Jur. § 649.

The record becomes constructive notice, not only that the instrument exists, but of its contents, and of all the estates, rights and interests, legal and equitable, created by it, or arising from its provisions (2 Pom. Eq. Jur. § 655; *Burrell v. Bull*, 3 Sandf. Ch. 15, 7 L. ed. 723; but where any of the preliminaries of execution, acknowledgment, and certificate attached are entirely omitted or defectively performed, it is a mere voluntary act, of no effect as to rights of subsequent purchasers or incumbrancers. See 2 Pom. Eq. Jur. § 652.

The registry of a mortgage is notice to all subsequent purchasers and mortgagees of the lien created thereby. *Toft v. Munson*, 63 Barb. 36.

It is notice of the contents of the instrument and not of any secret condition, trust or equity.

When Hape made the assignment on December 16, 1885, he could only assign what rights he held in the land previously mortgaged to Betz.

1 Am. & Eng. Encyclop. Law, p. 854.

The assignee takes only such rights as the assignor had at the time of the assignment.

Lemmon v. Hutchins, 1 Ohio C. Ct. Rep. 388; *Hodgson v. Barrett*, 83 Ohio St. 63.

A mortgage not recorded till after the death of the mortgagor is not for that reason inoperative as against the general creditors of the estate.

Gill v. Finney, 12 Ohio St. 38. See *Giauque*, Assignm. § 15, p. 44, and *notes*, p. 46, *note*; 1 Jones, Mortg. 2d ed. p. 468; Burrill, Assignm. 5th ed. § 391; *Morgan v. Kinney*, 38 Ohio St. 610.

Mears, W. G. Wells and Charles N. Snyder, *in propria persona*, for defendant in error:

The principle running through all the cases since the Recording Act of 1831 is that the subsequently acquired legal rights of title of third persons cannot be displaced by any unrecorded mortgage, a defectively executed mortgage, or any specific though merely equitable lien.

1. Cases where junior recorded mortgages with notice were preferred to prior unrecorded mortgages:

Stannell v. Roberts, 13 Ohio, 149; *Mayham v. Coombs*, 14 Ohio, 429.

2. Cases where a lien by judgment has been preferred to a prior unrecorded mortgage, a defectively executed mortgage, or a contract for a mortgage:

Houston v. McCluney, 8 W. Va. 150. See *note* to *Frost v. Beekman*, 1 Johns. Ch. 238, 1 L. ed. 143.

The statute speaks of any writing in the nature of a mortgage, and any agreement creating an equitable incumbrance. *Churchill v. Little*, 23 Ohio St. 309.

Record of a trust deed is notice of the trust to everyone, and there is no difference, as to consequences, between actual and constructive notice. *Bourne v. Hall*, 10 R. I. 143. See *Oliver v. Platt*, 44 U. S. 3 How. 333, 11 L. ed. 622; *Ellis v. Woods*, 9 Rich. Eq. 19.

If in examining the title to the property the person proposes to buy, he is led directly to a deed that puts him on inquiry as to the remaining part, it is sufficient constructive notice. *Iglehart v. Crane*, 43 Ill. 290; *Chase v. Woodbury*, 6 Cush. 143; *LaFarge F. Ins. Co. v. Bell*, 22 Barb. 54; *Montgomery v. Dorion*, 6 N. H. 255; *French v. Gray*, 2 Conn. 108.

A mortgage duly recorded will be preferred to a subsequent bona fide deed without notice. *Crane v. Turner*, 7 Hun. 339; *Wadsworth v. Wendell*, 5 Johns. Ch. 239, 1 L. ed. 1006; *Williams v. Birbeck*, Hoffm. Ch. 375, 6 L. ed. 1173; *Fleming v. Townsend*, 6 Ga. 112, 59 Am. Dec. 323.

As to effect of registry, see *note* to *Frost v. Beekman*, *supra*.

Public records, by construction of law, are notice to all persons of what they contain. Their contents are matters of public knowledge, because the law requires them to be kept, authorizes them to be used, and secures to all persons having access to them that knowledge of them may be public; and thence imputes to all interested persons that knowledge the opportunity to acquire which it has provided. *Neftin v. Wells Fargo Co.* 194 U. S. 433-441, 25 L. ed. 504-507; *Moore v. Simonds*, 100 U. S. 145, 25 L. ed. 590; 1 Greenl. Ev. § 484; 1 Story, Eq. 13 L. R. A.

Jackson v. Luce, 14 Ohio, 514; *Mayham v. Coombs*, 14 Ohio, 429; *White v. Denman*, 16 Ohio, 60; *White v. Denman*, 1 Ohio St. 111; *Fosdick v. Barr*, 3 Ohio St. 471; *Van Thorniley v. Peters*, 28 Ohio St. 471. See also 2 C. C. Rep. 485.

An assignee for the benefit of creditors comes within this rule.

Bloom v. Noggle, 4 Ohio St. 45; *Erwin v. Shuey*, 8 Ohio St. 510.

A mortgage void as to creditors is void as against an assignee for the benefit of creditors.

Hanes v. Tiffany, 25 Ohio St. 549; *Kilbourne v. Fay*, 29 Ohio St. 264; *Lindemann v. Ingham*, 36 Ohio St. 11; *Blandy v. Benedict*, 42 Ohio St. 299.

Williams, Ch. J., delivered the opinion of the court:

The common-law rule, that an assignee for the benefit of creditors succeeds only to the rights of the assignor in the property at the time of the assignment, and takes it subject to all equities and liens which could have been asserted against it had the assignment not been made, is not without important exceptions in this State, growing out of our legislation. It is well settled that chattel mortgages which fail to conform, in any substantial requirement, to the provisions of the Statute, relating to their execution or registry, though good against the mortgagor and the property while it is retained by him, are ineffectual as liens upon the property after it has passed into the hands of an assignee for the benefit of creditors of the mortgagor, under an assignment made subse-

§§ 403, 404; *McArthur v. Browder*, 17 U. S. 4 Wheat. 487, 4 L. ed. 622; *Anderson*, Law Dic. title, *Record*.

Statutory forms of registration.

A knowledge of the statutes, at least as to their leading features of similarity and dissimilarity, is essentially necessary to a proper understanding of the American Law of Registration. See 2 Pom. Eq. Jur. § 646, and *notes* thereto; also *Stimson*, Am. Stat. Law, §§ 1570-1632; *Webb*, Record of Title, chap. 11.

In every State, registration is held to impart constructive and absolute notice of the contents of instruments authorized by law to be recorded. *Edwards v. Barwise*, 69 Tex. 84; *Stevens v. Morse*, 47 N. H. 532; *Van Rensselaer v. Clark*, 17 Wend. 25; *Thomas v. Kennedy*, 24 Iowa, 397; *Shove v. Larsen*, 22 Wis. 142; *Irvin v. Smith*, 17 Ohio, 223; *Cushing v. Ayer*, 25 Me. 383; *James v. Morey*, 2 Cow. 216.

Who is a purchaser for value.

A purchaser for a valuable consideration, within the meaning of the Acts, is one who has paid the consideration of the conveyance, or some part thereof, or has parted with something of value upon the face of the conveyance. 3 Washb. Real. Prop. 3d ed. 299; *Tourville v. Naish*, 3 P. Wms. 306; *Story v. Lord Windsor*, 2 Atk. 630; *Hardingham v. Nicholls*, 3 Atk. 304; *Webster v. Van Steenberg*, 46 Barb. 211; *Weaver v. Barden*, 49 N. Y. 236; *DeLancey v. Stearns*, 66 N. Y. 157; *Dickerson v. Tillinghast*, 4 Paige, 215, 3 L. ed. 409; *Westbrook v. Gleason*, 79 N. Y. 23.

It is settled everywhere that unrecorded assignments of mortgages are void as against subsequent purchasers, whose interests may be affected thereby, and whose conveyances are duly recorded, provided such assignments are embraced by the Re-

quent to the execution of the mortgage. *Hanes v. Tiffany*, 25 Ohio St. 549; *Blandy v. Benedict*, 43 Ohio St. 295. In *Hanes v. Tiffany*, it was contended in behalf of the mortgagee that, as the mortgage was good against the mortgagor, it was also good against the assignee for the benefit of his creditors; for the latter, it was claimed, stood in no better situation than the assignor. In disposing of this contention, White, J., in the opinion of the court, said: "The correctness of this position at common law is admitted, but not so under the Statute." It was held in *Blandy v. Benedict* that where the affidavit, which the Statute requires the mortgagee to make on his chattel mortgage before filing the same with the proper officer, was defective in the statement of the liability the mortgage was given to secure, but the mortgage was otherwise properly executed and filed, and the mortgagor subsequently made an assignment of his property for the benefit of his creditors, the mortgage was not entitled to priority over the general creditors under the assignment, although the assignment contained a provision expressly excepting from its operation all liens, and though the mortgage was good as against the mortgagor, constituting a valid lien while the property remained in his possession. With respect to the purpose of that provision of the assignment which excepted all liens from its operation, and its effect upon the assignment and the rights of the creditors, it is said in the

opinion by McIlvaine, J.: "We think there can be no doubt that the intention was to secure the mortgagees the full amount of their liens, to the extent that such liens were valid as against the assignor. Can such purpose be accomplished by such means? We think not. Undoubtedly these mortgages were valid as against the assignor, but void as against his creditors."

These decisions rest upon the provisions of the Chattel Mortgage Statute, which enacts that such mortgages, when not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the property mortgaged, shall be void as against the creditors of the mortgagor, unless the mortgage, or a true copy, with the necessary affidavit of the mortgagee thereon, as prescribed by the Statute, be deposited with the proper officer. The right of the creditors to subject the property to the payment of their claims is in no way affected by such void mortgages, and an assignment of the property by the mortgagor for the benefit of his creditors clothes the assignee, not only with the assignor's title to the property, but also with all the rights of the creditors with respect to it. As was said in *Blandy v. Benedict*: "By the assignment, the rights of the creditors passed to the assignee as matter of law," and they are thereafter to be worked out through him, in the administration of his trust. Up to the time of the assignment, the creditors might seize the property by

ording Acts. *Bacon v. Van Schoonhoven*, 87 N. Y. 448; *Decker v. Boice*, 83 N. Y. 215; *Swartz v. Leist*, 13 Ohio St. 419; *Yerger v. Barz*, 56 Iowa, 77; *Henderson v. Pilgrim*, 22 Tex. 464; *Boone, Mortg.* § 92; 1 *Jones, Mortg.* § 472; *Reeves v. Hayes*, 95 Ind. 621, and authorities there cited.

Legislative intent, how ascertained.

In ascertaining the intent of the Legislature in the enactment of a statute, courts will take judicial notice of such contemporaneous history as led up to and probably induced the passage of the law. *Stout v. Grant County Comrs.* 5 West. Rep. 635, 107 Ind. 248.

Result of failure to record.

A statute which has for its purpose the better security and repose of titles may postpone one who voluntarily neglects to avail himself of the Registry Acts, which enable him to give notice to all the world of his claim, to the claim of a subsequent purchaser who acted on the faith of a public record. *Kenyon v. Stewart*, 44 Pa. 179; *Jackson v. Lamphire*, 23 U. S. 3 Pet. 280, 7 L. ed. 679; *Connecticut Mut. L. Ins. Co. v. Talbot*, 12 West. Rep. 289, 118 Ind. 373.

The protection of the Recording Act is not confined to a subsequent purchaser immediately from the same grantor; but applies to one who takes from him through mesne conveyances. *Fallas v. Pierce*, 30 Wis. 479. See *Ledyard v. Butler*, 9 Paige, 132, 4 L. ed. 687.

The younger recorded mortgage could not have preference to the older unrecorded mortgage. To have that advantage the younger must both be taken in good faith and be first recorded. This was always the rule between grantor and grantee, by deed, and between mortgagor and mortgagee. *Fort v. Burch*, 5 Denio, 191. See *Jackson v. Given*, 8 Johns. 137; *Jackson v. Van Valkenburgh*, 8 Cow. 264.

13 L. R. A.

Parties dealing in real estate may always lawfully assume that the title is completely disclosed upon the records, unless there is some circumstance of which they are bound to take notice, which would apprise a reasonable man, not merely that the records may be defective, but that they actually are so in the particular case in hand. *Roll v. Rea*, 11 Cent. Rep. 362, 50 N. J. L. 286.

Under the Registry Laws of Iowa, the holder of an unrecorded deed has a complete title except against a subsequent good-faith purchaser without notice. *Davis v. Lutkiewicz*, 72 Iowa, 254.

Actual notice of a claim to real property dispenses with the necessity of notice by registry. *Hoge v. Hubb*, 13 West. Rep. 687, 94 Mo. 439.

Illustrations of the scope, nature and effect of the Recording Acts.

The responsibility of seeing that a deed is actually recorded rests upon the grantee, and he is not relieved therefrom by receiving from the recorder a certificate stating that the record has been properly made. *Ritchie v. Griffiths*, 13 L. R. A. 384, 1 Wash. 429; *Mangold v. Barlow*, 61 Miss. 593.

A deed sent to a clerk to be recorded without payment of his fees, and which he "pigeon-holed," is not "lodged" for record within the New Jersey Recording Act. *Dickerson v. Bowers*, 7 Cent. Rep. 372, 43 N. J. Eq. 205.

The Registration Laws apply as well to purchasers by and from married women as to other persons. *Nicholson v. Condon*, 71 Md. 621.

A mortgage is within the provisions of the Act to register mortgages, which extends to every deed of mortgage, or conveyance in the nature of a mortgage, of or for any lands, tenements or hereditaments. Such mortgages are not only within the description of the Act, but they are also within its reason and spirit. *Decker v. Clarke*, 26 N. J. Eq. 165. See *Johnson v. Stagg*, 3 Johns. 510, 533; *Breece v. Bange*, 2 R. D. Smith, 474.

attachment or other process, and their lien, so acquired, would undoubtedly be superior to such a mortgage; and, in the language of McIlvaine, J., in *Blandy v. Benedict*: "Every right which the creditors might have asserted against the property before the assignment, the assignee is bound to secure for their benefit after the assignment." The assignment, therefore, as effectually fixes the rights of the creditors to the property, and establishes their priority over the mortgage, as if they had taken the property on execution or attachment. This operation of the assignment upon the rights of the creditors must, of course, be the same, whether the property embraced in it be real or personal, or both; and hence, upon the principle established by the cases referred to, the creditors are entitled to priority over a mortgage of real property which has not been deposited for record when the assignment is made, unless, under our Recording Acts, the effect of the failure to deposit the mortgage for record is substantially different from that which results from the like failure to properly file a chattel mortgage. Is there a substantial difference in this respect?

The Statute regulating the execution and registry of mortgages of real property does not, in terms, declare that such mortgages, when not deposited for record, shall be void as against the creditors of the mortgagor; but it does enact that they shall be recorded in the office of the recorder of the county in which the mortgaged premises are situated, and that they shall take effect from the time the same are delivered to the recorder of the proper county for record. Mortgages of real property, which are not so filed for record, like unfilled chattel mortgages, are good between the parties; and, while the latter are declared void as to creditors, the former do not take effect as to third persons until they are filed for record. A mortgage which has no effect is no better than a void one; for a void mortgage is simply without effect. It has been held as often as the question has been presented, and it has been made in a variety of forms, as well as in numerous cases, that mortgages of real property have no effect, either at law or in equity, until they are delivered to the recorder of the proper county for record, as against third persons acquiring a legal interest in, or lien upon, the property. In *Stansell v. Roberts*, 13 Ohio, 148, it was decided that, as between a prior unrecorded mortgage and a subsequent one which was recorded, the latter had priority. In the cases of *Mayham v. Coombs*, 14 Ohio, 429; *Jackson v. Luce*, Id. 514; *White v. Denman*, 16 Ohio, 60; *Holliday v. Franklin Bank of Columbus*, Id. 583; *White v. Denman*, 1 Ohio St. 110, and *Fordick v. Barr*, 3 Ohio St. 471,—it was held that an unrecorded mortgage, or one defectively executed, so as not to be entitled to record, was not entitled to preference over a subsequent judgment recovered against the mortgagor. It was not doubted that such mortgages were good as against the mortgagor, and but for the Statute would have been entitled to preference over the judgments, under the general rule that the lien of a judgment attaches only

to the interest which the debtor has in the property at the time of its rendition. But, as is said in the last case cited above, while such unrecorded instruments are good and effectual between the parties, they are "entirely nugatory as to third parties, both at law and in equity, until they are recorded." It was held in *Bloom v. Noggle*, 4 Ohio St. 45, that a valid agreement in writing for a mortgage on real property gave to the party entitled to the mortgage no priority over the general creditors under an assignment made by the other contracting party for the benefit of his creditors. And in *Erwin v. Shuey*, 8 Ohio St. 510, this court held that a mortgage of lands, defective because not under seal, but otherwise properly executed and recorded, created no lien, in favor of the mortgagee, against an assignee under a general assignment, subsequently made by the mortgagor for the benefit of his creditors, although the assignee had notice of the mortgage at the time of the assignment.

These cases, like those of *Hanes v. Tiffany*, and *Blandy v. Benedict*, *supra*, afford instances of the exceptions, which obtain in this State, to the rule of the common law that an assignee for the benefit of creditors takes the property assigned subject to all equities which could have been enforced against it in the hands of the assignor at the time of the assignment; and it is shown by them that the exceptions grow out of the similar effect given to the recording statutes applicable to the different classes of mortgages. In *Bloom v. Noggle*, Ranney, J., speaking of the effect of the Statutes upon the rules of the common law, and the rights of the parties before and since their enactment, said: "If the case could be decided upon general principles, the right of the complainants to the relief they seek would seem to us as clear as it now seems clear that it cannot be given consistently with statutory provisions bearing upon the questions stated. Upon general equity principles, unaffected by statutory provisions, an agreement in writing for a mortgage is a valid contract, fixing a specific lien upon the property agreed to be mortgaged, and will be specifically enforced by a court of chancery, against the party and all subsequent purchasers from him with notice, as well as against any general assignment, either voluntary or by operation of law, for the benefit of his creditors. These principles may be regarded as well settled, and the jurisdiction of courts of equity in such cases has been exercised, without question, from a very early period, as is abundantly shown by the cases cited in argument. It rests upon the same foundation, and has all the reasons for its support that exist in favor of a like interference upon contracts for the execution and delivery of absolute deeds. As between the parties to such contract, the agreement is valid and effectual in this State, and we see no reason to doubt that a specific performance may be enforced by our courts of chancery, in the same manner and to the same extent that such relief has been given in England and other States of the Union. But while these principles and remedies have their full application and effect, as between

the parties to such a contract, we are clear in the opinion that no effect whatever can be given to it consistently with section 7 of the Act of June 1, 1881 (Swan's Rev. Stat. 310), to provide for the proof, acknowledgment, and recording of deeds, etc., as against third persons who have subsequently acquired the legal title to, or lien at law upon, the property to which it relates. By the positive provisions of that section, as construed by the Declaratory Act of March 16, 1838 (Swan's Rev. Stat. 311), and repeated decisions of this court, as against such third persons, mortgages have no effect, either at law or in equity, until delivered to the recorder of the proper county for record. "To give them any effect before," says the learned judge, "as against the persons intended to be protected by the Statute, would be to repeal it. It was not made for the mortgagor, and therefore, as to him, the record of the mortgage was wholly unnecessary; but it was designed to protect third persons who might acquire legal interests in, or liens upon, the property. As to them, the record was made conclusive; and they are only bound to regard such mortgage liens as the record discloses at the time their rights accrue. The principle deducible from all the cases is that the legal rights of such persons cannot be displaced, at the instance of the holder of a prior unrecorded mortgage, or contract for a mortgage, although acquired with notice of such mortgage, or of the existence of such contract; the object of the law being to avoid all vexed questions of notice, actual or constructive, in determining priorities of lien."

We have quoted at some length from the opinion in *Bloom v. Noggle*, because we think the case before us comes within the principle established by it, and subsequently approved in *Erwin v. Shuey*, *supra*, which is that the essential condition to the validity of a mortgage of real property, as against an assignee of the mortgagor for the benefit of his creditors, is that the mortgage shall be deposited for record with the proper officer before the assignment takes effect. It can make no difference, in the application of the principle, whether the want of such record, or deposit for record, results from the defective execution of the mortgage, by reason of which it is not entitled to record, or from the voluntary withholding from the record of a mortgage properly executed. There can be no doubt that an assignment for the benefit of creditors operates as a conveyance, and not as a mere power. Nothing remains in the assignor but the incidental right to discharge the trust by the payment of the debts, or to claim whatever residue may remain after the debts are paid. That the deed of assignment, when properly executed, clothes the assignee with the legal title, is settled by the cases just referred to, and, according to those decisions, against the legal title thus acquired, the prior unrecorded mortgage cannot prevail. If the conveyance was made directly to the creditors, for the payment or security of their debts, it could not be claimed that either their title or their rights under the conveyance would be displaced or affected

by a prior unrecorded mortgage, nor by its subsequent record; and their rights, we apprehend, are none the less when the conveyance is made to the assignee for their benefit. The subsequent record of the mortgage could, of course, give it no validity as against rights which had been acquired before. We therefore hold that a mortgage of real property, which has not been deposited with the recorder of the proper county for record, before an assignment of the property by the mortgagor for the benefit of his creditors takes effect, is not a valid lien upon the property, as against the assignee or the creditors, nor does it become so by being subsequently recorded. It has been suggested, though it is not so contended by counsel in the argument, that the assignment lost its priority, because the deed of assignment was not deposited for record with the recorder of the county, while, soon after it was filed with the probate court, the mortgage was duly recorded. The record now under review does not show that the deed of assignment was not filed with the recorder. But, assuming that it was not, does the result suggested follow? The consequences of the failure to record deeds differ from those attending a like failure with respect to mortgages. As to deeds, the Statute simply declares that until recorded, or filed for record, they "shall be deemed fraudulent, so far as relates to a subsequent bona fide purchaser, having at the time of purchase no knowledge of the existence of such former deed." If it were conceded, though we do not deem it necessary to so decide, that by recording his mortgage, after the deed of assignment was properly filed in the probate court, the mortgagee, Retz, then became a subsequent bona fide purchaser, within the meaning of the Statute, it was still essential, in order to bring him within its protection, that at the time of filing his mortgage for record he had no knowledge of the assignment; and this it is incumbent upon him to show. He makes no claim of that kind in his answer, and the record of the courts below is silent on the subject.

But is it essential to the validity of an assignment of real property, as to third persons, that the deed should be recorded in the office of the county recorder? As a deed conveying real property, it falls within the class of instruments whose record is provided for by section 4184 of the Revised Statutes, and is subject to its provisions, unless controlled by other statutory regulations made especially applicable to such assignments. The whole subject of assignments by insolvent debtors for the benefit of their creditors is specifically provided for, and regulated, in detail, by chapter 4 of title 2 of the Revised Statutes. By the first section of that chapter (§ 6335), it is made the duty of every assignee, within ten days after the delivery of the assignment to him, to cause it to be filed in the probate court of the county in which the assignor resided at the time of its execution; and it enacts that every "such assignment shall take effect only from the time of its delivery to the probate judge, and the exact time of such de-

livery shall be indorsed thereon by the probate judge, who shall immediately note the filing on the journal of the court; and it may be delivered by the assignor to the probate judge, either before or after its delivery to the assignee." Upon the filing of the assignment, the assignee is required to enter into a bond for the faithful performance of his duties; and from that time the administration of the assignment becomes a pending proceeding in the probate court, and so continues until the trust is fully executed. Notice that the assignee has qualified is required to be given by publication, and notice must also be given by publication, or otherwise, of various steps in the proceedings. The probate court is invested with complete jurisdiction of the whole subject matter of the assignment, and of its administration to final completion. Its records, equally with those of the courts of common pleas, and of the records of deeds and mortgages, are constructive notice of what they are required to contain. It is a rule of construction that special statutory provisions for particular cases operate as ex-

ceptions to general provisions which might include the particular cases. The object of those provisions of section 6385, to which we have referred, was not, we think, simply to provide when and how assignments should become operative as between the parties to the instrument. They were not necessary for that purpose. As between them, the conveyance is complete without a compliance with those provisions. Their design evidently was to fix definitely a time from which such instruments should take effect as to all persons. And, it having been so specially enacted that assignments for the benefit of creditors shall take effect from the time of their delivery to the probate judge, the courts are not at liberty to annex, as a further condition to their taking effect, that they shall also be deposited with the recorder of deeds. This conclusion is sustained by the decision of the Supreme Court of Massachusetts in *Guttford v. Childs*, 22 Pick. 484, which involved the interpretation of statutes very similar to ours.

Judgment affirmed.

NEW YORK COURT OF APPEALS.

SAINT NICHOLAS BANK of New York, *Appl.*,

STATE NATIONAL BANK, *Respnt.*

(.....N. Y.....)

1. A bank which has received for collection a check which it forwards to its correspondent for that purpose, cannot fulfill its obligation to the owner by delivering to him the correspondent's draft on a third person, drawn and used for transmitting the proceeds of the check, not to the owner but to itself, and which has become worthless because of the insolvency of both drawer and drawee.
2. The courts of New York will construe the common law as applicable to a contract made and to be performed in another State, according to their own precedents, although they will follow the courts of such other State in the construction of its statute law.
3. The sending of a check by a New York bank to a Tennessee bank for collection in Texas does not constitute the contract for collection a Tennessee contract.

(June 2, 1891.)

APPEAL by plaintiff from an order of the General Term of the Supreme Court, First Department, reversing a judgment of the New York County Circuit in favor of plaintiff in an action brought to recover the proceeds of a draft which had been sent to defendant for collection. *Reversed.*

Statement by Earl, J.:

This action was brought to recover the proceeds of a draft for \$473.57 sent for col-

lection by the plaintiff to the defendant, and paid to the defendant's correspondents. The trial resulted in the direction of a verdict for the plaintiff for the amount demanded. Upon appeal to the general term, the judgment entered upon the verdict was reversed, and a new trial ordered. From the order of reversal the plaintiff appealed to this court. There is no controversy as to the facts, which for the most part were set forth in a stipulation read upon the trial. They may be summarized as follows: The plaintiff is a corporation organized under the laws of the State of New York, and engaged in the business of banking in the City of New York; and the defendant is a corporation organized under the National Banking Act, and doing business in the City of Memphis. For two years prior to the 18th day of November, 1884, the plaintiff had been accustomed to send checks, notes, and drafts to the defendant for collection, including such as were drawn upon persons residing at a distance, in the State of Texas and elsewhere. The commercial paper was inclosed in letters, consisting of printed forms, filled out by the insertion in writing of the date, the name of the defendant's cashier, and a description of the inclosure. The checks and drafts were collected by the defendant, and the proceeds were remitted to the plaintiff, less one fourth of 1 per cent, the defendant's commission, and the expense incurred in making distant collections. On November 10, 1884, the plaintiff was the owner and holder of a check for \$473.57 dated November 6, 1884, drawn upon the City National Bank of Dallas, Tex., by A.

NOTE.—Collecting agent; acceptance in payment. See note to *Fifth Nat. Bank v. Ashworth* (Pa.) 2 L. R. A. 491.

18 L. R. A.

Collecting bank as agent of owner of bill sent for collection. See note to *Freeman's Nat. Bank v. National T. W. Co.* (Mass.) 8 L. R. A. 42.

D. Aldridge & Co., and payable to the order of Henry Levy & Son. This check was indorsed by the plaintiff to the defendant for collection, and was sent to the latter in the usual course of business. The defendant received the check on November 13, 1884, and on that day indorsed it for collection, and forwarded it by mail to the firm of Adams & Leonard, at Dallas, Tex. They were at the time, and had been for many years, bankers in good standing at Dallas, and the correspondents of the defendant. They received the check on November 17, 1884, and on that day duly presented it for payment to the Bank upon which it was drawn, and it was immediately paid, and the proceeds were received by them. They then remitted to the defendant a sight draft for the amount collected, drawn by them upon Jemison & Co., of the City of New York. This draft was sent by the defendant for collection to the First National Bank of New York, and on November 24, 1884, was presented to Jemison & Co., who, in the mean time, had suspended payment. The draft was accordingly protested, and returned to the defendant. Thereupon the defendant, on November 28, 1884, mailed the protested draft to the plaintiff, and the plaintiff refused to accept it. Adams & Leonard had failed in business before the draft on Jemison & Co. was presented for payment. The only evidence offered by the defendant in opposition to these facts was proof of a decision of the Supreme Court of Tennessee, in the case of *Bank of Louisville v. First Nat. Bank of Knoxville*, 8 Baxt. 101, which will be referred to in the opinion.

Mr. Charles E. Hughes, with **Mr. William Tharp**, for appellant:

A bank receiving a bill of exchange in one State for collection from a drawee residing in another State, in the absence of a special agreement, is liable for a loss occasioned by the default of its correspondents, selected to effect the collection.

Allen v. Merchants Bank, 22 Wend. 215; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459; *Commercial Bank of Pa. v. Union Bank*, 11 N. Y. 203; *Ayrault v. Pacific Bank*, 47 N. Y. 570; *Naser v. First Nat. Bank*, 116 N. Y. 498; *Exchange Nat. Bank of Pittsburgh v. Third Nat. Bank of New York*, 112 U. S. 282, 28 L. ed. 724; *Titus v. Mechanics Nat. Bank*, 35 N. J. L. 588; *Wingate v. Mechanics Bank*, 10 Pa. 104; *Reeves v. Ohio State Bank*, 8 Ohio St. 465; *Tyson v. State Bank*, 6 Blackf. 225; *Simpson v. Waldbly*, 6 West. Rep. 158, 63 Mich. 439; *Power v. Bank*, 6 Mont. 251, 35 Alb. L. J. 185; *Mackerey v. Ramsays*, 9 Clark & F. 818.

The liability of a collecting bank extends not only to the acts of its correspondents by which the collection is defeated, but to a failure to remit the proceeds of the commercial paper when collected.

Bradstreet v. Emerson, 72 Pa. 124.

The insolvency of its correspondents furnishes no excuse for the defendant's failure to remit the proceeds of the collection.

Mackerey v. Ramsays, *Simpson v. Waldbly*, *Bradstreet v. Emerson* and *Reeves v. Ohio State Bank*, *supra*; *Hoover v. Wise*, 91 U. S. 306, 23 18 L. R. A.

L. ed. 392. See also *Exchange Nat. Bank of Pittsburgh v. Third Nat. Bank of New York*, *supra*.

The draft drawn by Adams & Leonard to the order of the defendant and tendered by the latter to the plaintiff was not a remittance of the proceeds of the collection.

Simpson v. Waldbly, *supra*; *People v. Bank of Danville*, 39 Hun, 187.

If the question involved were to be decided by local law, they would not be determined by the law of Tennessee.

Dickinson v. Edwards, 77 N. Y. 573.

Texas was the principal place of performance.

As to the law of Texas we have no information. It will therefore be assumed, with reference to a question of this sort, that it is in accord with the law of New York.

Leavenworth v. Brockway, 2 Hill, 202, *note*; *First Nat. Bank of Meadville v. Fourth Nat. Bank*, 77 N. Y. 320.

The question involved is one of general commercial law, and the courts of this State will not in such a case defer to the views prevailing in other jurisdictions, in opposition to principles here established.

Swift v. Tyson, 41 U. S. 16 Pet. 19, 10 L. ed. 871; *Oates v. First Nat. Bank of Montgomery*, 100 U. S. 239, 25 L. ed. 589; *Faulkner v. Hart*, 82 N. Y. 413.

Mr. A. Walker Otis, for respondent:

The contract was made in Tennessee, and was to be performed in Tennessee. It was a Tennessee contract to be governed by Tennessee law.

The duties of an agent who is made such for the purpose of collecting a claim and remitting the proceeds are to collect, and in the exercise of ordinary care intrust the proceeds to some proper carrier for transmission to his principal. That done, his whole duty is accomplished, and the contract is performed.

Buell v. Chapin, 99 Mass. 594; *Gurnsey v. Howe*, 9 Gray, 404; *Oran v. Pratt*, 13 Gray, 348; *Kingston v. Kincaid*, 1 Wash. Terr. 357; *Mechanics Bank of Baltimore v. Merchants Bank of Boston*, 6 Met. 28; *Indig v. National City Bank*, 80 N. Y. 100.

Referring to the law of Tennessee, which exempts the defendant from responsibility in this case, it may be remarked that the courts of a majority of the States are on that side of the question. The following are the States which so hold: Massachusetts, Connecticut, Maryland, Illinois, Wisconsin, Iowa, Mississippi, Missouri, Tennessee, Pennsylvania and Louisiana,—eleven in all.

On the other side we have New York, New Jersey and Ohio.

Morse, Banks & Banking, §§ 265, 287; *Mechem*, Ag. ed. 1889, § 515.

Plaintiff by volunteering to do business with the Memphis Bank, by implication, consented to do so, subject to the rules under which it did business and subject to the laws of Tennessee, by which it was exempted from liability for the defaults of sub-agents.

Wharton, Conf. L. ed. 1881, § 405; *Owings v. Hull*, 34 U. S. 9 Pet. 607, 9 L. ed. 246; *Morse, Banks & Banking*, §§ 9, *note* s. 270; *Bank of Washington v. Triplett*, 26 U. S. 1 Pet. 25, 7 L. ed. 37; *Ayrault v. Pacific*

Bank, 47 N. Y. 570; *Wells v. Bailey*, 49 N. Y. 464.

Earl, J., delivered the opinion of the court:

The rule has long been established in this State that a bank receiving commercial paper for collection, in the absence of a special agreement, is liable for a loss occasioned by the default of its correspondents or other agents selected by it to effect the collection. *Allen v. Merchants Bank*, 22 Wend. 215; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459; *Commercial Bank of Pa. v. Union Bank*, 11 N. Y. 203; *Ayrault v. Pacific Bank*, 47 N. Y. 570; *Naser v. First Nat. Bank*, 116 N. Y. 498. And the same rule prevails in some of the other States, in the United States Supreme Court, and in England. *Titus v. Mechanics Nat. Bank*, 35 N. J. L. 588; *Wingate v. Mechanics Bank*, 10 Pa. 104; *Reeves v. Ohio State Bank*, 8 Ohio St. 465; *Tyson v. State Bank*, 6 Blackf. 225; *Simpson v. Walldby*, 63 Mich. 439, 6 West. Rep. 158; *Mackerey v. Ramsays*, 9 Clark & F. 818.

In such a case the collecting bank assumes the obligation to collect and pay over or remit the money due upon the paper, and the agents it employs to effect the collection, whether they be in its own banking-house or at some distant place, are its agents, and in no sense the agents of the owner of the paper. Because they are its agents, it is responsible for their misconduct, neglect, or other default. Here, when this money was received by Adams & Leonard, the defendant's agents, it was, in law, received by it, and it became absolutely bound to pay or remit the same to the plaintiff. It is difficult to see upon what principle the defendant could be held liable if Adams & Leonard, its agents, had carelessly failed to collect the draft, or had collected it, and then purposely misappropriated the proceeds thereof, and yet not liable for their failure to pay over the proceeds in consequence of their unexplained insolvency. Upon what principle can the defendant be held liable for one default of its agents, and not for every default? That the insolvency of the sub-agent in such a case does not shield the collecting agent from responsibility for the loss has been decided in several cases quite analogous to this. *Reeves v. Ohio State Bank*, *Simpson v. Walldby* and *Mackerey v. Ramsays*, *supra*; and *Bradstreet v. Everson*, 72 Pa. 124. It is not needful now to vindicate the principle upon which these cases rest, as that has been sufficiently done by learned judges writing the opinions therein. They are well supported by many analogous cases in other branches of the law, and it is believed they lay down the best and safest rule, and subserve the wisest commercial policy. The case of *Indig v. National City Bank*, 80 N. Y. 100, is not opposed to these views. There the defendant received a note for collection which was payable at the Bank of Lowville, and it sent the note directly to the bank for payment, which on the next day sent a draft for the amount of the note to the defendant, and failed before the draft reached its destination, and it was held that the loss

did not fall upon the defendant. That conclusion was reached by holding that the Lowville Bank was not the agent of the defendant, but that the defendant was in the same position as if it had sent the note to some agent, and he had received the proceeds thereof, and had then bought a draft on New York of the Lowville Bank for the amount, and the Bank had then failed before the draft was paid. The defendant there would have been held liable if the Lowville Bank had been its agent for the collection of the note. *Briggs v. Central Nat. Bank*, 89 N. Y. 182. After Adams & Leonard had received payment of the draft, they drew a draft upon Jemison & Co. for the amount, and sent that to the defendant for the purpose of discharging their obligation to the defendant. That draft was not made for the purpose of remitting the proceeds of the collection to the plaintiff, and was not used by the defendant for that purpose. It sent the draft to the First National Bank of New York for collection, intending afterwards to remit the proceeds of the collection to the plaintiff in some other way. After Adams & Leonard and Jemison & Co. had failed, it sent the worthless draft to the plaintiff. By so doing it did not discharge its obligations to the plaintiff. If Adams & Leonard had purchased a draft of the Dallas Bank, and sent that to the plaintiff, or if it had sent the draft to the defendant, and the latter had then sent it to the plaintiff, then, according to the doctrine of *Indig v. National City Bank*, the defendant would not have been responsible for the continued solvency of the Dallas Bank. That case was much discussed here, and there was much difference of opinion about it. It is a border case, and its doctrine should not be much extended.

The defendant, however, claims that the contract with the plaintiff is to be treated as a Tennessee contract, and that by the law of that State it cannot be made liable for this loss. Upon the trial, for the purpose of showing the law of that State, it put in evidence a decision of the supreme court in the case of *Bank of Louisville v. First Nat. Bank of Knoxville*, 8 Baxt. 101. In that case a bill of exchange, payable at the First National Bank of Knoxville, was sent by a New York Bank to the Bank of Louisville for collection. It was transmitted by the Louisville Bank to the Knoxville Bank, was received by the latter, and was subsequently returned unpaid. The cashier of the Knoxville Bank delivered the bill to a notary public in good repute at the time, who failed to protest it, by reason of which the right of action against the drawer was lost. The Louisville Bank paid the amount of the bill to the New York Bank, and then brought suit to recover against the Knoxville Bank, and failed. It was held that, "where a bank receives a bill of exchange for collection, payable at a distant place, its liability is discharged by transmitting the same, in due time, to a suitable and responsible bank or other agent, at the same place of payment; and in such case the principal's assent to the employment of a sub-agent is implied," and that, "if a debt be lost by negligence of an agent to

whom a bill of exchange is sent for collection, the principal or home bank (having complied with its duty, and not being liable to the holders) cannot, by voluntarily discharging the claim of the payee, maintain an action on the case for negligence against the sub-agent. Such right accrues only to the holder or payee of the bill, under the circumstances." That decision was not based upon any statute law, but upon the principles of the common law, supposed to be applicable to the facts of the case. It did not make or establish law, but expounded the law, and furnished some evidence of what the law applicable to that case was,—evidence which other courts might or might not take and receive as reliable and sufficient; and even the same court, upon fuller discussion and more mature consideration, might, in some subsequent case, refuse to take the same view of the law. There is no common law peculiar to Tennessee. But the common law there is the same as that which prevails here and elsewhere, and the judicial expositions of the common law there do not blind the courts here. The courts of this State, and of other States, and of the United States would follow the courts of that State in the construction of its statute law. But the courts of this State will follow its own precedents in the expounding of the general common law applicable to commercial transactions, and so it has been repeatedly held. *Kaulkner v. Hart*, 82 N. Y. 413; *Swift v. Tyson*, 41 U. S. 16 Pet. 1, 10 L. ed. 885; *Oates v. First Nat. Bank of Montgomery*, 100 U. S. 239, 25 L. ed. 580; *Roy v. Western Pa. Gas. Co.* 188 Pa. 576, 12 L. R. A. 290 (decided in Pennsylvania Supreme Court, Jan. 12, 1891). We must therefore hold that the obligation resting upon the defendant was that which the principles of the common law, as expressed by the courts of this State, placed upon it. If it be said that the contract between these parties was made in view of the common law, then we must hold that it was the common law as expounded here.

But it cannot be maintained that the contract between these parties was a Tennessee contract. It is by no means clear, even, that it can be held that the contract was made there. It does not certainly appear where it was made. It cannot be said that a new contract was made every time a piece of paper was sent by the plaintiff to the defendant for collection. There was a general contract between the parties, which was either created

by some negotiation, or which grew out of the course of business between them, that the defendant should collect the paper sent to it for the compensation to be allowed. If that contract was made by correspondence, the plaintiff making a proposition by mail, and the defendant accepting it by mail, then, when the acceptance was put in the mail at Memphis, the contract was complete, and had its inception there. If the proposition came from the defendant, and was accepted in the same way in New York, then it would have to be treated as made in New York. In the absence of more proof than we have here, it cannot be assumed that this contract was made in Tennessee. Nor is this to be regarded as a Tennessee contract, for the reason that it was to be performed there, so that the defendant can claim that its obligations and interpretation are to be governed by Tennessee law. We cannot perceive how any substantial part of the contract was to be performed in Tennessee. The defendant was to collect this draft in Texas, and pay its proceeds, less its compensation, to the plaintiff in New York, and so the contract was to be performed in Texas and New York. Adams & Leonard collected the draft for the defendant in Texas, and sent it their own draft on Jemison & Co. This draft the defendant sent to the First National Bank of New York for collection and credit. If the draft had been paid, then the defendant would have had credit for the amount with that Bank, and would probably have sent its own draft on that Bank to the plaintiff for the amount of the collected draft, less its compensation, and that Bank would have paid that draft on presentation, and thus the proceeds of the collected draft would finally have reached the plaintiff, and the obligation of the defendant would then, and not until then, have been fully discharged. So, always, the defendant having collected a draft sent to it by the plaintiff, and received the proceeds thereof, would, in the ordinary course of business, discharge its obligation to the plaintiff by payment through its corresponding bank in New York. Therefore we think it is quite clear that this contract cannot, in any view, be treated as a Tennessee contract, subject in any way to the law of that State.

Our conclusion, therefore, is that the order of the *General Term* should be reversed, and the judgment entered upon the verdict affirmed, with costs.

All concur.

MISSOURI SUPREME COURT.

GEORGE D. BARNARD & CO., *Appt.*,

v.

KNOX COUNTY, *Respnt.*

(.....Mo.....)

A constitutional limitation on the amount of county indebtedness applies

NOTE.—Constitutional inhibition against counties contracting debts. See note to *Barnard v. Knox County* (Mo.) 2 L. R. A. 428.

13 L. R. A.

to a debt for necessary books and stationery which it is made by statute the duty of the county clerk to purchase for his office, as well as to any other obligation.

(June 29, 1891.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Knox County in favor of defendant in an action brought to enforce payment of a county warrant. *Affirmed.* The facts are stated in the opinion.

Mr. H. M. Pollard for appellant.

Mr. William Clancy, with **Mr. Charles D. Stewart**, *Procs. Atty.*, for respondent:

A Constitution is not to be made to mean one thing at one time and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. What a court is to do is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require.

Cooley, Const. Lim. 4th ed. 67, and cases cited.

A county cannot levy taxes to pay judgments against it, founded on warrants issued since the adoption of the present Constitution, to meet current expenses incurred since said adoption, where such levy is in excess of the rate prescribed for county purposes in art. 10, § 11, of said Constitution.

Arnold v. Hawkins, 14 West. Rep. 759, 95 Mo. 569; *Black v. McGonigle*, 103 Mo. 192.

This warrant was clearly issued for county current running expenses, and is clearly in violation of the Constitution.

Arnold v. Hawkins, *supra*.

Every person is presumed to know the law, and so knowing county officers and all those dealing with them are to contract and buy and sell within the prescribed limits of the law; and if any person so deals with the county and gets a county warrant, it is his duty to see that faithless county officers do not issue county warrants in excess of the revenues of that year. On any other theory of the law, the said sections 11 and 12 of article 10 of the Constitution of Missouri would be defeated and deprived of their clear and plain object and intention of making officers carry on the county governments within said maximum running annual expenses; but this court says the said Constitution is self-enforcing.

State v. Van Every, 75 Mo. 587; *St. Joseph Board of Pub. Schools v. Patten*, 62 Mo. 444, 450.

Black, J., delivered the opinion of the court:

This is a suit upon a duly protested warrant issued by the County Court of Knox County to George D. Barnard, dated the 7th day of May, 1885, for \$88.90, payable "out of any money in the treasury appropriated for contingent fund." Barnard assigned the warrant to the plaintiff corporation. The defense is that the debt for which the warrant was issued was created after the county court had issued warrants in excess of the revenue for 1885. In anticipation of this defense, it is alleged in the petition that though the county court had issued warrants in excess of the total revenue for that year, still the plaintiff's debt was created by law, and not by the act of the county court, and that the county debts for that year created by law were less than the county revenue for the same year. The case was tried on the following agreed facts: "That on the 7th day of May, 1885, the clerk of the County Court of Knox County, Missouri, bought from Geo. D. Barnard certain books and stationery for \$83.90. That said books and stationery were suitable and necessary for the use of said

clerk in his said official capacity. That, thereupon said Barnard presented said bill for said books and stationery to the county court of said county, which said court audited and allowed said bill, and issued the warrant filed herein. . . . That there is no money in defendant's treasury now to pay the same. That at the time of issuing said warrant the said county court had issued warrants in excess of the total revenue of said county, for the year 1885, raised by a levy of 50 cents on the \$100 and from licenses and other sources; but excluding the warrants issued during said year for support of paupers, and roads, and bridges, the remainder did not exceed such 50 cents on the \$100.

. . . That no vote of the people of the county on the question of paying this warrant, or the creation of the debt evidenced thereby, has ever been had. The annual revenue of the county, to the extent of the 50 cents on the \$100 valuation, is now entirely consumed by the ordinary annual expenses of the county government." The provisions of the Constitution to be considered in the disposition of this case are found in sections 11 and 12 of article 10. The first provides: "For county purposes the annual rate on property, in counties having six million dollars or less, shall not, in the aggregate, exceed fifty cents on the one hundred dollars valuation." The same section fixes the maximum annual rate of taxes for city and town purposes and for school purposes, and contains these exceptions: (1) the annual rate for school purposes may be increased to a designated amount by a majority vote of the taxpayers; (2) the rate may be increased by a two-thirds vote for the purpose of erecting public buildings. The rate allowed to each county is to be ascertained by the amount of taxable property therein, according to the last assessment. "Said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness." Section 12 declares: "No county

. . . shall be allowed to become indebted in any manner, or for any purpose, to an amount exceeding in any year the income and revenue provided for such year, without the assent of two thirds of the voters thereof voting at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount, including existing indebtedness, in the aggregate, exceeding five per centum on the value of the taxable property therein," etc. The Statute makes it the duty of the county court, at its May term in each year, to divide the revenue collected, and to be collected, into five designated and described funds, one of which is a contingent fund, not to exceed one fifth of the total revenue of the county for county purposes for any one year; and each fund is declared to be a sacred fund for the purpose for which it is designated. Sections 6818, 6819, Rev. Stat. 1879.

In 1875, and prior thereto, many of the counties and cities in this State were bur-

dened with debts because of bonds issued in aid of railroads, some of which were never built, and on account of extravagance, frauds and defalcations of officials. To put an end to this state of affairs, the Constitution adopted in that year denied to any county or city the right to thereafter take stock in or loan its credit to any railroad company or other corporation, and, by the two sections before mentioned, sought to bring the administration of county affairs to a cash basis. As said in *Book v. Earl*, 87 Mo. 246, the evident purpose of the framers of the Constitution, and the people in adopting it, was to abolish, in the administration of county and municipal government, the credit system, and establish the cash system, by limiting the amount of tax which might be imposed by a county for county purposes, and by limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury. We do not understand counsel for the appellant to dispute these propositions; but the claim is made, and pressed with much vigor, that section 12 does not include debts like that for which the warrant in question was given. The line of argument is this: As the Statute makes it the duty of the county clerk to provide suitable books and stationery for his office (§ 623, Rev. Stat. 1879), a debt created for such a purpose is not one incurred or created by the county court, but is a debt created by law, and such debts are not within the prohibition. Authorities are cited which give support to such a distinction: *Grant County v. Lake County*, 17 Or. 453; *Barnard v. Knox County*, 37 Fed. Rep. 563, 2 L. R. A. 426, and *Rollins v. Lake County*, 34 Fed. Rep. 845. The case last cited, it may be observed, was reversed by the Supreme Court of the United States. 130 U. S. 662, 32 L. ed. 1060.

On the other hand, the Constitution of Colorado contains this provision: "And the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this Constitution, shall not at any time exceed twice the amount above limited, unless," etc. The supreme court of that State said, when speaking of this clause: "The limitation being applicable to all debts, irrespective of their form, it follows that, in determining the amount of county indebtedness, county warrants are to be taken into account, and any warrant which increases the indebtedness over and beyond the limit fixed is in violation of the constitutional provision, and void." *People v. May*, 9 Colo. 80-98. The Circuit Court of the United States, in *Rollins v. Lake County*, *supra*, when having under consideration the clause of the Colorado Constitution before quoted, held that warrants issued for fees of witnesses, jurors, constables, and sheriff were not within the prohibition, because issued in payment of compulsory obligations; and hence it was no defense, in an action upon such warrants, that at the time they were issued the limit fixed by the Constitution had been reached. The Supreme Court of the United States, when speaking upon this question in the

same case, said: "Neither can we assent to the proposition of the court below that there is, as to this case, a difference between indebtedness incurred by contracts of the county and that form of debt denominated 'compulsory obligations.' The compulsion was imposed by the Legislature of the State, even if it can be said correctly that the compulsion was to incur debt; and the Legislature could no more impose it than the county could voluntarily assume it, as against the disability of a constitutional prohibition. Nor does the fact that the Constitution provided for certain county officers, and authorized the Legislature to fix their compensation and that of other officials, affect the question.

In short, we conclude that article six, aforesaid, is a limitation upon the power of the county to contract any and all indebtedness, including all such as that sued upon in this action; and therefore, under the stipulation already set forth, the county is entitled to judgment." *Lake County v. Rollins*, 130 U. S. 662, 32 L. ed. 1060. A clause in the Constitution of Illinois declares that "no county, city," etc., "shall be allowed to become indebted in any manner or for any purpose" beyond a stated amount. Yet the decisions of the supreme court of that State recognize no such distinction as that sought to be made in the case at bar. The result of the decisions of that court is that it can make no difference whether the debts be created for necessary current expenses or for something else. *Prince v. Quincy*, 105 Ill. 138, 215. The Supreme Court of Iowa, when speaking of the same clause in the Constitution of that State, says: "The language of this provision is very general and comprehensive. It includes indebtedness incurred in any manner, or for any purpose." *Council Bluffs v. Stewart*, 51 Iowa, 385. It is true, the clauses in the Constitutions of the States just named prohibit the incurring of indebtedness beyond a specified per cent of the assessed value of the taxable property, while in our Constitution the prohibition is against the incurring of an indebtedness in excess of the revenue of the particular year; but we do not see that this difference affects the question in hand. The object of all these provisions is to fix a limit to county and municipal indebtedness.

Our Constitution, it will be seen, first limits the rate of taxation for county purposes to 50 cents on the \$100 valuation in counties like the one in question. This rate may be increased, by the assent of the qualified voters, for the purpose of erecting public buildings, but it cannot be increased, even by such assent, for any other purpose. We have held that a county court cannot levy a tax in excess of the 50 cents for any purpose, except for the purpose of erecting public buildings, and for the purpose of paying indebtedness existing at the date of the adoption of the Constitution. *Arnold v. Hawkins*, 95 Mo. 569, 14 West. Rep. 739; *Black v. McGonigle*, 103 Mo. 192. The maximum limit of the rate of taxation for county purposes being thus fixed, section 12, to repeat, declares: "No county, city, . . . shall be allowed to become indebted in any manner, or for any purpose, to an amount

exceeding in any year the income and revenue provided for such year." As to counties the only exception is that, with the assent of the voters, the expenditures may be increased for the erection of a court-house or jail. The language just quoted is clear and explicit, and construes itself. It is broad and comprehensive as to the character of the indebtedness. It includes indebtedness created in any manner, or for any purpose. This strong and comprehensive language admits of no distinction between debts created by a county court and debts created by law. In a sense, all county debts are created by law; for the counties possess those powers, and those only, which are conferred upon them by the Constitution and laws of the State. While it is the duty of the county court to care for paupers and insane persons, and to build bridges and repair roads, still the county court is governed by the Statute in the performance of these duties. Debts incurred for such purposes may be called debts created by law, as well as debts incurred by the county clerk for books and stationery. Nor does it make any difference that the debt in question was created by the clerk instead of the county court. The clerk, in the purchase of the books and stationery, acted as a county officer. The debt incurred by him, if he did not exceed his authority, is just as much a county debt as one incurred by the county court. The law confers upon various county officers the power to create debts for designated purposes, but the debts are all county debts when chargeable to the county. The county clerk, county court, and other county officers must take notice of these constitutional limitations, and exercise the powers conferred upon them in subordination to such restrictions. To hold otherwise is to say the clerk and other officers may execute statutory powers in excess of constitutional restrictions, and thus make the statute laws override the Constitution. It is, of course, a hardship to the plaintiff to declare this warrant worthless, but we cannot dispose of the question on any such a surface view of the matter. The Constitution seeks to protect the citizen and taxpayer, and their rights are not to be overlooked. It is the duty of persons dealing with counties and county officials, as well as of county officials themselves, to take notice of the limit prescribed by the Constitution. 1 Dillon, Mun. Corp. 4th ed. § 134a.

Soliciting agents, contractors, and others who deal with county officials, must see to it that the limit of county indebtedness is not exceeded, and, if they fail to do this, they must suffer the consequences. Unless this is so, there is an end to all effort to bring about an economical and honest administration of county affairs. If this scheme of county

finances, built up by the Constitution, is a mistake, or if it produces great hardships in some counties, the remedy is with the people, and not with the courts. "What a court has to do is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require." Cooley, Const. Lim. 4th ed. 67.

The plaintiff insists that there is no substantial difference between this case and *Potter v. Douglas County*, 87 Mo. 240. In that case the plaintiff sued Douglas County for services performed by him as jailer of Greene County, in keeping, boarding, clothing, and taking to court prisoners. The indebtedness was incurred under section 6090, Rev. Stat. 1879. The agreed statement showed "that, at the time the fee-bill was presented to the county court, the revenue for said years was expended, and the same could not be paid without issuing warrants in excess of the income and revenue for said years." On this statement we held that plaintiff could recover. It is to be observed that the agreed statement in that case did not show that the revenues had been expended when the indebtedness was incurred. For aught that appears, there may have been revenues unexpended and set apart to the proper fund when the indebtedness was contracted. Our opinion, however, is not placed on any such ground. It is placed upon grounds which would include the case in hand, and which are inconsistent with what has been said on the present occasion. There is, of course, a difference between the facts in that case and the facts in the present one; but the Constitution takes no notice of such differences. That case is therefore overruled.

Now, the agreed statement in this case does not, in terms, say that the contingent fund set apart for 1885 had been exhausted when the books and stationery were purchased; but it does show that the warrant was issued at the date of the purchase, and that at that time the county court had issued warrants in excess of the total revenue for that year. This statement must be taken in connection with the petition, which is framed upon the theory that the whole of the revenue had been consumed, unless warrants issued for the support of paupers and for building bridges and repairing roads are to be excluded. We think it sufficiently appears that the contingent fund had been consumed when the debt sued for was incurred. Indeed, this proposition is not questioned in the briefs. The warrant was issued in violation of the Constitution, and is void.

Judgment affirmed.

Barclay, J., absent. The other Judges concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Reginald E. DANIPLE
v.
NEW YORK & NEW ENGLAND R.
CO.

(.....Mass.....)

A railroad company owes a boy who is a mere trespasser on its land no duty to keep its turn-table in safe condition; and no inducement or invitation to him to go upon the premises can be implied from the fact that the situation and condition of the turn-table were such as to be likely to attract or allure a boy of his age.

(September 8, 1891.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County (Mason, Ch. J.) made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which resulted in the direction of a verdict in defendant's favor. *Overruled.*

The facts are sufficiently stated in the opinion.

Messrs. Everett W. Burdett and Charles A. Snow for plaintiff.

Messrs. Charles A. Prince and R. D. Weston-Smith for defendant.

Lathrop, J., delivered the opinion of the court:

The plaintiff does not contend that he had any express invitation from the defendant to

enter upon its premises, but that he was enticed or allured by the attractiveness of the turn-table; and the proposition of law upon which he relies is that if a railroad company leaves a turn-table unlocked or unguarded upon its own premises, near a public highway, or in an open or exposed position near the accustomed or probable place of resort of children, it is for the jury to determine, even in the absence of other evidence as to the attractive nature of the turn-table, whether it is, in and of itself, calculated to attract children, and whether a child injured upon it was in fact attracted or allured by it; that, if so allured or attracted, the child comes upon the premises of the railroad company through its implied invitation or inducement, and is not a bare licensee or trespasser; and that the company owes to such child the duty to refrain from ordinary negligence with respect to the condition and management of its turn-table.

The turn-table is stated in the exceptions to have been five or six hundred feet from a highway crossing the railroad, and six hundred feet from another highway crossing. Shortly before the accident, the plaintiff and some other boys were at a station on the railroad, which appears by a plan used at the trial to have been about one thousand feet from the turn-table; that they then asked some train-men who were switching cars on the tracks adjacent to the turn-table to let them ride on the cars, and, on being refused, went to the turn-table. The only thing stated in the exceptions to show that the turn-

NOTE.—*Railroad company; duty to avoid injury to trespassers on its premises.*

A railroad company is under no obligation to locate its tracks, construct fences, and adjust the running of its trains so as to make it safe for children unlawfully to trespass on its right of way. *Morrissey v. Providence & W. R. Co.* 1 New Eng. Rep. 306, 15 R. I. 271.

Extra precautions are not required of a railroad company, in anticipation of the intrusion of trespassers, even though they be children. (*Biddle v. Hestonville, M. & F. P. R. Co.* 3 Cent. Rep. 405, 112 Pa. 551); but when they do so intrude and are known to be in an improper place, they must not be so wholly neglected as to leave them in danger of their lives and limbs. *Ibid.*; *Rine v. Chicago & A. R. Co.* 3 West. Rep. 800, 38 Mo. 392.

Ordinary care must be used to avoid injury, even to a trespasser. *Pennsylvania R. Co. v. Lewis*, 79 Pa. 38; *Hydraulic Works Co. v. Orr*, 83 Pa. 332; *Philadelphia & R. R. Co. v. Hummel*, 44 Pa. 375.

Although a child may be on a car by invitation of the driver, yet where the driver had no authority to give such invitation, the child is a trespasser. *Duff v. Allegheny Valley R. Co.* 91 Pa. 458.

A railroad company, in moving its trains upon the track, does not owe to one unlawfully upon the track any duty except to not purposely or willfully injure him. *Chicago & E. I. R. Co. v. Hedges*, 3 West. Rep. 392, 105 Ind. 398; *Little Rock, M. R. & T. R. Co. v. Haynes*, 47 Ark. 497; *Barstow v. Old Colony R. Co.* 3 New Eng. Rep. 747, 143 Mass. 532; *Kentucky Cent. R. Co. v. Gastineau*, 83 Ky. 119; *Masser v. Chicago, R. I. & P. R. Co.* 68 Iowa, 602.

The liability of a railroad company to a trespasser

on its track must be measured by the conduct of its employés after they become aware of his presence there, and not by their negligence in failing to discover him. *Brown v. St. Louis, I. M. & S. R. Co.* 58 Ark. 120.

When the trespasser is an infant, the railway company is held bound to exercise a higher degree of care and caution than is required as to adults; and the infant is not required to exercise a discretion and prudence beyond its years. *Indianapolis, P. & C. R. Co. v. Pitzer*, 4 West. Rep. 256, 7 West. Rep. 396, 109 Ind. 179.

In such case it is their duty to use all the means in their power to prevent injury to the child, and a failure so to do is negligence for which the company will be liable. *Payne v. Humeston & S. R. Co.* 70 Iowa, 584; *Indianapolis, P. & C. R. Co. v. Pitzer*, 7 West. Rep. 396, 109 Ind. 179.

A railroad company is not liable for negligently causing the death of a boy who was a trespasser on the track, in the absence of evidence that the servants of the company could have avoided the injury after discovery of his perilous position. *Bell v. Hannibal & St. J. R. Co.* 4 West. Rep. 391, 86 Mo. 599.

Injury from unguarded turn-table.

If a minor, not having sufficient judgment or discretion to know her danger, is injured while riding upon the turn-table, the company is liable if guilty of negligence in not enclosing or securing the turn-table; and it is not necessary to prove willful intention to inflict injury. *Gulf, C. & S. F. R. Co. v. Styron*, 66 Tex. 421. See *Woodbury v. District of Columbia*, 3 Cent. Rep. 793, 5 Mackey, 127.

table was attractive is that it had large upright standards or guys, twelve to fifteen feet in height, which could be seen from a considerable distance.

The cases upon which the plaintiff relies may be divided into two classes. Those of the first class rest upon the proposition that if a turn-table is of a dangerous nature and character, when unlocked or unguarded, in a place much resorted to by the public, and where children are wont to go and play, it is the duty of the railroad company owning the turn-table to keep the same securely locked or fastened, so as to prevent it from being turned or played with by children, or to keep the same guarded. *Stout v. Sioux City & P. R. Co.* 2 Dill. 294; *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745.

The decision of the Supreme Court of the United States was apparently approved of in *Atchison & N. R. Co. v. Bailey*, 11 Neb. 332, and followed in *Houston & T. C. R. Co. v. Simpson*, 60 Tex. 108, in *Gulf, C. & S. F. R. Co. v. Styron*, 66 Tex. 421, in *Evansich v. Gulf, C. & S. F. R. Co.* 57 Tex. 128, and in *Gulf, C. & S. F. R. Co. v. McWhirter*, 77 Tex. 356. See also *Bridger v. Asheville & S. R. Co.* 25 S. C. 24; *Ferguson v. Columbus & R. R. Co.* 75 Ga. 637, 77 Ga. 102.

The second class of cases proceeds upon the doctrine of constructive invitation; that is that if a person is allured or tempted by some act of a railroad company to enter upon its land, he is not a trespasser. And it is held that leaving a turn-table unguarded is such an act. *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207; *O'Malley v. St. Paul, M. & M. R. Co.* 43 Minn. 289; *Kansas Cent. R. Co. v. Fitzsimmons*, 22 Kan. 686; *Nagel v. Missouri Pac. R. Co.* 75 Mo. 653.

The decision of the Supreme Court of the United States in *Sioux City & P. R. Co. v. Stout* rests upon the proposition stated by Mr. Justice Hunt, "that while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts." The cases cited in support of this proposition are *Lynch v. Murdin*, 1 Q. B. 29; *Birge v. Gardiner*, 19 Conn. 507; *Daley v. Norwich & W. R. Co.* 26 Conn. 591; *Bird v. Holbrook*, 4 Bing. 628.

With the exception of *Daley v. Norwich & W. R. Co.*, all of these cases come within other rules or within well-defined exceptions to the general rule that a landowner owes no duty to a trespasser except he must not wantonly or intentionally injure him or expose him to injury.

Lynch v. Murdin, *supra*, rests upon the doctrine that if a person unlawfully places an obstruction in a way, he is liable to a child who is injured thereby, although the child wrongfully meddles with the obstruction. The contrary, however, was held in *Hughes v. Macfie*, 2 Hurlst. & C. 744, and in *Mangan v. Atterton*, L. R. 1 Exch. 289. In *Lane v. Atlantic Works*, 111 Mass. 186, the plaintiff was found to be without fault,

and not a trespasser. See also *Clark v. Chambers*, L. R. 8 Q. B. Div. 327; *Powell v. Deveney*, 3 Cush. 300.

Birge v. Gardiner, *supra*, rests upon the doctrine that an owner of land has no right to use his land near a highway in such a manner as to make it a public nuisance. To the same effect is *Hydraulic Works Co. v. Orr*, 88 Pa. 382.

Bird v. Holbrook, *supra*, decides that a landowner cannot lawfully, without giving notice, set traps upon his own land for the purpose of injuring trespassers; and that, if a person is injured by such a trap, he may recover. And in Connecticut the rule is held to be the same though no notice is given. *Johnson v. Patterson*, 14 Conn. 1. This, as pointed out by Morton, J., in *Marble v. Ross*, 124 Mass. 44, 49, proceeds upon the ground that the owner of land cannot wantonly injure a trespasser. The case of a trespasser injured by a vicious animal stands upon the same footing. *Marble v. Ross*, *supra*.

The owner of land adjoining a public street is undoubtedly liable for an excavation made by him therein, if the land, with his consent, has for a long time been used by the public as a street. *Lorue v. Farren Hotel Co.* 116 Mass. 67; *Beck v. Carter*, 68 N. Y. 283.

The case of *Daley v. Norwich & W. R. Co.*, *supra*, so far as it tends to support the result reached in *Sioux City & P. R. Co. v. Stout*, *supra*, must be considered as overruled by *Nolan v. New York, N. H. & H. R. Co.*, 53 Conn. 461.

The Court of Appeals of New York has stated in a well-considered case that it does not uphold the decision in *Sioux City & P. R. Co. v. Stout*, *supra*, and although it seeks to distinguish that case from the one before it, the difference between the two cases is not very apparent. *McAlpin v. Powell*, 70 N. Y. 126. In this case the plaintiff's intestate, a boy in his tenth year, stepped out of a window of the house in which he lived upon the platform of a fire-escape and fell through a trap door therein, which was insecurely fastened. The defendant was the landlord of the house and it was his duty to keep the fire-escape in order. It was held that he owed no duty to one who was using the fire-escape for his own pleasure; and that the defendant was not liable.

In *Frost v. Eastern R. Co.*, 64 N. H. 220, 4 New Eng. Rep. 527, the plaintiff, a boy seven years of age, was injured while playing upon a turn-table of the defendant's railroad. The ground upon which he sought to recover was that he was attracted to the turn-table by the noise of boys playing upon it. The turn-table was on the defendant's land about sixty feet from a public street, in a cut with high, steep embankments on each side, and was insecurely fastened. It was held that the plaintiff was but a trespasser; and that, under the circumstances, the defendant owed him no duty. The court expressly refused to follow the case of *Sioux City & P. R. Co. v. Stout*, *supra*.

On the question whether the defendant was liable on the ground of an implied invita-

tion, Clark, J., in delivering the opinion of the court, said: "One having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling, nor is the owner of a fruit tree bound to cut it down or inclose it, or exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys, who may be attracted by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond, or a blueberry pasture, legally required to exercise care in securing his gates and bars to guard against accidents to straying and trespassing children. The owner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists."

Subject to the exceptions we have before stated, and to some others which it is not necessary more particularly to refer to, an owner of land may use his land in such manner as he sees fit; and if a trespasser or mere licensee is injured he cannot complain that, if the owner had used it in a more careful manner, no injury would have resulted. *Hounsell v. Smyth*, 7 C. B. N. S. 781, and cases cited. *Clark v. Manchester*, 62 N. H. 576; *Kliz v. Nieman*, 68 Wis. 271; *Gramlich v. Wurst*, 86 Pa. 74; *Cauley v. Pittsburgh, C. & St. L. R. Co.* 95 Pa. 398; *Gillepie v. McGowan*, 100 Pa. 144; *Hargreaves v. Deacon*, 25 Mich. 1. See also *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 368; *Metcalf v. Cunard Steamship Co.* 147 Mass. 66, 6 New Eng. Rep. 309, and cases cited; *Bartow v. Old Colony R. Co.* 143 Mass. 525, 3 New Eng. Rep. 746.

In *Johnson v. Boston & M. R. Co.*, 125 Mass. 75, the plaintiff bought a ticket of the defendant corporation, which entitled her to be carried from Boston to Lawrence. She went as far as Somerville, a way station, and there left the cars and went to a house nearby, intending to take a later train for Lawrence. After remaining at the house for awhile, she returned to the station, and, while crossing the tracks to the station of another railroad corporation to meet her son, was injured. The space between the two stations was partly planked and partly filled in with earth so as to form a convenient passageway; and evidence was offered that a large number of passengers were in the habit of using this space as the plaintiff was using it; and that no notice or warning to the contrary had been posted. It was held that the evidence failed to show that the defendant held out any inducement to the plaintiff to enter its premises; that the use of the premises as a passageway by strangers was a matter in which the defendant was absolutely passive, and from which nothing was to be inferred in favor of or in aid of the plaintiff; and that the plaintiff was a mere intruder, and could not recover. See also *Wright v. Boston & M. R. Co.* 129 Mass. 440.

In *Morrissey v. Eastern R. Co.*, 126 Mass. 377, a child, four years of age, was run over by the cars of a railroad corporation while using the track as a playground. There was a footpath across the tracks which was used

by persons, but in which the plaintiff had no rights, and by which he got upon the track. Evidence was offered that the defendant had been notified that the place was dangerous for children, and had been requested to place a fence across the path. The court held that the plaintiff was a mere trespasser upon the track; that no inducement or implied invitation had been held out to him; and that he could not recover. There was some evidence in this case that the engineer acted maliciously, or with gross and willful carelessness; and this question was submitted to the jury, who found for the defendant.

In *Wright v. Boston & A. R. Co.*, 142 Mass. 296, 2 New Eng. Rep. 725, there was a well-defined path leading to a railroad track, and an opening in a ridge near the track, and a passageway for the path through the ridge. There was no fence or obstruction to prevent persons from going on the track from the path, and when freight cars stood on the track an opening opposite the path was sometimes left. This path had been used by persons to cross the track, and no objection had been made by the defendant's servants to persons crossing there, except when cars were approaching. The plaintiff, a boy between six and seven years of age, was injured while going to school and crossing the track by the path. It was held that these facts would not warrant the jury in finding that the defendant had held out an inducement or invitation to the plaintiff to use the path to cross the track.

The case of *McEachern v. Boston & M. R. Co.*, 150 Mass. 515, came up on demurrer to the declaration, which alleged, in substance, that the defendant, a railroad corporation, left a car standing on one of several side tracks adjoining a public street; that the defendant knew that one of the doors of the car was insecurely fastened, and was liable upon receiving a slight touch to fall to the ground; that the defendant well knew that said car then was, and would be, an enticing, attractive, and inviting object to children; and well knowing that children there were, and long prior thereto had been, accustomed to play in, upon, around, and about such cars as might happen from time to time to be placed upon any of said side tracks; that the plaintiff, being then upwards of eleven years of age, was traveling upon the street in the vicinity of the side track upon which the car was standing, "and saw said car with its open door, and was thereby enticed and invited to look into said car, and thereupon did undertake to look into said car exercising therein as much care as could reasonably be expected of a child of his years and capacity; and that in attempting to look into said car he carefully touched said door, and immediately said door fell upon him," and injured him. The demurrer was sustained, on the ground that the plaintiff was a trespasser, committing an unlawful act in meddling with the defendant's car; that he was not invited or enticed there by the defendant; and that the defendant owed him no duty to have the car safe for him to visit.

In *McCarthy v. Fitchburg R. Co.*, 163 Mass.

—, a child about five years old strayed from the yard of the house in which it lived onto a street, and thence into the freight yard of a railroad corporation, where it was injured. The freight yard was parallel with the street and there was no fence between. It was held, in the absence of evidence that a fence was required by Pub. Stat., chap. 112, § 115, that it did not appear that there was any evidence of a breach of any duty which the defendant owed the plaintiff.

The cases which we have last cited are conclusive of the one at bar, whatever may be the rule elsewhere. The plaintiff was a mere trespasser upon the land of the defendant. We find no evidence of any invitation by the defendant or inducement held out to him to go there, and no evidence of a breach of any duty which it owed him. The superior court rightly directed a verdict for the defendant.

Exceptions overruled.

ATTORNEY-GENERAL, by Information,

v.

George C. ABBOTT.

(.....Mass.....)

1. An intention to dedicate land for parks is shown where a corporation formed for establishing a summer resort procures land and records plats thereof with open spaces left thereon marked "park," copies of which are, for the purpose of selling lots, hung in public places and distributed about the country as circulars, and assurances are freely given by those having

charge of the sale that the parks shall always be kept open.

2. One holding a bond for one half the share in the proceeds of sales to which a stockholder in a corporation formed for establishing a summer resort will be entitled, has no such interest as to give him a voice in determining the policy of the company or to make his assent to, or dissent from, its proposed plans material.

3. Four of the six directors who own in equal shares all the stock of a corporation formed for establishing a summer resort upon its land may make a binding dedication of portions of such land to the public for parks.

4. The facts that very little has been done to adorn land claimed to have been dedicated by the originator of a summer resort for park purposes, and that that little was done by the originator himself, who exercised some control over the land, are not of much weight to show absence of intention to dedicate.

5. The acceptance of a dedication of land for park purposes need not, at common law, be by the town, nor need it be very specific. Acts by the public at large showing an acceptance are sufficient to divest the owner of the easement.

6. Purchasers of real estate are bound by a prior dedication thereof to the public.

7. One who before purchasing land makes a laborious investigation of facts tending to show its dedication to public use will not, in case it proves to have been so dedicated, be protected as a purchaser without notice, although he came to the conclusion upon either the law or the facts that it had not been dedicated.

(September 8, 1891.)

NOTE.—Dedication of lands for public parks.

The vital principle of a common-law dedication for public use is the intention, which must be unequivocally manifested, and clearly and satisfactorily appear (*White Bear v. Stewart*, 40 Minn. 284); but this intention may also be gathered from the owners' acts and conduct in respect to the property. *Harding v. Jasper*, 14 Cal. 647; *People v. Reed*, 81 Cal. 70; *Phillips v. Day*, 82 Cal. 80.

An owner of land who lays off a town or village thereon, and sells lots with reference to a map showing the town site to be divided into streets, etc., and upon which public squares or plazas are represented, thereby makes an irrevocable dedication of the spaces represented as streets, squares, etc., to the use of the public. *San Leandro v. Le Breton*, 72 Cal. 170.

Where certain owners of a tract of land laid the same off into blocks and lots, as an addition to the City of St. Louis, and the same was platted and recorded, and there was written upon the plat the words, "The land marked 'A' (describing it), is to be and remain a common forever," and known on the record as "Exchange Square" it is a dedication by the proprietors of this parcel of property to public use for a common. For all other purposes, then, it remains the property of the owners. The word "common" is used by the dedicators in its popular signification, as a parcel of land set apart for common and public use. *Cummings v. St. Louis*, 7 West. Rep. 274, 90 Mo. 259.

It is beyond the power of the Legislature to authorize any other use of property dedicated by private owners than that specified in the act of dedication; nor can it extend or enlarge the uses, much less authorize an out-and-out sale of property. *Ibid.* 13 L. R. A.

The difference between a statutory and common-law dedication is that one vests the legal title to the ground set apart for public purposes in a municipal corporation, in trust for the public; while the other leaves the legal title in the original owner, charged with the same rights and interests in the public which it would have if the fee was in the corporation. *Maywood Co. v. Maywood*, 5 West. Rep. 529, 118 Ill. 61.

An acceptance will be presumed if the gift is beneficial; and user is evidence that it is beneficial. *Abbott v. Cottage City*, 3 New Eng. Rep. 773, 143 Mass. 521.

It will not be contended that any formal acceptance on the part of the public is necessary, or even practicable. When a proprietor lays off a town, makes and publishes a plat of it, showing the blocks, lots, streets and public squares, and sells to various parties blocks and lots, referring to such plat in describing them, the acceptance will be implied. The proprietor in such case deals with the public. In every sale of a lot or block under such circumstances he gives an assurance that the ground, as platted, shall remain intact. *Carter v. Portland*, 4 Or. 339; *Ang. & D. Highways*, 3d ed. § 149.

The sale of lands by the owner according to a map showing a street 150 feet in width, and the user of 80 feet in width of such street by the public for years, constitutes a complete dedication and acceptance which cannot be affected by a deed from a subsequent owner. *Logan v. Rose*, 88 Cal. 283.

The owner of lands may devote and dedicate them to public use, and it is now well-settled law that a dedication of lands to public use does not require the existence of a corporation in which to vest the title. Such a dedication will be valid, with-

RESERVATION by the Supreme Judicial Court for Bristol County (Field, J.), for the opinion of the full court of a proceeding instituted to enjoin defendant from interfering with the right of the public to use and enjoy certain parks in the Town of Cottage City. *Decree for plaintiff.*

The facts sufficiently appear in the opinion. *Messrs. Thomas M. Stetson and Hosea M. Knowlton* for plaintiff.

Messrs. J. D. Ball, L. W. Howes and George C. Abbott, for defendant:

A part of tenants in common cannot make a dedication. It requires all.

Scott v. State, 1 Sneed, 629; *Adam v. Briggs Iron Co.* 7 Cush. 361-369; Washb. Real Prop. 4th ed. p. 654; *Marks v. Sewall*, 120 Mass. 176; *Bartlet v. Harlow*, 12 Mass. 848; *Blossom v. Brightman*, 21 Pick. 283-285; *Baldwin v. Whitney*, 18 Mass. 57; *Peabody v. Minot*, 24 Pick. 329.

The four associates by their most solemn act placed on record, viz., their deed, have not only said the property was free and clear, but have warranted it to be so, and ought now to be estopped and held incompetent to testify that this solemn act of theirs was false.

1 Greenl. Ev. § 22.

Mr. Abbott is a bona fide purchaser for value, and without notice. A purchaser has a right to rely upon such evidence as the registry of deeds affords, and if there is no recorded deed, to assume that the record title is the true title.

Dow v. Whitney, 6 New Eng. Rep. 276, 147 Mass. 6; *Atty-Gen. v. Merrimack Mfg. Co.* 14 Gray, 601; *Colorado C. & I. Co. v. United States*, 123 U. S. 807, 31 L. ed. 182.

Neither recording plans with the word "park" upon them nor circulating such plans amounts to a dedication on the part of the owner.

Com. v. Fisk, 8 Met. 298; *Atty Gen. v. Merrimack Mfg. Co. supra*; *Light v. Goddard*, 11 Allen, 5; *Boston W. P. Co. v. Boston*, 127 Mass. 374; *Coolidge v. Dexter*, 129 Mass. 167; *Williams v. Boston W. P. Co.* 184 Mass. 406; *Regan v. Boston Gas Light Co.* 187 Mass. 37; *Atty-Gen. v. Whitney*, 187 Mass. 450.

There is no suggestion in any deed in the case at bar that any plan is referred to as exhibiting any squares, parks, public parks or public areas. The purposes for which the plans are referred to are defined (to ascertain easily the location of the land conveyed and its dimensions and boundaries); and unless these specified objects are necessarily dependent upon, or to be construed with other portions of the plan, such other portions are not brought within the scope of the conveyances.

Boston W. P. Co. v. Boston, *Light v. Goddard*, and *Atty-Gen. v. Whitney*, *supra*.

To constitute dedication there must be some unequivocal act of the owner uniting with the intent to divest himself of the control of the property, and to vest an irrevocable interest in some other body.

Atty-Gen. v. Merrimack Mfg. Co. 14 Gray, 604; *Atty-Gen. v. Lord Foley*, 1 Dick. 363.

The acts shown by plaintiff in this case are, at the best, of the most equivocal kind, and show a most decided intention on the part of the owners not to divest themselves of title and not to vest an irrevocable interest in any body.

See *Beatty v. Kurtz*, 27 U. S. 2 Pet. 566, 7 L. ed. 521; *Atty-Gen. v. Merrimack Mfg. Co. supra*.

There can be no such thing as a dedication to the lotowners. Whatever rights they have they have by grant, and if they have any rights by reference to plans or by representations or

out any specific grantee in existence at the time the dedication is made. The public is an ever existing grantee, capable of taking a dedication for public uses. *Rutherford v. Taylor*, 38 Mo. 317; *M. E. Church Trustees v. Hoboken*, 33 N. J. L. 16.

A person who, for seven years after obtaining his majority, has knowledge of the action of a village in opening and improving a street partly his property, and permits it to be used without objection, may be presumed to have made a dedication of so much of the land as is within the street. *McKey v. Hyde Park*, 37 Fed. Rep. 389.

Where the owner of land lays it off into blocks, lots, and streets, platting it as an addition to a city, and causes the plat, although not acknowledged so as to entitle it to record, to be recorded in the book of deeds in the office of the clerk of the county in which the land is situated, and sells and conveys any of the lots or blocks by a reference, in the description thereof, to such plat, it constitutes an irrevocable dedication to the public of the streets shown upon it. *Meler v. Portland C. R. Co.* 1 L. R. A. 856, 18 Or. 500.

One who has sold lots with reference to a certain named avenue, and has dedicated the avenue to the public, cannot afterwards revoke the dedication, after its acceptance, by conveying the strip covered by the avenue to another. *Brown v. Stark*, 83 Cal. 636.

To make such dedication complete, no formal acceptance by the town authorities is necessary. The owner of the land holds the title to the property dedicated in trust for the public. *San Leandro v. Le Breton*, 72 Cal. 170.

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Where a strip of land has been dedicated and accepted as an avenue, and lots sold with reference thereto, the former owner cannot vary the nature of the strip by her own statement that she intended it only as a private alley. *Brown v. Stark, supra*.

A general dedication of land for public squares implies that they are to be enjoyed by the public at large, and they cannot rightfully be appropriated by city authorities for the use of the city in the management and conduct of its economic affairs. *Church v. Portland*, 6 L. R. A. 259, 18 Or. 73.

An owner of land around a public park, the fee of which is owned by the city, has no vested interest therein, such as will enable him to prevent the city, under sanction of the Legislature, from discontinuing the park and converting the land to other uses. *Clarke v. Providence*, 1 L. R. A. 726, 16 R. I. 337.

Where a parcel of ground in a city of the third class in Kansas is dedicated for a public park, the city, and not the board of county commissioners, is entitled to its control and possession. *Hurd v. Harvey County*, 40 Kan. 92.

Where a person has long enjoyed the use of land on a public square as appurtenant to his hotel, which right was granted to a former owner of the hotel lot, weighing scales cannot be erected thereon to his annoyance and injury, under an order of the trustees of the town granting the privilege of setting up such scales on condition that they should not interfere with the use of other private property. *Gibson v. Black* (Ky.) Sept. 20, 1898.

otherwise, they are the parties to enforce them, and not the Commonwealth.

Peole v. Huskinson, 11 Mees. & W. 827; *Bermundsey v. Brown*, L. R. 1 Eq. Cas. 215.

No public way can be established by dedication merely, and without the assent, express or implied, of the city or town bound by law to keep it in repair.

Bowers v. Suffolk Mfg. Co. 4 Cush. 340. See also *Peole v. Huskinson*, *supra*.

To constitute a dedication there must "be an abandonment by the owner to the use of the public exclusively, and not a mere user by the public in connection with a user by the owners in such measure as they may desire.

Washb. Easem. p. 205

An acceptance is necessary.

Townson v. Tickell, 3 Barn. & Ald. 87.

In this case, the Town voted not to accept, or, what is the same thing, to indefinitely postpone the consideration of an offer. Express acceptance by the town and repairs made by its officers are admissible to prove acceptance.

Rees v. Chicago, 38 Ill. 322.

There was none in this case. Direct recognition by the proper authorities is required.

Hyde v. Jamaica, 27 Vt. 473; *Tillman v. People*, 12 Mich. 401; *Jordan Trustees v. Otis*, 37 Barb. 50.

The owner of the land must intend to make the gift, and it must be accepted by the public authorities.

Travclon v. Templeton, 71 Ill. 68; *Hayden v. Stone*, 112 Mass. 346; *Derby v. Alving*, 40 Conn. 410; *Fairfield v. Morrey*, 44 Vt. 239; *Portland v. Whittle*, 3 Or. 126.

It is necessary, in the very nature of things, that in order to constitute a dedication, there must be an acceptance by the city or town in which the land dedicated is located. Some body that has a tangible existence must assume the responsibility or obligations which may from time to time attach in respect to that land.

Bowers v. Suffolk Mfg. Co. 4 Cush. 332, 340; *Hayden v. Stone*, 112 Mass. 346-351; *Guild v. And*, 150 Mass. 255; *Morse v. Stocker*, 1 Allen, 154.

C. Allen, J., delivered the opinion of the court:

A perusal of the voluminous evidence, aided by the full briefs of counsel, shows to our satisfaction that there was an intention on the part of the owners of the parcels of land called Ocean Park, Hartford Park, and Waban Park, to dedicate them to the use of the public as parks, and that the same were used by the public enough to show an acceptance thereof, prior to the year 1860.

It will not be useful to state in much detail the evidence which leads to these results, or to discuss the particulars in which witnesses disagree or contradict each other. The general features, however, are as follows: In 1866, six persons united in a plan for making a place of summer resort at Oak Bluffs in Edgartown. One of them already owned a large lot of vacant land which was deemed suitable for the purpose. Each of the five others purchased an undivided sixth part thereof. A professional landscape gardener, Mr. Copeland, was employed to lay out the grounds in such a manner as would be likely

to attract people who would come there only for the summer, and to induce them to buy lots, build cottages, and establish a village. In 1867, a deed of the premises was made to two of their number as trustees, for the benefit of the six owners; and in 1868 an Act of incorporation was obtained, and the land was conveyed to the corporation. The sole purpose of the corporation was the holding, improving and disposing of the land and a wharf then held by the two trustees, with power, also, to purchase, hold, improve and dispose of other adjacent lands. Stat. 1868, chap. 60. At the outset, the original six owners constituted all of the stockholders of the corporation, and they all became directors. According to the by-laws, four directors constituted a quorum, with full power to do all that the full board of directors could do; and the directors were to prepare the real estate of the company for sale, make sales thereof, expend all moneys, and dispose of all other property of the company in such manner as they should judge best calculated to promote the object of the company, and advance the interest of the stockholders, and make such improvements as they might deem advisable. Plans for laying out the proposed village were prepared by Mr. Copeland showing open spaces not divided into lots. These plans underwent certain changes in matters of detail. One plan, recorded August 20, 1867, showed such an open space, to which on later plans the name of "Ocean Park" was given, though with a change of limits. After this, and after the corporation was formed, other land was bought, and a new plan was made, which was recorded May 7, 1870, showing the three parks now in controversy described by their names. After this, there was no change in the boundaries of Hartford and Waban Parks, but there was a change in Ocean Park. A new plan was made, dated June 1, 1871, showing Ocean Park with somewhat modified boundaries, and the other parks as in the earlier plan, and this was recorded July 5, 1871. Still another plan was made in 1871, showing the three parks without change of limits, and this was recorded in 1873. A few lots were bargained for in 1867, but no sales were actually completed till 1868, after which lots were rapidly sold, to the number of five hundred within three years. Copies of the several plans were struck off, and widely circulated. The printed copies of the plan which was recorded August 20, 1867, had the name of "Ocean Park" added. Some of these were framed, and hung up in hotels, steamboats, railroad stations, and other public places. Very many were distributed through the mails. During all the period of settling the plans, great pains were taken to give wide publicity to them, not only in the above methods, but by circulars and advertisements calling attention to them, and by printing a reduced copy of one or more of them upon letter sheets. Copies of the plans were also kept in the directors' room for free distribution.

The testimony makes it very plain that the establishment of open spaces or parks was deemed an important feature of the scheme

for selling lots. At the outset it was a matter of discussion among the parties interested. Lots fronting upon the parks or having an unobstructed view of them, were deemed more attractive. Assurances were freely given by those having charge of the sale of the lots that these spaces or parks should always be kept open. Four of the original owners testify in distinct terms that it was the intention of those interested in the enterprise to make them open parks, free to the public forever. This is so extremely natural and probable, and any other course would be so unlikely, that evidence of a contrary intention on the part of any one of them would be received with some distrust. If the corporation had announced at the time of making the sales that it reserved the right to cut up the open spaces into building lots to sell them, after the village should be established, it would no doubt have diminished the sales. If the corporation had an intention to reserve this right, the course pursued of inviting purchasers was inconsistent with common honesty.

The defendant concedes that some of the original owners and stockholders in the corporation gave such assurances to purchasers and in various ways gave wide publicity to the plan of having these places kept open as public parks; but he contended that two of them did not assent to this course. One of these, Mr. Darrow, died in 1871; the other was a witness in the case. As to both of these, the evidence is satisfactory to show that they assented to the plan in manner and form as it was put forth to the public. Mr. Darrow at the outset thought too much land was devoted to the parks, but after discussion, acquiesced in the opinion of the majority. The other one, while in his direct testimony he denied that he ever assented to the plan, or that there was ever any authority to bind the owners of the land or the corporation by a dedication of the parks to the public, yet admitted that he knew of the existence of the plans and of their being on record, that he had seen them at many places, and that he gave away some of them himself; probably some of each.

The defendant also suggests that one Worth was interested, and never assented to the dedication. Worth held a bond from Bradley for one half of Bradley's share of the proceeds of sales, but his title was not such as to give him a voice in the proceedings, or to make his assent or dissent material. He did not become a stockholder in the corporation till 1877.

Without dwelling upon various other particulars of the evidence, which tend in the same direction, we cannot doubt that it was a part of the scheme of the enterprise or speculation that the public should understand that these spaces should be left open for public use, and that no right was reserved to sell them for building lots; and that the corporation held out to the public this assurance, and at the time fully and fairly intended to give up this right; and that the two persons upon whose supposed dissent the defendant relies did not in fact dissent at the time. If they had done so, their dissent

would be overborne by the action of the other four; but it seems to us more reasonable and probable to suppose that at the time they acquiesced, if they did not fully concur, in the views of the majority.

It is not necessary to go nicely into the question, at what time the intention to devote these open spaces to the public became fully formed. There certainly was an intention that some spaces should be left open, at an early day. Before the corporation was created a plan showing such spaces was prepared and put on record. Some changes were afterwards made in the boundaries. The land containing "Waban Park" was subsequently purchased.

The limits of these three several open spaces were finally settled after the corporation was formed. For a time, there was a somewhat fluctuating intention, so far as limits and boundaries were concerned. But the limits as shown on the last two plans may be taken as representing the final conclusion of the corporation as to the limits of the spaces that were to be left open.

The fact that not much was done to adorn these spaces, and that the corporation itself did whatever was done in this respect, and to some extent it seemed to exercise a certain control over the land, is not of much weight in opposition to the conclusion to which we have come. The chief element of a public park, in such a place, at least till the village is well settled, is to have the land kept open. The adornment would naturally come later if at all. The corporation did a little toward improving and caring for these open spaces. It had some interest in doing so. Ordinarily, when parks are established for public use, the municipal authorities exercise control over them. It was not so here. Whatever was done was done by the corporation, which to some extent did what municipal authorities usually do. Washb. Easem. *146, 147, 156. The corporation was interested in pushing its speculation, and as long as it had many lots left for sale it did something for the parks; but afterwards they were much neglected.

On the whole, we think the evidence is sufficient to show an offer to the public of the spaces shown on the last two plans, as Ocean, Hartford and Waban Parks.

In *Atty-Gen. v. Whitney*, 187 Mass. 450, where a majority of the court thought there was not sufficient evidence of such an intention, the evidence of dedication was far less strong.

The acceptance of such a dedication at common law need not appear of record, and need not be by the town. The acceptance is by the public at large, and the principal thing to show it is used by the public. Washb. Easem. *126, 129, 140. There is no need of a formal grantee. The fee remains in the original owner. *Cincinnati v. White*, 31 U. S. 6 Pet. 481, 8 L. ed. 452. No assent of the town is necessary, because no burden is put upon the town, as in the case of a way. The improvements upon a park thus dedicated are left to be made by those who are interested. The town may take it up, or it may be left to individuals. If in a

seaside summer resort no improvements at all are made, there will still be some benefit from having a space left for air, and for an open unobstructed prospect. Whether the easement of a public park could be accepted merely by enjoying an unobstructed view over it of the ocean need not be considered. Various other acts of use of all the parks are shown, sufficient to show an acceptance of them by the public. Such acceptance need not be very specific.

The defendant contends that such acceptance must have been by the Town of Edgartown originally, or by the Town of Cottage City afterwards. The chief argument in support of this view is, that there must be somebody who can be held responsible for the abatement of a nuisance, if one should exist upon the property; and that if the dedication is not to the town, and accepted by the town, there is virtually no owner of the property. This argument is of force, but the technical answer is that the fee remains in the original owner. The dedication for a park carries only an easement. This easement is not in the town, but it is in the public at large. There may be inconveniences in this doctrine, in cases which are supposable and possible, but the doctrine itself has been widely adopted, and has been expressly recognized as in force in this Commonwealth. *Abbot v. Cottage City*, 143 Mass. 521, 8 New Eng. Rep. 778. We need not consider whether this mode of accepting a park has been done away with by Stat. 1862, chap. 151.

The defendant further contended that he was a bona fide purchaser for value, without notice, and that his title should therefore be protected. This argument, however, cannot prevail, for two reasons. In the first place, purchasers of real estate must take notice of such a fact as a dedication to the public, in like manner as they must take notice of a title gained by adverse possession. There are various infirmities to which titles which appear good on the records are exposed. *Gillette v. Rogers*, 146 Mass. 610, 6 New Eng. Rep. 297, and cases there cited. If a dedication has become complete, the original owner cannot afterwards resume control or convey the land free from the easement of the public, any more than if the easement had been gained by prescription. *Washb. Easem.* *139; *Goddard, Easem.* 181; 2 Greenl. Ev. § 662; *M. E. Church Trustees v. Hoboken*, 38 N. J. L. 13.

But, moreover, in the present case, the defendant was fully put upon inquiry as to the facts, and made a laborious investigation of them, but came to a conclusion either upon the law or upon the facts different from that which we have reached. Under such circumstances, it cannot be held that he was a purchaser without notice. The price which he paid was far less than the value of the land, provided the title was clear, and whatever may have been the defendant's opinion as to the validity of his title, he certainly had reason to know that it was liable to be questioned.

Decree for the plaintiff.

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WATUPPA RESERVOIR CO.

CITY OF FALL RIVER.

TROY COTTON & WOOLEN MANUFACTORY

SAME.

(.....Mass.....)

1. The title to great ponds passed under deeds from Plymouth Colony, which plainly intended to convey them although the intention appears only from the habendum clauses of the deeds, no mention of them being found in the granting clauses.
2. The fact that a town was incorporated two years after the Colonial Ordinance of 1647, declaring the public rights in great ponds, became law, with boundaries nearly coincident with those of a prior private land grant, will not cause the territory embraced thereby to be treated as town property in determining the application of the ordinance to ponds situated therein, where the town is not shown to have ever assumed proprietorship over the land or ponds, and they appear to have been always dealt with as private property.
3. The rights in a great pond which had been appropriated to private persons, and was held by them as private property at the time the Colony Ordinance of 1647, declaring the public rights in great ponds, became operative, were not affected by that ordinance.
4. Where a colony conveyed a portion of a great pond to private owners prior to the taking effect of the Ordinance of 1647, which declared the public rights in great ponds, neither it nor its subsequent grantees of the remaining portion could, as owner and apart from the exercise of sovereign powers, draw off the water of the pond to the detriment of the prior grantees.
5. Although the Ordinance of 1647, declaring the public rights in great ponds, became applicable in Plymouth Colony as part of the common law, the fiction that the common law has existed immemorially does not require its application to transactions which arose prior to the Province Charter which made such law applicable therein.
6. A corporation composed of representatives of the several mills owning water-power on a river, which has built and maintains a dam at the outlet of the reservoir, and controls the whole waterpower in the interest of the owners for their benefit, may sue to enjoin third persons from drawing water from the reservoir.

(September 3, 1891.)

APPEALS by complainants from decrees of the Superior Court for Bristol County dismissing bills filed to enjoin defendant from drawing water from the Watuppa Ponds. *Reversed.*

NOTE.—This subject has received extended treatment in a note appended to *Henry v. Newburyport* (Mass.) 5 L. R. A. 179. See also *Watuppa Reservoir Co. v. Fall River*, 1 L. R. A. 406, 147 Mass. 556; *Proprietors of Mills v. Braintree Water Supply Co.* 4 L. R. A. 272, 149 Mass. 478; *Fernald v. Knox Wool Co.* 7 L. R. A. 459, 82 Me. 42; *Atty-Gen. v. Revere Copper Co.* 9 L. R. A. 510, 153 Mass. 444.

The facts are stated in the opinion.

Messrs. E. R. Hoar and Jennings & Brayton, for appellants:
The title to the Watuppa Ponds was in the Colony of Plymouth.

It owned the soil and the waters and had a right to convey the same.

If it imposed no conditions or restrictions in its deed, the grantee would hold upon the same conditions on which the State held it and no other.

Cedar Rapids & M. R. R. L. Co. v. Courtwright, 88 U. S. 21 Wall. 310, 22 L. ed. 582; *Vannickle v. Haines*, 7 Nev. 249.

The Pocasset deed conveys all ponds, waters, etc., in explicit terms. It is not a case of doubtful construction where the construction is to be in favor of the public.

See *Holyoke W. P. Co. v. Lyman*, 82 U. S. 15 Wall. 500, 21 L. ed. 133.

It is to be construed as any private grant would be construed.

Boston v. Richardson, 13 Allen, 156, 157.

The grant is absolute and unlimited on its face. Unless controlled by some statute of the Colony limiting and restricting its operation, the riparian owners of the "mill lot" cannot be deprived of the natural flow of the stream without compensation. No legislation subsequent to the grant can divest them of any part of it.

Dartmouth College v. Woodward, 17 U. S. 4 Wheat. 518, 4 L. ed. 629; *Holden v. James*, 11 Mass. 396; *Cooley*, Const. Lim. 360; *King v. Dedham Bank*, 15 Mass. 454; *Jones v. Jones*, 6 Cent. Rep. 391, 104 N. Y. 234; *Cedar Rapids & M. R. R. L. Co. v. Courtwright*, *supra*; *New Orleans Gas L. Co. v. Louisiana L. & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *Morawetz*, Priv. Corp. § 419; *Brown v. Grant*, 116 U. S. 207, 29 L. ed. 598; *Warren v. Charlestown*, 2 Gray, 84.

When a State sells a water privilege it cannot prevent the proper and reasonable use of it, nor derogate from the beneficial use of its grant.

Union Mill & Min. Co. v. Ferris, 2 Sawy. 176; *Union Mill & Min. Co. v. Dangberg*, Id. 450.

A legislative grant conveys with it all the fruits and effects of it.

Tymannus v. Williams, 7 Humph. 80; *Shep. Touch. 89*; *Rood v. New York & E. R. Co.* 18 Barb. 80.

Until 1692 the Ordinance of 1641-47 had no force in Plymouth Colony.

Litchfield v. Scituate, 136 Mass. 46; *Watuppa Reservoir Co. v. Fall River*, 1 L. R. A. 466, 147 Mass. 556.

A grant in Massachusetts Colony, prior to 1641, of a pond by a town, would have been valid.

Berry v. Raddin, 11 Allen, 580.

A grant of land by a State is a contract governed by the laws in force when it is made, and is protected by the Constitution from impeachment by a subsequent law.

Walker v. Whitehead, 83 U. S. 16 Wall. 314, 21 L. ed. 357; *Jackson v. Lamphire*, 28 U. S. 3 Pet. 280, 7 L. ed. 679.

The fact that in the deed rivers, waters, etc., are not specifically named, makes no difference to the deed's legal effect in conveying all the water rights and privileges which by law ap-
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pertained to the land bordering upon the stream.

Whitney v. Wheeler Cotton Mills, 7 L. R. A. 618, 151 Mass. 396.

If the State owned a part of one of these ponds it would have no right to divert the waters or do anything to or with them that would impair or interfere with the rights of other parties in the waters of the pond.

Atty-Gen. v. Revere Copper Co. 9 L. R. A. 510, 152 Mass. 444.

The Ordinance of 1641-47 applied solely to ponds lying in common, which means ponds not previously conveyed or appropriated in whole or in part to any particular person or persons.

Tudor v. Cambridge Water Works, 1 Allen, 164.

Messrs. James F. Jackson and Edward Higginson, for appellee:

The Commonwealth is the absolute owner of great ponds, holding them as trustee for the public uses and enjoyment, by a title similar to that which it has in navigable rivers and tide waters, and no private rights of property exist in such ponds.

West Roxbury v. Stoddard, 7 Allen, 158; *Paine v. Woods*, 108 Mass. 160; *Fay v. Salem & D. Aqueduct Co.* 111 Mass. 27; *Hittinger v. Eames*, 121 Mass. 539; *Atty-Gen. v. Jamaica Pond Aqueduct Corp.* 133 Mass. 361; *Watuppa Reservoir Co. v. Fall River*, 1 L. R. A. 466, 147 Mass. 548.

The reasoning is similar to that governing the consideration of public and private fishery rights.

Cole v. Eastham, 133 Mass. 65.

The principle already applied to owners on the shore is applied to owners upon the outlet stream.

Fernald v. Knox Wool. Co. 7 L. R. A. 459, 83 Me. 42; *Fay v. Salem & D. Aqueduct Co.* 111 Mass. 27; *Potter v. Howe*, 2 New Eng. Rep. 167, 141 Mass. 357.

The Ordinance of 1647 is not only in force throughout the whole territory of this State, but its rule was established as the law of the Plymouth Colony.

Barker v. Bates, 13 Pick. 255; *Watuppa Reservoir Co. v. Fall River*, 1 L. R. A. 466, 147 Mass. 548, 556.

The principle of the Ordinance of 1647 was an active rule of law, applicable to the Watuppa Pond, in the years (1680, 1686) when the grants now relied upon by plaintiffs were made; and to avail plaintiffs it must be found that the grants "conveyed to them the title to the ponds or the waters thereof."

Ibid.

The grants must be construed with reference to the rules of law existing at the time they were given, including the rule found in the Ordinance of 1647.

Bishop, Cont. §§ 456, 460; *Damman v. Commissioners of S. & U. Lands*, 4 Wis. 414.

The terms of these grants are to be taken most strongly against the grantees and in favor of the grantor; and the grants will not be held to include the Watuppa Pond "unless it is included in its terms by express words or necessary implication."

Watuppa Reservoir Co. v. Fall River, *supra*;

Com. v. Roxbury, 9 Gray, 451, 492, 493; *Cleveland v. Norton*, 6 Cush. 380; *Treat v. Lord*, 42 Me. 552; *Martin v. Waddell*, 41 U. S. 16 Pet. 367, 10 L. ed. 997.

The Pocasset grant mentions "ponds" in the habendum clause; "and yet if the thing granted be only in the habendum and not in the premises of the deed, the deed will not pass it."

Shep. Touch. 75; 2 Greenl. Cruise, title 32, chap. 21, §§ 68, 73, 75; *Sumner v. Williams*, 8 Mass. 162, 175; *Pynchon v. Stearns*, 11 Met. 312, 316; *Goodtitle v. Gibbs*, 5 Barn. & C. 709, 717.

Even if the word "ponds" were expressly mentioned in the granting clause, it should not be held to include great ponds held in trust for the public by the grantor.

Reg. v. Northumberland, Plowd. 310.

If the terms of the grants are ambiguous as to the great ponds, evidence of contemporaneous and long-continued usage is admissible to ascertain the intent.

Rogers v. Goodwin, 2 Mass. 477; *Chad v. Tiled*, 2 Brod. & Bing. 408; *Duke of Beaufort v. Swansea*, 8 Exch. 425; *Jackson v. Wood*, 13 Johns. 346.

If any title in the pond passed to the Proprietors of Freetown or of Pocasset, it was the legal title only, the beneficial right remaining in the public. The Proprietors never attempted to convey to a private person. If they had so attempted it would have been "in violation of law and of no effect."

Atty-Gen. v. Revere Copper Co. 9 L. R. A. 510, 152 Mass. 444.

The grants must be construed with reference to the situation of the parties, the state of the country and of the thing granted.

Adams v. Frothingham, 3 Mass. 352; *Com. v. Roxbury*, 9 Gray, 451, 498.

Bodies of proprietors bore a semi-political character, and although for certain purposes they have been held to possess some of the rights of ordinary tenants in common, yet, whether under the name of "proprietors," "freemen," or "townsmen," their organization largely partook of a public nature.

Com. v. Roxbury, *supra*; *Angell & A. Corp. chap. 6*; *Order of Gen. Ct. of Plym. Rep. 12*.

The Pocasset proprietors acted in the manner common to such bodies in both colonies, as to their meetings, orders, etc. Both Pocasset and the Freeman's purchase were incorporated as towns soon after the settlement. The former became Tiverton (1694) and the latter Freetown (1693). When the boundary disputes with Freetown (Rep. 10) were settled in 1700 the agreement was made between "the proprietors of Freetown" and "the proprietors of Tiverton." The line they agreed upon continued to be the division line between the two towns.

Fowler's Hist. Fall River, pp. 21, 62.

Holmes, J., delivered the opinion of the court:

These are the same cases which are reported in 147 Mass. 548. Since that decision other facts have been added to the agreed statement and the cases have been reargued with reference not only to the facts now first appearing but also to the old ones, and we have been asked to reconsider our former judgment. We intend, however, to express no opinion
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on the questions passed on then, because apart from the questions upon which our opinions were divided we are agreed that the plaintiffs now make a case calling for the interposition of this court.

The plaintiffs are successors in title to grantees of Plymouth Colony, to whom the land under and on both sides of the outlet of the pond, the Fall River, to a point below the plaintiff's dam, was conveyed as part of a large tract. This conveyance was made on March 5, 1680, to Church, Gray and others, and is known as the Pocasset grant or purchase. The territory described in the granting clause of the deed included the whole of the South Watuppa Pond and a large part, but less than half, of the North Watuppa Pond. The habendum is "all the above mentioned and bounded lands with all and singular the woods, waters, coves, creeks, ponds, brooks, benefits, profits, privileges, and hereditaments whatsoever in before arising, accruing, belonging or thereto anyways appertaining, or to any part or parcel thereof." The plaintiffs also own other land on the Fall River as successors in title to other grantees of Plymouth Colony, to whom another large tract was conveyed in 1656, including all of the North Watuppa Pond not embraced in the Pocasset grant. This is known as the Freeman's purchase.

The new questions concern the effect of these deeds and more especially of the Pocasset grant. Leaving the Ordinance of 1647 on one side for the moment, we are of opinion that that grant purported to convey the ponds and waterpower embraced within its boundaries to the grantees as private owners. It is argued that great ponds not being mentioned in the granting clause they must be taken to be excepted, and that the habendum cannot increase the gift. But no such technical argument can be allowed to prevail against the plain meaning of one of our early deeds, if it ever would have prevailed in a case like this anywhere. In the conveyances made early after the settlement of the country, artificial rules yield to the intention to be gathered from the four corners of the instrument, *propter inopiam consilii*. *Ipswich Grammar School v. Andrews*, 8 Met. 584, 592; *Berry v. Raddin*, 11 Allen, 577, 581.

It is argued also that the title of the grantees is to be dealt with on the same footing as the title of a town, and therefore as subject to the Ordinance of 1647 when that became the law. If so, then if the land at the outlet of the pond was held undivided by the original proprietors until after the Province Charter (1692), it might follow that the former decision in this case was still applicable. The Town of Tiverton was incorporated in 1694, with boundaries, it is said, nearly coincident with those of the Pocasset grant. Moreover we presume that there is no doubt that "in the early settlements in the country, proprietors, commoners and towns were often confounded." 2 Dane, Abr. 698. If we had before us a case where after a grant of land and a great pond to proprietors the same grantees or their successors were incorporated as a town and thereafter the town had assumed to act as the proprietor of

the land and pond, and in that state of things the Ordinance of 1647 came into operation, we might hesitate to say that the pond was not within the scope of the ordinance. *West Roxbury v. Stoddard*, 7 Allen, 158, 171. But the elements of the case supposed or of any equivalent to it are wanting. The original conveyance, the Pocasset grant, is not a grant to or the incorporation of a town. It is a sale of land as private property to private individuals for a substantial sum of money. As we have said this sale embraced the water right now claimed. So far as appears, or as we have any reason to suspect, the whole land and water rights conveyed have been dealt with as private property from that day to this. There is no ground for saying that when the Ordinance of 1647 became law in the Plymouth Colony or at any later moment it found the Watuppa ponds the property of the Colony or of a town or in a like position for the purposes of the ordinance. We may add that the Town of Tiverton was not in existence until two years after the date of the Province Charter which it seems is to be taken as the date when the Ordinance of 1647 was extended to Plymouth. *Litchfield v. Scituate*, 136 Mass. 39, 46, 47.

There is no doubt, of course, that if the pond and the rights claimed by the plaintiffs had been appropriated to private persons before the ordinance went into effect those rights remained unaffected afterwards. *Berry v. Raddin*, 11 Allen, 577. Again we do not understand it to be disputed that if the original Pocasset grantees got a private right to the waterpower now used by the plaintiffs, and did not lose it at the date of the Province Charter, the plaintiffs now have it. It seems to be plain that whatever mill or water rights the Pocasset grantees had at the mouth of the pond they conveyed to the plaintiff's predecessors in title. Finally, if the whole of the Watuppa ponds was the subject of private ownership or if the colony retained a part of one subject to its conveyance of the rest to the Pocasset grantees, the other owner, whether the grantees of the Freeman's purchase or the colony, in its capacity of owner and apart from the exercise of sovereign powers, could not draw off the water to the detriment of the Pocasset grantees. See *Tudor v. Cambridge Water Works*, 1 Allen, 164; *Smith v. Moodus Water P. Co.* 33 Conn. 460.

The only question which remains is whether the Ordinance of 1647 modifies the conclusion to which we have come apart from it. This may be answered in a few words. In *Litchfield v. Scituate*, 136 Mass. 39, 46, it is said that there is no sufficient evidence that the ordinance was the law of Plymouth Colony before its union with Massachusetts under the Province Charter, and on the next page the time when the Province Charter passed the seals is indicated as the moment when we are to take it that the ordinance became applicable to that part of the State. It is true that when it did become applicable it became so as part of the common law and that the fiction generally applied in respect to the common law is that it is only declared by the courts and has existed immemorially. But when the Ordinance of 1647 is said to be part of the common law of Plymouth all that is meant is that, as we said in *Litchfield v. Scituate*, it has been extended to that territory by usage and by judicial decision. Such an extension does not necessitate a fiction that the law has been so always, which would be as unreasonable as a change of private rights in the guise of a declaratory statute. It is fiction enough if we assume that the common law of Plymouth conformed to the ordinance from the date of the Province Charter, a date too late to affect the plaintiffs in this case. An illustration may be suggested from our common law as to prescription. This has conformed to the Statute of Limitations as they have been altered from time to time. *Melvin v. Whiting*, 10 Pick. 295, 297; *Edson v. Munsell*, 10 Allen, 557, 565; *Coolidge v. Learned*, 8 Pick. 504. But we do not suppose that it would be argued that when the Statute was changed the common law was changed for past time, retrospectively, so that, for instance, the use of a way for twenty years while the Statute of 1786, chap. 13, was in force should now be held to have gained a right, although at the time it was insufficient to do so.

There is no question made as to the remedy, if the plaintiff's rights are established. *Tudor v. Cambridge Water Works*, 1 Allen, 164.

We regard what we have said as sufficient to establish the rights of the Troy Cotton & Woolen Manufactory. It owns the land at the outlet of the pond. This being so, probably it is not regarded as material whether an injunction shall be issued in the case of the Watuppa Company also. That is a corporation made up of the representatives of the several mills owning waterpower on Fall River, but seems not itself to be an owner of land or water rights. We gather, however, from the facts admitted that it has built and is in possession of a dam at the outlet of the pond and controls the whole waterpower in the interest of the owners for their benefit. We are disposed to think that it shows a sufficient possession under the title of the owners to warrant the issuing of an injunction in its behalf.

Decree for plaintiffs.

Wilbur H. POWERS

v.

Jerome F. MANNING.
(2 Cases.)

(...Mass....)

1. A note 'payable "when the United States pays judgments" of the Court of Commissioners of Alabama Claims in the so-called class two cases' became due when a dividend had

NOTE.—Judges of Court of Commissioners of Alabama Claims.

The judges of the Court of Commissioners of Alabama Claims hold their offices while the court continues to exist, unless they are lawfully re-

been paid upon such portion of the judgments as to substantially exhaust the fund applicable to them. Full payment was not necessary.

2. Each separate item of an account upon which suit is brought may be composed of several elements if all taken together constitute but a single item of charge upon the same subject matter.

3. The fees of commissioners appointed to take testimony by the Court of Commissioners of Alabama Claims are not regulated by U. S. Rev. Stat., § 847, but such commissioners may make any contract in regard to compensation which may be agreed upon.

4. In considering exceptions to rulings of the trial court in an action to recover compensation for acting as commissioners to take testimony under appointment by the Court of Commissioners of Alabama Claims, the Supreme Court will not receive a copy of the instructions issued by that court to its commissioners; if material it should have been put in evidence at the trial.

5. An attorney's withdrawal from a case before it is finished, even without the consent of his client or the court, will not deprive him of the right to compensation for services already rendered, if it was for good cause upon reasonable notice and the client was not prejudiced thereby.

(September 5, 1891.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of two actions brought to recover the amount alleged to be due on certain promissory notes, and also to recover for services alleged to have been rendered by plaintiff to defendant, in which the court found for plaintiff. *Overruled.*

The facts are stated in the opinion.

Mr. Jerome F. Manning, defendant, *in propria persona.*

Mr. H. L. Boutwell for plaintiff.

Lathrop, J., delivered the opinion of the court:

These are two actions of contract tried in the superior court, without a jury. In each case the presiding justice found for the plaintiff; and the case comes before us on the defendant's exceptions.

The first count in the first case is on a promissory note, dated July 11, 1884, by the terms of which the defendant promised to pay the plaintiff the sum of \$685, "when the United States pays judgments of the Court of Commissioners of Alabama Claims in the so-called class two cases."

The defendant asked the court to rule that this note did not become due and payable until the United States had paid all such judgments in full, and that this action, as to said note, had been prematurely brought.

The court refused so to rule, as it appeared at the trial that the United States had substantially paid all judgments of the first class in full, and had paid 35.22 per cent of the greater part of the judgments of the second class, and substantially exhausted the fund.

The Court of Commissioners of Alabama Claims was constituted by the United States Statute of June 23, 1874, for the purpose of receiving and examining all claims, admissible under the Act, resulting from damage caused by the Alabama and other designated confederate cruisers. The claims allowed by this tribunal did not equal the amount of the award of the arbitrators appointed in pursuance of the Treaty of Washington between the United States and Great Britain, and which had been paid to the United States.

The Court of Commissioners of Alabama Claims having ceased to exist, Congress, by the Act of June 5, 1882, re-established it for the term of two years. By § 4 it was authorized to receive and examine the claims mentioned in § 5, and to enter judgments for the amounts allowed therefor in two classes. Section 5 defines the claims of the two classes. Section 7 provides that the judgments rendered by the court under the Act shall be paid by the secretary of the treasury out of the sum of money paid to the United States under the Treaty of Washington, and not appropriated to claims proved under preceding legislation. Section 8 provides that "judgments entered in the first class shall be paid before judgments of the second class are paid. If the sum of money so appropriated shall be insufficient to pay the judgments of the first class, they shall be paid according to the proportions which they severally bear to the whole amount of such unappropriated sum. If such sum shall be sufficient to pay the judgments of the first class and not sufficient to pay the judgments of the second class, the latter judgments shall be paid according to the proportions which they severally bear to the residue of such unappropriated sum after the judgments entered in the first class are paid." 22 U. S. Stat. at Large, 98.

Construing the condition contained in the note in suit and the finding of the court in connection with the terms of this Statute, we are of opinion that the ruling requested was rightly refused.

The award of the arbitrators was to the United States as a nation; and the fund was "to be distributed by Congress as it saw fit. No individual claimant had, as matter of strict legal or equitable right, any lien upon the fund awarded, nor was Congress under any legal or equitable obligation to pay any claim out of the proceeds of that fund." *Williams v. Heard*, 140 U. S. 529, 537, 538,

moved therefrom; and on continuance of the court for a further term they continue in office without the necessity of a reappointment. *Manning v. French*, 4 L. R. A. 339, 149 Mass. 301.

Jurisdiction, practice and procedure of the Court of Commissioners of Alabama Claims. See notes to *Kingsbury v. Mattocks (Me.)* 3 L. R. A. 463.

The payment of the expenses of the Geneva Arbitration has not been charged by Congress upon 13 L. R. A.

the fund received under the award. *United States v. Weld*, 127 U. S. 51, 32 L. ed. 62.

The prohibition in the Act of 1874 concerning compensation for collecting such claims is limited to liens, sales or assignments creating a right of property in the claim itself, and not to personal agreements as to compensation. *Bachman v. Lawson*, 109 U. S. 659, 27 L. ed. 1067. See note to *Kingsbury v. Mattocks (Me.)* 3 L. R. A. 462.

35 L. ed. 550, 553, 554. When, therefore, the note in suit was made payable "when the United States pays judgments of the Court of Commissioners of Alabama Claims in the so-called class two cases," the parties to the note had reference to claims which could be enforced only under the terms of the Statute, which were to be paid out of a specific fund, in subordination to cases of the first class, and which were in a certain contingency to be paid proportionally.

The remaining exception in the first case may be briefly disposed of. The second count is on an account annexed, which contained over twenty items. The defendant objected to several of these items on the ground that the plaintiff sought in each of them to recover for services in several different matters, and the defendant asked the court to rule that the plaintiff could recover for but one matter of charge under each of said items, and also asked the court to rule that there could be no recovery on any of said items. The court found upon the evidence, as a fact, that the different matters mentioned in each of said items constituted one item of charge upon the same subject matter; and refused to give the rulings requested. One of these items is as follows: "1885, Dec. 8. To letter to Payson and Speer, and two page letter to Brigham, \$3."

If these letters related to the same subject matter, we are unable to see why one charge might not be made, and why, being so charged, they could not be inserted in one item. The other items are similar and fall within the same rule.

The case of *Jones v. Holey*, 1 Allen, 273, on which the defendant relies, is clearly distinguishable. The defendant in that case filed a declaration in set-off, one item of which was as follows: "To goods sold, materials found, and work done, \$100."

At the hearing before an auditor, the defendant introduced evidence of several distinct matters of charge under said item. At the trial this item was disallowed. In delivering the opinion of the court, Chapman, J., said: "The item in the account in set-off, 'To goods sold, materials found, and work done, \$100,' should not have been entirely rejected. In many cases all these particulars may enter into a single item of charge. And any single thing of which that item gives reasonable notice might have been proved. But it appears that the auditor allowed the defendant to prove several particulars, with the various prices of the same, under this single item. This was erroneous. Under a single item of his bill, the defendant should have been limited to the proof of a single article."

In the second case, one of the counts was on an account annexed in which the plaintiff sought to recover on an oral agreement made between himself and the defendant, by which the defendant promised to pay him at the rate of \$20 a day for every business day in which he was engaged in taking depositions, as a commissioner appointed by the Court of Alabama Claims, for the defendant. Other counts were upon promissory notes, the con-

sideration of which was services rendered as such commissioner and as an attorney.

The charges for such services are found by the court not to conform either in form or amount, to the provisions of U. S. Rev. Stat., § 847. The defendant asked the court to rule "that the plaintiff, as commissioner of the Court of Commissioners of Alabama Claims, was a public officer; that the fees to which he was entitled for services as such commissioner were regulated by the Revised Statutes of the United States, § 847; and that he can recover no more fees than those prescribed in the said section, even though the defendant expressly agreed to pay him more; and also that, having made a special contract in reference to his fees which is opposed to public policy, the plaintiff cannot recover on a *quantum meruit*. The court refused so to rule, and found for the plaintiff.

Section 847, U. S. Rev. Stat., is entitled "Commissioners' Fees," and prescribes what are the legal fees of such persons. Section 823 of the same chapter provides that "the following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, . . . except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties."

The commissioners mentioned in the above sections are undoubtedly the commissioners authorized by section 627 of the United States Revised Statutes, to be appointed by each circuit court. This was expressly so decided by Judge Choate in *Sedgwick v. Grinnell*, 10 Ben. 6, and is apparent from a consideration of all the provisions of the chapter. Thus, by § 846, the accounts of "commissioners of circuit courts" are required to be examined and certified by the district judge of the district for which they are appointed. The fees which are allowed them by § 847, are for services imposed upon commissioners of the circuit court by other sections of the Revised Statutes.

We are of opinion, therefore, that the fees of the plaintiff, as commissioner are not regulated by U. S. Rev. Stat., § 847. It is accordingly unnecessary to determine whether the words in section 823, "the following and no other compensation shall be taxed and allowed to . . . commissioners," refer to anything more than the costs which may be taxed for their services, or to their claims against the government of the United States, when acting in a judicial or ministerial capacity, and prevent them from making a contract for services on such terms as may be agreed upon.

At the argument in this court, the defendant produced a certified copy of certain instructions, which on June 5, 1883, the Court

of Commissioners of Alabama Claims directed its clerk to issue "to commissioners appointed and authorized to take testimony to be used in the trial of causes pending before it." We declined to receive this copy, being of the opinion that if the instructions had any bearing upon the question of the power of the parties to make the alleged contract for fees, they should have been put in evidence at the trial of the case. We see no reason to change our views.

The plaintiff also seeks to recover, on an account annexed, for services rendered to the defendant, as an attorney and counsellor at law, in the courts of this Commonwealth, and in the Circuit Court of the United States for the District of Massachusetts.

The plaintiff testified that he withdrew from the defendant's service, as attorney and counsellor-at-law, on February 2, 1886, and on that day gave the defendant and all his opponents notice in writing of his withdrawal; that the case of Amy against Manning was then upon the trial list; that Charles Cowley, Esq., also appeared for the defendant, and that such withdrawal was without the consent of the court or of his defendant. The defendant asked the court to rule that the plaintiff was not entitled to recover in this action for any services performed by him in defending the action of Amy against Manning in this court, because he withdrew therefrom, before the trial thereof, without the consent of the defendant or of the court. Also that the same rule of law applied to all actions pending where the defendant was a party and the plaintiff was his counsel, when the plaintiff withdrew therefrom. The judge found from the evidence that the conduct of said Manning was such that the plaintiff was fully justified in withdrawing from said suits, and that said Manning had other counsel, and suffered no damage on account of said withdrawals and declined to give the rulings requested.

The defendant relies, in support of his proposition that an attorney cannot withdraw his appearance for a party without leave of court, upon the case of *United States v. Curry*, 47 U. S. 6 How. 108, 12 L. ed. 363, where language to this effect is used by Chief Justice Taney. The point decided in that case was that the citation or notice of an appeal might be served upon the attorney of record of the appellee, while his name remained upon the docket of the court below, although he had in fact been discharged by his clients. The remark of the chief justice is not to be taken as the statement of a general principle, apart from the question before the court. That it was not so intended is shown by the context. The entire quotation is as follows: "So, too, as to the service of the citation on the attorney. It is undoubtedly good, and according to the established practice in courts of chancery. No attorney or solicitor can withdraw his name, after he has once entered it on the record, without the leave of the court. And, while his name continues there, the adverse party has a right to treat him as the authorized attorney or solicitor, and the service of notice upon him is as valid as if served on the party himself." See also *De la*

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Pole v. Dick, L. R. 29 Ch. Div. 351; 3d Common Law Rule of this court; 23d Equity Rule.

No case has been called to our attention which holds that, as between an attorney and his client, leave of court is required before a contract between them can be ended.

It is stated in 1 Tidd, Pr. 9th ed. 86, that "when an attorney once appears, or undertakes to be attorney for another, he shall not be permitted to withdraw himself; and it is said to be his duty to proceed in the suit, although his client neglect to bring him money,"—citing 1 Sid. 31. This, however, is not the law of England or of this country to-day.

The question was thoroughly considered in England in the case of *Vansandau v. Browne*, 9 Bing. 402, and it was held that an attorney might for reasonable cause and upon reasonable notice, abandon the conduct of a case, and recover his fees. In regard to the case in Siderfin, Tindal, Ch. J., said: "Now in the report in Siderfin no facts are stated to explain the decision of the court. It may be, probably was, the fact, that the attorney on the very day of the assizes deserted the conduct of the cause, giving his client neither time nor opportunity to obtain other professional assistance; if so, the decision of the court was proper." See also *Rousson v. Earle*, M. & M. 538; *Wadsworth v. Marshall*, 2 Crompt. & J. 665; *Whitehead v. Lord*, 7 Exch. 691; *Harris v. Osbourn*, 2 Crompt. & M. 629.

In *Elliot v. Lawton*, 7 Allen, 274, it was held, in accordance with the English decisions, that the contract of an attorney with his client was an entire and continuous contract; and that the Statute of Limitations did not begin to run until the final service was performed. In answer to the objection that by holding the service to be entire the attorney would be precluded from enforcing any claim for services until the final termination of the suit, Mr. Justice Dewey, in delivering the opinion of the court, said: "To this it has been answered that such would be the effect, if nothing has occurred to change the relation of the parties and their duties to each other; but from the nature of this contract it may be terminated previous to the termination of the suit, for a good and sufficient cause, and upon reasonable notice. Hence it has been holden that failure to supply reasonable funds, or any other substantial cause for not further proceeding in the case, would justify the attorney in withdrawing from it, and in such a case a present right to enforce his claim for past services would arise, and of course also from that period the Statute of Limitations would commence running."

In *Rush v. Cavanaugh*, 2 Pa. 187, which was an action for slander, the plaintiff, an attorney, collected a sum of money for the defendant, and retained it for his fees. The defendant thereupon called him a thief, robber, and cheat. One question raised was whether the plaintiff, who had been employed by the defendant to prosecute a person criminally, was entitled to any fees, having abandoned the prosecution. It was held that

if he were satisfied of the innocence of the accused, he was entitled to abandon the prosecution, and recover compensation; and that he was not, to quote the language of Gibson, *Ch. J.*, "bound to give credence to the instructions of a heated client, rather than to the sober testimony of a dispassionate witness."

In *Tenney v. Berger*, 98 N. Y. 524, it was held that the employment by the client, without the consent of his attorney, of counsel against whom the attorney had personal and professional objections, and with whom he was unwilling to be associated, was a justifiable cause for his withdrawal from a case; and that, upon reasonable notice of such withdrawal, he was entitled to recover for services rendered.

In the case at bar, we are of opinion that, on the facts found, the presiding judge rightly refused to rule as requested by the defendant.

The only remaining exception relates to a promissory note payable "when the United States pays judgments of the Court of Commissioners of Alabama Claims." This is disposed of by the conclusion we have reached on a similar question in the first case.

The result is that in each case the order must be—

Exceptions overruled.

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Nathaniel F. BENSON, *Appt.*,

v.

Charles A. GRAY.

(...Mass....)

1. A contract for the transportation of live-stock, which provides that it shall be at owner's risk during transportation, loading and unloading; that it must be taken away within twenty-four hours after being unladen from the cars; that the carrier's liability shall cease "after their arrival at their place of destination and unloading," and that if not taken away it will be stored at owner's risk,—places the duty of unloading on the carrier.

2. A rule of a carrier, known to the shipper, requiring the latter to unload live-stock from the cars, will not override an express contract placing that duty on the carrier.

(September 18, 1891.)

A PPEAL by plaintiff from a judgment of the Superior Court for Bristol County in favor of defendant in an action brought to recover possession of two horses shipped by plaintiff over the Old Colony Railroad from Boston to New Bedford. *Judgment for plaintiff.*

NOTE.—*Shipment of live-stock; contract construed.*

The ways and means of loading the car being in proper condition, and the burden of loading being upon the shipper, it is his duty to have the car loaded that the train may not be unreasonably delayed. *Louisville, N. A. & C. R. Co. v. Godman*, 2 West. Rep. 325, 104 Ind. 490. See *Frazier v. Kansas C. St. J. & C. B. R. Co.* 48 Iowa, 571.

In case of special contract whereby the owner

The facts are stated in the opinion.

Messrs. Lem Le B. Holmes and Eliot D. Stetson for appellant.

Mr. W. H. Cobb for appellee.

Allen, J., delivered the opinion of the court:

The transportation of the plaintiff's horses was under an express contract. This contract was prepared by the railroad company, and called "Live Stock Receipt." In it the company acknowledged the receipt of the two horses marked for the plaintiff at New Bedford, Mass., "which the company promises to forward by its railroad, and deliver to or order at its depot in . . . He or they first paying freight for the same." "N. B. If merchandise be not called for on its arrival, it will be stored at the risk and expense of the owner." Then followed the rates for transporting different kinds of animals; after which were certain rules and regulations in regard to freight. Among these rules were the following: "Nor will they [the company] hold themselves liable as common carriers for such articles after their arrival at their place of destination and unloading in the company's warehouses or depots." "Machinery . . . and live animals will only be taken at the owner's risk of fracture or injury during the course of transportation, loading and unloading, unless specially agreed to the contrary." "All articles of freight arriving at their place of destination must be taken away within twenty-four hours after being unladen from the cars."

The plaintiff paid for the transportation of the horses on their arrival at New Bedford, and took a receipt which contained the same rules and regulations copied above, and applied for his horses; and the agent of the railroad company refused to unload the horses, and required the plaintiff to unload them.

In the opinion of a majority of the court the railroad company must be held under this contract to have undertaken to unload the horses, though at the owner's risk. This contract was made out with express reference to the carriage of live animals. The railroad company promised to deliver them, and this implies unloading them. The company would also store them, unless called for, and this also implies unloading them. There are three several stipulations as to unloading goods, one of which in express terms includes live animals, and each of which implies that the company will unload them. It must therefore be held that the company undertook to unload them.

This being so, a usage of the company's agent at New Bedford to require the owner or consignee to unload live animals is of no

agrees to and does take charge of the stock, the burden of proving negligence is on him. *McBeath v. Wabash, St. L. & P. R. Co.* 3 West. Rep. 129, 20 Mo. App. 445; *Clark v. St. Louis, K. C. & N. R. Co.* 64 Mo. 440; *Buddy v. Wabash, St. L. & P. R. Co.* 3 West. Rep. 335, 20 Mo. App. 208.

Carriers of live-stock; responsibilities of. See *notes to International & G. N. R. Co. v. Tisdale (Tex.)* 4 L. R. A. 545; *Missouri Pac. R. Co. v. Fagan (Tex.)* 2 L. R. A. 75.

consequence. The usage cannot override the contract. *Dickinson v. Gay*, 7 Allen, 29; *Secomb v. Provincial Ins. Co.* 10 Allen, 305, 310; *Dodd v. Farrow*, 11 Allen, 426, 429; *Boardman v. Spooner*, 18 Allen, 353, 359; *Adorne v. New Eng. Mut. M. Ins. Co.* 101 Mass. 551; *Snelling v. Hall*, 107 Mass. 184; *Haskins v. Warren*, 115 Mass. 514, 535, 536; *Hedden v. Roberts*, 134 Mass. 88; *Emery v. Boston Marine Ins. Co.* 138 Mass. 398; *Colender v. Dinmore*, 55 N. Y. 200.

A rule and regulation of the company can have no greater effect. The company's rule requiring consignees to unload livestock was not otherwise known to the plaintiff than this; he knew that the company's agent at New Bedford had been accustomed to require consignees to unload their horses. But if well known, it must still give way to the contract. It was a matter of contract between the plaintiff and the railroad company that the company should unload the plaintiff's horses. This being so, neither a usage nor a rule to the contrary will avail to excuse the company from the performance of its undertaking. In this respect, the case differs from *Miller v. Mansfield*, 112 Mass. 260, and other cases, where there was no such contract.

Judgment for the plaintiff.

Bertha BADENFELD, Admx., etc., of
Charles Badenfeld, Deceased,

2.
MASSACHUSETTS MUTUAL ACCI-
DENT ASSOCIATION.

(....Mass.....)

1. Arbitration is not a condition precedent to an action on a policy promising to

NOTE.—Accident insurance; warranty in application for insurance.

A warranty, in an application against "bodily or mental infirmity," is not broken by the fact that the applicant was near-sighted and defective in his vision, especially if he at that time wore eyeglasses and this was known to the insurance agent. *Cotten v. Fidelity & C. Co.* 41 Fed. Rep. 506.

A warranty that he never had "any bodily or mental infirmity" is not broken by the fact that he was subject to erysipelas. *Bernays v. United States Mut. Acc. Assn.* 45 Fed. Rep. 455.

Interpretation of contract.

A contract of insurance must have a reasonable interpretation, such as probably was in the contemplation of the parties when it was made. *Grandin v. Rochester German Ins. Co.* 107 Pa. 26.

Where the terms of a policy are susceptible, without violence, of two interpretations, that construction which is most favorable to the insured, in order to indemnify him against loss sustained should be adopted. *Teutonia F. Ins. Co. v. Mund*, 22 Pa. 89; *Burkhard v. Travelers Ins. Co. of Hartford*, Id. 202; *Hoffman v. Aetna F. Ins. Co.* 32 N. Y. 46.

The words "total and permanent loss of the sight of both eyes" mean the loss of eyesight when used in a policy insuring a person who has already lost an eye. *Humphreys v. National Ben. Assn.* 11 L. R. A. 564, 130 Pa. 234.
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pay a sum certain in case of death, although it provides that no suit shall be brought thereon unless the matter "has been first referred" to arbitration.

2. The burden of proving voluntary exposure to unnecessary danger as a defense to an action for accident insurance is on the insurer.

3. Voluntary exposure to unnecessary danger, which will prevent recovery of accident insurance, is not shown by the fact that the insured while waiting for a train was thrown or fell upon the track from a platform not intended for use in getting upon his train or in fact for use by passengers at all, though they sometimes used it, but for train hands, and which was only about two and a half feet wide in places where girders extended out from the wall.

4. Leaving a car while in motion is not necessarily "a voluntary exposure to unnecessary danger" which will defeat a recovery on a policy which by its terms is avoided by such exposure.

(June 10, 1891.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County, made during the trial of an action brought to recover the amount alleged to be due on an accident insurance policy, which resulted in a verdict in favor of plaintiff. *Overruled.*

The facts sufficiently appear in the opinion. *Messrs. Gaston & Whitney*, for defendant:

The effect of the first condition of the policy is to prevent a recovery, if it appears affirmatively that the negligence of the deceased was a contributing cause of his death.

Freeman v. Travelers Ins. Co. 4 New Eng. Rep. 621, 144 Mass. 572.

The conduct of the deceased, as disclosed by the facts admitted and proved by the plaintiff, was such as to require the court to rule affirmatively that, as a matter of law, the negligence

The knowledge of the general agent of the company is the knowledge of the company in such a case. *Ibid.*; *People's Ins. Co. v. Spencer*, 53 Pa. 363.

Certificate.

A mere indorsement upon the back of a certificate giving general relief does not make it cover partial disablement where no provision therefor is contained in the body of the certificate. *Hollobaugh v. People's Mut. Acc. Ins. Assn.* 138 Pa. 595.

Conditions in policy; burden of proof of breach.

The burden of proving the breach of a condition in the policy "that insured shall use all due diligence for his personal safety and protection," is on the company. *Freeman v. Travelers Ins. Co.* 4 New Eng. Rep. 621, 144 Mass. 572; *Haskins v. Hamilton Mut. Ins. Co.* 5 Gray, 432; *Daniels v. Hudson River F. Ins. Co.* 12 Cush. 416, 426; *Pierce v. Cohasset Mut. F. Ins. Co.* 123 Mass. 572; *Mulry v. Mohawk Valley Ins. Co.* 5 Gray, 541; *Hodsdon v. Guardian L. Ins. Co.* 97 Mass. 144; *Cluff v. Mutual Benefit L. Ins. Co.* 13 Allen, 308, 99 Mass. 317; *Jones Mfg. Co. v. Manufacturers Mut. F. Ins. Co.* 8 Cush. 62; *Orrell v. Hampden F. Ins. Co.* 13 Gray, 481; *Hedman v. Aetna Ins. Co.* 49 Wis. 431; *Grangers Life Ins. Co. v. Brown*, 57 Miss. 306; *Germain v. Brooklyn Life Ins. Co.* 30 Hun, 535; *Campbell v. New England Mut. L. Ins. Co.* 96 Mass. 381; *Cotton v. Fidelity & C. Co.* 41 Fed. Rep. 506.

The company must allege and prove the want of

of the insured contributed to his death, and that his death occurred in consequence of voluntary exposure to unnecessary danger.

Butterfield v. Western R. Corp. 10 Allen, 532; *Burns v. Boston & L. R. Co.* 101 Mass. 50; *Harvey v. Eastern R. Co.* 116 Mass. 289; *Wills v. Lynn & B. R. Co.* 129 Mass. 35; *Torrey v. Boston & A. R. Co.* 147 Mass. 412.

In a proper case it is both within the power of the court and also its duty to rule affirmatively, that the facts establish negligence as a matter of law, or that the deceased voluntarily exposed himself to unnecessary danger.

Holmes, *Theory of the Common Law*, pp. 120-124; *Tuttle v. Travelers Ins. Co.* 134 Mass. 175; *Freeman v. Travelers Ins. Co. supra*; *Lovell v. Accident Ins. Co.* 3 Ins. L. J. 887, 5 Ins. L. J. 559; *Neill v. Travelers Ins. Co.* 17 Can. L. J. 44.

It is clear, as a matter of law, that the death of the insured was due to his own negligence or voluntary exposure to unnecessary danger, upon any theory which the jury would have been authorized to adopt, upon the evidence, as to the precise manner in which he came to be under the wheels of the train.

Hickey v. Boston & L. R. Co. 14 Allen, 429.

The fact that circumstances or excuses might be imagined, which would justify the deceased in being where he was, does not alter the question.

Gahagan v. Boston & L. R. Co. 1 Allen, 187; *Burns v. Boston & L. R. Co. supra*.

compliance with any particular proviso or condition on which it relies. *Piedmont & A. L. Ins. Co. v. Ewing*, 22 U. S. 877, 23 L. ed. 610.

Until self infliction of the injury or the negligence procuring it is proved, the presumption of accident will prevail. *Cronkhite v. Travelers Ins. Co.* 75 Wis. 116. See notes to *Paul v. Travelers Ins. Co.* (N. Y.) 3 L. R. A. 443; *Sheanon v. Pacific Mut. L. Ins. Co.* (Wis.) 9 L. R. A. 685.

Temporary engagement in hazardous employment; classification of hazards.

The word "occupation" in the by-laws of the association has reference to the vocation, profession, or trade in which the assured is engaged for hire or profit, and does not preclude him from engaging in mere acts of exercise, diversion, or recreation, such as hunting. *Union Mut. Acc. Asso. v. Frohard*, 10 L. R. A. 383, and note, 33 Ill. App. 178.

Where the classification of hazards made in the by-laws is predicated only upon occupations and not in respect to acts, the case is no different than it would be if the word "act" were not found in the contract. *Ibid.* See note to *Sheanon v. Pacific Mut. L. Ins. Co.* (Wis.) 9 L. R. A. 685.

The classifications of risks on the back of the policy cannot control the express stipulations in the policy. *Ford v. United States Mut. Acc. Rel. Co.* 1 L. R. A. 700, 148 Mass. 153.

Exterior and visible marks and signs.

The clause that the insurance shall not cover any bodily injury of which there are no external or visible signs on the body of the insured, does not apply to fatal injuries. *McGlinchey v. Fidelity & C. Co.* 6 New Eng. Rep. 450, 80 Me. 261; *Tucker v. Mutual Ben. Life Co.* 50 Hun. 50; *Eggenberger v. Guarantee Mut. Acc. Asso.* 41 Fed. Rep. 172. See notes to *Paul v. Travelers Ins. Co.* (N. Y.) 3 L. R. A. 443; *Sheanon v. Pacific Mut. L. Ins. Co.* (Wis.) 9 L. R. A. 687.

The dead body is external and visible sign enough 13 L. R. A.

The court should have, as requested by the defendant, nonsuited the plaintiff, on the ground of there not having been any arbitration or request for arbitration.

Scott v. Aetna, 5 H. L. Cas. 811, 851; *Tredwin v. Holman*, 1 Hurlst. & C. 72; *Braunstein v. Accidental Death Ins. Co.* 1 Best & S. 783; *Edwards v. Aberayron Mut. L. Ins. Soc.* L. R. 1 Q. B. Div. 563.

Messrs. A. A. Ranney and John Woodbury, for plaintiff:

Circumstantial evidence is sufficient to establish accidental death.

Wright v. Sun Mutual L. Ins. Co. 29 U. C. C. P. 221; *Travelers Ins. Co. of Hartford v. McConkey*, 127 U. S. 661, 32 L. ed. 808; *Mallory v. Travelers Ins. Co.* 47 N. Y. 52; *Treo v. Railway Pass. Assur. Co.* 6 Hurlst. & N. 839; *United States Mut. Acc. Asso. v. Barry*, 181 U. S. 100, 33 L. ed. 60; *Freeman v. Travelers Ins. Co.* 4 New Eng. Rep. 621, 144 Mass. 572.

The burden of proving non-compliance with the condition requiring due diligence for personal safety and protection was upon the defendant.

Freeman v. Travelers Ins. Co. supra.

The question was rightly left to the jury whether the defendant had established this defense.

Stone v. United States Casualty Co. 84 N. J. L. 371; *Wright v. Sun Mut. L. Ins. Co. supra*; *Providence L. Ins. & I. Co. v. Martin*, 32 Md. 310.

that an injury was received. *Mallory v. Travelers Ins. Co.* 47 N. Y. 52; *Paul v. Travelers Ins. Co.* 3 L. R. A. 443, 45 Hun. 347.

External, violent, and accidental means.

Sunstroke or heat prostration is not a bodily injury "sustained through external, violent, and accidental means," within the meaning of an insurance policy covering such injuries, but expressly excluding liability for "any disease or bodily infirmity." *Dozier v. Fidelity & C. Co.* 46 Fed. Rep. 446; *Sinclair v. Maritime Pass. Assur. Co.* 3 El. & Bl. 478. See *Boos v. World Mut. L. Ins. Co.* 6 Thomp. & C. 364.

So death from the effects of a blow struck by a person after an attempt to blackmail is the result of accidental means. *Richards v. Travelers Ins. Co.* 89 Cal. 170.

Falling from a window while in a state of somnambulism, if death ensues, is produced by external and accidental means. *Travelers Ins. Co. v. Harvey*, 32 Va. 948.

Where a driver of a wagon died within an hour after narrowly escaping a collision, from fright or internal strain in controlling his horse, which took fright and ran away, death ensued from bodily injuries effected through external, violent, and accidental means. *McGlinchey v. Fidelity & C. Ins. Co.* 6 New Eng. Rep. 450, 80 Me. 261. See *McDonald v. Snelling*, 14 Allen, 290.

So where a man with an axe chased a boy, who in his fright ran against a barrel of wine and broke it, the man was held responsible for the loss of the wine. *Vandenburgh v. Truax*, 4 Denio, 467. See *Beach v. Hancock*, 27 N. H. 223.

Where a woman, frightened by an express wagon carelessly driven, jumped against a wall and injured her face, the express company was held liable. *Coulter v. American M. Union Exp. Co.* 56 N. Y. 685. See *Page v. Bucksport*, 64 Me. 51.

So accidentally inhaling coal gas, causing death, entitles insured to a recovery upon an accident

The only cases in which the court has taken this question from the jury are those in which there was direct evidence of a gross act of carelessness on the part of the assured.

Tuttle v. Travelers Ins. Co. 134 Mass. 175.

It is voluntary exposure to a known danger that constitutes carelessness.

Burkhard v. Travelers Ins. Co. 102 Pa. 262.

The jury were entitled to consider whether or not the circumstances of the accident were such as would have justified the assured in going upon this platform, even though inspection might have shown it dangerous.

Marx v. Travelers Ins. Co. 18 Ins. L. J. 727.

A collateral agreement to refer an existing right of action to arbitration is void.

Hove v. Williams, 97 Mass. 163; *Wood v. Humphrey*, 114 Mass. 185; *Vase v. Wales*, 129 Mass. 38; *Reed v. Washington F. & M. Ins. Co.* 188 Mass. 572; *Horton v. Sayer*, 4 Hurlst. & N. 643; *Dawson v. Fitzgerald*, L. R. 1 Exch. Div. 257.

The true construction of the policy shows the clause to be a collateral agreement, and not a condition precedent.

Freeman v. Travelers Ins. Co. supra; *Coburn v. Travelers Ins. Co.* 5 New Eng. Rep. 182, 145 Mass. 226.

If the language of this clause were such as to make arbitration a condition precedent, the condition would in this case either be inapplicable or else void.

Hood v. Hartshorn, 100 Mass. 117.

Such a condition precedent is void as "an

attempt to oust the courts of justice of all jurisdiction over the whole controversy."

White v. Middlesex R. Co. 135 Mass. 216; *Horton v. Sayer*, 4 Hurlst. & N. 643, 651; *Lee v. Page*, 30 L. J. Ch. 857, 859; *Edwards v. Aberayron Mut. S. Ins. Soc.* L. R. 1 Q. B. Div. 563, 568.

W. Allen, J., delivered the opinion of the court:

The promise of the defendant was to pay a certain sum in the event of the death of the plaintiff's intestate occasioned by "bodily injuries effected through external, violent and accidental means."

There are nine provisos in the certificate, the last of which is that "no suit or proceeding at law or in equity shall be brought to recover any sum herein, unless the same has been first referred to the arbitration of just and competent men." It was admitted that there had been no reference to arbitration of the plaintiff's claim, and that the plaintiff never requested such arbitration. The first exception is to the refusal of the court to rule that, for that reason, the action could not be maintained. The promise is, not to pay the award, but to pay the sum named, and the proviso does not make the award a condition precedent to the promise to pay, but a mode of enforcing that promise. It is well settled that such an agreement is no bar to an action on the promise. *Reed v.*

policy. *United States Mut. Acc. Assn. v. Newman*, 84 Va. 52; *Paul v. Travelers Ins. Co. supra*.

So death from accidental drinking of poison is within the terms of the policy. *Healey v. Mutual Acc. Assn.* 9 L. R. A. 371, 133 Ill. 556.

Death from blood-poisoning produced by virus communicated by a fly comes within the terms of such a policy. *Bacon v. United States Mut. Acc. Assn.* 44 Hun. 569.

Death from accidental drowning is within such policy. *Trew v. Railway Pass. Assur. Co.* 6 Hurlst. & N. 445; *Winepear v. Accident Ins. Co.* L. R. 6 Q. B. Div. 42.

An insane man who takes his own life dies from an injury produced by external, accidental, and violent means. *Accident Ins. Co. of N. A. v. Crandal*, 120 U. S. 527, 30 L. ed. 740.

If the injury be accidental, and the result is death, what matters it whether the injury is caused by a blow from a pitchfork or a strain in handling it? *North American L. & Acc. Ins. Co. v. Burroughs*, 69 Pa. 43. See note to *Healey v. Mutual Acc. Assn.* (L.) 9 L. R. A. 371.

Intentional injuries.

The exception as to "intentional injuries inflicted by the insured or any other person," includes intentional injury inflicted by another person. *Travelers Ins. Co. v. McCarthy*, 11 L. R. A. 297, 15 Colo. 251; *Travelers Ins. Co. of Hartford v. McConkey*, 127 U. S. 661, 32 L. ed. 808; *Hutchcraft v. Travelers Ins. Co.* 87 Ky. 301; *De Graw v. National Acc. Soc.* 54 Hun. 142.

An injury not anticipated and not naturally to be expected by the insured, though intentionally inflicted by another, is an accidental injury within the meaning of an accident policy. *Accident Ins. Co. v. Bennett* (Tenn.) June 6, 1891.

Where the insured was shot and killed by a third person, though without provocation, and while peaceably engaged in his ordinary business, no recovery can be had. *Fischer v. Travelers Ins. Co.* 77 Cal. 246.

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So where one willfully assaulted insured with a knife, no recovery can be had. *Boherck v. Travelers Ins. Co.* 38 Alb. L. J. 466. See notes to *Paul v. Travelers Ins. Co.* (N. Y.) 3 L. R. A. 448; *Sheanon v. Pacific Mut. L. Ins. Co.* (Wis.) 9 L. R. A. 684.

Voluntary exposure to unnecessary risks.

A case is within this exception in the policy where insured met his death while attempting in broad daylight to cross a main line of railway in front of an approaching train. *Cornish v. Accident Ins. Co.* L. R. 28 Q. B. Div. 458.

So boarding a train while in motion is a voluntary exposure. *Miller v. Travelers Ins. Co.* 39 Minn. 548.

A clause excepting railroad employes from the provision against entering a moving train includes a transfer agent employed by a baggage transfer company. *Cotten v. Fidelity & C. Co.* 41 Fed. Rep. 506.

Where one lowered himself from the window by a piece of bed ticking, it was a voluntary exposure which will defeat a recovery where death ensued. *Shaffer v. Travelers Ins. Co.* (Ill.) Oct. 31, 1890.

Passing over a trestle on a dark night, other ways of travel being open to one, is a voluntary exposure to danger. *Travelers Ins. Co. v. Jones*, 80 Ga. 541.

Passing from one car to another while the train is in motion avoids the insurance. *Sautelle v. Railway Pass. Ins. Co.* 18 Ins. L. J. 802.

But going out on the platform while the train is in motion, while suffering from nausea caused by heat of the car, is not a voluntary exposure such as will defeat a recovery. *Marx v. Travelers Ins. Co.* 59 Fed. Rep. 321.

Running towards an approaching train to get the mail, stumbling and falling down a bank against the engine is not a voluntary exposure to unnecessary danger. *Equitable Acc. Ins. Co. v. Osborn*, 90 Ala. 201, post, 267.

"Lifting and over exertion" must be a voluntary and unnecessary act, and not an act put forth to

Washington F. & M. Ins. Co. 138 Mass. 872, and cases cited.

The certificate also contains the proviso that "members are required to use all due diligence for personal safety and protection; and that "no claim shall be made under this certificate where death or injury may have happened in consequence . . . of any voluntary exposure to unnecessary danger." These provisos constitute matter of defense and the burden of proving them is upon the defendant. *Freeman v. Travelers Ins. Co.* 144 Mass. 572, 4 New Eng. Rep. 621. The other exceptions are to the refusals of the court to rule upon the undisputed evidence in the case, and upon the hypothetical findings of the jury upon the evidence, that the defense of want of due diligence or of voluntary exposure to unnecessary danger by the deceased was made out, and to instruct the jury to find a verdict for the defendant.

After the ten o'clock train left, the dead body of the plaintiff's intestate was found on the track where the train had stood in such a situation and condition as showed that he had been run over by the train and instantly killed. Track No. 8 was the easterly track and was near the easterly wall of the train house. A platform extended from the wall toward the track so far that a car upon the track would overhang the platform about six inches. The distance from the wall to the edge of the platform was about five and one half feet, but there were girders extend-

ing inward from the wall about three feet so that the distance from the face of the girders to the edge of the platform was about two and a half feet.

"There was evidence tending to prove that the plaintiff, before ten o'clock in the forenoon was waiting in the train house of a railroad station in Boston to take a train that left at a quarter after 10 on track No. 7, and that he knew that a train left on track No. 8 at 10 o'clock."

The defendant contended, and there was evidence to prove, that the platform east of the tracks was intended for the use of the train hands and not for passengers, though it was sometimes used by them, and that the place intended for and generally used by passengers for taking and leaving cars on track No. 8 was the platform on the westerly side of that track between it and track No. 7.

The supposition that the deceased fell in attempting to get on or off any platform of the cars while they were in motion seems inconsistent with the evidence. The only theory of accidental injury consistent with the evidence seems to be that the deceased was thrown or fell from the platform east of the cars, upon the rail between the front and rear trucks of the forward car about the time the cars started and before they had moved twenty feet. There was no evidence of the cause of his fall, and it cannot be contended that the mere fact that he fell under the car

save one's self from being crushed by a descending weight. *Reynolds v. Equitable Acc. Assn.* 59 Hun, 13.

Whether insured was guilty of voluntary exposure to danger is a question for the jury. *Cotten v. Fidelity & C. Co.* 41 Fed. Rep. 506. See notes to *Paul v. Travelers Ins. Co.* (N. Y.) 3 L. R. A. 444; *Sheanon v. Pacific Mut. L. Ins. Co.* (Wis.) 9 L. R. A. 687.

Payment of premium.

A cash payment by an accident insurance company to the assured on account of an injury received, to which he was not entitled unless the installments of premium had been paid, did not raise a conclusive presumption that all such installments had in fact been paid. *Melin v. North American Acc. Ins. Co.* 70 Wis. 579.

Where an agent solicits an ignorant negro porter of a railroad company to take insurance, and offers to take an order on the company for the premium, and the policy is delivered to the porter before the company can forfeit the policy for nonpayment of premium, in case it cannot realize on the order, it must give the insured notice of its nonpayment. *Bury v. Standard Life & Acc. Ins. Co.* 10 L. R. A. 534, and note, 89 Tenn. 427.

Limitation of right to sue.

In an accident policy limiting the right to sue thereon to one year from the time of the alleged injury, the limitation begins to run when the proofs are accepted and the claim is in a condition to be sued. *Cooper v. United States Mut. Acc. Assn.* 57 Hun, 407.

The stipulation in an accident insurance policy, that action thereon must be commenced within 13 L. R. A.

one year from the time the right of action accrues, is reasonable and valid. *Suggs v. Travelers Ins. Co.* 71 Tex. 579.

The provision that the action should be brought "within one year from the time of the alleged accidental injury," means a year from the time the right of action was complete. *Cooper v. United States Mut. Acc. Assn.* 32 N. Y. S. R. 725.

The limitation of a year runs during the minority of the beneficiaries where there is no exception in their favor. *Suggs v. Travelers Ins. Co.* 71 Tex. 579.

Notice of accident.

The requirement of an immediate written notice of an accident, means that notice must be given within a reasonable time. *People's Mut. Acc. Assn. v. Smith*, 126 Pa. 317.

Contributory negligence not a defense.

Contributory negligence on the part of the insured is not a defense, and by the use of the word "accidental," injuries to which the negligence of the insured contributed are not excluded from the protection of the policy. *Freeman v. Travelers Ins. Co.* 4 New Eng. Rep. 621, 144 Mass. 572; *Schneider v. Provident L. Ins. Co.* 24 Wis. 28; *Trew v. Railway Pass. Assur. Co.* 6 Hurst. & N. 839; *Providence L. Ins. & I. Co. v. Martin*, 22 Md. 310; *Stone v. United States Casualty Co.* 34 N. J. L. 371.

Proof of nature, cause, or manner of death.

The requirement, in an accident insurance policy, of direct and positive proof of the nature, cause, or manner of death, does not make it necessary to establish the fact by persons actually present at the death. *Accident Ins. Co. of N. A. v. Bennett* (Tenn.) June 6, 1891.

is a defense. The real contention of the defendant, expressed in different forms in its prayers for instructions, is, that the mere fact that the deceased was in a dangerous place (on the platform east of the track), or, as stated in one prayer for instructions, doing a dangerous act (leaving a car while it was in motion), is, as matter of law, conclusive proof that he did not use all due diligence for personal safety and protection, and that he voluntarily exposed himself to unnecessary danger.

This is not an action against the railroad company in which the mutual rights and duties of a person injured and the company are involved.

As regards the defendant, the deceased had a right to go upon the platform, and to examine the wall of the building, and the girders and the platform and the cars standing upon the track and to enter and leave them. None of these acts would of itself be evidence of want of due diligence for personal safety or of voluntary exposure to unnecessary danger. Any of them might be done carefully or carelessly. The manner and circumstances of the act would give character to it.

The facts that the deceased was upon the platform, and that he was injured in the manner shown, clearly do not constitute negligence in law or afford conclusive evidence of negligence.

The defendant asked for instructions upon

the hypothesis that deceased fell while leaving the car when it was in motion. There was no evidence that he so fell, but if it could be inferred it would not be conclusive of his negligence. That would depend upon the circumstances, and there would be no presumption that the circumstances were such as to make it negligent. If the jury could surmise that he left the car when it was in motion under circumstances which rendered the act negligent, they could equally well surmise that he left it under circumstances which would show that the act was not negligent. It may be said, in general, in regard to each of the defendant's prayers for rulings and instructions, that there is no evidence of the act of the deceased proximate to his injury and of course no evidence of the circumstances which characterize the act as negligent or otherwise. If the jury infer an act they are not, without evidence, at liberty to infer the circumstances which made the act negligent. The jury could not properly find their verdict upon particular facts found without evidence. The real question was whether the facts directly proved by the evidence and those inferred from them sustained the burden of proof which was upon the defendant, and this was clearly a question for the jury and not for the court, unless the court could rule that there was not sufficient evidence. The instructions give were sufficiently favorable to the defendant.

Exceptions overruled.

ALABAMA SUPREME COURT.

EQUITABLE ACCIDENT INSURANCE CO., *Appt.*,

Laura OSBORN, Admx., etc., of John Osborn, Deceased.

(90 Ala. 201.)

1. A general denial which puts in issue the execution of an insurance policy should be verified under the Alabama Code.
2. A plea which states only legal conclusions instead of facts is demurrable.
3. A variance is created by proof of a poli-

cy which specifies no time for its continuance under a complaint which describes it as running for one year from a certain date.

4. A man is not guilty of voluntary exposure to unnecessary danger within the meaning of a policy because he runs toward an approaching train, which does not stop there, to get the mail and stumbles and falls down a bank against the engine.

(November Term, 1890.)

A PPEAL by defendant from a judgment of the City Court of Birmingham in favor of plaintiff in an action brought to recover the

NOTE.—Scope, nature and effect of verification.

The Codes of all States which have adopted the reformed system of procedure contain provisions in regard to verification of pleadings. In all cases of a verification of pleading, the affidavit of the party must state that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true; and where a pleading is verified, it must be by the affidavit of a party, unless the parties are absent from the county where the attorney resides, or from cause are unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same. When the pleading is verified by the attorney, or other person except one of the parties, he must set forth in the affidavit the reason why it is not made by one of the parties. When a corporation is a party, the verification may be made by an officer thereof. See 1 Estee, Pl. § 278.

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The object of the verification is to secure good faith in the averments of the party. *Patterson v. Ely*, 19 Cal. 28.

An answer may be verified though the complaint is not. In such case a reply must be verified. *Levi v. Jakeways*, 4 How. Pr. 128, 2 Code Rep. 68; *Lin v. Jaquays*, 2 Code Rep. 29.

Courts lean against objections on the ground of insufficient verification. *Wilkin v. Gilman*, 13 How. Pr. 225.

The verification constitutes no part of a pleading, but when any pleading is verified every subsequent pleading, except a demurrer, or the general answer of an infant by his guardian *ad litem*, must also be verified. See N. Y. Code Civ. Proc. § 523; *Reynolds v. Smathers*, 87 N. C. 24; *Alford v. McCormac*, 90 N. C. 151; *Crompton v. Crow*, 2 Utah, 245; *Boone*, Code Pl. § 34.

Verification is only required to be adopted to the mode of statement in the pleading. If the mode of

amount alleged to be due on a policy of accident insurance. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. G. R. Harsh and Bowman & Harsh for appellant.

Mr. E. T. Taliaferro for appellee.

Somerville, J., delivered the opinion of court:

1. The first plea of the defendant, being a general denial of all the allegations of the complaint, necessarily put in issue the execution of the written policy of insurance which was the foundation of the suit, as well as the plaintiff's ownership of the policy, as the beneficiary under it. The plea should therefore have been supported by affidavit, and for want of such verification it was subject to the demurrer which was interposed to it, and was properly sustained by the trial court. *Mobile & M. R. Co. v. Gilmer*, 85 Ala. 423; Code 1886, §§ 2676, 2770; *Manning v. Maroney*, 87 Ala. 563.

2. The third plea was too vague and uncertain in its averments, and therefore necessarily ambiguous in meaning. It, moreover, states legal conclusions instead of facts, and was subject to demurrer on these and other grounds sustained by the court. *Carmelich v. Mims*, 88 Ala. 335.

3. The fourth plea was subject to like objections, as stated in the demurrer to it.

4. The court erred in not sustaining the plaintiff's motion to exclude the policy of insurance on the ground of variance. The complaint describes the policy as running for the term of one year from date, which was February 18, 1888. We discover nothing in the terms of the policy, or in the other evidence, which indicates how long the risk was to run. This may be an inadvertent omission; but, as

the bill of exceptions purports to contain all the evidence, the objection to the admission of the policy should have been sustained. In addition to this, we may observe that the evidence shows that the accident which produced the death of the insured happened on May 30, 1889, or more than a year after the issue of the policy, and the risk was not, therefore, covered by the time for which the policy described in the complaint was to remain in force. This, of itself, is fatal to any recovery, as the facts of the case now stand.

5. The policy insures against death and certain other injuries, effected through "external, violent, and accidental means." That the death of the insured resulted from precisely such a cause, the evidence leaves no doubt. The insured came speedily to his death by stumbling and falling, as he ran towards the railroad track upon the approach of a passenger train, coming in sudden contact with the steam-chest on the side of a railway engine. The injury, therefore, comes within the general terms of the policy, unless taken out by some one of the exceptions.

6. One of the exceptions, not covered by the policy, is "voluntary exposure to unnecessary danger." It is contended that the facts of the present case bring it within the terms of this exception. The phrase, "voluntary exposure to unnecessary danger" involves the idea of "intentionally doing some act which reasonable and ordinary prudence would pronounce dangerous." As said in an analogous case, where the same phrase was construed: "The approach to an unknown and unexpected danger does not make the act a voluntary exposure thereto. The result of the act does not necessarily determine the motive which prompted the action."

statement is absolute, then the verification should be absolute, but if the mode of statement is qualified, then the verification should be qualified. *Orvis v. Goldschmidt*, 64 How. Pr. 71, 2 N. Y. Civ. Proc. 314.

A defect in the verification of a complaint or petition may be waived, and will be deemed waived where no objection is made until after the rendition of the judgment. *Dorrington v. Meyer*, 8 Neb. 214; 2 Boone, Code Pl. 5.

Mode of verification.

As a general rule, every pleading should be verified by the party pleading; but for convenience and from necessity, many exceptions to the rule are allowed. Thus, when an artificial person, as a private corporation, is a party, the pleading may be verified by any of its officers; and when the State is a party, the verification may be made by anyone acquainted with the facts. N. Y. Code, § 157.

So, where a party cannot verify a pleading by reason of absence at the time such verification becomes necessary, his attorney may verify the pleading for him. *Stannard v. Mattice*, 7 How. Pr. 4; *People v. Aiken*, 14 How. Pr. 834; *Roscoe v. Maisson*, 7 How. Pr. 121; *Treadwell v. Fassett*, 10 How. Pr. 184; *Lefevre v. Latson*, 5 Sandf. 650, 10 N. Y. Legal Obs. 246; *Boston Locomotive Works v. Wright*, 15 How. Pr. 353; 2 Wait, Pr. 338.

Verification by agent or attorney.

A verification to a pleading, made by an agent, which states that "all the material allegations . . . 13 L. R. A.

are with his personal knowledge," is sufficient without assigning any reason why the verification is not made by the party. *Betts v. Krindell*, 13 N. Y. Civ. Proc. 157.

Verification by defendant's agent, stating after the usual form that the reason why it was not made by defendant was, that the allegations were within the agent's personal knowledge and not within that of the defendant, was held good. It was also held that the exception as to those matters stated on information, etc., might have been omitted. *Ross v. Longmuir*, 15 Abb. Pr. 336, 24 How. Pr. 49.

A pleading verified by an attorney, stating, as the ground for his verification, that he could not find the party in the city, and that it was his last day to reply, is not good as it states no legal reason why the verification is not made by the party. It may be treated as a nullity. *Lyons v. Murat*, 54 How. Pr. 23.

Where verification of an answer, made by the defendant's agent or attorney, contains an allegation inconsistent with an allegation in the answer, defendant may be required to verify in person. *Jailard v. Tomes*, 3 Abb. N. C. 24.

It seems that under Code Civ. Proc., § 2533, which provides that "the surrogate may require the petition or answer to be verified," he has authority to compel the verifications of objections to an account filed with him. *Thompson v. Mott*, 2 Dem. 154.

Verification by corporation.

When the verification is by an officer of a corporation, it is in fact the verification of the corporation, and the form is that of a party to the action,

The act may be voluntary, yet the exposure involuntary. The danger being unknown, the injury is accidental." *Burkhard v. Travelers Ins. Co. of Hartford*, 102 Pa. 262. Death by accident has been defined to be "death from any unexpected event which happens as by chance, or which does not take place according to the usual course of things" (*North American L. Ins. Co. v. Burroughs*, 60 Pa. 48), and again, as "any event which takes place without foresight or expectation of the person acted upon or affected by the event." May, *Ins.* 2d ed. § 520. So it is said in 1 *Am. & Eng. Encyclop. Law*, p. 87: "An accident, in its application to insurance policies, has been defined as an injury which happens by reason of some violence, casualty, or is major to the assured, without his design or consent or voluntary co-operation." See also *Schneider v. Provident L. Ins. Co.* 24 Wis. 28; *Tuttle v. Travelers & Acc. Ins. Co.* 134 Mass. 175, 45 *Am. Rep.* 316-319, *note*.

The evidence in the record fails to satisfy us that the insured was guilty of voluntarily exposing himself to unnecessary danger, and any degree of negligence short of this will not operate to defeat a recovery. May, *Ins.* 2d ed. § 530. He was approaching the arriving railway train, for the purpose of getting the mail for the postmaster. True, he was moving rapidly; but he made an effort to check his speed as he reached the sloping bank which led down to the side track of the railroad; and in doing this he stumbled, and came in collision with the engine. But for the accident of stumbling, the inference is fair that he would not have been injured. The efficient and proximate cause of the death, therefore, was the accident, as much as if the collision had been with a huge stone,

instead of with the steam-chest on the side of the engine. The injury received was clearly not "intentional" within the meaning of one of the exceptions of the policy. Nor, in our opinion, can it be properly construed to be a "walking or being on a railroad bridge or road-bed," within the meaning of another excepted class of cases contained in the policy, as is contended for by the appellant. Exceptions of this kind are construed most strongly against the insurer, and liberally in favor of the insured. This is now the settled rule for construing all kinds of insurance policies, rendered necessary, especially in modern times, to circumvent the ingenuity of the insurance companies in so framing contracts of this kind so as to make the exceptions unfairly devour the whole policy. Accordingly, in *Wright v. Sun Mut. L. Ins. Co.* 29 U. C. C. P. 231 (1878), a well-considered case of insurance against accidents, it was held that using a railroad track merely to cross a street, through which it ran, was not a "walking on the track" within the meaning of a prohibition of the policy, for accidents resulting from which no liability was to be incurred. A fair and reasonable construction of the phrase in question is: Voluntarily and intentionally being or walking on the railway road-bed, not being there by force of accident, and involuntarily, for a mere comparative moment of time. *Burkhard v. Travelers Ins. Co.* 102 Pa. 262; *Schneider v. Travelers Ins. Co.* 58 Wis. 13; 1 *Am. & Eng. Encyclop. Law*, 92.

These principles will be sufficient, without more, to enable the court below upon another trial to reach a proper conclusion.

Reversed and remanded.

and need not state the grounds of belief. *Glaubensack v. Hamburg & A. P. Co.* 9 *Abb. Pr.* 104.

The managing agent of a foreign corporation having charge of all its business, and on whom the process in the action was served, may verify its answer as an officer of the corporation, and without stating the grounds of his belief. *Ibid.*

The verification of a pleading made by the secretary of a corporation may be in the usual form of a verification by a party, and need not set forth the grounds of the officer's belief as to all matters stated on his knowledge, and the reason why the verification is not made by the party. The verification is the verification by the corporation, and therefore a verification by a party. *American Insulator Co. v. Bankers and M. Teleg. Co.* 7 *N. Y. Civ. Proc.* 443.

Miscellaneous considerations.

In all cases when the verification may be omitted, the criterion is whether, if called as a witness, the party would be excused from answering. If there is more than one party, and anyone would be privileged, verification may be omitted; so, if any part of the pleadings would excuse a party from testifying. *Clapper v. Fitzpatrick*, 3 *How. Pr.* 314, 1 *Code Rep.* 69; *Blaisdell v. Raymond*, 5 *Abb. Pr.* 144, affirmed, 8 *Abb. Pr.* 148; *Henry v. Bank of Salina*, 1 *N. Y.* 83.

The code provisions allowing an omission of the verification apply only where the accusatory matter is contained in the pleading to be answered. *Fredericks v. Taylor*, 52 *N. Y.* 506, 14 *Abb. Pr.* N. 8, 77.

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Long retention of an unverified bill of particulars, which have been verified, waives the irregularity. *Paine v. Smith*, 32 *Wis.* 336.

A garnishee's omission to verify his answer, or to serve it in time, cannot be objected to after joining issue thereon and going to trial. *Kirby v. Corning*, 54 *Wis.* 539.

A verification by attorney, setting forth a sufficient statutory ground of belief, is not vitiated by the statement of other real or supposed grounds of belief. *Market Nat. Bank v. Hagan*, 21 *Wis.* 217.

A verification is sufficient which states that the party "has read the foregoing petition, and is acquainted with the contents thereof; that the same is true of his own knowledge and belief." The words "and belief" may be treated as surplusage. *Seattle Coal & T. Co. v. Thomas*, 57 *Cal.* 167.

Party may serve with pleading an affidavit, excusing verification. *Blaisdell v. Raymond*, 5 *Abb. Pr.* 144 affirmed, 6 *Abb. Pr.* 148.

Where the affidavit of a defendant to his answer states that the matters set forth in the foregoing answer are true, except as to those matters therein stated on information or belief, and as to those matters that he believes them to be true, it is a sufficient verification; it is not necessary that the defendant should state in the affidavit that he has heard the answer read, and knows the contents thereof. *Fleming v. Wells*, 65 *Cal.* 336.

The omission to verify is an irregularity which may be waived, and the right to take advantage of it is lost by long delay. *Wilson v. Bennett*, 2 *N. Y. Civ. Proc.* 34.

MINNESOTA SUPREME COURT.

J. W. STEVENS, *Respt.*,

v.

John LUDLUM, *Appt.*

(....Minn.....)

*1. To constitute an estoppel in pais, an actual fraudulent intent in making the representation is not necessary. It is enough that the person making it knows, or ought to know, the truth; that he intends, or might reasonably anticipate, that the person to whom it is made, or to whom it is to be communicated, will rely and act on it as true; and that the latter has relied and acted on it, so that to permit the former to deny its truth will operate as a fraud.

*Head notes by GILFILLAN, *Ch. J.*NOTE.—“*Equitable estoppel*” defined.

Equitable estoppel is the effect of voluntary conduct of a party, whereby he is precluded, both at law and in equity, from asserting the rights which might perhaps have otherwise existed against another, who has, in good faith, relied thereon, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy. *Edwards v. Dickson*, 66 Tex. 613.

The conduct must be something which amounts either to a representation, or to a concealment of the present or past existence of a fact. *Ibid.* See *Bigelow, Estoppel*, 493; *Jackson v. Allen*, 120 Mass. 64; *Langdon v. Doud*, 10 Allen, 433; *White v. Ashton*, 51 N. Y. 240; *White v. Walker*, 31 Ill. 422.

One who makes representations cannot withdraw or deny them to the prejudice of a third person who has acted upon them in good faith, even though there is no preconceived design to defraud. *Babcock v. People's Sav. Bank*, 118 Ind. 212; *Anderson v. Hubble*, 93 Ind. 570; *Ward v. Berkshire L. Ins. Co.* 6 West. Rep. 593, 108 Ind. 301.

Constructive fraud lies at the foundation of the doctrine of equitable estoppel. *Brinckerhoff v. Lansing*, 4 Johns. Ch. 63, 1 L. ed. 765.

So the acts and declarations of the holder of a mortgage may be so instrumental in altering the position of a party as to make it inequitable for one to enforce the mortgage against the other. *Burke v. Grant*, 2 West. Rep. 584, 116 Ill. 124.

Examples of prior mortgagees losing his priority, by denying his own security, to an intended mortgagee who makes inquiry and states that he is about to lend money on the same property. 2 Pom. Eq. Jur. 189; *Ibbottson v. Rhodes*, 2 Vern. 554; *Berisford v. Milward*, 2 Atk. 49; *Stronge v. Hawkes*, 4 De G. M. & G. 186, 4 De G. & J. 632; *Beckett v. Cordell*, 1 Bro. Ch. 353; *Pearson v. Morgan*, 2 Bro. Ch. 3; *Evans v. Bicknell*, 6 Ves. Jr. 174; *Lee v. Munroe*, 11 U. S. 7 Cranch, 306, 3 L. ed. 373.

If one obtain money, or aid in obtaining it, by falsely representing that another has title to the land, when he knows to the contrary,—when in fact he has the title,—he will be estopped from setting up his title as against the lender. *Spencer v. Carr*, 45 N. Y. 406, 6 Am. Rep. 113; *Lee v. Porter*, 5 Johns. Ch. 272, 1 L. ed. 1093; *Fonbl. Eq.* 163.

Where one, without objection, suffers another to do acts upon his authority, or by his conduct adopts and sanctions such acts, he will be bound thereby, as if the requisite power had been given in the most formal manner. *Townsend v. Chappell* (“*Bronson v. Chappell*”) 79 U. S. 12 Wall. 681, 20 L. ed. 436.

If he has justified the belief of a third party that the person assuming to be his agent was authorized 13 L. R. A.

2. One making representations, relating to his business, to a commercial agency, may be estopped as to its patrons to whom it communicates such representations; as where defendant so represented that he was the owner of a business concern known as the “New York Pie Company,” and that representation was communicated by the agency to plaintiff, one of its patrons.

(May 11, 1891.)

APPEAL by defendant from an order of the Municipal Court of the City of Minneapolis denying his motion for new trial of an action brought to hold defendant liable upon a bill of exchange drawn upon the New York Pie Company and accepted by its manager, in

to do what was done, he is estopped to deny it, *ibid.* See notes to *Brookhaven v. Smith* (N. Y.) 7 L. R. A. 735; *Galbraith v. Lunsford* (Tenn.) 1 L. R. A. 523.

Equitable estoppel, when arises.

An equitable estoppel arises when one party by his faulty conduct has induced his adversary to omit some act which, but for said fault and negligence, he would have performed, and which, if done, might have prevented the loss. *Wilson Sewing-Mach. Co. v. Southern Exp. Co.* 42 La. Ann. 593. See *Leather Mfrs. Bank v. Morgan*, 117 U. S. 108, 29 L. ed. 816.

Positive fraud is not required to work an equitable estoppel, where silence or conduct has created a belief of the existence of a state of facts which it would be unconscionable to deny. *Alexander v. Woodford Spring Lake Fish Co.* (Ky.) 12 Ky. L. Rep. 107.

So one who represents himself as the owner of a bull which inflicted an injury, for the purpose of misleading the party injured, so as to deprive him of his right of action against the real owner, is estopped to deny that he is the owner. *Baird v. Vaughn* (Tenn.) Dec. 13, 1890.

A party may by his declarations and conduct, and even by his silence or negative omission to act, estop himself from claiming his rights, where such claim would operate to the injury of another. *Trenton Bkg. Co. v. Duncan*, 86 N. Y. 223; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344, 1 L. ed. 165.

It is the dictate of natural justice that he, who, having a right or interest, by his conduct influences another to act on the faith of its non-existence, or implies that it will not be asserted, shall not be allowed afterward to maintain it to that other's prejudice. *McGovern v. Knox*, 21 Ohio St. 547.

The doctrine has been applied to estates in land, trust funds, things in action, and other forms of interest, in some defensively, in others as the ground of affirmative relief. See 2 Pom. Eq. 230.

A fraudulent intent is necessary to create an estoppel affecting the legal title to land. *Storrs v. Barker*, 6 Johns. Ch. 106, 2 L. ed. 83.

It is an act of fraud for a party, conscious of his own right, to suffer another, ignorant of that right, to go on, purchase property, and make improvements thereon. *Ibid.*; *Miller v. Platt*, 5 Duer, 233; *Durham v. Alden*, 20 Me. 223, 37 Am. Dec. 42; *Hatch v. Kimball*, 16 Me. 146.

Doctrine of estoppel in pais.

The doctrine of estoppel in pais is applicable to one who has induced another to occupy a position he would not have occupied but for the acts of the

which judgment had been directed in plaintiff's favor. *Affirmed.*

At the trial the court found that defendant had stated to representatives of various commercial agencies, who called upon him in their official capacity, that he was sole proprietor of the New York Pie Company; that this information was communicated by the agencies to plaintiff, one of their subscribers, who in good faith acted thereon in extending credit to the company.

Messrs. Gilger & Harrison, for appellant:

Combs v. Cooper, 5 Minn. 254 (Gil. 200), expressly holds that there must have been an express design that the act or statement should influence the conduct of another in estoppels

former and his declarations. *Burke v. Grant*, 2 West. Rep. 864, 118 Ill. 124; *Hefner v. Vandolah*, 57 Ill. 520; *Dickerson v. Colgrove*, 100 U. S. 573, 26 L. ed. 618; *Faxton v. Faxton*, 28 Mich. 159; *Tucker v. Conwell*, 67 Ill. 552.

To constitute an estoppel *in pais*, (1) there must have been a false representation or a concealment of material facts; (2) the party to whom the representation was made, or from whom the material facts were concealed, must have been ignorant of the existence of the facts concealed or of the falsity of the representation. *Seed v. Petty*, 65 Tex. 490.

It is not created unless the declaration is plainly inconsistent with the rights which are alleged to be barred, and made with full knowledge of the existence of the inconsistent right. *Fletcher v. McGill*, 3 West. Rep. 532, 110 Ind. 395; *Lee v. Templeton*, 73 Ind. 315.

No estoppel *in pais* can arise unless to permit the party sought to be estopped to show the truth will operate as a fraud upon the other party. *St. Paul & D. R. Co. v. Blackmar*, 44 Minn. 514.

Neither married women nor infants are estopped *in pais* unless their conduct has been intentional and fraudulent. *Sneed v. Petty*, *supra*.

But a husband who holds himself out as a partner with his wife, and induces others to trust the partnership, is estopped to deny its existence. *Schlapback v. Long*, 90 Ala. 135. See note to *Brookhaven v. Smith* (N. Y.) 7 L. R. A. 755.

False representations.

If the declarations or conduct were intended to deceive generally, or occurred under circumstances likely to deceive, it is sufficient. *Horn v. Cole*, 51 N. H. 297, 12 Am. Rep. 124. See *Adams v. Brown*, 16 Ohio St. 78; *Dezell v. Odell*, 3 Hill, 231; *Quirk v. Thomas*, 6 Mich. 76; *Mitchell v. Reed*, 9 Cal. 204.

The representation must generally be the statement of a fact; when not resolvable into a statement of fact as distinguished from a statement of law, the party making it is not bound. *Mason v. Harper's Ferry Bridge Co.* 28 W. Va. 639.

If the element of fraud is wanting, there is no estoppel; as, where both parties are equally cognizant of the facts, and the declarations or silence of the one party produced no change in the conduct of the other, he acting solely on his own judgment. *Northwestern Mut. L. Ins. Co. v. Amerman*, 7 West. Rep. 715, 119 Ill. 339; *Davidson v. Young*, 38 Ill. 152.

There is no estoppel where parties have the same knowledge of the material facts. *Wolf v. Zimmerman*, 27 Ind. 486. See *Dodge v. Pope*, 93 Ind. 458; *Krug v. Davis*, 101 Ind. 75.

A representation, in order to estop, must be as to facts, either present or past; and a promise to do

by representations, and the court clearly distinguishes between such cases as *Pence v. Arbuckle*, 22 Minn. 417, and the class of cases to which the case at bar belongs.

Messrs. Hubachek & Daly, for respondent:

If a man so conduct himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists, and acts on that inference, he shall afterwards be estopped from denying it.

Manufacturers & T. Bank v. Hazard, 80 N. Y. 226; *Blair v. Wait*, 69 N. Y. 113; *McCravey v. Remson*, 19 Ala. 430; *Welland Canal Co. v. Hathaway*, 8 Wend. 480; *Brown v. Grant*, 39 Minn. 404.

Negligence when naturally tending to indi-

something in future may constitute a valid contract, but not an estoppel. *Jones v. Parker*, 67 Tex. 78; *Union Mut. L. Ins. Co. v. Mowry*, 98 U. S. 544, 24 L. ed. 674; *Mason v. Harper's Ferry Bridge Co.* *supra*; *Edwards v. Dickson*, 66 Tex. 613.

The only case in which a representation as to the future can operate as an estoppel is when it is in relation to an intended abandonment of an existing right, and is made to influence others, and they have been induced by it to act. *Union Mut. L. Ins. Co. v. Mowry*, *supra*. See *Faxton v. Faxton*, 28 Mich. 159; *Dickerson v. Colgrove*, 100 U. S. 573, 26 L. ed. 618.

Representations set up as an estoppel must have been made to the party asserting the estoppel, or have been of such a character and made under such circumstances that the party making them must be taken to have contemplated that they would be communicated to and acted on by him. *Hodge v. Ludlum*, 45 Minn. 290.

It is essential to an estoppel by conduct that there must have been a false representation or concealment of material facts; and a mistake of law made by the party asserting the estoppel, for which the other party was not responsible, is not sufficient. *St. Louis v. Schulenburg-Boeckler Lumber Co.* 95 Mo. 613.

No one can base an estoppel upon an act of the opposite party induced by his own fraud. *McMartin v. Continental Ins. Co.* 41 Minn. 198.

Representation must have been acted upon.

A representation, to create an estoppel, must have been acted upon. *Hope Lumber Co. v. Foster & L. Hardware Co.* 53 Ark. 194; *Stuart v. Lowry*, 43 Minn. 478.

No representations will authorize or constitute an estoppel, where the party to whom they were made did not act upon them, even if all the other elements which constitute an estoppel exist. *Huntington First Nat. Bank v. Williams*, 126 Ind. 423.

To work an estoppel the person estopped must have known the facts, or been guilty of negligence in not knowing them, and the persons in whose behalf the doctrine is invoked must have relied on and acted on the faith of what the former said or did or omitted. *Welsh v. Cooley*, 44 Minn. 446.

Parties who made false representations under the assumption that they were true are estopped to say that they were uninformed as to their truthfulness. *Ross v. Hobson* (Ind.) Feb. 5, 1891.

An estoppel *in pais* can never operate to prejudice the rights of the person estopped, except when the sole deed of such person would have a similar operative effect. *Henry v. Sneed*, 99 Mo. 407; *Mueller v. Kaessmann*, 84 Mo. 313.

cate intention, will have the same effect in creating an estoppel as actual intention.

Pence v. Arbuckle, 22 Minn. 417.

Representations made to mercantile agencies may be taken advantage of and work as an estoppel in favor of any subscriber to whom the representations are carried.

Ibid.; Bigelow, Estoppel, 5th ed. p. 597, note 3; *Swift v. Winterbotham*, L. R. 8 Q. B. 244.

Gillilan, Ch. J., delivered the opinion of the court:

The facts found by the court below are sufficient to create an equitable estoppel against defendant as to the ownership of the concern doing business as the "New York Pie Company." To raise such an estoppel, it is not necessary that the representations should have been made with actual fraudulent intent. If he knows, or ought to know, the truth, and they are intentionally made under such circumstances as show that the party making them intended, or might reasonably have anticipated, that the party to whom they are made, or to whom they are to be communicated, will rely and act on them as true, and the latter has so relied and acted on them, so that to permit the former to deny their truth will operate as a fraud, the former is, in order to prevent the fraud, estopped to deny their truth. *Coleman v. Pearce*, 26 Minn. 128; *Beebe v. Wilkinson*, 30 Minn. 548.

Nor need the representations be made directly to the party acting on them. It is enough if they were made to another, and intended or expected to be communicated as the representations of the party making them to the party acting on them, for him to rely and act on. "The representation may be intended for a particular individual alone, or for several, or for the public, or for any one

of a particular class, or it may be made to A, to be communicated to B. Anyone so intended by the party making the representation will be entitled to relief or redress against him, by acting on the representation to his damage." Bigelow, Frauds, 445.

If one act on a representation not made to nor intended for him, he will do so at his own risk. An instance of a right to act on a representation not made directly to the person acting on it, but intended for him, if he had occasion to act on it, is furnished by *Pence v. Arbuckle*, 22 Minn. 417. The representations a business man makes to a bank or commercial agency, especially to the latter, relating to his business or to his pecuniary responsibility, are among those expected to be communicated to others for them to act on. The business of a commercial agency is to get such information as it can relative to the business and pecuniary ability of business men and business concerns, and communicate it to such of its patrons as may have occasion to apply for it. Anyone making representations to such an agency, relating to his business or the business of any concern with which he is connected, must know, must be held to intend, that whatever he so represents will be communicated by the agent to any patron who may have occasion to inquire. His representations are intended as much for the patrons of the agency, and for them to act on, as for the agency itself. When the representations so made are communicated, as those of the person making them, to a patron of the agency, and he relies and acts on them, he is in position to claim an estoppel. The findings of fact in the case are fully sustained by the evidence.

Order affirmed.

Petition for rehearing overruled June 25, 1891.

TEXAS SUPREME COURT.

A. HEILIGMANN, *Appl.*,

v.

William ROSE *et al.*

(....Tex....)

1. Criminal acts need not be proved, in a civil action, by any greater or more certain

degree of proof than is required in civil actions generally.

2. An instruction which fails to present separately the elements of actual and exemplary damages, but limits the amount of recovery, is not prejudicial in the absence of special requests, if the verdict is for less than the jury could properly find.

NOTE.—Nature and scope of the judge's charge.

No instructions should be given, which are not relevant to facts which there is evidence tending to prove. In many cases, the giving of instructions has been held error. *Gist v. Loring*, 60 Mo. 487; *Huffman v. Ackley*, 34 Mo. 277; *Lillis v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 464; *Krech v. Pacific Railroad*, 64 Mo. 172; *Welland v. Weyland*, 64 Mo. 168.

It should be borne in mind in this connection that an appellate court will never reverse a decision on the sole ground that the trial court refused to instruct the jury upon an issue of fact which was not raised by the pleadings and in support of which no evidence has been elicited. *State v. Harris*, 59 Mo. 550; *Barr v. Armstrong*, 56 Mo. 577; *Winters v. Hannibal & S. J. R. Co.*, 39 Mo. 468; *Hamilton v. Russell*, 5 U. S. 1 Cranch, 309, 2 L. ed. 118; *Chirac v. Reinecker*, 37 U. S. 2 Pet. 612, 623, 7 L. ed. 538, 542; 13 L. R. A.

Clarke v. Kownslar, 35 U. S. 10 Pet. 657, 9 L. ed. 571; *Rhett v. Poe*, 43 U. S. 2 How. 458, 11 L. ed. 338; *Harper v. Smith*, 1 Cranch, C. C. 495; *Chicago & A. R. Co. v. Utley*, 38 Ill. 410; *State v. Rash*, 12 Ired. L. 382; *State v. Stouderman*, 6 La. Ann. 236; *Thompson v. Shannon*, 9 Tex. 536; *Hibler v. McCartney*, 31 Ala. 501; *Breece v. State*, 12 Ohio St. 146; *State Bank v. Williams*, 6 Ark. 156; *Paschal v. Davis*, 3 Ga. 256; *American Transp. Co. v. Moore*, 5 Mich. 368; *Snyder v. Wilt*, 15 Pa. 56; *Croft v. State*, 6 Humph. 317; *Storey v. Brennan*, 15 N. Y. 524; *Rouse v. Lewis*, 4 Abb. App. Dec. 121; *State v. Arthur*, 23 Iowa, 430; *Cowles v. Bacon*, 21 Conn. 451; *People v. Roberts*, 6 Cal. 214; *Whitner v. Hamlin*, 12 Fla. 18; *Henry v. Jones*, 1 Idaho, 48; *Packer v. Cockayne*, 3 G. Greene, 111; *Rice v. Rice*, 6 Ind. 100; *State v. McCurry*, 63 N. C. 33; *Harvey v. Skipwith*, 16 Gratt. 405; *Dwyer v. Dunbar*, 75 U. S. 5 Wall. 313, 18 L. ed. 489; *Ettig v. Bank of United States*, 24 U. S. 11 Wheat. 50, 6 L. ed. 419;

3. A verdict need not specify whether it is for actual or exemplary damages where the issues of actual and exemplary damages are not separately submitted to the jury.

4. Evidence of the market value of dogs is not necessary to sustain a judgment for damages for poisoning them, where there is proof of their usefulness and services from which the jury can infer value.

(May 26, 1891.)

APPEAL by defendant from a judgment of the District Court for Bexar County in favor of plaintiffs in an action brought to recover damages for the loss of plaintiffs' dogs, which were alleged to have been poisoned by defendant. *Affirmed.*

The facts sufficiently appear in the commissioner's opinion.

Conner v. State, 4 Yerg. 137; Allen v. Wanamaker, 31 N. J. L. 370; New York v. Price, 5 Sandf. 542; Rice, Ev. 792-797.

In the absence of statute to the contrary, the judge has power to instruct the jury *sua sponte*; but it is in his discretion whether to do so or not, if either party request it. Pennock v. Dialogue, 27 U. S. 2 Pet. 1, 15, 7 L. ed. 327, 332, affirming 4 Wash. C. C. 305; Haupt v. Pohlmann, 16 Abb. Pr. 301, 307.

State laws prescribing the manner in which the judge shall discharge his duty in charging the jury, or the papers which he will permit to go to them in their retirement, or requiring the jury to answer special interrogatories in addition to their general verdict, do not apply to the courts of the United States. Indianapolis & St. L. R. Co. v. Horst, 33 U. S. 301, 23 L. ed. 808; Nudd v. Burrows, 21 U. S. 433, 23 L. ed. 236; United States v. Train, 12 Fed. Rep. 323. For these regulations the local statutes should be consulted.

In the absence of any regulation requiring it, the judge's instructions need not be reduced to writing, except to the extent necessary for enabling counsel to except. Smith v. Crichton, 33 Md. 103, 105.

Instructions based upon a hypothetical state of facts.

A party has a right to submit a question of law arising on undisputed facts or upon a hypothetical statement within the scope of the evidence, and have the instruction of the court given to the jury thereon; and it is error to refuse to listen to a timely request so to do. Chapman v. McCormick, 38 N. Y. 479.

In order to justify him in giving an instruction predicated upon a supposed state of facts, it is not necessary that he should be entirely satisfied of the existence of such facts, but if there is any evidence from which the jury may infer them to be true, it is his duty to declare the law thereon. Flournoy v. Andrews, 5 Mo. 513; Bradford v. Pearson, 12 Mo. 71.

And it is not error for him to do so, even where the evidence is very slight. Camp v. Phillips, 42 Ga. 229.

He ought not, however, to give instructions upon trifling and indifferent statements irrelevant to the issue (Dickerson v. Johnson, 24 Ark. 251); nor leave a fact to the jury based upon evidence which goes no further than to raise a mere guess, possibility or conjecture as to the truth of what is claimed. Cobb v. Fogelman, 1 Ired. L. 440; Sutton v. Madre, 2 Jones, L. 320.

The judge opens any hypothetical statement with the formal words, "If the jury believe from the evidence." To use only the words, "If the jury believe," without conveying to their minds

Mr. Oscar Bergstrom, for appellant:

It is error for the court to suggest the amount or limit of damages which the jury might find.

Newman v. Dodson, 61 Tex. 91.

Damages are intended as compensation for the pecuniary injury sustained by the party injured, and in order to entitle a party to damages he must show that he has suffered some personal injury or pecuniary loss.

Brown v. Hoburger, 53 Barb. 15; *Drill v. Flagler*, 23 Wend. 354; *Canthing v. Hannibal & St. J. R. Co.* 54 Mo. 385; *Sutherland, Dam.* p. 802.

In the absence of testimony, authorizing the finding of actual damages, it is error to submit to the jury a charge authorizing them to find both actual and exemplary damages, without requiring them to find actual and exemplary damages separately, so as to ascertain whether

that they are to found their belief on the evidence, is an objectionable way of giving an instruction. *Matthews v. Hamilton*, 23 Ill. 470; *Toledo, W. & W. R. Co. v. Ingraham*, 77 Ill. 309.

But, as juries are supposed to have some small trace of sense, there is a presumption that they know that they are to find from the evidence, and accordingly it is not necessary to repeat this expression at every turn in the charge. *Toledo, W. & W. R. Co. v. Ingraham, supra*; *Miller v. Balthaser*, 73 Ill. 302. See *Thompson, Charging the Jury*, § 62.

A hypothetical instruction which announces a correct legal proposition, and is based on the evidence before the jury, is not liable to the objection that it assumes a fact in dispute. *Bushnell v. Crooke Min. & S. Co.* 12 Colo. 247.

When counsel should request the court to charge.

The usual course upon a trial is to hand up the requests to the judge before the charge is made, and, at most, prior to the time when the jury are ready to retire in charge of an officer. A proper degree of vigilance would certainly require that the right to present requests should be exercised before the latter contingency, and a delay beyond this ordinarily would leave it for the judge to say whether he would keep or call the jury back and pass upon the requests. *Chapman v. McCormick*, 38 N. Y. 479.

But notwithstanding such a limit of time, counsel acting in good faith have a right, after the judge has instructed the jury, and before they have retired, to request him to correct an error or supply a deficiency. *Crippen v. Hope*, 38 Mich. 344; *Chapman v. McCormick, supra*.

Good practice requires that counsel desiring to request instructions should present their requests to the judge in separate and distinct propositions, fairly and legibly written, before the judge begins his charge. If the presentation of requests is delayed until after the judge has charged the jury, he may not unreasonably require them to be presented orally, or by reading them, he responding to each as read, or he may, in his discretion, require them to be submitted to the adverse counsel, and then charge those that are consented to, and determine whether or not to charge those that are not consented to. *Abb. Tr. Pr.* 145.

Where, after a cause has been submitted to the jury, they desire further instructions, the court may give them such instructions publicly and in open court, notwithstanding counsel for one of the parties is not present. *Cornish v. Graff*, 7 N. Y. Civ. Proc. 204; *Rice, Colo. Code Proc.* § 187, and cases cited.

the verdict found by the jury is for actual or exemplary damages.

Galveston, H. & S. A. R. Co. v. Dunlavy, 56 Tex. 258; *Wallace v. Finberg*, 46 Tex. 35; *Galveston, H. & S. A. R. Co. v. LeGierse*, 51 Tex. 208.

Mr. J. M. Copeland for appellees.

Fisher, J., filed the following opinion:

This case originated in the justice court, and was tried on appeal in the District Court of Bexar County at its February Term, 1899, when judgment was rendered in appellees' favor against appellant for the sum of \$75 and costs of suit. No written pleadings are in court, except a statement of appellees' demand, wherein they charge that appellant wickedly and maliciously poisoned five dogs, for which they ask a recovery of damages against appellant in the sum of \$25 for each of said dogs as actual damages, and \$75 exemplary damages. Appellant assigns as error the refusal of the court to instruct the jury upon his request: "You are further instructed that the claim of plaintiffs is based upon acts which, if true, would constitute a criminal offense; and, before you can find for the plaintiffs, you must find from the evidence, beyond a reasonable doubt, that defendant poisoned the dogs sued for; and, if there is any reasonable hypothesis upon which this poisoning can be explained, except that the defendant did it or that some other person than defendant might have poisoned them, then you will find for defendant." We know of no decision, and none is cited, that would justify the court in giving this charge. There is no force in the position that, because the facts of this case may involve a criminal act, there should be a greater or more certain degree of proof than is required in other civil actions. A party holding the affirmative of an issue is only required to adduce a preponderance of evidence as will satisfy the minds of the jury of the truth of the facts in issue. As said by the court in the case of *Sparks v. Dawson*, 47 Tex. 145: "To require the facts to be established by evidence with that absolute certainty which fixes in the mind of the jury a conviction that excludes all reasonable doubts of their existence is a rule not applicable to this or any other civil case." The court did not err in refusing to give the charge.

The second assignment presented by appellant affirms that the court erred in the third subdivision of its charge, because the jury was authorized to find a verdict against defendant for exemplary damages, and suggests to them that the court believes the sum of \$75 is a proper amount therefor. The charge complained of reads: "If you find from the evidence that defendant intentionally and willfully poisoned the dogs of plaintiffs as charged, or any one of said dogs, you will find a verdict in favor of the plaintiffs for the actual market value of the dog or dogs so poisoned, and you will, in addition, find a verdict for such exemplary damages as you may deem adequate, not exceeding seventy-five dollars. If, however, you find the charge of plaintiffs not proven, you will find for the defendant." In this connection,

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the court, at the request of appellant, gave the following in charge first: "In order for the plaintiffs to recover, you must find from the testimony that the defendant poisoned the dogs, and that they were the property of plaintiffs; that the dogs were of some pecuniary value,—either that they had some market value at which they would sell, or that the services or use of the dogs were of some pecuniary value. The simple opinion of a witness, not based upon any facts, as to market value or use of the dogs, is not sufficient." The court does not present the two elements of damages separately, but submits them in one general charge, and restricts the jury in their finding not exceeding a certain amount. In both particulars, our courts have repeatedly deprecated this practice; but, while this is true, the decisions uniformly hold, in the absence of a special charge correcting the error, that it alone is not sufficient cause for reversal. *Newman v. Dodson*, 61 Tex. 98; *Brunswick v. White*, 70 Tex. 512; *East Line & R. R. Co. v. Lee*, 71 Tex. 541; *Brooke v. Clark*, 57 Tex. 109; *Belo v. Wren*, 68 Tex. 727; *Moehring v. Hall*, 66 Tex. 241. If the verdict of the jury is for a less amount than they could properly find, under the evidence and pleadings, an instruction that informs them that they cannot exceed a certain amount could result in no injury, and is harmless error. *East Line & R. R. Co. v. Lee*, 71 Tex. 541. The assignment is not well taken.

Appellant insists by his fourth assignment of error that the verdict of the jury is insufficient to support the judgment, because it does not specify whether they find actual or exemplary damages, or both, or how much of either. If the rule that the court is not required to submit the issues of actual and exemplary damages separately is correct, unless requested so to do, it would be inconsistent to require the jury to make separate findings upon issues not submitted. This assignment is governed by the rule discussed under the one preceding.

The appellant's third assignment questions the sufficiency of the evidence to support the verdict of the jury, on the ground that the dogs poisoned were of no market or pecuniary value, or that their service or use was of value to the owners. Considering the evidence under this assignment, we find that appellees lost these valuable dogs by poison, such dogs at the time their property. The evidence that connects the appellant with the killing of the dogs is partially circumstantial, but we think sufficient to show his guilty agency, and that the trespass was intentional and malicious. The dogs were of fine breed, and well trained, and one of the Newfoundland dogs was trained to signal the arrival of any person at appellee's, who could tell from his look if the person was man, woman, or child. The dogs, so testifies appellee, are worth \$25 each, and she would not take double that sum. Her husband paid \$5 for one when young, and one was given in pay for professional services rendered by appellee; and she could have sold the dogs for \$5 each, but would not take \$50 each for them. Great pains were taken in raising them, and they were well trained.

The authorities well settle that dogs are property, and that an owner has his action and remedy against a trespasser for the damages resulting from injuries inflicted upon them. Some authorities hold that dogs have no market value. This may be relatively true, but it is not a rule that will govern in all cases. It may be difficult, in the majority of cases, to ascertain the market value of a dog, but such a result may, in some cases, be accomplished. The special charge asked by appellant, and given by the court, substantially presents the true rule in determining the value of dogs. It may be either a market value, if the dog has any, or some special or pecuniary value to the owner, that may be ascertained by reference to the usefulness and services of the dog. *Ramsey v. Hurley*, 72 Tex. 300; *Brunswig v. White*, 70 Tex. 504; *Uhlein v. Cromack*, 109 Mass. 273; *Brent v. Kimball*, 60 Ill. 213; *Perry v. Phipps*, 10 Ired. L. 261; *Parker v. Mize*, 27 Ala. 483; *Harrington v. Miles*, 11 Kan. 483; *Cantling v. Hannibal & St. J. R. Co.* 54 Mo. 386; *Spray v. Ammerman*, 66 Ill. 813; *Slickney v. Allen*, 10 Gray, 355.

The law recognizes a property in dogs, and for a trespass and infraction of this right the

law gives the owner his remedy. The wrong-doer cannot escape the consequences of his acts by saying, "You have suffered no damages," for the law implies that some damages result from every illegal trespass or invasion of another's rights. *Parker v. Mize and Brent v. Kimball*, *supra*; *Champion v. Vincent*, 20 Tex. 816.

There is no evidence in this case that the dogs had a market value, but the evidence is ample showing the usefulness and services of the dogs, and that they were of special value to the owner. If the jury from the evidence should be satisfied that the dogs were serviceable and useful to the owner, they could infer their value when the owner, by evidence, fixes some amount upon which they could form a basis. We cannot say that the verdict in this case is not based upon actual damages, and when the evidence, as it does in this case, justifies a verdict for either actual or exemplary damages, or both, we will not presume that the finding of the jury was based on grounds not proper.

We find no error in the record, and report the case for affirmance.

Adopted by Supreme Court, May 26, 1891.

MASSACHUSETTS SUPREME JUDICIAL COURT.

James Seth ADAMS

v.

Anne T. ADAMS *et al.*

(...Mass....)

1. A statute providing that a child born before wedlock shall be made legiti-

NOTE.—Effect of subsequent marriage of the parents on antenuptial issue.

The general current of authority favors the doctrine that where an illegitimate child has been legitimated by the subsequent marriage of its parents according to the laws of the State or country where the marriage takes place, and the parents are domiciled, such legitimacy follows the child wherever it may go. *Miller v. Miller*, 91 N. Y. 315.

Each State has the right to determine the status of its own citizens; the domicil decides which State has the right. *Strader v. Graham*, 51 U. S. 10 How. 93, 13 L. ed. 342; *Story*, *Conf. L.* 141, § 106.

Foreign jurists generally maintain that the question of legitimacy or illegitimacy is to be decided exclusively by the law of the domicil of origin. *Story*, *Conf. L.* § 93.

It seems admitted by foreign jurists, that as the validity of the marriage must depend upon the law of the country where it is celebrated, the status or condition of the offspring, as to legitimacy or illegitimacy, ought to depend on the same law, so that if by the law of the place of the marriage the offspring, although born before marriage, would be legitimate, they ought to be deemed legitimate in every other country for all purposes whatever, including heirship of immovable property. *Story*, *Conf. L.* § 93.

Legitimacy or illegitimacy are among universal personal qualifications, and the laws of the State affecting all these personal qualities of its subjects travel with them wherever they go and attach to
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mate by the subsequent marriage of its parents will not legitimate a child whose father had not at the time of the marriage obtained a valid divorce from his former wife.

2. The status given a man by the laws of his domicil will not be recognized in other jurisdictions when it is constructed on principles contrary to those generally recognized

them in whatever country they may be resident. *Wheaton*, *Law of Nations*, 172.

When an illegitimate child has, by the subsequent marriage of his parents, become legitimate by virtue of the laws of the State or country where such marriage took place, and the parents were domiciled, it is therefore legitimate everywhere, and entitled to all the rights flowing from that status, including the right to inherit. *Miller v. Miller*, *supra*.

In cases of intestacy personal property is distributed according to the law of the place of the domicil of the intestate. *Parsons v. Lyman*, 20 N. Y. 103, 112; *Moultrie v. Hunt*, 23 N. Y. 394; *Story*, *Conf. L.* § 380.

But real estate in such cases descends according to the law of the place where it is situated. *White v. Howard*, 46 N. Y. 144-150; *Story*, *Conf. L.* § 424.

In this case it was held that an antenuptial child born in Scotland, of persons domiciled there, could not inherit lands in England, though by the law of Scotland the child had been legitimated by the subsequent intermarriage of the parents. The rule laid down in this case has been uniformly followed in England. *Don's Estate*, 4 Drew. 197; *Re Wright*, 2 Kay & J. 595; *Re Wilson's Trusts*, L. R. 1 Eq. Cas. 247; *Shaw v. Gould*, L. R. 3 H. L. 55.

An antenuptial child was born in South Carolina, in which State the parents intermarried, but at that time their intermarriage did not legitimate the child. Subsequently, the three became citizens of Mississippi, where antenuptial children were legitimated by the subsequent intermarriage of the

or to those which can be admitted by the laws of the forum.

3. **That a marriage has taken place on the faith of a previous divorce** does not preclude an inquiry by the courts of another State into the capacity of the divorced party and thus into the validity of the divorce, and the marriage may be declared invalid if the divorce is one which would be decreed void if directly in issue.
4. **A decree of divorce will be regarded as void** in other jurisdictions if granted by a court which was without authority because plaintiff had not resided within its jurisdiction the length of time fixed by statute as a condition precedent to his right to sue; and it may be impeached collaterally in such other jurisdictions by strangers to it notwithstanding the divorce record shows that the necessary residence was found as a fact by the court.
5. **A divorce decree which would be regarded as invalid** outside of the jurisdiction in which it was passed should not be regarded as beyond impeachment in that jurisdiction.
6. **A child whose parents were married after its birth** and after its father had obtained a divorce from his former wife, which was void as against his children by her because of lack of power in the court to grant it, cannot compete with the latter for an interest under a Massachusetts will giving a benefit to "all the children" of its father.
7. **Statutes providing that the issue of marriages null in law shall be legitimate**, and that when a marriage is annulled on the ground that a former husband or wife was living, children begotten before the judgment are legitimate, apply only to children born after the void ceremony was performed.

(September 2, 1891.)

REPORT from the Supreme Judicial Court for Suffolk for the consideration of the full court of a suit brought to establish an alleged right to share in the fund left by the will of Seth Adams, deceased. *Bill dismissed.*

The facts are stated in the opinion.

Messrs. M. F. Dickenson, Jr., and Hollis R. Bailey, for plaintiff:

The status of an infant (born before wedlock) as to legitimacy is determined by the law of the domicile of his father at the date of the act of legitimation, or possibly by the law of the father's domicile at the date of birth and legitimation.

If legitimate according to that law, he will be considered as legitimate in Massachusetts, and will be entitled to take under a Massachusetts will.

Ross v. Ross, 129 Mass. 246, 247, 256; *Re Andros*, L. R. 24 Ch. Div. 637; *Re Grove*, L. R. 40 Ch. Div. 216; *Re Goodman's Trust*, L. R. 17 Ch. Div. 266; Nelson, Private International Law, pp. 17, 18; Article on Legitimation, 88 L. T. 42; *Miller v. Miller*, 91 N. Y. 815; *Stack v. Stack*, 6 Dem. 281; *Dayton v. Adkisson*, 4 L. R. A. 488, 45 N. J. Eq. 603; *Caballero's Succession*, 24 La. Ann. 573.

According to the law of California, a child born before wedlock becomes legitimate by the subsequent marriage of its parents.

2 Cal. Civ. Code, § 215.

The language of the statute is mandatory and unqualified, and applies to all children born before wedlock without regard to the question whether or not the parents at the time

parents. The father died intestate. It was held that the status of the child was fixed by the domicile of its origin; where it was illegitimate, it so remained, and could not inherit. *Smith v. Kelley*, 23 Miss. 167.

A child born in Scotland, of parents domiciled there, who at the time of his birth were not married, but who afterwards intermarried in Scotland (there being no lawful impediment to their marriage, either at the time of the birth or afterwards), though legitimate by the law of Scotland, cannot take, as heir, lands of his father in England. *Birtwhistle v. Vardill*, 7 Clark & F. 695.

The English judges, in *Doe v. Vardill*, 5 Barn. & C. 438, did not deny, but admitted, that the effect of the Scotch marriage in that case was to legitimize the previous born issue, and that, being legitimate in Scotland, the country of his domicile, he was also legitimate in England. But they held, as before stated, that a person who inherits land in England must not only be legitimate, but must have been actually born in wedlock. *Ross v. Ross*, 129 Mass. 252-254; *Miller v. Miller*, 91 N. Y. 321, 322.

In addition to the cases cited in *Ross v. Ross* and *Miller v. Miller*, *supra*, and in the notes to *Stewart v. Stewart*, 31 N. J. Eq. 407, and to *Bussom v. Forsyth*, 32 N. J. Eq. 285, a few recent cases are appended; *Atkinson v. Anderson*, L. R. 21 Ch. Div. 100; *Re Grove*, L. R. 40 Ch. Div. 216; *Keegan v. Geraghty*, 101 Ill. 26; *Stoltz v. Doering*, 112 Ill. 234; *Sunderland's Estate*, 60 Iowa, 732; *Scott v. Key*, 11 La. Ann. 232; *Caballero's Succession*, 24 La. Ann. 573; *Stack v. Stack*, 6 Dem. 280; *Dayton v. Adkisson*, 4 L. R. A. 488, 45 N. J. Eq. 603, note.

The question involved was elaborately discussed in England, in *Doe v. Vardill*, 5 Barn. & C. 438, *sub nom.* *Birtwhistle v. Vardill*, 2 Clark & F. 571, 7 Clark & F. 805; in New York, in *Miller v. Miller*, 13 L. R. A.

supra; and in Massachusetts, in *Ross v. Ross*, *supra*. In the latter case *Chief Justice Gray* cites and comments upon every case up to that date (1880), and, after an exhaustive discussion of the whole subject, comes to the conclusion that the particular reasons that influenced the English court in holding, in *Doe v. Vardill*, that an heir to land in England must be actually born in wedlock, do not apply in this country, and that a person declared to be a legitimate child of another, by the law of the State of the domicile, must be held to have all the rights of a legitimate child wherever he goes.

An examination of these cases will show that the contrary result in England was attempted to be justified by the language of the Statute, so-called, of Merton, 20 Hen. III. chap. 8, which, it was claimed, negatively enacted that the English heir must be born in lawful wedlock. *Lord Brougham*, in 2 Clark & F. 582, and again, in 7 Clark & F. 914, combats this position with arguments that the courts of New York and Massachusetts seemed to think unanswerable. *Dayton v. Adkisson*, 4 L. R. A. 488, 45 N. J. Eq. 603.

The relation of husband and wife being a status based upon the contract of the parties, and recognized by all Christian nations, the validity of that contract, if not polygamous, nor incestuous, is governed by the law of the place of the contract; this status, once legally established, should be recognized everywhere as fully as if created by the law of the domicile; and therefore any such marriage, valid by the law of the place where it is contracted, is valid everywhere to all intents and effects, civil or criminal, including the settlement of the wife and children, her right of dower, and their legitimacy and capacity to inherit the father's real estate. *Parsons, Ch. J.*, in *Greenwood v. Curtis*, 6 Mass. 358, 377-379; *Medway v. Needham*, 16

of the conception or birth of the children were competent to marry.

See *Sulphin v. Cox*, 1 Western Law Monthly (Ohio) 848.

The competency of a party to marry is to be determined by the law of the State where the marriage takes place.

Ross v. Ross, *supra*; *Com. v. Lane*, 118 Mass. 462, 463; *Moore v. Hegeman*, 92 N. Y. 524; *Thorp v. Thorp*, 90 N. Y. 602; *Van Voorhis v. Brintall*, 86 N. Y. 18; *Pearson v. Pearson*, 51 Cal. 120; *State v. Ross*, 76 N. C. 242.

A marriage good where it is celebrated is good everywhere, except it be incestuous or polygamous, or where the parties, being residents of a State, have gone out of the State with intent to evade its laws.

Greenwood v. Curtis, 6 Mass. 378; *Medway v. Needham*, 16 Mass. 157; *West Cambridge v. Lexington*, 86 N. Y. 506; *Putnam v. Putnam*, 8 Pick. 433; *Sutton v. Warren*, 10 Met. 451; *Com. v. Hunt*, 4 Cush. 50; *Com. v. Lane*, *supra*; *Miliken v. Pratt*, 125 Mass. 380; *Ross v. Ross*, *supra*.

A suit for divorce, so far as it deals with the status of the libellant, is a proceeding *in rem* or *quasi in rem*, and a decree of divorce, so far as it determines that status, is binding on all the world, at least within the State or jurisdiction where the decree is granted.

Hood v. Hood, 110 Mass. 468, 465; *Burien v. Shannon*, 115 Mass. 458, 449; *Brigham v. Fayerweather*, 1 New Eng. Rep. 736, 140 Mass. 413; *McClurg v. Torrey*, 21 N. J. Eq. 228.

A divorce may be valid in the State where it is granted, even though it is not recognized as valid in other States.

Mass. 157; *West Cambridge v. Lexington*, 1 Pick. 506; *Putnam v. Putnam*, 8 Pick. 433; *Com. v. Lane*, 113 Mass. 468; *Bullock v. Bullock*, 122 Mass. 3; *Miliken v. Pratt*, 125 Mass. 380, 381.

Under the provisions of the celebrated "Code Napoleon," enacted in 1804, and substantially adopted in many of the American States, humane regulations as to legitimacy will be found established. No. 361 is in the following language:

Children born out of wedlock, other than such as are the fruit of an incestuous or adulterous intercourse, may be legitimated by the subsequent marriage of their father and mother, whenever the latter shall have legally acknowledged them before their marriage, or shall have recognized them in the act itself of celebration. The germ of this enactment dates back to the Roman law.

A natural son born of a free woman, with whom marriage is not prohibited, will become subject to the power of the father as soon as the marriage instruments are drawn as the Constitution directs; which allows the same benefit to those who are born before marriage as to those who are born subsequent thereto. *Cooper, Justin. De Legitimatione*, lib. 1, title 10, § 13.

A charge of illegitimacy must be supported by direct and irrefutable evidence. It must be conclusively proved. *Caujolle v. Ferrie*, 23 N. Y. 90.

As to a marriage at common law, and the evidence tending to prove it, see *Hebblethwaite v. Hepworth*, 98 Ill. 132; *Port v. Port*, 70 Ill. 498; *Caujolle v. Ferrie*, 23 N. Y. 107; 2 Greenl. Ev. § 462; 1 Bishop, Mar. & Div. § 13, 457, note, 1521; *Stoltz v. Doering*, 112 Ill. 234.

The law is unwilling to bastardize children, and throws the proof on the party who alleges illegitimacy; and, in the absence of evidence to the contrary, a child, *eo nomine*, is therefore a legitimate 13 L. R. A.

Pennoyer v. Neff, 95 U. S. 734, 24 L. ed. 572; *People v. Baker*, 76 N. Y. 84; *Flower v. Flower*, 42 N. J. Eq. 152; *Doughty v. Doughty*, 28 N. J. Eq. 584; *Cook v. Cook*, 56 Wis. 318; *Wright v. Wright*, 24 Mich. 180; *Trevino v. Trevino*, 54 Tex. 262; *Colvin v. Reed*, 55 Pa. 376.

A decree of divorce is valid and effectual within the State where it is granted, until it has been there directly attacked and vacated. It cannot thus be attacked collaterally.

Edson v. Edson, 108 Mass. 590, 597; *Keith v. McCaffrey*, 4 New Eng. Rep. 645, 145 Mass. 19; *Williams v. Haynes*, 77 Tex. 283; *People v. Harrison*, 84 Cal. 607; *Ex parte Sternes*, 77 Cal. 162.

The word "children" in a will includes a child made legitimate by a subsequent marriage.

Monson v. Palmer, 8 Allen, 551.

By the law of California and of Texas where a marriage is annulled or is deemed null, children begotten before the judgment are legitimate, whether born before or after wedlock. If entered into in good faith by either of the parties, the marriage, so far as children are concerned, has all the effects of a valid marriage.

2 Cal. Civ. Code, §§ 84, 1887; *Graham v. Bennett*, 2 Cal. 503; *Tex. Rev. Stat. § 1656*; *Carroll v. Carroll*, 20 Tex. 731, 745; *Nichols v. Stewart*, 15 Tex. 283; *Smith v. Smith*, 1 Tex. 627; *Hartwell v. Jackson*, 7 Tex. 580; *Lee v. Smith*, 18 Tex. 145; *Dyer v. Brannock*, 66 Mo. 418; *Wright v. Lore*, 12 Ohio St. 619; *Watts v. Owens*, 62 Wis. 518; *Buisiere's Succession*, 41 La. Ann. 217; *Workman v. Harold* (Ky.) Jan. 20, 1887; *Harris v. Harris*, 85 Ky. 49; *Stones v. Keeling*, 5 Cal. 148; *Coutte v. Greenhow*, 2

child. *Fielder v. Fielder*, 2 Hagg. Consist. 197, 4 Eng. Eccl. 527; *Wilkinson v. Adam*, 1 Ves. & B. 422.

In *Vowles v. Young*, 18 Ves. Jr. 145, *Lord Chancellor Erskine* said, in reference to proof of an actual marriage, that the evidence, especially in the case of obscure families, must be very slight. As sustaining the same rule, may also be cited *Starr v. Peck*, 1 Hill, 270; and the qualification of that case, as made in *Cheney v. Arnold*, 15 N. Y. 345, does not weaken its authority on the question of the duty of a court to presume matrimony, when the parties have cohabited, and there are circumstances from which a contract may be inferred. *Caujolle v. Ferrie*, 23 N. Y. 90.

At common law a bastard has no right of inheritance. In the eyes of the law, bastards are not regarded as children for civil purposes. 1 Bl. Com. p. 458, in discussing the rights of bastards, says: "The rights are very few, being only such as he can acquire, for he can inherit nothing, being the son of nobody, and sometimes called *filius nullius*, sometimes *filius populi*. In *Blacklaws v. Milne*, 82 Ill. 505, it was held that the common-law rule which excluded illegitimate children from inheriting was in force in that State.

Words and terms having a precise and well-settled meaning in the jurisprudence of a country are to be understood in the same sense when used in its statutes, unless a different meaning is unmistakably intended. The word "illegitimate," when used in this connection, has, by the common law, and the law of this State, a well-defined meaning, which is, begotten and born out of wedlock. 1 Rev. Stat. 641, § 1; 2 Kent, Com. 208, 209; 1 Bl. Com. 454, 455.

The so-called "Statute of Merton."

The Statute of Merton was enacted at the priory of Merton, in Surrey, in the year 1236. It is worthy

Munf. 372; *Glass v. Glass*, 114 Mass. 563; *Hiram v. Pierce*, 45 Me. 367; 1 Bishop, Mar. & Div. 6th ed. § 801; Stimpson, Am. Stat. Law, § 6116, p. 670.

Messrs. Robert M. Morse, Jr., and James Fox, for defendants:

The length of residence is purely a matter of jurisdiction. It has nothing to do with the merits of the cause, but solely with the right of the particular court to try it.

Brett v. Brett, 5 Met. 233; *Schrow v. Schrow*, 103 Mass. 575; *Eaton v. Eaton*, 122 Mass. 276; *Bennett v. Bennett*, 28 Cal. 599.

As a question of jurisdiction it is open to inquiry, and the recitals of the records are not conclusive.

Graham v. Spencer, 14 Fed. Rep. 603, 605; *Thompson v. Whitman*, 85 U. S. 18 Wall. 457, 21 L. ed. 897; *Knowles v. Gas Light & C. Co.* 86 U. S. 19 Wall. 58, 22 L. ed. 70; *Hall v. Lanning*, 91 U. S. 160, 28 L. ed. 271; *Sewall v. Sewall*, 122 Mass. 161; *Cummington v. Belchertown*, 4 L. R. A. 131, 149 Mass. 225; *People v. Danell*, 25 Mich. 247; *Reed v. Reed*, 52 Mich. 121, 122; *Gregory v. Gregory*, 1 New Eng. Rep. 796, 78 Me. 187; *Van Fossen v. State*, 87 Ohio St. 317; *Leith v. Leith*, 39 N. H. 20; *Hoffman v. Hoffman*, 46 N. Y. 30; *Neff v. Beauchamp*, 74 Iowa, 92; *Cheely v. Clayton*, 110 U. S. 701, 28 L. ed. 298.

A decree of divorce rendered by a court having jurisdiction over one only of the parties will not be treated as conclusive, but is open to inquiry.

Watkins v. Watkins, 135 Mass. 84; *Cummington v. Belchertown*, *supra*.

In much the larger part of adjudged cases a decree of divorce rendered in another State against a nonresident, who does not appear and who is not served with process, is treated as wholly void.

Prosser v. Warner, 47 Vt. 667. See *People v. Baker*, 76 N. Y. 78; *Thorn v. Salmonson*, 37 Kan. 441; *Cook v. Cook*, 56 Wis. 195; *Irby v.*

Wilson, 1 Dev. & B. Eq. 568; *Colvin v. Reed*, 55 Pa. 375; *Platt's App.* 80 Pa. 501; *Philadelphia v. Wetherby*, 15 Phila. 403. See also *Reed v. Reed*, 52 Mich. 117; *Doughty v. Doughty*, 27 N. J. Eq. 315, 28 N. J. Eq. 581.

Judgments of divorce have frequently been annulled, even by the court which granted them, upon proof that knowledge of the suit was fraudulently kept from the libellee.

Edson v. Edson, 108 Mass. 590; *Whitcomb v. Whitcomb*, 46 Iowa, 437; *Britton v. Britton*, 45 N. J. Eq. 88; *Holmes v. Holmes*, 63 Me. 420; *Adams v. Adams*, 51 N. H. 388; *Everett v. Everett*, 60 Wis. 200.

A decree which stands unreversed and in full force may be called in question or impeached in collateral proceedings under some circumstances.

Gilman v. Gilman, 126 Mass. 27; *Needham v. Thayer*, 147 Mass. 536; *Cummington v. Belchertown*, *supra*.

The effect, if any, of the decree and of the marriage immediately following was to deprive these children and the wife of their vested rights of property. The rights of these defendants are protected by the 14th Amendment of the United States Constitution and the courts of California would be bound to respect and enforce them, and they cannot be taken away by any recitals of the record falsely asserting the jurisdiction of the court.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 585; *Needham v. Thayer*, *supra*; *Belcher v. Chambers*, 58 Cal. 635; *Renaud v. Abbott*, 116 U. S. 277, 29 L. ed. 629.

As to the defendants other than Mrs. Adams, the rule that a judgment cannot be impeached collaterally has no application.

Downs v. Fuller, 2 Met. 135; *Chase v. Chase*, 6 Gray, 157; *Inman v. Mead*, 97 Mass. 310; *Duchess of Kingston's Case*, 20 How. St. Tr. 355; *Hargrave's Tracts*, 451, 11 Hargrave's St. Tr. 262; *Harrison v. Southampton*, 17 Eng. L. & Eq. 364.

of remark, that the famous Statute of Merton, 20 Hon. III. chap. 9, is, in fact, not a statute, but a mere entry on the minutes of Parliament of a refusal by the English lords to assimilate the laws of England to that of other civilized countries, by affirmatively declaring that the marriage of the parents subsequent to the birth rendered the child legitimate. *Dayton v. Adkisson*, 4 L. R. A. 488, 45 N. J. Eq. 603.

Before and during the reign of Henry III., if it was alleged that the person claiming as heir was illegitimate, a writ was issued to the archbishop, or bishop, commanding that inquiry and return upon this issue be made to the king or his justices. (1 Reeves, Hist. chap. 3, 168.) By the canons of the church, the rule of the Roman law, the subsequent intermarriage of parents legitimated antenuptial children, and the ecclesiastics were inclined to return according to the canons of their church, and contrary to the common law.

At the Parliament of Merton the ecclesiastics endeavored to enact the rule of their church, but "all the earls and barons, with one voice, answered that they would not change the laws of England which had hitherto been used and approved." (1 Bl. Com. 19, 456; 2 Kent, Com. 200.) No change whatever was made at Merton; and, thereafter, the ecclesiastics were required to return the facts, whether the claimant was begotten and born out of wedlock, and judgment was rendered by the courts accord- 18 L. R. A.

ing to the common law. 1 Reeves, Hist. chap. 3, 169.

Bracton, an ecclesiastic, as well as lawyer, who wrote, it is supposed, in the time of Henry III., in discussing the effect of the legitimation of antenuptial children by the subsequent intermarriage of their parents, said: "It follows to consider how the illegitimate are legitimated, and it is to be known, that if anyone has natural children by any woman, and afterwards contracts marriage with her, the children already born are legitimated by the subsequent marriage, and are reckoned fit for all lawful acts, nevertheless only for those which regard the sacred ministry, but they are not legitimate for those which regard the realm, nor are they adjudged to be heirs who can succeed to their relatives, on account of a custom of the realm, which is of a contrary import." Chap. 29, f. 63, b. or vol. 1, p. 503, of the Lords Commissioners' Edition.

It may be safely asserted that the decisions of the English courts rest on the common law. *Fenton v. Livingstone*, 5 Jur. N. S. pt. 1, p. 1183, holds that the Statute of Merton is only declaratory of the common law.

But it is not very material whether they rest on the common law or the early statutes, because the English statutes enacted before the settlement of this country are a part of its common law. *Bogardus v. Trinity Church*, 4 Paige, 198, 3 L. ed. 402; 1 Kent, Com. 473.

The question whether Charles W. Adams, when he undertook to marry Hannah Phillips, was married or single, is a question not of law but of fact. That question must be settled by this court, because the case is here, and the question what the California court would do with this question of fact if the case were there, is quite beside the point. The validity of the marriage depends wholly upon the question what view this court shall take concerning the validity of the divorce.

Re Wilson's Trusts, L. R. 1 Eq. 247; *Shaw v. Gould*, L. R. 3 H. L. 55; *Shaw v. Atty-Gen.* L. R. 2 Prob. & Div. 156; *Beasley v. Beasley*, 3 Hagg. Eccl. 639; *Briggs v. Briggs*, 5 Prob. Div. 163; *Smith v. Smith*, 13 Gray, 210.

Cal. Civ. Code, § 84, does not cover the case of a child born before marriage. It refers clearly to the children of the marriage.

Estate of Wardell, 57 Cal. 491; *Watts v. Owens*, 62 Wis. 517.

Under the statute by which a child born before wedlock becomes legitimate by the subsequent marriage of its parents, the marriage must be a valid marriage.

Pub. Stat. chap. 125, § 5; *Loring v. Thorndike*, 5 Allen, 257; *Greenhow v. James*, 80 Va. 686.

In *Boyes v. Bedale*, 1 Hem. & M. 798, it was held that a child legitimated by subsequent marriage under the law of France, where the father acquired a domicile after the death of the testator, was not a child within the meaning of the testator's will.

In no case in this State has the law of legitimation of another State different from our own been applied to the construction of a domestic will.

See *Cotman v. Krell*, 152 Mass. 214; *Lincoln v. Perry*, 4 L. R. A. 215, 149 Mass. 368.

Even if the California law permitted a man to legitimate a child already born by going through the form of marriage with his mistress,

this court would not recognize such legitimation any more than it would recognize the child of a polygamous marriage.

Bethell v. Hildyard, L. R. 38 Ch. Div. 220; *Hyde v. Hyde*, L. R. 1 Prob. & Div. 130.

Holmes, J., delivered the opinion of the court:

This is a bill in equity by which the plaintiff seeks to establish his right to a share in a fund left by the will of Seth Adams of Newton, Massachusetts, to the "present wife" of his brother, Charles W. Adams, "for the benefit of herself and all the children of said Charles in equal proportions." The question is whether the plaintiff is one of the children within the meaning of the will. The wife referred to is admitted to be the defendant, Anne T. Adams, who was married to Charles in Maine, in 1854, he then being a resident of New York. The plaintiff is the child of Charles W. Adams and Hannah Phillips, was born in California on August 28, 1881, and was then illegitimate. At that time Charles Adams' domicile was in Texas. In October, 1881, Charles Adams changed his domicile to California, and on December 3, 1881, he began an action there for divorce against the above-mentioned Anne, and got a decree on April 13, 1882. It is found that he had not been a resident of the State for six months next preceding the commencement of the action, as required by the California Civil Code, § 128, and that for this reason the court had no jurisdiction of the action, but that the court was imposed upon by Adams. We may also mention that it is found that Adams' wife was then residing in Massachusetts, and had no actual notice of the action, and that it might be a question, if material, whether her domicile followed that of her husband. Cal. Civ. Code, § 129;

The principles supposed to be incorporated in the so-called Statute of Merton are fully recognized by special legislation in the following States as summarized by Snyder in his *Geography of Marriage*, as follows:

In Arizona, the children of a man and woman living together as man and wife, or of persons living together, who subsequently marry, are legitimate.

In Florida, Iowa, Minnesota, Montana, Nevada, Oregon, Pennsylvania and Washington, children born out of wedlock become legitimate by the subsequent marriage of their parents.

In Connecticut, where the parents of children born out of wedlock subsequently marry, and recognize such children as theirs, they shall be deemed legitimate. Stat. 1878.

In Virginia and West Virginia children born out of wedlock, whose parents subsequently marry, if recognized by the father before or after marriage, shall be deemed legitimate.

In New Hampshire, where the parents afterwards marry and recognize them, they shall inherit as if they were legitimate.

In Illinois, Indiana, Massachusetts, Ohio, Vermont, Wisconsin and Wyoming a child born out of wedlock, whose parents shall subsequently marry, and whose father acknowledges such child, shall be deemed legitimate.

In New Mexico, children legitimated by a subsequent marriage of their parents are as direct heirs 13 L. R. A.

as legitimate children, with the exception of the right of primogeniture.

In North Carolina, children born out of wedlock can become legitimate only upon petition of the father, which must be presented to the superior court of the county where he resides, and if it appear that he is father of the child, the court may make a decree to that effect which shall be recorded by the clerk, and such child may then inherit from his father only.

In Michigan, children born out of wedlock become legitimate by the subsequent marriage of their parents, or, if they do not marry, the father can make the child "legitimate in law" by so acknowledging in writing, executed like a deed of land.

In Nebraska, children born out of wedlock become legitimate if the parents afterwards marry and have been adopted in the family with other children born in wedlock, or shall have been acknowledged by the father in writing, signed in the presence of one witness.

In Louisiana, children born out of wedlock, except those born from an incestuous or adulterous connection, may be legitimated by the subsequent marriage of their father and mother, when legally acknowledged before marriage, by an act passed before a notary and two witnesses, or by their contract of marriage itself. They are then known as natural children.

Burien v. Shannon, 115 Mass. 438, 447, 448. On April 20, 1882, Charles Adams married Hannah Phillips in California, then having his domicile there, and after the marriage recognized the plaintiff as his son. By the law of California a child born before wedlock becomes legitimate by the subsequent marriage of his parents. Civil Code, § 215. The law of Texas is similar if the child is recognized by the father. Rev. Stat. § 1650 (1879).

The word "children," in a Massachusetts will means legitimate children. *Kent v. Barker*, 2 Gray, 535, 536. Probably the meaning would be the same even if the parents referred to, and the child, were domiciled in a State where illegitimate children were recognized as children for some purposes. *Lincoln v. Perry*, 149 Mass. 368, 373, 374, 4 L. R. A. 215. But we do not need to consider this at length, as it does not appear that the law of California or of Texas would recognize the plaintiff as the child of Charles Adams for the present purposes unless he were legitimated, and Charles Adams in any case was only domiciled in California for a short time, long after the testator's death, and after the birth of his child, and died domiciled in Massachusetts. The plaintiff's case is put wholly upon his having been legitimated. We assume for the purposes of our decision that if he has been legitimated he is entitled to a share under the will. *Loring v. Thorndike*, 5 Allen, 257; *Sleigh v. Strider*, 5 Call, 439; *Re Andros*, L. R. 24 Ch. Div. 637.

We may as well add here that if the Texas domicile of Charles Adams at the time of the birth of his son was material (*Ross v. Ross*, 129 Mass. 248, 256; *Re Grove*, L. R. 40 Ch. Div. 216), no difference based on that fact and favorable to the plaintiff has been called to our attention. We shall speak only of the law of California in dealing with this part of the case. We shall not consider whether, if it were necessary to satisfy the requirements of the Texas statute, a marriage in California would do so.

It may be assumed that the California statute to which we have referred (Civil Code, § 215) requires a valid marriage to legitimate an earlier born child. *Loring v. Thorndike*, 5 Allen, 257, 268, 269; *Greenhow v. James*, 80 Va. 636, 641. For Charles Adams' marriage to be valid it was necessary that he should have obtained a valid divorce. But if we should assume that the decree of divorce was valid in California so that Charles Adams had a capacity to marry there, and that his marriage conferred the status of a legitimate child upon his son by the law of that State, we should encounter doubts like those expressed by Lord Colonsay in *Shaw v. Gould*, L. R. 8 H. L. 55, 97, whether at any distance of time we were to reopen the inquiry into the circumstances of Charles Adams' resort to the California court. The California record shows that the court there found that Charles Adams had been a resident of the State for the necessary time. There is color in the California decisions put in evidence for the argument that this finding could not be impeached collaterally in California.

and thus that the case supposed is the case before us.

Taking the case this way for a moment, we still are unable to decide it in favor of the plaintiff. The rule that the status of the domicile is the status everywhere must yield when the status is constructed on principles which are contrary to those which are generally recognized or which can be admitted by the law of the forum resorted to. See *Ross v. Ross*, 129 Mass. 243. We should agree with the English decisions so far as this, that the fact that a marriage has taken place on the faith of a previous divorce does not preclude an inquiry by the courts of another State into the capacity of the divorced party and thus into the validity of the divorce, or a denial of the validity of the marriage if the divorce is one which would be decreed void if it were directly in issue. A purely voluntary contract of marriage cannot be allowed to impart a conclusive character to a decree which before could have been examined. *Smith v. Smith*, 13 Gray, 209, 210; *Shaw v. Gould*, L. R. 8 H. L. 55; *Shaw v. Atty.-Gen.* L. R. 2 Prob. & Div. 156; *Briggs v. Briggs*, 5 Prob. Div. 168.

The present case offers remarkably little ground for hesitation in going into this inquiry. Marriage in California is, or may be, a pure matter of private contract entered into without intervention of the State except for purposes of registration. Civil Code, §§ 55, 75, 78; *Graham v. Bennet*, 2 Cal. 503. The mother's rights are not in question, and if they were, she did not stand at all in the position of a purchaser for value without notice. She is found to have known all the facts, and her belief in Charles Adams' capacity to contract marriage was simply an opinion about California law. (We are not now considering the conditions of a putative marriage, as to which different views have been expressed). *Glass v. Glass*, 114 Mass. 563, 564; *Shaw v. Gould*, L. R. 8 H. L. 55, 97; *Buissiere's Succession*, 41 La. Ann. 217, 220, 221; *Harris v. Harris*, 85 Ky. 49. The plaintiff is claiming a purely gratuitous benefit as an incidental result of the proceedings in California, at the expense of other children who were not parties to any of those proceedings, or entitled to be heard at any stage of them, but who nevertheless are to be precluded from denying their validity.

If the validity of the divorce were immediately in issue it could be impeached here, for want of jurisdiction, notwithstanding the recitals in the record, and those recitals could be contradicted by parol evidence. *Sevall v. Sevall*, 122 Mass. 156, 161; *Ownington v. Belchertown*, 149 Mass. 223, 225, 4 L. R. A. 131; *Thompson v. Whitman*, 85 U. S. 18 Wall. 457, 21 L. ed. 897. See *Bowler v. Huston*, 30 Gratt. 266; *Mitchell v. Ferris*, 5 Houst. (Del.) 34; *Eager v. Storer*, 59 Mo. 87. For instance, if Charles Adams had married Hannah Phillips in this State and had been indicted for polygamy (*People v. Davell*, 25 Mich. 247; *Van Fossen v. State*, 37 Ohio St. 317, 320. See *People v. Baker*, 76 N. Y. 78); or even in a proceeding between the parties to the divorce, if the

one raising the objection had not appeared in that cause, and was not domiciled in the State where it was granted. *Reed v. Reed*, 53 Mich. 117, 121; *Cross v. Cross*, 108 N. Y. 628. See *Chaney v. Bryan*, 15 Lea, 589; *Leith v. Leith*, 39 N. H. 20, 41. So a *fortiori* where the question is raised, as here, by third persons whose rights are concerned, and who were not parties to or entitled to be heard in the divorce suit. See *Gregory v. Gregory*, 78 Me. 187, 190, 1 New Eng. Rep. 796; *Neff v. Beauchamp*, 74 Iowa, 92, 94; *O'Dea v. O'Dea*, 101 N. Y. 23, 1 Cent. Rep. 785; *Cummington v. Belchertown*, 149 Mass. 223, 4 L. R. A. 131; *Shaw v. Gould*, L. R. 3 H. L. 55.

In *Hood v. Hood*, 11 Allen, 196, the fact of domicile was tried between the original parties for the purpose of determining the jurisdiction of an Illinois divorce, and in *Hood v. Hood*, 110 Mass. 463, it was the Massachusetts, not the Illinois, decree, which was held conclusive on third persons, they offering evidence only to impeach the Illinois decree. See also *Burien v. Shannon*, 115 Mass. 438, 445, 449; Pub. Stat. chap. 146, § 41.

There is no doubt that the requirement of six months residence goes to the jurisdiction of the court. The finding of the judge on this point is confirmed, not only by the plain effect of the California statute, but by the express statement of the Supreme Court of that State and by its intimation that a divorce granted without that prerequisite would not be binding in any other State. *Bennett v. Bennett*, 28 Cal. 599, 601; *People v. Davrell*, 25 Mich. 247, 263, 264.

But although we have made the assumption for a moment, we by no means are prepared to concede that if the present case arose in California under a California will it would be decided differently there. The universal effect of a judgment *in rem* in establishing or changing a status or title, whether given to it by statute or by the tradition of the courts, rests on the practical necessity of the case, because the effect is of a nature to concern strangers to the proceedings. It would be inconvenient for parties to be divorced as between themselves and yet married towards the world. The same convenience makes it desirable that the effect should be the same wherever the question arises, whether within the jurisdiction or without it, and therefore in the case of a decree which would be void outside the jurisdiction, that it should not be held conclusive within it. The decree, if binding in California, would be binding everywhere. *Cheever v. Wilson*, 76 U. S. 9 Wall. 108, 19 L. ed. 604. It is desirable, at least, that the converse rule should be applied, and that a decree void elsewhere should not be held binding there. We are aware that some of the cases which we have cited and others which we have not cited contemplate the possibility of a divorce which shall be valid only as to the plaintiff within the jurisdiction. But especially in this country where changes of residence from State to State are frequent, every court must strive so far as possible to bring the local view of a citizen's

status into accord with that which would prevail generally elsewhere.

We have tried to show that the decree before us would be regarded as void outside the jurisdiction, and void on the ground that the condition precedent attached by a California statute to the right of the court to take jurisdiction had not been complied with. The question is whether the statute has a less effect within the State. No conclusive evidence of the law of California upon this point has been called to our attention. If the plaintiff had been rightly in court and the objection had been that the defendant had not been duly served, it may be that if the record showed a proper publication it could not be contradicted. *Re Newman*, 75 Cal. 213, 220. But perhaps even this is doubtful in view of some of the decisions earlier cited, and however it may be, a distinction has been suggested between a total want of jurisdiction and a failure to get jurisdiction of the person of the defendant in a case which is rightly in court. *People v. Dawell*, 25 Mich. 247, 256. See *Henderson v. Staniford*, 103 Mass. 504, 506; *Whitwell v. Barbier*, 7 Cal. 54, 63, 64. We feel at liberty to assume the law of California to be in accordance with that generally received elsewhere, and to consider the question on principle. The argument for the conclusiveness of the decree in California would seem to be that the parties to a domestic judgment showing jurisdiction on the face of the record cannot impeach it collaterally. *Hendrick v. Whittemore*, 105 Mass. 23; *McCormick v. Fiske*, 138 Mass. 379; *Freeman*, Judgm. §§ 131, 134. And that if a judgment *in rem* is operative as between the parties while it stands, it must be effectual to determine their status as to third persons, although not parties, for reasons already given. *Re Newman*, 75 Cal. 213, 220; *Hood v. Hood*, 110 Mass. 463, 465; *Brigham v. Fayerweather*, 140 Mass. 411, 413, 1 New Eng. Rep. 736.

But if the judgment is thus binding to all intents and purposes in California, it would be binding elsewhere, which as has been shown is not the law. In New York this consideration has been adduced as a reason for the rule prevailing there that a domestic record may be impeached collaterally for want of jurisdiction, even by a party. *Ferguson v. Crawford*, 70 N. Y. 253, 261, 262. Whether the rule as to parties be regarded as an anomaly established on the principle *communis error facit jus*, or as a mere rule of procedure, that those who have it in their power to reverse a judgment must do so if they do not want to be bound by it, as possibly may be inferred from some of the cases (*Hendrick v. Whittemore*, 105 Mass. 23, 28), the conclusion cannot be admitted that those who have not that power are also bound, if the judgment is *in rem*, to admit the change of status which it purports to effect. Consider what would be the result. In a great majority of divorces neither party wishes to disturb the decree. If their acquiescence should be allowed to have the effect supposed, third persons may be affected in their property and in their most sacred personal

rights by the interested action of others without ever having had a chance to be heard. The cases are few, and we are aware of no binding authority. But in *Perry v. Meddowcroft*, 10 Beav. 122, 137, an infant was allowed to impeach a domestic sentence of nullity collaterally for collusion, although the sentence operated *in rem*, and bastardized him if it stood. *Harrison v. Southampton*, 22 L. J. N. S. Ch. 372; *Meddowcroft v. Huguenin*, 4 Moore, P. C. 386, 398. We cannot doubt that if the fraud on the court had concerned its jurisdiction rather than the merits, *Lord Langdale* would have been at least equally ready to hear the evidence. *Curran v. Smith*, 84 Ind. 380. Yet the parties to the collusive decree were bound by it. *Greene v. Greene*, 2 Gray, 361, 362; *Nichols v. Nichols*, 25 N. J. Eq. 60, 65. We have confined our citations mainly to cases of divorce and judgments *in rem*. But where there has been an execution sale under a judgment *in personam* there is a difficulty not unlike that which arises with regard to judgments *in rem* in allowing the validity of the judgment to be disputed by third persons for the purpose of destroying the purchaser's title. Yet it has been held that this may be done. *Safford v. Wear*, 142 Mass. 231, 2 New Eng. Rep. 586.

We shall not consider further whether this judgment was not absolutely void on the facts reported, and whether, if so, the record could be contradicted by the parties to it on what has been declared in California to be a "fundamental rule that no court can acquire jurisdiction by the mere assertion of it, or by deciding that it has it." *McMinn v. Whelan*, 27 Cal. 300, 314.

We are of opinion, for the reasons which we have given, that the validity of the divorce granted Charles W. Adams is open to contradiction in this suit, that the divorce was void and ineffectual as against his legitimate children, that therefore his marriage with the plaintiff's mother was void, and did not legitimate the plaintiff in such a sense as to entitle him to set up a claim in competition with the legitimate children under a Massachusetts will.

Another and distinct argument has been drawn from another California statute which provides that when a marriage is annulled on the ground that a former husband or wife was living, children begotten before the

judgment are legitimate. Cal. Civ. Code, § 84. The California and Texas statutes also provide that the issue of marriages null in law shall be legitimate. Cal. Civ. Code, § 1387; Tex. Rev. Stat. § 1656.

The Texas statute may be laid on one side. For even if we should hold that the Texas law imparted to the plaintiff his capacity for legitimation, which under the facts of this case we do not intimate, still, subject to the qualifications heretofore stated, the effects of his parents' marriage upon him must be determined by the law of California where it took place and where they and he then were domiciled. We lay on one side, therefore, without further remark, a dictum in a decision by the Supreme Court of Texas, that children born before the parents entered into a void marriage would be legitimated so as to take as children under a Texas will. *Carroll v. Carroll*, 20 Tex. 731, 745, 746.

We see no ground for construing the California Acts as applying to any children except those born after the void ceremony has been gone through with. They alone can be described as issue of the marriage, according to the express words of section 1387. *Greenhow v. James*, 80 Va. 636, 638. They alone fall within the obvious reasons for the Statute and the earlier Spanish law from which it would seem that the Statute may have been derived, according to the exposition in another Texas case. *Smith v. Smith*, 1 Tex. 621, 629. If we assume that section 84 applies where there has been no judgment annulling the marriage, the general words "children begotten before the judgment" must be confined to children born after the marriage in view of section 1387. Neither section 84, nor section 1387, nor both together, can be taken to enlarge the meaning of section 215, discussed at the beginning of this opinion, so that a void marriage shall legitimate children previously born. The view which we take seems to be that of the Supreme Court of California so far as they have expressed an opinion. *Estate of Wardell*, 57 Cal. 484, 491. See also *Watts v. Owens*, 62 Wis. 512, 517; *Fraser, Parent & Child*, 2d ed. 28. We have found no case favoring a different construction except the few words in *Carroll v. Carroll*, 20 Tex. 746.

Bill dismissed.

KANSAS SUPREME COURT.

Martna A. BUFFINGTON, *Plff. in Err.*,

William S. GROSVENOR,

SAME, Plff. in Err.,

John G. SEARS.

(....Kan.....)

*1. The word "citizens," as used in section

*Head notes by JOHNSTON, J.

NOTE.—*Laws regulating the descent of real property.* The descent or transfer of real property is governed by the law of the place where the land is 43 L. R. A.

17 of the Bill of Rights prior to the Amendment of 1888, meant citizens of Kansas; and the word "aliens," as there used, meant persons born out of the United States and not naturalized.

2. The statute which provides that the widow shall not be entitled to an interest in lands conveyed by the husband when the wife, at the time of the conveyance, was a non-resident of the State, is not repugnant to section 2 of article 4 of the Fourteenth Amendment to the Constitution of the United States.

situated, the *lex loci rei sitæ*. The law of the domicile, *lex domicilii*, does not apply to real property. And that law of descent governs which was in

(July 2, 1891.)

WRITS of error to the District Court for Kingman County to review judgments in favor of defendants in actions brought to recover possession of certain real estate. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. Hallowell, Hume & Gordon for plaintiff in error.

Messrs. John E. Lydecker and Douthitt, Jones & Mason, for William S. Grosvenor, defendant in error:

The State has a right to regulate by statute the manner any right, title or interest in and to real estate situated within the State of Kansas may be transferred; and whether the wife be an heir of the husband under the Statute, or not, when she survive him she cannot take any interest in real estate transferred to a purchaser in manner and form prescribed by the laws of the State; and provisions of the Statute prescribing certain modes of transfer, which will transfer the entire estate without the wife's joining therein, cannot properly be called provisions as to the descent of property; there is no descent.

Conner v. Elliot, 59 U. S. 18 How. 591, 15 L. ed. 497; *Magee v. Young*, 40 Miss. 164; *Albany F. Ins. Co. v. Bay*, 4 N. Y. 9, 14, 15.

The right of the wife to an interest in the real estate of the husband is contingent, and is not a vested or existing right, such that the Legislature may not at any time modify, change, or entirely abolish.

Conner v. Elliot, 59 U. S. 18 How. 591, 15 L. ed. 497; *Barbour v. Barbour*, 46 Me. 9; 1 Woerner, American Law of Administration, 225; *Ligare v. Semple*, 32 Mich. 438; *Bennett v. Harms*, 51 Wis. 251; *Wallace v. Reddick*, 6 West. Rep. 769, 119 Ill. 151; *United States v. Fox*, 94 U. S. 315, 24 L. ed. 192; *Cooley*, Const. Lim. 360, 361.

It was claimed in *Head v. Daniels*, 38 Kan. 2, that section 192 of the Civil Code, which provides that "no undertaking for attachment shall be required where the parties defendant were all nonresidents or a foreign corporation," was unconstitutional on the same grounds urged in this case, but that Statute was decided valid by the court.

The validity of this Statute has been recognized and upheld by the decisions of this court.

Comstock v. Adams, 23 Kan. 518; *Koons v. Rittenhouse*, 28 Kan. 359; *Chambers v. Cox*, 23 Kan. 396; *Farlin v. Sook*, 26 Kan. 398; *Busenbark v. Busenbark*, 38 Kan. 576.

force at the decease of the ancestor. *Story*, Conf. L. § 464; *Potter v. Titcomb*, 22 Me. 300; *Smith v. Kelly*, 23 Miss. 167; *Miller v. Miller*, 10 Met. 333; *Marshall v. King*, 24 Miss. 85; *McGaughy v. Henry*, 15 B. Mon. 323; *Jones v. Marable*, 6 Humph. 116; *Price v. Tally*, 10 Ala. 946; *Enslava v. Farmer*, 7 Ala. 52; *Tiedeman*, Real Prop. § 664.

Lands are to descend according to the laws of the State in which they are situated, irrespective of the domicile of the person dying intestate, or of those claiming as heirs. *Donovan v. Pitcher*, 53 Ala. 411, 25 Am. Rep. 634; *Boone*, Real Prop. § 293.

It will also be borne in mind that the distribution of personal property of an intestate must be according to the law of the country or State of which he is L. R. A.

The Legislature has the undoubted right by statute to declare what interest a wife, during the life and after the death of her husband, shall have in his real estate situated within the State, and the mode and manner such real estate may be transferred, so as to divest the husband and wife of all estate or interest therein; and the proviso to section 8 is such a Statute, and nothing more, and does not violate any provisions of the Constitution of the United States.

1 Hare, Am. Const. Law, 518; *Presser v. Illinois*, 116 U. S. 252, 29 L. ed. 615; *Cope v. Cope*, 137 U. S. 682, 34 L. ed. 832.

Johnston, J., delivered the opinion of the court:

Martha A. Buffington brought two actions in the District Court of Kingman County, one against William S. Grosvenor and the other against John G. Sears, to recover from each one half of certain real property situate in Kingman County. She was unsuccessful in each case, and is here complaining of the judgments that were given. The material facts of the cases are alike, and, as they present but one question, they may be disposed of in a single opinion. Martha A. Buffington became the wife of Pierce Buffington in 1865, and continued in that relation until the time of his death, in 1884. He removed to Kansas five or six years before his death and, shortly after coming here, he acquired the absolute legal title to the property in controversy. Afterwards he conveyed the property by warranty deeds to certain grantees, and the defendants, by subsequent conveyances, have acquired all the title obtained by such grantees. Martha A. Buffington did not join her husband in conveying the property, and has never executed a conveyance of the same to anyone, but she was never a resident or citizen of Kansas, and was never in the State prior to the death of her husband. She now claims to be entitled to one-half interest in the real estate of her husband, of which she had made no conveyance; but the trial court held, under the proviso of section 8 of the Act concerning descents and distributions, that, as she had not been a resident of Kansas, she never had any interest in the land conveyed, and her signature or conveyance was unnecessary to a complete transfer of the land by her husband. The section referred to reads as follows: "One half in value of all the real estate in which the husband, at any time during the marriage, had a legal

was a domiciled inhabitant at the time of his death, without regard to the place of either the birth or death, or the situation of the property at the time; but that real estate descends according to the law of the place where it is situated. *Lingen v. Lingen*, 45 Ala. 410, 412; *Woerner*, American Law of Administration, § 64.

For the minor details of the law regulating the descent of real property, the practitioner should consult the statutory regulation of the various States. Mr. Washburn, in his well-known treatise on the Law of Real Property (pp. 21 et seq. vol. 3), has appropriately grouped the various rules of descent that at present obtain in the various jurisdictions of the United States.

or equitable interest which has not been sold on execution or other judicial sale, and not necessary for the payment of debts, and of which the wife has made no conveyance, shall, under the direction of the probate court, be set apart by the executor as her property, in fee simple, upon the death of the husband, if she survives him: provided, that the wife shall not be entitled to any interest, under the provisions of this section, in any land to which the husband has made a conveyance, when the wife, at the time of the conveyance, is not or never has been a resident of this State. Continuous cohabitation as husband and wife is presumptive evidence of marriage, for the purpose of giving the right aforesaid." Gen. Stat. 1889, par. 2599. The plaintiff's contention is that the proviso of the section violates both the State and Federal Constitutions, in that it discriminates against the citizens of other States, and aliens. It is first contended that the proviso falls within the inhibition of section 17 of the Bill of Rights, which at the date of the conveyance of the land in controversy by Pierce Buffington read as follows: "No distinction shall ever be made between citizens and aliens in reference to the purchase, enjoyment, or descent of property." Does the proviso mentioned make "a distinction between citizens and aliens in reference to the purchase, enjoyment, or descent of property?" We are inclined to think that it is a regulation of the manner of transferring property within the State, instead of a restriction upon its descent. However, that question is immaterial in this case, so far as section 17 of the Bill of Rights is concerned. In no event can it be said that there is a distinction between citizens and aliens in the present case, for it does not appear that the plaintiff is an alien within the proper meaning of that term. It is alleged by plaintiff, and conceded on the other side, that she is a citizen of the United States. The wife of a citizen of Kansas, who resides in another State, cannot be regarded as an "alien." Webster defines the word as "one born out of the jurisdiction of the United States, and not naturalized," and Bouvier gives a like definition. Anderson's Dictionary of Law defines an "alien" to be "one born in a strange country, under obedience to a strange prince, or out of the allegiance of the king." The amendment to this constitutional provision, which was adopted in 1888, shows that that is the sense in which it is used in our Constitution. Section 17 of the Bill of Rights, as amended, reads as follows: "No distinction shall ever be made between citizens of the State of Kansas, and the citizens of other States and Territories of the United States, in reference to the purchase, enjoyment, or descent of property. The rights of aliens in reference to the purchase, enjoyment, or descent of property may be regulated by law." Before this amendment was adopted, citizens and aliens stood upon an equality with reference to the purchase, enjoyment, and descent of real property, but by the amendment the people ordained that the restriction upon the Legislature should be removed, and authorized such discriminating regulations against

aliens in this respect as might be deemed wise. The use of the term "alien" in the amendment leaves no doubt of the sense in which the word is used, and furnishes an argument that it was used in the same sense in the original provision. We agree with counsel for plaintiff that the term "citizen," as used in the original provision, refers to citizens of the State of Kansas. Counsel, who filed a brief by the permission of the court as *amicus curiae*, contend that the term includes all citizens of the United States, but we are not inclined to agree with that view. We conclude, then, that section 17 of the Bill of Rights had no application to this case.

It is next contended that the proviso is repugnant to that provision of the Federal Constitution which ordains that "the citizens of each State shall be entitled to all the privileges and immunities of the several States," and also violative of a like limitation in the 14th Amendment. We think the proviso is not in conflict with either of these provisions. It makes no discrimination against the citizens of other States in respect to any of the privileges or immunities of general citizenship. The proviso, in connection with other statutes, furnishes a rule regulating the manner of the transfer and transmission of real property. Where a person owns the absolute title to land in Kansas, and his wife is a resident of the State, she must join in the conveyance; but when she is not a resident of Kansas, and therefore not subject to its laws, her signature and conveyance are unnecessary, and the husband alone may convey a good title. It is competent for the Legislature of each State to declare the mode and manner by which real property situate within the State may be transferred by the husband, or by the husband and wife, or by judgment and process of court, so as to divest the husband, or husband and wife, of all estate or interest therein, and also to provide for the distribution of and the right of succession to the estates of deceased persons. "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated." *United States v. Fox*, 94 U. S. 315, 24 L. ed. 192.

It is urged by the plaintiff that the wife is an heir, and as such is entitled to inherit one half of her deceased husband's property, but that the proviso discriminates against widows who reside outside of the State, and deprives them of the right which is accorded to a resident widow. The wife, strictly speaking, is not an heir of the husband, although she is generally spoken of as such; but still, if she is regarded as an heir, the nonresident widow is not deprived of any "privilege or immunity." Under our Stat-

ute the property of the husband belongs exclusively to him, as the wife's property is exclusively her own. Neither has any vested interest or control over the property of the other by virtue of the marriage relation. The wife has no estate in the land of the husband. It is a mere possibility, depending upon the death of the husband, or whether he has divested himself of the title prior to his death. If he survives her, no interest is taken by nor transmitted to her heirs. If she survives him, but before his death he conveys the land, or it has been sold on execution or other judicial sale, nothing remains for her to take, and she has been deprived of no right. If there was an attempt to convey by the husband alone when his wife was a resident, the title would remain in her, because the manner of conveying land prescribed by statute had not been pursued; and if there was no judicial sale of the land, and it was not necessary for the payment of debts, a one-half interest would descend to her. In such a case, if she was a nonresident of the State, the conveyance by the husband alone would, under the rules prescribed for conveying, be sufficient to divest the title, and hence there would be nothing for her to inherit. It therefore appears that, if the conveyance is made in the manner prescribed by statute, there is nothing for either the resident or nonresident widow to inherit. There is really no discrimination between the resident and the nonresident widow, for each takes one half of all the real property which her husband owned at the time of his death. When the husband's land has been conveyed in accordance with law during his life, there is no descent to either, for there is nothing to descend. For reasons that were deemed sufficient, the Legislature made the signature and conveyance of the nonresident wife unnecessary. The fact that the wife did not accompany her husband to Kansas, or had abandoned him and gone to another State, and may or may not have obtained a divorce elsewhere, thus leaving the status of the parties in doubt, and making it difficult to obtain a perfect transfer of land in many cases, may have been deemed sufficient reason for prescribing this rule of conveyance. The Statute was enacted shortly after the admission of the State, and when it was rapidly increasing in population, through immigration from many of the eastern States, and also foreign countries, many coming without their wives and families; and possibly the rule was adopted to avoid inconvenience and deception in the transfer of real property. The "immunities" and "privileges" referred to in the Federal Constitution would not, in any event, include the claim made by the plaintiff. Those terms "mean that all citizens of the United States shall have the right to acquire property and hold it, and this property shall be protected and secured by the laws of the State in the same manner as the property of the citizens of the State is protected; that this property shall not be subject to any burdens or taxes not imposed on the property of citizens of the State." 3 Am. & Eng. Encyclop. Law, 253. See also 13 L. R. A.

the cases there cited, and *Corfield v. Coryell*, 4 Wash. C. C. 380; *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248.

According to these authorities, many rights and privileges may be granted by a State, depending to some extent upon the residence of those to whom they are granted, without infringing upon this provision of the Constitution. The privilege of voting, of holding office, or of acting as an administrator of estates, may be withheld until after persons have resided within the State a reasonable period of time, without violating the Constitution; and it is not violated by allowing an attachment against the property of a nonresident debtor without an undertaking, although such process cannot be obtained against a resident without an undertaking. *Head v. Daniels*, 38 Kan. 1; *Cooley*, Const. Lim. 6th ed. 490.

These and many other distinctions do not fall within the privileges and immunities of general citizenship. In treating upon this question, *Judge Cooley* says: "Although the precise meaning of 'privileges' and 'immunities' is not very clearly settled as yet, it appears to be conceded that the Constitution secures in each State, to the citizens of all the other States, the right to remove to and carry on business therein; the right, by the usual modes, to acquire and hold property, and to protect and defend the same in the law; the right to the usual remedies for the collection of debts; and the enforcement of other personal rights; and the right to be exempt in property and person from taxes or burdens which the property or persons of citizens of the same State are not subject to. To this extent, at least, discriminations could not be made by state laws against them. But it is unquestionable that many other rights and privileges may be made, as they usually are, to depend upon actual residence, such as the right to vote, to have the benefit of exemption laws, to take fish in the waters of the State, and the like." *Cooley*, Const. Lim. 6th ed. 490; also note on page 25.

There are several adjudicated cases in other States sustaining a provision of statute substantially similar to the proviso in question. In *Pratt v. Tefft*, 14 Mich. 191, it was decided that a woman residing out of the State at the time of her husband's death was not entitled to lands lying within the State owned by him, but which had been conveyed without her joining in the deed. Although the estate of dower has been abolished in Kansas, the contingent interest of the wife in the real property of the husband is similar to dower in its inchoate stage; at least, it is substantially similar, so far as the validity of such a provision as we are considering is concerned. In *Ligare v. Semple*, 32 Mich. 488, it was again decided that "a wife who is a nonresident of the State, at the time the husband makes an absolute conveyance of lands divesting himself entirely of his seisin and estate, has no right of dower, under the statutes of this State, in lands so conveyed." The Supreme Court of Nebraska held that, "where a husband conveys lands in this State while his wife is a nonresident thereof, she

has no dower interest in the land thus conveyed." *Atkins v. Atkins*, 18 Neb. 474.

In *Bennett v. Harms*, 51 Wis. 251, a like provision of the Statute was under consideration, and the point was directly made that it conflicted with the Constitution of the United States by discriminating against non-resident citizens, but the validity of the statute is sustained in an elaborate opinion. A like question has been decided by the Supreme Court of the United States under a law of Louisiana which discriminated in favor of women who contracted marriage within the State, or who contracted marriage out of the State, and afterwards went there to live, and it was claimed to be in conflict with the provision of the Federal Constitution that

"the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States;" but it was ruled, *Judge Curtis* delivering the opinion, that such discrimination had no connection with that clause of the Constitution. *Conner v. Elliot*, 59 U. S. 18 How. 591, 15 L. ed. 497. Following these decisions, we conclude that the Statute is not repugnant to the Federal Constitution; and, if we are in error in this regard, the parties are entitled to have the decision reviewed in the Supreme Court of the United States.

We find no error in the record, and therefore the judgment of the District Court will be affirmed.

All the Justices concur.

MICHIGAN SUPREME COURT.

PEOPLE OF the State of MICHIGAN
v.

Edward WAGNER *et al.*, *Appts.*

SAME

v.

Albert H. BARIE *et al.*, *Appts.*

SAME

v.

Frank WITTELSBERGER *et al.*, *Appts.*

(....Mich.....)

An ordinance establishing the weight of the loaves of bread that shall be offered for sale within the city, and fixing a penalty for offering for sale short-weight loaves, cannot be successfully attacked as not being within the police power, nor as taking property without compensation, or abridging, or unlawfully interfering with, the right to carry on business.

(July 23, 1891.)

CERTIORARI to the Recorder's Court of the City of Detroit to review three certain judgments convicting defendants of a violation of one of the ordinances of said city. *Writ dismissed.*

The facts are stated in the opinion.

Messrs. William Look and H. F. Chipman, for appellants:

By the terms of the ordinance, bread is required to be made of good, wholesome flour or meal, into loaves of one, two and four pounds, and no other, avoirdupois weight.

The undisputed testimony in the case shows that these provisions of the ordinance are impossible to be complied with.

A statute imposing impossible conditions is void.

Henderson v. Wickham, 92 U. S. 259, 275, 23 L. ed. 543, 550.

This by-law, in taking private property of respondents without compensation, is in contravention to the constitutional guaranties, that private property cannot be taken for public use until the necessity therefor and the amount of compensation therefor have been determined by a court and jury.

Powers' App. 20 Mich. 509.

If the respondents comply with this ordinance, they lose large quantities of valuable material every time a loaf is baked, and for which they receive no remuneration or return, and for which loss there is no redress.

See Mich. Const. art. 6, § 2; U. S. Const. 14th Amend.; *Parsons v. Russell*, 11 Mich. 121; *Ames v. Port Huron Log. D. & B. Co.* 11 Mich. 148.

Any law which imposes on any person any charge or burden greater than those which are imposed on all others, under like circumstances, is in conflict with the 14th Amendment of the United States Constitution, and is therefore void.

Monticello v. Banks, 48 Ark. 251; *St. Louis v. Spiegel*, 8 Mo. App. 478, 75 Mo. 145; *Higgle v. State*, 3 New Eng. Rep. 819, 59 Vt. 39; *Excelsior P. & Mfg. Co. v. Green*, 39 La. Ann. 455.

An Act which provided that every railroad company which shall cause the death of any live-stock by running against it with an engine shall be liable for its value, takes property without due process of law.

Jensen v. Northern Pac. R. Co. (Utah) 4 L. R. A. 724, citing *Cooley*, Const. Lim. 5th ed. 430-436, and notes; *Cottrel v. Union Pac. R. Co.* (Idaho) March 18, 1889; *Zeigler v. South & North Ala. R. Co.* 58 Ala. 594; *Bielenberg v. Montana U. R. Co.* 2 L. R. A. 818, 8 Mont. 271.

An Act which provides for assessment upon

NOTE.—City ordinance regulating weights and measures.

A city ordinance for the regulation of the standard of weights and measures, which provided that the sealer might inspect the weights and measures every six months, and "as much oftener as he thinks proper," and also provided that when the weights and measures were not in conformity with the standard they should be sent by the owners to 13 L. R. A.

a place designated by the sealer for correction, was not an unreasonable ordinance; and the common council had power under its charter to make such ordinance. *People v. Rochester*, 45 Hun. 102.

There is nothing in the Constitution of the State which invalidates a grant of power to a municipal corporation to regulate the weight and price of bread. *Mobile v. Yulle*, 3 Ala. 137; 1 Dillon, Mun. Corp. p. 392.

adjoining landowners of expense for providing for overflow of lands is unconstitutional, in authorizing property to be taken without due process of law.

Hutton v. Woodbridge Proc. Dist. 79 Cal. 90. See also *Chauvin v. Valiton*, 8 L. R. A. 194, 8 Mont. 451; *Campbell v. Campbell*, 68 Ill. 462.

This Act is void in abridging the privileges and immunities of the respondents, viz.: the right to do as they please with their own property, and to manufacture a loaf of any wholesome ingredients they may see fit; and of such size and weight as they may deem most salable and marketable.

Hunter v. Hatch, 45 Ill. 178; *Parmelee v. Lawrence*, 44 Ill. 405; *Cooley, Const. Lim.* 372-375; *Kuhn v. Detroit Common Council*, 70 Mich. 534.

This by-law curtails and in a measure destroys the business of the defendants, and places a limitation upon the capacity of the respondents to carry on a lawful calling or occupation, and to earn their living.

Re Jacobs, 98 N. Y. 98; *Butchers U. S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585; *Live Stock D. & B. Assn. v. Crescent City L. S. L. & S. H. Co.* 1 Abb. (U. S.) 288-398.

This ordinance cannot be sustained upon the ground that it is within the police powers of the State.

Police regulations are confined to the protection of the lives, health and morality of citizens, and to the preservation of good order and public morals.

People v. Phippen, 70 Mich. 6; *Robison v. Miner*, 18 West. Rep. 471, 68 Mich. 549.

In Minnesota, it is within the police power to impose such regulations as may reasonably be deemed necessary to protect people from imposition and fraud in articles sold for consumption as food.

Butler v. Chambers, 36 Minn. 69.

The manufacturer may be required, as a proper police regulation, for the benefit of the people in general, to sell the commodity for what it actually is and upon its merits.

See *People v. Arensberg*, 7 Cent. Rep. 247, 105 N. Y. 123; *Palmer v. State*, 39 Ohio St. 236; *Powell v. Com.* 5 Cent. Rep. 590, 114 Pa. 268, affirmed, 127 U. S. 678, 32 L. ed. 253; *State v. Addington*, 77 Mo. 110-118; *Ex parte Kohler*, 74 Cal. 38; *People v. Gillson*, 12 Cent. Rep. 616, 109 N. Y. 389, citing *Slaughter House Cases*, 83 U. S. 18 Wall. 36-106, 21 L. ed. 394-418; *Re Jacobs, supra*; *Bertholf v. O'Reilly*, 74 N. Y. 509, per Andrews, J.; *People v. Marx*, 99 N. Y. 377; *People v. West*, 8 Cent. Rep. 758, 106 N. Y. 298; *People v. Kibler*, 8 Cent. Rep. 761, 106 N. Y. 321; *People v. Cipperly*, 1 Cent. Rep. 804, 101 N. Y. 634; *Re Sam Ke*, 31 Fed. Rep. 680; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220; *People v. Budd*, 5 L. R. A. 559, 117 N. Y. 1; *Abeel v. Clark*, 84 Cal. 226; *Missouri Pac. R. Co. v. Harrelson*, 44 Kan. 253.

In Michigan, under the exercise of this power, the State may prohibit, under penalty, the exercise of any trade or employment which is bound to be hazardous or injurious to its citizens.

People v. Hawley, 3 Mich. 330; *People v. Gallagher*, 4 Mich. 244; *People v. Walling*, 53 Mich. 13 L. R. A.

268; *Robison v. Haug*, 14 West. Rep. 876, 71 Mich. 40, 41.

This ordinance is class legislation, and denies an equality of rights to the respondents, by placing upon their business an unusual or illegal burden, which amounts to a large special tax upon their trade and calling.

See *Evansville v. State*, 4 L. R. A. 93, 118 Ind. 426; *State v. Denny*, 4 L. R. A. 65, 118 Ind. 449; *Wilder v. Chicago & W. M. R. Co.* 70 Mich. 885; *Durkee v. Janesville*, 28 Wis. 464, 468; *Calder v. Bull*, 3 U. S. 8 Dall. 386, 388, 1 L. ed. 648, 649; *Schut v. Chicago & W. M. R. Co.* 14 West. Rep. 650, 70 Mich. 434; *Rinear v. Grand Rapids & I. R. Co.* 14 West. Rep. 908, 70 Mich. 620; *Lafferty v. Chicago & W. M. R. Co.* 71 Mich. 85; *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 111; *Janesville v. Carpenter*, 8 L. R. A. 808, 77 Wis. 288; *Re Prazee*, 6 West. Rep. 140, 68 Mich. 403; *People v. Armstrong*, 2 L. R. A. 721, 73 Mich. 288.

This ordinance prevents one class of citizens, and one class only, from carrying on a lawful and respectable calling or business, and from manufacturing and selling a wholesome and necessary commodity without first having a policeman enter and search the place of business of the citizen, without due process of law, and without the direction or authority of a court.

Hibbard v. People, 4 Mich. 125; *Robison v. Miner*, 18 West. Rep. 471, 68 Mich. 567.

This Act is void in imposing unusual conditions on private business.

Re Jacobs, 98 N. Y. 98; *People v. Marx*, 99 N. Y. 377; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220.

This ordinance is unreasonable and oppressive to a degree that it forces the respondents to do business at an actual loss of a portion of their material and stock.

People v. Armstrong, 2 L. R. A. 721, 73 Mich. 295; *People v. Gillson*, 12 Cent. Rep. 610, 109 N. Y. 389; *Re Jacobs and Re Prazee, supra*; *Anderson v. Wellington*, 2 L. R. A. 110, 40 Kan. 173.

The by-law in question is void in assuming to regulate that which the Legislature has no power to regulate, and consequently has no power to give the City of Detroit authority to regulate (a private business).

1 Dillon, Mun. Corp. 8d ed. 115, citing many authorities; *State v. Belvidere*, 44 N. J. L. 351; *Anderson v. Wellington, supra*.

The defendants have committed no offense known to the laws of the land. They have been guilty of no criminal intent. There can be no crime without a criminal intent.

Pond v. People, 8 Mich. 150; *Faulks v. People*, 39 Mich. 200; *People v. Parks*, 49 Mich. 383; *People v. Roby*, 52 Mich. 579.

Mr. Charles W. Casgrain for appellee.

McGrath, J., delivered the opinion of the court:

This case comes from the Records' Court of the City of Detroit by writ of certiorari, defendants having been convicted of a violation of a city ordinance. By stipulation, the cases come up on one record. Defendants are bakers, and are charged with making for sale, selling, and offering for sale, bread that was deficient in weight under the ordinance.

The ordinance is entitled "An Ordinance Relative to the Manufacture and Selling of Bread." The ordinance provides that it shall not be lawful for any person to carry on the trade or business of baker, without first having obtained from the common council a permit for that purpose. It next prescribes how the permit shall be obtained, and that the clerk shall keep a record of the permits granted. It then concludes as follows: "Sec. 4. All bread of every description, manufactured by the bakers of this city for sale, shall be made of good and wholesome flour or meal, into loaves of one pound, two pounds, and four pounds (and no other) avoirdupois weight; and no baker shall make for sale, or shall sell or expose for sale, any bread that shall be deficient in weight, according to the requisitions prescribed in the preceding section of this chapter: provided, always, that such deficiency in the weight of such bread shall be ascertained by the sealer of weights and measures, by weighing, or causing to be weighed, in his presence, within eight hours after the same shall have been baked, sold, or exposed for sale; and provided, further, that whenever any allowance in the weight shall be claimed on account of any bread having been baked, sold, or exposed for sale more than eight hours, as aforesaid the burden of proof in respect to the time when the same shall have been baked, sold, or exposed for sale shall devolve upon the defendant or baker of such bread. Sec. 5. The sealer of weights and measures, under the direction of the chief of police, shall be inspector of bread; and it shall be his duty, and he is hereby authorized and required, from time to time, and not less than once in each month, at all seasonable hours, to enter into and inspect and examine every baker's shop, storehouse, or other building where any bread is or shall be baked, stored, or deposited, or offered for sale, and to inspect and examine, in any part of said city, any person or persons, wagons or other carriages, carrying any loaf of bread for the purpose of sale, and weighing the same, and determine whether the same are in violation of the true intent and meaning of this chapter; and, if the said inspector shall find any bread not conformable to the directions herein contained, or any part of them, he shall make complaint thereof for the purpose of having such person prosecuted according to law. Sec. 6. No person or persons shall obstruct, or in any manner impede or willfully delay, the said sealer of weights and measures in the execution of his duties under this Act, either by refusing him or delaying his entrance or admission into any of the places above named, or refuse or omit to stop their wagon or carriage as aforesaid, whereby the due execution of this ordinance or any part of it, shall be impeded or obstructed. Sec. 7. Any violation of any of the provisions of this ordinance shall be punished by a fine not to exceed fifty dollars and the cost of prosecution; and the offender may be imprisoned in the Detroit house of correction until the payment thereof: provided, always, that the term of imprisonment shall not exceed the period of six months."

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The defendants insist (1) that matters contained within the body of the ordinance are not within its title; (2) that by the ordinance private property is taken without compensation; (3) that the ordinance abridges the right of the respondents to manufacture loaves of bread of such size or weight as they may deem most salable; (4) that it curtails defendants' business, and places a limitation upon the capacity of respondents to carry on a lawful business; (5) that the ordinance is not within the police powers of the State.

There is no force in the first objection, as the provisions of the ordinance are clearly within the scope of its title. It has been held that the constitutional provisions relating to the title of laws passed by the Legislature do not apply to ordinances enacted by a common council of a city. *People v. Hanrahan*, 75 Mich. 611-615, 4 L. R. A. 751. The ordinance does not provide for the taking, seizing, or destruction of short-weight bread. It does prohibit the sale of bread which is deficient in weight. The same objection might be made to ordinances prohibiting the importation of infected rags, or the sale of diseased cattle or of unsound beef, or of decayed vegetables, or of illuminating oils which are below the standard test, or of watered milk. In *Wheeler v. Russell*, 7 Mass. 258, it was held that no recovery could be had for the price and value of shingles which were not of the statutory dimensions. In *Eaton v. Kegan*, 114 Mass. 438, it was held that, in view of the Statute requiring oats and meal to be sold by the bushel, no recovery could be had for the price and value of those articles when sold by the bag.

It is claimed by defendants that, in order to get a pound of baked bread, they are compelled to put into the oven more than a pound of dough, and that the process of baking reduces the weight, and, when asked what it is that evaporates, they reply, "Water." But they say the process of baking is not always uniform. The oven may be too hot. In such case, the bread crusts or skins quickly, retaining the moisture. And again, it may be too cold; in which case the bread dries up, rather than bakes, and, in order to insure a pound loaf, the latter contingency must be provided against, and the weight of the dough must always be regulated accordingly. That fermentation is not always regular, and, when it reaches a certain point, the dough must be put into the oven, without reference to the condition of the oven. That the cutting up of the dough, the weighing of it, and its transfer to the oven is necessarily hurried, and the scales are liable to become clogged or affected by dust. Notwithstanding all the difficulties suggested by respondents, the evidence shows that the bread inspector has been diligent in the performance of his duties; had frequently visited the several bakeries of defendants, and but one of these defendants has before this time been complained of, and that was fifteen years ago; and it is admitted by defendants, not only that the ordinance may be complied with, but that the short-

weight bread discovered by the inspector was made for the very purpose of testing the validity of this ordinance; and, after the authorities had caused complaint to be made against defendants, they resumed the former manner of doing business, and made their bread in accordance with the provisions of the ordinance. Again, it is claimed that a barrel of flour will make two hundred and fifty loaves of bread, and that it is impossible to distribute an ordinary advance in price of flour over this product; in other words, that the price of a loaf of bread cannot be advanced a fraction of a cent. This difficulty affects the retail dealer more than the wholesaler. It has to be met in the sale of a pound of nails, of a dozen buttons, or of a paper of needles, as well as in the sale of a loaf of bread. The ordinance does not attempt to regulate the price of the commodity. That is not necessarily fixed with reference to flour at its cheapest price, so that, until the price of flour is reduced until it reaches a point where the reduction may be distributed, the dealer gets the advantage of the reduction, and when it advances above the standard the consumer gets the advantage, until a point is reached where the advance may be added. This fluctuation and these results are ordinary incidents of trade. The State may institute any reasonable preventive remedy when the frequency of the frauds, or the difficulty experienced by individuals in circumventing them, is so great that no other means will prove efficacious. Tiedeman, Pol. Powers, § 89, p. 208. Bread is an article of general consumption. It is usually sold by the loaf, and the individual consumer, in the majority of cases, buys by the single loaf. Each transaction involves but a few pennies, although the number of individual transactions in a large city reaches each day into the thousands, and the opportunities for fraud are frequent. It would be practically impossible to prevent fraud in

the sale of short-weight loaves; if the matter was left to the ordinary legal remedy afforded the individual consumer for fraud or deceit. The amount involved would not justify a resort to litigation. Sales are invariably made in loaves of the size of one, two, or four pound packages, and the ordinance simply takes the usual and ordinary packages or loaves into which bread is made, and fixes the standard of weight of each package. It does not prohibit the sale of bread by weight if it overruns, as it is claimed that it sometimes does, nor does it prohibit the exaction of an increased price by reason of the additional weight. It does not prohibit the sale of a half or a quarter or any other fraction of a loaf. Our statutes not only fix the number of pounds of each of the various commodities that shall constitute a bushel, but they also provide that a "box" or "basket" of peaches shall contain one third of a bushel, and they fix the size of a "barrel" of fruit, roots, or vegetables, and they may, with equal propriety, fix the weight of a package or loaf of bread.

The police power of a State is not confined to regulations looking to the preservation of life, health, good order, and decency. Laws providing for the detection and prevention of imposition and fraud, as a general proposition, are free from constitutional objection. Tiedeman, Pol. Powers, p. 208, § 89.

The charter of the City of Detroit empowers the common council "to direct and regulate the weight and quantity of bread, the size of the loaf, and the inspecting thereof." The ordinance is clearly within this provision, and it cannot, under the decision in *People v. Armstrong*, 73 Mich. 293, 2 L. R. A. 721, be subjected to the test of reasonableness.

The convictions are affirmed, and the writ dismissed.

The other Justices concurred.

KENTUCKY SUPREME COURT.

KINCAID *et al.*, *Appts.*,

v.

MCGOWAN *et al.*

(88 Ky. 91.)

1. A grantor of the fee of the surface of land may reserve an estate in fee in the

minerals and each estate will be subject to the Law of Descent, Devise and Conveyance.

2. The right to minerals, timber and a mill-site reserved to the grantor in conveyance of certain parcels of land within a larger tract will not pass by his subsequent conveyance of the whole tract expressly deducting therefrom the parcels of land previously conveyed.

NOTE.—Reservations in deeds; term defined.

Reservation has been defined as the creation of a right or interest, which had no prior existence as such, in a thing or part of a thing granted. *Kister v. Reeser*, 98 Pa. 5.

By a reservation in a deed a new right is created in the thing granted which did not previously exist, and is reserved to the grantor. An "exception" is always part of the thing granted, and the whole of the thing excepted. A reservation may be a right or interest in the particular part which it affects. The terms are often used in the same sense. Though apt words of reservation be

used, they will be continued as an exception, if such was the design of the parties. *Ibid.*; *Perkins v. Stockwell*, 131 Mass. 580; *Kimball v. Withington*, 141 Mass. 379. See also *Bowman v. Wathen*, 2 Mo-Lean, 322; *Sanger v. Sargent*, 8 Sawy. 99; *Bryan v. Bradley*, 16 Conn. 432; *Barnes v. Burr*, 88 Conn. 542; *Karmuller v. Krotz*, 18 Iowa, 368; *State v. Wilson*, 42 Me. 9; *Tarbox v. Eastern S. B. Co.* 50 Me. 340; *Hudson Iron Co. v. Stockbridge I. Co.* 107 Mass. 322, 323; *Ashcroft v. Eastern R. Co.* 126 Mass. 196; *Stockwell v. Couillard*, 129 Mass. 231; *Craig v. Wells*, 11 N. Y. 321; *Parrell v. Stryker*, 41 N. Y. 433; *Sloan v. Lawrence Furnace Co.* 29 Ohio St. 568; *Schofield v. Ferrers*, 47 Pa. 197; *Miller v. Lapham*, 44 Vt. 416;

13 L. R. A.

3. The legal owners in the actual possession of land can maintain a suit to quiet title against adverse claims which becloud the title and injure the market value of the land in which all adverse claimants, whether by independent titles or not, may be joined as defendants.

(May 31, 1887.)

APPEAL by complainants from a decree of the Circuit Court for Menafee County sustaining demurrers to a bill filed to quiet title to certain real estate. *Reversed.*

The facts are stated in the opinion.

Mr. William Lindsay, with Messrs. S. F. J. Trabue, E. F. Trabue and W. P. D. Bush, for appellants:

Plaintiffs having the legal title, and being in possession, it was proper to make as many persons parties to their bill as have adverse claims.

Rich v. Zellsdorff, 23 Wis. 547; Anderson, Law Dict. title, Reservation.

A distinction noted.

The distinction between a reservation and an exception is, that by an exception the grantor withdraws from the effect of the grant some part of the thing itself which exists in substance at the time of making the grant, and which is included in the granted premises; while a reservation is of some new right or other thing issuing or coming out of that which is granted, and not a part of the thing itself (*Shep. Touch. 80; Craig v. Wells, 11 N. Y. 315; Marshall v. Trumbull, 38 Conn. 188; State v. Wilson, 42 Me. 9; Ives v. Van Auken, 34 Barb. 508; Ashcroft v. Eastern R. Co. 126 Mass. 196; Whitaker v. Brown, 46 Pa. 197; Bridger v. Pierson, 1 Lans. 481; Stockbridge Iron Co. v. Hudson Iron Co. 107 Mass. 290; Munn v. Worrall, 58 N. Y. 44; Moulton v. Trafton, 64 Me. 219; or it may be of an existing easement or servitude, not capable of being severed from the grant. *Cutler v. Tufts, 3 Pick. 272, 278; Doe v. Lock, 4 Nev. & M. 807; Pettie v. Hawes, 13 Pick. 323, 326; Hurd v. Curtis, 7 Met. 110.**

And whether a restriction in a deed will be deemed a reservation or an exception depends less upon the words used than upon the nature of the right or thing reserved or excepted. *Barnes v. Burt, 38 Conn. 541; Martindale, Conv. 2d ed. § 118.*

What may be reserved.

A reservation cannot be made by parol (*Gibbon v. Dillingham, 10 Ark. 9; Winternute v. Light, 46 Barb. 278; Turner v. Cool, 23 Ind. 56. But see Backenstoss v. Stahler, 33 Pa. 251.*), and a reservation to a stranger is void. *Hornbeck v. Westbrook, 9 Johns. 73.*

It is for the benefit of the grantor and his successors, and not for that of persons claiming title to property not conveyed by the deed, and derived from other sources. *Moulton v. Faught, 41 Me. 298.*

Generally, the same rules of construction apply to a reservation or implied grant as to an express grant. *Ashcroft v. Eastern R. Co. 126 Mass. 196, 30 Am. Rep. 672; French v. Carhart, 1 N. Y. 96.*

The words "reserving to myself the right of passing and repassing, and repairing my aqueduct logs forever through a culvert," were held to vest an estate for life only (*Ashcroft v. Eastern R. Co. 126 Mass. 196, 30 Am. Rep. 672*), so of the words, "reserving to the grantor the use and control, etc., during his natural life" (*Richardson v. York, 14 Me. 216*), and so of a reservation, "for the use of our mother." *Keeler v. Wood, 30 Vt. 242; Boone, Real Prop. § 303.*

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Armitage v. Wickliffe, 15 B. Mon. 494; Bispham, Eq. § 575; Beard v. Smith, 6 T. B. Mon. 505; Huatt v. Calloway, 7 B. Mon. 180; Dudley v. Frankfort, 12 B. Mon. 612; Cates v. Loftis, 4 T. B. Mon. 442; Landrum v. Farmer, 7 Bush, 49.

The property in minerals and timber may be vested in other persons than the owner of the fee.

Collier, Mines, p. 15; Cardigan v. Armitage, 2 Barn. & C. 197, 3 Dow. & R. 414; Bainbridge, Mines, §§ 83, 84; Armstrong v. Caldwell, 53 Pa. 287; Caldwell v. Copeland, 37 Pa. 490.

The deed of June 9, 1843, passed all the rights and estates the grantor then had in the tract of land described, and therefore passed the timber, minerals, etc., which he had expressly reserved to himself by deed made prior to that date.

As to rules for construction of deeds, see 3 Bl. Com. pp. 16, 18; 3 Kent, Com. pp. 401,

A reservation (in a deed) of, and an agreement for, all the marble from certain land, that the grantor might want to manufacture, is not a grant of an exclusive right. *Rutland Marble Co. v. Ripley, 77 U. S. 10 Wall. 398, 19 L. ed. 965.*

When a reservation is made in a deed, it is not necessary, in order to give it effect, that the grantor should, when he executes the deed, assert verbally his right to the property excepted from the conveyance; and evidence that he made no such assertion is inadmissible. *Hornbuckle v. Stafford, 111 U. S. 380, 28 L. ed. 468.*

Where a grantor conveys land, "saving and reserving, nevertheless, for his own use the coal contained in the said piece or parcel of land, together with free ingress and egress by wagon road to haul the coal therefrom as wanted," the clause operates as an exception, and the grantor retains the entire and perpetual property in the coal. *Whitaker v. Brown, 46 Pa. 197; 3 Devlin, Deeds, § 980.*

A reservation of minerals and mining rights from a grant of the estate, followed by a grant to another of all that which was first reserved, vests in the second grantee an estate as broad as if the entire estate had been first granted to him with a reservation of the surface. *Stoughton's App. 88 Pa. 198, 201; Duke v. Hague, 107 Pa. 57, 65; Broman v. Young, 35 Hun. 173, 181; First Nat. Bank of Richburg v. Dow, 41 Hun. 18.*

The nature of a transaction, as well as the language may be regarded in deciding whether language in a deed constitutes a reservation or a condition. *Foxcroft v. Mallett, 45 U. S. 4 How. 353, 11 L. ed. 1008.*

Reservation in mortgage.

In those States in which the common-law doctrine of mortgages prevails, the mortgagee is entitled to immediate possession of the mortgaged premises, unless the right to retain the possession until default is reserved to the mortgagor. *Martindale, Conv. § 407, p. 348.*

In such States, therefore, if it be the intention that the mortgagor shall retain the possession, a clause should be inserted to that effect (*Coffey v. Hunt, 75 Ala. 236*). In the absence of any provision of the kind, parol evidence cannot be received to prove that such was the intention of the parties at the time of making the mortgage. Though it has been held that the agreement need not to be expressed in the mortgage, but may be implied from a note made by the mortgagor to the mortgagee at the same time with the mortgage (*Clay v. Wren, 34 Me. 187*), although the note was not referred to in the mortgage. *Martindale, Conv. § 453.*

402; 1 Washb. Real Prop. 4th ed. top page 3; Wms. Real Prop. pp. 18, 14; Bingham, Sale of Real Prop. pp. 190, 239, 258, 295, 296; *Caldwell v. Copeland*, 87 Pa. 427; 8 Washb. Real Prop. 4th ed. top pp. 897, 898, 403, 404, 431, 433; *Lexington & O. R. Co. v. Kidd*, 7 Dana, 279, 280; *Petach v. Dickson*, 1 Mason, 11; *Crosby v. Montgomery*, 88 Vt. 238.

Messrs. Peters & Tyler, Thomas Turner and H. C. Lilly & Son, for appellees:

The court did right in requiring plaintiffs to elect. The relief sought against Gray is inconsistent with that sought against the other defendants.

United States L. Ins. & T. Co. v. Vattier, 1 Handy, 217; *Tompkins v. White*, 8 How. Pr. 320; Civil Code, §§ 88-85; *Sala v. Crutchfield*, 8 Bush, 646; *Dragoo v. Levi*, 2 Duval, 520; *Bord v. Chandler*, 18 B. Mon. 408; *McKee v. Pope*, 18 B. Mon. 555; *Bonney v. Reardin*, 6 Bush, 36; *Caldwell v. Caldwell*, 2 Bush, 452; *Hancock v. Johnson*, 1 Met. (Ky.) 245.

The plaintiffs do not state facts sufficient to show their right to maintain an action to quiet title.

Scott v. Means, 80 Ky. 460; *Fraley v. Peters*, 12 Bush, 470; 2 Story, Eq. Jur. §§ 826, 859.

By his deed to Plummer and Kincaid, Duckham did not pass the timber, minerals, and mill-seat which he had reserved to himself in the deeds to the McGowans.

Bainbridge, Mines, p. 168.

Bennett, J., delivered the opinion of the court:

The appellants' petition contains three paragraphs: the first against William Gray, the second against the appellees, and the third against John M. Clayton. The allegations of the petition which are common to all the paragraphs are, that on the fourth day of January, 1788, the Commonwealth of Virginia granted to Dean Timmons twenty-two thousand acres of land, which lie in Menefee and Wolfe Counties, this State, and that Thomas Duckham, on the ninth day of June, 1843, he being the owner thereof, sold said survey of land to Edward Kincaid, the appellant's ancestor, and Samuel Plummer, except the tracts previously sold by Thomas Duckham to Powell Rose, James Cox and J. P. McGowan. That on the fourth day of October, 1846, Samuel Plummer sold his undivided interest in said land to Edward Kincaid, who thereby became the owner of the whole, and held and owned said land at the time of his death, except the tracts which he had previously sold to Dr. William Congleton, Spencer and John —, and George Centers. That the appellants, as the children and grandchildren of Edward Kincaid, he having died intestate, inherited said land from him, and that they own and are in the actual possession of the same, except said parcels sold by Edward Kincaid, and the tracts sold by Duckham to Powell Rose, James Cox and J. P. McGowan.

The first paragraph of the petition alleges that Wm. Gray holds a deed to five hundred acres of said land; that the deed purports on its face to have been executed by Thomas Duckham as the attorney in fact of Edward Kincaid, but that said Duckham had no authority from Edward Kincaid to make said con-

veyance, and that the said deed is void, but, nevertheless, cast a cloud upon their title, which the appellants ask the chancellor to remove by declaring said deed to be void, etc.

The second paragraph alleges that the appellees "are setting up some sort of claim to some part or interest in the said balance of said twenty-two thousand-acre tract," under some contract made with Thomas Duckham, the vendor of Edward Kincaid. Appellants also allege that they do not know the exact nature of the appellees' claim, but do know that they are giving out in speeches that they own and have the right to hold, possess and sell portions of said plaintiffs' lands, and also the minerals under and timber upon certain other parts of said survey of twenty-two thousand acres, which minerals and timber belong to these plaintiffs. It is also alleged that the claim of the appellees, although groundless, impairs the value of the appellants' land and casts a cloud upon their title. The chancellor is asked to compel appellees to exhibit any title they may have to said land, or to the minerals and timber under and upon any land lying within the said twenty-two thousand-acre survey; and that the appellants' title be quieted, etc. The third paragraph alleges that John M. Clayton "asserts that he holds title to some portion of the said balance of the twenty-two thousand-acre survey, as the remote vendee of Thomas Duckham, and gives out publicly that he can sell and pass a good title to purchasers, and that these plaintiffs have not a good title," whereby he greatly impairs the vendible value of their estate. They also allege that the claim of Clayton is groundless. They ask that he be required to exhibit his claim of title, and that their title be quieted, etc.

Upon motion of the appellees, the lower court required the appellants to elect to proceed on the first paragraph or second and third paragraphs. The appellants excepting to the ruling of the court, elected, under protest, to proceed on the second and third paragraphs.

Thereafter the appellants amended the second paragraph of their petition. The appellees then entered a general and special demurrer to the second paragraph of the appellants' petition as amended, both of which were sustained by the lower court, and the appellants electing to stand by their pleadings, the second paragraph was dismissed. They have appealed to this court. The amended petition sets out a more specific description of the land claimed by appellants. It also exhibits two deeds of conveyance from Thomas Duckham to James P. McGowan, the first dated the 2d day of February, 1842, and the second dated the 21st day of November, 1842. The first deed conveys a certain boundary within the twenty-two thousand-acre survey, but "reserves" to the grantor "all minerals and mines in the bowels of the boundary" conveyed, "and one half of the timber included in said boundary, and a mill-site on Gladly Creek."

The second deed conveys a certain other boundary of land within said twenty-two thousand-acre survey, but reserves to the grantor "one half of all the mines and minerals in the bowels of the earth" within said boundary, and "one half of the timber thereon," except on the south side of the river. On

that side he reserves all of the timber, except that which is "on Swift Camp."

It is alleged in the appellants' amended petition that the minerals and timber claimed in their original petition are the minerals and timber reserved in these two deeds. The special demurrer raises the question of the appellants' right to these minerals and timber. We will dispose of that question first. The appellants' contention is that they are entitled to the minerals and timber reserved by Duckham in said conveyances, by virtue of his deed to Edward Kincaid and Samuel Plummer, dated the ninth of June, 1843, which conveyed to them all of the twenty-two thousand-acre survey of land, only deducting therefrom "what" Duckham had sold and made deeds to prior to that date. In other words, that Duckham's reservations in said deeds, being a landed estate of inheritance in himself, were included in his conveyance of the entire twenty-two thousand-acre survey, which conveyance, to Edward Kincaid and Samuel Plummer, only excepted the surface conveyances previously made by him.

An estate in fee in land carries with it all metals and minerals thereunder, unless the metals and minerals are accepted in the conveyance, or "have before been served in ownership, and the right thereto vested in some other person." The surface and the metals and minerals may be a distinct property from each other by separate conveyances from individuals. Bingham, *Sales of Real Property*, p. 288.

Minerals in place are land. They are subject to conveyance. The surface right may be in one man and the mineral right in another. Both in such a case are landowners. They own separate and distinct corporeal hereditaments. *Caldwell v. Fulton*, 31 Pa. 475.

The owner of land may convey a surface estate in fee in it, and reserve to himself an estate in fee in the minerals, or any particular species of them, in which case the vendee holds a distinct and separate estate in the surface or soil, and the vendor holds a distinct and separate estate in the minerals. By this severance each estate is subject to the laws of descent, of devise, of conveyance. *Adam v. Briggs Iron Co.* 7 Cush. 361.

Also, by the severance each estate is as distinct property in the respective owners as is the property in a two-story house, where the title to the lower story is in one person and the title to the upper story is in another person. An action of ejectment will lie in behalf of the owner of the surface to recover it; also, an action will lie in behalf of the owner of the mineral estate to recover it; also the right of either owner may be barred by the Statute of Limitations.

Now, then, Duckham sold to McGowan two parcels of land out of a larger boundary which he owned. These two parcels of land were each designated and set apart by metes and bounds, thereby becoming separate and distinct tracts of land, not only from each other, but from Duckham's remaining portion of the survey. The title to the surface or soil, however, was only conveyed to McGowan in each of these boundaries, together with such portions of the minerals and timber as above set forth.

Duckham retained his title to the other minerals and timber, also a mill-site on one of the tracts. The interest that he retained was a separate and distinct interest in the two boundaries, which interest by the said conveyances, by metes and bounds, became separate and distinct from the remaining portion of the survey. Indeed, it not only became a distinct interest from the remaining portion of the survey, but a distinct and separate estate from the surface estate which was conveyed to McGowan. So Duckham owned, after these two conveyances, an absolute estate in all of the remaining portion of the twenty-two thousand-acre survey, and also owned a distinct estate in the other two parcels, consisting of minerals, timber and a mill-site. He sold to Edward Kincaid and Samuel Plummer the remaining survey, which he called, in the deed of conveyance, land. Of course this, by operation of law, passed title within that boundary to the vendees to the center of the earth, and included the minerals therein. In that deed he expressly deducted the parcels of land theretofore conveyed. In these parcels he owned a mineral and timber interest and a mill-site. These parcels were separate parcels from the portions sold to Kincaid and Plummer; also Duckham's interest therein was separate from said portion.

Now, it seems to us clear that the deed from Duckham to Kincaid and Plummer did not embrace the separate and distinct mineral and timber interest and mill-site that Duckham owned in these two tracts of land, which has been previously separated from the portion of the survey sold to Kincaid and Plummer.

Bainbridge, on the *Law of Mines and Minerals*, American ed., side page 129, says: "When mines form part of the general inheritance, they will, of course, be transferred along with the lands, without being expressly mentioned in the conveyance; but when they form a distinct possession or inheritance, a distinct title to them must also be established."

"In the latter situation the mines will still, of course, retain the qualities of real estate, and will be transferred by conveyances applicable to the particular disposition of them intended to be made."

So it seems that the mineral and timber interest and mill-site reserved by Duckham in these two tracts of land, being a distinct interest from the surface right conveyed, and also being separated from the balance of the twenty-two thousand-acre survey by designated boundaries, it would require apt words to convey these separate interests. To illustrate, suppose the mill-site reserved had had upon it a fine flouring mill, or there had been a valuable stone quarry (which is a mineral interest) opened on the land, or a fine lead or silver seam on it, worth thousands of dollars, would it be contended that the conveyance of the adjoining portion of the survey—we say adjoining, because the two tracts had become separated from it by metes and bounds—would include these interests? Surely not. The unhesitating answer would be that these were distinct and separate interests, which could only be conveyed by apt words.

We think, therefore, that the lower court did right in sustaining the special demurrer to the second paragraph of the petition.

The next question is, Was the general demurrer rightfully sustained?

It is distinctly alleged in the petition that the appellants have the legal title to all the balance of the twenty-two thousand-acre survey, after deducting the parcels previously sold by Duckham and the parcels sold by Edward Kincaid after his purchase, and that they are in the actual possession of said balance, less about one thousand acres occupied by squatters. It is also alleged, in substance, in the first paragraph, that Gray claims title to five hundred acres of this balance under a deed which is void. It is alleged, in the second paragraph, that the appellees claim some of this balance by some kind of title derived from Thomas Duckham. It is also alleged that Clayton claims a part of said land by some kind of title derived from Duckham.

By an Act of the Legislature, approved March 9, 1854, it is provided "that hereafter it shall and may be lawful for any person, having both the legal title and possession of lands, to institute and prosecute suit by petition in equity, in the circuit court of the county where the lands, or some part thereof, may lie, against any other person setting up claim thereto; and if the plaintiff shall be able to establish, and does establish, his title to said land, the defendant shall be by the court ordered and decreed to release his claim thereto," etc. This Act was not repealed by the General Statutes, and is now in full force.

Pomeroy, in his work on Remedies and Remedial Rights, section 369, in treating of actions to quiet titles, says: "The very object of the proceeding assumes that there are other claimants, adverse to the plaintiff, setting up titles and interests in the land or other subject matter hostile to his. Of course, all these adverse claimants are proper parties defendant, and if the decree is to accomplish its full effect of putting all litigation to rest, they are necessary defendants." He further says, on the same page, that "this action has been greatly extended by statute, especially in the western States, and is there an ordinary means of trying a disputed title between two opposite claimants. The general scope of these statutes is as follows: The plaintiff must be in possession claiming an estate in the lands. The adverse claimant or claimants must be out of possession, and must assert a hostile title or interest. In this condition, the possessor of the land, without waiting for any proceeding, legal or equitable, to be instituted against him, may take the initiative, and, by commencing an equitable action, may compel his adversaries to come into court, assert their titles, and have the controversy put to rest in a single judgment. It is plain, therefore, that this statutory suit is the converse of the legal action of ejectment."

So it is clear that by the Act of the Legislature of the ninth of March, 1854, any person having the legal title and possession of land may bring an action in equity in the circuit court of the county where the land or some part of it may lie, against any person setting up claim thereto, for the purpose of establishing and quieting his title to said land. But for this remedy, what remedy would the owner of the legal title and possessor of the land have? He cannot bring an action of ejectment, be-

cause he has the possession of the land. The adverse claim, however worthless it may be, clouds his title, and may be used injuriously to embarrass and belittle it, and to greatly depreciate its market value, for prudent persons would neither buy the property, at a fair value, while thus affected, nor loan money upon its security, although assured by the best lawyers that the adverse claim was worthless. The object of the statute was, therefore, to provide a certain remedy, notwithstanding the fact that equity, independently of the statute, affords substantially the same remedy.

The suit authorized by the Statute of the ninth of March, 1854, is the converse of the legal action of ejectment. See Pomeroy, *supra*. And this court, in *Woolfolk v. Ashby*, 2 Met. 288, having decided that an action of ejectment will lie against as many persons as hold an adverse possession of the land, although each one holds the possession of a distinct parcel from the other, and by a distinct claim of right, it follows that, under the Statute, *supra*, in an action to quiet the title to land, all persons setting up claim thereto, whether or not each claims a separate parcel of the land by distinct right, may be joined in the suit as defendants.

Also, it seems clear that in an equitable action to quiet the title to land, independently of the statutory authority, all of the adverse claimants, whether by independent titles or not, may be joined as defendants. Indeed, as the object to be accomplished is the putting of all litigation about the title to rest, it is not only desirable, but proper, to make all adverse claimants defendants. See Pomeroy, *supra*.

In the case of *Scott v. Means*, 80 Ky. 460, the petition did not disclose that there was a controversy between the parties as to the location of the boundary. It simply alleged that the defendants had trespassed upon plaintiffs' lands, and slandered their title. For trespass upon land or the slander of title an action at law for compensatory damages is ordinarily an adequate remedy. Therefore, this court held, in that case, that an action in equity to quiet title and settle the question as to the alleged trespass would not lie. Also, that as the plaintiffs' right in the possession of the land in dispute could be settled by an action at law, such action at law should have preceded an action in the nature of a bill of peace. The other cases relied on by appellees involve the same principle. Those cases are unlike this. Here the appellants, as alleged by them, are the owners of the land, and have the actual possession of it. The appellees are not complained of as trespassers or slanderers of the title, but as adverse claimants of the title, which beclouds the appellants' title, and injures the market value of their land. For this wrong there is no redress, except by an action in equity to quiet title.

We think that the lower court erred in sustaining the general demurrer to the second paragraph of the petition and in ruling the appellants to elect.

For these reasons the judgment of the lower court is reversed, and the case is remanded, with directions for further proceedings consistent with this opinion.

Holt, J., did not sit.

Petition for rehearing overruled.

NEW HAMPSHIRE SUPREME COURT.

LIME ROCK NATIONAL BANK

v.

W. G. R. MOWRY *et al.*

Charles A. SINCLAIR, Petitioner.

(.....N. H.....)

1. The assignment as collateral for future advances of a mortgage executed to secure an existing debt, is not prohibited by a statutory provision that no estate conveyed in mortgage shall be held by the mortgagee for any obligation or liability arising after the execution and delivery of the mortgage.
2. The mortgagee's acquisition of the

equity of redemption will not work a merger of the mortgage, if during all the time he owns such equity the mortgage is held by one to whom it had been assigned as collateral security for the mortgagee's debt.

(July 31, 1891.)

EXCEPTIONS by petitioner to rulings of the Trial Term of the Supreme Court for Grafton County (Smith, J.), refusing to vacate a decree foreclosing a mortgage. *Overruled.*

The facts are stated in the opinion.

Messrs. Bingham & Mitchell, for petitioner:

This assignment, if treated as a mortgage, as

NOTE. — Absolute assignment, when a mortgage.

An absolute assignment of a mortgage, with an agreement to sell the same to the assignor on receiving the amount intended to be secured, by a certain day, is a mortgage. *Clark v. Henry*, 2 Cow. 324.

Where a mortgagee makes an absolute assignment of his mortgage debt and of the mortgage, such assignment is sufficient to vest in the assignee the full legal title of the mortgage to the mortgaged premises, although no words of inheritance are used. *Barnes v. Boardman*, 3 L. R. A. 735, and note, 149 Mass. 103.

Form and sufficiency of assignment.

An assignment in short form on the back of a mortgage may be made by a corporation as well as by an individual, and without the appointment of an attorney appearing in the instrument. *Chilton v. Brooks*, 69 Md. 534.

The omission of the words "of Baltimore City," from the name of the assignor in the assignment of a mortgage is immaterial, where the mortgage itself gives the full name of the assignor corporation, and it also appears on the back of the assignment. *Ibid.*

An assignment neither attested by a witness, nor acknowledged in such manner as to dispense with such attestation, is not sufficient to convey the legal title of the mortgage, but only an equity. *Sanders v. Cassidy*, 36 Ala. 245.

And the assignee cannot execute a power of sale thereby given, unless the debt secured has been transferred to him so as to pass the legal title thereto. *Sanford v. Kane*, 3 L. R. A. 724, and note, 133 Ill. 199. See *Sanders v. Cassidy*, 36 Ala. 245.

So an assignment not under seal without purporting to convey an estate in the land does not confer the mortgagee's title on the assignee so as to authorize him to execute the power of sale contained in the mortgage. *Dameron v. Eskridge*, 104 N. C. 621.

Yet the assignee of a mortgage can enforce it, although there are no apt words of conveyance in his assignment to carry the legal title. *Johnson v. Beard* (Ala.) June 18, 1891; *Martinez v. Lindsay* (Ala.) Jan. 30, 1891.

The validity of the assignment of a mortgage cannot be impeached by the mortgagor in a suit by the assignee to enforce it. *Johnson v. Beard*, *supra*.

But an action instituted by the assignee may be defeated by the mortgagor by showing that there was no legal assignment. *Salinas v. Pearsall*, 24 S. C. 179.

The mortgage partakes of the negotiability of its principal, the note, without any formal assign-

ment or delivery, or even mention of the former, and the transfer without notice will not be affected by any undisclosed lien or secret trust. *Hagerman v. Sutton*, 3 West. Rep. 312, 91 Mo. 519. See *Carpenter v. Longan*, 83 U. S. 16 Wall. 271, 21 L. ed. 318; *Lewis v. Kirk*, 28 Kan. 497. *Contra* in Minnesota. *Oster v. Mickley*, 35 Minn. 245.

Assignment as collateral security.

Where the assignment of the notes and mortgage was as collateral security, it transferred the legal title, and being for a loan, it constituted a mortgage. *Rice v. Dillingham*, 73 Me. 62. See *Pond v. Eddy*, 113 Mass. 149; *Cutts v. York Mfg. Co.*, 18 Ma. 191; *Slee v. Manhattan Co.*, 1 Paige, 43, 2 L. ed. 537.

The assignment of a mortgage by the mortgagee, as collateral security for his own debt, is in substance a mortgage or pledge of the transferred security. *Gilbert v. Thayer*, 6 Cent. Rep. 213, 104 N. Y. 200.

The foreclosure of the mortgage assigned as collateral, and purchase by the assignee at the sale as against the assignor, work no other result than to substitute the land for the mortgage in the hands of the assignee, and to leave it subject to the assignor's right, by payment of the debt, to reclaim and hold his own property discharged of the assignee's lien upon it. *Gilbert v. Thayer*, 6 Cent. Rep. 213, 104 N. Y. 209; *Hoyt v. Martense*, 16 N. Y. 231; *Slee v. Manhattan Co.* *supra*.

Where by the laws of New York such assignee is the "trustee of an express trust," and may sue without joining the assignor, the judgment is conclusive against the assignor as to the amount of the debt, not 'only in that State, but in all other States. *Chew v. Brumagen*, 30 U. S. 13 Wall. 497, 20 L. ed. 663. See *Cummings v. Morris*, 25 N. Y. 635; *Consident v. Brisbane*, 23 N. Y. 339; *St. John v. American Mut. L. Ins. Co.*, 13 N. Y. 31.

Where the holder of the assigned mortgage takes a conveyance of the mortgaged property without a judicial sale and releases the mortgage, he may be treated as having wrongfully converted the property of the debtor, who may hold the creditor for the value thereof, and have his debt satisfied and recover the balance. *Kelly v. Matlock*, 35 Cal. 122.

Where a mortgage of real estate has been assigned as collateral security for a debt other than the mortgage debt, the property, as well after foreclosure as before, is held for the benefit of both pledgor and pledgee, and must be disposed of for the benefit of both. The price bid at the sale does not operate as payment upon the debt for which the mortgage was pledged. *First Nat. Bank of Jeffersonville v. Ohio Falls Car & L. Works*, 20 Fed.

it must be, cannot cover future advances from the assignee to the assignor.

New Hampshire Bank v. Willard, 10 N. H. 210; *North v. Crowell*, 11 N. H. 251; *Page v. Ordway*, 40 N. H. 253; *Johnson v. Richardson*, 38 N. H. 353; *Abbott v. Thompson*, 58 N. H. 255.

In *Hoyt v. Martense*, 16 N. Y. 234, the court said, in considering the effect of an assignment, it was, in effect, a mortgage of a mortgage.

See also *Whitney v. McKinney*, 7 Johns. Ch. 146, 2 L. ed. 250.

The mortgage, in the hands of an assignee, is subject to the same objections and equities that it is in the hands of the assignor.

Freeman v. Auld, 44 N. Y. 50; *Olds v. Cummings*, 31 Ill. 188; *Union College v. Wheeler*, 61 N. Y. 88-104.

The assignee, holding a mortgage as collateral security, can recover judgment only for

the sum for which the mortgage can legally be held as collateral.

Underhill v. Atwater, 22 N. J. Eq. 16; *Van Deventer v. Stiger*, 25 N. J. Eq. 224; *Hoy v. Bramhall*, 19 N. J. Eq. 74; *Fletcher v. Chase*, 16 N. H. 88.

As to creditors, even if the assignment could be held as security for future advances, the description of the indebtedness should be definite in amount or character.

Pettibone v. Griswold, 4 Conn. 158, 10 Am. Dec. 106; *Hart v. Chalker*, 14 Conn. 79; *Bramhall v. Flood*, 41 Conn. 68; *Tully v. Harloe*, 35 Cal. 302.

The assignment of the mortgage as collateral left the general property of the mortgage in Mowry.

Wheeler v. Newbould, 16 N. Y. 398; *Farwell v. Importers & T. Nat. Bank*, 90 N. Y. 488.

Rep. 69; *Brown v. Tyler*, 8 Gray, 135; *Montague v. Boston & A. R. Co.* 124 Mass. 242; *Stevens v. Dedham Inst. for Sav.* 129 Mass. 547; *Hoyt v. Martense*, 16 N. Y. 231; *Dalton v. Smith*, 86 N. Y. 178; *Smith v. Bunting*, 86 Pa. 116; *Slee v. Manhattan Co.* 1 Paige, 48, 2 L. ed. 557.

Where the mortgage was foreclosed without making such assignor a party, and the property was sold for more than the claim it was transferred to secure, and was purchased by the assignee, he is liable to account to the assignor for the excess. *Hoyt v. Martense*, *supra*.

Such sale and purchase work no other result than to substitute the land for the mortgage in the hands of the assignee, and to leave it subject to the assignor's right to redeem. *Gilbert v. Thayer*, 6 Cent. Rep. 22, 104 N. Y. 200; *Dalton v. Smith*, 86 N. Y. 183.

An agreement by the assignee that in case the mortgaged property is sold he will pay to the mortgagee any sum obtained by him in excess of the debt for which the mortgage was assigned, will not affect the validity of a purchase by the assignee at a foreclosure sale under the mortgage. *Eaton v. Rocca*, 75 Cal. 93. See *Henley v. Hotaling*, 41 Cal. 28; *Manasse v. Dinkelspiel*, 68 Cal. 404.

The guaranty by the owner of a mortgage, upon assigning the same, against loss from the mortgage, was limited to the amount paid on the assignment, and the plaintiff, in delaying unreasonably the collection of the mortgage, released the mortgagee from all liability on his guaranty. *Griffith v. Robertson*, 15 Hun, 345; *Leonard v. Morris*, 9 Paige, 91, 4 L. ed. 620.

Mortgagee cannot transfer the security without the debt.

A mortgagee, not in possession of the premises, has a mere chattel interest, which is transferable by a sale or assignment of the mortgage itself, together with the debt for the security of which it is given, but not by a grant in fee of the land it covers. *Miner v. Bookman*, 1 Jones & S. 95; *Runyan v. Mersereau*, 11 Johns. 534; *Jackson v. Bronson*, 19 Johns. 325; *Astor v. Hoyt*, 5 Wend. 618; *Astor v. Miller*, 2 Paige, 68, 3 L. ed. 818; *Lane v. Shears*, 1 Wend. 438; *Stoddard v. Hart*, 23 N. Y. 558; *Kortright v. Cady*, 21 N. Y. 343; *Waring v. Smyth*, 2 Barb. Ch. 119, 135, 5 L. ed. 560, 568; *Aymar v. Bill*, 5 Johns. Ch. 570, 1 L. ed. 1173.

A sale, pledge or mortgage of collateral interest in the land by which the debt was secured is ineffectual, and passes nothing, either absolutely or conditionally. *Power v. Lester*, 23 N. Y. 533; *Jackson v. Willard*, 4 Johns. 41; *Paoker v. Rochester & S. R. Co.* 17 N. Y. 296.

A transfer of the mortgage without the debt is a

nullity, and no interest is acquired by it. The security cannot be separated from the debt and exist independently of it. *Merritt v. Bartholick*, 36 N. Y. 46, 1 Trans. App. 64; 3 Pom. Eq. Jur. 198.

The incident cannot be separated from the principal, as the latter always draws with it the former. *Power v. Lester*, 17 How. Pr. 417; *Cooper v. Newland*, 17 Abb. Pr. 344; *Brant v. Clark*, 27 N. J. Eq. 235; *Gausen v. Tomlinson*, 23 N. J. Eq. 405.

The debt cannot reside in one person and the pledge in another. *Aymar v. Bill*, *supra*.

A conveyance by a mortgagee to a third person, of the mortgaged property, retaining to himself the debt intended to be secured, is a nullity. *Devlin v. Collier* (N. J.) May 27, 1891.

Assignment of mortgage debt carries with it the security.

The general rule is familiar that an assignment or transfer of a mortgage debt carries with it an equitable right to an assignment of the mortgage. *Sturtevant v. Jaques*, 14 Allen, 523; *Morris v. Bucon*, 123 Mass. 58; *Batesville Institute v. Kauffman*, 85 U. S. 18 Wall. 151, 21 L. ed. 775; *Carpenter v. Longan*, 88 U. S. 16 Wall. 271, 21 L. ed. 313; *Barnes v. Boardman*, 8 L. R. A. 785, 149 Mass. 114.

In some jurisdictions it is held that the mere transfer of the debt carries the mortgage with it. 2 Washb. Real Prop. 8d ed. 114, 118.

This doctrine has not prevailed in Massachusetts. In such cases the mortgagee would hold the legal title in trust for the purchaser of the debt, and the latter might obtain a conveyance by a bill in equity. *Wolcott v. Winchester*, 15 Gray, 461, 464; *Young v. Miller*, 6 Gray, 153; *Barnes v. Boardman*, *supra*.

Assignment of a debt carries the mortgage with it, and the mortgage can have no validity apart from the debt other than as an incident to the debt. *Union Mut. L. Ins. Co. v. Slee*, 10 West. Rep. 150, 123 Ill. 57; *Olds v. Cummings*, 31 Ill. 188; *Delano v. Bennett*, 90 Ill. 538; *Towner v. McClelland*, 110 Ill. 542.

An assignment of a note secured by mortgage carries with it the mortgage security. *Wildsmith v. Tracy*, 80 Ala. 258; *Thomson v. Madison B. & A. Asso. I. West. Rep.* 299, 108 Ind. 279; *Lee v. Clark*, 6 West. Rep. 205, 80 Mo. 553; *Hagerman v. Sutton*, 3 West. Rep. 312, 91 Mo. 519; *Carpenter v. Longan*, 83 U. S. 16 Wall. 271, 21 L. ed. 313; *Lalberge v. Chauvin*, 2 Mo. 179; *Anderson v. Baumgartner*, 27 Mo. 87; *Mitchell v. Ladew*, 36 Mo. 528; *Watson v. Hawkins*, 60 Mo. 550; *Logan v. Smith*, 62 Mo. 450; *Goodfellow v. Stillwell*, 73 Mo. 19; *Joerdens v. Schrimpf*, 77 Mo. 383; *Boatmen's Sav. Bank v. Grewe*, 84 Mo. 477.

An assignment of a note secured by a special mortgage and vendor's privilege carries with it

The conveyances of June 29 and December 31, 1880, to Mowry, the mortgagee, effected a merger of the legal and equitable estates. This, too, would be the legal effect of his deed of November 14, 1888, to N. S. Mowry.

James v. Morey, 2 Cow. 246; 14 Am. Dec. 475; *Starr v. Ellis*, 6 Johns. Ch. 593, 2 L. ed. 161; *Mills v. Comstock*, 5 Johns. Ch. 214, 1 L. ed. 1061; *Gardner v. Astor*, 8 Johns. Ch. 58, 1 L. ed. 540.

Messrs. J. W. Remick and E. C. Mowry, contra.

Clark, J., delivered the opinion of the court: This is a motion to vacate a decree for foreclosure of a mortgage by a creditor of the estate of N. S. Mowry, who at his decease was the owner of the equity of redemption in the mortgaged premises. N. S. Mowry died in

the spring of 1889, insolvent. The petitioner became a creditor of N. S. Mowry's estate in October, 1889, by an assignment of a judgment against Mowry and others. The foreclosure proceedings were by bill in equity filed November 6, 1889, in which the administrators upon the estate of N. S. Mowry were made defendants; and at the March Term, 1890, the bill was ordered taken as confessed, and a decree rendered that, unless the defendants pay to the plaintiff, within sixty days from March 18, 1890, the sum of \$24,902.16, with interest from that date, and costs of suit taxed at \$10.75, a writ of possession issue to the plaintiff to put and secure it in possession of the premises. A writ of possession issued May 20, and the plaintiff was put in possession May 21, 1890. At the September Term, 1890, the motion to vacate the decree was made, and denied sub-

both the mortgage and the privilege. *Forstall's Succession*, 39 La. Ann. 1052; *Race v. Bruen*, 11 La. Ann. 84; *Scott v. Turner*, 15 La. Ann. 346; *Jeckel v. Fried*, 18 La. Ann. 192; *Frost v. McLeod*, 19 La. Ann. 80; *Perot v. Levasseur*, 21 La. Ann. 529; *Miller v. Cappel*, 36 La. Ann. 284; *Thomson v. Madison B. & A. Assn.* 1 West. Rep. 269, 108 Ind. 279; *Lee v. Clark*, 6 West. Rep. 205, 80 Mo. 553; *Hagerman v. Sutton*, 8 West. Rep. 812, 91 Mo. 519.

The indorsement of mortgage notes, and the delivery thereof, operate as an assignment of a mortgage securing them, and transfer the same equitable rights in the mortgage that the holder had in the notes. *Converse v. Michigan Dairy Co.* 45 Fed. Rep. 18; *Connecticut Mut. L. Ins. Co. v. Talbot*, 12 West. Rep. 289, 113 Ind. 373.

The assignee takes subject to all equities, latent or open, of third persons. The "equity" in such a case must be some subsisting claim to or against the thing in action itself, or the fund which it represents. 2 Pom. Eq. Jur. 169; *Davies v. Austen*, 1 Ves. Jr. 247, per Lord Thurlow; *Mangles v. Dixon*, 3 H. L. Cas. 702, 731; *Bebee v. Bank of New York*, 1 Johns. 529, 532; *Bush v. Lathrop*, 22 N. Y. 535; *Schaefer v. Reilly*, 50 N. Y. 61; *Union College v. Wheeler*, 61 N. Y. 88; *Greene v. Warnick*, 64 N. Y. 220, 224, 225; *Murray v. Lyburn*, 2 Johns. Ch. 441, 443, 1 L. ed. 440, 444.

The mortgagees having transferred the note and received the consideration therefor, it would be inequitable for him to deprive the assignee of any part of its value, by insisting upon a priority or even an equality of right in sharing the insufficient proceeds. 3 Pom. Eq. Jur. 187; *McClintic v. Wise*, 25 Gratt. 448; *Stevenson v. Black*, 1 N. J. Eq. 338; *Salzman v. Creditors*, 2 Rob. (La.) 241; *Ventress v. His Creditors*, 20 La. Ann. 850; *Waterman v. Hunt*, 2 R. I. 298; *Bryant v. Damon*, 6 Gray, 564; *Warden v. Adams*, 15 Mass. 233; *Cullum v. Erwin*, 4 Ala. 452; *Forwood v. Dehoney*, 5 Bush, 174; *Clowes v. Dickenson*, 5 Johns. Ch. 235, 1 L. ed. 1008; *Pattison v. Hull*, 9 Cow. 747; *Mechanics Bank v. Bank of Niagara*, 9 Wend. 410.

But the following cases hold that they both share ratably: *Donly v. Hays*, 17 Serg. & R. 400; *Dixon v. Clayville*, 4 Md. 573; *McClanahan v. Chambers*, 1 T. B. Mon. 43; *Belding v. Manly*, 21 Vt. 560; *Van Rensselaer v. Stafford*, Hopk. Ch. 569, 2 L. ed. 526.

Assignment of bonds secured by mortgage.

An assignee of bonds secured by mortgage takes subject to the equities existing between his assignor and a purchaser subject to the mortgage, and cannot hold the latter personally liable for the debt where the assignor has entered into a valid agreement that such purchaser shall not be held personally liable. *Duncan v. Finn*, 79 Iowa, 653, 13 L. R. A.

The holder of non-negotiable bonds, secured by mortgage, with coupons attached, indorsed and transferred before due, takes subject to the defenses between the original parties. *Richardson v. Woodruff*, 20 Neb. 132.

The assignee of a bond, with notice of the illegality of the contract which forms the consideration, will not be protected by a declaration of no set-off. *Griffiths v. Sears*, 3 Cent. Rep. 240, 112 Pa. 523; *Duquesne Bank's App.* 74 Pa. 426; *Pom. Eq. Jur.* § 751.

An assignment of a mortgage which did not expressly assign the bond, but stated that the mortgage was made to secure the payment of a certain sum, "according to the conditions of the bond accompanying the same," is a valid assignment of the bond. *Yates County Nat. Bank v. Baldwin*, 43 Hun, 136.

Where an assignee of a bond and mortgage allowed the mortgagee to take the same for the purpose of getting dates, or for some purpose other than to sell, and the mortgagee sold them, it was held that such assignee had not parted with the possession so as to destroy his lien. *Ibid.*

Parties have a right to make a contract giving an assignee of a fractional part of a bond and mortgage priority of payment. *Thayer's App.* (Pa.) 8 Cent. Rep. 479; *Patrick's App.* 105 Pa. 356; *Donley v. Hays*, 17 Serg. & R. 400.

A bond and mortgage, although originally executed for a different purpose and without consideration, are valid and enforceable in the hands of the assignee, where mortgagor executes an agreement consenting to the assignment, and covenants that there is due and unpaid the full amount purporting to be secured by the bond and mortgage. *Houseman v. Bodine*, 122 N. Y. 153.

Assignment of notes secured by mortgage.

The assignment of one or more notes made to the same person and secured by a mortgage operates as an assignment *pro tanto* of the mortgage, and that the holders of the several notes have priority of lien in the order in which their respective demands become due. The notes so assigned stand as so many successive mortgages. *Purkhurst v. Watertown S. E. Co.* 6 West. Rep. 284, 107 Ind. 594; *Studebaker Mfg. Co. v. McCargur*, 20 Neb. 500; *Blair v. White*, 61 Vt. 110; *State Bank v. Tweedy*, 8 Blackf. 447; *Hough v. Osborne*, 7 Ind. 140; *Davis v. Langsdale*, 41 Ind. 399; *Doss v. Diftmars*, 70 Ind. 451; *The Bank of United States v. Covert*, 13 Ohio, 240.

So an indorsee of a part of such notes so secured by mortgage is entitled in equity to payment out of the mortgaged fund, in preference to the notes retained by the mortgagee and assignor, although the notes so assigned may fall due subsequently to

ject to exception. The petitioner does not charge any fraud on the part of the administrators of Mowry's estate in not resisting the foreclosure nor offer to redeem the mortgage, but, as the right of the petitioner to appear is not questioned, we express no opinion upon that point. The facts stated show no error in the decree of foreclosure, and the motion to vacate was rightfully denied. The mortgage was given January 23, 1877, by the Waumbeck Lumber Company to W. G. R. Mowry to secure a note dated October 1, 1876, payable on demand, for \$20,282.28, no part of which has ever been paid. April 27, 1878, W. G. R. Mowry assigned the mortgage to the plaintiff, "together with all the debts, claims, and demands upon which the same is predicated, with all the rights thereunto in any wise appertaining," as security for the repayment to the plain-

tiff of \$3,975, and as security for all other sums of money for which he was then indebted or liable, or might thereafter become liable, to the plaintiff. June 29, 1880, Charles G. Smith, assignee in bankruptcy of Waumbeck Lumber Company, conveyed the mortgaged premises to Charles A. Sinclair, and on the same day Sinclair conveyed one undivided half to W. G. R. Mowry, the mortgagee; and on December 8, 1880, he conveyed the other half to McKean and Fletcher; and on December 31, 1880, McKean and Fletcher conveyed their half to W. G. R. Mowry; and on November 14, 1883, W. G. R. Mowry conveyed the premises to N. S. Mowry. Each of these conveyances were made subject to the mortgage from the Waumbeck Lumber Company to W. G. R. Mowry. Upon these facts, as against W. G. R. Mowry, the plaintiff is entitled to a decree for the

those retained by the mortgagee. *People's Sav. Bank of Evansville v. Finney*, 63 Ind. 460; *Shaw v. Newson*, 78 Ind. 335; *Doss v. Dittmars*, 70 Ind. 451. See also *Richardson v. McKim*, 20 Kan. 343; 2 Jones, *Mortg.* § 1699-1701; *Mechanics Bank v. Bank of Niagara*, 9 Wend. 410; *Bryant v. Damon*, 6 Gray, 84; *Wright v. Parker*, 2 Aik. 212; *Monroe v. His Creditors*, 2 Rob. (La.) 280; *Winters v. Franklin Bank*, 33 Ohio St. 250.

Upon assignment of a mortgage securing several notes, one of which is overdue, the assignee takes subject to any equities existing between the mortgagor and mortgagee in respect to the notes not due. *Abele v. McGuigan*, 78 Mich. 415.

Where the mortgagee retains the remainder of a series of notes, the assignee is entitled, as against the mortgagee, without regard to the order in which the notes held by the two parties mature. *Anderson v. Sharp*, 4 West. Rep. 443, 44 Ohio St. 260; *Parkhurst v. Watertown S. E. Co.* 6 West. Rep. 234, 47 Ind. 594. See *State Bank v. Tweedy*, 3 Blackf. 45; *Hough v. Osborne*, 7 Ind. 140; *Davis v. Langsdale*, 41 Ind. 306; *Doss v. Dittmars*, 70 Ind. 451; *Bank of United States v. Covert*, 13 Ohio, 240.

The assignment carries with it the right to payment from the proceeds of the land of the notes assigned in preference to those retained, though the assignment was made without recourse. *Jenkins v. Hawkins*, 34 W. Va. 799.

One of two notes assigned after maturity, the other assigned before maturity to another person, is extinguished where, between the assignments, the assignor takes in exchange a part of the mortgaged property worth more than the note assigned after its maturity. *Massachusetts Loan & T. Co. v. Moulton* (Iowa) Oct. 16, 1890.

Assignee of mortgage takes subject to equities.

The assignee of a mortgage takes it not only subject to all the equities existing between the parties to the instrument, but also to all equities which third persons could enforce against the assignor. *Bush v. Lathrop*, 22 N. Y. 535; *Schafer v. Reilly*, 50 F. T. 41; *Union College v. Wheeler*, 61 N. Y. 85; *Greene v. Warnick*, 64 N. Y. 230; *Crane v. Turner*, 6 N. Y. 437; *Westbrook v. Gleason*, 79 N. Y. 23; *Temple v. Whittier*, 5 West. Rep. 144, 117 Ill. 282; *Ranney v. Hardy*, 1 West. Rep. 52, 43 Ohio St. 167.

And the Recording Act has no application to protect the assignee against a defense founded upon such equity. *Frear v. Sweet*, 118 N. Y. 454; *Schafer v. Reilly*, *supra*.

The assignee of a paid mortgage of real estate takes it subject to the defense that it has been paid, although it is not satisfied of record. *Redin v. Braban*, 43 Minn. 283.

It is a general rule that the assignee of a chose in 13 L. R. A.

action takes it subject to all equities to which it would be subject in the hands of the assignor. *United States v. Sturges*, 1 Paine, 534; *DeWolf v. Howland*, 2 Paine, 363; *Foot v. Ketchum*, 15 Vt. 253, 40 Am. Dec. 679; *Mott v. Clark*, 9 Pa. 399, 49 Am. Dec. 599; *Murray v. Iyburn*, 2 Johns. Ch. 441, 1 L. ed. 440; *Kleeman v. Frisbie*, 63 Ill. 484; *Clute v. Robison*, 2 Johns. 565; *Willis v. Twambly*, 13 Mass. 204; *Olds v. Cummings*, 31 Ill. 188; *Davies v. Austen*, 1 Ves. Jr. 249; *Covell v. Tradesman's Bank*, 1 Paige, 135, 2 L. ed. 590.

Although the assignee had no equitable notice of any equitable lien upon the mortgaged premises, the mortgagor may claim the same rights against him, as he could against the mortgagee. *Hubbard v. Turner*, 2 McLean, 534; 2 *Hov. Frauds*, 133; *Norrish v. Marshall*, 5 Madd. 481.

On general principles the mortgagor may claim the same rights against the assignee of the mortgage as he could against the mortgagee. A payment to the mortgagee, subsequent to the assignment, of which the mortgagor had no notice, will be allowed against the assignee. If the mortgagor have any set-off or mutual credit against the mortgagee, it is not affected by the assignment. *Hubbard v. Turner*, *supra*; *Niagara Bank v. Rosevelt*, 9 Cow. 419; 2 *Hov. Frauds*, 133; *Norrish v. Marshall*, *supra*.

But the assignee of a mortgage takes it discharged of the equities of persons not parties to it, of which he has no notice. *Bigley v. Jones*, 5 Cent. Rep. 674, 114 Pa. 510; *Mott v. Clark*, 9 Pa. 399; *Pryor v. Wood*, 31 Pa. 142.

So the rule that the assignee of a mortgage takes it subject to all equities to which it would be subject in the hands of the assignor does not embrace equities or defenses springing from default, or even fraud, of the assignor, committed subsequent to the assignment, and which had no existence and were simply possibilities at the time of the assignment. The rule excludes defenses and rights after the assignment. *Bush v. Cushman*, 27 N. J. Eq. 134; *Cornish v. Bryan*, 10 N. J. Eq. 146; *Losey v. Simpson*, 11 N. J. Eq. 233; *Coster v. Griswold*, 4 Edw. Ch. 374, 6 L. ed. 910; 2 *Lead. Cas. Eq. Pl.* 238.

Nor does the rule include latent equities in favor of third persons in the subject involved in the assignment, of which he had no notice. While it is the duty of the purchaser to inquire of the mortgagor, he is not required to inquire of the whole world as to latent equities. *Silverman v. Bullock*, 98 Ill. 19; *Moore v. Holcombe*, 3 Leigh, 597, 24 Am. Dec. 687; *James v. Morey*, 2 Cow. 298; *Hovey v. Hill*, 3 Laus. 172; *Tison v. People's Sav. & Loan Assn.* 57 Ala. 331; *Livingston v. Dean*, 2 Johns. Ch. 490, 1 L. ed. 457; *Livingston v. Hubbs*, 2 Johns. Ch. 513, 1 L. ed. 470; *Mott v. Clark*, 9 Pa. 399; *Redfearn v. Fer-*

amount of his indebtedness to the plaintiff, for which the mortgage is held as collateral security, and that was the amount allowed in the decree of foreclosure. Assuming that the estate of N. S. Mowry holds both the right of the Waumbeck Lumber Company, the original mortgagor, to redeem, and the right of W. G. R. Mowry to fulfill the condition of the assignment to the plaintiff by paying the indebtedness for which the mortgage note is held by the plaintiff as collateral security, these rights being acquired from W. G. R. Mowry, both the estate, and the creditors of the estate, are bound by the terms of the assignment of the mortgage to the plaintiff.

The motion to vacate the decree is based upon the claim that the assignment of the mortgage to the plaintiff was valid only to the extent of \$3,975, the actual indebtedness of W. G. R. Mowry to the plaintiff at the time of the

transfer, and that the stipulation in the assignment covering future indebtedness is repugnant to Gen. Laws, chap. 186, § 8, and inoperative. It is also claimed that the conveyances by Sinclair, June 29, 1880, and by McKean and Fletcher, December 31, 1880, to W. G. R. Mowry, the mortgagee, extinguished the mortgage title by merger, excepting as to the existing indebtedness of W. G. R. Mowry to the plaintiff. The fact that the assignment of the mortgage to the plaintiff covered future advances did not change the character of the debt secured by the mortgage. Section 3, chap. 186, Gen. Laws, provides that "no estate conveyed in mortgage shall be holden by the mortgagee for the payment of any sum of money, or the performance of any other thing, the obligation or liability to the payment or performance of which arises, is made, or contracted after the execution and delivery of such mortgage."

rier, 1 Dow, P. C. 50; Clute v. Robson, 2 Johns. 566; Olds v. Cummings, 31 Ill. 188; Pryor v. Wood, 31 Pa. 142; Westfall v. Jones, 23 Barb. 10.

On discharge of debt mortgage regarded as trustee.

The mortgagee or his assigns, after a discharge of the debt or liability, is regarded as a trustee for the mortgagor and his assigns, and holds the property, if at all, under an obligation to reconvey, and thus fulfill that resulting trust. Upham v. Brooks, 2 Woodb. & M. 413; Aymar v. Bill, 5 Johns. Ch. 570, 1 L. ed. 1178.

The assignee of a note and deed of trust securing the same is not authorized to appoint a new trustee, by a provision in the deed empowering the *cestui que trust* "or their legal representatives" to make such appointment. Fuller v. Davis, 63 Miss. 78.

A mortgagee who assigns the debt holds the legal title to the mortgage entirely for the benefit of the assignee, and retains no title which he can assert in any action or proceeding; and payment to the assignee revests all title in the mortgagor. Barnes v. Boardman, 3 L. R. A. 785, and note, 149 Mass. 106.

A mortgagee, or his assigns, is precluded by Ala. Code from claiming title under the mortgage, if the mortgage debt has been paid, although the mortgage and payment were made before the passage of the Act. Abbett v. Page (Ala.) May 20, 1891.

But a mortgagee cannot be required to release one of several lots covered by the mortgage, upon the payment of the proportionate share of such lot; but the whole amount of the mortgage must be paid by the owner of any lot who desires to redeem. Coffin v. Parker, 127 N. Y. 117.

A clause in an assignment of a mortgage, that it is "without recourse . . . in any event whatever," cannot prevent the assignor's liability for a fraudulent representation as to what had been paid to him upon the mortgage. Hexter v. Bast, 125 Pa. 52.

Evidence of payments made to a mortgagee, without suing the mortgagor, at times not specified, is insufficient to defeat the mortgage in the hands of an assignee under an assignment made by the mortgagee in his lifetime. Nau v. Brunette (Wis.) April 9, 1891.

Any assignee of a mortgage is liable to the penalty imposed by Neb. Comp. Stat., chap. 73, § 29, for refusal or neglect to execute a discharge after payment, although no formal assignment is made on the mortgage. Daniels v. Densmore (Neb.) May 6, 1891.

Priority among assignees.

The order of the respective assignments is wholly immaterial upon the rights of priority among the assignees. 3 Pom. Eq. Jur. 184; Winters v. Franklin Bank, 33 Ohio St. 250; Bank of United States v. Co-13 L. R. A.

vert, 13 Ohio, 240; People's Sav. Bank of Evansville v. Finney, 68 Ind. 460; Doss v. Dittmars, 70 Ind. 451; Stanley v. Beatty, 4 Ind. 134; Hough v. Osborne, 7 Ind. 140; Murdock v. Ford, 17 Ind. 52; Davis v. Langsdale, 41 Ind. 399; Crouse v. Holman, 19 Ind. 30; State Bank v. Tweedy, 8 Blackf. 447; Herrington v. McCollum, 73 Ill. 476; Funk v. McReynolds, 33 Ill. 481; Koester v. Burke, 81 Ill. 436; Vansant v. Allmon, 23 Ill. 30; Flower v. Elwood, 66 Ill. 498; Gardner v. Diederichs, 41 Ill. 158; Walker v. Schreiber, 47 Iowa, 529; Grapengether v. Fejervary, 9 Iowa, 163; Rankin v. Major, 9 Iowa, 297; Hinds v. Mooers, 11 Iowa, 211; Sangster v. Love, 11 Iowa, 580; Massie v. Sharpe, 13 Iowa, 542; Isett v. Lucas, 17 Iowa, 503; Wood v. Trask, 7 Wis. 566; Marine Bank v. International Bank, 9 Wis. 57; Lyman v. Smith, 21 Wis. 674; Mitchell v. Ladew, 36 Mo. 536; Thompson v. Field, 36 Mo. 320; Ellis v. Lamme, 42 Mo. 153; Richardson v. McKim, 20 Kan. 346; Gwathmeys v. Ragland, 1 Rand. 468; Wilson v. Hayward, 6 Fla. 171; Hunt v. Stiles, 10 N. H. 466; Gilman v. Moody, 43 N. H. 239; Phelan v. Olney, 6 Cal. 478; Gratian v. Wiggins, 23 Cal. 16. For a criticism on this doctrine, see Granger v. Crouch, 86 N. Y. 494, 499.

If the assignee of a note first maturing delays in enforcing his security, even though the second and other subsequent notes should have become due and payable, his priority is not thereby lost. Lyman v. Smith, 21 Wis. 674; People's Sav. Bank of Evansville v. Finney, *supra*.

When a judgment at law has been recovered on a note by its holder, the judgment takes the place of the note in the order of priority under the mortgage. Funk v. McReynolds, 33 Ill. 481.

According to this rule it would be impossible for a holder of a note or notes first maturing, to foreclose the mortgage entirely, and by a sale of the premises cut off the rights of the other holders. Cooper v. Ulmann, Walk. Ch. (Mich.) 251; Wilcox v. Allen, 36 Mich. 160; Donley v. Hays, 17 Serg. & R. 400; Hancock's App. 34 Pa. 155; Dixon v. Clayville, 44 Md. 573; Chew v. Buchanan, 30 Md. 367; Andrews v. Hobgood, 1 Lea. 663; Smith v. Cunningham, 2 Tenn. Ch. 565; Ewing v. Arthur, 1 Humph. 537; Parker v. Mercer, 6 How. (Miss.) 320; Henderson v. Herrod, 10 Smedes & M. 631; Bank of England v. Tarleton, 23 Miss. 173; Pugh v. Holt, 27 Miss. 461; Jefferson College v. Prentiss, 29 Miss. 46; Adams v. Lear, 3 La. Ann. 144; Deleapine v. Campbell, 52 Tex. 4; Paris Exch. Bank v. Beard, 49 Tex. 358; Robertson v. Guerin, 50 Tex. 317.

An assignment of a certain share in a mortgage, with no agreement as to priority of lien, although the mortgage is for separate installments, leaves the parties with equal claims and without preference. Jennings v. Moore, 33 Mich. 231.

The assignment of a mortgage given for an existing debt, as security for future advances, is not within the prohibition of the statute. The foreclosure proceedings are based upon the original mortgage debt, and the plaintiff is entitled, as against W. G. R. Mowry, the mortgagee, and assignor of the mortgage, and all parties deriving title from him with notice of the assignment, to a decree for the amount of its claims against W. G. R. Mowry, for which the mortgage, by the terms of the assignment, is held as collateral security, not exceeding the amount of the mortgage debt.

The claim that the mortgage debt became extinguished by merger is not sustained. By the assignment of the note and mortgage to the plaintiff, April 27, 1878, W. G. R. Mowry parted with his title as mortgagee, which he never regained; and, when he acquired the title of the mortgagor two years afterwards, there was no merger, because there was no union of estates.

Exceptions overruled.

Smith, J., did not sit. The others concurred.

ALABAMA SUPREME COURT.

AMERICAN FREEHOLD LAND MORTGAGE CO. of London, Limited, Appt., v.

William B. SEWELL *et al.*

(.....Ala.....)

1. A mortgagor who has conveyed the lands to a third person cannot exercise any election as to redemption from foreclosure sale.
2. A cross-bill for cancellation of a contract sued upon, on the ground of usury, must be dismissed if it fails to offer to do equity by paying principal and legal interest.
3. A loan is an Alabama contract when the application is made, the money paid over to the borrower, and the notes and mortgage executed in that State, although the debt is made payable in New York and the money was sent from that State to the mortgagee's agent in Alabama to be paid over on the execution of the papers.
4. Inconsistency or repugnancy of allegations is waived by failure to demur.

(April 22, 1891.)

APPEAL by complainant from a decree of the Chancery Court for Elmore County dismissing a bill filed to confirm in complainant a title to land acquired by it at a sale under a mortgage. *Reversed.*

The facts are stated in the opinion.

Messrs. Webb & Tillman and Caldwell Bradshaw, for appellant:

The expression, "No foreign corporation shall do any business in this State, without having at least one known place of business," does not include appellant's loan of money to Sewell.

Christian v. American F. L. Mortg. Co. 89 Ala. 198; 2 Morawetz, Priv. Corp. § 662; *Equitable L. Assur. Soc. v. Vogel*, 76 Ala. 441; *Beard v. Union & A. Pub. Co.* 71 Ala. 60; *People v. Tax Comrs.* 23 N. Y. 242; *Colorado Cooper Mfg. Co. v. Ferguson*, 18 Am. & Eng. Corp. Cas. 178; *Doty v. Michigan Cent. R. Co.* 8 Abb. Pr. 427; *State v. Smith*, 68 Miss. —; *Jahier v. Rascoe*, 62 Miss. 699; *United States v. American Bell Teleph. Co.* 29 Fed. Rep. 17, 88; *People v. American Bell Teleph. Co.* 29 Am. & Eng. Corp. Cas. 616, *note*.

Sale, and purchase by the mortgages, is a valid foreclosure until set aside.

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Craddock v. American F. L. Mortg. Co. 89 Ala. 281; *Alexander v. Hill*, Id. 488; *Emell v. Watson*, 88 Ala. 132; *Harris v. Miller*, 71 Ala. 28.

The mortgage was an executed contract after foreclosure sale.

Craddock v. American F. L. Mortg. Co. supra. Until set aside, the statutory right of redemption is a mere personal right.

Powers v. Andrews, 84 Ala. 289; *Commercial R. E. & Bldg. Assn. v. Parker*, 84 Ala. 398.

After the sale by Sewell to Whetstone, which was before he filed his answer, he lost all right of election to set aside the foreclosure sale.

Usury is largely a question of intention.

Uhlfelder v. Carter, 64 Ala. 527; *Call v. Palmer*, 116 U. S. 101, 29 L. ed. 560; *Arnold v. Potter*, 22 Iowa, 200; *Belaca v. Crampton*, 61 Ala. 507; *Barr v. Collier*, 54 Ala. 41; *Dosier v. Mitchell*, 65 Ala. 511.

The laws of Alabama, not those of New York, on the subject of usury, govern the case.

Wharton, Conf. L. 2d ed. §§ 505, 506a, 507, 508, 510; Rorer, Interstate Law, p. 48; 1 Randolph, Com. Paper, §§ 43, 45; 1 Dan. Neg. Inst. § 894; *Connor v. Bellamont*, 2 Ark. 382; *Chapman v. Robertson*, 6 Paige, 627, 3 L. ed. 1128; *Arnold v. Potter*, 23 Iowa, 194, 200; *Dugan v. Lewis*, 12 L. R. A. 93, 79 Tex. 246, decided by the Supreme Court of Texas, January 15, 1891; *Scott v. Perles*, 39 Ohio St. 68; *Kellogg v. Miller*, 2 McCrary, 895, 13 Fed. Rep. 198; *Pancoast v. Travelers Ins. Co.* 79 Ind. 178; *Townsend v. Riley*, 46 N. H. 810; *Fisher v. Otis*, 3 Chand. (Wis.) 83; *Bolton v. Street*, 3 Coldw. 81; *Kilgore v. Dempsey*, 25 Ohio St. 413.

Appellant actively seeking relief must offer to do equity.

1 Pom. Eq. Jur. §§ 891, 937; *Tongue v. Nutwell*, 31 Md. 302; *Uhlfelder v. Carter*, 64 Ala. 527, 532; *Belaca v. Elmore*, 50 Ala. 587; *Reggers v. Torbut*, 58 Ala. 525; *Hudnit v. Nash*, 16 N. J. Eq. 553; *Givens v. McMurtry*, Id. 468, 473; *Conover v. Van Mater*, 18 N. J. Eq. 487; *Vanderveer v. Holcomb*, 17 N. J. Eq. 87.

The principles of the foregoing cases apply equally as well when the Statute of Usury declares a forfeiture of the principal amount loaned as when only the interest.

1 Story, Eq. Jur. § 301; *Williams v. Fitzhugh*, 37 N. Y. 444; *Mason v. Gardiner*, 4 Bro. Ch. 486; *Fulton Bank v. Beach*, 1 Paige, 433, 2 L. ed. 705.

Messrs. Sample & Gunter for appellees

Coleman, J., delivered the opinion of the court:

The Corbin Banking Company, doing business as bankers in New York City, negotiated a loan between the plaintiff, a corporation under the laws of England, and William B. Sewell, the defendant, a resident citizen of Alabama. The loan was secured by a mortgage on lands in Elmore County, Ala. Under a power of sale included in the mortgage, the land was sold, and plaintiff, the mortgagee, became the purchaser. By the laws of this State a foreclosure of a mortgage, in accordance with its provisions, is a valid, legal foreclosure, and, there being no fraud or undue advantage, is absolute and final against all persons except against the mortgagor or his privies, although the mortgagee himself is the purchaser at his own sale. A mortgagor (or his privies or assignees who have become such before a foreclosure) may disaffirm and avoid the sale and foreclosure when the mortgagee becomes the purchaser, no such authority having been granted in the mortgage, seasonably expressed. The mortgagee also may, by bill in chancery, compel the mortgagor to elect whether he will ratify or disaffirm the sale, and if the sale is disaffirmed, the bill being framed for that purpose, upon sufficient proof the court will decree a foreclosure. Acting under these principles, the plaintiff, having purchased the mortgaged lands at a sale made in pursuance of the terms of the mortgage, filed the present bill, in which the defendant is required to elect whether he will ratify or disaffirm, and, in the event he disaffirms the sale, the court is prayed for a decree of foreclosure. The mortgage and notes are headed at Elmore County, Ala., and purport to have been dated and signed there. By the averments of the bill the mortgage is made a part of the bill. It has this provision in it: "It is further agreed between the parties hereto that the notes herein described and this mortgage shall be governed and construed by and under the laws of the State of Alabama, where the same is made." The note, bearing 8 per cent interest on its face, and interest coupons, are made payable at the office of the Corbin Banking Company, New York City. The defendant William B. Sewell answered the bill, and elected to disaffirm the sale. In his answer he states "that the said transaction was made in the State of Alabama on the 5th day of March, 1887, or about that time;" and this admission is followed with the statement that Gaddis was the agent of the complainant, and acting in its behalf, doing business in this State; and that plaintiff had not complied with the Constitution and laws of the State prohibiting the doing of business by a foreign corporation in the State without having a known place of business and an authorized agent; and further averring there was usury in the transaction; and asked that the answer be taken as a cross-bill; and prayed for affirmative relief. In answer to the cross-bill, the plaintiff denied that the transaction was made in Alabama, but averred that the contract loan was effected wholly in New York; and, 13 L. R. A.

for further answer to the cross-bill, the plaintiff averred that defendant Sewell, after the filing of the original bill, and before filing his answer and cross-bill, had sold, by lease and quitclaim, all his interest in the land to one William H. Whetstone. A copy of the conveyance to Whetstone, with the certificate of acknowledgment, is made an exhibit to the answer to the cross-bill. Plaintiff then amended its original bill by adding thereto an averment that the contract loan was made wholly in New York City, and not in Alabama. To the bill as amended the respondents answered, admitting the averment of the amendment to be correct, and, by way of answer and plea, set up the New York Statute, which prohibits a greater rate of interest than 6 per cent and which declares all contracts in which usurious interest is charged to be null and void. The pleadings have been stated at length, in order that we may be the better understood in considering the several questions of law discussed and insisted upon in argument. The chancellor dismissed plaintiff's bill and defendants' cross-bill, holding that the contract was governed by the laws of New York, and was null and void.

The foreclosure of the mortgage by sale, under power given in the mortgage, cut off the equity of redemption, as fully as a foreclosure by a decree by the court. The mortgagor in such a case may come into a court of equity, and in this court alone, and have the sale set aside, and thus become reinvested with the equity of redemption. But to obtain this relief, he must offer to do equity. *Garland v. Watson*, 74 Ala. 324; *Harris v. Miller*, 71 Ala. 82; *Craddock v. American L. & Mortg. Co.* 88 Ala. 281; *Alexander v. Hill*, 88 Ala. 487; *Ezzell v. Watson*, 83 Ala. 120; *Knox v. Armistead*, 87 Ala. 511.

The purchaser of the equity of redemption succeeds to all the rights of the mortgagor. The court does not set aside the sale on the ground that the equity of redemption still exists in the mortgagor, but on the theory that the mortgagee stands in the relation of a trustee, who has obtained an advantage over his *cestui que trust*, and, out of great caution, a court of equity permits the *cestui que trust* to elect within a reasonable time whether he will disaffirm the sale. *Thomas v. Jones*, 84 Ala. 304. After the foreclosure there is no property right in the mortgagor; nothing that can be levied on or sold or assigned. We do not now refer to the statutory right of redemption amended by the Acts of 1888-89, p. 764, but to the redemption rights of the mortgagor growing out of the transaction under consideration. He has the option to ratify or disaffirm, and no one who was not the owner of the equity of redemption, or his privies, at the time of the foreclosure by sale, and who has not in some way estopped himself, can assert this election. The only purpose and effect of a decree setting aside the sale is to restore to him the equity of redemption, and this will be done only upon his doing equity. If, therefore, after the foreclosure of the mortgage, the mortgagor sells and conveys the lands to a third person, he is not in a position to ask the court to

grant this relief, or to exercise any election in the matter. *McCall v. Mash*, 89 Ala. 497. If the bill had been amended under Chancery Rule 48, and averred that after the filing of the bill, and before the respondent filed his answer and cross-bill, the respondent had sold and conveyed the lands to William H. Whetstone, and the averments had been sustained by proof, we would hold that defendant was estopped from asserting the right of election, and complainant would have been entitled to a decree confirming the foreclosure; or complainant might have dismissed his bill without prejudice, and, the mortgage being valid and fully executed, could have successfully maintained a suit in ejectment for the recovery of the land, without interference by a court of equity, at the suit of the mortgagor. An answer is intended merely to bring forward a defense to the bill or cross-bill, as the case may be, and the only relief granted upon a mere answer is that the defendant be dismissed. If proof had been offered to sustain this ground of defense,—which we do not find in the record,—not having been charged in the bill, no affirmative relief on this ground could be granted, for the want of proper averment. It has been settled by numerous decisions that he who comes into a court of equity for relief must do equity, and this rule has been strictly applied in all cases when the complainant has applied to be relieved from a charge of usurious interest. The same rule is applied to a respondent who seeks affirmative relief by a cross-bill. When the respondent prayed in his cross-bill for the cancellation of the contract, failing to offer to do equity, by offering to pay the principal and legal interest, his cross-bill was without equity, and should have been dismissed. *Pulton Bank v. Beach*, 1 Paige, 429, 2 L. ed. 703; 1 Pom. Eq. Jur. § 391; *Mobile Branch Bank v. Strother*, 15 Ala. 51; *Hudnut v. Nash*, 16 N. J. Eq. 558; *Vanderveer v. Holcomb*, 17 N. J. Eq. 87; *Esleva v. Elmore*, 50 Ala. 587; *Rogers v. Torbut*, 58 Ala. 535.

The important question is to determine what law governs the contract, and to do this the first inquiry is to ascertain the place of the contract. The facts in the case of *Furrier v. New England Mortg. Secur. Co.*, 88 Ala. 277, were almost identical with those in the present case. In the second paragraph of the opinion in that case this court said: "The bill shows on its face with sufficient certainty that the notes and mortgage were presumptively executed and delivered in this State. They all bear date April 13, 1886, the notes and mortgage alike being dated in Alabama. There is contained, moreover, in the body of the mortgage this declaration: "It is further agreed between the parties hereto that the notes herein described and this mortgage shall be governed and construed by and under the laws of the State of Alabama, where the same is made;" the word, "made," as here used, obviously meaning "executed," and the latter word involves the act of delivery. The acknowledgment, moreover, taken before the notary, imports, in express words, that the grantor executed the mort-

gage on the day it bore date. . . . It was immaterial, therefore, that the notes were made payable in New York. The loan of the money and the taking of the security by mortgage were *prima facie* executed in Alabama."

The averments of the original bill in this suit are substantially the same. Does the proof sustain these allegations, or does it support the amendment to the bill, which alleges the transaction to have been executed in New York? There can be no doubt that the evidence fixes Alabama as the *locus contractus*. The presumption arising from the written instruments is fully sustained by the facts testified to by Gaddis, none of which are disputed in any way by the testimony of any other witness. The application for the loan was made in Alabama; the money was paid to the borrower in Alabama, upon the execution of the notes and mortgage, which was done in Alabama, and at the time of their execution and in consideration thereof. Prior to that time all that had been done was merely preliminary. Some of these preliminary acts, such as making out the application, had been performed in Alabama; others, such as the payment of the money by the loan company to the Corbin Banking Company, were done in New York. The Corbin Banking Company did not receive the money from the lender, or hold it as the agent of the borrower. As yet, the borrower had no claim upon it, and the Corbin Company was not responsible to the borrower for its use. The check sent out to Alabama was payable to Gaddis, not to Sewell, the borrower. It was to be paid over to the borrower after he had executed the contract by giving a note and mortgage upon the property designated in the application, and which was situated in Alabama; but, until this was done, there was no contract for the loan to Sewell, which Sewell could enforce against anyone. The negotiation ended in a contract when the note and mortgage were executed by Sewell. The proof shows that the note and mortgage were not made and sent to New York for delivery before the payment of the money, but the contrary is true. The money was sent out to Alabama before the execution of the notes and mortgage; and then and there paid over upon their execution. Until then the money was not subject to his order. Gaddis further testifies that, by previous arrangement with the Corbin Banking Company, he was paid in cash by the company, for his services in procuring the loan, 8 per cent on the amount loaned. He further says: "I received the mortgage and notes from said Sewell at the instance of the Corbin Banking Company of New York, and sent them to the Corbin Banking Company in New York." "I had the mortgage recorded after it was delivered to me."

Having arrived at the conclusion that the contract was made in Alabama, the stipulation to pay 8 per cent interest was in accordance with the *lex loci contractus*. If a valid contract where made, it is, as a general rule, valid everywhere. Under a valid contract, parties may agree for the payment of such

rates of interest as may be allowed by the law of the place of making or performance of the contract. This proposition is conceded. *Depau v. Humphrys*, 8 Mart. (N. S.) 27; *Andrews v. Pond*, 38 U. S. 13 Pet. 78, 10 L. ed. 67; 2 Kent, Com. § 460; *Hanrick v. Andrews*, 9 Port. (Ala.) 30; *Cromwell v. Sac County*, 96 U. S. 51, 24 L. ed. 681; *Hitchcock v. United States Bank*, 7 Ala. 433.

Proof without allegation, or allegation without proof, does not authorize relief. The *allegata* and *probata* must correspond, and both be sufficient. Are the pleadings in condition to entitle plaintiff to the benefit of the conclusion reached from the evidence as to the *locus contractus*? We have stated them as they appear in the record. The original bill averred that the contract was made in Alabama. By adding an amendment, it was averred that the contract was made in New York. The first averment was not stricken out. Both averments are in the bill, inconsistent and repugnant to each other as they are. The answer is in the same condition. The original answer to the original bill admitted and averred that the contract was made in Alabama, and the defense was usury, under the law of Alabama, and also that the contract was void, upon the ground that complainant had "no known place of business or authorized agent, as required by the Constitution and laws of Alabama." To avoid the effect of this defense, undoubtedly, the bill was amended so as to aver the contract was made in New York. To meet the force of the amendment made to the bill, respondent, both by answer to the amendment and plea, admitted and set up that the contract was made in New York, and pleaded the New York Statute, which declares contracts for a higher rate of interest than 6 per cent to be null and void. The original answer remains as first drawn, admitting and averring that the contract was made in Alabama. No objection was taken by either party for inconsistency in the pleadings.

We know the distinguished counsel representing the parties to this cause did not overlook or fail to appreciate the condition of the pleadings. They were left in this condition, no doubt, intentionally. At the time the pleadings were framed, and when the cause was submitted for decree in the chancery court, no adjudication had been made by this court construing the constitutional and statutory provisions, which prohibited the doing of any business in this State by a foreign corporation without having "a known place of business and an authorized agent" in this State. Previous decisions of this court had declared the constitutional provision self-executing, and the learned counsel did not know and could not tell what was necessary to be done in order to comply with the constitutional requirement. Plaintiff evidently was preparing to meet whatever construction the court might place upon the evidence in construing the law in regard to foreign corporations, and respondents' object apparently was to force plaintiff to shipwreck in either aspect, and for this purpose admitted that the contract was made in Alabama, or in New York, as

plaintiff might aver. If the proof showed that it was an Alabama contract, then respondents, for a defense, pleaded a non-compliance with the Alabama laws; if the proof showed that it was a New York contract, then defendants would insist that the contract was void under the New York Statute. Whether correct or not as to the purpose of counsel, the pleadings are as stated, and the rights of the parties under them as they are must be adjudicated. An amendment to a bill is a mere continuation, and the whole is but one bill. In the case of *Lockett v. Hurt*, 57 Ala. 200, the bill was filed in a double aspect—*first*, asserting a right to redeem lands under a sheriff's sale; and, *second*, asserting the invalidity of the sheriff's sale. This court held that the plaintiff was entitled to relief. In the case of *Ray v. Womble*, 58 Ala. 38, referring to the case of *Lockett v. Hurt*, *supra*, it was held that the inconsistency of the bill in the latter was not inquired into, because the assignments of demurrer did not embrace the cause of repugnancy in the bill. We hold that the failure of the defendants to demur to plaintiff's bill, or otherwise object to it, on account of inconsistent or repugnant allegations, was a waiver of the defect; and, if the proof shows that plaintiff was entitled to relief under either aspect of his case, the court below erred in not granting relief. Our conclusion has been that the *locus contractus* was Alabama, and that consequently the New York Statute was no defense.

We are further confirmed in our conclusion that plaintiff is entitled to relief by the leading authorities relied on by both appellant and appellees to sustain their respective contestations. The facts in the case of *Chapman v. Robertson*, 6 Paige, 627, 3 L. ed. 1128, were that Robertson, a citizen of New York, being in England, applied to Chapman for a loan of £800 to be secured by bond and mortgage on lands in New York. It was agreed that Robertson should return to New York and execute his bond and mortgage, and have the same recorded, and transmit it to complainant in England, and, upon receipt of the security, the £800 were to be deposited in London, with Robertson's bankers, for his use. On a bill filed in New York, the same defense was made as in the present case, viz., that the contract was made in England, and the money payable in England, and, being in violation of the Usury Laws of England, the contract was void. The court held that, the security being upon land situated in New York, the place of the domicile of the mortgagor, although the money was payable in England, the contract was governed by the laws of New York, and the plaintiff was granted relief. The conclusion of this decision has been followed in other courts, and adopted as a sound construction of the law applicable in such cases. *Dugan v. Lewis*, 12 L. R. A. 98, 79 Tex. 246; *New England Mortg. Secur. Co. v. McLaughlin* (in MS., from Supreme Court of Georgia, October Term, 1890); *Boone, Mortg. § 86*; *Hitchcock v. United States Bank*, *supra*.

We are aware that the soundness of the

reasoning in the decision in *Chapman v. Robertson*, *supra*, has been questioned, and Jones, in his work on Mortgages (vol. 1, §§ 660, 661), says it has been overruled. Most of the authorities which criticise the principle of law laid down, generally concede the correctness of the conclusion of the learned chancellor who rendered the decision in the case of *Chapman v. Robertson*. Judge Story (Conf. L.) in his criticism (sec. 293c), referring to the case of *Chapman v. Robertson*, says: "The decision itself seems well supported in point of principle; for the parties intended that the whole transaction should be in fact, as it was in form, a New York contract, governed by the laws thereof, and the repayment of the debt was there to be made." The italics are ours. There are no facts in the case, except those which arise from the making of the note and mortgage in New York, which authorize the assumption that the money was to be repaid in New York. The two differ as to the place of payment; Story holding it to be a New York contract, and consequently the place of payment presumptively was in New York; the former holding that, as no place of payment was fixed, the law fixed it in England; but further held that although, as a mere personal contract, it would be wholly inoperative until it was received by the lender in England, where the money was then to be deposited with the borrower's banker for his use, yet, on account of the character of the property, being real or heritable property, and the further fact that the mortgage was executed in New York upon property in that State, and being valid by the *lex situs*, which was also the law of the domicile of the mortgagor, it was the duty of the court to give full effect to the security, without reference to the Usury Laws of England, which neither party intended to evade by the execution of the mortgage upon the lands in New York. It is insisted by appellant that the rule declared in *Chapman v. Robertson* is fully sustained by principle and authority, and applies in the present case; and, on the other hand, it is insisted by appellees that *Chapman v. Robertson* is not based upon sound principles of law, has been overruled, and that Story's criticisms are well founded. We have cited both authorities, because both sustain our conclusion, so far as granting relief to plaintiff.

In the case of *Hitchcock v. United States Bank*, *supra*, the court, referring to the case of *Chapman v. Robertson*, 6 Paige, held that the facts of the case were sufficient to fix New York as the *locus contractus*. It says: "There the facts were substantially the same as in the preceding case, with the additional fact (which also exists in this case) that a mortgage was executed by a debtor on lands lying in New York, the place where the contract was made, though to be performed in England." The court further held that "the cases cited from 8 Mart. (N. S.) [*Depau v. Humphrys*, *supra*], and 6 Paige are identical with this, and, in our opinion determine the law correctly." The italics are ours. If the principles declared in the case of *Chapman v. Robertson* are correct, it is the duty of this 13 L. R. A.

court to hold the security valid, without reference to the Usury Laws of New York. On the other hand, if the facts of the case in *Chapman v. Robertson* are sufficient to fix the *locus contractus* in New York, as held by Story, and by this court in 7 Ala., *supra*, then the facts of the case under consideration, as we have shown, are much more potent to fix the *locus contractus* in Alabama; and, this being established, it is conceded the parties could contract for either rate of interest, without regard to the Usury Laws of the place of payment. The case before us does not require an adjudication of the question whether, when the *locus contractus* and *locus solutionis* is wholly in the same State, and where usurious contracts are declared void by statute, and the debt is secured by a mortgage upon property in another State where a higher rate of interest is legal, the parties may legally contract for the higher rate. Anything we might say on this subject would be regarded as mere dictum, inasmuch as we hold the present contract to have been made in Alabama, and in this respect the conclusion of this court differs from that reached in the case of *Dugan v. Lewis*. The case of *Dugan v. Lewis*, *supra*, was very similar to the case under consideration, and, if the facts had been detailed literally, probably the two would be identical in all respects. The Texas case regarded New York as the *locus contractus* and *locus solutionis*, and followed *Chapman v. Robertson*, *supra*, citing other authorities sustaining it. Judge Henry, by whom the opinion in the Texas case was rendered, brings forward, as an additional argument, this proposition, founded upon the doctrine that the contracting parties have the right to stipulate for the rate of interest legal at either of the two *loci*. He says there is no reason why their making their contract in one State instead of in the other, nor why their making it payable in one instead of in the other, should have a controlling influence over the question. Doing either will, in the absence of other evidence, serve to show their purpose, and control the result. But not so when they otherwise distinctly provide, or when, from other facts, their intention can be more satisfactorily ascertained. The general rule is, the validity of a contract, is determined by the place of the contract, and the intention of the parties only looked to in construing the contract, or, as forcibly put in brief of counsel, the "venue of the agreement determines its validity, and not the venue of the intention." *Cubbage v. Napier*, 62 Ala. 522. The necessities of trade, commerce, and progress may demand that the principle of *mutatis mutandis* be expanded and applied to other things "than names, offices, and the like." The evidence fails to establish that the plaintiff charged any higher rate of interest than 8 per cent. There is no evidence tending to show that plaintiff knew of, was connected with, or in any manner interested in, the commissions paid, or agreed to be paid, to Gaddis or the Corbin Banking Company to procure the loan. *Guin v. New England Mortg. Secur. Co. (Ala.)* 8 So. Rep. 388; *Call v. Palmer*, 116 U. S. 101, 29 L. ed. 560. Under the recent de-

cisions of *Nelms v. Edinburgh A. L. Mortg. Co. (Ala.)* and *New England Mortg. Secur. Co. v. Ingram (Ala.)*, both in MS., the averments and proof show a compliance with the law which requires that foreign cor-

porations shall have a known place of business and authorized agent.

Reversed and remanded.

Walker, J., did not sit.
Rehearing denied.

NEW YORK COURT OF APPEALS.

Cornelia GILMAN, *Resp't.*,

v.

Preble TUCKER, *Appl't.*

(.....N. Y.)

1. A statute is void as depriving one of his property without due process of law which provides that if a title to real estate, purchased at execution sale, is, at the suit of the judgment debtor, adjudged void, the judgment shall be of no effect unless within twenty days the plaintiff pays to the purchaser at such sale or his grantee the amount of the bid, with interest and costs of defending the title acquired, and that, in the event of plaintiff's failure to pay, the title shall be valid in the grantee; especially so where the judgment debtor would derive no benefit from the payment because the annulment of the

sale would revive the lien of the original judgment, and an assignee has a right to recover from his grantee the amount paid for the land.

2. Property rights are created by the rendition of a judgment, which the Legislature has no power to reach and destroy.

(October 6, 1891.)

APPEAL by defendant from an order of the General Term of the Superior Court for the City of New York, affirming an order of the Special Term, which denied his motion for an order declaring the judgment obtained by plaintiff to be of no force or effect because of plaintiff's failure to comply with the provisions of Code Civ. Proc. § 1440. *Affirmed.*
The facts are stated in the opinion.

NOTE.—The doctrine of caveat emptor applies to execution sales.

The doctrine of *caveat emptor* applies to every purchaser of real estate at a sheriff's sale on execution. *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553; *Freeman, Executions*, 517, § 310; N. Y. Code, § 1440; N. Y. Const. art. 1, § 6; *Westervelt v. Gregg*, 12 N. Y. 206; *Cooley, Const. Lim.* 335; *Woodcock v. Bennett*, 1 Cow. 711; *Day v. Bach*, 87 N. Y. 54; *Code Civ. Proc.* § 1479; *Place v. Riley*, 98 N. Y. 1.

Section 1440 of the New York Code, as amended by § 2, chap. 681, of the Laws of 1891, has no application where relief is sought against a fraudulent act of the defendant. *McIntyre v. Sanford*, 2 N. Y. Civ. Proc. 306.

Reluctance of the court to annul a statute.

! Courts are extremely reluctant to pass upon the constitutionality of a legislative enactment, and in an early case *Mr. Justice Johnson*, speaking for the New York Court of Appeals, said: "We ought not to pass upon the question of the constitutionality of a statute, unless the determination of the point is necessary to the determination of the cause." *Freas v. Ford*, 6 N. Y. 176.

Courts, at least, are bound to respect what the people have seen fit to preserve by constitutional enactment, until the people are unwise enough to undo their own work. *Allor v. Wayne County Auditors*, 43 Mich. 76.

Before the judiciary can with propriety declare an Act of the Legislature unconstitutional, a case should be presented in which there is no rational doubt. *Bank of Newbern v. Taylor*, 1 Law Repos. 246; *Ex parte M'Cullum*, 1 Cow. 560; *State v. Reid*, 1 Ala. 612, 35 Am. Dec. 44.

The determining of a question, involving the inquiry whether an exercise of power by the legislative department of the State is constitutional, is readily conceded to be not only a matter of delicacy, but of grave import, and demands the most deliberate and mature consideration. It should not, moreover, be decided but in cases of clear necessity, and where the character of the act done is in plain and obvious conflict with the Constitution. 18 L. R. A.

It has been aptly said to be an inquiry, "whether the will of the representatives, as expressed in the law, is or is not in conflict with the will of the people, as expressed in the Constitution." *Lane v. Dorman*, 4 Ill. 288, 36 Am. Dec. 543.

Where a judge is satisfied upon full consideration that an Act of the Legislature is contrary to the Federal Constitution, the supreme law which he is bound to obey, and which must prevail over any Act that comes in conflict and cannot stand with it, or is for any other reason invalid, he has no choice; and all that is left him is honestly and fearlessly to do his duty from the faithful discharge of which no upright judge can shrink if he would. On the other hand, a judge should not suffer himself to be betrayed to pronounce an Act unconstitutional or invalid on insufficient grounds, by a morbid apprehension that a contrary decision might be ascribed to the want of a just and proper sense of judicial duty. *Regents of University v. Williams*, 9 Gill & J. 365, 31 Am. Dec. 72.

It is clear that statutes passed against plain and obvious principles of common right and common reason are absolutely null and void, so far as they are calculated to operate against those principles. *Ham v. McCraw*, 1 Bay. 86.

Nor will a court listen to an objection made to the constitutionality of an Act by a party whose rights it does not affect, and who has therefore no interest in defeating it. *People v. Rensselaer & S. R. Co.* 15 Wend. 113, 30 Am. Dec. 83; *Cooley, Const. Lim.* 197.

A statute, it has been said, is judicially held to be unconstitutional, because it is not within the scope of legislative authority; it may either propose to accomplish something prohibited by the Constitution, or to accomplish some lawful, and even laudable, object, by means repugnant to the Constitution of the United States or of the State. *Com. v. Clapp*, 5 Gray, 97.

A law that is unconstitutional is so because it is either an assumption of power not legislative in its nature, or because it is inconsistent with some provisions of the Federal or State Constitution. *Com. v. Maxwell*, 27 Pa. 444, 456; *Cooley, Const. Lim.* 5th ed. 211, and *note*.

Messrs. Essek Cowen and Charles J. Hardy, for appellant:

Section 1440 of the Code of Civil Procedure is not a violation of any constitutional provision of this State, or of the United States.

By it a party having paid and extinguished the debt of a defendant in an execution, on receiving a deed of the debtor's land, if the debtor resumes the title to the land, he must pay back the amount of the debt. In other words, the person paying the debt, in case of the failure of his title, is given a species of equitable lien on the debtor's land, and is not to be deprived of the title by the debtor, unless that lien is paid.

See *McIntyre v. Sanford*, 89 N. Y. 634.

The Legislature may constitutionally pass laws which render valid and legal the doings of public officers who have exceeded their authority, although by said law individuals may be deprived of vested rights.

Smith, Com. on Const. Constr. 409.

Where the Legislature might, without any violation of the Constitution, have authorized certain conduct on the part of public officers, it may ratify and validate such conduct by a subsequent Act.

Bell v. Vanderbilt, 67 How. Pr. 340; *Ensign v. Barse*, 10 Cent. Rep. 254, 107 N. Y. 329;

What is due process of law.

What constitutes due process of law has been exhaustively defined in *Desty's Federal Constitution*, at page 222. The term is construed to mean such an exertion of the powers of government as the settled maxims of the law permit and sanction. *Bertholf v. O'Reilly*, 8 Hun. 16, 18 Am. L. Reg. N. S. 119; *Ex parte Ah Fook*, 49 Cal. 402.

It simply requires that a person should be brought into court and have an opportunity to prove any fact for his protection. *People v. Essex County Supra*, 70 N. Y. 229.

It means law in its regular course of administration through courts of justice (*Baker v. Kelley*, 11 Minn. 460; *Bowan v. State*, 30 Wis. 129; *State v. Becht*, 23 Minn. 413), a timely and regular proceeding to judgment and execution. *Dwight v. Williams*, 4 McLean, 588.

It generally implies and includes parties, judge, regular allegations, and a trial according to some settled course of judicial proceedings (*Den v. Hoboken Land & Imp. Co.*, 59 U. S. 18 How. 272, 15 L. ed. 372; *Huber v. Reilly*, 53 Pa. 112; *Kees v. Watertown*, 26 U. S. 19 Wall. 122, 22 L. ed. 76; *Westervelt v. Gregg*, 12 N. Y. 202), a legal proceeding under direction of a court (*Newcomb v. Smith*, 1 Chand. 71); intending to secure the right of trial according to the forms of law (*Parsons v. Russell*, 11 Mich. 113), the law of the land (*Re Meador*, 1 Abb. U. S. 331; *Den v. Hoboken Land & Imp. Co. supra*; *James v. Reynolds*, 2 Tex. 251); a present existing rule, and is not an *ex post facto* law (*Hoke v. Henderson*, 4 Dev. L. 15; *Taylor v. Porter*, 4 Hill 148; *Wynehamer v. People*, 13 N. Y. 408; *Norman v. Helst*, 5 Watts & S. 171; *Den v. Hoboken Land & Imp. Co. supra*; a law existing at the time of the vesting of rights. *Wilkinson v. Leland*, 27 U. S. 2 Pet. 558, 7 L. ed. 553; *Osborn v. Nicholson*, 80 U. S. 13 Wall. 662, 20 L. ed. 626; *Taylor v. Porter, supra*; *Wynehamer v. People*, 13 N. Y. 378.

That it means a trial according to some settled course of procedure is not universally true. *Greene v. Briggs*, 1 Curt. C. C. 811; *Den v. Hoboken Land & Imp. Co.*, *Hoke v. Henderson*, and *Taylor v. Porter, supra*; *Vanzandt v. Waddel*, 2 Yerg. 260; *State Bank v. Cooper*, Id. 690; *Jones v. Perry*, 10 Yerg. 52.

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Duanesburg v. Jenkins, 57 N. Y. 177; *Horton v. Thompson*, 71 N. Y. 522; *People v. McDonald*, 69 N. Y. 362.

Mr. Everett P. Wheeler, with **Messrs. Tucker, Hardy & Wainwright**, also for appellant:

The Legislature had power to regulate the form of the execution, and it also had power to regulate the remedy of parties aggrieved by defects of form.

This is in strict analogy to the authorities which hold that the Legislature has power to pass a statute curing defects in proceedings for the sale of property for non-payment of taxes or assessments.

Bouns v. May, 120 N. Y. 357. See also *Terrel v. Wheeler*, 123 N. Y. 76; *Clementi v. Jackson*, 99 N. Y. 591; *Ensign v. Barse*, 10 Cent. Rep. 254, 107 N. Y. 329; *Williams v. Albany County Supra*, 122 U. S. 154, 30 L. ed. 1088; *New York & O. M. R. Co. v. Van Horn*, 57 N. Y. 473; *People v. Turner*, 117 N. Y. 227.

Previous to 1837 it was the law of this State that a mortgage or other security taken upon a loan of money at a usurious rate was void. Nevertheless it was also the law that a party seeking equitable relief in reference to such mortgage or security was obliged, as a condition of obtaining this relief, to tender the amount

It does not necessarily import a jury trial (*Re Meador*, 1 Abb. U. S. 317), but includes summary remedies. *Martin v. Mott*, 25 U. S. 12 Wheat. 19, 6 L. ed. 537; *United States v. Ferreira*, 54 U. S. 13 How. 41, 14 L. ed. 42; *Re Meador and Den v. Hoboken Land & Imp. Co. supra*.

Civil proceedings for contempt are not included. *State v. Becht, supra*.

A statute making the property owner liable for damages resulting from the illegal use of property by a tenant is valid. *Bertholf v. O'Reilly*, 8 Hun. 16, 18 Am. L. Reg. N. S. 124; *Dobbins v. United States*, 96 U. S. 385, 24 L. ed. 697.

An assessment for grading and improving streets is not a taking of property without compensation, or without due process of law. *People v. Brooklyn*, 4 N. Y. 419.

Private property may be taken by a commander in war in case of exigency, but the case must be urgent. *Mitchell v. Harmony*, 54 U. S. 13 How. 115, 14 L. ed. 75. And see *Ex parte Milligan*, 71 U. S. 4 Wall. 2, 18 L. ed. 281; *Clark v. Mitchell*, 64 Mo. 561.

Provisions for searches and seizures to aid in the collection of the revenue are not repugnant to the Fourth Amendment to the Federal Constitution. *Re Platt*, 7 Ben. 261; 19 Int. Rev. Rec. 132; *Den v. Hoboken Land & Imp. Co.*, 59 U. S. 18 How. 277, 15 L. ed. 374; *Ames v. Port Huron Log D. & B. Co.* 11 Mich. 139.

So, processes for seizure and assessment are within the discretion of the Legislature (*Pullan v. Kinsinger*, 2 Abb. U. S. 94; *Davidson v. New Orleans Admrs.* 96 U. S. 97, 24 L. ed. 616), but Congress has no power to provide for the absolute forfeiture of land as a penalty for the non-payment of taxes, without any process. *Martin v. Snowden*, 18 Gratt. 100.

A Confiscation Act does not authorize seizure and confiscation without due process of law. *Hodgson v. Millward*, 3 Grant, Cas. 406.

Congress has no power to organize a board of revision to nullify confirmed titles. *Reichert v. Felps*, 73 U. S. 6 Wall. 160, 18 L. ed. 849.

A trial before a board of election officers is not due process of law. *Huber v. Reilly*, 53 Pa. 112.

By "without due process of law" is meant all the guarantees set forth in the Sixth Amendment. *James v. Reynolds*, 2 Tex. 251; *Jones v. Montes*, 15 Tex. 363.

which he had actually received, with legal interest.

Livingston v. Harris, 3 Paige, 527, 8 L. ed. 261; *Tupper v. Powell*, 1 Johns. Ch. 489, 1 L. ed. 203; *Fanning v. Dunham*, 5 Johns. Ch. 122, 1 L. ed. 1030.

This would seem to be in complete analogy to the present case. A statute may be constitutional in part, even though there are constitutional objections to another part.

Sedgw. Stat. Const. 413, 414; *People v. Green*, 58 N. Y. 295.

The requirement that the plaintiff shall repay to the defendant the amount due at the sale is valid, for the effect of this payment was undoubtedly to extinguish a debt due from the defendant in the first suit, the plaintiff in the second.

McIntyre v. Sanford, 89 N. Y. 634, 2 N. Y. Civ. Proc. 306.

Mr. Charles E. Hughes, with **Mr. George H. Fletcher**, for respondent:

The Amendment of 1881, to section 1440 of the Code of Civil Procedure, authorizes an unlawful deprivation of property and is unconstitutional.

See *Wilkinson v. Leland*, 27 U. S. 2 Pet. 627, 7 L. ed. 542; *Taylor v. Porter*, 4 Hill, 140; *Westerell v. Gregg*, 12 N. Y. 202.

If the Legislature cannot take the property of A and give it to B, it cannot compel A to pay sums that he does not owe under penalty of forfeiture of property.

It is difficult to perceive how any equitable claim can exist against anyone for the cost of void proceedings.

Cooley, Taxn. 2d ed. p. 553, note 1.

The attempt of the Legislature to charge property with the expenses of an invalid proceeding *in invitum* against the owner, is unconstitutional and void.

Boice v. U. S. Reflector Co. 36 Hun, 407; *Weston v. Wallis*, 45 Hun, 219; *Union Distilling Co. v. Union Pharmaceutical Co.* 6 N. Y. Supp. 540.

Where a betterment statute went so far as to attempt to create a lien upon the property of the adjudged owner for the purchase money without reference to its amount or to the benefit which the owner had derived, the Act was held void.

Madland v. Benland, 24 Minn. 372.

So a tax statute which had been construed as giving the holder of an invalid tax title a lien for "the money paid upon the sale" without regard to the question whether the owner was legally liable for the whole of the purchase money, as representing a valid obligation, was held void if such were the proper construction.

Hart v. Henderson, 17 Mich. 218.

It is not competent by legislation to bring into existence and establish against a party a demand which previously he was neither legally nor equitably bound to recognize and satisfy.

Cooley, Const. Law, 327; *Ohio & M. R. Co. v. Lackey*, 78 Ill. 55.

The Statute makes no provision for a judicial inquiry or for a judicial determination of the facts upon which the forfeiture is predicated and is therefore void.

See 2 Kent, Com. 13; *Wynhamer v. People*, 18 N. Y. 378; *Taylor v. Porter*, 4 Hill, 146; 13 L. R. A.

Campbell v. Evans, 45 N. Y. 356; *Rockwell v. Nearing*, 35 N. Y. 802; *Cooley*, Taxn. 2d ed. 465; *Lawton v. Steele*, 7 L. R. A. 184, 119 N. Y. 226; *Cooley*, Const. Lim. 6th ed. 444; *Leck v. Anderson*, 57 Cal. 251; *Lovory v. Rainwater*, 70 Mo. 152.

Where the Legislature seeks to enforce the performance of some act which public policy may seem to require, it is not competent to deprive the citizen of his rights of property, solely by virtue of a legislative enactment, because of his failure to comply with a prescribed condition.

People v. Otis, 90 N. Y. 48. See also *Reed v. Wright*, 2 G. Greene, 15; *Scharf v. Tasker* (Md.) Jan. 22, 1891; *Marshall v. McDaniel*, 13 Bush, 378.

If this were a curative statute, it would be invalid.

Hart v. Henderson, 17 Mich. 218; *Cromwell v. MacLean*, 123 N. Y. 474.

In case of a void judicial sale, if the lien be a valid one and is based upon an equitable or legal obligation of the owner, it is just that he should reimburse the defendant to the extent to which he has been benefited by the discharge of the lien. This result may be reached by compelling the owner to make the payment as a condition of granting relief.

See *Howard v. North*, 5 Tex. 290; *Johnson v. Caldwell*, 38 Tex. 217; *McLaughlin v. Daniel*, 8 Dana, 183. See also *M'Ghee v. Ellis*, 4 Litt. 245; *Muir v. Craig*, 3 Blackf. 292; *Hawkins v. Miller*, 26 Ind. 178; *Price v. Boyd*, 1 Dana, 436; *Jones v. French*, 92 Ind. 138; *Short v. Sears*, 98 Ind. 505; *Bentley v. Long*, 1 Strobb. Eq. 52.

In another class of cases the Legislature has made it a condition of granting relief against void tax sales, that the owner shall pay all taxes assessed against the property.

The validity of such a statute was denied in—*Wilson v. McKenna*, 52 Ill. 43. See *Craig v. Managin*, 21 Ark. 319; *Pope v. Macon*, 28 Ark. 644.

Clearly, however, an owner, as a condition of reclaiming his property, cannot be compelled to pay an invalid tax.

Hart v. Henderson, 17 Mich. 218; *Cooley*, Const. Lim. 6th ed. 453, note. See also *Conway v. Cable*, 37 Ill. 82; *Douglas v. Flynn*, 43 Ark. 398; *Kelso v. Robertson*, 51 Ark. 397.

It has been held to be within the legislative power to secure to the person who has made improvements in good faith a return for the benefit conferred upon the owner, by substantially giving to the latter an option to obtain the value of his land, less the improvements, or to recover his land and pay for the improvements.

Ross v. Irving, 14 Ill. 171.

Where the Legislature has sought to compel the owner to pay that which he is under no moral or equitable duty to pay, the Statute has been pronounced void.

Madland v. Benland, 24 Minn. 372.

Ruger, Ch. J., delivered the opinion of the court:

This appeal involves the construction and constitutionality of section 1440 of the Code of Civil Procedure as amended by chapter 681 of the Laws of 1881, relating to the sale,

redemption and conveyance of real property sold on execution.

The questions arise upon the affirmance by the general term of an order of the special term, denying the defendant's motion to set aside and vacate a judgment entered herein for the plaintiff. No claim was made but that the judgment was regular and authorized by the evidence in the case, or that there was any statute or rule of law which required the court to set aside such judgment. The purposes of the Act referred to, if valid, do not require an order of the court to render them effective. The contention is that the defendant is entitled to the relief asked for, because the plaintiff did not, within twenty days after the recovery of the judgment, make certain payments to the defendant, in default of which the section referred to declares the judgment to be of "no force or effect." Even if it be conceded that the provisions of the Code are valid, it does not follow that the defendant is entitled, as of course, to the relief demanded. It is not required by the language of the Statute, and the court might well have said, in the exercise of its discretion, that the defendant should be left to the remedies which the Statute gave him, and that it would not determine the controversy in a summary way upon motion. But we are disinclined to dispose of the appeal on this point, as important questions are raised by the case, which, in the interest of justice, require an early disposition.

The evidence in the case shows that previous to the commencement of this action the defendant had, as a subsequent judgment creditor of the plaintiff, acquired the right to a deed from the sheriff, by the redemption from the purchaser, upon an execution sale, of a house and lot in New York belonging to the plaintiff, and she, believing the sale to have been unauthorized and illegal, brought this action to compel a determination of the defendant's claim under such redemption. In answer to the action the defendant set up title in himself through the proceedings to redeem from the former judgment creditor, who had bid it in on an execution sale upon a judgment in his favor against the plaintiff. The question litigated upon the trial was as to the validity of the execution upon which such sale was had. The trial court found that it was "a void process, and that, therefore, the sale under that void process was also void and of no effect, and therefore the defendant Tucker could and did take no valid title by reason of his redemption from a sale which was void." *Place v. Riley*, 98 N. Y. 1.

Judgment was therefore rendered in favor of this plaintiff, with costs, and that judgment was affirmed, not only by the general term, but also by this court, with costs. It is claimed that this judgment is ineffective, because the plaintiff did not within twenty days after its recovery, in compliance with section 1440, pay to the defendant the moneys required to be paid by that section. The section, as amended, read as follows: "The right and title of the judgment debtor, or of a person holding under him, or deriving title through him, to real property, sold by

virtue of an execution, is not divested by the sale, until the expiration of the period within which it can be redeemed, as prescribed in this article and the execution of the sheriff's deed. But if the property is not redeemed and a deed is executed in pursuance of the sale, the grantee in the deed is deemed to have been vested with the legal estate from the time of the sale." Then follows the Amendment: "And if the title of such grantee, or his assignees, is adjudged, *for any reason or cause whatsoever*, to be null and void in any action for that purpose brought by the judgment debtor, or his assignees, such judgment shall have *no force or effect*, unless, within twenty days after the entry of such judgment, the plaintiff shall pay to such grantee, or his assignees, the sum of money which was paid upon the sale with interest from the time of the sale as prescribed in this article, including the costs and expenses of defendant in defending the action in which such judgment was recovered, to be adjusted by a judge of the court in which said action was brought; and in the event of plaintiff's failure to pay such purchase money and expenses within the time aforesaid, *said title shall be valid in said grantee.*" It was also provided that if, in any pending action to recover such property, an appeal had been taken, the plaintiff should have twenty days from final judgment in his favor to make the payments required.

In considering the meaning and effect of the Amendatory Act, it is desirable to have in mind the previous condition of the law on the subject. The Code of Civil Procedure, which was a substantial re-enactment of the provisions of the Revised Statutes in respect to this subject, provided that on a sale of lands on execution the debtor's title should not be divested until fifteen months after the sale. This period was allowed him and his judgment and mortgage creditors to enable them to redeem from the sale. The first year was allowed to the debtor and the three succeeding months to the creditors entitled to the benefit of the redeeming Statute. On the expiration of the fifteen months, in case there was no redemption by the owner, the sheriff was bound to execute a deed of the premises to the purchaser on the sale, or to his assignees, or to the person entitled thereto under the provisions of the Statutes relating to redemption (§ 1471). Upon a redemption by the judgment debtor, or his heirs, executors, or assignees, the sale and certificates thereof became null and void and no conveyance therefore was required to be executed, as the judgment became satisfied to the extent of the sum collected and applied on the execution, and the title of the property sold remained in the judgment debtor (§ 1448). In case of a redemption by a judgment or mortgage creditor, he was required not only to pay the amount specified by the Statute to the person from whom he redeemed, but also to execute a satisfaction of his judgment or mortgage, stating that the redemption satisfies the judgment or mortgage in full, or to a specified amount (§ 1463). The purchaser of real property, sold by virtue of an execution, who has been

evicted from the possession thereof, or against whom judgment is rendered in an action to recover the same in consequence, first, of any irregularity in the proceedings concerning the sale; or, second, if the judgment upon which the execution was issued, being vacated or reversed, or set aside for irregularity, or error in fact, may recover the purchase money paid by him, with interest, from the person for whose benefit the property was sold (§ 1479). In case of a sale upon a judgment based upon an "irregularity in the proceedings concerning the sale," the judgment under which the sale was made is revived and becomes valid to enable the judgment creditor to collect the sum paid on the sale, with interest (§ 1480). It is also provided that a judgment creditor, who completes proceedings for redemption, acquires all the right, title and interest in the property which the purchaser acquired by the sale (§ 1471). The protection which this scheme affords persons who have purchased land on an illegal sale is apparently sufficient for all of the requirements of justice or equity, independent of the amended section. Thus, when such sale is declared void, the security of the judgment creditor is restored for the purpose of enabling him to reimburse himself for the moneys paid on the sale, and a purchaser, on redemption, whose title is defeated for any of the causes specified, is authorized to recover the purchase money paid by him from the judgment creditor, or those who represent him.

These provisions gave an adequate and sufficient remedy to all of the parties interested where there had been an illegal sale on execution. The judgment creditor lost no rights by making such sale and the innocent purchaser and his assignees were protected, as well where the judgment was founded upon irregularities in the proceedings concerning the sale as when it had been reversed or vacated.

There could, of course, be no just foundation for a claim by the judgment creditor to be reimbursed by anyone when his judgment had, for any reason, been reversed or set aside, because in that event his claim would itself be extinguished and he would have suffered no loss.

A point is made by the respondent upon the language of the Act, that the defendant, being a redeeming creditor, does not come within its terms. By the express language of the Act, its provisions would seem to be operative only where the land had not been redeemed. There can be no question, we think, but that, under the language of the Statute, the land had, within its meaning, been redeemed, and the defendant was therefore precluded from availing himself of its benefits. If this should be held to be the true construction of the Act, its operation would then be confined to those who purchased on the sale, and their assignees alone, and would thus exclude the defendant from the benefit of the Act. It is contended, however, by the appellant that a redeeming creditor comes within the spirit of the Act, and should therefore be held to be within its meaning.

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We should be reluctant, under any circumstances, to extend by construction the scope and application of a statute which seems to be so uncalled for and inequitable as this, and particularly so when the redeeming creditor has an adequate remedy for any loss which he may have incurred; but where a party is excluded from the benefit of an Act by its express language the court is not at liberty to extend its operation by construction for the purpose of bringing him within its spirit. But, however this may be, we think that it is due to the gravity and importance of the questions raised that we should base our decision upon those more important points presented by the objections to the validity of the Amendment.

It is to be observed, in the first place, that the Act is predicated upon the existence of a final judgment determining, not only that the property to be affected has been illegally sold, but that it still belongs to the plaintiff therein, and that the defendant has no legal claim thereto, but also awards to the plaintiff the costs of the action, and, impliedly, holds that defendant is not entitled to such costs. The Act contains, therefore, the most ample concession that the party against whose rights it is aimed is, in law, the absolute owner of the property to be affected by the Amendment, and is a judgment creditor of the defendant to the extent of the costs included in the judgment. It then proceeds to declare how he may be divested of this title and property, and provides that, after recovering a judgment awarding him the title unless he pays, within a limited time, to the defendant an arbitrary sum, his property shall, by force of the Act alone, be transferred to his adversary.

The sole aim of the Statute thus seems to be to effect a change of title and to wrest from one person the property which has been finally adjudged to be his and vest it in another, by mere force of the legislative will. No obligation to make the payments referred to existed at law, and none was created by the Act, but it simply declared that unless they are made the defaulting party shall forfeit his property and it shall be transferred to another, who had neither legal nor equitable claim to it. In effect, it reverses the judgment and gives to one that which the courts have deliberately adjudged belongs to another.

The plaintiff contends that the Statute is unconstitutional, because it deprives the owner of his property without due process of law and we are of the opinion that the claim is well founded. It cannot be the subject of doubt, that an Act of the Legislature, which provides for an involuntary transfer of property from one person to another, without due process of law, whether with or without compensation, violates the principles of the fundamental law whatever may be the pretext upon which it is founded. It was said by Justice Jewett, in *Embury v. Connor*, 3 N. Y. 511, after a review of the authorities: "I think these decisions should be regarded as having settled the point that a statute is unconstitutional and void which authorizes the transfer of one man's property

to another without the consent of the owner, although compensation be made." And it is laid down in Cooley's Constitutional Limitations (p. 444), as an elementary principle, that a party cannot "by his misconduct so forfeit a right that it may be taken from him without judicial proceedings, in which a forfeiture shall be declared in due form. Forfeiture of rights and properties cannot be adjudged by legislative Acts, and confiscation without a judicial hearing after due notice would be void as not being due process of law."

The Act comes clearly within the spirit of our decision in *Cromwell v. MacLean*, 123 N. Y. 474, where Judge Peckham, in relation to a tax sale, says: "Holding, as we must, that no title or interest in fact passed to the purchaser at these tax sales, and that the original owner still retained his title, the effect of the Act in question, if valid, is by legislative fiat to transfer the title of the property of Edward C. Wilson, as trustee, to the lessees under three invalid leases."

Has the Legislature of this State the right to take the property of A and transfer it to B under the guise of confirming sales made of such land *in invitum*; but by which no title, in fact or in law, passed from the owner to the purchaser? The statement of the question should be its best answer. The property thus taken is not taken by due process of law.

What difference does it make to say that the Legislature is acting only in a way of validating proceedings to collect a tax, which, in justice, the owner of the land ought to pay? The answer is, that the proceedings have been so fatally defective that no title has passed, and the owner has his title to his property the same as if no proceedings had been taken. Where is the authority in such case for the Legislature to itself transfer the title of his property to someone else?"

It is obvious that if the Legislature could not directly confirm such sale, the court ought not to strain to discover such an illegal intention in the words of an Act, whose motives and purposes are ambiguous and indefinite.

Tested by these rules, we are unable to see how this Act can be supported and at the same time effect be given to the constitutional guaranty. It was said by Judge Earl, in *Stuart v. Palmer*, 74 N. Y. 183, that "the constitutional validity of a law is to be tested, not by what has been done under it, but by what may by its authority be done."

A consideration of the results which may be reached through the provisions of this Act, when construed according to the plain meaning of its language, demonstrates the impossibility of reconciling its provisions with the requirements of the fundamental law. The obvious intention of the Act is to take away from the owner all remedy for the recovery of his property, except upon the payment by him to his adversary of a sum of money which must frequently be greater than the value of the property itself. If he remains in possession of the property he is deprived of any remedy to protect his possession, and if his adversary has succeeded in obtaining possession, he is deprived of any remedy to recover it, except upon the condi-

tion that he pays as much, or more, than it is probably worth. An owner may, therefore, under this law, be stripped of his property under a void proceeding, be turned out of possession and denied any affirmative relief in the courts, unless upon the condition that he pays for the property its value, as determined by a judicial sale, and, in addition thereto, a sum for costs and expenses, the amount of which he has no means of ascertaining, and which may also exceed the value of the property in litigation.

A more effectual scheme to deprive an owner of his property could hardly be conceived. Whether he abandons it to the wrong-doer or elects to seek his remedy in the courts, the property as a subject of value has passed from him irrecoverably. It is not claimed by the appellant that the change of title, intended to be effected by this Statute, is to be produced by any process of law, or as the result of any judicial proceeding whatever; and the Statute in plain language declares that it shall take place as a consequence of the owner's successful attempt to establish his right through any action at law, upon a failure to make the payments required. The Statute is intended to execute itself and pass the title upon the expiration of the time limited by the Statute. One of the arguments by which the Statute is attempted to be sustained is the claim that the Legislature has, in effect, required the owner to repay certain sums of money which had theretofore been appropriated to her use, and inasmuch as she has had the benefit of the amount bid on the sale, it is argued that it is in accordance with equitable rules that he should be required to repay such sums before recovering back her property.

We do not think it is competent for the Legislature to deny, for any cause, a party who has been illegally deprived of his property, access to the constitutional courts of the State for relief. If, as we have seen, he is denied all remedy for the wrong inflicted upon him, the deprivation of his property becomes just as effectual as though it had been taken from him by direct legislative enactment. But, however this may be, the act does not seem to furnish any foundation for the argument. The plaintiff has never, in fact, been relieved from her liability to pay the original judgment, and has not derived any benefit from the attempted sale. That liability was revived against her in favor of the judgment creditor when she recovered judgment for the land, and no provision is made by the Act for the satisfaction of that lien, although the payment required by the Statute be actually made by her. The lien is given to one party and the payment is required to be made to another, and in the absence of any provision in the Statute making such payment a satisfaction it is difficult to see why the lien does not remain and the judgment stand unsatisfied.

The payment required was also unnecessary for the protection of the redeeming creditor, as he had his right of action to recover back the money paid by him from the person to whom it was paid. The section, as amended, thus secured to the judgment cred-

itor, not only a lien on the land for the original debt, but leaves him in possession of an equivalent sum received from the redeeming creditor, and the redeeming creditor is entitled to receive not only the money required to be paid under this Statute by the owner, but also acquires a cause of action against the judgment creditor to recover back the money expended by him on redemption. Both of these parties, therefore, have, by this Act, double security for the same debt and no provision is made by the Statute that the payment required to be made by the owner shall satisfy any of these liabilities. It would therefore seem that, in fact, no benefit accrued to the plaintiff from the moneys paid on the sale, and no pretense was left for the requirement made by the Statute.

But a further answer to the claim is found in the fact that the Statute proceeds upon no such theory and purports to make no such application. No reference is made in it to the liabilities of the judgment debtor, or provision made for their satisfaction, and the sum required to be paid by her has no reference to the existence of any lien or debt, or its amount. Indeed, it requires the payment, as well when it has been judicially pronounced that there is no debt, as when one may, in fact, exist. The Act makes no distinction between cases where the judgment upon which the sale was made has been reversed and set aside, and those in which the process alone has been adjudged to be void. It wholly ignores any such distinction and requires the payment to be made, as well where no claim ever existed, as where a legal claim has been illegally attempted to be enforced. It furnishes no argument in favor of the legality of this Act, to say that some of the consequences following its enactment could, under special conditions, have been constitutionally produced, if provided for in some other way. The broad question here is, whether this enactment construed according to its plain meaning and intent, enables one person to acquire the property of another against his will, except by due process of law. If it does the courts must condemn it as violative of the fundamental law. The vicious purpose of the Act is so thoroughly interwoven with the whole scheme of the enactment as to render it impossible to eradicate its objectionable features without reconstructing the entire section. It is not, therefore, a case where any part of the Act can be supported.

We also think the Act violates the constitutional guaranty, because it assumes to nullify a final and unimpeachable judgment, not only establishing the plaintiff's right to the premises in dispute, but also awarding him a sum of money as costs. After rendition, this judgment became an evidence of title, and could not be taken from the plaintiff without destroying one of the instrumentalities by which her title was manifested. A Statute which assumes to destroy or nullify a party's muniments of title is just as effective in depriving him of his property as one which bestows it directly upon another (*Re Jacobs*, 98 N. Y. 98, and authorities there cited). In the one case it

despoils the owner directly, and in the other renders him defenseless against any assault upon his property. Authority which permits a party to be deprived of his property by indirection is as much within the meaning and spirit of the constitutional provision as where it attempts to do the same thing directly. Even assuming that it might be lawful for the Legislature to impose a condition upon the right of a party to maintain a particular action to recover real property, no such case is here provided for. This Statute makes any action at law to establish his right subject to its provisions, and thus deprives him of all remedy for the wrong done him. It not only does this, but it attempts to reverse a judgment and give to the defeated party the fruits of a recovery awarded to another. We must bear in mind that a judgment has been rendered, and the rights flowing from it have passed beyond the legislative power, either directly or indirectly, to reach or destroy. After adjudication the fruits of the judgment become rights of property. These rights became vested by the action of the court, and were thereby placed beyond the reach of legislative power to affect.

We have been referred to no authority which justifies legislation taking such rights away arbitrarily, and we know of no theory upon which it can be sustained. Instances where land subject to a lien for taxes has been sold therefor, and the owner has been required to pay the taxes, as a condition of maintaining an action to recover the land, or the borrower of money, at usurious rates, is required to repay the sum equitably due before maintaining a suit in equity to enforce a forfeiture of the securities held by the creditor, are, obviously, not analogous to the case under consideration.

We are therefore of the opinion that the repugnancy between the law and the constitutional rights of the citizen is so irreconcilable that the law must fail.

Another serious objection to the law seems to exist in the ambiguity of the provisions relating to the time limited for making the payments required by it. The language of the Statute requires the payment to be made within twenty days after judgment, and the subsequent portions of the section, providing that in case of pending appeals the payment might be made within twenty days after final judgment, would seem to imply that, in other cases, the time must be limited by the original judgment. If this be so it might be that a defendant, by taking an appeal and staying proceedings, could defeat any effort of the owner to make the payments, and thus compel him to lose his land although he might be willing to comply with the statute. This seems to show the recklessness with which the owner's interests were regarded and the injustice which may be perpetrated under its provisions.

It is not without a feeling of satisfaction that we have found this amendatory Statute unconstitutional, for in every view in which it may be considered, it impresses us with the conviction that it is grossly inequitable and unjust. We can discover no reason in

the situation of the purchaser at an illegal execution sale under the existing law which justifies the adoption of the careless, ill-considered and inequitable provisions which distinguish this legislation.

The amended section is subject to many other criticisms, which we have not felt

called upon to make, as those already referred to fully justify the conclusion we have reached in the case.

The order should therefore be affirmed, with costs.

All concur (Earl, J., in result), except Finch, J., absent.

VIRGINIA SUPREME COURT OF APPEALS.

George W. HUBBLE, *Plff. in Err.*,

v.

M. A. E. COLE.

(.....Va.....)

Damages to a tenant, resulting from an injunction obtained without sufficient cause by the lessor, which prevented him from cultivating the land, may be recovered in an action on the covenants in the lease, although there may also be a remedy on the injunction bond.

(July 9, 1891.)

ERROR to the Circuit Court for Smyth County to review a judgment in favor of defendant in an action brought to recover damages for an alleged breach by defendant of covenants contained in a lease which she had executed and delivered to plaintiff. *Reversed.*

The facts are stated in the opinion.

Mr. F. S. Blair for plaintiff in error.

Messrs. Buchanan & Buchanan, for defendant in error:

The remedy for injury or damage resulting from an injunction in this State is upon the injunction bond.

Va. Code 1887, § 8442.

No action can be maintained for instituting a civil suit unless it was done maliciously and without probable cause.

4 Minor Inst. pt. I. pp. 433, 438.

We have no case, so far as we can ascertain, where damages have ever been allowed for injuries resulting from an injunction except upon or by reason of the bond and the statute which requires it.

See *Gorton v. Brown*, 27 Ill. 489, 81 Am. Dec. 245.

Could any other action be resorted to by the injured party he would then have two actions, one on bond, and case, or covenant for damages, and thus be enabled to split his action, which is not permissible.

See 7 Rob. Practice, 177, note 81; *Bender-nagle v. Cocks*, 19 Wend. 207, 32 Am. Dec. 448.

Should no bond be given or condition imposed by the court, and the injunction be granted, the resulting injury would be the act of the court, and therefore *damnum absque*

NOTE.—*Injunction granted with caution.*

A preliminary injunction frequently operates as a decision of the whole question, and should not be granted where other remedies suffice. *Buroh v. Cavanaugh*, 13 Abb. Pr. N. S. 410.

It should be issued with caution, and, so to speak, reluctantly, and only in a case reasonably free from doubt. *Higginson v. Farmers L. & T. Co.* 22 Hun, 479; *Woodward v. Harris*, 2 Barb. 439; *Van Veghten v. Howland*, 13 Abb. Pr. N. S. 461; *Rameey v. Erie R. Co.* 38 How. Pr. 136; *Redfield v. Middleton*, 7 Bosw. 649; *Gurnee v. Odell*, 13 Abb. Pr. 264; *Roberts v. Mathews*, 13 Abb. Pr. 199; *Brooklyn C. & J. R. Co. v. Brooklyn City R. Co.* 33 Barb. 420; *Central Cross Town R. Co. v. Bleecker St. & F. R. Co.* 49 How. Pr. 238.

It should not be granted in every case in which plaintiff brings himself within the letter of the rules allowing the issuance of the writ. Regard should be had to the nature and extent of the injury which plaintiff would suffer if the injunction should be withheld, and also to the consequences to defendant if granted. *Bruce v. Delaware & H. Canal Co.* 19 Barb. 371; *Gallatin v. Oriental Bank*, 16 How. Pr. 253; *McCafferty v. Glazier*, 10 How. Pr. 475.

It should not be granted in every instance of a *prima facie* case of probable right to a final injunction, but only in cases where without it the court cannot by its judgment do justice between the parties. *Van Veghten v. Howland*, *supra*.

It should not be granted where all the equities are disapproved. *Central Cross Town R. Co. v. Bleecker St. & F. R. Co.* *supra*.

It should only be granted where it appears by the complaint that the plaintiff is entitled to the relief 13 L. R. A.

demanded, and where it also appears by affidavit that sufficient ground exists therefor. *Fowler v. Burns*, 7 Bosw. 687; See *Hascall v. Madison University & B. E. Soc.* 8 Barb. 174.

Statutory conditions must be complied with.

Where a statute requires the giving of a bond as a condition precedent to the granting of an injunction, the court is not at liberty to disregard such statute; and it is error, in such case, to grant the injunction without the required bond. *Miller v. Parker*, 73 N. C. 58.

But the bond must be construed and governed by the statute in force at the time of its execution, and a statute then enacted, but which does not take effect until after such execution, cannot have a retroactive operation so as to affect a bond given prior thereto, since the question is one which goes to the contract itself and not merely to the remedy thereon. *Mix v. Vail*, 36 Ill. 40.

But in the absence of any statute prescribing the conditions of the bond, it rests in the discretion of the court to fix the terms upon which the relief may be granted, and where plaintiff gives such bond as is required by the court, and fails to prosecute his suit successfully, he is liable for all damages sustained by reason of the injunction. *Newell v. Partee*, 10 Humph. 325; *Foster v. Shephard*, 33 Tex. 637; 2 High, Inj. § 1620.

Bond must indemnify for damages sustained.

The recitals of an injunction bond may vary somewhat in phraseology, but the pivotal idea remains the same—they all aim to protect the defendant against loss or damage by reason of the injunc-

injuria, unless the injunction should be speeded out maliciously and without probable cause.

Young v. Gregorie, 3 Call, 447; *Russell v. Farley*, 105 U. S. 483, 26 L. ed. 1060. See Hilliard, *Inj.* p. 89; *High, Inj. ed.* 1890, § 1648, p. 101; *Lawton v. Green*, 64 N. Y. 326; *Keber v. Mercantile Bank*, 4 Mo. App. 195.

Lacy, J., delivered the opinion of the court:

This is a writ of error to a judgment of the Circuit Court of Smyth County, rendered at the March Term, 1890. The action is covenant, and the declaration set forth that on the 30th day of December, 1881, in the County of Smyth, the defendant leased for the term of five years to the plaintiff, in consideration of the sum of \$3,000, to be paid to her as stated in the deed of lease executed by them, certain real estate situated in the said county, with conditions stated and set forth in said deed; that the plaintiff performed all the covenants of the said deed on his part, but that the defendant did not perform on her part, setting forth the breaches, and by injunction prevented the plaintiff from cultivating the land, etc., and deprived him of the use and profit of the said land mentioned in the declaration from the 28th day of November, 1883, until after the expiration of the lease; that the said injunction was by decree of the Supreme Court of Appeals of Virginia dissolved, and the bill dismissed; and laid his damages at \$4,500. The defendant demurred to the declaration, which demurrer the court sustained, and rendered judgment for the defendant, from which judgment the plaintiff applied for and obtained a writ of error to this court. The ground of

the court's decision is that the common-law action of covenant will not lie when the alleged breach was by legal process, as by injunction; that, when damage was caused, and the injunction not sustained, the injunction bond furnished the only remedy, all others being merged therein. Mr. High says (*High, Inj.* § 1648): "Some conflict of authority exists as to whether a defendant in an injunction suit may, by an action on the case, recover damages for having been enjoined without cause; and the rule has been broadly stated that no such right of action exists. The better doctrine, however, seems to be that defendant's right of action at common law is not merged in the remedy upon the bond, and that an action in the case will lie."—citing *Cox v. Taylor*, 10 B. Mon. 17. Mr. Barton says, in his *Chancery Practice* (p. 478): "The right to damages upon the dissolution of an injunction is independent of any statutory provision upon the subject, and amid some conflict of the decided cases it is said that this right is cumulative of, and in addition to, the right of action at law upon the injunction bond. While the court decrees damages upon the dissolution, it cannot go beyond the injunction bond, so far as the penalty is fixed therein, and, when damages have been thus awarded, the decree of the court is conclusive as to the amount which can be recovered in an action on the bond; but not so the right of action on the contract, whose covenants have been broken." Mr. Lawson says (*Lawson, Rights, Rem. & Pr.* § 8704): "It is now held that the defendant in an injunction suit has a common-law right of action to recover damages for having been improperly enjoined, in addition to his remedy upon the

tion, if the court should finally decide that the plaintiff was not entitled thereto. *Allen v. Brown*, 5 Lans. 511.

Damages cannot be recovered beyond the amount specified in the undertaking on which the injunction is obtained. *Pacific Mail S. S. Co. v. Toll*, 10 N. Y. Week. Dig. 269, affirmed 85 N. Y. 646.

Where a preliminary injunction is vacated upon stipulation, the sureties on the undertaking are only relieved from liability for damages accruing subsequent to the time of its vacation; they are still liable for all damages which accrued prior thereto the same as if it had been vacated on motion or by a decision of the court. *Dickerson v. Hermann*, 10 N. Y. Week. Dig. 268.

What damages may be considered.

The loss of the use and rental of the premises during the time defendant was enjoined is a proper element of damages to be recovered in an action upon the bond. *Smith v. Wells*, 46 Miss. 64; *Homer v. Campbell*, 98 Ill. 572; *Richardson v. Allen*, 74 Ga. 719. But see *Hill v. Hill*, 55 Vt. 125.

So, too, damages for the crops which defendant was prevented by the injunction from harvesting may properly be allowed (*Allen v. Brown*, 5 Lans. 511), as well as waste committed upon the premises while defendants were deprived of their possession by the injunction. *Richardson v. Allen*, *supra*; 2 High, *Inj.* 8d ed. § 1673.

The damages which the enjoined party may be entitled to for losses and injuries sustained by the operation of the writ are as various as the subjects which may be affected by such restraint. These damages, however, are ascertained and measured by the principle of giving just and adequate compensation for actual loss, which is the natural and

proximate result of the injunction. *Bullock v. Ferguson*, 30 Ala. 227; *Collins v. Sinclair*, 51 Ill. 323; *Hale v. Meegan*, 39 Mo. 272; *Brown v. Tyler*, 34 Tex. 168; *Moulton v. Richardson*, 49 N. H. 76; *Hord v. Trimble*, 1 Litt. 413.

If the restraint keeps the owner of the property out of possession, or deprives him of its use, the compensation is given upon the same principle as in other cases of wrongful deprivation. Where a party was prevented from enjoying the benefit of his real estate by injunction which was obtained without cause, the value of the use and occupation was given as damages. *Rutherford v. Moore*, 24 Ind. 311; *Fleming v. Bailey*, 44 Miss. 123. See *Sturges v. Knapp*, 36 Vt. 439; 2 *Sutherland*, Dam. 69.

The only liability created by an injunction bond is for such damages as are actually sustained by the wrongful suing out of the injunction. *Staples v. White*, 88 Tenn. 30.

The dissolution of an injunction is *prima facie* evidence that the defendant has sustained damages. *Lemeunier v. McCleary*, 41 La. Ann. 411.

In a suit upon an injunction bond conditioned "for the payment of any decree or order that may be awarded . . . and all such costs and damages" the penalty of which, with interest, is less than the amount for which the obligor became liable, plaintiff may recover the whole penalty, with interest to the date of the judgment, and that aggregate to carry interest after the date of the judgment. *State v. Puroell*, 31 W. Va. 44.

Upon a proceeding to ascertain the damages sustained by a party in consequence of an injunction restraining him in the exercise of some legal right, it is proper to allow the expenses incurred upon a reference. *Holcomb v. Rice*, 119 N. Y. 593.

bond." *Mitchell v. Southwestern R. Co.* 75 Ga. 398; *Manlove v. Vick*, 55 Miss. 567; *Gorton v. Brown*, 27 Ill. 489; *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. App. 506; *Hayden v. Keith*, 32 Minn. 377.

In some of the States this matter is regulated by statute, and it is provided by law that before decree defendant may file his account for all damages, and have them in that suit allowed; but when there is no specific mode prescribed by the statute of assessing damages, and no such provision exists by statute, the right of action at law is in addition to the remedy upon the bond. The declaration states a good cause

of action, and the demurrer should have been overruled. The defendant was undoubtedly bound by her deed; and if, without sufficient cause (and the dissolution of the injunction and dismissal of the bill is conclusive of that), the defendant deprived the plaintiff of the benefits and profits accruing to him thereunder, she should undoubtedly respond in damages.

The judgment appealed from is erroneous, and the same will be reversed and annulled, and the cause remanded for a new trial to be had therein, when the demurrer must be overruled, and the case proceeded in to final judgment upon the merits.

MICHIGAN SUPREME COURT.

WHITE SEWING MACHINE CO.

v.

Milo H. DAKIN et al., Appts.

(..... Mich.)

1. The interlineation of an agreement to pay attorneys' fees in that clause of a bond to secure an agent's possible indebtedness to his principal, in which the obligors bind themselves to pay the penalty which has been fixed at a definite amount, is not a material alteration which will avoid the bond, under a statute providing that in suits on such bonds if a breach is found to exist the jury shall assess the damages, after which judgment shall be entered for the penalty and execution issued for the damages assessed.

2. Alteration of a bond after execution, by an agent of the obligee without authority, express or implied, will not avoid it.

(July 28, 1891.)

ERROR to the Circuit Court for Saginaw County to review a judgment in favor of

plaintiff in an action upon a penal bond. *Affirmed.*

The facts are stated in the opinion.

Messrs. Hanchett, Stark & Hanchett, for appellants:

If made with fraudulent intent the alteration of this bond, even if immaterial, will discharge the sureties.

1 Greenl. Ev. § 568.

If Mr. Van Ness, acting for the White Sewing Machine Company, inserted the words "attorneys' fees" after the execution of the bond without the knowledge and consent of the defendants, intending thereby to produce some benefit to the Company, his act was a fraud on the defendants, even though the insertion of the words in no way changed their liability, or affected the instrument.

Adams v. Frye, 3 Met. 103; *Van Brunt v. Hoff*, 35 Barb. 501; *Turner v. Billagiam*, 2 Cal. 523.

Any material alteration made in this instrument without the consent of the defendants after they executed it discharges them from liability.

NOTE.—Party producing instrument must account for alterations.

The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance of alteration. He may show that the alteration was made by another, without his concurrence, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that, he may give the writing in evidence, but not otherwise. Cal. Code Civ. Proc. § 182.

Evidence tending to show that the alteration or erasure was made by a stranger to the instrument is always competent as by intentment of law, where such appears to be the case, and there is no procurement or connivance by either party, an alteration or erasure does not avoid the instrument. *Hunt v. Gray*, 35 N. J. L. 227; *Ford v. Ford*, 17 Pick. 418; *Davis v. Carliele*, 6 Ala. 707; *Piersol v. Grimes*, 39 Ind. 129, 95 Am. Dec. 673; *Crockett v. Thomason*, 5 Sneed, 342; *Boston v. Benson*, 12 Cush. 61; *Nichols v. Johnson*, 10 Conn. 182; *Lewis v. Payn*, 8 Cow. 71, 18 Am. Dec. 427; *Bigelow v. Stilphen*, 35 Vt. 521; *Boyd v. McConnell*, 10 Humph. 68; *Croft v. White*, 3 Miss. 453; *Lubbering v. Kohlbrecher*, 22 Mo. 596; *Lee v. Alexander*, 9 B. Mon. 25, 48 Am. Dec. 412.

The material alteration of a written instrument

without the knowledge or consent of the maker renders it absolutely void, even in the hands of an innocent holder. *Angie v. Northwestern L. Ins. Co.* 32 U. S. 330, 23 L. ed. 556.

Some cases hold that in the case of a deed any alteration, whether material or not, avoids it. *Den v. Wright*, 7 N. J. L. 212; *Wallace v. Harmstad*, 15 Pa. 482, 53 Am. Dec. 603.

If the alteration is noted in the attestation clause, it is sufficient. If it appears in the same ink and handwriting with the body of the instrument, it may suffice. If the alteration is against the interest of the party claiming under the instrument, it is presumed properly made. *Bailey v. Taylor*, 11 Conn. 531.

Generally speaking, if nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument. *Trowel v. Castle*, 1 Keb. 22; *Fitzgerald v. Fanconberge*, Fitzg. 207, 213; *Bailey v. Taylor*, 11 Conn. 531, 534; *Gooch v. Bryant*, 13 Me. 386, 390; *Pullen v. Hutchinson*, 25 Me. 249, 254.

The general rule is that where any suspicion is raised, as to the genuineness of an altered instrument, whether it be apparent upon inspection or is made so by extraneous evidence, the party producing the instrument and claiming under it is bound to remove the suspicion by accounting for the alteration. Exceptions to the rule undoubtedly

People v. Brown, 2 Dougl. 9; *Wait v. Pomeroy*, 20 Mich. 428; *Holmes v. Trumper*, 32 Mich. 427; *Miller v. Finley*, 26 Mich. 249; *Bradley v. Mann*, 37 Mich. 1; *Aldrich v. Smith*, Id. 468.

The alteration makes a provision for an attorneys' fee, and this renders void the entire clause providing for an additional 10 per cent.

Bullock v. Taylor, 39 Mich. 137; *Meyer v. Hart*, 40 Mich. 517, 522.

The insertion of these words, then, effected a material alteration of the contract, and although the change was favorable to the defendants they are released from liability.

People v. Brown, *supra*; *Bradt, Suretyship*, § 338; *Hewins v. Cargill*, 67 Me. 554.

Mr. John M. Brooks, for appellee:

The entire provision for the 10 per cent in case of suit, with or without the words "attorneys' fees," is absolutely void. In either case, the purpose is to impose upon the obligors the cost of possible litigation, and an agreement to pay more than the taxable costs is void.

Bullock v. Taylor, 39 Mich. 137; *Myer v. Hart*, 40 Mich. 517-522; *State v. Taylor*, 10 Ohio, 378; *Shelton v. Gill*, 11 Ohio, 417; *Martin v. Belmont Bank Trustees*, 13 Ohio, 258.

Such provision being void, the insertion of the words, "attorneys' fees," if made after the execution of the bond, would not be a material alteration, as it would not change the liability of the obligors.

Miller v. Finley, 26 Mich. 249-253, affirmed in *Gano v. Heath*, 36 Mich. 441; *Leonard v. Phillips*, 39 Mich. 182; *Goodenow v. Curtis*, 33 Mich. 505, 509; *First Nat. Bank of Port Huron v. Carson*, 60 Mich. 432, 437; *Weaver v. Bromley*, 8 West. Rep. 190, 65 Mich. 213.

A material alteration, if made by one having authority, avoids an instrument, while an immaterial alteration does not; and the intent is unimportant.

Fuller v. Green, 64 Wis. 159; *Robinson v.*

Phaniz Ins. Co. 25 Iowa; 480; 488; *Leonard v. Phillips*, *Goodenow v. Curtis and Weaver v. Bromley*, *supra*.

An agent to sell goods and receive and transmit the price to his principal, is not the agent of his principal to alter a note so received; and an alteration by him is simply deemed a spoliation.

Bigelow v. Stilphen, 35 Vt. 521; *Hunt v. Gray*, 85 N. J. L. 227.

Champlin, Ch. J., delivered the opinion of the court:

This is an action on a bond given by Milo H. Dakin as principal, and Aaron T. Bliss and Anthony Byrne as sureties, to the plaintiff, to secure any indebtedness incurred by Dakin to the plaintiff while acting as its agent in selling sewing machines. In January, 1888, Mr. Van Ness, an agent of the plaintiff, employed to procure dealers in the White sewing machines, made a contract with the defendant Dakin, by which Dakin was given the exclusive right to deal in White sewing machines within certain territory. It is the custom of the plaintiff to require dealers to give a bond to secure the company on any indebtedness to them which may be incurred by such dealers. Blank forms are furnished by the company and are filled out by Van Ness when needed. Mr. Dakin signed the bond in this case, and obtained the signatures of the defendants Bliss and Byrne as sureties, and delivered it to Mr. Van Ness, who forwarded it to the plaintiff. The formal part of the bond, before stating the conditions, reads as follows: "Know all men by these presents, that Milo H. Dakin, Aaron T. Bliss and A. Byrne are hereby held and firmly bound, severally and individually, unto the White Sewing Machine Company in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the White Sewing Machine Company, their repre-

ly arise, as where the alteration is properly noted in the attestation clause, or where the alteration is against the interest of the party deriving title under the instrument. *Smith v. United States*, 69 U. S. 2 Wall. 219, 17 L. ed. 788.

The party who produces an altered instrument is generally bound to explain the alteration or erasure, if it is in a material point. *Jackson v. Osborn*, 2 Wend. 555; *Chappell v. Spencer*, 23 Barb. 584.

This is especially the rule where the alteration is suspicious, and is beneficial to the holder. *Tillou v. Clinton & E. Mut. Ins. Co.* 7 Barb. 564; *Acker v. Ledyard*, 8 Barb. 514; *O'Donnell v. Harmon*, 3 Daly, 424.

The instrument, with all the circumstances of its history, its nature, the appearance of the alteration, the possible or probable motives to the alteration, or against it, and its effects upon the parties respectively, ought to be submitted to the jury; and the court cannot presume, from the mere fact that an alteration appears on the face of the instrument, whether under seal or otherwise, that it was made after the signing. *Maybee v. Sniffen*, 2 E. D. Smith, 1, 10.

The party introducing or offering in evidence a deed that has been altered by erasure or interlineation must show that the alteration was made before delivery. *Jordan v. Stewart*, 23 Pa. 244.

But it has been held that the presumption, in the first instance, is, that the alteration apparent on its face was made before execution, so that it will be 13 L. R. A.

admitted in evidence without any proof on the subject. *Printup v. Mitchell*, 17 Ga. 558; *Boothby v. Stanley*, 34 Me. 115.

The nature of the alteration should doubtless be considered in determining whether the party offering the instrument is bound to give evidence explaining the alteration. If the alteration make the deed more favorable to the party producing it, that alteration becomes suspicious and must be explained; while in other cases no explanation need be given. *Huntington v. Finch*, 3 Ohio St. 445; *Wilde v. Armsby*, 6 Cush. 814.

If the alteration be merely verbal and immaterial, it will not affect the instrument, though made after delivery. *Arnold v. Jones*, 2 R. I. 345; 3 Phillips, Ev. 388, *notc*.

It is not every alteration that will destroy an instrument. In order to produce that effect the alteration must be material. *Flint v. Craig*, 59 Barb. 319. And the weight of adjudication inclines to the view that an alteration obviously non-prejudicial in its nature will not vitiate the instrument. *Sip v. Huey*, 3 Atk. 93; *Hornby v. Matcham*, 16 Sim. 325; *People v. Muzay*, 1 Denio, 239; *Dunn v. Clements*, 52 N. C. 58; *Pequawket Bridge v. Mathes*, 8 N. H. 139; *Landron v. Paul*, 20 Vt. 217; *Nichols v. Johnson*, 10 Conn. 192.

For further authority upon this subject, see notes to *Wilson v. Hayes* (Minn.) 4 L. R. A. 196; *Palmer v. Poor* (Ind.) 6 L. R. A. 469, and *Sanders v. Bagwell* (S. C.) 7 L. R. A. 743.

representatives or assigns; for which payment (together with 10 per cent attorneys' fees thereon in case of suit on this bond) well and truly to be made, they bind themselves, their heirs, executors and administrators, and separate estates, jointly and severally, firmly by these presents. Sealed with their seals. Dated the twenty-fifth day of January, one thousand eight hundred and eighty-eight." Then follows the condition of the bond, which was to pay, or cause to be paid, any and every indebtedness or liability then existing, or which may hereafter in any manner exist, or be incurred on the part of Milo H. Dakin to the White Sewing Machine Company, etc. The words "attorneys' fees" appear to have been interlined in the bond between the words "10 per cent" and the word "thereon." The only questions presented by the record are: *first*, was the insertion of the words "attorneys' fees" a material alteration, if inserted after the bond was executed? *Second*, if inserted by Van Ness after it was executed, and before it was forwarded by him to the plaintiff for acceptance or rejection, did it render the bond invalid in hands of the plaintiff?

Clearly the alteration by the insertion of the words "attorneys' fees" was immaterial. An alteration, to be material, must be in a material part of the instrument, and affect the rights and liabilities of the parties thereto. Am. & Eng. Encyclop. Law, p. 505. This instrument is not a money bond, and the action upon it is regulated by the Statute, which provides that, "when an action shall be prosecuted in any court of law, upon any bond for the breach of any condition other than for the payment of money, or shall be prosecuted for any penal sum for the non-performance of any covenant or written agreement, the plaintiff, in his declaration, shall assign the specific breaches for which the action is brought." And "upon the trial of such action, if the jury find that any assignment of such breaches is true, and that the plaintiff should recover damages therefor, they shall assess such damages, and shall specify the amount thereof in their verdict, in addition to their finding upon any other question of fact submitted to them." And "in every such action, if the plaintiff recover, the verdict of the jury, assessing the plaintiff's damages, shall be entered on the record, and judgment shall be rendered for the penalty of the bond, or for the penal sum forfeited, as in other ac-

tions of debt, together with the costs of suit, and with a further judgment that the plaintiff have execution to collect the amount of damages so assessed by the jury; which damages shall be so specified in such judgment." 2 How. Stat. §§ 7787-7789. The penalty of this bond is \$1,000, no more and no less, and no recovery can exceed that amount. *Bishop v. Freeman*, 42 Mich. 538; *Odd Fellows v. Morrison*, 42 Mich. 538; *Spencer v. Perry*, 18 Mich. 394. The damages, including the interest, where it is proper to allow it to be assessed under the conditions, cannot exceed the penalty; and, if they equal the penalty, they can only draw interest from the date of the judgment. In this case, as in the other cases under the Statute, the recovery and judgment would be for the penalty of the bond, and the further judgment that the plaintiff have execution for the damages assessed. The promise to pay 10 per cent as attorneys' fees is no part of the penalty of the bond, and by no possibility can it affect the judgment to be rendered upon the bond, nor the amount of damages to be assessed.

Second. If any alteration was made after the execution of the bond, it was done by Van Ness, and although he was the agent of the plaintiff, and received and forwarded the bond in question to the plaintiff for its approval or rejection, yet there is no testimony in this record tending to show that he was expressly or impliedly authorized to make any alteration in the bond. The rule of law is that, when an alteration is made by a third party, it is an act of spoliation, and the alteration, although material, cannot invalidate the written instrument; and, when the spoliation is done by the agent of one of the parties, it will not avoid the contract, if the agent had no express or implied authority to do it. 1 Am. & Eng. Encyclop. Law, p. 505; *Van Brunt v. Eoff*, 85 Barb. 501; *Collins v. Makepeace*, 13 Ind. 448; *Hunt v. Gray*, 85 N. J. L. 227; *Bigelow v. Stilphen*, 35 Vt. 521; *Miller v. Reed*, 8 Grant, Cas. 51, 27 Pa. 244; *Terry v. Haslewood*, 1 Duvall, 104.

The declaration counts upon the bond as being in a penalty of \$1,000, and assigns breaches of the conditions. It follows that the bond would be a valid instrument in the hands of the plaintiffs for what it was before the alteration was made.

The errors assigned must be overruled, and the judgment affirmed, with costs in both courts. The other Justices concurred.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Richard P. HALLOWELL, Assignee, etc.,
of Joseph W. Smith,

BLACKSTONE NATIONAL BANK.

(.....Mass.....)

1. A pledge of securities as collateral for a note which authorizes their sale "on the non-performance" of the promise, and the application of the proceeds to pay the note, and makes the surplus applicable "to any other note or

claim" held by the pledgee against the pledgor, is an absolute pledge of the securities for such other notes or claims, the right to enforce which does not depend on non-payment of the principal note.

2. Failure to pay the whole of a demand note when demanded, or to procure the extension of the balance as a time loan, is a breach of an agreement to pay on demand, within the meaning of a provision in a pledge of collaterals that in the event of such breach their surplus, after satisfying the note, may be applied to other demands against the maker; and the fact that the holder has agreed not to press the demand without further notice is immaterial.

NOTE.—See note to Fall River Nat. Bank v. Slade (Mass.) 12 L. R. A. 121.

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3. Claims against the firm of which the maker of a note is a member are included in a provision in his pledge of collaterals to secure the note that, on his failure to pay it when due, any excess of the collaterals may be applied to "any other note or claim" held against him by the pledgee.

(September 3, 1891.)

REPORT from the Supreme Judicial Court for Suffolk County (Field, *Ch. J.*) for the opinion of the full court of a suit brought to redeem certain securities which had been pledged by complainant's insolvent assignor to defendant as collateral for certain of his obligations. *Bill dismissed.*

Complainant's assignor executed and delivered to defendant a note, of which the following is a copy:

25000 Dolls. Boston, Mass. Dec. 14, 1888.

On demand, after date, with interest at per cent, I promise to pay to the Blackstone National Bank of Boston, or order, at said Bank, Twentyfive Thousand ¹⁰⁰ Dollars, for value received, having deposited with this obligation as Collateral Security,

149 Shares Smith & Dove Man'g Co.,

200 " Pacific Guano Co., with

authority to sell the same, or any collaterals substituted for or added to the above, without notice, either at public or private sale, or otherwise, at the option of the said Blackstone National Bank, on the non-performance of this promise, said bank applying the net proceeds to the payment of this note, and accounting to me for the surplus, if any; and it is hereby agreed that such surplus, or any excess of collaterals upon this note, shall be applicable to any other note or claim against me held by said bank. Should the market value of any security pledged for this loan, in the judgment of the holder or holders hereof, decline, I hereby agree to deposit on demand (which may be made by a notice in writing, sent by mail or otherwise to my residence or place of business) additional collateral, so that the market value shall always be satisfactory to said bank, and failing to deposit such additional security, this note shall be deemed to be due and payable forthwith, anything hereinbefore expressed to the contrary notwithstanding, and the holder or holders may immediately reimburse themselves by the sale of the security; and it is hereby agreed that the holder or holders of this note, or any person in his or their behalf, may purchase at any such sale.

Joseph W. Smith.

[Indorsed on back]: Waiving demand and notice. Geo. W. Dove.

Jan. 3, 1889—Received five thousand dollars.

Jan. 5, 1889—Received five thousand dollars.

The further facts sufficiently appear in the opinion.

Mr. J. B. Warner, for plaintiff:

There was no such "non-performance" by Smith as entitled the Bank to cut off by a sale his right to redeem his stock.

The security is primarily pledged for his note alone, and if this note was not dishonored the defendant acquired no further claim to the stock.

Hathaway v. Fall River Nat. Bank, 181 Mass. 14.

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The conduct of the Bank in assuring Smith that the demand was not then insisted on, and the resulting understanding, upon which Smith must be presumed to have relied, supply all the elements of estoppel.

Blake v. Exchange Mut. Ins. Co. of Phila., 13 Gray, 265; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. ed. 841.

But even if the note was so dishonored, when the plaintiff offered to pay it, that the Bank already had a right to sell the stock, still the right of redemption was not cut off so long as the Bank held the stock.

The terms of the note do not make the stock security for other debts simply upon non-payment of the note. Upon non-payment the stock may be sold, but it is not until it has been sold, the note paid, and a surplus obtained, that the right of the Bank to apply that surplus takes effect.

Hathaway v. Fall River Nat. Bank, *supra*.

The plaintiff's offer to pay the note, being accompanied with present ability and actual intention to pay, has, at least in equity, all the effect which a tender upon the same condition could have.

Cummock v. Newburyport Sav. Inst., 2 New Eng. Rep. 538, 142 Mass. 342, 347.

The duties of pledgor and pledgee are reciprocal, and the right to a return of the security is indissolubly bound with the obligation to pay.

Whether or not this right is correctly treated as making a strict legal condition, as in many cases (*Cortelyou v. Lansing*, 2 Cal. Cas. 200; *Halpin v. Phenix Ins. Co.* 118 N. Y. 165; *Cass v. Higgenbottom*, 1 Cent. Rep. 315, 100 N. Y. 248; *Ocean Nat. Bank v. Fant*, 50 N. Y. 474; *Stuart v. Bigler*, 98 Pa. 80), it would probably be recognized in some way, even at law, so far as to prevent an enforcement of the debt if the creditor had destroyed the security or expressly refused to restore it.

In equity the creditor's obligation to return the security is concurrent with that of the debtor to pay his debt, and the debt cannot be enforced unless at the same time the security is restored.

Palmer v. Hendrie, 27 Beav. 349; *Kinnaird v. Trollope*, L. R. 39 Ch. Div. 636.

The mere fact that a return of the security is refused seems, in this court, to be sufficient ground for proceedings in equity to obtain it on payment of the debt.

Bartlett v. Johnson, 9 Allen, 530; *Fowle v. Ward*, 113 Mass. 548; *Hathaway v. Fall River Nat. Bank*, *supra*. See *Newton v. Fay*, 10 Allen, 504; *Kemp v. Westbrook*, 1 Ves. Sr. 278.

In the sense that a debt owed by my firm can be enforced against all the members, including me, the firm debt is my debt; but the expression "claims against me" naturally points to individual, not joint, claims, and it is a matter for consideration which is meant.

Emerson v. Knower, 8 Pick. 63.

The property was Smith's individually, and he would not naturally devote it to paying firm debts. Considering the usual mercantile view of a firm, which the law recognizes as different from the legal view (Corey, Accounts, chap. 4), Smith would hardly have intended

anything but his own debts when he used the word "me."

The personal and the partnership' relations are not to be confused, and should be recognized as distinct unless there is a clear intention to treat them on the same footing.

Re Tuff, L. R. 19 Q. B. Div. 88; *Westenholm v. Sheffield Union Bkg. Co.* 54 L. T. N. S. 746.

The form of the note was a printed blank furnished by the Bank, and was such as would, presumably, have been used if Smith had not been a member of any firm. It is a mere accident that the language can cover a state of facts which neither party had in mind, and it would strain too far the effect of a printed form to make it cover more than was obvious at the time.

Cotton v. Atlas Nat. Bank, 4 New Eng. Rep. 859, 145 Mass. 43. See *Ex parte Freen*, 2 Gill & J. 246; *Chuck v. Freen*, Mood. & M. 259; *Ex parte McKenna (City Bank Case)*, 3 De G. F. & J. 629.

Mr. Frank E. Fitz, for defendant:

A borrower can bind collateral deposited with his obligation as security, also, for other obligations which may be held against him by the holder of the principal obligation.

Richardson v. Washington Bank, 3 Met. 536; *Wilcox v. Fairhaven Bank*, 7 Allen, 270; *Moors v. Washburn*, 6 New Eng. Rep. 680, 147 Mass. 344; *Hall River Nat. Bank v. Slade*, 12 L. R. A. 131, 153 Mass. —.

Parties having a legal capacity to contract have a right to make such stipulations between themselves as they see fit, provided they do not contravene the law; and such stipulations are to be faithfully observed by the contracting parties.

Jurris v. Rogers, 15 Mass. 897; *Adams v. Nichols*, 19 Pick. 275; *McCarren v. McNulty*, 7 Gray, 139; *Brown v. Foster*, 113 Mass. 186; *Miller v. Lord*, 11 Pick. 11.

It was not competent to show at the hearing by extrinsic parol evidence that neither party to the note spoke of the acceptances, when said note was signed, there being no ambiguity as to its terms.

Blackmer v. Davis, 128 Mass. 538; *Chemical Electric L. & P. Co. v. Howard*, 150 Mass. 495.

The debt due from a partnership is also due from each member of a partnership, and may be enforced against the separate property of each.

Newman v. Bagley, 16 Pick. 570; *Allen v. Wells*, 22 Pick. 450; *Stevens v. Perry*, 113 Mass. 380.

Each partner is a debtor *in solido* for the whole amount of a joint debt.

Benchley v. Chapin, 10 Cush. 173; *Morrell v. Trenton Mut. L. & F. Ins. Co.* 10 Cush. 282; *Hanson v. Paige*, 3 Gray, 239; *Collins v. Charlestown Mut. F. Ins. Co.* 10 Gray, 155; *Barry v. Foyles*, 26 U. S. 1 Pet. 311, 7 L. ed. 157.

A partnership is not a legal entity.

Faulkner v. Hyman, 2 New Eng. Rep. 181, 142 Mass. 53, 55; *Lewis v. United States*, 92 U. S. 618, 23 L. ed. 513.

Where a firm obligation is several as well as joint, a bank can apply the individual deposit of a partner to the payment of a debt of the firm.

Eyrick v. Capital State Bank, 67 Miss. 60. 13 L. R. A.

Where a statute has made a partnership debt joint and several so that its creditors can sue a single partner therefor, a defendant can set off his claim against the firm in an action by such single partner against him on an individual debt.

Allen v. Maddox, 40 Iowa, 124. See *Leach v. Lambeth*, 14 Ark. 668.

The clause in the note "that such surplus or any excess of collaterals upon this note shall be applicable to any other notes or claim against me held by said Bank" relates to such notes or claims as might be held by the creditor at the time recourse was had to the collateral.

San Antonio Nat. Bank v. Blocker, 77 Tex. 78, 78.

Holmes, J., delivered the opinion of the court:

This is a bill to redeem certain stock given by one Smith, the plaintiff's insolvent, to the defendant as collateral security for a loan to Smith. The main question is whether the defendant can hold the stock as security not only for the loan mentioned, but also for two acceptances of a firm of which Smith was a member, which acceptances the defendant had discounted before the date of the loan in question. The note given by Smith for the loan authorizes the defendant to sell the stock "on the non-performance of this promise, said Bank applying the net proceeds to the payment of this note and accounting to me for the surplus, if any." It then goes on, and these are the important words, "and it is hereby agreed that such surplus, or any excess of collaterals upon this note, shall be applicable to any other note or claim against me held by said Bank."

The counsel for the plaintiff based his argument on the proposition that the right to apply the excess of collaterals to any other note or claim was conditional upon Smith's non-performance of his promise. We think it doubtful, at least, whether that is the true construction of the words which we have quoted. We are disposed to read the agreement as an absolute pledge or mortgage of the securities for other notes and claims. But if this be not so we are of opinion that Smith did not perform his promise within the meaning of the note. The Bank demanded payment of Smith on January 3, 1889, and he made partial payments, but failed to pay the residue and requested the Bank to make the balance a time loan, which the Bank refused. This was a non-performance of his promise by Smith. It is true that the report states that it was understood that the demand should not be pressed without further notice. But this did not take away the effect of the breach. It merely called on the Bank to give notice before taking further steps, such as selling the security, and this it did. We neither construe the report as meaning, nor do we infer from it, that the breach of Smith's promise by his failure to pay on demand was waived by the Bank. On January 3, if not before, the Bank's right vested to apply any excess of collaterals upon other claims.

The question remains whether the Bank is entitled to hold the security for the bills, which were accepted by Smith's firm and not by him individually. It cannot be denied that the ac-

ceptances were "claims against him" and that the words used in his note were broad enough to embrace firm acceptances unless there is some reason in the contract, the circumstances, or mercantile practice, to give them a narrower meaning. *Singer Mfg. Co. v. Allen*, 122 Mass. 467; *Chuck v. Freen*, Mood. & M. 259.

If Smith had had private dealings and a private account with the Bank as a depositor, and his firm also had had dealings and an account there, and Smith had given security in the terms of his note, in order to be allowed to overdraw or to obtain a discount, it may be that the generality of the language would be restrained to the line of dealings in the course of which it is used. *Ex parte McKenna* (*City Bank Case*), 8 DeG. F. & J. 629. See Lindley, Partn. 5th ed. 119, note.

But we are called on to construe a printed form used by the Bank and presented by it for those who borrow from it to sign. The question is, What is the reasonable interpretation of such words when insisted on as a general formula to be used by would-be borrowers, irrespective of any special course of business of the particular person who signs it, which, for the matter of that, there does not appear to have been in this case. For all that appears, the note mentioned may have been the only transaction that ever took place between the defendant and the plaintiff alone. The printed form, it may be assumed, would have been used by the Bank equally in a case where the borrower was the principal man in his firm and the only one known to the Bank, was borrowing for his firm daily, and had never borrowed for himself but in this instance, and in a case where the borrower's membership in a firm whose notes the Bank held was unknown. This being so in the opinion of a majority of the court, there is no sufficient reason for not giving the words their full legal effect. The clause pledging the property for any other claim against the debtor is not inserted with a view to certain specific debts, but as a drag-net to make sure that whatever comes to the creditor's hands shall be held by the latter until its claims are satisfied. Corey on Accounts and Lindley on Partnership have made it popular to refer to a mercantile distinction between the firm and its members. But we have no doubt that our merchants are perfectly aware that claims against their firms are claims against them, and when a merchant gives security for any claim against him, and there is nothing to cut down the literal meaning of the words, he must be taken to include claims against him as partner.

Decree accordingly. *Bill dismissed.*

Caroline E. DODGE, *Appt.*,

BOSTON & PROVIDENCE R. CO.

(.....Mass.....)

A grandchild of one granting land to a railroad company, who has ceased to be a

member of the latter's household, has no rights under a clause in the deed entitling the grantor and his family to free passage over the road as long as the granted land shall continue to be used for railroad purposes under the charter of the grantee.

(September 2, 1891.)

A PPEAL by complainant from a decree of the Supreme Judicial Court for Suffolk County dismissing her bill filed to enforce performance of a condition in a deed by John C. Dodge, deceased, granting land to defendant. *Affirmed.*

The facts sufficiently appear in the opinion.

Miss Caroline E. Dodge, appellant, *in propria persona*:

The usage of the word "family" among other things, includes "descendants."

See Crundon's Concordance; *Spencer v. Spencer*, 11 Paige, 160, 5 L. ed. 92; Redf. Wills, pt. 2, p. 395; *Williams v. Williams*, 1 Sim. N. S. 357, 371; Webster, Dict. title, *Family*.

Mr. J. H. Benton, Jr., for defendant:

The primary meaning of the word "family" is "the collective body of persons who live in one house and under one head or management." Webster, Dict.; Worcester, Dict.; Psalms lxxviii. 6.

The secondary meaning is "those who descend from one common progenitor; a tribe or race, kindred, as the human family, the family of Abraham."

Webster, Dict.; Worcester, Dict.; Judges xlii. 2.

It is to be presumed that this word was used in its primary, usual and ordinary sense, and not in its secondary sense.

If the agreement in the deed bears the construction put upon it by the plaintiff, it was against public policy, and void. A railroad corporation cannot bind itself to carry in perpetuity the descendants of any person free of charge. Such a corporation is only a trustee of the public highway, and an agreement of that kind would be a direct violation of its duty as such trustee.

Worcester v. Western R. Corp. 4 Met. 564, 566.

But assuming that the contract to carry the descendants of the grantor is upon adequate consideration and not against public policy, it was not with the plaintiff, and cannot be enforced by her.

Re Empress Engineering Co. L. R. 16 Ch. Div. 125.

This contract, if it bears the construction put upon it by the plaintiff, cannot be enforced in equity. Upon such construction it is a contract to carry an indefinite number of persons in perpetuity, and any decree for its performance would necessarily be as indefinite in its terms as the contract itself.

Atlanta & W. P. R. Co. v. Speer, 32 Ga. 550; *Blanchard v. Detroit L. & L. M. R. Co.* 31 Mich. 43; *Cincinnati & C. R. Co. v. Washburn*, 25 Ind. 259; *Blackett v. Bates*, L. R. 1 Ch. App. 117; *Powell D. Steam Coal Co. v. Taff Vale R. Co.* L. R. 9 Ch. App. 331.

NOTE.—Deed, construction of consideration clause; rights thereunder.

In order to merit the interposition of the powers of a court of chancery the agreement must be 18 J. L. R. A.

found to be fair and equitable, certain, and consistent with public policy, and just in all its parts, or at least tend to produce a just end. *Griffith v. Frederick County Bank*, 6 Gill & J. 424; *Seymour v. DeLancy*, 8 Cow. 445; *Modisett v. Johnson*, 2 Blackf.

Specific performance of this contract, construed as the plaintiff construes it, ought not to be ordered, because the plaintiff asks for nothing which she cannot obtain by purchase.

Murray v. Stevens, 110 Mass. 95; *Wilson v. Northampton & B. J. R. Co.* L. R. 9 Ch. App. 279.

Lathrop, J., delivered the opinion of the court:

This is a bill in equity, filed on February 23, 1888, for specific performance of an agreement alleged to have been made by the defendant, in 1836, with John C. Dodge, the plaintiff's grandfather. The case was heard before a single justice of this court upon the pleadings and evidence, and comes before us on the plaintiff's appeal from a decree dismissing the bill.

From the evidence it appears that the defendant corporation, on December 23, 1833, took by the right of eminent domain a parcel of land belonging to John C. Dodge in the Town of Attleborough, and, having constructed its road over the land so taken, began to run trains of cars from Boston to Providence on August 23, 1835. By deed dated September 1, 1836, and acknowledged on

May 6, 1837, John C. Dodge conveyed a right of way over the land so taken to the defendant. After the description of the premises conveyed, and before the habendum, were the following clauses: "It being understood and agreed by and between the said parties to this deed that the said corporation shall erect, make, and keep up all necessary fences between the lands of the grantor and the land taken for said railroad. And it is further agreed by and between the said parties to this deed, and the said corporation by the acceptance of this deed do covenant and agree to and with the said grantor, for themselves, their successors and assigns, that the said grantor and his family shall have and enjoy the right of free passage on and over said railroad in the cars of said corporation, their successors and assigns as long as the land and appurtenances hereinbefore described shall continue to be used as a railroad, or for railroad purposes under the charter of said corporation."

It further appears from the evidence that in 1836 John C. Dodge had nine sons living with him; that in 1854 or 1855, he left this Commonwealth and did not return to it; and died in January, 1866; that the plaintiff's

43: *Millard v. Ramsdell*, Harr. Ch. (Mich.) 373; *Ohio v. Baum*, 6 Ohio, 383.

In all cases where a consideration is required, a party suing on a contract must show that the consideration flowed from him (*Boulton v. Jones*, 2 Hurst. & N. 564; *Mitchell v. Lapage*, Holt, N. P. 253; *Boston Ice Co. v. Potter*, 123 Mass. 28); as privity or reciprocal recognition is essential to establish a contractual relation. *Thomas v. Thomas*, 2 Q. B. 859; *Leake*, Cont. 2d ed. 612; 1 *Wharton*, Cont. § 506.

The consideration may be some benefit to the defendant, but it must be some detriment to the plaintiff, and it must move from the plaintiff. 1 *Wharton*, Cont. § 506.

The promise so far as the promisee is concerned must not have been gratuitous. He must have done something or suffered something at the promisor's request, as a reason for the promise, as no one can sue on a contract to which he was not a party. See *Anderson v. Longden*, 14 U. S. 1 *Wheat*, 85, 5 L. ed. 62; *Shear v. Mallory*, 13 Johns. 497; *Tweddle v. Atkinson*, 1 Best & S. 393; *Price v. Easton*, 1 Barn. & Ad. 453.

Thus, a bill for a specific performance can only be brought by those who are parties to the contract. *Tasker v. Small*, 3 Myl. & C. 69; *Wood v. White*, 4 Myl. & C. 460; *Paterson v. Long*, 5 Beav. 188; *French Civil Code*, art. 1165; 1 *Wharton*, Cont. § 734.

Rules for construction.

All the terms of a deed should be construed together. *Lowdermilk v. Bostick*, 98 N. C. 299; *Jones v. Pashby*, 5 West. Rep. 571, 62 Mich. 614; *Grueber v. Lindenmeier*, 42 Minn. 99.

The construction must be upon the entire deed, and not on disjointed parts. *Grueber v. Lindenmeier* and *Jones v. Pashby*, *supra*; *Baldwin v. Marton*, And. 225.

Every word and clause should be given some force and meaning, so far as possible. *Robinson v. Marquis*, 4 R. Co. 4 New Eng. Rep. 391, 50 Vt. 426. See *Coleman v. Sherwin*, Carth. 98; *Shrewsbury's Case*, 9 Coke, 47.

Courts should ascertain and give effect to the real intention of the parties; and such intention must 13 L. R. A.

be gathered from the whole instrument. *Richter v. Richter*, 10 West. Rep. 250, 111 Ind. 456; *Lehndorf v. Cope*, 11 West. Rep. 620, 123 Ill. 817; *Co. Litt.* 314b.

Where that intention is clearly revealed, it furnishes the rule by which deeds as well as statutes and other contracts must be construed. *Case v. Dexter*, 9 Cent. Rep. 250, 106 N. Y. 553.

Such a construction ought to be made of deeds, that their end and design should take effect; and such construction should be made of their words as is most agreeable to the intent of the grantor. These maxims are founded upon the highest authority,—Coke, Plowden, and *Lord Chief Justice Hale*; and the law commends the *astutia*, the cunning of judges, in construing words in such a manner as shall best answer the intent. *Smith v. Packhurst*, 3 Atk. 136.

For in expounding a grant according to the intent, it must be done according to the intent at the time of the grant (*Alderman of Chesterfield's Case*, Cro. Eliz. 35); in the light of the surrounding circumstances. *Newaygo Mfg. Co. v. Chicago & W. M. R. Co.* 7 West. Rep. 384, 64 Mich. 114; *Zimmer v. Miller*, 1 Cent. Rep. 702, 84 Md. 280.

The law in the true construction of grants hath respect to the estate of the grantor; to the ability of the grantee; to the consideration which leads the estate; and to the recompense, and loss which is sustained. *Gough v. Howards*, 3 Bulst. 125.

Words in grants should be construed according to a reasonable and easy sense, and not be strained to things unlikely and unusual. *London v. The Chapter of Southwell*, Hob. 304.

Technical rules of construction are not to be resorted to, when the meaning of the maker of a deed is obvious. *Henderson v. Mack*, 82 Ky. 379.

Such rules are not favored, and are not to be so applied as to defeat the intention of the parties, but effect must be given to such intention if practicable, when no principle of law will be thereby violated. *Grueber v. Lindenmeier*, 42 Minn. 99.

Judges in their judgments have great regard to the generality of the cases, and to the inconveniences which may ensue either way; *tales interpretatio semper tendit ad est, ut eritetur absurdum, et inconvenienti, et ne judicium sit illusorium*. *Case of Alton Woods*, 1 Coke, 52.

father, a son of John C. Dodge, was living with him in 1836, and continued to live with him from that time until about a year after his own marriage in 1846; that he left the Commonwealth in 1850, and returned to it in 1885 or 1886, and now resides here.

In regard to the plaintiff, the testimony shows that she was born in 1854 or 1855, in the State of Pennsylvania; that when she was a child she lived for some time in the family of her grandfather after he left this Commonwealth; and that she returned here with her father in 1885 or 1886, and has since lived with him.

The evidence was somewhat conflicting on the question whether the defendant has by its acts recognized the plaintiff as a person entitled to ride free over its road. It does appear that when she was a child she occasionally went over the road, when accompanied by her father or mother, and was allowed to do so; and that, since she came of age, passes had been occasionally given to her, she claiming the right to have them, but, as she states in her brief, "usually on objection by the officer of the Company." On this state of the evidence we need not consider how far the defendant would be bound by what the plaintiff contends is the practical construction put upon the deed by the officers of the defendant corporation. We find nothing in the evidence to show conclusively that what was accorded to her after she came of age was other than as a favor.

We pass, therefore, to the consideration of the construction of the deed. The word "family" has several meanings. Its primary meaning is the collective body of persons who live in one house and under one head or management. Its secondary meaning is those who are of the same lineage, or descend from one common progenitor.

Unless the context manifests a different intention, the word "family" is usually construed in its primary sense. In *Rez v. Darlington*, 4 T. R. 797, under the Settlement Act of 8 and 9 Wm. III., chap. 30, which provided for the granting of a certificate to a poor person who wished to remove from his own parish to another; and that the latter parish should "be obliged to receive and provide for the person mentioned in the certificate, together with his or her family,"—it was held that the certificate did not extend to a grandchild of the person receiving it, who lived with his father, but not with his grandfather.

Lord Kenyon, *Ch. J.*, said: "In common 18 L. R. A.

parlance, the family consists of those who live under the same roof with the *paterfamilias*; those who form (if I may use the expression) his fire-side. But when they branch out, and become the heads of new establishments, they cease to be part of the father's family." See also *Oystead v. Shed*, 18 Mass. 520; *Bowditch v. Andrew*, 8 Allen, 339; *Poor v. Humboldt Ins. Co.* 125 Mass. 274; *Bates v. Deurson*, 128 Mass. 334; *Bradlee v. Andrews*, 137 Mass. 50; *Phelps v. Phelps*, 143 Mass. 570, 4 New Eng. Rep. 183.

The plaintiff, however, contends that the words "so long as the land and appurtenances hereinbefore described shall continue to be used as a railroad or for railroad purposes under the charter of said corporation" imply perpetual succession, and must necessarily include all the descendants of John C. Dodge.

But we are of opinion that these words are words of limitation of the grant, and not words extending the meaning of the word "family."

By the charter of the defendant corporation, the Commonwealth reserved the right, at any time after twenty years from the opening for use of the road, to purchase of the corporation its railroad, and its franchise, property and privileges. Stat. 1831, chap. 56, § 12. The words "under the charter of the corporation" were therefore necessary to limit the agreement to carry to the time the corporation might have the power to use the land for railroad purposes.

So, too, the words, "used for railroad purposes," were a necessary and proper limitation of the contract to carry. If the location of the road were changed, and the land conveyed by Dodge should revert to him, the parties would naturally provide that the contract to carry should be at an end.

Other contingencies might also happen.

By the Statute of 1830, chap. 81, passed on March 11, 1831, the charter of the defendant corporation could be repealed at the pleasure of the Legislature; its franchise might be forfeited for misuser or nonuser; or it might be surrendered.

All these considerations show that the words in question were words of limitation, and did not extend the word "family" so as to include the descendants of John C. Dodge to the remotest generation. We are of opinion, therefore, that the plaintiff, after she ceased to be a member of her grandfather's household, was not entitled to a free pass over the road of the defendant as one of his family.

Decree dismissing the bill affirmed.

MICHIGAN SUPREME COURT.

Robert BALLENTINE *et al.*

Raymond S. WEBB.

(.....Mich.....)

1. The business of slaughtering animals for food is not a nuisance, as a matter of law, independently of the manner in which it is conducted, if the slaughter-house is situated in a new and sparsely settled portion of a city, in the neighborhood of stockyards and other slaughter-houses.
2. The noise made by hogs kept in confinement for the purpose of slaughter is not such a nuisance as to justify the destruction of a slaughter-house business for the sole purpose of ridding a neighborhood of such noise.
3. That the existence of a slaughter-house depreciates the value of neighboring property is not sufficient ground to justify a decree interfering with the business carried on therein.
4. A decree which attempts to enjoin a nuisance caused by the manner of carrying on a business should specifically point

out the things which are to be done and to be restrained from in order to abate the nuisance.

5. A slaughter-house business will be destroyed by a court of chancery at the instance of persons who moved into its neighborhood after it was established, only when it is injurious to health, where it was located at the outskirts of a city in a locality where similar kinds of business had been already established.

(December 24, 1890.)

CROSS-APPEALS from a decree in chancery of the Circuit Court for Wayne County enjoining the carrying on of a slaughter-house business in such a way as to make it a nuisance. Modified and affirmed.

The facts are stated in the opinion.

Messrs. Parker & Burton for complainants.

Messrs. Conely, Maybury & Lucking, for defendant:

That the slaughter-house diminishes the value of the neighboring lands, considered alone, can be no ground for an injunction.

Morris & E. R. Co. v. Prudden, 20 N. J. Eq. 537, 539; *Zabriskie v. Jersey City & B. R. Co.*

NOTE.—When injunction will be denied to restrain an alleged nuisance.

An injunction will not be granted to restrain the erection of a slaughter-house and place for keeping hogs, where, by the answer and affidavits, it appears the defendants intend to carry on the business so as not to be a nuisance. If it should be carried on in such manner as that it becomes a nuisance, it will then be enjoined. *Atty-Gen. v. Steward*, 20 N. J. Eq. 415.

A trade or business will not be enjoined unless it appears, from the place or manner in which it is carried on, that it materially injures the property of others, or affects their health, or renders the enjoyment of life physically uncomfortable; in such case it is a nuisance, which it is the duty of the court to restrain. *Ross v. Butler*, 19 N. J. Eq. 294.

Occupying real property in cities as a hog-yard, and fat and offal-boiling house is *prima facie* a common nuisance; but this presumption may be rebutted by showing that the business is so conducted and carried on as not to endanger the health, or interfere with the comfort, of the neighboring inhabitants. *Dubois v. Budlong*, 15 Abb. Pr. 445.

Until the Legislature provide a remedy, or until the fact of a nuisance is established by proof, it would be wrong to restrain a lawful calling merely because it does or might offend the senses of some. *Ibid.*

In the case of *Catlin v. Valentine*, 9 Paige, 575, 4 L. ed. 321, the chancellor held that the occupation of a building in a city, as a slaughter-house, was *prima facie* a nuisance to the neighboring inhabitants, and might be restrained by injunction. And in that case he refused to dissolve the injunction, and retained it until the hearing; although the defendant, in his answer, denied that a slaughter-house was a nuisance. To constitute a nuisance, it is not necessary that the noxious trade or business should endanger the health of the neighborhood. It is sufficient if it produces that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable. *Rex v. White*, 1 Burr. 337; 3 Bl. Com. 217; *Brady v. Weeks*, 3 Barb. 157.

But the discomfort must be physical, not such as

depends on taste or imagination. But whatever is offensive, physically, to the senses, and by such offensiveness makes life uncomfortable, is a nuisance; and it is not the less so because there may be persons whose habits and occupations have brought them to endure the same annoyances without discomfort. For a strikingly similar definition, see *Walter v. Seife*, 15 Jur. 416, 4 Eng. L. & Eq. 15; *Westcott v. Middleton*, 10 Cent. Rep. 202, 43 N. J. Eq. 478.

Slaughter-houses not necessarily a nuisance.

Slaughter-houses in a city or town were once reckoned by the courts as nuisances *per se*, and they are still so classed in the opinion of the court in *Green v. Lake*, 54 Miss. 340, 28 Am. Rep. 378, decided as late as 1877; but it is said in a late work of merit that the wonderful improvements wrought by science in all departments of life has shown that this position cannot now be upheld in reference to any trade, and that slaughter-houses are now regarded merely as *prima facie* nuisances. *Wood, Nuisances*, § 503, 504, and cases there cited.

While it is true that persons living in a city must suffer the consequences which come from the bustle and noise incident to the activity of business and the manner in which it may be done, and from the various causes which are produced by a dense population against which there is no legal ground for complaint, they are entitled to protection against the carrying on of a trade or business in a manner which materially injures their property or affects their health, or renders the enjoyment of it physically uncomfortable. *Crump v. Lambert*, L. R. 3 Eq. Cas. 406; *Catlin v. Valentine*, 9 Paige, 575, 4 L. ed. 321; *Brady v. Weeks*, 3 Barb. 157.

No action will lie and no recovery can be had for doing that which the law authorizes the party to do, and that cannot be adjudged a nuisance and be held unlawful, which the law declares to be lawful. *New York & B. R. Co. v. Young*, 33 Pa. 175; *Renwick v. Morris*, 3 Hill, 621; *Monongahela Bridge Co. v. Kirk*, 46 Pa. 112; *Northern Transp. Co. of Ohio v. Chicago*, 99 U. S. 635, 25 L. ed. 336; *Angell, Highways*, § 287; *Addison, Torts*, § 1040; *Porter v. North Missouri R. Co.* 33 Mo. 123; *Monongahela*

13 N. J. Eq. 314, 318; *Atty-Gen. v. Nichol*, 16 Ves. Jr. 343, 348; 2 Story Eq. Jur. § 925.

The remedy by injunction must be confined to that specific thing which constitutes the actual nuisance, as shown by the proofs.

Welch v. Stowel, 2 Dougl. 332; *Wreford v. People*, 14 Mich. 41, 46; *Babeock v. New Jersey S. Y. Co.* 20 N. J. Eq. 296.

Courts will rarely interfere by injunction, where it may be stopped by indictment.

Morris & E. R. Co. v. Prudden, *supra*.

If a business is lawful and is carried on in a suitable place, even though to the annoyance of neighbors, still courts will not enjoin.

Doelner v. Tynan, 88 How. Pr. 182-186, and many cases cited; *Gilbert v. Showerman*, 23 Mich. 448-455.

The court will consider the loss, the locality, all the circumstances and surroundings, even after a verdict that the thing is a nuisance, before giving an injunction.

Wood, Nuisances, § 483, p. 530.

Nothing can be a nuisance which is permitted to be set up by competent authority.

Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62, 70, 71; *Atty-Gen. v. Ewart Booming Co.* 84 Mich. 463. See also *People v. Detroit & H. Pl. Road Co.* 37 Mich. 195.

Cahill, J., delivered the opinion of the court:

The complainants are the owners of, and occupy, as residence property, lands in the northern part of the City of Detroit, lying between Trumbull Avenue and Twelfth Street, and between Merrick Avenue and Kirby Street. The neighborhood is a new one, as a residence part of the city, the complainants having for the most part moved there within a year prior to the filing of their bill in 1887. In the spring of 1886, the defendant had erected a slaughter-house on the southeast corner of Twelfth and Kirby Streets, the cost of which was something over \$4,000. Before doing so, he testified that he had acquired permission from the common council. In the near neighborhood was King's cattle-yard and Wreford's slaughter-house, both of which had been in operation some years. Defendant was engaged principally in slaughtering hogs. The hogs were received by rail, and were unloaded from a side track near the slaughter-house to the number of about 300 a week. They were usually kept in the yard at least over night, and sometimes twenty-four hours, to cool off before killing. Sometimes

hela Nav. Co. v. Coons, 6 Watts & S. 101; *Henry v. Pittsburgh & A. Bridge Co.* 8 Watts & S. 85; *Radcliff v. Brooklyn*, 4 N. Y. 196; *Bollinger v. New York Cent. R. Co.* 23 N. Y. 42; *Moyer v. New York Cent. & H. R. Co.* 38 N. Y. 361; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 37 L. ed. 739.

The occupation of a building as a slaughter-house is to be regarded as *prima facie* a nuisance, and where such a building exists so near dwelling-houses as to impair their comfortable enjoyment, it is an actionable nuisance. *Catlin v. Valentine*, 9 Paige, 675, 4 L. ed. 821.

The business of slaughtering animals ought not to be carried on in the populous parts of a city, and, more especially, when connected with slaughtering is the act of burning bristles and boiling offal. *Dubois v. Budlong*, 15 Abb. Pr. 445; 10 Bosw. 700.

And where slaughter-houses are originally erected on vacant ground, remote from human habitations, or public places, if they become nuisances by reason of roads being afterwards laid out in their vicinity, or by dwellings being subsequently erected near them, the fact of their prior existence in a place remote from dwellings is no defense. *Brady v. Weeks*, 3 Barb. 187; *Com. v. Upton*, 6 Gray, 473. And see *Bankart v. Houghton*, 37 Beav. 435; *Howell v. McCoy*, 3 Rawle, 256; 4 Wait, Act. & Def. 751.

Rule as to the measure of damages.

The rule of damage to real estate where the injury is to the value of the premises themselves, is the difference between the value of the premises before the injury and immediately after. 1 Hill, Torts, 603, § 18, a; Wood, Nuisances, § 533; *Seely v. Alden*, 61 Pa. 803; *Ruckman v. Green*, 9 Hun. 223; *Peck v. Elder*, 3 Sandf. 123; *Dana v. Valentine*, 5 Met. 8; *Chase v. New York C. R. Co.* 24 Barb. 273.

Where the nuisance can be abated, this rule does not apply. In such case, the measure of damages is the loss in rental value by the continuance of the nuisance. *Chipman v. Palmer*, 9 Hun. 517; *Pinney v. Berry*, 61 Mo. 359; *Park v. Chicago*, & S. W. R. Co. 43 Iowa, 636; *McKeon v. See*, 4 Rob. 450; *Ruff v. Hinaldo*, 55 N. Y. 694; *De Wint v. Wiltsie*, 9 Wend. 223; *Jutte v. Hughes*, 67 N. Y. 237; *Baltimore* 13 L. R. A.

& P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 37 L. ed. 739.

A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. Cal. Civ. Code, § 3480. All others are private nuisances. Id. § 3481.

Any person may maintain an action for a private and particular injury, distinct from that of the public in general for the commission of a public nuisance. *Pierce v. Dart*, 7 Cow. 609; *Lanning v. Smith*, 4 Wend. 9-23; *Cropesey v. Murphy*, 1 Hill, 122; *Wilkes v. Hungerford Market Co.* 2 Bing. N. C. 281; *Rose v. Groves*, 5 Man. & G. 613; *Milbau v. Sharp*, 27 N. Y. 611-627; *Myers v. Malcom*, 6 Hill, 222; *Sedgw. Dam.* 32-142; *Soltau v. DeHeld*, 9 Eng. L. & Eq. 104; 1 Hill, Torts, 554; *Chichester v. Lethbridge*, Willes, 71-73; 3 Bl. Com. 219; Co. Litt. 54.

The writ of injunction can rightfully be demanded to prevent irreparable injury, interminable litigation and a multiplicity of suits, and its refusal in a proper case would be error to be corrected by an appellate tribunal. It is matter of grace in no sense except that it rests in the sound discretion of the court, and that discretion is not an arbitrary one. If improperly exercised in any case, either in granting or refusing it, the error is one to be corrected upon appeal. *Corning v. Troy Iron & N. Factory*, 40 N. Y. 191; *Reid v. Gifford*, Hopk. Ch. 416, 2 L. ed. 470; *Politt v. Long*, 58 Barb. 20; *Mohawk and H. R. Co. v. Artcher*, 6 Paige, 83, 3 L. ed. 907; *Parker v. Winnepesaukee Lake C. & W. Co.* 67 U. S. 2 Black, 545, 551, 17 L. ed. 323, 337; *Webber v. Gage*, 39 N. H. 122; *Dent v. Auction Mart Co.* 66 L. J. Ch. 555; *Atty-Gen. v. United Kingdom Elect. Teleg. Co.* 30 Beav. 237; *Wood v. Sutcliffe*, 2 Sim. N. S. 165; *Clowes v. Staffordshire Potteries W. W. Co.* L. R. 8 Ch. App. 123.

To authorize a private person to maintain an action for a public nuisance, the injury which he sustains therefrom must differ in kind, not in degree, from that which is common to all. *Chicago v. Union Building Assn.* 108 Ill. 279, 40 Am. Rep. 598; *Haley v. Numan*, 53 Cal. 403; *Jarvis v. Santa Clara Valley R. Co.* 62 Cal. 438; *Nottingham v. Baltimore & P. R. Co.* 3 McArthur, 517.

car-loads of hogs intended for King's stock-yards, as well as for the defendant's, would stand upon the track for several hours at a time, and would make considerable noise by squealing. Complainants allege in their bill that the swine confined in defendant's yards produce a large amount of manure and filth, and give off an offensive, sickening, and unwholesome stench, and that at times it becomes so unendurable that the inhabitants, of whom complainants form a part, are compelled to leave their homes; that the confined swine make a great disturbance and noise by squealing so loudly as to awaken persons from sleep, and so constantly as to disturb inhabitants at all times, both day and night. It is alleged that, in consequence of the business carried on by defendant, the land in the vicinity has become depreciated in value, and complainants charge that the stench arising from said swine, and from the drying hair taken from the slaughtered hogs, and from the said slaughter-house, constitutes a nuisance, and that the noise and disturbance made by said swine in confinement constitute a nuisance; that such nuisances are greatly injurious to the health, comfort, and property interests of the complainants; that the injury to the complainants' health and comfort cannot be measured by monetary value; that the injury to their property interests is upwards of \$3,000; and that for such injury to their health, comfort, and property, they are without any adequate relief except in equity. The prayer of the bill is for preliminary and perpetual injunction to restrain defendant from further using or employing his property for a slaughter-house wherein to slaughter swine or any other animals, and from employing the same for the purposes of confining therein quantities of swine or other animals for the purpose of slaughtering them, and for using the same or any part of it as a drying-yard for drying hair or bristles taken from the slaughtered swine; also for general relief.

Defendant answered admitting that he owned and operated the slaughter-house at the place stated in the bill, and for purposes substantially as charged, but denied that the place was uncleanly, or gave out noisome or unwholesome smells, or that the same was a nuisance in any way. Says that the slaughter-house had been erected, and was carried on, after the newest and most approved methods, and was kept as clean as is possible for such a place to be kept; that it had been constructed expressly for the purpose for which he was using it, and that if he should be prevented from making such use of it the value of the property, amounting to about \$5,000, would be almost wholly destroyed; that when defendant bought and built there, there were very few buildings in the neighbourhood; and that, as yet, the neighbourhood was sparsely settled. The case was heard before *Hon. George S. Hosmer*, circuit judge, a large number of witnesses being examined on each side, and the testimony being very conflicting. Upon the part of the complainants, the testimony tended to show that the people living in the vicinity of the defendant's slaughter-house were an-

nnoyed, especially during the summer months, by offensive smells coming from the direction of the defendant's place; that these smells were in some instances so offensive as to make the parties sick. It also appeared that people were kept awake at night by the squealing of hogs confined in defendant's yard. It does not clearly appear from the complainants' proof, however, whether the offensive smells of which they complain were such as were necessarily connected with a slaughter-house for the slaughtering of hogs maintained in a proper manner, or whether such smells were due to the improper conduct of the business, and in consequence of defendant's neglect to keep the place in as clean a condition as the same could be kept with proper care. There was evidence tending to show that defendant was in the habit of spreading the hair scraped from the slaughtered hogs upon the ground to dry before sending the same to market, and some of the witnesses thought that much of the unwholesome smell came from this hair. On the part of the defendant, the testimony tended to show that great care was used by defendant to keep the place clean and wholesome; that the manure and other offal was removed every day by wagons to a distance in the country; that much of the noise with which complainants found fault came from the squealing of hogs standing in cars on the track intended for King's stock-yards. A considerable number of witnesses called by the defense, who lived in the neighborhood where defendant's business was carried on, testified that they had never noticed any offensive smells, and were never disturbed by the squealing of hogs. The court below found as a fact that in the prosecution of the business conducted by the defendant he has, at various times, been guilty of maintaining a nuisance in the noxious and offensive odors from the confined swine, and from swine in the process of being slaughtered, and has also been guilty of maintaining a nuisance in the offensive odors from the drying hair and bristles taken from the slaughtered swine, and that at times, depending on the state of the weather or the direction of the wind, such nuisances have been unbearable. The decree, however, did not order the defendant to cease using the place as a slaughter-house altogether, but decreed that defendant refrain from using or employing the buildings and sheds erected on defendant's premises for the purpose of a slaughter-house wherein to slaughter hogs in such a way as to be offensive to, or become a nuisance to, the complainants; and that defendant desist and refrain from using or employing the said inclosure or buildings for the purpose of confining therein quantities of swine or other animals in such a way as to be offensive to, or to be a nuisance to, the complainants, or any of them; and that defendant desist and refrain from using said inclosure, or any part thereof, as a drying-yard in which to dry hair or bristles taken from the slaughtered swine. And the complainants were given leave to apply to the court for a further order enjoining or restraining defendant from using his premises in any wise for the purpose of

slaughtering or confining swine, if it shall appear that the further use of said buildings and inclosure by said defendant be offensive or noxious to the complainants, or any of them, because of the noises arising from the swine, or because of disagreeable odors arising from the inclosure caused by confining swine therein. From this decree, complainants and defendant have both appealed.

On the part of the complainants, it is insisted that the decree falls short of giving them the relief to which they are entitled, because, having adjudged the defendant's business to be a nuisance, such judgment was not followed by an injunction perpetually restraining defendant from further carrying on such business. On the part of the defendant, it is claimed that the complainants were not entitled to any relief under their bill and the proofs made, for the reasons: *First*. That it does not appear from the bill that the defendant is maintaining such a business as is a nuisance *per se*; that it does not appear from the bill but that the offensive odors arise from causes which can be remedied without any serious interference with the conduct of defendant's business; that there is no allegation in the bill, and substantially no proof, that defendant's slaughter-house is of itself a nuisance. *Second*. It is claimed that the decree gave no relief to complainants, and that, upon facts found by the circuit judge, the bill ought to have been dismissed. Without attempting to review the voluminous testimony in this record, we have arrived at the following conclusions:

1. That defendant's business is not of such a character as, when properly conducted, to constitute a nuisance in the neighborhood where it is situated. This is practically conceded by complainants; and, if it were not, we should not be willing to hold, as a matter of law, that a business so necessary and important as that in which defendant is engaged, and which his own profit and the convenience of the city requires should be conducted within reasonable distance of the market which he supplies, was of necessity a nuisance, independent of the manner in which it was conducted.

2. The noise made by hogs kept in confinement for the purpose of slaughter, being to some extent unavoidable, does not constitute such a nuisance as would justify a court of equity in destroying defendant's business for the sole purpose of ridding a neighborhood of such noise. We do not intend by this to intimate that we regard the squealing of pigs as a soothing sound. We have no doubt that such noises are more or less annoying to some people, depending somewhat upon their peculiar temperament. Some of complainants' witnesses testified that they did not notice the squealing of the pigs, which annoyed other members of the family; but in this age of steam and iron, the squealing of a pig is scarcely to be heard amid the multitude of greater noises that everywhere assault the ear. Within a short distance of defendant's place, and nearer to some of complainants than the slaughter-house, are the railroad tracks, over which run the engines

with their shrieking whistles, louder than the squealing of a thousand hogs; in chorus, and their automatic bells, ringing at all times of the day and night, and yet none of the complainants would think of removing the railroad from their neighborhood because of the distressing noises which arise therefrom.

3. Complainants are not entitled to a decree which would interfere with defendant's business on the ground that the existence of it in that neighborhood depreciates the value of their property. As to such injury, if any, complainants have an adequate remedy at law. Wood, Nuis. 946; *Atty-Gen. v. Nichol*, 16 Ves. Jr. 842; *Zabriskie v. Jersey City & B. R. Co.* 18 N. J. Eq. 814; 2 Story, Eq. Jur. § 925.

4. We are satisfied that defendant has not, at all times, conducted his business with as much care to cleanliness as he ought. His counsel urged that the testimony fails to locate any offense arising from the slaughter-house proper. If this be granted, we fail to see the force of it. Complainants are not required to nicely discriminate as to the origin of offensive smells. The evidence is convincing that they come from defendant's place of business, and his business must be regarded as including all that is incident to it. The defendant insists that this business can be carried on so as not to be injurious to the health, or seriously offensive to complainants. The decree of the circuit court recognized this possibility, and undertook to give defendant time and opportunity to abate the nuisance complained of without requiring him to stop his business altogether. The trouble with the decree is that it fails to point out specifically what defendant is required to do in order to comply with its requirements. To adjudge that defendant should so conduct his business as not to be offensive is to give him no rule of conduct which the law had not before prescribed. The decree should have specifically pointed out the things that defendant was required to do, and to refrain from doing, in order to abate the nuisance which the court found to exist.

5. Defendant's business, established under the circumstances of this case, and conducted by him on his own premises, will not be enjoined because it cannot be carried on without some degree of offense and annoyance to those living near it. It is only when it reaches the point of discomfort where it becomes injurious to health that the injury can be said to be irreparable so as to call forth the extraordinary power of a court of chancery to destroy it. So careful is the law of human life and health that no consideration of mere property rights can be allowed to weigh against them. As to other wrongs, they can, for the most part, be compensated in damages. In the recent case of *People v. Detroit White Lead Works*, 9 L. R. A. 723, 82 Mich. 471, the rule in a case at law was stated by Mr. Justice Grant as follows: "The defendants cannot be protected in the enjoyment of their property, and the carrying on of their business, if it becomes a nuisance to people living upon the adjoining properties, and to those doing legitimate business with

them. Whenever such a business becomes a nuisance, it must give way to the rights of the public, and either devise some means to avoid the nuisance or must remove or cease its business. It may not be continued to the injury of the health of those living in its vicinity. This rule is founded both upon reason and authority. Nor is it of any consequence that the business is a useful one, or necessary, or that it contributes to the wealth and prosperity of the community. Wood, Nuisances, § 19; *Reg. v. Train*, 2 Best & S. 640; *Works v. Junction Railroad*, 5 McLean, 425; *Republica v. Caldwell*, 1 U. S. 1 Dall. 150, 1 L. ed. 77; *Ross v. Butler*, 19 N. J. Eq. 296; *Robinson v. Baugh*, 81 Mich. 290. It is true that, in places of population and business, not everything that causes discomfort, inconvenience, and annoyance, or which perhaps may lessen the value of surrounding property, will be condemned and abated as a nuisance. It is often difficult to determine the boundary line in many such cases. The carrying on of many legitimate businesses is often productive of more or less annoyance, discomfort, and inconvenience, and may injure surrounding property for certain purposes, and still constitute no invasion of the rights of the people living in the vicinity. Such a case was *Gilbert v. Showerman*, 23 Mich. 448.

In *Cleveland v. Citizens Gas Light Co.*, 20 N. J. Eq. 205, the rule was stated more broadly: "Any business, however lawful, which causes annoyances, which materially interfere with ordinary comfort physically of human existence, is a nuisance that should be restrained; and smoke, noise, and bad odors, even when not injurious to health, may render a dwelling so uncomfortable as to drive from it anyone not compelled by poverty to remain. Unpleasant odors, from the very constitution of our nature, render us uncomfortable, and when continued or repeated make life uncomfortable.

The only question is, What amounts to that discomfort from which the law will protect? The discomforts must be physical, not such as depend upon taste or imagination." This language was used in a case where the court was asked to restrain the defendants from erecting or carrying on their gas-works at the place at which they had begun to erect them, or in the neighborhood of that place, and al-

though the court declined to grant the injunction on the ground that it did not clearly appear that the works, "when completed, would be a nuisance," the foregoing rule was clearly stated as one that would govern the court in dealing with the company should complaint afterwards be made. The facts in that case were that defendants proposed to erect their gas-works in a populous residence portion of the City of Newark, and such a case is to be distinguished from this, where defendant erected his place of business at the outskirts of the city, and in a locality where similar kinds of business were already established. Most of the complainants had moved into this neighborhood since the defendant's business was established; and, although they have a right to be protected from nuisances that endanger the health of themselves or their families, a court of equity, in determining whether it will destroy defendant's business at their request, will consider whether the thing complained of is noxious or only disagreeable, and in the same connection will consider the fact that complainants have voluntarily put themselves into the disagreeable neighborhood. The rule here contended for is recognized by our Statute concerning the abatement of nuisances. How. Stat. § 1643. Under the general prayer for relief, complainants are entitled to a decree requiring defendant to remove from his premises every day all manure, blood, offal, hair, and other refuse of his establishment in covered garbage wagons, such as are in use by the board of public works in the City of Detroit, or in other wagons that will effectively avoid the spread of offensive odors; to thoroughly clean, cleanse, and disinfect his premises daily; to provide sufficient pens for the hogs in store so that they shall not be crowded and rendered noisy and quarrelsome by discomfort while in confinement; and to use such other precautions as are necessary to render his place of business clean and wholesome.

No costs will be awarded to either party in this court.

The decree below as to costs is affirmed.

Morse and Grant, JJ., did not sit. The other Justices concurred.

Petition for rehearing overruled.

NEW YORK COURT OF APPEALS.

Maria STELZ

v.

Minnie SCHRECK et al.

(.....N. Y.)

A tenancy by the entirety is severed by an absolute divorce between the ten-

ants, and thereafter each holds his or her proportional share of the property as a tenant in common without survivorship.

(Earl, J., dissents.)

(October 6, 1891.)

CROSS-APPEALS by plaintiff and defendant Schreck from an order of the General

NOTE.—The rule as to estates by entirety, stated.

The rule in regard to estates by entirety is, that neither tenant can sever the union of interest without the consent of the other, but this is construed to mean that the one cannot sever the interest or

make any disposition of the estate so as to affect the right of survivorship. In the case of *Washburn v. Burns*, 34 N. J. L. 18, the court, in speaking of the husband's rights in an estate by entirety, says: "The limit of this right of the husband is, that he

Term of the Supreme Court, First Department, overruling their motions for new trial of an action in which plaintiff was permitted to recover dower in an equal undivided half of certain real estate. *Affirmed.*

Statement by Peckham, J.:

Cross-appeals by the plaintiff and the defendant, Schreck, from an order of the General Term, Supreme Court, First Department, which denied the motions of both plaintiff and the defendant, Schreck, for a new trial under section 1001 of the Code of Civil Procedure on their exceptions in the case.

The premises in question, situated on the south side of Fiftieth Street, in the City of New York, were conveyed by deed on April 28, 1886, to William Stelz and Minnie Stelz,

his wife, and by force thereof the grantees became seised as tenants by the entirety. After this conveyance, William Stelz, on June 20, 1888, obtained a decree of divorce from his wife, Minnie Stelz, now Minnie Schreck, on the ground of her adultery. On October 18, 1888, William Stelz married the plaintiff, and on February 8, 1889, he died, leaving the plaintiff, his widow. His former wife, Minnie Schreck, survived him, and she, during the lifetime of Stelz, married Joseph Schreck. The plaintiff brought this action claiming dower in all the land and premises, and asking that such dower be admeasured, contending that by the judgment of divorce all estate and interest of the first wife ceased and was at an end.

The first wife, however, claimed the whole

cannot do any act to the prejudice of the ulterior rights of the wife." 1 Bishop, Married Women, § 622; Ames v. Norman, 4 Sneed, 683.

Decree of divorce severs the estate.

It is the prevailing doctrine that a severance of the marital relation by divorce also severs the estate, and after divorce they no longer hold by entirety, but as joint tenants, or tenants in common, owing to the differing policies and laws of the States. 2 Bishop, Mar. & Div. 6th ed. § 716; Harter v. Wallner, 80 Ill. 197.

The integrity of the estate is dependent upon the united effect by the marital relation. Obviously, whenever this relation is terminated or destroyed, the estate which is but a parasite of the relation of matrimony, dies with it. "One legal person has been resolved by judgment of law into two distinct, individual persons, having in future no relations to each other; and with this change in their relations must necessarily follow a corresponding change of the tenancy dependent upon the previous relation. As they cannot longer hold in joint seisin, they must hold by moieties." See note to Den v. Hardenbergh, 18 Am. Dec. 371; 2 Bright, Husb. & W. 365.

A recent writer expresses the prevailing view in the following language: "There are differences of judicial opinion regarding this estate; as, for example, some deem husband and wife incapable of taking lands either jointly or in common, so that whatever the terms of a conveyance to them, they will hold by the entirety. Others permit them to take and hold as joint tenants or tenants in common if the deed is in express words that they shall. But all agree that this tenancy does not and cannot exist where there is no marriage. The consequence is that when the marriage ends by divorce it falls." Bayeart v. Kepler, 118 Ind. 84, 36, 10 Am. St. Rep. 94, 96; Bishop, Mar. & Div. § 1644.

Attitude of the courts as to estates of the entirety.

There is a very sturdy disposition upon the part of both the state and federal courts to resist any invasion of the ancient common-law doctrine of tenancy of the entirety. Whiton v. Snyder, 88 N. Y. 290; Baker v. Lamb, 11 Hun, 519; Wright v. Saddler, 20 N. Y. 320, 17 Alb. L. J. 303; Pollock v. Webster, 16 Hun, 104; Matteson v. New York Cent. R. Co. 63 Barb. 373; Wright v. Wright, 54 N. Y. 437; Taylor v. Young, 71 Pa. 81; Laws 1880, chap. 472; 11 Alb. L. J. 373, 402; 20 Alb. L. J. 303; 37 Alb. L. J. 162; Hulett v. Inlow, 57 Ind. 412, 23 Am. Rep. 64; Dexter v. Phillips, 121 Mass. 178, 23 Am. Rep. 299; Gerard, Real Estate Titles, 2d ed. 72, 84; Wms. Real Estate, 5th ed. 225, note.

If an estate in fee be given to a man and his wife, they are neither properly joint tenants, nor tenants in common; for, being one person in law, they cannot take the estate by moieties, but both are seised of the entirety,—the consequence of which 13 L. R. A.

is, that neither can dispose of any part without the assent of the other, but the whole must remain to the survivor. 2 Bl. Com. 128; Anderson, Law Dict. title, Entirety.

Under well-recognized rules of the common law parties occupying the relation of husband and wife were considered one person, and when land was conveyed to them as such, they held, not as joint tenants, but each being seised of the whole *per tout et non per my*, so that the survivor takes the whole, not by survivorship but by virtue of the original estate. Jackson v. Stevens, 16 Johns. 110, 115; Rogers v. Benson, 5 Johns. Ch. 431, 437, 1 L. ed. 1122, 1124; Barber v. Harris, 15 Wend. 615-617; Jackson v. McConnell, 19 Wend. 175, 177; Dias v. Glover, 1 Hoffm. Ch. 73, 77, 6 L. ed. 1069, 1070; Doe v. Howland, 8 Cow. 233; Torrey v. Torrey, 14 N. Y. 430; Den v. Hardenburgh, 10 N. J. L. 49; Shaw v. Hearsey, 5 Mass. 521; Thornton v. Thornton, 3 Rand. (Va.) 178; Ames v. Norman, 4 Sneed, 683; Rogers v. Grider, 1 Dana, 242; Cochran v. Kerney, 9 Bush, 192; Gibson v. Zimmerman, 12 Mo. 386; Stuckey v. Keefe, 26 Pa. 397-399; Taul v. Campbell, 7 Yerg. 319; 4 Kent. Com. 362; 2 Bl. Com. 128; Fairchild v. Chastelleaux, 1 Pa. 176; Johnson v. Hart, 6 Watts & S. 219; Ketohum v. Walsworth, 5 Wis. 102; Brownson v. Hull, 16 Vt. 309; Fisher v. Provin, 25 Mich. 347-351; Davis v. Clark, 26 Ind. 423; McDuff v. Beauchamp, 50 Miss. 531; Greenlaw v. Greenlaw, 13 Me. 132-136; 1 Washb. Real Prop. 273; Bertles v. Nunan, 22 N. Y. 152.

A married woman and her husband constitute but one person in law; and where real property is conveyed or devised to them together they do not take by moieties. Both are seised of the entirety, and not as joint tenants or tenants in common; and the survivor takes the entire estate; and the deed of one without the other (if living) is inoperative and void. Jackson v. Stevens, Jackson v. McConnell, Barber v. Harris, Torrey v. Torrey, and Doe v. Howland, *supra*.

This is the law in the State of New York as to joint ownership of husband and wife under the legislation of 1843, 1849, and 1860. Goelet v. Gori, 31 Barb. 314; Torrey v. Torrey, *supra*; Farmers & M. Nat. Bank v. Gregory, 49 Barb. 155; Freeman v. Barber, 3 Thomp. & C. 574; Beach v. Hollister, 3 Hun, 519.

A dictum in Meeker v. Wright, 76 N. Y. 262, supported by a divided court, unsettled the law for some time in that jurisdiction as it was supposed to indicate an opinion of the court of appeals that, in such cases, husband and wife took as tenants in common; but the question was finally set at rest by the decision in Bertles v. Nunan, 22 N. Y. 152, cited in the principal case, which held the law to be as stated in the context. This case overruled that of Feely v. Buckley, 28 Hun, 451. Gerard, Real Estate Titles, 3d ed. 67. See note to Baker v. Stewart (Kan.) 2 L. R. A. 434.

of the premises under the deed by right of survivorship notwithstanding the severance of the marital relations by the judgment of divorce. The court at the trial sustained the plaintiff's right to be endowed of an equal undivided half part of the land, on the ground that after judgment in the action for divorce the parties to such action became tenants in common.

Mr. George H. Kracht, for plaintiff:

The deed to William Stelz, and Minnie, his wife, created an estate by the entirety, and the consideration for the interest the said wife received in said estate from her said husband was her vow of fidelity, and she, as the wife of William Stelz, took the same upon condition implied in law that she would remain faithful to all the solemn obligations of the marriage relation; and upon breach of this implied condition, and a judgment dissolving the marriage in consequence of said breach, she forfeited her interest in said estate.

Absolute divorce from the bonds of matrimony has the same operation and effect as the death of the guilty party.

Browning v. Headly, 2 Rob. Va. 340; *Schouler, Husb. & W.* § 558; *Highley v. Allen*, 3 Mo. App. 524; *Wood v. Simmons*, 20 Mo. 363; *Bewick v. Renuick*, 10 Paige, 423, 4 L. ed. 1037; *Levins v. Sleator*, 2 G. Greene, 609; *Barber v. Root*, 10 Mass. 260; 3 Bl. Com. 183; *Fitzherbert, Natura Brevium*, 446-470; Co. Litt. 351; *Wigney v. Wigney*, L. R. 7 Prob. Div. 177.

The rules laid down in *Ames v. Norman*, 4 Sneed, 696; *Lash v. Lash*, 58 Ind. 528, and *Harrer v. Wallner*, 80 Ill. 197, are wrong in principle, contrary to reason and natural justice, and against public policy. *Bardley v. Waring*, 58 Ga. 86.

The guilty wife should not be rewarded for bringing about an absolute divorce for her adultery by having half of her former husband's property bestowed upon her, to enjoy the same in common with her paramour, her subsequent husband.

Biggs v. Palmer, 5 L. R. A. 340, 115 N. Y. 511. See *Wigney v. Wigney*, L. R. 7 Prob. Div. 228; *Piper v. Hoard*, 9 Cent. Rep. 445, 107 N. Y. 82; *Holman v. Johnson*, Cowp. 343.

The defendant, Minnie Schreck, is estopped by her own wrongful conduct from claiming title to the premises in question or any part thereof.

Bigelow, Estoppel, 370; *Herman, Estoppel*, §§ 731, 733, 740, 791; 2 Story, Eq. Jur. §§ 1533, 1544.

Mr. Edward W. Scudder Johnston, with **Mr. Lewis S. Goebel**, for defendant:

The deed to William Stelz and Minnie Stelz created a vested estate in the said Minnie Stelz to hold the whole of said estate jointly with the said William Stelz during the lives of both of them, and a vested right to take the whole of the said estate free from the interest of the other, upon surviving the said William Stelz, and these vested rights could not be divested by a subsequent decree of divorce whose effect was merely to sever the marital relation, and which, by its terms, went no further than that purpose.

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See 2 Kent, Com. 7th ed. 110; 6 Am. & Eng. Encyclop. Law, 894; Cord, Legal & Equitable Rights of Married Women, § 110a; Wms. Real Prop. p. 208; Chaffin, Real Prop. p. 304; *Jackson v. McConnell*, 19 Wend. 176; *Doe v. Howland*, 8 Cow. 277; *Dickinson v. Codwise*, 1 Sandf. Ch. 223, 7 L. ed. 308; *Fairchild v. Chastelleaux*, 1 Pa. 176; *Stuckey v. Keefe*, 26 Pa. 397; *Washburn v. Burns*, 34 N. J. L. 18; *Luz v. Hoff*, 47 Ill. 425; *Ross v. Garrison*, 1 Dana, 35; *Beevins v. Oline*, 81 Ind. 87; *Doe v. Wilson*, 4 Barn. & Ald. 303; *Maynard v. Maynard*, 36 Hun, 229; *Bertles v. Nunan*, 92 N. Y. 152; *Altna Ins. Co. v. Reah*, 40 Mich. 241; *Chandler v. Cheney*, 87 Ind. 898; *Barnes v. Loyd*, 37 Ind. 524; *Gibson v. Zimmerman*, 13 Mo. 386; *Bram v. Bram*, 34 Hun, 489; *Dean v. Metropolitan Elec. R. Co.* 119 N. Y. 546.

A divorce is a creature of the statute and its effect must be determined by the provisions of the law under whose authority it is granted. All existing rights already vested remain and are not thereby ended or taken away except such as are expressly taken away or affected by statute. There is nothing in the statutes which deprives a woman of a vested right acquired by her during her coverture, even though her husband obtained a divorce from her for her adultery.

The seisin of the entirety by each and the right of survivorship cannot be divested by subsequent statute, as these rights are conveyed by virtue of the grant and not by mere acquisition, nor will the decree of divorce disturb vested rights or gifts.

Bishop, Mar. & Div. § 670, p. 546; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Pray v. Stebbins*, 1 New Eng. Rep. 531, 141 Mass. 221; *Wait v. Watt*, 4 N. Y. 100; *Re Ensign*, 4 Cent. Rep. 376, 103 N. Y. 234; *Chase v. Chase*, 55 Me. 21; *Wells v. Wells*, 10 N. Y. S. R. 252.

An executed gift to a wife would not be set aside and revert back to the husband, where the wife was subsequently divorced from him for her cause, by the mere fact of the subsequent divorce.

Sanford v. Sanford, 45 N. Y. 723; *Borst v. Spelman*, 4 N. Y. 288; *Draper v. Jackson*, 16 Mass. 480; *Ward v. Krumm*, 54 How. Pr. 95; *Platt v. Grubb*, 41 Hun, 447.

The parties were, after the divorce, tenants in common of the land for their joint lives, with the remainder to the survivor.

1 Bishop, Married Women, § 621; *Gillespie v. Worford*, 2 Coldw. 632; *Allen v. McCullough*, 2 Heisk. 189; 1 Washb. Real Prop. 5th ed. p. 708; *Lewis's App.* 185 Mich. 340; *Thornton v. Thornton*, 3 Rand. (Va.) 182; *Jacobs v. Miller*, 50 Mich. 120.

Mr. S. Jones, with **Mr. A. S. Hammersley, Jr.**, guardian ad litem of respondents, H. and C. Koehler:

The original estate of said Minnie as a tenant by the entirety with her husband was reduced by the judgment of divorce to an estate of tenancy in common with him.

2 Bishop, Mar. & Div. § 716; *Ames v. Norman*, 4 Sneed, 683; *Lash v. Lash*, 58 Ind. 526; *Harrer v. Wallner*, 80 Ill. 197; *Re Benson*, 16 Nat. Bankr. Reg. 377; *Baggs v. Baggs*, 55 Ga. 590; *Freeman, Co-tenancy in Partition*, § 76; *Bright, Husb. & W.* p. 365; *Brownson v. Hull*, 16 Vt. 309

Peckham, J., delivered the opinion of the court:

We agree in this case with the views expressed by the learned judges who delivered the opinions at the special and general terms of the supreme court. The sole question arises out of the decree of divorce which the husband obtained from his first wife on account of her adultery.

Did that divorce have any, and if so what, effect upon the character of the holding of the real property by the former husband and wife? By the conveyance the husband and wife took an estate as tenants by the entirety. *Bertles v. Nunan*, 93 N. Y. 152; *Zornlein v. Bram*, 100 N. Y. 13, 1 Cent. Rep. 66.

Such a tenancy differs from all others. In one respect it is like a joint tenancy, in that there is a right of survivorship attached to both, but it is not a joint tenancy in substance or form. *Barber v. Harris*, 15 Wend. 615; *Jackson v. McConnell*, 19 Wend. 175; *Bertles v. Nunan*, *supra*.

It originated in the marital relation, and although the survivorship presents the greatest formal resemblance to joint tenancy, instead of founding the estate by the entirety upon the notion of joint tenancy, all the authorities refer it to the established effect of a conveyance to husband and wife pretty much independent of any principles which govern other cases. *Jackson v. McConnell*, *supra*.

At common law, husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person. These two real individuals, by reason of this relationship, took the whole of the estate between them, and each was seised of the whole and not of any undivided portion. They were thus seised of the whole, because they were legally but one person. Death separated them, and the survivor still held the whole, because he or she had always been seised of the whole, and the person who died had no estate which was descendible or devisable. Being founded upon the marital relation and upon the legal theory of the absolute oneness of husband and wife, when that unity is broken, not by death, but by a divorce *a vinculo*, it stands to reason that such termination of the marriage tie must have some effect upon an estate which requires the marriage relation to support its creation. The claim on the part of the counsel for the wife is that it is only necessary the parties should stand in the relation of husband and wife at the time of the conveyance, and at that time the estate vests, and no subsequent divorce can affect an estate which is already vested. But the very question is, What is the character of the estate which became vested by the conveyance? If it were of such kind that nothing but the termination of the marriage by the death of one of the parties could affect the estate conveyed, then, of course, the claim of the counsel is made out; but it is an assumption of the whole case to say that the estate vested was of the character he claims. When the idea upon which the creation of an estate by the entirety depends is considered, it seems to me much the more logical as well as

plausible view to say that, as the estate is built upon the unity of husband and wife, it never would exist in the first place but for such unity, anything that terminates the legal fiction of the unity of two separate persons ought to have an effect upon the estate whose creation depended upon such unity. It would seem as if the continued existence of the estate would naturally depend upon the continued legal unity of the two persons to whom the conveyance was actually made. The survivor takes the whole in case of death, because that event has terminated the marriage and the consequent unity of person. An absolute divorce terminates the marriage and unity of person just as completely as does death itself, only instead of one, as in case of death, there are, in the case of divorce, two survivors of the marriage, and there are, from the time of such divorce, two living persons in whom the title still remains. It seems to me the logical and natural outcome from such a state of facts is that the tenancy by the entirety is severed, and a severance having taken place each takes his or her proportionate share of the property as a tenant in common, without survivorship. It is said that in such case it ought to be a joint tenancy, but I see no reason for that claim. As it has been held that seisin by the entirety does not create a joint tenancy either in substance or form (19 Wend. *supra*), and as a tenancy by the entirety depended wholly upon the marital relationship, there can be no reason why the seisin should be turned into a joint tenancy by virtue of the very fact which terminated the unity of person upon which the right of survivorship is itself founded, and to which it owed its continued existence.

It is true that a conveyance of this kind, if made to two persons who were not husband and wife, would at common law have created a joint tenancy. But our Statute provides that every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be a joint tenancy (1 Rev. Stat. 727, § 44). This Statute did not reach an estate by the entirety, nor did the Statutes of 1848 and 1849 and 1860 and 1862 (*Bertles v. Nunan*, *supra*). It, therefore, still exists under our law.

We have seen, however, that a tenancy by the entirety is not a joint tenancy in form or substance. Upon what principle should the termination of the former species of tenancy, resulting from an absolute divorce, be changed into the latter in the face of our Statute relating to joint tenancies? The conveyance did not expressly declare that the tenancy was to be a joint tenancy, and therefore when the original character of the tenancy by the entirety is changed, it cannot be transformed into that of a joint tenancy without a clear violation of our Statute.

The counsel for the defendant urges that we are giving, by this decision, a retroactive effect to a decree of divorce in a case not warranted by the Statute and in violation of the well-settled rule in this State as to the effect of such a decree. He says that we change the effect of the deed of conveyance,

and that the decree of divorce not only severs the unity of person from the time of its entry, but that we allow it to date back to the date of the conveyance, and to give an effect to such conveyance that it did not have at the time of its execution. We think not.

We do not at all question the contention of the defendant's counsel that a decree of divorce in this State only operates for the future and has no retroactive effect or any other effect than that given by statute. But we hold that the character of the estate conveyed was such in its creation that it depended for its own continuance upon the continuance of the marital relation, and when that relation is severed, as well by absolute divorce as by death, the condition necessary to support the continuance of the original estate has ceased, and the character of the estate has for that reason changed. The estate does not revert in the grantor or his heirs, for no such condition can be found in the law or in the nature of the estate, and it must therefore remain in the grantees, but by an altered tenure. Their holding is now a holding of two separate persons, and for the reasons already given such holding should be by tenancy in common, and, of course, without any survivorship.

I think the contention that the first wife is entitled to the whole of the estate as survivor of her husband cannot be maintained. Although the question is new in this State, it has been somewhat debated in the courts of some of the other States. In *Harner v. Wallner*, 80 Ill. 197, and *Lash v. Lash*, 58 Ind. 526, and *Ames v. Normin*, 4 Sneed, 683, similar views to those we have herein stated are set forth. A contrary decision has been made in Michigan, in the case of *Lewis App.*,

reported in 85 Mich. 340. We have read the opinion in that case, but we feel that our own view is more in accord with legal principles, and we cannot, therefore, follow it.

Upon the defendant's appeal the judgment ought to be affirmed.

Upon the appeal of the plaintiff, her counsel contends that there is a condition annexed to the estate by the entirety which is implied by law, and the condition is that each of the grantees shall remain faithful to the obligations of the married state, and shall not, by his or her misconduct, cause a dissolution of the marriage relation upon which the estate depends. I find no warrant for implying any such condition in the character of the holding, and still less for the result which, as he claims, flows from a violation of such condition. Its violation (judicially determined) results, according to the plaintiff's argument, in the immediate vesting of the whole estate in the innocent party to the marriage, just the same as if the other party thereto were actually dead instead of divorced. None of the authorities treat the estate as dependent upon any such condition, and, however proper it might be to enact by legislative authority a condition of that nature, this court has not that power.

It is unnecessary to add anything further to the views which have been expressed by the learned judges of the supreme court in this case, and we are of the opinion that the judgment appealed from should be affirmed, and as neither party appealing has succeeded here, the affiance should be on both appeals, without costs.

All concur, except Earl, J., dissenting, and Finch, J., absent.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Mary E. O'BRIEN, *per Pro. Ami*,

v.

CUNARD STEAMSHIP CO. (Limited).

(.....Mass.....)

1. The vaccination of a passenger by a ship's surgeon will not constitute an assault if the passenger's behavior indicates consent, whatever may be his unexpressed feelings on the subject.
2. A steamship company is not answerable for the negligence, in vaccinating passengers, of a surgeon carried by it in obedience to law, if it has used due care in his selection and in procuring pure virus.
3. Evidence of the quarantine regulations at the port of discharge, and that printed information in regard thereto was posted in different parts of the ship, as well as that the reg-

ulations were enforced, is admissible in defense of an action by a passenger against a steamship company for vaccinating him.

(September 1, 1891.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for an assault upon plaintiff by defendant's agents in vaccinating her, or for injuries resulting from their negligence, in which a verdict was directed for defendant. *Overruled.*

The first count of the declaration was for an assault, and the second for negligence. The court ruled the plaintiff could not maintain her action on either count.

At the trial the court admitted, over plaintiff's objection, the following evidence: An order of the Board of Health of the City of

Note.—Negligence, when not imputable to employer for acts of employé.

Negligence is not imputable to a master where there is no evidence that his employé was not competent to perform the duties assigned to such employé. *Reese v. Biddle*, 2 Cent. Rep. 798, 112 Pa. 72.

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A principal using due care in the selection of an employé to accomplish a certain work as an independent employment, who selects his own means and methods, is not responsible for the negligence of such employé. See *note to St. Louis, I. M. & S. R. Co. v. Yonky* (Ark.) 9 L. R. A. 604.

Boston in regard to the examination of immigrants as regards their protection from small-pox which required all unprotected persons to be vaccinated or quarantined.

Evidence that the quarantine officials on the arrival of the steamer made an examination of all steerage passengers and passed all having tickets from the ship's surgeon and vaccinated or detained at quarantine all not having tickets or vaccination marks.

Also evidence that notices were posted up about the ship informing passengers of the necessity for vaccination.

Further facts appear in the opinion.

Messrs. E. N. Hill and Frederic Cunningham, for plaintiff:

It is no answer to a claim for an assault that the plaintiff submitted to it, if the circumstances are such that resistance would have seemed useless; consent obtained by a show of superior force, or under such circumstances that the will cannot be said to have acted freely, is not consent in contemplation of law.

Reg. v. Lock, L. R. 2 Cr. Cas. 10, and cases cited; *Rea v. Nichol*, Russ. & R. Cr. Cas. 180.

If negligence is shown on the part of the defendant, from which, under all the circumstances of the case, the jury can properly infer that the injury happened, the case should be submitted to the jury to determine whether such negligence was the proximate cause of the injury or not.

Holbrook v. Ulica & S. R. Co. 12 N. Y. 286; *Orandall v. Goodrich Transp. Co.* 16 Fed. Rep. 75; *Ross v. Boston & W. R. Co.* 6 Allen, 87.

The act was performed by the surgeon of the ship, and he used the virus furnished by the owners.

See *Moore v. Fitchburg R. Corp.* 4 Gray, 465.

It must be presumed that, being the surgeon of the ship, he was the surgeon provided in compliance with Act of Congress, Aug. 2, 1882, 22 U. S. Stat. at L. 188. If so, he was one of the crew of the ship, whom the owners of the ship are required to carry and pay, and whose services they are required to furnish to any of the passengers needing them, and for his failure to give those services promptly and properly, not the surgeon, but the master, the representative of the owners in our ports, is made liable to a penalty.

See *United States v. Thompson*, 1 Sumn. 176, and cases cited in note.

Where is the sense of holding, in the case of a pilot, that the owners are liable for his negligence even when they have had no power of selection, being obliged by law to take the first one that offers?—and in the case of a surgeon that they are not liable for his negligence, though they have had the opportunity of selecting him, unless in such selection they have been wanting in due care?—especially when the pilot is employed only for a single service, and the surgeon is one of the regular crew of the ship.

"*The China*," 74 U. S. 7 Wall. 53, 19 L. ed. 67.

Messrs. George Putnam and Thomas Russell, for defendant:

The defendants' entire duty to the plaintiff was to use all reasonable care to secure pure virus and a competent physician.

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It is conceded that they performed their duty in both particulars.

They are, therefore, not liable to the plaintiff for the malpractice of the surgeon.

McDonald v. Massachusetts Gen. Hospital, 120 Mass. 432; *Laudheim v. Royal Netherland S. S. Co.* 9 Cent. Rep. 732, 107 N. Y. 228; *Secord v. St. Paul, M. & M. R. Co.* 18 Fed. Rep. 221.

The liability of a master for the acts of his servants rests upon his right to be obeyed, and his presumed power to enforce obedience.

Quarman v. Burnett, 6 Mees. & W. 499, 509; *Shearm. & Redf. Neg. § 142, note*; *Cooley, Torts*, p. 532; *Bennett v. New Jersey R. & T. Co.* 36 N. J. L. 225, 227; *Little v. Hackett*, 116 U. S. 366, 376, 29 L. ed. 652, 655; *The Bernina*, L. R. 12 Prob. Div. 58, 66.

It would be unreasonable to hold, and the law does not hold, an employer responsible for the negligence of an employé in matters where he cannot lawfully control his action.

The passenger in a public conveyance or hired carriage is not responsible for the driver's negligence, because he has no lawful control over the driver.

Little v. Hackett and *The Bernina*, *supra*; *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161.

The employer of a physician to attend another has even less lawful control over the physician's methods of treatment than the passenger in a public carriage has over the conduct of the driver.

The case of the pilot is not an exception. Liability for his negligence rests partly upon the ground that public policy makes the ship responsible for its safe navigation by public agencies as well as by servants of its own selection; partly upon the power of the master to displace and control the pilot; and partly upon the ground that it is a rule of the General Admiralty Law, and not of the common law.

The China, 74 U. S. 7 Wall. 53, 67, 19 L. ed. 67, 72; *Yates v. Brown*, 8 Pick. 23.

Knowlton, J., delivered the opinion of the court:

This case presents two questions: first, whether there was any evidence to warrant the jury in finding that the defendant by any of its servants or agents committed an assault on the plaintiff; secondly, whether there was evidence on which the jury could have found that the defendant was guilty of negligence towards the plaintiff. To sustain the first count, which was for an alleged assault, the plaintiff relied on the fact that the surgeon who was employed by the defendant vaccinated her on shipboard while she was on her passage from Queenstown to Boston. On this branch of the case the question is whether there was any evidence that the surgeon used force upon the plaintiff against her will. In determining whether the act was lawful or unlawful the surgeon's conduct must be considered in connection with the surrounding circumstances. If the plaintiff's behavior was such as to indicate consent on her part he was justified in his act, whatever her unexpressed feelings may have been. In determining whether she consented he could be guided only by her overt acts and the mani-

festations of her feelings. *Ford v. Ford*, 143 Mass. 578, 3 New Eng. Rep. 785; *McCarthy v. Boston & L. R. Corp.* 148 Mass. 550, 552, 2 L. R. A. 608.

It is undisputed that at Boston there are strict quarantine regulations in regard to the examination of emigrants to see that they are protected from small-pox by vaccination, and that only those persons who hold a certificate from the medical officer of the steamship stating that they are so protected, are permitted to land without detention in quarantine, or vaccination by the port physician. It appears that the defendant is accustomed to have its surgeons vaccinate all emigrants who desire it and who are not protected by previous vaccination, and give them a certificate, which is accepted at quarantine as evidence of their protection. Notices of the regulations at quarantine, and of the willingness of the ship's medical officer to vaccinate such as needed vaccination were posted about the ship in various languages, and on the day when the operation was performed the surgeon had a right to presume that she and the other women who were vaccinated understood the importance and purpose of vaccination for those who bore no marks to show that they were protected. By the plaintiff's testimony, which in this particular is undisputed, it appears that about two hundred women passengers were assembled below, and she understood from conversation with them that they were to be vaccinated; that she stood about fifteen feet from the surgeon and saw them form in a line and pass in turn before him; that he examined their arms and passing some of them by, proceeded to vaccinate those that had no mark; that she did not hear him say anything to any of them; that upon being passed by they each received a card and went on deck; that when her turn came she showed him her arm; he looked at it and said there was no mark and that she should be vaccinated; that she told him she had been vaccinated before and it left no mark; that he then said nothing; that he should vaccinate her again; that she held up her arm to be vaccinated; that no one touched her; that she did not tell him she did not want to be vaccinated; and that she took the ticket which he gave her certifying that he had vaccinated her, and used it at quarantine. She was one of a large number of women who were vaccinated on that occasion without, so far as appears, a word of objection from any of them. They all indicated by their conduct that they desired to avail themselves of the provisions made for their benefit. There was nothing in the conduct of the plaintiff to indicate to the surgeon that she did not wish to obtain a card which would save her from detention at quarantine, and to be vaccinated, if necessary for that purpose. Viewing his conduct in the light of the surrounding circumstances, it was lawful; and there was no evidence tending to show that it was not. The ruling of the court on this part of the case was correct.

The plaintiff contends that if it was lawful for the surgeon to vaccinate her the vaccination was negligently performed. "There was no evidence of want of care or precaution by the defendant in the selection of the surgeon, or in the procuring of the virus or vaccine mat-

ter." Unless there was evidence that the surgeon was negligent in performing the operation, and unless the defendant is liable for this negligence, the plaintiff must fail on the second count.

Whether there was any evidence of negligence of the surgeon we need not inquire, for we are of opinion that the defendant is not liable for his want of care in performing surgical operations. The only ground on which it is argued that the defendant is liable for his negligence is that he is a servant engaged in the defendant's business and subject to its control. We think this argument is founded on a mistaken construction of the duty imposed on the defendant by law. By the 6th section of the Act of Congress of August 2, 1882 (22 U.S. Stat. at L. 188) it is provided that "every steamship or other vessel carrying or bringing emigrant passengers, or passengers other than cabin passengers, exceeding fifty in number, shall carry a duly competent and qualified surgeon or medical practitioner, who shall be rated as such in the ship's articles, and who shall be provided with surgical instruments, medical comforts and medicines proper and necessary for diseases and accidents incident to sea voyages, and for the proper medical treatment of such passengers during the voyage, and with such articles of food and nourishment as may be proper and necessary for preserving the health of infants and young children, and the service of such surgeon or medical practitioner shall be promptly given in any case of sickness or disease to any of the passengers or to any infant or young child of any such passengers, who may need his services. For a violation of either of the provisions of this section the master of the vessel shall be liable to a penalty not exceeding two hundred and fifty dollars."

Under this Statute it is the duty of the ship-owners to provide a competent surgeon whom the passengers may employ if they choose in the business of healing their wounds and curing their diseases. The law does not put the business of treating sick passengers into the charge of common carriers and make them responsible for the proper management of it. The work which the physician or surgeon does in such cases is under the control of the passengers themselves. It is their business, not the business of the carrier. They may employ the ship's surgeon, or some other physician or surgeon who happens to be on board, or they may treat themselves if they are sick, or may go without treatment if they prefer, and if they employ the surgeon they may determine how far they will submit themselves to his directions, and what of his medicines they will take and what reject, and whether they will submit to a surgical operation or take the risk of going without it. The master or owners of the ship cannot interfere in the treatment of the medical officer when he attends a passenger. He is not their servant engaged in their business and subject to their control as to his mode of treatment. They do their whole duty if they employ a duly qualified and competent surgeon and medical practitioner and supply him with all necessary and proper instruments, medicines, and medical comforts, and have him in readiness for such passengers as choose to employ him. This is the whole requirement of

the Statute of the United States applicable to such cases, and if, by the nature of their undertaking to transport passengers by sea, they are under a liability at the common law to make provision for their passengers in this respect, that liability is no greater. It is quite reasonable that the owners of a steamship used in the transportation of passengers should be required by law to provide a competent person to whom sick passengers can apply for medical treatment, and when they have supplied such a person it would be unreasonable to hold them responsible for all the particulars of his treatment when he is engaged in the business of other persons in regard to which they are powerless to interfere.

The reasons on which it is held in the courts of the United States and of Massachusetts that the owners are liable for the negligence of a pilot in navigating the ship, even though he is appointed by public agencies, and the master has no voice in the selection of him, do not apply to this case. *The China*, 74 U. S. 7 Wall. 53-57, 19 L. ed. 67, 72; *Yates v. Brown*, 8 Pick. 23. The pilot is engaged in the navigation of the ship, for which, on grounds of public policy, the owners should be held responsible. The business is theirs, and they have certain rights of control in regard to it. They may determine when and how it shall be undertaken, and the master may displace the pilot for certain causes. But in England it has been held that even in such cases the owners are not liable. *Carruthers v. Sydebotham*, 4 Maule & S. 77; *The Protector*, 1 W. Rob. 45; *The Maria*, Id. 95.

The view which we have taken of this branch of the case is fully sustained by a unanimous judgment of the Court of Appeals of New York in *Laubheim v. De Koninglyke*, N. S. B. Co. 107 N. Y. 228, 9 Cent. Rep. 732. See also *Secord v. St. Paul, M. & M. R. Co.* 18 Fed. Rep. 221; *McDonald v. Massachusetts Gen. Hospital*, 120 Mass. 432.

We are of opinion that on both parts of the case the rulings at the trial were correct.

The evidence excepted to was rightly admitted.

Exceptions overruled.

OLD COLONY R. CO.

v.

FRAMINGHAM WATER CO.

(.....Mass.....)

1. Permission to a water company to take water from a pond the shores of

NOTE.—Principles in the law of eminent domain.

The public health of cities demands an ample supply of fresh water, and for this purpose land may be condemned for necessary facilities required in supplying cities with water. *Wayland v. Middlesex County Comrs.* 4 Gray, 500; *Kane v. Baltimore*, 15 Md. 240; *Thorn v. Sweeney*, 12 Nev. 251; *Olmsted v. Morris Aqueduct Proprs.* 46 N. J. L. 406; *Bailey v. Woburn*, 136 Mass. 416; *Lake Pleasanton Water Co. v. Contra Costa Water Co.* 67 Cal. 659.

In like manner, supplies of water required for health and comfort may be condemned. *Martin v. Gleason*, 139 Mass. 183; *Burden v. Stein*, 27 Ala. 104. 13 L. R. A.

which have already been appropriated to public use, and also to take and hold all land necessary for raising, holding and purifying it, impliedly authorizes the taking of previously appropriated land on the shore of the pond for a pumping station and filtering gallery, together with a right of way thereto, where such land is not indispensable to the prior appropriator while the water company could only with difficulty, if at all, do business without it.

2. A provision that a water company may be required to give security to the selectmen of the town for the payment of all damages awarded for lands taken by it, which may, upon becoming insufficient, be required to be increased, sufficiently provides for compensation to justify the taking of the land.

(May 19, 1891.)

R E P O R T by the Supreme Judicial Court for Suffolk County (Field, Ch. J.) for the opinion of the full court of an action brought to restrain defendant from entering upon or using plaintiff's land. *Bill dismissed.*

The facts sufficiently appear in the opinion.

Mr. J. H. Benton, Jr., for plaintiff:

The taking upon the validity of which defendant's right to cross plaintiff's location wholly depends is a taking of a right of way across the location and tracks of an operated railroad. Such a taking is not within the authority given by the general language of the Act.

Springfield v. Connecticut River R. Co. 4 Cush. 63; *Boston & M. R. v. Lowell & L. R. Co.* 124 Mass. 368; *Quincy v. Boston*, 148 Mass. 332.

Land appropriated to the public use of a railroad cannot be taken for any other public use without specific legislative authority. The only question, therefore, is whether the land covered by the railroad location between the tracks and the pond had been appropriated to railroad use at the time the location of the Water Company was filed. In other words, the question is, What constitutes an appropriation of land to a public use?

The term "appropriated" has been said to "embrace every mode by which property may be applied to the use of the public."

Boston & L. R. Corp. v. Salem & L. R. Co. 2 Gray, 35.

The real question is, Has the land been impressed with a public trust, so that it is the duty of the corporation to hold and use it for railroad purposes?

Boston & M. R. v. Lowell & L. R. Co. 124 Mass. 368; *Re Boston & A. R. Co.* 53 N. Y. 574; *State v. Montclair R. Co.* 85 N. J. L. 328; *Re New York, L. & W. R. Co.* 99 N. Y. 12, 21;

' The public have a right to an ample supply of pure water, and the company to which the right of taking land has been granted has the capacity to appropriate enough for that purpose, but the appropriation must not be in excess of the actual necessities of the case. *Spring Valley Water Works v. San Mateo Water Works*, 64 Cal. 123.

In Massachusetts the great ponds are regarded as public property, and the riparian owner cannot claim damages for water drawn off by an aqueduct company, under legislative authority. *Fay v. Salem & D. A. Co.* 111 Mass. 27.

Under a statute authorizing a city to take the

Evergreen Cemetery Asso. v. New Haven, 43 Conn. 234, 241; *Proprietors of Locks & Canals v. Lowell*, 7 Gray, 233; *Worcester v. Western R. Corp.* 4 Met. 584; *Boston & M. R. v. Cambridge*, 8 Cush. 287.

Land acquired for station purposes is appropriated to public use.

Norwich & W. R. Co. v. Worcester County Omra, 151 Mass. 69.

An appropriation to public use does not require actual occupation of the land.

If a railroad company acquires five acres of land for terminal freight yards and tracks convenient and suitable for that purpose in anticipation of the growth of business, and covers only a portion with yards and tracks, intending to cover the remainder as the business requires, it cannot be properly said that only the portion actually covered and built upon is appropriated to railroad purposes.

State v. Montclair R. Co. 34 N. J. L. 828; *Hendricks v. Johnson*, 6 Port. (Ala.) 473; *McDougle v. Clark*, 7 B. Mon. 448.

Where two companies commenced proceedings to condemn the same land, it was held that that company was entitled to condemn which first began proceedings.

Lake Merced Water Co. v. Coules, 31 Cal. 215. See also *Morris & E. R. Co. v. Blair*, 9 N. J. Eq. 685; *Sioux City & D. M. R. Co. v. Chicago*, M. & St. P. R. Co. 27 Fed. Rep. 770.

The necessity for land for railroad use is not confined to a present necessity, but is to be decided with reference to the prospective business of the company.

Re New York & H. R. Co. v. Kip, 46 N. Y.

546, 554; *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345; *St. Paul U. D. Co. v. St. Paul*, 30 Minn. 363.

But this land was "occupied" by the Railroad Company within the rule established by this court in similar cases.

Wesleyan Academy v. Wilbraham, 99 Mass. 599; *Massachusetts Gen. Hospital v. Somerville*, 101 Mass. 319; *New England Hospital v. Boston*, 113 Mass. 518; *Trinity Church v. Boston*, 118 Mass. 164.

When it has been decided that land is necessary for a public use, the decision cannot be questioned in any collateral proceeding.

Prospect Park & O. I. R. Co. v. Williamson, 91 N. Y. 552.

The question of whether a certain piece of land is necessary for a public use, is not a judicial question at all, and cannot be passed upon by the court.

Mississippi & R. R. Boom Co. v. Patterson, 98 U. S. 403, 406, 25 L. ed. 206, 207.

Whether the land was reasonably necessary, and what uses of it would promote the purposes for which the corporation was established, was properly determined by its own officers in the exercise of their honest judgment and discretion.

Massachusetts Gen. Hospital v. Somerville, 101 Mass. 319.

The reasoning by which legislative intent is established in a case like this is the same as that by which a right of way by necessity is established, and rests wholly upon the fundamental fact that the grant cannot otherwise take effect. Grants to private persons by im-

waters of great ponds for the purpose of supplying its inhabitants with water, and providing for the payment of damages, the owners of mill privileges along the outlet of such ponds are entitled to compensation for the privileges thus destroyed or impaired, and parties who are using the waters for other purposes than for power are entitled to damages. Each mill-owner can bring a proceeding, and a corporation owning a mill at some distance from the stream, the water being conveyed to it by a canal, may also bring a proceeding for the assessment of damages. *Watuppa Reservoir Co. v. Fall River*, 124 Mass. 267.

Water rights may be taken so far as may be necessary for the preservation and purity of water, including prescriptive rights to discharge sewage into such waters. *Gray v. Boston*, 139 Mass. 223.

A provision empowering the owners to appraise the compensation and fix the maximum of water to be taken is not unconstitutional; the latter provision enables the commissioners to determine the damages. *Re Middletown*, 82 N. Y. 196; *Mills, Em. Dom.* 2d ed. § 83.

The right of eminent domain remains in the aggregate body of the people in their sovereign capacity; and possession of private property may be resumed by them whenever the interest or even the convenience of the State is concerned. *Whitman v. Wilmington & S. R. Co.* 2 Harr. (Del.) 514, 38 Am. Dec. 419.

The people have the right to resume possession of property in the manner directed by the laws and Constitution of the State, whenever the public interest requires it. *Walker v. Gatlin*, 12 Fla. 15; *Bayard v. New York*, 7 N. Y. 825; *Weir v. St. Paul, & T. F. R. Co.* 18 Minn. 163. See *Varick v. Smith*, 5 Paige, 129, 3 L. ed. 668.

Land is no more property than a franchise. Both 13 L. R. A.

are subject to the right of eminent domain. *Minot v. Philadelphia, W. & B. R. Co.* 2 Abb. U. S. 336. See *West River Bridge Co. v. Dix*, 47 U. S. 6 How. 507, 12 L. ed. 586; *Brinfield Toll-Bridge Co. v. Hartford & N. H. R. Co.* 17 Conn. 454.

The only restriction upon this right of resumption for public use is that the property cannot be taken without just compensation to the owner, and in the mode prescribed by law. *Whiteman v. Wilmington & S. R. Co.* *supra*.

The Legislature may interfere with property held by a corporation for one public use and apply it to another, and without compensation where no private interests are involved or invaded. *People v. Kerr*, 27 N. Y. 188.

The Legislature may delegate this power to public officers, or to corporate bodies, municipal or other. It is a rule, however, that such delegation of power must be in express terms, or must arise from a necessary implication. *Re Boston & A. R. Co.* 53 N. Y. 574; *Boston W. P. Co. v. Boston & W. R. Co.* 23 Pick. 360; *Re Buffalo*, 68 N. Y. 167.

All property is held subject to an inherent right in the government to appropriate it to public use when the public good may require it to be done. *Alabama & F. R. Co. v. Kenney*, 39 Ala. 307.

The right of eminent domain is an attribute of sovereignty, and whatever exists in any form, whether tangible or intangible, may be subjected to the exercise of its power, and may be seized and appropriated to public uses when necessity demands it. *Metropolitan City R. Co. v. Chicago W. D. R. Co.* 87 Ill. 317, 324.

The Commonwealth may, by legislative enactment, duly authorize real estate to be taken from its own grantee. *Jackson v. Winn*, 4 Litt. 322; *Young v. McKenzie*, 3 Ga. 31; *Beekman v. Saratoga & S. R. Co.* 3 Paige, 45, 3 L. ed. 60.

plication "are limited to cases of strict necessity."

Buss v. Dyer, 125 Mass. 287.

Whatever is doubtful is decisively certain against the corporation.

Black v. Delaware & R. Canal Co. 24 N. J. Eq. 455, 485; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 662, 24 L. ed. 1086.

Convenience, even great convenience, is not sufficient to raise an implication of a grant.

Nichols v. Luce, 24 Pick. 102, 105.

If the Water Company had power by implication to make its location on the land of the Railroad Company, it must be because it could not by reasonable intendment accomplish the purpose of taking the waters of Farm Pond in any other way.

Springfield v. Connecticut River R. Co. 4 Cush. 63, 73.

An instance of implied authority from the general words of a legislative grant is found in the right of a railroad company to do things outside the location necessary in the construction of its railroad upon the location.

R. Dodge v. Essex County Comrs. 3 Met. 380.

But that implied authority is restricted to the things which are strictly necessary to be done, and does not arise merely because it is cheaper, more convenient, more fit and more suitable to do them than not to do them.

Estabrooks v. Peterborough & S. R. Co. 12 Cush. 224, 227. See also *Pettingill v. Porter*, 8 Allen, 1, 6; *Proprietors of Locks & Canals v. Lowell*, 7 Gray, 223; *Housatonic R. Co. v. Lee & H. R. Co.* 118 Mass. 391; *Providence & W. R. Co. v. Norwich & W. R. Co.* 138 Mass. 277.

The question in all these cases is whether it is to be presumed that the legislative attention was specially called to the state of things existing at the time the Act was passed, so that it must be assumed to have intended that the thing should be done which was necessary to exercise the franchise which it gave. The implication must be a necessary one.

Re Buffalo, 68 N. Y. 167; *Philadelphia G. & N. R. Co. v. Pennsylvania S. V. R. Co.* 16 Phila. 636; *People v. Thompson*, 98 N. Y. 6, 11; *New Jersey S. R. Co. v. Long Branch Comrs.* 39 N. J. L. 28; *Re Boston & A. R. Co.* 53 N. Y. 574; *Pennsylvania R. Co's App.* 93 Pa. 150, 159; *Pucker v. Sunbury & E. R. Co.* 19 Pa. 211.

The location by the Water Company is invalid, because the Act under which it is assumed to have been made does not provide compensation to the owners of land taken.

Powers v. Bears, 12 Wis. 214, 221; *Connecticut River R. Co. v. Franklin County Comrs.* 127 Mass. 50; *Ash v. Cummings*, 50 N. H. 591.

Messrs. J. G. Abbott and S. A. Phillips, for defendant:

The Legislature has the right to take property already appropriated to public purposes, for other public purposes.

Charles River Bridge v. Warren Bridge, 36 U. S. 11 Pet. 577, 9 L. ed. 836; *Boston W. P. Co. v. Boston & W. R. Corp.* 33 Pick. 860.

The defendant, in acting under its authority, was to be governed by its own discretion as to selecting the lands best situated to carry out the purposes of the grant. This selection was left to the defendant; its sound, reasonable and fair discretion was the only tribunal to

determine what lands were necessary for the purposes of the grant.

Boston W. P. Co. v. Boston & W. R. Corp. supra; *Re Buffalo*, 68 N. Y. 167; *Fall River Iron Works v. Old Colony & F. R. Co.* 5 Allen, 221; *New York Cent. & H. R. R. Co. v. Metropolitan G. L. Co.* 63 N. Y. 326.

The grant to the defendant authorized it to take any lands belonging to the plaintiff which were not necessary for the exercise of its franchise and the operating of its railway, although such land might be very useful, convenient and profitable to the plaintiff in the prosecution of its business.

Boston W. P. Co. v. Boston & W. R. Corp. supra.

The general authority given the defendant to take any lands to carry into execution the grant to it, made it the judge of what lands should be taken, and only required of it the exercise of a sound and reasonable judgment and discretion; and, if it is sought to go behind that judgment and discretion, it can only be done by assuming the burden of proving it to be unreasonable and unjust,—in fact, governed by improper and fraudulent motives.

Fall River Iron Works Co. v. Old Colony & F. R. Co., *Boston W. P. Co. v. Boston & W. R. Corp.*, *New York Cent. & H. R. R. Co. v. Metropolitan G. L. Co.* and *Re Buffalo, supra*.

In this matter the two rights and uses of the plaintiff and defendant can stand together, without any substantial interference with each other, and, when this condition of things exists, it is always holden that both rights should be sustained.

Peoria & P. U. R. Co. v. Peoria & F. R. Co. 105 Ill. 110; *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.* 97 Ill. 506; *East St. Louis O. R. Co. v. East St. Louis U. R. Co.* 108 Ill. 265; *Morris & E. R. Co. v. New Jersey Cent. R. Co.* 31 N. J. L. 205.

Knowlton, J., delivered the opinion of the court:

We will assume in favor of the plaintiff, without deciding, that the land taken by the defendant had been appropriated by the plaintiff to a public use, and that the plaintiff's right to it was in all respects as beneficial, in reference to a subsequent exercise by the Legislature of the right of eminent domain over it, as if it had originally been taken by the Railroad Company under the authority of the Statute. There can be no doubt that the Legislature may take, or authorize a corporation to take, land for a public use, which has previously been appropriated by legislative authority to a different public use. *Boston W. P. Co. v. Boston & W. R. Corp.* 33 Pick. 360; *Charles River Bridge v. Warren Bridge*, 36 U. S. 11 Pet. 577, 9 L. ed. 836; *Cary Library v. Bliss*, 151 Mass. 364, 379, 7 L. R. A. 765. But it will not be deemed to have done so unless its intention so to take such land is plainly manifested in the Statute. *Housatonic R. Co. v. Lee & H. R. Co.* 118 Mass. 391; *Providence & W. R. Co. v. Norwich & W. R. Co.* 138 Mass. 277; *Re Buffalo*, 68 N. Y. 167; *People v. Thompson*, 98 N. Y. 6; *New Jersey S. R. Co. v. Long Branch Comrs.* 39 N. J. L. 28.

We are therefore brought directly to the question on which the decision of this case must

turn,—whether, by Stat. 1884, chap. 271, the Legislature intended to authorize a taking of land on the border of Farm Pond, which had already been properly procured for a public use by the plaintiff corporation. Section 2 of this chapter provides, among other things, that “the defendant corporation shall have all the rights which belong to the Town of Framingham and the inhabitants thereof . . . to take, use, and hold of the waters of Farm Pond and Sudbury River . . . so much as may be necessary for the purposes specified in section one, . . . and may also take and hold by purchase or otherwise all necessary lands for raising, diverting, flowing, and holding said waters, and securing and preserving the purity of the same, and such other lands in the Town of Framingham as may be necessary to construct and maintain one or more storage and distributing reservoirs, and may do many other specified things; and in general may do any other acts and things necessary, convenient, or proper for carrying out the purposes of this Act.” The Legislature must be presumed to have been familiar with the situation and use of the lands about Farm Pond. At the time of the passage of the Statute referred to the waters of the pond had been taken by the City of Boston for a public use, and the entire shore of the pond had been purchased or taken and was then held for a public use, either by the City of Boston, or by the plaintiff corporation, or by the Boston & Albany Railroad Company, except a small portion, which was owned by the last-mentioned company, and which was not suitable to defendant’s pumping station. Nothing is expressly stated in the Statute in regard to taking property which was then held for a public use, but the right to do this was necessarily involved. The water of the pond could be taken only by diverting it from the City of Boston, which was then drawing it for the use of its inhabitants. No suitable place for a pumping station or a filtering gallery could be taken on the shore of the pond without taking it from a corporation which was then holding it for a public purpose. Doubtless it would have been possible for the defendant to erect its pumping station at a distance from the pond, and to draw the water out through a conduit, but even then it would have been necessary to construct the conduit across land which was held for a public use, and it would have been difficult and expensive so to construct the works, and very difficult, if not impossible, to provide a filtering gallery there. In considering what was the intention of the Legislature in regard to taking the plaintiff’s lands, the use to which it was then being put must not be overlooked. While it was properly procured and rightly held for the accommodation of the plaintiff’s growing business at the station, it was not necessary to the enjoyment of the plaintiff’s franchise, and was not then actually being used at all. The rights intended to be given by the Statute are not the same in reference to this land as in reference to land over which the main tracks of

the railroad are laid. It may well be held that this Statute does not go far enough to authorize the taking of land without which the plaintiff could not operate its railroad. *Boston W. P. Co. v. Boston & W. R. Corp.* 23 Pick. 360.

But the case last cited is an authority which decides that by mere implication, and without express statement, the Legislature may be held in a given case to have authorized the taking of land held by a corporation for a public use where the taking does not seriously interfere with the enjoyment by the corporation of its franchise. In the present case the judge found that the land taken is not indispensably necessary for the purposes of the plaintiff, and the plaintiff’s conduct in consenting to the erection of the defendant’s works, and in permitting them to remain there a long time without objection, shows the same thing. The judge found at the trial that the place selected by the defendant for its pumping station was the most suitable and proper place for it, although it would not have been impracticable to put it elsewhere. In view of all the circumstances, we are of opinion that the Statute authorized the defendant to take the plaintiff’s land for the public use to which it is now being put. The right to cross the plaintiff’s tracks to gain access to this land was also properly taken. If the land had been conveyed to the defendant by a deed from the plaintiff, the defendant would have had a way of necessity by implication. If a right of way over the location of the railroad to gain access to this land cannot be taken under any other provision of the Statute, it can under the last clause of the section above quoted.

The provision for compensation for the land taken is sufficient.* It is precisely the same as that contained in Pub. Stat., chap. 113, § 97, in reference to land taken for a railroad, except that the selectmen of the town are made the tribunal to determine the sufficiency of the security, instead of the county commissioners. Under the Constitutions of several of the States, and probably under the decisions of the courts in some others, this provision for compensation would not be held sufficient, and a statute of this kind would be unconstitutional; but in this Commonwealth the law is settled differently. *Brickett v. Haverhill Aqueduct Co.* 142 Mass. 394, 2 New Eng. Rep. 818; *Woodbury v. Marblehead Water Co.* 145 Mass. 509, 5 New Eng. Rep. 504; *Bigelow v. Union F. R. Co.* 187 Mass. 478. See also *Cushman v. Smith*, 84 Me. 247; *Pittsburgh v. Scott*, 1 Pa. 309; *Rubottom v. McClure*, 4 Blackf. 505.

Bill dismissed.

*Mass. Stat. 1884, chap. 271, § 11, provides that the owner of land taken thereunder by the said Water Company may, upon application by either party, require the Company to give security to the selectmen of said town for payment of all damages that may be awarded to them; and if, upon petition of the owner, the security appears to the selectmen to have become insufficient, they shall require the giving of further security. [Rep.]

CALIFORNIA SUPREME COURT.

Pio PICO, Appt.,

v.

Julius B. COHN, Admr., etc., of B. Cohn,
Deceased, et al., Resp'ts.

(.....Cal.....)

Perjured testimony procured by bribery on the part of the successful party is not ground for setting aside a decree, although there is a reasonable certainty that the result of a new trial would be different.

(February 11, 1891.)

APPPEAL by plaintiff from a judgment of the Superior Court for Los Angeles County in favor of defendants in an action brought to set aside a decree between the same parties alleged to have been procured by fraud. *Affirmed*.

The facts are stated in the opinion.

Mr. O. P. Evans, with *Messrs. Anderson, Fitzgerald & Anderson, Del Valle & Munday and Smith, Winder & Smith*, for appellant:

Equity may cancel and set aside or restrain judgments and decrees of any court, obtained by a fraud practiced upon the court and the losing party. When a judgment or decree of any court has been obtained by fraud, the fraud is regarded as perpetrated on the court, as well as upon the injured party.

2 Pom. Eq. Jur., cited in *Baker v. O'Riordan*, 65 Cal. 370; Story, Eq. Pl. § 426.

The limitations of the rule are that the fraud must have been practiced in the very act of obtaining the judgment.

Zellerbach v. Allenberg, 67 Cal. 298, citing *United States v. Throckmorton*, 98 U. S. 65, 25 L. ed. 95.

Judgments are impeachable for those frauds only which are extrinsic to the merits of the case.

Duchess of Kingston's Case, 20 How. St. Tr. 855, 554; *Amador C. & M. Co. v. Mitchell*, 59 Cal. 178.

Fraud alleged was extrinsic to the judgment. *United States v. Throckmorton*, *supra*.

Whenever one party by any contrivance prevents his adversary from having equality with him before the courts, he commits a fraud upon public justice, which, resulting in private injury, may be the ground of equitable relief against the judgment recovered.

United States v. Flint, 4 Sawy. 51; *Lasith v. McDonald*, 7 Kan. 254, 12 Kan. 340; *Fabritius v. Cook*, 8 Burr. 1771; *Verplanck v. Van Buren*, 76 N. Y. 247; *Ocean Ins. Co. v. Fields*, 3 Story, 73.

The rule that judgments will not be set aside merely because they are founded upon a forged instrument, or upon false, or even perjured testimony, does not apply where there is shown to be "some peculiarity attending such a case which will justify the interference of the court." *Vaughn v. Johnson*, 9 N. J. Eq. 178.

Any fact which clearly shows it to be against conscience to execute a judgment, and of which the injured party might have availed himself at law, but was prevented by fraud or accident, unmixed by any fault or negligence in himself or his agent, will justify an application to a court of equity.

Marine Ins. Co. v. Hodgson, 11 U. S. 7 Cranch, 385, 3 L. ed. 363; *Cairo & F. R. Co. v. Titus*, 27 N. J. Eq. 106; *Moffatt v. United States*, 112 U. S. 33, 19 L. ed. 635; *Dringer v. Jewett*, 8 Cent. Rep. 560, 42 N. J. Eq. 573.

A judgment or award obtained by false testimony, fraudulently given by the party benefited thereby, is voidable.

Jordan v. Volkering, 73 N. Y. 306. See also *Harris v. Cornell*, 80 Ill. 54, and *Doughty v. Doughty*, 27 N. J. Eq. 315; *Brooks v. O'Hara*, 8 Fed. Rep. 538.

The fraud is not to be presumed; it is to be alleged and at the proper time proved. With-

NOTE.—Perjury as ground for new trial.

Conviction of perjury is necessary before a new trial will be granted on the ground of perjury of a witness. *Enitz v. Schmidt*, 12 Jones & S. 337.

The fact that a witness who swore falsely on a former trial now deposes that he will tell the truth is not sufficient newly discovered evidence to warrant granting a new trial. *Loucheine v. Strouse*, 49 Wis. 623.

An equitable action cannot be maintained to annul a judgment upon the ground that the opposite party and his witnesses conspired together to obtain a judgment by perjury and fraud, and that the judgment was obtained by false evidence. The fraud which will justify equitable interference in setting aside a judgment or decree must be actual and positive, not merely constructive; it must be fraud occurring in the concoction or procurement of the judgment or decree, which was not known to the party at the time. *Ross v. Wood*, 70 N. Y. 8.

Where issues have been litigated in a former action, they cannot be retried in another between the same parties upon allegations that fraud, perjury, and conspiracy have been committed by the prevailing party and his witnesses. *New York Cent. R. Co. v. Harrold*, 65 How. Pr. 89.

And under our system of practice, where the 18 L. R. A.

court has jurisdiction of both law and equity, with power to relieve from unconscionable judgments on motion to the same extent as was formerly done by the court of chancery, a party who has litigated his case to the fullest extent in a common-law action cannot himself become plaintiff, and under the guise of an equity suit in the same court, and perhaps before the same judge, compel a retrial of the same question. Such a practice is opposed to the general policy of our law. *Interest reipublice ut sit Ante litem litem. Ibid.*

It was decided by the Court of Appeals in the case of *Ross v. Wood*, 70 N. Y. 8, that an equitable action cannot be maintained to annul a judgment rendered upon conflicting evidence, upon the ground that the opposite party and his witnesses conspired together to obtain a judgment by perjury and fraud, and that the judgment was obtained by false evidence. *Bearnes v. Bearnes*, 66 How. Pr. 466.

In *New York Cent. R. Co. v. Harrold*, *supra*, it was held that "where it appears that the same matter has been actually tried, or so in issue that it might have been tried, the party is estopped from applying to a court of equity to set aside the judgment because of fraud, for the reason that the judgment is the highest evidence and cannot be contradicted."

out this, the case is one of mere perjury, and comes within the rule; with it, it does not.

This case presents every element required by the affirmative rule and clearly comes within its provisions.

See *Maine Ins. Co. v. Hodgson*, 11 U. S. 7 Cranch, 335, 3 L. ed. 333; *United States v. Flint*, 4 Sawy. 51; *Steel v. St. Louis Smelt. & Ref. Co.* 106 U. S. 453, 37 L. ed. 233.

The *Throckmorton Case* was decided upon the ground of the negligence of the government officials in failing to make the defense, as they could readily have done on the former trial. The case therefore does not conflict with the cases cited by us.

The case is quite as strong as any that can be imagined; for here the false testimony was given under the immediate and impending influence of the bribe, exerted on the witness at the very time he was testifying. The fraud was "practiced in the very act of obtaining judgment."

Zellerbach v. Allenberg, 87 Cal. 298.

"It was perpetrated on the court as well as on the injured party" (*Baker v. O'Riordan*, 65 Cal. 370; 2 Pom. Eq. Jur. 919); and the court was "misled."

Amador C. & M. Co. v. Mitchell, 59 Cal. 178.

Messrs. Stephen M. White and A. Brunsen, for respondent:

The judgment which it is sought to set aside is the result of plaintiff's deliberate act, and he cannot avoid the consequences of his negligence.

Richmond v. Robinson, 24 Gratt. 551; *Ross v. Wood*, 70 N. Y. 8; *Barker v. Elkins*, 1 Johns. Ch. 465, 1 L. ed. 210; *Dodge v. Strong*, 2 Johns. Ch. 228, 1 L. ed. 357, and note c; *Gould v. Loughran*, 19 Neb. 392; *Horn v. Queen*, 4 Neb. 106; *Lansing v. Eddy*, 1 Johns. Ch. 49, 1 L. ed. 55; *Foster v. Wood*, 6 Johns. Ch. 87, 3 L. ed. 68; *Brick v. Burr*, 47 N. J. Eq. 199; *Smith v. Allen*, 68 Ill. 475; *Blackburn v. Bell*, 91 Ill. 442; *Marine Ins. Co. v. Hodgson*, 11 U. S. 7 Cranch, 333, 3 L. ed. 333; *Ocean Ins. Co. v. Fields*, 2 Story, 59; *Hendrickson v. Hinckley*, 58 U. S. 17 How. 443, 15 L. ed. 128; *Kibbe v. Benson*, 84 U. S. 17 Wall. 628, 21 L. ed. 742; *Orin v. Handley*, 14 U. S. 658, 34 L. ed. 218; *Brown v. Buena Vista County*, 95 U. S. 159, 24 L. ed. 423; *Knox County v. Harshman*, 133 U. S. 152, 33 L. ed. 556.

The plaintiff must be without "fault or blame," or he cannot recover.

Higgins v. Bullock, 78 Ill. 206.

If the defendant has omitted to file a bill for the discovery of facts known to him and material to his defense, and suffered the case to go to trial without adequate proof of such facts, he cannot afterwards claim an injunction or a new trial from a court of equity; for it is his own folly not to have filed a bill for the discovery and to have procured a stay of the trial until the discovery.

Weir v. Vail, 65 Cal. 468.

This authority is directly applicable here, where the plaintiff knew that Johnson was testifying falsely, and yet never even asked for a continuance.

See also *Bland v. Pope*, 4 J. J. Marsh. 595; *Finley v. Tyler*, 8 T. B. Mon. 400; Hayne, *New Trial & App.* § 91; *Board of Regents v. Linscott*, 30 Kan. 240.

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The facts stated in the complaint do not warrant the interference of equity.

They do not show the commission of a fraud of a character to justify the court in setting aside its judgment.

Perjured evidence is not sufficient to authorize a court of equity to overturn a judgment.

United States v. Throckmorton, 98 U. S. 63, 25 L. ed. 95; *Greene v. Greene*, 2 Gray, 363; *Hilton v. Guyott*, 42 Fed. Rep. 252; *Bigelow, Estoppel*, 5th ed. p. 807; *Zellerbach v. Allenberg*, 87 Cal. 296; *Sewel v. Freeston*, 1 Ch. Cas. 65; *United States v. White*, 17 Fed. Rep. 561, 9 Sawy. 125; *Smith v. Lowry*, 1 Johns. Ch. 324, 1 L. ed. 157; *Dringer v. Jewett*, 8 Cent. Rep. 560, 42 N. J. Eq. 573.

A court of equity will not interfere with the judgment of a court of law on the ground that a witness swore corruptly.

Cairo & F. R. Co. v. Titus, 27 N. J. Eq. 106. See also *Vaughn v. Johnson*, 9 N. J. Eq. 178; *Stratton v. Allen*, 16 N. J. Eq. 229; *Woodworth v. Van Buskerk*, 1 Johns. Ch. 482, 1 L. ed. 199; *Williams v. Lockwood*, Clarke, Ch. 172, 7 L. ed. 88; *United States v. Hancock*, 30 Fed. Rep. 858; *Cotzhausen v. Kerting*, 29 Fed. Rep. 821; *Demerit v. Lyford*, 27 N. H. 541; *Gott v. Carr*, 6 Gill & J. 209.

The credibility of testimony given in a case bearing upon the issue is not an extrinsic collateral act, but is a matter involved in the consideration of the merits, and the introduction of false testimony, known and shown to be so, does not affect the validity of the judgment rendered.

1 Herman, *Estoppel & Res Adjudicata*, 456; *Bigelow, Fraud*, p. 86, and note.

A new trial cannot be granted to give an opportunity to impeach the integrity and credit of a witness.

Duryee v. Dennison, 5 Johns. 248; *Smith v. Lowry*, 1 Johns. Ch. 320, 1 L. ed. 156.

An allegation that the judgment was obtained by false testimony is not sufficient.

Cottle v. Cole, 20 Iowa, 481; *Vance v. Burbank*, 101 U. S. 514, 25 L. ed. 929.

The mere concealment of facts, by either party to the suit, which might be beneficial to the other, is not such a fraud as will avoid a judgment.

Feld v. Flanders, 40 Ill. 474; Wells, *Res Adjudicata*, p. 393; *United States v. Hancock*, 30 Fed. Rep. 854; *Amador C. & M. Co. v. Mitchell*, 59 Cal. 176.

The failure of a party to introduce evidence known to him to exist, tending to overthrow his case, is not ground for a suit to set aside the judgment. It is not a fraud which is extrinsic or collateral to the matter examined in the first suit. *Re Griffith*, 84 Cal. 112.

Equity will not relieve on the ground that a witness was guilty of perjury.

Freem. Judgm. 3d ed. § 503; *Gray v. Barton*, 62 Mich. 186; *Flower v. Lloyd*, L. R. 10 Ch. Div. 527; *Allen v. Currey*, 41 Cal. 321.

Plaintiff is seeking to reopen the case that he may have an opportunity to impeach the witness Johnson. But this will not do.

Berry v. State, 10 Ga. 511; *People v. Anthony*, 56 Cal. 397; *Briencatter v. Palomares*, 66 Cal. 259; *Reed v. Drats*, 67 Cal. 491; *Hass v. Billings*, 42 Minn. 63.

Conceding, for the sake of argument, that

Johnson was bribed, and testified falsely, as stated in the complaint, no cause of action exists.

Smith v. Lewis, 3 Johns. 157; *Cotahausen v. Kerting*, 29 Fed. Rep. 821; *Hilton v. Guyott*, 45 Fed. Rep. 252; *Zellerbach v. Allenberg*, 67 Cal. 298; *Peck v. Woodbridge*, 3 Day, 30; *Gelston v. Codwise*, 1 Johns. Ch. 195, 1 L. ed. 110; *Demerit v. Lyford*, 27 N. H. 541; *Gott v. Carr*, 6 Gill & J. 309.

If a party willfully conceals a document, is his act any different in principle from that committed in suppressing oral testimony? Yet, in *Allen v. Currey*, 41 Cal. 321, it was definitely settled that the suppression of the truth is not enough.

See also *Field v. Flanders*, 40 Ill. 474; *Hillsborough v. Nichols*, 46 N. H. 379; *Dizon v. Graham*, 16 Iowa, 310.

No different rule should obtain regarding subornation of perjury.

Subornation of perjury is not a novel offense. The courts have long been annoyed by this crime.

Stearns v. United States, 73 U. S. 6 Wall. 590, 18 L. ed. 844; *Luco v. United States*, 64 U. S. 23 How. 541, 16 L. ed. 550; *United States v. Neleigh*, 66 U. S. 1 Black, 306, 17 L. ed. 146.

Beatty, Ch. J., delivered the opinion of the court:

This is a suit in equity to vacate and annul a final decree in another action between the same parties on the ground that it was procured by fraud. The superior court sustained a demurrer to the complaint, and thereupon gave judgment for the defendants, from which the plaintiff appeals. The principal question presented by the appeal, and the only question we find it necessary to consider, is whether the complaint, taken as true, presents a case entitling the plaintiff to the relief demanded or to any relief. It is alleged that in April, 1883, the plaintiff was owner of several parcels of real estate in Los Angeles, then worth over \$200,000, and of still greater value now. That one parcel of the land had been sold under decree of foreclosure and the time for redemption was about to expire. That there were other pressing liens resting upon the whole property, amounting, with the sum necessary to redeem the parcel sold, to about \$62,000 as then estimated. That plaintiff was anxiously endeavoring to raise money to effect such redemption and save his property from sacrifice. That one B. Cohn, since deceased, whose administrator is the principal defendant herein, offered to loan and did loan him the necessary sum, taking for security a grant absolute in terms of the incumbered property. The consideration expressed in the deed was the exact sum at which the liens and incumbrances on the land were estimated, — \$62,000. The value of the land was, as above stated, over \$200,000. Within a month or two after the execution of his deed, plaintiff tendered Cohn \$65,000, and demanded a reconveyance, which was refused, whereupon he commenced an action to compel a reconveyance, alleging in his complaint that his grant to Cohn was, in fact, a mortgage to secure a loan. Cohn answered, alleging that the transaction was an absolute

sale. Upon a trial of this issue the superior court found for the plaintiff, and decreed a reconveyance upon payment of \$103,000, this being the amount of the sum originally advanced by Cohn, and certain additional sum, which he was found to have expended subsequently in the compromise and settlement of other claims against the property. But on motion of the defendants in that action the superior court ordered a new trial unless the plaintiff would consent to a modification of the findings and decree, adding \$35,000 to the amount to be paid defendants upon reconveyance of the land; and, the plaintiff failing to consent to such modification, the order for a new trial was made absolute, and, upon appeal of the plaintiff, was affirmed by this court. 67 Cal. 258.

Thereupon a new trial was had in the superior court, but before a different judge, who found upon the principal issue in favor of the defendants, and decreed against the right of redemption. From that decree, and an order denying his motion for a new trial, the plaintiff again appealed to this court, where the decree and order were affirmed (78 Cal. 384), upon the ground that, the evidence being conflicting, the findings of the lower court could not be disturbed. It is to annul the decree so affirmed that the present action is brought and the fraud by which it was procured is shown by allegations in substance as follows: At the date of the original transaction with Cohn, Pico was an old man over eighty years of age, unable to speak or understand the English language, unused to complicated statements or accounts, easily deceived, and in great distress and trouble regarding his business affairs. He confided in Cohn, relied upon him implicitly, and at his solicitation abstained from consulting his usual legal advisers. In the conduct of the negotiations with Cohn the only other person present was one Pancho Johnson, who knew everything that took place, and well knew that the transaction was a loan and security, and not a purchase and conveyance absolute; and shortly after the execution of the deed, so stated in the presence of Pico's attorneys and numerous other persons. Relying on Johnson's knowledge of the transaction, and his statements concerning it, Pico called him as a witness on the first trial of the action to redeem, when, instead of testifying that the transaction was a loan and mortgage, he testified that it was a sale and absolute conveyance; but, in spite of his adverse testimony, the court, as above shown, found for the plaintiff. Before the cause came on for trial a second time, Johnson was dead; but his testimony, as given on the first trial, had been reduced to writing, and was on file among the papers in the case. Plaintiff and his counsel knew that this testimony was false in its general statement to the effect that the conveyance to Cohn was absolute, and they suspected that Cohn had bribed the witness to so testify; but they had no evidence of such bribery, although they had used the utmost diligence to discover it. Upon mature consideration, they decided at the second trial to put in evidence the written transcript of Johnson's testimony at the first

trial. Among their reasons for doing so were the following: Other testimony in the case showed that Johnson was present during the negotiations between Pico and Cohn, not only as interpreter, but as the particular friend and adviser of the former; and counsel for plaintiff feared that by omitting to offer Johnson's testimony they would incur the odium of suppressing evidence known to exist, whereas by putting it before the court they would have the advantage of some facts that they could prove by no other witness. They would have his admission of other facts inconsistent with the theory of a sale. The court would see that he was hostile to Pico, and he could be contradicted by proof of his statements made in the presence of others. Without going more fully into the reasons which induced counsel for plaintiff to submit the testimony of Johnson to the consideration of the court on the second trial of the former action, we content ourselves with saying that the allegations of the complaint show that the course pursued by them was, under the circumstances, wise and proper, if not absolutely necessary. But, contrary to their expectations, the court believed his false testimony, and for that reason alone decided against the plaintiff. In support of this conclusion the complaint sets out the substance of all the testimony of Cohn and Pico, and in detail the material portions of Johnson's testimony, from which, with other averments, it appears that but for Johnson's positive perjury and suppression of the truth the judgment here in question would not have been given. This being shown, it is next alleged that, after the final affirmance of that judgment by this court, plaintiff made the discovery that Cohn had paid Johnson \$2,000 to testify falsely. The particulars of this bribery and its discovery are detailed in the complaint and show that on the very morning that Johnson gave his testimony Cohn placed \$2,000 in the hands of one Forbes, with directions given in Johnson's presence to pay it to him if he testified to an absolute sale, and that, immediately after he had so testified, he demanded and received the money.

It is averred, and we think sufficiently shown, that upon proof of these facts there is a reasonable certainty that plaintiff would upon another trial gain his cause. Such being the case, is plaintiff entitled to a decree vacating and annulling the former decree on the ground that it was procured by fraud? After a careful and extended examination of the authorities, we are constrained to answer this question in the negative. That a former judgment or decree may be set aside and annulled for some frauds there can be no question, but it must be a fraud extrinsic or collateral to the question examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have ex-

hausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or, where an attorney fraudulently pretends to represent a party, and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest. *United States v. Throckmorton*, 98 U. S. 65, 66, 25 L. ed. 95, and authorities cited. In all such instances the unsuccessful party is really prevented by the fraudulent contrivance of his adversary from having a trial; but when he has a trial he must be prepared to meet and expose perjury then and there. He knows that a false claim or defense can be supported in no other way; that the very object of the trial is, if possible, to ascertain the truth from the conflict of the evidence, and that necessarily the truth or falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear. If, unfortunately, he fails, being overborne by perjured testimony, and if he likewise fails to show the injustice that has been done him, on motion for a new trial, and the judgment is affirmed on appeal, he is without remedy. The wrong, in such case, is, of course, a most grievous one, and no doubt the Legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied. Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice; and so the rule is that a final judgment cannot be annulled merely because it can be shown to have been based on perjured testimony; for, if this could be done once, it could be done again and again, *ad infinitum*. But counsel for appellant seek to distinguish this case from those in which it has been held that a judgment will not be set aside by reason of its being based upon forged documents or perjured testimony. They say that the fraud committed by Cohn was the bribing of Johnson: that this was collateral and extrinsic; that it was not, and could not have been, the subject of investigation at the trial of the original action. We do not think this distinction can be maintained. The fraud which Cohn committed was the production of perjured evidence in support of his defense. The means by which he induced the witness to swear falsely was but an incident. It may be safely asserted that a witness does not often deliberately perjure himself without being induced thereto by some fraudulent or corrupt practice on the part of him who gets the advantage of the perjury. It is a matter of indifference what particular form such corrupt practice takes. The evil

and the wrong is in the perjury which follows. In this case the truth of Johnson's evidence was necessarily drawn in question at the trial, and determined by the decision of the court; and all that has since been discovered is another item of testimony bearing on that point. We cannot find any substantial ground upon which this case can be distinguished from *United States v. Throckmorton*, *supra*. The decision in that case has been approved by this court as recently as *Re Griffith*, 84 Cal. 118. The following decisions of this court are also in point: *Allen v. Currey*, 41 Cal. 321; *Amador C. & Min. Co. v. Mitchell*, 59 Cal. 176.

Many other authorities to the same effect are cited in the brief for respondents. On the other hand, the case of *Laithe v. McDonald*, 7 Kan. 254, 12 Kan. 340, directly supports the position of appellant, as does the case of *Fabritius v. Cock*, 8 Burr. 1771. The cases of *Verplanck v. Van Buren*, 76 N. Y. 247, and *Dringer v. Jewett*, 42 N. J. Eq.

573, 8 Cent. Rep. 560, contain expressions which seem to imply the same doctrine, but they do not directly support it. Other cases cited by appellant are less in point.

We think, on the whole, that it is settled by the great weight of authority that the plaintiff's action cannot be maintained, and that the judgment of the Superior Court must be affirmed.

So ordered.

We concur: **McFarlin, J.; Sharpstein, J.; Paterson, J.**

A rehearing of the case was subsequently granted and on September 10, 1891, the following opinion was handed down:

Per Curiam:

After a full consideration of the argument presented upon the rehearing in this cause, we are satisfied with the former decision rendered in February, and for the reasons there given the judgment appealed from is affirmed.

TEXAS SUPREME COURT.

**W. J. FREES, Surviving Partner, etc., *Pff.*
in Err.,
v.**

George BAKER.

(...Tex....)

The liability of a surety on an unmatured obligation is a lawful debt, claim or demand which will make a transfer of goods to him by the debtor, on his assuming the obligation, valid as to other creditors, under a statute giving "creditors, purchasers, or other persons" the right to take sufficient property from their debtor to satisfy bona fide claims.

(May 23, 1891.)

NOTE.—Indemnity of surety.

§ The authorities are uniform in holding that it is among the indisputable rights of an assignor to make such provision as he can for the payment of his outstanding indebtedness, and hence the instrument of assignment may legally provide for his sureties and indorsers as well as his general creditors. Bank of Silver Creek v. Talcott, 22 Barb. 550; Halsey v. Fairbanks, 4 Mason, 208; Keteltas v. Wilson, 36 Barb. 298, 23 How. Pr. 69; Copeland v. Weld, 8 Me. 411; Stevens v. Bell, 6 Mass. 639; Canal Bank v. Cox, 6 Me. 386; Cunningham v. Freeborn, 11 Wend. 241, 1 Edw. Ch. 256, 6 L. ed. 130, 3 Paige, 557, 3 L. ed. 273; Duvall v. Ralston, 7 Mo. 446; Vaughan v. Evans, 1 Hill, Eq. 414; Bump, Fraud. Conv. 387.

If the principal deposit funds for the indemnity of the surety, there is a sufficient consideration for the contract, and the receiver becomes bailee for the surety. Keller v. Rhoads, 39 Pa. 513.

But if the debtor procures a third person subsequently to sign a contract of indemnity to the surety, there is no consideration, even if the surety promise to continue such for an indefinite time. Elix v. Adams, 9 Vt. 223.

He is authorized to realize upon any securities pledged, whenever he is in danger of being forced to pay the debt, and before payment. Bird v. Benton, 13 N. C. 179; 5 Wait, Act. & Def. 208.

A surety may retain funds in his hands belonging to the principal debtor, upon the latter's insolvency; and an assignee of the principal debtor has, in such case, no better right to such funds than his assignor would have. Williams v. Helme, 16 N. C. 151, 18 Am. Dec. 580.

It is entirely competent for an assignor to give a preference to a surety or indorser. Hendricks v. Walden, 17 Johns. 438; Hendricks v. Robinson, 2 Johns. Ch. 233, 1 L. ed. 380; Cunningham v. Freeborn, 11 Wend. 241; Keteltas v. Wilson, 36 Barb. 298, 23 13 L. R. A.

How. Pr. 69; Lansing v. Woodworth, 1 Sandf. Ch. 43, 7 L. ed. 231.

But he may not secure debts not in existence, or make provision for the payment of future advances (Hendricks v. Robinson, *supra*; Barnum v. Hempstead, 7 Paige, 563, 4 L. ed. 273), or future indorsements (Lansing v. Woodworth, 1 Sandf. Ch. 43, 7 L. ed. 231). And he may even give a preference to a party holding claims which he has purchased at a discount. Low v. Graydon, 50 Barb. 414; Powers v. Graydon, 10 Bosw. 630.

Liabilities actually existing, although contingent in their character and not yet matured, may be protected by an assignment. Instances of this are liabilities as indorser, surety, or bail. Keteltas v. Wilson, 36 Barb. 298, 23 How. Pr. 69; Griffin v. Marquardt, 21 N. Y. 121; Loeschigk v. Jacobson, 23 How. Pr. 523, 2 Robt. 645; Cunningham v. Freeborn, 11 Wend. 241, 1 Edw. Ch. 256, 6 L. ed. 130, 3 Paige, 557, 3 L. ed. 273; Brahmner v. Dunning, 30 N. Y. 211; Bishop, Insolvent Debtors, § 187.

And where the debtor has indemnified his surety by a mortgage containing a covenant to pay the debt, the mortgage will inure to the benefit of the creditor, and he may foreclose it. Loehr v. Colborn, 32 Ind. 24. And see Alabama Gold L. Ins. Co. v. Anderson, 67 Ala. 425; Re Fickett, 72 Me. 236.

But a security given to a surety, merely to indemnify him against loss, and not conditioned for the payment of the debt, is not available to the creditor. Pool v. Foster, 39 Miss. 253.

Mortgages given by co-sureties, each to the other, as security to indemnify him for any claim beyond his proportion assumed, are not in equity securities for the payment of the principal debt, which inure to the benefit of the creditors upon the principle of subrogation. Hampton v. Ehipps, 108 U. S. 280, 27 L. ed. 719. See Seward v. Huntington, 94 N. Y. 104; 8 Wait, Act. & Def. 446.

ERROR to the District Court for San Saba County to review a judgment in favor of claimant in an attachment suit in which the attachment was laid upon certain property alleged to belong to Stockbridge & Teague, but which was claimed by George Baker. *Affirmed.*

The facts are stated in the commissioner's opinion.

Messrs. West & McGown, Leigh Burleson, and Reeves & Channcy for plaintiffs in error.

Messrs. Hancock, Shelley & Hancock for defendant in error.

Garrett, J., filed the following opinion: This was an action to try the right of property. On December 1, 1885, **Frees & Son**, plaintiffs in this suit, filed a suit in the District Court of Dallas County against **Stockbridge & Teague**, of San Saba County, for the sum of \$820.10, and levied an attachment on the goods in controversy on the 4th day of December, 1885. Defendant in error, **George Baker**, claimed the goods. Plaintiffs tendered issue that the goods were the property of **Stockbridge & Teague**, and, as such, were subject to their writ. The claimant replied that he was a purchaser of said goods in good faith, for a full, fair, and valuable consideration, and was in possession thereof when the attachment was levied; that the consideration was that claimant should assume the payment to plaintiffs of four certain promissory notes executed by **Stockbridge & Teague** to them, on which claimant was surety, for the sum of \$391.91 each, dated July 22, 1885, and due January 22, 1886, April 22, 1886, and on dates afterwards; that he had paid the note due January 22, 1886, and was ready and willing to pay the others as they matured; that claimant was solvent, and worth, in excess of exemptions, \$50,000, while the aggregate amount assumed by him for said goods was about \$1,600 and interest; and that said sale was not made with the intent to defraud the creditors of **Stockbridge & Teague**. To this answer the plaintiffs demurred generally, and pleaded, further, that **Stockbridge & Teague** were insolvent at the time of the sale, which was or might have been known to claimant; that claimant was not surety on any note then due; that, of the four notes alleged to have been assumed, two were secured by a deed of trust on land belonging to **Stockbridge**, and that the claimant had failed to pay any of said notes except the one due January 22, 1886; that, when conveyed, the property was worth \$2,000; that the goods were in fact the property of **Stockbridge & Teague** when they were levied on, and that the conveyance was made to defraud their creditors, they and the claimant acting together with such common intent, and hence the sale was pretended and void. The case was tried without a jury, and on May 21, 1886, judgment was rendered in favor of the claimant. **J. Frees**, one of the plaintiffs, having died after judgment, the writ of error was sued out by **W. J. Frees** as surviving partner. **Stockbridge & Teague** were dealers in musical instruments and supplies at San

Saba, and owed the plaintiff for goods six promissory notes for \$391.91 each bearing date July 22, 1885, and payable 2, 4, 6, 8, 10, and 12 months after date. The first two were unsecured. The others were signed by the claimant as surety; the two last being also secured by a deed of trust on land belonging to **Stockbridge**. **Reeves**, a witness for the plaintiffs and their agent, testified that it was intended that **Baker** should sign the first four notes, but that by mistake he signed the last four, leaving the first two unsecured. There is no other direct evidence on this point, and no explicit finding of the court thereon. Plaintiffs' writ against **Stockbridge & Teague**, in which the attachment was issued and levied on the goods in controversy, was on the two unsecured notes. Some time prior to November, 1885, **Stockbridge** sold out his interest to **Teague**; the latter assuming the debts of the firm. **Teague** paid **Stockbridge** no money, but took the goods to pay the debts. **Reeves** was sent by plaintiffs from Dallas to San Saba to see **Stockbridge** about securing or collecting the first two notes then due. He found **Teague** in possession of the stock of goods sold by plaintiffs to **Stockbridge & Teague**. **Reeves** wanted the notes paid or secured. After an effort during the day to raise money, **Teague** met **Reeves** at his hotel at about 8 o'clock that night, and found that he had prepared a bill of sale for the stock to plaintiffs in consideration of the two unsecured notes, amounting to about \$800. **Teague** declined to take that amount, but offered to let plaintiffs have the goods at invoice price; to pay the two unsecured notes first, the balance to be credited on the notes on which **Baker** was security. This **Reeves** refused to do. **Teague** then went down town, and sold the goods to **Baker**, made him a bill of sale, and delivered to him the keys of the store. The consideration was that **Baker** assumed payment of the four notes on which he was security, amounting to about \$1,600, and released **Stockbridge** from all liability thereon. **Baker** was worth at the time about \$50,000. He paid the note due January 22, 1886. Very little of the stock had been sold at the time of the sale, or when this case was tried. **Baker** testified that he bought the stock of goods in order to protect himself as the surety of **Stockbridge & Teague**. He had notice that **Reeves** was trying to buy the stock of goods for plaintiffs. Plaintiffs' attachment was issued and levied after the sale. On January 1, 1886, the claimant employed **Teague** to take charge of the stock and sell it for him. His agreement was to sell the goods so as to net **Baker** the invoice price, and whatever there was over he was to receive for his services. The invoice price of the stock of goods at the time of the levy was about \$2,000. At the time of sale they were fairly worth about \$1,600. Neither **Stockbridge** nor **Teague** had any other property subject to execution when the sale was made.

Plaintiffs, by their third and fifth assignments of error, complain of the findings of the court on the facts of the case: (1) that **Baker** was surety on four notes; and (2) as to the circumstances attending the sale. The

latter finding is clearly supported by the evidence; and the former is not unsupported. If, as according to the testimony of the witness Reeves, Baker signed the two last notes by mistake, whether or not he would be bound as a surety thereon would be a question of law arising from the facts. This question is not properly before us, either under the pleadings or the evidence. Again, if Baker had the right, as surety, to take a conveyance of a sufficient amount of the goods to protect himself, he could also, for any balance of the sum agreed to be paid therefor, assume a debt of the seller for which he was not before liable, being bound only to see that such balance was so applied. *Ellis v. Valentine*, 65 Tex. 532. If he has not paid all that he assumed, it is the fault of the plaintiffs, who seized the goods under their writ of attachment. They will not be permitted to set aside the sale, and apply the goods to their unsecured notes, and at the same time require its terms to be complied with by demanding payment of the notes which were assumed. "The right of a creditor to receive property from an insolvent debtor in payment of a debt due to him, if the same be openly done, and more property is not taken than is reasonably necessary to pay the debt, although the creditor may know at the time he receives the property that he will thereby prevent other creditors from enforcing their claims, and although the creditor may know that the debtor is prompted to give him the preference through motives of friendship, is recognized. Such reception of property, however, must be bona fide; that is, for the sole purpose of securing the debt, and not with intent to cover up any of the property or its proceeds for the benefit of the debtor to the prejudice of other creditors." *Edrington v. Rogers*, 15 Tex. 188; *Hancock v. Horan*, Id. 507; *Greenlee v. Blum*, 59 Tex. 126. Whether Baker's claim was just or not was determined by the court, and its findings necessarily affirm that it was. They establish conclusively, also, as matters of fact, the good faith of Baker in the purchase of the goods, and that he paid for them a full and fair consideration by assuming the four notes, amounting to twice as much as Reeves had offered.

There is only one question presented by the remaining assignments of error, including the first, which assigns as error the action of the court in overruling the plaintiff's demurrer to claimant's answer, and that is the controlling question in the case. Was Baker, as surety for Stockbridge & Teague on obligations that had not matured at the time of the transfer, such a creditor or other person with a claim as could purchase from an insolvent debtor, in order to protect himself, considered both as to whether a surety or a surety on an obligation that has not matured is such a person or creditor? Would the consideration for the transfer be deemed valuable in law? Finally, was Baker, the surety, a creditor or other person with a demand against Stockbridge & Teague? It will be observed that in the consideration of this question we are not confined to the word "creditor" alone,

as descriptions of the class of persons protected by the Statute; for the language of the Statute is, "creditors, purchasers, or other persons." Rev. Stat. art. 2465. If a creditor or other person having a legal demand against another receives from his debtor property for his claim, bona fide, and no more than is reasonably sufficient to pay the same, he may do so, because he is a "creditor" or "other person" who is protected by the Statute; the principle of law being that, if the debtor transfers the property directly to the person to whom the law intends it should go, the conveyance cannot be fraudulent. And the same may be said of the sales permitted to stand where the debtor has sold his property openly for a fair price, and appropriated the proceeds to the payment of his just obligations; so, also, where the purchaser takes the property, and assumes and at once pays debts of the seller. The sole object of the Statute is to protect lawful debts, claims, or demands; and if Baker's liability on the notes of Stockbridge & Teague amounted to a lawful debt, claim, or demand against them, and the transfer was otherwise in good faith, and in accordance with the principles of law, often announced, authorizing the creditor to receive property from his debtor in satisfaction of his claim, then the sale was valid. A liberal construction is given to the words "creditors and others." Mr. Bump, in his work on Fraudulent Conveyances, says: "The character of the claim, if it is just and lawful, is immaterial. It need not be due; for, although the holder cannot maintain an action until it is due, he nevertheless has an interest in the property as a fund out of which the demand ought to be paid." Page 503. And again: "A contingent claim is as fully protected as one that is absolute. A liability as surety is within the Statute, as much as a liability as principal." *Ibid.* It is a general rule that all claims arising from contract are in force from the date of the agreement. It has been held that a surety is the creditor of his co-surety. *Howe v. Ward*, 4 Me. 195. These questions are ably discussed in the opinions of Justice Bronson in the case of *Van Wyck v. Seward*, 18 Wend. 375. In concluding the discussion of the question whether appellant in that case was entitled to the protection of the Statute as a creditor of William Seward, the learned judge said: "In these and all other cases depending upon contract the person to whom the engagement is made is as much a creditor, within the meaning of the Statute, as though he had a debt on which the right of action already existed. There is no reason why he should not be entitled to the same protection in the one case as in the other. In the language of Chief Justice Mellen in *Howe v. Ward*, 'although he cannot maintain an action on the contract until it has been violated, still he has an interest in the property conveyed, as a fund out of which the debt ought to be paid.'" In *Bonham v. Taylor* (Tex.) 16 S. W. Rep. 555 (decided at the present term of this court), it was held that the sureties on the bond of a city treasurer had the right to protect themselves by injunction restraining

the treasurer from paying over money, which had been raised for city purposes by taxation, to a bank to which the city council had agreed to lend it. Had the sureties on the city treasurer's bond been compelled to await action until their liability accrued, it would have been inequitable and unjust; and so if Baker should be forced to wait until the maturity of the notes on which he was surety for Stockbridge & Teague, and they had made default thereon, the goods to which he, as well as other creditors, had a right to look for the payment of the debts for which he was bound, would in all probability have been absorbed by the plaintiffs in this case to satisfy their unsecured notes. Baker was a creditor of Stockbridge & Teague, such as

entitled him to receive a conveyance of the goods in controversy to indemnify him against ultimate liability on assumption by time of the debts for which he was security. We are of the opinion that the sale was also complete, and not a mortgage or conditional sale, and that the title to the goods vested at once in Baker; yet, if it had been a mortgage or conditional sale, with Baker in possession, he would have still had the right to the possession of the property until the conditions had been complied with or broken.

In either event *the judgment of the court below in his favor was right, and should be affirmed.*

Adopted by Supreme Court, May 26, 1891.

PENNSYLVANIA SUPREME COURT.

ELI W. HOYT *et al.*

v.

Frank HOYT *et al.*, *Appts.*

(.....Pa.....)

1. **No trade-mark can be claimed in the shape of a bottle in which extracts are put up for sale.**
2. **No exclusive right can be acquired by adoption in a cap label for a bottle, which was originated by a third person and has been used by him for years.**
3. **Neither the shape of a box in which bottles of extracts are packed for purposes of trade, nor the mechanical arrangement of the bottles therein, is subject to appropriation as a trade-mark.**
4. **Combining a label and bottle cannot infringe a trade-mark if the separate use of each would not have that effect.**

(October 5, 1891.)

APPEAL by defendants from a decree of the Court of Common Pleas, No. 4, for Philadelphia County enjoining them from infringing plaintiff's trade-mark. *Reversed.*

The facts are stated in the opinion.

Messrs. William Henry Peace and F. Carroll Brewster, for appellants:

It may be seriously questioned whether labels and advertisements as mere labels and advertisements constitute trade-marks.

Leather Cloth Co. v. American Leather Cloth Co. 11 Jur. N. S. 513; *Browne, Trade-marks*, p. 144.

The bottle is not a trade-mark, because it is but the form of the goods.

Moorman v. Hoge, 3 Sawy. 78; *Browne, Trade-marks*, p. 108; *Harrington v. Libby*, 12 Pat. Off. Gaz. 188.

The shape and arrangement of the boxes cannot constitute a trade-mark.

Sawyer v. Meyer, 2 W. N. C. 197; *Browne, Trade-marks*, p. 113.

Plaintiffs' fraud in falsely representing their

cologne to be of German origin bars their right to relief.

Febbridge v. Wells, 4 Abb. Pr. 144; *Hobbs v. Francais*, 19 How. Pr. 587; *Leather Cloth Co. v. American Leather Cloth Co., Limited*, 4 De G. J. & S. 187; *Morgan v. McAdam*, 86 L. J. Ch. 228; *Palmer v. Harris*, 60 Pa. 156; *Kenny v. Gillet*, 70 Md. 574; *Laird v. Wilder*, 9 Bush. 131, 15 Am. Rep. 707; *Connell v. Reed*, 128 Mass. 477; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 27 L. ed. 700; *Siegert v. Abbott*, 61 Md. 276, 48 Am. Rep. 101; *Pidding v. How*, 8 Sim. 477; *Ginter v. Kinney T. Co.* 12 Fed. Rep. 782; *Flavel v. Harrison*, 10 Hare. 437; *Re Saunton & Co. Cox's Manual*, 625 (1878).

For the law on the question of similarity, see—

Spottiswoode v. Clark, 2 Sandf. Ch. 628, 7 L. ed. 783; *Partridge v. Menck*, 2 Sandf. Ch. 622, 7 L. ed. 729.

If it appear that the marks used by the defendants, though resembling the plaintiffs' in some respects, would not, probably, deceive the ordinary mass of purchasers, paying the attention which such persons usually do in buying the article in question, an injunction will not be granted.

Blackwell v. Crab, 86 L. J. R. Ch. 504; *Sawyer v. Meyer*, 2 W. N. C. 197.

The shape and arrangement of the boxes cannot constitute a trade-mark.

Gilman v. Hunnewell, 132 Mass. 130.

A person cannot have a right in his own name as a trade-mark, as against a person of the same name, unless the latter's form of stamp or label is so similar as to represent that his goods are of the former's manufacture.

Laughman's App. 5 L. R. A. 599, 128 Pa. 1; *Burgess v. Burgess*, 3 DeG. M. & G. 896; *Comstock v. White*, 81 Barb. 801; *Faber v. Faber*, 49 Barb. 857; *Emerson v. Budger*, 101 Mass. 62; *James v. James*, L. R. 18 Eq. 421; *Hardy v. Outler*, *Sebastian's Digest*, Case, 427 (1873); *Meneely v. Meneely*, 62 N. Y. 427; *Decker v. Decker*, 52 How. Pr. 218.

There is no trade-mark in the size and shape of packages, boxes, bottles, labels or wrappers. *Gillett v. Esterbrook*, 47 Barb. 461; *Moorman v. Hoge*, 2 Sawy. 78; *Sawyer v. Meyer*, 2 W. N. C. 197.

NOTE.—For a full discussion of the subject of "Trade-marks," see *Putnam Natl. Co. v. Dulany (Pa.)* 11 L. R. A. 624, and cases referred to in note. 13 L. R. A.

Messrs. Jones, Carson & Phillips and John G. Johnson, for appellees:

A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practice such a deception, nor to use the means which contribute to that end. He cannot therefore be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person.

Perry v. Truefitt, 6 Beav. 66; *Seizo v. Provezende*, L. R. 1 Ch. 192; *Levy v. Walker*, L. R. 10 Ch. Div. 447.

The imitation of the size, shape, style, label, and substantial appearance of the complainant's goods by the defendant is a fraud, and he is entitled to protection.

Williams v. Johnson, 2 Bosw. 1.

Sawyer v. Horn, 1 Fed. Rep. 24, decided that, whether the complainant has a trade-mark or not, as he was the first to put up bluing for sale in the peculiarly shaped and labeled boxes adopted by him, and as his goods have become known to purchasers, and are bought as goods of the complainant by reason of their peculiar shade, color and label, no person has the right to use the complainant's form of package, color or label or any imitation thereof in such a manner as to mislead purchasers into buying goods for those of complainant, whether they are better or worse in quality.

A party will be protected from the imitation of the packages peculiarly designed and shaded for the purpose of distinguishing his goods and from the imitation in color, design, style and lettering combined of the labels used to mark such packages when put on the market.

Carbolic Soap Co. v. Thompson, 25 Fed. Rep. 625.

Where a plaintiff has been in the habit of packing his goods in a peculiar and distinctive manner, he will be entitled to restrain another from imitating his packages.

Sebastian, Trade-marks, p. 255. See also *Id.* p. 112.

Where a person uses his own name for the purposes of fraud, if satisfactory evidence of fraudulent intention can be produced, such unfair conduct will be restrained, even though the free use of the man's own name may be thereby hindered.

Sebastian, Trade-marks, pp. 26, 233; *Dunachie v. Young & Sons*, Ct. Sess. Cas. 4th Ser. X. 874; *Churton v. Douglas*, Johns. V. Ch. 174; *Gillis v. Hall*, 8 Phila. 231.

A man may lose the right to use his own name in a particular way where others originally have become known to the public in connection with such particular or special use of the same name.

England v. New York Pub. Co. 8 Daly, 377; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 87 Conn. 278; *Messam v. Thorley's Cattle Food Co.* L. R. 14 Ch. Div. 752; *Burgess v. Burgess*, 3 De D. M. & G. 896; *James v. James*, L. R. 13 Eq. Cas. 421; *Rogers Mfg. Co. v. Rogers & S. Mfg. Co.* 11 Fed. Rep. 496; *Landreth v. Landreth*, 23 Fed. Rep. 43; *Shaver v. Shaver*, 54 Iowa, 208; *Clayton v. Day*, 76 L. T. 79.

It is a fraudulent act to purchase the right to use the name of a small maker because it

happens to be identical with that of a maker of reputation.

Sebastian, Trade marks, p. 81, citing *Perks v. Hall*, W. N. 1881, p. 111. See also *Declin v. Declin*, 69 N. Y. 212; *Croft v. Day*, 7 Beav. 84; *Lee v. Haley*, L. R. 5 Ch. 155; *Rogers Mfg. Co. v. Rogers Mfg. Co.* 16 Phila. 178, 40 Phila. Leg. Int. 294; *Russia Cement Co. v. La Page*, 6 New Eng. Rep. 577, 147 Mass. 200; *Meneely v. Meneely*, 62 N. Y. 431. *Taylor v. Taylor*, 23 L. J. Ch. 255, is also in point.

Williams, J., delivered the opinion of the court:

The cases in which a court of equity will interfere to protect a trade-mark are divisible into two classes. To the first of these may be referred those cases in which the trade-mark has been registered under a system provided by law for the protection of the owner in its use. To the other belong all those cases in which there has been no registration and in which the true ground for interference is the prevention of fraud. In cases falling within the first class, property in the trade-mark is shown by the certificate of registration. In those belonging to the second, the right asserted is of common-law origin, and is shown by proof of the adoption and use of the trade-mark. Its invasion is a fraud upon the owner and the public, to be restrained on principles of common right. All monopolies are odious and their maintenance in favor even of inventors, is limited in duration. When a statutory term of protection is over, whatever is valuable in the subject of the patent becomes, as does an unpatented invention, a contribution to the public welfare and may be freely used as such. Competition is essential to commerce, and within legitimate lines should always be encouraged. The "survival of the fittest" is a law of trade, no less than of the development of living organisms; and from the struggle which determines who and what is "fittest," come general development and progress. As a general proposition it may be said that one may imitate what is excellent in the process and business methods of his neighbor as freely and as safely as he may imitate what is good in his moral character, as long as he infringes no right secured to him by statute, and does not fraudulently personate him or simulate his products. An inventor who secures a patent for his device is protected in his exclusive right during the period fixed by law. When that period expires, his exclusive right expires with it, and thereafter he stands on no higher ground than any other citizen who may desire to use the thing or combination covered by the patent. The rules applicable to trade-marks are quite different. A trade-mark may increase in value to its owners by use, and the law could not put a time limit on the owner's right to it any more than it could put a limit upon his right to use any other article of property. A trade-mark is not an invention. It does not relate to or affect processes of manufacture or mechanical combinations. It is a sign or mark by which the manufactured articles produced by one per-

son or firm or maker are distinguishable from those produced by rival manufacturers. It must be distinctive and indicate the personal as distinguished from the geographical origin of the article to which it is applied. *Laughman's App.* 128 Pa. 1, 5 L. R. A. 599. Thus Sonman, the name of a large tract of land, cannot be appropriated by one of several owners of land within the tract, to the exclusion of the other owners; nor Lackawanna Valley, by one operator in that valley, to the exclusion of all others. But the trade-mark must relate to, and distinguish, the goods to which it is applied. For this reason, among others, the size or shape or mode of construction of a box, barrel, bottle, or package, in which goods may be put is not a trade mark. If there is any new and useful combination in the construction of such box or package it should be patented as an invention if the owner wishes to prevent others from using it; but such package cannot be registered as a trade-mark. A sign, device or mark originated and in actual use by another cannot be adopted and registered by anyone who takes a fancy to it, as his trade-mark, and such adoption and registration will not confer a title on him who makes it. It would be an infringement upon the original owner, and from the wrong so done no valid title could grow. A trade-name may, in a general way, be treated as a trade-mark and protected in the same manner. When a business has been conducted by some person or firm under a particular trade-name until the public come to regard the name as affording an assurance of the good quality of the article bearing it, the name is a valuable part of the business assets of the person or firm whose skill and integrity have won confidence for it. A rival who should appropriate the trade-name to his own use without the consent of the owners, and put his goods on the market bearing it, as though they were made by the rightful owner of the trade-name, is guilty of a fraud on the public, and a fraudulent taking from the proprietors which is, both in intent and effect, a larceny. But when such rival puts his goods on the market on their own merits and under his trade-name, his neighbors have no just ground of complaint if he has imitated, adopted, or improved upon their unpatented methods and processes. *Putnam Nail Co. v. Dulaney* (Pa.) 11 L. R. A. 524. It only remains to apply these general principles to the case now before us, so far as they are applicable to the questions raised by the appeal of the defendant below. The plaintiffs claim that the front or face label on their bottles has been registered by them as a trade-mark. It is put on obliquely to the length of the bottle. It bears the name of the liquid in the bottle thus, "Hoyt's German Cologne." It also bears the name and residence of the makers, and a reference to the fact of its registration. They also claim the following unregistered trade-marks: a bottle, having a depression or panel on the back side; a cap label over the cork in the bottle; a peculiar mode of arranging and packing bottles in boxes; in the name of the article sold, viz., "Hoyt's German Cologne."

15 L. R. A.

The defendants have a registered label or trade-mark which goes upon the bottle at right angles with its length, and which contains the name of the liquid, "Hoyt's Egyptian Cologne," with a view of a pyramid and the head of the Sphinx; with the names and residence of the makers, and a reference to its registration. The learned judge of the court below held that F. Hoyt of the defendant firm had a legal right to use his own name in his business, and that he could not be enjoined from using it upon goods produced by himself. The correctness of this holding is not raised by the defendant's appeal. The learned judge also held that the defendant's trade-mark or label was not an infringement upon that of the plaintiffs, whether considered by itself or in connection with the champagne shaped bottles on which it was originally used by the defendants. This also must be regarded as settled for the purposes of this appeal, since the plaintiffs have not appealed, and the defendants cannot, from this ruling. Then, too, the evidence shows very clearly that the bottle with the depression or panel on the back side, which both parties are now using, is a stock bottle to which neither of them has any exclusive right, and which is freely sold by manufacturers to all who apply. This bottle, as we have already seen, is not a trade-mark. It is not registered and it is not capable of registration. It is in common use, open to the purchase and use of all who may fancy its shape, in the same manner as the other stock bottles. The cap label was not originated by the plaintiffs and does not belong to them. It was devised, according to the contradicted testimony, by Dr. David Jayne, a Philadelphia chemist and dealer in medicines, and was used by him and his successors for years before and since the plaintiffs assumed to adopt it as their own. Their adoption of his cap label gave them no title to it. The mechanical arrangement of the bottles in boxes is neither an invention nor a trade-mark. If the box is an invention, and others are to be prevented from using it, the plaintiffs should have secured a patent for it. Without letters-patent they have no exclusive property in the shape or construction of a box. Whatever one manufacturer or tradesman may do to increase the safety of his goods in transportation, or to display them advantageously upon shelves, counters, or in show windows, is simply a good example or model for the public which anyone interested may imitate with impunity. The debatable ground presented by this appeal is thus seen to be very narrow. It may be learned to the best advantage by considering the language of the court below and the form of the decree made. The decree did not hold the defendants' label to be an infringement, or deny the defendants the use of their name. On the contrary the learned judge said: "The defendants have also, we think, the right to use the label placed on the sides of their bottles." If they made cologne and sold in bottles such as they used at first, with their labels upon them having the name "Hoyt's Egyptian Cologne," and the pyramid and the head of the Sphinx, and the names and resi-

dence of the makers, they were exercising a clear legal right and could not be enjoined. "But," the decree continues, the "defendants must be enjoined from putting up and offering for sale cologne in the bottles described in the bill, with the labels thereon." This is the decree appealed from. The court held that the defendants' label was no infringement, and was lawfully used on a stock bottle with a champagne bottle shape. But if the same label was used on another stock bottle having a panel on the back side, it became an infringement because of the shape of the bottle on which it was placed, and the use of the label on such a bottle must be prevented by injunction. As both styles of bottle were open to the public, as stock bottles, the label

was as lawful upon one of them as upon the other. The plaintiffs could no more acquire an exclusive right to a stock bottle by priority of use, than they could acquire an exclusive right to Dr. Jayne's cap label by being the first to appropriate it without his knowledge or consent. Adopting the conclusions of the learned judge that the label of the defendants did not infringe upon that of the plaintiffs, and that the defendants had a legal right to use their own names in their business, we cannot sustain this decree.

It is accordingly set aside; and as no ground of equitable relief appears upon the record before us, *the bill is dismissed* at the cost of the appellee.

DELAWARE CHANCERY COURT.

Miriam E. MOORE

v.

Samuel W. DARBY *et al.*

Thomas H. MOORE, Intervenor.

(....Del. Ch....)

A woman's share as tenant in common in the proceeds of lands, the right to the possession of which vested in her after the passage of the Married Woman's Acts, and which have been sold under direction of court for partition, will not, at the request of her husband, be invested for his benefit, but it will be paid to her absolutely.

(September 21, 1899.)

SUIT brought in Kent County for partition of certain real estate. On intervening partition petition by the husband of one of the co-owners to have her share of the proceeds of sale invested for his benefit. *Petition denied.*

The facts are stated in the opinion.

Mr. Nathaniel B. Smithers, Sr., for intervenor.

Messrs. Richard R. Kenney and Edward Ridgely, *contra:*

The Married Woman's Acts are remedial statutes and should be so construed as to advance the remedy and effect the object intended to be accomplished by the Legislature.

Billings v. Baker, 28 Barb. 343; *Johnes v. Johnes*, 3 Dow. 15.

As the law now stands in our State, the right of the husband to be tenant by the curtesy of his wife's lands is dependent upon the fact not only that the issue should be born alive during coverture, but also that the wife should be seised of the lands at the time of her death.

Any alienation of the lands during the life of the wife must necessarily defeat the right of tenancy by the curtesy in the husband.

Gram v. Lobdale, decided in the Court of Errors and Appeals of this State at the January Term, A. D. 1881 (not yet reported); *Breeding v. Davis*, 77 Va. 659; *Beach v. Miller*, 51 Ill. 206;

Hill v. Chambers, 30 Mich. 422; *Sleight v. Read*, 18 Barb. 159; *Billings v. Baker*, 28 Barb. 343; *Pool v. Blake*, 53 Ill. 495; *Forbes v. Sweeney*, 8 Neb. 520; *Coverdale v. Gorman*, 4 Houst. (Del.) 624; *Johnes v. Johnes*, 3 Dow. 15; *Stewart v. Ross*, 50 Miss. 776; *Greenwich Nat. Bank v. Hall*, 11 R. I. 124; *Slaby v. Bullock*, 10 Allen, 94; *Porch v. Fries*, 18 N. J. Eq. 205; *Hearle v. Greenbank*, 3 Atk. 695-716.

Saulsbury, Ch., delivered the following opinion:

Miriam E. Moore has filed her petition in this court, praying for partition between her and her two brothers, Samuel W. Darby and John C. Darby, of lands situate in Mispillion and South Murderkill Hundreds, formerly belonging to Samuel Warren, senior. One of these tracts of land contains about 700 acres; one other contains something over 200 acres, and a third tract contains upwards of 180 acres.

Samuel Warren, senior, died in 1848. By his will, admitted to probate November 6, 1848, he devised as follows:

"*Fourth.* I give and devise to my beloved wife, Miriam, for and during the term of her natural life, without impeachment of waste, all that farm or tract of land with the appurtenances situate in Mispillion Hundred, Kent County, and State of Delaware, being the Mansion Farm on which Solomon Townsend, senior, and Solomon Townsend, junior, lived and died, and now in the tenure of Abner Wooters, and containing six hundred acres more or less; and from and immediately after the death of my said wife, I give and devise the said farm or tract of land with the appurtenances unto Solomon Townsend Warren and John W. Hall and their heirs for and during the natural life of my daughter Mary Darby, now the wife of John M. Darby, upon trust, to receive the rents and profits thereof and to pay the same to my said daughter Mary during her natural life, for her sole and sep-

NOTE.—A husband's initiate right of curtesy is not a vested right but may be taken away or impaired by statute. It is done away with by the 13 L. R. A.

Married Woman's Act. See *note* to *Alexander v. Alexander* (Va.) 1 L. R. A. 125.

arate use, notwithstanding her coverture, free from the debts, management, power, control of her now husband the said John M. Darby or of any other husband by her hereafter to be taken, and the receipt of the said Mary alone from time to time to be a sufficient discharge, and after the death of my said daughter, I give and devise the farm or tract of land aforesaid with the appurtenances unto the heirs of my said daughter Mary in fee simple absolute, clear and discharged from the trust aforesaid.

"Fifth. I give and devise unto Solomon Townsend Warren and John W. Hall and their heirs for and during the natural life of my daughter Mary Darby, now the wife of John M. Darby, the farm or tract of land which I purchased of Dr. Alexander Lowber near Frederica containing five hundred acres more or less with the appurtenances upon trust, to receive the rents and profits thereof and to pay the same to my said daughter Mary during her natural life, for her sole and separate use, notwithstanding her coverture, free from the debts, management, power or control of her now husband, the said John M. Darby, or of any other husband by her hereafter to be taken, and the receipt of the said Mary alone from time to time to be a sufficient discharge. And after the death of my said daughter, I give and devise the farm or tract of land aforesaid unto the heirs of my said daughter Mary in fee simple absolute, clear and discharged from the trust aforesaid."

The tract of land in Mispillion Hundred, as appears from the return of the freeholders, in fact contains about 700 acres of land and the two tracts in South Murderkill Hundred contain, as appears by said report, something over 400 acres. This discrepancy between the will of Samuel Warren, senior, and the report of the freeholders is not accounted for by any proof in the cause, but the discrepancy is immaterial, as there is no doubt that the land mentioned in the will above recited and the land of which partition is sought are the same. Thomas H. Moore has filed his petition, therein stating that he intermarried with the said Miriam E. Moore, the petitioner in the proceedings for partition on or about the fourth day of September, A. D. 1852, and had by her issue born alive and thereby became tenant by the curtesy initiate of the lands of which she was seised for and during said coverture, and that as said tenant by the curtesy initiate in the lands of his said wife, Miriam E., he has been informed and believes that he has an interest and is entitled to be made a party to said proceedings in chancery and he therefore prays that he as her husband may be made a party thereto.

He was made a party by the consent of the solicitors for the plaintiff and defendants respectively.

The freeholders appointed to make partition of the lands have reported that the same cannot be divided without detriment to the parties entitled and that they therefore have appraised the lands as by their commission they were commanded to do. The lands in respect to which partition is prayed, have

been sold; the proceeds of sale paid into court; and the question is now raised by the solicitors for the husband of the petitioner whether her share of the proceeds of sale shall be paid to her absolutely, or; as they claim would be proper, shall be ordered to be invested for her benefit, the interest paid to her for life and the principal held to secure the possible right of the husband therein should he survive the wife.

An estate by the curtesy, says Cruise, quoting Littleton, vol. 1, §.1, of chap. 1, title 5, p. 107, is where a man taketh a wife seised in fee simple or in fee tail general or seised as heir in special tail, and hath issue by the same wife, male or female, born alive, albeit the issue after dieth or liveth, yet if the wife dies the husband shall hold the land during his life by the law of England.

And a tenant by the curtesy of England, says Blackstone, book 2, chap. 8, p. 126, is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee simple, or fee tail, and has by her issue, born alive, which was capable of inheriting her estate. In this case he shall on the death of his wife hold the lands for his life as tenant by the curtesy of England. There are four requisites, says Blackstone, necessary to make a tenancy by the curtesy: marriage, seisin of the wife, issue, and death of the wife.

1. The marriage must be canonical and legal.

2. The seisin of the wife must be an actual seisin or possession of the lands; not a bare right to possess which is seisin in law, but an actual possession; and therefore a man shall not be tenant by the curtesy of a remainder or reversion.

3. The issue must be born alive. The husband, he says, by the birth of the child becomes tenant by the curtesy initiate, and may do many acts to charge the lands, but his estate is not consummate till the death of the wife; which is the fourth and last requisite to make a complete tenant by the curtesy.

Miriam E. Moore had not the possession nor the right to the possession of these lands or any part of them until the death of her mother, Mrs. Mary Darby. Her mother herself had not the right to their possession in her lifetime, but the right to their possession during her lifetime was in Solomon Townsend Warren and John W. Hall and their heirs during her lifetime. The right to the possession of Miriam E. Moore to any portion of these lands did not accrue until the death of her mother, Mrs. Darby, which occurred, as Mr. Moore states in his petition, on or about the 27th day of January, A. D. 1888. At this period her children Miriam E. Moore, Samuel W. Darby and John C. Darby became entitled to the possession of the lands under the will of their grandfather Samuel Warren, senior.

Before that day and before Miriam E. Moore, and of course before her husband, Thomas H. Moore, could become entitled to any portion of said lands, the Legislature of Delaware had in effect abolished the right of a tenant by the curtesy initiate in this State.

In fact, tenancy by the curtesy of England and tenancy by the curtesy as theretofore existing in Delaware ceased to exist.

But to consider the law in reference to this subject independently of our Acts of Assembly, a man was not entitled to tenancy by the curtesy nor a woman to dower out of a reversion or a remainder expectant upon an estate of freehold; but upon a reversion expectant upon an estate for years both of these rights (of dower and of curtesy) accrue, for the possession of the tenant for years constitutes a legal seisin of the freehold in reversion. 1 Sharswood's Bl. bk. 2, chap. 8, p. 126; *Stoughton v. Leigh*, 1 Taunt. 410; *De Gray v. Richardson*, 3 Atk. 470; *Goodlittle v. Newmum*, 3 Wils. 521.

The right the husband acquires by marriage in the lands of the wife is thus stated in vol. 2, p. 181, of Kent's Commentaries, Lacy's edition 1889: "If the wife, at the time of marriage, be seised of an estate of inheritance in land, the husband, upon the marriage, becomes seised of the freehold *jure uxoris*, and he takes the rents and profits during their joint lives. It is a freehold estate in the husband, since it must continue during their joint lives, and it may, by possibility, last during his life. It will be an estate in him for the life of the wife only, unless he be a tenant by the curtesy. It will be an estate in him for his own life, if he dies before his wife, and in that event she takes the estate again in her own right. If the wife dies before the husband, without having had issue, her heirs immediately succeed to the estate. If there has been a child of the marriage born alive, the husband takes the estate absolutely for life, as tenant by the curtesy, and on his death the estate goes to the wife, or her heirs, and in all these cases, the emblements growing upon the land at the termination of the husband's estate go to him or his representatives."

If during her life real estate is converted by operation of law into personal estate the conversion will be treated as her own. *Graham v. Dickinson*, 3 Barb. Ch. 170, 5 L. ed. 861.

The rents, issues and profits of the wife's lands accruing during coverture belong absolutely at common law to the husband. How effectually these common-law rights of the husband had been changed by the Statutes of this State will appear by reference to those Statutes, and here I will remark that these Statutes are remedial in character and must be construed by courts so as to effectuate the intention of the Legislature so far as the same can reasonably and properly be done.

Our first Statute upon this subject was passed March 17, 1865, and provided "that the real estate, mortgages, stocks and silver plate belonging to any married woman at the time of her marriage, or to which she may become entitled at any time during her coverture, shall remain and continue to be her sole and separate property, and shall not be subject to the disposition of her husband by alienation; transfer, assignment or otherwise; or be liable to the debts or contracts of her husband, except where such debts are

judgments recovered against him for her liabilities before marriage: provided, that nothing in this section shall be construed to authorize the wife to sell or otherwise dispose of her real estate, mortgages, stocks or silver plate without her husband's consent, evidenced by writing under his hand and seal, or to authorize her to create any incumbrance upon her real estate, or to dispose of the rents, issues and profits thereof, or the interest upon her mortgages, or dividends, or other income arising from her stocks, without his consent, evidenced in the same manner: and, provided further, that nothing herein contained shall be construed to affect, in any manner, the rights of the husband (if he survive the wife), as tenant by the curtesy in the real estate of his wife."

The Act to secure to married women certain of their own earnings, p. 95, vol. 14, has no relation to the case before the court.

By an Act for the protection of married women, passed April 9, 1873, vol. 14, p. 688, § 1, it was provided "that the real and personal property of any female who may hereafter marry, and which she shall own at the time of her marriage, or that any female now married may receive by gift, grant, devise or bequest from any person other than her husband, shall be her sole and separate property, and the rents, issues and profits thereof shall not be subject to the disposal of her husband nor liable for his debts."

This last Act was amended March 17, 1875, by striking out said first section and inserting among other things, in lieu thereof: "Section 1. That the real and personal property of any married woman, which has been heretofore acquired, is now held, or which she may hereafter acquire in any manner whatsoever, from any person other than her husband, shall be her sole and separate property, and the rents, issues and profits thereof shall not be subject to the disposal of her husband, nor liable for his debts."

These are the portions of our Acts properly known as Married Women's Acts having relation to the question now before me. Regarded as remedial, and construed so as to advance the remedy and effect the object intended to be accomplished by the Legislature, what are their effects in the case before me?

Mrs. Miriam E. Moore was not entitled to the possession of these lands or any portion of them until the 27th day of January, A. D. 1888, the day of the death of Mrs. Darby, and the day on which the estates of Solomon Townsend Warren and John W. Hall, trustees thereof, expired. Thomas H. Moore had not then and has not since had any estate and no interest in said lands. He has not had the legal right to enter upon or into the possession of said lands for any purpose whatever; he is not entitled to the perception of the rents and profits of said lands or any part thereof during the lifetime of his wife; he has no estate by the curtesy initiate therein; he is entitled only to the possibility of entering into the possession of his wife's interest therein and enjoying the possession thereof during his lifetime in case he survives his wife, and in case no partition thereof be made between the tenants in com-

mon thereof, and unless the conversion of the wife's interest therein into money be in fact and in law not an absolute conversion, but a qualified conversion only. Would such a conversion of land into money under these circumstances have the effect of securing to Thomas H. Moore the preservation and enjoyment of the principal sum of money adjudged as the value of the wife's interest in the lands under the proceedings in partition in this cause?

The doctrine of conversion was thus stated by an eminent English equity judge in a leading case upon this subject "Nothing is better settled than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted and this, in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited, or only covenanted to be paid. Whether the land is actually conveyed, or only agreed to be conveyed, the owner of the fund, or the contracting parties, may make land money, or money land. The cases establish this rule universally." See 1 Pom. Eq. Jur. § 161, and authorities cited.

The principle properly applicable to this case was decided by the superior court at its fall session in 1874 in the case of *State, for the use of Samuel D. Coverdale, versus Randall B. Gorman and others*.

The court decided in that case that under the Act for Married Women, passed in 1865, a wife's interest in a recognizance in the orphan's court on the assignment of the real estate of a deceased father cannot be attached for the debts of her husband, except for such as are properly provided for in it.

In that case the court said: they considered that it would be contrary to the spirit and policy as well as the intention of the Statute of 1865, for the benefit of married women to now hold that a wife's sole and separate interest in the real estate of her deceased father secured by recognizance in the orphan's court may be attached for the debt of her husband except such debts as are specially provided for in it. *Jefferson v. Brady*, 4 Houst. (Del.) 626.

If I understood the argument of the solicitors for Thomas H. Moore, the husband of Miriam E. Moore, it was that the conversion of the interests of Mrs. Moore, and her brothers by a decree of a court of chancery of the real estate belonging to them in common was not a conversion out and out, but a special conversion for the purposes of partition only; and that the share of Mrs. Moore in the amount of the sales of the lands made under the order of the court in this partition cause should not be ordered paid to her absolutely, but that she should be required to give security for her proportion of such sale, so that in case her husband should survive her that amount should be secured so that her husband, in case he should survive her, might have the enjoyment of it during his life as tenant by the curtesy therein.

The position of the counsel for Mr. Moore is not in my opinion tenable. It is not supported by a proper consideration of our Acts of Assembly in reference to the estates of married women, or of the doctrine of conversion as supported by adjudged cases.

Partition of estates held in common is a necessary incident of such estates.

Where such estates cannot in fact be divided between tenants in common the law requires that they shall be valued in money, and that such valuation shall be returned to this court by the freeholders appointed to make partition or valuation. Such valuation being returned to the court, its duty is to decree a sale by a trustee to be appointed for that purpose, the trustee making sale under the authority of his appointment for that purpose. It is the duty of the court to decree the payment to each tenant in common subject only to costs and liens against them respectively.

No decision contrary to the principles here announced has been made by me since I have exercised the duties of chancellor, and none, I presume, have been made to the contrary, by any of my predecessors in office when their attention has been properly called to the provisions of our Acts of Assembly in respect to the rights of married women.

Let a decree be drawn for the payment to Mrs. Moore of her share of the proceeds of sale of the lands held in common by her and her brothers.

MICHIGAN SUPREME COURT.

MICHIGAN MUTUAL LIFE INSURANCE CO., *Appt.*,
v.

George D. REED.

(..... Mich.)

A policy of insurance may be rescinded by the insured on discovery of misrepresen-

tations in the application, made without his knowledge by the agent of the insurer, although the latter would be bound by the policy if it were not rescinded.

(February 6, 1891.)

ERROR to the Circuit Court for Lenawee County to review a judgment in favor of

NOTE.—Fraud in its relations to life insurance.
If a person is induced, by the false and fraudulent representations of the agent of an insurance company, to take a policy of insurance in the company, and to pay the premium thereon, he may rescind the contract, and, in an action against such agent, recover as damages the amount of the premium so paid. *Hedden v. Griffin*, 126 Mass. 229.

A recent Massachusetts case decides that where a policy of insurance was obtained through fraudu-

defendant in an action brought to recover the amount alleged to be due on a life insurance premium note. *Affirmed.*

The facts are stated in the opinion.

Mr. J. C. Winne, for appellant:

Suppose what defendant claims with regard to the statement of his occupation is true, and that his employment was embraced in the prohibited list, still it was no fraud upon him, but a fraud of the agent upon the Company and should he have died at any time prior to the date of payment of the note, his beneficiary would have been entitled to \$1,000 and likewise if the premiums had been kept up thereafter.

Fudritzky v. Supreme Lodge K. of H. 76 Mich. 428; *Temmink v. Metropolitan L. Ins. Co.* 72 Mich. 888; *Baker v. Ohio F. Ins. Co.* 14 West. Rep. 498, 70 Mich. 199; *Dwelling-House Ins. Co. v. Brodie*, 4 L. R. A. 459, 52 Ark. 11; *Dunbar v. Phenix Ins. Co.* 72 Wis. 492; *Kansas Protective Union v. Gardner*, 41 Kan. 897;

Pickels v. Phania Ins. Co. 119 Ind. 291; *Continental Ins. Co. v. Pierce*, 89 Kan. 396.

The only possible reasons urged by the defendant, that he may escape the payment of the note, is that the agent misstated his occupation in the application.

If it was true, that an untruthful statement misrepresenting Reed's occupation was intentionally inserted in the application by Vanderburg, the policy was not thereby rendered void.

Peoria F. & M. Ins. Co. v. Hall, 13 Mich. 213; *Alta L. S. F. & T. Ins. Co. v. Olmstead*, 21 Mich. 253; *North American F. Ins. Co. v. Throop*, 22 Mich. 159; *Michigan State Ins. Co. v. Lewis*, 30 Mich. 41; *Security Ins. Co. v. Fay*, 22 Mich. 487; *Kitchen v. Hartford F. Ins. Co.* 57 Mich. 187.

When the agent fills up the application, knowing or having been properly informed by the applicant, of the facts demanded by the questions therein, mistakes in the application,

lent representation of the agent, that fact alone is sufficient to vitiate the policy, and the party to whom such a policy was issued can maintain an action to recover the premium so paid. *Trabandt v. Connecticut Mut. L. Ins. Co.* 131 Mass. 167.

There seems to be no valid reason why the rules applicable to the rescission of contracts for fraud or mistake should not also apply to a rescission sought by the insurer. *Cooke, Life Ins.* §134, citing *Hoare v. Bremridge*, L. R. 14 Eq. 522; *Globe Mut. L. Ins. Co. v. Reals*, 50 How. Pr. 237.

Fraud and false representation defined.

Fraud consists in deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end desired. *Alexander v. Church*, 1 New Eng. Rep. 824, 53 Conn. 561.

A representation is to be deemed false when the facts fail to correspond with its assertions or stipulations. If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time when the representation becomes false. *Cal. Civ. Code*, §§ 2579, 2580.

Effects of fraud.

Fraud avoids a contract *ab initio*, vitiates all contracts whether intended to operate against a party, a stranger, or the public generally. The guilty party cannot allege his own fraud in order to avoid his own act; and he may be liable in damages where real injury is done. The agreement cannot be adopted in part; all must be disaffirmed, or none. *Foreman v. Bigelow*, 4 Cliff. 543, 549; *Felts v. Walker*, 49 Conn. 98, and cases cited.

Courts of equity have undoubted jurisdiction to compel the surrender and cancellation of deeds where the evidence shows they were obtained by fraud or held for inequitable and unconscientious purposes. *Walker v. Hunter*, 27 Ga. 336; *Hayward v. Dimsdale*, 17 Ves. Jr. 111; *Hamilton v. Cummings*, 1 Johns. Ch. 517, 1 L. ed. 225; *Van Doren v. New York*, 9 Paige, 838, 4 L. ed. 743; *Fonda v. Sage*, 48 N. Y. 187; *McHenry v. Hazard*, 45 N. Y. 580; *Whittingham v. Thornburgh*, 2 Vern. 208; *De Costa v. Scandret*, 2 P. Wms. 170; *Peake v. Highfield*, 1 Russ. 539.

Burden of proof.

It is familiar law that a party alleging fraud should be required to prove it; the burden of proof is with the affirmative. *Hickman v. Trout*, 63 Va. 478; *Heaton v. Shanklin*, 14 West. Rep. 827, 115 Ind. 506; *White v. Trotter*, 14 Smedes & M. 30, 53 Am. 12 L. R. A.

Dec. 112; Satterwhite v. Hicks, Bush. L. 105, 57 Am. Dec. 877; *Matthews v. Crockett*, 82 Va. 394; *Mitchell v. Deeds*, 49 Ill. 416; *Stewart v. Severance*, 43 Mo. 322; *Hempstead v. Johnston*, 18 Ark. 123, 65 Am. Dec. 458; *Jones v. Degre*, 84 Va. 685; *Wallace v. Mattice*, 118 Ind. 59; *Crawford v. Harlow*, 10 West. Rep. 78, 92 Mo. 498; *Bostwick v. Benjamin*, 63 Mich. 238, 15 West. Rep. 923.

It may be further observed that slight proof is necessary to establish proof of fraudulent intent between parties who occupy confidential relations. *Fisher v. Herron*, 22 Neb. 183; *Long v. Milford*, 17 Ohio St. 484, 98 Am. Dec. 638; *Fisher v. Bishop*, 10 Cent. Rep. 707, 108 N. Y. 25.

Fraudulent intent is rarely a matter of proof by direct and positive evidence. To require conclusive testimony in cases of fraud would result in a practical frustration of justice and render all attempts as to its disclosure abortive. The law is satisfied therefore with a reasonable degree of certainty, and this position is abundantly sustained by the adjudged cases. *Southern L. Ins. Co. v. Wilkinson*, 53 Ga. 535; *Conant v. Jackson*, 16 Vt. 355; *O'Donnell v. Segar*, 25 Mich. 367; *Stanfield v. Stiltz*, 93 Ind. 249; *Strong v. Hines*, 35 Miss. 201; *Brower v. Goodyer*, 88 Ind. 672; *Parrott v. Parrott*, 1 Heisk. 681; *Massey v. Young*, 73 Mo. 200; *Graham v. Roder*, 5 Tex. 141; *Smalley v. Hale*, 37 Mo. 102; *Burch v. Smith*, 15 Tex. 239; *Thompson v. Shannon*, 9 Tex. 536.

Liberality in admission of evidence.

In all investigations of questions involved in fraud the courts extend an exceptional liberality to the admission of evidence. *Zerbe v. Miller*, 16 Pa. 498; *Hopkins v. Slevert*, 56 Mo. 201; *Stauffer v. Young*, 39 Pa. 455; and a broad interpretation is to be afforded to all the rules of relevancy. *Smalley v. Hale*, 37 Mo. 102; *Rice*, Evidence in Civil Cases, 953.

If desirable to summarize the legal conclusions on this subject, it will be entirely accurate to state that parol evidence is always competent to establish the fraudulent omission or insertion of any material averment in the recitals of a contract, and such evidence is also admissible whenever the obligation has been contracted *in fraudem legis*. The contractual form of the reprobative matter is of no consequence. *Waddell v. Glassell*, 18 Ala. 561; *Bottomley v. United States*, 1 Story, 185; *Hunter v. Billeu*, 30 Ill. 228; *Townsend v. Cowles*, 31 Ala. 428; *Lunday v. Thomas*, 26 Ga. 593; *Pierce v. Wilson*, 34 Ala. 698; *Hamilton v. Conyers*, 26 Ga. 376; *Stannard v. McCarty*, Morris (Iowa) 124; *Bartle v. Vosbury*, 3 Grant, Chs. 277.

as to such facts are the mistakes of the Company, and do not avoid the policy.

Meckler v. Phoenix Ins. Co. 88 Wis. 665.

No misrepresentations can be predicated of a fact of which the insurers were fully cognizant.

Mutella v. Adams, 19 Fed. Rep. 891; *Russell v. Detroit Mut. L. Ins. Co.* 80 Mich. 407; *Crowe v. Hartford F. Ins. Co.* 79 Mich. 249; *O'Brien v. Home Ben. Soc.* 117 N. Y. 810; *Schreiber v. German American H. Ins. Co.* 48 Minn. 367; *Deitz v. Providence Washington Ins. Co.* 31 W. Va. 851.

Although the policy contains a condition, providing that if any of the statements specified in the written application are untrue "this policy shall be null and void," and the false material statements were made by the applicant, yet those conditions do not render the policy absolutely void, but voidable only, at the election of the company which may waive the breach of the condition.

Huntley v. Perry, 38 Barb. 569; *Schreiber v. German American H. Ins. Co.* *supra*; *Helme v. Philadelphia L. Ins. Co.* 61 Pa. 107, 100 Am. Dec. 621; *Union Mut. F. Ins. Co. v. Keyser*, 32 N. H. 813.

The statement with reference to the occupation of Reed, if it was incorrect, was immaterial. A representation is material when its truth or falsity would probably and naturally have induced the insurer either to enter into the contract or refuse to do so.

Bartow v. Phoenix Ins. Co. 67 N. Y. 595.

It is not the previous or present business of the applicant, but his future calling, that affects the risk; so it certainly could have been no fraud upon Reed, whatsoever his occupation was therein stated to be, for by accepting the policy with a true copy of his written application annexed to the same, printed in plain English, he was thereby told most plainly, forcibly and emphatically what his rights and obligations were.

See *Atina L. S. F. & T. Ins. Co. v. Olmstead*, 21 Mich. 252; *Van Buren v. St. Joseph Co. Village Fire Ins. Co.* 38 Mich. 399.

It must be presumed that he read the application and was cognizant of the limitations therein expressed.

New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 984; *Cleaver v. Traders Ins. Co.* 8 West. Rep. 815, 65 Mich. 527; *McIntyre v. Michigan State Ins. Co.* 52 Mich. 188.

Therefore Reed was fully informed as to what business he was, by the terms of the policy, precluded from engaging in "without first obtaining the written consent of the Company."

If false representations are made regarding matters of fact and the means of knowledge are at hand and equally available to both parties, and the party, instead of resorting to them, sees fit to trust himself in the hands of one whose interest is to mislead him, the law will leave him where he has been placed by his own imprudent confidence.

Naughton v. Gerson, 80 U. S. 13 Wall. 379, 20 L. ed. 627; *Rockafellow v. Baker*, 41 Pa. 819; *Holt v. Parker*, 31 Me. 143; *Brown v. Leah*, 17 Mass. 364.

Redress has often been refused to a party who claimed to have been induced by fraud to sign a contract or other paper whose contents were misrepresented to him.

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Cooley, Torts, 488, citing *Maine Mut. M. Ins. Co. v. Hodgkins*, 66 Me. 109; *New Albany & S. R. Co. v. Fields*, 10 Ind. 187; *Hawkins v. Hawkins*, 50 Cal. 558; *Taylor v. Atchison*, 54 Ill. 196; *Elliot v. Levings*, 54 Ill. 218.

There must be a false representation; the complaining party must have believed it to be true, and relied upon it and have been deceived thereby.

Masterton v. Beers, 1 Sweeney, 406; *Byard v. Holmes*, 34 N. J. L. 296.

There is no evidence that Reed confided in the truthfulness of Vanderburg's answer on returning the policy, "It is all fixed now." There is no evidence that the application was misread or in any way misrepresented to him. Evidence of fraud should be very clear.

Eates v. Furlong, 59 Ill. 298; *Bumpus v. Bumpus*, 59 Mich. 95; *Blish v. Collins*, 13 West. Rep. 546, 68 Mich. 542.

Messrs. Watts & Smith for appellee.

McGrath, J., delivered the opinion of the court:

This is assumpsit, brought in justice court, upon a note given by defendant for a portion of the second semi-annual premium on a policy of insurance issued by plaintiff upon the life of defendant. Defendant, with his plea, gave notice that the signature to the note was obtained by fraud, and that the note was without consideration. Defendant was a switchman in the employ of the Lake Shore Road, at Adrian. One Vanderburg, an agent of plaintiff, who resided at Adrian, and had known defendant for some time, solicited the insurance, took the application, delivered the policy, and took some cash and three notes for the first year's premium. The policy was dated November 28, 1888. Two of the notes were paid, and defendant refused to pay the third, which matured about September 1, 1889. The application was filled out by Vanderburg and presented to defendant for signature. Defendant insisted that Vanderburg had been acquainted with him for years, knew all about his occupation, and filled out the application largely from his (Vanderburg's) knowledge of the facts; that no questions were asked as to occupation, and defendant did not read the application before signing it, but relied upon Vanderburg; that defendant was a switchman engaged at the yard, and was upon and about trains as they were being made up; that the policy, with a copy of the application attached, was delivered to him in January, 1889; that some days afterwards, in examining the policy and copy of the application, he discovered that his occupation was given as "assistant yard-master, does no switching, don't go near trains;" that thereupon he called Vanderburg's attention to this misstatement, and told him that he was not a yard-master; that he did switching and did go near trains; that thereupon Vanderburg took the policy for the purpose of sending it to the Company for the purpose of correction; that afterwards Vanderburg returned the policy to defendant, saying that the change had been made, and that it was all right; that, supposing that the application had been changed to conform to the facts, defendant did not examine it for some time, but when he did finally examine it, he found that it read "assistant yard-

master, don't couple cars or do switching;" that upon this discovery defendant saw Vanderburg, accused him of again misrepresenting defendant, and told him that he (defendant) was not protected by the policy, and tendered it back to Vanderburg; that Vanderburg claimed that he had no right to receive it; that several conversations were had with Vanderburg, who finally advised him to send it back to the Company, which he did on or about September 26, 1889. The application contained the usual printed clause declaring "that the above is a fair and true answer to the foregoing questions, and I hereby agree that these statements, with this declaration, shall form the basis of the contract for assurance, and that any untrue or fraudulent answers . . . shall violate the policy and forfeit all payments made thereon." The policy provides in terms that "no agent has power to change the terms of this contract," and contains the further provision that "the person whose life is hereby insured shall not engage in blasting, . . . or be regularly employed . . . as a mariner, engineer, fireman, conductor, laborer, in any capacity . . . upon railroad trains."

The plaintiff requested the court to charge the jury as follows: "(1) You are directed to find a verdict for the plaintiff for the amount of principal and interest of note in issue. (2) Even should you find that the agent, Vanderburg, wrote wrongfully the answers in the application for insurance by Reed, which untruthful answers were known to him, Reed, or not, this fact would not relieve the plaintiff from the obligation fixed in the policy; and, in case he should have died during any of the time prior to the time fixed for the payment of the note, plaintiff would be obliged to pay the wife of insured \$1,000, and hence defendant is liable on his note. (3) There is no evidence before you that you can consider that will warrant you to find a verdict for the defendant." The court refused these requests, and instructed the jury as follows: "You are instructed, as a matter of law, that if Mr. Reed, in answering the question as to what his occupation was, said to Mr. Vanderburg that he was engaged in the yard there as a switchman, making up trains, and doing general work about the yards there in connection with trains, and Mr. Vanderburg put in his application, which was the foundation for the issuing of the policy, the statement that he did not go near the cars or do switching, then, I think, gentlemen of the jury, that that would be such a misstatement or fraud practiced upon the insured here as that he would be entitled to have these proceedings rescinded; that is, the policy and notes set aside and held for naught, from the time at least when such rescission should take place upon his part. . . . You will take all these circumstances into consideration; and if he did know it, but afterwards acted on the policy as if it was in force, and he was bound by it, and the Company was bound by it, then he could not assert the defense which he is seeking to assert here; or if the agent, Mr. Vanderburg, put into this application the language as used by the defendant in stating what his occupation was, as he claims that he did, why then, of course, Mr. Reed would not have the right to assert that

by way of defense to this note, because, if there was any fraud then, it would be the fraud of the defendant, and not the fraud of the Company or its agent." The jury brought in a verdict of no cause of action.

We think the court was correct, both in the refusal to give the plaintiff's requests and in the instructions given. The application here contained absolutely no restriction upon the powers of the agent. The applications are usually filed in in the hand writing of the agent, as was done in this case; and agents are nowhere in the blank prohibited from filling in the application. Indeed, on the face of the printed blank, the very first sentence is as follows: "This blank must be filled by the agent;" and again, in a blank left at the head of a printed blank, is the following: "Agents will note here anything specially regarding the policy applied for, and to whom and where it is to be sent." Although these appear in what might be termed the "caption" to the application, and not in the body of the application, yet to a person not familiar with these blanks it would be misleading if it is intended that the application is to be filled out by the applicant. Again, in the body of the application is the following: "N. B. Agents will be particular to see that all questions in the application are fully answered, particularly whether the age and date of birth agree." Again, in the general printed declaration in the application is the following: "It is hereby agreed that the policy shall not be in force unless the premium is actually paid to the Company or its authorized agents." At the bottom of the application are the following printed words: "Approved and recommended by (S. W. Vanderburg), agent;" the name of S. W. Vanderburg being written in in this case. At the head of the filing blank, upon the back of the application, occurs the following: "Agents will not fill up this filing." Vanderburg received the premium in notes and cash for the Company, and must be considered the duly authorized agent of the Company. Had the blank been presented to and read over by the insured before it was filled in, there is nothing contained in it which did not warrant his acting with the agent, just as he claims he did. The application was attached to the policy, and delivered to defendant. The policy contains this provision: "No agent has power to change the terms of the contract;" and also the following: "For the information of the assured, and in order that any unintentional errors or omissions which hereafter may be found to exist may be corrected, a copy of the application upon which this policy is based is hereto attached." It must be conceded that the representation in the policy as to the occupation of the insured is untrue, and, if made by the defendant, it would be a good defense to an action upon the policy. The court instructed the jury that, if made by the defendant, it would be no defense to the action upon the note. The jury found that it was not the act of the insured, but of the agent of plaintiff. It has been repeatedly held that, when an application is reduced to writing by an agent of the insured, upon oral statements of the applicant, the conversation between the agent and the applicant at the time of putting it in writing is admissible as bearing on the question of the actual contents of the paper, or

the representations of the insured; and that, when it appears that the insured fairly and correctly informed the agent as to any fact, and the agent unskillfully, carelessly, or fraudulently misrepresented the insured as to that fact, such unskillfulness, carelessness, or fraud is the unskillfulness, carelessness, or fraud of the company, and is no defense to an action on the policy. *Michigan State Ins. Co. v. Lewis*, 30 Mich. 42; *North American F. Ins. Co. v. Throop*, 22 Mich. 146; *Crouse v. Hartford Ins. Co.* 79 Mich. 249, and cases cited.

In *Atina L. S. F. & T. Ins. Co. v. Olmstead*, 21 Mich. 251, Justice Cooley says: "The agent of the insurance company assumes to have all the requisite knowledge for preparing the proper papers, and volunteered to make them out. He had all the necessary information for that purpose, and nothing was concealed from him. If the application is not in due form, and if it fails to give all the information called for, it must be either because the agent was too ignorant of his business to be properly intrusted with the agency, or because he was so negligent or reckless that he did not trouble himself to draft them correctly; or, lastly, because he was disposed to take Olmstead's money on fraudulent pretense of giving him indemnity when he knew he was giving none whatever. The general rule, undoubtedly, is that, in the absence of fraud, accident, or mistake, a party must be conclusively presumed to understand the force of his contracts, and to be bound by their terms. But it cannot be tolerated that one party shall draft the contract for the other, and receive the consideration, and then repudiate his obligation on the ground that he had induced the other party to sign an untrue representation, which was, by the very terms of the contract, to render it void. . . . The forms and requirements of the different insurers are different, and when an agent, who at the time and place is the sole representative of the principal, assumes to know what information the principal requires, and, after being furnished with all the facts, drafts a paper which he de-

clares satisfactory, induces the other party to sign it, receives and retains the premium moneys, and then delivers a contract which the other party is led to believe, and has a right to believe, gives him the indemnity for which he paid his money, we do not think the insurer can be heard in repudiation of the indemnity on the ground of his agent's unskillfulness, carelessness, or fraud. If this can be done, it is easy to see that the community is at the mercy of these insurance agents, who will have little difficulty, in a large proportion of the cases, in giving a worthless policy for the money they receive."

In the present case, upon the discovery of the fraud, defendant had the right to rescind the contract. He was not bound to subject the beneficiary named in the policy to a lawsuit after his death, to determine the validity of the policy, especially as in that event his testimony would be wanting. Again, it is not claimed here that the Company had actual notice of the facts as to defendant's occupation, but that they had constructive notice only; but it must be remembered that a copy of the application was attached to the policy, and delivered to the defendant, in which case, under the express provisions contained in the policy relating to the correction of "unintentional errors or omissions" in the application, it was defendant's duty to call attention to this misrepresentation, otherwise the defendant might have been chargeable with a fraud upon the Company; for while the Company would not be able to avoid a policy by reason of the rule of law that its agent's wrong was the Company's own wrong, of which it could not take advantage, it would be otherwise had the insured conspired with the agent, or had the insured been fully informed as to the representation made, and the contents of the application, and neglected to bring it to the attention of the Company.

The judgment is affirmed, with costs of both courts to defendant.

The other Justices concurred.

ARKANSAS SUPREME COURT.

FONES BROS. HARDWARE CO., *Appl.*,

v.

Jacob ERB *et al.*

(.....Ark.....)

1. Definite plans and specifications must accompany an advertisement for bids for building a public bridge, under a consti-

tutional provision requiring bridge contracts to be given to the lowest bidder; and a statute permitting the commissioners to advertise at the same time for plans, specifications and bids and to adopt one of the offered plans with its specifications and accept the accompanying bid is unconstitutional.

2. The Act of March 18, 1879, forbidding contracts in behalf of a county

NOTE.—In awarding public contracts statutory requirements must be observed.

Where, by the recitals of a municipal charter, its officials are prohibited from contracting for the purpose of furnishing materials and supplies in its behalf, except upon compliance with certain specified rules, the municipality is relieved from liability upon a contract made by a municipal officer in violation of the charter requirement, and the contractor furnishing the city with such materials and supplies is without remedy as against the municipality. *McDonald v. New York*, 68 N. Y. 22.

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It is fundamental that those seeking to deal with a municipal corporation through its officials must take great care to learn the nature and extent of their power and authority. *Hodges v. Buffalo*, 3 Denio, 110; *Donovan v. New York*, 38 N. Y. 293; *Cornell v. Grilford*, 1 Denio, 510; *Lowell F. O. Sav. Bank v. Winchester*, 3 Allen, 109.

In contracting, the board must pursue the course pointed out by the Statute, and cannot legally contract in any other way. This course is clearly pointed out. The board must first adopt plans and specifications of the work required to be done so

for which there is no unexpended appropriation, applies to bridges, and does not unlawfully interfere with the jurisdiction over bridges vested by the Constitution in the county court.

3. An appropriation for preliminary work, estimates, etc., towards securing a public bridge does not authorize a contract on behalf of the county to have such bridge built.
4. In the absence of an adequate remedy at law an injunction will lie at the suit of a taxpayer to restrain the making of an unauthorized contract on behalf of a county for the construction of a bridge.

(July 8, 1891.)

APPEAL by plaintiff from a judgment of the Chancery Court for Pulaski County in favor of defendants in a suit brought to enjoin the making of a contract for the construction of a bridge. *Reversed.*

The facts are stated in the opinion.

Messrs. J. M. Moore and W. S. McCain, for appellant:

The appropriation of \$3,000 made by the county court, was for preliminary purposes, and did not authorize a contract for the construction of the bridge.

Worthen v. Roots, 34 Ark. 356; *Lawrence County v. Coffman*, 36 Ark. 641, 646, 647; *Ex parte Turner*, 40 Ark. 549, 550; *Allis v. Jefferson County*, 34 Ark. 307, construing § 1449

that those desiring to contract therefor can understandingly make offers for its performance. In this way only can the advantages of competition be secured to the public (*Dillon v. Anderson*, 43 N. Y. 281), and every avenue of favoritism and fraud be closed. *Maset v. Pittsburgh*, 137 Pa. 548.

Under the Public Statutes, county commissioners are not bound to accept the lowest bid in answer to published notices for contracts for public works. *Mayo v. Hampden County Comrs.* 2 New Eng. Rep. 59, 141 Mass. 74.

A construction that will sustain, rather than defeat, the action of the local authorities should be put upon their acts where such construction is possible. *New York v. Broadway & S. A. R. Co.* 97 N. Y. 275, 281.

A contracting board, authorized by law to contract for pavements, etc., according to such plans as they may adopt, and, after due notice in the city newspapers, to let the work to the parties who shall offer to do the same at the lowest prices, have no power, after publication of a notice requiring the work to be done in accordance with a certain plan, to award such contract, with specifications which have not been adopted. It is the duty of the board first to adopt plans and specifications of the work required, so that those desiring to contract therefor can understandingly make offers for its performance. *People v. Board of Improvement*, 43 N. Y. 227.

A contractor who furnishes materials and supplies, etc., on a contract made without observance of the preliminaries of due advertisement required by law, cannot recover on the ground that the municipality has had the benefit of them, though it may be otherwise, if the city has collected by legal assessment the funds to pay for such materials. *McDonald v. New York*, 68 N. Y. 23; *Nelson v. New York*, 68 N. Y. 535, reversing 5 Hun, 190.

Where the municipal charter requires the officers of the city to let contracts to the lowest bidder, a contract made in violation of the charter requirements is null and void; and in an action brought to

of Mansfield's Digest; *Bradley v. United States*, 98 U. S. 104, 25 L. ed. 105.

The power to contract is so intimately connected with the power of taxation that it is necessary, in any well-considered policy intended to limit the one, to make corresponding limitations on the other.

See *United States v. New Orleans*, 98 U. S. 395, 25 L. ed. 226; *Ralls County Ct. v. United States*, 105 U. S. 785, 786, 26 L. ed. 1221; *Lilly v. Taylor*, 88 N. C. 489.

The incurring of a debt by a public corporation is, in a certain sense, the first step in taxation, since debts by such corporations are, commonly, only to be paid by taxation.

Cooley, Taxn. 2d ed. 827.

Where the charter of a city made the levying of an assessment a prerequisite to contracting for the improvement of a street, a contract made before the levy was held void.

Goodrich v. Detroit, 13 Mich. 279.

A contract in excess of the appropriation is void and cannot be ratified.

Farmers & M. Nat. Bank v. School Dist. No. 53 (Dak.) June 8, 1889; *Dickinson v. Poughkeepsie*, 75 N. Y. 72; *Bowling Green & M. R. Co. v. Warren County Ct.* 10 Bush, 714.

The Act of 1891, which provides for letting out bridges to bidders, violates the Constitution, art. 19, § 16.

People v. Buffalo County Comrs. 4 Neb. 150; *Boren v. Darke County Comrs.* 21 Ohio St. 323;

recover the value of the work, the city may plead the illegality as a defense; and neither the municipality nor its subordinate officers can make a valid contract for such work, except by complying with the requirements of the law. *Addis v. Pittsburgh*, 85 Pa. 379.

Their entire authority to let out the work on contract is conferred by the Statute, and that Statute prescribes how and how only they can make a contract: it must be upon public notice, be open to competition upon proposals, and must be made with the lowest bidder appearing upon such competition. Any other contract is wholly unauthorized, beyond their powers, and therefore void. *Re Eager*, 46 N. Y. 100; *Dillon, Mun. Corp.* § 938, and cases cited.

He who is the lowest bidder upon the estimates on which a contract is let is the lowest bidder under the law, and does not lose his rights because the estimates are erroneous; and that he knew them to be erroneous will not make the bid fraudulent. *Reilly v. New York*, 111 N. Y. 473.

In *Wells v. Burnham*, 30 Wis. 112, it was held that where the work to be done, and the manner and style in which it is required to be done, and the materials to be used, were not specified, the provision of the statute that the contract must be let to the lowest bidder is not complied with and the contract was held to be null and void.

In *People v. Buffalo County Comrs.*, 4 Neb. 150, where the law required the contract to be let, after due advertisement, to the lowest bidder, no plans or specifications were submitted by the commissioners on which bids could be based. Contractors were directed to furnish their own plans and specifications, and submit them under seal with their bids. It was held that without plans and specifications there could be no competitive bidding, and the contract was pronounced invalid. To the same effect, see *Boren v. Darke County Comrs.* 21 Ohio St. 311; *State v. Barlow*, 48 Mo. 17; *Re Eager*, 46 N. Y. 100.

People v. Contracting Board, 33 Barb. 515; *People v. Gleason*, 121 N. Y. 631; *Addis v. Pittsburg*, 85 Pa. 379.

When the law prescribes the mode which county commissioners must pursue in the exercise of their powers, it excludes all other modes of procedure.

Sioux City & P. R. Co. v. Washington County, 3 Neb. 42; *Woodruff v. Berry*, 40 Ark. 255.

An injunction is the proper remedy of the property owner whose property is about to be taken or damaged for public use without compensation.

Ex parte Martin, 18 Ark. 198; *Organ v. Memphis R. & L. R. Co.* 51 Ark. 235; *Niemeyer v. Little Rock J. R. Co.* 43 Ark. 119; *Mills, Em. Dom.* 130; *Myers v. St. Louis*, 82 Mo. 367; *Lackland v. North Missouri R. Co.* 31 Mo. 181; *Arkansas River Packet Co. v. Sorrels*, 50 Ark. 456; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984; *Holbert v. St. Louis, K. C. & N. R. Co.* 45 Iowa, 23.

The tax payer is entitled to an injunction against the making of illegal contracts by public officers.

High, Inj. 1251; *Kitchell v. Union County Comrs.* 123 Ind. 540; *Shinn v. Henderson (Fla.)* 8 L. R. A. 55, 29 Am. & Eng. Corp. Cas. 424; *Taylor v. Pine Bluff*, 34 Ark. 607; *State v. Baxter*, 38 Ark. 462; *Barnes v. Williams*, 53 Ark. 205; *Worthen v. Roots*, 34 Ark. 359; *Benton County Comrs. v. Templeton*, 51 Ind. 266; *Warren County Agr. J. S. Co. v. Barr*, 55 Ind. 30; *Jacksonport v. Watson*, 33 Ark. 704; *Collon v. Hanchett*, 13 Ill. 618.

Mayors George W. Caruth, U. M. Rose and G. B. Rose, for appellees:

Article 7, § 30, of the Constitution prescribes the jurisdiction of the county quorum; and the Legislature can neither add anything to it nor take anything away from it,—all the courts of this State being courts of limited jurisdiction, fixed by the terms of that instrument.

Miller v. Heard, 6 Ark. 75; *Byrd v. Brown*, 5 Ark. 710; *Cheek v. Claibourne*, 22 Ark. 384; *Ex parte Allis*, 12 Ark. 101; *Vaughn v. Harp*, 49 Ark. 160; *Dillard v. Noel*, 2 Ark. 456; *Laferty v. Day*, 7 Ark. 262; *Martin v. Foreman*, 18 Ark. 251; *Hempstead v. Watkins*, 6 Ark. 318; *Colby v. Lawson*, 5 Ark. 308; *Russell v. Jacoway*, 33 Ark. 192; *Willeford v. State*, 43 Ark. 67; *Wheat v. Smith*, 50 Ark. 271; *Worthen v. Badgett*, 32 Ark. 497.

If the foregoing proposition were not true, then we submit that the law relating to bridges is not involved in the section of the Act limiting contracts that are made by the county court.

Mansf. Dig. §§ 497, 503; Act of 1891; *Kinney v. Pulaski County*, 2 Dill. 258.

As there has been an appropriation for the bridge, which was partly unexpended, the contract is valid.

Acts of 1875, 53; Acts of 1879, 115; *Mansf. Dig.* 1451; *Cook v. Hamilton County Comrs.* 6 McLean, 113; *State v. Board of Public Works*, 38 Ohio St. 409; *Endlich*, Interpretation of Statutes, 353.

In the case of important public works no injunction should issue unless a plain case for relief is made.

Ex parte Martin, 18 Ark. 212; *McElroy v. 13 L. R. A.*

Kansas City, 21 Fed. Rep. 261; 1 High, Inj. § 34.

No ground for an injunction was presented, as the complaint showed that the damage was simply a question of dollars and cents.

Ex parte Foster, 11 Ark. 304; *Ellsworth v. Hale*, 33 Ark. 633.

Hemingway, J., delivered the opinion of the court:

This appeal presents for determination three questions: *First*. When a board of commissioners for building a bridge across a stream more than 400 feet wide have advertised for and received bids with competitive plans and specifications, can it adopt a plan and specification thus received, and accept the accompanying bid? *Second*. Can such board make a contract for building a bridge before any appropriation therefor has been made, or when there is an unexpended appropriation "for preliminary work, estimates, etc., towards securing such bridge?" *Third*. If such board is about to make such a contract, will a court of equity, at the suit of a taxpayer of the county, interfere by injunction?

1. If the first question could be determined by the provisions of the Act of February 19, 1891, our response would be that the board was authorized to adopt a plan and specification submitted in response to such notice, and to accept the accompanying bid. But it is insisted for the appellant that this Act is unconstitutional, because it contravenes section 16, art. 19, of the Constitution of the State, which is in the following words: "All contracts for erecting or repairing public buildings or bridges in any county, or for materials therefor, or for providing for the care and keeping of paupers, where there are no almshouses, shall be given to the lowest responsible bidder under such regulations as may be provided by law." The point made is that the Act does not admit of competitive bidding in awarding contracts, but provides a plan by which the lowest bidder cannot be known, or the giving of contracts confined to such bidders. The constitutional provision was designed to secure economy in the line of public improvements to which it relates. Extravagance therein might arise either from the inattention or incompetency of the contracting officer, and his consequent failure to obtain favorable offers for contracts; or it might arise from the corruption or favoritism of such officer, and his consequent refusal to accept favorable offers when made. To prevent extravagance from the first source, the plan of public letting is adopted, the public are informed of contracts to be let, and its self-interest and rivalry are appealed to for proper offers upon them; to prevent extravagance from the latter source, all discretion is withheld from the contracting officer; he is bound to give the contract to the lowest bidder, and cannot let it out for individual gain or as a reward to another. The method prescribed is well understood, clearly defined, and of distinctive character, specially adapting it to a conservation of public interests. It embodies three vital principles,—an offering to the public, an opportunity for competition, and a basis for an exact comparison of bids; and any statutory regulation of the matter which excludes or

ignores either principle destroys the distinctive character of the system, and thwarts the purpose of its adoption. Any arrangement which excludes competition prevents a letting to the lowest bidder. And it does not matter that such an arrangement maintains the form of public letting; if it excludes the essential principle of competition, there can be no real public letting. This is recognized as so essential that in some cases, where all the forms were preserved, but the contracts to be let were according to plans protected by a patent and the subject of a monopoly, it was held that such contracts could not be made because the monopoly prevented competition. 1Dillon, Mun. Corp. § 487, and cases cited.

When a contract to build a bridge is to be let, there are two kinds of competition that may arise: *first*, that between persons desiring to build different kinds of bridges; and, *second*, that between those desiring to build the same kind. And as was said by Judge Christlancy, in discussing a provision similar to that under consideration, the bidding which it contemplates is of the latter kind,—bidding for the same particular thing, to be done according to the same specifications. For, says he, no bids for different kinds of work, and referring to different specifications, could be recognized as coming in competition with each other for the purpose of determining the lowest bid within the requirement of this section, without opening the door to the same corrupt combinations, and furnishing facilities for the same fraudulent practices, which it was the purpose of this provision to prevent. *Atty-Gen. v. Detroit*, 26 Mich. 263.

As the competition contemplated is that between those desiring to do the same particular thing according to the same specifications, it is obviously essential that an opportunity should be given all persons to enter into competition for the specific thing which is the subject of the letting; and such opportunity cannot be afforded, unless the specific thing to be let has been determined upon and made known.

The Constitution contains no express provisions with regard to plans and specifications, but the requirement of an award to the lowest bidder implies the further requirement that such information shall be put within the reach of bidders as will enable them to understand the offering and bid intelligently, and enable the representatives of the county to know who is the lowest bidder. *Detroit v. Hoemer*, 79 Mich. 384.

There can be no intelligent bidding for a contract unless all bidders may know what the contract is; and this cannot be known unless the plan of the work to be contracted for, and the specifications according to which it is to be done, have been adopted; for they, with the price to be agreed upon, go to make up the contract.

In the case of *Boren v. Darke County Comrs.*, 21 Ohio St. 311, the Supreme Court of Ohio held, under a Statute embodying the provisions of our Constitution, that a bid could not be entertained which contemplated work or material not included in the plans and specifications according to which the contract was offered. This ruling was placed upon two grounds; *first*, that it could not be known who

was the lowest bidder; and, *second*, that the contract thus bid for had not been submitted to competition.

In the case of *People v. Buffalo County Comrs.*, 4 Neb. 150, the Supreme Court of Nebraska, considering the question upon a similar provision, ruled that, from the necessity of the case, plans and specifications must be adopted in advance of the offering as a basis upon which bids are to be made, and that where county commissioners advertised for plans and specifications with accompanying bids, they could not adopt plans and specifications and accept a bid thus received, because no opportunity had been given for competitive bidding, and no basis had been fixed on which to make bids.

In the case of *Bigler v. New York*, 5 Abb. N. C. 51, an action was brought upon a contract with the city to recover the price of lumber furnished; and the recovery was resisted on the ground that the contract was invalid because it had not been let to the lowest bidder. The advertisement was for bids to furnish nine different kinds of timber during the term of one year, specifying each kind of timber, but not specifying the quality of either or the aggregate. The court said, in regard to the proposal for bids: "We find in this contract that there were no plans and specifications as required by the provisions of the Dock Law; that the contract was general in every particular; that there was no way in which there could be competitive bidding, for the reason that we find no amount of timber is specified. Certain qualities of timber are specified, but there are no quantities—no amount of any kind—specified, so that there could be a comparison of bids. If the contract system is to prevail, it is necessary the contract should be in such a form that there shall be what is called 'competitive bidding.'" Illustrating the opportunities afforded for favoritism and fraud where contracts are offered upon indefinite plans and specifications, the court, continuing, says: "He [the favored bidder] puts a high price upon that of which they want a good deal, and a very low price upon that of which they want very little; and another man bids conscientiously, supposing they want an equal quantity of each character, and puts reasonable prices to each class of lumber, and he averages his prices accordingly. How are you going to compare those bids? If you foot up so many pieces at so much per thousand, you will find that the one will be lower than the other; when it comes to be filled, the first will be found to be infinitely higher than the other,—a fact which would be known to the officers of the department, in consequence of their knowing how the work will be carried on, and what proportion of timber of the various kinds would be furnished." The court concludes that without specifications as to quality and quantity of the various things to be furnished there could be neither competitive bidding nor comparison of bids. *Id.* p. 70.

An Act of the New York Assembly provided that every bidder for canal work should accompany his bid with a bond conditioned that, if the contract should be awarded him, he would within ten days enter into a contract for the performance of the work, upon the terms

prescribed by the contracting board. The supreme court held that the terms of such contracts should be prescribed by the board before the bidding, and could not be afterwards. *People v. Contracting Board*, 38 Barb. 510.

The charter of the City of St. Paul provided that contracts for paving the streets should be let to the lowest bidder upon notice of the time and place of letting. A notice called for proposals for two contracts for paving different parts of a street. A bid was offered, and accepted, for paving the entire street under one contract. In a suit upon the contract made in pursuance thereof, the Supreme Court of Minnesota said: "No bids were asked for such a contract as that made with the plaintiff, and, the contract let not being the same that was advertised, the acts of the city or ward officers in making it were void, and created no liability on part of the defendant." *Nash v. St. Paul*, 11 Minn. 174 (Gil. 110). We are constrained to believe that the rule announced in that case is the rule fixed by our Constitution, and that the contracts made must be the same as those advertised for letting. When it is determined to build a bridge within a given time, and the location, plans, and specifications have been adopted, all the terms of the contract are fixed except the price to be paid; the obligation to build a bridge according to the terms thus fixed is the thing to be offered to competition; and until it is formulated by the defining of those terms so that they, in connection with the bid to be thereafter accepted, will comprise a complete contract, there is nothing to be let, and nothing to which competition can be directed. It is idle to talk of competition where the minds of bidders are not directed to the thing offered. When the subject of competition is undefined and uncertain, and left to be moulded by the various competitors, it will assume as many forms as they have conceptions, and each will bid upon the thing of his own creation,—a thing upon which no other can bid. But the absence of competition is not the only difficulty; for when all bids are upon different things, or the same thing differently fashioned, there is no basis on which to compare them, or by which it can be determined with certainty which is the lowest bid, and such determination must rest in the discretion of the contracting board. But since the Constitution was designed to withhold all discretion in such matters, and thereby remove all opportunities for fraud or favoritism, any system which devolves such discretion is in violation of its provisions. It demands, in the letting of contracts, a basis upon which bids can be compared with mathematical precision, and which leaves nothing to official discretion after the bids are received; and no Act which provides regulations for letting without this basis can stand. If different plans and specifications were adopted, and bids invited at the same time for contracts according to each, whether the board could compare the bids upon different plans submitted, and accept the lowest bid upon the plan then selected,—is a question not raised or considered. See *Atty. Gen. v. Detroit*, 26 Mich. 268. We only decide that no contracting officer or tribunal has any authority to make a contract for building a bridge unless the same contract, in every material respect, had been

submitted to public bidding, and that this requires that it should be submitted with reference to definite plans and specifications. Such being the meaning and effect of the constitutional provision, is the Act of the Legislature void in so far as it provides that the board of commissioners shall advertise at the same time for plans, specifications, and bids, and afterwards adopt plans and specifications and accept a bid thus obtained? Upon an examination of the Statutes, it will be seen that, when the Act under consideration was passed, the laws in relation to bridges as well as county buildings authorized the advertisement of proposals only after the adoption of plans and specifications; a simultaneous advertisement for all was first brought into the Statute by the Act under consideration. See *Mansf. Dig.* §§ 499, 1098. This Act preserves the form of a public letting; but for what, or upon what basis, are bids invited? The commissioners are not required to advertise for bids upon a basis fixed by them, but each bidder is invited to define a basis for his own bid. It is plain that no two bids will be made upon the same basis, unless by accident, and that there can be no competition among bidders; and, when the bids are received, there is no standard by which to measure them, and therefore no means by which it can be absolutely known which is the lowest. In this respect, we think, the effect of the Act would be to nullify the Constitution, and it cannot be sustained.

Construing the complaint according to the established rules of construction in this State, we think it is sufficiently alleged that the board of commissioners advertised for bids on a contract, the terms of which had not been defined by the adoption of plans and specifications, and that, as the thing to be let was not defined, bidders could not compete with each other in the letting. According to those allegations, which are admitted to be true by demurrer, there was nothing to submit to the competition of bidders, no letting to the lowest bidder was possible, and the steps taken would not authorize the county court to make a contract, or order one to be made, and its action in that regard would be without jurisdiction and void.

We have not overlooked the allegation that the board had adopted what it denominated "general specifications;" but it appears from the advertisement of the board, which is exhibited with the complaint, that the board invited proposals and competitive plans and specifications at the same time, stating that all plans must comply with the general specifications furnished by the county. It thus appears that the specifications adopted were general, and not definite. "General specifications" were not sufficient, but it was essential that such definite and detailed specifications accompany the offering as would disclose the thing to be undertaken with circumstantial fullness and precision. The building of a bridge according to "general specifications" might be carried forward with such variety of detail and circumstances as to affect very materially its proper cost; and every bidder should know, not only the general plan, but every particular of detail and circumstance which could affect the cost of the work or the advantage of the contract. This is necessary, not only to active and intel-

ligent competition among bidders, but also to a certain and proper comparison of bids. An advertisement for bids for building a bridge 500 feet long, 80 feet wide, and of a stated capacity of burden, would contain "general specifications,"—if the words are not so contradictory as to make the term meaningless,—if, in response to this notice, bids with definite plans and specifications were returned. A. might offer to build a pontoon bridge at one price, B. a suspension bridge at another price, and C. a bridge on piers at another, and each bid might "comply with the general specifications;" yet there could have been no competition among bidders, and there would be no basis by which to determine with safety who was the lowest bidder. This supposes an extreme case; but the same conditions must arise, modified only in degree, wherever the plans and specifications adopted are so general as to admit of any substantial variety of detail in their absence. As there is nothing else in the Act of 1891 inhibited by the Constitution, its remaining provisions may stand, and must be held to be the law. *Cooley, Const. Lim.* §§ 210, 211; *State v. Marsh*, 37 Ark. 356.

2. Upon the second question stated, the appellant relies on a section of the Act of March 18, 1879 (Mansf. Dig. § 1451), which is as follows: "No county court or agent of any county shall hereafter make any contract on behalf of the county unless an appropriation has been previously made therefor, and is wholly or in part unexpended." It is contended that this Act has no application to contracts for bridges. According to its terms, it applies to any and all contracts that can be made by the county court or an agent of the county; and it is a part of the Act which provides for levying taxes and appropriating revenues for building bridges. We think its language and connection both imply that it was intended to regulate such contracts. It was urged in the argument that the Constitution conferred the jurisdiction of bridges on the county court, and that, if this Act was intended to apply to contracts for bridges, it would be void as interfering with the constitutional jurisdiction of that court. We hardly think that much reliance was placed on this ground, and a little consideration discloses its weakness. If the Act is void for this reason in its application to contracts for bridges, it is void in all respects, for the jurisdiction of the county court is co-extensive with the matters to which such contracts could relate. But the Constitution does not confer on the county court unlimited power in regard to bridges; it only vests in that court the exclusive jurisdiction to administer the law on that subject, and so long as this is permitted there is no room for complaint. Moreover, the clause which prescribes that such contracts shall be given to the lowest bidder provides that they shall be made under such regulations as may be provided by law (Const. § 16, art. 19); and the validity of a statutory regulation similar to, but more restrictive than, the one under consideration was affirmed by this court in the case of *Lawrence County v. Coffman*, 36 Ark. 641. We think the Act applicable in making contracts for bridges, and, further, that a contract to build a bridge is not

authorized by an appropriation for "preliminary work, estimates, etc., towards securing such bridge." It is the policy of the Act to require the concurring judgment of the levying court, and of the county judge, that a bridge should be built before a contract for building it can be made. When the levying court makes an appropriation to pay for one, that signifies its favorable judgment, and the county judge may afterwards signify his by letting the contract. But we do not think the appropriation relied on signifies the favorable judgment of the levying court. It is more reasonable to conclude that it was made with a view to reaching a decision than as the announcement of one reached. Under the Statute then in force, an examination of sites, and a procurement of plans and specifications, were preliminaries to making a contract, and they were no doubt intended in the designation of the appropriation. Soundings and surveys would be necessary to determine whether it would be practicable to build at any desirable location, and plans and specifications would be needed in estimating the probable cost of the work. We think, from the designation of the appropriation, that it was intended to defray the cost of obtaining that information, and it might lead to an appropriation for building the bridge, or to a determination to abandon it. While we think a contract cannot be made before there has been an appropriation for it, we do not think that, when an appropriation has been made, the contract will be limited to the amount appropriated. When the levying court appropriate any sum for the work, that signifies their judgment that the work should be done, and the county judge may then proceed to contract for it without further consulting them; the only limitation upon his power being found in other directions.

3. The ground of complaint in this case was not that the contract would be inexpedient or unjust, or that it would involve an extravagant outlay, but that it was about to be made without authority. So made, it would be void, and could not properly create a charge upon the taxable property of the county. If the contract should be made, and the bridge built, its cost would either be paid by taxation, or the contractor would sustain a heavy loss. Such a contingency would necessarily occasion injurious embarrassment, confusion, and contention to the county, the taxpayers, and the contractor, which would have been avoided by suit before the complications arose. We cannot say that the appellants could have obtained adequate relief by certiorari; for the want of jurisdiction arises from matter *dehors* the record. The remedy by appeal is inadequate; for the law does not give the taxpayer his day in court, or provide that he may appeal without it. Since the remedy at law is not adequate and complete, we are of opinion that injunction is the proper remedy. *Worthen v. Roots*, 84 Ark. 356; High, Inj. § 1251, and cases cited.

If the views herein expressed are correct, it follows that the chancellor erred in sustaining the demurrer to the complaint.

The judgment will be reversed, and the cause remanded, with directions to overrule the demurrer, and for further proceedings.

PENNSYLVANIA SUPREME COURT.

Catharine SNIDER

v.

Jacob H. BAER, Exr., etc., of Anna Shaffer,
Deceased, App't.

(.....Pa.....)

1. A direction by a testator in his will that his wife "shall have and hold the property" where he resides will carry to her the fee.
2. A fee which has been given by a will cannot be cut down to a life estate by a subsequent clause directing that the legatee shall have "the sole control of the property" during his lifetime.
3. A direction in a will that testator's real estate shall be sold whenever his widow shall direct and the proceeds paid over to her, and that she shall have power to dispose of the same by bequest or as she directs, is an absolute gift of the money to her.

(October 5, 1891.)

APPEAL by defendant from a judgment of the Court of Common Pleas for York County in favor of plaintiff in an action brought to recover possession of certain real estate. *Reversed.*

The facts sufficiently appear in the opinion.

Morris Horace Keesey and *V. K. Keesey*, for appellant:

The devising clause, "also, I direct that my beloved wife Anna shall have and hold the property in Bottstown, where I now reside," gives a fee, and the next clause does not mean to lessen or restrict the estate previously devised, but rather was placed there to show she was given the sole control during her lifetime. It is rather difficult to conceive how a testator could evince an intention to give greater powers than are by this will granted to his widow.

See *Roberts v. Unger*, 2 Pearson, 241.

To doubt is to solve the question and make a fee.

Shirey v. Postlethwaite, 72 Pa. 42; *Martin v. McDewitt*, 10 Phila. 19, 80 Phila. Leg. Int. 92; *Rockell v. Eddinger*, 81* Pa. 528.

Even if it be a gift for life, it is without any limitation over and without the intervention of a trustee. There is a line of decisions in this State which hold such a bequest is absolute.

Merkel's App. 109 Pa. 236; *Smith's App.* 28 Pa. 9; *Diehl's App.* 35 Pa. 190; *Silkmatter's App.* 45 Pa. 365; *Good's Estate*, 58 Pa. 482.

It is never to be presumed that a testator intends to disintestate of any portion of his estate, and where he states, in an introductory clause, that he intends to dispose of his estate, that intention is stated and nothing less than a clear omission makes an intestacy of any part of the estate.

Schriber v. Meyer, 19 Pa. 87; *Merkel's App. supra.*

A general devise with power to dispose of the corpus of the estate carries a fee.

Second Reformed Presby. Church v. Disbrow, 52 Pa. 219; *Post v. Dillon*, 8 Phila. 31; *Robeson*

NOTE.—See note to *Powers v. Jeudevine* (Vt.) 7 L. R. A. 517.

13 L. R. A.

v. Collum, 23 Pittsb. L. J. 155; *Smith v. Falkinson*, 25 Pa. 109.

A devise for life with an absolute power of disposal carries a fee.

Morris v. Phaler, 1 Watts, 389; *Musselman's Estate*, 39 Pa. 469; *Grove's Estate*, 58 Pa. 429.

Mr. Robert F. Gibson, for appellee:

Whoever claims against the Laws of Descent must show a written title, which the court, with satisfaction, decides to be sufficient.

Lipman's App. 30 Pa. 184.

The question in expounding a will is not what the testator meant, but what is the meaning of his words.

Clayton v. Clayton, 3 Binn. 484; *Hancock's App.* 3 Cent. Rep. 527, 112 Pa. 541.

Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba flenda est.

A will must be so construed as to render every part of it effective. The restricting clause cannot be ignored.

Mutter's Estate, 38 Pa. 321; 1 Jarman, Wills, 415, 416.

There is no residuary clause, but its omission, even though accidental, cannot be supplied.

Carman's App. 2 Pennyp. 336.

The rule established by the Act of April 8, 1833, is that, if the intention of the testator to the contrary appears in the will, the Act does not apply.

Shirey v. Postlethwaite, 72 Pa. 42; *Rockell v. Eddinger*, 81* Pa. 525.

Only in doubtful cases the law leans in favor of the first taker as the principal object of the testator's bounty.

Smith's App. 23 Pa. 9; *Renalt v. Ulrich*, Id. 338.

There is a line of decisions in which it was held that a life estate is not enlarged by even an absolute power of disposal.

Fisher v. Herbell, 7 Watts & S. 63; *Musselman's Estate*, 39 Pa. 469; *Palethorp v. Bergner*, 52 Pa. 149; *Hoffner v. Wynkoop*, 97 Pa. 132; *Forsythe v. Forsythe*, 108 Pa. 131; *Hinkle's App.* 8 Cent. Rep. 863, 116 Pa. 497, and cases cited.

Paxson, Ch. J., delivered the opinion of the court:

We agree with the court below that this is a close case. Its solution must mainly depend upon the proper construction of the will of Michael B. Shaffer, deceased. The testator, after expressing his desire "to settle my worldly affairs," thus disposes of the real estate in controversy: "Also, I direct that my beloved wife, Anna, shall have and hold the property in Bottstown where I now reside, said Anna to have the sole control of the same during her lifetime, and at the discretion of my beloved wife, Anna, she shall order my executor to sell the real estate at public sale, or at private sale, all my real estate to the best advantage of my wife. And I hereby empower my executor to make deeds of conveyances for the same as fully as I could have done in my lifetime, and the money realized from the sale of my real estate, my executor shall pay over to my beloved wife, Anna, and she, the said Anna,

shall have power to dispose of the same by bequeath, or as she directs. . . . Also I direct that my wife, Anna, shall have and hold all my personal property for her own."

The learned judge below held that the widow of the testator took but a life estate in the land, with a power to compel a sale thereof, and to appoint the proceeds; and that the testator intended to die intestate in case his widow failed to exercise these powers.

From the case stated it appears that the widow never did exercise these powers; the real estate in controversy remained unsold at the time of her death. This contest is between the heir-at-law of the testator and the executor of his wife. The court below entered judgment upon the case stated in favor of the heir-at-law.

A careful consideration of the case leads us to a different conclusion. The testator evidently intended to dispose of his entire estate. He was childless; his wife was the sole object of his bounty; there is no other person named or referred to in the will. The first sentence of the will, in the paragraph above quoted, carried the fee. He says his wife "shall have and hold the property in Bottstown where I now reside," while this language in a deed would not carry the fee it is otherwise in a will. Having thus given the fee, what was there to cut it down to a life estate? Admittedly nothing except the next sentence, in which the testator says: "Said Anna, to have the sole control of the same during her lifetime," etc. But this was mere surplusage. After giving a fee it cannot be cut down to a life estate by the unnecessary provision that she should have the control of it during her life. The testator may have thought that in some way which he did not understand; his executor might interfere with his widow's enjoyment of the property, and the clause in question may have been inserted to prevent this. In either view of the case the language is without legal effect, and might well have been omitted. He then orders the executor to sell the property whenever the widow shall direct, and then follows this significant sentence: "And the moneys realized from the sale of my real estate, my executor shall pay over to my beloved wife, Anna, and she, the said Anna, shall have the power to dispose of the same by bequeath or as she directs." The learned judge below construed this as merely a power of appointment of the proceeds of the sale. Whereas it is an absolute gift of the money, and the superadded power of appointment is the merest surplusage. It detracts nothing from a fee for a testator to say that his devisee shall have the sole control of the property during her lifetime, and an absolute gift of money is not qualified by a superfluous authority to bequeath it.

We have here a childless testator who gives the sole interest in the land to his wife. We think the case comes within the 9th section of the Act of April 8, 1868, which declares: "All devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of in-

heritance or of perpetuity, unless it appears by a devise over, or by words of limitation or otherwise in the will, that the testator intended to devise a less estate."

The will of Michael Shaffer contains no devise over, nor do we find any express limitation of the estate to his wife for life only. I have not discussed the authorities. It is sufficient to refer to *Morris v. Phaler*, 1 Watts, 389; *Musselman's Estate*, 39 Pa. 469; *Second Reform Presby. Church v. Disbrow*, 52 Pa. 319; *Grove's Estate*, 58 Pa. 429.

The judgment is reversed, and judgment is now entered in favor of the defendant in the case stated.

Jane E. WENGERD'S APPEAL.

(....Pa.....)

The respective legacies vest at the death of the testator under a will converting the estate into money and directing the distribution of one third of it in equal shares among the children of testator's son, and in case of the death of any child before the payment to him of his share, such share to be divided between the survivors, and no share is devised by the death of a legatee before actually receiving it.

(October 5, 1891.)

APP^EAL by Jane E. Wengerd from a decree of the Orphans' Court of Cumberland County disallowing her claim upon the estate of John Wengerd, Sr., deceased, for a legacy given by Wengerd to claimant's husband and by him willed to her. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. J. E. Barnitz and F. E. Belts-hoover, for appellant:

The law always and justly favors the first taker as the first object of the testator's bounty and will not permit any other intent to prevail unless it cannot be avoided.

King v. Frick, 185 Pa. 575; *Mickley's App.* 92 Pa. 514; *Green's Estate*, 140 Pa. 253; *Gill's Estate*, 45 Phila. Leg. Int. 287; *Little's App.* 9 Cent. Rep. 809; 117 Pa. 14; *Muller's Estate*, 19 W. N. C. 820.

It has been uniformly held in this State from *Corbin v. Wilson*, 2 Ashm. 178, through all the cases where the question has ever been considered down to the present, that "a bequest of personal property relates to the time of the testator's death, unless a contrary intent is clearly indicated in the will."

See *Coggin's App.* 124 Pa. 10; 8 Jarman. Wills, p. 672; *Rammell v. Gillo*, 15 L. J. N. S. Ch. 35; *Hutchison v. Mannington*, 1 Ves. Jr. 362; *Martin v. Martin*, L. R. 2 Eq. Cas. 403; *Minors v. Battison*, L. R. 1 App. Cas. 428; *Girdlestone v. Creed*, 10 Hare, 487.

The rights of the legatee could not be defeated by the accidental circumstances of the case.

Law v. Thompson, 4 Russ. 92.

Mr. J. W. Wetzel for appellee.

Paxson, Ch. J., delivered the opinion of the court:

The contention in this case arises over the

NOTE.—See notes to *Gray v. Woodward* (N. Y.) 7 L. R. A. 367; *Gale v. Nickerson* (Mass.) 9 L. R. A. 500.

following clause in the will of John Wengerd, deceased:

"I direct my executors, hereinafter named, to sell at public or private sale, my house and lot on the east side of Penn Street, known as the pastorage; and for the purpose of enabling them to do so, I hereby authorize them to make, execute, acknowledge and deliver the necessary deed or deeds to grant and convey the same to the purchaser or purchasers thereof, and the proceeds of the said sale, together with the proceeds of all bonds, notes and cash on hand, with the proceeds of my personal property, I direct my said executors, after paying the legacy hereinbefore mentioned, my just debts and funeral expenses, and the expenses of administration, to divide into three equal shares, which I hereby bequeath as follows: viz.: to Mary Gettle one third; to Elizabeth Kozer one third; and to John Wengerd, Harry Wengerd and Catharine Wengerd, children of my son David Wengerd, deceased, the remaining one third to be equally divided, between them share and share alike, and in case of the death of any of the children of my son David, before the payment to them of their said share, then to be divided between the survivors."

John Wengerd, one of the grandsons above named of the testator, died about eleven months after the death of the latter. He had received \$200 of his share before his death. He left a will in which he made his widow, Jane E. Wengerd, the appellant, his sole legatee and executrix. She now claims, under her husband's will, the balance due him under the will of his grandfather. The court below rejected her claim, hence this appeal.

The question is, When did the legacy to John Wengerd vest, if it vested at all? And if it vested at the death of the testator, was it divested by the accident of John's death before the full and final distribution of his grandfather's estate? That the executors regarded his interest as vested, is clear from the fact that they paid him \$200 on account of it. And it is equally clear, had the distribution been made, as it might well have been, prior to John's death, he would have been entitled to the share. The testator had no debts; with the exception of a house and lot, his estate not otherwise disposed of consisted of cash securities and money which could readily have been distributed almost immediately after his death. The account was not filed until two years after the testator died, and then in obedience to a citation. We do not think the executors can defeat the rights of a legatee by delaying distribution.

In considering the nice question whether a legacy is vested or contingent regard must always be had to the position of the parties. In construing a will where the bequest is ambiguous the inclinations of the courts are always towards vesting the legacies. *Coggin's App.* 124 Pa. 10. The presumption that a legacy was intended to be vested applies with far greater force where a testator is making provision for a child or a grandchild, than where the gift is to a stranger, or to a collateral relative, as in *Haerstick's App.* 13 L. R. A.

103 Pa. 394. It would be straining a point to hold that this testator intended that his grandchild should be deprived of his share, though he should die leaving a child or children, by the mere accident of his death the day before the money was distributed. This would enable an executor, under some circumstances, absolutely to defeat the will of his testator, by withholding or refusing distribution for a certain period. We cannot assume that this testator intended to lodge such a power in the hands of the executor of his will.

The doctrine of this State from the time of *Corbin v. Wilson*, 2 Ashm. 178, has uniformly been that a bequest of personal property relates to the time of the testator's death, unless a contrary intent is clearly indicated in the will. "If any immediate legacy is given without specifying a time for payment, and is given over in case the legatee dies before it becomes payable, the word 'payable' can only have reference to the death of the testator." Jarman, Wills, 800; and the same learned author says in vol. 8 of the same work, p. 612: "Executory gifts over in the event of legatees dying before receiving their legacies have given rise to much litigation. Actual receipt may be delayed by so many different causes that the court is unwilling to impute to the testator an intention to make that a condition of the legacy, and thus indefinitely postpone the absolute vesting of it."

In *Rammell v. Gallow*, 15 L. J. N. S. Ch. 35, where the will directed that the fund should go in equal shares to testator's children when they should attain twenty-one years of age, but in the event of the decease of any of said children before they should have received or become possessors of their share, said share was to go to their children, it was held that those who had attained the age of twenty-one took vested interests even though they died before receiving the money. In *Hutcheon v. Mannington*, 1 Ves. Jr. 862, there was a gift over, if the legatee should die before he may have received it, and Lord Thurlow said: "I am to compute what time would be sufficient to enable these parties to receive their legacies. It is all too uncertain. Suppose we have given real estate in the manner you specify; it is clear that it will neither depend on the caprice of the trustee to sell, for that would be contrary to all common sense, nor upon his dilatoriness; in some way it may be sold immediately; but I should not inquire when a real estate might have been sold with all possible diligence, for it might be the very next day, or that very evening, and therefore the court always in such a case considers it as sold the moment the testator is dead; for where there is a trust, there is always considered here as done which is ordered to be done, and the court cannot measure the time."

In this case it is an immeasurable purpose. I can do nothing with it, and it must be considered as vested from the death of the testator." *Martin v. Martin*, L. R. 2 Eq. Cas. 403; *Minor v. Battison*, L. R. 1 App. Cas. 428, and many other English cases, hold the same doctrine. The only case cited in op-

position to this line of authority is *Haverstick's App.*, *supra*, which, while it gives color to the appellee's contention, differs in some respects from the case in hand. There the appellant claimed as the heir of his deceased wife. The clause in the will was: "Should any of them die before the distribution of my estate, without heirs, then the part allotted to such shall be divided equally among

the others named." The court held that the words "heirs" meant "children," and that the appellant was not entitled as heir to the legacy. The whole contention was over this point.

The decree is reversed at the costs of the appellee, and it is ordered that the record be remitted with instructions to make distribution in accordance with this opinion.

KANSAS SUPREME COURT.

ATCHISON, TOPEKA & SANTA FÉ R.
CO., *Pff. in Err.*,

Samuel A. TEMPLE.

(.....Kan.....)

*A contract between a railroad company and a shipper of stock stipulated
*Head note by GREEN, C.

NOTE.—Contracts of carrier may provide for reasonable exemptions.

In the United States, a condition commonly inserted by common carriers in their contracts relates to the time and manner of presenting claims for damages; and the courts have been liberal in sustaining such regulations. *Lawson, Carriers*, 144.

The carrier is bound to perform the service upon being paid therefor, and it is a dangerous policy to allow it to exonerate itself, even from its full liability at common law, by an artifice, to the injury of those who are, in the ordinary course of business, compelled to employ its services. *Fillebrown v. Grand Trunk R. Co.* 55 Me. 462, and cases cited; *Blossom v. Dodd*, 43 N. Y. 284; *Southern Exp. Co. v. Moon*, 39 Miss. 822; *Orndorff v. Adams Exp. Co.* 3 Bush, 194; *Jones v. Voorhees*, 10 Ohio, 145.

And in a case where one of the conditions of a telegraph company, printed in their blank forms, was that the company would not be liable for damages in any case where the claim was not presented in writing within sixty days after sending the message, it was ruled that the condition was binding on an employer of the company who sent his message on the printed form. *Wolf v. Western U. Tele. Co.* 62 Pa. 83.

The condition printed in the form was considered a reasonable one, and it was held that the employer must make claim according to the condition before he could maintain an action. Exactly the same doctrine was asserted in *Young v. Western U. Tele. Co.* 2 Jones & S. 390.

Early adjudications, notably that of *Gould v. Hill*, 2 Hill, 623, and *Jones v. Voorhees*, *supra*, were in contravention of the established English rule, and held that a common carrier could not limit his liability by recitals in the contract of carriage which would absolve him from the results of negligence, however gross. This doctrine, however, must be regarded as having been expressly repudiated. *Dorr v. New Jersey S. Nav. Co.* 4 Sandf. 136, 8 N. Y. Legal Obs. 245, 11 N. Y. 485; *Parsons v. Monteath*, 13 Barb. 369; *Mercantile Mut. Ins. Co. v. Chase*, 1 E. D. Smith, 115; *Peek v. North Staffordshire R. Co.* 10 H. L. Cas. 473, 494; *Austin v. Manchester, S. & L. R. Co.* 11 Eng. L. & Eq. 506; *Carr v. Lancashire & Y. R. Co.* 7 Exch. 707, 14 Eng. L. & Eq. 340.

The weight of modern adjudication favors the proposition that as between the carrier and consignor an express contract is valid which by its terms and stipulations limits the responsibility of

that, as a condition precedent to his right to recover damages for any loss or injury to such stock, he should give notice in writing to some officer of the railroad company, or its nearest station agent, before the removal of such stock from the place of delivery. In an action to recover damages for injuries to such stock while en route, where the condition of the stock was made known to the station agent of the railroad company at the place of destination, and such

the carrier. *Camden & A. R. Co. v. Baldauf*, 16 Pa. 67; *Falkenau v. Fargo*, 85 N. Y. 642; *Walker v. York & N. M. R. Co.* 3 Car. & K. 379; *Slim v. Great Northern R. Co.* 28 Eng. L. & Eq. 297, 14 C. B. 647; *Kimball v. Rutland & B. R. Co.* 26 Vt. 256; *Wallace v. Matthews*, 39 Ga. 617; *Beno v. Hogan*, 12 B. Mon. 63; *Roberts v. Riley*, 15 La. Ann. 103; *Mobile & O. R. Co. v. Weiner*, 49 Miss. 725.

Restrictions upon the right to limit liability.

It is a well-recognized principle, however, that these exemptions from liability must include such only as are just and equitable in contemplation of law. *Peek v. North Staffordshire R. Co.* 10 H. L. Cas. 473, 493; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17, Wall. 357, 21 L. ed. 637, 10 Am. Rep. 366.

And it is a rule of extended application that the carrier cannot, by special contractual form, so abridge his liability as to relieve him virtually from any responsibility, even from his own gross carelessness or that of his employé. So tenaciously have the courts enforced this principle that it may well be regarded at the present time as forming an exception to an otherwise universal rule, which permits a reasonable limitation from liability. The cases supporting the averment, and which refuse to limit the liability for negligence and carelessness, are as follows: *Camden & A. R. Co. v. Baldauf*, 16 Pa. 67; *Goldney v. Pennsylvania R. Co.* 30 Pa. 242; *Pennsylvania R. Co. v. Henderson*, 51 Pa. 315; *Farnham v. Camden & A. R. Co.* 55 Pa. 58; *Laing v. Colder*, 8 Pa. 479; *Empire Transp. Co. v. Wamsutta Oil Co.* 63 Pa. 14, 3 Am. Rep. 515; *Knowlton v. Erie R. Co.* 19 Ohio St. 280, 2 Am. Rep. 393; *Graham v. Davis*, 4 Ohio St. 362; *Welsh v. Pittsburgh, Ft. W. & C. R. Co.* 10 Ohio St. 75; *Jones v. Voorhees*, 10 Ohio, 145; *Michigan S. & N. I. R. Co. v. Heaton*, 37 Ind. 448; *Adams Exp. Co. v. Fendrick*, 38 Ind. 180; *Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *Medfield School Dist. v. Boston, H. & B. R. Co.* 102 Mass. 552; *Adams Exp. Co. v. Stettanera*, 61 Ill. 184, 14 Am. Rep. 57; *Fillebrown v. Grand Trunk R. Co.* 55 Me. 462; *Sager v. Portsmouth, S. & P. & E. R. Co.* 31 Me. 228; *Nashville & C. R. Co. v. Jackson*, 6 Helek. 271; *Ketchum v. American M. U. Exp. Co.* 52 Mo. 390; *New Orleans Mut. Ins. Co. v. New Orleans, J. & G. N. R. Co.* 20 La. Ann. 302; *Southern Exp. Co. v. Moon*, 39 Miss. 822; *Steele v. Townsend*, 37 Ala. 247; *Berry v. Cooper*, 28 Ga. 543; *Swindler v. Hilliard*, 2 Rich. L. 286; *Flinn v. Philadelphia & B. R. Co.* 1 Houst. (Del.) 469; *Parsons v. Monteath*, 13 Barb. 363; *Moore v. Evans*, 14 Barb. 524.

agent consented to the removal of the stock from the car, and had an opportunity to examine and inspect the animals after such removal, and before they had mingled with other stock, or been removed from the place of destination, and a written notice for damages was transmitted to the claim agent of the railroad company within four days after the removal of the stock from the car, and ten days thereafter, upon the death of one of the animals, a subsequent notice for damages was given to the railroad company.—*Held*, that there had been a substantial compliance with the contract upon the part of the shipper.

(July 9, 1891.)

ERROR to the District Court for Finney County to review a judgment in favor of plaintiff in an action brought to recover damages for injuries to live-stock while in defendant's possession for transportation. *Affirmed*.

The facts sufficiently appear in the commissioner's opinion.

Messrs. George R. Peck, A. A. Hurd and J. G. Egan, for plaintiff in error:

The oral notice was not a sufficient compliance with the condition.

Goggin v. Kansas Pac. R. Co. 12 Kan. 416.

Where a shipper fails to comply with a condition in the contract of carriage requiring such a written notice, he is not entitled to recover.

Sprague v. Missouri Pac. R. Co. 34 Kan. 347. See also *Messengale v. Western U. Teleg. Co.* 17 Mo. App. 257; *Weir v. The Express Co.* 5 Phila. 355; *Cole v. Western U. Teleg. Co.* 83 Minn. 227; *Hirschberg v. Dinsmore*, 12 Daly, 429; *Young v. Western U. Teleg. Co.* 2 Jones & S. 390; *United States Exp. Co. v. Harris*, 51 Ind. 127; *Southern Exp. Co. v. Hunnicutt*, 54 Miss. 566.

Mr. Milton Brown, for defendant in error:

The proof shows a substantial compliance with the purposes of the contract. It gave an opportunity to the Company for an inspection of the stock before they were mingled with other animals, or an ascertainment of the damages, otherwise rendered impracticable. The conduct of the Company, its agents and employees, amounts to a waiver of any delay in giving the notice.

Rice v. Kansas Pac. R. Co. 63 Mo. 314.

The law as given by the lower court in this case is supported by the third volume of the American and English Encyclopedia of Law, at page 15.

Upon the doctrine of negligence enunciated by the trial judge, see—

Kansas Pac. R. Co. v. Reynolds, 17 Kan. 251; *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 30 Kan. 845.

Green, C., filed the following opinion:

This was an action for damages, commenced in the District Court of Finney County by Samuel A. Temple, against the Atchison, Topeka & Santa Fé Railroad Company. The plaintiff alleged that on the 21st day of March, 1887, he shipped over the defendant's railroad from Kansas City to Pierceville, Kan., a bay mare and three mules: that a written contract for the transportation of the stock was made, a copy of which was attached to his petition; that the

Railroad Company broke the contract by negligently and violently striking the car in which the stock was being transported against another car, and thus throwing the animals together upon the floor of the car, and injuring them, resulting in the death of the mare and the crippling of the mules; that the condition of the stock was made known to the agent of the Railroad Company at Pierceville while they were in the car at the station; that the agents inspected the stock, and consented and requested that the mare and mules be removed from the car, and, after such removal, and before they had been intermingled with other stock, inspected the injured animals; that before bringing suit, and after the death of the mare, written notice was given to the defendant, through its agent, of the plaintiff's claim for damages. The contract of shipping contained the following condition: "And for the consideration before mentioned said party of the second part further agrees that as a condition precedent to his right to recover any damages for loss or injury to said stock he will give notice in writing of his claim therefor to some officer of said party of the first part, or its nearest station agent, before said stock is removed from place of destination above mentioned, or from the place of delivery of the same to said party of the second part, and before said stock is mingled with other stock." The defendant filed a general denial, and for a further defense alleged that the plaintiff had not complied with the condition precedent in the contract for transportation requiring written notice of the claim for damages. The defendant filed a demurrer to the plaintiff's evidence, which was overruled. No evidence was introduced upon the part of the defendant. The jury returned a verdict for the plaintiff for the sum of \$345. A motion for a new trial was overruled, and judgment was rendered on the verdict. The plaintiff in error brings the record here for review, and the principal assignment of error is that there was not such a substantial compliance with the condition precedent, as to a written notice of a claim for damages, under the contract, as to entitle the plaintiff to recover.

Complaint is made that the court refused certain instructions asked for by the defendant in error, to the effect that, if the plaintiff did not give a written notice of his claim for damages to some officer of the railroad company, or its nearest station agent, before the stock was removed from the place of destination or place of delivery, and before they were mingled with other stock, then their verdict should be for the defendant. Further, that if they should find from the evidence that the plaintiff did not serve upon the defendant a written demand for damages for injury or loss of the mare in question until April 7, 1887, after the death of the mare, and her removal from the place of destination or delivery, or after the animals had mingled with other stock, then their verdict should be for the defendant. We think the instructions requested were properly refused. Upon this branch of the case the court instructed the jury as follows: "You are instructed that

the Railroad Company, has a right to limit their responsibilities to the owners in the carrying of stock or goods by a special contract, so long as the limitation does not affect their liability on account of negligence or misconduct. Plaintiff further alleges that the animals were removed from the car in which the injury was sustained by the advice and with the knowledge and the consent of the employes of the defendant prior to the time that written notice was given of any claim of damage because of said injuries. Should you find from the testimony that the animals were so removed, and that the mare died from the injuries so received, and that the mules were injured so as to be depreciated in value, and that the death of the mare and the injuries to the mules were caused by the carelessness and negligence of the agents and servants of the defendant Company, and that the Company had a good, fair, and reasonable opportunity to examine and inspect all of such stock, and to know of its condition after it was removed without unreasonable inconvenience, you will then find that the service of the notice of application for damages was made in due time, and that the Company is not absolved from liability because of the fact that the written notice introduced in the testimony was not served upon the station agent or other employé of the Company named in said contract prior to the removal of the stock from the car at the place of destination. The purpose of such notice is that the Company may have a fair and reasonable opportunity of examination and inspection of the condition of the live-stock transported under its management before it shall be placed beyond its reach or beyond the possibility of certain identification."

The court stated the law correctly. The plaintiff in error seems to rely upon the cases of *Goggin v. Kansas Pac. R. Co.*, 12 Kan. 416, and *Sprague v. Missouri Pac. R. Co.*, 34 Kan. 352. In the former case no written notice was given for more than a year after the cattle were injured, and in the latter case no notice was given before suit was commenced. In the case before us written notice was given within a few days after the stock arrived at

Pierceville, and before the mules were taken from the place of destination. While the carrier may stipulate by contract that notice of a claim for damages shall be given within a specified time in order to be valid, still the construction upon such stipulations must be reasonable, and adapted to the circumstances of each case. 3 Am. & Eng. Encyclop. Law, 15. This court said, in the case of *Goggin v. Kansas Pac. R. Co.*, *supra*: "Of course it is not understood that by the phrase 'before or at the time the stock is unloaded,' it must be the identical moment, but so immediately that the object sought by the notice can be attained. Nor would such a notice be reasonable in the case of an ordinary shipper who did not accompany and superintend his stock, nor would it probably prevent a recovery for injuries sustained which could not readily be seen, and actually should not be discovered till the time for giving the notice had expired." *Rice v. Kansas Pac. R. Co.* 63 Mo. 314. *Oxley v. St. Louis, K. C. & N. R. Co.* 65 Mo. 620.

It is claimed that the court erred in permitting a witness for the plaintiff to testify to a conversation had with some employé of the Railroad Company at Argentine, where it seems the stock was injured. In this conversation the employé told him how the accident had occurred; that there had been a jam, and the stock had been injured. The evidence may not have been competent, but we fail to see how the Railroad Company was prejudiced. It was established that the car and stock were in good condition at Kansas City. When next seen at Argentine the mare and mules were injured, and the car damaged. There was no controversy about there having been an accident, and the statement of the employé of the Railroad Company was immaterial error. We need not notice the other errors, as they are of the same nature.

It is recommended that the judgment of the District Court be affirmed.

Per Curiam.

It is so ordered.

All the Justices concur.

TENNESSEE SUPREME COURT.

LITTLE ROCK & MEMPHIS R. CO.,
Plff. in Err.,

WILSON.

(.....Tenn.....)

The duty to keep a "person upon the locomotive always upon the lookout ahead" imposed upon every railroad company by Mill. & V. Code, § 1298, in default of which it is by section 1299 made responsible for all damages from accident or collision, is absolute and renders the company liable for all accidents happening while it is running a train with the locomotive at the rear, whether it has a lookout upon the front car or not.

(May 21, 1891.)

13 L. R. A.

ERROR to the Circuit Court for Shelby County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's failure to comply with statutory requirements as to lookouts. *Affirmed.*

The facts are stated in the opinion.

Mr. W. G. Weatherford for plaintiff in error.

Mr. John H. Watkins for defendant in error.

Snodgrass, J., delivered the opinion of the court:

The defendant in error recovered judgment against the Little Rock & Memphis Railroad Company for \$1,500, damages for injuries

sustained while drunk and asleep on its track in Fulton Street, Memphis, Tenn. The accident occurred at a point about thirty yards north of Market Street, during the night of October 10, 1889, and while the employes of the Company were, by means of an engine in the rear of a train of nine cars, pushing the train into the Company's yard south of Market Street. The front car of this train ran over Wilson, causing the loss of one arm and partial loss of the other. By consent of parties, a jury was waived, and the case tried by *Hon. W. D. Beard*, sitting as special judge in place of *Judge Estes*, who was incompetent. His finding of law and facts and judgment thereon were reduced to writing, and so given on demand of parties. They are, in substance and effect, that the Railroad Company was guilty of negligence, which proximately caused the injury, in failing to keep a lookout at some place on the front car of the train, or on the ground, either in front of the car, or on the side and so near the road that he could command a view of the road-bed in front of the moving train; that a lookout so placed could have discovered Wilson in time to have prevented the accident, notwithstanding Wilson's negligence in being there, and so the Company was responsible for failure to take this precaution, which he held evidenced a lack of reasonable care and prudence. The plaintiff's negligence was considered in mitigation of damages, and recovery only to amount stated was allowed. The Railroad Company appealed, and assigned errors.

It is not necessary to state them in detail, because the determination of one question settles them all, so far as they relate to the judgments on the verdicts. But there is a preliminary one proper to be noticed. It is that the court erred in sustaining a demurrer to the second plea, because the declaration showed the accident within the limits of the City of Memphis and therefore the Statute to prevent accidents on railroads (*Mill. & V. Code*, § 1298) does not apply. This is an erroneous assumption. We have held in a case at this term the contrary of this proposition. We repeat the holding here, but content ourselves by a reference to that case, without repetition of its assignment. *Katsenburger v. Lano* (Tenn.) ante, 185.

The material question, as indicated, as determining all others involved in the assignment of errors, is whether the Statute applies to a train in which the engine is in the rear; the argument upon this being that the Statute provides that the lookout shall be upon the locomotive ahead, and only contemplates the placing of a lookout ahead when the locomotive is leading, instead of following, the train; and this appears to have been the view of the circuit judge, because he did not predicate the liability of the defendant upon the failure to observe the statutory precautions, but upon the due observance of common-law duty to exercise reasonable care and prudence.

There is, of course, a manifest difference in the situation, as respects the view taken of the law to be applied. If the Railroad

Company was liable for failure to observe statutory precautions at all, the burden of proof is on it to show that it did observe them (*Code*, § 1800), and, if it fails to show this, it is liable (§ 1299), notwithstanding the negligence of the injured party, which can only go in mitigation. If, however, it was not a case in which the statutory precautions were required to be observed because of the situation or order of arrangement of the train, then defendant's negligence would have to be shown, and plaintiff's might be considered in bar of the action, as at common law,—about the only difference which our Statute occasions,—for we have repeatedly held that its precautions suggested were only those indicated by the wisdom and prudent requirement of the common law, in cases where the Statute is now applicable. In those cases, however, where it is not applicable, the *onus* of proof remains as it was, and the effect of contributory negligence continues the same as it was at common law. But it is obvious, as has been often held, that, if the court applied the right rule of law, it is immaterial upon what consideration it was done. If, then, in fact, the Statute applied, the ruling of the circuit judge was right, to the effect that the plaintiff's negligence did not bar the action, and we must therefore determine that question.

The argument that the Statute does not apply, because the engine was in the rear of the train instead of in front, and that consequently a lookout ahead on the locomotive is dispensed with, proceeds upon the erroneous assumption that, if the Railroad Company, for convenience or otherwise, takes the engine from the front end of the train, and uses it in the rear, or at some other place in the train, a lookout is dispensed with in front. This is manifest when we look to the object of the Statute. It contemplates an engine in front, with perfect head-light, a bell to be rung, and machinery for blowing the whistle, reversing the engine, and taking the precautions indicated in the special and general terms of the Statutes, including, of course, a place for the lookout to be and an engineer, fireman, and some other person always there as a lookout. Now, in case the engine had been in front, and its head-light or machinery for alarm or stopping taken away from it, or the lookout taken off of it, it would not be denied that the Company was liable; but because the Company had taken not one, but all, of these things away, the argument is that it escapes statutory liability. Thus stated, it seems perfectly manifest that the proposition is erroneous. Putting it in other words, it is that, although the Railroad Company could not take away any one of these and avoid liability, it could take them all away, and do so. That the whole includes all of its parts is a proposition not more axiomatic than that all the parts are necessary to make up the whole. If, therefore, observance of the Statute as a whole consists in keeping an engineer, fireman, or other person upon the locomotive, always upon the lookout ahead, in order that objects appearing on the track may be discovered, and the other precautions taken for which the Statute pro-

vides, it follows that all these things are necessary to be severally done, in order that the whole requirement be complied with. The lookout must be kept ahead, on the locomotive, and the locomotive must, of course, be kept there for him to be upon, or he cannot be upon it, and kept in the place required. The keeping of the locomotive there is therefore one of the parts of the observance, like all others absolutely essential to constitute the whole observance. And the same is true as to other things not specifically mentioned as included within the purpose of the Statute, and which, by construction, have been held essential; as a head-light for night use on running trains. So of those things mentioned in the Statute, and properly belonging to the engine, and parts of its machinery, as the whistle and bell. These must be ahead or in front of the train, because it is not contemplated that collisions will occur in the rear; nor would the Statute be met by having a light and a lookout in front, while the engine is in the rear. The Statute intends, not a lookout as a formal matter, but a lookout on the locomotive in front, and the machinery and appliances on it at hand and in immediate control, so that, as soon as an object appears, the observance of it, and the attempts to avoid collision, may be prompt and immediate; for in the majority of cases they must be so, if they serve any purpose. To have a lookout, with a lantern in front, watching in a dim light for an obstruction, which could only be seen a few yards off, and then signaling an engineer in the rear, to ring a bell or blow a whistle far away from the object, and take such precaution as could be then and there done to avoid an accident, would be practically to provide for accidents instead of against them. The man with the lantern could see, at best, but a short distance. The engineer must take some little time to observe his signal. Then, when he does so, if he rings the bell or causes the whistle to be sounded, he is at a

greater distance from the object, and these alarms may not, therefore, be so well heard or understood or apprehended. In this case the engine was 270 feet from the front of the train. The Statute, in making the engineer or fireman or some other person on the locomotive represent a lookout, manifestly contemplates looking, alarming, and acting as practically contemporaneous. It is no more contemplated that the engine, therefore, would be in the rear, than that the lookout should. Both must be in front, if the Statute is complied with.

It may be argued that this is inconvenient; that a railroad company must sometimes back its trains on its tracks. This may be entirely true, but it proves nothing. The Company can do all its running that way, if it prefers. The Statute does not prohibit it absolutely and at all events. The Statute merely makes it liable for any injury inflicted while doing so. If for reasons of convenience or economy, the company prefers to take the risk, it may do so; but it cannot complain that it suffers the legal consequences of the risk thus taken. Of course, it can reduce the risk to a minimum, by keeping someone in front of the train, and warning off or actually removing obstructions. If it prevents injury, it prevents loss; but this it must do if it avoids the consequence of disregarding the Statute. Nothing else will answer. In the present case the Company elected to attempt the running of the train in a street without observing the statutory precautions, but in the observance of others which it deemed sufficient. These, however, proved insufficient, and plaintiff's injury was the result of that election and this judgment. His recovery was the legal consequence. It was made small by properly considering his contributory negligence, and there is nothing, in its amount or otherwise, of which the defendant can complain.

Let the judgment be affirmed, with costs.

PENNSYLVANIA SUPREME COURT.

Amelia Ann FEARN, Admx., etc., of
John Fearn, Deceased, *Appt.*,

v.

WEST JERSEY FERRY CO.

(.....Pa.....)

1. A deposition taken in an action by deponent's wife, to which he was made a formal party, brought to recover damages for

personal injuries to her, alleged to have resulted from a carrier's negligence, is not admissible in an action against the same defendant, prosecuted by the wife as administratrix of deponent to recover damages for injuries to him, alleged to have been received at the same time and place and through the same cause as those sued for in the first action.

2. The mere existence, during the storm which caused it, of snow on the deck of

NOTE.—"Deposition" defined.

"Deposition" is a generic expression, embracing all written evidence verified by oath, and thus includes "affidavits;" but, in legal language, a deposition is evidence given by a witness under interrogatories, oral or written, and usually written down by an official person; while an affidavit is the mere voluntary act of the party making the oath, and is generally taken without the cognizance of him against whom it is to be used. Yet the terms may be convertible, as in the rules of law of the 18 L. R. A.

supreme court. *Stimpson v. Brooks*, 3 Blatchf. 456, 457; *Anderson*, Law Dict. title, *Deposition*.

When rejected as evidence.

Depositions, except to perpetuate testimony, cannot be read unless taken in reference to an issue made up at the time they were taken. *Morrow v. Hatfield*, 6 Humph. 108. See, *contra*, *Blackburn v. Morton*, 18 Ark. 384.

Where a deposition was taken in another case, and there was a stipulation that it should be used

a ferry-boat raises no presumption of negligence on the part of the ferry company which will establish its liability to respond in damages to a passenger who receives injuries by falling on the slippery deck.

3. Where the cause of the accident by which a passenger was injured is known as well to the passenger as to the carrier, the presumption of negligence which arises from the mere fact of the injury of a passenger while on the carrier's vehicle has no application, but the passenger must affirmatively show negligence.

(October 5, 1891.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 1, for Philadelphia County in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Frank P. Prichard and J. Davis Duffield, for appellant:

The deposition of John Fearn was taken in a case in which he was a party, and read in evidence, and the parties are technically and in fact the same, and for the same cause of action; and it is certainly a "question" in "issue" and was admissible.

Act of March 28, 1814, § 1; *Purd. Dig.* 729, pl. 34; Act of May 23, 1887, § 9, *Pub. Laws*, 161.

At common law, it is generally deemed sufficient for the admissibility of depositions taken in one suit and offered in another that the matters in issue were the same in both causes, and the parties against whom the deposition

was offered, had full power to cross-examine the witness. Complete materiality, or identity of all the parties, is not necessary.

1 *Greenl. Ev.* § 553; *Haupt v. Henninger*, 37 Pa. 138. See *Kohler v. Henry*, 4 Phila. 61; *Hobart v. McCoy*, 3 Pa. 419; *Galbraith v. Zimmerman*, 100 Pa. 374; *Fulton v. Sellers*, 4 Brewst. 42.

Statutes providing for the perpetuation of evidence are in furtherance of justice and a clear administration of the law, and should receive a liberal construction.

Pratt v. Patterson, 81 Pa. 114.

If a deposition be evidence for any purpose, as against a general objection it is admissible.

Batdorf v. Farmers Nat. Bank, 61 Pa. 179; *Peters v. Horbach*, 4 Pa. 134.

Under the term "parties" are comprehended all persons standing in relation of privies in blood, privies in estate, and privies in law.

Jackson v. Lawson, 15 Johns. 544.

A privy is a person so connected with another in an estate, a right or liability as to be affected as he is affected.

Anderson, *Law Dict.* title *Privy*.

Evidently a man and wife joining in a former suit to her use under the Act (not in her right) are both privies "in estate" and "in law;" and the husband is besides actually a party and liable for costs.

See 1 *Greenl. Ev.* § 553; *Magill v. Kauffman*, 4 Serg. & R. 316; *Clark v. Sanderson*, 3 Binn. 192; *Kohler v. Henry*, *supra*; *Ottinger v. Ottinger*, 17 Serg. & R. 142; *Cooper v. Smith*, 8 Watts, 536.

The requirement in actions of ejectment that titles should be the same in one action as those litigated in the other, in order that the deposi-

on the trial, "with the same force and effect, and subject to the same exceptions and objections in all respects, as if taken in this case," the court held the effect of the stipulation was to place the deposition upon the same footing as if it had been taken in the action, and said that a party who appears at the time of a deposition, and examines the witness without objecting to his competency, cannot afterwards interpose the objection. *Brooks v. Crosby*, 23 Cal. 50.

When depositions were read on a former trial by consent, it was held that upon a second trial ordered on appeal, the consent not being limited, plaintiff was entitled to read them. *Vattier v. Hinde*, 32 U. S. 7 Pet. 252, 8 L. ed. 675, affirming 1 McLean, 110; *Edmondson v. Barrell*, 3 Cranch, C. C. 28, 232.

A deposition taken in another and different cause is not competent evidence against one not a party to the suit in which it was taken, to prove any fact, except it may be proper for the purpose of showing notice of the pendency of the proceeding in which it was used. *Cookson v. Richardson*, 69 Ill. 57.

The deposition of a plaintiff, taken in the lifetime of a deceased party, cannot be read after the death of that party when the suit is against the administrator of the deceased (*Beaty v. McCorkle*, 11 Heisk. 593); and it is error to permit the reading, over objection, of the deposition of one who was a party to the suit in his own right, and also as administrator of a deceased party, where the deponent's testimony was in regard to statements and transactions with his intestate. *Taylor v. Mayhew*, 11 Heisk. 596; *Weeks*, *Depositions*, § 474.

Depositions taken in a former case between the same parties cannot be read in a case pending, 13 L. R. A.

unless some peculiar reasons exist making their introduction necessary, as that the witnesses cannot themselves be called. *O'Harra v. Hunt*, 19 Ohio, 460.

Both the state and federal courts are substantially unanimous in holding that a deposition taken in a former suit is incompetent as evidence in a subsequent trial against one not a party to the first proceeding, and who was denied the legal right to file cross-interrogatories at the time of its issuance, or to cross-examine a hostile witness when on the stand. *Rutherford v. Geddes*, 71 U. S. 4 Wall. 230, 15 L. ed. 243; *Tappan v. Beardsley*, 77 U. S. 10 Wall. 427, 19 L. ed. 674.

A party is one who appears on the record as a plaintiff or defendant. *Woods v. De Figanlere*, 16 Abb. Pr. 1, 1 Robt. 607, 25 How. Pr. 522.

Code provisions on the subject.

The California Code provisions allow depositions once taken to be read in evidence, as the language of the following section (2064) indicates: "When a deposition has once been taken it may be read by either party in any stage of the same action or proceeding, or in any other action between the same parties, upon the same subject, and is then deemed the evidence of the party reading it. Depositions taken in another court between the same parties and in regard to the same subject matter may be read in evidence upon parol proof of the existence of such former action." *Ayers v. Chism* (N. M.) 1 West. Coast Rep. 520.

So the deposition is admissible, notwithstanding the complaint has been amended subsequent to the taking thereof, provided the subject matter remains the same. *Anthony v. Savage*, 8 Utah, 277. See also N. Y. Code Civ. Proc. § 870 et seq.

tion be admissible, is founded upon a very good reason.

Sample v. Coulson, 9 Watts & S. 63.

No such reason exists in actions for negligence.

Norris v. Monen, 3 Watts, 465; *Hocker v. Jamison*, 2 Watts & S. 438; *Wright v. Oumpsty*, 41 Pa. 103; *Bath v. Bathersea*, 5 Mod. 10; *Goodrich v. Hanson*, 83 Ill. 498.

Depositions taken in a former suit between the same parties, involving the same question or subject matter, are admissible when the question arises again for judicial determination.

Wade v. King, 19 Ill. 301; *Harger v. Thomas*, 44 Pa. 180; *Melen v. Andrews*, 1 Mood. & M. 336; *State v. Johnson*, 12 Nev. 121; *O'Brien v. Com.* 6 Bush, 571; *Com. v. Richards*, 18 Pick. 434; *United States v. Macomb*, 5 McLean, 286; *Kendrick v. State*, 10 Humph. 479; *State v. McO'Blenis*, 24 Mo. 402; *State v. Baker*, Id. 437; *State v. Harman*, 27 Mo. 120.

Nowhere is "matter in question," or "subject matter," construed as meaning "cause of action," although the latter is included in the former as the less in the greater; and of course where the cause of action is the same, at common law even, "what a witness swore to on a former trial may be given in evidence in case of his death."

Miles v. O'Hara, 4 Binn. 111; *Lightner v. Wike*, 4 Serg. & R. 208; *Chess v. Chess*, 17 Serg. & R. 410.

It is generally deemed sufficient if the matters in issue are the same in both cases, and the party against whom the deposition was offered had full power to cross-examine the witness.

1 Greenl. Ev. §§ 164, 558; *Starkie. Ev.* 10th ed. p. 61; *Mathews v. Colburn*, 1 Strobh. L. 258; *Pyke v. Crouch*, 1 Ld. Raym. 780; *Buller*, Nisi Prius, 7th ed. 232a; *Williams v. Cheney*, 3 Gray, 220; *Long v. Davis*, 18 Ala. 802; *Kritzer v. Smith*, 21 Mo. 301; 1 Greenl. Ev. §§ 123, 125; *Parry v. Parry*, 130 Pa. 104; *Hallett v. O'Brien*, 1 Ala. 585; *Philadelphia, W. & B. R. Co. v. Howard*, 54 U. S. 13 How. 307, 14 L. ed. 157; *Louisville & N. E. Co. v. Atkins*, 2 Lea, 248; *Ross v. Cobb*, 9 Yerg. 463; *Yale v. Comstock*, 112 Mass. 367.

The touchstone of admissibility of depositions is the power or right to cross-examine on that "question" in the issue (fact or facts), identical in both cases.

Heth v. Young, 11 B. Mon. 278; *Wertz v. May*, 21 Pa. 279; *Gilbert, Ev.* 62; *Cornell v. Green*, 10 Serg. & R. 17; *Wolf v. Wyeth*, 11 Serg. & R. 149; *Hepler v. Mt. Carmel Sav. Bank*, 97 Pa. 422; *Warren v. Nichols*, 6 Met. 261; *Taylor, Ev.* 8th ed. § 709; *Orr v. Hadley*, 36 N. H. 575; *Jackson v. Bailey*, 2 Johns. 17; *Cox v. Pearce*, 7 Johns. 298; *Witch v. Hyde*, Kirby, 258; *Ray v. Bush*, 1 Root, 81; *Gardner v. Moutt*, 10 Ad. & El. 464; *Sills v. Brown*, 9 Car. & P. 601; *Rez v. Brinnell*, 3 T. R. 707, 712, 721; *Cazenove v. Vaughan*, 1 Maule & S. 4.

This is the case of a passenger against a carrier, who has undertaken to carry him safely, and is bound to use such precautions as "human care and foresight" can suggest for his safety [*Sir James Mansfield in Christie v. Griggs*, 2 Campb. 79], and provide such appli-

ances as will contribute to and promote his safety.

In the case of an injury to a passenger there is a presumption of negligence on the part of the carrier.

Erie & W. V. R. Co. v. Smith, 125 Pa. 259; *Philadelphia & R. R. Co. v. Anderson*, 94 Pa. 351; *Holbrook v. Utica & S. R. Co.* 12 N. Y. 236; *Pennsylvania R. Co. v. MacKinney*, 2 L. R. A. 820, 124 Pa. 462; *Spear v. Philadelphia, W. & B. R. Co.* 11 Cent. Rep. 643, 119 Pa. 61; *Philadelphia & R. R. Co. v. Hughes*, 11 Cent. Rep. 823, 119 Pa. 302.

A passenger is only required to make out a prima facie case as against the carriers.

Pennsylvania R. Co. v. Fuller, 3 Pennyp. 176; *Sullivan v. Philadelphia & R. R. Co.* 30 Pa. 284.

An injury upon a railroad while the passenger injured was in the exercise of ordinary care is prima facie evidence of the company's liability.

New Jersey R. & T. Co. v. Pollard, 89 U. S. 22 Wall. 341, 22 L. ed. 877; *Pauling v. Hoskins*, 132 Pa. 617.

Frequently householders, after sweeping off the snow on their pavements, put ashes on the ice found underneath. This is an exhibition of ordinary care or precaution, and shows the common-sense judgment of the community as to what ordinary or reasonable care is when there is ice or snow on the pavement, and there is no reason why it should not be law as to carriers. If the ice caused the plaintiff to fall, it is proper for the jury to consider whether, under all the circumstances proven, it was allowed to remain an unreasonable length of time.

Seymour v. Chicago, B. & Q. R. Co. 3 Biss. 43; *Dewire v. Bailey*, 131 Mass. 169; *Neslie v. Second & Third Streets Pass. R. Co.* 4 Cent. Rep. 699, 118 Pa. 300; *Mahoney v. Metropolitan R. Co.* 104 Mass. 73; *Dixon v. Brooklyn City & N. R. Co.* 1 Cent. Rep. 293, 100 N. Y. 170; *Weston v. New York Elec. R. Co.* 73 N. Y. 595; *Shenperd v. Midland R. Co.* 20 Week. Rep. 705; *Davis v. London & E. R. Co.* 2 Fost. & F. 588; *Langmore v. Great Western R. Co.* 19 C. B. N. S. 183; *McLean v. Burbank*, 11 Mian. 277.

Carrier must provide cars or vehicles adequate, that is, sufficiently secure as to strength and other requirements; and for the slightest fault or negligence, in that regard, the carrier is liable.

Pennsylvania R. Co. v. Roy, 102 U. S. 451, 26 L. ed. 141.

Messrs. A. H. Wintersteen and George Tucker Bispham, for appellee:

In order for notes of prior testimony to be admissible in a subsequent proceeding three conditions must co-exist: (1) an opportunity to cross-examine in the earlier suit; (2) the same parties in interest in both suits; (3) the issues in the two suits must involve the same subject matter.

Haupt v. Henninger, 37 Pa. 138, 140; *Harger v. Thomas*, 44 Pa. 123, 130; *Miles v. O'Hara*, 4 Binn. 103, 111; *Norris v. Monen*, 3 Watts, 465; *Sample v. Coulson*, 9 Watts & S. 62; 1 Wharton, Ev. § 177.

The appellant seeks to avail herself of the

rule of a presumption of negligence in case of accident to a passenger. But where the cause of the accident is known, the plaintiff must always show a duty of the defendant to the plaintiff violated before any presumption of negligence whatever arises.

Parley v. Philadelphia Traction Co. 182 Pa. 58; *Hayman v. Pennsylvania R. Co.* 10 Cent. Rep. 835, 118 Pa. 508.

The only negligence that can exist in these cases is in allowing the snow and ice to accumulate and remain an unreasonable time in a dangerous condition.

Nelis v. Second & Third Streets Pass. R. Co. 118 Pa. 600, 804; *McDonald v. Chicago & N. W. R. Co.* 26 Iowa, 124; Wood, Railway Law, p. 1166; Wharton, Neg. § 821.

What is required of the company is not the warranty of the safety of everybody from everything, but such diligence as a good business man in such matters is accustomed to use.

Stanton v. Springfield, 12 Allen, 566; *Mauch Chunk v. Kline*, 100 Pa. 119; *McLaughlin v. Corry*, 71 Pa. 118; *Denhardt v. Philadelphia*, 16 Phila. 47; *Hanson v. Warren*, 23 W. N. C. 133.

McCollum, J., delivered the opinion of the court:

The questions which confront us in this case are, first, whether the deposition of John Fearn was admissible, and second, whether there was error in the refusal to take off the nonsuit. The deposition was taken in a suit in the circuit court of the United States in which Mary Ann Fearn was the plaintiff and the West Jersey Ferry Company was the defendant. In that action the plaintiff claimed damages for personal injuries caused by the alleged negligence of the defendant Company. In this case the administratrix of John Fearn claims that he received an injury through the negligence of the same Company, which caused his death. It is contended by the appellant that the injuries for which these suits were brought were received at the same time and place, and were attributable to the same cause, to wit: the neglect of the defendant Company to keep its boat in a reasonably safe condition for the ingress and egress of its passengers. Assuming that the claim of the appellant is correct, it does not follow that a deposition taken in one action is admissible as evidence in the other. The actions are not between the same parties, although we have the same defendant in each. The fact that the plaintiff in the first action was the wife of the plaintiff in this action, or that she is now his widow and administratrix, can make no difference in the rule which allows testimony taken in one action to be given in evidence on the trial of another which involves the same subject matter and is between the same parties or their privies. The joinder of the husband in the former suit was merely formal, and it did not give him control of, or an interest in, it. It was the wife's claim that was litigated, the judgment was obtained in her right, and it was exclusively hers. Identity of subject matter in whole or in part, and identity of parties in interest, must unite to render a deposition in one case

admissible in another. This is the doctrine of our cases, of the Act of 1814, and of the Act of 1887, which contains the last legislative deliverance on this subject. *Haupt v. Henninger*, 37 Pa. 188; *Harger v. Thomas*, 44 Pa. 128; Act of March 23, 1814 (Purd. Dig. 10th ed. 625); Act of May 23, 1887 (Pub. Laws, 153).

The appellant's offer was not within this rule and the deposition was properly rejected.

In considering the question raised by the second specification of error it must be borne in mind that there is no evidence in the case which suggests any defect in the construction of the boat, and that the sole complaint is that its deck was slippery. This condition and its cause are adequately described in the appellant's testimony. It appears that it commenced snowing about the time Fearn left the Pennsylvania Station for the ferry and that it was snowing when he entered the boat. As a result of the brief storm, then in progress, the deck was covered with a thin coating of snow, and in crossing it to reach the cabin he slipped and fell. Nearly five years after this occurrence, alleging that he was injured by his fall and that it was caused by the negligence of the defendant Company, he brought this action. After his death his administratrix was substituted as plaintiff and on the trial the evidence of his widow and son was relied on to sustain the charge of negligence. This developed the situation at the time of the accident, the commencement and progress of the snow storm and the condition of the boat as affected by it, substantially as we have stated. Assuming, as the appellant contends, that the cause of the accident was the slippery condition of the deck, it is obvious that this condition was produced by the snow falling upon it. It is not pretended that it was the duty or within the power of the Company to prevent the snow falling on the deck of its boat, but it is claimed that its obligation to its passengers required it to immediately remove the snow and restore the condition which existed before the storm. It is well known that rain or snow falling upon the sidewalks of a town or city, the steps and platforms of railway cars, and the decks of ferry-boats will render them slippery and consequently more difficult to walk upon. But it is not practicable to absolutely prevent this condition while the rain or snow is falling, and the mere existence of it during the storm which causes it raises no presumption of negligence on the part of the municipality, the railway or ferry company. In our case it commenced snowing but a few minutes before the accident and was snowing at the time of it. There was no accumulation of ice or snow on the deck formed or left there from a prior rain or snow fall. There was not a spark of evidence from which an inference could be drawn that there was any ice on the deck where Fearn crossed it. Where the snow was displaced by his fall the deck had a slippery appearance caused by the moisture from the snow upon it. It is shown by the testimony and the photographs produced by the appellant on the trial that it was the same appearance pre-

sented by the decks of ferry-boats of like construction, in a rain storm, or when wet from any cause. It was therefore incumbent upon the appellant to prove an omission or violation of a duty which the company owed to him. The cause of the accident was known as well to the appellant as to the Company. In such case the presumption of negligence arising from the mere fact that a passenger was injured while on the appellant's boat has no application. *Delaware, L. & W. R. Co. v. Napheys*, 90 Pa. 135; *Hayman v. Pennsylvania R. Co.* 118 Pa. 508, 10 Cent. Rep. 835; and *Farley v. Philadelphia Traction Co.* 132 Pa. 58. As the appellant failed to show any omission or violation of duty by the Company in connection with the cause of the accident, we think the nonsuit was properly ordered. We find nothing in *Neslie v. Second & Third Streets Pass. R. Co.*, 113 Pa. 300, 4 Cent. Rep. 699, which is in conflict with this conclusion. In that case there was ice on the step of the car, caused by a storm the day before, and the ice "had been suffered to remain on the step from the previous day," and it was held that, "whether it remained there for such time and in such form as to establish the negligence of the defendant" was a question for the jury. Here there was only a slippery condition of the deck caused by a storm in progress when the accident occurred.

Judgment affirmed.

W. F. HALLSTEAD, Guardian of Mary E. Clapp *et al.*,

v.

Levi CURTIS *et al.*, *Appts.*

2 Cases.

(.....Pa.....)

1. To hold the owners of an insolvent bank individually liable as partners

NOTE.—Banking a legitimate object of co-partnership.

The objects of a co-partnership may embrace all kinds of legitimate and lawful enterprise. *Chester v. Dickerson*, 54 N. Y. 1, 45 How. Pr. 323, 13 Am. Rep. 560.

And it need not be confined to dealings in personal property, but may embrace operations in real estate. *Ludlow v. Cooper*, 4 Ohio St. 1; *Buffum v. Buffum*, 49 Me. 103; *Cowles v. Garrett*, 30 Ala. 341.

But the business must be a lawful one, and not contemplate a fraud or a violation of law or a moral duty. *Bartle v. Nutt*, 29 U. S. 4 Pet. 184, 7 L. ed. 325; *Gordon v. Howden*, 12 Clark & F. 237.

The partnership relation; how proved.

The actual existence of a partnership may be disclosed by evidence which establishes (1) a distinct agreement for a partnership in so many words; or (2) an agreement to share profit and loss; or (3) an agreement to share profits; or (4) such a state of things as is sufficient to establish a quasi partnership. 1 Lindley, Partn. § 91, 141-147.

Evidence of general reputation that one is a partner in a firm is incompetent to charge him as such, and while a formidable array of authorities sustains this proposition, there is some serious dissent, which is entitled to consideration. Our first state-
13 L. R. A.

for its debts plaintiff must show that it was a partnership enterprise of which defendants were members; and until a prima facie case of partnership is made out the burden cannot be placed on defendants of showing that it was incorporated or was a limited partnership, to relieve themselves from liability.

2. Evidence tending to show the organization of a bank under a legal charter, the holding of stock in it and the receipt of dividends thereon is sufficient to make a question for the jury whether the bank was not a corporation rather than a partnership concern.

3. If the absence of the books and papers of an insolvent bank affords a presumption as to its character against either party to a suit to hold members of the concern individually liable as partners for its debts, it must be against plaintiff where the documents are in possession of his witness in another State, beyond the reach of process, while defendants are simply small stockholders without means of reaching them or compelling their production.

(October 5, 1891.)

A PPEAL by defendants from a judgment of the Court of Common Pleas for Bradford County in favor of plaintiff in an action brought to hold defendants individually liable as partners for the debts of an insolvent banking concern. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. D. A. Overton and M. F. Elliott, for appellant, Levi Curtis:

To constitute a partnership as between the parties there must be a contract making them such.

Story, Partn. § 2, p. 2.

Persons can only become partners as to each other, or become liable as partners to third persons either by contracting the legal relation of partners *inter se* or by holding themselves out to the world as such.

Collyer, Partn. § 6; *Hodge's App.* 63 Pa. 273-278; *Thompson v. Toledo First Nat. Bank*, 111 U. S. 529, 28 L. ed. 507; *Denithorne v. Hook*, 3 Cent. Rep. 124, 112 Pa. 240.

ment, however, is supported by the following authorities: *Hunt v. Jucka*, 1 Hayw. 173, 1 Am. Dec. 556; *Carter v. Douglass*, 3 Ala. 499; *Campbell v. Hastings*, 29 Ark. 512; *Hicks v. Cram*, 17 Vt. 449; *Carlton v. Ludlow Woolen Mill*, 27 Vt. 496; *Hallday v. McDougall*, 20 Wend. 81, 22 Wend. 284; *Smith v. Griffith*, 3 Hill, 323, 38 Am. Dec. 639; *Brown v. Crandall*, 11 Conn. 92; *Sinclair v. Wood*, 3 Cal. 98; *Bowen v. Rutherford*, 60 Ill. 41, 14 Am. Rep. 26; *Earl v. Hurd*, 5 Blackf. 248; *Scott v. Blood*, 16 Me. 192; *Godard v. Pratt*, 16 Pick. 412; *Sager v. Tupper*, 33 Mich. 268; *Lockridge v. Wilson*, 7 Mo. 560; *Southwick v. McGovern*, 28 Iowa, 533; *Tumlin v. Goldsmith*, 40 Ga. 251.

Upon the issue as to whether a member of a firm is a dormant partner, evidence of a general reputation is admissible. *Metcalf v. Officer*, 1 McCrary, 325; *Rice, Evidence*, 1155.

The contradiction referred to as to the integrity of this proposition is best evidenced by the decision in *Bowen v. Rutherford*, 60 Ill. 41.

Corporate existence, how shown.

Where a company has been incorporated by a special Act of the Legislature, it is, in general, sufficient to give in evidence the Statute, and to show the actual use of the privileges of an incorporated company under the name designated in the Act, to

Plaintiff having dealt with a *de facto* corporation, as such, cannot now be permitted to show that it was not one *de jure*.

Blanchard v. Kaull, 44 Cal. 440; *Cochran v. Arnold*, 58 Pa. 399; *Fay v. Noble*, 7 Cush. 188; *Spahr v. Farmers Bank*, 94 Pa. 429.

Where persons supposing in good faith that they are incorporated and stockholders in a valid corporation do business as a corporation for a series of years without the corporate existence being challenged by the State, parties who deal with the company as a corporation cannot hold the stockholders personally liable in case they afterwards discover that the company was not validly incorporated in consequence of some defect or irregularity in the proceedings of the supposed incorporation.

Gartside Coal Co. v. Maxwell, 32 Fed. Rep. 197, 6 Am. & Eng. Corp. Cas. 359.

Messrs. E. Overton and H. F. Maynard for appellant, Michael Coleman.

Messrs. E. N. Willard, Everett Warren and Rodney A. Mercur, for appellee:

Individual members cannot set up their own faults or mistakes of organization, or false and fraudulent representations whereby they were induced to become stockholders, as a defense against creditors.

McHose v. Wheeler, 45 Pa. 32.

Even if it were true that the appellant was induced to subscribe for his stock by false and fraudulent representations imputable to the company, yet, as the rights of the creditors have intervened subsequent to the time the appellant became a stockholder, his remedy, if he has any, is a special action on the case for fraud against the individuals by whom the fraud was perpetrated, but it affords no defense to proceedings instituted by a creditor.

2 Lindley, Partn. § 528; Morawetz, Priv. Corp. § 595; Kerr, Fraud, §§ 329, 330; *Henderson v. Royal British Bank*, 7 El. & Bl. 586;

Powis v. Harding, 1 C. B. N. S. 531; *Oakes v. Turquand*, L. R. 2 H. L. 326; *Stone v. City & County Bank* (*Collins v. City & County Bank*), L. R. 8 C. P. Div. 282, 30 Moak, Eng. Rep. 156; *Tennent v. City of Glasgow Bank*, L. R. 4 App. Cas. 615, 33 Moak, Eng. Rep. 896; *Houldsworth v. City of Glasgow Bank*, L. R. 5 App. Cas. 317; *Upton v. Hansbrough*, 10 Nat. Bankr. Reg. 369; *Michener v. Payson*, 13 Nat. Bankr. Reg. 49; *Upton v. Englehart*, 3 Dill. 496; *Turner v. Granger's L. & H. Ins. Co.* 65 Ga. 649; *Hamilton v. Granger's L. & H. Ins. Co.* 67 Ga. 145; *Duffield v. Barnum W. & I. Works*, 7 West. Rep. 606, 61 Mich. 203; *Ogilvie v. Knos Ins. Co.* 63 U. S. 22 How. 380, 16 L. ed. 849; *Upton v. Trillick*, 91 U. S. 45, 23 L. ed. 203.

Partnership may be formed not only by express agreement, but may grow out of transactions or relations in which the word "partnership" is not uttered.

Parsons, Partn. pp. 8, 9; 1 Lindley, Partn. §§ 17, 19, 20; Cook, Stock & Stockholders, § 506; *Re Mendenhall*, 9 Nat. Bankr. Reg. 497; *Whipple v. Parker*, 29 Mich. 369; *Koster v. Moulton*, 35 Minn. 458; *National U. Bank of Watertown v. Landon*, 45 N. Y. 412.

The Home Savings Bank of South Waverly although it possesses many of the elements of a joint-stock company, is nearer a partnership.

Re Oliver's Estate, 9 L. R. A. 421, 136 Pa. 58.

But whether it is a joint-stock company or a partnership, the liability of the appellant is practically the same.

Cook, Stock & Stockholders, § 508; *Kellogg Bridge Co. v. United States*, 15 Ct. Cl. 111;

Westcott v. Fargo, 61 N. Y. 542; *Witherhead v. Allen*, 3 Keyes, 362.

All unincorporated banks are partnerships.

Hess v. Werts, 4 Serg. & R. 359; *Witmer v. Schlatter*, 2 Rawle, 359; *Bidgely v. Dobson*, 3 Watts & S. 118; *Beaver v. McGrath*, 50 Pa. 479; *Re Fry's Account*, 4 Phila. 133; *Protchett v.*

entitle one to maintain an action against the corporation. *Narragansett Bank v. Atlantic Silk Co.* 3 Met. 232; *Cane v. Brigham*, 39 Me. 36; *Merchants Bank of St. Louis v. Harrison*, 30 Mo. 433; *Haynes v. Brown*, 35 N. H. 545. See Ang. & A. Corp. § 635.

The existence of the corporation may be proved by producing the books of the company containing the license issued to the corporation by an officer of the State, under a statute, to enable it to act as such. *Culver v. Third Nat. Bank*, 64 Ill. 523.

It may also be proved by a certified notice of the formation of the corporation, made in pursuance of the statute, sworn to by its president, treasurer, clerk and directors, and recorded, as provided by the Statute, in the registry of deeds. *Chamberlin v. Huguenot Mfg. Co.* 118 Mass. 532.

Negligence not subject to a standard rule.

It is impossible to give the measure of culpable negligence in those occupying fiduciary relations for all cases, as the degree of care required depends upon the subjects to which it is to be applied. *First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 N. Y. 278.

What would be slight neglect in the care of a quantity of iron might be gross neglect in the care of a jewel. What would be slight neglect in the care exercised in the affairs of a turnpike corporation, or even of a manufacturing corporation, might be gross neglect in the care exercised in the management of a savings bank intrusted with the savings of a multitude of poor people, depending for its life upon credit and liable to be wrecked by the breath of suspicion. *Hun v. Cary*, 32 N. Y. 65, 13 L. R. A.

The relation between bank officials and depositors.

The relation and relative obligations arising between a bank and its depositing customers are in general simply those of debtor and creditor. *Foley v. Hill*, 2 H. L. Cas. 23; *Extra Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314; *Boyd v. Bank of Cape Fear*, 65 N. C. 13; *Allen v. Fourth Nat. Bank of New York*, 5 Jones & S. 137, 59 N. Y. 12; *Buchanan F. Oil Co. v. Woodman*, 1 Hun, 639, 4 Thomp. & C. 133; 1 Wait, Act. & Def. 502.

The relation between a savings bank and its trustees or directors is that of principal and agent, and that between the trustees and depositors is similar to that of the trustee and *cestui que trust*. If such trustees transcend the limits placed upon their power in the charter of the bank and cause damage to the bank or its depositors, they are liable. *Hun v. Cary*, 32 N. Y. 65.

Each partner is personally responsible for the obligations and liabilities of the partnership, whether on contract or for torts, and his property may be taken on execution or attachment against the firm, although the firm may be insolvent. *Parsons*, Partn. 63, 349; *Woolley v. Kelly*, 1 Barn. & C. 66; *Nicholson v. Janeway*, 16 N. J. Bq. 285; *Bryant v. Hawkins*, 47 Mo. 410; *Villa v. Jonte*, 17 La. Ann. 9; 5 Field, Lawyer's Briefs, § 6. See note to *Marshall v. Farmers & M. Sav. Bank* (Va.) 2 L. R. A. 534.

As to the distinction between saving banks and banks of deposit, see note to *Lewis v. Lynn Inst.* for Sav. (Mass.) 1 L. R. A. 735.

Schaefer, 11 Phila. 166; *Schamburg v. Fowler*, 25 Pittsb. L. J. 148; *Thomson's Estate*, 5 W. N. C. 14.

So are unincorporated joint-stock companies. *Kramer v. Arthurs*, 7 Pa. 165; *Hedge's App.* 68 Pa. 278; *Clarke's App.* 107 Pa. 486; *Re Oliver's Estate*, 9 L. R. A. 421, 186 Pa. 43.

The shareholders are therefore each personally liable for all the debts of the bank.

2 Lindley, Partn. §§ 1088, 1421.

Where persons enter into articles of association for banking purposes, and without any charter assume a name, open a stock book, subscribe for shares of stock, and a portion pay small sums thereon, hold meetings, elect directors, publish the names of such directors, enter into and transact business as a bank, they are all liable as partners.

Pettis v. Atkins, 60 Ill. 454; *Hodgson v. Baldwin*, 65 Ill. 582; *Boston & A. R. Co. v. Pearson*, 128 Mass. 445; *Jessup v. Carnegie*, 12 Jones & S. 261; *Shamburg v. Ruggles*, 83 Pa. 148; *Clark v. Fletcher*, 96 Pa. 416; *Shamburg v. Abbott*, 2 Cent. Rep. 802, 112 Pa. 6; *Christy v. Sill*, 131 Pa. 492; *Weiterhauser v. Shaver*, 29 Pittsb. L. J. 213.

A participant in profits directly as such, no matter what may be the arrangement between the parties, is as to third persons a partner.

Gill v. Kuhn, 6 Serg. & R. 839; *Churchman v. Smith*, 6 Whart. 148; *Edwards v. Tracy*, 62 Pa. 890; *Reed v. Kremer*, 2 Cent. Rep. 64, 111 Pa. 466; *Caldwell v. Miller*, 127 Pa. 442.

And one who shares in the profits, although his name may not be in the firm, is responsible for all its debts.

Winship v. Bank of United States, 30 U. S. 5 Pet. 560, 8 L. ed. 227.

Two things must be shown to establish the existence of a corporation *de facto*, viz.: *first*, the existence of a charter or some law under which such a corporation with the powers assumed might be created; *second*, a user by the party assuming to be such corporation, of the rights claimed to be conferred by such charter or law.

Methodist Epis. U. Church v. Pickett, 19 N. Y. 482.

One who contracts with others under a corporate name believing that he is contracting with a corporation, when none in fact exists, is not, in a suit against such persons to enforce the contract, estopped to deny that they were a corporation.

Glenn v. Bergamann, 2 West. Rep. 597, 20 Mo. App. 343; *Hurt v. Salisbury*, 55 Mo. 310; *Sheble v. Strong*, 128 Pa. 315; *Cook, Stock & Stockholders*, § 233.

Williams, J., delivered the opinion of the court:

The learned judge before whom this case was tried correctly stated the principles that controlled the liability of partners to third persons dealing with them. There is no doubt that where the relation is shown to exist, each partner is liable individually for all the debts of the firm. It is also true, as a general rule, that participation in profits makes one a partner as to persons dealing with the firm, although this rule is not without some well-recognized exceptions. *Edwards v. Tracy*, 62 Pa. 374; *Hart v. Kelley*, 13 L. R. A.

83 Pa. 236. The business of banking is one in which a partnership may lawfully engage; and it is immaterial that the names of the partners do not appear in the firm name. *Shamburg v. Ruggles*, 83 Pa. 148. The liability of the partners depends, not on the name of the partnership, but on the existence of the partnership relation. These rules were correctly stated on the trial. The ground of complaint is the manner of their application to the facts of this case. In his charge to the jury the learned judge drew attention to the evidence showing the organization of the bank, the holding of stock by the defendants, and their receipt of dividends, and then submitted the questions to the jury in the following order: *first*, was the bank indebted to the plaintiff as alleged; *second*, was the bank a partnership, and *third*, were the defendants members of the firm. Having simply stated the second question, he proceeded to consider and discuss the third, and, among other things, said to the jury: "Did they (the defendants) invest their money in this business, and did they stipulate for a share of the profits of the business?" To enable them to understand the significance of their finding upon this question he immediately added: "If they did, they became partners and individually liable for all the debts of the firm, unless they can protect themselves from this liability. If the institution was an incorporated bank, then they would not be individually liable. But if it was incorporated the burden is upon the defendants to show it. And if it was a limited partnership the burden is on the defendants to show it." This instruction was calculated to divert attention from the second question, which was the important one, and fix it on the third. It assumed that there was competent and adequate proof before the jury to establish, *prima facie*, that the bank was a private enterprise owned and conducted by a partnership; and it put the burden of proof on the defendants. It left the jury to infer that until the defendant should assume the burden put upon them and show affirmatively that the bank was incorporated, or was organized as a limited partnership, they should be held liable as partners. But the learned judge went still further. Having put the burden on the defendants of showing the character of the bank, and having explained to the jury what the defendants must show in order to "protect themselves from liability," he proceeded to say: "No evidence has been given before you that it (the bank), was incorporated, and no evidence that it was a limited partnership." This left the jury no alternative; they must find that the defendants invested their money in the bank, with a view to share in the profits of the business, for this was not denied; and this they were told made them partners. They could protect themselves only by showing the incorporation of the bank, or its organization as a limited partnership, and this, they were told, had not been done. The conclusion naturally followed that they were liable as partners. Now the important question in this case, which lay at the threshold of the plaintiff's cause of action, was whether

this bank was a partnership. The plaintiff alleged it, and claimed to recover against the defendants as members of the banking firm. The burden of proving the partnership was on him, and until this proof was given the defendants were not called upon to enter upon their defense. They were not bound to prove the character of the organization of the bank in order to "protect themselves," until they were first put in danger of a verdict against them by proof that the bank was a partnership, and that they were members of the firm. As they did not deny that they were stockholders, the only open question was that of the character of the bank, and this is the question to which the attention of the jury should have been drawn. What was the evidence upon this question? The plaintiff showed the fact that the bank was organized, that it conducted a banking business under the management of a board of directors with a president, vice-president, and cashier, until 1887, when it failed. This was all. No articles of co-partnership, or contract between the founders of the bank, were shown. How the organization was effected, or the business of the bank done, did not appear. There was not even a single act or declaration of any officer, director, stockholder, or clerk, tending to show that the bank had ever been represented, at any time or to any person, as a partnership. There was no proof that the defendants or either of them had ever attempted to exercise any control over the business of the bank or had participated in it in any other way than by the receipt of a few small dividends. On the other hand, it appeared in the evidence that Kirby, the founder of the bank, represented that he had obtained a legal charter for it, while he was engaged in soliciting subscriptions to the stock. The certificates held by the defendants, which were put in evidence by the plaintiff, described the bank as "organized under an Act of the Legislature of Pennsylvania, and as having an authorized capital of \$100,000 divided into shares of \$100 each." This description is certainly appropriate to an incorporated bank, and no inference can be drawn from it favorable to the position of the plaintiff, that it was not such. Moreover the defendants were severally upon the witness stand and testified in the most positive manner that they were not partners with Kirby and others, but stockholders, as they understood and believed the fact to be, in an incorporated bank; and that the stock was sold to them, and bought by them, as and for the lawfully issued stock of a bank doing business under a valid charter. From this evidence the jury would have been justified in finding against the plaintiff; and if their attention had been drawn to it, as its importance required, the result of their deliberations might have been just opposite to what it was. The position of the parties is not without some bearing on this question. The real plaintiff was the wife of one of the sons of the man who organized the bank, presided over its affairs for fourteen years, and conducted it into hopeless bankruptcy. Her husband had been in the employ of the bank for years as a clerk and bookkeeper. He had

the means of knowing, and it is fair to presume did know, the character of the bank and the manner in which it was organized. His brother, who was the assignee both of his father and of the bank, and had actual custody of all the books and papers of both at his place of business in another State, was present at the trial as a witness for the plaintiff. Whether the bank rested on a contract between its founders, or on a charter from the State, he was in a position to know, and to bring the document before the court. With these two witnesses the plaintiff was in a position to show all that the books and papers of the bank, or its founder, contained relating to the organization. The defendants, on the other hand, were simply small stockholders shown to have had no connection with or knowledge of the business of the bank, and no access to its books or papers. How, in a contest between parties so situated, can it be said that the burden of showing the nature and character of the organization of the bank is on the defendants?

The books and papers from which this evidence is to be drawn are in another State, beyond the reach of process, and in the hands of the plaintiff's witness and brother. The defendants have no means of reaching them or compelling their production. Under such circumstances if the absence of exact proof of the nature of the organization affords a basis for a presumption against either party it must be against him who is in a position to produce such proof. It was error therefore to say, on the facts of this case as they were presented in the court below, that the burden of proving a charter, or an organization as a limited partnership, was on the defendant. The burden of proving a partnership as alleged, was on the plaintiff, and until this was shown, the defendants were not called upon to enter upon a defense. It was error also to say that there was no evidence tending to show an incorporation of the bank. There was some evidence and it should have been submitted to the jury in such manner as to draw their attention to the importance of the question. Something has been said in the argument about the unconscionable position of bankers, who first invite the public confidence and, when they have secured it, betray it, and then seek to escape from the legal consequences of their own frauds. We quite agree with all that has been said by way of censure of such conduct, but it is not quite appropriate upon the facts of this case. The defendants took their stock in an organized bank, doing business as a savings bank. They had nothing to do with its current business. They neither invited the plaintiff to make deposits, nor embezzled the money when deposited.

It is not alleged that they aided in bringing about, or profited by, the ruin of the bank. They are, rather, among the sufferers from the ruin wrought, apparently, by the president.

While he squandered the money of depositors he sunk also the money of the stockholders. If the defendants are now liable to the creditors of the bank, it is not for their own fault or fraud, but because of their misfor-

tune in being associated in business with one who has wasted the money of his partners, and that of the customers of the firm, at the same time, and left both remediless.

This is their position if the bank was a partnership. They must in that case bear their own loss and make good, to the extent of their ability, the losses of the depositors. But he who asserts their liability as partners must show it, and the sufficiency of the showing must be determined by the jury under proper instructions.

The judgment is reversed and a venire facias de novo awarded.

Daniel KEHLER, by Next Friend,

v.

William SCHWENK, Surviving Partner,
etc., Appl.

(.....Pa.....)

1. The discretion of the master is absolute in selecting which of several styles of apparatus in common use he will use in his business; and he cannot be made to respond in damages to an employé injured while using the apparatus selected, on the ground that some

other style might, under the circumstances, have been safer.

2. The attention of the jurors should not be drawn to the price for which they would be willing to suffer the injury for which they are to assess damages, in laying down the rules which are to guide them in making such assessment.

3. The degree of care and prudence which must be exercised by a child to avoid the charge of negligence is measured by his capacity to see and appreciate danger whether he is under or over fourteen years of age, and in the absence of evidence to the contrary such capacity will be held to be that which is usual to children of his age and experience. Fourteen years is simply the age after which capacity is presumed and the burden of showing lack of it placed on the child.

(October 5, 1891.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Northumberland County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

Plaintiff was a minor about fourteen years of age. He was employed at defendant's colliery as slate picker. At the time he received

NOTE.—Implements furnished an employé must be reasonably safe.

A master does not guarantee the safety of the implements furnished to his servants, and is not liable for injuries resulting from a defect in the implements furnished which could not be discovered by careful inspection or the application of appropriate tests. *Probst v. Delamater*, 1 Cent. Rep. 507, 100 N. Y. 266.

And in an action by an employé against his employer to recover damages for injuries incurred by reason of defects in the implements furnished, the burden of proof is on the party plaintiff to show defendant's negligence in the exercise of his duty to the employé in the selection of improper implements. *Painton v. Northern Cent. R. Co.* 83 N. Y. 7; *DeGraff v. N. Y. Cent. & H. R. Co.* 78 N. Y. 125; *St. Louis, I. M. & S. R. Co. v. Harper*, 44 Ark. 524.

The employé has a right to assume the suitable character of the machinery for all purposes for which it is furnished to be used. *Stevenson v. Jewett*, 16 Hun. 210; *Swords v. Edgar*, 50 N. Y. 28, 33; *Willy v. Mulledy*, 78 N. Y. 310; *Mehan v. Syracuse, B. & N. Y. R. Co.* 78 N. Y. 586.

Even where the knowledge of defects comes to the servant, it is a question for the jury to decide as to whether his negligence amounted to a contribution on his part, and it is only in a very extreme case that the court will decide it to be a matter of law. *McMahon v. Port Henry Iron Co.* 24 Hun. 48; *Sprong v. Boston & A. R. Co.* 58 N. Y. 56; *Laning v. New York Cent. R. Co.* 49 N. Y. 521, 536, 537; *Willy v. Mulledy, supra*; *Hawley v. Northern Cent. R. Co.* 82 N. Y. 370; *Kain v. Smith*, 80 N. Y. 375.

It was the duty of the employer to furnish his employes, for use in the prosecution of his business, safe and suitable machinery and to keep the same in good repair. *Cone v. Delaware, L. & W. R. Co.* 81 N. Y. 208; *Power v. New York, L. E. & W. R. Co.* 32 Hun. 415; *Ryan v. Fowler*, 24 N. Y. 415; *Kirkpatrick v. New York Cent. & H. R. Co.* 79 N. Y. 240; *Chapman v. Erie R. Co.* 55 N. Y. 585; *Malone v. Hathaway*, 2 Thomp. & C. 664; *Brickner v. New York Cent. R. Co.* 2 Lans. 517; *Flike v. Boston & A. R. Co.* 53 N. Y. 549; *Kain v. Smith*, 80 N. Y. 458. 13 L. R. A.

By encouraging employes to use the structure and machinery furnished, the master must use proper care and diligence to make such structure and machinery fit for use. *Union Pac. R. Co. v. Fort*, 84 U. S. 17 Wall. 553, 21 L. ed. 739; *Sullivan v. India Mfg. Co.* 113 Mass. 396; *O'Connor v. Adams*, 120 Mass. 427; *Reedie v. London & N.W. R. Co.* 7 Erch. 253; *Dynen v. Leach*, 25 L. J. Erch. 221; *Lawler v. Androscoggin R. Co.* 62 Me. 466; *Fifield v. Northern R. Co.* 42 N. H. 225; *Hard v. Vermont & C. R. Co.* 32 Vt. 473; *Swords v. Edgar*, 50 N. Y. 28; *Plank v. New York Cent. & H. R. Co.* 60 N. Y. 607; *Patterson v. Pittsburgh & C. R. Co.* 76 Pa. 389; *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541; *Indianapolis, B. & W. R. Co. v. Flanagan*, 77 Ill. 365; *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 175; *Muldowney v. Illinois Cent. R. Co.* 36 Iowa, 403; *Wedgwood v. Chicago & N. W. R. Co.* 41 Wis. 478; *LeClair v. First Div. of St. Paul & P. R. Co.* 20 Minn. 9; *Whalen v. Centenary Church of St. Louis*, 62 Mo. 336; *Mobile & O. R. Co. v. Thomas*, 42 Ala. 673; *Malone v. Hawley*, 46 Cal. 409; *Batterson v. Wallace*, 1 Macq. H. L. Cas. 748; *Toledo, W. & W. R. Co. v. Moore*, 77 Ill. 217.

The master is simply bound to exercise reasonable care in selecting appliances for a servant's use. *Wood, Mast. & Serv.* 696; *Hackett v. Middlesex Mfg. Co.* 101 Mass. 101; *Ryan v. Fowler*, 24 N. Y. 410; *Wright v. New York Cent. R. Co.* 25 N. Y. 562; *Warner v. Erie R. Co.* 30 N. Y. 468; *Faulkner v. Erie R. Co.* 49 Barb. 324; *Malone v. Hathaway*, 64 N. Y. 5; see *note*, 21 Am. Rep. 579; *Tinney v. Boston & A. R. Co.* 62 Barb. 218; *McMillan v. Saratoga & W. R. Co.* 20 Barb. 449; *Davis v. Detroit & M. R. Co.* 20 Mich. 105, 4 Am. Rep. 364; *Rose v. Boston & A. R. Co.* 58 N. Y. 217; *Chapman v. Erie R. Co.* 55 N. Y. 579; *Laning v. New York Cent. R. Co.* 49 N. Y. 521; *Flike v. Boston & A. R. Co.* 53 N. Y. 550; *Columbus, C. & I. C. R. Co. v. Troesch*, 68 Ill. 545, 18 Am. Rep. 579; *Wonder v. Baltimore & O. R. Co.* 32 Md. 411, 8 Am. Rep. 143; *Keegan v. Western R. Corp.* 8 N. Y. 175; *Story*, Ag. § 45 d, c; *Parsons*, Cent. 523; *Leonard v. Collins*, 70 N. Y. 90; *Allen v. New Gas Co.* 17 Moak, Eng. Rep. 420-424; *Hoffnagle v. New York Cent. & E. R. R. Co.* 55 N. Y. 606.

the injuries complained of he was engaged in driving a mule attached to a car hauling dirt from the breaker. The work required that he should ride on the car to the dump and unhitch the mule while the car was running on an up grade with enough momentum to carry it to the end of the dirt bank, the place where it was to be dumped. The mule was hitched to the car by means of a spreader and chain. The attachment was in front, beneath the car. Plaintiff claimed that the car was not properly constructed; that the attachment should have been at the side of the car, or if in front, it should have been in a more elevated position.

Further facts appear in the opinion.

Mears, W. B. Faust, W. H. M. Oram, C. M. Clement and S. P. Wolverton, for appellant:

A boy fourteen years of age is competent to drive a mule hauling a dump car. It was therefore not negligence to put this plaintiff at such work. The average boy of fourteen years was fully competent to know the danger.

O'Keefe v. Thorn, 24 W. N. C. 379; *Rickert v. Stephens*, 138 Pa. 538; *Zurn v. Tellow*, 184 Pa. 213.

An infant of the age of fourteen years is presumed to have sufficient capacity to be sensi-

ble of danger and to have the power to avoid it, and this presumption will stand until overthrown by clear proof of the absence of such discretion as is usual with infants of that age.

Nagle v. Allegheny R. Co. 88 Pa. 35; *Strawbridge v. Bradford*, 128 Pa. 200; *Gillespie v. McGowan*, 100 Pa. 149; *West Philadelphia Pass. R. Co. v. Gallagher*, 108 Pa. 527; *Colgan v. West Philadelphia Pass. R. Co.* 4 W. N. C. 401.

It was not a question for the jury to determine as to which of the three kinds of hitches described by the witnesses should have been used at this colliery, nor whether it would have been a safe thing to employ a boy of this age in the use of any other hitch. The undisputed evidence was that boys of this age did this work with the style of hitch in evidence.

See *Faber v. Carhills Mfg. Co.* 126 Pa. 389; *Titus v. Bradford, B. & K. R. Co.* 136 Pa. 625.

Where an employer has furnished his employees with tools and appliances, which, though not the best possible to be obtained, may by ordinary care be used without danger, he has discharged his duty and is not responsible for accidents.

Pittsburgh & C. R. Co. v. Sentmeyer, 92 Pa. 276; *Allison Mfg. Co. v. McCormick*, 11 Cent. Rep. 396, 118 Pa. 519; *Drew v. Gaylord Coal*

Burden of proof is with the party alleging want of due care.

The burden is upon the plaintiff to establish negligence of the master and his own care. The presumption is that the master discharged his duty, and this presumption must be fairly overcome by proof of his personal fault or negligence. *McMillan v. Saratoga & W. R. Co.* 20 Barb. 449; *Rose v. Boston & A. R. Co.* 58 N. Y. 217; *Wright v. New York Cent. R. Co.* 25 N. Y. 562; *Malone v. Hathaway*, 64 N. Y. 5, 21 Am. Rep. 573, notes 580, 581; *De Graff v. New York Cent. & H. R. R. Co.* 76 N. Y. 125; *Davis v. Detroit R. Co.* 20 Mich. 105, 4 Am. Rep. 364.

This presumption is not overcome and an inference of negligence indulged from the existence of a defect in the machine, although a servant may be injured in consequence of that defect. *De Graff v. New York Cent. & H. R. R. Co. supra*; *Wood, Mast. & Serv.* § 366, 419; *Terry v. New York Cent. R. Co.* 23 Barb. 524; *Curran v. Warren Chem. & Mfg. Co.* 26 N. Y. 153; *Moble & O. R. Co. v. Thomas*, 43 Ala. 672; *Bauleo v. New York & H. R. Co.* 50 N. Y. 366; *Hard v. Vermont & C. R. Co.* 32 Vt. 473.

It was for the plaintiff to prove that proper tests had not been applied, the law presuming that ordinary care had been exercised. *Wood, Mast. & Serv.* § 419; *Rose v. Boston & A. R. Co.* and *De Graff v. New York Cent. & H. R. R. Co. supra*; *Henry v. Staten Island R. Co.* 81 N. Y. 373; *Wright v. New York Cent. R. Co.* and *Bauleo v. New York & H. R. Co. supra*; *Hayes v. Forty-Second St. & G. St. Ferry R. Co.* 97 N. Y. 259.

To carry a case to a jury the evidence on the part of the plaintiff must be such as, if believed, would authorize them to find that the injury was occasioned solely by the negligence of the defendant. *Johnson v. Hudson River R. Co.* 20 N. Y. 65; *Wilde v. Hudson River R. Co.* 24 N. Y. 430; *Reynolds v. New York Cent. & H. R. R. Co.* 58 N. Y. 248; *Sammson v. New York & H. R. Co.* 62 N. Y. 251; *Leonard v. Collins*, 70 N. Y. 90; *Hale v. Smith*, 78 N. Y. 480; *Hart v. Hudson River Bridge Co.* 84 N. Y. 56; *Rice-man v. Havemeyer*, Id. 647; *Owen v. New York Cent. R. Co.* 47 N. Y. 670; *Gibson v. Erie R. Co.* 63 N. Y. 448; *Brick v. Rochester, N. Y. & P. R. Co.* 21 N. Y. Week Dig. 14.

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This duty not an absolute one.

The duty of the master to furnish safe, suitable and sound tools, machinery and appliances for the use of the servant in the performance of the work of the master, and to keep them in repair, is not an absolute one, and is satisfied by the exercise of reasonable care and prudence on the part of the master in the manufacture, selection and repair of such appliances. *Fuller v. Jewett*, 80 N. Y. 46; *Painton v. Northern Cent. R. Co.* 83 N. Y. 7; *Ellis v. New York, L. E. & W. R. Co.* 95 N. Y. 552; *Burke v. Witherbee*, 98 N. Y. 552.

When servant assumes risk.

The rule that a servant assumes the risk by continuing in the employment with knowledge of the defect applies even to a case where the defect was due to improper construction of the machine, or existed when the machine was furnished by the master; but there is a wide difference between its application to such a case and to a case like the present, where the defect was not one originally existing, but was one which resulted from the use of a good and safe machine. *Thomp. Neg.* 1017; *Prenate v. Union Iron Co.* 23 Hun. 528; *Pieroe, Railroads*, 374; *Belair v. Chicago & N. W. R. Co.* 43 Iowa, 662; *Malone v. Hathaway*, 64 N. Y. 5; *De Graff v. New York Cent. & H. R. R. Co.* 76 N. Y. 125; *Wood, Mast. & Serv.* 737; *McMillan v. Saratoga & W. R. Co.* 20 Barb. 449; *Columbus & X. R. Co. v. Webb*, 12 Ohio St. 475; *Wunder v. Baltimore & O. R. Co.* 33 Md. 411; *Illinois Cent. R. Co. v. Jewell*, 46 Ill. 90; *Seaver v. Boston & M. R. Co.* 14 Gray, 468.

Where a servant is employed on machinery, from the use of which danger may arise, it is the duty of the master to take due care, and to use all reasonable means to guard against and prevent any defects from which increased and unnecessary danger may occur. *Clarke v. Holmes*, 7 Hurlst. & N. 937. And see *Hayden v. Smithville Mfg. Co.* 29 Conn. 548; 4 Walt, Act. & Def. 417. See notes to *Sherman v. Menomonee River Lumber Co. (Wis.)* 1 L. R. A. 173; *Louisville, N. A. & C. R. Co. v. Buck (Ind.)* 2 L. R. A. 560; *Lindvall v. Woods (Minn.)* 4 L. R. A. 7; *Louisville, N. A. & C. R. Co. v. Corps (Ind.)* 8 L. R. A. 665.

Co. (Pa.) 3 Cent. Rep. 889; District of Columbia v. McEligott, 117 U. S. 631, 29 L. ed. 546; *Lehigh & W. B. Coal Co. v. Hayes*, 5 L. R. A. 441, 128 Pa. 294; *Philadelphia & R. R. Co. v. Hughes*, 11 Cent. Rep. 822, 119 Pa. 803; *Marsden v. Haigh*, 14 W. N. C. 526; *Wanamaker v. Burke*, 2 Cent. Rep. 283, 111 Pa. 423.

Messrs. Voris Auten and C. R. Savidge, for appellee:

This case is ruled by *Rummel v. Dilworth*, 131 Pa. 509.

Mitchell, J., delivered the opinion of the court:

We have had occasion several times recently to lay down the rule that the test of liability of an employer to an employé for injury received in the course of the employment is not danger but negligence. The employer is bound to furnish machinery and appliances that are of ordinary character and reasonable safety, and the former is the conclusive test of the latter. Whatever is according to the general, usual and ordinary course, adopted by those in the same business, is reasonably safe within the meaning of the law. As said by our brother Green in *Northern Cent. R. Co. v. Huson*, 101 Pa. 1, an employer is not liable "because a particular accident might have been prevented by some special device or precaution not in common use," and by our brother Williams, in *Iron Ship Building Works v. Nuttall*, 119 Pa. 149, 11 Cent. Rep. 662: "It is not enough that some persons regard it as a valuable safeguard. The test is general use." Nor can the jury be permitted to set up their judgment against the general customs of the business. *Titus v. Bradford, B. & K. R. Co.* 126 Pa. 618. In the present case it was in undisputed evidence that there were three kinds of hitches to the dumper in common use, each having its own peculiar advantages adapted to different conditions of the dirt bank. Much evidence was given as to whether it would not have been practicable and better, under the conditions of this colliery, to use the side hitch, or the box centre hitch. This question, though made the burden of the contest, was entirely irrelevant. It was exclusively for the determination of the defendants themselves. Where, as in the present case, the evidence shows clearly that several methods are in general use, the choice being a matter of judgment depending on the surrounding conditions, the owner has the absolute discretion to select according to his own judgment. The necessary control of his own business demands that this right shall be strictly maintained. Except to make another man's will for him after his death, there is nothing which a jury is more apt to think it can do better than the owner, especially under the stress of a claim for damages by one who has been injured, than to say how another man's business ought to have been managed, and nothing in which juries should be held more strictly and unflinchingly within their proper province. As already said, there was a large amount of evidence as to the superiority of the side or upper hitch, the admission and discussion of which tended naturally to lead the jury

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to suppose that they might find a verdict on their own judgment which was the best, and this was put explicitly before them by the charge that "the proper question for you to determine is as to which of these hitches was the proper hitch for these parties to make use of at this colliery." This was giving the jury an entirely erroneous view of the point of the case and of their province in regard to it. They should have been told that if they found from the evidence that the lower hitch was the one in general use upon dirt banks with an up grade there was no negligence in the use of that hitch by the defendants. The ninth assignment of error must be sustained.

As the case is to go back for another trial, we may also say that the measure of damages quoted in the eighth assignment is somewhat vague, and the expression "you would not be willing to lose your arm for the world, or for the wealth of a Vanderbilt," though followed by the caution that that would be no test of value, was an undesirable form of putting the matter to the jury and tended to inflame damages in a class of cases where juries are prone enough to measure verdicts by sympathy with the injured more than by regard for the strict right of the parties.

The error complained of in the second and fourth assignments is in brief the charge that while the law presumes a boy of fourteen to be capable of appreciating danger and therefore responsible for his own negligence, yet he is not to be held to the same degree of prudence as a man of mature years. It is notable that in the legion of cases upon negligence in our books this particular question has received little attention. But the principles upon which it must be settled are firmly established. All the cases agree that the measure of a child's responsibility is his capacity to see and appreciate danger, and the rule is that in the absence of clear evidence of lack of it, he will be held to such measure of discretion as is usual in those of his age and experience. This measure varies, of course, with each additional year, and the increase of responsibility is gradual. It makes no sudden leap at the age of fourteen. That is simply the convenient point at which the law, founded upon experience, changes the presumption of capacity, and puts upon the infant the burden of showing his personal want of the intelligence, prudence, foresight, or strength usual in those of such age. The standard remains the same, to wit: the average capacity of others in his condition. That this is the rule as to children under fourteen is held in all our cases from *Rauch v. Lloyd*, 81 Pa. 358, to *Sandford v. Hestonville M. & F. Pass. R. Co.* 186 Pa. 84. That it also applies to infants over fourteen follows from the same reasoning, and is expressly ruled in *Oakland R. Co. v. Fielding*, 48 Pa. 320. In that case plaintiff's son, a youth between sixteen and seventeen, while running with a fire engine stepped into a hole in the street, fell and was run over. The judge charged the jury, upon the point of contributory negligence, that they must consider the age, strength, size, and activity of the plaintiff's son, and if it was the habit

of boys of his age and capacity to run with the engines to a fire, and to assist in drawing them, the jury may take the fact into consideration in determining whether or not the plaintiff's son was guilty of negligence or misconduct; the plaintiff's son was bound to exercise the same degree of caution, prudence, and discretion that other boys of his age and capacity ordinarily exercise. If he did this he was exercising ordinary care and prudence, but if not he was guilty of negligence." This was affirmed upon the reasons given by the judge below.

Nagle v. Allegheny R. Co., 88 Pa. 85, much relied on by appellant, is in entire harmony with the foregoing. In that case a boy of fourteen ran across a railroad track without looking, and the court held that this was negligence *per se*, and sustained a nonsuit. "At fourteen," says Paxson, J., "an infant is presumed to have sufficient capacity and understanding to be sensible of danger and to have the power to avoid it. And this presumption ought to stand until it is overthrown by clear proof of the absence of such discretion and intelligence as is usual with infants of fourteen years of age."

In the present case there was evidence that the unhitching of a dumper of this kind was manifestly dangerous, and on the other hand that it was entirely safe and commonly performed by boys. It is quite clear that the amount of danger depended very largely on the length and weight of the chain, the condition of the track and the speed of the mule. These factors made up a varying standard which was necessarily for the jury to determine, and the judge was right in leaving it to them, and in the rule of law which he gave for their guidance.

The other points were based upon the assumption that the evidence was undisputed, and included a peremptory direction in defendant's favor. The learned judge was right in refusing them for that reason.

Judgment reversed and venire de novo awarded.

Joseph MOVEY *et al.*

v.

John H. BRENDL, *Appt.*

(.....Pa.....)

1. **The International Cigar Makers' Union**, the object of which is "to promote the mental, moral, and physical welfare of its members," is neither a manufacturer, dealer, nor trader, so as to be entitled to protection in the use of a trade-mark.

2. **Equity will not protect a labor union in the use of a nontrade-mark label** which it distributes to all its members to be placed upon their work, the object of which is to discriminate between union and nonunion labor and to coerce the latter into joining the union by recommending to the public the goods on which such labels appear because made by union labor,

and denouncing all other goods as the product of "inferior, rat shop, cooley, prison, or filthy tenement-house workmanship."

(October 5, 1891.)

A PPEAL by defendant from a decree of the Court of Common Pleas for Lancaster County enjoining him from making use of certain devices or labels upon cigars manufactured in his shop. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. D. G. Eshleman and N. Franklin Hall, for appellant:

The label in question does not fall within the definition of a trade-mark, and therefore cannot be protected as such.

Unless the person be a trader, that is, unless he or she is engaged in mercantile business of some kind, a title to a trade-mark could not be acquired.

Browne, Trade-marks, §§ 53, 54; *Delaware & H. Canal Co. v. Clark*, 80 U. S. 13 Wall. 311, 20 L. ed. 581.

A trade-mark is a word or device adopted and used by the manufacturer or vendor of goods to designate the origin and ownership of his goods.

Burke v. Cassin, 45 Cal. 467. See also *Metcalf v. Brand*, 86 Ky. 831, 343; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 52, 25 L. ed. 994.

If it appears that the device, mark, or symbol was adopted and placed upon the article for the purpose of indicating its class, grade, style, or quality, or for any purpose other than a reference to or indication of its origin or ownership, it cannot be upheld as a trade-mark.

Lawrence Mfg. Co. v. Tennessee Mfg. Co. 21 Fed. Rep. 776; *Laughman's App.* 5 L. R. A. 599, 128 Pa. 19.

A trade-mark is the exclusive right to use some name or symbol as applied to a particular manufacture or vendible commodity by the owner.

Hall v. Burrows, 4 DeG. J. & S. 150, 158; *Amoskeag Mfg. Co. v. Trainer*, *Metcalf v. Brand*, and *Burke v. Cassin*, *supra*; High, Inj. 1063.

A right to a trade-mark can be acquired only by him who puts merchandise or a valuable commodity marked or distinguished by his particular mark on the market.

Leather Cloth Co. v. American Leather Cloth Co. 4 DeG. J. & S. 137, 142; *McAndrew v. Bassett*, 4 DeG. J. & S. 380, 388; *Leather Cloth Co. v. American Leather Cloth Co.* 11 H. L. Cas. 523, 533; *Farina v. Silverlock*, 6 DeG. M. & G. 214; *Ainsworth v. Walmaley*, L. R. 1 Eq. 518, 524; *Maxwell v. Hogg*, L. R. 2 Ch. App. 307, 814; *Hirst v. Denham*, L. R. 14 Eq. 542, 549; Kerr, Inj. 475.

Until the thing is actually on the market, marked by the person intending to acquire title, no property in the mark arises.

Lawson v. Bank of London, 18 C. B. 84; *Maxwell v. Hogg*, L. R. 2 Ch. App. 307, 316.

The jurisdiction of courts of chancery in the protection of trade-marks rests upon property,

NOTE.—See *notes* to *Bumford Chemical Works v. Muth (Md.)* 1 L. R. A. 44; *Cigar Makers Prot. Union No. 98 v. Consham (Minn.)* 3 L. R. A. 125; *Laughman v. Piper (Pa.)* 5 L. R. A. 599; *Gato v. El Modelo Cigar* 13 L. R. A.

Mfg. Co. (Fla.) 6 L. R. A. 823; *Weener v. Brayton (Mass.)* 8 L. R. A. 640; *Alff v. Radam (Tex.)* 9 L. R. A. 145; *New York & R. Cement Co. v. Coplay Cement Co. (Pa.)* 10 L. R. A. 833.

and fraud in the defendant is not necessary for the exercise of that jurisdiction.

Hall v. Barrows, *supra*; *Biapham*, Eq. 4th ed. § 456, p. 515; *Schneider v. Williams*, 5 Cent. Rep. 255, 44 N. J. Eq. 391. See also *Allen v. McCarthy*, 37 Minn. 349; *Cigar Makers Prot. Union v. Conhaim*, 3 L. R. A. 125, 40 Minn. 243; *Weener v. Brayton*, 8 L. R. A. 640, 152 Mass. 101.

Mr. M. Brosius, for appellees:

It is not important whether this label is called a trade-mark, a trade label, a trade sign, or trade device. The purpose of it is to identify the origin and manufacture of goods that are sold in the markets of the country, and it is entitled to protection.

Browne, Trade-marks, § 521; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 53, 25 L. ed. 994; *Congress & E. Spring Co. v. High Rock C. Spring Co.* 57 Barb. 526; *Heinz v. Brueckmann*, 134 Pa. 495; *Carson v. Ury*, 39 Fed. Rep. 777; *Colton v. Thomas*, 7 Phila. 257.

Anyone who makes or manufactures goods or commodities for the market without regard to the ownership of the raw material or of the completed commodity has a right to the use of a sign, mark, or symbol to identify his manufacture—to the end that he may have the benefit of any superiority he may have given it, derived either from superior skill or the place or conditions of the manufacture.

Re Sykes, 43 L. T. N. S. 626.

The trade-mark or sign may be used to indicate, not the owner, but some other person who has expended labor on the article.

Sebastian, Trade-marks, 3d ed. p. 4. See *Diron Crucible Co. v. Guggenheim*, 7 Phila. 408; *Brace v. Evans*, 5 C. C. R. 163.

Plaintiffs and the other members of this association on behalf of whom these plaintiffs sue have a property right in this label or trade-mark, and are entitled to apply to the court to interfere by injunction.

Todd v. Brenner, 16 Cigar Makers Off. Jour. 10; *Maher v. Iowa Fruit & P. Co.* Id. 10; *Kammerer v. Stapleton*, Trade-mark Laws and Decisions issued by C. M. I. Union of America, p. 34; *Strasser v. Moonelis*, 11 Cent. Rep. 461, 108 N. Y. 611; *Bloete v. Simon*, 19 Abb. N. C. 88; *People v. Fisher*, 50 Hun, 552; *Meyer v. Hoak*, Trade-mark Laws and Decisions, issued by C. M. I. Union of America, p. 26; *Cigar Makers Union v. Bamberger*, Id. 13; *Cigar Makers Union v. Kuttbauer*, Id. 11; *Cigar Makers Union v. Bernard Link*, Id. 9.

Including the above rulings the label of the Cigar Makers' International Union of America has been protected by injunctions and criminal convictions by the lower courts in the following States, some of the decisions being by lower courts and not reported: Ohio (*Cigar Makers Union v. Miller Bros.*; *State v. Lawler*, *Cigar Makers Union v. Bamberger*, *supra*); Maryland (*Cigar Makers Union v. Bernard Link*, *supra*); New York (*Cigar Makers Union v. Simon*; *Cigar Makers Union v. Moonelis*; *People v. Fisher*, 14 Wend. 9); Illinois (*Cigar Makers Union v. Berriman*); Missouri (*Cigar Makers Union v. Ury*; *Cigar Makers Union v. Schenbeck*); Nebraska (*Cigar Makers Union v. Wilson*; *Cigar Makers Union v. Gloas*); Rhode Island (*Cigar Makers Union v. Wolchouse*); Michigan (*Cigar Makers Union v. Kuttbauer*, 13 L. R. A.

supra; *Cigar Makers Union v. Reinhardt*); Minnesota (*Cigar Makers Union v. McCarthy*); Wisconsin (*Cigar Makers Union v. Stapleton*); Connecticut (*Cigar Makers Union v. Weil*); Iowa (*Cigar Makers Union v. Haak*; *Cigar Makers Union v. Iowa Fruit Co.*); Massachusetts (*Cigar Makers Union v. Atlantic Cigar Co.*); California (*Cigar Makers Union v. Poska*; *Cigar Makers Union v. Curtis*, *Diron & Co.*; *Cigar Makers Union v. Ryan*); Oregon (*Cigar Makers Union v. Gunst*); Pennsylvania (*Cigar Makers Union v. Brendle*); Texas (*Cigar Makers Union v. Phillipson*); Canada (*Cigar Makers Union v. Brenner*).

Williams, J., delivered the opinion of the court:

The question presented by this appeal is a new one; at least it is new in this State. It involves important consequences to employers and employes, and it touches the rights and obligations of workmen in their relation to each other. The facts upon which the question is presented as found by the learned master are as follows. The Cigar Makers International Union of America is a voluntary, unincorporated association of workmen organized, as its constitution affirms, "for promoting the mental, moral, and physical welfare of its members." It has devised and registered the label which is the subject of this controversy, and claims an exclusive right to control its use. The office of the label is to advise the public that the cigars in the box which bears it were made by members of the union. Every member of the union in the United States and Canada is entitled to have this label upon the cigars made by him. The plaintiffs represent neither the Cigar Makers' International Union, the alleged owner of the label, nor Strasse, the officer whose name appears upon it, but a subordinate local organization known as No. 126, located at Ephrata, Lancaster County, Pa. No. 126 did not devise or register the label and does not claim to own it, but asserts the ownership of the international organization to which it is a tributary and whose jurisdiction it acknowledges. The defendant is a manufacturer whose shop is, as the learned master finds, "a strict union shop" belonging to Union No. 126. His workmen, ten or twelve in number, are members of the union. He as the owner of a union shop, and his men, by virtue of their membership, are entitled to the use of the label on the cigars made by them. He procured a quantity of imitation or counterfeit labels, because, as he alleges, he was refused the genuine when he applied for them, and avowed his purpose to use them. The plaintiffs then filed a bill and asked the court to enjoin the defendant against the use of the imitation labels for any purpose whatever. Upon these facts the master recommended and the court made the decree asked for. The grounds upon which an injunction will issue to restrain the infringement or appropriation of a trade-mark are well settled. They are, first, the protection of property in a trade-mark; and second, the prevention of fraud by an imitator. In either case it issues at the suit and for the protection of the owner of the device or trade-mark infringed. The plaintiffs represent Union No. 126, which has no other

ownership in, or control over, the International Union's label than any others of the hundreds or thousands of subordinate unions scattered over the United States and the Canadas. If it can maintain this bill, then each and every subordinate union can do the same thing, although no one of these devised, registered, or claims to own the trade-mark, and may prevent its use by workmen and in shops which, under the general rules of the international body are entitled to use it. But we are not disposed to impale this case upon what may be thought to be a technical point. On the other hand we will consider whether the International Cigar Makers' Union is a trader, whether the label in question is a trade-mark, and whether upon any ground of equitable relief the plaintiffs are entitled to consideration in a court of equity. The first question is disposed of by the learned master upon the pleadings. The organization that devised, registered, and owns the label is neither a manufacturer nor dealer, and has no trade in which a trade-mark can be used. The second question would seem to go with the first. Trade-marks are provided for by the Act of Congress of July 8, 1870. Registration is made under it by furnishing a statement to be recorded in the patent office, showing "the names of the parties applying for the registration, with their residences and places of business; the class of merchandise, and a description of the goods composing the class, by which the trade-mark has been or is intended to be appropriated, together with a description of the trade-mark and facsimiles of it." This provision of the Act clearly contemplates an actual business conducted by the person or persons named, the adoption of a trade-mark in that business and its appropriation to a particular "class of merchandise" produced or sold by the parties making the registration. Any device, figure, or inscription which seems to indicate the personal origin of the goods may be adopted as a trade-mark. *Laughman's App.* 128 Pa. 19, 5 L. R. A. 599. Such trade-mark will be protected against fraudulent imitation, whether registered or not. *Hoyt v. Hoyt*, ante, 348, decided at the present term.

Registration affords evidence of ownership. Its object is to secure to the maker or dealer the fruits of his skill, industry, and reputation by a positive legislative provision. *Pratt's Appeal*, 117 Pa. 411, 10 Cent. Rep. 596. But the Act of Congress referred to makes it clear that it is a maker or a dealer only who is entitled to protection, for it declares that the commissioner of patents "shall not receive and record any proposed trade-mark which is not and cannot become a lawful trade-mark." Now if the Cigar Makers' International Union was a business organization engaged in making cigars for sale, it could adopt and use a trade-mark in its business and acquire property in it; but it is not a business organization. It neither makes nor sells cigars but directs its attention to cigar makers, and seeks "to promote the mental, moral, and physical welfare of its members." These are worthy objects. They deserve and should receive the encouragement and support of all right-minded men. It is obvious, however, that they are personal and social objects, not commercial ones. They do not look toward

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the production or sale of any class or quality of cigars or tobacco, but towards the personal elevation and comfort of cigar makers. I conclude, therefore, that the Cigar Makers' International Union of America is neither a trader within the meaning of the common law, nor within the purview of the Act of Congress. Not being a trader in any sense, it can have no distinctive trade-mark. Registration under such circumstances is not authorized by the Act of Congress, and if made confers no title, and gives no standing ground in a court of law or equity. I come now to inquire whether the adoption of the label for the purposes set forth in the bill gives to the International Union any ground for equitable relief. We have seen that this label is not a trade-mark, and that the union is not in a business that enables it to adopt or acquire a trade-mark. Still it is urged that as the defendant was about to use an imitation of the label he should be enjoined whether the label is a trade-mark or not. But what is this label? And why should it be protected? It purports to be "issued by the authority of the Cigar Makers' International Union of America" to the person who uses it. The name of the workman who made the cigars does not appear upon it, nor the owner or location of the shop at which they are made. It does not point out the personal or the local origin or ownership of the goods on which it is placed. On the other hand, it issues to every one of the many thousands of workmen who make up the membership of the union, and it certifies, in the name of the union, that the cigars in the box on which it is placed were made "by a first-class workman, a member of the Cigar Makers' International Union." Who this first-class workman was, where he lived, for whom he worked, the label does not tell. He is indorsed as a "first-class workman" because he is "a member" of the union. As to all who are not members, the label proceeds to define the position of the organization that issues it by describing their work as "inferior, rat shop, cooley, prison or filthy tenement-house workmanship." The label then proceeds in these words: "Therefore we recommend these cigars to all smokers throughout the world." The value of this label is in the recommendation and the reasons given for it. The label is thus seen to be something quite different from a trade-mark in its character, its purpose and the manner of its use, viz., a device to distinguish between union and non-union workmen, and to discriminate against the work of the latter. It says to the public in spirit and in effect: "Buy the cigars that bear this label because they were made by a member of this union. Do not buy those not bearing it because they were made by workmen who do not belong to us. Such cigars are the product of 'inferior, rat shop, cooley, prison, or filthy tenement-house workmanship.'" It is the request of a powerful labor organization to "all smokers throughout the world" to take sides with it in its contest with those who are outside of its membership by refusing to buy the work of such persons. It is an attempt to use the public as a means of coercion upon them, compelling them to unite with the union in order to find a market for their goods or their labor. Right here let us distinguish broadly between an ob-

ject and the means employed to reach it. Organization is the privilege, perhaps I might say the duty, of labor; and an organization seeking to promote "the mental, moral, and physical welfare of its members," by securing fair wages, steady work, and the comforts of home for them, occupies a legitimate field of usefulness and is capable of doing great good to its members and to the public. The Cigar Makers' Union is no doubt seeking to do such a work and accomplishing much in that direction. What we are now considering is one of the means it employs to increase its membership and to hurt workmen who do not belong to it. The real question now before us is whether the international organization of workmen shall have the help of a court of equity in making war upon all cigar makers who do not belong to it, and in driving their work out of the market by representing it as coming from "inferior rat shops, from coolies, prisoners, or filthy tenement houses." A "first class workman" is one who does first-class work, whether his name is on the rolls of any given society or not. Filthiness and criminality of character depend on conduct, not on membership of the union. Legitimate competition rests on superiority of workmanship, and business methods, not in the use of vulgar epithets and personal denunciation. When the Cigar Makers' International Union of America stigmatizes those who do not belong to it and seeks to induce the public to discriminate against them and their work by covering them with opprobrious epithets, it is not engaged in "promoting the mental, moral, and physical welfare of its members," but in trying to hurt and destroy those who do not choose to become members. While the courts would aid the former purpose in all ways within their power, they cannot help the latter. We cannot justify the defendant's

conduct. There is no rule of morals or of business upon which he can defend himself in the preparation and use of spurious labels. But it is not every wrong action that a chancellor will enjoin, because the purpose of an injunction is to protect the plaintiff in the exercise and enjoyment of a clear legal right, for an infringement of which the law does not afford an adequate remedy. If, therefore, the right of the plaintiff is doubtful, equity will withhold its aid. The plaintiff in this case has no trade-mark to protect and no right to a decree resting on the law relating to trade-marks. What they have is a label which recommends the purchase of cigars made by union men, and warns against the purchase of all others as inferior and unwholesome because made in "rat shops, or prisons, or by coolies, or tenants of filthy tenement houses." Their right to use such a label may well be doubted, whether the question be treated as one of morals or of law. But the plaintiffs come into a court of equity and seek to enlist the conscience of a chancellor in their behalf. They must come, with clean hands, with a conscientious regard for the rights of others, ready to do equity on their part, and seeking only equity at the hands of the court. They do come in this case with the avowed purpose to do harm to non-union men, to prevent the sale of their work, to cover them with opprobrium; and they ask a court of equity to say that they have a right to do it. We decline to say so.

The decree of the court below is reversed, the injunction dissolved and the bill dismissed.

As we cannot approve the conduct of the defendant, we shall not award him costs, but direct that each party pay the costs it has made, and that the fees of the master be paid in equal parts by the plaintiffs and the defendant.

MARYLAND COURT OF APPEALS.

Skipwith WILMER, Assignee, etc., of the
Druid Mills Manufacturing Co., *Appt.*,

v.
Douglas H. THOMAS *et al.*

(.....Md.....)

The good-will and all trade-marks, not personal in their character, of an insolvent manufacturing company, will pass to a purchaser at a sale of the plant by the

assignee for benefit of creditors, under an assignment transferring all the property of whatever kind owned by the insolvent, and an advertisement of sale describing the property as "old established and valuable cotton duck mills"

(June 17, 1891.)

A PPEAL by the assignee for benefit of creditors of the Druid Mills Manufacturing Company from an order of the Circuit Court for Baltimore City setting aside his report of

NOTE.—Good-will regarded as property.

Good-will is a firm asset. Whether it survives to a partner has not been uniformly decided. After a voluntary dissolution, each partner has a right to use the old firm name, unless otherwise agreed. It is the subject of sale, like other personality. See *Barber v. Connecticut Mut. L. Ins. Co.* 15 Fed. Rep. 312, 315-322; 14 Am. Law Reg. N. S. 1-11, 320-341, 649-650, 713-725; 18 Cent. L. J. 162-165; 19 Cent. L. J. 302-303; 19 Alb. L. J. 502-503; 3 Kent, Com. 64; 1 Pars. Cont. 153; *Musselman's App.* 62 Pa. 81; *Hammond v. Douglas*, 5 Ves. Jr. 539; *Crawshaw v. Collins*, 15 Ves. Jr. 213, 227; *Anderson, Law Dict.* title *Good-will*.

It is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of a trade. If the restric-

tion as to time is held to be illegal because extended beyond the period of the party carrying on the trade himself, the value of such good-will, considered in these various points of view, is altogether destroyed. *Hitchcock v. Coker*, 6 Ad. & El. 438, 446.

A good-will in business is recognized as property in law, and is protected as such. *Howe v. Searing*, 6 Bosw. 358, 363.

The good-will of a concern (so far as it is local, and arises from an established place of business), while it cannot well be divided, may be sold by assignees. *Allen v. Woonsocket Co.* 11 R. L. 229. See *Crutwell v. Lye*, 17 Ves. Jr. 303; *Mellern v. Keen*, 27 Beav. 230, 23 Beav. 453; *Turner v. Major*, 3 Giff. 442.

The good-will survives to the remaining partner,

sale of the cotton manufacturing plant of the insolvent. *Reversed.*

The facts are stated in the opinion.

Messrs. Randolph Barton and Ship-wilmer, in propria persona, for appellants.

*Messrs. R. D. Morrison, Howard Mun-
nikhuyser and Nicholas P. Bond*, for
appellees:

The deed conveyed "all its estate and prop-
erty of whatever kind and wherever situated."

The good-will and business, not being ex-
pressly mentioned, did not pass.

Lord Eldon, in Crutwell v. Lye, 17 Ves. Jr.
336, said the "good-will" was "nothing more
than the probability that the old customers
would resort to the old place;" but it has been
held that this is too narrow a view, and that
"it must mean every positive advantage that
has been acquired by the old firm in the
progress of its business, whether connected
with the premises in which the business was
previously carried on, or with the name of the
late firm, or with any other matter carrying
with it the benefit of the business."

Churton v. Douglas, Johns. V. C. 174, 188;
Menendez v. Holt, 128 U. S. 522, 83 L. ed. 528.

Judge Story defines it to be "the benefit or
advantage, which is acquired by an establish-
ment beyond the mere value of the capital
stock, funds or property employed therein, in
consequence of the general public patronage
and encouragement which it receives from con-
stant or habitual customers, on account of its
local position or common celebrity, or reputa-
tion for skill or affluence, or punctuality, or
from other accidental circumstances or neces-

sities, or even from ancient formalities or
prejudices."

Story, Partn. § 99. See Smith v. Gibbs, 44 N.
H. 843; *Boon v. Moss*, 70 N. Y. 478; *Morgan v.*
Perhamus, 86 Ohio St. 532; *Brill v. Kitis*, 83
Cal. 624; *Hove v. Searing*, 19 How. Pr. 26.

Included in the sale of a "good-will" is the
right to prevent the vendor from interfering
in the enjoyment of the purchase by resuming
business in the same locality (*Dwight v. Ham-
ilton*, 113 Mass. 175; *Ginesi v. Cooper*, L. R.
14 Ch. Div. 596; *Williams v. Wilson*, 4 Sandf.
Ch. 879, 7 L. ed. 1141; *Okurton v. Douglas*,
supra); and to prevent the vendor from using
personal efforts to induce the old customers to
leave the vendee. *Ibid.*

Can it be held that a firm, individual, or
corporation, which by misfortune is compelled
to make an assignment for the benefit of cred-
itors, intends to, or does, give to its assignee the
right to make a sale carrying with it these
consequences?

Alvey, Ch. J., delivered the opinion of
the court:

The only question presented on this appeal
is whether the purchasers of the Druid Mills
manufacturing property, at the sale thereof
by the trustee, under and by virtue of a deed
of assignment made by the manufacturing
company for the benefit of creditors, will
acquire, with the property purchased by
them, the right to the good-will and busi-
ness of the insolvent corporation, including
the brand or trade-mark used by the company
to mark the goods manufactured by it before
the assignment. By the deed of assignment

and a sale of it cannot be compelled by the repre-
sentatives of the deceased partner. It is not part-
nership stock of which the executor may compel a
division, but belongs of right to the survivor.
Hove v. Searing, 10 Abb. Pr. 270, 19 How. Pr. 17,
See Dougherty v. Van Nostrand, Hoffm. Ch. 68, 6 L.
ed. 1008.

The good-will of a business may be sold the same
as any other personal property. *See Musselman's*
App. 62 Pa. 51; *Hove v. Searing*, 19 How. Pr. 14;
Dougherty v. Van Nostrand, Hoffm. Ch. 68, 6 L. ed.
1008; *Partridge v. Menck*, 3 Barb. Ch. 101, 5 L. ed.
52; *Parson v. Pearson*, L. R. 27 Ch. Div. 145.

Or it may be the subject of a contract of sale.
See Croes v. Fessler, 39 Cal. 386; *Holmes v. Holmes*,
3 Conn. 278; *McFarland v. Stewart*, 2 Watts, 111;
Palmer v. Graham, 1 Para. Eq. 473.

Where a partner sells out all his share in the
business, the presumption is that he meant to
include the good-will. *See Churton v. Douglas*,
Johns. V. C. 174.

Where a trader sells for value his business and
good-will to another, he may be restrained from
soliciting his old customers to deal with him, as if
no sale had been made. *See Hall's App.* 60 Pa. 453;
McCard v. Williams, 96 Pa. 78; *Ginesi v. Cooper*, L.
R. 14 Ch. Div. 608. Disapproved, however, on the
point that he might be restrained from dealing
with his old customers, in *Leggott v. Barrett*, L. R.
15 Ch. Div. 303.

Must pertain to an established business.

While the good-will of a business is property that
may be sold or mortgaged, yet it is property of a
very peculiar and exceptional character. It is
intangible property which, in the nature of things,
can have no existence apart from a business of
some sort that has been established and carried on
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at a particular place; and it cannot be sold by
judicial decree, or otherwise, unless it be in con-
nection with a sale of the business on which it
depends. *Story, Partn. § 99; Robertson v. Quid-
dington*, 28 Beav. 529; 3 Pom. Eq. Jur. § 1255, and
notes; Smith, Merc. Law, 188.

Is a fit subject of transfer.

While it has been held that good-will is not a
transferable or partnership asset (*Hove v. Searing*,
19 How. Pr. 14, decided in 1880), the great weight of
modern authority is in favor of the contrary rule,
Williams v. Wilson, 4 Sandf. Ch. 879, 7 L. ed. 1141;
Marten v. Van Schalk, 4 Paige, 479, 3 L. ed. 523;
Case v. Abeel, 1 Paige, 401, 3 L. ed. 636; *Lewis v.*
Langdon, 7 Sm. 421; *Banks v. Gibson*, 11 Jur. N. S.
693; *Johnson v. Halleley*, 24 Beav. 63; *Macdonald v.*
Richardson, 1 Giff. 81; *Dougherty v. Van Noe-*
strand, 1 Hoffm. Ch. 68, 6 L. ed. 1008; *Musselman's*
App. 62 Pa. 51; *McFarland v. Stewart*, 2 Watts, 111;
Holden v. McMakin, 1 Para. Eq. 270; *Willet v.*
Blanford, 1 Hare, 271; *Wedderburn v. Wedderburn*,
22 Beav. 84; *Sheppard v. Boggs*, 9 Neb. 258; *Bin-*
inger v. Clark, 10 Abb. Pr. N. S. 264; *Mellersh v.*
Keen, 28 Beav. 458; *Bradbury v. Dickens*, 27 Beav.
63; *Austen v. Boys*, 2 DeG. & J. 623; *Turner v.*
Major, 3 Giff. 442.

But a mortgage of the "machinery, type, presses,
cases, furniture, paper, forms and tools" of a news-
paper company, together with the "good-will" of
its business, cannot be foreclosed as to the good-
will after all the tangible property covered by the
mortgage has been alienated, worn out or de-
stroyed, and the corporation has become consoli-
dated with another newspaper corporation. *Met-*
ropolitan Nat. Bank v. St. Louis Disp. Co. 26 Fed.
Rep. 722.

dated the 12th of December, 1890, the Druid Mills Manufacturing Company, an insolvent corporation, assigned and conveyed to the appellant, as trustee, "all its estate and property, of whatever kind and wherever situated," in trust for the benefit of creditors, with power to the trustee to sell either at public or private sale, and on such terms as might seem best for the interest of the creditors. The trustee advertised the property for sale at public auction, and in the advertisement he described the property as the old-established and valuable cotton-duck mills, at Woodberry, well known as "Druid Mills," containing about 12,000 spindles and 200 looms, in full operation, and adding, after full description of the particulars of the plant, "that the machinery is of the most modern, and is constructed for the manufacture of all numbers, widths, and weights of cotton duck, awnings, stripes, yarns, twines, etc.,—all the well-known 'Druid Mills' brand." The trustee sold the property to the appellees under this advertisement, and according to the foregoing description; and in his amended report of the sale he states that he "offered at public sale the well-known Druid Mills, as then in full operation and a going concern, with all the real and leasehold property, machinery, and plant, together with the good-will and business of the said Druid Mills Manufacturing Company of Baltimore County, subject to the operation and effect of a certain mortgage described in the advertisement of sale; and that he then and there sold the same to Douglas H. Thomas, Christian Devries, and Charles C. Homer, as a committee, representing the creditors of the said company, at and for the sum of \$120,000, that being the highest bid." These purchasers, upon the report being made, came into court, and, while admitting the facts stated in the trustee's amended report, objected to the ratification of the sale upon two grounds: (1) that the deed of trust or assignment did not assign or transfer to the trustee the right to sell and convey to the purchasers of the Druid Mills property the exclusive right to continue the business, and to the brand or trade-mark of the company; and (2) that the advertisement of sale did not distinctly state that the brand and trade-mark of the company would be offered for sale. Upon these exceptions, an order *pro forma* was passed setting aside the sale as reported, and the trustee has appealed. That the good-will of an established business, as also the brands or the trade-marks used to distinguish and specially denote the product or manufacture of the establishment, are property, and form the subjects of contract and sale, is a principle too well settled to need the citation of authorities for its support. Indeed, it is often the case that a large portion of the intrinsic marketable or assessable value of a manufacturing establishment consists in the good will maintained by it, and in the brands or trade-marks to which it has acquired an exclusive use, by which to denote the origin and make of its goods when placed upon the market. And so important a contribution to the value of the establish-

ment are these elements or accessories of the business that in the sale or assignment of such manufactory or business establishment, to be continued as formerly, the sale or transfer of such an establishment ordinarily carries with it, by reasonable intendment or implication, the right to such good-will and trade-marks, as incidents to or accessories of the business carried on by the establishment. This would now seem to be settled by a great preponderance of authority, though after a considerable conflict of judicial opinion.

This court, in the case of *Witthans v. Matfieldt*, 44 Md. 805, has said that, where a trade-mark is used to designate the place and the person by whom the goods are made, the right to such trade-mark passes to the purchaser upon the sale and transfer of the business and manufactory at which the goods are made. And the Supreme Court of the United States, in *Kidd v. Johnson*, 100 U. S. 617, 620, 25 L. ed. 769, 770, in speaking of the right to dispose of a trade-mark, in connection with a business establishment, said: "As to the right of Pike to dispose of his trade-mark in connection with the establishment where the liquor was manufactured, we do not think there can be any reasonable doubt. It is true, the primary object of a trade-mark is to indicate by its meaning or association the origin of the article to which it is affixed. As distinct property, separate from the article created by the original producer or manufacturer, it may not be the subject of sale. But when the trade-mark is affixed to articles manufactured at a particular establishment, and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred either by contract or operation of law to others, the right to the use of the trade-mark may be lawfully transferred with it. Its subsequent use by the person to whom the establishment is transferred is considered as only indicating that the goods to which it is affixed are manufactured at the same place, and are of the same character, as those to which the mark was attached by its original designer. Such is the purport of the language of *Lord Cranworth* in the case of *Leather Cloth Co. v. American Leather Cloth Co.* 11 H. L. Cas. 523. See also *Ainsworth v. Wainmesley*, 85 L. J. Ch. 855, and *Hall v. Barrows*, 10 Jur. N. S. 55." And, in addition to the cases thus referred to, see the recent cases of *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 138 U. S. 537, 34 L. ed. 997, and *Symonds v. Jones*, 82 Me. 302, 8 L. R. A. 570.

The trade-mark or brand used by the Druid Mills Manufacturing Company was simply "Druid Mills" imprinted upon their goods, and, while there is no question made as to whether or not such mark or imprint constitutes a legal brand or trade-mark such as will be protected, the questions made by the exceptions are whether that or any other valid brand or trade-mark used by the company to designate and identify its manufacture passed to the trustee by the deed of assignment; and, if it did pass, then, whether, by the terms of the advertisement of sale, the right

to such brand or trade-mark passed to the purchasers of the manufacturing establishment as sold by the trustee.

The deed of assignment transferred to the trustee all the property of the assignor of whatever kind owned by it. This was certainly broad enough to include the property in the good-will of the business, and in the brand or trade-mark of the company. All the property in the business and the plant were assigned, and we can have no doubt but that it was intended that the important accessories of good-will and the brand should pass. It can hardly be supposed that it was intended that the manufacturing establishment should be sold by the trustee without them, as such sale could not be otherwise than greatly to the loss and prejudice of the creditors of the company. It was manifestly the intention and desire of the assigning company that the manufacturing establishment should be sold by the trustee to the best advantage, and to be operated by the purchasers; and the fact that the good-will and trade-mark or brand were not mentioned *eo nomine* in the deed of assignment in no manner excludes the construction that they did pass to the trustee; for, as laid down by Upton in his work on the Law of Trade-marks, p. 58, "there can be no doubt that a contract, by which a manufacturer disposes absolutely of his business, and vests in another the right to manufacture the goods which he has before produced, and which have become known in the market by a distinguishing trade-mark, though it were silent upon the subject of such trade-mark, by necessary implication vests in the purchaser the exclusive right to its use as it was before used." The terms of transfer employed in the assignment before us are not less comprehensive than those employed in Bankrupt or Insolvent Laws, which declare what property of the bankrupt or insolvent shall pass to the assignee; and yet, in cases occurring under those laws, it has been repeatedly held that the right to a trade-mark, not personal in its character, but which denotes simply the place or establishment at which the goods are manufactured, passes to the assignee. As an instance of this, we may refer to the case of *Warren v. Warren Thread Co.*, 134 Mass. 247. The Insolvent Law of Massachusetts provided

that "the assignment shall vest in the assignee all the property of the debtor, real and personal, which he could have lawfully sold, assigned, or conveyed." Upon this provision of the Insolvent Law the supreme court of that State held that, as the trade-marks there involved were designs or symbols designating the place or the establishment at which the thread was manufactured, and not implying any peculiar personal skill in the manufacturer designing them, they passed to the assignee of the insolvent. In that case the court said: "Under this Statute, all the plaintiff's property which he could assign passed to his assignee. It includes, *ex termini*, his manufacturing establishment, machinery, tools, and fixtures, manufactured goods, and the right to use the trade-mark in connection with the establishment and goods." And, if a trade-mark will pass in such case, there can be no reason why it should not pass in a case such as the present, where the object of the assignment is virtually the same as that provided for by the Insolvent Law, and where the terms of the assignment are equally comprehensive as those declaring the effect of the assignment under that law. There are many cases to the same effect as that just referred to, but to which we need only refer by name. *Hudson v. Osborne*, 39 L. J. Ch. 79; *Pepper v. Labrot*, 8 Fed. Rep. 29; *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217. And having determined that the deed of assignment, by legal operation, passed the good-will of the business, with the brand or trade-mark thereof, with the right and power in the trustee to sell the same with the manufacturing establishment, we can perceive no difficulty in holding that, under the advertisement of sale, the trustee sold the good-will and trade-mark of the business to the same full extent as they came to him under the assignment. They formed part, though but incidents, of the property assigned to him; and the purchasers, upon the ratification of the sale, will acquire the exclusive right to such good-will and trade-mark of the business as fully and in like manner as the same were used and enjoyed by the manufacturing company for the assignment. It follows that the *pro forma* order appealed from must be reversed. *Order reversed, and cause remanded.*

TEXAS SUPREME COURT.

George C. ALTGELT, *Appt.*,
v.
CITY OF SAN ANTONIO *et al.*
(.....Tex.....)

1. A city with power to provide for itself a water supply cannot contract to give a water company the exclusive right to furnish such supply for a term of years.

2. A taxpayer cannot maintain a suit to set aside a city's water supply contract although it is void for granting a monopoly, unless he shows injury to himself as a taxpayer,—as, that he is thereby compelled to get water from the grantee or is prevented from getting it on better terms.

3. A city cannot exempt a water-works company from taxation in consideration

NOTE.—Municipality cannot create a monopoly. It is abundantly settled that a municipality, acting under charter rights granted by legislative enactment, cannot create a monopoly, unless the 13 L. R. A.

power so to do is clearly indicated by the recitals of said charter. *New Orleans C. R. Co. v. Crescent City R. Co.* 12 Fed. Rep. 308, 5 Fed. Rep. 160; *Meadville Fuel Gas Co. v. Meadville Nat. Gas Co.* (Pa.) 3

of the furnishing by it to the city of water at a reduced rate.

4. To restrain the collection of taxes made excessive by an illegal exemption, the tax-payer must show the amount of the excess, or facts from which such amount may be computed.

(June 24, 1890.)

APPEAL by complainants from a judgment of the District Court for Bexar County in favor of defendants in a suit brought to procure the cancellation of a certain contract and to enjoin the collection of an alleged illegal tax assessment. *Affirmed.*

The facts sufficiently appear in the commissioner's opinion.

Mr. George C. Altgelt, appellant, in propria persona.

The contract granting the exclusive right for twenty-five years to supply said City with water, and the supplemental contract by which the property of the corporation is released from city taxation, are unauthorized by law, and are void as against public policy. Equity will interfere to restrain the performance of such contracts at the suit of one or more taxpayers of the City.

Upon the want of power to establish a monopoly and to barter away administrative powers, see—

City Charter, § 46, p. 250; *Laws 1870*; Const. art. 1, §§ 17, 26, art. 12; *Brenham v. Brenham Water Co.* 67 Tex. 542; *Waterbury v. Laredo*, 68 Tex. 565; *Wright v. Nagle*, 101 U. S. 796, 25 L. ed. 923; *Minturn v. Larus*, 64 U. S. 23 How. 485, 16 L. ed. 574; *Dillon, Mun. Corp.* §§ 97, 114, 362; *Cooley, Const. Lim.* p. 249; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Saginaw Gas-Light Co. v. Saginaw*, 28 Fed. Rep. 529; *Jackson County H. R. Co. v. Interstate R. T. Co.* 24 Fed. Rep. 306; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80; *Logan v. Pyne*, 43 Iowa, 524, 22 Am. Rep. 261.

Upon the invalidity of the exemption from taxation, see—

Tex. Const. art. 8, § 2; *Austin v. Austin Gas-Light & Coal Co.* 69 Tex. 180; *Norris v. Waco*, 57 Tex. 641; *Citizens Sav. & Loan Assn. v. Topeka*, 87 U. S. 20 Wall. 685, 22 L. ed. 461; *Burroughs, Taxn.* § 53; *Cooley, Taxn.* pp. 152-154; *State v. Indianapolis*, 69 Ind. 375; *Weeks v. Milwaukee*, 10 Wis. 242; *People v. Eddy*, 43 Cal. 381, 18 Am. Rep. 143; *Brewer Brick Co. v. Brewer*, 62 Me. 62, 16 Am. Rep. 395; *Lancaster v. Clayton*, 86 Ky. 873; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39.

Upon the plaintiff's right to maintain the suit, see—

Caruthers v. Harnett, 67 Tex. 131; *Sansom v. Mercer*, 63 Tex. 498; *Williams v. Davidson*, 43 Tex. 1; *Crampton v. Zabrickie*, 101 U. S.

Cent. Rep. 321; *Jackson County H. R. Co. v. Interstate R. T. R. Co.* 24 Fed. Rep. 306; *Saginaw Gas Light Co. v. Saginaw*, 28 Fed. Rep. 529.

It is now universally conceded that "powers are conferred on municipal corporations for public purposes; and, as their powers cannot be delegated, so they cannot be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party, to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties." *Dillon, Mun. Corp.* 97.

An Act authorizing a board of town auditors to cause the streets of the town to be lighted with gas and to enter into a contract for that purpose, does not confer a power to make an absolute binding contract for a term of years, but only subject to a termination thereof by a modification or repeal by subsequent legislation of the provision giving the power. *Richmond County Gas-Light Co. v. Middletown*, 59 N. Y. 228.

A taxpayer of a municipal corporation may maintain a suit to enjoin the corporate authorities from entering into an unauthorized contract. *Sackett v. New Albany*, 88 Ind. 473, 2 Am. & Eng. Corp. Cas. 85; *Madison v. Smith*, 83 Ind. 502; *Noble v. Vincennes*, 42 Ind. 125; 2 *Dillon, Mun. Corp.* 3d ed. § 922.

While a city has authority to make contracts for a supply of water for the public use, *Vincennes v. Callender*, 86 Ind. 484.

The authority is, in a general sense, a discretionary one, and is by no means without limitation. The authority is so far of a discretionary character as to authorize the corporate officers to determine when the wants of the city demand a supply of water, and with this decision courts cannot interfere. But the power cannot be so exercised as to create a corporate debt beyond that limited by law, nor can it be so exercised as to surrender or suspend legislative power. *Valparaiso v. Gardner*, 97 Ind. 1, 7 Am. & Eng. Corp. Cas. 637.

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Though the use of a street for water mains may not be of common right, yet when the use would assist in the maintenance of a claim of exclusive right to sell water, the courts, in view of the constitutional declaration that monopolies "shall never be allowed," will give no sanction to a contract entered into by the city resulting in a monopoly. The exercise of such a franchise, involving, as it does, a use of the public streets, is subject to control. *Brenham v. Brenham Water Co.* 67 Tex. 542. Compare *Norwich Gas Light Co. v. Norwich City Gas Co.* 25 Conn. 19; *State v. Cincinnati Gas Light & C. Co.* 18 Ohio St. 232; *Memphis v. Memphis Water Co.* 5 Heisk. 495; *Crescent City Gas Light Co. v. New Orleans Gas Light Co.* 27 La. Ann. 128; *Anderson, Law Dict.* title, *Monopoly*.

This question was argued with great skill and thoroughness in *State v. Cincinnati Gas-Light & C. Co.* 18 Ohio St. 232. Where the charter conferred on the gas company power "to manufacture and sell gas, to lay pipes," etc., provided the consent of the city council be obtained for that purpose. Under a power given to the city council "to cause said city, or any part thereof, to be lighted with oil or gas," and to levy a tax for that purpose, it contracted to invest the defendant with the full and exclusive privilege of lighting the city for the term of twenty-five years. It was held that, while there was no doubt that the city might by contract provide for lighting by gas, there was no necessity for making such right exclusive, and that the city had no authority to make the grant.

Judge Brewer holds that, in the absence of express authority in its charter, the City of Kansas had no power to grant to a street railway company the sole right, for the space of twenty-one years, to construct, maintain, and operate its railway over and along the streets of the said city. *Jackson County H. R. Co. v. Interstate R. T. R. Co.* 24 Fed. Rep. 306. See notes to *Lealie v. Lorillard* (N. Y.) 1 L. R. A. 436; *Adams County v. Hunter* (Iowa) 6 L. R. A. 615; *People v. Chicago Gas Trust Co.* (Ill.) 6 L. R. A. 497.

601, 25 L. ed. 1070; *Smith v. Suormstedt*, 57 U. S. 16 How. 802, 14 L. ed. 948; *Davenport v. Kleinschmidt*, 6 Mont. 508; 2 Dillon, Mun. Corp. §§ 914-919, notes; Green's Brice, Ultra Vires, p. 597, note; Story, Eq. Pl. §§ 94-96; High, Inj. § 1553; Cooley, Taxn. p. 548; *Austria v. Goggeshall*, 12 R. I. 829, 34 Am. Rep. 648; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *The Liberty Bell*, 23 Fed. Rep. 843; *Newmeyer v. Missouri & M. R. Co.* 52 Mo. 81, 14 Am. Rep. 394; *Willard v. Comstock*, 58 Wis. 565, 46 Am. Rep. 657; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 40; *Cummings v. St. Louis*, 7 West. Rep. 274, 90 Mo. 259.

Messrs. Denman & Franklin, for appellee:

The City of San Antonio has authority under its charter to enter into a contract with a corporation or an individual to supply it with water for fire protection and other public purposes.

Brenham v. Brenham Water Co. 67 Tex. 542.

The contract complained of by appellant in his petition does not create a monopoly and is not void.

7 Bacon, Abr. p. 22; 2 Bl. Com. bk. 4, p. 159; Austin, Jur. p. 586; *Charles River Bridge v. Warren Bridge*, 36 U. S. 11 Pet. 567, 9 L. ed. 831; *New Orleans v. Clark*, 95 U. S. 652, 24 L. ed. 521; Dillon, Mun. Corp. 8d ed. § 991; *State v. Cincinnati Gas-Light & C. Co.* 18 Ohio St. 262; *Boston v. Richardson*, 18 Allen, 146; *New Orleans Gas-Light Co. v. Louisiana Light & H. P. & M. Co.* 115 U. S. 650, 29 L. ed. 516; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 315; *State v. Columbus Gas-Light & C. Co.* 34 Ohio St. 573, 32 Am. Rep. 335; *Slaughter-House Cases*, 88 U. S. 16 Wall. 35, 21 L. ed. 394; *Memphis v. Memphis Water Co.* 5 Heisk. 495.

In making such contract the city exercises its business and not its legislative powers. An individual may sell his services for a term of years, or may agree to receive a certain commodity exclusively from one person for a term of years, and neither contract will create a monopoly. If this be true, a municipality, whenever it is authorized to act as an individual, has the same power to make such a contract.

See *Greenhood*, Pub. Pol. 676, 677; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 84; *Valparaiso v. Gardner*, 97 Ind. 1; *Indianapolis v. Indianapolis Gas Light & C. Co.* 66 Ind. 396; Dillon, Mun. Corp. 8d ed. §§ 478, 474, note.

The power to contract being in the City, it must be held to have discretion as to the character of contract to be made under the power. In the exercise of that power it could bind itself for twenty-five years, and its action in so doing would not be void.

Memphis v. Dean, 75 U. S. 8 Wall. 64, 19 L. ed. 526; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 419; *Palestine v. Barnes*, 50 Tex. 551; *East St. Louis v. East St. Louis Gas-Light & C. Co.* 96 Ill. 415, 38 Am. Rep. 97.

If the City has exceeded its authority in making a contract running for twenty-five years, that does not vitiate the whole contract, although the courts may refuse to enforce it for the full term. The difference between acts done *ultra vires* that are void, and those that are simply voidable, must be kept in mind.

See *Miners Ditch Co. v. Zellerbach*, 87 Cal. 13 L. R. A.

548, 99 Am. Dec. 379; *McPherson v. Foster*, 43 Iowa, 48, 22 Am. Rep. 215; *East St. Louis v. East St. Louis Gas-Light & C. Co.* 93 Ill. 415, 38 Am. Rep. 97; *State Board of Agriculture v. Citizens Street R. Co.* 47 Ind. 407, 17 Am. Rep. 702; *Whitney Arms Co. v. Barlow*, 68 N. Y. 62, 20 Am. Rep. 506; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693.

The term complained of in the contract does not "exempt" the property of defendant from taxation in the sense in which the word "exempt" is used in the State Constitution. The effect of the contract is that the water-works company is permitted to pay in water what it might otherwise be required to pay in money. The exemption is not a gift, but full consideration is paid therefor. It is not an exemption, it is a trade.

Home of the Friendless v. Rouse, 75 U. S. 8 Wall. 430, 19 L. ed. 495, citing *New Jersey v. Wilson*, 11 U. S. 7 Cranch, 164, 3 L. ed. 808; *Gordon v. Appeal Tax Ct.* 44 U. S. 3 How. 133, 11 L. ed. 529; *Piqua Branch of State Bank v. Knoop*, 57 U. S. 16 How. 369, 14 L. ed. 977; *Ohio L. Ins. & T. Co. v. Debolt*, 57 U. S. 16 How. 416, 14 L. ed. 997; *Dodge v. Woolsey*, 59 U. S. 18 How. 331, 15 L. ed. 401; *Mechanics & T. Bank v. Thomas*, 59 U. S. 18 How. 384, 15 L. ed. 460; *Mechanics & T. Bank v. Debolt*, 59 U. S. 18 How. 380, 15 L. ed. 458; *McGhee v. Mathis*, 71 U. S. 4 Wall. 143, 18 L. ed. 314; *North Missouri R. Co. v. Macguire*, 49 Mo. 490, 8 Am. Rep. 145; *Tucker v. Ferguson*, 89 U. S. 22 Wall. 527, 22 L. ed. 805; *West Wisconsin R. Co. v. Trempealeau County Suprs.* 93 U. S. 596, 23 L. ed. 814.

Appellant is not entitled, as a municipal taxpayer, to the relief asked by him.

San Antonio v. Stumberg (Tex.) present term; 2 High, Inj. p. 818; Cooley, Taxn. pp. 536; 587, and note.

If the exemption from taxation complained of is illegal, the whole tax levy would not be void.

McPherson v. Foster, 43 Iowa, 48, 22 Am. Rep. 235; Cooley, Taxn. 537, and note 3.

If the contract complained of is not void but only voidable, appellant cannot ask this court to direct the municipal authorities to avoid it. It is within the discretion of those authorities to either adopt or reject a voidable act of their predecessors, and this discretion is not subject to control by the courts.

2 High, Inj. p. 818; *Waterbury v. Laredo*, 60 Tex. 538.

Hobby, J., filed the following opinion:

The appellant brought this suit in the District Court of Bexar County to vacate a contract set forth at length in his petition, and entered into by the City of San Antonio with the San Antonio Water-Works Company, incorporated under the general laws of this State. The appellant also sought to restrain said City from paying to said Company any of the municipal funds by virtue of said contract, which was alleged to be illegal and unauthorized, and from making any appropriation of public money to satisfy said contract. The defendant's exceptions to the petition were sustained, and, the plaintiff declining to amend, the cause was dismissed, and this appeal is the result. It

will be unnecessary to state all of the grounds upon which the exceptions were predicated, or to set forth the entire petition. So much of the pleadings will be referred to as is thought to be essential to a proper understanding of the question arising out of them.

It appears from the petition that on or about the 3d of October, 1877, the City of San Antonio entered into a contract in writing with what is now known as the "San Antonio Water-Works Company" for the purpose, as stated in the preamble of the contract, "of supplying said City with water for fire protection, sanitary, public, and domestic purposes, said company using the head of the San Antonio River as a source of supply." By the first section of the contract it was provided, in substance, that the company would erect the necessary buildings and machinery, etc., upon land to be set aside by the City for that purpose, to accomplish the object in view. The second section provided for a system of pipe, etc., to be laid from the source of the supply of water, and for the distribution of the water throughout the City, and the location of fire hydrants at such points as the city council might decide to be proper. The third made provisions also for laying pipes, main conductors, aqueducts, etc., to conduct water throughout the City, and for the necessary buildings and machinery. The fourth section stipulated that such additional hydrants should be erected as were required by the city council. The fifth section provided for flushing the gutters on streets, and sprinkling said streets, and for supplying water for the fire department, etc. The sixth section guaranteed that the works should be of the most durable material, etc., and capable of affording a supply to the citizens of the City of a specified number of gallons, etc. The seventh prescribes the time within which the work shall be completed, and provides for the erection of a reservoir. The eighth section regulates the rate at which water will be supplied to private consumers. Such is a synopsis of the obligations entered into by the water-works company. The first section of that part of the contract containing the grants, etc., made by the City, provided for a lease of six acres of land to the company for a reservoir. The second conceded to the company full power to enter upon the streets, squares, alleys, etc., and to take up pavements, etc., to lay pipes and construct culverts, to conduct and distribute the water, etc., giving the company the right of way, free of cost, over all public grounds controlled by the City. The third was as follows: "The said City further obligated itself not to grant to any other body of man or persons, during the continuance of said contract, the right to furnish water for fire hydrants or other public purposes." The sixth section provided, among other things, "that said contract should subsist for a period of twenty-five years from the completion of said works, at the end of which time said City should have the right to buy the works at an appraised value; but, if said City did not buy at the end of twenty-five years, said contract should run until the works are finally

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purchased, and the right to purchase the same should inure to the City every five years thereafter, after giving twelve months' notice."

The water-works, except the reservoir, were to be completed not later than July, 1878. A supplemental contract was entered into between the City and the company in January, 1881, by the terms of which it was stipulated that, for the use of the 100 fire hydrants then established in accordance with the first contract, the City should pay an annual rent of \$50 each, instead of \$100, as originally required. "And, in consideration of said reduction of the rent of said 100 fire hydrants, the said City further remitted and relinquished to the water-works company all city taxes whatever, which might otherwise be assessed and levied upon any of the property of said water-works company, and owned or held by said company for the purpose of operating their works, such property, however, not to exceed in value the sum of \$250,000; so that said water-works company should be discharged from the payment of all city taxes during the continuance of the original contract aforesaid, by the terms thereof." The petitioner further alleged that these contracts were illegal, and against public policy, because they attempted to create a monopoly on the part of said water-works company to supply water to said city, and because they attempted to exempt from taxation by said City the property of said defendant (the water-works company), which otherwise would be liable to taxation as other property within said municipal corporation. He further alleges that, "by exempting the property of said San Antonio Water-Works Company from taxation, the rate of taxation upon property within said City is increased, and continues to be increased; and that thereby petitioner, and all other inhabitants and taxpayers of said City, have been compelled to pay higher taxes than he and they would otherwise be compelled to do; and that such taxation, increased as aforesaid, will continue unless the injunction hereinafter prayed for is granted. Petitioner avers that since the making of said supplemental contract said City of San Antonio has exempted from taxation the property of its said co-defendant to the value of \$250,000, and will continue so to exempt the same unless the relief hereinafter prayed for is granted. Petitioner further shows by the grant or supposed grant of exclusive privileges to said San Antonio Water-Works Company by said City all competition is avoided, and that in consequence thereof excessive and unreasonable rates and prices for water are charged and collected from the inhabitants of said city, including petitioner."

The exceptions of the appellee to the plaintiff's petition, which were sustained by the court, raise the following questions: Was the contract set forth in the petition, and entered into between the City of San Antonio and the water-works company, unauthorized and invalid because it attempted to create a monopoly and an exclusive privilege upon the part of said company to fur-

nish said water, and because the city council could not impair and embarrass the exercise of the power conferred on said City by its charter to provide water for said City? And was it also illegal because it attempts to exempt from taxation by said City the property of said water-works company? If for the above reasons, or either of them, it is determined that the contract was illegal, then the next question is whether this suit can be maintained by plaintiff under the allegations contained in his petition. If under either of them it can be, the judgment should be reversed. In so far as the first question above mentioned is involved, there is no material distinction between this case and that of *Brenham v. Brenham Water Co.*, 67 Tex. 545, where it was decided.

Without attempting to enumerate the different provisions of the contracts respectively entered into by these cities, and the sections of their charters authorizing said cities to enter into contracts to supply the inhabitants and the cities with water, and without citing the statutes which were looked to in the case cited in determining this question, it will be sufficient to say that said charters and contracts are substantially the same, and the statutes referred to are the same, and are now in force. It follows, therefore, that, for the reasons given and elaborated in that case by Chief Justice Stayton, the contract in the case under consideration is illegal and unauthorized. But it does not follow, we think, in this case because the contract is, as alleged by plaintiff, unauthorized and illegal, and creates a monopoly, or attempts so to do, and surrenders for the period of twenty-five years the legislative power with which the city is invested, that for these reasons alone the plaintiff can in this suit vacate or set aside said contract. In the case mentioned the suit was by the water-works company to enforce the contract. This was resisted by the City of Brenham upon the ground that it attempted to create a monopoly, and was a surrender of the legislative power in the City with reference to that subject for twenty-five years. In the case under consideration the City is not complaining. On the contrary, the contract is recognized by the City, and, as long as it is so recognized by the City through its properly constituted authorities, it cannot be vacated by plaintiff upon these grounds. The plaintiff does not show by his averments that he, as a taxpayer of the City, is authorized to maintain this action by reason of any injury resulting to him from the contract of October, 1877, entered into by the City of San Antonio. It does not appear from the petition that he is prevented from obtaining water upon any better terms, nor does it appear that he is compelled under the terms of that contract to get water from the defendant water-works company, only we do not mean to say that a taxpayer of a municipal corporation cannot maintain a suit like the present, under proper averments showing injury to him as such taxpayer, resulting from an illegal and unauthorized contract. But the petition does not present such a case with respect to the contract originally entered

into by the City, in October, 1877. It does sufficiently appear, however, from the allegations of the petition, that the release from or exemption by the City of San Antonio of the property of the defendant water-works company during the continuance of the contract, which is alleged to have been done under the supplemental contract of January, 1881, operates to the injury of plaintiff. It is shown that this exemption of said property, valued at \$250,000, resulted in increasing the rate of taxation upon property in the City, and that thereby petitioner, and all other inhabitants and taxpayers of said City, have been, and will continue to be, compelled to pay higher taxes than they would otherwise be required to do. That the City of San Antonio did not have the power to exempt this property from taxation is well settled in the case of *Austin v. Austin Gas Light & C. Co.*, 69 Tex. 187. In the same case it was held that the power to commute taxes was but an incident of the power to exempt, and, as the latter power did not exist, so the incidental power must be denied. This is decisive of the question in this case.

We are of opinion that, under the plaintiff's allegations of injury resulting to him as a taxpayer from the exemption by the City of the property of the water-works company, thereby increasing the rate of taxation on his property, and compelling him to pay higher taxes than he would otherwise be required to do, he is entitled to maintain this suit; and there was error in dismissing it; and for the error in dismissing the suit we think the judgment should be reversed, and the cause remanded.

Stayton, Ch. J.:

Report of the commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

A rehearing was subsequently granted and on June 19, 1891, *Gaines, J.*, delivered the opinion of the court:

At the last term of the court at this place the judgment in this case, upon the report and opinion of the commission of appeals, was reversed, and the cause remanded. Both parties having insisted that there was error in the opinion and judgment of the court, and moved that they be set aside, a rehearing was granted. A reconsideration has not changed our opinion upon the main questions in the case, but we now think that we were in error in holding the allegations in the petition sufficient to authorize a judgment for appellant enjoining the collection of taxes assessed against him in excess of what they would have been if the exemption from taxation had not been allowed the water company. The plaintiff nowhere avers the amount of such excess, nor does he allege any other facts or amounts from which the excess may be arrived at by a mathematical calculation. In this respect the petition is not sufficient to support an action to restrain the collection of illegal taxes. In such cases, the amount of the unlawful assessment must be averred. In fact, it is apparent

from the form of the petition and the prayer that the object of the suit was not merely to enjoin the collection of excessive taxes. Except upon this question we stand by the conclusions announced in the former opinion. It held that the suit was maintainable only as an action to restrain the collection of an excessive tax assessment resulting from an

illegal exemption. We hold that it is not good for that purpose, and it follows that the judgment shall be affirmed. It is due to the commission of appeals and to the learned judge who wrote the former opinion to say that this court is responsible for the error in that opinion.

The judgment is affirmed.

MICHIGAN SUPREME COURT.

M. J. P. DEMPSEY, Exr., etc., of Casper H. Borgess, Deceased,

Isaac PFORZHEIMER *et al.*, Appts.

(.....Mich.)

1. One who sells another goods on credit during the interval between the making and recording of a mortgage on the latter's stock in favor of a third person under which no possession was taken, and who after the recording of such mortgage takes another mortgage on the stock to secure his claim, under which he takes possession, has a right to the stock which is superior to that of the first mortgagee, under How. Stat., § 6193.
2. The cancellation of an indebtedness and substitution for it of a new contract is not shown by the taking of notes for its amount secured by mortgage, although the notes are payable at different future dates and the mortgage provides for future indebtedness, if an

intention to cancel is not directly shown and there were no subsequent dealings, while the entire indebtedness was to become payable at once on default as to any installment.

(July 23, 1891.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged wrongful conversion of plaintiff's interest in a stock of jewelry. *Reversed.*

The facts are stated in the opinion.

Messrs. Dickinson, Thurber & Stevenson, for appellants:

The court, in construing section 6193 of Howell's Statutes, has held that it was designed to protect and afforded protection, not only to those who obtained judgment or levy of attachment between the date of the giving and the date of the filing of the chattel mortgage, but that those who became creditors

NOTE.—Chattel mortgage; registration and filing equivalent to delivery.

Under the statutes of several States, registration or filing the mortgage is equivalent to delivery of the property. *Sturgis v. Warren*, 11 Vt. 433; *Morrill v. Sanford*, 49 Me. 506; *Bullock v. Williams*, 16 Pick. 38; *Shurtleff v. Willard*, 19 Pick. 202; *Frank v. Miner*, 50 Ill. 444; *Crooks v. Stuart*, 2 McCrary, 13; *Field v. Baker*, 12 Blatchf. 428; *Morrow v. Reed*, 30 Wis. 81; *Donaldson v. Johnson*, 2 Chand. (Wis.) 100.

The mortgage must either be filed as the law requires, or the mortgagee must take possession of the property. The taking of possession is sufficient. *Morrow v. Reed*, 30 Wis. 81; *Cooper v. Brock*, 41 Mich. 488; *Gill v. Griffith*, 2 Md. Ch. 270; *Waite v. Mathews*, 50 Mich. 392; *Fromme v. Jones*, 13 Iowa, 474; *Gregg v. Sanford*, 24 Ill. 17.

As between the parties themselves, it is not necessary that a chattel mortgage should be filed or recorded. *Beeman v. Lawton*, 37 Me. 543; *Lemay v. Williams*, 32 Ark. 166; *McTaggart v. Rose*, 14 Ind. 230; *Hall v. Snowhill*, 14 N. J. L. 8; *Fuller v. Page*, 28 Ill. 338; *Wilson v. Lealie*, 20 Ohio, 161; *Kilbourne v. Fay*, 29 Ohio St. 284; *Douglas v. Vogeler*, 6 Fed. Rep. 53; *Winsor v. McLellan*, 2 Story, 492; *Coggeshall v. Potter*, 1 Holmes, 75; *Griffin v. Wertz*, 2 Ill. App. 487; *Hudson v. Warner*, 2 Harr. & G. 415; *Hodgson v. Butts*, 7 U. S. 8 Cranch, 138, 2 L. ed. 301; *Merrick v. Avery*, 14 Ark. 370.

But a chattel mortgage which is not recorded within ten days after its execution is void as to a third person, although such person has actual notice of its existence. *Ross v. Menefee*, 125 Ind. 432.

' Validity under Recording Acts.

The Registry Acts do not make a chattel mortgage absolutely void for omission to file it, but simply declare it void as to judgment creditors and 13 L. R. A.

subsequent purchasers in good faith. As to other persons it is valid without filing. *Steele v. Benham*, 84 N. Y. 634; *Thompson v. Van Vechten*, 37 N. Y. 568; *Porter v. Parmley*, 52 N. Y. 185; *Hayman v. Jones*, 7 Hun, 238; *Fraser v. Gilbert*, 11 Hun, 634; *Moses v. Walker*, 2 Hilt. 539; *Johnson v. Jeffries*, 30 Mo. 423; *Kohl v. Lyon*, 34 Mich. 360; *Hackett v. Manlove*, 14 Cal. 85; *Gill v. Pinney*, 12 Ohio St. 38.

An attaching creditor having actual knowledge of a prior bona fide chattel mortgage made by his debtor is bound by it, although the record of the mortgage is erroneously indexed. *Kern v. Wilson* (Iowa) May 13, 1891.

A chattel mortgage is valid, though not filed, against the claim of a general creditor which has never been reduced to judgment. *Button v. Rathbone*, 43 Hun, 147.

If made in good faith it will be sustained against a voluntary assignee for the benefit of the creditors of the mortgagor. *Wilson v. Eeten*, 1 New Eng. Rep. 13, 14 R. I. 621.

A chattel mortgage not on file or recorded as required by statute is not void as against a wrongdoer. *Johnson v. Jeffries* and *Moses v. Walker*, *supra*.

That a chattel mortgage is not recorded is not a defense that can be made by the administrator or heir of the mortgagor, though his estate is insolvent. *Mayer v. Myers* (Ind.) May 25, 1891.

When personal property is mortgaged without a delivery thereof to the mortgagee, and the mortgage is not recorded, a party who buys the property of the mortgagor and takes possession of it, although he has knowledge of the mortgage, will hold it against the mortgagee. *Crawford v. Harter*, 5 West. Rep. 37, 22 Mo. App. 631.

The rule that an unrecorded chattel mortgage is void as against subsequent good-faith purchasers applies in favor of a creditor who, in ignorance of

whilst the mortgage is not filed are protected as well.

Fearey v. Oummings, 41 Mich. 883.

The contention that the defendants could not establish the invalidity of the Borgess mortgage, except by attachment or execution levy upon the property, and that attack could not be made under the lien created by the chattel mortgage executed to the defendants, is not well founded.

Putnam v. Reynolds, 44 Mich. 114.

The rule in equity, requiring a preceding judgment at law, is purely an equitable one based on the fact that unless there be a debt due the complainant, he has no ground of complaint; that the existence as an unsecured debt can only be made certain by means of a judgment that a court of chancery cannot render this judgment. It follows, therefore, that a prior judgment establishing the plaintiff's claim of indebtedness should not be required in a proceeding in a court possessing power and authority to investigate and determine the validity of the claim.

Bump, Fraud. Conv. p. 521; Reese River S. Min. Co. v. Atwell, L. R. 7 Eq. 347.

The prior judgment, where required, serves two purposes. It established the indebtedness, and further enables a direct lien upon specific property to be obtained by the levy of "process," i. e., execution. It follows that where it is not needed to prove the debt, it is not needed at all, provided "process" other than execution or liens otherwise created, will suffice. Process is anything that will create the desired lien—not necessarily judicial process.

the mortgage, receives a portion of his debtor's stock of goods in payment of his debt. *Burton v. Hathbone, supra*.

A chattel mortgage registered in the county where made, but not in the county to which the mortgagee consents that the mortgagor may remove the chattels, is void as to a purchaser or mortgagee thereof in the latter county without actual notice of the prior mortgage. *Reed v. Spikes* (Tex. App.) Nov. 12, 1890.

Effect of actual notice.

The general rule is that actual notice of an unrecorded mortgage dispenses with the necessity of filing. *Nat. Bank of the Metropolis v. Sprague*, 21 N. J. Eq. 530; *Steele v. Adams*, 21 Ala. 534; *Boyd v. Beck*, 20 Ala. 708; *Doyle v. Stevens*, 4 Mich. 87; *Kohl v. Lynn*, 34 Mich. 360; *Stowe v. Meserve*, 13 N. H. 46; *Gooding v. Riley*, 50 N. H. 400; *Clark v. Tarbell*, 87 N. H. 388; *Crane v. Chandler*, 5 Colo. 21; *Shuler v. Boutwell*, 18 Hun, 171; *Benjamin v. Elmira J. & C. R. Co.* 54 N. Y. 675; *Wright v. Birchier*, 5 Mo. App. 322; *Coble v. Nonemaker*, 78 Pa. 501; *Paine v. Mason*, 7 Ohio St. 198; *Campbell v. Leonard*, 11 Iowa, 439; *Gregory v. Thomas*, 20 Wend. 17; *Lewis v. Palmer*, 28 N. Y. 272.

Renewal of mortgage; rules in different States.

The object of refileing a chattel mortgage is merely to extend and continue in operation the effect of the first filing as to the amount remaining unpaid for another year. *Dillingham v. Bolt*, 37 N. Y. 200; *Marsden v. Cornell*, 62 N. Y. 219.

The statement must be made by the mortgagee; it cannot be made by the mortgagor or third persons. So the filing of a new mortgage in place of the old one is not sufficient. *Osborn v. Alexander*, 40 Hun, 323.

If the property remains in the hands of the mort-
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See *Fearey v. Oummings*, 41 Mich. 883; *Bump, Fraud. Conv.* 524, citing cases; *Hastings v. Belknap*, 1 Denio, 190; *Frisbey v. Thayer*, 25 Wend. 896; *Coles v. Marquand*, 2 Hill, 447; *Stocum v. Clark*, 2 Hill, 475; *Martin v. Black*, 9 Paige, 641, 4 L. ed. 848; *Hanes v. Tiffany*, 25 Ohio St. 549.

All that the law requires to enable a creditor to assail a mortgage for want of filing, is that he shall in some manner have acquired, or at least asserted, the right to have his debts satisfied out of certain specific property, and this right is denominated a lien. What lien can be more certain, specific and binding than a mortgage by which the debtor gives absolute authority to his creditor to seize and dispose of his property.

See *Brown v. Brabb*, 10 West. Rep. 892, 67 Mich. 17; *Root v. Hart*, 63 Mich. 420.

Messrs. Keena & Lightner, for appellee: As against all persons, except such as can bring themselves within the terms of the Statute, plaintiff's mortgage was perfectly valid.

Brown v. Brabb, 10 West. Rep. 892, 67 Mich. 17; *Jones, Chat. Mort.* § 281.

Defendants must claim either as "creditors of the mortgagors," or as "subsequent purchasers or mortgagees in good faith."

That they cannot claim as subsequent purchasers or mortgagees in good faith seems apparent from the fact that they took their mortgage with full notice of plaintiff's mortgage.

Kohl v. Lynn, 34 Mich. 360; *American Cigar Co. v. Foster*, 36 Mich. 363, 3 Am. & Eng. Encyclop. Law, p. 208.

As to their being creditors they asserted their

gagor, the mortgagee must refile his mortgage within the year, although default has been made in the payment. *Ely v. Carnley*, 19 N. Y. 496; *Steele v. Benham*, 84 N. Y. 634; *Porter v. Parmley*, 52 N. Y. 187; *Marsden v. Cornell*, 62 N. Y. 219.

The Michigan statute requires the first renewal affidavit of a chattel mortgage to be made within thirty days next preceding the expiration of the year from the filing of the mortgage. *Burrill v. Wilcox Lumber Co.* 9 West. Rep. 115, 65 Mich. 671.

In Wisconsin, filing an affidavit more than thirty days before the expiration of two years from the filing of a chattel mortgage is not sufficient to keep the mortgage valid, under the statute requiring such affidavit to be filed within thirty days before such expiration. *Rice v. Kahn*, 70 Wis. 323.

In Ohio, a chattel mortgage not refiled and refiled within thirty days before the expiration of one year after the original filing, is void against creditors and bona fide purchasers and mortgagees. *Cooper v. Koppes*, 18 West. Rep. 465, 45 Ohio St. 625.

Refiling the mortgage four days after one year creates no lien against a levy in favor of an execution creditor made thereafter. *Ibid*.

On a failure to refile a chattel mortgage, as required by law, before the expiration of the year, the mortgage ceases to be valid against subsequent bona fide purchasers or creditors, and cannot be revived by any act of the parties so as to give it priority over other liens. *Herder v. Walther*, 29 N. Y. S. R. 410.

A chattel mortgage which was filed, but has not been renewed, is invalid as against bona fide purchasers or creditors. *Gibson v. Ferris*, 30 N. Y. S. R. 663.

In Kansas, a subsequent mortgagee who becomes such before the expiration of the year from the first filing of a prior chattel mortgage cannot take advantage of an omission to renew the latter within

claim to the property under their mortgage. The benefit of the Statute can be invoked only by creditors who have a lien, by process, upon the property in question. The defendants were confessedly not such creditors.

People's Sav. Bank v. Bates, 120 U. S. 560, 30 L. ed. 756; *Thompson v. Van Vechten*, 27 N. Y. 568; *Jones, Chat. Mort.* 2d ed. § 245; *Stewart v. Beale*, 7 Hun, 405, 68 N. Y. 639; *Jones v. Graham*, 77 N. Y. 628; *Ransom v. Schmela*, 13 Neb. 73; *Cameron v. Marwin*, 26 Kan. 612; *Smith v. Clarendon*, 25 N. Y. S. R. 221; *Root v. Potter*, 59 Mich. 498; *Trowbridge v. Bullard*, 81 Mich. 451.

When defendants made this contract of December 30, 1887, with Harris & Karpp, and took the notes referred to, defendants' rights under their former contract with Harris & Karpp were surrendered.

Bigelow, Fraud, p. 484; *Bump, Fraud. Conv.* pp. 457, 459; *Baker v. Gilman*, 52 Barb. 26.

The defendants, with knowledge of plaintiff's mortgage, elected their remedy and must abide by their election. They cannot sell the property under their mortgage (which they obtained by canceling the prior indebtedness of Harris & Karpp), and also claim as creditors without notice.

6 Am. & Eng. Encyclop. Law, p. 247, and notes; *Dunks v. Fuller*, 32 Mich. 244; *Button v. Trader*, 75 Mich. 293.

the year. *Farmers & M. Bank v. Bank of Glen Elder* (Kan.) May 9, 1891.

Priority of Men.

A chattel mortgage, being first in date and first of record, is not affected by a parol agreement prior thereto, as to the order of priority of such mortgage and others which are made subsequent to it. *Lezarus v. Heurletta Nat. Bank*, 72 Tex. 364.

Under the Oregon statutes, in cases of successive chattel mortgages upon the same property, the one first filed is entitled to priority. *Pitcock v. Jordan*, 19 Or. 7.

In Nebraska, the lien of a chattel mortgage continues between the parties so long as the debt subsists, although the mortgage is not filed or refiled, as required by the Nebraska statute. *Sandford v. Mumford* (Neb.) May 8, 1891.

Novation.

The validity of a chattel mortgage is not affected by the fact that it is given in place of old mortgages not recorded within the time required by statute, where such mortgages were executed to secure an existing indebtedness. *Johnson v. Stellwagen*, 10 West. Rep. 348, 67 Mich. 10.

A mortgagee occupies the position of mortgagee for a valuable consideration where the mortgage is taken for the surrender of a prior mortgage and accrued interest thereon. *Constant v. Rochester University*, 3 L. R. A. 734, 111 N. Y. 604.

A mortgagee who releases his mortgages and accepts a later mortgage covering also debts not secured by the first, supposing there were no other liens on the property, is not entitled to a reinstatement of the released mortgages. In the absence of any proof that he released them in reliance upon the mortgagor's representations. *McKeen v. Haseltine* (Minn.) July 1, 1891.

Novation is a substitution of a new obligation for an old one. See note to *Spycher v. Werner* (Wis.) 5 L. R. A. 414.

There must be a substitution of the new obligation for the old. See note to *Pope v. Vajen* (Ind.) 13 L. R. A.

Morse, J., delivered the opinion of the court:

On the 22d day of October, 1886, William H. Harris and Charles T. Karpp, in partnership in the general jewelry business in Detroit, and both residents of that city, borrowed \$2,000 of Casper H. Borgess. To assure the payment of the same, they executed to him, under the firm name of Harris & Karpp, a chattel mortgage for that amount. Said mortgage was taken by said Borgess in good faith to secure such indebtedness, but it was not filed in the city clerk's office until December 26, 1887, at 9:08 o'clock A. M. This mortgage covered all the goods "now contained or hereafter to be contained" in the jewelry store; also the fixtures and safe therein; and was payable on or before October, 1889. On December 30, 1887, Harris & Karpp executed a mortgage to the defendants in this suit to secure a previous indebtedness incurred in the purchase of merchandise between the date of the execution and the filing of the Borgess mortgage; and said merchandise was sold by defendants in ignorance of the existence of the indebtedness to Borgess or the execution of the mortgage to him. The two mortgages embraced substantially the same property. The mortgage to defendants recited that it was to secure an indebtedness of \$2,528.53, which was the amount of the merchandise sold as above. It also contained the following recital in addition: "And whereas,

6 L. R. A. 686; *Outting Packing Co. v. Packers Exchange* (Cal.) 10 L. R. A. 269.

Mortgage of stock of goods.

A mortgage of all the goods, etc., in and about a certain building is valid as to all articles that can be identified. *Pond v. Baker*, 1 New Eng. Rep. 400, 58 Vt. 293.

A schedule annexed to the mortgage is a part of it, and where it refers to after-acquired property such property is included, and the lien of the mortgage thereon is superior to the lien of an execution subsequently levied upon the goods purchased after date of the mortgage. *Page v. Kendig* (N. J.) 6 Cent. Rep. 323.

In such case the lien attaches as soon as the property is acquired by the mortgagor. *Ludlum v. Roehchild*, 41 Minn. 218.

While a mortgage on a stock of merchandise may not be enforceable as to goods not in store at the time of the mortgage, such a mortgage having been enforced by the lower court without defense, this court cannot assume that the stock had been replenished, but must assume that the lien existed and was properly enforced. *Hoffman v. Brunga*, 33 Ky. 401.

A stipulation in a chattel mortgage that renewals to the stock should be deemed covered by a mortgage does not render the mortgage invalid on its face, but is ineffectual of itself to vest in the mortgagee a lien upon such after-acquired property. *Fisher v. Syfers*, 7 West. Rep. 913, 109 Ind. 514.

A contract of sale cannot be extended by implication, or be considered as creating a lien or mortgage upon goods bought by the purchaser after the date of the contract. *Edwards v. Symons*, 8 West. Rep. 784, 65 Mich. 349.

Where one in possession mortgages goods under circumstances which indicate him to be the absolute owner, to a third person who has knowledge of the rights of the true owner, the latter is not estopped to set up his claim against the mortgagee. *Bray v. Flickinger*, 69 Iowa, 167.

the said parties of the first part [Harris & Karpp] expect to buy from the parties of the second part [the defendants] from time to time, during the continuance of this mortgage, goods on time, and on such terms of credit as may be agreed upon; and whereas, the indebtedness of the said parties of the first part to said parties of the second part is therefore liable to change in amount and time of payment; and whereas, the said parties of the first part have agreed that the payment of the existing indebtedness of said parties of the first part to said parties of the second part, and also the payment of the other indebtedness for goods to be purchased by said parties of the first part from said parties of the second part, shall be secured in the manner hereinafter mentioned." The \$2,528.58 was to be paid according to five promissory notes of even date with the mortgage, as follows: \$500 in 60 days, \$500 in 90 days, \$500 in 4 months, \$528.58 in 6 months, and \$500 on demand. This mortgage was filed the same day it was executed, at 3:30 o'clock P. M. Subsequently defendants, by Henry T. Thurber, their attorney and agent, took possession of said stock, being the same described in both mortgages. Plaintiff's testator, by James T. Keena, at the time of the sale, demanded said stock under his mortgage. Defendants refused to deliver the same, and sold the same under their mortgage, expressly denying the validity of testator's mortgage, and in disregard of said mortgage. There was upon the property so sold by defendants, at the time of such sale, a chattel mortgage held by Eugene Deimel for \$600, which was a prior lien to the defendants, and they sold such property under their chattel mortgage subject to the payment of the Deimel mortgage. The defendants were, at and during the time the merchandise aforesaid was sold to Harris & Karpp, merchants in New York City, selling jewelry, etc., at wholesale, and Harris & Karpp were conducting business of selling jewelry, etc., in Detroit, Mich., during such time, at retail. Such merchandise was sold in the usual course of business, and upon usual terms of sale. Plaintiff's testator thereupon brought this action of trover against defendants for the conversion of said stock, which at the time of the seizure and sale by defendants was worth \$3,200. The defendants composed the copartnership of Pforzheimer, Keller & Co. No part of the principal or interest secured by the mortgage of plaintiff's testator has been paid. The original plaintiff having died, the cause was revived in favor of his executor. Defendants' plea was the general issue. The case was tried before Hon. George Gartner, one of the Wayne circuit judges, without a jury, who made a finding of law upon the facts, which were stipulated, that the plaintiff was entitled to recover against the defendants the sum of \$2,520. It is plain, under the rulings of this court, that the Borgess mortgage was void for want of filing, as against the original indebtedness of Harris & Karpp to defendants, incurred while the mortgage was in existence and not filed, and for goods sold by defendants in the usual course of business, in ignorance of the existence of such mortgage. *Pearrey v. Cummings*, 41 Mich. 883; *Root v. Hari*, 62 Mich. 420; *Waite v. Mathews*, 50 Mich. 392, 394; *Wallen v. Rossman*, 45 Mich. 333; *Johnson*

v. Stelhwagen, 67 Mich. 10, 14, 16, 10 West. Rep. 848; *Brown v. Brabb*, 67 Mich. 17, 10 West. Rep. 692; *Talcott v. Crippen*, 52 Mich. 638; *Crippen v. Jacobson*, 56 Mich. 386; *Outler v. Steele*, 85 Mich. 627.

If the defendants before taking their mortgage, and after the filing of the Borgess mortgage, had proceeded against the property so mortgaged, and obtained by any process of law a lien upon it, or had they obtained judgment upon their claim, and issued execution and levied on it, there can be no doubt but such lien or levy would have been good as against the Borgess mortgage. But it is claimed on behalf of plaintiff that, because defendants took a mortgage to secure the indebtedness to them, after the Borgess mortgage was put on file, and therefore had notice of it, they cannot now claim the benefit of the rule adopted by this court as shown above, and that they have no standing under the Statute upon which the rule is founded. It is contended that, to avail themselves of the Statute, the defendants, at the time of seizing the goods in question, must have the standing either as "creditors of the mortgagors" or as "subsequent purchasers or mortgagees in good faith;"* that they cannot claim as subsequent mortgagees in good faith, because they took their mortgage with full notice of the Borgess mortgage, which had then been on record for four days; and that the benefit of the Statute cannot be invoked in favor of creditors, except by those who have a lien by process of law upon the property in question; and it is argued that a mortgage lien will not avail, except, perhaps, in equity. We are cited to *People's Sav. Bank v. Bates*, 120 U. S. 560, 30 L. ed. 766, and other cases, in support of this contention; but we can see no difference between a lien obtained by process and one gotten by consent of the owner through a chattel mortgage. If the defendants were entitled, as they undoubtedly were, to obtain a lien upon this property by legal process, and to hold it to the amount of such lien against the mortgage of Borgess, because the debt they were seeking to collect was made while this mortgage was withheld from record, we can see no reason in principle why they cannot hold the property under a lien obtained by chattel mortgage to secure the same indebtedness. A review of the cases in our own court upon this subject may not be unprofitable. The contention of plaintiff that, in order to take advantage of the non-filing of the Borgess mortgage, the defendants must first have a lien upon the property by process, is based upon language used in *Thompson v. Van Vechten*, 27 N. Y. 568, and that case has often been referred to in our decisions on this subject, and is considered a leading case. It was said "that the mortgage cannot be legally questioned until the creditor clothes himself with a judgment and execution, or with some legal process against his property, for creditors cannot interfere with the property

*How. Stat. Mich., § 6198, provides that "every mortgage or conveyance intended to operate as a mortgage on goods and chattels which shall hereafter be made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against creditors of the mortgagor in good faith, unless the mortgage or a true copy thereof shall be filed in the office of the township clerk," etc.

of their debtors without process." *Thompson v. Van Vechten*, *supra*.

The gist of the reason is that the creditor has no business with the debtor's property until he has obtained possession of it by some legal process that gives him a lien upon it. This is not because of any right that the mortgagor, who has kept his mortgage from record, has against the other creditors, but because such creditors have no right to touch the debtor's property without his consent, without legal process; and when the debtor has turned out his property to a creditor in payment of his debt, or in pledge for its payment, or, as in this case, a chattel mortgage which authorizes him to take possession of it, it seems to me that the reason of the rule is satisfied, and that he has a right to defend against a prior mortgage which is void as against him. And I think some of our decisions decidedly tend in this direction, and that none of them militate against it.

In *Fearcy v. Cummings*, 41 Mich. 383, *Mr. Justice Graves* uses this language: "Still no one as a creditor at large can question the mortgage. He can only do that by means of some process or proceeding against the property." Is not the taking into possession of mortgaged property under the mortgage, for the purposes of foreclosing, a "proceeding" against the property?

In *Putnam v. Reynolds*, 44 Mich. 114, the court refused to foreclose such a mortgage, declaring it void as to the mortgagor's creditors because it was kept from the record. The assignee for the benefit of creditors, who had no knowledge of this mortgage at the time the mortgagor made the assignment, defended against the mortgage. The complainant insisted that the assignee had no standing because his rights were no greater than the assignor's, and the mortgage was valid as against the mortgagor. *Mr. Justice Cooley*, in speaking of this claim, said: "The assignee is not a purchaser for value, and not a creditor, and even creditors, it is said, cannot attack the mortgage indirectly, through a seizure of the property by attachment or other suitable process. This is doubtless true where the invalidity of the mortgage arises from some fraud of the mortgagor; but whether the same rule will apply when the mortgage was originally valid, but is made void by the neglect of the mortgagee, may well be questioned. It would be easy to suggest weighty considerations arising in such cases, but not existing in the case of a fraudulent mortgage, and which it might well be thought should control. But we do not think the question fairly arises in this case." Here we have a pretty good index to the opinion of this learned jurist. It would seem that he doubted the necessity of any lien upon the property by the attacking or defending creditor in a case like the present.

In *Root v. Potter*, 59 Mich. 504, *Chief Justice Campbell* says: "It has always been held in this State that general creditors, having no judgment or lien on the debtor's property, cannot attack conveyances or other dealings for fraud,"—citing *Tyler v. Pratt*, 80 Mich. 63; *Maynard v. Hoskins*, 9 Mich. 485; *Griswold v. Fuller*, 33 Mich. 268.

In the present case, the defendants cannot be said to be general creditors. They are credi-

tors having a lien on the property, and lawfully in possession under such lien. An examination of the cases above cited by *Chief Justice Campbell* will show that they have no bearing upon the question at issue here.

In *Troubridge v. Bullard*, 81 Mich. 451, *Mr. Justice Long* says: "It has many times been held by this court that general creditors having no judgment or lien upon the debtor's property cannot attack conveyances or other dealings for fraud,"—citing a number of Michigan cases, in addition to those cited in *Root v. Potter*, *supra*, to wit: *McKibben v. Barton*, 1 Mich. 213; *Stoddard v. McLane*, 56 Mich. 11; *Scott v. Chambers*, 62 Mich. 532; *Krolík v. Root*, 63 Mich. 532, 6 West. Rep. 364.

The main case is relied upon by plaintiffs in this case, but it does not touch the question here involved. The first case cited is of no importance to the issue here.

In *Stoddard v. McLane* an execution had been levied on personally, and the aid of equity was invoked to set aside fraudulent conveyances of the property levied upon. Held, that a lien obtained by the levy of execution on personally did not in general require the aid of equity for its enforcement, and that there was a remedy at law.

In *Scott v. Chambers*, 62 Mich. 532, *Chief Justice Campbell* uses this language: "It is the settled law of this State that creditors cannot attack the interest of third parties, alleged to have been obtained by fraud, until they have obtained a standing by legal proceedings, and, so far as these bonds are concerned, they could only be reached by judgment creditors."

This is the strongest language anywhere used in our Reports in favor of plaintiff's contention, but the case was one where a creditor was proceeding in equity against a receiver of an assignor for the benefit of creditors (who stood in the place of an assignee who failed to qualify under the assignment), for neglect, and making him, with the assignor and others, parties defendant, for the purpose of reaching and bringing under the assignment certain lands and other property, including two United States bonds issued in 1882 and 1885, to the wife of the assignor. It was held that the creditor had no right to implead the receiver without leave of the court, and no right to file the bill against the other parties, as that right belonged to the receiver alone. The property sought to be reached was in the name and possession of other parties than the debtor, and the language of the court was applicable to that case; but there is no reason why it should control this, where the property is lawfully in the hands of the defendants under a mortgage lien, reduced to possession for the purposes of foreclosure, and where the party assailed has a right to a standing in court to defend his right to possession, and to attack the alleged prior lien of the plaintiff.

In *Krolík v. Root*, the language of *Justice Sherwood* is: "The complainants in this case never obtained a lien upon the property in question, or any part thereof, so far as appears upon this record. They are not in a situation to attack the validity of the defendant's last mortgage, without such lien obtained in some manner."

In *Crippen v. Jacobson*, 56 Mich. 386, it was

held that garnishee proceedings would reach assets covered by an unrecorded mortgage made before the debt was incurred for which the mortgagee is garnished, and the following language is used by *Justice Campbell*: "The law does not require previous proceeds to exhaust other remedies. The Garnishee Law is unconditional upon this subject, and garnishee proceedings will reach the assets if they exist. When the debt is not incurred on the credit of an apparently clear title, which is in fact covered by a secret mortgage, the cases cited hold that there is no right to complain of a subsequent mortgage, without taking some step which puts the creditor on a different legal footing than that of a quiescent party. But when a chattel mortgage exists, and is concealed, it is, under the Statute, void, for the reason that it produces a false appearance of solvency, when, in fact, the person known to have mortgaged his stock would not be as likely to get credit as one who had given no such security, and those who deal with such a debtor are liable to be defrauded by appearances. One who gives credit under such circumstances is necessarily exposed to that mischief, and the law has removed all questions of suspicion or notice by making chattel mortgages void, at all events, against creditors who deal with a debtor so situated. Such creditors are directly within the policy of the Statute."

In view of this language, it seems absurd to hold that such a creditor, having possession of the debtor's property under a chattel mortgage, cannot defend against a chattel mortgage absolutely void as to him, unless he goes further, and attaches the property, or takes some legal process other than the enforcement of his mortgage lien, under the power of sale in the mortgage to get a lien upon it.

In *Root v. Harl*, 63 Mich. 420, Harl & Stevens, merchants doing business at Muir, Mich., as copartners, had made an assignment. Chauncey Rumsey held a mortgage upon their stock. Between the date of this mortgage and its recording, Root & Co. and others gave credit to Harl & Stevens in ignorance of this mortgage. The complainants filed a bill for the appointment of a receiver of the assigned property, and claiming a preference of their debt, contracted as aforesaid, in ignorance of the unrecorded mortgage, over the Rumsey mortgage, because it was void under the Statute as against them. They had no lien, by legal process or otherwise, upon the property. They might be called "general creditors" of the debtors, except that they stood in a different relation to this mortgage than the others. In delivering the opinion in that case, it was said by *Chief Justice Campbell* that the "general creditors" could not attack the mortgage, but that Root & Co. could. "We have no doubt that, under our Statutes, any creditors have a right to avoid an unrecorded mortgage who have, during its absence from the record, done anything material which they may be fairly considered to have done on the basis of its non-existence." This doctrine was also enunciated in *Brown v. Brabb*, 67 Mich. 17, 10 West. Rep. 892, and in *Johnson v. Stellwagen*, 67 Mich.—(opinion of *Justice Campbell* at p. 14), 10 West. Rep. 848.

It would seem to be settled in *Root v. Harl*, 13 L. R. A.

supra, that, when an assignment is made by a debtor for the benefit of creditors, such creditors—as are the defendants in this case—can, upon the equity side of the court, attack the unrecorded mortgage and obtain a preference over it, although they have no lien whatever upon the debtor's property; and that they are not "general creditors," in such a sense that they cannot attack the mortgage without first obtaining a lien, by legal process or otherwise. If this is so, why cannot such a creditor who has obtained a mortgage lien upon the property, and possession under it, defend against a void mortgage without resorting to legal process against the property? And why should he be compelled to relinquish his possession under such mortgage lien, or pay the amount of a void mortgage? In my opinion, there is no equity or justice in the plaintiff's claim in this case, and no law under which he can enforce it.

I do not think that the fact that the defendants obtained their mortgage after the mortgage of plaintiff's testate was put on file cuts any figure in the case. The mortgage was a security for the payment of the debt, against which the Borgess mortgage had no standing and was void. The rights of defendants were not at all impaired by the taking of this security, but the security gave them a lien upon and possession of the property out of which to make their debt. If, instead of giving this mortgage, the debtors had turned out to them enough of the property to pay the debt, I think no one would seriously contend that the holder of this void mortgage could have demanded the goods of them, and, if the demand was refused, have sued them in trover and recovered, although at the time the goods were so turned out to defendants the mortgage had been placed of record. I can see no difference in principle in the two cases.

But it is further contended that in taking this mortgage the defendants canceled the old indebtedness under which they might have claimed the benefit of the Statute, and with full knowledge of the Borgess mortgage, and its invalidity, as against their debt, not only extended the time of payment of the old indebtedness, but made a new contract, looking towards further dealings with Harris & Karpp, thereby waiving their rights under the Statute, and deliberately entering into another contract, to which the Statute would not apply to give them preference to the Borgess mortgage; that by this dealing they elected their remedy, and must abide by such election, and cannot sell the property under their mortgage, and also claim as creditors without notice. It does not appear by the record that the taking of this mortgage was a cancellation or extinguishment of the first indebtedness, nor can there be any presumption that the mortgage and notes were taken in payment and extinguishment of the original indebtedness. The presumption would be that they were taken as security rather than in payment. The recital in the mortgage, also securing indebtedness that might be credited thereafter, cuts no figure in the case, as there were no subsequent dealings between Harris & Karpp and the defendants. The mortgage recites that it is given in security of an indebtedness of \$2,528.58, which is the exact amount

of the indebtedness incurred between the dates of the execution and filing of the Borgess mortgage. Nor does the extension of the time of payment of the indebtedness alter the rights of the defendants as against the Borgess mortgage because such extension did not in any way impair the security of Borgess, or hinder him from proceeding to enforce such security, the same as if no extension had been granted by defendants in the payment of their debt. Furthermore, part of the debt was made payable on demand, and the mortgage provided that, in default of the payment of any of the indebtedness at the day named for its payment, the entire amount should become due and payable at once; and it would seem that there was

really no extension, and the only thing in view and accomplished was the securing of defendants' claim by a mortgage lien, which would also give them possession of the property. We think, under the facts as stipulated, the defendants were entitled to the possession of the property as against the plaintiff, and to make their claim out of it by a sale of the property under such mortgage.

The judgment in favor of the plaintiffs is reversed, and a judgment will be entered here in favor of the defendants for the costs of both courts.

McGrath, J., did not sit; the other Justices concurred.

GEORGIA SUPREME COURT.

E. O'CONNELL, *Plff. in Err.*,

v.

EAST TENNESSEE, VIRGINIA & GEORGIA R. CO.

(.....Ga.....)

***Where a railway company erects an embankment for its track along the margin of a river, the accumulated waters of which, in times of flood, had previously escaped on that side, it being lower than the other, but which thereafter, and because of the embankment, overflowed the opposite side more than it had done before, and thus injured land there situate, the owner has a right of action against the company; or if, by the erection of such embankment, the river was deflected from its natural course, or deposits were made therein so as to raise its bottom, and from either of these causes such land was injured by the river when swollen, a recovery may be had for the damages thereby occasioned.**

(May 27, 1891.)

*Head note by LUMPKIN, J.

NOTE.—Facts of each case determine rights.

Each case must of necessity depend largely upon its own facts. Even in those States where the common law prevails the courts hold that the landowner must improve his property in a reasonable manner. *Hosher v. Kansas City, St. J. & C. B. R. Co.* 60 Mo. 329; *Abbott v. Kansas City, St. J. & C. B. R. Co.* 83 Mo. 271; *Pettigrew v. Evansville*, 25 Wis. 220.

But persons exercising this right to improve and ameliorate the condition of their own land must exercise it in a careful and prudent way. Each proprietor, in such case, is left to protect his own lands against the common enemy of all, so as to cause no unnecessary inconvenience or damage to plaintiff. *McCormick v. Kansas City, St. J. & C. B. R. Co.* 57 Mo. 433. See also *Benson v. Chicago & A. R. Co.* 78 Mo. 504.

The law prevailing in different States.

In some of the States the doctrine of the civil law has been adopted as the rule of decision. By that law, the right of drainage of surface waters, as between owners of adjacent lands of different elevations, is governed by the law of nature. The lower proprietor is bound to receive the waters which naturally flow from the estate above, provided the industry of man has not created or in-

ERROR to the Superior Court for Bibb County to review a judgment overruling a demurrer to the complaint in an action brought to recover damages for injuries to plaintiff's property alleged to have resulted from defendant's negligently building an embankment which caused the waters of a river to overflow plaintiff's land. *Reversed.*

The facts are stated in the opinion.

Messrs. Gustin, Guerry & Hall for plaintiff in error.

Mr. Augustus O. Bacon, for defendant in error:

It is important to note the distinction recognized by all courts between the water within the banks of a natural stream, and the water which in times of freshets overflows the boundary of the natural and ordinary channel of the stream, and rests or flows outside such boundary and upon the lands adjacent thereto. Such overflowing water upon the lands outside of the natural banks of the stream is recognized and classed as surface water. This recognition and classification is uniform.

creased the servitude. Corp. Jur. Civ. 39, title 3, §§ 2-5; *Domat* (Cush. ed.) 616; *Code Napoleon*, art. 640; *Code Louisiana*, art. 656.

The courts of Pennsylvania, Illinois, California and Louisiana have adopted this rule, and it has been referred to with approval by the courts of Ohio and Missouri. *Martin v. Riddle*, 26 Pa. 415; *Kauffman v. Griesemer*, Id. 407; *Gillham v. Madison County R. Co.* 49 Ill. 484; *Gormley v. Sanford*, 52 Ill. 159; *Ogburn v. Connor*, 46 Cal. 346; *Delahoussaye v. Judice*, 13 La. Ann. 587; *Hays v. Hays*, 19 La. 351; *Butler v. Peck*, 16 Ohio St. 334; *Laumier v. Francis*, 23 Mo. 181.

On the other hand, the courts of Massachusetts, New Jersey, New Hampshire and Wisconsin have rejected the doctrine of the civil law, and hold that the relation of dominant and servient tenements does not by the common law apply between adjoining lands of different owners, so as to give the upper proprietor the legal right, as an incident of his estate, to have the surface water falling on his land discharged over the land of the lower proprietor, although it naturally finds its way there; and that the lower proprietor may lawfully, for the improvement of his estate and in the course of good husbandry, or to make erections thereon, fill up the low places on his land, although by so doing he obstructs or prevents the surface water from

See *Shane v. Kansas City, St. J. & C. B. R. Co.* 71 Mo. 238; *Taylor v. Fickas*, 64 Ind. 167; *Bradcomb v. Ramotham*, 11 Exch. 602.

The distinguishing principle is this: Water running within the natural banks of a stream is known as a living stream, to the equal enjoyment of which all persons are entitled through whose land it runs; and to protection from the overflow of the waters of which all such land-holders are entitled, whether caused by the obstruction or diversion of the same. On the other hand, all other waters from rain, melted snows, etc., wherever found outside the natural banks of a stream, are surface water, to be absolutely appropriated, if he sees fit, by the one on whose land it is found, or, if he prefers, to be fenced out or embanked against to keep it off his land, regarding it in the language of Lord Tenterden in *Rea v. Pagham Comrs.*, 8 Barn. & C. 855, as "the common enemy," against which all are authorized to protect themselves, as the necessity of the case may require.

On this distinguishing principle rest the varying rules of servitude in the two cases, and from which, in the two cases, different rights, obligations, and liabilities necessarily result.

In examining into the nature of these rights, obligations, and liabilities, the fact must not be lost sight of that the rule establishing the same under the civil law is very different from that recognized and enforced by the common law.

In Pennsylvania, Ohio, Illinois, Louisiana, North Carolina and Iowa the rule of the civil law has been followed.

The contention that the landowners on the one bank owe a duty or obligation to the landowners on the opposite bank as respects the fending off of the overflow water, is based on the legal maxim, "*Sic utere tuo ut alienum non laedas*." This maxim is found of force both in civil law and in the common law; but the construction of the rule in the former system of law is very different from that which is enforced in the latter.

The construction by the civil-law writers and courts is expressed in the statement of the rule

by Pothier: "Each of the neighbors may do upon his heritage what seemeth good to him, in such manner, nevertheless, that he doth not injure the neighboring heritage."

Customs of Orleans, chap. 13.

Under this broad construction of the rule, it may be generally stated that under the civil law any act is unlawful on one man's land which is injurious to another's land. From this rule are deduced the principles as to surface water: *first*, that the upper landowner cannot divert the flow of surface water so as to deprive the lower land-holder of the right to receive it in its natural flow; *second*, that the lower land-holder cannot embank against it so as to prevent its flowing on to his land from the upper landowner; and *third*, that the upper landowner cannot by any change or use of his own land cause surface water to flow on the land of his neighbor when it would not otherwise do so.

The construction of the maxim by the common-law courts is very different, and the rules deduced therefrom as to surface water are in direct conflict with those of the civil law above stated.

See *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114; *Chatfield v. Wilson*, 28 Vt. 49.

The simple fact that injury results to one does not give a right of action. Such injury to be actionable must result from the violation of some right existing in and belonging to the party injured.

Limiting the inquiry to the case of the erection of any kind of structure by one, on his own land, the only "legal right" which can so exist in another as to make that structure unlawful, is some easement in the land, to the enjoyment of which that other is entitled, and through the interference with which that other receives injury and damage. Upon this principle rests the common-law doctrine of ancient lights.

See *Bradbee v. London*, 5 Scott, N. R. 120; *Partridge v. Scott*, 3 Mees. & W. 220; *Wyatt v. Harrison*, 3 Barn. & Ad. 871, 876; *Brown v. Windsor*, 1 Crompt. & J. 20.

passing thereon from the premises above, to the injury of the upper proprietor. *Luther v. Winnimmet Co.* 9 Cush. 171; *Parks v. Newburyport*, 10 Gray, 28; *Dickinson v. Worcester*, 7 Allen, 19; *Gannon v. Hargadon*, 10 Allen, 108; *Bowlsby v. Speer*, 31 N. J. L. 361; *Pettigrew v. Evansville*, 26 Wis. 238; *Royt v. Hudson*, 27 Wis. 656; *Swett v. Cutts*, 50 N. H. 439.

Embankment must not occasion injury to others.

"While it is true that a riparian owner may erect bulwarks to protect his property from injury by the stream, yet they can only do this when it can be done without injury to others, either to an owner upon the opposite side of or to those above or below him on the stream." *Wood, Nuisances*, § 360, citing *Gerrich v. Clough*, 48 N. H. 9, where the defendant had erected a break-water upon his bank of the river to protect it from injury by the water, but the effect of this was to throw the water against another's land, so that in high water his land was washed away, and such injury was held actionable.

It is held by the Ohio court that "a railway company, like an individual, may, on his own land, lawfully cut a new channel for a stream of water and turn the stream into such new channel, if thereby no danger is caused to another; but when

it so controls and directs the course of the stream that the water is thrown across the old channel and against and upon the land of another, and thereby causes damage to such other, the company is liable for such damage." *Valley R. Co. v. Franz*, 2 West. Rep. 358, 43 Ohio St. 623.

The court said in *Livington v. McDonald*, 21 Iowa, 172, that "the rules of the civil law, . . . so far as they deny to the upper owner the right to collect the water in a body, or precipitate it in greatly increased or unnatural quantities upon his neighbor, to the substantial injury of the latter, we deem to be just and equitable; . . . and to this extent it is supported by the weight of authority in the common-law courts."

The law recognizes the general rule that each may do with his own as he pleases, but it also recognizes the qualification to that rule that each should so use his own as not to injure his neighbor. *Id.* 173.

The same principle, as applied to the obstructing of a flow of surface water from the dominant to the servient estate, was recognized in *Drake v. Chicago, R. I. & P. R. Co.* 68 Iowa, 303. See notes to *Jordan v. St. Paul, M. & M. R. Co.* (Minn.) 6 L. R. A. 573; *Haines v. Hall* (Or.) 3 L. R. A. 600.

Upon this same principle is based the right of one man to have his house sustained by land of an adjacent landowner.

See *Stansell v. Jollard*, cited in *Solomon v. Vintners Co.* 4 Hurlst. & N. 585; *Hide v. Thornborough*, 3 Car. & K. 250.

The cases of the obstruction of lights not ancient, and of the excavation of ground up to land line, thereby causing the fall of a house of less than twenty years' standing, furnish illustrations of the familiar principle *damnum absque injuria*.

Humphries v. Brogden, 12 Q. B. 743; *Tapling v. Jones*, 11 H. L. Cas. 811.

Where one man's land owes a legal servitude to another man's property, that servitude cannot be interfered with by the owner of the land, even by an act otherwise lawful in itself; and if such servitude is interfered with, or destroyed, liability arises for the damage occasioned thereby to the other. But, unless there is such servitude due to another, the owner of the land may erect thereon such structure, lawful in itself, which he may deem to his interest.

This proprietary interest of one man in the land of another is "the legal right," which the law requires the owner of land to so regard that it shall not be injured or destroyed in the use of property otherwise lawful.

An analysis of all the decisions relative to the obstruction of streams will show that they necessarily rest on this rule of servitude, creating, so far as the bed of the stream is concerned, "the legal rights" of one man in the land of another man.

The low grounds adjacent to a river, but outside of its well-defined banks, do not owe any servitude to the waters resulting from rain, etc., in time of freshet, which do not flow within such banks, but which are found on such adjacent lands.

If such servitude is imposed by the law, it is perpetual in its obligations. It condemns these lands to unending slavery as the receptacle of waste, irregular, useless and vagrant waters. It is a lasting prohibition to the improvement and utilization of such lands. It extends to all structures on such lands, and to any change in the lands themselves by which the capacity of such lands to hold the water will be decreased. It extends to lands in the city, and to those in the country. On the border of the river no factories or mills could be erected, or any other building. In the cities no wharves could be built, nor could the lands ever be raised by filling in earth so that the same could be useful for streets, stores, and dwellings. The inhabitants in the lower part of a city could not be protected by levees from the inundations which would destroy their dwellings. In the country not only could no embankments or levees be raised, but the lowlands and marshes could not be filled up and made valuable for cultivation.

All authorities agree that the principles applicable to running streams, or watercourses, are not applicable to questions affecting mere surface water—rain-water or melting snow.

Washb. Easem. p. 439; Angell, Watercourses, § 108 a; *Flagg v. Worcester*, 18 Gray. 601; *Parks v. Newburyport*, 10 Gray, 28; *Luther v.* 13 L. R. A.

Winnissimmet Co. 9 Cush. 174; *Mellen v. Western R. Corp.* 4 Gray, 301; *Perry v. Worcester*, 6 Gray, 548; *Gannon v. Hargadon*, 10 Allen, 106; *Goodale v. Tuttle*, 20 N. Y. 459; *Hoyt v. Hudson*, 27 Wis. 656; *Bowley v. Spear*, 31 N. J. L. 851; *Dickinson v. Worcester*, 7 Allen, 19; *Chatfield v. Wilson*, 28 Vt. 49; *Sweet v. Cutts*, 50 N. H. 489, 9 Am. Rep. 276; *Dalhi v. Youmans*, 50 Barb. 816; *Waffle v. New York Cent. R. Co.* 58 Barb. 418.

The rule of the common law is that no legal right of any kind can be claimed, *jure natura*, in the flow of surface water, so that neither its retention, diversion, nor repulsion is an actionable injury, even though damage ensue.

Bowley v. Spear, 31 N. J. L. 351; *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114; *Atchison, T. & S. F. R. Co. v. Hammer*, 22 Kan. 763, 31 Am. Rep. 216; *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241; *Greatrix v. Haygood*, 8 Exch. 291; *Raustron v. Taylor*, 11 Exch. 869; *Broadbent v. Ramsbotham*, 11 Exch. 602; *Dickinson v. Worcester*, 7 Allen, 19; *Parks v. Newburyport*, 10 Gray, 28; *Luther v. Winnissimmet Co.* 9 Cush. 171; *Ashley v. Wolcott*, 11 Cush. 192; *Shields v. Arndt*, 4 N. J. Eq. 284.

Both by the civil law and the common law it is unlawful for one to collect surface water into ditches, sewers, etc., and in this concentrated form discharge it on the lower landowner.

Goldsmith v. Elsas, 58 Ga. 186.

But this rule does not in any manner conflict with the general rule governing surface water and the flow thereof. This general rule is recognized in Georgia.

Phinizy v. Augusta City Council, 47 Ga. 260.

There being no servitude due by the lowlands of a river to the overflow waters of a freshet from excessive rains, etc., there is no "legal right" in the owners on the opposite side of the river which is violated when such overflow waters are fended off from such lowlands, and in consequence no right of action for any supposed or real injury resulting therefrom. If there is any such actual injury it is *damnum absque injuria*.

That the rule of the civil law is otherwise is indisputable, but the common law is the law of Georgia.

One of the strongest cases maintaining the rule of the civil law, *Shane v. Kansas City, St. J. & C. B. R. Co.* 71 Mo. 287, 36 Am. Rep. 480, is overruled in *Abbott v. Kansas City, St. J. & C. B. R. Co.* 83 Mo. 271. See also *Martin v. Jett*, 12 La. 503; *Sowers v. Shiff*, 15 La. Ann. 300.

In the case before the court there is no ponding of water on the same side of the stream, and the effect of the embankment complained of is to turn the overflow water into the channel of the stream. This it is legitimate to do.

Slater v. Fox, 5 Hun, 544; *Harding v. Whitney*, 40 Ind. 379; *Wheeler v. Worcester*, 10 Allen, 591.

Lumpkin, J., delivered the opinion of the court:

The precise question in this case is whether the owner of land on the bank of a river can without liability erect on his own land an embankment which increases the overflow in times of flood upon the lands of the opposite proprietor, to the injury thereof; or is there any duty for each owner to receive upon his

land the share allotted it by nature of the flood-waters of the river? It is contended by defendant's counsel that the overflow from a river in time of flood or freshet is surface water, against which, by the common law, a man may protect himself without regard to the consequences to his neighbor. Many cases cited by him make a distinction between the common law and the civil law as to surface water: the former allowing the landowner to dispose of it in any way, the latter restraining him from so using it as to injure his neighbor's tenement. There is authority to show that there is no difference between the common and the civil law in this respect, but that the common follows the civil law. *Gilham v. Madison County R. Co.* 49 Ill. 484; *Gormley v. Sanford*, 52 Ill. 159; and the able opinion in *Boyd v. Conklin*, 54 Mich. 589.

There is much conflict in the American cases (Washb. Easem. p. 485, *353 *et seq.*), the majority of the States seeming to follow the so-called "civil-law rule." Thus it is material to consider whether the overflow, as above stated, is properly classed with surface water. This depends upon the configuration of the country, and the relative position of the water after it has gone beyond the usual channel. If the flood-water becomes severed from the main current or leaves the stream, never to return, and spreads out over the lower ground, it has become surface water; but if it forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel *animo revertendi*, presently to return, as by the recession of the waters, it is to be regarded as still a part of the river. The identity of a river does not depend upon the volume of water which may happen to flow down its course at any particular season. The authorities hold that a stream may be wholly dry at times without losing the character of a water-course. So, on the other hand, it may have a "flood channel," to retain the surplus waters until they can be discharged by the natural flow. The low places on a river act as natural safety-valves in times of freshet; and the defendant claims the right to stop up one of these without liability for ensuing damage.

The English cases on the question are not numerous, though from the decisions and dicta of the judges the law appears to be well understood and settled. In *Rex v. Pagham Comrs.*, 8 Barn. & C. 365, it was held that an owner of land on the seashore could erect works to protect his land from encroachments by the sea, without liability for damage inflicted on his neighbor. The sea was called a "common enemy," against which each might fortify at will.

It appeared in *Rex v. Trafford*, 1 Barn. & Ad. 874, that a canal had been built by authority of Parliament, and carried across a river and the adjoining valley by means of an aqueduct and an embankment containing several arches. A brook fell into the river above its point of intersection with the canal. In times of flood the water, which was then penned back into the brook, overflowed its banks, and was carried, by the natural level of the country, through the arches into the river, doing much mischief to the lands over which it passed. The aqueduct was sufficiently wide for the passage of the river

at all times but those of high flood. The occupiers of the injured lands adjoining the river and brook, for the protection thereof, erected banks (called "fenders"), so as to prevent the flood-water from escaping; consequently the water, in time of flood, came down in so large a body against the aqueduct and canal as to endanger them, and obstruct the navigation. The fenders were not unnecessarily high, and without them many hundred acres of land would be exposed to inundation. It was held that the defendants were not justified, under these circumstances, in altering for their own benefit the course in which the flood-water had been accustomed to run; that there was no difference in this respect between flood-water and an ordinary stream; that an action would have lain at the suit of an individual; and, consequently, that an indictment lay where the act affected the public. The conviction was accordingly sustained. The doctrine of *Rex v. Pagham Comrs.*, *supra*, was sought to be extended to this case, but Tenterden, *Ch. J.*, who had rendered the decision [in that case, said: "It has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons, to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons, and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these fenders cannot be justified. No case was cited or has been found that will support such a distinction. The *Pagham Case* . . . is of a very different kind. . . . In the one case the water is prevented from coming where, within time of memory at least, it never had come; in the other it is prevented from passing in the way in which, when the occasion happened, it had been always accustomed to pass." This seems to be an authoritative enunciation of the common law. *Menzies v. Breadalbane*, 3 Bligh, N. S. 414, is directly in point, but was determined by the law of Scotland. Yet the Lord Chancellor said: "It is clear beyond the possibility of a doubt that by the law of England such an operation could not be carried on. The old course of the flood stream being along certain lands, it is not competent for the proprietors of those lands to obstruct that old course by a sort of new water-way, to the prejudice of the proprietor on the other side." In *Atty-Gen. v. Lonsdale*, L. R. 7 Eq. 387, 20 L. T. N. S. 64, it was attempted to extend the sea doctrine to the case of a tidal river, but *Vice-Chancellor Malins* refused to so extend it on the authority of *Menzies v. Breadalbane*, *supra*, saying that Lord Eldon put that case upon the general law of England. In *Mason v. Shrewsbury & H. R. Co.*, L. R. 6 Q. B. 581, we find a dictum by Blackburn, *J.*, as follows: "Before the canal was made, the person whose estate the plaintiff now has, had the ordinary rights and liabilities of a riparian owner on the banks of a natural stream. He was entitled to have the water flow to him in its natural state, so far as that was a benefit,—as, for instance, to turn his mill, or water his cattle; and he was bound to submit to receive the water, so far as it was a nuisance, as by its tendency to flood his lands."

Lawrence v. Great Western R. Co., 4 Eng. L. & Eq. 265, 16 Q. B. 643, is considerably in point. A railway was constructed across certain low lands adjoining a river, over which the flood-waters used to spread themselves. These low lands were separated from the plaintiff's lands by a bank, constructed under certain Drainage Acts, which protected the plaintiff's lands from floods. By the construction of the railway the flood-waters could not spread themselves as formerly, but were penned up and flowed over the bank upon the plaintiff's lands. It was held that an action would lie against the company for the injury. Pattenon, J., said: "Prima facie this would give the plaintiff a cause of action, and the question is whether the company are protected by their act;" a question which cannot arise in our law. In connection with the cases of *Re v. Trafford* and *Lawrence v. Great Western R. Co.*, *supra*, it must be borne in mind that the first obstruction of the flood-waters there mentioned is, in England, justified by the statute authorizing it, and therefore stands on much the same footing as a natural obstruction; but the liability of the other party, who erected the second obstruction without statute authority, springs from the common law. No English authority has been found to controvert these principles, but the text-writers recognize them as settled law. Woolr. Waters, 218 (78 Law Lib. 212); Crabb, Real Prop. 420 (54 Law Lib. 263); Michael & W. Gas. & Water (London ed. 1884), pp. 218, 214, 606; Angell, Watercourses, §§ 338, 384; Gould, Waters, §§ 160, 209.

In grouping the American cases, those tending to sustain the contention of the defendant in error will first be stated. *Taylor v. Fickas*, 64 Ind. 167, was much relied upon. There the injury was caused by the obstruction of the passage of driftwood, both owners being on the same side of the river, and the lower owner having planted a row of trees along the dividing line. The opinion, it is true, treats overflow in flood times as surface water, but it will be noticed that nothing is said or decided about changing the course of the water. The facts are obviously different from those in the present case. In *Cairo & V. R. Co. v. Stevens*, 78 Ind. 278, the plaintiff's land was between the river and the railroad embankment. The overflow is treated as surface water, and the road held not liable; but it would seem that the water doing the damage had left the river, never to return. *Shelbyville & V. Turnp. Co. v. Green*, 99 Ind. 205, follows the last case. The turnpike was flooded because of an embankment erected by Green to protect his land from overflow, both parties being on the same side. It was held that the company could not recover. But note that the court adverts to the fact that the company did not own the soil over which the pike ran, but merely had an easement therein. *McCormick v. Kansas City, St. J. & C. B. R. Co.*, 57 Mo. 433, can also be distinguished. Here the overflowing water left the stream permanently, and entered a pond formed thereby and by other surface water, the draining of which pond caused the injury sued for.

In *Shane v. Kansas City, St. J. & C. B. R. Co.*, 71 Mo. 238, the overflow is apparently treated as surface water, although it had a way,

through a slough, back into the stream. But the court applied the civil law, and held the railroad liable. This case, together with that of *McCormick v. Kansas City, St. J. & C. B. R. Co.*, 70 Mo. 359, is overruled, in so far as the civil law was followed, by *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 83 Mo. 271, 20 Am. & Eng. R. R. Cas. 108, and the common law as to surface water returned to. In this last case it is said that the court in the *Shane Case* treated the overflow as part of the stream, and, therefore, that the decision was correct on common-law principles. In the *Abbott Case*, the court expressly assumes the waters to be surface waters. It seems they escaped from the bed of the creek, and flowed over the lands without any return. *Lamb v. Reclamation Dist. No. 108*, 78 Cal. 125, is not much in point. The defendant was a public corporation for the purpose of reclaiming the low lands protected by the embankment, which closed up a slough through which an inconsiderable part of the flood-waters escaped into a natural basin. The plaintiff's land lay two miles below, on the opposite side. The court applied the sea doctrine of the common law, and held the company not liable; but the decision is mainly rested on another ground, namely, that the corporation was not liable as for exercising the right of eminent domain; and in view also of the concurring opinions, the case is weak on the question involved in the case at bar. See below for an earlier decision by the same court, looking another way, not noticed in the case above.

In *Hoard v. Des Moines*, 62 Iowa, 826, the plaintiff's land was between the river and the embankment, and it was held that the plaintiff had no right to have the flood-waters from the river pass over his land on to that of another, although they finally joined the river again at a point further down. At first view, *Moyer v. New York Cent. & H. R. R. Co.*, 88 N. Y. 351, seems to support the defendant's position; but a close examination shows otherwise. The complaint averred that the damage was caused by the railroad building an embankment on the opposite side of the river. Evidence was offered and objected to, to show damage caused by raising the tracks. It was admitted, the railroad excepting. The referee included in his finding for the plaintiff the damages caused by raising the tracks, as to which the complaint alleged nothing, thus tainting the whole finding with illegality. The judgment was reversed for the error in admitting said evidence and in said finding. The court says the defendant, as a matter of law, would not be liable for consequential damages caused by the raising of the embankment on the company's own land in a proper and workman-like manner, citing *Bellinger v. New York Cent. R. Co.*, 28 N. Y. 47. This case bases the freedom from liability upon the legislative authority, but concedes that a private individual would be liable under the same conditions. In our law the railroad occupies no better position in this respect than the private individual.

Now will be stated the American cases going to show that the defendant is liable if it has erected the obstruction to the flood-waters of the river, as complained of in this case. The surplus waters do not cease to be a part of the river when they spread over the adjacent low

grounds, without well-defined banks or channel, so long as they form with it one body of water, eventually to be discharged through the channel proper. Thus it is held, where the waters of a stream disperse themselves over low ground, without any well-marked course, but gather up lower down into a defined channel, they are not surface water while in the dispersed state, and interference with them then gives the injured party a right of action. *Macomber v. Godfrey*, 108 Mass. 219; *Gillett v. Johnson*, 30 Conn. 180; *Briscoe v. Drought*, 11 Ir. C. L. 250; *West v. Taylor*, 16 Or. 165. But if it were conceded that the overflow is surface water, it would certainly cease to be such when turned back into the stream by the defendant's obstruction. *Sulvens v. Chicago, R. I. & P. R. Co.* 74 Iowa, 659; *Moore v. Chicago, B. & Q. R. Co.* 75 Iowa, 268; *Jones v. Hannover*, 55 Mo. 482; *Mississippi & T. R. Co. v. Archibald*, 67 Miss. 88. Under these authorities, this declaration might be sustained as complaining that the defendant prevented the flood-waters from becoming surface waters, and threw them back across the river upon plaintiff's land. See, further, as to surface water, 17 Cent. L. J. 42, 62; Angell, *Water-courses*, § 108a *et seq.*; Gould, *Waters*, § 263 *et seq.* But it is not necessary to take this view, as the following authorities show the defendant to be liable under the alleged facts: Where the effect of the defendant's dike was to retain on the land of the plaintiff flood-waters from the river longer than they would otherwise remain, the injury was held actionable, and the demurrer overruled. *Montgomery v. Locke* (Cal.) 11 Pac. Rep. 874. Where, in a freshet, the stream broke over one of its banks, carrying a part of it away, it was held that the owner might replace the bank with a dam, provided he did not build higher than the original bank, or otherwise cause the water to flow differently from the natural flow. *Pierce v. Kinney*, 59 Barb. 56.

"It is well settled that every person through whose land a stream of water flows may construct embankments and other guards on the bank to prevent the stream washing the bank away, and overflowing and injuring his land. But in doing this he must be careful so to construct them as not to throw the water upon his neighbor's lands, where it would not otherwise go in ordinary floods. If he does, he will be liable for the injury." *Wallace v. Drew*, 59 Barb. 413. There is no distinction in principle or authority between obstructing the flow of a stream at its ordinary level and in time of flood. *Burwell v. Hobson*, 13 Gratt. 822. This case is in point, and holds the defendant liable. Another case in point is *Crawford v. Rambo*, 44 Ohio St. 279, 4 West. Rep. 445, holding that flood-water is not surface water, and that interference therewith gives a right of action. So *Byrne v. Minneapolis & St. L. R. Co.*, 38 Minn. 212, holds that overflow in times of high water is not surface water, and the railroad is liable for obstruction of such water by an embankment erected on its own land. See also *Rau v. Minnesota Valley R. Co.* 18 Minn. 442 (Gil. 407), where the railroad made an extensive excavation on its own land, into which overflow waters from the Mississippi River entered, to the damage of an adjoining

owner. The railroad was liable. *Gerrish v. Clough*, 48 N. H. 9, 97 Am. Dec. 561, and notes, and *Tutill v. Scott*, 43 Vt. 525, seem not to involve the question as to the action of the water in times of flood, but are adverse to defendant as far as they go.

In *Carriager v. East Tennessee, V. & G. R. Co.*, 7 Lea, 898, the railroad embankment did not affect the usual flow of the streams, but obstructed the flood channel, and threw the excessive waters upon the plaintiff's lands. This same defendant contended that they were surface waters, which it had a right to obstruct. The trial court gave judgment for the defendant, holding "that the overflow in question resulted from accumulations of surface water caused by extraordinary rains, and that the law relating to surface water, and not that of running streams, governs the case." The supreme court said: "The question to be determined is, Is this such surface water as to relieve the defendant? . . . The springs and their branches are never-failing, and flow off in a northward direction towards the farm of plaintiff. In ordinary times they find outlets through the caverns or sinks in the earth. In extraordinary times their volumes are too great for the usual place of discharge. These springs and branches are sometimes large and sometimes small; still they are the same springs and branches, requiring, as all running streams do, sometimes less and at other times more surface for their escape. . . . If the embankment had been erected in a valley, near a low bank of the river, which overflowed at high tide, but escaped in one passage, so as not to materially injure adjoining lands, but, if obstructed by the embankment, would overflow and damage, as in this case, we think it would not be insisted that it was not obligatory on the defendant to build a culvert to prevent damage that must certainly come with the high tide. Is there a difference in reason as to the case put and the one at bar? We think not. While they may not be so frequent, the overflows from the branches are as certain as those from the river; one is as certainly a constant running stream as the other. . . . It is no defense for it to say that it was only in extraordinary times the injuries now complained of could result. The rises in the waters had for all time occurred at intervals before the building of the road, and it was to be conclusively presumed they would occur afterwards from similar causes." The court entered judgment for the plaintiff. This is a stronger case than the one now to be decided. Counsel for defendant ably and strenuously insist that the common, and not the civil, law be applied to this case. The above authorities prove that the common law does not regard the waters here complained of as mere surface water, but as a part of the river. The civil law might be more favorable to the defendant's case, for it seems to regard the flood-waters of a river as a common enemy, against which each riparian owner may build defenses with impunity. *Mulhot v. Pugh*, 80 La. Ann. 1859, citing authorities. The defendant also claims that the question is settled by an Act of the Legislature, and cites section 2253 of the Code. That section says: "All persons owning, or who may hereafter own, lands on any water-

courses in this State, are authorized and empowered to ditch and embank their lands, so as to protect the same from freshets and overflows in said watercourses; provided, always, that the said ditching and embanking does not divert said watercourse from its ordinary channel; but nothing shall be so construed as to prevent the owners of land from diverting un-navigable watercourses through their own lands." This contention may be answered in three ways: *First*. The declaration in this case distinctly alleges that the defendant did divert the river from its ordinary channel, for which act the Statute affords no shadow of protection. *Secondly*. The allegations of the declaration do not show that defendant embanked its land "so as to protect the same," but constructed an embankment on which to lay its track, without regard to any consequences of benefit or injury to the contiguous country. *Thirdly*. The construction long ago and repeatedly put by this court on the last part of the section, which says, "Nothing shall be so construed as to prevent the owners of land from diverting un-navigable watercourses through their own lands," necessitates the conclusion that this whole Statute is not alternative, but only declaratory, of the common law. In other words, the Legislature did not intend to give riparian owners the privilege of ditching or embanking their lands, or of diverting un-navigable watercourses, so as to injure neighboring proprietors, without liability therefor. Indeed, the power of the Legislature so to alter the common law is expressly denied in *Pearson v. Hill*, 33 Ga. Supp. 143. And in *Choates v. Danielly*, 80 Ga. 118, the same view is taken as to the intention of the Legislature in passing this Act. It is true, these cases deal with the diversion of an un-navigable stream, but it would be absurd to impute to the Legislature two conflicting intentions in the same Act; and the ground taken in *Pearson v. Hill* will equally well support the same rule of construction as to the other branch of the Statute. The facts in *Pearson v. Hill* require notice. The owners were on the same side of the Flint River, into which Beaver Creek emptied after passing through the defendant's land. By mutual agreement between the upper owner (plaintiff) and the lower owner (defendant), the expense being also shared, an embankment was erected along the river to keep back the flood-waters which, from the facts of the case, seemed to have this course,—that is to say, coming out on plaintiff's land, they flowed across the same over defendant's land into the creek, by which they would empty back into the river. The embankment not being kept up according to the agreement, defendant proposed to protect himself by diverting the creek through a canal on his own land to the river and building an embankment along his side of the canal. This canal would make an opening through the high bank of the river, and, with the embankment, would allow and cause the high waters to back up on the plaintiff's land. This court granted an injunction against the construction of the canal, but allowed the defendant to continue the embankment. One great difference from the present case might be found in the agreement for consideration to have the common protec-

tion of the first embankment. See *Savannah, F. & W. R. Co. v. Lawton*, 75 Ga. 192. But at any rate the decision does not contemplate that defendant's individual embankment would injure the plaintiff's land, such an inference being inconsistent with the plain language of the opinion on page 197.

There is another section of the Code, not cited or discussed in the argument, which deserves mention in this connection: "No person shall be permitted to make or keep up any dam to stop the natural course of any water, so as to overflow the lands of any other person, without his consent; nor shall any person stop or prevent any water from running off of any person's field, whereby such person may be prevented from planting in season, or receive any other injury thereby; nor so as to turn the natural course of any water from one channel or swamp to another, to the prejudice of any person." Code, § 1607. This Statute was passed September 29, 1773, and apparently revived by the Act of February 25, 1784 (*Marbury & C. Dig.* p. 404), being recognized by subsequent amendments and by the Codes (Acts 1855-56, p. 12; Acts 1865-66, p. 27). It is put in the Code under the head "Cultivation of Rice," but from reading the original Act (*Marbury & C. p.* 178) it is by no means clear that it was intended to apply only on rice farms. Neither the title nor the body of the Act contains the slightest intimation to that effect. Its terms are as broad and general as they well could be. The preamble, it is true, in stating the mischiefs to be remedied, describes such as probably were common in the localities where rice was cultivated, though even here there is no distinct allusion to rice culture. These mischiefs may, as a matter of history, have occasioned the enactment of the Statute. But might not the Legislature have deemed it wise to pass a general law, applicable in all portions of the State where similar mischiefs were likely to happen? It is not inconsistent with the purpose of an Act for curing a special class of mischiefs to provide therein a remedy at the same time for all mischiefs of that genus. On the contrary, that would be highly a proper mode of legislation. If the preamble is not to be given a controlling and restrictive effect, this Act alone would completely and effectually dispose of the present case, as the declaration alleges acts by the defendant which violate the law in question if it was intended to have a general application. But, since it is unnecessary for the purposes of this case to measure the extent of this statute, the question is not decided, especially as it deserves more argument and consideration. It was urged in the argument that the law ought to encourage the reclaiming and improvement of lands which are subject to injury from the natural action of floods and surface water, and it is surprising to find this argument unquestioningly relied upon in many cases which are supposed to follow the common law of surface water. The error therein is easily exposed, for to the same extent as the land of an adjoining owner is damaged by the improvement on the defendant's land, so far exactly is the development of the damaged land set back and retarded. The defendant might bring his land to perfection for his uses, and then have all

that good work ruined by the first measures of improvement adopted by his less progressive neighbor. The rule contended for by the defendant would be a poor encouragement to painstaking labor engaged in reclaiming unprofitable land. Everyone is charged with notice of nature's operations; but who can tell when a man will build his bulwarks against the flood? There is no public policy to allow one landowner to improve his condition at the cost of his neighbor; but the improver must, at his peril, see to it that the benefit to himself is large enough to pay both him and his neighbor's damage, if any. The law does not look to the interest of one individual, but recognizes and enforces the duties implied in his relation to others. Of course, for these principles to apply, there must be, as in this case, an invasion of some tangible right. *Peel v. Atlanta*, 85 Ga. 188, 8 L. R. A. 787.

And it must not be understood that this discussion rules anything beyond the questions contained in this particular case. Undoubtedly there is a class of rare cases not within the general rule, as indicated by the eloquent language of Agnew, J., in *Pittsburg, Ft. W. & C. R. Co. v. Gilleland*, 56 Pa. 452, where he says: "There is therefore no liability for extraordinary floods—those unexpected visitations whose comings are not foreshadowed by the usual course of nature, and must be laid to the account of Providence, whose dealings, though they may afflict, wrong no one." But such is not the case made by this declaration. For the foregoing reasons it is evident that the court erred in sustaining the demurrer to the declaration.

Judgment reversed.

NEW YORK COURT OF APPEALS.

Lena PAPPENHEIM, *Resp't.*,

v.

METROPOLITAN ELEVATED R. CO.,
et al., App'ts.

(...N. Y....)

The transfer of property abutting on a street in which an elevated railroad has been constructed, before bringing suit for damages for injuries to the appurtenant easements of light, air, and access or the transfer of them to the company, carries with it all the grantor's rights and remedies to compel payment of such damages, regardless of the price paid for the land.

(October 13, 1891.)

APPEAL by defendants from a judgment of the General Term of the Superior Court for the City of New York, affirming a judgment of the Special Term in favor of plaintiff in an action brought to compel payment of damages for injuries caused to plaintiff's property by the construction and operation of defendants' elevated railroad. *Affirmed.*

Statement by Peckham, J.:

This action is brought to perpetually enjoin the defendants from operating their railway in Second Avenue, between 120th and 121st Streets, in the City of New York, in front of the plaintiff's premises, and to procure the structure already built there to be removed, and to recover from defendants the loss and damage already sustained by reason of the past operating of the defendants' railway in front of the plaintiff's premises, and, if the defendants shall be permitted to so operate their road in the future, that it shall be only upon condition that they first pay to the plaintiff the amount of the permanent loss and damage to her premises sustained by her by reason of such operation, and also the amount of her loss and damage already sus-

tained. This is, in substance, the relief asked for by the plaintiff. The defendants in their answer to the complaint, set up various defenses, the chief of which, and the one particularly argued and relied upon here, is that the railway was built in 1880, and has been in operation ever since, and, if any damage has been inflicted upon plaintiff's premises by the erection and operation of the railway, such damage was inflicted at the time it was so built and operated, and at that time the premises were owned and possessed by some other person, and the plaintiff was not then their owner, and is not the owner of the cause of action. The court found that the plaintiff, on the 23d of April, 1889, became the owner of the premises, and has ever since owned them, and since that time there has been a valuable building standing on them. Since that time the plaintiff has also owned, as attached or appurtenant to the premises, an easement of light, air, and access in and over Second Avenue, and the only property rights of the plaintiff interfered with by the defendants are easements of light, air, and access therein appurtenant to the plaintiff's premises, and she is not seised of any estate in the land forming the bed of such avenue in front of her premises. The railroad had in fact been built and had been in operation along Second Avenue for some years prior to the time when the plaintiff purchased, in 1888. She paid, according to some of the evidence, the fair market value of the lot with the railroad in the avenue. It was also proved that the plaintiff had sustained injuries by the construction and operation of the road from the time of her purchase to the trial of the action in the sum of \$1,800, and that the value of the plaintiff's easement in fee taken, appropriated, or interfered with by reason of such construction and perpetual maintenance and operation of defendants' railway, over and above any benefits resulting therefrom and peculiar to the premises, was the sum of \$2,000. It was also found that the defendants were author-

NOTE.—Servitudes of light and air. See note to *Abendroth v. Manhattan R. Co.* 132 N. Y. 1.
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ized by certain Acts of the Legislature to exercise the right of eminent domain, and thus to acquire plaintiff's easement, if necessary, and defendants had like authority to build the railway in the streets in which it has been built; but there was nothing in the acts giving the defendants any authority to take plaintiff's property without compensation. The road has been built under the provisions of the so-called "Rapid Transit Act." Laws 1875, chap. 606.

Judgment was given for the plaintiff in accordance with the findings of the court, and it was provided that the injunction should not issue in case the defendants paid the amount of the damage to the fee upon the execution by plaintiff of a deed conveying to defendants plaintiff's interest in the easement taken by defendants. The judgment so entered was affirmed by the general term of the superior court of the City of New York upon appeal (13 N. Y. Supp. 955); and from the judgment of affirmance the defendants appeal here.

Messrs. John F. Dillon, Julien T. Davies and Brainerd Tolles, with Messrs. Davies & Rapallo, for appellants:

Equity does not intervene to prevent every trivial, insignificant or unsubstantial violation of a bare legal right.

McLaury v. Hart, 121 N. Y. 636; *Genet v. Delaware & H. Canal Co.* 57 Hun, 174; *Jeffers v. Jeffers*, 9 Cent. Rep. 875, 107 N. Y. 658; *Corning v. Troy I. & N. Factory*, 40 N. Y. 230; *Clinton v. Myers*, 46 N. Y. 521; *People v. Canal Board*, 55 N. Y. 397; *Health Dept. of New York City v. Purdon*, 99 N. Y. 287; *Morgan v. Binghamton*, 3 Cent. Rep. 648, 102 N. Y. 500; *Troy & B. R. Co. v. Boston*, *H. T. & W. R. Co.* 86 N. Y. 106; *People v. Metropolitan Teleph. & Teleg. Co.* 81 Hun, 596; *Drake v. Hudson River R. Co.* 7 Barb. 508; *Jerome v. Ross*, 7 Johns. Ch. 815, 2 L. ed. 805; *Livingston v. Livingston*, 8 Johns. Ch. 497, 2 L. ed. 196; *Sargent v. George*, 56 Vt. 627; *Blake v. Brooklyn*, 26 Barb. 801; *Atty-Gen. v. Nichol*, 16 Ves. Jr. 342; *Eastman v. Amoskeag Mfg. Co.* 47 N. H. 78; *Bigelow v. Hartford Bridge Co.* 14 Conn. 580; *Elmhirst v. Spencer*, 2 Macn. & G. 50; *Saunders v. Smith*, 3 Myl. & C. 711; *Dover Harbour v. Southeastern R. Co.* 9 Hare, 498; *Holyoake v. Shrewsbury & B. R. Co.* 5 Eng. R. & Canal Cas. 421; *Cooper v. Crabtree*, L. R. 19 Ch. Div. 198. See also *Purdy v. Metropolitan Elev. R. Co.* 86 N. Y. S. R. 48, and cases there cited.

Plaintiff's right, in the ultimate analysis, is really and substantially a right to compensation and not a right to the enjoyment of specific real property.

Henderson v. New York Cent. R. Co. 78 N. Y. 428; *Uline v. New York Cent. & H. R. R. Co.* 2 Cent. Rep. 116, 101 N. Y. 98; *Story v. New York Elev. R. Co.* 90 N. Y. 122; *Pond v. Metropolitan Elev. R. Co.* 112 N. Y. 189; *Tallman v. Metropolitan Elev. R. Co.* 8 L. R. A. 173, 121 N. Y. 119; *Abendroth v. Manhattan R. Co.* 122 N. Y. 1; *New York Elev. R. Co. v. Fifth Nat. Bank*, 135 U. S. 432, 34 L. ed. 281; *Krone v. Kings County Elev. R. Co.* 50 Hun, 431; *Taylor v. Metropolitan Elev. R. Co.* 18 Jones & S. 811; *Knox v. Metropolitan Elev. R. Co.* 13 L. R. A.

Co. 83 Hun, 517; *Sixth Ave. R. Co. v. Metropolitan Elev. R. Co.* 56 Hun, 182; *Pittsburgh, V. & C. R. Co. v. Oliver*, 181 Pa. 408, 44 Am. & Eng. R. Cas. 175; *McElroy v. Kansas City*, 21 Fed. Rep. 257; *Paterson N. & N. Y. R. Co. v. Kamiah*, 42 N. J. Eq. 98.

The easements in question have in themselves no more than a nominal value, and plaintiff's claim to substantial compensation rests wholly upon proof of consequential injury.

Newman v. Metropolitan Elev. R. Co. 7 L. R. A. 289, 118 N. Y. 618; *Henderson v. New York Cent. & H. R. R. Co.* 78 N. Y. 428; *Re New York, L. & W. R. Co.* 27 Hun, 151; *Re New York, W. S. & B. R. Co.* 29 Hun, 609; *Re Brooklyn Elev. R. Co.* 55 Hun, 165; *Re Union Elev. R. Co.* 80 N. Y. S. R. 164; *Re Kings County Elev. R. Co.* 35 N. Y. S. R. 367; *Brush v. Manhattan Elev. R. Co.* 26 Abb. N. C. 73; *Gray v. Manhattan Elev. R. Co.* 85 N. Y. S. R. 82; *Welsh v. New York Elev. R. Co.* 35 N. Y. S. R. 85; *Purdy v. Metropolitan Elev. R. Co.* 86 N. Y. S. R. 48.

The measure of compensation, where part of an entire tract is taken, is the difference between the actual market value of the entire tract at the time of condemnation and the market value of what will be left after the part proposed to be appropriated is taken out.

Newman v. Metropolitan Elev. R. Co. supra; *Troy & B. R. Co. v. Lee*, 13 Barb. 169; *Re New York, L. & W. R. Co. and Re New York, W. S. & B. R. Co. supra*; *Re Utica, C. & S. V. R. Co.* 56 Barb. 456; *Re New York Cent. & H. R. R. Co. v. Judge*, 15 Hun, 68; *Re Furman Street*, 17 Wend. 649; *Muller v. Southern P. B. R. Co.* 83 Cal. 240; *Geissinger v. Hillertown*, 183 Pa. 522; *Central Land Co. v. Providence*, 1 New Eng. Rep. 873, 15 R. I. 246; *Fr. Worth & N. O. R. Co. v. Pearce*, 75 Tex. 281; *Omaha Belt R. Co. v. McDermott*, 25 Neb. 714; *Pennsylvania S. V. R. Co. v. Cleary*, 125 Pa. 442; *Wichita & W. R. Co. v. Kuhn*, 38 Kan. 104; *Cresson, C. C. & N. Y. S. R. Co. v. Aunsman* (Pa.) 10 Cent. Rep. 340; *Reading & P. R. Co. v. Balthasar*, 12 Cent. Rep. 173, 119 Pa. 483; *Kucheman v. C. C. & D. R. Co.* 46 Iowa, 366; *Jeffersonville, M. & I. R. Co. v. Esterle*, 13 Bush, 667; *Pangor & P. R. Co. v. McComb*, 60 Me. 290; *Indiana, B. & W. R. Co. v. Allen*, 100 Ind. 409; *Virginia & T. R. Co. v. Henry*, 8 Nev. 165; *Dearborn v. Boston, C. & M. R. Co.* 24 N. H. 179; *Mt. Washington Road Co's Petition*, 35 N. H. 134; *Page v. Chicago, M. & St. P. R. Co.* 70 Ill. 324.

A property owner who has the bare legal title to the easement, and must rely upon present market values alone for the measure of his compensation, can receive only a nominal award.

A jury might well find that the loss sustained by one who exercised his lawful right of selling his own property, and was compelled because of the proximity of an elevated railroad to accept a diminished price for it, was the natural and proximate result of the construction and maintenance of the railroad. And if they so found, there is no legal reason why the railway company should not be liable to make compensation for the loss actually sustained.

Squiter v. Gould, 14 Wend. 159.

The wrong to be redressed in such a case is one which is personal to the owner and which

results from discrediting the property in the market, and which accrues only when the property is brought into the market for sale. It bears more analogy to slander of title than to any other tort mentioned in the books.

See Bishop, Non-cont. Law, § 845; *Like v. McKinstry*, 41 Barb. 186, 4 Keyes, 397; *Dodge v. Colby*, 11 Cent. Rep. 466, 108 N. Y. 445; *Linden v. Graham*, 1 Duer, 670.

An instance of a recovery by an abutting owner, who had sold his lots after the construction of a railway in front of them, of the loss sustained through the lessening of the price obtained, is furnished by—

Henderson v. New York Cent. R. Co. 78 N. Y. 423.

A cause of action for damages already accrued would not in any event pass by the deed.

Porter v. Metropolitan Elev. R. Co. 120 N. Y. 284; *King v. New York*, 8 Cent. Rep. 89, 102 N. Y. 171; *McFadden v. Johnson*, 72 Pa. 335. See *Foote v. Metropolitan Elev. R. Co.* 86 N. Y. S. R. 119.

Other instances of a recovery for the diminution in the price obtained for property upon a sale are found in—

Porter v. Metropolitan Elev. R. Co. supra, and *Paret v. New York Elev. R. Co.* See also *Hins v. New York Elev. R. Co.* 37 N. Y. S. R. 606; *Mulford v. Metropolitan Elev. R. Co.* 86 N. Y. S. R. 51; *Mortimer v. Manhattan R. Co.* 25 Jones & S. 509.

In other States instructive decisions may be found denying the right of one who has purchased land under such conditions as this plaintiff did to maintain an action for substantial damages.

Dunlap v. Toledo, A. A. & G. T. R. Co. 50 Mich. 470; *Pomeroy v. Chicago & M. R. Co.* 25 Wis. 643; *Dixon v. Baltimore & P. R. Co.* 1 Mackey (D. C.) 78, 8 Am. & Eng. R. Cas. 207; *Lewis v. Wilmington & M. R. Co.* 11 Rich. L. 91; *Church v. Grand Rapids & I. R. Co.* 70 Ind. 167.

Meers, Sackett & Bennett, for respondent:

Lord Coke calls the Register Brevium the oldest book of the law; and Fitzherbert in his new Natura Brevium, p. 290, says that the Register contains a writ for a grantee of land against the grantee of other land for abatement of a nuisance erected prior to either grant.

Among the early examples of actions on the case for nuisance are two which involve the points under consideration and decide it in accordance with the doctrine of Fitzherbert, where the remedy was pursued by *quod permittat*.

Westbourne v. Mordant, 1 Cro. Eliz. 191; *Beurick v. Comden*, 1 Cro. Eliz. 402. See also *Penruddock's Case*, 5 Coke, 101.

These cases go on the ground that a continuance of the nuisance was a new wrong or nuisance. Upon the same ground from the Year Books down have the cases proceeded, which have held that an action could be maintained against the heir of a person who had levied a continuing nuisance.

4 Liber Assisorum, 8; *Johnson v. Long*, 1 Ld. Raym. 870; *Roswell v. Prior*, 1 Ld. Raym. 713; *Moore v. Brown*, Dyer, p. 819, pl. 17; *Blunt v. Aikin*, 15 Wend. 522.

In Lord Eldon's time, chancery began to
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grant injunctions against nuisances of a continuous nature, and also against continuing trespasses. In this State the chancellor, following the authority of Lord Eldon, began at an early day to exercise a similar jurisdiction.

See *Brady v. Weeks*, 8 Barb. 157; *Corning v. Troy I. & N. Factory*, 40 N. Y. 191; *Campbell v. Seaman*, 63 N. Y. 568. See also *Barnhart v. Painter*, 2 Rawle, 82; *Staple v. Spring*, 10 Mass. 74.

The action at bar is not for a nuisance according to the technical language of the black-letter lawyers, but for a continuing trespass; but this makes the argument against the appellants all the stronger, if we consider the origin and nature of the action of the trespass. The writ of trespass is one of the oldest of the formed writs, *brevier formata*.

See Register, p. 93, *de Transgressionibus*.

In case of a continuing trespass, the person might bring a new action every day.

Maron v. New York Cent. & H. R. Co. 24 N. Y. 658; *Pond v. Metropolitan Elev. R. Co.* 112 N. Y. 186.

Every argument which can be made in favor of the rule announced by Fitzherbert and followed by Earl, J., in *Campbell v. Seaman*, 63 N. Y. 568, in an action for a continuing nuisance, applies with greater force in an action for a continuing trespass.

In the *Brookside Case*, 55 N. Y. 220, this court sustained a perpetual injunction, obtained by a purchaser of land abutting on a public street in the City of Brooklyn, restraining the further maintenance of a railway in the street in front of his premises, which was constructed and in operation prior to his purchase.

See *Griswold v. Metropolitan Elev. R. Co.* 123 N. Y. 102.

For years in all the lower courts the law has been settled adversely to the appellant's contention.

Glover Case, 19 Jones & S. 1; *Mitchell v. Metropolitan Elev. R. Co.* 56 Hun, 543; *Foote Case*, 36 N. Y. S. R. 119.

Mr. E. Willett Van Nest, also, for respondents:

A purchaser has the same right as his vendor to recover.

The Constitution requires compensation to be made before any real estate can be taken. Until the money is paid railroad companies acquire no rights under the Constitution and under the express provisions of the statutes.

Laws 1850, chap. 140, § 18; Laws 1875, chap. 606, § 20; *Sixth Ave. v. Kerr*, 73 N. Y. 838; *Re Washington Park Comrs.* 56 N. Y. 152; *Bloodgood v. Mohawk & H. R. Co.* 18 Wend. 19.

The easements of light, air, and access pass to the purchaser whether he acquire his title by will or deed.

Story v. New York Elev. R. Co. 90 N. Y. 145; *Hills v. Miller*, 8 Paige, 254, 3 L. ed. 141; *Child v. Chappell*, 9 N. Y. 246; *Taylor v. Hopper*, 63 N. Y. 649; *Arnold v. Hudson River R. Co.* 55 N. Y. 661; *Glover v. Manhattan R. Co.* 19 Jones & S. 1; *Rolf v. Rolf*, 5 Coke, 101a; *Penruddock's Case*, 5 Coke, 100; *Griswold v. Metropolitan Elev. R. Co.* 123 N. Y. 102; *Brookside v. South Side R. Co.* 55 N. Y. 220; *Corning v. Troy I. & N. Factory*, 40 N. Y. 192; *Crippen v. Morse*, 49 N. Y. 68; *Shepard v. Manhattan R. Co.* 117 N. Y. 442; *Dean v. Metropolitan*

Elev. R. Co. 119 N. Y. 546; *Tallman v. Metropolitan Elev. R. Co.* 8 L. R. A. 173, 121 N. Y. 119.

A person who sells property before condemnation proceedings have been begun cannot recover the diminished selling value.

Tallman v. Metropolitan Elev. R. Co. 8 L. R. A. 173, 121 N. Y. 123; *Pond v. Metropolitan Elev. R. Co.* 112 N. Y. 186.

Peckham, J., delivered the opinion of the court:

The structure erected by defendants in Second Avenue, in front of the plaintiff's premises, was an illegal structure, and inconsistent with the use of the avenue as a public street. At the time of building the railway a trespass was committed by the defendants upon the property now owned by the plaintiff, although she did not own it at that time. Such trespass has been continued from the time when the road was built up to the time when the judgment in this action was entered. By continuing the trespass the defendants laid themselves open to continuous actions, in which the recovery would be for the damage sustained up to the time of the commencement of each action. These propositions are clear, and are now undisputed. They have been settled by the *Story* and the *Uline Cases*, so familiar to the court and the bar. 90 N. Y. 122; 101 N. Y. 98, 2 Cent. Rep. 116.

As the structure is illegal, and as it constitutes while it exists a continuing trespass, the Railroad Company is under a legal obligation to remove it, and the law presumes that the Company will do so.

In an action at law the owner of the property interfered with or trespassed upon cannot recover damages to his premises, based upon the assumption that such trespass is to be permanent. He can recover only the damages which he has sustained up to the commencement of the action. The judgment entered for the damages sustained does not operate as a purchase of the right to continue the trespass. But the owner may resort to equity for the purpose of enjoining the continuance of the trespass, and to thus prevent a multiplicity of actions at law to recover damages; and in such an action the court may determine the amount of damages which the owner would sustain if the trespass were permanently continued, and it may provide that upon payment of that sum the plaintiff shall give a deed or convey the right to the defendant, and it will refuse an injunction when the defendant is willing to pay upon the receipt of a conveyance. The court does not adjudge that the defendant shall pay such sum, and that the plaintiff shall so convey. It provides, that, if the conveyance is made and the money paid, no injunction shall issue. If defendant refuse to pay, the injunction issues. It may be that, in the case of a railroad actually running its cars upon or through property of another, it would not be justified in refusing to pay upon the delivery of the conveyance, and, instead thereof, submitting to an injunction. Public interests might have a right to be heard in that respect. But it is enough to say that, in the 13 L. R. A.

cases where permanent damage is to be paid, there is a condition that a conveyance shall be made, and the defendant thus secures title to the property used. In cases where the owner wishes to actually stop the further trespass, and where the defendant has no legal right to acquire the property, such condition would not be inserted, and a strict injunction would issue upon the right of the owner being determined. *Henderson v. New York Cent. R. Co.* 78 N. Y. 423. The owner, if he receive the amount of the permanent damage, is by the court compelled to convey the interest to the defendant which the defendant pays for in that way. Condemnation proceedings are thus avoided. It is conclusively determined that the trespass is to be continuous, and defendant concedes it when it avails itself of the condition, and pays the permanent damage in order to receive the conveyance. It is only in this way that the owner recovers as for a permanent damage to his property.

In a case where the defendant has no power to condemn the property, if the owner in that event proceed in equity, he recovers only his damage up to the entry of the judgment, and at the same time secures an injunction which prevents the future trespass. If the owner sue at law, he recovers his damages as stated. If the owner, without having brought any suit in equity, sell his property at a loss caused by the erection of the railroad, the question at once arises as to what rights are acquired by the purchaser, and what claim, if any, has the vendor against defendant. The vendee has purchased and the vendor has sold to him, in fee simple absolute, the premises fronting the street, to which premises are attached, as property passing to him by the conveyance, the easements of light, air, and access which the defendant has already interfered with and trespassed upon by the erection and operation of the road. *Story v. New York Elev. R. Co.* 90 N. Y. 122; *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268, 6 Cent. Rep. 371; *Kane v. New York Elev. R. Co.* 125 N. Y. 164, 11 L. R. A. 640.

The vendee finds the Railroad making use of a portion of his property without right, and in the character of a mere wrong-doer. That use depreciates the value of the remaining part of the owner's property, and causes him daily damage. He institutes his action, either at law or in equity, to recover damages up to the time of the commencement of the action or permanently, and for an injunction, as the case may be, and, in answer to proof of ownership and daily or permanent damage, he is told by way of defense that the Railroad Company paid or is liable to pay to his vendor the difference between what the vendor sold the property for to him and what it could have been sold for if the railroad were not there, and therefore it has the right to continue the act which by such payment or liability has been changed from a trespass to a valid action. It is true that the railroad has not received any conveyance of any right to continue the trespass. On the contrary, the vendor conveyed to plaintiff the absolute fee simple in the property, and all the ordinary rights of ownership passed with such conveyance. It was after such

conveyance, and when the vendor was no longer owner, that, according to defendants, the Company paid, or became liable to pay, his alleged loss caused by such sale, and which payment or liability defendants now claim has altered the situation so effectually. The vendee, who obtained the property at what may have been a low price, has nevertheless the rights of a general owner which are not dependent upon the price which he paid for his title. Every day that the Company operates its road over or through the property of the plaintiff, it commit an illegal act or trespass; and the character of that act with respect to the property of the plaintiff is not in any degree affected by the fact that the plaintiff's vendor sold his property at a loss, which that vendor says he sustained from the illegal action of the defendant. There is no doubt that the same easements which were appurtenant to the premises owned by the plaintiff's vendor passed to his vendee, the present plaintiff, by the conveyance to her. They passed because they were appurtenant, and the vendor never attempted to reserve them, assuming even that such reservation were a legal possibility. As these easements passed to the vendee and became her property, as much so as the land itself, how is it that the Railroad Company has become possessed of the right to appropriate such easements, or any portion of them, without payment to her? Her private property is taken without compensation to her under such circumstances, if defendant have the right to permanently enter upon and use these easements; and thus a constitutional guaranty is violated in her case, and she is without redress. The answer to this assertion is made by the counsel for defendants in a very ingenious argument, the foundation of which is, however, laid in what seems to me an erroneous application of a general rule relating to the measure of damages in condemnation proceedings, and from which it is argued that the real actionable loss falls upon the owner of the property when the road was built, provided he sells his property in a depreciated market. They claim that such an owner has a cause of action to recover the loss he has sustained by a sale of his property in a market depreciated by the wrongful act of defendants in entering upon or appropriating the easements appurtenant to such property. The argument, of course, assumes that, if such a cause of action be made out, it must follow that none arises in favor of a subsequent purchaser who obtains the land at a price reduced on account of the existence of the road. Unless the one cause of action exclude the other, the defendants would accomplish nothing by proving the existence of one in favor of the original owner.

The defendants' counsel assert that the permanent damage to the property was sustained by the vendor at the time he sold to the plaintiff, and that the Company is liable to pay the same to him. Hence they say that in taking from the present owner the easements spoken of,—which, when separated from the land to which they are appurtenant, are of themselves but of a nominal value,—

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the defendants would only be condemned to pay therefor a nominal sum, such as six cents; and as to the resulting loss in value to the adjoining land of the vendee, caused by the erection and operation of the railroad, the vendee has not sustained that loss, because she has only paid for the property the sum to which it had depreciated by reason of the existence of the road in front of it. Continuing the argument, the counsel for the defendants state that if the present owner (the vendee) should commence an action to restrain the further trespass the defendants could at once commence proceedings to condemn the easements, and that the rule of damages would be the difference between the present market value of the whole property and that portion which would be left after the taking, and that difference would be nominal only; so that when the present owner commences her action to restrain the further commission of the trespass the whole matter may be adjusted in such suit, and the same rule of damages would obtain. The result would be either that the defendants would be enjoined from further operating their road until they paid six cents, the nominal damage sustained by the present owner, or else the bill would be dismissed entirely, on the ground that the aid of equity could not be invoked for the purpose of compelling the payment of merely nominal damages. This course of argument does not, as it seems to me, answer the claim of the present owner to enjoin the further trespass upon her property unless she is paid the damage which such trespass will permanently cause her. That damage is not merely nominal. In 1890, the defendants erected their road, and by its erection and operation depreciated the value of the property now owned by the plaintiff. In erecting their road, they trespassed upon the easements appurtenant to that property, and such trespass has been continuous ever since. By these wrongful acts the market value of the plaintiff's property has been greatly depreciated. If they were compelled to resort to condemnation proceedings, the defendants say it is the present market value which they must pay. The vice in this argument lies in the erroneous statement of the measure of damages. In such case, and under these circumstances, where the value has been depreciated by the wrongful entry of defendants upon the property, it is not the present market value of such property thus damaged that the defendants must pay. Actual market value at the time of the institution of the condemnation proceedings is usually the inquiry. But when the defendant has already entered upon the property, and has depreciated its value thereby, it is plain that the simple question of value at the time of condemnation is not the proper rule. In such case the inquiry must be, What would be the fair market value of the whole property at the time of condemnation, without the railroad? and the difference between that sum and the present market value of the property left, with the railroad in existence, would constitute the measure of damages to which the owner would be entitled. This insurges no new

rule of damages in condemnation proceedings in this State. As the entry was unlawful, it is, for the purpose of arriving at the value of the property, regarded as not made, and the inquiry is, What is the present value of such property without the presence of a structure which is there without right, and which cannot be continued without payment in full for all damage done? Its existence cannot be considered for the purpose of diminishing what would otherwise be the present market value of the property. I think the same rule would hold in the case put by the defendants, where the city or any other body having the power should seek to take the owner's property, even though such owner had himself purchased subsequent to the erection of the road. The city would have no right to take the property from its owner on a valuation based upon the permanent character of a trespass which the law regards as temporary. The inquiry in the case supposed would still be, What would be the fair market value of the property with the railroad away? That sum the city would have to pay; and when it acquired the title it would have the same right as any other owner to compel the defendants to desist from their trespass, or pay the amount of permanent damage they caused by its continuance. Under this rule the amount which the present owner may have paid for the property will be wholly immaterial. As the act of the defendants in trespassing upon or appropriating any portion of the property was unlawful, any depreciation in the value of the property caused by such illegal action cannot be regarded in fixing the value of the property to be taken, or the damage to that which will remain. The claim of the defendants that this depreciation in value was suffered by the original owner when he sold, and that it is a personal claim in his case against them for which they are responsible, cannot, as it seems to me, be maintained. Such a doctrine would do away with the right of an owner of property to prevent a continuous trespass upon it by another. The defendants would say that, because the original owner transferred the property to his vendee, the defendants by reason thereof were thereby invested with the right to continue forever the original trespass, and the consideration for such license rested in their liability to pay (not necessarily in the payment to) the vendor the difference between the sum which he actually received for the conveyance of his land and that which he would have been able to secure, had it not been for the acts of the defendants. Whether such sum had been paid or not would be immaterial so far as concerned the present owner. That would be a matter between the original owner and the defendants. But the present owner, on account of the transfer of the land to him, would really have no right to prevent the trespass, no matter how much in truth his property was damaged, and although the defendants had no more title to the property trespassed upon than they ever had. They could have no title, because the original owner transferred it to his vendee, and after such transfer, of course, that owner could

not again transfer any portion of the property to anyone else. The vendee took the title, and he certainly has not conveyed it to the defendants, but, on the contrary, still retains it absolutely. Thus, with no title, the defendants have, by this course of reasoning, been in substance invested with a right to perpetually appropriate property belonging to the plaintiff, because of a liability on their part, as they allege, to pay a former owner certain damages which he alleges he sustained by selling his property to the plaintiff at a reduced value caused by defendants' illegal act. This mere liability of the defendants to reimburse the vendor operates, by defendants' argument, as a bar to the rights of the vendee. If not paid by the defendants, the liability still remains, and of course the bar still continues; and thus the general right which follows the possession of property to protect it from a trespass is denied an owner because the defendants are, they say, liable to a former owner on a personal claim by him for a loss occasioned by a sale. Heretofore absolute ownership or legal possession of property has been regarded as sufficient to enable the owner to protect it from a trespass. It has been sufficient to permit him to maintain an action to restrain its continuance, even though he was fortunate enough to secure the property at one half its value. The inquiry in such cases, where the owner sought to restrain the future trespass, has never been in regard to the price which the owner paid, or whether the former owner sold at a loss on account of the trespass. The inquiry has been whether the plaintiff was the owner or entitled to the possession, and whether the acts of the defendant were illegal. That is all that should now be required.

I have thus far referred to the case of the vendee for the purpose of inquiring what rights appertained to him as the present owner of the property. But the argument in favor of the vendor, who owned the property when the road was built, and who sold his land in a depreciated market caused by the wrongful acts of the defendants, is not to my mind very strong. In the first place, he had his right of action to recover for all damage caused by the trespass up to the time of the commencement of his action, and the subsequent conveyance of the land would not in any way affect that right. If he desired to restrain its further continuance, or to recover for the permanent damage caused, he could while owner commence and maintain his action in equity. In that action he would obtain full relief. If he chose to sell instead of using the remedies which the law gives him, that was a matter, legally speaking, of his own choice. The defendants did not compel or limit or restrain such sale. Nothing that they did could be said to amount to any compulsion by them. The law says their action cannot be regarded as a permanent trespass, for the very reason that it is unlawful, and the law will not presume that an unlawful act is to be forever continued. His choice to sell, rather than avail himself of the remedies given him by the law, does not furnish a cause of action against the defendants to reimburse him for a loss,

arising because of the presumption he has indulged in that the trespass would be continuous and unpaid for. He has chosen to regard the trespass in a light opposite to that in which the law regards it, and the loss he has suffered thereby is not one which the law can regard as caused by the defendants. If the original owner thus chooses to sell his property without enforcing those rights which he has only by virtue of such ownership, the purchaser at any rate takes his fee, and with it the rights of such an owner. The right to enjoin the continuance of the trespass has not escaped by the conveyance. It cannot rest with the vendor, for he has no longer any interest in the land. Unless it passed to the vendee, it has vanished; and yet no conveyance by anyone having the right to convey has been made to the trespasser, and so far as the legal title to the property is concerned the trespasser has no lot or parcel in it. It seems to me the right passed to the vendee. I can see no similarity in the case of the owner of property who has thus sold at a loss, to that of one who has suffered from a slander of his title. To start with, there is in the case at bar no slander. And again, there is no malice. The erection of a structure on plaintiff's property by defendants cannot be twisted into a slander of plaintiff's title by them. No one asserts that the defendants built their road knowing they were wrong-doers or trespassers. The findings in this case substantially negative any such idea. The court finds that the road was built in conformity with plans prescribed by boards of commissioners appointed under legislative authority. It has been held that punitive damages ought not to be awarded against defendants for the taking of the property of abutting owners by the building of their road. *Powers v. Manhattan R. Co.* 120 N. Y. 178.

In brief, all the substantial facts which constitute a cause of action for slander of title are absent in this case, and the facts which exist here have no analogy to those which constitute such a cause of action. The wrong by the defendants in the erection of the railroad does not directly or proximately cause the sale of the vendor's property at a loss. The defendants' counsel lays down the rule broadly that "whoever, by a wrongful act, limits or restrains another in respect to his lawful right to dispose of his property in the market to the best advantage, is liable in an action at law for the damages thereby occasioned." Without stopping to question the accuracy of the rule which the defendants here lay down as an abstract proposition, I think no case can be found where it has been enforced under such circumstances as this case presents. All the facts must be here taken into account. It must be remembered that the law regards the act as a temporary wrong only, and as such it provides a full remedy for it. It provides a full equitable remedy if the owner choose to pursue it, and the act be of a permanent nature. If, instead of resorting to his legal or equitable remedy, he chooses to sell, it cannot be said that in a legal sense he has been limited or restrained in respect to his lawful right to sell his property by

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defendants' wrongful act. The connection between the sale and the alleged cause is too remote and indefinite. It is not proximate or direct. Further than this, however, the right of action with respect to the damage inheres in the owner and possessor of the land and it is by reason of such ownership and possession that the right of action accrues. *Brostedt's Case*, 55 N. Y. 220; *Corning v. Troy I. & N. Factory*, 40 N. Y. 191.

A perpetual injunction was sustained in the first above-entitled case, which was obtained by a purchaser of land abutting on the street, restraining the further operation of the road, although it was operated prior to his purchase. Nothing that has been said in any other case in this court is opposed to these views. On the contrary, they are in the line of all its previous utterances. The point was not decided in the *Henderson Case* nor has it been decided in the *Lawrence Case*, against these same defendants. Reported in 126 N. Y. 483, 18 L. R. A. 102. The question in the last case was in relation to the validity of the defense alleging that the property was used for the purposes of a house of prostitution. The defense was disallowed for the reasons stated in the opinion of Andrews, J., and the rule of damages stated in the *Uline Case* was reiterated,—that of diminished rental value.

The case of *King v. New York*, 102 N. Y. 171, 8 Cent. Rep. 89, simply held that the right to compensation for the property taken belonged to him who was the owner of the fee at the time the city took possession, although before the award under the statute the original owner had conveyed the premises. This was upon the ground that the Statute authorizing the taking contained an adequate and certain method for raising the money on the part of the city to pay for the taking, and that when the possession was taken by the city under the Statute it was a legal possession, and the award which was subsequently made paid for the title at the time the possession was taken, and that was in the original owner, who conveyed before the award was made. The *Tallman Case*, 121 N. Y. 119, 8 L. R. A. 173, does not assert or assume that the plaintiff could recover for the diminished rental value for a term any portion of which was in the future. The recovery in that case had been allowed for a possible use of the premises which the plaintiff had not, in fact, attempted to make, and the possible profits for such possible use we held he was not entitled to. I have, as is seen, alluded to but a few of the many cases cited by counsel in the very elaborate briefs submitted to us. I have, however, read them, and I feel confident that nothing is laid down herein which is opposed to anything heretofore decided by this court.

What the ultimate rights of lessor and lessee, against defendants, may be, we, of course, do not decide in this case. Their rights are not before us. Whether there is or is not any distinction between the rights of a vendor in fee and those of a lessor, is not the question, and we do not, therefore, argue it.

The judgment here should be affirmed, with costs. All concur.

IOWA SUPREME COURT.

William J. LEMP

v.

Nixon FULLERTON, Sheriff, etc., *Appt.*

(.....Iowa.....)

1. **Replevin will not lie** for goods in the hands of a sheriff by virtue of a search warrant in proceedings to declare a forfeiture, even if they are in the original packages in which they were brought into the State and the plaintiff is therefore entitled to have them restored to his possession.
2. **Jurisdiction to grant a continuance** in proceedings for the forfeiture of goods cannot be inquired into in replevin for the goods against the sheriff.

(June 1, 1891.)

APPEAL by defendant from a judgment of the District Court for Des Moines County, in favor of plaintiff in an action brought to recover possession of certain personal property. *Reversed.*

The facts are stated in the opinion.

Messrs. Newman & Blake, for appellant:

The replevin proceeding was disorderly without support of any statute whatever, glaringly illegal, and was in contempt of the decisions of this court (*State v. Harris*, 38 Iowa, 246; *Funk v. Israel*, 5 Iowa, 453), and of the United States Circuit Court for the Southern District of Iowa.

Senior v. Pierce, 31 Fed. Rep. 632.

Where personal property has been seized under a legal writ from a court having jurisdiction, such property cannot be replevied by the owner.

Ibid.

NOTE.—*Replevin will not lie for property in legal custody.*

At common law, property in the custody of an officer, under a valid, legal process, could not be the subject of replevin. *Smith v. Huntington*, 3 N. H. 76; *Perry v. Richardson*, 9 Gray, 216; *Gardner v. Campbell*, 15 Johns. 401; *Pott v. Oldwine*, 7 Watts, 173; *Gist v. Cole*, 2 Nott & McC. L. 456; *Griffith v. Smith*, 22 Wis. 646; *Ratford v. Hyde*, 36 Ga. 98; *Goodrich v. Fritz*, 4 Ark. 625; *Freeman v. Howe*, 65 U. S. 24 How. 450, 16 L. ed. 749; *Carroll v. Hussey*, 31 N. C. 89; *Lathrop v. Cook*, 14 Me. 414.

But in order to exempt property from seizure under a writ of replevin, in such a case, it must be held by a valid process, and the rule does not apply if the law under which the first process issued is unconstitutional. *Cooley v. Davis*, 34 Iowa, 128.

And if it is apparent on the face of the process that it was issued without jurisdiction, it would not protect the goods taken thereon from a writ of replevin. *Wood v. Orser*, 25 N. Y. 348.

Goods in custody of the law, or held by an officer or by any legal process, are not ordinarily the subject of replevin. Any attempt to interfere with them was formerly regarded as a contempt, and punished severely. *Cobbey, Replevin*, § 299, citing 1 Chitty, Pl. 164; *Phillips v. Harris*, 3 J. J. Marsh. 123; *Funk v. Israel*, 5 Iowa, 450; *Cooley v. Davis*, 34 Iowa, 128; *Powell v. Bradlee*, 9 Gill & J. 220; *Hagan v. Deuell*, 24 Ark. 216; *Goodrich v. Fritz*, 4 Ark. 625; *Allen v. Staples*, 6 Gray, 493; *Beers v. Wuerpui*, 24 Ark. 273; *Shearick v. Huber*, 6 Bin. 4; *Morgan v. Craig*, Hardin, 101; *Hall v. Tuttle*, 2 Wend. 478; *McLeod v. Oates*, 30 N. C. 387; *Jenner v. Joffie*, 9 13 L. R. A.

Where liquors were seized under search warrant they could not be replevied.

Funk v. Israel, *supra*; *Cooley v. Davis*, 34 Iowa, 128; *State v. Harris*, *supra*; *Weir v. Allen*, 47 Iowa, 482; *Fries v. Porch*, 49 Iowa, 351; *Thompson v. Button*, 14 Johns. 84; *Kellogg v. Churchhill*, 2 N. H. 412; *Freeman v. Howe*, 65 U. S. 24 How. 450, 16 L. ed. 749; *Deahler v. Dodge*, 57 U. S. 16 How. 622, 14 L. ed. 1084; *Musgrave v. Hall*, 40 Me. 498; *Griffith v. Smith*, 22 Wis. 646.

Mr. S. L. Glasgow, for appellee:

The action of replevin can be maintained upon the facts involved in this case, and is the proper remedy. The petition of appellee contains all the requirements of the Code, prescribed for actions in replevin.

McClain's Code, 1888, § 4455; *Fries v. Porch*, 49 Iowa, 356.

The law under which the warrant was issued being unconstitutional, the search warrant therefore furnished no authority for the retention of the property.

Cooley v. Davis, 34 Iowa, 130.

Replevin will lie if the property is not rightfully held by the officer under the writ, and the question of the wrongful detention, therefore, is the gist of the action.

State v. Harris, 38 Iowa, 242; *Armel v. Lendrum*, 47 Iowa, 537.

In the case at bar, the law under which the pretended warrant was issued, and under which the seizure was made, is unconstitutional and has been so declared; therefore, the process or warrant under which the seizure in question was made is void and this action may be maintained for the property so seized. *Bowman v. Chicago & N. W. R. Co.* 125 U.

Johns. 384; Buckley v. Buckley, 9 Nev. 379; *Watkins v. Page*, 2 Wis. 97; *Beeside v. Fischer*, 2 Harr. & G. 320; *Spring v. Bourland*, 11 Ark. 668; *Watson v. Todd*, 5 Mass. 271; *Mulholm v. Cheney*, Add. 301; *Goodheart v. Bowen*, 2 Ill. App. 578; *Badlam v. Tucker*, 1 Pick. 389; *Brownell v. Manchester*, Id. 234; *Milliken v. Selye*, 6 Hill, 623; *Squires v. Smith*, 10 B. Mon. 38; *Cromwell v. Owings*, 7 Harr. & J. 55; *Musgrave v. Hall*, 40 Me. 498; *Armel v. Lendrum*, 47 Iowa, 536.

It was undoubtedly well settled at common law, even with respect to courts sitting under the same general jurisdiction, that the custody of property by one court under legal process could not be disturbed by the authority of any other court of concurrent judicial power. See *Payne v. Drew*, 4 East, 523; *Evelyn v. Lewis*, 8 Hare, 472; *Noe v. Gibson*, 7 Paige, 513, 4 L. ed. 252.

This principle has been modified by the legislation of Iowa with respect to civil actions in its own courts. The Code of Iowa, § 8223, provides that the action of replevin may be under certain circumstances maintained for property in the possession of an officer holding it by legal process.

Money, credits and property are in the custody of the law when held by executors, administrators, guardians and like quasi officers, in their representative and administrative capacity. They are accountable to courts for what they administer, and there is ordinarily the same reason that the law's custody of the things and credits should not be disturbed in their hands, as there is for non-disturbance in the hands of a sheriff or other officer. *Roth v. Hotard*, 32 La. Ann. 280; *Brooks v. Cook*, 6 Mass.

S. 465, 81 L. ed. 700; *Leisy v. Hardin*, 185 U. S. 100, 84 L. ed. 128. See *Osborn v. Bank of U. S.* 22 U. S. 9 Wheat. 738, 6 L. ed. 204.

The official acts of a justice of the peace, to be valid, must be in accordance with the provisions of the statute from which he derives his legal and official existence.

Cook v. United States, 1 G. Greene, 42.

Even had appellee consented to an adjournment, the justice would have lost jurisdiction over the subject matter of the suit. Jurisdiction over the "subject matter" cannot be conferred by consent.

Boyer v. Moore, 42 Iowa, 544; *Hamilton v. Hillhouse*, 46 Iowa, 74; *McMeans v. Cameron*, 51 Iowa, 691; *Hynds v. Fay*, 70 Iowa, 433.

This is not a collateral attack upon the pretended judgment of the justice, but is a question of jurisdiction which is never waived, and can be raised at any time.

Moore v. Reeves, 47 Iowa, 81; *Brown v. Davis*, 59 Iowa, 641.

A seizure, if valid originally, must be followed up by the forfeiture of the property seized. If the proceedings be abandoned, the seizure becomes a nullity.

Josefa Segunda, 28 U. S. 10 Wheat. 812, 6 L. ed. 329.

Robinson, J., delivered the opinion of the court:

In the year 1889 plaintiff was a brewer, engaged in business in St. Louis. In May of that year he shipped from St. Louis to Burlington, consigned to himself, a car-load of beer. His agents at Burlington were Werthmueller & Ende. After the car containing the beer had been placed on a side track at Burlington, it was opened by the agents named, but on the 15th day of May,

before the beer had been removed, and while it was in the original casks in which it had been shipped, a part of it, including that in controversy, was seized by the defendant, as sheriff, by virtue of a search-warrant issued under the provisions of section 1544 of the Code. The information on which the search-warrant was issued charged that the intoxicating liquors which it described were owned by Werthmueller & Ende. After defendant made his return on the search-warrant, the justice of the peace who had issued it caused notice to be given to Werthmueller & Ende, and to all others whom it might concern, to appear at his office on the 24th day of May, to show cause, if any they had, why the liquors seized should not be forfeited. On the day fixed for the hearing plaintiff appeared in the justice's court, and filed a pleading, in which he alleged that he was the owner of the property in controversy; that it was shipped from Missouri to Iowa, and seized by the sheriff while in the original packages, and before it had been delivered by the railway company; that it had not been sold, nor kept for sale, in violation of the Laws of Iowa. On the 16th day of May this action was commenced, and the property in controversy was surrendered to the coroner. After the plaintiff in this action had filed the pleading described in justice's court, the State moved for a continuance, and as ground for the motion showed that this action had been commenced, and that the property seized by the sheriff under the search-warrant had been taken from him and was not at that time under his control, nor subject to the order of the court. The court thereupon sustained the application, and continued the case until November

246; *Commercial Bank v. Neally*, 39 Me. 402; *Hanson v. Butler*, 48 Me. 81; *Force v. Brown*, 32 N. J. Eq. 118; *Conway v. Armington*, 11 R. I. 116; *Davis v. Drew*, 6 N. H. 308; *Bank of Chester v. Ralston*, 7 Pa. 482; *Parker v. Donnelly*, 4 W. Va. 648; *Thorn v. Woodruff*, 5 Ark. 55; *Fowler v. McClelland*, 5 Ark. 188; *Post v. Love*, 19 Fla. 634; *Mock v. King*, 15 Ala. 66; *McCreary v. Topper*, 10 Pa. 419.

It is laid down as a well-established principle, that, whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court and under its control for the time being; and no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises. *Buck v. Colbath*, 70 U. S. 3 Wall. 341, 18 L. ed. 200. See also *Hagan v. Lucas*, 35 U. S. 10 Pet. 400, 9 L. ed. 470; *Freeman v. Howe*, 65 U. S. 24 How. 450, 16 L. ed. 749; *Watson v. Jones*, 80 U. S. 13 Wall. 679, 20 L. ed. 666; *Noe v. Gibson*, 7 Paige, 513, 4 L. ed. 252.

It has been held that property in the hands of a garnishee is in the custody of the law, and that an officer has no right, after the garnishment, to take the property from the garnishee. *Dennistoun v. New York Croton & S. Faucet Co.* 6 La. Ann. 782.

In general, goods in the custody of the law cannot be replevied, even if the execution has been paid and satisfied. If the officer, upon an execution against A, seizes the goods of B, the latter may bring replevin. Or, if the judgment was void for want of jurisdiction, replevin lies. 2 *Estee*, Pl. § 2155.

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To constitute a valid levy, the officer must bring his property under dominion and control. This he cannot do while it is in the hands of another officer under levy, for he could not lawfully obtain any dominion over it while thus in custody of the law. *Seymour v. Newton*, 17 Hun, 32.

In accordance with the principle stated in the preceding cases, it is held that property once levied on under a valid execution remains in the custody of the law, and it is not liable to be taken by another execution in the hands of a different officer, and especially by an officer acting under another jurisdiction. *Hagan v. Lucas*, 35 U. S. 10 Pet. 400, 9 L. ed. 470; *Taylor v. Carryl*, 61 U. S. 20 How. 584, 15 L. ed. 1028; *Clymer v. Willis*, 3 Cal. 363; *Thompson v. Brown*, 17 Pick. 462; *Kidder v. Orcutt*, 40 Me. 589.

Reason for the rule.

This principle is said to be essential to the dignity and just authority of every court, and to the comity which should regulate the relations between all courts of concurrent jurisdiction. A departure from it would lead to the utmost confusion, and to endless strife between concurrent jurisdiction deriving their powers from the same source; but the consequences of such a departure would be still more disastrous in the conflict of jurisdiction between courts whose powers are derived from entirely different sources, while their jurisdiction is concurrent as to the parties and the subject matter of the suit. *Buck v. Colbath*, 70 U. S. 3 Wall. 334, 341, 18 L. ed. 257, 260.

5, 1889, "to enable the district court to make some adjudication in the replevin suit." It was further ordered that, if the suit should be still pending at the date to which the cause was continued; then it should be subject to a further continuance, on the request of the State. On the 5th day of November, 1889, the cause was continued to the next day by the justice, on account of the general election. On the 8th day of November, there being no appearance by the claimants, the property in controversy was adjudged to be forfeited. When the coroner attempted to serve the writ of replevin, the sheriff at first refused to surrender the property. Thereupon an application was made to the court from which the order issued, which recited the refusal of the sheriff and asked that he be required to show cause why he should not be punished for contempt. The court upon that application ordered the sheriff forthwith to deliver to the coroner the property in controversy, and that order was obeyed. The defendant asked the court, by motion, to cancel that order, but the motion was overruled. In September, 1889, the defendant filed his answer. In January, 1890, the plaintiff filed a reply, and the trial of the cause was commenced to a jury. After all the evidence had been introduced, the defendant asked the court to direct the jury to return a verdict for him, but was refused. The court then, upon its own motion, instructed the jury to return a verdict for plaintiff, which was done.

1. The plaintiff contends that the law under which the seizure was made by defendant is unconstitutional, and relies upon the case of *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, as sustaining his claim. In that case the Supreme Court of the United States held that a citizen of one State has a right to import intoxicating liquor into another State, and there sell it in original packages, notwithstanding a prohibition of the statutes of the State into which the liquor was imported; and in which it was sold. So far as such statutes prohibit transactions of that kind, they were held to be in conflict with the Constitution of the United States, and therefore void. But it was not held that a State may not enforce its police regulations against traffic in liquor which is not in the nature of interstate commerce. The State has the right to enforce such regulations, and one of the means provided is a proceeding by search warrant, such as was adopted in regard to the liquor in controversy. It may be conceded that such liquor was prohibited from forfeiture by reason of the rule announced in the *Leisy Case*, and that upon the final hearing before the justice it should have been restored to plaintiff. But the object of the proceeding was to ascertain if a law of the State was being violated, not to declare forfeited property which was not subject to its provisions. In such a case, if the court errs, the party aggrieved has the right of appeal. The proceeding cannot, however, be ignored nor treated as a nullity. It is a duly constituted

means of ascertaining and determining the rights of the respective parties in interest, including the right of the owner of the property to claim it as exempt from the operation of the state laws, and the decision of the court is binding, as in other cases. It follows from what we have said that the search warrant was properly issued, and the property in controversy was rightfully in the hands of the defendant when this action was commenced and the writ of replevin was issued.

It was said in *Funk v. Israel*, 5 Iowa, 450, that liquors seized by virtue of a search warrant issued under a statute substantially the same as section 1544 of the Code could not be replevied. That decision was approved in *State v. Harris*, 38 Iowa, 246. It was said in the case last cited that the writ of replevin was not a lawful process for taking property from the possession of an officer rightfully holding it, under a writ properly issued in a criminal proceeding. We conclude that the writ of replevin was wrongfully sued out in this case, and that the court had no power to cure the defect by ordering the sheriff to deliver the property in question to the coroner.

2. It is urged that the action of the justice in continuing the proceedings in connection with the search warrant from May 24 to November 5, 1889, was unauthorized, and that by so doing he lost jurisdiction of the case. When this action was commenced, the justice's court had jurisdiction of the property in controversy. It was in the custody of the law, subject to the further order of that court. The proceedings of that court were entirely regular, until after plaintiff had appeared and pleaded. When he entered his appearance, the court had complete jurisdiction of both the person and property of the plaintiff in this action. If it exceeded its jurisdiction in granting the continuance demanded, the plaintiff had an appropriate remedy for correcting the error by direct proceedings. We cannot in this action inquire into that question. In our opinion on the undisputed evidence, the motion of defendant for a verdict in his favor should have been sustained.

3. The petition alleges that the value of the property in controversy is \$200. The answer alleges that it is worth more than that sum. On the trial defendant conceded that it was of the value alleged in the petition. Evidence was given on behalf of plaintiff to the same effect. The defendant, in his motion for a verdict, asked that the value of the property be fixed "at the sum testified to." Since there was practically no dispute as to the value, defendant was entitled to judgment for \$200.

The judgment of the District Court is reversed, and the cause is remanded, with directions to that court to render judgment in favor of defendant for the amount stated, with interest thereon at 6 per cent per annum from the date of its former judgment, and costs.

Rehearing denied October 22, 1891.

MINNESOTA SUPREME COURT.

Giles GILBERT, *Appt.*,

v.

Charles H. ELDRIDGE *et al.*, *Respds.*

(....Minn.....)

- *1. The riparian right of the owner of lands on the shore of navigable water, as on our great lakes, to reclaim, improve, and occupy the land submerged by shallow water, beyond the shore, may be dissociated from the shore-land by the act of the owner, so that a conveyance by him of the shore-land would not include such riparian rights as incident thereto.
2. This principle applied in a case where the owner of shore-land platted it, together with the shallows beyond the shore, into town blocks and streets.
3. The owner, after such platting, having conveyed an inland block with reference to the platting, and the water having gradually encroached upon the land, until the shore-line reached that block,—*Held*, that the riparian right to reclaim and use the platted blocks and streets in the water did not attach to the block thus conveyed as incident thereto.

(September 7, 1891.)

APPEAL by complainant from a judgment of the District Court for St. Louis County in favor of defendants in an action brought to enjoin the filling in of certain land covered by water lying between complainant's land and the deep waters of Lake Superior or the Bay of Duluth. *Affirmed.*

The facts are stated in the opinion.

Mr. William W. Billson, for appellant:

Lands gradually and imperceptibly denuded and submerged by the action of navigable waters cease to be private property as a part of the bank, and become public property as a part of the bed.

The theory that, as the respondents were formerly the owners of block 110, by title which extended indefinitely downward toward the center of the earth, they must still be the owners of it, notwithstanding that its surface has been washed away, was decently buried more than two hundred years ago, and the doctrine of alluvion or accretion is the grass which grew upon its grave.

It was precisely upon this ground that the possibility of acquiring title by accretion or reliction was originally denied.

De Jure Maris, p 14.

There could be no right, either of alluvion or reliction, until the inaccuracy of this reasoning was confessed. The rights of alluvion, reliction and erosion are strictly correlative.

There is no possible process of reasoning which justifies or establishes any one of them which does not justify and establish all of them.

*Head notes by DICKINSON, J.

NORM.—Riparian rights; reclamation of submerged land. See note to *Case v. Loftus* (Or.) 5 L. R. A. 699. And see *Henry v. Newburyport*, 5 L. R. A. 179, 149 Mass. 562.

The riparian owner on conveying land may reserve to himself the right to build wharves out into 13 L. R. A.

In *Smith v. St. Louis Public Schools*, 30 Mo. 290, it is said: "The law of alluvion is understood to be a part of the *jus gentium*, that code which natural reason has established among all men. The principle upon which the right is placed is, that the proprietor of land bounded by a river, being exposed to danger from its floods, is entitled to increment, which, from the same cause, may be gradually annexed to it."

Another accepted basis of the right of accretion and reliction is that suggested by Blackstone: *De Minimis non curat lex*.

2 Bl. Com. 262. See also *Lord Abinger v. Re Hull & S. R. Co.* 5 Mees. & W. 327; *Poster v. Wright*, L. R. 4 C. P. Div. 438.

The most searching examination will fail to disclose any judicial decision or text-book in the English language, in which the doctrine of the loss of title by erosion has been questioned within the last two hundred years.

See 2 Bl. Com. 262; *Callis, Sewers*, 51, 52; *Phear, Rights of Water*, 43; *Coulson & Forbes, Waters*, p. 23; 3 Kent, Com. 435; *Gould, Waters*, § 155; *Tyler, Boundaries*, p. 92; *Hall, Sea Shore*, pp. 108-134; 2 Hall, Law Journal, pp. 326, 355, 356, 357; 5 Hall, Law Journal, pp. 150, 160, 161, 162; *Vattel, Law of Nations*, bk. 1, chap. 22, § 275; *Re Hull & Selby R. Co.* 5 Mees. & W. 327; *Scrutton v. Brown*, 4 Barn. & C. 485; *Dunlap v. Stetson*, 4 Mason, 349; *Camden & A. L. Co. v. Lippincott*, 45 N. J. L. 405-417; *New Orleans v. United States*, 35 U. S. 10 Pet. 662-717, 9 L. ed. 573-594; *Gerrish v. Clough*, 48 N. H. 9; *Steele v. Sanchez*, 72 Iowa, 65; *Welles v. Bailey*, 55 Conn. 292.

It was once considered with reference to both alluvion and gradual reliction, that, except in cases of local custom, they existed only in the absence of means to identify the original boundaries.

De Jure Maris, chap. 6.

All the three branches of the doctrine of accretion were then still in the embryo. But they long ago assumed definite form in England as well as in this country.

Rez v. Yarborough, 3 Barn. & C. 91; *Poster v. Wright*, L. R. 4 C. P. Div. 438; *Re Hull & S. R. Co.* 5 Mees. & W. 327.

This case is directly within the authority of *Gerrish v. Clough*, 48 N. H. 9; *Rez v. Yarborough*, 3 Barn. & C. 91; *Camden & A. L. Co. v. Lippincott*, 45 N. J. L. 405.

The fact that artificial causes have contributed to a gradual shifting of the water line does not affect the legal result.

Gould, Waters, § 155, p. 288, and cases cited; *Coulson & Forbes, Waters*, 22, 23, and cases cited; *Lovington v. St. Clair County*, 64 Ill. 58, 90 U. S. 23 Wall. 46, 23 L. ed. 59; *Hunt, Boundaries*, 23; *Adams v. Frothingham*, 3 Mass. 852; *Henry v. Vermont Cent. R. Co.* 30 Vt. 688.

The case of the respondents is not withdrawn from the operation of the general rule respect-

the water. *Parker v. West Coast Packing Co.* 5 L. R. A. 61, 17 Or. 510.

Rights may be dissociated and separately transferred. *Miller v. Mendenhall*, 8 L. R. A. 90, 43 Minn. 96.

ing the loss of title by erosion, by the fact that the water gradually advanced until it denuded and submerged their entire tract.

Welles v. Bailey, 55 Conn. 292; *Giraud v. Hughes*, 1 Gill & J. 249.

The principle of the separableness of the ownership of the bank from that of the riparian privileges, adopted by this court in the *Hanford Case*, has neither direct nor indirect bearing upon this controversy.

It is doubtful whether the lines platted in the water had the effect of curtailing in any respect the rights acquired under the deed of the riparian block.

Richardson v. Prentiss, 48 Mich. 88.

Messrs. William B. Phelps and White, Reynolds & Schmidt for respondents.

Dickinson, J., delivered the opinion of the court:

At the head of Lake Superior a peninsula of land called "Rice's Point" extends from the main land eastward into the water. On the northerly or northeasterly side of this peninsula is the Bay of Duluth, constituting the present harbor of the City of Duluth. On the south of the peninsula is St. Louis Bay. In 1858 one Orrin Rice, who then owned this land, platted the same as a town-site, and filed the plat thereof in the proper public office. The name of Rice's Point was given to the platted lands. Embraced in this platting were two blocks designated, respectively, by numbers as blocks "108" and "110." At that time the land comprising block 110 was situate on the northeasterly shore of the peninsula. The line of low water crossed the block, so that the northeasterly part of it was within the shallow water of the Bay of Duluth, while the southwesterly part of it was dry land. Block 108 was southwest of block 110, separated from it by a street, and was wholly above and beyond the shore-line. The platting of Rice extended into the shallow water of the Bay of Duluth, beyond the shore-line; other lots, blocks, and streets being platted in the shallow water beyond block 110. December 31, 1858, Rice, by warranty deed in the usual form, conveyed block 110 to one Wilson, to whose rights the defendants have succeeded, and block 108 to one Meeker, to whose rights the plaintiff has succeeded. In 1873 the common council of the City of Duluth, under authority of the Legislature, by ordinance established a dock-line in the waters of the Bay of Duluth, several hundred feet distant from this block 110, and nearly parallel with its water-front, thereby definitely limiting the right to construct wharves and other structures to that part of the bay within such dock-line. In 1872, for the improvement of the harbor of Duluth, the city caused a ship canal to be dug through another point of land lying between the Bay of Duluth and Lake Superior, which resulted in so changing the currents of water in the bay that from this, with perhaps other causes, the water gradually encroached upon and washed away the shore at the easterly end and on the northeasterly side of Rice's Point. The process of erosion and encroachment was so gradual as not to be perceptible, except by

comparison of the conditions in different seasons. In 1885 this encroachment of the water had extended so far inland, on the northeasterly side of this point, that the shore-line at low water then ran across block 108, block 110, and the intervening street having become submerged. At the time of the commencement of this action a process of filling was being carried on under the authority of the defendants, so as to again raise the surface of block 110 and of the intervening street above the surface of the water. Thereupon the plaintiff instituted this action to prevent by injunction such attempted and proposed reclamation. The plaintiff rests his claim of right to the relief sought upon the ground that, by the gradual and imperceptible encroachment of the water, and the retrogression of the shore-line, his land (block 108) has come to be the riparian estate, and that whatever riparian rights were originally incident to the shore-land are now vested in him as the riparian owner; and that the title of the defendants to block 110, and the riparian rights which may have been incident thereto, have been extinguished. The decision and judgment of the district court being in favor of the defendants, the plaintiff appealed.

We shall assume, in accordance with the claim of the plaintiff, but without so deciding, that it is a general principle of the common law that when the sea or navigable water, although not forming a boundary between adjacent estates, gradually encroaches upon and submerges the shore-land, the owner of the land thus won by the water becomes divested of his estate, and of such riparian rights as had been incident thereto; and that, in general, whoever may own the land constituting the shore has also, as incident thereto, the ordinary rights of riparian owners over the submerged lands beyond the shore, and out to the point of actual navigability. But, while this may be the general rule of law, it is not necessarily applicable alike in all cases. It may be controlled in its operation by the conditions under which titles have been acquired and held; and we are of the opinion that, by reason of the facts to which we have referred, of the platting of the submerged lands as well as of the upland, and of the conveyances of the platted blocks, under which these parties acquired titles, it is not open to the plaintiff to interpose objection to the refilling of the submerged block 110, or to assert that the defendants' title thereto or rights therein have become extinguished. Of course, the plaintiff cannot consistently claim that by the retrogression of the shore-line, and the submerging of block 110, he has acquired a title to that block. The shore-line did not constitute a boundary between the property of the plaintiff and that of the defendants; and, if we accept the theory of the plaintiff, that by the gradual submergence of block 110 the defendants' title became divested, it did not pass to the plaintiff. Not until and only as the defendants' title became extinguished by the retirement of the shore-line to and across the line of boundary between the two blocks, did the plaintiff acquire any

proprietary right or interest in the premises beyond that boundary. If the defendants lost their title, it was by the slow process of erosion, and little by little, as the water advanced upon the land. If the title was thus gradually devested, as fast as the shore-line was worn away, the title either was extinguished, or, if it was transferred or passed to any other holder, it was to the State; and when, at length, the last thread of shore-land on block 110 was submerged, the title had either become extinct, or had passed to the State. As the line forming the boundary between the two blocks was crossed by the advancing water the title to the submerged block, if extinguished by the encroachment of the water, did not suddenly revive, to vest in the plaintiff; and, if already vested in the State, it did not pass from it to the plaintiff. If, then, it be conceded that the defendants lost their title, it is certain that the plaintiff never acquired it. The utmost that he can reasonably claim is that by reason of the gradual encroachment of the water, submerging the defendants' land and hence divesting them of their title, the plaintiff's land (block 108) has come to be the shore-land, and that, as incident thereto, he has acquired the ordinary rights of riparian owners, including the exclusive and riparian right to refill the submerged block 110, or to otherwise improve it, and to occupy it for his private purposes. Our inquiry, then, is narrowed to the question whether the plaintiff has become thus possessed of such rights, so that he may be heard to complain of the defendants when they proceed to fill in and reclaim the submerged block. The State not only does not complain, but, impliedly, from the establishing of the dock-line, it concedes and ever since 1873 has conceded, the right to reclaim, improve, and use the submerged lands. *Miller v. Mendenhall*, 43 Minn. 95, 8 L. R. A. 89. The defendants undoubtedly formerly enjoyed that right as respects this block of land, and might certainly have exercised it, at least at any time before the last thread of their land became submerged. The only question is whether that right has now come to be in the plaintiff. The defendants have never transferred it, and, if the plaintiff has become possessed of it, it is only because it must be deemed to attach as an incident to the shore land, and to have passed to him as the owner of block 108, as the shore-line receded until it reached that land. We have heretofore decided that riparian rights of this nature, although originally incident or appurtenant to the shore-land, do not necessarily remain so; that they are property rights subject to the control of the owner; that they may be transferred by him, and remain in existence and be enjoyed by his grantees, although having no interests in the estate to which such rights were originally incident. *Hanford v. St. Paul & D. R. Co.* 7 L. R. A. 722, 43 Minn. 104, and see *Miller v. Mendenhall*, *supra*. See also, to the same effect, *Ladies S. F. Soc. v. Halstead*, 58 Conn. 144.

It follows that when, by the act of the owner of the principal estate, such rights have been legally dissociated therefrom, 13 L. R. A.

the ordinary principles of law relating to the existence, transfer, and enjoyment of merely incidental rights would to a great extent cease to be applicable. Subsequent changes in the condition and right of enjoyment of the principal estate would not, of necessity, correspondingly and incidentally affect such rights. To illustrate, we will suppose that after Rice, the owner of this peninsula, and hence entitled to the right to reclaim, improve, and use the submerged lands, had platted it, and recorded his plat, as he did do, he had by deed conveyed the blocks lying in the shallow water outside of this block 110, across which the shore-line then ran; that such deed had been recorded, so as to be notice to all subsequent purchasers; and that thereafter he had conveyed to another person block 110. Except for the prior platting and conveyance of the submerged lands, the deed conveying the shore-land would have been effectual to transfer to the grantee the riparian rights of Rice, naturally incident thereto. But in view of those facts, and under the late decisions to which we have referred, the result would not be so. The platting and conveyance of the lands in the water beyond the shore-line would be legally effectual to transfer to the grantee all the right which Rice might have to reclaim and occupy such lands. To that extent the riparian rights belonging to him as the owner of the shore-land would be divested and transferred to his grantee. He would thereafter be precluded from enjoying such rights by virtue of his continued ownership of the shore, not merely by reason of an estoppel springing from any covenants which may have been embraced in his deed, but because he had effectually conveyed those property rights which had been appurtenant to his shore-land. His grantee would have acquired, at least as against him and those who might succeed to his estate, the legal right to occupy, improve, and enjoy the submerged lands, subject only to the paramount rights of the State. This right thus coming to exist in another than the owner of the shore estate, and enjoyable independent of it, could no longer be deemed incident to that particular estate or a part thereof. By the subsequent conveyance by Rice of the shore-land, these rights would remain unaffected. They would not pass by the deed as incident or appurtenant to the land conveyed.

As Rice might have conveyed the rights which he, as the owner of the shore-land, had in the submerged land, so, and for the same reasons, he might have conveyed the land above low-water mark, and have reserved the rights naturally incident thereto in respect to the shallows lying beyond the shore; and the grantee, in a deed clearly importing an intention to limit the grant to the land above the shore-line, would acquire only such land. The proposition thus stated and illustrated, that the owner of the shore-land may legally dissociate therefrom and transfer to another, or reserve to himself, to be enjoyed independent of the shore-land, his riparian right to reclaim and use the shallows lying beyond, so that neither he nor his grantee of the shore-land may there-

after claim such rights as incident to their estate, is applicable to the facts of this case. When Rice conveyed block 108 (through which conveyance the plaintiff's title was derived), he had already made and recorded the plat embracing not only the dry land, but the shallows beyond. Block 110, the land here in controversy, was located partly within the shoal water beyond the shore, and still beyond that other blocks, with intervening streets, were platted. Rice, and no one else,—subject to certain public rights which have not been, and probably never will be, asserted, and which do not affect the question before us,—then had the exclusive right to appropriate the submerged lands to occupancy, improvement, and use in the manner indicated by the platting; that is, in separate or distinct parcels, as town blocks and streets, wholly independent of the future ownership or use of his shore-land. No principle of policy or of law forbade him, as the owner of all this property and of these property rights, from thus doing, however it might result in adding to or impairing the natural advantages of the shore-land, or that lying inland from the shore, all of which he owned. Subsequent purchasers from him of the shore-land, or of the inland, purchasing with reference to the plat, might well be deemed to take their estates subject to the disadvantages as well as to the advantages resulting therefrom. He might thus restrict or limit the rights incident to his shore-land or inland, so as to bind, not only himself, but his grantees. *Yates v. Judd*, 18 Wis. 126.

It was said in *Wilder v. St. Paul*, 12 Minn. 192, 204 (Gil. 116): "The purchaser of a lot according to such plan acquires a right to every advantage, privilege, and easement which the plan represents. His lot is made valuable by other streets, as well as the one on which it fronts. By the sale of a lot according to such plan there is an implied warranty that the purchaser shall enjoy all the privileges and benefits which it is calculated to secure, and by no private arrangement can he be deprived of this." And so it may be said that such a purchaser takes subject to whatever disadvantages may be involved in the platting. For instance, as against the purchaser of block 108, Rice, although he had remained the owner of the riparian block 110, would have been precluded by his platting and conveyance from afterwards appropriating the street, platted in the shallow water beyond it, to his private use, so as to prevent the improvement and use of it as a street. But the grantee of block 108, conveyed with reference to the plat, would also be precluded from denying to the grantor or to his assigns the right to occupy, improve, reclaim, and use the blocks platted in the shallow water, even though in the course of time the shore-line should gradually move inland so as to reach this block 108, as has actually occurred. It was perfectly apparent from such a platting that Rice intended thereby to devote the platted blocks within the shallow water to disposal and use in separate parcels, and wholly independent of the ownership or use of the

shore-land; and when the plaintiff's grantor purchased and accepted a conveyance of block 108, although the deed was in the ordinary form and included the "appurtenances thereunto belonging," it must have been understood that no right or interest in the blocks located in the water passed thereby. Even if the block conveyed had been in fact situate on the shore, it could hardly have been supposed that it was intended that the deed should, in legal effect, include all the platted blocks lying beyond the shore; or that, notwithstanding the platting of the submerged lands, it was intended that, by the conveyance of the shore block alone, with its boundary lines on all sides precisely defined by means of the plat, the ordinary and unlimited rights of riparian ownership should pass with the deed, so that the grantee should acquire thereby the exclusive right to occupy, improve, and use for his own benefit all the platted blocks and streets lying beyond. If, under such circumstances, a conveyance of the block situate on the shore would have been deemed not to have been intended to transfer to the grantee the existing property rights in respect to the platted lands beyond the shore, then, for the same reason, the gradual retirement of the shore-line, until the plaintiff's block has come to be on the water-front, has been of no effect to vest in him any property rights in respect to such submerged blocks. The conveyance of a platted inland block was as much subject to the effect of the platting as a conveyance of a riparian block would be; and if in the latter case the ordinary riparian rights,—that is, the exclusive right to occupy improve, reclaim, and use the blocks lying in the water,—would not pass, then, for the same reason, the gradual retirement of the shore-line would not be incidentally attended with the consequence of vesting such rights in the plaintiff. He took his title subject to the existence of rights which, at least as between parties claiming under the common grantor and in accordance with the platting, had ceased to depend upon the location of the shore-line, or to be affected or devested by the shifting of that line. We have treated the conveyance to the grantor of the plaintiff as having been made with reference to the plat. It is true that the finding of the court does not show that the conveyance was in terms so made, and that probably would not be necessary to affect the grantee in the manner above considered. We suppose, however, that we are justified in assuming that the conveyance was really, if not in express terms, made with reference to the plat, not only from the finding that the conveyance was of the platted block numbered 108 of Rice's Point, but because the plaintiff in his complaint alleges his ownership of the block so described, "according to the recorded plat thereof," etc.

The conclusions which we have expressed, as to the power of a riparian owner upon a body of water, which does not form a boundary between his own and a neighboring estate, by his own act to dissociate his riparian rights in the submerged lands from his principal estate and with the consequences

here indicated, naturally and logically follow from our former decisions above cited, and we know no good reason why those decisions should not be followed to the results here stated. The undoubted and exclusive owners of riparian rights, of rights in real property susceptible of enjoyment independent of the riparian lands, are thus held to be competent, not only to themselves use valuable property, the right to use which belongs exclusively to them, but, if more desirable, to dispose of their rights so that their grantees may make the property useful. Purchasers of the principal estate, after the riparian rights have been by any means dissociated therefrom, acquire all that they purchase. It is no hardship if, as in this case, the purchaser of a part of the platted inland is denied the advantage of claiming, to the exclusion of former owners, interests in property which he never purchased, and probably never expected to acquire, and which, if it vests in him at all, does so only by means which may be fitly called accidental. And on the other hand, if we have rightly declared and applied legal principles, those who have purchased and acquired the unquestioned and exclusive right of the riparian owner to occupy and enjoy the use of platted lands beyond the line of the shore, whether or not they may have reclaimed the same from the water or otherwise improved it, retain what they purchased; and neither their grantors, nor those who may succeed to the estate of the latter in any of the platted lands, can, by virtue of holding or succeeding to such estates, successfully claim that the rights of the purchasers have been divested, upon the ground that they were incident to the gradually shifting line of the shore.

Judgment affirmed.

Collins, J., did not hear the argument, and so takes no part in this decision.

ST. PAUL UNION DEPOT CO., *Appt.*,

MINNESOTA & NORTHWESTERN R. Co., *Resp.*

(.....Minn.....)

***1. The object of the plaintiff's incorporation considered as being the combining in this corporate organization of all the railroad companies whose lines of road enter or may enter the City of St. Paul, for the purpose of providing and maintaining depot and other railroad**

***Head notes by DICKINSON, J.**

NOTE.—Formation of union depots.

A contract to form a corporation to acquire realty to furnish terminal facilities for railroad companies is not against public policy. *King v. Barnes*, 12 Cent. Rep. 204, 100 N. Y. 207.

That one of the railroad companies to be benefited by the agreement reimbursed one of the parties for advances for the purchase of realty is no reason why his associates should not respond to him for such advances. *Ibid.*

The rights and liabilities of the parties as among 13 L. R. A.

facilities for the common benefit of all such railroad companies and of the public.

2. In view of this purpose, and construing the provisions of this charter.—*Held*, that railroad companies entering the city since this corporate organization, are entitled, for the purpose of becoming members of the corporation, and sharing in and contributing to the benefits of the organization, to subscribe for and purchase a proper proportion of its stock at its par value.

3. If necessary for this purpose, and for a proper apportionment of the stock, the existing members may be required to surrender or sell a part of the stock held by them.

(August 24, 1891.)

A PPEAL by plaintiff from a judgment of the District Court for Ramsay County in favor of defendant and from an order denying a motion for leave to file a supplemental reply in an action brought to enjoin defendant from connecting its tracks with those of the plaintiff until it had complied with plaintiff's regulations and by-laws and had become the owner of a certain number of shares of plaintiff's stock at a specified value. *Affirmed.*

The facts are stated in the opinion.

Mr. W. H. Norris, for appellant:

The power of a corporation to issue stock and to receive money therefor is a corporate franchise, the exercise of which is vested in the discretion of its board. But this discretion is not unlimited. It is subject to the duty of the board to give *pro rata* preference to the existing stockholders as first and best entitled to fruitage of their previous investment and labor; and no majority of the stockholders can in this respect enlarge the powers of the board. If the corporation, either through its officers, directors or a majority of its stockholders, may dispose of the new stock to whomsoever it will, at whatever price it may fix, then it has the power to diminish the value of each share of old stock by letting in other parties to an equal interest in the surplus, and in the good will or value of the established business.

Jones v. Morrison, 31 Minn. 140.

A corporation cannot issue new shares at less than their full market value, except by equal distribution among all shareholders.

1 Morawetz, Priv. Corp. 2d ed. § 454, and cases cited.

The interest of each individual shareholder is a share of the net proceeds of the capital stock of the corporation, when brought into one fund.

Boone, Corp. § 105.

Messrs. Lusk, Bunn & Hadley for respondent.

themselves are enforced upon principles applicable to partnership transactions. *Ibid.*

That certain parties to the contract were officials of the railroad companies does not deprive them of their individual interest. *Ibid.*

The Union Yards & Transit Company of Chicago having by charter the right to own and operate its railway, and to connect its yard with all railroad lines running into the city, is subject to the same duties and liabilities to the public and individuals as all railroad companies. *Pennsylvania Co. v. Ellett*, 122 Ill. 654.

Dickinson, J., delivered the opinion of the court:

The plaintiff is a domestic corporation, the general object of the organization of which may be said to have been to secure and afford necessary depot and terminal facilities for railroads running into the City of St. Paul, by means of a combination of all such railroads for that purpose. Its stockholders are various railroad corporations, at present five in number, operating lines of railroad running into that city. The defendant, a domestic corporation with a line of railroad running into the city, desires to avail itself of the benefits afforded by the plaintiff's incorporation, and claims the right so to do. In this action it was decided in the district court that, in order that the defendant be entitled to such benefits, it must become the owner of a proper proportion (one-sixth) of the stock of the plaintiff corporation. Of the whole amount of stock authorized, there was still unissued more than the amount required for this purpose, and the plaintiff was willing to sell such stock to the defendant at what the plaintiff deemed to be the actual value of it (a price much above the par value), and thereupon to admit the defendant to the enjoyment of the benefits desired by the latter; but the defendant contends that it should be allowed to purchase its proper proportion of the stock at its par value, without regard to the fact that the property held by and devoted to the use of the Depot Company may have greatly increased in value. The principal controversy on this appeal is whether the defendant should be required to pay more than the par value for the stock. In deciding this question, attention is directed to the peculiar nature and objects of the plaintiff's incorporation.

We had occasion to consider this subject for another purpose in *State v. St. Paul Union Depot Co.*, 42 Minn. 142. 6 L. R. A. 234, and the opinion in that case so fully sets forth the character and objects of the corporation that we will avoid repetition by here referring to that statement. We are of the opinion that it was rightly decided that the defendant should only be required to pay the par value of the stock, which is all that any of the companies composing the corporation have heretofore paid for their stock therein. This conclusion is most consistent with the purposes and intention entering into the plan of incorporation, as shown in the articles adopted, and in the Special Law of 1879 (chap. 318), which was accepted by the corporation, and became a part of the law of its existence. It seems apparent that the object sought to be accomplished was to bring all the railroads, whose lines of road should enter the city, into a legal acting, efficient combination, as a convenient and advantageous means of providing and maintaining suitable depot and terminal facilities, for the common use of all the roads, facilitating transfers from one line of road to another, and contributing to the convenience and advantage both of the railroad companies and of the public. The scheme contemplated the combination, not only of the railroads entering the city at the time the organization was effected, but of such as should come thereafter. It was doubtless considered that it would not only be advantageous for the

new companies to enter the combination, but desirable on the part of the previous members that they should do so. For the most complete accomplishment of some, at least, of the obvious purposes contemplated, such a general combination was to be desired. Not only did the original articles of incorporation indicate that it was intended that the contemplated facilities should be "open alike to the use [under proper regulations] of all railroads now constructed, or which may be hereafter constructed, to or into the said city;" but, by the special law above referred to, any such corporation was empowered to "subscribe to the capital stock of the said St. Paul Union Depot Company, or become a stockholder thereof;" and upon becoming the owner of such a number of shares of the stock "as shall be deemed equitable by the board of directors of the said St. Paul Depot Company, and upon executing an agreement to conform to its by-laws and regulations, and to pay such charges as are required to be paid by the other railroad companies, any such company is declared to be entitled to elect or appoint one member of the board of directors. By section 4 it is declared: "There shall be no unjust discrimination against or in favor of any railroad corporation or railroad company using, or desiring to use, the said road, tracks, and union depot of the said the Saint Paul Union Depot Company, but the terms, conditions, and regulations adopted for the same shall be, as far as practicable, uniform, and apply alike to all railroads using, or desiring to use, the said road, tracks, and union depot of the said the St. Paul Union Depot Company." As being significant of the intention that only the par value should be required to be paid by a railroad company entitled to acquire a membership in this corporation, it is to be noticed that, while it was obviously intended that, from time to time, subsequent to the corporate organization, other railroad companies were to become the owners of stock, and become members of this corporation, provision is made, as above indicated, for determining or apportioning the number of shares which any such railroad company should take, while no provision is made respecting the price to be paid therefor. Both the original articles of incorporation and the amended articles, adopted in 1884, however, provide that the stock shall be divided into a specified number of shares, of \$100 each. All this is naturally consistent with the theory that all the companies whose roads enter the city should be permitted to take their proper proportion of the stock, as subscribers, at the value named in the articles of incorporation. Thus would the "conditions" under which different companies might be entitled to the benefits to result from the combination be, "as far as practicable, uniform, and apply alike to all," as the special law requires. On the other hand, if effect be given to the claim of the plaintiff, and if its theory as to the increased value of the depot property, and hence of its stock, be correct, it might directly result in an inequality of burden between the corporations sharing alike in the benefits of the organization, which would be quite contrary to the provisions of the special law, and to the obvious purposes of the corporate organization. The five companies constituting the present membership

paid for their stock at the par value of \$100 per share; but it is demanded of this defendant that it pay for its proper proportion of the stock at the rate of \$342.86 per share, amounting to \$200,000 for one sixth of the stock. It may be readily seen that the admission of new members upon such terms might provide funds sufficient to pay off the whole indebtedness of the corporation (\$250,000), and, if the stock is to be reapportioned as new members come in, so as to preserve equality in the amount of stock held, it would reimburse to the companies now composing the corporation all that their stock had cost them, thus giving to them the advantages and benefits of the combination at the expense of the junior members of the corporation.

In view of the peculiar purposes for the accomplishment of which this corporation exists, of the means contemplated and adopted for securing such purposes, and of the conditions relating to the holding of its stock, there would seem to be not much propriety in assigning to it a commercial or market value greater than that fixed in the corporate articles. It is difficult to understand how it could commercially bear a value greater than that, if, indeed, it can be said to have a commercial value. The title of the property which the corporation acquired, improved, and occupies, and upon which the alleged increase in the value of the stock may be supposed to rest, is not an unqualified title in fee simple. It is conditioned upon the continued use of the premises for the specified corporate purposes. Its value to the corporation, or to its members, consists in its practical usefulness; its adaptation to the actual uses of the organization. That usefulness is not affected by any enhancement in the commercial value of the land. The plan of incorporation was not to secure a profit to the corporation or to its members, in the ordinary sense of the term, but to unite the several railroad companies in the undertaking of providing and maintaining necessary railroad facilities for their common benefit, as well as for that of the public. The income was chiefly derived from the members themselves, by tolls or rates for the use of the depot and other railroad facilities, and was graduated to meet the necessary current expenses, and to pay interest on its bonded indebtedness, and 6 per cent interest, and no more, on the stock. To a large extent, at least, the amounts of interest received by stockholders may be said to come from tolls or rates paid by themselves. There could be no profit, such as could enhance the value of stock, derived from an income paid by the stockholders themselves. The right to hold this stock, and to enjoy the benefits of the organization, is restricted to railroad corporations whose lines of road enter the City of St. Paul; and by the action of the corporation its stock is made subject to be forfeited if the Railroad Company holding it fails to avail itself of the use of the facilities

afforded, and to pay the tolls and rentals charged. By resolution of the corporation, it is provided that the stock shall not be transferable. These considerations, from which it would seem to be improbable that this stock can bear a value above par, also go to support the view, already expressed, that it was not originally contemplated that any other than the fixed par value should be paid by the corporations who should be entitled to become stockholders, and to share in and contribute to the benefits of the organization. As it could have hardly been anticipated that the stock would come to have a value greater than the price fixed in the articles of incorporation, it may readily be supposed that no other price was intended to be paid for it. This view of the matter is most consistent, not only with what is expressed in the articles and in the special law, but with the significant omission, already referred to, to make provision with reference to the price to be paid for stock subscribed for. It is consistent, too, with the construction which the corporation itself seems to have hitherto adopted and applied.

After the rendition of the judgment in this action, the plaintiff moved for leave to file a supplemental reply, alleging that, since the completion of the trial, the plaintiff had offered to issue and sell to its present stockholders, at its par value, all the stock which it is authorized to issue (the limit being \$500,000), and that three of the five stockholders had elected to take their proper proportion of it. This is alleged to have been necessary as a means for providing funds for making needed improvements in the depot facilities, and which have been made at an expense of more than \$130,000. The motion was denied, and the plaintiff has appealed both from the order denying the motion and from the judgment. We think that, for at least two reasons, the court was justified in refusing the plaintiff's application. One is that it does not appear that all of the unissued stock has been or will be taken by the present members of the corporation, or that enough will not remain to be issued to this defendant in accordance with the judgment. The other reason is that, even if all the stock had been issued to the existing members of the corporation, the defendant would still be entitled to an apportionment and transfer to it of its proper share of the stock; and for that purpose the present stockholders should surrender so much of the stock held by them as may be necessary. They received and hold the stock subject to this condition. The obvious and expressed purposes of the corporation are not to be frustrated by allowing the existing stockholders to take and to hold all the stock so as to exclude other corporations from participation. That would be opposed to the purposes for which the corporation has its existence.

Order and judgment affirmed.

CALIFORNIA SUPREME COURT.

Charles KIESSIG, *Resp't.*,
v.

A. M. ALLSPAUGH *et al.*, and N. P. Lundeen, *App't.*

(.....Cal.....)

A surety upon a contractor's bond conditioned to save harmless the owner from any claims for materials or labor used in the construction of the building, is discharged from liability if the owner without his consent pays over to the contractor money which the building contract provides he shall retain in his possession until final settlement for the discharge of claims; at least such will be the result if such money would have canceled all claims.

(September 16, 1891.)

APPEAL by defendant N. P. Lundeen from a judgment of the Superior Court for San Diego County in favor of plaintiff in an action upon a contractor's bond brought to recover the amount which plaintiff alleged that he was compelled to pay because of defendant's failure to satisfy certain mechanics' liens in accordance with the provisions of the bond. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Parrish, Mossholder & Lewis*, for appellant:

1. There is no principle of law or equity that will

permit a beneficiary of a bond to bring about a loss by his own gross misconduct and then compel the surety to make good such loss.

Brandt, Suretyship & Guaranty, § 886.

The obligee can do nothing that would change or increase the liability of the surety without at once releasing the surety from liability on his contract.

See *Brandt, Suretyship & Guaranty*, §§ 79, 108, 873, 886, 457; *Law v. East India Co.* 4 Ves. Jr. 824.

Mr. Carl Schutze for respondent.

De Haven, J., delivered the opinion of the court:

The defendant, Lundeen, was a surety for his co-defendants, Allspaugh and Hall, upon a bond executed to plaintiff to indemnify and save him harmless against any claims or liens for material or labor used or employed by his principals in the construction of a building, which they had theretofore contracted to erect for plaintiff. The contract price for the construction of the building was \$8,000, and by the terms of the building contract the plaintiff was authorized to retain one fourth of that sum in his hands until final settlement between the parties thereto. The complaint alleges "that after the time said house had been finished, and when final settlement was made as per contract aforesaid, there were good and valid claims and demands and liens for mate-

NOTE.—Sureties' liability not to be extended by implication.

The liability of a surety is not to be extended by implication. To the extent, and in the manner, and under the circumstances, pointed out in his obligation, he is bound, and no farther. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal. *Miller v. Stewart*, 22 U. S. 9 Wheat. 703, 6 L. ed. 195; *Anderson*, *Law Dict. title, Surety*. See also *M'Kay v. M'Donald*, 5 Ala. 388; *Granite Bank v. Ellis*, 43 Me. 367; *Reed v. Garvin*, 13 Serg. & R. 100; *Ludlow v. Simond*, 2 Cal. Cas. 38.

The liability of a surety is always *strictissimi juris*, and may not be extended by construction beyond his specific engagement. *National Mechanics Bkg. Asso. v. Conkling*, 90 N. Y. 116.

The courts are not concerned with the inquiry whether the alteration is prejudicial or beneficial to the surety. This is immaterial. He is sponsor for one contract and but one, and no one has a right to make another contract for him. *Fellows v. Prentiss*, 3 Denio, 521. See also *Ludlow v. Simond*, *supra*; *Ward v. Stahl*, 81 N. Y. 406; *Barnes v. Barrow*, 61 N. Y. 30.

It is an elementary rule regulating the liability of sureties that they can only be charged when the case is brought within the strict terms of their contract (*Birkhead v. Brown*, 5 Hill, 635); and that their liability is not to be so extended by implication as to embrace purposes and objects not originally contemplated by the parties. *McCluskey v. Cromwell*, 11 N. Y. 568.

This principle applies with equal force to sureties upon a bond. *United States v. Kirkpatrick*, 22 U. S. 9 Wheat. 720, 6 L. ed. 196; *Birkhead v. Brown* and *McCluskey v. Cromwell*, *supra*; *McMicken v. Webb*, 47 U. S. 6 How. 232, 12 L. ed. 443, 13 L. R. A.

The alteration of the obligation of a surety without his knowledge or consent extinguishes his obligation and discharges the surety. *People v. Vilas*, 36 N. Y. 460; *Martin v. Thomas*, 65 U. S. 24 How. 317, 16 L. ed. 690; *Miller v. Stewart*, 22 U. S. 9 Wheat. 703, 6 L. ed. 195.

A surety is not liable beyond the express terms of his contract, even where liquidated damages are provided for its breach; and the liability of the surety cannot exceed the penalty agreed upon. *Tunison v. Cramer*, 5 N. J. L. 498; *Dickerson v. Cook*, 3 Duer. 324; *Clark v. Bush*, 3 Cow. 151; *Ludlow v. Simons*, 2 Cal. Cas. 1; *Walsh v. Baillie*, 10 Johns. 180; *Penoyer v. Watson*, 16 Johns. 100; *Manhattan Gaslight Co. v. Ely*, 39 Barb. 174.

What acts will release the surety.

The surety may be released by substitution. *Reid v. Nunnally*, 24 Ark. 356; *McIntyre v. Borst*, 26 How. Pr. 411.

Or the creditor may discharge him by a parol declaration that he will look to others for relief. *Harris v. Brooks*, 21 Pick. 195; *Poster v. Walker*, 34 Miss. 365; *Hope v. Eddington*, Hill & D. Supp. 43.

Any fraudulent conduct of the creditor will relieve the surety from liability. *Franklin Bank v. Cooper*, 36 Me. 179; *Ham v. Greve*, 34 Ind. 19; *Shively v. United States*, 5 Watts, 332; *Peacock v. Chapman*, 8 La. Ann. 87.

And if the creditor prevents performance, the surety will be discharged. *Trustees of Section 16 v. Miller*, 3 Ohio, 261; *Blest v. Brown*, 4 DeG. F. & J. 397.

So where the surety abandons an appeal from a judgment rendered against the principal and himself on the faith of the creditor's promise that he will seek indemnity from the principal alone, the surety is released. *Wimberly v. Adams*, 51 Ga. 423, See note to *Best v. Johnson* (Cal.) 3 L. R. A. 168.

rial and labor expended and used in the building, construction, and finishing said house, in excess of the contract price of said building, to the amount of one thousand eight hundred seventeen 25-100 dollars;" and that by reason of the failure of the contractors to discharge them the plaintiff was compelled to pay the same after having paid the full contract price for the house. This action is brought against the principals and sureties on the bond referred to, to recover the amount so paid by plaintiff. The plaintiff recovered judgment in the superior court, and from that judgment the defendant Lundeen prosecutes this appeal. The judgment cannot be sustained upon the facts. The appellant Lundeen was a surety, and as money sufficient to satisfy all of the liens mentioned in the complaint was, or ought to have been, in the hands of the plaintiff at the time of his settlement with the contractors, he should have so applied it, instead of paying it to the contractors. This balance was to be retained in his hands as an additional security against liens upon the building, and in equity he held the same also for the benefit of the sureties. It was a special fund to which they had a right to look for their indemnity, and in view of which it must be supposed that they assumed the obligation of sureties, as the original contract is referred to in the bond as the inducement or consideration for its execution, and the plaintiff was not authorized to surrender it without their knowledge or consent, and, having done so, the appellant was discharged. *Bragg v. Shain*, 49 Cal. 131; *Taylor v. Jeter*, 23 Mo. 244. In this latter case the court used this language: "The contract duty of this builder was to furnish the materials and do the labor, and he failed in both respects when he allowed the building to be

incumbered with these liens. The owner, having notice of them, and paying what, by the substantial terms of the contract he was entitled to retain until they were removed, voluntarily abandoned an ample fund, which, according to the conditions of the contract, was to accumulate in his own hands as the primary security for its due performance, and in which the surety had an equal interest with himself. He must, therefore, bear the loss occasioned by his own negligence or folly."

This is an elementary rule of law governing the relation of principal and surety, and is thus stated by the Master of the Rolls in *Law v. East India Co.*, 4 Ves. Jr. 829. "It cannot be contended, upon any principle that prevails with regard to principal and surety, that when the principal has left a sufficient fund in the hands of the obligee, and he thinks fit, instead of retaining it in his hands, to pay it back to the principal, the surety can be called upon."

The failure of the plaintiff to retain this balance, or to apply it for the satisfaction of the obligation for which the appellant was surety, does not present the case of a mere neglect upon the part of a creditor to insist upon a set-off in his favor, arising out of some other transaction, before paying what might be due on a particular contract, but was the neglect to resort to a fund already in his hands for his own protection, in the very matter for which the defendant was a surety, and which fund was therefore charged with a trust in favor of appellant, and its surrender without his consent constitutes a defense to this action.

Judgment reversed as to appellant Lundeen.

We concur: **McFarland, J.; Sharpstein, J.**

MISSOURI SUPREME COURT (2d Div.).

STATE OF MISSOURI

v.

A. G. ARMSTRONG, *App't.*

(....Mo.....)

1. An oath on the "best knowledge and

NOTE.—Libel defined.

A libel is a malicious defamation, expressed either in writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural or alleged defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule. See *Desty*, Cal. Penal Code, § 248, and *note*.

Of libel in general.

Libel is an offense under the law both of England and of the States of the Union. *Com. v. Holmes*, 17 Mass. 332; *Com. v. Chapman*, 13 Met. 68; *State v. Bernham*, 9 N. H. 34.

It is a representation in writing or by pictures, calculated to lead to any act which, when done, is indictable. *Com. v. Clap*, 4 Mass. 163; *State v. Far-*
13 L. R. A.

belief" of the prosecutrix is a sufficient verification to an information for criminal libel.

2. **Duplicity in an information which amounts only to surplage is not ground for motion in arrest.**

3. **An information need not all be written by the prosecuting attorney himself.**

ley, 4 McCord, L. 317; *Steele v. Southwick*, 9 Johns. 214.

Any publication which tends to excite people to the commission of any crime is a libel. *Starkie, Slander & Libel*, § 152.

A malicious publication in printing, writing, signs, or pictures, tending to injure reputation, disgrace and degrade a person, and lower him in the esteem of the world, or bring him into public hatred, contempt, or ridicule is a libel. *State v. Jeaudell*, 5 Harr. (Del.) 475; *Layton v. Harris*, 3 Harr. (Del.) 406; *Rice v. Simmons*, 2 Harr. (Del.) 417.

Intent is an essential element (*Com. v. Snelling*, 15 Pick. 337; *Root v. King*, 7 Cow. 613; *Rex v. Reeves*, Peake, Ad. Cas. 84; *Rex v. Harvey*, 2 Barn. & C. 287); and the party will be presumed to intend the consequences of his act. See *Taylor v. State*, 4 Ga. 14; *Com. v. Snelling and Rex v. Harvey*, *supra*; *Reg. v. Lovett*, 9 Car. & P. 462.

4. The words "Bad Debt Collecting Agency" printed in large bold type on envelopes mailed to a debtor, especially when mailed in care of his employers, constitute a criminal libel under Rev. Stat. 1889, § 3869, as tending to "expose him to public hatred, contempt, or ridicule, or deprive him of the benefits of public confidence," etc.
5. A creditor may be guilty of criminal libel in permitting libelous communications to be sent to his debtor by his agents or associates in a collecting agency.
6. A portion of an envelope containing a libel is not inadmissible in evidence on a trial for criminal libel because it has been unnecessarily pasted in the information.
7. A letter written by the debtor protesting against libelous duns from a collecting agency and claiming that the debt has been paid, on which the creditor writes a reply, is admissible against the latter on a trial for criminal libel.
8. Evidence of specific indebtedness of the prosecutrix to other persons is not admissible in behalf of a defendant in an action for criminal libel.
9. The jury are final judges of the law as well as of the facts in a prosecution for criminal libel under Const., art. 2, § 14, although the judge should assist and inform them what the law is.

(June 2, 1891.)

A PPEAL by defendant from a judgment of the St. Louis Court of Criminal Correction which convicted him of criminal libel. *Affirmed.*

What necessary to sustain charge.

To sustain a charge of publishing a libel, it is not needful that the words or things complained of should have been read or seen by another. It is enough that the accused knowingly parted with the immediate custody of the libel, under circumstances which exposed it to be read or seen by any other person than himself. *Desty, Cal. Penal Code, § 262, and note.*

Publication defined.

The offense is committed by sending the libel to the one libeled, though it reaches the ear of no third person. *Watrous v. Chalker, 7 Conn. 226; Swindle v. State, 2 Yerg. 581.*

The transmission of a sealed letter containing libelous matter is indictable. *Hodges v. State, 5 Humph. 112; Giles v. State, 6 Ga. 276.*

Incidents of libel.

Whenever an action lies for libel without laying special damages, indictment lies. *Stanton v. Andrews, 5 U. C. Q. B. O. S. 229.*

The provisions of state statutes, in relation to malicious libels, are not violable of the constitutional guaranty of the freedom of speech. *Morton v. State, 3 Tex. App. 510; Com. v. Blanding, 20 Mass. 304. See Desty, Am. Crim. Law, § 140.*

So charging or imputing to one the commission of some crime is libelous (*Walker v. Winn, 8 Mass. 248; Chaddock v. Briggs, 13 Mass. 248; Wonson v. Sayward, 30 Mass. 402; Miller v. Parish, 25 Mass. 384; Gay v. Homer, 30 Mass. 535; Hotchkiss v. Oliphant, 2 Hill, 510; Stillwell v. Barter, 19 Wend. 18 L. R. A.*

Statement by Gantt, P. J.:

This is a charge of criminal libel. The defendant lived in Mexico, Mo., and the Sprague Collecting Agency did business in Chicago, Ill., and the defendant's firm, consisting of Kabrick, Armstrong, Atkins and Snyder, employed this agency to do some collecting for them; and among the claims placed in its hands was one of \$5 against the prosecuting witness, Mary Vincil. The agency used an envelope which bore the device "Bad Debt" in large letters. The charge consists in accusing the defendant of procuring the said agency to send envelopes to the address of the said Mrs. Mary Vincil, in St. Louis, from Chicago, Ill., and that the said words so used on the envelope are libelous. The information is as follows:

"State of Missouri, } ss.
"City of St. Louis, }

"In the St. Louis Court of Criminal Correction. St. Louis, March 29, 1888. State of Missouri, Plaintiff, v. A. G. Armstrong, Defendant. Charged with criminal libel. Bernard Dierkes, assistant prosecuting attorney of the St. Louis Court of Criminal Correction, now here in court, on behalf of the State of Missouri, information makes as follows: That A. G. Armstrong, of Mexico, Audrain County, Missouri, in the City of St. Louis, on the 27th day of March, 1888, and on divers days in said year, did willfully and maliciously libel and defame one Mary Vincil, of the City of St. Louis, by causing to be published and issued in said city, and by having sent through the mails and put before the eyes of divers people in said city, a certain envelope, printing, writing, sign, representation and effigy, as follows:

487; *Nash v. Benedict, 25 Wend. 645; Cramer v. Riggs, 17 Wend. 206; Smith v. State, 32 Tex. 504; Woolnorth v. Meadows, 5 East, 468; Roberts v. Camden, 9 East, 98; Peake v. Oldham, Cowp. 275, 2 W. Bl. 969; Harrison v. King, 7 Taunt. 431; Beaver v. Hides, 2 Wils. 300; Onslow v. Horne, 3 Wils. 186, 2 W. Bl. 750; as charging one with engraving silver ore in a rock, to cheat (Williams v. Godkin, 5 Daly, 499); or that one was tempting another to commit adultery. State v. Avery, 7 Conn. 228.*

It is a malicious publication though it impute no crime (*State v. Henderson, 1 Rich. L. 179*); as simply charging a person with forging. *Jackson v. Weisger, 2 B. Mon. 214.*

The law presumes that the party intended what the libel is calculated to effect. *Reg. v. Atkinson, 17 U. C. C. P. 296; Desty, Am. Crim. Law, § 140 a.*

The proprietors of a mercantile agency engaged in collecting and publishing for circulation among all its patrons, information as to the standing and financial credit of merchants and traders, are liable for a false report thus disseminated, injurious to the credit of the subject of it, although made in good faith and upon information deemed reliable. *Sunderlin v. Bradstreet, 46 N. Y. 188.*

No basis for an excuse will permit a wanton and deliberate assault, insult and outrage upon feelings of a person, by sending through the mail, in a manner to be seen by others, scurrilous notices, and libelous envelopes. *King v. Patterson, 8 Cent. Rep. 357, 49 N. J. L. 417; Montgomery v. Knox, 22 Fla. 575; Blynn v. Collins, 2 L. B. A. 129, 111 N. Y. 143, 7 Am. St. Rep. 728; Lynch v. Febiger, 39 La. Ann. 386.*

BAD DEBT Collecting Agency, 218 La Salle St., Chicago.	Chicago, Ill. March 23, 6:30 P. M. R. R.	U. S. Postage Stamp.
Mrs. Mary Vincil,		
2 N. Beaumont Street.	c-o Scruggs, Vandervoort & Barney,	St. Louis, Mo.

—Intending and meaning thereby to indicate to the public, and to all persons seeing said writing, printing, sign, representation and effigy, that she, the said Mary Vincil, was dishonest; that she did not pay her just debts; that she had been guilty of unfair dealing; that she was a 'dead beat,' tending to provoke the said Mary Vincil to wrath, to expose her to public hatred, contempt and ridicule, and to deprive her of the benefits of public confidence and social intercourse. That said envelope contained certain scurrilous, blackmailing and indecent allegations concerning said Mary Vincil, as follows:

“‘SPRAGUE’S

“‘Bad Debts

“‘Collecting Agency.

“‘Agency’s 4th Letter.

“‘Mrs. Mary Vincil. Chicago, 8-26, 1888.

“‘c-o A. G. Armstrong: \$5.00

“‘We find that the account of which we notified you some time ago is still unsettled. Can you afford to have the public know that you refuse to pay this bill? You may need credit again some time, but as long as this account remains in this unsatisfactory manner it will be hard for you to obtain it. If you desire to have credit with the merchants in your locality, and maintain a reputation for honesty and fair dealing, you will adjust this claim. Call on or write the party, and make some kind of a settlement at once. If you will pay part of it now, and make some arrangements for the balance, we will not crowd you for a while. Have the party to whom the bill is due write us at once, stating what arrangements you have made, before we publish the delinquent list of your town. Very respectfully,

Sprague’s Collecting Agency.

“‘Per.’

“‘P. S. Should you positively refuse to make any arrangements for a liquidation of this claim we feel justified in advertising the same for sale in the newspapers, as well as to send you a statement regularly until the matter is settled. A delinquent list is published for the good and protection of the public, as well as a guide for business men in extending credit, as it contains the names of those who do not try to meet their obligations. Do not correspond with us. Settle the matter with the party to

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whom the account is due, whose name was given in our former letter.”

—“That said envelope was known by the public to contain said scurrilous and abusive matters, and said Armstrong intended, by causing said matter to be sent to said Mary Vincil through the mails, to advertise her as a ‘dead beat,’ as dishonest, as ‘poor pay,’ as unfit to be trusted, as unfit for public confidence; and said acts were done by said Armstrong to extort money from said Mary Vincil, under the pretense that she, the said Mary Vincil, was indebted to him, when such was not the fact, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

[Signed.] “Bernard Dierkes,

“Asst. Pros. Atty. St. Louis Court of Criminal Correction.”

“State of Missouri, City of St. Louis, ss: Mary Vincil, being duly sworn, upon her oath says that the facts stated in the above information are true, according to her best knowledge and belief. [Signed.] Mrs. M. B. Vincil.

“Sworn to and subscribed before me, this 6th day of April, 1888. [Signed] Michael J. Kenefick.”

The case, as made by the evidence, showed that defendant was a member of the firm of Kabrich & Co., merchants of Mexico, Mo. Mrs. Vincil, the prosecuting witness, had in her girlhood, and prior to her marriage, lived in Mexico. After her marriage she and her husband continued to live in Mexico, until he was killed in a railroad accident in 1880. After that, in the year 1881, she removed to St. Louis, and at the time of this prosecution she was clerking for Scruggs, Vandervoort & Barney, of St. Louis. According to the testimony of defendant, his firm claimed that she owed them an account of \$3.70, due in 1881, and interest to the date of this prosecution, amounting in all to \$5. This claim they placed in the hands of the Sprague Collecting Agency of Chicago. This agency used in its business an envelope, with these words printed on it in the left-hand upper corner: “Bad Debt Collecting Agency. 218 La Salle St., Chicago.” Upon the receipt of this account, they opened a correspondence with Mrs. Vincil. It appears that she received four communications in envelopes like this in regard to this debt. The envelope

described in the information was the fourth of the series that she received. She testified that at the time she received the first she was working at Scruggs, Vandervoort & Barney's; that a large number of employees were in the house; that their mail was put in a common repository, and distributed out of a common box; that different ones saw this letter, and the superscription on it. She was so mortified at this that she went to the postoffice, and directed her mail sent to her residence. Her relations saw the other three letters she received. When she received the first letter, she wrote on 30th January, 1888, to Armstrong, the defendant:

"Dear Sir: I received the inclosed from some association in Chicago. How dare you do such a thing? I have never refused to pay a just debt, but I do most emphatically refuse to pay them twice. My word is as good as Mr. K's, and I say again I have paid this bill,—a part at one time, and the balance on leaving Mexico. I have a statement of \$5.85 from Mr. K. If he remembers a part of it being settled, how is it I am still charged with the full amount? I do not propose, with all my present grief and troubles, to be persecuted and annoyed further by you. There is a limit to all things. It is as much as I can possibly do to support myself and child; and, now that my father is dead, I will also have to contribute to my mother's support. This double method on your part to collect this bill twice is outrageous, more especially as it is against a woman who has no other resources but her own exertions to maintain herself and child. It is unworthy of a man. I will not submit to further insult. You will drop this at once, and withdraw my name, as you have no right to use it in such a manner. If you continue this it will be at your cost. [Signed] Mrs. M. B. Vincil, No. 2 N. Beaumont Street."

On the bottom of that is the answer, to that. "2-1, 1888."

The Court. Did the letter that you wrote to the defendant come back to you with this lead-pencil memorandum at the bottom of it? A. It did.

Mr. Goode (continuing to read). "We differ in opinion on this account. When paid, I will stop the agency, and would advise you to pay it at once, and avoid further trouble. Respectfully, A. G. Armstrong."

She received this letter from defendant, written, as the other one was, on the letter-head of Kabrich & Co., dated 14th February, and is as follows:

"Mrs. Mary Vincil, St. Louis, Mo.: Miss Mary, I have your letter 2-11, and contents noted. Herewith inclosed find your account. On receipt of five dollars I will stop Sprague's Collecting Agency. Hoping this to meet with your approval, etc., most respectfully, A. G. Armstrong."

To this is attached a bill dated "February 15, 1888, Mexico, Missouri," showing indebtedness, \$6.70; credit by cash, \$3.00; leaving due \$3.70; interest on above, \$1.80; making a total of \$5.00. "The above is correct, according to your own buying and paying when in Mexico, Missouri. Yours respectfully. [Signed] G. Kabrich and J. B. Snyder."

There seems to be no question but that this account was barred by the five years' limitation. 13 L. R. A.

Mrs. Vincil had been a resident of the State all the time. Kabrich, one of the firm, testified there were two small errors in the account; that the balance due in 1881 was \$3.45; that, with interest, it amounted to \$5. He denied that she had ever paid this balance. She testified that she paid it when she left Mexico, to live in St. Louis. Among other witnesses, Mr. Bassford, editor of the Ledger, a newspaper published in Mexico, testified that when he heard Armstrong was to be prosecuted for libel he "interviewed" him concerning the matter. He went into his store, and asked him to tell him something about it, and read him an article that had been printed in the St. Louis Evening Chronicle the day before. Defendant said it was "pretty rough, proceeded to explain the matter to me, how he had dunned Mrs. Vincil. Mr. Armstrong stated that this lady, Mrs. Vincil, had owed the firm a bill for a long time, of which she had repeatedly been sent a statement, and that didn't avail very much, and so he sent one registered—sent a registered letter—in care of Scruggs, Vandervoort & Barney, for whom the lady was working. That letter was received, but there was no money forthcoming. He said he was a member of Sprague's Collecting Agency of Chicago, and he sat down and filled out a blank supplied by this concern, and sent it to Mrs. Vincil. About that time—I don't know whether it was at that stage of the talk or not—he showed me one of those blanks I have spoken of. After he sent the blank, no money came, he said, and he resolved to place the matter in the hands of this agency of Chicago, which he said he did. A short time after having placed it in the hands of the agency in Chicago, he received a letter from Mrs. Vincil. He described it as being a stinging one, of several pages, in which she denied the debt. He said the debt was just, and the book showed it to be unpaid. He said he wanted the money. This was the substance of the interview." Defendant also stated to the witness that he thought from the tone of Mrs. Vincil's letter she had received "a chromo;" that is, he described it as being a large envelope, covered with heavy, black letters containing the sentence "Bad Debt" or "Dead Beat" "Collecting Agency," and so forth. On the part of the defendant, it was shown that Mrs. Vincil had not paid \$3.45 of the account; also evidence tending to impeach or deny Mr. Bassford's account of his conversation with defendant; also offers to prove she owed several other small bills in Mexico, which were refused by the court. Defendant testified in his own behalf that Mrs. Vincil owed his firm a book-account of \$5 and he desired to collect it. He mailed her a card as follows:

"Mexico, Missouri [giving the month], 1888. Mrs. Vincil: Your bill, amounting to five dollars, is past due. Please call and make a settlement inside of ten days. The principal merchants and leading professions of the west have organized a protective union. I have become a member of the union. Every member is required to report all persons who owe bills that are past due. Please do not compel us to report your name. Respectfully, A. G. Armstrong."

The heading to this card read as follows: "P. H. Sprague, President. A. H. Wilson,

Manager. T. W. Sprague, Secretary & Treasurer. Sprague's Collecting Agency, formerly Western Merchants' Retail Protective Union."

Defendant denied that he ever mailed a letter to Mrs. Vincil in one of the "Bad Debt" envelopes; denied knowing that the agency was using this form of envelope in writing to her until this prosecution commenced; and that he did not instruct or cause the agency to use this envelope. Whereupon the court gave the jury the following instructions:

"The jury are instructed that if they believe from the evidence that the defendant, on or about the 27th day of March, 1888, caused the envelope given in evidence to be sent to Mary Vincil, in the City of St. Louis, through the mails, willfully and maliciously intending and meaning to indicate to the public and to all persons seeing said envelope that she, the said Mary Vincil, was dishonest, or did not pay her just debts, or that she had been guilty of unfair dealing, or was a 'dead beat,' and that said envelope was so understood by those persons who saw it; and if the jury further believe that the reception through the mails of such envelope containing the inclosure set out in said information tended to provoke the said Mary Vincil to wrath, and to expose her to public hatred, contempt and ridicule, and to deprive her of the benefit of public confidence and social intercourse; and if the jury further believes that said defendant willfully and maliciously intended by said acts to advertise said Mary Vincil as a dead beat, or as dishonest,—then the jury will find the defendant guilty, unless they further find that said Mary Vincil is a dead beat, and is dishonest, and unfit to be trusted, and unfit for public confidence. (2) The jury are instructed that malice is the willful doing of a wrongful act without just cause or excuse; and they may infer malice from the facts, if they believe it to be the natural inference to be drawn from them. (3) The previous good character of the defendant, if established, is a fact in this case which the jury ought to consider in passing upon his guilt or innocence of this charge. (4) But if all the evidence in the case, including that given touching the previous good character of the defendant, shows him to be guilty, then his previous good character cannot justify or excuse the offense. (5) The defendant is a competent witness in his own behalf; but the fact that he is a witness testifying in his own behalf, and the interest he has at stake in this case, may be considered by the jury in determining the credibility of his testimony. (6) The jury are the exclusive judges of the credibility of the witnesses. With that the court has nothing to do. And if you believe and find from the evidence that any witness has willfully testified falsely to any material fact in the case, you are at liberty to disregard the whole or any portion of such witness' testimony. (7) The law presumes the defendant to be innocent, and this presumption continues until it has been overcome by proof which establishes his guilt to your satisfaction and beyond a reasonable doubt; and the burden of proving his guilt rests with the State. If, however, this presumption has been overcome by the evidence, and the guilt of the defendant established to a moral certainty, and be-

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yond a reasonable doubt, your duty is to convict. If of his guilt you are not convinced beyond a reasonable doubt, your duty is to acquit. But to justify an acquittal on the ground of doubt alone, it should be reasonable and substantial, and not a mere guess or conjecture of the possibility of innocence. (8) The jury are further instructed that if defendant caused said envelope to be sent through the mails directed to the said Mary Vincil at the City of St. Louis, then such acts constitute a publication of the libel in said city. (9) If the jury find the defendant guilty, they may assess his punishment at imprisonment in the city jail for a term not exceeding one year, or by a fine not exceeding \$1,000, or by both such fine and imprisonment. (10) The jury are instructed that the only meaning that they can put upon the words 'bad debt' upon said envelope are the usual and ordinary meaning attached to them as used in the English language; and they are not to place the meaning and meanings alleged by way of innuendo in the information, unless they find that the words 'bad debt' and the said meaning and meanings so alleged by way of innuendo are the true meanings and sense of the said words 'bad debt.' (11) The court instructs the jury that the mere fact that the defendant, Armstrong, may have been a subscriber to or employer of the Sprague Collecting Agency of Chicago, will not render him liable for their criminal acts; and that said defendant is not responsible for the sending or publishing of the alleged libelous matter, unless such was done by him or upon his direction and instruction. (12) The court instructs the jury that an indebtedness by open account is a valid and legal debt, although of more than five years' existence. (13) The court instructs the jury that before the jury can convict they must find and believe beyond a reasonable doubt that the prints alleged and set forth in the information herein were of a libelous nature, and had the effect of charging the aforesaid Mary Vincil with being dishonest, and guilty of unfair dealing; and that, further, said prints were sent to the said Mary Vincil by the defendant, or by someone at his instance and request; and, further, that the inference to be drawn from the prints of 'bad debt,' etc., on the alleged envelope, were, as a matter of fact, untrue. (14) The jury are instructed that they are the sole judges of the weight of the evidence and the credibility of the witnesses, and it is for them to find from the evidence in this case whether there was any intention on the part of the defendant, in the use of the means employed to collect a debt, to libel the prosecuting witness, Mary Vincil; and, if they find there was no such intention, then they will return a verdict of not guilty. (15) The court instructs the jury that under the Constitution of Missouri and the statutes thereof the jury are themselves the judges of the law of libel, as well as of the facts, and that they are not required to accept the instructions given by the court as being conclusive of what the law of criminal libel is."

To the giving of which said instructions the defendant excepted, and saved his exceptions at the time.

Refused instructions. And the defendant asked the following instructions: "(1) The

court instructs the jury at the close of all the testimony that, under the evidence in this case, they must acquit the defendant. The court instructs the jury that they cannot construe the words 'bad debt' as meaning that one is a 'dead beat,' or that one 'has been guilty of unfair dealings,' or 'is dishonest;' and that the jury should disregard so much of the innuendo of the information in this case as charges such to be the meaning of said words 'bad debt.' (2) The court instructs the jury that there is no evidence in regard to the receipt by Mary Vincil of the letter set forth in the information, and purporting to come from the Sprague Collecting Agency of Chicago, nor publication of said letter in the City of St. Louis, and the jury should disregard said letter, and that portion of the information in reference to the same, and all charges of libel based on the same. The court instructs the jury that the law presumes the defendant to be innocent of the crime alleged in the information; and that, before the jury can find the defendant guilty in this case, the State must prove to the jury beyond a reasonable doubt that the defendant, at the City of St. Louis, on or about the 27th day of March, 1888, did unlawfully and maliciously mail to the said Mary Vincil, or that the defendant, at the City of St. Louis, on or about the 27th day of March, 1888, did unlawfully, willfully, and maliciously cause to be mailed to the said Mary Vincil, the said envelope shown in evidence, and that by so doing he, the defendant, intended thereby to commit the offense of criminal libel; and before the jury can find that the defendant did cause the mailing of said envelope to be done, the State must prove beyond a reasonable doubt that the defendant directed the said Sprague Collecting Agency to direct and mail the said envelope with the words 'bad debt' thereon; and the State must further prove to the jury beyond a reasonable doubt that the said Mary Vincil does not owe the debt claimed by defendant; and, unless the State has proven all of these things to the jury beyond a reasonable doubt, then the jury will return a verdict of not guilty. (3) The jury are instructed that if they believe from the evidence in this case that the said Mary Vincil owes the debt referred to in the correspondence put in evidence in this cause between her and the defendant, then it is their sworn duty to return into court a verdict of not guilty, although the jury may find that said debt is barred by the Statute of Limitations of five years. (4) The jury are instructed that, although they may find that the words 'bad debt,' as used upon said envelope, are libelous, still, before they can find the defendant guilty, they must further find that the defendant directed the composing of and publishing of said libelous matter, and this fact must be proven to the jury by the State beyond a reasonable doubt. (5) The court instructs the jury that evidence of good character is competent in favor of a person accused and on trial, as tending to show that he would not commit the offense alleged against him; and if in this case the jury believe from the evidence in this case that the defendant has always borne a good character for truth and honesty and quietude among his acquaintances and in the neighborhood where he lived, then

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this is a fact proper to be considered by the jury in arriving at a verdict; and if, after a careful consideration of all the evidence in the case, including that bearing on his character, the jury entertain any reasonable doubt of the defendant's guilt, then it is their sworn duty to acquit him. (6) The jury are instructed that they will reject and not consider any meaning placed upon the words 'bad debt' upon said envelope, except the usual and ordinary meaning attached to them in the English language. (7) The court instructs the jury that, although they may believe and find from the evidence that the defendant, Armstrong, placed an account against Mrs. Vincil in the hands of the Sprague Collecting Agency of Chicago for collecting, and that he may, at the time of doing so, have been aware of the methods used by said agency in attempting to make collections, yet the defendant cannot be held responsible for any acts of said agency in sending the alleged prints and writings, unless they were sent at the instance and request of defendant."

Which the court refused, to which refusal of the court the defendant excepted, and saved his exceptions at the time. After argument of counsel the jury returned into court the following verdict: "State of Missouri v. A. G. Armstrong. Charged with criminal libel. We, the jury in the above-entitled cause, find the defendant guilty as charged in the information, and assess his punishment at a fine of \$500. Thos. D. Ford, Foreman.

Mr. George Robertson, for appellant:

The court should have sustained the defendant's demurrer to the State's evidence, as it did not appear from the evidence that the defendant knowingly or willfully caused the matter to be published. He simply employed this agency to do some collecting, and the agency used its own methods. Sending the libelous matter, if it be such, was not within the scope of its employment.

Townsend, Slander & Libel, 4th ed. 104, note; *Harding v. Greening*, 1 Moore, 477, 1 Holt, N. P. 581, 8 Taunt. 42; *Hardin v. Cumstock*, 2 A. K. Marsh. 480.

It was error in the court to exclude the evidence offered by the defendant to show that the complainant owed numerous other debts that she had failed to pay.

In prosecutions for libel the truth thereof may be given in evidence.

Mo. Const. art. 2, § 14; Rev. Stat. 1889, § 8872; Rev. Stat. 1879, § 1594; *State v. Hosmer*, 85 Mo. 553.

Instruction No. 15 given by the court is erroneous.

State v. Hosmer, *supra*.

The court has no less or different duty to perform in libel cases, nor have the jury any greater rights or powers, than in other criminal cases.

Rex v. Burdett, 4 Barn. & Ald. 358; 2 Kent, Com. *19, pt. 4, note.

It was not the object, either in England or in this country, to set up instead of the arbitrary power of the court an equally arbitrary power of the jury, but simply to restore in the trial of these cases the anciently established and popularly approved course of the common law.

Hallam, Constitutional History of England, chap. 15; Proffatt, Jury Trial, §§ 882-886; Folkard's Starkie, Slander & Libel, H. G. Wood's notes *52-62, top p. 72-84; Thompson, Trials, §§ 2025-2029; Cooley, Const. Lim. 3d ed. 460 *et seq.*; England in the 18th Century, by Lecky, chap. 11; *Montgomery v. State*, 11 Ohio, 427.

Mcara. J. M. Wood, Atty-Gen., and Charles M. Napton, for respondent:

Evidence that Mary Vincil owed several debts in Mexico other than that claimed to be due defendant was properly excluded.

Townshend, Slander & Libel, pp. 318, 319.

The general charge of "dead beat" cannot be justified by a single instance.

Townshend, Slander & Libel, § 213, p. 319, and cases.

Gantt, P. J., delivered the opinion of the court:

The appellant contends that various errors were committed in this trial, and they will be noticed in the order in which he complains. His first assignment is the insufficiency of the information. The verification is claimed to be bad because the prosecutrix only swore that the facts stated were "true to her best knowledge and belief." This was ruled otherwise in the recent decision of this court in *State v. Bennett*, 102 Mo. 352, 10 L. R. A. 717. It is next said that the information is bad for duplicity. This objection is raised for the first time in the motion in arrest. There are various methods for taking advantage of duplicity in an indictment or information. A motion to quash, a demurrer, or motion to compel the State to elect, will, either of them, correct this fault; but it is almost universally held that it is too late after verdict to make this objection in a motion in arrest in a misdemeanor. 1 Bishop, Crim. Proc. §§ 442, 448; *Com. v. Tuck*, 20 Pick. 856; Wharton, Crim. Pl. §§ 255, 760. The cause was heard on the charge of libel, the evidence confined to that offense, and the instructions all had reference to that misdemeanor. We cannot see that any substantial right of the defendant was violated in this respect in overruling the motion in arrest. The matter complained of was at most mere surplusage, and this defect, if any, was cured by our Statute of Jeofails. Section 4115 or section 1821, Rev. Stat. 1879.

Equally groundless is the objection that the information did not charge the matter complained of was "willfully" or "maliciously" published. It distinctly alleges that defendant "did willfully and maliciously libel and defame the prosecuting witness by sending the said envelope with its indorsements through the mails," etc., and is sufficient according to the most approved precedents. The defendant was fully informed by it of the nature and character of the offense with which he was charged, and, after all, this is the great object of an information or indictment.

It is next urged against this information that it does not contain the written allegations of the libelous matter complained of. Anyone reading the information in this cause would be at a loss to understand this objection. As a matter of fact, the point made in argument was not that it was not in writing, but it was not

written by the prosecuting attorney at the time the remainder of the information was drawn, but the original envelope, or at least that portion containing the alleged libel, was pasted in the information, and made a part thereof. Learned counsel for defendant seem to think that it was very material who did the writing. This point is entirely too technical to be seriously entertained in a court of justice. Besides these specific objections, there is a general assignment of error that the information does not charge an offense under the Statute. This information is drawn under section 3860, Rev. Stat. 1880 (Rev. Stat. 1879, § 1591), which defines a libel as follows: "A libel is the malicious defamation of a person, made public by any printing, writing, sign, picture, representation, or effigy tending to provoke him to wrath, or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or any malicious defamation, made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives and friends." Was the sending of this envelope with these indorsements on it the publishing of a libel, tending to expose the prosecutrix to contempt or ridicule, and bring her in disrepute with her employers and the public? We are clearly of the opinion that it was. The words "Bad Debt Collecting Agency" were printed in large, bold type on the envelopes, and were obviously intended to attract the attention of the public? These words must be construed in the light of the times in which they are used. Similar associations had sprung up all over the country, and these devices were resorted to to force debtors to pay their debts. To such extent did they go that the Congress of the United States forbade the use of the mails for their distribution. They had become so common that they were thoroughly understood in the mercantile world. Under this state of affairs, the defendant resorts to this Chicago agency to collect this debt of the prosecutrix. He sets in motion this machine for extorting this money from her. It was known that the prosecutrix was earning her living by her work in the large and responsible dry goods house of Scruggs, Vandervoort & Barney. Accordingly, these letters, four in number, are directed to her in the care of her employers. All the mail for the employes of this large house was put together and taken by the carriers to the store. There the various clerks went to a common repository for their mail. So that the scheme was well devised to attract the attention of those with whom she was most intimately connected, and without whose respect and good opinion the life of a sensitive woman would soon become a burden and unendurable. This envelope on its face was designed to attract the attention of the public, and when the prosecutrix received these letters in these envelopes the fact was thereby published that this association was in correspondence with her for the purpose of collecting a bad debt; and we cannot shut our eyes to the necessary implication that she was a bad debtor; that she was not in the habit of paying her honest debts; and was unworthy of credit. Nor are we left in doubt

that this was the purpose of the association. In the letter which came under cover of this envelope the agency asks her: "Can you afford to have the public know that you refuse to pay this bill? You may need credit again some time, but as long as this account remains in this unsatisfactory manner it will be hard for you to obtain it." In other words: "By means of this style of publishing you to the world we will advertise you as unworthy of credit." Nor was this all. She is warned: "Should you positively refuse to make any arrangements for a liquidation of this claim, we feel justified in advertising the same for sale in the newspapers, as well as to send you a statement regularly until the matter is settled." These regular communications, if sent without these libelous words in large type, would not attract any attention; but, received regularly in this form, would give a painful publicity. The evident purpose and design of the defendant and the association he employed, and for whose acts he is responsible in this matter, was to publish the prosecutrix as a bad debtor, a dishonest person, who would not pay her honest debts, and to degrade her in the eyes of the public and her employers, and as such was clearly libelous, and within the meaning of the Statute. *Muetz v. Tuteur*, 77 Wis. 286, 9 L. R. A. 86; *Dennis v. Johnson*, 42 Minn. 901; *Johnson v. Com. (Pa.)* 14 Atl. Rep. 435.

The law will not countenance or tolerate this method of collecting a debt. The facts that the debt was originally only \$3.45; that it was barred by the Statute of Limitations; that defendant persisted in his endeavor to extort the money from the prosecutrix after her protest; and the avowed intention of his agents to publish her to the world, and advertise this account for sale in the newspapers,—amply sustain the charge that this was maliciously done. To permit a defenseless woman in this day of enlightenment to be thus persecuted would be a reproach to our laws. *Beale v. Thompson*, 149 Mass. 405.

It is insisted by defendant that the court ought to have sustained a demurrer to the evidence. The defendant's own letters of February 1 and 14, 1888, both show that he was aware that this agency was sending to Mrs. Vincil letters that she regarded as insulting. She had appealed to him to call off this agency, and he complacently informs her he will when she sends the \$5. "*Qui facit per alium, facit per se*;" and this maxim applies in all its strictness in libel. Besides, Bassford, the editor of the Ledger, testified that the defendant told him he was a member of the Sprague Agency, and in referring to Mrs. Vincil's letter he said he thought she had received a "chromo," to which he alluded. After believing or thinking that she had received this style of a letter from his agents or associates in Chicago, he declined to stop them unless she pays the \$5. There was ample evidence to sustain the verdict of the jury as to his knowledge and complicity in originating and publishing the libelous envelope. The pasting of the portion of the envelope containing the libelous matter in the information so as to make it a component part thereof was unusual, and, we think, wholly unnecessary, but it certainly did not and could not destroy its character as original evidence

in the case; hence the trial court committed no error in admitting it as evidence.

There was no error in admitting the letter of January 30, 1888, in evidence. It was admissible to show defendant's knowledge of the means his agency was pursuing in his behalf, and of the claim that the debt was paid; and his reply, written on the letter itself, shows his determination to persist, notwithstanding the protest of Mrs. Vincil. Nor did the court err in excluding the evidence of Reed, Emmons, Bedell, and Mrs. Harding, tending to prove that Mrs. Vincil owed them altogether some \$18.50. No offer was made to prove her general reputation in regard to paying her just debts. She was not expected, nor was the State required, to come prepared to meet and try every individual claim that might be made against her. Evidence of specific indebtedness was not admissible. *Wilson v. Noonan*, 27 Wis. 598; *Campbell v. Campbell*, 54 Wis. 90; *Muetz v. Tuteur*, 77 Wis. 286, 9 L. R. A. 86. Indeed, the fact that, after the zealous efforts of defendant to destroy her character as an honest woman, he could only find an indebtedness of \$18.50 against her in a community where she had lived for many years, is rather a vindication. It is questionable, if admitted, if it would have had any appreciable effect upon any sensible juror.

The point made, that the court permitted the State's counsel to cross-examine the defendant on matter not elicited by his counsel in chief, has been carefully examined, and we have concluded that it really amounts to nothing more than an inquiry if he understood what Mrs. Vincil referred to as insulting in her letter of the 30th of January. No possible injury could come from this. The court expressly ruled the counsel for the State to a cross-examination of the matter brought out by defendant, and none other was elicited. The instructions correctly told the jury what was necessary to constitute the libel under the information. The only one requiring special examination is the fifteenth, which informs the jury that they are the judges of the law of libel as well as of the facts, and they were not required to accept the instructions given by the court as being conclusive of what the law of criminal libel is. Section 14 of article 2 of the Constitution of Missouri declares "that no law shall be passed impairing the freedom of speech; that every person shall be free to say, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact." It was to this constitutional provision in our Bill of Rights this instruction referred. In *State v. Hosmer*, 85 Mo. 553. Judge Henry, in discussing an instruction similar to the one complained of here, says: "The defendant asks the court to declare the law to be 'that under the law the jury are to determine the law and the facts in this case.' Section 1594, Rev. Stat. 1879, is as follows: 'In all prosecutions for libel or verbal slander the truth may be given in evidence to the jury, and shall constitute a complete defense; and the jury, under the direction of the court, shall determine the law and the

fact.' I confess that I do not fully comprehend the meaning of the remarkable concluding clause of that section;" and he condemns that instruction. No allusion is made by the learned judge to the Bill of Rights, nor to the history of this provision in our Constitution and law. Section 14, art. 2, of our Constitution is but a rescript of section 1, Fox's Libel Act, enacted by the British Parliament (32 Geo. III.) in 1792. Before that Act it had become to be the rule that the judge, not the jury, should decide whether or not the publication was a libel. The judge would direct the jury to find the defendant guilty on proof of the publication, of the innuendoes, and of the other necessary averments. But that Act declared and enacted that on the trial of an indictment or information for libel the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue before them. This Act in full will be found in *Odgers on Libel and Slander*, p. 665. In the case of *Reg. v. Sullivan*, for seditious libel, in 1868, this law was interpreted by *Fitzgerald, J.*, who presided in the trial. It is reported in 11 Cox, C. C. 51. Among other things, in his charge to the jury, he said: "The next question is of paramount importance, and it is the one of which the jury are the sole judges,—whether these publications are seditious libels. That question of law and fact is intrusted to the jury alone. I know that some of you have considerable experience as jurors, and I have often had the duty cast upon me of addressing you as such. You must have observed that in ordinary cases, especially in the crown courts, the questions were divided into those of law and fact. The questions of law are usually for the judge, and on them the jury are bound to take his direction. The questions of fact are solely for their determination. In this peculiar case of libel the law of the land says the jury shall determine the whole question whether the publication is a libel or a seditious libel. That power has been given to the jury for the purpose of protecting the inviolable blessing of a free and independent press. You should bear in mind that, while you will receive assistance from me, you are not bound to follow anything I tell you. You are the sole judges of the law and fact."

In *Rex v. Burdett*, 4 Barn. & Ald. 131, *Mr. Justice Best* said: "Libel is a question of law, and the judge is the judge of the law, in libel, as in all other cases. The jury have the power of acting agreeably to his statement or not." When we remember the origin of this provision in our Constitution, that it was the result of the speech made by *Lord Erskine*, in his defense

of the *Dean of St. Asaph* in 1784, a speech declared by *Fox* to be the finest argument in the English language, and that this speech prepared the way for the adoption of *Fox's Libel Bill* in 1792, it is impossible for us to view it as having no other or different meaning than the other provisions guaranteeing a jury trial. Does not the usual construction apply here, as in other cases,—that, when foreign laws are adopted, and made a part of our Code, the presumption is that we adopt also the construction already given by the foreign courts where they had their origin? As we have seen, the English courts make a broad distinction in prosecutions for criminal libel and all other cases as to the province of court and jury. The scope of this opinion forbids any further elaboration of the great principles upon which this provision is founded. The argument of *Lord Erskine* on the right of juries in criminal libel is in itself a complete history, and will be found reported in full in 21 How. St. Tr. 847–1046.

Viewed in the light of the history of the constitutional provision, and the great contest for the freedom of the press out of which it grew, and of the construction given *Fox's Libel Bill* by the English judges, did the criminal court err, after it had fully instructed the jury in this cause, in further instructing them that they were themselves the judges of the law of libel, as well as of the facts, and that they were not required to accept the instructions given by the court as conclusive of the law of criminal libel? Is not this instruction, in substance and effect, just what the Constitution commands, and is it not simply another way of stating the same principles that were announced by *Judge Fitzgerald* in the *Sullivan Case*, *supra*, and *Justice Best* in *Rex v. Burdett*, *supra*, viz., that while the judge may assist and inform him what the law is, and it is his duty to do so, still they are, by virtue of organic law, the final judges in a prosecution for criminal libel? We think so; and in so doing we conclude that the decision in *State v. Hosmer* was decided without this constitutional provision; and its history having been brought to the attention of this court, and inasmuch as it is of the very gravest importance that the Constitution itself should govern, we think *State* against *Hosmer* should not longer be followed.

This brings us to the conclusion that there are no reversible errors in the record in this cause, and the judgment of the Criminal Court is accordingly affirmed.

Thomas, J., concurs; *Macfarlane, J.*, not sitting.

PENNSYLVANIA SUPREME COURT.

GENESEE FORD IMPROVEMENT CO.

James IVES, Appt.

(.....Pa.....)

1. A second bond is not required from a corporation organized under the Act of 1863 for the improvement of the navigable R. A.

gation of a stream, which has failed to agree with abutting property owners as to payment of damages, before it can exercise its franchises, if it has given the one prescribed by section 5 of that Act, although section 4 provides that in case of failure to agree as to damages they shall be assessed under Act 1874, § 41, which requires the tender of a bond to the person claiming damages.

2. The right to exercise a corporate

franchise and collect tolls under a charter acquired under the Act of 1883 for improving the navigation of a stream cannot be defeated by denying the necessity of the franchise or questioning the degree of perfection in the improvements made by the company.

3. The reasonableness of the tolls charged by a company organized under the Act of 1883 for improving the navigation of a stream cannot be questioned so long as they are within the limit fixed by the statute.

4. A judgment will not be reversed for the error of the court in directing a verdict for plaintiff when the case should have been submitted to the jury because the right of recovery depended on oral testimony, where no interest of defendant would be subserved by reversal, if the assignments of error do not contain the language of the court in *totidem verbis*, and the question is not argued for appellant.

(October 5, 1891.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Potter County in favor of plaintiff in an action brought to recover tolls for logs floated on the Genesee Fork of Pine Creek. *Affirmed.*

At the trial defendant objected to evidence that he had floated logs on the stream by the aid of plaintiff's improvements on the ground that plaintiff had no rights in the stream because it had not filed the bonds required by statute. The objection was overruled, and the evidence admitted. [1st assignment of error.]

Defendant attempted to show that there was sufficient water in the stream to run out his logs without the assistance of any of defendant's improvements; that the stream was in no better condition for running logs after, than it was before, plaintiff's alleged improvements; that there had been no material improvement in the navigability of the stream; and that the improvements did not obviate the necessity of assistance from the banks in running the logs; all of which was objected to and excluded. [2d, 3d, 4th, 5th, assignments of error.]

He attempted further to show that ten cents per thousand feet was not a reasonable toll, and that no improvements had been made which would authorize the collection of any toll; all of which was objected to and excluded. [6th and 7th assignments of error.]

The court charged the jury that what was a reasonable charge per thousand feet was not for the court or jury to fix, but for the Company itself, the law simply fixing a maximum beyond which they cannot go. [8th assignment of error.]

The court instructed the jury to find for plaintiff the full amount charged. [9th assignment of error.]

The tenth assignment of error questioned the constitutionality of the Act of 1883.

Further facts appear in the opinion.

Messrs. Mann & Ormerod, for appellant:

The plaintiff was a trespasser upon the defendant. It was attempting to exercise a right it had never obtained, not having made compensation to the defendant, who was a riparian owner, nor tendered security.

Lord v. Meadville Water Co. 8 L. R. A. 202, 185 Pa. 181.

It cannot be said that there was an implied 13 L. R. A.

contract on the part of Ives to pay when he rolled his logs into the stream. It was a natural highway which he had used for that purpose for more than twenty-one years. It was the only way of getting his logs to market, and the same reasoning would not apply to his use of the stream, that might apply to the use of an artificial highway such as a railroad or a turnpike road.

Irvine v. Lumbermen's Bank, 2 Watts & S. 190, and *Dyer v. Walker*, 40 Pa. 157, do not rule this case.

The franchise to collect tolls did not vest with the granting of the charter. The law contemplates the making of improvements before the imposition of tolls, and the franchise to collect tolls did not take effect until the improvements were made. Tolls were permitted by the Legislature in consideration of making improvements, not of making an application for a charter.

Carman v. Clarion River Nav. Co. 81* Pa. 412.

An interpretation of this law which will permit a corporation to blanket a stream by purchasing a charter and passing a resolution to charge tolls, is in conflict with the rule which requires a construction of a charter against the corporation and in favor of the public.

The Legislature certainly never intended to allow a corporation to appropriate a public highway, unless for the public benefit. It could not be for the public benefit unless they improved its use, and an attempt to collect tolls before they had done something to benefit the public would be an imposition and fraud upon the public which the law will not permit.

Scranton R. L. & H. Co's App. 1 L. R. A. 285, 122 Pa. 174, 175.

The rights and powers of a corporation can be inquired into by the courts under the Act of 1871, p. 1860.

McCandless's App. 70 Pa. 216; *Western Pennsylvania R. Co's App.* 104 Pa. 406.

There is nothing in the Act which gives the plaintiff exclusive control of the stream. The Legislature evidently intended to limit the rights of the corporation to the control of its improvements. All persons shall have the right to have their logs floated with the aid of these improvements, subject to the payment of tolls. Exclusive rights of corporations are not favored.

Scranton, R. L. & H. Co's App. supra; Freeport Water Works Co. v. Prager, 129 Pa. 605; *Emerson v. Com.* 108 Pa. 111; Act of 1887, Pa. Laws 812, § 3.

Ten cents is the maximum figure for twenty miles. Ten cents is the amount charged Ives for floating his logs one and a half miles from the mouth of the stream. While the discretion of a corporation, if exercised reasonably, cannot be inquired into in a suit at law, still when that discretion is misused or abused it may be redressed or restrained in a suit at law.

Pennsylvania R. Co's App. 128 Pa. 521-522; *Com. v. Erie & N. E. R. Co.* 27 Pa. 339; *Parke's App.* 64 Pa. 187; *Struthers v. Dunkirk, W. & P. R. Co.* 87 Pa. 282-286; *Clarke v. Birmingham & P. Bridge Co.* 41 Pa. 160.

Messrs. M. F. Elliott and Dornan & Peck, for appellee:

Our right to collect tolls was a franchise,

contained without any limitation in our charter, and the defendant cannot, in this collateral proceeding, inquire into this franchise to take tolls, and take away or forfeit this franchise of the corporation.

3 Wood, Railway Law, § 817; *Irvine v. Lumbermen's Bank*, 2 Watts & S. 190; *Murphy v. Schuylkill County Farmers' Bank*, 30 Pa. 416, 418; *Dyer v. Walker*, 40 Pa. 157; *Cleveland & P. R. Co. v. Speer*, 56 Pa. 825, 835; *Farnham v. Delaware & H. Canal Co.* 61 Pa. 265, 271; *Bennett's Branch Imp. Co's App.* 65 Pa. 242; 251; *Grant v. Henry Clay Coal Co.* 80 Pa. 208; *Building & L. Asso. v. Fenner*, 13 Phila. 107; 86 Legal Int. 124.

The Act of June 19, 1871, does not apply to this case, for that Act only authorizes a private citizen by bill in equity or other proceedings in accordance with said Act, to investigate into causes of forfeiture, which may appear from the limitations of the charter of the corporation.

Western Pennsylvania R. Co's App. 104 Pa. 390.

The stream was a public highway for the floating of logs.

Barclay R. Co. v. Ingham, 36 Pa. 194, 201, 202; *Meyer v. Phillips*, 97 N. Y. 485; *Brig "City of Erie" v. Canfield*, 27 Mich. 479; *Olsen v. Merrill*, 42 Wis. 203.

Then, what property of the defendant therein did the corporation take?

Bennett's Branch Imp. Co's App. supra.

Evidence that the improvements we had made were not beneficial to the navigation of the stream for floating logs, either generally, or so far as the defendant was concerned, was rightly excluded.

Ibid.

Within the maximum limits fixed by the statute, "the amount of tolls the corporation or its proper officers may require," "is to be regulated by the discretion of the corporation, exercised through its proper officers."

Cumberland Valley R. Co's App. 62 Pa. 229; *Struthers v. Dunkirk, W. & P. R. Co.* 87 Pa. 282; *Pennsylvania R. Co's App.* 128 Pa. 500; *Park's App.* 64 Pa. 137; *Clarke v. Birmingham & P. Bridge Co.* 41 Pa. 147.

Green, J., delivered the opinion of the court:

After the trial of this case the bond given by the appellees in the course of their organization proceeding under the 5th section of the Act of 1883 was found. The condition of the bond is in exact conformity with the requirement of the 5th section. It was duly approved by the court on March 22, 1888, and was therefore a full compliance with the statutory requirement in that regard. It is still contended, however, that the plaintiff was obliged to file another bond under the 4th section of the Act, before it could exercise its corporate franchise. While we do not consider that the defendant is entitled to raise this question in the present collateral proceeding, an examination of the 4th section satisfies us that there was no necessity for the giving of any other bond than the one required by the 5th section. The 4th section merely provides a method of proceeding for the assessment of damages sustained by the owners of dams and land along the streams,

and simply directs that when the Company and the owner cannot agree as to the damages the assessment shall be made under the forty-first section of the Act of 1874 to which the Act of 1883 is a supplement. Upon recurring to that section we find that it contains an elaborate provision for the assessment of damages by the appointment of viewers whose proceedings are prescribed in about the usual manner in which views for such purposes are conducted. The section contains a further provision that when the parties cannot agree upon the amount of the damages to be paid, the corporation shall tender a bond to the party claiming damages, with condition that the corporation will pay such amount of damages as the party shall be entitled to receive after the same shall have been agreed upon by the parties, or assessed in the manner provided for in the Act. It is plain that the duty to tender this bond arises as a part of the proceedings for the assessment of damages in the cases covered by the Act of 1874. Had the Act of 1883 contained no other provision for the giving of a bond than is contained in the Act of 1874 it would have been necessary for the plaintiff to have given the bond required by that Act. But the Act of 1883 does contain a specific provision for the giving of a bond in its 5th section. The condition of the bond there required to be given is for the indemnification of all and every person whose property may be injured by reason of the construction and operation of the improvements of the corporation. As this language is broad enough to include all owners of dams and lands on the streams in question it is manifest that it is ample to confer every remedy afforded by the bond required by the forty-first section of the Act of 1874. The giving of such a bond therefore is entirely unnecessary when the bond required by the fifth section of the Act of 1883 has been given. The first assignment of error is not sustained.

The questions raised by the second, third, fourth and fifth assignments relate to matters which must be considered as having been settled when the corporate franchise was acquired. The right to appropriate the stream for the purpose of floating logs upon it was conferred by the Act of 1883, under which the plaintiff was organized. It could not be tolerated that the right to exercise the franchise and collect the tolls allowed by the Act, should be defeated by objections which deny the necessity of the franchise, or call in question the degree of perfection in the improvements made by the Company. Although it might be possible for an owner to float his logs upon the natural state of the water and without assistance from the dams, at times, that is no reason why the Company may not claim the fruits of its franchise. And so also as to its right to collect tolls, which is called in question under the sixth and seventh assignments. So long as the Company keeps within the discretionary limit fixed by the Statute, its right to collect the tolls cannot be defeated, nor its discretion to fix the amount questioned. All of this was decided in the cases of *Boyle v. Philadelphia & Reading R. Co.* 54 Pa. 310, and *Cumberland Valley R. Co's App.* 62 Pa. 218. In the later case Thompson, Ch. J., said:

"The company has therefore the clear warrant of the charter for demanding the aggregate of the sums, viz.: seven cents per mile per ton for private freight in their own cars on their own road. Within this limit no court can interfere with them. This is settled by the charter and by the decision in the case of *Boyle v. Philadelphia & Reading R. Co.*, *supra*. The master finds that the company has not transcended this limit and the court, very properly concurring with the master, dismissed this portion of the bill."

In the case of *Parke's App.*, 64 Pa. 187, we held that the court has no right to interfere with a company's location of its road, on the score of preference, within the limits of its charter. In the case of *Struthers v. Dunkirk, W. & P. R. Co.*, 87 Pa. 282, the present chief justice said: "There is only one question remaining in the case and that is, whether the court below should have received evidence to show that the company might have located its road upon another route and thus have avoided laying the track upon High Street. We are clearly of opinion that the learned judge was right in excluding evidence of this character, and also in his answers to the points, in which the same question was presented. The discretion of the company in locating its road cannot be reviewed in this manner. The location was made in the exercise of an undoubted power. It was said in *Parke's App.*, 64 Pa. 137: "Neither the court below nor this court has any right to interfere with the location made by the company on the score of preference, if any be felt. The only question is whether it has or has not exceeded a discretion on the subject, apparent on the face of the Act of incorporation."

In the case of *Bennett's Branch Imp. Co's App.*, 65 Pa. 242, in which the company was authorized to clear out, improve and use Bennett's Branch, to use dams erected and erect new dams, and to use all of said dams and the waters of the said stream, in the floating of sawlogs down the same, Thompson, *Ch. J.*, in delivering the opinion, said: "The company, having authority by law to improve the stream in the manner prescribed for the consideration of taking toll on the lumber and logs floated thereon, would not lose its franchises, because the improvement was in fact not beneficial, there being no such condition prescribed. The Legislature determined that question in granting the charter and all the franchises granted will remain, in the absence of any limitation, until taken away by some direct action for that purpose, legislative or judicial. . . . The right to impose tolls as a consideration for the completion of an enterprise intended to benefit the public is a right of government. It is conceded to the promoters, as a compensation for the benefit, in contemplation of law, which every individual receives for an improved mode of transit of person or property. Individual complaints avail nothing against the right. These individual inconveniences must yield to the wants of the whole public. In 18 L. R. A.

most of these cases of improved navigation, by companies, or the State, if not all, individuals have always been found who would claim to be as well off without such improvements as with them, and yet they are obliged to pass over them with their property, and pay tolls. There is no reason in this for impeaching the validity of the law. This results from the accident of location and of this nobody is to blame but the owner, and he must submit to all legal consequences incident thereto." The consideration so well expressed in the foregoing opinion practically disposes of all the questions arising upon the rejected offers of testimony covered by the several assignments of error now under discussion, including the question of the reasonableness of the tolls charged for the logs floated in 1889. The only question discussed by counsel for the appellant under the eighth assignment of error is the correctness of the instruction that neither the court nor the jury had the right to determine what was a reasonable charge per thousand feet so long as the Company kept within the maximum price fixed by the Statute. As we have already held that this is a subject within the discretion of the Company, we think there was no error in this portion of the charge. We are bound to consider that so long as the charge did not exceed ten cents per thousand it was reasonable within the contemplation of the law. The ninth assignment of error, as it is pressed upon our attention, raises no other question than the one covered by the eighth assignment. The full amount charged was ten cents per thousand upon the number of feet of logs floated as stated in the testimony, and it is not claimed that there was any error in the court's statement of the quantity. It is true that the court did direct a verdict absolutely in favor of the plaintiff although the right of recovery depended upon oral testimony. This ordinarily would be error, as it includes substantially an instruction that the jury must believe the plaintiff's witnesses and that is a subject over which the jury has exclusive control. The ninth assignment is in violation of our rule of court as it does not contain the language of the court *in totidem verbis*. Expressed as it is, and discussed as it is, it complains only of the amount charged and not of the direction to find for the plaintiff. Were we at liberty to reverse for the technical error of the charge in this respect, we do not think any interest of the defendant would be subserved by our doing so. We prefer to say, therefore, that we disregard this feature of the assignment because it is not properly expressed, nor is the question itself anywhere discussed in the argument for the appellant. There is no force in the tenth assignment as the Act of 1888 is not an amendment to the Act of 1879, but to the Act of 1874, and the amended section of that Act is correctly re-enacted in the Act of 1888. Moreover, this point was not made in the court below and no exception on the record raises the question.

Judgment affirmed.

President, Managers & COMPANY FOR
ERECTING a BRIDGE over the Juniata
River AT or near the Village of MIF-
FLIN, in the County of Mifflin (now
Juniata).

v.

COUNTY OF JUNIATA, Appt.

(.....Pa.....)

1. In a proceeding to determine the compensation to be made to the owners of a toll-bridge which has been taken by the county, witnesses should be questioned as to the value and not the cost of the bridge.
2. The cost of repairs upon a toll bridge which has been taken by a county cannot be considered in determining the compensation which must be paid to the owners because of such taking.
3. Returns of the value of its capital stock, made by a toll-bridge company to the state auditor as required by law, is competent evidence upon the question of such value in a proceeding to determine the compensation to be made to the company for the taking of the bridge by the county.
4. For what sum the county could have erected a new bridge is immaterial in a proceeding to determine what compensation it must make to the owners of a toll bridge which it has taken for the use of the public.

(October 5, 1891.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Mifflin

County, fixing the compensation to be made to plaintiff because of the taking of its toll-bridge by the county. *Reversed.*

The case is sufficiently stated in the opinion. *Messrs. Alfred J. Patterson and D.W. Woods*, for appellant:

The certified copies of the returns made by the Bridge Company of the value of their capital stock, to the auditor general were competent evidence.

These returns were made under oath, and their object was to ascertain the value and worth of the stock for the purposes of taxation.

See *Lynch v. Lively*, 33 Ga. 575; *Benken-dorf v. Taylor*, 29 U. S. 4 Pet. 849, 7 L. ed. 882; *State v. Gorham*, 65 Me. 270; *Clarke v. Dougan*, 13 Pa. 87.

The declarations of the secretary and treasurer of this Company, made under the law, and under the circumstances of this case, and enjoined upon them, were within the scope of their authority and were binding upon the company.

Magill v. Kauffman, 4 Serg. & R. 817; *Toll Bridge v. Betworth*, 80 Conn. 280; *La Salle County v. Simmons*, 10 Ill. 216; *Covington & L. R. Co. v. Ingles*, 15 B. Mon. 687; 2 Wharton, Ev. § 1078.

A written admission by a party, if published by him, is strong evidence against him or those claiming under him.

2 Wharton, Ev. § 1122.

The declarations and admissions of the real party in interest, though his name does not appear as the party of record, are competent

NOTE.—Right of eminent domain.

The right of eminent domain or inherent sovereign power gives to the Legislature the control of private property for public uses and for public uses only. *Memphis Freight Co. v. Memphis*, 4 Coldw. 425; *Coester v. Tide Water Co.* 18 N. J. Eq. 64; *Townsend v. Morris Canal & Bkg. Co.* 6 Trans. App. 276; *Varick v. Smith*, 5 Paige, 137, 3 L. ed. 659.

It must rest with the wisdom of the Legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain. *Taylor v. Porter*, 4 Hill, 151; *Dingley v. Boston*, 100 Mass. 558; *St. Louis County Ct. v. Griswold*, 58 Mo. 124; *Coester v. Tide Water Co.* 18 N. J. Eq. 67; *Beekman v. Saratoga & S. R. Co.* 3 Paige, 73, 3 L. ed. 63.

A statute is unconstitutional and void which authorizes the transfer of one man's property to another without the consent of the owner although compensation is made. *Embury v. Conner*, 3 N. Y. 517, 53 Am. Dec. 323; *Hay v. Cohoes Co.* 3 Barb. 47; *Bloodgood v. Mohawk & H. R. R. Co.* 18 Wend. 59; *Taylor v. Porter*, 4 Hill, 147; *Re John & Cherry Sts.* 19 Wend. 659; *Wilkinson v. Leland*, 27 U. S. 2 Pet. 653, 7 L. ed. 553.

The legislative department of the government cannot divest a citizen of a lawfully acquired right or title (to property; and the maxim, *nemo potest suare constitutum suum in alterius injuriam*, is a principle of the common as well as the civil law; and is applicable, in a free government, as well to the government as to individuals. *Dockery v. McDowell*, 40 Ala. 481.

There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power, as to authorize manifest injustice by positive law; or to take away that security of personal liberty, or private property, for the protec-

tion whereof government is established. *Durkee v. Janosville*, 23 Wis. 463, 9 Am. Rep. 504; *Calder v. Bull*, 3 U. S. 3 Dall. 357, 1 L. ed. 645; *Fletcher v. Peck*, 10 U. S. 6 Cranch, 143, 3 L. ed. 180; *Torrett v. Taylor*, 13 U. S. 9 Cranch, 60, 3 L. ed. 653. See note to *Logan v. Stogdale* (Ind.) 8 L. R. A. 58.

Compensation must be made to the owner.

The qualification of the right of eminent domain, existing by the general law of European nations and the common law of England, that compensation should be made for private property taken or sacrificed for public use, has in this country been established beyond legislative control by the provisions of the Constitution of the United States and the Constitutions of the several States. *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166, 20 L. ed. 557.

By the Constitution of the Mexican State of Tamaulipas, in force in 1823, the land of an individual could not be devoted for an object of common recognized utility, without previous compensation. *Brownsville v. Cavazos*, 100 U. S. 138, 25 L. ed. 574.

The owner of a private bridge across which a public road was created by the county board to enable the county to appropriate the bridge, which is thereafter used by the public, is entitled to compensation. *Blaine County v. Brewster* (Neb.) June 30, 1891.

A statute which, under this power, repeals an Act of incorporation, and at the same time creates a new corporation with similar powers, is not in conflict with the Constitution of the United States, if it provides for compensation for the property of the extinct corporation, so taken by the new one. *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 931. See note to *Alloway v. Nashville* (Tenn.) 8 L. R. A. 123.

evidence against him, the law giving him the same rights as though he were a party to the record.

1 Greenl. Ev. § 180; 2 Starkie, Ev. Metcalf's ed. 40, 41; Wharton, Ev. § 1213.

Messrs. B. F. Junkin and A. Reed for appellees.

Paxson, Ch. J., delivered the opinion of the court:

It was held in *Montgomery County v. Schuylkill Bridge Co.*, 110 Pa. 54, that where a bridge is taken by a county for public use under the Act of May 8, 1876 (Pub. Laws, 181), the measure of damages is the value of the property to the owners, not to the county taking it, and that such value is to be ascertained not only by the cost of the structure, but also by the value of its franchises. The value of its franchises depends largely upon its earning capacity. A bridge, as was observed in the case cited, is a peculiar kind of property, and seldom has a market value. The value of its capital stock may, and generally does, indicate with some accuracy, the value of its franchises. Hence in an action against a county for taking a bridge, the cost or value of the structure, the amount of net tolls, and the market value of its capital stock, are all elements to be considered in ascertaining the value of the bridge and its corporate franchises. No one of these elements, standing alone, would in all cases furnish a test; considered together, they will seldom fail to lead to a satisfactory result.

Property which may be taken.

The right of eminent domain clearly implies the right in the sovereign power to determine the time and occasion, and as to what particular property it may be exercised. *Heyward v. New York*, 7 N. Y. 325.

All private rights vested under the government, including those held by charter or other contracts, are subordinate to the power of eminent domain. *West River Bridge Co. v. Dix*, 47 U. S. 6 How. 507, 12 L. ed. 535.

A franchise granted by a Legislature is subject to the right of eminent domain. *Richmond, F. & P. R. Co. v. Louisa R. Co.* 54 U. S. 13 How. 71, 14 L. ed. 55.

Like all other property, corporation property is subject to the necessities of the public; and not only its property, but its franchises, when inseparable, may be taken for public use on compensation being made therefor. *Re First Street*, 9 West. Rep. 573, 66 Mich. 42.

Any of its property not actually in use, or absolutely necessary for the enjoyment of the franchise, is subject to condemnation for other purposes, the same as the property of an individual. *Ibid.*; *West River Bridge Co. v. Dix*, 47 U. S. 6 How. 543, 12 L. ed. 530; *Peirce v. Somersworth*, 10 N. H. 370; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35, 66; *Charles River Bridge v. Warren Bridge*, 36 U. S. 11 Pet. 638, 641, 9 L. ed. 781; *Bona-partie v. Camden & A. R. Co. Baldwin*, C. C. 206; *Tuckahoe Canal Co. v. Tuckahoe & J. R. Co.* 11 Leigh, 42; *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.* 17 Conn. 40; *Armington v. Barnet*, 15 Vt. 745; *Lexington & O. R. Co. v. Applegate*, 8 Dana, 259.

Yet property taken by one corporation for a public use cannot be taken by another corporation, without an express grant or by necessary implication. Right by implication can arise only from ab-

The first three assignments may be considered together. The witness, L. G. Brown, was asked as to the value of the bridge, by which I understand to be meant the superstructure only. This was objected to on the ground that Brown, having contracted for the erection of the bridge, should have been asked as to the contract price. We do not think this objection well taken. The true question was the value of the bridge, not what it cost. The contractor may have taken it at too low a figure, or the owner may have paid too much; the county is entitled to pay for it at its actual value at the time of taking.

The fourth and fifth assignments allege that the court below erred in rejecting evidence in reference to the cost of certain repairs to the bridge. The evidence was clearly irrelevant and properly rejected.

The sixth assignment is more serious. The defendant offered a certified copy of the return made by the Bridge Company of the value of its capital stock, to the auditor general under oath, from the year 1881 up to the present time. This was offered for the purpose of showing the value of the capital stock as made for the Company under oath by its officers.

The capital stock represents the property and franchises of the corporation, and as before observed is an element to ascertain the damages. The plaintiff had given in evidence, to show the value of the capital stock or franchises, the receipts from tolls for 1884, 1885, 1886, 1887, 1888, 1889. It was clearly

solite necessity, such as that without it the grant would be defeated. *Pittsburg Junction R. Co's App. (Pa.)* 4 Cent. Rep. 267; *Groff's App.* 5 L. R. A. 661, 129 Pa. 621.

A bridge held by an incorporated company under a charter from a State may be condemned and taken as part of a public road, under the laws of that State. *West River Bridge Co. v. Dix*, 47 U. S. 6 How. 507, 12 L. ed. 535.

Measure of damages for toll-bridge taken.

The principle that the true measure of damages for property taken for public use is the market value of the property at the time of the taking does not apply to a toll-bridge company whose property is taken for a county bridge, such property being of a peculiar character and having no market value. *Montgomery County v. Schuylkill Bridge Co.* 110 Pa. 54.

The damages are not limited to the cost of the construction of a new and similar bridge at the time of the taking, but include the value of the franchises arising from the income from the tolls. *Ibid.*

In arriving at the value of the franchises it is proper to prove the receipts of the company for a matter of five years before the taking, but not to extend the inquiry back forty or fifty years to the organization of the company. *Ibid.*

A toll-house and canal bridge built by the company for the convenience and proper use of the bridge, are properly considered. *Ibid.*

In estimating the sum to be paid, the franchise of the corporation to collect tolls shall not be considered, but the court in *Re Condemnation of Lock & Dam No. 7*, 46 Phila. Leg. Int. 89, held that, as the question was not free from doubt, it would arrest the proceeding, but would overrule the objections, without prejudice to respondent's right to renew them thereafter.

competent, therefore, for the defendant to show the value placed by the company upon its own stock; a valuation made upon the oath of its officers. It is no answer to this to say that the return was made by the officers and not by the stockholders. The officers were the duly constituted agents or representatives of the latter, and their act was the act of the corporation itself. The return was made in pursuance of the Act of Assembly, and was the official act of the corporation. Hence we need not discuss the cases cited as to the power of an agent to bind his principal by his declarations. They are not relevant. While this return does not conclude the Bridge Company upon the question of value, it is nevertheless competent evidence for the consideration of the jury, and is moreover important. The difference between the verdict and the valuation placed upon its property by the Company under the oath of its officers is so great as to justify the suggestion that the verdict was too large, or the company has undervalued its property to escape taxation.

What has been said covers the seventh assignment. The eighth assignment is not sustained. It was not relevant to show what the county could have erected a new bridge for, at this or some other point. The county might have erected a new bridge, but it preferred to take the bridge of the plaintiffs, and must pay for it at its value to the latter. The remaining assignments refer to the charge of the court and are not sustained. The learned judge said in answer to the defendant's first point: "If the jury finds that the property was liable to destruction from flood or ice, this may be considered to the extent that this liability decreased the value of the property." This was an affirmation of the point, but the defendant complains that it was not strong enough, and that the learned judge should have instructed the jury that they *must* consider the matters referred to instead of that they *may* do so. This is somewhat of a refinement. The jury could not fail to have understood that if the liability to destruction from flood and ice lessened the value of the property, their verdict should be reduced to that extent.

The judgment is reversed and a venire facias de novo awarded.

A. Stanley ULRICH, Exr., etc., of Andrew Bleistine, Deceased, Appt.,
v.

Adolphus REINOEHL et al.,

(.....Pa.....)

1. Whether or not a policy of insurance taken out by a creditor on the life of his debtor,

NOTE.—Life insurance; insurable interest essential to validity of policy.

An insurable interest must be actual, and such as will reasonably justify a well grounded expectation of advantage dependent upon the life of the insured. *Corson v. Garner* (Pa.) 4 Cent. Rep. 308; *Baker v. Union Mut. L. Ins. Co.* 43 N. Y. 233.

A creditor has an insurable interest in the life of his debtor. *American L. & H. Ins. Co. v. Robert* 13 L. R. A.

to secure his debt, is so excessive as to be a wager policy, is a question for the court where the facts are not in dispute.

2. A creditor may lawfully take out a policy on the life of his debtor in an amount sufficient to cover the debt, with interest thereon, and the cost of the insurance with interest thereon during the period of the expectancy of life of the insured, according to the Carlisle Tables, and may retain the full proceeds of the policy, regardless of the time of the debtor's death.

(October 5, 1891.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Lebanon County in favor of defendants in an action brought to recover the excess of proceeds of an insurance policy taken out on the life of plaintiff's testator, over and above the amount of defendant's claim, with interest and the cost of insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. Grant, Weidman and A. Stanley Ulrich, for appellant:

There was in this case every element of speculation in life insurance, viz.:

1. Want of relationship.

Gilbert v. Moos, 104 Pa. 74.

2. Disproportion between the policy for \$8,000 and the debt of \$110.

Cooper v. Shaeffer (Pa.) 9 Cent. Rep. 601.

3. The taking and holding of the policy and payment of all premiums and dues by the defendants, from the start to the finish.

Scott v. Dickson, 108 Pa. 16; *Downey v. Hoffer*, 110 Pa. 115.

4. The purchase of this policy by the defendants for the consideration of the satisfaction of their judgment of \$99.51, with interest for one year and four months, and costs, and the satisfaction of their judgment in exchange for the assignment of this policy for \$3,000.

Downey v. Hoffer, *supra*.

5. The receipt of the insurance provided for in the policy from the aid society.

With proof of these facts before the court, it erred in admitting the offer to prove that the speculative venture of the defendants would have proved disastrous to them if Bleistine had lived his expectancy of twenty-six more years. A disproportion so gross as 80 to 1 was not capable of excuse or justification.

Cooper v. Shaeffer (Pa.) 9 Cent. Rep. 601;

Cummack v. Lewis, 82 U. S. 15 Wall. 643, 21 L. ed. 244; *Gilbert v. Moos*, 104 Pa. 74; *Corson's App.* 4 Cent. Rep. 307, 113 Pa. 438.

The taking out of the policy and its assignment to defendants was the consideration with them for the satisfaction of the judgment. By this their debt was canceled, their lien was surrendered and priority was given to the subsequent lien-holders; and they by this substi-

shaw, 23 Pa. 189; *Cunningham v. Smith*, 70 Pa. 450; *Rittler v. Smith*, 2 L. R. A. 844, 70 Md. 261.

An insurable interest, such as will take the contract out of the wager class, arises from the relation of the party taking the insurance to the insured, so that from such relation there may be some expectation of benefit or advantage in the continuance of the assured life. *Keystone Mut. Ben. Assn. v. Norris*, 7 Cent. Rep. 204, 115 Pa. 446; *Warnock v. Davis*, 104 U. S. 775, 23 L. ed. 924; *Cor-*

tution, by purchase, of the policy for their debt, placed themselves under the ban of holding for speculative purposes.

Donney v. Hofer, supra; The Insurance Co. v. Hazard, 2 Ins. L. J. 180; *Bliss*, L. Ins. 2d ed. p. 41.

The question of excessive disproportion being in plain view of the court, it was its duty, under *Cooper v. Shaeffer, supra*, to assert its rights and declare the transaction a wager as a matter of law.

Moore v. Small, 19 Pa. 468; *DeFrance v. DeFrance*, 34 Pa. 390.

It is a question of public policy and not of good intentions; and motives, however good, avail nothing.

Seigrist v. Schmaltz, 5 Cent. Rep. 280, 118 Pa. 326.

If I undertake to risk the payment of assessments which may run over a period of twenty-six years, and may with interest aggregate over \$4,800 for the bare chance of getting \$8,000—on the death of a man, perhaps on to-

morrow and perhaps only twenty-six years from now, I am playing for the stake resulting from the happening of the event upon which it depends. The entire game is one of chance and on the early or late happening of the man's death, as in the case of the bet on the life of Napoleon Bonaparte in *Phillips v. Ives*, 1 Rawle, 36, depends the extent of my loss or gain.

See *Gilbert v. Moore*, 104 Pa. 78.

Disproportionate insurance of this nature is against public policy and a gambling transaction.

Pritchett v. Insurance Co. of N. A. 3 Yeates, 458; *Cooper v. Shaeffer* (Pa.) 9 Cent. Rep. 601; *Corson's App.* 4 Cent. Rep. 407, 118 Pa. 488; *Gilbert v. Moore, supra; Cammack v. Lewis*, 82 U. S. 15 Wall. 643, 21 L. ed. 244.

The speculation is classed with one who should undertake to make a bet or wager for another and who advances the money staked, and would have no right of action against his principal in the event of loss.

Ferreira v. Gabell, 89 Pa. 91, 92.

son v. Garnier and Baker v. Union Mut. L. Ins. Co. supra.

The sum insured must not be grossly disproportionate to the interest the holder of the policy has in the life insured, without leaving the transaction open to the imputation of being a speculation or wager upon the hazard of a life. *Wainwright v. Bland*, 1 Mood. & R. 481; *Miller v. Easie L. & H. Ins. Co.* 2 E. D. Smith, 268; *Grant v. Kline*, 7 Cent. Rep. 626, 115 Pa. 618.

The law seems to be well settled that it is wholly unnecessary to prove an insurable interest in the life of the assured, at the maturity of the policy, if it was valid at its inception; and in the absence of express stipulation to the contrary, the sum expressed on the face of the policy is the measure of recovery. *Rawls v. American Mut. L. Ins. Co.* 27 N. Y. 282; *Mowry v. Home L. Ins. Co.* 9 R. 1. 346; *Hoyt v. New York L. Ins. Co.* 3 Bosw. 440; *Phoenix Mut. L. Ins. Co. v. Bailey*, 80 U. S. 13 Wall. 616, 20 L. ed. 501.

Creditor's policy on life of his debtor.

A creditor holding a policy on the life of his debtor as security for his debt is a trustee to the extent of the proceeds above the debt and expenses, and may be called on to account therefor by the personal representatives of the debtor. *Tateum v. Ross*, 150 Mass. 440.

In the absence of evidence that the policy was held in trust for the debtor, where the rights of the parties appear upon the face of the policy the presumption is against such trust. *Corson v. Garnier* (Pa.) 4 Cent. Rep. 308.

It has been said, however, on the authority of *Godsall v. Boldero*, 9 East, 72, that an insurance upon the life of a debtor, in behalf of a creditor, is in legal effect but a guaranty of the debt, and if the debt is paid the insurance is at an end. But it is now settled that this case is not the law. It was directly drawn in question and was expressly overruled in *Dalby v. India & L. L. Assur. Co.*, decided in the exchequer chamber, 15 C. B. 366.

A policy in favor of a creditor is to be regarded as collateral security only where the debtor is under obligation to pay the premiums; but where the creditor pays the premiums, the right of the creditor is absolute. *Amick v. Butler*, 9 West. Rep. 845, 111 Ind. 578.

A creditor who insures the life of his debtor, which he is obliged to keep alive by paying premiums, may hold all he can recover on the policy, unless there is gross disproportion between the 18 L. R. A.

debt and the amount of the policy. *Rittler v. Smith*, 2 L. R. A. 844, 70 Md. 261.

A creditor who takes an assignment of a life policy as security for a loan can hold the proceeds of that policy only to the extent of the sums actually advanced by him. *Roller v. Beam* (Va.) 6 L. R. A. 126.

Wager policies void.

A policy of insurance taken out on the life of a third party by a beneficiary in the continuance of whose life the beneficiary has no pecuniary interest, is a wagering policy and as such is void. *Bloomington Mut. L. Ben. Assn. v. Hise*, 8 West. Rep. 642, 120 Ill. 121; *Cammack v. Lewis*, 82 U. S. 15 Wall. 643, 21 L. ed. 244; *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251; *New York Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 561, 29 L. ed. 997; *Gilbert v. Moore*, 104 Pa. 74; *Scott v. Dickson*, 108 Pa. 6.

A policy on the life of another for \$3,000, to cover a debt of \$70, is a mere wagering policy. *Cammack v. Lewis, supra.*

A policy taken out by a creditor on the life of his debtor in the sum of \$3,000, \$2,000 for his own benefit and \$1,000 for the benefit of his debtor, while the debtor in fact owed him only \$70, is a wagering policy. *Ibid.* See *Connecticut Mut. L. Ins. Co. v. Luchs*, 106 U. S. 498, 27 L. ed. 800.

So where he took out policies, on which he became liable to be assessed as a member of the association, and paid thereon, within about nine months thereafter, the sum of \$351.75, and the amount collected on which, on the debtor's death, was \$2,124.82, being an excess of \$474.53 over the amount of the debt, there was no such disproportion as would warrant a condemnation of the transaction as a speculation or wager. *Rittler v. Smith*, 2 L. R. A. 844, 70 Md. 261.

Where a creditor had insured his debtor's life on two several occasions, and had to abandon the policies on account of insolvency of the companies, then took out a third policy for \$3,000, paying \$302 therefor, the debtor being sixty-five years old, it was held that there was no disproportion of which the debtor's administrators could take advantage. *Grant v. Kline*, 7 Cent. Rep. 626, 115 Pa. 618.

An insurance on the life of the debtor for \$2,000, where the indebtedness was uncertain, but was afterwards ascertained to be between \$500 and \$750, was held under the circumstances not a wager. *Corson v. Garnier* (Pa.) 4 Cent. Rep. 308.

No tabulations can purify or validate a speculative venture.

Grant v. Kline, 7 Cent. Rep. 626, 115 Pa. 625; *Downey v. Hoffer*, 110 Pa. 115.

Messrs. F. E. Meilly and W. M. Derr, for appellees:

A wagering insurance contract is one where the person for whose benefit an insurance on the life of another is taken has no insurable interest in the continuance of that life at the time the contract is made. The disproportion between the debt of a creditor who insures the life of his debtor and the amount of insurance taken by itself determines nothing, unless the amount is so disproportionately great that one's eyes cannot be shut to the gross disparity.

Grant v. Kline, 7 Cent. Rep. 626, 115 Pa. 625; *Cooper v. Shaeffer* (Pa.) 9 Cent. Rep. 601.

The good faith of the parties distinguishes this case from *Gilbert v. Moose*, 104 Pa. 78, and that line of cases. See *Grant v. Kline*, 7 Cent. Rep. 626, 115 Pa. 624.

Sir G. Jessel, *M. R.*, in *Printing & N. Reg. Co. v. Sampson*, L. R. 19 Eq. Cas. 463, 465, says: "You are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

Under all the circumstances of this case, the judgment is well founded on the verdict; the facts justified the jury in its finding and the jury had the legal right to determine the question whether or not this was a wagering contract.

Kareira v. Gabell, 89 Pa. 89; *Kirkpatrick v. Bonsall*, 72 Pa. 159; *Shaak v. Meilly*, 136 Pa. 161.

Paxson, Ch. J., delivered the opinion of the court:

This case is not free from difficulty. It has been twice argued and has received a most careful consideration. It presents the question, to what extent a creditor may lawfully insure the life of his debtor. We have avoided ruling this point before, because it was one of grave importance, and the cases in which it was raised did not necessarily require it, nor did they present all the facts necessary to enable us to dispose of it satisfactorily. This record raises the whole question squarely. The facts are substantially as follows:

The defendants are doing a firm business at Lebanon, Pa., and hold a judgment against one Andrew Bleistine, in the Court of Common Pleas of Lebanon County, which, with interest and costs amounted to \$110.03. The judgment was sufficiently secured on real estate, and the defendants were not pressing their debtor for the money. He was being pressed by other creditors who held subsequent liens on his property. It was necessary to quiet them for Bleistine to pay off the judgment held by the defendants, or get rid of it in some

manner. Not having the money he applied to the defendants to satisfy it, and take a policy on his life instead. The evidence is uncontradicted that the defendants were averse to this, and for a time declined, but finally yielded to Bleistine's entreaties, and his wife's tears, to save their home. The evidence shows that Bleistine offered them an insurance of \$3,000, or \$5,000, or \$10,000, or any amount they wanted. The negotiation resulted in the defendants taking a policy of \$3,000 on the life of Bleistine in the U. B. Mutual Aid Society. The policy was issued in the name of Bleistine as beneficiary and afterwards assigned by him to the defendants, who paid the entrance fee and all subsequent assessments. The assignment was absolute and not as collateral security, and the judgment referred to was satisfied of record. After Bleistine's death the insurance money was paid by the company to the defendants. Subsequently this suit was brought by the executor of Bleistine to recover from them the amount received over the debt and interest, and premiums paid; the plaintiff alleging that the amount of insurance was so disproportioned to the debt as to make it a gambling transaction within the doctrine of *Gilbert v. Moose*, 104 Pa. 74, and the cases following it.

We may safely assume that the debt due by Bleistine to the defendants was bona fide; that so far from the latter having procured the former to insure his life for their benefit for speculative purposes, they entered into it with reluctance at the earnest request of Bleistine and his wife, to relieve them from financial embarrassment and to save their home. This takes out of the case the controlling element which existed in *Gilbert v. Moose*, and that line of cases. Yet if the defendants, even for an honest purpose, have transgressed the law, and made this a gambling transaction, they must suffer the penalty for such violation.

The first and second assignments present the main question in the case. Upon the trial below the defendants proved, under exception, the life expectancy of Bleistine, and the amount of assessments on this policy had he lived out his full life expectancy. It appears from this evidence that the insured was forty-two years of age, and that his expectation of life, according to the Carlisle Tables, was twenty-six years; that had he lived that length of time the interest on the judgment, with the annual dues and assessments and interest thereon, would have amounted to \$4,386.81, being \$1,386.81 in excess of the amount of the policy. This evidence was not contradicted. Its admission forms the subject of the first assignment.

In the second assignment, complaint is made that the learned judge erred in his answer to the plaintiff's sixth point. The point is as follows: "The amount allowed and paid as the consideration of the transfer of the insurance, to wit the sum of \$99.51, with interest thereon from December 7, 1875, to April 2, 1877, and the costs were grossly inadequate; and the disproportion between that amount and the amount of the insurance—\$3,000—is so great as to require the court to say, as matter of law, that the transaction was a wager, and that in this action Reinoehl & Meilly have no right to retain

more of the insurance money received by them than the amount of their satisfied judgment with interest and costs, and the premiums and assessments paid by them, with interest thereon, and therefore the verdict of the jury must be in favor of the plaintiff for the amount received by the defendants, with interest from the date of its receipt, less the amount of the judgment, interest and costs, and assessments and premiums paid with interest." This point was refused.

Whether the question of excess of insurance is to be disposed of by the court as a matter of law, or by the jury as a question of fact, it is essential that we should have a fixed rule. We have none now. I felt the importance of this in delivering the opinion of the court in *Grant v. Kline*, 115 Pa. 618, 7 Cent. Rep. 626, where I said: "Speaking for myself, it may be that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt with interest, and the amount of premiums with interest thereon, during the expectancy of life, as shown by the Carlisle Tables. This view, however, has never been adopted by this court in any adjudicated case, nor do we feel compelled to define the disproportion now in view of the particular facts of the case in hand." In the subsequent case of *Cooper v. Shaeffer* (Pa.) 9 Cent. Rep. 601, our brother Sterrett, after quoting the above, remarked: "This appears to be a just and practicable rule." No such rule was established, however, in *Cooper v. Shaeffer*. In that case there was an insurance of \$3,000 to cover a debt of \$100, and this court said, through Mr. Justice Sterrett: "In view of the undisputed facts, the learned judge of the common pleas held that the disproportion between the insurance of \$3,000 and the debt of \$100 was so great as to require him to say, as matter of law, that the transaction was a wager, and that the assignors of the policy had no right to retain more of the insurance money recovered by them than the amount of the debt, plus the premiums paid and interest thereon. In this he was clearly right. The disproportion is so great as to make the insurance a palpable wager, and no court should hesitate to declare it so as matter of law."

We have no doubt that in a proper case where the facts are not disputed, it is the duty of the court to pronounce upon the character of the policy. Thus in *Grant v. Kline*, *supra*, it was said: "To take out a policy of \$5,000 to secure a debt of \$5 would be such a palpable wager that no court would hesitate to declare it so as matter of law." It is true this remark was made by way of illustration, and we only refer to it for that purpose now. In *Cooper v. Shaeffer* decided nothing but that particular litigation. It laid down no rule for the future beyond its own particular facts, viz.: That an insurance of \$3,000 for a debt of \$100, unexplained, was a gambling policy. It may be asked why it does not rule this case where the amount of insurance was the same and a difference of a few dollars only in the amount of the debt? The answer is not difficult. *Cooper v. Shaeffer* was decided upon the single ground of the disproportion between the insurance and the debt. There were no facts in evidence by which this disproportion could be explained,

or shown to be justifiable. This appears by the report of the case as well as from the opinion of Judge Simonton, who tried that, as well as this case below. In refusing a new trial in the case in hand, that learned and able judge said in reference to *Cooper v. Shaeffer*: "Even the age of the insured was not dwelt upon as an element of the problem, and there was not a word of evidence as to the expectancy of life or the probable amount of annual payments to be made. Here, however, these important matters were urged as a principal ground of defense and required consideration. In our opinion they necessarily carried the case to the jury, and abundantly justified the verdict. The defendants insured a healthy man of forty-two years in the sum of \$3,000 to protect a debt of \$100. If he had merely lived out his expectancy and no longer, they would have been obliged to pay for assessments and annual dues \$2,436.32, to which, if interest be added, the amount of their investment would have been \$4,836.31. In return they would have received \$3,000, thus suffering a considerable loss. Surely to call such a transaction speculation is to misuse the word. That it happened to be profitable, because the insured died within a few years, is manifestly not to the point." I have quoted this extract at length because I could in no better way emphasize the distinction between *Cooper v. Shaeffer* and the case in hand.

The law very properly lays a mailed hand upon speculative life insurance. Of all the forms of gambling, it is one of the most objectionable. The records of our own court show that it sometimes leads to murder. The holder of a policy upon a life in which he has no interest either of a social or pecuniary nature has a strong interest in the death of the assured. This interest grows and strengthens with each payment of premium. He has made a bid upon the life of another person. A man who will engage in such a transaction cannot safely be regarded as a saint. He sees with growing impatience that life prolonged from year to year, and his money slipping away in premiums. A man thus situated soon becomes familiar with the thought of the death of the person who stands between him and what, in his morbid fancy, he may regard as his rights. That crime follows in some instances is a fact of which we have judicial knowledge.

All life insurance is in one sense speculative, yet within proper restrictions it has been found to be highly beneficent and not in conflict with public policy. It enables a man in the days of his early struggles to provide for his family in case of his death. It renders it possible for a business man to borrow the capital needed for success. It furnishes the means and the only means by which a creditor may sometimes secure a doubtful claim. Yet in all these cases there is the element of speculation, for if the assured dies shortly after the policy is issued, the beneficiary, whether he be a blood relation or a creditor, gets a sum of money greatly disproportioned to the amount paid. But in these cases the law does not regard the speculative element as one of danger. It is true that a son who takes out a policy on the life of his father, or a creditor upon the life of his debtor, may have an interest in the death of the assured,

and resort to crime to procure it, but experience shows that such instances are extremely rare, and the temptation no greater than in thousands of other instances in which one person may be benefited pecuniarily by the death of another. But a policy taken out by one who has no interest either as a creditor or a relative in the life of the assured, is always a danger signal.

It is settled law that a creditor has an insurable interest in the life of his debtor, but up to this time there is no decision as to the limit of this right. Our own cases furnish us no settled rule, and for this reason I do not think it necessary to review them. Each case has been decided upon its own facts. In *Cooper v. Shaeffer*, as before observed, it was said the insurance was too large; in *Grant v. Kline*, on the other hand, we held that the amount of insurance was not disproportioned to the debt. We have now reached a point where it is necessary to lay down some fixed rule by which such cases can be disposed of in the future, otherwise the rulings of the courts and the verdicts of juries upon such questions will be arbitrary, and where there is nothing in a case but the amount of the insurance and the amount of the debt it is impossible for either a court or a jury to arrive at a correct result.

Starting out with the conceded proposition that a creditor has an insurable interest in the life of his debtor, and may lawfully take out a policy thereon, it follows logically that he may take out the policy in such a sum as may reasonably secure the debt. It needs no argument to show that if my debtor owes me \$1,000 a policy for \$1,000 would be inadequate, for if my debtor dies within twenty-four hours after the policy is taken out, I am a loser by the amount of the premium paid, and it would be but a few years before the interest on the debt and the premiums would exceed the debt. Every future payment then would be a loss, with the only alternative of adding to this loss year by year, or abandoning the policy altogether, and sinking the whole amount paid. It seems clear upon reason that the creditor may take out a policy in excess of his debt. But to what excess? The answer to this question obviously depends upon circumstances. An important element in the consideration of this question is the age of the assured. The difference between a policy on the life of a man of twenty-five years of age and one of seventy-five is clear to the duller understanding. The assured was only forty-two years of age; and his expectancy of life was twenty-six years. The chances were greatly in favor of his living out his expectancy. The Carlisle Tables were prepared with care by competent experts, and are the result of actual experience. I am therefore justified in saying that the chances were in favor of the assured living out his expectancy, in which case there would be the loss of interest on the debt for twenty-six years added to the dues and assessments, with interest thereon, for the same period. The evidence shows that in such event the defendants would have been losers by a considerable sum. In fact I infer from the tables furnished that after about seventeen years the defendants would have carried this policy at a loss. The defendants assumed this risk when they took out the pol-

icy. They also had the chance of the assured not living out his expectancy. This is a risk which an insurance company assumes upon every policy which it issues. In a particular instance the assured may live many years beyond his expectancy, which is a large gain to the company. But this gain is equalized by the loss in instances where the assured dies before the expiration of his expectancy, so that in the vast volume of business of such corporations the average result is reasonably uniform. But the holder of a single policy can have no average result. He takes the risk with the chances fairly balanced. Had these defendants taken out one hundred policies on the lives of as many debtors, it is more than probable that some of them would have largely exceeded their expectation, while others would not have reached it. In such case there would not have been material gain or loss.

Had the assured lived out his expectancy of life no question would probably have arisen as to the right of the defendants to retain the whole of the money. It could not then have been successfully assailed as a gambling transaction. I submit that the character of the contract cannot depend upon results, or the accident of death. If not lawful in its inception it could never become so.

In order to ascertain whether an insurance is disproportioned to the debt, regard must be had to the age of the assured, his expectation of life, and the cost of carrying the insurance with interest thereon, as well as upon the amount of the debt. The evidence which forms the subject of the first assignment was not only proper, but essential, to an intelligent understanding of the case. It is just what was lacking in *Grant v. Kline*, and was one of the reasons why we avoided deciding the broad question in that case. But anyone who reads that opinion between the lines can see that the judicial mind must have been influenced to some extent by the suggestion in reference to the Carlisle Tables.

The rule we now announce may not be the best, but we have not been able to find a better, after a most careful and anxious consideration of the question. That it will not produce exact justice in all cases is possible. There will always be cases of individual hardship in the application of all general rules. No general rule can be made to fit each particular case, otherwise it would cease to be a rule. My attention was especially called to this difficulty by the following extract from the opinion of the learned judge below in refusing a new trial:

"With much respect it is suggested that the principle indicated in *Grant v. Kline*, 115 Pa. 625, 7 Cent. Rep. 626, and *Cooper v. Shaeffer*, *supra*, as the proper rule to determine for what sum a creditor's policy should be taken out, ought to be somewhat expanded before it is positively adopted. As now stated, it would not provide for a case like this, where the policy is taken out in a company which levies annual (monthly?) assessments, and where therefore allowance must be made in the creditor's forecast for possible fluctuations; neither would it now provide for the not infrequent contingency of the insured outliving his expectancy. Under the present form of the in-

licated rule, the creditor must always lose if the debtor lives beyond his expectancy; and it cannot be accurately applied to assessment insurance, because in this variety of the business the annual payments are not a previously known and certain sum."

We have no difficulty in disposing of the objection that the rule does not provide for the case of the assured living beyond his expectancy and thus entailing a loss upon the creditor. If we go beyond the expectancy where are we to stop? A man may live to the age of a hundred, and such length of days is of frequent occurrence. To sanction a policy covering such a period, and yet to allow the holder to recover the full amount in case of death within a year would be a retrograde step in our decisions. Under such a system the creditor would be absolutely secure, with the possibility of an enormous gain in case of an early death. Whereas at present, as I have endeavored to show, the risk of a debtor's exceeding his expectancy is equalized by the possibility of his death within it, and in a given number of cases the result produces uniformity. The want of uniformity is not the fault of the rule, but of its application to a single case.

There is more difficulty in the other objection. The policy in question, however, was taken out in a mutual company, where assessments are made from time to time, and there appears to have been no difficulty upon the trial below in ascertaining with sufficient accuracy the amount of assessments which the defendants would have been called upon to pay had the assured lived out his expectancy. The precise amount of such assessments cannot of course be estimated with the same accuracy as in the case of a company in which the annual premium is a fixed sum. But the assessments even in a mutual company can be approximated by the experience of other similar companies with sufficient accuracy to base an insurance upon it. And where a policy has been taken out in good faith by a creditor, the law does not exact impossibilities. A slight mistake, one way or the other, owing to the condition of the company's business, by which assessments are increased or diminished, would not necessarily vitiate a policy. The cost of life insurance by whatever system adopted, it is believed, does not vary so greatly as to prevent a reasonable approximation thereof.

It may be that few men would take out a life policy to secure a debt of \$100, where there is an expectancy of life for twenty-six years, and pay an annual assessment or premium in excess of the whole amount of the debt. But we do not pass upon the wisdom of contracts; we only consider their legality, and care must be taken in the enforcement of an admittedly sound rule of public policy not to impinge upon the right of the citizen to contract. In this instance the contract was lawful, and the defendants appear to have entered into it not so much for their own benefit as for the accommodation of the assured. We are not to measure its legality by its results but by its surroundings at the time it was made.

We are of opinion that a creditor may lawfully take out a policy on the life of his debtor in an amount to cover the debt with interest, 13 L. R. A.

and the cost of such insurance with interest thereon during the period of the expectancy of life of the assured according to the Carlisle Tables.

We find no error in the ruling of the court below.

Judgment affirmed.

CONESTOGA CIGAR CO.

Charles FINKE *et al.*, Appts.

(.....Pa.....)

1. In an action to enforce the alleged liability of a tobacco sampler to make good the loss resulting to a buyer because the tobacco in the cases was not as represented by the tags attached to the samples, evidence is admissible to show what meaning apparently ambiguous words and figures on the tags conveyed to the trade, and that by usage the sampler undertook to make good losses resulting from untrue statements on the tags.
2. A verdict against a tobacco sampler for the amount of loss resulting to a buyer because the tobacco in the cases was not as represented by the sample tags is supported by evidence that by usage of trade he undertook to make good such loss, and that he had promised to make it good after having been notified of it and had paid other losses resulting from the same cause, although there was no privity of contract between him and the person injured.

(October 5, 1891.)

NOTE.—Custom and usage, as law.

Usage or custom is a source of law in all governments. *United States v. Arredondo*, 31 U. S. 6 Pet. 691, 8 L. ed. 547.

A custom is an unwritten law established by long usage and the consent of our ancestors. Usage is the legal evidence of the custom. *Minis v. Nelson*, 43 Fed. Rep. 777.

Usages long established and followed have, to a great extent, the efficacy of law in all countries. They control the construction and qualify and limit the force of positive enactments. *Shdell v. Grandjean*, 111 U. S. 412, 28 L. ed. 321; *Mitchel v. United States*, 34 U. S. 9 Pet. 711, 9 L. ed. 283.

A custom, to have the force of law, must be universal, and its origin in point of time so far back "that the memory of man runneth not to the contrary." *Ulmer v. Farnsworth*, 6 New Eng. Rep. 835, 80 Me. 500.

A long and inveterate usage for half a century, under express sanction of law, should be able to continue without further re-enactment, unless the legislative will is expressed to the contrary. There can be no presumption against it from mere silence, with no substituted rule on the subject. *Warren v. Board of Registration*, 2 L. R. A. 208, 72 Mich. 396.

Cannot be in conflict with rules of law.

A custom should not be in conflict with the rules and principles of law. *Turnbull v. Osborne*, 12 Abb. Pr. N. S. 208; *East Birmingham Land Co. v. Dennis*, 2 L. R. A. 698, 85 Ala. 565.

A mere custom or usage is without force, in opposition to a positive law. *Coleman v. M'Murdo*, 5 Rand. (Va.) 51; *Randall v. Smith*, 63 Me. 105; *Cranwell v. The Fanny Foodick*, 15 La. Ann. 436; *Winder v. Blake*, 49 N. C. 332; *Thompson v. Ashton*, 14 Johns. 316; *Greene v. Tyler*, 30 Pa. 361; *Delaplane v. Cren-*

APPPEAL by defendants from a judgment of the Court of Common Pleas for Lancaster County in favor of plaintiff in an action brought to recover the loss alleged to have resulted to plaintiff because tobacco purchased by it in reliance upon defendants' sample tags was not as represented by such tags. *Affirmed*.

The facts sufficiently appear in the opinion. *Messrs. Brown & Hensel*, for appellants: A party cannot recover unless on a duty assumed to himself.

1 Wharton, Cont. § 506.

To support a contract a consideration must move from the promisee. "The plaintiff must unite in his person both the promise and the consideration of it, and if the action in such a case cannot be sustained on the foundation of the consideration by drawing the promise to it, it cannot be sustained at all."

Edmundson v. Penny, 1 Pa. 835.

To maintain an action against an alleged contracting party his privity of contract must be shown.

1 Wharton, Cont. § 507; Chitty, Pl. 1; *Campbell v. Loeck*, 40 Pa. 450; *Torrans v. Camp-*

bell, 74 Pa. 475. See *DeBelle v. Pennsylvania Ins. Co.* 4 Whart. 68.

In all cases, where a consideration is required, a party suing on a contract must show that the consideration flowed from him.

1 Wharton, Cont. § 506.

Messrs. E. K. Martin and T. B. Holahan, for appellee:

Custom makes law in the absence of more definite enactments, and appellee has proven what the custom has been for twenty years in this line of business, so exactly and unerringly that it cannot be mistaken. By this custom there was a subsisting valid contract running with the warranty into whosoever hands that warranty came, within six months from the time it was made. The universal custom of the trade is the purchase of leaf tobacco stripped, assorted and packed in boxes. By reason of not being able to inspect it in that shape, it is sold upon the guarantee of the inspector's sample.

Custom must be certain, uniform and notorious, so as to be known to the parties to the trade.

McMasters v. Pennsylvania R. Co. 69 Pa.

shaw, 15 Gratt. 457; *Piscataqua Exch. Bank v. Carter*, 20 N. H. 246; *Joyes v. Shadburn*, 11 Ky. L. Rep. 82; *Baltimore First Nat. Bank v. Taliaferro*, 72 Md. 164.

No one can escape the punishment of the law by proving a custom contrary to law. *Minaghan v. State*, 77 Wis. 645.

A custom making 2,240 pounds a ton of coal is not good when opposed to a statute (Act of April 15, 1834) making 2,000 pounds a legal ton. *Godcharles v. Wigeman*, 4 Cent. Rep. 887, 113 Pa. 431.

A custom of railroads not to receive for transportation any live-stock unless under certain conditions modifying their common-law liability would be contrary to law and public policy. *Missouri Pac. R. Co. v. Fagan*, 2 L. R. A. 75, 72 Tex. 127.

Usage will not control the legal interpretation of a statute. *Dwight v. Boston*, 12 Allen, 316.

A custom contrary to morality, religion, or the law of the land is void. *Holmes v. Johnson*, 42 Pa. 159.

Nor can custom deprive a person of a legal right. See *Atty-Gen. v. Tarr*, 2 L. R. A. 87, 148 Mass. 806; *East Birmingham Land Co. v. Dennis*, 2 L. R. A. 836, 85 Ala. 565.

A usage must not be in restraint of trade, nor in conflict with public policy or the law of the land. *Susquehanna Fertilizer Co. v. White*, 6 Cent. Rep. 624, 65 Md. 444.

Where the statute imposes an absolute liability to make highways safe for travel, a general custom and usage as to placing barriers is of no importance where barriers at a dangerous place were not provided. *Molloy v. Walker Twp.* 6 L. R. A. 665, 77 Mich. 445.

Must be reasonable.

A custom must be reasonable and not productive of injustice in its practical operation. *Susquehanna Fertilizer Co. v. White*, 6 Cent. Rep. 434, 66 Md. 444.

An absurd and unreasonable custom is not binding. *Tilley v. Chicago* (Tilley v. Cook County) 103 U. S. 155, 25 L. ed. 374; *United States v. Buchanan*, 40 U. S. 8 How. 58, 12 L. ed. 967; *Walker v. Western Transp. Co.* 70 U. S. 5 Wall. 150, 18 L. ed. 172.

A custom of railroad companies to leave all turntables unfastened is unreasonable. *Iwaco R. & Nav. Co. v. Hedrick* (Wash.) Dec. 10, 1890.

An unreasonable usage as to the operation of similar mills will not excuse the owners of a mill in 18 L. R. A.

operating it in a way that constitutes a nuisance. *Shepard v. Hill*, 151 Mass. 541.

A custom which would prevent a shipowner from vacating the agency of his agent is unreasonable and has no legal force. *Minis v. Nelson*, 43 Fed. Rep. 777.

Must be applicable to matter in controversy.

A usage is ineffectual unless established, known and applicable to the matter in controversy. *Jannet v. Boyd*, 80 Minn. 819; *Taylor v. Mueller*, Id. 345; *Dunham v. Haggerty*, 1 Cent. Rep. 600, 110 Pa. 589; *Ruth v. Katterman*, 2 Cent. Rep. 776, 112 Pa. 251; *Cheraw & S. R. Co. v. Broadnax*, 1 Cent. Rep. 348, 109 Pa. 432.

Proof of custom cannot avail, unless shown to be applicable to the case. *Ruth v. Katterman*, *supra*. The general usage of a foreign port in settling general average is binding. If, however, it is not a case for general average, it is not binding. *Cheraw & S. R. Co. v. Broadnax*, *supra*.

Must be actually known to the party sought to be bound.

A custom or usage, to be available against a party to a contract, must be so notorious as to affect him with knowledge of it, and raise the presumption that he dealt with reference to it, or he must be shown to have had actual knowledge of it. *Blake v. Stump*, 10 L. R. A. 103, 73 Md. 160.

A custom among brokers to deliver equal quantities of grain or its market value in fulfillment of contracts of purchase made by them for others, does not bind the seller, without evidence that he had knowledge of it. *Irwin v. Williar*, 110 U. S. 490, 28 L. ed. 225.

So the fact that a person dealt through brokers is not sufficient of itself to affect him with knowledge of a peculiar custom among them. *Blake v. Stump*, *supra*.

Usage and custom as part of contract.

In all contracts as to the subject matter of which known usages prevail, the parties proceed on the tacit assumption of such usages but commonly reduce into writing the particulars of their agreement, omitting to specify those known usages which are included as of course by mutual understanding. *MacCulsky v. Klosterman*, 10 L. R. A. 785, 20 Oreg. 108.

874; *Carter v. Philadelphia Coal Co.* 77 Pa. 286. *Reed v. Garvin*, 12 Serg. & R. 103, holds "that the guaranty ran with the bond, and into whosever hands it came the beneficial interest in the bond carried with it the guaranty of payment."

Paxson, Ch. J., delivered the opinion of the court:

This case presents a novel question. It is whether a tag placed upon a bale of tobacco by the inspector or sampler is a warranty of the quality of the tobacco, and whether it inures to the benefit of subsequent purchasers thereof. The facts, briefly stated, are as follows: The Conestoga Cigar Company, plaintiff, is a corporation engaged in the manufacture of cigars in Lancaster, Pa. Charles Finke & Co., defendants, are engaged in what is known as "sampling" of leaf tobacco, with their main office in the City of New York, and an agency, or branch office in the City of Lancaster. In

the regular course of business the plaintiffs purchased two cases of tobacco from the firm of B. S. Kendig & Co. These cases were purchased by sample, each sample having on it one of defendants' tags containing such an inscription as the following—the number, weight and tare, varying with the different cases:

"Stripped and sample warranted, No. 408, Feb. 5th, 1887; 484 lbs. & 84 off. Not responsible for any change or damage occurring after inspection. Charles Finke & Co., Inspectors, 149 Water Street, New York; Frank Buscher, John T. Mellon, Jr."

Shortly after the purchase of the tobacco a portion of it—1973 lbs.—was found to be injured. The plaintiffs immediately notified Kendig & Co., from whom they purchased it, and the latter notified the defendants, whose tag was on the samples. Shortly thereafter the agents of Finke & Co. called upon the plaintiff, examined the defective tobacco, and promised to make it all right, and pay for it.

A general custom is a general law, and forms the law of a contract on the subject matter; though at variance with its terms, it enters into and controls its stipulations, as an Act of Parliament or of a State Legislature. *United States v. Arredondo*, 31 U. S. 6 Pet. 691, 8 L. ed. 547.

Not admissible to vary written contract.

Oral testimony of a custom in trade, or of any other matter, is inadmissible to vary the terms of a written contract which is clear, precise and unambiguous, and which embraces the entire agreement of the parties. *Miller v. Dunlap*, 5 West. Rep. 91, 22 Mo. App. 97.

There must be ambiguity or uncertainty upon the face of a written instrument to justify extraneous evidence of usage, and it must be limited to the clearing up of the obscurity. It is not admissible for the purpose of adding to the contract new stipulations. *Oelricks v. Ford*, 64 U. S. 23 How. 49, 16 L. ed. 534; *Orient Mut. Ins. Co. v. Wright*, 68 U. S. 1 Wall. 456, 17 L. ed. 505; *Stagg v. Connecticut Mut. L. Ins. Co.* 77 U. S. 10 Wall. 589, 19 L. ed. 1038; *Hearne v. New Eng. Mut. Mar. Ins. Co.* 87 U. S. 20 Wall. 488, 22 L. ed. 365; *First Nat. Bank of Cincinnati v. Burkhardt*, 100 U. S. 686, 25 L. ed. 768.

Clear and explicit provisions cannot be varied by proof of a custom existing at the place and known to both parties. *Larrowe v. Lewis*, 44 Hun, 226.

A contract is to be respected, not only in view of its terms, but of its legal effect; and that legal effect can no more be changed or contradicted by parol than its express terms may be. *Turnbull v. Osborne*, 12 Abb. Pr. N. S. 208.

Omissions may, in some cases, be supplied by the introduction of a custom, but it is not admitted to contradict or vary express stipulations or provisions of a contract. *Bliven v. New England Screw Co.* 64 U. S. 23 How. 420, 16 L. ed. 510.

Where the plaintiff agrees to deliver flour, in consideration of which the defendants agree to pay the price, parol evidence of usage to deposit a given sum of money in a bank as security is inadmissible. *Oelricks v. Ford*, *supra*.

A custom which is not pleaded cannot be considered as modifying an unambiguous written promise on which an action is based. *Lindley v. Waterloo First Nat. Bank*, 2 L. R. A. 709, 76 Iowa, 629.

A clear, certain and distinct contract cannot be modified by proof of custom inconsistent with it or which expressly or by necessary implication contradicts it. *Champion Mach. Co. v. Ervay* (Tex. App.) June 16, 1890.

The custom of a party to deliver a part of a quantity of goods contracted to be delivered, though invariable, cannot excuse such party from compliance with his contract. *Bliven v. New England Screw Co.* *supra*.

A contract to pay a certain price for railroad ties cannot be modified by proof merely of a general custom to inspect such ties as firsts and seconds. *Larrowe v. Lewis*, 38 N. Y. S. R. 769.

Evidence of a custom of most plasterers to slight their work, and do "drawn work" when three-coat work is contracted for, is inadmissible to excuse violation of a contract to build a house, calling for good three-coat plastering. *Cook v. Hawkins* (Ark.) April 18, 1891.

The rights of the parties under their contract cannot be changed by proof of a local custom different from the rule of law. *Weinsteine v. Harrison*, 66 Tex. 546.

Evidence of custom or usage.

A custom or usage may be proved by parol evidence. *Bliven v. New England Screw Co.* 64 U. S. 23 How. 420, 16 L. ed. 510; *Oelricks v. Ford*, 64 U. S. 23 How. 49, 16 L. ed. 534.

The usage of trade may be proved by parol, although such usage originated in a law or edict of the government of the country where it prevails. *Livingston v. Maryland Ins. Co.* 11 U. S. 7 Cranch, 508, 3 L. ed. 421.

So evidence is admissible to show that an established usage has been subsequently changed. *Cookendorfer v. Preston*, 45 U. S. 4 How. 317, 11 L. ed. 962.

Usage may be proved by a single witness who testifies explicitly to the antiquity, duration and universality of the usage, and who is uncontradicted. *Robinson v. United States*, 80 U. S. 13 Wall. 363, 20 L. ed. 663.

Where a question was objected to as calling for a custom instead of for facts, but the objection was overruled, and the witness proceeded to state facts and not a custom, the party objecting was not prejudiced. *Patterson v. Chicago, M. & St. P. R. Co.* 70 Iowa, 598.

Evidence of usage and custom is not admissible on the question of negligence. See *note to Standard Oil Co. v. Swan* (Tenn.) 10 L. R. A. 366.

As part of contract; usage of trade to aid interpretation. See *notes to Newhall v. Appleton* (N. Y.) 3 L. R. A. 859; *Smith v. Clews* (N. Y.) 4 L. R. A. 392; *MacCulsky v. Klosterman* (Or.) 10 L. R. A. 785, 20 Ore. 108.

Effect on legal right. See *note to Atty-Gen. v. Tarr* (Mass.) 2 L. R. A. 87.

The defendants subsequently failed to make it all right, and this suit was brought to compel them to do so.

The plaintiffs were met at the very threshold of their case with the contention that there was no contract between the parties nor was there any privity. It may be conceded that no contract with the plaintiff appears upon the face of the tag, nor was there any evidence to show that the defendants had sampled the tobacco at the request of the plaintiffs, or that it had paid them for doing so. On the contrary it was evident that it had been sampled for some previous owner, and had passed, thus sampled, to the plaintiffs.

Had there been no ambiguity about the tag, its construction would have been for the court. As, however, it was unintelligible in some respects without explanation, the learned judge below permitted the plaintiffs to call a number of witnesses, inspectors, and persons in the tobacco trade, to testify to the meaning of certain words and figures on the tags as understood and acted upon by those engaged in the business in this country. The uncontradicted evidence upon this point was in substance that the tag or label on the sample means that the sampler guarantees the tobacco in the case to be identical with the tobacco in the sample, and unless the tag bears marks to the contrary, that the tobacco in the case is sound; that it is the custom in sampling tobacco, when any damaged tobacco is found in the case, to mark on the ticket the percentage of damage that the case contains; the absence of marks indicates that the tobacco is sound. It is inspected for the convenience and safety of both buyer and seller; the tobacco sold by these samples is frequently paid for long before it is delivered; that the label is not only a guarantee of the quality of the tobacco, at the time of inspection, but that the guarantee is good for six months, for the benefit of any person into whose possession the tobacco may come within that time; that if the tobacco thus inspected proves defective the sampler shall make it good by paying for so much as is injured or spoiled.

There is no doubt under the evidence that this is the usage of the trade, so general as to

be universal. Whether the usage has continued so long as to have grown into a custom such as the law would write into every such contract is a very serious question, which we are not called upon to rule in this case. As it is one of first impression, and at the same time of vast importance to this large industry, we prefer to decide only what is before us, and not anticipate cases which may arise in the future under other circumstances.

We are of opinion that the evidence explanatory of the tag and the usage of trade in connection therewith was properly received and submitted to the jury. Their verdict settles the matter so far as the facts are concerned. They have found the contract substantially in accordance with the plaintiff's construction of it. Was there evidence sufficient to justify this finding?

However much we might hesitate were there nothing in the case but the proof of the usage of the trade, there is evidence that the defendants' own construction was in harmony with that usage. It is in proof that defendants' agents when notified of the defect in the tobacco, called upon the plaintiffs, examined it, admitted the defect, and promised to make it good. There was also evidence that in other cases, when the same thing had occurred, they had "made it good" by paying for the defective tobacco. It is no answer to this to say that there was no proof of their agency, nor that the tags were placed on the samples by the defendants. It was not only shown that Irwin & Schroeder were acting as agents for the defendants, but there was direct proof of their agency by the admission of a member of defendants' firm. There was also the recognition of the sample tags by the agents, accompanied by the promise to pay for the defective tobacco. We have then the construction of the contract by the defendants themselves—a construction in entire harmony with that of the plaintiff, and the usage of trade which was offered in explanation of it.

The case was submitted to the jury with proper instructions, and the verdict was fully warranted by the evidence.

Judgment affirmed.

MISSOURI SUPREME COURT (2d Div.).

Sarah C. BLEVINS *et al.*, *Respts.*,
v.

Silas P. SMITH, *Appt.*

(....Mo....)

1. Nominal damages only can be recovered for breach of a covenant of warranty

NOTE.—Dower; bar of inchoate right.

A wife, in the lifetime of her husband, can bar her right of dower in no other mode than prescribed by statute; a conveyance thereof by deed signed by the husband will not operate against her by way of equitable estoppel. *Mason v. Mason*, 1 New Eng. Rep. 106, 140 Mass. 63.

It is not barred by seven years' adverse possession with color of title and payment of taxes, under the Illinois Act of 1830. *Miller v. Pence*, 132 Ill. 149; *Brian v. Melton*, 125 Ill. 647.

by reason of an incumbrance consisting of a right of dower so long as it remains inchoate.

2. An inchoate right of dower is not cut off by a sale of the husband's land for taxes, since the tax proceeding is not strictly *in rem*, although the statutes do not permit any personal judgment for the tax, where they also provide that the wife's interest shall not be af-

sion with color of title and payment of taxes, under the Illinois Act of 1830. *Miller v. Pence*, 132 Ill. 149; *Brian v. Melton*, 125 Ill. 647.

It is not a lien within the General Statutes, § 170, declaring that "taxes shall be a first lien," and therefore is not made by that section subordinate to the lien for taxes. *Shell v. Duncan*, 5 L. R. A. 821, 31 S. C. 547.

fectured by any act or laches of the husband or by any judgment against him.

(Thomas, J., dissents from proposition 2.)

(March 31, 1891.)

APPEAL by defendant from a judgment of the Circuit Court for Johnson County in favor of plaintiffs in an action brought to recover damages for an alleged breach of a covenant of warranty in a deed. *Reversed.*

The facts are stated in the opinions.

Mr. Samuel P. Sparks, for appellant:

The existence of an inchoate right of dower in Mrs. Collier at the time appellant entered into the covenants at most constituted only a technical breach of the covenants against incumbrances, and only nominal damages were recoverable.

Sedgwick, Dam. 4th ed. 195, note; 4 Kent, Com. art. 4; Rawle, Cov. Title, 541; *Collier v. Gamble*, 10 Mo. 467; *Walker v. Deaver*, 79 Mo. 664; *Priest v. Deaver*, 23 Mo. App. 276; *Dickson v. Desire*, 23 Mo. 151; *Wyatt v. Dunn*, 98 Mo. 459; *Runnells v. Webber*, 59 Me. 488; 2 Sutherland, Dam. 1st ed. p. 327; *Hazelrig v. Hutson*, 18 Ind. 481; *Lewis v. Lewis*, 5 Rich. L. 12; *Nyce v. Obertz*, 17 Ohio. 71; *Bender v. Fromberger*, 4 U. S. 4 Dall. 440, 1 L. ed. 900; *Durrett v. Piper*, 58 Mo. 551.

The existence of this inchoate right of dower was not an act "done or suffered by appellant, nor those under whom he claimed," against the existence of which he covenanted.

Rev. Stat. 1879, § 675; *Walker v. Deaver, supra*; 4 Kent, Com. § 440; *Armstrong v. Darby*, 26 Mo. 517; *Bender v. Fromberger*, 4 U. S. 4 Dall. 436, 1 L. ed. 898; Rawle, Cov. Title, p. 541; *Alexander v. Schreiber*, 10 Mo. 460.

Until there had been an actual loss, eviction, or its equivalent consequent on the breach, only nominal damages could be recovered.

Walker v. Deaver, supra; *Hunt v. Marsh*, 80 Mo. 396; *Morgan v. Hannibal & St. J. R. Co.* 63 Mo. 129; *Matheny v. Mason*, 78 Mo. 677.

The sale for taxes barred the inchoate right of dower of Mrs. Collier.

It was within the power of the Legislature to pass laws which would defeat an inchoate right of dower.

Cooley, Const. Lim. p. 445; *Morrison v. Rice*, 35 Minn. 436; Tiedeman, Pol. Powers, § 117, pp. 341, 351.

The proceeding to enforce taxes by the State is always analogous to the exercise by it of the right of eminent domain, which it has always been held bars dower.

It is not defeated by a tax sale where the lien for taxes attached after the dower right had become fixed by the concurring facts of marriage and the husband's seisin. *Ibid.*

When dower once attaches the husband cannot, by any act or admission of his, defeat it, and no judgment recovered against him will prejudice the right and interest of the wife. See *Williams v. Courtney*, 77 Mo. 588; *Grady v. McCorkle*, 57 Mo. 172.

No judgment or decree confessed by or recovered against him, and no laches, default, covin or crime of the husband, shall prejudice the right and interest of the wife provided in the foregoing sections of this chapter. *Grady v. McCorkle*, 57 Mo. 172; *Davis v. Green* (Mo.) 11 L. R. A. 90.

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Brown v. Austin, 41 Vt. 283; Tiedeman, Real Prop. § 182; *Robbins v. Barron*, 32 Mich. 36; 1 Washb. Real Prop. 220, ed. 1868; *Moore v. New York*, 8 N. Y. 110; *Finch v. Brown*, 8 Ill. 488; *Jones v. Devore*, 8 Ohio St. 430.

In partition proceedings her inchoate right of dower is barred.

Lee v. Lindell, 23 Mo. 202.

Messrs. A. B. Logan and W. W. Wood, for respondents:

When respondent discharged the incumbrance, the existence of the inchoate right of dower became a substantial breach, and she was entitled to recover the reasonable amount paid.

Durrett v. Piper, 58 Mo. 551; *Ward v. Ashbrook*, 78 Mo. 515; 2 Scribner, Dower, 2d ed. chap. 1, § 2, 4; *Prescott v. Trueman*, 4 Mass. 627; *Shearer v. Ranger*, 22 Pick. 447; *Bigelow v. Hubbard*, 97 Mass. 195; *Harrington v. Murphy*, 109 Mass. 299; *Porter v. Noyes*, 2 Me. 37; *Whisler v. Hicks*, 5 Blackf. 100; *Smith v. Ackerman*, Id. 542; *Fitts v. Hottel*, 17 N. H. 530; *Kellogg v. Malin*, 62 Mo. loc. cit. 483; *Chambers v. Smith*, 23 Mo. 174.

Under a strict covenant of seisin it is necessary to prove an eviction, but under the covenant of indefeasible seisin or the covenant against incumbrances implied by the Statute as amended in 1879, it is not necessary to prove an eviction. It is only necessary to prove that the estate conveyed has been defeated, or the right to defeat it has been extinguished, or the incumbrance removed.

Collier v. Gamble, 10 Mo. 467, 472; *Sheiton v. Pease*, 10 Mo. 478, 482; *Mosely v. Hunter*, 15 Mo. 322, 330; *Dickson v. Desire*, 23 Mo. 151; *Walker v. Deaver*, 79 Mo. 664.

The tax sale did not convey the dower. There are two theories upon that subject: the one is, that it is a proceeding against the land itself, and has nothing to do with the previous chain of title; that it is a breaking up of all previous titles (*Jones v. Devore*, 8 Ohio St. 431); the other, that it is a derivative title; the purchaser taking only such title as the party to the proceedings had. This court, in construing the statutes, has adopted the latter theory.

Gitchell v. Kreidler, 84 Mo. 472; *Grandy v. Casey*, 12 West. Rep. 398, 93 Mo. 595.

Under a statute in almost the precise words of § 2197, Rev. Stat. 1879, it has been held by two eminent text-writers, that the laches of the husband in permitting his land to sell for taxes would not debar the wife of her dower.

Black, Tax Titles, 2d ed. 549; Scribner, Dower, 2d ed. 809, 820.

Her inchoate right attaches in subordination to a lien accompanying the seisin of her husband, and foreclosure of a purchase-money mortgage destroys the right. *Seibert v. Todd*, 4 L. R. A. 606, 31 S. C. 206.

It has been held in Ohio that a valid sale of property for nonpayment of taxes bars dower. *Jones v. Devore*, 8 Ohio St. 430.

So the exercise of the right of eminent domain bars dower. *Moore v. New York*, 8 N. Y. 110.

Dower rights of wife and widow. See notes to *Callahan v. Robinson* (S. C.) 3 L. R. A. 497; *Everson v. McMullen* (N. Y.) 4 L. R. A. 118; *Mandel v. McClave* (Ohio) 5 L. R. A. 519; *Shell v. Duncan* (S. C.) 5 L. R. A. 821; *Gore v. Townsend* (N. C.) 8 L. R. A. 443.

Grant, P. J., filed the following opinion:

This is an action on a covenant of warranty, made by appellant to the respondent Mrs. Sarah C. Blevins. The land conveyed is the S. 1 of S. E. 1, section 6, township 46, range 25, Johnson County, Mo. The evidence showed title in appellant, Smith, at the date of conveyance to respondent, except an outstanding inchoate right of dower in Mrs. Mary E. Collier, the wife of Daniel Collier. Appellant deduced his title from Daniel Collier by virtue of a tax sale and deed under the Act of 1877. It was admitted that Daniel Collier was still alive at the time of the commencement of the suit. After respondent obtained her deed from appellant, she attempted to mortgage the land, and failed because of this outstanding inchoate dower right in Mrs. Collier. She thereupon purchased this right for \$150, and brought this suit against appellant for that amount. Appellant assigns two grounds for reversal,—one, that the court erred in permitting respondent to recover more than nominal damages for the breach of the covenant by reason of the inchoate dower of Mrs. Collier, remaining outstanding; and, secondly, that the court erred in not holding that the tax sale and deed conveyed the land absolutely, and by it Mrs. Collier's inchoate right of dower was entirely barred, and, of course, could constitute no incumbrance.

We all agree that the first contention of appellant must be sustained. While an inchoate right of dower is an incumbrance, as it is a contingency founded upon a contingency, it is not susceptible of computation by any definite rule; hence the practice has been adopted in this State to allow only nominal damages until the dower becomes consummate. *Walker v. Deaver*, 79 Mo. 684.

2. In regard to the second assignment. We think the court committed no error in holding that the tax proceedings did not divest Mrs. Collier's dower right. We shall not attempt to discuss the power of the Legislature to collect taxes. We think it sufficient for the case in hand to ascertain, if we can, what the Legislature has determined shall be the policy of the State. In the first place, we have by statute adopted the common law in regard to dower. *Lord Coke* says: "There be three things highly favored in law,—life, liberty and dower." *Co. Litt.* *Chief Justice McKean*, in *Kennedy v. Nedrow*, 1 U. S. 1 Dall. 415, 1 L. ed. 202, asserts that "dower is a legal, equitable, and moral right, favored in a high degree by the law, and, next to life and liberty, held sacred." Strong as these terms are, they are strengthened by our Statute. Section 4525: "No act, deed, or conveyance, executed or performed by the husband without the assent of the wife, evidenced by her acknowledgment thereof in the manner required by law to pass the estate of married women, and no judgment or decree confessed by or recovered against him, and no laches, default, covin, or crime of the husband, shall prejudice the right and interest of the wife, provided in the foregoing sections of this chapter;" that is to say, the sections securing the widow her common-law and statutory dower. Now, at common law, and by our Statute reaffirming it, "the right of dower attaches whenever there is

a seisin by the husband, during the marriage, of an estate of inheritance; and, unless it is relinquished by the wife in the manner prescribed by law, it becomes absolute at the husband's death." "It is a right in law fixed from the moment the facts of marriage and seisin concur, and becomes a title paramount to that of any person claiming under the husband by subsequent act." *Grady v. McCorkle*, 57 Mo. 172. This, then, is the character of the estate that is to be divested by this new construction of the Statute. It is conceded that our Statute requires "the owner" to be made a party before his or her interest in the lands can be affected by a tax proceeding under our Act of 1877, and this section has been uniformly construed so that *cestuis que trustent*, mortgagees, remaindermen, and incumbrancers, who are not made parties, are not affected by these suits. *Stafford v. Fizer*, 82 Mo. 393; *Corrigan v. Bell*, 78 Mo. 53; *Graves v. Ewart*, 99 Mo. 13. No lawyer will question that inchoate dower is an incumbrance. But it is sought to sustain this new doctrine on the ground that our tax proceeding, beginning with the assessment, is a proceeding strictly *in rem*, and we may remark here that only by sustaining this position can this new rule be maintained. Beginning with *Abbott v. Lindenbower*, 43 Mo. 162, under a statute requiring the lands in all cases to be assessed to the person appearing to be the owner at the time of assessment, this court said: "It is unnecessary for us to say further here what might be the effect of this last clause in any cases; but we may go so far as to declare now that an assessment in the name of a person who neither was, nor ever had been, the owner of the property, would be an utterly void assessment." Our present Statute requires the land to be listed and assessed in the name of the owner, if known. Under this Statute, in *Gitchell v. Kreidler*, 84 Mo. 472, *Judge Black*, speaking for the whole court, says: "While the judgment is against the property, and not personal, still the tax is assessed against the owner, if known. The law looks to him for payment of the tax. Such a proceeding cannot be said to be strictly *in rem*. *Blackw. Tax Titles*, 630.

It will serve no good purpose to cite authorities to the same effect. This has been the accepted construction of our tax laws for many years. Were it a proceeding strictly *in rem*, there would be no such thing as collecting the tax on real estate out of personal property, which it is conceded may be done. Indeed, the whole system is based on the idea that it is the duty of the husband to pay the taxes on his land; and a failure to pay the taxes is a default on his part. The wife is under no obligation to pay the tax. She does not own the fee; she does not reap the usufruct. Certainly no system based upon justice would exact of her tribute on property she might never enjoy, and rob her of her dower for failure to pay a tax she did not owe. If, then, taxes become delinquent, whose fault is it? Not the wife's, certainly.

But it is said that, because there can be no personal judgment for taxes, therefore section 2197, Rev. Stat. 1879, § 4525, Rev. Stat. 1889, cannot be invoked. It would be difficult to conceive of a statute that would protect a wife's

dower, if this is not sufficient. But we think this construction of this section too narrow. The injury is not confined to "judgment." The Statute says, in addition to "judgments or decrees confessed or suffered," "no laches, default, covin or crime of the husband shall prejudice the rights of the wife." Is it not laches in a citizen to neglect or refuse to pay his taxes? Is not the word "delinquent," used throughout the Statute, a synonym for "laches" and "default?" And could there be a sale of the land, and a divestiture of the wife's dower, but for this delinquency on his part? The proposition is too clear for argument.

But if it is held that this section does not protect the wife's dower against the laches and default of the husband, we will have an anomalous state of affairs. A husband cannot, by deed or mortgage, the most solemn and praiseworthy, for the most valuable consideration, alien or destroy her dower right. No judgment against him, willing or unwilling, can affect her dower,—no fraud, covin or crime; and yet he can suffer this new "fine and recovery," and successfully bar her dower, by simply refusing to pay his taxes, and let the land sell; and thus a result is reached, by this simple device, that could not be compassed by the most skillful conveyancer. We cannot believe the Legislature intended such result. On the contrary, the whole scope of the Tax Act clearly shows that the Tax Law of 1877 (Rev. Stat. 1879, chap. 145, art. 6), was designed to furnish a method for collecting taxes, in which notice was given to the delinquent of the amount of his taxes, and a day in court, if erroneous, to show the error. When the judgment is entered, an execution issues just as on other judgments, and it is intended to convey the right, title and interest of the defendant who owned the land, and whose duty it was to pay the taxes. Says Judge Black: "We have repeatedly held that the purchaser at these sales acquires, and acquires only, the title and interest of the parties who are made defendants." *Graves v. Ewart*, 90 Mo. 18; *Powell v. Greenstreet*, 95 Mo. 14, 14 West. Rep. 339.

An ordinary execution sale conveys to the purchaser all the right, title and interest of the defendant in execution, but it has no effect upon the inchoate dower of the wife. It was clearly the intention of the Legislature to give the same effect to a tax deed, under regular and valid proceedings, that a deed under a general judgment would have,—"no more, no less." "A tax title is a derivative title." *Gitchell v. Kreidler*, 84 Mo. 472. Says Judge Black again: "It must be taken as settled law that purchasers at these sheriff's sales, made on executions in tax suits, acquire only the right, title and interest of the defendant in the tax suits." *Powell v. Greenstreet*, 95 Mo. 13, 14 West. Rep. 339; *Evans v. Roberson*, 92 Mo. 192, 10 West. Rep. 393.

No inconvenience has been felt in Missouri, because, in ordinary execution sales, the wife's inchoate dower was not conveyed. Creditors and purchasers know her interest is fixed, and all business transactions are based upon that understanding. The State has adopted a most stringent policy in passing the fee-simple estate to the tax purchasers for the insignificant sum 13 L. R. A.

of the tax; a *bagatelle*, usually, compared to the value of the lands sold. While the State has a right to its revenue, no reason appears why it should take the dower of the unoffending wife, and vest it in the tax speculator, thus giving him a vantage over all creditors and purchasers at all other execution sales. We do not so read the statute. We regard the dower right as of inestimable value to the homes of this State. The trend of public opinion is rather to enlarge, as our Homestead Laws clearly indicate, than to cut off this sustenance of the widow. Instead of being a "shadow," it has proved a "pearl of great price" in thousands of ruined homes. Between the tax speculator and the defenseless widow, section 4525 of our Statutes of 1899 stands as a monument to the wisdom and humanity of our Commonwealth.

Macfarlane, J., concurs in this opinion. **Thomas, J.**, files his separate opinion, holding a different view.

Thomas, J., dissenting:

Daniel Collier owned the S. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, section 6, township 46, range 25 W., in Johnson County, Mo., and at the time he so owned this land a suit was instituted against him for taxes due thereon, which culminated in a judgment and sale of the land. The sale occurred on the 18th day of February, 1890, and A. H. Tuttle was the purchaser. The sheriff executed the proper deed for the land to Tuttle under this sale. By a succession of conveyances the defendant acquired all the title to this property that Tuttle acquired by virtue of the tax deed. On the 12th day of September, 1892, defendant sold the land to Sarah C. Blevins for a consideration of \$1,000, and gave her a warranty deed therefor, by which he covenanted with said Sarah C. Blevins to warrant and defend the title to this land "against the claim of every person whomsoever." It was admitted that Mary E. Collier was the wife of Daniel Collier at the time of the assessment of the taxes and the institution of the suit which resulted in the sale of the land for taxes. Sarah C. Blevins is the wife of her co-plaintiff, W. R. Blevins. After she acquired the title to this property she attempted to mortgage and sell it, but was unable to do so on account of the supposed existence of an inchoate right of dower in Mrs. Collier in it. She, in conjunction with her husband, then bought Mrs. Collier's interest, and paid therefor \$150, taking a deed from her and her husband for it. They then sold the land to William L. Gaston for \$900; and they bring this suit against defendant upon his covenant of warranty, and in the circuit court they obtained judgment for the amount thus paid Mrs. Collier for her inchoate right of dower, and defendant appeals.

Two controlling questions arise in this case. (1) Is Mrs. Collier's inchoate right of dower in the land described cut off by the tax sale and deed? (2) Can there be any breach of a general covenant of warranty by the existence of an inchoate right of dower in the land?

The most important question is this: Did the tax deed made by the sheriff of Johnson County to Tuttle, in 1890, divest Mrs. Collier of her inchoate right of dower in the premises,

and will it operate to bar her dower in case she survive her husband, it being admitted that he is still alive? This question has never been passed upon in this State, and we have therefore given it a most careful consideration. We are unable to find any reliable guides in the adjudications of other States on this subject, for local statutes have almost wholly controlled the determination of the question. We are hence driven to our own rules and adjudications on the subject of taxation and sale of land for taxes, in order to arrive at a correct conclusion. We can use only general conclusions reached by text-writers, and the decisions of the courts as illustrating the principles we announce. We will briefly refer to some of these. In the first place we will inquire into the general nature and extent of the power of taxation. "The power to levy taxes," says Judge Cooley, "is one so unlimited in force and so searching in extent that the courts scarcely venture to declare it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. . . . No attribute of the government affects more constantly and intimately all the relations of life than through the exactions made under it. 'Taxes' are defined to be burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes. The power to tax rests upon necessity, and is inherent in every sovereignty." Cooley, Const. Lim. 8d ed. 479.

The power to tax is analogous to the right of eminent domain. The same author, in his work on Taxation, p. 287, uses this language: "When the State has need of the property of citizens for its sovereign purposes, it may lawfully appropriate it against the will of the owner, either under the power to tax or the right of eminent domain." Mr. Blackwell, on the same subject, says: "There is no difference in principle between the power of taking land for public use and the power to tax and enforce its collection by a sale of the land. In both cases the land is taken for the use of the public; they only differ in degree." 1 Blackw. Tax Titles, 5th ed. § 90. A tax, in legal contemplation, is not a debt due by the owner of property. It is a charge levied upon the person or property of the citizen for a public purpose, by the State. *Carondelet v. Picot*, 88 Mo. 125; Cooley, Taxn. 15; *Be Life Assn. of America*, 12 Mo. App. 40. And imprisonment for the nonpayment of taxes is not imprisonment for debt. Cooley, Taxn. 17.

We will, in the second place, inquire into the general rule in regard to the sale of land for taxes, and the title acquired by the purchaser at such sale. There are, in the several States of this Union, two methods of listing lands for taxation; one is to list the lands "as the summation of all interests," and the other is to list the interest of the owners of the land as set out in the assessment roll; and much depends on the method of the assessment as to the interest that passes to the purchaser at a tax sale. Indeed, when the principles underlying the exercise of the taxing power are examined, and the sale of lands for unpaid taxes, it will be found that the title conveyed at a tax sale depends almost wholly on the theory upon which the land is listed and valued

for taxation. On this subject, Mr. Blackwell, in his work on Tax Titles, 5th ed. § 954, says: "When the sale and deed are valid, and have their complete effect, . . . the interest conveyed depends upon the circumstances and the statutes. If a particular interest in the land is separately assessed as such, a sale of that does not pass the whole land, nor will a sale of the land pass such interest. If the land alone is assessed, as the summation of all interests, liens, incumbrances, etc., the general rule is that the deed carries a fee-simple absolute, a new and independent title, the land itself being conveyed; and all prior liens, incumbrances and interests in, to or upon the land, are extinguished. . . . In those States where the tax is a charge upon the land alone, where no resort, in any event, is contemplated against the owner or his personal estate, and where the proceeding is strictly *in rem*, the tax deed will undoubtedly have the effect to destroy all prior interests in the estate, whether vested or contingent, executed or executory, and those in possession, reversion and remainder. . . . On the other hand, where the law requires the land to be listed in the name of the owner of the fee, or of any other interest in the estate, provides for a personal demand of the tax, and, in case of default, authorizes the seizure of the body or goods of the delinquent in satisfaction of the tax, and in terms, or upon a fair construction of the law, permits a sale of the land only when all other remedies have been exhausted, then the sale and conveyance by the officer pass only the interest of him in whose name it was listed, upon whom the demand was made, who had notice of the proceedings, and who alone can be regarded as legally delinquent. In such case the title is a derivative one, and the tax purchaser can recover in ejectment only such interest as he may prove to have been vested in the defaulter at the time of the assessment."

As we shall see later on, the method of listing lands for taxation and the sale of them for unpaid taxes in Missouri does not come under either of the categories mentioned by Mr. Blackwell, but partakes of the nature of both somewhat. Mr. Cooley, in his work on Taxation (3d ed. p. 464), on this same subject, says: "The usual method of enforcing the payment of taxes upon property is by putting the property up at public sale. No one questions the right to do this, and no one doubts that the sale, if fair and made in compliance with the law, and after all preliminary steps have been taken, vests a perfect title in the purchaser to the full extent that the Statute has declared."

With these general rules as lights to guide us, let us examine the statutes and decisions in Missouri in reference to this question. The tax sale involved in this case was made under the Revenue Law first enacted in 1877, and which has substantially continued in force to this time. The title to the property was vested in fee in Daniel Collier, and he alone was made a party to the tax suit. Mrs. Collier not being made a party, the question is whether her contingent right of dower is barred by the tax proceeding, sale and deed. If it is, there can be no recovery in this case for breach of warranty. The Statute in force at the time the tax suit was instituted required the suit to

be brought against the "owner" of the property. § 6887, Rev. Stat. 1879. Was Mrs. Collier an "owner of the property" within the meaning of that Statute? Her right of dower at the time of these proceedings was, and is yet, inchoate only. McClean, J., in *Johnston v. Vandyk*, 6 McLean, 422, says: "It is not easy to define the right of dower before the death of the husband. It is not only an inchoate right, but contingent. It depends upon the death of the husband. If he survive his wife, she has no right transmissible to her heirs, nor during the life of her husband can she give it any form of property to her advantage. . . . So long as the husband shall live, it is only a right in legal contemplation, depending upon the good conduct of the wife and the death of the husband. Until the death of the husband, the right, if it may be called a right, is shadowy and fictitious, and, like all rights that are contingent, may never be vested."

In *Moore v. New York*, 8 N. Y. 110, the court says, in speaking of the inchoate right to a claim for dower, that it is a right "contingent upon the death of the husband. Such a possibility may be released, but it is not, it is believed, the subject of grant or assignment. It is not of itself property, the value of which may be estimated, but an inchoate right, which, on the happening of certain events, may be consummated so as to entitle the widow to demand and receive a freehold estate in the land." Mr. Scribner, in his work on Dower, says: "Although, therefore, an inchoate right of dower cannot be properly denominated an estate in lands, nor indeed a vested interest therein, and notwithstanding the difficulty of defining with accuracy the precise legal qualities of the interest, it may nevertheless be fairly deduced from the authorities that it is a substantial right, possessing, in contemplation of law, the attributes of property, and to be estimated and valued as such." 2 Scribner, Dower, 8.

If we understand the rulings of this court, however, on the subject, it is not conceded that this contingent right of the wife is capable of being estimated and valued. In *Hinds v. Stevens*, 45 Mo. 209, Judge Bliss, in discussing the effect of a partition proceeding on this right, says: "If the land be divided *in specie*, her inchoate right attaches at once to the land thus set apart to the husband in severalty; and, if it be sold, I know not how it would be possible to so estimate the value of that shadowy right, or to pay her or invest for her any portion of the proceeds of the sale." And in *Durrett v. Piper*, 58 Mo. 551, the court, through Wagner, J., says: "A dower interest upon the part of the wife, while the husband is living, is an inchoate and contingent right. Its value depends wholly upon the death of the husband. . . . It is a mere possibility, which may be released, but cannot be the subject of grant or assignment. The covenant being for an indemnity against a claim of dower, it is obvious that no breach could happen till the contingency arose which would legally vest in the wife a valid or substantial claim." From all the authorities, we conclude that the wife is not the owner of any estate or vested right in the property of which her husband is seised. But she is the owner of a con-

tingent interest to dower, however; and the question is whether the owner of such a contingency in real estate is an owner of property in such a sense as to require that she be made a party to a tax suit in order to bar that right. In our Revenue Laws the word "owner" is used several times. Section 6706, Rev. Stat. 1879, provides that the assessor shall list land in numerical order, "with the owner's name, if known, and, if not, then the name of the original patentee," etc.; and, if the land cannot be listed numerically, then he shall describe it as briefly as he can, giving the "owner's name, if known," etc. By section 6884 the clerk of the county court is required to make a "back-tax book," and insert therein "a correct list, in numerical order, of all tracts of land and town lots on which back taxes shall be due, . . . setting forth opposite each tract of land or town lot the name of the owner, if known, and, if the owner thereof be not known, then to whom the same was last assessed." It is provided by section 6887, *supra*, that "all actions commenced under the provisions of this chapter shall be prosecuted in the name of the State of Missouri, at the relation and to use of the collector, and against the owner of the property; and all lands owned by the same person or persons may be included in one petition." Section 6858 provides that "each tract of land or lot shall be chargeable with its own taxes, no matter who is the owner, nor in whose name it is or was assessed or advertized."

We have thus set out in detail the provisions of the Revenue Laws in which the word "owner" occurs, to enable us to determine what was meant by it; for it is a well-established canon of statutory construction that, where the same word is used more than once and in different connections, it must be held to have the same meaning in all, unless it be manifest it is used in different senses. Now, what did the General Assembly mean when it required the assessor to place the name of the "owner" opposite each tract of land or lot on the assessment roll? It will scarcely be claimed that the wife of the owner is included in that term as used in this connection. And the same may be said of the provision in regard to the making of "the back-tax book." The word "owner" as used in that connection, would not include the wife of a man who held the legal title. If the word "owner" does not include the wife having simply an inchoate right of dower, when applied to the assessment roll and the "back-tax book," neither will it include her when applied to a section of the same statute requiring suit for taxes to be brought against the "owner." She cannot be regarded as an owner of property of which her husband is seised, within the meaning of any of the provisions of the Revenue Laws quoted, and hence for that reason she is not a necessary or proper party to an action to collect taxes on the land of her husband. But she was not a necessary party for another reason. This court has frequently held that the word "owner," as used in these laws, does not necessarily mean the actual owner. The collector is not bound to go beyond the record to ascertain the owner of property against whom to bring suit, and a purchaser, at a sale for

taxes against the person appearing from the record to be the owner, will take the title in fee, as against the true owner whose deed or title is not of record, if such purchaser has no knowledge of the unrecorded title. *Vance v. Corrigan*, 78 Mo. 94; *State v. Sack*, 79 Mo. 661; *Boans v. Roberson*, 92 Mo. 192, 10 West. Rep. 398; *Allen v. Ray*, 96 Mo. 542.

The records of the county in which the land is situated do not always nor usually give the name of the wife, and the revenue officers cannot get the names of the wives in making assessments or in instituting proceedings for the enforcement of the state's lien for taxes. Hence if the Statute in terms required the collector to make the wives of the owners of land parties to the proceedings to collect the taxes, it would be impracticable, in a very large proportion of cases, for him to comply with the requisition.

Having determined that the wife is not an owner of the property of her husband; in such a sense as to require her to be made a party to an action to enforce the lien for taxes against his land, it seems this ought to dispose of the case; for when the suit is brought against the owner, and the proceeding is regular, the purchaser gets a title "in fee" to the land sold. And as to the meaning of an estate in "fee," Mr. Tiedeman, in his work on Real Property, § 36, says: "The word 'fee,' without any qualifying adjective, implies an unlimited estate of inheritance. Such is also the case with the term 'fee simple' and 'fee simple absolute.' The three terms 'fee,' 'fee simple,' and 'fee simple absolute' may be used interchangeably; the adjectives in the last two are surplusage." See also *Allen v. McCabe*, 93 Mo. 188, 12 West. Rep. 118. The lien of the State for taxes is a "first lien on the land." This lien attaches to the *res*, and is paramount to every interest and estate in the land, as well as to all other incumbrances, whether prior or subsequent. *Gitchell v. Kreidler*, 84 Mo. 472. And a sale to foreclose this lien, in an action where all owners of the land, within the meaning of the statute, have been regularly made parties, "digs up," as it were, the "fee," and vests it in the purchaser. *Jones v. Devore*, 8 Ohio St. 430; *Osterberg v. Union Trust Co. of N. Y.* 93 U. S. 424, 23 L. ed. 964; Cooley, Taxn. 2d ed. 445, and cases cited. We have not lost sight of the doctrine laid down by this court in the case of *Gitchell v. Kreidler*, 84 Mo. 472, that the title acquired by a purchaser at a tax sale under our Statute is a derivative one. This we do not deny, but we hold that when all of the owners of the land taxed, within the meaning of our Revenue Laws, are made parties to the suit, a perfect title passes to the purchasers under these laws, because it is provided that a title "in fee" shall pass. Cooley, Taxn. 2d ed. 464. In the same case in which Judge Black declares that a tax title under our statutes is a derivative one, he is careful to say, also, that the judgment in these cases is *in rem*.

But it is contended that a judgment against the husband for the taxes cannot affect the wife's inchoate right of dower, and § 2197, Rev. Stat. 1879, is quoted in support of this contention. That section is as follows: "No act, deed, or conveyance, executed or per-

formed by the husband, without the assent of the wife, evidenced by her acknowledgment thereof, . . . and no judgment or decree confessed by or recovered against him, and no laches, default, covin, or crime of the husband, shall prejudice the right and interest of the wife provided in the foregoing sections of this chapter." This is chapter 29, entitled "Of Dower." Plaintiffs denominated the failure of Collier to pay the taxes on the land, and permitting judgment to go against it for them, "laches" on his part, within the meaning of the word as used in the section quoted. Mr. Blackwell, in his work on Tax Titles (5th ed. § 961), holds that a sale for taxes does not cut off the inchoate right of dower under a similar statute in Illinois, and he quotes several cases as authority for that position; but, on examination, it will be found that not a single case he quotes involved the sale of land for taxes. In the most of them it was held that an execution sale, under a judgment against the husband for debt, did not bar dower either consummate or inchoate. There is no doubt about the soundness of that position. That is the unquestioned law in Missouri. This writer announces the same doctrine again in section 954, but his reference is to section 961 of his own work above, as authority for it. It is not easy to determine Mr. Blackwell's meaning when it is a recognized principle, even by himself, that the State can sell the property of the citizen for the payment of taxes, either by a direct proceeding against the owner, or against the *rem*, or against both, and convey a title in fee to the purchaser. Blackw. Tax Titles, 5th ed. §§ 75 et seq. 954; Cooley, Const. Lim. 3d ed. 402; Cooley, Taxn. 672.

We presume he does not intend to announce the doctrine that the State cannot sell the inchoate right of the wife to dower in her husband's real estate by any process whatever. He intended, no doubt, to simply state the rule to be that, in order to bar this right, the wife must in some way be made a party to the proceeding. We can hardly conceive that the "shadowy" right of dower of the wife, while her husband is living, can be regarded as any more sacred than the vested estate of the husband. In section 954, *supra*, he states the doctrine to be that where the State assesses and sells the land, irrespective of any particular owner's interest in it, "the tax deed will undoubtedly have the effect to destroy all prior interests in the estate, whether vested or contingent." And Mr. Cooley says, in the extract above quoted, that "no one doubts that the sale, if in compliance with law, vests a perfect title to the purchaser, to the full extent that the Statute shall declare." That the Legislature has the power to divest, by a proceeding of this character, the wife's inchoate right of dower is well settled upon principle and authority. Cooley, Taxn. 2d ed. 444; Blackw. Tax Titles, §§ 188, 954; Cooley, Const. Lim. 3d ed. 860; 3 Scribner, Dower, p. 8 et seq.; Woerner, Administration, § 112; *Morrison v. Rice*, 35 Minn. 496; *Jones v. Devore*, 8 Ohio St. 430.

Let us examine section 2197, *supra*, and see if a judgment for taxes, where the husband alone is made a party to the action, is within its scope and meaning. That section provides

that "no judgment or decree confessed by or recovered against him, and no laches, default, covin or crime of the husband, shall prejudice the right of the wife" to dower. The decree or judgment here referred to does not apply to a judgment for taxes. There can be no personal judgment for taxes. The judgment must be against the land. *State v. Sargeant*, 76 Mo. 557; section 6838, Rev. Stat. 1879. Hence the judgment in this case was not "confessed by or recovered against" Collier. The judgment was rendered against the land, and a special execution ordered for the sale of that. The state obtained judgment, and sold the land against the will of Collier. The judgment did not grow out of any contract of Collier. The section quoted was intended to prevent the husband doing anything, either actively or passively, to bar dower, without the consent of his wife. A tax proceeding is a proceeding *in invitum*. The Revenue Laws of Missouri require that the land itself, and not the interest of any particular owner, be valued for taxation, and that taxes be levied on the land. *Allen v. McCabe*, 93 Mo. 138, 12 West. Rep. 118. In the first place, the assessor is required to list the land, and set opposite each tract or town lot the name of the owner, if known. In the second place, "the back-tax book" must contain a list of the tracts of land and town lots, with the names of the owners, if known, set opposite to them. In the third place, the judgment must state the amount of taxes due on each tract of land or lot, and "shall decree that the lien of the state be enforced, and that the real estate, or so much thereof as may be necessary to satisfy such judgment, interest, and costs, be sold, and a special *feri facias* shall be issued thereon, which shall be executed as in other cases of special judgment and execution; and said judgment shall be a first lien upon said land." Section 6838, *supra*. Here it is required that the judgment shall not only be against the land, but the taxes must be decreed against the tract or lot on which they have been levied. "The State has no lien upon one lot for taxes charged against another, although both lots are owned by the same person." *State v. Sargeant*, 76 Mo. 557. In the fourth place, the Statute provides that the land is chargeable with the taxes levied thereon, "no matter who is the owner nor in whose name it is or was assessed." Section 6853. And in the fifth place, the sheriff shall, after the sale of land for taxes, make a deed, "which shall convey a title in fee to the purchaser of the real estate therein named."

Construing all these provisions together, it is manifest that the proceeding under our laws for the sale of lands for taxes is essentially a proceeding *in rem*. 2 Blackw. Tax Titles, § 954; Cooley, Taxn. 2d ed. 527. It is true the tax when levied is made a personal charge against the owner of the property assessed, and may be collected by the seizure and sale of his personal property, and the owner must be made a party to the action for the recovery of taxes due on land; yet when it is sought to sell the land itself the proceeding is confined strictly to the establishment of a lien against it, and no personal judgment is permitted against the owner, not even for costs, though known, and a party to the suit. *Milner v. Shipley*, 94 Mo. 13 L. R. A.

109, 18 West. Rep. 199; *State v. Sargeant*, *supra*. It seems anomalous, too, that the collector can seize and sell the personal property of the person he supposes is the owner, but that no personal judgment can be rendered against the owner when he is brought before the court, and it has been judicially determined who the owner is; but this is nevertheless true, as is apparent from the plain letter of the statute and the adjudications of this court. In *Watt v. Donnell*, 80 Mo. 195, it was held that the tax books were not evidence to show, even *prima facie*, who the owner of the land is. Under this ruling, it would appear difficult for the collector to make any demand, and especially any seizure, of personal property for a land tax. It is clear that the judgment or decree referred to in section 2197, *supra*, means a judgment or decree against the husband founded upon some act, contract, tort, or fraud of his, and does not embrace a judgment obtained by the State *in rem*, in the exercise of its paramount power of taxation or eminent domain. It seems to have been uniformly held by the courts of this country, when this question came before them, that, where lands are appropriated by the exercise of eminent domain, the dower of the wife, though not a party to the proceeding, is barred. *Moore v. New York*, *supra*. In this case the land had been condemned for public use, and the full value paid to the husband, the wife not being made a party to the proceeding. The court said: "The question which is here presented is whether a wife has such an interest in the premises owned by the husband, while her right of dower is inchoate, as can be divested by this Act of the Legislature and the proceedings under it. . . . The right being merely an incident to the marriage relation, it seems to us that, while this right is thus inchoate, and before it has become vested by the death of the husband, any regulation of it may be made by the Legislature, though its operation is, in effect, to divest the right; the marriage relation itself being within the power of the Legislature to modify or even abolish. The power of the State to take private property for public use results from its right of eminent domain, and that power is not restricted, except by constitutional provision that just compensation shall be made to the owner. In this case the husband was deemed to be the owner of the entire estate in the land, and the inchoate right of the wife was not considered by the commissioners, and we think justly so, as the subject of estimate as to its value separate from his. Indeed, the value of her interest, such as it was, would seem to be scarcely capable of being estimated as a separate interest. We see no reason to doubt that the commissioners were right in considering the entire estate in these lands as vested in the husband, and, he having been paid the full value for them, the corporation, by force of the act, became seized of the lands in fee simple absolute, discharged of any claim of dower of the wife therein." The case went to the Court of Appeals of New York, and was there affirmed (8 N. Y. 110). Gardiner, J., who delivered the opinion of the latter court, said: "The estate of the widow, after assignment of dower, is a continuation of the estate of her deceased husband. It follows that, while liv-

ing, he, as owner, is entitled to and represents the entire fee. This the statute vests on confirmation of the report of the commissioners, and concludes all those entitled to the land, and all other persons whomsoever. Mrs. Moore, at the time of the proceedings to appropriate the real estate, was not, as we have seen, entitled to it, but her husband; and she was concluded by the general language of the Act. . . . Dower is not the result of contract, but a positive institution of the State, founded on reasons of public policy. In the case under consideration the land was taken, against the consent of the husband, by an act of sovereignty for the public benefit. The only person owning and representing the fee was compensated by being paid its full value. The wife had no interest in the land, and the possibility which she did possess was incapable of being estimated with any degree of accuracy."

The inchoate right of dower may be barred, not only by the State in its exercise of the right of eminent domain, without consulting the wife, but the husband also can, by his own act, bar this right by a dedication of his property to public use when the dedication is complete, or when the public accepts the dedication. This point was ruled by the Supreme Court of Indiana in *Dunoon v. Terre Haute*, 85 Ind. 108. Judge Dillon, in his treatise on Municipal Corporations (2d ed. § 459) says: "As dower is not the result of contract, but is a positive legislative institution, it is constitutionally competent for the Legislature to authorize lands to be taken by a municipal corporation for a market, street, or other public use, upon an appraisal and payment of their value to the husband, the holder of the fee, and such taking and payment will confer an absolute title, divested of any inchoate right of dower. Nor is the widow dowerable in lands dedicated by her husband in his lifetime to the public, where the dedication is complete, or has been accepted and acted upon by the municipal authorities." On the same subject, Mr. Washburn, in his work on Real Property (4th ed. 209), uses this language: "One mode in which dower may be defeated remains to be mentioned, and that is by the exercise of eminent domain during the life of the husband, or, what is equivalent to it, the dedication of land to the public use."

In *Geyne v. Cincinnati*, 8 Ohio, 24, the husband gave the city a square for a market-house and a street opening to it. His wife did not join in this dedication. The city ordinance accepted this dedication. The supreme court held that the wife was barred. It is there said: "The counsel for the complainants insist that it is a case to be distinguished from that of public grounds for public uses, but the court are unable to comprehend the distinction. When a town is laid out, the law requires the plat to be recorded, and by such record the streets become public highways, and the title to the grounds set apart for public uses is vested in the county for the purposes contemplated. The uses thus created are inconsistent with the exertion of any private right while the use remains; consequently all private rights must be either suspended or abrogated. Such has been the general understanding, not only in this

State, but also, as far as we are informed, in other States also."

Mr. Scribner, in his work on Dower, after reviewing the adjudged cases in England and America, and after an examination of the principle involved, concludes the discussion of this question thus: "The rule fairly deducible from these authorities would seem to exclude dower in all cases where lands are dedicated to the public for a legitimate purpose, and the public have acquired a right to the enjoyment thereof, or where they are lawfully appropriated by virtue of the right of eminent domain. The reasoning of the courts appears to apply as well where lands are granted and used for public parks, public libraries, or other public use of a like character, as where they are devoted to the purposes of a market-place or a public highway." Scribner, Dower, chap. 27.

Let us examine this question, now in the light of the Missouri Statutes and decisions. We have a chapter, and have had for many years, providing for the dedication of streets and grounds to the public. Chapter 127, Rev. Stat. 1889. The Statute authorizes the proprietor of land to make, acknowledge, and file a plat, on which shall be designated the streets and grounds dedicated to the public, and that such plat, when acknowledged by the proprietor and recorded, "shall be a sufficient conveyance to vest the fee of such parcels of land as therein named, described or intended for public uses in such city, town, or village, when incorporated, in trust for the uses therein named." Section 7818, Id. No provision whatever is made for the concurrence of the wife in the dedication; but the authorities we have quoted would seem to indicate that such dedication, when accepted by the public, would operate to bar the inchoate right of dower of the wife of the "proprietor," where she does not join in the dedication. Our Road Laws and laws in regard to eminent domain provided for the appropriation of land for the public use, but no provision is anywhere made to obtain the inchoate right of dower of the wife of the owner of the land which is appropriated. The statutes on these subjects do not look beyond the husband, when he is seized of the fee. Though the question has never been directly involved in any case determined by this court, yet *Judge Bliss*, in *Mogwire v. Riggin*, 44 Mo. 512 (loc. cit. 515), quotes and approves the doctrine of *Moore v. New York*, *supra*. By common consent among the people and members of the bar of this State, it has not been deemed necessary to make the wife a party to a proceeding to condemn her husband's land for a public road, or a railroad, in order to cut off her inchoate right of dower. This common opinion in this instance has so long prevailed in Missouri, and has been so universally acted upon, that its overthrow now would introduce great confusion in the titles to estates. It is not merely speculative and theoretical, but has been made the ground-work and substance of practice. The presumption is that this practice is founded upon the rule announced by Scribner and Washburn, and the cases quoted above.

Again, it has been held in this State that, where the wife joins with her husband in a mortgage of his real estate, she is not a neces-

nary party to a suit to foreclose the mortgage, and that a foreclosure against the husband alone bars her inchoate right of dower. *Riddick v. Walsh*, 15 Mo. 519; *Thornton v. Pigg*, 24 Mo. 249; *Hoyt v. Oliver*, 59 Mo. 188. It is true that in the *Riddick-Walsh Case*, the foreclosure occurred at a time when our statute provided that a sale under a general execution against the husband carried the wife's dower, yet Judge Scott did not rest the determination of the case wholly upon the Statute, but held that the foreclosure carried the dower without regard to the Statute. He uses this language: "On the one hand it was argued that, as the land out of which this right of dower is claimed had been sold under a special *ferri facias* on the judgment in the mortgage proceedings, that was a sale under execution, within the meaning of the Act, and therefore the right of dower was barred. On the other hand, it was contended that the wife was a necessary party to the proceedings to foreclose the equity of redemption, and, not being joined, she could not be affected by the judgment in a suit to which she was not a party. There is a marked distinction throughout the books between cases where a suit affects a wife's interest in real estate which is claimed in her own right, and those in which she has only an inchoate right of dower. In the former class of cases no instance is to be found in which it is not maintained that a wife is a necessary party to the proceedings in order to divest her right. In the latter class the husband alone is deemed the proper party to defend a proceeding instituted to divest the title to land to which a mere inchoate right of dower has attached. . . . The execution of the mortgage, with the wife's acknowledgment and relinquishment of dower, the proceedings to foreclose the equity of redemption, the judgment, execution, and sale by the sheriff, taken with his deed, are the links in the chain of title of the purchaser at the sheriff's sale. The wife having given her assent to the deed, and having a mere inchoate right in her husband's estate, who was still in existence, and he being competent to defend such interests of the wife in all other proceedings against him, no reason is perceived why the wife should have been made a party to this suit. So, in either point of view, the wife is barred of her dower." The doctrine laid down in this case was directly involved in the case of *Thornton v. Pigg*, *supra*, decided in 1857, and was approved by this court; and again, in 1875, the same doctrine received the sanction of this court in *Hoyt v. Oliver*, *supra*. In 1835 the question arose in *Lee v. Lindell*, 22 Mo. 202, whether a judgment of partition against the husband divested the wife's inchoate right of dower, and it was distinctly held by a majority of the court that it did; and it was also held that section 2187, which was then in force, did not affect the question. In other words, it was held that a judgment in partition against the husband was not included in that section. Judge Scott, who delivered the opinion of the court, said: "There being no law requiring her to be made a party, it is not perceived how the arbitrary use of her name can impart validity to a proceeding which without it would not affect her. Nothing seems clearer than that, if the law does not re-

quire a married woman to be made a party to a proceeding, the making her one arbitrarily cannot affect her rights. If the proceeding is such as does not bind her, the use of her name without authority of law cannot produce such a consequence. Under our law, the wife of the husband, who owns an interest in the land to be divided, is not required to be made a party in partition, any more than such wife is required to be plaintiff or defendant in an action of ejectment for lands claimed by the husband, and in which she may have a right of dower. If the husband alone is competent to protect her interests in this action, why not in other actions in which her interests are the same?" And *Riddick v. Walsh*, *supra*, is cited as authority. The general principle upon which this decision proceeded was that the wife's interest was subordinate and subject to the right of partition, and for that reason she was not a necessary party. The same question arose again, and was again determined the same way, in 1870, in *Hinds v. Stevens*, 45 Mo. 209. The opinion this time was unanimous. This case goes further, however, than that of *Lee v. Lindell*. The judgment of the *Hinds-Stevens Case* was rendered against the husband in his lifetime, but the sale did not occur till after his death, when his widow applied for her dower, she not having been made a party to the proceeding. Judge Bliss, delivering the opinion of the court, said: "Since the decision of this court in *Lee v. Lindell*, 22 Mo. 202, it has never been deemed necessary to make the wife of a person interested in the partition of lands a party to a proceeding for partition. The Statute does not expressly require it, and I cannot conceive of any interest she can have in the result, more than in any other suit touching the realty. . . ." The broad language in relation to parties to proceedings in partition was substantially the same in 1835, under which *Lee v. Lindell* was decided, as in that of 1835, covering the proceedings in question. Since this decision the question has not been mooted in this State. In 1875, in the case of *Hoyt v. Oliver*, *supra*, it was held that a wife was not a necessary party to a suit to correct a deed of trust given on the land of the husband. In the case of *Bailey v. Winn*, 101 Mo. 649, it was held that a wife was not a necessary party to an action to foreclose a vendor's lien in order to bar her dower. See also *Fontaine v. Boatmen's Sav. Inst.* 57 Mo. 552; *Duke v. Brandt*, 51 Mo. 221. Where the husband has taken a title bond for land, and paid part of the purchase money, his wife has an inchoate right of dower in the land thus held (*Hart v. Logan*, 49 Mo. 47); and yet, in such case, if the husband's interest be sold under a general execution, the inchoate right of dower is barred (*Worsham v. Callison*, 49 Mo. 206); and the husband alone, in such case, can transfer the property, and bar his wife's right to dower (*Duke v. Brandt*, 51 Mo. 221). It seems clear that the reason of the rule applicable to the exercise of eminent domain, and the dedication of land to public use, to the foreclosure of mortgages and vendors' liens, and to partition proceedings, applies to the case at bar with great force. When the State appropriates the land of a private citizen for public use, it does it against his will. So when the State enforces

its lien against the land of the citizen it does it against his will. If one proceeding cuts off the inchoate right of dower, why does not the other? In case of foreclosure of a mortgage or vendor's lien, the husband and wife both are interested, first, to show that nothing is due; and, in the second place, they have a right to receive the surplus. This court has said that the husband is competent in that case to protect the interests of his wife. In the case at bar the husband and wife were interested, first, to show that no tax was due on the land; and, in the second place, they had a right to receive the surplus arising from the sale after the satisfaction of the lien. In the proceeding instituted against him to enforce the State's lien for the taxes, was he not competent to protect his wife's interests? Was he not, as remarked by Gardiner, J., in *Moore v. New York*, *supra*, "the only person owning and representing the fee?" If a judgment in partition against the husband bars the wife's dower, *a fortiori* will not a judgment enforcing the State's lien for taxes, when the husband is made a party, bar her dower? In a partition proceeding, the wife is peculiarly interested. It is said her dower will attach at once to the land allotted to her husband in severalty, but may not land be allotted to him that is unimproved, and hence be utterly valueless to the widow? She has no right to be heard in regard to whether partition shall be made at all, or in regard to what land shall be allotted to her husband; and, if the land be sold, the proceeds go to her husband, and she is cut off entirely. But still this court has held, and the rule is now firmly established, that the husband is competent to protect his wife's interests in such a proceeding. If that be the rule where the husband may, on his own motion, commence the proceeding, with how much greater force will it apply in a case where the State sells the land against the will of the husband as well as the wife. It is true, no one shall be deprived of his property without "due process of law." But a proceeding *in rem*, in which no named person is served with notice, is due process of law. Cooley, Const. Lim. 8d. ed. 402; Cooley, Taxn. 2d ed. 51. A proceeding defended by one person, who represents another, is due process of law. This was held in the cases we have cited, not probably in so many words, but in effect. A good illustration of this principle is to be found in the administration of estates. The administrator or executor is the only necessary party to establish a debt against the estate of the testator or intestate, though the debt thus established may finally operate to deprive the heir of the property he would otherwise take. Yet he is bound by the judgment against the administrator or executor; and, where the mortgagor dies, the administrator or executor is the only necessary party defendant in a proceeding of foreclosure, and a judgment against him not only bars the widow, but the heir also. *Tierney v. Spica*, 97 Mo. 98. "The owner in fee of land represents his heirs as well as creditors in all actions involving the title to the land. In such actions he represents the fee, and this includes everyone who will derive title through him. If he is competent to protect those who will be his heirs, as also his creditors, whose interests

are vastly superior, as a rule, to the wife's inchoate right of dower, is he not competent to protect his wife's interests? The dower right of a widow is a continuation of the husband's estate. Her dower interest, whether inchoate or consummate, is part of the fee." *Doty v. Baker*, 11 Hun, 292; *Moore v. New York*, *supra*. There is no provision in the Revenue Laws for making the wife a party to the action against the land of her husband, and as was said in *Lee v. Lindell*, in the absence of such a provision, making her a party arbitrarily cannot affect her interests. It being provided that the "title in fee" shall pass to the purchaser under a tax judgment, and no provision being made for bringing in the wife, it is the plain intent of these laws to pass not only the husband's interest, but the wife's also, where he alone issued. Cooley, Taxn. 464. The courts, in all the instances named, where the wife's inchoate right of dower was held to have been cut off by a proceeding to which she was not a party, have proceeded upon the general principle that this contingent right was subordinate to other rights; that the wife's right attached subject to a superior claim. So, a tax lien in our State being paramount to all interests and claims, the wife's inchoate right of dower attaches subject to that lien, and she is no more a necessary party to a proceeding to foreclose it in order to bar the right than she is a necessary party in the instances referred to.

From the authorities cited, and from what has been said in this opinion, we deduce these propositions: (1) that when an action is brought against the "owner" of land, within the meaning of that word as used in our Revenue Laws, to establish and enforce the State's lien thereon for taxes, a valid judgment rendered, the land sold thereunder, and the sheriff executes a deed to the purchaser, the whole title in fee is conveyed, as the statute declares; (2) that the wife is not an "owner," within the meaning of the statute, by virtue of her inchoate right of dower in her husband's land, in such a sense as to require her to be made a party to a tax suit against her husband, in order to bar her contingent interest; (3) that the husband in such a case represents the fee, and is competent to protect his wife's interests; and hence (4) that a valid tax sale of the husband's fee-simple estate cuts off the wife's inchoate right of dower.

2. This is the conclusion we have reached upon an examination of the authorities, but we are equally well satisfied that this conclusion is sound upon principle also. It is to the interest of the State, of course, that it should have the power to collect its taxes by the sale of land, and to thereby convey the title in fee; but it is of vastly more importance to property owners that the proceeding to sell lands for taxes should, in the first place, be as inexpensive as practicable, and, in the second place, that the interest and title offered for sale should be definitely known. Suits for taxes are expensive, at best; but to require the wife to be made a party with the husband would add to that expense. Frequently the tax is only a dollar or two, and it would cost that much or more to make the wife a party, and when she is made a party, what can she accomplish more than her husband can accomplish?

Nothing. His interests are identical with hers. The State, in its efforts to enforce the collection of the tax, is the common enemy of both. The proceeding is *in invitum* as to both. But when lands are offered for sale against the will of the owner, it is important to the owner that the estate offered should be definitely known; otherwise it will be sacrificed. If the title and estate offered for sale be known with certainty the land will probably bring its value. If the collector be required to make the wife as well as the husband party to the suit in order to bar her dower, in ninety-nine hundredths of the tax sales it will not—it cannot—be known whether there be a wife at all or not, and hence there will be a doubt as to the extent of the title conveyed. Sacrifices of land must follow necessarily, and these sacrifices will largely exceed the value of the “shadowy” right of inchoate dower. It is a well-known fact that nearly all tax suits are against non-resident owners, and in such cases it is utterly impracticable to learn the name of the wife of the owner, or to know that the owner is married. Sacrifices of property must result from the enforcement of such a requirement, and these sacrifices will generally exceed the value of the contingent right of inchoate dower. It is said the sale of land for taxes is against common right, and is not, therefore, favored in law. That is true. But it is a common saying that “taxes and death” are certain. Every property owner knows that an annual tax will be levied on his property. He knows, or ought to know, when it becomes due in each year, and the sooner it is known that if the taxes be not paid within the prescribed time the property will be sold and the owner will lose his property the better. This rule would be better for the State and better for the taxpayer. Better for the State, because it would be sure to collect its taxes; and better for the owner, because, when he knows payment will be enforced certainly he will be

more apt to pay, and if for any reason he should fail to pay the taxes due by him, and his property be sold to pay them, it would bring its full value, when it is known that a good title in fee is to be conveyed. Hence all embarrassments thrown in the way of tax sales simply operate to make taxpayers careless, in the first place, about the payment of their just share of the expenses of the State; and, in the second place, to sacrifice the property sold, because no one can know definitely what is offered for sale. It should be the policy of the State to create competition at these sales, so that there may be a surplus left, after the payment of costs and taxes, to go to the owner. *Cooley, Taxn. 2d ed. 464.*

The second contention on the part of the appellant is that there was no breach of the covenant of general warranty in this case at the institution of this suit, nor now, because there existed only a right of inchoate dower in Mrs. Collier, and no breach could occur till this right became consummate, and vested by the death of her husband. It is universally held that inchoate dower constitutes an incumbrance of land, and the rule is that the covenant is broken as soon as made, in such case. This breach, however, is technical only, and the trial court committed error in giving judgment for substantial damages. *Walker v. Deaver, 79 Mo. 664, and cases cited.*

Enough has been said in the former part of this opinion to show that this right of inchoate dower is too shadowy and unsubstantial to be valued or estimated.

The judgment will be reversed, and cause remanded for new trial, it being the opinion of a majority of Division No. 2 that the tax sale and deed did not cut off Mrs. Collier's inchoate right of dower and that there was a technical breach of the covenant in the case, for which plaintiffs are entitled to recover nominal damages only.

Motion to transfer to court in banc denied.

CONNECTICUT SUPREME COURT OF ERRORS.

Charles COOK, Conservator of Sarah A. Bostwick,

v.

Uri P. BARTHOLOMEW *et al.*

(....Conn.....)

1. A deed granting land for a certain money consideration, with a condition that, if the grantor shall support the grantees during her natural life and give her decent burial the deed shall be void, otherwise it shall remain of full force and effect, constitutes a mortgage which may be foreclosed on failure to fulfill the condition.
2. No entry for breach of the condition is necessary to enable a mortgagee to maintain an action to foreclose the mortgagor's right of redemption although the mortgage is in form a deed absolute with a condition annexed.

NOTE.—Deed on consideration of support for life. See note to *Dreisbach v. Serfass* (Pa.) 3 L. R. A. 836.

18 L. R. A.

(January 7, 1891.)

RESERVATION from the Court of Common Pleas for Litchfield County for the opinion of the Supreme Court of an action brought to foreclose a mortgage. *Judgment for plaintiff advised.*

The facts sufficiently appear in the opinion.

Mr. R. E. Hall, for plaintiff:

The instrument executed by Ammon Bostwick to Charles Cook is a mortgage.

The condition of a mortgage may be the payment of a debt, the indemnity of a surety, or the doing or not doing any other act.

2 Swift, Dig. 183; Robinson, Elementary Law, § 102; 2 Washb. Real Prop. 4th ed. *475; Tiedeman, Real Prop. § 296; *Lanfair v. Lanfair*, 18 Pick. 304; *Erskine v. Townsend*, 2 Mass. 498; *Mitchell v. Burnham*, 44 Me. 209; *Wing v. Cooper*, 37 Vt. 179; *Lund v. Lund*, 1 N. H. 41.

Courts treat as mortgages conveyances conditioned for the support and maintenance of mortgagees or others.

1 Jones, Mort. § 886; *Austin v. Austin*, 9 Vt. 420; *Niske v. Niske*, 20 Pick. 499; *Flanders v. Lamphear*, 9 N. H. 201; *Daniels v. Eisenlord*, 10 Mich. 454; *Bresnahan v. Bresnahan*, 46 Wis. 386; *Hiatt v. Parker*, 29 Kan. 765; *Bryant v. Erakine*, 55 Me. 158.

They are at all events so far mortgages that they can be foreclosed.

1 Jones, Mort. § 393; *Lanfair v. Lanfair*, 18 Pick. 299-304; *Marsh v. Austin*, 1 Allen, 235; *Gilson v. Gilson*, 2 Allen, 115; *Pettes v. Case*, Id. 546; *Wilder v. Whittemore*, 15 Mass. 262; *Gibson v. Taylor*, 6 Gray, 310; *Austin v. Austin and Flanders v. Lamphear*, *supra*; *Rhoades v. Parker*, 10 N. H. 88; *Eastman v. Batchelder*, 36 N. H. 141; *Hawkins v. Olermont*, 15 Mich. 511; *Wright v. Wright*, 49 Mich. 624; *Hiatt v. Parker and Bresnahan v. Bresnahan*, *supra*.

Our Connecticut courts have repeatedly recognized mortgages to secure the performance of other acts than the payment of money.

See *Crane v. Deming*, 7 Conn. 387; *Harding v. Mill River Woolen Mfg. Co.* 34 Conn. 458; *Lewis v. Hartford Silk Mfg. Co.* 5 New Eng. Rep. 608, 56 Conn. 25.

There is no analogy to a deed upon condition.

See 2 Swift, Dig. *169.

In all doubtful cases a court of equity will construe a conveyance, a mortgage, rather than a deed upon condition.

Boone, Real Prop. § 225.

If the deed is a mortgage it may be redeemed.

1 Jones, Mort. 395, and cases.

Mortgages for support may be redeemed unless the condition be so far a personal covenant that a breach cannot be satisfied by money payment.

Jones, Mort. 395; *Henry v. Tupper*, 29 Vt. 358-375; *Bryant v. Erakine*, 55 Me. 153; *Bethlehem v. Annis*, 40 N. H. 34-43.

If the court judge that compensation in money damages can be made for the breach, then a decree limiting a time for redemption may be granted.

Henry v. Tupper, 29 Vt. 359.

Otherwise an absolute decree of foreclosure without privilege to redeem should be given.

Bresnahan v. Bresnahan, 46 Wis. 386.

Messrs. **Henry B. Graves and D. C. Kilbourn**, for defendants:

The instrument in question is not a mortgage.

Anderson, Law Dict.; *Bouvier*, Law Dict.; *Baron v. Brown*, 19 Conn. 34; *Jarvis v. Woodruff*, 22 Conn. 550; *Ansonia Bank's App.* 58 Conn. 261.

The amount of the debt cannot be ascertained, which is an essential requisite of foreclosure.

Goodrich v. Stanley, 23 Conn. 83.

There is a distinction between the breach of a covenant or condition to pay money and one requiring acts to be done.

Hill v. Barclay, 18 Ves. Jr. 56; 4 Kent, Com. 130.

When an estate is granted upon condition in a deed, and there is a breach of the condition, an actual entry or claim by the grantor is necessary in order to revest the estate (*Chalker v. Chalker*, 1 Conn. 79); and this entry for the purpose of taking advantage of a condition is 13 L. R. A.

a thing of substance (*Bowen v. Bowen*, 18 Conn. 541; *Warner v. Bennett*, 81 Conn. 468), and must be pleaded.

Gould, Pl. chap. 4, § 7.

Carpenter, J., delivered the opinion of the court:

This is a suit for the foreclosure of a mortgage, with the alleged mortgage annexed as an exhibit. The mortgage is in two parts,—an ordinary deed for the consideration of \$900, duly executed to convey real estate, and a condition thereto attached, of the same date, and signed by the grantor, as follows: "The condition of the within deed is as follows: The said Bostwick, for the consideration named in the within deed, covenants and agrees with said Charles Cook, as such conservator, that he will receive said Sarah A. Bostwick into his care and keeping during the term of her natural life; that he will provide for all her wants in a reasonable and proper way; will provide her with all needed food, drink, and clothing; have a room and fire when needed; lodging and every necessary comfort, both in sickness and health; and at her decease give her decent and proper burial, and erect tombstones at her grave, with a suitable inscription thereon, within one year after her decease, said tombstones to be of a value of not less than fourteen dollars. Now, therefore, if said Bostwick shall well and truly perform all and every of the above covenants and stipulations faithfully, then this deed to be void; otherwise to remain in full force and effect in law." The complaint also alleges that the defendant Bostwick subsequently conveyed his interest in the premises to the defendant Jones, and that Jones conveyed his interest to the other defendant, Bartholomew. The defendants demurred, and the case is reserved. Whether the instrument sued on is or is not a mortgage is the principal question in the case. What is a mortgage? "A mortgage is a contract of sale executed, with power to redeem. . . . The condition of a mortgage may be the payment of a debt, the indemnity of a surety, or the doing or not doing any other act. The most common method is to insert the condition in the deed, but it may as well be done by a separate instrument of defeasance executed at the same time. . . . A bond or note is usually taken for the debt, which is described in the deed with a condition that if the debt is paid by the time the deed shall be void. In such case the mortgage is called a collateral security for the debt. In like manner an engagement to indemnify, or any other agreement, may be described in the mortgage deed." 2 Swift, Dig. 182, 183. "To constitute a mortgage, the conveyance must be made to secure the payment of a debt." *Bacon v. Brown*, 19 Conn. 29. "A conveyance of lands by a debtor to a creditor as a security for the payment of the debt." *Jarvis v. Woodruff*, 22 Conn. 548. What is a debt? "That which is due from one person to another, whether money, goods, or services; that which one person is bound to pay to another or to perform for his benefit; that of which payment is liable to be exacted; due; obligation, liability." Webster, Dict.

What is this case? Ammon Bostwick re-

ceived \$900 from the plaintiff, in consideration of which he agreed to support Sarah A. Bostwick during life, and at her death to bury her, and to erect a tombstone to her memory. To secure the performance of this agreement, he executed this deed, with a condition that the deed should be void if the agreement should be performed. He assumed a duty which may be aptly described as a debt. He executed a deed of real estate as collateral security for the performance of that duty,—the payment of that debt. The obligation falls within an approved definition of “debt” and the conveyance is within the legal definition of a “mortgage.” There is no force in the objection that this cannot be a mortgage because of the difficulty in ascertaining the amount of the debt, as clearly appears by the definitions. Of course, there is less certainty and more inconvenience in reducing an obligation of this nature to a money valuation than there is in computing the amount due on an ordinary bond or note. Nevertheless it may be approximately done, and that is sufficient for all the purposes of substantial justice. Courts never refuse to redress an injury on account of the difficulty in estimating the extent of the injury in dollars and cents. In this case the age, health, general condition, and expectation of life of Sarah

A. Bostwick must be known. Add to these the probable cost of supporting her for one year, and we have the data for a reasonable estimate of the cost of supporting her through life. It is a problem of the same nature, containing the same elements and similar factors, with the problem which the parties solved 14 years ago. They then, as it seems, fixed the outside limit at \$900. The same thing can be done now as well as then. Possibly \$900 may be considered an equitable limit, beyond which the plaintiff may not claim in this case. As other circumstances may exist which will materially affect the general question, we will not consider the question further on this demurrer. Regarding the conveyance as a mortgage, as we do, there is no foundation for the claim that an entry for a breach of the condition is essential. An entry is essential when the grantor would divest the grantee of his title for a breach of a condition. This is an action by the grantee, in whom the title is, not to enforce a forfeiture, but to foreclose an equity of redemption, unless the grantor, within a reasonable time allowed him therefor, pays the damage sustained by a breach of his agreement.

The court of common pleas is advised to overrule the demurrer.

The other Judges concui.

NEW YORK COURT OF APPEALS.

AMERICAN RAPID TELEGRAPH CO.,

Appt.,
v.

Jacob HESS *et al.*, *Respts.*

(....N. Y.....)

1. Legislative authority to a telegraph company to construct its lines along and upon any public roads and highways grants to it no interest in the streets of the city, but must be construed as conferring a license

which although acted on may be revoked by the Legislature whenever the public interest requires or as an exercise of the police power, and therefore not beyond the control of future legislation.

2. Granting a telegraph company the franchise to construct its line along and upon city streets will not be construed as an abdication of the police power over such streets, but if the poles and wires become a serious obstruction or nuisance therein provisions may be made for their removal; and for that

NOTE.—*Telegraphs subject to the police power of municipalities.*

A franchise granted to a telephone company, of constructing and operating its lines along and upon streets, is subordinate to the rights of the public in the street for the purpose of travel. *Cincinnati Incline Plane R. Co. v. City & S. Teleg. Asso. (Ohio) 12 L. R. A. 541; Cincinnati & S. G. A. St. R. Co. v. Cumminsville, 14 Ohio St. 523.*

A telephone company having a franchise to erect poles and wires upon the streets of a municipality has not such a vested interest and exclusive right in the ground circuit of electricity as to authorize it to enjoin the operation of an electric street railway subsequently constructed on the same streets and using the ground circuit for the return current of electricity. *Cincinnati Incline Plane R. Co. v. City & S. Teleg. Asso. supra.*

Telegraph companies, like all other corporations which occupy the highway of municipalities, are subject to proper police regulation. *Philadelphia v. Western U. Teleg. Co. 2 W. N. C. 455; Philadelphia Steam Supply Co. v. City, 17 Phila. 110.*

And such regulations are presumed to be reasonable. *Van Hook v. Selma, 70 Ala. 361; Com. v. Patch, 97 Mass. 231; St. Louis v. Weber, 44 Mo. 550. 13 L. R. A.*

So a charge per annum imposed upon all poles erected by a telegraph company is a proper exercise of the police power of a city, where its charter confers upon it police power. *Western U. Teleg. Co. v. Philadelphia (Pa.) 11 Cent. Rep. 182.*

State legislation compelling electric wires in the streets of a city to be placed under the surface of the streets is an exercise of the police power, and not an unlawful attempt to regulate commerce or an invasion of the rights of a telegraph company (*Western U. Teleg. Co. v. New York, 3 L. R. A. 449, 2 Inters. Com. Rep. 533, 38 Fed. Rep. 552*); nor is it an unwarranted interference through state legislation with its operations, an Act of Congress giving such companies their dual capacity as agents of the general government and instruments of interstate and foreign commerce. *Pensacola Teleg. Co. v. Western U. Teleg. Co. 98 U. S. 1, 24 L. ed. 708.*

State legislation strictly and legitimately for police purposes does not, in the sense of the Constitution, necessarily intrench upon any authority which has been confided expressly or by implication to the national government. *Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115.*

Corporate rights subject to the police power. See *note to People v. North River Sugar Ref. Co. (N. Y.) 9 L. R. A. 35.*

purpose the company may lawfully be directed to place its wires under ground, commissioners may be appointed to see that the work is done, and a contract made for the construction of conduits in which the wires can be placed, and, if after due notice they are not removed, they may be cut down.

3. That under the Acts of Congress telegraph companies have the right to erect and maintain their lines along and upon the public streets of a city will not prevent the State in which such city is located from requiring the wires to be placed under ground.

(February 24, 1891.)

APPEAL by plaintiff from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the Special Term for New York County in favor of defendants in an action brought to restrain defendants from taking down or otherwise interfering with any of the poles or wires belonging to plaintiff. *Affirmed.*

The facts are stated in the opinion.

Mr. William G. Wilson, for appellant: The State has the right to take or destroy property without making compensation only when there is an immediate and urgent necessity, and continues to have that right only so long as the pressing necessity continues. It may be called the right of necessity.

American Print Works v. Lawrence, 38 N. J. L. 590; *Re Jacobs*, 98 N. Y. 107; *Mills*, Em. Dom. § 7.

The right of eminent domain differs from the above in that it is exercised with deliberation and according to well fixed rules and courses of procedure and with that due regard to private and vested rights which is impossible in the case of a sudden and overwhelming necessity.

If any scheme for the benefit of the general welfare of the community involves as an incident or as an essential to its accomplishment the appropriation or destruction of private property, the right to take or destroy such property must be exercised through this right or power of eminent domain.

The Constitution protects such property and says it shall not be taken without due process of law and just compensation.

Baker v. Boston, 12 Pick. 193; *Wynhamer v. People*, 18 N. Y. 885.

The police power is, so far as it affects property, the right of the State to prescribe and regulate the use of property so that the public at large or other individuals shall not be injured by its use.

There is in principle a broad line of demarcation between this and the above powers. This power is used to enforce the maxim, *sic utere tuo ut alienum non laedas*.

Com. v. Alger, 7 Cush. 85.

The limitation which controls the exercise of this power is that which is supplied by the Constitution. When alleged regulations either expressly or by necessary effect take away the property itself, or the substantial right of its enjoyment, then they contravene the constitutional protection of property and property rights, and must be held nugatory and void.

Wynhamer v. People, 18 N. Y. 885.

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Nothing is a public nuisance which is authorized by law.

Miller v. New York, 18 Blatchf. 469; *People v. Metropolitan Teleph. & Tel. Co.* 11 Abb. N. C. 804; *Davis v. New York*, 14 N. Y. 506; *Atty-Gen. v. New York*, & L. B. R. Co. 24 N. J. Eq. 49.

The State may not pass any Act impairing the obligations of its contract with the plaintiff.

Dartmouth College v. Woodward, 17 U. S. 4 Wheat. 518, 4 L. ed. 629; *The Binghamton Bridge*, 70 U. S. 8 Wall. 51, 18 L. ed. 137; *People v. O'Brien*, 2 L. R. A. 255, 111 N. Y. 45.

The legislation by Congress upon this subject was a valid execution of its constitutional power to regulate commerce between the States.

Pennacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708.

The laws of the United States upon the subject are supreme and controlling, for the protection as well as the control of the plaintiff's lines.

Leloup v. Port of Mobile, 137 U. S. 845, 32 L. ed. 818; *Hannibal & St. J. R. Co. v. Huesen*, 95 U. S. 478, 24 L. ed. 531; *Henderson v. New York*, 92 U. S. 271, 23 L. ed. 548; *New Orleans Gas Light Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 872, 29 L. ed. 524; *Baker v. Boston*, 12 Pick. 193.

Mr. David J. Dean, with Mr. William H. Clark, for respondents:

The acts in question are a valid exercise of the police power of the State, to which the plaintiff is subject.

Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346; *People v. Squire*, 10 Cent. Rep. 437, 107 N. Y. 598; *Com. v. Alger*, 7 Cush. 84; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 149; *People v. Morris*, 18 Wend. 326; *Wynhamer v. People*, 18 N. Y. 421; *United States Illum. Co. v. Hess*, 19 N. Y. S. R. 838.

The action of the public authorities is the removal of a public nuisance, not the confiscation of private property.

People v. Squires, 1 N. Y. S. R. 633; *United States Illum. Co. v. Grant*, 55 Hun, 222.

Earl, J., delivered the opinion of the court:

Prior to 1863, the plaintiff was incorporated under Act 265 of the Laws of 1848, the General Act for the incorporation and regulation of telegraph companies, and the Acts amendatory thereof; and prior to that year it had erected its lines of telegraph poles and wires in the streets of the City of New York, described in the complaint. It also had extensive connecting lines in other States, and throughout this State, which constituted a system of telegraphy then in active use and operation. Section 5 of the Act of 1848 provides as follows: "Such association is authorized to construct lines of telegraph along and upon any of the public roads and highways, or across any of the waters within the limits of this State, by the erection of the necessary fixtures, including posts, piers, or abutments, for sustaining the cords or wires of such lines: provided, the same shall not be so constructed as to incommode the public use of said road or highways, or injuriously interrupt the naviga-

tion of said waters; nor shall this Act be so construed as to authorize the construction of any bridge across any of the waters of this State." The Act (chap. 471, Laws 1853) amends the Act of 1848, and section 2 thereof provides as follows: "Such association is authorized to erect and construct, from time to time, the necessary fixtures for such lines of telegraph, upon, over, or under any of the public roads, streets, and highways, and through, across, or under any of the waters within the limits of this State, subject to the restrictions in the said recited Act contained." The plaintiff constructed its telegraph lines in the streets of the City of New York under the Acts referred to, without any special grant or authority from the city.

The claim of the plaintiff is that these acts operated as a grant to it of a franchise to use the streets for its poles and wires, and that, therefore, an inviolable contract was created which is under the protection of the Federal Constitution, and hence that neither the State nor the city, under its authority, could cause its poles and wires to be removed from the streets, except upon compensation to it ascertained in the manner prescribed by the Constitution and laws for cases where private property is condemned for public use. We think the Act of 1848, as amended in 1853, can in no proper sense be said to have granted any interests to the plaintiff in the streets of the city. There certainly was no formal grant, and the statutes contain no terms or phraseology appropriate to a grant. They at most confer upon the plaintiff an authority or license to enter upon the streets for its purposes, and subject to certain conditions. The people of the State do not own the streets, and the only authority the Legislature has over them is to deal with them as streets, and to regulate their use as streets for public purposes; and by these acts it, in effect, determined that one of the purposes for which the streets could be used was the erection of poles and stringing of wires for the business of telegraphy, and that that was a public use, not inconsistent with the use of the streets for general street purposes. These were general public legislative Acts, in the exercise of the police power of the State, and therefore they were not beyond the reach or touch of future legislation. The Legislature did not intend to divest itself, and could not divest itself, of its control over the streets for the public welfare, and we must infer from the language used that it did not intend to bind itself by an irrevocable grant. If, therefore, these acts are to be construed as merely conferring a license which has been acted upon by the plaintiff, the Legislature could revoke the license, or modify it in any way, or at any time, when the public interests might require it.

But in this case it is not necessary to hold that the plaintiff did not, by the Acts referred to, obtain some sort of franchise in the streets of the city. We may, for the present purpose, construe these Acts as constituting, in some sense, grants of interests in the streets to the companies organized under them, and contracts *sub modo* with such corporations, and yet the contention of the plaintiff in this case must fail. In the exercise of its rights under

the assumed grant and contract, this corporation was subject to the regulation and control of the Legislature. By giving the franchise, the State did not abdicate its power over the public streets, nor in any way curtail its police power to be exercised for the general welfare of the people; nor did the State absolve itself from its primary duty to maintain the streets and highways of the State in a safe and proper condition for public travel and other necessary street and highway purposes. The grant, if any, was made in reference to the streets, and their maintenance and regulation forever as streets. The State could at all times regulate the size and location of the poles, the height of the wires from the surface of the ground, and their location in the streets; and when the poles and wires became a serious obstruction and nuisance in the streets, from any cause, it could take such action, and make such provisions by law, as were needful to remove the nuisance, and restore the utility of the streets for public purposes. The right of the plaintiff to maintain and operate its wires in the streets could certainly be no greater than the right of railroads, which by public authority occupy the streets and highways of the State. The State, in the exercise of its police power, and the regulating control which it has over corporations created by its authority, may exercise a general supervision over such corporations. It may prescribe the location of the tracks, the size and character of the rails, the precautions which shall be taken for the protection of the public, and the character and style of highway crossings; and no one has ever questioned that it may do whatever is necessary and proper for the public welfare in the control and regulation of the franchises which such corporations have obtained by statutory authority.

Now, what has the Legislature attempted to do in this case? By the Act (chap. 584, Laws 1884), it was provided that all telegraph, telephonic, and electric light wires and cables, in all cities of the State having a population of 500,000 or over, "shall hereafter be placed under the surface of the streets, lanes, and avenues" of the city, and that it should be accomplished before the 1st day of November, 1885. It was further provided that, in case the owners of the property specified should fail to comply with the Act within the time specified, the local governments of the cities should remove, without delay, all such wires, cables, and poles, wherever found in their respective cities. Under that Act, no property was or could be taken from any of the owners specified. They were simply required to remove their poles and wires from the surface of the streets, and place the wires under ground. Their property was not taken, but the use of their franchise was regulated. In 1885, chapter 499 was enacted, which provided for the appointment of a board of commissioners of electrical subways, and that board was charged with the duty of enforcing the provisions of the Act of 1884. It was made the duty of that board to cause to be removed from the surface of the streets, and put and maintained under ground, wherever practicable, all electrical wires and cables, so as to enable and require all duly authorized companies operating the same to transact their business with under-ground conductors, where-

ever practicable. All subways for underground conductors of electricity were required to be built under the direction and control of that board, and no electrical wires or cables were to be allowed above the surface of the streets without the permission of the board. Commissioners were duly appointed under that Act, and in 1886, the Consolidated Telegraph & Electrical Subway Company of New York having been incorporated under the laws of this State, the commissioners entered into a contract with it, whereby it contracted to build, with its own capital, the necessary subways for the electrical conductors, the subways to be constructed in all respects subject to the approval of the commissioners. It was also provided in the contract that all corporations owning and operating electrical wires above the streets should have the right to place them in the subways, under certain conditions specified. In 1887 the Legislature enacted chapter 716, entitled "An Act in Relation to Electrical Conductors in the City of New York." By that Act the agreement made between the subway commissioners and the Consolidated Telegraph & Electrical Subway Company, above referred to, was ratified and confirmed; and the Act provided that whenever, in the opinion of the board of electrical control constituted by that Act, sufficient conduits or subways under ground shall have been made ready, the board shall notify the owners or operators of the electrical conductors above ground in such streets or locality to make such electrical connections in such underground conduits or subways as shall be determined by the board, and to remove their poles and wires from the street within ninety days after such notice. This provision was made a police regulation in and for the City of New York, and, in case it was not complied with by the telegraph and other companies referred to, it was made the duty of the commissioner of public works to cause the poles, wires, etc., to be removed forthwith by the bureau of incumbrances, upon the written order of the mayor to that effect. Subways having been constructed in certain of the streets of the City of New York, by the Consolidated Telegraph & Electrical Subway Company, under the supervision and with the approval of the board of electrical control, notice was given to the plaintiff, as provided in the Act, to remove its poles and wires from the streets, and place its electrical conductors in such subways. Having refused to comply with such notice, and with the provisions of the Act, the commissioner of public works of the city caused the poles to be cut down, and the wires to be removed from the streets, and this is what the plaintiff complains of.

Its property was not taken for public use. It was simply removed from the streets, where it had become a nuisance, and the public authorities had the same right to remove it from the streets, doing no unnecessary damage, that it had to remove any other incumbrance therefrom. After the passage of the Acts referred to, and the building of the subways, and the notice to the plaintiff, it had no right longer to maintain its poles and wires above the surface of the streets. They were then there without authority, and thus became a nuisance, and

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hence the public officials had the right to remove them. It is quite true that the plaintiff could not remove its electrical conductors into the subways without some expense, but the same is true of railroads occupying streets. They cannot change from one style of rail to another, nor from one place in the street to another, nor make a change of grade without a considerable expense; and yet the mere fact that they are subjected to expense is no answer to the right of the public, in pursuance of law, to require them to comply with the prescribed regulations. If the authority did not otherwise exist to require these poles and wires to be removed from the streets, it could be found in section 5 of the Act of 1848, in which is contained the authority to construct telegraphic lines upon public roads and highways, with the proviso that the same shall not be "so constructed as to incommode the public use of such roads or highways." Who shall judge whether they incommode the public use of the streets? It is unquestioned that they do, and the Legislature has determined that fact, and when the plaintiff maintained its wires and poles in the streets in such a manner as to incommode the public use of the streets, the Legislature had the right to provide that they should put them under the streets, so that the streets above the surface could be devoted to the public uses for which they were intended. The plaintiff seeks to strengthen its position, in reference to the use of the streets of the City of New York, under the laws of the United States, to which we will make brief reference. It is provided in section 5263 of the Revised Statutes of the United States that "any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States, which have been, or may hereafter be, declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads." Section 5268 provides that, "before any telegraph company shall exercise any of the powers or privileges conferred by law, such company shall file their written acceptance with the postmaster general of the restrictions and obligations required by law." Section 3964 provides that all the letter-carrier routes established in any city or town for the collection and delivery of mail matter are post-roads; and by the Act approved March 1, 1884, it is enacted that "all public roads and highways, while kept up and maintained as such, are hereby declared to be post-roads." The plaintiff filed the written acceptance with the postmaster-general required by section 5268. The precise scope and range of operation of these sections within a State are not quite apparent, and cannot be easily defined. But this much, at least, must be true, that under them no telegraph company could interfere with the use of the streets and highways of the State, except under regulations pre-

scribed for the control of all telegraph companies within the State, nor could such companies interfere with streets and highways in the State so as materially to impair their usefulness as ordinary highways. Nor could these congressional Acts deprive the State of its control over its highways, and its right to regulate their use, under the police power, for the public welfare. The laws of Congress are perfectly satisfied by the permission granted to the plaintiff, of which it is perfectly feasible for it to avail itself, to place its electrical conductors in the subways constructed beneath the surface of the streets. We have carefully scrutinized the contract entered into by the board of electrical control with the defendant, the Consolidated Telegraph & Electrical Subway Company, and we find nothing in its provisions unreasonable or impractical, and the power of the Legislature to authorize such a contract, and to confirm it when made, is beyond doubt. These Acts of 1864, 1865, and 1867 have been under consideration in several cases, and have uniformly been upheld and enforced. *People v. Squire*, 107 N. Y. 593, 10 Cent. Rep. 487, 14 Daly, 154; *United States Illum. Co. v. Hess*, 19 N. Y. S. R. 883; *United States Illum. Co. v. Grant*, 55 Hun, 222; *Western U. Teleg. Co. v. New York*, 38 Fed. Rep. 552, opinion by Wallace, J., in United States circuit court, 3 L. R. A. 449, 2 Inters. Com. Rep. 538.

We are therefore of opinion that the judgment should be affirmed, with costs.
All concur.

Laura WOODEN, *Respt.*,

WESTERN NEW YORK & PENNSYLVANIA R. CO., *Appt.*

(..... N. Y.)

1. The mere fact of a difference as to the one designated to bring the action

NOTE.—When personal representatives of a deceased party may bring action.

When the statute of a State gives a remedy for the death of a person caused by the negligence of another, and provides that the action shall be brought by the personal representative of such deceased person, the personal representative appointed in a State other than that wherein the death occurred may bring such action in the courts of the State in which he was so appointed. *Dennick v. New Jersey Cent. R. Co.* 108 U. S. 11, 28 L. ed. 430.

When lex fori governs.

In New York State the party suffering the pecuniary loss must bring the action. This relates only to the form of the remedy, and the *lex fori* governs in all matters relating to the remedy itself. *Thornton v. Western Reserve Farmers Ins. Co.* 81 Pa. 531; *Dennick v. New Jersey Cent. R. Co.* 108 U. S. 11, 24 L. ed. 430; *Knight v. West Jersey R. Co.* 108 Pa. 250; *Lodge v. Phelps*, 1 Johns. Cas. 129; *Foss v. Nutting*, 14 Gray, 484.

The *lex fori* governs the nature, extent and character of remedies; who shall be proper parties to a suit, the mode of procedure and the execution of judgments. These matters are regulated solely and exclusively by the law of the place where the

in the provisions of the statutes of two States providing for the recovery of damages for the benefit of those injured by the negligent killing of a person is not sufficient to prevent the maintenance of the action in the State where the accident did not occur if the statutes are otherwise substantially the same.

2. The plaintiff in an action to recover damages for the benefit of those injured by the negligent killing of a person which is brought outside of the State where the accident occurred in the courts of a State which enforce the liability because of the similarity of its statutes to those of the former State, must be the person designated by the statutes of the State where the injury occurred.

3. The fact that the amount of recovery for the negligent killing of a person is limited in the *lex fori* and unlimited in the *lex loci* does not make the statutes of the two States so dissimilar that the remedy will not be enforced in the former State; but the amount that can be recovered will be governed by the *lex fori*, at least where the killing was done by one of its corporations.

(March 10, 1891.)

A PPEAL by defendant from a judgment of the General Term of the Superior Court of Buffalo overruling a demurrer to the complaint in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. John G. Milburn, for appellant:

The death of the plaintiff's husband having occurred in Pennsylvania an action will only lie in this State if the legislation of Pennsylvania imposes a liability for negligently causing the death of a person similar to the liability imposed by the Statute of this State.

Leonard v. Columbia Steam Nav. Co. 84 N. Y. 48; *Deboveise v. New York, L. E. & W. R. Co.* 88 N. Y. 877.

It was incumbent upon the plaintiff to allege

action is instituted. *Story, Conf. L.* §§ 242, 253, 556, 558.

Questions as to who are the proper parties to suits relate rather to the form of the remedy than to the right and merit of the claim, and are therefore to be determined by the law of the forum. *Kirkland v. Lowe*, 83 Miss. 422; *Orr v. Amory*, 11 Mass. 26; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48; *Chicago, St. L. & N. O. R. Co. v. Doyle*, 60 Miss. 977, 8 Am. & Eng. R. R. Cas. 171; *Selma R. Co. v. Lacey*, 49 Ga. 108; *Bank of the United States v. Donnelly*, 33 U. S. 8 Pet. 361, 8 L. ed. 974; *McClees v. Burt*, 5 Met. 188.

The construction given by the courts of another State to the statutes of that State should control in the tribunals of a sister State. *Jessup v. Carnegie*, 80 N. Y. 441, 10 N. Y. Week Dig. 150; *Hunt v. Hunt*, 72 N. Y. 218; *Hoyt v. Sheldon*, 3 Bosw. 287, 3 Bosw. 172.

In determining the interpretation to be placed upon a statute, it is important to ascertain whether the courts of the enacting State have considered the subject and the construction which has been placed upon it. Ordinarily the courts of a sister State would feel bound to respect the decision thus made and should not reconsider the subject. This course has been substantially pursued in the state and federal courts, and any other rule would lead

and prove a statutory right in Pennsylvania to maintain this action similar to the statutory right in this State.

Debenois v. New York, L. E. & W. R. Co. supra.

If the Pennsylvania Statute is similar in its import and character to our Statute then only the executor or administrator of the decedent can maintain this action.

Code Civ. Proc. § 1903.

Plaintiff must show by clear and unequivocal allegations her right to maintain this action in the capacity in which she brings it.

Clark v. Dillon, 97 N. Y. 870.

The widow of the decedent cannot maintain an action of this nature in this State though she may be the party designated by the Pennsylvania Statute, and the court holds that the complaint sufficiently shows this.

If the action can be maintained at all, the *lex fori* must govern as to the proper party to bring the suit.

The cause of action created by these Statutes is an entirely new one; the Statute in each State is its original source.

Hegerich v. Keddies, 99 N. Y. 258.

There are two possible views of first importance which may be taken: (1) that the designation of the party to bring the action is an integral part of the right created by the statute, or (2) that it is a matter pertaining merely to the remedy, the right created being vested in the beneficiaries named.

If the first view be the true one and the right

of action is given to the widow, though the recovery is for the benefit of herself and children, we do not see how she can enforce it in a State whose legislation gives the right of action to the executor or administrator.

Usher v. West Jersey R. Co. 4 L. R. A. 261, 126 Pa. 206, 41 Am. & Eng. R. R. Cas. 508, *note*.

If the view that the designation of the party to bring the suit for the beneficiaries is a matter pertaining to the remedy merely be deemed to be the true one, then it would seem to follow that the *lex fori* must govern and this action should have been brought by the plaintiff in her capacity as administratrix.

Whitford v. Panama R. Co. 23 N. Y. 465; *Story*, Conf. L. § 558, 555 *et seq.*; *Wharton*, Conf. L. § 719; *Stoneman v. Erie R. Co.* 53 N. Y. 429; *Andrews v. Herriot*, 4 Cow. 508; *note* 10; *Bank of United States v. Donnelly*, 33 U. S. 8 Pet. 372, 8 L. ed. 978; *Smith v. Spinella*, 2 Johns. 198.

In our State the recovery is limited to the pecuniary damages resulting from the decedent's death, not exceeding \$5,000, whilst the recovery in Pennsylvania is unlimited.

This is such a radical difference that the two Statutes cannot be said to be similar within the meaning of *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48.

Ash v. Baltimore R. Co. 72 Md. 144; *St. Louis, I. M. & S. R. Co. v. McCormick*, 71 Tex. 660; *McCarthy v. Chicago, R. I. & P. R. Co.* 18 Kan. 46; *Vawter v. Missouri Pac. R. Co.* 34 Mo. 679; *Davis v. New York & N. E. R. Co.*

to confusion, operate injuriously, in many cases, and would be in direct hostility to the comity which is due to the authority which is conferred upon the lawfully constituted tribunals of a sovereign State. *Jessup v. Carnegie, supra.*

The statutes giving an action for damages resulting from death caused by culpable negligence do not apply where the injury was committed in another State, unless it is proved that the laws of that State were similar in character with the law of the State where the action is brought. *Whitford v. Panama R. Co.* 23 N. Y. 464; *Beach v. Bay State S. R. Co.* 30 Barb. 428; *Crowley v. Panama R. Co.* Id. 38; *McDonald v. Mallory*, 77 N. Y. 547.

Actions for damages for causing death are creations of Statute. 2 *Wait*, Act. & Def. § 71; 2 *Thomp. Neg.* 1272, *note*.

Our statutes giving a right of action in such cases have no extraterritorial effect, nor can our courts infer or presume that a similar statute exists in the State or country where the death was caused and occurred. The only presumption that can be indulged is that the common law exists there. *Whitford v. Panama R. Co.* *supra*; *Crowley v. Panama R. Co.* *supra*; *McDonald v. Mallory*, 77 N. Y. 547; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48; *Wilcox Silver Plate Co. v. Green*, 9 Hun, 347; *White v. Knapp*, 47 Barb. 549; *Holmes v. Broughton*, 10 Wend. 75; *Harris v. White*, 81 N. Y. 532; *Van Voorhis v. Brintnall*, 86 N. Y. 18; *People v. Chase*, 28 Hun. 250; *Abell v. Douglass*, 4 Denio, 306; *Starr v. Peek*, 1 Hill, 276.

The doctrine that an action will lie when the common law or the statutes of different States or countries correspond is sustained by numerous authorities. *Madraso v. Willes*, 3 Barn. & Ald. 353; *Melan v. Duke de Fitzjames*, 1 Bos. & P. 136; *Moestyn v. Fabriga*, 1 Cowp. 161, 2 Smith, Lead. Cas. 9th Am. ed. 263; *Shipp v. McCraw*, 7 N. C. 463; *Wall v. Hopkins*, 27 N. C. 177; *Stout v. Wood*, 1 Blackf. 71; 18 L. R. A.

Real party in interest must bring suit.

The immediates and in some respects the most important consequence of the rule that "every action must be prosecuted in the name of the real party in interest," is this: Whenever a thing in action is assignable, the assignee thereof must sue upon it in his own name. *Pom. Remedies*, § 125.

Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. *N. Y. Code Civ. Proc.* § 449.

The former chancery practice is now adopted as to making parties. *Wallace v. Eaton*, 5 How. Pr. 99; *Hollenbeck v. Van Valkenburgh*, Id. 284; *Voorhis v. Childs*, 17 N. Y. 354.

An action is properly brought in the name by which the party is generally known. *Cooper v. Burr*, 45 Barb. 9.

Rule governing the survivability of things in action.

The rules of the common law still determine the survivability of actions for torts, except where the law has been specially modified or changed by statute. The whole scope and design of the statute is to extend a remedy already accrued, to the representatives of a deceased party, and provide for the survival only of an existing cause of action. *Hegerich v. Keddies*, 99 N. Y. 261, 262.

The qualities of assignability and survivability are tests of each other, and have been declared by the court of appeals to be convertible terms. *Blake v. Griswold*, 6 Cent. Rep. 771, 104 N. Y. 613, 616.

The assignability and survivability of things in action have frequently been held to be convertible terms, and perhaps furnish as clear and intelligible a rule to determine what injuries to property rights or interests survive, as it is possible to lay down. *Hegerich v. Keddies*, 99 N. Y. 258.

8 New Eng. Rep. 1408, 143 Mass. 301; *O'Reilly v. New York & N. E. R. Co.* (R. I.) 42 Am. & Eng. R. R. Cas. 50; *The Alaska*, 180 U. S. 201, 82 L. ed. 923.

Mr. Harlow C. Curtiss, for respondent:

The Statutes of the State of Pennsylvania have created a cause of action in favor of the widow, as trustee for the benefit of herself and of the children of her deceased husband, whenever the death of said husband shall have been occasioned by unlawful violence or negligence, the proceeds to be distributed when recovered, as in cases of intestacy.

Huntingdon & B. T. R. Co. v. Decker, 84 Pa. 419.

A cause of action for wrongfully causing the death of a person, accruing and given by the statute of one State or country, may be enforced in any other State or country where jurisdiction of the parties can be obtained, provided that the laws of both countries correspond or substantially concur in giving a right of action for the injury complained of.

Leonard v. Columbia Steam Nav. Co. 84 N. Y. 48; *Dennick v. New Jersey Cent. R. Co.* 103 U. S. 11, 26 L. ed. 439; *Stallknecht v. Pennsylvania R. Co.* 18 Hun. 451; *Burns v. Grand Rapids & I. R. Co.* 12 West. Rep. 688, 113 Ind. 169; *McDonald v. Mallory*, 77 N. Y. 546; *Debois v. New York, L. E. & W. R. Co.* 98 N. Y. 377; *Knight v. West Jersey R. Co.* 108 Pa. 250; *Whitford v. Panama R. Co.* 23 N. Y. 465; *Beach v. Bay State S. B. Co.* 30 Barb. 438; *Crowley v. Panama R. Co.* 30 Barb. 99.

Where a cause of action given by a foreign statute is transitory, and there is an existing statute in this State to the same general purport, an action to recover on such cause of action may be maintained in a court of this State.

Cavanagh v. Ocean Steam Nav. Co. 19 N. Y. Civ. Proc. 391; *Robinson v. Ocean Steam Nav. Co.* 2 L. R. A. 686, 112 N. Y. 321, 16 N. Y. Civ. Proc. 255; *The Harrisburg v. Rickards*, 119 U. S. 199, 30 L. ed. 358; *McDonald v. Mallory*, 77 N. Y. 546; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48.

Comity will enforce rights not in their nature local and not contrary to the policy of the government of the tribunal, no matter where arising, and without regard to whether they are of common-law or statutory origin.

Usher v. West Jersey R. Co. 4 L. R. A. 261, 126 Pa. 206; *Patton v. Pittsburgh, C. & St. L. R. Co.* 96 Pa. 169; *Knight v. West Jersey R. Co.* 108 Pa. 250.

Wherever by either the common law or the statute law of a State, a right of action has become fixed, and a legal liability incurred, that liability may be enforced, and the right of action pursued in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties.

Dennick v. New Jersey Cent. R. Co. 103 U. S. 11, 26 L. ed. 439.

The cause of action arose where the tort was committed which caused the death. The decisions of the Pennsylvania courts and the provisions of the Pennsylvania statutes are the laws governing this cause of action, to enforce the remedy given by the Pennsylvania statute.

Hunt v. Hunt, 72 N. Y. 286; *Jessup v. Car-*
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negie, 80 N. Y. 440; *Robinson v. Oceanic Steam Nav. Co.* 2 L. R. A. 686, 112 N. Y. 321; *Leonard v. Columbia Steam Nav. Co. supra*; *Vandercenter v. New York & N. H. R. Co.* 27 Barb. 244; *Cavanagh v. Ocean Steam Nav. Co. supra*.

The statutes of the States of New York and Pennsylvania in regard to such actions are certainly of similar import and character, and the similarity is such as to authorize the conclusion that they are founded upon the same principles and possess the same general attributes and purpose and aim.

Bocks v. Duncville Borough, 95 Pa. 158; *Hege-rich v. Keddle*, 99 N. Y. 267; *Dickins v. New York Cent. R. Co.* 23 N. Y. 158; *Yertore v. Wisnall*, 16 How. Pr. 8.

Absence, in the foreign Statute of Limitation, as to amount of damages recoverable for death caused by negligence is not a dissimilarity.

Dennick v. New Jersey Cent. R. Co. 103 U. S. 11, 26 L. ed. 439.

Finch, J., delivered the opinion of the court:

This appeal is from an interlocutory judgment overruling a demurrer and determining that the complaint assailed stated a good cause of action. That pleading alleged that the plaintiff was and is a resident of this State, and the defendant a corporation created and existing under our laws. The contest thus is between a resident individual and a domestic corporation. The latter owned and operated a line of railroad extending beyond our boundaries into the adjoining State of Pennsylvania, and the complaint alleged that in that State the plaintiff's husband was killed by the negligence of the defendant Company. The complaint further averred that the statutes of that State gave a right of action for the injury sustained by the widow and children; that the remedy could be enforced in the name of the former as plaintiff, but for her own benefit and that of the children; and that such Statute was of similar import to that existing in our own jurisdiction. Judgment was thereupon demanded for damages in the sum of \$30,000. The demurrer interposed raised two objections: *first*, that the statutes of the two States were not similar, but different; and *second*, that the action could not be maintained here in the name of the widow, but only in that of an executor or administrator of the deceased; and the final result sought to be established was that the widow could not maintain an action in this State because that is contrary to our Statute, and that the administratrix could not because that is contrary to the Pennsylvania Statute; and so there is no remedy whatever in our jurisdiction.

Certain propositions essential to the inquiry before us have been explicitly determined in *McDonald v. Mallory*, 77 N. Y. 546, and need no other citation for their support. That case held that the liability of a person for his acts, whether wrongful or negligent, depends in general upon the law of the place in which the acts were committed; that actions for injuries to the person in another State are sustained here without proof of the *lex loci*, because they are permitted by the common law which is presumed to exist in the foreign State; that such

presumption does not arise where the right of action depends upon a statute which confers it; and that in such case the action can only be maintained here by proof that the statutes of the State in which the injury occurred give the right of action, and are similar to our own. Upon the question of similarity we have also held that the two statutes need not be identical in their terms, or precisely alike, but it is enough if they are of similar import and character, founded upon the same principle, and possessing the same general attributes. *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 53. It is quite evident that the two Statutes are of similar import. They are founded upon the same principle, are aimed at the same evil, construct the same sort or kind of action, and give it for the benefit of the same class of individuals. In both the utter failure of redress at common law where the injury ended in death was the injustice for which a remedy was enacted; and in both the new action was given for the benefit of those who had suffered an injury as the consequence of the wrong. This fundamental agreement in the main and substantial characteristics of the two Statutes is not affected by the differences of detail which the demurrer points out. The first is that by the *lex loci* the proper person to bring this action, and the only person who can maintain it, is the widow; while by our law the right of action is given to the executor or administrator. But it is given to the latter not in his broad representative character, but solely as trustee, in a case like the present, for the widow and children. *Hegerich v. Keddie*, 90 N. Y. 267. It is not a right which survives to the personal representatives, but a right created anew. The real parties in interest,—those whose injury is redressed, whose right is vindicated, to whom all damages go,—are one and the same in both forums. If the formal parties are different, the substantial and real parties are identical, and the difference in the trustee appointed by the law to represent their right is not such a difference as to bar our tribunals from their jurisdiction, or make the two Statutes dissimilar under the rule.

It is claimed, however, that, even in that event, the right of action accruing in the place of the transaction can only be enforced in our jurisdiction under our remedial forms, and so should have been brought by the plaintiff, not as widow, but as administratrix, to which office she had been appointed in this State. But it must not be forgotten that the cause of action sued upon is the cause of action given by the *lex loci*, and vindicated here and in our tribunals upon principles of comity. *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 53, *supra*. That cause of action is given to the widow in her own right and as trustee for the children, and we open our courts to enforce it in favor of the party who has it, and not to establish a cause of action under our Statute which never in fact arose. We refer to the *lex fori*, and measure it by and compare it with the *lex loci*, I think, for two reasons,—one, that the party defendant may not be subjected to different and varying responsibilities; and the other, that we may

know that we are not lending our tribunals to enforce a right which we do not recognize, and which is against our own public policy; and we do not refer to our law as treating the cause of action which we enforce. It is the cause of action created and arising in Pennsylvania which our tribunals vindicate upon principles of comity; and, therefore, must be prosecuted here in the name of the party to whom alone belongs the right of action; and that rule the courts of Pennsylvania enforce where the cause of action arises here, by permitting it to be brought by the executor or administrator to whom by our law the right is given, although not by their own. *Usher v. West Jersey R. Co.* 126 Pa. 207, 4 L. R. A. 281.

But the second difference relied on is that in Pennsylvania there is no restriction upon the amount of damages which may be recovered, while in our State they cannot exceed \$5,000. That restriction pertains to the remedy, rather than the right. *Dennick v. West Jersey Cent. R. Co.* 108 U. S. 11, 26 L. ed. 489. It is a limitation upon the discretion of the jury in fixing the amount of damages, but not upon the right of action, or its inherent elements and character. The restriction indicates our public policy as to the extent of the remedy, and the plaintiff who chooses to avail herself of our remedial procedure must submit to our remedial limitations; and be content with a judgment beyond which our courts cannot go. They cannot exceed it in a case arising here, and no principle of comity requires them to enlarge the remedy which the plaintiff voluntarily seeks. There may be—there very possibly is—an exception to that rule, resting upon its own peculiar reasons, in a case where the defendant is not, as here, a domestic corporation, formed under our law, and so entitled to the benefit of our remedial limitations, but is a corporation of the State within whose jurisdiction the cause of action arose, and by whose law no restriction upon the amount of damages is permitted or enacted. We do not decide that question; but the same reasoning which would expose such a corporation to the law of its own jurisdiction would serve equally to justify the right of the domestic corporation to be protected by the remedial limitations of its jurisdiction. The difference between the two Statutes, therefore, does not strictly affect the rule of damages, but rather the extent of damages; and that extent, as limited or unlimited, does not enter into any definition of the right enforced, or the cause of action permitted to be prosecuted; and so the causes of action in the two forums are not thereby made dissimilar.

These views lead to an affirmance of the interlocutory judgment. That judgment should be affirmed, with costs, but with leave to the defendant to withdraw the demurrer and plead anew within twenty days after service of a copy of the judgment entered upon filing the *remittitur*, and upon payment of the costs of the action from the interposition of the demurrer to that date.

All concur.

MINNESOTA SUPREME COURT.

John L. MACDONALD, Assignee of J. H. Mahler Co., Insolvent, *Resp't.*,

FIRST NATIONAL BANK of Corunna, Mich., *App't.*

(.....Minn.....)

***Our State Insolvent Law is effectual as to nonresidents** of the State, so far as to control the disposition of property within our jurisdiction. A preferential conveyance of property here situate, by contract made here, may be avoided under that law, notwithstanding the nonresidence of the creditor preferred.

(July 23, 1891.)

A PPEAL by defendant from a judgment of the District Court for Ramsey County setting aside a transfer to it by the J. H. Mahler Company of property as security for a debt. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. A. Sperry and Lewis L. Wheelock, for appellant:

Our Insolvent Laws cannot be made applicable to a contract made between a citizen of this State and a citizen of another State.

Wendell v. Lebon, 30 Minn. 234; *Gilman v. Lockwood*, 71 U. S. 4 Wall. 409, 18 L. ed. 426; *Donnelly v. Corbett*, 7 N. Y. 600; *Brighton Market Bank v. Merick*, 11 Mich. 405; *Anderson v. Wheeler*, 25 Conn. 603; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 213, 6 L. ed. 606.

Mr. J. L. McDonald, for respondent:

The law of the place where the contract is made governs the rights and liabilities of the parties.

Burchard v. Dunbar, 83 Ill. 450, 25 Am. Rep. 334; *Brown v. American F. Co.* 31 Fed. Rep. 516; *Central Trust Co. v. Burton*, 74 Wis. 329; *Addison*, Cont. 4th ed. § 241, note 1.

The contract in controversy was executed in this State, and in this city.

Our Insolvent Law is constitutional, and it makes void preferences made by insolvent debtors, as was done in the case at bar.

Weston v. Loyhed, 30 Minn. 221.

Where the point at issue in any case was analogous to the one at bar, it supports our contention here, and we have not found any that hold to the contrary.

In *Sturges v. Crowninshield*, 17 U. S. 4 Wheat. 123, 4 L. ed. 529, State Insolvent Laws were adjudged invalid as to pre-existing contracts.

Ogden v. Saunders, 25 U. S. 12 Wheat. 213, 6 L. ed. 606, held that such laws were not unconstitutional as respects subsequent contracts

*Head note by DICKINSON, J.

between persons of the same State, but that a discharge under them did not affect nonresident creditors.

This result was reached as said in *Von Glahn v. Varrenne*, 1 Dill. 515, upon the ground, largely, if not wholly, that every contract made in the State has relation to the existing law of the State, which, so to speak, becomes part of the contract, and since the Insolvent Law declares a right on the part of the debtor to be discharged from contracts thereafter made, on certain terms, the exercise of such right cannot be said to impair the obligation of the contract.

As against citizens of other States, as well as those of the State where the assignment is made, an assignment valid by the laws of the State in which it is made is valid everywhere.

Re Paige & S. Lumber Co. 31 Minn. 136; *Greene v. Sprague Mfg. Co.* 52 Conn. 330; *Train v. Kendall*, 137 Mass. 366; *Faulkner v. Hyman*, 2 New Eng. Rep. 181, 142 Mass. 53; *Re Waite's Accounting*, 99 N. Y. 433; *Ockerman v. Cross*, 54 N. Y. 29; *Smith's App.* 104 Pa. 381; *Zuppann v. Bauer*, 17 Mo. App. 678; *Holmes v. Remsen*, 4 Johns. Ch. 460, 1 L. ed. 902; *Hoyt v. Thompson*, 5 N. Y. 320; *Atherton Co. v. Ives*, 20 Fed. Rep. 894; *Van Winkle v. Armstrong*, 41 N. J. Eq. 402; *Varnum v. Camp*, 13 N. J. L. 326.

The *lex loci rei sita* governs the construction. Story, Conf. L. § 428.

Here the *lex loci contractus* and *lex loci rei sita* are all in favor of respondent.

See *Forward v. Harris*, 30 Barb. 338; *Arnold v. Shade*, 8 Phila. 82; 3 Am. & Eng. Encyclop. Law, 621, and note 6.

In this case the *lex loci contractus* must prevail.

Wharton, Conf. L. § 371.

The validity of an assignment for the benefit of creditors is governed by the laws of the State of the debtor's domicile, though it embraces real and personal property situate in other States.

D'Ivernois v. Leavitt, 23 Barb. 63; *Livermore v. Jencks*, 62 U. S. 21 How. 126, 16 L. ed. 55; *Wickham v. Dillon*, 2 West. L. Mo. 511. See also *Parkinson v. Scoville*, 19 Wend. 150; *Van Raugh v. Van Arsdain*, 3 Cal. 154.

Dickinson, J., delivered the opinion of the court:

This action by the assignee (under our Insolvent Law) of an insolvent debtor is for the purpose of avoiding the transfer of personal property executed in writing by the insolvent to the defendant, a creditor, as security for the debt. The conditions under which this was

[NOTE.—When the *lex loci* governs the contract.

The rule regulating the construction of contracts has long since declared that the law of the country where the contract is made, called the *lex loci*, must govern in its construction and determine its validity. *Bradshaw v. Newman*, 1 Ill. 94; *Roundtree v. Baker*, 52 Ill. 241; *Haines*, Treatise, 18th ed. 142.

The place of the contract is the place where it is delivered or the bargain consummated. *Hawley* 13 L. R. A.

v. Keeler, 53 N. Y. 114; *Commercial Bank v. Warren*, 15 N. Y. 577; *Wharton*, Ag. §§ 76, 77; *Addison*, Cont. 15; *Kington on Hull v. Petch*, 24 L. J. Exch. 23; *Honeyman v. Marryatt*, 26 L. J. Ch. 619; *Brown v. New York Cent. R. Co.* 44 N. Y. 79; *Alkin v. Davis*, 45 Barb. 44; *Smith v. Smith*, 27 N. H. 244; *Real Estate Mut. F. Ins. Co. v. Roessle*, 1 Gray, 336; *Weatherby v. Covington*, 3 Strobb, L. 28; *Jack v. Nichols*, 5 N. Y. 178. See note to *Osgood v. Bauder* (Iowa) 1 L. R. A. 665.

made were such that, by force of the Insolvent Law, it was avoided by the insolvency proceedings, as an unlawful preference, unless that result is affected by the fact that the defendant, thus preferred, was a nonresident of the State. The contract was made in this State, and the property in question was, and still remains, here. The defendant (appellant) disclaims making any attack upon the validity of the law, or of the assignment; but relies upon the proposition that, by reason merely of its nonresidence, the Insolvent Law had no effect to avoid its contract. This position of the defendant cannot be sustained. The contract in question, made in this State concerning property here, and to be executed here, was subject to the law under which it was made. Its legal effect in no respect depended upon the residence of the parties. The law under which it was made declared that, under certain specified conditions (which are found to have existed), such a contract should be void, legally ineffectual as a transfer of the property. The legal effect of invalidity followed from the conditions specified in the law, and which the parties must be deemed to have had in contemplation. That law makes no exception in favor of nonresidents entering into such contracts here. The property is still here, subject to our jurisdiction. As to that property, the court is exercising its jurisdiction in the enforcement of the law under which the contract was made. This enforcement of the law, by the legal appropriation of the property within our jurisdiction to the payment of the debts of the insolvent, does not involve the giving of an extraterritorial effect to the Statute.

The appellant relies in support of its contention upon *Ogden v. Saunders*, 25 U. S. 12 Wheat 213, 6 L. ed. 606, and other decisions of the same court, and upon what is said in *Wendell v. Lebon*, 30 Minn. 284. But a later decision of the Supreme Court of the United States removes whatever seeming support the language of prior decisions may have afforded for such a proposition as that here contended for. *Denny v. Bennett*, 128 U. S. 489, 32 L. ed. 491. That was an action for conversion prosecuted by the assignee of an insolvent debtor against the United States marshal, who, after the assignment under our Insolvent Law, and after the assignee had acquired actual or constructive possession of certain personal property embraced in the assignment, seized the same by virtue of an attachment issued out of the circuit court of the United States in an action against the insolvent by nonresidents of this State. The plaintiff recovered judgment in this court, which was affirmed in the Supreme Court of the United States. That court stated the principal question to be decided as being whether our Insolvent Law was repugnant to the Constitution of the United States, so far as it affects citizens of other States. The argument of the plaintiff in error was to the point (aside from that based on the doctrine of the inviolability of contracts) that such a statute can have no extraterritorial operation, and cannot, therefore, be binding on creditors living in a different State from that of the debtor, and of the *situs* of his property; and that is the point of the appellant's argument in this case. The court, referring to its former decisions, in 13 L. R. A.

cluding *Ogden v. Saunders*, said: "The proposition lying at the foundation of all these decisions is that a statute of a State, being without force in any other State, cannot discharge a debtor from a debt held by a citizen of such other State. . . . The substance of the restrictive principle goes no further than to prohibit, or to make invalid, the discharge of a debt held by a citizen of another State than that where the court is sitting, who does not appear and take part or is not otherwise brought within the jurisdiction of the court granting the discharge. In other words, whatever the court before whom such proceedings are had may do with regard to the disposition of the property of the debtor, it has no power to release him from the obligation of a contract which he owes to a resident of another State who is not personally subjected to the jurisdiction of the court. Anyone who will take the trouble to examine all these cases will perceive that the objection to the extraterritorial operation of a State Insolvent Law is that it cannot, like the Bankrupt Law passed by Congress under its constitutional grant of power, release all debtors from the obligation of the debt. The authority to deal with the property of the debtor within the State, so far as it does not impair the obligation of contracts, is conceded; but the power to release him, which is one of the usual elements of all Bankrupt Laws, does not belong to the Legislature, where the creditor is not within the control of the court. The Minnesota Statute makes no provision for any such release. The creditor who became such after the Statute was passed cannot complain that the obligation of his contract is impaired because the law was a part of the contract at the time he made it."

This decision recognizes our Insolvent Law as being effectual as to nonresidents as well as to residents of the State, so far as it controls the disposition of property within our jurisdiction. The decision in *Wendell v. Lebon* is to the same effect, and is an authority opposed to the contention of the appellant here.

Judgment affirmed.

JACOB TABERT, *Resp't.*,

v.

G. C. COOLEY, *Appt.*

(...Minn....)

"Upon the trial of an action for malicious prosecution the plaintiff, when at-

***Head note by COLLINS, J.**

NOTE.—Malicious prosecution; what must be shown.

To sustain an action on the case for a malicious prosecution, four points must concur, the absence of either of which will be fatal to the right of the plaintiff to recover: (1) falsehood in the demand; (2) want of probable cause; (3) malice in the defendant; (4) damage to the plaintiff. 3 Bl. Com. (Chitty's ed.) *126, note 13.

This question of probable cause, or reasonable ground for suspicion, whether it arises in actions for malicious prosecution or false imprisonment, is one of law, unless the evidence out of which it arises is conflicting; in which event it is the duty of the court to instruct the jury what facts, if

ttempting to establish a want of probable cause, is not confined to proof of such facts as he can affirmatively show were actually known to defendant, but may also prove the existence of such open and notorious facts as would or should have been ascertained by the latter, had he, before instituting the proceedings, made such inquiry and investigation as anyone with honest motives, and not actuated by malice, would have made.

(June 23, 1891.)

APPEAL by defendant from an order of the District Court for Jackson County overruling his motion for new trial after verdict in favor of plaintiff in an action brought to recover damages for an alleged malicious prosecution. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. L. F. Lammers and T. J. Knox for appellant.

Mr. J. G. Redding, for respondent:

If defendant did not himself believe that the act of plaintiff in taking the horse was larceny, in other words, if he did not believe the horse was stolen, he had, of course, no probable cause for making the complaint.

Wetmore v. Mellinger, 64 Iowa, 741.

Probable cause is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged.

2 Greenl. Ev. § 454; *Gilbertson v. Fuller*, 40 Minn. 413.

The prosecution of an innocent person without using reasonable care to ascertain the facts is certainly not justified.

Walker v. Camp, 63 Iowa, 627.

established, will constitute probable cause, and submit to them only the question as to such facts. *Bulkeley v. Keteltas*, 6 N. Y. 284.

Burden of proof.

In actions of this nature the *onus probandi* is always upon the plaintiff, and mere failure of the prosecution does not establish a want of probable cause; plaintiff having alleged malice, must show it. *Diets v. Langfitt*, 63 Pa. 234; *McKown v. Hunter*, 30 N. Y. 625; *Frowman v. Smith*, Litt. Sel. Cas. 7; *Thaule v. Krekeler*, 81 N. Y. 428; *Morton v. Young*, 55 Me. 24, 22 Am. Dec. 535; *Boyd v. Cross*, 35 Md. 194; *Besson v. Southard*, 10 N. Y. 236; *Israel v. Brooks*, 23 Ill. 575; *Purcell v. Maconamara*, 9 East. 361; *Flickinger v. Wagner*, 46 Md. 581; *Levy v. Brannan*, 39 Cal. 426; *Sappington v. Watson*, 60 Mo. 53.

Malice must be shown.

Evidence that no previous demand was ever made for a debt before instituting a prosecution therefor in which the debtor was arrested, is admissible to show malice in instituting the prosecution. *Tucker v. Wilkins*, 105 N. C. 372.

The existence of malice is always a question exclusively for the jury. It must be found by them, or the action cannot be sustained. Hence it must always be submitted to them to find whether it existed. The court has no right to find it, nor to instruct the jury that they may return a verdict for the plaintiff without it. Even the inference of malice, from the want of probable cause, is one which the jury alone can draw. *Wheeler v. Nesbitt*, 63 U. S. 24 How. 545, 16 L. ed. 765; *Newell v. Downs*, 8 Blackf. 523; *Johnson v. Chambers*, 32 N. 13 L. R. A.

A person's belief in a charge made by him, when arising from his own negligence in examining the evidence within his reach, does not constitute probable cause for such charge.

Grinnell v. Stewart, 12 Abb. Pr. 220.

A groundless suspicion unwarranted by the conduct of the accused or by facts known to the accuser when the accusation is made, will not exempt the latter from liability to an innocent person for damages for causing his arrest.

Carl v. Ayers, 53 N. Y. 14.

Mere belief that the plaintiff was guilty is not probable cause for the prosecution if the prosecutor acted negligently or irrationally and upon suspicion not warranted by facts, or by appearances which would not lead a prudent man to suppose the plaintiff guilty.

Farnham v. Feeley, 56 N. Y. 451; *Hamilton v. Smith*, 39 Mich. 222; *Spencer v. Anness*, 33 N. J. L. 100.

There is no question as to the manner in which plaintiff went away with the horse and what he was doing with it when he was found by the officer, and surely there was no error in allowing these facts to go to the jury that the jury might pass upon the question as to whether defendant was negligent in not knowing of their existence.

Patterson v. Garlock, 39 Mich. 447.

Defendant acted maliciously in making the complaint against plaintiff. Malice may be inferred from want of probable cause.

Wertheim v. Altschuler, 12 Neb. 591; *Carson v. Edgeworth*, 43 Mich. 241.

Defendant was bound to have that horse back and he took the shortest, quickest and least expensive means to the end, to wit, have

C. 287; *Van Voorhees v. Leonard*, 1 Thomp. & C. 148; *Schofield v. Ferrara*, 47 Pa. 194.

Slight evidence of malice was held insufficient in *Mitchinson v. Cross*, 58 Ill. 386; and sufficient in *Williams v. Vanmeter*, 8 Mo. 399; *Ganea v. Southern Pac. R. Co.* 51 Cal. 140; *Davie v. Wisner*, 72 Ill. 262; *Palmer v. Richardson*, 70 Ill. 544; *Stewart v. Cole*, 46 Ala. 646; *McFarland v. Washburn*, 14 Ill. App. 869; *Sutton v. Anderson*, 103 Pa. 151; *Thaule v. Krekeler*, 81 N. Y. 428; *Thompson v. Laimley*, 50 How. Pr. 105; *Ames v. Snider*, 69 Ill. 376; *Wilkinson v. Arnold*, 11 Ind. 45; *Good v. French*, 115 Mass. 301; *Heyne v. Blair*, 62 N. Y. 12; *Calef v. Thomas*, 81 Ill. 478; *McCormick v. Sleson*, 7 Cow. 715; *Boyd v. Cross*, 35 Md. 194.

The existence of a want of probable cause is essential to every suit for a malicious prosecution. Both that and malice must concur. Malice may be inferred by the jury from want of probable cause, but the want of that cannot be inferred from any degree of even express malice. *Sutton v. Johnstone*, 1 T. R. 438; *Foshat v. Ferguson*, 2 Denio, 577; *Murray v. Long*, 1 Wend. 140; *Wood v. Weir*, 5 B. Mon. 544.

What amounts to probable cause is a question of law in a very important sense. In the celebrated case of *Sutton v. Johnstone*, *supra*, the rule was thus laid down: "The question of probable cause is a mixed question of law and of fact. Whether the circumstances alleged to show it probable are true, and existed, is a matter of fact; but whether, supposing them to be true, they amount to a probable cause is a question of law." This is the doctrine generally adopted. *McCormick v. Sleson*, 7 Cow. 715; *Besson v. Southard*, 10 N. Y. 236. See notes to *Pope v. Pollock* (Ohio) 4 L. R. A. 355; *Antcliff v. June* (Mich.) 10 L. R. A. 621.

him arrested and have the officer bring the horse at the same time. This was malice, pure, clean-cut malice.

Ross v. Langworthy, 18 Neb. 498.

Collins, J., delivered the opinion of the court:

This was an action for malicious prosecution, and under the issues as presented by the pleadings, defendant having admitted a criminal prosecution by him which terminated in plaintiff's acquittal or discharge, it was incumbent upon the latter to show that the prosecution was without probable cause, and originated in defendant's malice. The proof of this want of probable cause, although a negative proposition, was on the plaintiff, as is always the case with such issues. He had been prosecuted for the crime of the larceny of a horse, which he had taken from defendant's possession under a claim of title. To establish want of probable cause on defendant's part, the plaintiff had shown that about noon of a certain day he proceeded to defendant's barn in a small village, where he was well known, took the animal out, rode it through the public streets, passing and speaking with several acquaintances, and from thence to his farm, about fourteen miles distant. The defendant knew where he resided, and had been personally acquainted with him for years. Defendant immediately made complaint to a justice of the peace, charging a larceny of the horse, procured a warrant, placed it in the hands of a deputy sheriff, and before night the deputy had reached the farm, arrested the plaintiff, and with him and the horse was on his return to the village. The officer was one of plaintiff's witnesses, and, notwithstanding defendant's objection, was permitted to testify that he found the plaintiff openly at work in his field, hauling flax upon a wagon drawn by a pair of horses, that in dispute being one. The defendant contends that in admitting this testimony the trial court erred, greatly to his prejudice, because, as he insists, his acts and conduct were to be weighed in view of what appeared to him when he made the complaint,

and not in the light of facts appearing subsequently,—citing *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. ed. 116. Even if this evidence was inadmissible, its reception was error without prejudice, for all that it tended to prove was a fact already established by the testimony, and which was not controverted on the trial, viz., that the taking and appropriation of the horse by the plaintiff was open and public, without stealth or concealment. But in our opinion the evidence was properly admitted, conceding the rule to be, as it doubtless is, that, in determining whether defendant acted without probable cause, his conduct is to be weighed in view of what appeared to him when he made the complaint, and not in the light of subsequently appearing facts, yet, when establishing want of probable cause, the plaintiff is not confined to the proof of such facts as he can affirmatively show were actually known to the defendant, but may also prove the existence of such open and notorious facts as the defendant would or should have ascertained had he, before instituting the proceedings, made such inquiry and investigation as any man with honest motives, and not actuated by malice, would have made. Now, the importance of the officer's testimony consisted, not in the particular fact that the plaintiff was hauling flax with the animal, but in the general fact that he was keeping and using it openly, and without any attempt at concealment. While the particular time of which the sheriff testified was subsequent to the making of the complaint by defendant, yet the manner and conduct of the plaintiff at that time constituted, under all the circumstances, a legal basis for the inference that it was but a continuation of the same open and unconcealed manner and course of conduct which he had previously pursued, and which the defendant should and would have ascertained had he made the investigation which he ought to have made, instead of shutting his eyes to facts easily to be discovered. The remaining assignments of error need no special consideration.

Order affirmed.

NORTH DAKOTA SUPREME COURT.

George A. BENNETT, *Resp't*,

v.

NORTHERN PACIFIC R. CO., *Appt.*

(....N. Dak....)

*1. Plaintiff was injured while coupling an engine to a car because there was

*Head notes by COLLINS, Ch. J.

NOTE.—Declarations of pain and suffering admissible in evidence.

A formidable array of authorities establish the proposition that all declarations of pain, suffering, actions, groans, outcries, expressions of pain and distress at the time of such suffering, may be given in evidence of the injured person's favor, even though after the commencement of the action. *Matteson v. New York Cent. R. Co.* 35 N. Y. 487, 42 13 L. R. A.

not sufficient space for his body between them. The draw-bars of the engine and of the car were unusually short, leaving a space of only about ten inches between the end of the car and of the engine when the draw-bars came together, whereas the usual space is from twenty-four to thirty inches. *Held*, sufficient to justify a verdict that defendant's negligence was one of the proximate causes of the injury. It appearing that plaintiff was injured in consequence of his failure to obey

Barb. 364; *Murphy v. New York Cent. R. Co.* 66 *Barb.* 125; *Barber v. Merriam*, 11 *Allen*, 322; *Kent v. Lincoln*, 32 *Vt.* 591; *Kennard v. Burton*, 25 *Me.* 39, 43 *Am. Dec.* 249; *Phillips v. Kelly*, 29 *Ala.* 623; *Caldwell v. Murphy*, 11 *N. Y.* 416; *Werely v. Persons*, 28 *N. Y.* 344; *Baker v. Griffin*, 10 *Boew.* 140; *Brown v. New York Cent. R. Co.* 32 *N. Y.* 537; *Gray v. McLaughlin*, 26 *Iowa*, 270.

Evidence of exclamations of pain made by a per-

the rule of defendant that he must examine so as to know the kind and condition of the coupling apparatus, the rule giving him sufficient time to make such examination in all cases,—*Held*, that he could not recover.

2. Exclamations and expressions of present pain may be proved by anyone who hears them, although made subsequently to the injury.

(July 27, 1891.)

APPEAL by defendant from a judgment of the District Court for Stutsman County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed*.

The facts sufficiently appear in the opinion.

Messrs. W. F. Ball and John S. Watson, for appellant:

No negligence can be inferred from the fact that a railroad track is constructed on a curve at the place of an accident to a servant.

Tuttle v. Detroit, G. H. & M. R. Co. 123 U. S. 189, 30 L. ed. 1114.

Testimony as to exclamations and expressions of pain is admissible only when it relates to expressions and exclamations made at or about the time of the injury.

Reed v. New York Cent. R. Co. 45 N. Y. 575; *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 587; *Wharton, Ev.* § 268, and cases cited; *Laughlin v. Grand Rapids St. R. Co.* 80 Mich. 154.

It is not for the employé to judge of the reasonableness of the Company's rules.

Wolsey v. Lake Shore & M. S. R. Co. 33 Ohio St. 227; *Hulett v. St. Louis, K. C. & N. R. Co.* 67 Mo. 289.

It was contributory negligence upon plaintiff's part to place himself in such a situation as to incur the danger and suffer the injury complained of.

Tuttle v. Detroit, G. H. & M. R. Co. supra; *Missouri Pac. R. Co. v. Lyde*, 57 Tex. 405, 11 Am. & Eng. R. R. Cas. 188.

Bennett entered upon the service of defendant under a written contract and he cannot escape strict compliance with the terms to which he there consented.

Pennsylvania Co. v. Whitcomb, 9 West. Rep. 823, 111 Ind. 212, 31 Am. & Eng. R. R. Cas. 149; *Darracott v. Chesapeake & O. R. Co.* 83 Va. 288; *Wolsey v. Lake Shore & M. S. R. Co. supra*; *Toledo, W. & W. R. Co. v. Black*, 88 Ill. 112; *Sloan v. Georgia Pac. R. Co.* (Ga.) 44 Am. & Eng. R. R. Cas. 553.

It appeared that prior to the accident, plaintiff was warned that the engine by which he was injured was not as safe to switch with as the regular switch engines, and he was given special caution to exercise care in working with such engine. With warning of the increased danger, he saw fit to continue in the service, and if he was injured in consequence he cannot complain.

Beach, Contrib. Neg. 866, 867, and cases cited.

There was no negligence imputable to defendant for receiving and hauling over its road the union tank line car, because it had a shorter dead wood and draft iron than those in use upon appellant's car.

Whitman v. Wisconsin & M. R. Co. 58 Wis. 408, 12 Am. & Eng. R. R. Cas. 214; *Kelly v. Wisconsin Cent. R. Co.* (Wis.) 21 Am. & Eng. R. R. Cas. 638; *Toledo, W. & W. R. Co. v. Black*, 88 Ill. 112; *Smith v. Potter*, 46 Mich. 258, 2 Am. & Eng. R. R. Cas. 140.

The servant not only assumes risks ordinarily incident to the service, but assumes that he has capacity to understand the nature of the service and ability to perform it.

International & G. N. R. Co. v. Hester, 64 Tex. 401, 21 Am. & Eng. R. R. Cas. 535.

Mr. S. L. Glasspell, for respondent:

son immediately on returning home an hour or two after receiving personal injuries is admissible on the question of damages. *Smith v. Dittman*, 24 N. Y. S. R. 303.

Declarations of the injured party, though plaintiff, at time of disaster, explaining the occurrence and its effects upon him, are competent in his own favor, if part of the *res gestæ*. *Brownwell v. Pacific R. Co.* 47 Mo. 289; *Frink v. Coe*, 4 G. Greene, 555.

Declarations subsequent to the act are also deemed admissible. *Com. v. M'Pike*, 3 Cush. 181; *Harriman v. Stowe*, 57 Mo. 93. *Contra*, see *Cleveland, C. & C. R. Co. v. Mara*, 26 Ohio St. 185.

As a corollary of the propositions above established, we may infer that complaints and indications of suffering by injured parties on a physical examination requested by the opposite party, are admissible (*Quaife v. Chicago & N. W. R. Co.* 48 Wis. 513, 38 Am. Rep. 821); or to his attending physician. *Fay v. Harlan*, 128 Mass. 244, 35 Am. Rep. 372.

The existence of many bodily sensations and ailments which go to make up the symptoms of disease or injury can be known only to the person who experiences them. It is the statement and description of these which enter into and form part of the facts on which the opinion of an expert as to the conditions of health or disease is founded. *Barber v. Merriam*, 11 Allen, 324.

When such declarations are evidence, they may be proved by any witness who heard them; they 13 L. R. A.

are of greater weight if made to and proved by a medical attendant. *Howe v. Plainfield*, 41 N. H. 185; *Perkins v. Concord R. Co.* 44 N. H. 223.

In all instances where it is pertinent to show the bodily or mental feelings of a person, the natural expressions of such feelings made at the time in question are, as to the facts in issue, regarded as original evidence. Such expressions usually furnish satisfactory evidence, and it is the province of the jury to determine what degree of credence should be accorded them. *Phillips v. Kelly*, 29 Ala. 623; *Hyatt v. Adams*, 16 Mich. 180; *Caldwell v. Murphy*, 11 N. Y. 416.

It is one of the natural concomitants of illness and of physical injuries, for the sick or injured person to complain of pain and distress. A complaint may be simulated, but it is generally real. Such evidence is admissible from the necessity of the case, and it may safely be left to the jury in connection with the other evidence touching the alleged sick or injured person's condition. *Caldwell v. Murphy, supra*.

What were the complaints, what the symptoms, what the conduct of the parties themselves at the time, are always received in evidence upon such inquiries, and must be resorted to from the very nature of things. *Aveson v. Kinnaird*, 6 East, 182.

For an extended argument in favor of the contrary view, see *Sullivan v. Oregon R. & Nav. Co.* 12 Or. 302.

Where cars standing on a curve require additional and safer appliances than when on a straight track it is negligence not to provide them.

Cincinnati, I. St. L. & C. R. Co. v. Roesech, 126 Ind. 445.

Whether Bennett should have known and appreciated the danger was a question of fact properly submitted to the jury.

Hungerford v. Chicago, M. & St. P. R. Co. 41 Minn. 444, 41 Am. & Eng. R. R. Cas. 269; *Lawless v. Connecticut River R. Co.* 136 Mass. 1, 18 Am. & Eng. R. R. Cas. 96; *Greenleaf v. Illinois Cent. R. Co.* 29 Iowa, 14; *Goodrich v. New York Cent. & H. R. R. Co.* 5 L. R. A. 750, 116 N. Y. 398; *Kane v. Northern Cent. R. Co.* 128 U. S. 91, 82 L. ed. 889; *Thomp. Neg.* pp. 1015, 1239; *Williams v. Northern Pac. R. Co.* 3 Dak. 168; *Dorsey v. Phillips*, 42 Wis. 583, 599; *Maree v. Northern Pac. R. Co.* 3 Dak. 336, 341, 123 U. S. 710, 81 L. ed. 298; *Herbert v. Northern Pac. R. Co.* 8 Dak. 38, 55, 56, 116 U. S. 643, 29 L. ed. 755.

The testimony as to exclamations of pain was admissible.

Matteson v. New York Cent. R. Co. 85 N. Y. 487; *Perkins v. Concord R. Co.* 44 N. H. 223; *Houston & T. C. R. Co. v. Shafer*, 54 Tex. 641, 6 Am. & Eng. R. R. Cas. 421; *Cleveland, C. C. & I. R. Co. v. Newell*, 1 West. Rep. 890, 104 Ind. 264; *Yeatman v. Hart*, 6 Humph. 375; *Eckles v. Bates*, 26 Ala. 655; *Kent v. Lincoln*, 23 Vt. 592; *State v. Geddicke*, 43 N. J. L. 86. See note to *Louisville & N. R. Co. v. Brice* (Ky.) 28 Am. & Eng. R. R. Cas. 568.

A rule must be promulgated in good faith and must be practicable.

Pennsylvania Co. v. Whitcomb, 9 West. Rep. 823, 111 Ind. 212.

Promptness and celerity in the discharge of his duty is expected and required of a switchman, and it is generally held that he has a right to assume that the master has supplied safe cars and coupling appliances.

Goodrich v. New York Cent. & H. R. R. Co. 5 L. R. A. 750, 116 N. Y. 398, 41 Am. & Eng. R. R. Cas. 269; *King v. Ohio & M. R. Co.* 9 Biss. 378, 8 Am. & Eng. R. R. Cas. 118.

The rule says: "Coupling by hand is strictly prohibited. Use for guiding the link, a stick or pin."

The testimony showed without contradiction that a stick could not be used in setting a pin, and that even where a stick is used in guiding the link that it is necessary for the brakeman to get between the ends of the cars. The ostensible object of the rule is to save the hands of the men from being caught between the draw-bars, and where as in this case the injury results from the man's body being caught between the cars the rule is immaterial.

Reed v. Burlington, C. R. & N. R. Co. 78 Iowa, 176.

Again, the rule was never observed in the yard and its constant violation must have been known to defendant. Under such circumstances silence gives consent.

Sean v. Georgia Pac. R. Co. (Ga.) 44 Am. & Eng. R. R. Cas. 558; *Thomp. Neg.* p. 989.

Care must be taken to note the distinction between a vice common to a whole class of cars, with which the brakeman may be supposed to be familiar, and a vice peculiar to a

particular car, such as a defective draw-bar, of which the brakeman may have had no knowledge.

Where the coupling apparatus of a particular car is too short the company is liable.

Toledo, W. & W. R. Co. v. Fredericks, 71 Ill. 284; *Greenleaf v. Illinois Cent. R. Co.* 29 Iowa, 14; *Ortschfeld v. Richmond & D. R. Co.* 78 N. C. 300; *Missouri Pac. R. Co. v. Callbreath*, 66 Tex. 536.

The duty of inspection applies to foreign cars as well as to those owned by the railroad company and the use of such cars with defective coupling apparatus is negligence.

Shearm. & Redf. Neg. § 196; *Gottlieb v. New York, L. E. & W. R. Co.* 1 Cent. Rep. 728, 100 N. Y. 462; *O'Neil v. St. Louis, I. M. & S. R. Co.* 9 Fed. Rep. 387; *Fay v. Minneapolis & St. L. R. Co.* 30 Minn. 218, 11 Am. & Eng. R. R. Cas. 198; *Goodrich v. New York Cent. & H. R. R. Co.* 5 L. R. A. 750, 116 N. Y. 398, 41 Am. & Eng. R. R. Cas. 269; *Bomar v. Louisville, N. & S. R. Co.* 42 La. Ann. 988; *Missouri Pac. R. Co. v. Barber*, 44 Kan. 612, 44 Am. & Eng. R. R. Cas. 523.

It was the duty of the defendant to discover and remedy the defect in the car.

Herbert v. Northern Pac. R. Co. 116 U. S. 654, 29 L. ed. 760.

Bennett was not familiar with engine 29. It had only been in use by him part of two days. He was used to the switch engines with round corners. It is negligence to use for freight trains an engine with a goose-neck equipment for passenger service.

Galveston, H. & S. A. R. Co. v. Garrett, 78 Tex. 262; *Hungerford v. Chicago, M. & St. P. R. Co.* 41 Minn. 444, 41 Am. & Eng. R. R. Cas. 269.

Whether the use of an engine for switching with a draw-bar so low that it would pass under the draw-bar on a car is negligence or not is a question for the jury.

Lawless v. Connecticut River R. Co. 136 Mass. 1, 18 Am. & Eng. R. R. Cas. 96.

Corliss, Ch. J., delivered the opinion of the court:

The circumstances under which plaintiff was injured we think warranted the jury in finding that the defendant's negligence was one of the proximate causes of the damage which the plaintiff suffered. He was an employé of the defendant, acting as switchman. The first important fact in the history of the accident was the stepping of the plaintiff upon the foot-board of a switch-engine to ride down upon it to a flat-car standing upon a curved switch, for the purpose of aiding in coupling the engine to the car in order to transfer it to another track. The car did not belong to defendant, but was owned by the Union Tank-Line Company. This fact is of no moment, however, as the defendant was bound to inspect this foreign car the same as one of its own cars. *Goodrich v. New York Cent. & H. R. R. Co.* 5 L. R. A. 750, 116 N. Y. 398; *Gottlieb v. New York, L. E. & W. R. Co.* 100 N. Y. 462, 1 Cent. Rep. 728; *International & G. N. R. Co. v. Kernan*, 78 Tex. 294, 9 L. R. A. 708; *Bomar v. Louisiana, N. & S. R. Co.* 42 La. Ann. 983; *Fay v. Minneapolis & St. L.*

R. Co. 80 Minn. 381; O'Neil v. St. Louis, I. M. & S. R. Co. 9 Fed. Rep. 837; Missouri Pac. R. Co. v. Barber, 44 Kan. 612, 44 Am. & Eng. R. R. Cas. 538; Gettridge v. Missouri Pac. R. Co. 94 Mo. 468, 18 West. Rep. 644.

It was defendant's duty to make this inspection before incorporating the car into one of its trains. More than sufficient time had elapsed since receiving the car to enable it to perform this duty, as the accident occurred in Jamestown, in this State, a considerable distance beyond the point where the car must have first come into its possession. It had been long enough in its custody to be carried to its destination and unloaded, as it was standing empty upon the switch at the time plaintiff was injured. There is no proof that the car was ever inspected. The defect was of such a nature that the exercise of reasonable care in making an inspection must have disclosed the defect. Therefore, whether the car was or was not inspected, there was sufficient to justify a verdict that the defendant had been careless in the discharge of its duty to use reasonable care to furnish its employes with safe appliances of every kind, and keep them in safe condition. *Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 29 L. ed. 755.* This is one of the master's duties, and the servant upon whom the master devolves its performance represents the master in that respect, and is not in the discharge thereof a fellow servant of the employé injured. *Northern Pac. R. Co. v. Herbert, International & G. N. R. Co. v. Kernan, and Fay v. Minneapolis & St. L. R. Co. supra; Condon v. Missouri Pac. R. Co. 78 Mo 567; Bushby v. New York, L. E. & W. R. Co. 107 N. Y. 374, 10 Cent. Rep. 238; Ell v. Northern Pac. R. Co. (N. Dak.) 48 N. W. Rep. 222.*

When plaintiff stepped upon the foot-board of the engine, it appears to have been a short distance from the car, and was backing down towards it slowly. Plaintiff stood upon that portion of the foot-board which was on the short side of the curve of the switch. On the other side, standing also on the foot-board, was the foreman of the switching crew. He guided the link into the opening, while plaintiff reached over to the flat-car to pick up a pin lying there, for the purpose of using this pin to complete the coupling. While in this position he was squeezed between the locomotive and the car, and injured, because, as the evidence demonstrated, there was too little space between them, owing to the undue shortness of the draw-bars both of the car and of the engine. He rests his right to indemnity upon this conduct of defendant in permitting a car with so short a draw-bar to be placed upon its track for use, and in augmenting the danger by bringing it into connection with an engine whose draw-bar was likewise, as appears from some of the evidence, much shorter than the draw-bars in ordinary use. Each of these draw-bars was, according to some of the evidence, so much shorter than those in common use that we are inclined to the view that the jury were justified in holding the defendant negligent on this account. Nor can it be said that the

risk attending the use of such short draw-bars—particularly their use in connection with each other—was one of the ordinary risks of the employment, in the usual sense of that phrase. The evidence discloses that they were so short that when their ends came together there was only about ten inches between the end of the car and of the locomotive, whereas the usual space, according to the evidence, is from about twenty-four to thirty inches. To so diminish this usual standing room that an employé is almost sure to be caught when in the discharge of his duty between a heavy standing car and an engine whose momentum, because of its weight, is tremendous, however slow its speed, would seem to be some evidence of negligence. If the space is too narrow for the body, serious injury is almost inevitable in case the servant is caught. There is respectable authority for the proposition that these facts warrant a finding of negligence. *Toledo, W. & W. R. Co. v. Fredericks, 71 Ill. 294; Greenleaf v. Illinois Cent. R. Co. 29 Iowa, 14; Belair v. Chicago & N. W. R. Co. 43 Iowa, 662; Crutchfield v. Richmond & D. R. Co. 78 N. C. 300; Missouri Pac. R. Co. v. Callbreath, 66 Tex. 526.*

Assuming that the jury were justified in finding the defendant guilty of negligence, it remains to be considered whether the plaintiff was not guilty of contributory negligence as a matter of law. The question arises not under ordinary circumstances. The defendant appears expressly to have imposed upon plaintiff duties in addition to those which the law would imply from an ordinary contract of employment of a switchman. At the time the plaintiff entered into the service of the defendant, the latter presented to plaintiff for signature certain regulations, and plaintiff, in answer to the question printed thereon, "Have you read and do you understand the following extract from the book of rules of the Northern Pacific Railroad Company?" replied in his own handwriting: "I have read and understand them." So far as they are here material, these rules are as follows: "Great care must be exercised by all persons when coupling cars. Inasmuch as the coupling apparatus of cars and engines cannot be uniform in style, size, or strength, and is liable to be broken, and as from various causes it is dangerous to expose between the same the hands, arms, or persons of those engaged in coupling, all employes are enjoined before coupling cars or engines to examine so as to know the kind and condition of the draw-heads, draw-bars, links, and coupling apparatus, and are prohibited from placing in the train any car with a defective coupling until they have first reported its defective condition to the yard-master or conductor. Sufficient time is allowed, and may be taken by employes, in all cases to make the examination required." Our first concern is to ascertain the true scope of this regulation. It will hardly be claimed that it was the purpose of defendant to impose upon the plaintiff all the duties of a car inspector, so far as the proper discharge of such duties were essential to the protection of the plaintiff. Such an interpre-

tation would in effect exempt the defendant from liability for its own negligence, however gross. The same facts which would convict the defendant of carelessness would, under such a view of the rule, likewise convict the plaintiff of contributory negligence in every instance. The employer would thus save itself from liability, although negligent in the discharge of the duties of a master. It is an elementary rule of construction that the courts shrink from so interpreting the language employed by a common carrier as to exempt it from the consequences of its own negligence. No such interpretation will be adopted, unless by the use of the word "negligence," or by other explicit language, the court is driven to such view. Then the provision so exempting from negligence is often struck down as opposed to public policy. (Whether the doctrine relates to an employé as well as to the public it is not necessary to decide.) It would be unreasonable to give the rule this construction. It would not be practicable for one employed in coupling cars to devote the same amount of time to and exercise the same degree of care in the inspection of the apparatus employed in the coupling of cars, and of such parts of the car as are immediately connected therewith, as a car inspector must. To exempt the Company from liability, something more than a short examination must be made by the car inspector. There may be obscure defects which the exercise of due care renders it imperative he should discover, and for his failure to discover and remedy which the Company would be responsible; and yet for the master to insist that a trainman or a switchman should be held to the obligation of making such an investigation as would result in their disclosure would seriously cripple the power of the Company to handle and ship the freight intrusted to it. It would be an unreasonable and impracticable requirement that all the dangers to an employé which a proper car inspection should bring to light should be discovered every time two cars are coupled together, or one car is coupled to a locomotive. It would be exacting of the trainman or the switchman more onerous duties than those imposed upon the expert car inspector. The company would require the less expert servant to discover at his peril a defect which the more expert employé had failed to detect. With less skill in such matters, and less time to investigate, it would be a gross wrong to allow the master to dictate to his servant the condition that he would have no redress for injury occasioned by the master's carelessness because he, the servant, had not complied with a regulation which it would be impossible for him to observe. But it is within the domain of possibility for the employé to obey this rule, when reasonably construed. There are defects which will appear when extra care is used. We think the reasonable construction of this rule is that more than ordinary care must be exercised by the employé; that he may not rely implicitly upon the uniform discharge by the master, through his servants, of the duty of using ordinary care in furnishing proper and safe appliances

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and machinery, and in keeping them in repair, and that he must in some measure be on his guard against injury from the occasional negligence of those who are charged with the performance of the master's duties to his employées. No matter what degree of care is exercised in the selection of the servants by whom these master's duties are to be discharged, negligence will sometimes characterize their conduct. Said the court in *Smith v. Potter*, 46 Mich. 258: "When a brakeman handles any car, he knows that there is at least a possibility that he may be injured unless he examines it carefully. It may not always be legal negligence in him to rely with some assurance on the accuracy of the persons who should have examined it before it comes to him. But he is bound to know that omissions of such care are possible, and are dangerous if they occur. And he is also bound to know, as all men know, that it is impossible for employées to completely guard against it."

It would be contrary to sound policy to suffer the master to exonerate himself from liability in all cases, even by agreement with the servant. But there are defects resulting from the careless performance of the master's duties, so patent that it is very reasonable for the master to charge an employé with the duty of discovering such defects at his peril. Even in the absence of any regulation, the servant is often held accountable for his failure to guard against such defects. In this case the regulation but augmented this obligation. It called the servant's attention to the fact that the very difficulty which occasioned the injury sometimes existed. It notified him that the coupling apparatus of cars and engines were not uniform in size; this embraces differences in length. It apprised him of the dangers of the work; enjoined upon him the duty of examining so as to know the kind and condition of the draw-heads, draw-bars, links, and coupling apparatus; prohibited him from placing in the train any car with a defective coupling; and, that the rule might be faithfully obeyed by the servant, it explicitly granted to him ample time to observe its behests. The language is unmistakable: "Sufficient time is allowed, and may be taken by employées in all cases, to make the examination required." It was insisted at the bar of this court that this rule was not ordained in good faith; that it was never expected that an employé would observe it; and that any servant who took sufficient time to follow and obey its requirements must inevitably look for discharge.

On what principle this court is asked to attribute a Machiavellian policy to the defendant, we are at a loss to determine; and, should we find that only grasping self-interest without one touch of humanity was the motive for this rule, still we must adjudge that its grant of sufficient time to make the examination enjoined was written in good faith, when the rule receives, as we believe it was the purpose of the defendant that it should receive, a reasonable construction. In the light of such an interpretation of it, it is obvious that the use of this time by the

servant will not seriously discommode the master or delay the shipment of its freight. And, on the other hand, the master has a deep interest in the safety of the servant; for, no matter how perfect the former's defense to a claim for damage, the making of that defense is always attended with expense. Unadulterated selfishness would prompt the adoption of a regulation, the observance of which would save such expense, while not materially reducing the servant's efficiency or affecting the volume of work he can perform. It is without force to assert that the master would discharge an employé who would take the necessary time to make the required examination. Should he discharge the servant before his term of employment had expired, for no other reason, the law would give the servant redress; and, if no time of employment is prescribed, it is the master's legal right, as it is the legal right of the employé, to terminate the relation at any time, without any excuse at all, or for any reason, however unjustifiable in ethics. We would not, however, be understood as asserting that the master could insist upon a rule when the master's conduct in the discharge of its employés, or in any other manner, indicated a purpose not to accord to the latter the necessary time without which the master's command to the exercise of a higher degree of care could not be obeyed. Its actions must not belie its words. This record discloses no such condition of affairs. Neither the plaintiff nor any other employé of the defendant has been discharged, or threatened with discharge, because he sought in good faith to comply with this regulation, and took the necessary time for that purpose. Nor are we confronted with the difficult question as to the rights of the plaintiff, had someone in superior authority commanded a disregard of the rule; neither was the press of business such that a full observance of its behests was not practicable. There was no exigency. The plaintiff, with the defects in full view,—one immediately beneath his gaze, and one before his eyes only a short distance away,—moved slowly towards his fate, oblivious of danger, because, as is conceded, he took no precautions to discover an open peril. He seeks to excuse his omission to examine the length of the draw-bar by his statement, upon which the verdict of the jury has set the seal of truth, that he was engaged in looking for a pin with which to make the coupling. The pin could have been found as well after he had observed the defendant's rule, that he must examine to ascertain whether there was any danger from the size of the draw-bars of the engine and of the car. The same argument would exonerate him from blame had the coupling apparatus and the dead-woods been entirely wanting. He testified that he knew every road had different cars, with different length draw-heads; that prior to the accident he did not notice the length of the draw-heads of the car and of the engine; that, if he had known of the undue shortness of these draw-heads, he could have escaped injury, as there was plenty of time for him to have stepped down and out from the end of the foot-board

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upon the ground, so as to clear himself from the flat-car before he was hurt; and that he knew that, if two cars met upon a curve, the distance between them would be shorter on the inside than on the outside of the curve. It is clear that plaintiff made no effort to obey the rule requiring him to make an examination of the coupling apparatus. He does not pretend to have obeyed it. He disavows any such obedience. That an observance of its requests, giving it a reasonable interpretation, would have saved him from injury, cannot admit of doubt. The defects were patent; the difference between the combined lengths of these draw-bars and the combined lengths of those in ordinary use was fourteen to twenty inches. The ratio was about ten to thirty. One was directly beneath his gaze; the other was almost directly before his eyes. There was time for inspection while the engine was moving slowly backwards. Further time might have been taken, if necessary, under the rule. To fail to discover, under these circumstances, that these draw-bars were only about one-third the usual length, must be negligence, particularly in view of the express warning contained in the rule, the injunction to examine so as to know the kind and condition of the coupling apparatus, and the granting of sufficient time for that purpose. When warned of the danger generally, and afforded time to pause and examine whether it existed in the particular case, the servant may not, with thoughtless imprudence, rush headlong upon peril at the expense of his master.

Said the court in *Karrer v. Detroit, G. H. & M. R. Co.* 76 Mich. 400, after quoting a regulation of the defendant very similar to the one in the case at bar: "It was plaintiff's duty to examine into the coupling arrangements of both cars before he attempted to couple them, and as they were only a rod apart at most before he started the train back, and as he says the defect was visible at once to anyone looking, one or two seconds would have furnished all the time needed to satisfy himself had he been acting under anyone else's orders; but, as he had personal direction of the engineer's movements and could move when he pleased, the case, as he presents it, was an aggravated one, of the grossest carelessness, for which he, and no one else, was responsible."

Said the court in *Dorvacott v. Chesapeake & O. R. Co.*, 83 Va. 288: "At all events, the evidence shows that the dangerous condition of the coupling was obvious, and that the plaintiff, in violation of the rules of the company, voluntarily put himself in a position of danger, in consequence of which he was injured. Under these circumstances, in the eye of the law, he was the author of his own misfortune: that is to say his negligence, or what is the same thing, his failure to use reasonable and proper care and caution was the proximate cause of the injury complained of. The action is not therefore maintainable."

In *Michigan Cent. R. Co. v. Smithson*, 45 Mich. 212, there was no rule giving warning, enjoining examination and according

sufficient time for that purpose; and yet it was held fatal to recovery that the plaintiff, a brakeman, had failed to notice that there were double dead-woods on the cars he was coupling, instead of a single dead-wood on each, it being contended that it was negligence for the defendant to receive and transport cars equipped with double dead-woods. Said Judge Cooley: "If, therefore, a switchman were to declare that he had attempted to couple the double dead-woods without noticing how they differed from the cars of defendant, the conclusion would be inevitable that he had gone heedlessly in the performance of a duty requiring great care, and that he had not allowed his eyes to inform him what was before him. . . . The best notice is that which a man must of necessity see, and which cannot confuse or mislead him. He needs no printed placard to announce a precipice when he stands before it."

In a similar case, *Hathaway v. Michigan Cent. R. Co.*, 51 Mich. 258, the court said: "In this case the danger consisted in the brakeman being caught between the two dead-woods as they came together. The dead-woods were in plain sight. They were really the most prominent objects on the end of the cars. The plaintiff had a full opportunity of examining the one by which he stood some moments before the cars came together. Its size, shape, and the location of the draw-bar were before him. He had only to look at it to be informed of any peril surrounding it. The moving car, at a distance of twenty feet, with its dead-wood and draw-bar in plain view, slowly approached the one where the plaintiff was standing. It does not appear that there was any hurry about the business. How could the plaintiff have been better warned? Certainly he knew the car was coming, and could see the dead-woods and draw-bar thereon as well as if he had made the coupling a thousand times before. He could not fail to see it, if he looked at all." See also *Kelley v. Wisconsin Cent. R. Co.* (Wis.) 21 Am. & Eng. R. Cas. 633; *Toledo, W. & W. R. Co. v. Black*, 88 Ill. 112; *Brewer v. Flint & P. M. R. Co.* 56 Mich. 620; *St. Louis, I. M. & S. R. Co. v. Rice*, 51 Ark. 467, 4 L. R. A. 173.

In several of the cases referred to, the master had not, as in the case at bar, imposed upon the servant the duty of extra care, nor had he expressly granted to him sufficient time to enable him to examine the coupling apparatus before making the coupling. It must further be remembered that plaintiff was on the short side of the switch. He testified that he knew that the distance would be shorter on the inside than on the outside of the curve. But he seems to have paid no attention to this obvious law. Being upon the shorter side, it was all the more important for him to ascertain whether there would be sufficient room between the car and the engine for him to stand with safety on the foot-board in making the coupling. It does not seem to be strenuously insisted that a charge of negligence can be predicated upon the curve of the switch. There is no evidence of the degree of the curve, and there is eminent authority for the proposition that,

unless the curve is abnormally sharp, the courts will not regard it as evidence of carelessness. *Tuttle v. Detroit, G. H. & M. R. Co.* 123 U. S. 189, 80 L. ed. 1114. The language of the court in this case, both on this point and on the further point of contributory negligence, because the injured servant stood upon the inside of the curve in making the coupling, is very applicable here: "The perils in the present case arising from the sharpness of the curve were seen and known. They were not like the defects of unsafe machinery which the employer has neglected to repair, and which his employes have reason to suppose is in proper working condition. Everything was open and visible, and the deceased had only to use his senses and his faculties to avoid the dangers to which he was exposed. One of these dangers was that of the draw-bars passing each other when the cars were brought together. It was his duty to look out for this, and avoid it. The danger existed only on the inside of the curve, and this must have been known to him." On the question whether it was negligent to build a switch with so sharp a curve, the court observed: "We have carefully read the evidence presented by the bill of exceptions, and although it appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved, much less that it should be left to the varying opinion of juries to determine such an engineering question." It is true that in the *Tuttle Case* there was no one standing on the foot-board on the outside of the curve, as in the case at bar; but, if the brakeman was bound in the *Tuttle Case* to know that it was dangerous to stand on the inside when there was no one on the outside, surely the plaintiff in this case was bound to know that his position was one of danger, although there was someone standing on the outside. The fact that another stood in one of the places of safety did not render the place occupied by plaintiff any less dangerous or obscure his sense of that danger. The other place of safety was outside of the space between the car and the engine, upon the ground. Perhaps he might not have found room with the foreman on the outside of the curve on the foot-board, but he might have gone ahead, and set the pin, and, if the jar of the collision had not been sufficient to cause the pin to fall down into its place, then, he could have inserted it in the aperture with his hands without the slightest danger, or, at least, he then would have plainly seen the danger of going between the engine and the car on the short side of the curve, and could have completed the coupling on the long side. The plaintiff has sustained severe, and perhaps permanent, injuries. His case appeals to our sympathy, and he may be a not unworthy object of charity, but justice will not seize his master's property to compensate him for the consequences of his own imprudence. There seems to be marked una-

nimity on the point that, where disobedience to or disregard of a reasonable rule or regulation of the master contributes to the injury, there can be no recovery. *Sloan v. Georgia Pac. R. Co.* (Ga.) 44 Am. & Eng. R. R. Cas. 558; *Cahill v. Hilton*, 100 N. Y. 512, 9 Cent. Rep. 255; *Karrer v. Detroit, G. H. & M. R. Co.* 76 Mich. 400; *San Antonio & A. P. R. Co. v. Wallace*, 76 Tex. 696; *Memphis & O. R. Co. v. Thomas*, 51 Miss. 640; *Deeds v. Chicago, R. I. & P. R. Co.* 74 Iowa, 154; *St. Louis, I. M. & S. R. Co. v. Rice*, 51 Ark. 467, 4 L. R. A. 173; *Sedgwick v. Illinois Cent. R. Co.* 73 Iowa, 158; *Wolsey v. Lake Shore & M. S. R. Co.* 38 Ohio St. 237; *Pennsylvania R. Co. v. Whitcomb*, 111 Ind. 212, 9 West. Rep. 633, 31 Am. & Eng. R. R. Cas. 149.

Plaintiff may not ask us to speculate whether, by the exercise of due care, he would have discovered the peril, and avoided the danger, had he made the examination which the rules of the company required. We think an observance of this reasonable rule would have saved him from injury. If he had stopped and looked, and then failed to discover the peril that menaced him, possibly a different case might have been presented. But this is doubtful. The exercise of proper care must have revealed the danger. We hold that this record discloses the fact that plaintiff's own negligence contributed to his injury, and the judgment and order denying the motion for a new trial must therefore be reversed, and a new trial granted.

A single question as to the admissibility of certain evidence remains to be considered. The wife of plaintiff was allowed, against the defendant's objection, to testify to exclamations of pain made by the plaintiff on waking up during the night. She said: "Well, he has more than once woke up,—more than once in the night,—groaning; and I asked 'him what was the matter.'" The record discloses nothing further on this point. It does not appear that she testified touching his answer to her inquiry as to what was the matter with him. We are very clearly of the opinion that this evidence was admissible, both on principle and under the great weight of the adjudications. There was no attempt to prove a narration by him of a

past transaction. He was not stating that the night before he had suffered pain. He was making no communication whatever to her. It was only the involuntary expression of suffering. True, it might have been simulated, but that was a question for the jury. The evidence of the physician relating to the extent of his injuries must have rested in some degree upon statements of the plaintiff to him, and therefore upon what is more truly hearsay than exclamations of pain. The testimony of the medical expert may often be founded mainly upon such interested declarations of the patient, and yet its competency cannot be seriously questioned. On the other hand, the rule allowing the proof of the expression of present pain will rarely result in imposition upon juries or other triers of questions of fact. Other facts in the case will generally aid them in determining how much of real and how much of fictitious pain the expression of suffering shadows forth. We think the true rule is stated in *Cleveland, C. C. & I. R. Co. v. Newell*, 104 Ind. 284-269, 1 West. Rep. 890: "Where, however, it becomes important to illustrate the physical or mental condition of an individual, either at the time an injury is received, or from thence to the time of an inquiry as to its severity, effect, and nature, we think expressions or declarations of present existing pain or malady, whether made at the time the injury is received or subsequently to it, are admissible in evidence [citing many authorities]. Expressions of present existing pain, and of its locality, are exceptions to the general rule, which excludes hearsay evidence. They are admitted upon the ground of necessity, as being the only means of determining whether pain or suffering is endured by another. Whether feigned or not, is a question for the jury. Such declarations and expressions are competent, regardless of the person to whom they are made." See also cases cited in opinion, and *State v. Geddie*, 43 N. J. L. 86; *Eckles v. Bates*, 26 Ala. 655; *Yeatman v. Hart*, 6 Humph. 374; *Hagenlocher v. Coney Island & B. R. Co.* 90 N. Y. 186.

Reversed, and new trial ordered.

All concur.

NEW YORK COURT OF APPEALS.

Philo L. MILLS *et al.*

v.

J. Foster PARKHURST, Assignee, *etc.*, of
Henry W. Perine *et al.*

Reuben O. SMITH *et al.*, *Appts.*

(.....N. Y.....)

**Bringing and prosecuting an action to
set aside as fraudulent his debtor's**

assignment for the benefit of creditors, is not such an election of remedies as will debar a creditor from sharing in a distribution of the assigned estate made pending such suit.

(March 20, 1891.)

A PPEAL by Reuben O. Smith and the First National Bank of Towanda, Pennsylvania, from a judgment of the General Term of the Supreme Court, First Department, affirm-

NOTE.—*Election of remedy.*

The doctrine of election means that where two inconsistent rights are presented to the choice of a party, by a person who manifests a clear intention that he should not enjoy both, he must accept or
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reject one or the other; and so one cannot take a benefit under an instrument and then repudiate it. *Peters v. Bain*, 133 U. S. 670, 33 L. ed. 690.

Separate remedies, one legal and the other equitable, are inconsistent and cannot be pursued, being against the policy of the law. One party will not

ing a judgment of the Special Term for New York County denying their right to share in the distribution of the insolvent estate of Henry W. Perine. *Reversed.*

Statement by Gray, J.:

The appellants, being creditors of Henry W. Perine, an insolvent debtor, upon judgments against him, brought an action to set aside an assignment made by Perine for the benefit of his creditors, as fraudulent, in which they were eventually defeated. Before the action was commenced they had made proof of their claims before the assignee. The deed of assignment provided for certain preferences in payments from the assigned estate, but these appellants were not among the creditors preferred. The present action was brought on behalf of the creditors to compel the assignee to account and for a distribution of the assets in his hands. A reference was therein ordered to a referee to ascertain and to report the amount due each of the creditors who should come in under the order and seek the benefit of this action. Appellants appeared by counsel before the referee, but protesting and giving notice that they waived no rights or remedies theretofore exercised, or that might thereafter be insisted upon. At that time an appeal was pending to this court from the judgment in their action, which upheld the validity of the assignment, and objections were made by other creditors to the allowance by the referee of the appellants' claims, upon the ground that they were proceeding in hostility to the assignment in prosecuting their other action. The referee, however, allowed the claims, on the theory that by appearing and refusing to withdraw their claims there was an election to participate in the accounting. Upon the coming in of the referee's report the court, at special term, sustained the exceptions of the creditors to the allowance of the appellants' claims, on the ground stated, and the court at general term affirmed that decision. From the judgment of affirmance the appellants have appealed to this court.

Mr. Benjamin S. Harmon, for appellants:

The doctrine of election is not applicable in the premises.

The action brought by Reuben O. Smith to set aside the assignment herein was not in disregard of the assignment, but distinctly recognized its existence, while seeking, by judicial proceedings, to establish its invalidity.

be allowed to vex and harass another, with two different and inconsistent proceedings, but will be put to his election. *Livingston v. Kane*, 3 Johns. Ch. 224, 1 L. ed. 660; *Butler v. Wehle*, 6 Thomp. & C. 262, 4 Hun, 66.

If the plaintiff institute separate actions, he cannot carry both to judgment and satisfaction; but may be compelled by order of the court, at any stage of the proceedings, to elect, which he will further prosecute. *Conthan v. Thompson*, 111 Mass. 272; *Hogers v. Vosburgh*, 4 Johns. Ch. 84, 1 L. ed. 712. See note to *Terry v. Munger* (N. Y.) 8 L. R. A. 216.

A party cannot, either in the course of litigation or in dealing *in pite*, occupy inconsistent positions. See note to *Crossman v. Universal Rubber Co.* (N. Y.) 13 L. R. A. 91.
13 L. R. A.

See *Woodward v. Harlow*, 28 Vt. 338; *Jewett v. Woodward*, 1 Edw. Ch. 195, 6 L. ed. 103; *Sternfeld v. Simonson*, 44 Hun, 429.

The bringing of an action to set aside the assignment herein, either was, or was not, an election at the time, upon the part of appellants, such as to preclude them from ever after sharing thereunder in the assigned estate.

Fowler v. Bowery Sav. Bank, 4 L. R. A. 145, 113 N. Y. 450.

That it was not such an election at the time is conceded, and if not, then how can the mere pendency of the action, its nature remaining the same and no substantial benefit having been derived therefrom afterwards have that effect.

If any election became necessary at the time of the proceedings before the reference herein, then appellants elected to share under the assignment.

Creditors may elect to share even under a void assignment, the assignment as to them being, in such case, merely voidable.

Hone v. Henriquez, 13 Wend. 240.

This being so, it follows that merely asserting the invalidity of an assignment, or bringing an action to have its validity or invalidity judicially determined, will not preclude a creditor from sharing under the assignment when the question as to whether or not he will so share thereafter squarely presents itself.

Woodward v. Harlow, *supra*. See *Shannon v. Tarkington*, 7 Heisk. 612; *Busby v. Finn*, 1 Ohio St. 409; *Maynard v. Maynard*, 4 Edw. Ch. 711, 6 L. ed. 1029; *Loney v. Bayly*, 45 Md. 447; *Pratt v. Adams*, 7 Paige, 615, 4 L. ed. 300.

The appellants elected to share under the assignment before the bringing of the action to set that assignment aside, and all subsequent acts upon the part of said appellants, inconsistent with said elections, are of no effect.

The proofs of claims never having been withdrawn from before the assignee, nor the dividend declared and paid by him refunded, there was a conclusive election upon the part of appellants to become parties to, and to ratify and accept, said assignment.

Rapalee v. Stewart, 27 N. Y. 810; *Hone v. Henriquez*, *supra*.

An election once made is made forever, and if appellants elected to claim under the assignment before the bringing of proceedings hostile to that assignment, then the latter proceedings were without effect, and the said election, with all its advantages or disadvantages, remains unchanged.

An action to set aside an insolvency discharge is not the proper remedy of a creditor seeking to enforce his right to the agreed percentage under a compromise agreement of creditors, but he should sue for the agreed percentage. *Drake v. McQuade* (N. H.) July 25, 1890.

A creditor who has availed himself in any mode of an assignment made by his debtor, or of the benefits to be derived therefrom, bars himself from taking any action to defeat the purpose of the assignment as a transfer of the property of the assignor. *Thompson v. Fry*, 51 Hun, 296.

A party should not enjoy an advantage under an instrument and at the same time insist on its invalidity. *Babcock v. Dill*, 43 Barb. 577; *Haydock v. Coope*, 53 N. Y. 68. See note to *Fowler v. Bowery Sav. Bank* (N. Y.) 4 L. R. A. 145.

Morris v. Rexford, 18 N. Y. 552; *Möller v. Tuska*, 87 N. Y. 166; *Fowler v. Bowery Sav. Bank*, 4 L. R. A. 145, 118 N. Y. 450; *Kinney v. Kiernan*, 49 N. Y. 164.

Mr. Humphrey McMaster, for respondents:

The appellants, by bringing and prosecuting to judgment their action to set aside the assignment as fraudulent, have elected to repudiate the assignment, and cannot share in the distribution under it.

Any decisive act of the party, with knowledge of his rights and of the facts, determines his election in the case of conflicting remedies.

Fowler v. Bowery Sav. Bank, 4 L. R. A. 145, 118 N. Y. 457; *Morris v. Rexford*, 18 N. Y. 552; *Bouker Fertilizer Co. v. Cor.*, 9 Cent. Rep. 160, 106 N. Y. 555; *Conroy v. Little*, 5 L. R. A. 693, 115 N. Y. 387; *Terry v. Munger*, 8 L. R. A. 216, 121 N. Y. 161.

There would seem to be no good reason why a party should not be held as strictly to an election to accept or repudiate an assignment as in any other case calling for an election between inconsistent remedies.

See *Sternfeld v. Simonson*, 44 Hun, 480; *Iaelin v. Henlein*, 16 Abb. N. C. 73; *New England Bank v. Lewis*, 8 Pick. 113.

When a creditor by an attachment suit takes property from the assignee and sells it, on giving bonds to the assignee, such creditor is precluded from claiming any benefit under the assignment.

Valentine v. Decker, 43 Mo. 583; *Geisse v. Beall*, 3 Wis. 367.

Having made his election, he is bound by it.

Möller v. Tuska, 87 N. Y. 166; *Strong v. Strong*, 3 Cent. Rep. 48, 103 N. Y. 69; *Kennedy v. Thorp*, 51 N. Y. 174; *Joslin v. Cowee*, 52 N. Y. 90; *Iaelin v. Henlein*, *supra*; *Acer v. Hotchkiss*, 97 N. Y. 397; *Terry v. Munger*, *supra*.

And if one makes an election between two inconsistent remedies, his failure to secure satisfaction, by means of the one he adopts, forms no legal reason for permitting him to resort to the other.

New York Firemen Ins. Co. v. Lawrence, 14 Johns. 55; *Morris v. Rexford*, 18 N. Y. 552; *Rodermund v. Clark*, 46 N. Y. 354; *Hughes v. Vermont Copper Min. Co.*, 7 Hun, 678; *Goss v. Mather*, 2 Lans. 238, 46 N. Y. 689.

Gray, J., delivered the opinion of the court:

The first of the two questions which were presented relates to the right of the appellants to come in and share in the distribution of the assigned estate, and the argument against their right is that, in bringing and prosecuting the action to set aside the assignment as fraudulent, they had thereby elected to repudiate the assignment. The doctrine of election, which has been thus far successfully invoked in support of the argument, does not seem to be applicable to such a case, and no authority is found warranting its application. The learned justices, who considered the question at the special and general terms, were influenced in their conclusions by the supposition that these appellants were pursuing two remedies upon their claims against their debtor Perine, and that, though direct authority might be want-

ing upon precisely such a case, yet analogy with adjudged cases, which hold that inconsistent remedies may not be availed of or concurrently pursued, required the application of the doctrine of election in this instance. If the definition of the legal position taken by these appellants was correctly assumed below, we should have nothing to say, and could not add to their opinion. But we cannot agree with them in their view of the situation of the parties. The elements required to make out a case of election were wanting. The doctrine of election, usually predicated of inconsistent remedies, consists in holding the party, to whom several courses were open for obtaining relief, to his first election, where subsequently he attempts to avail himself of some further and other remedy not consistent with, but contradictory of, his previous attitude and action upon his claim. The basis for the application of the doctrine is in the proposition that where there is, by law or by contract, a choice between two remedies, which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other. An extended citation of authorities illustrating the principle, in cases of breaches of contract, or of a duty imposed by the law, would be unprofitable here, because of many recent decisions of this court, and because not needed in the present discussion. Where parties are under some contract, or the case is one of a deed or of a will, an election is deemed to be made where there has been an acceptance of a benefit, under the one or the other, and the party benefited will not be heard to raise the question of validity, nor to insist upon some other, but inconsistent, legal rights, however well founded. So it is conceivable that the rule may be so extended as to apply to the case where a creditor comes in under an assignment by his debtor for the benefit of creditors, in such way and with such attitude as should preclude him from thereafter assailing its validity. But how can the converse of the proposition be sustained? The assignment by an insolvent debtor is involuntary as to creditors in the application of his assets to their claims, and, it may be, unequal as well as unjust as to some, and it is of no effect if fraudulently made, within the meaning of the law. Shall the creditor, for endeavoring to set it aside on legal grounds, if unsuccessful, be held incapable of receiving his share of the debtor's assets? Such a rule could not be based upon equitable principles. It would come so near to lending aid and encouragement to attempts at fraudulent assignments as to render its adoption impossible. The assignment is not like a gift of property upon conditions open to the acceptance or rejection of the donee. It is a payment by the assignor of his debts after his own plan. The deed of assignment is in no sense a contract between the debtor and his creditors, and it does not depend for its validity in law upon their assent. It is a means or mode which the Statute permits to be adopted by an insolvent debtor for the distribution of his estate among his creditors, and so long as he has acted without fraud, in fact or in law, and has complied with the prescriptions of the Act, his conveyance to an assignee, for the purposes stated

therein, will stand and be effective. If the distribution is to be made unequally among the creditors, and some are preferred to others in payment, the assignment is not viewed by the courts with any favor, and is only tolerated and upheld when all conditions are met for the prevention of fraud. *Nichols v. MeEwen*, 17 N. Y. 23.

The debtor's proceeding sets at naught whatever elements of superiority the non-preferred creditor's claim may possess, as it may nullify the results of any diligent effort on his part to secure his debt. It compels him to submit to inequality in payment, and to take his *pro rata* share of the estate, unless he discovers and can establish its invalidity. But if he believes himself possessed of proof invalidating the assignment he is not debarred from attacking it, and endeavoring to set it aside. He is then but insisting upon his general right to be paid his judgment in the order of its priority, and on what principle should his endeavor in that direction prevent him from proving and establishing his right, in any event, to his share in the assigned estate, which the assignee must be deemed to be holding in trust for him and all other creditors under the debtor's deed? The creditor may not feel any more hostility to the debtor's proposed distribution of his estate when he sues to annul it than he did before. The bringing of the suit is merely the hostility on his part pronounced in legal proceedings. The learned justice delivering the opinion at the general term conceded that, where an action to set aside the assignment had been brought, and was unsuccessful and terminated, an election would not be held to have taken place. How does the mere pendency of the action affect and change the situation? What is the attitude of the parties? The debtor has transferred his estate to another, upon the trust that he distribute it, in the manner provided in the deed, to and among his creditors. The assignee is a trustee, whose duty it is to make that distribution. A creditor's only alterna-

tive, if he is not contented to take what would thus come to him, is to endeavor to set aside the deed of assignment, if he deems himself possessed of the requisite evidence of its invalidity at law. If there is any election for him to make, it can only be with respect to what remedies may be available to him in order to right himself upon his judgment against the assignor and to avoid the assignment. We think, therefore, that this was not a case of election of remedies, and that, in endeavoring to set aside the deed of assignment, in order to render their judgments effective, the appellants were testing and contesting the legality and validity of their debtor's act and disputing its binding force upon them, as they had a legal right to do, and which was a course that recognized the debtor's deed, but alleged the existence of grounds for holding it voidable, and therefore not compulsory upon the creditor. It in no wise militated against the right of the appellants, if defeated upon that issue, to share in the assigned estate, on the basis of distribution provided in the debtor's deed to his assignee. The second question argued was whether the appellants, if entitled to share in the distribution of the assigned estate, could claim preference in payment under the assignment, as being individual creditors of Perine. With respect to that question, we agree with the decision of the court below denying that right. The indebtedness represented by their claims was clearly excepted by the terms of the deed of assignment, and they could only claim to share ratably with other creditors, after the payments previously directed.

So much of the judgment appealed from as affirmed the judgment disallowing the right of these appellants to share in the distribution of the funds in the assignor's hands should be reversed, and these appellants adjudged entitled to share with other creditors not preferred in the assignment. Costs to the appellants to be paid out of the estate in the assignee's hands.

All concur.

CALIFORNIA SUPREME COURT.

Franklin H. SMITH *et al.*, *Repts.*,
v.

PHOENIX INSURANCE CO. of Brooklyn,
New York, *Appt.*

(.....Cal.....)

1. One in possession of property under a contract to lease it at a fixed monthly

NOTE.—Contract; on whom loss falls in case of destruction by fire.

The question, On whom does the advantage or loss fall, resulting from events happening in the case of private contracts? is to be decided by the question whether or not the title had been actually accepted. *Wyvill v. Exeter*, 1 Price, 232; *Paine v. Meller*, 6 Ves. Jr. 340.

The whole question is, Who shall bear the loss occasioned by a *vis major*? And that depends much upon the question, Who was the proprietor when that loss was occasioned? *Mittelholzer v. Fullarton*, 6 Q. B. 989.

If all the buildings upon leasehold premises be destroyed by fire, the lessee is at the common law, nevertheless, liable for the full amount of the

rental for five years and at the end of that time to purchase it at a designated price will not, before the expiration of the five years, be held to have entered under his contract to purchase for the purpose of enforcing specific performance against him, and in case the building is destroyed by fire within that time his obligation to purchase is at an end.

2. Letting a tenant into possession of

rent during the residue of the term (*Baker v. Holtzaffel*, 4 Taunt. 45); and if he has covenanted to repair, he must also rebuild. *Phillips v. Stevens*, 16 Mass. 238.

So if a fire occur after contract of sale, but before the conveyance is executed, the loss must be borne by the buyer. *Surd. Vend.* 291.

The seller is not bound to warrant the buyer against acts of mere force, violence and casualties, nor against the acts of the sovereign, and this was the rule under the French and Roman law. 1 *Domat*, Civil Law, pt. 1, bk. 1, title 2, § 10, art. 4.

"After the bargain is completed, the purchaser stands to all losses." *Digest*, 2, 14, 77; *Cooper's Justinian*, 615.

In such case, the maxim *Res perit suo domino ap-*

property under an agreement to rent the same for five years and then to buy it is not, prior to the expiration of the five years, a violation of the condition of an insurance policy thereon, making the policy void in case of a transfer of title or possession of the property, where provision is made in the application for occupancy by a tenant.

(September 21, 1899.)*

A PPEAL by defendant from a judgment of the Superior Court for Los Angeles County in favor of plaintiff in an action brought to recover the amount alleged to be due on a fire insurance policy. *Affirmed.*

The facts are stated in the opinion.

Messrs. Haggin, Van Ness & Dibble, for appellant:

If the agreement between the plaintiff and Stewart, and Stewart's entry and possession thereunder, operated as a change of either title or possession, the policy is void.

Title is the "means whereby the owner of lands hath the just possession of his property, and a perfect title consists of actual possession under a right thereto based upon a right to the property."

2 Bl. Com. chap. 13.

The manner of acquiring title is by descent or purchase.

Id. pp. 199, 200.

The term "purchase" includes every mode of acquisition of estate known to the law, except that by which an heir, on the death of his ancestor, becomes substituted in his place as owner by operation of law.

2 Bouvier, L. Dict. title *Purchase*.

† The term "deed" includes an agreement.

1 Bouvier, L. Dict. title *Deed*.

The possession of Stewart was more than that of tenant; he was in possession under a contract to convey, and this made him the equitable owner of the premises.

Fry, Spec. Perf. 3d ed. p. 638, § 635, and *note* 2.

The contract between plaintiff and Stewart operated as a change of title and consequent violation of the policy.

*A decision was reached and an opinion handed down in this case on March 10, 1890, which reversed the judgment of the court below. A rehearing was subsequently granted, and after deliberation the court reached the opposite conclusion and handed down the opinion given herewith, which makes the former opinion immaterial. [Rep.]

ples. *Meredith's Emérigon*, 419; *Paine v. Meller*, 6 Ves. Jr. 349, cited in *Osborn v. Nicholson*, 80 U. S. 13 Wall. 654, 20 L. ed. 685.

It is the established doctrine of equity that if a contract to purchase is to be completed at a given period, and the title is finally made out, the parties continuing in treaty, and the purchaser not by any acts released from his bargain, the estate is considered as belonging to him from the date of the contract, and the money from that time as belonging to the vendor. *Hurford v. Purrier*, 1 Madd. 583.

When the contract has been completely made, the thing sold is at the risk of the purchaser, who must bear all subsequent losses, and is entitled to all subsequent gains. *Inst.* 1, iii, title 24, § 3; *Pothier, Traité de Contrat de Vente*, pt. IV.

But where the contract is in its inception conditional, the transfer of the property to the purchaser takes place only on the performance of the 13 L. R. A.

Pelton v. Westchester F. Ins. Co. 77 N. Y. 605; *Davidson v. Hawkeye Ins. Co.* 71 Iowa, 532; *Semmelhaank v. Canada F. & M. Ins. Co.* 4 Mont. L. N. 205; *Germond v. Home Ins. Co.* 2 Hun. 540; *Johannes v. Standard Fire Office*, 70 Wis. 196; *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568; *Ramsey v. Phenix Ins. Co.* 2 Fed. Rep. 429; *Laffan v. Naglee*, 9 Cal. 663; *De Rutte v. Muldrow*, 16 Cal. 505; *Hall v. Center*, 40 Cal. 68; *Doud v. Clarke*, 54 Cal. 48; *Peasley v. McFadden*, 68 Cal. 611; *Southern Pac. R. Co. v. Terry*, 70 Cal. 484; *Monroe v. West*, 12 Iowa, 119, 79 Am. Dec. 524; *Dennett v. Penobscot Fair G. Co.* 57 Me. 425, 2 Am. Rep. 58; *Smith v. Gage*, 41 Barb. 60, 2 Am. L. Reg. N. S. 438; *McKeechie v. Sterling*, 48 Barb. 381; *Moore v. Burrows*, 34 Barb. 173; *Adams v. Green*, Id. 176; *Richter v. Selin*, 8 Serg. & R. 430.

A contract to convey, accompanied by delivery of possession, operates as an equitable transfer of the title.

Baldwin v. Pool, 74 Ill. 97; *Fitzhugh v. Maxwell*, 34 Mich. 138; *Strickland v. Kirk*, 51 Miss. 795; *Den v. Dellinger*, 75 N. C. 800.

A title such as that of Stewart will support a warranty by the insured that he is the sole, entire, absolute and unconditional owner of the property.

1 Wood, Ins. § 88 *et seq.*; *Hough v. City F. Ins. Co.* 29 Conn. 10; *Millville Mut. F. Ins. Co. v. Wilgus*, 88 Pa. 110; *Chandler v. Commerce F. Ins. Co.* Id. 228; *East Texas F. Ins. Co. v. Dyches*, 56 Tex. 565; *Swift v. Vermont Nat. F. Ins. Co.* 18 Vt. 313; *Gaylord v. Lamar F. Ins. Co.* 40 Mo. 16; *Franklin F. Ins. Co. v. Crockett*, 7 Lea, 721.

Messrs. Barclay, Wilson & Carpenter, for respondents:

If Stewart was in possession as the tenant of the plaintiffs, on the first day of January, 1888, and remained in possession as tenant of the plaintiffs, until the destruction of the building, it is utterly incomprehensible that "he was more than a tenant."

The rule in equity that requires a specific performance in favor of a party who has made improvements, expended money, paid a part or the whole of the agreed price of property purchased in good faith from another, proceeds upon the idea that a failure to make such conveyance would be a fraud upon the purchaser. The application sought to be made of the rule in a court of law, in this case, by the appel-

condition, and until that event the property remains at the risk of the vendor. *Couster v. Macpherson*, 5 Moore, P. C. 88.

Personal property is, equally with real estate, the subject of conditional sale, and possession is to be construed as only prima facie evidence of its ownership. *Mount v. Harris*, 1 Smedes & M. 185.

At law a failure of consideration in cases of contract is a sufficient ground for considering the contract as rescinded, and for maintaining the action for money had and received on the contract. *Lyon v. Annable*, 4 Conn. 350; *Pettibone v. Roberts*, 2 Root, 258; *Cloherly v. Creek*, 3 Harr. & J. 323; *Bames v. Savage*, 14 Mass. 425; *Davis v. Marston*, 5 Mass. 199; *Spring v. Coffin*, 10 Mass. 34; *Gillet v. Maynard*, 5 Johns. 85; *Raymond v. Bearnard*, 12 Johns. 274; *Wheeler v. Board*, Id. 263; *Putnam v. Westcott*, 19 Johns. 73; *Danforth v. Dewey*, 3 N. H. 79; *Boyd v. Aderson*, 1 Overton (Tenn.) 426.

lant, would enable the insurance company, after the utmost good faith, on the part of the plaintiffs, in their application for insurance, payment of the premium, notice and proof of the loss, to refuse payment, and turn what was intended as a shield for the protection of honesty into a sword for its destruction.

If we admit, for the sake of argument, that the provision in the lease amounted to a sale of the premises, still the preponderance of authorities, as well as reason, shows that the Company cannot avoid payment on that account.

Washington F. Ins. Co. v. Kelly, 32 Md. 421. See also *Allen v. Mutual F. Ins. Co. in Hartford Co.* 2 Md. 111; *Jackson v. Massachusetts Mutual F. Ins. Co.* 23 Pick 418; *Hitchcock v. Northeastern Ins. Co.* 26 N. Y. 68; *Strong v. Manufacturers Ins. Co.* 10 Pick. 40; *Stetson v. Massachusetts Mut. F. Ins. Co.* 4 Mass. 380; *Jackson v. Silvernail*, 15 Johns. 277.

A sale or assignment of the property will only defeat the recovery of the assignor in the policy, when and so far as it strips him of insurable interest.

3 Kent, Com. 261.

Where the insured had entered into an agreement for the sale of his insured property, but had not made the conveyance or received the purchase money, his interest in the property and policy was not thereby parted with so as to bar his right of action on the policy.

Perry County Ins. Co. v. Stewart, 19 Pa. 48; *Clinton v. Hope Ins. Co.* 45 N. Y. 454; *Altma Ins. Co. v. Jackson*, 16 B. Mon. 242; *Masters v. Madison County Mut. F. Ins. Co.* 11 Barb. 624; *Orrell v. Hampden F. Ins. Co.* 13 Gray, 431; *Trumbull v. Portage County Mut. F. Ins. Co.* 12 Ohio, 306; *Phillips v. Merrimack Mut. F. Ins. Co.* 10 Cush. 350; *Davis v. Quincy Mut. F. Ins. Co.* 10 Allen, 118; *Hill v. Cumberland Valley Mut. F. Co.* 59 Pa. 474; *Boston & Salem Ice Co. v. Royal Ins. Co.* 12 Allen, 381.

Beatty, Ch. J., delivered the opinion of the court:

In March, 1890, we made a decision in this case, reversing the judgment of the superior court with directions to enter judgment on the findings in favor of the appellant. 23 Pac. Rep. 383. After a rehearing of the case, and upon fuller consideration of the questions involved, we are satisfied that our former decision was erroneous and that the judgment of the superior court should be affirmed.

The action is upon a fire insurance policy. Plaintiffs had judgment in the lower court and defendant appealed from the judgment alone, claiming that upon the facts found the judgment should have been in its favor.

The policy in suit was issued in August, 1887, and the property insured consisted of a frame building designed for a hotel or boarding house. The defendant was advised by the papers accompanying the application for insurance—which, by the terms of the policy, are made a part of the contract—that the building was occupied, or to be occupied, by a tenant (no particular tenant being named) for hotel purposes, and it is found by the court, as alleged in the complaint, that before said insurance was effected defendant had full knowledge that said building was built by plaintiffs for the

purpose of renting the same for a boarding and lodging house, and was to be occupied by the tenant of the plaintiffs; the said building not being at that time fully completed and furnished."

After the insurance was effected and the building completed the plaintiffs, on December 24, 1887, by a written lease demised the insured premises to one J. D. Stewart, for a term of five years, at a fixed rent, payable monthly. The lease also contained stipulations binding the plaintiffs to put in certain furniture, consisting of carpets, cooking range, gas fixtures, etc., and binding Stewart to put in other necessary furniture. It was agreed that the building and furniture should be properly insured for the benefit of the parties as their interest might appear, and that Stewart, the lessee, should pay one half of the expense of insuring the building and the entire expense of insuring the furniture.

It was further agreed as follows: "Said party of the second part (Stewart) may at any time during said term of five years purchase said hotel, lots and premises for the sum of \$25,000 cash, and likewise purchase said carpets, gas fixtures and range at cost price. It is further agreed that said party of the second part will purchase said hotel, lots and premises on or before five years from this date for the sum of \$25,000, together with said carpets, gas fixtures and range at their cost price."

The defendant had no notice of these stipulations for purchase and sale of the property. Under this lease and agreement Stewart entered into possession of the insured premises, and so continued until the destruction of the hotel by fire in April, 1888.

The plaintiffs thereafter, upon due notice and proofs of loss, demanded payment of the policy, which was refused by the defendant. Hence this action, which is defended on the ground of an alleged violation by plaintiffs of the following conditions of the policy:

"If the property be sold or transferred (in whole or in part) or upon the commencement of foreclosure proceedings against or a sale under a deed of trust or the existence of a judgment lien or the issue or levy of an execution against any kind of property herein described; or if the property be assigned under any bankrupt or insolvent law, or any change takes place in the title or possession (except in case of succession by reason of the death of the assured) whether by legal process or judicial decree, or voluntary transfer, assignment or conveyance; or if the title or possession shall be changed from any cause whatsoever; or if this policy shall be assigned before a loss, without the consent of the company indorsed hereon,—this policy shall in each and every instance be void."

The passages which we have italicized are those to which attention is particularly directed, the claim of appellant being that the lease and agreement of sale, and Stewart's possession thereunder, wrought a change both in the title and possession of the property insured, involving a forfeiture by plaintiffs of all rights under the policy.

In their argument at the rehearing counsel

for appellant took the position, for the first time, that possession by Stewart, under the lease and as a tenant merely, without regard to the contract of sale, was a violation of the provision of the policy against a change of possession. But clearly this position cannot be maintained in view of the statement made in the application upon which the policy was issued, to the effect that the building was to be occupied by a tenant for hotel purposes, and the fact found by the court that defendant had full knowledge, before issuing the policy, of the purpose for which the building was being constructed, and that it was to be occupied by a tenant. Occupancy of the identical character contemplated by the policy was not a change of possession. The issuance of the policy was an express consent to possession by a tenant, and since no particular tenant was named it was a consent to occupancy by any tenant selected by the assured, subject of course to revocation by canceling the policy and returning the premium if an objectionable tenant was selected.

The real and only question in the case is whether the contract of sale embraced in the lease, or superadded to it, wrought a change in the title to the insured premises within the meaning of the policy, or imparted to the possession of Stewart a character materially different from the possession of a tenant. Upon this question we held in our former decision, in accordance with the contention of appellant, that Stewart by taking possession of the insured premises under the lease and agreement of December 24, 1887, not only acquired the right, but became absolutely bound to complete the purchase; that henceforth the buildings were at his risk, that if they were destroyed the loss would be his alone, because he was obliged at the expiration of his term as tenant, upon tender of a deed for the land without the buildings, to pay the full contract price of \$25,000. From this it necessarily followed that Stewart, from the time of taking possession, acquired an insurable interest equivalent to the value of the buildings, and that if plaintiffs could collect the insurance and keep it, they would be paid twice over for the buildings, so that they would have a direct interest in their destruction. Of course upon these premises it was impossible to avoid the conclusion that the effect of the transaction with Stewart was to work a change in the title not merely nominal and technical, but substantial and material to the risk, and necessarily violative of the conditions of the policy.

But on a fuller consideration of the case we are satisfied that the authorities cited in our opinion and in the briefs of counsel did not warrant us in holding that under the circumstances of this case Stewart, by taking possession under the lease and contract of December 24, 1887, became absolutely bound to complete the purchase of the premises at the expiration of his term, notwithstanding the previous destruction of the buildings.

There can be no question that under such a contract the equitable title to the land, as between the vendor and vendee, is in the 13 L. R. A.

latter. This is a familiar doctrine of equity, based upon the principle that, for the prevention of fraud and the enforcement of the just rights of the parties, equity will deem that to be done which ought to be done. The maxim is applied most frequently in actions by the vendee for specific performance of the contract, or in aid of his defense when the vendor is seeking to recover possession of the land upon his legal title. *Laffan v. Naglee*, 9 Cal. 683; *DeRutte v. Muldrow*, 16 Cal. 505; *Hall v. Center*, 40 Cal. 63; *Dowd v. Clark*, 54 Cal. 48; *King v. Ruckman*, 21 N. J. Eq. 599.

Decisions almost innumerable to the same effect might be cited from the reports of this and other States, but they do not decide the question involved in this case.

There is a wide distinction between the proposition that the vendee in possession under an executory contract of sale may maintain the possession against the vendor as long as he performs his part of the agreement, and upon full compliance may enforce specific performance of the vendor's contract to convey the legal title, and the proposition here contended for, viz., that the vendor in such a contract, notwithstanding the destruction of the subject of the contract in whole or in part, before the date stipulated for payment and conveyance, and his consequent inability to make a conveyance of that for which the vendee has bargained, may nevertheless compel the vendee to pay the whole contract price in exchange for a fraction of the property sold.

When we come to make a critical examination of the cases cited to this point, and especially the cases in which the precise question we are considering are directly involved, we find that they lend a very slight support to the appellant's contention.

In the case of *McKechnie v. Sterling*, 48 Barb. 390, the doctrine is, it is true, carried to an extreme degree, but the authorities cited in support of that decision are not in point, and the reasoning by which they are made to support the decision is very unsatisfactory.

In *Richter v. Selin*, 8 Serg. & R. 439, the Supreme Court of Pennsylvania uses this language: "Where a contract is made for the sale of land, equity considers the vendee as the owner of the estate sold, and the purchaser as a trustee for the vendor for the purchase money. So much is the vendee considered in contemplation of equity as actually seized of the estate that he must bear any loss that may happen to the estate between the agreement and the conveyance, and he will be entitled to any benefit which may accrue to it in the interval, because by the contract he is the owner of the premises to every intent and purpose in equity." But this was said *arguendo* in deciding a case where the point was not directly involved, and the proposition, true enough in general, and in its application to the circumstances of that case, was stated in its most unqualified form and without regard to the special circumstances which in many cases render it inapplicable.

Similar statements of the same doctrine

are to be found in some of the insurance cases hereinafter referred to, with reference to most of which it was correctly applied, as we shall see.

But we shall see also that the doctrine has its reasonable limitations, and that this is one of the cases to which it cannot be applied without doing the wrong and injustice which it was designed to prevent.

In the case of *Wells v. Calnan*, 107 Mass. 514, the facts were that the plaintiff agreed to sell the defendant a farm and the defendant agreed to buy. On the day previous to that fixed for the payment and conveyance, the buildings on the farm were destroyed by fire. The plaintiff tendered a conveyance in pursuance of the contract, and demanded payment of the purchase price, which being refused, he sued for damages. It was held that he could not recover, because by reason of the destruction of the buildings he was unable to comply with the contract on his part. It is true the vendee had not taken possession, and the court found it necessary to distinguish the cases in which lessees in possession had been held liable on their covenant to pay rent or make repairs notwithstanding the destruction of tenements by fire during the term. In those cases it was said the liability of the defendant resulted from the fact that the lessors had fully complied with their contracts, while in the case under consideration the plaintiff was unable to do so.

There can be no doubt of the soundness of this distinction, and no difficulty, we think, in showing that it applies to the present case.

In the earlier Massachusetts case, *Thompson v. Gould*, 20 Pick. 134, it was applied where the defendant was in possession and had paid the purchase price for the purpose of sustaining his right to recover back the money paid.

In that case the agreement of purchase and sale was by parol, but the plaintiff paid at different dates the whole purchase price and got receipts in writing specifying the purpose of the payments, and he had entered into possession of the house. Clearly under the circumstances he had put himself in a position to enforce specific performance of the contract to convey, and was the owner of the equitable title. But before any conveyance was tendered, the house was destroyed by fire, and the plaintiff sued in assumpsit for the money paid. In a well-considered opinion the court held that he was entitled to recover back the money on account of failure of consideration.

It was conceded that the contract of the vendor, though by parol, could under the circumstances have been specifically enforced, but it was denied that it could have been enforced against the vendee after destruction of the house.

It may be said that in this decision the mere legal rights of the parties were regarded, and that the court could not act upon the equitable doctrine for want of jurisdiction; but it will be seen that the equitable doctrine was discussed in the opinion and its reasonable limitations pointed out.

13 L. R. A.

What those limitations are it is not necessary that we should consider exhaustively. For the purpose of this decision it is sufficient to say that no case has been cited, and we have discovered none, in which the vendee has been held bound to pay the purchase price where a valuable part of the property has been destroyed before the day fixed for payment and conveyance, unless he has taken possession under the contract of sale, or has the right to such possession under the contract before the occurrence of the loss.

Now, in this case, it is to be remembered that the agreement between plaintiffs and Stewart consisted of a lease for a term of five years, reserving a rent payable monthly in money, a stipulation giving Stewart the privilege of purchasing at \$25,000 at any time during the term, and the contract binding him to purchase at \$25,000 at the end of the term.

In considering the question before us we may lay out of view the stipulation giving Stewart the privilege of purchasing, for clearly he was not thereby bound to take the property and pay for it even if it remained whole and intact. To determine the character of his possession with reference to the extent of his liability upon his agreement to purchase, the contract is to be viewed as if it consisted merely of the lease and the agreement to purchase. Would Stewart, entering under such a contract, at the beginning of the term demised, be deemed, for the purpose of enforcing a most inequitable liability, to have entered and to be holding under his contract of purchase? Clearly he would not, if his possession could be referred to either the lease or the contract as distinct from the other; for there can be no doubt that during the term of the lease he would hold under that. His right to remain in possession would depend on his payment of rent and performance of other covenants of the lease, and would be determined by failure so to pay and perform.

And we think that, for the purpose of determining his liability under his agreement to purchase, in case of destruction of a material part of the property sold prior to the time for payment and conveyance, this distinction between the lease and agreement ought to be made. It is reasonable and equitable, and not opposed to any authority cited unless the case in 48 Barbour, above referred to, should be deemed an authority against it. If so, we can only say that we think that case goes to an unreasonable length, and that it ought not to be followed. On the contrary, we think the best considered cases warrant us in holding that the liability of Stewart upon his agreement to purchase ended with the destruction of the hotel; that it was never at his risk, but was always at the sole risk of the plaintiffs.

But appellant contends that even on this view there was a change of title and possession within the meaning of the policy, and he cites a number of cases to sustain the proposition that the equitable ownership of a vendee under a contract of purchase constitutes a sole, absolute and unconditional ownership, and consequently that the vendor

cannot also be the sole, absolute and unconditional owner. A review of these cases, however, will show that they differ essentially from the case in hand.

In the case of *Hough v. City F. Ins. Co.*, 29 Conn. 10, the legal title to the property insured was in a trustee, who held it as security for about \$1,600, subject to which incumbrance the plaintiff and two others owned the equitable title in equal shares. The plaintiff bought out his co-owners, agreeing to pay each the sum of \$1,000 for his interest, and he had paid on his purchase \$500 to one and \$700 to the other. He had also taken possession of the land and erected a dwelling thereon, at a cost of \$2,700 and was to receive a conveyance from the trustee upon the payment of the sum secured to him on the property. Under these circumstances the court held that it was not a misrepresentation on the part of plaintiff in applying for insurance to state that the property was his. And it was also held that his interest in the property was within the meaning of the policy an absolute interest, because he could by no contingency be deprived of it except by his own consent. No doubt this case was correctly decided.

The plaintiff by reason of his original interest in the property, his payment to his co-owners upon the purchase of their interests, and the money he had expended in improvements on the property, independent of his agreement to purchase, had bound himself to do so, and he was the only person who could suffer loss by destruction of the property. It was his, therefore, absolutely in every sense of the word material to the risk. And the decision was in line with hundreds of others in which the courts everywhere have refused to defeat recovery upon insurance policies by giving effect to the literal terms of clauses of forfeitures. Such clauses are always, and justly, construed with the utmost strictness against the insurer, and always with reference to their only legitimate object, *i. e.*, the protection of the insurer against risks that are materially different from those which he has undertaken. The cases of *Millville Mut. F. Ins. Co. v. Wilgus*, and *Chandler v. Commerce F. Ins. Co.* 88 Pa. 107, 223; *East Texas F. Ins. Co. v. Dyckes*, 56 Tex. 565; *Swift v. Vermont Nat. Ins. Co.* 18 Vt. 812, and *Gaylord v. Lamar F. Ins. Co.* 40 Mo. 18, are all substantially like the Connecticut case, and the decisions rest upon the same ground. In every instance the vendee had made large or complete payments upon his purchase, or valuable improvements, or both. In other words, he had given bonds to complete it, so that the loss must necessarily fall upon him in case of destruction of buildings.

The case of *Davidson v. Hawksey Ins. Co.*, 71 Iowa, 532, upon the authority of which, principally, our former decision herein was based, was another of the same sort. There the vendee had entered into possession of a small farm under a contract to purchase it for \$400, upon which \$50 was to be paid in cash. Prior to the sale the vendor had, as in this case, procured insurance on a building on the farm. After the sale the building was destroyed by fire, and the vendor sued

on the policy. The defense was breach of a condition of the policy against any sale or conveyance of the property by the insured. The defense was sustained on the ground that there was a sale of the property. This ruling was clearly opposed to the decision of the Supreme Court of Maryland in *Washington Ins. Co. v. Kelly*, 32 Md. 421, and to other decisions cited in the dissenting opinion.

It was rested also upon the false assumption that if the plaintiff could collect the insurance he could also collect the full purchase price of the building from his vendee, which would be holding in effect that the defendant remained bound by the policy after it became the interest of the assured to destroy the property.

But upon the doctrine of equity that the vendee in possession is the equitable owner of the property and the vendor merely his trustee of the legal title, the money collected by the plaintiff on the policy would have been held in trust for the vendee, and applied on the purchase price (*Reed v. Lukens*, 44 Pa. 203); so that in fact the plaintiff, even if he had been held entitled to recover on the policy, could have no interest in the destruction of the property. And so in this case, even if Stewart could be held bound by his contract of purchase after the fire, the plaintiff could gain nothing by collecting the amount of the policy. This, however, would be no answer to the objection of defendant that the title was changed in a sense material to the risk; for, to hold that the plaintiff could collect the insurance for the benefit of his vendee would convert the transaction into a virtual assignment of the policy, which can never be done without the consent of the insurer.

We do not, therefore, rest our decision in any degree upon the ground that the plaintiffs could not possibly have derived an advantage from the destruction of the hotel, and have only alluded to the matter for the purposes of calling attention to the false quantity in the reasoning of the Iowa Supreme Court in the case cited in support of our former decision.

The cases of *Imperial F. Ins. Co. v. Durham*, 117 Pa. 480, 10 Cent. Rep. 575, and *Elliott v. Ashland Mut. F. Ins. Co.* 117 Pa. 548, 10 Cent. Rep. 581, cited on the rehearing, are essentially like the other cases cited to the same point, which we have already considered.

We conclude that there was in this case no change of title or possession material to the risk, and that the judgment of the superior court on the facts found was correct.

In reaching this conclusion we have not overlooked the argument based upon the fact that Stewart agreed to pay one half of the premium on the insurance of the hotel. That agreement is evidently one of the terms of the lease as contradistinguished from the agreement to purchase.

The judgment is affirmed.

We concur:

Paterson, J., Harrison, J., DeHaven, J., Garoutte, J.

McFarland, J.: I concur in the order of affirmance.

Petition for second rehearing denied October 19, 1891.

INDIANA SUPREME COURT.

MOUNT VERNON FIRST NATIONAL
BANK *et al.*, *Appts.*,Richard SARLLS *et al.*

(....Ind....)

1. A property owner may maintain a suit to enjoin the rebuilding, in violation of a valid city ordinance, of a wooden building [which has been partially destroyed by fire, although it would not be a nuisance *per se*, if it will work special and irreparable injury to him and to his property, as by diminishing the value of the property and increasing the rates of insurance thereon.

2. Owners of separate and distinct tenements may unite in an action to restrain the rebuilding, in violation of a city ordinance, of a structure partially destroyed by fire, the injury from which will affect all of them alike.

3. The intention to deprive a municipal corporation of its common-law powers will not be inferred simply because certain of such powers are enumerated and conferred upon it by its charter while no mention is made of the rest of them.

NOTE.—Municipal control over the erection of wooden buildings.

It is entirely competent for a municipal corporation to regulate the extent of the fire limits and prescribe the character of the material with which buildings within certain designated limits shall be constructed. The city council has the sole, absolute, and final control of all questions of this character. *State v. Clarke*, 54 Mo. 17; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 509; 1 Dill. Mun. Corp. § 94; *St. Louis v. Boffinger*, 19 Mo. 15; *Baker v. Boston*, 13 Pick. 184; 1 Dillon, Mun. Corp. 3d ed. § 475, p. 401, note 1; *Veazie v. Mayo*, 45 Me. 560; *Fay, Petitioner*, 15 Pick. 243; *Danielly v. Cabanis*, 52 Ga. 21; *Parks v. Boston*, 8 Pick. 218; *Sheridan v. Colvin*, 73 Ill. 237; *Western Sav. Fund Soc. v. Philadelphia*, 21 Pa. 175, 185; *Monroe v. Hoffman*, 29 La. Ann. 651, 29 Am. Rep. 345; 2 Dillon, Mun. Corp. § 832, and cases cited; *Indianapolis v. Indianapolis Gas L. & C. Co.* 68 Ind. 395.

The by-law of a municipality has the same effect within its limits and with respect to the persons upon whom it lawfully operates as an Act of Parliament has upon the subjects at large. *Lord Abinger in Hopkins v. Swames*, 4 Mees. & W. 631, 64; *Mine v. Davidson*, 5 Mart. N. S. 409; *The Queen v. Ouler*, 32 U. C. Q. R. 324.

That a city, especially when authorized by its charter, has the right to establish fire districts, and may prohibit the erection of wooden buildings, as a safeguard against the occurrence and spread of conflagration is not denied, and is well settled by authority. See 1 Dillon, Mun. Corp. 405, citing *Charleston v. Elford*, 1 McMull. L. 234; *Brady v. Northwestern Ins. Co.* 11 Mich. 425; *Douglasse v. Com.* 3 Rawle, 232; *Wadleigh v. Gilman*, 12 Me. 403; *Vanderbilt v. Adams*, 7 Cow. 349, 352; *Charleston v. Reed*, 27 W. Va. 651; *King v. Davenport*, 98 Ill. 305; *Raungartner v. Hasty*, 100 Ind. 575; *Klingler v. Nickel*, 10 Cent. Rep. 331, 117 Pa. 325.

While it is an indisputable proposition that the Legislature is alone empowered to enact statutory laws, it is equally well settled that it may, in its discretion, delegate to municipalities the power to

4. A municipality cannot, without express authority, absolutely and without regard to circumstances, prohibit the making, upon any wooden building within designated limits, of repairs to the amount of \$300 or over.

(September 22, 1891.)

APPEAL by complainants from a judgment of the Circuit Court for Posey County in favor of defendants in an action brought to enjoin the repairing of a certain wooden building. *Affirmed.*

The facts are stated in the opinion.

Messrs. Elijah M. Spencer and William P. Edson, for appellants:

The ordinance in question is fully authorized by law. The Statute confers upon the City of Mt. Vernon, if not expressly, at least by implication, as a part of the police power of the State, full authority to pass such ordinance.

1 Dillon, Mun. Corp. §§ 141, 143.

Under the police power of the State and general welfare clause of the Statute, a city may, by ordinance, prohibit the erection of frame buildings within its fire-limits, in the absence of express legislative authority; and such city

make by-laws and ordinances which are invested with all of the force and effect of general laws duly sanctioned by the Legislature. *Heland v. Lowell*, 3 Allen, 407; *St. Louis v. Boffinger*, 19 Mo. 13, 15; *Brick Presby. Church v. New York*, 5 Cow. 538; *St. Louis v. Manufacturers Sav. Bank*, 49 Mo. 574; *McDermott v. Board of Police*, 5 Abb. Pr. 422; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 508, 24 Am. Rep. 756; *Mason v. Shawneetown*, 77 Ill. 533; *State v. Tryon*, 39 Conn. 183; *Starr v. Burlington*, 45 Iowa, 97; *Indianapolis v. Indianapolis Gas L. & C. Co.* 68 Ind. 395.

The only test of general legislative action should be, Was the law passed in pursuance of and in accordance with the Constitution, and in the exercise of the constitutional powers of the legislative body? In the case of a municipal corporation, the question is, whether it was in accord with the Constitution, state and federal, and then within the powers granted in the charter of the corporation. If so, the propriety and mode of its exercise is one solely for the legislative body exercising it. *Knoxville v. Bird*, 12 Lea. 121, 47 Am. Rep. 325.

Cities and villages are vested with power to prescribe fire limits, and direct that all wooden buildings within those limits, when damaged by fire, decay or otherwise, to the extent of fifty per cent of their value, shall be torn down and removed. *Hurd, Stat.* 1881, p. 219, § 62. See also *Harvey v. Dewoody*, 18 Ark. 253; *Ferguson v. Selma*, 43 Ala. 398; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37; *Cooley, Const. Lim.* 5th ed. 471; *Wadleigh v. Gilman*, 12 Me. 403; *King v. Davenport*, 98 Ill. 305; *Louisville v. Webster*, 103 Ill. 414.

A regulation of the use of property, or a prohibition of its repair when partially destroyed, is not a condemnation to the public use. *Brady v. Northwestern Ins. Co.* 11 Mich. 425.

These cases rest on solid principle, for the rule has always been that a municipal corporation has the inherent power to enact ordinances for the protection of the property of its citizens against fire. 2 Bacon, Abr. 147; *Clark v. South Bend*, 85 Ind. 276, 44 Am. Rep. 13; *North Western Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 660, 24 L. ed. 1036-1039; 2 Kent, Com. 399.

may, by ordinance, prohibit the repair and rebuilding of frame houses within its fire limits, in the absence of express legislative authority.

Monroe v. Hoffman, 39 La. Ann. 651, 39 Am. Rep. 845; *Baumgartner v. Hasty*, 100 Ind. 580, 581; *Dillon*, Mun. Corp. § 405, cited approvingly in *Baumgartner v. Hasty*, 100 Ind. 580; *Wood*, Nuisances, § 741; *Charleston v. Reed*, 27 W. Va. 681, 55 Am. Rep. 386; *Wadleigh v. Gilman*, 12 Me. 408, 28 Am. Dec. 188; *Salem v. Maynes*, 128 Mass. 872; *Try v. Winters*, 4 Thomp. & C. 256; *Hins v. New Haven*, 40 Conn. 478; *Alexander v. Greenville*, 54 Miss. 659; *Hasty v. Huntington*, 8 West. Rep. 322, 105 Ind. 542.

A city may adopt an ordinance prohibiting the repair and rebuilding of frame houses within its fire limits, in the absence of express legislative enactments authorizing the same.

Brady v. Northwestern Ins. Co. 11 Mich. 425; *Clark v. South Bend*, 85 Ind. 276; *Baumgartner v. Hasty*, *supra*; *King v. Davenport*, 98 Ill. 805, 88 Am. Rep. 89.

The general law which authorizes the City of Mount Vernon to adopt an ordinance forbidding the repair and rebuilding of wooden buildings, either expressly or by necessary implication, is constitutional and valid. The power of the State over police regulations is supreme.

Laughter House Cases, 88 U. S. 16 Wall. 36, 21 L. ed. 394; *Baumgartner v. Hasty*, 100 Ind. 584; *Com. v. Alger*, 7 Cush. 84; *Taunton v. Taylor*, 116 Mass. 254; *Watertown v. Mayo*, 109 Mass. 315; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191; *Daniels v. Hilgard*, 77 Ill. 640; *Barbier v. Connolly*, 118 U. S. 27, 28 L. ed. 923.

The powers conferred by the laws of the State upon municipal corporations to protect property from fire "are in their nature legislative and governmental; the extent and manner of their exercise within the sphere prescribed by statute are necessarily to be determined by the judgment and discretion of the proper municipal authorities," and "the power of the city over the subject is that of a delegated quasi sovereignty."

Wheeler v. Cincinnati, 19 Ohio St. 21. See also *A Coal Float v. Jeffersonville*, 10 West. Rep. 833, 112 Ind. 18; *Dillon*, Mun. Corp. §§ 315, 319; *State v. White*, 82 Ind. 278, 42 Am. Rep. 496; *Fortich v. Michener*, 9 West. Rep. 394, 111 Ind. 472.

The ordinance in question is not unconstitutional, is not against common right, and is not unreasonable.

Dillon, Mun. Corp. §§ 141-420; *Respublica v. Duquet*, 2 Yeates, 493; *Brady v. Northwestern Ins. Co.* 11 Mich. 425; *Clark v. South Bend*, 85 Ind. 276.

The following authorities further sustain the validity of the ordinance in question:

Cooley, Const. Lim. § 596; *King v. Davenport*, 98 Ill. 805, 88 Am. Rep. 89; *Fields v. Stokley*, 99 Pa. 306, 44 Am. Rep. 109; *Wood*, Nuisances, § 118; *Theilan v. Porter*, 14 Lea, 622, 52 Am. Rep. 178.

Injunction is the proper remedy to prevent the wrongful acts of a person in repairing and rebuilding a frame house on his property, within the fire limits of a city, in violation of its ordinance, after he has threatened and com-

menced to so repair and rebuild the same, when the injunction is invoked by a person whose private property does and will suffer great and irreparable damage from such wrongful acts.

Blanc v. Murray, 36 La. Ann. 162, 51 Am. Rep. 7; *Story*, Eq. Jur. § 924; *Milbau v. Sharp*, 27 N. Y. 625; *Doolittle v. Broome County Supra*, 18 N. Y. 160; *Horstman v. Young*, 13 Phila. 19; *Brice's App.* 89 Pa. 85; *Rand v. Wilber*, 19 Ill. App. 896; *Wood*, Nuisances, §§ 730, 769; *High*, Inj. § 498.

Measrs. W. S. Jackson and G. V. Menzies, for appellees:

Appellants had no right to join in a bill for injunction.

Hilliard, Inj. 3d ed. 338-337.

An action to restrain the commission of a threatened public nuisance cannot be instituted by individuals, but must be brought by the proper officer, the people or the municipality.

Pom. Eq. Jur. § 1349; *Atty. Gen. v. Tudor Ice Co.* 104 Mass. 239; *Jones v. Cardwell*, 98 Ind. 331; *Lippard v. Edwards*, 39 Ind. 165; *Holsman v. Hibben*, 100 Ind. 338.

Courts of equity will not interpose their powers to enforce such by-laws either at the suit of the corporation itself or one of its members.

Waupun v. Moore, 84 Wis. 450; *Hudson v. Thorne*, 7 Paige, 261, 4 L. ed. 148; *St. Johns v. McFarlan*, 33 Mich. 72; *Wood*, Nuisances, § 789.

The power conferred by a general welfare clause is restricted by reference to other provisions of the charter or constituent act.

State v. Merrill, 37 Me. 829; *Montgomery v. Montgomery & W. Pl. Road Co.* 31 Ala. 76; *Mount Pleasant v. Breeze*, 11 Iowa, 399.

The Legislature restricted, confined and covered all it intended to do in granting power to protest against fire in a special clause, excluding all other thoughts or ideas. *Expressio unius est exclusio alterius*.

"Repairing" is in no sense the same as "erecting" and cannot be so construed under the most liberal rules of interpretation.

Brady v. Northwestern Ins. Co. 11 Mich. 425.

Where the acts to be done more or less affect or impair private property—the powers granted to a municipal corporation must be strictly construed.

Kyle v. Malin, 8 Ind. 37; *La Fayette v. Cox*, 5 Ind. 39; *McEwen v. Gilker*, 38 Ind. 235; *Robb v. Indianapolis*, 38 Ind. 51; *Waldo v. Wallace*, 12 Ind. 584; *Leavensworth v. Norton*, 1 Kan. 432; *Hooper v. Emery*, 14 Me. 375; *Wood*, Nuisances, § 788.

It is repugnant to justice to extend by implication, a power which may become penal in its effects, and through and under the specious guise of providing for public security destroy vested rights.

A corporation with the power of making by-laws cannot make any such law to incur a forfeiture.

Kirk v. Norville, 1 T. R. 124.

No municipality in legislating by virtue of its charter can enact an ordinance unreasonable in its scope and operation.

A Coal Float v. Jeffersonville, 10 West. Rep. 833, 112 Ind. 15.

How unreasonably the second section of the

ordinance can operate is graphically stated by Justice Campbell in *Brady v. Northwestern Ins. Co. supra*.

McBride, J., delivered the opinion of the court:

This case involves the validity of the second section of an ordinance of the City of Mt. Vernon, entitled "An Ordinance Concerning the Prevention of Fires." The first section, the validity of which is not called in question, establishes fire limits and prescribes the material which may be used in the erection of buildings within these limits.

The second section is as follows: "Section 2. It shall be unlawful for any person to alter, repair, or rebuild any frame or wooden building situated within the limit defined and prescribed by this ordinance, whenever the amount required to alter, repair, or rebuild shall equal or exceed the sum of three hundred dollars. Any person violating the provisions of this section may be fined in any sum not less than two dollars, nor more than one hundred dollars, with costs, and each day that workmen are employed on such building shall constitute a distinct offense."

The complaint charges, in substance, that the appellees were the owners of certain real estate in Mt. Vernon, and within the fire limits prescribed by the ordinance in question, upon which they were threatening to and had commenced to rebuild and repair certain frame buildings, at a cost exceeding \$200, which had previously been partially destroyed by fire. The appellants (plaintiffs below) are shown to be each the owners of certain other tracts of land, either adjacent to or in the immediate vicinity of the appellee's building, on which valuable buildings have been erected; and they charge that by reason of the threatened repairing and rebuilding by the appellees, the danger of the destruction by fire of their respective buildings is "greatly increased and made more imminent, thereby diminishing the value of said plaintiff's real estate and increasing the rate of fire insurance thereon, to the irreparable injury and damage of the said buildings on each and all of the said pieces of real estate, so, as aforesaid, owned by the plaintiffs, and is an obstruction to the free use by the plaintiffs of their said property and interferes with the comfortable enjoyment thereof," etc.

Prayer for an injunction. The circuit court sustained a demurrer to the complaint and rendered judgment for costs in favor of the appellees. Three questions are presented and discussed:

1. Will injunction lie in such a case?
2. If so, is there a misjoinder of parties plaintiff?
3. Is the section of ordinance in question valid?

As a rule, a court of equity will not, at the suit of a city, restrain by injunction the threatened violation of an ordinance of such city regulating the erection of buildings for the purpose of greater security against damage by fire. 15 Am. & Eng. Encyclop. Law, 1172; *St. Johns v. McFarlan*, 83 Mich. 72, 20 Am. Rep. 671; *Waupun v. Moore*, 84

Wis. 454, 17 Am. Rep. 446; *Hudson v. Thorne*, 7 Paige, 261, 4 L. ed. 148; *Manchester v. Smythe*, 64 N. H. 380, 5 New Eng. Rep. 62.

Nor will the courts thus interfere at the suit of an individual when such interference is sought solely for the enforcement of the ordinance, and not because of special damage threatening the party asking such interference.

Some of the authorities above cited affirm that to warrant the application of the restraining power to prevent the erection of buildings in violation of a city ordinance the act sought to be restrained must be a nuisance in fact, and not one created solely by statutory enactment or municipal ordinance.

We can see no good reason for the distinction. When it is shown that the erection of a building, if permitted, will be in express violation of a valid municipal ordinance, although it would not be a nuisance *per se*, an individual who shows such fact, and shows, in addition, that its erection will work special and irreparable injury to him and to his property, is entitled to relief by injunction. It is only when the injury is general and public in its effects, and no private right is violated in contradistinction to the rights of the rest of the public, that individuals are precluded from bringing private suits for the violation of their individual rights. *Blanc v. Murray*, 36 La. Ann. 162, 51 Am. Rep. 7; *Wood, Nuisances*, 645 *et seq.*; *McCloskey v. Kreling*, 76 Cal. 511, 23 Am. & Eng. Corp. Cas. 151; *Horstman v. Young*, 13 Phila. 19; *Rand v. Wilber*, 19 Ill. App. 895; *Monroe v. Hoffman*, 29 La. Ann. 651, 29 Am. Rep. 845. In the case at bar it is charged by the averments of the complaint that the threatened act will be in violation of a municipal ordinance, and that it will work special and irreparable injury to the property of the petitioners. They have the right to maintain the action.

There is no misjoinder of parties plaintiff. While the appellants are shown to be the owners of separate and distinct tenements, and thus are not united in interest with each other, there is one object of common interest among all of them. They all claim one general right to be relieved from that which they insist is a nuisance, and which alike affects all of them. Their common danger and common interest in the relief sought authorizes them to join in the action. *Tate v. Ohio & M. R. Co.* 10 Ind. 174, and authorities there cited; *Sullivan v. Phillips*, 110 Ind. 320, 9 West. Rep. 49.

The question as to the validity of the ordinance presents much greater difficulty. There can be no doubt that in this State cities possess ample power to enact and enforce reasonable ordinances to secure protection against fire. In the absence of express statutory authority, the enactment and enforcement of reasonable regulations of this character is recognized as a legitimate exercise of the police power, necessary to the safety of the city. *Baumgartner v. Hasty*, 100 Ind. 575; *Hasty v. Huntington*, 105 Ind. 542, 8 West. Rep. 822; *Clark v. South Bend*,

85 Ind. 276, and authorities cited in each. Also, *Monroe v. Hoffman*, *supra*; *King v. Davenport*, 98 Ill. 305; *Wadleigh v. Gilman*, 12 Me. 403, 28 Am. Rep. 188; *Salem v. Maynes*, 123 Mass. 373; *Troy v. Winters*, 4 Thomp. & C. 256; *McKiddin v. Fort Smith*, 35 Ark. 352; *Klunger v. Bickel*, 117 Pa. 326, 10 Cent. Rep. 381.

In addition to the power thus possessed, clause 32 of § 3106, Rev. Stat. 1881, enumerating the powers conferred upon cities, confers express authority to establish fire limits and prevent the erection of wooden buildings in such parts of the city as the common council may determine. The statutory authority is still further extended by clause 5 of the same section, and by section 3155, known as the "general welfare" clause. Counsel for appellee insist, however, that the enactment of the statutes in question served as a limitation upon the powers of the city; that the powers therein enumerated and more belonged to the city at common law, and that by the statutory enumeration of certain specific powers, all others not thus enumerated are excluded. *Expressio unius est exclusio alterius* has no application. The Statute, in so far as it enumerates common-law powers previously possessed by the municipality is merely declaratory of the common law. But, while it is no doubt competent for the Legislature, in creating such corporations, to deprive them of all common-law police power, and enact that they shall possess and exercise such only as are conferred by statute, such intention of the Legislature will not be inferred simply because some of the common-law powers are enumerated while no mention is made of others. In the exercise of these powers, they may not only prescribe where wooden buildings may and where they may not be erected, but they may undoubtedly exercise a reasonable control over the making of repairs on all buildings, whether of wood or not, and may prevent the use of inflammable or otherwise dangerous material in making such repairs. It can hardly be doubted, that if the owner of a building proposed to make repairs or additions to it of such material, or in such manner as to seriously menace the public safety or to greatly endanger adjacent property, the city authorities have ample power to interfere and prevent the making of such repairs or additions. *Montgomery v. Louisville & N. R. Co.* 84 Ala. 127; *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89.

They also have full power to abate nuisances, and may, if necessary, remove or compel the removal of buildings which have for any cause become nuisances, by getting in such condition that they greatly endanger the public health or safety or the safety of adjacent property, provided the danger inheres in the building and not simply in the use to which the building is put. Here, also, although the statute gives ample authority, they have, without statutory authority, ample power at common law to cause the abatement of the nuisance; and if it cannot be otherwise abated, they may destroy the thing which constitutes or creates it. *Baumgartner v. Hasty*, *supra*, and authorities cited. 13 L. R. A.

They may also remove, or compel the removal of, wooden buildings erected in violation of a valid ordinance, not, necessarily, because the building thus erected is a nuisance, but because its erection was in violation and defiance of the law, and its owner cannot complain when the law is vindicated by its removal. If it were possible to so prepare wood that it would be absolutely non-inflammable, and that a building erected of it would be fire-proof and safer than one erected in the ordinary way, of stone or brick, a building thus erected of wood, in violation of a valid ordinance enacted under clause 32 of section 3106, *supra*, forbidding such erection, would be as much subject to removal or destruction by the authorities as if it were constructed of wood not thus prepared.

It is manifest, therefore, that the right to remove or destroy the building thus erected in violation of an ordinance does not grow out of the fact that it is a nuisance, as a building made out of such material, if otherwise skillfully and properly constructed, would be as safe or safer than one built in the ordinary way, of stone and brick, and could not be a nuisance. As is said in *Baumgartner v. Hasty*, *supra*: "A municipal corporation has no power to treat a thing as a nuisance which cannot be one." See also *Wood, Nuisances*, 823; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

The power in such case to compel the removal of the building grows solely out of the fact that its erection was in violation of the ordinance.

The discovery of a process by which wood could be made non-inflammable, and in all respects as safe to be used in the construction of buildings as stone or brick or iron, would end the common-law power of the city to prohibit the erection of wooden buildings, or its power under the general welfare clause, while under the statute that power would still exist simply because the material was wood, and not at all because it was dangerous. So with the power to remove buildings already erected. There is no express legislation on the subject, and such powers as the city has are its common-law powers, reinforced by the general welfare clause of the Statute.

As above shown, a building erected in violation of a valid ordinance may be removed without reference to its character; but with this exception cities can only condemn as nuisances and compel the removal of buildings which are in themselves for some reason dangerous or hurtful. The author of a valuable work on the law of nuisances states the law as follows: "The power to abate nuisances does not warrant the destruction of valuable property which was lawfully erected; or anything which was erected by lawful authority. It would indeed be a dangerous power to repose in municipal corporations to permit them to declare, by ordinance or otherwise, anything a nuisance which the caprice or interest of those having control of its government might see fit to outlaw, without being responsible for all the

consequences; and even if such power is expressly given by the Legislature, it is utterly inoperative and void unless the thing is in fact a nuisance, or was created or erected after the passage of the ordinance and is in defiance of it." Wood, Nuisances, 828. See also the opinion of Justice Miller in *Yates v. Milwaukee*, *supra*.

This may serve to indicate the scope of the common-law powers of the city in this direction, and the additional powers given by the Statute. At common-law, they are only authorized to interfere with the erection or repair of buildings far enough to prevent the doing of that which from its nature would have a tendency to create or enhance danger.

There is in this State no statute purporting to give to cities any power to prevent the repair of wooden buildings. If they have such power, it is derived either from the general welfare clause, or it is an incident of their common-law police power. The section of ordinance in question, if valid, absolutely prohibits the altering or repairing of all frame or wooden buildings within the fire limits, in all cases where the cost of altering or repairing will equal or exceed \$300. It makes no difference what material is to be used in making the repairs, or what the effect may be on the building. Repairing with fire-proof material is equally prohibited, with repairs from dangerous and inflammable material. A repair which would tend to diminish danger falls under the ban equally with those the tendency of which would inevitably increase it. It makes no difference whether the building was erected before or after the establishment of fire limits, or what its value is. Its value may be trifling. It may be a mere wreck or remnant which \$300 would practically rebuild, or it may be valuable, worth many thousands of dollars, and the cost of the repairs although \$300 or more, relatively insignificant. It may also be that no other building is near it to be affected or endangered.

As we have heretofore said, we do not doubt that cities may exercise a reasonable control over the making of repairs to buildings, and may prevent alterations and repairs which would create nuisances. This they can do even in the absence of statutory authority, in the exercise of the police power. And where fire limits are established, they may doubtless prevent the repair of a wooden building within such limits, when to repair would practically be to rebuild, whether such repairs would create a nuisance or not. They cannot, however, at least without express statutory authority, enforce a general sweeping prohibition of all repairs.

Whether a statute attempting to confer such power would be constitutional we need not, of course, decide in this case; but a consideration of some of the possible effects of such an ordinance may well suggest a query of that character.

To repair a building means simply to restore it to a sound condition. The natural and probable effect of repairing, if carefully done, would be to diminish danger, instead of to increase it. Certainly, a building so

much injured or otherwise out of repair as to require \$300 to repair it is more likely to endanger the public and surrounding property than if put in proper repair. If it is lawful to maintain it without repairs, how can the police power afford any jurisdiction for a refusal to allow its owner to remedy the effects of accident or decay and restore it to a sound condition? To hold that this was a proper exercise of the police power would be to prevent entirely the use of that power which is designed to protect society and prevent the doing of things inimical to its well being. Such an ordinance might in many cases compel the owner of valuable property to stand by and allow it to become valueless and a nuisance without the power to prevent it. The accidental destruction or removal of a roof which it would cost \$300 to replace might thus reduce valuable property to the condition of a mere heap of material. It is not simply a restraint on a noxious or improper use of property by its owner, but prohibits him doing that which alone will in many cases save his property from becoming a noxious and dangerous thing. Instead of restraining him from so using it as to make it pernicious to his neighbors, it would compel him by inaction to allow it to become and remain so. It might unquestionably in many cases amount to a taking of the property of the citizen without due process of law, and without the sanction of that overriding necessity by virtue of which at times the rights of the individual may be sacrificed for the public good.

Re Jacobs, 98 N. Y. 98, 54 Am. Rep. 636, Justice Earl, speaking for the court, says: "The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated. It is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence any law which destroys its value or takes away any of its essential attributes, deprives the owner of his property. The constitutional guaranty would be of little worth if the Legislature could, without compensation, destroy property, or its value, deprive the owner of its use, deny him the right to live in his own house or to work at any lawful trade therein," etc.

In *Pumpelly v. Green Bay & M. Canal Co.*, 80 U. S. 13 Wall. 166-177, 20 L. ed. 557-560, Miller, J., says: "There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the Constitution. But the claim is made that the Legislature could pass this Act in the exercise of the police power which every sovereign State possesses. That power is very broad and comprehensive, and is exercised to promote the health, comfort, safety and welfare of society. Its exercise in extreme cases is frequently justified by the

maxim: *Salus populi suprema lex est.* It is used to regulate the use of property by enforcing the maxim *sic utere tuo ut alienum non laedas.* Under it the conduct of an individual and the use of property may be regulated so as to interfere to some extent with the freedom of the one and the enjoyment of the other; and in cases of great emergency, engendering overruling necessity, property may be taken or destroyed without compensation, and without what is commonly called due process of law. The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the Constitution. When it speaks, its voice must be heeded. It furnishes the supreme law, the guide for the conduct of legislators, judges, and private persons, and so far as it imposes restraints, the police power must be exercised in subordination thereto," etc.

In *Potter's Dwaris* on Statutes, 458, it is said that, "the limit to the exercise of the police power can only be this, the legislation must have reference to the comfort, the safety or the welfare of society."

In *Watertown v. Mayo*, 109 Mass. 315-319, Colt, J., says: "The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health or protection against a threatened nuisance." In *Slaughter House Cases*, 83 U. S. 16 Wall. 36-87, 21 L. ed. 394-412, Field, J., says: "Under the pretense of prescribing a police regulation the State cannot be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgement," etc.

In *Coe v. Schultz*, 47 Barb. 64, a learned judge speaking of the constitutional limitations upon the police power says: "I am not willing to concede that the Legislature can constitutionally declare an act or thing to be a common nuisance which palpably, according to one present experience or information, is not and cannot be under any circumstances a common nuisance, by the common-law definitions or common-law decisions. . . . Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the Legislature is not final or conclusive."

The author of *Tiedeman's Limitations of Police Power* says: "Sec. 122: . . . An arbitrary interference by the government, or by its authority with the reasonable enjoyment of private lands is a taking of private property without due process of law, which is inhibited by the Constitution. . . . One can lawfully make use of his property only in such a manner as that he will not injure another. Any use of one's land to the hurt or annoyance of another is a nuisance and may be prohibited. . . . Section 122 a:

. . . But, the police power of the Legislature in reference to the prohibition of nuisances is limited to the prohibition or regulation of those acts which injure or otherwise interfere with the rights of others. The Legislature cannot prohibit a use of lands which works no hurt or annoyance to the

neighbors or to adjoining property. The injurious effect of the use of the land furnishes the justification for the interference of the Legislature. The legislative prohibition or regulation of the use and enjoyment of one's private property in land is in violation of constitutional principles, which is not confined to the prevention of a nuisance. A certain use of lands, harmless in itself, does not become a nuisance because the Legislature has declared it to be so."

This author also tersely and correctly states the full scope of police regulations, when confined within their proper limits, substantially as follows: "To compel everyone to so use his own, and so conduct himself as not to injure others, or infringe upon their rights."

Tried by these tests, the second section of the ordinance in question, in so far as it relates to the repair of wooden buildings, is clearly invalid. It arbitrarily attempts to take from the owner of property all power to make repairs necessary for its preservation, or necessary for its enjoyment, regardless of the effect which such repairs may have upon the public, upon adjacent property or upon the rights of others, and applies with equal force to buildings detached and remote from all others, as to those in immediate proximity to others, and not only to repairs which would tend to create danger, but also to those which would serve to remove or diminish it.

It will not be contended by anyone that the establishment of fire limits will justify the condemnation and removal of wooden buildings previously constructed, simply because they are wooden buildings. Before their destruction or compulsory removal can be justified, they must become nuisances. Yet this ordinance by forbidding repairs, would accomplish by indirection what could not be done directly. It would first compel the owner to allow it to become and remain a nuisance, and then punish him for so doing by destroying or removing his property.

We have not been able to find an authority anywhere which would sustain appellants' position in this case. The case of *Brady v. Northwestern Ins. Co.*, 11 Mich. 425, cited by them, holds that under the charter of the City of Detroit, which expressly authorized the enactment of an ordinance forbidding repairs to wooden buildings, an ordinance which forbade such repairs without the consent of the common council was valid. That case in two essential particulars differed from the case at bar: (1) the charter gave express authority to enact the ordinance; and (2) the ordinance then in question was not prohibitory, but allowed repairs when consent was first obtained of the common council. The opinion was by a divided court; Campbell, J., filing a strong dissenting opinion holding the ordinance invalid as applied to a building erected before its enactment, notwithstanding the charter.

The case of *King v. Davenport*, 98 Ill. 805, 88 Am. Rep. 89, was also a case where the charter of the City of Jacksonville conferred express authority, and the ordinance in question only forbade the building or repairing of buildings within the fire limits

with other than fire-proof material. A party removed an old shingle roof from her building and replaced it with a new shingle roof. Failing to remove it upon notice, the city marshal removed it. It was held that under the express authority conferred by the charter the ordinance was valid. The ordinance in that case, instead of prohibiting repairs, simply prescribed the material that might be used in making repairs. These two cases are the only ones cited by the appellants upon the question of the right to prohibit repairs, although many others are cited upon the general power of the city in the establishment of fire limits, and their power to prohibit the erection of buildings. Other authorities bearing upon the right to prohibit, or to regulate, repairs are as follows:

Horr & Bemis, on Municipal Police Ordinances, page 214, says: "The making of ordinary repairs to existing buildings cannot be prohibited. Reshingling a building for instance, is an ordinary repair." See also, to the same effect, *Reg. v. Howard*, 4 Ont. 377; *Brown v. Hunn*, 37 Conn. 383; *Stewart v. Com.* 10 Watts, 307.

The case of *Ex parte Fiske*, 72 Cal. 125, was a case where an ordinance prohibited the alteration or repair of wooden buildings within the fire limits without permission in writing from the fire wardens. The court discusses at some length the provision that certain officers may grant permission to make repairs, and says: "It is clear, however, that a literal compliance with a regulation prohibiting the repairing of a wooden building might work, in some instances, useless hardships. The repair of a leaking roof or broken window would be necessary to the comfort and health of a family, without enhancing the danger which the framers of the ordinance sought to guard against, and repairs of a more extensive character might be made to particular houses, standing in particular localities, without increasing the fire risks. And it is equally clear that no general rule could be established beforehand that would meet the emergencies of individual cases. Therefore, the power to give relief in particular instances is conferred on certain officers; and it is not to be presumed that they will exercise it wantonly, or for purposes of profit or oppression." The court

concludes that the conferring of the discretionary power on the fire wardens was valid and sustained the ordinance.

The case of *Montgomery v. Louisville & N. R. Co.*, 84 Ala. 127, was a case where an ordinance prohibited repairing the roofs of buildings within the fire limits with wood or other inflammable material. Like *King v. Davenport*, *supra*, it did not prohibit making repairs, but forbid the use of certain material in making them.

In *State v. Schuchardt*, 42 La. Ann. 49, it is held that a legislative mandate, authorizing a municipal corporation to prevent the reconstruction in wood of old buildings within certain limits, does not include the mandate to prevent the repairing with shingles the roof of buildings originally covered with shingles. It will be observed on examining these cases with others that more or less directly bear upon the question involved, that there is wide diversity in the interpretation given to the law in the different courts. Some go so far as to deny the power to interfere at all with the making of ordinary repairs. The weight of authority, however, is clearly with these cases which recognize the power of municipal corporations to regulate the making of repairs to buildings, and treat it as a legitimate exercise of the police power, but none of them go to the extent of sustaining the power of absolutely prohibiting repairs, as is sought to be done in this case. The complaint contains no averments showing the value of the building proposed to be repaired. It is possible that the part remaining will be of small value, and that this is a case where to repair will mean a substantial rebuilding of a structure. If so, however, it would have been easy to show such fact by special averment. As it is, we are unable to say from any averment of the complaint that the proposed repairs, costing \$800 or more, may not be very small compared with the value of that portion of the building which remains, and that to restore or rebuild it may not be to preserve valuable property and to prevent instead of create a nuisance.

In our opinion, the circuit court did not err in sustaining the demurrer to the complaint.

Judgment affirmed, with costs.

WISCONSIN SUPREME COURT.

Frederick BROWNELL, *Appt.*,

v.

Harris R. DURKEE *et al.*, *Repts.*

(....Wis....)

An officer cannot forcibly take personal property from its owner, who has

acquired peaceable possession of it after the officer has levied on it as the property of the third person.

(March 17, 1891.)

APPEAL by plaintiff from a judgment of the Circuit Court for Rock County in favor of defendants in an action brought to re-

NOTE.—Right to defend property.

A sheriff, in the execution of a writ of attachment, is not authorized to take personal property into his custody where it is in the possession of a third person; in such case he can only attach the property by leaving a certified copy of the writ, and a notice specifying the property attached, with

the person having the possession of the same. *Lewis v. Birdsey*, 19 Or. 164.

The right of self-defense extends to the protection of property, and to its recovery after it is taken, where it can be re-taken without undue violence. *State v. Elliot*, 11 N. H. 540. See 1 Wharton, Cr. L. 8th ed. § 102; *Desty*, Cr. L. § 81a.

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cover damages for an assault upon plaintiff and alleged wrongful ejection of him from a certain railroad car. *Reversed.*

The facts are stated in the opinion.

Messrs. Fethers, Jeffris & Fifield, with **Mr. J. F. Lyon**, for appellant:

The owner may lawfully retake the possession of goods unlawfully taken or detained from him wherever he finds them, provided he does not thereby endanger the public peace, etc. Cooley, Torts, pp. 50-56, and cases cited.

It is held in Massachusetts that one may even resort to force to retake his property.

Com. v. Donahue, 2 L. R. A. 623, 148 Mass. 529.

A man is justified in using force to protect his property against a person who attempts to take possession of it wrongfully.

Filkins v. People, 69 N. Y. 101.

The owner of property is justified in resisting the attempt of an officer to take property under process running against another. And if the officer use force upon the owner, the officer is guilty of an assault and battery and is liable to the owner in damages.

Elder v. Morrison, 10 Wend. 128; *Pike v. Colvin*, 67 Ill. 227; *Wentworth v. People*, 5 Ill. 550; *State v. Johnson*, 12 Ala. 840; *People v. Clements*, 18 West. Rep. 760, 68 Mich. 655; *Com. v. Kennard*, 8 Pick. 183; *Buck v. Colbath*, 70 U. S. 3 Wall. 334, 18 L. ed. 257; *Filkins v. People* and *Elder v. Morrison*, *supra*.

Even under the Vermont rule, in view of the undisputed testimony in this case, plaintiff was entitled to a verdict for at least his actual damages.

Merritt v. Miller, 13 Vt. 416. See *Sims v. Reed*, 12 B. Mon. 51.

Messrs. John B. Simmons and Charles S. French, for respondents:

A mere temporary interference with the property, not going to the extent of removing it from the place of storage selected by the officer, nor withdrawing it from his control, does not amount to a change of possession nor in any way affect the lien of the attachment.

Harriman v. Gray, 108 Mass. 229; *State v. Buchanan*, 17 Vt. 573; *Faris v. State*, 3 Ohio St. 159.

The question of the rights of an officer in the execution of an attachment, when directed to levy upon property the title to which is at the time or afterward becomes the subject of controversy, first came up for adjudication in this country, in *State v. Downer*, 8 Vt. 424.

In that case the court decides the better and safer and only practicable rule to be that, whenever the question of property is so far doubtful that the creditors or officers may be supposed to act in good faith in making the attachment the owner cannot even justify resistance, but must yield possession and resort to his remedy by action.

See also *State v. Buchanan*, *supra*; *State v. Fifield*, 18 N. H. 84; *State v. Richardson*, 38 N. H. 208; *Faris v. State*, 3 Ohio St. 159; 2 Am. & Eng. Encyclop. Law, 792, note 2, and cases cited; *Harriman v. Gray*, 108 Mass. 229.

It is the duty of the officer to make the levy, and in doing so to overcome all resistance, and it is just as much his duty to retain it against opposition, until the law has settled the disposition to be made of it.

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1 Wade, Attachm. §§ 181, 248; *State v. Fifield* and *State v. Downer*, *supra*; *Marshall v. Hoemer*, 4 Mass. 63; *Marsh v. Gold*, 2 Pick. 285; *Chamberlain v. Beller*, 18 N. Y. 115; *Long v. Neville*, 86 Cal. 455; *Com. v. Van Dyke*, 57 Pa. 84.

This is also the rule in Wisconsin.

Grace v. Mitchell, 31 Wis. 533. See also *Halpin v. Hall*, 42 Wis. 176; *Webber v. Blunt*, 19 Wend. 188; *Connelly v. Walker*, 45 Pa. 449; *Winter v. Kinney*, 1 N. Y. 865.

It is even held that the officer is not excused by his knowledge that the attachment was obtained from an improper motive.

Wakefield v. Fairman, 41 Vt. 339; *Bond v. Ward*, 7 Mass. 123.

If it be his duty as an officer to levy, then his act is not a mere naked trespass, but it is an act *colore* or *virtute officii*, and upon this principle the sureties upon his official bond are liable, and likewise he and they are liable for the acts of his deputies.

1 Wade, Attachm. § 241, and cases cited; 2 Freeman, Executions, § 254, and cases cited; *Rogers v. Wright*, 21 Wis. 684; *Turner v. Skason*, 137 Mass. 191; *Lammon v. Feuster*, 111 U. S. 17, 28 L. ed. 337; *People v. Schuyler*, 4 N. Y. 173; *People v. Mercereau*, 74 Mich. 637.

Cole, Ch. J., delivered the opinion of the court:

This is an action brought to recover damages for the wrong of the defendants in assaulting the plaintiff on or about the 15th of December, 1885, and forcibly ejecting him from a railroad car while he was unloading coal that belonged to him. The defendants justify their acts by answering that at the time the defendant Harris R. Durkee was a constable, and had a writ of attachment in favor of the other two defendants against one Price and one Paul, and that he levied on the coal in the car mentioned as the property of Price and Paul, in good faith, and without malice, and exercised only so much force as was necessary for the purpose of ejecting the plaintiff from the car where the coal was. It appears that the plaintiff, shortly before the 15th of December, ordered a car of coal, which he expected to sell to Price. The car arrived at Geneva, consigned to him. Price paid the freight on the coal, but did not pay for the coal, and it was not delivered to him by the plaintiff. The attachment was levied on the coal in the car, while the car was standing on the side track of the company at Geneva, on the 15th of December, as the property of the defendants in the attachment. The railroad agent was informed of the attachment, and was asked by the constable to seal the car up, and let it stand where it was, for him, temporarily. The next day the plaintiff notified the defendants that Price did not own the coal, but that it belonged to him. On the morning of the 17th of December the plaintiff went to the freight depot, saw the agent about the coal, and the agent formally opened and delivered the car of coal to him. The plaintiff thus took quiet and peaceable possession of the car, and was engaged in removing the coal therefrom, when the constable arrived on the ground, forbade him

from interfering with the coal, and demanded possession of the car. This being refused, he forcibly ejected the plaintiff from the same, which is the wrong complained of.

These material facts are clearly established by the evidence, and are really not disputed. The possession of the coal, after the seizure on the attachment, must be deemed to have been constructively in the constable, as he had left the car, with its contents, where he found it, though in charge of the railroad company. But he had taken as complete possession of the coal as was practicable, unless he removed it from the car. The constable had such possession and special interest in the coal by virtue of his levy that he could have maintained an action against anyone who interfered with it, had the coal been the property of the defendants in the attachment. It seems to us there can be no doubt as to the correctness of this proposition. But the coal belonged to the plaintiff. It had been ordered by him, and was consigned to him, and was afterwards adjudged to be his property in an action brought to recover the value thereof. But after the seizure, as we have said, he acquired peaceable possession of the coal, and held such possession when the constable deprived him of it in a forcible manner.

The important question in the case is as to the justification of the officer. The other defendants were present at the time, aiding and abetting him in the execution of the writ. The learned counsel for the defendants argues and insists that, as the officer was required by his writ to levy upon the coal the title to which was in dispute or in doubt, and he being indemnified therefor, he was in duty bound to make the levy and hold the property until the question of title was settled, or the property otherwise released; and that an officer, while so acting, may not be lawfully interfered with or resisted by the rightful owner, whether such owner be the defendant in the attachment or not; but that the officer had the right to overcome such resistance, and keep or regain possession by the use of such force as might be necessary for the purpose. The learned circuit court doubtless adopted this view of the law, as it directed a verdict for the defendants.

The counsel for the plaintiff insists that the court erred in thus directing the verdict for the defendants, because, he says, it was a question of fact for the jury to determine whether the defendants were acting in good faith in seizing the coal as the property of Price and Paul, and in taking it from the possession of the plaintiff; also whether the defendants used greater force than was necessary in ejecting the plaintiff from the car; and further, that, under the undisputed testimony, the plaintiff was entitled to recover his actual damages for the wrongful act of the defendants in ejecting him from the car. We shall spend no time in considering the first two questions. As it is said by the opposing counsel, no claim was made on the trial that the evidence raised any doubts on these points, and there was no suggestion or request made that they should be sub-

mitted to the jury. The judgment must be reversed for the reason which we will now proceed to state. As we have said, the important question is, Was the officer justified or protected in forcibly taking possession of the coal as against the plaintiff, who was the real owner? The counsel for the plaintiff contends he was not so justified or protected. He says, notwithstanding the absolute right of the officer to proceed and execute the writ, still, if he takes the property of the plaintiff on a process against Price and Paul, he is none the less a trespasser upon the rights of the plaintiff, and, if a trespasser, he acquired no property in the thing attached as against the real owner. The plaintiff, he says, may have his action, and recover the value of the property taken, as was done in this case; or if, after the seizure on the attachment, the plaintiff can peaceably obtain the possession of the attached property, he may take it, and thus subject himself to an action at the suit of the officer; but that the officer has no right in law to dispossess the owner by using force for that purpose, and is not protected in doing so. These different positions of counsel as to the duty and liability of an officer attaching property, though diametrically opposed, are sustained by high authority. There is a serious conflict of judicial opinion on the subject, and we have to make a choice to some extent between the rules laid down in opposing decisions. The courts of Vermont, New Hampshire and Ohio support the contention of the defendants, while those in Massachusetts, New York, and Illinois sustain the plaintiff's position. See *State v. Downer*, 8 Vt. 424; *State v. Buchanan*, 17 Vt. 573; *State v. Fyfield*, 18 N. H. 34; *State v. Richardson*, 38 N. H. 208; *Faris v. State*, 3 Ohio. St. 159. *Contra: Com v. Kennard*, 8 Pick. 133; *Elder v. Morrison*, 10 Wend. 128; *Wentworth v. People*, 5 Ill. 550.

But the rule which commends itself to our judgment as the most salutary and reasonable is to hold that if, after seizure on attachment against a third party, the rightful owner can quietly and peaceably obtain possession of the property, he may retain such possession, and the officer will not be justified in using forcible means to regain possession. If the officer wishes to test the right of the owner, he should bring an action for that purpose. The courts which adopt the Vermont rule think there are strong grounds of public policy, where the question of property is doubtful, that the owner should resort to his remedy at law to settle the question in the courts. There is, doubtless, force in this consideration. Parties should not be permitted to resort to force to vindicate their rights where peaceable remedies exist. But the question can be as well determined in an action brought by the officer as when it is brought by the owner. The courts all admit that due regard should be had to the rights which the owner has to his property, and that these rights should be protected and secured as far as possible. Now, why should the owner then, when he has possession of that which is his own, be required to give it up to an officer who comes

with a process, not against him, but against a third party, with whom he has no connection, and demands possession? See *Gilman v. Williams*, 7 Wis. 829 (side page). We can perceive no sufficient reason, founded either in law or on public policy, for holding that the owner of personal property may not insist upon his rights, and refuse to surrender the same to an officer, because the latter has attached it on a writ against a third party. The creditor or officer is not without legal redress to test the question of title to the property. It is admitted that the officer is a trespasser if he seizes property not belonging to the defendant in the attachment. Why should his unlawful act be regarded with more favor than the rights of the real owner? True, it is said, the owner of property seized or attached on a process against another has legal remedies by an action, and therefore he ought not to be allowed to protect his goods with a strong hand, for this power may be abused so as to cover the property of the debtor, and the creditor

may fail to collect his debt. But, as we have said, the officer, after a levy, may bring an action against anyone who interferes with his possession, and thus settle all rights of property. See *Merrit v. Miller*, 13 Vt. 416. There is no hardship in this rule. It is surely unnecessary to allow the officer to resort to force and violence to regain possession of attached property, where the law affords him an adequate legal remedy to enforce his rights. To allow him to use force under such circumstances is certainly not essential for the protection of the officer, nor to vindicate the authority of the law. But the question is so fully considered and discussed in the cases to which we have referred that no further remarks upon the subject are called for.

We think the circuit court erred in directing a verdict for the defendants, and that *the judgment of the Circuit Court must be reversed*, and a new trial ordered.

Rehearing denied.

ARKANSAS SUPREME COURT.

Biscoe HINDMAN et al., Appts.,

v.

Laura E. B. O'CONNER.

(....Ark....)

1. A judicial sale of minors' property to their step-grandmother will, at their request, be set aside when, after the death

of their mother and at her request the step-grandmother took charge of them and was virtually constituted their guardian by the probate court and had before the sale at their request taken charge of the property and taken up her residence thereon, although the management of the sale was by law imposed on a stranger, the curator of the estate, and the purchaser acted fairly and in good faith.

2. The five years' Statute of Limitations

NOTE.—Confidential relations between parties.

The rule of the civil law is practiced in our courts of equity, and applied to trustees, agents, and generally to all persons who have been employed in a confidential character in relation to property. *Saltmarsh v. Beene*, 4 Port. (Ala.) 283, 30 Am. Dec. 528; *Parkist v. Alexander*, 1 Johns. Ch. 397, 1 L. ed. 186.

The rule holds good as to all advantages gained by means of necessary confidence, growing immediately out of the legal relations of the parties as attorney and client, guardian and ward, etc. *Marvin v. Bennett*, 26 Wend. 183.

A fundamental doctrine of equity is that a trustee can gain no advantage to himself, to the detriment of those for whom he holds a trust. The object of the rule is to secure fidelity on the part of the trustee, and to preserve the interest of those whose rights are confided to his care. *Wright v. Ross*, 36 Cal. 432; *Parkist v. Alexander*, *supra*; *Holridge v. Gillespie*, 2 Johns. Ch. 33, 1 L. ed. 288; *Van Horne v. Fonda*, 5 Johns. Ch. 409, 1 L. ed. 1123; *Slade v. Van Vechten*, 11 Paige, 22, 5 L. ed. 42.

Personal interests cannot conflict with fiduciary duty.

No one having duties to discharge of a fiduciary nature shall be allowed to enter into engagements in which he has, or can have, a personal interest, conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. *Gardner v. Ogden*, 23 N. Y. 348; *Mitchoud v. Glrod*, 45 U. S. 4 How. 503, 11 L. ed. 1078; *Campbell v. Johnston*, 1 Sandf. Ch. 152, 7 L. ed. 276. See note to *Manhattan Cloak & S. Co. v. Dodge* (Ind.) 6 L. R. A. 389.

13 L. R. A.

This principle applies to the relation of trustee or agent. *Oloott v. Tignor* R. Co. 27 N. Y. 565; *Davoue v. Fanning*, 2 Johns. Ch. 252, 1 L. ed. 365; *Moore v. Moore*, 4 Sandf. Ch. 48, 7 L. ed. 1018. See *Ward v. Smith*, 3 Sandf. Ch. 522, 7 L. ed. 908; *Tyler v. Sanborn* (Ill.) 4 L. R. A. 218.

A purchase by the testamentary guardian of one of the devisees will not be rendered valid by the fact that the ward had another guardian, appointed by the surrogate for the express purpose of representing his interests in that particular transaction (*Brasber v. Van Cortlandt*, 2 Johns. Ch. 242, 1 L. ed. 382); this rule applied in *Bostwick v. Atkins*, 3 N. Y. 60.

Party cannot purchase property for his own benefit where he has a duty to perform in relation to it.

It is a rule in equity that no party is permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account, and for his individual use. *Voorhees v. Presbyterian Church*, 8 Barb. 142, 5 How. Pr. 65; *State v. McKay*, 43 Mo. 609; *Williams v. Townsend*, 31 N. Y. 415; *Currie v. Cowles*, 6 Bosw. 462; *Colburn v. Morton*, 3 Keyes, 305, 26 How. Pr. 160, 5 Abb. Pr. N. S. 315, 1 Trans. App. 149, 1 Abb. N. Y. App. 884; *Chase v. Hogan*, 6 Bosw. 450; *Cram v. Mitchell*, 1 Sandf. Ch. 256, 7 L. ed. 330, 3 N. Y. Legal Obs. 166; *Iddings v. Bruen*, 4 Sandf. Ch. 263, 7 L. ed. 1098; *Abbot v. American Hard Rubber Co.* 33 Barb. 593, 21 How. Pr. 301; *South Baptist Soc. v. Clapp*, 13 Barb. 47; *Boardman v. Flores*, 37 Mo. 561; *Dobson v. Racey*, 3 Sandf. Ch. 62, 7 L. ed. 770; *Blake v.*

applies to an action to set aside the confirmation of a judicial sale of minors' lands at which their guardian had become the purchaser, notwithstanding the ground upon which the claim to relief is based is fraud.

3. The record must show that the minor resided within the county in which the court was held which attempted to remove his disability under the authority conferred by Act of February 18, 1869, to render the order of removal valid.

(July 3, 1891.)

APPEAL by complainants from a decree of the Circuit Court for Phillips County in favor of defendant in a suit brought to set aside a judicial sale of land. *Reversed in part. Affirmed in part.*

The facts are stated in the opinion.

Mrs. U. M. Rose, G. B. Rose and John C. Palmer, for appellants:

The rights of the beneficiaries in trust estates have always been carefully guarded by the laws of this State, particularly in regard to transactions involving titles to land.

Imboden v. Hunter, 23 Ark. 623.

A trustee "in the strict sense of the word" is "a person who holds property upon trust."

Rapalje & Lawrence, Law Dict.

The probate court decreed that O'Conner and his wife should assist in the management of complainants' property. This made them trustees in the strict sense of the term.

The guardian cannot purchase the property of his ward, either in his own name or by the intervention of a third person.

De Felice, La Legislation Universelle, Tome 18, pp. 480, 486.

2 *Domat*, Civil Law, §§ 2, 8.

"Trustee" is also used in a wide and perhaps inaccurate sense, to denote that a person has the duty of carrying out a transaction, in which he and another person are interested, in such manner as will be most for the benefit of the latter, and not in such way that he himself might be tempted, for the sake of his personal advantage, to neglect the interests of the other.

2 *Rapalje & Lawrence*, Law Dict. 1802.

This is the sense in which the word is used in the rule forbidding trustees to buy.

See *Jones v. Arkansas Mech. & A. Assn.* 38 Ark. 26; *West v. Waddill*, 33 Ark. 587; *Lewin*, Tr. p. 484; *Underhill*, Tr. p. 484; *McGaughey v. Brown*, 46 Ark. 32; *Wright v. Walker*, 30 Ark. 44; *Livingston v. Cochran*, 33 Ark. 801; *Black v. Keenan*, 5 Dana, 570; *Brockett v. Richardson*, 61 Miss. 766.

The fact that the sale was conducted by the curator can make no difference.

Powell v. Powell, 80 Ala. 11.

Whether the sale be public or private, the trustee is equally disabled from becoming a purchaser of the trust estate.

Davous v. Fanning, 2 Johns. Ch. 259, 1 L. ed. 371.

The court below fell into the error of supposing that the plaintiffs must show some actual fraud in order to sustain their complaint.

West v. Waddill, *supra*; *Ex parte James*, 8 Ves. Jr. 347; *Aberdeen R. Co. v. Blaikie*, 2 Macq. H. L. Cas. 461; *Gardner v. Ogden*, 23

Buffalo Creek R. Co. 56 N. Y. 491; *Downs v. Richards*, 4 Del. Ch. 433; 2 Pom. Eq. Jur. 453; *Moore v. Moore*, 4 Sandf. Ch. 37, 7 L. ed. 1014; *Burbans v. Van Zandt*, 7 N. Y. 523; *Ringo v. Binns*, 35 U. S. 10 Pet. 299, 9 L. ed. 626; *Fisk v. Sarber*, 6 Watts & S. 18; *Jewett v. Miller*, 10 N. Y. 402; *Rogers v. Rogers*, Hopk. Ch. 515, 2 L. ed. 507; *Hamilton v. Wright*, 9 Clark & F. 111; *De Caters v. De Chaumont*, 3 Paige, 178, 3 L. ed. 105; *Tanner v. Elworthy*, 4 Beav. 487; *Carter v. Palmer*, 1 Dru. & W. 722; *York Bldgs. v. Mackenzie*, 8 Bro. P. C. 42; *Anderson v. Lemon*, 8 N. Y. 234; *Van Epps v. Van Epps*, 9 Paige, 237, 4 L. ed. 632; *Terwilliger v. Brown*, 44 N. Y. 241, 59 Barb. 12; *Olcott v. Tioga R. Co.* 27 N. Y. 565; *Hawley v. Cramer*, 4 Cow. 717; *Slade v. Van Vechten*, 11 Paige, 21, 5 L. ed. 42; *Torrey v. Bank of Orleans*, 9 Paige, 644, 4 L. ed. 553; *Davous v. Fanning*, 2 Johns. Ch. 252, 1 L. ed. 368.

This rule was not limited in its application to a particular class of persons, such as trustees, guardians, or solicitors, but went much deeper, and the rule was one of universal application, affecting all persons who came within its principle, which was that no party could be permitted to purchase an interest, where he had a duty to perform which was inconsistent with the character of purchaser. *Dickinson v. Codwise*, 1 Sandf. Ch. 223, 7 L. ed. 209; *Marshall v. Carson*, 38 N. J. Eq. 254; *Fulton v. Whitney*, 66 N. Y. 556.

Any person placed in a situation of trust or confidence in reference to the subject of the sale, or who has a duty to perform which is inconsistent with the character of a purchaser, cannot be a purchaser on his own account. *Williams v. Townsend*, 31 N. Y. 415.

If an agent employed to sell becomes himself the purchaser, or the agent of another; or if he be an agent to buy, and he becomes himself the seller, or the agent of another in making the sale, the principle is *R. A.*

pal may avoid the sale or purchase in equity. *New York Cent. Ins. Co. v. National Prot. Ins. Co.* 20 Barb. 471; *Reed v. Warner*, 5 Paige, 650, 3 L. ed. 869; *Van Epps v. Van Epps*, *supra*; *Barker v. Marino*, Ins. Co. 2 Mason, 399; *Bennett v. Pratt*, 4 Denio, 275.

The law will not permit a trustee to act in the double capacity. *Wilcox v. Smith*, 26 Barb. 362; *Bayer v. Phillips*, 17 Abb. N. C. 430; *Gardner v. Ogden*, 22 N. Y. 337; *Forbes v. Halsey*, 26 N. Y. 53; *Joyner v. Farmer*, 78 N. C. 200; *New York Cent. Ins. Co. v. National Prot. Ins. Co.* 14 N. Y. 91; *Torrey v. Orleans Bank*, 9 Paige, 633, 4 L. ed. 859.

Trustee cannot purchase the objects of the trust.

The trustee of property cannot become its purchaser. He has a duty to perform in regard to it which is entirely inconsistent with his assuming that character. *Iddings v. Bruen*, 4 Sandf. Ch. 263, 7 L. ed. 1068; *Dobson v. Racey*, 3 Sandf. Ch. 60, 7 L. ed. 770; *Moore v. Moore*, 4 Sandf. Ch. 37, 7 L. ed. 1014; *Cram v. Mitchell*, 1 Sandf. Ch. 251, 7 L. ed. 318.

Trustees are never permitted, without the aid of the court, to buy the property which they hold as such. *Carson v. Marshall*, 37 N. J. Eq. 215; *Staats v. Bergen*, 17 N. J. Eq. 237, 554; *Fulton v. Whitney*, 66 N. Y. 543; *Bennett v. Austin*, 31 N. Y. 308, 332.

A trustee cannot purchase an outstanding title and hold it for his own use, against his *cestui que trust*, even though he purchases at a judicial sale under a title superior to that conveyed to him as trustee. *Roberts v. Moseley*, 64 Mo. 511; *Jewett v. Miller*, 10 N. Y. 405; *Kellogg v. Wood*, 4 Paige, 579, 3 L. ed. 569.

A trustee acting in his fiduciary character, and without the intervention of the beneficiary, cannot sell the trust property to himself nor buy his own property from himself for the purposes of the trust. *Fox v. Mackreth*, 3 Bro. Ch. 400, 1 White & T. Lead. Cas. Eq. 4th Am. ed. 183, 213, 237; *Lewis v.*

N. Y. 827; *New York Cent. Ins. Co. v. National Prot. Ins. Co.* 14 N. Y. 91; *Mechem*, Ag. § 463; 1 Story, Eq. Jur. § 322; 2 Sugd. Vend. p. 687; *Michoud v. Girod*, 45 U. S. 4 How. 554, 11 L. ed. 1099; *Million v. Taylor*, 38 Ark. 428; *Gillespie v. Holland*, 40 Ark. 32.

If there were no more in the order of the probate court than the appointment of the appellee as the adviser of the curator in the management of the property, that alone would suffice to prevent her from buying the trust property.

Underbill, Trusts, p. 203; *Torrey v. Bank of Orleans*, 9 Paige, 661, 4 L. ed. 858; *Hawley v. Cramer*, 4 Cow. 736; *Allen v. DeGroodt*, 98 Mo. 159, 14 Am. St. Rep. 626; *Moore v. Woodall*, 40 Ark. 49; Story, Eq. Jur. § 317; *McCants v. Bee*, 16 Am. Dec. 616, note.

The proceeding to remove the minor's disabilities, being unknown to the common law, and unlike any known to the common law, the residence of the minors is jurisdictional, and must be shown by the record in the proceeding, or else the order is void.

Pulaski Co. v. Stuart, 28 Gratt. 879; *Thatcher v. Powell*, 19 U. S. 6 Wheat. 119, 5 L. ed. 221; *Harrey v. Tyler*, 60 U. S. 2 Wall. 842, 17 L. ed. 873; *Galpin v. Page*, 85 U. S. 18 Wall. 371, 21 L. ed. 964; *Wells, Jurisdiction of Courts*, § 163; *Gibney v. Crawford*, 51 Ark. 85; *Denning v. Corwin*, 11 Wend. 648; *Striker v. Kelly*, 7 Hill, 24; *Lawson, Presumptive Ev.* p. 27; *Reeves v. Clarke*, 5 Ark. 27; *Ex parte Anthony*, Id. 858; *Pendleton v. Fowler*, 6 Ark. 41; *Levy v. Shurman*, Id. 182; *Latham v.*

Jones, Id. 871; *Everett v. Clements*, 9 Ark. 460; *Butler v. Wilson*, 10 Ark. 816; *Freem. Judgm.* § 123.

Messrs. Stephenson & Trieber, John J. Harnor and E. C. Harnor, for appellees:

Appellants by their conduct, before and after the confirmation of the sale, having full knowledge of all the facts, are estopped to deny the title of appellee.

No word of dissent or dissatisfaction was expressed by appellants, or either of them, until the filing of the bill in this case, more than six years after the confirmation of the sale, full three years of which existed after the disabilities of each of them were removed. This bars their right of recovery.

Jones v. Graham, 36 Ark. 390; *McGaughey v. Brown*, 46 Ark. 95; *Woodard v. Jagers*, 43 Ark. 248; *Scott v. Freeland*, 7 Smedes & M. 409, 45 Am. Dec. 810; 2 Pom. Eq. §§ 815, 917, 965; Story, Eq. § 385; *Hoffert v. Miller*, 86 Ky. 572; *Goodnow v. Empire Lumber Co.* 31 Minn. 468; *Wells v. Seixas*, 24 Fed. Rep. 82; *O'Brien v. Gaultin*, 20 Neb. 348; *Ward v. Lavery*, 19 Neb. 429; *Durfee v. Abbott*, 61 Mich. 471; *Thley v. Padgett*, 27 S. C. 800.

Guardian of minors may purchase lands of wards when the sale by a public officer is inevitable, and when he has no funds in his hands belonging to the wards.

Chorpenning's App. 32 Pa. 815, 72 Am. Dec. 789; *Prevost v. Gratz*, Pet. C. C. 378; *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516.

The position occupied by appellee at the time of the application for and sale of the

Hillman, 3 H. L. Cas. 607; *Aberdeen R. Co. v. Blakie*, 1 Macq. H. L. Cas. 461; *Re Bloye's Trust*, 1 Maon. & G. 486; *Knight v. Marjoribanks*, 2 Maon. & G. 10; *Parkinson v. Hanbury*, 2 De G. J. & S. 450; *Ingle v. Richards*, 6 Jur. N. S. 11, 78; *Ridley v. Ridley*, 34 L. J. Ch. 462; *Franks v. Bollans*, 37 L. J. Ch. 148, 156; *Grover v. Hugell*, 3 Russ. 428; *Gregory v. Gregory*, Coop. Ch. 201; *Baker v. Carter*, 1 Younge & C. 250; *Woodhouse v. Meredith*, 1 Jac. & W. 204, 222; *Ex parte Lacey*, 6 Ves. Jr. 625; *Ex parte Bennett*, 10 Ves. Jr. 381, 394; *Randall v. Errington*, 10 Ves. Jr. 423; *Atty-Gen. v. Clarendon*, 17 Ves. Jr. 491, 500; *Tracy v. Colby*, 55 Cal. 67; *Tracy v. Craig*, Id. 91; *Scott v. Umbarger*, 41 Cal. 410; *Union Slate Co. v. Tilton*, 69 Me. 244; *Connolly v. Hammond*, 51 Tex. 635; *Paine v. Irwin*, 16 Hun, 300; *Michoud v. Girod*, 45 U. S. 4 How. 503, 11 L. ed. 1078; *Stephen v. Beall*, 89 U. S. 22 Wall. 329, 22 L. ed. 786; *Wormley v. Wormley*, 21 U. S. 8 Wheat. 421, 5 L. ed. 651; *Caldwell v. Taggart*, 20 U. S. 4 Pet. 190, 7 L. ed. 828; *Freeman v. Harwood*, 49 Me. 195; *Dyer v. Shurtleff*, 112 Mass. 165; *Brown v. Cowell*, 116 Mass. 461; *Smith v. Frost*, 70 N. Y. 66; *Fulton v. Whitney*, 66 N. Y. 518; *Star F. Ins. Co. v. Palmer*, 9 Jones & S. 267; *Woodruff v. Boyden*, 3 Abb. N. C. 29; *Child v. Brace*, 4 Paige, 309, 3 L. ed. 449; *Campbell v. Johnston*, 1 Sandf. Ch. 148, 7 L. ed. 275; *Cram v. Mitchell*, 1 Sandf. Ch. 261, 7 L. ed. 318; *Cumberland Coal & I. Co. v. Sherman*, 30 Barb. 553; *Johnson v. Bennett*, 30 Barb. 237; *Romaine v. Hendrickson*, 27 N. J. Eq. 162; 2 Pom. Eq. Jur. 482.

Property not the subject of the trust, but whose sale at less than its value will diminish the trust fund, cannot be purchased by the trustee for himself. *Fulton v. Whitney*, 66 N. Y. 555, 5 Hun, 19; *Case v. Carroll*, 36 N. Y. 335; *Hickley v. Hickley*, L. R. 2 Ch. Div. 190.

Trustee cannot purchase the trust property. See notes to *Wilson v. Brookshire* (Ind.) 9 L. R. A. 793; 13 L. R. A.

Anderson v. Butler (S. C.), 5 L. R. A. 166; *Tyler v. Sanborn* (Ill.) 4 L. R. A. 218.

Effect of purchase by trustee.

A trustee cannot derive any private advantage from the sale of the trust property committed to his guardianship; and all the advantages which he does thus improperly acquire shall result to the benefit of the cestui que trust. *Chapin v. Weed*, Clarke, Ch. 466, 7 L. ed. 173.

A trustee who buys in the trust property under a prior incumbrance, and at a price below its real value, is always considered as doing so for the use and benefit of his cestui que trust. *Colburn v. Morton*, 36 How. Pr. 160, 5 Abb. Pr. N. S. 315, 3 Keyes, 306, 1 Trans. App. 149, 1 Abb. App. Dec. 365; *Campbell v. Johnston*, 1 Sandf. Ch. 148, 7 L. ed. 275.

Where the purchaser is the attorney for the execution plaintiff, and has controlled a part of the preliminaries to the sale, he will be deemed to hold the property as trustee of the owner. *O'Donnell v. Lindsay*, 7 Jones & S. 586; *Dickinson v. Codwise*, 1 Sandf. Ch. 214, 7 L. ed. 304; *Dobson v. Racey*, 3 Sandf. Ch. 60, 7 L. ed. 770; *Alkins v. Delaney*, 12 Ir. Eq. 1; *Harrison v. Guest*, 6 DeG. M. & G. 435.

A purchase by a guardian of his ward's land may be enforced against the purchaser's assignee in bankruptcy, and the sureties for the purchase money (*Reed v. Jones*, 30 Gratt. 133; 2 Tucker's Bl. Com. 456; *Moore v. Hilton*, 12 Leigh, 1; *Daniel v. Lettich*, 13 Gratt. 195; *Howerly v. Helmes*, 20 Gratt. 1; *Cline v. Catron*, 22 Gratt. 378; *Phelps v. Seely*, Id. 573; *Zirkle v. McCue*, 26 Gratt. 517; *Brice v. Rice*, 27 Gratt. 812; *Talley v. Starke*, 6 Gratt. 339); or against an executor who purchases at his own sale. *McClure v. Miller*, 1 Ball. Eq. 107, 21 Am. Dec. 522.

Purchase inures to benefit of cestui que trust.

property imposed no duty upon her as to its conduct or management.

West v. Waddill, 33 Ark. 587, and *Imboden v. Hunter*, 23 Ark. 622, enunciating the duties of trustees, lay down the rule of law applicable to those whose relations to the property impose upon them positive duties to be performed in and about the sale, by and through which the price may be affected.

There is a distinction where the trustee deals with the *cestui que trust*, the latter having his own advisor.

Colton v. Stanford, 82 Cal. 851.

While as a rule trustees are not permitted to purchase the property of *cestuis que trust*, yet such purchases are only voidable, and will not be set aside in all cases by courts of equity.

See *Jones v. Graham*, 36 Ark. 383; *McGaughey v. Brown*, 46 Ark. 25; *Woodard v. Jagers*, 48 Ark. 249; *Apel v. Kelsey*, 47 Ark. 419.

In the case at bar the minors were actually present in the probate court by their attorneys, by their next friend in the person of their nearest adult relative, and by their friend who had been, in the lifetime of their mother, the trustee to hold title to their real property, and their failure to appeal was, under the ruling of *Jones v. Graham*, an election to take the proceeds and discharge the trust.

Bramble v. Kingsbury, 39 Ark. 181; *Jowers v. Phelps*, 33 Ark. 468; *Goodman v. Winter*, 64 Ala. 410; *Schnell v. Chicago*, 88 Ill. 882; *Penn v. Heisey*, 19 Ill. 295; 1 Story, Eq. § 385.

Appellants were barred by the Statute of Limitations when the bill was filed.

The bill was filed October 13, 1887, six years

and two days after the date of confirmation of the sale, at which time Biscoe and Blanche Hindman had been of full age more than three years; and as to the statute bar, so far as they are concerned, there can be no question.

McGaughey v. Brown, *supra*; *Chandler v. Neighbors*, 44 Ark. 479.

As to T. C. Hindman, his disabilities of non-age were removed by the Phillips Circuit Court on November 15, 1881, so that at the time of the filing of the bill more than three years had elapsed, during which he was under no disability.

Judgments of superior courts, even of limited jurisdiction, cannot be collaterally attacked where the court had jurisdiction of the person and subject matter.

The circuit courts of the United States are courts of limited jurisdiction, one of the requisites to give it jurisdiction being that there shall be divers citizenship of the plaintiffs and defendants; yet it has been held that a failure of the record to show the necessary citizenship will not vitiate a judgment of such a court in a collateral proceeding, although on appeal such a judgment would be set aside and reversed.

McCormick v. Sullivan, 23 U. S. 10 Wheat. 193, 6 L. ed. 300; *O'Brien v. Gastin*, 20 Neb. 347; *Appelgate v. Lexington & C. County Min. Co.* 117 U. S. 255, 29 L. ed. 892; *Harvey v. Tyler*, 69 U. S. 2 Wall. 329, 17 L. ed. 872; *Florentine v. Barton*, 69 U. S. 2 Wall. 210, 17 L. ed. 783; *Freem. Judgm.* §§ 116, 118, 119, 122-124, 126-128; *Boyd v. Roane*, 49 Ark. 398; *Adams v. Thomas*, 44 Ark. 267. The two last reaffirming *Borden v. State*, 11 Ark. 519.

See note to *Wilson v. Brookshire* (Ind.) 9 L. R. A. 72.

Relief of cestui que trust.

A purchase by a trustee is voidable at the election of the *cestui que trust*, within a reasonable time. *Wormley v. Wormley*, 21 U. S. 8 Wheat. 421, 5 L. ed. 651.

When the delay is far within the Statute of Limitations, and the trustee has not suffered from any act done on the supposition that the *cestui que trust* have abandoned their intention to question the sale, the laches will not bar such proceedings. *Morse v. Hill*, 136 Mass. 66. See note to *Cox v. Mackreth*, 2 Bro. Ch. 400, 1 White & T. Lead. Cas. Eq. 123; *De Bussche v. Alt*, L. R. 8 Ch. Div. 286; *Hayward v. Elliot Nat. Bank*, 96 U. S. 611, 24 L. ed. 83; *Michoud v. Girod*, 45 U. S. 4 How. 508, 11 L. ed. 1073; *Learned v. Foster*, 117 Mass. 365; *Clark v. Backington*, 116 Mass. 309; *Yeackel v. Litchfield*, 13 Allen, 417; *Litchfield v. Cadworth*, 15 Pick. 25; *Hayward v. Ellis*, 13 Pick. 272.

No one but the *cestui que trust* has a right to call in question or set aside a purchase made by the trustee for his benefit. *Wilson v. Troup*, 2 Cow. 23; *Graves v. Waterman*, 63 N. Y. 658; *Johnson v. Bennett*, 39 Barb. 250.

And he can at once have a purchase made by the trustee of the equity of redemption at a sale thereof set aside. *Hubbell v. Medbury*, 53 N. Y. 101.

The right of action was held to have expired after ten years from the time at which it had accrued. *Ibid.*

His right to set aside the purchase does not depend upon the question of good faith in the purchase, but on the peril of permitting any conflict between the personal interests of the individual and his duties as trustee, in his fiduciary character. *Duncomb v. New York, H. & N. R. Co.* 84 N. Y. 190.

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He is not bound to prove fraud in the purchase by the trustee. *Grubbs v. McGlawn*, 39 Ga. 675; *Price v. Winter*, 15 Fla. 106; *Miles v. Wheeler*, 43 Ill. 126.

On what terms set aside.

The purchase money and expenditures for repairs and permanent improvements must be refunded, and complete equity must be done between the parties, to authorize setting aside such purchase. *Yeackel v. Litchfield*, 13 Allen, 419; *Rotch v. Morgan*, 106 Mass. 430; *Duncomb v. New York, H. & N. R. Co.* 84 N. Y. 190; *People v. Merchants Bank*, 35 Hun, 100; *Eichelberger v. Hawthorne*, 33 Md. 504; *Hill, Trustees*, 4th Am. ed. 539, and cases cited; *Cumberland Coal & I. Co. v. Sherman*, 30 Barb. 570; *Terwilliger v. Brown*, 59 Barb. 9; *Hawley v. Crumer*, 4 Cow. 735; *Abbot v. American Hard Rubber Co.* 33 Barb. 578; *Mason v. Martin*, 4 Md. 124; *Jones v. Jones*, 4 Gill, 87; *McLaughlin v. Barnum*, 31 Md. 425.

Setting aside sale.

If one acting as trustee for others becomes himself interested in the purchase, the *cestui que trust* are entitled to have the sale set aside, unless the trustee had fairly divested himself of the character of trustee. *Stephen v. Beall*, 99 U. S. 23 Wall. 340, 22 L. ed. 788; *Jewett v. Miller*, 10 N. Y. 402; *Slade v. Van Vechten*, 11 Paige, 21, 5 L. ed. 42.

Or if the fact is unknown to the buyer and seller. *Armstrong v. Campbell*, 3 Yerg. 236; *Graves v. Waterman*, 63 N. Y. 668.

Executors and administrators who become buyers at sales made by themselves acquire only an imperfect title, which will be set aside at the option of any of the parties interested in the property. *Yeackel v. Litchfield*, 13 Allen, 419; *People v. Open Board of S. B. Bldg. Co.* 92 N. Y. 103.

And it has been quite generally held that where an administrator becomes a purchaser of the estate

The removal of the disabilities of non-age set in motion the Statute of Limitations. The three years' extension of the Statute of Limitations was given as a protection to the disability of minors, etc. When that is removed the terms of the statute are satisfied.

Garland County v. Gaines, 47 Ark. 558.

Battle, J., delivered the opinion of the court:

In September, 1867, Thomas C. Hindman, and on the 19th of August, 1876, Mary B. Hindman, his wife, died intestate, leaving Susie Hindman, Biscoe Hindman, Thomas C. Hindman, Jr., and Blanche Hindman, their only children, surviving them. Biscoe, Thomas C., and Blanche were minors when their parents died,—Biscoe having been born on the 27th of November, 1861; Thomas C. on the 23d of November, 1863; and Blanche on the 2d of December, 1865. Laura E. O'Conner and the mother of Mrs. Hindman were sisters, and Mrs. O'Conner (Laura E. B.) was the step-grandmother of Mrs. Hindman's children, she having been the wife of their grandfather. When Mrs. Hindman was on her death bed, she requested Mrs. O'Conner to take charge of her children, and she promised that she would to the best of her ability, and proceeded to do so immediately after the death of Mrs. Hindman, by taking them home with her, and exercising personal supervision over them. On the 5th of September, 1876, Susie, Biscoe, and Thomas C. Hindman filed a petition in the Phillips Probate Court, stating that they and Blanche Hindman were children and heirs-at-law of Mary B. Hindman, deceased; that Biscoe, Thomas C., and Blanche were minors; that they were the owners in their own right of an interest in real estate in the County of Phillips in this State, and equally entitled to a distributive share in the estate of their mother, the late Mary B. Hindman, and representing that their mother had requested that Mrs. O'Conner and her husband should take charge of and have the entire control and custody of her children, and assist in the management of their property interests; and asking that B. Y. Turner be appointed curator of the estate of the minors. On the same day the probate court granted the petition, and B. Y. Turner, having given bond with approved security, was appointed curator of the estate of Biscoe, Thomas C., and Blanche Hindman. The court further ordered that the minors remain in the care and custody of Mrs. O'Conner and her husband, in accordance with the last wish

and request of their mother; and appointed J. H. O'Conner, the husband of Mrs. Laura E. B. O'Conner, the attorney and next friend of the minors, "to look after and render such aid and assistance to the curator as may be necessary for their interest." After this the children continued to live with Mrs. O'Conner, and she endeavored to act the part of a mother to them. They were the owners of block 17, in that part of the City of Helena known as New Helena, having thereon a valuable residence, the late home of their father and mother, and other buildings. It became delinquent for taxes for the years 1878, 1874, and 1875, and she redeemed it by paying \$396.87, the cost of redemption. Susie, needing money to enable her to attend school and pay her debts, offered to sell and convey to her (Susie's) interest in the block. She bought it, and became the owner of one undivided fourth of the block. On the 22d of November, 1880, Bart. Y. Turner, curator of the estate of the minor children, presented his petition to the Phillips Probate Court for an order to sell the minors' interest in the block; and the court, finding that it was to the interest of the minors that it should be sold to procure means for their support and education, ordered it to be sold on the 10th of January, 1881. The block was not sold on that day for the want of bidders; and the court again ordered it to be offered for sale, and fixed the 11th of April, 1881, as the day of sale. The entire block, including the one fourth purchased from Susie, with the consent of Mrs. O'Conner, was offered for sale on the last-named day; and Mrs. O'Conner, at the request of the children, bid for the same. She offered \$4,000 for the block, and, no one bidding more, she was declared the purchaser. The curator reported the sale to the probate court for confirmation. It having been reported that one A. H. Johnson would have given \$4,200, the children were dissatisfied, and filed exceptions to the report. Mrs. O'Conner thereupon offered \$4,500, and the \$4,000 in the report was changed to \$4,500, and the exceptions were withdrawn, and the sale was confirmed by the court, and the property was conveyed to Mrs. O'Conner. Three fourths of the purchase money, amounting to \$3,375, which was the proportion due the minor children, have been paid.

To set aside the purchase of the three-fourths interest of the block that belonged to Biscoe, Thomas C., and Blanche Hindman, this action was brought by them since they ceased to be minors. They contend that Mrs. O'Conner

of his intestate, such purchase is not merely voidable, but absolutely void. *Dwight v. Blackmar*, 2 Mich. 390, 57 Am. Dec. 132; *Walton v. Torrey*, Harr. Ch. (Mich.) 299; *Beaubien v. Poupard*, Id. 300; *Pearson v. Moreland*, 7 Smedes & M. 609, 45 Am. Dec. 319; *Erskine v. De la Baum*, 3 Tex. 408, 49 Am. Dec. 751; *Stallins v. Foreman*, 3 Hill. Ch. 405; *Ingerson v. Starkweather*, Walk. Ch. 346; *Ryden v. Jones*, 8 N. C. 497, 9 Am. Dec. 600; *Scott v. Gorton*, 14 La. 115, 33 Am. Dec. 578; *Church v. Marine Ins. Co.* 1 Mason, 341; *Clute v. Barron*, 3 Mich. 192; *Torrey v. Bank of Orleans*, 9 Paige, 640, 4 L. ed. 853; *Ex parte Bennett*, 10 Ves. Jr. 384; *Michoud v. Girod*, 45 U. S. 4 How. 509, 11 L. ed. 1076; *Worthy v. Johnson*, 8 Ga. 233, 52 Am. Dec. 390; *Muselman v. Eshleman*, 10 Pa. 394, 51 Am. Dec. 433, note; *Grubbs v. McGlawn*, 36 18 L. R. A.

Ga. 674; *Alexander v. Alexander*, 46 Ga. 291; *Buckles v. Lafferty*, 2 Rob. (Va.) 232, 40 Am. Dec. 732.

A purchase of trust property by a trustee at public sale is valid at law, and is voidable only, not void, in equity. It is voidable only at the election of the persons whose interests are affected by the purchase. *Oloott v. Tioga R. Co.* 27 N. Y. 557; *Jackson v. Van Dalen*, 5 Johns. 47.

A purchase by an auctioneer, employed by an executor, in which the executor became interested before confirmation, is invalid, both because the auctioneer was agent of the executor and because of the interest acquired by the auctioneer. *Terwilliger v. Brown*, 44 N. Y. 241, 59 Barb. 13.

Sale may be set aside. See *note to Wilson v. Brookshire* (Ind.) 9 L. R. A. 732.

was under a disability to purchase, arising from the relation she sustained to them at the time the block was sold. Can they avoid the sale?

As a general rule, a party occupying a relation of trust or confidence to another is, in equity, bound to abstain from doing everything which can place him in a position inconsistent with the duty or trust such relation imposes on him, or which has a tendency to interfere with the discharge of such duty. Upon this principle, no one placed in a situation of trust or confidence in reference to the subject of a sale can be the purchaser, on his own account, of the property sold. If such a one purchases the property, it is in the option of the person interested in the property, and to whom the relation of trust or confidence was sustained, to set aside the sale, within a reasonable time, however innocent the purchaser may be. 1 Story, Eq. Jur. §§ 307-325, and cases cited.

In Sugden on Vendors the rule and its reason are expressed as follows: "It may be laid down as a general proposition that trustees, unless they are nominally such, as trustees to preserve contingent remainders, agents, commissioners of bankrupts, assignees of bankrupts, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, counsel, or any person who, by being employed or concerned in the affairs of another, have acquired a knowledge of his property, are incapable of purchasing such property themselves, except under the restrictions which will shortly be mentioned; for, if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying on their integrity. The characters are inconsistent. *Emptor emit quam minimo potest, venditor vendit quam maximo potest.*" 2 Sugd. Vend. 7th Am. ed. *887; *Michoud v. Girod*, 45 U. S. 4 How. 504, 11 L. ed. 1077.

In *Imboden v. Hunter*, 23 Ark. 632, this court said: "It is a stern rule of equity that a trustee to sell for others is not allowed to purchase, either directly or indirectly, for his own benefit at the sale. He cannot be both vendor and purchaser. As vendor, it is his duty to sell the property for the highest price; and as purchaser, it is his interest to get it for the lowest; and these relations are so essentially repugnant—so liable to excite a conflict between self-interest and integrity—that the law positively forbids that they shall be united in the same person. And it matters not, in the application of the rule that the sale was bona fide, and for a fair price. The inquiry is not whether there was fraud in fact. In such a case, the danger of yielding to the temptation is so imminent, and the security against discovery so great, that a court of equity, at the instance of the *cestui que trust*, if he applies in a reasonable time, will set aside the sale, as of course. The rule is not intended to remedy actual wrong, but is intended to prevent the possibility of it. The situation of the party itself works his disability to purchase. . . . The rule is not confined to persons who are trustees within the more limited and technical signification of the term, or to any particular class of fiduciaries, but applies to all persons placed in a situation

of trust or confidence with reference to the subject of the purchase. It embraces all that come within its principle, permitting no one to purchase property, and hold it for his own benefit, where he has a duty to perform in relation to such property, which is inconsistent with the character of a purchaser on his own account, and for his individual use."

Following the rule laid down in *Imboden v. Hunter*, *supra*, this court held in *Wright v. Walker*, 30 Ark. 44, that "the purchase by an attorney, at a tax-sale of land in regard to which he had been retained," was inconsistent with his relations to his client, and could be avoided by the client, notwithstanding there was no bad faith in the purchase. After a careful examination of numerous authorities, it held that it was a well-settled principle that no one can be permitted to purchase an interest when he has a duty to perform that is inconsistent with the character of a purchaser,—quoting the remark of Lord Thurlow in *Hall v. Balliett*, 1 Cox, Ch. 134, that "no attorney can be permitted to buy in things in a course of litigation, of which litigation he has the management. This the policy of justice will not endure."

In *West v. Waddell*, 33 Ark. 587, reiterating the doctrine laid down in the cases cited, this court held that a purchase of land at an administrator's sale by the attorney of the administrator was voidable at the instance of the heirs of the intestate to whose estate the land belonged.

In *Livingston v. Cochran*, 33 Ark. 294, this court, in considering the validity of a purchase of lands by a probate judge at a sale made by an administrator under an order of the court of which he was the judge, after quoting, as we have, from *Imboden v. Hunter*, said: "All that is above said in relation to trustees purchasing at sales made by them applies, on principle, to the case of a probate judge purchasing at a sale made upon his own order, and which he is obliged to have conducted fairly, and for the benefit of creditors, legatees, or distributees of the estate."

In *Clements v. Cates*, 49 Ark. 243, this court used the following language: "The law forbids a trustee, and all other persons occupying a fiduciary or quasi fiduciary position, from taking any personal advantage, touching the thing or subject as to which such fiduciary position exists. . . . If such a person acquires an interest in property as to which such a relation exists, he holds it as a trustee for the benefit of those in whose interest he was prohibited from purchasing, to the extent of the prohibition. This rule applies to tenants in common by descent with the same force and reason as it does to persons standing in a direct fiduciary relation to others; for they stand, by operation of law, in a confidential relation to each other, as to the joint property, and the duty is imposed on them to protect and secure their common interests. They have a community of interest which produces a community of duty, and imposes on each one the duty to exercise good faith to the others. Neither one can take advantage of the others by purchasing an outstanding title or incumbrance, and asserting it against them. Such an act would be inconsistent with good faith, and against the reciprocal obligations to do nothing to the prejudice

of each other's equal claims which their relationship created. Such a purchaser, notwithstanding the design of the one making it was to the contrary, would be for the common benefit of all the co-tenants, and the legal title acquired would be held in trust for the others, if they should choose, within a reasonable time, to claim the benefit thereof, by contributing, or offering to contribute, their proportion of the purchase money."

We have quoted at length from the opinions of this court to show the reason and extent of the rule laid down. Its applicability to guardians and wards, and persons standing in like relation is apparent. Judge Story, in speaking on this rule, says: "In the next place, as to the relation of guardian and ward. In this most important and delicate of trusts the same principles prevail, and with a larger and more comprehensive efficiency. It is obvious that, during the existence of the guardianship, the transactions of the guardian cannot be binding upon the ward, if they are of any disadvantage to him; and, indeed, the relative situation of the parties imposes a general inability to deal with each other. But courts of equity proceed yet further in cases of this sort. They will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased, and the relation become thereby actually ended, if the intermediate period be short, unless the circumstances demonstrate, in the highest sense of the terms, the fullest deliberation on the part of the ward, and the most abundant good faith, *uberrima fides*, on the part of the guardian. For in all such cases the relation is still considered as having an undue influence upon the mind of the ward, and as virtually subsisting, especially if all the duties attached to the situation have not ceased; as, if the accounts between the parties have not been fully settled, or if the estate still remains in some sort under the control of the guardian." 1 Story, Eq. Jur. 18th ed. § 817.

Quasi guardians and all other persons occupying the relation of confidential advisers have been held to come within the rule. *Revett v. Harrey*, 1 Sim. & Stu. 502, 1 Eng. Ch. 502; *Huguenin v. Basely*, 14 Ves. Jr. 278; 1 Story, Eq. Jur. 18th ed. §§ 317, 319, and cases cited; 1 Perry, Tr. § 204; *Torrey v. Bank of Orleans*, 9 Paige, 663, 4 L. ed. 859; Underhill, Tr. p. 298.

In *Hobday v. Peters*, 28 Beav. 349, a mortgagor consulted a solicitor, "who turned her over to his clerk to assist her gratuitously." The clerk, by reason of information derived during such employment, bought up the mortgage for less than half the amount due thereon. The court held that the clerk was a trustee for the benefit of the mortgagor. The same was held as to the clerk of a broker employed to make sale of land in *Gardner v. Ogden*, 23 N. Y. 327.

The relation sustained by Mrs. O'Conner to the Hindman children, at the time of the sale in question, was peculiarly confidential. A dying mother had committed them to her care. She took them to her house, and treated them as a part of her family. They were the children of her niece, and the grandchildren of a former husband. Her treatment of them was

kind, and, with the ties of kindred which existed between them naturally caused them to lean on her for protection and repose in her implicit confidence. She recognized this fact, and sometimes, if not always, responded to their wishes. At their request she moved upon the block in question, and with them occupied the late residence of their parents, and continued to do so some time before, and at the time of, and after the sale. At their request the probate court virtually made her and her husband the guardians of their persons, and they accepted the situation. At their request she paid out \$806.87 to redeem their home from a forfeiture for taxes. When the home was offered for sale they wanted her to buy it, and looked to her to save it from the sacrifice. She responded to their request, but failed to meet their expectation. She purchased, but, having heard that another would give more, they were dissatisfied. She increased her bid, and they withdrew all opposition to the confirmation of the sale by the probate court; but they had been disappointed and the final result was a lawsuit.

But it is contended for Mrs. O'Conner that "the position occupied by her, at the time of the application for an order to sell, and the sale of the property purchased by her, imposed no duty upon her as to its conduct or management;" that the conduct and management of the sale was, by the law, imposed upon Turner, as curator, and that she acted fairly and in good faith. For this among other reasons, her counsel insist that the sale should not be set aside.

In support of their contention, they cite and rely upon *Jones v. Graham*, 36 Ark. 383. In that case the facts were: An administrator reported to the probate court that there had come into his possession a deed of trust of certain lands, executed in 1860, by one Sullivan to George W. Beasley, to secure to the intestate a debt of about \$5,500. "That he had directed the trustee to sell under the power; that he had attended the sale, and finding the lands were about to go below value, had himself bid the sum of \$3,040, and the lands were upon that bid struck off, no one being willing to bid more. He represented that he had no desire to keep the lands, but was willing to hold them as the property of the estate, if the court should deem it best; and submitted the matter to the court to say whether he should keep them as his own, charging himself with the net price, after paying expenses or hold them as administrator for the benefit of the estate." The court ordered him to keep the lands as his own, and to receipt to the estate for the proceeds of the sale, less the amount of the indebtedness of his intestate to himself. In pursuance of this order, he, in his settlement, charged himself with the sum of \$2,715.50, as proceeds of the sale. The settlement was laid over until the second term of the court after it was filed, a period of nearly six months, when it was taken up and confirmed without objection. This court held that the whole proceeding of the court upon the report of the administrator was unauthorized and irregular; that the administrator became clothed, upon the purchase, with a constructive trust because of the use of the means of the estate in making

the purchase, and also because of his fiduciary relation to the estate; and was wearing it when he went into the probate court to ask, if deemed best, that he should be denuded, by accounting for the proceeds; and that the order of the probate court had no greater effect than mere advice as to the probable future action of the court upon his settlement, when the same should be made. But this court, nevertheless, refused to disturb the sale. Why? The reasons assigned are: Constructive trusts are at the option of those entitled to claim the benefits: that they may leave the property in the hands of the trustee, and accept the proceeds, in accordance with the legal title, and that election, deliberately and intelligently made, dispels the trust; and that in that case the action of the probate court, "in view of the obvious absence of all fraudulent intent, the length of time that the settlement lay unchallenged and its first confirmation," amounted to an election to take the proceeds and discharge the trust.

In *Jones v. Graham* the court said that it did not mean to say "that, ordinarily, the approval of a sale, or dealing with the proceeds by a probate court, would relieve a purchaser of a constructive trust;" that, ordinarily, it would not; that that case was a peculiar case, not likely to arise again; that it stood on its own peculiar grounds, with such distinctions from reported cases as will be sufficiently obvious; and that it was not like the case of an administrator or attorney who simply purchases for himself, with the design of acquiring the property, and who has the sale confirmed without question or explanation of the circumstances. Whether the court was correct in its conclusion or not it is not necessary for us to say, but it is evident that the court did not intend to repudiate the rule announced in former cases. That case was regarded as exceptional. But this case does not come within the exception as laid down in that case. Here the purchaser bought for herself, with the design of acquiring the property. Three of the Hindman children were minors. She was quasi guardian of their persons, and stood to them in the place of a parent. They were under her care and protection, and the property sold was and had been in her possession. They were not *in jure*, and could not act for themselves. If the curator had failed to discharge his duty in the management of their property, and in making settlements in the probate court, it was the duty of her and her husband, if of anyone, to have interfered in their behalf and asserted their rights. No election to accept the proceeds and ratify the sale could have been made by them while the disabilities of minority rested upon them, and none can be imputed to them on account of any act or failure of theirs while such disabilities continued.

The doctrine as to purchases by trustees, guardians, administrators, and persons having a confidential character arises from the relation between the parties, and not from the circumstance that they have power to control the sale. The right to set aside the sale does not depend on its fairness or unfairness. To set aside the purchase, it is not necessary to show that it was actually fraudulent or advantageous. If the trustee or other person having

a confidential character, can buy in an honest case, he may in a case having that appearance, but which may be grossly otherwise; and yet the power of the court, because of the infirmity of human testimony, would not be equal to detect the deception. It is to guard against this uncertainty, and the hazard of abuse, and to remove the trustee and other persons having confidential relations from temptation, that the rule does and will permit the *cestui que trust* or other person to come at his option, and, without showing actual injury or fraud, have the sale set aside. *Davoue v. Fanning*, 2 Johns. Ch. 252, 1 L. ed. 385; *Torrey v. Bank of Orleans*, 9 Paige, 663, 4 L. ed. 859; *Ex parte James*, 8 Ves. Jr. 345; *Brockett v. Richardson*, 61 Mass. 766; *Van Epps v. Van Epps*, 9 Paige, 237, 4 L. ed. 682; *Campbell v. Walker*, 5 Ves. Jr. 678, 18 Ves. Jr. 601; *Callis v. Ridout*, 7 Gill & J. 1; *Ex parte Lacey*, 6 Ves. Jr. 625; *Ex parte Bennett*, 10 Ves. Jr. 381; *Campbell v. Pennsylvania L. Ins. Co.* 2 Whart. 62; *Michoud v. Girod*, 45 U. S. 4 How. 557, 11 L. ed. 1100, and cases before cited; *McGaughey v. Brown*, 46 Ark. 25.

Mrs. O'Conner comes within the rule. She was virtually constituted guardian of the persons of the minor children by the order of the probate court. Her husband was appointed their attorney and next friend to look after them, and to render such aid and assistance to the curator as might be necessary for their interest. She and her husband took possession of their property, and she redeemed it. How far the curator was controlled by them does not appear, but it does appear that he permitted them to take charge of their property, obviously on account of their relation to the children. They had ample opportunities, by reason of their relation to the children, to acquire full knowledge of the property. Whether they acquired information by reason of such relation, which, if known to the public, would have caused the property to have been sold for more than it did, is not, under the rule, necessary to inquire. She occupied a confidential relation to the children, approaching nearly to that of parent to child. Whether she abused it, no inquiry, under the rule, can be made. She and her husband assumed the duty of taking care of the children and looking after their property. While she sustained that position she was not permitted to purchase their property, because the right to do so might have interfered with a faithful discharge of her duty.

Mrs. O'Conner relies on the five years' Statute of Limitations to sustain her title. That Statute provides: "All actions against the purchaser, his heirs, or assigns for the recovery of lands sold at judicial sales, shall be brought within five years after the date of such sale, and not thereafter: saving to minors and persons of unsound mind the period of three years after such disability shall have been removed." Appellants insist that that Statute has no application to an action like this, the object of which is to set aside a sale of land for fraud. So *McGaughey v. Brown*, 46 Ark. 25, was an action to set aside a sale of land for fraud. The prayer of the bill in that case was that the sale be set aside; that a master be appointed to take an account of the rents and profits; that

the conveyances of the land, which were alleged to be fraudulent, be removed as a cloud upon the title of plaintiffs; and that they be put into the possession of the land. This court held that the object of the bill was to get possession of the land, and that the action was barred by the five-years' statute.

In this case the prayer of the complaint is that the sale be set aside; that an account be taken between the plaintiffs and defendants, as to the rents and profits of the block in question, and the sums paid by defendant for the benefit of plaintiffs; and that "the correct and true balance be ascertained between them;" and that said property be sold for purposes of partition and to satisfy the balance found by the master, and for other relief. One of the obvious objects of the complaint was the recovery of the land. That was necessary to accomplish the purpose of the action. The Statute applies.

The sale in question was confirmed on the 11th day of October, 1881. Mrs. O'Conner held adverse possession after that date. This action was brought on the 18th of October, 1887, at which time Biscoe and Blanche Hindman had been of age more than three years, and were barred from maintaining it. Three years had not expired when Thomas C. arrived of age; but it is said his disabilities of nonage were removed by the Phillips Circuit Court on the 15th of November, 1881, and that at the time this action was commenced more than three years had elapsed, during which he was under no disability. On the other hand, it is contended that the judgment of the circuit court which declared his disabilities removed was void for want of jurisdiction.

The authority to remove the legal disabilities of minors was conferred upon circuit courts by an Act of the General Assembly which was approved February 18, 1869. Mansf. Dig. § 1362. Section 2 of the Act, after providing that circuit courts shall have authority to remove legal disabilities of minors, adds: "Provided, the person praying such relief shall be a resident of the county in which the court to which such application shall be made is held." The Act makes the residence jurisdictional,—a condition upon which the court can remove the disabilities of the minor.

The record shows that Biscoe and Thomas C. Hindman made an application to the Circuit Court of the County of Phillips for the removal of their disabilities, and that their application was granted. It does not appear in their application, or in the order removing their disabilities, that either of them was a resident of Phillips County. Is the order void for want of jurisdiction?

In *Harvey v. Tyler*, 69 U. S. 2 Wall. 328, 342, 17 L. ed. 871, 878, the Supreme Court of the United States uses the following language: "The jurisdiction which is now exercised by the common-law courts in this country is, in a very large proportion, dependent upon special statutes conferring it. . . . In all cases when the new powers thus conferred are to be brought into action in the usual form of common-law or chancery proceedings, we apprehend there can be little doubt that the same presumption as to the jurisdiction of the court, and the conclusiveness of its action, will be made as in 18 L. R. A.

cases falling more strictly within the usual powers of the court. On the other hand, powers may be conferred on the court, and duties required of it, to be exercised in a special, and often summary, manner, in which the order or judgment of the court can only be supported by a record which shows that it had jurisdiction of the case."

In *Gulpin v. Page*, 85 U. S. 18 Wall. 850, 371, 21 L. ed. 959, 964, the court said: "But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction, upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record." To the same effect, see *Pulaski Co. v. Stuart*, 28 Gratt. 872; *Gibney v. Crawford*, 51 Ark. 35; *Foster v. Waterman*, 124 Mass. 592; *Ferguson v. Jones*, 17 Or. 204, 3 L. R. A. 620; *Brown v. Wheelock*, 75 Tex. 385; 1 Black, Judgm. § 279; *Freem. Judgm.* § 123.

The power to remove the disabilities of minors is a special power conferred upon the circuit courts, and is to be exercised in a summary manner, and not according to the course of the common law. The record does not show the fact—the residence of the minors in Phillips County—necessary to give the Phillips Circuit Court authority to remove the disabilities of Biscoe and Thomas C. Hindman, and the order declaring the removal of their disabilities is void.

This action is not barred as to Thomas C. Hindman. He has not ratified the sale of the block in question by receiving any part of the proceeds thereof since he arrived of age. He is entitled to one fourth of the block, and to one fourth of the rents and profits which have accrued since the 11th of October, 1881, the day on which the sale was confirmed by the probate court, and Mrs. O'Conner is entitled to the remaining three fourths of the block, and of the rents and profits. He should be charged, in account with Mrs. O'Conner, with the proceeds of the sale paid to him, or for him to anyone authorized to receive the same, and lawful interest thereon from the date of the payment, and with one fourth of the taxes paid by her on the block since the sale and interest thereon, and one fourth of the value of the improvements made by her on the block since the sale, and credited with one fourth of the rents and profits. If the property can be divided without prejudice to the interest of the parties concerned, it should be partitioned between them according to their respective interests; and if not, it should be sold, and the proceeds of the sale divided according to their interests. Upon an account being stated as to the rents, profits, purchase money received by Thomas C. Hindman, interest, taxes and improvements, the balance should be made a charge on the part or interest in the block, or in the proceeds of the sale thereof, if it be sold for partition, belonging to the party against whom it is found, and the payment of it (the charge) should be enforced according to the rules of equity.

The decree of the court below is therefore af-

frmed as to Biscoe and Blanche Hindman, and as to Thomas C. Hindman is reversed, and the cause is remanded for proceedings consistent with this opinion.

NEW YORK COURT OF APPEALS.

Edward ROBERTS, Respt.,

v.

NEW YORK ELEVATED R. CO. et al.,
Appts.

(.....N. Y.)

1. In an action by a landowner to compel a company operating an elevated railroad in the street in front of his property to pay the damage done him by cutting off the easements of light, air and access connected with such property, an expert witness cannot be permitted to state what, in his opinion, the amount of such damage is, nor what would have been the present value of the land if the road had not been built.

2. The admission of incompetent evidence will not be held to be nonprejudicial to defendant in an action to enjoin an elevated railroad company from operating its road until it pays the damage done to an abutting property owner, because the company is not bound to pay the ascertained damages to acquire the easement but may submit to the injunction and proceed to acquire the right by eminent domain.

(October 20, 1891.)

APPEAL by defendants from a judgment of the General Term of the Superior Court of the City of New York affirming a judgment of the Special Term in favor of plaintiff in an action brought to recover damages for injuries caused to plaintiff's property by the construction and operation of defendants' road. *Reversed.*

The facts are stated in the opinion.

Memo. Julien T. Davies and Brainard Teller, for appellants:

The conclusions of the witness upon the very matters which the court had to decide, viz., the existence and amount of damages, were not competent evidence.

McGinn v. Manhattan R. Co. 117 N. Y. 219; *Avery v. New York Cent. & H. R. R. Co.* 121 N. Y. 31. See also *Morehouse v. Matheus*, 2 N. Y. 514; *Clark v. Baird*, 9 N. Y. 183; *Van Deusen v. Young*, 29 N. Y. 9; *McGregor v. Brown*, 10 N. Y. 114; *Marley v. Shults*, 29 N. Y. 346; *Teerpenning v. Corn Ezech. Ins. Co.* 43 N. Y. 279; *Green v. Plank*, 48 N. Y. 669; *Van Zandt v. Mut. Ben. L. Ins. Co.* 55 N. Y. 169; *Ferguson v. Hubbell*, 97 N. Y. 507; *Wakeman v. Wheeler & W. Mfg. Co.* 2 Cent. Rep. 130, 101 N. Y. 205; *Reed v. McConnell*, 2 Cent. Rep. 747, 101 N. Y. 270; *Van Wycklen v. Brooklyn*, 118 N. Y. 424; *People v. Kemmler*, 7 L. R. A. 715, 119 N. Y. 580; *Fish v. Dodge*, 4 Denio, 211; *Lamoure v. Caryl*, Id. 370; *Norman v. Wells*, 17 Wend. 136; *Lincoln v. Saratoga & S. R. Co.* 23 Wend. 425; *Dunham v. Simmons*, 3 Hill, 609; *Paige v. Hazard*, 5 Hill, 608; *Giles v. O'Toole*, 4 Barb. 261; *Cook v. Brockway*, 21 Barb. 381; *Simons v. Montier*, 29 Barb. 419; 13 L. R. A.

Richardson v. Northrup, 66 Barb. 85; *Thompson v. Dickhart*, 36 Barb. 604; *Duff v. Lyon*, 1 E. D. Smith, 536; *Hudson v. Caryl*, 2 Thomp. & C. 245; *Benkart v. Babcock*, 27 How. Pr. 391; *Newton v. Fordham*, 7 Hun, 58; *Fleming v. Delaware & H. Canal Co.* 8 Hun, 358; *Schermerhorn v. Tyler*, 11 Hun, 549; *Re New York, L. & W. R. Co.* 27 Hun, 151; *Re New York, W. S. & B. R. Co.* 29 Hun, 609; *Van Wagoner v. New York Cement Co.* 36 Hun, 552; *Ranch v. New York, L. & W. R. Co.* 17 N. Y. S. R. 401; *Re New York Elev. R. Co.* 35 N. Y. S. R. 944; *Thompson v. Manhattan Elev. R. Co.* 29 N. Y. S. R. 720; *Malcom v. Metropolitan Elev. R. Co.* 36 N. Y. S. R. 809; *Evansville, I. & C. S. L. R. Co. v. Fitzpatrick*, 10 Ind. 120; *White v. Stoner*, 18 Mo. App. 540; *Humes v. Brownlee*, 63 Ala. 277; *Thompson v. Pennsylvania R. Co.* 51 N. J. L. 42; *Crane v. Northfield*, 33 Vt. 124; *Tingley v. Providence*, 8 R. I. 493; *Brown v. Providence & S. R. Co.* 12 R. I. 238.

It may be conceded that the current of authority in Massachusetts is in favor of the admission of the opinions of witnesses as proof of the amount of damages in all cases.

Shattuck v. Stoneham Branch R. Co. 6 Allen, 115; *Vandine v. Burpee*, 13 Met. 288; *Swan v. Middlesex County*, 101 Mass. 173; *Tucker v. Massachusetts Cent. R. Co.* 118 Mass. 546.

But the decisions are not uniform.

Wesson v. Washburn Iron Co. 13 Allen, 95; *Burt v. Wigglesworth*, 117 Mass. 302.

Shattuck v. Stoneham Branch R. Co., *supra*, has been followed in Maine, Minnesota, and West Virginia.

Tebbetts v. Haskins, 16 Me. 263; *Portland & R. R. Co. v. Deering*, 1 New Eng. Rep. 475, 78 Me. 61; *Lehmicks v. St. Paul, S. & T. P. R. Co.* 19 Minn. 466; *Sherman v. St. Paul, M. & M. R. Co.* 30 Minn. 227; *Grafton & G. R. Co. v. Foreman*, 24 W. Va. 878.

In New Hampshire, Illinois, and Wisconsin the decisions are conflicting and uncertain, with the weight of authority in favor of the exclusion of such evidence. In Arkansas the decisions are uniform to the effect that such evidence should be excluded, except in *Texas & St. L. R. Co. v. Kirby*, 44 Ark. 106, where there is a dictum to the contrary. In Pennsylvania no case can be found which is in point, *White Deer Creek Imp. Co. v. Sassaman*, 87 Pa. 415, really turning on another point. The same is true of Connecticut.

With these exceptions it is believed that every State whose decisions are regarded as of importance has adopted the rule excluding evidence of this character.

See Alabama: *Montgomery & W. P. R. Co. v. Varner*, 19 Ala. 185; *Alabama & F. R. Co.*

v. *Burkett*, 42 Ala. 83; *Hames v. Brownlee*, 63 Ala. 277; *Young v. Cureton*, 87 Ala. 727.

Arkansas: *Pierson v. Wallace*, 7 Ark. 282; *Lindauer v. Delaware Mut. L. Ins. Co.* 18 Ark. 461; *St. Louis, A. & T. R. Co. v. Anderson*, 39 Ark. 167.

California: *Collins v. Sullivan*, 54 Cal. 238; *Fleming v. Albeck*, 67 Cal. 226.

Georgia: *Brunswick & A. R. Co. v. McLaren*, 47 Ga. 546; *Gilbert v. Cherry*, 57 Ga. 128; *Central R. Co. v. Senn*, 78 Ga. 705.

Illinois: *Chicago & A. R. Co. v. Springfield & N. W. R. Co.* 67 Ill. 142; *Linn v. Sigbee*, 67 Ill. 75; *Hoener v. Koch*, 84 Ill. 408.

Indiana: *Evansville, I. & O. S. L. R. Co. v. Fitzpatrick*, 10 Ind. 120; *Baltimore, P. & O. R. Co. v. Johnson*, 59 Ind. 480; *Ohio & M. R. Co. v. Nickless*, 71 Ind. 271; *Yost v. Conroy*, 92 Ind. 464.

Iowa: *Dalzell v. Davenport*, 12 Iowa, 487; *Prosser v. Wapello County*, 18 Iowa, 327; *Russell v. Burlington*, 30 Iowa, 262.

Kansas: *Roberts v. Brown County Comrs.* 21 Kan. 247; *Parsons Water Co. v. Knapp*, 83 Kan. 752; *Wichita & W. R. Co. v. Kuhn*, 38 Kan. 675; *Ottawa, O. C. & C. G. R. Co. v. Adolph*, 41 Kan. 600; *Ottawa, O. C. & C. G. R. Co. v. Fisher*, 42 Kan. 675.

Kentucky: *Muldrough's Mill, C. & C. Turnp. Co. v. Maupin*, 79 Ky. 101.

Louisiana: *Liles v. New Orleans Canal & Bkg. Co.* 11 Rob. (La.) 92; *Holland v. Cammett*, 5 La. Ann. 705.

Missouri: *Belch v. Missouri Pac. R. Co.* 18 Mo. App. 80; *White v. Stoner*, Id. 540; *Hurt v. St. Louis, I. M. & S. R. Co.* 13 West. Rep. 233, 94 Mo. 255.

Nebraska: *Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb. 585; *Burlington & M. R. Co. v. Schluntz*, 14 Neb. 421; *Burlington & M. R. Co. v. Beebe*, Id. 463; *Omaha v. Kramer*, 25 Neb. 489.

New Hampshire: *Rochester v. Chester*, 3 N. H. 349; *Peterborough v. Jaffrey*, 6 N. H. 462; *Beard v. Kirk*, 11 N. H. 397; *Hoitt v. Moulton*, 21 N. H. 586; *Concord R. Co. v. Greeley*, 23 N. H. 287.

New Jersey: *Thompson v. Pennsylvania R. Co.* 51 N. J. L. 42.

Ohio: *Atlantic & G. W. R. Co. v. Campbell*, 4 Ohio St. 583; *Cleveland & P. R. Co. v. Ball*, 5 Ohio St. 568; *Powers v. Hazelton & L. R. Co.* 33 Ohio St. 329; *Columbus, H. V. & T. R. Co. v. Gardner*, 11 West. Rep. 264, 45 Ohio St. 309.

Rhode Island: *Tingley v. Providence*, 8 R. I. 493; *Brown v. Providence & S. R. Co.* 12 R. I. 238.

Texas: *Houston & T. C. P. Co. v. Burke*, 55 Tex. 323; *Gainesville, H. & W. R. Co. v. Hall*, 9 L. R. A. 298, 78 Tex. 169.

Vermont: *Crane v. Northfield*, 33 Vt. 124; *Bain v. Cushman*, 60 Vt. 343.

Wisconsin: *Farrand v. Chicago & N. W. R. Co.* 21 Wis. 435; *Church v. Milwaukee*, 31 Wis. 513; *Churchill v. Price*, 44 Wis. 540.

Reasons for the exclusion of the evidence:

(1) It encroaches upon the functions of the jury or other appointed triers of fact.

Van Deusen v. Young, 29 N. Y. 9; *Van Zandt v. Mut. Ben. L. Ins. Co.* 55 N. Y. 169; *Avery v. New York Cent. & H. R. R. Co.* 121 N. Y. 31; *Fish v. Dodge*, 4 Denio, 311; *Cook v. Brock-*

way, 21 Barb. 331; *Simons v. Monier*, 29 Barb. 419; *Lincoln v. Saratoga & S. R. Co.* 23 Wend. 425; *Fleming v. Delaware & H. Canal Co.* 8 Hun, 358; *Hudson v. Caryl*, 2 Thomp. & C. 245; *Ranch v. New York, L. & W. R. Co.* 17 N. Y. S. R. 401; *Malcolm v. Metropolitan Elec. R. Co.* 86 N. Y. S. R. 741; *Wichita & W. R. Co. v. Kuhn*, 38 Kan. 675; *Prosser v. Wapello County*, 18 Iowa, 327; *Columbus, H. V. & T. R. Co. v. Gardner*, 11 West. Rep. 264, 45 Ohio St. 309; *Chicago & A. R. Co. v. Springfield & N. W. R. Co.* 67 Ill. 142; *Hames v. Brownlee*, 63 Ala. 277.

(2) It violates the rule that opinion evidence shall be received only in cases of necessity.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; *Carter v. Boehm*, 3 Burr. 1913; *Teerpenning v. Corn Eech. Ins. Co.* 43 N. Y. 279; *Reed v. McConnell*, 2 Cent. Rep. 747, 101 N. Y. 270; *Van Wycklen v. Brooklyn*, 118 N. Y. 424; *Dolittle v. Eddy*, 7 Barb. 74.

(3) It involves a conclusion of the witness upon a matter of law as to the measure of damages.

Richardson v. Northrup, 66 Barb. 85; *Re New York, W. S. & B. R. Co.* 29 Hun, 609; *White v. Stoner*, 18 Mo. App. 540; *Rochester & S. R. Co. v. Buddlong*, 10 How. Pr. 289; *Decker v. Myers*, 31 How. Pr. 372.

(4) The formation of such conclusions does not appertain to any science, art, trade, or occupation known to mankind.

Ferguson v. Hubbell, 97 N. Y. 507; *Van Wycklen v. Brooklyn*, *supra*; *Duff v. Lyon*, 1 E. D. Smith, 536; *Thompson v. Pennsylvania R. Co.* 51 N. J. L. 42.

(5) The matter is one upon which judges and jurors are as competent to pass as any witness, when the necessary facts as to values and courses of values are placed before them.

Ferguson v. Hubbell, *Reed v. McConnell*, and *Thompson v. Pennsylvania R. Co.* *supra*; *Crane v. Northfield*, 33 Vt. 124.

(6) Such conclusions are conjectural and can have no certain or definite basis of fact.

Marcy v. Schultz, 29 N. Y. 346; *Wakeman v. Wheeler & W. Mfg. Co.* 2 Cent. Rep. 130, 101 N. Y. 205; *Lamoure v. Caryl*, 4 Denio, 370; *Lincoln v. Saratoga & S. R. Co.* 23 Wend. 425; *Thompson v. Manhattan R. Co.* 29 N. Y. S. R. 720.

(7) The admission of such evidence tends to induce an omission to prove the facts necessary for an independent and intelligent decision of the question of damage.

Morehouse v. Mathews, 2 N. Y. 514; *Avery v. New York Cent. & H. R. Co.* 121 N. Y. 31; *Paige v. Hazard*, 5 Hill, 603; *Giles v. O'Toole*, 4 Barb. 261; *Newton v. Fordham*, 7 Hun, 58.

(8) Such evidence cannot be tested or contradicted by proof of facts.

Cook v. Brockway, 21 Barb. 331; *Ferguson v. Hubbell*, 97 N. Y. 507; *Re New York Elec. R. Co.* 35 N. Y. S. R. 944.

(9) Such evidence affords an ample field for bias and corruption, and is contrary to the policy of the law.

Tracey Peerge Case, 10 Clark & F. 154; *Ferguson v. Hubbell*, 97 N. Y. 507; *Wakeman v. Wheeler & W. Mfg. Co.* 2 Cent. Rep. 130, 101 N. Y. 205; *Reed v. McConnell*, 2 Cent. Rep. 747, 101 N. Y. 270; *People v. Kemmler*, 119 N. Y. 580, 7 L. R. A. 715; *Re New York Elec. R. Co.*

supra; *Beansville, I. & C. S. L. R. Co. v. Fitzpatrick*, 10 Ind. 120.

Mr. Henry H. Man, with *Messrs. A. P. & W. Man*, for respondent:

The evidence of expert witnesses was competent as to the diminution of fee and rental value.

Clark v. Baird, 9 N. Y. 183; *People v. McCarthy*, 3 Cent. Rep. 833, 102 N. Y. 639; *Krumm v. Beach*, 96 N. Y. 407; *Rochester & S. R. Co. v. Budlong*, 10 How. Pr. 289; *Re Rochester*, 40 Hun, 583; *Kenkele v. Manhattan R. Co.* 55 Hun, 398; *Vandenburgh v. Boston & A. R. Co.* 21 N. Y. Week. Dig. 474; *Hine v. New York Elev. R. Co.* 36 Hun, 293; *Reed v. Rome, W. & O. R. Co.* 48 Hun, 231; *Shaw v. Charleston*, 2 Gray, 107; *Shattuck v. Stoneham Branch R. Co.* 6 Allen, 116; *Swan v. Middlesex County*, 101 Mass. 173; *Snow v. Boston & M. R. Co.* 65 Me. 230; *White Deer Creek Imp. Co. v. Sassaman*, 67 Pa. 415; *Carter v. Thurston*, 58 N. H. 104; *Sigafoos v. Minneapolis, L. & M. R. Co.* 36 Am. & Eng. R. R. Cas. 675; *Portland & R. R. Co. v. Deering*, 78 Me. 61, 23 Am. & Eng. R. R. Cas. 51; *Yost v. Conry*, 92 Ind. 469; *Galena & S. W. R. Co. v. Haslam*, 73 Ill. 494; *Keithsburg & E. R. Co. v. Henry*, 79 Ill. 290; *Chicago v. McDonough*, 112 Ill. 85; *Colvill v. St. Paul & O. R. Co.* 19 Minn. 283; *Sherman v. St. Paul, M. & M. R. Co.* 30 Minn. 227; *Lehman v. St. Paul, S. & T. F. R. Co.* 19 Minn. 444; *Snyder v. Western U. R. Co.* 25 Wis. 60; *Telephone Teleg. Co. v. Forke*, 2 Tex. C. C. § 365; *Texas & St. L. R. Co. v. Kirby*, 44 Ark. 108; *Grafton & G. R. Co. v. Foreman*, 24 W. Va. 673.

Peckham, J., delivered the opinion of the court:

The principal question in this case is in regard to the admissibility of the opinions of experts in reference to the amount of damages sustained by the plaintiff by reason of injury to his easements of light, air, and access to his property in Third Avenue, in the City of New York, caused by the building and operation of the defendants' railroad. As the question is one of considerable importance, and arises in each one of this class of cases, and as the number of such cases tried and to be tried is, as we understand, very large, a critical examination of the question is called for. It will be well to have a clear view of the facts existing at the time that the questions in controversy were put to the witness, so that we may determine understandingly the precise point in issue.

It appears that the plaintiff, in November, 1852, became the owner in fee of the premises in question, which consisted originally of six lots on the east side of Third Avenue and on the south side of Ninety-ninth Street, but the plaintiff subsequently sold some, leaving himself with a frontage of about 100 feet on Third Avenue, and about 110 feet in depth. These lots cost the plaintiff about \$500 apiece at the time he purchased them; at which time they were vacant, and they so remained until 1865, when the plaintiff leased them for \$150 per year. The tenant erected a house upon the corner lot, with a stable, which buildings were destroyed by fire about 1877, at which time the tenant gave up his lease, and 13 L. R. A.

the lots remained vacant until 1881. In the meantime the plaintiff filled them in, and graded them. Before filling in, the premises formed a portion of a marsh or swamp over which the tide ebbed and flowed. In 1881 the plaintiff sold these lots under a contract for \$40,000, and the purchaser commenced the erection thereon of the present buildings, five in number, four of which front on Third Avenue and the fifth on Ninety-ninth Street, each house being four stories high, constructed of brick with brown-stone trimmings. The buildings are about forty-seven feet front elevation and sixty-five feet deep, and cost about \$11,000 each. The purchaser had them substantially inclosed and the plastering nearly completed in the spring of 1883, when the plaintiff foreclosed his liens thereon and took them from him, and completed them, so that they were ready for occupancy in the fall of the year 1883. Since the month of October, 1883, the buildings have been leased to tenants, and the rents actually collected from the Third Avenue buildings from January 1, 1884, to January 1, 1889, have been from one house and lot, \$7,053; from the second, \$6,129.11; from the third, \$7,554.50; and from the fourth, \$7,541.66. The defendants' railroad was constructed in Third Avenue in front of plaintiff's lots in the year 1878, and was put in operation in December of that year. The plaintiff in his complaint alleged that the building of the railroad was unlawful, and that the unlawful construction thereof interfered with his access to his premises, and impaired his easement in the street or avenue by depriving him of a large portion of light and air, and of facility of access to them, in the amount of \$75,000, and that by reason of the maintaining and operation and managing of defendants' railways the value and the use and enjoyment of his premises, he alleged, had been depreciated and diminished to the amount of \$5,000 per annum. He demanded judgment against the defendants, restraining them from operating their road through Third Avenue in front of his premises, and also from continuing the unlawful acts set forth in his complaint; and he asked that the damages he had sustained down to the commencement and during the pendency of this action be adjusted by the court, and that he might have judgment therefor against the defendants, and each of them, and that he might have such other relief as should be just and equitable. The defendants joined issue with the plaintiff in regard to many of his allegations, and set up that the defendants were organized under the laws of the State of New York, granting them the right to use the street in question for the purpose of building their railroad, and that they had built it and equipped it, and used and operated it, under such Acts of the Legislature, and in the most careful and skillful manner in which it was possible to construct, use, and operate the same in the street mentioned in the complaint.

Upon the trial of the action the plaintiff was a witness, and after stating the condition of the premises, and the fact that he had erected or caused to be erected buildings upon them at an expense of about \$11,000 each, he said that he had offered the whole premises for sale, including the house on Ninety-ninth Street,

about two years previous, which would have been in the fall of 1887, for the sum of \$105,000, and that in his judgment that was a fair price for them. Here is certainly a very large appreciation in value over the original cost. Would it have been as much if the railroad had not been built? It will be seen that the present buildings were not erected until some two years after the building of the road had been completed, and the operation thereof commenced. Whether the value of the property would have been still greater without the road than it now is with it, was the fact to be found by the court.

Upon the trial a witness was called on behalf of the plaintiff, and testified that he was a real-estate broker, and had carried on that occupation in the City of New York for 28 years; his transactions had extended throughout the whole city, and had involved both leasing and selling; that he knew the property in question, and was familiar with the value of that property, and of the property in the neighborhood; that he had made an examination of the property with a view of seeing what the physical effects to the abutting property were, produced by the railroad and its trains, commencing at least six months ago, on four or five different occasions; that he had given special attention to the effect upon abutting property produced by the elevated railroad, and the passing of its trains; that he had been examined a large number of times as a witness on the subject, and in reference to property scattered all over the city; that he had made it his business to be familiar not only with the selling but the rental values of property along Third Avenue since the railroad came there; that he had informed himself about such transactions, not only in reference to this property, but other property; that, so far as experience from personal transactions was concerned, he had none in that vicinity since the building of the railroad, in renting or in selling; that he had been engaged by property owners for the last three years to make examinations and testify as an expert witness, and it had been a considerable part of his business, and in every case in which he had testified he had testified against the Railroad Company; that he was paid \$100 to come and give these opinions; he did not know but that the property at the upper end of Third Avenue had been benefited to some extent; his opinion was that rapid transit had helped Harlem; that the building up of the upper end of Harlem had been due to the growth and filling up of all the cross-streets; that the growth and filling up of the cross-streets had been due to the rapid transit afforded by the elevated railroad in large part. The following question was put to him: "To what extent, if at all, in your judgment, is the value of Mr. Roberts' four buildings on the Third Avenue—excluding from consideration the house on 99th Street—to what extent, in your judgment, is the value of that property damaged, if at all, by the presence of the structure and the running of the trains?" Under objection and exception the answer was permitted, and the witness stated that the diminution extended from about \$110,000 to \$80,000, including the loss to the fee value simply. The court then said: "That is, you

think that the four houses fronting on Third Avenue are worth \$80,000 now?" Witness: "Yes, sir." Court: "And that they would be worth \$110,000 if the structure and road were not there?" Witness: "Yes, sir." Question: "What do you estimate the rental value of the property to be, the railroad not being there?" I refer to the Third Avenue front only." Same objection and exception. Answer: "\$90,000." Q. "And with the railroad there?" A. "\$6,400; as collectible rents, I mean."

Upon this appeal, the question is: Were these objections of the defendant properly overruled? By resorting to a court of equity, and seeking the aid of such court to prevent the operation of the defendant's road until all his damages consequent upon the illegal construction of its road in front of his premises have been paid once for all, the plaintiff has brought before the court the question, What were the damages to the fee of the premises owned by him, consequent upon this wrongful act of the defendant? The amount of damages thus caused to plaintiff's fee is the precise question which the court or jury must determine, and for such amount the court gives judgment, upon condition of the plaintiff executing a deed to the defendant of the property wrongfully taken or interfered with by it.

The first question asked of this witness, to which exception is taken, as above noted, calls for his opinion as to the amount of such damage; and the second question is of substantially the same nature, except that it refers to the injury of the rental value of the property instead of the injury to the fee. The precise and specific question which is to be determined by the court and jury is by this interrogatory placed before the witness for his opinion and decision. To permit it to be asked and answered is, beyond all question, against the great mass of authority in this and other States. It is now asked that this court, in view of the alleged abnormal character of the litigations growing up in the City of New York over the erection and operation of these elevated railroads, shall sanction in regard to them a departure from well-established rules of law touching the admission of expert evidence. It seems to me that neither the nature nor the extent of the litigation affords the slightest justification for such departure. Expert evidence, so called, or in other words evidence of the mere opinion of witnesses, has been used to such an extent that the evidence given by them has come to be looked upon with great suspicion by both courts and juries; and the fact has become very plain that in any case where opinion evidence is admissible the particular kind of an opinion desired by any party to the investigation can be readily procured by paying the market price therefor. We have said lately that the rules admitting the opinions of experts should not be unnecessarily extended, because experience has shown that it is much safer to confine the testimony of witnesses to facts, in all cases where that is practicable, and leave the jury to exercise their judgment and experience on the facts proved. As is stated by Earl, *J.*, in *Ferguson v. Hubbell*, 97 N. Y. 507: "It is generally safer to take the judgments of unskilled jur-

ors than the opinions of hired and generally biased experts." It is the general rule that testimony should consist of facts and not opinions, and the admission of opinions forms an exception to that general rule. *Mr. Justice Cowen* said, in speaking of the opinions of witnesses as to the then present value of real estate, that they were barely admissible, and that to receive them at all was a departure from the general rule of evidence, and that judges who preside at *nisi prius* sometimes have reason to regret that they should in practice form an exception. He referred to *Rochester v. Chester*, 9 N. H. 349, 364-366, where the court refused to receive the opinions of witnesses as to the value of land, even from those skilled in the market. They said the land must be described, and the jury must then judge from facts. See *Re Pearl Street*, 19 Wend. 654. I refer to this, not for the purpose of throwing any doubt upon the admissibility of expert evidence upon the question of the past or present value of real estate, where the witness is shown to be competent to give an opinion thereon,—that has been decided years ago by this court, and has been continuously approved since that time (see *Clark v. Baird*, 9 N. Y. 183); but I cite it for the purpose of showing the opinion of learned judges regarding evidence of this kind when it first came into practice, and the questions thereon first came up for decision. The only inquiry here is whether this is one of those cases in which the testimony is allowable.

The precise question has been decided by this court as lately as 117 N. Y. 219, and in *McGeen v. Manhattan R. Co.* The question there asked was, "What would have been the fair rental value in the years 1879, 1880, and 1881, if the railroad had not been built?" and we decided it to be improper. It was so held because it is merely speculative, and it is speculative upon the very question and upon the only question which the court or jury is called upon to decide, and the question calls for the opinion of the witness upon that very subject. Some criticism has been made in regard to that case by the learned counsel for the plaintiff herein, and we are asked substantially to review it, and to reverse our decision therein. We have carefully considered the arguments of counsel on both sides, and have again looked through the cases decided in this court upon the subject, and we are unable to see that there has been any error in the *McGeen Case*, but on the contrary we think it is in strict conformity with the law as heretofore laid down by this court.

I shall refer to but a few of the cases cited by the appellant herein to sustain his claim that the court below erred in admitting the question in controversy. They are all contained in his very voluminous brief upon the subject, submitted to us, and out of them the following are all that I deem it necessary to comment upon. *Morehouse v. Matthews*, 2 N. Y. 514, was an action brought by the plaintiff to recover damages for a breach of contract by the defendant in not feeding to the plaintiff's cattle as good hay as had been agreed upon. The plaintiff asked a witness what damage had occurred in consequence of feeding the cattle upon the hay in question instead

of that agreed upon. Under objection the witness answered, and stated that he thought the damage would be \$50. This court reversed the judgment on the ground that the evidence had been erroneously admitted, and stated that the question called simply for the opinion of the witness as to the amount of damage sustained by the plaintiff. *Van Deusen v. Young*, 29 N. Y. 9, was an action under the Revised Statutes to recover treble damages for cutting trees on a certain piece of land owned by the plaintiffs who were remaindermen subject to a life estate. A witness was asked, "What, in your opinion, is the difference in value of the farm by the removal of the timber?" and also, "Would the farm be worth more or less with the timber cut off?" *Davies, J.*, held that the questions were objectionable as calling for a speculative opinion and not for facts, and referred to *McGregor v. Brown*, 10 N. Y. 114; and *Mullin, J.*, said: "It was unquestionably competent for the witness to give his opinion as to the value of the farm with the timber on, and its value after it was taken off. The difference between the two may be the damages, and, in cases where the damages are arrived at by merely subtracting one sum from another, it may seem to be refining overmuch to refuse the witness the right to make the subtraction himself, and declare the result; for this is what he is called on to do when asked to give his opinion as to the amount of damages." The learned judge was speaking of a case where the witness knew the farm in question, knew it when the timber was on it, and knew what its value then was, and, the timber having been cut off, he knew what the value of the land was with the timber thus cut off; and, in a case where the difference between the two would be the legal damages, it does not even then follow that a witness may be asked the bald question, "What amount of damages had the plaintiff sustained?" The reason is that the rule of damages is a question of law, and the witness upon such a question might adopt a rule of his own, and hold the defendant responsible beyond the legal measure. In *Marley v. Shultz*, 29 N. Y. 346, the court, per *Denio, J.*, held that a witness could not be allowed to state his opinion of the amount of damages. That was in an action for damages for raising a dam so as to overflow the plaintiff's house. The learned judge said the witness could describe the character of the overflow and its effect, and then it would be for the jury to estimate the damages; that what was offered was in substance an opinion as to the amount of the damages which the plaintiff had sustained by the wrongful act of the defendant. This court, in *Green v. Plank*, 48 N. Y. 669, in an action of replevin for a canal boat, reversed a judgment for the plaintiff where the witness had been asked to state the damages for taking and withholding the boat during the time the defendant had it. In *Ferguson v. Huddell*, *supra*, which was an action for damages for a fire claimed to have been negligently set, from which the plaintiff sustained damage to his land, a farmer was called as a witness for defendant, and asked the question: "What do you say as to whether it was a proper time or not to burn a fallow?"

The testimony was said to have been erroneously admitted. In *Van Wycklen v. Brooklyn*, 118 N. Y. 424, the question of the admissibility of expert evidence is discussed, and held to be allowable only when, from the nature of the case, the facts cannot be stated or described to the jury in such a manner as to enable them to form a correct judgment thereon, and no better evidence than such opinions is attainable. In *Avery v. New York Cent. & H. R. R. Co.*, 121 N. Y. 31, which was an action for damages on account of the violation of a covenant to keep a proper opening from the defendant's depot yard, opposite the plaintiff's hotel, the plaintiff was asked this question: "Do you know what the rental value of your Continental property, real and personal, would have been between the 10th day of September, 1881, and the 28th day of January, 1884, if there had been a sufficient opening kept and maintained by the defendant opposite your hotel, for the convenient access of passengers and their baggage to and from the twenty-foot strip of land lying south of the hotel?" This evidence was held to be improper. Judge Gray, in delivering the opinion of this court, said: "The witness should not have been permitted to give his opinion upon that head. His testimony should have been confined to stating facts. He might have described the condition of his property. He could have given evidence of what the defendant did to or upon the land over which he claimed to possess rights. He could have stated what his business was, and what it amounted to, at times prior and subsequent to any change in the situation and circumstances surrounding its conduct; and it would then be for the jury to draw the conclusions from the facts stated as to whether plaintiff had been injured by the defendant, and what amount of damages he should recover." In *Norman v. Wells*, 17 Wend. 136, it was held by the old supreme court that the amount of indemnity, when it is not capable of being reached by computation, is always a question for the jury. It was stated that, if there be any rule without exception, it is this; and the court was unable to find any instance where the opinion of a witness has been received upon that particular question. The action was on covenant for damages to the plaintiff by the erection of another mill on the same stream with plaintiff's mill, and a witness was asked the damages which in his opinion the plaintiff had sustained by reason of the erection of such mill. The question was allowed at circuit, and a new trial was granted for the error in allowing it.

The learned counsel for the plaintiff has cited a number of cases on his side, which he claims are authorities for the question put to the witness herein. The briefs of both counsel exhibit untiring industry and research, and all the cases that have been decided involving questions of this nature, both in this and other States, would seem to have been found and cited on the one brief or the other. It is impossible to notice them all, and I shall not make the attempt. Special reliance seems to have been placed, by the learned counsel for the plaintiff, upon the cases I now refer to. In *Clark v. Baird*, 9 N. Y. 183, the point decided was that the opinions of a witness

acquainted with real estate, the value of which was in dispute, were competent upon the question of such value. It was an action on the case by the purchaser of a tavern stand against his vendor for fraudulently misrepresenting the boundaries of the land. A witness for the plaintiff testified that he had examined the tavern stand with a view of buying it, and that "it was worth \$1,000 if it extended to the race and trees. The strip taken off would reduce it one fourth." This testimony was objected to on the ground that the amount of damage could not be ascertained by the opinion of the witness. The objection was overruled, and the defendant excepted. Part of the alleged fraud consisted of the statement that the tavern stand extended to the race and trees. The plaintiff claimed that as matter of fact it did not extend so far. The learned judge, in the course of his opinion, said that the witness had in substance stated the value of the stand, including all the land it was represented to include, and also, in contrast with that statement, and as bearing upon the question of damages, had further stated the value of the stand excluding that part which, as the plaintiff contended, did not pass by the defendant's conveyance to the plaintiff by reason of his want of title. I do not see that the case affords any countenance for the claim of the plaintiff herein. The witness simply stated the value of the tavern as it stood, estimating that a certain amount of ground in plain view was attached to the stand, and then stated what in his opinion was the value of the land with that particular piece of land not included. Within any rule regarding the opinions of experts, we think this evidence admissible. In *Rochester & S. R. Co. v. Budlong*, 10 How. Pr. 289, which was a proceeding by plaintiff to take defendant's property by the right of eminent domain, the opinion of the general term of the supreme court was delivered by Justice Selden, in 1854. It contains expressions which favor the views contended for here by plaintiff's counsel, and it includes all that can be said in favor of the admission of this kind of evidence. The opinion has not been followed by the courts of this State, and many subsequent decisions of this court, some of which have already been cited, are at war with the doctrines announced by *Mr. Justice Selden*. The case cannot be regarded as authority in this State at the present time. See also *Harpending v. Shoemaker*, 37 Barb. 270; *Simons v. Monier*, 29 Barb. 419.

In *Hine v. New York Elev. R. Co.*, 36 Hun, 293, which was an action brought to recover damages for the obstruction of light, air and access to the plaintiff's premises by reason of the construction of the defendant's road, a real estate broker was called on the part of the defendant, who, after stating that he was familiar with the premises in question, was asked this question: "What has been the effect, in your opinion, of the Elevated Railroad upon the value of the property, so far as the items of light, air and access are concerned?" Upon the plaintiff's objection the question was excluded, and the court held that this was error. The court in the course of the opinion, which was delivered by Davis, P. J., said that "the answer to the question should have been received. The witness was an expert, and that

fact was sufficiently shown to entitle him to express an opinion on the subject. The opinion called for related to the precise question of damages, which, as will be seen, the court submitted to the jury, and there is no reason why the opinions of experts are not admissible upon those questions." No case is cited in the opinion, and what I have quoted is all the learned judge said in regard to the admissibility of evidence of this kind. The case is not in harmony with the cases in this court, and should not be followed. The evidence is open to all the objections spoken of, in that it puts the witness in the place of the court and jury, and is only his opinion upon the very point to be decided by them.

In *Kenkels v. Manhattan R. Co.*, 55 Hun, 308, an action similar to the one at bar, and where, as here, the defendant had neglected to take proceedings to condemn the property of the plaintiff, the general term of New York held that the measure of damages was the difference, at the time of the trial, between the value of the property to which the easements were appurtenant, with the easements, and its value without them. The manner of proving such difference was not discussed. *Mr. Justice Van Brunt*, in the course of his opinion in that case, after stating what he regarded the true rule of damages to be, said: "We do not think that the court of appeals has as yet condemned the rule. Until they do, justice seems to require that it should be followed." It is stated as one of the grounds for the motion for a new trial in that case that incompetent evidence upon the subject of damages had been given, but it does not appear what that incompetent evidence was. The learned judge said: "The evidence as to the value of these easements is necessarily, from the very nature of the case, somewhat conjectural, and stringent and strict rules are not to be applied where they would deprive the owner of all proof of damage, as we are dealing with the damage done by a trespasser; and, while damages should be proven with reasonable certainty, the rights and interests of the owner of these easements should not be sacrificed." That is undoubtedly true. Continuing, the learned judge said: "What more certain evidence of the value of these easements can be given than by proof of what the property to which they are appurtenant would now be worth with the easements and what it is worth without these easements?" Evidence as to what the value of the property would be with the easements alluded to, unaffected by defendant's acts, is proper. No dispute arises on that point. The controversy arises when the fact of that value is to be sworn to as an opinion by a so-called "expert," and which opinion, speculative and uncertain as it must be, is directed to the very point which the jury is to determine. Evidence upon the subject of this speculative value,—a value which in fact does not and cannot exist,—should be confined to those facts which the court shall hold to be material for a fair and intelligent judgment; and then the inferences to be deduced from them may be drawn just as well by the jury as by the expert, and in all probability much more fairly. This case is one where the facts which form the basis of opinion can be specified, and should

be stated, and the inference to be drawn from those facts should be drawn by the court or by the jury.

A sufficient number of cases have been cited on both sides, I think, to place fairly before us the different reasons for the different views which would exclude or permit evidence of this nature to be laid before a jury. There can be no doubt, as I have already observed, that the great weight of authority, both in the supreme court and in this court, is against the introduction of this evidence; and, indeed, there is no reason why it should be introduced. Expert evidence of the value of real estate is proper, and in many cases essential. The present value of the property of the plaintiff can be proved by expert evidence,—both the value of the fee and the rental value. Both classes of values could also be proved by expert evidence, as of a time immediately prior to the building of this road. They are facts which now exist, or which once existed; and, if the expert have knowledge of them, he should be permitted to state it. As to what the value would have been under wholly different circumstances, he knows and can know nothing, but must form an opinion wholly speculative in its nature, which opinion must be based upon data perfectly easy for him to state, and from which, when once stated, an ordinarily intelligent jury can draw as just and fair an inference of a possible value as could the expert. And that very inference must in some way be drawn by the jury, for it is the question it is called upon to decide. The opinion of the expert, if of the least value, would have to be based upon an intelligent consideration and knowledge of the value of other property as nearly as may be similarly situated, in about the same quarter of the town, and under nearly the same circumstances, but without the presence of a railroad of the nature of the defendants' in front of the property. All this information he could easily impart to the jury. Proof might be made of the filling up of the side streets along the lines of this railroad, and of the incoming of a large population; the erection of buildings somewhat similar to plaintiff's, and their rental and fee value; and finally a general statement of the condition and value of property in the neighborhood of that in question could be proved. All these facts would be of service in determining the question to be submitted to the jury. When they are all stated, and past and present values proved, the jury or the court will then be as fully competent to draw the inference which it is its peculiar province and duty to draw as the expert. This special question is one which all admit is to some extent and in all cases a matter of conjecture and speculation. How much the appreciation of property is itself due to the erection of the road, and the consequent filling up of the neighborhood opened by it, and whether the property without the construction of the road would ever have become as valuable as it is, are questions which, when these various data have been given, can be speculated upon as well by the judicial tribunal as by the hired expert. It is none the less conjecture and speculation because the expert is willing to swear to his opinion. He comes on the stand to swear

in favor of the party calling him, and it may be said he always justifies by his works the faith that has been placed in him. This case is a good illustration of what may be almost termed the wholly worthless character, for any judicial purpose, of the testimony on both sides upon this one point, as to what would be the value of this property if this railroad had not been built. The experts on the part of the plaintiff guessed that it would have been \$30,000 more valuable, while those on the part of the appellant (equally intelligent, it would seem, and equally honest) thought that the value of the property would have been less if the railroad had not been built. The court is not in the least aided by these various guesses of these hired experts. If the facts upon which these gentlemen based their guesses are placed before the court more exact justice will in my judgment be the result if their speculations be excluded, and all speculation as to the damage sustained by a plaintiff be confined to the court, and drawn entirely from the evidence in the case.

It is claimed, however, on the part of the plaintiff, that, even if this question were objectionable, yet the fault was cured by the questions put by the court, in response to which the witness said that the four houses fronting on Third Avenue were worth \$80,000, and would have been worth \$110,000, if this structure and road were not there. If the objection were only to the form of the question, that which was made use of by the court would probably have cured the difficulty. But it is no objection to form that I have been discussing. The objection is to the substance of permitting the witness to state what in his opinion would have been the value of this property at this time in case the railroad had not been built and operated. This objection was not cured by the alteration of the form of the question. It is also claimed that there was sufficient evidence, excluding entirely the evidence of experts under the ruling of the court, upon which this judgment may be sustained. There is some other evidence in the case, but what would have been the result if all this objectionable evidence were eliminated, it is impossible for this court to determine. We went to the very extreme limit in upholding the judgment in the *McGean Case*, but there the evidence was much more minute, and the objectionable evidence seemed to have been objected to on grounds other than its absolute incompetence.

We thought that it was doubtful whether the objection specifically and pointedly raised the question. The objection in this case is not only that it was incompetent, but the question was objected to on the ground that it was for the court alone, and not for the witness, to determine the amount of damage. We think the objection was sufficiently exact to raise the question that has been discussed here.

Lastly, it is alleged on the part of the plaintiff that, even assuming error, it is not prejudicial to the defendant, because the defendant is not bound to avail itself of the privilege granted it by taking a deed of the easement from the plaintiff upon the payment of the amount of the damages found by the court, but may submit to the injunction, and in the mean time take proceedings to condemn the property.

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We do not think this contention can avail the plaintiff. The inquiry into the fee value of the plaintiff's property is predicated upon the idea that the defendant is to take the property at the value found in order to escape the injunction which would otherwise issue, and indeed it would seem that the defendant would have not much choice in the matter, and that it would be substantially bound by the judgment to take the property at the value found by the court or jury. It is idle to talk about a company situated like this corporation submitting to an injunction, and ceasing to operate its road through the avenue for a single day. It might be questionable whether there would be the slightest justification for such stoppage, founded upon any allegation that the amount of damages found by the court was too great. At any rate, the question was tried by both sides for the purpose of determining what the amount of damages really was, and the defendant has the right under the circumstances, where the investigation of such question was proper and material, to claim that it should be made upon competent and legal evidence; and, where improper evidence is admitted to its damage, it has the right to ask the court for relief.

Our conclusion is that for the error in the admission of this evidence *the judgment should be reversed* and a new trial granted, costs to abide the event.

Andrews, Earl, Finch, and O'Brien, JJ., concur.

Gray, J., dissenting:

The errors presented by this record, and upon which the appellants insist as requiring the reversal of the judgments below, consist in the admission by the trial court of certain evidence adduced by plaintiff to show that the maintenance and operation by defendants of the elevated railroad were damaging to his property rights. Witnesses were called who were qualified to speak from business experience, from familiarity with the values of real property in the City of New York, and who professed to be skilled by reason of an especial study of the general effect upon abutting properties of the elevated railroads, and the exceptions arose upon the admission of their opinions in answer to the following questions: "To what extent, in your judgment, is the value of that property damaged, if at all, by the presence of the structure and the running of the trains?" "What do you estimate the rental value of the property to be, the railroad not being there?" "To what extent, in your judgment, if at all, is the selling and rental value of this property . . . diminished by the presence on Third Avenue of the elevated road, and the operation of the passing trains?" To these questions the defendants interposed objections on several grounds, the only one of which material here is that of the competency of such evidence; but the trial court, nevertheless, permitted the witnesses to answer. The question, which is thus brought prominently before us for decision is, only comparatively speaking, novel; but it assumes very great importance, because not only are the principles of evidence involved, but, as we are informed, a great number of decisions in the courts below, and many recov-

eria, rest upon the theory that the admission of such evidence is necessary and proper in such cases. If we shall say that it is inadmissible, it must be because it is deemed contrary to the principles underlying the law of evidence and to settled rules. The point which is mainly made against the competency of such evidence is that it calls for the conclusions of the witness upon a matter which the court or jury should alone determine, and hence invades their province. It is also suggested that to allow of such evidence is to permit speculation to supply proof. If the proposition were wholly true, it might be difficult to sustain the right of the plaintiff to submit his case to the jury upon such proof. But it seems to me that the argument against this species of proof is inapplicable to cases of this character, where evidence as to the damage suffered by the abutting landowner cannot always be furnished by exact data or in statements of facts, and where, to an intelligent judgment upon the issue, expressions of opinions seem so necessary. Nor is it true that the evidence is forbidden by established rules, whether we consider that question upon its truth, or upon the principles of the law of evidence. These principles cannot be embodied in rigid and lifeless formulas which deny adaptation to new conditions in human affairs. They admit of expansion and of frequent exception, whenever it is needed, in order to demonstrate the truth. A different view of the law of evidence might be extremely subversive of justice. The law of evidence, as a system, is based both upon principles and upon rules which, when not prescribed in statutes, arise out of precedents in decided cases. The rule is an exposition of the principle; but it is based upon judicial experience in the investigation of controversies by means of testimony, and is necessarily influenced by what may be the existing condition of things. It is well, though somewhat elementary, to observe that in the application of the principles of the law of evidence to the investigation of the truth, in a controversy over an alleged matter of fact, the aim is to confine the proofs only within the bounds of what is competent and satisfactory evidence; and that by competent evidence is meant such as the nature of the thing to be proved requires, and that by satisfactory evidence is meant such as shall suffice to satisfy the unprejudiced mind. 1 Greenl. Ev. § 1. If some rule of evidence is alleged to militate against the competency of the species of proof offered, I suppose that it should comply with two conditions, to satisfy the mind as to its force. It should appear that it was established upon a sufficient precedent, fitting the case, and that the nature of the thing to be proved did not require any exception to or modification of the supposed rule. In this case the matter of fact, the truth of which is the subject of judicial investigation, is whether the maintenance by the defendants of an elevated railroad structure, and the operation of its trains upon the street in front of the plaintiff's premises, have caused any damage to him by which the value of his property rights has been impaired. The controversy is over that fact, and the question of the damage. Such a condition of things in the street is a new use, and affects certain rights in and over the street,

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which are considered as appurtenant to the abutting lands. It constitutes a taking of the easements, which the property holder is legally or beneficially entitled to; and, if he can establish that the acts of the defendants have caused damage to him by depreciating the value which his estate in the abutting land would otherwise have, he is entitled to recover from them, as trespassers, damages to the extent of the injury suffered by his estate. It is very plain that the value of these easements cannot be arrived at by exact proof. Judge Van Brunt, in delivering the opinion of the general term of the supreme court in *Kenkele v. Manhattan R. Co.*, 55 Hun. 898, well said: "How are we to arrive at the value of these easements taken by the defendant? To the plaintiffs they are of no value except because of the enhanced value which they give to the property they own fronting upon the streets. By themselves they are worthless,—have no intrinsic value." Hence he reasoned that the more certain evidence of their value was in proving what the property would be worth with the appurtenant easements, and what without them. I think that reflection, and a careful consideration of the real bearings of the evidence and of the circumstances of the case, must induce the conviction that the evidence does not usurp the province of the court or jury, and that there are ample and cogent reasons for its admission.

The admissibility of opinions as proof of the marketable condition and value of property, where it is not practicable to give more definite knowledge, has been long settled, and has formed one of the admitted exceptions to the rule which excludes the opinions of witnesses as evidence. 1 Greenl. Ev. § 440a; *Clark v. Baird*, 9 N. Y. 183; *Robertson v. Knapp*, 35 N. Y. 91. The ground of the exception is not because the persons who give such opinion evidence are superior in scientific capacity or attainments, but because they are shown to have a knowledge of such matters which jurors have not, and the value of property is actually a mere matter of opinion. If, then, expert or skilled evidence is admissible to prove generally the value of real property, why should it be deemed inadmissible to prove its value under different circumstances; that is to say, not only what is its value as at present circumstanced, but what would be its value if circumstanced differently, and under ordinary conditions of street uses? And why is an opinion not proper as to the extent of the damage, if any, to the value of the land, as being often the best attainable evidence? The mere objection of incompetency is no longer available to exclude opinion evidence, because upon the fact in controversy, in a case where more definite knowledge is not to be had. There is the strongest reason for admitting the opinions of witnesses to prove the extent of damage sustained by reason of the defendant's acts in the circumstances and necessities of the case. Without the aid of the opinions of persons experienced in the subject of real estate values in a metropolitan center like New York, it would be rarely, if ever, possible for the plaintiff to make a satisfactory or sufficient case for an intelligent judgment by courts or jurors. The values of real estate are fixed by and depend

upon many considerations. The factors of value in the particular locality, in the character of the neighborhood, and in the tendencies of trade or, of residence, are indefinite, and are not matters of common knowledge. A new and different use of the street may affect the growth in value of a city lot favorably or adversely; but as to which way and to what extent is a matter largely of opinion, based upon study and experience, and not of exact knowledge from definite facts. It is not a matter requiring any particular intellectual attainments to understand, but it involves an acquaintance with affairs and the possession of knowledge acquired through habits of observation and business, which must be essentially peculiar, and it would be stretching presumption rather far to assume that the knowledge is common to all persons. In the growth of a city and the increase of its business and wealth are causes for a steady enhancement of its real estate values, though its direction may be erratic and incapable of being foreseen. That the value of the plaintiff's property upon the Third Avenue might be greater to-day than it was before the defendants built their railroad structure, if the street remained in its earlier condition, is a possible if not a natural assumption. But it is a fact incapable of definite knowledge, and plainly, as it seems to me, best ascertainable through the opinions of persons whose familiarity with the neighborhood and habits of business observation in such respects could qualify them to speak to the issue. The question before us is not like that of a trespass once committed upon property rights, where the value before the trespass and the value after its commission might sufficiently express the facts, from which jurors could deduce conclusions as to any damage. Here the continuing trespass upon and the deprivation of appurtenant property rights introduce an element, the aggregation of which is to be considered in connection with possible general benefits conferred and in relation to municipal growth under normal or usual conditions. Whether the elevated railroad enhanced the values of the abutting property over what they would have become in its absence is a fact which is best and most intelligently determined from competent opinions.

An earlier and leading case in the reports of the decisions of this court is *Clark v. Baird*, 9 N. Y. 183, which was an action on the case for fraud in misrepresenting the boundaries of property sold by defendant. The premises consisted in a tavern stand, and the representation made was that they extended to a certain mill-race and tree. A witness who had examined the property with a view to purchase was permitted, under objection, to testify that "it was worth \$1,000 if it extended to the race and trees. The strip taken off would reduce it one fourth." This testimony was objected to upon the ground that the amount of damage cannot be ascertained by the opinion of the witness. The opinion of the court was delivered by Judge A. S. Johnson, a most learned and able jurist, and was directed to the discussion and elaboration of the question of the competency of opinions upon such a question. This is clear from an observation of the judge, who said: "The evidence was pointed solely

to the question of damages, and the objection was undoubtedly understood by the court to relate to the competency of opinion upon the question of value." Many cases in this and other States were considered, and with such particularity as to render it quite unnecessary to repeat the labor here. The propriety of the evidence objected to was sustained upon the ground of necessity and of superior convenience. The opinion summed up a general discussion in this wise: "Upon this ground [*i. e.*, of necessity], as well as upon that of superior convenience and the constant reception of such testimony upon trials without objection,—a tact but strong proof of its propriety,—it must be deemed established that upon a question of value the opinion of a witness who has seen the thing in question, and is acquainted with the value of similar things, is not incompetent to be submitted to a jury."

In *Robertson v. Knapp*, 35 N. Y. 93, *Clark v. Baird* is referred to with approval as authority for the rule that opinions are admissible "as to the value of property in cases where the value was properly the subject of inquiry." The point of the objection in *Clark v. Baird* is precisely the same in principle, if not in its facts, as the one now presented.

In the early case of *Rochester & S. R. Co. v. Budlong*, 10 How. Pr. 289 (which was decided in 1854, a year later than *Clark v. Baird*), the opinion of a witness was held competent to show what would be the injury to the appellant's farm, arising from the construction of the railroad, and what would be its diminution in value from the same cause. The general term of the supreme court, at which the case was decided, was composed of Justices Selden, Welles and Johnson, and the opinion was delivered by Justice Selden. The evidence was held admissible upon the ground that unless questions involved a subject, knowledge of which is presumed to be alike common to all men, skilled opinions were proper. The authority of these cases has sufficed for the views of courts in other States, though it must be admitted that judges have not uniformly agreed. Some of these cases are cited in the respondent's brief; but extended reference to them seems unnecessary. The proposition must commend itself upon obvious grounds of necessity and of right, as well as because it is sanctioned by authority in the courts of this State. But I may refer to some cases in the Supreme Court of Massachusetts, where the question has been pertinently discussed.

In *Shattuck v. Stoneham Branch R. Co.*, 6 Allen, 115, where lands were taken for a railroad, testimony as to the amount of damage done to the petitioner's estate was allowed upon the theory that, where the amount of damage done to property is in controversy, opinions by persons acquainted with the value of the property may be given. It was there observed that, "as value rests merely in opinion, this exception to the general rule that witnesses must be confined to facts, and cannot give opinions, is founded in necessity and obvious propriety;" and the opinion cites *Clark v. Baird*, *supra*. In *Swan v. Middlesex County*, 101 Mass. 173, where land was taken for widening a street, the admission of such opinions was justified upon like reasoning and "rather

from necessity, upon the ground that they depend upon knowledge which anyone may acquire, but which the jury may not have, and that they are the most satisfactory and often the very best attainable evidence of the fact to be proved." It was there said: "The witnesses, being competent to testify to the value of the land affected before and after the alteration of the highway, might testify to the simple question of arithmetic, which of those two values was the greater; in other words, whether the petitioner's estate was benefited or injured." And see *Sexton v. North Bridgewater*, 116 Mass. 200.

The decisions in our own State, which I have mentioned, have been relied upon by several text-writers. See Lawson, Exp. Ev. p. 451; Rogers, Exp. Test. § 152; and also Whart. Ev. § 450. In Rogers' work it is remarked: "That there is no such inherent distinction between questions of value and questions of damages, if from the latter is excluded all idea of any legal rule or measure of damages, as brings the one within and the other without the province of the opinion of witnesses." And in Wharton's work it is remarked, with respect to the facts upon which a witness bases his opinion as to the depreciation in value, that "when, as is often the case, these facts can be best expressed by the damage they cause, then this damage and its extent may be testified to by witnesses." The following authorities are in point, and may be referred to in connection with this discussion: *Snow v. Boston & M. R. Co.* 65 Me. 230, 231; *Keithsburg & E. R. Co. v. Henry*, 79 Ill. 294; *White Deer Creek Imp. Co. v. Sassaman*, 67 Pa. 415; *Bayder v. Western U. R. Co.* 25 Wis. 66, 70; *Lehmie v. St. Paul, S. & T. F. R. Co.* 19 Minn. 464 (Gil. 406).

As against the weight of authority in the cases of *Clark v. Baird*, *supra*, and *Rochester & S. R. Co. v. Budlong*, *supra*, I find no case since, in this court, which compels a different view. *Van Deusen v. Young*, 29 N. Y. 9, was an action of trespass for damages caused by cutting down and taking away trees from land, and a witness was asked, "Would the farm be worth more or less with the timber cut off?" The impropriety of this question was deemed to exist in its being irrelevant to the issue, and as calling for a speculative opinion. Clearly this is not authority for the case at bar. *Judges Mullin*, who delivered an opinion in the case, in discussing the competency of opinion evidence as to value, most pertinently says: "There are cases in which it is necessary to put to the witness the very question how much damages the plaintiff has sustained by reason of the act or neglect of the defendant. These are cases in which no data can be given which could enable a jury to arrive at the measure of damages, because the amount of the damage is known and can be properly appreciated and measured only by persons of skill in the business or matter to which the damage in the case relates. For a full and accurate examination of the cases on the question, see *Clark v. Baird*, 9 N. Y. 183."

Marcy v. Shultz, 29 N. Y. 856, was an action for damages for the overflowing of the plaintiff's land from a mill-dam, and a question discussed related to the offer to ask the

plaintiff (himself a witness) what the value of the use of the house was per annum before the raising of the dam. This was deemed objectionable because the value of the rent was not important, "except argumentatively." It was remarked, however, that "if the house had been kept for renting, and something in the nature of a market price for the use could have been proved, it might have been competent." *Teerpenning v. Corn Eack. Ins. Co.*, 43 N. Y. 279, was an action on a policy of insurance for the loss of goods by fire, and cannot be deemed to be, either in fact or in principle, controlling. *Clark v. Baird* is there cited with this observation, "that upon questions of value the opinions of witnesses are admissible, but with the qualification that the witnesses must have peculiar knowledge of the article in question and its value."

I do not think other authorities cited from the decisions of this court call for discussion, until we come to the recent cases of *McGean v. Manhattan R. Co.*, 117 N. Y. 223, and of *Avery v. New York Cent. & H. R. R. Co.*, 121 N. Y. 81. The first of these cases might be deemed upon a cursory consideration, decisive of a contrary view. The decision of that case, however, did not turn nor depend upon the point as to the competency of the evidence as to value, nor was the question altogether the same as in the present case. There was no discussion by counsel of the point, except in the brief of the appellant's counsel, and the case of *Clark v. Baird* was not alluded to at all. The case was affirmed upon other considerations; and, as our decision did not involve any necessary determination as to the principle of evidence in question, there is no valid or just reason why we should be limited in our present discussion by the *McGean Case*, especially when the point becomes important, and the determination of the question essential. In the other case, of *Avery v. New York Cent. & H. R. R. Co.*, the plaintiff was a witness, and he was asked this question: "Do you know what the rental value of your property, real and personal, would have been between the 10th day of September, 1881, and the 28th day of January, 1884, if there had been a sufficient opening kept and maintained by the defendant opposite to your hotel for the convenient access of passengers and their baggage to and from the twenty-foot strip of land lying south of the hotel?" The propriety of such a question was denied upon several grounds. It was held that the witness had not been shown to be qualified to give such an opinion, and that the question assumed the insufficiency of the opening. It was said that it was an attempt "to prove through the witness that he was prejudiced by the existing condition of things as to the opening in the fence, and, under the guise of giving his knowledge, to elicit his opinion that the value of his business to him would have been greater if something different in the way of an opening had been maintained." Therefore, and on the strength of authorities mentioned in the opinion, the question was condemned as usurping the province of the jury. There was no question nor discussion as to the competency of expert evidence, or as to opinions of persons possessing a knowledge of a subject which in its nature is peculiar, and cannot be assumed

to be common to all. The plaintiff was conducting a hotel and restaurant business, and was a lessee of the premises. Whether his business was injured or not was the subject of definite knowledge, and capable of being testified to by exact data. The present case, therefore, differs in its facts, as in its principles, from the cases relied upon, and is only appositely met by the authorities of *Clark v. Baird* and *Rochester & S. R. Co. v. Budlong*, *supra*. Here we have a new structure in the streets, which was a perversion of a street use, and which the Legislature could not authorize nor sanction without providing for compensation to the abutting property owner for the value of the appurtenant easements appropriated, if shown to have a value to him greater than any particular benefit conferred upon his estate by the presence of the structure. How, in the nature of things, is such a matter susceptible of exact proof by facts? Is not the effect upon the plaintiff's estate from the presence of the defendant's structure and its operation of trains, and any damage sustained thereby, best shown by receiving in evidence the opinions of those persons who, by reason of experience, observation, and familiarity with the various and more or less inexact and indefinite causes which operate upon real estate values, are skilled or expert upon the subject? How can the value of the property, if enjoyed in a usual manner and if subjected to ordinary street uses, be ascertained except by way of such evidence? There is no application of any new principle of evidence. *Clark v. Baird* is sufficient authority for the reception of opinions in evidence upon questions of value and damage. But there is, in a changed and new condition of things, a new reason for the admission of ex-

pert opinions as to the extent of damage sustained by an abutting landowner from the presence of these elevated railroads. This court has decided that their structures destroyed the ordinary uses for which a street was intended, and appropriated certain easements of the abutting property owners, wherefore they should make compensation in damages for any injury which may be proved to have been suffered. Is not that injury, under the extraordinary circumstances of the case, more intelligently proved through the opinions of persons shown to be competent to express such opinions? The witness' evidence does not conclude the court or jury; and it is still left to them to decide, with the aid of such skilled opinions, as to the measure and amount of damages which should be awarded by way of compensation. And, if the witness is asked for his opinion as to the extent to which the plaintiff's estate has been damaged, it seems an overrefinement of argument to deny the propriety of allowing him to state the result of a mere subtraction of the values assigned to the premises with and without the structure. The judgment of the court or of jurors is not limited to the opinions given, but is formed from the consideration they may give to the evidence, and is simply aided by the information they may have derived from the skilled opinions in the case. Upon the grounds of superior convenience, of necessity, and of an obvious propriety, and if we would have intelligent and just decisions of such issues, I think the evidence objected to is admissible in such cases, and therefore that the judgment below should not be reversed for the errors alleged.

Ruger, Ch. J., concurs.

UTAH SUPREME COURT.

A. W. WERTZ, *Respt.*,

v.

WESTERN UNION TELEGRAPH CO.,
Appt.

(.....Utah.....)

A stipulation in a telegraph blank exempting the company from liability for

mistakes and delays in the transmission of unrepeat messages will not prevent recovery of the full damages occasioned by a mistake resulting from the negligence of the company's servants.

(July 1, 1891.)

A PPEAL by defendant from an order of the District Court for the First District setting

NOTE.—*Telegraph companies: effect of stipulations in contract to transmit.*

A telegraph company cannot limit its liability for the plain and palpable negligence of its operators and agents. *Garrett v. Western U. Teleg. Co. (Iowa) 10 Ry. & Corp. L. J. 115.*

It is not relieved from liability for failing to forward a message, by a stipulation that it shall not be liable for errors or delays or for nondelivery. *Ibid.* See *Western U. Teleg. Co. v. Collins*, 10 L. R. A. 516, 45 Kan. —.

Its liability for mistakes or delays in delivering telegrams written not on the company's blank forms is not limited by stipulations in such forms, the terms of which were not actually known to the sender, although he had been in the habit of sending messages on those forms. *Pearson v. Western U. Teleg. Co.* 124 N. Y. 256.

A stipulation on a telegraph blank that the company will not be liable for delays arising from un-

avoidable interruption in the working of its lines, does not embrace a temporary, exclusive usurpation of the wire in sending out train orders. *Western U. Teleg. Co. v. Rosenreter (Tex.)* March 24, 1891.

A stipulation in a printed form upon which messages are required to be written before being accepted for transmission that the company shall not be liable for mistakes or delays or for nondelivery of unrepeat messages beyond the amount paid for their transmission is contrary to public policy and void so far as it seeks to relieve the company from liability for negligence. *West. Union Teleg. Co. v. Short*, 9 L. R. A. 744, and *note*, 58 Ark. 434; *West. Union Teleg. Co. v. Stevenson*, 5 L. R. A. 515, 128 Pa. 442; *Kiley v. Western Union Teleg. Co.* 11 Cent. Rep. 895, 100 N. Y. 331.

Where the message was properly transmitted and transcribed and the loss was occasioned by failure to promptly deliver, a stipulation on the blank lim

aside a verdict favorable to defendant and granting a new trial in an action brought to recover the damages caused by a mistake in the transmission of a telegraph message. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. Evans & Rogers for appellant.

Messrs. Smith & Smith, for respondent:

Notwithstanding the terms of the blank, the Company was not released from liability for the negligence of its servants.

Gillis v. Western U. Tele. Co. 4 L. R. A. 611, 61 Vt. 461; *Western U. Tele. Co. v. Yopst*, 3 L. R. A. 224, 118 Ind. 248.

This question is also substantially controlled by the decision of the Supreme Court of the United States in *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627.

The telegraph company occupies the same relation to commerce as a carrier of messages that a railroad does as a carrier of goods.

Western U. Tele. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; *Western U. Tele. Co. v. Pendleton*, 123 U. S. 347, 30 L. ed. 1187.

The Company is liable for the full damage incurred.

Pepper v. Western U. Tele. Co. 4 L. R. A. 660, 87 Tenn. 554; *Alexander v. Western U. Tele. Co.* 3 L. R. A. 71, 66 Miss. 161; *Western U. Tele. Co. v. Griswold*, 87 Ohio St. 301; *Thompson v. Western U. Tele. Co.* 64 Wis. 581; *Fowler v. Western U. Tele. Co.* 80 Me. 381; *Western U. Tele. Co. v. Crall*, 38 Kan. 679; *Brown v. Western U. Tele. Co. (Utah)* June 21, 1899.

Telegraph companies are in all respects bound by the same rules that control common carriers, and it is held that they cannot contract with their employers for exemption from liability for the consequences of their negligence.

Southern Exp. Co. v. Caldwell, 88 U. S. 21 Wall. 269, 270, 22 L. ed. 558, 559.

Zane, Ch. J., delivered the opinion of the court:

The plaintiff delivered to the defendant, at its office in Ogden City, Utah, to be transmitted to Eagle Rock, the following message: "To

Geo. H. Storer, Eagle Rock, Idaho: I will give one thousand cash, ball, six months. Answer." Which was delivered to the addressee at Eagle Rock in the following language: "I will give one hundred cases, balc six months. Answer." In consequence of the change, the evidence tended to show that the plaintiff lost a contract for the conveyance for \$4,000 of real estate then worth \$5,500. The message was written on a blank, on which was printed a condition that the Company would not be liable for mistakes and delays in transmission, from negligence of its agents or otherwise, unless the message should be repeated, and requiring therefor an additional charge of one half the regular rate. The message was not repeated. The jury returned a verdict under the charge of the court for the amount received for transmission, which the court, upon the motion of the plaintiff, set aside. From this order the defendant has appealed, and assigns the same as error. The cause of the failure to transmit the message as delivered is not expressly shown; but the probability is that the defendant's agents knew precisely how the failure occurred. If they did not, the defendant had the best means of finding out. If it was not the Company's fault, it should have shown it. The presumption from the evidence is that the negligence of the defendant's agents caused the failure. This brings us to the question, Did the contract exempt the defendant from liability for the negligence of its agents? If the senders of dispatches and telegraph companies were the only parties interested in such transactions, they might make such contracts. The public has an interest in the telegraph service. The property employed belongs to the Company, as well as the proceeds of the business; but the property is used and business is conducted for the accommodation and convenience of the public. Public policy forbids contracts by telegraph companies exempting them from the consequences to others of the negligence of their agents in transmitting messages for their employers. Such liability promotes promptness, skill, and care in that branch of business.

ting the company's liability in case of unreported messages is no defense to a suit to recover damages for the loss. *Western U. Tele. Co. v. Lowrey* (Neb.) 40 N. W. Rep. 707, citing *Gulf, C. & S. F. R. Co. v. Wilson*, 60 Tex. 739; *Western U. Tele. Co. v. Broesche*, 72 Tex. 654; *Western U. Tele. Co. v. Way*, 68 Ala. 542; *White v. Western U. Tele. Co.* 14 Fed. Rep. 710; *Western U. Tele. Co. v. Tyler*, 74 Ill. 188; *Western U. Tele. Co. v. Henderson*, 80 Ala. 510; *Gulf, C. & S. F. R. Co. v. Miller* (Tex.) Feb. 14, 1899.

A stipulation in a telegraph blank limiting the liability of the company for mistakes or delays in transmitting or delivering unreported messages is void under Neb. Comp. Stat., chap. 89a, § 12. *Western U. Tele. Co. v. Lowrey* (Neb.) 49 N. W. Rep. 707, citing *Kemp v. Western U. Tele. Co.* 28 Neb. 661, distinguishing *Becker v. Western U. Tele. Co.* 11 Neb. 87.

Such a stipulation does not protect the company from its negligent delay in transmission. If it has any validity at all, it is only in cases of a mistake in transmitting, and then only when the negligence is slight. *Thompson v. Western U. Tele. Co.* 107 N. C. 449.

A printed stipulation in a telegraph blank, that no claim for damages for negligence in transmit-

ting the telegram shall be valid unless presented in writing within thirty days, is reasonable and obligatory. *Beasley v. Western U. Tele. Co.* 39 Fed. Rep. 181.

It is binding on the party injured where the damages were known within three days from the sending. *Western U. Tele. Co. v. Culbertson*, 79 Tex. 65.

The rule that a telegraph company cannot stipulate against its own negligence will not prevent a stipulation requiring a claim to be presented within a certain time. *Western U. Tele. Co. v. Daugherty* (Ark.) 11 L. R. A. 102.

A stipulation contained on the blank of a telegraph company, that the company will not be liable for damages where the claim is not presented in writing within sixty days after sending the message, does not apply when suit is commenced before the expiration of the sixty days. *Western U. Tele. Co. v. Trumbell* (Ind.) April 14, 1891.

Such a stipulation does not require any notice or demand to fix the liability of the company, where there is a total failure to transmit the message. *Western U. Tele. Co. v. Yopst*, 3 L. R. A. 224, 118 Ind. 248. See note to *Gillis v. Western U. Tele. Co.* (Vt.) 4 L. R. A. 611.

Such companies may by contract exempt themselves from loss or damage to others not from their own fault. Notwithstanding such conditions, the companies are liable for ordinary negligence in transmitting dispatches. *Western U. Teleg. Co. v. Griswold*, 87 Ohio St. 301; *Gillis v. Western U. Teleg. Co.* 61 Vt. 461, 4 L. R. A. 611; *Thompson v. Western U. Teleg. Co.* 64 Wis. 531.

In the case of *Southern Elex. Co. v. Caldwell*, 88 U. S. 21 Wall. 264, 22 L. ed. 556, the court said: "Telegraph companies, though not common carriers, are engaged in a business that is in its nature almost, if not quite, as important to the public as is that of carriers. Like common carriers, they cannot contract with their employers for exemption from liability for the consequences of their own negligence. But they may by such contracts, or by their rules and regulations brought to the knowledge of

their employers, limit the measure of their responsibility to a reasonable extent. Whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier." And in *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627, the same court held that a common carrier cannot lawfully stipulate for exemption from responsibility from the negligence of himself or his agents. If the plaintiff lost the difference between the contract price of the land and its actual value at the time because of the negligence of defendant's agents, that difference was his damage.

The decision of the court granting the new trial is affirmed, and the cause is remanded to the court below.

Anderson and Blackburn, JJ., concur.

INDIANA SUPREME COURT.

Board of COMMISSIONERS OF ALLEN COUNTY, Appt.,

v.

Millard W. SIMONS *et al.*

(....Ind....)

1. To sustain a tax upon land which is shown to have been legally exempt from taxation for a long period prior to the year for which the tax was assessed, the burden is on the tax officers to show that something had occurred before such year to remove the exemption.
2. Art. 3 of U. S. Ord. July 13, 1787, providing that lands and property of Indians shall never be taken from them without their consent, is in force in Indiana.
3. The land of an Indian who has retained his tribal relations cannot be taxed by a State in which U. S. Ord. July 13, 1787,

art. 3, is in force, although it has been patented to him in fee simple without restraint on alienation.

(September 22, 1891.)

APPEAL by defendant from a judgment of the Circuit Court for Allen County in favor of plaintiffs in an action brought to recover money paid at a tax sale for lands which were alleged to have been legally exempt from taxation. *Affirmed.*

The facts are stated in the opinion.

Messrs. Bell & Morris for appellant.

Messrs. Randall & Vesey, W. G. Colerick, S. R. Alden and Colerick & Oppenheim for appellee.

Coffey, Ch. J., delivered the opinion of the court:

The central question in this case relates to

NOTE.—Taxation, exemption of Indians from.

The right of Indians in the land is merely a right of occupancy, the fee being in the United States, subject only to such right of occupancy. *Johnson v. McIntosh*, 21 U. S. 8 Wheat. 574, 5 L. ed. 689; 1 Kent, Com. 257; *Cherokee Nation v. Georgia*, 30 U. S. 5 Pet. 48, 8 L. ed. 42.

Possession when abandoned by the Indians attaches itself to the fee without further grant. *Cherokee Nation v. Georgia*, 30 U. S. 5 Pet. 17, 8 L. ed. 31.

But where by treaty the Indian title is extinguished, with provision for their removal, the lands are assessable. *Fellows v. Denniston*, 23 N. Y. 420; *State v. Miami County Comrs.* 68 Ind. 497; *Franklin County Comrs. v. Pennock*, 18 Kan. 579; *The Kansas Indians*, 72 U. S. 5 Wall. 737, 18 L. ed. 667; *Peck v. Miami County Comrs.* 4 Dill. 370; *Pennock v. Franklin County Comrs.* 103 U. S. 44, 26 L. ed. 367.

The lands belonging to an Indian tribe are not taxable. *The New York Indians*, 72 U. S. 5 Wall. 761, 18 L. ed. 708; *State v. Miami County Comrs.* 68 Ind. 497.

So long as the tribal organization is recognized by the national government, lands in possession of the Indians are not subject to state taxation. *The Kansas Indians*, 72 U. S. 5 Wall. 737, 18 L. ed. 667; *Boyer v. Dively*, 68 Mo. 510; *Morgan v. McGehee*, 5 Humph. 13; *Wall v. Williams*, 11 Ala. 323.

13 L. R. A.

Indians and their property exempt from taxation by treaty or statute of the United States cannot be taxed by any State. *United States v. Rogers*, 45 U. S. 4 How. 567, 11 L. ed. 1105; *United States v. Holliday*, 70 U. S. 3 Wall. 407, 18 L. ed. 182; *The Cherokee Tobacco*, 78 U. S. 11 Wall. 616, 20 L. ed. 227; *United States v. 48 Gallons of Whiskey*, 93 U. S. 183, 23 L. ed. 846; *Crow Dog's Case*, 109 U. S. 556, 27 L. ed. 1090; *Hastings v. Farmer*, 4 N. Y. 236.

Where the consideration of an exemption was the cession of the Indian title to a tract of land, the exemption was a part of the purchase price of the land ceded. *New Jersey v. Wilson*, 11 U. S. 7 Cranch. 164, 3 L. ed. 308.

State lands purchased from the Indians may be exempt from taxation in the hands of purchasers; but where for many years the purchasers had paid taxes without question this fact raises a conclusive presumption that by some convention with the State the right of exemption had been surrendered. *State v. Wright*, 41 N. J. L. 473.

The language used in treaties with the Indians should never be construed to their prejudice. If words are used susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty, they should be considered as used only in the latter sense. *Worcester v. Georgia*, 31 U. S. 6 Pet. 581, 8 L. ed. 503, followed in *Choctaw Nation v. United States*, 21 Ct. Cl. 32.

the right to tax certain lands in Allen County. The cause was tried in the circuit court before a jury, who returned a special verdict. Among others, the following facts appear by the verdict, viz.: That John Baptiste Richardville, prior to the year 1818, and until his death in 1841, was the principal chief of the Miami Tribe of Indians. For some time prior to the year 1818 he had, with the consent of his people, and under their law, resided upon and held exclusive possession of the land in controversy, the same being the property of the tribe of which he was principal chief; which included three sections of land described in the third article of the Treaty of 1818 between the United States and the Miami Nation of Indians. By that Treaty, the United States agreed, in consideration of the cession, by the tribe, of certain lands to the United States, to grant or release the three sections to Richardville in fee simple. The Treaty was signed by Richardville as one of the parties thereto; and pursuant to its terms, letters-patent were issued to him on the 24th day of September, 1823. By another treaty made on the 6th day of November, 1839, the United States granted to Richardville and his family the privilege of remaining in Indiana when his tribe should remove from the State, and stipulated that he and his family should receive the annuities due them, under the terms of the Treaty, at Fort Wayne.

In the year 1846, all the Miami Nation of Indians, except the family of Richardville and some other families granted a similar privilege, removed from the State to the then Territory of Kansas. Richardville remained in the undisturbed possession of these three sections of land until his death. By his last will he devised the land to his daughter, La Blonde, or Mary Louise Richardville. The daughter and other descendants of Richardville remained in the possession of the land until the daughter's death in the year 1847. By her last will she devised the land to her son, Ke-la-ke-wa-ke-ah, *alias* George Ausum, and her daughter, Mon-go-se-quah, *alias* Archange Godfrey. Both wills were duly probated. Ke-la-ke-wa-ke-ah died and left his portion of the land to his sister, Mon-go-se-quah and his son, Me-che-ke-no-quah, *alias* William Cass. In the year 1856, Mon-go-se-quah and Me-che-ke-no-quah, by order and judgment of the Common Pleas Court of Allen County, had partition of the land between themselves. Before the death of Richardville, Mon-go-se-quah intermarried with James R. Godfrey, son of Francis Godfrey, the war chief of the Miamis, who, with his family, was also permitted by the United States to remain in Indiana. Mon-go-se-quah and her husband resided with Richardville on this land, and she and her descendants continued to reside there until her death, which occurred in the year 1885. Her husband is still living, and continues to reside on the land. Ke-la-ke-wa-ke-ah and his son, Me-che-ke-no-quah have, since the death of La Blonde to the present time been in the possession and occupancy of their portion of the land. There has been born to

Mon-go-se-quah and her husband thirteen children, five of whom are still living, and, with their families, have ever resided on this land. The families of Godfrey and Me-che-ke-no-quah are among the families mentioned in the Treaty of 1854 between the Miami Indians and the United States, and after that Treaty the United States annually took a census of the family and placed upon the list Che-ke-no-quah, James Godfrey, Mon-go-se-quah and all their children and grandchildren, as provided by that Treaty, and annually paid to each of them, at Fort Wayne, their portion of the annuities provided for by that Treaty, and in the year 1882 paid to them their portion of the amount of the principal sum agreed by the Treaty to be paid. They have at all times resided upon and owned the land patented to Richardville, being his descendants. The government of the United States has never consented that they should put off their tribal relations. By all the treaties made before his death, the United States recognized Richardville as the principal chief of the Miami Nation, and as a member of that tribe. He executed, as chief of the Miami Nation, the Treaty of 1795, and every subsequent treaty with that nation, until the time of his death. The tribe and the whites who came among them treated and recognized him as a Miami Indian, and the principal chief of the nation. James M. Godfrey is a Miami Indian and has always been treated as such by the United States. All the above named and their descendants have been treated with by the United States and known as the Miamis of Indiana, and have been so enumerated. The chiefs and head men of the nation, in the west, from time to time called upon them and consulted with the descendants of Richardville whenever any question between them and the United States arose requiring the presence, at Washington, of representatives of the Miami Nation. None of the owners of this land have ever become citizens of the United States or any State therein. The Miamis of Indiana wear such clothing as is usually worn by the white people in the neighborhood where they reside. Some of them have been married by Catholic priests and some by justices of the peace, under licenses procured from state authority. In 1866, 1867 and 1868, the children of Me-che-ke-no-quah attended public school, and in 1880, George Godfrey, a son of Mon-go-se-quah voted at the presidential election. They speak both the Indian and English languages. In her lifetime, Mon-go-se-quah caused the lands received from her mother, La Blonde, to be platted into lots numbered from one to nine inclusive; but the title and possession of the lots has never been out of the descendants of Richardville since his death. For the years 1871, 1872, 1873, 1874, 1875, 1876 and 1877, lots one to nine inclusive were placed upon the tax duplicate of Allen County and assessed for state and county purposes, and were duly returned delinquent. On the 13th day of February, 1878, they were bid in for delinquent taxes by Charles H. Aldrich. The

land not having been redeemed, the auditor executed to him a deed. Aldrich conveyed to the appellee in this case and assigned to him all his rights in the premises. Aldrich brought suit in the Allen Superior Court, after receiving his deed, to enforce a tax lien against said lands; but after the determination of the case, *Wau-pe-man-quā*, reported in 28 Federal Reporter, 489, holding that the land was not subject to taxation, his suits were dropped from the docket without any final adjudication. This suit was brought against the Board of Commissioners of Allen County to recover the amount paid for taxes by Aldrich, under the assumption that the lands above named were not subject to taxation.

It is contended by the appellant that as these lands were granted and patented to Richardville in fee simple, without any restraint upon alienation, for his own use, and not to any nation or tribe of Indians, or for their benefit, that they are subject to taxation as any other lands in the State.

On the other hand, it is contended by the appellee that the Indian title to these lands was never extinguished, and as the owners of the same have kept up their tribal relations with the Miami Nation and have never become citizens of the United States, the lands are within the purview of article 3, Ordinance 1787; and are not, therefore, subject to taxation by the State.

So far as we are informed by the record, no effort was ever made to tax these lands prior to the year 1871. Long acquiescence in the imposition of taxes, unexplained, raises a presumption of a surrender of the privilege of exemption. *Given v. Wright*, 117 U. S. 648, 29 L. ed. 1021.

As it does not appear in the special verdict that these lands, prior to that date, had been assessed for taxation, we think it should be assumed, for the purposes of this case, that they had not paid taxes for the support of the state and county government up to that time. If for any reason they had been legally exempt from taxation between the year 1818 and the year 1871, the burden of showing that something had occurred between those dates which rendered them liable to taxation rested upon the appellant. Such reason is not found in any change in our Statute upon the subject, for the statutes declaring what lands in the State shall be subject to taxation have remained substantially the same from 1848 to 1881.

It is earnestly contended by the appellant that the Ordinance of 1787 is not in force in the State of Indiana; but it has been judicially determined that the third article of that ordinance is in force in this State. *Me-shing-go-mesia v. State*, 36 Ind. 310; *Wau-pe-man-quā v. Aldrich*, 28 Fed. Rep. 489.

The third article of that ordinance contains this clause: "The utmost good faith shall always be observed towards the Indians. Their lands and property shall never be taken from them without their consent; and in their property rights and liberty they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress;" 13 L. R. A.

but laws founded in justice and humanity shall from time to time be made for preventing wrongs being done them and for preserving peace and friendship with them."

In the month of April, 1816, Congress passed an Act which provided that the people of the Indian Territory might form a constitution and be admitted into the Union; provided that the same when formed should be republican, and not repugnant to the articles of the Ordinance of July 13, 1787, which are declared to be irrevocable between the original States and the people and the States of the territory northwest of the River Ohio, etc. On the 10th day of June, 1816, the Territorial Legislature of Indiana enacted the following: "That we do for ourselves and our posterity agree, determine, declare and ordain that we will and do hereby accept the proposition of the Congress of the United States as made and contained in their Act of April nineteen, eighteen hundred sixteen, etc."

It will thus be seen, as adjudged in the cases above cited, that Indiana made a solemn compact with the United States by the terms of which certain portions of the Ordinance of 1787, among which is the clause above set out, was kept in force. This clause is a provision in favor of the Indian tribes residing on Indian territory, and as such is to be liberally construed in their favor. *Choctaw Nation v. United States*, 119 U. S. 27, 30 L. ed. 314; *United States v. Kagama*, 118 U. S. 383, 30 L. ed. 231; *The Kansas Indians*, 72 U. S. 5 Wall. 737, 18 L. ed. 667.

It takes no argument to prove that if the State of Indiana can tax these lands, and sell them for the nonpayment of such taxes, it may deprive the owners of such lands of their title and use without their consent. This the clause of the Ordinance of 1787, above set out, prohibited.

It is claimed, however, by the appellee that this case does not come within the rule laid down in the case of *Me-shing-go-mesia v. State*, *supra*, for the reason that it was patented to Richardville in fee simple, without any restraint upon alienation and for his own use, and not for the benefit of a tribe of Indians. The cases relied upon by the appellee as sustaining this position, viz.: *Taylor v. Vandergrift*, 126 Ind. 325; *Looney v. Weaver*, 4 McLean, 82; *Pennock v. Franklin County Comrs.* 103 U. S. 44, 26 L. ed. 367; *Langford v. Monteith*, 102 U. S. 147, 26 L. ed. 54; *Pka-o-wah-ah-kum v. Sorin*, 8 Fed. Rep. 740; *Hilgers v. Quinney*, 51 Wis. 62; *McMahon v. Welsh*, 11 Kan. 280; *Miami County Comrs. v. Brackenridge*, 12 Kan. 114; *South Western R. Co. v. Wright*, 116 U. S. 231, 29 L. ed. 626,—are not, in our opinion, in point in this case. Those bearing upon the question under immediate consideration turn upon the construction of particular treaties and statutes; but none of them bear upon the construction to be placed upon the Ordinance of 1787. There is nothing in the language used in the clause here involved limiting it in the manner contended for by the appellee. The language is broad enough to cover the claim of individual Indians,

and titles held in fee simple, acquired by treaty or otherwise from the United States. We are unable to discover any substantial reason for depriving an Indian of his land without his consent, where he owns a fee-simple title, when he would be permitted to hold it if his title were less than a fee. The question as to whether these lands are subject to taxation by the State does not, we think, depend so much upon the question as to whether the owners hold the fee or a less estate, as it does upon the question of their tribal relations. That the owners of this land constituted a part of the Miami Nation and have kept up their tribal relations is abundantly shown by the special verdict before us. They are not citizens of the United States; and, indeed, could not rid themselves of their allegiance to their nation and become citizens without the consent of the United States. *Elk v. Wilkins*, 112 U. S. 94, 28 L. ed. 643.

At the time the lands were granted to Richardville, he was the principal chief of the Miami Nation. It has been held by this court that the lands granted to Me-shing-gom-sia, an inferior chief, were not subject to taxation by the State. It is not reasonable to presume that it was the intention of Richardville and of the government to place his lands where they could be taken without his consent, while all the other lands reserved to the Miami were placed beyond the reach of the State. In our opinion, the lands described in the complaint in this case were not subject to taxation for state and county purposes during the period for which they were assessed. What the status of this land is now we are not called upon to decide. We are not unmindful of the fact that the conclusion here reached is in seeming conflict with the case of *State v. Miami County Commrs.*, 68 Ind. 497. That was an action by the State on the relation of Godfrey, to compel the Board of Commissioners of Miami County, by writ of mandamus, to refund certain taxes alleged to have been illegally assessed and collected. It was held that mandamus was not the proper remedy. It was also held that the complaint was bad for the further reason that it did not allege that the land upon which the tax had been assessed was reserved to the Indians as a band, and not to them individually; but the question of the effect of the Ordinance of 1787 upon the lands assessed was not decided; and, so far as we know, was not considered. However, the question as to whether these lands are exempt from taxation under the treaties and laws of the United States is a federal question, and it was expressly held in the case of *Wau-pe-man-gus v. Aldrich*, *supra*, that they are not subject to taxation, and that the particular tax involved in this suit was void. The reasoning in that case seems to us to be sound, and we know of no reason why we should hold the opinion rendered by the federal court erroneous.

Judgment affirmed.

McBride, J., took no part in the decision of this case.

13 L. R. A.

Thomas HYLAND, Auditor of Clay County,
et al., Apples.

CENTRAL IRON & STEEL CO.

(...Ind....)

Taxation of the excess in value of the capital stock of a corporation over that of its tangible property subjected to taxation is not prohibited by a statutory provision that when the tangible property of a corporation is, its shares of capital stock shall not be listed and assessed for taxation.

(September 15, 1891.)

APPEAL by defendants from a judgment of the Circuit Court for Clay County in favor of plaintiff in an action brought to enjoin defendants from collecting a tax assessed on plaintiff's capital stock by the County Board of Equalization. *Reversed.*

The case sufficiently appears in the opinion. *Messrs. William B. Schwartz, James A. McNutt and Hiram Teter*, for appellants:

The right to assess the franchises or capital stock of individuals or corporations is a conceded or adjudged principle, and has ceased to be a subject of discussion or argument.

Cooley, Taxn. pp. 82, 879, 883; *People v. Astor*, 1 Cent. Rep. 770, 100 N. Y. 597.

It is nowhere averred that appellee has tendered the taxes properly chargeable to it, and there is nothing in the complaint showing any intention to ever pay any taxes, and the appellee can therefore have no standing in equity.

Logansport v. McConnell, 121 Ind. 416.

There are two entirely separate and distinct quantities in relation to every private business corporation, that may become the object of assessment for the purposes of taxation, to wit, the corporate property in its proprietary sense to the corporation as owner, and the capital stock, representing the aggregate of the shares held by the individual owners. These two separate quantities may be regarded as distinct legal units not in any manner alike, but in contemplation of law and in fact possessed of independent attributes and values.

And since the board assessed the value of said capital stock of corporation and therefrom deducted the assessed value of all the tangible property, there is in this case no double taxation in any sense.

Wright v. Stiltz, 27 Ind. 341; *Cooley*, Taxn. §§ 223, note, 226, 218, 230, 232, and cases cited on pp. 226, 227; 9 Am. Law Rep. 78; *La Salle*

NOTE.—Taxation; shares of capital stock.

Stock means not only stock subscriptions but the actual tangible property of the corporation. *Michigan Cent. R. Co. v. Porter*, 17 Ind. 380; *Floyd County v. New Albany & S. R. Co.* 11 Ind. 570; *State v. Hamilton*, 5 Ind. 310; *State v. Brantn*, 23 N. J. L. 484; *McKeen v. Northampton County*, 49 Pa. 519; *Whitesell v. Northampton County*, 49 Pa. 526.

Shares of stock in incorporated companies, whether the property of such companies be tangible or intangible, are personal property. *Seward v. Rising Sun*, 79 Ind. 331. See 1 *Desty*, Taxn. 351-353.

Taxation of corporate stock: See note to *People v. Coleman* (N. Y.) 12 L. R. A. 762.

de P. H. & D. R. Co. v. Donoghue, 127 Ill. 37; *St. Louis Bridge & T. R. Co. v. People*, Id. 627; *People v. Coleman*, 52 Hun, 93, 115 N. Y. 178; *Lee v. Staryes*, 46 Ohio St. 158; *People v. McCarthy*, 3 Cent. Rep. 833, 102 N. Y. 630; *People v. Asten*, 1 Cent. Rep. 770, 100 N. Y. 597; *Humphreys v. Nelson*, 115 Ill. 45; *Porter v. Rockford, R. I. & St. L. R. Co.* 76 Ill. 561; *Chicago, B. & Q. R. Co. v. Siders*, 88 Ill. 320; *Chicago, P. & S. W. R. Co. v. Raymond*, 97 Ill. 212; *Hamilton Mfg. Co. v. Massachusetts*, 73 U. S. 6 Wall. 632, 18 L. ed. 904.

Messrs. George A. Knight and A. W. Knight, for appellee:

The complaint avers that the entire capital stock of appellee was invested in tangible property, all of which was listed and assessed for taxation; that its capital stock represented its tangible property and was of the value of it and no more, that it had no surplus or accumulations. This being true, to tax all the tangible property, under its own proper designation, and then to tax the capital stock invested in that property, is to tax the same property, owned and held by the same person, twice for the support of government. This cannot be done under our Constitution and laws.

Const. art. 10, § 1: *Loftin v. Citizens Nat. Bank*, 85 Ind. 345, 346; *Richmond v. Scott*, 48 Ind. 568; *Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 185; *Bright v. McCullough*, 27 Ind. 223; Rev. Stat. 1881, §§ 6305, 6308.

A statute which exempts the shares of stock from taxation exempts the capital stock from taxation also.

King v. Madison, 17 Ind. 480; *Cooley, Taxn.* 212.

There are four recognized methods of taxation of corporate interests: (1) tax on franchise; (2) on capital stock; (3) on real and personal property; (4) on shares of stocks in hands of stockholders.

Cook, Stock & Stockholders, § 561.

The action of the board of equalization in this case cannot be justified or upheld upon the ground that its assessment of appellee's stock is a tax on the franchise, for the reason that under our tax laws the board of equalization has nothing whatever to do with assessing it.

Rev. Stat. 1881, §§ 6303, 6336. See also *Taylor, Priv. Corp.* 2d ed. § 477a; 2 *Waterman, Corp.* § 251.

A tax assessed on the capital stock of a corporation is a tax on the property of which such capital is composed.

Whitney v. Madison, 23 Ind. 335, 336; *Com. v. Standard Oil Co.* 101 Pa. 119. See also *Fox's App.* 3 Cent. Rep. 561, 112 Pa. 337; *Scotland Co. v. Missouri, I. & N. R. Co.* 65 Mo. 123; *People v. Badlam*, 57 Cal. 594.

Our statute expressly forbids assessing the shares of stock where the capital stock or the tangible property of the corporation is assessed. Our law-makers recognized this as double taxation and hence expressly forbade it.

State v. Cumberland & P. R. Co. 40 Md. 22; 2 *Waterman, Corp.* pp. 330, 331. See also *State v. Hamilton*, 5 Ind. 310; *Floyd County v. New Albany & S. R. Co.* 11 Ind. 570; *Michigan Cent. R. Co. v. Porter*, 17 Ind. 330; *Cooley, Taxn.* p. 389, note 3.

13 L. R. A.

To tax a bank on its property and also the stockholders on their shares, is duplicate taxation.

Gordon v. Baltimore, 5 Gill, 281; *Baltimore v. Baltimore & O. R. Co.* 6 Gill, 288.

The capital of a corporation is represented by the property in which it has been invested.

Cooley, Taxn. note 1, p. 225.

Although the State may elect to tax either the capital stock or the real and personal property of a corporation, yet it cannot tax both.

2 *Waterman, Corp.* pp. 330, 331, 335, note 2 to p. 336; *State v. Hannibal & St. J. R. Co.* 87 Mo. 265; *People v. Badlam*, 57 Cal. 594.

The capital stock takes its value from what remains of the property after the payment of its debts.

2 *Waterman, Corp.* p. 320.

An offer to pay taxes is not necessary where the validity of every portion of them is denied.

Wells County Comrs. v. Gruver, 115 Ind. 224; *Logansport v. McConnell*, 121 Ind. 419; *Cooley, Taxn.* pp. 763, 764, note 1; *Albany City Nat. Bank v. Maher*, 9 Fed. Rep. 884; *Clement v. Everest*, 29 Mich. 19.

Elliott, J., delivered the opinion of the court:

The facts in this case are similar to those presented by the record in *Hyland v. Brazil B. Coal Co.* (Ind.), 26 N. E. Rep. 672; but there is one material fact presented by the record now before us, which was not presented by the record in the case cited. Many of the questions presented here were decided in the case to which we have referred, and it is unnecessary to again discuss those questions in detail; but it is perhaps proper to speak very briefly of one of them. It was not decided in the case of *Hyland v. Brazil B. Coal Co.* that a tax-payer might enjoin the collection of taxes where his property was subject to taxation, although part of the taxes are illegal, without tendering the part for which his property is liable; on the contrary, it was expressly declared that where the property is subject to taxation, the collection of the tax cannot be enjoined without paying or tendering the amount for which the property is liable, although part of the amount levied may be illegal. The cases of *Logansport v. Case*, 124 Ind. 254, and *Morrison v. Jacoby*, 114 Ind. 83, 12 West. Rep. 187, were there fully approved and so they are here. What was decided in *Hyland v. Brazil B. Coal Co.* is, that where the property is not subject to taxation at all, and there is no jurisdiction to levy any part of the tax assessed on the particular property, no tender is necessary. There was no departure from the long and firmly settled doctrine that where the property is subject to taxation, but is irregularly assessed, or assessed beyond its value, a tender of the amount for which the property is liable is always indispensable.

The fact which we have said appears in this record, but was not contained in the record in *Hyland v. Brazil B. Coal Co.*, *supra*, is this: The schedule made out and verified

by the appellee contains these statements:

"Actual value of stock	\$150,000
Total amount of indebtedness except for the indebtedness for the current expenses, excluding from such expense the amount paid for the purchase and improvement of property	284,761
Assessed value of lands	7,485
" " " personal property	27,880
Total assessed valuation of all tangible property of said Company	\$5,815."

It thus appears from the appellee's return of property for taxation, that the tangible property is of less value than the capital stock; inasmuch as the actual value of the capital stock is \$150,000, while the tangible property is of the value of \$35,815. This fact clearly and decisively discriminates the present case from *Hyland v. Brazil B. Coal Co.* inasmuch as in that case, according to the confessed allegations of the complaint, the entire capital stock was invested in and represented by the tangible property returned for taxation. We there said that "the question whether an assessment may be levied upon capital stock to the extent to which it exceeds in value the tangible property is not presented by the complaint; nor is the question whether corporate franchises may be taxed where they have a value over and above the capital stock presented for our decision." The question which we declared not then before us is now presented.

It seems quite clear that no tax-payer can be twice taxed upon the same property, and so the authorities declare. *State v. Hannibal, & St. J. R. Co.* 37 Mo. 265; *People v. Badlam*, 57 Cal. 594; *State v. Cumberland, & P. R. Co.* 40 Md. 22; *Cooley*, Taxn. 225.

Where the property once pays its full share of taxes to the State or county, it cannot be subjected to a greater burden for the same purposes, although it may be subjected to special taxes in the form of assessment for local improvements, or to municipal corporation taxes in common with other property. Where there is an attempt to doubly tax property, there is a violation of law. Our Statute provides that "in all cases where the tangible property of an incorporated company is listed and assessed under this Act, the shares of capital stock of such incorporated companies shall not be listed and assessed." Rev. Stat. 1891, §§ 6305, 6308.

This provision was intended to prohibit double taxation and enforces the principle stated by us. We cannot, however, hold that the provision quoted is to be considered apart from other provisions of the Statute and construed as prohibiting the taxation of capital stock in all cases; on the contrary, we hold, as was held in *Hyland v. Brazil B. Coal Co.*, *supra*, that it is to be considered in connection with other provisions of the Statute, and that, when so considered, it does not exclude the taxation of capital stock where it is not invested in and fully represented by tangible property subjected to taxation. If the capital stock exceeds in value the tangible property subject to taxation and assessed for

taxation, then, to the extent of its value in excess of the value of the tangible property, it may be listed and assessed; for it is apparent that in such a case there is not double taxation. It cannot be assumed that the tangible property necessarily represents the value of the capital stock, for the business of a corporation owning comparatively little tangible property may be so profitable as to impress upon its stock a value much beyond its tangible property; or it may be the owner of a franchise which gives the stock a value much greater than that of the tangible property of which it is the owner. A corporation which, in its sworn return, values its capital stock at almost five times as much as its tangible property, cannot successfully assert that the taxation of its tangible property entirely absolves its capital stock from liability. It is, at all events, entirely clear that where it affirmatively appears, as it does from the evidence in this case, that the tangible property is not equal to the value of the stock, the stock is taxable to the extent that it exceeds in value the tangible property. The only evidence as to the value of the capital stock, as well as the only evidence of the value of the tangible property, was that contained in the tax list or schedule; and that certainly does not prove, or tend to prove that there was double taxation, since the actual value of the capital stock is shown to exceed that of the tangible property more than \$100,000.

The record affirmatively shows that there was authority in the board of equalization to act upon the list returned by the appellee, for there was such a list placed before it, and the statute vests it with jurisdiction over the subject. Rev. Stat. 1891, §§ 6305-6308, 6357, 6358, 6359; *Hyland v. Brazil B. Coal Co.* *supra*.

The list showed that the capital stock was subject to taxation to the extent that it exceeded in value the tangible property; so that there was not, as in *Hyland v. The Brazil, B. Coal Co.* an attempt to subject property to taxation which was not taxable. Here there was jurisdiction, for here there was a list placed before the board of equalization as the law requires; that list disclosed property subject to taxation, and on that property, the capital stock, the Statute expressly makes it the duty of the board to place a value. It may well be doubted whether the courts can interfere at all in such a case as this; for the rule supported by the weight of authority is, that where there is jurisdiction and no principle of law is violated, the valuation of the board of equalization is conclusive. *Cooley*, Taxn. 747, 748; *Small v. Lawrenceburgh (Ind.)* (May 1, 1891). *Pulaski County Comrs. v. Senn*, 117 Ind. 413. There is here no evidence that the valuation of the board was erroneous; and certainly no reason for setting it aside, even if the courts had power to do so. If the board had placed a much greater value upon the capital stock than that fixed by the appellee in the schedule, its action could not, under the rule referred to, be disturbed, unless it was made to appear that some principle of law was violated; but the

board did not increase the valuation; on the contrary, it placed the value of the capital stock at \$60,000, and from this deducted the value of the tangible property, \$27,880; thus leaving subject to taxation \$32,170 as the value of the capital stock.

The trial court erred in finding for the ap-

pellee upon the evidence adduced; for upon that evidence the law is with the appellants.

Judgment reversed, with instructions to award a new trial.

Coffey, Ch. J., did not take any part in the decision of this case.

TENNESSEE SUPREME COURT.

R. H. DEMING *et al.*

MERCHANTS' COTTON-PRESS & STORAGE CO. *et al.*,
and Other Cases.

(.....Tenn.....)

1. **A cotton compress company which receives cotton for compression and storage under a contract, either express or implied from usage, to insure the same to its full value for the owners' benefit is liable to the latter for its full value in case it is destroyed by fire while, through the company's negligence, it remains uninsured, although the company is free from negligence in caring for it.**
2. **A carrier which by contract or by usage selects a compress company as its agent to receive cotton that is to be shipped over its road, and issues bills of lading therefor on presentation of the compress company's receipts, is in possession of the cotton when the bill of lading has been executed so as to be liable for its loss by fire.**
3. **The ordinary exemption clause in a bill of lading exempting the carrier from liability of the shipper's property by fire will not cover cotton while in the warehouse of a com-**

press company which has received it as the agent of the carrier.

4. **Carriers making a through contract for the shipment of merchandise, whether through an initial line agreeing to ship beyond its own road or through a transportation company having no line of its own, but simply authorized to ship over connecting lines, may insert therein a fire exemption clause, although no offer is made to assume the risk for additional compensation, since there is no common-law liability to make the through shipment.**
5. **If one, who delivers his cotton to a compress company under an agreement by the latter to procure insurance on it does not rely on the obligation so imposed, but procures other insurance thereon in solvent companies, he cannot, in case of the destruction of the cotton, recover from the compress company because of its failure to procure insurance.**
6. **Where a compress company fails to comply with its agreement to procure insurance on cotton which it has received as agent for a carrier, and the cotton is destroyed, covered only by insurance procured by its owner, if the owner's insurer pay the loss the amount may be recovered, for its benefit, from the carrier if he is unprotected by an exemption contract, or from the compress company if the cotton was de-**

NOTE.—Common carrier may limit his responsibility by special agreement.

A common carrier is bound to transport for a reasonable remuneration, and if he offers to do so and at the same time offers to carry on condition that he shall assume no liability, and holds forth, as an inducement, a reduction of price, or some additional advantage which he does not give to those who employ him with a common-law liability, the conditions thus offered are reasonable. *Peek's Case*, 10 H. L. Cas. 473.

A contract exempting the carrier from liability for a loss by fire not due to negligence, and based upon a sufficient consideration, the shipper having the right to elect between a liability with or without the fire clause, is valid. *Dillard v. Louisville & N. R. Co.* 2 Lea, 288; *Louisville & N. R. Co. v. Gilbert*, 7 L. R. A. 162, 88 Tenn. 430.

The authorities are practically unanimous concerning a loss by fire under a bill of lading containing a fire clause, and they establish the identical relation of bailor or bailee. *Hutchinson, Carr.* 767, 768; *Sobouler, Bailm.* § 439, 473, 573; 2 Am. & Eng. Encyclop. Law, 904, and authorities cited; *Memphis & C. R. Co. v. Reeves*, 77 U. S. 10 Wall. 173, 19 L. ed. 909; *Clark v. Barnwell*, 53 U. S. 12 How. 274, 13 L. ed. 935; *Western Transp. Co. v. Downer*, 73 U. S. 11 Wall. 129, 20 L. ed. 160; *Wheeler, Carr.* 254, 255.

Clauſes ſimilar to thoſe conſidered in the principal caſe, when based upon a ſufficient conſideration, have, by the Supreme Court of the United States, been held to be valid, and to protect the company from liability for loſs by fire, cauſed oth-

erwiſe than by the negligence of the company or its agents. *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 8 Wall. 107, 18 L. ed. 170; *Dillard v. Louisville & N. R. Co.* 2 Lea, 288. In the caſe laſt cited the court ſaid: "A lower rate of freight, or ſomething equivalent, will be a ſufficient conſideration for the ſtipulation." *Dillard v. Louisville & N. R. Co.* 2 Lea, 293.

It is now well ſettled that the common-law liability of carriers may be limited by ſpecial contract, even to the extent of denuding them of the character of insurers, except as againſt their own negligence, and the limitation may be embraced in the bill of lading. To be valid, it muſt be fairly obtained, and juſt and reaſonable. Under the Engliſh Railway and Canal Traffic Act of 1854, ſuch ſtipulations are called "conditions" and are upheld only when they are . . . juſt and reaſonable." The ſame criterion is uniformly applied in this country, and no limitations of the carrier's common-law liability will afford protection unleſs "juſt and reaſonable" in the eyes of the law. *New York Cent. R. Co. v. Lockwood*, 64 U. S. 17 Wall. 357, 21 L. ed. 627; *Hart v. Pennsylvania R. Co.* 113 U. S. 338, 23 L. ed. 720; *Marr v. Western U. Telegr. Co.* 85 Tenn. 542.

The burden of proving the reaſonableneſs of a condition lies upon the company. The moſt cogent evidence in favor of reaſonableneſs is to ſhow that the condition was not forced upon the customer, but that he had a fair alternative of getting rid of the condition, and yet agreed to it. *Redman, Carr.* 2d ed. p. 66, citing *Lewis v. Great Western R. Co.* 47 L. J. N. S. Q. B. 131.

stroyed through its negligence; but no recovery can be had because of the compress company's failure to procure insurance.

7. Any advancement of money by an insurer to the assured for the loss of property in possession of a bailee who had failed to comply with his agreement to procure insurance on it, which recognizes the insurer's liability for the loss, constitutes a payment so as to prevent a recovery for the bailee's failure to procure insurance, whether the advancement was a loan to be repaid upon recovery from the bailee, or was borrowed from a third person on the insurer's credit, or was provided for in the insurance contract.

8. The taking of an obligation by an insurer, in complying with its contract to, in case of loss, advance money to the assured pending the collection of the claim from the one primarily liable, for a return of the money, not if the insurer was not liable, but in case some other person should prove to be so, will be held to be a concession of liability on the part of the insurer.

9. The dates of the policies, and not the times of attachment of the risks, must govern in determining the priority of insurance under a clause in an open policy providing that insurance "prior in date to this policy" shall be first applied in payment of a loss.

10. Where a bailee's agent, under contract to procure insurance on the property, insures only part of it for the benefit of itself, its principal and the owners, and part of the owners insure their interests in a separate company for their own benefit, in case of loss, the first insurance will be applied to the risks covered by it alone, to wit: those of the bailee and owners uninsured by the other company and thus incidentally to the benefit of the agent, before contribution will be enforced in favor of the second insurer towards paying the loss of the owners insured by it.

11. Where, in attempting to remove a car loaded with merchandise, from the proximity of a burning building, a draw-bar breaks, in consequence of which the fire reaches and destroys the merchandise, the carrier is liable for its loss, notwithstanding a clause in the bill of lading exempting it from liability for loss by fire, unless it can show that the breakage was caused by a latent defect or other cause sufficient to excuse it.

12. No rights of a shipper growing out of a contract between the carrier and its agent that the latter shall procure insurance on the shipper's property while in its possession as such agent, can be adjusted, as between the shipper and agent, in case of the loss of the property by fire, unless the carrier has been sued and its liability for the loss established.

(June 5, 1891.)

CROSS-APPEALS from a decree of the Chancery Court for Shelby County in a suit brought to recover the value of certain cotton which was destroyed by fire while in the possession of the defendant storage company as agent for certain transportation companies. *Modified and affirmed.*

The facts are sufficiently stated in the opinion.
Meurs. Julius A. Taylor and W. H. Carroll, for complainants, R. H. Deming & L. R. A.

Co., The Jackson Co., Tremont & Suffolk Mills, Dwight Mfg. Co., E. H. Coates & Co., Whitefield Mills, Union Mfg. Co., Hooper & Buffington Shove Mills, Providence Washington Ins. Co., and Lancaster Mills:

The limitation of the carrier's liability by contract is necessarily confined to the services contracted for, and the carriers who were parties to it.

Babcock v. Lake Shore & M. S. R. Co. 49 N. Y. 496, 497.

The bill of lading of defendants does not give the privilege of compressing, or embrace the peril of a fire except transportation fire perils.

See *Robinson v. Merchants Despatch Transp. Co.* 45 Iowa, 470.

Exemptions must be clearly and unambiguously expressed.

Hutchinson, Carr. §§ 275, 276.

It cannot be ruled that a peril entirely distinct from the transportation perils is to be interpolated into contracts for transportation unless they are to be read in the light of a local usage known and assented to. The contract should be construed very strictly, and where it in terms embraces only a portion of the risks of transportation, responsibility in other respects should be held as at common law.

2 Redfield, Carr. p. 82; *Merchants Bank v. Union R. & Transp. Co.* 69 N. Y. 378; *Western Union R. Co. v. Wagner*, 65 Ill. 197; *Liverpool & G. W. S. S. Co. v. Phenix Ins. Co.* 129 U. S. 441, 32 L. ed. 792.

In New York a carrier may stipulate against a liability for a loss by negligence. A consideration of the adjudged cases in that State will lead to the conclusion that a loss by fire in a press is not within the conditions of the contracts expressed in the general bill of lading.

Holsapple v. Rome, W. & O. R. Co. 86 N. Y. 278; *Magnin v. Dinmore*, 56 N. Y. 168.

When the particular dangers or risks against which the carrier has specially guarded himself are preceded by general or more comprehensive words of exemption, the former are to be construed to embrace only occurrences *ejusdem generis* with those subsequently enumerated, unless there be clear intent to the contrary.

Hutchinson, Carr. § 275; *St. Louis & S. E. R. Co. v. Smuck*, 49 Ind. 302; *Barter v. Wheeler*, 49 N. H. 9.

If there was an established custom by which it was generally understood by carriers and shippers that when there was a general exception against a loss by fire in a bill of lading it included as well the peril of a fire at or in a press, as it did those attending transportation, it would not be binding on those appellants to whom it was not known.

Lawson, Carr. § 125; *Grissom v. Commercial Nat. Bank*, 3 L. R. A. 273, 87 Tenn. 353.

The rule "the expression of the one is the exclusion of the other," limits the "fire clause" of the Blue Line bill of lading to fires "in transit," i. e., those which occur while cotton is being transported and to fires at stations, i. e., at the depots or station houses of the railways.

Lawson, Carr. § 151.

Under the circumstances the condition limit-

ing the carrier's liability for loss by fire in a press is not valid, nor supported by any consideration.

Is a condition valid that the carrier shall not be liable for a loss by fire while the cotton is in a press, where it was lodged for compression by such carrier, for its benefit, when the costs, i. e., insurance, compression, warehousing, and loading on cars are charged as part of the freight in the tariff of the carrier, and collected from owners?

The defense relied on to sustain the reasonableness of this exception is, it is contained in a through contract. The argument is, that any such condition inserted in a through contract is reasonable because the carrier need not make one. The argument in support of it has no merit.

New York Cent. R. Co. v. Lockwood, 84 U. S. 177, 21 L. ed. 637.

The shippers in this case could not have had a common-law contract if they had desired. The carrier cannot, by a valid stipulation, contract against liability for his or his servants' negligence; neither can he limit liability under circumstances that render the limitation unjust and unreasonable.

Ibid.; *Merchants Dispatch Transp. Co. v. Bloch*, 86 Tenn. 397.

It is not every special contract that is effective. To be valid it must be fairly obtained, founded upon a consideration, and be just and reasonable.

Louisville & N. R. Co. v. Gilbert, 7 L. R. A. 162, 88 Tenn. 430; *New York Cent. R. Co. v. Lockwood*, *supra*; *Hart v. Pennsylvania R. Co.* 113 U. S. 338, 28 L. ed. 720; *Marr v. Western U. Teleg. Co.* 85 Tenn. 542; *Merchants Dispatch Transp. Co. v. Bloch*, *supra*.

The shipper should have the alternative of shipping under the common-law liability, or a less or restricted liability, at his option.

Peck's Case, 10 H. L. Cas. 473; *Louisville & N. R. Co. v. Gilbert*, *supra*; *Manchester, S. & L. R. Co. v. Brown*, L. R. 8 App. Cas. 703; *Beal v. South Devon R.* 8 Hurlst. & C. 337-342; *The Montana*, 129 U. S. 897, 32 L. ed. 788.

A condition to be reasonable must be coupled with compensating advantages.

Clayton v. Corby, 2 Ad. & El. 819.

It may not contravene public policy.

Ibid.

It must be fairly obtained.

Rooth v. Northeastern R. Co. L. R. 2 Exch. 173.

The common law and charter duty required the several carriers to carry and to have adequate facilities for the transportation of the cotton destroyed in the compress fire.

Scofield v. Lake Shore & M. S. R. Co. 2 Inters. Com. Rep. 67.

The measure of carriers' duty to transport goods is determined, not by the line of carriers' railways, but by the public, and professed habits of such carriers. He is bound to carry goods from and to such places as his public profession has connected his trade with.

Browne, Carr. § 290.

Carrying beyond his own line, or guaranteeing a through rate of freight, may furnish an adequate consideration for limitations upon his common-law liability, but neither of those circumstances affects the conditions of limitation.

13 L. R. A.

If it were otherwise, then the limitation would not be dependent upon its being just and reasonable, but on its being in a bill of lading granted by a carrier for transportation of goods beyond its own line.

It would consequently follow that a provision exempting carriers from liability for negligence would be valid if the contract was to transport the goods beyond carrier's line. That condition of limitation is not valid, because it is not a reasonable one.

East Tennessee, V. & G. R. Co. v. Nelson, 1 Coldw. 272; *Southern Exp. Co. v. Womack*, 1 Heisk. 256; *Nashville & C. R. Co. v. Jackson*, 6 Heisk. 271; *DiVard v. Louisville & N. R. Co.* 2 Lea, 288; *Merchants Dispatch Transp. Co. v. Bloch*, *supra*.

The several carriers engaged in the traffic of cotton each had its own line; but in connection with other lines of an association of carriers, continuous lines were formed, for which carriers' agents solicited shipments and granted through bills of lading for one sum, that consignees paid, and the carriers divided among them; therefore as to third parties with whom they contracted, the several carriers in association are liable for a loss taking place on any part of the whole line.

Barter v. Wheeler, 49 N. H. 9; *Bradford v. South Carolina R. Co.* 7 Rich. L. 201; *Cincinnati, H. & D. R. Co. v. Spratt*, 2 Duvall, 4; *Nashua Lock Co. v. Worcester & N. R. Co.* 43 N. H. 339; *Chouteau v. Leech*, 18 Pa. 224; *Baltimore & P. S. B. Co. v. Brown*, 54 Pa. 77; *Hart v. Rensselaer & S. R. Co.* 8 N. Y. 37; *Evansville & C. R. Co. v. Androscooggin Mills*, 89 U. S. 22 Wall. 594, 22 L. ed. 724; *Ogdensburg & L. C. R. Co. v. Pratt*, 89 U. S. 22 Wall. 123, 22 L. ed. 827; *Coates v. United States Exp. Co.* 45 Mo. 238; *Gass v. New York, P. & B. R. Co.* 99 Mass. 220; *Aigen v. Boston & M. R. Co.* 132 Mass. 423.

Being thus associated they are obligated to carry cotton through from Memphis to eastern points by their vocation and holding out.

Merchants Dispatch Transp. Co. v. Bloch, 86 Tenn. 398; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 177 Wall. 357, 17 L. ed. 637; *Atchison, T. & S. F. R. Co. v. Deneer & N. O. R. Co.* 110 U. S. 680, 28 L. ed. 296.

If the carrier demands and receives compensation additional to that usually charged for transportation with restricted risk, the agreement for restriction would seem to be *nudum pactum*.

Wheeler, Carr. 223, 224; *Buckland v. Adams Exp. Co.* 97 Mass. 124; *Perry v. Thompson*, 98 Mass. 249; *Fillebrown v. Grand Trunk R. Co.* 55 Me. 462.

The test of the right to appropriate the proceeds of the insurance is determinable upon the interest of the bailee in the property. The policies supply the place of the property.

Stillwell v. Staples, 19 N. Y. 406; 1 Wood, Ins. §§ 289, 297.

If a carrier is not liable for the loss, he has no right to share in the proceeds, because he has no interest.

Fire Ins. Assn. of England v. Merchants & M. Transp. Co. 6 Cent. Rep. 487, 66 Md. 339; *California Ins. Co. v. Union Comp. Co.* 133 U. S. 416, 33 L. ed. 738.

The policies are not worded so as to cover

even the liability of the Merchants Cotton Press & Storage Company.

Rogers v. Traders Ins. Co. 6 Paige, 590, 3 L. ed. 1114.

Insurance by shippers and by the carriers does not entitle one lot of insurers to contribution from the other.

Royster v. Roanoke, N. & B. S. B. Co. 26 Fed. Rep. 492; *California Ins. Co. v. Case, supra*.

The first beneficiaries of the compress policies are the railroads, who are liable for the cotton destroyed by the fire.

North British Ins. Co. v. London, L. & G. Ins. Co. L. R. 5 Ch. Div. 581.

Messrs. H. C. Warinner, C. W. Frayser, and Beard & Clapp also for complainants.

Messrs. William M. Randolph & Son and Gantt & Patterson, for the Blue Line, defendant:

The cotton was in the exclusive custody and control of the Merchants Cotton Press & Storage Company when destroyed by fire, the Blue Line had no possession of it, or control over it, and the transportation it undertook by its bills of lading had never been begun, and consequently there is no liability on the Blue Line for the cotton.

St. Louis, I. M. & S. R. Co. v. Knight, 123 U. S. 79, 30 L. ed. 1077; *California Ins. Co. v. Union Comp. Co.* 133 U. S. 887, 33 L. ed. 730; *St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co.* 139 U. S. 228, 35 L. ed. 154.

Proof of the mere fact of the loss of the cotton by fire, without more, raises no presumption of negligence against the carrier, and the plaintiff must in such a case aver and prove affirmatively that the loss by fire resulted from the carrier's negligence, before he can have a recovery.

Louisville & N. R. Co. v. Manchester Mills, 88 Tenn. 658.

A common carrier may by actual expressed contract to that effect, clearly made, devote himself of all responsibility for loss of his consignee's goods by any fire happening without his own fault.

Schouler, Bailm. p. 454; *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 104, 18 L. ed. 170; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 376, 377, 21 L. ed. 639; *Louisville & N. R. Co. v. Manchester Mills, supra*.

The cotton destroyed was, by the consent of the owners, and indeed, by their own act, in a warehouse or compress, and subject to the control of the Compress Company, and no duty or responsibility of any carrier had in fact attached, or could in the nature of things attach.

Butler v. East Tennessee & B. R. Co. 8 Lea, 32.

Through transportation beyond the terminus of the railroad of the railroad company undertaking the carriage, as well as a lower rate of freight, is a sufficient consideration for the stipulation for the exemption.

Dillard v. Louisville & N. R. Co. 2 Lea, 288; *Louisville & N. R. Co. v. Manchester Mills, supra*; *Louisville & N. R. Co. v. Gilbert*, 7 L. R. A. 162, 88 Tenn. 430.

The carrier need not in every case show that

he made a special offer to carry under his common-law liability in order to render a special contract exempting him from that liability valid.

Louisville & N. R. Co. v. Sowell (Tenn.) March 3, 1891.

In *Louisville & N. R. Co. v. Gilbert*, 7 L. R. A. 162, 88 Tenn. 434, 435, the court spoke only "of a company standing before the public as a common carrier, and enjoying advantages and franchises as such," and applied to a carrier so circumstanced the rule "that he must be ready to do the business of a common carrier with the full measure of responsibility imposed by the common law."

In the present case the Blue Line is not such a common carrier. Where it appears that the goods had been destroyed by fire when in the actual custody and control of a person other than the carrier, the carrier need not prove affirmatively that he was not responsible for the fire.

Louisville & N. R. Co. v. Manchester Mills, supra; *Lancaster Mills v. Merchants C. P. & S. Co.* 89 Tenn. 1.

Mr. Thomas H. Jackson, for Phoenix Insurance Co., defendant:

The insertion in the marine policies of the clause intended to prevent shippers from accepting bills of lading with what is known as the insurance subrogation clause releases the companies from liability for cotton covered by Blue Line bills of lading which contained the subrogation clause.

Inman v. South Carolina R. Co. 129 U. S. 182, 32 L. ed. 615.

The assured warrants that the policies are not to cover the common-law liability of the common carrier.

The peril of a fire in transit, or at stations, or depots or in presses or warehouses or on landings or wharves at points of delivery, before delivery, is one for which the carrier issuing the bill of lading is liable at common law, whether caused by his negligence or by an accident as to which he is without fault.

California Ins. Co. v. Union Compress Co. 138 U. S. 887, 33 L. ed. 730; *The Lancaster Mills Case, supra*; Schouler, Bailm. § 411.

The peril which destroyed the plaintiffs' cotton is not one covered by the marine policy.

See 18 Ins. L. J. 483.

The warranty is an agreement antecedent to the contracts evidenced by the bills of lading, and therefore, if there was contained in each of them a subsequent agreement that the carriers should have the benefit of the insurance by subrogation, the policy would be void.

Carstairs v. Mechanics & T. Ins. Co. 18 Fed. Rep. 473; Wheeler, Carr. 340.

For insuring this specific risk the fire insurers received an adequate premium, and the Merchants Cotton Press & Storage Company, for their superadded obligation to effect full insurance, also received compensation, for their charges included it.

Coates Case, 90 Tenn.—; *California Ins. Co. v. Union Compress Co. supra*.

The clause on the margin does not necessarily control the interpretation nor destroy the limitation contained in the clause covering a fire risk on shore.

All the stipulations in a policy, both printed

and written, are to be given effect if it can be done without defeating the written stipulations.

Goss v. Citizens Ins. Co. 18 La. Ann. 97; *Barget v. Orient Mut. Ins. Co.* 3 Bosw. 885; *Stettiner v. Granite Ins. Co.* 5 Duer, 594; 1 Wood, Fire Ins. p. 143.

Under the marine policy covering freight "at and from," the risk ordinarily begins when the freight is contracted for shipment.

Flint v. Fleming, 1 Barn. & Ad. 45. See *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.* 41 Fed. Rep. 643.

The proofs sustain the wrongful delay and detention, the unreasonable length of time which the cotton was detained, and the carrier in fault is liable and so are the fire insurers.

Phenix Ins. Co. of Brooklyn v. Erie & W. Transp. Co. 117 U. S. 824, 29 L. ed. 879; *California Ins. Co. v. Union Compress Co.* 133 U. S. 414, 33 L. ed. 737.

Enhancing the risks or varying from them discharges the underwriters from their liability for loss.

1 Phillips, Ins. § 979.

The doctrine of deviation is applicable to river and lake navigation.

Gazzam v. Ohio Ins. Co. Wright (Ohio) 202; *Jolly v. Ohio Ins. Co.* 1 Ohio, 539.

An unreasonable delay in performing the voyage insured will discharge a policy of marine insurance.

Chitty v. Selwyn, 2 Atk. 359; *Pulmer v. Marshall*, 8 Bing. 161; *Odier v. Jennings*, 1 Campb. 505; *Smith v. Surridge*, 4 Esp. 25; *Hull v. Cooper*, 14 East, 479; *Mount v. Larkins*, 8 Bing. 122; Park, Marine Ins. 71, 72.

The marine insurance policies, in order to be required to contribute to this loss, must cover the same risks and upon the same interest in the cotton and in favor of the same person as the fire policies.

California Ins. Co. v. Union Compress Co. 133 U. S. 421, 33 L. ed. 739; *North British & M. Ins. Co. v. London, L. & G. Ins. Co. L. R.* 5 Ch. Div. 569; Wood, Fire Ins. 1st ed. 352; *Lowell Mfg. Co. v. Safeguard F. Ins. Co.* 88 N. Y. 591.

Messrs. Metcalf & Walker, Holmes Cummings and Turley & Wright also for defendants.

Snodgrass, J., delivered the opinion of the court:

At the last term of this court two cases, *Lancaster Mills v. Merchants' Cotton-Press & Storage Co.* and *Coates v. Merchants' Cotton-Press & Storage Co.*, were decided. The first of these is reported in full in opinion by Judge Lurton, 89 Tenn. 1. In that opinion, which fully states many of the facts now being considered, and not necessary to be restated here, it was mentioned that the case was "one of a series of suits [and the *Coates Case* was another] involving the liabilities of the Compress Company and various railroad companies for the loss of [about] 14,000 bales of cotton, valued at \$700,000, burned on the night of November 17, 1887, while in press No. 4 of the defendant Compress Company at Memphis, Tenn." In the case now being considered are presented the

questions undisposed of in those two cases, and nineteen others herewith consolidated, together with all other questions arising on bills then pending in the chancery court, and amended, and cross-bills subsequently filed against the Compress Company, and various railroad and transportation companies and insurance companies, to determine the several rights and liabilities of all such parties to complainants sustaining the loss, and *inter sese*.

Obviously, it is impossible, within the limits to which an opinion must of necessity be confined, to take up *seriatim* and state the pleadings and facts of each particular case embraced in a record of 4,500 pages, nor is it necessary, for the determination of certain questions disposes of the suits in classes, many of them depending upon the same questions, and to be determined upon adjudication of certain general principles, applicable alike to these, and, in certain instances, to all the classes. Nor is it necessary to state in full the decree of the chancellor. The modifications of that decree (which was an entirety in all the cases now consolidated), indicated as a result of the principles now settled by this opinion, determine the proper decree to be drawn as a settlement of the questions raised in each particular case. It is sufficient to say that the skill and ability of the eminent counsel representing the different parties in the pleadings there, and assignments of error here, have so presented, and the forceful and far-reaching comprehension of the chancellor has so determined, the various questions involved, as to enable us to review them all as a series of general questions; and we proceed to present and discuss them in the most natural order in which they arise, incidentally noticing, of course, and applying, those already settled in the *Lancaster Mills Case*.

The principal question of primary liability of the Compress Company for loss on account of negligence was settled in the *Lancaster Mills Case* on evidence not materially supplemented in this record, on the verdict of the jury finding that the Company was not liable. The same result was reached in the several other cases now before us by decree not upon verdicts; and with this result we are entirely satisfied, and to this extent the decree is affirmed. Another question practically determined in that case was that the effect of the contracts of the Compress Company with the several railroads and transportation companies, and impliedly with all persons dealing with the Compress Company as depositors of cotton, was to make that Company liable to railroads and transportation lines who had such contracts, and to owners of cotton deposited with it for compression, not as an insurer, but upon its agreements, express and implied, to procure insurance in good and solvent companies, sufficient to cover any loss while such cotton was under the control of the Compress Company, and until loaded on cars for transportation. The inception of the liability thus assumed was in the contracts it made with carriers. One of these contracts is set forth in full in the *Lancaster Mills Case*, and

the others stated to be, as in fact they are, in substance identical.

Another contract involved in this case we quote in full, for the purpose of more specific statement on points to be herein considered: "This agreement is made and entered into on this 24th May, 1887, between the Cairo & Vincennes Railroad Co., . . . termed the party of the first part, and the Merchants' Cotton-Press & Storage Company, termed the party of the second part, witnesseth: *First.* The party of the first part hereby agrees to give to the party of the second part all cotton to compress that they carry out of Memphis compressed. The party of the second part bind themselves to properly and promptly compress all of said cotton, and shall insure the same for the benefit of the first party; and the price to be paid therefor by said first party shall be at the rate of 12½ cts. per 100 pounds, bill of lading weights, for all cotton compressed, etc., on and prior to 31st Aug. 1897, and 10 cts. per 100 pounds, bill of lading weights, for all cotton so compressed, etc., thereafter during the term of this agreement. This compensation covers compressing and insurance, as well as the use of the second party's grounds, sheds, platforms, steamboat landing, and all services rendered by said second party in and about such cotton delivered it hereunder until the same is delivered either in cars or to steam-boats to the first party by the second party. *Second.* Such insurance shall be taken for the benefit of the first party, in good and solvent companies, so as to cover any loss while such cotton is under the second party's control, and until delivered to the first party. *Third.* The second party shall be liable for any loss arising from negligence or lack of care in any wise to such cotton while under its control, agreeing to be bound therefor as a bailee for hire, and for any such loss shall pay the first party all damages and costs, or the first party may retain any dues to the second party to cover such loss; this, however, not to be limited to the amount of such dues. *Fourth.* The first party hereby constitutes the second party its agent to receive such cotton for it, and sign receipts on which bills of lading may be issued, when cotton is delivered in their compresses on the ground located at its river landing. *Fifth.* So far as it can legally do so, the first party agrees to establish no other compress agency, nor employ any other compress to do its compressing of cotton, at Memphis, Tennessee, during the term of this contract. *Sixth.* All bills for compressing cotton shall be paid weekly. *Seventh.* This contract is to continue in force until the 31st of Aug. 1896, said rate of 12½ cts. per 100 pounds being for one year from the 1st day of September, 1886, and said rate of 10 cts. per 100 pounds for the remaining nine years; and this contract is to relate back to said 1st day of Sept., 1886, and is to cover as to its terms all compressing of cotton by the second party for the first party since that date."

The first of these contracts was made with the Louisville & Nashville Railroad, and when the facilities for warehousing and compression of the Merchants' Cotton-Press

& Storage Company were very limited. But the Company built other presses, enlarged its facilities, and extended its contracts until all the railroad and transportation companies doing business in Memphis, and having an initial carrier there, were included in the contractual arrangement under which it did business. It was originally contemplated that all cotton received into its various compresses should be "permitted" by the various carriers in the manner described in detail in the *Lancaster Mills Case*, but this contemplated method was not adhered to, and cotton was received from owners without permits; when so delivered the Compress Company receipting therefor, and agreeing, either in face of receipts or understood to do so as fully when such receipts were not executed, to cover all cotton delivered with insurance. Such we hold to have been the actual fact of their several special contracts, and the effect of their reception of cotton for compression, according to the understanding between themselves and owners. The usage as to all was in substantial accord with special agreements as to some of the patrons of the Company, as before explained; that is, to insure for carriers by contracts expressly made, and owners expressly made in the carrier contracts and dray receipts, contracts or usage. It therefore follows that the Compress Company, not being liable to any for negligence in suffering the cotton to be burned, is liable to all interested as carriers by express contracts made with them, or owners under such express contracts, and those evidenced as made with owners by dray receipts and usage, for the failure to procure insurance sufficient to cover any loss that occurred. The Compress Company had in fact procured insurance only to the amount of \$301,750, while the entire loss was about \$700,000. Before going to other questions involved, it is proper to consider here the relation which this Company occupied to the railroad and transportation companies with which it had contracts, and in what sense delivery of cotton to its compresses is to be taken as delivery to these carriers. For them it is argued, on the one hand, that, where cotton was delivered to the Compress Company, and its receipts executed therefor, and these given up to the railroad or transportation companies, and bills of lading by them issued for such cotton, there was no actual delivery to the carriers; and, on the other hand, that, if there was in such event a delivery to them, then the cotton was in their depots or stations, within the meaning of certain exemption clauses in their bills of lading, wherein, in various forms, they have stipulated against liability in cases of fire in their depots, stations, or places of transshipment. Both of these contentions are unsound. The carriers selected by contract, and by usage (as to those who had no contracts), the Compress Company as their agent, and agreed to be bound on delivery to it when they executed bills of lading. It was competent for them to do this, and they did it; and, while doing so, those who had contracts with the Compress Company, recognizing it as a special risk before the

cotton came actually into their own depots or cars, stipulated with their agent (the said Compress Company) to carry insurance for their indemnity, as they also had the right to do, while those who had no such contract took this special carrier risk without it, as they also had the right to do. But the compresses of the Company did not thereby become depots, stations, or places of transshipment of the carriers, even of those who had none of their own in Memphis, because they contracted, where such carriers issued bills of lading, with reference to intended shipment over lines which did have, and the same rule applies to them as to initial lines, either alone or in association with others.

The compresses were not in fact depots or stations of the railroad or transportation companies, and in no contract entered into do they purport to be. Each road leading from Memphis had its own depot, and each transportation company not having any contract to use these lines which they did as agents, and hence their "depots" and "stations" are those meant in contemplation of the carrier contracts into which they entered. The presses were alone those constructively, as in fact, of the Merchants' Cotton-Press & Storage Company, and this Company reserved the right to charge storage on cotton after a stated time, and, in receipts given for cotton to be surrendered to the carriers, in lieu of which bills of lading were issued by them, it was stipulated that, "if held in press over fifteen days before bills of lading issue, or if sold while in press, 50 cts. per bale per month charges will be collected before delivery or shipment." The form is not given as of all receipts, though it would seem it was so, nor is it deemed very material. It is only one of the evidences (about which, perhaps, the well-understood fact on this point called for none) that nobody contracted for or understood the Compress Company to be a depot or station or place of deposit of any company other than the corporation which owned it. The carriers which had contracts with the Compress Company contracted only that the Compress Company should represent them as agents, and receive in its warehouse or press, and hold until actual delivery to them, while those who had no contracts with the Compress Company had, of course, no agreement to use the Compress Company's warehouse or press as a depot. Therefore no exemptions not in terms embracing a loss by fire in warehouse for compression or other cotton-press include this loss. General clauses of exemption from loss by fire will be construed to relate alone to loss in depots, stations, on the cars, or in places of transshipment of the carrier after actual custody of the cotton, and held inoperative to excuse from liability for this loss. These limitations upon the common-law liability of a common carrier are not favored. They are to be strictly construed, and limited to the general risk of the carrier after actual custody of the cotton, unless the terms thereof expressly extend to a special risk. Where, therefore, a carrier has effected an arrangement with a Compress Company to act as the carrier's agent, and receive cotton in the

agent's press, and accepts delivery there by the shipper, instead of at the carrier's own depot, and upon such delivery issues the ordinary carrier bill of lading, stipulating for exemption from loss by fire, it will not be construed to relate to fire in the cotton-press. Such a clause will not cover a special risk like this.

The Kanawha Despatch is therefore the only carrier entitled to exemption on account of its carrier contracts. The bills of lading of the Kanawha Despatch, so far as material to this question, read as follows: "It is further mutually agreed that no carrier shall be liable for loss or damage of any article or property whatever by fire or other casualty, in or at any cotton-press, or during transportation to or from press, or while in transit, while in depots or on wharves awaiting shipment, transshipment, or delivery, or fire from any cause, on land or water." The Louisville, New Orleans & Texas Railway Company, which the chancellor held not liable, and the Newport News & Mississippi Valley Company, the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company, the Cairo, Vincennes & Chicago Line, and the Blue Line, which he held liable, are all liable under the principle settled.

The bill of lading of the Louisville, New Orleans & Texas Railway Company, so far as material to this question, is as follows: "Neither of said carriers shall be liable for leakage of any kinds of liquids, nor for losses by the bursting of casks or barrels of liquid, arising from expansion or other unavoidable causes; breakage of any kind of glass, carboys of acid, or articles packed in glass, stoves and stove furniture, casting machinery, carriages, furniture, musical instruments of any kind, packages of eggs; or loss or damage of hay, hemp, cotton; or the evaporation or leakage of liquids of any description; leakage of grain in bulk; or for damages to personal property of any kind, occasioned from delays from any cause or change of weather; or damage by fire; or loss or damage on sea or rivers."

The bill of lading of the Newport News & Mississippi Valley Company on this point is as follows: "That this company shall not be liable . . . for loss or damage by wet, dirt, fire, or loss of weight, or for condition of baling on hay, hemp, or cotton; nor for loss or damage of any kind on any article whose bulk requires it to be carried in open cars; nor damage of perishable property of any kind, occasioned by delays from any cause or change of weather; nor for loss or damage on any article of property whatever, by fire or casualty while in transit, or while in depots, or places of transshipment, or at depots or landings at point of delivery; nor for loss or damage by fire, collision, or the dangers of navigation, while on seas, rivers, lakes, or canals."

The bill of lading of the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company, after acknowledging in the usual form the receipt of the goods, proceeds: "Which they agree to deliver at Cleveland, Ohio, station, with as reasonable dispatch as the general business will permit, subject to

the conditions mentioned below, in like good order (the dangers incident to railroad transportation, loss or damage by fire while at depots or stations, loss or damage of combustible articles by fire while in transit, and unavoidable accidents excepted), upon the payment of charges. It is agreed,

and is a part of the consideration of this contract, that neither this nor any company or carrier to whom the same shall be delivered, in the course of transportation to the place of final destination, is to be responsible for loss or damage to goods occasioned by providential causes, or by fire from any cause whatever, while in transit or at stations."

The bill of lading of the Cairo, Vincennes & Chicago Line, as to this question, is as follows: "That the C., V. & C. Line, and the forwarding lines with which it connects, and which receive said property, shall not be liable for leakage of oils, or any other kinds of liquids, breakage of any kind of glass, earthen, or queen's ware, carboys of acid, or articles packed in glass, stoves, stove furniture, castings, machinery, carriages, furniture, musical instruments of any kind, packages of eggs, or for rust of iron and iron articles, or for loss or damage by wet, dirt, fire, or for loss of weight, or for condition of bailing on hay, hemp, or cotton, or for loss or damage of any kind on any article whose bulk requires it to be carried in open cars; nor for loss or damage on any article of property whatever by fire or other casualty, while in transit, or while in depots or other places of transshipment, or at depots or landings at points of delivery; nor for loss or damage by fire, collision, or the dangers of navigation while on seas, rivers, lakes, or canals."

Like clause in the bill of lading of the Blue Line reads: "It is agreed and is a part of the consideration of this contract, that the Company will not be responsible for leakage of liquids, breakage of glass or queen's ware, the injury or breakage of looking-glasses, glass show-cases, picture frames, stove castings, or hollow ware; nor for the injury to the hidden contents of packages; nor for the loss of weight or otherwise of grain and coffee in bags, or rice in tierces; nor for the decay of perishable articles; nor for damage arising to any article carried from the effects of heat or cold; nor for the loss of nuts in bags, or lemons or oranges in boxes, unless covered with canvas; or loss or damage to goods occasioned by providential causes, or by fire from any cause whatever, while in transit or stations; nor will the companies be responsible for damage on tobacco, unless it is proved to have occurred during the time of its transit over this line, and notice must be given within thirty hours after the arrival of same."

Settling thus the effect of the exemption clauses in the several bills of lading, we reach the main question made against them all, and that is that they are void, because (1) without consideration, and (2) unreasonable.

Taking up these divisions of the question in order, we consider that of consideration first. And here we observe that again the

pleadings have been so amended as to meet the difficulty suggested in the *Lancaster Mills Case*, that there was an omission of allegation in the pleadings there that the clause was without consideration, imposed by duress, or unreasonable. In that case it was held that such a stipulation in a bill of lading, wherein a through rate was granted for carriage over lines of more than one carrier, will be presumed to be upon a sufficient consideration, and reasonable. It is now alleged and insisted that the carrier has charged and received compensation additional to that usually taken for transportation, with restricted risk, and that, in effect, the shipper has been made to pay the insurance premium. It is true that for effecting insurance of the special risk of the compress holding, and agreement to procure carriage beyond the line of particular carriers, the charge was slightly greater, but there were additional benefits conferred which justified it, and this was no more than just consideration therefor.

The argument that the stipulation for exemption is unreasonable is based, not alone upon the idea that one line of road may not stipulate for such exemption in consideration of its procuring carriage beyond its own line, but it is said that here the various carriers were in combination, forming a continuous line from Memphis to points of distribution; or transportation companies sued as carriers having no line leading from Memphis were in association with initial lines there, and contracting as a continuous line to carry from Memphis to such destination, as the Kanawha Despatch, or transportation companies having no lines and no initial carriers in Memphis were contracting as through lines to carry from Memphis to points of destination, as the Blue Line, which, without a road, contracted to carry from ocean to ocean. It is argued that the effect of such agreement as was made by the several lines and transportation companies is the same as though made by a carrier owning the line from Memphis to destination point. That such a carrier could not have stipulated for exemption from fire loss, unless it had been ready and willing to have made the shipment under its common-law liability, which included such loss, and that the evidence shows that none of the companies or associations sued were prepared or willing to so ship. The evidence does show that none of them would have issued bills of lading such as these, omitting the fire clause, but that all the initial carriers and lines leading from Memphis would have done so over their own lines, but had no arrangement authorizing them to do more.

The question thus presented is the most serious in the case. If complainant be right in assuming that these lines or companies shipping by special contract over and beyond any one initial carrier's line, stand upon the same footing as would a carrier owning the entire line over which the shipment was made, then it follows, from the fact that they were not ready and willing to execute a contract for shipment under common-law liability, the stipulation for exemption against fire loss would be void, for it is well settled

in this State that such a clause is only valid when it was optional with the shipper to ship upon or without such agreement. The option need not be in fact offered to the shipper. It is sufficient if it would have been given had he demanded it. *Louisville & N. E. Co. v. Manchester Mills*, 88 Tenn. 638.

Before determining this question it is necessary to notice here a division of it arising upon differences in the character of carrier lines assuming the obligations. These, though they are susceptible of more, may be, for the purpose of this statement, divided into two classes, one being that of an initial carrier having a line leading from Memphis to a given point, and a traffic arrangement or combination with connecting lines, whereby it is authorized to make (and make only) the contract in question as to shipment beyond its own line; the other being a transportation company having no initial carrier or line, but offering to make such special contract only, and not having power to execute any other, proposing to use initial and connecting roads for one continuous shipment. Respecting the character of these companies and liability assumed, we hold they are the same. Both but in fact proposed to use agencies which they did not profess to own, and contracts made with one are governed by the same rules of law as those which control the other. In the case of *Merchants Despatch Transp. Co. v. Bloch*, 86 Tenn. 392, a transportation company not owning or controlling any means of conveyance itself, but engaging on its own behalf, in the business of transporting goods through the agency and over the lines of other carriers of its own selection and employment, was held to be a common carrier, and subject to all the responsibilities attaching to that character, and that the carriers employed by such transportation company were its agents, and not the agents of the shipper or consignee. In this view each could make any contract which the other could lawfully make, and would be bound by the same agreements, and be exempted from the same responsibility, in like contracts.

This being true, the contract must be regarded as though made by one line for itself and as agent to make the special contract for others. The through bills of lading issued were for the performance of the service of transportation by several successive carriers, no one of which was under any common-law obligation to enter into any contract at all for through carriage over all. It is no longer doubted that each carrier in the connection could have made a contract for itself, whereby it limited its liability for loss by fire. *York Mfg. Co. v. Illinois Cent. R. Co.*, 70 U. S. 3 Wall. 107, 18 L. ed. 170; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 360, 21 L. ed. 634; *Dillard v. Louisville & N. E. Co.*, 2 Lea, 288.

These were all cases in which the contract was for delivery at a point beyond the terminus of the line of the contracting carrier. It was presumed, in the first case cited, though there was no evidence to that effect, that the initial carrier had rates proportioned to the risk assumed from the nature of the

goods carried, and that losses by fire must necessarily have affected the compensation demanded. But the court said: "Be this as it may, the consideration expressed was sufficient to support the entire contract made." Here it is proven that they had no charge for the entire route agreed upon with other carriers, and ready to be proposed to the shipper, without limitation of responsibility; but it is proven that they had such a rate on their own initial lines; and, in the absence of proof, it may be presumed that the connecting carriers each did have such a rate under the authority cited. But, be this as it may, as they were under no common-law liability to agree to ship at all beyond their own lines, they may make such a special contract, and, if otherwise reasonable (as in each of these cases it was) such contract is not void, but must be upheld.

Having determined, in the order in which they most naturally arise, the relation which the Compress Company occupied towards owners and carriers under its contracts and usage, with its liability for failure to procure insurance, and its non-liability for negligence, we are brought to the questions which arise upon the insurance contracts effected by it, and to others arising upon insurance contracts effected by owners, and to those of contribution between the several insurers. The \$301,750 of insurance procured by the Compress Company was distributed in forty-four companies. In all policies procured the Merchants' Cotton-Press & Storage Company was named as the assured, and in each of them the risk was set forth on a printed slip, pasted in the body of the policy, reading: "On all cotton in bales received by them [it] as agents [agent] for the benefit of railroads, transportation lines, or owners in the boundaries of the Merchants' Cotton-Press & Storage Company's West Navy-Yard Compress. . . . The liability of the insurers is to begin on the receipt of said cotton on the premises of the assured as here in described, for compressing, and is to cease and terminate when removed from the platforms of the Merchants' Cotton-Press & Storage Company for transportation." The greater part of the cotton in the compress was covered by marine policies of insurance in favor of special owners. They aggregated about \$700,000. The amount of cotton destroyed was about 14,000 bales, of the value of \$700,000. Of this amount there was \$52,472.26 worth for which no bills of lading had been issued, and upon which there was no other insurance. The other cotton destroyed was covered by marine policies, and the amounts due the several parties thereunder have been paid or advanced to them by the several companies issuing these policies. In respect to all these companies except those represented and claiming through Deming & Co. in their suit the chancellor held there could be no recovery against the Merchants' Cotton-Press & Storage Company, because of a breach of its contract to fully cover by insurance; the theory upon which this holding was made being that announced in the *LANCASTER MILLS CASE*, that an owner not relying upon the obligation of the Com-

press Company to carry insurance, and having for himself effected other insurance in good and solvent companies, would not be heard to say that he had been damnified by the failure of the Compress Company to do for him that which he had done for himself. This proposition was not actually decided in that case, the necessity for it being obviated by the fact of payment. The owner, therefore, not only having insured in solvent companies, but having in fact received payment from them, could not complain that he had been injured by the failure of the Compress Company to cover his cotton with other insurance. Not having been injured by such failure, he acquired no right, and, of course, his insurer could obtain none on this account. But the proposition was law, and the chancellor might properly have adjudged additionally, as we now do, that the transactions by which the marine insurance companies advanced money in full of the several losses, subject to be repaid only upon the contingency that the assured should recover from bailee or carrier primarily liable for negligence, or, in the latter case, for loss without exemption in bill of lading, were for all purposes of these suits payments, and that thereafter neither the assured nor their insurers had any right, original or by subrogation, against either Compress Company or carrier, unless the Compress Company was primarily liable for negligence, or the carrier was primarily liable for the fire loss, unprotected by bill of lading exemptions. And this is true as to the arrangement effected by Deming & Co., which the chancellor held was not a payment upon the particular facts now to be stated. After the loss, and when the insurance company was fully informed concerning the circumstances thereof, the president of the Phoenix Insurance Company procured, for and through Deming, of banks, the full amount of insurance of Deming & Company, and an amount additional sufficient to purchase claims of complainants in that suit. This borrowing was done in the name of Deming, but it was absolutely secured by an actual deposit of the insurance company, and with the understanding that Deming was only to pay it out of the recovery against the carrier; or, to put it differently, that the insurance company was to pay it if Deming & Company failed to recover in this case. Then, if no recovery could be had against the carrier, it was a payment. This is its legal effect. It concedes liability fixed by the loss, and that the policies extended to and covered it. As to the questions that it now attempts to make, that its policies did not cover this risk, and that it was not in fact liable, the company is concluded by the arrangement and understanding with Deming. These companies all stand on the same footing. But, having paid the assured, they are entitled to be subrogated to his right against parties primarily liable,—that is, against the Compress Company, if the loss was occasioned by its negligence; and against any carrier primarily liable for the loss,—that is, one not protected by valid exemption from liability on account of loss by fire.

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We have elsewhere shown what carriers were primarily liable, and this is all we need say in this connection.

Another question was made and determined by the chancellor against the liability of the Marine Insurance Company, Limited, of London, for 305 bales of cotton, on account of "shore risk" clause, whereby its risk of fire "on shore," prior to shipment, was to cover a period not exceeding ten days. This money had been advanced to the assured by the insurance company, but the chancellor held it not to be a payment, because of the following agreement contained in its policy, to this effect: "It is understood and agreed, between Warren Manufacturing Company and the Marine Insurance Company, Limited, of London, that when said Warren Manufacturing Company shall present to Marine Insurance Company, Limited, proof that any cotton shipped, or purchased for shipment, by said Warren Manufacturing Company, has been lost, damaged, or destroyed while in the custody or control of any carrier, or while any carrier or other bailee was liable to said Warren Manufacturing Company therefor, said Marine Insurance Company, Limited, shall advance to said Warren Manufacturing Company, or to the holder of the certificate issued by said Warren Manufacturing Company, against such shipment, an amount equivalent to the insured value of the cotton so lost, damaged, or destroyed, pending the collection of the claim against the carrier or other bailee, said Warren Manufacturing Company agreeing to refund said advance immediately upon collection of said claim. It is further understood and agreed that, upon the first advice of such loss, said Warren Manufacturing Company shall notify said Marine Insurance Company, Limited, and shall select as their representative to deal with the carrier, or other bailee, such person or persons as the said Marine Insurance Company, Limited, may designate. War-ranted that this agreement to advance and the policy of insurance to which it applies, shall not in any way inure to the benefit of any carrier or other bailee. This agreement to be binding so long as policy No. 502, issued by said Marine Insurance Company, Limited, to said Warren Manufacturing Company shall remain in force." It was held that the 305 bales were not covered by the policy, and that advancement of the amount of its insurance did not, in legal effect, amount to payment, or estop the company to deny its liability, or insist that the policy did not cover the loss, and that, by reason of said agreement, the company had the right to advance it, and still contest the liability.

The reasoning of the learned chancellor on this point can be best presented by quoting it. It is as follows: "The owners of cotton holding the policies of the Marine Insurance Company, Limited, of London, were not insured by those policies to the extent of all cottons that remained in the compress exceeding ten days before the fire, and to this extent the complainants will take decree against the compress company for breach of its liability to insure, and for shares of insurance actually taken by it. Under the

terms of the agreements attached to the policies of this company, and forming parts thereof, the advances of money to the assured cannot be regarded either as payments of the losses or as evidences of admissions of liability on the policies. These agreements expressly provide that, when proofs of loss merely are presented, the insurance company shall advance 'an amount equivalent to the insured value of the cotton so lost or destroyed, pending the collection of the claim against the carrier or other bailee, the insured agreeing to refund said advance immediately upon collection of said claim.' Here was an advance actually made under a valid stipulation of the policy, and not a payment in the guise of an advance, made under a new arrangement after the loss, independent of an obligation of the company to make it. Why was the advance made? Clearly, because the contract imposed the obligation to make it. Why was it received at that time by the assured? Clearly, because at that time he was not under the contract entitled to anything more. Without elaboration, I think it is entirely clear that this feature of these policies distinguishes them, in respect of the point under consideration, from all the others where the loans or advances were made without stipulation in the policies to that effect, and without obligation on the part of the company, under *post nati* arrangements, which bear unmistakable signs of cloaking the real purposes of the parties."

The agreement on which the money, after loss, was advanced, was as follows: "Whereas by certain contract or contracts of insurance made and concluded on or about the 5th day of November, the Marine Insurance Company, Limited, of London, insured Messrs. Warren Manufacturing Company and their assigns against loss or damage to certain cotton therein described, and the said assured warranted that the said insurance should not in any way inure to the benefit of any bailee of said cotton, and the said assurer undertook that, in case of loss or damage to any of said cotton while in the custody or control of any bailee, that it would lend to assured, or to their assigns, an amount equivalent to the insured value of the cotton so lost or damaged, pending the collection of the claim for the loss or damage from the bailee or bailees liable therefor; and whereas, certain cotton claimed by the said assured to be so insured has been damaged or destroyed while in the custody or control of the bailees thereof, to wit, a loss by fire amounting in its insured value to the sum of twenty-five thousand one hundred and three and thirty-seven one hundredths dollars: Now, therefore, this agreement witnesseth that the undersigned, the above-named assured, have this day borrowed from the above named, the Marine Insurance Company, Limited, of London, the sum of money last above written, upon the express condition that the said sum shall be by them returned to the said the Marine Insurance Company, Limited, upon the collection of the claim for the loss or damage to the cotton from the bailee or bailees liable therefor, and payment thereof

to the undersigned. Dated December 29th, 1887. [Signed] Warren Manufacturing Company. John Waterman, Treasurer."

It will be seen that the chancellor reached this conclusion, and took this case out of the rule herein announced, respecting payment, by the assumption that this advance was agreed to be made at all events in the policy, and that, the subsequent advance having been made in pursuance of the original contract, it was not payment or concession of liability, because the policy covered the loss sustained. In this conclusion we do not concur. The original agreement, properly construed, only required an advance in case the loss was at a time and under such circumstances as made the company liable therefor; and, when the amount to cover a loss was advanced only to be returned upon collection from the bailee or bailees liable therefor, it was a concession that the loss was covered by the policy, and but reserved the right of the insurance company to recover of the bailee through the owner. If the bailee was not liable to the owner, there was to be no return, and there could be no subrogation. There was nothing in the policy, properly construed, which required this advance, whether the policy covered the loss or not. There was nothing to prevent the insurance company requiring, as a condition of advancement, that the assured should guarantee a return, if for any reason the insurance company turned out not to be liable, or, at least, agree to return the money in that event. It chose to advance without taking any guaranty or agreement for restitution, if it should thereafter appear that the insurance company was not liable for the loss, but took, instead, an obligation to return it, not if it were not liable, but if someone else, the bailee, should be made so. This must be held, in legal effect, to concede that the loss was covered by the policy, and that the insurance company was liable therefor, and to reserve only the right of subrogation to assured's claim against the bailee for negligence, and carrier unprotected by fire clause, and hence primarily liable,—a right existing without such contract. This advance was therefore a payment. If the insurance company could not have been held to make it, it has chosen voluntarily to do so and thus put the owner in a situation in which he cannot be damaged by reason of failure of the compress company to insure for him. Not being able to establish this, he has no right to a decree against the Compress Company, and, of course, his insurer has none. The only thing not conceded by the payment was the right which payment gave of subrogation to owner's right against one primarily liable for negligence or loss by fire without exemption.

There is still another special question which arises in the marine insurance policies, proper to be disposed of here before coming to the last insurance question we will present,—that of contribution. The question indicated is the construction of what is known as the "American clause" contained in some of the marine policies. It would be a useless increase of the volume of this statement to quote that clause from all of the said poli-

cles. They are all in substantially one form. We quote two of them, to wit: (1) That of the Phenix Insurance Company, held by R. H. Deming & Co.: "Provided, always, and it is herein further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in date to this policy, then the said Phenix Insurance Company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured; and the said Phenix Insurance Company shall return the premium upon so much of the sum by them assured as they shall be by such prior assurance exonerated from. And, in case of any insurance upon the premises, subsequent in date to this policy, the said Phenix Insurance Company shall, nevertheless, be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no subsequent assurance had been made." (2) That of the British & Foreign Marine Insurance, Limited, of Liverpool, is as follows: "Provided, always, and it is hereby further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in day of date to this policy, then the said assurers shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured; and the said assurers shall return the premium upon so much of the sum by them assured as they shall be, by such prior assurance, exonerated from; and in case of any insurance upon the said premises, subsequent in day of date to this policy, the said assurers shall, nevertheless, be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made. Other insurance upon the premises aforesaid, of date the same day of this policy, shall be deemed simultaneous herewith; and the said assurers shall not be liable for more than a ratable contribution, in the proportion of the sum by them insured to the aggregate of such simultaneous insurance."

Under the terms of this, the American clause, as contained in the various marine policies, it was held by the chancellor that the question as to whether the fire insurance preceded, was contemporaneous with, or was subsequent to, the marine insurance, was to be determined, not by the dates of the respective policies, but by the date of the attaching of the risk under each, and, holding that the risk attached contemporaneously under each, it was held that the principle of contribution must govern. To fully understand the chancellor's view, and reasons therefor, it is proper to quote his admirable statement in full on this point. It is as follows: "I am of the opinion that, under the American clauses of the marine open policies, there was no insurance until the cotton

was brought within their terms, and became the subject of insurance. An open policy does not, *ex vi termini*, insure property until the property is brought within its terms. Hence there is no insurance until then. The rule making the date of the policy the date of the insurance applies to valued policies, but not to open policies. Here confessedly, under this rule, the risks under the marine open policies and the fire open policies were concurrent, and the American clauses do not operate."

The proposition of fact upon which this is based is denied, and it is insisted that there was a period of time, however brief, after purchase before deposit in the compress when the cotton was covered alone by the marine policy, and such seems to be the fact. But, waiving this, we hold that the date of the policy, and not of the attaching of the risk, must govern. It is so agreed in express terms, and no reason is perceived why such an agreement might not be made in contemplation of open policies. It is true that ordinarily the date of a contract is not material, but this is not true when it is specially made so in terms,—where it is, among other things, an object contracted about. The insurer, for whose advantage in one sense it is, may well contract to assume an entire liability, and retain an entire premium against contemplated additional insurance as well as existing insurance. No case has been found adjudging the contrary, and, although none has been produced in which the question was in terms raised and disposed of, several have been cited where, upon the facts, it arose and was taken for granted, as we decide it, neither counsel nor court disputing its correctness, and where it was necessarily applied in effecting the result. *American Ins. Co. v. Griswold*, 14 Wend. 399; *Whiting v. Independent Mut. Insurance Co.* 15 Md. 287.

That the actual date controls is assumed and taken for granted in previous cases. *Lee v. Massachusetts F. & M. Ins. Co.* 6 Mass. 208; *M Kim v. Phenix Ins. Co.* 2 Wash. C. C. 95; *Columbian Ins. Co. v. Cullett*, 25 U. S. 12 Wheat. 383, 6 L. ed. 664; *Seamans v. Loring*, 1 Mason, 146. While in others it has been held, if policies bear same date, evidence might be received to show actual time of execution of each. Opinion by Judge Story, *Potter v. Marine Ins. Co.* 2 Mason, 476.

This last contingency was provided for in one of the policies quoted, which made other insurance of the same day as that policy, "simultaneous" therewith, a strong evidential fact to show that the date of the contract was regarded as controlling, and that it is now construed as then understood. It will be seen further on that the purpose of the clause was to alter the common-law rule of contribution, as announced in a case to be cited, and to make the policies liable successively in the order of their respective dates. If it be now determined that the date does not control, but the date of the attaching of the risk under open policies determines, the rule of contribution, which the clause was intended to avoid, would in all its force be reinstated. We think it clear

that it can have no such construction as would defeat the purpose for which it was originated. In view of the origin and purpose of this clause, this construction is all the more manifestly correct. Its object, as deduced from its effect, seems to have been to meet a modification or change made in the law of insurance as it had been understood to exist before in England, by a decision of Lord Mansfield in *Newby v. Reed*, 1 W. Bl. 416. It is thus stated by Chancellor Walworth in the case hereinbefore cited of *American Ins. Co. v. Griswold*: "By the continental law of Europe, and the law of English insurance as it existed previous to the decision of Lord Mansfield in *Newby v. Reed*, *supra*, if there were several policies of different dates upon the same subject, and the amount of insurable interest was insufficient to cover the whole amount insured in both policies, so as to constitute a case of double insurance, the second policy only attached upon or covered so much of the insurable interest as was not covered by the first policy; and the second underwriter was only entitled to retain the premium *pro tanto*, where the commencement and termination of the risk and the perils insured against were the same. 3 Kent, Com. 281; Vanderl. Com. p. 655, b. 4, chap. 16, § 7; Miller, Ins. 366. By this ancient English rule and the continental law the second underwriter was, as he ought to be, merely substituted in the place of the assured, as to the uninsured interest of the latter, which was not covered by the first policy; so that the rule of apportionment between the first and second sets of insurers, where both policies, when taken together, were sufficient to cover the whole insurable interest, was precisely the same as it would have been between the underwriters in the first policy and the assured, if the second insurance had not been made. If the object of the American clause was to restore this ancient rule of apportionment between the underwriters in successive policies, as it originally existed in the Mercantile Law of England as well as the rest of Europe, it is hardly possible to do it in more appropriate and explicit language than is used in the last paragraph of this clause. That language is that, in case of an insurance subsequent in date to the first policy, the underwriters in the first policy 'shall nevertheless be answerable for the full extent of the sum by them subscribed, without the right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received in the same manner as if no such subsequent assurance had been made;' that is, that they are to have no right to claim a contribution from the subsequent assurers, and are to be answerable to the assured in the same manner as if the subsequent insurance had not been made, as well as to retain the premium in the same manner. It appears to be impossible, therefore, under this policy, that the circumstance of there being subsequent policies underwritten by others could make any difference as to the apportionment of the loss as between the underwriter in the first policy and the assured, or those who represented the insur-

able interest of the goods on board at the time of the loss not covered by that policy." Id. pp. 481, 482.

We have presented the quotation, with the argument and statement of the purpose for which it is made, and do not deem it necessary to add more on that question.

We come now to the question of contribution between the insurers or co-insurers, the fire and marine companies. The nominal assured in the fire policies was the Compress Company; the designated beneficiaries were the railroad companies, transportation lines, and owners. The two former (the Compress Company and carrier risks) were not included in the marine policies. Nevertheless it is insisted that the owners' risk covered in the marine policies was the same as owners' risk covered in the fire policies, and that contribution must therefore be enforced between these companies. The insuperable objection to this, so far as the Compress Company and carriers are involved, is that as to their risks they are not covered by the marine policies, while they are covered by the fire policies. It follows, therefore, that, so far as the Compress Company or the carriers may be held liable, the fire companies must respond to that liability, and there can be no contribution as to owners' insurance until that liability is extinguished. If this were not true, the very purpose for which the fire policies were procured—that of indemnity to the assured—would fail. The object of all such insurance is indemnity, and no equity of contribution can defeat it. Indemnity is the prime object of insurance. Every other rule is subordinate, and in no case will contribution be enforced so as to deny indemnity and equity to all the assured.

In application of this rule the Compress Company insists that the fire insurance must be so appropriated as to leave no party included among the assured in these policies unprotected. Recognizing that the effort to protect its own interest had been made without specification, except that it was assured, and that carriers' and owners' interest specially insured must be taken into consideration, and be provided with full indemnity before it is affected, and to prevent its being injuriously affected, it insists that it has the right to have the fire insurance fund so applied as to indemnify carriers and uninsured owners, and thus protect itself as one of the assured, which it insists it is in this sense and to this effect, because the object of being an assured was to derive any benefit properly or in any contingency occurring in consequence of insuring these special interests; that being thus insured, then it, as assured, is a beneficiary to any extent which such insurance so applied makes it, when their protection and its own is secured by such application. It does not insist that it can in any event take a benefit under these policies over an owner, but it claims the right to have the fire insurance appropriated to uninsured owners because the others are not damaged; and, if they are, then the compress company is liable to them under its contract, express or implied, to procure insurance, and the money it receives in such appropriation

would have been at last appropriated to owners when needed for their indemnity. It is insisted, however, in this contingency which has now arisen, where certain owners are damaged by the loss, and others not, that equity requires the appropriation in the carriers' favor to the loss of the otherwise uninsured owner; that such appropriation cannot injure an assured owner, for he gets his full insurance from that source, and, if it fails, the Compress Company is liable, and the protection it receives in the appropriation claimed goes to his benefit; that this result cannot be defeated in favor of contribution, by the intervention of owners' insurer claiming subrogation. He is not entitled to subrogation to the owner's claim against the Compress Company for failure to procure insurance. This right would only exist as to that procured, nothing else preventing; but here it must not be construed to extend to that, and thus defeat the application of the policies procured to indemnity of the assured. The claim of the Compress Company is not that it escapes liability to the owner for default in not procuring insurance, or that it is entitled to thus escape it, but it is that, to the extent the Compress Company did take out such insurance, the insurance can and must be applied before any contribution is invoked, so as to protect the Compress Company to that extent, and that is done by applying this insurance to the carrier liability and to cover loss of the otherwise uninsured owner.

In this view we concur, disagreeing with the chancellor, who held all owners entitled primarily to participate, and their insurers to do so by subrogation. This was one of the questions not before the court in the *Leicester Mills Case*. There it was said, while taken out for the benefit of carriers (meaning contracting carriers), the cotton itself was insured, and this we again repeat here. But the question of contribution and subrogation now arising did not arise in that case; what was then said was not in that view. Leaving, therefore, that question, we return to the question of contribution among others.

The rule of contribution among co-insurers is one which equity has evolved out of conditions of contemporaneous liability for the same loss. Like all others of such origin, it is the application of common sense and natural justice to situations, and the solution of difficulties not provided for by fixed rules of law. Its object is to do justice, and it will not be, under any circumstances, a correct application of it if the result is injustice to any of the assured affected by the application. If the property which was the subject matter of insurance was the same, interest the same, and risks identical, the contribution consequent is obviously that which would be proper as between co-sureties for the same obligation. But here the fire policies were on two interests and risks (that of contracting carriers, and of the Compress Company, as shown), not covered by the marine policies, and the fire insurance fund must therefore be first applied so as to protect these. If in such application it is ex-

hausted in indemnifying the carriers held liable and uninsured owners, then there will remain no fund for contribution. If not, the marine insurers, not having the American clause, are entitled to have contribution, as the fire insurance was for all owners, including those covered by the marine policies (excluding, of course, Hall, who did not consent to procuring of fire insurance for him, but forbade it). To do equity, the fire insurance must be appropriated to cover carrier liability and otherwise uninsured owners. As it is insufficient for this purpose, it will result that there will be no contribution.

One of the claims involved in this record, that of Paton & Co. for twenty-nine bales of cotton, stands on different ground from that of others discussed. The bill of lading of the Kanawha Dispatch, held for this cotton, had a valid fire-clause exemption; but this, of course, did not operate to excuse the company from liability, if the loss was occasioned by negligence, and it is insisted the loss was so occasioned. There was no special allegation that the twenty-nine bales referred to were burned after they were loaded on the cars, but such was the fact, as proven upon general allegation of liability of the company for its loss. The evidence was proper under the general allegation, and, if it makes but a case of negligence, the Kanawha Dispatch is liable notwithstanding the fire clause exemption. The testimony of witness Wheaton, introduced by defendant, shows that this cotton was in the second section of a train made up to leave about 7 o'clock. That this section stood near the compress. The train should have been made up and pulled away from there from one half to three quarters of an hour before leaving time. He says leaving time was 7 o'clock or 7:30; "about 7." He was asked by counsel of the company to examine his (witness') office records, and see if he can find the schedule then in force, and give it to said counsel, and answered, "I will do so." Whether he did or not does not appear. If so, counsel did not file it. It may be therefore fairly presumed that the starting time was not later than 7. He was asked by complainants' counsel if the leaving time was 7 o'clock, and if that custom had been followed would not the compress track have then been cleared; and answered, "It would have been cleared of the loaded cars." It thus and elsewhere appears in his testimony that the cars were left where they burned later than ordinary. But, added to this, the witness shows that, while taking off the first section of the train, the "engine in starting broke a draw-bar about the middle of the car of the first section. The key came out, and they had to throw that car on the main line, and go back and get the rear part of the train, and pull that out." That this breakage caused a delay of at least 7 to 10 minutes. In the meanwhile, before reaching the second section, it had taken fire, and in that condition was removed. Even after this, two cars attached to this one, containing the twenty-nine bales of cotton, were put out with buckets of

water. This one could not be, and was lost. Upon the facts the chancellor found this issue in favor of defendant.

It is insisted here, in support of the finding, that neither the delay nor the breakage of the train, but the fire, was the proximate cause of the loss. In this we do not concur. Granting that the slight delay would not of itself have made the company liable, here we have, in addition, the breaking of the train machinery when the effort is made to remove the cotton, but for which it might have been saved notwithstanding the fire. This, we think, was therefore the proximate cause of the loss. The proximate cause of an injury may, in general, be stated to be that act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another, which, had it not happened, the injury would not have been inflicted, notwithstanding the latter; illustrating by these facts: It is true that the fire destroyed the cotton, and in that sense caused the loss, but it appears that, notwithstanding the occurrence of the fire, the cotton would not have been burned by it had not the breaking of the train while it was being removed happened, so that but for this fact the cotton would have been saved. This must therefore be held to be the proximate cause of the loss, and, if it was the result of negligence, the carrier must answer for it. The complainant must show negligence. He proved a delay of the train caused by breaking of machinery. It then devolved upon the carrier to show that this resulted from a latent defect or other cause sufficient to excuse it. Failing to do this, the carrier was liable, and the liability is here adjudged, reversing the decree of the chancellor on this point.

There was a question decided by the chancellor as to appropriation of the share of insurance of a carrier not before the court, which it is necessary to notice, and we will do so in the summary of results of modifications of his decree, this being a most material one; for we disagree with the chancellor that this fund can be here disposed of under the principles settled. To indicate the modifications resulting, we add a more specific statement of loss and relations to it of various carriers. The figures given are from the briefs of counsel assumed to be accurate, without actual verification from the record. There were 14,009 bales of cotton in all in the compress when burned. Of this number, 2,124 bales were never sued for, the Compress Company or its insurers having paid for 1,038 bales to owners, and no suit was brought as to the remaining 1,086 of the 2,184. Of the remaining 11,865 bales, 2,226 were in the compress shed under permits and compress receipts, but covered by no bills of lading. The other 9,639 were in the compress shed, and under bills of lading of various railroad companies and transportation lines; but some have disappeared, leaving about 9,579 bales covered by bills of lading of cotton involved in these and suits heretofore heard, with 29 bales belonging to Paton & Co., covered by bills of lading of Kanawha Dispatch, and burnt on cars of Newport

News & Mississippi Valley Company, making, in all 9,608 bales now in suit. The following carriers had executed bills of lading for same, to wit:

Cairo, Vincennes & Chicago Line.....	5,087	bales	cotton.
Kanawha Despatch (or Newport News & Mississippi Valley Company).....	2,358	"	"
Newport News & Mississippi Valley Company.....	477	"	"
Louisville, New Orleans & Texas Railroad.....	464	"	"
Indiana, Bloomington & Western Railroad.....	455	"	"
Cleveland, Columbus, Cincinnati & Indianapolis Railroad.....	410	"	"
Blue Line.....	357	"	"
	9,608		

The Kanawha Despatch is held not liable in all suits except that of Paton & Co. In the contribution therefore 2,329 bales are eliminated, so far as the carrier liability is concerned. There is consequently no recovery to be had against the Compress Company, through this carrier, by owners in favor of marine insurers. The recovery of marine insurers through owners depends upon the establishment of the primary liability of the carriers having contracts with the Compress Company, to cover cotton with insurance, and thus, by and in consequence of such recovery, reaching the Compress Company. It is indispensable, therefore, to that result that the carrier be sued, and judgment be rendered against it. The Cairo, Vincennes & Chicago Line is not sued, and therefore there can be no recovery in favor of the owners through that carrier against the Compress Company. This eliminates 5,082 bales, for which no recovery can be had against the Compress Company. The chancellor thought, by reason of declaring a liability without adjudging it against this Company not before the court, he could pass over it, and appropriate so much of the fire insurance fund as he might thus determine belonged to it. We are of opinion this cannot be done. There was no service on the Cairo, Vincennes & Chicago Company; no appearance entered by or for it; no attachment of property and publication; and hence it is not actually or constructively before the court for the appropriation of any property or fund in which it has an interest. No appropriation of any fund can be made to an extent which, under any holding in a suit against it, might result in showing that it is injured. It cannot be injured by the appropriation of that proportion of the fire insurance fund, which, as between itself and other carriers, would not belong to it under any ruling. Hence, in appropriating so much of that entire fund to the liability of other carriers as their proportion of the liability is to its share, no injustice can be done, and this is the extent to which we can go in this case. The Compress Company is entitled to hold that fund in trust for the absent carrier, to indemnify it (and to that extent to protect the Compress Company), in case the carrier is sued, and its liability fixed, and it sues the Compress Company.

In view of the fact that only contracting carriers (that is, those having contracts with the Compress Company to carry insurance),

were enumerated as being entitled to participate in the insurance fund, it is deemed superfluous to say that non-contracting carriers—as the Blue Line—are not so entitled, and will be by decree excluded from such participation.

We are aware that, long as this opinion is, it is necessarily too brief in many particulars. The number of cases and the multitude of questions involved have made the whole presentation a matter of extended writing, even after elimination of many special questions, the result of the decision of certain general ones, but for the same reason have occasioned us to deal in too brief a manner with most, if not all, of them, to do justice to the able and elaborate arguments which have been addressed to us. But after all, it must be remembered that what is desired of a court is a solution of difficulties,—a correct decision of questions,—rather than elaborate statement or discussion of them, particularly when, from their number or variety, an opinion of much length must necessarily be short in particulars. It would have given us much pleasure to have, with

each question; restated at length the various positions and arguments of counsel *pro* and *con*, and to have reviewed the many authorities collected with so much industry, and pressed upon us with so much force; but time is inadequate to the task, and we have been obliged to content ourselves with determining, upon due considerations, the application of the law as in our judgment it is best settled amid the views presented. If, in reflecting the judgment of the court, I have done it with reasonable accuracy and correctness, I have accomplished the purpose chiefly desired, and better than would have been done by elaboration of statement and inaccuracy of conclusion. *The decree of the chancellor will be modified* as herein indicated. The costs of both courts will be divided in the several suits in which they are respectively involved between the marine insurance companies and the Compress Company. Costs of special recovery, as that of Paton & Co. against defendant, held specially liable, and complainants cast in suits will pay costs thereof.

OREGON SUPREME COURT.

J. W. COOK, *Appt.*,

v.

PORT OF PORTLAND *et al.*, *Respts.*

(.....Or.....)

1. A corporation composed of the inhabitants of the territory situated around the mouth of a public navigable river, which is charged with the duty

of maintaining therein a ship channel of sufficient width and depth, and empowered to levy taxes to raise the necessary funds, is created for municipal purposes within a constitutional provision permitting the creation of such corporations by special laws.

2. Placing the burden of maintaining a harbor upon those living in its immediate vicinity does not violate a constitutional requirement that all taxation shall be

NOTE.—Taxation, general and local, must be for public purpose.

Taxation may be either general or local; but, whether general or local, it must be for a public purpose and not a mere private purpose. *McBean v. Chandler*, 9 Helsk. 349; *Astor v. New York*, 7 Jones & S. 120; *People v. Brooklyn*, 4 N. Y. 419; *People v. Salem Twp. Board*, 20 Mich. 452; 1 *Desty*, Taxn. 14.

Municipal corporations, other than cities, towns and villages, may be vested with powers to assess and collect taxes for corporate purposes, but such taxes must be uniform as to persons and property within the district created. *Udike v. Wright*, 31 Ill. 53; *Board of Directors v. Houston*, 71 Ill. 318; *Harvard v. St. Clair & M. L. & P. Drainage Co.*, 51 Ill. 120; *People v. Salomon*, 61 Ill. 37; *Gage v. Graham*, 57 Ill. 144; *Hessler v. Drainage Comrs.*, 53 Ill. 105.

The essential requisite of all taxation is that it be for public purposes, whether the penalty be payable to the State or to individuals. The purpose must be public. *Silabee v. Stockell*, 44 Mich. 561; *Scammon v. Chicago*, 44 Ill. 206; *Wauwatosa v. Gunyon*, 25 Wis. 271; *Hanson v. Vernon*, 27 Iowa, 57; *Sharpless v. Philadelphia*, 21 Pa. 163; *Curtis v. Whipple*, 24 Wis. 380; *Williams v. Newfane School Dist. No. 6*, 32 Vt. 271; *Louisville & N. R. Co. v. Davidson County Ct.*, 1 Sneed, 608; *Freeland v. Hastings*, 19 Allen, 579; *Hammett v. Philadelphia*, 65 Pa. 132; *Allen v. Jay*, 60 Me. 124.

A state purpose must be accomplished by state taxation, a county purpose by county taxation, and a public purpose for any inferior district by 13 L. R. A.

taxation of such district. *Cooley*, Taxn. 2d ed. 141.

A corporate purpose is a purpose necessary or proper to carry into effect the object of the creation of the corporate body. *Chicago, D. & V. R. Co. v. Smith*, 62 Ill. 268; *Livingston County v. Darlington*, 101 U. S. 417, 25 L. ed. 1019.

A public governmental use or purpose is essential to the validity of a tax. *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 238; 1 *Desty*, Taxn. 14.

Equality and uniformity of taxation.

The provision of the State Constitution requiring equality and uniformity in taxation is not a restriction on the absolute power of taxation, but affects only the mode of its exercise. *Beals v. Anador County*, 35 Cal. 624.

A tax is not unconstitutional when it is equal and uniform throughout the taxing district. *East Portland v. Multnomah County*, 6 Or. 62.

That the rule of taxation shall be uniform, means that the course or mode in levying or laying taxes shall be uniform; that each step taken, the valuation and the rate, must be uniform. *New Orleans v. Davidson*, 30 La. Ann. 555; *Weeks v. Milwaukee*, 10 Wis. 242; *Knowlton v. Rock County Suprs.*, 9 Wis. 410.

Local taxation.

Local taxation must be for a local as well as a public purpose. See 1 *Desty*, Taxn. § 9; *Nichols v. Bridgeport*, 27 Conn. 459; *Williams v. Cammack*, 37 Miss. 206.

The Legislature may make local improvements, or authorize the same to be made, and a tax on a

equal and uniform, although the entire State will be benefited thereby, if its maintenance is positively necessary to the existence of the settlements upon its shores.

(*Strahan, Ch. J., dissents.*)

(July 8, 1891.)

APPEAL by complainant from a decree of the Circuit Court for Multnomah County in favor of defendants in a suit brought to test the validity of an Act creating defendant a municipal corporation. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. Dolph, Bellinger, Mallory & Simon* for appellant.

Mr. Ellis G. Hughes, for respondents:

The meaning of "municipal" is, in legal effect, the same as public, or governmental, as contradistinguished from private.

Worcester, Dict.; Webster, Dict.; Burrill, Law Dict.; Bouvier, Law Dict.

Kent does not even use the word "municipal" in his division of corporations into classes, but he does use the word "public" as its equivalent, which it in fact is.

2 Kent, Com. *274, 275. See *State v. Leffingwell*, 54 Mo. 458; *Horton v. Mobile School Comrs.* 43 Ala. 598, 607; *People v. Salomon*, 51 Ill. 37.

Local district for such improvements is constitutional. *Daily v. Swope*, 47 Wis. 387; *Williams v. Cammack*, 27 Miss. 209.

Where lands are improved by legislative action, on the ground of public utility, the cost of such improvements may, to a certain degree, be imposed on the parties who, in consequence of owning the lands in the vicinity, receive a peculiar advantage. *Hanscom v. Omaha*, 11 Neb. 37; *Tide-Water Co. v. Coster*, 18 N. J. Eq. 527.

A statute delegating power to charge the property of individuals with the expenses of local improvements must be strictly pursued, and any substantial departure will vitiate the proceedings. *Merritt v. Portchester*, 71 N. Y. 309.

The Legislature may provide for the construction of a free bridge over a river, and require the expense to be borne by taxation of the city into which it leads. *Philadelphia v. Field*, 58 Pa. 220, citing *Thomas v. Leland*, 24 Wend. 65; *Norwich v. Hampshire County Comrs.* 18 Pick. 60; *Hingham & Q. Bridge & Turnp. Corp. v. Norfolk County*, 6 Allen, 353; *Board of Wardens of Port of Phila. v. Philadelphia*, 42 Pa. 209.

Municipal taxation for local purposes.

A town, under its general authority to vote taxes for township purposes, cannot raise money for public improvements outside its territorial limits (*Riley v. Rochester*, 9 N. Y. 64; *Denton v. Jackson*, 2 Johns. Ch. 338, 1 L. ed. 400; *North Hempstead v. Hempstead*, 2 Wend. 139; but a town, if authorized specially by the Legislature, may do so on the ground of special local benefits. *Talbot County Comrs. v. Queen Anne County Comrs.* 50 Md. 245. See *Halsey v. People*, 84 Ill. 89; *Wright v. People*, 87 Ill. 582; *Concord v. Boscawen*, 17 N. H. 465, cited in *Cooley*, Taxn. 2d ed. 163.

So it is competent by legislation to provide a special water precinct in a city for waterworks, and levy a tax within the same. *Brown v. Concord*, 56 N. H. 375.

So it may be authorized to construct gas works for public purposes. *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 175, 185.

Or it may be required to contract for corporate necessities with private corporations or persons. *Nelson v. La Porte*, 63 Ind. 258.

13 L. R. A.

Beam, J. delivered the opinion of the court:

This suit involves the constitutionality of an Act of the Legislative Assembly of this State entitled "An Act to Establish and Incorporate the Port of Portland, and to Provide for the Improvement of the Willamette and Columbia Rivers in said Port and between Said Port and the Sea." Laws 1891, p. 791. This Act, in terms, creates a separate district, with defined boundaries, which embraces substantially what was at the time of the passage the Cities of Portland, East Portland, and Albina, and now the City of Portland, to be known as the "Port of Portland," and the inhabitants thereof are constituted and declared to be a corporation by the name and style of the "Port of Portland," and as such to have perpetual succession, and by said name to exercise and carry out all the corporate powers and objects by said Act conferred and declared, make all contracts, hold, receive, and dispose of real and personal property, such as may be necessary, requisite, or convenient in carrying out the objects of said corporation, as therein set out and expressed, and sue and be sued, plead and be impleaded, in all actions, suits, and proceedings brought by or against it. By said Act it is declared that the object, purpose, and occupation of such

The constitutional provision inhibiting the incorporation of towns and villages by special charter has no reference to quasi municipal corporations. *Cathcart v. Comstock*, 56 Wis. 590.

When a statute confers power upon a corporation, to be exercised for the public good, its exercise is not merely discretionary, but imperative. The words "power" and "authority" in such cases may be construed "duty" and "obligation." *Allegany Co. P. S. Comrs. v. Allegany County*, 20 Md. 449.

Special taxing district.

As distinct from its power of local assessment, the Legislature may create special taxing districts, which may include one or more subdivisions of the State or parts of such subdivisions without making such districts correspond with their territorial limits. 1 *Desty*, Taxn. § 58.

It has power to impose a tax on such local district for the construction of local improvements, and to levy assessments for benefits conferred; but this power is in some States subject to the limitation that local burdens cannot be imposed without the consent of the taxpayers to be affected thereby. *Id.* § 69.

Works of public improvement which may be an advantage to the whole State, as a canal, may be constructed at the expense of the local district where it was likely to confer local benefits on the locality specially taxed. *Thomas v. Leland*, 24 Wend. 65; *Revenue Comrs. v. State*, 45 Ala. 399.

The interest of the district must be the true test, whether an object is or is not a proper object of district taxation, as in the case of the erection of city waterworks. *Goddin v. Crump*, 6 Leigh, 120.

Several towns may for a common purpose be united into a single district, and commissioners of the district may be invested with taxing powers for district purposes. *People v. Salomon*, 51 Ill. 37; *West Chicago Park Comrs. v. Western U. Teleg. Co.* 108 Ill. 38.

Local taxes may be levied on different systems in different districts, even when they are for the benefit of the whole State. *People v. Central Pac. R. Co.* 43 Cal. 308; *Bright v. McCullough*, 37 Ind. 222; *Merrick v. Amherst*, 19 Allen, 500; *Allegany Co. P. S. Comrs. v. Allegany County*, 20 Md. 447.

corporation shall be to so improve the Willamette River at the Cities of Portland, East Portland, and Albina, and the Willamette and Columbia Rivers between said cities and the sea, as that there shall be made and permanently maintained therein a ship channel of good and sufficient width, and having a depth at all points at mean low water, both at said cities and between said cities and the sea, of not less than twenty five feet. So far as is necessary, requisite, or convenient to carry out the said object, this corporation is given full control over said rivers at and between said cities and the sea, so far and to the full extent that this State can grant the same, and in carrying on said work is given the same power of eminent domain as exists under the laws of this State in favor of corporations organized for the construction and operation of railroads. For the purpose of providing funds necessary for such improvement said corporation is authorized from time to time to borrow money in such sums as may be found necessary, not exceeding the sum of \$500,000, and to issue its promissory notes or bonds therefor; and is given power to assess, levy, and collect taxes upon all property, real and personal, within its boundaries, and which is by law taxable for state and county purposes, not exceeding the rate therein provided. The power and authority given to the corporation, the Port of Portland, is vested in and to be exercised by a board of commissioners named therein, and their successors in office, chosen as in said Act provided, who shall serve without salary or compensation, except for actual expenses incurred by any commissioners while engaged in the actual work of the corporation.

At the outset it is well to observe that every court approaches with hesitancy the question of declaring a law unconstitutional, and never exerts its power so to do while doubt exists. Every intendment must be given in favor of its validity. As was said by Lord, J., in *Cline v. Greenwood*, 10 Or. 241: "Before a statute is declared void in whole or in part its repugnancy to the Constitution ought to be clear and palpable, and free from doubt. Every intendment must be given in favor of its constitutionality. Able and learned judges have, with great unanimity, laid down and adhered to a rigid rule on this subject. Chief Justice Marshall in *United States v. Peters*, 9 U. S. 5 Cranch, 128, 3 L. ed. 57; Chief Justice Parsons in *Kendall v. Kingston*, 5 Mass. 534; Chief Justice Tilghman in *Farmers & M. Bank v. Smith*, 3 Serg. & R. 72; Chief Justice Shaw in *Norwich v. Hampshire County Comrs.*, 13 Pick. 61, and Chief Justice Savage in *Ex parte McCollum*, 1 Cow. 564,—have with one voice declared that it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts be considered void. The opposition between the Constitution and the law should be such that the people feel a clear and strong conviction of their incompatibility with each other." Keeping these views in mind, we proceed to the examination of the question before us. It is first contended by plaintiff that the Act incorporating the defendant, the Port of Portland, is repugnant to section 2 of article 11 of the Constitution, which provides that "corporations may be formed under general

laws, but shall not be created by special laws, except for municipal purposes." Under this section there can be but one question: What is a corporation created for municipal purposes? No corporation can be created by special Act except for municipal purposes, but there is no limitation on the creation of corporations for municipal purposes by special Act. Any corporation for municipal purposes may therefore be thus created. If, then, the Port of Portland is a corporation created for municipal purposes, the Act creating it is not repugnant to this section of the Constitution. The whole question, therefore, turns upon the meaning of the phrase "municipal purposes," as used in the Constitution. The word "municipal" is defined by the lexicographers as belonging to a city, town, or place; having the right of local government; belonging to or affecting a particular State or separate community; local; particular; independent. It is usually applied to what belongs to a city, but has a more extensive meaning, and is in legal effect the same as public or governmental, as distinguished from private. Burrill, Dict. title *Municipal*. Thus we call municipal law not the law of a city only, but the law of the State. 1 Bl. Com. 44. Municipal is used in contradistinction to international. Thus we say an offense against the law of nations is an international offense, but one committed against a particular State or separate community is a municipal offense. And so are municipal affairs public affairs, and municipal purposes are public or governmental purposes, as contradistinguished from private purposes. A corporation, therefore, created for municipal purposes, is a corporation created for public or governmental purposes, with political powers to be exercised for the public good in the administration of civil government, whose members are citizens, not stockholders; an instrument of the government, with certain delegated powers, subject to the control of the Legislature, and its members, officers, or agents of the government for the administration or discharge of public duties. A city, or purely municipal corporation, is perhaps the highest type of a corporation created for municipal purposes, because it is a miniature government, having legislative, executive, and judicial powers; but there is another class of corporations, such as counties, school districts, road districts, etc., which, though varying in application and peculiar features are but so many agencies or instrumentalities of the State to promote the convenience of the public at large, and are, in the broadest use of the term, for municipal purposes. It would be a narrow and unwarranted construction of the language to say that "municipal purposes" means only city, town, or village purposes. The Constitution of this State evidently contemplates the creation of counties under the direct supervision of and by special Act of the Legislature, yet no direct power is given to create them, and the section under consideration contains a direct prohibition against doing so, unless the word "municipal" covers this class of corporations. We thus perceive that the word "municipal" not only applies to cities, towns, and villages, but has a broader and more general signification relating to the State or nation. And therefore the words "municipal corporations," as applied

to incorporated cities or towns, and "municipal purposes," are not synonymous. The latter embrace, by the common speech of men before and since the days of Blackstone, state or national purposes. And therefore, while cities, towns, and villages are for municipal purposes, there are also other corporations for municipal purposes that are not of that class. It was in the broader and more general sense of the term that the words "municipal purposes" were used in the Constitution of this State. This is evident from section 9 of the same article of the Constitution, wherein it is provided that no county, city, town, or other municipal corporation, by a vote of its citizens or otherwise, shall become a stockholder in any joint stock company, corporation, etc. Here is a direct interpretation from the Constitution itself. A municipal corporation is not necessarily a county, city, or town. Were it so, the added words, "or other municipal corporations," would be without meaning. Clearly a corporation for municipal purposes is one composed of citizens, as distinguished from stockholders; a public, as distinguished from a private, corporation.

In *Curry v. Sioux City Dist. Treas.*, 62 Iowa, 104, it is said: "The word 'municipal,' as originally used, in its strictness applied to cities only. But the word now has a much more extended meaning, and, when applied to corporations, the words 'political,' 'municipal,' and 'public' are used interchangeably." In *Horton v. Mobile School Comrs.*, 48 Ala. 598, an Act had been passed which repealed all prior laws upon the subject of taxation except those created for municipal purposes, and it was held that these are not words of technical import, and should be construed to apply to a corporation to carry on a public free school, and to raise funds for its support.

In *People v. Solomon*, 51 Ill. 87, under an Act of the Legislature providing for the location and maintenance of a park for the towns of South Chicago, Hyde Park, and Lake, those towns were erected into a park district; and the people of the towns affected by the Act having by a vote accepted its provisions, the board of park commissioners thereby created, and appointed by the governor, to whom was committed the entire control of the park, was held to be a municipal corporation, in whom it was competent for the Legislature to vest the power to assess and collect taxes within the park district so created for the special corporate purpose of its creation, and this was under a constitutional provision similar to ours. *Mr. Chief Justice Breese*, on page 52, says: "One of the counsel for respondent asks: Of what character is the corporation thus endowed with extraordinary, unheard-of, and unknown powers and privileges, and, after defining the several kinds of corporations, he asks: To which of these divisions of public corporations does the South Park Commissioners belong? The answer is ready and obvious. By the vote of the people within the jurisdiction of their action they became a corporate authority, quasi municipal; the object of their creation being of a municipal character, and of that alone. They became a public municipal corporation." So in *People v. School Trustees*, 78 Ill. 186, *Mr. Justice Walker*, in treating of the

power and authority of school townships under the Constitution of that State to subscribe for the capital stock of railway companies, says: "These school townships were created and are continued for school purposes alone, and not for municipal purposes. They are only intended to establish schools, and loan and manage school funds of the township, and pay the teachers of schools taught in their jurisdiction. This was the purpose of their organization. They were not created to exercise any of the functions of government, and hence are not municipal in their nature or purpose; nor are they provided with the officers or the power to exercise the functions of government." The test of a corporation for municipal purposes, adopted by the court, seems to have been the right or power to exercise some of the functions of government, and this we apprehend is the true test. In the case of *State v. Leffingwell*, 54 Mo. 458, cited and relied on by counsel for plaintiff, the same principle is clearly recognized, under a constitutional provision similar to ours. In the first opinion there is a tendency to hold that nothing but a city, or some corporation connected therewith, and instituted for the purpose of carrying out some of the known objects of the municipality, is a corporation created for municipal purposes; but in the opinion on a motion for a rehearing, after citing the provisions of the Constitution, this language is used: "From these provisions it is manifest that the Legislature is prohibited from creating any sort of corporation by special Act except such as are for municipal purposes. A corporation for municipal purposes is either a municipality, such as a city or town, created expressly for local self-government, with delegated legislative powers; or it may be a subdivision of the State for governmental purposes, such as a county, a school or road district, etc. These subdivisions are sometimes called 'quasi corporations,' but they are nevertheless corporations within the meaning of the Constitution. It was therefore eminently proper in framing the Constitution that there should be no express or implied prohibition against creating such subdivisions or quasi corporations for municipal purposes. The phrase 'municipal purposes' was intended to embrace some of the functions of government, local or general; and no corporation, not exclusively designed for this end, can be properly denominated a corporation for municipal purposes." And again: "The aim of the Constitution was to prevent the creation of corporations by special legislation, except for a particular purpose. In framing this prohibition it was necessary to exclude the idea that quasi corporations or subdivisions of the State for municipal purposes were to be embraced among the inhibited Acts of the Legislature. No language could have expressed this more clearly than the phrase 'except for municipal purposes,' as used in the Constitution." We have not overlooked the cases of *Lov v. Mayville*, 5 Cal. 214, and *San Francisco v. Spring Valley Water Works*, 48 Cal. 498, cited by counsel for plaintiff, but we do not think they conflict with the doctrine we are attempting to announce. In the former the court held that a private corporation, organized to run steamboats, with one of its

termini in the City of Marysville, was not a corporation created for municipal purposes, so that the Legislature could authorize the city to subscribe for its stock; and in the latter it was held that the Legislature could not confer on a private corporation by special Act the right or duty to supply the City of San Francisco with water. The purposes and powers of the Port of Portland are all public, political or governmental. It possesses none of the features of a private corporation. There is no stock to be subscribed. Its members are citizens, not stockholders. There is no acceptance necessary, and its powers and very existence are at the will of the Legislature. The sole object of the corporation is to so improve the Willamette and Columbia Rivers at the City of Portland, and between that point and the sea, as to create and maintain a ship channel of a specified depth; and for this purpose it is given full power over these rivers, so far as the State can grant the same. There is no power to take tolls, or make profit of any kind. No private interests of any kind are granted or acquired. The highway to be created or improved belongs to the public, and is open to the whole public, to be used at will, and with such means of navigation as taste, pleasure, or convenience may dictate. No one questions that the establishment and improvement of highways and the opening facilities for access to market are within the governmental powers of every State or nation, and that, among the most important of these highways, are to be classed navigable rivers. These things are necessarily done by law. The State may directly levy taxes to improve such highways, or it may apportion and impose the duty, or confer the power of assuming it, upon the municipal divisions of the State, or create a municipal division locally benefited for that express purpose. These municipal corporations or divisions exist only for the convenient administration of the government. Such organizations are instruments of the State to carry out its will. When they are authorized to levy a tax or appropriate its proceeds, the State is doing through them indirectly what it might do directly. The rivers placed under the control of this corporation are not only navigable but are the great convenient highway, not only of this State, but largely of the entire northwest. The only powers conferred upon the Port of Portland, except the necessary incidental powers of holding the property and making the contracts necessary to carry out the main purpose, are the control and improvement of this public highway, and the levy and collection of taxes therefor. The Port of Portland, and the commissioners who exercise its powers, are nothing more than the agents of the State, delegated to exercise one of its highest prerogatives—the taxing power—in carrying out one of its best known and recognized objects and most important duties—the improvement of a great and important public highway.

It is also contended that this Act is unconstitutional as being in violation of section 32, art. 1, of the Constitution, providing that "all taxation shall be equal and uniform." Counsel for plaintiff admits the general rule that a tax is not unconstitutional for lack of uniform-

ity, when levied for local purposes, if it is equal and uniform throughout the taxing district; but his contention is that, to authorize the Legislature to lay a tax upon one district or subdivision of the State alone, the purpose for which it is laid must not only be public, but, as regards the people of such district or subdivision, it must also be local. This is admitted by counsel for respondent to be the correct rule, but he contends—and, we think, correctly—that the power of taxation here under consideration is not subject to objection under this rule. It is a fact of which this court will take judicial knowledge, that the Port of Portland, a district which is now the City of Portland, is the commercial metropolis of the State of Oregon, if not of the whole Pacific northwest. It is the center of trade and commerce for a vast section of country, simply because here the commerce of land and sea meet, and through this city the country trades with the world at large. It holds communication with the sea, the great highway of commerce, by the Willamette and Columbia Rivers, and can only retain its commercial supremacy by the maintenance in these rivers of a ship channel of sufficient depth to enable the largest sea-going vessels to find anchorage at its wharves. Its present prosperity is due to the fact that it is a center of trade and commerce, which it would not be were these rivers closed, and which in all probability it will not remain if the improvement contemplated is not made. It is not surrounded by any fertile farming districts, rich mines, or vast forests, to make it a local center, but depends entirely upon its trade and commerce. Counsel has well said: "That the maintenance of this great commercial center at this point is of advantage to the whole State is witnessed by the fact that it does its business here. That anything that will cheapen the handling of what the country exports and imports will be a benefit to all is a self-evident fact, and leaves no doubt of the public interest in this improvement. But the public might find other centers of trade, or channels of export and import, presumably not so advantageous, or it would now use them but still capable of use at need. But the center of trade and commerce, the Port of Portland, cannot go elsewhere. It must live or die here. In the public the interest is general,—the improvement and maintenance of an advantageous channel of trade. To the metropolitan district, center of trade and commerce, city, cities, or what you will, embraced in the Port of Portland, the interest is one of life and death." The people of the Port of Portland, therefore, will reap the principal benefit from the proposed expenditure, and it is not unconstitutional that they should bear the burden. As was said by *Mr. Justice Strong* in *Chicago, B. & Q. R. Co. v. Otoe County*, 83 U. S. 16 Wall. 676, 21 L. ed. 381: "The Legislature has the undoubted power to apportion a public burden among all the taxpayers of the State, or among those of a particular section, if, in its judgment, those of a single section may reap the principal benefit from a proposed expenditure, as from the construction of a road, a bridge, an almshouse, or a hospital." It is not unjust, therefore, that they should alone bear the burden. This subject has so often been

discussed, and the principles we have asserted so thoroughly vindicated, that it seems to be needless to say more, or even to refer at large to the decisions.

It follows, therefore, that the Act incorpo-

rating the Port of Portland is constitutional and valid, and the decree of the court below must be affirmed.

Strahan, Ch. J., dissents.

COLORADO SUPREME COURT.

Re Mary Sternberg THOMAS.

(.... Colo.)

1. **Women will be admitted to the bar** on equal terms with men in the absence of a statutory or constitutional provision to the contrary.*
2. **The use of the masculine pronoun exclusively** in the statutes relating to applicants for admission to the bar and to licensed attorneys is not sufficient to show a legislative intent to exclude women from the bar.
3. **Attorneys-at-law are not civil officers** within the meaning of a constitutional provision that no person except a qualified elector shall be elected or appointed to any civil or military office.

(September 14, 1891.)

APPPLICATION by Mary Sternberg Thomas for admission to the bar. *Granted.*

The facts are stated in the opinion.

Mr. J. Warner Mills, for petitioner:

Speaking of women as deputy clerks of county courts, the court said in *Jeffries v. Harrington*, 11 Colo. 194 (1887): "It was not the intention to declare such avenues of employment closed to women, and, until some clear expression to that effect has been made by constitutional or legislative provision, the courts should not declare against the employment of women in such positions." This principle is equally apt, on this occasion, as to the employment of women as attorneys, and their consequent admission to the bar.

Re Hall, 50 Conn. 181, 47 Am. Rep. 625; *Foltz v. Hoge*, 54 Cal. 28, 35.

Many of the premises for the arguments upon which the court in the case of *Re Bradwell*, 55 Ill. 535 (1869), founded their decision denying her application for admission to the bar are refuted in 1 History of Woman Suffrage.

It is assumed by the Supreme Court of Illinois, and this assumption is the bulwark of all the other adverse decisions on this subject, that there was no precedent at common law for the admission of women as attorneys.

Blackstone recounts that Anne, Countess of Pembroke, held the office of sheriff of Westmoreland, and exercised its duties in person. (See Co. Litt. p. 326.) The Scotch sheriff is properly a judge, and by the Statute 20 Geo. II., chap. 43, he must be a lawyer of three years' standing.

Eleanor, Queen of Henry III. of England, in the year 1253, was appointed lady-keeper of the great seal, or the supreme chancellor of

England, and sat in the *Aula Regia*, or king's court.

Queen Elizabeth held the great seal at three several times during her remarkable reign. After the death of Lord-keeper Bacon she presided for two months in the *Aula Regia*.

3 History of Woman Suffrage, p. 108.

At page 378 of the book entitled "Education in the United States," by Richard J. Boone, Prof. of Pedagogy in Indiana University, published by Appletons in 1890, being vol. 11 of the "International Educational Series," edited by Wm. T. Harris, is this single sentence in a note to the text: "It is a fact of history that one Margaret Brent, attorney-at-law, was admitted to the Maryland bar in 1648."

See also 3 History of Woman Suffrage, pp. 815, 816; W. Hand Browne's "Maryland," pp. 636, 639; Series of Am. Commonwealths, edited by Horace E. Scudder, and published by Houghton, Mifflin & Co. (1884).

The Colorado Constitution is favorable to this application.

The only section of the Constitution which could possibly stand in the way of this application is art. 7, § 6, which reads as follows: "No person except a qualified elector shall be elected or appointed to any civil or military office in this State."

In construing this section this court has decided, in *Re House Bill No. 166*, 9 Colo. 628, that a woman could not be elected or appointed a notary public, as that was a "civil office."

In *Darrow v. People*, 8 Colo. 420, it was said that the right to vote and the right to hold office must not be confused; that citizenship and the requisite sex, age, and residence constituted the individual a legal voter, but other qualifications are essential to the efficient performance of the duties connected with almost every office.

In the case of *Jeffries v. Harrington*, 11 Colo. 193, it was held that the word "office" in this section of the Constitution did not include a deputy clerkship of the county court; and that such a clerkship could be held by a woman.

An attorney is not, in the strictest sense, a public officer.

Re Robinson, 181 Mass. 376, 41 Am. Rep. 239; *White's Case*, 6 Mod. 18; *Bradley's Case*, 74 U. S. 7 Wall. 864, 378, 379, 19 L. ed. 214, 219; *Cohen v. Wright*, 22 Cal. 298.

The terms "office," and "office and public trust," as employed in the Constitution, have relation only to those persons and duties that are of a public nature.

*Admission of Women to the Bar of the Supreme Court of the United States.

Any woman who shall have been a member of the bar of the highest court of any State or Territory, or of the Supreme Court of the District of Columbia, for the space of three years, and shall have

maintained a good standing before such court, and who shall be a person of good moral character, shall, on motion, and the production of such record, be admitted to practice before the Supreme Court of the United States. Act of Congress approved February 15, 1879 (20 U. S. Stat. 227).

Re Attorneys & Counselors, 20 Johns. 492; *Ex parte Yale*, 24 Cal. 244, 245; Weeks, Attorneys, p. 74; *Re Dorsey*, 7 Port. (Ala.) 293; *Leigh's Case*, 1 Munt. 486; *Re Cooper*, 22 N. Y. 84; *Byrne v. Stewart*, 3 Desaus. Eq. 466; *Ex parte Garland*, 71 U. S. 4 Wall. 378, 18 L. ed. 370; *Re Hall*, 50 Conn. 131, 47 Am. Rep. 625, 21 Am. L. Reg. 728.

The prevailing practice in other States is favorable to this application.

For cases where the applications for admission to the bar by women have been refused, see—

Re Bradwell, 55 Ill. 585, 83 U. S. 16 Wall. 130, 21 L. ed. 442, 2 History of Woman Suffrage, pp. 601-626; *Re Lockwood*, 9 Ct. Cl. 346; *Re Goodell*, 39 Wis. 232, 20 Am. Rep. 42. (The statutes were subsequently changed and Miss Goodell was then admitted. 48 Wis. 693, 604.) *Robinson's Case*, 131 Mass. 376, 41 Am. Rep. 239.

The latest reported case upon the subject of the admission of women to the bar is in their favor, and is the *Application of Mary Hall*, 50 Conn. 131, 47 Am. Rep. 625, 21 Am. L. Reg. 728, note 635.

The note to this case, as reported in the American Law Register, quotes largely from the opinions in the *Bradwell*, *Lockwood*, *Goodell* and *Robinson Cases*, and then concludes as follows: "Whatever may be the current of judicial opinion, there can be no question but that the tendency of modern legislation is strongly in favor of allowing women the privilege of admission to the bar. It is worthy of note that each one of the decisions above referred to was followed by a statute granting to women the privilege which the court had denied. See Ill. Rev. Stat. chap. 13, § 1; Act of Congress Feb. 15, 1879, 30th Stat. 292; Wis. Rev. Stat. § 2586; Mass. Stat. 1882, chap. 139.

There are a great many instances where women have been admitted as a matter of course without any question.

See 2 History of Woman Suffrage p. 606; Chicago Legal News, Feb. 5, 1870.

Miss Charlotte E. Ray was admitted on graduating from Howard University, about 1873, in the District of Columbia.

Re Goodell, 39 Wis. 238, 239; *Miss Barkalow's Case*, Chicago Legal News, April 3 and April 9, 1870; Chicago Legal News, Oct. 26, 1872; Me. Rev. Stat. p. 597, § 18.

The federal district court of Illinois admitted Miss Alta Hulett.

See Chicago Legal News, May 28, 1874.

In Mrs. Lockwood's brief addressed to the Senate of the United States, March, 1878 (8 History of Woman Suffrage, p. 107), is this statement: "Illinois, Michigan, Minnesota, Missouri, North Carolina, Wyoming, Utah and the District of Columbia admit women to the bar." And writing in 1888, she says: "Most of the States in the Union have since recognized her right thereto, and notably the State of Pennsylvania, as in the case of Carrie B. Kilgore, who has recently been admitted to the supreme court of the State."

Lippincott's Mag. Feb. 1888, p. 229.

For the further literature, both *pro* and *con*, in any wise affecting women and their relation to the bar, see—

Women at the Bar, 5 N. J. L. J. 188; Women 13 L. R. A.

en and the Bar, 2 Pump. Ct 5; 18 Ir. L. T. 306; Women and the Legal Profession, by Montgomery H. Throop, 30 Alb. L. J. 464; 19 Ir. L. T. 18; Women as Advocates, 18 Am. L. Rev. 478, 11 Ir. L. T. 340; Women as Judicial Officers, 12 Am. L. Rev. 190; Women as Law Clerks, 35 L. T. 363; Lord Brougham on Women as Law Engrossers, Bookkeepers and Printers, 35 L. T. 364; Women as Lawyers, 16 Ir. L. T. 407; Women as Lawyers, *Mrs. Goodell's Case*, 3 Cent. L. J. 186; Learned Women of Bologna, 1 Chicago Legal News, 594; Women Jurors in Wyoming, by J. H. Howe, 2 Chicago Legal News, 213, 220; Judge Greene's Charge to the Grand Jury (1884), 17 Chicago Legal News, 29; "Prudes for Proctors," 14 L. J. 746; 14 L. T. 3; Shall Women be Admitted to the Bar, 1 Chicago Legal News, 184; Female Attorneys, 16 Can. L. J. 160; Married Women as Attorneys, 23 Pittsb. L. J. 5, 10 Alb. L. J. 113; Ladies as Lawyers, 18 Ir. L. T. 264; Ladies as Lawyers in London, 3 Wash. L. Rep. 94; Married Women as Attorneys at Law, by David Stewart, 20 Cent. L. J. 365; Women as Lawyers, by Louis Frank, Chicago Law Times, Jan. 1889, American, July, 1888; Women as Lawyers, 23 Lippincott, 387, 28 Vict. Mag. 219; Women's Relations to the Professions, by E. Van De Walker, 6 Popular Science Monthly, 454; Laws for Ladies as Lawyers, R. Vashon Rogers, 21 Can. L. J. 326, 19 Ir. L. T. 621; Lady Lawyers of the Long Robe, 6 Ir. L. T. 638, 8 L. J. 9, 28; Presence of Lady Lawyers in Courts of Justice, 11 Sol. J. and Rep. 57, 187; Lady Lawyers, 13 Ir. L. T. 77, 153, 332, 605; 14 Ir. L. T. 57, 200, 208, 16 Ir. L. T. 241.

Mr. Joseph H. Maupin, Atty-Gen., amicus curia, filed no brief.

Helm, Ch. J., delivered the opinion of the court:

Petitioner, Mrs. Mary S. Thomas, asks to have her name placed upon the roll of attorneys practicing before this and other courts of the State. She tenders credentials attesting the prescribed professional qualifications, and a compliance with all express requirements of the Statute and rules of court regulating access to the legal profession. The question is therefore squarely presented, Are women entitled to admission to the bar of this State on equal terms with men? By ancient and universal usage, women have been denied the right to practice before the English courts. The two or three exceptions cited in petitioner's brief, such as that of Anne, Countess of Pembroke, are not well authenticated. During the early history of this country a like exclusion from the profession generally prevailed, though a few instances are recorded, as in the case of Margaret Brent, also mentioned in petitioner's brief, where they were permitted to appear specially in particular proceedings. In the District of Columbia, and in Massachusetts, Illinois, and Wisconsin, within a period comparatively recent, such applications have been rejected, the courts promulgating learned opinions in connection therewith. Fifteen years ago the Supreme Court of the United States also denied the right. The case was not reported, but the chief justice, in orally epitomizing the reasons for adverse

action, declared that the court had concluded to adhere to the uniform custom since its organization, of licensing men only, till "a change is required by statute or a more extended practice in the highest courts of the States." *Re Lockwood*, 9 Ct. Cl. 846; *Ex parte Robinson*, 131 Mass. 376, citing the above ruling of the United States Supreme Court; *Re Bradwell*, 55 Ill. 585; *Ex parte Goodell*, 89 Wis. 232.

The written opinions mentioned marshal all objections to conferring this privilege upon women, dwelling with especial force and clearness upon those existing outside of constitutional and statutory provisions. They ably discuss questions of impropriety and inexpediency based upon the laws of nature, the bearing of historical customs and usages, and the impediments growing out of woman's legal status at the common law. With all deference to those learned courts, we decline to imitate their example in the latter regard. We shall not indulge in speculation concerning the natural aptitude and physical ability of women to perform the duties of the profession, nor shall we dwell upon considerations of propriety or expediency in the premises. These are matters as to which wide differences of opinion exist; and we conceive that they have little, if any, bearing upon similar applications now presented in this State, however pertinent they may have been in the Commonwealths referred to when the above rulings were made. We shall likewise decline to give controlling weight to historic custom or usage in England, in the American colonies, and in the republic during its infancy. Reasoning, predicated upon the latter ground, possesses the inherent weakness of ignoring, to a greater or less extent, the marvelous changes throughout the country during the last fifty years in the legal status of woman. It is a significant circumstance, indicating the trend of popular sentiment on the subject, that each of the cases above referred to was speedily followed by a statute providing for the admission of women to the profession. The Supreme Court of the United States, and the courts of the District of Columbia, Massachusetts, Illinois, and Wisconsin, no longer adhere to the rule of discrimination on the ground of sex. Women are now licensed without question to practice in these courts as well as in those of several other States upon the same conditions as men, save only that the Act of Congress requires three years' membership of the bar of the highest court in some State or Territory as a condition precedent to their appearance before the Supreme Court of the United States. In this Commonwealth, women of sufficient age, married or single, may make contracts, form partnerships, inherit, acquire, and dispose of property, in all respects substantially the same as men. The policy of our legislative and judicial action has tended constantly towards conferring upon them the same property rights and business status as are enjoyed by men. They may undoubtedly pursue all vocations and enterprises of a business character. They may also become ministers, physicians, or educators, and, if any limitation

in regard to the learned professions exists, such limitation applies solely to the bar. The privilege of practicing this profession and sharing in its emoluments is alone questioned. Hence we contend with none of the difficulties encountered by the courts above mentioned arising from the disabilities of women, especially married women, at the common law. Applications like the one before us may therefore be regarded with the judicial favor usually extended when equality of rights is involved, unless some restrictive provision be found in our Statutes or Constitution.

Turning to the Act regulating the licensing of attorneys, and defining their duties, liabilities, etc., we find nothing that, in our judgment, fairly shows a legislative intent to bestow this privilege upon men exclusively. The substantive phrases used throughout the Act, when speaking of applicants, cover both sexes. They are "no person" and "any person;" as, "no person shall be permitted to practice; . . . " "no person whose name is not subscribed; . . . " "any person producing a license from any court of record; . . . " "if any person not licensed as aforesaid shall receive any money. . . . " The pronouns employed with reference both to applicants and licensed attorneys are, it is true, masculine; but this fact, standing alone, is a matter of very little significance. The masculine pronoun is constantly used in legal and secular literature to designate both sexes; besides, it is expressly provided by law here, as in other States, that, unless the language contains something inconsistent therewith, this rule may be followed in construing statutes: "Every word importing the masculine gender only may extend to and be applied to females as well as males." Mills, Ann. Stat. § 4185. There is no language in the Act under consideration inconsistent with the application to its construction of this statutory guide. We are not unmindful of the rule that a statute is to be interpreted in the light of other statutes constituting a part of the same legislative system. But, as already suggested, the uniform and unmistakable policy of our legislation, as shown in numerous provisions, has been to extend the legal rights of women, and enlarge their sphere of occupation and usefulness. The proposition, however, is advanced, with plausibility and force, that section 6, art. 7, of the Constitution, indirectly, but clearly, forbids licensing women to practice law. This section reads: "No person except a qualified elector shall be elected or appointed to any civil or military office in the State." It is argued that attorneys are civil officers, and that since women are not electors they cannot become attorneys. Women may participate in school elections, and hold certain offices connected with the public schools, but they are not such electors as this section of the Constitution contemplates. The constitutional term "qualified elector" is here "used in its broadest sense, meaning a person qualified to vote generally." *Re House Bill No. 166*, 9 Colo. 628. The limitation declared by this provision is plain, and, if attorneys at law are civil

officers within its meaning, the objection must be sustained.

The phrase "civil office," as thus employed, is frequently used interchangeable with the term "public trust." It undoubtedly relates to public offices; that is, to those offices which involve an election or appointment by or on behalf of the general public, and the performance of duties essentially public in their nature. See *Cohen v. Wright*, 22 Cal. 293; also *Weeks, Attorneys*, § 39, citing cases from Alabama, Virginia, New York, and South Carolina. Attorneys at law are constantly spoken of as "officers of the court." The designation is not inaccurate. Their special researches and general legal knowledge enable them to aid the courts, and thus to contribute somewhat towards the due administration of justice. The office is therefore an important one, and the attorney incidentally performs a quasi public duty. But admission to the profession is purely a private matter, and is secured solely for the advancement of private interest. By virtue of such admission, attorneys are not required to perform specific public acts, nor are specified duties devolved upon them in behalf of the general public. The duties they assume and the labor they perform are usually in pursuance of personal contracts with private litigants. Admission to the bar is an essential prerequisite to the filing of certain offices, such as prosecuting attorney and judges of supreme, district, and other

courts. But these public trusts, and the functions connected therewith, devolve only upon members of the profession by virtue of an independent election or appointment. Until thus designated, they can no more enter into offices where the functions are of a public nature than can unlicensed persons wholly ignorant of the law. Our conclusion is that attorneys at law are not, *per se*, civil officers, within the meaning of the constitutional phrase under consideration. See authorities last above cited.

The major premise of the argument in support of a constitutional inhibition thus proves upon examination to be untrue, and of course the conclusion falls. That instrument, so far as we are aware, contains nothing inconsistent with the admission of women to the bar. If there were anything in the rules or usages of the court involving this inconsistency, we would feel that a modification of such rules or usages should now be made. We have no disposition to postpone falling into line with the Supreme Court of the United States and other enlightened tribunals throughout the country, that have finally, voluntarily, or in obedience to statutory injunction, discarded the criterion of sex, and opened the door of the profession to women as well as men.

The prayer of the petitioner will be granted. It is ordered that her name be placed upon the roll of attorneys.

ALABAMA SUPREME COURT.

A. J. VEASEY, *Appt.*,

v.

Francis BRIGMAN.

(.... Ala.)

A judgment by default in an action against

A. J. Veasey is supported by a return of service of summons on "Jack Veasey, the defendant."

(June 26, 1891.)

APPEAL by defendant from a default judgment of the Circuit Court for Covington County which the court refused to set aside up-

NOTE.—The doctrine of *idem sonans*.

The law does not treat every slight and trivial variance, such as the omission of a letter, as fatal. The variance should be a substantial and material one, such as would render the instrument offered in evidence a different and distinct instrument from the one described in the petition, to authorize the court to exclude it from the jury on the ground of variance. The rule of *idem sonans*, when strictly adhered to, is considered too rigid, and has been much relaxed in modern practice. *Stevens v. Stebbins*, 4 Ill. 25.

It is claimed that mere identity of sound is a surer method of designating the names of persons than that of depending upon mere identity in the orthography. *Ahtol v. Beniditto*, 3 Taunt. 401; *Myer v. Pegaly*, 39 Pa. 422.

If the sound of a name *idem sonans* be not affected by a misspelling which occurs, such error is immaterial, and any two names being alike in original derivation and used interchangeably, though different in sound, do not, by the use of either, constitute a material variance. 33 *Kolle*, Abr. 185; *Bacon*, Abr. title *Misnomer*.

The doctrine of *idem sonans* should not be too rigidly enforced. The principal question in all cases should ask as to the materiality of the variance. *Beiton v. Fisher*, 44 Ill. 32.

And this is always a question of fact, to be determined by the jury. In the case of foreign names, courts are reluctant to pronounce that a variance which in most instances is a simple misspelling, or the result of a mispronunciation shall affect vested rights honestly acquired. In an early case the Supreme Court of Illinois has held, where material variance was claimed in the names of a conveyance that Michael Allen named in a deed as grantor was, presumptively, Michael Allaine, grantee of the same property as, also, that Otoine Allaine was, presumptively, Antoine Allaine. *Chiniquy v. Catholic Bishop of Chicago*, 41 Ill. 143.

The misspelling of a defendant's name in a summons is no excuse for non-appearance to defend, especially where it appears that the name "Butler" was written Hultner. Knowing there is a suit against himself, defendant is held bound to appear. *Hermann v. Butler*, 59 Ill. 225.

The rule is, that if the distinction in the pronunciation of the names is indistinguishable in ordinary conversation, the doctrine of *idem sonans* applies. *Barnes v. People*, 18 Ill. 52.

The position contended for in the principal case is sustained by a Maine decision which holds that, although the surname of a party defendant had been spelled in seven different ways in the course of a judicial proceeding, the names were all *idem sonans* and sufficiently identified the defendant. *Millett v. Blake*, 81 Me. 581.

on defendant's claim that he was not served with process. *Affirmed.*

The case sufficiently appears in the opinion.

Mr. John D. Gardner for appellant.

Mr. W. D. Roberts for appellee.

McClellan, J., delivered the opinion of the court:

The following is the assignment of error on this appeal: "Comes the appellant in this cause, and assigns for error (1) the judgment of the court, it not appearing that the defendant, A. J. Veasey, was served or had notice of the bringing of the suit." The record shows a complaint filed by Francis Brigman against A. J. Veasey; a writ issued by the clerk of the court on May 19, 1890, commanding the sheriff to summon A. J. Veasey to appear and answer the complaint of Francis Brigman; that this writ was received by the sheriff, May 20, 1890, and bears the following indorsement:

"Executed this 20th day of August, A. D. 1890, by leaving a copy of the within summons and complaint with Jack Veasey, the defendant.

"M. C. Gault,
"Sheriff."

We suppose the objection to this service is rested on the fact that it purports to have been made on "Jack," not A. J. Veasey. It is untenable. Had only the surname been written in the return, had the service been "by leaving a copy, etc., with Veasey," it would have been good, the presumption being that the defendant was thereby intended (*Snellgrove v. Mobile Branch Bank*, 5 Ala. 295); and surely the fact that a given name is set out, the initial letter of which is the same as one of the initials by which the defendant is designated in the summons and complaint, can have no tendency to overturn this presumption, but rather to strengthen it. But the return goes further than this. It not only asserts that service was made upon Jack Veasey, thus raising the presumption that the person served was the person sued; but it affirms that "Jack Veasey" is the defendant in the cause, and designated therein by the name of "A. J. Veasey." We have no hesitation in reaching the conclusion that service was upon A. J. Veasey, the defendant, and that upon his failure to appear judgment by default was properly entered against him.

Affirmed.

TEXAS SUPREME COURT.

MISSOURI PACIFIC R. CO., *Appl.*,

v.
J. M. CULLERS.

(.....Tex.....)

1. It seems that an Indian may resort to state courts for redress of wrongs under a constitutional provision guaranteeing to every person the right of redress for injuries done to him in his person, property or reputation.

2. An objection to the ability of plain-

tiff to maintain suit on an assigned claim, based on the disability of the assignor to sue in person or through another, is waived unless raised by plea in abatement or by special exception.

2. An action for injury to lands without the State by an act no part of which was performed within the State cannot be maintained in a Texas court.

4. Proof of actual, peaceable and exclusive possession of personal property is sufficient prima facie evidence of ownership to sustain a suit for damages for its destruction

NOTE.—Indians may enforce their rights in a court of justice.

In the early case of *Jackson v. Reynolds*, 14 Johns. 365, an Indian was denied any status in our courts except through the attorney of his tribe; but the reasons assigned for the holding are not applicable to the present status of the Indians. *Jemmisson v. Kennedy*, 55 Han. 47.

An early Kansas case brought for the partition of real property by an Indian decides that the court had jurisdiction of the subject, and in effect accorded to the Indian a status in the courts. *Swartzel v. Rogers*, 3 Kan. 377.

In New York it appears that since the decision of the chancellor in *Strong v. Waterman*, 11 Paige, 607, 5 L. ed. 250, the tenure of the Indians to their reservation, and their right to prosecute and maintain actions for the enforcement and protection of their rights, appears to have been settled by an Act of the Legislature. *Seneca Nation of Indians v. Tyler*, 14 How. Pr. 109.

Therefore, an action brought by said Seneca Nation of Indians, in their own name, upon a promissory note, given and made payable to them, may be sustained; and it is not necessary that they should aver their authority to sue in the state courts. *Ibid.*

It is a general rule that all persons having a just 13 L. R. A.

cause of action may bring a suit therefor, except as herein mentioned; and no personal disability will deprive one of this right. 3 Bouvier, Inst. 138; *Sinclair v. Sinclair*, 18 Mees. & W. 640; *Broom, Parties to Actions*, 84; *Barbour, Parties to Actions*, chap. 1, §1; *The Kansas Indians*, 72 U. S. 5 Wall. 737, 18 L. ed. 607.

Indians do not submit themselves to all the laws of a State because they seek its courts for the preservation of rights and the redress of wrongs. *The Kansas Indians, supra.*

An Indian may maintain an action in a state court to enforce his right to the enjoyment of property, real or personal. *Lobbell v. Hall*, 3 Nev. 507.

They may file a bill in equity, on behalf of themselves and the residue of the nation on the reservation, to restrain a trespass on their land. *Strong v. Waterman*, 11 Paige, 607, 5 L. ed. 250.

An Indian is liable to be sued in a state court. *Jones v. Rieler*, 8 Kan. 124; *Murch v. Tomer*, 21 Me. 536; *Rubideaux v. Vallie*, 12 Kan. 28.

If an Indian dies before the laws of a State are extended over the reservation, a state court may grant letters of administration on his estate, when they are so extended. *Brashear v. Williams*, 10 Ala. 330. But see, *contra*, *Dole v. Irish*, 2 Barb. 639; *United States v. Shanks*, 15 Minn. 399; *Desty, Fed. Const. art. 1, § 8.*

against a mere wrong-doer who shows no right to it.

5. The fact that buildings in the possession of one person, and because of the destruction of which he brings suit, were on the land of another, repels the presumption of ownership arising from possession, and plaintiff must affirmatively show that they were personal property and that he had the right to remove them from the soil.

6. Exclusive and peaceable possession of hay which had been severed from the soil is prima facie sufficient to support a recovery against a wrong-doer for its destruction, although it grew on the land belonging to the Choctaw Nation of Indians.

7. An Indian may lawfully own personal property and assign a claim for damages for its wrongful destruction so as to entitle the assignee to maintain a suit therefor in the Texas courts.

8. A railroad company is not relieved from liability for injuries caused by fire set out through its negligence by the facts that the fire had traveled over considerable space and had been revived by a strong wind after having apparently gone out before doing the damage which occurred the day after the fire started.

9. The presumption of negligence which arises upon proof that engines of a railroad company set out fire which destroyed property of the complaining party is rebutted by showing that the engines were provided with the best improved spark arresters, in good condition and properly operated.

10. To recover from a railroad company the value of property destroyed by fire alleged to have been negligently set out by the company, plaintiff must prove by a preponderance of evidence both that the company set out the fire and that it was negligent.

(June 16, 1891.)

APPEAL by defendant from a judgment of the District Court for Grayson County in favor of plaintiff in an action brought to recover the value of certain property alleged to have been destroyed by fire negligently set out by defendant. *Reversed.*

The facts are stated in the commissioner's opinion.

Messrs. E. C. Foster and A. E. Wilkin-
son, for appellant:

There is no right to maintain suit in this State upon a local action accruing in the Indian Territory.

Rev. Stat. Tex. art. 9; *Pelham v. Murray*, 64 Tex. 477; *Rorer*, Interstate Law, p. 140, and authorities cited; Wharton, Conf. L. § 711; Story, Conf. L. §§ 543-554; 1 Chitty, Pl. 271; Cooley, Torts, 471; *McKenna v. Piek*, 42 U. S. 1 How. 247-249, 11 L. ed. 119, 120; *Livingston v. Jefferson*, 1 Brock. 208; *Rafael v. Verelot*, 2 W. Bl. 1055; *Doulson v. Matthews*, 4 T. R. 503; *Moatyn v. Fabrigas*, Cowp. 161; 1 Smith, Lead. Cas. 4th Am. ed. 656; *Worster v. Winnipewogee Lake County*, 35 N. H. 525.

An Indian residing in the Indian Territory has no right to sue a citizen of Texas.

Treaty with Choctaw Nation, September 27, 1830, art. 7, U. S. Stat. at L. V. 7, p. 384; Treaty with Chickasaws and Chickasaws, June 2d, 1835, art. 14, Laws and Treaties of Choc-

taw Nation, p. 27; Treaty with Choctaws and Chickasaws, April 28, 1836, art. 6; 38; Rev. Stat. U. S. §§ 463, 466, 1839, 1840, 1892, 2108, 2116-2118, 2120, 2128, 2147, 2149, 2156; *Elk v. Wilkins*, 112 U. S. 94, 28 L. ed. 648; 2 Story, Const. p. 8, 47 at seq.; *Worcester v. Georgia*, 81 U. S. 6 Pet. 515, 8 L. ed. 483, 10 Curt. Dec. 240-242; *Goodell v. Jackson*, 20 Johns. 693, 11 Am. Dec. 351; *Gardner v. Thomas*, 14 Johns. 184; Wells, Jurisdiction, § 115, p. 110.

The court erred in refusing the second instruction requested by defendant.

Seale v. Gulf, C. & S. F. R. Co. 65 Tex. 274; *Toledo, W. & W. R. Co. v. Muthersbaugh*, 71 Ill. 572.

Messrs. W. W. Wilkins and Brown & Bliss for appellee.

Marr, J., delivered the opinion of the court:

"Appellee, J. M. Cullers, filed this suit against appellant in the District Court of Grayson County on March 4, 1887, and by amendment filed October 28, 1887, set up that on November 21, 1885, defendant negligently allowed sparks and fire to escape from its engine, which fire caught and destroyed the following property, to wit: One portable engine, valued at \$500; one hay-press, valued at \$400; one hay-press, valued at \$250; one mower, valued at \$85; one mower, valued at \$70; one derrick and hay loader, valued at \$50; six bundles hay wire, valued at \$15; one sickle grinder, valued at \$10; two dozen hay forks, valued at \$6; one rubber belt, valued at \$30; 4,500 bales of hay, valued at \$1,600; one hay shed, valued at \$200; one house and kitchen, valued at \$200; and one stable, valued at \$50; all of which property was located in the Indian Territory, and was reasonably worth, at the time and place of its destruction, in the aggregate, the sum of \$3,666. That certain portions of the hay, machinery and fixtures were owned by appellee, G. T. Black, and H. C. Lavo, individually, but that it was used in the partnership business of the firm, consisting of appellee, Black, and Lavo, which said firm was engaged at the time in the hay business; and that the hay belonged to them jointly. Appellee and Lavo were citizens of the County of Grayson, Tex. Black was a citizen and member of the tribe of the Chickasaw Indians. Black and Lavo, for valuable considerations, had transferred their interest in the claim against the appellant for the destruction of said property to appellee, and had authorized him to sue therefor in his own name. The trial before a jury on September 19, 1888, resulted in a verdict and judgment in favor of appellee for the sum of \$4,519.78, of which amount appellee remitted the sum of \$100 on November 12, 1888. From this judgment appellant has perfected its appeal to this court." Black transferred his claim to plaintiff to aid in the payment of the debts of the firm, which Cullers had partly paid and assumed the balance.

The assignments of error present several questions which require a decision thereof by this court. The first and second assignments, relating to the sufficiency of the evi-

dence in law to support the verdict of the jury, and the fourth assignment, based upon the refusal of the court to allow the second instruction requested by the defendant, and dependent for support upon the nature of the evidence, will be postponed until we have determined the other questions presented by the appellant for our consideration. Summarized, the other points contended for by appellant's counsel are: That the court erred in refusing to instruct the jury as requested by appellant, to the following effect: *First.* That Black, being a member of an Indian tribe, and an Indian himself, cannot sue, nor, by assignment of whatever right of action he might have elsewhere, authorize or confer upon plaintiff the right to sue in the courts of this State, and therefore plaintiff cannot recover as to so much of the property destroyed as originally belonged to Black. *Second.* In refusing to charge that the court below had no jurisdiction of controversies arising in the Indian Territory between Indian citizens and citizens of the United States, the defendant being a citizen of Missouri; and that a citizen of an Indian nation cannot transfer his claims for such damages to a citizen of the State of Texas, so as to enable the latter to maintain the suit thereon in the courts of this State. *Third.* In refusing to charge that, in any event, the plaintiff could not recover damages for the destruction of "the houses, stables, and other real property situated on lands of the Choctaw Indians, and belonging to a member of that tribe;" and that nothing should be allowed "by reason of the burning of the dwelling-house and stable mentioned in the petition." *Fourth.* In refusing "to instruct the jury [as requested in the fifth instruction] that plaintiff, having shown no right to cut or put up the hay for the loss of which he sues, on the lands of the Choctaw Nation, is not entitled to recover anything by reason thereof."

The plaintiff, J. M. Cullers, as well as Lavo, is a citizen of Texas and of the United States, but Black is a citizen of the Chickasaw Nation, and the property destroyed was at the time in the territory of the Choctaw Nation. It will thus be seen that the plaintiff himself is under no disability to sue in our courts, unless it be that the fact that a part of his right to recover, being derived from the Indian, Black, imparts to him a partial disability to that extent. But it seems to us that even then the question would not be one of the personal disability of the plaintiff to sue, but would depend upon the right of Black to assign his claim. If he could do this, then undoubtedly plaintiff, as his assignee, could maintain the suit on the claim, whether Black could have done so originally or not. The plaintiff is entirely free from any disability which, under the law, would deny him a standing in the courts if he possesses otherwise a right of action. There is no question of "comity" in such case. Rorer, *Interstate Law*, p. 155. If, however, it were necessary for us to decide the question, we think we would have little difficulty in holding that an Indian, like Black, is a "person" within the

meaning of our State Constitution and laws, and is thereby guaranteed the right of redress for injuries done to him "in his person, property, or reputation." If he is not a person, then what is he? Even the plea of an alien enemy has been denounced by our courts as an "odious plea," though it must be sustained if timely interposed. *Bishop v. Jones*, 28 Tex. 294. Every day alien citizens of friendly nations are allowed to sue in our courts *nemine dissente*. We should not hesitate to hold that an Indian—certainly a civilized Indian—is entitled to a redress of wrongs through our state courts. It is not a question of comity, but of right given by law, supposing the court otherwise to have jurisdiction of the controversy. *Swartzel v. Rogers*, 3 Kan. 377; *Wiley v. Keokuk*, 6 Kan. 94; *Wiley v. Man-a-to-wah*, Id. 111; 10 Am. & Eng. Encyclop. Law, p. 440, note 5; Dicey, *Parties*, pp. 1, 2; *Gho v. Jules*, 1 Wash. T. 325; Cooley, *Torts*, p. 35.

The federal courts, by generally deciding that an Indian is neither "an alien" nor a "citizen" until naturalized or admitted to citizenship, necessarily deprived those courts of jurisdiction over controversies between Indians and citizens of one of the States of the Union, wherever the jurisdiction is dependent upon the status of the parties. This does not apply to the state courts. But in the present case there was no plea in abatement or special exception to the disability of the plaintiff supposed to result from a supposed disability affecting Black's right to sue himself in person or through another; therefore the question is waived anyhow by the pleadings of the defendant. It may be, however, that the right of Black to assign the claim, and thus invest plaintiff with the ownership thereof, as well as the right of the plaintiff to recover damages done to such of the property as defendant contends was real estate, and, if so, was not owned by any of the parties, is sufficiently raised and presented by the pleading of the general issue which, we think, throws on the plaintiff the burden of showing at least *prima facie* his right to the property destroyed or to the damages done thereto. Before determining this branch of the case, we deem it not inappropriate to here dispose of the question raised by the defendant and argued by counsel on both sides,—that so much of the action as seeks to recover damages for the destruction of the house and kitchen and stable is purely local, and not transitory, and therefore arose out of the jurisdiction of this State, and, as a consequence, will not, like a transitory action, follow the person of the wrong-doer, so as to allow the courts of another jurisdiction to entertain jurisdiction thereof. To all intents and purposes, so far as being sued is concerned, the appellant is a resident of this State and subject to its laws, and to the jurisdiction of its courts. Its road extends into and through the country in which it was sued, and it has an agent and representative there. The court below had "jurisdiction over the subject matter," and therefore, by express provisions of law, the defendant was amenable to the process of that court, and liable to be sued in that

county. Sayles' Civil Stat. art. 1198, § 21b, and section 21. This is unquestionably correct as to so much of the cause of action as is of a transitory nature. Dicey, Parties, p. 87. But while this is true as to transitory actions, and therefore the court below undoubtedly had jurisdiction of so much of plaintiff's claim for damages as is of that nature, and would have had jurisdiction of the whole claim if it had been clearly shown that the action is transitory as to all of the items for which damages are claimed, still, upon the other hand, it must now be regarded as the settled law of this State, in harmony with the rule of the common law, that an action or remedy for injuries done to land situated beyond the territorial limits of this State, and when no part of the act resulting in the injury was committed or performed within the State, is purely local, and cannot be maintained in any court in this State, but the enforcement of the remedy in such cases must be had within the jurisdiction where the land is situate. *Morris v. Missouri Pac. R. Co.* 78 Tex. 17.

The court below therefore should have charged the jury on the subject as requested by appellant, but with a proper qualification so as to leave to the jury whether any of the property destroyed was in fact real estate or not. The necessity of such a charge, and of the jury being allowed under appropriate instructions to determine the issue whether the buildings were a part of the land or not, will hereafter be more fully discussed in the several respects in which the question is presented.

We now recur to the other questions: *first*, Could there be any recovery for the destruction of the house, kitchen, and stable? and, *secondly*, Could any part of the claim for damages be assigned by Black?

First. The appellee contends that the house and stable were chattels, not real estate. If so, it would seem that Black's right to them is as strong as to the other property held by him. It is admitted that the ownership was proved, as alleged, in all of the property; and it is alleged that the house, kitchen, and stable, were "furnished by Black" and used in the partnership. It appears, however, that these buildings were on the lands of the Choctaw Nation. If, therefore, they were a part of the realty, it is very evident that plaintiff is not entitled to recover for their destruction either in his own right or in the right of Black or Lavo, since it is not pretended that any of the parties owned or held the title to the land. It will thus be seen that the solution of this particular question does not depend upon the citizenship of the parties, since, had the house and stable been "furnished" by the plaintiff himself, instead of Black to be used by the partners, the same issue would have been presented, of the right to recover for injuries to the land, which the plaintiff admits that he did not own, nor did Black. How, then, could he recover damages for such injury? If allowed to do so, the true owner could also recover, and thereby the defendant would be subjected to a double recovery for the same act. Before proceeding further, we desire to observe that

if all of the property destroyed can be regarded as personal property, then we hold that the plaintiff established such *prima facie* right or title thereto as would entitle him to recover against a mere wrong-doer which showed no right to the property, if it is sufficiently proven that the defendant did destroy the property. The plaintiff proved that at the time the property was destroyed he and his partners had the actual, peaceable, and exclusive possession thereof, which, we think, was *prima facie* evidence of ownership or right to the property, sufficient to maintain the suit. *Pacific Exp. Co. v. Dunn* (Tex.) (Sup. Ct. present term); *Cooley, Torts*, pp. 436, 437, 445, 446; *Weymouth v. Chicago & N. W. R. Co.* 17 Wis. 550, 84 Am. Dec. 764; *Angell, Lim.* p. 385, *note 4*. But this does not eliminate the difficulty in his way to recover for the injuries (if any) to the land, because, as we have said, it is not claimed even that any of the parties owned the land; and as to that, therefore, the *prima facie* proof of ownership resulting from the possession is repelled. In arriving at their verdict and assessing the amount of damages the jury undoubtedly allowed for the loss of the house, kitchen, and stable. Can we hold that it is conclusively shown that these buildings were mere chattels, and no part of the land? If not, can we hold—would we be justified in holding—that the first paragraph of the charge of the court, allowing a recovery therefor by plaintiff, as well as its refusal to give the fourth special instruction asked by the defendant as above set forth, were harmless errors? We think not. The defendant, also, in this connection, assigns as error the first paragraph of the court's charge, and that the verdict of the jury is contrary to the law and the evidence in this particular. The court charged the jury to the effect that, under "the written transfers from Black and Lavo to the plaintiff, in connection with the undisputed evidence" in the case, he could recover for all of the property, if shown to have been destroyed by the negligence of the defendant, its servants or employes. Such was the legal effect of the charge, and it put the buildings upon the same footing as the other property destroyed. Under such circumstances, we think that the issue of ownership of those structures and the right of the plaintiff to recover therefor, as well as the right to maintain the suit in the courts of this State for an injury to the buildings, is duly raised and presented. Appellee attempts to obviate this, as we have said, by contending that the buildings were nothing more than chattels or personal property. He states all of the evidence (so far as we can discover) tending to support this contention as follows, together with the authorities cited by him, viz.: "The buildings and structures consisted of one hay shed, valued at \$200; one house and kitchen, valued at \$200; and one stable, valued at \$50; all of which was located in the Indian Territory, near Cale's switch, on appellant's line of railway. They were called the 'hay camp,' and were used in the partnership business." Authorities: *Tiedeman, Real Prop.* § 2; 1 Washb. Real

Prop. p. 8; *Ashmun v. Williams*, 8 Pick. 402; *Moody v. Aiken*, 50 Tex. 65; *Hutchins v. Masterson*, 46 Tex. 554. It is not alleged that these structures were personal property in the petition, nor is any right to remove them from the soil alleged or proven. It is shown that Black "furnished" the house and kitchen and the stable to be used in the partnership. But where did he acquire a right to the buildings? When and how were they erected on the ground of another? Did he own the material, and himself erect the structures, or were they already standing on the ground, and thus taken possession of by him and "furnished" or appropriated by him to the use of the partnership, of which he was a member? If he erected them, was it done in such a manner that they were still portable, and removable as on wheels, and not fixed and attached to the soil, as a house or stable generally is? We find no sufficient answer, if any, in the evidence on the subject as given in the briefs of counsel, nor have we found any in the statement of facts. The fact that the buildings are spoken of, in connection with the other property, as "the camp," does not prove that they are no part of the land. It may tend to show that the parties intended only to use them temporarily while camped there and engaged in cutting hay, but yet if Black, in fact, erected the buildings with his own material, but did so in such manner as to affix and attach them to the soil without permission of the owner, they became, as he had no interest in the realty, a part of the land, and were lost to him. We think it will not be denied that a dwelling-house and kitchen would generally be regarded as a part of the realty. In any event, whether they were movable fixtures or not, in the present instance, was a mixed question of law and fact, and the issue was not submitted to the jury at all. Authorities *supra*. Besides, as we have said, it is not shown that Black, in fact, erected these buildings, and, if he did, he put them on the land of a stranger, without license to do so. Tiedeman, in the second section of his work on Real Property (cited by appellee), says: "Land is the soil of the earth, and includes everything erected upon its surface, or which is buried beneath it. Under the term 'land,' therefore, are included the buildings made so under the doctrine of accession. . . . The general rule of law is that a permanent annexation to the soil of a thing in itself personal makes it a part of the realty. The rule applies in some cases even where the thing annexed is the personal property of another. Thus, if a stranger erects a building upon the land of another, having no estate therein, the building becomes the property of the owner of the soil. [Certainly where he knew he did not own the land.] . . . But if such erection is in pursuance of a license granted by the owner of the soil, then the annexation will not make the building or structure a part of the realty." It seems, therefore, according to the weight of the evidence, that the structures, without further proof on the subject, would come under the operation of the general rule, and not the exception. We certainly cannot hold

as a matter of law that there was no permanent annexation, and that the structures are movable fixtures; but, on the contrary, in the light of testimony on the subject, an opposite deduction is more reasonable. We therefore think that there was error in the first paragraph of the court's general charge, given as it was without any qualification, so as to leave to the jury the determination of this issue,—whether there had been any permanent annexation to the soil. The same may be said of the refusal to allow the fourth special instruction. In this connection we will dispose of the question as to the right of the plaintiff to recover for the hay. We think that there was no error in the court's refusal to allow the fifth instruction requested by the defendant, "that the plaintiff, having shown no right to cut or put up hay on land of the Choctaw Nation," cannot recover for its destruction. Plaintiff alleged that under the laws of that nation the members of his firm had the right to cut and put up hay on the land, and that they had complied with all the requirements of law in the premises. When destroyed, the grass had been severed from the soil, and reduced to the actual possession of the parties, ready for market. It was no longer any part of the land. Their exclusive and peaceable possession thereof was *prima facie* sufficient to support a recovery against a wrong-doer. Under such circumstances, and in the absence of proof that they did not have the right to put up the hay, a license to do so ought to be presumed. Abb. Tr. Ev. p. 623, § 4. This is different from the right to recover for an injury to the land itself, for it clearly appears that none of the parties owned the land, and the damage, therefore, in legal contemplation, could not be to them. They did not show even a possessory right to use and occupy the land itself, except temporarily, while engaged in making hay, and to the extent only that was necessary for that purpose. Had there been proof that Black had the legal authority to erect the buildings on the land, and if he did so under such circumstances as gave him the right to remove the same, then the exclusive actual possession of the buildings would likewise have been sufficient evidence of ownership, if it were necessary, under such circumstances, to rely upon that fact. 1 Civil Cas. Ct. App. §§ 517, 996; 2 Civil Cas. Ct. App. § 780. As to permanent annexations, etc., see Cooley, Torts, pp. 428-430, and *note 1*. But we have already sufficiently discussed the issue of fixtures *vel non* to indicate our views on that subject. At the risk of prolixity, however, we will make a few additional observations upon the matter of title in cases like the present, to prevent, if possible, a misapprehension of our views when construed in the light of some of the authorities which we have cited. Many of the decisions of most eminent courts as well as able text-writers announce the rule of law to be that in actions of trespass or trover or in kindred actions the wrong-doer cannot avail himself of a title to the property in a third party with which he is not connected. We do not doubt that the proof of such fact would not be allowed

to completely justify the wrong-doer anywhere, or prevent the plaintiff from recovering for the injury done to his possession as such, or to defeat an existent right to the possession of the property, etc.; but, upon the other hand, we are equally clear that, if it is established that the plaintiff was not the owner of the property, and had no other interest therein than the bare possession thereof, then, where the measure of damages relied upon is the value of the property injured, destroyed, or converted, in such case the defendant would not be legally liable to compensate the plaintiff for the value of property which he did not own; and ought to be permitted to prove title in a third party, not only for the purpose of disproving the plaintiff's right, or rather, claim for damages, without an injury to himself, but also to avoid being compelled to respond in double damages for the same injury to the property. *Vide Clapp v. Glidden*, 39 Me. 448. Until such outstanding title or a title in the defendant is established, however, the possessory right of the plaintiff is sufficient to justify a full recovery; hence it is correctly said that the actual possession of property is prima facie proof of the ownership thereof, but it amounted to no more than this.

We now reach the consideration of the second question propounded above, viz.: Could Black transfer his claim for damages? The appellant contends that an Indian, being under the control and protection of the government of the United States, cannot own property, nor transfer any claim for damages done thereto, and that his only redress is through the agencies provided by the general government. Without stopping to consider the inconsistency of this contention, pointed out by appellee's counsel, we hold that the entire position is untenable, and that we do not doubt that an Indian (certainly a civilized one) is entitled to own personal effects or chattels, and to be protected in their enjoyment until deprived thereof by due course of law. Any other doctrine would be monstrous, and contrary to the civilization of the age. His possessory right to keep and enjoy the property cannot, as we think, in any event be denied, upon any sound legal principle. Can he be robbed or stripped naked in our streets by lawless hands, and yet have no recourse in the courts, upon the ground that he is without title, and legally incapable of acquiring title? At the time of the destruction of the property in question it appears that Black was off his own reservation, and was not occupying strictly tribal relations with his own nation, the Chickasaws, but was engaged in business, and in a co-partnership with white men, and on his own account. We have found no law of the United States or of this State that would prevent him, or, in fact, any Indian, from acquiring personal property, and of enjoying the fruits of his labor and industry, but the laws are quite to the contrary. While it may be true that there are some restrictions upon the right of Indians to make contracts, or to dispose of either real or personal property of certain kinds, under some circum-

stances, imposed by the laws of Congress (Rev. Stat. arts. 2116, 2127 *et seq.*) still we do not believe that they apply to the transfer made by Black to the plaintiff. None of his property, as such, was in fact transferred, but only a claim for its loss. That contract does not come within the purview of section 2108, Rev. Stat. U. S., which, among other things, requires certain character of agreements made with Indians to be approved by the secretary of the interior. They are for the most part contracts to render services for an Indian or tribe of Indians in the collection of claims against the general government. This Statute was construed by the Supreme Court of Indiana, and it was held that an Indian could assign or transfer even a portion of her annuity due from the general government in payment of her debts, and authorize the creditor to receive and apply the same to the extinguishment of the debt; and that agreements or transactions of this nature between an Indian and a citizen were not prohibited nor regulated by the laws of Congress. *Godfrey v. Scott*, 70 Ind. 259. The present controversy falls within the reasoning and principle of that case. We do not think that the laws of Congress, nor the provisions of any treaty of which we are advised, were intended to confine an Indian exclusively to the interior department for a redress of grievances, or would prevent him from assigning a right of action like the present. Unless restricted by some positive law, the right to property and dominion over it, inherent in every human being, would entirely embrace the right, if not the necessity, of transferring it or of using it in such manner as seems most advantageous to the owner. The mass of personal property would be of little benefit unless it could be sold, exchanged, or transferred by the owner; and Congress certainly did not intend to deny to an Indian like Black complete dominion over and full enjoyment of such of the property as was acquired by his own industry, and not as a pensioner of the United States. The Supreme Court of Washington Territory held that an Indian sustaining tribal relations could contract, sue, and be sued the same as an alien. Among other things, the court says, in speaking of the right of an Indian to acquire property and make contracts, that "he had the same right and power to contract with appellee as the appellee had to contract with him. Money and all other personal property, which he certainly had the right to get and hold, he had also the right to use immediately, and to promise in advance in all proper ways, in pursuit of his happiness." *Gho v. Jules*, 1 Wash. T. 325, *q. v.* for a discussion of the right of an Indian to acquire and use property, to sue and be sued, and the necessity of such rights, etc. The nature of Black's claim for damages done to property being such as is ordinarily assignable, we are of the opinion that the fact that Black is an Indian does not render the assignment illegal or inoperative, and therefore the court below did not err in refusing to instruct the jury as requested by appellant on this point. Having the right both to transfer the property and to sue in

our courts, as we have seen, he could undoubtedly transfer the cause of action, when it is otherwise assignable under the law.

We return now to the first, second, and fourth assignments of error, adverted to in the outset. In regard to the fourth assignment, which relates to the refusal of the court to allow the second instruction requested by the defendant* it may be said that the first proposition thereof was applicable, and, if standing alone, should, perhaps, have been given, in order to call the attention of the jury pointedly to the issue; but it was mixed up and connected with other improper directions that should not have been allowed. It was not "wholly immaterial" whether the fire which had been raging on the previous day was "communicated by the engines of the defendant," and destroyed the hay camp, for there was some evidence to that effect. If that fire arose from the negligence of the defendant, and in fact destroyed plaintiff's property, we do not see why the defendant should not be held responsible for the consequences of that fire. Defendant offered proof tending to show that the fire which destroyed the camp was a prairie fire, not kindled by its engines. This was permissible, but the court had already charged the jury that, if the fire that destroyed the property was not caused by fire escaping from the defendant's engines, but resulted from some other cause, they would find for the defendant. The court was not, therefore, bound to reform and rectify the requested instruction into a presentable shape.

The first and second assignments present more serious questions, viz.: Does the evidence sustain the verdict finding that the engines of the defendant communicated the fire which destroyed the property, and that this was due to the negligence of the defendant? The only facts proved by the plaintiff to show the origin of the fire, or negligence upon the part of the defendant in this respect, are the following: A short time before the fire was discovered two freight trains belonging to the defendant, one following the other after a short interval, passed over the road, and near to the point where appellee claims the fire was started, and might, therefore, have set out the fire. Between three and four hours after the fire was first discovered, a witness (Lavo) for the plaintiff went over the recently burned district, and traced the course of the fire to where he says it "started." The place located by this witness and relied on by the plaintiff as the beginning point of the fire was at the foot of the railway embankment, and within 15 feet of the track, and south of the bayou. Here the witness testifies that he found "grass and brush still burning." On the next day another witness for plaintiff observed ashes at the same point. It was proved that the

country was very dry, and that at and during the time of the fire a furious wind was blowing, which swept the flames and shocks of burning grass before it with rushing rapidity, and to great distances, defying every effort of the witness to protect the hay camp, which, though situated at some considerable distance from the railway, was quickly reached and consumed by the fire. The defendant introduced a great deal of testimony to disprove the facts relied on by the plaintiff, and at least completely repelled the presumption of negligence that would be indulged from the fact that its engines communicated the fire, even if it be conceded that the fire was thus caused. The defendant proved by a number of witnesses that these engines were provided with the best improved fire-arresters, in good condition, and properly operated. Nay, more than this, that its road track was down grade at this point, and that these trains (as was the habit) passed along by their own momentum, without the use of steam, or the working of the engines, and that in such case it is "impossible" for an engine to emit sparks and cinders, etc. These facts the plaintiff did not even attempt to disprove. There was also proof of the prevalence of "the prairie fire" which we have already mentioned. But it may be said, as it is argued by appellee's counsel, that there is a conflict of evidence as to the origin of the fire, and that the jury had the right to conclude that it was set out by the act of the defendant. If we concede this, still, where is the proof that the fire was kindled through the culpable negligence of the defendant? Both of these facts must be shown by a preponderance of the evidence, at least in the court *a quo*. Appellee answers that the defendant permitted combustible material to accumulate on its right of way. If so, that would be negligence, if that caused the fire. But the only proof of this is that "some grass and brush" (how much it is not shown) were found burning at the beginning point of the fire, as fired by appellee, several hours after the fire. If in fact dry and combustible, how is it that the grass and brush burned so long and continued to burn at the same place in the face of so strong a wind as was then prevailing? Would not such material have been swept away as fast as it burned, or been extinguished in a short while? The process of incineration was entirely of too great duration to be compatible with the hypothesis that the material was dry and combustible, under the circumstances. It seems to us that this brush and grass must have been green and difficult to burn, or else the fire did not, in all probability, originate at this point. If it did not, then there is no proof of negligence. The evidence, in our opinion, fails to show an accumulation of dry and combustible material at this point or anywhere on the right of way. One wit-

*That instruction was as follows: "If you believe that the property in question was set on fire by the prairie fires which had been burning on the preceding day and night, and that this fire, after having apparently gone out, was revived by a strong wind on the day in question, and carried to the property, and caused its destruction instead, you should find for defendant. There is no compe-

tent evidence that such fire was communicated by defendant's engines, nor is it material for the jury to consider whether or not it was so caused under the circumstances. If this fire, and not one freshly set out by the engines which approached Cale switch just before the destruction of the hay, caused the damage, plaintiff is not entitled to recover." [Rep.]

ness testifies that the fire started at a point north of the bayou, but this does not appear to have been on the right of way; and, besides, on that side of the bayou the defendant had recently cleared and burned off its right of way. The law did not require nor permit the defendant to destroy or remove grass or other inflammable material not on its right of way. In view of the evidence as presented in the record, we are constrained, though not without some reluctance, to hold that it does not support the verdict of the jury to the extent required by law in such cases, particularly as to the issue of negligence. *Vide, Missouri Pac. R. Co. v. Bartlett*, 69 Tex. 79; *Guif, C. & S. F. R. Co. v. Witte*, 68 Tex. 295; *Fort Worth & N. O. R. Co. v. Wallace*, 74 Tex. 585; *International & G. N. R. Co.*

v. Timmermann, 61 Tex. 663; *Texas P. R. Co. v. Levi*, 59 Tex. 677.

Upon another trial additional evidence may be adduced, or at least fuller explanations of the circumstances relied upon may be made, on behalf of the plaintiff, and we forbear therefore from saying that the verdict is entirely without any evidence for its support. We have endeavored to dispose of all of the numerous questions presented because it is apparent that they will arise again upon another trial, and this has unavoidably protracted the opinion to an extent much beyond our desire.

For the errors indicated we think that the judgment should be reversed, and the cause remanded.

Adopted by Supreme Court, June 16, 1891.

FLORIDA SUPREME COURT.

D. S. FORBES, *Appt.*

v.

ESCAMBIA COUNTY BOARD OF HEALTH.

(..... Fla.)

- *1. The Act of 1885, chap. 3603, providing for the creation of county boards of health, and constituting them corporations, must be construed in connection with the Acts of 1879, chap. 3162; 1881, chap. 3312, and 1883, chap. 3443, Laws Fla.,—as being *in part materia*, and having in view one object.
2. Under the Act of 1879, chap. 3162, as amended by the Act of 1883, chap. 3443, county boards of health have no authority to demand and collect from vessels coming into the jurisdiction of said boards fees for fumigation or disinfection, unless said vessels are subject to and have been put in quarantine.
3. Under the Act of 1885, chap. 3603, and the acts *in part materia* prior thereto, county boards of health have no authority, without an examination or inspection, to require vessels upon entering ports within the jurisdiction of said boards to deviate from their course six miles and go to a quarantine station for inspection and examination.
4. County boards of health are corporate bodies, invested by statute with functions of a public nature, to be exercised for the public benefit, and, in the absence of such remedy conferred by statute, are not liable in an action for tort for damages in the performance of an official duty.

(August 15, 1891.)

APPEAL by plaintiff from a judgment of the Circuit Court for Escambia County sustaining a demurrer to the complaint in an action brought to recover damages for defendant's alleged illegal interference with plaintiff's vessel in compelling it to go into quarantine and pay the charges thereof. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. R. L. Campbell and J. Emmet Wolfe for appellant.

Mr. John C. Avery, for appellee:

If the Board of Health made an error in their construction of the law in so far as it authorized them to thoroughly protect the public health of the county, they were acting within the general scope of their jurisdiction and cannot be held responsible for an error in their comprehension of the limits of their power.

4 Wait, Act. & Def. 632, par. 2; 1 Dillon, Mun. Corp. par. 39, 304; 2 Dillon, Mun. Corp. par. 753; 2 Thompson, Encyclop. Law, 429; *Bryant v. St. Paul*, 33 Minn. 289; *Ex parte O'Donovan*, 24 Fla. 281; *Ferrari v. Escambia County Board of Health*, 24 Fla. 390.

Mabry, J., delivered the opinion of the court:

In September, 1888, appellant, D. S. Forbes, commenced a suit against appellee in the Circuit Court of the First Judicial Circuit of Florida for Escambia County. A demurrer was sustained on the 22d day of October, 1888, to the original declaration filed by plaintiff below, and leave given to amend the declaration. On the 5th day of November, 1888, plaintiff below filed the following amended declaration: "D. S. Forbes, by his attorney, R. L. Campbell, sues the Board of Health of Escambia County, a corporation existing under the laws of the State of Florida, for that, on the 27th day of August, A. D. 1888, the British bark *Tiber*, whereof said plaintiff was and is master, did enter the Port of Pensacola, in said county and State, the Port of Cape Town being the last port from which said bark *Tiber* sailed on the voyage which ended at the Port of Pensacola on the day and year above mentioned; and plaintiff avers that, although no quarantine had, before the entry of said bark into the said Port of Pensacola, nor during the stay of said bark in said port, been declared by said defendant against said Port of Cape Town, and although no contagious, infectious, or pestilential disease existed upon said bark at the time of or after her coming into the said Port of Pensacola as aforesaid, and although no such disease had occurred or existed upon said bark during her voyage from said Port of Cape Town to said Port of

*Head notes by **MABRY, J.**

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Pensacola, nor within thirty days before her arrival at said Port of Pensacola, said defendant did compel said bark, immediately upon her entering the Bay of Pensacola, in which said Port of Pensacola is situated, to proceed directly to the quarantine station of said defendant, which said quarantine station is situated upon an arm of said Bay of Pensacola, and distant southeasterly six miles from the said Port of Pensacola, where vessels load and unload, thereby compelling said bark to deviate six miles from the course of vessels not subject to quarantine, proceeding to the usual place of loading and unloading cargo in said Port of Pensacola, and did compel said bark to make said deviation and proceed to said quarantine station as aforesaid, without any inspection or examination of said bark, her crew, or cargo, by any health inspector or city physician of said port, and without any report of such inspector or physician, or order of said defendant in respect to the sanitary condition of said bark, her crew or cargo, but solely and exclusively under the provisions of section 1 of a proclamation of said defendant made on the 23d day of April, A. D. 1888, which is as follows: 'That from and after the 15th day of May, A. D. 1888, and until the 15th day of November, A. D. 1888, no vessel which may have been, between those dates, at ports or places where yellow fever or other malignant disease had actually appeared, shall be permitted to discharge ballast or cargo or load cargo in said Bay of Pensacola; and that all other vessels arriving in said bay between said dates shall, immediately upon crossing the bar, proceed to the quarantine station hereinafter designated, to be inspected, and, if deemed necessary by the quarantine physician, discharge ballast, and be submitted to a cleansing and disinfecting process;—and not under any other proclamation or order or requirement of said defendant, or law of the State of Florida; and did, for a long space of time, to wit, twelve days, detain said bark, the reasonable damages for which detention is \$73.94 per day, rating the same at the usual rate of demurrage per day for a vessel such as the said bark, which is 8 cents per day per registered ton, said bark being of the burden of 924 registered tons; and did also compel said bark to undergo fumigation, for which said defendant charged the plaintiff the sum of \$46.20 for said fumigation and the materials used in effecting the same; and also did compel said bark, with her own crew and appliances, to discharge her ballast at said quarantine station, and did charge and compel the payment by said bark at the rate of thirty-five cents per ton for every ton of ballast so discharged, which amounted to 830 tons, making the aggregate charge for the discharging of said ballast of \$112. And plaintiff further avers that he was compelled to pay said ballast and fumigation charges under pain of attachment and seizure of his vessel for the refusal of plaintiff to pay the same, and also of plaintiff being prevented from taking said bark from the said quarantine station to the loading ground for vessels in said Port of Pensacola, for the purpose of fulfilling the charter of said bark, for the fulfillment of which said bark came lawfully into the Port of Pensacola,

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as aforesaid. Wherefore plaintiff says that he is damaged in the sum of \$2,000, and therefore he brings this suit," etc.

Defendant below demurred to the amended declaration on the ground that "the same is bad in substance, in this: that it fails to set forth any cause of action against defendant." This demurrer was sustained, and, plaintiff below declining to further amend, a final judgment was rendered against him on the 12th day of December, 1888, from which decision an appeal is prosecuted to this court.

The errors assigned here are: (1) in sustaining the appellee's demurrer to appellant's amended declaration; (2) in rendering final judgment against appellant upon said demurrer.

The sole question for us to deal with now is the sufficiency of the allegations of appellant's declaration to state a cause of action against appellee. The Board of Health of Escambia County is a creature of statutory law, and all its duties and powers are derived from this source. Before analyzing the declaration to see if its allegations are sufficient to constitute a cause of action, let us refer to the statutory provisions on the subject of county boards of health. The first enactment on this subject to which reference need be made is the Act of 1879 (chap. 3162, Laws Fla.) This Act constitutes the mayor, aldermen, and city physician, if there be one, of every incorporated city or town a board of health for said city or town; and when there is no incorporated city or town the board of county commissioners shall constitute a board of health for such county. The boards of health thus created are invested with power to declare quarantines on water or land, within their jurisdictions, against boats or vessels upon which any contagious, infectious, or pestilential disease existed or had existed during the voyage to said city, town, or district, or within thirty days next preceding the arrival of said boat or vessel within the jurisdiction of said boards, and against any country or locality infected with plague or other malignant or contagious disease. Said boards are authorized to make such rules for the regulation of quarantines as may be deemed necessary, not inconsistent with said act, and to prescribe penalties for their violation. They are also authorized to appoint one or more port inspectors, whose duty it shall be to board every boat or vessel approaching such city or town, and ascertain if the same is subject to perform quarantine; and, if such boat or vessel is subject to quarantine, the inspector visiting her shall order her thrown into quarantine at the place designated for such purpose, and immediately notify the board that such boat or vessel has been ordered into quarantine. This Act gave to the boards of health power to deal with infected persons, goods, vessels, or localities, and as to such matters they could only act by putting in operation a quarantine. The boards created by this Act have no power to act in regard to matters pertaining to public health otherwise than by establishing quarantines. To carry out this object such boards are authorized to establish quarantine grounds, appoint port inspectors and quarantine physicians, and to make rules regulating quarantines when declared. After a quarantine has

been established by the board of health as provided by this Act, and due notice thereof given, all persons are bound to observe the regulations thereof. This Act (sec. 17) provides for the payment of the expenses of the quarantine boards and the officers and employes in and about quarantine, and also for the payment of certain fees by vessels undergoing inspection and in quarantine. This section has been amended by the Act of 1888 (chap. 3443, Laws Fla.). In 1881 the Legislature, by chapter 3312, Laws Fla., provided that the governor shall appoint for every incorporated city and town in this State containing 300 or more registered voters a board of health. Section 4 of this Act confers upon boards of health created by it power to act in regard to all matters pertaining to the public health and vital statistics, and to make such rules and regulations as they may deem necessary for its government and the protection of the public health. The 5th section gives to said boards in matters of quarantine the same powers as are conferred upon boards of health by the Act of 1879 (chap. 3162, Laws Fla.). This Act also provides that section 1 of chapter 3162, so far as it relates to cities and towns of less than 300 registered voters, is not repealed. The Act of 1885, chap. 3603, provides that the governor shall appoint for every county in the State a board of health, which shall be a corporation, with power to sue and be sued, contract and be contracted with, and to acquire and dispose of property, both real and personal. The sixth section of this Act provides that the county commissioners of each county are empowered to assess and levy a tax not to exceed in any year two mills on the dollar, to defray the expenses of said boards of health. The county boards of health created under this Act shall have full power to act in all matters pertaining to quarantine, public health, vital statistics, and the abatement of nuisances, to appoint and suitably compensate a port inspector and such other officers or agents as they may find necessary; and any person who shall interfere with, hinder, or oppose any such officer or agent of the Board in his or their discharge of duty shall be fined not exceeding \$1,000. The 9th section of this Act provides that such boards of health may at any time establish such quarantines as in their judgment are expedient for the public welfare, and to provide rules and regulations for the same; and, after the same are established against any port or place, any person violating the same shall be guilty of a felony, and upon conviction shall be punished by fine or imprisonment. The tenth section enacts that every such board may adopt such rules and regulations as they may deem needful in the exercise of the powers and discharge of the duties created and imposed by this Act.

In *Ex parte O'Donovan*, 24 Fla. 281, it was held that "the Statute of 1885 (chap. 3603), providing for the appointment of county boards of health, and defining their powers, does not repeal the Act of 1879 (chap. 3162), providing a uniform system of quarantine in this State. These statutes are *in pari materia*, and to be construed together." It was also held in the case of *Ferrari v. Escambia County Board of Health*, 24 Fla. 390, that these Acts

are on the same subject, and have in view one object, and should be construed together as one system.

The question arises under these Acts, Under what conditions can the County Board of Health of Escambia County detain vessels coming into the Port of Pensacola, and impose upon them the payment of fees for inspection, fumigation, and discharge of ballast? All the powers which this Board can exercise in this respect must be derived from the Statute. This board is a corporate body, the creature of statute, and is incapable of exercising any other powers than those conferred by the Act of Incorporation, or in any other manner than it authorizes. The Act of 1885, however, authorizes county boards of health to declare quarantines and to act in all matters pertaining to quarantines, and this must be taken to confer on such boards all the powers given by statute in reference to such matters. In *Ex parte O'Donovan*, *supra*, it was held that the authority to declare quarantine conferred by the Act of 1885, means quarantines as authorized by the Act of 1879. The latter Act (sec. 3) provides in reference to vessels that "any board of health may at any time during each year establish a quarantine, forbidding the approach to the city, town, or district over which said board of health has jurisdiction of any vessel or boat upon which any contagious, infectious, or pestilential disease has occurred or existed during the voyage to said city, town, or district, or within thirty days next preceding the arrival of said vessel or boat at said city, town, or district, and forbidding the landing of any persons or goods from such boat or vessel until such boat or vessel has performed quarantine in accordance with the provisions of this Act and with the rules and regulations of the board of health." Section 4 provides that "any board of health may at any time, upon information that any country or locality is infected with plague or other malignant, contagious, or infectious disease, establish quarantine against such country or locality, forbidding the approach to the town, city, or district over which the said board may have jurisdiction of any vessel or boat or persons from such infected country or locality, and forbidding the landing of such boats or vessels, or of any persons or goods therefrom, until such boat or vessel, person, and goods shall have performed quarantine in accordance with the provisions of this Act and with the rules and regulations of the board of health." The sixth section provides that the boards of health "may appoint one or more port inspectors, whose duty it shall be to board every boat or vessel approaching such city or town, and to ascertain if the said boat or vessel is subject to perform quarantine under the third or fourth sections of this Act; and, if such boat or vessel is subject to perform quarantine as aforesaid, the inspector so boarding said boat or vessel shall order the same, together with all persons and goods, thrown into quarantine at the place designated by the board of health. The said inspector shall immediately notify the board of health that the said boat or vessel has been ordered into quarantine." The quarantines mentioned in this Act are not self-existing. They are to be estab-

lished by the boards of health when conditions give rise to them. The object of the Statute in providing for quarantines was to protect the people of the State from infectious, contagious, or malignant disease, and the boards of health, in order to accomplish this object, were authorized to establish and maintain quarantines against infected vessels, or vessels from infected places and infected localities. Before any vessel can be put in quarantine one must be established, and the vessel ascertained, by inspection, to be subject to perform quarantine. If the vessel is ascertained by inspection not to be subject to quarantine, she cannot be detained by the board of health, under the Act of 1879, for any purpose. If a vessel is not subject to quarantine,—that is, if she has not been found subject to perform quarantine on account of having on board, or existing within thirty days next preceding the arrival of said vessel at some town or city, “contagious, infectious, or pestilential disease,” or on account of her coming from some infected country or locality,—there is no authority to impose upon her any other charge than that for inspection. It is clear that all the authority the board of health has to collect fees from such vessels must be found in the Statute. The 17th section of the Act of 1879, as amended by the Act of 1883 (chap. 3448), provides that “all the officers and employes in and about quarantine shall be paid, and the expenses of quarantine board, by the city or town establishing such quarantine. Every vessel undergoing inspection by the port inspector, and every vessel in quarantine, which, in the opinion of the port physician, shall require and receive fumigation or other disinfection, shall pay therefor to the board of health such fee or fees as may be prescribed by said board of health, and if the master of any ship, boat, or vessel shall refuse to pay such fees, the board of health may detain said vessel in quarantine until the same are paid, or may sue for and recover the same from the owner of such ship or vessel.” The port inspector, as provided in the sixth section of the Act of 1879, is required to board the vessel as she approaches the city or town, and, if found subject to perform quarantine, she is thrown into quarantine. The Statute provides that every vessel undergoing inspection shall pay such fees therefor as may be prescribed by the board of health; and this, of course, becomes a charge, whether said vessel is ordered into quarantine or not. As will be seen, it further provides that every vessel in quarantine, which, in the opinion of the port inspector, shall require and receive fumigation or other disinfection, shall pay the fees therefor which the board shall prescribe. If the vessel is not subject to and has not been put in quarantine, there is no authority under this Act to make her pay for fumigation or disinfection fees. Counsel for appellee contends, however, that the defendant has power not only to establish quarantines, but to act in all matters pertaining to the public health, vital statistics, and the abatement of nuisances, and to make rules and regulations to govern such matters; that, under the power given to make rules to protect the public health, defendant had the right to require vessels entering the Port of Pensacola to go to a point called a

“quarantine station” for inspection, and if in ballast, and deemed expedient, to discharge ballast, and undergo fumigation. It is true that county boards of health, in addition to the power to declare quarantines, have authority to act in all matters pertaining to public health, vital statistics, and the abatement of nuisances, and there is an express grant of power to such boards to adopt such rules and regulations as they may deem needful in the exercise of the powers conferred to protect the public health; but the power to act in matters pertaining to public health, and to make rules and regulations in reference thereto, does not include the authority to demand and collect fees or other money exactions from those who are made to undergo quarantine. Such a power as this must be expressly conferred in order to its rightful exercise. The Board of Health of Escambia County had a right to make such rules in reference to the deposit of ballast near the City of Pensacola as were deemed necessary to preserve the health of the inhabitants of that city. It would be competent, when deemed essential to preserve the public health, for such board to direct that all vessels coming into the Port of Pensacola and in ballast shall discharge the same a reasonable distance from the wharves and inhabitants of the city, and to enforce such rules by adequate penalties. When, however, fees, charges, or money exactions are attempted to be imposed on vessels coming into port, the authority to demand and collect the same must be pointed out in the Statute.

We are satisfied from a careful examination of the statutory provisions on the subject in force at the time the cause of action is alleged to have accrued in this case that no fees other than for inspection can be imposed on vessels coming into the jurisdiction of county boards of health, unless such vessels have been ascertained, by inspection, to be subject to quarantine, and have been put in quarantine.

Let us now turn our attention to the allegations of the declaration, and see if sufficient has been averred to make a case against defendant. It is alleged that defendant promulgated on the 23d day of May, 1883, the following order, viz.: “That from and after the 15th day of May, A. D. 1883, and until the 15th day of November, 1883, no vessel which may have been between those dates at ports or places where yellow fever or other malignant disease has actually appeared shall be permitted to discharge ballast or cargo or load cargo in said Bay of Pensacola; and that all other vessels arriving in said bay between said dates shall immediately upon crossing the bar proceed to the quarantine station hereinafter designated, to be inspected, and, if deemed necessary by the quarantine physician, discharge ballast, and be submitted to a cleansing and disinfecting process.” That on the 27th day of August, 1883, the bark Tiber entered the Port of Pensacola, in Escambia County, Fla., the Port of Cape Town being the last port from which said bark sailed on her voyage to the Port of Pensacola, and that no quarantine had been established against Cape Town by defendant before said bark entered the Port of Pensacola; or during her stay in said port, and that no contagious, infectious or pestilential disease existed upon said bark during her said

voyage from Cape Town, nor within thirty days before her arrival at the Port of Pensacola, nor at the time of or after her coming into said port. Further, that upon entering said Bay of Pensacola said bark, without any inspection or examination of said vessel, her crew, or cargo by any health inspector or physician of said port, was compelled to proceed directly to the quarantine station of defendant, and thereby to deviate six miles from the course of vessels not subject to quarantine. That defendant proceeded against said bark solely and exclusively under the said proclamation dated 23d day of May, 1888, and did retain said bark twelve days, to her damage \$73.94 per day; and did also compel said bark to undergo fumigation at a cost of \$46.20, and with her own crew and appliances to discharge her ballast at said quarantine station, and pay the sum of \$112 therefor, rating the same at thirty-five cents per ton for ballast discharged; and that plaintiff was compelled to pay said ballast and fumigation charges under pain of seizure of his vessel, and also of being prevented from taking said bark from said station to the loading grounds in the Port of Pensacola. All the allegations of the declaration that are well pleaded are admitted by the demurrer.

Admitting the allegations of this declaration to be true, the defendant had no authority to impose any fees on the Tiber for fumigation or unloading ballast. She was not subject to quarantine, as provided by statute; and the authority given defendant to act in matters of public health, and to make rules and regulations in reference thereto, did not extend to the right to collect such fees. When a quarantine has been established, and a vessel entering port is ascertained, by inspection, to be subject to perform quarantine, she may, in the opinion of the port physician, be required to undergo fumigation or disinfection, and in this event shall pay therefor such fees as may be prescribed by the board of health. The statute authorizes fees for inspection; and when a vessel is subject to quarantine, and in quarantine, she may be taxed by the board of health with the fees for fumigation or disinfection, and beyond these charges the county boards of health have no power to go in exacting money from vessels. In the case of *Ferrari v. Escambia County Board of Health*, *supra*, a regulation of said board, providing that "vessels in quarantine may be discharged at the crib therein by paying fifty cents per ton for so discharging," was sustained by a majority of the court. Judge Maxwell, in speaking for the majority of the court, said, in reference to this regulation: "That is legitimate, if such discharge is for the purpose of disinfecting the vessel; but not otherwise." He was speaking of a vessel subject to quarantine and in quarantine. The Statute authorizes fees only for inspection, fumigation, or disinfection, and if in disinfecting a vessel in quarantine the board of health would have to discharge her ballast in order to accomplish this object, the cost of the same might be included in the disinfecting fees; but we see no authority in the statute authorizing county boards of health to establish a place where vessels with their own crew and appliances shall discharge ballast, and impose

charges on such vessels for so doing. The regulation under which appellant avers his vessel was detained and forced to pay fees requires vessels crossing the bar of Pensacola to proceed to the quarantine station to be inspected, and, if deemed necessary by the quarantine physician, to discharge ballast, and be submitted to a cleansing and disinfecting process. No fees or charges are mentioned in this regulation to be paid, nor is the location of the quarantine grounds, where vessels shall go on entering the bar for inspection, fixed. The declaration avers that defendant did compel the Tiber without an inspection to go six miles deviation out of her course to a quarantine station, and did compel her to pay for fumigation, and to pay for discharging her ballast with her own crew and appliances at said station. In *Ez parte O'Donovan*, *supra*, a regulation of the board of health that a vessel shall be detained until not only the inspection has been made, but also until the report and release of the vessel, was held unauthorized by the Statute. The Statute provides (Act 1879, chap. 3162, § 6) that the port inspector shall "board every boat or vessel approaching such city or town, and to ascertain if the said boat or vessel is subject to perform quarantine; . . . and, if such boat or vessel is subject to perform quarantine as aforesaid, the inspector so boarding said boat or vessel shall order the same, together with all persons and goods, thrown into quarantine at the place designated by the board." The declaration avers that plaintiff's vessel, without an inspection or examination, immediately upon entering the Port of Pensacola, was forced by defendant to go six miles out of her course to the quarantine station. Conceding this to be true, it was unauthorized by the Statute or any rules or regulations which defendant had authority to make. Our conclusion is that the detention of the Tiber, and the exaction from her of fees for fumigation and the discharge of her ballast by defendant in the manner and under the conditions alleged in the declaration, were without legal authority. This conclusion is based upon the statutory provisions in force on the subject at the time of the alleged cause of action.

Counsel for appellee further contends that, should the court find that the declaration presents a case in which the acts complained of were not authorized by the terms of the law, yet the board only committed an error of judgment, for which it cannot be held responsible in damages in an action in tort. It will be discovered upon an examination of the declaration that appellant's suit is not to recover back money illegally exacted, but the action is in tort, for illegally detaining the vessel, and compelling her to pay certain charges. Can the defendant, as a county board of health, be sued for damages in respect to the matters alleged in the declaration? The answer to this question, we admit, is not free from difficulty. The defendant is a body corporate, made so by statute, capable of suing and being sued, contracting and being contracted with and of acquiring and disposing of property, real and personal. A careful examination of the various statutory provisions in reference to the creation, duties, and powers of these corporate boards leaves no room to doubt that the functions con-

ferred upon them are a part of the police power of the State, to be exercised exclusively for public purposes. The sole purpose of the Legislature in creating these corporate boards was to protect the inhabitants of the State from contagious or infectious disease, and to preserve the public health. Such powers and duties are of a public nature, and of the highest importance and value. *Cooley, Torts, 882; Bryant v. St. Paul, 88 Minn. 289; Spring v. Hyde Park, 187 Mass. 554; Harrison v. Baltimore, 1 Gill, 264; Raymond v. Fish, 51 Conn. 80.*

In determining the liability of public corporations a distinction has been drawn between the functions exercised by them as agencies of the State as a part of its governmental machinery for the public benefit and those denominated strictly corporate powers, conferred for the benefit and profit of the corporation. In the sphere of the former powers they are exempt from liability upon the theory that the corporation, to that extent, is performing a part of the functions of the state government, and the officers are public officers; but in the latter sphere they are held liable as private corporations for the acts of their agents. This distinction is recognized generally by the authorities, although its application in many of the adjudicated cases has not been free from confusion. Its application has been made most frequently in suits against municipal corporations. In the case of *Hill v. Boston, 123 Mass. 344*, which was a suit for damages for injuries received by a child at school by reason of a defective house, required by law to be furnished by the city, Judge Gray reviews the authorities on this subject. The conclusion reached in this well-considered case is "that a duty which is imposed upon an incorporated city, not by the terms of its charter, nor for the benefit of the corporation, pecuniary or otherwise, but upon the city as the representative and agent of the public, and for the public benefit, and by general law applicable to all cities and towns in the Commonwealth, is a duty owing to the public alone; and a breach thereof by a city is to be redressed by prosecution in behalf of the public, and will not support an action by an individual, even if he sustains special damage thereby." See also *Hafford v. New Bedford, 16 Gray, 297; Walcott v. Swampscott, 1 Allen, 101; Buttrick v. Lowell, Id. 172; Richmond v. Long, 17 Gratt. 375; Hill v. Board of Aldermen, 72 N. C. 55; Bartholomew County Comrs. v. Wright, 23 Ind. 187; Hayes v. Oshkosh, 83 Wis. 314; Dargan v. Mobile, 81 Ala. 469; Murtough v. St. Louis, 44 Mo. 479; Condict v. Jersey City, 46 N. J. L. 157; Mazmilian v. New York, 62 N. Y. 160; Dillon, Mun. Corp. § 778 et seq.*

A public corporation, invested with powers for public purposes, may also have conferred upon it powers for private advantage and emolument. This has been held in many cases against municipal corporations. In *Bailey v. New York, 8 Hill, 581*, it is said in reference to these two powers blending in a public corporation: "But this distinction is quite clear and well-settled, and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred as to the object and purpose of the Legislature in conferring them. If granted for public pur-

poses exclusively, they belong to the corporate body in its public, political character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company."

The case of *Jones v. New Haven, 34 Conn. 1*, illustrates this distinction. The fact that these boards are created corporations with power to sue and be sued does not of itself authorize a suit against them for everything, but this must be taken to mean that such artificial bodies may be sued, like an individual, for all those matters and things for which they are legally liable. To determine the liability we must look to the principles of law applicable in such matters. *Sussex County Board of Chosen Freeholders v. Strader, 18 N. J. L. 108; Finch v. Toledo Board of Education, 80 Ohio St. 37.*

In the case of *Ogg v. Lansing, 85 Iowa, 495*, suit for damages was instituted against the city for the negligence of its officers or agents in executing sanitary regulations adopted to prevent the spread of small-pox. A statute of Iowa provided that the city council shall have power to establish a board of health, and to invest it with powers and duties necessary to secure the people of the city against contagious and malignant diseases. It was alleged in this case that the agents and employes of defendant requested and directed plaintiff to assist in taking a coffin, in which the corpse of a person who had died of small-pox was deposited, without giving him information of this fact, and without having cleansed the house in which the coffin was; and that plaintiff went to his home and soon thereafter had small-pox, and from him two of his children contracted the disease and died. On demurrer it was held that defendant was not liable.

In *White v. Marshfield, 48 Vt. 20*, suit was brought against the town for neglect and refusal of the selectmen to take care of and provide for plaintiff, as the Statute required, while he was infected with small-pox, by reason whereof the disease was communicated to the family of plaintiff, and three of his children died. The Statute provided that the selectmen of the town should perform certain duties to protect the inhabitants against infectious disease. On demurrer it was held that the action would not lie. In *Richmond v. Long, 17 Gratt. 375*, suit was instituted against the City of Richmond for the value of a slave, who, it was alleged, lost his life through the carelessness of the agents of the city. The declaration alleged that the slave was admitted into the hospital of the city to be cared for and treated for small-pox, in pursuance of the ordinance of the city, and that the city carelessly and negligently permitted him to escape from the hospital and go off at night whereby he lost his life. The ordinance of the city establishing the city hospital was adopted in pursuance of legislative authority for towns and counties in the State to provide against contagious disease. The liability of the city was denied in this case, and the judge who wrote the opinion said that if a recovery could be sustained he did not perceive why, by parity of reason, the

State should not be held liable, through its public functionaries in civil actions at the suits of individuals, for losses or torts occurring in the management of its departments under its immediate control and supervision. In Maine a statute provided that the selectmen of any seaport town, when deemed necessary to protect the safety of the inhabitants thereof, may cause any vessel arriving there from any port or place to perform quarantine at such place and under such regulations as they may judge expedient; that said towns may select a health committee, or health officers, who may perform the duties and exercise the authority which selectmen may perform. Under the Statute the health authorities had no power to impress vessels coming into port, but could compel them to perform quarantine. One Mitchell sued the City of Rockland for damages sustained by him for the partial destruction of his vessel and her cargo by fire occasioned by the health officers of said city. This case was three times before the supreme court of that State, reported in 41 Me. 363, 45 Me. 496, and 52 Me. 118. In this case plaintiff's vessel came into port with a case of small-pox on board, and the health officers of the city took possession of the vessel, and it was claimed through their illegal and negligent acts the vessel caught on fire. It was decided finally in this case that neither a town nor its officers have any right to appropriate or interfere with private property except so far as that right is conferred by statute, and that health officers of the City of Rockland had no authority to take possession of plaintiff's vessel; also that neither the relation of master and servant nor principal and agent existed between a town and its health or police officers, nor is the town liable for their unlawful or negligent acts. *Mitchell v. Rockland*, 52 Me. 118.

The same doctrine was reaffirmed in that State in the case of *Lynde v. Rockland*, 86 Me. 309. Here the plaintiff alleged that his hotel in the city was taken possession of by the health officers of the city against his consent, and converted into a small-pox hospital for thirty days, thereby endangering the lives and health of plaintiff and his family, and destroyed the business, reputation, and character of the hotel for all time to come. It was decided in this case that no action can be maintained against a city or town for the unlawful acts of its health committee or other officers in taking possession of a house and using it for a small-pox hospital without the consent of the owner, and without legal authority. The action in this case was in tort. See also the case of *Barbour v. Ellsworth*, 67 Me. 294, sustaining the same doctrine. A case similar in its features is *Spring v. Hyde Park*, 137 Mass. 534. In this case the action was in assumpsit on contract, and it was held that under the Statute of Massachusetts, which provided how property could be impressed for use as a hospital, a board of health of a town, without pursuing the course pointed out by the Statute, has no authority to take possession of a dwelling house without the consent of the owner, and use the same as a hospital for a person found therein sick with a contagious disease, and the owner cannot maintain an action of contract against the city for the use

and occupation of the house during the time it was so held by the board of health.

In the case of *Aaron v. Broiles*, 64 Tex. 316, it was held that the city council had the right, under legislative authority, to enact an ordinance providing for the removal from the city of persons afflicted with contagious disease, and that there was nothing judicial in the act removing persons under such an ordinance; but in doing so those to whom such a duty is given by the city must make every reasonable provision for the safety of the persons removed. The suit in this case, however, was not against the city or the board of health of the city, but the individuals who composed the Board of Health,—the mayor and marshal of the city. The plaintiff's case against the defendants was that they, acting under the ordinance of the city, took by force his child, four years old, sick at the time with small-pox, and its mother, and conveyed them to the country, in the rain and cold, at night, and failed to provide them any suitable place to stay, which caused the death of both of them. Held, that plaintiff was entitled to recover damages.

In the case of *Southampton Bridge Co. v. Southampton Board of Health*, 8 El. & Bl. 801, an action for damages was sustained against the defendant as a corporate body under allegations that "defendant, acting as such board of health, conducted itself so wrongfully, improperly, and negligently, and with want of due care in the construction, management, and direction of a certain sewer, that by means of the wrongful, improper, and negligent conduct of defendant as such board of health great quantities of filth and sewage matter were poured in and upon certain canals of which plaintiffs were proprietors." The Act incorporating the defendant as a local board of health authorized it to construct sewers. It was contended in this case that defendant could not, as a board of health, be held liable in an action for damages. Lord Campbell said that defendant's liability must be determined by a true interpretation of the Statute by which it was created. The decision against the defendant was placed upon the construction of the Statute. The Act creating the board of health provided that no action shall be maintained against the board unless previous notice thereof be given for one month, and that the defendant may tender amends, and plead such tender to the action. This language was held to give a right of action for damages against defendant.

Independent of the provision making county boards of health bodies corporate, with power to sue and be sued, there is nothing in the statutory provisions in reference to them giving the right of action in tort for damages, or indicating a purpose on the part of the Legislature to subject them to such suits. As we have already seen, the right alone to sue and be sued cannot be construed to give such remedy. These boards are created for public purposes in the exercise of the police power of the State, and they have no corporate interest in the execution of the powers given them. They cannot levy taxes, and under the Statute must invoke the taxing power of the county authorities for the means to defray their expenses. It is true, they can fix and collect fees for inspection, and,

when vessels are subject to quarantine and in quarantine, can collect fees for fumigation when deemed necessary; but it is evident that such exactions were intended to meet the reasonable expenses in such matters.

In the case of *Finch v. Toledo Board of Education*, 30 Ohio St. 37, the liability of defendant in tort as a corporate body arose. The board of education of Toledo was a corporation, with power to sue and be sued, and derived its means of support from taxation by the City of Toledo and a portion of the public school fund. The suit was for damages for negligently digging wells or openings near school buildings, into one of which a child at school fell and was hurt. Judge Ashburn said, in delivering the opinion: "We have wholly failed to find any provision of the School Law, general or special, creating or implying the liability of defendant in this class of cases. No possible means appears in the School Laws by which defendant, if liable for a tort, could provide a fund out of which to satisfy a judgment against it." It was held in this case that, while defendant was a corporation with power to sue and be sued, yet it was a corporation for public purposes, and the nature, duties, and powers conferred upon it was a sufficient reason why it was not liable to be sued in tort. See also *McDonald v. Massachusetts General Hospital*, 120 Mass. 432; *Benton v. Boston City Hospital Trustees*, 140 Mass. 13; *Summers v. Daticess County Comrs.* 103 Ind. 262, 1 West. Rep. 217; *Sherbourne v. Yuba County*, 21 Cal. 118; *Shearn & Redf. Neg. § 266.*

There are cases of recovery in actions of tort against municipal corporations, but they proceed upon the ground that where the corporation acts in the exercise of powers or performance of duties not discretionary, governmental, or public in their nature, but ministerial, and for some corporate benefit, it incurs the common-law liability for its acts as an individual. *Bailey v. New York*, *supra*; *Gibbs v. Liverpool Dock Trustees*, 8 Hurlst. & N. 164; *Jones v. New Haven*, *supra*.

In the case before us the plaintiff avers that solely and exclusively under the proclamation of the board of health, and which is set out in the declaration, plaintiff's vessel was compelled to go to quarantine station, and discharge ballast, and pay fees. It is not charged that defendant acted maliciously or willfully, or otherwise, for aught that appears in the declaration, than in the discharge of a supposed public duty. An examination of the authorities and the principles governing such cases leads us to the conclusion that defendant was invested with public functions, and the duties it owed were to the public, and as such it comes within the sphere of public functionaries, exempt from liability in tort, unless such remedy has been provided by statute. As we have seen, no such remedy has been provided by statute, and the declaration shows that plaintiff is pursuing this course.

The judgment of the court below sustaining the demurrer is affirmed.

MICHIGAN SUPREME COURT.

Michael SULLIVAN

v.

Edmund HALL, *Appt.*

(.....Mich.....)

1. Absence of evidence to support a

NOTE.—Venue and jurat should appear in the affidavit.

The venue is an essential part of every affidavit. It is prima facie evidence of the place where it was taken. *Belden v. Devoe*, 12 Wend. 225, *note*; *Manufacturers & M. Bank v. Cowden*, 3 Hill, 461; *Lane v. Morse*, 6 How. Pr. 364.

A venue is essential to an affidavit but it may be supplied by amendment. *Clement v. Ferenback*, 1 City Ct. Rep. 57.

Omission of venue in landlord's affidavit in summary proceedings is fatal. *People v. De Camp*, 12 Hun, 373.

When the landlord's affidavit omitted the venue, and it did not appear where it was sworn to nor where the justice of the peace who appears to have taken it resides, it was held a fatal error. *Cook v. Staats*, 18 Barb. 407; *Lane v. Morse*, *supra*.

Jurisdiction frequently depended on the affidavit, and if it is lacking in an essential requisite all subsequent proceedings founded upon it are void unless the defect is waived. Where there is no appearance before the justice there can be no waiver of defects. *People v. De Camp*, *supra*.

The jurat, when the deposition is taken by a notary, acting out of his home county, should have attached to it the name of the county for which the notary was appointed and in which he resides, and 13 L. R. A.

justice's judgment cannot be presumed where no attempt to return the evidence was made but the return states that the judgment was rendered after listening to the testimony and after due deliberation.

2. The appearance as attorney in proceedings to enforce a logger's lien, on

also a statement that his certificate is filed in the county in which the venue is laid and the act performed, though an omission to make such designation will not render the verification void. *Produce Bank v. Baldwin*, 49 How. Pr. 277; *Estate of King*, 2 Civ. Proc. Rep. 71; *Snyder's Notaries' Manual*, p. 57.

The jurat should be in proper form and be subscribed by the officer before whom it is made. If the jurat be all right in the original it is immaterial as to the copy served. *Barker v. Cook*, 40 Barb. 254; *Livingston v. Cheetham*, 2 Johns. 473; *Union Furnace Co. v. Shepherd*, 2 Hill, 414.

The case of *Graham v. McCoun*, 5 How. Pr. 363, seems to hold the contrary. *Wait*, Pr. p. 580.

Under the former practice before the adoption of the Code the New York court of errors held in *Livingston v. Cheetham*, *supra*, that the omission of the jurat and signature of the party to a copy of an affidavit on which a motion was made formed no objection to the service. The rule has been followed in similar cases since. *Graham v. McCoun*, *supra*.

A clerical omission on the part of the prothonotary to put his signature to the jurat, after swearing the defendant, does not vitiate the affidavit, the defendant appearing personally in court and declaring his willingness to be sworn again. *Maples v. Hicks*, *Brightly*, 56; *Endlich, Affidavits of Deference*, § 340.

behalf of the claimant, of the notary public who administered the oath in support of the lien is not unlawful.

3. The omission of venue from a notary public's jurat does not render it invalid where he is a state officer the record of whose appointment is required to be kept in the office of the secretary of state.

(May 8, 1891.)

ERROR to the Circuit Court for Clare County to review a judgment in favor of plaintiff in an action brought to enforce a logger's lien. *Affirmed.*

The facts are stated in the opinion.

Messrs. C. W. Perry and Henry A. Chasney, for appellant:

The statement of lien in this case is a nullity; the law requires it to be sworn to (Act 1887, No. 229, § 2), and this involves an affidavit.

An affidavit is an oath in writing, sworn before, and attested by, him who has authority to administer the same.

1 Bacon, Abr. 64.

The jurat of affidavits should state when, where, and before whom they are sworn.

1 Tidd, Pr. 494.

The authority to administer the oath, and the fact that the oath was taken before the officer having such authority, are indispensable to a good affidavit. It is not enough that these conditions exist in fact, but they must appear affirmatively, though whether they appear from the venue, the body of the affidavit, the jurat, or the signature thereto, is immaterial.

Smart v. Lowe, 3 Mich. 590; *Cross v. People*, 10 Mich. 24; *Re Teachout*, 15 Mich. 846; *Griffin v. Forrest*, 49 Mich. 311.

The party for whose information the lien is filed, and whose rights are put in jeopardy by it, ought surely to be able to see, by an inspection of the paper, where to look for the authority by which it was certified. Admitting that Wickham, as a notary for any county in Michigan, could act in any other, it would be intolerable that he whose interests are imperiled should have to search the records for every county in the State to settle the question of his authority.

A notary, in Michigan, is an inferior officer deriving all the power he has from positive statute.

How. Stat. (Mich.) § 631.

The jurisdiction of such an officer should appear affirmatively.

Id. § 632.

The mere signing of one's name cannot be the official signature contemplated. The authority to sign must be disclosed. The entry of a justice's judgment must be signed officially.

Howard v. People, 3 Mich. 207; *Hollister v. Giddings*, 24 Mich. 501.

So must the transcript of it.

Bigelow v. Booth, 39 Mich. 622.

Where an affidavit is made for an appeal from before a justice if taken before anyone but the justice himself, an official signature to the jurat is necessary.

People v. Simondson, 25 Mich. 113.

The certificate of acknowledgment to any sort of deed must be signed (*Ryerson v. Eldred*, 18 Mich. 12; *Marston v. Bradshaw*, 18 Mich. 81) and signed officially.

Final v. Backus, 18 Mich. 218; *Wright v.* 13 L. R. A.

Wilson, 17 Mich. 192. See also *People v. Murphy*, 56 Mich. 546; *First Nat. Bank v. St. Joseph*, 46 Mich. 526.

It is no idle form or mere technicality for which we contend, but such a general rule as will give certainty to official papers and reasonable security to all whose rights may be involved therein.

To say nothing of the affidavit's having no venue (*Persinger v. Jubb*, 52 Mich. 304); it is not even entitled.

Graham v. Elmore, Harr. Ch. 285; *Whipple v. Williams*, 1 Mich. 115; *Arnold v. Nye*, 11 Mich. 456.

And, what is also fatal, it is sworn to before a person who had no right to administer the oath.

Greenvault v. Farmers & M. Bank, 2 Dougl. (Mich.) 498.

Because, as the record shows, he was the claimant's attorney; and an attorney cannot swear his own client.

How. Stat. (Mich.) § 637; *McOastlin v. Camp*, 26 Mich. 390; *Snyder v. Hemmingway*, 47 Mich. 549; *Bradley v. Andrews*, 51 Mich. 100; *Re Hogan*, 8 Ark. 813; *Rex v. Wallace*, 3 T. R. 403; *Hopkinson v. Buckley*, 8 Taunt. 74; *Jenkins v. Mason*, 3 Moore, 825; *Chicago Rubber Clothing Co. v. Branch*, Feb. 13, 1891.

Mr. W. A. Burritt for appellee.

Long, J., delivered the opinion of the court:

This action was brought by attachment in Justice Court under Act No. 229, Laws 1887, to enforce a lien upon certain logs of the defendant. On the trial plaintiff had judgment for \$16 and costs of suit, and for a lien upon the logs. The cause was removed by certiorari to the Circuit Court for Clare County, where the judgment was affirmed. The cause comes to this court by writ of error. The errors complained of are set forth in the affidavit for the writ of certiorari to the justice, and are: "(1) that the notice of the lien was not properly sworn to as required by the Act; (2) because no testimony was given on the trial tending to prove any agreement with defendant or any authorized agent of his, or any contractor under defendant, with plaintiff that he should do any work on said logs, and no proof that defendant or any agent of his or contractor under him knew that plaintiff was doing work on said logs; (3) because no testimony was offered of any contract with defendant or his agent for any specific wages, and no proof of how much his labor was worth; (4) because said justice gave judgment in said cause for an attorney fee of five dollars; (5) because the person who claimed to be the attorney for plaintiff, and was so recognized by said justice, undertook to administer the oath to plaintiff of the notice claiming lien against the property attached; (6) because the evidence given at the hearing of said cause did not warrant any of the findings or judgment of the court; (7) because no evidence was given tending to prove the property mentioned in said writ of attachment and in plaintiff's declaration are the same." There is no force in the objections made that there was no evidence tend-

ing to show the plaintiff's claim. The evidence was not reduced to writing, and is not returned. The justice, in his return, states that the plaintiff was sworn in his own behalf, and, after listening to the testimony, and after due deliberation, he gave judgment for the plaintiff. Under these circumstances we cannot presume that there was no evidence tending to support the judgment. The writ of attachment contains a description of the property attached, and the declaration contained the same description, and there is therefore no force in the seventh assignment of error. It is not shown that the notary public who administered the oath to the plaintiff on the statement of claim of lien was the attorney for the plaintiff at that time. The lien was sworn to and filed in the office of the county clerk, as provided by statute. The notary public who administered the oath thereto afterwards appeared in justice court as attorney for the plaintiff. This is not in violation of section 637, How. Stat., and does not fall within the ruling of cases cited by defendant's counsel. The fourth assignment of error is not noticed in the brief of counsel, and will be treated as abandoned. The only remaining assignment of error is the first, which relates to the notice of lien. No objection is made to the statement except that the same does not show in what county the oath was administered. The claim of the lien is in the following form: "The statement of lien made under oath of Michael Sullivan in manufacturing, cutting, skidding, the following described property, to wit: One million feet of white pine, Norway pine, and hemlock saw-logs, marked as follows: [C] That the last day's work of said labor [C] was done on the 8th day of February, 1889, and said labor was performed in the County of Clare; and that said described property, or a portion of the same, is now situated in the County of Clare, State of Michigan; and that there is now due claimant for said work and labor over and above all legal set-offs the sum of \$16, as near as may be, for which said sum a lien is claimed upon said described property. Michael Sullivan. Subscribed and sworn to before me this 9th day of February, 1889. Henry K. Wickham, Notary Public."

The statement of lien has no caption showing the county or State in which it was made. It follows the form laid down in the Statute, but, inasmuch as the notary public does not state in the jurat the county in which he acts as such officer, it is contended that no valid lien was filed authorizing the bringing the writ of attachment under this Statute. Section 632, How. Stat., provides that his certificate, when under his hand and seal, shall be presumptive evidence of the facts contained in it, except in certain specified cases. His right to that office comes from an appointment by the governor of this State, and his compliance with the requirements of the Statute in filing oath of office, bond, etc. Act No. 117, Pub. Acts 1867. By this same Statute the county clerk of the county in which the oath of office and bond is filed is required to transmit the name of such person to the state treasurer and secretary of state. 13 L. R. A.

Thus it is that the fact whether one is a notary public may always be ascertained in the office of the state treasurer and secretary of state, as well as in the office of the county clerk in the county for which the appointment is made. Therefore the objection that the statement of lien contains no venue, and the party whose property is thus incumbered has no means of ascertaining whether the person who acts as notary public is such in fact, has no force. It is not true, as claimed, that the party who desires to ascertain the fact must go from one county clerk's office to another to get the desired information. An inquiry at the office of the secretary of state would at once show the fact, as it is a matter of record there. A notary public is in no sense a county officer. "The governor, by and with the advice and consent of the senate, may appoint one or more persons notaries public in each county, who shall hold their office," etc. Act No. 117, Pub. Acts 1867. While it is very proper that a notary public should sign himself as a notary public in and for the county from which he is appointed, yet his certificate would not be fatally defective if the designation of the county is omitted. He may act in any part of the State, and his official acts are not confined to the county where he resides. It is true that under the Amendatory Act of 1889 (Act 74, Pub. Acts 1889) no person is eligible to the office of notary public unless the person is a resident of the county of which he or she desires to be appointed, yet their official acts are not necessarily confined to that county. The office would undoubtedly become vacant by removal from that county, but it does not follow that for this reason the party is a county officer. The appointment has always been regarded as one of state matter, rather than that of county. It is a state appointment, and the omission of the venue would not be a fatal defect in the jurat. It cannot matter to the party to be affected by such certificate from what particular county the notary public was appointed. In legal phraseology "venue" means the county where a cause is to be tried, and originally a venue was employed to indicate the county from which the jury was to come. The necessity of stating a venue at all is reluctantly confessed by the authorities. *Bean v. Ayers*, 67 Me. 487; *Briggs v. Nantucket Bank*, 5 Mass. 95. In process or pleading, the objection under the strict rules of the common law, and perhaps under our Statute, to the want of venue might be taken advantage of by demurrer. It may also be true that a certificate made by a justice of the peace would be void if it omitted the venue, were no venue stated at all in the instrument. But the question here involved is not to be governed by the reasons which would be applicable in such cases. Claim is also made by appellant in his brief that the Act under which the lien is claimed is unconstitutional and void. That question was settled by this court in *Oradock v. Dwight* (filed at the present term of this court), and the cases there cited.

Judgment affirmed, with costs.

The other Justices concurred.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Neil McNEIL

v.

BOSTON CHAMBER OF COMMERCE.

(....Mass....)

1. The rights of persons submitting bids for the erection of a building cannot be determined by the printed "notice to bidders" where it appears that the terms of the contract were orally fixed at a conference between the bidders and the persons requesting the bids, that the terms so fixed were not incorporated into the printed notice, and that both parties rested upon what was said and done at the conference.
2. A majority of a committee appointed by a corporation to contract for the erection of a building may, in the absence of the other members, lawfully act in letting the contract.
3. Silent acquiescence by directors of a corporation in acts of its building committee in procuring bids and letting the contract for the building with full knowledge of such acts will make the contract binding on the corporation, although the committee had in fact no authority to make it.
4. That acts of a committee were known and assented to by those who appointed it may be inferred from circumstances.

(September 2, 1891.)

REPORT by the Supreme Judicial Court for the Suffolk County (Holmes, J.) for the opinion of the full court of an action brought to recover damages for the breach by defendant of an alleged agreement to award the contract for erecting defendant's building to plaintiff in which a verdict had been directed in favor of defendant. *Judgment for plaintiff.*

The following questions were submitted to the jury:

First. "Did the committee on building purport to make a contract on behalf of the defendants by which they agreed to accept the lowest bid in case the building was built substantially in accordance with the plans and specifications submitted, without reserving the right to reject bids in that case?"

Answer. "Yes."

Second. "If such contract was made was it approved by the directors?"

Answer. "Yes."

Third. "If such contract was made, was it within the ostensible authority of the committee?"

Answer. "Yes."

Fourth. "Was the building as finally contracted for, a building substantially in accordance with the said plans and specifications?"

Answer. "Yes."

Fifth. "If the plaintiff is entitled to recover, what are his damages?"

Answer. "\$14,500."

The further facts appear in the opinion.

Messrs. Robert M. Morse, Jr., and Charles E. Hellier, for plaintiff:

Even if the plaintiff had incorporated the notice to bidders into the written offer made

and signed by him, it would have been competent for the plaintiff to show a subsequent parol agreement modifying and controlling it.

Cummings v. Arnold, 3 Met. 486; *Hastings v. Lovejoy*, 1 New Eng. Rep. 218, 140 Mass. 261; *Bartlett v. Stanchfield*, 3 L. R. A. 625, 148 Mass. 394; *Goss v. Nugent*, 5 Barn. & Ad. 65.

Silence of a principal, with knowledge of the acts of his agent, amounts to approval and ratification of such acts.

Brigham v. Peters, 1 Gray, 189; *Sherman v. Fitch*, 98 Mass. 59; *Foster v. Rockwell*, 104 Mass. 167; *Lyndeborough Glass Co. v. Massachusetts Glass Co.* 111 Mass. 315; *Matthews v. Fuller*, 123 Mass. 446; *Harrod v. McDaniels*, 126 Mass. 418; *Murray v. Nelson Lumber Co.* 3 New Eng. Rep. 419, 148 Mass. 250; *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 131 U. S. 871, 33 L. ed. 157; *Sawland v. Green*, 40 Wis. 431; *Pickard v. Sears*, 6 Ad. & El. 469.

Defendants actually held forth the committee as having "full powers and authority to procure plans and specifications for a building, and make the contracts for the erection and completion of the same," and the qualification upon their authority "subject to the approval of the directors," may fairly be understood as meaning "subject to the control of the directors."

See *Winchester v. Glacier*, 9 L. R. A. 424, 152 Mass. 316.

A corporation, like an individual, is bound by the acts of its agents within the scope of their apparent authority, or of that authority which it is customary and usual for such agents to have.

Fay v. Noble, 12 Cush. 1; *Lester v. Webb*, 1 Allen, 84; *Reed v. Ashburnham R. Co.* 120 Mass. 48; *Ayer v. R. W. Bell Mfg. Co.* 6 New Eng. Rep. 329, 147 Mass. 46; *Craft v. South Boston R. Co.* 5 L. R. A. 641, 150 Mass. 207; *Bartlett v. Mystic River Corp.* 151 Mass. 483; *Bank of Columbia v. Patterson*, 11 U. S. 7 Cranch, 299, 3 L. ed. 351; *Southern L. Ins. Co. v. McCain*, 96 U. S. 84, 24 L. ed. 653; *Mahoney Min. Co. v. Anglo-Californian Bank*, 104 U. S. 92, 26 L. ed. 707; *Haight v. Sahler*, 30 Barb. 218; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 80; *Georgia Military Academy v. Estill*, 77 Ga. 409.

Mr. Richard Stone, for defendant:

Plaintiff merely promised that he would submit a bid. That was not an acceptance of the offer. An offer to give a contract to the lowest bidder is not accepted by promising to submit a bid. An offer can only be accepted in the terms in which it is made. An acceptance, therefore, which modifies the offer in any particular, will go for nothing.

Langdell, Cont. p. 22; *Fry*, Spec. Perf. 8d ed. § 271.

A party incurs no responsibility by a mere proposition that is not accepted.

Waterman, Spec. Perf. § 183; *Potts v. Whitehead*, 23 N. J. Eq. 514. See also *Benjamin*, Sales, 4th ed. § 89, note c; *Gowing v. Knowles*, 118 Mass. 232.

It was clearly the intention of both parties that the whole of the contract should be in writing.

NOTE.—See note to *Fones Bros. Hardware Co. v. Rob. ante*, 353, 13 L. R. A.

The circumstance that the parties intend a subsequent agreement to be made is strong evidence to show that they do not intend the previous negotiations to amount to an agreement.

Pollock, Cont. 5th ed. p. 43, citing *Ridgway v. Wharton*, 6 H. L. Cas. 238, 264, 268, 305. See also *Lord Blackburn*, in *Richardson v. Gray*, L. R. 8 App. Cas. 1151; *Lewis v. Brass*, L. R. 8 Q. B. Div. 667.

The contract which the plaintiff alleges was made by the building committees was never approved by the directors as required by the vote of the stockholders under which the committee were appointed, and from which they derived their authority.

The approval required by the vote is the approval of the directors as a board.

This has been said to mean that it should be the vote of a majority of a quorum at a regular and legal meeting of the board.

1 Morse, Banks & Banking, 3d ed. § 124.

The assent of a majority of the directors, expressed by them individually, and not at a regular meeting of the board, is not sufficient to confer upon the cashier authority to do any act which he would not have authority to do unless it was conferred upon him by the directors.

Elliot v. Abbot, 12 N. H. 549. See also *Despatch Line of Packets v. Bellamy Mfg. Co.* 12 N. H. 207; *Edgerty v. Emerson*, 23 N. H. 559; *Ft. Scott First Nat. Bank v. Drake*, 35 Kan. 564; *Tenney v. East Warren Lumber Co.* 43 N. H. 343; *Corbett v. Woodward*, 5 Sawy. 403; *Baldwin v. Canfield*, 26 Minn. 43; *Ang. & A. Corp.* § 504; *Junction R. Co. v. Reeve*, 15 Ind. 237; *Barcus v. Hannibal R. & P. Pl. Road Co.* 26 Mo. 102; *D'Arcy v. Tamar. K. & C. R. Co.* 4 Hurlst. & C. 463; *Wood's Field, Corp.* § 209, and cases cited.

When authority is conferred upon two or more agents to represent their principal in transaction of business of a private nature, the rule is that such agency will be presumed to be joint, and can be executed only by all of them jointly.

Mechem, Ag. § 77, and cases cited. See also *Kupfer v. Augusta South Parish*, 12 Mass. 185, 189, note; *Sutton First Parish v. Cole*, 20 Mass. 232, 243; *Copeland v. Mercantile Ins. Co.* 6 Pick. 197, 201; *Story, Ag.* § 42; *Story, Cont.* § 208, and cases cited; *Wharton, Ag.* § 140, and cases cited.

C. Allen, J., delivered the opinion of the court:

There was sufficient evidence to warrant the finding that the members of the committee on building, who were present at the conference of March 15, purported to make a contract on behalf of the defendants, by which they agreed to accept the lowest bid, in case the building was built substantially in accordance with the plans and specifications submitted, without reserving the right to reject bids in that case. The presiding justice, in his charge to the jury, called attention to the distinct difference in the testimony introduced on the one side and on the other. Five different buildings had been selected by the architects and the building committee of the defendants, to whom written notices had been sent, requesting bids for the defendant's proposed new building. To each

of these a copy of the specifications was afterwards delivered, to which was attached a "notice to bidders," containing the terms of the bidding. After an examination of these documents, four of the selected builders declined to submit bids. A conference was thereupon invited and had, between the builders and the building committee, at which there was a full discussion, and certain changes from the terms of the "notice to bidders," and from the specifications, were agreed upon; and the builders agreed to submit bids. In respect to one particular, which has become material, the testimony is somewhat at variance as to what was the result of this conference. The "notice to bidders" contained the two following provisions: "The work to be let to the lowest and best bidder upon his executing to the Boston Chamber of Commerce a good and sufficient bond," etc. "The building committee of the Chamber of Commerce reserves the right to reject any and all bids." These provisions were the subject of discussion at the conference. All the witnesses agree that the words "and best" were to be struck out of the first clause. The plaintiff contends that the last clause was modified by an agreement that in case the building should be erected substantially in accordance with the plans and specifications then submitted, the contract should be given to the lowest bidder among the five selected builders. The defendant contends that the committee only agreed to give the contract to the lowest bidder among the builders, if any of their bids under the competition should be accepted; but that they did not surrender the right to reject all of the bids and open a new competition. The plaintiff offered testimony tending to support his view, which was met by testimony offered by the defendant tending to support the contrary view. This testimony was all submitted to the jury, under instructions to which no exception was taken; and their verdict sustained the view contended for by the plaintiff.

There can be no doubt that it was competent in law for the parties by an oral agreement to vary the terms of the "notice to bidders." This would be so even if that notice had expressed the terms of a concluded contract. *Burtlett v. Stanchfield*, 148 Mass. 894, 2 L. R. A. 625. But it was only a proposal which was never accepted as it originally stood; and it is not contended that there was anything in the nature of it to make it legally impossible for the final contract between the parties to be expressed and represented partly by the writing and partly by additions or changes orally agreed to.

The defendant, however, contends that an examination of the evidence shows clearly that both parties to the conference understood that the terms on which bids should be invited were to be expressed in writing, and that they were then and there undertaking to do no more than to settle the terms in which a future invitation should be expressed; so that the notice to bidders, subsequently sent, must be taken to embody all the terms upon which the bids were to be made. This proposition is controverted by the plaintiff, and it does not seem to us that it can be said to be clearly established. No witness testified that there was to be a new written or printed notice embodying the new terms, which had been settled upon. No one of the

builders testified that he accepted the new notice as having the effect contended for by the defendant. On the other hand, the plaintiff testified that he did not think he read it, but did not remember. The specifications attracted his chief attention. Mr. Woodbury testified that he did not remember whether there was any change in the notice to bidders. The several bidders apparently proceeded with their estimates without waiting for any new statement of terms, and when it came, no one of them appears to have treated it as embodying all the terms of a new proposal for bids. Indeed it plainly did not do so. One of the terms upon which there was no dispute was that the bids should be opened in the presence of all the bidders. There was a reason for insisting on this stipulation. The original notice to bidders provided for a delivery of the bids signed and sealed to the architects; but there was a distrust of the fairness of the architects. Mr. Lothrop, in his letter of March 12, declining to submit a bid under that notice, mentioned as one objection that the proposals should be opened in the presence of the bidders. At the conference this letter was read, and this stipulation, according to the testimony of the plaintiff, and of Mr. Lothrop, was expressly agreed to, and no witness said anything to the contrary. All agreed that the letter was read and its objections commented on, one by one. Nor does it appear that the terms of the new notice were fixed by the committee. The plaintiff asserts that it was prepared by one of the architects, who was not present at the conference. So far as it appears, the jury might properly find that both the committee and the builders rested upon what had been said and done at the conference.

The defendant further contends that the building committee were joint agents of the defendant, and that the four members who were present at the conference of March 15 could not execute the power which was delegated to the whole committee consisting of five members, jointly. It does not clearly appear that this was taken at the trial and it is not noticed in the charge of the presiding judge; but we have considered it. Where special agents are appointed to act jointly in the execution of a particular power, it has often been held that the action of all is necessary, in order to execute the power properly. This rule, however, is subject to many qualifications or exceptions. It is well understood that public agents may usually act by a majority. So also it has been settled that a majority of the directors of a corporation constitute a quorum, and a majority of the quorum may act. *Sargent v. Webster*, 13 Met. 497, 504; *Elderly v. Emerson*, 23 N. H. 555; *Wells v. Railway White Rubber Co.* 19 N. J. Eq. 402. Generally speaking, a committee of a corporation is subject to the same rules as the directors. *State v. Jersey City*, 27 N. J. L. 498; *Jenkins v. Doughty Falls U. School Dist.* 89 Me. 220. It would be very inconvenient in practice if a committee of this character, whose duties involve many acts in carrying out the general purpose of their appointment, could do nothing if a single member should be absent. There is sufficient precedent for holding that a majority may act, and such is the better rule. *Kupfer v. Augusta South Parish*, 12 13 L. R. A.

Mass. 185; *Damon v. Granby*, 2 Pick. 845; *Hayward v. Pilgrim Soc.* 21 Pick. 275, 277; *Haven v. Lowell*, 5 Met. 35, 42; *Weymouth & B. Fire Dist. v. Norfolk County Comrs.* 108 Mass. 142.

Moreover, there was evidence from which the jury might infer the assent of Mr. Speare, the absent member of the committee, to what was done by his associates. He went away temporarily, to New Orleans, leaving the business in their hands. But on his return it expressly appears that he had a conference with them, or with some of them, and that they undertook to tell him what had been done. He denies, to be sure, that what they told him was in accordance with what the plaintiff contends and what the jury have found to be the fact. The significant fact, however, that they undertook to tell him the result of the conference in respect to the right of the committee to reject any and all bids is testified to by Mr. Speare. He says: "They told me they had expressly reserved that" if, in point of fact, the reservation of this right was accomplished with the qualification that they would accept the lowest bid in case they should build substantial, in accordance with the plans and specifications submitted, the jury might think it a natural inference that at that time, before any controversy had arisen as to accepting the plaintiff's bid, Mr. Speare's associates told him all that had been agreed to on this head, though Mr. Speare had forgotten a part of it at the time of testifying. Mr. Lothrop's testimony tends to support such an inference. He said: "Before the meeting I stated to Mr. Blaney and Mr. Speare that in my opinion the right to reject any and all bids passed (ceased?) after they had selected five from the many mechanics who had been recommended; and I was assured by them that if any one of these parties whom they had selected, and whom they supposed to be responsible, should be the lowest bidder, his bid would be accepted, and it was on that condition that I estimated, and I should not have figured on any other." He further testified that in a private conversation, perhaps a different one before that meeting, Mr. Speare said he would not consent to give up the right to reject all bids. It is further to be observed that the chief reason assigned by the members of the committee who were present at the conference, why they did not wish to give up the right to reject any and all bids, was that they were not willing to be bound absolutely; that the cost of the building might be too much for their means, so that a substantial change of plan might be necessary, or possibly the erection of the building given up entirely; that the lowest bid might be entirely above the views of the committee, so that they were unwilling to accept it unconditionally. Mr. Speare himself testified that he gave to Mr. Lothrop two reasons why the committee would not give up the right to reject all bids. The first was, that the lowest bid might be a sum which the directors would not think advisable to spend to erect a building. The second was, that it was the directors who would be the final arbitrators whether the committee should award the contract, and therefore the committee would have no right to give up the right to reject any and all bids. Mr. Lothrop,

on the other hand, testified very explicitly and in detail, that while Mr. Speare in conversation had mentioned the names of the committee to him, he (Mr. Lothrop), did not know then, nor at the time of testifying, whether the action of the committee must be approved by any other board or body. Looking at all the testimony, if the objection now urged had been distinctly presented as a question of fact at the trial, it must have been left to the jury to determine whether Mr. Speare assented to the terms of the contract, by which (as found by the jury) his four associates purported to agree to accept the lowest bidder, in case the building should be built substantially in accordance with the plans and specifications submitted. Their finding that the contract was approved by the directors must have involved the finding that it was approved by Mr. Speare. And this finding might well be reached without implying any intentional misstatement on his part.

The remaining questions are, whether there was sufficient evidence to warrant the second and third findings, or either of them, that such contract, if made by the committee, was approved by the directors, and was within the ostensible authority of the committee. If either of these was supported by the evidence, it is enough for the plaintiff's purposes, and most, if not all, of the evidence relating to the second finding bears also upon the third. The plaintiff contends that it was within the ostensible authority of the committee to fix the terms upon which it would receive bids, and to make the agreement which is embodied in the first finding of the jury, without any reference to an approval by the directors. He urges that this was within the ordinary province of a building committee; and that, in this instance, the directors knew that there was to be a competition for bids, that this competition was to be limited to five selected builders, and that the committee would fix the terms of it; that the directors were well aware that the committee were going on to attend to all these matters, that a vote had already been passed by the directors authorizing the committee to make leases in the new building, that they also knew that the architects had been selected, that the plans were hanging up in the office, that the erection of the new building was the most important subject which the board of directors or the Chamber of Commerce had under consideration during this period; that it was a subject of constant talk; that no director ever objected to the committee's undertaking to fix the terms of the competition among the builders, or questioned its powers to do so, till after a letter from the plaintiff's attorney threatening an action at law. There was testimony in support of these various propositions. So far as appears, no one of the bidders doubted the power of the committee to act in the matter. The committee assumed to make changes in the terms of the competition at its own will. There is nothing to show any suggestion to any of the bidders in respect to the need of consulting the directors, except in Mr. Speare's testimony already referred to, of his conversation with Mr. Lothrop. The notice to bidders held out the building commit-

tee as having the power to act in the premises. No mention of the directors was made in it. The board of directors had regular monthly meetings. Mr. Speare was president of the board, and was upon the building committee. He testified: "It was known to the directors, in a general way, that specifications, notice to bidders, and other details preliminary to obtaining bids and making the contract were being attended to by the committee and the architects." "Was it not the understanding of the directors that there was to be a competition? Yes, sir. How was that known to them? Simply in a general way; I presume at a meeting of the directors I told them." He added, later, that the board of directors knew that the committee was trying to get bids and that no effort was made to inform bidders that they could not safely deal with the committee. According to the strict letter of the original vote, the committee could not even procure plans and specifications, except subject to the approval of the directors. It was allowed, however, not only to procure plans and specifications, but to employ the architects, without formally consulting the directors.

Without dwelling further upon the details of evidence, the jury might properly find that the committee itself believed that it was authorized to go on as it did without consulting the directors as to the details, and that the directors were aware in a general way of what the committee was doing. It seems to us that the jury, as a result of the whole testimony, might properly come to the conclusion that the contract was within the ostensible authority of the committee, and that the bidders had a right to assume that the defendant would be bound by the contract of the committee as to the terms of the bidding.

The doctrine as to the ostensible authority is thus stated in *Bronson v. Chappell*, 79 U. S. 12 Wall. 681, 688, 20 L. ed. 436: "Where one without objection suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, although no previous authority exists, in all respects as if the requisite power had been given in the most formal manner." Circumstances may warrant an inference that acts of a committee openly done and extending over a considerable period of time were known and assented to by those who appointed the committee. The directors represented the corporation, and if the directors knew, and by silence acquiesced in the acts of the committee, that is enough. The vote of the stockholders would show what in the first instance was the actual authority of the committee, but the course of the directors might be considered in determining its ostensible authority. A secret or unknown limitation of authority imposed by the stockholders would not control an apparent authority from the directors, since the business was within the scope of the general authority of directors. This was clearly left to the jury by the presiding judge in terms to which the defendant did not except, and which appear to be unexceptionable. The decisions cited by the plaintiff afford various illustrations of the application of the rule of law as to

apparent authority in an agent. The rule itself is not open to doubt. *Pay v. Noble*, 12 Cush. 1, 17, 18; *Lester v. Webb*, 1 Allen, 34; *Ayer v. R. W. Bell Mfg. Co.* 147 Mass. 46, 6 New Eng. Rep. 329; *Southern L. Ins. Co. v. McCain*, 96 U. S. 84, 24 L. ed. 653; *Mahoney Min. Co. v. Anglo-Californian Bank*, 104 U. S. 192, 26

L. ed. 707. See also *Case v. Citizens Bank of Louisiana*, 100 U. S. 446, 454, 25 L. ed. 695, 698. The defendant does not now insist that the evidence did not warrant the fourth finding of the jury.

The result is, that there should be—
Judgment for the plaintiff on the finding.

DELAWARE CHANCERY COURT.

William G. BRYAN *et al.*

v.

Rebecca P. MILBY.

(3 Del. Ch.)

No obligatory trust is created by a will giving all of testator's estate to his wife with a request that if she does not require the whole of it as a support, she will, at her death, will the remainder to certain other persons named.

()

BILL filed in Kent County by the children of Charles A. Bryan to establish a trust in certain money alleged to have been loaned to defendant by Mary R. Bryan, deceased, and to recover such money for the benefit of com-

plainants, the alleged *cestuis que trustent*. *Bill dismissed.*

The case sufficiently appears in the opinion. *Mr. J. Alexander Fulton*, for complainants:

Precatory words in a will create a trust. But the objects of the bounty must be sufficiently described, and the property sufficiently defined.

2 Bouv. L. Dict. 364.

Words of recommendation, request, entreaty, wish or expectation, addressed to a devisee or legatee, make him a trustee for the person or persons in whose favor such expressions are used, provided the testator has pointed out, with sufficient certainty and clearness, both the subject matter and the object or objects of the intended trust.

NOTE.—Will—Precatory words, effect of.

Where a testator devises property absolutely and recommends devisee at his death to leave it in trust to certain of his descendants, and if there be none such then living then to a certain college, no trust is created in favor of the college. *Re Whitcomb's Estate*, 86 Cal. 285.

Where property is given absolutely and without restriction, a trust is not to be lightly imposed upon mere words of recommendation and confidence. *Colton v. Colton*, 127 U. S. 314, 32 L. ed. 144; *Hess v. Singler*, 114 Mass. 59.

A clause in a will declaring that testator "desires" that a certain disposition should be made of all that remains on his wife's death of the real and personal property given her by previous clauses of the will is merely precatory, and will not prevent her from taking the fee-simple title of the land and the absolute property in the subject of the bequest. *Bills v. Bills*, 8 L. R. A. 696, 80 Iowa, 269.

Precatory words expressive of desire, recommendation, and confidence are not sufficient to convert a devise or bequest into a trust. *Hopkins v. Glunt*, 2 Cent. Rep. 64, 111 Pa. 287.

After an unqualified devise by a testator of his property, no precatory words addressed to his devisee can defeat the estate previously granted. *Ibid.*

Where a testator devised real estate to his widow in fee simple, the words: "I only make this request of her, and only as a request, . . . viz., that in the event she should marry again she will see that the interests of our children in said property are protected,"—the widow takes an absolute estate in the land, and does not hold it in trust for herself and children. *Sale v. Thornberry*, 86 Ky. 206.

Provision giving the whole estate to certain persons, "assuming that they will not fail to do for another son as their fraternal regard may require," does not create a trust and is not an incumbrance on real estate. *Rose v. Porter*, 1 New Eng. Rep. 26, 141 Mass. 309.

13 L. R. A.

When create a trust.

Precatory words are frequently sufficient to create a trust by implication. *Jones v. Jones*, 13 West. Rep. 527, 124 Ill. 264.

They will be held to import a trust when they are so used as to exclude all option or discretion in the party who is to act, when the subject is uncertain. *Maught v. Getzendanner*, 3 Cent. Rep. 866, 65 Md. 527.

Words of recommendation, request, entreaty, wish or expectation will impose a binding duty upon the devisee, by way of trust, provided the testator has pointed out with clearness and certainty both the subject matter and the object of the trust. *Noe v. Kern*, 12 West. Rep. 234, 93 Mo. 367.

The words "wish" and "desire" used as expressing a desire for an act to be done by some person named, may be held to be precatory; but when used to express the intention of the testator, they are mandatory. *Taylor v. Martin* (Pa.) 8 Cent. Rep. 139.

Where the donee of property is "desired" or "requested" by the testator to dispose of that property in favor of others, those words are imperative and their use will create a trust. *Riker v. Leo*, 115 N. Y. 99. See 1 Wms. Exrs. 88; *Vandyck v. Van Beuren*, 1 Cal. 84.

In a will devising a farm to testator's son for his support, thereby indicating that a life estate is intended, and then declaring that if the son should have family the testator desires the estate to go to the use of his children, the word "desire" is mandatory. *Oyster v. Knoll*, 137 Pa. 448.

If a testator should desire his wife, at or before her death, to give certain personal estate among such of his relatives as she should think most deserving and approve of, such request would be held to be a legacy among such relatives. *Wheeler v. Lester*, 1 Bradf. 298; *McLachlan v. McLachlan*, 9 Faig. 534, 4 L. ed. 806.

Precatory words in will. See notes to *Slattery v. Wason* (Mass.) 7 L. R. A. 393; *Knor's App.* (Pa.) 6 L. R. A. 353.

Trust created by. *Ibid.*

1 Jarman, Wills, 2d Am. ed. 1849, p. 882; Little & Brown's ed. 1881, p. 885. See also 2 Story, Eq. 2d ed. § 106.

It is plain from the will that the intent of the testator was to provide for the support of his widow during life, and that whatever remained at her death should go to the children of his brother Charles.

In the construction of wills the intention of the testator is the first object of inquiry, and when found it must be fully carried out, and control the disposition of the estate.

Precatory words, when used in a will, are imperative, and must be so regarded.

Where the object and the subject can be discovered from the will itself, or the will and surrounding circumstances, or where the court, by the exercise of its usual powers and functions, can ascertain the subject of the gift and the persons to be benefited, the trust shall not fail because of uncertainty.

1 Jarman, Wills, 2d Am. ed. 1849, p. 882; 2 Story, Eq. § 1068; *Malim v. Keighley*, 2 Ves. Jr. 338; *Wilson v. Major*, 11 Ves. Jr. 205; *Wright v. Atkyns*, 17 Ves. Jr. 255; *Parsons v. Baker*, 18 Ves. Jr. 476; *Briggs v. Penny*, 8 Eng. L. & Eq. 281; *Coates' App.* 2 Pa. 129; *McKonkey's App.* 18 Pa. 253; *Pennock's Estate*, 20 Pa. 268; *Ingram v. Fraley*, 29 Ga. 553; *Henderson v. Blackburn*, 104 Ill. 227; *Bull v. Bull*, 8 Conn. 48; *Hall v. Otis*, 71 Me. 826.

This is a Virginia case. The testator was domiciled there at the time of his death. The will was proved there. The estate was there. The rule in such cases is that the law of the testator's domicile shall direct the court of distribution.

Wms. Exrs. 366.

The rule above contended for is the one adopted and acted upon in Virginia.

Harrison v. Harrison, 2 Gratt. 1.

That the gift over was subject to accretion or diminution is immaterial.

Pierson v. Garnet, 2 Bro. Ch. 39; *Horwood v. West*, 1 Sim. & Stu. 387; *Knight v. Knight*, 3 Beav. 148.

Mr. Nathaniel B. Smithers, Sr., for defendant:

Wherever a bequest is made in terms importing an absolute gift, precatory words will never be construed as creating a trust, if either they ought not upon the whole will to be considered as imperative, or if the subject matter of the request be uncertain, or if the objects intended to be benefited be not clearly ascertained. If in any gift there is manifest an intention to give to the devisee a right or power to dispose of the property so given, and by using such right to leave more or less or nothing upon which such trust would operate, then such precatory words will never be construed as imperative.

This principle is found in Lewin on Trusts, 194; and *Harding v. Glynn*, 1 Atk. 469, 2 Lead. Cas. Eq. 4th Am. ed. 1079-1082, 1086, 1087, and it is sustained by the adjudicated cases.

Wynne v. Hawkins, 1 Bro. Ch. 179; *Pierson v. Garnet*, 2 Bro. Ch. 328; *Sprange v. Barnard*, 2 Bro. Ch. 585; *Malim v. Keighley*, 2 Ves. Jr. 333; *Pushman v. Filliter*, 3 Ves. Jr. 7; *Heneage v. Andover*, 10 Price, 230; *Horwood v. West*, 1 Sim. & Stu. 387; *Knight v. Knight*, 3 18 L. R. A.

Beav. 171; *Gowman v. Harrison*, 10 Hare, 234; *Parnall v. Parnall*, L. R. 9 Ch. Div. 96; *Mussoorie Bank v. Raynor*, L. R. 7 App. Cas. 321.

In the decisions of the chancery judges of England for more than a century there is an unbroken assent to the proposition that, when in a will there has been an absolute gift and a subsequent bequest over of an unused residue, it is void, and where the disposition over has been attempted to be made by the agency of a precatory trust it is equally void, and that this always occurs when the terms of the first bequest show that the person to whom it was given had the right to spend the property out of which the gift over, whether direct or precatory, was to arise.

The only change which has been made in England is the modification of the doctrine of the earlier cases in regard to the presumption with which the judges approached the subject of construction. It was at first held that words of desire and confidence had at least a quasi technical meaning and force and *prima facie* imported a trust unless controlled by other expressions. This was unsatisfactory to many of the ablest judges.

See *Wright v. Atkyns*, 1 Ves. & B. 313; *Sale v. Moore*, 1 Sim. 534; *Heneage v. Andover*, 10 Price, 230.

As the result of this extensive and increasing dissatisfaction the current of judicial sentiment has changed and in modern decisions the leaning of the court has been distinctly against the establishment of precatory trusts.

See *Mussoorie Bank v. Raynor*, L. R. 7 App. Cas. 321.

Such being the doctrine of the English courts, it will be found that the American decisions are in harmony with them.

See *Howard v. Carusi*, 109 U. S. 725, 27 L. ed. 1089; *Coates' App.* 2 Pa. 129; *McKonkey's App.* 18 Pa. 253; *Pennock's Estate*, 20 Pa. 268.

The *cestuis que trust* could not have filed a bill alleging that the widow was extravagantly wasting the fund and asking that it be impounded and an allowance made to her.

Wynne v. Hawkins, 1 Bro. Ch. 179; *Pushman v. Filliter*, 3 Ves. Jr. 7; *Sprange v. Barnard*, 2 Bro. Ch. 585; *Mussoorie Bank v. Raynor*, *supra*.

Even under the ancient stringent rule which made the use of precatory words presumptive evidence of the intention to create a trust, the will of William A. Bryan imposed upon his widow no obligatory trust as to the bequest to her,—and much more, under the modern canon of interpretation, by which words of desire, request, or expectation are deprived of their former technical signification and are construed according to their ordinary meaning, such bequest will be held to have been an absolute gift.

With this conclusion the law of Virginia, the domicile of the testator, is in harmony.

May v. Joyner, 20 Gratt. 692; *Carr v. Effinger*, 78 Va. 197; *Cole v. Cole*, 79 Va. 251.

Saulsbury, Ch., delivered the following opinion:

An agreement between the solicitors for the plaintiffs and defendant respectively was filed in this cause before the argument thereof began, which is in the following words: "It is agreed by the solicitors for the complainants

and defendants respectively, in order to save costs and expenses consequent upon taking testimony, that as if upon demurrer to so much of the complainant's bill as alleges that by the bill of William A. Bryan, the gift to his widow, Mary R. Bryan, was upon an obligatory trust in favor of the complainants, it shall be first argued whether any such trust was by the said will created; and if it shall be finally determined that such trust was thereby created, then the parties shall be at liberty further to proceed in the cause and take testimony in support of their respective allegations of facts and go on to hearing."

The only question for me to decide, therefore, is, Was the gift to his widow, Mary R. Bryan, by William A. Bryan upon an obligatory trust in favor of the complainants?

That gift was as follows: "I give and devise to my wife, Mary R. Bryan, all of my estate both real and personal. And I do hereby authorize and direct my executrix hereinafter named, to sell my real estate as soon as it can be sold to advantage and to invest the money in good stocks and bonds. And I do request my wife if she should not require the whole of my estate as a support, that she will will at her death the remainder to the children of my brother, Charles A. Bryan, of Cecil County, Maryland. I do hereby constitute and appoint my wife, Mary R. Bryan, sole executrix to this my last will and testament, with the request to the court in which she may qualify that no security may be required of her and no appraisalment be made of my estate."

This is the first case, so far as I know, in respect to what is called precatory trusts, which has come before the courts of Delaware for decision. I am not therefore embarrassed by authority here upon the subject.

The tendency of modern decisions, however, is, not to extend the rule or practice, which from words of doubtful meaning deduces or implies a trust.

In the case of *Mussoorie Bank v. Raynor*, L. R. 7 App. Cas. 331, a man gave his widow the whole of his real and personal property, feeling confident "that she will act justly to our children, in dividing the same when no longer

required by her. The privy council, in deciding in favor of the widow, expressed the opinion that "the current of decisions now prevalent for many years in the court of chancery shows that the doctrine of precatory trusts is not to be extended."

Lindley, L. J., in a subsequent case, after quoting from the judgment in the case of *Mussoorie Bank v. Raynor*, *supra*, remarked: "I am very glad to say that the current has changed, and that beneficiaries are not to be made trustees unless intended to be so by the testator." But I am not going to enter into any extended argument in respect to the principles involved in the case.

The principles have been fully and ably discussed by the solicitors representing the parties plaintiff and defendant. Their arguments were marked by extraordinary research and ability.

I content myself therefore by simply saying that there is no precatory trust in the will of William A. Bryan in favor of the plaintiffs.

The subject of the gift claimed as precatory was not certain. The testator, William A. Bryan, gave and devised to his wife, Mary R. Bryan, all of his estate, both real and personal, after the payment of his debts, and only requested his wife if she should not require the whole of his estate, that she should will at her death, not the property devised to her, but the remainder, to the children of his brother, Charles A. Bryan of Cecil County, Maryland.

There might be, or there might not be, any remainder of his estate which could be enjoyed after his wife's death by any person whomsoever. A necessary ingredient or characteristic, therefore, in a precatory devise or gift is wanting in this case. There was nothing that this court could have ordered impounded if application for that purpose had been made to it.

I must therefore decide, and I do so decide, that the gift to Mrs. Bryan was absolute and unconditional, and not upon an obligatory trust in favor of the complainants.

The bill of the complainants is therefore dismissed with costs.

NEBRASKA SUPREME COURT.

George W. HEPLER, *Plff. in Err.*,

Henry H. DAVIS.

(.....Neb.....)

*A judgment was recovered against A in the State of Illinois, in the year 1879, and

*Head note by MAXWELL, J.

A soon afterwards removed to this State, and has resided herein continually ever since. In 1888, the judgment was revived in Illinois, without personal service upon A in that State, or an appearance by him in the action, and suit was thereupon brought on the revived judgment in Nebraska. *Held*, that the alleged revivor of the judgment in Illinois did not affect the running of the Statute of Limitations in this State, as the court had no jurisdiction over the defendant

NOTE.—The doctrine of the principal case illustrated.

The doctrine of the principal case has been sustained and recognized from a very early period. In the case of *Bank of the United States v. Donnelly*, 33 U. S. 8 Pet. 373, 8 L. ed. 978, the court held that "remedies are to be governed by the laws of the country where the suit is brought." The nature, validity, &c., of the contract may be ad-

mitted to be the same in both States; but the mode by which the remedy is to be pursued, and the time within which to be brought, may essentially differ. The laws of the State where the action is brought must govern the limitation of the suit.

The same principle is established by the court in *Pearson v. Dwight*, 2 Mass. 84, and *Byrne v. Crowninshield*, 17 Mass. 55, where it is shown that the encroachment upon the *lex fori* is inconsistent

and could make no order to affect him personally.

(July 2, 1891.)

ERROR to the District Court for Fillmore County to review a judgment in favor of defendants in an action brought to compel payment of a judgment. *Affirmed.*

The facts are stated in the opinion.

Messrs. Billings & Billings, for plaintiff in error:

By the common law of our county the Statute of Limitations commences to run at the time of the judgment of revivor.

Littleton, § 805.

Lord Coke observes in commenting upon this passage in Littleton, 290, b: "So by the writ it appeareth that the defendant is to be warned to plead any matter in bar of execution and therefore albeit it be a judicial writ."

Every writ whereunto the defendant may plead, be it original or judicial, is in law an action.

Pulteney v. Townson, 2 W. Bl. 1226; *Kirkland v. Krebs*, 34 Md. 98.

It is hardly to be supposed that the law intended to allow the plaintiff to revive his judgment by *scire facias* and not permit it to be used as evidence of indebtedness in an action of debt upon it in any other State. If a judgment is good for anything it is certainly good as an evidence of indebtedness.

See U. S. Const. art. 4; *Packer v. Thompson*, 25 Neb. 688.

In an action based on a judgment of revivor from another State the Statute of Limitations begins to run from the date of such revivor and not from the date of the original judgment.

Pagan v. Bently, 32 Ga. 584.

A court that has authority to render a judgment in the first instance certainly retains the power where no appeal has been taken to keep such judgment alive until it is satisfied.

Dennis v. Omaha Nat. Bank, 19 Neb. 677; *Mitchell & R. Furniture Co. v. Sampson*, 40 Fed. Rep. 805; *Wegman v. Childs*, 41 N. Y. 159; *Ullaher v. Stewart*, 71 Pa. 170; *Woodward v. Baker*, 10 Or. 491.

This can do the defendant no injustice because he was charged with the knowledge that the court which rendered the original judgment would have power to keep it alive until paid because such was the law at that time.

Elasser v. Haines, 52 N. J. L. 10.

Mr. F. B. Donisthorpe, for defendant in error:

A judgment rendered in the State of Illinois becoming dormant may be revived by service by publication, whereby it will become of

full force and effect against the defendant in that State; but not in this State, unless personal service of notice of the proceedings had to revive said judgment be had upon said defendant.

Tessier v. Englehardt, 18 Neb. 177.

The judgment, as revived, is simply a continuation of the vitality of the original judgment with all its incidents from the time of its rendition. And not, as plaintiff in error would have it, a new judgment.

Eaton v. Hasty, 6 Neb. 424.

The defendant having resided in this State for eight years after the original judgment against him was rendered, and before the commencement of this action on said judgment revived, our Statute of Limitations prevents such action from being maintained in this State.

Neb. Code Civ. Proc. § 10; *Marz v. Kilpatrick*, 25 Neb. 107.

Maxwell, J., delivered the opinion of the court:

In January, 1879, the plaintiff recovered a judgment against the defendant in the State of Illinois, the defendant being personally served with summons. Soon after the recovery of the judgment the defendant removed to this State, and has continued to reside here to the present time. On the 12th of October, 1888, the judgment in Illinois was revived in that State without jurisdiction of the person of the defendant. In December following this action was brought in the District Court of Fillmore County, upon the judgment so alleged to have been revived. On the trial of the cause the court found as follows: "That on the 7th day of January, 1879, plaintiff recovered judgment against the defendant in the Circuit Court of Livingston County, Ill., on personal service, said court being a court of general jurisdiction, for the sum of \$180.65, and \$49.25 costs of suit, together with interest at six per cent per annum, in an action then pending in said court between said parties. That on the 12th day of November, 1888, said plaintiff obtained a judgment of revivor in said court as by the law of said State provided, which said law is as follows, viz.: Sec. 27. *Scire Facias*. It shall not be necessary to file a declaration in any *scire facias* to revive a judgment, or foreclose a mortgage, in any court of record in this State; and in any such case of *scire facias* to revive a judgment, where the plaintiff in the judgment sought to be revived, or his attorney, shall file an affidavit in the office of the clerk of court, out of which the writ issues, showing that the defendant in the *scire facias* resides or has gone out of the State, or is concealed within the State, so that process cannot be served on him, and stating the place of residence of such de-

with the necessity and convenience of every State in controlling remedies in its own courts.

Though the Statute of Limitations of the State where the parties resided, and where the debt was contracted, had barred the remedy, yet, when resort was made to the courts of another State, the statutes of the latter must govern that remedy. *M'Elmoyle v. Cohen*, 38 U. S. 13 Pet. 312, 10 L. ed. 177.

It has been held by the Supreme Court of Arkansas that the Statute of Limitations is not a bar to the revival of a judgment by writ of *scire facias*. 13 L. R. A.

Montgomery v. Brittin, 23 Ark. 322; *Brearily v. Peay*, Id. 172.

Code doctrine regarding the revival of judgments.

A judgment in a civil action may be revived by filing a petition in the action alleging the time the judgment was rendered, that it remains unsatisfied in whole or in part, stating the amount it is claimed the judgment should be revived for; which petition shall be verified, as complaints are required to be by the Act. Colo. Code, § 241; N.Y. Code Civ. Proc. 428.

defendant, if known, or that on due inquiry his place of residence cannot be ascertained, then, in such case, notice to the defendant may be given by publication and mail in the same manner as is provided by statute for notice in like cases in chancery." Chap. 110, Rev. Stat. Ill. 1883. "Sec. 25. Revival of Judgment by *Scire Facias*. Judgments in any court of record in this State may be revived by *scire facias*, or an action of debt may be brought thereon, within twenty years next after date of such judgment, and not after." Chap. 83, Id. "Notice by Publication, etc. Sec. 12. Whenever any complainant or his attorney shall file in the office of the clerk of the court in which his suit is pending an affidavit showing that any defendant resides or hath gone out of this State, or on due inquiry cannot be found, or is concealed within this State, so that process cannot be served upon him, and stating the place or residence of such defendant, if known, or that upon diligent inquiry his place of residence cannot be ascertained, the clerk shall cause publication to be made in some newspaper printed in his county, and, if there be no newspaper published in his county, then in the nearest newspaper published in this State, containing notice of the pendency of such suit, the names of the parties thereto, the title of the court, and the time and place of the return of summons in the case; and he shall also, within ten days of the first publication of such notice, send a copy thereof by mail, addressed to such defendant whose place of residence is stated in such affidavit. The certificate of the clerk that he has sent such notice in pursuance of this section shall be evidence." Chap. 22, Id. "That no personal service of notice was had of said proceedings upon said defendant who then and now and for eight years last past

has continually been a resident of Fillmore County, Neb., and he had no notice or knowledge in any manner of said proceedings. It is therefore considered by the court that said cause of action did not accrue within five years next before the commencement of this action, and is therefore barred by the Statute of Limitations, and that the plaintiff's cause of action be and the same is hereby dismissed."

In *Packer v. Thompson*, 25 Neb. 688, the plaintiff in error had removed from Iowa to this State after a judgment had been recovered against him in that State. Eight years afterwards he returned to Iowa on a visit, when he was personally served with a conditional order of revivor, and the action afterwards revived. An action was thereupon brought on the revived judgment in this State, and the action was sustained. That case, however, differs materially from this. The judgment rendered in Illinois had no extraterritorial force. If it was sought to collect it in this State by due course of law, an action must be brought thereon, and service had upon the defendant, and a defense such as payment, release, the Statute of Limitations, etc., is available. An action upon a foreign judgment must be brought within five years, or it will be barred; and the judgment of a sister State is, within the meaning of the Statute of Limitations, a foreign judgment. Neither did the alleged revivor, there being neither an appearance by nor service on the defendant, remove the bar of the Statute, as the writ could have no effect beyond the limits of the State where issued. The bar of the Statute of Limitations, therefore, was not removed by the attempted revivor, and the action is barred.

The judgment is right, and is affirmed.
The other Judges concur.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF GEORGIA.

Philip A. SCHLEY

Charles H. P. COLLIS *et al.*

(....Fed. Rep....)

1. **The assent of executors to a specific legacy** is presumed where the legatees are in possession under it.
2. **He who accepts a benefit under a will** must adopt the whole contents of the in-

strument renouncing every right inconsistent with it.

3. **An execution under a judgment against executors** as such cannot be levied on land of which a life tenant under the will had taken possession with the executors' assent before the judgment was rendered.

(June, 1891.)

SUIT to enjoin the sale of certain property under an execution. *Injunction granted.*

NOTE.—*The doctrine of elections as applied to wills.*

It is a familiar principle of equity jurisprudence that one who is the recipient of a beneficial interest under a will is assumed to have ratified the other recitals of the instrument and the courts will not allow him to set up a cause of action of his own, however well founded, which has a tendency to defeat or in any way impair the full operation of the will. *Collins v. Woods*, 66 Ill. 283; *Morrison v. Bowman*, 29 Cal. 387; *Theilsson v. Woodford*, 13 Va. Jr. 308; *Hyde v. Baldwin*, 17 Pick. 303; *Brown v. Ricketts*, 3 Johns. Ch. 533, 1 L. ed. 714; *Cox v. Rogers*, 71 Pa. 160; *Churchman v. Ireland*, 1 Russ. & M. 230; *Wise v. Rhodes*, 84 Pa. 402.

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It is an exceedingly stubborn principle that no one shall be permitted to claim under, and adverse to, a will. If the testator assumes to dispose of property belonging to a devisee or legatee, the latter, accepting the benefit, must also make good the testator's attempted disposition." *White v. Brokaw*, 14 Ohio St. 339. See also *Havens v. Sackett*, 15 N. Y. 365; *Ditch v. Sennott*, 5 West. Rep. 162, 117 Ill. 362.

In 1 Jarman, Wills, 386, the doctrine of election is stated thus: "That he who accepts a benefit under deed or will must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it." See also *Havens v. Sackett*, *supra*.

The facts are stated in the opinion.

Mr. W. W. Montgomery for plaintiff.

Messrs. Charlton & Mackall for defendants.

Speer, J., delivered the following opinion:

This case depends upon the following statement of facts: One Anderson was the assignee, under the laws of New York, of the estate of DeLeon, and committed a devastavit thereon. William Schley, late of this district, was the surety upon the assignee's bond, and after the death of Schley, who died testate, Collis, who had been substituted as assignee of this New York estate, brought suit there on the bond of the defaulting assignee and obtained judgment for the sum of \$7,000. The record of the proceedings there was brought to this district, and suit instituted in the circuit court, at common law, against the executors of William Schley, to wit: Thomas M. Norwood and J. W. Schley on their testator's obligation as surety for Anderson, assignee, and a verdict and judgment was rendered against them, as executors. The execution was issued upon that judgment, and levied upon a certain estate known as "Richmond Hill," near Augusta, claimed by the complainant in the bill now before the court, which was duly advertised for sale. This complainant is Philip A. Schley. He was the brother of William Schley and he claims an estate for life in Richmond Hill by virtue of the following item of the will of William Schley:

"Item 5th.—I direct that my old home known as Richmond Hill in Richmond County, Georgia, shall be held by my executors as trustees for, and during the lives of my sister Mary Ann Haines, and my brother Phillip A. Schley, and during the life of the survivors of them. My purpose being to give them a home as long as they live."

He insists that the estate cannot be lawfully sold for the debts of William Schley, sued to judgment, after the specific legacy made by the clause of the will above quoted was assented to by the executors, and after the property had long been in his possession. He had been in possession of this property long anterior to the death of William Schley; and continuously since then. It is in dispute whether he was there by the express assent of the executors, or as a tenant by sufferance, but in the view the court has of the law that fact is not important to be settled at this time. The rule as announced by the Supreme Court of Georgia in *Parker v. Chambers*, 24 Ga. 527, may be deduced from the following extract from that decision:

When a person accepts a legacy, it is an election to stand by the provisions of the will. *Fulton v. Moore*, 26 Pa. 468; *Pennsylvania L. Ins. Co. v. Stokes*, 61 Pa. 138.

Courts of equity adopt the rational exposition of the will, that there is an implied condition that he who accepts a benefit under the instrument shall adopt the whole, conforming to all its provisions, and renouncing every right inconsistent with it. *Story, Eq. § 1077.*

In *Wilbanks v. Wilbanks*, 18 Ill. 19, where a testator devised property belonging to his son to a third person, and in the same will made a devise to the son, it was held that the son must either relin-

"The objection that no evidence was submitted to the jury to prove the assent of the executor to the legacy to Chloe Parker and her children cannot be sustained. The executor allowed the property to remain in the possession of the tenant for life, and that was an assent to the entire legacy. It was in her possession at the death of the testator, and remained there, with the assent of the executor of course.

In *Jordan v. Thornton*, 7 Ga. 520, the court observes: "It was further claimed before the court below that there was no assent to the legacy by the executor proven, and therefore the plaintiff had no right of action. The court held that assent might be implied from possession; and as there was some evidence of possession, both in the tenant for life and in the plaintiffs after her death, he left that question to the jury. And this view of the case we affirm. Assent to a legacy is necessary to enable a legatee to sue at law for his legacy. It is not necessary to show an express assent; it may be implied from facts and circumstances. The assent, it is true, must be clear and unambiguous. The possession of the property willed does make out a clear case of assent by implication, - citing 2 Wms. Executors, p. 980; Mathews, Presumptions, 287; 8 Preston, Abstr. 2d ed. 145; *Richardson v. Gifford*, 1 Ad. & El. 52, and other authorities.

For the purposes of this investigation therefore the court concludes that the assent to this specific legacy was made by the executors.

And moreover these executors may not be heard to deny this. It is in evidence that one of the executors took a benefit under the will. He thereby received certain property and mortgaged it for his purposes. That mortgage is in evidence, and it concludes the executor, because it contains recitals which show that the executor relied for his title to the mortgaged property upon the will itself; and the authorities seem to be plain and conclusive, that he who accepts a benefit under a will must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it. *Hainer v. Legion of Honor*, 78 Iowa, 245; *Eichelberger's Estate*, 135 Pa. 160; *Scholl's App.* (Pa.) 17 Atl. Rep. 206; *Vanant v. Bigham*, 76 Ga. 759; *Taliaferro v. Day*, 82 Va. 79.

All these decisions are comparatively recent, and quite a number of others might be cited in support of that proposition. Indeed the statute law of this State seems to recognize the doctrine without qualification. Ga. Code, para. 2456-3162.

This rule would seem especially applicable

quish his claim to his own property or to the legacy,—that the son might elect which he would take, but he would be concluded by his election. This decision was based on the rule established by the authorities, that a devisee could not at the same time take under a will and contrary to it. The doctrine of election again arose in *Brown v. Pitney*, 30 Ill. 468, and after referring to the authorities bearing upon the question, it was held "that the beneficiary under a will cannot insist that the provisions in his favor shall be executed and those to his prejudice annulled,—he must accept the instrument in its entirety or not at all."

where the legatee is also an executor, who qualifies solemnly as such, to execute the will, and therefore the entire will.

It is clear, therefore, that there was an assent to this specific legacy, and it is equally clear that the assent was distinctly and definitely made with all of its legal effectiveness before the date of judgment, upon which the plaintiff at common law, and defendant here, relies for the enforcement of his rights, and that J. W. Schley, the executor, taking a benefit under the will, may not be heard to deny this. It will follow, therefore, that if the plaintiff in the execution seeks to subject this specific legacy, assented to, as we have seen by the executor, to the payment of his debt, he must adopt a proceeding other than that to which he has resorted. The case of *Baker County v. Moreland*, 20 Ga. 146, is we think sufficient authority for this proposition. The court, Justice McDonald delivering the opinion, in that case, makes this announcement: "This is a proceeding at law to subject to the payment of a judgment against the administrator obtained in 1864, a negro man who had been distributed in 1848 to the claimant who was one of the heirs-at-law of defendant's estate. If the legal lien of the judgment upon the property had not attached before the distribution it is not subject thereto, unless there was fraud in the distribution. If the suit on which the judgment was rendered, was pending at the time of the distribution, the question whether the distribution was made to delay and hinder the creditor in the collection of his debt ought to have been submitted to the jury. But the record discloses no such fact.

There is no legal reason why the legal title of the claimant to the property which had passed to him without fraud nearly six years before should be disturbed by the judgment. This property is unquestionably liable, ratably, to pay the plaintiff's judgment, if the administrator has not assets or is not solvent; but it must be subjected by a different kind of proceeding before a tribunal that can bring all the heirs of the estate before it, and compel those who are solvent to contribute, ratably to the payment. If some are solvent, those who are able to pay may be compelled to contribute to the extent of the assets, if necessary, received by them."

It follows, therefore, we think conclusively, that the plaintiff here has no right to single out this specific legacy and fasten his entire debt upon that. The judgment should have been under the pleading "*de bonis testatoris*." Wms. Exrs. 1388, 1389; Ga. Code, 3573.

Specific legacies are favorites of the law. When no specific provision is made for the pay-

ment of the testator's debts in the will, the personal estate is primarily liable. If that is insufficient a lapsed devise may be applied thereto, and if debts still remain specific devises must contribute *pro rata*. *Morse v. Hayden*, 82 Me. 227; *Ruston v. Ruston*, 2 U. S. 3 Dall. 245, 1 L. ed. 366.

It appears that this property was returned for taxes by the plaintiff for seventeen or eighteen years, and it appears that the executors were absolutely silent about it, although they were obliged to make an inventory of the real property lying outside of the County of Chatham, in which their executorship was located. We have the testimony of the ordinary of Chatham County that they made no return whatever to this property, and these facts are all material. On the final trial of this case an interesting question will arise also, upon the proposition of plaintiffs that this creditor could not now subject a specific legacy to the payment of his debt because of an alleged collusion on his part with the executors. He is seeking to enforce the judgment, not against the executors, and there is some evidence which seems to indicate it was understood that the executors would be relieved from the lien of this judgment. We are not prepared to say how important the question is at this time, but if it be true that the executors have been relieved from liability upon this judgment, it may become quite important to the rights of the plaintiff in execution, who is the defendant in this bill. The judgment was taken against the executors as such, and that is conclusive of assets. This is so held in *Demere v. Scranton*, 8 Ga. 47.

The general estate, as we have seen, would be first liable to pay the debts, and if the executors have permitted a devastavit as to the general estate of William Schley, which would be in the first instance liable for this debt, it would be perhaps quite important to determine whether their individual estate would not be liable rather than a specific legacy which they had assented to.

There are several other questions which have been presented in argument, but the court has indicated enough to justify in its opinion the conclusion that this is a case which should be inquired into more carefully upon sworn testimony, taken in the usual manner in equity and upon fuller consideration. It is not one of those cases which should be disposed of on a preliminary hearing.

We think, therefore, that the injunction restraining the sale under execution should be made permanent, and the case proceed as usual in equity.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Helena SCHULTZ *et al.*, *Plffs. in Err.*,

John S. BYERS.

(.....N. J. L.....)

"Excavation by an owner on his own
*Head note by SCUDDER, J.

NOTE.—*Duty of owner in making excavations.*
One cannot, by erecting a building near the extremity of his own land, deprive the adjoining owner of the right of digging in his own soil for a
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land adjoining another's building, causing damage, without his knowledge, or previous notice to him, is evidence of want of care in doing the work.

(Magie, J., dissents.)

(August 10, 1891.)

legitimate purpose, even though the house be thereby ruined. *Radcliff v. Brooklyn*, 4 N. Y. 201; *Quincy v. Jones*, 76 Ill. 287; *Roath v. Driscoll*, 20 Conn. 533. See *Callender v. Marsh*, 1 Pick. 434;

ERROR to the Circuit Court for Hudson County to review a judgment in favor of defendant in an action brought to recover damages for injuries to plaintiffs' building, which were alleged to have resulted from defendant's negligence in making excavations on his adjoining property. *Reversed.*

Statement by **Scudder, J.:**

The plaintiffs, Helena Schultz and Valentine Schultz, were the owners of a lot of land in Bayonne, Hudson County, upon which there was a building erected on brick piers set from three feet to three feet and a half in the ground. The defendant, who owned the adjoining land, excavated to the depth of seven feet, within three or four inches of the plaintiffs' building, and erected a house thereon. The excavation by the defendant, within the line of his own land, caused the building of the plaintiffs to sink, and it was weakened, cracked, and injured. There was judgment of nonsuit, and exceptions, on which errors are assigned.

Mr. W. W. Anderson for plaintiffs in error.

Mr. De Witt Van Buskirk for defendant in error.

Scudder, J., delivered the opinion of the court:

The declaration is framed on the idea that the plaintiffs' land, dwelling-house, and build-

ing were entitled to support by the adjacent land of the defendant, and that by wrongfully digging away and removing such support the damage complained of was caused, whereby a right of action accrued. A demurrer was filed to this declaration, but it appears to have been waived, and the cause was tried on a plea of the general issue and proofs. With this form of pleading, leaving the declaration unaltered, there is difficulty in holding the case in court to determine the exact cause of controversy between these parties. But as the court at the circuit heard and decided the cause as if the pleadings were amended to present the issue, and the question is important, it will be considered as it was there tried and decided. It is almost unnecessary to say that the juxtaposition of lands gives no right of support to buildings erected thereon, unless conferred by grant, conveyance, or statute. As this is a case of recent erection of the building alleged to have been injured, the question of prescription, or lapse of time sufficient to infer a grant or conveyance, does not arise, nor has such right ever been conceded in our courts. The principle of the lateral support of lands and buildings was settled in this State by the case of *McGuire v. Grant*, 25 N. J. L. 356 (1856). As to land in its natural condition, there is a right to such support from the adjoining land; as to buildings on or near the boundary line, injured by excavating on the adjoining land, there is no right of action, in the absence of improper motive, or of carelessness in the execution of

Wyatt v. Harrison, 3 Barn. & Ad. 371; *Greenleaf v. Francis*, 18 Pick. 117.

A landowner has no right to require the adjacent owner to desist or refrain from improving his own, for his benefit or security. *Bellows v. Sackett*, 15 Barb. 101. See *Partridge v. Scott*, 3 Mees. & W. 220; *Acton v. Blundell*, 12 Mees. & W. 352.

For an excavation causing an injury to the soil in its natural state an action would lie; but without proof of a right, by grant or prescription, in the plaintiff, or of actual negligence on the part of the defendant, no action would lie for an injury to buildings by excavating adjoining land not previously built upon. *Gilmore v. Driscoll*, 122 Mass. 207. See *Hay v. Cohoes Co.* 2 N. Y. 159; *Richart v. Scott*, 7 Watts, 460; *Richardson v. Vermont Cent. R. Co.* 25 Vt. 465; *Beard v. Murphy*, 37 Vt. 99; *Shrieve v. Stokes*, 8 B. Mon. 458; *Charles v. Rankin*, 22 Mo. 566; *McGuire v. Grant*, 25 N. J. L. 362; *Massey v. Goyder*, 4 Car. & P. 161; *Humphries v. Brogden*, 12 Q. B. 739; *Gayford v. Nicholls*, 9 Exch. 702.

The opinion of a witness whether ordinary care or diligence is used in digging or excavating an adjoining lot is not proper testimony. *Rogers v. Rhodeback*, 5 N. Y. Legal Obs. 365.

All which can be claimed is that the adjacent owner shall not so dig upon his land as that that of his neighbor shall fall into his pit. If the weight of buildings of late erected by his neighbor on the land cause it to slide, when of its own weight it would not, there is no claim for redress. *Marvin v. Brewster Iron Min. Co.* 55 N. Y. 566.

A land proprietor has a right to assume that the soil of which he is the owner shall be allowed to stand in its natural state; and any interference with that right constitutes an actionable wrong without reference to the question of negligence. *Richardson v. Vermont Cent. R. Co.* *supra*; *Wild v. Ministerley*, 2 Rolle, Abr. 565; *Foley v. Wyeth*, 2 Allen, 181; *Humphries v. Brogden*, *Hay v. Cohoes Co.*, and *McGuire v. Grant*, *supra*.

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Where the complainant has himself erected weighty structures upon his own property, and an abutting owner in attempting to do likewise causes damage and loss, the complaint is remediless as he has directly contributed to the cause of the injury. To recover he must aver and prove negligence and want of skill on the part of the adjoining owner. *Washb. Easem.* § 444; *Charles v. Rankin*, 22 Mo. 566; *Lasala v. Holbrook*, 4 Paige, 169, 3 L. ed. 390; *Elliot v. Northeastern R. Co.* 10 H. L. Cas. 383; *Panton v. Holland*, 17 Johns. 92; *Beard v. Murphy*, 37 Vt. 99.

A man in digging upon his own land is to have regard to the position of his neighbor's land, and the probable consequences to his neighbor, if he digs too near his line; and if he disturbs the natural state of the soil, he shall answer in damages; but he is answerable only for the natural and necessary consequences of his act, and not for the value of a house put upon or near the line of his neighbor. *Thurston v. Hancock*, 12 Mass. 230.

The injury usually consists in depriving the owner of a part of the soil to which his right was absolute. No degree of care in the excavation by the pit-owner would justify the transfer of a portion of another man's land to his own. *Hay v. Cohoes Co.* 2 N. Y. 162.

The right of lateral support extends only to the soil in its natural condition. *Northern Transp. Co. of Ohio v. Chicago*, 99 U. S. 635, 25 L. ed. 386.

It must be regarded as an incident to the land, naturally attached to the soil. *Farrand v. Marshall*, 19 Barb. 383.

Such right does not extend where the owner, by building or otherwise, has increased the lateral pressure upon the adjoining soil. *People v. Canal Board*, 2 Thomp. & C. 277.

The topics of "The Reciprocal Easement of Lateral Support," and "Title in Party-wall and Right to Strengthen and Elevate," are the subjects of extended treatment in *Ray on Negligence of Imposed Duties*, 190.

the work. This is the law as established by the cases prior to that decision. It has remained the unquestioned law in this State since that time, and it has been confirmed by many cases since in other courts. Some of the most recent are very valuable for reference, notably *Gilmore v. Driscoll*, 122 Mass. 199; *Dalton v. Angus*, L. R. 6 App. Cas. 740, L. R. 3 Q. B. Div. 85, where a most thorough examination of the subject will be found. Although this law seems to give the owner of a building put upon his own land, in a manner most advantageous and sometimes necessary to make it available for his use, especially in a closely built city, but little protection against the choice or caprice of another who may own the adjoining land, yet it will be observed he is not entirely without protection. Neither can say, "It is lawful for me to do what I will with my own," as has been sometimes loosely stated in discussing this subject, and that it is a man's folly to build near the dividing line between his land and that of his neighbor, for it is more frequently his necessity that compels him to do so. The rights of the parties are equal, and are subject to modification by the conflicting right of each other. Our Statute relating to party walls (Revision, 809), shows that in some cases it has been thought necessary to fix authoritatively the mutual concessions and limitations in the rights of adjoining landowners. This Statute only applies where the excavation is more than eight feet in depth, while in this case the digging is but seven feet deep; but it is a recognition of the reciprocal right and duty which sometimes grow out of the mere vicinage of property. The maxim, *sic utere tuo ut alienum non ledas*, is often invoked in such cases, and is of very wide application. In this case the limitation of this principle is that, if the owner of adjoining land would dig down beside the foundation of his neighbor's house, he must exercise his right to do so, not carelessly, but cautiously. There was no proof, or offer to prove, at the trial, that the defendant was negligent in digging his cellar, whereby the plaintiff's house was caused to settle, and the walls to crack, beyond the mere fact that this was the result. This result alone was not sufficient, for it may have been caused by defects in the plaintiffs' house. The special ground of complaint is that it was done without the knowledge of the plaintiffs, and without notice to them, by which they might have been enabled to protect their property. It is argued that the defendant thereby took upon himself the whole risk of injury to the building. The question whether such omission to give notice, under the circumstances stated, is evidence of carelessness in the execution of the work, is an important one, and it cannot be said to be definitely settled. The case most frequently cited in this country in favor of requiring such notice is *Lasala v. Holbrook*, 4 Paige, 169-173, 8 L. ed. 390-392 (1833). In this case Chancellor Walworth, while affirming the right of the owner of adjacent land to excavate for improvement on his own land, using ordinary care and skill, without incurring damages for injury to a building supported thereby, says: "From the recent English decisions it appears that the party who is about to endanger the building of his neighbor by a reasonable im-

provement on his own land is bound to give the owner of the adjacent lot proper notice of the intended improvement, and to use ordinary skill in conducting the same." He cites *Peyton v. London*, 9 Barn. & C. 725, 4 Man. & R. 625; *Walters v. Pfeil*, 1 Mood. & M. 362; *Massey v. Goyder*, 4 Car. & P. 161. In *Peyton v. London* it was held that the plaintiff could not recover, because the defendant had not given notice of his intention to pull down his supporting house, that not being alleged in the declaration as a cause of the injury. Lord Tenterden says, because of the failure to allege want of notice, the action cannot be maintained upon the want of such notice; supposing that, as a matter of law, the defendants were bound to give notice beforehand, upon which point of law we are not in this case called to give any opinion. In *Massey v. Goyder*, where notice was given to the occupier of adjoining premises of an intention to pull down and remove the foundation of a building, it was held that he was only bound to use reasonable and ordinary care in the work, and not to secure the adjoining premises from injury. In *Chadwick v. Trower*, 6 Bing. N. C. 1, 8 Scott, 1 (1839), it was decided in the exchequer chamber that the mere circumstance of juxtaposition does not render it necessary for a person who pulls down a wall to give notice of his intention to the owner of an adjoining wall. This case was first considered in *Trower v. Chadwick*, 3 Bing. N. C. 334, and cited in *Smith v. Tanner*, 2 Scott, N. R. 77, and *Chadwick v. Trower*, 5 Scott, N. R. 119. In the argument, when it was urged that, if it be a duty imposed on a party not to do work so incautiously as to injure his neighbor's rights, and it is clearly a want of proper caution to omit giving such notice as may enable the neighbor to take steps for his own security, Parke, B., replied: "The duty of giving notice in such cases seems to be one of those duties of imperfect obligation which are not enforced by the law." But if it be a duty affecting property rights, and the breach causes damage, it would seem that the law must afford a remedy. In *Brown v. Windsor*, 1 Crompt. & J. 20, Garrow, B., said: "There may be cases where a man, altering his own premises, cannot support his neighbor's, and the support, if necessary, must be supplied elsewhere. In such case he must give notice, and then, if an injury occur, it would not be occasioned by the party pulling down, but by the other party neglecting to take due precaution."

There are no later cases that I have found in the English courts which change the rule given in *Chadwick v. Trower*, and that is therefore supposed to be the present law in England relating to this subject, though the cases above cited refer to support by adjoining buildings. There are very few cases in our country which bear directly on this point. *Shafer v. Wilson*, 44 Md. 268, is most frequently referred to, after *Lasala v. Holbrook*, above cited. It is there said that notice to one's neighbor of an intention to make a contemplated improvement of property would seem to be a reasonable precaution in a populous city, where buildings are necessarily required to be contiguous to each other, and improvements made by one proprietor, however skillfully conducted, may be

attended with disastrous results to his neighbors, who ought to have the opportunity to protect themselves and property. To the like effect is *Beard v. Murphy*, 37 Vt. 101. *Chancellor Kent* (8 Com. 487) has quoted the case of *Isala v. Holbrook*, and this has been referred to in *Shafer v. Wilson* and elsewhere. Washb. Easem. 434, 435; Shearm. & Redf. Neg. 497; 1 Thomp. Neg. 276; and other text-books,—cite these cases, and from such quotations it is impossible to determine how far the requirement of notice has passed into the general law of the courts in this country. None of these cases are of binding authority in this court, and, in a case of doubt like this, we should seek for that result which is most reasonable and just. Where the danger of loss in doing a legal act is not equally balanced, we should lean to that side which most needs protection. Here a mere notice, which can cause but little trouble to one who is honestly exercising his right of excavating his land next to his neighbor's house may enable the receiver of notice to shore or prop his wall to prevent its falling, or it may lead to some arrangement by which neither will be injured. It is more than a mere neighborly courtesy to give such notice, because it involves the right of one man to assert his right, regardless of the injury he may cause to his neighbor without such warning. The manner of giving notice may be only such as is reasonable under the circumstances, either to the owner of the property, or, if there be difficulty in finding or serving it on him, then it may be given to the tenant or occupant who is interested in protecting the property. Where it can be shown that such owner had knowledge of the improvement that was about to be made, it would not be necessary to prove a formal notice given to him.

In this view of the case, there was error in rejecting the evidence which was offered to show that the defendant gave no notice to the plaintiffs of his intention to excavate the land adjoining the house of the plaintiffs; and the judgment will be reversed.

Magie, J., dissenting:

The question in this case is whether the owner of an urban lot, who, in excavating its soil for a lawful purpose and in a manner not in itself negligent, has caused to settle a building erected on the adjoining lot, and deriving support from such soil without having acquired any right to such support, is liable to an action for the injury, merely because he had given no previous notice to the owner of the building of the intended excavation. The solution of the question is of great importance, and, as I have the misfortune to differ from the majority of the court, I deem it my duty to give my reasons for my dissent. From a very early period judicial consideration has been given to the right of support to soil in its natural state, and to artificial structures erected thereon, by the soil of adjacent or subjacent lands. A complete review of the course of decisions in England can be found in the opinions of *Baron Pollock* in *Dalton v. Angus*, L. R. 6 App. Cas. 740, and of *Chief Justice Gray* in *Gilmore v. Driscoll*, 122 Mass. 199. It is thereby thoroughly settled as the law of Great Britain that the undisturbed maintenance by an owner of a building erected

on the confines of his land, and supported by the soil of adjacent lands, for a period requisite to make title by adverse possession, will establish in such owner a right to that support. While there are conflicting views as to the legal source and character of the right (*Dalton v. Angus, supra*), all agree that, once acquired, the right cannot be invaded by removal of the supporting soil, without liability for the resulting damage. Whether this doctrine is obligatory upon us, or has been adopted in this country, may, perhaps, be open to question. The analogous doctrine respecting the acquisition of rights by "ancient lights" has been doubted and denied. *Hayden v. Dutcher*, 31 N. J. Eq. 217.

But it is unnecessary to express any opinion on the subject, for in the case in hand plaintiffs had not, by length of maintenance of their house, acquired any right of lateral support, if they could have done so. But it is settled by the general concurrence of courts administering the common law that, when a building on the land of its owner derives actual support from the soil of adjacent land of another owner, but has acquired no right to such support, the latter owner may, for any lawful purpose, excavate and remove his supporting soil without any liability for injury occasioned thereby to the building, provided he does not act wantonly, or without the exercise of due care and prudence. In the case before us, the excavation was for a lawful purpose, and liability for the injury occasioned will only attach to the owner if his act in excavating was, in the eye of the law, negligent. Negligence is the want of that care which, under the circumstances, is due. As the only negligent act charged is the lack of notice, the question before us resolves itself into this, viz., whether it was defendant's duty to give notice of his excavation to plaintiffs. If so, a breach of that duty would constitute negligence. No such duty has been attempted to be imposed by statute. The "Act to regulate party-walls" is not applicable.

The contention is that the duty arose out of the juxtaposition of the lands, and the application of the maxim *sic utere tuo ut alienum non ledas*. But it must be remembered that the conflicting interests of the parties arose, not from the mere juxtaposition of their lands, but from the erection of a building by one owner, supported by the soil of the other owner, without having acquired a right to such support. In making such erection, the owner of the building must be deemed to have full knowledge that the supporting soil can be lawfully removed. Can his act restrict the right of the other owner to remove the soil, and impose on the latter the duty of giving notice of what it is admitted he may lawfully do? If the act is an actionable wrong, or if the maintenance of the building will, by lapse of time, ripen into an indefeasible right, it seems to border on the absurd to say that the owner of the land injured, or threatened with injury, may not interrupt the running of the claim by removing the support improperly claimed, without the necessity of giving previous notice to him who is attempting to burden the land by such an easement or right. But if the act is neither actionable nor capable, by continuance, of creating an easement of support, or right of that

nature, yet as to the adjoining owner it is without authority, and it is unreasonable, in my judgment, to permit such an act, knowingly done, to impose on the adjoining owner positive obligations restrictive of his rights. He who knowingly burdens the soil of another with the support of his building, without right, must in reason be deemed to take the risk of the owner removing the supporting soil, and to be prepared to protect his interest by his own vigilance. He cannot, by such act, impose on his neighbor the duty of being vigilant for him. The maxim, *sic utere tuo*, forbids the exercise of one's rights so as to injure the rights of others. But the removal of supporting soil, under the supposed circumstances, injured no right, for none had been acquired. The maxim no doubt forbids the negligent use of one's rights to the injury of the rights of others. This negative obligation is in my judgment the bound of the duty imposed in the case before us. The owner, in excavating, as he has a right to do, is under a duty to do the work with care and prudence, so as to do no unnecessary injury to the right of the owner of the building in its support on his own land. A failure to perform this duty will be negligence, but negligence cannot be predicated of a failure to give notice, for such a duty is not laid upon him. The argument in behalf of plaintiff seems to me to confound the rules of neighborly courtesy with the rules of law. Politeness to a neighbor might dictate the giving of notice to him in many instances where the law would not require any. What we settle in this case is a rule of law to govern an owner of land in the use of his undoubted rights therein.

But it is said that the doctrine contended for is established by authority. Among the many litigated cases on the subject of lateral support, which engaged the English courts before the separation of this country, none has been discovered in which this doctrine has been even hinted at. In 1833, *Chancellor Walworth*, in dealing with a case not involving this question, made this statement, viz.: "From the recent English decisions, it appears that the party who is about to endanger the building of a neighbor by a reasonable improvement on his own land is bound to give the owner of the adjacent lot proper notice of the intended improvement." *Lasala v. Holbrook*, 4 Paige, 169, 3 L. ed. 390. To support this statement he cites *Peyton v. London*, 9 Barn. & C. 725; *Walters v. Pfeil*, 1 Mood. & M. 362, and *Massey v. Goyder*, 4 Car. & P. 161. All these cases were decided in 1829. I think it can be shown that this statement of *Chancellor Walworth* is the sole basis of the claim that the doctrine contended for is established by authority. The independent opinion of that eminent jurist would go far to establish the doctrine, but, as has been seen, no opinion was called for, and none was expressed by him. Moreover, the cases referred to do not support his statement. In *Peyton v. London*, *Lord Tenterden*, after adverting to the fact that the declaration did not charge a want of notice of taking down the house whereby the alleged injury was caused, added: "Therefore, in our opinion, the action cannot be maintained upon the want of such notice, supposing that, as

matter of law, the defendants were bound to give notice beforehand; upon which point of law we are not in this case called upon to give any opinion." In *Walters v. Pfeil*, the question of the obligation to give notice was not raised or mentioned. *Massey v. Goyder* is the report of a trial before *Chief Justice Tindal*. By one count, defendant was charged with excavating on his own land to the injury of plaintiff's building, without giving previous notice; by another count he was charged with negligently excavating. The question of notice was left to the jury, who found notice had been given, but upon a general finding judgment was entered on the last count. It is plain that none of the cases justified the statement in *Lasala v. Holbrook*. The precise question was afterwards raised. One of the counts of a declaration for injury done to a building by removal of its support on adjacent land was founded on a lack of notice. *Tindal, Ch. J.*, in dealing with the case on demurrer, said: "As to the allegation that it was the duty of defendant to give notice to plaintiff of his intention to pull down his wall, . . . it is objected, and we think with considerable weight, that no such obligation results as an inference of law from the mere circumstance of the juxtaposition of the walls of defendant and plaintiff." *Trower v. Chadwick*, 8 Bing. N. C. 334. That cause was thereafter tried before the same chief justice. One of the issues was on the above-mentioned count. Damages were awarded generally. On writ of error, the exchequer chamber reversed the judgment. *Baron Parke*, delivering the unanimous judgment of the court, quoted the language of *Chief Justice Tindal*, above set out, and added: "We also think it impossible to say that, under such circumstances, the law imposes upon a party any duty to give his neighbor notice. We are inclined to think that the second count of the declaration has made the breach of this supposed duty a substantial ground for damage; and the probability is that the main damage did result from the want of notice, for it is obvious that, if notice had been given, the plaintiffs might have taken precautions to strengthen their vault. Inasmuch, therefore, as the damages are given generally upon the whole declaration, we think that the judgment must be arrested, and a *verdict de novo* awarded." *Chadwick v. Trower*. 6 Bing. N. C. 1 (1839). Notwithstanding this unmistakable deliverance, the statement of *Chancellor Walworth* commenced and has continued to be cited as expressing the conclusions of English courts on this subject. In the edition of the third volume of *Kent's Commentaries*, which was published in 1840, it is stated that "if the owner of a house in a compact town finds it necessary to pull it down and remove the foundation of his building, and he gives due notice of his intention to the owner of the adjoining house, he is not answerable for the injury which the owner of that house may sustain by the operation, provided he remove his own with reasonable and ordinary care." This statement was not made in the first edition of that volume, which was published in 1828. From that fact, and from the note to the passage above quoted, it is plain that it was based upon *Lasala v. Holbrook* and the English cases of 1829. The case of

Chadwick v. Trower was not alluded to. After the decision of *Trower v. Chadwick*, Gale & Whately, in their treatise on Easements, discussed the question of the duty to give notice, now contended for, and declared their opinion that, if the observations of *Chief Justice Tindal* in that case were well founded, no such duty was imposed by law. Those observations were, as we have seen, adopted and approved by the exchequer chamber. Subsequent authors in this country have expressed views in respect to the duty to give notice, such as have been contended for, but they refer for English authority only to the cases of 1829, on which the statement in *Lasala v. Holbrook* had been based. The case of *Chadwick v. Trower* is not mentioned. They also refer to American cases as authority for the doctrine. I have not been able to find among them a single case justifying the statement. The cases generally cited are *Shriee v. Stokes*, 8 B. Mon. 453; *Winn v. Abeles*, 35 Kan. 85, and *Shafer v. Wilson*, 44 Md. 268. In *Shriee v. Stokes* the question of the obligation to give notice was not raised by the pleadings or the evidence. What was said by the court on the subject was incidental, and based on the supposed authority of the English cases of 1829. In *Winn v. Abeles*, the question of duty to give notice was not involved. In *Shafer v. Wilson* the question of liability for want of notice was raised. The court below instructed the jury that notice was a duty. In reviewing this instruction, the court above only says that such notice would seem to be a reasonable precaution, and basis this statement on *Lasala v. Holbrook*.

This review in my judgment justifies the assertion that the doctrine contended for has not the sanction of authority. In the only adjudicated case not based on mistaken cita-

tions the determination was against the doctrine; and although the decision does not bind us, it must have great weight as a declaration of the obligations imposed by the common law on adjoining property owners, by a court of eminent ability. Having found no support for the contention of plaintiffs, either in principle or authority, I am unwilling to join in imposing this burden on property owners. I have devoted much consideration to this case, from the sincere conviction that the rule to be promulgated will disastrously affect urban property, and without producing any practical good. A judicial determination that notice is necessary in cases such as that before us cannot prescribe the form of notice, or fix the time, or provide for constructive notice. Our determination will simply require reasonable notice, and whether in any case such notice has been given must be matter for the jury. An owner hereafter proposing to improve property so situate must give notice. Must the notice be in writing, or will verbal notice or knowledge suffice? How shall notice be given to the owner of the building if he be an infant, or *non compos mentis*, or non-resident? Such and other similar questions the owner, when confronted by the rule to day promulgated, must determine according to his own view of what is reasonable, but conscious that a jury may disagree with his view and hold him liable. If the owner of the building be infant, idiot, or beyond seas, it would seem to be impossible to give the required notice. To add to the difficulties and risks which have before attended the putting down a suitable foundation for building in such cases, the difficulty of giving notice, and the risk of its being ineffective, will retard the improvement of such property and diminish its value. I shall vote to affirm the judgment below.

CALIFORNIA SUPREME COURT.

Ex Parte D. M. VANCE, Petitioner.

(....Cal.....)

The time of absence from jail of one who, having been committed under an alternative judgment that he pay a fine or be imprisoned a certain number of days, secures his release through the unauthorized act of the sheriff, can-

not be considered as having been spent in jail in satisfaction of the judgment.

(July 15, 1891.)

APPPLICATION for a writ of habeas corpus to procure the release from jail of one who had been committed for contempt of court,

NOTE.—Absence from jail not considered in satisfaction of the sentence.

A convict is not serving out his sentence while away from prison on parol where commutation of time is given by statute for obedience to prison discipline. *Woodward v. Murdock*, 124 Ind. 439.

The time during which a convict is at large on parol by the governor is to be computed as part of the term of his imprisonment, so as to extend the period of his sentence. *Ibid*.

One who escapes from prison before the expiration of his sentence becomes a fugitive, and upon his return no previous examination before a magistrate is required before an information is filed for another offense with which he is charged. *People v. Kuhn*, 11 West. Rep. 533, 67 Mich. 539.

The English courts have found no obstacle in the way of executing a prisoner where he has escaped after sentence, and remained at large beyond the 13 L. R. A.

time fixed for execution. In 1716, Charles Ratcliffe, after conviction and sentence to death for treason, escaped from prison and went to France. About thirty years afterwards he was brought before the king's bench, where his identity was established and he was afterwards beheaded. *Rex v. Ratcliffe*, 18 How. St. Tr. 429, 1 Wils. 160; *Rex v. Harris*, 1 Ld. Raym. 482.

Lord Hale says: "If a prisoner for felony be in jail and escape and the jailor pursue after him, he may take him seven years after, though he were out of view." Again: "If a felon escape out of the jail by negligence, though the jailor be fined for it, he may retake the felon at any time after, for the felon shall not take advantage of his own wrong or the jailor's punishment." 1 Hale, P. C. 602; 1 Russ. Crimes, 421.

In *Cleek v. Com.*, 21 Gratt. 777, the defendant was sentenced to imprisonment for ten months, com-

but who alleged that the term of imprisonment had expired. *Petitioner remanded.*

The facts sufficiently appear in the opinion. *Mr. A. H. Carpenter* for petitioner.

Meers, C. S. Denson and Wilson & Wilson, contra.

De Haven, J., delivered the opinion of the court:

The return to the writ of habeas corpus issued herein shows that the petitioner, D. M. Vance, was on October 18, 1889, adjudged by the Superior Court of Sacramento County to be guilty of contempt, and to pay a fine therefor of \$300, and to be imprisoned in the county jail of Sacramento County until such fine was paid, in the proportion of one day for every dollar of the fine. The petitioner was on that day committed to jail under said judgment, and there remained until October 22, 1889, when he was released by the sheriff, and remained at liberty, free and without confinement, until June 10, 1891, at which date he was re-arrested under an order of the superior court made June 9, 1891, directing that its former judgment be enforced. The release of petitioner by the sheriff was not by any order of the court, but upon an undertaking given by petitioner on appeal to the supreme court from said judgment of contempt, and it may be assumed that both the sheriff and the petitioner acted upon the belief that the execution of said judgment was stayed by said appeal and undertaking. The petitioner now claims his release upon various grounds which assail the validity of the original judgment for contempt, and also because "the term of such imprisonment has long expired, and there having been no legal or authorized suspension of said judgment." In regard to the first claim of petitioner it will be sufficient to say that the affidavits charging him with contempt were such as to authorize the order which directed him to show cause why he should not be punished for the contempt therein alleged, and the subsequent proceedings ending in the judgment for contempt were regular, and the judgment itself valid. The remaining ground upon which the petitioner claims his release presents the single question whether his release from jail under the circumstances here stated, and thereafter remaining at large with free and perfect liberty, for a length of time sufficient to have satisfied said judgment if he had re-

mained in jail, operate as a complete execution of the judgment; and it would seem from the mere statement of the proposition that the contention of petitioner on this point cannot be sustained. The sentence of the court was that he pay a fine, and that part of the judgment relating to imprisonment was merely incidental to the judgment of fine, and in the nature of an award of execution directing the particular way in which that judgment should be enforced, in the event of the non-payment of the fine imposed, and it seems clear to us that such judgment can only be satisfied by a compliance with its terms. In this case it is admitted that the judgment of fine has not been paid, and that the defendant has not suffered the alternative of actual imprisonment. The judgment therefore remains in full force. The act of the sheriff in releasing the petitioner was unauthorized, and petitioner's departure from the jail to which he had been lawfully committed, without having been discharged by due course of law, was equally so, and was in effect a technical escape, from which he can derive no advantage. The time of petitioner's absence from jail, in violation of law, cannot be considered as having been spent in jail in satisfaction of the judgment which required his actual imprisonment.

This question, although presented here for the first time, is not a new one. *Re Edwards*, 43 N. J. L. 555, the petitioner had been committed to state's prison for the term of ten years at hard labor. He made his escape, and remained at large for seven years, and he claimed that, notwithstanding such fact, he was entitled to his discharge at the end of the term of ten years, but the supreme court, in an elaborate opinion, held otherwise. The same question came before the Supreme Court of Kansas in the well-considered case of *Hollon v. Hopkins*, 21 Kan. 688, and was disposed of adversely to the contention of the petitioner here. In that case the petitioner had been sentenced to the state prison for three years "from the 19th day of September, A. D. 1874." On the next day after sentence he made his escape, and was not recaptured until 1878, and he insisted that the judgment had expired by its own limitation, but the court held that the essential part of the judgment was that petitioner be imprisoned for three years, and that the time fixed by the court for its commencement was not such a material part thereof as to per-

meining July 13, 1870. He escaped September 21, 1870, and was not apprehended until January 14, 1871. He sued out a writ of habeas corpus, but the court refused to discharge him, holding that he must bear the full measure of imprisonment imposed.

Workhouse commissioners are without authority to establish rules by which a subsequent sentence against one imprisoned shall date from his incarceration, or by which deduction shall be made from sentences for good behavior. *Vanvabry v. Station*, 88 Tenn. 324.

A prisoner who has served out the full extent of any valid sentence under the general laws will be discharged, although he was sentenced to a longer term, whether the judgment was altogether erroneous or only void as excessive. *Re Franklin*, 77 Mich. 615.

Under the New Hampshire statute, a convict who has been incarcerated, but subsequently com-

mitted to an insane asylum, cannot, upon discharge from the asylum, be remanded to prison, if at the time of the discharge the term for which he was sentenced to imprisonment has expired. *Re McQuinn*, 65 N. H. 84.

Gross v. Rice, 71 Me. 241, is not in conflict with the cases which have been cited. There, a statute providing that a prisoner should not be discharged from state's prison until he has remained the full term for which he was sentenced, excluding the time he was kept in solitary confinement for violating the prison rules, was held to be unconstitutional, on the ground that it deprived him of liberty without due process of law.

The defendant, in *Ex parte Clifford*, 29 Ind. 106, was sentenced, September 13, 1862, to three years in state's prison. January 9, 1863, he escaped, and remained at large until April 4, 1867, at which time he was recaptured. Being brought up on habeas corpus, his discharge was refused.

mit an evasion of the judgment by the wrongful act of the prisoner. The court there said: "The only way of satisfying a judgment judicially is by fulfilling its requirements. Of course, if Hollon had died, or been pardoned, the sentence would be at an end. But, as those things have not happened, and as the sentence has not been disturbed by any judicial decision or determination, there is no way of satisfying its requirements, or of exhausting its force, except service by Hallon of the time required in the penitentiary.

In *State v. Cockerham*, 24 N. C. 204, the defendant had been sentenced to be imprisoned for two months "on and after the first day of November next," and did not go into prison according to the sentence, and at a subsequent term of the court it was directed that the sentence should be immediately executed, and it was held that the order was proper, and that the essential part of the judgment was not the time when it should be executed, but the extent of the punishment fixed. So also in *Dolan's Case*, 101 Mass. 219, the same conclusion was reached, the court holding that "expiration of time without imprisonment is in no sense an execution of the sentence. Other cases might be cited to the same effect, and, indeed, our attention has not been called to the decision of any appellate court holding to the contrary. We are satisfied with the law as thus declared.

Petitioner remanded.

We concur: **Harrison, J., Sharpstein, J.; McFarland, J.**

Alpheus BULL, *Appt.*,

v.

Watson A. BRAY *et al.*, *Repts.*

(89 Cal. 286.)

The fact of fraudulent intent must be found to support a judgment setting aside a voluntary conveyance as in fraud of creditors, at least unless the facts found absolutely exclude all possibility of the absence of fraudulent intent in the mind of the grantor, under statutes making every transfer of property with intent to defraud or delay a creditor void, and providing that the question of fraudulent intent is one of fact and not of law, and that no transfer shall be adjudged to be fraudulent solely on the ground that it was not made for a valuable consideration; findings that the transfer was voluntary, that the grantor was insolvent, and that the transfer actually defrauded creditors are not sufficient.

(May 28, 1891.)

A PPEAL by plaintiff from an order of the Superior Court for Alameda County setting aside a judgment in his favor and granting a new trial in an action brought to set aside certain conveyances as fraudulent. *Affirmed.*

The facts are stated in the opinion.

Meers, J. F. Wendell, W. B. Sharp, S. C. Denson and William H. Sharp for appellants.

Meers, J. P. Phelan and Garber & Bishop, with Meers, Chickering & Thomas, for respondents.

13 L. R. A.

Garoutte, J., delivered the opinion of the court:

This is an appeal from an order granting defendants a new trial. The action was brought by plaintiff, a judgment creditor, to set aside two certain deeds of gift made by defendant Watson A. Bray, the judgment debtor, to Julia A. Bray, his wife, May 20, 1880, and August 3, 1881, respectively, of lands in Contra Costa County, as being void against prior creditors. Plaintiff's debt had been reduced to judgment; execution was issued thereon, and returned wholly unsatisfied. In the lower court, plaintiff had judgment, as prayed for, declaring said deeds null and void as against his judgment, and that he be entitled to enforce his execution against the property in said deeds described. Defendants moved for a new trial, and their motion was granted upon the ground that the findings as filed omitted to find upon the issue of intent raised by the pleadings in the case; that is to say, there is no finding on the issue made by the pleadings, whether the conveyances from Bray to his wife, referred to in the pleadings, were made or accepted with intent to hinder, delay, or defraud the plaintiff or other creditors of said Bray. The question presented by this appeal is, therefore, whether, in view of the facts found by the court, it was necessary to make a further finding as to the fraudulent intent; for, if the facts found by the court necessarily establish the fraudulent intent, that satisfies the law. If probative facts only are found, yet, if the ultimate fact flows as a necessary conclusion therefrom, the findings are sufficient. *Osborne v. Clark*, 60 Cal. 623; *Biddell v. Brizzolari*, 56 Cal. 381; *People v. Hagar*, 52 Cal. 189; *Coveny v. Hale*, 40 Cal. 555.

The only findings of the court necessary to consider in the investigation of this most important question are as follows:

(1) That said deeds were entirely voluntary, and there was no valuable consideration whatever for the making and delivery of the same, and said deeds were deeds of gift.

(2) That at the times of the making of said deeds the defendant Watson A. Bray was insolvent, and has ever since remained insolvent.

(3) That defendant Bray, at the time he made and delivered said deeds, was not fully aware, and did not know his actual financial condition, and his inability to pay and discharge in full his then outstanding debts and liabilities.

(4) That by the making and delivery of said deeds Watson A. Bray did hinder, delay, and defraud this plaintiff in the collection of his debt.

This action rests upon section 3439 of the Civil Code: "Every transfer of property . . . made . . . with intent to delay or defraud any creditor . . . is void." "Every transfer of personal property . . . is conclusively presumed if made by a person having . . . the possession or control, . . . and not accompanied by an immediate delivery . . . to be fraudulent and therefore void against those who are his creditors, while he remains in possession." Civil Code, § 3440.

Then, to exclude all possibility of misconception arising out of the conflicting decisions of other States as to whether the question of intent is a matter of law or of fact, section 3442 provides that in all cases arising under section 3439 "the question of fraudulent intent is one of fact, and not of law." It further provides that no transfer shall be adjudged fraudulent solely on the ground that it was not made for a valuable consideration. It also expressly excepts transfers of personal property arising under section 3440, for that section makes the question one of law by providing that transfers made in a certain way shall create a conclusive presumption of fraud. The general contention of appellants in this case is fairly illustrated by the doctrine laid down by Bump, in his work on Fraudulent Conveyances, 3d ed. 271, 272: "If the act necessarily delays, hinders, or defrauds his creditors, then the law presumes that it is done with fraudulent intent. The intent is to be assumed from the act. The circumstances of the act, or rather the act itself, is conclusive evidence of fraud, for no man is permitted to say that he does not intend the necessary consequences of his own voluntary act. The law will not speculate about what is actually passing in the donor's mind, for the act need not be immoral or corrupt. The law does not concern itself about the private or secret motives which may influence the debtor. . . . He may make a conveyance with the most upright intentions, really believing that he has a right to do so, and that it is his right and duty to do it, and yet, if the transfer is voluntary, and hinders, delays, or defrauds his creditors, it is fraudulent. . . . The presumption in such a case is conclusive, and against it all other evidence is unavailing. The debtor may have some other purpose in view, but the intent to defraud is a part and parcel of his act. It is upon these principles that the law relating to voluntary conveyances rests. In the construction of the Statute, they are deemed within its operation, when they necessarily tend to defeat the just rights of creditors, even though they are made bona fide and with the intention of conferring a gratuitous benefit upon some meritorious object. The law stamps a man's generosity with the name of fraud when it prevents him from acting fairly towards his creditors, and presumes fraud if he disables himself from paying his debts. In such case the presumption of fraud arises and may exist without the imputation of moral turpitude. The principle is, that persons must be just before they are generous, and that debts must be paid before gifts can be made." This doctrine, ever since the celebrated cases of *Reade v. Livingston*, 3 Johns. Ch. 500, 1 L. ed. 696, decided by Chancellor Kent, has been recognized and accepted by many judges in many States of the Union.

Respondents insist that "the question of intent is a question of fact, and that the intent or purpose of the grantor in making the transfer in all cases is a question for the jury, and that it is material to the issue to determine whether the act done is a bona fide transaction, or whether it is a trick or contrivance

to defeat creditors." "That the question of solvency or insolvency of the grantor at the time of the making of the deeds is a matter of evidence to be given its due weight in determining the ultimate fact as to the fraudulent intent of the grantor; that a rich man may make a fraudulent deed as well as one who is insolvent; and that while a voluntary conveyance by an insolvent may be prima facie fraudulent, it cannot be conclusively fraudulent, for that would make the question of intent a question of law, and thus be in violation of that provision of the Code which says it shall be a question of fact." These views, to a great extent, are supported by the exhaustive case of *Seaward v. Jackson*, 8 Cow. 450, and by other authority, both English and American. The cases in this country passing either directly or indirectly upon the questions involved in this litigation are practically numberless, and, as we have already seen, are greatly at variance. But, as has been said by Bigelow on Fraud (Preface, iv. and v., ed. 1877): "The law here to be applied is statutory law, and, as to the statutory law concerning fraud on creditors and purchasers, each State of the Union, with few exceptions, has a Code of its own, interpreted by independent tribunals, and enforced by distinct and diverse penalties and procedure. With deference to the views of others who have attempted to present a harmonious view of the statutes of the different States, the author is satisfied that such efforts are both unsatisfactory and dangerous. The decisions of the courts of New York concerning the interpretation of an ambiguous statute of that State,—that is, concerning the intention of the Legislature of that State in the passage of the Act,—cannot be safe authority in another State, even upon a question of the meaning of a statute framed in the very same words. The Legislature of New York meant one thing by the language used, and the Legislature of another State may have meant something else, and so the courts of each State may have declared, and rightly. To say, therefore, that the decisions are in conflict is incorrect, and to attempt to deduce the true rule of law as applicable to both States is vicious." Without attempting to deduce the true rule from the many authorities of many States, we will discuss this case by the authority of our statutes and Codes, and in the light of the decisions of our own judicial tribunals.

Having found the fact that the conveyances were voluntary conveyances, that the defendant Watson A. Bray was insolvent at the time he made the conveyances, and that these conveyances delayed and defrauded the plaintiff in the collection of his debt, was it still necessary for the court to find the further fact that the intent of the grantor in making the conveyances was to delay and defraud creditors, and was the court justified in granting a new trial by reason of its failure to make such finding? Appellant contends that the absence of a finding of intent is immaterial, because the conveyance being voluntary, the grantor being insolvent, and the conveyance having defrauded the creditor, the intent to delay and defraud follows

as an absolute and conclusive presumption, and the intent, being the ultimate fact, necessarily results from such probative facts. In order to support this contention the ultimate fact must follow necessarily—that is, as a matter of law—from the other facts.

In *Coveny v. Hale*, 49 Cal. 556, the court said: "Of course, it is only when the conclusion follows as a matter of law that such finding will be held sufficient."

"The only inferences which we can draw from the findings," said the court in *De Celis v. Porter*, 65 Cal. 10, "are inferences of law. We are not allowed to draw inferences of fact from the facts found. If this court would infer a fact from other facts, it would be usurping the province of the trial court, which alone can find the facts in issue. This is the rule with regard to special verdicts, and we are of opinion that the same rule applies to findings of fact." To the same effect are the cases of *Chandler v. People's Sav. Bank*, 65 Cal. 499; *Salisbury v. Shirley*, 66 Cal. 228; *Hibberd v. Smith*, 67 Cal. 556.

It may be conceded that it would have been perfectly proper for the trial court to have drawn an inference of fact as to the fraudulent intent of the grantor from the other facts found; that this court might be justified in setting aside a finding to the contrary as not being supported by the evidence (*Judson v. Lufford*, 84 Cal. 505), but that does not dispense with the necessity of an actual and express finding as to the ultimate fact, as a fact, by the lower court, nor authorize this court to exercise what would be original jurisdiction by supplying a finding upon this most vital and essential matter. As section 3442 of the Civil Code declares that the question of fraudulent intent is "one of fact and not of law," it is not entirely plain that this court can under any state of facts, however plain they might be, hold that the ultimate fact might flow from the probative facts as a matter of law. But, assuming that the ultimate fact of "intent to defraud" may flow as "matter of law" from the probative facts, yet to obviate a finding of this ultimate fact the facts found must necessarily and conclusively indicate that the grantor was possessed of the intent to defraud at the time the conveyances were made. If the facts found do not absolutely exclude all possibility of the absence of fraudulent intent in the mind of the grantor, then the want of the finding of such intent cannot be dispensed with in this court. Thus, in the case of *Enmal v. Webb*, 36 Cal. 204, the court, in considering whether it could infer a fact from other facts, said: "To warrant us in so doing, the fact to be inferred must follow inevitably from the facts found, or in other words, the non-existence of the fact to be inferred must, upon every conceivable theory of which the case will admit, be inconsistent with the existence of the facts which are found." And to the same effect are *Coveny v. Hale*, 49 Cal. 556; *Younger v. Pagles*, 60 Cal. 520; *Walker v. Buffandeau*, 63 Cal. 312; *Coglan v. Beard*, 65 Cal. 63; *Alhambra Addition Water Co. v. Richardson*, 72 Cal. 601.

We then proceed to consider whether there is any possible state of facts consistent with the findings of the court heretofore quoted, and also consistent with the absence of fraudulent intent in the mind of the grantor at the time of the making of the deeds sought to be set aside in this action. The finding of the court "that the defendant Bray by the making of these deeds did hinder, delay, and defraud the plaintiff in the collection of his debt" throws no special light upon the solution of the question as to the actual intent of the grantor; while important as evidence of the intent, by reason of the presumption that every man intends the usual and ordinary consequences of his voluntary acts, yet our Statute requires that a conveyance shall not only delay and defraud creditors, but that it was made with the intent to delay and defraud, and the Statute appears to recognize the intent as the prevailing and controlling element in measuring the bona fides of the transactions. Bray did actually defraud Bull in the making of the deeds, by depriving him of property which would otherwise have been applied to the satisfaction of the execution; but it does not necessarily and conclusively follow therefrom that the intent was present in his mind to defraud, or that in making the transfer he may not have been actuated by the most honest motives.

Appellant insists that the existence of the facts, to wit, "that the grantor was insolvent at the time of the transfer, and that the conveyances were deeds of gift, render the inference of fraudulent intent absolute and conclusive, and a conveyance under such circumstances, therefore, would be void under any and all conceivable states of facts; and this is the important and determinative question in this case." Very many of the authorities from other States relied upon by appellant to support this contention rest in whole or in part upon the presumptions "that every man intends the usual and natural consequences of his voluntary act," and that "every man is presumed to know the condition of his own business," and, applying those presumptions, it is said that the natural consequence of an insolvent giving away his property is to defraud his creditor, and that, therefore, the insolvent must have intended to defraud; and, again, "a man is presumed to know the condition of his own business affairs, and therefore if, as a matter of fact, he is insolvent, he must know of such insolvency."

Best, in his work on Evidence, section 307, speaking of the changes which this subject of presumptions has undergone in our legal history, says: "Certain presumptions which in earlier times were deemed absolute and irrebuttable have, by the opinion of later judges, acting on more enlarged experience, either been ranged among *presumptiones juris tantum*, or considered as presumptions of fact, to be made at the discretion of the jury. On the whole, modern courts of justice are slow to recognize presumptions as irrebuttable, and are disposed rather to restrict than to extend their number. To conclude a party by an arbitrary rule from adducing evidence in his favor is an act which can only be

We then proceed to consider whether there is any possible state of facts consistent with the findings of the court heretofore quoted, and also consistent with the absence of fraudulent intent in the mind of the grantor at the time of the making of the deeds sought to be set aside in this action. The finding of the court "that the defendant Bray by the making of these deeds did hinder, delay, and defraud the plaintiff in the collection of his debt" throws no special light upon the solution of the question as to the actual intent of the grantor; while important as evidence of the intent, by reason of the presumption that every man intends the usual and ordinary consequences of his voluntary acts, yet our Statute requires that a conveyance shall not only delay and defraud creditors, but that it was made with the intent to delay and defraud, and the Statute appears to recognize the intent as the prevailing and controlling element in measuring the bona fides of the transactions. Bray did actually defraud Bull in the making of the deeds, by depriving him of property which would otherwise have been applied to the satisfaction of the execution; but it does not necessarily and conclusively follow therefrom that the intent was present in his mind to defraud, or that in making the transfer he may not have been actuated by the most honest motives.

justified by the clearest expediency and soundest policy, and some presumptions of this class ought never to have found their way into it."

According to the provisions of the Code of Civil Procedure (§§ 1961-1968), the foregoing presumptions are disputable presumptions, and may be controverted by other evidence; and, indeed, the presumption that every man knows the condition of his own business affairs has no standing in this case, for the trial court has found as a matter of fact that "the defendant Bray did not know that he was insolvent." And, not knowing his insolvency, how can it be presumed from the existence of his insolvency that he intended to defraud? For no man can be presumed to intend a consequence which he does not know, of which he is ignorant, and which, therefore, he cannot contemplate. It may be conceded that one who acts recklessly and regardless of consequences is not to be exonerated. The fraud in this case rests upon the insolvency of the grantor; for, while there is no allegation, proof, or finding as to the value of the property conveyed, still, if he was solvent, a gift of this character, in the absence of an actual fraudulent intent, would be upheld. If defendant Bray did not know that he was insolvent, then he did not know that this property was required to pay his debts, and the finding of the court that he was ignorant of his insolvency is absolutely inconsistent with the presumption that he intended the consequences of an act, which consequences depended upon insolvency. Appellant's counsel insist that a voluntary conveyance by an insolvent is void under all circumstances, and that the intent to defraud is conclusively presumed. If that be so, it must be by reason of some presumption of law; but, if it be said that fraud can be conclusively presumed in any case, except as provided by section 3440, Civil Code, then fraud is again made a question of law, and this would amount to an abrogation of section 3442, Id., which provides that "fraudulent intent is a question of fact," and would be creating a class of conclusive presumptions not recognized or justified by either section 3440, Id., or section 1962, Code Civil Proc.

As has been remarked at the inception of this opinion, the great number of cases from the courts of other States, cited by appellant's counsel to support this contention, will not be reviewed. Some of them directly sustain such position; others merely affirm the decisions of *nisi prius* courts, that a gift by an insolvent is sufficient evidence to justify the setting aside of a conveyance by a creditor; others hold the insolvent guilty of a fraudulent intent as a matter of law; and many others are based upon the two presumptions heretofore referred to, and holding that such presumptions were conclusive presumptions, and that therefore the fraudulent intent necessarily resulted therefrom; and this was the reasoning adopted by this court in the case of *Swartz v. Hazlett*, 8 Cal. 118. The court held in that case that "every man must be held to know the law and the facts regarding his own business." In other words,

if the debtor is insolvent, he is conclusively presumed to know that fact; and, the necessary consequences of a transfer of his property being to delay and defraud his creditors, the fraudulent intent follows in all cases. The important distinction between that case and the one at bar is that in this case the lower court not only recognized the presumption that "every man is presumed to know the condition of his own affairs," as being rebuttable, but absolutely rebutted it by finding as a fact that "the defendant Bray did not know the condition of his own affairs, and did not know that he was insolvent."

In 1 Wharton, Cont., § 877, subd. 4, is used this language: "As a condition of fraudulent intention, insolvency known to the grantor must be shown. A party who believes himself to have the pecuniary ability to make a gift can make such gift without the risk of its being subsequently impeached, supposing his belief is not negligently adopted."

In the case of *Swartz v. Hazlett*, *supra*, this court really held that a transfer of property by a grantor who knew of his insolvency was conclusively fraudulent; and, while we are not inclined to even adopt that view of the law under our statutes, yet, from the reasoning of the court in that case, if there had been a finding as to the grantor's ignorance of his insolvency, it does not appear that the case could have been reversed, and judgment ordered for the plaintiff. As we have already seen (*Emmal v. Webb*, *supra*), if, upon any conceivable theory, the inference of fraudulent intent would be inconsistent with the fact of insolvency, then this court cannot find the intent as matter of law. Now, it appears from the record in this case, in addition to the findings already discussed, that the liabilities and assets of the defendant Bray approximated three quarters of a million dollars, respectively; that he continued in business for years after these deeds were made, and before he made an assignment for the benefit of his creditors; and, in addition to these facts, we will suppose that he honestly believed at all times that he had ample property remaining to pay his debts after this property was transferred, and that the property transferred was of merely nominal value. A state of facts could be imagined even much more favorable to the grantor, Bray, than the foregoing, and which would be perfectly reconcilable with the fact of actual insolvency, and the absence of fraudulent intent at the time of the making of the conveyances; and, conceding the trial court would be justified in drawing the inference of fraudulent intent from such a state of facts, this court would not and could not say that such intent would flow therefrom as a matter of law. It is difficult to see how trivial gifts, made with fair, honest intentions, can be adjudged to have been made with a fraudulent intent, when intent is declared to be a matter of fact in all cases.

In the case of *Carpentier v. Mendenhall*, 28 Cal. 484, it was held that a finding of a demand by one tenant in common to be let into possession, and a refusal by his co-tenant, was not a finding of ouster. The court said:

"The law will not presume from either the one or the other, nor from both combined, that there was an intent to oust. That intent must be established as a fact by the finding of the jury. Conversion is one of the points to be established in actions of trover, but it is settled that demand and refusal is not conversion, but only evidence of it, for the consideration of the jury. In the absence of all explanation, the court would be justified in directing or advising the jury to infer a conversion or an ouster, in a case like the one at bar, from the fact of demand and refusal, but the inference is to be made by the jury and not by the court." There appears to be no reason why the legal principles declared by this court in the criminal case of *People v. Mize*, 80 Cal. 44, are not applicable here. The defendant was charged with an assault with intent to commit murder. It is a statutory offense, and the intent is the essential ingredient. The trial court gave the following instruction: "The jury are instructed that the natural and probable consequence of every act deliberately done by a person of sound mind is presumed to have been intended by the author of said act; and if the jury believe from the evidence, beyond a reasonable doubt, that the defendants, or either of them, did shoot at said Henry Coffey, as charged in the information, and that the natural and ordinary consequences of said shooting would be the death of said Henry Coffey, then the presumption of law is that the defendant so shooting did shoot at said Coffey with intent to kill him." This court said: "It is doubtless true that a man is presumed to have intended the immediate and natural consequences of his act, but, when an act becomes criminal only when it has been performed with a particular intent, that intent must be alleged and proved. It is for the jury, under all the circumstances of the case, to say whether the intent required by the Statute to constitute the offense existed in the mind of the defendant." This charge withdrew from the jury the consideration of the question whether the defendants intended to kill Coffey. The defendants claimed that they were acting in self defense, and upon real and apparent danger. To tell the jury, therefore, if they believed that the defendants had shot at Coffey, and that the natural and ordinary consequences of the shooting would be the death of Coffey, the law would presume them guilty of an intent to kill, was erroneous, because it entirely disregards the question whether the defendants acted in good faith, and to defend themselves against real or apparent danger. So, in the case at bar, if a voluntary transfer by the defendant insolvent carries with it a conclusive fraudulent intent, the defendant would be precluded from showing his motives and good faith in making the conveyance, and the question of intent, which a jury may have been called to try, which in all cases is a question of fact, and which is the fact in the case, would be driven from the case by the court calling to its aid presumptions which, as we have already seen, are not only liable to attack, but are put to

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flight at the moment they come in contact with a substantial fact.

The case of *Hager v. Shindler*, 29 Cal. 58, 59, holds that insolvency is but a circumstance from which fraud may be inferred or argued; evidence of fraud, but not by any means conclusive or irrebuttable evidence. In that case the court said: "In a case like the one at bar, insolvency is not a fact of jurisdictional consequence, nor is it *per se* a condition of relief. . . . A complaint framed for the purpose named, while stating that the deed was without consideration, should aid or help out the averment, not by averring insolvency, for that is but a circumstance, not by averring generally that the deed was fraudulent, for that is but a conclusion of law, but by averring the fact superadded by the Statute, to wit, that it was made with 'intent to hinder, delay, or defraud creditors.' The state of the grantor's worldly affairs may be used as evidence to elucidate the intent, if disputed; but as matter of pleading it is not necessary that insolvency should be averred in the complaint, and for the obvious reason that the fact does not enter as a term into the legal proposition. A rich man may make a fraudulent deed as well as one who is insolvent."

The Civil Code provides that the mere want of consideration does not of itself render a conveyance fraudulent as to creditors; and considering this section in connection with the presumptions recognized by the court in *Swartz v. Hazlett*, *supra*, the distinction between sales for an inadequate consideration and voluntary conveyances is entirely imperceptible, and the question in both cases at once becomes one of intent to be decided from all the evidence in the case. The difference in these two classes of conveyances is only in degree; for the grantor must upon appellant's theory be presumed to know his condition, and to know that the consideration is inadequate, and that he is thereby depriving his creditors of the portion of the "fund" which is represented by the difference between an adequate and inadequate consideration, he must be presumed conclusively to intend to defraud them *pro tanto*, for the conveyance is voluntary to that extent. But *McFadden v. Mitchell*, 54 Cal. 629, holds that inadequacy of price and insolvency of the debtor are only circumstances more or less potential in the determination of fraud as a question of fact; and, referring to certain instructions given by the trial court, *Justice McKee* says: "By these instructions the court in effect took away from the jury the consideration of fraudulent intent as a question of fact, and as they are contrary to the plain rule established by the Code the cause is remanded for a new trial." Appellant's position in this case takes away from the jury the consideration of fraudulent intent as a question of fact. In *Jamison v. King*, 50 Cal. 136, the court, speaking through *Justice McKinstry*, said: "Doubtless the concurrence of insolvency on the part of the assignor, and inadequacy of price, would be a circumstance strongly tending to establish fraud; but inadequacy or failure of con-

sideration is not of itself sufficient, even as against the creditors of an insolvent assignor, to authorize a court to find fraud as a conclusion of law. By our Statute it is provided: "The question of fraudulent intent, in all cases arising under the provisions of this Act, shall be deemed a question of fact and not of law; nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded upon a valuable consideration." In the case before us the district court did not find fraud as a fact or as a conclusion of law, nor does the amended complaint allege it." In *Miller v. Stewart*, 24 Cal. 504, the court uses this language: "Whether the transactions in question were entered into by the Millers with intent to hinder, delay, or defraud their creditors is a question which the Statute leaves to the determination of the jury upon such evidence as may be presented for their consideration. The intent is expressly declared to be a question of fact, and must therefore be for the jury, and not the court. In the instruction above quoted the court in effect takes the question from the consideration of the jury, and assumes the decision thereof." In *Lewis v. Burns*, 50 Cal. 141; it appears, the trial court instructed the jury that certain facts, if proven, were conclusive as to the intent of the assignor to hinder, delay, and defraud his creditors. In the opinion of this court, Chief Justice Wallace says: "This instruction cannot be supported. The question of fraudulent intent is a question of fact; it is so declared by the Statute. . . . The instruction, in effect, took away from the jury the decision of the question of fact, and established the fraudulent intent by mere legal conclusion from an isolated circumstance. This we held erroneous in *Jamison v. King*, 50 Cal. 132, at the present term." This decision is not based upon the theory that the facts referred to by the trial court in the instruction were in themselves too weak to justify a conclusive presumption of a fraudulent intent; but it declares that the intent being a question of fact, such a presumption could not be indulged in under our Statute.

If the Legislature had intended a gift by an insolvent to constitute a constructive fraud or fraud in law, it was easy to have said so. Instead of that, they expressly legislated away all the reasons upon which the decisions so holding profess to stand. When the Legislature did intend to preserve the doctrine of fraud in law, they did so in ex-

press language; by section 3440, Civil Code, and then provided that in all other cases the question of fraudulent intent is one of fact, and not of law. It is impossible to comprehend how any decision or series of decisions of other States can make the question of fraud in this State, and in this character of action, a question of law. No decision or series of decisions can repeal a statute.

Let the order be affirmed.

We concur: **DeHaven, J.; Harrison, J.; McFarland, J.; Paterson, J.**

Beatty, Ch. J.:

I concur. It does not seem possible to avoid the conclusion that the law of California on the subject of voluntary conveyances by insolvent debtors is such as in the opinion of *Justice Garoutte* it is declared to be. But I cannot refrain from expressing the belief that it is most unfortunate that the court should be forced to that conclusion. When an insolvent debtor makes a gift of his property to a donee of his own selection, there can be but one result, so far as his creditors are concerned. They are necessarily deprived of what is rightfully theirs, and the law ought to pronounce such transaction *ipso facto* fraudulent and void as to them. Our Legislature, however, has deliberately chosen to make the rights of creditors in such case depend, not upon the proof of facts susceptible of demonstration, and from which the injury is a necessary result, but upon proof of the secret intent of the debtor; in other words, upon the whim of a jury. Such a law invites fraud, puts a premium upon perjury, and multiplies fruitless litigation. It ought to be changed, but the Legislature alone has the power to change it. In the mean time the courts should give the utmost force and effect to so much of the law for the protection of creditors as remains. There should be no hesitation in stating, and in everywhere insisting upon, the proposition that a voluntary conveyance by an insolvent debtor is *prima facie* proof of a fraudulent intent, which throws upon the donee the necessity of rebutting the inference of fraud; and it ought not to be held or intimated that such inference will be rebutted by the mere fact that the debtor was at the date of the conveyance ignorant or uncertain as to his insolvency. It ought to be made clear, on the contrary, that he believed, and had good reason to believe, that his property remaining after the conveyance would be amply sufficient to enable him to meet and discharge his obligations as they matured.

PENNSYLVANIA SUPREME COURT.

APPEAL OF **Charles M. LUKENS et al.**

Re Henry KESLER'S ESTATE.

(...Pa....)

1. The testimony of two witnesses or

Note.—What is not sufficient consideration for new contract.

The performance of an act which the party is
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their equivalent is necessary to modify an ante-nuptial agreement even on the ground of fraud.

2. The resumption of other marital duties by a wife, who has voluntarily estranged herself from her husband because of her dissatisfaction with a valid and binding ante-nuptial con-

under a legal obligation to perform cannot constitute a consideration for a new contract. *Bartlett v. Wyman*, 14 Johns. 239; *Crosby v. Wood*, 6 N. Y.

tract, is no consideration for a revocation of such contract.

3. Abandonment of legal proceedings which are without merit, is no consideration for the revocation of a valid and binding contract.

(October 5, 1861.)

APPEAL by the executors and trustees under the will of Henry Kesler, deceased, from a decree of the Orphans' Court of Philadelphia County awarding Mary R. Kesler one third of decedent's personal estate. *Reversed.*

Mary R. Kesler was the wife of Henry Kesler. Before their marriage they entered into a contract by which she was given a certain annuity in full satisfaction of all claims upon his estate. She claimed that this contract was a fraud upon her rights and the auditing judge disregarded it and permitted the widow to share in the estate as though the testator had died intestate.

Further facts appear in the opinion.

Messrs. Joseph M. Pile and Richard P. White, for appellants:

A party executing a legal instrument is presumed to be acquainted with its contents—where it is unconnected with suspicious circumstances the burden of disproving the presumption lies on him who would impeach the deed.

Greenfield's Estate, 14 Pa. 489.

If one who is about to execute an instrument can read it, and neglects to do so, or being blind or illiterate chooses to act without requiring the contents to be made known to him, he will be bound to it.

Pennsylvania R. Co. v. Shay, 82 Pa. 203.

Evidence to destroy a written contract must be clear, precise and indubitable. This can only be done by the testimony of two witnesses or one witness corroborated by circumstances equivalent to another.

Thomas v. Loose, 5 Cent. Rep. 193, 114 Pa. 35.

Declarations of the testator cannot be received to establish a fact, since the testator is not a party to the conflict over the disposition of his estate.

Herster v. Herster, 122 Pa. 239.

Messrs. Samuel P. Hanson and John G. Johnson, for appellees:

The deed of marriage settlement was void because procured through fraud. There is no rule of evidence which requires that fraud shall be proven by more than one witness.

In *Thomas v. Loose*, 5 Cent. Rep. 190, 114 Pa. 35, the evidence referred to was evidence of facts which varied or changed the writing. Fraud is a fact like any other, which can be proved without overcoming that weight of inference which sustains a written instrument against an effort to modify it by parol.

The presumption as against a person of sound mind, who signs an instrument, that he or she is acquainted with its contents necessarily falls after uncontradicted proof has been offered, of the existence of a deliberate fraud, calculated to induce the execution.

If there be affirmative proof of fraud, the settlement will not be permitted to stand. The woman does not bear such a position towards the man as enables him to induce her signature to the settlement by any deceit.

See *Shea's App.* 1 L. R. A. 322, 131 Pa. 302; *Neely's App.* 124 Pa. 424; *Kline v. Kline*, 57 Pa. 120; *Tiernan v. Binns*, 92 Pa. 248; *Dar-*

396; 2 Parsons, Cont. 437; *Vanderbilt v. Schreyer*, 91 N. Y. 392.

Neither the promise to do a thing, nor the actual doing of it, will be a good consideration if it is a thing which the party is bound to do by the general law, or by a subsisting contract with the other party. *Pollock*, Cont. 161; *Crosby v. Wood*, 6 N. Y. 399; *Deacon v. Gridley*, 15 C. B. 296.

"Nor is the performance of that which the party was under a previous valid legal obligation to do a sufficient consideration for a new contract." 2 Parsons, Cont. 437.

Illustrations of the rule.

When certain sailors had signed articles to complete a voyage, but at an intermediate port refused to go on, and the captain thereupon promised to pay them increased wages, it was held that the promise was without consideration. *Bartlett v. Wyman*, 14 Johns. 280.

A firm having a contract to build a railroad found the contract unprofitable, whereupon the railroad company promised if they would go on and complete the contract they would repay to the contractors all of the obligations which they had or would incur in consequence of their completion of the work. Held no consideration. *Ayres v. Chicago, R. I. & P. R. Co.* 52 Iowa, 478.

The payment of the accrued interest upon a promissory note which is past due does not constitute a valid consideration for the extension of the note; it is the payment of interest in advance that will support and enforce an extension. *Waters v. Simpson*, 7 Ill. 570; *Warner v. Campbell*, 23 Ill. 280; *Dennis v. Piper*, 21 Ill. App. 169.

When a mortgagor, as a condition to the pay-

ment of his mortgage, exacted from the mortgagee an obligation that he would procure the cancellation of a certain outstanding bond executed by the mortgagor, or pay him the sum of \$100, said bond being given to indemnify against some apparent incumbrance, it was held that, it not being shown that there was any incumbrance existing against the land, the obligation was without consideration. *Conover v. Stillwell*, 34 N. J. L. 54.

A promise to pay an attorney additional compensation to attend as a witness, after he has been duly subpoenaed, is without consideration. The attorney did nothing except what he was legally bound to do. *Smithett v. Blythe*, 1 Barn. & Ad. 514.

Part payment of a debt overdue is not a valid consideration for an agreement to postpone or discharge the payment of the residue. *Pabodie v. King*, 12 Johns. 433; *Reynolds v. Ward*, 5 Wend. 501; *Gibson v. Renne*, 19 Wend. 399; *Smith v. Bartholemew*, 1 Met. 276; *Deacon v. Gridley*, 15 C. B. 294.

So a promise to pay increased compensation for services which the party was under a prior legal obligation to render is not valid. *Stilk v. Myrick*, 2 Campb. 317; *Harris v. Carter*, 3 Ell. & Bl. 559; *Voorhees v. Woodhull*, 33 N. J. L. 494.

The relinquishment of a security deposited by a debtor with his creditor, as collateral security for a debt, which was afterwards discharged by a composition deed, is no consideration for a promise by the debtor to pay the residue of the debt beyond the amount of the composition; the debt being released and the debtor entitled to the return of the security, the creditor cannot make its surrender a consideration of a new promise. *Cowper v. Green*, 7 Mees. & W. 633; *McDonald v. Nelson*, 2 Cow. 140; *Crosby v. Wood*, 6 N. Y. 399.

lington's App. 86 Pa. 512; *Miskey's App.* 107 Pa. 611; *Yardley v. Outhbertson*, 108 Pa. 395; *Byrd v. Boyd*, 66 Pa. 293; *Russell's App.* 75 Pa. 279; *Boyd v. De La Montaigne*, 73 N. Y. 502; *Comstock v. Comstock*, 57 Barb. 453, 470; *Rhodes v. Bate*, L. R. 1 Ch. App. 252; *Turner v. Collins*, L. R. 7 Ch. App. 329; *Savery v. King*, 5 H. L. Cas. 627, 657, 668; *Hoghton v. Hoghton*, 15 Beav. 278, 314; *Cooke v. Lamotte*, Id. 241, 249; *Whelan v. Whelan*, 3 Cow. 587.

The burden of proof being on the beneficiary under the deed, he must clearly and affirmatively prove that the woman (1) fully knew what she was doing; (2) was entirely competent to act; (3) was wholly free from undue influence; (4) had independent advice; (5) that the transaction was righteous; (6) that it fully expressed her intentions; (7) that "the deed was the well-understood act of her mind," and (8) that she had full knowledge "of its import and effect."

This burden of proof the appellants have not assumed. They have failed to show the existence of any of these requisites.

Story, Eq. § 308; *Kline v. Kline*, *Boyd v. De La Montaigne*, *Shed's App.*, and *Whelan v. Whelan*, *supra*; *Gross v. Lober*, 47 Pa. 525.

In *Thomson v. White*, 1 U. S. 1 Dall. 426, 1 L. ed. 206, it was said: "In the case of *Harvey v. Harvey*, 2 Ch. Cas. 180, three successive chancellors decreed, on the parol proof of a single witness, against a deed of settlement."

See also *Wallace v. Baker*, 1 Binn. 616; *Dinkle v. Marshall*, 3 Binn. 589.

Declarations of an interested party made before, at the time of, or after, a contract, are evidences against him.

Duncan v. Lawrence, 24 Pa. 154; *Shirley v. Shirley*, 59 Pa. 267; *Munger v. Silabee*, 64 Pa. 434; *Simons v. Vulcan & M. Oil Co.* 61 Pa. 202; *Fuller v. Kelsey*, 4 Brewst. 106.

There was a valid contract, upon sufficient consideration, to treat the marriage settlement as void, and to maintain, unrevoked, a codicil giving the wife one third of the testator's real and personal estate.

The settlement of a family difficulty and dispute was a valuable consideration for a promise such as this.

Burkholder's App. 105 Pa. 36; *Rice v. Bixler*, 1 Watts & S. 445; *Chamberlain v. McClurg*, 8 Watts & S. 31; *Pazson v. Hewson*, 8 W. N. C. 197; *Share v. Anderson*, 7 Serg. & R. 62; *Barton v. Wills*, 5 Whart. 225; *Wilen's App.* 105 Pa. 124.

It is immaterial that the decedent puts his contract into the shape of a codicil.

Smith v. Tuitt, 127 Pa. 341; *Dufour v. Peireira*, 1 Dick. 419; *Wigram, Wills*, p. 4.

An instrument may operate as a will in one part and as a deed in another.

Wigram, Wills, 27; *Meek v. Holton*, 22 Ga. 401; *Babb v. Harrison*, 9 Rich. Eq. 111; *Brinker v. Brinker*, 7 Pa. 55; *Johnson v. McCue*, 84 Pa. 183.

Sterrett, J., delivered the opinion of the court:

There is certainly no apparent reason why, situated as these parties were, the "law should regard with disfavor" the ante nuptial agreement made by them. Mr. Kesler was advanced in years, had already accumulated a for-

ture, and had a family by a former marriage; while Mrs. Davidson was lifted out of poverty and comfortably provided for by it. Persons, situated as they were, do not usually act from mere impulse, or contract without consideration; and the court below has accordingly found that "every requirement of the law seems to have been complied with in the execution of this contract. A full disclosure was made to the intended wife, and every opportunity afforded her either to obtain information as to the nature and character of the instrument she came prepared to execute, or object to its execution if ignorant of its contents, or deceived as to its purpose and object. She was not illiterate, but intelligent and well educated. She was not young and inexperienced, but of mature years and acquainted with marital duties and rights. She was a free agent, of sound mind, and fully capable of protecting herself. Nor was she under any restraint. The deed of settlement, although of great length, is in the usual form adopted by careful and accomplished conveyancers, and its preamble, in clear and perspicuous language, easily comprehended by a person of even ordinary intelligence, specified the terms and objects of the agreement entered into between the parties. That it was understood by the claimant we think there is no doubt. And from her necessities circumstances it is not wholly improbable she was content, assured of the maintenance and comforts afforded by her future husband's wealth during his lifetime and the secured annuity of \$600 for her life after his death, to relinquish all further claim upon his estate." It is impossible to understand how, consistently with these facts, Mr. Kesler can be found to have practiced a fraud upon his intended wife in the execution of this contract. In his senile garrulity he may have made statements to his son-in-law which might better have been left unsaid; but when brought face to face with his wife he distinctly averred, and she did not deny, that she had never asked him any questions in regard to the agreement, and that he had made the settlement "to protect his family; that she might jump over the traces; that he fully intended if she proved a faithful, good wife,—he only had this to protect himself and his family,—if she proved to be what he thought she was, and what she had now turned out to be, he would have given her at the same time one third." (Testimony, pp. 48 and 49). But, whatever may have been his original intention, in view of the findings of the court below, that Mrs. Davison, knowing her rights and fully informed of the situation, deliberately and in writing released all her interest in her deceased husband's estate in consideration of the provision made for her by this agreement and was content, it is incredible that a fraud should have, in fact, been practiced on her. Even assuming that the facts are as claimed by her counsel, the quantum of proof adduced is not sufficient to modify the agreement; they were not proved by two witnesses or their equivalent. *Thomas v. Loose*, 114 Pa. 35, 5 Cent. Rep. 190.

The agreement must be considered as having embodied the real intention of the parties at its date, and therefore conclusive of their rights. Was there a valid revocation of it? It will

be conceded that there must have been a meritorious or valuable consideration for such revocation (*Stickney v. Borman*, 2 Pa. 67); and it is very clear that neither of these existed here. The sole inducement was the doing of that which Mrs. Kesler was legally bound to do. She had voluntarily estranged herself from her husband because of her dissatisfaction with the ante-nuptial contract; there is no pretense that she had any other cause of complaint. If, as has been shown, that was a valid and binding contract, the estrangement was without justification; it was a wanton abuse of the marital relation for mercenary purposes; and reconciliation was her duty. Public policy forbids that the performance of such duty be made the subject of barter and sale. The law fixes and regulates the marital relation on public considerations, and will not allow the parties to discard and renew it for money. Thus in *Roberts v. Frisby*, 38 Tex. 219, the supreme court held that the husband is not legally bound by a post-nuptial contract in which he hires his wife to live with him. The same principle was affirmed by the Supreme Court of Tennessee in *Copeland v. Boas*, 9 Baxt. 223; and *Mr. Justice Allen* of the Supreme Judicial Court of Massachusetts we-

said: "It is as much against public policy to restore interrupted conjugal relations as it is to continue them without interruption for the same consideration. The right of condonation is not exercised for the sake of justice to the injured party, or with regard to the rights of others or the interests of the public when it is sold for money, and the law cannot recognize such a consideration." *Merrill v. Peaslee*, 146 Mass. 460, 6 New Eng. Rep. 120.

There are no cases in conflict with this view, decided by this court. It was not involved in *Burkholder's App.*, 105 Pa. 81, upon which the court below relied.

It is said that abandonment of the legal proceedings instituted by Mrs. Kesler for the revocation of the ante-nuptial contract was sufficient consideration. The answer to this is that she was not prejudiced by that act; the question involved there has been raised here, and has been shown to be without merit.

Mrs. Kesler is therefore not in a position to claim the aid of a court of equity; and the decree of the court below must be reversed.

Decree reversed with costs to be paid by the appellee, and record remitted with instructions to distribute the fund in accordance with the foregoing opinion.

MARYLAND COURT OF APPEALS.

J. Fred C. TALBOTT, *Appt.*,

v.

FIDELITY & CASUALTY CO. of New York.

(.....Md.....)

A Maryland statute providing that whenever the laws of any other State imposed upon Maryland insurance companies seeking to do business within its borders greater obligations or prohibitions than are prescribed for foreign companies seeking to do business in Maryland, the same obligations and prohibitions shall be imposed on companies of such State which shall seek Maryland business, makes such foreign law the rule which Maryland will apply to companies of the foreign State asking permission to do business within its territory; and if a Maryland company is refused a license in the foreign State merely on the ground

of discretion, the latter's companies may be refused license in Maryland on the same ground, although the Maryland statutes do not in terms authorize it.

(June 18, 1891.)

A PPEAL by defendant from an order of the Baltimore City Court directing the issuance of a writ of mandamus to compel the insurance commissioner of the State of Maryland to issue a license to permit complainant to do business in Maryland. *Reversed.*

Argued before Alvey, *Ch. J.*, and Bryan, McSherry, Fowler, and Irving, *J.J.*

The facts are stated in the opinion.

Messrs. William A. Fisher, William Cabell Bruce, and D. K. Este Fisher, for appellant:

It would be strange if the appellant could not exclude the appellee from the State until the

NOTE.—*Foreign corporations; when amenable to local law; the law of comity.*

The corporations of one State have no right to migrate to another, there to exercise their franchises, except upon the assent of such other State, and upon such terms and conditions as the State granting it may think proper to impose. *Lafayette Ins. Co. v. French*, 59 U. S. 18 How. 404, 15 L. ed. 451; *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357; *Ducat v. Chicago*, 77 U. S. 10 Wall. 410, 19 L. ed. 872; *Liverpool Ins. Co. v. Massachusetts*, 77 U. S. 40 Wall. 566, 19 L. ed. 1029; *Osborne v. Mobile*, 83 U. S. 16 Wall. 479, 21 L. ed. 470.

The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a State is always revocable. *Christ Church v. Philadelphia County*, 65 U. S. 24 How. 300, 16 L. ed. 602; *People v. Roper*, 35 N. Y. 629; *People v. Commissioners of Taxes*, 47 N. Y. 601.

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The power to revoke can only be restrained, if at all, by an explicit contract upon good consideration to that effect. *Humphrey v. Pegues*, 83 U. S. 16 Wall. 24, 21 L. ed. 338; *Tomlinson v. Jessup*, 82 U. S. 15 Wall. 454, 21 L. ed. 204.

A corporation, organized and existing under the laws of one State, is a creature of those laws, and beyond its jurisdiction, it carries its corporate life and existence only by sufferance and upon an express or implied consent. It cannot come within another jurisdiction to transact business except by permission, either express or implied. The right of a State to exclude foreign corporations is perfectly settled and not open to debate. *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357; *Bank of Augusta v. Earl*, 38 U. S. 13 Pet. 566, 10 L. ed. 306; *Liverpool & L. L. & F. Ins. Co. v. Massachusetts*, 77 U. S. 10 Wall. 566, 19 L. ed. 1029; *San Mateo County v. Southern Pac. R. Co.* 13 Fed. Rep. 722; *People v. Fire Asso. of Phila.* 23 N. Y. 811.

Maryland company is admitted into New York, dependent as the appellee is for its right to engage in business here merely upon the comity of the State to permit it to come into its borders—"a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interests or repugnant to their policy."

Paul v. Virginia, 75 U. S. 8 Wall. 168, 19 L. ed. 857; *Doyle v. Continental Ins. Co.* 94 U. S. 534, 24 L. ed. 148; *People v. Fire Asso. of Phila.* 92 N. Y. 325; *Fire Asso. of Phila. v. New York*, 119 U. S. 118, 30 L. ed. 346.

The appellant, as the head of a separate and independent department of the government of the State, is vested with a discretion and judgment which he has exercised for the protection of a corporation of this State, and with his discretion and judgment the courts have no power to interfere.

Marbury v. Madison, 5 U. S. 1 Cranch, 187, 2 L. ed. 60; *Kendall v. United States*, 37 U. S. 12 Pet. 608, 9 L. ed. 1214; *Decatur v. Paulding*, 39 U. S. 14 Pet. 497, 10 L. ed. 559; *Gaines v. Thompson*, 74 U. S. 7 Wall. 848, 19 L. ed. 63; *Mississippi v. Johnson*, 71 U. S. 4 Wall. 498, 18 L. ed. 440; *United States v. Black*, 128 U. S. 40, 32 L. ed. 354; *Dwelling-House Ins. Co. v. Wilder*, 40 Kan. 569; *United States v. Schurz*, 102 U. S. 878, 2 L. ed. 167; *Butterworth v. United States*, 112 U. S. 50, 28 L. ed. 658; High, Extraordinary Legal Remedies, § 42; *State v. Register*, 59 Md. 289; *George's Creek Coal & I. Co. v. Alleghany County Commrs.* 59 Md. 259. See also *Devin v. Belt*, 70 Md. 354; *Green v. Purnell*, 12 Md. 329; *Miles v. Bradford*, 22 Md. 184; *Brooke v. Widdecombe* 30 Md. 401; *Magruder v. Swan*, 25 Md. 178.

That the Maryland company was not transacting business in New York when the appellant refused the license to the appellee is immaterial.

Germania Ins. Co. v. Swigert, 4 L. R. A. 478, 128 Ill. 244; *Phoenix Ins. Co. v. Welch*, 29 Kan. 679; *State v. Moore*, 39 Ohio St. 490.

Our statute contemplates the case of a refusal by the insurance commissioner of a sister State to issue a license to an insurance company of the State of Maryland to do business in such State; and of the right of this State to exclude the New York corporation, there cannot be any doubt.

Doyle v. Continental Ins. Co. 94 U. S. 542, 24 L. ed. 152.

Until the requirements of the law have been complied with, a foreign corporation is without power to do any business whatever within the limits of a State. *Utley v. Clard-Gardner Lode Min. Co.* 4 Colo. 369.

Conditions imposed by statute. See note to *State v. Western U. Mut. L. & Acc. Soc.* (Ohio) 8 L. R. A. 159.

The right of a corporation created by the laws of one State to do business in another depends upon the comity of the State in which the business is transacted,—a comity which is never extended where the exercise of such power is prejudicial to its interests or repugnant to its policy. *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 11, 26 L. ed. 644.

A foreign insurance company, doing business in Pennsylvania, under the authority of a statute requiring an agreement that judicial process served upon its agent should have the same effect as if served upon the corporation, is within the 13 L. R. A.

Messrs. Bernard, Carter & Sons for appellee.

Irving, J., delivered the opinion of the court:

The question to be decided in this case arises upon an appeal from a *pro forma* order of Baltimore City Court directing a mandamus to issue against the insurance commissioner of the State, commanding him to issue a license to the Fidelity & Casualty Company of New York to do business in this State. It is especially interesting and important, as it involves a question of comity between the States, and a construction of the statutes of this State and of New York State in relation to each other. The case has been argued with very great ability by the counsel on both sides, and by the aid of that skillful and learned debate we have been able to reach a unanimous conclusion. The record discloses the following state of affairs: The appellee for several years, as a New York corporation, upon paying the requisite license fees, has been transacting business in the State of Maryland, and has outstanding risks in the State of over \$3,500,000. It is a corporation with \$250,000 paid-up capital. In December, 1890, this company, tendering the usually demanded license moneys, asked for its annual license to transact business in Maryland. It was informed that, in consequence of a protest from the American Casualty Insurance & Security Company of Baltimore City, license to transact business in Maryland would not be granted. Thereupon the appellee filed its petition in the Baltimore City Court, alleging compliance or tender of compliance with all the prerequisites to the granting of license, and that the same had been refused. It then asked for mandamus to compel its issuance. Rule was laid on the insurance commission to show cause why the mandamus should not issue. By his answer the following admitted facts were disclosed: The American Casualty Insurance & Security Company of Baltimore City was organized and incorporated in 1890, with a paid-up capital of one million of dollars, and a half million of surplus. Its line of business was manifold, and similar to that of the appellee, and it became the rival of the appellee in insurance business. This company having started business here, desired to open an office and transact business in the City of New York. It applied for license to trans-

meaning of the Act of Congress of 1875, relating to service of process, "found" in that State so as to give jurisdiction to federal courts sitting in that State. *Ex parte Schollenberger*, 98 U. S. 373, 24 L. ed. 833.

There is no sound reason why, in the case of an insurance company doing business in another State, by an agent, under statutes such as those referred to in the principal case, it should not be deemed to be represented in the latter by such agent, and held responsible for its obligations and liabilities there incurred. See also *Baltimore & O. R. Co. v. Harris*, 79 U. S. 12 Wall. 65, 20 L. ed. 354; *Chicago & N. W. R. Co. v. Whitton*, 80 U. S. 13 Wall. 235, 20 L. ed. 576; *St. Clair v. Cox*, 106 U. S. 357, 27 L. ed. 225.

As to the law regulating the terms upon which foreign insurance companies may transact business within a State, see note to *State v. Western U. Mut. L. & Acc. Soc.* (Ohio) 8 L. R. A. 159.

Retaliatory legislation. *Ibid.* See also note to *Boulware v. Davis* (Ala.) 9 L. R. A. 601.

act business in New York City. The insurance superintendent of New York State replied that under the laws of New York he could not grant license to do more than one kind of business in that State. The application was modified so as to ask license for only one kind of insurance, viz., that of steam-boilers. Notwithstanding the company was ready and willing to comply with all the requirements of the State of New York preliminary to the issuance of license, the superintendent refused to grant license, in the exercise of the discretion which the Statute of that State in express terms confided to him. The language of the Statute of New York, to wit, of the second section of chapter 593 of the Acts of 1873, is as follows: "The said superintendent shall have power to refuse admission to any company, corporation, or association applying to be permitted to transact the business of insurance in this State from any other State or country wherever the capital stock shall be impaired, and also whenever in his judgment such refusal to admit shall best promote the interests of the people of this State." In the 138th section of article 23 of our Code of Public General Laws the following proviso is put: "Provided, that when by the laws of any other State any deposit of money or securities is required, or taxes, fines, or penalties, or other obligations or prohibitions are imposed upon insurance companies incorporated or organized under the laws of this State, and transacting business in such other State, or upon the agents of such insurance companies, greater than those required or imposed by the laws of this State, so long as such laws continue in force the same taxes, fines, penalties, and deposits, obligations, and prohibitions shall be imposed upon all agents or insurance companies of such State doing business in this State, instead of those prescribed by the laws of this State." The insurance commissioner of this State, regarding this provision of our Statute as substituting the New York Statute for our Statute whenever the New York law differed from ours, and introduced other and greater "obligations and prohibitions" as affecting Maryland companies desiring to prosecute business in New York State, and being informed that a Maryland company of like character with the appellee had been excluded from New York, and refused license to do business in that State, deemed it his duty to refuse license to the appellee to do business in this State. To test the correctness of his view of the law and conduct in the premises this proceeding was instituted and a *pro forma* order for mandamus was granted, from which this appeal was taken.

The appellee contends that the Statute of Maryland does not give our insurance commissioner any discretion whatever, as the New York law does, in express terms, give to its commissioner or superintendent of insurance; and that, therefore, when the appellee had tendered full compliance with all the provisions of our Statute which section 124 of article 23 of the Code enumerates, it was the imperative duty of the insurance commissioner to grant a license; and that his refusal was without warrant of law. The argument is that, as the Statute says that license shall not be granted

"unless it be fully organized and possessed of the amount of capital required of similar companies formed under the laws of this State, or until the following conditions have been complied with," then, when it is properly organized, and has proper amount of capital, and has complied with the conditions mentioned in the Statute,—as was admitted was the case as respects the appellee,—there was no alternative to the commissioner, and he must issue the license. The appellant controverts this position, and insists that, while a discretion in the matter is not conferred on the commissioner in express language, as is done by the New York Statute to its superintendent of insurance, yet our Statute is a strictly retaliatory one; and when the New York Statute imposes an "obligation or a prohibition" not found in ours, that obligation and prohibition must be treated as if found in so many words in our Statute, and it is to be enforced accordingly. In other words, the contention of the appellant is that, in such case, and for such emergency, our Statute makes the New York law our law to control the action of our commissioner of insurance. This, we think, is the correct view, and justifies the commissioner in refusing license to the appellee.

We cannot agree to the view, pressed with so much earnestness and ability by appellee's counsel, that the exclusion of the Maryland company from New York State by the refusal on the part of the New York superintendent to allow it license, was not a "prohibition" by the law of New York, within the meaning of our Statute. The law of New York vests such absolute discretion in its superintendent of insurance that it is within his power to exclude every Maryland company from working in New York State, if in his judgment it was not to the interest of the New York people to have companies of other States to compete with insurance companies of that State. Now, it is perfectly clear that our law-makers never designed that our statute should be so interpreted as to allow New York companies to have access to our State on the same terms as our own, while ours cannot be allowed in New York State. According to the view of the appellee, that very condition of things might have existed by the action of the New York superintendent, and yet it would not have existed by the law of New York. Clearly that cannot be a sound view which might lead to such result. The Maryland company has been shut out of New York. How has that been effected? By the unappealable determination of the New York officer not to grant it a license. By what authority has that officer so conclusively shut the door upon a Maryland company? By the law of New York, giving him the discretion and power of prohibiting that company from entering the State of New York to do insurance business there. It is the law that enabled the superintendent to prohibit, and that is responsible for the prohibition; and the prohibition must be referred to and charged to the superior authority,—the law of New York. It will not do to say, therefore, that the law of New York does not prohibit. By its express provisions, in certain contingencies, exclusion (which is prohibition most effectual) is allowed; and supposing that contingency as arising, the

superintendent has excluded the Maryland company from New York; so that it is prohibited now, under penalties, from attempting to work there. The facts show it to have been a willful exclusion of the Maryland company from New York. Only two considerations are mentioned in the law giving the superintendent his power to refuse license. One is where there is impairment of the value of the stock of the company seeking license, and the other, when the superintendent for any reason may think it not for the interest of the New York people that such company should be permitted to do business in that State. There was no impairment of the stock, for the company was in unusually safe condition. Its capital was \$1,000,000, all paid up; and it had a half million of surplus. So safe a company could not jeopardize the interests of the people by offering it insurance. It was four times as strong as the New York company in paid-up capital, and with so large a surplus offered an unusually safe medium of insurance in the several directions in which it took risks. It is apparent, therefore, that no justifying reason existed for prohibiting it from exercising its functions in the State of New York, and it was well justified in asking the commissioner in this State to put into force the retaliatory feature of our law; and there would seem to be especial fitness enforcing it as against the appellee, whose business is so especially along the same line and plane as the American Casualty Insurance & Security Company.

The rule for the construction of statutes is that statutes are to be "read according to the natural and obvious import of their language;" and no construction ought to be made against the express letter of the statute, for nothing can so express the meaning of the makers as their own direct words. Sedgw. Stat. & Const. Law, 260. The same author, in the same connection, says that words are to be taken in their ordinary sense, unless such a construction would be obviously repugnant to the intention of its framers. The object and intent of a statute is always to be regarded; and, of course, its language is to be understood and construed as furthering the object contemplated by the makers. A forced construction "for the purpose of extending or limiting their operation" must not be resorted to. The object of our Statute is palpable. The design was to put insurance companies coming from other States into the same position as ours would be in the State whence they came. They were to be admitted on the same terms, and none other than ours would be there. Companies coming from

other States were intended to fare no better than ours would on going to their State. Any obligation or "prohibition" affecting Maryland companies in other States was to operate here on companies coming here from thence. With such an object in view, as very manifestly existed, the "prohibition" can have but one reference and meaning, and it would be forcing it from its natural and obvious meaning in the Statute to suppose, because it is used together with the language, "deposit of money or securities, taxes, fines, or penalties, or other obligations," and "or prohibitions" must have some reference to the subject of money deposits or taxes. After enumerating all the other things that might be demanded to be done, it winds up with "prohibitions," meaning thereby plainly what the word means in its most natural and usual signification. It clearly meant that if our companies were prohibited from a State, theirs were to be prohibited here. The law was intended to be one of strict reciprocity. "Prohibition" means, according to lexicographers, "forbidding to do;" "an inhibition;" "an interdiction." When, therefore, the superintendent refused license to the Maryland company, it was instantly forbidden to attempt to transact business in the State of New York. That such legislation as that of this State which we have been called on to construe is legitimate and constitutional is fully established by authority; but, as that has not been questioned, and the whole argument has rested on the construction of the language of the statutes of the two States, we need not cite authority in support of the law. The enforcement of the law in a fair and just way, as we have construed it, and its authority to the commissioner, cannot operate prejudicially to the people promoting competition. Competition is always in the interest of the masses, and a judicious officer will never unnecessarily do what will prevent it; but action such as he has taken in this case will tend to secure just treatment from other States. If this Maryland company was impaired in credit, and had for that reason been refused license in New York State, its prohibition from doing business there would not have given rise to the exercise of the retaliatory feature of our law, unless it was against some company from that State in like unsound condition.

Being of opinion that the mandamus against the appellant should not have been ordered, *the ordered granting it must be reversed*, and the petition therefor must be dismissed.

Petition for rehearing overruled.

INDIANA SUPREME COURT.

CITY OF RICHMOND, *Appt.*,

v.

Charles E. DUDLEY.

(.....Ind.....)

A city ordinance for regulating the stor-

Notz.—Municipal ordinances, unconstitutional and void.

An ordinance which permits one person to carry on an occupation within municipal limits, and prohibits another, who has an equal right, from pursuing such business, is unconstitutional. *Cooley*, Const. L. 243-247.

age of inflammable or explosive oils, which reserves to the common council the right to grant or refuse permission to keep and store such oils according to its discretion, and at its option to revoke such permission at any time, without fixing any rule for determining the con-

ditions under which such business may be carried on. *Cooley*, Const. L. 243-247.

An ordinance prohibiting any person from be-

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ditions under which such oils may be kept, which may be complied with by all alike, is invalid.

(September 17, 1891.)

APPEAL by plaintiff from a judgment of the Circuit Court of Wayne County in favor of defendant in an action brought to recover a penalty for the violation of a city ordinance forbidding the keeping within the city limits of large quantities of inflammable oils without permission. *Affirmed.*

A decision was reached and an opinion handed down in this case on January 13, 1891, reversing the judgment of the lower court. A rehearing was subsequently granted and conclusion announced by the opinion given herewith was then reached.

The facts sufficiently appear in the former opinion as reported in 10 L. R. A. 187, and in the opinion given herewith.

Messrs. A. C. Lindmuth and Fox & Robins for appellant.

Messrs. Burchenal & Rupe, for appellee:

Municipal ordinances placing restrictions upon lawful conduct or business, or the use of lawful property, must, in order to be valid, specify the rules and conditions to be observed in such conduct or business, or the use of such property; and must admit of the exercise of the privilege by all citizens alike, who will comply with such rules and conditions; and must not admit of the exercise of any arbitrary discrimination, by the municipal authorities, as between citizens who will so comply.

Yick Wo v. Hopkins, 118 U. S. 856, 30 L. ed. 220; *Baltimore v. Radecke*, 49 Md. 217; *Re Frazer*, 6 West. Rep. 140, 63 Mich. 396; *Anderson v. Wellington*, 40 Kan. 173; *Chicago v. Trotter* (Ill.) Jan. 22, 1891; *Newton v. Belger*, 3 New Eng. Rep. 722, 143 Mass. 598; *Dillon, Mun. Corp.* §§ 320-322; *Barthet v. New Orleans*, 24 Fed. Rep. 563; *Bills v. Goshen*, 3 L. R. A. 261, 117 Ind. 226; *Grafty v. Rushville*, 5 West. Rep. 858, 107 Ind. 502, 509; *Clark v. South Bend*, 85 Ind. 276; *Baumgartner v. Hasty*, 100 Ind. 575.

Miller, J., delivered the opinion of the court:

This was an action brought before the may-

coming a visitor to any gambling place within certain prescribed limits in a city is not a violation of U. S. Const., 14th Amend., although those limits are generally designated and known as the "Chinese quarter." *Re Ah Kit*, 45 Fed. Rep. 793.

A city ordinance which discriminates against Chinese prisoners in the degree of punishment for offenses committed within the municipal jurisdiction as that awarded to other aliens is void. *Ah Kow v. Nunan*, 5 Sawy. 562.

A municipal ordinance prohibiting the keeping of cows within the city limits without a permit, but which fails to regulate or control the city council as to granting the permission, is not general in its operation among the class, and is void. *State v. Mahner*, 43 La. Ann. —; *State v. Delaney*, 43 La. Ann. —. See First Municipality of New Orleans v. Blureau, 3 La. Ann. 688.

An "eight-hour" city ordinance which attempts to prevent certain parties from employing others in a lawful business is unconstitutional and void. *Re Kubach*, 9 L. R. A. 482, 85 Cal. 274.

A municipal ordinance making it unlawful to

engage in laundry business without consent of the board of supervisors, except the business be located in a building of brick or stone, confers a naked, arbitrary power upon the board, and is unconstitutional. *Yick Wo v. Hopkins*, 118 U. S. 856, 30 L. ed. 220.

Any attempt to discriminate, as regards licenses or license fees, between a resident and a nonresident, is a violation of article 4, § 2, U. S. Const. *Ward v. Maryland*, 79 U. S. 12 Wall. 418, 20 L. ed. 449; *Dillon, Mun. Corp.* 400; *Simrall v. Covington* (Ky.) Sept. 30, 1890; *Daniel v. Richmond*, 78 Ky. 542; *Braceville v. Doherty*, 89 Ill. App. 646; *Re White*, 43 Fed. Rep. 913; *American Fertilizer Co. v. Board of Agriculture*, 43 Fed. Rep. 609; *Fecheimer v. Louisville*, 84 Ky. 308; *State v. Bracco*, 108 N. C. 849; *Simmons Hardware Co. v. McGuire*, 89 La. Ann. 848; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368; *State v. North*, 27 Mo. 464.

Scope and effect of municipal ordinances. See note to *Fath v. Tower Grove & L. R. (Mo.)* 13 L. R. A. 75.

not be assignable or transferable by the person receiving the same to any other person directly or indirectly, and any attempt so to do shall be deemed a revocation of all rights and privileges on the part of the person making the attempt." Two objections are urged against the validity of this ordinance: (1) That it gives to the council the power to arbitrarily discriminate between citizens by giving the permission to some and withholding it from others under similar conditions; and because it specifies no terms or conditions to be observed in the keeping or storing of such oils which could be complied with by all citizens alike. (2) That the ordinance is unreasonable, and is an undue restraint upon lawful trade and business.

The subject covered by the ordinance in question is clearly within the police power conferred by the charter upon the municipality. Section 3155, Rev. Stat. 1881, provides that the common council of a city shall have power to make by-laws and ordinances not inconsistent with the laws of the State, and necessary to carry out the objects of the corporation. The danger to be apprehended from the storing of large quantities of inflammable or explosive substances in large quantities within the limits of a city to life and property is so great as to invite legislative control of the same by the city government. The principal question in this case is whether or not the ordinance in question is a valid exercise of that power. It will be observed that this ordinance does not establish any general rule for the storage of substances proposed to be regulated; but it reserves to itself, at regular meetings, the right to grant or refuse permission to keep and store such oils, dependent upon whether it at such time deems the location and buildings suitable for such purpose and the person presenting the petition "a proper person." It further provides that the permission, when granted, "may be revoked at any time, at the option of the council." Language better calculated to enable the common council to arbitrarily control the business, without any fixed or known rules, cannot well be imagined. The business of keeping, storing, and dealing in such oils is a legitimate business, and every citizen has an inherent right to engage in the business upon equal terms with any other citizen.

In the case of *Mills v. Goachen*, 117 Ind. 221, 3 L. R. A. 261, an ordinance of the city requiring a license for carrying on the business of roller skating, and providing that such license should be issued upon the payment into the city treasury of such sum of money "as the mayor or common council shall determine in each particular case," was held invalid; the objection being that a discretion was lodged in the mayor or common council in fixing the fee to be charged. In the opinion this language is quoted with approval from *Horst & Bemis on Municipal Police Ordinances*: "The ordinance itself should specify every condition of the license, and the officer should be merely intrusted with the duty of issuing licenses."

In *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, an ordinance of the City of San Francisco, prohibiting the carrying on of laundries without a permit from the board of supervisors, except in buildings constructed of stone, was held invalid. The court says: "It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows, with restriction, the use for such purposes of buildings of brick or stone; but as to wooden buildings,—constituting nearly all those in previous use,—it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld at their mere will and pleasure. And both classes are alike only in this: that they are tenants at will, under the supervisors, of their means of living."

In *Baltimore v. Radecke*, 49 Md. 217, an ordinance of the City of Baltimore prohibiting the use of steam whistles without the permit of the mayor was held invalid. The objection to the ordinance was that it permitted him to exercise his own discretion in revoking a permit, without general rules to guide or control his action.

In *Burthel v. New Orleans*, 24 Fed. Rep. 564, an ordinance was held invalid which made it unlawful to maintain a slaughter house, "except permission be granted by the council of the City of New Orleans."

In *State v. Mahner* (La.) 9 So. Rep. 480, an ordinance of the City of New Orleans forbidding the keeping of dairies within certain limits, except by the permission of the city council, was held to be null and void.

In *Newton v. Belger*, 148 Mass. 598, 8 New Eng. Rep. 722, an ordinance which permitted the board of aldermen to exercise a discretion in granting or refusing a permit for the erection of buildings within a fire-district was held invalid.

Ordinances, apparently aimed at the "Salvation Army," prohibiting marching through the public streets without first obtaining the consent of the mayor or common council, or some other specified officer, not containing regulations operating uniformly on all processions, have been held invalid in *Re Frazee*, 63 Mich. 396, 6 West. Rep. 140; *Anderson v. Wellington*, 40 Kan. 173; *Chicago v. Trotter*, (Ill.) 26 N. E. Rep. 859.

It seems from the foregoing authorities to be well established that municipal ordinances placing restrictions upon lawful conduct or the lawful use of property must, in order to be valid, specify the rules and conditions to be observed in such conduct or business; and must admit of the exercise of the privilege of all citizens alike who will comply with such rules and conditions; and must not admit of the exercise, or of an opportunity for the exercise, of any arbitrary discrimination by the municipal authorities between citizens who will so comply. We are of the opinion that the ordinance under consideration is objectionable for the reasons indicated. Having arrived at a conclusion that will necessarily not only dispose of the case, but invalidate the

ordinance, we deem it unnecessary to pass upon the other objection to its validity. The ordinance, in its present form, cannot be enforced; and, if another one should be enacted,

we must presume that the municipal authorities will, in their wisdom, enact a proper and reasonable ordinance.

Judgment affirmed.

CONNECTICUT SUPREME COURT OF ERRORS.

FARIST STEEL CO. v. CITY OF BRIDGEPORT.

(.....Conn.....)

1. **Compensation must be paid to a riparian owner by a city which in establishing harbor lines appropriates a portion of the land lying between high and low water mark adjacent to his property under a charter which gives power to establish such lines but preserves to landowners the same rights that they have under the section of the charter providing for the opening of highways, where the latter section makes full provision for compensation for whatever damage a landowner may suffer.**
2. **The establishment of harbor lines by a city under power conferred by its charter will not preclude it from altering them by the subsequent establishment of new ones, as proper occasion may require, without further legislative authority, and the legal discontinuance of the old lines will be accomplished by the legal establishment of new ones without any specific declaration of discontinuance.**
3. **Under a charter provision that harbor lines established by a city may be laid out and designated by a committee appointed by the city council for that purpose, no legal layout can be made by the adoption by the council of a mere recommendation by the committee of the acceptance of a resolution previously passed by the council to the effect that the lines be laid out.**
4. **Although the presumption is that the establishment of harbor lines is for a public use in the interest of navigation, yet if the record shows that their purpose was to prevent a new bridge from being marred by the erection of structures on either side of and connected with it, the proceedings will be held void.**

(March 20, 1891.)

RESERVATION by the Superior Court for Fairfield County for the opinion of the Supreme Court of Errors of an appeal from the action of the common council of Bridgeport in establishing harbor lines and assessing damages therefor. *Judgment for appellant advised.*

The facts are fully stated in the opinion.

Messrs. Morris W. Seymour, A. M. Tallmadge and H. H. Knapp, with Messrs. D. B. Lockwood and A. B. Beers, for appellant;

Though the Legislature has given power to

establish harbor lines it nowhere in express terms gives the power to discontinue or alter such lines.

Municipal corporations have no inherent powers respecting wharves and docks; all their powers respecting them must be derived from the Legislature.

Murphy v. Montgomery, 11 Ala. 586; *Dillon, Mun. Corp.* 1st ed. § 74; *Nichols v. Bridgeport*, 28 Conn. 208; *Tiedeman, Pol. Powers*, p. 378.

The common council having once exhausted this right, there can nowhere be found express authority in the charter to again exercise it.

Hudson & D. Canal Co. v. New York & E. R. Co. 9 Paige, 323, 4 L. ed. 718; *Brigham v. Agricultural B. R. Co.* 1 Allen, 816; *Morris & E. R. Co. v. Central R. Co.* 31 N. J. L. 205; *Lodge v. Philadelphia, W. & B. R. Co.* 8 Phila. 345; *Atkinson v. Marietta & C. R. Co.* 15 Ohio St. 21; *Mills, Em. Dom.* § 58.

The right of eminent domain, even when full compensation is given, can be exercised only for public purposes.

Sedgw. Stat. & Const. Law, 473; *Dillon, Mun. Corp.* § 45; *Eggleston, Damages*, p. 262. If there be no public necessity there is no public right.

2 Parsons, Cont. p. 542; *Beckman v. Saratoga & S. R. Co.* 3 Paige, 45, 3 L. ed. 50; *West River Bridge Co. v. Dia*, 47 U. S. 6 How. 507, 12 L. ed. 535; *Boston Water Power Co. v. Boston & W. R. Co.* 23 Pick. 393; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 94; *Scott v. Toledo*, 36 Fed. Rep. 394; *Tiedeman, Pol. Power*, p. 379.

The plaintiff is owner in fee of certain real estate consisting of upland, and is a riparian owner of the mud-flats, adjacent thereto. For taking our mud-flats and depriving us at certain states of the tide of access to the channel, we claim we are clearly and legally entitled to substantial damages.

Simons v. French, 25 Conn. 346; *Lockwood v. New York & N. H. R. Co.* 37 Conn. 387; *New Haven S. Co. v. Sargent*, 50 Conn. 199; *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.* 17 Conn. 40; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 94; *Weber v. State Harbor Comrs.* 85 U. S. 18 Wall. 65, 21 L. ed. 801; *Murray v. Sharp*, 1 Bosw. 539; *Gould, Waters*, § 149; *Angell, Watercourses*, p. 642; *Mills, Em. Dom.* 379; *Wadsworth v. Tillotson*, 15 Conn. 366; *Myers v. St. Louis*, 82 Mo. 367.

The sounder and better rule is that riparian owners upon waters the bed of which belongs to the public, have valuable rights.

Lewis, Em. Dom. § 76.

These riparian rights are property and can-

NOTE.—The exhaustive and discriminating briefs of the respective council leave nothing to be supplied in the way of annotation. On the question of littoral rights, the practitioner is also referred 13 L. R. A.

to the notes to *Case v. Loftus*, 5 L. R. A. 604; *Miller v. Mendenhall* (Minn.) 8 L. R. A. 99; *Eisenbaca v. Hatfield* (Wash.) 12 L. R. A. 632.

not be taken away without paying just compensation.

Union Depot Street R. & Transf. Co. v. Brunswick, 31 Minn. 297; *Brisbane v. St. Paul & S. C. R. Co.* 23 Minn. 114; *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214; *Lyon v. Fishmonger's Co.* L. R. 1 App. Cas. 662; *Baltimore & O. R. Co. v. Chase*, 48 Md. 28; *Providence Steam Engine Co. v. Providence & S. S. S. Co.* 12 R. I. 848; *Chapman v. Oshkosh & M. R. Co.* 33 Wis. 629; *Clement v. Burns*, 43 N. H. 606; *Yale College v. New Haven*, 57 Conn. 1.

A franchise is property, and when the public necessities require it, it may be taken for public purposes on making suitable compensation.

Richmond, F. & P. R. Co. v. Louisa R. Co. 54 U. S. 13 How. 88, 14 L. ed. 60; *West River Bridge Co. v. Dix*, 47 U. S. 6 How. 534, 12 L. ed. 546; *Crosby v. Hanover*, 36 N. H. 404; *Van Dusen v. New York*, 17 Fed. Rep. 819; *Weber v. State Harbor Comrs.* 85 U. S. 18 Wall. 57, 21 L. ed. 796; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Lyon v. Fishmonger's Co.* L. R. 1 App. Cas. 662, 35 L. T. N. S. 569.

There has been no layout of the proposed harbor line "in question by any committee in accordance with the charter of the City."

Gregory v. Bridgeport, 52 Conn. 43.

Messrs. John J. Phelan and George W. Wheeler, for appellee:

The harbor line established in 1886 was discontinued by the establishment of another harbor line in 1889.

Com. v. Boston & A. R. Co. 150 Mass. 176; *Brook v. Horton*, 68 Cal. 554; *Hark v. Gladwell*, 49 Wis. 177; *Com. v. Westborough*, 3 Mass. 406; *Com. v. Cambridge*, 7 Mass. 158; *Bowley v. Walker*, 8 Allen, 21; *Bliss v. Deerfield*, 13 Pick. 102; *Johnson v. Wyman*, 9 Gray, 186; *Hoart v. Plymouth*, 100 Mass. 159; *Dillon*, Mun. Corp. 4th ed. § 666, note 1; *Bowers v. Snyder*, 88 Ind. 302; *Patton v. Cresswell*, 120 Ill. 149; *Ellcott, Roads & Streets*, p. 661.

The establishment of a harbor line is the exercise of legislative power and is a continuing power which never becomes exhausted, but lives on to be exercised from time to time as the public need requires.

Goatler v. Georgetown, 19 U. S. 6 Wheat. 593, 5 L. ed. 839; *Pontiac v. Carter*, 32 Mich. 171; 2 *Dillon*, Mun. Corp. 4th ed. §§ 686, 780; *Lewis, Em. Dom.* § 107; *Cooley*, Const. Lim. 206, 207; *Ellcott, Roads & Streets*, p. 335; *Horr & Bemis*, Mun. Pol. Ord. § 9; *Fellowes v. New Haven*, 44 Conn. 257; *Healey v. New Haven*, 47 Conn. 815; *Kokomo v. Mahan*, 100 Ind. 244; *Russell v. Burlington*, 80 Iowa, 263; *Macy v. Indianapolis*, 17 Ind. 269; *Smith v. Washington*, 61 U. S. 20 How. 135, 15 L. ed. 858; *McCormack v. Patchin*, 53 Mo. 33; *Re Furman Street*, 17 Wend. 666; *Methodist Episcopal Church v. Wyandotte*, 31 Kan. 724; *Callender v. Marsh*, 1 Pick. 418; *Karst v. St. Paul R. Co.* 23 Minn. 121; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 509; *Kelley v. Milwaukee*, 18 Wis. 86; *Jelliff v. Newark*, 2 Cent. Rep. 234, 43 N. J. L. 108; *McKevitt v. Hoboken*, 45 N. J. L. 495.

The convenience and necessity of the proposed improvement are implied by the action of the common council in making the layout.

Townsend v. Hoyle, 20 Conn. 8.

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The municipality is the judge of the necessity for the establishment of a harbor line.

Dillon, Mun. Corp. § 689; *Macy v. Indianapolis*, 17 Ind. 269; *Smith v. Washington*, 61 U. S. 20 How. 135, 15 L. ed. 858; *Delphi v. Evans*, 36 Ind. 91; *Methodist Episcopal Church v. Wyandotte*, 31 Kan. 724; *Waddell v. New York*, 8 Barb. 96; *McCormack v. Patchin*, 53 Mo. 33; *Dunham v. Hyde Park*, 75 Ill. 373; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 579; *Fellowes v. New Haven*, 44 Conn. 251; *Healey v. New Haven*, 47 Conn. 814; *Park Eccl. Soc. v. Hartford*, 47 Conn. 99.

The legality of the establishment of a harbor line cannot be tested by an inquiry into the motive impelling those who established it.

Freeport v. Marks, 59 Pa. 259; *Park Eccl. Soc. v. Hartford*, 47 Conn. 92; *Dillon*, Mun. Corp. § 811; *Milhan v. Sharp*, 15 Barb. 212; *Miners Bank of Dubuque v. United States*, 1 G. Greene, 558; *Cooley*, Const. Lim. 189; *State v. Cincinnati Gas Light & C. Co.* 18 Ohio St. 802; *Plum v. Morris Canal & Bkg. Co.* 10 N. J. Eq. 260.

The title of a riparian owner terminates at ordinary high-water mark, and the State is the owner in fee of the flats between high and low water mark.

Chapman v. Kimball, 9 Conn. 41; *Welles v. Bailey*, 4 New Eng. Rep. 841, 55 Conn. 316; *State v. Sargent*, 45 Conn. 373; *Mather v. Chapman*, 40 Conn. 395; *Church v. Meeker*, 84 Conn. 438; *Simons v. French*, 25 Conn. 358; *Nichols v. Lewis*, 15 Conn. 138; *East Haven v. Hemingway*, 7 Conn. 203.

The Commonwealth has sovereign dominion, jurisdiction, and ownership over the seashore.

The State by virtue of such sovereignty establishes harbor lines and regulates the erection of wharves upon the shore (*State v. Sargent*, 45 Conn. 373; *Com. v. Alger*, 7 Cush. 53; *Engs v. Peckham*, 11 R. I. 226); appoints harbor masters (*Vanderbilt v. Adams*, 7 Cow. 349); establishes a board of harbor commissioners (*State v. Sargent*, 45 Conn. 360); incorporates a company to remove obstructions to navigation (*Hollister v. Union Co.* 9 Conn. 436); regulates drawbridges and dams (*New Haven & E. H. Toll Bridge Co. v. Bunnell*, 4 Conn. 54; *Holyoke W. P. Co. v. Lyman*, 82 U. S. 15 Wall. 500, 21 L. ed. 183); controls the construction of public works in navigable waters.

Gould v. Hudson River R. Co. 6 N. Y. 523; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Atlee v. North Western U. Packet Co.* 88 U. S. 21 Wall. 394, 23 L. ed. 620.

All this may be done without making any compensation to the riparian owner because the State owns the land below high-water mark, while the riparian owner has the right to reclaim the same until the State has otherwise decided. Until he has reclaimed he has no title, no property to be taken, hence no compensation to be given.

Pennsylvania R. Co. v. New York & L. B. R. Co. 23 N. J. Eq. 159; *Stevens v. Patterson & N. R. Co.* 34 N. J. L. 532; *Gould v. Hudson River R. Co. supra*; *Tomlin v. Dubuque*, B. & M. R. Co. 32 Iowa, 109; *Ravenwood v. Flemings*, 22 W. Va. 52; *Barney v. Keokuk*, 94 U. S. 335, 24 L. ed. 227; *Langdon v. New York*, 93 N. Y. 159; *New York v. Hart*, 95 N. Y. 407; *Martin v. O'Brien*, 34 Miss. 37; *Wood v.*

Worler, 26 Kan. 688; *Bailey v. Philadelphia, W. & B. R. Co.* 4 Harr. (Del.) 389; *Com. v. Alger*, 7 Cush. 58; *Wood, Nuisances*, p. 623, note 2; *State v. Sargent*, 45 Conn. 358; *Gerhard v. Seekonk River Bridge Comrs.* 2 New Eng. Rep. 619, 15 R. I. 334; Gould, Waters, § 138.

Seymour, J., delivered the opinion of the court:

The finding of facts states that the plaintiff is the owner in fee of certain real estate in the City of Bridgeport, consisting of uplands, and, as a riparian owner, of the mud flats adjacent thereto, on the east side of Bridgeport harbor. It further appears that in the year 1886 the common council of the City legally designated and established a harbor line on the east side of the Bridgeport harbor, which line ran over the mud flats of the plaintiff and others, and assessed benefits and damages resulting therefrom to the respective parties interested. At that time, and for many years before, a bridge existed over the harbor, with which certain buildings were connected along the sides of the east end thereof. In pursuance of a vote of the common council passed December 5, 1887, the City proceeded to lay out a new bridge or public highway in substantially the same location as that of the bridge above mentioned, which new bridge was completed and opened as a public highway about December 8, 1888. At the time the new bridge was completed the buildings along the sides of the east end thereof were connected with it, and still continue to be so connected. On the 3d day of September, 1888, the board of public works made the following report to the common council: "That in their judgment it would be wise, before the completion of the said new lower bridge, to take such action as would prevent the erection of buildings either on the north or south sides of the iron portion of said structure, and connecting therewith on either side. Such action should be taken, however, in accomplishing this purpose as will result in the least injury to private rights. The board suggests the advisability of condemnation by the City, for public use, of so much of the adjoining property as will be necessary to secure the result desired, and recommend that the matter be referred to some appropriate committee for action." This report was accepted, and referred to the street committee by the common council. On the 10th day of December, 1888, the committee on streets reported to the common council on the report of the board of public works, and made the following recommendation: "That such action be taken as will result in preventing the erection of buildings on either the north or south sides of the iron portion of the new lower bridge. The committee fully agree with said board that this expensive and slightly structure should not be marred by placing buildings on either side thereof; and they further report that they have consulted the city attorney in reference to the subject, and, as a result of such conference, have come to the conclusion that the most desirable course to pursue, in order to accomplish the object desired, would be to establish harbor lines on both sides of said bridge." The committee recommended the adoption of the following resolution: "Resolved, that the com-

mittee on harbor improvements is hereby directed to take such preliminary action as will result in the establishment of harbor lines on both sides of the lower or Bridgeport bridge, extending from the present harbor lines at the western end of the eastern causeway of said bridge, westerly to the draw of said bridge." This report was accepted and the resolution adopted by the common council. On the 7th day of January, 1889, the committee on harbor improvements reported on the report of the street committee relative to establishing harbor lines on both sides of the lower bridge, and recommended the adoption of the following resolution: "Resolved, that the clerk is hereby directed to notify owners of property and parties in interest to appear before this common council at the council room, on Monday evening, January 21, 1889, at 8.30 o'clock, and be heard in relation to the establishment of harbor lines on the east side of Pequonnock River, as follows: Beginning at a point in the harbor lines as already established, at the old wall or point of rocks, on property belonging to the Farist Steel Company; thence northeasterly in the direction of the common center of Kossuth Street and the new bridge, 340 feet; and thence northerly in a straight line to a point in the harbor line as already established at Howe's dock, at the foot of Howe Street, excepting that so much of said line as may lie upon or pass over the eastern approach to the new lower bridge shall remain inoperative and of no effect." The report was accepted and the resolution adopted by the common council. On the 21st day of January, 1889, the board of aldermen and the board of councilmen assembled in joint convention, and hearings were had relative to the establishment of said harbor line. On the 4th day of February, 1889, the committee on harbor improvements reported to the common council relative to the establishment of harbor lines on the east side of Pequonnock River, a hearing upon which was had before the common council January 21, 1889. They recommended the adoption of the following resolution: "Resolved, that harbor lines be and are hereby ordered laid out and established on the east side of Pequonnock River, north and south of the new lower bridge, commencing at the old wall or point of rocks on property of the Farist Steel Company, and extending northeasterly in the direction of the common center of Kossuth Street, 340 feet; and thence northerly, in a straight line to a point in the established harbor lines at Howe's dock, at the foot of Howe Street. Resolved, that Messrs. John McNeil, Richard B. Cogswell, and Charles R. Brothwell be and are hereby appointed a committee, whose duty it shall be to make such layout of harbor lines, and report in writing their doings to the common council, which report shall embody a survey and particular description of said lines." On the 18th of February, 1889, the committee reported, recommending the adoption of the following resolutions: "Resolved, that harbor lines or dock lines be and are hereby established on the east side of Pequonnock River, in accordance with a map thereof herewith submitted, and the following description of survey: Beginning at a point in the harbor line, as already established at the old wall or point

of rocks on property belonging to the Farist Steel Company; thence extending northeasterly in the direction of the common center of Kosmth Street and the new lower bridge, 840 feet; and thence northerly in a straight line to a point in the harbor line, as already established, at Howe's dock at the foot of Howe Street, except in that so much of the line as may lie upon or pass over the eastern approach to said lower bridge shall remain inoperative and of no effect. Resolved, that the mayor appoint appraisers to estimate the damages and benefits resulting from the foregoing layout of harbor lines." The resolutions were adopted and the mayor thereupon appointed appraisers on said layout who proceeded to assess benefits and damages thereon, and on July 1, 1889, reported to the common council. In their report they did estimate, ascertain, and determine that the appellant will receive an equal amount of damages and benefits from the establishment of the harbor line. On the 15th of July, 1889, the common council accepted the report, whereupon this appeal was taken. It seemed to be conceded on the argument that the report of the appraisers, that the appellant's damages and benefits are equal to each other, proceeded upon the theory that he is entitled to no damages on account of the establishment of the harbor lines. The finding states that a tract of land is taken by the layout of the proposed harbor lines, and the appellant is deprived of the use, benefit, and worth of the same, and of all the privileges and franchises connected therewith, without compensation.

The first question, therefore, which we shall consider relates to the general right of the owner of lands abutting on navigable waters to damages for the legal establishment of a harbor line over the abutting flats, between high and low water marks. In Connecticut the public is the owner in fee of the flats adjoining navigable waters up to high-water mark, such title being vested in the public for purposes of navigation and commerce. *Simons v. French*, 25 Conn. 346.

The owner of the adjoining uplands has the exclusive privilege of wharfing and erecting stores and piers over and upon such soil, and of using it for any purpose which does not interfere with navigation, and it may be converted separately from the adjoining uplands. Over it he has the exclusive right of access to the water, the right to accretions, and generally to reclamations. Because the soil, between high and low water marks, is held to be *publici juris*, the right of the owner of the adjoining upland in it is termed a "franchise." But it is none the less a well-recognized, substantial, and valuable right. It constitutes, as the court says in *Simons v. French*, *supra*, speaking of the right of wharfage, like other franchises, a species of property, which, like other property, is alienable by the owner, and alienable as well before the right has been exercised as it would be after a wharf had been actually erected. It is claimed by the appellee that, inasmuch as the fee of the flats is in the State, therefore the State has the undoubted right, by itself or by those to whom it delegates the right to take and use them for any public purpose without giving compensation therefor, so

long, at least, as the upland proprietor has not appropriated them to such uses as he legally may. There are cases which sustain such a claim. On the contrary there are cases which hold that riparian owners upon navigable waters have rights appurtenant to their estates of which they cannot be deprived, when once vested, except in accordance with established law, and upon due compensation. This, says Lewis, in his recent work on Eminent Domain, after reviewing the cases, seems the better and sounder rule. It certainly seems more in harmony with our Connecticut decisions that the right of wharfage—perhaps the most valuable franchise attached to the upland—is as much the subject of sale by the owner of the right before it has been exercised as it would be after.

The common council of Bridgeport, in establishing harbor lines, acts under the delegated power of the State. If the State might take the mud flats of the appellant in the legal establishment of harbor lines, without granting compensation therefor, on the ground that it owns them, and if the council, representing the power of the State, might, if it were so authorized, possess the same power, yet no such power is given or intended. The State has a right to give compensation, and to require the city to do so; and this it has expressly done. Section 38 of the city charter provides that the common council shall have power to designate and establish a line or lines on or along either or both sides of Bridgeport harbor or Pequonnock River, or on any part thereof, from the mouth of the harbor to Berkshire mill; and in designating and establishing such line or lines for the purposes aforesaid similar proceedings in all respects in relation thereto, and in relation to benefits and damages therefor, shall be had, and the persons whose land or mud flats are thus taken and appropriated, or who are especially benefited or damaged thereby, shall have the same rights, and be subject to the same obligations and liabilities, as in the case of the lay-out, alteration, or enlargement of highways, streets, public walks, etc., in said city. Section 32 of the charter provides that, before the common council shall determine to lay out, alter, extend, enlarge, discontinue, or exchange any highway, street, public walk, etc., in said City, they shall cause reasonable notice to be given, describing in general terms such proposed lay-out or alteration, and specifying a time and place when and where all persons whose land is proposed to be taken therefor may appear and be heard in relation thereto by the common council assembled in joint convention for such hearing; at which time and place, and at any meeting adjourned therefrom, the common council shall hear all the parties in interest who may appear and desire to be heard in relation thereto. Section 33 provides that if, after such hearing, the common council shall resolve to lay out, alter, extend, enlarge, discontinue or exchange such street, highway, walk, avenue, park, or landing place, they shall appoint a committee, whose duty it shall be to make such lay-out or alteration and report in writing their doings to the common council, which report shall embody a survey and particular description of such street, high-

way, etc., or alteration thereof. Section 34 provides, if said report shall be accepted, for the appointment of three judicious and disinterested freeholders of the City to estimate and appraise the benefits or damages, as the case may be, accruing or resulting to any person or persons from the taking of such land for public use or from such lay-out, alteration, etc. Said freeholders shall be sworn, and before making any such assessment of damages and benefits shall give reasonable notice to all persons interested of the time and place when and where they shall meet for that purpose. They shall meet at the designated time and place, and at such other times and places as they shall adjourn to therefrom, and shall hear all parties in interest who may appear; and they shall thereupon ascertain and determine what person or persons will be damaged by such taking of land or such lay-out or alteration, and the amount thereof over and above any damages they may receive therefrom; also who will receive an equal amount of damages and benefits therefrom. Thereupon they shall report to the common council. The report shall be continued to its next general meeting and published. Upon the acceptance of the report at the next meeting of the common council the same shall be recorded, and the common council shall cause a notice containing the names of the persons assessed, with the amounts of their respective assessments, to be published, as in the section directed, and such publication shall be deemed to be legal and sufficient notice to all persons interested in the assessments. Section 35 provides that upon the acceptance of the report of the freeholders, the survey and particular description which the charter requires to be made (section 83) shall be signed by the mayor, or, in his absence, by the president of the board of aldermen, and recorded in the records of the board of aldermen. Section 42 provides that any party who shall feel aggrieved by any act of the assessors in making any of the assessments of benefits or damages authorized in the charter, may make application for relief to the superior court or court of common pleas in and for Fairfield County, which court may confirm, annul, or modify the assessments, or make such order in the premises as equity may require. These extracts from the charter show that whatever right the State might have to take the property of the appellant in the flats between high and low water mark, yet it has authorized the council to take it only upon the payment of just compensation therefor; and upon this appeal the appellant has, of course, a right to be heard upon the question of damages, if the other proceedings should be held to be regular, so that a legal assessment can be made. But the appellant not only claims that the assessment gives it no compensation for the taking of its property, and is therefore unjust and illegal, but it also claims that the assessment was invalid, because, to state it generally, there has been no legal discontinuance of the harbor line established in 1886, and because the action of the common council in the matter of establishing the harbor lines in question has been irregular and illegal, so that no lawful lay-out of said lines has been made, and no legal assessment of damages and benefits has

been or could be made thereon. The reasons are set forth particularly in the appeal, and are based upon the facts stated in the finding and reservation. We see no good reason for holding that the council, having in 1886 established harbor lines on the east side of the harbor, is thereby precluded from altering them by the subsequent establishment of new lines as proper occasion may require, without further legislative authority. We think, also, that the legal establishment of new harbor lines would of itself be, to all intents and purposes, a legal discontinuance of the old lines, without any specific action declaring them to be discontinued.

We come now to the question whether the harbor lines were legally established according to the provisions of the charter. That instrument, as we have seen above, provides that, in designating and establishing harbor lines, similar proceedings in all respects in relation thereto, and in relation to benefits and damages therefor, shall be had as in the case of the lay-out, alteration, or enlargement of highways, streets, public walks, etc., in said city. That is, as will appear by reference to the proper section, and adapting it to these proceedings, if after certain preliminary steps, the common council shall decide to designate and establish a harbor line, they shall appoint a committee, whose duty it shall be to make such lay-out and designation, and report in writing their doings to the common council, which report shall embody a survey and particular description of such harbor line. By reference to the finding incorporated in the early part of this opinion it appears precisely what was done in relation to the lay-out, after the steps preliminary to the appointment of the committee to make such lay-out had been taken. To briefly summarize it: February 4, 1889, the committee on harbor improvements reported resolutions, which the council adopted, and by which a committee was appointed to lay out the harbor lines, and report their doings to the council. February 18, 1889, the last-named committee reported and recommended resolutions for adoption, which the council adopted. Now the appellant claims that it appears from an examination of the above proceedings in detail that there has been no legal lay-out and establishment of said harbor lines; that it appears, and that such is the fact, that no action whatever was taken by the committee respecting the lay-out and establishment of harbor lines, except to report back and recommend the acceptance of the resolution in substance passed by the common council February 4, 1889; that the committee neither laid out nor established, nor does their resolution purport to lay out and establish, any harbor line, but only to recommend that the same be established by the common council, and that the common council in adopting the resolution, itself laid out and established such line. This precise point, among others, was discussed in *Grady v. Bridgeport*, 53 Conn. 40. In that case a petition for widening a highway was referred by the common council to a committee. The committee subsequently reported as follows: "The committee on streets and sidewalks beg leave to report concerning the widening of the approach to the lower bridge, and recommend

the adoption of the following resolutions: 'Resolved, that the widening of the western approach to the lower bridge from the present north line of the street approaching the bridge, extending along the harbor seventy feet south on a line with the present wharf, and extending from the wharf westerly to the railroad, according to the map and survey thereof made by the city surveyor, and submitted herewith, be accepted and approved, and the same be and become, after the final settlement of assessments, a part of the highway thereto. Resolved, that the mayor appoint a special committee of three judicious and disinterested freeholders to estimate and appraise the benefits or damages, as the case may be, accruing or resulting to any person or persons from said widening.'" Upon this state of facts the court said: "There is nothing here which purports even that the committee had laid out the widened part of the street. . . . Obviously the report is nothing more than a recommendation to the council that the widening should be made in accordance with the map and survey submitted. Again the court says: "If what was done October 3d [the day the report was accepted] can be construed as a lay-out of the alteration of the street, the lay-out was made by the common council alone, contrary to the express provisions of the charter. The committee simply recommend the alteration described to the common council for their acceptance and approval. The council accepted and approved; and if, by so doing, the alteration was laid out, who did it? The committee, by their report and recommendation, do not pretend to have done it. They described the alteration, it is true, but this was necessary to enable the common council to know what alteration should be laid out. . . . It is clear, if there was any lay-out here, that it was done by the common council, and not by the special committee, as the present charter requires. But there was no lay-out of this improvement, and consequently no basis for the assessment of damages or benefits, and the assessment was therefore void." Manifestly, if that case is still an authority, there has been no legal lay-out and establishment of the harbor line in dispute.

It is claimed, however, that it is overruled on that point by *Hough v. Bridgeport*, 57 Conn. 290. It is true that it would seem from the case as stated in the opinion that the same question might have been made. If it was, there is no intimation that it was considered and decided, and no suggestion that anything therein contained overruled the point so explicitly stated in the former case. Instead of overruling, it distinguished, the case of *Gregory v. Bridgeport* from the one then under consideration. The first held that, under the charter, which provides that if, after certain preliminary proceedings, the council shall resolve to lay out a street, it shall appoint a committee to make such lay-out, the standing committee on streets and sidewalks was not of itself, and without such special reference, such a committee as was intended by the charter. In point of fact, as the opinion shows, upon receipt of the petition for widening the highway, the council immediately referred it to the standing committee on streets and side-

walks. That committee subsequently reported resolutions that the common council should order the widening to be made according to plans which it submitted. The resolutions were adopted, and furnished the first indication that the council resolved to make the lay-out. The charter was not followed; no committee was appointed to make the lay-out after the council had resolved that it should be made. The only committee which acted was the standing one on streets and sidewalks, to which the matter was referred before the lay-out was resolved upon by the council. Now, in *Hough v. Bridgeport*, the standing committee on streets and sidewalks was also appointed a committee to make the lay-out. Relying upon the general statement of the syllabus in *Gregory v. Bridgeport*, it is evident that the claim was made that such a reference was contrary to the charter. Thereupon the court distinguishes the two cases, and shows that whereas, in the former case, the petition was referred to the standing committee immediately upon its receipt, not to make a lay-out, but to examine and report what should be done, and no committee was appointed to make the lay-out after the council had resolved upon it, yet in the latter case the regular steps in this behalf were taken, and, though the lay-out was committed to the standing committee on streets and sidewalks, it was as a special committee, appointed after the council had resolved to make the lay-out, and consequently the decision in *Gregory v. Bridgeport* was not applicable. The second point made was that the committee appointed after the council had resolved upon the lay-out was not appointed to lay out the street, but to procure and report to the council a survey, etc. This the court says is a distinction without a difference, and that, taken in connection with its fellow resolution ordering the extension, it is to be construed as a direction to the committee to lay out the street, as well as to procure and report a survey of it. No other point which was in any respect common to the two cases was discussed or decided. If the point made in *Gregory v. Bridgeport* and in the case at bar, that the council, and not the committee, made the lay-out, was made, the law respecting it, as laid down in the former case, was not in terms overruled. We are not disposed to overrule it nor evade it. Under the charter it is necessary, and upon general principles it is expedient, that a committee should make the lay-out. In theory, at least, it is not a mere formal thing which anybody can do off-hand upon paper, but should be done carefully, and, as far as possible, with a view to the convenience of individuals, even after general directions have been given by the council.

One other point demands consideration. It is claimed that, even if all the proceedings were legal in form, yet there is a fatal objection to the validity of the assessment, in that the case itself discloses the fact that the harbor lines were established and the appellant's land condemned in order that the new bridge, that "expensive and slightly structure, should not be marred by placing buildings on either side thereof," and not for any legitimate public use whatever. The appellant says that, except for public uses, private property cannot be

taken even upon the payment of just compensation. We presume that no one will question the correctness of that proposition. The taking of private property in the legal establishment of harbor lines is *prima facie* a taking for public use. The Legislature so considered it in granting the charter to the City of Bridgeport, and, though that fact is not conclusive, inasmuch as it is held almost universally that whether a particular use is public or not within the meaning of the Constitution is a question for the judiciary, still there can be no question but that property taken in the legal establishment of harbor lines is taken for public use. But the right to establish harbor lines, and to take private property for that purpose, must be exercised in good faith, and for a public use naturally connected with their establishment. Private property cannot be taken for other than public uses under the guise of taking it for public use. There may be difficulty in many cases in applying this rule, as where nothing appears in the proceedings of the purpose for which the lines were established, and the presumption would be that they were established in the interest of navigation. But where, as in the present case, all the proceedings declare the purpose to be an ulterior one, which no one would claim to be a public one within the meaning of the Constitution, when this purpose is spread upon the very records

which are laid before us as containing the authority on which the assessment committee acted, we should be shutting our eyes to the real state of affairs, and permitting property to be taken under the excuse of the right of eminent domain in a case where no public use was contemplated, if we should decide in accordance with the appellee's claim. That would commit us to the doctrine that we are bound by the fact that it was a harbor line that was established, no matter for what purpose it appears to have been established, nor how far it is removed from the harbor. We cannot accept that conclusion, but must hold that, whereas it appears from the records themselves, which are introduced to show the facts upon which the legality of the assessment depends, that the harbor lines were laid out for the purpose of preventing a new bridge from being marred by the building of structures connected with it which would obscure it, and not in the interests of navigation or any other public use, private property cannot be taken without violating constitutional rights.

It is unnecessary to consider the other questions which were discussed. Upon those already considered we advise the Superior Court to render judgment for the appellant, annulling the assessment appealed from.

The other Judges concurred.

MINNESOTA SUPREME COURT.

Homer E. WARDWELL, *Resp.*

CHICAGO, MILWAUKEE & ST. PAUL
R. CO., *App't.*

(.....Minn.....)

***1. Plaintiff, without a ticket, though he had full opportunity to procure one, boarded defendant's train at Faribault, to go to Owatonna, and, when he told the fare collector where he was going, the latter told him the fare was fifty cents, which he paid. This was more than the ticket fare, but six cents less than the train fare. Before the train arrived at Walcott, the first station at which the train was to stop, the collector informed plaintiff of his error in the amount of the fare, and required him to pay the six cents, which plaintiff refused, and the collector told him unless he paid it he must leave the train. On arrival at Walcott, where the train stopped, the plaintiff persisting in his refusal, the collector put him off, and then returned him the fifty cents, less the fare from Faribault to Walcott. Held, that the collector, on discovering the mistake, might, within a reasonable time, require plaintiff to pay the other six cents.**

2. Also that, notwithstanding his first refusal, the plaintiff might, at any time before the arrival at Walcott, still pay the six cents, and secure the right to be carried to Owatonna.

3. Also that the collector's retention of

*Head notes by GILFILLAN, Ch. J.

the fifty cents till the arrival at Walcott was not a waiver of the right to require payment of the six cents. *Qualifying Du Laurans v. First Div. St. Paul & P. R. Co.* 15 Minn. 49 (Gil. 29).

4. Also that the Company had a right to be paid the fare from Faribault to Walcott, and the collector might retain it out of the fifty cents. Overruling *Du Laurans v. First Div. St. Paul & P. R. Co.* supra.

5. Also that the collector could not retain the entire amount, and also put plaintiff off, but could put him off only upon first returning to him the fifty cents, less the fare to Walcott, and, having put him off before doing so, the expulsion was wrongful.

(July 7, 1891.)

A PPEAL by defendant from an order of the District Court for Steele County denying its motion for new trial of an action brought to recover damages for the alleged wrongful expulsion of plaintiff from defendant's train in which a verdict had been returned in favor of plaintiff. *Affirmed.*

The facts are stated in the opinion.

Mr. F. W. Root (Mr. W. H. Norris, of counsel), for appellant:

Respondent endeavoring to secure from the collector reduced transportation, knowing that such act on the part of the collector would be against the rules of the carrier, and that in permitting it the collector would be disobedient to his rules and instructions, amounts to a fraud

NOTE.—Ejection of passenger for nonpayment of fare. See notes to *McKay v. Ohio River R. Co.* (W. Va.) 9 L. R. A. 122; *McGowan v. Morgan's L. & T.* 13 L. R. A.

R. & S. Co. (La. Ann.) 5 L. R. A. 217; *Carsten v. Northern Pac. R. Co.* (Minn.) 9 L. R. A. 622.

on the part of the respondent; and he is not, in such case, entitled to a passenger's rights.

McVeety v. St. Paul, M. & M. R. Co. 45 Minn. 268.

It is a reasonable regulation which prohibits persons from traveling upon railroads without purchasing tickets or paying fare, and a person going on the road in known violation of such a rule, and by inducing the conductor to violate it, is not lawfully on the road.

Toledo, W. & W. R. Co. v. Brooks, 81 Ill. 245.

Being unlawfully upon the train for one purpose, he was unlawfully there for all purposes, and the appellant had the right to expel him at any time or place, provided care was taken not to expose him to serious injury or danger.

Man v. Northern Pac. R. Co. 84 Minn. 310, 312.

The act of the collector in retaining a portion of the amount paid by respondent as his fare to Owatonna, was no waiver on the part of the company.

Trottinger v. East Tennessee, V. & G. R. Co. 11 Tenn. 538, 13 Am. & Eng. R. R. Cas. 49.

The collector had not the power to waive the additional ten cents, nor had he the rights to receive any sum less than that fixed by the rules and regulations of the company. Knowing this, the respondent was guilty of fraud in tendering any sum less than fifty-six cents, or in endeavoring to persuade the collector to accept anything less than this amount.

Alabama G. S. R. Co. v. Carmichael, 9 L. R. A. 388, 90 Ala. 19.

The collector had the right to retain an amount sufficient to pay the respondent's fare to Walcott, even though respondent had not so consented.

McCarthy v. Chicago, R. I. & P. R. Co. 41 Iowa, 432.

The company was under no duty to immediately, upon respondent's refusal to pay fare, stop the train and expel him.

Harrison v. Fink, 42 Fed. Rep. 792.

Messrs. Amos Coggswell and Sawyer & Sawyer, for respondent:

Du Laurant v. First Div. St. Paul & P. R. Co., 15 Minn. 49 (Gil. 29), is "on all fours" with the case in hand and determines every question that can be raised here against the appellant; and unless that decision is squarely overruled the order appealed from must be affirmed.

Gillilan, Ch. J., delivered the opinion of the court:

The plaintiff, without procuring a ticket, though he had full opportunity to do so, boarded a passenger train of defendant at Fairbault to go to Owatonna. The ticket fare was forty-six, the train fare fifty-six, cents. Soon after the train started the fare collector came to plaintiff, and asked him where he was going, and, on being told to Owatonna, said the fare was fifty cents, which plaintiff then paid him. A few minutes after, and before the train reached Walcott, the first station from Fairbault, the collector came again to plaintiff, and told him he had made an error in the amount of the fare, and insisted that he should pay the other six cents, and, on plaintiff refusing, told him unless he paid it he would put him off the train. Plaintiff still refused, and on 13 L. R. A.

the arrival of the train at Walcott, plaintiff persisting in his refusal, the collector put him off; and, after he was off, returned to him the difference between the fifty cents and the fare from Fairbault to Walcott. Assuming (what, in view of the defendant's regulations posted up in its passenger stations and passenger cars, can hardly be assumed) that the collector had authority to accept for the fare any less than the fifty-six cents and waive the Company's right to full train fare, the receipt by the collector, through mistake, for the full fare, of less than the fare, did not amount to such waiver. The collector had a right, on discovering the mistake, to require the plaintiff, certainly within a reasonable time, on informing him of the error, to pay the remainder of the train fare, just as anyone on discovering a mistake in payment may, within a reasonable time, require its correction. And it was the duty of the plaintiff, on being informed of the error, to pay the remainder of the full train fare, as demanded by the collector. Nor was the collector's retention of the money paid him by plaintiff (still assuming his authority to waive any part of the train fare) until the arrival of the train at Walcott, and while the question whether the plaintiff would pay the remaining six cents or leave the train was an open one (for notwithstanding his previous refusal, the plaintiff might, until the arrival at Walcott, where the train was to stop without regard to his matter, still pay and secure the right to go to his intended destination), such waiver, and especially as the collector insisted on payment of full train fare, and informed plaintiff that he must pay or leave the train. The rule laid down in *Du Laurant v. First Div. St. Paul & P. R. Co.*, 15 Minn. 49 (Gil. 29) to the effect that when a passenger tenders in good faith, on the train, the ticket fare as full fare to his place of destination, and the conductor takes and retains it, he thereby waives the right to require the passenger to still pay the difference between the ticket and train fare, is (assuming the conductor's authority to waive it) undoubtedly correct as applied to a case where, from the circumstances attending the tender, receipt, and retention of the money, the passenger is justified in the belief that it was accepted in full for his fare to the place of his destination. Thus, if the conductor should receive and retain it without demanding more, till the train had passed the place at which he must exercise or abandon the right to eject the passenger for non-payment, the latter would have the right to assume that the amount paid was satisfactory. But it cannot correctly be applied to a case like this. It would be equivalent to the proposition that the collector waived payment while insisting upon it, a proposition contradicting itself.

To determine whether he would pay the difference demanded, or persist in his refusal and leave the train, the plaintiff had until the train stopped at a place where he might be put off. So long as he had that election, the collector might retain the amount paid him to abide it. As soon as it was made, to wit, when plaintiff finally refused at

Walcott, the right of the collector to retain the entire sum paid ceased, except he chose to retain it for the very purpose for which it was paid him; that is, for the full fare to Owatonna. He could not retain the entire sum, and also eject the plaintiff. As precedent to the right to expel him from the train, he should have returned to plaintiff what he was entitled to of the money, and until he did that he had no right to put him off. It is true he returned it to him immediately after the expulsion. But the wrong had then already been committed, and could not be repaired by doing what ought to have been done before the expulsion. We have said the collector ought to have returned to him what he was entitled to of the money (not the whole of the money), because we hold that where a passenger refuses to pay the fare rightfully demanded of him to his place of intended destination, and the carrier puts him off at a proper place, because of such refusal, the carrier has a right to be paid the proper fare for carrying him to that place, and to retain it out of any money the passenger may have paid on account of fare. This is contrary to what was decided (the court being divided upon it) in the *Du Laurans Case*. The reasons given for the decision in that case were that the passenger does not intend to make a contract to be carried to the place short of his intended destination, where he is put off, and that the carrying the passenger in that case to the place where he was put off was no benefit, but, on the contrary, a detriment to him.

When, under circumstances that imply a request, a railroad company carries a passenger

from one point to another, it is no concern of the company, as affecting its right to compensation, that it is or is not to the advantage of the passenger to be carried to and left at the latter place, and it is therefore immaterial. The sole question is, Was the service rendered at the request, express or implied, of the passenger? When one voluntarily enters a train of cars, and expressly requests to be carried to a particular place, but refuses to pay the rightful fare to that place, so that the company has a right to put him off before reaching that place, a request must be implied to be carried to the place where the company may rightfully put him off. His intention must be taken to be to ride to the destination expressed by him, if the company will carry him to that place, without his paying the fare, and, if it will not, then to ride to such place where the company may rightfully put him and does put him off. That in such case he may be carried to and left at such place is what he must be presumed to expect and intend. And he can have no right to expect that the company will put him off, till the train reaches its first regular stopping station. The train need not stop for the mere purpose of putting him off. The facts upon which we hold that the expulsion of the plaintiff from the train was wrongful were established at the trial, and not disputed, so that he was entitled to a verdict. The instructions of the court, assigned as error, going only to the right to a verdict, were therefore, if erroneous, harmless. We see no error in the instructions touching the measure of damages.

Order affirmed.

MISSISSIPPI SUPREME COURT.

J. H. ALSUP, Admr., etc., of N. M. Alsup,
Deceased, *Appl.*,

v.

R. M. BANKS *et al.*

(..... Miss.)

1. A written lease for five years of a valuable plantation is not terminated by the death of the lessee before the expiration of that time, and his administrator will be liable for the rent for the unexpired term.

2. Reletting real estate at the best price obtainable to a third person, after the death of the lessee, before the expiration of the term, with notice to the latter's administrator, who has abandoned the premises,

that he will be held for the rents, and that the premises will be let on account of his intestate's estate, will not constitute an annulment of the original lease, nor release the administrator from his liability for the rents.

(May 25, 1891.)

A PPEAL by defendant from a decree of the Chancery Court for Tunica County in favor of complainants in an action brought to recover rent. *Affirmed.*

Plaintiffs leased a plantation to N. M. Alsup, in December, 1888, for the term of five years, and in the following October the lessee died. His administrator abandoned the leased premises, and plaintiffs let them to a stranger at a less rent than deceased had agreed to pay, and

NOTE.—*Lease, not terminated by death of lessee.*

Upon the death of a tenant, the lease vests in his executor or administrator. James v. Dean, 15 Ves. Jr. 241; Doe v. Porter, 3 T. R. 13.

It vests for the usual purposes to which testator's assets are applied, and the legatee has no right to enter without the executor's special assent. 1 Wms. Exrs. 60.

Although he does not enter into possession of the premises, he may be sued as assignee of the lease, for the rents subsequent to the death of the lessee. Wollaston v. Hakewell, 3 Man. & G. 297.

13 L. R. A.

If he enters upon the demised premises he becomes personally liable for the accruing rent. Hopwood v. Whaley, 6 C. B. 744.

Where the land yields some profit, but less than the rent, he may tender the amount of such profit or pay it into court. Patten v. Reid, 6 L. T. N. S. 281.

But by assigning the term he may free himself from liability for future rent, and for subsequent breaches of covenant. Taylor v. Shum, 1 Bos. & P. 21. See Collins v. Crouch, 13 Q. B. 542, cited in Wood, Land. & T. 356, p. 560.

brought this action to recover the difference. Defendant claimed that the lease was terminated by the lessee's death; that it was canceled by the reletting of the premises; and filed a cross-bill alleging the insolvency of the lessee's estate, and asking that plaintiffs pay him, for the benefit of other creditors, the difference between their *pro rata* share of the assets, according to their full claim, and the amount they realized from the reletting.

Further facts appear in the opinion.

Mr. St. John Waddell, for appellant:

Where a contract is executory, and the administrator can do all that the deceased could have done, it may be enforced.

Wood, Land. & T. § 856.

But where the death of a party to a contract puts a stop to his business, and leaves no legal right in his administrator, except to close it up with the least loss to the estate, no recovery can be had against the administrator.

Yerrington v. Greens, 7 R. I. 589, 84 Am. Dec. 560.

This was an executory contract, and the administrator could not carry it out.

Chalmers, Probate Law & Practice, [§ 281, and cases cited.

Mr. Banks took possession, and this was *prima facie* evidence that there had been a revocation of the contract.

Bedford v. Terhune, 30 N. Y. 453, 86 Am. Dec. 402; *Wilbourn v. Wilbourn*, 48 Miss. 88; *Hardy v. Thomas*, 23 Miss. 544. See also *Baumgartner v. Haas*, 68 Md. 32.

Messrs. Perkins & Percy, for appellees:

It must be proved that the lessor and lessee mutually agreed to a surrender of the term.

Bedford v. Terhune, 30 N. Y. 453, 86 Am. Dec. 402.

The surrender of demised premises by a tenant during the term, to be effectual, must be accepted by the lessor.

Auer v. Pennsylvania, 99 Pa. 370, 44 Am. Rep. 114.

Taking possession, repairing, advertising the house for rent, are all acts in the interest and for the benefit of the tenant, and do not discharge him from his covenant to pay rent.

Breckmann v. Treibill, 89 Pa. 58.

Where acts are relied upon as evincing an agreement to surrender, they should be such as are not easily referable to a different motive.

Martin v. Stearns, 52 Iowa, 345-349; *Thomas v. Nelson*, 69 N. Y. 118; *Nelson v. Thompson*, 23 Minn. 508; 2 Taylor, Land. & T. § 507.

Whether the administrator is personally liable where he enters after the death of the lessee, and how he may exonerate himself from that liability, have been inquired into in numerous cases, quite a number of which are cited in the note to Wood on Landlord and Tenant, § 856, p. 500.

It has been held that the administrator may discharge himself from all liability as such by alleging that the term is of no value, and that he has fully administered the assets which have come into his hands.

Wood, Land. & T. p. 561.

Woods, J., delivered the opinion of the court:

That the demurrer to the cross-petition was properly sustained is too clear to require any 13 L. R. A.

remark. Equally non-maintainable is the proposition that the contract of lease was terminated by the death of the lessee, and that no suit to enforce the same could be prosecuted against his administrator. That a contract of lease for a very valuable plantation, running for a term of five years, does not fall in the small class of contracts ended by the death of the lessee is perfectly clear. The execution of this contract was not with reference to a business which could not be carried on without the personal presence of the lessee. Such a thought cannot be supposed to have occurred to the parties to the contract, for the execution of it was not at all contingent upon the continued existence of the parties, or either of them.

The remaining contention on the part of appellant rests upon the proposition that there was an annulment of the lease contract, by agreement or by implication in law, from the acts of the parties and a surrender by the administrator. The facts are that after the death of the lessee, and at the beginning of the second year of the term, the appellant signified to appellees his purpose not to carry out the contract, and to abandon and surrender up the premises, which was met by an expression of unmistakable unwillingness to that course, by appellees; that soon afterwards appellant did abandon and vacate the premises; that appellees notified him that they would hold the estate of the lessee for the rents, according to the terms of the lease, and that they would let the premises for the account of the intestate's estate, and hold it for any deficiency that might arise; that appellees, after appellant's abandonment of the premises, took possession and rented the place to others, at an annual rental less by about a thousand dollars than that agreed to be paid by the deceased lessee; that appellees did all they could to obtain the best terms in renting to others, and that the price obtained was the highest and best that could be secured. That there was no surrender, in the sense that there was such yielding of possession of the leased premises, by mutual agreement, which worked a cancellation of the original contract and an extinguishment of the leasehold estate, appears certain to us. There can be no reasonable inferences drawn from the facts above recited tending even to show such mutual agreement and purpose. On the contrary, we have the expressed declaration of the unwillingness of appellees to that course, and their declared purpose, in the event of appellant's abandoning the premises, to let them and hold the lessee's estate for the difference between the sum thus obtained and that stipulated for in the lease contract. On these facts, the case seems manifestly against appellant's contention.

Nor do the facts that appellees took possession of the premises, after their abandonment by appellant, and rented them on the best terms obtainable, release appellant from his liability to pay, as the representative of the deceased lessee; for all these acts of appellees were in the interest and for the benefit of the lessee, equally as for the interest and benefit of the lessors. There was no taking by the lessors of possession unqualifiedly and unconditionally, and a dealing with the premises in a manner inconsistent with the continuance of

the unexpired lease. True, the lessor might have permitted the premises to remain vacant and untitled, and have recovered the entire rental from the lessee or his representative; but he was not compelled to take this course. He wisely and lawfully took the other course, whereby the interests of the lessee's estate were largely subserved.

The decree of the court below conforms to these views, and *must be affirmed*.

C. M. STRICKER, *Appt.*,

v.

T. P. LEATHERS *et al.*

(.....Miss.....)

A common carrier by water who receipts for goods marked for delivery at a private landing cannot, without excuse or justification, deliver them at another landing

without liability for the damages so occasioned. And if such delivery is made with a willful purpose to harass and injure the owner, punitive damages may be recovered.

(June 1, 1891.)

APPEAL by plaintiff from a judgment of the Circuit Court for Wilkinson County in favor of defendants in an action brought to recover damages for defendants' breach of their contract as common carriers to deliver goods at plaintiff's wharf. *Reversed*.

The case sufficiently appears in the opinion.

Messrs. J. H. Jones and D. O. Bramlett, for appellant:

The evidence clearly established a contract on the part of defendants to carry the freight to plaintiff's landing. The conduct of defendants in refusing to comply with their obligation as common carriers was oppressive and willful. The question of damages should have been submitted to the jury.

2 Sedgw. Dam. § 822 *et seq.*, and authorities

NOTE.—Exemplary or punitive damages; when allowed.

Exemplary damages grow entirely out of the nature of the act of the defendant for which the plaintiff recovers. They are given in enhancement, merely, of the ordinary damages on account of the bad spirit and wrong intention of the defendant, and are recoverable with the ordinary damages, under the common allegation that the act declared for was done to the damage of the plaintiff. *Hoadley v. Watson*, 45 Vt. 289.

Other terms sometimes used are "punitive" or "punitive" damages, and "smart money." These terms are usually employed indifferently in describing these damages. *Hackett v. Smelsley*, 77 Ill. 108; *Roth v. Eppy*, 80 Ill. 283; *Giles v. Eagle Ins. Co.* 2 Met. 148; *Louisville & P. R. Co. v. Smith*, 2 Duvall, 556; *Stonesifer v. Sheble*, 31 Mo. 243; *Kennedy v. North Missouri R. Co.* 36 Mo. 351; *Green v. Craig*, 47 Mo. 90; *Freese v. Tripp*, 70 Ill. 496; *Meidel v. Anthis*, 71 Ill. 241; *Freidenheit v. Edmundson*, 36 Mo. 226; *McKeon v. Citizens R. Co.* 42 Mo. 79.

Exemplary damages belong alone to actions of tort. *Norfolk & W. R. Co. v. Wysox*, 82 Va. 250.

Where the damage to the plaintiff is merely nominal, and there is no evidence of actual damage, there is no foundation upon which exemplary damages can attach or rest. *Kuhn v. Chicago, M. & St. P. R. Co.* 74 Iowa, 137.

Punitive damages may be awarded when a wrongful act is done willfully in a wanton or oppressive manner, or even when it is done recklessly. *Fotheringham v. Adams Exp. Co.* 1 L. R. A. 474, 36 Fed. Rep. 252; *Reeves v. Winn*, 97 N. C. 246.

A common carrier becomes liable to exemplary damages in cases of injury to the passenger by his negligence, only when his conduct has been such as to justly charge him with wanton or reckless indifference to the passenger's safety. Whenever this is the case, the law allows punitive damages, not because the plaintiff is entitled to anything more than strict compensation, but for the sake of the salutary effect which such examples may have in deterring the perpetration of similar wrongs. *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 23 L. ed. 374; *Caldwell v. New Jersey B. Co.* 47 N. Y. 282; *Louisville & P. R. Co. v. Smith*, 2 Duvall, 556; *Bannon v. Baltimore & O. R. Co.* 24 Md. 106; *Memphis & C. R. Co. v. Green*, 52 Miss. 779; *New Orleans, J. & G. N. R. Co. v. Statham*, 42 Miss. 607; *Williamson v. Western Stage Co.* 24 Iowa, 171; *Peoria Bridge Assn. v. Loomis*, 20 Ill. 236; *Kentucky Cent. R. Co. v. Dills*, 4 Bush, 568; *Bowler v. Lane*, 3 Met. (Ky.) 13 L. R. A.

311; *Millard v. Brown*, 85 N. Y. 297; *Hutchinson v. Carr*, § 812.

The doctrine of exemplary or punitive damages, as applicable to common carriers, is not sanctioned in Louisiana. *Rutherford v. Shreveport & H. R. Co.* 41 La. Ann. 793.

Such damages as a punishment or example cannot be recovered in a civil action, in Colorado. *Greeley, St. L. & P. R. Co. v. Yeager*, 11 Colo. 345.

In cases other than for personal injuries.

Exemplary damages are allowed whenever fraud, malice, oppression, or other aggravating circumstances accompany an injury to property. *Day v. Woodworth*, 54 U. S. 13 How. 363, 14 L. ed. 181; *Sherman v. Duteh*, 16 Ill. 283; *Cutler v. Smith*, 57 Ill. 282; *Whitfield v. Whitfield*, 40 Miss. 352; *Storm v. Green*, 51 Miss. 103.

The conduct and motives of the injuring party are open to inquiry. If he acted recklessly, or willfully and maliciously, with a design to oppress and injure the plaintiff, the jury may, as a punishment, and as a protection to society against a violation of personal rights, award such additional damages as in their discretion they may deem proper. This rule is applied in torts amounting to misconduct and recklessness. *Smalley v. Smalley*, 81 Ill. 70; *Voitz v. Blackmar*, 64 N. Y. 440; *Tift v. Culver*, 3 Hill, 180; *Wade v. Thayer*, 40 Cal. 578; *Tillotson v. Cheatham*, 3 Johns. 58; *Malecek v. Tower Grove R. Co.* 57 Mo. 17; *Philadelphia, W. & B. R. Co. v. Larkin*, 47 Md. 155; *Taylor v. Grand Trunk R. Co.* 48 N. H. 320; *Fox v. Stevens*, 13 Minn. 272; *Magee v. Holland*, 27 N. J. L. 86; *Storm v. Green*, 51 Miss. 103; *Goodspeed v. East Haddam Bank*, 22 Conn. 530; *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 15; *Titus v. Corkins*, 21 Kan. 728; *Fleet v. Hollentemp*, 18 B. Mon. 219; *Robinson v. Burton*, 5 Harr. (Del.) 385; *Dibble v. Morris*, 26 Conn. 416; *Bradshaw v. Buchanan*, 50 Tex. 462; *Cochran v. Miller*, 13 Iowa, 128; *Dalton v. Beers*, 38 Conn. 529; *Hoadley v. Watson*, 45 Vt. 289; *Western U. Teleg. Co. v. Eyser*, 2 Colo. 141; *Raynor v. Nims*, 37 Mich. 34; *McWilliams v. Bragg*, 3 Wis. 424; *Gilreath v. Allen*, 32 N. C. 67; *Grable v. Margrave*, 4 Ill. 373; *McBride v. McLaughlin*; 5 Watts, 375; *Huckle v. Money*, 2 Wils. 205; *Slater v. Sherman*, 5 Bush, 306; *Merest v. Harvey*, 5 Taunt. 442; *Brewer v. Dew*, 11 Mees. & W. 625.

If a railroad company refuses to carry goods through ill will or willful disregard of the rights of the shipper, it may be charged with exemplary damages. *Avinger v. South Carolina R. Co.* 29 S. C. 255.

cited; 5 Am. & Eng. Encyclop. Law, 21 *et seq.*, and authorities cited. See also *Day v. Woodworth*, 54 U. S. 18 How. 363, 14 L. ed. 181.

Plaintiff was entitled to recover punitive damages. At all events he was entitled to actual damages by way of compensation.

1 Sedgw. Dam. 70, 71, and notes.

Meers, H. S. Van Eaton and A. G. Shannon, for appellees:

A steamboat is not bound to deliver freight to the consignee at his private landing or place of business.

Kohn v. Packard, 8 La. 224, 38 Am. Dec. 454; *Prak v. Newton*, 1 Denio, 45, 48 Am. Dec. 649; *Braemer v. Toledo & W. R. Co.* 25 Ind. 434, 87 Am. Dec. 367; 2 Wait, Act. & Def. 52; *The "Eddy"*, 72 U. S. 5 Wall. 481, 18 L. ed. 486; *McAndrew v. Whitlock*, 53 N. Y. 40, 11 Am. Rep. 657.

A steamer is not bound to stop at every landing unless so advised.

Universal Encyclop. Law, § 1970 *et seq.*

Woods, J., delivered the opinion of the court:

The court below erred in striking out the plaintiff's evidence, and entering judgment for defendants. It is perfectly clear that defendants gave receipts to consignors for two shipments (those from the Red Star Shoe Store and from Durner) marked to appellant, for his

landing, at Ft. Adams, and that there was willful refusal to deliver according to contract. It is equally clear that seventy-two other packages, as appears from the evidence of the witness Price, were marked for delivery at Stricker's landing, but, in disregard of the contract, were delivered at another place, without excuse or justification on the part of appellees. For the small damages sustained by appellant in these instances, at any rate, the plaintiff was unquestionably entitled to a recovery. But on the evidence, taken as a whole, it appears that the conduct of appellees, in refusing to comply with their obligations to Stricker to deliver the packages of freight at his landing, after they had undertaken so to do, was not only without sufficient excuse, but was plainly the result of a willful purpose to harass and injure the appellant, and would fairly seem to entitle him to punitive damages to some extent. At least, under the evidence offered by appellant, he was entitled to have had his claim, in both the aspects adverted to, submitted to a jury, and, in the absence of countervailing evidence, he should have had a verdict for such amount as the proofs warranted. While a common carrier by water may not be required to stop at any and all mere private landings, yet when he contracts so to do he cannot be permitted capriciously to disregard his obligation and duty.

Reversed and remanded.

RHODE ISLAND SUPREME COURT.

Supreme Assembly of ROYAL SOCIETY OF GOOD FELLOWS

v.

John H. CAMPBELL *et al.*

(...R. I....)

1. An agreement between all the next of kin of one who died a member of a benefit society, before anyone knew in whose favor the certificate was made payable, that the fund should be collected by the administrator and divided equally among them, is sufficiently supported by consideration in the mutual surrender by each of the chance to receive a larger share, and will be binding on the one who proves to be the beneficiary named.

2. An agreement between the next of kin of a decedent that all his property,

including money due on life insurance policies, payable to some of them, shall be collected by the administrator, and a certain portion of the proceeds used in the ornamentation and care of decedent's burial lot and the remainder divided equally among the next of kin, will be supported as a family settlement and the beneficiaries in the insurance policies cannot claim their proceeds.

3. An agreement by a man, on behalf of his wife, to a family settlement of an estate in which she is interested, by which certain insurance policies payable to her are made part of the general fund, is ratified by her subsequently joining in an application for the appointment of an administrator and the execution of a power of attorney to enable him to collect the money in accordance with the agreement, and it will be binding on her although the husband had no authority to make it.

4. A married woman may sell and con-

NOTE.—Courts favor the compromise of litigation.

A prevention of litigation is a valid and sufficient consideration; for the law favors the settlement of disputes. *Penn v. Baltimore*, 1 Vea. Sr. 144; 1 Parsons, Cont. 7th ed. p. 467.

Compromises and settlement of litigated suits by the parties are favored by the courts, and are held binding upon the parties. *Steele v. White*, 2 Paige, 473, 3 L. ed. 906; *Shank v. Shoemaker*, 18 N. Y. 489; *Potter v. Smith*, 14 Johns. 444; *Magee v. Badger*, 30 Barb. 246.

They are to be encouraged because they promote peace, and when there is no fraud, and the parties meet on equal terms and adjust their differences, the court will not overlook the compromise but will hold the parties concluded by the settlement. *Williamson v. Field*, 2 Sandf. 542, 7 L. ed. 697; *Palmerton v. Buxford*, 4 Denio, 190; *Coon v. Knap*, 8 N. Y. 402; *Cornell v. Masten*, 35 Barb. 157.

13 L. R. A.

Compromises of disputed claims, fairly entered into, are conclusive, and will be sustained by the courts without regard to the validity of the claims. *Wehrum v. Kuhn*, 61 N. Y. 623; *Kidder v. Horrobin*, 73 N. Y. 159; *Williams v. Irving*, 47 How. Pr. 440; *Farmers Bank of Amsterdam v. Blair*, 44 Barb. 641.

A compromise of an alleged claim, the extent of which is unknown, there being no bad faith or concealment, is a valid and highly favored consideration. *Feeter v. Weber*, 78 N. Y. 334; *Flanagan v. Kilcome*, 58 N. Y. 443; *Craus v. Hunter*, 28 N. Y. 389; *White v. Hoyt*, 73 N. Y. 506; *Clark v. Gamwell*, 125 Mass. 428; *Dunham v. Griswold*, 1 Cent. Rep. 305, 160 N. Y. 224; *Clark v. Turnbull*, 47 N. J. L. 265; *Conover v. Stilwell*, 34 N. J. L. 54; *Graham v. Meyer*, 99 N. Y. 611; *Bosinger v. Tynes*, 120 U. S. 198, 30 L. ed. 649; *Russell v. Cook*, 3 Hull, 504; *Kidder v. Horrobin*, and *Wehrum v. Kuhn*, *supra*; *Morey v. Newfane*, 8 Barb. 645; *Home Ins. Co. v. Watson*.

vey her right to recover upon policies of life insurance made payable to her without the intervention of a trustee, under Pub. Stat., chap. 166, § 6, authorizing her to sell and convey any of her personal property other than that described in section 5, with the same effect as though she was unmarried.

5. Agreement by the beneficiary in certain life insurance certificates to the family settlement of the estate of the insured, which provides that they shall go into the general fund and be collected by the administrator for equal distribution among the next of kin, signing a power of attorney to enable the administrator to collect the money due on them and leaving them with him, amounts to an equitable assignment of the life insurance fund.
6. A power of attorney to enable an administrator to collect the amount due on life insurance certificates, which have been equitably assigned to him, is coupled with an interest so as to be irrevocable.

(June 20, 1891.)

BILL of interpleader against the administrator and next of kin of Duncan Campbell, deceased, to determine who is entitled to the proceeds of certain benefit certificates which he had taken out in his lifetime. *Judgment in favor of the administrator.*

The facts are stated in the opinion.

Messrs. Frank H. Jackson and John Haskell Butler for complainant.

Messrs. Cooke & Angell, for J. I. Greenhalgh and wife:

Upon the death of Duncan Campbell this fund was a chose in action. It was due to Phebe A. Greenhalgh exclusively. It was hers individually. It was no part of the estate of Duncan Campbell.

Aetna L. Ins. Co. v. Mason, 14 R. I. 583; *Holland v. Taylor*, 9 West. Rep. 606, 111 Ind. 12, 6 Am. Prob. Rep. 586, and cases cited in foot note.

The agreement signed by her husband purporting to be for his wife, was void *ab initio*. Pub. Stat. chap. 166.

The husband was prevented by the statute from reducing the fund to "possession."

Arnold v. Ruggles, 1 R. I. 165.

The agreement was in excess of his powers because made in ignorance of the fact that his wife was the only loser by the scheme and to what amount she would lose by it.

If the husband had been duly authorized to include such funds, the agreement, however

worded, would still be void, because revoked before acted upon.

Elderkin v. Rowell, 42 How. Pr. 330; *Parish v. Stone*, 14 Pick. 198; *Carr v. Silloway*, 111 Mass. 26; *Mace v. Sage*, 8 Week. Dig. 509; *Snyder v. Guthrie*, 21 Hun, 341; *Cottage St. M. E. Epis. Church v. Kendall*, 121 Mass. 523; *Hamilton College v. Stewart*, 1 N. Y. 581.

The brothers of Mrs. Greenhalgh procured this agreement with a motive of personal gain and expected to gain by it, but these are not considerations.

Philpot v. Gruninger, 81 U. S. 14 Wall. 577, 20 L. ed. 744.

In spite of all probable opposition even, everything would have been compulsory upon the administrator that this agreement called for, except the application of these funds. Even a court of law would brand this as unconscionable and void.

Hume v. United States, 21 Ct. Cl. 328; *Shepard v. Rhodes*, 7 R. I. 470.

Mr. John J. Arnold for the other respondents.

Matteson, Ch. J., delivered the opinion of the court:

This is a bill of interpleader to determine to whom shall be paid a benefit fund of \$1,000 due from the complainant on account of the death of Duncan Campbell, one of its members. This fund is claimed on the one hand by the respondent John H. Campbell, administrator of the estate of the deceased, by virtue of an agreement entered into as herein set forth, and on the other hand by the respondent Phebe A. Greenhalgh, wife of the respondent James I. Greenhalgh, who, under the name of Phebe A. Metcalf (her name prior to her marriage with Greenhalgh), is designated as a beneficiary in the certificate of membership issued by the complainant to the deceased. The deceased died December 7, 1887, unmarried, leaving as his next of kin the respondents, Catherine Campbell, his mother; John H. Campbell, Frank E. Campbell, his brothers; and Phebe A. Greenhalgh, his sister. On December 12, 1887, a meeting was held, at which all the respondents except Mrs. Greenhalgh were present, for the purpose of arranging for the settlement of his estate. At this meeting an agreement was entered into by which it was provided that John H. Campbell should be appointed administrator; that he should pay all bills owed by the deceased at his death;

59 N. Y. 386; *Cooper v. Parker*, 14 C. B. 121; *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449.

Where the compromise is voluntary, and there is the absence of fraud or imposition, it will be upheld however disadvantageous. *Ackerman v. Ackerman*, 44 N. J. L. 174; *Steele v. White*, 2 Paige, 478, 2 L. ed. 995.

The party compromising cannot be relieved from it, although he shows that it was not beneficial to him, or that he had the right to recover in the suit in point of law. *Brooklyn Bank v. Waring*, 2 Sandf. Ch. 5, 7 L. ed. 484.

Where there is a real controversy between parties, and the case is one of any doubt, the court will not set aside a compromise fairly made by them, though it should afterwards appear that one has thereby received property to which he was not legally entitled. *Jordan v. Stevens*, 51 Me. 78; See 13 L. R. A.

Trigg v. Read, 5 Humph. 529. See *Day v. Sizer*, Clarke, Ch. 199, 7 L. ed. 91.

A doubtful claim prosecuted in good faith is a good consideration for a promise made on compromising and settling it; and the promise cannot be impaired by showing that the claim was invalid. *Brooklyn Bank v. Waring*, *supra*.

Compromise of family disputes is favored.

The compromise, among the members of the same family, of disputed claims with reference to family property, has always been regarded by the courts as constituting a valid consideration for the contracts entered into effecting the settlement. *Adams v. Adams*, 70 Iowa, 258. See *Stapilton v. Stapilton*, 1 Atk. 2; *Westby v. Westby*, 2 Drew. & W. 502; *Zane v. Zane*, 6 Munt. 406; *Paris v. Dexter*, 13 Vt. 379; *Cruger v. Douglas*, 4 Edw. Ch. 428, 6 L. ed. 523.

that he should put in order the burial lot in Swan Point cemetery according to the rules and regulations of the cemetery; that a suitable head-stone should be erected to the memory of the deceased, at a cost not exceeding \$100; that the administrator should have orders on the different organizations to which the deceased belonged for the full amount of insurance in such organizations, and that the moneys collected thereon, or from any other source, should be placed in a general fund; that the sums required for the purposes specified, and also to provide for the perpetual care of the burial lot, should be paid by the administrator out of such general fund; and that the next of kin should share equally in the residue, no matter to whom the certificates of membership held by the deceased in the several societies might have been made payable. Mrs. Greenhalgh was represented at this meeting by her husband, and he entered into and signed the agreement in her behalf. The valuable papers of the deceased were contained at the time of his death in a package kept in the safe of the Providence Gas Company. These papers were taken by John H. Campbell to the meeting; but the package was not opened until the signing of the agreement, and none of the respondents knew, until after the package was opened, who had been named as beneficiary in the certificates of membership. Pursuant to the agreement, John H. Campbell was subsequently appointed administrator, and accepted the office, Mrs. Greenhalgh and her husband both signing the application for his appointment. Powers of attorney from Mr. and Mrs. Greenhalgh to the administrator, dated December 19, 1887, were prepared and executed, authorizing him to demand, recover, receive, and receipt for all sums of money due or payable to Mrs. Greenhalgh, formerly Phebe A. Metcalf, from the societies of which the deceased was a member, by reason of his death. These powers of attorney were subsequently left by the administrator with these societies; but before the moneys due from them had been paid to the administrator Mr. and Mrs. Greenhalgh caused notices to be served upon the different societies revoking the powers of attorney, and forbidding the payment of the moneys. The administrator first learned of the revocation of the powers of attorney about the first of the following February or March, and had in the mean time, on the faith of the agreement, ordered a head-stone, and contracted for the improvement of the burial lot, and for its perpetual care. The complainant declined to pay the money to Mrs. Greenhalgh without the surrender of the certificate issued by it to the deceased.

Mrs. Greenhalgh thereupon requested the administrator to deliver the certificate to her, but the administrator refused to comply with her request. Up to this time the certificate had remained, without objection, in the possession of the administrator. No adjustment of the matter having been made by the respondents, the complainant, after a year or more had elapsed, filed this bill.

In behalf of Mrs. Greenhalgh it is contended that the agreement was void for want of con-

sideration. The purpose of the agreement was to provide for the settlement of the affairs of the deceased, and the amicable distribution among his next of kin of the surplus of his estate, including the benefit funds of the several societies referred to, after payment of his debts, and the sums required for the objects specified. The distribution was not unreasonable, for it was an equal distribution among the next of kin, and the same which the law makes of intestate estates. There is no charge of fraud or undue influence, and, so far as the testimony discloses, all of the parties to the agreement were possessed of equal knowledge, and stood upon an equal footing. In the uncertainty as to who had been named as beneficiary or beneficiaries, each was willing to surrender his chance of getting a larger share, or the whole, for the certainty of an equal share with the others. If there was no other consideration for the agreement than this mutual surrender by each of his or her chance to receive a larger share, we think the agreement could be supported. There are numerous cases of compromises of doubtful or disputed rights, not only between members of families, but between strangers, which rest upon no other consideration than the surrender by the parties of a portion of such doubtful or disputed rights, and which have been upheld, though it may have appeared upon subsequent investigation or adjudication that one of the claimants had no right, or not so great a right as the share he received by the compromise, in the property in doubt or in controversy. In *Dunnage v. White*, 1 Swanst. 137, 151, 152, the master of the rolls remarks: "Undoubtedly parties entitled in different events may, while the uncertainty exists, each taking his chance, effect a valid compromise." The agreement in the case at bar was not strictly a compromise, since at the time it was made no dispute had arisen between the parties, and neither had made any claim to any greater share in the whole or any part of the estate than the others. There are, however, cases which do not involve any element of disputed right, and which, therefore, were no more compromises than the agreement in question, which rest upon the consideration of a mutual chance.

In *Beckley v. Newland*, 2 P. Wms. 182, the complainant and respondent had married sisters, who were cousins and presumptive heirs of a Mr. Turgis, a very rich man. Turgis made a will, in which he left a large estate, real and personal, to the respondent, but only a small real estate to the complainant. Before the execution of the will the complainant and respondent had entered into articles by which they agreed that whatever should be given to either should be equally divided. The Lord Chancellor said: "A performance of these articles ought to be decreed, though there was no other consideration for them than the mutual benefit of the chance."

In *Harwood v. Tooke*, 2 Sim. 193, the complainant was a nephew, heir-at-law, and one of the next of kin of William Tooke, a man of large property. The respondent was not related to William Tooke, but was an inti-

mate friend. The complainant and respondent, both having expectations from him, agreed by parol to divide equally whatever he might leave them. He died in 1802, having left a much larger portion of his property to the complainant than to the respondent. The respondent, not wishing to hold the complainant to the full extent of their agreement, proposed to accept £4,000 in satisfaction of his claims, and the complainant gave him a promissory note for that sum. The respondent afterwards indorsed the note to Sir Francis Burdett as the consideration for the purchase of an annuity. The bill prayed that the note might be declared to have been unduly obtained from the complainant, and without good or valuable consideration, and that it might be delivered up to be canceled, and that the defendant might be restrained from using, applying, negotiating, or paying it away, or bringing an action against the complainant respecting the note. Lord Eldon granted the injunction, and the money was paid into the court; but subsequently, upon hearing, dismissed the bill, and upon rehearing the decree of dismissal was affirmed. In *Wethered v. Wethered*, 2 Sim. 183, two sons agreed to divide equally whatever property they might receive from their father in his lifetime, or become entitled to under his will or by descent or otherwise from him. It was held that the agreement was not against public policy, and would be enforced in equity.

But there is a class of cases of family arrangements, relating to the settlement of property, in which there is no question of doubtful or disputed rights, and in regard to which a peculiar equity has been administered, in that they have been supported upon grounds which would hardly have been regarded as sufficient if the transaction had occurred between strangers. In these cases the motive of the arrangements was to preserve the honor or peace of families or the family property. When such a motive has appeared, the courts have not closely scrutinized the consideration. *Trigg v. Read*, 5 Humph. 529, 546; *Barkholder's App.* 105 Pa. 31; *Wilen's App.* Id. 121; *Watworth v. Abel*, 53 Pa. 370; *Furnsworth v. Dinmore*, 2 Swan, 88; *Williams v. Williams*, L. R. 2 Ch. App. 294, 304; *Houghton v. Houghton*, 15 Beav. 278; *Wycherley v. Wycherley*, 2 Eden, 175; *Frank v. Frank*, 1 Ch. Cas. 84; *Stapilton v. Stapilton*, 1 Atk. 2; *Pullen v. Ready*, 2 Atk. 587; *Cory v. Cory*, 1 Ves. Sr. 19; *Head v. Godlee*, Johns. V. C. 536, 569.

In the case at bar, the motive for the agreement was, as we have seen, to provide, among other things, for the amicable distribution among the respondents of the surplus of his estate, including the moneys payable on the benefit certificates, after the payment of debts, etc. This motive constituted a sufficient consideration within the law relating to family arrangements, and the agreement is therefore sustainable as a family arrangement.

In *Hoghton v. Hoghton*, 15 Beav. 278, 300, it is said: "If the transaction is one which tends to the peace and security of the family, to the avoiding of family disputes

and litigation, or to the preservation of the family property, the principles by which such transactions must be tried are not those applicable to dealings between strangers, but such as upon the most comprehensive experience have found to be most for the interest of families."

Williams v. Williams, L. R. 2 Ch. App. 294, was a case the facts in which were as follows: A. died in 1881, possessed of real estate held in socage, gavelkind, and borough English tenures, and also of leaseholds, stock in trade, and other personal property. He made a will by which, after certain provisions for his wife, he gave all his property to his two sons equally, but, the will being incomplete was refused probate. At an interview between the brothers shortly after the will had been refused probate, the elder brother declared that the invalidity of the will should make no difference, and that the property should not be "mine or thine, but ours." No agreement in writing was made, but for twenty years after the death of A. the two sons carried on the partnership together, and dealt with the whole property, real and personal, as if it belonged to them equally. The widow never insisted upon her rights in her husband's property. In 1861 the partnership was dissolved. The younger brother having died, his representatives brought two suits,—the first to determine the rights of the two brothers in certain real estates, alleging that a family arrangement had been made between them that they should be equally entitled to those estates; the second to take the accounts of the partnership which had been carried on between the two brothers. The elder brother, the respondent, denied any such arrangement as was alleged. The vice-chancellor held that such a course of dealing had been proved as established the existence of a family arrangement which the court would uphold, and declared the complainant entitled to the relief prayed. The respondent appealed from this decree. Turner, Lord Justice, in his opinion affirming the decree of the vice-chancellor, remarks: "Nor do I think there was any want of consideration. The vice-chancellor has, and I think correctly, rested this part of the case upon the footing of the cases as to family arrangements. They extend, as I apprehend, much further than is contended for on the part of the appellant, and apply, as I conceive, not merely to cases in which arrangements are made between members of a family for the preservation of its peace, but to cases in which arrangements are made between them for the preservation of its property." He then refers to the resettlement of family estates upon an arrangement between father and the eldest son on his attaining 21 as a branch of these cases, and adds: "Certainly this court does not in such cases inquire into the quantum of consideration." *Wycherley v. Wycherley*, 2 Eden, 175, was a case of the resettlement of property, in which a son upon his marriage had joined with his father in the resettling of the estate, and by a memorandum executed at the same time agreed to secure £300 to each of his sisters. It was held that there

was a sufficient consideration for the court to decree specific performance of this agreement. The Lord Chancellor said: "I think the present was not a mere voluntary agreement, and the court will (and I am warranted by the precedents to say that it has done so) attend to slight considerations for confirming family settlements and modifications of property. They pay a regard to reasonable motives and honorable intentions. In these cases they will not weigh the value of the consideration. They consider the ease and comfort and security of families as sufficient consideration." But, independently of the considerations above mentioned, the agreement provides for putting in order the burial lot and also for its perpetual care. These are matters outside of the administration. Each of the parties to the agreement, presumably on the faith of it, has, by signing it, consented to the reduction of his or her distributive share of the estate by his or her proportion of the sums required for those purposes. It is possible that but for the agreement this consent would not have been given. This, of itself, would seem to furnish a sufficient consideration, and, as we have seen above, in cases of family arrangements courts do not inquire into the quantum of the consideration.

It is further contended in behalf of Mrs. Greenhalgh that it clearly appears from the testimony that the only authority that her husband had was to represent her in relation to Duncan Campbell's estate, and not to give away her separate property; and that this fund was no part of his estate, but a gift from him to her. There would be some force in the suggestion were it not that Mrs. Greenhalgh subsequently joined in the application for the appointment of the administrator and in the execution of the powers of attorney to the administrator for the collection of the moneys in pursuance of the agreement, and thereby ratified the making

of the agreement by her husband and cured the lack of authority, if the lack existed. The counsel for Mrs. Greenhalgh further contend that the fund in question, being a chose in action, could not be conveyed by Mr. and Mrs. Greenhalgh, but could only be disposed of by a trustee of her estate, appointed under R.I. Pub. Stat., chap. 166, § 18, or § 22. A chose in action is personal estate. R. I. Pub. Stat., chap. 166, § 6, authorizes any married woman to sell or convey, or to make contracts respecting the sale and conveyance of any of her personal property other than that described in section 5 of the same chapter, with the same effect, and with the same rights, remedies, and liabilities, as if she was *sole* and unmarried. The personal estate described in section 5, though it embraces some choses in action, does not include such a chose as the fund in question. We are of the opinion that the signing of the agreement and the subsequent ratification of it by Mrs. Greenhalgh, the execution and delivery of the power of attorney to collect the money, and the leaving of the certificate with the administrator for the purpose of enabling him to collect the money, were consistent only with an intention to transfer the fund to the administrator under the agreement, and operated as an equitable assignment of the fund accordingly. *Clemson v. Davidson*, 5 Binn. 891, 898; *Spain v. Hamilton*, 64 U. S. 1 Wall. 604-624, 17 L. ed. 619-625; *Newby v. Hill*, 2 Met. (Ky.) 530-532; *Wiggins v. McDonald*, 18 Cal. 126, 127; *Garnsey v. Gardner*, 49 Me. 167, 171, 173; *Wallace v. Walter Heywood Chair Co.* 16 Gray, 209.

We are further of the opinion that, an equitable assignment of the fund having thus been made, the power of attorney was coupled with an interest, and therefore not revocable.

We decide that the respondent John H. Campbell, administrator, is entitled to the fund in suit.

CALIFORNIA SUPREME COURT.

D. K. SWIM, *Respt.*,
v.
John Scott WILSON, *Appt.*
(.... Cal.)

Stockbroker who receives stock from one who has stolen it, sells the same and

pays over the proceeds to his principal, is liable to the true owner for its value although he has acted in good faith, without notice, and in reliance on the thief's representations of ownership.

(Beatty, Ch. J., and Paterson, J., dissent.)

(July 1, 1891.)

NOTE.—Rights of the owner of stolen stock certificates.

Different rules from those affecting negotiable paper obtain as regards stock certificates indorsed in blank and subsequently lost or stolen. A purchaser of such certificates is not in any sense, a bona fide holder for value or entitled to protection, nor is any subsequent purchaser of that identical certificate. The real owner may compel the corporation which originally issued the certificate to register the stock as his on its books, or he may have an action for damages against a bona fide transferee of the thief where such transferee sold with notice. *Barstow v. Savage Min. Co.* 64 Cal. 282; *Winter v. Belmont Min. Co.* 58 Cal. 428; *Anderson v. Nicholas*, 28 N. Y. 600; *Biddle v. Bayard*, 13 L. R. A.

Pa. 150; *Given's App.* (Pa.) Nov. 5, 1888; *Cook, Stock and Stockholders*, § 363.

If the principal is a wrong-doer, the agent is a wrong-doer also. A person is guilty of a conversion who sells the property of another without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner, and is ignorant of such person's want of title. *Kimball v. Billings*, 66 Me. 147; *Koch v. Branch*, 44 Mo. 542; *Hoffman v. Carow*, 23 Wend. 285.

Simply intrusting the possession of a chattel to another as depositary, pledgee or other bailee, or even under a conditional executory contract of sale, is clearly insufficient to preclude the real owner from reclaiming his property, in case of an

APPPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco in favor of plaintiff in an action brought to recover the value of certain mining stock which defendant had sold, and delivered its proceeds to a third person. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. Wilson & Wilson for appellant.

Messrs. Tilden & Tilden, for respondent:

A stock broker who sells and transfers stolen stock cannot escape liability by paying the proceeds of such sale to the thief.

Cerkel v. Waterman, 63 Cal. 34; *Barstow v. Savage Min. Co.* 64 Cal. 388; *Swim v. Bernard*, 4 West Coast Rep. 525; *Pease v. Smith*, 61 N. Y. 480; *People v. Bank of North America*, 75 N. Y. 547. See also *Harpending v. Meyer*, 55 Cal. 555.

De Haven, J., delivered the opinion of the court:

The plaintiff was the owner of 100 shares of stock of a mining corporation, issued to one H. B. Parsons, trustee, and properly indorsed by him. This stock was stolen from plaintiff by an employé in his office, and delivered for sale to the defendant, who was engaged in the business of buying and selling stocks on commission. At the time of placing the stock in defendant's possession, the thief represented himself as its owner, and the defendant relying upon this representation, in good faith, and without any notice that the stock was stolen, sold the same in the usual course of business, and subsequently, still without any notice that the person for whom he had acted in making the sale was not the true owner, paid over to him the net proceeds of such sale. Thereafter the plaintiff brought this action to recover the value of said stock, alleging that the defendant had converted the same to his own use, and, the facts as above stated appearing, the court in which the action was tried gave judgment

against defendant for such value, and from this judgment, and an order refusing him a new trial, the defendant appeals. It is clear that the defendant's principal did not by stealing plaintiff's property acquire any legal right to sell it, and it is equally clear that the defendant, acting for him and as his agent, did not have any greater right, and his act was therefore wholly unauthorized, and in law was a conversion of plaintiff's property. "It is no defense to an action of trover that the defendant acted as the agent of another. If the principal is a wrong-doer, the agent is a wrong-doer also. A person is guilty of a conversion who sells the property of another without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner, and is ignorant of such person's want of title." *Kimball v. Billings*, 55 Me. 147; *Coles v. Clark*, 8 Cush. 399; *Koch v. Branch*, 44 Mo. 542.

In *Stephens v. Ellswell*, 4 Maule & C. 259, this principle was applied where an innocent clerk received goods from an agent of his employer, and forwarded them to such employer abroad; and, in rendering his decision on the case presented, Lord Ellenborough uses this language: "The only question is whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit, when he sent the goods to his master; but, nevertheless, his acts may amount to a conversion; for a person is guilty of conversion who intermeddles with my property, and disposes of it, and it is no answer that he acted under the authority of another, who had himself no authority to dispose of it."

To hold the defendant liable, under the circumstances disclosed here, may seem upon first impression to be a hardship upon him. But it is a matter of every day experience that one cannot always be perfectly secure from loss in his dealings with others, and the defend-

unauthorized disposition of it by the person so entrusted. *Ballard v. Burgett*, 40 N. Y. 314.

The mere possession of chattels, by whatever means acquired, if there be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give a good title. *Covill v. Hill*, 4 Denio, 323.

Where the stock sold and converted was indisputably the property of another, the purchaser acquires no title thereto by the delivery thereof to him by the person who purloined the same. He has no greater or better title to it than that possessed by the person from whom he received it. *Mechanics Bank v. New York & N. H. R. Co.* 13 N. Y. 599; *Anderson v. Nicholas*, 28 N. Y. 600.

Certificates of stock of an incorporated company are within the statutory definition of personal property, and are the subjects of larceny. *People v. Griffin*, 38 How. Pr. 475.

Where an owner has been deprived of his stock without either his consent or negligence, and by means of a forged power of attorney, he may compel the corporation to issue a certificate to him equal to the amount of shares lost or stolen and to pay him the dividends accruing thereon. *Ashby v. Blackwell*, 2 Eden, 299; *Sloman v. Bank of England*, 14 Sim. 475; *Midland R. Co. v. Taylor*, 8 H. L. Cas. 751; *Pollock v. National Bank*, 7 N. Y. 274; *Sewall v. Boston Water Power Co.* 4 Allen, 277.

A stock certificate is a mere evidence of property. *Ang. & A. Corp.* 482.

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Stock certificates are denied the attributes of negotiability such as characterize bills of exchange or promissory notes. Title, however, may pass to the transferee by the indorsement and delivery of the owner, but not without his consent; and it cannot pass under a forged power of attorney. *Davis v. Bank of England*, 2 Bing. 393; *Pollock v. National Bank*, 7 N. Y. 274.

Even a stolen bank note may be recovered from anyone not a bona fide holder. *Solomons v. Bank of England*, 13 East, 155, note; *Mechanics Bank v. New York & N. H. R. Co.* 13 N. Y. 621; *Sherwood v. Meadow Valley Min. Co.* 50 Cal. 412.

The assignee takes them subject to all the equities which exist against the assignor. They are choses in action. *Cornick v. Richards*, 3 Lea, 1; *Young v. South Tredegar Iron Co.* 85 Tenn. 189; *Mechanics Bank v. New York & N. H. R. Co.* 13 N. Y. 600; *McCready v. Rumsey*, 6 Duer, 674; *Clarke v. Rochester*, 28 N. Y. 604; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 60; *Bush v. Lathrop*, 22 N. Y. 585.

Where a stock certificate, having attached to it a blank power of attorney authorizing its transfer, which was duly signed by the original holder, of whom the loser purchased it, was either lost or stolen, and upon the faith of which a transferee obtained a new stock certificate which he subsequently sold, the purchaser will be protected in his possession of the stock. *Mandlebaum v. North American Min. Co.* 4 Mich. 466.

ant here is only in the position of a person who has trusted to the honesty of another, and has been deceived. He undertook to act as agent for one whom it now appears was a thief, and, relying upon his representations, he aided his principal to convert the plaintiff's property into money, and it is no greater hardship to require him to pay to the plaintiff the value of this property than it would be to take it away from the innocent vendee who purchased and paid for it. And yet it is universally held that the purchaser of stolen chattels, no matter how innocent or free from negligence in the matter, acquires no title to such property as against the owner, and this rule has been applied in this court to the innocent purchaser of shares of stock. *Barstow v. Savage Min. Co.* 64 Cal. 388; *Sherwood v. Meadow Valley Min. Co.* 50 Cal. 413.

The precise question involved here arose in the case of *Berckich v. Marye*, 9 Nev. 312. In that case, as here, the defendant was a stockholder who had made a sale of stolen certificates of stock for a stranger, and paid him the proceeds. He was held liable, the court in the course of its opinion saying: "It is next objected that, as the defendant was the innocent agent of the person for whom he received the shares of stock, without knowledge of the felony, no judgment should have been rendered against him. It is well settled that agency is no defense to an action of trover, to which the present action is analogous." The same conclusion was reached in *Kimball v. Billings*, 55 Me. 147, the property sold in that case by the agent being stolen government bonds, payable to the bearer. The court there said: "Nor is it any defense that the property sold was government bonds payable to bearer. The bona fide purchaser of a stolen bond payable to bearer might perhaps defend his title against even the true owner. But there is no rule of law that secures immunity to the agent of the thief in such cases, nor to the agent of one not a bona fide holder. . . . The rule of law protecting bona fide purchasers of lost or stolen notes and bonds payable to bearer has never been extended to persons not bona fide purchasers, nor to their agents."

Indeed, we discover no difference in princi-

ple between the case at bar and that of *Rogers v. Hute*, 2 Cal. 571, in which case Bennett, J., speaking for the court, said: "An auctioneer who receives and sells stolen property is liable for the conversion to the same extent as any other merchant or individual. This is so both upon principle and authority. Upon principle, there is no reason why he should be exempted from liability. The person to whom he sells, and who has paid the amount of the purchase money, would be compelled to deliver the property to the true owner or pay him its full value; and there is no more hardship in requiring the auctioneer to account for the value of the goods than there would be in compelling the right owner to lose them, or the purchaser from the auctioneer to pay for them." It is true that this same case afterwards came before the court, and it was held, in an opinion reported in 2 Cal. 571, that an auctioneer, who in the regular course of his business receives and sells stolen goods, and pays over the proceeds to the felon, without notice that the goods were stolen, is not liable to the true owner as for a conversion. This latter decision, however, cannot be sustained on principle, is opposed to the great weight of authority, and has been practically overruled in the later case of *Cerkel v. Waterman*, 68 Cal. 84. In that case the defendants, who were commission merchants, sold a quantity of wheat, supposing it to be the property of one Williams, and paid over to him the proceeds of the sale before they knew of the claim of the plaintiff in that action. There was no fraud or bad faith, but the court held the defendants there liable for the conversion of the wheat. In this case it was the duty of the defendant to know for whom he acted, and, unless he was willing to take the chances of loss, to have satisfied himself that his principal was able to save him harmless if in the matter of his agency he incurred a liability by the conversion of property not belonging to such principal.

Judgment and order affirmed.

We concur: **Garoutte, J.; McFarland, J.; Sharpstein, J.**

We dissent: **Beatty, Ch. J.; Paterson, J.**

KANSAS SUPREME COURT.

State of KANSAS, *Plff. in Err.*,
v.

W. O. BUSH.

(...Kan....)

***1. That portion of section 15 of chapter 80 of the Laws of 1879 which prescribes a criminal punishment for improperly registering the names of voters is not constitutional or void.**

2. A criminal information setting forth that B., the city clerk of a city of the second class, registered the name of a person as a voter who did not appear in person, and was not

NOTE.—Statutory offense, indictment for.

Where an indictment avers facts which certainly charge defendant with the commission of the act forbidden by statute, it is sufficient. *State v. Melville*, 11 R. I. 417; *McCarthy v. Territory*, 1 Wyo. 311. But all the facts and circumstances which go to constitute the offense must be stated. *Humphreys v. State*, 17 Fla. 381; *State v. McKenzie*, 42 Me. 392; *Davis v. State*, 39 Md. 355; *Wood v. People*, 56 N. Y. 13 L. R. A.

511; *Kinney v. State*, 21 Tex. App. 348; *Com. v. Clark*, 2 Ashm. 105; *State v. Straus*, 77 N. C. 500.

An indictment which charges all the facts necessary to constitute the offense is good. *Kerah v. State*, 24 Ga. 191; *United States v. Donau*, 11 Blatchf. 168.

Where the statement of the case necessarily includes a knowledge of the illegality of the act an averment of knowledge or of intent is not necessary. *Com. v. Storr*, 7 B. Mon. 247.

present, and did not give his name, age, occupation, or place of residence, may be sufficient, without expressly alleging any criminal intent.

- 3. When the commission of an act is made a crime by statute,** without any express reference to any intent, then the only criminal intent necessarily involved in the commission of the offense is the intent to commit the interdicted act, and in such a case it is not necessary to formally or expressly allege such intent, or any intent, but simply to allege the commission of the act, and the intent will be presumed.

(*On Rehearing.*)

- 4. A slight departure from some directory provision of the Act** relating to the registration of voters in cities, without any fraudulent intent on the part of the officer, and which in its nature and effect cannot injure anyone, or operate to interfere with or defeat the purpose of the Act, is not punishable as a felony, or within the penalty described in section 15 of the Act.

(January 10, 1891.)

ERROR to the District Court for Butler County to review a judgment in favor of defendant in a proceeding to punish him for violating the provision of the Statute relating to the registration of voters. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. L. B. Kellogg, Atty-Gen., and E.

H. Hutchins for the State

Messrs. Clogston, Hamilton, Fuller & Cubbison for defendant in error.

Valentine, J., delivered the opinion of the court:

This was a criminal prosecution in the District Court of Butler County, under § 15, chap. 80, Laws 1879 (Gen. Stat. 1889, par. 711), in which the defendant, W. O. Bush, who was the city clerk of the City of El Dorado, a city of the second class, was charged, upon information in two counts, with registering J. N. Hanna as a voter, Hanna not being present, nor appearing in person, nor giving his name, age, occupation, or place of residence. The title to the Act in which the aforesaid section 15 is found, and sections 8 and 15 of such Act, read as follows: "An Act to Provide for and to Regulate the Registration of Voters in Cities of the First and Second Class, and to repeal all prior Acts in Relation thereto." "Sec. 8. No person shall be registered unless he appear in person before the city clerk, at the city clerk's office, during usual office hours, and apply to be registered, and give his name, age, occupation, and particular place of residence, as required to make the proper entries in the poll-books." "Sec. 15. If any officer shall neglect or refuse to perform any duty required by this Act, or in the manner required by this Act, or shall neglect or refuse to enter upon the performance of any such duty, or shall enter, or cause or permit to be entered, on the registry books, the name of any person in any other manner, or at any other time than as prescribed by this Act, or shall enter, or cause or permit to be entered, on such list, the name of any person not entitled to be registered thereon, according to the provisions of this Act, or shall destroy, secrete, mutilate, alter, or change any such

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registry books, he shall, upon conviction, be punished by confinement and hard labor in the penitentiary, not exceeding one year, and shall forfeit any office he may then hold."

The portions of the foregoing sections particularly applicable to this case are those which read as follows: "No person shall be registered, unless he appear in person before the city clerk, at the city clerk's office, during usual office hours, and apply to be registered, and give his name, age, occupation and particular place of residence. . . . If any officer [a city clerk] . . . shall enter, or cause or permit to be entered, on the registry books, the name of any person in any other manner, or at any other time, than as prescribed by this Act, . . . he shall, upon conviction, be punished," etc. The defendant moved the court to quash the information, upon the following grounds, to wit: "first, that the Act of the Legislature of the State of Kansas, under which said information is pretended to be drawn, to wit, chapter 80 of the Session Laws of 1879, is unconstitutional, being in contravention of § 16 of article 2 of the Constitution of the State of Kansas; second, that no offense is charged against the defendant in said information; third, that neither of the counts of said information states and charges an offense against the laws of the State of Kansas." The court sustained the motion, and discharged the defendant, and the State of Kansas appeals to this court. No brief for the defendant has been filed in this court, but from the plaintiff's brief, and the defendant's motion to quash, we can probably obtain a correct understanding as to what were the grounds upon which the court below quashed the information. It is claimed, as we understand, that the title to the Act is not broad enough to authorize a provision in the body of the Act creating a criminal offense, or prescribing a punishment therefor. We think it is. *State v. Barrett*, 27 Kan. 218, and cases there cited; *Durein v. Pontious*, 34 Kan. 353. The offense in the present case, and the punishment therefor, have relation to the general subject contained in the title to the Act, which is the registration of voters in certain cities, and such offense and punishment are included within such subject, within the meaning of the Constitution. They clearly relate to the registration of voters.

It is further claimed, as we understand, that the information is defective, for the reason that it does not allege any criminal intent on the part of the defendant. Of course, a crime cannot be committed unless the person committing the acts supposed to constitute the crime entertains a criminal intent, and that criminal intent must, in some manner, be averred in the information or indictment, either expressly or impliedly. But when the commission of an Act is made a crime by statute, without any express reference to any intent, then the only criminal intent necessarily involved in the commission of the offense is the intent to commit the interdicted act, and in such a case it is not necessary to formally or expressly allege such intent, or any intent, but simply to al-

lege the commission of the act, and the intent will be presumed. In the present case, the wrong committed was the registration of the name of J. N. Hanna as a voter, without his appearing in person, or being present, and without his giving his name, age, occupation, or place of residence. In such a case, all that is necessary is simply to allege the fact that the defendant so registered the name of Hanna, without also stating that he so registered such name, with the intent to so register the same. It is alleged in the information that the defendant "unlawfully and feloniously" so registered the same. Mr. Bishop, in his work on Criminal Procedure (vol. 1, § 521), uses the following language: "Starkie says: 'To render a party criminally responsible, a vicious will must concur with the wrongful act. But, though it be universally true that a man cannot become a criminal unless his mind be in fault, it is not so general a rule that the guilty intention must be averred upon the face of the indictment.' For, in a large part of the crimes the vicious will appears, *prima facie*, in the act itself; hence to allege simply the act makes the required *prima facie* case, and any non-concurrence of the will therein is a matter of defense." And in note 2 to the same section he uses the following language: "Where the act is in itself unlawful, an evil intent will be presumed, and need not be averred, and, if averred, is a mere formal allegation, which need not be proved by extrinsic evidence."

In the American and English Encyclopedia of Law (vol. 4, p. 681) the following language is used: "Where the Statute contains nothing requiring acts to be done knowingly, and the acts done are not *malum in se*, nor infamous, but are merely prohibited, the offender is bound to know the law, and a criminal intent need not be proved. The intent is immaterial where the Statute declares it a misdemeanor to obstruct a public road. When the Statute does not make intent an element of the crime, intent need not be alleged, although, under general principles, it must be proved; and it is held that one who does that which the law forbids is presumed to have had the criminal intent." In the present case, we think the criminal intent was impliedly and sufficiently alleged by the allegations setting forth and averring the commission of the prohibited acts.

The judgment of the court below will be reversed, and cause remanded for further proceedings.

All the Justices concur.

A petition for rehearing was subsequently filed, in support of which Messrs. E. N. Smith and Redden & Schumacher, for defendant in error, contended:

This section, examined and interpreted in the light of common sense, simply means that no officer shall fraudulently violate the provisions of the Act regulating the registration of voters. To hold that the clerk is guilty under the admitted facts in this case would be such a harsh construction of the criminal law that its enforcement would simply be revolting. Upon referring to other sections

of the Act it appears that if the clerk is guilty on the stated facts in this case, every officer in the city is equally guilty; and one half of the city officers in the State of Kansas are liable to prosecution and conviction for the violation of the letter of the law. The statement of such a proposition is sufficient.

See 4 Am. & Eng. Encyclop. Law, §§ 4-6, p. 679; 7 Crim. L. Rep. p. 273, article by W. F. Elliott.

Johnston, J., on October 10, 1891, delivered the opinion of the court:

Upon the original hearing no argument or appearance in behalf of the defendant was made, but upon this application for a rehearing the defendant appears by his counsel, and insists that the information filed against him is inadequate in its averments, and fatally defective in not charging a culpable intent. It is stated, in substance, that he was the city clerk of El Dorado, and that he unlawfully and feloniously registered J. N. Hanna as a qualified voter, when Hanna did not appear in person, or was not present in the office of the city clerk, giving his name, occupation, and place of residence, as the Statute directs. It is stated that, at the hearing of the motion to quash, the county attorney informed the court "that there would be no effort made to show any fraudulent intent on the part of the defendant in the simple act of registering J. N. Hanna, who was at that time a resident and otherwise a legal and qualified elector in the City of El Dorado, but who did not appear in person before said clerk on the day on which he was registered." It is also stated that the district court held that unless "the defendant by his act intended to commit some wrong, either in registering a person not entitled to vote, or intending to injure or defraud a person with a right to vote out of his vote, or intending to injure or defraud some candidate before the election, the defendant would not be guilty of violating the law," and, as none of these things were contended for by the prosecution, the motion to quash was sustained.

It is earnestly contended that it was not within the legislative intent to punish as for felony every omission or failure of the officers to carry out the minute and minor details of the Registration Act, and that, although the prohibition of the Act was general in its terms, it fairly embraced only the mischiefs which the enactment was intended to prevent. It is therefore urged that the information should contain statements showing a culpable intent on the part of the defendant to defeat the obvious purpose of the statute, or allegations of some acts or omissions of the defendant of a substantive character necessarily resulting in the wrong or injury which the Legislature intended to suppress. The writer hereof is now inclined to think that the allegations of the information are insufficient; but the majority of the court are of opinion that the language of the charge, stating that the act was unlawfully and feloniously done, characterizes it as a crime, and therefore the information is not so inadequate in statement as to be fatally defect-

ive. The court, however, does not decide, as counsel seems to think, that every departure from the letter of the Statute comes within its prohibition and penalty, and therefore the hardships which counsel imagine will result from the enforcement of the Act do not exist. It is true that the language of section 15 is sweeping in its terms, and, if construed with literary severity, would embrace the slightest departure from any direction or detail which the Statute contains, however innocent and harmless the act or omission of the officer might be. It is evident from the provisions and penalty of the Act that such was not the purpose of the Legislature. The Act is a general one, giving specific and minute directions and details as to the preparation for and the regulation of the registration of voters in cities of the first and second classes. Minute directions are given as to the various steps to be taken, and the manner thereof, some of which are very important, while others are of less importance; and at the end of the chapter it is provided that if any officer shall neglect or refuse to perform any act required by the Statute, and in the manner required by it, he shall be guilty of a felony, and punished by confinement and hard labor in the penitentiary, as well as to forfeit the office which he then holds. The Legislature doubtless intended to impose upon the officers a faithful observance of the provisions of the Act, with a view of carrying out its purposes; but it will hardly be contended that the Legislature intended to visit so severe a punishment upon an officer, free from any wrong intent, for some slight departure from an unimportant detail of the law, which does not and cannot operate to defeat its object. We may properly look at the mischief proposed to be remedied, and to some extent the severity of the penalty imposed in determining the true legislative intent in framing the Act. It has been held that the purpose of the Registration Act is to preserve the purity of the ballot-box by ascertaining in advance, by proper proofs, who are entitled to vote at an election, thus securing, ten days before the election, the full registry of all persons entitled to vote, which registry can be examined and scrutinized by any interested party. *State v. Butts*, 31 Kan. 537.

Any substantive act or omission of an officer which appears to operate to defeat this purpose comes within the prohibition and penalty of the Statute; but a strict compliance with a minor detail that could have no such effect was not intended to be punished as a felony. For instance, the Act provides that on January 1st of each year the mayor and council shall procure and open a poll-book for each ward in the city. Would the inadvertent omission to furnish a poll-book until the following day subject these officers to imprisonment in the state penitentiary? The Statute further provides that the poll-books shall at all times be kept in the office of the city clerk. If the clerk should take one book out for repairs after office hours, and return it in time for the opening of business the next morning, would he be liable to a felon's punishment? Again, the Act requires

that the books shall be open at all times during the year, except for ten days preceding the election; but, it will not be contended that the clerk must keep them open during the night-time, or be held liable to the rigorous penalties of the Act. This is the more apparent, for another section provides for registration during the usual office hours. If the clerk, as a matter of courtesy and accommodation, should remain in his office a short time beyond the usual office hours, and should then register legally qualified voters, would he be held liable to the penalties of the law. He is required to enter the names of the persons registered in alphabetical order; but if he should, by mistake, fail to enter a name in that order, he would hardly be guilty of felony, although the work was not done in the manner provided in the Act. It is also provided that no person shall be registered unless he appear in person at the city clerk's office, and apply to be registered; but if a qualified voter who was an invalid was driven in a carriage to the city clerk's office, but was unable to enter there, and should call the city clerk out in the street, or should chance to meet him in the street, and there apply to be registered, and the city clerk, knowing that he was unquestionably a qualified voter, should register him, would this deviation from the strict letter of the Statute be within the severe penalties provided in section 15? We think not. These and many other like acts and omissions are within the letter of the Statute; but manifestly the Legislature did not contemplate that such acts or omissions should be punished as felonies. A departure from some directory provision, made without fraudulent intent, and which, in its nature and effect, cannot injure anyone, or operate to defeat or interfere with the purpose of the Act, cannot be regarded to have been in the mind of the Legislature in prescribing the penalties of the Act. Although such departure appears to be within the strict letter of the Act, a consideration of the mischief intended to be prevented, the remedy proposed, and the punishment provided, indicate clearly that such was not the intention of the makers of the Statute. It has already been held that, when the intention of the Legislature can be discovered, it should be sensibly followed, although such interpretation may seem contrary to the letter of the Statute. *Intoxicating Liquor Cases*, 25 Kan. 751, 762.

The motion for a rehearing will be denied.
Horton, Ch. J., concurs.

Valentine, J. :

I concur in overruling the motion for a rehearing, but I do not wish to express any opinion upon any matter not involved in the consideration of this question. The fundamental question to be considered is whether the defendant's motion in the court below to quash the information should have been sustained or not; and as to when informations may be quashed, and when not, see the case of *State v. Morrison*, 46 Kan. —.

The only substantial question now presented is whether the information states a

public offense as against the defendant or not. Or, in other words, the question is this: Where a criminal information states and charges everything and all things necessary, under the statutes, to constitute a public offense, and states the same substantially, and almost literally, in the language of the Statute defining the offense, and charges that the acts of the defendant constituting the offense were committed by him "unlawfully and feloniously," does such an information state a public offense or not? Or perhaps, in still other words, the question is this: May a person unlawfully and feloniously violate a criminal statute without being guilty of any offense?

In the case of *Wong v. Astoria*, 18 Or. 538, it was held that to allege that an act was done "willfully and unlawfully" was equivalent to alleging that it was done "knowingly." In the case of *Weinscopff v. State*, 7 Blackf. 186, 195, it is said, among other things, as follows: "'Feloniously' is substituted for it [the word 'unlawfully'] in this indictment, and is not tantamount to it, but is a word of far more extensive criminal meaning. The act complained of could not have been feloniously, and not unlawfully, done." In the case of *Carver v. State*, 17 Ind. 307, it is said "that the word 'feloniously,' in the connection in which it was used in the indictment, was identical in its import with the word 'purposely.'" In the case of *Com. v. Adams*, 127 Mass. 15, 17, it is said: "But the allegation that the defendant maliciously and feloniously incited and procured the principal to commit the felony imports that she acted with an unlawful intent." In the case of *Allen v. Hundred of Kirtton*, 3 Wils. 318, it is said as follows: "Here he [the prosecutor] has alleged in his declaration, and proved at the trial to the satisfaction of the jury, that the same was committed and done feloniously; and that act, which was committed feloniously, was certainly done

willfully, unlawfully, and maliciously; for doing an act feloniously is doing it *malice animo*, viz., with malice. Therefore Sergeant Burland concluded that the declaration was perfectly right; and of that opinion was the whole court, and gave judgment for the plaintiff." In Webster's International Dictionary it is said that the word "felonious" means "having the quality of a felony; malignant; malicious; villainous; perfidious; in a legal sense, done with intent to commit a crime." The Encyclopædic Dictionary says that the word "felonious" means, in law, "of the nature of a felony; done with deliberate purpose to commit a crime." And the word "feloniously" means, in law, "in a felonious manner; with deliberate intention to commit a crime." See also the Imperial Dictionary and the Century Dictionary, substantially to the same effect.

Under the foregoing authorities, and under the allegations of the information, the defendant did all that was necessary to be done, under the statutes, to constitute his acts a criminal offense; and as he did the same "unlawfully and feloniously," he did the same "with intent to commit a crime." (Webster, Int. Dict.); or "with deliberate intention to commit a crime" (Encyclop. Dict.). It would therefore seem that the information ought to be held to be sufficient. Can a person violate a criminal statute "with deliberate intention to commit a crime," and still be innocent and blameless? Where a statute prohibits a thing, and makes the doing of the same a criminal offense, but nevertheless a party does such thing, and does it "unlawfully and feloniously," or, in other words, does it "with the intent to commit a crime, is he still innocent and blameless? Will it be claimed that the Statute in the present case is a bad law, and that the Legislature has no right to pass a bad law, and therefore that the same should be annulled by the courts?

NEW YORK COURT OF APPEALS.

Frederick HABERMAN, *Resp't.*,

v.

John O. BAKER, *Appt.*

(...N. Y....)

1. The mere fact that a map bearing a prior date and showing a road not mentioned in a deed is annexed to a subsequent deed is not sufficient to show that the earlier conveyance was made with reference to the road.
2. A conveyance of land bounded "along" a certain road which was laid out entirely on the grantor's land, but on the margin thereof, carries the fee in the whole roadbed.
3. Lands purchased at a mortgage sale by the mortgagee's administrator c. t. a. in his own name although held by him in trust, take on in his hands the character of the mortgage indebtedness and are as personality of which he can convey a good title that cannot be disputed by the mortgagee's heirs.

(October 6, 1891.)

12 L. R. A.

APPEAL by defendant from a judgment of the General Term of the Superior Court for the City of New York, affirming a judgment of the Special Term in favor of plaintiff in an action brought to compel specific performance of a contract to purchase real estate. *Affirmed.*

The facts sufficiently appear in the opinion. *Mr. Robert Sturgis, with Messrs. Daly, Hoyt & Mason, for appellant:*

The vendor of a lot carved out of a larger plot owned by him can impose no servitude upon the lot so sold in favor of the portion retained by him, in derogation of his grant, without an express reservation in the grant.

Sloat v. McDougal, 30 N. Y. S. R. 912; *Burr v. Mills*, 21 Wend. 290; *Oakley v. Stanley*, 5 Wend. 528.

It is therefore evident that Stillwell had no idea of conveying the fee in this roadbed to Robert L. Bowne, or Charlton or Adams for their exclusive use and enjoyment as against his own use, or that of the purchasers from him.

The courts will not extend the effect of a conveyance, so as to carry title to the centre lines of roads adjoining property so conveyed.

Bissell v. New York Cent. R. Co. 23 N. Y. 61; *Perrin v. New York Cent. R. Co.* 36 N. Y. 120; *People v. Colgate*, 87 N. Y. 512; *White's Bank of Buffalo v. Nichols*, 64 N. Y. 65; *English v. Brennan*, 60 N. Y. 609; *Mott v. Mott*, 68 N. Y. 246; *Kings County F. Ins. Co. v. Stevens*, 87 N. Y. 287; *Story v. New York Elev. R. Co.* 90 N. Y. 161; *Husner v. Brooklyn City R. Co.* 96 N. Y. 16; *People v. Jones*, 112 N. Y. 597.

Where the vendor fails to show he has a marketable title, a purchaser will not be compelled to specifically perform.

Schriber v. Schriber, 86 N. Y. 684.

Messrs. Samuel Untermyer and Moses Weinman, for respondent:

The intention and effect of the deeds from Stillwell to Bowne and Charlton was to convey the fee of the property in the Stillwell Road and the fee in the adjoining half of the Bloomingdale Road.

Re Ladue, 118 N. Y. 218; *Elliott, Roads & Streets*, 1890.

Conceding it to be true, for the sake of argument, that after the conveyance to Bowne, Stillwell laid out a road running along his own property, his deed to Charlton would then convey the fee of the entire roadbed.

Re Robbins, 84 Minn. 99; *Taylor v. Armstrong*, 24 Ark. 102.

Herman Le Roy Edgar, as administrator with the will annexed of William Edgar, deceased, foreclosed the mortgage belonging to the estate. Having purchased the property at the sale, he would be deemed to have purchased it as trustee and he would have a right to convey it without a release from those interested in the estate.

Lockman v. Reilly, 95 N. Y. 64; *Valentine v. Balden*, 20 Hun, 537.

Gray, J., delivered the opinion of the court:

In this action, which was brought to compel the defendant to perform his point of an agreement with plaintiff, and to complete his purchase of the plaintiff's land, various objections to the plaintiff's title were raised, and have been more or less discussed. If any of them are substantial, the defendant should not, of course, be compelled to accept the title tendered by plaintiff. Whether equity will enforce the specific performance of such contracts is a matter resting, it is true, in discretion; but it is a discretion which proceeds, in its exercise, upon settled rules, and not arbitrarily. Where the case is one in which the proceeding is against the purchaser at a judicial sale, to compel him to carry out his bid, the discretion of the court may be influenced differently from a case like the present, where the action is upon the private contract of the parties. But this is just; for, in the former case, the bidder is warranted in assuming, not only that the title to the land is readily marketable but also that the judgment of the court has set at rest all questions which might reasonably be raised concerning the validity of the title offered. In all cases I suppose that the quality of the title must be the same; but where

the deliberate convention of private parties results in a contract for the sale and purchase of lands, the matter of the plaintiff's right to an enforcement of that contract should be considered more favorably; and if, notwithstanding all the legal questions raised by objections, or suggested from the records, the vendor is found to have the legal title to the premises, and has a legal right to convey, as he has agreed, performance by the vendee must be decreed. That precise rules can be laid down, to be observed in the various cases, where the object is to compel the specific performance of agreements for the sale and purchase of lands, I doubt, and their necessity is not apparent. "The discretion of courts in such cases," to cite the observation of Lord Eldon in *White v. Damon*, 7 Ves. Jr. 35, and which Sir John Romilly, master of the rolls, quotes in *Haywood v. Cope*, 25 Beav. 140, "must be regulated upon grounds that will make it judicial." In this case the objections relate to the plaintiff's title to, and right to convey, certain pieces of land, which formerly were included in highways since abandoned. His contract was to sell a distinct parcel or block of land lying between Eighty-Sixth and Eighty-Seventh Streets, the Boulevard, and Tenth Avenue, in the City of New York. At about this point, an old highway, known as the "Bloomingdale Road," skirted, on the west, the lands of which this block is a part, and, in laying out the Boulevard, the old highway was here mainly taken in. From the Bloomingdale Road, at about where Eighty-Seventh Street meets the Boulevard, there led off to the eastward a way, which was known as "Stillwell's Road" or lane. As a consequence of the alternation of lines, caused by opening and regulating the Boulevard, Eighty-Seventh Street, and Tenth Avenue, pieces or gores of land were added to the property of the plaintiff's grantors, to form the present block, to which, from their having previously constituted parts of the abandoned highways, the title is deemed to be in the heirs of Samuel Stillwell. Originally, Samuel Stillwell owned the farm or tract of land of which the block now in question once formed a part, and the lane or road bearing his name was built by him for purposes of convenience of access for himself and to other adjoining parcels of land which he had sold to various parties. It ran wholly upon his own lands and partly upon the northerly margin of the premises in question. For some distance eastwardly from the Bloomingdale Road the land on the other or northerly side of this lane belonged to other owners. The first conveyance made by Stillwell, in the chain of this title, was made in 1803 to John Charlton. The description of the premises conveyed bounded them "along the Bloomingdale Road," and, where they adjoined Stillwell's road, "along said road . . . to the Bloomingdale Road." By such a description a grantor usually is deemed to convey the fee of the soil to the center of the road, where it is the dividing line between properties. In the absence of some express reservation by a grantor of his property in a road, such as would be implied

where an easement over it was alone granted, and the description ran to and along the side of it, as it was in *Jackson v. Hathaway*, 15 Johns. 447, or later, in the case of *Mott v. Mott*, 68 N. Y. 246, a conveyance of lands, generally bounded as along or upon a road, will convey the fee to its center. See *Jackson v. Hathaway*, *supra*.

A recent decision of this court, in its second division, made with respect to another part of Stillwell's property, has settled this question of what passed of this private road, in the case of a grantee of land adjoining, and where the description of the grant was "along the lane of said Stillwell, intended for a road," etc. It was held that, under the deed, the fee of the soil was granted to the center of the road when built. *Re Ladue*, 118 N. Y. 218. To complete the title to all of Stillwell's road, the plaintiff attempts to deduce a title to the further half through the original conveyance of lands made by Stillwell to R. L. Bowne in November, 1796, which comprised a tract extending from the Bloomingdale Road eastwardly, and along the land subsequently laid out and used as a lane. In this deed there was no reference to any road, and the only ground for presuming anything with regard to its dedication or existence at that time was that, in a conveyance of other parts of Stillwell's property, subsequent in time to Bowne's, a map annexed thereto showed this lane laid out. As this map bore a date earlier than that of the deed to Bowne, the plaintiff argues that Bowne's conveyance must have been with reference to the road as shown thereby. I think, however, that such an inference is hardly permissible from the mere fact of the date. Something further was required as proof concerning the map, or of the laying out of the road, in order to ingraft upon the grant to Bowne any such additional right of property. But it is not necessary to depend upon that line of argument in aid of the plaintiff's title to the land formerly comprised within the abandoned highways. From the proofs, I think we must assume that Stillwell conveyed to Bowne with no reference to this lane.

The question, then, is whether, as the road was laid out upon Stillwell's land, a title in fee to the whole roadbed did not pass to Charlton, or his grantees, subject only to any easements in its use as a road. This question, I think, must be answered in the affirmative. That any property in the northerly half of the road should have remained in Stillwell or his heirs would require the support of some presumption, bearing upon his interests, or relating to some necessity in fact, the elements for which, I think, we cannot find. The only interest in the lane, or in its maintenance as such, was possessed by Stillwell's grantees. He had parted with all of his land bordering on the lane. The natural presumption, and one which seems to flow from the established rules, would be that, in bounding his grant to Charlton along this highway, Stillwell had conveyed his fee in the roadbed. Where the highway divides two properties, the owner of each abutting piece is presumed to own to the center of the way. 13 L. R. A.

The presumption is based on the idea that the adjacent owners originally contributed the land for the road, and this presumption assumes that nothing militates against it in the facts of ownership. But, if the grant of the abutting property went only to the side of the road, or the public authorities are vested with the right to the soil of the street, the presumption cannot exist. *Dunham v. Williams*, 37 N. Y. 251.

Where the highway has been, as in the present case, wholly made from and upon the margin of the grantor's land, his subsequent grant of the adjoining land should be deemed to comprehend the fee in the whole roadbed, upon the same principle that exists for giving the fee to the center in the other cases. The grantor should be presumed to have intended by his conveyance the full investiture of the grantee with all appurtenant property rights in the highways. What other intention could be consistently supposed?

In the early case of *Jackson v. Hathaway*, *supra*, it was observed that there was reason for intending that the parties to a conveyance of property bounded along or upon a highway meant to the middle of the highway. Would there not be equally reason for the legal intendment that they meant the whole highway, where it was the property of the grantor in its entirety? Can we suppose an intention in the grantor to reserve to himself, or to his heirs, the fee in half of the highway? I think not. As to the grantor, the control and beneficial use of the road have ceased to be of importance; but to the grantee they must be important, if not essential, for many patent reasons.

The case of *Bissell v. New York Cent. R. Co.*, 23 N. Y. 61, though applied to a case where the question of title related to only half of the street, is authority for the proposition that there is no reason to infer an intention in the grantor to withhold his property in, or title to, the land covered by the highway, after parting with all his right and title to the adjoining land.

Our attention has been directed to several cases in the courts of other States where this question has been discussed and similarly decided, and in some of them the reasoning is upon the authority of *Bissell v. New York Cent. R. Co.* *supra*. See *Re Robbins*, 34 Minn. 99, and *Taylor v. Armstrong*, 24 Ark. 102, and, as well, *Watrous v. Southworth*, 5 Conn. 305; *Chaplin v. Pindleton*, 13 Conn. 23.

I am therefore of the opinion that, under Stillwell's grant to Charlton, the ownership of the soil of Stillwell road, where adjacent to the property granted, passed to the grantee as a parcel of the grant. So long as the road was required as such, and an easement had been acquired by the public, the ownership of its soil may have been subjected to the use. But when, after the year 1846, the public easement had been abandoned, and the highway ceased to exist, the land comprising it reverted to primary conditions of ownership and of use, and became a parcel of the adjoining property, from which it was taken originally. The fee in the land of Stillwell's lane being in the plaintiff, and because of the description of the grant as to

the Bloomingdale Road, questions as to the title to the gore produced by the change in the westerly line of the tract by the laying out of the new Boulevard are disposed of. The ownership of the land in the lane carried the fee to the center of the Bloomingdale Road opposite to the lane, and that, with the description along the Bloomingdale Road, comprehended the gore in question. In 1847, Eighty-Sixth Street, but not Eighty-Seventh Street, having been theretofore legally opened and in use, an agreement as to a division of lands was made between John Adams, then in possession of the property composed of the block in question, and Herman Le Roy Edgar, in whom had become vested the legal title to the lands north of Stillwell's Road. The effect of that agreement was to make the south side of Eighty-Seventh Street, subsequently opened, from the Boulevard to Tenth Avenue, *pro tanto* a division line between their properties. But the appellant interposes certain objections as to the title of Le Roy Edgar, and affecting his right to conclude other interests in the land by such an agreement. After Bowne had acquired the title to the tract of land, of which a portion bordered upon the north side of Stillwell's Road, he mortgaged the same in 1809 to William Edgar, as security for the repayment of a loan. Upon a sale decreed in proceedings instituted after the mortgagee's death to foreclose the mortgage, the premises were purchased by Herman Le Roy Edgar in his individual name. He was, however, at the time, the administrator with the will annexed of William Edgar, the deceased mortgagee, and it is argued that he acquired the title to the premises purchased in the capacity of trustee for those interested in the testator's estate, and that releases were needed to cut off their interests. The point is not tenable, however, for though it is true that he held the property in trust, nevertheless the premises so acquired took on the character of the mortgage indebtedness, and were as personally in the administrator's hands, which he could dispose of and was liable to account for as such. The case of *Lockman v. Reilly*, 95 N. Y. 64, 71, is sufficiently in point as to this. In that case it was held that whether the executors took a deed in their names as such executors, or in their individual names, was immaterial. The testator's heirs could take no direct interest in the land so purchased, and could not dispute the title of a purchaser from the executors; and this would be so, it was said, even though no power of sale might be contained in the will.

Another objection raised by the appellant is that the mortgagee, Edgar, had taken possession and had become seised of the property by title, which descended to his heirs, and was not affected by the mortgage foreclosure. The point is not discussed, and does not seem serious. It need be but briefly adverted to in answer. It seems to me to be sufficient to say that, while it is true that the mortgagee went into possession of the mortgaged premises, the possessory right gained thereby was to satisfy the mortgage debt out of the property mortgaged. Had the debt been paid before any adverse title had been gained, the possessory right would have ceased, and the mortgagor would have been entitled to repossess himself of the property. But upon the foreclosure of the mortgage by the executor of the mortgagee, it not only appeared that Bowne, the mortgagor, had regained possession of the mortgaged premises within 18 years of the time that his mortgage had entered, but all claims to any interest therein were expressly waived, except for the amount due upon the bond and mortgage. Further than this, it is to be observed that it was found as a fact by the trial court that the devisees of William Edgar, Jr., to whom Edgar, Sr., the mortgagee, had bequeathed and devised his residuary estate, in which were comprehended the mortgage interests in question, had conveyed all their right, title, and interest to the grantee, Herman Le Roy Edgar. As that grant conveyed the lands, which included the premises in question, by boundaries as rearranged under the agreement of division between said Edgar and Adams, the plaintiff's predecessor in interest, any possible claims outstanding in William Edgar, Jr.'s, devisees were relinquished, and their conveyance quieted all questions as to any land which, by the rectangulation of the line of the south side of Eighty-Seventh Street, would be left between it, the westerly side of Tenth Avenue, and the north line of what was the old Stillwell lane.

I have discussed those objections which seemed to me to offer any legal question requiring an expression of opinion, and I think neither they, nor any others, are material, or disclose any flaw in the plaintiff's title. The appellant, therefore, should be compelled to perform his contract.

The judgment should be affirmed, with costs.

All concur, except Finch, J., absent.

NEBRASKA SUPREME COURT.

John T. BRESSLER, *Pff. in Err.*,
v.

WAYNE COUNTY.

(.....Neb.....)

*1. The owner of national bank stock,

*Head notes by NORVAL, J.

NOTE.—Taxation of national bank stock.

The authority of the States to tax the shares of national bank stock is derived wholly from the 13 L. R. A.

in listing his shares for taxation, is not entitled to deduct his bona fide indebtedness from the value of such shares of stock.

2. The decision on the former hearing of the case, reported in 25 Neb. 468, is overruled.

(September 16, 1891.)

Act of Congress permitting it. Without the assent of Congress such bank-stock shares cannot be taxed by state authority. *McCulloch v. Ma*

ERROR to the District Court for Wayne County to review a judgment in favor of defendant in a proceeding brought to compel the correction of plaintiff's tax assessment by allowing him a deduction for debts owed by him. *Affirmed.*

A decision was reached in this case and an opinion handed down at the January Term, 1889, which reversed the judgment below and is reported in 25 Neb. 468. A rehearing was subsequently granted, after which the opinion given herewith was handed down.

The facts sufficiently appear in the opinion. *Messrs. Northrup & Welch* for plaintiff in error.

Messrs. William Leese, Atty. Gen., and J. D. King for defendant in error.

Norval, J., delivered the opinion of the court:

This case is on rehearing, the opinion being reported in 25 Neb. 468. The question involved is the right of the owner of shares in a national bank, having no other credits or moneyed capital, to have deducted, in the assessment and taxation of such shares, his bona fide debts. On the former hearing it was held that, under section 5219 of the Revised Statutes of the United States, he was entitled to such deduction. Said section 5219 permits state taxation of the shares of stock in national banks, subject only to two restrictions: *first*, "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State;" and, *second*, "that the shares of any national banking association, owned by nonresidents of any State, shall be taxed in the city or town where the bank is located, and not elsewhere."

1 U. S. 4 Wheat. 316, 4 L. ed. 579; *Osborn v. Bank of United States*, 22 U. S. 9 Wheat. 738, 6 L. ed. 204; *Weston v. Charleston*, 37 U. S. 3 Pet. 449, 7 L. ed. 481; *People v. Weaver*, 100 U. S. 539-543, 25 L. ed. 705, 708.

The provision of the National Bank Law, that state taxation on the shares of the banks shall not be at a greater rate than is assessed on other moneyed capital in the hands of citizens of the State, has reference to the entire process of assessment and includes the valuation of the shares as well as the ratio of percentage charged on such valuation. *People v. Weaver*, 100 U. S. 539, 25 L. ed. 705.

It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt. *Hepburn v. School Directors of Carlisle*, 90 U. S. 23 Wall. 480, 23 L. ed. 112.

The subject was further considered in the case of *Adams v. Nashville*, 95 U. S. 12, 24 L. ed. 399. One of the questions in that case had reference to an exemption from taxation by state authority of bonds issued by a municipal corporation in the hands of individuals. It was held that the exemption did not invalidate the assessment upon the shares of national banks.

Discrimination in favor of other moneyed capital inhibited.

The Act of Congress was not intended to curtail the state power on the subject of taxation. It simply required that capital invested in national banks should not be taxed at a greater rate than like property similarly invested. By the modification of the Act of 1864 by the Act of February 10, 13 L. R. A.

The second limitation is not important in this case, but it is claimed that by not allowing bona fide debts to be deducted, in the assessment of shares in national banks, the State thereby places a higher burden of taxation upon money invested in national banks than is imposed upon other moneyed capital, and therefore contravenes the first restriction imposed by Congress in the section above referred to. The Supreme Court of the United States has in many cases considered and construed the provisions of the Act of Congress which limit the power of the States in the taxation of national bank shares. A reference to some of these decisions will aid in the determination of the question involved in this case.

In *People v. Weaver*, 100 U. S. 539, 25 L. ed. 705, it is held that the Statute of the State of New York, which permits a taxpayer, in listing his property for taxation, to deduct the amount of his debts from the valuation of all his personal property, including moneyed capital, except his bank shares, is in conflict with the Act of Congress, in that shares of national banks are required to be assessed higher in proportion to their real value than other moneyed capital in the hands of citizens of the State is valued for taxation. It is further held that the rule of uniformity in the taxation of such shares applies to the valuation of the shares, as well as to the ratio of percentage laid on such valuation. To the same effect is *Albany County Supra. v. Stanley*, 105 U. S. 305, 26 L. ed. 1044.

In *Pelton v. Commercial Nat. Bank*, 101 U. S. 143, 25 L. ed. 901, it is held that where a state statute provides for the valuation of all moneyed capital for taxation at its true value,

1868, it was intended to provide that the validity of the state tax was hereafter to be determined by the inquiry whether it was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens. *Boyer v. Boyer*, 118 U. S. 691, 28 L. ed. 1069.

Although, for the purpose of taxation, the state statutes provide for the valuation of all moneyed capital, including shares in national banks, at the true cash value, yet if the tax officers systematically and intentionally valued the shares at their full value, while other moneyed capital was assessed at far less than its actual value, such assessment was in violation of the Act of Congress. *Pelton v. Commercial Nat. Bank*, 101 U. S. 143, 25 L. ed. 901. To the same effect is the decision in *Cummings v. Merchant's Nat. Bank*, 101 U. S. 153, 25 L. ed. 903.

In the case of *Hepburn v. School Directors of Carlisle*, 90 U. S. 23 Wall. 480, 23 L. ed. 112, it was decided to be competent for the State to value, for taxation, shares of stock in a national bank at their actual value, even if in excess of their par value, provided thereby they were not taxed at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State.

When national bank shares had been assessed at their full value, while all other property in the State was only assessed at from thirty to forty per cent of its real value, the court held that the assessment was illegal, and that the bank in its corporate capacity was a proper party complainant. *Merchants Nat. Bank of Toledo v. Cumming, Thomp. Nat. Bank Cas.* 926; *Morse, Banks & Banking*, 587.

But a court of equity will not restrain the collection of a tax upon the shares of a national bank

including shares of the national banks, and the taxing officers intentionally assess such shares at their actual valuation, while other moneyed capital was assessed far below its real value, such assessment of national bank stock was in violation of section 5219 of the Revised Statutes.

In *Beansville Nat. Bank v. Britton*, 105 U. S. 322, 26 L. ed. 1053, it is ruled that under the Statute of Indiana, which allows deductions of bona fide debts to be made from all credits, in listing the same for taxation, the assessing of national bank shares, without permitting the shareholders to deduct from the value the amount of his bona fide debts, is a discrimination forbidden by Congress.

In the more recent case of *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. ed. 895, the court, in an able and exhaustive opinion, construed the meaning of the words "other moneyed capital," as used in the Act of Congress. We quote from the opinion: "The key to the proper interpretation of the Act of Congress is its policy and purpose. The object of the law was to establish a system of national banking institutions in order to provide a uniform and secure currency for the people, and to facilitate the operations of the treasury of the United States. . . . The main purpose, therefore, of Congress, in fixing limits to state taxation, on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business, and operations and investments of a like charac-

ter. The language of the Act of Congress is to be read in the light of this policy. Applying his rule of construction, we are led, in the first place, to consider the meaning of the words 'other moneyed capital,' as used in the Statute. Of course it includes shares in national banks; the use of the word 'other' requires that. If bank shares were not moneyed capital, the word 'other' in this connection would be without significance. But 'moneyed capital' does not mean all capital the value of which is measured in terms by money. In this sense, all kinds of real and personal property would be embraced by it, for they all have an estimated value as the subjects of sale. Neither does it necessarily include all forms of investment in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations are represented by certificates showing that the owner is entitled to an interest, expressed in money value, in the entire capital and property of a corporation; but the property of a corporation which constitutes its invested capital may consist mainly of real and personal property, which, in the hands of individuals, no one would think of calling moneyed capital; and its business may not consist in any kind of dealing in money, or commercial representatives of money. So far as the policy of the government in reference to national banks is concerned, it is indifferent how the State may choose to tax such corporations as those just mentioned, or the interest of individuals in them, or whether they should be taxed at all. . . . The business of banking, as defined by law and custom, consists in the

because a state statute does not set forth in express terms that there shall be no greater assessment upon national banks located within the State than upon the state banks. *First Nat. Bank v. Douglas County*, 3 Dill. 830.

Capital stock not taxable.

The capital of a national bank is not taxable by the State. *National Commercial Bank v. Mobile*, 62 Ala. 285; *New York v. Comrs. of Taxes*, 71 U. S. 4 Wall. 244, 18 L. ed. 844; *Bradley v. Illinois*, 71 U. S. 4 Wall. 459, 18 L. ed. 433; *Salt Lake City Nat. Bank v. Golding*, 2 Utah, 1; *Sumter County v. National Bank of Gainesville*, 62 Ala. 464; *First Nat. Bank v. Douglas County*, 3 Dill. 830.

Capital stock as such cannot be assessed. The only way stock can be reached is by assessment of the different shares of stockholders (*Collins v. Chicago*, 4 Biss. 472), and an assessment on the shares in gross against the bank is not authorized and is illegal. *National Commercial Bank v. Mobile*, 62 Ala. 284.

A bank is not liable to taxation on its capital under a statute which requires owners of property to return it for taxation (*Waco Nat. Bank v. Rogers*, 51 Tex. 606; *State v. Newark*, 40 N. J. L. 558; *Waite v. Dowley*, 94 U. S. 327, 27 L. ed. 181; *Sumter County v. National Bank of Gainesville*, 62 Ala. 468; *Van Allen v. Nolan*, 70 U. S. 3 Wall. 584, 18 L. ed. 234; although it is the owner of all the property of the corporation, real and personal (*Van Allen v. Nolan* and *Sumter County v. National Bank of Gainesville*, *supra*); and it is not liable for either state or municipal taxes on the shares of stock not owned by it, but owned by individual stockholders. 13 J. R. A.

Waco Nat. Bank v. Rogers, 51 Tex. 606; 1 Dext. Taxn. 377.

In Minnesota a state statute requiring all the shares of a national bank to be assessed and taxed at their actual tax value, without any deduction on account of the real property held by the bank, and in which a portion of its capital is invested, does not authorize the taxation of real property, *ex nomine* lawfully owned and used as a place for the transaction of its business, for tax acts are presumed not to impose a double burden. *Rice County Comrs. v. Citizens Nat. Bank of Faribault*, 23 Minn. 280.

In New Jersey, to the extent that the capital is invested in the securities of the federal government, it is beyond the power of the States to tax it as against the corporation, for the reason that taxed in that instance would be indirectly a tax upon the credit and securities of the government. *State v. Newark*, 39 N. J. L. 380; *First Nat. Bank of Louisville v. Kentucky*, 76 U. S. 3 Wall. 553, 19 L. ed. 701; *Van Allen v. Nolan*, 70 U. S. 3 Wall. 573, 18 L. ed. 229.

The policy of the New York Legislature in regard to the taxation of bank capital and bank shares has been uniform. The stock has been taxed at its nominal value, without deduction for debts or charge for surplus, and, more recently, at its actual value. *People v. Dolan*, 36 N. Y. 59.

In Wisconsin the value of stock in a national bank, owned by a taxpayer, must be considered a part of the "debts due or to become due" him from which he is entitled to deduct the amount of his bona fide and unconditional indebtedness, in listing his property for taxation. *Ruggles v. Foad du Lac*, 53 Wis. 436.

issue of notes payable on demand, intended to circulate as money, where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans; and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it, in the eye of this Statute, 'moneyed capital.' Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the Act of Congress. The terms of the Act of Congress, therefore, include shares of stock or other interest owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loans, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily, with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as 'personal property.'"

It follows from these decisions that any method of assessment of taxes which prohibits the owner of national bank shares, who owns no other credits or moneyed capital, from deducting his bona fide indebtedness from the value of such shares, and permits the deduction of such debts in the assessment of like property similarly situated, conflicts with the Act of Congress. Was the rule of uniformity prescribed by the federal statute violated in the assessment of the plaintiff in error? In determining this question, it will be necessary to examine some of the provisions of the Revenue Law of this State. Sections 27, 30, and 33 of the Revenue Law are as follows: "Sec. 27. In making up the amount of credits which any person is required to list for himself, or for any other person, company, or corporation, he shall be entitled to deduct from the gross amount of credits the amount of all bona fide debts owing by such person, company, or corporation, to any other person, company, or corporation, for a consideration received; but no acknowledgment of indebtedness not founded on actual consideration, believed when received to have been adequate, and on such acknowledgment made for the purpose of being so deducted, shall be considered a debt, within the meaning of this section; and so much only of any liability, as surety for others, shall be deducted

as the person making out the statement believes he is legally and equitably bound and will be compelled to pay on account of the inability or insolvency of the principal debtor; and, if there are other sureties who are able to contribute, then only so much as the surety in whose behalf the statement is made will be bound to contribute: provided, that nothing in this section shall be so construed as to apply to any bank, company, or corporation exercising banking powers or privileges, or to authorize any deductions allowed by this section from the value of any other item of taxation than credits." "Sec. 30. Every bank (not incorporated), banker, broker, or stock jobber shall, at the time fixed by this chapter for listing personal property, make out and furnish the assessor a sworn statement, showing—*first*, the amount of property on hand or in transit; *second*, the amount of funds in the hands of other banks, bankers, brokers, or others, subject to draft; *third*, the amount of checks or other cash items, the amount thereof not being included in either of the preceding items; *fourth*, the amount of bills receivable, discounted, or purchased, and other credits due, or to become due, including accounts receivable, and interest accrued, but not due, and interest due and unpaid; *fifth*, the amount of bonds and stocks of every kind, state and county warrants, and other municipal securities, and shares of capital stock of joint-stock or other companies or corporations, held as an investment, or any way representing assets; *sixth*, all other property appertaining to said business, other than real estate (which real estate shall be listed and assessed as other real estate is listed and assessed under this Act), *seventh*, the amount of deposits made with them by other parties; *eighth*, the amount of all accounts payable, other than current deposit accounts; *ninth*, the amount of bonds and other securities exempt by law from taxation, specifying the amount and kind of each, the same being included in the preceding fifth item. The aggregate amount of the first, second, and third items in said statement shall be listed as moneys. The amount of the sixth item shall be listed the same as other similar personal property is listed under this chapter. The aggregate amount of the seventh and eighth items shall be deducted from the aggregate amount of the fourth item of said statement, and the amount of the remainder, if any, shall be listed as credits. The aggregate amount of the ninth item shall be deducted from the aggregate amount of the fifth item of such statement, and the remainder shall be listed as bonds or stocks." "Sec. 33. The stockholders in every bank located within this State, whether such bank has been organized under the laws of this State or of the United States, shall be assessed and taxed on the value of their shares of stock therein in the county, town, precinct, village, or city where such bank or banking association is located, and not elsewhere, whether such stockholders reside in such place or not. Such shares shall be listed and assessed, with regard to the ownership and value thereof, as they existed on the first day of April,

annually; subject, however, to the restriction that taxation of such shares shall not be at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens of this State, in the county, town, precinct, village, or city where such bank is located. The shares of capital stock of national banks not located in this State, held in this State, shall not be required to be listed under the provisions of this Act."

It will be observed that section 27 authorizes the individual tax-payer to deduct the bona fide debts owing by him from the gross amount of his credits, and prohibits any deduction from the value of any other item or property of taxation than credits. The word "credits," as used in the section was not intended to include notes, securities, accounts due, or other credits which are the assets of any bank, banker, broker, or stock jobber but was intended to cover debts due the tax-payer growing out of the other ordinary business transactions. We must therefore look elsewhere for the rule which governs the assessment of moneyed capital invested in the banking business. Section 33 declares that shares of stock in every bank within the State, whether incorporated under the laws of this State or the United States, shall be assessed according to their value, subject to the restriction "that the taxation of such shares shall not be at a greater rate than is assessed upon other moneyed capital in the hands of the individual citizens of this State." This limitation is the same as imposed by Congress upon the States as a condition to the taxation of national banks. So it cannot be said that the Legislature, in providing for the taxation of national banks, has unfavorably discriminated against them. The word "rate," as used in this section, applies as well to the valuation of the shares of the stockholder as to the ratio of tax to be levied thereon. There must be uniformity, both in the assessment and the levying of the tax. National bank shares cannot be assessed at their full value, and "other moneyed capital" below its actual value. Looking to section 30, we find that in assessing the property of unincorporated bank, and that of bankers, brokers, and stock jobbers, they are allowed to deduct the amount of their indebtedness to depositors and the amount of all accounts payable, other than current deposit accounts, from the amount of their bills receivable, and other credits due, or to become due; but this deduction cannot be made from any other item of their property. The fact that the unincorporated bank is entitled to such deduction is no valid reason why the debts of the owner of national bank stock should be deducted from the value of his shares in assessing them. National banks are assessed solely by taxing the shares of stock. In unincorporated banks there are no shares to tax, and the Legislature, of necessity, was compelled to adopt a different method of taxing them, by assessing the value of the capital therein invested, which is practically the difference between the value of the assets and the amount of liabilities. The shares of a national bank do not represent the assets of the bank, but rather

the difference between the value of its property and its liabilities. While the method of assessing national banks is different from that by which a private bank or banker is assessed, the rule of uniformity is preserved so that it cannot be said that the law of the State requires that national banks shall be taxed at a greater rate than is imposed upon the capital invested in the state banks.

It must, we think, be conceded that the larger part of the moneyed capital of the individual citizens of this State, within the meaning of the words "other moneyed capital" as defined by the Supreme Court of the United States, is in the hands of brokers, stock jobbers, and incorporated and unincorporated state banks. And as the State has not, in the taxation of the capital thus invested, unjustly discriminated against the national banks, the fact that in the assessment of a small portion of the moneyed capital in the State, which is not invested so as to come in competition with the national banks, the tax-payer is permitted to deduct his bona fide indebtedness from credits, is not such a discrimination as violates the rule of equity required by the legislation of Congress. The principle was substantially recognized in the case of *Mercantile Nat. Bank v. New York*, *supra*. In that case, the plaintiff, a national bank located in the city of New York, brought suit against the defendants to enjoin the collection of taxes levied upon the shares of the stockholders of the bank, claiming that the laws of the State exempt from the taxation so much of the moneyed capital of the individual tax-payer as creates a discrimination against capital invested in such shares. The laws of the State of New York exempt from assessment shares of stock in trust companies, life insurance companies, deposits in savings banks, and bonds of the municipalities of the State. The court held the exemptions already mentioned did not effect an unfriendly or unlawful discrimination against national banks, or the capital therein invested, nor does it result in taxing the shares of such banks at a higher rate than is levied upon other moneyed capital in the hands of individual citizens of the State. So in the case of *Adams v. Nashville*, 95 U. S. 19, 24 L. ed. 369, it is held that taxes assessed on national bank shares are not invalidated by reason of the exemption from taxation by state authority of bonds issued by the City of Nashville in the hands of individuals.

The rule deducible from the decisions of the United States Supreme Court is that, where the rate fixed by the State for the taxation of capital in the hands of individual citizens, situated similarly to that invested in national banks, is not less than that placed upon national bank shares, the rule of uniformity prescribed by the Act of Congress is maintained, even though some moneyed capital in the State, which is invested by individuals in business or enterprises, which do not come in competition with national banks, is exempt from taxation, or is assessed at a less rate than is imposed upon shares of stock in national banks. It is obvious that the laws of this State providing for the taxation of

national banks are in perfect harmony with this rule, and that the plaintiff in error has no legal ground to complain because he was not permitted to deduct the amount of his debts from the value of his national bank stock. If our Statute permitted debts to be deducted from the value of all kinds of property, or from all credits, in listing the same for assessment, as the laws of some of the States allow, then the indebtedness of the owner of national bank shares would have to be deducted from the value of his shares. But the proviso clause of section 27 of the

Revenue Law of this State provides that the rule which allows the deduction of debts from credits shall not "apply to any bank, company, or corporation exercising banking powers or privileges." We therefore reach the conclusion that in this State, in the assessment of shares of national bank stock, the owners thereof are not entitled to deduct their bona fide indebtedness from the value of such shares of stock.

The judgment of the District Court is affirmed.
The other Judges concur.

INDIANA SUPREME COURT.

Dustin M. SPAULDING, Impleaded, etc.,
Appt.,
v.
George W. HARVEY et al.
(.....Ind.....)

1. One who, in protection of a mortgage which he in good faith has taken from one who had no legal power to make it, because under guardianship as of unsound mind, satisfies a prior judgment lien on the mortgaged property, is entitled to be subrogated to the rights of the judgment creditor for the collection of the amount paid; especially where he was induced to take the mortgage by fraudulent statements that the guardianship had been terminated.
2. The complaint in an action to obtain subrogation to the lien of a judgment need not allege the insolvency of the judgment debtor, nor that he has no other property out of which the claim may be collected.

(September 19, 1891.)

APPEAL by defendant Spaulding from a judgment of the Circuit Court for Grant

County subrogating the complainants to the lien of a judgment which they had satisfied for the protection of an invalid mortgage held by themselves. *Affirmed.*

The facts are stated in the opinion.

Mr. John A. Kersey, for appellant:

No one can so contract with a person under guardianship, as a person of unsound mind, as to become entitled to subrogation by paying any claim against the one under such guardianship.

If appellees have any claim whatever on account of having paid the Ferguson judgment, it is a claim against the judgment debtors for money paid to their use, and at their instance and request; and it is not sufficient to work an equitable assignment of the Ferguson judgment to them as against the appellant, who held a judgment against and was the guardian of Ferguson's judgment debtors.

A mere stranger or volunteer who pays a debt cannot be subrogated to the creditor's rights.

Brandt, Suretyship, § 260.

It is only in cases where the person paying

NOTE.—Subrogation defined.

Subrogation is the equity by which a person who is secondarily liable for a debt, and has paid the same, is put in the place of the creditor, so as to entitle him to make use of all the securities and remedies possessed by the creditor, in order to enforce the right of exoneration as against the principal debtor, or of contribution against others who are liable in the same rank with himself. Bispham, Eq. § 335.

When a man pays a debt which could not properly be called his own, but which it was his interest to pay, the law subrogates him to all the rights of the creditor. 2 Bouvier, Law Dict. 417.

This definition includes the case now under consideration. The complainant paid the debt, not his own, but which it was his interest to pay. Gaskill v. Wales, 36 N. J. Eq. 527.

Doctrine of subrogation.

The doctrine of subrogation is of wide extent and operation in various departments of equity jurisprudence. The courts of all the American States, with very few exceptions, have extended the remedy in cases arising between principal and surety, as well as mortgagor and mortgagee. Scribner v. Adams, 73 Me. 541; Kelly v. Herrick, 131 Mass. 373; Pierson v. Catlin, 18 Vt. 77; Hayes v. Ward, 4 Johns. Ch. 123, 1 L. ed. 738; Talbot v. Wilkins, 31 Ark. 471; Dent v. Watt, 9 W. Va. 41; Saffold 13 L. R. A.

v. Wade, 51 Ala. 214; Townsend v. Whitney, 75 N. Y. 425; Steele's App. 72 Pa. 101; Farmers & D. Bank v. Sherley, 12 Bush. 304; McArthur v. Martin, 23 Minn. 74; Hollingsworth v. Pierson, 53 Iowa, 53; Smith v. Rumsey, 33 Mich. 133; McDougald v. Dougherty, 14 Ga. 674; Van Santen v. Standard Oil Co. 81 N. Y. 171; Price v. Trusdell, 28 N. J. Eq. 200; Parham v. Green, 64 N. C. 436; Brown v. Ray, 18 N. H. 102; Lidderdale v. Robinson, 25 U. S. 12 Wheat. 564, 6 L. ed. 740; Prout v. Lomer, 79 Ill. 331. See Pom. Eq. Jur. § 1419, note.

The doctrine of subrogation is a device to promote justice. We shall never handle it unwisely if that purpose controls the effort, and the resultant equity is steadily kept in view. Acer v. Hotchkiss, 97 N. Y. 385.

One who is only a volunteer cannot invoke the aid of subrogation, for such a person can establish no equity. Gans v. Thieme, 38 N. Y. 232. See notes to Boone v. Clark (Ill.) 5 L. R. A. 276, and Wilton v. Mayberry (Wis.) 6 L. R. A. 61.

Right of subrogation; its nature and scope.

The right of subrogation is afforded in cases where a person is required to pay a debt or prior incumbrance to protect his right or to save his property; and whenever to accomplish such protection it is necessary that he have the support of the security so paid, he will be entitled to it if it can be taken without prejudice to the superior rights of others. Cole v. Malcolm, 63 N. Y. 363; Baynes v.

the debt stands in the situation of a surety, or is compelled to pay in order to protect his own interests, that equity substitutes him in the place of the creditor.

Richmond v. Marston, 15 Ind. 184.

The fraudulent representations being denied, there should have been some proof of them, if they were sufficient for any purpose when proved.

Bevan v. Tomlinson, 25 Ind. 258; *Attna L. Ins. Co. v. Buck*, 6 West. Rep. 419, 108 Ind. 174; *Binford v. Adams*, 1 West. Rep. 911, 104 Ind. 41.

For aught that is averred, the Lockwoods may be amply able to pay appellees any sum due them for any cause or on any account. If that is so they ought not to be allowed subrogation, and thus compel appellant to pay them in order to protect his claim, accruing to him by virtue of his judgment and sheriff's certificate.

Edinburg Am. Land Mortg. Co. v. Latham, 88 Ind. 88.

Messrs. Harvey & Paulus, Marsh & Brownlee and J. L. Custer for appellees.

McBride, J., delivered the opinion of the court:

November 28, 1886, Amaretta Lockwood, one of the appellees herein, was the owner of an undivided interest in certain land in Grant County. On that day one Josiah Ferguson recovered a judgment in the Grant Circuit Court against her for \$30 and costs, which became a lien on her interest in the land. December 28, 1886, she with her husband and co-appellee, James H. Lockwood, were by the Wells Circuit Court adjudged of unsound mind, and incapable of managing their respective estates, and the appellant was duly appointed their guardian. The guardianship was terminated by a judgment of the Wells Circuit Court on the — day of April, 1887, declaring them restored to their right minds, and again capa-

ble of managing their estates. On the 26th day of January, 1887, the Lockwoods applied to the appellees, Harvey & Paulus, to act as their attorneys in the institution and conduct of certain litigation, and represented to them that they had been already adjudged of sound mind, and their guardianships terminated. Harvey & Paulus, not knowing that this was untrue, accepted and entered upon the duties of the employment, and to secure the compensation agreed upon took from the Lockwoods a mortgage on the land in Grant County. On the day the mortgage was executed the land was advertised for sale by the sheriff of Grant County on an execution issued on the Ferguson judgment. Harvey & Paulus, to save the land from sale, and thereby protect their mortgage, paid to the sheriff \$48.43, the amount of the judgment, with costs. This suit was originally commenced to foreclose the mortgage; but the Lockwoods and the appellant, who was joined as a defendant, attacked the validity of the mortgage on the ground of the incapacity of the mortgagors when it was executed. The appellant, also by a separate answer, which was supported on the trial by proof, showed that when he was discharged as guardian the Wells Circuit Court allowed him for services, money expended, etc., \$373.78, which the court adjudged to be a specific lien on the mortgaged land, and that a transcript of the judgment had been duly filed and recorded in the clerk's office of Grant County. Harvey & Paulus thereupon, with leave of the court, and without objection from the defendants, filed a second paragraph of complaint, alleging the facts substantially as above stated, and asking to be subrogated to the lien of the Ferguson judgment. This paragraph also contained averments charging that the representations made by the Lockwoods to Harvey & Paulus that they had been adjudged of sound mind and relieved from guardianship were not only false, but were fraudulently made to induce them to

Mott, 64 N. Y. 397; *Averill v. Taylor*, 3 N. Y. 44; *Snelling v. McIntyre*, 6 Abb. N. C. 469; *Frost v. Yonkers Sav. Bank*, 70 N. Y. 558; *Twombly v. Cassidy*, 82 N. Y. 155; *Clark v. Mackin*, 96 N. Y. 346; *Platt v. Brick*, 85 Hun, 121.

The sureties on an undertaking on appeal, as between the original parties are entitled to be subrogated to all the rights of the judgment creditor, both as against the judgment debtor and the real estate on which the judgment is a lien. *Mathews v. Aiken*, 1 N. Y. 556; *Craythorne v. Swinburne*, 14 Ves. Jr. 159; *Lewis v. Palmer*, 28 N. Y. 371; *Wells v. Kelsey*, 25 How. Pr. 384; *Munn v. Barnum*, 3 Abb. Pr. 406; *Hinckley v. Kretz*, 58 N. Y. 593; 1 Story, Eq. Jur. § 499, note 5.

A surety who pays the debt of his principal is entitled to subrogation in equity, and to an assignment of the securities held by the creditor. When, therefore, a second mortgagee pays to the first mortgagee his debt, although the first mortgage is thereby satisfied, the second mortgagee is entitled to hold the premises as security for the amount paid on the first mortgage. *Ellsworth v. Lockwood*, 42 N. Y. 89.

A party advancing funds to raise the incumbrance upon real estate belonging to a person incapable of making a valid contract may invoke the equitable doctrine of subrogation. *Coleman v. Frazer*, 3 Bush, 300.

If the right to redeem from the mortgage, and 13 L. R. A.

by such redemption to stand in the place of the mortgagee, and hold his interest in the land, is treated as identical with the right to make payment, then this right belongs to every surety for the mortgage debt, even if he has no interest in or lien upon the estate; for, upon the equitable principle of subrogation, a surety who has satisfied a demand is entitled to hold the securities of the creditor and to enforce them as against the person and the fund primarily liable. *Averill v. Taylor*, 3 N. Y. 44.

And it is sufficient to entitle a junior incumbrancer to be subrogated to the rights of a senior mortgagee if he tender to such senior mortgagee the amount secured by his mortgage, with interest and costs before the foreclosure sale. *Marshall v. Ruddick*, 28 Iowa, 487; *Dings v. Marshall*, 7 Hun, 522.

A junior mortgagee or judgment creditor has a right to protect his interest by paying a prior mortgage due and payable, and if he does pay it he succeeds by subrogation to the rights and interests of such prior mortgagee in the lands, as security for the amount so paid, without any assignment or act of transfer by or on the part of the prior mortgagee. 2 Story, Eq. § 1024; *Brainard v. Cooper*, 10 N. Y. 356; *Silver Lake Bank v. North*, 4 Johns. Ch. 370, 1 L. ed. 371; *Dale v. McEvers*, 2 Cow. 118; *McLean v. Towle*, 3 Sandf. Ch. 119, 7 L. ed. 792; *Barnet v. Denniston*, 5 Johns. Ch. 35, 1 L. ed. 999.

act as such attorneys, and accept said mortgage. The circuit court found these averments to be true, and adjudged the mortgage void, but sustained the claim of Harvey & Paulus to be subrogated to the lien of the Ferguson judgment, with priority over the judgment of the appellant. This conclusion of the court is vigorously attacked by the appellant; who insists that, the mortgage being void; and the mortgagors incapable of contracting, the payment by the appellees of the Ferguson judgment was voluntary, and by persons standing in the relation of strangers to the debtors, and will not entitle them to subrogation. In this the appellant is wrong; and the judgment of the circuit court is right. True, the mortgage was void, because the mortgagors were, by the express terms of the Statute, legally incapacitated from contracting. One may, however, be so weak intellectually as to be incapable of managing his estate, and thus be legally subjected to guardianship, and still be capable of perpetrating a fraud. The court has found in this case that these parties, by means of the representations made, not only secured the services of the appellees as attorneys, but also induced them to save their land from sale by the sheriff by paying the Ferguson judgment. It is certain that they obtained a substantial benefit. To sustain their present claim would be to relieve them wholly from liability for the Ferguson judgment, without having rendered any equivalent whatever therefor. The Statute which provides for the guardianship of those *non compos*, and for the conservation of their estates, is intended to protect them from the consequences of their mental weakness, and to guard against the danger of wrong being done to them by the dishonest and the unscrupulous. It was never intended to serve as an entrenchment to shelter them from the consequences of such wrongs as their limited capacity gave them the power to knowingly perpetrate upon others. Indeed, if no question of

fraud or of attempted fraud entered into the transaction, it is a clear case calling for the application of the doctrine of subrogation, which does not depend upon or grow out of the ability of the parties to make valid contracts, as it is not founded upon contract, either express or implied, but upon principles of equity and justice, intended to afford protection to a meritorious creditor, and prevent the sweeping away of the fund from which in good conscience he ought to be paid. *Sheld. Subr. § 4; 3 Pom. Eq. Jur. § 1419; Roeker v. Benson, 88 Ind. 250.*

Assume that the mortgagors, as well as the mortgagees, acted in good faith; when the mortgagees, to protect what they erroneously supposed was a valid mortgage, paid the judgment, they were neither strangers nor volunteers. The fact that the mortgage proved to be void because the makers had not the legal power to make it affords only stronger reasons why the equitable doctrine of subrogation should be invoked.

The second paragraph of the complaint, asking for subrogation, did not contain any averments of the insolvency of the debtors, or that they had no other property out of which the claim could be collected. Appellant demurred to this paragraph on the ground that it did not state facts sufficient to constitute a cause of action, and, the demurrer being overruled, an exception was saved to the ruling. This ruling is assigned as error, appellant insisting that the omission of such averments or their equivalent makes the complaint bad. The question in this case is as to the preservation of a security in favor of a creditor. The right of a creditor to be subrogated to the securities of one whose claim he has paid does not depend upon the solvency or the insolvency of the debtor, but upon the circumstances attending the payment of the debt to which the security was an incident.

Judgment affirmed with costs.

MICHIGAN SUPREME COURT.

Stephen COLLAR

v.

Hamblin D. COLLAR, *Appt.*

(....Mich.....)

1. Evidence that a conveyance of his interest by a tenant in common to a

NOTE—Parol evidence is inadmissible to vary the terms of a written instrument.

Few axioms of law have a more extended application or are so universal in their application as that which denies to parol evidence the right to explain, vary, or contradict the terms of a written instrument. *Chapin v. Dobson, 78 N. Y. 74; Croome v. Lediard, 2 Myl. & K. 251.*

Every jurisdiction in this country, without exception, has given indorsements to the rule stated in the text, and while great misconception and contrariety of view exists as to the nature and scope of the numerous exceptions which have engrafted themselves upon the original formula, still it may be affirmed without fear of contradiction that wherever the evidentiary facts disclose a pertinent

trustee to facilitate a sale of the property and distribution of the proceeds was in fraud of his creditors is immaterial in an action by him to recover his share of the proceeds of the sale, to which they are not parties.

2. When a writing is shown to have been executed for the purpose of conveying an estate held in common to a trustee for sale and

case, the courts apply in all its rigor the provisions of the law as stated. *Morrill v. Robinson, 71 Me. 24; Brandon Mfg. Co. v. Morse, 48 Vt. 322; Fay v. Gray, 124 Mass. 500; Carlton v. Vineland Wine Co. 33 N. J. Eq. 466; Weiler v. Hottenstein, 102 Pa. 499; Baltimore Perm. Bldg. & L. Soc. v. Smith, 54 Md. 187; Huntin v. Emmart, 55 Md. 285; Trentman v. Fletcher, 100 Ind. 106; Porter v. Sandidge, 32 La. Ann. 449; Tennessee & C. R. Co. v. East Alabama R. Co. 73 Ala. 428; Winona v. Thompson, 24 Minn. 199; Dickson v. Harris, 60 Iowa, 727; Schults v. Coon, 51 Wis. 418; McLean v. Piedmont & A. L. Ins. Co. 29 Gratt. 361; Service v. Stockstill, 30 Ohio St. 418; Belcher v. Mulhall, 57 Tex. 17; Koehring v. Muemminghoff, 61 Mo. 408; Smith v. Odum, 63 Ga. 499; Gillespie v. Sawyer, 15 Neb. 536; Pickett v. Ferguson, 45 Ark. 177; Mayer*

distribution of the proceeds, it is the best evidence of the terms of the trust and unless it has been lost, parol evidence respecting the terms should be excluded.

3. Although a parol agreement to acquire the interests of all the tenants in common of real estate, convert the same into money and pay over to each his pro rata share of the proceeds, is not enforceable under the Statute of Frauds, yet if the agreement is carried out so far that the title is acquired and the property converted into money, a trust will arise to pay over the proceeds. The trust, however, is not enforceable at law unless the trustee has affirmatively recognized his duty to make the payment.

4. Upon the death, before converting the land into money, of one who has received a conveyance of the shares of tenants in common of real estate under a parol agreement to sell the same and divide the proceeds among his grantors, the land descends to his heirs unincumbered by any trust, and a purchaser from them will owe no duty to the orig-

inal grantors arising out of the parol agreement made with them.

(July 28, 1891.)

ERROR to the Circuit Court for Ingham County to review a judgment in favor of complainant in an action brought to recover money alleged to have been received by defendant for land in which complainant had an interest and which it was defendant's duty to pay over to complainant. *Reversed.*

For a full statement of the facts of this case, see the former report in 4 L. R. A. 491, from which it appears that George Collar died in 1868 intestate seised of fifty-five acres of land and leaving the following children heirs surviving, being all his heirs-at-law, viz.: Silas, Sylvester, John, Martin, Henry, Cameron, Mary (wife of Jacob Thorne), Stephen and Hamblin D.

In December, 1874, plaintiff and others of the heirs conveyed their interests in this fifty-

v. Adrian, 77 N. C. 88; Falcouer v. Garrison, 1 McCord, L. 209; Seckler v. Fox, 51 Mich. 92; Little Kanawha Nav. Co. v. Rice, 9 W. Va. 636; Chamness v. Crutchfield, 37 N. C. 148; Young v. Frost, 5 Gill, 287; Smith v. Gibbs, 44 N. H. 335; Drake v. Starks, 45 Conn. 96; La Farge v. Rickert, 5 Wend. 187; Perrine v. Cheeseman, 11 N. J. L. 207; Heilner v. Imbrie, 6 Serg. & R. 401; Abrams v. Pomeroy, 13 Ill. 133; Pennsylvania & N. Y. Canal & R. Co. v. Betts, 1 W. N. C. 368; Spencer v. Tilden, 5 Cow. 144; Myrick v. Dame, 9 Cush. 245; Rice, Ev. p. 255.

The meaning of the rule is, not that courts require the strongest possible assurance of the matters in question, but that no evidence shall be admitted, which, from the nature of the case, supposes still greater evidence behind in the party's possession or power; because the absence of the primary evidence raises a presumption that, if produced, it would give a completion to the case at least unfavorable, if not directly adverse, to the interest of the party. *Clifton v. United States*, 45 U. S. 4 How. 242, 11 L. ed. 967.

On prior and on subsequent occasions the same court has announced a similar principle, and we may safely affirm that it is a cardinal feature of evidentiary law as administered in this country. No evidence shall be received, which presupposes better evidence in the party's possession, and this rule may be regarded as established beyond question. *Taylor v. Riggs*, 28 U. S. 1 Pet. 591, 7 L. ed. 275; *Cooke v. Woodrow*, 9 U. S. 5 Cranch, 13, 8 L. ed. 22; *Fresh v. Gilson*, 41 U. S. 16 Pet. 327, 10 L. ed. 962; *De Lane v. Moore*, 65 U. S. 14 How. 253, 14 L. ed. 408; *McPhaul v. Lapsley*, 87 U. S. 20 Wall. 264, 28 L. ed. 344.

The rule that the best evidence must be produced which the nature of the case admits, means, not that the courts require the strongest possible assurance, but that no evidence shall be admitted which presupposes greater evidence in the party's favor. *United States v. Reyburn*, 31 U. S. 6 Pet. 352, 8 L. ed. 424.

The reason of the rule that secondary or inferior evidence shall be substituted for any evidence of a higher nature which the case admits of is the attempt to substitute the inferior for the higher implies that the higher would give a different aspect to the case of the party introducing the lesser. *United States v. Wood*, 39 U. S. 14 Pet. 430, 10 L. ed. 527; *Taylor v. Riggs*, 28 U. S. 1 Pet. 591, 7 L. ed. 275; *Clifton v. United States*, 45 U. S. 4 How. 242, 11 L. ed. 967; *De Lane v. Moore*, 65 U. S. 14 How. 253, 14 L. ed. 408.

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Analogous reasoning will require the rejection of parol evidence where the best evidence attainable is, for instance, a letter, statement or document, and its non-production is not accounted for, and no foundation is laid for the introduction of secondary evidence. *Mugge v. Adams*, 78 Tex. 418.

Where the best or primary evidence has been lost or destroyed, much latitude is allowed in the admission of parol evidence to supply the omission, and although much latitude may have been carried to its extreme limits, a new trial will not be granted where the finding was substantially right upon the evidence. *McCullough v. Davis*, 6 West. Rep. 579, 106 Ind. 232; *Rice*, Ev. p. 147.

As to the rule that parol evidence cannot vary or contradict a written contract, see note to *La Fayette County Mon. Corp. v. Magoon* (Wis.) 3 L. R. A. 761.

Exceptions to the foregoing rule.

The following American cases illustrate the exception by which parol evidence may be admitted to vary written instruments, on the ground of mistake, in different forms and modes of proceedings: *Peterson v. Grover*, 20 Me. 363; *Bradbury v. White*; 4 Me. 391; *Rogers v. Saunders*, 16 Me. 92; *Goodell v. Field*, 15 Vt. 448; *Lawrence v. Staiger*, 8 R. I. 256; *Quinn v. Roath*, 37 Conn. 16; *Canterbury Aqueduct Co. v. Emsworth*, 22 Conn. 608; *Patterson v. Bloomer*, 35 Conn. 57; *Margraf v. Muir*, 57 N. Y. 155; *Best v. Stow*, 2 Sandf. Ch. 293, 7 L. ed. 601; *White v. Williams*, 48 Barb. 222; *Morganthau v. White*, 1 Sweeney, 305; *Kyno v. Darby*, 20 N. J. Eq. 281; *Conover v. Wardell*, Id. 206; *Perry v. Pearson*, 1 Humph. 431; *Blanchard v. Moore*, 4 J. J. Marsh. 471; *Chambers v. Livermore*, 15 Mich. 891; *Van Nee v. Washington*, 29 U. S. 2, 27 L. ed. 842; *Rice*, Ev. p. 257. See note to *Bulkley v. Devine* (Ill.) 3 L. R. A. 330.]

Parol proof not admissible to vary the terms of a trust.

Where a trust is declared in writing the courts never permit parol proof to contradict the intention as expressed upon the face of the instrument itself. *Lewis v. Lewis*, 2 Rep. in Ch. 77; *Finch's Case*, 4 Inst. 86; *Childers v. Childers*, 3 Kay & J. 310; *Leman v. Whitley*, 4 Russ. 423; *Simms v. Smith*, 11 Ga. 198; *Harris v. Barnett*, 3 Gratt. 339; *Steere v. Steere*, 5 Johns. Ch. 1, 1 L. ed. 987. See notes to *Diven v. Johnson* (Ind.) 3 L. R. A. 308; *Bulkley v. Devine* (Ill.) 3 L. R. A. 330; *Minneapolis Threshing Mach. Co. v. Davis* (Minn.) 3 L. R. A. 796; *Ferguson v. Rafferty* (Pa.) 6 L. R. A. 38.

five acres of land to Jacob Thorne, the husband of their sister Mary, for the purpose of enabling him to make a sale of the same, and distribute the proceeds among the heirs according to their equitable interests. In 1876 Jacob Thorne and wife, with such others of the heirs as had not conveyed to Thorne, conveyed said lands to Sylvester, the purpose of which conveyance was the same as it was in the conveyance to Thorne. In 1880 Sylvester died, not having executed the trust or conveyed said lands, and afterwards the defendant Hamlin D. obtained a conveyance of said lands, from the heirs of Sylvester.

Further facts appear in the opinion.

Mr. R. A. Montgomery, with **Mr. Q. A. Smith**, for appellant.

Meers, Parkinson & Day, for appellee:

Plaintiff had always insisted that he was entitled to a distributive share of the proceeds of the sale of the land in question. The defendant was aware of this and took the title with that understanding on his part.

With this understanding on the 18th of May 1886, he promised plaintiff to pay him \$225 in settlement of this claim. This promise was based upon a good consideration, and such as would support the promise. It was such a claim as defendant saw fit to recognize and compromise.

The precise nature and extent of the claim is not material; it may have been of a legal or equitable nature.

Sheldon v. Rice's Estate, 80 Mich. 299; *Stevens v. Tuller*, 4 Mich. 387; *Gooding v. Hingson*, 20 Mich. 439.

Champlin, Ch. J., delivered the opinion of the court:

On a former trial of this case the defendant prevailed, the trial court holding that upon the showing then made there could be no recovery upon any theory, either as for money had and received, or upon an account stated, or upon the special count, unless the contract was proven. Upon a writ of error to this court, the judgment was reversed, and a new trial ordered. 75 Mich. 414. Another trial has been had, and the plaintiff has recovered a judgment, and we are asked to review the proceedings which led to that result. Thirty-one errors have been assigned, only a few of which demand particular attention in an opinion, although all have been carefully considered. The facts, as developed by the testimony upon this trial, are but slightly variant from those which appeared upon the other trial upon the main issues. At the conclusion of the testimony, the court stated to the counsel the theories upon which he submitted the case to the jury, as follows: "The court: I think this case should go to the jury upon two theories, in both of which there is some tendency, in my judgment, in the proof to support the plaintiff's case, as well as proof having an opposite tendency, and what the truth is about it the jury will determine from the evidence. And the one theory is upon the count for the money had and received. Now, to sustain that, I make this statement that you may understand, generally, what the views of the court are previous to the argument: To sustain the 13 L. R. A.

case upon the theory for money had and received, it must appear that parties in their transactions understood and treated the business of procuring these titles by Hamblin as embracing within it an interest for Stephen. That must have been the understanding all round. Now, whether or no such a condition of things as that existed will be left to the jury to determine under the evidence. The plaintiff also claims that an agreement was made on the 18th of May, 1886, by which the defendant, in settlement of the plaintiff's claimed interest in the lands, agreed to pay him \$225. Now, to make that a valid agreement, if it is proved to the satisfaction of the jury, it must appear that it was made upon a lawful consideration or a good consideration in law. As applied to this case, it is contended on behalf of the plaintiff that there was consideration for making that agreement, in this: That Stephen Collar claimed to have an interest in the lands, and went there to settle with Hamblin for that interest. It is not essential, as has been stated on all hands in the argument, that he should have had a legal interest. If he had such an apparent or claimed interest in the lands as, under the circumstances surrounding the parties, was esteemed by them a thing which it was worth while for Hamblin to settle or consider of value, then, I think, it would be a good consideration. Whether that was the case or not the jury must determine from the evidence. It is true that, so far as anything appears here, the sheriff's deed had alienated Stephen's interest in the land as a matter of law, and from what appears before me I think that is true. The parties may have not considered that that was so, and, if Stephen claimed an interest, notwithstanding that, in the property, and Hamblin yielded to that claim, and for the purpose of settling it, and avoiding a controversy upon it, agreed to pay him \$225 in settlement of that claim, I think that would be a good consideration for the agreement. While the sheriff's deed would, as matter of law, have alienated Stephen's interest in the land, there appears to have been in Sylvester at his death not only the interest which was conveyed by virtue of the sheriff's deed, but also such interest, if any, as could be conveyed by Stephen and his wife by quitclaim of the premises. If the parties regarded the interest acquired by both these conveyances, although the sheriff's deed may have conveyed Stephen's interest entirely, and I think it did, if the parties regarded the interest owned by Sylvester at his death, and by his heirs afterwards, as embracing some equitable interest in Stephen, represented by the quitclaim from Stephen and his wife, or, if they regarded the Secor deed, Secor being the execution creditor, as having been procured in the interest of Stephen, those facts and circumstances should be considered with a view of determining whether or not Stephen did have any equitable interest in the fund."

The defendant's counsel, in the course of their cross-examination of Stephen Collar, attempted to show that the conveyance made by Stephen Collar and his wife to Jacob Thorne on the 28th day of December, 1874,

was fraudulent as to his creditors. The court, however, refused to permit the attorneys for the defendant to go into such inquiry. We do not think that the court erred in excluding this testimony. The creditors of Stephen Collar are not before the court, or making any complaint of the conveyance by Stephen Collar to Jacob Thorne, and we do not think that the inquiry is material to the issue before the court.

It appears in the case that a creditor of Stephen Collar proceeded by attachment against him, and levied upon his interest in the lands in question, and obtained a judgment against him in the State of New York, and levied upon and sold his interest in said lands at public auction, by which the judgment was fully satisfied, the judgment creditor being Joseph S. Secor. The land was bid off at the sheriff's sale by one Isaac Secor, and in due time he received the sheriff's deed therefor. It appears also that the proceedings in the attachment suit, so far as service upon the defendant, Stephen Collar, was concerned, was a substituted service, no personal service upon the defendant having been acquired in the State of New York, and it was claimed on the part of the defendant in this suit that the sheriff's deed conveyed to Isaac Secor all the interest which the plaintiff, Stephen Collar, had in such land. The deed of the sheriff bears date the 29th day of December, 1870, being prior in time to the deed of Stephen Collar to Jacob Thorne; and therefore the defendant in this suit claims that, at the time of the execution of the deed to Thorne, Stephen Collar had no interest whatever to convey, and conveyed nothing whatever by such deed.

It appears, further, that Sylvester Collar acquired the interest of Isaac Secor under the sheriff's deed by purchase and conveyance from him to Sylvester dated the 25th day of April, 1877. He also obtained a deed from Thorne and wife dated December 8, 1876. Stephen Collar contends that the court in the State of New York obtained no jurisdiction in the suit, and that the sheriff's deed is invalid, and did not extinguish his title to the land. The circuit judge charged the jury that he was of opinion that the sheriff's deed did extinguish the title of Stephen Collar to the land, but further instructed the jury that, if he insisted that he had a claim upon the land after the sheriff's deed, even after he had conveyed to Thorne and he to Sylvester Collar, such claim would constitute a good consideration for the promise of Hamblin D. Collar to pay him the sum of \$225 for such interest.

We held, when the case was here before, that where lands were conveyed under a parol trust to sell and convert into money, and divide the proceeds, and the trust had been so far executed by the trustee as to sell the land and receive the money, and such trust had been recognized by him, an action for money had and received would lie to recover such money by the person entitled thereto.

Collar v. Collar, 75 Mich. 414. And in *Bitely v. Bitely*, 85 Mich. 227 (at the April Term of this court) we held also that parol evidence

was admissible to prove that land was conveyed to sell and divide the proceeds among the heirs.

In *White v. Clever*, 75 Mich. 17, we held that such a trust was not within the provisions of the Statute of Frauds. Such testimony was admitted upon the trial of this case, but upon this trial it appeared, upon the examination of the plaintiff, that there was a writing having reference to four of the conveyances by the heirs to Sylvester Collar which the plaintiff signed, and that it was sent by Henry to the heirs in Kent County; that this writing was for the purpose of fixing up and to sell the place so as to divide the money with the four heirs, namely, Hamblin, Cameron, Mary, and himself. When this fact appeared, such writing was the best evidence. It defined the trust, and all parol evidence respecting the trust, upon which Sylvester obtained the deeds from such heir, should have been excluded. There was no sufficient showing of the loss of such writing as to permit the introduction of parol evidence of its contents. Such parol evidence, when introduced, was objected to, and when it appeared later that there existed such writing, such objections became effective. It appears that such writing did not include or provide for all the heirs, but it did include the plaintiff, and measured the rights of those who were parties to it and Sylvester Collar. The plaintiff also testified that at his talk with the defendant on May 18, 1886, he represented these same four heirs, and wanted to settle only for those four interests. It is very important that it should appear what agreement Sylvester had with those four heirs, and the writing is the best evidence of that. The parol testimony tended to show that the trust which Sylvester assumed was not a trust in land, but a trust arising out of the disposition of land conveyed to him for a specific purpose. It was a trust arising out of the confidence reposed in him by the heirs in conveying their interest to him, without any other consideration to them than that he should dispose of the land, and divide the proceeds *pro rata* among them. The agreement was executory and contemplated action on the part of Sylvester. He was to acquire the interests of all the heirs, and sell and convert the real estate into money, and pay over to each his *pro rata* share. So far as the agreement relating to the purchase and disposition of real estate rested in parol, it was void under the Statute of Frauds. *Wright v. King*, Harr. Ch. 12; *Bernard v. Bougard*, Id. 130; *Trask v. Green*, 9 Mich. 358; *Newton v. Sly*, 15 Mich. 391; *Cobb v. Cook*, 49 Mich. 11; *Puford v. Morton*, 62 Mich. 25; *Shafter v. Huntington*, 53 Mich. 310.

It was only after Sylvester had proceeded in the execution of the parol agreement, and had obtained title of all the heirs, and converted the real estate into money, that the trust would arise, founded upon equity and good conscience, to pay over the proceeds; and, before such trust could be enforced at law, some new promise must have been made, and his duty to pay over must have been

affirmatively recognized before an action could be maintained. *Calder v. Moran*, 49 Mich. 17.

But what becomes of the remedy of the heirs so deeding, if the grantee dies before performance on his part of those provisions which are void by the Statute of Frauds, and before the property is converted into personality, so that a trust can attach? At such time it is not such a trust as equity will lay hold of, and appoint a new trustee to carry out the parol trusts which are void by the Statute of Frauds. The most that can be said in such a case is that the parties have voluntarily conveyed away their interest in the real estate, and placed it beyond recall. They would have been in the same predicament as if Sylvester Collar, after having obtained the absolute deeds of conveyances from all the heirs, had refused to sell or convey the land, or further perform the parol agreement. The heirs could not have compelled a specific performance, because the parol agreement is void under the Statute of Frauds. Sylvester Collar died before the parol trust attached, and the rights of the heirs to have a performance died with him. It was said by *Mr. Justice Campbell* in *Bulen v. Granger*, 56 Mich. 208: "As our statutes have abolished the old doctrine of resulting trusts, a person who deliberately conveys land to a wife or other relative stands in no better condition as to enforcing such a trust than anyone else." The plaintiff could not have maintained this action against the heirs of Sylvester Collar, even though they had sold the fifty-five acres for \$3,000 and received the money. The land was incumbered by no trust when it descended to them. It does not become subject to any trust in the hands of the purchaser from them, nor does such purchaser owe to the heirs any duty arising out of the original parol agreement between Sylvester and the heirs. But, if there was an express trust evidence in writing, other considerations obtain, and what the rights and remedies of the parties would be in such a case depends entirely upon the writing; and, until that is produced or established with sufficient certainty, it is impossible to determine whether the present action could be maintained or not. When the case was here before, the opinion was based upon the statement that "in 1880 Sylvester Collar died, not having executed the trust or conveyed said lands, and afterwards the defendant, Hamblin D. Collar, obtained a conveyance of said lands from the heirs of Sylvester Collar, deceased, which included the interest of the plaintiff which had been conveyed to Thorne, and afterwards to Sylvester for the same purpose. It was also proposed to be shown that the defendant obtained the whole title to this land from the heirs of Sylvester, and that he knew his brother had taken the title to the land for the purpose of thus distributing the proceeds, and that, although he had recognized the rights of all the other heirs, and paid them on the basis of the agreement made with the plaintiff, of May 18, 1886, he had not paid the plaintiff, and refused to recognize his rights in any funds, though he has the funds representing that 13 L. R. A.

interest in his hands." Such is not the case disclosed by this record. It is not shown that the defendant acquired conveyances from Sylvester's heirs for the same purpose as Sylvester had obtained deeds from the heirs; nor is it shown that he recognized the rights of all the other heirs to a share of the proceeds of sale of the land. On the contrary, it now appears that the agreement under which Stephen Collar claims an interest through Sylvester was in writing, defining the purposes for which Sylvester received the conveyances entered into between four of the heirs, including the plaintiff, and it was with reference to these same four heirs that the original promise to pay \$225 was made on May 18, 1886.

The judgment must be reversed, and a new trial ordered.

The other Justices concurred.

Alice B. CANFIELD, *Appt.*,
p.

Great Camp of the KNIGHTS OF MACCABEES, for the State of Michigan.

(..... Mich.)

A benefit society may lawfully provide that death claims shall be finally de-

NOTE.—Mutual benefit associations; binding effect of their judicatory decisions.

Where private beneficial associations adopt laws for their government to be administered by themselves, to which everyone who joins them consents, the decisions of their tribunals under such laws are binding upon the courts of the State. *Oceola Tribe*, No. 11 I. O. of R. M. v. Schmidt, 57 Md. 98. See *Black & White Smith's Soc. v. Vandyke*, 2 Whart. 909; *Logan Tribe, I. O. of R. M. v. Schwartz*, 19 Md. 565.

If a by-law is reasonable and valid, not oppressive or against public policy, it forms part of the contract and the member is bound by its terms. See *Allnutt v. Subsidiary High Court of U. S. A. O. of F. & M.* 110.

With voluntary associations, the court, before it will interfere, must see that it is under obligations to act, and that it can effectually act in the premises. *Ellison v. Bignold*, 2 Jac. & W. 503.

Where there are no property rights the court will not interfere at all. *Rigby v. Connol*, 23 Week. Rep. 850.

Courts should not as a general rule interfere with the contentions of voluntary associations so long as the government is fairly and honestly administered; the remedy for grievances should be sought in the first instance in their rules and regulations. *Lafond v. Deems*, 81 N. Y. 507; *Fischer v. Raab*, 57 How. Pr. 87.

The officers of a medical society, as to the question of expulsion of a member, are to that extent a court, and chancery is not the proper tribunal to correct their errors and irregularities. *Gregg v. Massachusetts Med. Soc.* 111 Mass. 185.

But courts are not bound by decisions made by such officials concerning the force and effect of contracts of the association. *Manson v. Grand Lodge A. O. U. W.* 30 Minn. 509.

Power of benevolent associations to make by-laws. See *note* to *Supreme Lodge, K. of P. v. Knight* (Ind.) 3 L. R. A. 409.

Death claims of deceased members. See *note* to *Lawler v. Murphy* (Conn.) 8 L. R. A. 113.

terminated by a committee designated by itself, and that there shall be no right of appeal to the courts; and such provision will be conclusive on the beneficiary named in a certificate, although not a member of the society, and prevent the maintenance by him of an action on a claim rejected by the committee. In the absence of a charge of fraud or violation of the rules or regulations of the order.

(October 2, 1891.)

APPEAL by plaintiff, on a case made from a judgment of the Circuit Court for Macomb County, in favor of defendant in an action brought to recover the amount alleged to be due on a benefit certificate issued to plaintiff's husband for her benefit. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. Eldredge & Spier, for appellant:

A by-law or constitutional provision which undertakes to make the decision of a tribunal, created of its own members, and therefore interested, conclusive upon a claim of a beneficiary, made pursuant to a certificate, in the nature of a policy of insurance upon the life of a member, is unreasonable, against public policy, and void.

Austin v. Searing, 16 N. Y. 112-123; *Bauer v. Samson Lodge, K. of P.* 102 Ind. 262.

Such restrictive provisions are repugnant to art. 6 of the Constitution of this State. The judicial power is vested in certain courts, and consists of the power to hear and determine controversies between adverse parties, and questions in litigation.

Story, Const. § 1640 *et seq.*

This power can only be conferred upon courts.

Re Buddington, 29 Mich. 472-474; *Roue v. Roue*, 28 Mich. 358; *Risser v. Hoyt*, 53 Mich. 185-193; *Underwood v. McDuffee*, 15 Mich. 361.

In *Home Ins. Co. of New York v. Morse*, 87 U. S. 20 Wall. 445, 22 L. ed. 365, even the statute of a State, aimed to restrict the right of insurance companies of other States to remove suits against it to the United States courts, was held unconstitutional and void.

The effect of these restrictive provisions of defendant, if held valid, would be to deprive the claimant of property of the right to a jury trial. A statute having that effect cannot be sustained.

Edwards v. Symons, 8 West. Rep. 784, 65 Mich. 348-354, and cases cited; *Wood v. Humphrey*, 114 Mass. 184-186.

It is not in the power of the parties to a contract (by a general arbitration clause) to oust the courts of their jurisdiction.

Mentz v. Armenia F. Ins. Co. 79 Pa. 478, 21 Am. Rep. 80.

The rule we contend for is enforced in *Kistler v. Indianapolis & St. L. R. Co.* 88 Ind. 460.

Messrs. Markey & Hall, for appellee:

The laws, by-laws, rules, regulations and constitution of the order are binding upon the members.

Niblack, Mut. Ben. Soc. par. 12; *Bacon, Ben. Soc. & Life Ins. pars.* 69, 79, 81; *Hirschl, Law of Fraternities & Societies*, p. 83; *Morawetz, Priv. Corp.* par. 491; *May, Ins. par.* 426; *Union Mut. Aid Asso. v. Montgomery*, 14 West. Rep. 877, 70 Mich. 586; *Van Poucke v. Nether-* 18 L. R. A.

land St. V. De P. Soc. 6 West. Rep. 182, 68 Mich. 378; *Arthur v. Oddfellows Ben. Asso. of Columbus*, 29 Ohio St. 557, 560; *Osceola Tribe No. 11, I. O. of R. M. v. Schmidt*, 57 Md. 106.

The rights of a member or his beneficiary to be paid any part of the fund provided for the benefit of the widow and orphan is governed entirely by his benefit certificate and the constitution, laws, and regulations of the order. The parties are bound by just such contracts as they make which are free from fraud or illegality. Courts cannot make contracts for parties or render a party liable on a different basis from that upon which his liability is mutually stipulated for.

Lorscher v. Supreme Lodge; K. of H. 2 L. R. A. 206, 72 Mich. 326.

Where one has a claim against an association like defendant, under its laws, which has been disputed and decided adversely by the proper tribunal acting under the laws of the order, a court of law has no jurisdiction as he is concluded by the forum of his choice.

Anacosta Tribe No. 12, I. O. of R. M. v. Murbach, 18 Md. 91; *Osceola Tribe No. 11, I. O. of R. M. v. Schmidt*, 57 Md. 98; *Yoram v. Howard Ben. Asso.* 4 Pa. 519; *Poultney v. Bachman*, 81 Hun. 49; *Lafond v. Deems*, 81 N. Y. 507; *Harrington v. Workingmen's Ben. Asso.* 70 Ga. 840, 27 Alb. L. J. 438; *Black & White Smith's Soc. v. Van Dyke*, 2 Whart. 309; *Sperry's App.* 116 Pa. 391; *McAlees v. Supreme Sitting Order of Iron Hall (Pa.)* 12 Cent. Rep. 415; *Woolsey v. Independent O. of O. F. Lodge No. 23*, 61 Iowa, 492; *Harrison v. Hoyle*, 24 Ohio St. 254; *Van Poucke v. Netherland St. V. De P. Soc. supra*; *Elliot v. Royal Exch. Assur. Co. L. R.* 2 Exch. 237; *Dawson v. Fitzgerald*, L. R. 1 Exch. Div. 257.

The exact point at issue was before the court in *Rood v. Railway Pass. & Freight C. Mut. Ben. Asso.* 81 Fed. Rep. 62, where the court said it was certainly competent for the members of this association to agree among themselves that the action of their board of directors in reference to any claim presented against the association should be final. This view has been practically adopted by our court.

Van Poucke v. Netherland St. V. De P. Soc. supra; *Lorscher v. Supreme Lodge K. of H.* 2 L. R. A. 206, 76 Mich. 326.

Plaintiff not being a member of the order cannot assail this law, as she can recover only under the provisions regulating the membership of her deceased husband. This attack cannot be sustained, because if it was admitted that the rule of the association is bad as a by-law, it may be good as a contract.

Ang. & A. Corp. par. 342; *Austin v. Searing*, 16 N. Y. 112; *Goddard v. St. Louis Merchants Exch.* 78 Mo. 609.

Grant, J., delivered the opinion of the court:

This case was tried by the court, and the finding contains the following material facts: Defendant is a mutual benefit association incorporated under Act 89, Pub. Acts 1883, for the improvement morally, socially, and intellectually of its members, and for the purpose of establishing a benefit fund, from which shall be paid a certain sum to the member, or his

widow, or certain other relatives, as he may direct, and as the endowment laws of the order provide. Its constitution provides for a great camp, composed of certain officers and one representative from each of the subordinate tents in the State. This Great Camp meets annually, and its members are selected annually. Three of the principal officers constitute the executive committee. Article 18, § 2, of its laws reads as follows: "The executive committee shall have power to pass on all death claims, and if in their judgment any such claim is not on its face a valid one, they shall notify the beneficiary or beneficiaries of the deceased members thereof, and give them, or their attorneys, an opportunity to appear before such committee within sixty days thereafter, and present such evidence as they may have to establish the justness or validity of such claim, and the said committee shall try, hear, and decide upon the justness or validity of such claim, and such decision shall be binding upon such claimant, unless an appeal is taken to the Great Camp. The notice of the appeal from the decision of the said committee must be filed with the great record keeper within sixty days thereafter. The decision of the Great Camp, in all such cases, shall be final, and no suit in law or equity shall be commenced or maintained by any member or beneficiary." Plaintiff's husband, now deceased, became a member of the defendant, and received what is termed a "half endowment certificate," which entitled him to receive one assessment on the membership not exceeding \$1,000, as a benefit to his wife, upon satisfactory proof of his death, and the surrender of the certificate, provided he shall have, in every particular, complied with all the rules and regulations of the order. Upon his death plaintiff presented her claim to the committee, which decided against it on the ground that at the time of his death he was not a member in good standing, but had been duly and regularly suspended therefrom, in accordance with the rules and regulations thereof. She then appealed to

the grand camp, which also disallowed the claim, after a full examination and hearing. She then brought this suit, and judgment was rendered therein against her.

It is claimed on behalf of plaintiff that the provision above quoted, which makes the decision of the Grand Camp final, is contrary to public policy, and void, in that it ousts the court of jurisdiction. No charge is made that either the committee or the grand camp acted fraudulently, or in any manner contrary to the rules and regulations of the order. I am unable to see any difference between the present case and that of *Van Poucke v. Netherland St. V. De. P. Soc.* 63 Mich. 378, 6 West. Rep. 162. These organizations are purely voluntary, and it may well be considered by their members important that claims of this character should be determined by methods more inexpensive than resorts to the courts. This reason is well expressed by my Brother Champlin in the case above cited. Plaintiff seeks to maintain a distinction between that case and the present one, in that the plaintiff was himself a member claiming for "sick benefits," while the plaintiff here is not a member, and had no voice in the selection of members of the tribunal. Her right depends solely upon the voluntary act of her husband in becoming a member. Her right to receive the benefit depended upon his complying with the constitution and rules to which he assented, and which became a part of his contract. I can see no reason why a different rule should apply to plaintiff than to a member making a claim for benefits. Similar provisions have been sustained by the courts. *Anacosta Tribe No. 18 I. O. of R. M. v. Murbach*, 13 Md. 91; *Toram v. Howard Ben. Assn.* 4 Pa. 519; *Black & White Smith's Soc. v. Vandyke*, 2 Whart. 309; *Woolsey v. Independent O. of O. F. Lodge No. 23*, 61 Iowa, 492; *Rood v. Railway Pass. & Freight C. Mut. Ben. Assn.* 81 Fed. Rep. 62.

Judgment affirmed.

The other Justices concurred.

PENNSYLVANIA SUPREME COURT.

G. J. LILLIBRIDGE *et al.*, *Appts.*,

v.

LACKAWANNA COAL CO., Limited.

(.....Pa.....)

A grantor in fee of coal underlying his land with the right to mine and remove the

same cannot, at least before the vein has been exhausted, enjoin the grantees from using tunnels cut through the body of the coal for the removal of other coal from beneath lands adjoining those of the grantor

(*Sterrett, McCollum and Mitchell, JJ., dissent.*)

(October 5, 1891.)

NOTE.—Conveyance of mineral beneath surface of land.

The minerals beneath the surface of land may be conveyed by deed, distinct from the right to the surface, and are a corporeal hereditament passing by deed. *Lee v. Bumgardner*, 86 Va. 315.

A demise of coal under the surface of a specified piece of land is a sale of the coal. *Fairchild v. Fairchild* (Pa.) 7 Cent. Rep. 872.

The grant of a right to mine coal in the land of the lessor and remove it therefrom is a grant of an interest in the land itself, and not a mere license to take the coal. *Hope's App.* (Pa.) 2 Cent. Rep. 42.

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Where grantee contracted to pay a specified price per ton, the instrument was a sale of the coal notwithstanding the parties contracted as "lessor and lessee." *Delaware. L. & W. R. Co. v. Sandersson*, 109 Pa. 583, 1 Cent. Rep. 102.

Such interest of the lessee is property liable to sale on judgment and execution, as real estate. *Hyatt v. Vincennes Nat. Bank*, 113 U. S. 408, 28 L. ed. 1009.

A sale of coal to be mined with houses, shops, shutes, drums, etc., and other appurtenances, with no covenant to repair or return such appurtenances, carries title to such articles. *Montooth v. Gamble*, 123 Pa. 240.

APPEAL by complainants from a decree of the Court of Common Pleas for Lackawanna County in favor of defendant in a suit brought to enjoin the use of tunnels under complainants' land for the mining of coal underlying lands adjoining those of complainants. *Affirmed.*

The facts are stated in the opinion.

Messrs. John S. Harding and Garrick M. Harding, for appellants:

The great rule of interpretation, with respect to deeds and contracts, is to put such a construction upon them as will effectuate the intention of the parties, if such intention be consistent with the principles of law.

Hollingsworth v. Fry, 4 U. S. 4 Dall. 345, 1 L. ed. 880; *Staver v. Staver*, 9 Serg. & R. 450; *Doe v. Burt*, 1 T. R. 701.

As the coal was mined out and removed, there resulted an "open way" a "space," or a "chamber," through, under and across the plaintiff's property. The roof above, the floor below, the "chamber" between, each and all were real estate. One may own a chamber even in a house as his separate real estate.

Doe v. Burt, *supra*; *Loring v. Bacon*, 4 Mass. 575; *South Cong. Meeting House Proprietors v. Lowell*, 1 Met. 541; *Cheeseborough v. Green*, 10 Conn. 818.

Plaintiffs were the owners of this real estate. It cannot be said that they conveyed it away when they executed the so-called lease.

If the plaintiffs were reversioners of the "chamber," they certainly could maintain an action for the violation of any of their rights in connection with it. The degree of damage was wholly immaterial.

Ripka v. Sergeant, 7 Watts & S. 9; *Pastorius v. Fisher*, 1 Rawle, 27; *Seneca R. Co. v. Auburn & Rochester R. Co.* 5 Hill, 170.

A grant of a part of an owner's premises, as of the coal under the surface, or a mine, will carry with it and create such easements as may

be necessary for the attainment of the subject matter of the grant; thus a grant of coal in a place creates an easement of entrance and mining and carrying away.

Ewing v. Sandoval C. & Min. Co. 110 Ill. 290; *Marvin v. Breckster Iron Min. Co.* 55 N. Y. 538.

But an easement in, over, or through land, must be restricted to the purpose for which it was granted; and ownership of the easement will not justify the use of the land, in, or through which it exists, for other purposes.

Kaler v. Beaman, 40 Me. 207; *Noyes v. Hemphill*, 58 N. H. 536; *Valley Falls Co. v. Dolan*, 9 R. I. 489.

And the burden of a servient tenement must not be increased by new or extended methods of use not strictly deducible from the grant.

Washb. Real Prop. bk. 2, p. 280; *Chestnut Hill Spring House Turnp. Co. v. Piper*, 77 Pa. 432; *Richardson v. Clements*, 89 Pa. 503.

If one who has a way for one purpose makes use of it for another, he becomes a trespasser as much as though he had no easement at all in the land.

Covling v. Higginson, 4 Mees. & W. 245; *Ballard v. Dyson*, 1 Taunt. 279.

Where one who was the owner of a two-acre mowing lot, and had a right of way across another's land adjoining it, for the purpose of bringing away hay, purchased another lot adjoining the last, from which he carried hay over the land of the other also, though mixed with hay from his two-acre lot, he was held to be a trespasser.

Howell v. King, 1 Mod. 190; *Davenport v. Lamson*, 21 Pick. 72. See *Garritt v. Sharp*, 3 Ad. & El. 325.

Where Miller, by writing, sold all the coal under a tract of land, with privilege to the vendee to use the railroad, tenements and other improvements of Miller, McCloskey, the vendee, to remove the coal in forty years; at the

estate will be subject to the law of descent, devise, and conveyance. *Kincaid v. McGowan*, 86 Ky. 91.

The right to minerals, timber, and a mill-site, reserved to the grantor in conveyance of certain parcels of land, will not pass by his subsequent conveyance of the whole tract, expressly excepting the parcels previously conveyed. *Ibid.*

Liability of owner of surface land, and of the mineral.

Where the surface is owned by one person and the coal by another, the former is liable in trespass for mining without a license. *Ashman v. Wirtton* (Pa.) 9 Cent. Rep. 629.

The lessors of coal lands are liable for taxes assessed on the unmined coal as well as on the surface lands, under a clause in the lease that they "shall pay all taxes on lands hereby leased." The lessees to pay taxes on the coal after it is mined. *Miles v. Delaware & H. Canal Co.* 140 Pa. 623.

Where the lessors engage to pay all the taxes imposed upon coal in the ground, this obligation is not affected by a subsequent deed of a part of the surface of the ground to the lessee, or by the fact that the courts subsequently held that the lease was in effect a sale of the coal. *Woodward v. Delaware, L. & W. R. Co.* (Pa.) 22 W. N. C. 292.

The owner of the coal is liable to the owner of the surface, if a spring is ruined through his failure to properly support the surface. *Gumbert v. Kilgore* (Pa.) 6 Cent. Rep. 406.

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expiration of which time, or on the removal of the coal, "the rights or privileges hereby granted shall cease," it was held that the vendee had no right to use the improvements, etc., for removing, etc., other coal than that mentioned in the writing.

McCluskey v. Miller, 73 Pa. 151.

Measrs. Henry A. Knapp and Everett Warren, for appellee:

The instrument or contract between the parties is, under the laws of this Commonwealth, a sale of the subjacent stratum of coal.

Defendant having purchased from plaintiffs, and become the owner in fee of the subjacent stratum of coal, may put the same to any use, so long as the contract relations between plaintiffs and defendants are not violated.

Caldwell v. Fulton, 31 Pa. 475; *Caldwell v. Copeland*, 37 Pa. 427; *Barnes v. Mawson*, 1 Maule & S. 87; *Sanderson v. Scranton*, 105 Pa. 469; *Delaware, L. & W. R. Co. v. Sanderson*, 1 Cent. Rep. 102, 109 Pa. 583.

By the conveyance defendants took the fee-simple title as actual owners of the land, consisting of the veins of coal underlying the tract of surface land mentioned in the plaintiff's bill.

Dunbar Furnace Co. v. Fairchild (Pa.) Oct. 7, 1889.

Owning this land, defendants may use it as they like, so that there is no breach of contract rights of plaintiffs, and the injunction "*Sic utere tuo, ut alienum non laedas*," is not violated.

Broom, *Legal Maxims*, p. 264; Austin, *Jurisp.* § 515; Anderson, *Law Dict.* p. 741; MacSwinney, *Mines*, p. 67.

We are not using or in any manner interfering with plaintiff's property.

Hamilton v. Graham, L. R. 2 H. L. Sc. 166; *Bovser v. Maclean*, 2 DeG. F. & J. 415; *Hamilton v. Dunlop*, L. R. 10 App. Cas. 813; *Balackrish B. L. & C. Min. Co. v. Harrison*, L. R. 5 P. C. App. Cas. 49; *Eardley v. Granville*, L. R. 3 Ch. Div. 826.

Plaintiffs endeavor to distinguish *Proud v. Bates*, 34 L. J. Ch. 406, for the reason that the subject there arose under an exception. But there is no difference between the effect of words in a grant and words in an exception.

3 Washb. *Real Prop.* p. 432; Shep. *Touch.* 100; *Whitaker v. Brown*, 46 Pa. 199.

An instructive discussion of the subject "Horizontal Divisions of Land," appears in *American Law Register*, vol. 1, N. S. p. 577.

See also *Erskine's Institutes of the Law of Scotland*; *Armstrong v. Caldwell*, 53 Pa. 284.

Green, J., delivered the opinion of the court:

It is not at all questioned, but is expressly conceded, by the learned counsel for the appellants, that the agreement between these parties is an absolute sale to the defendant of all the merchantable coal underlying the tract of land in question, and that the surface of the land and the minerals beneath it may be dissevered in title and become separate tenements. This doctrine has been so frequently decided by this court, and in such varying circumstances, that a mere reference to some of the leading cases will be all that is necessary, for the present occasion. *Caldwell v. Fulton*, 31 Pa. 475; *Caldwell v. Copeland*, 37 Pa. 427; *Scranton v. Phillips*, 94 Pa. 15; 13 L. R. A.

Sanderson v. Scranton, 105 Pa. 469; *Delaware, L. & W. R. Co. v. Sanderson*, 109 Pa. 583, 1 Cent. Rep. 102.

In the opinions delivered in the foregoing and other cases, we have emphatically decided that the coal or other mineral beneath the surface is land, and is attended with all the attributes and incidents peculiar to the ownership of land. We have held the mineral to be a corporeal and not an incorporeal hereditament; that the surface may be held in fee by one person and the mineral also in fee by another person; that the mineral may be subject to taxation as land, and the surface to an independent taxation as land, when owned by a different person; that possession of the mineral may be recovered by ejectment and title to it may be acquired by adverse possession under the Statute of Limitations, though not by prescription because it is not an incorporeal right. In short, we have for nearly half a century judicially regarded the ownership of mineral, where it has been properly severed from the surface, as the ownership of land to all intents and purposes. Said Strong, J., in *Caldwell v. Fulton*, *supra*: "Coal and minerals in place are land. It is no longer to be doubted they are subject to conveyance as such. Nothing is more common in Pennsylvania than that the surface right should be in one man, and the mineral right in another. It is not denied in such a case that both are landowners, both holders of a corporeal hereditament." Woodward, J., in *Caldwell v. Copeland*, *supra*, said: "There is no more reason why mines in another's land, whether opened or unopened, may not be held by a deed duly acknowledged and recorded, than why land in its most ordinary significance may not be so held. In other words, mines are lands and subject to the same laws of possession and conveyance."

In the litigated causes the contentions have been rather upon the interpretation and legal effect of the instruments under which the questions have arisen, than upon the doctrine itself. No such contention arises here as counsel have very candidly conceded, what was indeed inevitable, that the instrument between the present parties came nearly within the adjudged cases and created an estate in fee simple in the defendant in the coal underlying the plaintiff's surface. It includes "all the merchantable coal" under the surface, "with the sole and exclusive right to mine and remove the same," and with this habendum: "To have and to hold the coal in and under said land unto the said party of the second part, its successors or assigns, until the exhaustion thereof under the terms of this indenture."

It is not possible that there can be any question that this is an absolute grant in fee simple of all the coal under the surface of the tract.

But it is contended with great earnestness and ability by the learned counsel for the appellants, that nothing more than the coal passed to the defendant under the agreement, and as to the chamber or space left by the removal of the coal under the mining operations of the defendant, the plaintiffs were still owners in fee, or reversioners, with a

right which could not be invaded by the defendant, except for the purpose of removing the coal that underlaid the surface. This brings us to consider the precise character of the present proceeding and the particular question that arises under it. The proceeding is a bill in equity to restrain the defendant from removing coal belonging to them on another tract adjoining this tract on the north, by moving the same through a tunnel or way made by the defendant through one of the underlying veins of coal across the tract to the other land of the defendant, two hundred feet below the surface, of considerable breadth, and twelve feet in height. It is alleged in the bill that this way was produced by the mining operations of the defendant in accordance with the contract, and that the defendant, having acquired the adjoining property after the agreement with the plaintiffs was made, has been and is taking out coal from the adjoining tract through and over this tunnel or way, and this is claimed to be an illegal use of the plaintiffs' property which they ask to have restrained. The argument is that it was not within the intention of the parties that such a right should be granted or exercised, and that, whether it was or not, the plaintiffs have such a property in the chamber or space left by the mining operations that it cannot be used without their permission. There is nothing in the instrument, or in the circumstances surrounding it, which can give any force to the argument from intention. We cannot know what was the intention of the parties except from the terms of their contract. The defendant demurred to the bill for want of equity. No testimony of any kind has been taken. The bill makes no averment of any intention of either of the parties but simply sets out the contract, and the acts of the defendant in executing its terms. Of course there are no surrounding facts that we can consider. There are none in the bill except such as are subsequent to the contract, and these amount only to an allegation of the subsequently acquired interest of the defendant in the adjoining property, and the removal of coal therefrom through the way made by the removal of the coal under the tract.

The proposition that the plaintiffs have a fee in the chamber or space left by the removal of the coal antagonistic to the right of the defendant to use it, is a novel one. No authority is cited to support it, and it seems quite incongruous with the admitted ownership and estate of the defendant in the coal displaced. Under all the decisions, the coal in place was absolutely owned in fee simple by the defendant. In a state of nature the coal necessarily occupied space. How could the defendant own the coal absolutely and in fee simple, and not own the space it occupied? Or how is it possible to conceive of such a thing as the ownership of the space independently of the coal? If the coal in place is a part of the very substance of the soil, more corporeal than the surface, as was said in *Caldwell v. Fulton*, how can the law regard the space which the substance occupies as other than the substance itself?

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Of course such an idea is incapable of practical application except upon the theory that the coal is not a corporeal substance to be sold and delivered, but that only an incorporeal right to remove it passes to the grantee under a conveyance. And such is the real nature of the appellants' argument. It could not be otherwise. Certainly if such were the nature of the defendant's right, the argument and the authorities cited in support of it, would be applicable and of controlling force; but it is a sufficient reply to all of them to say that all the decisions are directly the other way and that they all establish that a conveyance of the coal in fee carries everything with it, just as fully and completely as a conveyance of the soil above. We said in *Caldwell v. Fulton*: "It is a common thing in the mineral districts of Pennsylvania for the surface to belong to one owner, and the coal which it covers to another. Both the surface and the coal are held by deeds executed and delivered and recorded in the same manner; and there is no more reason for considering the coal an incorporeal hereditament because it has not been opened, than there is for considering the soil such because it has not been ploughed. Still less reason is there for calling it an incorporeal hereditament if the deed happen to describe the grant as a right to enter, dig, and carry away all the coal, instead of describing the coal without the customary circumlocution. In all these cases, where the right rather than the thing is described, nobody is at a loss to know what is intended to pass. It is the thing that is bought and sold. And when that is a coal bed, it is an abuse of language, and an unnecessary application of legal distinctions, to call it an incorporeal hereditament." If, then, the coal in place is a pure corporeal hereditament, the title in fee simple to which passes to a purchaser by apt conveyance, there would be no more propriety in claiming a title in the grantor to the space it occupies, than there would be in claiming a similar right in a vendor of the surface to the space developed by the vendee in digging the cellar and foundations of a house. We are altogether unwilling to adopt any such view of the rights of the parties in either of such cases. By the necessity of the case the appellants argue that the defendant's right in the chamber or way is only an easement, and then cite authorities that an easement can only be exercised to the extent of the grant. But as we have already seen this is in direct hostility to all the authorities on that subject. If the subject be further considered upon principle, it will be found difficult to understand that any property right of the appellants is invaded by the action of the defendant. According to the averments of the bill the tunnel or way is cut through a vein of coal, two hundred feet below the surface and is twelve feet high, and it extends in the vein all the way from the one side to the other of the tract. In this way or chamber the plaintiffs, as owners of the surface, have no right or title. They have no access to it, they cannot use it, they are in no manner obstructed or injured by

it. Nor can we understand how they are or can be injured in any other way. It is of no avail to say generally in the bill that they are injured. The injury must be stated specifically so that a court may know what it is. This is not done and we know not what the injury complained of is. How, then, can we enjoin the defendant? We are asked to enjoin against the removal of coal from the adjoining tract, but this is a matter with which the plaintiffs have no concern. They do not pretend to have any title or interest in that coal. They ask to enjoin removing that coal through the chamber or way made by the defendant through its own property, to wit the coal sold to them by the plaintiffs. Why or for what reason should we do this? The plaintiffs would gain nothing which they do not now have, if we did. No complaint is made in the plaintiffs' bill of either the deprivation or injury of any right growing out of the contract. The plaintiffs cannot possibly use any part of the space left by the removal of the coal, and hence they are not obstructed in the slightest degree. The right to use that space is exclusively in the defendant and that use is not, and cannot be, questioned by the plaintiffs. It is not alleged that the defendant has failed to perform any duty imposed upon it by the contract. We are bound to assume, therefore, that all the coal which the defendant agreed to take out or pay for each year has been taken out or paid for. In no circumstances would the case be a proper one for an injunction.

But upon the authorities the case is entirely with the defendant. The question has arisen in several cases in the British courts, and the right of the owner of the coal to use the tunnel or way to carry other coal through it than that underlying the land of the surface owner has always been affirmed. The subject is thus presented in MacSwiney on Mines, page 67: "The owner in fee simple or tail of lands containing mines or quarries has an absolute right to use them, and the chamber which encloses them, and the space or shell which the working of the minerals creates, and the subsoil generally, in any manner which he thinks proper. And where the owner in fee simple of lands grants them, excepting the underlying mines, he has, with respect to those mines, a similar right. And as by excepting the mines he *ipso facto* excepts the chamber which encloses them, he has a similar right with respect to that chamber, and with respect to the space or shell which the working of the minerals creates. The containing chamber is not purely and solely a species of property which can only be made profitable by the removal of the inclosed minerals, with the incidental rights of using all proper means for obtaining them. It is a species of property which is as free as other property from restrictions as to its mode of use. The grantor may therefore use the space or shell created by his previous working of the inclosed minerals as a thoroughfare for the carriage of minerals gotten out of his adjoining land. And if, instead of working the inclosed minerals and then utilizing the

space or shell thereby created, he prefers to cut a passage through those minerals for the express purpose of using it, and to accordingly use it as a thoroughfare for the carriage of other minerals, he is entitled to do so."

In *Hamilton v. Graham*, L. R. 2 H. L. Sc. 166, there was an exception in a free charter in favor of the Duke of Hamilton and his heirs of all the coal and limestone within the lands granted. He was the owner of three estates, Clydesmill, Cambuslang, and Morristown, and one Graham had become the owner of the surface of Cambuslang. The Duke leased the coal in Clydesmill and a portion of the coal under Mr. Graham's surface in Cambuslang, and his lessees at once made use of a passageway through the coal underlying Graham's surface, for the conveyance of other coal and limestone mined from the estates of Clydesmill and Morristown, and this coal and limestone the Duke owned by virtue of the reservation, or exception out of the grant of the surface. Mr. Graham brought an action to stop the further use of the passage but it was held on appeal to the house of lords that this was a rightful use of the passage. Lord Westbury, delivering his opinion, said: "You may approach it laterally from another estate, for the purpose of mining the minerals. You may use the strata which you have reserved to yourself, or rather declared to remain in yourself, in any manner consistent with ownership. You may traverse it from any adjoining land you have. You may create a road or tunnel through it. And you may, through that road or tunnel, carry either the minerals or any other proceeds of an adjoining estate. You therefore have, for there is nothing to restrain you, the same universal right and unlimited power of enjoyment of the estate that remains in you, as you had antecedently to the grant of the *dominium utile*, the enjoyment of which that grant of the *dominium utile* in no respect impairs or affects." Lord Colonsay, in the same case, said: "It is a great mistake to say that the Duke has no right to use these minerals except for the purpose of bringing them to the surface. He may use them in the way which is most beneficial to himself. . . . There is no doubt that the Duke of Hamilton was not entitled to increase the burdens upon the servitude on the surface by bringing the minerals from the other property over the surface. The surface was the servient tenement and the minerals under that tenement were the dominant tenement in regard to that particular right of servitude. But the principle does not apply in regard to the right of property, and to say that he is carrying the minerals through the property of the pursuer is another mistake. He is carrying them through his own property and not through the property of the pursuer at all. There is a want of keeping in view the distinction between the right of property and the right of servitude here, which seems to me to have led to an erroneous judgment in the case. I conceive that so long as there is any of the mineral property which the Duke of Hamilton has, he is entitled to use any of that property in the mode which is most beneficial to himself." The

Lord Chancellor also said, referring to his opinion in the case of *Proud v. Bates*, 34 L. J. Ch. 406: "As to the excepted mines, I held that the owner had an absolute right to do as he pleased with them, and that he therefore had a right to carry his coal through them."

In this last-mentioned case of *Proud v. Bates* a lease was made of the waste land of the manor with an exception of the mine and quarries with full power to win and work the same. A way available for the carriage of minerals lay exclusively within the excepted mines and the lord claimed the right to carry through this way minerals worked on other property than that embraced in the lease. The court held that he had an absolute right to do what he pleased with the excepted mine and therefore he had a right to carry through them minerals from wherever gotten. *Vice-Chancellor Wood*, in delivering his opinion, said: "Now whether the word 'mines' be used, as it often was, in the sense of minerals, the thing dug out of the mine or that which contains the minerals, that which contains cannot be less than the thing contained; and therefore there is no doubt that the whole containing chamber which has the minerals is 'the mine', and so far as the mines are concerned there can be no question that they are altogether out of the demise; and as to them the representatives of the lessee are of course entitled to use them for any purpose whatsoever and at any period. *Lord Campbell's* decision in the cause of *Bowser v. Maclean*, *supra* [2 DeG. F. & J. 415] in this court, completely explains what the right view is. He says, 'With regard to copyholds, the copyholder has the whole right in him but subject to the right of the lord to work the mines, and the lord cannot use an underground way for the purpose of passing through any portion of the copyhold premises. But as to that which is excepted out of a demise by contract, of course the owner can use whatever he excepts in any way he thinks fit.'"

In *Eardley v. Granville*, L. R. 3 Ch. Div. 828, *Jessel, M. R.*, says: "If a freeholder grants lands excepting mines he severs his estate vertically, i. e., he grants out his estate in parallel horizontal layers, and the grantee only gets the parallel layer granted to him and does not get any underlying mineral layer or stratum. That underlying stratum remains in the grantor." Referring to the case of *Hamilton v. Graham*, he said: "I decided that the same law applies to Scotland which applies to England. In a case like that the word 'mines' meant subsoil containing the minerals, and not merely the minerals themselves."

The appellants reply to these cases by saying they were cases of exceptions out of grants, and the mines reserved or excepted were the property of the grantors and never were conveyed; hence they held everything not granted by their original title. But the distinction is without force. There is no substantial difference between a title by exception out of a grant, and a title by direct grant of the same subject. In the case of an

exception the grantor retains the whole title which he already holds and in the case of a direct grant the grantee holds the whole title granted, and the ownership is as absolute in the one case as in the other. We have held that a grant of all the coal underneath a tract of land is an absolute conveyance in fee simple of all the coal, and no greater title than that could be acquired by an exception to the same effect in a grant of the surface. The books make no distinction. Thus in *Washburn on Real Property*, vol. 3, p. 492, it is said: "As an exception is the taking of something out of the thing granted, which would otherwise pass by the deed, it may be said in general terms that it ought to be stated and described as fully and accurately as if the grantee were the grantor of the thing excepted, and the grantor were made the grantee by the exception."

In *Bowser v. Maclean*, 2 De G. F. & J. 415, the Lord Chancellor said: "I am inclined to think that a mistake has been committed in not distinguishing between a copyhold tenement with minerals under it, and freehold leased land with a reservation of the minerals, or freehold land where the surface belongs to one owner and the subsoil containing minerals belongs to another, as separate tenements, divided from each other vertically instead of laterally. If this had been such freehold land the owner of the surface could not have complained of the making or of the excess in using a tramway through the subsoil."

In *Whitaker v. Brown*, 46 Pa. 197, we held that where a deed in fee of land was made, the grantor "saving and reserving, nevertheless, for his own use, the coal contained in said piece or parcel of land together with free ingress and egress by wagon road to haul the coal therefrom as wanted" the saving clause operated as an exception of the coal, and therefore that the entire and perpetual property therein remained in the grantor. The whole reasoning of the opinion puts the case upon exactly the same footing as if the words of the exception had been contained in a specific grant of the coal, and *Pulton v. Caldwell* and kindred cases were cited as authorities for the ruling.

In *MacSwinney on Mines*, p. 68, the author says: "Similar principles apply where the owner grants it (the surface) by way of lease excepting the mines, or where he grants the mines in fee simple, and excepts the surface."

In *Bainbridge on Mines and Minerals*, *34, the author says: "The severance of mines is usually effected by exceptions in deeds of assurance, which transfer the freehold in the surface and reserve the mines. An exception is distinguished from a reservation by its being part of the thing granted and in existence at the time of the grant, while the latter is a right of new creation arising out of the subject of the grant. They are different in legal effect, but in their creation 'there is no magic in words,' and if the meaning is clear, either of the above expressions will operate for the purpose designated. They are also construed exactly in the same way

as actual grants. In either case the law favors their construction by giving them all proper and necessary incidents."

There is no averment in the bill that all the coal in the vein has been taken out, or that the tunnel is opened on the bed rock underneath the vein; on the contrary it is alleged that the tunnel has been cut through the coal, by which we understand it is in the very body or substance of the coal which

was bought by the defendant. It follows, hence, that the tunnel or way is exclusively within the defendant's own property, and is subject to such use as any owner may desire of property belonging to himself. Upon the whole case we think the disposition of it made by the learned court below was correct.

Judgment affirmed.

Sterrett, McCollum and Mitchell, JJ., dissent.

MISSISSIPPI SUPREME COURT.

M. B. LEE, Appt.,

v.

A. E. HAWKS.

(.....Mts.....)

Stipulation in a written lease giving the tenant the right to cut and use trees growing on the leased premises may be waived by parol.

(May 25, 1891.)

A PPEAL by plaintiff from a judgment of the Circuit Court for De Soto County in favor of defendant in an action brought to re-

cover damages for trespass in cutting timber. *Reversed.*

The case sufficiently appears in the opinion.

Messrs. Powell & Powell for appellant.

Mr. A. M. Solomon, for appellee:

Under the Statute of Frauds a verbal agreement could not be shown to contradict the written contract of lease, which had more than two years to run.

1 Greenl. Ev. §§ 802, 805.

Defendant having, by a written contract, acquired a right to the timber which was not severed from the soil, the alleged sale or transfer of the trees to plaintiff under a verbal con-

NOTE.—*Parol evidence to show waiver.*

The proposition of the principal case that parol evidence is competent to show a waiver of a right secured under the recitals of the written contract is enunciated in both early and late decisions. *Kwin v. Saunders*, 1 Cow. 249; *Robinson v. Batchelder*, 4 N. H. 40; *Richardson v. Hooper*, 13 Pick. 446; *Porter v. Stewart*, 2 Atk. 417; *Cube v. Jameson*, 82 N. C. 193; *Munroe v. Perkins*, 9 Pick. 298; *Goss v. Nugent*, 5 Barn. & Ad. 65; *Blood v. Enos*, 12 Vt. 626; *Grafton Bank v. Woodward*, 5 N. H. 99; *Batcliff v. Pemberton*, 1 Esp. 35; *Reed v. McGrew*, 6 Ohio, 375; *Keating v. Price*, 1 Johns. Cas. 22; *Cummings v. Arnold*, 3 Met. 486.

This rule is laid down by *Lord Denman* in *Goss v. Nugent*, *supra*, as a well-established principle. In these terms: "After the agreement has been reduced to writing, it is competent for the parties, at any time before breach of it, by a new contract, not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract" (*Harvey v. Graham*, 5 Ad. & El. 61). and this principle has been adopted in this country. See *Ernestson v. Slater*, 63 U. S. 23 How. 41, 16 L. ed. 306; *Munroe v. Perkins*, 9 Pick. 298; *Snow v. Ware*, 13 Met. 42; *Vicary v. Moore*, 2 Watts, 451; *Cummings v. Arnold*, 3 Met. 486; *Fleming v. Gilbert*, 3 Johns. 528; 1 Phill. Ev. Cow. & H. ed. 563.

While it is generally true that all prior and contemporaneous negotiations are merged in the written agreement of the parties, and parol evidence could not be received of such negotiations to vary, contradict, or alter the terms of the written agreement to ingraft a new condition, yet there is another rule equally important which allows a collateral agreement made prior to or contemporaneous with a written agreement, but not inconsistent with or affecting the terms, to be given in evidence. *Erskine v. Adeane*, L. R. 8 Ch. App. 756; *Morgan v. Griffith*, L. R. 6 Exch. 69; *Johnson v. Oppenheim*, 8 N. Y. 280.

It is quite necessary to remark that where on a consideration independent of a written instrument

a certain thing is to be done or omitted, parol evidence of such contemporaneous or antecedent agreement is admissible. *Lewis v. Seabury*, 74 N. Y. 409; *Rice*, Ev. p. 813.

Fleming v. Gilbert, 3 Johns. 528, was an action on a bond conditioned that the defendant would procure for plaintiff a certain bond and mortgage, and discharge the same of record. The defendant did procure them, offering to do whatever was necessary to discharge them, but the plaintiff agreed by parol to waive a performance if the defendant would do another thing, which he afterwards did. It was held that evidence of the substituted performance constituted a defense. *Munroe v. Perkins*, 9 Pick. 298, and *Lattimore v. Harsen*, 14 Johns. 380, are similar in principle. These cases go upon the ground that he who prevents a thing from being done by saying he will accept something else for it, shall not, after such acceptance, avail himself of the nonperformance he has occasioned. *Long v. Hartwell*, 34 N. J. L. 116.

Batterman v. Pierce, 3 Hill, 171, sustains the defense to a note given upon the sale of a lot of wood on plaintiff's land, which was based upon the proof that the plaintiff had verbally agreed, prior to the sale, that if anything occurred to the wood he would be accountable, and would guarantee the purchasers against any damage in consequence of his acts. The principle of the decision was that there were mutual stipulations between the parties, all made at the same time and relating to the same subject matter, and the whole engagement was open to proof. The cases of *Chapin v. Dobson*, 78 N. Y. 74; *Van Brunt v. Day*, 61 N. Y. 251, and *Brigg v. Hilton*, 1 Cent. Rep. 307, 99 N. Y. 517, fully sustain the proposition that in such a case, where the agreement of the plaintiffs rested in parol, it is open to proof. The rule which rejects parol evidence, when offered with respect to a contract between parties and put into writing, has no application to a case where, of the original agreement which has been executed a part only is in writing. *Routledge v. Worthington Co.*, 119 N. Y. 592.

That a party may waive a provision in a contract, see *note* to *Huthway v. Lynn* (Wis.) 6 L. R. A. 532.

tract was within the Statute of Frauds. This was transferring an interest in land.

Harrell v. Miller, 85 Miss. 700; 1 Benjamin, Sales, p. 153, and notes.

The original written contract could not be varied by a subsequent parol agreement.

1 Benjamin, Sales, p. 227, and notes.

Woods, J., delivered the opinion of the court:

It may be admitted that a contract for the sale of growing timber is within the Statute of Frauds, and must be in writing, but this does only touch the point involved in the ruling of the court below by which the parol evidence offered was excluded. This suit is for the recovery of damages for trespass in cutting certain trees on lands belonging to plaintiff, and is not an action on a contract required to be in writing. The contract of lease, under which defendant went into possession of the premises for a term of three years, was read to the jury in the examination of the plaintiff, on the trial of the cause, by which it was shown that the defendant acquired the right to cut and use the trees in question. As this alone would have defeated a recovery by plaintiff, he then offered to prove a parol agreement, made subsequent to the execution of the lease, by which for a valid consideration, as was offered to be proven, the defendant waived his right to cut and use the timber, by way of meeting the defense made for the defendant by the contract of lease. In effect, the matter stands as if plaintiff had sued for the trespass, and defendant

had pleaded justification under the written contract, and plaintiff had then offered to prove the parol agreement by way of defense to the plea. The Statute of Frauds debars one of an action on a contract, in certain cases, unless the contract be in writing; but a parol agreement to annul or waive a particular stipulation in the written contract which has been mutually assented to and fully performed, may be offered in evidence in defense of an action for a breach of the original written contract. An action may not be maintained, in cases within the Statute, upon a contract not in writing; but a defense may be made by showing an executed parol agreement waiving or annulling a particular provision of the written contract. The subject is not free from difficulty, and the discussions by text-writers, and the opinions of courts in reported cases, are full of subtle distinctions and refinements, nor is the current of authority clearly bent in any direction. The views briefly advanced hereinbefore are supported by some excellent authorities, and are agreeable to reason and justice. Benjamin, in his admirable work on Sales (p. 229), states the rule with his usual clearness: "Parol evidence to prove, not a substituted contract, but the assent of the defendant to a substituted mode of performance of the original contract, when that performance is completed, is admissible." See *Suain v. Seamens*, 76 U. S. 9 Wall. 255, 19 L. ed. 534; *Jackson v. Litch*, 62 Pa. 451; *Long v. Hartwell*, 34 N. J. L. 116; Reed, Stat. Fr. § 239.

Reversed and remanded.

GEORGIA SUPREME COURT.

CENTRAL RAILROAD & BANKING CO. of Georgia, *Plff. in Err.*,

v.

Maud A. RYLEE, by Next Friend.

(.....Ga.....)

*1. A deed made in 1869 to the defendant company, or its predecessor, conveying the land on which the yard of the Company is located, was irrelevant. An exception in the warranty of title which that deed contained would be no evidence that the public or any individual had a right of way or used the premises as a pass-way at the time the accident occurred, the exception merely

*Head notes by SIMMONS, J.

excluding from the warranty, rights, if any, that may have grown up previous to the execution of the deed. Other evidence tending to show how the premises were used before they became the railroad yard of the Company was irrelevant, and therefore inadmissible.

2. Though the analogies of criminal law touching presumptions as to the age of discretion are properly regarded by a court in ruling upon a demurrer where contributory negligence by an infant is involved (as was decided by this court in *Rhodes v. Georgia R. & Bkg. Co.* 34 Ga. 280), it is doubtful whether these analogies have relevancy on the trial of the case before the jury. It would seem the better rule would be for the jury to deal with

NOTE.—*Negligence in passing between or under cars.*

To pass between cars while a train is temporarily stopping at a station is a risk which a person has no right to take, and which will prevent any right of action against the railroad company if he is caught and injured by so doing. *Lake Shore & M. S. R. Co. v. Pinchin*, 11 West. Rep. 247, 112 Ind. 502; *O'Mara v. Delaware & H. Canal Co.* 18 Hun. 192; *Memphis & C. R. Co. v. Copeland*, 61 Ala. 376; *Stillson v. Hannibal & St. J. R. Co.* 67 Mo. 671; *Lewis v. Baltimore & O. R. Co.* 38 Md. 568.

In the case last cited this rule was applied where a child eight or nine years old was injured while attempting to pass through an opening not more than twenty inches wide several feet from the line of a street which was blocked by a train. But in a Pennsylvania case it was held that a recovery

might be had against a railroad company for an injury to a child by the starting of a train without warning while he was trying to pass under it. *Philadelphia & W. B. R. Co. v. Laver*, 3 Cent. Rep. 381, 112 Pa. 414.

Implied license to go upon railroad track.

Long acquiescence in a custom of the public to pass over a railroad track amounts to a license by the railroad company, and makes it liable for the lack of ordinary care toward persons thus upon the track. *Swift v. Staten Island Rapid Transit R. Co.* 123 N. Y. 645; *Bryne v. New York Cent. & H. R. R. Co.* 6 Cent. Rep. 302, 104 N. Y. 302; *Barry v. New York Cent. & H. R. R. Co.* 32 N. Y. 228; *Taylor v. Delaware & H. Canal Co.* 4 Cent. Rep. 623, 113 Pa. 102; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 9

each case on its own facts; unhampered by presumptions of law either for or against the competency of the child. In the present case, however, the charge of the court on this subject, if erroneous, was harmless.

3. Only express consent would serve to license a thoroughfare under stationary cars. Mere knowledge by a railroad company or its servants that numerous persons, including children, without any public or private right of way, passed daily and hourly through its yard, situate in or near a populous part of the city, and crawled under stationary cars occupying its tracks, will not render it liable for an injury accruing to a child by a sudden and involuntary movement of a long line of such cars, resulting from the negligence of the company's servants in handling other cars several hundred yards distant from the scene of the accident, such other cars rolling against the standing cars and setting them in motion while the child was passing under one of them.

4. The other grounds of the motion are not cause for a new trial.

(July 13, 1891.)

ERROR to the City Court of Atlanta City to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Calhoun, King & Spalding and **J. T. Pendleton**, for plaintiff in error:

A railroad company owes no duty to persons who have no right to be upon its tracks, except not to intentionally injure them. This is true, although it may have permitted people to cross the tracks without objection, where there was no public crossing, thus giving an implied license to do so. The licensees who avail themselves of the license must take the risk of danger.

Wharton, Neg. § 388 a.; 1 Thomp. Neg. 158; Sutton v. New York Cent. & H. R. Co. 66 N. Y. 243; Motze v. New York Cent. & H. R. R. Co. 1 Hun, 417; Illinois R. Co. v. Godfrey, 71 Ill. 500; Illinois Cent. R. Co. v. Hetherington, 83 Ill. 510; Johnson v. Boston & M. R. Co. 125 Mass. 75; Morrissey v. Eastern R. Co. 126 Mass. 377; Vanderbeck v. Hindry, 84 N. J. L. 467; Nicholson v. Erie R. Co. 41 N. Y. 525; Gaynor v. Old Colony & N. R. Co. 100 Mass. 214; Jeffersonville, M. & I. R. Co. v. Goldsmith, 47 Ind. 43; Galena & C. U. R. Co. v. Jacobs, 20 Ill. 478; Sweeney v. Old Colony & N. R. Co. 10 Allen, 372; Gillis v. Pennsylvania R. Co. 59 Pa. 129; Wright v. Boston & A. R. Co. 2 New Eng. Rep. 725, 142 Mass. 296, 28 Am.

West. Rep. 428, 45 Ohio St. 11; Palmer v. Chicago, St. L. & P. R. Co. 11 West. Rep. 676, 112 Ind. 260; Davis v. Chicago & N. W. R. Co. 58 Wis. 646; Troy v. Cape Fear & Y. V. R. Co. 99 N. C. 298.

An invitation to the public to use a railroad crossing as a highway may be established by use with permission of the company, even if the crossing leads only to private premises. *Hanks v. Boston & A. R. Co. 147 Mass. 485.*

So it was held that increased vigilance was required of railroad employes to prevent injury to members of a family who were in the habit of crossing the track from their dwelling to a well between which the railroad had been built. *Isabel v. Hannibal & St. J. R. Co. 60 Mo. 476.*

Although there may be no statutory duty to **13 L. R. A.**

& Eng. R. R. Cas. 652; Hanks v. Boston & A. R. Co. 147 Mass. 495, 35 Am. & Eng. R. R. Cas. 321; Morgan v. Pennsylvania R. Co. 7 Fed. Rep. 78; Rome R. Co. v. Tolbert, 85 Ga. 447; Bulger v. Albany R. Co. 42 N. Y. 459; Chicago & A. R. Co. v. McLaughlin, 47 Ill. 265; Burke v. Broadway & S. Ave. R. Co. 49 Barb. 529; McKenna v. New York Cent. & H. R. R. Co. 8 Daly, 804; Hearn v. St. Charles Street R. Co. 84 La. Ann. 180.

Though a standing railway train be an unauthorized obstruction of a public crossing, a person attempting to pass between the cars by climbing over the platform and bumpers, if injured thereby in consequence of a sudden movement of the train, cannot recover unless the engineer, conductor or some other person having control of the train's movements knew of his attempt to cross or had notice of his exposure to danger.

Andrews v. Central R. & Bkg. Co. 10 L. R. A. 58, 86 Ga. 192.

There can be no license to crawl under cars. *Grinold v. Chicago & N. W. R. Co. 64 Wis. 652, 28 Am. & Eng. R. R. Cas. 468.*

The plaintiff must exercise ordinary care or be responsible for ordinary care, whether she knew what ordinary care was or not.

White v. Central R. & Bkg. Co. 88 Ga. 595. She lacked one month of being nine years old; she was a smart, sprightly girl and had lived for years within one hundred yards of of this place, and knew as well as anyone the danger of going under cars.

Moore v. Pennsylvania R. Co. 99 Pa. 301, 4 Am. & Eng. R. R. Cas. 572; Cauley v. Pittsburg, C. & St. L. R. Co. 95 Pa. 398, 2 Am. & Eng. R. R. Cas. 4, 8.

A person who tries to use a track while the railroad is using it is a trespasser.

Central R. Co. v. Thompson, 76 Ga. 772; Wilds v. Brunswick & W. R. Co. 82 Ga. 669.

A serious trespass which exposes the trespasser to danger will bar a recovery.

Central R. Co. v. Brinson, 70 Ga. 207; Central R. Co. v. Thompson, 76 Ga. 772; Western & A. R. Co. v. Meigs, 74 Ga. 857; Baston v. Georgia R. Co. 60 Ga. 839.

Due care is the rule, and not ordinary care. *Western & A. R. Co. v. Young, 81 Ga. 397, 415, 83 Ga. 512, 518.*

Messrs. Hoke Smith and Burton Smith for defendant in error.

Simmons, J., delivered the opinion of the court:

Maud Rylee, by her next friend, brought

signal the approach of a train to a path across the track which the public has been permitted to use, the failure of such signals may constitute negligence. *Houston & T. C. R. Co. v. Boozer, 70 Tex. 580.*

A railroad company was also held liable for negligently backing a gravel train over a school girl six years old at a crossing which school children were in the habit of using, although not a public highway. *Bellefontaine & I. R. Co. v. Snyder, 18 Ohio St. 399.*

By a similar application of the principle as to license it is held that boys are not trespassers in riding on a freight train if they have been habitually allowed to do so. *Eciff v. Wabash, St. L. & P. R. Co. 7 West. Rep. 462, 64 Mich. 196. B. A. R.*

her action against the defendant for damages. So far as specifically enumerated, the facts in the declaration (excluding certain mere conclusions therein stated, and which, in connection with the specific facts alleged, made the declaration good against a demurrer) were substantially proved, and were as follows: The defendant Company had a yard in which it left stationary cars. Two streets ended at this yard, but there was a pass-way from one of these streets to the shops of another railroad company; and this pass-way was used by men, women, and children at all hours of the day, and was so used with the knowledge of the defendant. The places at which the people were accustomed to pass were, at the time of the injury, occupied by stationary cars, and "the line of cars stretched as far as the eye could see." The plaintiff was under nine years of age, and was going to the shops of another railroad to carry a meal to one of the employes. When she reached the place where people usually crossed she found it occupied by these stationary cars. There was no way for her to cross except by passing under the cars. Children in the neighborhood were in the habit of passing beneath the cars while standing at the place. In attempting to pass under one of the stationary cars she was injured. The injury was occasioned by the employes of the defendant "kicking" other cars from a quarter of a mile above where the child was, and out of sight, and these cars ran down and "kicked" the stationary cars, so as to cause them to move, and the one under which the child was ran over her leg. The plaintiff further proved that people were in the habit of crossing at this place before the Railroad Company established its yard. The plaintiff also introduced the deed by which the defendant Company obtained title to this property, dated in 1869, in which it was recited that the Company then claimed and had possession of the premises therein described, which were also claimed by the vendors, who had brought ejectment against the Company, which, to settle the action, and to obtain an undisputed warranty title to the premises in fee simple, had, by way of compromise, and without surrendering its former claim or conceding the invalidity thereof, agreed to pay the vendors \$2,000, for which consideration the vendors warranted the title to the premises against the claims of all persons whatsoever; but this warranty was not to extend to any right the Western & Atlantic Railroad and certain other named persons might have to remove the buildings, tracks, or other structures erected by them on the premises, "nor to any right of way the public may have acquired in streets, ways, or roads over, across, or upon said premises." The defendant objected to the admission of this deed in evidence, "because it showed no use by the public of a pass-way across its tracks, and because, if it did, it showed a right to use by the public, whereas this suit is to recover on the ground of permissive use by the defendant." The objection was overruled, and the defendant excepted. A witness for the plaintiff testified that he had lived on Mechanic Street since 1863; that it

was a common wagon-way until about 1870. From 1855 to 1860 there was no obstruction across the old Monroe track. "We passed on just as though it continued a street. We walked on it, and drove on it, and rode on it." The defendant moved to rule this out, because it did not show a permissive use by the defendant to pass over its tracks, but referred to a use at a time prior to the occupancy of the place by tracks, and before its ownership by the defendant. This objection was overruled, and the defendant assigns error thereon.

1. Counsel for the plaintiff insisted that the deed was admissible because the exception in the warranty showed that at the time the Railroad Company bought the land people were using the place as a pass-way, and thus brought home knowledge to the Company of this fact. The deed was clearly inadmissible and irrelevant. While the warranty in the deed was a limited one, it was not the purpose of the grantors in making the limitation to assert or to give notice to the grantee that the public had acquired the right to pass over the land. The grantors only intended to limit their liability in case it should subsequently appear that the public asserted a right to use the land as a pass-way. The limitation in the warranty does not give notice, nor was it intended to give notice, to the grantee that the public had acquired or were exercising the right of passage over the land. The other evidence tending to show how the premises were used before they became the railroad yard of the Company was also irrelevant and inadmissible. The Company could not be bound by the use made of the premises by the permission or acquiescence of its former owner. The Company purchased it for the purpose of laying tracks and running cars thereon, and for the purpose of keeping other cars standing on it when not in use,—a purpose totally inconsistent with the former use by the public. The purpose for which the Company purchased the land, to wit, to lay tracks, and keep standing cars thereon, destroyed the former use by the public. It was, in effect, a notice to the public that the land could not be used longer as a pass-way. It seems, therefore, it would be absurd to hold that the Company was bound to recognize the former use made of this land by the public.

2. The judge charged the jury that "the law declares that an infant under the age of ten years *prima facie* does not have sufficient capacity and discretion and knowledge of right and wrong to make her responsible for her conduct and acts, unless it is clearly shown that she had such capacity and discretion. The presumption is that she did not have sufficient capacity to be sensible of danger, and to have the power to avoid it, and this presumption continues until overcome by proof showing the contrary." This charge was excepted to by the defendant, and assigned as error in its motion for a new trial. Where a child under fourteen years of age is injured, and brings his action for the injury, and there is a demurrer to the declaration on the ground that the allegations therein

show that the child did not observe due care, or could have avoided the injury by the observance of such care, the court may overrule the demurrer on the ground that prima facie the child did not have sufficient knowledge or capacity to know what was due care, or sufficient capacity to have avoided the injury by its observance, and may invoke the analogy of the criminal law, and hold that the presumption is that the child did not know or did not have sufficient capacity, as was held in the case of *Rhodes v. Georgia & R. Rky. Co.*, 84 Ga. 320. But where there is no demurrer, and the case is submitted to the jury, there is no presumption one way or the other, and the jury must find from the evidence whether the child had sufficient capacity at the time of the accident to know the danger, and to observe due care for its own protection. If it has such capacity, and voluntarily goes into danger or to a dangerous place, it cannot recover; otherwise it can. *Western & A. R. Co. v. Young*, 81 Ga. 397, 83 Ga. 512.

It depends altogether upon the capacity of the child at the time of the injury. The better rule would be for the jury to deal with each case upon its own facts, unhampered by presumptions of law either for or against the competency of the child. In the present case, however, the charge of the court on this subject, if erroneous, was harmless.

3. It was argued by counsel for the defendant in error that the fact that the people were allowed to use this place as a pass-way to go under these cars when they were stationed upon the track was a license by the Company for them to do so, and the Company was therefore bound, before it moved the stationary cars, to give the public notice; and, not having done so in this instance, it was guilty of such negligence as would authorize the plaintiff to recover. It is such gross negligence and want of care and so reckless an act for persons to attempt to pass under cars which are left standing upon the track and are liable to be moved at any moment, that we do not think a license can be implied from the fact that the Company had knowledge that people were in the habit of passing under the cars there. Where, under such circumstances, a person attempts to pass under the cars and is injured, before he can recover upon the theory that he had a license to pass under the

cars, he must prove to the satisfaction of the jury an express license from the Company. It would be unreasonable to hold the Company bound by an implied license or permission when the Act is of such a negligent character. It would be unreasonable to hold the Company bound by an implied license when it is occupying the track with its own cars. It would be unreasonable to hold that it had agreed that others might have a joint occupancy of the tracks at the time the Company was using them for its own purposes. The joint use by the Company and by the public of the tracks at the same time would be so inconsistent and so dangerous that the law will not imply a license from the Company to the public for such joint use. The placing of stationary cars in its yard on the tracks where people are accustomed to pass is notice to the public not to attempt to pass while the cars remain, and if a person undertakes to pass under the cars he does so at his peril. It is different where the public pass over a track which is occupied by a railroad company with its cars only a few times a day, and then when the track is not being used by the company. In a case of that kind, where the railroad company permits people to pass over its track when not in use by the company, the permission may amount to an implied license; but where the company is in continuous occupation of its tracks, either in running its cars or in keeping stationary cars thereon, a license will not be implied.

The facts of this case show that the cars constantly occupied these tracks; that this stationary train was more than a quarter of a mile long; and that at the upper end of the train the servants of the Company, negligently perhaps, kicked another train of cars against the stationary train and set it in motion, and thus injured the plaintiff. We do not think the mere knowledge by the Company or its servants that numerous persons passed daily and hourly through its yard, situated in a populous part of the city, and that they crawled under these stationary cars, will render the Company liable for an injury occurring to this child, under the facts above stated.

4. The other grounds of the motion are not cause for a new trial.

Judgment reversed.

VERMONT SUPREME COURT.

Joseph DURAN

STANDARD LIFE & ACCIDENT INSURANCE CO.

(...Vt....)

An injury received by slipping on the frozen ground while returning from a hunt-

NOTE.—Accident insurance; conditions in policy.

See notes to *Sheanon v. Pacific Mut. L. Ins. Co.*
18 L. R. A.

ing expedition or a visit of pleasure to one in an adjoining town on Sunday is within the provisions of an accident insurance policy exempting the insurer from liability where the violation of law is either the proximate or remote cause or condition of the injury, under statutes prohibiting hunting and traveling, except from necessity or charity, on Sunday.

(April 14, 1891.)

(Wis.) 9 L. R. A. 686; *Paul v. Travelers Ins. Co.* (N. Y.) 3 L. R. A. 443; *Union Mut. Acc. Assn. v. Frohard* (Ill.) 30 L. R. A. 863.

EXCEPTIONS by defendant to rulings of the Burlington City Court, made during the trial of an action brought to recover upon two policies of accident insurance which resulted in a judgment in favor of plaintiff. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. Seneca Haselton and L. F. Englesby, for defendant:

The insurance for which the plaintiff paid did not cover injuries resulting wholly or partly, directly or indirectly, from any violation of law on the part of the insured, whether such violation of law be regarded as a cause or a condition. Plaintiff's injury manifestly resulted from his gross violation of sections 4315 and 4316 of the Revised Laws with reference to the observance of Sunday.

In cases in which a wrong-doer has sought to escape responsibility for his tort to a Sunday traveler or laborer, some of the most eminent courts in this country, notwithstanding the resulting hardship, have held that the Sunday travel or labor was the direct and immediate cause of the injury.

Day v. Highland St. R. Co. 135 Mass. 113, and cases there cited; *Cratty v. Bangor*, 57 Me. 423. See also *Baldwin v. Barney*, 12 R. I. 392; *Platz v. Cohoes*, 89 N. Y. 228; *Johnson v. Irasburgh*, 47 Vt. 28; *Travelers Ins. Co. v. Seaver*, 86 U. S. 19 Wall. 531, 22 L. ed. 155, should be decisive of this case.

Messrs. W. L. Burnap and J. J. Earright, for plaintiff:

The only inquiry is, Did the plaintiff's injury result from any violation of law?

If the provision in the policy is susceptible of more than one construction, that one is to be adopted which will support the validity of the contract, and it will be strictly construed against the insurer.

Darrow v. Family Fund Soc. 6 L. R. A. 495, 116 N. Y. 537.

Conceding that a violation of some law was in progress at the time of the hurt, a relation must exist between such violation and the injury, to make the defense available; the injury must have been caused by the violation of law.

Bradley v. Mutual Ben. L. Ins. Co. 45 N. Y. 422.

The policy is not to be avoided because the assured had, just previous to the accident, been violating some law, unless the natural or direct operation of such violation caused the accident.

The hunting expedition and the visit, if brought within the range of consideration at all, were the remote and not the proximate cause.

In *Louisville, N. A. & C. R. Co. v. Buck*, 2 L. R. A. 524, 116 Ind. 566, the court says: "It is quite true that a plaintiff will in no case be permitted to recover where it is necessary for him to prove his own illegal act as a part of his cause of action, or where an essential element of his cause of action is his own violation of law."

Holt v. Green, 73 Pa. 198; *Hall v. Coppell*, 74 U. S. 7 Wall. 558, 19 L. ed. 248; *Steele v. Burkhardt*, 104 Mass. 59; *McGrath v. Merwin*, 112 Mass. 467.

But where he can prove his cause of action without proving he was violating the law, even 13 L. R. A.

though it appears incidentally that he was at the time acting in disobedience of some statute, unless his illegal act was the efficient or proximate cause of the injury complained of, a recovery may be sustained nevertheless.

Cooley, Torts, 178.

No violation of law was in progress at the time. The plaintiff was not hunting when he was hurt; he was walking home after having been visiting.

It was not because he was walking on Sunday that he was hurt. Had he received his injury while fighting, or committing a breach of the peace, or a burglary, it would be different, and within the line of cases where this defense has been permitted, as in—

Travelers Ins. Co. v. Seaver, 86 U. S. 19 Wall. 531, 22 L. ed. 155. See *Goetzman v. Connecticut Mut. L. Ins. Co.* 3 Hun, 517; *Murray v. New York L. Ins. Co.* 96 N. Y. 614; *Cluff v. Mut. Ben. L. Ins. Co.* 13 Allen, 308.

The words "violation of law" mean "crime." *Cluff v. Mutual Ben. L. Ins. Co.* 99 Mass. 326.

In using the term "violation of law" the Company could not have contemplated any violation not in itself importing personal peril—involving the doing of something which human experience has shown to be fraught with peril to the person.

Murray v. New York L. Ins. Co. supra.

Thompson, J., delivered the opinion of the court:

This is an action of assumpsit on two policies issued by defendant to plaintiff insuring him against accidental injuries. If the plaintiff has any ground of recovery, it rests wholly on these contracts of indemnity. A contract of insurance is to be construed according to its terms and the evident intent of the parties as gathered from the language used. All conditions involving forfeitures, as well as all exemptions, are to be construed strictly against the insurer, and most favorably for the insured. Yet the language of the contract is to be construed as a whole, is to receive a reasonable interpretation, and the risk is not to be extended beyond what is fairly within the terms of the policy. *May, Ins.* 2d ed. §§ 172, 175; *Brink v. Merchants & M. Ins. Co.* 49 Vt. 440; *Mosley v. Vermont Mut. F. Ins. Co.* 55 Vt. 100; *Darrow v. Family Fund Soc.* 116 N. Y. 537, 6 L. R. A. 495; *Mutual Assur. Soc. v. Scottish Union & N. Ins. Co.* 84 Va. 116.

Each policy contains the following clause: "This insurance does not cover . . . injury resulting wholly or partly, directly or indirectly, from any of the following acts, causes, or conditions, or when effected by any such act, cause, or condition, or under its influence." Then follows an enumeration of such acts, causes, or conditions, among which is "violation of law" by the insured. The injury for which plaintiff seeks to recover is an injury to his knee sustained by him on Sunday, January 20, 1889. The plaintiff and a companion, about 9 o'clock in the forenoon of that day, took guns and ammunition, and set out from Burlington on foot for Colchester on a hunting expedition. They traveled on the highway six or seven miles, and then took dinner with a Mr. Choates. After dinner they engaged in

hunting with Choates, who went with them as far as a Mr. Thayer's, where they stopped a short time. Here Choates left them, and the plaintiff and his companion started for home through a field, and, while crossing frozen plowed ground in the field to get to the highway, the plaintiff's foot slipped upon the frozen plowed ground, and his knee was injured. At the time of slipping he was carrying his gun. The accident occurred between 2 and 3 o'clock in the afternoon.

The defendant contends that the facts of the case bring it within the provisions of the policy in respect to violations of law, and that, therefore, the plaintiff cannot recover. Rev. Laws, § 4315, prohibits traveling on Sunday, except from necessity or charity, or visiting from house to house except from motives of humanity or charity, or for moral or religious edification. Rev. Laws, § 4316, prohibits hunting, shooting, pursuing, taking, or killing wild game, or other birds or animals, on Sunday. A person violating the provisions of either of these sections is to be fined. At the time of the accident, the plaintiff was engaged in hunting. He had his gun with him, and was ready to shoot any game he might see, whether in the field or on the highway on his way home. He started out to secure game wherever he might find it, and it does not appear that at the time of the accident he had abandoned this purpose. In hunting he was violating the law of this State. The traveling of the plaintiff was as much a part of his act of hunting as carrying his gun and ammunition or shooting or capturing game when the opportunity occurred in the course of the hunt. Without walking, the plaintiff could not have engaged in his hunt. Thus the accident was caused directly by plaintiff's violation of the law in hunting. The effect of the violation of the Sunday Law upon a person's right to recover for injuries received in the course of such violation has generally arisen in cases in which the defendant sought to escape responsibility for his own tort to a traveler or laborer. On this question the decisions have not been uniform. Some courts have held that the immediate cause of the injury was the travel or labor on Sunday, and that the plaintiff could not recover. Of this class of cases are *Day v. Highland St. R. Co.* 135 Mass. 113; *Cratty v. Bangor*, 57 Me. 423. Other able courts have held that a Sunday traveler or laborer, injured by the wrongful act or neglect of another, might recover upon the ground that the violation of the Sunday Law by the injured party is in the nature of a condition, rather than an immediate cause of the injury. To this effect are *Baldwin v. Barney*, 12 R. I. 392; *Platz v. Cohoes*, 89 N. Y. 219; *Sutton v. Wauwatosa*, 29 Wis. 21.

In *Johnson v. Irasburgh*, 47 Vt. 28, the court avoided the line of reasoning adopted in each of these classes of cases, by holding that a town was not bound to maintain a safe and sufficient highway for unlawful travel on Sunday or any other day, and that a person using the highway in violation of the Sunday Law was there at his own risk, there being no duty

or liability on the part of the town in respect to the highway except that imposed by statute. The plaintiff's right of recovery rests in contract; and not in tort. No act or neglect of the defendant caused or contributed to the plaintiff's injury. Were the reasoning in *Baldwin v. Barney*, *supra*, to be adopted, it would not avail the plaintiff, for, if being engaged in the unlawful expedition was not the immediate cause of his injury, it was certainly the condition causing it. The provision quoted from the policy excluded liability from any injury of which a violation of the law was the cause or condition producing it. It also expressly provides exemption from liability where violation of law is either the proximate or remote cause or condition producing the injury. In short, it is so drawn as to exempt from liability under the reasoning and the holding of the courts in both classes of cases cited.

The plaintiff contends in argument that he was not engaged in hunting at the time he received the injury, but was walking home after he had been visiting. Were this claim conceded, we do not see how it gives plaintiff any better ground for recovery. He was not out simply for open air and gentle exercise, without any object of business or pleasure, as in *Hamilton v. Boston*, 14 Allen, 475, but was traveling several miles and from town to town, on this theory, to make a visit for pleasure.

In *Cratty v. Bangor*, *supra*, the plaintiff was traveling on foot on Sunday with other persons to make a visit of pleasure to a friend, and it was held that he was traveling in violation of a statute prohibiting traveling on Sunday, unless for charity or necessity. The court further says that "no distinction is made between those who travel within town and those who travel from town to town." In going from Burlington to Colchester, and back, a distance of twelve or fourteen miles, to visit Choates for pleasure, or to hunt, the plaintiff was clearly violating the provisions of Rev. Laws, § 4315, prohibiting traveling on Sunday. Every step he took in making that trip was in and of itself a violation of law. In taking one of those steps he slipped and was injured. We think it would savor too strongly of hair-splitting refinement to hold that the injury was not directly caused by the violation of the law in traveling. But, in this view of the case, the exception in the policy exempts the defendant from liability, whether the traveling is held to be the cause or only a condition producing injury, or influencing it, directly or indirectly. The liability to accident must be greatly enhanced in the case of a person who, like the plaintiff, engages in hunting or traveling about the country on Sunday, in open violation of law, as compared with one who observes the law. The defendant has a right to say that it would not assume such increased risk. The defendant not having contracted to indemnify the plaintiff for the injury which he received, he cannot recover.

Judgment reversed, and judgment for defendant.

Moses M. KELSEY, Admr., etc., of James Roberts, Deceased,
v.

John KELLEY et al., Appts.

(.....Vt.....)

1. The separate estate of a married woman cannot, in favor of her deceased father's creditors, be charged with an amount which he was compelled to pay as surety for her husband.
2. The cost of repairs gratuitously made by a father on his married daughter's house while he was living with her, for his own benefit and without any expectation of payment or substantial benefit to the property, cannot after his death be charged against her separate estate for the benefit of his creditors.
3. Where a father advanced his married daughter money with the expectation that himself and his wife would live with her and be cared for in her family during their lives, and, after so living with her until, at a fair price for board, the amount would be exhausted, the parties entered into another agreement as to future support, the court will, after the mouth of the daughter has been closed by the death of the father and mother, consider the board as the full equivalent for the money furnished as the parties then treated it.
4. Although a conveyance of property in consideration of future support is void as against creditors, yet it will not be set aside at their instance after support has been furnished in reliance on it, which in value exceeds that of the property conveyed.

(March 23, 1891.)

APPEAL by defendants from a decree of the Chancery Court for Orleans County in favor of complainant in a suit brought to charge the separate estate of defendant Malina Kelley with money received by her from her father during his lifetime. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. C. A. Prouty and Edwards & Burke, for appellants:

To charge the separate estate of a married woman, it must affirmatively appear that credit was given her estate.

Priest v. Cone, 51 Vt. 495; *Dale v. Robinson*, Id. 20; *Sargeant v. French*, 54 Vt. 334.

NOTE.—Voluntary conveyances; consideration.

A voluntary conveyance may become valid, and even a fraudulent grant may be purged of the fraud, by matter *ex post facto*, whereby the fraudulent intent is abandoned and the grant confirmed for a good and valuable consideration. *Oriental Bank v. Haskins*, 3 Met. 332; *Thomas v. Goodwin*, 12 Mass. 140; *Crowninshield v. Kittredge*, 7 Met. 524; *Harvey v. Varney*, 98 Mass. 120.

So a voluntary deed has been made good by a subsequent marriage. *Andrews v. Jones*, 10 Ala. 400; *Bunnell v. Witherow*, 29 Ind. 123; *Smith v. Allen*, 5 Allen, 454; *Armfield v. Armfield*, Freem. Ch. 311; *Jones' App.*, 62 Pa. 324; *Herring v. Wickham*, 29 Gratt. 623; *Wood v. Jackson*, 8 Wend. 38.

A valuable or meritorious consideration is founded on something deemed valuable, as money, goods, services and marriage; and a voluntary or good consideration is founded upon natural love and affection between near relatives by blood. *Wickes v. Clarke*, 8 Paige, 161, 4 L. ed. 384; *Van Derveer v. Wright*, 6 Barb. 549.

Considering that the conveyance for future support would be voidable as to a prior debt when made, it was voidable at that time because no valuable consideration passed. Afterwards a valuable consideration did pass; and from the date of the passing of that consideration, the conveyance ceased to be voidable.

It is important to notice the distinction between this conveyance and one fraudulent in fact. In the latter case the transaction is void as to both prior and subsequent debts.

McLane v. Johnson, 48 Vt. 49.

In the former case it is only void as to existing debts.

Brackett v. Waite, 4 Vt. 369; *Rutland & B. R. Co. v. Powers*, 25 Vt. 15. See also *Foster v. Foster*, 56 Vt. 551; *Church v. Chapin*, 35 Vt. 223.

If a voluntary conveyance be made, which is voidable when made because voluntary, and subsequently a good consideration passes, the deed ceases to be voidable from the passing of such consideration.

Jones v. Bryant, 13 N. H. 59; *Rarker v. Abell*, 8 B. Mon. 556; *Wood v. Jackson*, 8 Wend. 25; *Verplank v. Sterry*, 13 Johns. 555; *Sterry v. Arden*, 1 Johns. Ch. 258, 1 L. ed. 183.

It has even been held that where the original conveyance is fraudulent in fact, the transaction may be purged of its taint by the passing of a subsequent valuable consideration, provided the consideration be paid before the bringing of the suit to set aside the conveyance.

Thomas v. Goodwin, 12 Mass. 140; *Hutchins v. Sprague*, 4 N. H. 469.

This conveyance was not void. It was merely voidable.

Wait, Fraud. Conv. § 817. See *Allen v. Mover*, 17 Vt. 68.

Messrs. Dickerman & Young, for appellee:

Orator is entitled to a decree, as rendered below, for the amount of the Hopkinson note of \$600, delivered to defendant Malina by the deceased, March 23, 1884, in consideration of the bond for the future support of said Roberts and wife through life. Therefore the transaction was fraudulent and void in law as to creditors and gave defendants no right or title to the money received on the note as against them so long as their claims remained unpaid.

Consideration of support and maintenance.

A grantee by accepting the deed and entering into possession under it is bound by the agreement providing for the support of the grantor. *Hutchinson v. Hutchinson*, 46 Me. 154; *Exum v. Cauty*, 34 Miss. 523; *Spalding v. Hallenbeck*, 30 Barb. 202; *Shontz v. Brown*, 21 Pa. 123; the case of *Jackson v. Florence*, 16 Johns. 47, distinguished where the provision for support raised no obligation on the grantee. 2 Devlin, Deeds, § 807. See *Henderson v. Hunton*, 26 Gratt. 923.

Where, after executing a lease in consideration that lessees should occupy the premises and support the lessor during life, the lessor executes a deed to the lessees in fee, providing that if the latter conform strictly to the agreements in the lease the deed shall remain in full force and effect and take effect at the grantor's death, the grantees are entitled to retain the possession so long as they comply with the covenants to support and care for the grantor; and it is immaterial whether the legal title passed in present or not. *Stanton v. Allen*, 38 S. C. 537.

Crane v. Stickles, 15 Vt. 252-257; *Jones v. Spear*, 21 Vt. 426-431; *Worthington v. Jones*, 23 Vt. 549; *Church v. Chapin*, 35 Vt. 223; *McLane v. Johnson*, 43 Vt. 48.

The master finds that "Roberts . . . went to live with defendants," not with defendant Malina. Consequently it is presumed that Mr. Roberts and wife boarded with defendant John Kelley. Therefore Mr. Roberts had the right to have any debt, either or both defendants owed him applied in payment *pro tanto* of his board. Where there are mutual accounts and no application is made by the parties, the court will apply the first credit or payment in satisfaction of the first debt or charge.

Pierce v. Knight, 31 Vt. 701; *St. Albans v. Failey*, 46 Vt. 448; *Langdon v. Bowen*, 46 Vt. 512.

This rule would apply the claim for board in satisfaction of the amount paid upon the suretyship obligations.

See *Roberts v. Kelley*, 51 Vt. 97.

All transactions which precede the date of the bond for support stand as mutual debits and credits, and should be treated as an open book account. Interest should be allowed upon the account.

Langdon v. Castleton, 30 Vt. 285; *Spencer v. Woodbridge*, 38 Vt. 492; *Goodnow v. Parsons*, 36 Vt. 46; *Davis v. Smith*, 48 Vt. 52.

Ross, J., delivered the opinion of the court:

The original bill proceeds upon the ground that the defendant wife had, in the lifetime of the intestate, her father, received from him various sums of money or loans, which she had not fully repaid, and the orator, as administrator, brings the bill to have the balance due ascertained, and made a charge upon the wife's real and personal property, that it may be available to him in the payment of the debts proved against the estate. He brings the bill in the interest of the creditors. After the master's report was filed, showing that none of the claimed sums were received by the wife as loans, the orator was allowed to amend his bill, by setting forth that she received the various sums charged in the original bill, which were found established by the master, under such circumstances that it would be fraudulent in law to allow her to retain the sums so received against the creditors, who have proved their debts against the father's estate. When these transactions transpired, to lay the foundation for a charge in equity upon the wife's separate property, the money must have been advanced upon the credit of the separate property, and for its benefit, or for the personal benefit of the wife. *Dale v. Robinson*, 51 Vt. 20; *Priest v. Com.* Id. 495.

1. Considering the scope of the bill, and the requisites necessary to constitute a charge in equity upon the wife's separate property, it is evident that the \$200 paid by the intestate as surety for the defendant husband cannot be considered. The scope of the bill, as amended, and the principles of equity law applicable to charging the wife's separate estate, do not permit a general accounting of all matters existing between the intestate and the defendants. They include such

matters only as the wife is interested in and as fall within the principles of the cases *supra*. It is not found that this sum was paid by the intestate upon the credit of the wife's property, or for its benefit, or for the wife's benefit; but it is found to have been paid by the intestate only as surety for the husband, and that it had no connection with the subsequent dealings between the intestate and the defendants, in which the wife or her property was interested.

2. The facts found by the master dispose of the \$468.25, which the intestate let the wife have in money, and which he expended in repairs upon the house, in 1874. During that year the intestate and his wife boarded with the defendants. He let them have \$200 in money, and laid out in repairs on the wife's house \$269.25. The master has found that the board of the intestate and his wife was more than enough to pay the \$200, which, he finds, the intestate expected would be taken up in board, and that the intestate made the repairs "to suit his own taste and convenience, consulting no one about them;" and that "it was not understood by either party that any money was to be paid the intestate for the repairs; and that what was not paid in board was done by the intestate and for his benefit." These facts fully sustain the disallowance of any part of this item by the master, especially when he has not found that the repairs materially enhanced the value of the premises or were necessary. The facts found show that at this time the property owned by the intestate was more in value than required to pay all the debts proved against the estate. These facts leave no ground for the contention of the orator that the balance of this item which remained unpaid by the board furnished the intestate and his wife should enter into the accounting in connection with the subsequent items. The law does not imply a promise to pay for repairs made as these were, without expectation of payment, and without it being found that they were of a substantial benefit to the property.

3. In the spring of 1879 the defendant wife purchased a farm; and the intestate paid \$1,000 towards it, with the expectation that he and his wife should live with and be cared for by the defendants. From that time to the time of the death of the intestate and his wife they did live with and were cared for by the defendants. At different times between the spring of 1879 and November, 1884, but at what times or in what sums is not found, the intestate furnished the defendant wife \$200, which was invested in personal property, for her benefit, to be used on the farm. The master has not found that any part of the \$200 was furnished subsequently to the arrangement made in March, 1884. He treats the \$200 in the same way he does the \$1,000, and has found no fact to show that it should be treated otherwise, except that he says that no evidence relating to interest upon any item was introduced; and that, as the particular times and amounts at and in which this item was furnished are not shown, he allows it as of November 4, 1884. From the manner in which the master has treated

the \$200, and from the facts he has found in regard to it, we do not think there is any just ground for the contention of the orator that this sum should be treated as furnished after the arrangement of March, 1884. If the master had so regarded it he would not have treated it in connection with and in the same way he has treated the \$1,000. Further than that, the intestate and his wife expected to live with and be cared for by the defendants. "All the transactions between the parties seem indefinite and without design. It was one of those frequent, unfortunate, and indefinite transactions which occur among relatives." He finds that at a fair price for boarding the intestate and his wife, in March, 1884, this \$1,200 had been more than overpaid; and the husband told the intestate that the money was all exhausted, and the intestate soon after entered into a further arrangement in regard to the future support of himself and wife. After the death of the intestate and his wife, and after the mouths of the defendants have become closed by the Statute, it would be hazardous for the master or court to attempt to treat the matter of the \$1,200 and board differently from what the parties then treated it, or the board as a full equivalent for the money furnished. We think they should be so considered.

In March, 1884, the intestate advanced to the defendant wife \$600 more by way of the Hopkinson note, which was used to make a further payment towards her farm, and took a bond from the defendants for the support of himself and wife during their natural lives. During the period covering all these transactions the defendant husband was insolvent. The defendants fully performed the condition of the bond, and, as found by the master, at an expense of more than the \$600 received therefor. The debts proved against the estate and represented by the orator were all contracted by the intestate before the transactions of 1879. By that transaction, and the transaction of 1884, the intestate disposed of substantially all his property for the support of himself and wife, without making any provision for the payment of these debts. The orator contends that this disposition of the property was in law fraudulent, as regards these creditors, although good between the parties, and although the defendants' agreement to support the intestate and his wife was, as between the parties, an ample and valid consideration for the money advanced. This contention is fully supported by the authorities cited. *Crane v. Sickles*, 15 Vt. 252; *Jones v. Spear*, 21 Vt. 426; *Worthington v. Jones*, 28 Vt. 549; *Church v. Chapin*, 35 Vt. 223. The other case cited (*McLane v. Johnson*, 43 Vt. 48) is one of fraud in fact, and not in law, and not applicable. The other cases proceed upon the ground that it is the legal duty of a debtor to pay his debts rather than provide for the future support of himself and family, and that existing creditors may avail themselves of property conveyed for future support for the payment of their debts. The creditor can avoid such conveyances only because the debtor has no other property out of which payment can be enforced. In none

of these cases, and in no case to which our attention has been called, has it been held that the creditor could wait until the support had been furnished, and the contract fully executed by both parties, and then recover enough of the value of the property conveyed for the support to pay his debt. In all the cases cited the identical property conveyed in consideration of future support, or some of it, was taken and appropriated by the creditor, except the case in 15 Vt.; and in that case it is said: "Perhaps the judgment of the county court would have been more technically correct if it had adjudged them trustees for the specific articles of personal property which they had received of the defendant, instead of adjudging them trustees generally," plainly indicating the course of proceeding which was followed in the other cases. This is a case in equity, in which the orator must do, as well as receive, equity. The master has not found that these transactions between the intestate and these defendants were tainted with fraud in fact, nor does the bill charge fraud in fact. If now, after the defendants have fully supported the intestate and his wife, at an expense greater than the money received, the orator can compel a return of the money received sufficient to pay the creditors represented by the orator, these defendants are left with a debt of an equal amount, also provable against the estate represented by the orator. Why should the creditors represented by the orator receive payment more than the defendants? The defendants have been guilty of no wrong in supporting their father and mother, nor was it any more of a wrong for them to receive payment for such support than for the creditors represented by the orator to receive payment for their debts. These creditors did not know of the existence of the property received by the defendants for the support, and did nothing on the strength of its existence. On the other hand, the defendants knew of it, and furnished the support for it. If they had furnished the support before receiving payment therefor, and then received the same property which they did receive, no one would claim that the orator could recover the property back, to pay the creditors represented by him. If the creditors represented by the orator had intervened before the defendants had furnished the support, they would have had the better right to the property, and the defendants have sustained no damage. Their intervention would have relieved the defendants from this contract to furnish further support. The consideration for this contract further to support would have been taken away. The defendants, until they had furnished the full support, were like a purchaser bona fide in every respect, except he had not fully paid the contract price of the property purchased. Where he must be a bona fide purchaser for value, to be protected in his purchase, if otherwise a bona fide purchaser, he is protected only to the extent he has paid value. But although he does not pay full value at the time of the purchase, if such payment is made in full before he is made aware of the infirmity of his purchase, he is fully pro-

tected. We think this principle applicable between the orator and these defendants, especially the wife, on the facts of this case. Conveyances of property to secure future support, until the support is furnished, have the infirmity of voluntary conveyances, or conveyances for which a full, valuable consideration is not paid at the time the conveyance is made. It is well settled that supineness of a creditor to attack and have such conveyances set aside may defeat his right. *Egleberger v. Kibler*, 1 Hill, Eq. 113, 26 Am. Dec. 192. Such conveyances may be validated by *ex post facto* acts. *Verplank v. Sterry*, 12 Johns. 536, 7 Am. Dec. 348.

While these cases are not analogous in

their facts to the facts in the case at bar, we think this case is controlled by the same equitable principles. When this suit was brought, in principle the defendants stood related to the money received for the support of the intestate and wife in equity, just as they would if they had first furnished the support, and then received the money in payment therefor. The intestate then might well prefer them, in making payment of his debts, to the creditors represented by the orator. We notice nothing in the testimony excepted to that was inadmissible in substance.

The decree of the Court of Chancery is reversed, and the cause remanded, with a mandate to dismiss the bill, with costs to the defendants.

CONNECTICUT SUPREME COURT OF ERRORS.

Charles H. DILLABY

v.

Betsy A. WILCOX, *Appt.*

(....Conn.....)

A verbal promise by the administrator of an estate holding a mortgage against a third person to pay taxes assessed against the mortgagor if the collector will not levy on the mortgaged property, upon which he has no lien, is within the Statute of Frauds and not enforceable.

(January 19, 1891.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for New London County in favor of plaintiff in an action brought to recover certain taxes which it was alleged defendant had agreed to pay. *Reversed.*

The facts are stated in the opinion.

Mr. S. Lucas for appellant.

Messrs. J. Halsey and W. A. Briscoe, for appellee:

The promise of the defendant was an original undertaking and therefore not within the Statute of Frauds. While it is true that the taxes in question were not a specific lien upon the personal property, nevertheless the plaintiff had a right to levy upon the equity of redemption in said property and to sell it for the taxes. In consideration of his promise to relinquish such right, the defendant undertook to pay the taxes when the property should have been sold under foreclosure.

See *Browne*, Stat. Fr. § 204; *Burr v. Wilcox*, 13 Allen, 273.

Forbearance at the request of the defendant, or any act done at defendant's request and for her convenience or to the inconvenience of the plaintiff, is a sufficient consideration for the promise.

Burr v. Wilcox, *supra*.

Seymour, J., delivered the opinion of the court:

The plaintiff in this case was collector of

taxes for the town, city, and central school-district of Norwich, and had in his hands warrants for the collection of taxes assessed in favor of each of them upon property of one Gordon Wilcox. The defendant and her mother were the administrators of the estate of William Wilcox, deceased, and, as such, held a mortgage on certain personal property of Gordon Wilcox, consisting of printing presses and material in the possession of and used by him in Norwich. The plaintiff was unable to procure payment of the taxes from Gordon Wilcox, and applied to the defendant for the payment thereof, and threatened to levy upon said mortgaged property unless they were paid. The defendant promised the plaintiff that if he would forbear to levy upon the property she would pay the taxes as soon as the property should be sold under the judgment of foreclosure which she and her mother, as administrators aforesaid, had obtained upon the mortgage. The plaintiff, in consideration of this promise of the defendant, promised to forbear, and did forbear, to levy upon the property, and the same was sold under the judgment of foreclosure, and was bid in for the defendant. The defendant, after the sale, refused to pay the amount of the taxes to the plaintiff, and they have not been paid. The suit, it will be observed, is against Mrs. Wilcox personally. No pleadings subsequent to the complaint appear to have been filed, but the finding shows that the defendant denied that she made the promise upon which the action was brought. She also claimed that the promise declared on was within the Statute of Frauds, and, not being in writing, no recovery could be had upon it; and, further, that there was no consideration for the promise, and asked the court so to rule; but the court refused so to do, and rendered judgment for the plaintiff, from which the defendant appeals. Was the promise, which the court finds was made, within the Statute of Frauds? The Statute provides that "no civil action shall be maintained upon any agreement whereby to charge any executor or administrator upon a special promise to answer damages out of his own estate, or against any person upon any special promise to answer for the debt, default, or miscarriage of another, . . . unless such agreement, or some memorandum thereof, be made in writing, and signed

NOTE.—Statute of Frauds; promise to answer for debt or default of another. See *note to Tighe v. Morrison* (N. Y.) 5 L. R. A. 617.

13 L. R. A.

by the party "to be charged therewith or his agent." Gen. Stat. § 1868.

The first clause has reference to promises by an executor or administrator to answer out of his own estate for a claim against his decedent,—some liability resting upon the executor or administrator strictly in his representative character, and which, but for the promise, he would have been liable to discharge only in due course of the administration of the estate. To change the expression, this clause of the Statute covers a special promise made by the executor or administrator to pay, out of his own estate, what (being the legal representative of the party originally liable) he is already, in that representative capacity, under a liability to pay, to the extent of the property which has come into his hands. "The particular object of this provision," says a recent writer upon the Statute, "was evidently to guard executors and administrators against being held to a personal liability to pay debts, legacies, or distributive shares in consequence of a willful or mistaken perversion of expressions of encouragement which they may have used in conversation with claimants, and which were not justified by the ultimate result of administration of the assets in their hands." Throop, Verb. Agr. p. 87. However that may be, the suggestion illustrates the nature of the promise referred to in this section. The promise proved, in the case before us, was to answer for the debt or default of Gordon Wilcox, a third party, and is a promise to which that clause has no reference. The suggestion that the defendant, if compelled to pay the judgment, can repay herself out of the assets of the estate, does not tend to bring the promise within the clause. Most of the personal obligations of an executor contracted in the course of his administration, says the court in *Chambers v. Robbins*, 28 Conn. 550, are proper charges against the estate in the final settlement of his account, but they are none the less his private debts, for which he is alone liable in his private capacity. In *Pratt v. Humphrey*, 22 Conn. 317, a leading case upon this clause, the promise was to pay a debt due from the estate of which the defendants were administrators,—an entirely different case from the one at bar.

The second clause of the Statute relates to the special promise of any person to answer for the debt, default, or miscarriage of another. An immense amount of litigation has arisen over its construction. It is impossible to reconcile the decisions which have been made under it. Almost any theory of its scope and meaning can find some case to support it. The most careful text-writers have acknowledged their inability to find anything like uniform rules of construction in the conflicting decisions which have been rendered. It has even been stated that the law upon it is in a state of hopeless confusion. It is all the more satisfactory, therefore, that our own court seems, so far at least as the points involved in this case are concerned, to have found and adopted a rule which has proved satisfactory,—a rule which, we think, substantially settles the question before us. The promisor, to briefly restate the facts, was one of the administrators of William Wilcox's estate,—a fact, as we have seen, of no significance, unless to

show a motive for her promise, founded on a fancied advantage to the estate of her decedent. The promisee was the collector of taxes, threatening to levy on personal property upon which he had no lien, and on which William Wilcox's estate held a mortgage. The levy, if made, would of course have been subject to such mortgage. The party for whose debt or default the promise to answer was made was a delinquent tax-payer, who, after the promise, continued liable for the taxes until paid. The suit, then, is by a tax-collector against a defendant, who, in consideration of the plaintiff's forbearance to levy for a third person's tax on personal property on which an estate of which she was one of the administrators had a mortgage, promised to pay taxes due to Norwich town and city and a school-district of the town from said taxpayer, the mortgagor of the property. In *Packer v. Benton*, 35 Conn. 343, it was held that "where a person, not before liable, agrees to pay the debt of a third person, and, as a part of the arrangement, the original debtor is discharged from his indebtedness, the agreement is not within the Statute of Frauds. Otherwise, if the original debtor continues liable." We shall quote somewhat extensively from that case, as the rule therein established has subsequently been applied in *Pratt's App.*, 41 Conn. 191, and in *Gridley v. Sumner*, 43 Conn. 16, and is, as already suggested, decisive of the case now before us. Judge Butler writes the opinion, and after contrasting the facts then before the court with those in *Clapp v. Lawton*, 31 Conn. 95, he says (p. 349): "Here the contract was tripartite, between the debtor, a creditor, and a third person; and it contemplated the discharge of the original debtor, and a new obligation by the third party to the particular creditor. Such new obligation and indebtedness is not within the Statute of Frauds. In *Turner v. Hubbard*, 2 Day, 457, the distinguished counsel for the defendant in error deduced, from the cases which had then occurred under this branch of the Statute, the following definition of the promise intended by it, to wit, 'an undertaking by a person not before liable, for the purpose of securing or performing the same duty for which the party for whom the undertaking is made is, at the same time, liable;' and it was adopted by the court. With a single modification, that definition furnishes as perfect a test as has ever been, or, we think, can be devised. . . . The foregoing definition may be modified, therefore, so as to read: 'An undertaking by a person not before liable, for the purpose of securing or performing the same duty for which the party for whom the undertaking is made continues liable.' Applying this test to the case in hand, it is obvious that the objection of the defendant ought not to prevail. It was the purpose and effect of the tripartite contract in question to discharge the original debtors in consideration of their giving up their property to the defendant, as well as to operate the defendant in consideration of that discharge. . . . As the original debtors did not continue liable, an essential element of the test was wanting, and the contract was not within the Statute."

In the case now before us all the essential elements of the test are present, and bring the

promise within the Statute. The case of *Packer v. Benton* does not discuss the questions which might arise in that class of cases, where the defendant, for his own use and advantage, procures from the plaintiff the surrender, release, or waiver of a lien or security which the latter holds for a debt due him, upon the promise to pay the debt. In such cases it has been held, in a large number of cases, that the promise is not within the Statute, though the original debt is not discharged, on the ground that the transaction amounts to a purchase from the creditor of such lien or security for a price which is the amount of the original debt, and that the relinquishment of the lien or security has inured to the defendant's benefit. In the leading case of *Fullam v. Adams*, 37 Vt. 391, it is held that "a verbal promise to pay the debt of another, where the original debt still subsists, is never legally binding, except where the promisor has received the funds or property of the debtor for the purpose of being so applied, so that an obligation or duty rests upon him, as between himself and the debtor, to make such payment, whereby his promise, though in form to pay the debt of another, is in fact a promise to perform an obligation or duty of his own." Poland, *Ch. J.*, who writes the opinion, says (p. 397) that the cases which decide that where a creditor holds a security and surrenders it to a third person, for his benefit, upon his promise to be answerable for the debt, stand really upon the same substantial principle.

It is stated in the text of the American and English Encyclopedia of Law, *in loco*, that, in a large and increasing number of the States of the Union, the promise, although made upon a new consideration of benefit to the promisor, is held to be collateral, whatever the intent of the parties, if the original liability remains; and a very large number of authorities are cited in support of the proposition. It is to be noticed, as illustrating the difference in construction already alluded to, that, in a recent case in New York (*White v. Rintoul*, 108 N. Y. 222, 10 Cent. Rep. 704) it is stated, though under a *semble*, that a promise to pay a debt of another, antecedently contracted, where the primary debt still subsists, is original, and so valid, within the Statutes of Frauds, although not in writing, when it is founded on a new consideration moving to the promisor, and beneficial to him, and when by the promise he comes under an independent duty of paying, irrespective of the liability of the principal debtor. Curiously enough, this intimation of an opinion—for it amounts to nothing more, as reported—is made in a case where the defendant was a creditor of a firm, and was secured by a chattel mortgage. The plaintiff was the holder of two notes of the firm, which were nearly matured. The defendant disclosed the fact that he held the mortgage, and promised to pay the notes if the plaintiff would forbear for a time. It was held that the promise was within the Statute. The court says: "The plaintiff contends that the defendant had a direct personal interest in procuring a forbearance to sue the firm, which he explains in his brief by saying that 'if the plaintiff pressed the collection of his notes, and did not wait till the then next summer, the defendant would

lose his money, which had been loaned to the firm.' But I do not discover a single fact in the case which tends to any such conclusion. . . . It was a fear without a foundation; a state of mind, and not a result of existing facts seen in their legal bearing. Delay on the part of the plaintiff is not shown to have been of the slightest consequence to the interest of the defendant." No more do we see in the case before us a single fact which shows that a levy by the collector, subject, as it must have been, to the mortgage, could have injured the defendant or the estate she represented. If she thought so, "it was a state of mind, and not a result of existing facts seen in their legal bearing;" and the decision of the case from which we are quoting seems to unmistakably favor her defense, though the *dictum* seem adverse. It is said in *Browne* on the Statute of Frauds, § 214e, that "the mere passing of a new and independent consideration between the plaintiff and defendant does not take the case out of the operation of the Statute; and, so far as some of the decisions depend upon the contrary, they cannot be regarded as law. Every contract of guaranty requires a consideration moving from the party to whom the guaranty is given. There can be no sensible distinction made between 'new and independent' considerations and any other considerations; and the general proposition that 'a new and independent consideration, moving between the parties to the contract of guaranty,' takes it out of the Statute, simply nullifies the Statute. The distinction is between a merely valid consideration for the defendant's promise of guaranty, and that transfer of value which creates an original obligation on the part of the defendant, the measure of which is, by the agreement of the parties, the defendant's payment of the third party's debt." It was suggested that the promise relied on was an original undertaking. We cannot look upon it as such, within the proper meaning of that word. It is a new promise to pay the already existing debt of a third party. The court says in *Mallory v. Gillett*, 21 N. Y. 412: "The words 'original' and 'collateral' are not in the Statute of Frauds, but they were used at an early day,—the one, to mark the obligation of a principal debtor; the other, that of the person who undertook to answer for such debt. This was, no doubt, an accurate use of language; but it has sometimes happened that, by losing sight of the exact ideas represented by these terms, the word 'original' has been used to characterize any new promise to pay an antecedent debt of another person. Such promises have been called 'original' because they are new; and then, as original undertakings are agreed not to be within the Statute of Frauds, so these new promises, it is often argued, are not within it. If the terms of the Statute were adhered to, or a more discriminating use were made of words not contained in it, there would be no danger of falling into errors of this description."

Where the person undertaking to pay the debt of another receives property or funds of the debtor for the purpose, his promise is in no proper sense an undertaking to answer for the debt of another, but an undertaking to apply the property or funds to such payment. The undertaking becomes then an independent one,

and the continuing obligation of the debtor becomes in a sense collateral to it. Whenever the new promise is merely collateral to the original debt, it must be in writing, whatever the consideration, and it remains collateral so long as the original debt still subsists as the principal debt. The decision at which we have arrived makes any discussion of the other questions presented on the record superfluous.

There is error in the judgment appealed from, and it is reversed.

The other Judges concur.

George BROWN

v.

George THROOP, App't

(.....Conn.....)

A parol agreement made in March permitting one who was to take possession of a farm as tenant April 1st next, under a lease for one year, to use the ice in an ice-house thereon without charge, if he would refill it so as to leave it filled when he surrendered possession, is not void as not to be performed within a year from the making of it.

(January 7, 1891.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Litchfield County denying his right to charge plaintiff with the cost of filling an ice-house on defendant's land with ice which plaintiff used while in possession of such land as tenant. *Affirmed.*

The facts are stated in the opinion.

Mr. R. E. Hall, for appellant:

It appears from the nature of the agreement that the parties understood at the time it was made that its full performance, the "leaving the ice-house full when he went away," by the plaintiff, was not to be performed in one year from that time.

This is within the Statute of Frauds.

Gen. Stat. § 1366; 1 Swift, Dig. *263; *Herrin v. Butters*, 20 Me. 119; *Peters v. Westbrook*, 19 Pick. 364; Wood, Stat. Fr. 495.

If it appears to have been the understanding of the parties to a contract that it was not to be completed within a year, though it might be, and was in fact, part performed within that time, it is within the Statute and cannot be enforced.

Boydell v. Drummond, 11 East, 142.

The whole scope of the agreement shows that the parties did not contemplate a complete performance within one year from the time it was made.

Herrin v. Butters, *supra*.

That the written contract or parol agreement is defeasible within the year will not take the case out of the Statute.

Wood, Stat. Fr. 494, and cases cited; 3 Parsons, Cont. 86, and *note q*.

Mr. H. B. Graves for appellee.

NOTE.—Statute of Frauds; contracts not to be performed within a year. See *notes to Seddon v. Rosenbaum* (Va.) 3 L. R. A. 387; *Lowman v. Sheets* (Ind.) 7 L. R. A. 784; *Wooldridge v. Stern* (Mo.) 9 L. R. A. 129.
13 L. R. A.

Andrews, Ch. J., delivered the opinion of the court:

This is an appeal from a judgment rendered by the court of Common Pleas in Litchfield County. Three reasons of appeal are given in the record. Only one is pursued in this court; the others may be disregarded. The one argued here is, "the court erred in admitting, against the objection of the defendant, the evidence of James E. Brown in relation to the agreement between the plaintiff and defendant in regard to leaving ice in the ice house when the plaintiff went away, made in the month of March, 1887." The plaintiff had had possession of and carried on a farm belonging to the defendant under a contract in writing—being substantially a letting and hiring on shares—from April 1, 1887, to April 1, 1888, and by a renewal till April 1, 1889, when he left. The parties disagreed about their accounts, and this suit was brought. Each party filed a bill of particulars containing a great number of items. The defendant in his bill had charged the plaintiff, under the date of February 5, 1887, the sum of \$23.70 "for getting ice." It appeared that when the plaintiff took possession of the farm on the 1st day of April, 1887, the ice-house thereon was filled with ice. This the plaintiff used during his occupancy of the farm, and refilled the ice-house with other ice; and when he left the premises on the 1st day of April, 1889, the ice-house was left as full of ice as it was when he took possession. The charge of \$23.70 was for getting the ice that was in the ice-house at the time the plaintiff took possession of the farm. The written contract contained no reference to the ice then in the ice-house, nor to any refilling of it with ice. To show that the defendant was not entitled to make said charge or to recover said sum of money, the plaintiff called James E. Brown as a witness, who testified that he was present upon the defendant's premises before the execution of the written contract, some time in the month of March, 1887, with the plaintiff and defendant, and heard them agree that, as the defendant had then filled the ice-house upon the premises in question, the plaintiff should have the same without charge, provided he refilled the ice-house, and left as much ice in it when he went away as there was then in it. The defendant objected to the evidence on the ground that it offended against that clause of the Statute of Frauds which provides that no action shall be maintained upon any agreement that is not to be performed within one year from the making thereof, unless it be in writing, etc. The objection was not well taken, and was properly overruled. There was no attempt to show an agreement not to be performed within a year. The testimony of the witness was that the plaintiff was to refill the ice-house, and leave as much ice in it when he went away as there then was. The defendant, in his objection and in his argument, quotes only the latter part, as though the fact of leaving the ice-house filled at the end of the year was the whole of the agreement. On the contrary, it was not the whole of the agreement, nor was it the essential part of the agreement. The real thing agreed to be done was the refilling the ice-house with ice, so that at the end of the term it could be left filled. The

ice-house could not be left full of ice on the 1st day of April unless it had been previously filled. It could not be filled except during the season for ice, and that was within a year. In respect to the charge for getting the ice, Mr. Throop was the actor. He was the plaintiff and Mr. Brown was the defendant. Mr. Throop asserted that such a condition of things existed as entitled him to charge Mr. Brown for getting the ice which was in the ice-house when Mr. Brown came on to the farm. Mr. Brown denied that any such state of things existed.

He insisted that there was a totally different state of facts. If the evidence to show Mr. Throop's contention be admissible, then Mr. Brown's evidence must be equally admissible, for they both relate to the same transaction. It would be a strange use of the Statute framed to prevent frauds to hold that it permits one side of an agreement to be proved, but forbids the other side to be shown.

There is no error in the judgment appealed from.

The other Judges concur.

INDIANA SUPREME COURT,

William H. CROWDER *et al.*, *Apple.*,

TOWN OF SULLIVAN *et al.*

(.....Ind.....)

1. A debt for the aggregate amount to become due on a contract by a city for electric lights to be furnished for a series of years at a certain sum per year is not incurred by the city at the time of making the contract. The debt for each year is incurred only when it has been earned.
2. Notice inviting proposals for a contract to furnish electric lights need not be given by a municipal corporation unless required by statute where payment is all to be made from the corporation treasury.
3. A mere licensee of the right to use streets does not obtain a monopoly or an exemption from subsequent reasonable police regulations.
4. A special license may be given for the use of streets by an electric light company although a general ordinance is necessary to make regulations as to the mode of using streets.

(June 13, 1891.)

APPEAL by complainants from a judgment of the Circuit Court for Sullivan County in favor of defendants in an action brought to enjoin defendant from paying for electric light which had been furnished to the town. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. Humphreys & Wolfe, Beasley & Williams, and J. H. Kelley for appellants.

Messrs. John T. Hays and Buff & Hays for appellees.

Elliott, J., delivered the opinion of the court:

The object of this suit is to enjoin the officers of the Town of Sullivan from paying to the Sullivan Electric Light & Power Co. compensation for furnishing the Town and its citizens with light. The theory upon which the complaint is constructed is that the contract with the company and the ordinance upon which it is founded, are void.

One of the grounds upon which the validity of the contract is assailed is that it creates an

indebtedness beyond the limits prescribed by the Statute. The law is against the appellants upon this point. They assume that the contract creates a debt for the aggregate of all the yearly payments provided for by the contract; and if this assumption is not valid, their position is untenable. That this assumption is not valid is clear. Where a municipal corporation contracts for a usual and necessary thing, such as water or light, and agrees to pay for it annually as furnished, the contract does not create an indebtedness for the aggregate sum of all the yearly installments; since the debt for each year does not come into existence until the compensation for each year has been earned. It may be true that the contract creates an obligation, for a breach of which an action for damages will lie; but it does not create a right of action for the unearned compensation. The earning of each year's compensation is essential to the existence of a debt. If municipal corporations cannot contract for a long period of time for such things as light or water, the result would be disastrous; for it is matter of common knowledge that it requires a large outlay of money to provide machinery and appliances for supplying towns and cities with light and water, and that no one will incur the necessary expense for such machinery and appliances if only short periods are allowed to be provided for by contract. The courts cannot presume that the Legislature meant to so cripple the municipalities of the State as to prevent them from securing light upon reasonable terms, and in the ordinary mode in which such a thing as electric light or gas is obtained. But it is unnecessary to discuss this point at greater length, for we regard the law upon it as settled by the adjudged cases. *Valparaiso v. Gardner*, 97 Ind. 1, and authorities cited; *New Albany v. McCullough*, 127 Ind. 500; *East St. Louis v. East St. Louis G. L. & C. Co.* 98 Ill. 415; *Erie's App.* 91 Pa. 398; *Grant v. Davenport*, 36 Iowa, 896; 1 Dillon, Mun. Corp. 4th ed. § 185.

The Statute confers upon municipal corporations authority to contract for electric lights, and does not require that notice should be given inviting proposals, nor does it require notice in any form. *Elliott, Supp.* § 794.

As the mode of making contracts is commit-

NOTE.—For authorities supporting the proposition that public contracts must be awarded to the lowest bidder and should comply with all statutory provisions relating to such awards, see *note to Fones Bros. Hardware Co. v. Erb (Ark.) ante*, 353.

ted to the discretion of the municipal authorities and they are not required to give notice, a contract may be awarded without giving notice. *Aurora v. Fox*, 78 Ind. 1.

If the municipality were endeavoring to levy a specific assessment upon individuals or upon private property, then notice would be required upon general principles; but there is no such attempt here, for the entire compensation is to be paid from the corporate treasury. There is a clear and important difference between cases where a debt is created payable out of general corporate revenues and cases where special assessments are laid upon property. See authorities cited note 1, Elliott, Roads & Streets, 343.

The right of the electric company to exercise corporate functions cannot be collaterally attacked. Where there is a statute authorizing the creation of a corporation, an attempt to comply with the Statute and an actual exercise of corporate functions, the existence of the corporation can only be destroyed by a direct proceeding. *Baker v. Neff*, 78 Ind. 68; *Williamson v. Kokomo Bldg. & L. Fund Asso.* 89 Ind. 389.

It is unquestionably true that a municipal corporation cannot grant to a private corporation the exclusive privilege of using its streets for the purpose of supplying the corporation or its citizens with light, water, fuel or the like. *Indianapolis Cable St. R. Co. v. Citizens St. R. Co.* 127 Ind. 869, 8 L. R. A. 589; *Citizens Gas & M. Co. v. Elwood*, 114 Ind. 382, 14 West. Rep. 92. See authorities cited in 2 Elliott, Roads & Streets, 332.

If the ordinance before us is to be construed as granting an exclusive privilege, it must be adjudged void in so far, at least, as it attempts to make such a grant. We are, however, quite well satisfied that the ordinance does not attempt to grant an exclusive privilege. It does, it is true, grant a right to use the streets of the Town; but it does not exclude their use by competing companies. It does not throttle competition, for it merely grants a license to use the streets. It cannot be held that permission to one company to use the streets excludes others; on the contrary, the grant of such a license leaves plenary power in the municipality to grant licenses to rival companies at any time. A licensee who obtains a right to use public streets does not obtain a monopoly. The right to grant other licenses remains open and unobstructed. Not only does the right to license other companies remain open, but the right to prescribe reasonable police regulations by a general ordinance also remains unimpaired. This is the effect of the decision in *Citizens' Gas & M. Co. v. Elwood*, *supra*.

A private corporation that obtains license to use the streets of a municipality takes it sub-
13 L. R. A.

ject to the power of the municipality to enact a general ordinance, such as that exercised in enacting police regulations; for a governmental power cannot be surrendered or bartered away even by express contract. But there is here no attempt to surrender or barter away this governmental power; for there is nothing more than a license to use the streets of the town. The decision in the case of *Citizens' Gas & M. Co. v. Elwood*, *supra*, was made upon an ordinance assuming to make a discrimination in favor of one company and thus exclude all others from using the streets of the town for supplying the citizens with fuel; and it cannot be regarded as denying the right to grant a license to a designated company, although it does deny the power to discriminate in favor of one company to the detriment of competing companies. When a municipality attempts to regulate the mode of using its streets it must do so by a general ordinance; but it does not follow that a general ordinance is essential to the validity of a license granted to a designated company. It is one thing to specifically license a corporation to lay pipes in a street or construct electric lines, and quite another to regulate the entire subject of supplying light, fuel, or the like for where the municipal authorities assume to legislate upon the entire subject, a general ordinance is required; but where they simply grant a privilege to use the streets and do not undertake to regulate the entire subject, a general ordinance is not indispensably necessary to authorize the licensee to use the streets. But neither by a general ordinance nor by special license can discriminations be made or monopolistic privileges be created. It is, however, often true that a privilege in its nature monopolistic, and, as shown in the case of *Indianapolis Cable St. R. Co. v. Citizens St. R. Co.*, *supra*, when this is so, the grant of the privilege is of necessity the grant of a monopolistic right; but in such a case the corporate grant does not create the monopoly. See authorities cited in notes 1, 2, and 3, Elliott on Roads and Streets, 567. In this instance, there is nothing more than the grant of a license; there is no attempt to create exclusive privileges nor any attempt to regulate the entire subject. The rights acquired under a mere permissive license are subject to control under the delegated governmental power vested in the municipality; for no licensee can acquire rights not subject to regulation under the police power delegated to local governmental instrumentalities. We have here no question of contract rights, for the question presented by the record is whether a special ordinance granting a permissive license to a designated corporation is effective.

Judgment affirmed.

ILLINOIS SUPREME COURT.

Philip S. KINGSLAND *et al.*, Appls.,Herman KOEPPE *et al.*

(.....ILL.....)

1. The liability intended to be assumed by a stranger to a promissory note, who places his name on the back of it, may be shown by parol.
2. In an action on a joint contract judgment cannot be rendered against one defendant by default and in favor of the others.

(March 3, 1891.)

APPEAL by plaintiffs from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of defendants, Koeppe, Klinge and Schwuchow, and against defendant Loring, in an action brought to recover the balance due on certain promissory notes executed by the Lake View Electric Light Company, which defendants were alleged to have guaranteed. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Tenney, Hawley & Coffeen*, for appellants:

The contract of an indorser of a note, as well as that of a guarantor, may with strict accuracy of language be termed a contract of guaranty; one being conditional, the other unconditional. It is almost universally the case that the name of the guarantor or indorser is signed in blank, with no words of contract over them. The law, however, supplies these words, and the written contract thus created is just as certain in the rights and liabilities arising under it, as any other written contract. When the blank indorsement of the payee appears on a note, the law implies the contract and consequent liability of an indorser, which is a guaranty of collection, or conditional guaranty. And parol evidence is not admissible to show that the contract, instead of being a conditional guaranty or guaranty of collection, is an absolute guaranty of payment.

Johnson v. Glover, 10 West. Rep. 125, 121 Ill. 283.

When a note in the hands of the payee has

NOTE.—*Parol evidence is admissible as between the immediate parties to a promissory note.*

An indorser may prove by parol, as against his immediate indorsee, that a blank indorsement was made for the purpose of collection. *Downer v. Chesebrough*, 35 Conn. 39; *McWhirt v. McKee*, 6 Kan. 412.

Some of the authorities maintain that parol evidence is inadmissible to control the construction of an irregular indorsement as against bona fide purchasers for value, and that such evidence is only admissible as between immediate parties to the transaction. *Houston v. Bruner*, 39 Ind. 333; *Browning v. Merritt*, 61 Ind. 425; *Schneider v. Schiffman*, 30 Mo. 571.

In Missouri, it is also held to be admissible against an indorsee after maturity (*Seymour v. Farrell*, 51 Mo. 95); but the better opinion is that, in every case where the signature on the back is in an ambiguous position, and the meaning can only be definitely ascertained by parol evidence, then parol evidence is admissible to prove its true character, even against a purchaser for value, for he can reasonably be charged with notice of this ambiguity. *Greenough v. Smead*, 3 Ohio St. 415; *Thacher v. Stevens*, 46 Conn. 561; *Rey v. Simpson*, 63 U. S. 22 How. 341, 16 L. ed. 230; *Good v. Martin*, 95 U. S. 96, 24 L. ed. 343; *Cavazos v. Trevino*, 73 U. S. 6 Wall. 73, 18 L. ed. 613; *Frank v. Liffenfeld*, 38 Gratt. 332; *Denton v. Peters*, L. R. 5 Q. B. 475.

It is always competent to show by parol evidence that the indorsement was made without consideration, as, for example, that it was made for the accommodation of the indorsee. *Breneman v. Furness*, 90 Pa. 186; *Hamburger v. Miller*, 48 Md. 325; *Morris v. Faurot*, 21 Ohio St. 155; *Cole v. Smith*, 29 Ia. Ann. 551; *Davis v. Morgan*, 64 N. C. 570; *Lovejoy v. Citizens Bank*, 23 Kan. 331; *Kirkham v. Boston*, 67 Ill. 599; *McCoon v. Biggs*, 2 Ill. 121; *Dennison v. Bacon*, 10 Johns. 198; *Foster v. Jolly*, 1 Cramp. M. & R. 703. See *Tiedeman*, Com. Paper, 274.

Subsequent failure of consideration may be shown by parol evidence, as well as by an original want of consideration. *Smith v. Carter*, 25 Wis. 283.

Discord with early decisions.

Some confusion has been thrown around this subject from what has been finally settled to have been 13 L. R. A.

an error, treating such an indorsement as a guaranty and charging the indorser as a maker or guarantor. This doctrine was advanced in *Herrick v. Carman*, 12 Johns. 180, and was adjudged in *Nelson v. Dubois*, 13 Johns. 175, and *Campbell v. Butler*, 14 Johns. 349.

It was attacked in *Dean v. Hall*, 17 Wend. 214, and in *Seabury v. Hungerford*, 2 Hill, 80, and was finally overthrown in *Hall v. Newcomb*, 3 Hill, 233, and the same case in error, 7 Hill, 416.

There are a few cases in the books which hold that a written contract of one kind may be turned into a contract of a different kind, by parol proof concerning the intention of the parties; that the indorser of a promissory note may, under certain circumstances, be charged as maker or guarantor; and that the guarantor of a promissory note may sometimes be charged as maker or indorser. Although these cases stand upon no principle, it has been a work of some time and difficulty to get rid of them. The court of errors was at first equally divided on the question, but after a second argument the court decided by a pretty strong vote to uphold contracts as they had been made by the parties, instead of making new contracts for them. *Seabury v. Hungerford*, 2 Hill, 80; *Hall v. Newcomb*, 3 Hill, 233, 7 Hill, 416, in error, and note, p. 426; *Manrow v. Durham*, 3 Hill, 587.

Whether parol evidence will be received to vary the contract which arises from such indorsement when it is made in blank, is not entirely settled. In *Johnson v. Martinus*, 9 N. J. L. 132, it was held that parol evidence was competent to overcome the implied contract which resulted from a blank indorsement, on the ground that such indorsement is an inchoate and imperfect contract, and not a written instrument, nor entitled to its effect, protection, or immunity. This decision was made on the authority of *Herrick v. Carman*, 10 Johns. 224; *Hill v. Ely*, 5 Serg. & R. 333; *Barker v. Prentiss*, 6 Mass. 430.

"There was no error in receiving the evidence of the verbal agreement and understanding of the parties at the time of the making of the note. The object was to show a partial or total failure of the consideration for the note, and for that purpose the evidence was admissible." *Peterson v. Johnson*, 23 Wis. 21, was just such a case, and is decisive of the

the name of a third person indorsed on it in blank, the law presumes a contract of guaranty.

Upon principle there would seem to be no difference between a contract of guaranty and one of indorsement, which would exclude parol evidence in one case, and admit it in the other.

It was decided in a number of cases, all prior to *Johnson v. Glover*, *supra*, that one who is, apparently, by reason of his blank indorsement, liable as guarantor, might show by parol that, in fact, his contract was that of indorser.

Boynton v. Pierce, 79 Ill. 145; *Stowell v. Raymond*, 83 Ill. 120; *Eberhart v. Page*, 89 Ill. 550.

After these decisions came the case of *Wornden v. Salter*, 90 Ill. 160, in which the principle was applied to a case apparently of indorsement, and it was held proper to show, by parol, that a blank indorsement by the payee was, in fact, a guaranty.

Three of the judges dissent from the decision, and in *Johnson v. Glover* it was expressly overruled.

But it was perfectly consistent with, and indeed, the logical result of, the cases which held that a contract of guaranty could be varied by parol. And when it was overruled those decisions went with it, and the principle stated in *Johnson v. Glover* applies with equal force

to contracts of guaranty and indorsement, and that case overrules all prior contrary decisions.

When the payee of a note indorses it in blank, a contract is created which cannot be varied by parol. And yet his signature on the note is entirely consistent with an agreement that he should not be liable in case of dishonor. It is necessary for him to indorse the note, in order to pass title, and there would seem to be good reason for holding that he might show that he indorsed merely for that purpose, and that it was agreed that he should not be held liable. Yet that such evidence is not admissible is well settled.

Courtney v. Hogan, 93 Ill. 101.

If this is so in a case where his signature is perfectly consistent with an agreement that he should not be liable, the reasoning applies with much greater force to a case where he could have signed for no other purpose than to assume a liability. The law does not and cannot presume that his act in signing is a mere idle ceremony, and it therefore presumes a contract of guaranty, just as it presumes a contract of indorsement from the signature of the payee.

Underwood v. Hossack, 88 Ill. 208.

Mr. S. P. Douthart for appellees.

Craig, J., delivered the opinion of the court. This was an action brought by Kingsland

point. Under the Wisconsin decisions (*Smith v. Carter*, 25 Wis. 288) and the same court has held that it is competent to show by parol evidence a contemporaneous agreement as to the manner in which a note is to be paid. *Jones v. Keyes*, 16 Wis. 582.

Whether parol evidence is allowed to determine the liability of the person signing before the payee is a matter upon which opinion is diverse. Many authorities take the ground that when it appears that the note was intended for the payee, or that the name was placed upon the back of the note before its delivery to the payee, that circumstance fixes the liability contracted as that of joint maker (*Good v. Martin*, 95 U. S. 94, 24 L. ed. 342; *Way v. Butterworth*, 108 Mass. 512), and excludes further inquiry. But this does not seem sufficient. See *Price v. Lavender*, 38 Ala. 390; *Hall v. Newcomb*, 7 Hill, 416; *Schneider v. Schiffman*, 20 Mo. 571; *Irish v. Cutter*, 31 Me. 536.

Others regard that circumstance as only determining that he cannot be regarded as an indorser, because he could not have had title to the note as indorsee, and as leaving it open for further inquiry whether he intended to be a joint maker or a guarantor. *Greenough v. Smead*, 3 Ohio St. 415.

In some cases it is held that he will be presumed to have signed for the payee's accommodation. *Barto v. Schenck*, 28 Pa. 447; *Schollenberger v. Nehf*, 28 Pa. 189; *Daniel*, Neg. Inst. § 715.

The doctrine of the principal case sustained.

While it is elementary law that parol evidence is incompetent to vary the terms of a written instrument, still it is equally well settled that, as between the original parties to commercial paper, such proof is admissible as will have a tendency to establish the character in which an indorser intended that he should be bound; and proof of this intention will countervail the prima facie presumptions which the law indulges with reference to the paper. *Kitley v. Gerrish*, 9 Cush. 104; *Sylvester v. Downer*, 20 Vt. 355; *Owings v. Baker*, 54 Md. 82; *Nurre v. Chittenden*, 56 Ind. 465; *Pierse v. Irvine*, 1 Minn. 369; *Strong v. Riker*, 16 Vt. 555; *Quin v. 13 L. R. A.*

Sterne, 26 Ga. 224; *Good v. Martin*, 95 U. S. 95, 24 L. ed. 343.

It has been held that a guaranty may be written by an indorsee over a blank indorsement, if such was the indorser's intention, and that such intention may be shown by parol. *Levi v. Mendell*, 1 Duvall, 77; *Ulen v. Kittredge*, 7 Mass. 233.

And it has been held that parol evidence is admissible to show that a blank indorsement was given by the indorser to the holder merely as a receipt or voucher on payment of the note by him as the maker's agent. *Davis v. Morgan*, 64 N. C. 570; *Andover v. Grafton*, 7 N. H. 298; 1 *Randolph*, Com. Paper, § 373.

Parol proof is admissible to show whether the indorsement was made before the indorsement of the payee, and before or after the instrument was delivered. If the indorsement was made before the payee became the holder of the note, then the party so indorsing the note may be charged as an original promisor. *Good v. Martin*, 95 U. S. 90, 24 L. ed. 341.

So parol evidence that one of two joint makers of a promissory note signed as surety, in order to let in the defense that he was discharged by the holder giving time to the principal debtor, with knowledge of the suretyship is admissible. *Hubbard v. Gurney*, 64 N. Y. 457, overruling *Campbell v. Tate*, 7 Laus. 370, and *Benjamin v. Arnold*, 2 Hun, 447, 5 Thomp. & C. 54. See generally, on this subject, *Rice*, Ev. p. 1137.

In *Free v. Hawkins*, 8 Taunt. 92, it was held that evidence of a parol agreement between the holder and the indorser of a promissory note, at time of making and indorsing it, that payment should not be demanded of the maker of the note at the time when it became due, nor until after the sale of certain estates of the maker, was inadmissible, because it controlled and varied the legal obligations of the indorser.

The extent to which parol evidence is admitted to explain or qualify the indorsement of commercial paper is the subject of an extended note to *Baxter Nat. Bank v. Talbot* (Mass.) *ante*, 52.

Bros. & Co., the appellants, against Koeppe, Schwuchon, Klinge, and Loring, to recover a balance due on certain promissory notes executed by the Lake View Electric Light Company, and payable to the plaintiffs. At the date of the execution of the notes by the corporation, the four defendants wrote their names across the back of the notes, and they were sued in this action as guarantors. On the trial in the circuit court, one of the defendants, Loring, withdrew his pleas, and judgment was rendered against him by default for the full amount claimed by the plaintiffs. Nothing need therefore be said as to him at present. The other defendants claimed that they were not guarantors of the notes, and offered parol evidence to show what the contract was between them and appellants at the time they placed their names on the backs of the notes. The court admitted the evidence, and, in the propositions of law submitted, held that it was competent to prove by parol evidence what the real contract between the parties was; and this ruling was affirmed in the appellate court. 85 Ill. App. 81.

Where the payee of a note indorses it by placing his name on the back of the instrument, a contract of indorsement is created; the liability assumed by the payee being established by the writing. Parol evidence to change or vary the terms or conditions of a contract is not admissible. *Mason v. Burton*, 54 Ill. 853; *Johnson v. Glover*, 121 Ill. 283, 10 West. Rep. 125; *Jones v. Albee*, 70 Ill. 84; *Woodward v. Foster*, 18 Gratt. 200.

But where a person who is not the payee of a promissory note, but a third party, places his name on the back thereof, a different question arises. In such case the rule long established in this State is that it may be shown by parol evidence what liability was intended to be assumed. In an early case (*Cushman v. Dement*, 4 Ill. 497), where a third party wrote his name across the back of a note, it was held that the indorsement was prima facie evidence of a liability in the capacity of a guarantor, but the legal presumption was liable to be rebutted by parol proof.

In *Boynnton v. Pierce*, 79 Ill. 145, where the obligation of a guarantor arose, it was expressly held that the presumption that a party, not the payee, who places his name on the back of a note is a guarantor, may be rebutted by parol evidence. In *Stovell v. Raymond*, 83 Ill. 120, where the question again arose, the same rule was declared. The question again arose in *Eberhart v. Page*, 89 Ill. 550, and in deciding the case it is said: "The indorsement of a note in blank by a third party raises a presumption only that it is intended thereby to assume the liability of guarantor, which may be rebutted by proof that the real agreement between the parties was different." From the cases cited it is apparent that this court is fully committed to the doctrine that, when a third party writes his name across the back of a promissory note, the presumption from the indorsement is that he assumed the liability of guarantor; yet parol evidence may be introduced to prove what liability was in fact assumed. It is conceded in the argument of appellants that the cases cited fully establish the rule indicated; but it is insisted that these cases were virtually over-

ruled by *Johnson v. Glover*, 121 Ill. 283, 10 West. Rep. 125. This is a misapprehension of the force and effect of that decision. In that case, Johnson, who was the payee of a note, indorsed it in blank, and the note subsequently fell into the hands of Glover, who sued Johnson as a guarantor; and it was held that he was not a guarantor, but an indorser, and that parol evidence was not admissible to vary or change the character of the liability he had assumed. It is there said: "The general rule is that the name of the payee appearing on the back of the instrument is evidence that he is indorser, and proves that he has assumed the liability of an indorser as fully as if the agreement was written out in words [citing authorities]. Parol evidence is no more admissible to contradict or vary this contract than any other written contract." What was decided in this case, and what was said, had reference solely to a payee of a promissory note who had indorsed the note in blank, and had no bearing whatever upon the rights or obligations of a third party who had placed his name on the back of a note. Moreover, it is manifest that there was no intention to overrule or modify the doctrine announced in *Boynnton v. Pierce*, 79 Ill. 145; *Stovell v. Raymond*, 83 Ill. 120; and *Eberhart v. Page*, 89 Ill. 550,—from the ruling in *Dewitt County Bank v. Nixon*, 125 Ill. 618.

This case was heard and decided some time after *Johnson v. Glover* had been decided, and the doctrine of *Boynnton*, *Stovell*, and *Eberhart* Cases was approved, and those cases were cited as sustaining the rule announced. We think, therefore, that the ruling of the circuit court, in the admission of evidence, that the defendants might resort to parol evidence to prove what contract was made between the parties was correct. The signature of the defendants written on the back of the notes was prima facie evidence that the defendants assumed the liability of guarantors; but whether the evidence introduced was sufficient to remove the legal presumption of guaranty was a question of fact for the trial court, who heard the cause without a jury, which does not arise here, and upon which we express no opinion. Whether the propositions of law held or refused by the court are technically accurate it will not be necessary to determine, as the judgment will have to be reversed on other grounds. What has already been said may be regarded as sufficient on another trial to obviate any supposed error in this regard.

As was said in the first part of this opinion, judgment was rendered against one of the defendants by default, and in the trial the court found in favor of the other defendants, and judgment was rendered in their favor against the plaintiffs. The plaintiffs now assign as error the rendition of judgment in their favor against one of the defendants. This error was well assigned. *Thayer v. Finley*, 36 Ill. 262.

The action was brought on a joint contract, and the general rule in such cases is that judgment must be rendered against all or none. *Davidson v. Bond*, 12 Ill. 84; *Clafin v. Dunne*, 129 Ill. 248.

The judgments of the Appellate and Circuit Courts will be reversed and the cause remanded to the Circuit Court.

NEW YORK COURT OF APPEALS (2d Div.).

Adolph TODE *et al.*, *Respts.*,v.
Lena GROSS, *Appt.*

(.....N. Y.....)

1. A five years' restriction on the use of a secret process and trade-marks sold with a business is not an illegal restraint of trade, though it applies not only to the seller but to those employed by or associated with her in the business.

2. A covenant by one selling a business that she, her father, husband and brother-in-law will refrain from communicating a secret recipe used in the business to anyone but the buyer and from using trade-marks connected with the business under a penalty of \$5,000 named as stipulated damage in case of a violation of the covenant within five years does not limit her liability for such damages to her own personal violation of the covenant, but extends it to a violation by any of the persons named.

3. "The penalty of \$5,000 which is hereby named as stipulated damages" for violation of a covenant made on the sale of a business not to reveal a secret process or use trade-marks belonging to the business is to be regarded as stipulated damages notwithstanding the use of the word "penalty."

(October 6, 1891.)

A PPEAL by defendant from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of a Special Term for Orange County in favor of plaintiffs in an action brought to recover the alleged stipulated damages for breach by defendant of her covenant not to permit certain persons to sell certain brands of cheese. *Affirmed.*

Statement by Vann, J.:

Action for breach of covenant to recover the sum of \$5,000 as stipulated damages. On the

NOTE.—Property in secrets; processes; recipes.

A secret process of manufacture, whether it is a proper subject for a patent or not is so far the property of the inventor or discoverer that he will be protected by the court of chancery against one who in violation of contract or any breach of confidence attempts to apply it to his own use or to disclose it to third persons. *Peabody v. Norfolk*, 98 Mass. 452; *Morison v. Moat*, 9 Hare, 241; *Yovatt v. Winyard*, 1 Jac. & W. 394.

The law is settled in accordance with these cases, although *Lord Eldon* in the early case of *Newbery v. James*, 2 Meriv. 446, inquired what means a court possessed of enforcing an injunction in such a case and a little later in the case of *Williams v. Williams*, 3 Meriv. 157, queried whether there was any right to such a remedy.

But a person has no right to the exclusive use of secret recipes further than to prevent them from being obtained or used by breach of trust or confidence. He cannot prevent their use by one who comes honestly to a knowledge of them and the latter may signify to the public that medicines which he makes are made according to such recipes. *Chadwick v. Covell*, 6 L. R. A. 339, 151 Mass. 190.

Thus a purchaser of recipes for medicines from the administrator of their deceased maker has a right to use them although they had been previously conveyed to a third person, and his own deed makes an exception of rights previously granted. *Ibid.*

Nor will the right of such a purchaser, if it is not exclusive, become so by the grant of the trade-name and trade-marks pertaining to medicines made according to the recipes. *Ibid.*

A person will be protected against disclosure of his own secret process in an action for account against him as a licensee of plaintiff's process where he sets up a plea of "secret process;" but he cannot refuse to give any discovery as to the extent of his use of plaintiff's process. *Ashworth v. Roberts*, L. R. 45 Ch. Div. 623.

A son to whom a secret recipe had been verbally communicated by his mother for the benefit of his brothers and sisters was held liable to account to them as trustee for the profits obtained from the recipe. *Green v. Folgham*, 1 Sim. & Stu. 398.

A clerk who stands by and sees another purchase of his employer's secret recipe without disclosing his own knowledge of its contents or claiming any right to use it may be enjoined by such purchaser 13 L. R. A.

on the ground of estoppel from afterwards setting up any such right. *Champlin v. Stoddart*, 30 Hun, 300.

Secret code or catalogue.

The inventor of a secret code or system of letters, figures and characters showing the cost and selling price of his wares and merchandise which he furnishes to his traveling salesmen has a property therein which the law will protect; and if the law is inadequate he may have a temporary injunction and receiver. *Simmons Hardware Co. v. Wasbel* (S. Dak.) 11 L. R. A. 267.

Where other parties have wrongfully or fraudulently obtained a knowledge of such code or system and the key thereto, and have copied it into a catalogue of their own, the court may take such marked catalogue into its possession through a receiver and retain it pending the action, and order it to be delivered up to the owner of the original catalogue, or at least that the secret marks shall be erased or canceled before returning it to its owner. *Ibid.*

Validity of contracts relating to secrets.

A contract to purchase the exclusive right to a secret art or process is not void as in restraint of trade. *Bryson v. Whitehead*, 1 Sim. & Stu. 74; *Vickery v. Welch*, 19 Pick. 523; *Jarvis v. Peck*, 10 Paige, 118, 4 L. ed. 910; *Alcock v. Gibberton*, 5 Duer, 76; *Hard v. Seeley*, 47 Barb. 433.

But an injunction will not lie to restrain the seller from revealing the secret to others at the suit of a purchaser whose payments are in default. *New York Chemical Co. v. Halleck*, 15 N. Y. Supp. 517.

But a trade, although not generally known to the public, cannot be held secret so as to justify a contract which is otherwise void in restraint of trade to restrain a partner after dissolution from engaging afterwards in the trade anywhere within the State, where it is carried on in three different towns of the State by persons not connected with the contract. *Taylor v. Blanchard*, 13 Allen, 374.

A contract of an employé not to disclose a secret of the business is valid and its violation may be prevented by injunction. *Peabody v. Norfolk*, 98 Mass. 452.

And assumpsit will lie for breach of an agreement by the defendant not to take advantage of the communication of a secret invention not yet patented, where he obtained a patent for himself in violation of the agreement. *Smith v. Dickenson*, 3 Bos. & P. 630. B. A. R.

15th of October, 1884, the defendant owned a cheese factory situate in the Town of Monroe, Orange County, comprising two parcels of land, with the buildings thereon, and a quantity of fixtures, machinery, and tools connected therewith. For some time prior, with the assistance of her husband, Conrad Gross, her brother-in-law, August Gross, and her father, John Hoffman, she had been engaged in the business of manufacturing cheese at said factory known as "Fromage de Brie," "Fromage d'Isigny," and "Neufchâtel." Such cheeses were made by a secret process known only to herself and her said agents. On the day last named, she entered into a sealed agreement with the plaintiffs, whereby she agreed to sell and transfer to them the said factory and all its belongings, together with the "good will, custom, trade-marks, and names used in and belonging to the said business," for the sum of \$25,000, to be paid and secured March 1, 1885, when possession was to be given. Said instrument contained a covenant on her part that she would "communicate after the first day of March, 1885, or cause to be communicated, to" said plaintiffs, "by Conrad Gross, John Hoffman, and August Gross, or one or other of them, the secret of the manufacture of the cheeses known as 'Fromage de Brie,' 'Neufchâtel,' and 'D'Isigny,' and the recipe therefor, and for each of them, and will instruct or cause to be instructed them, and each of them, in the manufacture thereof. And that she and the said Conrad Gross, John Hoffman, and August Gross will refrain from communicating the secret recipe and instructions for the manufacture of said cheeses, or either of them, to any and all persons other than the above-named parties of the second part [plaintiffs], and will also, after the first day of April, 1885, refrain from engaging in the business of making, manufacturing or vending of said cheeses, or either of them, and from the use of the trade-marks or names, or either of them, hereby agreed to be transferred in connection with said cheeses, or either of them, or with any similar product, under the penalty of five thousand dollars, which is hereby named as stipulated damages to be paid by the party of the first part [defendant], or her heirs, executors, administrators, or assigns, in case of a violation by the party of the first part [defendant] of this covenant, of this contract, or any part thereof, within five years from the date hereof." She further covenanted that she herself, as well as "said Conrad Gross, John Hoffman, and August Gross, during and up to and until the first day of May, 1885, shall continue and remain in said County of Orange, and from time to time, and at all reasonable times during said period, by herself, or by said Conrad Gross, John Hoffman, and August Gross, whenever so requested by the said parties of the second part [plaintiffs], impart to them, or either of them, the secret of making such cheeses, and each of them, and instruct them and each of them, in the process of manufacturing the same, and each of them, as fully as she or the said Conrad Gross, John Hoffman, or August Gross, or either of them, are informed concerning the same." Both parties appear to have duly kept and performed the agreement, except that, as the trial court found "subsequently to the 1st day of May,

13 J. R. A.

1885, Conrad Gross, the husband of defendant, went to New York City, and engaged in the business of selling 'foreign and domestic fruits, and all kinds of cheese and sausages, etc.,' . . . and while so engaged sold and personally delivered from his place of business to one John Wassung three boxes of cheese marked and named 'Fromage d'Isigny,' and having substantially the same trade-marks thereon as that sold by defendant to plaintiffs, and having stamped thereon the name 'Fromage d'Isigny,' and that said cheese so sold by him to said Wassung was a similar product to that formerly manufactured by defendant." Also, that "said August Gross, the brother-in-law of defendant, subsequent to the 1st day of May, 1885, engaged in the business of retailing fancy groceries in the City of New York, and in and during the fall of 1887, and prior to the commencement of this action, kept for sale at his place of business in New York City boxes of cheese marked or stamped 'Fromage d'Isigny.'" The court further found that the cheese so sold by Conrad Gross under the name of "Fromage d'Isigny," as well as that kept for sale by August Gross marked 'Fromage d'Isigny,'" "was never sold by plaintiffs, nor made or manufactured by them, or either of them, but that the same was a similar product." The court found as conclusions of law that said agreement was a reasonable one, and was founded upon a good and sufficient consideration; that said sale by Conrad and said keeping for sale by August Gross was a direct violation of the covenant in question; that the restriction imposed was no more than the interests of the parties required, and that it was not in restraint of trade or against public policy. Judgment was ordered for the plaintiffs for the sum of \$5,000 as stipulated damages.

Mr. John Fennel, for appellant:

The trial judge having found that the defendant did not know of the violations, and there being no proof that the defendant had violated the covenant, there was no such breach as entitled the plaintiff to recover the \$5,000.

Leggett v. New York Mut. L. Ins. Co. 53 N. Y. 397, 398. See also *Houg v. McGinnis*, 22 Wend. 168.

In every case in which a party was held to pay the stipulated sum, it was because of a personal breach, the courts holding that the payment of the sum could have been avoided by the compliance with the contract, and hence the party held could not complain.

Bagley v. Peddie, 16 N. Y. 471.

No damages have been proven except nominal damages.

The provision in the agreement "under the penalty of \$5,000, which sum is hereby named as "stipulated damages," is a penalty. *Bagley v. Peddie*, *supra*; *Kemp v. Knickerbocker Ice Co.* 69 N. Y. 58.

If a bond is conditioned for the performance of a covenant, the penalty is not recoverable and *quantum damnificatus* is the true thing in issue.

Beers v. Shannon, 78 N. Y. 308.

Whether a sum named is a penalty or stipulated damages should be determined according to the justice and equity of the particular case.

1 Sedgw. Dam. p. 478, citing *Jaquith v. Hudson*, 5 Mich. 123.

It is unjust to compel defendant "to suffer an enormous loss, wholly disproportionate to the injury to the other party."

1 Sedgw. Dam. p. 480; *Baye v. Ambrose*, 28 Mo. 39; *Jaquith v. Hudson*, *supra*; *Beale v. Hayes*, 5 Sandf. 640; *Taylor v. Sandiford*, 20 U. S. 7 Wheat. 13, 5 L. ed. 384; *Ramond v. Van Benschoten*, 12 Barb. 366; *Colwell v. Lawrence*, 38 N. Y. 75, citing *Hoag v. McGinnis*, 22 Wend. 165; *Spear v. Smith*, 1 Denio. 464; *Lampman v. Cochran*, 16 N. Y. 275; 1 Sedgw. Dam. p. 527.

Messrs. Bacon & Merritt, for respondents:

The covenant in question is not void as being in restraint of trade, because: (1) it was not limited as to time; (2) it was a covenant not affecting general trade at all, but affecting the use of trade-marks and secret recipes which were the very property sold by the defendant to the plaintiffs.

Ainsworth v. Bentley, 14 Week. Rep. 630; *Stiff v. Cassell*, 2 Jur. N. S. 848; *Ingram v. Stiff*, 5 Jur. N. S. 947; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. Cas. 345; *Hitchcock v. Coker*, 6 Ad. & El. 438; *Roussillon v. Roussillon*, 42 L. T. N. S. 679; *Davies v. Davies*, 58 L. T. N. S. 209. 37 Alb. L. J. 408; *Vickery v. Welch*, 19 Pick. 523; *Taylor v. Blanchard*, 13 Allen, 373; *Peabody v. Norfolk*, 98 Mass. 452; *Morse T. Drill & M. Co. v. Morse*, 103 Mass. 73; *Jarvis v. Peck*, 10 Paige, 118, 4 L. ed. 910; *Hard v. Seeley*, 47 Barb. 428; *Diamond Match Co. v. Roeber*, 9 Cent. Rep. 181, 106 N. Y. 473; *Hodge v. Sloan*, 9 Cent. Rep. 870, 107 N. Y. 244; *Leslie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 533; *Watertown Thermometer Co. v. Pool*, 51 Hun, 157; 2 Story, Eq. Jur. § 950.

The fact that this covenant not only provided against the acts of the defendant herself, but also as against the acts of her husband her father and brother-in-law, does not relieve her of liability. If a party enters into an absolute contract without any qualification or exception, and receives from the party with whom he contracts the consideration of such engagement, he must abide by the contract and either do the act or pay damages, his liability arising from his own direct and positive undertaking.

Shubrick v. Salmond, 3 Burr. 1637; *Hadley v. Clarke*, 8 T. R. 259; *Hand v. Baynes*, 4 Whart. 204; *Trenton School Trustees v. Bennett*, 27 N. J. L. 514; *School Dist. No. 1 v. Dauchy*, 25 Conn. 530; *Bebe v. Johnson*, 19 Wend. 500; *Parr v. Greenbush*, 42 Hun, 232; *Harmony v. Bingham*, 12 N. Y. 99; *Tompkins v. Dudley*, 25 N. Y. 272.

Plaintiff was entitled to recover \$5,000 as liquidated and stipulated damages. The use of the word "penalty" is not important if upon a construction of the whole covenant it is obvious that the parties intended that the amount provided should be stipulated damages.

Price v. Green, 16 Mees. & W. 846; *Dakin v. Williams*, 17 Wend. 447; *Knapp v. Maltby*, 13 Wend. 587; *Bagley v. Peddie*, 16 N. Y. 469; *Woster v. Kisch*, 26 Hun, 61.

Vann, J., delivered the opinion of the court:

The business carried on by the defendant was founded on a secret process known only to her-

self and her agents. She had the right to continue the business, and by keeping her secret to enjoy the benefits to any practicable extent. She also had the right to sell the business, including as an essential part thereof the secret process, and, in order to place the purchasers in the same position that she occupied, to promise to divulge the secret to them alone, and to keep it from everyone else. In no other way could she sell what she had, and get what it was worth. Having the right to make this promise, she also had the right to make it good to her vendees and to protect them by covenants with proper safeguards against the consequences of any violation. Such a contract simply left matters substantially as they were before the sale, except that the seller of the secret had agreed that she would not destroy its value after she had received full value for it. The covenant was not in general restraint of trade, but was a reasonable measure of mutual protection to the parties, as it enabled the one to sell at the highest price, and the other to get what they paid for. It imposed no restriction upon either that was not beneficial to the other, by enhancing the price to the seller, or protecting the purchaser. Recent cases make it very clear that such an agreement is not opposed to public policy, even if the restriction was unlimited as to both time and territory. *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 9 Cent. Rep. 181; *Hodge v. Sloan*, 107 N. Y. 244, 9 Cent. Rep. 870; *Leslie v. Lorillard*, 110 N. Y. 519, 534, 1 L. R. A. 456; *Watertown Thermometer Co. v. Pool*, 51 Hun, 157. The restriction under consideration, however, was not unlimited as to time.

The chief reliance of the defendant in this court, where the point seems to have been raised for the first time, is that the covenant, so far as stipulated damages are concerned, is confined to the personal acts of Mrs. Gross, and does not embrace the acts of her agents. A careful reading of the agreement, however, in the light of the circumstances surrounding the parties when it was made, shows that no such result was intended. What was the object of the covenant? It was to keep secret, at all hazards, the process upon which the success of the business depended. On no other basis could the plaintiffs safely buy, or the defendant sell, for what her property was worth. Who had the power to keep the process secret? Clearly the defendant, if anyone, as she had confided it to no one except her trusted agents, who were nearly related to her by blood or marriage. But could she covenant against the acts of those over whom she had no control? She had the right to so covenant by assuming the risk of their actions; and, unless she had done so, presumptively she could not have sold her factory for so large a sum. It was safer for her to sell with such a covenant than it was for the plaintiffs to buy without it. She could exercise some power over her own husband and her father and her husband's brother, all of whom had been associated with her in carrying on the business, and whose actions in certain other respects she assumed to control for a limited time, whereas the plaintiffs were powerless, unless they had her promise to keep the process secret at the peril of paying heavily if she did not. It is not surprising, therefore,

to find that the restrictive part of the covenant applies with the same force to her agents that it does to herself; for she undertakes that neither she nor they will disclose the secret, or engage in making or selling either kind of cheese, or use the trade-marks or names connected with the business. We do not think that a personal act of the defendant is essential to a violation of this covenant by her; for if she permits, or even does not prevent, her agents from doing the prohibited acts, the promise is broken. While it is her exclusive covenant, it relates to the action of others; and, if they do what she agreed that they would not do, it is a breach by her, although not her own act. She violated her agreement, not by selling herself, but by not preventing others from selling. This construction of the restrictive part of the covenant would hardly be open to question, were it not that in the same sentence occurs the reparative or compensatory part designed to make the plaintiffs whole if the defendant either could not or did not keep her agreement. While this provides that any violation involves the penalty of \$5,000, it adds, "which sum is hereby named as stipulated damages to be paid" by the defendant in case of a violation by her of the covenant in question. What kind of violation is thus referred to? The defendant says a personal violation by her only, but we think, for the reasons already given, that the spirit of the agreement includes both a violation by her own act and by the act of those whom she did not prevent from selling, although she had agreed that they would not sell. As no one not a party to a contract can violate it, every act of defendant's former agents contrary

to her covenant was a violation thereof by her, whether she knew of it or assented to it or not. Whenever that was done which she agreed should not be done, it was a breach of covenant by her, even if the act was contrary to her wishes, and in spite of her efforts to prevent it. Her covenant was against a certain act by any one of four persons, including herself. Two of those persons separately did the act which she had agreed that neither of them should do, and thus there was a violation of the covenant by her, the same as if she had done the act in person. The argument of the learned counsel for the defendant that the contract fixed a sum to be paid in case of a violation by the defendant, but not in case of a violation "by the other parties," while plausible, is unsound, for there were no "other parties" who could break the covenant. She was the sole covenantor, and unless she kept the covenant she broke it; and she did not keep it. As the actual damages for a breach of the covenant would necessarily be "wholly uncertain, and incapable of being ascertained except by conjecture," we think that the parties intended to liquidate them when they provided that the sum named should be "as stipulated damages." The use of the word "penalty" under the circumstances is not controlling. *Bagley v. Peddie*, 16 N. Y. 469; *Dakin v. Williams*, 17 Wend. 448, affirmed, 22 Wend. 201; *Wooster v. Kiech*, 26 Hun, 61.

As there is no other question that requires discussion, *the judgment should be affirmed, with costs.*

All concur, except *Brown, J.*, not sitting.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Samuel ROTHHOLZ, *Pff. in Err.*,

v.

Oliver R. DUNKLE.

(.....N. J.....)

***A communication made by the cashier of a bank to a stockholder with reference to the solvency of the plaintiff, who was surety upon an official bond to the bank, is privileged; and it is not necessary, to justify the communication, that it be in response to an inquiry made by the stockholder.**

(June 16, 1891.)

ERROR to the Circuit Court for Atlantic County to review a judgment in favor of defendant in an action brought to recover damages for the publication of an alleged libel. *Affirmed.*

The facts sufficiently appear in the opinion. *Mr. August Stephany*, for plaintiff in error:

*Head note by VAN SYCKEL, J.

NOTE.—Libel; privileged communications. See notes to *John W. Lovell Co. v. Houghton* (N. Y.) 6 L. R. A. 368; *Missouri Pac. R. Co. v. Richmond* (Tex.) 4 L. R. A. 280; *Moore v. Manufacturers Nat. Bank of Troy* (N. Y.) 11 L. R. A. 758.

18 L. R. A.

To in any way impute insolvency to any merchant or trader, or to write concerning him that he cannot pay his debts, is libelous, and therefore actionable.

Odgers, Libel & Slander, 23, 80.

Although the rest of defendant's letter was privileged, because written in answer to Mr. Ohnmeiss' questions, yet the libelous words, being volunteered, were not privileged under the circumstances. A letter may be privileged as to one part and not as to the rest.

Odgers, Libel & Slander, 199; *Warren v. Warren*, 1 Cramp. M. & R. 250; *Cole v. Wilson*, 18 B. Mon. 212; *Godson v. Home*, 1 Brod. & B. 7; *Lewis v. Chapman*, 16 N. Y. 369.

A communication, if volunteered, will be privileged when the party to whom it is made has an interest in it, and such party stands in such relation to the communicator as to make it a reasonable duty, or at least proper, that he should give the information.

King v. Patterson, 8 Cent. Rep. 857, 49 N. J. L. 417; *Marks v. Baker*, 28 Minn. 162; *Locke v. Broadstreet Co.* 23 Fed. Rep. 771; *Erb-er v. R. G. Dun & Co.* 12 Fed. Rep. 526; *Crane v. Waters*, 10 Fed. Rep. 619.

That anyone, in a transaction of business or employment with another, has a right to use language bona fide which is relevant to that business or employment, and which a due re-

gard for his own interest makes necessary, will not justify defamatory aspersions against character, or wanton and gratuitous charges.

Tuson v. Evans, 12 Ad. & El. 738; *Toogood v. Spyrring*, 1 Crompt. M. & R. 181; *Robertson v. McDougall*, 4 Bing. 670; *Addison, Torts*, § 1100; *Fahr v. Hayes*, 11 Cent. Rep. 558, 50 N. J. L. 275.

No charge should ever be made recklessly and wantonly, even in confidence, and the answer must be pertinent to the inquiry, and the defendant must not commence to disparage the plaintiff's credit.

Odgers, Libel & Slander, 199, 204, 205.

Officious gossip and meddlesome interference are not privileged.

Rumsey v. Webb, 1 Car. & M. 104; *Odgers, Libel & Slander*, 206.

If the bona fides of the defendant is in question, and when the occasion was made use of colorably as a pretext for wantonly injuring the plaintiff, a question arises which must be decided by the jury.

Odgers, Libel & Slander, 206, 213; *Hageman, Privileged Communications*, 197; *Palmer v. Concord*, 43 N. H. 217; *Elam v. Badger*, 23 Ill. 498; *Hamilton v. Eno*, 81 N. Y. 116; *Van Wyck v. Aspinwall*, 17 N. Y. 190.

If the defendant exceeded the just limits which were necessary and proper to accomplish a legitimate purpose, it will be evidence of malice proper to be weighed by the jury.

Andrew v. Deahler, 45 N. J. L. 171.

Mr. Howard Carrow, for defendant in error:

The question in every case is this: Were the circumstances such that an honest man might reasonably suppose it his duty to act as the defendant has done in this case?

Odgers, Libel & Slander, 157.

Where the occasion is privileged the burden of proving actual malice is upon the plaintiff; its existence must be made out, the presumption being that it does not exist.

Decker v. Gaylord, 35 Hun, 584; *Lewis v. Chapman*, 16 N. Y. 872; *Spill v. Maule*, L. R. 4 Exch. 282; *Briggs v. Garrett*, 2 Cent. Rep. 364, 111 Pa. 404; *Press Co. v. Stewart*, 12 Cent. Rep. 275, 119 Pa. 584; *State v. Balch*, 31 Kan. 472; *Guieldford v. Windell*, 42 Phila. Leg. Int. 844; *Laughton v. Bishop of Soder & Marr*, L. R. 4 P. C. 504; *King v. Patterson*, 8 Cent. Rep. 875, 49 N. J. L. 419; *Toogood v. Spyrring*, 1 Crompt. M. & R. 181.

Van Syckel, J., delivered the opinion of the court:

This is an action for damages for an alleged libel contained in the following letter, written by Oliver R. Dunkle, the cashier of the Merchants' Bank of Atlantic City:

"Robert Ohnmeiss, Esq.: Inclosed please find one share of Merchants' stock received some time ago. Our board refuses to purchase at present, but hold under advisement. We have stricken your name from the bond of Mr. Carl Voelker by request; also Samuel Rothholz's, as the latter has no financial standing. Respectfully, O. R. Dunkle, Cashier."

Robert Ohnmeiss was a stockholder in the same bank, and he and Rothholz, the plaintiff, were sureties on the official bond of Carl Voelker, an employé of the bank. Previous to the

writing of this letter, Ohnmeiss had requested Dunkle to have his name stricken from the said bond, but did not make any inquiry with respect to the plaintiff, Rothholz. At the close of the plaintiff's case, the trial judge, regarding the communication a privileged one, ordered the plaintiff to be called. Whether, under the given circumstances, the nonsuit should have been ordered is the sole question in this court.

The statement that the plaintiff had no financial standing was libelous, and constituted a legal foundation for the recovery of damages, unless the occasion upon which it was uttered gave rise to the privilege of publishing what would otherwise be actionable. The term "privilege," as applied to a communication alleged to be libelous, means, simply, that the circumstances under which it was made are such as to repel the legal inference of malice, and to throw upon the plaintiff the burden of offering some evidence of its existence beyond the falsity of the charge. This court, in *King v. Patterson*, 49 N. J. L. 419, 8 Cent. Rep. 875, declared "that a communication, made bona fide, upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it may contain criminatory matter which, without this privilege, would be . . . actionable." In the case cited the learned judge who delivered the opinion of the court referred with approbation to *Lawless v. Anglo-Egyptian C. & Oil Co.* L. R. 4 Q. B. 262, and to *Philadelphia, W. & B. R. Co. v. Quigley*, 62 U. S. 21 How. 202, 16 L. ed. 73. The first of these cases was an action for libel against a corporation for publishing a report made to the company by auditors, in their audit of the manager's account, reflecting upon the plaintiff. The report was submitted at a general meeting of the shareholders of the company, and, under a resolution of the meeting, was printed and circulated among the shareholders. The court held that, inasmuch as it was the interest of all the shareholders to be informed of the report, the publication was privileged, on the ground, as Mellor, J., said, "that to print the report was a necessary and reasonable mode of communicating it to all the shareholders, who must be more or less numerous." In the second case a report made to stockholders in writing, and printed, with respect to the capacity and skill of one of the company's employés, was held to be a privileged communication. These cases are referred to for the purpose of showing that a communication to a shareholder of a corporation touching matters which concern the corporate body are within the rule of privilege, which secures the immunity to the official who makes the publication. Ohnmeiss being not only a co-surety with Rothholz upon the official bond of Voelker, but also a shareholder in the bank, he had the right to receive the information imparted to him by Dunkle, the cashier. The fact that Rothholz's name had been taken from a bond held by the bank, and the reason for removing it, was a matter which concerned Ohnmeiss. As a stockholder he could justly have complained if a competent security had been improperly surrendered by those who conducted the affairs of

the bank. It was not necessary, to justify the communication, that it should have been in response to an inquiry made by Ohnmeiss.

In *Waller v. Lock*, 45 L. T. N. S. 243, Jessel, M. R., says: "If an answer is given in the discharge of a social or moral duty, or if the person who gives it thinks it to be so, that is enough. It need not even be an answer to an inquiry, but the communication may be a voluntary one." In my judgment, the circum-

stances under which the letter was written upon which this suit is based, repel the inference of an improper motive on the part of defendant, and cast upon the plaintiff the burden of proving malice.

No evidence having been produced in the trial court to show malice in the publication, the non-suit was properly ordered, and the judgment below should be affirmed.

TEXAS SUPREME COURT.

J. S. SELLERS, *Appt.*,

v.

TEXAS CENTRAL R. CO. *et al.*

(.....Tex.....)

No reservation of a right to flood lands. conveyed by a railroad company, with water of a river backed up by the faulty construction of the embankment on which its tracks are laid, will be implied from the mere fact that the conveyance was made after the embankment was finished.

NOTE.—Implied reservations.

It is now settled law in England that a reservation out of a grant will not be implied except in case of necessity. *Crossley v. Lightowler*, L. R. 2 Ch. App. 478.

The right to foul a stream from dye works cannot be reserved by implication. *Ibid.*

Neither will an easement of light and air for windows be so reserved on the sale of a vacant lot. *Wheeldon v. Burrows*, L. R. 12 Ch. Div. 31; *White v. Bass*, 7 Hurlst. & N. 722; *Ellis v. Manchester Carriage Co.* L. R. 2 C. P. Div. 18; *Russell v. Watts*, L. R. 28 Ch. Div. 559.

Nor an easement for the projection of bowsprits of large vessels at a dock over a neighboring coal wharf on the sale of the latter. *Suffield v. Brown*, 4 De G. J. & S. 185.

Of right of way.

An implied reservation of a right of way over land sold will be made only in case of strict and absolute necessity (*Shoemaker v. Shoemaker*, 11 Abb. N.C. 80); and not of a way merely for convenience. *Mitchell v. Seipel*, 53 Md. 251.

But it may be upheld in case of an alley over premises sold with a house where it is the only means of access to another house. *Durel v. Boisblanc*, 1 La. Ann. 407.

And in Pennsylvania the use of an alley which was open and apparent, having a gate set up, was held to be reserved though not strictly a way of necessity. *Cannon v. Boyd*, 73 Pa. 179.

An express reservation of an archway on the sale of a house was held to imply a reservation of the use of a passageway under it to reach a stable in the rear. *Davies v. Sears*, L. R. 7 Eq. Cas. 427.

On the other hand, a right of way of necessity is not reserved where the grantor expressly releases an existing right of way although his land is thus left entirely shut in from the public road. *Richards v. Attleboro Branch R. Co.* 158 Mass. 120.

These two cases last referred to may perhaps be considered as turning on the question of implied reservation.

Of stairways and hallways.

An easement of evident necessity in stairways and hallways is reserved on the sale of part of a

(June 19, 1891.)

A PPEAL by plaintiff from a judgment of the District Court for Bosque County in favor of defendants in an action brought to recover damages for injuries caused to plaintiff's property by the backing up of the water of a river on account of the alleged faulty construction of defendant's railroad embankment. *Reversed.*

The facts sufficiently appear in the opinion. *Mears, Knight, Crane & Ramsey* for appellant.

Mr. L. C. Alexander for appellees.

building. *Dillman v. Hoffman*, 38 Wis. 559; *Thompson v. Miner*, 30 Iowa, 394.

The same rule applies where a lessee sublets the first floor of the building so arranged that the necessity of his own use of the stairway, hall, etc., is apparent. *Benedict v. Barling* (Wis.) May 5, 1891.

In Wisconsin a reasonable necessity as distinguished from an absolute necessity is sufficient to sustain an implied reservation of the use of stairways, etc. *Galloway v. Bonesteel*, 65 Wis. 80.

But such use of stairways is not reserved where other independent entrances exist. *Outerbridge v. Phelps*, 58 How. Pr. 77; *Schrymser v. Phelps*, 62 How. Pr. 1.

Of dam and race.

In Pennsylvania the use of a dam and race on land sold for supplying with water a mill retained by the grantor was held to be reserved by implication. *Seibert v. Levan*, 8 Pa. 383.

There are exactly contrary decisions in New York and Maine. *Burr v. Mills*, 21 Wend. 290; *Preble v. Reed*, 17 Me. 176.

In New Jersey a similar reservation of the use of a spring and an artificial conduit on land sold for the benefit of a paper mill on another tract was upheld; the court, like the courts of Pennsylvania, seeming to extend the doctrine of implied reservations beyond cases of strict necessity. *Seymour v. Lewis*, 13 N. J. Eq. 430.

Of use of drain.

No implied reservation of the use of a drain which is not apparent exists on the sale of premises over which it runs, at least where another could be made at reasonable expense, and therefore such use is not a necessity. *Randall v. McLaughlin*, 10 Allen, 396; *Carbrey v. Willis*, 7 Allen, 309; *Butterworth v. Crawford*, 46 N. Y. 349; *Scott v. Beutel*, 23 Gratt. 1. *Contra*, *Pyer v. Carter*, 1 Hurlst. & N. 918. But this last case has been completely overruled in the later English cases cited at the beginning of this note.

There is another class of cases, not considered in this note which relate to easements, where the premises affected are sold simultaneously to different purchasers.

B. A. B.

Gaines, J., delivered the opinion of the court:

Appellant brought this action to recover of the Texas Central Railway Company, and of Dillingham and Clark, as receivers of its property, operating its railroad, damages for the destruction of a stock of goods by an overflow of the Bosque River. The overflow was alleged to have resulted from the negligent construction of the bed of the railroad across the valley of the river. The defendant filed a special answer to the petition, in which it was averred, in substance, that at the time the railroad was constructed the Railroad Company owned the land along the river at the place of the embankment, including as a part thereof the lot upon which the plaintiff's goods were stored at the time of the overflow, and that the plaintiff held the lot "under a purchaser from said Company, who purchased the same after the erection of said railroad and embankment,

... whose title was governed by a conveyance from said Company, containing a clause warranting the title to the same against all persons claiming or to claim the same by, through, or under its assigns or successors." It was also alleged that the parcel of land so conveyed was a lot in a town which had been laid off by the company prior to the conveyance, and that at the time the Company sold this lot it also sold other lots in the town to other persons. The plaintiff demurred to this special answer, but the demurrer was overruled. The sufficiency of the answer is practically the only question presented by this appeal. The determination of the appeal resolves itself into the inquiry whether in the conveyance of the lot by the Company there was an implied reservation of the right to flood the granted premises in case of freshets by retaining the embankment as it then existed. The questions of grant of easements by implication, and of implied reservations of easements, have given rise to much conflict of opinion. A distinction is generally recognized between an implied grant and an implied reservation. It is conceded to be the settled law in England "that, when the owner of two adjoining lots sells one, he does not reserve impliedly for the benefit of the other any easements except those of a strict necessity; . . . but that he does impliedly grant to the grantee all continuous and apparent easements which are necessary for the reasonable use of the property granted, and which have been or are at the time of the grant used by the owner of the entirety for the benefit of the part granted." Washb. Easem. 4th ed. p. 105.

The reason for denying a reservation by implication is that to permit it would be to allow the grantor to derogate from the grant. Many of the American courts of the highest authority adhere to the English doctrine as to implied reservations, though there are others which lay down a rule more favorable to the grantor. The Supreme Court of Maine has decided that "where the owner of land flowed by a mill-dam sells the mill and dam, and retains the land, the right to flow the land to the extent it was then flowed without payment of damages passes by the grant; but where the owner sells the land flowed, and retains the mill and dam without reserving the right to

flow, he is not protected from the payment of damages." *Preble v. Reed*, 17 Me. 169; *Burr v. Mills*, 21 Wend. 289; *Goddard, Easem.* 124; *Washb. Easem.* 4th ed. 64; *Gould, Waters*, § 354.

Even those courts which hold that a reservation of an easement may be implied beyond strict necessity restrict the rule to such easements as are "apparent and continuous." An apparent easement is one which is obvious. Applying that rule to the facts of this case, can it be said that it obviously appeared to the purchaser that the lot which was sold was flooded by the embankment? The embankment itself was doubtless obvious enough. But it would seem to us that the purchaser might have reasonably presumed that the Company had availed itself of competent engineering skill, and had so constructed its works as not to impede the natural flow of the water. Under such circumstances, we think it should not be held that the company, by mere implication, reserved a right to flow the land without paying damages therefor. There is much that commends them to favorable consideration in the remarks upon the question of *Chief Justice Ryan*, of the Supreme Court of Wisconsin: "We may say, however, in passing, that it is always safest to let written contracts speak for themselves. This rule is often relaxed with doubtful expediency. Parties ought to make their own contracts complete. Alienations of land are, or ought to be, grave and deliberate transactions. Every conveyance should contain 'the certainty of the thing granted to the full extent of the grant.' What may be expressed enlarging or restricting the grant in particular cases should not be left to implication. It is often difficult, as the cases show, to determine what shall be implied in conveyances by way of grant or reservation of easement; what parties who might have spoken shall be held to intend by their silence; and, because 'a deed shall be construed most strongly against the grantor,' this view applies with great force against implied reservations in the servient estate conveyed by the owner of the dominant estate. Indeed, it is remarkable that the doctrine of implied grant of easement in the land of the grantor once rested very much on the principle that the grantor should not be heard to derogate from his grant (*Howton v. Pearson*, 8 T. R. 50); and yet the same doctrine has been extended to implied reservations to the grantor in what he conveys, in direct derogation of his grant. On principle, therefore, we should be disinclined to enlarge or limit estates granted by implication of law, further than a general current of decisions might oblige us." *Dillman v. Hoffman*, 38 Wis. 573. We think there was no implied reservation in this case, and that the demurrer to the answer should have been sustained. The defendant receivers put in a demurrer to the petition, which was overruled by the court. The appellees have filed no cross-assignments of error, and the question of their liability is not before the court. The counsel for appellees admit this.

For the error of the court in sustaining the demurrer to the special answer, the judgment is reversed, and the cause remanded.

ALABAMA SUPREME COURT.

A. H. ALSTON *et al.*, *Appts.*,

v.

STATE OF ALABAMA.

(32 Ala. 124.)

1. The addition to the name of the depositor in an account with a bank of the words "judge of probate, license money," is not alone sufficient to make deposits on such account special.
2. A judge of probate cannot relieve himself from the duty imposed upon him by law of turning over to the State all moneys received by him as license fees by showing that it had been lost by the failure of a bank in which he had deposited it in good faith at a time when it enjoyed the confidence of the business world, where the deposits made were general ones, since he had no right to make such deposit under the Code provision that he could not use the money himself or permit anyone else to use it.

(June 25, 1891.)

APPEAL by defendants from a judgment of the Circuit Court for Barbour County in favor of plaintiff in an action on the official bond of defendant, Alston, to recover the amount of license money which he had received and neglected to turn over to the State. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Lawrence H. Lee and Peach & Evans* for appellants.

Mr. William L. Martin, Atty.-Gen., for the State:

A credit given for the amount of a check by the bank upon which it is drawn is equivalent to and will be treated as a payment of the check. It is the same as if the money had been paid over the counter on the check and then immediately paid back to the account of the depositor.

Morse, Banks & Banking, §§ 451, 569; *City Nat. Bank of Selma v. Burns*, 68 Ala. 267; *Oddie v. National City Bank*, 45 N. Y. 785, 6 Am. Rep. 160.

Whether the deposit here in question was general or special is immaterial. The bank is bound to exercise ordinary care and no more in keeping a special deposit.

Morse, Banks & Banking, §§ 183, 194.

A deposit is general unless expressly made special.

Morse, Banks & Banking, § 186.

A general deposit is in legal effect a loan by the depositor to the bank, the title to the money passing to the bank.

Morse, Banks & Banking, § 289.

The statutes of Alabama, construed on principles of public policy, exact of officers charged with collecting, keeping, and paying over the public revenue, the highest care, vigilance, and diligence known to the law, such as a very prudent and cautious man exercises in respect to the most important matters.

State v. Houston, 78 Ala. 578.

There is no statute in Alabama authorizing public officers to deposit public funds in bank; 13 L. R. A.

hence the deposit in this case was an unauthorized conversion of the State's money.

Code 1886, §§ 3803, 3805.

A public officer is not discharged from liability for public funds deposited by him in bank without legislative authority, and which are lost by reason of the failure of the bank.

State v. Powell, 87 Mo. 935, 29 Am. Rep. 512; *State v. Moore*, 74 Mo. 413, 41 Am. Rep. 332; *Lovely v. Polk County*, 51 Iowa, 50, 33 Am. Rep. 114; *Ward v. Colfax Co. School Dist.*, No. 15, 10 Neb. 293, 85 Am. Rep. 477; *Inglis v. State*, 61 Ind. 212; *Wilson v. Wichita County*, 67 Tex. 647; *Havens v. Lathene*, 75 N. C. 505; *United States v. Freeman*, 1 Woodb. & M. 45; *Mechem*, Pub. Off. § 912; *Murphy*, Off. Bonds, § 200.

York County v. Watson, 15 S. C. 1, 40 Am. Rep. 675, which holds to the contrary view, seems to stand alone.

Walker, J., delivered the opinion of the court:

In such cases as the law prescribes a state or county license to engage in or carry on any business, or to do any act, the amount required for such license must be paid to the probate judge of the county in which it is proposed to engage in or carry on such business or to do such act. The money so paid for licenses being part of the revenue of the State or county, as the case may be, and received by the probate judge in his official capacity, he is prohibited, under criminal penalties, from knowingly converting or applying any of it to his own use, or to the use of any other person, or permitting another to use any of it; and he must, on the last day of each quarter, pay to the state treasurer the money received by him for such licenses belonging to the State, and to the county treasurer the money received by him for such licenses belonging to the county, less the amount of the commissions allowed to him by law. Code 1886, §§ 632, 633, 3803, 3805. The plain statutory requirements here referred to exert a controlling influence in the determination of the question presented in this case by the contention that the failure of the defendant Alston to pay to the State certain license money, which he collected, and with which he is chargeable as probate judge, should be excused on the ground that said license money has been lost by reason of the failure of a bank in which it had been deposited, at a time when said bank enjoyed the confidence and esteem of the business world, and of the embarrassment of which said Alston had no reason to know or suspect until after the failure was publicly announced. Can this excuse avail as a defense to the suit of the State to recover the amount of its license money so lost? This inquiry involves the question of right of the probate judge to make the deposit as he did. Alston, as probate judge, accepted payment of the license money in the check of the licensee, made payable "to county and State of Ala., or bearer." This check Alston presented to the bank, and had the amount thereof put to his credit on an account entered on the books of the bank with "A. H. Alston,

Judge of Probate, License Money." Deposits made with bankers are either general or special. In the case of a special deposit, the bank merely assumes the charge or custody of property, without authority to use it, and the depositor is entitled to receive back the identical money or thing deposited. In such case, the right of property remains in the depositor, and, if the deposit is of money, the bank may not mingle it with its own funds. The relation created is that of bailor and bailee, and not that of creditor and debtor. *Boyd v. Bank of Cape Fear*, 66 N. C. 18; *Dawson v. Real Estate Bank*, 5 Ark. 297; *Lourey v. Polk County*, 51 Iowa, 50; 2 Am. & Eng. Encyclop. Law, 93; 1 Morse, Banks & Banking, § 183 *et seq.*

When a money deposit is made, it is to be regarded as a general deposit, unless there is evidence to show that it was the bank's duty, by agreement, express or clearly implied, to keep it separate and apart from its own funds, and to return that identical money to the depositor. Money received by a bank on general deposit becomes the property of the bank, and can be loaned or otherwise used by it, as other moneys belonging to it. The bank becomes the debtor of the depositor, and its obligation is satisfied by honoring the depositor's checks to the amount of his deposit. The depositor's claim is a mere chose in action for so much money. He becomes a creditor of the bank. *Bank of the Republic v. Millard*, 77 U. S. 10 Wall. 152, 19 L. ed. 897; 2 Am. & Eng. Encyclop. Law, 98, 94.

The words, "judge of probate, license money," annexed to the name of the depositor, served to distinguish that particular account, and to keep it separate from other dealings he might have with the bank. Moneys deposited on an account kept in that form would be more readily traced, and the bank, perhaps, would be chargeable with notice of the source from which the depositor derived funds which he directed to be credited to him in that way. But the addition of the words referred to would not operate to change the character of the deposit from a general to a special one. There is nothing to indicate that the amount charged against itself by the bank on this account was kept separate or unmingled with its own property. The contrary appears. Manifestly, the bank did not undertake to become the bailee of that license money. The effect of the transaction was simply to substitute one person to another's position, as a creditor of the bank, to the amount of the check deposited. The maker of the check had no property in the funds of the bank by virtue of his account therewith. The entry of the amount of the check on Alston's account was but a shifting of the bank's liability. So far as Alston was concerned, the bank, by accepting the deposit, merely became his debtor, and assumed the obligation to honor his checks to the amount so credited to him. *Hovens v. Lathene*, 75 N. C. 505; *McLain v. Wallace*, 103 Ind. 562, 8 West. Rep. 359; 1 Morse, Banks & Banking, 3d ed. § 183; 2 Morse, Banks & Banking, 3d ed. § 604.

The money of the State was thus turned over to the bank on general deposit, and became a part of its funds, and subject to its use, as any other of its property. This use of the public money by the probate judge was without

warrant of law. He had no right to convert it to his own use, or permit anyone else to use it. The deposit was of like effect as a loan of the money. It was an unauthorized use thereof. The probate judge by that act voluntarily relinquished his custody and control of this public fund, so that he could not reclaim it. When the State demands it, his answer is that he no longer has it, but has a claim for the amount thereof against an insolvent bank. In view of the statutory provisions above referred to, we think that this answer is wholly insufficient as a defense. The effect of the Statute is to make the probate judge the custodian of that money, and to prohibit him from permitting another to use it. Whether or not it would have been wise to authorize the deposit of the public funds in banks of reputed solvency was a matter for legislative determination. The Legislature has prohibited any such disposition of public moneys as is effected by a general deposit thereof in bank. The courts cannot recognize as legitimate and excusable that which the statutes have forbidden. They are without power to dispense with the requirements of the Statute, though it may be apparent that the defendant did not knowingly violate the law; that, in making the deposit, he was acting under a generally prevailing misapprehension that such disposition of public moneys was authorized; and that he may have honestly thought that it was the safest and most prudent thing to do, under the circumstances, until the arrival of the time when he was required to make payment to the State. The deposit itself having been unlawful, a violation of an official duty, and a breach of the condition of the bond, a defense which necessarily involves reliance upon that act as valid and authorized must unavoidably fail. *Lourey v. Polk County*, 51 Iowa, 50; *Ward v. Coffey Co. School Dist. No. 15*, 10 Neb. 204.

It would be outside of the issues in this case to undertake to specify what would be regarded as a discharge by an officer intrusted with public money of the duty to keep it safely until he is required to pay it over. In the case of *State v. Houston*, 78 Ala. 576, the defense that certain tax money which had not been paid over was taken from the collector's person by a robbery was set up in a suit on the tax collector's bond. The court there stated the elements essential to the validity of that defense. Clopton, J., delivering the opinion, said: "If, having observed the highest care, vigilance, and diligence to prevent loss, the collector is robbed of money belonging to the State by irresistible force, it constitutes a valid defense to an action on his bond for the recovery of such money. We say, 'money belonging to the State;' for, if it appears that the specific funds received by the collector have been used or changed for any unauthorized purpose, he becomes *eo instanti* a debtor, and he and his sureties are bound to absolute payment, as for a debt. In such case, subsequent robbery of money, substituted for the amount misused, is no defense. The robbery must be of money, the property of the State."

In the present case, as has been shown, the absolute liability, as for a debt, was fixed upon the probate judge and the sureties on his bond by the unauthorized deposit in bank; so that

no question is presented as to what the liability would have been if the probate judge had not voluntarily relinquished his custody of that license money. In the absence of any specific regulation as to the mode or place of keeping public funds, it would seem that the question as to whether or not the custody over them has been maintained with the highest degree of care, vigilance and diligence known to the law would depend, in a measure, upon the

particular situation of the officer charged with the preservation thereof, and upon the existence of means available to him of providing a place of safe keeping. This decision does not involve the assertion that the security afforded by bank vaults may not in any case be availed of by an officer intrusted with the custody of public moneys.

Affirmed.

PENNSYLVANIA SUPREME COURT.

H. W. PICKETT, Admr., etc., of John W. Moore, Deceased,

PACIFIC MUTUAL LIFE INSURANCE CO. of California, Appt.

(.....Pa.....)

1. **Death from asphyxia, occasioned by deadly gas** in a shallow well, into which one descends to fix a pump, is caused by external, violent and accidental means.
2. **"Inhalation of gas," causing death,** within the meaning of a clause exempting an insurer from liability, does not include the involuntary inhaling of deadly gas in a well where its presence is unsuspected.

(October 5, 1891.)

APPPEAL by defendant from a judgment of the Court of Common Pleas for Warren County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of accident insurance. *Affirmed.*

The material portions of the policy on which this suit was brought are as follows:

"The Pacific Mutual Life Insurance Company of California, in consideration of the warranties in the application for this insurance, and the stipulations herein contained, . . . does hereby insure John W. Moore, by occupation, profession or employment a contractor and driller, . . . in the principal sum of five thousand dollars, for the term of twelve months, ending on the fourth day of June, eighteen hundred and ninety, at twelve o'clock noon. The said sum to be paid to the legal representative of the insured, after due notice and satisfactory proof that the insured has, during the continuance of this policy, sustained such violent and accidental injuries as shall externally be visible upon his person, and which alone shall have caused his death within ninety days of the date of such accident. . . . Except that if injured in any occupation or exposure classed by the company as more hazardous than here specified, then the insurance and weekly indemnity shall be for such amounts as the premium paid will purchase at the rates fixed by this company for such increased hazard."

On the back of the policy, and made a part

thereof by agreement, were the following conditions:

"The insured agrees to use due diligence for personal safety and protection. . . .

"This insurance shall not cover disappearances, nor injuries of which there is no visible external mark upon the body of the insured; nor death or injury resulting from or attributable partially or wholly to any of the following causes: . . . taking of poison, contact with poisonous substances, inhalation of gas. . . ."

Further facts appear in the opinion.

Messrs. D. I. Ball and C. C. Thompson, for appellant;

It cannot be contended that the clause "inhalation of gas" should be limited to a voluntary and conscious "inhalation of gas," because, (1) it is not so written in the policy,—if so intended, the word "involuntary" would have been expressed in this list of the classes of injuries to which the policy does not apply, instead of being left to be understood; (2) this court has adjudicated that these exceptions apply to the involuntary as well as voluntary acts of the insured.

Pollock v. United States Mut. Acc. Assn. 102 Pa. 280.

The policy provides that its amount shall be paid after due notice and satisfactory proof that the insured has, during the continuance of this policy, sustained such violent and accidental injuries as shall externally be visible upon his person, and which alone shall have caused his death. There is no pretense of any evidence of violent and accidental injuries externally visible upon the person of Mr. Moore; and therefore, under the foregoing provision of this policy, the plaintiff is not entitled to recover.

This distinguishes the case from *Mallory v. Travelers Ins. Co.* 47 N. Y. 52; *Paul v. Travelers Ins. Co.* 8 L. R. A. 843, 112 N. Y. 477; and *McGlinchey v. Fidelity & C. Co.* 6 New Eng. Rep. 450, 80 Me. 251.

Messrs. Noyes & Hinckley and Brown, Stone & Rice, for appellee:

The contention of the defendant that in a case like this, or in those cases of accidental injury causing immediate death, resulting from drowning, suffocation, choking, all cases of asphyxia, lightning, electricity, or in any case of death from violent external means, it be-

NOTE.—Insurance; death from inhaling gas.

In exact conflict with the above case, and with the leading case of *Paul v. Travelers Ins. Co.* 3 L. R. A. 443, 112 N. Y. 477, which this case follows, is the 13 L. R. A.

case of *Richardson v. Travelers Ins. Co.*, 46 Fed. Rep. 843, which holds that death by inhaling illuminating gas in a sleeping room is within an exemption as to liability for death from "inhaling gas." B. A. R.

comes necessary to show more than the body of the deceased, is repugnant to common sense and unreasonable.

See *Mallory v. Travelers Ins. Co.* 47 N. Y. 52.

This provision of the policy as to external injuries has received] consideration and construction in a long line of cases, beginning in the highest English courts and followed in the United States and state courts of this country.

See *Trew v. Railway Pass. Assur. Co.* 5 Hurlst. & N. 211; *Winspear v. Accident Ins. Co.* L. R. 6 Q. B. Div. 42, 29 Moak, Eng. Rep. 488; *Accident Ins. Co. of North America v. Crandal*, 120 U. S. 582, 80 L. ed. 742; *United States Mut. Acc. Assn. v. Newman*, 84 Va. 52; *Paul v. Travelers Ins. Co.* 3 L. R. A. 443, 112 N. Y. 472, 45 Hun, 813; *Bacon v. United States Mut. Acc. Assn.* 9 L. R. A. 617, 123 N. Y. 804; *McGlinchey v. Fidelity & C. Co.* 6 New Eng. Rep. 450, 80 Me. 251; *Roggenberger v. Guarantees Mut. Acc. Assn.* 41 Fed. Rep. 172.

Sterrett, J., delivered the opinion of the court:

The undisputed facts, upon which the jury in this case was instructed to find for the plaintiff the full amount of his claim, are briefly as follows: On June 4, 1889, the plaintiff's intestate, John W. Moore, received and paid for the policy of insurance on which this suit was brought, a copy of which will be found in the record. Returning to his boarding house, same evening, he informed his landlady that he had no dinner, and requested that his supper be prepared. He then went to the well in the open yard for a drink and finding that the pump required priming with water, he remarked that he would fix it, so as to obviate that difficulty in the future. After procuring a hatchet, and removing planks from the opening at the top, he descended into the dug-out portion of the well, which was four or five feet wide and only ten or twelve feet deep, for the purpose of closing a small opening in the iron pipe, about midway-down. A few minutes later his lifeless remains were found at the bottom of the well. He died from asphyxia, or suffocation, due to the accidental and unconscious inhalation of carbonic acid or other deadly gas that had unexpectedly accumulated in the dug-out portion of the shallow well. The well, with which deceased was familiar, and in which he had been shortly before, was one of those known as a "driven well," made by driving an iron pipe into the ground to the depth, in this case, of about forty feet. For the distance of about ten or twelve feet from the top the earth around the iron pipe was dug out so as to form, as above stated, an open well, of about four or five feet in diameter, in which there was little or no water. The top of the well was covered with plank. The deceased was a strong, healthy man. His sudden and wholly unexpected death, under the circumstances above stated, and within a few hours after he had procured the policy of insurance, undoubtedly resulted from external, violent, and accidental injuries or means, and without any conscious or voluntary act on his part. There was no evidence, nor was it even suggested, that he had committed suicide, or that he was wanting in reasonable care, or that he voluntarily exposed himself to danger. In describing

the condition in which he found the body of deceased the physician who made the *post mortem* examination testified: "The surface of the body was of a livid bluish color. The lips and tongue were blue, the right side of the head was partially distended with dark blood. The left side was nearly empty. The lungs contained more blood than they would under different circumstances. They were somewhat congested. The pulmonary arteries were distended with blood. The liver was slightly congested, and also the kidneys. There was, however, no disease of the kidneys, no disease of any of the internal organs. . . . His death was caused by asphyxia, due to the inhalation of gas." If the latter undisputed and undoubtedly correct conclusion of fact needed any confirmation, it may be found in the testimony as to the effect of the same noxious gas on those who went to the relief of the deceased, and assisted in removing his remains from the well. It shows how narrowly they escaped a similar violent and accidental death. The notice and proofs of death were full and complete. Their sufficiency was not even questioned.

In view of the undisputed facts, of which the above is an outline, the learned president of the common pleas refused to affirm defendant's points for charge, some of which are predicated of the foregoing facts, and instructed the jury that upon the undisputed facts before them the plaintiff was entitled to recover; and there was accordingly a verdict and judgment in his favor. This action of the court in refusing defendant's points and instructing the jury in plaintiff's favor are the subjects of complaint in the several specifications of error. The first and main point was as follows: "The clause in the policy of insurance sued on, to wit: 'This insurance shall not cover . . . death or injury resulting from or attributable partially or wholly to . . . inhalation of gas,—applies to the case of death resulting from asphyxia caused by inhaling gas accumulated at the bottom of the well.'" This, in connection with the remaining seven points, was rightly refused. According to the undisputed facts above referred to, the death of the insured was caused by external, violent, and accidental means, and without any conscious or voluntary act on his part. No one knowing, as he did, the shallowness of the dug-out portion of the well, would ever suspect the presence of noxious gas therein. Doubtless he never for a moment contemplated the slightest danger. His death was purely accidental; quite as much so as if he had been suddenly and unexpectedly engulfed in water, and drowned. The deadly but invisible gas by which he was unconsciously and accidentally enveloped was undoubtedly the external and violent cause of his injury and death. According to the physician's testimony, above quoted, its violent effect upon the vital organs of the deceased was plainly visible at the time of the *post mortem* examination. As was well said in *Paul v. Travelers Ins. Co.*, 112 N. Y. 472, 3 L. R. A. 443 (which in principle rules this case): "As to the point raised by appellant, that the death was not caused by external and violent means, within the meaning of the policy, we think it a sufficient answer that the

gas in the atmosphere, as an external cause, was a violent agency, in the sense that it worked upon the intestate so as to cause his death. That a death is the result of accident, or is unnatural, imports an external and violent agency as the cause." In that case the policy on which suit was brought provided that the insurance should not extend to death caused "by inhaling gas." It appeared that the insured was found dead in bed. Gas had escaped in the room, and death was caused by breathing the atmosphere of the room filled with gas. It was held that death was not caused by the inhaling of gas, within the meaning of the policy. The company relied upon the same narrow and technical defense that is made by the defendant in this case. In an able opinion, reported in 45 Hun, 513, the learned judge of the general term, whose judgment was afterwards affirmed by the court of appeals, said, *inter alia*: "Was the death of the intestate caused by or through 'external, violent, and accidental means,' within the language of the policy? . . . We should say the death was due to external and violent means as clearly as drowning. . . . The cause of death came from outside as surely as would a rifle ball, or water in the case of drowning. The escape of gas into the room was violent in the same sense that would be the flow of water into a wrecked vessel. In either case, the external means constitute the cause which produces death. It is a violent death, produced by an external power, not natural. Some poisons, such as opium and chloral, produce no violent action on the human system. The man who descends into a well of carbonic acid gas is killed with no greater violence, perhaps, than was the intestate. Yet in all these cases the result would be called a violent death. . . . We also think the words 'inhaling of gas' were used to designate those common uses of gas in dentistry, surgery, etc. . . . Evidently an exception from death caused by a surgical operation was not broad enough to include the use of anesthetics preparatory to the operation. It contemplated a voluntary and intelligent act by the assured, not an involuntary and unconscious act." On this question, the court of appeals, in affirming the decision of the general term, said: "A careful consideration of this instrument, and of the scope and design of its provisions, leads us to the conclusion that appellant must fail in its contention. . . . In expressing its intention not to be liable for death from 'inhaling of gas' the company can only be understood to mean a voluntary and intelligent act of the insured, and not an involuntary and unconscious act. Read in that sense, and in the light of the context, these words must be interpreted as having reference to medical or surgical treatment, in which *ex vi termini* would be included the dentist's work or a suicidal purpose. Of course, the deceased must have, in a certain sense, inhaled gas; but, in view of the finding that death was caused by accidental means, the proper meaning of the words compels, as does the logic of the thing, the conclusion that there was not that voluntary or conscious act necessarily involved in the process of inhaling. An accident is the happening of an event without the aid and the design of the person, and which is unforeseen." 13 L. R. A.

. . . To inhale gas requires an act of volition on the person's part before the danger is incurred. Poison may be taken by mistake, or poisonous substances may be inadvertently touched; but, whatever the motive of the insured, his act precedes either fact. . . . If the policy had said that it was not to extend to any death caused wholly or in part by gas, it would have expressed precisely what the appellant now says is meant by the present phrase, and there could have been no room for doubt or mistake. Policies of insurance are to be liberally construed, and as in all contracts conditions are to be construed strictly against those for whose benefit they are reserved."

The principles, so well stated and enforced in the cases above cited, were afterwards approvingly considered in *Bacon v. United States Mut. Acc. Assn.* 123 N. Y. 804, 9 L. R. A. 617. In further support of same principles, reference might be made to other authorities,—among which are: *May, Ins.* 631, in which reference is made to *Treu v. Railway Pass. Assur. Co.* 5 Hurlst. & N. 211; *Winspear v. Accident Ins. Co.* 29 Moak, Eng. Rep. 488; *Accident Ins. Co. of North America v. Crandal*, 120 U. S. 533, 80 L. ed. 742; *Mallory v. Travelers Ins. Co.* 47 N. Y. 52; *North American L. & Acc. Ins. Co. v. Burroughs*, 69 Pa. 43; *McGlinchey v. Fidelity & C. Co.* 80 Me. 251, 6 New Eng. Rep. 450; *Eggenberger v. Guarantee Mut. Acc. Assn.* 41 Fed. Rep. 172; *United States Mut. Acc. Assn. v. Newman*, 84 Va. 52,—but further elaboration is unnecessary.

This case is not ruled by *Pollock v. United States Mut. Acc. Assn.*, 103 Pa. 280, on which defendant relies. While that case may well stand upon its own peculiar facts, we think the present case is clearly distinguishable in its controlling facts as well as in the principles applicable to them. In that case the injury did not result from external, violent and accidental means. The fatal drug was voluntarily and intentionally taken by the deceased. In deciding that case this court never could have intended to lay down the broad rule that in construing an accident policy there is no distinction between external, violent, and accidental causes of death, and those cases in which death results from voluntary acts. What was decided in that case was that, under the various clauses of the policy sued on, there could be no recovery, and it was unimportant whether the means arose from the designing act of the insured or otherwise.

Another ground of defense suggested in defendant's 5th, 6th, and 7th points was that the deceased was injured in an occupation or exposure classed by the company as more hazardous than that specified in the policy, etc. The points referred to appear to be predicated of testimony which was improperly before the jury. The Company, in disregard of the provisions of the Act of May 11, 1881 (P. L. 20), had failed to attach to the policy copies of the by-laws or application, and should not have been permitted, against plaintiff's objection, to give them in evidence. The Act was passed in the interest of honesty and fair dealing, and its provisions should be strictly enforced. We have no doubt they apply to such companies as the defendant.

Without further referring to the specifica-

tions of error, it is sufficient to say that neither of them is sustained. The deceased was accidentally, violently, and fatally asphyxiated by the unknown presence of a fluid foreign to his person. If that fluid had been oil, smoke, water, or molten metal, the result would have been substantially the same. Death, caused not so much by the inhalation of the fluid as by its ac-

tion in excluding life-supporting air, would have inevitably resulted. A fair construction of the policy leads to the conclusion reached by the court below, that death resulting from causes such as killed the intestate is not within any of the exemptions relied on by the Company.

Judgment affirmed.

MICHIGAN SUPREME COURT.

Charles F. HARRINGTON

CITY OF PORT HURON, *Appt.*,

(..... Mich.)

Ejectment is not the proper remedy to procure the discontinuance of a sewer which was constructed by a city over lands of the United States government which was afterwards conveyed to plaintiff, where the only facts that appear are that the sewer was constructed and was thereafter continuously applied to its proper use without being fenced in or anything done to prevent plaintiff from taking possession of the land.

(*Morse, J., dissents.*)

NOTE.—What dissents will support ejectment.

Actual personal presence of the defendant on the land is not necessary; any subjection to his will and domain excluding the plaintiff is sufficient. *Bell v. Foxen*, 14 Sawy. 799, 43 Fed. Rep. 755.

Wrongful permanent possession, whether it arises from a dispute as to boundary or otherwise, is a sufficient dissensin. *Leprell v. Kleinschmidt*, 112 N. Y. 364.

A claim of title by a trespasser may be regarded as a dissensin. *Chilson v. Buttolph*, 12 Vt. 231.

So under 2 N. Y. Rev. Stat., § 4, may a verbal claim to unoccupied land. *Banyer v. Emple*, 5 Hill, 48.

But a mere claim of possession and title by one who has committed no actual trespass on the land is insufficient. *Grignon v. Black*, 75 Wis. 674.

A claim of an easement simply (here the use of a wharf) is not a sufficient dissensin to support ejectment. *Child v. Chappell*, 9 N. Y. 246.

The same rule was applied to a claim of an easement to flow land. *Wilklow v. Lane*, 37 Barb. 244.

So the flowing of land by a dam will not support ejectment in favor of one who has only a right to mines in the land. *Ezzard v. Findley Gold Min.* Co. 74 Ga. 520.

Wrongfully insisting on remaining in the house of plaintiff, who is occupying it, will not make a case for ejectment. *Buchanan v. Streper*, 12 Phila. 620.

Projection of eaves, walls, etc.

The projection of a roof over land makes a case for ejectment. *Murphy v. Bolger*, 1 L. R. A. 309, 60 Vt. 723; *Sherry v. Frecking*, 4 Duer, 452. *Contra*, *Aiken v. Benedict*, 39 Barb. 400; *Vrooman v. Jackson*, 6 Hun, 393.

It will be noticed that the earlier of the three New York cases cited is overruled by the two later ones; but the question has not been passed upon by the court of last resort in that State which incidentally noticed the question but did not decide it in the case of *Leprell v. Kleinschmidt*, 112 N. Y. 364.

So the projection of some of the stones of a foundation wall will support the action. *McCourt v. Eckstein*, 22 Wis. 153.

13 L. R. A.

(May 8, 1891.)

A PPEAL by defendant from the judgment of the Circuit Court for St. Clair County in favor of plaintiff in an action brought to recover the possession of certain land over which defendant had constructed a sewer. *Reversed.*

The facts are stated in the opinion.

Mr. A. E. Chadwick, with *Mr. Frank T. Wolcott*, for appellant:

The second count is wholly insufficient to admit of any evidence, or as the foundation of any judgment.

How. Stat. 7795; *White v. Hapeman*, 43 Mich. 267; *Twoood v. Hoyt*, 42 Mich. 609.

Dissensin of owner where lands are subject to highway or other easement.

The owner of the fee may maintain ejectment for land subject to a public way against one who claims as owner. *Goodtitle v. Alker*, 1 Burr. 133; *Jackson v. Hathaway*, 15 Johns. 447; *Ets v. Dally*, 20 Barb. 32; *Brown v. Galley, Hill & Denio*, Supp. 306; *Wright v. Carter*, 27 N. J. L. 77; *Gardiner v. Tisdale*, 2 Wis. 153. *Contra*, *Cincinnati v. White*, 31 U. S. 6 Pet. 481, 5 L. ed. 482.

It will lie also for premises subject to an easement where plaintiff's rights in the land are denied. *The Edmondson Island Case*, 42 Fed. Rep. 15.

A turnpike company may also maintain the action for an encroachment upon its road. *Borough of Chambersburg v. Manko*, 39 N. J. L. 496.

So it will lie against a railroad company which is in a street without any right as against the owner in fee. *Sharpe v. St. Louis & S. E. R. Co.* 49 Ind. 296; *Lozier v. New York Cent. R. Co.* 42 Barb. 466; *Carpenter v. Oswego & S. R. Co.* 24 N. Y. 655; *Wager v. Troy Union R. Co.* 26 N. Y. 526, overruling *Redfield v. Utica & S. R. Co.* 25 Barb. 54.

It is also proper where defendants have entered and built a wharf and pier on lands of a city and are taking wharfage. *New York v. Law*, 125 N. Y. 380.

Public use as a dissensin.

Similar to the main case as involving the question of dissensin by the public are the following: Ejectment will lie against a city where land is taken without right for a highway denying the rights of the owner of the fee. *Armstrong v. St. Louis*, 69 Mo. 309; *Strong v. Brooklyn*, 65 N. Y. 1.

Also against a county for lands laid out as a public road by void proceedings. *McCarty v. Clark County*, 101 Mo. 179.

In an earlier New York case it was held that the action would not lie against a city where land was taken for a street, but it did not appear that the ownership of the fee was denied. *Cowenhoven v. Brooklyn*, 38 Barb. 9.

So the action lies for land occupied by a city as an approach and landing for a swing bridge. *Lawe v. Kaukauna*, 70 Wis. 306.

B. A. H.

A corporation cannot maintain ejectment for a mere easement.

Bay County v. Bradley, 39 Mich. 163; *Grand Rapids v. Whittlesey*, 83 Mich. 109; *Taylor v. Gladwin*, 40 Mich. 232.

Such an easement is but an incorporeal hereditament.

3 Kent, Com. 419, and cases cited; *Taylor v. Gladwin*, *supra*; 2 Washb. Real Prop. 875.

It must follow, as a corollary on this, that if a municipal corporation cannot maintain ejectment for an easement, because having no title or right to its exclusive possession, or of the land subject to it, the same reasons prohibit a like action against it.

The plaintiff is the undisputed legal owner and in possession of this whole tract so far as it is capable of possession, or he chooses to exercise it.

How. Stat. 8701.

He cannot maintain ejectment for the whole tract while himself in undisputed possession of a part.

Rea v. Rea, 5 West. Rep. 911, 68 Mich. 257, 262.

If he sought to recover a part only, he must describe that part from which he is evicted and excluded with certainty, and such certainty as without extraneous aid it can be ascertained and admeasured.

King v. Merritt, 11 West. Rep. 291; 67 Mich. 195, 210; *White v. Hapeman*, 48 Mich. 267.

Meers, Avery Brothers, for appellee:

Our Statute allows ejectment against any "person exercising acts of ownership on the premises claimed or claiming title thereto, or some interest therein."

How. Stat. 7791.

The acts of ouster in this case are much more pronounced than were those of the defendant in *Cole v. Wells*, 49 Mich. 450.

One who records an invalid tax title can be made defendant in ejectment even though no step has been taken to assert possession.

Heinmiller v. Hatheway, 60 Mich. 391. See also *Anderson v. Courtwright*, 47 Mich. 161; *Boyl v. Southard*, 58 Mich. 434.

On the principle that the owner of the fee owns all above and below the surface, ejectment has been sustained for space above land covered by an overhanging roof (*Tyler, Ejectment*, 87; *Aiken v. Benedict*, 39 Barb. 400; *Hoffman v. Armstrong*, 43 N. Y. 201; *McCourt v. Eckstein*, 22 Wis. 155), and for a coal mine. *Tyler, Ejectment*, 41; *Adams, Ejectment*, 20; *Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 760.

If mines and minerals are thus recoverable, why not the land occupied by this sewer, even separate and distinct from the outlet structure?

And defendant in lawful possession of the surface is liable in trespass for removal of coal below surface without right.

Pennsylvania R. Co. v. Japes (Pa.) 11 Cent. Rep. 166.

And ejectment lies for veins and lodes beneath the surface (*Sedgw. & W. Title to Lands*, § 115-284; *Caldwell v. Fulton*, *supra*); and for entering upon the land below water. *Merting v. Jackson*, 14 West. Rep. 229, 69 Mich. 488.

Ejectment lies in favor of the owner against
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one in possession and exercising acts in the nature of easement, as where a railroad company laid its track over one's land.

Carpenter v. Oswego & S. R. Co. 24 N. Y. 656.

And where a city claimed the right to swing a bridge crossing a canal, over the lands of plaintiff.

Lowe v. Kaukauna, 70 Wis. 806.

The contention that mere prevention of beneficial use of premises is not enough to warrant ejectment is answered by *Judge Cooley's* reasoning in *Grand Rapids Boom Co. v. Jarvis*, 80 Mich. 320.

Champlin, Ch. J., delivered the opinion of the court:

The plaintiff brought an action of ejectment against defendant by filing a declaration as commencement of suit, which contains two counts. The first count described the premises as follows: "A tract of land bounded on the northwest by Pine Grove Park, on the northeast by St. Clair River, and on the south by Lincoln Avenue, excepting a strip of land across said premises seventy-five feet in width, occupied by the Port Huron & Northwestern Railway Company, being fifty feet in width on the westerly side of the center line of the roadway of said company, and twenty-five feet on the easterly side thereof," which premises the plaintiff claimed in fee. The second count described the premises as follows: "All that part of that piece of land bounded on the northwest by Pine Grove Park, on the northeast by St. Clair River, and on the south by Lincoln Avenue, which is occupied by Superior-Street sewer and Ontario-Street sewer, and the outlet thereof;" and then the same exception as in the first count,—which premises the plaintiff claims in fee. A trial was had before a jury, and it appeared that this land described in the first count of plaintiff's declaration was formerly a part of the Ft. Gratiot military reservation; that on the 20th day of July, 1868, the Congress of the United States authorized the secretary of war to sell portions of this reservation, including the tract in controversy, "at such times as he may deem most advantageous to the interests of the government." On March 18, 1879, before any sales had been made by the secretary, a portion of the tract was granted to the City of Port Huron for park purposes, to be known as "Pine Grove Park." Some time during the season of 1870 the secretary of war caused the remaining portion of the reservation to be platted, and public sale was made of a part thereof. The part unsold, which is in controversy here, was sold under authority of an Act of Congress passed June 16, 1890, to the Port Huron & Northwestern Railway Company, and this company conveyed to the plaintiff in this suit such land by deed dated April 3, 1884. In this deed there was an erroneous description, which was corrected by a deed dated January 8, 1886. In June, 1874, the City of Port Huron, by its common council, decided to construct a sewer from the St. Clair River westward, through and along Park Place, to Ontario Street, and during that year entered upon the premises and constructed the sewer. The authorities of the United States had prepared a map previously to that

time, on which was designated a street across the land described in the declaration as "Park Place," but before the same was recorded or the property sold the authorities of the United States had ignored such street, and retained the premises as property belonging to the government. In 1875 or 1876 the City caused a sewer to be built along Superior Street, which connected with the one through Park Place. These sewers have always been maintained by the City as public sewers, and continue so to be. They are used by the inhabitants of the City for sewage purposes, and, among others, by the plaintiff in this suit, who was, as appears, one of the petitioners for the construction of the sewer in Superior Street, which was built before he obtained title from the railway company. It further appears that at the outlet of the sewer, at its junction with the river, there is a structure of masonry several feet in height and twenty-two feet in width, extending outward from the bank into the stream, protected by a system of piling; and testimony was introduced tending to show that this structure prevents the land being used for any purposes requiring dockage, and that the land is so situated as to be valuable for a dock frontage. It was further shown upon the trial that the premises are uninclosed, and that there is nothing to prevent the plaintiff from taking possession peaceably of the lands described in his declaration. The sewer in question was built several years before the railway company made its purchase in 1880, and while the land belonged to the general government; and some effort was made on the part of the defendant to show that permission was given the City by the officer in charge of Ft. Gratiot for it to construct the sewer across these premises, but we think that such testimony wholly failed to show such permission. On the contrary, it was shown that, during the time they were excavating for the sewer, the officers in charge of the fort caused stakes to be set along the lines of this parcel of land to indicate that it belonged to the government.

It is a principle of law that where a person who, without the permission from the owner, knowingly enters upon his lands, and erects structures permanent in their character, annexed to the freehold, such structures belong to the owner of the soil to which they are annexed or upon which they are erected; and it follows that when the City erected this sewer across the lands of the government of the United States, without its consent or permission, such structure immediately belonged to the owner of the soil, and when the government conveyed such land to the railway company the whole of the premises passed to its grantee. The testimony does not show that the City is in possession of any of the premises described in plaintiff's declaration, or that it assumes to exercise any act of control or ownership over it; the facts appearing that in 1874 it constructed a sewer across it, which is the outlet of two sewers, and has done nothing since upon the lands. But if the City did claim to own the sewer, and have the right to discharge water through it, we do not think that the action of ejectment would lie, under the circumstances of this case. Ejectment will not lie in this State for anything that is not

tangible or capable of being delivered to the plaintiff by the sheriff under the writ of possession. Here the judgment was rendered upon the verdict of the jury for the premises described in the first count of the plaintiff's declaration, such verdict having been directed by the trial court. A writ of possession, under such judgment, would only put the plaintiff in possession of what he could at any time have had without the aid of the court, and, when he was so put in possession of the land described in the first count of his declaration, the sewer would still incumber the land, and the water continue to be discharged through this artificial conduit. Ejectment will not lie for a mere trespass, nor for a mere right of way or an easement. *Northern Turnp. Road Co. v. Smith*, 15 Barb. 355; *Judd v. Leonard*, 1 D. Chip. (Vt.) 204; *Clement v. Youngman*, 40 Pa. 341; *Caldwell v. Fulton*, 81 Pa. 433; *Child v. Chappell*, 9 N. Y. 251.

If the corporation had obtained the right to construct the sewer across these lands to discharge the water passing therein, it would have created an easement upon the land. If the City constructed the sewer without authority, thus discharging the water upon and across the land, the act would be a trespass, but not an ouster of the plaintiff from the lands described. Expressed in simplest language, the City has constructed an artificial aqueduct across the lands belonging to plaintiff's grantor, through which it discharges water and sewage from two of the sewers laid in the streets of the City. There is no doubt that the plaintiff's title, as riparian owner, extends to the boundary line in the St. Clair River, and gives him the right to erect docks and employ the land for any purpose not inconsistent with the rights of navigation; and if the defendant in this case is in possession, and sets up a claim of right to maintain the sewer in the St. Clair River in front of his land, and to drive and maintain piles there for the purpose of protecting such sewer, we think ejectment would lie for the land so appropriated; but the facts in this case do not warrant this court in finding that the City of Port Huron has laid any claim to the right to maintain the structure which they erected when they built the sewer, and we are of opinion that the court erred in directing a verdict for plaintiff under the first count of plaintiff's declaration. The learned judge instructed the jury that "the act of the City in entering upon and excavating the soil for this sewer, and constructing the same, was such an act as amounted to an assertion or claim of title on its part, and so the owner of the property may treat it as an act of disseisin or ouster; and, as the sewer has been used and maintained continuously to the present time, I think it a legal fact that the plaintiff has been kept out of possession of the premises by the City." We have already called attention to the fact that this sewer was constructed long before the plaintiff obtained his title from the railway company, and in fact before the railway company had obtained its title to the land in dispute, and if there was any ouster of the owner, or an act of disseisin, it occurred a long time prior to the conveyance to plaintiff's grantor. The government, in conveying to plaintiff's grantor, only conveyed all the right, title, and interest of the United States to the

land in question, without any covenants of warranty whatever. We shall not assume in this suit, at this time, to pass upon the question as to whether or not it was the intention of the government to recognize defendant's rights upon the premises; although it may be said that the government granted to the purchaser the full extent of its right, title, and interest in the premises. It is apparent, however, that whether the act of the City in constructing the sewer was a disseisin of the owner would depend very much upon the facts and circumstances under which the city entered upon the land and constructed the sewer. If at that time the City authorities supposed that there was a public street called "Park Place," in which they were constructing a sewer, it would not be such an assertion or claim of title on its part as would operate as a disseisin, if it afterwards turned out that the City was mistaken as to the claim under which it entered. Neither would it be a disseisin if the City entered by the consent, express or implied, of the owner. The mere fact that the sewer has been used continuously to the present time to discharge water into the St. Clair River, without any other acts or claims made by the defendant, would not amount in law to keeping the defendant out of possession of the premises. We think that the plaintiff has mistaken his remedy, and that the judgment must be reversed, and a new trial granted.

McGrath, Long, and Grant, JJ., concurred.

Morse, J., dissenting:

This judgment should be affirmed. The title of the premises in issue is indisputably in the plaintiff, and he is not in possession. The City of Port Huron is maintaining continuously from day to day and hour to hour a sewer upon his premises. The mouth of the sewer, where it empties into the St. Clair River, is constructed of stone, and protected by piles, constituting an obstruction to the erection of a dock, elevator, or building, and depriving plaintiff of all beneficial use of his water front. He has frequently applied to the municipal authorities in relation to this sewer, claiming it to be an obstruction to the exercise of his property rights in the land, and notified them that he was the owner of the premises; but they have always denied his title, and insisted on their right to maintain this sewer. It is true, under the authorities, that ejectment cannot be maintained for a mere trespass upon land, nor for a mere right of way or an easement; but that is not this case. This occupation of the city for the purpose of sewerage is not a mere temporary trespass, like one going onto the premises of another and doing damage and going away again, but it is a continuing trespass,—one that never ceases. The sewer remains there all the time, and is in use by the city night and day. It amounts substantially to a constant occupation of the plaintiff's premises, and a possession which is sufficient to justify the remedy of ejectment. Ejectment, under our Statute, will lie against any "person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein." How. Stat. § 7791.

In *Cole v. Wells*, 49 Mich. 450, the defendant

fastened a boom-pole to piles driven in the Black River in front of plaintiff's land, and used the boom for the storage of logs, claiming the right to do so. It was held that ejectment could be maintained. There was nothing in that case to prevent the plaintiff from tearing away and removing this boom from his premises. He could have destroyed it, as he can destroy this sewer; but the law, in my opinion, does not force the plaintiff to destroy property to remove such an obstruction, or to get, as he probably would, into a war or conflict over the possession of the premises so occupied by another, in which conflict the superior force would prevail. He is entitled to the peaceful remedy of ejectment. Nor is he even compelled to resort to the inadequate and vexatious remedy of trespass,—a remedy which, in case of judgment in his favor, settles nothing as to his title to the land. *Keyser v. Sutherland*, 50 Mich. 455. But it is said that there has been and is nothing in the way of his taking peaceful possession of the land. But this is no valid reason why he cannot bring ejectment under our Statute. We have held repeatedly that the putting on the record of a tax deed to premises and claiming title thereunder would warrant an action of ejectment by the owner of the land out of possession against the holder of such tax title. *Heinmiller v. Hatheway*, 60 Mich. 391; *Anderson v. Courtwright*, 47 Mich. 161; *Hoyt v. Southard*, 58 Mich. 434. Yet in such case there would be nothing to prevent the owner obtaining peaceable possession of the premises in most cases, but it has never been claimed that the fact that such possession could be taken had anything to do with the right to bring ejectment. Possession in the defendant is not a necessary element in ejectment in this State. The remedy is aimed against the assertion of ownership of or an interest in the land as well as against an unlawful possession. Nor are the cases cited by the chief justice in relation to easements or rights of way applicable here. The plaintiff is not bringing ejectment to recover a right of way or an easement, but to free his land of an unauthorized occupation under a claim of right by the city to so occupy it. As before shown, he is not obliged to invite trouble and conflict in an attempt to free his premises by removing the piles and tearing out the sewer. The action of trespass would not settle his title. He is not obliged to forbear his remedy in ejectment,—the only proper action to declare and fix his title permanently,—because the premises are not guarded against his peaceable entry upon them. In 24 N. Y. 656 (*Carpenter v. Oswego & S. R. Co.*), ejectment was brought against the defendant, and upheld, a majority of the court holding that the occupation was such that the action would lie. It was shown that the railway company had laid a track and affixed it to the soil, but had never used it or connected it with their operating road. They justified the laying of the track under permission of the municipal authorities, claiming the ground to be a public street; and also raised the point that ejectment would not lie because of the character of their occupancy. The court held that the fee of the soil, if it was a street, was in the plaintiff, and he had a right of action against any person using it for any other than legitimate street purposes, and

that the defendant had sufficient occupancy to justify bringing ejectment. The court said: "Ejectment will lie for anything attached to the soil of which the sheriff can deliver possession." But it is said that a writ of possession under a judgment in favor of the plaintiff will only put him in possession of what he could at any time have had without the aid of the court, and that the sewer would still incumber the land. So also a writ in the case of *Hoyt v. Southard*, 58 Mich. 434, would only have given the plaintiff, as far as the possession was concerned, what he could also have taken without suit. But something more is accomplished by the writ in both cases than the mere delivery of the possession. The possession is delivered

symbolically, but with it goes the establishment of plaintiff's title, freed from the adverse claim of title by the defendant. In the case at bar, also, the sewer with its stonework and piles is delivered to the plaintiff as his own, to do with them as he sees fit, without fear of further litigation, or any other conflict. In no other way except by an action of ejectment can the plaintiff determine and adjudicate at law his title to this land unless he shall do something which will authorize the City to bring ejectment against him; and it is very doubtful if he could do any act which would authorize the City to maintain ejectment against him under the authorities.

KENTUCKY COURT OF APPEALS.

F. ZABEL, *Appt.*,

v.

LOUISVILLE BAPTIST ORPHANS' HOME.

(.....Ky.....)

1. To plead a private statute under Civ. Code, § 119, subsec. 2, a party must at least state its title and the day on which it became a law.
2. A Baptist Orphans' Home is a charity, and as such renders a public service for which it may be lawfully exempted from taxation by the Legislature.
3. An exemption of a charitable institution from "all taxation" by state or local laws for any purpose whatever, does not extend to assessments for street improvements.
4. The power to fix the grade of a street cannot be delegated by a city council to a contractor.
5. A petition to enforce a lien for a street assessment is fatally defective if it fails to show that the city council and not the contractor fixed the grade of the street.

(October 6, 1891.)

APPPEAL by plaintiff from a judgment of the Louisville Chancery Court in favor of defendant in a proceeding instituted to enforce an assessment for street improvements. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. Newton G. Rogers, for appellant:

Defendant is not a public corporation; is not in fact capable of providing a general public service. It is limited strictly by the provisions of its charter, and strictly by the very title of its charter, to a limited class of people. Such being the case, it cannot claim an exception from the general public burdens on the ground that it has or does perform acts of a public nature.

Com. v. Masonic Temple Co. 87 Ky. 349; *Louisville v. Board of Trade* (Ky.) 12 L. R. A. 629.

Even if it had performed or did perform acts

of a public nature, so as to entitle it to be exempt from the payment of the ordinary taxes or revenue to the City of Louisville, or even to the State of Kentucky, it would not be exempt from the payment of a special tax or assessment like the one at bar.

Broadway Bapt. Church v. McAtee, 8 Bush, 508.

If the charter would exonerate it from the payment of taxes in general, then the act or the charter is invalid and unconstitutional.

Barbour v. Louisville Bd. of Trade, 82 Ky. 645.

Messrs. Oneal, Jackson & Phelps for appellee.

Holt, Ch. J., delivered the opinion of the court:

The appellant, F. Zabel, sues to enforce a lien against the property of the appellee, the Louisville Baptist Orphans' Home, for its proportion of the cost of constructing an alley abutting it, under a contract with the City of Louisville. The answer denies the averments of the petition, and in a second paragraph avers that it is a corporation conducted solely for charity, realizing no profit from its investments; and that its charter, which antedates the ordinance under which the improvement was made, in consideration of public services exempts its property from all taxation for any purpose. A demurrer to this paragraph was overruled, and, the plaintiff declining to plead further, the action was dismissed as to the appellee. The judgment, as copied into this record, does not expressly so order, but it overrules the demurrer, recites that the plaintiff declined to plead further, and, after excepting to the judgment, prayed an appeal to this court, which was granted, the case being retained for further proceedings against the other defendant, the City of Louisville.

With some hesitation we shall treat this as a final judgment as to the appellant, and therefore consider the appeal. The court evidently so intended it. The parties so regarded it, and have so treated it in argument in this court. Under the charter of the city, the proper averment in a petition of all the steps leading to the creation of such a lien, when supported by such exhibits as were filed in this instance,

NOTE.—For effect of exemption from taxation generally on local assessments, see note to *Atlanta v. First Presby. Church* (Ga.) 12 L. R. A. 852, 18 L. R. A.

creates, in the face of a mere denial, a prima facie case. Hence, if the petition was sufficient, and the defense set out in the second paragraph insufficient, the plaintiff was, in the absence of testimony, entitled to judgment. It is claimed, first, that if a good defense upon the score of exemption in fact existed, it was not sufficiently pleaded. The answer did not set forth the exemption statute *in hac verba*, nor did it refer to it by stating its title and the time when it became a law. It is a private statute, and section 119, subsec. 2, of the Civil Code provides: "In pleading a private statute it shall be sufficient to refer to it by stating its title and the day on which it became a law." A party relying upon such a statute must at least state this much; and the plea was defective in this respect.

As the case must go back for another hearing, it is not improper to consider other objections to the plea. To do so will doubtless expedite the case. It is urged that the appellee renders no public service, and that therefore the Legislature could not constitutionally exempt it from taxation. It is, however, a charity, and as such renders a public service. Its very name indicates its object, and entitles it to privilege and gratitude. It is the duty of the State to care for its indigent orphans; and, if done by another, he renders what is properly a public service, and the Legislature may therefore, without regard to the extent of it, exempt the property devoted to such use from taxation. Examination shows, however, that the provision of the Statute intended to be relied upon reads thus: "The property, money, and estate and rights of said corporation shall be exempt from all taxation by state or local laws for any purpose whatever." Acts 1869-70, vol. 1, p. 181. While the language is broad, yet it really amounts to no more than saying that the appellee shall be exempt from all taxation. The word "tax" does not embrace a local assessment. Something more is needed, showing that such was the legislative intention. Such a purpose, inasmuch as it imposes an additional burden upon others, should appear with reasonable certainty. Exemptions are of grace. They are to be strictly construed, and can embrace only what is clearly within their terms. While the right to levy a local assessment—as, for instance, to pay for a street improvement in a town or city—is derived from the taxing power, yet it is a distinct character of taxation, not ordinarily included within the meaning of that term. It proceeds upon the ground of equivalent benefits, and that it is no burden to pay for the improvement of a street in the ratio of benefits received. It is said in *Burroughs on Taxation* (page 461): "The word 'tax' or 'taxes' does not include local assessments, unless there be something in the statute in which it is found to indicate such an intention. The question frequently arises in the construction of statutes exempting persons or corporations from the payment of 'taxes,' and the almost unbroken current of authority is that such expressions do not include local assessments. In the case cited from 46 Cal. 553 (*Williams v. Corporan*), the defendant was 'exempted from taxation of every kind;' yet this was construed not to include a local assessment for the improvement of a street on which its real estate

abutted. The language in the other cases cited is fully as strong. It is regarded as a distinct species of taxation, not included in the general term 'tax' and 'taxation.'" Another leading writer upon this subject says: "It has been shown in another place that, while these local assessments are laid under a taxing power, they are not taxes in the ordinary understanding of that term, and that consequently the usual exemptions from taxation will not preclude the property exempted being subjected to them." Cooley, Taxn. 2d ed. 650. The adjudged cases are in accord with these writers. *Baltimore v. Green Mount Cemetery*, 7 Md. 517; *Bridgeport v. New York & N. H. R. Co.* 86 Conn. 255; *State v. Newark*, 27 N. J. L. 185; *Pater-son v. Society for Estab. U. Manuf.* 24 N. J. L. 385. We have in this State a general statute exempting church property from taxation, but in the case of *Broadway Baptist Church v. McAtee*, 8 Bush, 508, it was held that such property in the City of Louisville was liable for its proper proportion of the cost of construction and reconstruction of streets. In that case the Statute was a general one, applying to all church property, while here it is a private one, relating only to the appellee; but this does not render a different rule of construction applicable. The principle is the same; and whether the exemption be by a general statute or by a special one, relating only to the party claiming the exemption, it must, in the absence of language importing otherwise, be held to relate only to taxation for the general purpose of state, county and municipal government. To say of property that it is "exempt from all taxation by state or local laws for any purpose whatever," certainly gives no greater exemption than to say that it is "exempted from taxation of every kind;" and in enacting the Statute in question the Legislature must be presumed to have known of the almost uniform construction that has been given to the word "taxation." This being so, had it been intended to exempt the property of the appellee from being liable for its proper proportion of the cost of a benefit, which, as must be presumed, is directly conferred upon it by the construction of the street, the Statute would have provided in express terms that it should be exempt from local assessments. Such an intention cannot fairly be inferred from the language used, and it must be presumed that the word "taxation" was employed in its legal sense.

It is said, however, that the petition is defective, in that it fails to aver or show by any of the exhibits filed as a part of it that the city council fixed what should be the grade of the street. This objection is well taken. The copy of the city ordinance filed with the petition refers to another one, but no copy of it is filed, nor are its provisions set forth in the petition. It may or it may not fix the grade of the improvement. No presumption that it does is admissible. The council could not abdicate its legislative power in this respect, and leaving the matter to the judgment, or, perhaps, whim, of the city engineer or the contractor, subject the property of the abutting owner to whatever the improvement might cost. This would leave him largely at the mercy of an irresponsible, and, perhaps, interested party. The city, by its charter, has power to improve its streets as

may be prescribed by ordinance. The power is a legislative one, and the kind and character of the improvement must be fixed by the city council. *Hydes v. Joyes*, 4 Bush, 464.

While, therefore, the second paragraph of the answer was for the reasons indicated open

to demur, yet it should have been carried back and sustained to the petition; and *the judgment is reversed*, with leave to the parties to amend the pleadings, and for further proceedings in conformity to this opinion.

NEW HAMPSHIRE SUPREME COURT.

ATTORNEY-GENERAL

v.

Edward A. MARSTON.

(..... N. H.)

1. A tax collector is such while he retains his warrants and lists upon which are uncollected taxes, even after the expiration of his term, within the meaning of a statute prohibiting collectors of taxes from being members of the board of selectmen.
2. The acceptance of an office by one disqualified to hold it by reason of holding an incompatible office is not necessarily a resignation of the prior office in the absence of a special statutory or constitutional provision giving it that effect.
3. One cannot divest himself of the office of tax collector by resignation unless his resignation is accepted by competent authority.

4. One acquires no title to an office by being elected to it when he was disqualified by statute to hold it by reason of his holding an incompatible office.

(July 31, 1891.)

PETITION for a writ of quo warranto to oust defendant from the office of selectman for the Town of Durham, heard in vacation before Doe, Ch. J., and adjourned by him to the law term. *Judgment of ouster.*

Defendant was elected to the office of tax collector for the years 1888, 1889, and 1890. He took the official oath and served for the designated terms. At the annual meeting in March, 1891, he was elected selectman and took the oath and assumed to exercise the duties of that office. This proceeding was instituted to try his title thereto.

Further facts appear in the opinion.

NOTE.—Tenure of public office; incompatibility of offices.

It is well settled that when a person accepts an office incompatible with one which he then holds, he thereby impliedly resigns or vacates his former office. *State v. Buttz*, 9 S. C. 156; *State v. Brown*, 5 R. 1. 1; *People v. Carrique*, 2 Hill, 83; *Magie v. Stoddard*, 25 Conn. 555; *People v. Nostrand*, 46 N. Y. 375; *Stubbs v. Lee*, 64 Me. 196; *People v. Hanifan*, 98 Ill. 420.

In cases where the question of incompatibility of offices has arisen, independently of statutory or constitutional provision, two rules are generally recognized: (1) that incompatibility does not depend upon the incidents of the offices, as upon physical inability to be engaged in the duties of both at the same time; (2) the character and relation of the offices. *State v. Goff*, 4 New Eng. Rep. 100, 16 R. I. 505.

In *People v. Green*, 5 Daly, 254, "it was held that the office of member of the Legislature and clerk of the court of special sessions might be held by the same person, even though attendance upon one office prevented for the time being the performance of the duties of the other. This point was approved on appeal. *People v. Green*, 58 N. Y. 205.

In *Com. v. Kirby*, 2 Cush. 577, 580, the court says: "It has never been supposed that persons holding minor offices appertaining to the executive department of the government, such as deputy sheriffs, constables, or coroners, were thereby disqualified from holding seats in the Legislature. The same was formerly true of the judges of the court of common pleas, who frequently held the office of senator or representative while in commission as judges.

The test of incompatibility under the second rule is the character and relation of the offices; as where one is subordinate to the other, and subject in some degree to its revisory power; or where the functions of the two officers are inherently inconsistent and repugnant. In such cases it has uniformly been held that the same person cannot hold both offices. *State v. Goff*, 4 New Eng. Rep. 100, 16 R. I. 505.

formly been held that the same person cannot hold both offices. *State v. Goff*, 4 New Eng. Rep. 100, 16 R. I. 505.

In *Cotton v. Phillips*, 56 N. H. 220, where one was chosen a member of the prudential committee and also an auditor in a school district, it was held he could not hold both offices. The court says: "If the same person could hold both offices, he would in fact sit in judgment on his own acts."

Incompatibility arises where the functions of the two offices are inconsistent with their being exercised by the same person; such as being judge and clerk of the same court; the officer who presents his accounts for audit and the officer who passes upon it; judge and deputy sheriff (*People v. Green*, 58 N. Y. 205; *State v. Goff*, 4 New Eng. Rep. 100, 16 R. I. 505, 2 Am. St. Rep. 321; governor of a State and member of its Legislature; justice of the peace and judge of the appellate court (*Barnum v. Gilpin*, 27 Minn. 466, 38 Am. Rep. 304; *Mohan v. Jackson*, 52 Ind. 599; *Com. v. Bins*, 17 Serg. & R. 221; *State v. Feibleman*, 28 Ark. 424); sheriff and justice of the peace. *Stubbs v. Lee*, 64 Me. 196, 18 Am. Rep. 251; *Wilson v. King*, 3 Litt. 457, 14 Am. Dec. 84; *State Bank v. Curran*, 10 Ark. 142; *Lawson*, Rights, Remedies & Practice, § 3804.

When a person is selected for office who has not the qualifications required by law, the selection is not therefore void. The person selected is *de facto* an officer; his acts in the discharge of his duties are valid and binding. The peace and repose of society imperiously require that his official acts, so far as others are concerned, should be valid. This is true of the highest and lowest officers from the governor to the constable. *St. Louis County Ct. v. Sparks*, 10 Mo. 117, 45 Am. Dec. 355.

Offices incompatible. See notes to *De Turk v. Com. (Pa.)*, 5 L. R. A. 853.

De facto officers. See notes to *Worrel v. Peelle* (Ind.), 8 L. R. A. 228; *State v. Carr* (Ind.), ante, 177.

Messrs. J. G. Hall and John Kivel for plaintiff.

Messrs. Frink & Batchelder, for defendant:

There is no incompatibility between the office of collector of taxes and selectman, save the statutory one.

Pittsburg v. Danforth, 56 N. H. 274.

The Statute does not prohibit a collector, chosen or appointed for a prior year, but who has not collected all the taxes on his list, from being elected, and discharging the duties of selectman.

Gen. Laws, chap. 49, § 5, provides that neither the treasurer nor the collector of taxes shall be a member of the board of selectmen.

The Statute recognizes but one officer, existing at any one time, as the collector of taxes.

The reason of the law does not extend to ex-collectors. The law itself intends that the collector shall collect all his taxes within the year and settle his account.

Northumberland v. Cobleigh, 59 N. H. 254.

After that he is only a debtor to the town for the amount of the uncollected taxes. He cannot act upon their abatement if he is a selectman.

Pittsburg v. Danforth, *supra*.

By his acceptance of the office of selectman, defendant must be regarded as having resigned his office as collector of taxes.

Cotton v. Phillips, 56 N. H. 220.

Clark, J., delivered the opinion of the court:

"Neither the treasurer nor collector of taxes shall be a member of the board of selectmen." Gen. Laws, chap. 40, § 5. The duties of the offices of collector and selectmen are in some respects conflicting. The collector is required to give a bond to the acceptance of the town or selectmen. *Id.* chap. 42, § 4. The selectmen may remove a collector for certain causes (*Id.* chap. 42, § 9); and in certain cases they have power to issue an extent against him (*Id.*

chap. 66, § 5). And it is the duty of the selectmen, acting in behalf of the town, to see that the collector faithfully performs his official duties, and in default to take measures to protect the interests of the town. The defendant having been elected and having served as collector for the years 1888, 1889, and 1890 and still retaining his warrants and lists upon which are uncollected taxes, is still collector for those years. "Every collector, in the collection of taxes committed to him to collect, and in the service of his warrant, shall have the powers vested in constables in the service of civil process, which shall continue until all taxes in his list are collected." *Id.* chap. 58, § 1.

The defendant's acceptance of the office of selectman did not relieve him of the office of collector. The acceptance of an office by one disqualified to hold it by reason of holding an incompatible office is not necessarily a resignation of the prior office, unless it is made so by special statutory or constitutional provision. Const. pt. 2, arts. 94, 95. The defendant's resignation would not divest him of the office of collector unless it was accepted. Gen. Laws, chap. 42, § 1, provides that in case any officer who has given an official bond shall resign, he and his sureties shall continue liable upon his bond for all acts under color of his office until he shall resign and his resignation shall have been accepted by the town, selectmen, or others competent to accept the same.

The defendant being a collector of taxes for the Town of Durham when he was elected a selectman, was disqualified to hold the office, and his election gives him no title to it. *Cotton v. Phillips*, 56 N. H. 220, 223. Having assumed the office of selectman under color of an election, Marston is an officer *de facto*, and his official acts are valid as to third persons.

Judgment of ouster.

Doe, Ch. J., did not sit. The others concurred.

KANSAS SUPREME COURT.

C. M. CONDON, *Plff. in Err.*,

v.

L. H. KEMPER.

(....Kan.....)

Kemper and Condon entered into a written contract whereby Condon agreed to

*Head note by VALENTINE, J.

build a wall, etc., or else, at his election, to remove a certain house three feet, and put it in as good condition as it was before; and in such contract the parties further stipulated as follows: "It is mutually agreed between said parties that a failure on the part of said Condon to perform these obligations shall entitle said Kemper to recover from him the sum of \$500 as liquidated and ascertained damages for the breach of this contract." Condon elected not to build the wall.

NOTE.—Contract; Liquidated damages and penalty distinguished.

Whether an amount stated in a contract is to be regarded as a "penalty" or as "liquidated damages" is frequently a matter of great difficulty to determine, especially as the question is not controlled or indeed affected by the employment of either or both these terms. *Dwinal v. Brown*, 54 Me. 466; *Howland v. Segur*, 38 N. J. L. 236; *Foley v. McKeehan*, 4 Iowa, 1; *Bagley v. Peddie*, 16 N. Y. 469; *Sareve v. Brereton*, 51 Pa. 175; *Thoroughgood v. Walker*, 47 N. C. 15; *Watts v. Sheppard*, 2 Ala. 425; 13 L. R. A.

Grand Tower Min. Mfg. & Transp. Co. v. Phillips, 90 U. S. 23 Wall. 471, 28 L. ed. 71; *Burrage v. Crump*, 48 N. C. 330; *Davis v. Freeman*, 10 Mich. 188.

As illustrative of the difficulties experienced in this respect, see *Cothéal v. Talmage*, 9 N. Y. 551; *Clement v. Cash*, 21 N. Y. 268; *Spencer v. Tilden*, 5 Cow. 144; *Williams v. Dakin*, 22 Wend. 201; *Pierce v. Fuller*, 8 Mass. 223; *Hall v. Crowley*, 5 Allen, 304; *Knapp v. Matthy*, 13 Wend. 588; *Esmond v. Van Benschoten*, 12 Barb. 366; *Richards v. Edick*, 17 Barb. 200; *Colwell v. Lawrence*, 33 N. Y. 71; 3 *Parsons*, Cont. 150; *Noyes v. Phillips*, 60 N. Y. 408.

etc., and afterwards failed to remove the house. The cost of removing the house, and putting it in as good condition as it was before, would not have exceeded \$100. *Held*, that when the parties made the contract, and stipulated for damages in case of breach, fixing the amount at \$500, they could not have had in contemplation actual, compensatory damages; and therefore,—*Held*, that the sum of \$500 mentioned in such contract as liquidated and ascertained damages must be treated as a penalty, and not as liquidated damages.

(October 10, 1881.)

ERROR to the District Court for Labette County to review a judgment in favor of plaintiff in an action brought to recover the sum of \$500 as liquidated damages for the breach of a contract. *Reversed*.

Statement by **Valentine, J.**:

This was an action brought in the District Court of Labette County by L. H. Kemper against C. M. Condon to recover \$500 as liquidated damages for the alleged breach of the following written contract, to wit:

Even where the parties expressly stipulate in the recitals of the contract that the sum mentioned shall be regarded as liquidated and ascertained damages, and not as a "penalty," or where any other language equally conclusive had been used, the courts will still construe the recitals as in the nature of a contract, and restrict the measure of damages to such as the evidence shows have been actually received. *Kemble v. Farren*, 6 Bing. 141; *Dennis v. Cummins*, 3 Johns. Cas. 297; *Jackson v. Baker*, 2 Edw. Ch. 471, 6 L. ed. 470; *Reindell v. Schell*, 4 C. B. N. S. 97; *Curry v. Larer*, 7 Pa. 470; *Baird v. Tolliver*, 6 Humph. 186; *Moore v. Platte Co.* 8 Mo. 497; *Shreve v. Breton*, 51 Pa. 175; *Re Newman*, L. R. 4 Ch. Div. 724; *Boys v. Ansell*, 5 Bing. N. C. 390; *Horner v. Flintoff*, 9 Mees. & W. 678; *Lawson, Rights, Remedies & Practice*, § 2643.

The question is held to depend upon the meaning and intent of the parties as gathered from a full view of the provisions of the contract, the terms used to express such intent, and the peculiar circumstances of the subject matter of the agreement. *Dakin v. Williams*, 17 Wend. 447, affirmed, 22 Wend. 201; *Shute v. Hamilton*, 8 Daly, 462; *Perkins v. Lyman*, 11 Mass. 76; *Streep v. Williams*, 48 Pa. 450; *Chase v. Allen*, 13 Gray, 42.

The contractual agreement of the parties must control, and the true inquiry is, What was the undertaking? Whether it was advantageous or otherwise for the contracting parties to make this particular contract, is immaterial, if the intent is clear. *Bagley v. Peddie*, 16 N. Y. 469; *Hosmer v. True*, 19 Barb. 106; *Cushing v. Drew*, 97 Mass. 445.

So the use of the word "penalty," or the term "liquidated damages," does not conclusively show this intention, if the entire agreement indicates a different view. *Chamberlain v. Bagley*, 11 N. H. 284; *Dimech v. Corlett*, 12 Moore, P. C. 199; *Davis v. Penton*, 6 Barn. & C. 216; *Davis v. Freeman*, 10 Mich. 188.

The rule established by the principal case is further illustrated by the following decisions: *Bayne v. Ambrose*, 28 Mo. 36; *Clark v. Kay*, 28 Ga. 408; *Daly v. Litchfield*, 10 Mich. 29; *Gower v. Saltmarsh*, 11 Mo. 271; *Nash v. Hermosilla*, 9 Cal. 584; *Halderman v. Jennings*, 14 Ark. 329; *Foley v. McKeegan*, 4 Iowa, 1; *Baird v. Tolliver*, 6 Humph. 186; *Wilson v. Graham*, 14 Tex. 223; *Lord v. Gaddis*, 9 Iowa, 265; *Hallock v. Slater*, Id. 599; *Abrams v. Kounts*, 4 Ohio, 214; *Ricketson v. Richardson*, 19 Cal. 380; *Lindsey v. Anesley*, 23 N. C. 186; *Hammer v. Breidenbach*, 31 Mo. 48; *Long v. Towl*, 42 Mo. 545.

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"This agreement between L. H. Kemper and C. M. Condon witnesseth, that whereas, the said Kemper has sold to said Condon lot 7, block 38, in Oswego, Kansas, said Condon, as a part of the consideration therefor, agrees to erect thereon a two-story stone or brick building, not less than 100 feet deep, within six months, and to give use of the north wall thereof to said Kemper; or else remove the house now on lot 6, in said block 38, three feet north of where it now stands, as said Condon shall elect to do, and put said building in as good condition as it is in its present location. It is mutually agreed between said parties that a failure on the part of said Condon to perform these obligations shall entitle said Kemper to recover from him the sum of five hundred dollars as liquidated and ascertained damages for the breach of this contract. C. M. Condon, Oswego, Kansas, March 11, 1887." The defendant answered as follows: "Said defendant admits the execution and delivery of the writing marked 'Exhibit A,' attached to and made part of plaintiff's petition, but he alleges

A sum named in an agreement containing disconnected stipulations of various degrees of importance, will be considered as a penalty, though it is called in the agreement liquidated damages, unless the agreement specify the particular stipulation or stipulations to which the liquidated damages are to be confined. *Astley v. Weldon*, 3 Bos. & P. 346; *Kemble v. Farren*, 6 Bing. 141; *Boys v. Ansell*, 5 Bing. N. C. 390; *Horner v. Flintoff*, 9 Mees. & W. 678; *Cheddick v. Marsh*, 21 N. J. L. 463; *Whitfield v. Levy*, 35 N. J. L. 149.

If upon the face of the instrument it be doubtful whether the contracting parties intended that the sum specified in the agreement shall be a penalty or liquidated damages, the inclination of courts is to consider the contract as creating a penalty to cover the damages actually sustained by a breach of the contract, and not liquidated damages. *Crisdee v. Bolton*, 2 Carr. & P. 240; *Taylor v. Sandiford*, 20 L. S. 7 Wheat. 13, 5 L. ed. 284; *Chilliner v. Chilliner*, 2 Vca. Sr. 523; *Shute v. Taylor*, 5 Met. 61; *Dimech v. Corlett*, 12 Moore, P. C. 199; *Coles v. Sims*, 5 De G. M. & G. 1; *Hahn v. Horstman*, 12 Bush, 249; *Yenner v. Hammond*, 36 Wis. 277; *Streep v. Williams*, 48 Pa. 450; *Lynde v. Thompson*, 2 Allen, 456; *Wallis v. Carpenter*, 18 Allen, 19; *Green v. Price*, 13 Mees. & W. 701; *Pom. Eq. Jur.* § 440.

The tendency of late years has been to regard the statements of the contracting parties as to liquidated damages in the light of a penalty; and unless the contrary intention is unequivocally expressed, harsh provisions will be avoided, and compensation in the way of a penalty will be decreed. *Gammon v. Howe*, 14 Me. 250; *Richards v. Edick*, 17 Barb. 280; *Leggett v. New York Mut. L. Ins. Co.* 53 N. Y. 394; *Bright v. Rowland*, 3 How. (Mass.) 306; *Hamilton v. Overton*, 6 Blackf. 206; *Hoag v. McGinnis*, 22 Wend. 168; *Brown v. Bellows*, 4 Pick. 179; *Baird v. Tolliver*, 6 Humph. 186; *Wallace v. Carpenter*, *supra*; *Watts v. Sheppard*, 2 Ala. 425; *Hodges v. King*, 7 Met. 583; *Owens v. Hodges*, 1 McMull. L. 106; *Moore v. Platte Co.* 8 Mo. 467.

The tendency and preference of the law is to regard a sum stated to be payable if a contract is not fulfilled as a penalty and not as liquidated damages. Yet courts endeavor to learn, from the subject matter of the contract, the nature of the stipulations, and the surrounding circumstances, what was the real intent of the parties, and are governed by such intent. *Cushing v. Drew*, 97 Mass. 445.

the fact to be that said writing was executed and delivered under a misapprehension and a mistake of the facts in reference to the subject matter of the transaction therein referred to as they actually existed, and that but for such mistake such writing would not have been executed. Defendant alleges that plaintiff was the owner of lots 6 and 7, in block 38, in the City of Oswego, Kansas. That the frame house mentioned in said writing belonged to plaintiff, and was appurtenant to said lot 6. That defendant negotiated for and purchased from plaintiff said lot 7 with a view of erecting thereon a stone or brick building. That at the time of purchasing said lot 7, and of executing and delivering said writing, both plaintiff and defendant understood and believed that said frame house, mentioned in said writing, and which belonged on and was appurtenant to said lot 6, stood on the line between said lots 6 and 7; the main part of it being, as said parties supposed, on lot 6, and about two or three feet in width of it standing on said lot 7. That to permit defendant to build on his said lot 7 would necessitate the removal of said house, as said parties believed, some three feet to the north. That plaintiff sold, and defendant bought, said lot under such belief. That plaintiff, in negotiating for the sale of said lot 7, objected to being put to the expense of removing said house so that it would all stand on his own lot 6, or insisted, if he were put to such expense, he should be compensated therefor; and to this defendant assented, and agreed that he would, at his own expense, remove said frame house so that it should entirely stand on said lot 6, and far enough across the line between said lots 6 and 7 not to interfere with the erection of a wall on said line, and put it in as good condition as it then was, where it then stood; or if he should so elect, instead of removing and repairing said house as aforesaid, he might erect on said lot 7 a brick or stone building not less than 100 feet deep, and give plaintiff the use of the north wall thereof as compensation for his moving and repairing said house as aforesaid. That it was to meet such contingency, and secure such end, that said writing was executed and delivered. That thereafter this defendant elected not to erect said stone or brick building on said lot 7, and not to furnish plaintiff the use of the north wall thereof. That, by agreement between said plaintiff and defendant, said block was afterwards surveyed, and the fact was then ascertained that said frame building did not stand, as both of said parties had supposed it did, across the line between said lots 6 and 7,—a part on 6 and a part on 7,—but that it all then stood on said lot 6, and so far from the line between lots 6 and 7 as not to interfere with the erection of a wall thereon, and therefore a removal of said frame building was unnecessary, and would be of no advantage whatever to plaintiff. Defendant alleges that the only purpose on the part of plaintiff or defendant in the execution and delivery of said writing was to indemnify plaintiff against cost and expense in the removal and repair of said house as aforesaid,

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and that, had plaintiff desired its removal after the fact in reference to its true location was ascertained, he could have had it removed three feet north of where it then stood, and put in as good condition as it was, where it then stood, at a cost and expense of not to exceed \$100. That said house could, at the time of the execution of said writing, or at any time since then, have been removed three feet north of where it then stood and now stands, and put in as good condition as it then was, in its then location, at a cost of not to exceed \$100. That in no event could plaintiff's damage, had he desired to have had said house removed, exceed one hundred dollars. That to indemnify against such possible damage was the only object in giving said writing. Defendant alleges that plaintiff has not removed said house, and has in no way been to any cost or expense on account of the removal of said house, or for any other purpose referred to in any way in said writing. Defendant denies that plaintiff has suffered any damage on his account, and denies any liability to him in any respect. Wherefore defendant asks that this cause be dismissed, and that he recover his costs herein." The plaintiff replied, denying every allegation of the answer inconsistent with the allegations of his petition. When the case was called for trial, the plaintiff moved for judgment upon the pleadings; and the court sustained the motion, and rendered judgment accordingly in favor of the plaintiff and against the defendant for \$500, with interest and costs; and the defendant excepted, and afterwards, as plaintiff in error, brought the case to this court for review.

Messrs. Case & Glasse, for plaintiff in error:

The tendency of courts is to hold a sum named as a penalty rather than liquidated damages, when such a construction is at all compatible with the language used and the conditions of the contract entered into. Notwithstanding the language used, they will not find the intention to have been to consider a sum named as liquidated damage when it is to secure the performance of several items of unequal value or importance, the value of which can be accurately determined; and especially will they so hold when the sum named is greatly disproportioned to the damage which may be sustained.

Kemble v. Farren, 6 Bing. 141; 3 Parsons, Cont. pp. 157-159; *Wood's Mayne*, Dam. p. 212, §§ 172, 173, p. 218, §§ 168, 169, pp. 209, 210; *Sedgw. Dam. p. 339*; *Spencer v. Tilden*, 5 Cow. 144; *Spear v. Smith*, 1 Denio, 464; *Hoag v. McGinnis*, 22 Wend. 163; *Wallis v. Carpenter*, 18 Allen, 19; *Shute v. Taylor*, 5 Met. 61; *Higginson v. Weld*, 14 Gray, 165; *Lampman v. Cochran*, 16 N. Y. 275; *Cobwell v. Lawrence*, 38 N. Y. 71; *Lyman v. Babcock*, 40 Wis. 503; *Carter v. Strom*, 41 Minn. 522; *Berry v. Wisdom*, 3 Ohio St. 241; *Taylor v. Sandiford*, 20 U. S. 7 Wheat. 13, 5 L. ed. 384.

For a clear statement of the rule as to when a sum named is to be considered a penalty and when liquidated damages, see—

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Pa. 445. See also *St. Louis & S. F. R. Co. v. Shoemaker*, 27 Kan. 677; *Heatwole v. Gorrell*, 35 Kan. 692.

Mr. J. H. Morrison for defendant in error.

Valentine, J., delivered the opinion of the court:

The substantial question involved in this controversy is whether the plaintiff below, L. H. Kemper, may recover from the defendant below, C. M. Condon, the sum of \$500 as agreed and liquidated damages, or whether he can recover only the amount of his actual loss or damage resulting from the breach of the contract sued on, which amount, according to the facts of the case as presented to us, cannot exceed \$100. The contract upon which Kemper seeks to recover contains the following among other stipulations: "It is mutually agreed between said parties that a failure on the part of said Condon to perform these obligations shall entitle said Kemper to recover from him the sum of \$500 as liquidated and ascertained damages for the breach of this contract." It will be seen that the parties themselves have used the words "liquidated and ascertained damages;" but nearly all the authorities agree that neither these words, nor any other words of similar import, are conclusive, but that the amount named, notwithstanding the use of such words, may nevertheless be nothing more than a penalty. Some of such authorities are the following: *Lampman v. Cochran*, 16 N. Y. 275; *Ayers v. Peas*, 12 Wend. 393; *Hoag v. McGinnis*, 22 Wend. 163; *Beale v. Hayes*, 5 Sandf. 640; *Gray v. Crosby*, 18 Johns. 219; *Jackson v. Baker*, 2 Edw. Ch. 471, 6 L. ed. 470; *Shreve v. Brereton*, 51 Pa. 173; *Fitzpatrick v. Cottingham*, 14 Wis. 219; *Fisk v. Gray*, 11 Allen, 132; *Wallis v. Carpenter*, 18 Allen, 19; *Ex parte Pollard*, 2 Low. 411; *Baay v. Ambrose*, 28 Mo. 39; *Carter v. Strom*, 41 Minn. 522; *Schrimpf v. Tennessee Mfg. Co.* 86 Tenn. 219; *Haldeman v. Jennings*, 14 Ark. 329; *Davis v. Freeman*, 10 Mich. 188; *Hahn v. Horstman*, 12 Bush, 249; *Low v. Nolte*, 16 Ill. 475; *Kemble v. Farren*, 6 Bing. 141; *Davies v. Penton*, 6 Barn. & C. 216; *Horner v. Flintoff*, 9 Mees. & W. 678; *Newman v. Capper*, L. R. 4 Ch. Div. 724.

Of course the words of the parties with respect to damages, losses, penalties, forfeitures, or any sum of money to be paid, received, or recovered, must be given due consideration, and, in the absence of anything to the contrary, must be held to have controlling force; but when it may be seen from the entire contract, and the circumstances under which the contract was made, that the parties did not have in contemplation actual damages or actual compensation, and did not attempt to stipulate with reference to the payment or recovery of actual damages or actual compensation, then the amount stipulated to be paid on the one side, or to be received or recovered on the other side, cannot be considered as liquidated damages, but must be considered in the nature of a penalty; and this, even if the parties should name such amount "liquidated damages."

13 L. R. A.

The following text-books upon this subject may be examined with much profit: 1 Sedgw. Dam. 8th ed. chap. 12, §§ 389-427; 1 Sutherland, Dam. pp. 475-530, chap. 7, § 6; 13 Am. & Eng. Encyclop. Law, pp. 857-868; 1 Pom. Eq. Jur. §§ 440-447; 3 Parsons, Cont. pp. 156-163, § 2.

The text-books upon this subject unite in saying that the tendency and preference of the law is to regard a stated sum as a penalty, instead of liquidated damages, because actual damages can then be recovered, and the recovery be limited to such damages. 1 Sutherland, Dam. 490; 13 Am. & Eng. Encyclop. Law, pp. 853, 860. The decisions of this court are also in this same line. The only decisions of this court upon the subject of liquidated damages are the following: *Kurtz v. Sponable*, 6 Kan. 395; *Foot v. Sprague*, 13 Kan. 155; *St. Louis & S. F. R. Co. v. Shoemaker*, 27 Kan. 677; *Heatwole v. Gorrell*, 35 Kan. 692.

We are satisfied with the foregoing decisions of this court, but they do not go to the extent of controlling the decision in the present case. The last case cited is supported by the following additional cases: *Davis v. Gillett*, 52 N. H. 126; *Caswell v. Johnson*, 58 Me. 164; *Burrill v. Daggett*, 77 Me. 545.

In 1 Sedgwick on Damages, 8th ed., the following among other language is used: "From the foregoing we derive the following as a general rule governing the whole subject: Whenever the damages were evidently the subject of calculation and adjustment between the parties, and a certain sum was agreed upon and intended as compensation, and is in fact reasonable in amount, it will be allowed by the court as liquidated damages." Section 405. "And here we are brought back by a somewhat circuitous path to the great fundamental principle which underlies our whole system,—that of compensation. The great object of this system is to place the plaintiff in as good a position as he would have had if his contract had not been broken. So long as parties themselves keep this principle in view, they will be allowed to agree upon such a sum as will probably be a fair equivalent of a breach of contract. But when they go beyond this, and undertake to stipulate, not for compensation, but for a sum out of all proportion to the measure of liability which the law regards as compensatory, then the law will not allow the agreement to stand. In all agreements, therefore, fixing upon a sum in advance as the measure or limit of liability, the final question is whether the subject of the contract is such that it violates this fundamental rule of compensation. If it does so, the sum fixed is necessarily a penalty. If it does not do so, the question arises, as in any other contract, as to what agreement the parties have actually made; and here, as in all other cases, their intention, as ascertained from the language employed, is a guide." Section 406. "Where the stipulated sum is wholly collateral to the object of the contract, being evidently inserted merely as security for performance, it will not be allowed as liquidated damages." Section 410. "Whenever an amount stipulated is to be

paid on the non-payment of a less amount, or on default in delivering a thing of less value, the sum will generally be treated as a penalty." Section 411. "Whenever the stipulated sum is to be paid on breach of a contract of such a nature that the loss may be much greater or much less than the sum, it will not be allowed as liquidated damages." Section 412. "A sum fixed as security for the performance of a contract containing a number of stipulations of widely different importance, breaches of some of which are capable of accurate valuation, for any of which the stipulated sum is an excessive compensation, is a penalty." Section 413. "If the contract is one in which the measure of damages for part performance is ascertainable, and a sum is stipulated for breach of it, this sum will not be allowed as liquidated damages, in case of a partial breach." Section 415.

In 1 Pomeroy on Equity Jurisprudence the following language is used: "Where an agreement contains provisions for the performance or non-performance of several acts of different degrees of importance, and then a certain sum is stipulated to be paid upon a violation of any or all of such provisions, and the sum will be in some instances too large, and in others too small, a compensation for the injury thereby occasioned, that sum is to be treated as a penalty, and not as liquidated damages. This rule has been laid down in a somewhat different form, as follows: Where the agreement contains provisions for the performance or non-performance of acts which are not measurable by any exact pecuniary standard, and also of one or more other acts in respect of which the damages are easily ascertainable by a jury, and a certain sum is stipulated to be paid upon a violation of any or all of these provisions, such sum must be taken to be a penalty." Section 443. "Whether an agreement provides for the performance or non-performance of one single act, or of several distinct and separate acts, if the stipulation to pay a certain sum of money upon a default is so framed, is of such a nature and effect that it necessarily renders the defaulting party liable in the same amount at all events, both when his failure to perform is complete and when it is only partial, the sum must be regarded as a penalty, and not as liquidated damages." Section 444.

In Sutherland on Damages the following among other language is used: "While no one can fail to discover a very great amount of apparent conflict, still it will be found on examination that most of the cases, however conflicting in appearance, have yet been decided according to the justice and equity of the particular case." Page 478. "To be potential and controlling that a stated sum is liquidated damage, that sum must be fixed as the basis of compensation, and substantially limited to it; for just compensation is recognized as the universal measure of damages not punitive. Parties may liquidate the amount by previous agreement. But, when a stipulated sum is evidently not based on that principle, the intention to liquidate damages will either be found not to exist,

or will be disregarded, and the stated sum treated as a penalty. Contracts are not made to be broken; and hence, when parties provide for consequences of a breach, they proceed with less caution than if that event was certain, and they were fixing a sum absolutely to be paid. The intention in all such cases is material; but, to prevent a stated sum from being treated as a penalty, the intention should be apparent to liquidate damages in the sense of making just compensation. It is not enough that the parties express the intention that the stated sum shall be paid in case of a violation of the contract. A penalty is not converted into liquidated damages by the intention that it be paid. It is intrinsically a different thing, and the intention that it be paid cannot alter its nature. A bond, literally construed, imports an intention that the penalty shall be paid if there be default in the performance of the condition; and formerly that was the legal effect. Courts of law now, however, administer the same equity to relieve from penalties in other forms of contract as from those in bonds. The evidence of an intention to measure the damage, therefore, is seldom satisfactory when the amount stated varies materially from a just estimate of the actual loss finally sustained." Pages 480, 481. See also especially 3 Parsons, Cont. 6th ed. p. 156 *et seq.*

Many courts hold that the intention of the parties must govern, but say that if the damages stipulated to be paid, received, or recovered on the breach of the contract are out of proportion to the actual damages that might be sustained, then the parties could not in fact have intended liquidated damages, but merely a penalty, whatever their language might be. Other courts hold that it makes no difference what the intention of the parties might be; that the nature of the contract itself must govern, and if the amount stipulated to be paid, received, or recovered is out of all proportion to the actual damages that might be sustained, then such amount must be treated as a penalty, whatever may have been the intention of the parties; that in fact, and in the very nature of things, such amount would be a penalty, and could not be anything else; that the parties could not by misnaming the amount, and calling it liquidated damages, make it such. In this connection the following language of Judge Christiancy, who delivered the opinion of the court in the case of *Jacquitt v. Hudson*, 5 Mich. 123, 136, 137, is instructive: "Again, the attempt to place this question upon the intention of the parties, and to make this the governing consideration, necessarily implies that, if the intention to make the sum stipulated damages should clearly appear, the court would enforce the contract according to that intention. To test this, let it be asked whether, in such a case, if it were admitted that the parties actually intended the sum to be considered as stipulated damages, and not as a penalty, a court of law would enforce it for the amount stipulated. Clearly, they could not, without going back to the technical and long-explored doctrine which gave the whole pen-

alty of the bond, without reference to the damages actually sustained. They would thus be simply changing the names of things, and enforcing, under the name of stipulated damages, what in its own nature is but a penalty. The real question in this class of cases will be found to be, not what the parties intended, but whether the sum is in fact in the nature of a penalty; and this is to be determined by the magnitude of the sum, in connection with the subject matter, and not at all by the words or the understanding of the parties. The intention of the parties cannot alter it. While courts of law gave the penalty of the bond, the parties intended the payment of the penalty as much as they now intend the payment of stipulated damages. It must therefore, we think, be very obvious that the actual intention of the parties in this class of cases, and relating to this point, is wholly immaterial; and, though the courts have very generally professed to base their decisions upon the intention of the parties, that intention is not, and cannot be, made the real basis of these decisions. In endeavoring to reconcile their decisions with the actual intention of the parties, the courts have sometimes been compelled to use language wholly at war with any idea of interpretation, and to say 'that the parties must be considered as not meaning exactly what they say.' *Horner v. Plaintiff*, 9 Mees. & W. 678, per Parke, B. May it not be said, with at least equal propriety, that the courts have sometimes said what they did not exactly mean." And in the case of *Myer v. Hart*, 40 Mich. 517, 523, the Supreme Court of Michigan held as follows: "Just compensation for the injury sustained is the principle at which the law aims, and the parties will not be permitted, by express stipulation, to set this principle aside."

We might quote further from the text-

books and the reported cases, but we think the foregoing is sufficient; and from the foregoing it certainly follows that the plaintiff below, Kemper, cannot "recover" "the sum of \$500 as liquidated and ascertained damages for the breach of this contract," notwithstanding such is the language of the contract. If the defendant, Condon, had removed the building situated on lot 6 three feet north, and had then put the same in as good condition as it was before, he would have so completed his contract that not one cent of damage could be recovered from him; and to so remove such building, and to to put it in as good condition as it was before, would not have cost to exceed \$100. But suppose that Condon had removed the building, and then have failed to put the same in as good condition as it was before; he would have committed a breach of the contract, but the actual damages might not have been \$25. Then, should the plaintiff, Kemper, recover the said sum of \$500? Or suppose that Condon had removed the house, and attempted to put it in as good condition as it was before, but had failed to repair a lock, or a small portion of the plastering, or a broken window, which repairing might not have cost \$1; then, should Kemper have the right to recover the said sum of \$500? All this shows that the parties did not have in contemplation the matter of actual compensatory damages when they stipulated that Kemper might recover \$500 from Condon as liquidated and ascertained damages, in case of a breach of the contract, but shows that in fact, though not in words, they fixed the sum of \$500 as a penalty to cover all or any damages which might result from a breach of the contract.

The judgment of the court below will be reversed, and cause remanded for further proceedings.

All the Justices concur.

VERMONT SUPREME COURT.

Asher BURDITT, Admr., etc., of Angeline W. Gorham, Deceased, *Appl.*,

v.

Charles S. COLBURN, Admr., etc., of Rollins S. Meacham, Deceased.

(.....Vt.....)

1. A mortgage by an administrator individually to himself as administrator to secure an indebtedness which he owes to the estate is invalid for want of contracting parties.

2. A mortgagor's placing the mortgage, which he has executed individually to himself as administrator, without recording it, in a receptacle used for keeping papers belonging to himself and the estate, where it is found after his death, is not a delivery; and its subsequent recordation, by his successor is ineffectual.

(August 21, 1881.)

A PPEAL by complainant from a decree of the Chancery Court for Rutland County

NOTE.—Deed, essentials to validity of.

A deed must be signed, sealed, and acknowledged, and it is still inoperative for any purpose until it is actually or constructively delivered by the grantor, and accepted by the grantees. This element of delivery is the inseparable accompaniment of every conveyance, and it cannot be omitted without fatal effect. *Jackson v. Dunlap*, 1 Johns. Cas. 114; *Goddard's Case*, 2 Coke 4 b; *Stiles v. Brown*, 16 Vt. 553; *Fisher v. Beckworth*, 30 Wis. 55; *Huloh v. Scovill*, 9 Ill. 175; *Younge v. Guilbeau*, 70 U. S. 3 Wall. 441, 18 L. ed. 228; *Church v. Gilman*, 18 L. R. A.

16 Wend. 656; *Fairbanks v. Metcalf*, 8 Mass. 230; *Overman v. Kerr*, 17 Iowa, 498; *Johnson v. Farley*, 45 N. H. 510; *Cook v. Brown*, 34 N. H. 476; *Fisher v. Hall*, 41 N. Y. 421; *Fletcher v. Mansur*, 5 Ind. 287.

Delivery includes a surrender and acceptance, and both are necessary to its completion. This must be the result of a contract, the meeting of two minds, the accord of two wills. The grantor must be willing and agree to deliver, and the grantees must be willing and consent to receive, and this accord of wills must be evinced in some way to show the unequivocal intention of both parties that the

dismissing his bill filed to foreclose a mortgage. *Affirmed.*

The facts are stated in the opinion.

Mr. George E. Lawrence, for complainant:

Meacham, as administrator, was an entirely separate person from Meacham individually.

While public policy does not permit him in his representative capacity to deal and contract with himself in his individual capacity, nevertheless such contracts are in the nature of voidable contracts rather than void. And whenever contracts so made result beneficially to the trust they may be enforced in favor of the trust—and the trustee himself cannot nullify them.

Boerum v. Schenck, 41 N. Y. 188; *Woerner, Law of Administration*, 700-702, 1086, 1087.

Delivery, appears to have been accomplished, since the deed was signed, sealed, and delivered in the presence of attesting witnesses, and placed among the papers of the estate he intended to be benefited thereby.

Souwerby v. Arden, 1 Johns. Ch. 240, 1 L. ed. 126.

An administration stands in the place of the deceased, and cannot defend against this mortgage, unless Meacham himself could, supposing the same had, by reason of his removal, passed to another administrator during his lifetime.

Martin v. Martin, 1 Vt. 91.

Mr. J. C. Baker, for defendant:

Every contract necessarily involves two parties: one bound to perform the contract, and the other entitled to have it performed.

A party cannot contract with himself.

2 Chitty, Contracts, 1839.

Without delivery there is no mortgage.

1 Jones, Mortgages, § 84.

Delivery is an incident necessary to give effect to a mortgage, even as between the parties to it.

1 Jones, Mortgages, § 589; 3 Washburn, Real Property, 282; *Stiles v. Brown*, 16 Vt. 563; *Duinnell v. Bliss*, 58 Vt. 358.

The grantor must part with the control and custody of the mortgage permanently, with the intention of having it take effect as a mortgage. So long as he retains the control of the deed he retains the title conveyed by it.

Elmore v. Marks, 39 Vt. 538. See *Orr v. Clark*, 62 Vt. 136; *McElroy v. Hiner*, 133 Ill. 156.

This deed being found among Mr. Meacham's papers in his safe after his death, and there having been no delivery in his lifetime, no record made after that time can have any effect.

Walsh v. Vermont Mut. F. Ins. Co. 54 Vt. 351.

instrument shall take effect according to its purport and tenor. *Fisher v. Hall*, 41 N. Y. 416; *Brackett v. Barney*, 28 N. Y. 633; *Best v. Brown*, 25 Hun, 223.

It is a legal presumption that where a conveyance is found in the possession of the grantee or mortgagee, a due delivery of the instrument was intended. *Green v. Yarnall*, 6 Mo. 396; *Clarke v. Ray*, 1 Harr. & J. 319; *Chandler v. Temple*, 4 Cush. 285; *Southern L. Ins. & T. Co. v. Cole*, 4 Fla. 369; *Ward v. Lewis*, 4 Pick. 512; *Canning v. Pinkham*, 1 N. H. 356; *Houston v. Stanton*, 11 Ala. 412; *Cutts v. York Mfg. Co.* 18 Me. 290; *Ward v. Ross*, 1 Stew. (Ala.) 196.

13 L. R. A.

Tyler, J., delivered the opinion of the court:

The following facts are reported: Rollins S. Meacham, in his life-time, was administrator with the will annexed of the estate of Angeline W. Gorham, and became largely indebted to the estate for moneys that had come into his hands as such administrator. For the purpose of securing the estate for this indebtedness, on March 1, 1889, he made and executed a promissory note for \$1,550, payable to himself as administrator on demand, and in like manner a mortgage of his home place, conditioned for the payment of the note. He never settled the estate, nor rendered any account to the probate court. He converted the assets into money, and appropriated it to his own use in his private business. At the time the note and mortgage were executed, and at his decease, he was indebted to the estate to the amount of \$7,000, and was insolvent. His debts, besides what he owed the estate, amounted to about \$9,000 and his assets to about \$4,000. The note and mortgage were retained by him, and were found after his decease in his safe among other papers that belonged to the estate, and among certain deeds and mortgages of his own. He died November 17, 1889. His wife was the daughter of the testatrix, and is the only person interested in her estate. After Meacham's decease, the defendant, as his administrator, handed the note and mortgage to Burditt, after the latter's appointment as administrator upon the estate of Mrs. Gorham, and Burditt caused the mortgage to be recorded in the town clerk's office. The question is as to its validity.

The mortgage must be held invalid for want of contracting parties. A contract necessarily implies a concurrence of intention in two parties, one of whom promises something to the other, who, on his part accepts such promise. One person cannot by his promise confer a right against himself until the person to whom the promise is made has accepted the same. Until the concurrence of the two minds, there is no contract; there is merely an offer which the promisor may at any time retract. Chitty, Cont. 9, quoting Pothier Obl.

It is essential to the validity of a deed that there be proper parties,—a person able to contract, and a person able to be contracted with. 3 Washb. Real Prop. 217.

To uphold this mortgage, we must say that there may be two distinct persons in one; for in law the mortgagor and mortgagee are identical. The addition of the words "executor of A. W. Gorham's estate" does not change the legal effect of the grant, which is to Meacham in his individual capacity. In 3 Washb. Real

But this presumption may be rebutted by evidentiary facts calculated to prove the reverse of the conclusions established by the presumption. *Williams v. Sullivan*, 10 Rich. Eq. 217; *Morris v. Henderson*, 37 Miss. 501; *Johnson v. Baker*, 4 Barn. & Ald. 440; *Wolverton v. Collins*, 34 Iowa, 238; *Adams v. Frye*, 3 Met. 109; *Ford v. James*, 2 Abb. App. Dec. 162; *Little v. Gibson*, 99 N. M. 506; *Roberts v. Jackson*, 1 Wend. 478; *Black v. Shreve*, 13 N. J. Eq. 457; *Black v. Lamb*, 12 N. J. Eq. 118; *Den v. Farlee*, 21 N. J. L. 279. See notes to *Standiford v. Standiford* (Mo.) 3 L. R. A. 299; *Stokes v. Anderson* (Ind.) 4 L. R. A. 343; *Taylor v. Street* (Ga.) 5 L. R. A. 121.

Prop. 279, it is said that a grant to A., B., and C., trustees of a society named, their heirs, etc., is a grant to them individually; and *Austin v. Shure*, 10 Allen, 552; *Tovar v. Hale*, 46 Barb. 361; *Brown v. Combs*, 29 N. J. L. 36,—are cited. In this case the grant and the habendum are not to the estate and its legal representatives, but to Meacham, executor, his heirs and assigns. Meacham had misappropriated the funds of the estate, and no one but himself assented to his giving a note and mortgage for the purpose of partially covering his default.

2. The mortgage was not delivered. An actual manual delivery of a deed or mortgage is not necessary. If it had been so disposed of as to evince clearly the intention of the parties that it should take effect as a conveyance, it is a sufficient delivery. *Orr v. Clark*, 32 Vt. 138. Whether it has been so disposed of or not depends upon the facts of a given case.

In *Elmore v. Marks*, 39 Vt. 538, the orator was indebted to Marks, and for the purpose of security made and executed to him a deed of certain land, and carried it to the town clerk's office to be filed, but not recorded, and to be returned to him when his indebtedness to Marks should be paid. Through inadvertence, the deed was recorded, and the orator took it into his possession. It was never delivered to Marks, and he had no knowledge of it until several months after it was recorded, when the orator told him that it had been recorded by mistake. It was held that there was no delivery. Pierpont, Ch. J., said: "All the authorities seem to agree that, to constitute a delivery, the grantor must part with the custody and control of the instrument permanently, with the intention of having it take effect as a transfer of the title, and must part with his right to the instrument, as well as with the possession. So long as he retains the control of the deed, he retains the title." Anything which clearly manifests the intention of the grantor and the person to whom it is delivered that the deed should presently become operative and effectual, that the grantor loses all control over it, and that by it the grantee is to become possessed of the estate, constitutes a delivery. *Byars v. Spencer*, 101 Ill. 429.

In *Stone v. French*, 37 Kan. 145, it appeared that Francis B. French formed an intention of giving a certain piece of land to his brother, unless he should dispose of it during his lifetime. Accordingly, he wrote a letter to his brother in which he stated that in case of his decease his brother should have the land, and do with it as he pleased; that he would make a deed of it, inclose it in an envelope, and direct it to him to be mailed in event of the grantor's death. The grantor afterwards made a deed which contained the usual words, "Signed, sealed, and delivered in the presence of," etc. It was in all respects properly executed, and was placed in an envelope in the grantor's table drawer, with directions indorsed upon the envelope to have the deed recorded, but it was in fact never delivered. It was held that there was no delivery of the deed, and that the title to the land did not pass to the grantee; that, the deed being void, the recording of it after the grantor's death gave it no validity. A mere intention to convey a title is not sufficient. 13 L. R. A.

The intention and the act of delivery of the deed are both essential. To constitute a complete delivery of a deed, the grantor must do some act putting it beyond his power to revoke. Phill. Ev. (2 Cow. & H. notes, 5th ed.) 660, and authorities collated.

In *Younge v. Guilbeau*, 70 U. S. 3 Wall. 636, 18 L. ed. 262, it is said that "the delivery of a deed is essential to the transfer of a title. It is the final act, without which all other formalities are ineffectual. To constitute such delivery, the grantor must part with the possession of the deed or the right to retain it."

In *Fisher v. Hall*, 41 N. Y. 416, the court of appeals said: "A rule of law by which a voluntary deed executed by the grantor, afterwards retained by him during his life in his own exclusive possession and control, never during that time made known to the grantee, and never delivered to anyone for him, or declared by the grantor to be intended as a present operative conveyance, could be permitted to take effect as a transmission of the title, is so inconsistent with every substantial right of property as to deserve no toleration whatever from any intelligent court, either of law or equity." Without a delivery and acceptance, there is no mortgage, but only an attempt at one, or a proposition to make one. 1 Jones, Mort. § 104; *Jewett v. Preston*, 27 Me. 400; *Foster v. Perkins*, 42 Me. 168; 3 Washb. Real Prop. 299.

The fact that the note and mortgage, duly executed by Meacham, were found after his decease among his papers and papers of the estate, shows no delivery of them in any legal sense; on the contrary, the facts that he omitted to have the mortgage recorded, that he retained it in his possession and under his control so long a time, and that it ran to him and his heirs and assigns, indicate that he never decided to give it legal effect. He did not make it operative in his lifetime, or direct that it should take effect at his death, which was necessary to give it a testamentary character. The act of recording it after that event could not give it validity.

Decree affirmed, and cause remanded.

Elizabeth H. CROSSMAN

Frank W. JOHNSON.

(....Vt....)

Representations privately made in regard to property which has been ad-

NOTE.—Warranty, before or after sale.

Before sale.

A warranty shortly before the time of a sale, if relied upon, is binding. *Wilmot v. Hurd*, 11 Wend. 584; *Lisney v. Selby*, 2 Ld. Raym. 1120.

Statements made in negotiations at any interview before a sale may be warranties. *Way v. Martin*, 140 Pa. 400.

A verbal warranty of horses on a day when the price was fixed but prior to the actual purchase, when a written bill of sale was made, may be binding on the seller. *Hobart v. Young*, 12 L. R. A. 603, 68 Vt. —.

But evidence of representations a month before

vertised for sale at public auction may become the foundation of an action for breach of warranty in favor of one who, in reliance on them, bids in the property.

(September 4, 1891.)

EXCEPTIONS by defendant to rulings of the County Court for Rutland County, made during the trial of an action brought to recover damages for alleged breach of warranty of a horse. *Judgment affirmed.*

The facts are stated in the opinion.

Mr. Joel C. Baker, for defendant:

If what passes between a vendor and purchaser forms no part of the negotiation ending in the purchase, it cannot be treated as a warranty. Thus, in the case of a sale by auction, you cannot "tack on a previous private communication to what is said by the auctioneer at the time of the actual public sale, in order to constitute a warranty."

2 Addison, Torts, 1014; *Hopkins v. Tanqueray*, 15 C. B. 180; 2 Benjamin, Sales, pp. 808, 809; *Bartlett v. Purnell*, 4 Ad. & El. 792; 1 Wait, Act. & Def. 477.

The claimed representations after the sale but before payment were wholly without consideration and are void.

2 Benjamin, Sales, 809.

Mr. D. E. Nicholson for plaintiff.

Start, J., delivered the opinion of the court: The defendant and one Wiley were co-administrators of the estate of William Wiley, and as such administrators had advertised the property of the estate to be sold at public auction on March 14, 1889. On the 21st day of February, 1889, and after the horse in question had been advertised for sale at public auction, the plaintiff went to see the defendant about purchasing him. Her evidence tended to show that the defendant then told her the horse was only twelve years old and sound; that he would not sell him at private sale; that he must be sold at public auction, and she could bid for him there; that she bid off the horse at the auction sale relying upon these representations, which were known to the defendant. After the sale, and before delivery or payment, the defendant repeated these representations. The plaintiff's evidence also tended to show that the horse was twenty years old, and unsound, and that this was known to the defendant at the time he made the representations. The plaintiff claimed to recover upon a warranty and on account of fraud. The defendant requested the court to charge the jury as follows: "No claim of

damages for breach of warranty can be predicated upon a sale at auction, unless the representations upon which the claim is made are made at the auction, or in such a manner as to operate as a representation or warranty to any bidder who should become a purchaser at the sale." The court refused to so instruct the jury, to which the defendant excepted. It appears from the exceptions that the charge in other respects was such as the case called for, and that the rules with reference to both branches of it were fully stated, to which no exceptions were taken. By the charge, the jury were left at liberty to find the defendant liable on account of a warranty. In this respect the defendant's counsel claims there was error, and insists that the jury should have been instructed as requested, and contends the plaintiff was not entitled to recover on account of a warranty, because the representations constituting the warranty were made to the plaintiff privately, and to permit such recovery would be to encourage a fraud upon all others attending the sale. We think the defendant is not in a situation to take advantage of his own wrong. To excuse the defendant from liability, under the circumstances of the case, would be a greater fraud upon the plaintiff. The defendant, in effect, said to the plaintiff, when she called to buy the horse: "I am going to sell him through the auctioneer as my agent at such a time and place. He is only twelve years old, and sound. I decline to make the sale myself now, or to fix a price, as I have advertised him for sale at public auction. You can attend the sale, and the price is to be fixed there by the highest bidder." She attends the sale, and makes the purchase, relying, as she had a right to, upon his representations in regard to the age and soundness of the horse.

We are unable to find that the rule contended for by the defendant's counsel has ever been adopted in this State, and we see no good reason for making this case an exception to the general rule applicable to warranties. This general rule is well stated by Rowell, J., in the case of *Hobart v. Young*, 68 Vt. —, 12 L. R. A. 698: "Any affirmation as to the kind or quality of the thing sold, not uttered as a matter of commendation, opinion, or belief, made by the seller pending the treaty of sale, for the purpose of assuring the purchaser of the truth of the affirmation, and of inducing him to make the purchase, if so received and relied upon by the purchaser, is deemed to be an express warranty."

Judgment affirmed.

a sale, offered to establish a warranty, was excluded as too remote. *Bryant v. Crosby*, 40 Me. 9.

And antecedent representations forming no part of the contract as concluded cannot be regarded as warranties. *James v. Bogue*, 45 Ark. 234; *Zimmerman v. Morrow*, 28 Minn. 367.

Representations in a catalogue of articles for sale at auction do not constitute a warranty when the auctioneer at the beginning of the sale publicly announces that the seller warrants nothing. *Craig v. Miller*, 22 U. C. C. P. 348.

After sale.

A written warranty after the sale, based on a prior oral warranty, is good. *Collette v. Weed*, 68 Wis. 428.

A warranty written into a bill of sale before payment or delivery, where a question arose after 13 L. R. A.

bidding for a horse at auction, is valid, but it is otherwise if it was done after payment and delivery. *McGaughy v. Richardson*, 148 Mass. 608.

A warranty after the sale is complete is not valid without a new consideration. *Bloes v. Kittridge*, 5 Vt. 28; *Summers v. Vaughan*, 35 Ind. 323; *Towell v. Gatewood*, 8 Ill. 24; *Hogins v. Plympton*, 11 Pick. 97; *Cady v. Walker*, 62 Mich. 157; *Morehouse v. Comstock*, 42 Wis. 628; *Roscorla v. Thomas*, 2 Gale & D. 506, 3 Q. B. 234; *Grant v. Cadwell*, 8 U. C. Q. B. 161.

But if there is a new consideration it may be valid. *Congar v. Chamberlain*, 14 Wis. 258.

A warranty renewed by the original vendor to a subsequent purchaser from the vendee and relied upon by him in making the purchase is binding. *Porter v. Pool*, 62 Ga. 238.

B. A. R.

CALIFORNIA SUPREME COURT.

I. S. MILLER, *Appt.*,

v.

W. J. WADDINGHAM *et al.*, *Respts.*

(.....Cal.....)

1. Whether or not in any case buildings that are placed upon land become fixtures, is a question of fact to be determined upon the evidence of that particular case.
2. A vendor of land, who retains the legal title as security for the fulfillment of the contract of purchase, cannot prevent the removal of buildings voluntarily placed on the land by the vendee after taking possession, where a large amount of the purchase money has been paid, and there is nothing to indicate that he will fail to complete his contract, or to show that the land is less valuable than when the contract was made; or that the sufficiency of the security will be, in any way, impaired by such removal.

(September 26, 1891.)

APPEAL by complainant from a judgment of the Superior Court for San Bernardino County, in favor of defendants in an action to enjoin the removal of buildings from certain real estate. *Affirmed.*

A decision was reached and an opinion handed down in this case on January 19, 1891, reversing the judgment of the court below. 11 L. R. A. 510. A rehearing was subsequently granted and the present opinion handed down, affirming such judgment.

The facts sufficiently appear in the opinion.

Messrs. Waters & Gird, for appellants:

Plaintiff being the owner of the title can maintain injunction to restrain removal of fixtures.

Civil Code, §§ 826, 3222, subsec. 2; *More v. Massini*, 32 Cal. 595; *Waterman*, *Trespass*, § 927, and *notes*.

The houses being constructed under an ordinary building contract, for residence purposes, till about one eighth finished, became, from their commencement to said time, fixtures and a part of the realty.

Waterman, *Trespass*, § 415; Civil Code, § 660, and *note*.

Messrs. Harris & Gregg, for respondents:

The buildings were put upon the land under an agreement that they should be the property of the builder until paid for. This agreement fixed the status of the buildings. Section 660 of the Civil Code only fixes the status of buildings in the absence of agreements.

Fratt v. Whittier, 58 Cal. 126.

Ownership of buildings, apart from the ownership of the soil, involves the conclusion that the buildings can be moved by the owner.

2 Smith, *Lead. Cas.* p. 223.

The houses can be moved from the premises, even though when they were placed upon the premises it was supposed they would remain there permanently.

NOTE.—Upon the question of fixtures between vendor and purchaser or mortgagor and mortgagee, see annotation under *Overman v. Sasser*, 10 L. R. A. 724.

13 L. R. A.

Tift v. Horton, 53 N. Y. 877; *Hendy v. Dinkerhoff*, 57 Cal. 7; *Ford v. Cobb*, 20 N. Y. 344.

Agreements making personality of what would, were it not for the agreement, be realty, are valid as against prior mortgagees and subsequent mortgagees or purchasers, who are not innocent purchasers. Such personality can be removed when the severance does not involve serious physical injury to the premises.

Tift v. Horton, *Ford v. Cobb* and *Hendy v. Dinkerhoff*, *supra*.

A grocery and dwelling-house can be made personality by agreement between the parties. *Smith v. Benson*, 1 Hill, 176.

The right to remove dwelling-houses, etc., can be transferred.

Ham v. Kendall, 111 Mass. 297.

A house built by one man upon the land of another by his consent is removed by the builder.

1 Washb. *Real Prop.* pp. 4, 6, 8.

Clubine was the equitable owner of the lots upon which the buildings were erected and in possession. Any agreement therefore made between Clubine and Newman as to the status of the buildings can be enforced against Miller.

Hendy v. Dinkerhoff, 57 Cal. 7, and cases therein cited; *Willis v. Wescroft*, 22 Cal. 608.

Although the vendor may upon breach by the vendee disaffirm the contract, until such disaffirmance he cannot maintain an action for injury to the freehold.

Ives v. Cress, 5 Pa. 118, 47 Am. Dec. 408; *Reed v. Lukens*, 44 Pa. 202; *Lombard v. Chicago Sinai Cong.* 64 Ill. 482; *Brewer v. Herbert*, 80 Md. 301; *Oldham v. Kennedy*, 3 Humph. 260.

Harrison, J., delivered the opinion of the court:

In March, 1887, the plaintiff entered into an agreement in writing with one Clubine, for the sale and conveyance to him of two blocks of land in Ontario, in this State, receiving from him the sum of \$9,000 on account of the purchase price of the property, and placed his vendee in possession of the land. Clubine subdivided the land into lots suitable for residence and business purposes, and employed the defendant Newman to construct certain dwelling-houses upon the land, and to furnish the materials therefor, for the sum of \$4,100, payable in weekly installments as the work progressed. Shortly after Newman began the construction of the houses, Clubine, failing to make such payments, agreed with him that the houses should belong to said Newman until paid for, and thereupon Newman proceeded with his work, and finished the houses, having received from Clubine only the sum of \$725 upon account thereof. Prior to the commencement of this action, Newman sold the houses to the defendants Waddingham and Gargan, and they very soon thereafter commenced to remove them from the land, and had partly completed such removal when the plaintiff commenced this action. The houses were built on redwood mud-sills of two-inch by six-

inch timber, resting upon the soil, and the soil was not disturbed in building or removing the houses. The plaintiff brought this action for the purpose of perpetually restraining the defendants from removing the houses from the land, and also to recover from them the sum of \$3,000 damages alleged to have been done to his property by the attempted removal. At the commencement of the action a restraining order was issued by the court, and upon the trial of the cause the court rendered judgment in favor of the defendants, and dissolved the restraining order. From this judgment the plaintiff has appealed upon the judgment roll alone.

Although the principal ground urged by the appellant for the reversal of the judgment is that upon the construction of the houses they became fixtures attached to the land, and that by their removal the defendants were committing waste, we think that the respective rights of the parties are to be determined upon principles other than those applicable to the subjects of waste and fixtures. The court below did not find that the buildings in question were fixtures, and, in absence of a finding by it upon that subject, we cannot say upon the facts that were found that they did become fixtures. Whether, in any case, buildings that are placed upon land become fixtures, is a question of fact to be determined upon the evidence of that particular case. The mere erection of a building upon land does not necessarily make it a fixture (*Pennysacker v. McDougall*, 48 Cal. 160); and in order to determine whether it be a fixture depends upon various circumstances and relations connected with its being placed upon the land. *Lavenson v. Standard Soap Co.* 80 Cal. 250.

The rules applicable to fixtures have been created by a series of judicial decisions, and these decisions are not always capable of being reconciled. The attempt in the Civil Code to give a definition of a "fixture" only in part removes the difficulty. Section 660 declares that "a thing is deemed to be affixed to land when it is . . . permanently resting upon it, as in the case of buildings;" but it still requires evidence to determine what is "permanently resting" upon the land. The finding in the present case that "said houses were built on redwood mud-sills of two-inch by six-inch timber, said mud-sills resting upon the soil," and that "the soil was not disturbed in building or removing said houses," is consistent with a determination of the court below that the buildings in question were not fixtures, and, for the purpose of upholding its decision, it may be assumed that such determination was made by it. But, without determining whether or not the buildings were fixtures, we are of the opinion that upon other principles applicable to the case the plaintiff is not entitled to the relief sought by him.

The plaintiff has invoked the aid of a court of equity to protect him against threatened injury, and, in order that he may have such protection, it is incumbent upon him to show that he has rights which need and can receive it, and also that the acts charged upon the defendants are an invasion of such rights, and demand such assistance. In his complaint he alleged that he was the owner of certain land

upon which certain buildings exist, and that the defendants had committed certain acts of trespass upon the same, causing a damage thereto of \$3,000. Upon the trial the court, instead of finding that he was the "owner" of the land upon which the alleged trespass was committed, found that he had made a contract of sale thereof with the grantor of the defendants, and placed his vendee in possession of the land, and that the buildings had been thereafter placed upon the land at the instance of the vendee, and were being removed under authority derived from him. Upon the execution of this contract of sale, the vendee of the plaintiff became vested with the equitable title to said land, and the plaintiff retained in himself the legal title as a security for the performance of the contract by the vendee. By placing his vendee in possession of the land, he thereby conferred upon him the right to its use and enjoyment, so long as he should continue to comply with the obligations of his contract. It may be conceded that, if the buildings had been upon the land at the date of the purchase and had formed a part of the subject matter of the sale, the plaintiff might have had the right to have them remain upon the land as a part of his security until the whole purchase price was paid. In this case, however, the buildings formed no part of the consideration for the purchase of the land, nor were they placed upon the land in pursuance of any terms of the contract of sale. The fact that the plaintiff was under no obligation to give to his vendee possession before a conveyance of the land is immaterial. He did give him possession, and while such possession did not authorize the vendee to do any act which would diminish the value of the property of which he had received the possession, he had the right under his equitable ownership to any use and enjoyment thereof consistent with such obligation. For such use and enjoyment he could not be chargeable with waste. After the execution of a contract of sale the relation of the vendor and vendee to the land is likened to that of mortgagor and mortgagee. The vendor retains the legal title as security for the performance by the vendee of the contract on his part, and by placing the vendee in possession of the land gives to him the right to use and enjoy it as his own, so long as he does not impair its condition, or diminish its value as it existed when received by him. So long as the vendee complies with the terms of his contract he is entitled to retain possession of the land (*Willis v. Woencraft*, 22 Cal. 607), and the vendor can at no time enforce payment of more than the agreed price therefor, however much the land may have appreciated in value, or been improved by the vendee. The fact that the vendor holds the legal title as security for such payment does not give him any greater rights than he would possess if he had conveyed the land and taken back a mortgage for the unpaid portion of the purchase money or than are held in land by a mortgagee, who takes for his security a conveyance absolute in form, instead of a formal mortgage. It is a well-recognized principle in equity that a mortgagee cannot maintain an action to restrain waste without showing that thereby his security will be impaired (*Robinson v. Russell*,

24 Cal. 467; *Buckout v. Swift*, 27 Cal. 423. See also *Perrine v. Marsden*, 84 Cal. 14; and, by parity of reasoning, the vendor who holds the legal title as security for the fulfillment of the contract of purchase by the vendee in possession should show that he will sustain some injury before he can maintain an action like the present. So long as the sufficiency of the security is unimpaired, he has no right to disturb the vendee in any use or enjoyment which he may make of the land. Such use and enjoyment by the vendee is a use of his own property, and unless he thereby impairs the security, or diminishes the estate which he received from the vendor, or the value of the land as he received it, he should not be restrained. In view of these principles, the plaintiff has failed to show any right to the equitable interposition of the court, and the action of the court in dismissing his complaint was correct. It is not alleged in his complaint, nor is it found by the court, that the vendee has in any respect failed to comply with the terms of his contract, or that he is unwilling or unable to do so. The record does not dis-

close the terms of the contract of sale,—either the amount of the purchase price remaining unpaid, or the time when it will become payable. Nor is it alleged or found that the land is less valuable than it was at the date of the contract of sale, or how great is the obligation for which the plaintiff holds it as security. In the absence of any allegation or finding to the contrary, it must be assumed that the land is fully as valuable as at the date of the contract, and that the vendee is not only able to comply with his obligations, but that he will fully and promptly meet them as they mature. Inasmuch, then, as the plaintiff has received \$9,000 towards the payment of the purchase price of the land, he does not show any impairment of his security or injury to himself by the fact that the defendants are threatening to remove from the land buildings placed thereon by themselves, and which are shown to be of the value of only \$4,100.

The judgment of the court below is affirmed.

We concur: **Beatty, Ch. J.; De Haven, J.; Garoutte, J.; Sharpstein, J.**

MISSISSIPPI SUPREME COURT.

Sallie A. HEWLETT, *Appt.*,
v.

W. W. GEORGE, *Exr.*, etc., of Sarah A. Ragsdale, Deceased.

(....Miss....)

- 1. The privilege extended by Code, § 1608, to a female plaintiff in an action to testify by deposition taken before trial** does not, in view of the Statute forbidding one to testify as a witness to establish his claim against a decedent's estate, extend to having the deposition read in case defendant dies before trial, and the action is revived against her executor notwithstanding defendant is also a female and might have had her deposition taken to meet plaintiff's and so prevented plaintiff from securing any undue advantage over her.
- 2. Punitive damages for a personal wrong** cannot, under the Mississippi statutes, be recovered against the personal representative of the wrong-doer.
- 3. Compensatory damages recoverable by one wrongfully confined in an insane asylum** may include an award for mental anguish, shame, and mortification, and injury to character.
- 4. A minor cannot maintain an action against its parent for wrongful confinement in an insane asylum** where the relation of parent and child with its reciprocal duties has not been dissolved between them.

(May 18, 1891.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Lauderdale County in favor of defendant in an action brought to

recover damages for the wrongful confinement of plaintiff in an insane asylum by defendant's testatrix. *Reversed.*

The facts are stated in the opinion.

Messrs. Witherspoon & Witherspoon, for appellant:

It was error to exclude plaintiff's deposition. At the time it was taken, May 31, 1888, Mrs. Ragsdale was living. She was notified of the taking of the deposition, and her counsel were present. She afterwards had more than six months in which to take her own deposition, which she, being a woman, was entitled to have taken under § 1608 of the Code. Under such circumstances, it cannot be said that plaintiff, by her deposition, is testifying against the estate of the deceased person.

Strickland v. Hudson, 55 Miss. 235.

The competency of a witness is to be determined by the facts existing at the time the testimony is given. The deposition was given while the defendant was living.

2 Woerner, Am. Law of Administration, § 398; *Comins v. Hetfield*, 80 N. Y. 261.

The testimony was competent when taken, and became then a part of the evidence in the case.

Erans v. Reed, 78 Pa. 415.

All statutes which provide for the perpetuation of evidence are in furtherance of justice and should receive a liberal construction.

Pratt v. Patterson, 81 Pa. 114.

The test of present admissibility is the competency of the testimony at the time it was given.

Galbraith v. Zimmerman, 100 Pa. 374; *Rees v. Livingston*, 41 Pa. 119.

NOTE.—Punitive damages.

As regards the rule that prohibits an action to recover punitive damages against the representative of a deceased wrong-doer, the doctrine of the principal case is vindicated by the following authorities: *Riphey v. Miller*, 33 N. C. 217; *Edwards v. Hicks*, 30 La. Ann. 925; *Sheik v. Holston*, 64 Iowa, 143; *Wright v. Donnell*, 34 Tex. 291. See *Sedgw. Dam.* § 362; 2 *Watt, Act. & Def.* 451; and see *note to Quinn v. South Carolina R. Co.* (S. C.) 1 L. R. A. 662.

The court erred in refusing to instruct that mental suffering, shame and humiliation, and injury to reputation are not proper elements of compensatory damages.

8 *Lawson, Rights & Remedies*, §§ 1104, 1218, 1302, 1970; *Ross v. Leggett*, 61 Mich. 445; *West v. Western U. Teleg. Co.* 59 Kan. 93.

Messrs. Walker & Hall, for appellee:

The deposition was properly suppressed under Rev. Code 1880, § 1602, because its effect was to establish her own claim against the estate of a deceased person.

Jacks v. Bridewell, 51 Miss. 881; *Wood v. Stafford*, 50 Miss. 370; *Rushing v. Rushing*, 52 Miss. 329; *Buie v. Buie*, 67 Miss. 456.

In trespass against executors and administrators, Rev. Code 1880, § 2060, provides "that in assessing damages, the jury shall only render a verdict for the amount the plaintiff may prove that he or she actually sustained, and vindictive damages shall not be given."

See 1 *Suth. Dam. p.* 758; 5 *Am. & Eng. Encyclop. Law*, 42, *note*.

The only injury shown by the testimony to have been suffered by appellant is the pecuniary loss of \$200 paid her attorney for services in having her released from the asylum.

Plaintiff is not entitled to recover any amount for the reason that she was a minor, and though previously married had separated from her husband and was living at the time with her mother, Mrs. Sallie A. Ragsdale.

7 *Am. & Eng. Encyclop. Law*, p. 665.

Woods, J., delivered the opinion of the court:

The deposition of plaintiff, taken in a pending suit, in a court of law, during the lifetime of defendant's testatrix, on the final trial of this cause, and after the death of the original defendant and the revivor against the executor of the deceased, was offered in evidence on behalf of plaintiff, and on motion of defendant was excluded by the trial court, and this action of the court is assigned for error. Relying upon the proposition that the competency of a witness is determinable by the facts existing at the time the testimony of such witness is given, counsel for appellant, with much vigor and ingenuity, contend that the appellant's deposition was competent evidence, even under our Statute which forbids any person testifying as a witness to establish his claim against the estate of a deceased person which originated during the lifetime of such deceased person. Code 1880, § 1602. Reported cases from New York, Pennsylvania and Maryland are cited and relied upon by counsel as directly supporting this contention. If these decisions had been made in cases similar to the one at bar, and upon statutes identical with ours, we should feel constrained, nevertheless, to decline to follow them. But we are unable to say they were made in cases involving the same or similar facts as those shown in the record before us, or upon statutes identical with ours. They may be perfectly correct expositions of the laws existing in the States where rendered, and yet be not at all persuasive as authority in this State. The argument of counsel is that under section 1608, Code 1880, the plaintiff had the right to have her own deposition taken in this cause; that the original defendant was

then alive, and, by her counsel, attended the taking of such deposition, and was made acquainted with its contents and their significance; that, thus advised and warned, it was the right of defendant then to have procured the taking of her own deposition, with a view to meeting, if she could, the case made against her by plaintiff's evidence contained in her deposition; and that, having failed or neglected to have her own deposition taken when she might have done so, her executor cannot now be heard to say that the lips of the plaintiff are sealed by law because the defendant's have been sealed by death. The argument is plausible, but fallacious, we think. Let us assume that the deposition of the plaintiff was taken because she was a female,—a class of cases covered by the fifth paragraph of section 1608. In this particular case, the original defendant being likewise a female, it is contended she might have enjoyed the same right accorded the gentler sex by our law, and have procured her own deposition to be taken, and have it used, and her executor might also have used her deposition on this trial; and no advantage could have, in such case, accrued to plaintiff, nor possible harm or injustice to defendant or to the executor of her will on final trial. If all citizens of the State were females, or if all suitors in the law courts were females, the construction of our statutes, necessarily involved in appellant's contentions, would be greatly strengthened. But, beside the favored class to whom the Statute extends the personal privilege of testifying by deposition, there exists that large and litigious and unfavored class, the male citizen, upon whom no such privilege has been conferred. Now, let us suppose the original defendant in this suit to have been a male—one of the unprivileged class,—upon whom the right to testify by deposition had not been conferred; and let us further suppose such male defendant had been alive at the time of taking plaintiff's deposition, without the power or privilege of preparing to meet it by having his own deposition taken, and that he had subsequently died before trial,—could it be reasonably insisted that the plaintiff's deposition could have been properly introduced in evidence on the trial of the suit revived against the dead man's executor? If not, the argument of counsel is specious, in this: that by the same statute we have two rules for recovery of claims against the estates of decedents prescribed,—one working no advantage to the plaintiff, nor hardship to the defendant, where both parties are females; but the other working unconscionable advantage to the plaintiff, and gross inequality and injustice to the defendant, where the plaintiff is a female and the defendant is a male. This incongruous construction is not to be tolerated. The general laws of the State touching property, none the less than life and liberty, must bear uniformly on male and female alike, and the mere deference shown woman by our laws, in permitting her, in certain states of cases, to withdraw from a public examination as a witness in open court, and to testify by deposition, must not be extended beyond the obvious purpose of the Legislature. Moreover, under the Statute we are considering (sec. 1608), it seems certain from an examination of the sixth par-

agraph of said section that in cases such as we have presented in this record the competency of a witness does not depend absolutely upon the facts existing at the time the deposition was taken; for, notwithstanding the fact that the deposition of a female, or of any witness residing in this State, but more than sixty miles from the place of trial, may have been taken, yet, on proper showing, the female or other witness residing more than sixty miles away may be compelled to appear and testify in open court. In these classes of cases the competency of the evidence offered does not depend absolutely upon the facts existing at the time the deposition was taken, but upon the conditions existing at the time of trial. We see no error in the rulings of the court on this point.

The action of the court, in its instructions, in excluding from the consideration of the jury the question of punitive damages, is also assigned for error. On this point it will be sufficient to say that at common law the action would have been abated upon the death of the defendant, and no recovery could have been had against her representative. The doctrine was that for a personal wrong the offender could not be followed into the grave, and the dead be visited with punishment. Our Statutes have modified the common law to the extent of permitting a recovery against the representative of the deceased wrong-doer to an amount sufficient to compensate for the actual damage sustained by the injured party; but the realm of the dead is not invaded, and punishment visited upon the dead.

This brings us next to the instructions of the court touching compensatory damages. By the second instruction asked by plaintiff and refused by the court, and by the instruction given for the defendant, the jury were shut up to return damages, if they found for the plaintiff, not exceeding the actual amount in dollars and cents shown to have been expended by the plaintiff in procuring her release from the insane asylum. It is true that in the instruction given for defendant the jury was told that a recovery might be had for actual damages, but by the second refused instruction of the plaintiff actual damages were held not to include compensation for mental suffering and pain, the sense of humiliation, shame, and disgrace, and injury to reputation, inflicted upon and endured by plaintiff. Here was actual damage to the extent of \$200, and actual damage for eleven days of time lost during confinement in the asylum, and to these should

have been added damages for mental pain and suffering, shame and mortification, and injury to character. Surely these injuries were real ones, and compensation for these would have been an award of actual damages. Compensatory and actual damages are one; and compensation for wrongs done to one's character is in no sense punitive. We cannot consent that actual damages, in this case, must be confined to the few dollars and cents shown to have been expended by plaintiff to secure her release from the asylum, and that no compensatory damages were awardable for shame and anguish and hurt to character. On this point we are of opinion the action of the trial court was erroneous, and that its judgment must be reversed. We decline, however, to reinstate the verdict of the jury on the first trial, because we are not satisfied as to plaintiff's right to a recovery absolutely. The evidence shows that the plaintiff was the minor daughter of the defendant, who had been married, but who, at the time of the alleged injuries, was separated and living away from her husband. Whether she had resumed her former place in her mother's house, and the relationship, with its reciprocal rights and duties, of a minor child to her parent, does not sufficiently appear. If by her marriage the relation of parent and child had been finally dissolved, in so far as that relationship imposed the duty upon the parent to protect and care for and control, and the child to aid and comfort and obey, then it may be the child could successfully maintain an action against the parent for personal injuries. But so long as the parent is under obligation to care for, guide and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The State, through its criminal laws, will give the minor child protection from parental violence and wrong-doing, and this is all the child can be heard to demand. On this very delicate and difficult point in the case the evidence is most unsatisfactory, and for this reason, if for no other, we decline to reinstate the first verdict.

Reversed and remanded.

MICHIGAN SUPREME COURT.

William H. OLNEY, *et al.*, *Appls.*,
v.

GERMAN INSURANCE CO. of Freeport,
Illinois.

(....Mich.....)

A chattel mortgage given by one partner on firm property for his individual

NOTE.—For mortgage as affecting insurance on property, see note to Russell v. Cedar Rapids Ins. Co. (Iowa) 4 L. R. A. 538.

18 L. R. A.

benefit makes a change of "interest," if not of title or possession within the meaning of an insurance policy providing against incumbrances by chattel mortgage and changes in interest, title or possession.

(October 30, 1891.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of defendant in an action upon a policy of fire insurance. *Affirmed.*

The facts sufficiently appear in the opinion. *Mr. George W. Bates*, for appellants: The incumbrance was not valid and conveyed no specific interest in the property.

It is not in the power of either partner to dispose of the firm property in payment of his private debts.

The interest of a partner is not separable, and cannot be seized, nor any part of the partnership property taken on process against either partner and that only which may be determined to exist on a settlement of the partnership.

Sirrine v. Briggs, 81 Mich. 443; *Haynes v. Knowles*, 86 Mich. 407; *Hutchinson v. Dubois*, 45 Mich. 143.

Such a mortgage passes no title to nor creates any lien upon the firm property, and does not affect the right or title of his co-partner, and is absolutely void as against the partnership or its creditors.

Jones, Chat. Mort. § 45; *Deeter v. Sellers*, 102 Ind. 458; *Smith v. Andrews*, 49 Ill. 28; *Caldwell v. Scott*, 54 N. H. 414; *Viles v. Bange*, 36 Wis. 135; *Nichol v. Stewart*, 36 Ark. 612; *Kingsberry v. Tharp*, 61 Mich. 216; *Walker v. White*, 60 Mich. 427; *Osborne v. Barge*, 29 Fed. Rep. 725.

Such a disposition of the firm property does not divert the title of the partnership in favor of the private creditor.

Rogers v. Batchelor, 37 U. S. 12 Pet. 221, 9 L. ed. 1063; *Hotchin v. Kent*, 8 Mich. 526; *Chase v. Bull Iron Works*, 55 Mich. 139; *Towle v. Dunham*, 76 Mich. 251.

No fraudulent act of one partner as to the partnership property would affect the partnership.

Edwards v. Hughes, 20 Mich. 289.

Such a mortgage is a void mortgage, and is not enforceable as against the partnership or McMurdie, the co-partner, who can ignore it; and as such would not vitiate the policy under the clause against incumbrances. A mortgage to affect an insurance must be valid and enforceable.

Pitney v. Glens Falls Ins. Co. 65 N. Y. 26; *School Dist. No. 6 in Dresden v. Aetna Ins. Co.* 62 Me. 330; *Copeland v. Mercantile Ins. Co.* 6 Pick. 198; *Scammon v. Commercial U. Assur. Co.* 6 Ill. App. 551; *Wood, Fire Ins.* § 812; 1 May, Ins. 3d ed. § 269; *Watertown F. Ins. Co. v. Grover & B. S. Mach. Co.* 41 Mich. 187; *Milner v. Germania F. Ins. Co.* 13 Phila. 551.

The same principle is applied to subsequent insurance under a clause against additional insurance, without the consent of the company, and it is held that such insurance will not affect the prior insurance unless the latter is valid and effectual.

Clark v. New England Mut. F. Ins. Co. 6 Cush. 347; *Philbrook v. New England Mut. F. Ins. Co.* 37 Me. 187; *Jackson v. Massachusetts Mut. F. Ins. Co.* 23 Pick. 418; *Hubbard v. Hartford F. Ins. Co.* 38 Iowa, 325.

It does not effect a "change" of interest. A mortgage makes no "change" in the title, interest, or possession.

Lucking v. Wesson, 25 Mich. 443; *Kohl v. Lynn*, 34 Mich. 360; *People v. Bristol*, 35 Mich. 28; *Gardner v. Matteson*, 38 Mich. 200; *Haynes v. Leppig*, 40 Mich. 602; *Wilson v. Montague*, 57 Mich. 688.

13 L. R. A.

Such a conveyance will not vitiate the insurance under a condition of the policy, which provided that if "the property be sold or transferred, or any change takes place in the title or possession, the same is void."

Shepherd v. Union Mut. F. Ins. Co. 38 N. H. 282; *McLaren v. Hartford F. Ins. Co.* 5 N. Y. 151; *Van Deusen v. Charter Oak F. & M. Ins. Co.* 1 Robt. 55; *Pollard v. Somerset Mut. F. Ins. Co.* 42 Me. 221; *Aurora F. Ins. Co. v. Eddy*, 55 Ill. 213; *Hennessey v. Manhattan F. Ins. Co.* 28 Hun, 98; *Hanover F. Ins. Co. v. Conner*, 20 Ill. App. 297; *Hubbard v. Hartford F. Ins. Co.* 38 Iowa, 833; *Wood, F. Ins.* § 324. *Messrs. Howard & Ross* for appellee.

Long, J., delivered the opinion of the court:

The plaintiffs were partners, carrying on a grocery business in the City of Detroit. On the 1st day of May, 1890, they procured a policy of insurance of \$400 in the defendant Company on a stock of flour, feed, and other goods, and \$150 on hay, etc. The policy was for one year. After the insurance was procured, it appears one of the plaintiffs gave a chattel mortgage upon the property described to secure an individual debt of his. On July 13, 1890, the goods caught fire, and were destroyed and injured to the extent of \$319.87. The defendant Company had no knowledge of the chattel mortgage until after the fire. They refused to pay the loss, and on the trial in the circuit court the jury was instructed to find a verdict for the defendant. Plaintiffs bring error.

The policy sued upon is what is known as a "Michigan Standard Policy," and contains this clause: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage; or if any change other than by death of the insured takes place in the interest, title, or possession, whether by legal process or judgment, or by the voluntary act of the insured or otherwise."

The defense of the action is based upon the proposition that the placing of the chattel mortgage by one partner upon the partnership property for his individual benefit works a change in the interest of the insured, so that the policy becomes void under the stipulation above quoted, contained in the policy. This stipulation in the policy in regard to giving chattel mortgages is valid and reasonable, and we think the court below not in error in directing verdict for defendant. The placing of the chattel mortgage by one partner for his individual benefit upon the partnership chattels works a change of interest therein.

In *Hicks v. Farmers Ins. Co.*, 71 Iowa, 119, it was held: "A condition in a fire insurance policy issued to a firm, that property should not afterwards be in any manner incumbered, was violated by the execution of a mortgage by one of the partners on his undivided one-third interest in the property, and by a judgment against him, which became a lien upon his said interest."

We think the Company discharged from liability on the policy by such an incumbrance without its knowledge, or any notice to it, and

its assent thereto. The placing of the chattel mortgage there by one partner may not have changed the title or possession, but there was a change of interest, which was provided against by the policy. The court was not in

error in directing verdict and judgment for defendant.

The judgment of the court below will be affirmed, with costs.

The other Justices concur.

MAINE SUPREME JUDICIAL COURT.

CITY OF BANGOR

v.

Melbourne P. SMITH *et al.*

(.....Me.....)

A state statute requiring a carrier, who brings into the State a person not having a settlement therein, to remove him from the State upon request of the proper officers if he falls into distress within a year, or to be liable for his support, is an unconstitutional regulation of commerce.

(April 16, 1891.)

REPORT by the Supreme Judicial Court for Penobscot County (Libbey, J.,) for the opinion of the full court, of an action brought to recover from defendants the cost of maintaining certain Italians whom defendants had brought into the State and who subsequently became a public charge. *Judgment for defendants.*

NOTE.—*State laws imposing taxes or penalties upon immigration are unconstitutional.*

State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, encroaches upon the exclusive power of Congress. *Hall v. De Cuir*, 96 U. S. 485, 24 L. ed. 547.

Any attempt on the part of the State to regulate commerce of a national or interstate character is an interference with that federal power which, under the Constitution of the United States, is vested solely in Congress. *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 469, 24 L. ed. 529; *Moran v. New Orleans*, 112 U. S. 69, 23 L. ed. 653; *Brown v. Houston*, 114 U. S. 632, 29 L. ed. 260; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23; "The Passenger Cases," 48 U. S. 7 How. 319, 12 L. ed. 717; *Brown v. Maryland*, 26 U. S. 12 Wheat. 438, 446, 6 L. ed. 635, 638; *State Freight Tax Case*, 82 U. S. 15 Wall. 232, 21 L. ed. 146; *Welton v. Missouri*, 91 U. S. 282, 23 L. ed. 850; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *Guy v. Baltimore*, 100 U. S. 434, 23 L. ed. 743; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *Mobile County v. Kimball*, 102 U. S. 697, 26 L. ed. 239; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158; *Western U. Tele. Co. v. Texas*, 105 U. S. 460, 23 L. ed. 1097; *New York v. Miln*, 36 U. S. 11 Pet. 102, 9 L. ed. 648; *Groves v. Slaughter*, 40 U. S. 15 Pet. 511, 10 L. ed. 823; *Cooley v. Port Wardens of Philadelphia*, 53 U. S. 12 How. 319, 13 L. ed. 1004; *Crandall v. Nevada*, 73 U. S. 6 Wall. 35 49, 18 L. ed. 745-749; *Chicago & N. W. R. Co. v. Fuller*, 84 U. S. 17 Wall. 560, 21 L. ed. 710.

A tax levied under N. Y. Stat. of May 31, 1881, on every passenger from a foreign country in the port of New York, who is not a citizen of the United States, has been repeatedly decided by the United States Supreme Court to be a regulation of commerce with foreign nations, a subject confided by the Constitution to the exclusive control of Congress. *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 13 L. R. A.

The facts are stated in the opinion.

Mr. Henry L. Mitchell, City Solicitor, for plaintiff:

Each of the several States in the Union has the right to pass necessary and reasonable laws to protect the people of such States from the introduction of criminals, paupers, and diseased persons into their community.

A law is not unconstitutional, because it may prohibit what one conscientiously thinks right, or require what he may conscientiously think wrong.

Donahue v. Richards, 88 Me. 379.

Whether an enactment is reasonable, or for the benefit of the people, is for the Legislature alone to decide.

Moor v. Veazie, 32 Me. 348.

All Acts of the Legislature are presumed to be constitutional; and the court will never pronounce a Statute to be otherwise, unless in a case where the point is free from all doubt.

State v. Lunt, 6 Me. 412.

The object of the Legislature was to prevent

550; *People v. Compagnie Générale Transatlantique*, 107 U. S. 59, 27 L. ed. 388.

Result of the decisions in "The Passenger Cases."

The result of "The Passenger Cases," 48 U. S. 7 How. 283, 12 L. ed. 702, was to hold that a tax demanded of the master or owner of the vessel for every passenger was a regulation of commerce by the State in conflict with the Constitution and the laws of the United States, and therefore void. Hence, a statute which imposes a burdensome and almost impossible condition on the ship-master as a prerequisite to his landing his passengers, with an alternative payment of a small sum of money for each of them, is a tax on the ship-owner for the right to land such passengers, and, in effect, on the passenger himself, since the ship-master makes him pay it in advance as part of his fare. *Henderson v. Wickham*, 92 U. S. 269, 23 L. ed. 543.

What commerce includes.

Commerce includes navigation. It means intercourse and includes all the instruments by which intercourse is carried on. It includes, also, all the subjects of such intercourse, and the transportation of persons as much as that of property. *Chicago & N. W. R. Co. v. Fuller*, 84 U. S. 17 Wall. 560, 21 L. ed. 710; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 189, 215, 6 L. ed. 62-74; *Crandall v. Nevada*, 73 U. S. 6 Wall. 35, 18 L. ed. 745; *The "Passenger Cases,"* 48 U. S. 7 How. 405, 413, 12 L. ed. 753-756; *Baltimore & O. R. Co. v. Maryland*, 88 U. S. 21 Wall. 455, 23 L. ed. 673.

Commerce includes an intercourse of persons, as well as the importation of merchandise. "The Passenger Cases," 48 U. S. 7 How. 283, 12 L. ed. 702.

The immigration of foreigners to this country their transportation to and admission at the port of one State for the purpose of passing through that State to another State for residence in the latter, and the whole subject of passengers from foreign ports to and through the various States of the Union, is palpably a subject which is national in

the tax-payers of the State of Maine from being burdened by an influx of pauper element brought here by transportation companies either from foreign countries or from any other of the States and prevent them from being public charges as paupers; this being the case and the object of the Statute, it is a valid Statute and should be upheld as such.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 490, 31 L. ed. 708; *United States License Cases*, 46 U. S. 5 How. 504, 13 L. ed. 256; *Cooly v. Port Wardens of Phila.* 58 U. S. 12 How. 299, 13 L. ed. 996.

The Statute cannot be construed as intending to regulate commerce, but relates to the police internal government of the State, and this right is reserved by States, and the Statute of Maine under consideration is a valid Statute.

New York v. Miln, 36 U. S. 11 Pet. 132, 9 L. ed. 659; *Robbins v. Shelby County Tating Dist.* 120 U. S. 489, 30 L. ed. 694. See also *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585.

Messrs. Wilson & Woodward, for defendants:

The provisions of the Statute in question constitute a regulation of commerce with foreign countries and among the States, and are

the broadest sense. The interests of the nation require one uniform system of regulation of that branch of commerce. *State Tax on Ry. Gross Receipts*, 82 U. S. 15 Wall. 297, 21 L. ed. 169; *State Freight Tax Case*, 82 U. S. 15 Wall. 282, 21 L. ed. 146; *Cooly v. Port Wardens of Philadelphia*, 58 U. S. 12 How. 299, 319, 13 L. ed. 996-1004; *Baltimore & O. R. Co. v. Maryland*, 88 U. S. 21 Wall. 472, 22 L. ed. 684.

It was said in *United States v. Holliday*, 70 U. S. 3 Wall. 417, 13 L. ed. 185, that commerce with foreign nations means commerce between citizens of the United States and citizens or subjects of foreign governments. It means trade and commercial intercourse between nations, and parts of nations in all its branches. It includes navigation as the principal means by which foreign intercourse is effected. To regulate this trade and intercourse is to prescribe the rules by which it shall be conducted. "The mind," says the great chief justice, "can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of one nation into the ports of another;" and he might have added, with equal force, which prescribes no terms for the admission of their cargo or their passengers. *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 180, 6 L. ed. 63; *Henderson v. Wickham*, 92 U. S. 259, 271, 23 L. ed. 542, 548.

Landing passengers is an incident to their transportation.

The commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character and requires uniformity of regulation. Congress alone can deal with such transportation, and its nonaction is a declaration that it shall remain free from burdens imposed by state legislation. Receiving and landing passengers and freight is incident to their transportation. All re-

therefore beyond the power of any State to make.

Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 283; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158.

Interstate transportation of passengers is beyond the reach of a state legislature.

State Freight Tax Case, 82 U. S. 15 Wall. 282, 21 L. ed. 146; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700.

It cannot be fairly said that if these statutory provisions do relate to interstate commerce, or to commerce with foreign countries, they do not assume to regulate such commerce.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158.

Regulating commerce is prescribing the rules by which it shall be governed, that is prescribing the conditions upon which it shall be conducted, determining when it shall be free and when subject to duties or other exactions.

If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship.

Hall v. DeOuir, 95 U. S. 485, 24 L. ed. 547.

Although the penalty imposed by these provisions is laid upon the carriers, ultimately it must fall upon the passengers carried, and if, under these provisions, burdens are laid upon the carriers, the cost of sustaining the burdens

straints by exactions in the form of taxes upon such transportation or upon acts necessary to its completion are invasions of the exclusive power of Congress. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158.

A law or a rule emanating from any lawful authority which prescribes terms or conditions on which alone the vessel can discharge its passengers is a regulation of commerce; and, in case of vessels and passengers coming from foreign ports, is a regulation of commerce with foreign nations. *Henderson v. Wickham*, 92 U. S. 259, 271, 23 L. ed. 543-548.

A statute that imposes a burdensome and almost impossible condition on the ship-master, as a prerequisite to his landing his passengers, with an alternative payment of a small sum of money for each, is a regulation of commerce, and void. *Ibid.*

The only state interference with the landing and receiving of passengers and freight which is permissible is confined to such measures as will prevent confusion among the vessels and collision between them, insure their safety and convenience, and facilitate the discharge or receipt of their passengers and freight. *Gloucester Ferry Co. v. Pennsylvania*, *supra*.

If a law passed by a State comes in conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other like equal opposing powers. The nullity of any Act inconsistent with the Constitution is produced by the declaration that the Constitution is supreme. Where the federal government has acted, its Act is supreme; and the laws of the State, though enacted in the exercise of powers not controverted, must yield to it. *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 210, 6 L. ed. 73.

See notes to *State v. Indiana & O. Oil G. & Mfn. Co. (Ind.)* 6 L. R. A. 579; *People v. Budd (N. Y.)* 5 L. R. A. 559.

must be obtained by the carrier by increasing its charges for carriage. In this respect the cost of carrying the burden imposed by these provisions is like the tax under consideration in—

The Passenger Cases, 48 U. S. 7 How. 283, 12 L. ed. 702. See *Crandall v. Nevada*, 73 U. S. 6 Wall. 35, 18 L. ed. 745.

Nor can these provisions be sustained as a legitimate exercise of the police power of the State, because, under the authorities hereinbefore referred to, it is a plain regulation of interstate commerce, or of commerce with foreign nations.

Whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States it is void, no matter under what class of powers it may fall, or how closely allied it may be to powers conceded to belong to the States.

Henderson v. New York, 92 U. S. 259, 23 L. ed. 543; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23.

Libbey, J., delivered the opinion of the court:

The defendants were the owners of the steamer *Caroline Miller*, in December, 1887, and January, 1888, which they used as common carriers for passengers and merchandise between the City of New York, in the State of New York, and Bangor, in this State; and by said steamer brought from New York into Bangor, on the 9th of December, 1887, 58 Italians, who came into this State to work as laborers on the Canadian Pacific Railroad. But for some reason they ceased to work on said road, and on the 14th of December, 1887, returned to the City of Bangor, and it is alleged by the plaintiff were destitute, and in need of relief; and the overseers of the poor of said City, on application therefor, took charge of them, and furnished them with relief as paupers. And on the 19th day of said December, it is claimed by the plaintiff that the City through its officers tendered to the defendants at their wharf, and at their steamer in Bangor, the alleged paupers, and requested that the defendants should receive them and carry them back to New York. This the defendants declined to do, and thereupon the City paid their passage on board said steamer from Bangor to New York.

This action is brought to recover for the necessary supplies furnished said alleged paupers after they were tendered to the defendants, and to recover the money paid for their fare for transportation to New York. The plaintiff claims to recover by virtue of section 50 of chapter 24 of the Revised Statutes of this State, which reads as follows: "Any common carrier who brings into the State a person not having a settlement therein shall remove him beyond the State if he falls into distress within a year; provided, that such person is delivered on board a boat or at a station of such carrier by the overseers or municipal officers requesting such removal; and, in default thereof, such

carrier is liable in assumpsit for the expense of such person's support after such default."

The defendant's claim that this Statute is unconstitutional and void, and furnishes the plaintiff no ground for the maintenance of this action; and this is the question for our determination.

Congress has power "to regulate commerce with foreign nations and among the several States and with the Indian tribes." Const. U. S. art. 1, § 8, cl. 3. That the carrying of persons from a foreign country into the United States or from State to State, is commerce within the meaning of this clause of the Constitution is too well settled to justify the citation of authorities. The bringing of persons by common carriers, then, from another State into this State is commerce between the States. Is the state statute which we have quoted a regulation of commerce? We think it is. In *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527, the court says: "Transportation is essential to commerce, or rather it is commerce itself; and every obstacle to it, or burden laid upon it, by legislative authority is a regulation." It is imposing an additional duty upon the carrier. It makes the commerce more burdensome to the carrier; for, after a person is landed in this State, it imposes upon the carrier the responsibility for his pecuniary condition for a year.

But it is claimed that this is the exercise of the police power of the State. That the State, in the exercise of its police power, may indirectly to some extent affect commerce between foreign countries and the United States or between States, may be conceded. Just what the police power of the State embraces, and how far it extends, does not appear to have been definitely determined. It may exercise it to require quarantine or inspection before landing, of persons brought from abroad. It may exercise it to prevent the landing of passengers infected with contagious disease. It may exercise it over the landing of convicted felons from abroad. It may exercise it over persons who have been subject to contagious disease, so as to be liable to be infected by it, and communicate it to others, and thereby endanger the health of the community. But it cannot exercise it to prevent commerce, nor can it exercise it over the carrying and landing of persons who are not at the time they are brought into the State in a condition to be dangerous to the public. *Hannibal & St. J. R. Co. v. Husen*, *supra*; *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550. It cannot exercise it over persons who are free from contagion, who have not been subject to any danger of contagious disease, on the ground that they may become dangerous in that respect within a year or any other fixed period of time after landing. It has been said that it may exercise it to prevent the bringing into the State of paupers,—persons who have no means of support, who are destitute, and dependent upon public charity. But it cannot exercise it over a person who is not a pauper when landed, on the ground that he may become a pauper within some fixed period of time. While we do not undertake to determine just where the police

power of the State in regard to these matters terminates, it is safe to say that it does not embrace the subjects that we have last pointed out.

This Statute is broad and general in its terms. It embraces all persons brought into the State, having no settlement in the State; and as it is found in the Pauper Statute, the term "settlement" must be held to mean a pauper settlement, without regard to the fact whether the person is poor at the time when he is brought into the State or wealthy. He may be worth thousands and hundreds of thousands of dollars when he is landed in the State, and, from the various vicissitudes that men are subject to, within a year from that time may not have a dollar, may be destitute, and in need of support as a pauper. He may, when brought into the State, be a citizen of the State, having no settlement in it; and still, under the terms of the Statute, if he becomes a pauper within a year, it is the duty of the carrier who brings him here to take him and carry him out of the State. By what authority may it be done? A citizen of the State has the legal right to come into it, either with the aid of a common carrier or without such aid. Every citizen of the United States has the right to enter every other State for temporary purposes or to become a citizen of such State. Suppose the carrier who brings him in undertakes to seize him and carry him out of the State because he has lost

his property within a year, and become needy. Would not the courts interfere at once on application therefor, and discharge him from such unlawful restraint? We think it is clearly so. Then, again, what right would the carrier have, if he is a pauper, and the police power of the State extends to the extent to prevent the landing of paupers within it to carry him out of this State, and land him in another State?

But it is unnecessary to discuss the effect of this Statute further. Its provisions are too broad and sweeping to be considered within the power of the State. It is the exercise of a power granted solely to the United States, which the State cannot exercise. It is so general that, as we have said, it applies to all persons brought into the State by a carrier, without regard to wealth or poverty when brought in; but undertakes to impose upon the carrier the burden of removing or supporting him if he shall within the time named become destitute.

It is said by counsel that it is aimed against pauperism, and may be sustained as valid as to persons who are paupers when brought into the State. Its terms are general. It cannot be divided, and held to be valid as to one class of persons and invalid as to others.

Judgment for defendants.

Peters, Ch. J., and Virgin, Emery, Foster, and Whitehouse, JJ., concurred.

GEORGIA SUPREME COURT.

Elizabeth HARALSON, Impleaded, etc.,
Pf. in Err.,

v.

W. I. MCARTHUR.

(.....Ga.....)

*1. **The defendant's attorney being absent with leave of the court on account of sickness, his relationship to the case being known to counsel for the plaintiff, although his name was not marked on the docket, his leave of absence applied to the case; and, if his client was also absent on account of a public announcement made by the judge in open court (she being then present and hearing it) that no case would be taken up in which the absent counsel was concerned, the judgment against such defendant ought to be set aside upon application made at the same term, supported by an affidavit of a meritorious defense.**

2. **A joint verdict and judgment against several defendants, some of whom were never served, and had not waived service by appearance, should be set aside on motion made at the same term.**

(July 8, 1891.)

ERROR to the Superior Court for Montgomery County to review a decision refusing to set aside a judgment rendered against defendant Haralson during the absence from court of her attorney. *Reversed.*

The case sufficiently appears in the opinion.
Mcara, Martin & Smith and H. W. Carswell for plaintiff in error.

*Head notes by **Simmons, J.**

13 L. R. A.

Messrs. E. A. Smith, D. C. McLennan and DeLacy & Bishop, for defendant in error:

It is not the fault of plaintiff or his counsel that the name of counsel for Haralson was not marked on the docket, and they are not responsible for its not being marked, nor for the counsel's relying upon the judge upon a private application to have his name marked, and it was the duty of defendant Haralson and her counsel to file their defense at the first term instead of allowing the case to be marked in default, and hence the motion to set aside should be denied.

Storey v. Weaver, 66 Ga. 300; *Morris v. Morris*, 76 Ga. 733; *Graham v. Smith*, 80 Ga. 676.

Motion for a new trial is the remedy, and not a motion to set aside the judgment.
Ga. Code, 3590.

McArthur could have sued Haralson alone for the trespass, and having sued several joint trespassers could have dismissed as to all but Haralson, and proceeded against her alone; and the fact that verdict and judgment were rendered improperly against other co-defendants, who are not complaining, furnishes no cause of complaint for Haralson who was duly served, and against whom the verdict and judgment were properly rendered.

Brooks v. Ashburn, 9 Ga. 302.

Simmons, J., delivered the opinion of the court:

1. At the time the judgment was rendered in this case in the court below, Mr. Stanley, the attorney of Mrs. Haralson, one of the defendants, was absent from the court under a

leave granted on account of sickness. This providential cause would have been a sufficient excuse for his absence without any leave from the court. It was known to plaintiff's counsel that he had been employed in this case, although his name was not marked on the docket. Mrs. Haralson heard the judge announce in open court that no case in which Mr. Stanley was concerned as counsel would be taken up. For this reason she was not present when the case was called, and, doubtless for the same reason, made no arrangement to be represented by other counsel. She ascertained during the term that a judgment had been rendered against her, and immediately before the expiration of the term moved to set the same aside, which the court declined to do. This decision, in our opinion, was erroneous. Although Mr. Stanley had neither filed a plea for defendant nor caused his name to be marked on the docket, his client should not, in our opinion, suffer on account of his failure to do these things, because at the time the case was called and disposed of he was at home sick, and unable to attend to any business. If his leave of absence had been obtained for any other cause, he could at least have done what was necessary to inform the court what cases were to be affected by the leave granted. This he could have accomplished by furnishing the court with a list of his cases, or by seeing to it that his name was marked on the docket in all of them. Where an attorney is well, and gets a leave of absence from the court for his own convenience, it would be negligence to allow a case he was employed to defend to stand on the docket till called for a final disposition, without having previously done anything whatever to inform the court the case was to be contested, and that he represented the defendant. There seems to be no good reason, other than sickness or some other providential cause, why an attorney could not do this much, in person or otherwise, before the case was reached in its order for a hearing; and, unless prevented by such cause, he would have until then to protect his cases under his leave of absence; but where he is sick his opportunity to do so does not extend up to that time, and for this reason we think the rule above indicated should be modified in a case like this, where providential interference cuts an attorney off from the full exercise of his rights and privileges.

In the case of *Bentley v. Finch* (Ga.) 13 S. E. Rep. 155, the record shows that the judge stated to Mr. Humphreys, counsel for defendant, who was present in the court, he would not try that day any case in which he was employed, yet nevertheless, on the same day did render judgment against his client in a case wherein Mr. Humphreys' name was not

marked on the docket, the judge not knowing that he was employed therein. The court below afterwards set that judgment aside, and was, we think, properly reversed by this court for so doing. The suit was upon an unconditional written contract, and was in default, no plea having been filed, and no counsel's name having been marked for defendant on the docket. Mr. Humphreys' client relied upon the clerk to enter his name, and, this being at his own risk, he could take nothing by the clerk's failure to comply with his request. Again Mr. Humphreys was present in court when the judge made the announcement as to his cases, and there is no reason why he could not have then had his name marked in the cases he defended, or at least have informed the judge what his cases were. Nothing of the sort was done, and under these facts we thought no sufficient reason appeared for setting the judgment aside. In the *Bentley Case*, the motion to set aside the judgment was not made at the term at which it was rendered, as was done in the case at bar; nor does the record in the former allege that defendant or his counsel were ignorant till after the term closed, of the rendition of the judgment, or state any reason whatever why the motion to set aside was not made during the term. These two cases differ in many respects, but the controlling distinction between them is that in one the defendant's counsel was prevented by providential interference from giving all needed attention to his client's interests, and in the other he was not, but had ample and sufficient opportunity to do so, and by availing himself thereof could have prevented the rendition of the judgment.

2. This was an action against several defendants, including the plaintiff in error, some of whom were not served at all, and never had their day in court. The verdict and judgment being a joint one in favor of the plaintiff against all the defendants, ought not to stand. Those who were not served, of course, are not bound by it; and this fact would effectually prevent the plaintiff in error, in case she satisfied the judgment, from having her right to contribution from all her co-defendants. In the event she should demand such contribution, they would only have to reply they were not bound by the judgment at all, and that it established no right against them in favor of anyone. If the plaintiff had obtained judgment against those defendants only who were served, it may have been valid as to them; but inasmuch as the judgment is against all the defendants, including those not served, we are clear it should be set aside for the reason above stated.

Judgment reversed.

Lumpkin, J., not presiding.

MASSACHUSETTS SUPREME JUDICIAL COURT.

John J. WILLIAMSON

v.
Warren S. HILL.

(.....Mass.....)

The first annual payment is optional with the obligor on a contract to purchase 13 L. R. A.

certain patents and inventions which does not mention a cash payment made when the contract took effect, but which calls for annual payments for fourteen years, amounting to \$250,000 or, in lieu thereof, the sum of \$100,000 at any time within two years, and provides that on failure to make any payment when due within sixty days after

demand the "sale shall be null and void and of no effect" and the patents revert discharged of any obligations under the contract, with a further provision giving the obligor the right to assign the contract and thus free himself from personal liability.

(June 26, 1891.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County overruling a demurrer to the declaration and admitting certain evidence as well as to instructions and refusals to instruct made in an action brought to recover money alleged to be due under a contract for the purchase of certain patent rights which resulted in a verdict in plaintiff's favor. *Sustained.*

The facts sufficiently appear in the opinion. **Mr. Charles M. Barnes** for defendant. **Mr. Thomas William Clarke** for plaintiff.

Knowlton, J., delivered the opinion of the court:

The plaintiff was the owner of certain letters-patent, and of an invention on which letters-patent had been applied for, all for methods or processes of manufacturing electrical conducting wires. On April 26, 1887, he made a contract in writing with the defendant to sell these letters-patent and inventions, and stipulated also to sell and convey any other letters-patent which he should obtain or inventions which he should make for wires of similar compounds during the term mentioned in the contract. The contract proceeds in the following language: "The conditions of sale, and the payments to be made, and the times and mode of so making them are hereinafter expressly stipulated, as follows:—

"Said Warren S. Hill, or his assigns, shall pay to said Williamson, his heirs or assigns, the sum of twenty-five hundred dollars in one year from the first day of May, A. D. 1887."

[Then follows a statement of sums to be paid annually on the first day of May for fourteen years from May 1, 1887, amounting in all, including the \$2,500, to \$250,000.]

It being understood and provided that in case any of the aforesaid payments being due, and having been demanded, and such payment be not made or tendered within the sixty days next succeeding such demand (except as is hereinbefore provided), then and in that case this contract and agreement and sale shall be null and void and of no effect from the date so determined, and the patents shall revert to said Williamson or to his assigns, discharged of any obligations of whatever nature due to this contract, and of any rights to manufacture thereunder." The next clause relates to the places where the payments are to be made. The next stipulates that the defendant or his assigns may at any time within two years from the 1st day of May, 1887, make payment or tender of payment of \$100,000 in cash to the plaintiff, and that the plaintiff shall receive the same and the title to all such payments "shall pass absolutely to said Hill or his assigns discharged of all future payments."

The last provision is as follows: "Said Warren S. Hill may assign this agreement, 13 L. R. A.

subject to all the conditions of payment, to any person or corporation; and in case of the payment by such assigns or their assigns, or their successors in interest, at or before the conclusion of any calendar year, or shall make the special single payment on or before May 1, 1889, as above stipulated, the sale hereby provided for shall inure to the benefit of such assigns or persons having his or their title. But in case such payments be not made this agreement ceases and determines as hereinbefore provided."

The suit is brought to recover the first payment mentioned in the contract, which was duly demanded soon after May 1, 1888. "At the time it appeared by the evidence that the sum of twelve hundred and fifty dollars was paid to the plaintiff at or about the time of the execution of the contract, by one Edwin S. Thayer, and at the same time, or shortly after, the plaintiff paid two hundred and fifty dollars of this sum to the defendant Hill, in pursuance of a verbal agreement had by the plaintiff and defendant before the time of the execution of the contract; and that in all the negotiations between the plaintiff and defendant concerning the making of the contract, the plaintiff insisted on a payment being made to him at the time of the execution of the contract, and the payment was made at such time in pursuance of this agreement which was not contained in the contract; and by such agreement it was understood that twelve hundred and fifty dollars should be paid to the plaintiff at the time of the delivery of the contract, and that two hundred and fifty dollars of that money should be paid back by the plaintiff to the defendant Hill." It also appeared that at the time the contract was made the wire had not been manufactured for the market, nor put to any use except for the purpose of testing its mechanical and electrical qualities, and there was uncontradicted evidence that the plaintiff had been, for some years before the execution of the contract, trying to get someone to undertake the manufacture of the wire, and that on one occasion previously he had had a contract with the defendant, concerning the purchase of the patents, which had run out.

The question before the court is, What is the true construction of the contract in regard to the payments mentioned in it. Was it an absolute sale, and did the defendant become bound absolutely to pay the sum of \$250,000, or was it a contract which merely secured him rights in the patents on his making payments from time to time so long as he continued to pay in accordance with the contract. The defendant contends that the purpose of the contract was to enable the defendant to experiment with the patents and to endeavor to obtain a purchaser of them, and that the payment of \$1,250 by Thayer, who testified that he was interested in the purchase of the patents, was to secure to the defendant rights in them for one year, and that at the end of the year he had his option either to pay \$2,500 within sixty days after a demand by the plaintiff, and thereby secure control of the patents for another year, or to decline to pay, and so make the contract "void and of no effect."

There can be no doubt that his failure to make the payment demanded terminated all

his rights in the patents and his liability for future payments. If such a failure had occurred several years later, after some of the payments had been made, it would have rendered the contract of no effect from the date—that is to say, so far as the contract had been completely executed in the making of payments it would remain in effect, but so far as it remained entirely executory it would be terminated and none of the payments provided for in the future could be collected. The only question of difficulty relates to the payment which had become due, either absolutely or conditionally, but remained unpaid. As to that, is the contract in force so that it can be invoked for the collection of it? That depends on whether the payment had become absolutely due and payable before the contract became void.

It is worth while to inquire whether the parties intended this provision for the benefit of the defendant as well as the plaintiff. Was the defendant entitled to be free from all future liability by refusing to pay on demand, or could the plaintiff if he saw fit compel him to pay the whole sum of \$250,000? The stipulation is absolute that on the defendant's failure to pay within sixty days after a demand the contract shall become of no effect for the future; and, considering the nature of the contract, we cannot doubt that the parties intended to allow the defendant to avail himself of this provision at the end of any year to relieve himself from future liability. This the plaintiff's counsel concedes in argument; but he says that the defendant could not relieve himself from liability for the payment which had been demanded, and which he contends had become absolutely payable on the first day of May. But the contract becomes void only after the expiration of sixty days from the plaintiff's demand for the payment; and if the plaintiff's construction were correct, following literally the terms of the contract, he would have nothing to do but to decline to make a demand, and at the expiration of a year the second payment would become due, and at the expiration of another year with no demand the third would become absolutely due, and so on, while the defendant would have no way of avoiding an absolute liability for the whole. To hold that each payment becomes absolutely due on the first day of May, when the contract says it shall be paid, is equivalent to holding that this provision of the contract is for the plaintiff only, and that the defendant has no option if the plaintiff sees fit to hold him as an absolute purchaser.

If we look critically at the contract we notice that the stipulation for a payment on the first day of May in each year is only one of the "conditions of sale," and is qualified by the clause beginning, "it being understood and provided." When we look at the subject matter of the contract, the situation of the parties, the apparently experimental nature of the

transaction, and the payment made by the defendant in advance, we think the parties intended that each payment should be made only in case the defendant wished to keep the contract in force for his benefit, and that he was to have sixty days after a demand in which to determine whether to pay or to allow the contract to become void except as to those parts which had been fully executed. If he failed to pay, the contract would become of no effect as to the payment demanded. This appears also by the last paragraph of the contract, which gives the defendant a right to assign "the agreement, subject to all the conditions of payment, to any person or corporation" and to be relieved from further personal liability upon it by substituting another in his place. On such an assignment the assignee would be under no direct obligation to the plaintiff, and the plaintiff would have no remedies under the contract except as it gives him security on the patents. Yet it is stipulated that on payment by such assignee or his assigns or successors in interest "at or before the conclusion of any calendar year," etc., the sale provided for by the contract shall inure to his or their benefit. But if the payment be not made the agreement ceases and determines as before provided. Under this provision it is clear that, if the contract should be assigned, the plaintiff could not recover a payment which should subsequently accrue and be demanded of the assignee; and the contract assumes that this part of it is identical in legal effect with that on which this suit is brought.

We are of opinion, therefore, that the exceptions to the ruling at the trial should be sustained.

In passing on the demurrer to the declaration we are obliged to consider the question presented without the benefit of the facts proved at the trial, and the solution of it is not easy. But in the contract itself, although it does not appear that the payment was made in advance, there is much to show the experimental nature of the transaction. The principal patents had been in existence about three years, as appears by the description of them, and one application for a patent was then pending, and the contract by the terms looked to future inventions to be made and patents to be obtained by the plaintiff which were to be assigned to the defendant. Then the provision for assignment by the defendant "to any person or corporation," and the stipulation that a payment of \$100,000 at any time within two years might stand instead of \$250,000 to be paid year by year, indicate that this was not considered an absolute sale with security back to the seller, but a grant of a privilege to be kept alive by annual payments, or lost on the failure to pay annually. We are of opinion that the demurrer should be sustained.

Exceptions sustained. Demurrer sustained.

MICHIGAN SUPREME COURT.

Benjamin WOLF *et al.*
v.
William O'CONNOR, *Appt.*

(.....Mich.....)

1. An assignment preferring some creditors whom it fails to specify either in the instrument itself or in an indexed schedule is void upon its face.
2. An execution purchaser of land included in an assignment for creditors which is void on its face may have his title quieted against such assignment where the statute at the time of the purchase authorized a levy on lands fraudulently conveyed. It was not necessary for the judgment creditor to seek aid in equity before the sale.

(October 30, 1891.)

A PPEAL by defendant from a decree of the Circuit Court for Osceola County in favor of complainants in a suit brought to quiet title to certain real estate. *Affirmed.*

Statement by Long, J., in the opinion handed down July 2, 1890, after the first hearing.

The bill is filed in this cause to quiet title to certain lands in Osceola County. The bill avers that complainant is in possession and has the original or government title, and also has certain tax titles, and that certain conveyances to the defendant, and claims made by him, cloud the title. On the hearing in the court below the tax titles asserted by each party were admitted to be void, and the only controversy here arises under the original title. All the lands in question were patented by the United States to Dennis Robinson under two patents dated, respectively, November 8 and December 15, 1855. October 5, 1857, Dennis Robinson made a deed of assignment conveying these and other lands, and all his property, real and personal, the lands being specifically described, to Nelson Robinson and George H. White of Grand Rapids, and Robert R. Robinson, of Newaygo County, this State, in trust for the benefit of creditors. This assignment

was signed and acknowledged by all the parties and witnesses, and was recorded October 6, 1857. On March 24, 1859, August Washman recovered a judgment against Dennis Robinson for \$688 and costs in the Circuit Court for Newaygo County. March 23, 1859, Mr. Washman sold and assigned in writing this judgment and claim against Dennis Robinson to William S. Utley, who was then the clerk of that court. August 12, 1859, Utley issued an execution to the sheriff of Newaygo County to collect the Washman judgment. This execution was returned and filed November 1, 1859, by Utley. December, 1859, Utley issued another execution to the sheriff of Mecosta County, Osceola County, forming a part of Mecosta County at that time. By virtue of this execution the sheriff of Mecosta County levied upon the lands in question and other lands. The execution on March 10, 1860, was returned satisfied in full by sale of these lands. Mr. Utley bought in the lands in question under this execution sale. August 28, 1871, Utley conveyed the lands to Delos A. Blodgett and James Kennedy, by deed of quitclaim, for a consideration of \$500; and on June 3, 1874, Blodgett purchased Kennedy's interest therein, taking a quitclaim deed; the consideration being named as \$500. The defendant claims under the following chain of title: (1) The assignment from Dennis Robinson to Nelson Robinson, Robert R. Robinson, and George H. White, dated October 5, 1857; Mr. Nelson Robinson, the other assignee, having died in January, 1888. Deed of warranty from Dennis Robinson to him (William O'Connor), dated December 28, 1887, consideration \$1, conveying one-half interest in these and other lands, subject to taxes and tax titles. Deed of quitclaim from Robert R. Robinson and George H. White, trustees, etc., dated January 28, 1888, to Dennis Robinson, consideration therein \$1; and also warranty deed from Dennis Robinson to him (William O'Connor) conveying all the lands, dated March 4, 1889, for a consideration therein expressed of \$50. About the time of the filing of the bill in the present case, two other bills were also filed against the defendant, William O'Connor, one by Henry O.

NOTE.—Recitals of the assignment.

The principal case was decided upon well-recognized rules of law. These rules require that the instrument creating the assignment must itself fix and determine the rights of the creditors in the assigned property. Preferred creditors must be named, and, generally, it may be said that the omission of any of the statutory formulas is a vice which will avoid the instrument. The debtor cannot reserve to himself or transfer to his assignee the right to declare future preferences, or to change the order of the preferences already given, or to give preference at the assignee's discretion. *Grover v. Wakeman*, 11 Wend. 187; *Boardman v. Halliday*, 10 Paige, 223, 223, 4 L. ed. 958, 956; *Van Nest v. Yoe*, 1 Sandf. Ch. 4, 7 L. ed. 216; 2 Kent, Com. (523) 691, note; *Kerchels v. Schloss*, 49 How. Pr. 223.

Assignments containing provisions to this effect have been repeatedly held fraudulent and void. *Barnum v. Hempstead*, 7 Paige, 563, 4 L. ed. 278; *Boardman v. Halliday*, *supra*; *Sheldon v. Dodge*, 4 13 L. R. A.

Denio, 217; *Strong v. Skinner*, 4 Barb. 546; *Averill v. Loucks*, 6 Barb. 470; *Mitchell v. Stiles*, 13 Pa. 306; *Gazzam v. Poyntz*, 4 Ala. 374; *Burrill*, Assignm. 3d ed. § 179.

In the case of *Wakeman v. Grover*, 4 Paige, 41, 3 L. ed. 334, the New York Court of Chancery decided that a debtor could not put his property beyond the reach of his creditors at law by assigning it to trustees to pay debts, without settling the rights of creditors under the assignment, leaving it to the assignees to give such future preferences in payment as they might deem proper.

It is a familiar rule on the subject of preferences that the debtor must declare such preferences in the assignment and there should be no power reserved to him by the assignment to interfere with the distribution of the property, and no means or opportunity reserved to him in any way, nor for any length of time, after the execution of the instrument, to make preferences among his creditors, or to use the assignment as a means of extorting terms from them. *Kerchels v. Schloss*, 49 How. Pr. 224.

Bevier, and the other by William F. Seeley. These other two cases presented by these bills were heard in the court below at the same time with the present case, and the evidence, under the stipulation of counsel, was to be treated as taken in all the cases. Decree was entered in the court below granting the prayers of the bills, and declaring the trust deed void, and a cloud upon the title of the several complainants; the other complainants having derived their titles also through the execution sale to Utley. The tax deeds held by defendant were also declared void. The decree provided that the defendant should release to complainants his claims to said premises, and, in default, that the decree stand in lieu of such conveyance, and be recorded for such purpose. From these decrees the defendant appealed, and all three cases are heard as one in this court. The whole question hinges upon the validity of this trust-deed, as it appears that none of the complainants, except possibly Mr. Bevier, has been in actual possession and occupancy the time required by the statute to settle his title by adverse possession.

It is the claim of the complainants, (1) that the trust deed was never accepted, and that the assignment was never acted upon by the parties, and was never operative; (2) that the instrument is void upon its face. The testimony was taken in open court, and the court below found with the complainant upon these two propositions. These facts are controverted by the defendant. Defendant's contention is, (1) that the complainants cannot assert in a court of equity a title procured through an execution sale; (2) that the trust deed conveyed the estate and title to the trustees, and it was so vested in the trustees at the time of the levy and sale under the execution; (3) that, the title being conveyed to Dennis Robinson by the trustees, the defendant procured an absolute title to the premises under his deeds. The complainant fails to point out the reason for his assertion that the deed of assignment is void on its face. It purported to convey the whole of the property of the assignor for the use and benefit of his creditors. It was executed prior to our Statute regulating the manner of making and execution of assignments for the benefit of creditors. It was signed and acknowledged by the assignors, as well as the assignees, and placed upon record in the office of the register of deeds of the County of Mecosta, where the assignor and one of the assignees resided, and in which the lands in controversy here were situate. Upon its face, it was not void, but a valid conveyance of all the property of Dennis Robinson to Nelson Robinson, Robert R. Robinson, and George H. White for the benefit of the creditors of the assignor. At the time of its execution, it appears that Washman, under and through whose judgment the complainants now claim to hold the property, was a creditor of Dennis Robinson, and after the execution of the trust deed, those claiming under his judgment called upon the assignees for payment of the claim. Washman, Utley, nor any other of the creditors, appear to have moved to set the deed of conveyance aside, but, after the lapse of two years and more from the time the deed was recorded, and while the title of record stood in the

trustees, levied upon and sold the land under an execution directed against the assignor. There is an abundance of evidence contained in the record showing that the assignees never acted, or attempted to execute the trust. It appears that, after the deed of assignment was recorded, the assignor continued to control the personal property assigned, of which there was about \$2,000, consisting of horses, wagons, harnesses, and lumbering outfits, etc.; that it was disposed of by someone, or spirited away, and no creditor was ever paid a dollar, so far as here shown. It also appears that the assignor afterwards gave deeds of conveyance of a portion of the lands described in the deed of assignment, and did other acts showing that he still claimed an interest in and control over the property. It also appears that certain of the creditors called upon the assignees, or some of them, and demanded payment of their claims, and that they denied any interest in the property; and stated expressly that they never had anything to do with it, and should not, so far as the execution of the trust was concerned. The legal title to these lands, however, conveyed by the trust deed, remained in the assignees, and the survivor of them, until the execution of the deed of quitclaim of January 28, 1888, by White and Robert R. Robinson, the surviving assignees, to Dennis Robinson. So that, at the time of the levy and sale of the lands under the Utley execution the legal title stood in the assignees, and not in Dennis Robinson. Washman and Utley had notice by the record of this deed that the legal title had gone out of Dennis Robinson, and the testimony shows that they had actual notice of that fact; yet they levied upon and sold the land as the property of Dennis Robinson, without any proceeding for the enforcement of the trust, or to set it aside as fraudulent. Utley then stood in the position of purchaser under execution sale of whatever interest Dennis Robinson had in the premises at the time of the levy. As we have seen, he at that time did not have the legal title; and, whatever the attitude of Dennis Robinson or of the assignees towards the property may have been thereafter, or the refusal of the assignees to act under and carry out the terms of the trust would not operate to reconvey the title to the realty to Dennis Robinson. The creditors have the right to its enforcement, as the assignees had accepted the trust in writing, acknowledged its execution, and placed the same of record.

Messrs. Cahill & Ostrander for appellant.

Mr. C. H. Rose, with **Mr. G. A. Wolf**, for appellees:

If the assignment substantially reserves the right to name the preferred creditors in the future it is fraudulent and void.

Averill v. Loucks, 6 Barb. 470; *Bump*, Fraud. Conv. 3d ed. 382.

The law requires that the assignment must itself fix and determine the rights of the creditors in the assigned property. Otherwise it places the creditors in the power of the debtor and compels them to acquiesce in such terms as the debtor may think proper to prescribe as the only conditions upon which they are permitted to participate in his property. This is a fraud

upon the creditors, and necessarily delays and hinders them in the collection of their debts.

Wakeman v. Grover, 4 Paige, 41, 3 L. ed. 831, 11 Wend. 203; *Barnum v. Hempstead*, 7 Paige, 571, 4 L. ed. 279; *Boardman v. Halliday*, 10 Paige, 227, 4 L. ed. 956; *Sheldon v. Dodge*, 4 Denio, 221; *Hyslop v. Clarke*, 14 Johns. 463.

The law prior to 1867 did not require a bill to be filed at all.

Cleland v. T aylor, 3 Mich. 201; *Trask v. Green*, 9 Mich. 368; *Jenison v. Rankin*, 57 Mich. 49.

The law in this State at that time followed the common law rule that the purchaser at the sale could bring ejectment or file a bill.

Bump, Fraud. Conv. 3d ed. 546; *Wait, Fraud. Conv.* § 126. See *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 481.

Every equity in this case is in favor of complainants.

It was the duty of the assignees, if they had accepted the trust, to proceed without delay in the premises.

Clark v. Craig, 29 Mich. 398.

The great lapse of time and the acquiescence of all parties interested in the sheriff's sale, made in 1860, will preclude defendant from now attacking complainant's rights thereunder.

Montgomery v. Merrill, 18 Mich. 338.

Mezera, Uhl & Crane, also for appellers:

The complainants are entitled to the same relief against the assignment upon the ground that it was made to defraud the creditors of the assignor as the judgment creditor had either before or after the execution sale.

Hildreth v. Sands, 2 Johns. Ch. 86, 1 L. ed. 287; *Sands v. Hildreth*, 14 Johns. 497; *Borr v. Hatch*, 3 Ohio, 527; *Frakes v. Brown*, 2 Blackf. 295; *Rhodes v. Magonigal*, 2 Pa. 39; *Fepper v. Carter*, 11 Mo. 540; *Harrison v. Kramer*, 3 Iowa, 543; *Gerrish v. Mace*, 9 Gray, 235; *Eastman v. Schettler*, 13 Wis. 324; *Warren v. Williams*, 52 Me. 343; *Gallman v. Perrie*, 47 Miss. 131; *Oliver v. McClure*, 28 Ark. 555; *Porter v. Parmley*, 52 N. Y. 185; *Miller v. Jarison*, 26 N. J. Eq. 411; *Cook v. Ligon*, 54 Miss. 652.

A purchaser of land at an execution sale acquires title to the land if the judgment debtor owned the land at the time of the sale, and may go into equity to set aside a fraudulent deed of the judgment although he is not in possession of the property.

Mohawk Bank v. Atwater, 2 Paige, 54, 2 L. ed. 810; *Hager v. Shindler*, 29 Cal. 48; *Bunce v. Gallagher*, 5 Blatchf. 481; *Ormsby v. Barr*, 22 Mich. 80; *Jones v. Smith*, 22 Mich. 360; *Borie v. Price*, 81 Wis. 82; *Gould v. Steinburg*, 84 Ill. 170; *King v. Carpenter*, 37 Mich. 363; *Newark M. E. Church v. Clark*, 41 Mich. 730; *Stock Grocers Bank v. Newton*, 13 Colo. 245; *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474.

A creditor having a valid lien upon the real estate of his debtor by the levy of an execution issued upon a valid judgment may sell such real estate upon his execution and the purchaser at such sale may impeach a prior fraudulent conveyance made by the judgment debtor in an action at law. The purchaser may resort to a bill in aid of execution, but he is not compelled to adopt the equitable remedy.

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Jackson v. Myers, 18 Johns. 425; *Jackson v. Parker*, 9 Cow. 73; *Jackson v. Timmerman*, 7 Wend. 436, 12 Wend. 299; *Stephens v. Sinclair*, 1 Hill, 143; *Cleland v. Taylor*, 3 Mich. 201; *Chautauqua County Bank v. Risley*, 19 N. Y. 369; *Bergen v. Carman*, 79 N. Y. 146.

The courts almost universally hold that a judgment creditor may levy upon land which the judgment debtor has fraudulently conveyed, sell it upon execution, and test the validity of the fraudulent conveyance in an action at law.

Bridge v. Eggleston, 14 Mass. 245; *Den v. Underwood*, 4 Wash. C. C. 129; *Hinde v. Longworth*, 24 U. S. 11 Wheat. 199, 6 L. ed. 454; *Doe v. Rowe*, 4 Bing. N. C. 737; *Middleton v. Sinclair*, 5 Cranch, C. C. 409; *Carter v. Castleberry*, 5 Ala. 277; *Rhodes v. Magonigal*, 2 Pa. 39; *Webb v. Dean*, 21 Pa. 29; *Eastman v. Schettler*, 13 Wis. 324; *Warren v. Williams*, 52 Me. 343; *Mulford v. Peterson*, 85 N. J. L. 127.

The assignment is fraudulent and void on its face, in that it did not declare the trusts created by it, but practically reserved to the assignor the power of subsequently expressing and defining the trusts.

Grover v. Wakeman, 11 Wend. 189; *Barnum v. Hempstead*, 7 Paige, 568, 4 L. ed. 278; *Gazzam v. Poyntz*, 4 Ala. 374; *Boardman v. Halliday*, 10 Paige, 223, 4 L. ed. 953; *Sheldon v. Dodge*, 4 Denio, 217; *Averill v. Loucks*, 6 Barb. 470; *Pierson v. Manning*, 2 Mich. 447; *Kerchels v. Schloss*, 49 How. Pr. 294.

The assignor directed his assignee to pay the fund received by him to certain creditors named in schedules to be annexed to the assignment. There are no schedules annexed to the assignment, and none have been found. The assignor has departed this life, and two of the assignees have died. The trusts created by the assignment are therefore incapable of execution, and are null and void.

Gloucester v. Wood, 3 Hare, 181; *Gloucester Corp. v. Osborn*, 1 H. L. Cas. 272; *Atty-Gen. v. Windsor*, 24 Beav. 679; *Aston v. Wood*, L. R. 6 Eq. 419.

Champlin, Ch., J., delivered the opinion of the court:

We granted a rehearing in this case upon the application of the complainants, and the case has again been submitted to us for our consideration. The opinion handed down by us is reported in 83 Mich. 301. One of the points made upon the original hearing was that the instrument was void upon its face. In the opinion handed down we said that the complainants had failed to point out the reason of their assertion that the deed of assignment was void upon its face; but in their motion for a rehearing they have stated the grounds upon which this claim is made, and to which our attention is now challenged. It is claimed that the assignment is void upon its face, because it declares preferences in favor of certain creditors, and such preferred creditors are not named either in the body of the instrument or in a schedule attached thereto. For a statement of the claim made by the complainants and of the chain of title of the respective parties reference is made to our former opinion.

It appears from the testimony that at the

time of the assignment Robinson was considerably indebted to different persons, and was unable to pay them, and executed an assignment purporting to be for the benefit of all his creditors, with certain preferences, hereinafter more particularly referred to. The contest here is not between creditors claiming any benefit under the deed seeking to enforce an execution of the trust, but complainants claim through a creditor acting in defiance of the title of the trustees. The defendant is not a creditor, and does not claim title through the trustees in the execution of their trust. The bill charges that the deed of assignment was executed to hinder, delay, and defraud creditors. Patent proof of such intention is shown by the fact that the assignees never took any steps to enforce the trust, never took possession or control of the property, never sold it in execution of the trust, and never paid a creditor of the assignor. The creditor under whom the complainant claims title, instead of acquiescing in or recognizing the validity of the assignment, proceeded to judgment, and levied execution upon the lands as the property of Dennis Robinson. The property was sold under such execution levy, the sheriff's deed executed, and it has passed through successive purchasers; and for more than twenty-nine years this action has remained unchallenged by either party to the assignment, or by any creditor of Robinson. The testimony shows conclusively that the assignment was a mere formality, executed with the intention of defrauding, delaying, and defeating creditors of Dennis Robinson. Two, at least, of the assignees asserted as early as 1859 that they had never accepted the assignment, and never had done anything under it, and never should; and Dennis Robinson himself directed the assignee of the judgment, who obtained the title under the sheriff's sale, to convey the title which he so obtained to a parcel of the land to Mr. Ryan, in payment of a debt due from Robinson to Ryan.

The assignment refers to a schedule of creditors who were preferred in the instrument. No schedule of creditors accompanies the instrument, and it does not appear that any was ever prepared or furnished to the assignees. It was an imperfect instrument when delivered, and two of the grantees named in it stated that they never had accepted it; and if it can be said that they did in fact accept the instrument in writing by signing their names to the instrument as recorded, still it cannot be said that they ever accepted a complete assignment. The assignment contains this clause: "They shall apply the surplus or residue of said trust moneys in and towards the payment and satisfaction of the several debts and sums of money due to the persons or creditors named in the schedule marked 'A,' as aforesaid, and enumerated in and under class number one, and so marked and indicated; and they, in the successive order in which they relatively stand in said class, to wit, after full payment and satisfaction of the debts due the first (1st), then the residue, if any there be, to be applied to the payment of the second (2d), and then in succession to the third (3d), and that thus successively the whole may be paid as far as the property and effects hereby assigned as afore-

said may or shall be sufficient to pay the same, and, after payment and satisfaction of such last above referred to debts and creditors mentioned in class number one, so marked in said schedule, and of all such costs, charges, and expenses aforesaid, then in trust, that they, or the survivor of them, his executors or administrators, do and shall apply the surplus or residue of said trust moneys in and towards payment and satisfaction of the several debts and sums of money due to the persons or creditors named in said schedule marked 'A,' as aforesaid, and enumerated in and under said class number two, so marked and indicated in said schedule to them *pari passu*, and without any preference or priority of payment in reference to the order or succession in which they stand in said class." While it will not invalidate an assignment which professes to convey all the assignor's property, and refers therein to a schedule of such property to be annexed, if such schedules are not annexed at the time of the execution of the assignment, yet I have not met with any authority which holds an assignment valid as against non-consenting creditors where the assignor prefers certain creditors over others unless such creditors are specified in the assignment itself, or embraced in a schedule annexed at the time the instrument was executed. The reason is obvious. It cannot be left to the debtor or to the assignees to say what creditors shall be preferred after the assignment is executed. This would leave the door open to the grossest frauds and favoritism. The debtor might sell his favors at a premium, and the assignees would not know at the time they accepted the trust who they were to pay in preference to other creditors of the debtor. Thus, in *Aerill v Loucks*, 6 Barb. 470: "Where an assignment directed the assignees to pay the debts specified in the schedules annexed thereto according to the priority of the several schedules, and provided that such schedules should be made within sixty days, and be annexed to and form a part of the assignment, but did not prescribe what debts should be inserted in the respective schedules, or in what order they should be arranged therein, the preparation of such schedules being left entirely to the discretion of the assignors, and it appears that such schedules had not been made out and annexed to the assignment previous to its execution, but that they were prepared by the assignors and annexed at some subsequent time, held, that the assignment was fraudulent and void." And Mr. Burrill, in his work on Assignments, at page 280, says: "Where a preference is intended to be indicated by a schedule it must be distinctly shown by some separation of the debt intended to be preferred from the other debts specified. The mere placing of a debt at the head of a schedule is not sufficient; and where an assignment refers to one or more schedules, as fixing the order in which certain preferred creditors shall be paid, it is essential that they should be annexed to the assignment previous to its execution, unless the assignment itself prescribe what debts shall be inserted in them, and in what order." And he cites, in support of what has been quoted, *Window v. Ancrum*, 1 McCord, Eq. 100, and *Aerill v. Loucks*, 6

Barb. 470. See also *Barnum v. Hempstead*, 7 Paige, 571, 4 L. ed. 279; *Boardman v. Halliday*, 10 Paige, 227, 4 L. ed. 956; *Sheldon v. Dodge*, 4 Denio, 221; *Hyslop v. Clarke*, 14 Johns. 463; *Kercheis v. Schloss*, 49 How. Pr. 284.

It is urged by defendant's solicitor that the complainants are too late in seeking relief against the alleged fraudulent and invalid conveyance; that under the decisions of the court the judgment creditor through whom complainant claims should have filed his bill in aid of his execution before sale; and in support of this position they cite the following: *Messmore v. Huggard*, 46 Mich. 558; *Cranston v. Smith*, 47 Mich. 189; *Jentson v. Rankin*, 57 Mich. 49; *Munson v. Ellis*, 58 Mich. 835; *Edsall v. Nevins*, 80 Mich. 146.

If those cases were applicable to the present, I should be loth to follow them where to do so would be to inflict palpable injustice upon the parties who have obtained rights relying upon the decisions and intimations of this court in its reported cases. In *Cleland v. Taylor*, 3 Mich. 202, the action was ejectment; and the plaintiff relied upon the sheriff's deed, made upon a levy upon land which the plaintiff claimed had been conveyed by defendant with intent to defraud his creditors, and the question raised and decided was that the plaintiff could introduce evidence tending to show that the conveyance was executed with intent to hinder, delay, and defraud the creditors of the defendant in the execution. The presiding judge, at page 206 of the opinion, said: "It is said that a conveyance intended to defraud creditors is not void, but voidable only, at the instance of such creditor. In some respects this is so. As between the parties to the deed it conveys the legal title, which is good also as against the creditor until he pursues his remedy as such creditor, and acquires a lien upon or an interest in the land. When he has done this, the deed is void as to him, and may be treated by him in the prosecution of his remedies as creditor as absolutely void in law as well as in equity. The Statute makes no distinction,"—citing the Revised Statutes, p. 828. And in *Trask v. Green*, 9 Mich. 363, *Mr. Justice Christianity* says: "Where the title before the conveyance has been vested in the debtor himself, and he has conveyed for the purpose of defrauding his creditors, the right of creditors to levy and sell rests upon the ground that, the deed being void as to creditors, the legal title, as to them, still remains in the debtor, as if no conveyance had been made. The land may therefore be sold on execution at law, without invoking the aid of a court of equity; and the purchaser may, if he chooses, try the question of fraud in an action at law (*Cleland v. Taylor*, 3 Mich. 201, and cases cited); and he may, doubtless, file his bill in a proper case, after sale, to remove the cloud created by the fraudulent conveyance. But it is generally more advantageous to all parties, and therefore more common, for the creditor to bring his bill before sale, in aid of the execution. And this may be done at any time after the creditor has obtained a lien upon the land by his judgment, when that of itself creates the lien, or only after the levy of an execution, where, as in this State, the levy is necessary to give the lien." It is true that what

was thus said by *Mr. Justice Christianity* was only the reasoning of the court, but all of the justices of the court concurred in this reasoning, *Mr. Justice Campbell* so expressly stating. The decisions were not questioned until the case of *Messmore v. Huggard*, 46 Mich. 558. In that case it was claimed that the mortgage had been executed by the judgment debtor before the levy of execution, which mortgage, it was claimed, was fraudulent and void as to the judgment creditor, and after sale he filed a bill to have the mortgage set aside and discharged as a cloud upon his title. The defendant claimed that the bill should have been filed before sale in aid of execution; and *Mr. Justice Cooley*, at page 561, said: "The point has never before been distinctly presented in this State, though since the decision in *Cleland v. Taylor*, 3 Mich. 202, it has perhaps been assumed that the right to question the bona fides of any conveyance by the judgment debtor was as much available to the creditor after he had caused the land to be sold on execution and become the purchaser as it was before. In that case the debtor had made an absolute conveyance, and the creditor, without proceeding to have the conveyance set aside, had become purchaser at the execution sale, and then brought ejectment. The defendant in ejectment questioned the right to inquire into the fraud in a court of law for the purpose of avoiding the deed; but the court, citing and relying upon *Jackson v. Myers*, 18 Johns. 425; *Jackson v. Parker*, 9 Cow. 78; *Jackson v. Timmerman*, 7 Wend. 436, 12 Wend. 299; and *Stephens v. Sinclair*, 1 Hill, 143,—decided that it was as competent to set aside the fraudulent deed by suit at law as by bill in equity, and that ejectment by the purchaser at the execution sale was a suitable proceeding for the purpose. There are numerous decisions in other States to the same effect, and we do not question their authority. But the case of *Cleland v. Taylor*, and the others referred to, have little analogy to this. In those cases the judgment debtor had conveyed away his whole interest, and any offer to sell on an execution against him necessarily attacked his conveyance. The judgment debtor would understand this, and his grantee would understand it and take his measures accordingly. So would all persons who should be inclined to become bidders at the sale understand it, and all would stand on an equality with the judgment creditor in making bids. No doubt it would be proper for the sheriff expressly to give notice at the sale that the validity of the debtor's conveyance was disputed; but, as the offer to sell would be idle and meaningless if the conveyance was not contested, any such notice would obviously be unimportant. In this case the situation was altogether different. The judgment debtor had only mortgaged his lands, and an interest remained in him which was subject to execution sale without questioning the mortgage." It is thus seen that *Messmore v. Huggard* does not overrule *Cleland v. Taylor*. In *Cranston v. Smith*, 47 Mich. 139, the bill was filed in aid of execution by a purchaser at the execution sale. The execution debtor had, prior to the levy, executed a quitclaim deed of the premises to his wife, which the complainant alleged was done with the intent to cheat, delay, and defraud his

creditors. It was held that the bill in aid of execution must be filed before sale, and could not be afterwards. *Mr. Chief Justice Marston* distinguishes the case from *Cleland v. Taylor* and *Trask v. Green*. It will furthermore be perceived that this case originated since the amendment to the Statute in 1867, by which the practice is regulated. In *Jenison v. Rankin*, 57 Mich. 49, the court pointed out the distinction which the amendment to the Statute (Sess. Laws 1867, p. 182) made in the remedies to be pursued, and called attention to the fact that *Cleland v. Taylor* was decided under the Revised Statutes of 1846, and that since the amendment the parties must pursue the remedy provided by the amendment; and this was again announced in *Edsell v. Neovins*, 80 Mich. 146. The levy and sale were made in this case under the statute authorizing a levy of execution on lands fraudulently conveyed, as such statute read before amendment in 1867, and as it read when the cases of *Cleland v. Taylor* and *Trask v. Green* were decided; and so we may say that, if the deed of assignment was valid upon its face, the creditor at that time might attack it by a levy and sale upon the real property as the property of the debtor, and, as pointed out by *Mr. Justice Cooley* in *Messmore v. Huggard*, the judgment debtor had conveyed away his whole interest, and any offer to sell on execution necessarily attacked his conveyance. It has never been decided in this State, in cases which arose previous to the amendment of the Statute in 1867, that an execution purchaser cannot attack a conveyance made in fraud of creditors, either in action of ejectment or by bill in equity to remove cloud upon the title. In this case the defendant is not in a position to appeal to the conscience of a court of equity in his behalf. After the lapse of more than twenty-five years, through someone's instigation, the trustees in the deed of assignment, without having attempted to execute the trust, reconveyed in consideration of one dollar the land described in Schedule B to Dennis Robinson, the debtor, who executed the assignment. In this they merely attempted to discharge themselves of the trust, not to execute it. Robinson obtained no right, title, or equity superior to the purchaser at the execution sale against him. Utley was both prior in time and prior in right. Robinson could not successfully contend against the title of the execution purchaser, and O'Connor stands in no better situation than Robinson. I do not consider it necessary to place the decision of this case upon the ground simply that the assignment was executed for the purpose of cheating, delaying, and defrauding creditors, although I think it might safely be rested there, but I place it also upon the ground that the conveyance is void upon its face, and conveyed no title whatever to the grantees, for the reason that it did not contain the names of the creditors preferred, either in the body of the instrument or in the schedule annexed at the time of its execution. If the instrument were a valid one, the defendant in the original and complainant in the cross-bill would not be entitled to the relief here prayed.

If there was a trust which had not been executed by the trustees, he would become trustee by the transfers under which he claims title, 13 L. R. A.

and his title would be subject to the execution of the trust in equity, and he could not be allowed relief without paying the debts for which the assignment was executed; but it is not necessary to consider this branch of the case, as the other is a sufficient answer to his claims for relief, and it follows that *the decree of the court below should be affirmed.*

The other Justices concurred.

James S. AYRES *et al.*

v.

Henry C. DUTTON *et al.*, *Appts.*

(....Mich.....)

Subscribers of money and land to induce a third person to establish a manufactory in a certain community, the entire cost of which is nearly four times the value of the subscriptions, cannot, in the absence of a stipulation as to the time the business shall be continued, maintain an action to recover back their subscriptions, or to enjoin a removal of the machinery; if, after an honest and faithful attempt for two and one half years to render the business a success, it proves a losing venture.

(October 9, 1891.)

A PPEAL by defendants from a judgment of the Circuit Court for Huron County in favor of plaintiffs, in an action brought to enjoin defendants from removing the machinery from a certain manufacturing establishment, without paying back to plaintiffs certain subscriptions which they had given toward the establishment of the manufactory. *Reversed.*

The facts sufficiently appear in the opinion. *Mr. Q. A. Smith*, with *Messrs. William T. Bope* and *Horace G. Snover*, for appellants:

If any of complainants have paid Dutton any money on a consideration that has failed, they can recover it in an action at law.

Barrows v. Doty, Harr. Ch. 1; *Bennett v. Nichols*, 12 Mich. 22; *Torrent v. Muskegon Boom Co.* 22 Mich. 354; *Hagenbuch v. Howard*, 34 Mich. 1; *Torrent v. Rodgers*, 39 Mich. 85; *Webster v. Gray*, 37 Mich. 87.

Plaintiffs have no equitable lien upon the mill property for their contributions.

NOTE.—*Forfeiture of gifts made to secure location of public buildings, etc.*

Land given for the location thereon of the public buildings of a parish reverts to the original owner on their removal. *Police Jury v. Reeves*, 6 Mart. N. S. (La.) 221.

But a conveyance on the consideration that the county seat shall be "permanently located" upon the land, without stipulating that it shall forever remain there, does not give a reversion on its removal some years later. *Harris v. Shaw*, 13 Ill. 456; *Adams v. Logan County*, 11 Ill. 336.

Nor in case of a donation to build a court-house under a statute stipulating that the "place shall forever thereafter be the permanent seat of justice of the county." *Armstrong v. Dearborn County Comrs.* 4 Blackf. 308.

Nor where the land was given under a statute declaring that a county seat on the fulfillment of certain conditions shall be "permanently established" at that place. *Newton v. Mahoning County Comrs.* 100 U. S. 542, 25 L. ed. 710.

A lien cannot be created except the relation of debtor and creditor exists.

1 Thomas, Mort. 2d ed. § 41.

Equitable liens cannot exist without a precedent agreement for security.

1 Jones, Mort. § 168.

It is clear that there was no implied trust.

Wright v. King, Harr. Ch. 17; 2 Story, Eq. Jur. § 1195; *Cook v. Fountain*, 8 Swanst. 566; *Hascall v. Madison University*, 8 Barb. 174.

Mr. W. L. Carpenter, with *Mr. James H. Hall*, for appellees:

A bonus is not a gift or gratuity, but a sum paid for services, or upon a consideration, in addition to, or in excess of, that which would ordinarily be given.

2 Am. & Eng. Encyclop. Law, p. 467, note 2; *Kenicott v. Wayne County Supers.* 83 U. S. 16 Wall. 452, 470, 21 L. ed. 319-322.

The property of a religious corporation, dissolved by reason of expiration of its charter, vests in its members.

Roman Catholic Church of Ascension Cong. v. Texas & P. R. Co. 41 Fed. Rep. 564.

The Legislature enacted, in 1887, that "it shall be unlawful for any railroad company whose road has been constructed wholly or in part by public aid or local subscription given as a bonus, to take up, or abandon, or cease the operation of said road."

Act Oct. 1887, p. 275.

The courts will restrain, in equity, a like wrong when the improvement is a grist-mill which the subscribers aided in placing here as a public, as well as a private, benefit to serve the people, which it ought to have done with impartiality the same as a common carrier.

Merrill v. Cahill, 8 Mich. 55.

Contributors to a fund to build a church, who were deprived in a measure of their privilege of worship, might maintain their bill for protection.

Ludlam v. Higbee, 11 N. J. Eq. 342.

Complainants had a right to have the mill operated in Fort Austin. They therefore had a right to an injunction from the court of

equity restraining the removal of the mill.

Avery v. Baker, 27 Neb. 398.

The subscription paper does not constitute the entire contract.

Davis v. Belford, 70 Mich. 120; *Northern Cent. M. R. Co. v. Belov*, 40 Mich. 292; *Parker v. Northern Cent. M. R. Co.* 83 Mich. 24; *Kalamazoo Novelty Mfg. Works v. McAlister*, 40 Mich. 84.

Grant, J., delivered the opinion of the court:

The complainants, sixteen in number, are residents of the Village of Port Austin. They, together with others, numbering in all one hundred and forty-seven, were desirous of having a flouring-mill built at said village. Conversations took place between some of complainants and the defendant, Henry C. Dutton, who was a practical miller, and then a stranger in that community. The result of these conversations was that Dutton offered to erect a mill of a certain capacity, provided that a bonus of \$3,500 was raised by the citizens of the village and vicinity, and sufficient ground given on which to erect the mill. A meeting of citizens was called, and a committee of three was appointed, two of whom are complainants here, to complete the arrangement and attend to the raising of funds. A subscription paper was drawn up, which reads as follows: "In consideration of our mutual promises, and in consideration of and for the purpose of inducing H. C. Dutton to construct a roller-process flouring mill in the Village of Port Austin, Michigan, of seventy-five barrels per day capacity, we severally promise to pay to said H. C. Dutton the sums set opposite our respective names, as follows: Two fifths thereof when the mill building is completed and ready for the machinery, and two fifths thereof when the machinery is delivered at the mill ready to be set up, and the balance when the mill is completed of that capacity and in operation, which shall be February 11, 1888. Dated Port Austin, Mich., this 12th day of September, 1887." The subscriptions amounted to \$2,874,

The ground of these decisions as to county seats is that the donors must have given with knowledge of the power to remove the county seat. On the other hand it was said *obiter* in *Twiford v. Alameda County*, 4 Greene (Ia.) 60, that a county should reconvey on removal of a county seat "permanently" located on condition of a conveyance.

Subscribers of money for an educational institution on condition that "it shall locate permanently" in a certain place may have an injunction against its removal. *Hascall v. Madison University*, 8 Barb. 174.

But unsolicited contributions toward the cost of purchasing a site for a county seat do not give the donors a right to restrain the sale thereof. *Warren County v. Patterson*, 54 Ill. 111.

A grant in consideration of a railroad company's placing its station on the grantor's land entitles him to damages or the restitution of his land on the removal of the depot one and a half miles away after twenty years. *Jessup v. Grand Trunk R. Co.* 28 Grant, Ch. (U. C.) 563.

And a deed "for a site for a depot . . . to have and to hold . . . for the purpose aforesaid . . . in consideration of the permanent location" of a railroad depot gives a reversion on removal of the depot after eighteen years. *Indianapolis, P. & C. R. Co. v. Hood*, 66 Ind. 580.

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But these cases are much limited by later ones. Thus land conveyed "expressly for the use and purpose of depot grounds," to revert back if the company shall "fail to erect buildings and occupy said ground for that purpose," is held not to revert on a removal of the depot thirty years afterward, there being no express stipulation that such occupancy should be perpetual. *Jeffersonville, M. & I. R. Co. v. Barbour*, 60 Ind. 375.

Nor is there any reversion of land donated to a railroad company under a contract that it shall "permanently" establish the terminus of its railroad and its main machine works and carworks at that place where after eight years they are removed in whole or in part in accordance with the interests of the public and of the railroad company. Such contract does not amount to a covenant to keep such works there forever. *Texas & Pac. R. Co. v. Marshall*, 136 U. S. 308, 34 L. ed. 385.

And there is no forfeiture of title to land donated for a tan-yard by discontinuance of its use for that purpose after twenty-four years use. *Hunt v. Beeson*, 18 Ind. 380.

But an express provision in a deed donating land for depot purposes that it shall revert upon discontinuance of such use is valid and enforceable. *Owensboro & N. R. Co. v. Griffith* (Ky.) Oct. 17, 1891.

B. A. R.

of which \$165 still remains unpaid. Three of the complainants, Frederick, James and Ebenezer Ayres, comprised the firm of Ayres & Co. They deeded the land to Dutton, September 29, 1887, and at the same time Dutton executed an agreement with them by which, among other things, it was provided "that in case said flouring-mill, to be erected upon said lots, should be destroyed by fire within three years, and another flouring mill of like kind and capacity is not erected upon said lots within said three years, or its erection begun within said three years and completed within a reasonable time thereafter, said Dutton shall deed back said lot to said Ayres and Co.; . . ." or, if he was unable to reconvey, he should pay Ayres & Co. \$300 as liquidated damages. These are the only two written documents in connection with the transaction. All else rests in parol.

The defendant, Dutton, erected the mill, according to the terms and specifications, and carried on the business for about two years and a half. The investment was a losing one for him, and, after offering to sell the property to other parties, who are complainants in this suit, at a considerable sacrifice, he sold the machinery, and was proceeding to remove the same, when this bill was filed, and he was enjoined. The original bill set up a bonus of \$2,500 paid to Dutton, and prayed that said sum, with interest from the time of payment, be decreed to be paid into court for payment back to the several subscribers; that the complainants Ayres be paid the sum of \$300; and that, in default of such payments, the defendants be enjoined from removing the mill. Subsequently complainants filed an amended bill, in which their prayer for specific relief was to enjoin the removal of the mill and its machinery. There was also a general prayer for relief. The court below found that the amounts subscribed were paid upon the equitable and implied consideration that Dutton should erect the mill and operate it with ordinary business skill, and fairly attempt to make the same a profitable and permanent business; that it was not carefully and skillfully conducted; and that it was inequitable towards the subscribers to remove the mill. The decree was for a lien upon the mill and machinery for the amounts paid by complainants, and that until such payments be made defendants be enjoined from removing the machinery. There was no express stipulation, either verbal or written, that Dutton should continue the business for any specified time. The building and plant were erected by Dutton, as agreed upon, at an expense of about \$10,500.

1. Complainants have failed to establish a case for the relief asked. Complainant Campbell is in default upon his subscription, and makes no offer to pay the balance due from him. The bill alleges that the agreement was for a bonus of \$2,500; that this amount was subscribed and turned over to Dutton; and accepted by him as money. It is now conceded that the whole \$2,500 was not raised nor subscribed. It is neither alleged nor proven that Dutton received the subscription pledges as a fulfillment of the agreement on the part
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of the complainants and their co-subscribers. The demand of complainants, therefore, is in violation of the universal rule that they who ask equity must do equity.

2. It was undoubtedly contemplated by the subscribers, and by Dutton, that the business would be permanent, as the plant itself was permanent in character. It was undoubtedly also contemplated that the business would be successful. Neither party, therefore, thought of making any provision as to time. No bonus would have been subscribed, and Mr. Dutton would not have expended nearly all his means, if any serious doubt of the success of the enterprise had existed. The subscribers to the bonus gave no guaranty. It was a common venture, in which the subscribers staked their bonus of \$2,500, and Mr. Dutton the balance, about \$8,000. It would be against reason and common sense, under these circumstances, to imply an agreement on the part of Mr. Dutton to continue the business at a loss. We have not before us the case of a successful business under like conditions, and upon such a case we intimate no opinion. It remains, therefore, to determine, from the record presented to us, whether defendant Dutton made a fair and honest effort to render the business a success, so as to warrant its continuance. The business was not successful; and the court below attributed the failure to want of care, skill and attention on the part of Mr. Dutton. There is no charge or evidence of bad faith on his part. He fully complied with his agreement in erecting the mill. He had more at stake and was more deeply interested in the success of the enterprise than any other person. The chief complaint against him is that certain customers who took wheat to the mill did not receive good flour in return, and in some instances received short weights, and that in consequence farmers took their wheat to other mills, or sold it in other places. Several other mills of a like character were doing business not far from this one. Several millers testified in the case, and from the evidence it is at least doubtful whether the complaints against Mr. Dutton in this respect were more common than against millers generally. Several causes operated against Mr. Dutton, which it is not necessary to enumerate. I think the evidence establishes the fact that Mr. Dutton fully complied with his agreement, and made an honest and faithful attempt to render the business a success. Having done this, he was no longer compelled to carry on the business, and had the right to sell and remove the machinery.

3. It follows that the complainants did not by their subscriptions obtain a lien upon the mill plant. There was no express provision for a lien, and none can be implied in such a case as this. It would be most inequitable to hold that Mr. Dutton took all the risks, and, in the event of failure, must pay the subscribers in addition to the large loss which he has incurred.

The decree of the court below is reversed, and bill dismissed, with the costs of both courts.

The other Justices concurred.

NEW YORK COURT OF APPEALS (3d Div.).

David MILLER, *Resp't.*,

v.

Sarah F. MEAD, Impleaded, etc., *Appt.*

(.....N. Y.....)

The insertion in a contract for the sale of real estate of a clause binding the vendee to erect certain described buildings on it within a specified time shows the vendor's consent to such erection so as to render his interest in the property liable for liens for labor and material furnished for them, and its effect is not diminished by the insertion in the contract of a stipulation that mechanics' liens shall be subsequent to those of the vendor.

(October 6, 1891.)

APPEAL by defendant Mead from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the Special Term in favor of plaintiff in an action brought to enforce a mechanics' lien. *Affirmed.*

Statement by Follett, *Ch. J.*:

May 23, 1887, the defendant owned in fee land in the City of New York extending from 127th to 128th Street, and bounded on the east by Madison Avenue and on the west by a line drawn parallel with and 85 feet west of the avenue. On the date mentioned she and one

NOTE.—*New York Mechanics' Lien Law of 1885; legislative intent.*

The legislative intent, as disclosed by the judicial interpretation of similar preceding Acts, is "to enlarge the remedy afforded by the former Acts on the same subject." *Heckmann v. Pinkney*, 81 N. Y. 216; *Hackett v. Badeau*, 83 N. Y. 478; *Loonie v. Hogan*, 9 N. Y. 440; *Knapp v. Brown*, 45 N. Y. 207; *Stuyvesant v. Browning*, 1 Jones & S. 204; *Muldoon v. Pitt*, 4 Daly, 104, 54 N. Y. 330.

The principle object is to provide security for a class of persons whose claims gradually accumulate from day to day, and who cannot protect themselves in any other way. As the lien attaches from the outset upon the land as well as upon the improvements, and rests alike upon both, it must be held to remain upon the land after the improvements have been destroyed or removed. *Steigleman v. McBride*, 17 Ill. 301; *Clark v. Parker*, 58 Iowa, 509.

The object of the Legislature was not arbitrarily to give a personal privilege to certain persons and refuse it to others, but it was to charge the fund or property which was not by the common law chargeable with the debt. *Donaldson v. Wood*, 22 Wend. 307.

The lien is to have "an operation somewhat in the nature of an attachment of the fund in the owner's hands." *Miller v. Moore*, 1 E. D. Smith, 761.

The lien is akin to that given by the common law to artisans upon materials in their possession for labor bestowed on them, and is a favored lien both in law and equity. 2 Kent, Com. 634; *Roberts v. Fowler*, 3 E. D. Smith, 633.

The Legislature intended altogether to discard the requirements of "a contract, express or implied," on the part of the owner of the land, and to enlarge the remedy of the workman or furnisher of materials in the direction of all cases where the owner of the land should consent to the work, or at all events instigate, or in any way procure it to be done on his land. *Burkitt v. Harper*, 79 N. Y. 273; *Otis v. Dodd*, 24 Hun, 538; *Loonie v. Hogan*, 9 N. Y. 436; *Riley v. Watson*, 3 Hun, 570; *Reno v. Pinder*, 20 N. Y. 301; *Pearson v. People*, 18 Hun, 248; *Eckhard v. Donohue*, 9 Daly, 214.

In order to confirm this view of the legislative intention, and to ascertain its compass, it is allowable to refer to contemporaneous legislation, although, not precisely *in pari materia*. *Chase v. Lord*, 6 Abb. N. C. 276.

Judicial construction of the Act.

Under a very recent construction placed upon this Act by the New York Court of Appeals it appears that in an action to foreclose the lien its beneficial effects cannot be defeated by the stipulation as against one not in privity with either of the parties to it, and who, without notice of the stipulation, have furnished labor or material. It was further held that the contract was proof of defendant's consent to the erection of the building and is sufficient to subject the owner's interest to all the incidents of the lien. *Miller v. Mead*, 127 N. Y. 544.

The Act of 1885 recognizes only the legal ownership, as contra-distinguished from the equitable ownership. *Riley v. Watson*, 3 Hun, 560; *Schmaltz v. Mead*, 23 N. Y. S. R. 117; *Neills v. Beilinger*, 6 Hun, 560; *Hackett v. Badeau*, 83 N. Y. 478; *Husted v. Mathes*, 77 N. Y. 338.

We are at liberty to regard the judicial interpretation of the statutory recitals in a similar preceding law as it is an elementary rule of interpretation that where an Act is of the same general character as the former Act, and is in furtherance of the same general policy, it is subject to the same rules of construction. *Turnipseed v. Schaefer*, 78 Ga. 109.

Nature and scope of the remedy.

The lien of mechanics and materialmen on buildings and the land upon which they are erected, as security for the amount due them for work done and materials furnished, is the "creation of statute," and was unknown either at common law or in equity. *Phillips, Mechanics' Liens*, § 1, citing *Davis v. Farr*, 13 Pa. 107; *McNiel v. Borland*, 23 Cal. 144; *Doelner v. Rogers*, 14 Mo. 340; *Ayers v. Bevers*, 25 N. J. L. 474; *Spencer v. Barnett*, 36 N. Y. 41; *South Fork Canal Co. v. Gordon*, 73 U. S. 6 Wall. 561, 18 L. ed. 804; *McCoy v. Quick*, 30 Wis. 821.

Statutes governing mechanics' liens are remedial, and must be liberally construed. *Rogers v. Omaha Hotel Co.* 4 Neb. 59.

This proceeding is wholly statutory, and, to entitle a claimant to its benefits, the recitals of the enactment must be closely observed; any substantial failure in this respect will avoid the lien and the court has no power or authority to sustain the proceeding, as a compliance with the requirements of the Statute is necessary to confer jurisdiction, and when that is omitted in any essential particular, the benefit designed by the Statute cannot be obtained. *Brown v. New York*, 6 Thomp. & C. 164; *Van Loon v. Lyons*, 61 N. Y. 22; *Burrows v. Ford*, 6 N. Y. 178; *People v. Knowles*, 47 N. Y. 415.

The State "prescribes the conditions under which a court may act; those conditions cannot be dispensed with by litigants, for in such a case the particular condition or status of the defendant is made a jurisdictional fact." *Davidsburgh v. Knickerbocker L. Ins. Co.* 90 N. Y. 530.

Herman Gierke entered into a written contract by which she covenanted to sell, and he to purchase, the premises for \$70,000. Gierke also covenanted to complete, on or before October 1, 1887, six dwelling-houses, then begun on the south part of the lands, in a style specified in the contract, and costing at least \$6,000 each. The defendant covenanted to advance Gierke \$21,000, payable by installments as the work progressed, to aid in the erection of the buildings. It was mutually covenanted that when the houses were completed the defendant would convey the land to Gierke, and that he, concurrently therewith, would give his bonds to secure the payment of the purchase price, \$70,000, and the \$21,000 to be advanced, secured by mortgages on the premises. The contract contained the following provision: "And it is

agreed that, should any mechanics' lien be filed against the property herein described during the progress of said buildings, or against any part thereof, . . . such mechanics' lien . . . shall be subsequent to the liens and claims of the party of the first part (Sarah F. Mead), but in such cases, or either of them, it is agreed that all payments or advances due or to become due under this contract may, at the option of the party of the first part (Sarah F. Mead), be withheld until such lien or liens shall be removed and discharged of record; or said party of the first part may, at her option, apply such payments or advances to the payment and discharge thereof, or said party of the first part (Sarah F. Mead) may, at her option, in the case of a mechanics' lien, deposit an amount sufficient to cover said lien or liens, or give security

The foundation of a mechanics' lien is an indebtedness existing upon a contract by the person sought to be charged. *Tiley v. Thousand Island Hotel Co.* 9 Hun, 424; *Dixon v. LaFarge*, 1 E. D. Smith, 722; *Pendleburg v. Meade*, 1 E. D. Smith, 728; *Quinn v. New York*, 2 E. D. Smith, 558; *DeRonde v. Olmsted*, 47 How. Pr. 175; *Knapp v. Brown*, 45 N. Y. 207; *Gay v. Brown*, 1 E. D. Smith, 725; *Broderick v. Pollon*, 2 E. D. Smith, 554; *Walker v. Paine*, Id. 662; *Meyers v. Bennett*, 7 Daly, 471; *Muldoon v. Pitt*, 54 N. Y. 290.

Proceedings and judgment under the Mechanics' Lien Law are held to be *in personam* and not *in rem*. The lien of the judgment upon the particular property relates back to the time the work, etc., began, but is in other respects a general judgment. An invariable and inseparable quality, etc., of a proceeding *in rem* is the seizure of the thing, *e. g.* seizure under an attachment, although such writs issue against the defendants by name. *Capelle v. Baker*, 3 Houst. (Del.) 344.

Lien governed by the contract with the owner.

A party furnishing materials or doing work, relying upon the lien given by statute for security, must examine the contract with the owner; for it is only to the extent of what is due or to become due upon this contract, that his lien can attach. If he furnishes the material, or does the work for a sub-contractor, in like reliance, he should not only examine the contract with the owner, but also that of the sub-contractor; for, if the sub-contractor fails to perform his contract, so that nothing becomes payable thereon, or is paid in full, according to its terms, in case of performance, there can be no lien within the principle of the decisions in *Carman v. McInerow*, 18 N. Y. 70; *Lumbard v. Syracuse*, B. & N. Y. R. Co. 55 N. Y. 491; *Crane v. Genin*, 60 N. Y. 127; *Hagan v. American Baptist Home M. Soc.* 14 Daly, 131.

To what the lien attaches.

As between the owner and mechanic, everything put into and forming part of a building, or machinery for manufacturing purposes, and essential to the manufactory, is a part of the freehold; as wheels of a mill, the stones and even the bolting-cloth, a copper kettle or boiler in a brewing-house, when proved to be essential to the brew-house, are subject to the Mechanics' Lien Law. *Gray v. Holdship*, 17 Serg. & R. 413.

So is a cooking range (*Reilly v. Hudson*, 62 Mo. 383); and a cotton gin placed in a gin-house, *Ewell, Fixturea*, 290.

So the engine by which a steam saw-mill is propelled is part of the building. *Morgan v. Arthurs*, 3 Watts, 140.

Likewise mill-stones (*Wademan v. Thorp*, 5 Watts, 13 L. R. A.

115), and machinery put up for a mill, fastened by screws and bolts. *McGreary v. Osborne*, 9 Cal. 119.

Under a statute that "every person performing labor upon, or furnishing materials to be used in the construction of, any building, shall have a lien upon the same," mirror-frames set in the wall, fastened by hooks and screws, so they can be removed, but designed by the owner to be permanent and to go with the building when sold, entitle the mechanic to a lien on the building. *Ward v. Kilpatrick*, 85 N. Y. 413; *Phillips, Mechanics' Liens*, 2d ed. § 177.

It covers anything used in the construction of the building. *Hazard Powder Co. v. Byrnes*, 12 Abb. Pr. 499; *Henderson v. New York*, 62 U. S. 266, 23 L. ed. 547; *Kent v. New York Cent. R. Co.* 12 N. Y. 631, 632; *Phillips, Mechanics' Liens*, § 3, 43, 156.

When the articles furnished are in fact and in intention annexed to the freehold, so as to become a part of it, and would, as between vendor and vendee pass by deed of the premises without special enumeration, the materialman has performed labor and furnished materials used in altering or repairing a building, or appurtenances thereto, for which he is entitled to a lien under the statute. *Ward v. Kilpatrick*, 85 N. Y. 413; *Voorhees v. McGinnis*, 48 N. Y. 278; *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489; *Laws 1885*, chap. 342.

The materials furnished may become so affixed to the reality as to entitle the party furnishing the same to file a mechanics' lien. *Ombony v. Jones*, 19 N. Y. 238; *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489; *Dobschuets v. Holliday*, 82 Ill. 371; *Gaty v. Casey*, 15 Ill. 130, 191; *Gross v. Jackson*, 6 Daly, 468.

A lien lies for the flagging laid on the sidewalk in front of a building. *McDermott v. Palmer*, 8 N. Y. 387; *Moran v. Chase*, 52 N. Y. 346.

Who are within the Act.

The several Mechanics' Lien Acts of this State unite in making the privilege of a lien as broad as language can frame it. "Every person" says the New York City Act, "Any person," say the other Acts, who performs labor or furnishes materials by the "request" (N. Y. City Act), "consent" (State Act), or "permission" (Kings Co. Act), of the owner, may have a lien. Construing this language strictly, there is no limit to the right so far as parties are concerned. Unfortunately for this simple construction, the term "Any person" is not always construed literally (*Freethy v. Freethy*, 42 Barb. 641). It only covers those persons whom it is reasonable to presume the Legislature intended to be designated, and who are capable, legally and physically, of coming within its terms. *Kneeland, Mechanics' Liens*, 2d ed. § 2.

The word "contractors," as used in the Act, is to be understood to embrace all who employ "laborers" in the construction of the work, whether they

under the Statute, and contest the same at the cost and expense of the party of the second part (Herman Gierke), and deduct the same from said payments or advances; and the said party of the first part (Sarah F. Mead) expressly reserves the right to make the said payments or advances, or any part of the said payments or advances, before they, or either of them, may be due and payable, or out of the order in which they, or either of them, may become due and payable." June 9, 1887, Gierke, with the assent of Sarah F. Mead, assigned the contract to Edward Grippentrog. On the 20th of June, 1887, David Miller (the plaintiff), and Grippentrog entered into a written contract by which Miller contracted to furnish stone for the completion of the buildings for \$9,060, under which, prior to January 24, 1888, the plain-

tiff furnished stone of the value of \$1,500; and, the price thereof not being paid, a lien was filed on the 24th of January, 1888, pursuant to chapter 342 of the Laws of 1885, to foreclose which this action was brought. Upon the trial the court found that the plaintiff had furnished under the contract stone used in the buildings of the value of \$1,500, which was adjudged to be due, and a judgment was entered foreclosing the lien, with costs; from which the defendant appealed to the general term, where it was affirmed, and thereupon the defendant appealed to this court.

Mr. E. N. Taft for appellant.

Mr. William E. Stewart, with *Mr. James T. Hoyt*, for respondent:

It was the design of the Statute to charge

be original or sub-contractors. So, too, the word "laborers," in contra-distinction to the word "contractors," is intended to include such persons as, upon the employment of contractors actually engage in the construction of the work. *Warner v. Hudson River R. Co.* 5 How. Pr. 454.

An architect has been held to come within the protection of the statute and his work is as much entitled to the designation of labor and services as that of carpenters, masons or plumbers. *Knight v. Norris*, 13 Minn. 473-476; *Bank of Pennsylvania v. Gries*, 25 Pa. 422-426; *Mutual Ben. L. Ins. Co. v. Rowand*, 28 N. J. Eq. 399, 397; *Conant v. Vanbechaick*, 24 Barb. 87; *Hovey v. Tenbroeck*, 3 Robt. 316; *Vincent v. Bamford*, 12 Abb. Pr. N. S. 252; *Jones & S. 508*, 510; *Coffin v. Reynolds*, 37 N. Y. 640-642; *Erissom v. Brown*, 38 Barb. 390; 1 Domat, Civ. Law, by Strahan, § 1736, 1744; *Aikin v. Wesson*, 24 N. Y. 482; *Richardson v. Abendroth*, 43 Barb. 162, 226, 229; *Gurney v. Atlantic & G. W. R. Co.* 56 N. Y. 356, 367, 371; *Williamson v. Wade*, 40 Barb. 294; *Mulligan v. Mulligan*, 18 La. Ann. 30-32; *Capron v. Strout*, 11 Nev. 304, 310.

Labor upon a building and materials used in its construction are the test of the lienor's right. In other words, the work and the materials, both in fact and in intention, must have become part and parcel of the building itself. *Ward v. Kilpatrick*, 56 N. Y. 413.

The law is solicitous for all parties who are within the Act and where a right of lien has been created and no express waiver of this right is shown, the law is reluctant to imply a waiver of that right. *Payne v. Wilson*, 74 N. Y. 848.

Sub-contractor or materialman.

In order to entitle a sub-contractor or materialman to a judgment against the owner, he must show either that at the time of the creation of the lien, by the filing of the notice, a debt was actually owing from the owner to the contractor, or else that the same subsequently became due and owing. *Smith v. Coe*, 2 Hill. 265; *Ferguson v. Burk*, 4 R. D. Smith, 760; *Lynch v. Cashman*, 8 E. D. Smith, 600; *Sullivan v. Brewster*, 1 E. D. Smith, 662. See also *Schneider v. Hobeln*, 41 How. Pr. 232.

A sub-contractor or materialman can acquire a lien to the extent of the sum due from the owner to the contractor at the time of filing the lien. *O'Brien v. Lenane*, 94 N. Y. 128.

It is not the duty of the contractor to hunt up everyone who may have worked for or furnished materials to a sub-contractor, and ascertain whether they have been paid, but it is the duty of such persons to give the contractor the notice required by law in order to bind him. *French v. Bauer*, 32 N. Y. S. R. 326.

Upon proof of the indebtedness and of the facts as to filing the notice, the question as to the liability is a R. A.

ty of the owner becomes a question of law. *Smith v. Coe*, 29 N. Y. 686. See note to *Schroeder v. Gal-land (Pa.)* 7 L. R. A. 711.

Term "owner" defined.

The word "owner," in statutes relating to mechanics' liens, is construed to mean the owner of the legal title, the vendor before the actual conveyance of the land, and not the vendee under a contract for conveyance. *Thaxter v. Williams*, 14 Pick. 49; *Lamb v. Cannon*, 38 N. J. L. 362; *Metcalf v. Hunnewell*, 1 Gray, 297; *Hayes v. Fessenden*, 106 Mass. 228; *Guy v. Carriere*, 5 Cal. 511; *Johnson v. Pike*, 35 Me. 291; *Steinmetz v. Boudinot*, 3 Serg. & R. 541.

Consent of owner sufficient.

However manifested, the consent of the owner to the erection of the house is sufficient to give persons furnishing labor or materials a mechanics' lien. *Husted v. Matthes*, 77 N. Y. 388; *Nellis v. Bellinger*, 6 Hun, 560.

Consent implies a degree of superiority, at least the power of preventing; it implies not merely that a person accedes to, but authorizes, an act. *Crabbe's Synonyms*; *Ottwell v. Watkins*, 15 Daly, 306.

It is synonymous with "permission." *Hackett v. Badeau*, 63 N. Y. 476.

Such consent may be implied by the acts and declarations of the owner, and such implied consent is operative to the same extent as if he contracted directly for the improvements. *Otis v. Dodd*, 90 N. Y. 336. See *Ross v. Simon*, 30 N. Y. S. R. 545.

The knowledge and approbation of the work by the owner are sufficient to subject her interest in the land to the operation of the lien. *Hellwig v. Blumenberg*, 28 N. Y. S. R. 75.

There is an implied consent of the owner to furnish necessary labor and materials where he leases the land and agrees that his tenant may make improvements thereon, which are to become his property at the end of the term. *Burkitt v. Harper*, 79 N. Y. 273.

But under a prior Statute (Act of 1875), it was held that where the owner, during the running of the lease, approved of certain improvements made by the lessee, he did not thereby subject his interest to a lien therefor on the ground of consent. *Jones v. Manning*, 25 N. Y. S. R. 711. See *Craig v. Swinerton*, 8 Hun, 144.

Where the owner contracted with a building company to erect a building, and the company ordered certain equipments, and the owner, with the company's consent, ordered larger and more expensive equipments as a substitute on his own responsibility, his interest was subjected to a lien therefor. *Richardson & B. Co. v. Reid*, 3 N. Y. Supp. 224.

The knowledge of a married woman that im-

the land with debts contracted in improving it, in case the owner consented to or permitted the work to be done, although under a contract made with the vendee.

Rollin v. Cross, 45 N. Y. 766; *Burkitt v. Harper*, 79 N. Y. 273; *Otis v. Dodd*, 90 N. Y. 336.

Where an owner of land agrees to sell it, and advances money with which to build upon the premises sold, and after completion of the houses the builder is to secure the purchase price and the advances by mortgages, the person who agrees to purchase builds by permission of the owner (*Hart v. Wheeler*, 1 Thomp. & C. 403), and the property is charged with a lien until the deed is actually delivered without regard to the terms of the contract of purchase.

Improvements are being made on her lands by her husband, where she interposes no objection, is an implied consent to their construction. *Husted v. Mathes*, 77 N. Y. 389.

Lien not assignable.

A mere inchoate right to a mechanics' lien is not assignable. Such lien passes with an assignment of the debt only where it has been perfected under the Statute. *Goodman v. Pence*, 21 Neb. 459.

A contractor cannot at any time during the progress of the work assign all his claim to a third party, so as to deprive the sub-contractor of all the benefits afforded him by the Statute. *Bourget v. Donaldson*, 83 Mich. 478.

The lien under statutes of this character is, in general, a personal right given to the mechanic, materialman and laborer, for his own protection, and the right to create it cannot be assigned or transferred to another (*Daubigny v. Duval*, 5 T. R. 604; *Caldwell v. Lawrence*, 10 Wis. 332; *Pearsons v. Tincker*, 38 Me. 384), unless the assignment is made for the benefit of the assignor, and to be held as his agent, so that the lien may be preserved. *Urquhart v. McIvor*, 4 Johns. 102; *McCombie v. Davies*, 7 East. 5. See note to *Farmers Loan & T. Co. v. Canada & St. L. R. Co.* (Ind.) 11 L. R. A. 740.

But after the lien has been filed by the original creditor, or if the assignee files it in the name of the assignor, or if the assignment is made for the benefit of the assignor, the assignee may afterwards foreclose it, either in his own name as assignee, or in the name of the assignor as his agent. *Hallahan v. Herbert*, 11 Abb. Pr. N. S. 328; *Rollin v. Cross*, 45 N. Y. 766; *Palmer v. Merrill*, 6 Cush. 282.

Notice to be filed.

While conceding that this statute gives a remedy, and is to be liberally and beneficially construed, it does not follow that a construction can be admitted under that rule which will impose a lien, unless the terms of the Statute have been complied with by filing the notice within the prescribed period. *Spencer v. Barnett*, 35 N. Y. 94.

One entitled to a mechanics' lien, until he files his notice, has no greater equities than other general creditors, and is affected by all equities existing at that time in favor of those dealing with his debtor. His lien attaches only to the estate and interest of the debtor as it then exists. His lien is subject to a prior equitable lien although he had no notice of it. *Payne v. Wilson*, 74 N. Y. 348.

The notice should state, among other things, the "situation of the building by its street and number, if the number be known." *Duffy v. McManus*, 3 E. D. Smith, 657.

That the owner of the soil had personal or actual knowledge that the work was being done need not be stated in the notice of a mechanics' lien. *Jewell v. McKay*, 82 Cal. 144.

13 L. R. A.

Gates v. Whitcomb, 4 Hun, 187. See *Nellis v. Bellinger*, 6 Hun, 560; *Husted v. Mathes*, 77 N. Y. 388; *Riley v. Watson*, 8 Hun, 569; *Hackett v. Badeau*, 68 N. Y. 476; *Schmalts v. Mead*, 28 N. Y. S. R. 117.

Follett, Ch. J., delivered the opinion of the court:

It is provided by chapter 342 of the Laws of 1885 (the General Mechanics' Lien Law of this State), as follows: "Section 1. Any person . . . who shall hereafter perform any labor or service, or furnish any materials which have been used, or which are to be used, in erecting, altering, or repairing any house, . . . with the consent of the owner, as hereinafter defined, or his agent, or any contractor or subcontractor, or any other person contracting with such

If enough appears in the description of the property in the notice filed to enable a party familiar with the locality to identify the premises sought to be described with a reasonable degree of certainty, the description will be held sufficient. *Scholes v. Hughes*, 77 Tex. 482; *Northwestern Cement & C. Pav. Co. v. Norwegian D. R. L. A. Sem.* 43 Minn. 449; *Brown v. Wright*, 25 Mo. App. 54; *Duffy v. McManus*, *supra*.

The notice of a mechanics' lien need not state in so many words that the lien is claimed against the persons named; but if the names are given, and the facts subjecting their interest to the lien are stated, the statute is satisfied. *Ross v. Simon*, 80 N. Y. S. R. 545.

The lien which a contractor acquires by filing a notice with the county clerk attaches only to the legal right, title and interest of the owner, then existing. If, previous to the filing of such notice, the owner has parted with his interest in the property, no lien is acquired. *Ernst v. Reed*, 49 Barb. 387.

Under a statute requiring the verification of a notice of mechanics' lien to be that the statements therein are true to the knowledge or information and belief of the person making it, a verification stating that such statements are true to his knowledge, information and belief is sufficient. *Kealey v. Murray*, 15 N. Y. Supp. 403.

The New York Lien Law of 1882, chap. 478, applicable to Kings County, which does not require verification of notice of lien, is not repealed by N. Y. Laws 1880, chap. 488, for cities of the State generally, requiring such verification. *Graf v. Cunningham*, 12 Cent. Rep. 302, 109 N. Y. 399.

The filing of the notice within the period of statutory limitation is absolutely necessary, and without it the claim is totally void. *Hubbell v. Schreyer*, 14 Abb. Pr. N. S. 284; *Donaldson v. O'Connor*, 1 E. D. Smith, 695; *Tiley v. Thousand Island Hotel Co.* 9 Hun, 424; *Scott v. Cook*, 3 Mo. App. 193; *Duffy v. Baker*, 17 Abb. N. C. 357; *Spencer v. Barnett*, 35 N. Y. 94; *Lutz v. Ey*, 3 E. D. Smith, 621; *Gates v. Buddenstok*, 6 Abb. N. C. 357; *Danziger v. Simonson*, 21 Jones & S. 138; *Barrows v. Knight*, 55 Cal. 155; *Dart v. Fitch*, 23 Hun, 261.

The lien is fatally defective in failing to state whether all the work for which it was filed was actually performed or furnished. *Luscher v. Morris*, 18 Abb. N. C. 67.

A certified copy of the notice of lien filed, as herein provided, shall be entitled to be read in evidence with the same force and effect as if the original were provided, and such copy shall be prima facie evidence of the execution and filing of the original. Laws 1885, chap. 342, § 6.

Proof of notice.

The essential facts, and the burden of proof, depend upon the statute. The notice of lien is not

owner, to erect, alter, or improve, as aforesaid, within any of the cities or counties of this State, may . . . have a lien for the principal and interest of the price and value of such . . . material upon such house . . . and upon the lot . . . upon which the same may stand or be intended to stand, to the extent of the right, title, and interest at that time existing of such owner, whether owner in fee or of a leasehold, . . . or of the owner of any right, title, or interest in such estate, which may be sold under an execution. . . . In cases in which the owner has made an agreement to sell and convey the premises to the contractor or other person, such owner shall be deemed to be the owner, within the intent and meaning of this Act, until the deed has been actually delivered and recorded conveying said premises pursuant to such agree-

ment." Section 5. The parts of the Statute above quoted have been recently construed by the court of appeals in *Schmale v. Mead*, 125 N. Y. 188, which affirms 4 N. Y. Supp. 614, the facts of which were as follows: The defendant, the owner in fee of the land involved in the case at bar, contracted in November, 1885, to sell and convey it to George Kuhn for an agreed price, and to advance to the vendee a certain sum in installments to enable him to erect buildings of a kind agreed to thereon. The vendor covenanted that when the buildings were completed he would convey the land, and take the grantee's bond, secured by a mortgage on the land, for the payment of the purchase price, and the sum to be advanced for building purposes. Under this contract, the vendee entered into possession, and began the

proved by the county clerk's certified copy (*Sampson v. Buffalo*, N. Y. & P. R. Co. 4 Thomp. & C. 600); but his certificate proves the filing. Mortgagees and others acquiring interest in property against which the lien is claimed have a right to call for strict proof of all that is essential to the creation of the lien, and this includes proof of the commencement of the work, of its character, and of its completion. *Davis v. Alvord*, 94 U. S. 545, 547, 24 L. ed. 283, 284; *Abbott*, Tr. Ev. chap. 55.

Performance as a condition precedent.

In a building contract where performance is made a condition of payment, performance must be shown to entitle a party to recover. *Smith v. Brady*, 17 N. Y. 173, and cases cited.

But when the builder has in good faith intended to and has substantially complied with the contract, although there may be slight defects caused by inadvertence or unintentional omissions, he may recover the contract price, less the damage on account of such defects. *Johnson v. DePeyster*, 50 N. Y. 686; *Glacius v. Black*, 60 N. Y. 145.

Literal performance in every detail, according to the specifications, is not required in building contracts. Substantial performance is sufficient to sustain the lien. *Sinclair v. Tallmadge*, 35 Barb. 602; *Smith v. Gugerty*, 4 Barb. 614; *Smith v. Brady*, 17 N. Y. 173; *Colwell v. Lawrence*, 24 How. Pr. 324; *Thomas v. Fleury*, 26 N. Y. 32.

Where the evidence shows an abandonment of the contract by the defendant, plaintiff is not required to prove a legal excuse for nonperformance on his part in order to recover on a quantum meruit; and where the time agreed upon for performance has been waived, plaintiff need not notify defendant of his intention to foreclose and demand specific performance of the contract rectified within a reasonable time. *Powers v. Hogan*, 67 How. Pr. 256.

In an action for labor and material under a contract it is sufficient to show substantial performance; but where a defect in the performance exists the defendant may counterclaim and prove what damage he has sustained by reason of the defect. *Phillip v. Gallant*, 62 N. Y. 256; *Johnson v. DePeyster*, 50 N. Y. 686; *Vanderbilt v. Eagle Iron Works*, 25 Wend. 635.

If the contractor has been induced by the owner to omit performance within the time limited, he would be required to complete the contract with due diligence. *Sinclair v. Tallmadge*, 35 Barb. 602, 607; *Wallman v. Society of Concord*, 45 N. Y. 426; *Green v. Haines*, 1 Hilt. 254; *Reed v. Brooklyn Board of Education*, 3 Keyes, 105; *Leslie v. Knickerbocker L. Ins. Co.* 68 N. Y. 27; *Ruff v. Rinaldo*, 55 N. Y. 664.

There must be no willful or intentional departure, and the defects must not pervade the whole, 13 L. R. A.

or be so essential as that the object which the parties intended to accomplish, to have a specified amount of work performed in a particular manner, is not accomplished. *Sinclair v. Tallmadge*, 35 Barb. 602.

This is a question of fact, and from the nature of the question it must be so. *Phillip v. Gallant*, 62 N. Y. 256.

But if it appears that there were departures by mutual consent from the original plan, and, furthermore, that after the time prescribed by the contract had expired the defendant Clark notified plaintiffs to go on and complete, under competent authorities either of these circumstances would operate as a waiver of the time conditioned in the contract. It has also been directly held that in a contract of this character a provision that the work shall be completed by a certain date, and paid for upon completion, does make time of the essence of the contract, and that, if the builder proceeds afterwards with the assent of the other party, he may recover at the contract price. *Dillon v. Masterton*, 7 Jones & S. 133.

Priority of liens.

The priority as between mechanics' liens and mortgages is largely controlled by statutory enactment in the different States. *Cheshire Provident Inst. v. Stone*, 52 N. H. 365; *Chadbourne v. Williams*, 71 N. C. 450; *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 448, 25 L. ed. 1057; *Cal. Code Civ. Proc.* §1186; *Shepardson v. Johnson*, 60 Iowa, 229; *Mass. Gen. Stat. chap. 150*; *Mellor v. Valentine*, 3 Colo. 258; *Davis v. Bilaland*, 85 U. S. 18 Wall. 659, 21 L. ed. 969.

The first mortgage given in good faith and duly recorded is prior, superior and paramount to a mechanics' lien subsequently filed. *Coe v. New Jersey M. R. Co.* 81 N. J. Eq. 127, 128; *West v. Klots*, 37 Ohio St. 420; 2 Wood, *Railway Law*, 222; *Choteau v. Thompson*, 2 Ohio St. 114.

It is the law of Ohio that a mortgage takes effect from the date it is duly filed for record, and this fact controls its priority. *Kling v. Ballentine*, 40 Ohio St. 391; *Bloom v. Noggle*, 4 Ohio St. 52; *Bercoaw v. Cookerill*, 30 Ohio St. 163.

In some States the lien attaches from the commencement of the work, although the particular work for which the lien is claimed was done after the execution of the mortgage. *Hall v. Hinckley*, 32 Wis. 362; *Neilson v. Iowa Eastern R. Co.* 44 Iowa, 71; *Davis v. Alvord*, 94 U. S. 545, 24 L. ed. 283; *Dubois v. Wilson*, 21 Mo. 314; *Meyer v. Delaware R. Const. Co.* 100 U. S. 457, 25 L. ed. 586; *Brooks v. Lester*, 3 Md. 65.

To allow the vested rights of third persons, not parties or privies to a contract, to be prejudiced by its terms would be destructive of the rights of property (*Brown v. Morison*, 5 Ark. 217) and en-

erection of the buildings, but soon failed, and abandoned his purchase. The vendor had performed her part of the contract, and no advances were due from her when the lien for materials furnished the vendee was filed or foreclosed. The vendor defended the action to foreclose the lien on the grounds (1) that the

contract of sale and for the erection of buildings was not sufficient evidence of the owner's (vendor's) consent, within the statutory meaning of "the consent of the owner" that the buildings be erected; (2) that only the interest of George Kuhn, vendee and contractor could be subjected to lien; (3) that the lien could at-

tirely at variance with the office of a lien, which is not to create an estate, or in the slightest degree affect or interfere with prior incumbrances. Its true function is to prevent subsequent alienations and incumbrances, except in subordination to itself. *Watkins v. Wassell*, 15 Ark. 73; *Spence v. Etter*, 8 Ark. 69.

To determine, therefore, priority among different lien-holders, it is only necessary to decide who has the first right or lien, unless it has been displaced by some act of the party holding it, which shall postpone him to subsequent claimants. *Parker v. Kelly*, 10 Smedes & M. 184; *Weller v. McNabb*, 4 Sneed, 422; *Twelves v. Williams*, 8 Whart. 435.

This may be either by agreement of parties, or fraud in its creation. *Phillips, Mechanics' Liens*, 2d ed. § 225.

The principle may be regarded as established, that an equitable mortgage duly created before the filing of a mechanics' lien has priority over it. *Cox v. Broderick*, 4 E. D. Smith, 721; *Sinclair v. Fitch*, 8 E. D. Smith, 677; *Noyes v. Burton*, 29 Barb. 630; *Quimby v. Sloan*, 2 E. D. Smith, 594; *Cronk v. Whittaker*, Id. 647; *Lehretter v. Koffman*, 1 E. D. Smith, 664; *Chamberlain v. O'Connor*, Id. 685; *Kaylor v. O'Connor*, Id. 672; *McAuley v. Mildrum*, 1 Daly, 396; *Bailey v. Johnson*, Id. 61; *Ernst v. Reed*, 49 Barb. 367.

A mortgage duly executed and recorded holds superior equities to that of a mechanics' lien, and the latter will attach only to the equity of redemption. *Bayne v. Wilson*, 11 Hun, 305, 74 N. Y. 355; *Munger v. Curtis*, 42 Hun, 465.

Summarizing the principles which underlie this subject of priority, it may be said that if the premises are already incumbered by a mortgage to a bona fide incumbrancer, the claim of the mechanic is subordinate to that of the mortgagee; and this is a well-recognized law governing the subject. *Munger v. Curtis*, 42 Hun, 465.

Mechanics' lien on lands of married women. See note to *Esterbrook v. Riley* (Iowa) 10 L. R. A. 38.

Lien created by consent of owner. *Ibid.*

Materials must be furnished with knowledge of the wife, to bind her. *Ibid.*

In such case the husband's agency is a question of fact, and he may be called as a witness to controvert his alleged agency. *Robe v. Hess*, 118 N. Y. 608.

It has been held that where the contract for the improvements was made expressly with the husband and upon his credit, the wife's consent will not be inferred. *Ziegler v. Galvin*, 45 Hun, 44.

Discharging the Lien.

The lien can be discharged only in one of the modes provided by the Statute. The whole proceeding is a special one, and such remedies only as are given by the Statute can be pursued. A lapse of one year without proceeding discharges the lien; and a more speedy mode of testing its validity may be had by a notice to the claimant to foreclose his lien. The court has not the power to discharge the lien, and the bringing of a suit could not of itself have that effect. *Fettrich v. Totten*, 2 Abb. Pr. N. S. 264.

On an application to discharge a mechanics' lien for failure by the holder to foreclose after notice, the court must take into consideration the equities of the case, and exercise a sound discretion in 13 L. R. A.

granting or refusing the application. *Re Poole*, 38 N. Y. S. R. 806.

The purpose of the provisions, allowing the payment of money to the county clerk, is to remove the lien from the lands of the party and impose it upon the money, the object being to enable the owner of real estate, by substituting money to the amount of the alleged lien, to enjoy the power of disposing of his land relieved from the incumbrance. *Dunning v. Clarke*, 2 E. D. Smith, 585.

The proceeding to foreclose a mechanics' lien is a proceeding *in rem*, founded on statute, not *in personam*, and operates only as a foreclosure, and not as an action for the collection of a debt. *Randolph v. Leary*, 3 E. D. Smith, 637, 4 Abb. Pr. 206; *Quimby v. Sloan*, 2 E. D. Smith, 609; *Cronkright v. Thomson*, 1 E. D. Smith, 661; *Cox v. Broderick*, 4 E. D. Smith, 721.

It is not an action within the meaning of the Code, but a special proceeding. *Hallahan v. Herbert*, 67 N. Y. 409.

In an action to enforce a lien, the owner may avail himself of all matters allowable by way of recoupment or counterclaim arising out of the contract between the owner and the contractor, and which would be available against the contractor. The rights of the parties are determined by the facts existing at the time of the creation of the lien. *Cheney v. Troy Hospital Asso.* 65 N. Y. 282.

The proceedings must be conducted strictly in accordance with the provisions of the Lien Law. *Mushitt v. Silverman*, 50 N. Y. 360; *Burroughs v. Tostevan*, 75 N. Y. 567.

Amount recoverable.

The extent of the lien is distinctly made to depend upon the time when the notice was filed. The amount which the owner can be required to pay depends entirely (according to the construction of the Statute in *Doughty v. Devlin*, 1 E. D. Smith, 625), upon the time when the notice was filed. *Kaylor v. O'Connor*, 1 E. D. Smith, 672.

The clause in the Statute "must not exceed the amount which the owner would be otherwise liable to pay at the time of the filing of the claim," was intended solely to limit the liability of the owner in the aggregate to the amount which he had contracted to pay, after deducting such payments as he had made before the filing of the lien. The present Lien Law limits the liability to the stipulated price of the contract remaining unpaid at the filing of the lien. *Heckmann v. Pinkney*, 81 N. Y. 211.

The plaintiffs can recover no more than they claimed when they filed the paper to create the lien. The subsequent notice is to enforce the lien so created. By the notice filed, the amount originally stated, with interest, is the extent of the recovery. *Protective Union of New York v. Nixon*, 1 E. D. Smith, 671.

Costs.

The right to costs is created by statute, and wholly depends upon it, and the right does not become fixed until the determination of the suit. *Onondaga Supra v. Briggs*, 3 Denio, 173.

This rule was again asserted in *Garling v. Ladd*, 27 Hun, 112, and in *Balcom v. Terwilliger*, 42 Hun, 170.

tach only to advances due from her, if any, and not to her interest as vendor in the real estate. These defenses were overruled, and the lien was held to attach and bind the vendor's interest in the realty. *Schmalz v. Mead* differs from the case at bar only in the fact that the contract of sale and for building did not contain the stipulation contained in the agreement under consideration and quoted in the statement of facts,—that if any mechanics' lien was filed it should be subject to the lien and claim of the vendor. The defendant's relation to and interest in the land constituted her the owner thereof, within the meaning of the word "owner" as defined in the fifth section of the Mechanics' Lien Law (*Schmalz v. Mead, supra*), and her estate could be subjected to the liens of persons furnishing labor or materials for the construction of buildings erected thereon with her consent. By the contract entered into May 25, 1887, between Mrs. Mead, then the owner of the fee, and Gierke, and by him assigned to Grippentrog with her consent, she not only agreed to sell and thereafter convey the land, but bound the vendee to build within a specified time six houses according to plans which had been agreed on, to cost not less than \$6,000 each, she agreeing to advance \$21,000 for the purpose of partly paying the cost of their erec-

tion; which contract was proof of her (the owner's) consent that the buildings be erected, and rendered her interest in the premises subject to such liens as might be filed for labor and materials furnished for the construction of the houses, unless in some way relieved from liability by the stipulation that any mechanics' lien should be subject to her interest in the property. *Schmalz v. Mead, supra*; *Rollin v. Cross*, 45 N. Y. 766; *Husted v. Mathes*, 77 N. Y. 388; *Burkitt v. Harper*, 79 N. Y. 273; *Otis v. Dodd*, 90 N. Y. 336.

The stipulation in respect to the priority of liens did not destroy the owner's consent that the houses should be built, nor diminish its effect, nor did it lessen the absolute obligation resting upon the vendee to build them. It was not the design of the parties to accomplish any such results, but simply to circumvent the statute, and defeat the rights given by it to persons furnishing labor and materials for the work, which design could not be accomplished by such a stipulation as against persons not in privity with either of the parties to it who should, without notice of the stipulation, furnish labor or materials for the work.

The judgment should be affirmed, with costs. All concur.

CALIFORNIA SUPREME COURT.

Frank BURKETT, *Appl.*,

v.

G. J. GRIFFITH, *Resp't.*

(....Cal.....)

1. An action for slander of title cannot be maintained for statements causing the

NOTE.—Slander of title.

An action lies for false and malicious slander of title to real property causing damage; as, for instance, in claiming a lease thereof thereby preventing a lease to another. *Gerrard v. Dickenson*, Cro. Eliz. 194.

Or stating that ore on plaintiff's land is nearly played out, thereby preventing a sale. *Paull v. Halferty*, 63 Pa. 46.

Or for forbidding an auction sale of land on the ground that the party offering it has no right to sell it. *Gent v. Lynch*, 23 Md. 58.

Or for alleging insanity of a former owner thereby casting doubt on plaintiff's title. *Pitt v. Donovan*, 1 Maule & S. 659.

Or for alleging the illegality of a marriage which would make a defect in plaintiff's title. *Bold v. Bacon*, Cro. Eliz. 346.

By application of the same principle damages caused by a wrongful suit by the vendor, attacking the title of his purchaser, may be deducted from the purchase money. *Akerly v. Villas*, 23 Wis. 27.

To personal property.

The action will also lie for slander of title to personal property. *Steward v. Young*, L. R. 5 C. P. 136; *Newman v. Zachary*, Aleyn, 3; *Like v. McKinstry*, 41 Barb. 168.

So in respect to a slave. *Hill v. Ward*, 13 Ala. 310.

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breach by a third person of a valid contract to purchase plaintiff's property.

2. The complaint in an action to recover damages for slander of title by charging that plaintiff had broken the covenants of certain leases and forfeited all rights thereunder, must aver facts sufficient to show that plaintiff had rights under the leases and that there were covenants to be broken; and the want of

Slander of quality of goods or property.

The action lies for falsely publishing statements disparaging the quality of plaintiff's goods, thereby causing him damage. *Western Counties Manure Co. v. Lowe's Chem. Manure Co.* L. R. 9 Exch. 218.

To say that a dealer's watches are bad is not actionable unless the words import that he is guilty of deceit or malpractice. *Tobias v. Harland*, 4 Wend. 557.

But to charge one with having nothing but rotten goods in his shop has been held actionable as imputing deceit or malpractice. *Burnet v. Wells*, 12 Mod. 420.

And charging a brewer with putting lime in his ale, thereby causing the death of one who drank it, is actionable. *Nuton's Case*, Freem. 25.

So a publication imputing an immoral tendency to works published by plaintiff. *Tobart v. Tipper*, 1 Campb. 350.

Charging infringement.

An action lies for falsely charging infringement of a patent, thus preventing the sale of plaintiff's articles. *Snow v. Judson*, 38 Barb. 210.

But not if it is done in good faith. *Wren v. Weild*, L. R. 4 Q. B. 730; *Halsey v. Brotherhood*, L. R. 19 Ch. Div. 986.

It also lies for circulars sent out falsely claiming a copyright with intent to injure plaintiff's business for defendant's benefit. *Dicks v. Brooks*, L. R. 15 Ch. Div. 22; *Barley v. Walford*, 9 Q. B. 197.

such averments is not cured by the fact that the leases themselves, from an inspection of which all such facts would appear, were attached as exhibits to the complaint, at least where they were attached merely to identify the leased land.

3. Only damage which is the natural and direct result of slander of title is recoverable therefor.

4. A person is not liable for statements in disparagement of the title to another's property because a third person has been thereby deterred from purchasing it, unless he made the statements to the latter or directed or authorized their communication to him.

(August 21, 1891.)

APP^EAL by plaintiff from a judgment of the Superior Court for Los Angeles County in favor of defendant in an action brought to recover damages for alleged slander of title. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. John Roberts and John D. Bicknell, for appellant:

If A states in public that B has no title to land which he (B) is about to sell, and thereby prevents the sale by him, A's statement that B has no title or that his title is defective, is a conclusion of law, and is slander of title. Addison, Torts (Dudley & Baylie's ed.) pp. 969, 970, and notes; *Brook v. Rawl*, 4 Exch. 521, 19 L. J. Exch. 114.

Slander of title ordinarily means a statement

of something tending to cut down the extent of title, which is injurious only if it is false and malicious, not malicious in the worst sense, but with intent to injure the plaintiff, and that he has suffered damage thereby.

Pater v. Baker, 8 C. B. 868; Cooley, Torts, p. 321.

False, defamatory and malicious statements, made with the intent to injure the owner of land and his title thereto, constitute slander of title.

Dodge v. Colby, 11 Cent. Rep. 466, 108 N. Y. 445.

An action on the case is the proper remedy. 1 Bacon, Abr. 7th Eng. ed. pp. 108, 143; *Pennyman v. Rabanks*, Cro. Eliz. 427.

Defendant having maliciously and without probable cause, and with intent to prevent the consummation of the sale, declared that he would not execute the deed provided for in the leases, even if tendered the purchase price as therein provided, Sketchley would have been justified in refusing to take a title from Burkett that was not marketable; and Burkett could not have prevailed in an action against Sketchley to enforce specific performance.

A vendee will not be compelled to buy a lawsuit.

Price v. Strange, 6 Madd. 159-165; *Sharp v. Adcock*, 4 Russ. 374; *Butler v. O'Hear*, 1 Dessaus. Eq. 882; *Parkin v. Thorold*, 16 Beav. 67; *Rogers v. Waterhouse*, 4 Drew. 329; *Jeffries v. Jef-*

But not for a publication charging infringement of copyright, although the copyright claimed is not valid, unless there was express malice. *John W. Lovell Co. v. Houghton*, 6 L. R. A. 363, 116 N. Y. 520.

The action also lies for slandering title to a trademark alleging infringement and threatening plaintiff's customers. *McElwee v. Blackwell*, 94 N. C. 261.

Denying right to sing copyrighted song.

An action lies for letters falsely denying the truth of a notice published by vocalists in which their right to sing certain copyrighted songs is claimed. *Hart v. Wall*, L. R. 2 C. P. 146.

Malice; good faith.

Malice is the gist of the action. *Steward v. Young*, L. R. 5 C. P. 126; *Smith v. Spooner*, 8 Taunt. 246; *Hargrave v. LeBreton*, 4 Burr. 2422; *Lake v. McKinstry*, 41 Barb. 186.

A claim of title to property asserted in good faith will not constitute an actionable slander of title. *Walden v. Peters*, 2 Rob. (La.) 331; *Bailey v. Dean*, 5 Barb. 297; *Harris v. Sneed*, 101 N. C. 273.

Stating the truth as to the facts of a lease with a bona fide claim of right under it at a sale of land will not sustain the action. *Cornwell v. Parke*, 63 Hun, 598.

Good faith is the test and not a belief such as a man of sense and knowledge would form. *Pitt v. Donovan*, 1 Maule & S. 639.

Malice is not presumed from an injurious slander of title. *McDantel v. Baca*, 3 Cal. 326.

Nor from an erroneous statement by a surveyor of highways at a sale concerning his power to require highways to be made before the purchasers could construct buildings. *Pater v. Baker*, 3 C. B. 831.

But the falsity of a publication disparaging the quality of plaintiff's school books, if there is special damage shown, has been held to raise the presumption of malice. *Swan v. Tappan*, 5 Cush. 104.

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Special damages; proofs.

Special damages are also necessary to make out a case of slander of title. *Cane v. Goulding, Styles, 176; Tasburgh v. Day*, Cro. Jac. 484; *Manning v. Avery*, 3 Keb. 153; *Lowe v. Harewood*, Sir Wm. Jones, 196; *Linden v. Graham*, 1 Duer, 670.

This rule applies in case of slander of title to land. *Kendall v. Stone*, 5 N. Y. 14; *Stark v. Chitwood*, 5 Kan. 144.

Or of slander of title to personal property. *Like v. McKinstry*, 41 Barb. 186.

Or for disparaging of qualities of ship. *Ingram v. Lawson*, 6 Bing. N. C. 212.

Or for false publication disparaging the quality of school books. *Swan v. Tappan*, 5 Cush. 104.

Or for saying that a dealer's watches are bad. *Tobias v. Harland*, 4 Wend. 537.

Or that a brewer's beer is worthless. *Fenn v. Dixie*, Sir Wm. Jones, 444.

But otherwise in case of charging that he puts lime in his ale and that a person on that account has lost his life from drinking it. *Nuton's Case*, Freem. 25.

If plaintiff's contracts to sell are valid he cannot recover for slander causing a breach of them. *Morris v. Langdale*, 2 Bos. & P. 204; *Vicars v. Wilcocks*, 8 East, 1; *Walden v. Peters*, 2 Rob. (La.) 331.

Plaintiff to make out his case must show title to the property slandered. *Edwards v. Burris*, 60 Cal. 157.

He must prove not only malice and falsity of the slander but an injury to his title. *Like v. McKinstry*, 41 Barb. 186.

Joinder of parties.

Two persons cannot be sued jointly for verbal slander of title. *Webb v. Cecil*, 9 B. Mon. 193.

Closely connected with this subject is the matter of injunctions against false statements concerning property or business which will be treated in another note.

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fries, 117 Mass. 184; *Dobbs v. Norcross*, 24 N. J. Eq. 327.

If the false representation was made with knowledge of its falsity and with intent to deceive, this is "actual malice."

Pitt v. Donovan, 1 Maule & S. 639; *McDaniel v. Baca*, 2 Cal. 326; *Stark v. Chittwood*, 5 Kan. 141; *Wilson v. Dubois*, 35 Minn. 471; *Wren v. Weild*, L. R. 4 Q. B. 780; *Roscoe*, Ev. title, *Slander of Title*, 12th ed. 768.

Messrs. Stephen M. White and George W. Knox, for respondent:

After the offer was made and accepted, the defendant, it is said, publicly asserted that plaintiff had no rights, or property, which he could thus convey to Sketchley; and thereupon Sketchley withdrew his proposal. But Mr. Sketchley could not have withdrawn his offer without plaintiff's consent, because that offer had been already accepted.

McDonald v. Mission View Homestead Assn. 51 Cal. 210; *Brennan v. Ford*, 46 Cal. 8; *Vasault v. Edwards*, 43 Cal. 458; *Miles v. Thorne*, 38 Cal. 385; *Wakefield v. Greenhood*, 29 Cal. 598.

Where one under contract for the purchase of property is induced to refuse to complete the purchase by reason of slanderous words uttered concerning the property, by a third person, the vendor cannot sue such third person for slander. His remedy is on the contract of sale.

Ensor v. Belgiano, 67 Md. 190; *Brentman v. Note*, 24 N. Y. S. R. 281; *Morris v. Langdale*, 2 Bos. & P. 283; *Vicars v. Wilcocks*, 8 East, 1; *Bailey v. Dean*, 5 Barb. 207; *Townshend, Slander & Libel*, 4th ed. § 206, p. 284.

The publication must be made by the defendant. If the party to whom the slanderous words or statements of a written libel are sent, being the one defamed, gives it to the world, the defendant is not responsible.

3 Lawson, *Rights, Remedies and Practice*, § 1236, p. 2189; *Prime v. Eastwood*, 45 Iowa, 640.

A person who utters a slander is not responsible for its voluntary and unjustifiable repetition without his authority or request, by others over whom he has no control, and who thereby rendered themselves liable to the person slandered.

Hastings v. Stetson, 126 Mass. 329. See also *Shurtleff v. Parker*, 130 Mass. 298.

While the authorities above cited do not directly treat of slander of title, the principle is manifestly applicable. It is not perceived that there can be any distinction as far as this issue is concerned.

Townshend, Slander & Libel, 4th ed. § 206. It is necessary for plaintiff to aver and prove special damages.

Brentman v. Note, 24 N. Y. S. R. 281; *Newell, Defamation*, p. 204.

An action of this kind cannot be maintained unless the plaintiff shows title or interest in the property.

Edwards v. Burris, 60 Cal. 157.

The exhibits do not be relied upon to cure defects.

Los Angeles v. Signoret, 50 Cal. 298.

Harrison, J., delivered the opinion of the court:

The plaintiff brought this action against the 13 L. R. A.

defendant to recover the sum of \$25,000 damages caused by certain false and malicious statements alleged to have been made by him concerning certain property of the plaintiff. The defendant demurred to the complaint upon the grounds of insufficiency and uncertainty, and from a judgment entered upon an order sustaining the demurrer the plaintiff has appealed.

Although the term "slander" is more appropriate to the defamation of the character of an individual, yet the term "slander of title" has by use become a recognized phrase of the law; and an action therefor is permitted against one who falsely and maliciously disparages the title of another to property, whether real or personal, and thereby causes him some special pecuniary loss or damage. In order to maintain the action, it is necessary to establish that the words spoken were false, and were maliciously spoken by the defendant, and also that the plaintiff has sustained some special pecuniary damage as the direct and natural result of their having been so spoken. As words spoken of property are not in themselves actionable, it is necessary to allege the facts which show wherein the plaintiff has sustained damage; and, as special damage is the only ground upon which the action can be maintained, it is essential that such damage be distinctly and particularly set out in the complaint. *Linden v. Graham*, 1 Duer, 670; *Susan v. Tappan*, 5 Cush. 104; *Mulachy v. Soper*, 3 Bing. N. C. 371.

It is not actionable to speak disparagingly of the title of another unless he is damaged thereby. The utterance of a mere falsehood, however malicious, will not sustain an action unless damage has resulted therefrom (*Add. Torts*, 25); and the damage which can be recovered is only such as is the direct and natural result of the utterance of the words. As in all other cases dependent upon special damage, there must be both injury and damage. The slanderous words, false in fact and maliciously uttered, constitute the injury, and give the right of action; and the pecuniary damage sustained is the measure of recovery. If the words uttered are not false, or if there be no malice, there is no right of action, and there can be no recovery unless some special pecuniary damage has resulted from their utterance. In order to show that the words uttered have caused injury to the plaintiff, it is generally necessary to aver and show that they were uttered pending some treaty or public auction for the sale of the property, and that thereby some intending purchaser was prevented from bidding or competing. *Folkard, Starkie, Slander & Libel*, § 128; *Odgers, Slander & Libel*, 138.

"This action lieth not but by reason of the prejudice in the sale." Per *Fenner, J.*, in *Bold v. Bacon*, Cro. Eliz. 346.

If the plaintiff has merely a general intention to sell, or if the words uttered do not reach any intending purchaser, or if they do not prevent any sale, or are uttered after the sale is completed or agreed upon and contracted for, the plaintiff does not suffer any damage from their utterance.

It is alleged in the complaint that in August, 1888, the plaintiff was the owner of a certain leasehold interest, with option and privilege of purchasing two certain tracts of land in Los

Angeles County, and that one Arthur Sketchley was then negotiating and treating with him for the purchase of, and offered to purchase from him, an undivided one half of the same for the sum of \$25,000, "and that the plaintiff accepted said offer;" that the defendant, well knowing the premises, did willfully, maliciously, and without probable cause, during the period that the said Sketchley was so negotiating and making the offer aforesaid, and prior and subsequent thereto, publicly state to divers persons (naming them), and to the plaintiff, "that the plaintiff had broken the covenants of his said leases, and had forfeited all rights thereunder and by virtue thereof," and that the defendant would not sell to the plaintiff, or to any person purchasing from him, the lands described in said leases, or execute a deed therefor on the tender of said purchase price; that the said statement and declarations were false, and were made by the defendant for the purpose of preventing the plaintiff from disposing of said leasehold interests and option, and that said Sketchley was informed of the said statements, and was intimidated, dissuaded, and deterred from carrying out his agreement with plaintiff, and withdrew his offer to purchase, and refused to purchase the same; that, but for said statements by defendant, Sketchley would have completed said purchase; and that by reason of the said statements plaintiff has been unable to sell said property to Sketchley, and has been thereby damaged in the sum of \$25,000. The averment in the complaint that Sketchley offered to make the purchase from the plaintiff, and to pay therefor the sum of \$25,000, and that "the plaintiff accepted said offer," must, for the purposes of the demurrer, under the familiar rule that the pleading is to be construed *contra proferentem*, be regarded as an allegation of a valid and efficient offer and acceptance, and that by virtue thereof a complete and executed contract of purchase and sale was entered into between them. This construction is corroborated by the subsequent averment that, after Sketchley was informed of the statements of the defendant, he was "intimidated, dissuaded, and deterred from carrying out his agreement with plaintiff," and shows that it was the intention of the pleader to allege such contract. This acceptance by the plaintiff of Sketchley's offer, and the agreement between them for the purchase and sale of the property, terminated the "treaty," and gave to the plaintiff a contract capable of being enforced against Sketchley, and on which he can recover any damages he may have sustained from its violation. The subsequent refusal by Sketchley to carry out his agreement did not give the plaintiff the right to recover in this action the damages thus sustained. In an action like the present, the plaintiff can recover only such damage as he may have sustained by reason of an intending purchaser being prevented from making the contract; but the complaint herein shows that whatever statements or declarations were made by the defendant prior to the making of the contract did not have the effect to prevent Sketchley from entering into the same, and those which he made thereafter have not caused the plaintiff any damage which can be said to have resulted therefrom. We know of no case in which it

has been held that, when the plaintiff has a valid contract of sale, he can recover damages for its breach against one whose words, however false and malicious, have induced the other contracting party to violate such agreement.

In *Morris v. Langdale*, 2 Bos. & P. 284, in an action for defamation, the special damage alleged was that certain persons had refused to fulfill their contracts with the plaintiff in consequence of the words spoken; but Lord Eldon said: "Now, if the plaintiff has sustained any damage in consequence of the refusal of any persons to perform their lawful contracts with him, it is damage which may be compensated in actions brought by the plaintiff against those persons; and the law supposes that in such actions the plaintiff would receive a full indemnity." A similar principle is laid down in *Townshend, Slander & Libel*, § 206; *Kendall v. Stone*, 5 N. Y. 14; *Vicars v. Wilcocks*, 8 East, 1; *Paul v. Huferty*, 68 Pa. 46; *Brentman v. Note*, 24 N. Y. S. R. 281.

It is not shown by the complaint whether the plaintiff accepted the refusal of Sketchley to complete his purchase as a termination of the contract, or whether he still holds his right of action to enforce the contract. From the averment that "the said Sketchley was then and there, and at all times since has been, able and willing to purchase" the property contracted for, it would seem that Sketchley is still bound by the contract; and, if so, the complaint fails to show that the plaintiff has sustained any damage. In any action against Sketchley founded upon the contract, it would be no defense that he had been induced to refuse to complete his purchase by reason of the statements of the defendant alleged herein; and as, in such action, the plaintiff can recover all the damages he has sustained, he has no right of action herein against this defendant. If, on the other hand, the plaintiff has released Sketchley from the obligations of his contract, or does not desire to enforce the same, whatever damage he has suffered is the result of his own voluntary act, and cannot be visited upon this defendant. *Kendall v. Stone*, *supra*.

2. The complaint fails to show that the statements and declarations alleged to have been made by the defendant could have caused any damage to the plaintiff. It was necessary for the plaintiff to set forth and describe in his complaint the property respecting which the defamatory statements had been made, as well as to aver his title thereto, so that it might be shown wherein the defendant had done him any injury. The defamatory statements alleged to have been made by the defendant are "that this plaintiff had broken the covenants of his said leases, and that plaintiff had forfeited all rights thereunder and by virtue thereof." The only leases referred to in the complaint are those which are annexed to it as exhibits for the purpose of identifying the lands in which the plaintiff had a "leasehold interest, with option and privilege of purchasing." The plaintiff has not alleged the nature or extent of his leasehold interest, or the terms of his option, or what were the covenants of his leases, or the nature of his rights thereunder; nor has he alleged that the covenants or the option are those which are contained in the exhibits. As the

statements alleged to have been made by the defendant referred to the "covenants of his said leases, and his rights thereunder," it was necessary to aver facts sufficient to show whether he had any rights, or whether there were any covenants to be violated or broken. The exhibits attached to the complaint are made a part thereof only for the purpose of identifying the lands referred to, and do not satisfy this requirement of pleading. Argumentative pleading is no more permissible under the Code than it was at common law. Matters of substance must be alleged in direct terms, and not by way of recital or reference, much less by exhibits merely attached to the pleading. Whatever is an essential element to a cause of action must be presented by a distinct averment, and cannot be left to an inference to be drawn from the construction of a document attached to the complaint. *Los Angeles v. Signoret*, 50 Cal. 296.

The only property to which the plaintiff alleges that he had any title is the leasehold interest and option to purchase. He does not allege that the defendant denied his title to this property, but charges him only with disparaging certain rights which the complaint does not allege that he possessed. The allegation that the defendant had stated that he would not sell the lands described in the leases cannot be regarded as any slander of his title, even if the complaint had shown any right to make a purchase from the defendant. The plaintiff, moreover, does not allege that Sketchley was informed of this declaration of the defendant.

3. The complaint also fails to show that the special damage alleged to have been sustained by the plaintiff is the natural and direct result of the statements and declarations made by the defendant. This action is governed by the same rule that obtains in the ordinary action of slander, viz., that, if the words are not actionable in themselves, the originator of the slander is only liable for such damage as is the direct and natural result of his act, and that he is not liable for the subsequent repetition of those words by another without his direction or authority. *Folkard, Slander & Libel*, Starkie's ed. § 642; *Addison, Torts*, 795; *Parkins v. Scott*, 1 Hurlst. & C. 153; *Ward v. Weeks*, 7 Bing. 211; *Tervilliger v. Wanda*, 17 N. Y. 54; *Gough v. Goldsmith*, 44 Wis. 262; *Hastings v. Setoon*, 126 Mass. 329.

This is but the application of the general rule that, when special damages are to be recovered, they must be the legal and natural consequence arising from the tort itself, and not from the wrongful act of a third party, remotely induced thereby. *Crain v. Petrie*, 6 Hill, 524.

The only special damage which the plaintiff has alleged is that Sketchley was informed of the statements and declarations made by the defendant, and withdrew his offer to purchase, and that the plaintiff thereby sustained damage. It is not alleged that the defendant ever made any statement or declaration to Sketchley, or in his presence, or that he directed or authorized any of his statements to be communicated to him; nor is it alleged that either of the persons to whom the defendant made such statements repeated them to Sketchley, or by whom or in what manner Sketchley "was informed" of the statements. The only connec-

tion between the statements by the defendant and their reaching Sketchley is that the defendant made them for the purpose of circulating the rumor and conveying the impression that the plaintiff had violated the covenants and conditions of his leases. This, however, is too remote to render the defendant liable.

We are of the opinion that the complaint fails to state a cause of action, and that the demurrer was properly sustained, and the judgment is therefore affirmed.

We concur: **Paterson, J.; Garoutte, J.**

Emma B. COHEN, *Resp't.*,

v.

Charles C. KNOX, Impleaded, etc., *Appl't.*

(.....Cal.....)

1. A conveyance by a father to his daughter in consideration of her marriage, made without intent on the part of either to defraud, is not fraudulent as to creditors, although the father is insolvent at the time.
2. Failure of a complaint to state a cause of action is cured by the filing of a cross-complaint in which the omitted facts are stated, even though a demurrer was interposed.

(July 18, 1891.)

APPEAL by defendant Knox from a judgment of the Superior Court for Alameda County in favor of plaintiff in an action brought to enjoin the sale of certain property

NOTE.—Ante-nuptial settlement.

The American rule is favorable to marriage articles when the party marrying on their faith had good reason to rely upon them as such. *Schouler*, Dom. Rel. § 177.

The consideration of marriage is a good and valuable consideration for such contracts. *Bradish v. Gibbs*, 8 Johns. Ch. 532, 1 L. ed. 704; *Wright v. Wright*, 54 N. Y. 440.

In England after-acquired property may be settled by the parties. *Smith v. Osborne*, 6 H. L. Cas. 375; *Re Peddler*, L. R. 10 Eq. 585; notes to *Story*, Eq. Jur. §§ 963, 964; *Banning*, Mar. Set. 80, 172, 179.

Ante-nuptial contracts, by which it is attempted to regulate and control the interest which each of the parties to the marriage shall take in the property of the other, like dower, are favored by the courts and will be enforced in equity according to the intention of the parties whenever the contingency provided by the contract arises. 2 Kent, Com. 165; *Re Youngs*, 27 Hun, 54, affirmed, 32 N. Y. 335.

No especial formality is requisite in such instruments, and, in order to effectuate the intentions of the parties, courts of equity will impose a trust upon the property agreed to be conveyed commensurate with the obligations of the contract, or will decree their specific performance, and when such relief is inadequate or impracticable from the situation of the property or the character of the contract, will award damages for its breach. *De Barante v. Gott*, 6 Barb. 494; *Peck v. Vandemark*, 99 N. Y. 29; Pom. Eq. Jur. §§ 1297, 1403; *Schouler*, Dom. Rel. 263-266, *et seq.*; *Pierce v. Pierce*, 71 N. Y. 154, 156.

The same principles apply to a conveyance in consideration of marriage, which is not only a val-

levied upon by execution as belonging to Watson A. Bray. *Affirmed.*

The facts are stated in the opinion.

Messrs. William B. Sharpe and S. C. Devson for appellant.

Messrs. Scrivner & Boone and Garber, Bealt & Bishop for respondent.

McFarland, J., delivered the opinion of the court:

In the year 1888 there was a treaty or agreement of marriage pending between the plaintiff, then a young unmarried woman, and Alfred H. Cohen. Cohen was then a young lawyer just beginning the practice of his profession, and having no income or means sufficient to procure a home and support a family, and they were both unwilling to get married until they had a home. These facts coming to the knowledge of Watson A. Bray, the father of plaintiff, he concluded, in order to encourage the consummation of said marriage, to convey to plaintiff a lot of land and build a house thereon as a home for the young couple, provided the father of said Cohen would furnish it. After some conferences between the said Bray and the father of said Cohen, the proposition was accepted by the latter; whereupon Bray, on July 12, 1888, conveyed a lot

of land, being the premises described in the complaint herein, to the plaintiff (then Emma Bray) and proceeded immediately to build a house thereon, which was completed in the early part of 1884. This was done with the knowledge of Cohen, and he was consulted about it. The house was furnished by said Cohen's father. In February, 1884, plaintiff and Alfred H. Cohen were married, and moved into the house, where they have lived ever since. It is found by the court, and clearly established by the evidence, that the said conveyance of said lot to plaintiff, and the construction of said house thereon, were the consideration which induced said marriage, without which it would not then (if ever) have been consummated. The value of the lot and the cost of the house amounted at the time to about \$16,000, and the present value of the property is \$18,000. At the time of the conveyance of said lot to plaintiff and the building of said house, the said Bray was the owner of several hundred thousand dollars' worth of property, and supposed himself to be worth a quarter of a million of dollars. The conveyance was not made with any design on his part to hinder or defraud creditors (whether that fact be material or not), and it is entirely clear that plaintiff and her husband believed

unable consideration, but the highest consideration known in law.

Thus, it is said by Story, J., in *Magniac v. Thompson*, 82 U. S. 7 Pet. 368, 8 L. ed. 725. Nothing can be clearer, both upon principle and authority, than the doctrine that, to make an ante-nuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in or have cognizance of the intended fraud. If the seller alone intends a fraud, and the other party has no notice of it, he is not and cannot be affected by it. Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value; and from motives of the soundest policy is upheld with a steady resolution. The husband and wife, parties to such a contract, are therefore deemed in the highest sense purchasers for a valuable consideration, and, so that it is bona fide and without notice of fraud brought home to both sides, it becomes unimpeachable by creditors. To the same effect, see *Campion v. Cotton*, 17 Ves. Jr. 364, 372, and notes.

This is also the settled doctrine in Alabama. *Andrews v. Jones*, 10 Ala. 400, 421.

Consequently, if it is made in good faith, and without notice of fraud to the parties who take under it, it is unimpeachable by creditors. *Eppes v. Randolph*, 2 Call, 108; *Bunnell v. Witherow*, 29 Ind. 123; *Frank's App.*, 59 Pa. 190; *Magniac v. Thompson*, 82 U. S. 7 Pet. 348, 8 L. ed. 709; *Campion v. Cotton*, 17 Ves. Jr. 364; *Ex parte McBurnie*, 1 DeG. M. & G. 441; *Coutts v. Greenhow*, 2 Munf. 363, 4 Hen. & M. 485; *Tunno v. Trezeant*, 3 Desaus. Eq. 264; *Jones' App.*, 62 Pa. 324; *Bank v. Marchand*, T. U. P. Charit. 247; *Partridge v. Copp*, 1 Eden, 168 Ambl. 596; *Cadogan v. Kennett*, 2 Cowp. 482; *Andrews v. Jones*, 10 Ala. 400; *Haselinton v. Gill*, 3 T. R. 630, note; *Croft v. Arthur*, 3 Desaus. Eq. 223.

An ante-nuptial settlement, though made by the intended husband with the design of defrauding his creditors, will not be set aside in the absence of the clearest proof of the wife's participation in the fraud. *Prewitt v. Wilson*, 108 U. S. 223, 28 L. ed. 360.

Tyler, on Infancy and Coverture, p. 464, says: "A court of equity will always support a marriage settlement, if no particular evidence of fraud is

made out, showing an intention to deceive and defraud creditors."

Bishop states the doctrine on this subject as follows: "If a man, wishing to enter into matrimony with a particular woman, should, being insolvent, convey to her all his property, which was accepted by her with full knowledge of the fact, the nuptial intent being not to defraud his creditors, as a primary object, but to contract marriage, each on such terms as could be reasonably procured from each other, the case would not be within either of the Statutes of Elizabeth. Neither would it be in violation of any principles of the common law, because the common law, though it abhors every sort of cheating, loves matrimony; its principles all point towards it, whenever the circumstances of a case expose them to this attractive force." 1 Bishop, Married Women, § 784.

As against creditors, if both parties intend, or if the settlor intends, and the settlee has notice of such intent (*Magniac v. Thompson*, 82 U. S. 7 Pet. 348, 8 L. ed. 709), to hinder, delay, or defraud his creditors, the contract, to the extent at least of the settlor's debts (*Smith v. Cherrill*, L. R. 4 Eq. 300), is void (*Bulmer v. Hunter*, L. R. 8 Eq. 44; *Cadogan v. Kennett*, 2 Cowp. 482; *Andrews v. Jones*, 10 Ala. 400; *Phillips v. Meyers*, 82 Ill. 67; *Jones' App.*, 62 Pa. 324; *Herring v. Wickham*, 29 Gratt. 628; *Colombine v. Penhall*, 1 Sm. & G. 228); no matter what the consideration (*Bulmer v. Hunter*, 38 L. J. Ch. 543; *Cason v. Murray*, 15 Mo. 378; *Ashmead v. Hean*, 13 Pa. 584; *Bozman v. Droughan*, 3 Stew. 243; *Mosely v. Gainer*, 10 Tex. 383, 419; and mere knowledge of the settlor's indebtedness (*Campion v. Cotton*, 17 Ves. Jr. 364; *Richardson v. Horton*, 7 Beav. 112), or insolvency (*Sisson v. Roath*, 30 Conn. 15), will not amount to fraudulent intent or notice, though they may go to prove it (*Ex parte McBurnie*, 1 DeG. M. & G. 441; *Marshall v. Morris*, 18 Ga. 368; *Croft v. Arthur*, 3 Desaus. Eq. 223; *Colombine v. Penhall*, 1 Sm. & G. 228), just as the unreasonableness of the settlement may. *Ex parte McBurnie*, *Marshall v. Morris*, *Croft v. Arthur*, and *Colombine v. Penhall*, *supra*; *Simpson v. Graves*, *Riley*, Eq. 232; *Bank v. Marchand*, T. U. P. Charit. 247; *Stewart, Mar. & Div.* § 39. See notes to *McNutt v. McNutt* (Ind.) 2 L. R. A. 372; *Deshon v. Wood* (Mass.) 1 L. R. A. 518.

him to be a man of large means, and fully able to make the said provision for her marriage, and that she accepted the same without any intent of hindering or defrauding his creditors. It turned out afterwards, however, that said Bray was, in fact, insolvent at the time said conveyance was made to plaintiff. On said July 12, 1883, the date of said conveyance to plaintiff, said Bray was indebted to the defendant Charles C. Knox in an amount exceeding \$80,000; and on August 12, 1885, said Knox recovered judgment against said Bray for \$79,218. On April 26, 1887, Knox caused an execution to be issued on said judgment, and delivered the same to the sheriff with instruction to levy it upon said lot conveyed by said Bray to plaintiff as aforesaid, as the property of said Bray. The sheriff made said levy, and was about to sell said lot, when the plaintiff brought this present action to restrain such sale, upon the ground that it would cast a cloud upon her title. The court gave judgment for plaintiff according to her prayer, and from said judgment, and from an order denying a new trial, the defendant Knox appeals.

The main question presented is whether the said conveyance from Bray to his daughter, under the circumstances above stated, was void as against the creditors of Bray. This question has been very ably and elaborately discussed by counsel, and a multitude of authorities have been cited. We will not undertake here to review these authorities, but will merely state the conclusions to which they clearly lead. Where one party conveys land to another for a valuable and adequate consideration, the conveyance will be good against the creditors of the grantor, although the latter intended thereby to defraud his creditors, if the grantee had no knowledge of such intent, and was in no way a participant in the fraudulent purpose. Marriage is the highest and most valuable of considerations; and when a conveyance is made upon such consideration, the grantee, if guiltless of fraud herself, is in at least as firm and sure a position as if she had paid in money the full value of property conveyed. It has even been held that a voluntary conveyance to a daughter, intended as a settlement, and without present reference to her marriage, will become *ex post facto* valid against creditors and purchasers with only implied notice, if upon the credit of the conveyance a person has been induced to marry her. Marriage being in its nature permanent, and being the most important of all civil relations, the law will not lightly allow the inducements which have led to it to be disturbed. And the dowry of a bride, without special proof, is presumed to be an inducement to her marriage. The law does not require a delicate investigation into the *quantum* of influence which her property has had with her suitor. A few of the many authorities which establish the principles above stated are the following: *Bump, Fraud*, Conv. pp. 305, 306, and cases cited; *Wait, Fraud*, Conv. § 212, and cases cited; *Magniac v. Thompson*, 32 U. S. 7 Pet. 348, 8 L. ed. 709; *Previl v. Wilson*, 103 U. S. 22, 26 L. ed. 360; *Wood v. Jackson*, 8 Wend. 9; *Herring v. Wickham*, 29 Gratt. 633; *Huston v. Condit*, 11 Leigh, 146, 155; *Sterry v. Arden*, 1 13 L. R. A.

Johns, Ch. 260, 271, 1 L. ed. 183, 187; *Brown v. Carter*, 5 Ves. Jr. 877, 878; *Otis v. Spencer*, 103 Ill. 622; *Dugan v. Gittings*, 3 Gill, 188, 43 Am. Dec. 306.

The case at bar presents a clear field for the application of these principles. It has none of those peculiarities or complications of facts which often make it difficult to determine what rule of law applies. It is a plain case of a conveyance upon the express consideration of marriage, which was the direct and immediate inducement of the marriage, and made, not only without any knowledge of fraud by the grantee, but without any intent to defraud on the part of the grantor. The court was therefore right in upholding the said conveyance against appellant, claiming, as a creditor of Bray.

2. Appellant contends that the judgment should be reversed, because the complaint does not state facts sufficient to constitute a cause of action, and because his demurrer on that ground was erroneously overruled. The point is, as we understand it, that facts constituting a cloud on plaintiff's title are not stated, because it does not appear that plaintiff derived her title from Bray, against whom the execution runs. The complaint shows, among other things (in brief, that since July 12, 1883, plaintiff has been the owner and in possession of a certain described lot of land; that said land is "a portion of W. A. Bray's Oak Tree farm tract, as surveyed for W. A. Bray by James T. Stratton, April, 1869, as per map," etc.,—"all of which was and is well known to the defendants herein;" that defendant Knox recovered judgment against Bray, caused an execution to be issued, and levied on said land as the property of Bray, and is about to have the same sold, as in this opinion heretofore stated, and that said sale will cast a cloud upon plaintiff's title, and greatly damage and impair the value thereof. It is not necessary to definitely determine whether this complaint is so totally defective in its statement of a cause of action as to be bad on general demurrer, or whether it merely presents a case of defective averments, assailable only on special demurrer; because defendant, in addition to his answer in which the averments of the complaint are denied, filed a cross-complaint in which he asked for affirmative relief, and in which he averred specifically the very facts which he contends should have been averred in the complaint of plaintiff. In his cross-complaint he avers that on said July 12, 1883, and for a long time prior thereto, the said Bray was the owner in fee and in possession of said land; that on said day he conveyed the same by deed to plaintiff, who is his daughter, that the deed was voluntary and without consideration; that plaintiff holds under said deed, and not otherwise; and that the deed was made to hinder and delay creditors, and particularly defendant. He prays that the deed be declared fraudulent and void, and that he be allowed to proceed with the execution. To this cross-complaint plaintiff filed an answer, in which she admitted said deed from Bray, and that she held under it, but denied that it was voluntary, or without consideration, or fraudulent, and averred the consideration of marriage, and the facts concerning said marriage, as heretofore stated. Upon these pleadings the case went to

trial; and it would be a vain thing to reverse the judgment, and allow plaintiff to amend her complaint by averring facts already averred in the cross-complaint, and to again in that form present issues which have already been raised and determined. The appellant made no objection to the introduction by plaintiff of the said deed to her from Bray; and the issue of the validity of said deed, raised by the cross-complaint and answer to it, was the one issue tried; and therefore, if it be conceded that the complaint failed to state sufficient facts, such failure was cured by the statement of the omitted facts in the other pleadings, which present a case of "express ailer." And the fact that there was a demurrer does not take it out of the rule. There was a demurrer in *Schenck v.*

Hartford F. Ins. Co., 71 Cal. 28, but the court held there that the omission of a material fact in the complaint was cured by its averment in the answer. That case, in principle, cannot be distinguished from the case at bar. See also Pom. Rem. § 579. Many cases to the same point are cited by counsel for respondent.

8. We see nothing in the point that an ante-nuptial contract must be in writing. No question arises here as to the enforcement of a verbal contract which ought to have been in writing. There are no other points necessary to be specially noticed. *The judgment and order denying a new trial are affirmed.*

We concur: **De Haven, J., Sharpstein, J.**

UTAH SUPREME COURT.

Dwight PECK *et al.*, *Repts.*,

v.

Cecilia REES, *Appt.*

(.....Utah.....)

1. The amendment of an answer by striking out certain allegations is properly refused, where, after the amendment, the answer would still contain affirmative allegations of similar import to those stricken out.
2. Death of the grantor before delivery of a deed of gift which he has placed in his agent's hands to be delivered, terminates the agent's authority, and a subsequent delivery is invalid.
3. The mere intention, evidenced by the execution of a deed, on the part of one about to die, to make a gift of property to a person towards whom he is under no obligations, legal or moral, creates no equity in the latter's favor superior to that of the grantor's heirs, and unless the gift is completed in the grantor's lifetime no title can pass.
4. The delivery by a grantor to his own agent of a deed of gift intended for one who has no knowledge that it was to be made, is not a valid delivery to the latter.

(September 12, 1891.)

APPEAL by defendant from a judgment of the District Court for Webber County in favor of complainants, in a suit brought to quiet title to certain real estate. *Affirmed.*

The facts are sufficiently stated in the opinion.

Messrs. Miller & Maginnis, for appellant:

To constitute a delivery good for any purpose, the grantor must divest himself of all power and dominion over the deed. To do this he must part with the possession of the deed and all right and authority to control it, either finally and forever, as where it is given

over to the grantee himself or some person for him.

Pruteman v. Baker, 30 Wis. 644.

If a grantor deliver any writing, as his deed to a third person to be delivered over by him to the grantee, on some future event, it is the grantor's deed presently and the third person is a trustee of it for the grantee.

Wheelwright v. Wheelwright, 2 Mass. 452; *Hathaway v. Payne*, 84 N. Y. 106; *Ball v. Foreman*, 37 Ohio St. 137; *Cooks v. Cooks*, 34 Ohio St. 616; *Albright v. Albright*, 70 Wis. 583.

Messrs. Smith & Smith for respondents:

An instrument, whatever is its form, is testamentary in its operation and quality if it be intended not to operate till the death of the party who made it, and the intention of the maker may be gathered either by the instrument or from extrinsic testimony.

Hatch v. Hatch, 9 Mass. 308, 810, and note.

There was no delivery of the deed in this case.

Herbert v. Herbert, 1 Ill. 278, 13 Am. Dec. 192; *Jackson v. Phipps*, 12 Johns. 419; *Maynard v. Maynard*, 10 Mass. 457; 2 Bl. Com. 307; *Hibberd v. Smith*, 67 Cal. 547; *Fitch v. Bunch*, 80 Cal. 210; *Pennington v. Pennington*, 75 Mich. 600.

To constitute a good *donatio mortis causa*, the first thing that is required is that the thing given must be personal property; second, that the gift must be made by the donor in peril of death and to take effect only in case the giver dies; third, there must be an actual delivery of the subject to convey a *donatio* in cases where delivery can be made.

The first requirement concludes the defendant in this case. It is impossible that there should be a gift *mortis causa* of real estate.

Bouvier, Law Dict. title *Donatio Mortis Causa*, pp. 559, 560.

The death of Henry Peck terminated absolutely the authority of Jones, who was his agent.

2 Kent, Com. 645, par. 4.

Anderson, J., delivered the opinion of the court:

The complaint in this case alleges that the

NOTE.—*Donations causa mortis*. See notes to *Drew v. Hagerty* (Me.) 3 L. R. A. 230; *Williams v. Guile* (N. Y.) 6 L. R. A. 386; *Devol v. Dye* (Ind.) 7 L. R. A. 436; *Ridden v. Thrall* (N. Y.) 11 L. R. A. 684 and *Walsh's App.* (Pa.) 1 L. R. A. 535. 13 L. R. A.

plaintiff Julia Eliza Peck is the widow and the other plaintiffs are the children and heirs-at-law of Henry Peck, late of Oneida County, Idaho Territory, deceased; that Henry Peck died at Malad, Oneida County, Idaho Territory, on or about the 28d day of July, 1889; that about ten days before his death he made a will by which he devised to the defendant certain real estate situated in Cache County, Utah Territory; that the devise in the will was for the purpose of having carried out the testator's temple work (meaning thereby certain pious, superstitious, and polygamous practices of the Mormon Church), to be carried on in the Mormon temple at Logan, Cache County, Utah; that the will was duly probated August 29, 1889, and the plaintiffs Howard Peck and Dwight Peck duly qualified as executors, and letters testamentary were duly issued to them on that day; that after the execution of the will, to wit, on the 17th day of July, 1889, the said Henry Peck executed a deed for the same real estate to the defendant, but that the deed was wholly without consideration, and was never delivered, and that after the death of the said Henry Peck the deed came wrongfully into the possession of the defendant, and she caused the same to be recorded in the records of Cache County, Utah. The plaintiffs claimed to be the owners of the land under the will and as heirs of Henry Peck, and asked to have their title quieted against the defendant. The defendant, by her answer, denied that the deed was never delivered, or that it came wrongfully into her possession, and alleged that the deed was duly executed by Peck in his lifetime, and "by him delivered to one Jenkin Jones, unconditionally, for the use and benefit of this defendant, with express directions and authority to deliver the same to this defendant upon the death of said Henry Peck, as a gift *causa mortis*; and that said deed was made and delivered in anticipation of the approaching death of said Henry Peck," and that Jones delivered the deed to her in pursuance of such authority. The depositions of Jenkin Jones, Henry R. Jones, and Howard Peck were introduced and read on behalf of plaintiffs. No evidence was offered by the defendant. At the close of the evidence the defendant asked leave of the court to amend her answer by striking out the words "*causa mortis*, and that said deed was made and delivered in anticipation of the approaching death of said Henry Peck," which was refused by the court, to which ruling the defendant excepted, and assigns the same as error.

The court found that Henry Peck was the owner of the land in controversy at the time of his death; that within ten days prior to his death he made an attempted devise of his property to the defendant, Cecilia Rees, by will, which devise was void under the statutes of Idaho Territory, where he resided prior to his death on the 28d day of July, 1889, and after his said will had been written; "and as an attempt to make a testamentary disposition of said property to the defendant, and without any consideration whatever, either good or valuable, made, executed, and delivered to one Jenkin Jones a deed for said property, said deed being in favor of the defendant, Cecilia Rees, she being named as grantee therein; that Jenkin Jones

had no authority from the defendant to receive said deed, and was directed by said Henry Peck to keep said deed until after his death, and then deliver the same to the defendant; that about one week after the death of Henry Peck, Jenkin Jones sent said deed to the defendant through the United States postoffice; that until she received said deed through the mail the defendant had no knowledge of the existence of such deed, or of any deed." The court found that the plaintiffs are the only heirs-at-law of said Henry Peck, and are the residuary legatees under the will. As conclusions of law the court found that the deed never became operative and is void; that the plaintiffs are the owners of the property, and entitled to a decree quieting their title to the same. The defendant made a motion for a new trial, which was overruled, and the appeal is from the findings and judgment.

Counsel for defendant say in their brief that all claim of the defendant under the will is abandoned, and that they rest their case on the deed alone, and that the only question they present for determination is. Was there a delivery of the deed? They further say in their printed brief in this court that "It is admitted that the grantee, Cecilia Rees, had no knowledge of the execution of the deed until received by her through the postoffice, about one week after the death of Henry Peck. It is further admitted that neither the grantee, nor any person for her, paid any consideration for the deed." The evidence as to the delivery of the deed is as follows: Jenkin Jones, a witness for the plaintiff, testified: "I knew Henry Peck in his lifetime. I saw a deed for the Cache County land which appeared to be executed by him, and the deed was in my possession. Henry R. Evans delivered the deed to me at my residence in Malad City, just a little time before Henry Peck's death, and said, at the time of delivery, here was a deed for me to keep. No instructions at that time were given me. The deed was delivered to Cecilia Rees, after the death of Henry Peck for fully a week. I sent it, addressed to her, through the postoffice. . . . A short time before the death of Henry Peck he called on me, and told me he was very sick, and did not know whether he would get well or not, and said he might make a paper or deed for Cecilia Rees, and asked me if I would deliver it, and told me to keep the matter to myself." Henry R. Evans testified: "Was acquainted with Henry Peck in his lifetime. I wrote a deed for him, conveying to Cecilia Rees the property in Cache County, and described in the complaint. . . . I had possession of the deed after it was made, and delivered it to Jenkin Jones. I received from Henry Peck instructions to deliver the deed to Jenkin Jones, with directions that he should send it to Mrs. Cecilia Rees, and I gave Jenkin Jones that direction. The deed was made and executed about a week before the death of Henry Peck. I delivered the deed to Jenkin Jones on the day it was made and executed. The deed was made in view of the approaching death of Henry Peck, and there was no express instruction whether it was or was not to be delivered in case he should live. He said Jenkin Jones would know what

to do with it. I had already written his will for him." Howard Peck, a son of Henry Peck, and one of the plaintiffs in this action, testified that the deed was intended by his father as a gift in view of approaching death.

It will be observed that, even if the court had permitted the defendant to make the proposed amendment to the answer, striking out the admission that the deed was intended as a gift in view of the approaching death of Henry Peck, still that fact was abundantly proved by the evidence already introduced, and without objection; so that, even if the court erred in refusing to allow the amendment, it worked no prejudice to the defendant. The right to make the amendment is claimed under section 3256, 2 Comp. Laws 1888. We think there was no error in refusing the amendment. If the amendment had been made, the answer would have still contained the affirmative allegation that Peck executed and delivered the deed to Jenkin Jones for her benefit, and "with express directions and authority to deliver the same to this defendant upon the death of said Henry Peck."

While there can be but little doubt that the deed from Peck to the defendant was made to evade the Statute of Idaho Territory which rendered the devise in the will to defendant void in case Peck should die in less than thirty days after the execution of the will, still he had a right to deed her the property as a gift, and confer upon her a good title; and the only question for determination is, Did he so far execute his intentions as to render the deed operative? It is essential to the validity of every deed that it be delivered to and accepted by the grantees. It need not be delivered by the grantor himself, but may be delivered by anyone duly authorized by him to make such delivery. Nor need it be delivered to the grantee in person, but may be delivered to anyone authorized by the grantee to receive or accept it. If, however, a grantor execute a deed of gift of real estate, and place it in the hands of an agent to deliver to the grantee, and the grantor dies before delivery, no delivery can then be made, because the authority of the agent to act ended with the death of the principal; and in this case, unless the delivery to the agent Jones was a delivery to the defendant, there was no such delivery of the deed as would render it operative, and transfer the title to the defendant.

Peck being under no obligation, legal or moral, by reason of indebtedness, kinship, or otherwise, to convey the land to the defendant, no equity was created in her favor by reason of his intention to make the gift, superior to the equity of his heirs, and unless he succeeded in making the gift to her complete in his lifetime by delivery of the deed, no title could pass to her. But Jones was not the agent of the defendant to accept the deed for her, and hence a delivery to him was not a delivery to her. It does not appear in the evidence that Jones even knew her, but it does appear that he was not her agent for any purpose connected with the deed, for it is conceded she had no knowledge that such a deed, or any deed, would be made by Peck to her. Jones was the agent of Peck, and had no authority to do anything with the deed except as author-

ized by Peck, and Peck could have demanded and regained possession of it at any time during his lifetime. While, therefore, it was out of his immediate possession, it was under his control, and liable at all times to be recalled and canceled by Peck. The title, then, was in Peck at the time of his death, and not in defendant, for she had not so much as heard of the deed, much less accepted it, and did not hear of it for a week after Peck's death. Suppose she had died the next day after Peck's death, but before Jones forwarded her the deed, to whose heirs would the property have descended,—the heirs of Peck or the heirs of the defendant? If to her heirs, it could only be because the title was fully vested in her by the execution of the deed, although she had never accepted it by herself or agent, nor even heard of it, and we would have a case where a delivery of a deed was not essential to transfer title. If we concede that Jones could deliver the deed to the defendant a week after the death of Peck, and, when delivered to her, it would vest the title in her from that date, where was the title between the death of Peck and the delivery of the deed to the defendant? If the title was in abeyance during this time,—floating around, as it were,—what would have been the result if Jones had lost or destroyed or refused to deliver the deed? Suppose the instructions to Jones should be construed to mean that he was not to await the death of Peck before delivering the deed, and Peck had demanded the return to him of the deed, and that the defendant had heard of the deed and demanded of Jones that he deliver it to her, who would have had the greater right to it? We think there can be no question but that Jones, being the agent of Peck, would have been bound to redeliver the deed to him, for it is of the essence of a gift that it be voluntary, and may be recalled any time before actual completion. In *Youngs v. Guilbeau*, 70 U. S. 3 Wall. 686, 18 L. ed. 262, the grantor executed and caused to be recorded a deed to the grantee, without the knowledge of the grantee, and he did not know of its execution until after the death of the grantor, when the deed was found among his papers. In a suit between the heir of the grantor and those holding under the grantee, the Supreme Court of the United States said: "The delivery of the deed is essential to the transfer of title. It is the final act without which all other formalities are ineffectual. To constitute such delivery the grantor must part with the possession of the deed, or the right to retain it. Its registry by him is entitled to great consideration upon this point, and might, perhaps, justify, in the absence of opposing evidence, a presumption of delivery."

In *Parmalee v. Simpson*, 72 U. S. 5 Wall. 81, 18 L. ed. 542, one Bovey conveyed certain real estate to Simpson, to whom he was indebted, and placed the deed on record without the knowledge of Simpson. Two days later he mortgaged the same lands to Parmalee, and the mortgage was recorded before Simpson knew of the deed to him, and the court held that the mortgage took precedence over the deed. The court said: "The placing of the deed on record was Bovey's own act, and done without the assent of Simpson. Under this state of facts,

there was manifestly no delivery. The execution and registration of a deed, and delivery of it for that purpose, does not vest the title in the grantee. If Simpson had agreed to accept the deed in liquidation of his debt, and constituted the register his agent to receive it, then the delivery of the deed to the register would have been, in legal contemplation, a delivery to him." See also *Maynard v. Maynard*, 10 Mass. 456; *Samson v. Thornton*, 8 Met. 281;

Jackson v. Phipps, 12 Johns. 419; *Jackson v. Leek*, 12 Wend. 105. So, in this case, the delivery of the deed to Jones did not vest the title in the defendant; and before she knew of its existence and had an opportunity to accept it, the title passed upon the death of Peck to the plaintiffs by operation of law.

The judgment of the District Court is affirmed.

Zane, Ch. J., and Blackburn, J., concur.

IOWA SUPREME COURT.

Max J. BAEHR

v.

A. A. CLARK, Appt.

(.....Iowa.....)

A bona fide purchaser of diamonds from one who obtained them from their owner, under the fraudulent representation that he had a customer for them, and would return them or their price in an hour, with the intention of appropriating them to his own use, acquires no title as against the bailor.

(October 5, 1891.)

APPEAL by defendant from a judgment of the District Court for Pottawattamie County, in favor of plaintiff in an action to recover possession of certain diamonds. *Affirmed.*

Statement by **Rothrock, J.:**

Action of replevin for a diamond ring and a diamond stud. The plaintiff and the defendant each claim to be the owner of said property. The cause was submitted to a jury, and, the jury being unable to agree upon a verdict, by agreement of the parties the issue was afterwards submitted to the court without a jury, on the evidence taken by the short-hand re-

porter at the jury trial. The court, upon an examination of the evidence, found for the plaintiff. Defendant appeals.

Messrs. Flickinger Bros., for appellant:

Even if a criminal act had been committed by Barker this would in no way or manner determine the passing of the title to the property. Property does pass if the vendor so intends, however fraudulent the devices of the buyer may be to induce that intention.

Benjamin, Sales, § 437, and authorities cited.

In cases of fraud, criminal or otherwise, as between the parties, the property passes subject to the right of rescission on the ground of fraud, unless the rights of innocent third parties intervene.

Oswego Starch Factory v. Lendrum, 57 Iowa, 578; *Babcock v. Lawson*, L. R. 4 Q. B. Div. 394; *Plummer v. People's Nat. Bank*, 65 Iowa, 405.

Plaintiff, in stating the contract made with Barker, brings the case fairly within section 1922 of the Code, which provides: "No sale, contract or lease, wherein the transfer of title or ownership of personal property is made to depend on any condition, shall be valid against any creditor or purchaser of the vendee or lessee in actual possession, and obtained in pursuance thereof, without notice, unless same be in writing executed by the vendor or lea-

NORM.—When the vendee of personal property will not acquire title.

The principle is well recognized in the established rules regulating the sale of personal property, that no person can transfer title to another's property, unless the owner by some direct and unequivocal act has clothed him with the indicia of ownership. *McGoldrick v. Willits*, 52 N. Y. 612.

The reasoning in the case last cited is controlling upon *McGoldrick v. Willits*, *supra*. The defendant bought the plaintiff's whiskey from a third person who had neither real nor apparent authority from the owner to sell it. The ruling was that the vendee could acquire no better title, merely because it was disclosed by the evidence that he purchased in good faith. The rule *caveat emptor* applies, if any rule at all be necessary, to show that you cannot get a title to my property by a purchase, no matter how high your faith, from one who has no authority from me, real or apparent, to sell it.

One having possession of personal property as a bailee for hire, with an executory and conditional agreement for its purchase, which conditions have not been performed, can give no title thereto to a purchaser, although the latter acts in good faith and parts with value, and is without notice of the want of title of his vendor. *Ballard v. Burgett*, 40 18 L. R. A.

N. Y. 814; *Walt v. Green*, 86 N. Y. 568; *Austin v. Dye*, 46 N. Y. 500.

A purchaser of chattels takes them, as a general rule, subject to whatever may turn out to be infirmities of the title. *Farmers & M. Nat. Bank v. Logan*, 74 N. Y. 568.

And it is a rule of extended application, that no person can transfer any greater title than he himself has in the thing transferred. 2 Kent, Com. 324; *Saltus v. Everett*, 20 Wend. 267, 275; *Brower v. Peabody*, 13 N. Y. 121; *Peer v. Humphrey*, 2 Ad. & El. 495; *Dows v. Perrin*, 16 N. Y. 825; *Covill v. Hill*, 1 Denio, 323, 327; *Whistler v. Forster*, 14 C. B. N. S. 248; *Ballard v. Burgett*, 40 N. Y. 814.

The sale of chattels by one not in possession of the legal title conveys to the transferee no title in the goods, even where the purchase is for value and in entire good faith. This rule is supported by well-recognized authority. *Boyce v. Brockway*, 31 N. Y. 490; *Brower v. Peabody*, 13 N. Y. 121; *Hoffman v. Carow*, 22 Wend. 285; *Spaulding v. Brewster*, 50 Barb. 142; *Dudley v. Hawley*, 40 Barb. 397; *Cobb v. Dows*, 10 N. Y. 335; *Murray v. Burling*, 10 Johns. 172; *Everitt v. Coffin*, 6 Wend. 604; *Saltus v. Everett*, 20 Wend. 270; *Connah v. Hale*, 23 Wend. 462; *Covill v. Hill*, 1 Denio, 323; *La Place v. Aupoix*, 1 Johns. Cas. 407; *Diabrow v. Tenbroeck*, 4 R. D. Smith, 397.

F. S. R.

sor, acknowledged and recorded the same as chattel mortgages."

A sale is "the transfer of an absolute or general property in a thing for a price or money," and a conditional sale is such transfer subject to conditions, etc.

See Benjamin, Sales, chap. 1; *Warner v. Jameson*, 52 Iowa, 70; *Singer S. Mach. Co. v. Holcomb*, 40 Iowa, 83; *Moline Plow Co. v. Braden*, 71 Iowa, 141, citing *Push v. Weston*, 52 Iowa, 675, and *Thorpe v. Fowler*, 57 Iowa, 541. See also *Thatcher v. Union Scale Co.* 74 Iowa, 117.

Messrs. A. W. Askwith and Wright & Baldwin, for appellee:

If Barker never had the title to the diamonds, any attempted transfer of title by him would confer none on his vendee.

Gimble v. Ackley, 12 Iowa, 27; *Frane v. Young*, 24 Iowa, 375.

Baehr did not sell the diamonds to Barker, but Barker obtained them under the false and fraudulent representation that he wanted to show them to a purchaser, and he had no intention of showing the diamonds to a purchaser at the time he got possession of them. The court could not reach any other conclusion. Such acts amount to a crime.

State v. Anderson, 47 Iowa, 142; *State v. House*, 55 Iowa, 466; *State v. Joaquin*, 43 Iowa, 131.

Baehr never intended to pass title to Barker.

Rothrock, J., delivered the opinion of the court:

1. The court made special findings of the facts which it was thought were established by the evidence. We need not set out these findings in detail, but will recite such as are deemed material to a determination of the rights of the parties upon an appeal. The plaintiff is a dealer in diamonds at the City of Omaha, in the State of Nebraska. In the month of December, 1888, one J. J. Barker made his appearance at the plaintiff's place of business, and represented that he had a customer for a diamond ring and stud, and desired to examine the plaintiff's goods. He selected the ring and stud now in controversy, and the plaintiff delivered them to him to take them and show them to the party who desired to make the purchase. The sum of \$450 was fixed as the price of the diamonds, and Barker was to return them, or return with the price, in an hour. The plaintiff saw no more of Barker for two or three days, when he succeeded in having an interview. Barker at first stated that he had been robbed of the diamonds; said he had been knocked down and robbed, and called attention to certain bruises on his face and marks on his fingers. The plaintiff threatened to have Barker arrested, and then he stated he had lost the diamonds at a gambling-house; and afterwards he stated that they were in possession of the defendant, Clark, at Council Bluffs. It was afterwards ascertained that Barker, after obtaining possession of the diamonds, crossed the Missouri river to Council Bluffs and stopping at a gambling-house kept by one Carrigg. While there he was in urgent need of money, and Carrigg advanced money to him, from time to time, and took and held the diamonds as security. When these advances amounted

to \$247 Carrigg, refused to make further advancements, and he and Barker went to the defendant with the diamonds, and sold them to him for the sum of \$275 and Clark paid Carrigg, the keeper of the gambling-house, the sum of \$247, and he paid Barker the balance, being \$28. Barker represented to the defendant that the diamonds belonged to him. There are other facts disclosed in evidence as to efforts made by plaintiff to obtain payment for the property, and offers to purchase the diamonds from Clark, which are of no importance in the case. The plaintiff did no act which would in law estop him from asserting any claim he may have had at any time to recover the property from Clark. The court found that Clark was an innocent purchaser for value, and we incline to think that finding was correct. The only real question in the case is whether Clark is entitled to the property as an innocent purchaser? Other facts might be stated which authorize the conclusion that Barker obtained the possession of the goods by fraudulent representations, but enough has been stated to show that the court was fully authorized in finding that Barker had no customer for valuable diamonds. The fact that he did not return in an hour, but repaired to a gambling-house and pledged the diamonds to the keeper of the house, fully warrants the finding that he obtained possession of the property by fraud. If the plaintiff had sold and delivered the diamonds to Barker upon these representations, and Barker had resold to the defendant, he being an innocent purchaser, the plaintiff could not maintain this action. It is well settled that when goods are obtained from their owner by fraud, and the facts show a sale to the party guilty of the fraud, an innocent purchaser of the goods from the fraudulent vendee for value, and without notice of the fraud, will take the title. The true inquiry is, Did the owner intend to transfer both the property in and possession of the goods to the person guilty of the fraud. If he did, there is a contract of sale, however fraudulent the device, and the property passes, and subsequent innocent purchasers for value will be protected. *Rowley v. Bigelow*, 12 Pick. 312; *Perkins v. Anderson*, 65 Iowa, 398; 1 *Parsons*, Cont. 520. And see *Oswego Starch Factory v. Lendrum*, 57 Iowa, 578, in which the rule announced is recognized, but held not applicable to an attaching creditor of the fraudulent vendee. *Robinson v. Pogue*, 86 Ala. 257; *Hutchinson v. Watkins*, 17 Iowa, 475; *Chicago Dock Co. v. Foster*, 48 Ill. 507.

But this rule has no application unless there is an actual sale of the property by the alleged vendor. If one delivers property to another as a mere bailee, a purchaser from the bailee acquires no title, however innocent he may be. He has no more right to assert title to the property than if it had been stolen, and his purchase had been from the thief. The principle upon which this distinction rests is that the vendor in the cases last supposed does not part with the title to the property, nor does he have any such intention, and the fraudulent possessor of the property can convey no title to any third person, however innocent; for no property has passed to himself from the true owner. *Benjamin, Sales*, 369; *Rohrbough v. Leopold*, 66 Tex. 254; *Church v. Melville*, 17 Or. 418.

It is very plain that the transaction between the plaintiff and Barker did not pass the title of the diamonds to Barker. He did not pretend or claim that he wanted to purchase diamonds. He was intrusted with the possession of them merely as the agent of the plaintiff, and instead of returning them, he embezzled them by pawning them in a gambling-house, and by subsequently, in connection with the keeper of the house, selling them to the defendant. The authorities appear to be uniform that in such case the purchaser from a mere agent or bailee acquires no title, even though he pay value, and has no notice of the embezzlement, and that the rule *caveat emptor* applies. It is idle to contend that Barker did not have the criminal intent to embezzle the diamonds when he obtained possession of them from the plaintiff. There is no evidence that he had any friend who was in need of diamonds. All of his acts subsequent to the time he acquired possession indicate that his purpose, from the inception of his enterprise, was not to procure a purchaser for the property, but to appropriate it to his own use. There are no other questions in the case which demand consideration.

The judgment of the District Court is affirmed.

REYNOLDS & CHURCHILL, *Appts.*,

v.

G. W. HANES *et al.*

(.....Iowa.....)

The proceeds of a policy of insurance on the books and instruments of a physician, which are by statute exempt from sale under execution for his debts, are also exempt.

(October 9, 1891.)

APPPEAL by plaintiffs from a judgment of the District Court for Fayette County in favor of defendants in a proceeding by garnishment to enforce payment of a judgment in favor of plaintiffs out of the proceeds of a policy of fire insurance, upon certain books and instruments belonging to defendant Hanes, which had been destroyed by fire. *Affirmed.*

The facts are stated in the opinion.

Messrs. George H. Phillips and Ainsworth & Hobson, for appellants:

The proceeds of exempt insured property are not exempt while in the hands of the insurer, in the absence of a statutory provision making it so.

Wooster v. Page, 54 N. H. 125, 20 Am. Rep. 128; *Smith v. Ratcliff*, 66 Miss. 688.

There are numerous cases in Iowa which are in favor of the position of appellants.

See *Webb v. Holt*, 57 Iowa, 712; *Cranz v. White*, 27 Kan. 319; *Spelman v. Aldrich*, 126 Mass. 118; *Connell v. Fisk*, 54 Vt. 381; *Trip-lett v. Graham*, 58 Iowa, 185; *Goble v. Stephenson*, 68 Iowa, 270; *Robion v. Walker*, 82 Ky. 60, 56 Am. Rep. 878; *Friend v. Garcelon*, 77 Me. 25, 52 Am. Rep. 739; *Kellogg v. Waite*, 12 Allen, 529; *Cook v. Holbrook*, 6 Allen, 572.

The proceeds of personal property exempt from execution, voluntarily sold by the owner, are not exempt.

Harrier v. Fassett, 56 Iowa, 264.

While life insurance policies may be exempt from execution under our Statute, property acquired by sale or assignment thereof is not.

Friedlander v. Mahoney, 81 Iowa, 811.

The proceeds of a policy of insurance upon the life of the husband or wife are not exempt from the debts of the survivors after the proceeds shall be realized.

Smedley v. Felt, 43 Iowa, 607.

The Exemption Law cannot be legally or properly construed to apply to exemptions not therein given.

Mitchell v. Joyce, 69 Iowa, 121; *Charles v. Lamberson*, 1 Iowa, 435; *Christy v. Dyer*, 14 Iowa, 438; *Elston v. Robinson*, 23 Iowa, 208; *Givans v. Dewey*, 47 Iowa, 414.

Mr. D. W. Clements, for appellee:

The law applicable in this case should receive a liberal construction, and one that will carry out the spirit and object sought, as well as the letter of the Statute.

Bevan v. Hayden, 18 Iowa, 125; *Davis v. Humphrey*, 22 Iowa, 137, 140; *Kaiser v. Seaton*, 62 Iowa, 463, 466.

The more liberal construction given by this and other courts of last resort, not only includes articles embraced in the letter, but also those coming within the spirit and intent of the Statute.

Under a statute exempting a cow, her butter was held to be also exempt, although not enumerated.

NOTE.—*Exemption Laws should receive a liberal construction.*

The Statute exempting certain property of the debtor from execution should be fairly construed to enable the debtor to enjoy such property. If when such property is wrongfully taken from the debtor against his will, the law does not afford him an adequate remedy for the injury and protect him in its enforcement, the Statute is to the extent of the failure rendered nugatory. Such construction should be adopted as will secure the debtor in the enjoyment of the exempt property, and afford him an adequate and complete remedy for a violation of his right. *Andrews v. Rowan*, 28 How. Pr. 123.

Even an agreement "to waive all exemptions to property" creates no estoppel, and in the eye of the law such a contract is hard, oppressive and unconscionable, and totally void as in contravention of L. R. A.

tion of the spirit of our statutes, and of public policy. *Harper v. Leal*, 10 How. Pr. 276.

A statute exempting property from levy and sale is not to be construed strictly, but so as to carry out the obvious intention of the law-maker. *Washburn v. Goodheart*, 38 Ill. 229; *Haines, Treatise*, 387, note.

Where personal property was insured, and a fire renders an insurance company liable to replace the furniture destroyed or its equivalent in money, it has been held that for a reasonable time the debtor has a right to the money due from the insurance company, to replace the articles of household furniture, if he has not used other means for that purpose. *Cooney v. Cooney*, 65 Barb. 524.

Exemption in favor of debtors is favored by liberal interpretations. The Exemption Law of a State bars an execution on a judgment in favor of the United States. *Fink v. O'Neil*, 106 U. S. 280, 37 L. ed. 199.

Leavitt v. Metcalf, 2 Vt. 342, 19 Am. Dec. 718.

The proceeds of a voluntary sale of an exempt cow were held exempt.

Mulliken v. Winter, 2 Duv. 256.

A judgment for damages by reason of the seizure and sale of an exempt horse on execution was held exempt.

Tillotson v. Wolcott, 48 N. Y. 188.

The proceeds of exempt property in excess of a chattel mortgage thereon were exempt.

Evans v. St. Paul Harvester Works, 63 Iowa, 204; *Brainard v. Simmons*, 67 Iowa, 646. See also *Davis v. Humphrey*, 22 Iowa, 187; *Patterson v. Johnson*, 59 Iowa, 397, 400.

Where exempt property is invaded and converted in whole or in part into a money claim, against the will of the owner, the money collected thereon is exempt, at least for a reasonable time.

Kaiser v. Seaton, 62 Iowa, 463; *Stebbins v. Peeler*, 29 Vt. 289; *Keyes v. Rines*, 37 Vt. 260; *Mitchell v. Milhoan*, 11 Kan. 617; *Houghton v. Lee*, 50 Cal. 101; *Cooney v. Cooney*, 65 Barb. 524; *Tillotson v. Wolcott*, 48 N. Y. 188.

A judgment for damages to the homestead by fire was held exempt.

Mudge v. Lanning, 68 Iowa, 641.

Also money in the hands of the sheriff under condemnation proceedings for railroad right of way.

Kaiser v. Seaton, *supra*. See also *Chicago S. W. R. Co. v. Swinney*, 38 Iowa, 182.

Beck, C. J., delivered the opinion of the court:

1. The plaintiffs caused process of garnishment to be issued against the Capitol Insurance Company upon a judgment against defendant, claiming that the insurance company is a debtor of defendant upon a policy issued to him upon which there had been a loss of the property insured. A motion to dismiss the proceeding was sustained, upon the grounds, which were not disputed, that the property insured was exempt from execution, being books, instruments, etc., used by defendant, who was a physician and surgeon, in the practice of his profession.

2. The question presented for decision by the record is this: Are the avails of insurance upon personal property which is exempt under the Statute from debts of the assured also exempt? The Statute (Code, § 3072) declares that "if the debtor is a resident of this State,

and is the head of a family, he may hold exempt from execution" certain personal property, which includes the books, instruments, etc., of a physician, the property covered by the policy of insurance in this case. There is no provision as to the exemption or liability of the proceeds or avails of such property when disposed of by sale or otherwise.

3. The purpose of the Statute is to secure to the debtor, who is the head of the family,—a physician and surgeon in this case,—the instruments, books and other articles which enable him to practice his profession. Its purpose is to secure the necessities of life—food, raiment and shelter—to families who are dependent upon heads thereof, by securing to them the instruments and means by the use of which they are enabled to support their families. The exemption is plainly for the benefit of families of debtors, for those having no family can claim no exemption. The Statute must be liberally construed, to carry out its purpose and spirit. *Bevan v. Hayden*, 18 Iowa, 129; *Davis v. Humphrey*, 22 Iowa, 139; *Kaiser v. Seaton*, 62 Iowa, 463.

The debtor in the case before us was authorized, under the Statute, to hold the property in question exempt from debts, if it were used for the purpose of his profession. It is plain that the use for which the property was kept determined the question of its exemption. The books, instruments, etc., of the physician and surgeon may be kept subject to the authority to change them, by sale or otherwise, in order to procure those of better character or improved construction. It is plain that the physician may sell his books, and replace them by better ones. Such sale is a proper use of his books and instruments in his profession. Another proper use of his books and instruments is their preservation from injury and destruction. He may insure them, to protect himself and family from loss from fire. The fact that they were insured would not make them subject to his debts. If they are destroyed by fire, the indemnity secured by insurance stands in the place of the books. It is intended to preserve the physician's library by securing means for its restoration after it is lost by fire. Surely that indemnity which is the indebtedness of the insurance company, or the money paid by it, stands in the place of the library, and ought to be, as it is, exempt from execution. The money due on the policy stands in the place of

Exemption Laws seek to promote the general welfare of society by taking from the head of a family the power to deprive it of certain property by contracting debts which will enable creditors to take such property in execution. Parties ought not, therefore, to be permitted to contravene the policy of the law by contract. *Kneettle v. Newcomb*, 22 N. Y. 249; *Crawford v. Lockwood*, 9 How. Pr. 547; *Harper v. Leal*, 10 How. Pr. 276. *Contra*, *McKinney v. Reader*, 6 Watta, 84; *Case v. Dunmore*, 23 Pa. 36; *Lauck's App.*, 24 Pa. 426; *Bowman v. Smiley*, 31 Pa. 225; *Anderson, Law Dict. title, Exemption*.

In most of the States, and probably in the larger number of cases in all the States where this exemption is claimed, it must be done by the debtor for whose benefit the provision of the Statute applies. In Illinois at least, however, where the subject of garnishment is wages due an employé, and such

wages are exempt, it is the duty of the employer when garnished to make the claim for him. Thus, if a railroad company pay over to the plaintiff, when it is garnished, wages exempt by law, when the employé to whom such wages are due is the head of a family, it will still be liable to the employé. *Chicago & A. R. Co. v. Ragland*, 24 Ill. 375.

So in Vermont, where the garnishee knows that money in his hands was received for a pension due the defendant from the government, and is for that reason exempt, he cannot be charged, and should at least bring this fact to the knowledge of the court, if not make a complete defense against the proceeding by which he is sought to be held as garnishee. *Hayward v. Clark*, 50 Vt. 612; *Adams v. Newall*, 8 Vt. 190; *Lock v. Johnson*, 36 Me. 464; *Pierce v. Chicago & N. W. R. Co.* 36 Wis. 238; *Webb v. Holt*, 57 Iowa, 712; 2 Wade, *Attachm.* § 401.

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the property destroyed, and this must be true whether the money takes the place of the property by contract, or is acquired *in itinere* by proceedings against the owner.

It is plain that a trespasser, by appropriating the property and converting it to his own use, cannot make it subject to the payment of the owner's debts by holding the value of the property the measure of the debtor's damages for the trespass, subject to garnishment by the creditors. If he could do this, it would be a convenient method to defeat the exemptions of the Statute. As we before remarked, the object of the Statute is to secure to the family the benefit of certain property. These benefits cannot be enjoyed unless the debtor have the unrestricted use and control of the property, free from liability for debts as long as it is owned and used by him. When it is used for other purposes than the support of the family it becomes liable for debts. But the change of the property into money will not indicate an immediate abandonment of the claim of exemption to the money on the ground of a purpose to invest it in like or other exempt property. Until an opportunity exists to make such investment, which is not a change of articles of exempt property, the debtor ought not to be presumed to abandon his claim. The debtor, as we have seen, has the authority to change the articles of exempt property by sale and purchase, exchange, or otherwise. He cannot

be presumed to have abandoned his right to this authority until he has had an opportunity to exercise it. The creditor cannot complain of its exercise. He is defeated of no right thereby. The property is held free of his debt, and he is not prejudiced by the change to the other like property.

These doctrines and conclusions find support in the following decisions of this court: *Kaiser v. Seaton*, 62 Iowa, 468; *Mudge v. Lanning*, 68 Iowa, 641. See also cases cited in *Kaiser v. Seaton*, *supra*, and the following: *Evans v. St. Paul Harvester Works*, 68 Iowa, 204; *Brainard v. Simmons*, 67 Iowa, 646; *Leavitt v. Metcalf*, 2 Vt. 342; *Mulliken v. Winter*, 2 Duvall, 256; *Tillotson v. Walcott*, 48 N. Y. 188.

Counsel for plaintiffs cite *Wooster v. Page*, 54 N. H. 125. It is not in harmony with our conclusions. We think that the reasoning upon which it is based is not sound. Other cases cited by the same counsel are not in conflict with our conclusions. They are to the effect that sales of exempt property, with no purpose to reinvest the avails in other like property, or to exchange the articles of exempted property, or are cases involving the exemption of pension money, and some other cases involving like questions, none of which are in conflict with our conclusions in this case.

We reach the conclusion that the judgment of the District Court ought to be affirmed.

NORTH CAROLINA SUPREME COURT.

JAMESVILLE & WASHINGTON R. CO.,

Appt.,

v.

A. FISHER.

(....N. C....)

An infant may be appointed a deputy sheriff unless otherwise provided by statute, although under the State Constitution he cannot be an "officer."

(October 12, 1891.)

APPEAL by plaintiff from a judgment of the Superior Court for Beaufort County dismissing the action for want of legal service of process. *Reversed.*

Statement by Avery, J.:

This was a civil action originally instituted before a justice of the peace, and brought by appeal to the Superior Court of Beaufort County, in which court it was tried at the May

Term, 1890, before Whitaker, J. The return of the officer upon the summons was as follows: "Received March 24, 1890. Served March 24, 1890, by reading the within summons to A. Fisher. R. T. Hodges, Sheriff. By J. H. Hodges, D. S."

Both in the court of the justice of the peace and in the superior court the defendant entered a special appearance, and moved to dismiss for want of service, because James H. Hodges, who actually served the summons as deputy for R. T. Hodges, was at the time of serving it under the age of twenty-one years. It was admitted in both courts that he (James H.) was not twenty-one years old on said 24th March, 1890, when said summons was served by him. From the judgment of the court dismissing the action the plaintiff appealed.

Mr. John H. Small for appellant.

Mr. Charles F. Warren, for appellee:

By Const. art. 6, §§ 1, 4, the age at which

NOTE.—Infants as deputy sheriffs.

At common law the office of sheriff might be granted to one in fee, and the grant was not void although the office might descend to an infant. *Keynol's Case*, 9 Coke, 97b.

The reason assigned by Abbott, Ch. J., for the validity of such grants was that responsible deputies might be appointed on behalf of infants in case the office descended to them. *Claridge v. Favyn*, 5 Barn. & Ald. 81.

An infant could not be appointed general deputy sheriff, but might be deputed to serve a particular writ. *McCracken v. Todd*, 1 Kan. 169.

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Under the Vermont statutes a special deputation for the service of a particular writ is valid. *Barrett v. Seward*, 22 Vt. 17a.

It has also been held valid in New Hampshire. *Moore v. Graves*, 3 N. H. 411.

Women as deputy clerks.

In strict analogy to the doctrine of the principal case are the following authorities holding that a woman, though incompetent to hold the office of clerk of court, may lawfully be appointed deputy clerk. *Warwick v. State*, 25 Ohio St. 21; *Jeffries v. Harrington*, 11 Colo. 191; *Wilson v. Genesee Circuit Judge* (Mich.) Oct. 6, 1891.

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persons may become officers is fixed at twenty-one years.

By section 2067 of the Code it is provided that no person shall be eligible to the office of sheriff who is not of the age of twenty-one years, etc.

If the position of deputy sheriff is an office under the laws of North Carolina, then it would seem to be reasonably clear under the Constitution of North Carolina and the Statute above referred to that a minor is ineligible.

In *Cuckson v. Winter*, 2 Mann. & R. 813, service by an infant acting as deputy was held as illegal.

Avery, J., delivered the opinion of the court:

A sheriff is liable to answer in damages for any wrongful act of his deputy done under color of his office, for which the sheriff would have incurred such liability had he done the act himself, and in all such cases he and his deputy are, in contemplation of law, one person. *Murfree, Sheriffs*, §§ 20, 59, 60, 62. So far has this doctrine, as to all wrongful acts of the deputy done *colore officii*, been carried by this court, that a demand on a defaulting deputy for money collected by him in that capacity has been declared equivalent to a demand on the sheriff. *Lyle v. Wilson*, 26 N. C. 226.

While a deputy is professing to act, and inducing others to believe that he is acting, under color of his office, his personality, like that of other agents, seems to be merged, in legal contemplation, in the person of the sheriff under whose directions, as principal, he is supposed to act. *Murfree, Sheriffs*, §§ 20, 61. The service of the summons is a mere ministerial duty which can be performed by a deputy, where the law gives the right to appoint one, and even as between him and third persons his official acts are considered those of the sheriff, done by his lawfully constituted agent. The right to appoint under-sheriffs or bailiffs and deputies is not always, if generally, regulated by statute. These subordinates are the servants and agents of the sheriff, and his responsibility for them and relations with them are controlled generally by the law governing the relation of principal and agent. *Id.* §§ 16, 60. While policy may have induced the courts to hold his responsibility in some instances to be greater, never less, than that of a principal for the acts of his agent within the scope of the agency, our Code is still silent as to the manner of appointment or the distinct duties of both general and special deputies, while this court has declared that there is no provision of the common law which requires the deputation of a sheriff to be in writing, and that, in any action against a sheriff for the misconduct of a person alleged to be his deputy, it is not necessary to prove a deputation, but it is sufficient simply to show that the person acted as deputy with the consent or privity of the sheriff. *State v. Allen*, 27 N. C. 86; *State v. McIntosh*, 24 N. C. 53.

In some of the States statutes have been enacted providing for the appointment of general deputies and bailiffs, and prescribing certain duties and liabilities arising out of the position; and the interpretations of these laws have given rise to some confusion, and apparent conflict,

in the decisions of different States. In some of these States we find distinctions drawn by the courts as to the duties, powers, and liabilities of general deputies, coming within the provisions of their statutes, and special deputies, who are left as at common law to be treated as the trusted servants or agents of the sheriff. *Proctor v. Walker*, 12 Ind. 660.

In North Carolina, both general and special deputies may be appointed by the sheriff without writing, and, when they act with his assent or privity, they are either his general or special agents as to the discharge of his ministerial duties, and are accountable to him as such. An individual can unquestionably constitute an infant his agent, and subject himself to responsibility for all acts of the latter within the scope of the agency. *Wharton, Ag.* §§ 15, 16; *1 Lawson, Rights, Remedies & Practice*, § 6; *Story, Ag.* § 7.

In the absence of statutory restrictions, we see no reason why a minor, appointed by the sheriff as his general or special deputy, should not have the power to perform a mere ministerial duty of his office, such as serving a summons issued in a civil action. *Murfree, Sheriffs*, § 71; *McGee v. Eastis*, 3 Stew. (Ala.) 307; *Barrett v. Seward*, 22 Vt. 176; *Miller v. McMullan*, 4 Ala. 530; *Ewell, Evans, Ag.* *40, 41. Indeed, *Judge Story* says (in a note to section 149 of his work on Agency): "There is a distinction between doing an act by an agent and doing an act by a deputy, whom the law deems such. An agent can only bind his principal when he does the act in the name of his principal. But a deputy may do the act and sign his own name, and it binds the principal; for the deputy, in law, has the whole power of the principal." This citation is made not to give approval to the distinction drawn by him, but to show that the learned jurist considered a deputy as sustaining the relation of an agent to the officer who appoints him. If a deputy-sheriff were, by law, constituted an officer, and the mode of appointing him and inducing him into office were prescribed, as in some of the States, our view of this case might be materially different. *Guyman v. Burlingame*, 36 Ill. 203; *Murfree, Sheriffs*, § 72.

The qualifications of an officer are clearly set forth in sections 4 and 5 of article 6 of the Constitution, and it is declared essential that he should be "twenty-one years old;" but we find no provision in our Constitution or laws which restricts the right to appoint agents on the one hand, or the liability for their acts on the other. In *YeARGIN v. Siler*, 83 N. C. 848, *Justice Dillard*, for the court, says: "The rule in matters judicial is *delegatus non potest delegare*; but in duties ministerial the officer may act in person or by deputy, of his own choice and appointment." We think that, in the absence of any statutory restriction, the sheriff has the power to appoint a minor his general, as well as his special, deputy, and clothe him with the power of a bailiff, as to his ministerial duties, as effectually as he could constitute him his agent to attend to private business for him as an individual. *Broom, Legal Maxims*, 619. The current of authority in this country sustains this view. It is true that in the English case cited by counsel (*Cuckson v. Winter*, 2 Mann. & R. 813) the court held that it was

highly improper for a sheriff to intrust the service of a warrant in replevin to an infant, because the deputy was authorized to take possession of the goods, and was responsible for the custody of them, and that service of the warrant by the infant was illegal. The learned judge who tried the case below was doubtless influenced by this authority in holding the service void in our case. But the conclusion of the court in *Cuckson v. Winter* seems to be based upon the idea that a defendant, whose goods were taken for rent, had no remedy for an unlawful seizure except against the deputy. That difficulty is met by holding that the sheriff is civilly responsible for the unlawful acts of his deputy to the extent to which he would be liable if he had acted in his own proper person; and that he selects and appoints his agents at his own hazard, third parties having no interest in the security he may exact from them. *Murfree, Sheriffs*, §§ 20, 59, 60, 64. Thus in every way the courts of this country have, in the absence of specific statutory provisions, ad-

justed the powers of sheriffs and their deputies, and their liabilities to the public and to each other, according to the rules which determine the duties and responsibility of principal and agent, and have recognized the right of the sheriff to select such agents for the discharge of mere ministerial duties, as an individual could appoint and constitute for the transaction of private business, even though he might intrust the duty to a person not *sui juris*. *Id.* §§ 71, 75, and references; *Yeargin v. Siler*, *supra*. Mr. Wharton says, in substance, that the only qualification of the rule that infants may act as agents, and bind their principals, is that the infant agent must not be very deficient in mental capacity. Wharton, Ag. § 15.

We think that the judge below erred in sustaining the demurrer, and the judgment is therefore reversed. The cause will be remanded, to the end that the defendant may be allowed to answer if he be so advised.

Judgment reversed.

SOUTH CAROLINA SUPREME COURT.

John J. McCLURE, Admr., etc., of George W. Melton, Deceased,
v.

Margaret A. MELTON *et al.*, *Respts.*,
W. Holmes HARDIN, Intervenor, *Appt.*

(.....S. C.....)

1. The doctrine of subrogation cannot be invoked for the enforcement of a judgment against the estate of one who agreed to pay it as part of the consideration for property which he bought, subject to its lien, in favor of one who afterwards bought the property from him with notice of the judgment, and who was compelled to pay it for his own protection, where there was no privity between him and the one

with whom the agreement was made, and the judgment was against the latter and primarily payable out of the property purchased.

2. A mortgage on property given to secure payment of its purchase price cannot be kept alive against the mortgagor's estate in favor of one to whom the property was afterwards transferred, and who for his own protection had to make a payment contemplated by the mortgage, where it was never a lien on any other property of the mortgagor.

3. Sealed notes which have been surrendered up and canceled by a valid arrangement between the parties thereto, cannot afterwards form a legal cause of action in favor of a stranger against their maker's estate.

4. No damages can be recovered for

NOTE.—Voluntary covenants, how far enforceable.

The tendency of the early cases was specifically to enforce a voluntary covenant, especially where it was founded on a meritorious consideration; thus: *Elms v. Nimmo*, Lloyd & G. 383, held that an agreement by a father to make provision for his married daughter upon consideration of natural affection would be specifically enforced in equity against the father as being founded on a meritorious consideration. This case was questioned in *Holloway v. Headington*, 8 Sim. 324, and overruled in *Jefferys v. Jefferys*, 1 Craig & P. 138, where a covenant by a father to surrender certain copyhold estates for the benefit of his daughters was refused execution against the father's widow, who had gone into possession of them after his death. See also *Dillon v. Coppin*, 4 Myl. & C. 647; *Moore v. Crofton*, 3 Jo. & LaT. 442.

A covenant in a deed by a man to his grandchildren, granting slaves on consideration of love and affection, that the grantor will defend the title to the slaves, will sustain an action in favor of the grantees. *Stovall v. Barnett*, 4 Litt. 208.

Covenants founded upon a good or meritorious consideration are enforced specifically in equity. *Hayes v. Kershaw*, 1 Sandf. Ch. 258, 7 L. ed. 321.

But collateral consanguinity is not a meritorious consideration within the rule. *Ibid.*, citing *Ed-*
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wards v. Jones, 1 Myl. & C. 226; *Meek v. Kettlewell*, 1 Hare, 464, 1 Phill. 342; *Buford v. McKee*, 1 Dana, 107.

These cases rest largely upon authority like the following: A voluntary agreement by a father with a child to convey land will be specifically executed. *Mahan v. Mahan*, 7 B. Mon. 579; *Bright v. Bright*, 5 B. Mon. 194; *Molntire v. Hughes*, 4 Ky. 186, citing *Husband v. Pollard*, cited in *Randal v. Randal*, 2 P. Wms. 487; *Cotton v. King*, 2 P. Wms. 857; *Goring v. Nash*, 3 Atk. 185; *Hardham v. Roberts*, 1 Vern. 122; *Bradley v. Bradley*, 2 Vern. 163; *Tudor v. Anson*, 3 Ves. Jr. 563; *Sarth v. Blanfrey*, Gilb. 168.

A sealed contract by a father to convey to his daughter land of which he put her in possession will, on her application, be specifically enforced in equity. *Haines v. Haines*, 6 Md. 435.

But it has been said that voluntary conveyances are not enforced in equity. *Anthony v. Harrison*, 14 Hun, 206, citing *Ellison v. Ellison*, 6 Ves. Jr. 651; *Jefferys v. Jefferys*, 1 Craig & P. 137; *Buford v. McKee*, 1 Dana, 107; *Hayes v. Kershaw*, 1 Sandf. Ch. 258, 7 L. ed. 321; *Duvoll v. Wilson*, 9 Barb. 437.

And where a man in consideration of love and affection executed a deed to his grandchildren, which contained a covenant of *seisin*, the grantees were not permitted to maintain an action against the grantor's executors to compel them to pay off

breach of a covenant of warranty in a deed given in consideration of love and affection, under a statute limiting the recovery in case of breach of covenants of warranty, to the amount of purchase money paid, with interest thereon.

5. The grantee in a quitclaim deed, without warranty, who takes the property with notice that it is subject to a judgment lien, cannot, upon paying the judgment for his own protection, maintain an action against his grantor to recover the amount paid; and it is immaterial that the latter may have assumed payment of the lien by contract with a third person.
6. An injunction preventing the bringing of suits against a decedent's estate, which does not prevent creditors from coming in and proving their claims in the case in which the injunction was granted, will not prevent a claim from becoming barred by the Statute of Limitations if it is not presented within the statutory period.
7. An action cannot be maintained upon a simple contract to relieve property from the lien of a judgment, after the expiration of six years, although one entitled to benefit by the obligation is not damaged by its breach, in having to pay the judgment himself until after the expiration of that time.

(September 14, 1891.)

APPEAL by the intervening petitioner from a judgment of the Common Pleas Circuit Court for Chester County dismissing his petition, setting up a claim against the estate of George W. Melton, deceased, in an action by Melton's administrator to marshal the assets of his estate. *Affirmed.*

The decree rendered by the court below is as follows:

"The cause entitled J. J. McLure, administrator of George W. Melton, was instituted by the administrator against M. A. Melton and others to facilitate the settlement of the estate

a mortgage on the property out of the assets of their testator. Duvoll v. Wilson, 9 Barb. 487.

In *Marling v. Marling*, 9 W. Va. 70, the court extensively reviews the authorities, and holds that *Ellis v. Nimmo*, Lloyd & G. 333, is approved by the weight of American authorities, and decides that a court of equity will effectuate a gift of lands by a father to his child.

Marshaling grantor's estate in favor of grantees.

In case of a voluntary settlement of real estate in favor of children, with covenants that it should remain to the proper use and for quiet enjoyment, where the grantor afterwards mortgaged the settled estate and died, the children were held entitled to throw the mortgages on the unsettled estate and as against the legatees to prove under the covenant against the settlor's assets for the damages sustained by breach of the covenant. *Hales v. Cox*, 32 Beav. 118.

Where a father made a voluntary settlement under seal on his sons with covenant to warrant and defend, and subsequently compromised an ejectment suit for the property by receiving a money consideration, the sons were permitted to maintain a bill to compel payment out of his assets after his death of the amount which he received from the compromise. *Williamson v. Codrington*, 1 Ves. 8r. 511.

Where deed apparently voluntary, with cove-

of G. W. Melton, which was insolvent. Creditors of the estate were enjoined from proceeding against it save through that action, and were required to establish their demands in it. W. Holmes Hardin claims to be a creditor of the estate, and seeks by this petition to be allowed to establish his demand. The facts upon which petitioner supports his demands are as follows: On the 25th of November, 1867, C. D. Melton sold and conveyed to G. W. Melton a dwelling-house and land adjacent for a large sum of money. Notes were executed by G. W. Melton to C. D. Melton for the purchase price, and these notes secured by a mortgage of the premises. When the note which had the longest time to run matured C. D. and G. W. Melton had a settlement on 25th November, 1871. It was agreed that G. W. Melton should assume the payment of several judgments, which had been obtained against C. D. Melton prior to the conveyance of the house and land to G. W. Melton and which were liens upon the property, and which in the aggregate were about equal in amount to the aggregate sum due upon G. W. Melton's notes. Upon this understanding the notes and mortgage of G. W. Melton were canceled and given up to him. G. W. Melton, in pursuance of this agreement, paid all the judgments which were liens upon the land save one, known as the 'Wright judgment.' That judgment, at the time the others were paid, was in litigation, its validity as a lien being in controversy. Its validity as a lien was finally established. It was obtained 15th November, 1867. In the mean time the house and land had been conveyed by G. W. Melton to trustees, with warranty, in trust for his wife and children. G. W. Melton died insolvent, and had not paid the Wright judgment. The trustees who had the title to the property asked and obtained leave of the court to sell it with a view of making a more advantageous investment for the *cestuis que trustent*. At the sale thus ordered the petitioner here,

nants of seisin in fee of the premises, charged the grantor's estate with an annuity upon breach of covenant a fund was set apart from the personal estate of the grantor to answer the annuity. *Giles v. Roe*, 2 Dickens, 570, citing *Whaley v. Norton*, 1 Vern. 493; *Matthew v. Hanbury*, 2 Vern. 187; *Anandale v. Harris*, 1 Eq. Cas. Abr. 31; *Priest v. Parrot*, 2 Ves. Jr. 160.

Damages for breach.

In contrast with the main case is the decision that, on the consideration of natural affection, damages may be recovered for a breach of the covenant of warranty in a deed, as a gift by way of advancement to the grantor's granddaughter; and that where a money consideration is expressed in the deed the damages will be limited to that amount with interest thereon. *Hanson v. Buckner*, 4 Dana, 251.

In case of a deed of settlement, after grantor's death, on his nephews and nieces in consideration of love and affection, with covenants for further assurance and a subsequent will of the same property to others after his death, a bill against the executors to compel performance of the covenant was dismissed (*Ward v. Audland*, 8 Sim. 571); and permission refused to prove the claim in an administration suit; but a verdict was returned against the executor for breach of the covenant. *Hervy v. Audland*, 14 Sim. 531.

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W. Holmes Hardin, became the purchaser for the sum of \$5,000. In a little more than a year after his purchase he sold to another for the sum of \$6,000. All this while the Wright judgment was in litigation, and, as before said, its validity and as a lien upon this house and land was finally established. All the time of these transfers this judgment had been of record in the register's office of Chester County, and upon the final determination of the contest as to it W. Holmes Hardin's vendee, James C. Hardin (who had it under a warranty deed from W. Holmes Hardin) was in possession. After further litigation, which need not be set out here, the Wright judgment was levied upon the house and land. W. Holmes Hardin was informed by his vendee that he rested upon his warranty; and because there was no further ground of resistance W. Holmes Hardin paid to the sheriff of Chester County the amount, principal, interest, and costs, of the Wright judgment, and thus made good his warranty to James C. Hardin. W. Holmes Hardin claims upon this state of facts that he is a creditor of the estate of G. W. Melton, and that he should be allowed to set up both the mortgage of G. W. Melton to C. D. Melton and the Wright judgment, which he has paid. The force of the mortgage of G. W. Melton to C. D. Melton related only to the house and land upon which it was a lien. To restore to it now all the force it ever had would not aid petitioner in the collection of a claim against G. W. Melton's estate, for it would not constitute a lien upon any property of that estate. The same may be said of the Wright judgment. That was a judgment against C. D. Melton, obtained in a proceeding to which G. W. Melton was not a party. The doctrine of subrogation cannot impart new and enlarged scope to instruments, but only prevent extinguishment, in support of an equity. It is the relegation to another's right; nor is the right enlarged by the transfer. If, therefore, the mortgage and judgment were both restored to their original vigor, they could have no relation to the estate of G. W. Melton. G. W. Melton promised to pay the Wright judgment, and reserved money due C. D. Melton with which to do so. This promise did not make him liable on the judgment. The ground of his liability was his promise. This promise was made in November, 1871, and of course has been long since barred by the Statute of Limitations. It is therefore ordered that the prayer of the petitioner be denied."

To this decree Hardin filed the following reasons for exception: "(1) Because his honor erred in holding that the petitioner had no right to prove the amount paid by him in satisfaction of the Wright judgment against the estate of George W. Melton, when the petitioner was the assignee of the covenant of warranty of George W. Melton against incumbrances and for quiet enjoyment, and said covenant was broken by the levy of the execution issued on said judgment on the Chester property and the payment of the same by the petitioner, and he was entitled to prove the same according to the rank of his said debt under the Statute. (2) Because, the case of *J. J. McClure, Administrator, v. M. A. Melton and Others*, being still before the referee, the fund still in court arising 13 L. R. A.

from the sale of the real estate of the intestate, the administrator not having accounted for his administration, and there being a large sum of money in his hands undistributed, it was error in his honor not to allow the petitioner to prove in this action the breach of the covenant of warranty of George W. Melton, of which the petitioner was the assignee, and his payment of the Wright judgment, as a debt against the estate of the said G. W. Melton. (3) Because his honor erred in not holding that when W. Holmes Hardin paid the Wright judgment he was entitled to be subrogated to all the rights which the estate of C. D. Melton had in the agreement between C. D. and G. W. Melton of November 25, 1871, and through that instrument to prove it as a judgment debt against the estate of George W. Melton. (4) Because, when W. Holmes Hardin paid the Wright judgment, he paid the unpaid part of the purchase money of the Chester real estate, on which C. D. Melton held a mortgage of G. W. Melton, and Hardin is entitled to be subrogated to all the rights of the former in said mortgage, and has a right to have it kept alive for his benefit, so that he may prove it against the estate of George W. Melton as a mortgage debt; and his honor erred in not so finding. (5) That his honor erred in holding that the petitioner's claim was in any sense barred by the Statute of Limitations."

Mr. S. P. Hamilton, for appellant:

Having paid the balance of the purchase money, we claim:

1. To be subrogated to all the right in the four sealed notes and mortgage held by the estate of C. D. Melton necessary to reimburse us for that part of the purchase money which we have been obliged to pay, and to be allowed to prove the amount before the referee as a mortgage debt.

2. If it is objected that the mortgaged property has been conveyed away, the mortgage and notes canceled, and the mortgage has no longer a lien on the Chester property in the hands of the purchaser, then the debt for the purchase money was never paid by G. W. Melton and we are entitled to prove it as a sealed-note creditor.

3. That having paid the Wright judgment, a debt which G. W. Melton promised to pay as part of the purchase money of the Chester property by the agreement of 1871, we are entitled to set it up as a judgment in the distribution of assets of the estate. That for such purpose we are entitled to have the equity which C. D. Melton would have to set the judgment up as part of the purchase money of the Chester property through the agreement of 1871.

Burrows v. McWhann, 1 Desaus. Eq. 409; *Sheldon, Subrogation*, p. 10; *Perkins v. Kershaw*, 1 Hill, Ch. 351. See *Eddy v. Traver*, 6 Paige, 521, 8 L. ed. 1186.

Subrogation has been exercised in behalf of a stranger who pays the debt of another, if it appears that it was intended as a purchase of the debt and not satisfaction.

Bispham, Eq. § 337, p. 314.

If C. D. Melton was alive or his administrator after his death had been compelled to pay the Wright judgment, his brother being dead

and insolvent, he could have disregarded the agreement of 1871, it being a promise of an inferior degree, it being a promise to pay a judgment, and through that the balance due on sealed notes and mortgage for the purchase money of the Chester property.

Fraser v. Hest, 2 Strobb. Eq. 250; *Boulware v. Harrison*, 4 Rich. Eq. 317.

The Statute of Limitations did not begin to run until the Wright judgment, being the balance of the purchase money, was paid, December, 1888. In the case of a surety or guarantor paying the debt of the principal debtor, the right of action accrues from the time of payment.

Peters v. Barnhill, 1 Hill, L. 234.

Meers. G. W. S. Hart, G. J. Patterson and J. & J. Hemphill, for respondents.

McIver, J., delivered the opinion of the court:

The principal case in which the petition of appellant has been filed was an action brought by the plaintiff, as administrator of George W. Melton, deceased, against his heirs and creditors, to marshal the assets of the estate of said George W. Melton, which is insolvent, and it was commenced on the 17th of July, 1877. On the 24th of August, 1877, an order was passed in said case enjoining all creditors of George W. Melton "from suing on said claims, or prosecuting their actions at law thereon against said administrator, until the further order of this court." On the 13th of October, 1877, another order was passed, whereby, among other things, all creditors were required to prove their demands before the clerk on or before the 15th of January, 1878; and on the 14th of November, 1881, A. G. Brice was substituted as referee in place of the clerk, who, after holding several references, made his report on the 1st of February, 1884, ascertaining the debts proved, and classifying them according to their legal priorities. To this report some of the creditors filed exceptions to the classifications adopted by the referee, and his report with the exceptions thereto came before his honor Judge Wallace, who, on the 20th of May, 1885, rendered judgment sustaining the exceptions, but in all other respects confirming the report of the referee. From that judgment some of the mortgage creditors appealed, and on the 22d of April, 1886, the supreme court rendered judgment affirming the judgment of Judge Wallace. 24 S. C. 559. The case was then carried by writ of error to the Supreme Court of the United States, where the writ of error was dismissed [133 U. S. 880, 34 L. ed. 600], and the mandate from that court, together with the remittitur from the supreme court of this State, was filed in the circuit court on the 4th of June, 1890. In the mean time the real estate of the said George W. Melton had been sold, and a considerable portion of the proceeds of such sale remain in the hands of the clerk; and it is conceded that there are assets yet in the hands of the administrator, who has not yet formally accounted.

On the 25th of June, 1890, the appellant filed his petition in the cause, praying for leave to come in and prove his alleged claim against the estate of George W. Melton. His claim is based upon the following allegations contained 18 L. R. A.

In his petition: That Mrs. Wright, on the 15th of November, 1867, recovered a judgment against C. D. Melton, which became a lien on certain real estate in and adjoining the Town of Chester; that on the 25th of November, 1867, C. D. Melton conveyed said real estate to his brother, George W. Melton, with general warranty, and received from his brother four notes under seal, bearing that date, and secured by a mortgage of the premises; that when the last of these notes became payable, to wit, on the 25th of November, 1871, an agreement in writing not under seal, was entered into by the Melton brothers, whereby George W. Melton assumed the payment of certain specified judgments, including that in favor of Mrs. Wright, which had been previously obtained against C. D. Melton, and were liens upon said real estate, and thereupon the said C. D. Melton canceled and surrendered the said four notes, together with the mortgage to secure the payment of the same, to the said George W. Melton, but the record of said mortgage still remains uncanceled; that thereafter, to wit, in August, 1875, the said George W. Melton conveyed the said real estate, with the usual covenants of warranty, to certain trustees for the benefit of his wife and children; that in January, 1880, the said trustees, being duly authorized so to do, sold and conveyed the said real estate to the appellant, who bought in entire ignorance of the agreement above mentioned between the Melton brothers; that in April, 1881, the said appellant sold and conveyed the said real estate to James C. Hardin, with the usual covenants of warranty; that on the 13th of July, 1886, the Wright judgment, which had not been paid by George W. Melton in his lifetime or by anyone since his death, was levied upon the real estate in the possession of James C. Hardin, and the appellant, in exoneration of his covenant of warranty, having no defense to an action thereon, paid up the Wright judgment; wherefore the appellant claims that by the payment of said judgment he became the assignee of the covenant of warranty in the deed of George W. Melton to the said trustees; and that, having been compelled to pay the Wright judgment, which George W. Melton had undertaken to pay by his agreement of the 25th of November, 1871, the appellant stands as a surety to George W. Melton's estate, "and is entitled to set up said judgment in equity in his own favor in the marshaling of the assets of the estate of the intestate." Again, appellant claims that by the payment of the Wright judgment he in effect paid the balance of the purchase money due by George W. Melton for the said real estate, over which C. D. Melton held a mortgage, and appellant "is entitled to have the benefit of said mortgage as against the estate of George W. Melton, and to have leave to set it up as a mortgage debt against his estate, and to be subrogated to all the rights of the estate of C. D. Melton in said mortgage." To this petition the creditors of George W. Melton who have heretofore established their claims filed an answer, admitting all of the allegations of the petition except the following, which they deny: That appellant has become a creditor of the estate of George W. Melton; that appellant bought the real es-

tate "in entire ignorance of the agreement" set forth in the petition; that petitioner had no defense to an action on the covenant of warranty contained in his deed to James O. Hardin; and that appellant, by the payment of the Wright judgment, became an assignee of the covenant of warranty in the deed from George W. Melton to the trustees. They also plead the Statute of Limitations.

It is conceded that the deed from George W. Melton to the trustees was a voluntary deed, based upon the consideration of natural love and affection only; and we presume that the deed from the trustees to the appellant contained no warranty. The testimony adduced on the part of the appellant was that of Maj. Hamilton, who stated that he was the attorney of George W. Melton, and as such drew the deed to the trustees, as well as the proceedings under which the trustees obtained leave to sell, and conducted the sale made by them to appellant, and that at that time the Wright judgment was supposed by all parties to be no judgment and no lien upon the property sold, and that the agreement between the Melton brothers, of the 25th of November, 1871, was not known to witness or anyone engaged in the case until it was produced in evidence by W. A. Clark in 1884. G. W. S. Hart, a witness examined for respondents, testified that he, with his partner, were the attorneys of Mrs. Wright, and they first learned that George W. Melton had assumed the payment of the Wright judgment some time in the latter part of 1881 or early part of 1882, prior to July, 1882; but the appellant, it is admitted, had no personal knowledge of such assumption at the time he purchased. It appears from the statements made in the case that C. D. Melton died in December, 1875, and George W. Melton in July, 1876, both being insolvent. The case was heard by his honor Judge Wallace, who rendered judgment dismissing the petition, and from his judgment the petitioner appeals upon the several grounds set out in the record. Inasmuch as the decree of the circuit judge, together with appellant's exceptions thereto, should be incorporated in the report of the case, it is unnecessary for us to state them particularly here.

The fundamental inquiry in the case is whether the appellant has any such claim against the estate of George W. Melton as entitled him to the aid of the court in enforcing it. Whatever claim he may have is unquestionably based upon the fact that he has paid the Wright judgment, the payment of which was assumed by George W. Melton by the agreement of 25th of November, 1871; but, as such payment was not made for the purpose of relieving the estate of C. D. Melton, but solely for the purpose of relieving the property from the lien of said judgment, which the appellant had bought with notice of the judgment, and conveyed with warranty to another, in order to perform his covenant of warranty, it is difficult for us to understand what equity he has to be subrogated to the rights which the holder of that judgment or to the rights which C. D. Melton's estate may have had against the estate of George W. Melton. There was no privity whatsoever between the appellant and C. D. Melton. He was not a surety of C. D. Melton, and in no

way bound to pay said judgment for him. Indeed, practically, he paid no debt for which the estate of C. D. Melton was in equity and good conscience liable; for, though such estate was legally liable to pay such judgment, yet in equity and good conscience it was really payable out of the property which the appellant saw fit to buy with notice that it was subject to such lien. But, in addition to this, as the circuit judge well says, the judgment was against C. D. Melton and not against George W. Melton, who was never liable to pay the amount thereof as a judgment, but only liable by reason of his agreement of 25th of November, 1871, which was a mere simple contract obligation, and hence we do not see how it is possible, under any view of the case, for the Wright judgment to be set up as a judgment against the estate of George W. Melton.

As to appellant's claim to set up the mortgage originally given by George W. Melton to C. D. Melton to secure the payment of the purchase money of the Chester property, the same remark as that just made in reference to the Wright judgment may be made. That mortgage never was a lien on anything but the Chester property, and did not cover any other portion of the property belonging to the estate of George W. Melton; and hence it could not be proved as a mortgage debt against the assets of the estate of George W. Melton, under the principle decided in *McClure v. Melton*, 24 S. C. 559; but, if set up at all, it must take the same rank as the debt which it was given to secure, to wit, that of a sealed note.

It is necessary, therefore, to inquire whether the appellant can set up the sealed notes as a claim of that rank against the estate of George W. Melton. These notes were extinguished by the arrangement between the Melton brothers of the 25th of November, 1871, when they were canceled and surrendered to George W. Melton, and they cannot now constitute any legal cause of action against the estate of George W. Melton; and whatever equities C. D. Melton or his estate may have had, as intimated in the case of *Hardin v. Clark*, 32 S. C., at pages 435, 436, the appellant has no connection with, so far as we can see. He cannot claim as assignee of the covenant of warranty contained in the deed from C. D. Melton to George W. Melton, as was held in the case just cited, and we do not see what claim he could have against the estate of George W. Melton, as assignee of the covenant of warranty contained in the deed from George W. Melton to the trustees, for, that being a voluntary deed, and the measure of damages for breach of a covenant of warranty being fixed by statute at the amount of the purchase money paid, with interest from the time of the alienation, where there was nothing paid, nothing could have been recovered. If the trustees had been evicted, they certainly could have recovered nothing from the estate of George W. Melton for the breach of the covenant of warranty contained in the voluntary deed under which they held; and the appellant, as their assignee, could have no higher rights than his assignors. If therefore, the appellant has any claim at all upon the estate of George W. Melton, it must arise from the agreement of 25th of November, 1871, whereby George W. Melton assumed the pay-

ment of the Wright judgment. But how can the appellant connect himself with that agreement? That was made for the benefit of C. D. Melton, and possibly might have inured to the benefit of the holder of the Wright judgment; but appellant is neither the assignee of C. D. Melton nor of the holder of the Wright judgment. It seems to us that the true position of the appellant is that of a purchaser of real estate under a quitclaim deed, without warranty, upon which there rested the lien of a judgment, of which he had not only constructive notice unquestionably, arising from the record, which would have been sufficient, but also, as it would seem, actual notice, if we are at liberty to refer to the decision in *Hardin v. Clark*, *supra*, offered in evidence in this case, at the time he purchased, and has seen fit to remove such lien by payment in order to protect himself against an action for breach of his covenant of warranty in his deed to his vendee. If this be so, then it is plain that he has no cause of action against the estate of George W. Melton; for, if so, then, in every case where a person who sells real estate covered by a judgment or other lien, of which his vendee has notice, and conveys the same without warranty, the vendor would be liable for any amount which the vendee might be called upon to pay for the purpose of removing such lien; and this could hardly be pretended, as it would destroy all distinctions between a quitclaim deed and a warranty deed. The fact that the vendor may have assumed the payment of such lien by a contract with a third person, with whom the vendee has not been able to connect himself cannot alter the case, as such third person might at any time he saw fit release the vendor from the performance of such contract. But, even if appellant could connect himself with the agreement of 25th of November, 1871, that would create a simple contract obligation, which could not be enforced by action after the lapse of six years,—not four, as contended by one of the counsel for respondents, as the change in the statutory period was effected by

the Code, which was adopted 1st of March, 1870, and not by the Revised Statutes of 1872. So that it is clear that C. D. Melton or his administrator would have been barred of his action on such promise long before the petition in this case was filed, unless protected by the order of injunction; and the appellant, who certainly could not claim any higher rights, would be in like condition.

We must consider, then, the effect of the order of injunction, which was granted before the expiration of the six years. It will be observed that this order only restrained creditors from prosecuting their actions at law and did not prevent them from coming in and proving their demands in the case in which the order of injunction was granted. On the contrary, they were called upon to do so by a time fixed for that purpose,—15th of January, 1878. But the appellant not only failed to come in within six years from that date and present his demand, but he failed to do so within six years from the filing of the report on claims,—1st February, 1884; so that, even if appellant ever had any claim against the estate of George W. Melton, growing out of his promise to C. D. Melton to pay the Wright judgment, it was barred by the Statute before he filed his petition or presented his claim, which, according to what was held in *Warren v. Raymond*, 17 S. C., at pages 203, 204, must be regarded as the time when he commenced his action. The fact that the appellant filed his petition—commenced his action—within six years after he paid the judgment cannot affect the question, for, without considering the question whether he could have brought his action before making such payment, it is sufficient to say that he can claim no higher rights than C. D. Melton, and certainly he and his administrator were barred long before the appellant instituted this proceeding.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

McGowan, J.: I concur.

MICHIGAN SUPREME COURT.

Noe ROUX, *Appt.*,

v.

BLODGETT & DAVIS LUMBER CO.

(..... Mich.)

1. A servant does not, by continuing his work at the command of the superintendent of the mill, assume the risk of

injury from dangerous machinery which had, prior to the previous day, been enclosed, and which, upon his complaint, the superintendent promised to but did not re-enclose the previous night, although he promised in response to the servant's further complaint to fix it at noon, so as to prevent recovery for injuries received by coming in contact with the machinery during the forenoon.

2. The mere fact that a servant comes in

NOTE.—Jury should determine the question of negligence.

If there is any conflict in the testimony in a negligence case, either as to the defendant's negligence or the contributory negligence of the person killed or injured by such negligence, the case must go to the jury; but if, upon either one of these points, there be no conflict, then it becomes a question of law, and a verdict should be directed. *Mynning v. Detroit*, L. & N. R. Co. 7 West. Rep. 324, 64 Mich. 38; *Underhill v. Chicago & G. T. R. Co.* 81 Mich. 43.

The great weight of authority, both English and 13 L. R. A.

American, favors the proposition that the question of negligence should be submitted to the jury. Questions of this nature are properly for their determination. *Merritt v. Fitzgibbons*, 29 Hun, 634; *Hall v. Union Pac. R. Co.* 16 Fed. Rep. 744; *Terre Haute & I. R. Co. v. Jones*, 11 Ill. App. 322; *Milwaukee Nat. Bank v. City Bank*, 108 U. S. 608, 25 L. ed. 417; *Brann v. Chicago, R. I. & P. R. Co.* 53 Iowa, 595; *Bierbach v. Goodyear Rubber Co.* 14 Fed. Rep. 823, 15 Fed. Rep. 490; *Baltimore & O. R. Co. v. Fitzpatrick*, 35 Md. 33; *Davis v. Central Cong. Soc.* 129 Mass. 337; *Hunt v. Salem*, 121 Mass. 294; *Grand Rapids & L.*

contact with exposed machinery the danger of which is well known to him but the risk from which he has not assumed is not sufficient to show contributory negligence as matter of law if his work was in its immediate vicinity and required close attention, rapidity of action, and considerable moving about; but the question is for the jury.

(May 8, 1891.)

ERROR to the Circuit Court for Menominee County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.* The facts are fully stated in the opinion.

Mr. H. O. Fairchild, with **Mr. B. J. Brown**, for plaintiff in error.

Messrs. Sawyer & Waite for defendant in error.

McGrath, J., delivered the opinion of the court:

This was case for negligence. The court below took the case from the jury on the ground that plaintiff was guilty of contributory negligence, and plaintiff appeals. Roux was employed in defendant's saw-mill, upon the band-saw. It was his duty to take the cants from the saw, and guide them over the rollers, which took them to the gang-saw. The logs were brought to the saw from the north end of the mill, and upon a carriage-way, which extended about thirty feet to the south from the saw. Immediately east of this carriage-way, and running parallel therewith, was a system of rollers upon which the cants fell as they were cut from the logs. The first two rollers were dead, and stood three feet and six feet, respectively, to the south of the saw, and then came an open space of four feet, and then a system of five live rollers, forming a kind of a table through which the rollers projected. The power was communicated to these rollers, on the easterly ends thereof, by means of bevel-

gear wheels running into each other on the horizontal shaft along-side of the table, several inches below the top of the rollers. This shaft was operated by an upright shaft, coming through the floor from below, on the top of which was a bevel-gear wheel, which worked into a similar one keyed to the horizontal shaft. The head sawyer's place was near the second dead roller, south of the saw, and plaintiff's usual place was in and upon a space between the second dead roller and the first live roller, and his duty was to bring the board or cant down upon the rollers, and guide it upon its journey to the wheel-skids, which carried it to the edger or gang-saw. These wheel-skids were on the easterly side of the rollers. The carriage which brought the logs to the saw passed back and forth with each cut in front of plaintiff, and to the west of the rollers. East of the rollers was an open space, about four feet wide, at the point where the accident occurred. When the board or cant struck the rollers it would be between plaintiff and the carriage-way. Up to the day before the accident the gearing referred to had been covered by boards adjusted upon hinges and brackets. This covering had been split up and destroyed by the action of the boards in falling upon it, and in being carried along its surface, leaving the gearing exposed; and on the day before the accident plaintiff called the attention of the mill superintendent to this condition of the gearing, and the latter promised to attend to it that night. But when plaintiff went to the mill the next morning nothing had been done, and he again called the superintendent's attention to the exposed and dangerous condition of the gearing, and the superintendent stated that he had not had time, but that he would fix it at noon; directing plaintiff to go to work, but to take care of himself till noon, and that it would then be fixed. At about 10 o'clock of the same day plaintiff had his leg crushed by having his clothing caught, and his leg drawn into the bevel-gear wheels, at the junction of the upright

R. Co. v. Martin, 41 Mich. 667; Fortune v. Missouri R. Co. 10 Mo. Apr. 52; Watkins v. Atlanta Ave. R. Co. 20 Hun, 237; Hanover R. Co. v. Coyle, 55 Pa. 306; Clark v. Eighth Ave. R. Co. 32 Barb. 667; O'Mara v. Hudson River R. Co. 38 N. Y. 445; Bills v. New York Cent. R. Co. 84 N. Y. & Central R. Co. v. Freeman, 66 Ga. 170; Garrett v. Chicago & N. W. R. Co. 38 Iowa, 121; Bierbach v. Goodyear Rubber Co. 14 Fed. Rep. 826, 15 Fed. Rep. 490; Sleeper v. Worcester & N. R. Co. 58 N. H. 520; Corcoran v. New York Elev. R. Co. 19 Hun, 938; Bell v. New York Cent. & H. R. R. Co. 29 Hun, 560; Mahar v. Grand Trunk R. Co. 19 Hun, 32; Thomas v. New York, 28 Hun, 110; Rexter v. Starin, 73 N. Y. 601; Philadelphia & R. R. Co. v. Long, 75 Pa. 267; Pittsburgh, C. & St. L. R. Co. v. Wright, 80 Ind. 182.

It is a sound rule of law that it is not contributory negligence not to look out for danger when there is no reason to apprehend any. Beach, Contrib. Neg. 41, and cases cited.

The authorities cited go much farther than the text, and state the rule to be that everyone has a right to presume that others, owing a special duty to guard against danger, will perform that duty. Grand Rapids & L. E. Co. v. Martin, 41 Mich. 667.

The question is one of some difficulty, and is not free from doubt. But in such cases the facts should be submitted to the jury. Palmer v. Harrison, 57 Mich. 183; Dundas v. Lansing, 75 Mich. 499.

13 L. R. A.

Where the essential fact in a case is whether contributory negligence did or did not exist, and this depends upon inferences to be drawn from facts and circumstances about which honest, intelligent, and impartial men might differ, such a case should be submitted to the jury. Lowell v. Watertown Twp. 58 Mich. 588; Carver v. Detroit & S. Plank-road Co. 61 Mich. 584; Harris v. Clinton Twp. 7 West. Rep. 668, 84 Mich. 447; Little v. Grand Rapids Street R. Co. 78 Mich. 205; Brezee v. Powers, 80 Mich. 172.

What is the test of contributory negligence.

The test of contributory negligence or want of due care is not found in the failure to exercise the best judgment or to use the wisest precaution, but allowance may be made for the influences ordinarily governing human action, as what would under some circumstances be want of reasonable care may not be such under others. Lent v. New York C. & H. R. R. Co. 120 N. Y. 467.

The contributory negligence which prevents recovery for an injury must be such as co-operates in causing the injury and without which the injury could not have happened. Lehigh Valley R. Co. v. Greiner, 4 Cent. Rep. 898, 113 Pa. 600; Fernandes v. Sacramento City R. Co. 52 Cal. 45; Ray, Negligence of Imposed Duties, Personal, 364.

shaft with the horizontal shaft. These wheels move towards each other, while the other wheels on the horizontal shaft at the rollers move from each other. When injured, plaintiff was engaged in righting a cant, which was two inches thick, somewhere from twelve to fourteen inches in width, and about twenty-four feet long, the southerly end of which had gotten off the rollers and into the carriage-way, and plaintiff was endeavoring from the east side of the rollers to get the plank back upon the rollers. It appeared from the testimony that plaintiff was required to work rapidly; that nothing could be done at the band-saw till this plank was out of the way; that in the mean time three or four men were standing idle; and that the work at the gang-saws depended upon the progress of the work at the band-saw, and that it was not unusual for cants to require adjustment upon the rollers. It is urged that plaintiff's knowledge of the exposed and dangerous condition of this gearing was equal to that of his employers, and by continuing his work he assumed the risk.

This rule of law is not applicable to the circumstances of the present case. The risk to which plaintiff was exposed on the day of the injury was not one ordinarily incident to his employment. The danger was not one existing at the time of his engagement. It was a temporary peril. It did not arise until the day before the injury. In view of the danger this very machinery had been covered up. Plaintiff, acting as a prudent man should, had, on the evening before, and again on the very morning of the accident, notified defendant of the fact that the gearing was exposed, and defendant had, in recognition of the danger, and of plaintiff's exposure thereto, promised to replace the covering, and instructed the plaintiff to continue his work until noon, when it should be done. There was no voluntary assumption of the risk on the part of the plaintiff. He proceeded under protest. It was defendant's bounden duty, when notified, to re-cover this gearing. It was postponed to suit defendant's convenience, and not that of the plaintiff.

As was said in *Greene v. Minneapolis & St. L. R. Co.*, 31 Minn. 248: "If the emergencies of a master's business require him temporarily to use defective machinery, we fail to see what right he has in law or natural justice to insist that it shall be done at the risk of the servant, and not his own, when, notwithstanding the servant's objection to the condition of the machinery, he has requested or induced him to continue its use under a promise thereafter to repair it."

Mr. Cooley, in his work on Torts (sections 555, 559) says: "It has been often—and very justly—remarked, that a man may decline any exceptionally dangerous employment; but if he voluntarily engages in it he should not complain because it is dangerous. Nevertheless, where one has entered upon the employment and assumed the incidental risks, it is not reasonable to hold that other risks, which he is directed by the master to assume, are to be left to rest upon his shoulders merely because he did not take upon himself the responsibility of throwing up the employment, instead of obeying the order. Many considerations might reasonably induce the servant to hesitate under

such circumstances. In many cases the consequences might be very serious should he refuse to obey a lawful command of the master; and any command may not be clearly and manifestly unlawful which directs the doing of nothing beyond the general scope of the business. The servant who refuses to obey must consequently expect to take upon himself the burden of showing a sufficient cause for the refusal. However clear the case might be to him, it might not be easy to make a showing satisfactory to third parties, who would naturally assume that the order was given in good faith, and that the master understood better than another the risks to be encountered in his business. The servant also, it may reasonably be assumed, would to some extent have his fears allayed by the commands of a master, whose duty it would be not to send him into danger, and who might therefore be supposed to know, when he gave the command, that the dangers were not such or so great as the servant had apprehended." "It is also negligence for which the master may be held responsible, if, knowing of any peril which is known to the servant also, he fails to remove it in accordance with assurances made by him to the servant that he will do so. This case may also be planted on contract, but it is by no means essential to do so. If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for argument that the servant by continuing the employment engages to assume its risks. So far as the particular peril is concerned, the implication of law is rebutted by the giving and accepting of the assurance; for nothing is plainer or more reasonable than that parties may, and should, where practicable, come to an understanding between themselves regarding matters of this nature."

Deering on Negligence, § 196, says: "Where injury results not from anything that is incident to the employment, but from a temporary peril, to which he is exposed by the negligent positive acts of the employer, he can recover."

1 Shearman & Redfield on Negligence, § 209, says: The servant cannot avoid responsibility "if he continues to work for any considerable time, knowing these facts, without being induced by his master to believe that a change will be made, and without making any complaint of such defects, or calling the attention of his master to them." The doctrine laid down by these authors is supported by a long line of well-considered cases.

In *Greene v. Minneapolis & St. L. R. Co.*, *supra*, plaintiff was in the service of defendant as locomotive engineer on a train running between Minneapolis and Albert Lea. On reaching the former place in the morning with his train, upon examining his engine he discovered that the "chafing irons" between the engine and tender were partly broken off. He immediately reported the fact on the "repair-book" to the foreman of the round-house, whose duty it was to have the repairs made, and to direct what engine should go out. On returning in

the evening to go out with his train he found the engine out, but not repaired. On inquiring of the foreman why the repairs had not been made, the reply in substance was that he had not had time. On plaintiff suggesting that he did not like to take out this engine, that it was not safe, the foreman replied that he was short of engines to do the work of the road, and had no other to send out, and added: "Proceed with that, and you can get it fixed at Lea, if you have time; if not, I will remedy it when you get back." The plaintiff did so, and on the way collided with another train (for which he does not appear to be responsible), and in attempting to escape was caught between the engine and tender, the defects in the "chafing irons" causing the engine to override the tender, and close up the gangway through which he was attempting to escape.

In *Manufacturing Co. v. Morrissey*, 40 Ohio St. 148, plaintiff was working upon a jointer which was out of repair.

In *Clarke v. Holmes*, 7 Hurlst. & N. 937, plaintiff was employed to oil dangerous machinery. When he entered upon the service certain of the machinery was fenced, but the fencing became broken by accident.

In *Hough v. Texas & Pac. R. Co.*, 100 U. S. 213, 25 L. ed. 612, there was a defect in the locomotive which plaintiff had in charge. "There can be no doubt," says the court, "that where a master has expressly promised to repair a defect the servant can recover for an injury caused thereby, within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept."

In *East Tennessee, V. & G. R. Co. v. Duffield*, 12 Lea, 63, plaintiff was supplied with a defective hammer to drive railroad spikes. He testified: "Of course, I was obliged to see that the hammer was broken. Any man who wasn't blind could have seen the condition of the hammer. I knew when I saw it that it wouldn't do to drive spikes with, and that is why I spoke to the section boss about it."

In *Missouri Furnace Co. v. Abend*, 107 Ill. 44, a locomotive foot-board was defective, from which deceased fell, while oiling the engine.

In *Parody v. Chicago, M. & St. P. R. Co.*, 15 Fed. Rep. 205, the injury was occasioned by a defective draw-bar.

In *Laning v. New York Cent. R. Co.*, 49 N. Y. 521, the court says: "Where the servant has full and equal knowledge with the master that the machinery or materials employed are defective, or that the fellow servant is incompetent, and he remains in the service, this may constitute contributory negligence; but if it appears that the master has promised to amend the defect, or other like inducement to remain has been held out to the servant, the mere fact of his continuing in the employment does not, of itself, as matter of law, exonerate the master from liability, but the question of contributory negligence is one of fact for the jury." See also *Pieart v. Chicago, R. I. & P. R. Co.* (Iowa, 1891) 47 N. W. Rep. 1017; *Kane v. Northern Cent. R. Co.* 128 U. S. 91, 32 L. ed. 339; *District of Columbia v. McElligott*, 117 U. S. 621, 631, 29 L. ed. 946-949; *Galveston, H. & I. R. A.*

S. A. R. Co. v. Drew, 59 Tex. 18; *Patterson v. Pittsburg & C. R. Co.* 76 Pa. 3-9; *Mehan v. Syracuse, B. & N. Y. R. Co.* 73 N. Y. 586; *Booth v. Boston & A. R. Co. Id.* 86; *Coombs v. New Bedford Cordage Co.* 102 Mass. 572-578; *Greenleaf v. Dubuque & S. C. R. Co.* 33 Iowa, 53.

This principle has been recognized and approved by this court. In *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205, the servant was justified in obeying the orders of his superior. *Justice Cooley* (p. 212) says: "The risk was not fairly upon the servant's shoulders," and again: "We agree with the Supreme Court of Pennsylvania, that when a servant, in obedience to the orders of his superior, incurs the risks of machinery which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable that it may be safely used by extraordinary caution or skill, the case is not to be regarded as one of concurring negligence,"—citing *Patterson v. Pittsburg & C. R. Co.* 76 Pa. 389-394.

In *Stonoboda v. Ward*, 40 Mich. 420-423, the court, after laying down other general rules, says: "If the servant, with full knowledge of the facts, and understanding the risks occasioned thereby, in the absence of any promise by the master to remedy the same, consents to and remains in the master's employ, then he voluntarily incurs such increased risks." See also *Lytle v. Chicago & W. M. R. Co.* 84 Mich. 289. *Jones v. Lake Shore & M. S. R. Co.*, 49 Mich. 573, recognizes the right of the servant to show that he did not consent or agree to the change or performance of extra duties, and that he did not freely and voluntarily enter upon a discharge of new duties imposed. The new duties in that case involved extra hazard.

It is insisted, however, that the dangerous condition and character of this machinery was known to plaintiff, and that he was guilty of concurring negligence in approaching it; that he did not exercise ordinary care, and might have gone around on the other side of the rollers, and thus have avoided the danger. Knowledge of the existence of a defect or danger, while it is evidence of contributory negligence, is not conclusive. In the cases already referred to the existence of the danger was known to plaintiff, and in all of them it is held that the question of defendant's contributory negligence is for the jury.

In *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572-578, it is said: "Inattention which has led to a collision or a fall, if duly accounted for, or if excused, or occasioned by the nature of the employment, is no hindrance to a recovery when the injury is legally imputable to a defect without which the fall would not have occurred, or the collision would have been harmless. Thus attention might be prevented by the darkness of night, or by the duty to couple cars at a particular moment, or, as is contended in this case, to separate them. Knowledge is only one piece of evidence bearing on the question of negligence; and how much it should bear depends on all the circumstances, and is for the consideration of the jury."

In *Byerly v. Anamosa*, 79 Iowa, 204, held, that the question of plaintiff's contributory negligence in driving a horse along a street

with knowledge of conditions rendering it dangerous was for the jury, as such act was not *per se* negligence.

In *Harris v. Clinton Twp.*, 64 Mich. 447, 7 West. Rep. 606, the court says: "It is not a universal rule that the defendant is excused from liability merely because the plaintiff, knowing of the danger caused by defendant's negligence, voluntarily incurs that danger. If the defendant has so acted as to induce the plaintiff, acting with reasonable prudence, to incur the danger, or if plaintiff, by defendant's negligence, is placed in a situation of peril, to escape which he voluntarily incurs another danger, the defendant is liable, although the plaintiff may not, in the emergency, have pursued the course which ordinary prudence would have dictated."

In *Kane v. Northern Cent. R. Co.*, *supra*, the court says: "In determining whether an employé has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position,—indeed, to all the circumstances of the particular occasion."

In *Greenleaf v. Dubuque & S. C. R. Co.*, *supra*, the court says: "If the service to be performed by Macy (the deceased) was of a character to require that his exclusive attention should be fixed upon it, and that he should act with rapidity and promptness, it could hardly be expected that he should always bear in mind the existence of the defect, or be prepared at all times to avoid it."

In *Snow v. Housatonic R. Co.*, 8 Allen, 441, the superstructure or roadbed between the tracks of the defendant's road where it crossed the highway at a point where the trains were made up, was such that it was necessary for the person whose duty it was to unshackle the cars or to fasten them together to pass and repass over the space covered with plank between the tracks frequently, and with rapidity, and with his attention in great degree diverted from the surface over which he passed, and directed to the special duty or service of separating and uniting the cars, in order to prepare the trains for transit. While engaged in that service in the usual and ordinary mode, plaintiff was thrown down by reason of the defect in the road. The court says: "As the plaintiff was in the discharge of his duty in placing himself in a perilous position,—a duty the performance of which was known to and sanctioned by the defendants,—the fact that he was in such position has no tendency to prove that he was negligent or careless. The question of due care in such case depends on the manner in which the plaintiff performed the duty incumbent on him,—whether he acted with due skill and caution, and conducted himself in the usual and ordinary way in which similar acts are done by persons engaged in like employment; and on other considerations of like character, which do not fall within the range of ordinary observation and experience. The question of negligence was therefore a subject of evidence, and should have been submitted, with proper instructions, to the jury for their determination. Nor do we think that it was any the less a question of fact to be decided by the jury because it appeared that the plaintiff had pre-

vious knowledge of the defect in the road which caused the accident. *Reed v. Northfield*, 13 Pick. 98; *Smith v. Lovell*, 6 Allen, 40. This certainly was a circumstance to be taken into consideration, but by no means a decisive one. If the service to be performed by the plaintiff was of a character to require that his exclusive attention should be fixed upon it, and that he should act with rapidity and promptness, it could hardly be expected that he should always bear in mind the existence of the defect, or be prepared at all times to avoid it."

In *Malloy v. Walker Twp.*, 77 Mich. 448, the court says: "If it was the negligence of the defendant in not repairing the highway which placed the deceased and those under his charge in a precarious condition, no negligence could be imputed to the deceased if, acting upon that occasion, as it appeared to him to be, for the safety of himself and party in his charge, he did not take the precaution which, upon consideration, a more prudent man might have taken. At least it was a question for the jury, and fairly submitted." Nothing short of gross negligence on the part of the injuring party can relieve the injured party from the exercise of care. The promise made by defendant in this case did not absolve plaintiff from the exercise of reasonable care while about this dangerous machinery; but what shall constitute such care in a given case must necessarily depend upon all the facts and circumstances of that case. He is held to that degree of care which every prudent man is expected to employ under similar circumstances in carrying on the same kind of business. Here the gearing had been covered, because it was dangerous in its exposed condition, and because the employés of the mill, and this very plaintiff, were likely to come into contact with it. Plaintiff remonstrated, but he was directed to continue work which involved the probability of this contact. This is but a necessary inference from the plaintiff's complaint and the superintendent's reply. The performance of plaintiff's duty required him to go in the vicinity of this machinery. His work afforded very little opportunity for deliberation. It was necessary that he should act promptly. Hesitation was not expected of him, and the degree of care required of him with respect to his own personal safety must be measured to some extent by the exactions of his employment, by its demands upon his attention, and by his devotion to its duties. His diligence and zeal in his master's service should count in his favor, and not against him, in determining this question.

In *Harris v. Clinton Twp.*, *supra*, the court says: "Upon this issue there are two reasonable, but different, views which might be taken; and therefore the question should have been submitted to the jury. The facts that Soper knew the location of the highway; that it was crooked, and that there were no guides or barriers; that it was overflowed, and the water had raised since he last passed over it; and knew that some hazard was incurred in attempting to pass over it,—did not conclusively show that it was negligence in him to make the attempt. Of course, the increased hazard from the rising of the water called upon Soper to exercise increased caution, and may have been a circumstance which, in the opinion of

some persons, should have determined him not to make the attempt at all, but whether it was or not, in connection with the other facts, should have been left with the jury to determine." "Where there is a chance, upon the facts shown, for ordinary candid and intelligent men to arrive at different conclusions, the question of contributory negligence is to be determined by the jury. *Adams v. Iron Cliffs Co.* 78 Mich. 271; *Luke v. Wheat Min. Co.* 71 Mich. 364, and *Teipel v. Hilsendegen*, 44 Mich. 461."

This is one of those cases where two reasonable and different views might be taken, and two men of equal candor might differ. In my judgment, the court below erred in taking the case from the jury, and in ruling that as a matter of law the plaintiff was guilty of contributory negligence.

The judgment will be reversed, and a new trial had, with costs of this court to plaintiff.

Grant, J., did not sit. The other Justices concurred.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Elias R. HUNNEWELL

v.

J. W. DUXBURY *et al.*

(.....Mass.....)

False statements in a certificate required by Stat. 1884, chap. 330, § 3, to be filed with the commissioner of corporations to enable a foreign corporation to do business in Massachusetts, will not render the persons signing it liable for deceit to one who, relying upon them, takes the corporation's notes and thereby suffers loss.

(September 2, 1891.)

APPEAL by defendants from an order of the Superior Court for Suffolk County

overruling a demurrer to the second count in the declaration in an action brought to recover damages from defendants for deceit in making false representations which induced plaintiff to take certain worthless notes, and exceptions by them to rulings made during the trial of the action, which resulted in a verdict in favor of plaintiff. *Demurrer and exceptions sustained.*

The second count of the declaration alleged, in substance, that defendants were officers of a Maine corporation; that they signed and swore to a false statement or certificate therein representing that the corporation's capital stock of \$150,000 was all paid in, and that patents of the value of \$149,650 had been transferred to it, and caused the certificate to be filed with the commissioner of corporations; that plain-

NOTE—*Proximate and remote cause of damage.*

It is an elementary rule governing both personal and corporate liability that only such damage can be recovered as is traceable directly to the wrongful act. "A long series of judicial decisions has defined proximate or immediate and direct damages to be the ordinary and natural results of the negligence, such as are usual and as therefore might have been expected." *Henry v. Southern Pac. R. Co.* 50 Cal. 183.

The general rule is that the party who commits a trespass or other wrongful act is liable only for the direct injury resulting from such act, although such resulting injury could not have been contemplated as a probable result of the act done. *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64; *Salisbury v. Herchenroder*, 108 Mass. 458, 8 Am. Rep. 354; *Patten v. Chicago & N. W. R. Co.* 33 Wis. 524, 36 Wis. 413; *Bowas v. Pioneer Tow Line*, 2 Sawyer. 21; *Ward v. Vanderbilt*, 34 How. Pr. 144; *Eten v. Luyster*, 60 N. Y. 252; *Lane v. Atlantic Works*, 111 Mass. 126; *Hart v. Western R. Corp.* 13 Met. 99, 104; *Keenan v. Cavanaugh*, 44 Vt. 268; *Collard v. Southeastern R. Co.* 7 Hurst. & N. 79; *Little v. Boston & M. R. Co.* 66 Me. 239; *Metallic Comp. Cast. Co. v. Fitchburg R. Co.* 109 Mass. 277; *Perley v. Eastern R. Co.* 96 Mass. 414; *Williams v. Vanderbilt*, 23 N. Y. 217; *Kellogg v. Chicago & N. W. R. Co.* 36 Wis. 223, 7 Am. Rep. 69.

In the language of the Supreme Court of Pennsylvania, to visit upon the defendant all the consequences of his wrongful act "would set society on edge, and fill the courts with useless and injurious litigation. It is impossible to compensate for all losses, and the law therefore aims at a just discrimination, which will impose upon the party causing them the proportion of them that a proper view of his acts and the attending circumstances would dictate." *Fleming v. Beck*, 48 Pa. 309, 313; 1 Sedg. Dem. § 113.

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The law cannot undertake to trace back the chain of causes indefinitely, for it is obvious that this would lead to inquiries far beyond human power and wisdom—in fact, infinite in their scope. It therefore stops at the first link in the chain of causation, and looks only to the person who is the proximate cause of the injury. *Shearm. & Redf. Neg.* § 9.

The general rule is, that the damage to be recovered must be the natural and proximate consequence of the act complained of. 2 Greenl. Ev. § 254.

It is not enough if it be the natural consequence; it must be both natural and proximate. *Richardson v. Dunn*, 8 C. B. N. S. 664.

To maintain an action for special damages, they must be the legal and natural consequences arising from the tort, and not from the wrongful act of a third party remotely induced thereby. *Crain v. Petrie*, 6 Hill. 622.

The negligent burning of a house, and the spreading of the fire to a neighboring house, and the burning thereof, do not give the owner of the last house a cause of action against the owner of the house in which the fire originated. The damages are too remote. *Ryan v. New York Cent. R. Co.* 35 N. Y. 210.

It is not easy at all times to determine what are proximate and what are remote damages. In *Thomas v. Winchester*, 6 N. Y. 408, *Judge Ruggles* defines the damages for which a party is liable as those which are the natural or necessary consequences of his acts.

Subject discussed in *notes to Smethurst v. Independent Cong. Church Proprs.* (Mass.) 2 L. R. A. 695; *Erickson v. St. Paul & D. R. Co.* (Minn.) 5 L. R. A. 786; *Louisville, N. A. & C. R. Co. v. Lucas* (Ind.) 6 L. R. A. 194; *Read v. Nichols* (N. Y.) 7 L. R. A. 130; *Smith v. Kanawha County Ct.* (W. Va.) 8 L. R. A. 82.

tiff manufactured goods for the corporation for which he was asked to take its notes; that plaintiff caused an examination of the records in the commissioner's office to be made and thereby learned of the certificate and its contents; that, believing the same to be true, he accepted the notes; that the statements were false and the corporation was insolvent, and that plaintiff was unable to collect the amount of the notes.

The further facts appear in the opinion.

Mr. Charles R. Darling, with *Messrs. W. F. Slocum and W. S. Slocum*, for appellants:

A statement filed under the Act of 1884 referred to cannot be made the subject of a private action for damages for false representation against the signers of the statement.

A person making a representation is only accountable for its truth or honesty to the very person or persons whom he seeks to influence; no one else has a right to rely on the representation, and to allege its falsity as a wrong to him.

Cooley, Torts, 2d ed. *498; Kerr, Fraud & Mistake, 98; Brackett v. Griswold, 112 N. Y. 454.

Thus, a misrepresentation by A to B, as to A's solvency, gives no right of action to a third person to whom the representation is repeated without A's authority.

Rawlings v. Bean, 80 Mo. 614. See also *McCraeken v. West*, 17 Ohio 16; *Harding v. Commercial Loan Co.* 84 Ill. 251; *Wells v. Cook*, 16 Ohio St. 67.

Such statements cannot be said to be public records; and no rights are given by the statute to the public to examine them, or to the information therein contained. It is a matter entirely between the corporation and the commissioner of corporations. This Statute is entirely different from those Acts which require officers of corporations to make detailed reports as to the condition of the corporation annually. It is at least doubtful whether there is any liability under the latter class of statutes, apart from the express provision referred to.

Brackett v. Griswold, *supra*; *Fogg v. Pew*, 10 Gray, 409; Pub. Stat. chap. 106, §§ 59, 60, cl. 5.

The statement under the Statute may be likened to testimony given by a witness in court. A bystander would not be entitled to rely on witness's statement in a subsequent transaction with him, and then allege its falsity as a fraud upon him.

See *Morris v. Talcott*, 96 N. Y. 100.

A further reason why a statement under the Statute should not be recognized as the foundation of an action against the officers of the corporation individually is that it is the company, and not the officers, that is required to file the statement.

See *Van Weel v. Winston*, 115 U. S. 238, 29 L. ed. 384.

The case at bar is to be distinguished from the following:

(1) Where officers of a corporation publish a prospectus with the intention of attracting subscribers. The purpose is to induce people to invest.

Peck v. Gurney, L. R. 6 H. L. 377; *Brackett v. Griswold*, 112 N. Y. 454, 471.

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(2) Statements to commercial agencies, which are made to obtain credit.

Macullar v. McKinley, 99 N. Y. 653; *Long v. West*, 31 Kan. 298; *Bradley v. Poole*, 98 Mass. 169.

The rule by which a person is liable for representations made by him as of his own knowledge, without other evidence of fraud, is not properly applicable in this case.

That doctrine is substantially identical with the equitable doctrine which holds the mere falsity of a representation sufficient ground for relief without regard to fraud.

The equitable doctrine is limited to cases between contracting parties, *i. e.*, the principals in the contract; consequently, the doctrine in question should be similarly limited.

In equity a contract will be rescinded, or other similar relief granted, on account of a representation which is false in fact, however innocently made.

Wright v. Snowe, 2 DeG. & S. 321; *Rawlins v. Wickham*, 1 Giff. 855, 8 DeG. & J. 304; *New Brunswick & C. R. Co. v. Muggeridge*, 1 Drew. & S. 363; *Directors of Central R. Co. v. Kisch*, L. R. 2 H. L. 99; *Re Overend*, L. R. 3 Eq. 576; *Reese River S. Min. Co. v. Smith*, L. R. 4 H. L. 64; *Mathias v. Yelts*, 46 L. T. N. S. 497; *Newbigging v. Adam*, L. R. 34 Ch. Div. 582; *Torrance v. Bolton*, L. R. 8 Ch. App. 118; *Redgrave v. Hurd*, L. R. 20 Ch. Div. 1, 12, 13; *Smith v. Richards*, 38 U. S. 13 Pet. 26, 10 L. ed. 42; *McFerran v. Taylor*, 7 U. S. 3 Cranch, 270, 2 L. ed. 486; *Daniel v. Mitchell*, 1 Story, 172; *Hough v. Richardson*, 3 Story, 659; *Doggett v. Emerson*, Id. 700; *Mason v. Crosby*, 2 Ware, 306; *Warner v. Daniels*, 1 Woodb. & M. 90; *Smith v. Babcock*, 2 Woodb. & M. 246; *Smith v. Mitchell*, 6 Ga. 458; *Frenzel v. Miller*, 37 Ind. 1; *Wilcox v. Iowa Wesleyan Univ.* 33 Iowa, 367; *Harding v. Randall*, 15 Me. 332; *Taymon v. Mitchell*, 1 Md. Ch. 496; *Spurr v. Benedict*, 99 Mass. 468; *Converse v. Blumrich*, 14 Mich. 109; *Rimer v. Dugan*, 89 Miss. 477; *Glasscock v. Minor*, 11 Mo. 655; *Rossett v. Dale*, 2 Cow. 129; *Beknap v. Sealey*, 14 N. Y. 143; *Miner v. Medbury*, 6 Wis. 295.

In England this doctrine is supposed to be limited to rescission cases. But the distinction in the application of the doctrine, between claims for rescission and for damages is not well maintained in England, and is still less so in this country.

See *Newbigging v. Adam*, *supra*.

See also the doctrine as to compensation for misdescription or misrepresentation in sales of land (Story, Eq. Jur. § 779), and the application thereof in—

Hill v. Buckley, 17 Ves. Jr. 401; *Re Turner v. Skelton*, L. R. 13 Ch. Div. 190; *Kent v. Carcaud*, 17 Md. 291; *Marbury v. Stonestreet*, 1 Md. 147; *Mendenhall v. Steckel*, 47 Md. 453; *East v. Matheny*, 1 A. K. Marsh. 192; *Comp v. Norfleet*, 83 Va. 380; *Harrell v. Hill*, 19 Ark. 102, 115.

The decree may be in the alternative for rescission or damages, or for damages alone.

McFerran v. Taylor and Warner v. Daniels, *supra*; *McCormick v. Malin*, 5 Blackf. 509; *DuFlon v. Powers*, 14 Abb. Pr. N. S. 391; *Anderson v. Snyder*, 21 W. Va. 632; *Lockridge v. Foster*, 5 Ill. 569.

In suits to foreclose purchase-money mort-

gages, damages for innocent misrepresentations made by the vendor in the sale may be recovered by the vendee.

Frenzel v. Miller, *supra*; *Estell v. Myers*, 54 Miss. 174; *Sweezey v. Collins*, 36 Iowa, 589.

In fact, the equitable doctrine has been adopted outright at law, as applicable to actions for damages between contracting parties in several States.

See *Bird v. Kleiner*, 41 Wis. 134; *Cotzhausen v. Simon*, 47 Wis. 103; *Davis v. Nuzum*, 72 Wis. 439; *Frenzel v. Miller*, *supra*; *Baughman v. Gould*, 45 Mich. 481; *Holcomb v. Noble*, 69 Mich. 396 (but see *Comstock v. Smith*, 20 Mich. 338; *Whitten v. Wright*, 34 Mich. 92; *Beebe v. Knapp*, 28 Mich. 53; *Stone v. Conell*, 29 Mich. 359; *Starkweather v. Benjamin*, 32 Mich. 805; *Nowlin v. Snow*, 40 Mich. 699; *Mutvey v. King*, 39 Ohio St. 491 (but see *Taylor v. Leith*, 26 Ohio St. 428; *Parmlee v. Adolph*, 28 Ohio St. 10; *Aitna Ins. Co. v. Reed*, 33 Ohio St. 288); *Sledge v. Scott*, 56 Ala. 202; *Davis v. Beta*, 66 Ala. 206, 210; *Tabor v. Peters*, 74 Ala. 90; *Brown v. Freeman*, 79 Ala. 406, 409; *Jordan v. Pickett*, 78 Ala. 331, 338 (but see *Barnett v. Stanton*, 2 Ala. 181, 187; *Munroe v. Pritchett*, 16 Ala. 785; *Atwood v. Wright*, 29 Ala. 346, 352; *Blackman v. Johnson*, 35 Ala. 252); *Lynch v. Mercantile Trust Co.* 18 Fed. Rep. 496; *Goodwin v. Robinson*, 30 Ark. 535; *Snyder v. Findley*, 1 N. J. L. 48; *Hogg v. Caradwell*, 4 Sneed, 151; *Waterbury v. Russell*, 8 Baxt. 159; *Crump v. United States Min. Co.* 7 Gratt. 852; *Pennock v. Tilford*, 17 Pa. 456; *Bower v. Fenn*, 90 Pa. 359; *Babcock v. Case*, 61 Pa. 427.

The equitable doctrine does not extend to a case where the plaintiff did not contract with the defendant on the faith of the representation.

Smith v. Mariner, 5 Wis. 551, 577, 578.

The Massachusetts special doctrine ranges with the doctrine of the States last referred to. It is merely the equitable doctrine slightly disguised.

Hazard v. Irwin, 18 Pick. 95; *Page v. Bent*, 2 Met. 871; *Stone v. Denny*, 4 Met. 151; *Milliken v. Thorndike*, 103 Mass. 382; *Litchfield v. Hutchinson*, 117 Mass. 196; *Savage v. Stevens*, 126 Mass. 207; *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403; *Loddell v. Baker*, 1 Met. 193, 201, per Wilde, J.; *Randall v. Hazelton*, 13 Allen, 412, 415, per Colt, J.; *Potts v. Chapin*, 133 Mass. 276, 280, per Field, J. See notes to *Pasley v. Freeman*, 2 Smith, Lead. Cas. 9th Am. ed. 1920; Benjamin, Sales, Bennett's ed. § 454 et seq.; *Joliffe v. Baker*, L. R. 11 Q. B. Div. 255; *Behn v. Burness*, 3 Best & S. 751; *Kennedy v. Panama, N. Z. & A. R. Mail Co.* L. R. 2 Q. B. 580.

See also the following Massachusetts cases requiring knowledge of falsity to be shown:

Tryon v. Whitmarsh, 1 Met. 1; *Pearson v. Howe*, 1 Allen, 207; *King v. Eagle Mills*, 10 Allen, 548; *Hartford L. S. Ins. Co. v. Matthews*, 102 Mass. 221; *Cooper v. Lovering*, 106 Mass. 77, per Ames, J.; *Tucker v. White*, 125 Mass. 344. Compare *Bennett v. Judson*, 21 N. Y. 238, and *Sharp v. New York*, 40 Barb. 257, with subsequent New York cases, as follows:

Weed v. Case, 55 Barb. 548; *Barrett v. Western*, 66 Barb. 205; *Craig v. Ward*, 3 Keyes, 887; 36 Barb. 377; *Marah v. Falke*, 40 N. Y. 562, 13 L. R. A.

Chester v. Comstock, Id. 575, note, 6 Robt. 1; *Oberlander v. Spiess*, 45 N. Y. 175; *Meyer v. Amidon*, Id. 169; *Atkins v. Elwell*, Id. 758; *Wakeman v. Dalley*, 51 N. Y. 27.

The Massachusetts rule is stated in *Milliken v. Thorndike*, 103 Mass. 382, in a form which limits it to cases between contracting parties.

In actions of this character, *i. e.*, actions for deceit against officers, promoters, etc., of corporations, moral fraud, actual as distinguished from constructive fraud, is in other jurisdictions required to be shown to maintain the action.

Taylor v. Ashton, 11 Mees. & W. 401; *Moore v. Burke*, 4 Post. & F. 258, 278, 282, 284, 290. *Cockburn, Ch. J.*; *Shremsbury v. Blount*, 2 Man. & G. 475; *Purker v. McQueen*, 32 U. C. Q. B. 273; *Derry v. Peek*, 61 L. T. N. S. 265; *Conley v. Smyth*, 46 N. J. L. 380. See *Wakeman v. Dalley*, 51 N. Y. 27; *Beach v. Bemis*, 107 Mass. 498; *Bannister v. Alderman*, 111 Mass. 261; *Cole v. Cassidy*, 138 Mass. 437; *Bouker v. Deloy*, 2 New Eng. Rep. 229, 141 Mass. 815.

Mr. Fred McIntire, for appellee:

The penalty of personal liability for debts of the corporation, imposed by the statute relating to domestic corporations upon officers for making a false certificate, is not limited to debts in favor of persons who have been actually misled by the certificate, or the debts created after the certificate was filed.

Felker v. Standard Yarn Co. 148 Mass. 226. See also *Bradley v. Poole*, 96 Mass. 169; *Fogg v. Pew*, 10 Gray, 409, 415.

The representations need not be made directly to the plaintiff, or with the specific intent to induce the particular transaction.

Scott v. Dixon, 29 L. J. Exch. 62, note; *Peek v. Gurney*, L. R. 6 H. L. 377; *Swift v. Winterbotham*, L. R. 8 Q. B. 244; *Bedford v. Bagshaw*, 4 Hurlst. & N. 538; *Clarke v. Dickson*, 6 C. B. N. S. 453; 2 Addison, Torts, Wood's 6th ed. § 786; *Loddell v. Baker*, 3 Met. 469; *Tryon v. Whitmarsh*, 1 Met. 1; *Kidney v. Stoddard*, 7 Met. 252; *Polhill v. Walter*, 3 Barn. & Ad. 114.

In an action of tort for fraudulent representations, the allegation of fraud is sustained by proof that the defendant represented, as of his own knowledge, material facts susceptible of knowledge, which were untrue.

Chatham Furnace Co. v. Moffat, 147 Mass. 403, and cases cited; *Peek v. Derry*, L. R. 37 Ch. Div. 541; Article by Sir Frederick Pollock on *Derry v. Peek*, H. L. 5 L. Q. Rev. 410.

Barker, J., delivered the opinion of the court:

The action is tort for deceit in inducing the plaintiff to take notes of a corporation by false and fraudulent representations alleged to have been made to him by the defendants, that the capital stock of the corporation amounting to \$150,000 had been paid in, and that patents for electrical advertising devices of the value of \$149,650 had been transferred to it.

From the exceptions it appears that the corporation was organized in January, 1885, under the laws of Maine, and engaged in business in Massachusetts. That it filed with the commissioner of corporations a certificate dated August 11, 1885, required by the Statute of 1884, chap. 330, § 3, signed by the defendants,

with a jurat stating that on that date they had severally made oath that the certificate was true to the best of their knowledge and belief. That before the plaintiff took the notes the contents of this certificate had been communicated to him by an attorney whom he had employed to examine the records, and that he relied upon its statements in accepting the notes. There was no other evidence of the making of the alleged representations.

The main question is whether the plaintiff can maintain an action of deceit for alleged misstatements contained in the certificate. In the opinion of a majority of the court this question should have been decided adversely to the plaintiff. The execution by the defendants of the certificate to enable the corporation to file it under Stat. 1884, chap. 330, § 3, was too remote from any design to influence the action of the plaintiff to make it the foundation of an action of deceit.

To sustain such an action misrepresentations must either have been made to the plaintiff individually, or as one of the public, or as one of a class to whom they are in fact addressed, or have been intended to influence his conduct in the particular of which he complains.

This certificate was not communicated by the defendants or the corporation to the public or the plaintiff. It was filed with a state official for the definite purpose of complying with a requirement imposed as a condition precedent to the right of the corporation to act in Massachusetts. Its design was not to procure credit among merchants, but to secure the right to transact business in the State.

The terms of the Statute carry no implication of such a liability. Statutes requiring similar statements from domestic corporations have been in force here since 1829, and whenever it was intended to impose a liability for false statements contained in them there has been an express provision to that effect; and a requisite of the liability has uniformly been that the person to be held signed knowing the statement to be false. Stat. 1829, § 90; Rev. Stat. chap. 88, § 28; Gen. Stat. chap. 60, § 90; Stat. 1870, chap. 224, § 38, cl. 5; Pub. Stat. chap. 106, § 60, cl. 5.

To hold that the Statute of 1884, chap. 330, § 3, imposes upon those officers of a foreign corporation who sign the certificate which is a condition of its admission the added liability of an action of deceit, is to read into the Statute what it does not contain.

If such an action lies it might have been brought in many instances upon representations made in returns required of domestic corporations, and yet there is no instance of such an action in our reports. In *Fogg v. Pew*, 10 Gray, 409, it is held that the misrepresentations must have been intended and allowed by those making them to operate on the mind of the party induced and have been suffered to influence him.

In *Bradley v. Pools*, 98 Mass. 169, the representative

statements proved and relied on were made personally by the defendant to the plaintiff in the course of the negotiation for the shares the price of which the plaintiff sought to recover.

Felker v. Standard Yarn Co., 148 Mass. 226, was an action under Pub. Stat. chap. 106, § 60, to enforce a liability explicitly declared by the Statute.

Nor is there any English case which goes to the length necessary to sustain the plaintiff's action. The English cases fall under two heads: (1) those of officers, members or agents of corporations, who have issued a prospectus or report addressed to and circulated among shareholders or the public for the purpose of inducing them to take shares; (2) those persons who, to obtain the listing of stocks or securities upon the stock exchange in order that they may be more readily sold to the public, have made representations to the officials of the exchange, which in due course have been communicated to buyers. *Bagshaw v. Seymour*, 4 C. B. N. S. 873; *Watson v. Charlemont*, 8 Q. B. 856; *Bedford v. Bagshaw*, 4 Hurlst. & N. 537; *Clarke v. Dickson*, 6 C. B. N. S. 453; *Jarrett v. Kennedy*, 6 C. B. 319; *Campbell v. Fleming*, 1 Ad. & El. 40; *Peck v. Derry*, L. R. 37 Ch. Div. 541, and 14 App. Cas. 837; *Angus v. Clifford* [1891] L. R. 2 Ch. Div. 449.

In these cases the representations were clearly addressed to the plaintiffs, among others, of the public or of a class, and were plainly intended and calculated to influence their action in the specific matter in which they claimed to have been injured. So, too, in the American cases relied on to support the action. *Morgan v. Skiddy*, 62 N. Y. 319; *Ternwilliger v. Great Western U. Teleg. Co.* 59 Ill. 249; *Paddock v. Fletcher*, 42 Vt. 889. The numerous cases cited in the note to *Pasley v. Freeman*, 2 Smith, Lead. Cas. 9th Am. ed. 1820, are of the same character.

In the case at bar the certificate was made and filed for the definite purpose, not of influencing the public, but of obtaining from the State a specific right, which did not affect the validity of its contracts, but merely relieved its agents in Massachusetts of a penalty. It was not addressed to or intended for the public, and was known to the plaintiff only from the search of his attorney. It could not have been intended or designed by the defendants that the plaintiff should ascertain its contents and be induced by them to take the notes. It is not such a representation made by one to another with intent to deceive as will sustain the action. Its statements are in no fair sense addressed to the person who searches for, discovers, and acts upon them, and cannot fairly be inferred or found to have been made with the intent to deceive him.

This view of the law disposes of the case and makes it unnecessary to consider the other questions raised at the trial.

Demurrer to the second count sustained. Exceptions sustained.

CONNECTICUT SUPREME COURT OF ERRORS.

James L. McCASKILL, *Appt.*,
v.
CONNECTICUT SAVINGS BANK.

(....Comm.....)

1. A savings bank pass-book is not a negotiable instrument, either by itself or in connection with an order signed by the depositor directing payment to a third person or bearer, nor can it be made so by contract. The account may be transferred but the assignee takes it subject to the equities and defenses between the original parties, in the absence of facts creating an estoppel.
2. The entry by a savings bank of a credit in a pass-book will not estop it from denying that a deposit was made as against an assignee of the account where the entry was procured by fraud and the bank made it without knowledge of the material facts or any intention that the representation should be acted on, especially where the assignee is not a bona fide holder.
3. A finding by the trial court upon a distinct issue of fact whether or not the assignee of a savings bank pass-book is a bona fide holder is conclusive.

(March 20, 1891.)

NOTE.—Possession of bank pass-book not conclusive of right to draw deposit.

Agreements between a savings bank and its depositors that the moneys intrusted to the bank shall be paid to anyone presenting the pass-book will not relieve the bank from the legal consequences of its failure to exercise reasonable precaution in paying the deposit to a party having possession of the pass-book. *Kimball v. Norton*, 59 N. H. 1, 47 Am. Rep. 171.

And the bank, in making payment to one having no other evidence of right to receive it, must show some valid contract by virtue of which it was understood such a payment was authorized. *Smith v. Brooklyn Sav. Bank*, 1 Cent. Rep. 801, 101 N. Y. 58.

A rule of a savings bank, that payments made to any person producing the pass-book shall be valid does not relieve it from liability for negligent payment made thereon after it is informed of the death of the depositor; where another rule provides that upon such death the deposit shall be paid to the depositor's legal representative. *Farmer v. Manhattan Sav. Inst.* 59 N. Y. S. R. 523.

Where the officials of a savings bank, acting in good faith, duly pay to a party presenting its pass-book under circumstances in no wise calculated to engender suspicion, and where, in making such payment, there is present the exercise of reasonable care and diligence, their action will be protected and the payment held good. *Appleby v. Erie County Sav. Bank*, 62 N. Y. 12; *Hayden v. Brooklyn Sav. Bank*, 15 Abb. N. S. 297; *Allen v. Williamsburgh Sav. Bank*, 60 N. Y. 817.

Irrespective of any by-laws a bank would be protected by a payment made in good faith to the holder of the pass-book. *Sullivan v. Lewiston Sav. Inst.* 56 Me. 507; *Eaves v. People's Sav. Bank*, 27 Conn. 284; *Heath v. Portsmouth Sav. Bank*, 46 N. H. 78; *Camp's App.* 36 Conn. 88, 4 Am. Rep. 39; *Tillinghast v. Wheaton*, 3 R. I. 536, 5 Am. Rep. 621.

The doctrine of the principal case has been previously indicated by a decision in the New York Court of Appeals, which distinctly holds that the pass-book of a savings bank is not negotiable pa-
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APPPEAL by plaintiff from a judgment of the Superior Court for New Haven County in favor of defendant in an action brought to recover the amount credited on a savings bank pass-book which had been assigned to plaintiff. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. George D. Watrous and Edward G. Buckland*, for appellant:

The ruling that the plaintiff was not the bona fide holder of book and order is a conclusion of law and is reviewable by this court.

White v. Brown, 14 How. Pr. 286; *Hamilton v. Vought*, 84 N. J. L. 192.

The question of *bona fides* and conversely of *mala fides* presupposes a duty which has been done or left undone. What duty rested upon the plaintiff in connection with the transfer of the pass-book to his possession is therefore a question of law.

Nolan v. New York, N. H. & H. R. R. Co. 1 New Eng. Rep. 826, 53 Conn. 471.

The finding that the plaintiff had "reason to believe" that Harrison's possession of the book is tainted with fraud or illegality, all the facts having been ascertained, is also a conclusion of law and likewise reviewable.

Burns v. Erben, 40 N. Y. 466; *Bulkeley v. Keteltas*, 6 N. Y. 387.

per, and that its possession constitutes in itself no evidence of a right to draw money thereon. It merely imports a liability of the bank to the depositor for the moneys deposited and an agreement to repay them at such time and in such manner as the depositor shall direct. *Allen v. Williamsburg Sav. Bank*, *supra*.

That as between the depositor and the bank, it may be shown that an entry in a pass-book is an error, and that the depositor is not entitled to receive the sum stated, or that it has been paid, or that it has been taken from the bank by legal process, can hardly be controverted. *Salem Bank v. Gloucester Bank*, 17 Mass. 129; *Chocheeo Nat. Bank v. Haskell*, 51 N. H. 116; *Merchants Bank v. Marine Bank*, 3 Gill, 183; *Storey*, Ag. § 115.

Where one receives credit on his pass-book for a check found afterwards not to be good, the entry may be canceled. *National Gold Bank & T. Co. v. McDonald*, 51 Cal. 64.

Deposit may be transferred by assignment and the delivery of the pass-book.

A transfer of a deposit may be shown by a delivery of the bank-book to the grantee, accompanied by an assignment thereof. As there can be no manual delivery of the credit which the depositor has with the bank, the delivery of the book, which represents the deposit and is the only evidence of the contract together with the assignment, operates as a transfer of the existing fund, and is all the delivery of which the subject is capable. *Pierce v. Boston Five Cents Sav. Bank*, 129 Mass. 428.

Entry in pass-book may be regarded as an admission.

Ordinarily, whenever a deposit is made the amount and date thereof are entered by the cashier or teller in the pass-book of the depositor, and such entries when made by the proper officer bind the bank as admissions. In some cases it has been held that they become conclusive upon the bank like an account stated, when the bank-book is balanced. *Morse, Banks & Bankers*, 3d ed. § 291. See note to *Gifford v. Rutland Sav. Bank* (Vt.) 11 L. R. A. 794.

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If not, they are conclusions of facts from facts specially found, and thus are reviewable.

Tyler v. Waddingham, 8 L. R. A. 657, 58 Conn. 886; *Bennett v. New York, N. H. & H. R. R. Co.* 57 Conn. 425; *Dyson v. New York & N. E. R. Co.* Id. 23; *Atwood v. Partree*, 6 New Eng. Rep. 465, 56 Conn. 82; *Hayden v. Allyn*, 5 New Eng. Rep. 87, 55 Conn. 289; *Mead v. Noyes*, 44 Conn. 489.

Good faith rather than diligence is the standard by which a holder's right is determined, and diligence or want of it is immaterial, except so far as it legitimately tends to establish or rebut the claim of a bona fide possession of the paper.

Ladd v. Franklin, 87 Conn. 64; *Hamilton v. Vought*, 34 N. J. L. 192.

A certificate of deposit is negotiable.

Kilgore v. Bulkley, 14 Conn. 888; *Miller v. Austen*, 54 U. S. 13 How. 228, 14 L. ed. 123; *Fell's Point Sav. Inst. v. Weedon*, 18 Md. 320, 81 Am. Dec. 605.

Why, then, is not a pass-book?

The elements here present are sufficient to constitute an estoppel *in pais*, to wit:

1. A false representation.
2. Ignorance of the truth, the result of inexcusable negligence.
3. The plaintiff relying on the representation and being ignorant of the facts.
4. The representation having been made with the intention that it should be acted upon.
5. Plaintiff having been induced to act upon the representation to his prejudice.

7 Am. & Eng. Encyclop. Law. 12; *Preston v. Mann*, 25 Conn. 128; *McNeil v. Hill*, Woolw. 96; *Bank of Batavia v. New York, L. E. & W. R. Co.* 7 Cent. Rep. 822, 106 N. Y. 199; *Armour v. Michigan Cent. R. Co.* 65 N. Y. 122; *Roe v. Jerome*, 18 Conn. 188.

Even if the plaintiff had means of knowing the falsity of the matter, he was justified in acting upon the clear, positive representations contained in the pass-book.

Watson v. Atwood, 25 Conn. 820.

Of two innocent parties, he whose acts have caused the loss must bear it.

Armour v. Michigan Cent. R. Co. supra; *Blair v. Wait*, 69 N. Y. 116; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 47.

This doctrine of estoppel applies independently of the question of negotiability. It has grown up and has become firmly fixed in our law in the cases of transfers of stock, warehouse receipts, bills of lading, elevator receipts and non-negotiable notes. In every transaction where parties contemplate, or where usage supposes them to have contemplated, the possibility of transfer, this doctrine applies.

Pom. Rem. & Rem. Rights, § 160 *et seq.*; *Bridgeport Bank v. New York & N. H. R. Co.* 30 Conn. 275; *McNeil v. Hill*, *Bank of Batavia v. New York, L. E. & W. R. Co.* and *Armour v. Michigan Cent. R. Co. supra*; *New York, N. H. & H. R. R. Co. v. Schuyler*, 34 N. Y. 52; *Babcock v. People's Sav. Bank*, 118 Ind. 212; *Winton v. Hart*, 39 Conn. 20; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 329; *Joslyn v. St. Paul Distilling Co.* 44 Minn. 188.

Mr. C. R. Ingersoll, for appellee:

The deposit book of a savings-bank depositor is not a negotiable instrument in law.

Com. v. Reading Sav. Bank, 133 Mass. 16; 18 L. R. A.

Smith v. Brooklyn Sav. Bank, 1 Cent. Rep. 801, 101 N. Y. 60; *Eaves v. People's Sav. Bank*, 27 Conn. 238; *Witte v. Vincenot*, 43 Cal. 825; *Moore v. Ulster Bank*, 11 Ir. C. L. Rep. 512.

Negligence on the part of the Bank is not found. And negligence is a fact that must be found by the trial court.

Fiske v. Forayth, Dyeing L. & B. Co. 57 Conn. 118.

Mala fides, and not mere negligence, is necessary to invalidate the title to ordinary commercial negotiable paper. But the negligence is still proper evidence of the *mala fides*. And so all the circumstances of the taking enter into the settling of that conclusion of fact.

Credit Co. v. Howe Mach. Co. 54 Conn. 384; *Seybel v. National Currency Bank*, 54 N. Y. 283; *Murray v. Lardner*, 69 U. S. 2 Wall. 110, 17 L. ed. 857; *Potts v. Meyer*, 74 N. Y. 594; 2 Dan. Neg. Inst. § 777; 2 Parsons, Notes & Bills, 279; 1 Parsons, Notes & Bills, 258.

But this rule of *mala fides* is confined to negotiable paper. A party claiming an estoppel by negligence must prove himself to be free from negligence.

2 Story, Eq. § 1553 b; *Trenton Bkg. Co. v. Duncan*, 86 N. Y. 221.

Loomis, J., delivered the opinion of the court:

Upon the trial of this case, and upon the facts contained in the finding, the plaintiff's contentions relative to five questions were overruled by the court, and furnish the only foundation for this appeal; but as four of the questions embrace only two subjects, the questions for our review may well be reduced to three, as follows: *First*. Is the Savings Bank pass-book, upon which the suit is predicated, a negotiable instrument? *Second*. Is the defendant Bank estopped from showing that the \$750 which appears on that book to the credit of Michael Harrison was in fact never deposited with the Bank, nor any part of it? *Third*. Did the court err in holding that the plaintiff was not a bona fide holder of the pass-book?

1. The first question we are constrained to answer in the negative. The pass-book was not negotiable by itself, nor by virtue of the written order signed by the pretended depositor directing payment to J. J. Stuart & Co. or bearer. In *Eaves v. People's Sav. Bank*, 27 Conn. 229, the bank undertook to defend against the suit in favor of a depositor to recover the money deposited, upon the ground that the amount had been paid in good faith to a person who brought the original pass-book to the bank, accompanied with an order good on its face, though in fact forged. This court held that the forged power of attorney was no power, and that the presentation of the book itself had no greater effect, because it was not negotiable. There was not a very full discussion of this point, but the court held that the rights of the depositors would be very insecure if the pass book was held negotiable. It may be suggested that, if the book was accompanied with a genuine order for the payment of the money, the rights of the depositor could not be affected, and that therefore the reasoning could not apply to the case at bar; but, if we concede that the rights of the particular depositor, who had given a genuine order to pay the money to

another, would not be rendered insecure by holding the instrument negotiable, yet it would seriously affect the rights of the depositors in their relation to each other and to the assets of the Bank. A reference to some decisions of this court in respect to these relations will render the point more clear. In *Coits v. Society for Savings*, 32 Conn. 173, it was held that savings banks were "incorporated agencies for receiving and loaning money on account of the owners; that they have no stock and no capital; and that they are merely places of deposit, where money can be left to remain or be taken out at the pleasure of the owner." In *Osborn v. Byrne*, 43 Conn. 155, it was held that "a savings bank is an agent for the depositors, receiving and loaning their money; and its losses are their losses, and are to be borne by them equally, according to their interest. The depositors in savings banks bear the same relation to each other and to the assets of the bank that stockholders in other monetary institutions do to each other and to the property of the bank." In *Bunnell v. Collinsville Sav. Soc.*, 38 Conn. 203, the defendant bank having met with a loss equal to twenty-four per cent of the deposits, the directors reduced the amount to each depositor's credit in that proportion. In an action by a depositor to recover of the bank the amount so deducted, it was held that the defendant was merely the agent of the plaintiff to receive and hold his money, and that the loss was occasioned by his own act, through the instrumentality of his agent, and that he could not recover. Now, suppose in the last case the plaintiff, before or after the act of the directors reducing the amount of the deposits, had sold his book, and given the proper order to some bona fide purchaser for full value, and the latter had brought such a suit against the bank to recover the original deposit in full, could he recover any better than the original depositor? If he could, then the act of one depositor could injuriously affect the rights of all the others, for they would have to bear the additional reduction in consequence of paying one in full. It seems to us that no principle can be accepted which admits of such inequality and injustice, and it is contrary to the principles already adopted by this court in the decisions referred to.

In the case at bar, by reason of fraud, forgery, and falsehood, Harrison obtained two pass-books from the bank, upon which appeared credits amounting to \$1,250, when in truth nothing had been contributed to the funds of the Bank. If by assigning the books he made this fraud successful, the amount, of course, is virtually to be paid by the honest depositors. It is certain that Harrison, in his own name, could recover nothing at all in a suit against the Bank, for he contributed nothing to its deposits. We think he should not be allowed by assigning his book to convert nothing into something, but that the nature and purpose of savings banks, and the relation of depositors to each other, as well as their mutual security, all require the application of the principle that no depositor can convey to another any greater right in the funds of the Bank than he has himself, and that any defense on the part of the Bank which is good against the original depositor is equally good against his assignee, unless

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there are facts to create an estoppel. The argument in behalf of the plaintiff, founded upon an assumed analogy between certificates of deposit issued by commercial banks and the pass-books issued by savings banks, is fallacious, for there is no such analogy. The two kinds of banks are created for widely different purposes. The former must have a capital of their own, and the purpose for which they exist is to facilitate commercial transactions over a wide territory; while the latter have no capital, and hold no relations to commerce, are neither adapted nor designed to aid commercial transactions, have a local and limited field for their operations, and hold no relation to any persons except their depositors, and those to whom the depositors' money has been loaned. The purpose of the certificate issued by a commercial bank is to enable the person receiving it to obtain credit in the public markets, and to carry his funds safely to remote places. On the other hand, the savings bank pass-book is not issued with any design to induce third persons to give credit to the holder, but its sole purpose is to put in a shape convenient for the depositor and the bank a statement of the accounts between them; and the order about which so much was said in argument is, in contemplation of the law, the mere appointment of some person as agent for the depositor to receive the money. In *Leaves v. People's Sav. Bank*, *supra*, it is well termed "a power of attorney." By this we do not, of course, intend to have it implied that the depositor cannot sell his right to the money. Like any other non-negotiable chose in action, it may be sold, subject to the equities and defenses between the original parties. But the plaintiff further contends that the book, with or without the order, was made negotiable by contract. We are not quite sure that we apprehend the force of this point as it lay in the mind of counsel. There was no transaction with anyone but Harrison, and by reason of his fraud that was no contract at all; and besides, as it is for the law to declare the negotiability of instruments, we do not see how the mere contract of the parties can be effectual to this end. In further confirmation of the result we have reached that the savings bank pass-book is not negotiable, we refer to the following well-considered cases: *Com. v. Reading Sav. Bank*, 133 Mass. 16; *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 58, 1 Cent. Rep. 801; *Witte v. Vincenot*, 48 Cal. 325.

In *Witte v. Vincenot* it was held that "the pass-book of a savings bank was an account kept between the bank and the depositor, . . . showing the business transactions of the parties with each other. . . . It is not of itself a negotiable instrument, nor could any mere agreement of the parties to it have the effect to invest it with that character in a commercial sense. In this respect the account shown in the pass-book is not to be distinguished from the account of a merchant or tradesman kept with his customer in the same way, nor would the agreement of the parties to such account, that the account itself might be transferred to order, have any more effect upon the rights and remedies of any third party in the one case than in the other. . . . That a negotiable instrument may be transferred to order is clear; but it does not follow that every instrument which

may be transferred to order is thereby necessarily become a negotiable instrument. A collateral agreement between the parties that an instrument in writing, not negotiable, might be transferred by the holder to order, would not alter the character of the instrument itself."

2. We come now to the question whether, upon the facts that appear in the finding, the defendant is estopped from showing that the sum appearing on the book to the credit of Harrison was in fact never deposited. The precise claim of the plaintiff under this head is that the defendant was estopped by its negligence, which impliedly concedes that this is the one controlling fact to create the estoppel. But negligence on the part of the defendant is a fact not found by the court, and without such a finding there is no foundation at all for the plaintiff's claim. There was no specific duty resting upon the Bank which, being omitted, constituted negligence as matter of law. There are doubtless facts and circumstances which as evidence would tend to show negligence, but they failed to convince the trial court of the fact, and so they amount to nothing for the purposes of this review. This alone defeats the claim of estoppel; but there are other essential elements wholly wanting. The only representation on the part of the defendant was the entry contained in the pass-book, which was not made with knowledge of the material facts on the part of the defendant; nor was the party

to whom it was made ignorant of the truth. The pass-book was obtained from the Bank by gross fraud, and therefore it was not in law issued by the defendant Bank. And where representations have been procured by fraud, except under very peculiar circumstances,—such, for instance, as representations directly affecting the currency of negotiable paper,—there will be no estoppel upon the party making them, though made with the full intention that they should be acted upon. But here there was no such intention. *Bigelow, Estoppel*, 2d ed. 450; *Wilcox v. Howell*, 44 N. Y. 398; *Holden v. Putnam F. Ins. Co.* 46 N. Y. 1; *Calhoun v. Richardson*, 80 Conn. 210; *Sinnett v. Moles*, 83 Iowa, 25. Then, in addition to all these insuperable objections to the plaintiff's claim, we have the fact that the plaintiff himself was guilty of negligence, and is not a bona fide holder of the pass-book.

3. But here the plaintiff claims that the court erred in finding that the plaintiff was not a bona fide holder of the pass-book. The fact was distinctly alleged in the complaint that he was a bona fide holder, and denied in the answer, presenting a distinct issue of fact, which the court upon all the evidence found adversely to the plaintiff. We think the finding is conclusive on this point.

There was no error in the judgment complained of.

The other Judges concurred.

NORTH CAROLINA SUPREME COURT.

HORNTHALL & Brother

v.

D. S. BURWELL *et al.*, *Appts.*

(.....N. C.)

1. A mortgagor's removal of personal property to another State, where it is seized and sold by his creditors on attachment, cannot affect the rights of the mortgagee whose mortgage was duly recorded in the State where the parties resided.

2. A judgment on attachment against a debtor who has brought mortgaged personalty into the State is not binding on the mortgagee who is not a party, and whose mortgage is duly recorded in another State where the parties reside.

(October 20, 1891.)

APPEAL by defendants from a judgment of the Superior Court for Washington County overruling a demurrer to the complaint in an action brought by the mortgagees of certain

NOTE.—*Lien of chattel mortgage; removal of property to another State.*

If a mortgage on chattels is invalid when made, all of the requirements of the law having been complied with, and if the property is thereafter removed by the mortgagor into another State, the lien of the mortgage will not thereby be lost, but it may be enforced in the State where the property is found. If the mortgage *licet* is invalid when made, because of a failure to comply with the regulations prescribed by the State in which the property is then located, it will continue invalid after the removal of the property to another State. *Thomas, Chat. Mort.* §§ 320, 321.

In New York State it is held that where a contract in regard to personal property is made in another State, the law of such State as to its validity and effect is to govern here, and if valid there it is to be considered equally valid, and can be enforced here. *Etna Ins. Co. v. Aldrich*, 26 N. Y. 98. So, also, where a lien is valid in this State, and the property is temporarily removed to another State, 13 L. R. A.

a creditor cannot defeat the interest acquired under the same, by proceedings in *motum* in another State. *Martin v. Hill*, 12 Barb. 631.

The rule last stated is also recognized by the decisions in other States. *Langworthy v. Little*, 12 Cush. 109; *Jones v. Taylor*, 30 Vt. 42; *Ferguson v. Clifford*, 37 N. H. 86.

The principle is well settled that a voluntary conveyance of personal property, good by the law of the place where it was made, passes title wherever the property may be situated. *Hoyt v. Thompson*, 19 N. Y. 224.

The true rule is laid down in *Egderly v. Bush*, 81 N. Y. 203, by *Folger, Ch. J.*, as follows: "The law of the domicile of the owner of personal property, as a general rule, determines the validity of every transfer made of it by him."

A mortgage valid in Connecticut, where the property was, and where the parties entered into the mortgage contract, protects the mortgagee in his right to any property covered thereby that may have been subsequently brought into the State of

personal property which had been removed from the State and sold under execution against the mortgagor, to recover its value from the purchaser at the execution sale. *Affirmed.*

The case sufficiently appears in the opinion. *Mr. B. B. Winborne* for appellants.

Messrs. C. L. Pettigrew and Pruden & Vann for appellees.

Shepherd, J., delivered the opinion of the court:

The principle embodied in the maxim *mobilia sequuntur personam* is generally recognized in all civilized countries, and it follows as a natural consequence, says Story (Conf. L. 383), that "the laws of the owner's domicile (or the *lex loci contractus*) should in all cases determine the validity of every transfer, alienation, or disposition made by the owner, whether it be *inter vivos* or be *post mortem*." The authority of such laws, however, is admitted in other States, not *ex proprio vigore*, but *ex comitate*, and hence it is now very generally held that when they "clash with and interfere with the rights of the citizens of the countries where the parties to the contract seek to enforce it, as one or the other of them must give way, those prevailing where the relief is sought must have the preference." *Olivier v. Townes*, 2 Mart. N. S. 93; 2 Kent, Com. 458; *Moye v. May*, 43 N. C. 181.

This is illustrated by the leading case first cited, where a ship sold in Virginia was before delivery attached by creditors at New Orleans. The court held the sale void as to the attaching creditors, because the law of the *situs* required an actual delivery to pass the title. So, in the case of *Green v. Van Buskirk*, 74 U. S. 7 Wall. 139, 19 L. ed. 109, an attachment in Illinois was sustained as against the mortgage executed by the owner in New York, but not registered in Illinois, where the property was situated. The laws of that State provided that the mortgage should be "void as against third persons unless acknowledged and registered, and unless the property be delivered to and remain with the mortgagee." This principle, however, has no application to a case like ours, where the mortgage was executed and duly registered according to both the law of the domicile and the law of the *situs*. The

property was situated in this State, and the title of the mortgagees perfected here. This being so, we think it quite clear that the removal of the property to another State could not deprive the mortgagees of their rights. In support of this position there seems to be a *consensus* of judicial opinion. Even in Louisiana (whose courts were, perhaps, among the most prominent in giving effect to the law of the *situs*, as above explained) there has never been any doubt upon this question. On the contrary, in *Thuret v. Jenkins*, 7 Mart. (La.) 318, it was held that, where the title had passed, "the circumstance of the chattel being afterwards brought into a country, according to the laws of which the sale would be invalid, would not affect it." The doctrine of this case has since been affirmed in *Southern Bank v. Wood*, 14 La. Ann. 564. To the same effect is *Langworthy v. Little*, 12 Cush. 109, where Shaw, Ch. J., says that "a party who obtains a good title to property, absolute, or qualified by the laws of a sister State, is entitled to maintain and enforce those rights in this State." The property was attached in Massachusetts as the property of the mortgagor, and the sheriff was held liable for its conversion. So in *Jones, Chat. Mort.*, 801, it is said that, "although the mortgage be not executed in conformity with the laws of the State to which the property is afterwards removed, if executed and recorded according to the laws of the State or country of its execution, it is effectual to hold the property in the State to which it is removed." So in *Ballard v. Winter*, 39 Conn. 17, the Supreme Court of Connecticut sustained an action of trover against one of its own citizens for suing out attachment proceedings against property which had been mortgaged according to the law of Massachusetts, but which had been subsequently removed to the former State. The court said: "By the general rules of law, title thus perfected in one State is respected in all other States and countries into which the property may come. . . . It would certainly be very inconvenient if such mortgages, fairly made in Massachusetts, should be held invalid in Connecticut in respect to movable property, which may be daily passing to and fro along the dividing lines between the States." This case is re-

New York. *Ætna Ins. Co. v. Aldrich*, 20 N. Y. 93, 97; *Hoyt v. Thompson*, 19 N. Y. 224; *Ferguson v. Clifford*, 37 N. H. 86; *Martin v. Hill*, 12 Barb. 631; *Story, Conf. L. § 244*; *Ockerman v. Cross*, 54 N. Y. 32; 2 Kent, Com. 458; *Langworthy v. Little*, 12 Cush. 109; *Edgerly v. Bush*, 31 N. Y. 199; *Jones v. Taylor*, 30 Vt. 42.

It is the general rule in reference to personal property that it has no locality, but follows the person of its owner, and that its disposition and transfer are governed by the law of his domicile, and that a voluntary conveyance, valid by the laws of the place where the owner resides, will operate as a transfer of property wherever situated. *Ockerman v. Cross*, 54 N. Y. 29.

So, an assignment, valid by the laws of the State where it is executed, cannot be allowed to operate to the disadvantage of creditors residing in another State, so far as property interests of the assignor, situate in the other State, are concerned. *Hoyt v. Thompson*, 5 N. Y. 320, 349; *Bank of Augusta v. Earle*, 20 U. S. 13 Pet. 568, 10 L. ed. 297; 2 Kent, Com. 406; 4 Kent, Com. 406, 407; *Andrews v. Harriot*, 4 Cow. 510; 13 L. R. A.

Guillander v. Howell, 35 N. Y. 637; *Fox v. Adams*, 5 Me. 245; *Johnson v. Parker*, 4 Bush. 149; *Einer v. Deynoodt*, 39 Mo. 96; *Story, Conf. L. §§ 7, 244, 326, 327, 383, 384, 380*; *Hardmann v. Bowen*, 30 N. Y. 196; *Scott v. Guthrie*, 10 Boew. 408; *Julland v. Rathbone*, 20 N. Y. 306; *Kelley v. Crapo*, 45 N. Y. 86, 94, 97; *Varnum v. Camp*, 13 N. J. L. 326; *Ingraham v. Geyer*, 13 Mass. 146; *Boyd v. Rockport Steam Cotton Mills*, 7 Gray, 408; *Burr. Assignments*, 362, 379; *Moore v. Bonnell*, 31 N. J. L. 90; *Walters v. Whitlock*, 9 Fla. 86.

As we have seen, the general rule is, that if the transfer or disposition of personal property is valid at the owner's domicile, where made, it is valid everywhere. This rule has its exceptions, when the laws of different jurisdictions are in conflict, and particularly in cases where the *situs rei* at the time of the contract is in another State. *Varnum v. Camp*, 13 N. J. L. 326; *Moore v. Bonnell*, 31 N. J. L. 90; *Ranyon v. Grosheon*, 12 N. J. Eq. 87; *Bentley v. Whittemore*, 19 N. J. Eq. 462; *Frazier v. Fredericks*, 24 N. J. L. 162. See note to *Weinstein v. Freyer* (Ala.) 12 L. R. A. 700. F. S. R.

ported in 12 Am. L. Reg. N. S. 759, and is highly approved by the annotator, who cites several authorities in its support. The same point was decided by the Supreme Court of the United States in *Bank of United States v. Lee*, 38 U. S. 18 Pet. 107, 10 L. ed. 81. There certain property, being in Virginia, was conveyed in trust to Richard Bland Lee, for the benefit of Mrs. Lee. The title passed according to the Virginia law, but, the property being subsequently removed to the District of Columbia, where under a prevailing Maryland statute, such a transfer would not be good except upon certain conditions, which had not been complied with, the court (Catron, J.), said that "the Statute had no reference to a case where the title had been vested by the laws of another State, but operates only on sales, mortgages, and gifts made in Maryland." The following authorities are also directly in point: *Hill. Mortg.* 412; *Keenan v. Stinson*, 32 Minn. 877; *Ferguson v. Olifford*, 87 N. H. 86; *Jones v. Taylor*, 80 Vt. 42; *Rhode Island Cent. Bank v. Danforth*, 14 Gray, 123; *Martin v. Hill*, 12 Barb. 681; *Kanaga v. Taylor*, 7 Ohio St. 184; *Wilson v. Carson*, 13 Md. 54; *Smith v. McLean*, 24 Iowa, 822; *Hicks v. Skinner*, 71 N. C. 589; *Barker v. Stacy*, 25 Miss. 477; *Feurt v. Rowell*, 62 Mo. 524.

The defendants, however, contend that they are protected by the sale under the attachment proceedings in the Virginia court. They rely upon the case of *Green v. Van Buekirk*, *supra*, and insist that under the Act of Congress full faith and credit must be given to the judgments of the courts of a sister State. It is true that the decision referred to was chiefly based upon that Statute, but it must be observed that the record of such an adjudication has only (we quote from the opinion) "the same faith and credit as it has in the state court from which it is taken," and that, "in order to give due force and effect to a judicial proceeding, it is often necessary to show by evidence outside of the record the predicament of the property on which it operated." Such was the course pursued by the court in that case; and, as we have seen that the title to the property had not passed according to the law of the *situs*, the attachment proceedings were sustained. If, however, it had appeared that at the time of the execution of the mortgage in New York the property was also there, but had been afterwards removed to Illinois, it cannot be doubted that the decision would have been otherwise. Happily we have a case directly in point from the Supreme Court of Illinois—*Mumford v. Canty*, 50 Ill. 370. It is there distinctly held that, "where personal property was mortgaged in the State of Missouri, and permitted to remain with the mortgagor (contrary to the law of Illinois) after the maturity of the debt to secure which the mortgage was given, and, upon being subsequently brought into Illinois, was seized under an attachment in favor of a bona fide creditor of the mortgagor, the rights of the mortgagee [would] be determined by the law of Missouri;" and the mortgagee was permitted to recover the property of the purchaser. Here, then, we have an express decision as to the effect which is to be given to such a judgment in the State in which it is rendered, and it is only to this 13 L. R. A.

extent, and no further, that the judgment is conclusive in a sister State. To hold otherwise would go beyond what the Statute requires, and give the same effect to an attachment proceeding which generally follows a proceeding which is strictly and technically *in rem*. Such is not the law. An attachment proceeding, though often spoken of as a proceeding *in rem*, "cannot be admitted to come within the strict meaning of that term; the judgment is conclusive only upon the actual parties to the litigation and those in privity with them. . . . and they use the hold obtained by the seizure of specific property merely as a means of reaching and giving effect to the rights of parties, and neither claim nor exercise any controlling authority over the title of strangers. The same remark applies to replevin." 2 Black, Judgm. § 801; *Duchess of Kingston's Case*, 3 Smith, Lead. Cas. 9th Am. ed. 2011; *Drake, Attachm.* 245. In his notes to the latter case, Judge Hare cites with entire approval the opinion of Hall, J., in *Woodruff v. Taylor*, 20 Vt. 65, in which it is said that the operation of such a proceeding "must be limited to the parties to it, and cannot in any manner affect the right or interest of any other person having an independent and adverse claim to the goods," etc. Having shown, we think, that the title perfected here was not lost by the removal of the property to Virginia, and that the record of the judgment in the attachment proceedings is only to be respected in so far as effect is given to it in that State, we cannot but assume, in the absence of any decision to the contrary, that the same principle of comity so universally recognized and acted upon likewise prevails in Virginia, and that, even if these plaintiffs were suing in that jurisdiction, they would be permitted to recover. This would seem all the more reasonable, as we have extended this very comity to a citizen of our sister State in a case precisely similar to the one under consideration. *Anderson v. Doak*, 32 N. C. 295. There a slave, being in Virginia, was mortgaged by its owner, and the mortgage duly registered in Carroll County. It was never registered in this State, nor was it executed according to its laws. The slave came to this State, and was attached by a creditor of the mortgagor. In an action of trover, brought by the mortgagee against the sheriff, the plaintiff was permitted to recover. It will be noted that we have discussed this question as if the plaintiff were seeking redress in the courts of Virginia. If we have shown that, according to what appears to be the entire course of judicial opinion, they would be entitled to recover there, *a fortiori* can they recover in the courts of this State when they have acquired jurisdiction over the parties. To the foregoing authorities we will add a recent decision of the Court of Appeals of New York. In that case (*Edgerly v. Bush*, 81 N. Y. 199) B. executed to plaintiff a chattel mortgage upon a span of horses. Both parties were then residents of New York. B. subsequently took them to Canada, where they were sold by a regular trader dealing in horses, the purchaser buying in good faith. Under the laws of Canada property cannot be reclaimed from one so purchasing without refunding the price paid. Defendant, a resident of this

State, bought the horses in Canada from such purchaser, and they were left in Canada. Upon refusal of defendant to deliver them, the plaintiff sued for their conversion. The court held (Folger, *Ch. J.*, delivering an elaborate opinion) that the plaintiff was entitled to recover. We are of the opinion that his honor

very properly overruled the demurrer, but he should have given the defendant an opportunity to answer. Code, § 272; *Moore v. Hobbs*, 77 N. C. 65; *Bronson v. Wilmington N. C. L. Ins. Co.* 85 N. C. 411.

Affirmed.

KENTUCKY COURT OF APPEALS.

W. B. STULTS, *Appt.*,

v.

H. H. SALE.

(...Ky....)

Loss of his family will not terminate the legally acquired homestead exemption of one who continues to occupy the premises as a housekeeper, under statutes which were enacted from a spirit of liberality towards the debtor, as evidenced by the continuance of a wife's homestead exemption for the benefit of her husband after her death and other similar provisions.

(September 12, 1891.)

A PPEAL by plaintiff for a judgment of the Louisville Chancery Court in favor of defendant in an action brought to subject certain property to the payment of plaintiff's claim against defendant. *Affirmed.*

The facts are sufficiently stated in the opinion.

Messrs. A. C. Rucker and C. B. Seymour, for appellant:

One cannot be regarded as a bona fide housekeeper with a family, unless there are those living with him who not only bear a dependent relation to him, but whom he is under a natural or legal obligation to maintain.

Brooks v. Collins, 11 Bush, 625; *Carter v. Adams* (Ky.) 9 Ky. L. Rep. 91; *Riley v. Smith* (Ky.) 9 Ky. L. Rep. 616; *Ellis v. Davis* (Ky.) 11 Ky. L. Rep. 893.

In Kentucky there is a derivative homestead, which does not in any way depend upon the survivor being a housekeeper with a family.

Allensworth v. Kimbrough, 79 Ky. 334; *Ellis v. Davis*, *supra*.

But the case at bar is not a case of derivative homestead. The title was not in Mrs. Sale, but in appellee.

The claim that, as Sale once had a homestead exemption and had never abandoned the property, his exemption continued although he has ceased to have a family, cannot be sustained.

Cooper v. Cooper, 24 Ohio St. 488.

The Legislature has enacted a statute and provided to what class of people it shall apply; when a party ceases to belong to that class the Statute becomes inapplicable to him.

It never was the intention of our law that anything should be exempt for the benefit of the debtor. He is under moral as well as legal obligation to pay his debts; but for the benefit of his family exemptions are allowed him.

See *Murray v. Shuck*, 6 Bush, 111; *Thorn v. Dartington*, 6 Bush, 449.

Messrs. Abbott & Rutledge for appellee.

Holt, Ch. J., delivered the opinion of the court:

This appeal presents a single, but hitherto undecided, question by this court. When the appellee, H. H. Sale, in 1864, first came into the occupancy of the property in contest, and in which he had a life estate, he was undoubtedly a bona fide housekeeper with a family. It then consisted of a wife and five children; and that he then acquired a homestead right in the property is beyond question. He has occupied it as a housekeeper ever since. In 1883, when this suit was brought upon a return of *nulla bona* to subject whatever property he had to the payment of the appellant's debt, his family had narrowed to one daughter, an invalid brother, and his mother-in-law; and since October, 1887, although a housekeeper in the property, he has, by reason of death and marriage, had no family whatever, within the legal meaning of that term, living with him. *Brooks v. Collins*, 11 Bush, 622. It is therefore claimed that it is not now exempt to him as a homestead, but it is liable to the appellant's

NOTE.—Homestead, how far defeated by loss of family.

A man's homestead once acquired is not lost or defeated by the death or absence of his wife and children. *Wilkinson v. Merrill* (Va.) 11 L. R. A. 632; *Kessler v. Draub*, 52 Tex. 575; *Taylor v. Boulware*, 17 Tex. 77; *Silloway v. Brown*, 13 Allen, 30; *Barney v. Leeds*, 51 N. H. 233; *Kimbrel v. Willis*, 97 Ill. 494. *Contra*, *Cooper v. Cooper*, 24 Ohio St. 488.

Or by her abandonment of him. *Griffin v. Nichols*, 61 Mich. 575.

Thus a widower whose children have all married and moved away retains his homestead where he occupies one room and boards with the tenant. *Myers v. Ford*, 22 Wis. 129.

And a childless widower may have his homestead

right continued. *Ellis v. Davis* (Ky.) 11 Ky. L. Rep. 893.

A divorce obtained by a wife does not destroy her husband's homestead right. *Byers v. Byers*, 21 Iowa, 268.

Even if she is given the custody of the children. *Woods v. Davis*, 24 Iowa, 264. *Contra*, *Arp v. Jacobs* (Wyo.) Oct. 12, 1891.

On removal of the wife and children after a limited divorce the same rule applies and the husband's homestead continues. *Doyle v. Coburn*, 6 Allen, 71.

This note does not include matters about derivative homesteads or the homestead right of a surviving husband or wife and children as such.

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debt. Our Statute exempts to the debtor as a homestead land worth not over \$1,000, if he be a bona fide housekeeper, with a family, of this Commonwealth. The nature of this right is not fixed by the Statute by name. He may sell the property, but is divested of the right to it if he permanently abandons it as his home. It may, perhaps, be said to be a qualified estate. It continues after his death, for his widow, during her occupancy of it, though there be no children. *Gay v. Hanks*, 81 Ky. 522.

The husband has the like right in the homestead of the deceased wife. This court has decided that where the right is thus derivative the having of a family is not necessary to its continuance. It is to the creation of the right at the outset in the husband or wife, but not to the continuance of it in the survivor. *Ellis v. Davis* (Ky.) 11 Ky. L. Rep. 898.

In this case, however, there is no derivative right of homestead. The property belongs to the husband, who is the debtor, and is claiming it as exempt to him as a homestead. Undoubtedly the having of a family was necessary to the creation of the right in him, but is it necessary to the continuance of it? While essential to its coming into existence, yet, when it has once vested in the debtor, does he lose it by death or the marriage of his children, leaving him alone, but still a housekeeper, in the occupancy of the property? The Statute makes no express mention in this respect. We must therefore look to its general scope and spirit for guidance, the right being the creature of it. It is urged with force that the homestead exemption is for the benefit of the family, and, therefore, where this family relation does not exist, there is no homestead exemption. In other words, the reason for the rule ceasing, the rule ceases. This is true as to the coming into existence of the homestead right; and it is no doubt also true that the primary object of the Statute was the protection of families from want, and the giving to them a shelter; yet the fact that the Statute gives the homestead of the deceased wife to the husband during his occupancy of it, although he has no family, shows that it was not intended to provide for the wife and children alone. He, in such a case does not become homeless. Can it well be supposed, that the Legislature intended that, in the event of the death of the wife, owning the homestead, the benefit of it should continue to the husband during his occupancy, although he has no family, and yet that if he be the owner of it, and his wife and children die, or the latter marry and leave him, his right to the exemption ceases? If so, it is a singular state of case; and, if so, it is equally true of the wife, where she owns the homestead. In the event of the husband's death owning the homestead, she takes it as survivor, so long as she occupies it, although she has no family; but if she owns it, and her husband dies, there

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being no longer any family, her homestead right ceases. Why should not the original owner have a right equal to the survivor, and why should not the law favor the latter equally at least with the former? Is the party to be worsted because he owns the property? Can any reason be given why the same right should not exist as to his own property as is given to him in his wife's property after her death? Ought not his claim to a homestead in his own property, as against his own creditors, to be as much regarded as his claim to one in her property after her death? The construction here contended for by the creditor should not be given to a statute which was enacted from a spirit of liberality towards the debtor. The Massachusetts Statute of 1855 limited the homestead exemption to a "householder having a family." It continued it to the widow and children after his death, but contained no provision for its continuance to the husband after the death of his wife, and the departure of his children; but the supreme court of that State held that his right was not thereby lost, so long as he continued to occupy the property as his home, saying: "Any other construction would render a husband who had been deprived of his family by accident or disease, or by their desertion, without any fault of his, liable to be instantly turned out of his homestead by his creditors." *Silovey v. Brown*, 12 Allen, 80.

This case, and other somewhat kindred ones, are cited in section 72 of Thompson on Homesteads with apparent approval; and, while the Massachusetts Statute, as well as that of Illinois, denominates the right as "an estate of homestead," while our own merely exempts land worth \$1,000 as a homestead, yet the case last cited, as well as *Kimbrel v. Willis*, 97 Ill. 494, and *Kessler v. Draub*, 52 Tex. 575, are so far kindred to this one as to merit citation. True, the question is one of statutory construction, and the decisions in other States are of value only so far as their statutes are like our own; but, considering the entire Act, and the spirit which led to its enactment, it seems to us its only reasonable construction is that, while the having of a family is necessary to the creation of the homestead right, this is not necessary to its continuance. It is not necessary to inquire why this was made a necessary condition to its creation. The Statute in substance says so, but it does not provide that it is necessary to its continuance, and, in order to harmonize and render consistent and reasonable its other provisions, it should not, in our opinion, be so construed. Here the debtor was invested with the right. It existed when this suit was brought. He has done nothing to release or forfeit it; and, in our opinion, is still entitled to it, being yet a housekeeper in the property, although by misfortune he no longer has a family.

Judgment affirmed.

NEW YORK COURT OF APPEALS

Warren BRYANT *et al.*, Exrs., etc., of
Francis W. Tracy, Deceased, *Appls.*,
v.

Harriet F. Tracy THOMPSON, Impleaded,
etc., *Resp't.*

(.....N. Y.)

The right to appeal as a party "aggrieved" does not extend to executors who have obtained a judgment construing a will as to which of two parties is entitled to a certain bequest where the alleged claimants acquiesce in the decision.

(*Ruger, Ch. J., and Andrews and Gray, JJ., dissent.*)

(October 12, 1891.)

APPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a judgment of a Special Term for Erie County construing the will of Francis W. Tracy, deceased, and holding that defendant, Mrs. Thompson, was entitled to a benefit thereunder. *Dismissed.*

The facts are stated in the opinion.
Mr. John G. Milburn, for appellant:

The plaintiffs have the right to bring this appeal.

Bryant v. Thompson, 36 N. Y. S. R. 921.

The executors of a will have the right to bring an action of this nature. As to the personal property the executors are trustees, and only personal property is involved in this action.

Bowers v. Smith, 10 Paige, 198, 4 L. ed. 940; *Wager v. Wager*, 89 N. Y. 161; *Bailey v. Briggs*, 56 N. Y. 413; *Chipman v. Montgomery*, 63 N. Y. 231; *Dill v. Wisner*, 88 N. Y. 160.

The executors are "parties aggrieved" within the meaning of section 1294 of the Code of Civil Procedure.

Messrs. John E. Parsons and Charles Robinson Smith, with **Mr. H. B. Closson**, for respondent:

The expression "party aggrieved," used in the Statute, does not necessarily and in all cases mean a party who has a direct pecuniary interest in the question, in the sense that if one construction of the will be adopted, he gets a bequest, and if another, he does not.

People v. Jones, 110 N. Y. 509; *Bookes v. Hathorn*, 78 N. Y. 222; 2 Perry, Trusts, § 928.

Only parties aggrieved can appeal.

Code Civ. Proc. § 1294; *Banta v. Kent*, 4 N. Y. Week. Dig. 62; *Reid v. Vanderheyden*, 5 Cow. 719; *Steele v. White*, 2 Paige, 478, 2 L. ed. 995; *Colden v. Botts*, 12 Wend. 234; 2 Rumsey, Practice, 646; *Kellogg v. Israel*, 11 Paige, 147, 5 L. ed. 88; *Card v. Bird*, 10 Paige, 426, 4 L. ed. 1038; *Hyatt v. Dusenbury*, 8 Cent. Rep. 78, 106 N. Y. 663; *Ross v. Wigg*, 1 Cent. Rep. 292, 100 N. Y. 243; *Bush v. Rochester City Bank*, 43 N. Y. 659; *Hall v. Brooks*, 89 N. Y. 33; *Hoag v. Hatch*, 24 N. Y. S. R. 91.

The word "aggrieved," in the Statute, refers to a substantial grievance,—a denial to the party of some claim of right either of property or of person or the imposition upon him of some burden or obligation.

It is not the province of courts to decide abstract questions of law disconnected from the granting of actual relief.

Grow v. Garlock, 29 Hun, 598; *People v. Troy*, 82 N. Y. 575.

The plaintiffs brought this action for a construction of certain clauses in the will which affect only the two defendants, and they asked the instructions of the court.

They have obtained this relief, and received their instructions. Neither defendant complains. The plaintiffs are therefore not aggrieved.

Atkinson v. Manks, 1 Cow. 691.

NOTE.—Right of administrator, executor, or trustee to appeal as party aggrieved from a decision as to rights of distributees or beneficiaries inter sese.

The main case is in accordance with the weight of authority, which holds that executors, administrators and trustees are not aggrieved by a decision as to the rights of the beneficiaries among themselves. *Goldtree v. Thompson*, 83 Cal. 420; *Merrifield v. Longmire*, 66 Cal. 190; *Wright's Estate*, 49 Cal. 560; *Bates v. Ryberg*, 40 Cal. 465; *Re Dewar's Estate*, 10 Mont. 422.

An executor cannot appeal as such from a decree of settlement and distribution, although he is a legatee. *Re Marrey's Estate*, 65 Cal. 287.

And a trustee in insolvency cannot appeal from the allowance of a claim where the creditors interested acquiesce in the decision. *Salmon v. Pierson*, 3 Md. 297, distinguishing *Ellcott v. Ellcott*, 6 Gill & J. 35, where a trustee in chancery was allowed to appeal from a decree of distribution on the ground that in that case he was personally interested. But see *Marrey's Estate*, *supra*.

And a trustee to sell mortgaged property cannot appeal from an order directing the payment of a claim against the fund. *Stewart v. Codd*, 58 Md. 56.

By an application of the same principle an administrator is not entitled to file cross-interrogatories in a proceeding to determine who are the

distributees and their rights as to each other. *Roach v. Coffey*, 73 Cal. 281.

An executor cannot appeal from the refusal to allow a claim of a creditor which he has not paid or become liable to pay. *Kellett v. Rathbun*, 4 Paige, 104, 3 L. ed. 362.

On the other hand, it has been held that a trustee is aggrieved by a decision denying a valid claim on the fund because he is a trustee for all the claimants. *Bookes v. Hathorn*, 78 N. Y. 222.

And in exact conflict with the principle laid down by the cases first cited above is a decision that it is the duty of an administrator to appeal if he has reasonable ground to believe there is error in a judgment and order of distribution. In this case the alleged error was in holding that conveyances to the intestate's sons were advancements and as the debts had all been paid only the distributees were interested. *Ruch v. Biery*, 9 West. Rep. 215, 110 Ind. 444.

In line with this is another decision that an administrator may appeal from an order of payment on the ground that it lays down a rule of apportionment which works injustice as between creditors of the estate. *Re McCune's Estate*, 76 Mo. 200.

An executor may appeal from an order setting aside a sale which he has made as authorized and required by the will. *Re Bagger's Estate*, 78 Iowa, 171.

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The right to appeal is limited to the extent of the grievance.

Hone v. Van Schaick, 7 Paige, 222, 8 L. ed. 182; *Cuyler v. Moreland*, 6 Paige, 278, 8 L. ed. 983; *Idley v. Bowen*, 11 Wend. 227; *Card v. Bird*, 10 Paige, 426, 4 L. ed. 1088; *Reid v. Vanderheyden*, 5 Cow. 719.

This is like a bill of interpleader, the plaintiffs being stakeholders and the defendants being the two claimants.

In such an action the plaintiff has no interest except to be rid of the thing, debt, or duty which the two defendants both claim. All that is material to him is a determination that the bill of interpleader has been properly filed.

Dorn v. Fox, 61 N. Y. 264; *Atkinson v. Manks*, 1 Cow. 691; 11 Am. & Eng. Encyclop. Law, pp. 494, 504, note 1; *Cogswell v. Armstrong*, 77 Ill. 139; *Badeau v. Rogers*, 2 Paige, 209, 2 L. ed. 878.

An executor cannot appeal in behalf of one set of legatees or creditors as against another, where all are before the court.

Kellett v. Rathbun, 4 Paige, 102, 8 L. ed. 361; *Bates v. Ryberg*, 40 Cal. 463; *Wright's Estate*, 49 Cal. 550.

A trustee cannot appeal in behalf of one beneficiary as against others where all are before the court.

Salmon v. Pierson, 8 Md. 209; *Stewart v. Codd*, 58 Md. 86; *Bockes v. Hathorn*, 78 N. Y. 222; *Hall v. Brooks*, 80 N. Y. 83.

O'Brien, J., delivered the opinion of the court:

The plaintiffs, as executors and trustees of the will of Francis W. Tracy, who died April 15, 1886, brought this action in order to procure a judicial construction of its provisions. The will and codicils dispose of a large estate, consisting of both real and personal property. Numerous large bequests were made to collateral relatives, and also to various public and private charitable institutions. The residuary estate was left to the widow. The only clause of the will with which we are concerned, in the decision of this appeal, is the one in which provision was made for the defendant Harriet F. Tracy, who is the only child and heir-at-law of the testator. At the time of his death she was an infant, nearly nineteen years of age, and since the commencement of this action, and about the month of April, 1890, she married one George Thompson. She is the daughter of a former wife, who obtained a divorce from the testator many years before his death. When very young, she and her mother separated from the testator, and took up their residence in the City of New York, while the deceased continued to reside in Buffalo, where he died. The relations between the deceased and his daughter and her maternal relatives had for many years been hostile. Her mother's maiden name was Robinson, and the child took that name, and is so designated in some parts of the case. The testator, by a codicil to his will bearing date August 19, 1879, provided a trust fund of \$100,000, the income of which was to be paid to his daughter during her life, the principal to be divided among her issue at her death. The form of the bequest was to the executors of his will in trust. The same codicil contained, however, the following provision:

"In case any beneficiary named in my said last will and testament, whether a devisee, legatee, or *cestui que trust* therein named, shall, in person or by another, contest the probate of my said last will and testament or any codicil thereto, or shall institute any proceedings of any kind with a view to avoid or annul my said last will and testament or any codicil thereto, or any provision in my said last will and testament or in any such codicil contained, then and in either case I do hereby revoke all provisions in my said last will and testament or in any codicil thereto contained in favor of the person or corporation contesting or seeking to avoid such last will and testament or codicil or provision. And if such contestant shall be my daughter, then I give, devise, and bequeath to my wife all the property which in and by such last will and testament and the codicils thereto is or shall be given to my executors in trust for my said daughter's benefit. If my wife shall be such contestant, then I give, devise, and bequeath to my executrix and executors all the property which is by my said last will and testament or any codicil thereto given to my wife, in trust for my daughter, upon the same trusts in every particular as are specified in the second article of this codicil." It seems that the testator contracted a second marriage, and the wife referred to in the provisions of the will, and who took the residuary estate, and with whom he lived up to the time of his death, is the wife of this marriage.

A few days after the death of the testator, his will, with the codicils, were presented to the surrogate of Erie County for probate, by the plaintiffs, and a citation was issued and served upon the daughter, the defendant in this action. Upon the return day of the citation the surrogate, of his own motion, appointed a special guardian for the daughter for the sole purpose of appearing and protecting her interest in the proceedings to prove the will. Subsequently, and after consultation with the defendant and her relatives in New York, and with counsel there, acting for them, the guardian interposed an answer before the surrogate, taking issue in the usual form with the allegations of the petition. The special guardian also retained counsel, and under the direction of the surrogate the proponents of the will were required to produce many witnesses before him for examination, and the trial continued during a number of days. It was contended in behalf of the special guardian that the testator did not possess testamentary capacity; and various witnesses, including servants of the deceased and also experts, were called to sustain that contention. The guardian, through his counsel, requested the surrogate to refuse probate to the will. In the month of November, 1886, the surrogate entered a decree admitting the will to probate, which among other things, contained this clause: "Pursuant to section 2623 of the Code of Civil Procedure, it is hereby stated that the probate of said will was contested." The daughter herself was present at the hearing, and was called and heard as a witness on behalf of the special guardian. After the entry of the decree admitting the will to probate, the widow executed, acknowledged, and filed with the surrogate a paper, under seal, which recited

that she was the residuary legatee and devisee of her late husband's will, which had been admitted to probate. The provision of the decree stating that it was contested, and of the will and codicil that the legacy, in case of such contest should be deemed revoked, were referred to. It then recited that she was desirous that all the provisions of her husband's will, respecting his daughter, should be observed, providing his reputation and capacity be not further questioned. It then stipulated that the executors (of whom she was one) shall not claim in any way that the right of the daughter to the provisions of the will for her benefit had been forfeited; that no effect should be given to the clause revoking the legacy in case of a contest by the legatee, but that the legacy should be deemed legal and valid, and the trust in favor of the daughter executed. The consideration for this agreement on the part of the widow was stated to be the omission of the daughter to appeal from the decree of the surrogate, and it was in terms conditioned that no such appeal should be taken, and that no action or proceeding of any nature should be brought by or in behalf of the daughter, or by any person claiming through or under her, to set aside the probate, or question the validity of the will or the testamentary capacity of her husband; and in case such appeal, action or proceeding should be brought or instituted, then the stipulation and agreement should be void and of no effect. The special guardian, however, appealed from the decree of the surrogate to the general term, where the decree was affirmed.

Two of the executors then brought this action to procure the judgment of the court as to the disposition of the \$100,000 which the daughter was to take by the provisions of the will. The widow declining to become a party plaintiff, was made a defendant, both individually and as executrix and trustee under the will. The daughter is the only other defendant, and no other question is raised by the pleadings. The complaint, after alleging the making of the will, its provisions, the death of the testator and the proceedings before the surrogate, stated that the daughter still claimed the legacy, but that the plaintiffs were advised that by reason of the clause above quoted, and the contest, the provisions of the clause revoking the gift upon certain contingencies became operative, and that the widow was entitled to the same. The relief asked was that the court give construction to the clauses of the will touching this legacy, and the fund mentioned therein, and that it determine the conflicting claims thereto, and define the rights and duties of the plaintiff concerning the same. The special term held that the contest before the surrogate, by and in the name of the special guardian, was not a contest by the daughter, in person or by another, within the meaning of the clause in the codicil expressing the conditions upon which the legacy should vest, and that she was entitled to the bequest. The general term affirmed the judgment, but upon the ground that, the daughter being an infant, and having merely submitted her rights to the court, the revoking clause was, as to her, an attempt to subvert the course of judicial proceedings, and to deprive the court of the right and duty imposed upon it by law, in all cases, to institute

of its own motion proper proceedings for the protection of infants, and that as to the daughter the condition was void as against public policy. It held that the contest must be deemed to have been made by the daughter, although the actual steps were taken by the guardian. *Bryant v. Thompson*, 87 N. Y. S. R. 431.

The widow allowed the judgment to pass without any answer or other opposition, and the only parties who have appealed to this court are the two executors who brought the action. The argument of the case was accompanied by a motion in this court to dismiss the appeal. The question is therefore raised whether the plaintiffs have such a standing in the case as enables them to bring the appeal. The plaintiffs clearly had the right to bring this action in order to procure a judicial determination of the question as to which of two claimants was entitled to the fund, and also to obtain the instructions of the court in regard to their duties under the will. They have obtained these instructions and this determination from the highest court of the State possessing original and general jurisdiction. There were two parties who had a pecuniary interest in the decision of the question involved in the case,—the daughter, who is satisfied with the result, as it is in her favor, and the widow, who does not appeal. The judgment rendered in the court to which the plaintiffs resorted in the first instance is a perfect protection to them in the disposition of the fund in accordance therewith, and in the performance of every duty growing out of the legacy to the daughter under the provisions of the will. This being true, what interest have the plaintiffs in the further prosecution of the action? They had an interest, and it was their duty, to procure a judicial determination of the questions presented by the facts alleged, but no interest or duty in obtaining a decision according to some view of the law that they may have themselves entertained, or have been advised by counsel. Appeals are not allowed to this court for the purpose of settling abstract questions, however interesting or important they may be to the general public or to the legal profession, but to correct errors injuriously affecting the rights of some party to the litigation. The plaintiffs are not concerned in the slightest degree in any legal sense, with the question whether the provision for the daughter be held for her or deemed revoked, under the other clause, and secured to the widow. The widow is not here complaining of the result in the courts below. Had she waived in writing, or in any other way binding upon her, the conditions of her stipulation touching the contest before the surrogate, after the general term had passed upon the question, it would amount to a settlement of the controversy between the only parties having a pecuniary interest in it which would prevent an appeal. Looking at the substance of things, and keeping in mind the relations which these two beneficiaries now hold to the case, we cannot see that the present appeal stands on grounds any different from what it would then. The widow, after the appeal to the general term from the decree of the surrogate, could have waived the conditions contained in her stipulation in regard to the effect of an appeal, as she had before renounced

the benefits of the clause revoking the legacy in case of the contest. She did not, it is true, waive these conditions expressly, but she failed when made a party to this action, to insist upon them; and it is not perceived that the plaintiffs have any interest in insisting, through an appeal to this court, upon a point which the real and only beneficiary has refused to raise for herself. The widow, as already observed, conditionally renounced the benefits of the revoking clause by her deed; and no one, we think, should be permitted to urge that this deed has become inoperative by reason of a breach of its conditions except herself, and that position she is not, it seems, inclined to take.

The plaintiffs are not seeking any benefit for themselves in the action. They have simply asked the judgment and advice of the court in regard to the disposition of property belonging to others, which is in their care and keeping. The court has given the judgment and advice prayed for, and the real beneficiaries do not complain. Whether the plaintiffs are entitled to be heard further in this court does not depend upon any inherent right which the plaintiffs, as suitors, have, but upon express statutory permission. *State v. Kings County*, 125 N. Y. 312.

The right of a party to have all disputes in which he has any interest determined according to judicial forms in a court possessing original jurisdiction is absolute, if indeed there are any such rights, in a strict sense. But, when he seeks to have the judgment reviewed in this court, he must be able to point to some statute giving him the right and conferring the jurisdiction. The only statute relied upon as securing to the plaintiff in this case the right to appeal is section 1294 of the Code of Civil Procedure, and under that section the right is limited to a party aggrieved. In this case the executors and trustees under a will, having asked the court for directions in regard to their duty and for a judgment as to which of two parties is entitled to a certain bequest, which directions and judgment are given and acquiesced in by both of the alleged claimants of the fund, the plaintiffs are not aggrieved, within the meaning of the Statute, by the judgment rendered. The question decided in the courts below and presented by the record is undoubtedly one of great interest and importance, and for that reason should not be passed upon by this court until brought here by some party

having an actual and practical, as distinguished from a mere theoretical, interest in the controversy. Cases can be and are cited by the learned counsel for the appellants in which this court has entertained appeals by executors and trustees under wills from judgments of this character. But it is believed that they are cases either in which the point was not raised at all, or, if raised, the appeal was not only by the trustees, as in this case, but by the beneficiaries, also, so that a motion to dismiss, as now before us in this case, if granted, would not dispose of the case, but would still leave the same questions to be determined upon the appeal of the other parties. If in this case the widow had contested the right of the daughter to receive the legacy, and claimed it for herself, under the clause providing for revocation, and had appealed to this court to maintain that position, and the appeal was before us, we would not then regard this motion as of much practical importance. This was the situation when the court was asked to dismiss the appeal in most if not all the cases of a similar character to which our attention has been directed. An appeal to this court does not lie unless the party appealing has an interest in the controversy. *People v. Lawrence*, 107 N. Y. 607, 10 Cent. Rep. 720; *Hyatt v. Dusenbury*, 106 N. Y. 663, 8 Cent. Rep. 78.

The case of *People v. Jones*, 110 N. Y. 509, is not contrary to these views. In that case the commissioners of the land office, representing the State, made a grant of land under water to an individual. Subsequently the determination of the commissioners in making the grant was reversed by the supreme court on certiorari, and the commissioners appealed to this court, where a motion to dismiss was denied. The order appealed from in that case in effect nullified the grant made by the State and the commissioners, as public officers representing the State, were in duty bound to defend the grant against the effect of an erroneous decision, and so were aggrieved.

We think that the plaintiffs have no interest in the question presented by the record in this case, and that *the appeal should be dismissed*, with costs to both parties payable out of the estate.

Earl, Finch, and Peckham, JJ., concur;
Ruger, Ch. J., and **Andrews and Gray, JJ.**, dissent.

WYOMING SUPREME COURT.

Re Leonard WRIGHT.

(...Wyo....)

A law changing the mode of procedure from indictment to information in cases of offenses already committed, is not *ex post facto*, and does not infringe any substantial right of the offenders.

(June 11, 1891.)

APPPLICATION for a writ of habeas corpus to obtain the release of petitioner from the 18 L. R. A.

custody of the sheriff of Taramie County.
Denied.

The facts are stated in the opinion.

Messrs. Donselmann & Van Orsdel, for petitioner:

It is a vested right, belonging to the petitioner, to have his case presented to a grand jury, and he cannot be deprived of such vested right by legislation subsequent to the date of the commission of the alleged crime.

Bill of Rights, § 85, Wyoming Const. art. 1; *Kring v. Missouri*, 107 U. S. 221, 228-225, 27 L. ed. 506, 508-511; *McCarty v. State*, 1

Wash. 377; *Re Durbin*, 10 Mont. 147; *People v. Tisdale*, 57 Cal. 104.

A petition for a writ of habeas corpus is the proper remedy and mode of procedure when it draws in question the jurisdiction of the court under whose sentence the petitioner is deprived of his liberty.

People v. Neilson, 16 Hun. 214; *Re Eldred*, 46 Wis. 530; *Ex parte Farnham*, 3 Colo. 545.

Mr. Charles N. Potter, Atty-Gen., for the State.

Groesbeck, Ch. J., delivered the opinion of the court:

This is a hearing upon the demurrer to the answer and return of A. D. Kelley, sheriff of Laramie County, to the petition for the writ of habeas corpus, and to the writ. It is admitted that the demurrer raises all the questions involved, and that the decision upon it will dispose of the entire case. The answer and return of the sheriff show that the petitioner, Leonard Wright, is restrained of his liberty by the said sheriff in the jail of said Laramie County, under a sentence of the district court of said county, for the term of two years and six months, under his plea of guilty of an assault with an attempt to commit rape. The defendant was informed against by the county and prosecuting attorney of said county for the crime of rape, under the provisions of the law passed by the first Legislature of the State of Wyoming, approved January 10, 1891, entitled "An Act to Change and Regulate the Grand Jury System by Reducing the Number of Grand Jurors, Providing that a Grand Jury shall be Summoned only when Ordered by the Court, and Providing for the Prosecution by Information, and the Procedure thereunder." *Sess. Laws Wyo. 1890-91*, chap. 59, p. 213.

The offense is charged in the information as having occurred on the 16th day of December, A. D. 1890, nearly a month before the Act took effect; and the counsel for the petitioner claim that the petitioner, notwithstanding his plea of guilty, should be proceeded against by indictment instead of by information, as, prior to the passage of the Act above named, he could only have been accused by indictment. It is urged that the petitioner is held without due process of law, and that the law applying to the prosecution of offenses committed prior to its enactment is an *ex post facto* law, and in violation of section 35 of the Declaration of Rights (Const. Wyo. art. 1), which states that "no *ex post facto* law, nor any law impairing the obligation of contracts, shall ever be made." The constitutional authority for the enactment of the Statute is found in said article, and reads as follows: "Sec. 9. The right of trial by jury shall remain inviolate in criminal cases, but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve men, as may be prescribed by law. Hereafter a grand jury may consist of twelve men, any nine of whom concurring may find an indictment, but the Legislature may change, regulate, or abolish the grand jury system." "Sec. 13. Until otherwise provided by law, no person shall, for a felony, be proceeded against criminally, otherwise than by an indictment, except in cases arising in the land or naval

forces, or in the militia; when in actual service in time of war or public danger."

The Act providing for prosecutions by informations, and under which the petitioner was accused, provides, among other things, that all crimes, misdemeanors, and offenses may be prosecuted in the court having jurisdiction thereof, either by indictment, as "hereinafter provided," or by information. It further provides that "no grand jury shall hereafter be summoned or required to attend at the sittings of any district court in this State, unless the same shall be ordered by a district court, or by the judge thereof, in the vacation or recess of said court, and the grand jury shall consist of twelve men, nine of whom must concur in the finding of an indictment." The Act was undoubtedly intended to apply to prosecutions of all offenses committed prior to the passage of the Act as well as to those committed thereafter. There is no repeal of existing laws, nor any saving clause providing that offenses committed prior to the passage of the Act shall be inquired of, prosecuted, and punished under laws existing at the time of the passage of the Act. It seems that the Legislature had determined to dispense with grand juries after the Act took effect, except when called by the court or judge thereof, following very closely the law of Michigan in this respect. The general right to substitute prosecutions by information in place of prosecutions by indictment is conceded, in view of the constitutional provisions in this State, and it is not claimed that this infringes any right of a defendant. Indeed, this has been so frequently settled that it is unnecessary to cite any authorities, but we cite a few, which have come immediately under our observation. *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 282; *Re Lourie*, 8 Colo. 499; *State v. Barnett*, 3 Kan. 250; *Rowan v. State*, 30 Wis. 129.

These cases dispose also of the question as to whether or not a proceeding by information is due process of law, and we do not consider it necessary to dwell longer on this point. We reach the vital question, which it is practically admitted is the only one before us, whether or not the petitioner has a right to complain now, after his plea of guilty has been entered, that he was not indicted by a grand jury. Notwithstanding the somewhat singular case presented to us, of a defendant, represented in every stage of the case by eminent counsel, waiting until he has withdrawn his plea of not guilty, after he has interposed his plea of guilty, after he has had ample time to raise all objections to the validity of the proceedings, now asking this court to release him from imprisonment under what he claims is a void sentence, we shall proceed to determine the question whether or not the District Court for Laramie County acquired jurisdiction of the case by the information filed therein, or whether the petitioner had a right to be indicted by the grand jury of said county.

The rules laid down for the determination of the question as to whether or not a law is *ex post facto* are found in the case of *Caldwell v. Bull*, 3 U. S. 8 Dall. 386, 1 L. ed. 648, and have been very generally adopted by the courts of this country. They define the following laws as *ex post facto*: (1) every law that makes

an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; (2) every law that aggravates a crime or makes it greater than when it was committed; (3) every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; (4) every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender. *Mr. Justice Chase*, who delivered the opinion of the court, says: "But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction." Tested by these plain rules, there would be little difficulty in determining the question before us; but the courts have not contented themselves with this clear definition; and so it was held by *Mr. Justice Washington*, in his charge to the jury in a United States circuit court, that "an *ex post facto* law is one which in its operation makes that criminal which was not so at the time when the action was performed; or which increases the punishment; or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage." *United States v. Hall*, 2 Wash. C. C. 366.

In the case of *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506, this last definition was quoted with the evident approval of the learned justice delivering the opinion of the Supreme Court of the United States in that case, with a statement that the case was carried to the supreme court and the judgment affirmed, as reported in *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87, 3 L. ed. 163; but a careful investigation of the opinion in the case last cited will show that the charge of *Mr. Justice Washington* was not considered, or even touched upon, in the opinion of the court. It will be seen that the familiar definition of Blackstone found in his Commentaries (vol. 1, p. 46) has been much enlarged by modern decisions.

Blackstone thus defines the meaning of an "*ex post facto* law:" "When, after an action, indifferent in itself, is committed, the Legislature then, for the first time, declares it to have been a crime, and inflicts a punishment upon the person who has committed it." *Judge Cooley*, in his work on Constitutional Limitations (5th ed. p. 329), says: "But, so far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the Legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The Legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused

of crime. Statutes giving the government additional challenges, and others which authorized the amendment of indictments, have been sustained, and applied to past transactions, as doubtless would be any similar Statute, calculated merely to improve the remedy, and in its operation working no injustice to the defendant, and depriving him of no substantial right." This definition was accepted as most satisfactory in the case of *Robinson v. State*, 84 Ind. 452, where a statute, providing that, "in all questions affecting the credibility of a witness, his general moral character may be given in evidence," was held not to be an *ex post facto* law. The court says: "The Statute is general, and applies to the trial of all criminal cases. It furnishes merely a rule of practice applicable alike to trials for offenses committed before and after its passage. It does not come within the constitutional inhibition of an *ex post facto* law." *Vide Ex parte Bethurum*, 66 Mo. 545. The celebrated case of *Kring v. Missouri*, *supra*, was a step further in the direction of enlarging the meaning and definition of an *ex post facto* law. *Kring* had pleaded guilty to murder in the second degree, and his conviction of this crime, under the law of Missouri in force at the time of the commission of the crime, was an acquittal of the crime of murder in the first degree. The Constitution of Missouri had been changed after the commission of the crime in such manner as to abrogate this provision. The Supreme Court of the United States, by a bare majority of the justices, held this constitutional provision to be an *ex post facto* law, and that it could not apply to offenses committed prior to the taking effect thereof. Counsel for the petitioner urge with great force the following language of *Mr. Justice Miller*, who delivered the opinion of the court, as a new definition of an *ex post facto* law: "Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed to the disadvantage of the prisoner by state legislation after the offense was committed, and such legislation not be held to be *ex post facto* because it relates to procedure, as it does, according to *Mr. Bishop*? And can any substantial right which the law gave the defendant, at the time to which his guilt relates, be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot." The learned justice who delivered this opinion did not seem to be satisfied with the definition, as he restates the definition in the case of *Re Medley*, 134 U. S. 160, 33 L. ed. 835, as follows: "The term '*ex post facto* law,' as found in the provision of the Constitution of the United States, to wit, that 'no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts,' has been held to apply to criminal laws alone, and has been often the subject of construction in this court. Without making extracts from these decisions, it may be said that any law which was passed after the commission of the offense for which the party is being tried is an *ex post facto* law when it inflicts a greater punishment than the law annexed to the crime at the time it was committed (*Caldier v. Bull*, 3 U. S. 3 Dall. 386, 390, 1 L. ed. 648, 650; *Kring v. Missouri*, 107 U. S. 221,

37 L. ed. 506; *Fletcher v. Peck*, 10 U. S. 6 Cranch, 57, 3 L. ed. 162), or which alters the situation of the accused to his disadvantage; and that no one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, or by some law passed afterwards, by which the punishment is not increased."

This is a material change in the definition given in the case of *Kring v. Missouri*, and it now remains to be seen whether or not the situation of the accused has been altered to his disadvantage. We do not see that it has. How does the change in the accusing tribunal take away any substantial rights of the accused? He admits himself, by his solemn plea of guilty, to be rightfully accused of a grade of the offense with which he is charged, and this presumably by the advice of his counsel, after due time has been given to him to plead, and after he has deliberately withdrawn his plea of not guilty. Should he now be heard to complain that a grand jury of sixteen men, as required by the law in force at the time of the commission of the offense, might not have indicted him? He admits his guilt, and after conviction and sentence says that he was not properly accused. This is a travesty upon justice, and illustrates the absurdity of the proposition laid down by some of the courts. It has, however, been recently held by the Supreme Court of Montana, in the case of *State v. Ah Jim*, 9 Mont. 167, that the constitutional provision there reducing the number of grand jurors from sixteen to seven, five of whom must concur in the finding of an indictment, is self-executing; and the court quotes with approval the following cases to show that such provisions apply to offenses committed before the passage of a law, and are not *ex post facto* in their nature or effect: *Cooley*, Const. Lim. 272, 331, 332; *People v. Mortimer*, 46 Cal. 114; *Bishop*, Stat. Crimes, §§ 178, 180.

In the California case (*People v. Mortimer*, *supra*), it was held that "it is not an uncommon practice to change the number of grand jurors required to investigate criminal charges, but we have never heard the right of the Legislature to make such changes questioned; neither has it ever been claimed that the charge must be investigated by the precise number of grand jurors of which that body was composed at the time the act was committed;" and the Missouri case was noticed in this opinion of the Montana court. So, then, it was held that the reduction in the number of the accusing body did not invade any substantial right of the defendant. If the broad definition of *Mr. Justice Miller* in the *Kring Case*, apparently modified in the case of *Re Medley*, *supra*, was followed, it would seem that such a change in the number of the grand jury might be the loss of a substantial right to the accused. If the defendant has an unalterable right to be accused by indictment, it would seem that he has a right to be presented by twelve men out of sixteen, if such law existed at the time of the commission of the offense; and that if a reduction in the number of the grand jury is not a change in his substantial rights, to his disadvantage, the abolition of the accusing body itself would not be. He has been presented by a sworn officer, and, under our law, an official

under bond, and the information must have been sworn to, as the law requires it. It was held in the case of *Marion v. State*, 20 Neb. 233, that although a law in force at the time of the commission of an offense (murder) provided that juries should be the judges of the law, and was repealed before the trial, it was competent to make the judge, instead of the jury, judge of the law of the case as the Legislature could make such a change, and that such a law was not *ex post facto*. The court adhered to its definition of an "*ex post facto* law" made in the case of *Marion v. State*, 16 Neb. 349, which is nearly in line with the definitions given heretofore, and says: "The procedure only has been changed. The degree of punishment, the character of the offense, and the rules of evidence remain as under the former law. It may be observed that the only change in the law is to provide another tribunal to pass upon the law of the case. Prior to the change, if the words in the former Code are to be taken at their full meaning and import, the jury were the judges as to the law of the case on trial. After the change, the court sits in that capacity, and is the judge of the law. No vested right of the plaintiff in error is affected. A new tribunal may be erected, or a new jurisdiction given to try him, and no right is abridged." *Com. v. Phillips*, 11 Pick. 28.

Now, certainly, here was a change in the powers of the trial jury. They were stripped of the right to act as judges of the law, and the court was clothed with that power, and yet this was held to be no infraction of the rights of the defendant. In the case of *People v. Tisdale*, 57 Cal. 104, a case upon which the counsel for the petitioner greatly rely, and which they state to be the only case directly in point, found after the utmost diligence, the court said: "The real and only question is whether an information presented after the repeal of a law, which required that a person who violated it should be proceeded against by indictment, can be sustained for an offense committed before the repeal." That court held that the law was not intended to be retrospective, like ours. It also held that a constitutional guaranty such as existed at the time the respondents were charged with the violation of a Statute could not be taken away by any Act of the Legislature. This seems to be the view taken by the Supreme Court of Washington, in the case of *McCarty v. State*, 1 Wash. 377. In this case the offense occurred before the admission of the State into the Union, and the court there held that the guaranty of the Constitution of the United States was in force at the time of the commission of the offense, and could not be taken away, and that the defendant was entitled to be presented by a grand jury. This was held evidently with much hesitation, as the court announces on the petition for a rehearing that in view of the public importance of the question, and in view of the fact that the case was submitted without oral argument on the part of the State, it would not be bound by the opinion rendered on the constitutional questions involved. The situation of the petitioner here is different. The Constitution of Wyoming was in force five months before the offense was committed, and the only constitutional guaranty which was given to the defendant, except as to the passage

Statement by Hayt, J.:

In June, 1891, petitioner was examined before a justice of the peace in and for Las Animas County under four separate and distinct charges of obtaining money under false pretenses. As a result of such examinations he was required in each case to give bond for his appearance at the next succeeding term of the district court to be held in Las Animas County to answer such charges, or, upon a failure so to do, to be committed to the common jail of the county to await the action of the grand jury. The petitioner failing to furnish bond, warrants of commitment were issued, upon which he was incarcerated in the county jail. Thereupon he made application to the honorable J. C. Gunter, judge of the Third Judicial District, to be discharged upon a writ of habeas corpus. After a full hearing upon such application the prisoner was remanded to custody. It appeared, however, from the complaint, as well as by the evidence, that the money which he had obtained by the alleged false pretenses was paid in each instance by the prosecuting witnesses, respectively, in the furtherance of an illegal purpose to obtain by fraud valuable coal lands from the United States. The application is now renewed in this court.

Messrs. Dixon & Dixon for petitioner.

Mr. H. B. Babb, with **Mr. J. H. Maupin**, *Atty-Gen.*, *contra*.

The statute says: "If any person or persons shall knowingly and designedly, by any false pretense or pretenses, obtain from any other person or persons, any chose in action, money, goods, wares, chattels, effects, or other valuable thing whatsoever, with intent to cheat or defraud any such person or persons of the same, every person so offending shall be deemed a cheat, and upon conviction shall be fined," etc.

See *Laws 1889*, p. 111.

In statutory construction words must be given their most usual signification and plainest meaning.

Sutherland, Stat. Const. §§ 237, 238, and cases cited.

The authorities are in hopeless conflict, the courts of New York and Wisconsin holding that the law was not intended to protect any person who is *particeps criminis* with the accused, and the courts of Pennsylvania and Massachusetts holding that such a defense cannot be sustained.

See *McCord v. People*, 46 N. Y. 470; *People v. Stetson*, 4 Barb. 157; *State v. Crowley*, 41 Wis. 271, 23 Am. Rep. 720; and *contra*, *Com. v. Henry*, 22 Pa. 253; *Com. v. Morrill*, 8 Cush. 571.

The New York cases are based upon the proposition that "neither the law nor public policy designs the protection of rogues in their dealings with each other, or to insure fair dealing and truthfulness, as between each other, in their dishonest practices."

But criminal suits are punishment of offenses against the public, and are conducted in the name of the crown.

Wharton, Cr. L. § 1; *Bishop*, Cr. L. § and citations; *Cooley*, Torts, 1st ed. p. 6; *Rector v. State*, 6 Ark. 187; *People v. Ontario County Supra*, 4 Denio, 260. See also dissenting opinion of *Peckam, J.*, in *McCord v. People*, *supra*.

The authorities relied upon by petitioners proceed on the theory that the injured party, and not the public, is concerned with the punishment of offenders, in accordance with some of the preamble of the Act of 30 Geo. II, chap. 24, from which the Statutes are supposed to have been copied.

People v. Clough, 17 Wend. 351.

That theory may be correct in England, but in America the prosecution is instituted and conducted by an officer of the State, and in theory the injured party has no more interest in the punishment of the offense than any other citizen.

Cooley, Torts, 1st ed. p. 87, and authorities cited. See also *Young v. King*, 3 T. R. 98; *Reg. v. Henderson*, 1 Car. & M. 328; *Reg. v. Ball*, Id. 249.

This proceeding cannot be perverted so as to make it perform the functions of either a writ of error, a grand jury, or the proceeding of a trial court; and this court has no jurisdiction, in this proceeding, to review the magistrate's judgment.

Freeman, Judgm. 3d ed. §§ 619-622; *Griffin v. State*, 5 Tex. App. 457; *Ex parte McCullough*, 85 Cal. 97; *Ex parte Bird*, 19 Cal. 130; *Re Bogart*, 2 Sawy. 396; *Brown*, Jur. §§ 18a, 105.

The rule that judgments cannot thus be collaterally attacked applies to judgments rendered by all inferior courts.

Freeman, Judgm. 3d ed. § 524, and cases cited; *Brown*, Jur. §§ 20, 20a; *People v. Cassels*, 5 Hill, 167; *State v. Towle*, 42 N. H. 540; *Bell v. Raymond*, 18 Conn. 100; *Shoemaker v. Brown*, 10 Kan. 388; *Comstock v. Crawford*, 70 U. S. 3 Wall. 396, 18 L. ed. 84.

Hayt, J., delivered the opinion of the court:

If two persons conspire together to accomplish an unlawful purpose, and one, by false pretenses, obtains money from the other, which the latter parts with in furtherance of the illegal purpose, will a prosecution lie against the former for obtaining the money under false pretenses? This is the substantial question presented upon the record. Counsel for petitioner contend that it will not, while the affirmative is assumed by the attorney-general. The authorities bearing upon the question cannot be reconciled. In the leading cases of *Com. v. Henry*, 22 Pa. 253, and *McCord v. People*, 46 N. Y. 470, exactly opposite conclusions were reached upon facts that are quite similar. In the former case it was alleged in the indictment

following language: "After much investigation and deliberation, we have reached the conclusion that the rule of the New York cases is supported by the better reasons, as well as by the weight of authority, and it is our duty to adopt it. We do so with hesitation, because able judges and courts have held a different rule; and with reluctance, because

the acts of the defendants were outrageous and indefensible, and richly merit punishment. But it is far better that they should escape than that sound legal rules should be disregarded to meet the supposed exigencies of a particular case." *State v. Crowley*, 41 Wis. 271. F. S. R.

ment that the defendant, intending to defraud the prosecutor, falsely asserted to him, and also to another person, who communicated it to him, that he had a legal warrant for the arrest of the daughter of the prosecutor for an offense punishable by a fine and imprisonment, and that he threatened to arrest her, by means of which representation he obtained from the prosecutor property of the value of \$100. The trial court having quashed the indictment, its judgment was reversed by the supreme court and the indictment declared sufficient. In the case of *McCord v. People*, *supra*, the indictment charged the defendant with having falsely and fraudulently represented that he had a warrant for one Miller, and that Miller, believing said false representations, was induced to and did deliver to the defendant a gold watch and diamond ring. In this case it was held that, as the property had been voluntarily surrendered as an inducement to the officer to violate the law and disregard his official duties, the indictment could not be sustained; the court declaring that the Statute against obtaining money by false pretenses was designed to protect only those who for an honest purpose are induced by false or fraudulent representation to give credit, or part with their property, and not to protect those who do this for an unworthy or illegal purpose. The opinion of the court in this case is quite brief, while Peckham, J., filed an able and exhaustive dissenting opinion. In support of the majority opinion two cases are cited by the court, viz., *People v. Williams*, 4 Hill, 9; *People v. Stetson*, 4 Barb. 151. An examination of the former case shows it to be no authority upon the question presented here; the decision being simply to the effect that a false representation, to be within the Statute, must be such as is calculated to mislead persons of ordinary prudence and caution,—a conclusion not generally accepted elsewhere. 2 Bishop, Cr. L. § 438.

In *People v. Stetson*, *supra*, it seems, however, to have been determined that, if the owner in parting with his property, etc., was himself guilty of a crime, the indictment, under the statute, could not be sustained; and a similar conclusion was reached in *State v. Crowley*, 41 Wis. 271, in which case the information charged a conspiracy on the part of several defendants to defraud the prosecutor of his money, and, the proof showing that the conspiracy charged was in connection with an unlawful enterprise, in which the prosecutor and the defendants were *particeps criminis*, it was held that a conviction was not warranted. It appeared, also, that, had the prosecutor exercised common prudence and caution, he could not have been misled by the false pretenses by

which he was induced to part with his money. In opposition to this doctrine, and in line with the Pennsylvania decision, we find *Com. v. Morrill*, 8 Cush. 571. Mr. Bishop, reviewing the different conclusions, says: "Another doctrine sustained in New York is that where, if the false pretenses were true, the person parting with his goods would be guilty of a crime therein, or where he actually commits an offense in parting with them, the indictment for the cheat cannot be maintained. On the other hand, the Massachusetts court appears to have directly discarded this doctrine. The point decided was that a defendant cannot set up, in answer to an indictment of this nature, any wrongful representation of the person injured concerning the goods charged to have been obtained through the false pretense. 'Supposing,' said Dewey, J., 'it should appear that [the individual defrauded] had also violated the Statute, that would not justify the defendants. If the other party had also subjected himself to a prosecution for a like offense, he also may be punished. This would be much better than that both should escape punishment because each deserved it equally.' And this view accords with the general spirit of the criminal law, wherein the fault of one man is not received in excuse for that of another; while the New York doctrine would introduce a well-known principle of civil jurisdiction into a system of laws to which it is alien." 2 Bishop, Cr. L. 7th ed. § 469.

Finding this conflict in the authorities, we are left free to decide the question propounded solely upon principle. In our opinion, the conclusion reached by Mr. Bishop is supported by the better reasons. The primary object of punishment is the suppression of crime; and, where both the prosecutor and defendant have violated the law, it is better that both be punished than the crime of one should be used to shield the other. When the plaintiff in a civil action is shown to have been guilty of a wrong in the particular matter about which he complains, he cannot ordinarily recover. But there is little chance to apply this rule to criminal prosecutions conducted by the State; the person defrauded being at most a prosecuting witness in the case, and not a party to the proceeding. The language of our Statute is plain. The false pretenses charged in this case are embraced within its express terms, and we are not in favor of sanctioning a rule that will permit offenders to escape by showing that another should also be punished.

The petitioner's application to be discharged will therefore be denied, and the prisoner remanded.

CALIFORNIA SUPREME COURT.

PACIFIC R. CO. *et al.*

v.
W. P. WADE.

(.....Cal.....)

The amount to be paid for the joint use of a street railway track in the hands of 18 L. R. A.

a receiver may be determined by the court on a petition where the statutes give the right to such use on payment of one half the cost of construction, and there is no right to a jury on the ground that it involves the exercise of the right of eminent domain.

(September 30, 1901.)

APPPLICATION for a writ of prohibition to prevent the court having charge of petitioner's road from allowing the Los Angeles Consolidated Electric Railroad Company to use part of petitioner's road, and from determining the compensation to be paid petitioner for such use. *Application denied.*

The facts are fully stated in the opinion.

Messrs. Houghton, Silent & Campbell, with *Mr. S. C. Hubbell*, for petitioner.

Messrs. Dom & Dom, S. C. Denson, and W. S. Goodfellow, with *Messrs. John D. Pope and Chapman & Hendrick*, *contra.*

Paterson, J., delivered the opinion of the court:

The Pacific Railway Company is the owner of a street railroad, operated by means of a wire cable, for the carriage of persons in the City of Los Angeles. On January 20, 1891, Edward W. Russell commenced an action against said Company, its stockholders, and a large number of creditors, alleging, among other matters, that he was a judgment creditor; that the Company was indebted in large sums to divers persons, without means or revenue to pay the same, except by the operation of its railroad system, and the proceeds thereof were wholly insufficient; that suits had been brought and many attachment suits would follow, unless steps be taken to prevent the same, and the operation of the road would be suspended; that to protect all parties a receiver was necessary; wherefore plaintiff prayed for the appointment of a receiver, to take charge of and control the property of said Company, and, if necessary, to sell the same for the payment of the debts. On the day the complaint was filed J. F. Crank was appointed receiver, with directions to take charge of the street railways owned by and under the control of the Pacific Railway Company, together with all its real and personal property and to manage and conduct the business thereof, and from time to time render his accounts. Crank qualified and took possession, and has ever since continued to operate the road under the order of the court. On January 26, 1891, the Los Angeles Consolidated Electric Railway Company presented to the superior court a petition in said cause, setting forth that the petitioner had entered upon the construction of its line of road, as authorized by certain ordinances, and in the further prosecution of its work it was necessary that it should intersect the tracks of the Pacific Railway Company, and run along the same for a distance of three blocks; and praying an order authorizing it to operate over and on said tracks for said distance, and directing the receiver to grant all necessary facilities therefor, and for a further order fixing the amount of compensation which petitioner should pay for the right to use the tracks as aforesaid. At the time fixed for hearing, the petitioners herein appeared, and objected to any proceedings being taken, on the ground that the court had no authority to grant the relief asked. The court overruled the objection, and decided that it had jurisdiction to determine the amount of damages which would be occasioned by making the connections referred to in the petition, and continued the matter for hearing to July 16, 1891. Thereupon petitioners applied to this court for an al-

ternative writ of prohibition, which was granted. In response to the order to show cause why he should not be restrained from any further proceedings in said matter the judge filed an answer, admitting the facts stated, and alleging that the order appointing the receiver was made on motion of the plaintiff in the action, and with the consent of the defendants therein; that on February 18, 1891, the plaintiff Russell filed a petition setting forth that there was some doubt whether the order appointing the receiver was sufficient of itself to vest in him the title to the property, especially the real property, so as to enable him to exercise all the powers and perform all the duties which the exigencies of the case might require, and asking for an order directing the Pacific Railway Company to assign its property to the receiver; that the order was made as prayed for, with the consent of the Pacific Railway Company.

Section 499 of the Civil Code provides that "two lines of street railway, operated under different managements, may be permitted to use the same street, each paying an equal portion for the construction of the track and appurtenances used by said railways jointly; but in no case must two lines of street railway, operated under different managements, occupy and use the same street or tracks for a distance of more than five blocks consecutively." The petitioner contends that, as the ordinances granting the franchises do not provide how compensation shall be ascertained, the electric company must proceed under the provisions of subdivision 6 of section 465, Civil Code. That section is a part of the chapter on the enumeration of the powers of every railroad corporation, and provides that "every corporation whose railroad is, or shall be hereafter, intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersection and connections, and grant facilities therefor; and, if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points or the manner of such crossings, intersections, and connections, the same shall be ascertained and determined as is provided in title 7, pt. 3, Code of Civil Procedure." But title 7, pt. 3, prescribes rules for the assessment of compensation and damages (§ 1248, Code Civ. Proc.) inconsistent with the measure of compensation established by section 499, Civil Code, and the latter must control, as it relates particularly to street railroads. What counsel for the petitioner means to claim, doubtless, is that the procedure prescribed by title 7 must be followed; that there must be an effort to agree with the cable company as to the amount to be paid; and, upon disagreement, an action against the receiver in the manner and form required by the title on eminent domain, including a trial by jury, if the defendant insist upon it.

The question to be determined is simply whether the court, which, through its receiver, has the custody and control of the insolvent corporation's property, has the power to determine the compensation, viz., one half of the cost of the construction of the tracks and appurtenances used by the companies jointly, or whether the electric company must treat with the cable company, and, upon failure to agree as to the amount to be paid, bring an ac-

tion therefore against the receiver, with the permission of the court. There are none of the elements of an ordinary condemnation proceeding involved in the litigation. There is no private property to be taken for public use, —no occasion to exercise the right of eminent domain. The cable company did not acquire by the grant of its franchise any proprietary interest in the street. There can be no private property in a street, except the fee of the owner, which is held subject to the easement as long as the public continue to use the street as a highway. "The maintenance of horse railroads and running of cars upon the public streets of the City of San Francisco, designed for the carriage of passengers, is a mere special mode of using the highway, nothing more. The right to maintain such a railroad does not exclude the public from the use of the street." *Market St. R. Co. v. Central R. Co.* 51 Cal. 586. The franchise of the cable company gave it no exclusive use of that portion of the street upon which its road was constructed. It gave to the company the right to construct its road in such a place and manner as not to interfere with the use of the street by the public. The material placed in the street, it is true, is still the property of the cable company; but it was placed where it is with full knowledge on the part of the company that the latter would have no exclusive right to its use, so long as it should remain in the street. The right of the public to drive vehicles over and upon its road, and the right of the mayor and council to grant to another street-car company a franchise to connect with its track, and to use the same for a distance not exceeding five blocks, entered into its contract with the city as fully, under the provisions of section 499, Civil Code, then in force, as if the condition had been expressly stated in the grant; and, as the cable company took its franchise with the understanding—in effect an express stipulation—that any other company authorized by the mayor and council might use the track jointly with itself, it cannot now be heard to say that such a taking is without its consent, and is a taking of private property for public use, which can be done only by proceedings under the Statute relating to eminent domain. The grant to the cable company was made to facilitate, not to abridge, the public use of the street; and, the subsequent franchise having been granted to the electric company in accordance with the provisions of the Statute, it cannot be said to be a taking of the property of the cable company for any higher, or different purpose than that to which it had already been devoted. Civil Code, §§ 497-499; *Omnibus R. Co. v. Baldwin*, 57 Cal. 178; *Jersey City & H. H. R. Co. v. Jersey City & B. R. Co.* 21 N. J. Eq. 556; *Kinman St. R. Co. v. Broadway & N. St. R. Co.* 86 Ohio St. 239; *Sixth Ave. R. Co. v. Kerr*, 45 Barb. 188; *People v. Kerr*, 37 Barb. 357; *Chicago & W. T. R. Co. v. Dunbar*, 100 Ill. 198; *St. Louis R. Co. v. Southern R. Co.* (Mo.) 15 S. W. Rep. 1013, 16 S. W. Rep. 960.

If it be true that the grant of the franchise to the electric company gave to it an absolute right, under the Statute (§ 499, Civil Code), to use the tracks of the cable company upon payment of one half of the cost of construction of the tracks and appurtenances used jointly by

the companies, and that there is no question as to the right of eminent domain involved in the matter before us, the question whether the respondent has the right to fix the amount of damages or compensation to be paid by the electric company is a simple one. The property of the cable company is *in custodia legis*. The receiver is indifferent between the parties. His possession is the possession of the court for the benefit of all persons interested, whether named as parties in the action or not, and it cannot be disturbed without the consent of the court. No one claiming a right paramount to that of the receiver can assert it in any action without the permission of the court. No sale can take place, no debt can be paid, no contract can be made, which does not receive the sanction of the court. The receiver, with permission of the court, can do anything the corporation might have done to make the most out of the assets in his hands. It has been held that in a proper case he may settle disputed claims and compromise with debtors of the corporation; he may lease other lines of railways, and operate them; he may complete the construction of unfinished lines of railroad, and negotiate loans for the payment of the cost thereof; he may enter into contracts by the terms of which the owners of other roads may use the road under his control at given rates; and he may change the rates agreed upon prior to his appointment between the company he represents and another railroad corporation. Code Civ. Proc. § 568; *Beach, Receivers*, §§ 268, 335, 360, 406; *Gluck & B. Receivers*, pp. 106, 107, 181, 140, 241; *Re New Jersey & N. Y. R. Co.* 29 N. J. Eq. 67; *Winwall v. Sampson*, 55 U. S. 14 How. 65, 14 L. ed. 328; *Gibert v. Washington City, V. M. & G. S. R. Co.* 33 Gratt. 586.

In the case before us the electric company has the right, under the Statute and its franchise, to use the tracks of the cable company upon payment of one half of the cost of the construction thereof. The only question to be determined is, What is the amount due the cable company? It is like any other claim for damages or compensation in favor of a corporation whose property is in the hands of a receiver, and is to be determined in the same way. As to the manner of determining such question there has been some discordance of opinion among judges, but, so far as we have investigated the subject, there has been no conflict of decision. The cases all hold that, while it is, under certain circumstances, proper to direct the prosecution of an action at law against the receiver to determine the amount of compensation or damages to be paid, the better and more commonly recognized practice is to apply for relief by petition to the court in which the receiver is acting. The rule applies to all cases of damages to person or property, whether occasioned prior or subsequent to the appointment of the receiver. *Re Merrill*, 54 Vt. 200; *Redfield, Railways*, 6th ed. 378, 380; *High, Receiver*, §§ 139, 255, 256; *Mills, Em. Dom.* § 75; *Olyphant v. St. Louis, O. & Steel Co.* 28 Fed. Rep. 729; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 28 Fed. Rep. 871.

Any party deeming himself aggrieved by the judgment of the court has the right of appeal. *Detroit First Nat. Bank v. Barnum*

Wise & I. Works, 55 Mich. 315; *Porter v. Kingman*, 126 Mass. 141.

It is claimed by petitioner that this view of the case deprives it of the right to have the question of compensation determined by a jury,—a right which is guaranteed to it by the Constitution, art. 1, § 14; but, as it is not a case involving the exercise of the right of eminent domain,—is not a taking of private property for public use,—the contention is without merit.

In *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672, the court, speaking to a similar objection, said: "The argument is much pressed that, by leaving all questions relating to the liability of receivers in the hands of the court appointing them, persons having claims against the insolvent corporation or the receiver will be deprived of a trial by jury. This, it is said, is depriving the party of a constitutional right.

... But those who use this argument lose sight of the fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If it be conceded or clearly shown that a case belongs to this class, the trial of questions involved in it belongs to the court itself, no matter what may be its importance or complexity. . . . The new and changed condition of things which is presented

by the insolvency of such a corporation as a railroad company has rendered necessary the exercise of large and modified forms of control over its property by the courts charged with the settlement of its affairs and the disposition of its assets." See also *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 848.

It is unnecessary, in view of what has been said, to consider the questions raised by respondent, whether prohibition is the proper remedy, and whether the petitioner is competent to invoke it. The question as to whether the East & West Los Angeles Railroad Company sold or leased its tracks on Washington Street to the petitioner is a matter to be considered by the superior court on the hearing of the petition, and is not the subject of inquiry in this proceeding. *Bishop v. Los Angeles Co. Super. Ct.* 87 Cal. 236. The respondent declares in his answer filed herein that "neither the said court nor the judge thereof ruled or intimated that he had any power to fix the compensation or authorize the connection with any railway tracks not belonging to the Pacific Railway Company, or any property not in the custody and control of the court."

The application is denied, and the alternative writ is discharged.

We concur: *De Haven, J.; Sharpstein, J.; Harrison, J.; Garoutte, J.*

IOWA SUPREME COURT.

W. R. EMERICK

David EMERICK, *Appt.*

(.....Iowa.....)

An aged person is not of unsound mind so as to require a guardian of his estate merely because he has not sufficient strength of mind and ability to transact his business affairs with "ordinary care and prudence"

if he is capable of transacting the ordinary business involved in taking care of his property, and understands the nature and effect of what he does, and can exercise his will concerning it with discretion, notwithstanding the influence of others.

(October 13, 1891.)

APPEAL by defendant from a judgment of the District Court for Mills County ap-

NOTE.—*Mere mental weakness will not justify the appointment of a guardian.*

The unsoundness of mind which will justify the action of the court must be more than mere debility (*Ex parte Cranmer*, 12 Ves. Jr. 445), or impairment of memory. *Re Holmes*, 4 Russ. 182.

It is held in New Jersey that not every imbecility of mind is intended, but that the mind must be so unsound that it cannot apply its faculties, in their weakened and impaired state, to the management of the person's affairs, and the government of himself (*Re Collina*, 18 N. J. Eq. 235), and at the same time that it is enough if such incapacity of mind arises from any cause, whether it be age, disease, affliction, or intemperance. *Perrine's Case*, 41 N. J. Eq. 411.

Mental incapacity.

It is not every case of mental weakness or imbecility which will authorize the court of chancery to exercise the power of appointing a committee of the person and estate; but to justify the exercise of such a power the mind of the individual must be so far impaired as to be reduced to a state which, as an original incapacity, would have constituted a case of idiocy. *Re Morgan*, 7 Paige, 236, 4 L. ed. 128.

To authorize the appointment of a committee of the person and estate of one proceeded against as a

lunatic or person of unsound mind, if he be not a lunatic, the unsoundness of mind is the essential thing, and must be established as an independent proposition, and his incapacity must be the result of such mental unsoundness. To sustain such proceedings, the fact must be clearly established, that the party proceeded against is of unsound mind. *Re Shaul*, 40 How. Pr. 204.

An early Massachusetts case decides that an inquisition by the selectmen that one is *non compos*, and an appointment of a guardian for that cause, are not justified by evidence that the person is old and has become less careful of his property. *Darling v. Bennett*, 5 Mass. 129.

Even where the facts proved show that the senses and physical powers are much impaired, and that the mental faculties are somewhat weakened, all this would fail to show anything that would amount to unsoundness so as to make him incapable of managing his affairs. He may be so weak and infirm as to be easily influenced or imposed upon, which would be a reason for setting aside any instruments or transactions executed under the effect of such influence, but this does not amount to unsoundness, such as to take from him the control of himself and his property. The presumption of law is not against the soundness of mind of a person one hundred years of age. *Re Collina*, 18 N. J. Eq. 233.

pointing a guardian of his estate on the ground that he was of unsound mind. *Reversed.*

Statement by Robinson, J.:

Plaintiff seeks to have appointed a guardian of the estate of defendant on the alleged ground that he is of unsound mind, and is not possessed of the judgment necessary for the management of his estate. The cause was tried to a jury, which found that defendant was of unsound mind. A judgment was rendered on the verdict, and defendant appeals.

Messrs. Scott Lewis and H. C. Watkins, for appellant:

The definition which the court gave to the jury is of too high a character and fixes too high a standard as to what constitutes in law a person of unsound mind, and is not the true test.

Smith v. Hickenbottom, 57 Iowa, 738; *Seerley v. Sater*, 68 Iowa, 375.

Messrs. Shirley Gilliland, T. L. Genung and E. B. Woodruff for appellee.

Robinson, J., delivered the opinion of the court:

This proceeding was instituted under section 2272 of the Code. The petition alleges that defendant owns and has the management of an estate of 557 acres of land, situated in Mills County, of the value of about \$20,000; that he is old and infirm, and of unsound mind, and is not possessed of the judgment necessarily required for the management of his estate; that he has become possessed of the delusion that he can make large sums of money in the real-estate business in Nebraska, and for the purpose of engaging in such business he has contracted to sell his real estate for four or five thousand dollars less than it is worth; that his wife exerts an undue influence over him, to the detriment of himself and his property; that by reason of his infirmities of mind and

body, and the undue influence of his wife, he has been attempting to dispose of his property in various ways, and place it under the control of his wife or her friends; and that he has not sufficient mind to resist her undue influence. Defendant admits the ownership of the land as claimed by plaintiff, but denies that he is of unsound mind, and that he is subject to undue influence. The defendant was seventy-nine years old at the time of the trial in the district court. Two years before that time his wife died, and a year and a half after her death he married his present wife. She was active in bringing about the marriage, and some of the evidence tends to show that she became a party to it for mercenary reasons, and that she attempts to influence improperly her husband against his children, of whom plaintiff is one. There is evidence to show that defendant is easily influenced to become surety for irresponsible persons, and that he has incurred losses by so doing. He admits having contracted to sell his land for \$25 per acre, but it is not certain that it is worth much, if any, more than that amount. The evidence as to his mental capacity was conflicting, and, had the jury found that he was of sound mind, the verdict would not have been without support in the evidence. That being the condition of the case, the court charged the jury, in substance and effect, that a person of sound mind is one who exercises ordinary understanding and ability in the transaction of business, and that, if defendant was not possessed of "sufficient strength of mind and ability to transact his business affairs with ordinary care and prudence, then, in law, he will be deemed of unsound mind." The question presented for our determination is whether the test of mental unsoundness given by the court is correct.

Section 2272 of the Code provides for the appointment of a guardian of the property and minor children of a "person of unsound mind." The Statute is silent as to what shall constitute

In *Perrine's Case*, 41 N. J. Eq. 400, 411, *Chancellor Runyon* said that it is enough to warrant the interference of the court, if, from any cause, a person has become incapable of managing his own affairs; and he referred for support to *Lord Eldon*, in *Gibson v. Jeyes*, 6 Ves. Jr. 206, and *Chancellor Kent*, in *Re Barker*, 2 Johns. Ch. 232, 1 L. ed. 366. But in these cases the attention of the judges was turned more to the source and nature of the mental imbecility than to its extent, and they must not be understood as holding that weakness of mind which does not amount to idiocy, or lunacy, or unsoundness of mind, and does not deprive a man of the power of governing himself, would justify a court in placing him and his estate under guardianship. The opinions of *Lord Lyndhurst*, in *Re Holmes*, 4 Russ. 182, and of *Chancellor Walworth*, in *Re Morgan*, 7 Paige, 236, 4 L. ed. 186, indicate that such is not the law. *Lord Eldon* himself, in *Sherwood v. Sanderson*, 19 Ves. Jr. 280, 286, declared that, if the jury merely find the incapacity of the party to manage his affairs, and will not infer, from that and other circumstances, unsoundness of mind though the party may live where he is exposed to ruin every instant, yet upon that finding the commission cannot go on.

If a court can see that there were no equitable incidents, such as undue influence, great ignorance and want of advice, very inadequate price, and the like, it would not interfere merely because one

party possessed very much less intelligence than the other, nor because the transaction is not one which the court in all respects approves. *Ball v. Mannin*, 3 Bligh, N. S. 1; *Osmond v. Fitzroy*, 3 P. Wms. 129; *Lewis v. Pead*, 1 Ves. Jr. 19; *Pratt v. Barker*, 1 Sim. 1, 4 Russ. 507; *Clark v. Mathias*, 31 Beav. 80; *Prideaux v. Lonsdale*, 1 De G. J. & S. 433; *Harrison v. Guest*, 6 De G. M. & G. 424, 8 H. L. Cas. 441; *Stone v. Wilbern*, 83 Ill. 105; *Pickerell v. Morris*, 97 Ill. 220; *Graham v. Castor*, 55 Ind. 559; *Mulloy v. Ingalls*, 4 Neb. 115; *Cowce v. Cornell*, 75 N.Y. 91, 99, 100; *Paine v. Roberts*, 82 N. C. 451; *Willemin v. Dunn*, 93 Ill. 511; *Beverley v. Walden*, 20 Gratt. 147; *Mann v. Betterly*, 21 Vt. 326; *Howe v. Howe*, 99 Mass. 88; *Ex parte Allen*, 15 Mass. 58; *Stiner v. Stiner*, 58 Barb. 643; *Hyer v. Little*, 20 N. J. Eq. 443; *Lozcar v. Shields*, 23 N. J. Eq. 509; *Aiman v. Stout*, 42 Pa. 114; *Dean v. Fuller*, 40 Pa. 474; *Graham v. Pancoast*, 30 Pa. 89; *Nace v. Boyer*, id. 99; *Greer v. Greers*, 9 Gratt. 330, 332; *Rippy v. Gant*, 39 N. C. 443; *Thomas v. Sheppard*, 2 McCord, Eq. 36; *Oldham v. Oldham*, 58 N. C. 89; *Graham v. Little*, 58 N. C. 152; *Long v. Long*, 9 Md. 348; *Prewett v. Coopwood*, 30 Miss. 369; *Killian v. Badgett*, 27 Ark. 166; *Darnell v. Rowland*, 30 Ind. 342; *Wray v. Wray*, 32 Ind. 126; *Gratz v. Cohen*, 58 U. S. 11 How. 19, 18 L. ed. 573, 586; *Harding v. Handy*, 24 U. S. 11 Wheat. 103, 6 L. ed. 429; 2 Pom. Eq. Jur. § 947, note 3. See notes to *Pharis v. Gere* (N. Y.) 1 L. R. A. 270, and *Howard v. Howard* (Ky.) 1 L. R. A. 610.

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the unsoundness which it contemplates, but it is clear that it relates to the capacity of the person affected to transact business. The protection of property is one of the main objects of such statutes as that under consideration, and the test of the unsoundness in question is largely the incompetency of the person to manage property in a rational manner. 1 Wharton & S. Medical Jurisp. § 108. A person may be so weak and infirm as to be easily influenced in such manner that the transactions had under the effect of such influence will be set aside, and yet not be so unsound of mind as to warrant the appointment of a guardian of his property. *Id.* § 104. The unsoundness of mind which will justify such an appointment must be more than mere debility or impairment of memory. It must be such as to deprive the person affected of ability to manage his estate. *Re Lindsley*, 43 N. J. Eq. 9.

The fact that a person, by reason of age, ignorance, and feeble condition of mind and body, is unfit to manage his estate judiciously will not authorize the appointment of a guardian of his property. *Com. v. Reeves*, 140 Pa. 258. "Imbecility of mind is not sufficient to set aside a contract when there is not an essential privation of the reasoning faculties or an incapacity of understanding and acting with discretion in the ordinary affairs of life." 2 Kent, Com. 609. "Courts of law, as well as equity, afford protection to those who are of unsound mind. They endeavor to draw a line between sanity and insanity, but cannot so well distinguish between degrees of intelligence." 1 Parsons, Cont. 887. "The law does not assume to measure the different degrees of power of the human intellect, or to distinguish between them where the power of thought and reason exists." *Somers v. Pumphrey*, 24 Ind. 245.

In *Darren v. White*, 42 N. J. Eq. 569, there was evidence to show that the person whose act was in question lacked mental capacity. But the court held that the test in such cases is, "Did the person whose act is brought in judgment possess sufficient ability at the time he did the act to understand in a reasonable manner the nature and effect of his act or the business he was transacting?" "Although the mind of an individual may be to some extent impaired by age or disease, still, if he be capable of transacting his ordinary business, if he understand the nature of the business in which he is engaged, and the effect of what he is doing, and can exercise his will with reference thereto, his acts will be valid." *English v. Porter*, 109 Ill. 291. In *Fiscus v. Turner*, 125 Ind. 46, a rule was approved as follows: "Unsoundness of mind is where there is an essential privation of the reasoning faculties, or where a person is incapable of understanding and acting with discretion in the ordinary affairs of life." A court of equity will not ordinarily set aside a transaction on the ground of

mere weakness of understanding, or liability to be sometimes deceived and duped, on the part of one of the parties to it. Such party must be, in a legal sense, of unsound mind. *Henderson v. McGregor*, 80 Wis. 80.

Some of the authorities cited refer to the mental capacity which is sufficient to enable a person to enter into a valid contract. Cases may arise where a person competent to make such a contract is so subject to an improper influence, or is so affected by some delusion, or is so liable to be controlled to his prejudice by some other cause, that he should be deprived of the right to manage his property; but ordinarily a person who has sufficient mental capacity to make a valid agreement in regard to his property, and to manage it with reasonable care, unaffected by another's will, should be permitted to retain it. It is manifest that there may be such a degree of mental capacity less than that possessed by persons of ordinary understanding and ability. The deficiency may be due to ignorance, or a want of shrewdness, or to other causes which do not denote unsoundness of mind. If a person may be deprived of the control of his property, because he does not exercise ordinary understanding, ability, and prudence in managing it, large numbers of people who now display a reasonable degree of care and judgment in accumulating, keeping, and disposing of property may be deprived of the right to do so, because the business skill and ability they manifest is not quite equal to that commonly exercised. We do not think such a rule as that should prevail.

In *Seerley v. Sater*, 68 Iowa, 376, it was said that "a person of unsound mind is one incapable of transacting the particular business in hand." The question to be determined in this case was whether defendant was capable of managing his estate, not whether he was capable of managing it as well as such estates are commonly managed. No general rule can be given which will be alike applicable to all cases, but each must be determined largely by its own facts and the conditions which control it. In this case, if defendant is capable of transacting the ordinary business involved in taking care of his property, and if he understands the nature of the business, and the effect of what he does, and can exercise his will with reference to such business with discretion, notwithstanding the influence of others, he is not of unsound mind, within the meaning of the Statute, and should not be deprived of the control of his property. The charge of the district court required a higher degree of mental capacity than that, and is to that extent erroneous. Other questions are discussed by counsel, but, as they are not likely to arise on another trial, need not be determined.

For the reasons indicated the judgment of the District Court is reversed.

MICHIGAN SUPREME COURT.

William J. SHIELDS *et al.*

v.

John C. JACOB *et al.*, Election Commissioners
for the City of Detroit.

(....Mich.....)

1. The name of the political party sufficiently appears at the head of a ticket where it is combined in a vignette, without repeating the name in a separate heading.

2. The regularity of either of the tickets nominated by the separate divisions of a split convention cannot be determined by election commissioners in preparing ballots, but they must print thereon the names of both sets of candidates and give for each set the party name as certified by the committee presenting it, without addition or distinctive designation.

(October 30, 1891.)

APPPLICATION for a writ of mandamus to compel the election commissioners for the City of Detroit to print a certain ticket upon the official ballots which they were about to prepare for use at a coming election. *Granted.*

The case sufficiently appears in the opinion.

Messrs. Don M. Dickinson, J. Logan Chipman and George V. N. Lothrop, with Mr. Alfred Russell, for petitioners.

Messrs. John J. Speed and Charles S. McDonald for respondents.

Per Curiam:

The petition of the relators sets forth the appointment of the respondents as election commissioners of the City of Detroit on the 6th day of October inst.; and also of the calling of the Democratic city convention for the nomination of city officers; the holding of such convention and the proceedings had thereat; and the fact that such convention divided, and two tickets were nominated,—one of them headed by William G. Thompson for mayor, and the other by John Miner, also for mayor; that the committee of that branch of the Democratic party supporting John Miner for mayor prepared a ticket consisting of the officers nominated by the convention, and also a vignette consisting of a right arm holding a flag, upon which was printed the words, "Regular Democratic Ticket," duly certified by them, which was presented to each member of the board of election commissioners, with a request that it be printed upon the ballots to be voted at the election to be held on the 3d day of November prox. They further set up that the election commissioners refuse to say whether they will print such tickets or not, but, from rumors and reports, they believe it is the intention of the election commissioners not to print such ticket upon the ballot authorized by law to be voted; that they have inquired of such commissioners whether they intend to print such ticket, and such commissioners have refused to give any answer to such inquiry. They ask for a mandamus to be directed to the members

of the board of election commissioners, commanding them to "organize, and proceed to prepare, and cause to be printed, ballots bearing upon them, as the regular Democratic ticket, the ticket and candidates and vignette embraced in the certificate of relators hereinbefore set forth;" and that the said John Christ Jacob, Joseph T. Lowry, and Augustus G. Kronberg, board of election commissioners of the City of Detroit; be commanded to place upon the ballot for the municipal election to be held in the City of Detroit on November 3, 1891, in a regular and due form, the list of candidates for mayor and city offices, named and embraced in the certificate hereinbefore referred to. The board of election commissioners have answered the petition, stating that they met on the 26th day of October, and organized as a board, and elected as chairman John Christ Jacob, and G. Henrion as secretary; that at such session they directed the secretary to insert in the daily newspapers a notice that the board of election commissioners for the City of Detroit would be in session at the city clerk's office in the city hall on Tuesday and Wednesday, October 27 and 28, 1891, at noon on said days, for the purpose of receiving from the chairmen of the several political organizations the names of the persons nominated to the several city and ward offices to be filled at the coming charter election, and that the proof copy of the ballot which is to be prepared by said board of election commissioners would be open for the inspection of the chairman of each of the political organizations on Saturday and Monday, October 31 and November 2, at the office of the city clerk in the city hall. It sets forth that the notices were published in certain papers, naming them. It also states that at a session of the board held on October 27 there was filed with said board a certificate, a copy of which, signed by William J. Shields as chairman, is set forth in said petition; that prior to said meeting of October 27 there was not at any time presented to said board any certificate from any committee of any political party setting forth the names of candidates for office to be voted for at the next charter election to be held in said city; that on receiving said certificate said board directed its secretary to place such certificate on file, and to notify William Cosgrove, the secretary named in said certificate, that said certificate was informal, for the reason that it did not designate the name of a party or political organization which the said chairman and secretary represented. They deny that they had, as individuals or as a board, expressed any intention as to their individual action, or any opinion as to how the said board should determine any question which might arise as to the printing upon the election ballots the names of the candidates mentioned in said certificate, and for the reason that they desired to avoid discussion with or the importunities of personal or political friends in relation to the printing of said tickets; and they admit that when approached they each declined, excepting when acting as a board, to express any such opinion or determination. They deny that as a board of election

NOTE.—See note to next case.

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commissioners, or as individuals, a majority of said board, or either of them, claimed the right to decide as to the tickets, one of which is headed by John Miner as a candidate for mayor, and the other by William G. Thompson as a candidate for said office, as to which one was nominated by the regularly called convention of any party, or to decide which was the regularly called convention, as between the convention which nominated the ticket headed by said Miner and the convention which nominated the ticket headed by Thompson. They also deny the allegations in the petition impugning their good faith and honesty as members of said board. They further answer, and aver that "they have not as a board, excepting as hereinbefore stated, acted upon or determined as to the printing of said names on said ballots, but respondents aver that at a meeting of their board held on the 28th day of October, 1891, said board by resolution determined to print, on the official ballot which they are to prepare, all the names of candidates for any and all of the several city, ward and precinct offices, which have been nominated by the regularly called convention of the several political parties, and which shall be duly certified to said board by the respective chairman and secretary of said organizations, and, unless otherwise ordered by your honorable court, it is the intention of respondents to print the names of all the candidates on the so-called Miner and Thompson Democratic ticket. Respondents also determined to print on the official ballot any vignette which the various political organizations may designate, provided said party supply respondents with a sufficient number of cuts in time to enable them to use the same."

In closing their said answer, respondents state as follows: "These respondents respectfully submit themselves to the order of the court, and they pray, if any order be made herein, that they may be advised thereby whether they are required by law to determine which of the list of candidates nominated as aforesaid they should cause to be printed on the ballots prepared by them, or whether they should print on said ballots both of said lists of candidates; and they pray to be further advised if the same name of a party shall be certified by both of two committees, whether the names so certified shall be printed without further addition or distinctive designation."

We are clearly of the opinion that the board of election commissioners was in error in supposing that the notice sent by Mr. Shields, and

served upon them, was defective for the reason that it did not designate the name of a party or political organization which the said chairman or secretary represented. The vignette, which was a part of the certificate and notice served upon the board, combined within it the name of the party or political organization which they represented, and, where the name of the party is combined with the vignette, it is not necessary to put another heading below it. The petition shows that the call for a convention of the Democratic party of the City of Detroit resulted in two nominating conventions; and we are of opinion that each of the tickets nominated at such convention containing the names of the persons nominated by such conventions, with the vignette and heading, if any is furnished by the committee of such conventions, should be printed upon the ballot. We do not consider that it is the province of the board of election commissioners to determine which convention represented the regular nominating convention of the party; but that it is the duty of said board to print and place upon the ballot the names of the candidates certified to them by the committee of either branch of the party represented by the two conventions held to nominate city officers, and that the names so certified to them in each list shall be embraced in the ticket so printed; and that it is their duty, further, if the same name of a party shall be certified by each of two committees, that the name so certified shall be printed without further addition or distinctive designation than such as is contained in the certificates furnished. And, inasmuch as the respondents request that they may be advised therein upon the points stated in their answer, the order for mandamus will issue, commanding them to print upon the ballots to be prepared by them the ticket so furnished to them by the committee of the convention who placed in nomination John Miner for mayor, and also the vignette furnished them by the committee, and that the tickets so printed by them shall contain the name of each of the candidates nominated for the respective offices by said convention in the form substantially prescribed by the Statute, with the name which the committee certify to them as the distinctive name of the party, without further addition or distinctive designation. As the answer denies any design to avoid the law or their duty as election commissioners, no costs will be awarded against them.

CALIFORNIA SUPREME COURT.

Thomas RUTLEDGE, *Appt.*,

v.

R. F. CRAWFORD, *Resp't.*

(.....Cal.....)

1. A ballot having on its back "an offset" or faint impression of the printing on a

similar ticket will not be rejected under Pol. Code, § 1206, as bearing any device, etc., designed to distinguish it, without proof that the impression was the result of design.

2. The presumption is that an "offset" or faint impression of printing on the back of a ballot, or a grease stain or small piece of sealing wax thereon, was the result of accident.

NOTE.—Marks or devices to distinguish ballots.

In Mississippi, where the statute expressly declares that "any device or mark" by which a ticket may be distinguished shall make it invalid, the 18 L. R. A.

courts hold that they cannot determine the materiality of any such device or mark but that it is necessarily fatal. *Steele v. Calhoun*, 61 Miss. 550; *Oglesby v. Sigman*, 58 Miss. 502.

- A small piece of sealing wax or a small grease stain on the back of a ballot will not prevent counting it, unless it is shown not to be accidental.
4. A ticket having the names of two candidates for judge and one for senator, arranged and numbered in consecutive order, cannot be counted for another candidate for judge whose name is written on the line for and in the place of the name of the senatorial candidate, which was erased.
 5. The use of an indelible pencil in erasing and substituting the name of a candidate on a ballot is within the spirit of and a

substantial compliance with a statute which requires it to be done with "a lead-pencil or common writing ink" in order to permit the ballot to be counted.

6. Red ink is common writing ink within the meaning of such a statute.
7. Erasing the name of a candidate will not prevent counting a ballot for him under the California statute, unless another is substituted or the words "no vote" written thereon after his name.
8. The failure of a contestant to file a statement sufficient to show his own eligibility to a disputed office will not prevent

In the last case the mark seems to have been merely a plain line as a border.

So a space less than that fixed by statute between the names on the ticket will make them void. *Perkins v. Carraway*, 60 Miss. 222.

But in most States the rule is less strict. Thus the word "judiciary" on the backs of judicial ballots of one candidate only does not render them void under a statute which prevents distinguishing marks. *State v. Barden*, 10 L. R. A. 155, 77 Wis. 601.

The word "for" before the name of each office does not invalidate a ballot under a statute prohibiting any words other than the official indorsement and the names of the candidates and the political party. *Fields v. Osborne* (Conn.) 12 L. R. A. 551.

But the words "and ex officio registrar of births, marriages and deaths" added to the office of town clerk, invalidate the ballot under that statute. *Ibid.*

So will the substitution of the word "citizen" for the name of the political party by which ballots are issued. *Ibid.*

And substituting the words "for assemblyman" instead of "for member of assembly" or the words "for superior judge" instead of "for judge of the superior court," and the omission of the word "senatorial" from "9th senatorial district" do not constitute distinguishing marks which will make the ballot invalid. *Coffey v. Edmonds*, 58 Cal. 536.

And where the name of the party is not required by statute the words "Democratic ticket," at the head of a ballot and "people's party" in the middle of it will not invalidate it. *Williams v. State*, 60 Tex. 399.

Neither at a presidential election will the words "election ticket" and the names of the candidates for president and vice-president and the counties where the electors reside. *Owens v. State*, 64 Tex. 500.

Marking the voter's number on ballots when given out by the officer makes them void under a statute prohibiting marks by which they can be identified. *Woodward v. Sarsons*, L. R. 10 C. P. 33.

So will the repetition in writing of the candidate's name printed thereon. *Ibid.*

So will the signature of the voter written thereon. *Ibid.*

But the use of two or three crosses instead of one, or of a peculiar form of the cross-mark, or of an additional mark, or of an oblique mark for a cross, or the placing of the cross-mark on the wrong side of the name of a candidate, will not invalidate the ballot without evidence of intent to distinguish it. *Ibid.*

And under a similar statute the words "Erase the clause you do not favor" will not vitiate a ballot which offers a choice of propositions. *Apple-gate v. Eagan*, 74 Mo. 258.

The discoloration of a ballot from the use of ink by the voter in scratching the ballot is not a distinguishing mark which will make it invalid. *Wyman v. Lemon*, 51 Cal. 373.

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Nor will printing which shows through on the back of the ballot constitute such distinguishing mark. *State v. Adams*, 65 Ind. 393.

Nor will a sticker or paste containing the name of a candidate make such a distinguishing device. *Quinn v. Markoe*, 37 Minn. 430.

But ballots with eagles on, cast at an election of a religious corporation where a by-law authorized by law prohibits anything thereon but names, are void. *Com. v. Woelper*, 3 Serg. & R. 29.

Color, size, and shape of ballots.

Ballots on colored paper have been held void under a statute which requires them to be printed on plain white paper without mark or designation. *State v. McKinnon*, 8 Or. 498.

But a later case in the same State, while not deciding whether the former case should be followed on similar facts, holds that such ballots are not void when they are printed on tinted paper selected for the purpose and furnished by the secretary of state. *State v. Wolf*, 17 Or. 119.

A similar rule is applied in California to ballots furnished by an officer where there were variations from the statutory requirements as to size, printing, and paper. *Kirk v. Rhoads*, 46 Cal. 398.

And under the Colorado statute which prohibits printing or distributing ballots on other than plain white paper, but does not expressly prohibit voting or counting them, ballots printed on pale yellow paper, which was the nearest like that required that could be found and used because the regular tickets had not come, were held valid. *Kellogg v. Hickman*, 12 Colo. 256.

And white paper tinged with blue with ruled lines was held a sufficient compliance with the Statute requiring the use of white paper without marks intended to distinguish the ballots, in the absence of evidence that such paper was used with intent to distinguish the ballots. *People v. Kilduff*, 15 Ill. 432.

Making tickets of diamond shape does not of itself amount to a "device" to distinguish them where the shape is not prescribed by statute. *State v. Phillips*, 63 Tex. 390.

Marks on the inside of ticket.

Under a statute which provides for tickets "without any distinguishing mark or other embellishment thereon," but permitting the voter to write his name on the back thereof, marks on the inside of a ticket, such as a party name for a heading, do not make the tickets void. *Druiner v. State*, 29 Ind. 306; *Stanley v. Manly*, 35 Ind. 275; *Mulholland v. Bryant*, 39 Ind. 363.

But in Mississippi it is held that the prohibition of "any device or mark by which one ticket may be distinguished" from another applies to marks on the inside as well as on the outside of a ballot. *Steele v. Calhoun*, 61 Miss. 556; *Ogleby v. Sigman*, 58 Miss. 502; *Perkins v. Carraway*, 60 Miss. 222.

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relief to the extent of annulling the certificate of election of the opposing candidate who has been illegally declared elected.

9. An amendment of the statement of a contestant of an election may be made to show his eligibility after the cause has been remanded from an appellate court.

(October 8, 1891.)

A PPEAL by plaintiff from a judgment of the Superior Court for Sonoma County in favor of defendant in an action brought to contest defendant's right to act as one of the superior court judges for that county. *Reversed.*

The facts sufficiently appear in the opinion. **Mr. T. J. Geary**, with **Mr. A. P. Ware**, for appellant.

Messrs. C. S. Farvuar and J. A. Barham for respondent.

De Haven, J., delivered the opinion of the court:

The parties to this action were opposing candidates for the office of superior judge of Sonoma County at the general election of 1890. The respondent, Crawford, received a certificate of election, and this is an action contesting his right thereto. As a result of the trial and recount in the superior court, it appearing that the defendant received one vote more than the plaintiff, the court, on motion of defendant, granted a nonsuit and dismissed the proceedings. The contestant appeals from this judgment, and claims that the court erred in counting certain ballots for the respondent, and in refusing to count others for the appellant.

1. Two ballots, regular on their face, and with the appellant's name printed thereon for judge of the superior court, were not counted by the court for the reason that there was on the back of each a faint type impression of a portion of the face of a similar ticket. The impression is known among printers as an "off-set," and, if there is too much ink upon the type used, is produced when one sheet is placed face downward upon the back of another, which has preceded it from the press. In our opinion the court erred in its refusal to count these ballots for appellant.

Section 1206 of the Political Code Provides: "When a ballot found in any ballot-box bears upon the outside thereof any impression, device, color or thing, or is folded in a manner designed to distinguish such ballot from other legal ballots deposited therein, it must, with all its contents, be rejected." Prior to the adoption of the Code, it was the usual practice to have the tickets of the different political parties of a different color or weight or size, so that an observer at the polls could see at a glance and detect which party ticket was deposited by the voter. It was to prevent this, and secure to the citizen absolute secrecy for his ballot, that the section above quoted, and others of the same Code, were enacted, prescribing for ballots, uniformity of paper, color and size; and, in order to justify the rejection of a ballot under this section, it must appear that such "impression, device, color or thing," on the outside thereof, was intended to distinguish it from other legal ballots (*Wyman v. Lemon*, 51 Cal. 278); and the court is not

authorized to find such design when it is just as reasonable to attribute the appearance of the ticket to accident as design. It is not doubted, as was argued here, that tickets may be marked as these were for the purpose of distinguishing them from other ballots, and to be furnished only to a certain class of voters. But in the absence of any proof tending to show this, the presumption must be that such impression was the result of accident, and not intended, and therefore within neither the letter nor spirit of this section, or section 1207 of the same Code, which provides that when a ballot bears upon it any impression, device, color or thing intended to designate or impart knowledge of the person who voted it, it must be rejected.

2. What is said in the preceding paragraph will apply with equal force to the two ballots not counted for appellant, one of which had upon its back a very small piece of red sealing wax, and the other a small stain, as if made by a drop of oil, or something of that nature. It is far more reasonable to suppose that the wax was accidentally placed upon the ticket by the officers of election in sealing the package in which it was returned than to believe that it was designedly placed there as a distinguishing mark before its deposit in the ballot-box; and as to the other, the mark or discoloration is of that character that the most natural conclusion in relation to it is that it was due to some accidental cause, and was not intended to distinguish the ballot or impart knowledge of the person who voted it.

3. The court erred in counting ballot marked "Exhibit 37" as a vote for the respondent. The ticket, so far as necessary to be set out, is as follows:

"18. Judge of the Superior Court, Thomas Rutledge.

"19. Judge of the Superior Court, J. W. Oates.

"20. State Senator, Tenth District, Robert Howe."

—with the name "Robert Howe" erased and that of the respondent written opposite, or in line with it. We do not see how this ticket can be read as a vote for respondent for the office of judge of the superior court. A ballot is to be construed as any other writing; and, while a resort to parol evidence of extrinsic circumstance may be had for the purpose of interpreting what would otherwise be doubtful, it cannot be shown that the intention of the voter was anything different from what plainly appears upon the face of the ballot. *People v. Seaman*, 5 Denio, 409.

And when the ballot intelligently shows that a particular person is voted for to fill a particular office, it cannot be counted differently because the court may believe that the voter made a mistake in preparing his ticket. Voting for a person to fill an office for which he is not a candidate may be the result of mistake, or it may be merely the frivolous exercise of the right of suffrage; but, no matter whether such action may be attributed to folly or mistake, the ballot is the only expression of the voter's will, and it must be counted according to its legal effect. The intention of the voter, as it appears upon the face of this ballot, was to vote for respondent for state senator, and not

for judge of the superior court, and it should be so counted.

4. Upon certain ballots the printed name of the respondent was erased with an indelible pencil, and the name of the appellant written opposite thereto with the same kind of pencil. The court refused to count the same for appellant, but did count such ballots as votes for respondent. The respondent insists that the rulings of the court in relation to the counting of these ballots are justified by section 1204 of the Political Code. That section declares: "When upon a ballot found in any ballot-box a name has been erased and another substituted therefor, in any other manner than by the use of a lead-pencil or common writing ink, the substituted name must be rejected, and the name erased, if it can be ascertained from an inspection of the ballot, must be counted." There was evidence introduced tending to show that indelible pencils are not in fact lead-pencils, nor commonly known as such by merchants selling them. The question is thus presented whether a voter must follow the very letter of this section of the Code in preparing his ticket, or have his vote for a particular candidate rejected. We think it very clear that such is not the purpose or the meaning of that section. The Code commissioners, in their note to this section, say: "This section is intended to prevent the use of nitrate of silver, or any other chemical substance which may be written over a name and not be distinguishable until time brings out the impression; also, to prevent the use of pasters, the use of which is subject to two objections: *first*, their liability to come off; *second*, their liability to be fraudulently taken off." This object of the law—and it is apparent that the Legislature could have had no other in view—is attained if the erasure and substitution are made in such a manner as to present at the time and retain the same general appearance as if made by a lead-pencil or common writing ink. This section, in declaring that erasures and change of names shall not be made "in any other manner than by the use of a lead-pencil or common writing ink," really means that the erasure and substitution shall not be made in any other style or form, or with any different effect, than would be produced by the use of a lead-pencil or common writing ink. The law looks only to matters of substance; and does not waste its energies in pursuit of shadows; and if the appearance of having been made with a lead-pencil is produced by the use of an indelible pencil, there is a substantial compliance with the statute, although such a pencil may not, strictly speaking, be known as a lead-pencil. Any other construction would sacrifice the spirit and reason of the law to the mere letter; and yet it is one of the great maxims of interpretation to keep strictly in view the general scope, object and purpose of the law, rather than its mere letter. "He who considers merely the letter of an instrument goes but skin deep into its meaning." Broom, *Legal Maxims*, 611. "A rigid and literal meaning would, in many cases, defeat the very object of the Statute, and would

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exemplify the maxim that 'the letter killeth, while the spirit keepeth alive.' Every statute ought to be expounded, not according to the letter, but according to the meaning. . . . And the intention is to govern, although such construction may not in all respects agree with the letter of the Statute." *Tracy v. Troy & B. R. Co.* 88 N. Y. 487.

5. The court erred in counting ballot No. 8 as a vote for the respondent. Upon this ticket the printed name of respondent was erased with red ink, and that of J. W. Oates written in place of it, also in red ink. The respondent contends that red ink is not common ink within the meaning of the Statute. We cannot say that it is not such an ink; and its use is not within the mischief which it is the object of the law to prevent.

6. Upon several ballots the name of appellant was erased and no name substituted therefor, and the words "No vote" were not written after the name erased. These were counted as votes for appellant. The court was correct in this ruling. The Statute, in order to guard against fraudulent erasures, has provided this as the only way in which the voter can manifest his intention to erase a name, when he does not substitute another; and under such circumstances the erasure is not complete unless followed by these words. There is no valid constitutional objection to this requirement. It does not prescribe any educational qualification for the voter, nor require him to disclose the secrecy of his ballot, as contended.

7. The statement or complaint filed by appellant in this proceeding does not allege that he possesses the qualifications required by the Constitution of this State, to make him eligible to the office of judge of the superior court, and it is claimed by respondent that the statement is therefore fatally defective, and for that reason the judgment dismissing the proceeding should be affirmed. It is true that in order to entitle appellant to the full relief asked for, to wit, a judgment that he was elected instead of respondent, the statement should have alleged facts showing that he was eligible. But the statement is not fatally defective if it states a case for any relief. *Perri v. Beaumont* (Cal.) 27 Pac. Rep. 584. And we think that it does. It is alleged that the appellant is an elector of the County of Sonoma; and, such being the case, he was authorized to commence this proceeding, and upon proof of facts alleged in his statement, was entitled to a judgment annulling the election of defendant. As the case must be remanded for a new trial, the court below should, upon application, permit the appellant to amend his statement so as to allege the necessary facts showing his eligibility to be chosen to the office, the election to which is in controversy here. *Perri v. Beaumont, supra*.

Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

We concur: *Beatty, Ch. J.; Garoutte, J.; Harrison, J.; Sharpstein, J.; Patterson, J.*

UTAH SUPREME COURT.

John ROBINSON, *Resp't.*,OREGON SHORT LINE & UTAH NORTH-
ERN R. CO., *Appt.*

(.....Utah.....)

1. A common hand-car standing on the ground beside a railroad track is not a thing dangerous in and of itself, which a railroad company is required to guard or lock.
2. It is not negligence to leave a common hand-car, weighing from six hundred to seven hundred pounds, six feet from a railroad track and four or five feet below it, a mile from the thickly settled part of a city and a quarter of a mile from the nearest house, and let it remain there over Sunday, unlocked and unguarded so as to render its owners liable in damages for the death of a boy eleven years old, who, while riding on it with other boys who had replaced it on the track, fell off and was run over and killed.

(September 12, 1891.)

NOTE.—Trespass and unwarrantable interference in its relation to negligence.

It is difficult to see how a liability can be incurred where the defendant corporation had done nothing directly to produce the injury, and where there was an unauthorized interference with or invasion of its rights. It is true that cases may be found where a different doctrine seems to be upheld, as in *Lynch v. Nurdin*, 1 Q. B. 29, where an infant entered into a cart standing in the street and was injured, the owner was held liable. But there is a clear distinction between such a case, where the infant was lawfully in the highway, which it has the right to travel and use, and where the blameable carelessness of the defendant tempted the child to amuse himself with an empty cart and a deserted horse, and the case at bar where he is palpably invading the premises of another as a mere trespasser. In the latter case a party is without the protection of the law except in special cases. The owner of land may dig an excavation in his own premises, not substantially adjoining a public highway, and no action lies against him by one who has strayed off the highway and fallen into the excavation. *Hardcastle v. South Yorkshire R. Co.* 4 Hurlst. & N. 67; *Hounsell v. Smith*, 29 L. J. Q. P. 208; *Hott v. Wilkes*, 3 Barr. & Ald. 304; *Nicholson v. Erie R. Co.* 41 N. Y. 523.

But a different rule prevails when the pit dug is so near the highway that a person in using the same with ordinary caution may fall in. See *Beck v. Carter*, 66 N. Y. 253, where the authorities are reviewed.

Within well-recognized legal principles.

The deceased being a trespasser, defendant would not be liable for his death (*Wharton*, Neg. § 505; *Kohn v. Lovett*, 44 Ga. 251; *Murray v. McLean*, 57 Ill. 378; *Hargreaves v. Deacon*, 25 Mich. 6; *Gillis v. Pennsylvania R. Co.* 59 Pa. 129; and the Supreme Court of Pennsylvania has asserted that an entry upon the land of an unfenced railroad company stood upon the same footing with an entry into a bedroom. *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 373. See *New York & E. R. Co. v. Skinner*, 19 Pa. 311.

In all cases, where a recovery has been sustained against a party not immediately connected with the 18 L. R. A.

APPEAL by defendant from a judgment of the District Court for Salt Lake County, in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death, and alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Williams & Van Cott, for appellant:

If the instrument in and of itself is dangerous, then the defendant is liable in case it is left near a public place and young children are injured by reason of the same. Generally speaking, a machine dangerous in and of itself would be one that does injury when being tampered with in its then present condition and without changing its locality to an entirely different one so as to be most advantageous to do injury.

See *Roddy v. Missouri Pac. R. Co.* 13 L. R. A. 749, 104 Mo. 234.

This principle of liability is the one recognized by the authorities.

Chicago & A. R. Co. v. McLaughlin, 47 Ill.

injury, the negligent act was in itself positively unlawful, or recklessly dangerous. *Lynch v. Nurdin*, 1 Q. B. 29, has not been followed, nor is it regarded as authority. *Hartfield v. Roper*, 21 Wend. 615; *Tonawanda R. Co. v. Munger*, 5 Denio, 237, 4 N. Y. 360.

Effects of an act of negligence imminently dangerous.

Had the act of the defendant corporation been one imminently dangerous to the lives of others, the decision in the principal case would doubtless have been in favor of the plaintiff, within the principle of the familiar rule stated by *Sutherland on Damages*, vol. 2, p. 435: "Where an act of negligence is imminently dangerous to the lives of others the guilty party is liable to the one injured by the negligence, whether there be a contract between them violated by that negligence or not." The principle is illustrated by the case of *Thomas v. Winchester*, 6 N. Y. 397. That was a case in which a dealer in drugs had carelessly labeled a poison as harmless medicine, and sent it, so labeled, into the market. It was held that the dealer was liable to any person who might be injured by the use of the drug. In considering what articles can be regarded imminently dangerous, the same court, in *Loop v. Litchfield*, 42 N. Y. 357, says: "They are instruments and articles in their nature calculated to do injury to mankind, and are generally intended to accomplish that purpose; they are essentially and in their elements instruments of danger." *Roddy v. Missouri Pac. R. Co.* 13 L. R. A. 749, 104 Mo. 234.

In *Longneid v. Holiday*, 6 Eng. L. & Eq. 592, the distinction is recognized between an act of negligence imminently dangerous to the lives of others and one that is not so. In the former instance, the party guilty of the negligence is liable to the party injured; in the latter, the negligent party is liable only when his negligence is a breach of contract, express or implied.

It cannot reasonably be contended that a railroad car, though supplied with defective brakes, is an imminently dangerous instrument. Unless put in motion it is perfectly harmless, and when in motion it is not essentially dangerous. *Roddy v. Missouri Pac. R. Co.* 13 L. R. A. 749, 104 Mo. 234; *Chicago & A. R. Co. v. McLaughlin*, 47 Ill. 265; *Gurley v. Missouri Pac. R. Co.* 12 West. Rep. 330, 93 Mo. 445.

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265; *Chicago, B. & Q. R. Co. v. Stumps*, 69 Ill. 414; *McAlpin v. Powell*, 70 N. Y. 126; *St. Louis, V. & T. H. R. Co. v. Bell*, 81 Ill. 76; *Patterson, Railway Accident Law*, pp. 184-188; *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. 258; 2 Wood, *Railway Law*, p. 1296; *Central Branch U. P. R. Co. v. Henigh*, 23 Kan. 347.

The boys in this case were trespassers. They were not upon the public street or sidewalk or upon their own premises, but they went way off to a place where they would clearly become trespassers by going upon the appellant's property where the appellant would owe them no duty, so that the sole question would be brought home, Was a car of this kind down by the side of the track, not in a public place and not dangerous of itself, such an instrument that the appellant was bound to anticipate that boys could lift the same upon the track and be injured in consequence thereof?

See *McEachern v. Boston & M. R. Co.* 150 Mass. 515, and cases cited; *Daniels v. New York & N. E. R. Co.* (Mass.) ante, p. 248.

The son of the respondent was guilty of contributory negligence in the premises. An infant is held to care according to his age and understanding. Appellant should not be charged with greater care in looking after a boy of this age than he would be capable of exercising towards himself.

Masser v. Chicago, R. I. & P. R. Co. 68 Iowa, 602; 1 Shearm. & Redf. Neg. p. 108.

Messrs. Sutherland & Judd for respondent.

Anderson, J., delivered the opinion of the court:

This action is brought by the plaintiff to recover damages for the death of his son, aged between eleven and twelve years, alleged to have been caused by the negligence of the defendant. There was a verdict and judgment in favor of the plaintiff for \$4,000, and the defendant brings this appeal from the judgment, and from the order of the court overruling a motion for a new trial.

The complaint alleged that on October 11, 1890, the defendant left a hand-car upon one of the tracks of its road within the limits of Salt Lake City, and permitted it to remain there until the evening of October 12, without being in any way guarded or locked, and that on the last named date plaintiff's son was attracted to the hand-car, and got on the same with other boys, and while riding down a grade lost his balance, and fell from the car and was killed. The answer of the defendant denied each and every allegation of the complaint. The evidence showed that the defendant was constructing yards and side tracks near the north limits of Salt Lake City. That on Saturday, October 11, 1890, there was a set of hands at work there, and that about noon of that day they quit work, and started back to the city on a hand-car; that on account of snow having fallen on the rails, and an ascending grade, they were unable to propel the car; that they set the car off the track, left it unlocked, and came back to the city on foot; that the car weighed between six and seven hundred pounds and required four men to lift it from the track, that at the point where they put the hand-car off the track the track is four or five feet above

the level of the ground, and they placed it so that the edge of the car would be about six feet from the rail; that the place where they left the car is about a mile from the thickly settled portions of the city, and that there are no houses nearer than a quarter of a mile, and that the ground is swampy and wet, and is not used nor suitable for a play-ground for children; that either that afternoon or on Sunday morning some boys placed the car back on the track. On Sunday forenoon a number of boys were playing with the hand-car by running around on the side tracks or switches, and about 3 o'clock in the afternoon they were joined by plaintiff's son and other boys, when they pushed the car up an ascending grade, and all got on, and started down the grade, and when a high rate of speed had been attained the son of plaintiff either jumped or fell off in front of the car, and was run over and killed. Some of the plaintiff's witnesses who were on the car at the time of the accident testified that the deceased jumped off, while others say they thought he lost his balance, and fell off. The ages of the boys, as far as it appears in the evidence, ranged from eleven to fifteen years. In the opinion of the witnesses the car was running at the time of the accident at a rate of twenty-five miles an hour, and the distance within which they stopped it, according to the testimony, was from ten to seventy-five feet from where the accident happened. James Morris, a witness for plaintiff, testified that he was fifteen years old; that he was one of the boys on the car when Robinson was killed; that after the accident they took the car off the track; and left it where the other boys told him they got it. He further testified that he, with other boys, had used the car before, with the permission of the "boss," eight or ten times, when the men were there working; but the boss never gave them permission to take the cars and ride on them when the men were not there.

The defendant contends that no negligence on its part was shown, and that the evidence is not sufficient to support the verdict. A hand-car, weighing six or seven hundred pounds, standing on the ground a quarter of a mile outside the settled limits of the city, is not of itself dangerous; and boys of sufficient age and strength to lift it up an embankment four or five feet high and place it upon the track are old enough to fully understand and appreciate whatever danger there is in running upon the track. The deceased and the other boys had no right to be upon the defendant's track meddling with its property. They were technically trespassers, and the defendant owed them no duty, as in the case of passengers or employees. If the boys who took this car and placed it on the track had found a common wagon standing beside the road and had hauled it to the top of a hill, removed or raised the tongue, and all gotten in and let it run down the hill at such a reckless rate of speed as to cause one of their number to become so alarmed as to jump or fall out and get killed; or if they had gone on a neighbor's premises without permission, and while there had taken a sled belonging to him, and engaged in the amusement called "coasting," and while so engaged one of them had fallen off and been run over and killed,—it would scarcely be contended that the owner

of the wagon or sled would be liable in damages for the injury; and yet in principle those cases would differ but little, if any, from the one under consideration.

The case of *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745, cited by plaintiff, was a case where a turn-table was left unfastened, and a small child was injured while it was being turned around. The court charged the jury in that case that, "if the turn-table in question, in its construction and the manner in which it was left, was not dangerous in its nature, the defendants were not liable for negligence;" and this instruction was approved by the Supreme Court of the United States. A machine, to be dangerous in and of

itself, must be of such a character that it can only be handled with safety by persons of mature years and experience. But we think a common hand-car, standing on the ground beside a railroad track, is not a thing dangerous in and of itself, which the railroad company is required to guard or lock. *Chicago & A. R. Co. v. McLaughlin*, 47 Ill. 265; *Chicago, B. & Q. R. Co. v. Stumps*, 69 Ill. 414.

We think that to leave the hand-car where it was left in this case, under the circumstances, was not negligence, and that the verdict is unsupported by the evidence.

The cause is reversed and remanded, and a new trial ordered.

Blackburn and Miner, JJ., concur.

CONNECTICUT SUPREME COURT OF ERRORS.

FAIRFIELD COUNTY BAR, *ex rel.* Samuel FESSENDEN *et al.*,

v.

Howard W. TAYLOR, *Appt.*

(.....Conn.....)

1. Attorneys preferring charges against another attorney

of unprofessional conduct, for the purpose of having him disbarred, need not show that they constitute a committee appointed by the bar association of the county for that purpose either to establish their right to institute the proceeding, or to give the court jurisdiction.

2. The record in an action against an attorney to recover money out of which

he was charged with defrauding plaintiff, which resulted in a judgment against him, is admissible in a proceeding by members of the bar, based on the transaction out of which such action arose, to procure his disbarment for unprofessional conduct, especially where the complaint averred

the existence of such record, which the answer denied.

3. The absolute disbarment of an attorney is justified where he, upon receiving an unenforceable claim against his own client, caused a complaint to be served in the name of another attorney and then advised his client to settle, falsely telling him, with full knowledge of the facts, that the claim was good and could be collected out of his property.

(January 7, 1891.)

A PPEAL by defendant from a judgment of the Superior Court for Fairfield County disbarring him from practice as an attorney. *Affirmed.*

The facts are fully stated in the opinion.

Mr. H. S. Sanford for appellant.

Messrs. Samuel Fessenden, John C. Chamberlain and George W. Wheeler, for appellees:

The courts have been steadfast in their pro-

NOTE.—Disbarment of attorneys.

An attorney is an officer of the court admitted to practice under its rules, amenable to it, and liable to have such relations sundered upon satisfactory evidence of dishonest professional conduct, habits of general immorality, or any such single act of crime or vice as may show him unfitted for the trusts and confidence reposed in him as such. *Percy's Case*, 36 N. Y. 651; *Hawk*, P. C. 312; *Bryant's Case*, 24 N. H. 155; *Ex parte Brounall*, 2 Cowp. 829; 12 Geo. I. chap. 29; 4 Henry IV. chap. 18; *Case of Austin*, 5 Rawle, 204; *Com. v. District Ct. Judges of Phila.* 5 Watts & S. 272; *Dicken's Case*, 67 Pa. 169; *Mill's Case*, 1 Mich. 392.

He has a right to an opportunity to appear and answer in his own behalf before a final judgment against him; but any notice, rule, or summons does not require the technical nicety in its allegations, nor the exactness of proof, of a criminal proceeding. *Penobscot County Bar v. Kimball*, 64 Me. 140; *Leigh's Case*, 1 Munf. 481.

It is an inherent power with every court to disbar an attorney for unprofessional conduct, and in a series of decisions the following reasons have been assigned: ignorance of the law (*Bryant's Case*, 24 N. H. 149); drawing check on a bank in which the attorney had no deposit (*Bank of New York v. Stryker*, 1 Wheel. C. C. 530); improperly disclosing information received (*People v. Barker*, 56 Ill. 290); false representations in the form of affidavits by which the court was induced improvidently to grant an order (*Re Houghton*, 67 Cal. 511); grossly abusive language to or in the presence of the presiding judge (2 Dowl. Pr. 110); for unfaithful conduct as the trustee of an express trust acting under the appointment of the court. *People v. Appleton*, 105 Ill. 474.

In proceedings to disbar an attorney he can only be convicted on evidence good at common law, delivered, if he chooses, in his presence, by witnesses subject to cross-examination. *Re an Attorney*, 83 N. Y. 164.

Where an attorney employed by a husband to bring a divorce suit enters into collusion with the wife to manufacture evidence, which if not wholly untrue is deceptive, and thus to enable the husband to procure a divorce, this is an act of professional misconduct which authorizes an order disbarring the attorney. *Re Gale*, 75 N. Y. 536.

Where, after the examination of the evidence, it is evident, in view of the respondent's positive denial and explanation, that the evidence is not sufficient to justify his degradation and punishment, and where it further appears that the proceeding was penal in its nature, a motion to disbar should be dismissed. *Re an Attorney*, 1 Hun. 321.

Under a very recent decision by the supreme court of the State of New York, it appears that while by a special statutory enactment attorneys and counselors are declared to be judicial offi-

tection of the integrity of the bar, and have uniformly held that gross violation of the confidence of a client is good ground for disbarment.

Strout v. Proctor, 71 Me. 388; *Re Martin*, 6 Beav. 387; *Farlin v. Sook*, 26 Kan. 397; *Goodwin v. Gosnell*, 2 Coll. C. C. 457; *Re Wool*, 36 Mich. 800; *State v. Burr*, 19 Neb. 593; *Re Peterson*, 8 Paige, 510, 8 L. ed. 252; *People v. Goodrich*, 79 Ill. 148. See note to *State v. Kirke*, 95 Am. Dec. 840, 12 Fla. 278.

In the absence of specific provision to the contrary, the power of removal is commensurate with the power of appointment.

Penobscot County Bar v. Kimball, 64 Me. 147; *Ex parte Garland*, 71 U. S. 4 Wall. 878, 18 L. ed. 370; *Re Austin*, 5 Rawle, 203.

Andrews, Ch. J., delivered the opinion of the court:

The appellant was an attorney-at-law residing at Danbury, and practicing in Fairfield County. He was displaced from being an attorney by an order of the superior court in that county made on the 18th day of May, 1890. From that order he has appealed to this court. Section 784 of the General Statutes provides as follows: "The superior court may admit and cause to be sworn as attorneys such persons as are qualified therefor, agreeably to the rules established by the judges of said court; and no other person than an attorney so admitted shall plead at the bar of any court in this State, except in his own cause; and said judges may establish rules relative to the admission, qualifications, practice, and removal of attorneys." Section 785 provides that "attorneys admitted by the superior court shall be attorneys of all courts, and shall be subject to the rules and orders of the courts before which they act, which may fine them for transgressing any such rule or order, not exceeding one hundred dollars for any offense, and may suspend or displace them for just cause." As is seen from these sections, the superior court alone has power to admit persons to be attorneys-at-law, and the persons so admitted are attorneys in all

the courts of the State. Any other court than the superior court may fine an attorney for transgressing its rules, and doubtless has the power to forbid him from appearing before it; but only the superior court can make an order of total suspension or displacement. In the absence of specific provisions to the contrary, the power of removal is, from its nature, commensurate with the power of appointment. There is no statute authorizing an appeal from an order by the superior court suspending or displacing an attorney; nor, so far as we are able to learn, is there any usage permitting it. Such orders have been made many times in the superior court, and this is the first instance in which any attempt has been made to take an appeal from one of them to the court of errors. Such an order, although it is a judicial act, has in it so much that is of a discretionary nature as to suggest great difficulties in an appeal. It is a discretion, too, that ought to be exercised with great moderation and care. But sometimes it must be exercised, and no other tribunal can decide in a case of removal from the bar with the same measure of information as the court itself. A revising tribunal, if there be such a one, would feel the delicacy of interposing its authority, and do so only in a plain case. In this case all objection to the appeal is expressly waived, and apparently with the approval of the judge of the superior court who made the order. We have therefore concluded to examine it.

The case is this: Certain attorneys practicing in Fairfield County, describing themselves to be a committee of the bar of that county, made a presentment to the superior court in that county, in the form of a complaint, therein charging the appellant with fraud and with other unprofessional conduct; and that he had been sued by Margaret and David Sprague, who claimed to have been his clients, and that in a matter concerning which they had asked and followed his professional advice he had defrauded them out of a large sum of money; that a trial had been had before the superior court in that county at a former session, and a

cers, yet the exercise of these functions is not to be construed as making them office holders or the custodians of a public trust in the constitutional use of the term, but they are deemed to be officers of the court exercising a privilege or franchise, but subject at all times to disbarment for unprofessional conduct. *Re Baum*, 30 N. Y. S. R. 174.

Under a conviction of an offense recognized in law to be infamous, sufficient ground is disclosed for the disbarment of the attorney so convicted. *Re McCarthy*, 42 Mich. 71.

It is well settled that attorneys and counselors-at-law should be classified and designated as judicial officers. They are subject at all times to removal or suspension for a just cause shown, and when charged with deceit, malpractice, or misdemeanor, they should be given an opportunity to defend. The office of attorney and counselor becomes vacant upon the conviction of the incumbent of an infamous crime. *Re Niles*, 48 How. Pr. 246.

The doctrine of *Austin's Case*, 5 Rawle, 191, is, that the power of the court may be exercised against attorneys-at-law, either for a contempt which is an offense against the court itself, or for unfitness which disqualifies the attorney from filling the office properly. If an attorney should, by a series of unprofessional acts, form a character

which unfits him for association with the fair and honorable men of the profession, such unfitness, the result of habitual practices, may be made the subject of inquiry by the court and expulsion from the bar. But an act merely discreditable, but not infamous, while it would lose a member of the bar the favor and countenance of the high-minded men of the profession, cannot of itself give jurisdiction to the court to take judicial cognizance of it, and expel him from his office. *Dickens' Case*, 67 Pa. 169, 5 Am. Rep. 420.

The power to disbar an attorney is possessed by all courts which have authority to admit attorneys to practice. But it is a power which should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself, or a proper regard for the integrity of the profession. And it has been said that a removal from the bar should never be decreed where any punishment less severe—such as reprimand, temporary suspension, or fine—would accomplish the end desired. See *Bradley v. Fisher*, 80 U. S. 18 Wall. 335, 20 L. ed. 646; *Ex parte Garland*, 71 U. S. 4 Wall. 383, 18 L. ed. 368; *Ex parte Burr*, 23 U. S. 9 Wheat. 639, 6 L. ed. 159; 1 Walt, Ad. & Def. 473.

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judgment rendered in favor of the said Spragues to recover of the appellant the sum of \$2,238.75 for such fraud. A copy of the entire record in that case, the complaint, pleadings, finding of facts, and judgment, was attached to and made a part of the presentment so made by them. Upon that presentment the superior court made an order of notice to the appellant, requiring him to appear on a day named to make answer thereto. On the day so named the appellant did appear with counsel, made an answer denying all the material allegations of the presentment, and was fully heard. At the hearing the attorneys who had preferred the charges appeared to prosecute them. They offered a duly certified copy of the record, a copy of which had been set out in and made a part of their charges, and also the testimony of witnesses to prove the charges they had made, and also the truth of the things averred in the complaint of the said Daniel and Margaret Sprague. The appellant was also fully heard in his exculpation. All the evidence he offered was received without objection, and the matter was argued at length in his behalf by counsel. The court made a finding of facts, and rendered a judgment that the appellant be disbarred and forever prohibited from practicing law before the courts of this State.

At the commencement of the hearing the committee who had made the charges proposed to offer evidence of their appointment as a committee of the Bar, and for that purpose had the records of the Bar in court, and so stated. The court ruled that such evidence was not required, but that the court would recognize the persons named, they being known to the court as members of the Bar, as proper persons to prefer the charges and to present the matter therein contained to the court. This ruling was objected to, and is the first reason of appeal. There is no force to the objection. While it would have been well enough, perhaps, to have received that record, it would have been wholly without significance. It was the duty of the attorneys, if they knew of unprofessional conduct by the appellant or any other attorney, to bring it to the attention of the court. An appointment by the Bar to do that which it was their duty to do without any appointment could give them no added authority. Nor was any such appointment necessary to give the court jurisdiction. The court might summon the appellant to a hearing upon any information it had that it deemed worthy of credit, whether it came from lawyers or laymen. The manner in which the proceeding should be conducted, so that it be without oppression or injustice was for the court itself. *Ex parte Wall*, 107 U. S. 265, 27 L. ed. 552.

The appellant also objected to the record of the case brought by Daniel and Margaret Sprague against him being read, and further objected to the finding of the facts therein as not being a part of the record. It is to be observed that the finding of the facts in that case is made a part of the record by the order of the judge who heard the cause. There has been among the statutes of the State ever since 1864 a provision that a finding of facts may be made a part of the record by such an order. Acts 1864, chap. 49, p. 87. This provision may be

found in the Revision of 1875, at page 444, § 9. It is in substance reproduced in the Practice Act (Acts 1879, p. 439, § 30), and is now section 1111 of the General Statutes of 1888. The objection to the record as a whole is that it was between other parties,—*res inter alios acta*. This objection has in it a tinge of sophistry. It turns aside from the purposes for which the hearing was had. It was an investigation by the court into the conduct of one of its own officers, not the trial of an action or suit. Neither the whole Bar of Fairfield County nor its committee were parties to an action in any proper sense. They were not prosecuting any matter of their own. They were not plaintiffs. They were performing their sworn duty to the court by bringing to its knowledge the misdoings of one of its agents. But if that committee be regarded as a party, and applying the strictest technical rule, the record was admissible. One of the averments of the complaint was the existence of a certain record. That averment was denied. On such an issue the plaintiffs might surely offer the best possible evidence there could be of the truth of their allegations. The existence of such a record as was averred in the complaint was proved by the production of a copy. For that purpose the whole record was admissible. And it does not appear to have been offered or used for any other purpose. The court seems to have been careful to limit it to its proper effect. All the other parts of the case were proved by other and appropriate evidence.

It is true that the charges contained in the present complaint are substantially the same as those contained in the Sprague complaint. They go over the same ground, and their truth or falsity was involved in this investigation. To prove them the evidence of witnesses was offered and received, and the finding of the court in this case is based exclusively on their testimony. But these charges did not contain the whole issue. The ultimate question lay beyond them. The real question was whether or not the appellant was a fit person to be longer allowed the privileges of being an attorney. And on that question the fact of the existence of such a record would be legitimate and cogent evidence.

The last reason of appeal is that the court erred in rendering a judgment of disbarment, instead of suspension only for a reasonable and stated period. Examined somewhat more in detail, the record shows that prior to January, 1886, the appellant had had such professional relations with Margaret and Daniel Sprague that he believed they would come to him for professional advice and assistance if they should have any law business. In that month he engaged to collect a judgment rendered in the Supreme Court in Dutchess County, in the State of New York, against the said Daniel Sprague, and owned by one Emeline Kent, for the amount of \$1,849.62, with interest thereon from and after 1874. The appellant was authorized to settle for \$1,000 net to the owner of the judgment, and was to receive for his own services all he could obtain over \$1,000, up to \$1,500, and one third of the amount collected in excess of the latter sum. Daniel and Margaret Sprague were husband and wife. Daniel had no property; Margaret had some

property. In order to deceive the Spragues, and to cause them to believe, if they should come to him for advice or assistance, that he was not employed to collect the judgment, the appellant drew up and caused to be issued by another attorney a complaint against Daniel and Margaret Sprague in favor of the said Emeline Kent, to recover the amount due on the judgment. Upon this complaint the property of Margaret Sprague was attached. As soon as it was served the Spragues came to the appellant, and retained him as their counsel. He accepted that employment. He went to Dutchess County, and there learned that Margaret Sprague was not liable on the judgment. On his return he falsely stated to Mr. and Mrs. Sprague that she was liable on it, and that her property could be taken for it in the suit that had been served on them, and advised them to settle that suit on the most favorable terms they could. Relying on that advice they did settle, the said Margaret paying of her own money the sum of \$1,875 in settlement, of which sum the appellant received the stipulated proportion. The appellant knew that from the time of her employment of him as aforesaid until the settlement of the suit the said Margaret relied upon him as her counsel, and believed him to be acting solely in her interest and behalf. He was, however, at that time acting for and in behalf of said Emeline Kent, plaintiff in the suit, which the Spragues did not know. It is hardly possible to characterize such conduct by an attorney-at-law in measured terms. That it was a gross violation of the attorney's oath is only a moderate statement. That it manifested a low condition of moral sensibility is true, and that it showed

the appellant to be utterly wanting in the qualities which would entitle him to public confidence is also true. It is not enough for an attorney that he be honest. He must be that, and more. He must be believed to be honest. It is absolutely essential to the usefulness of an attorney that he be entitled to the confidence of the community wherein he practices. If he so conducts himself in his profession that he does not deserve that confidence, he is no longer an aid to the court nor a safe guide to his clients. A lawyer needs, indeed, to be learned. It would be well if he could be learned in all the learning of the schools. There is nothing to which the wit of man has been turned that may not become the subject of his inquiries. Then, of course, he must be specially skilled in the books and rules of his own profession. And he must have prudence, and tact to use his learning, and foresight, and industry, and courage. But all these may exist in a moderate degree, and yet he may be a creditable and useful member of the profession, so long as the practice is to him a clean and honest function. But possessing all these great faculties, if once the practice becomes to him a mere "brawl for hire," or a system of legalized plunder where craft and not conscience is the rule, and where falsehood and not truth is the means by which to gain his ends, then he has forfeited all right to be an officer in any court of justice, or to be numbered among the members of an honorable profession.

There is no error in the judgment complained of.

The other Judges concurred.

MICHIGAN SUPREME COURT.

Daniel LOVEJOY *et al.*

v.

Jacob MICHELS, *Appt.*

(.....Mich.....)

1. The price fixed by a combination of manufacturers with sole reference to their own interests will not govern in determining

what a purchaser from one of them should pay for goods which he ordered and received, without any agreement as to price.

2. Argumentative comment on the evidence in the charge to the jury, the obvious tendency of which is to convey the judge's impression regarding the testimony and to give direction to the verdict, is erroneous.

(October 16, 1891.)

NOTE—*Nature of monopolies; price fixed by an illegal combination is void.*

A monopoly is a menace to the public. Its object and direct tendency are to prevent free and fair competition, and control prices throughout the national domain. It is no answer to say that it has in fact reduced the prices. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of a combination to raise the price to an exorbitant degree. Such combinations have frequently been condemned by courts as unlawful, and against public policy. *Alger v. Thacher*, 19 Pick. 51; *Stanton v. Allen*, 5 Denio, 434; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 672; *Hooker v. Vandewater*, 4 Denio, 349; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 186; *Craft v. McConoughy*, 79 Ill. 346; *Hannah v. Fife*, 27 Mich. 172.

Such a combination to effect such a purpose is inimical to the interests of the public, and all contracts designed to effect such an end are contrary 13 L. R. A.

to public policy, and therefore illegal. This is too well settled by adjudicated cases to be questioned at this day. *People v. Fisher*, 14 Wend. P. Morris Run Coal Co. v. Barclay Coal Co. 68 Pa. 173; *Saratoga County Bank v. King*, 44 N. Y. 87.

Modern adjudications have declared that all agreements tending to monopoly, or restraint of trade, or that have for their primary intent the destruction of competitive business and a consequent increase of price in the market value of commodities, are injurious to the commercial interests of the country, are contrary to public policy, and, therefore void. *Anderson v. Jett*, 89 Ky. —; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 556; *Hooker v. Vandewater*, 4 Denio, 349; *People v. Chicago G. Trust Co.* 41 Alb. L. J. 68; *Leonard v. Poole*, 4 L. R. A. 723, 114 N. Y. 871; *Stanton v. Allen*, 5 Denio, 434; *Texas & P. R. Co. v. Southern Pac. R. Co.* 41 La. Ann. 970; *Clancey v. Onondaga F. S. Mfg. Co.* 62 Barb. 306; *People v. Fisher*, 14 Wend. 9-12; *Watson v. Harlem & N. Y. Nav. Co.* 52 How. Pr. 342; *Can.*

ERROR to the Circuit Court for Wayne County to review a judgment in favor of the plaintiffs in an action brought to recover the value of certain knives, which had been sold and delivered to defendant without any agreement as to price, in which defendant claimed that the price charged and recovered was too high. *Reversed.*

The facts are stated in the opinions.

Messrs. Conely, Maybury & Lucking, for appellant:

The court erred in that it clearly and distinctly indicated to the jury its opinion of the facts of the case, and the verdict which it thought ought to be rendered, and in making an attack upon the credibility of the defendant.

Wheeler v. Wallace, 53 Mich. 355; *Richards v. Fuller*, 88 Mich. 653; *People v. Gastro*, 75

Mich. 182; *Marquette, H. & O. R. Co. v. Kirkwood*, 45 Mich. 51; *People v. Lyons*, 49 Mich. 82; *People v. Colerick*, 67 Mich. 363; *Chase v. Buhl Iron Works*, 55 Mich. 189; *Hayes v. Homer*, 86 Mich. 376; *Perrott v. Shearer*, 17 Mich. 54; *Blackwood v. Brown*, 82 Mich. 107; *Davis v. Gerber*, 69 Mich. 246.

It was error to charge the jury: "It is a question of fact, to be determined from what took place between these men, whether the association was unlawful or not."

The indisputable facts were such that any disinterested person would at once pronounce the association an institution having for its sole end, aim, and object the crushing out of competition and the maintaining of prices.

See *Richardson v. Buhl*, 6 L. R. A. 457, 77 Mich. 632.

tral Ohio Salt Co. v. Guthrie, 35 Ohio St. 672; *Colles v. Trow City D. Co.* 11 Hun, 397; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 182; *Craft v. McConoughy*, 79 Ill. 336; *Santa Clara Valley, M. & L. Co. v. Hayes*, 78 Cal. 387, 9 Am. St. Rep. 211; *Ray v. Mackin*, 100 Ill. 246; *Hilton v. Eckersley*, 6 El. & Bl. 47; *People v. Stephens*, 71 N. Y. 545; *Hartford & N. H. R. Co. v. New York & N. H. R. Co.* 3 Robt. 411; *Central R. Co. v. Collins*, 40 Ga. 582; *Saratoga County Bank v. King*, 44 N. Y. 87; *The Case of Monopolies*, 11 Coke, 84b; *India Bagging Assn. v. Kock*, 14 La. Ann. 168; *Raymond v. Leavitt*, 46 Mich. 447.

In *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, five coal companies entered into an agreement to divide two coal regions of which they had the control, to appoint a committee to take charge of their interests, which was to decide all questions, and appoint a general agent, through whom the coal mined was to be delivered. Each corporation was to deliver its proportion at its own cost in the different markets at such time and to such persons as the committee might direct; and the committee was empowered to adjust prices and freights and enter into agreements with other companies, by which the companies might sell their coal themselves only to the extent of their proportion, and at prices adjusted by the committee, and the agent to suspend shipments by either, beyond their proportion, the prices to be averaged and payments made to those in arrear by those in excess, and neither to sell coal otherwise than as agreed upon. This agreement was held by the court to be void, and incapable of being carried into effect. It was held to contemplate a business arrangement injurious to trade and commerce, and for that reason incapable of being legally supported. See *People v. North River Sugar Ref. Co.* 5 L. R. A. 386, 54 Hun, 354.

As to the illegality of contracts in restraint of trade, see notes to *Herrschoff v. Boutineau* (R. I.) 8 L. R. A. 460; *Richardson v. Buhl* (Mich.) 6 L. R. A. 467; *Carroll v. Giles* (S. C.) 4 L. R. A. 154; *People v. North River Sugar Ref. Co.* (N. Y.) 2 L. R. A. 38; *Gulf, C. & S. F. R. Co. v. State* (Tex.) 1 L. R. A. 849; *Lealie v. Lortillard* (N. Y.) 1 L. R. A. 456.

Market price, how determined.

The market price of a merchantable commodity may be determined as well by offers to sell, made by dealers in the ordinary course of business, as by actual sale, and statements of dealers in answer to inquiries as to price are competent evidence. *Harrison v. Glover*, 72 N. Y. 461.

The meaning of "market price," of "value of an article," is the price at which such articles are sold and purchased, clear of every charge but such as is laid upon it at the time of sale. This is the general L. R. A.

eral meaning of the expression. *Goodwin v. United States*, 2 Wash. C. C. 493.

The "actual market value" is the price which the owner or producer of the goods is willing to receive for them, if they are sold in the ordinary course of trade—the prices which the purchaser must pay to get them. *Re 8109 Cases of Champagne*, 1 Ben. 241.

In *Lush v. Druse*, 4 Wend. 314, the witness, who testified as to the market price, had inquired of merchants dealing in the article, and examined their books, thus giving the source of his knowledge.

In *Blydenburgh v. Welsh*, *Baldw.* 381, 340, it was said: "To make a market there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market price? Men sometimes put fantastical prices upon their property."

In *Trout v. Kennedy*, 47 Pa. 368, *Strong, J.*, said: "If at any particular time there be no market demand for an article, it is not, of course, on that account of no value."

In *James v. Muir*, 88 Mich. 223, 227, *Campbell, J.*, said: "In the present case it is sufficient to say that according to *Acobal v. Levy* [10 Bing. 376] there is, at least, no implication of a promise to pay at what may happen to be the market rate, which may not be always as there held, a reasonable rate." 1 Benjamin, Sales, Corbin's ed. § 86, note.

An offer to purchase may be some evidence of price. *Hotochkis v. Germania F. Ins. Co.* 5 Hun, 30; *Terry v. McNeil*, 58 Barb. 241; *Whelan v. Lynch*, 60 N. Y. 469, 474.

A price-list, stating the price at which a manufacturer will sell, or statements of dealers in answer to inquiries, is competent evidence of the market-price of a marketable commodity, and is a common way of ascertaining or establishing a market-price. *Lush v. Druse*, 4 Wend. 313; *Cluquot's Champagne*, 70 U. S. 3 Wall. 114, 18 L. ed. 116.

If nothing has been said as to price, when a commodity is sold, the law implies an understanding that it is to be paid for at what it is reasonably worth; and where there is a conflict in the evidence as to the price agreed upon, the real value of the article may be shown. 1 Benjamin, Sales, *Kerry's* ed. § 99; *Hillenbrand v. Wittkemper*, 79 Ind. 180; *Johnson v. Harder*, 45 Iowa, 677; *Norris v. Spofford*, 127 Mass. 85; *Brewer v. Housatonic R. Co.* 107 Mass. 277; *Saunders v. Clark*, 106 Mass. 331; *Parker v. Coburn*, 10 Allen, 82; *Rennell v. Kimball*, 5 Allen, 356; *Bradbury v. Dwight*, 3 Met. 31.

A market value signifies a price established by public sales, or sales in the way of ordinary business, as of merchandise. *Murray v. Stanton*, 99 Mass. 345.

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In case the jury found the association to be unlawful, and the price to be fixed arbitrarily by them, then in arriving at the true market value, they might consider all the evidence in the case, including the market value, both before and after the time in question, and all other items of information as to value which were admitted in evidence.

2 Sutherland, Dam. 374.

Messrs. Bowen, Douglas & Whiting, for appellee.

McGrath, J., delivered the following opinion:

Defendant is a manufacturer of machines for cutting hoops, in which certain knives are used. He had dealt in the same knives for eight years, and bought from White Bros., of Buffalo, N. Y. One of the plaintiffs called upon defendant in September, 1888, soliciting orders for knives. Prices were talked over, and defendant claimed that he exhibited to plaintiff bills of knives which defendant had purchased from White Bros., and plaintiff said: "We will furnish you them at the same price you pay White Bros., and give you a better knife." The bills show the price per set to be \$58.28. Defendant gave no order at that time. In November following defendant ordered by letter, from plaintiffs, two sets of hoop knives. Nothing was said about prices in the order. Plaintiffs booked the orders, and the goods were shipped, one set November 30, and the other December 5. Defendant testified that he was in a hurry for the knives, and that the bills came several days after the knives were received; that when he received the knives the machines were waiting for them, and his customers were waiting for the machines. The sole controversy in the case is as to the price which defendant shall pay for these knives. Plaintiffs claim \$72.86 per set, and defendant admits an indebtedness of \$58.28 per set. Plaintiffs admit that they were members of the Knife-Makers' Association; that this association at that time embraced all the knife-makers in the United States; that the prices charged by plaintiffs and sought to be collected were fixed by the association; that one of the principal objects of the association was to keep up prices; that the members of said association agree, to sell at the prices fixed by the association, and that in case of any violation of such agreement, the member violating should forfeit \$100; that the prices were subject to change without notice; that during the year 1888 there was a change made by the association, and twenty per cent added to the price. In answer to questions upon cross-examination, one of the defendant's witnesses said: "The Knife-Makers' Association was formed seven or eight years ago to keep up prices. In the early part of 1849 we [a new firm which had gone into the business in 1839, and was not in the association] cut 10 per cent on old prices, making 30 per cent off the list. Then later in the year the association cut 20 per cent on old prices, being 10 per cent below us. Then later on they cut 5 per cent more about holidays, and present prices were made early in 1890, making 45 per cent off the list. We followed to their figures."

Upon cross-examination of one of the plaintiffs, defendant's counsel sought to ascertain 18 L. R. A.

whether plaintiffs were governed in fixing prices by a printed schedule furnished by the association. Objection was made, and the court excluded the testimony, saying: "The only question is as to value; it don't make any difference how it was fixed. What could these knives be purchased for in the open market?" Counsel asked defendant when upon the stand what, in his judgment, was a fair market price for the knives in November, 1888, but the court excluded the testimony, saying: "Not what the fair market price was, but what the market price was,—what he could buy at from other manufacturers."

Defendant's counsel requested the court to charge the jury as follows: "(1) If you find that it was understood and agreed between Michels and Lovejoy, in September, 1888, that Lovejoy would make and furnish the knives to Michels at the same price as White had theretofore sold them, and that the order in question was given and accepted in pursuance of such agreement, then both parties are bound by it. (2) If no price was agreed upon, then plaintiff is entitled to recover the fair market value of the knives. (3) In arriving at such value, you are not bound by the price fixed by the Knife-Makers' Association. (4) The Knife-Makers' Association, under the evidence in this case, was an unlawful combination for the purpose of fixing prices. (5) In arriving at the fair market value of the knives in question, you will consider all the evidence in the case, including the market value both before and after the time in question, and all other items of information as to the value, which have been admitted in evidence before you. (6) Even if plaintiffs could not have bought the goods elsewhere for less than the price fixed by plaintiffs, yet if you find from the evidence that such price was an arbitrary one, beyond the true value, temporarily maintained by an unlawful combination of manufacturers, then you are not bound by such price, but may fix the true market value from all the evidence in the case." These requests were refused.

The charge of the court contained the following: "Mr. Michels contends that he had some conversation with one of the plaintiffs in this case in September, when he was here, with reference to making certain knives, and he urges that his understanding at that time was that these knives should be made at the price that he had been paying for them heretofore, although there was nothing said with reference to these particular knives. Now, if there was any such understanding between Mr. Michels and the plaintiffs, why didn't he mention it in the letters that he wrote them after these goods were received? One of these letters was dated January 10, 1889, and it seems, from an inspection of these letters,—and they have been read to you,—that he make no reference whatever, in complaining of the price of these knives, that these knives were made by the plaintiffs for a price agreed upon in September. Now Mr. Lovejoy says that no such conversation ever took place as claimed by Mr. Michels. Mr. Michels says there was such a conversation. It is for you to determine whether there was or not. If there was, how does it happen that no reference to it was made in these letters to the plaintiff in January, 1890, after the receipt of

these goods? Now, there is another thing as bearing upon this price. These goods were made and shipped to Mr. Michels, he claiming that they were, as he supposed, to be \$58 a set; but it appears that there was an invoice sent with these goods at the time. Now, if the price was as contended by him, would he not, in the ordinary course of business, have made some complaint at once upon the receipt of these goods, seeing that they were charging for them 20 per cent more than he supposed he was to pay? This testimony in this case should be considered in all its bearings as determining the dispute between the parties. On the part of the defendant it is further contended that there was an unlawful combination between the manufacturers of such articles as these for the purpose of enhancing their price or putting their price beyond the real market value. If that is so, such a combination is unlawful, and the mere fact that the price is fixed in an arbitrary manner like that is not binding upon the jury in determining the real market value of the property. On the part of the plaintiff it is admitted that there was such an association or organization of the manufacturers of knives or edge tools of this country; that they got together and put reasonable prices only upon their goods. Well, if that is a fact, then there would be nothing unlawful in such a combination as that. If they combine for the purpose of putting a fictitious value upon their goods, or for the purpose of driving small manufacturers out of the business by putting their goods down to a lower price than the market price, and below what they can be made for, and do this for the purpose of ruining such other manufacturers, such a combination is unlawful. It is a question of fact, to be determined from what took place between these men, whether the association was unlawful or not. The fact that there is an association would not justify the inference that it was unlawful or that it was formed for a purpose contrary to law. If without any reason they put an additional 20 per cent upon these knives, merely using this power that they had arbitrarily for the purpose of controlling the market, that would be unlawful on their part; but if, on the other hand, as it is claimed, there was a great risk connected in the making of these particular knives, and, on account of the nicety of the work required and the extreme risk, these manufacturers felt that it was just and right and proper, for the purpose of protecting themselves against loss, to fix a fair market price for this work, and they put this 20 per cent on it, I should say it was a legitimate act."

The trial judge heard and submitted the case upon the theory that a combination to fix prices was not unlawful if the purpose was to fix reasonable prices, and when defendant sought to show that the prices fixed were not fair market prices, and were above the market value, the court refused to permit him, and restricted him to the market price, when, as a matter of fact, the association embraced all the manufacturers, and the only "market price" was that fixed by the association.

In *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457, this court held that any combination to control prices was unlawful, as against public policy. In the present case, as in that, it was

claimed that the combination had in fact reduced prices, and upon that point the court says: "It is no answer to say that this monopoly has in fact reduced prices. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of the corporation at any time to raise the price to an exorbitant degree."

In the present case no price was agreed upon at the time the order was given, and there was no evidence tending to show that defendant had any knowledge of the price fixed by the association. An attempt is made to fasten a price fixed by a combination upon such a purchaser. It is sufficient to know that the price sought to be imposed is that fixed by the combination. If so, it was unlawfully fixed, and has no force as a market price, for that reason. It is the combination for the purpose of controlling prices that is unlawful, and the fact that they, the manufacturers, deemed the prices fixed to be reasonable, does not purge it of its unlawful character. Independently of the unlawful character of the combination fixing it, a price so fixed cannot be regarded as any better evidence of value than that fixed by any vendor upon his own wares. A price so fixed is not to be entitled to rank as the market price. It is not a market price, within the contemplation of the law. The market price of an article manufactured by a number of different persons is a price fixed by buyer and seller in an open market, in the usual and ordinary course of lawful trade and competition. It cannot be divested of these incidents, and retain its character. Associations of this character give the buyer no voice, and close the market against competition.

In *Acebal v. Levy*, 10 Bing. 376, cited in 1 Benjamin on Sales, 103, the court declared that, when there was no express contract as to price, the price is to be a reasonable price,—“such a price as the jury upon the trial of the cause shall, under all the circumstances, decide to be reasonable. The price may or may not agree with the current price of the commodity at the port of shipment at the precise time when such shipment is made. The current price of the day may be highly unreasonable from accidental circumstances, as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the immediate vicinity, or from various causes.”

In *James v. Muir*, 33 Mich. 223-227, *Mr. Justice Campbell*, speaking for the court, says: “According to *Acebal v. Levy*, there is at least no implication of a promise to pay at what may happen to be the market rate, which may not be always, as there held, a reasonable rate.”

In *Kountz v. Kirkpatrick*, 72 Pa. 376, the court says: “Ordinarily, when an article of sale is in the market, and has a market value, there is no difference between its market value and the market price, and the law adopts the latter as the proper evidence of the value. This is not, however, because ‘value’ and ‘price’ are really convertible terms, but only because they are ordinarily so in a fair market. The market price of an article is only a means of arriving at compensation; it is not itself the value of the article, but is the evidence of value. The law adopts it as a natural inference of fact, but not

as a conclusive legal presumption. Without adding more, I think it is conclusively shown that what is called the 'market price' or the quotations of the articles for a given day is not always the only evidence of actual value, but that the true value may be drawn from other sources, when it is shown that the price for the particular day has been unnaturally inflated."

It has frequently been held that the value of a commodity is not to be determined by the necessities of a particular buyer or the demands of a particular seller. If the "current price" is not conclusive upon the purchaser, because the vendor may have by some act of his own made that price unreasonable, or if it may be shown that the market price had been unnaturally inflated, how can it be said that a price fixed by a combination of the manufacturers of a given article, with sole reference to their interests, is to govern, to the exclusion of all other considerations? In such case there is no market price, and evidence of a fair market price or a fair market value is clearly admissible. In the absence of an agreement, a price fixed by a combination of dealers does not bind the purchaser, nor will the law so far countenance such combinations as to regard prices fixed by them as even evidence of value.

The argumentative portion of the charge, relating to the letters written by defendant, was clearly erroneous. It could not fail to convey to the jury the impression formed by the trial judge regarding that testimony, and to give direction to their judgment. All inferences to be drawn from the testimony are exclusively for the jury, and not for the court. *Richards v. Fuller*, 38 Mich. 656; *People v. Gastro*, 75 Mich. 182, and cases cited. It is no part of the duty of the court to convince the jury as to matters of fact.

The judgment must be reversed, and a new trial ordered, with costs to defendant.

Morse, J., concurred with **McGrath, J.**

Champlin, Ch. J., delivered the following opinion:

In executed contracts of sale upon credit, where the price is not agreed upon at the time of sale, the law implies an understanding to pay what the commodity is reasonably worth. 1 Benjamin, Sales, § 85, p. 102. In *Acebal v. Levy*, 10 Bing. 876, the declaration alleged that the plaintiff had sold to the defendants a cargo of nuts, at a certain value, namely, the then usual and common shipping price for nuts at the port where the cargo was shipped, and that in consideration thereof defendants undertook and faithfully promised to accept the said nuts, and pay the plaintiff for the same on delivery thereof to the defendants. The declaration then alleged that the usual and common shipping price and value of the nuts at the port of shipment was at a certain rate, naming it; and that they were ready to deliver, and offered to deliver, the nuts to the defendants, but they refused to accept. In deciding the case, *Chief Justice Tindal* said: "Whether, in all cases of executory contracts of purchase and sale, where the parties are altogether silent as to the price, the law will supply the want of any agreement as to the price by inferring that the parties must have intended to sell and to buy at a rea-

sonable price, may be a question of some difficulty. Undoubtedly, the law makes that inference where the contract is executed by the acceptance of the goods by the defendant, in order to prevent the injustice of the defendant taking the goods without paying for them. But it may be questionable whether the same reason applies to a case where the contract is executory only, and where the goods are still in the possession or under the control of the seller." And he further says: "A contract to furnish a cargo at a reasonable price means such a price as the jury upon the trial of the case shall, under all the circumstances, decide to be reasonable. This price may or may not agree with the current price of the commodity at the port of shipment at the precise time when such shipment is made. The current price of the commodity may be highly unreasonable, from accidental circumstances, as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the immediate vicinity, or from various other causes."

This case is cited and approved in *James v. Muir*, 38 Mich. 223. The principle underlying the decision is that the vendor cannot be permitted, by withholding the commodity from market or otherwise, to fix the current price of the commodity, and thus fasten upon the purchaser an implied agreement to pay such price. If the plaintiffs in this suit, by combining with other manufacturers or dealers, can thus arbitrarily establish the current price of the commodity sold, and if the purchaser can be held to have impliedly promised or agreed to pay the price so established, it follows that he may be obliged to pay a highly unreasonable price. I do not think a price so fixed by a combination of manufacturers or dealers is competent evidence to show a reasonable price of goods sold by the members of such combination. Such combinations to control prices are intended to stifle competition, which is a stimulus of commercial transactions, and to substitute therefor the stimulus of unconscionable gain, whereby the participants in such combinations become enriched at the expense of the consumer, beyond what he ought legitimately to pay, under a healthy spirit of competition in the business community. The effect of such combinations to control prices is the same as that other class of contracts which has always been denounced as vicious, namely, contracts in restraint of trade. Public policy places its reprobation upon one equally with the other. These combinations to control prices are becoming very numerous, and affect, not only the staples of human sustenance, but nearly all the necessities of life and the necessities of business. Such combinations to control prices are against public policy, and void, on the ground that they have a mischievous tendency, so as to be injurious to the best interests of the State. The best interests of the State require that all legitimate business should be open to competition; that the current price of commodities should be controlled by the law of demand and supply; that the laws of commerce should flow in their accustomed channels, and should not be diverted by combinations to control prices fixed by the arbitrary decision of interested parties. Of course,

what is said above does not apply to monopolies authorized by law; as, for instance, to patented articles. The odious features of illegal monopolies are plainly apparent. These can absolutely control the prices which the public shall pay, and it is this monopolistic feature of such combinations to control prices which stamps them as odious, because they exercise the franchises of the monopoly without the legal right. These views are supported in the following cases: *Anderson v. Jett*, 89 Ky. —; *Cleveland, O. C. & I. R. Co. v. Closser*, 128 Ind. 343, 9 L. R. A. 754; *People v. North River Sugar Ref. Co.* 54 Hun, 354, 5 L. R. A. 386; *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457; *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46, 7 L. R. A. 46; *Stanton v. Allen*, 5 Denio, 434; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 553; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 686; *India Bagging Assn. v. Kock*, 14 La. Ann. 163; *Denver & N. O. R. Co. v. Aschison, T. & S. F. R. Co.* 15 Fed. Rep. 650; *Hilton v. Eekersley*, 6 El. & Bl. 47; *West Virginia Transp. Co. v. Ohio River P. L. Co.* 22 W. Va. 600, 617; *Western U. Teleg. Co. v. American U. Teleg. Co.* 65 Ga. 160; *Craft v. McConoughy*, 79 Ill. 846; *Raymond v. Leavitt*, 46 Mich. 447; *Faulds v. Yates*, 57 Ill. 416; *Wright v. Ryder*, 26 Cal. 342.

I have no doubt that in executory contracts of sale, where the goods have not been accepted, such prices so fixed cannot be recovered; and I am also of opinion that such price so fixed is no criterion of the market value or current price in an action brought for goods sold and delivered, where no price has been agreed upon. In this case the goods have been ordered and accepted without any reference to the price to be paid. The law presumes that defendant intended to pay what the knives were reasonably worth. As pointed out in *James v. Muir*, 33 Mich. 223, the market value and the reasonable worth of a commodity are not always the same. Ordinarily the market value is evidence of what goods are reasonably worth. *Kovnts v. Kirkpatrick*, 72 Pa. 376, 386; Benjamin, Sales, p. 103, § 86. If there be no market value of manufactured goods, the evidence to establish the reasonable worth must necessarily be the cost of production, which would include the cost of labor and material, and a reasonable profit on the cost of production. The testimony must be submitted to the jury, and it is their province to determine from such testimony the reasonable worth of such goods. It does not rest with the witnesses to swear what they are reasonably worth, but they may state the facts from which the jury may determine the reasonable worth. Nor can this court pass upon that question. It is one of fact, and not of law. *Becker v. Hecker*, 9 Ind. 497. Generally speaking, it is competent for a witness, after he has been shown to be qualified to express an opinion as to value of the thing in dispute, to state to the jury what his opinion as to value is. But such opinions are not absolutely binding upon the jury, but only as persuasive, and may be considered by them in arriving at their own conclusion. Thompson, Trials, § 380.

In order to pass upon the specific questions raised by the assignment of errors, it is necessary to specify with more particularity what the record shows. The declaration in this case was upon the common counts in assumpsit, and the bill of particulars for goods sold August 29, 1889. This, however, is not the true date of sale. The plea was the general issue, with notice of recoupment. On the trial in the circuit the plaintiffs claimed to recover \$139.89 and interest. The defendant admitted the plaintiffs' claim to the amount of \$116.06, less \$6, under the plea of recoupment. Under the charge of the court the jury returned a verdict of \$140.74, for which plaintiff had judgment. The sale of the goods was through a written order signed by defendant, and mailed to plaintiffs in November, 1888, for two sets (six knives) hoop knives, one-half inch thick, to be so made that they will interchange one with the other. The plaintiffs are manufacturers of machine knives of all kinds, at Lowell, Mass. They received the order on November 30, and December 5, 1889, the knives were shipped to defendant and received by him. The defendant claims that they were not exactly according to the pattern furnished, and that he expended some \$6 in fitting them. On the same day the goods were shipped a bill was forwarded to defendant charging him \$72.86 per set for the knives, and 20 per cent extra for manufacturing so that they could be used as one knife, or \$14.57 for this purpose. Thus the total bill for the two sets amounted to \$174.86, from which the plaintiffs discounted 20 per cent to the trade, leaving a balance of \$139.89, the amount they claimed due them. Elwin W. Lovejoy, one of the plaintiffs, testified that the plaintiffs charged the regular market price of \$73 per set; that the price was \$174.86 for the two sets, less discount to the trade of twenty per cent, making \$139.89, which he testified was a reasonable charge, and was the market price for the knives, exactly such as would be charged by other dealers for the same knives; and that the goods were sold on thirty days' time. He also testified that the plaintiffs made the knives from a pattern furnished them before that time, along in the summer, by Michels. It appears from the testimony that plaintiffs are members of what is called the "Machine Knife Makers' Association," and at the time of the trial all the manufacturers of knives in the United States were members of that association, with the exception of the Anderson Knife & Bar Association, located at Anderson, Ind. But this association had not commenced the manufacture of knives at the time the goods in this case were sold. The association of which the plaintiffs were members was formed in 1882, for the purpose of keeping up the prices on the goods, and that such was its principal object was testified to by Lovejoy. Every member of the association is bound by agreement to maintain the prices fixed by the association, and there is a clause in the agreement that a man who does not sell at these prices shall forfeit \$100. The plaintiffs agreed to sell at the regular prices fixed by the association. It further appears that the prices charged for the goods sold defendant are the regular prices fixed by the association, and the reason why the plaintiffs fixed these prices was because the association had before that fixed it at the same price.

These prices are fixed twice a year, in January and July, and the witness Lovejoy testified that he was one of the persons who assisted in fixing the prices. It also appears that in July, 1888, the association advanced the prices, as claimed by the witness, 20 per cent from what had been the prices prior thereto in 1887 and 1886, and that no notice of such advances had been given to their customers; that at former prices goods such as these sold to defendant had been sold at a fair profit. The prices for which they had been fixed prior to July, 1888, was \$58.28 a set, this price having also been fixed by the association; and it further appears that there had not been 20 per cent difference in the cost of making knives. The association raised the price in July from \$58.28 for knives such as those sold to defendant to \$72.86, an increase of 25 per cent. The plaintiffs then added 20 per cent more because defendant ordered them to be made so as to be used interchangeably, or \$14.57 each set, and then made a discount of 20 per cent on the whole amount to the trade. The defendant had purchased such knives in 1886 and 1887 of a firm in Buffalo, N. Y., who were members of the association, and had charged therefor the prices fixed by it, namely, \$58.28 a set, and plaintiffs were aware that this price was fixed by the association. It was the theory of plaintiffs that the price fixed by the association was the market price, because that price was what all the members of the association sold the goods for; and they produced several witnesses to testify that the price sued for was the market price, but these witnesses were members of the association, and testified that they regarded the prices fixed by the association as the market price. No other criterion to ascertain the reasonable worth of the goods sold was given by the plaintiffs' witnesses.

The defendant's theory was, first, that he had agreed with plaintiffs, in an interview with Mr. Lovejoy a short time before he gave the order, that plaintiffs should furnish the knives for the same price that he had been paying to the Buffalo firm; that the inducement held out by Lovejoy was that plaintiffs would make him a better article. This was denied by Lovejoy. The defendant's contention, further, was that the agreement made by the association to fix the prices, to which all the members were bound, embracing, as it did, nearly the whole of the manufacturers of such goods in the United States, and the whole, with one exception, was an unlawful combination, entered into for the purpose of controlling prices of such goods, based, not upon the market value or upon what such goods were reasonably worth, but upon the arbitrary determination of the members for the purpose of profit, and such price so fixed was no evidence of what such goods were reasonably worth; that his liability could not extend beyond the reasonable worth of such goods; that the price charged for which plaintiffs sued and recovered was unreasonable; and, as relevant to this issue, he claimed the right to show by the plaintiffs' witness Lovejoy who had, with others, raised the price 20 per cent, and had testified that such price was reasonable, that in June, 1888, he was selling this same kind of goods for \$58.28, and

that the cost of production had not increased, and that in June plaintiffs regarded \$58.28 as a reasonable price. I think, upon cross-examination of this witness, the defendant was entitled to inquire of him, "What was the price of these knives in June, 1888?" and that the court erred in excluding the answer. He also erred in not permitting the witness Lovejoy to answer this question: "Was there any increase in the cost of making these knives in November from what there was in June?"

Defendant's counsel requested the court to charge the jury as follows: "First. If you find that it was understood and agreed between Michels and Lovejoy in September, 1888, that Lovejoy would make and furnish the knives to Michels at the same price as White had theretofore sold them, and that the order in question was given and accepted in pursuance of such agreement, then both parties are bound by it." This request was given, but in language and with observations which counsel for defendant deemed subject to exception. The learned judge said: "Mr. Michels contends that he had some conversation with one of the plaintiffs in this case in September, when he was here, with reference to making certain knives, and he urges that his understanding at that time was that these knives should be made at the price that he had been paying for them heretofore, although there was nothing said with reference to these particular knives. Now, if there was any such understanding between Mr. Michels and the plaintiffs, why didn't he mention it in the letters that he wrote them after these goods were received? One of these letters was dated January 10, 1889, and it seems, from an inspection of these letters,—and they have been read to you,—that he made no reference whatever, in complaining of the price of these knives, that these knives were made by the plaintiffs for a price agreed upon in September. Now Mr. Lovejoy says that no such conversation ever took place as claimed by Mr. Michels. Mr. Michels says there was such a conversation. It is for you to determine whether there was or not. If there was, how does it happen that no reference to it was made in these letters to the plaintiffs in January, 1890, after the receipt of these goods? Now, there is another thing as bearing upon this price. These goods were made and shipped to Mr. Michels, he claiming that they were, as he supposed, to be \$58 a set. But it appears that there was an invoice sent with these goods at the time. Now, if the price was as contended by him, would he not, in the ordinary course of business, have made some complaint at once upon the receipt of these goods, seeing that they were charging for them 20 per cent more than he was supposed to pay? This testimony in this case should be considered in all its bearings, as determining the dispute between the parties." We have had occasion heretofore to call attention to the impropriety of the trial judge calling the attention of the jury to a particular part of the testimony of a witness for comment, and everything that savors of argument had much better be left to the hired advocates of the parties. Some points in the testimony of a witness may strike a trial judge as inconsistent with disclosed facts, but there is dan-

ger of creating a prejudice against the witness, to the detriment of the rights of the parties, if the trial judge steps aside from instructions as to the law which governs a case to draw inferences from facts disclosed. It is exclusively within the province of the jury to draw such inferences. Everyone who reads this charge, and anyone hearing it given, must have been impressed with the idea that the trial judge did not believe the testimony of the defendant, Michels. He pointed out inferences which might be drawn by the jury which were apparently inconsistent with the idea of a contract. He failed to observe upon the testimony of the plaintiff, given upon his direct examination, that "we made the knives from a pattern furnished before that time, along in the summer, by Michels;" and the inference that might be drawn therefrom; and he might have added, with equal pertinency, Why, if there had been no contract or agreement previous to the written order, had Michels furnished plaintiffs with a pattern for the knives? I mention this for the purpose of showing the impropriety of attempting an argument to the jury by a judge upon the facts, unless it is argued fully for both sides. These witnesses were parties, and their testimony was conflicting, and their credit should have been left to the jury, without pointing out upon one side inferences which might tend to affect it. *Williams v. Sheldon*, 61 Mich. 815; *Bulen v. Granger*, 68 Mich. 311; *People v. Finley*, 88 Mich. 486; *People v. Colerick*, 67 Mich. 362; *People v. Gastro*, 75 Mich. 127; *Kelly v. Emery*, 75 Mich. 147.

The court further charged the jury as follows: "On the part of the defendant, it is further contended that there was an unlawful combination between the manufacturers of such articles as these, for the purpose of enhancing their price or putting their price beyond the real market value. If that is so, such a combination is unlawful, and the mere fact that the price is fixed in an arbitrary manner like that is not binding upon the jury in determining the real market value of the property. On the part of the plaintiff it is admitted that there was such an association or organization of the manufacturers of knives or edge-tools of this country; that they got together, and put reasonable prices only upon their goods. Well, if that is a fact, then there would be nothing unlawful in such a combination as that. If they combine for the purpose of putting a fictitious value upon their goods, or for the purpose of driving small manufacturers out of the business by putting their goods down to a lower price than the market price, and below what they can be made for, and do this for the purpose of ruining such other manufacturers, such a combination is unlawful. It is a question of fact, to be determined from what took place between these men, whether the association was unlawful or not. The fact that there is an association would not justify the inference that it was unlawful or that it was formed for a purpose contrary to law. If, without any reason, they put an additional 20 per cent upon these knives, merely using this power that they had arbitrarily for the purpose of controlling the market, that would be unlawful on their part; but

if, on the other hand, as it is claimed, there was a great risk connected with the making of these particular knives, and on account of the nicety of the work required, and the extreme risk, these manufacturers felt that it was just and right and proper, for the purpose of protecting themselves against loss, to fix a fair market price for this work, and they put this 20 per cent on it, I should say it was a legitimate act." What I have said in the beginning of this opinion need not be repeated; much that is said in the instruction is a correct statement of the law, but testimony was ruled out that would have thrown light upon the question as to whether the purposes of the association are only "to put reasonable prices upon their goods." The testimony of the members of the association cannot be taken as undisputed or indisputable. On the contrary, the testimony in the case before referred to was sufficient, in my judgment, to condemn the object of this association as unlawful. The reasonableness of the prices must depend upon the cost of production, the cost of material used, the risks of the business, the labor of producing, the demand for the goods, and all those facts which tend to show the reasonable worth of the articles, and there can be no market value of the article where its current price is not affected by competition, but, on the other hand, competition is disarmed by combination, and the price is fixed arbitrarily by the sellers, to which all engaged in selling must conform. The judgment should be reversed, and a new trial granted.

Grant, J., delivered the following opinion:

This suit is brought to recover the price of two sets of knives used in hoop-machines. Plaintiffs carried on their business in Lowell, Mass., while the defendant resided and did business in Detroit, Mich. Defendant sent a written order in November, 1888, without any reference to price. Defendant's counsel insist that these goods were ordered in reliance upon an agreement made in September previous between himself and plaintiff E. W. Lovejoy, who visited him in Detroit. Defendant's version of the conversation then had fails to establish an agreement. Mr. Lovejoy at that time solicited an order, but defendant told him he did not need any knives then, and made no promise to order any in the future.

1. This claim of defendant is based entirely upon the statement of defendant, which is that he showed Mr. Lovejoy some bills of knives purchased from White Bros., and that Lovejoy said: "We will furnish you them at the same price that you pay White Bros." This conversation was two months or more prior to the written order of defendant. There is not a *scintilla* of evidence tending to show any agreement, or even understanding, that defendant would order goods from plaintiffs in consequence of this statement or any other. Courts cannot manufacture contracts for parties out of such statements. Did defendant agree to buy? Did he agree to order? If he agreed to do either, when was the contract to be performed? Was this a standing offer to be accepted by defendant at any time in the future? Furthermore, defendant in his written order made no reference to this conversa-

tion, nor did he testify that he gave it, relying upon Lovejoy's statement. The court left it to the jury to determine whether this conversation constituted an agreement. The alleged erroneous instructions of the court upon this branch of the case become immaterial, for the finding of the jury was such as the court should have instructed them to find.

2. The price charged was \$72.86 per set with 20 per cent extra. From the total bill a discount of 20 per cent was allowed, leaving the amount claimed \$139.89. Defendant admitted his liability for all except the extra 20 per cent, amounting to \$29.14. This price was fixed by the Machine Knife Makers' Association of the United States, of which plaintiffs were members, and which then embraced all the knife-makers in the United States. Under its rules, its members were required to charge association prices, under a penalty of \$100 for neglect to do so. These knives were what were called "special knives," so made as to form in reality one knife. Evidence on the part of the plaintiff showed that greater care was required in their manufacture than in that of ordinary knives, and that the price charged afforded a reasonable profit. Defendant's counsel requested the court to instruct the jury that this combination was unlawful. This the court refused, but did instruct them that "an arbitrary price fixed by such an association was not binding upon them in determining the market value of the property, but that there was nothing unlawful in their combining and putting reasonable prices upon their goods; that the fact that there is an association would not justify the inference that it was unlawful, or that it was formed for a purpose contrary to law; that if, without any reason, they put an additional twenty per cent upon these knives, merely using this power that they had arbitrarily, for the purpose of controlling the market, that would be unlawful on their part; but if, as it is claimed, there was a great risk connected with the making of these particular knives, and on account of the nicety of the work required, and the extreme risk, these manufacturers felt that it was just and right and proper, for the purpose of protecting themselves against loss, to fix a fair market price for this work, and they put this twenty per cent on it, I should say it was a legitimate act."

Associations of manufacturers are not necessarily unlawful. The evidence does not show that the sole object of this association was to control prices. The association might be entirely lawful, while an arbitrary price fixed by it would not bind a purchaser who had not expressly agreed to pay it. The court would certainly have been justified, under the plaintiff's evidence, in instructing the jury that this 20 per cent so fixed by this association did not bind the defendant, and did not make a market price. But, in addition to the instruction I have above quoted, the court instructed the jury that the combination was unlawful, if formed for the purpose of enhancing the price, or putting it beyond the real market value. There was no evidence that the price was unreasonable, or afforded more than a fair profit. The only error in these instructions was in not informing the jury that as to this 20 per cent there was no evidence of a market value, for a

combination cannot fix a price arbitrarily, and make it the market price, and that the only question for them was the reasonable worth of the knives. But the failure to so instruct the jury is not complained of. If the case made was one for a jury to determine the "fair" or "real" market value, I think the charge fairly submitted that question to the jury, and that no error, was committed in refusing to charge that the association was unlawful.

3. Did the court commit any errors in rejecting testimony offered by the defendant? The defendant was asked by his counsel to state the fair market value of these knives. The court rejected this testimony as incompetent, but limited the question to the market price. It is insisted that this ruling limited him to the price fixed by the association. The price of commodities bought and sold may be fixed in three ways: (1) by express agreement; (2) by the market; (3) by the actual value. It must be remembered that we are dealing with an executed contract, one of those daily commercial transactions between buyer and seller, where the one orders, and the other completes the transaction by delivering the goods. In such cases the price must be determined in one of the three ways above mentioned. If there be no express agreement and no market price, the contract then is to pay what the commodity is reasonably worth. As already shown, there was no express agreement as to price, and no market price. Therefore the only issue to be tried was, Was this additional 20 per cent reasonable, affording only a fair profit to the plaintiffs? A market price is the price fixed by fair and open competition in an open market, where sellers and buyers stand upon an equal footing. Legally the price so established is fair, and fixes the reasonable worth of the commodity. When the price is high, the purchaser may call it unfair; when the price is low, the seller may call it unfair; but in law both are fair, and, in the absence of any express agreement, seller and purchaser alike contract with reference to it. Upon no other basis can the great commercial transactions of the world be carried on. The immense granaries of this country are filled with products which represent labor, some of which has been remunerative, and others unremunerative, according to the character of the soil and the industry and management of the laborers and other conditions. If the market price of wheat reaches \$1.25 to \$1.50 per bushel, will a purchaser be permitted by the law to say to the farmer who sells: "That is not a fair market price; it allows you too much profit, and therefore is not binding upon me?" On the other hand, if the market price of the same commodity is so low as not to afford the farmer a reasonable profit, can he say to the purchaser of his grain: "The market is unfair, and affords me no profit, and therefore you must pay more." If there be a "fair market price," distinguishable in law from the "market price," then there is no such thing as a "market price," binding upon sellers and buyers, unless they contract with express reference to it; but it must be left to a jury in each case to determine what is the fair market value. The same rule must apply to manufactured commodities, the price of which is ordinarily fixed by such competition in an

open market. But a price fixed by a combination of sellers or of buyers is not a market price, and binds no one. The testimony was therefore, in my judgment, properly rejected by the court.

4. A witness for plaintiffs testified that if he had made the same knives for defendant he would have charged the same price that plaintiffs charged, and that it was a "fair market price." Upon cross-examination, he was asked the price he had manufactured them for before. This testimony was rejected by the learned circuit judge upon his own motion, and without any objection from plaintiffs. This testimony was competent, and should have been admitted.

5. During the progress of the trial the court, in the presence of the jury, used the following language: "The only question is as to the value; it don't make any difference how it is fixed. What could these knives be purchased for in the open market?" I think these and other similar remarks were erroneous, for the reasons above given, and tended to mislead the jury; and for these errors the verdict should be set aside, and a new trial ordered. I do not think that the defendant presented his case upon the proper theory, and therefore no costs should be allowed. The testimony he offered and his requests to charge were based solely upon the idea of a fair market value.

Long, J., concurred with Grant, J.

PENNSYLVANIA SUPREME COURT.

George C. HAMILTON *et al.*

v.

Stephen S. JACKSON *et al.*,
Impleaded, etc., *Appts.*

(....Pa....)

1. **Subscribers to the stock of corporations which never become fully organized** because all the stock is not taken, but which are merged with their consent in a new corporation, cannot set up illegality of the merger or the lack of corporate character of any or all of the companies to defeat their liability as against

creditors of the new company after they have permitted it to incur liabilities.

2. **Administration in one county** will not prevent an administrator of a stockholder from being joined as defendant in another county in a suit in equity to enforce the liability of stockholders.

(October 5, 1891.)

A PPEAL by defendants S. S. Jackson, R. C. Winslow and A. E. Litch, administrator of Thomas K. Litch, deceased, from a decree of the Court of Common Pleas for Warren

NOTE.—Corporations are amenable to the rules governing equitable estoppel.

Where both the contracting parties are duly chartered as corporations, the one entering into the contract cannot subsequently deny the corporate existence of the other. The principle of estoppel may be successfully invoked. *Smelser v. Wayne & U. S. L. Turnp. Co.* 82 Ind. 419; *Douglas County v. Bolles*, 94 U. S. 104, 24 L. ed. 46; *Swartwout v. Michigan A. L. H. Co.* 24 Mich. 396; *Jones v. Bank of Tennessee*, 8 B. Mon. 123; *Bigelow, Estoppel*, 2d ed. 424; *Dutchess Cotton Mfr'y. v. Davis*, 14 Johns. 244; *Hubbard v. Chappel*, 14 Ind. 601; *Cowell v. Colorado Springs Co.* 100 U. S. 55, 25 L. ed. 547; *Evansville, I. & C. S. L. R. Co. v. Evansville*, 15 Ind. 416; *St. Louis Comrs. v. Shields*, 62 Mo. 251; *Heaston v. Cincinnati & Ft. W. R. Co.* 16 Ind. 275; *Occidental Ins. Co. v. Ganzhorn*, 2 Mo. App. 205; *Brownlee v. Ohio, I. & I. R. Co.* 18 Ind. 70; *Methodist Epia. U. Church v. Pickett*, 19 N. Y. 485; *Kennedy v. Cotton*, 28 Barb. 56.

In the case of the associates in the corporate management and those who have had dealings with it, there is a mutual estoppel, resting upon broad grounds of right, justice and equity. The first class are not suffered to deny their incorporation, nor the second to dispute the validity of their assertions of corporate powers. *Armstrong v. Harvey*, 11 Ohio St. 527; *Methodist Epia. U. Church v. Pickett*, *supra*; *Brouwer v. Appleby*, 1 Sandf. 158; *Ewing v. Robeson*, 15 Ind. 29.

The State itself, it has been held in this State, may be precluded by its action or neglect from denying the incorporation (*People v. Maynard*, 15 Mich. 463); or from taking advantage of a forfeiture after long acquiescence. *People v. Oakland County Bank*, 1 Doug. (Mich.) 282.

In further illustration of these views, reference is made to *Smith v. Heidecker*, 30 Mo. 157; *Goodrich v. Reynolds*, 31 Ill. 490; *Low v. Connecticut & P. R.* 13 L. R. A.

Co. 45 N. H. 378; Society for Visitation of Sick v. Com. 32 Pa. 125; *Heaston v. Cincinnati & Ft. W. R. Co.* 16 Ind. 275.

The injustice of permitting a corporation to avoid obligations by pleading its own want of power to incur them is obvious. But it should be remembered that this argument is just as applicable to the case of an individual who sets up the illegality of his own contract, and thus shields himself from responsibility upon it, as to that of a corporation. Their powers are prescribed by statute, and everyone who deals with them is presumed to know the extent of these powers. Where the circumstances are such that this presumption cannot arise, it is conceded that the corporation would be estopped from setting up that its contract was *ultra vires*. *Bissell v. Michigan S. & N. I. R. Co.* 22 N. Y. 258.

The sound rule upon the subject is this: A private corporation will be estopped to set up the defense of *ultra vires* in respect to all acts and contracts within the apparent scope of its powers; and that both private and public corporations will be estopped to set up such defects in their establishment or organization, or in the preliminaries to the execution of their acts, as are peculiarly within their own knowledge. *Bigelow, Estoppel*, 2d ed. 423.

Corporate powers are limited by charter recitals.

The powers of a corporation are such, and such only, as are conferred on them by the Acts of the Legislature of the several States under which they are organized. *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 32 L. ed. 837.

That a corporation, as a creature of the Legislature, can possess and exercise "no other powers than those specially conferred by the Act creating it, or such as are incidental or necessary to carry into effect the purposes for which it was created"

County in favor of plaintiffs, who were creditors of the Clarion, Mahoning & Pittsburgh Railroad Company, in an action brought to enforce payment of plaintiff's claims out of unpaid subscriptions to the stock of the debtor corporation. *Affirmed.*

From the findings of the master the following facts appear:

The Mahoning & Susquehanna Railroad Company was incorporated by an Act of Assembly approved April 19, 1854. Supplements to this Act were passed on March 24, 1865, April 9, 1869, April 3, 1872, and April 5, 1878, which made some changes in the commissioners appointed to open subscription books and in the limit to the amount of capital stock, and provided for the extension of time for the completion of the road.

What if any steps were taken to organize this company did not appear, nor did it appear who were its stockholders or what the amount

of unpaid stock subscription. No part of this road was ever built or completed.

The Conewango & Clarion Railroad Company became incorporated by Articles of Association filed in the office of the secretary of the Commonwealth on November 22, 1881. Its capital stock was fixed at 20,000 shares of the par value of \$50 each. Defendants became subscribers to this stock. The total number of shares subscribed for was 4,003 shares.

These two companies by a joint agreement dated December 6, 1881, and filed in the office of the secretary of the Commonwealth were consolidated and merged into one company, named the Clarion, Mahoning & Pittsburgh Railroad Company. By the agreement the companies undertook to consolidate all their rights, powers, privileges, franchises, corpora stock, etc., so that they might form one company, but agreed that all stock actually subscribed for should be canceled.

(*Caldwell v. Alton*, 33 Ill. 416, 418); that it cannot of its own motion absolve itself from its obligations by transferring its franchise to another (*Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; and that it cannot by a vote of a majority of the stockholders arbitrarily deprive a minority of their interest in its property and practical existence (*Kean v. Johnson*, 9 N. J. Eq. 413).—are propositions too plain to be disputed. *Boston & P. R. Corp. v. New York & N. E. R. Co.* 13 R. I. 200.

So *Nelson, Ch. J.*, in *Hartford & N. H. R. Co. v. Croswell*, 5 Hill, 383, says: "The charter is the fundamental law of the association—the constitution which prescribes limits to the directors, officers, and agents of the company not only, but to the action of the body corporate itself, and no radical change or alteration can be made or allowed, by which new and additional objects are to be accomplished, or responsibilities incurred by the company, so as to bind the individuals composing it, without their assent."

Acts ultra vires of the corporation.

Robbins v. Clay, 33 Me. 132, decides that the directors of a corporation, as such, and without special authority for that purpose, have no authority to make sale of any portion of its property, which is essential for the transaction of its customary business. *Kean v. Johnson*, 9 N. J. Eq. 401; *Bagshaw v. East. R. Co.* 7 Hare, 114, and *Bank of Comrs. v. Bank of Brest, Harr. Ch. (Mich.)* 101, are strongly confirmatory of the decision, *supra*.

An act which, to all intents, terminates the corporation, by taking from it its power to fulfill the purposes of its organization, is not consistent with the purposes of its constitution. That which changes the nature and business of a corporation from that for which it was created does effectually destroy it for all the purposes for which it was formed. It is no longer the same corporation. An act which compels a corporation to change its business is no less valid and repugnant to its charter than an act that directly makes the change. A similar act was styled by *Judge Willard* "an act of self-destruction which the law cannot tolerate." *Conro v. Port Henry Iron Co.* 12 Barb. 64.

The chancellor held, in *Ward v. Sea Ins. Co.* 7 Paige, 294, 4 L. ed. 163, "that the directors of a corporation could not, even with the consent of the stockholders, discontinue the corporate business and distribute the capital stock among the stockholders, unless expressly authorized by legislative Act." It is true that this decision proceeds upon principles of public policy, but it throws light upon

the question as to the power of directors and the limitations upon their power.

So, also, a lease or sale of one railroad to another, without express authority from the Legislature, is beyond the power of the directors or a majority of the stockholders as against a dissenting stockholder. It is a violation of the implied contract between the corporation and each stockholder that the business prescribed in the charter will be pursued until the dissolution of the corporation. Generally the lease of a railroad is made under an agreement whereby the stockholders of the old corporation are guaranteed a certain income. The effect it, any case, however, is not a continuation of the business of the old corporation, but an abandonment of it. It is an act *ultra vires* of the corporation, and in violation of the contract between the corporation and its stockholders. A single stockholder may obtain an injunction against the lease, or if it is already made, may go into a court of equity and have it set aside. *Cook, Stock and Stockholders*, 2d ed. § 663, citing *Winch v. Birkenhead, L. & C. J. R. Co.* 5 De G. & S. 552; *Cass v. Manchester J. & S. Co.* 9 Fed. Rep. 640; *Stevens v. Davison*, 18 Gratt. 519; *South Georgia & F. R. Co. v. Ayres*, 56 Ga. 230; *Tipecanoe County Comrs. v. Lafayette, M. & E. R. Co.* 50 Ind. 86; *Black v. Delaware & R. Canal Co.* 24 N. J. Eq. 455, reversing 22 N. J. Eq. 130; *Simpson v. Denison*, 10 Hare, 51; *Clinch v. Financial Corp. L. R.* 5 Eq. 450; *Kean v. Johnson*, 9 N. J. Eq. 401.

But though a corporation cannot directly put an end to its existence, and merge it by any process of amalgamation in that of another, yet it may accomplish this in an indirect and circuitous manner. It may do so by transferring its property, funds, rights, and liabilities to the other contracting corporation, and then voluntarily dissolving itself, usually by winding up. Generally the arrangement is supplemented by a proviso, whereby the transferee, the purchasing company, indemnifies the selling company against the liabilities which it may be under in respect of claims, existing or prospective. *Green's Brice, Ultra Vires*, 607, citing *Anglo-Australian L. Assur. Co. v. British Provident S. & F. Soc.* 3 Giff. 521, 4 De G. F. & J. 341; *Re Albert L. Asso. L. R.* 11 Eq. 164.

Consolidation; amalgamation; merger.

Authority is frequently given to corporations, either by special charter or by general law, "to consolidate" with other corporations. The meaning to be attached to the word "consolidated," when thus applied, and the important legal consequences following from a consolidation, have, as yet, been only partly determined by the courts. It

This agreement was signed *inter alia* by Stephen S. Jackson and R. C. Winslow, both of whom became officers of the new company. Thomas K. Litch was named as a director of the new company.

The capital stock of the new company was fixed at 120,000 shares of the par value of \$50 each. It did not appear that any of this stock was subscribed for.

On December 21, 1881, the Clarion, Mahoning & Pittsburgh Company entered into a contract for the construction of its road, which was signed by Jackson and Winslow. Nothing was ever done under this contract. There has been no election of directors, or work done under the company's charter since 1883. During the period from November, 1884, to June, 1886, plaintiffs recovered judgments against the company, which is insolvent.

As conclusions of law, the master found, *inter alia*, as follows:

It is plain that corporations cannot be consolidated without the consent of the shareholders of both companies, and that this consent cannot be implied. A consolidation would involve the formation of a new company by the shareholders, under a new constitution. *Morawetz, Priv. Corp.* 2d ed. § 893, 940.

The Legislature may, when public necessity requires it, grant authority to consolidate existing connecting railroad routes, if they provide a just compensation for the shares of such stockholders as dissent. *Black v. Delaware & R. Canal Co.* 24 N. J. Eq. 455.

As a general rule, the consent of every stockholder is necessary for consolidation, and those who dissent cannot be compelled. *Ibid.*; *Kean v. Johnson*, 9 N. J. Eq. 401; *Fisher v. Evansville & C. R. Co.* 7 Ind. 407; *Blatchford v. Ross*, 5 Abb. Pr. N. S. 424, 54 Barb. 42; *Chapman v. Mad River & L. E. R. Co.* 5 Ohio St. 119. And see *Re Empire Assur. Co.* L. R. 4 Eq. 341.

There is no power to force a dissenting stockholder to join the new corporation, and to receive stock in it on the surrender of his stock in the old company. *Ferguson v. Meredith*, 68 U. S. 1 Wall. 25, 17 L. ed. 604. And see *McMahan v. Morrison*, 16 Ind. 172; *Mowrey v. Indianapolis & C. R. Co.* 4 Biss. 78.

And a consolidation without his consent relieves him from liability on his subscription, or entitles him to recover his interest. *Shelbyville & R. Turnp. Co. v. Barnes*, 42 Ind. 498; *Lauman v. Lebanon Valley R. Co.* 30 Pa. 42; *Illinois G. T. R. Co. v. Cook*, 29 Ill. 237. Compare *Cork & T. R. Co. v. Paterson*, 18 C. B. 414; *Midland G. W. R. of Ireland v. Leach*, 8 H. L. Cas. 873; *Boone, Corp.* § 188.

Where power is given by statute to one railroad corporation to consolidate with any other, whatever other corporation it selects for a union, and finds willing to join it, has power to unite with it, although such other corporation is not named in the Statute. *Re Prospect Park & C. I. R. Co.* 67 N. Y. 271.

That the company with which the consolidation is effected belongs to another State is immaterial. *Scotland County v. Thomas*, 94 U. S. 682, 24 L. ed. 219.

Strictly speaking, a merger of one corporation into another "is a dissolution, destroying the actual identity of both, while the legal identity of one of them is preserved. As where a life estate is merged into a fee simple, one being destroyed and the other enlarged by the operation." *Lauman v. Lebanon Valley R. Co.* 30 Pa. 42.

The consolidation may be authorized either by the charters of the corporations, by general laws, 13 L. R. A.

3. It is not a good defense to the defendants in this action, that the Conewango & Clarion Railroad Company and Mahoning & Susquehanna Railroad Company were merged and consolidated into a new company as the Clarion, Mahoning & Pittsburgh Railroad Company. The regularity of such merger and consolidation cannot be questioned collaterally in this proceeding.

4. The Clarion, Mahoning & Pittsburgh Railroad Company being a *de facto* if not a *de jure* corporation, the defendants who have dealt with it in its corporate capacity cannot in this proceeding question the legality of the corporation.

5. As against these creditors of the Clarion, Mahoning & Pittsburgh Railroad Company, the defendants cannot defend on the ground that all the stock of the corporation has not been subscribed for.

6. The agreement in the articles of consolidation of the Conewango & Clarion Railroad

by an Act passed subsequent to the incorporation of the several companies, or by legislative recognition and ratification of the proceeding. 1 *Waterman, Corp.* § 153, citing *Bishop v. Brauerd*, 23 Conn. 289; *Mead v. New York, H. & N. R. Co.* 45 Conn. 199; *Mitchell v. Deeds*, 46 Ill. 418; *McAuley v. Columbus, C. & I. R. Co.* 83 Ill. 848. See *New Orleans Gas Light Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516.

After the consolidation all debts due to or rights of action vested in either of the previously existing companies are vested in the new company. *London, Brighton & S. C. R. Co. v. Goodwin*, 3 Exch. 320; *East Union R. Co. v. Cochrane*, 24 Eng. L. & Eq. 495.

Where two or more railroad companies are consolidated, as far as the creditors of one of the original companies are concerned, the consolidated company is successor of the old company; but in respect to the properties of the other companies it is a new and independent company, and such creditors have no claim against it upon their original contracts but only by virtue of its assumption of the obligations of the old companies. *Prouty v. Lake Shore & M. S. R. Co.* 52 N. Y. 368.

The English doctrine of amalgamation.

The recognized English doctrine on the subject of amalgamation is, that a majority of the members cannot amalgamate, and transform shares from one association into another, as such a proceeding would be *ultra vires*. *Field, Corp.* § 425.

Mr. Brice observes: "It may do so by transferring its property, funds, rights and liabilities to the other contracting corporation, and then voluntarily dissolving itself, usually by a winding-up. Generally the arrangement is supplemented by a proviso, whereby a transferee, the purchasing company, indemnifies the selling company against the liabilities which it may be under in respect to claims existing or prospective. This, after all, is not an amalgamation; it is not a union of one corporation with another, but is simply a transfer of assets, with attendant responsibilities. It is, however, a sufficient amalgamation for all practical purposes, and it is therefore the process always adopted." *Green's Brice, Ultra Vires*, 518; *Anglo-Australian L. Assur. Co. v. British Provident S. & F. Soc.* 3 Giff. 521, 4 DeG. F. & J. 841. See also same principle in *Hodges v. New England Screw Co.* 1 R. I. 312, 3 R. I. 9; *Booth v. Bunce*, 33 N. Y. 139; *Rorke v. Thomas*, 56 N. Y. 566; *Barclay v. Quicksilver Min. Co.* 9 Abb. Pr. N. S. 288, 6 Lans. 25; *Kelly v. Mariposa L. & Min. Co.* 4 Hun, 682. F. S. R.

Company and Mahoning & Susquehanna Railroad Company, that all their stock actually subscribed for shall be canceled, is not sufficient to relieve the defendants from liability to the creditors of the Clarion, Mahoning & Pittsburgh Railroad Company upon their unpaid subscriptions to the Conewango & Clarion Railroad Company.

The material parts of the master's opinion are as follows:

It is very strenuously urged on behalf of the defense, that the merger and consolidation of the Conewango & Clarion Railroad Company, and the Mahoning & Susquehanna Railroad Company, into a new company, or into a company with a new name, is illegal. I agree with the learned counsel for some of the defendants, Mr. Corbet, that, under the law, the merger should be of one existing railroad company into another existing railroad company. But I do not agree with him that because two railroad companies have merged into a new company, or into a company with a new name, such merger is so illegal as to constitute a valid defense in favor of the subscribers to the capital stock of one of the companies, in a suit by judgment creditors of the new corporation. The law carefully gives a remedy to the stockholders if they are dissatisfied with, or object to, the consolidation. Section 3 of the Act of May 16, 1861, Pub. Laws, 708, entitled "An Act Relating to Railroad Companies," provides for the disposition of the stock of dissatisfied stockholders, in cases of consolidated companies. Section 2 of the same Act provides for notice to the stockholders of the intended consolidation and method of voting thereon. The forms of law have been gone through with, and the agreement of consolidation of the two companies has been filed in the proper office at Harrisburg. No objection to this consolidation has been raised by any one of these defendants, so far as we are advised by the evidence. After all this, it will be presumed that the law was complied with so far as notice to them of the intended consolidation was concerned, and that they were satisfied with the merger. But more than that, in this case several of the defendants have dealt with the new corporation in various ways. In so far, they have invited others to deal with the consolidated corporation, and I think are held out to the world to give it credit.

The corporation defendant is a corporation *de facto* if not *de jure*. *Morawetz, Priv. Corp.* §§ 138, 145.

In the latter section it is said: "The rules referred to in the preceding sections are applicable in an action brought by a creditor of an insolvent corporation, to enforce the liability of its stockholders to pay the amount of their stock subscriptions. In a case of this character, the defendant cannot impeach the binding force of their contracts of membership by showing that the formation of the corporation was unauthorized by law, nor can they establish the invalidity of the obligation assumed by the company in favor of complainant, upon the ground that the company had no authority to act in a corporate capacity." And see *McHose v. Wheeler*, 45 Pa. 32.

It is urged on behalf of some of the defendants as a ground of defense, that all the stock

of the Conewango & Clarion Railroad Company was not subscribed for. I think this would be a complete defense in an action by the corporation to recover unpaid subscriptions to its capital stock. But it does not follow that a defense, good between the subscriber to its capital stock and the corporation, is good in a suit between such subscriber and a creditor of the corporation. After having permitted unquestioned the consolidation of the companies, and the consolidated company to make contracts and incur liabilities, I do not see how this defense can be interposed.

In *Morawetz on Private Corporations*, § 285, it is said: "A stockholder may waive the performance of a condition precedent to his liability to contribute his proportionate share of the capital of the company; and after such waiver he will be liable as if the conditions had been performed. Yet if a subscriber, knowing that the requisite subscriptions had not been obtained, should attend meetings of the corporation and co-operate in votes for expending money and for making contracts, or take part in any other acts which could be properly done only upon the assumption that the capital of the company had been fully subscribed, he would not be permitted to refuse to contribute his proportion of capital upon the ground that the amount required by the charter had not been subscribed."

In section 185 of the same work it is said: "For similar reasons it has been held that a stockholder might be estopped by his conduct from setting up as a defense to an action for calls that the number of shares required by law to authorize the corporation to be founded have not been subscribed."

It is urged in opposition to this view that those dealing with the corporation are bound to know that all the stock has not been subscribed to. There is some force in this view; yet I think that those persons who originate a corporation should see that it does not act, until the implied condition on which they subscribed has been complied with; and that when it does act persons dealing with it have a right to assume that the precedent conditions have been complied with. Neither do I think that the stipulation in the agreement of merger, that, "all the stock of the two first-mentioned companies actually subscribed for shall be canceled," constitutes a good defense. This stipulation is followed by the provision, "That the Clarion, Mahoning & Pittsburgh Railroad Company shall and will issue to the several holders and owners of, or subscribers to, the stock of the Conewango & Clarion Railroad Company, and the several owners and holders of, or subscribers to, the stock of the two last-named companies shall be entitled to receive for every share thereof one share of the capital stock of the Clarion, Mahoning & Pittsburgh Railroad Company." The plain intent and effect of this agreement is to substitute the stock of the consolidated company for the stock of the companies which have become merged in it. It is the stock that is canceled and not the subscription for stock. Any other construction would have been to denude the consolidated company of all advantages from the subscriptions to the capital stock of the two companies merged in it.

The construction I have given this agreement is in harmony with the provision contained in the third section of the Act of May 16, 1861, Pub. Laws, 703, that, "all the property, real, personal and mixed, and debts due and rights of action, shall be deemed and taken to be transferred to, and vested in the company into which such merger may have been made, without further act or deed; and all property, all rights of way, and all other interests, shall be as effectually the property of such company or corporation into which such merger may have been made, as they were of either of the former corporations, parties to said agreement." And see *Land's App.* 105 Pa. 63.

The important assignments of error are as follows:

1. In not sustaining joint exception number 4 which is as follows: "In not finding that there was no legal or sufficient evidence that the alleged Mahoning & Susquehanna Railroad Company ever existed as a corporation."

2. In not sustaining joint exception number 11, which is as follows: "In not finding that there was no legal or sufficient evidence that the alleged Conewango & Clarion Railroad Company was a corporation."

3. In not sustaining joint exception number 14, which is as follows: "In not finding it was incumbent on the plaintiffs, the same having been put in issue by the pleadings, to establish the existence of the corporation by them styled the Clarion, Mahoning & Pittsburgh Railroad Company, and that its existence was legal, which plaintiffs did not do; but on the contrary the evidence adduced by them showed that such company had no corporate existence by any warrant or authority of law."

4. In not finding, *vide* Litch's 9th and Winslow and Jackson's 5th exceptions, as therein stated: "That T. K. Litch, R. O. Winslow, and S. S. Jackson, severally, never became stockholders of the Conewango & Clarion Railroad Company; that there was no evidence that any stock certificates were ever issued by it, or tendered either of them; or that such company ever so far organized that they could have complied with their respective agreements to take shares of stock therein."

11. (Assigned on behalf of E. A. Litch, administrator.) In not sustaining the 40th exception of E. A. Litch, administrator, that the Master erred in his 10th conclusion of law, which is as follows: "This suit may be maintained in Warren County against E. A. Litch, administrator of the estate of Thomas K. Litch, deceased, joined with other defendants, for their unpaid subscriptions to the capital stock of the Conewango & Clarion Railroad Company notwithstanding the residence and domicil of Thomas K. Litch in Jefferson County, at the time of his death, and the granting of letters of administration upon his estate by the Register of Jefferson County."

Messrs. George A. Jenks and Charles Corbet, for appellants:

After the expiration of the time fixed by law, for the completion of the road in a collateral action for the recovery of stock, the defense of non-completion can be set up and is a valid defense. *McCully v. Pittsburgh & C. R. Co.* 83 Pa. 31.

In consequence of the company's failure to
13 L. R. A.

build any road within the time fixed by the Acts, the franchise reverted to the Commonwealth without judicial action.

Com. v. Lykens Water Co. 1 Cent. Rep. 219, 110 Pa. 891.

The Acts of Assembly authorizing the Mahoning & Susquehanna Railroad Company, which purported to constitute it, had ceased to exist and were void before the 6th day of December, 1881.

No letters-patent appear to have been issued in pursuance of those Acts, as required by the second section of the Act of February 19, 1849.

Brightly's *Purd. Dig.* p. 1417, pl. 19.

Until the requirements of this section are complied with, the Acts authorizing incorporation are absolutely ineffective to establish a corporate life.

The alleged consolidation of the non-existent Conewango & Clarion Railroad Company, with the non-existing Mahoning & Susquehanna Railroad Company was void; and the Clarion, Mahoning & Pittsburgh Railroad Company, the result of the pseudo-consolidation, was a nullity.

Act of May 16, 1861; Brightly's *Purd. Dig.* 1429, pl. 78.

That there never was such a corporation, goes to the right of action and is pleadable in bar.

Northumberland County Bank v. Eyer, 60 Pa. 486. See also *Rheem v. Naugatuck Wheel Co.* 38 Pa. 358; *Scovell v. Thayer*, 105 U. S. 143, 150, 151, 26 L. ed. 908, 972, 978.

The defendants are not by virtue of their subscriptions to the articles of association of the Conewango & Clarion Railroad Company, responsible to the amount of their respective subscriptions for the debts of the Clarion, Mahoning & Pittsburgh Railroad Company.

A corporation cannot sustain an action against one who, before it was chartered, with others, signed a paper agreeing to take a certain quantity of its stock and afterwards refused to do so.

Strasburg R. Co. v. Echternacht, 21 Pa. 220; *Cook, Stock & Stockholders*, § 186.

A subscriber to the capital stock of a corporation cannot be held on his subscription unless the whole capital stock is subscribed for.

Cook, Stock & Stockholders, § 176; *Rockland, Mt. D. & S. S. B. Co. v. Sewall*, 78 Me. 167, 12 Am. & Eng. Corp. Cas. 85.

As the consolidation is "a radical change in the organization," it therefore takes "away the motive which induced the subscription, as well as affects injuriously the consideration of the contract."

Nugent v. Putnam County Supra. 86 U. S. 19 Wall. 241, 22 L. ed. 83.

A dissenting member cannot be forced into a new corporation, and his property in one corporation cannot be taken from him and the stock of another imposed upon him by way of compensation, by the Act either of the Legislature or of his co-corporators, or of both combined.

Lauman v. Lebanon Valley R. Co. 30 Pa. 42. See also *Cook, Stock & Stockholders*, § 671.

A stockholder who never converted his stock into that of the consolidated company has no footing in court for a stockholder's bill against the said company.

Philadelphia & E. R. Co. v. Catawissa R. Co. 53 Pa. 20, 62.

Messrs. George N. Frasier, James W. Wiggins and S. T. Neill, for appellees:

Were this a suit even by the Conewango & Clarion Railroad Company against these defendants to recover upon their unpaid subscriptions, the defense set up would not avail.

Garrett v. Dillsburg & M. R. Co. 78 Pa. 465.

As to the existence of the Clarion, Mahoning & Pittsburgh Railroad Company, the record from the office of the Secretary of the Commonwealth was sufficient proof.

Com. v. Atlantic & G. W. R. Co. 58 Pa. 9.

In *Scotland County v. Thomas*, 94 U. S. 682, 24 L. ed. 219, the consolidated company did not adopt the name of either corporate body and it was held not to be of any consequence.

The Clarion, Mahoning & Pittsburgh Railroad Company was entitled to collect and recover the subscriptions to the capital stock of the Conewango & Clarion Railroad Company.

Act of May 16, 1861; Brightly's Purd. Dig. p. 1480, pl. 75.

The cancellation of the stock certificates did not cancel the subscription.

See *Scotland County v. Thomas*, 94 U. S. 682, 24 L. ed. 219; *Henry County v. Nicolay*, 95 U. S. 619, 24 L. ed. 394; *Schuyler County v. Thomas*, 98 U. S. 169, 25 L. ed. 88; *Green County v. Conness*, 109 U. S. 104, 27 L. ed. 872.

The decree *pro confesso*, entered November 26, 1888, against the corporation defendant, is conclusive upon the stockholders, defendants, as to the regularity of the organization of said corporation as averred in the bill.

Hawkins v. Glenn, 181 U. S. 819, 88 L. ed. 184; *Thomson v. Wooster*, 114 U. S. 104, 29 L. ed. 105; *Williams v. Corwin*, 1 Hopk. Ch. 471, 2 L. ed. 491.

If there is anything settled it is that the corporate existence of a corporation *de facto* cannot be inquired into collaterally.

Cochran v. Arnold, 58 Pa. 405.

Paxson, Ch. J., delivered the opinion of the court:

The opinion of the learned master covers this case so fully that an elaborate discussion of it is unnecessary. The main contention on the part of the appellants was that the Mahoning & Susquehanna Railroad Company, the Conewango & Clarion Railroad Company, and the Clarion, Mahoning & Pittsburgh Railroad Company never had a legal corporate existence; that the said appellants, T. R. Litch, R. C. Winslow, and S. S. Jackson never became stockholders in the last-named company, and that said company was never so far organized that they could have complied with their respective agreements to take shares of stock therein. See first, second, third, and fourth assignments of error.

It would be tedious to detail all the proceedings in relation to the organization of these companies, and the merger of the first two companies into a consolidated corporation under the name of the Clarion, Mahoning & Pittsburgh Railroad Company. All this has been carefully done by the learned master. It is enough to say that the merger sufficiently appeared by the certificate of the secretary of the Commonwealth, and the effect of it was, under 18 L. R. A.

the third section of the Act of May 16, 1861, Pub. Laws, 702, to vest in the consolidated company all the property, rights and franchises of said companies subject to all rights of their respective creditors. The consolidated company is estopped by the decree *pro confesso* from alleging that it is not a corporation *de jure* and liable as charged in the bill to the plaintiffs, who are the appellees here, and who have recovered judgments against it in actions at law. It is idle, as against creditors, to set up the defense that the corporation had no legal existence. It had sufficient existence to contract debts, and in the interests of its creditors it must at least be treated as a *de facto* corporation. And if there is anything settled in the law it is that the existence of a corporation *de facto* cannot be inquired into collaterally. *Cochran v. Arnold*, 58 Pa. 399. Much less can such a corporation or a stockholder therein set up a defect in its charter as against a creditor who has contracted with it upon the faith of its charter. We are not considering the case of a subscriber to shares who refuses to pay his subscription on the ground that the organization has not been perfected, and the cases cited upon this point have no application.

We are clearly of opinion that by force of the articles of consolidation and the Act of Assembly the subscription to the stock of the Conewango & Clarion Railroad Company insured to the benefit of the consolidated company, and became an asset in its hands for the payment of debts, and that the subscribers thereof are liable to the creditors of the latter to the amount of their unpaid subscriptions. This bill was filed to enforce this personal liability against certain of the stockholders. The corporation itself is admittedly insolvent. It does not appear to have any available assets. While it is well settled that a single creditor may not sue a particular stockholder at law, and thus secure an advantage over other stockholders (see *Bunn's App.* 105 Pa. 49), yet this bill was filed by or on behalf of all the creditors against the corporation, and its stockholders, precisely as was done in *Bunn's App.*, *supra*. The rights of all parties, therefore, can be adjusted in the one proceeding, and the decree of the court below is so framed as to compel contribution in case any one defendant is required to pay more than his just proportion.

A point was made that this suit cannot be maintained against E. A. Litch in Warren County for the reason that he is sued as administrator of Thomas K. Litch, deceased, the domicil of said administrator being in Jefferson County, in which county the letters of administration were taken out. See eleventh assignment.

This objection is based upon the ground that the Orphans' Court of Jefferson has the exclusive jurisdiction over the estate of said decedent. It may be conceded that the estate of Thomas R. Litch cannot be distributed by the Common Pleas of Warren, but no such question arises here. It is not a question of distribution but of the fixing of a liability or of a right. When that is ascertained it will be for the Orphans' Court of Jefferson to decide to what extent it can be enforced against the estate. That will depend upon the amount of the estate and the rights of other creditors. Aside from

this it must not be overlooked that it was a bill in equity, and the court acquired jurisdiction over E. A. Litch, administrator, because said court had "acquired jurisdiction of the subject matter in controversy by the service of its process on one or more of the principal defendants." Act of April 6, 1869, Pub. Laws, 387.

No question appears to have been raised as to the regularity of the proceeding under this Act. It was urged that the administrator should not have been joined with living parties,

and we are asked what execution would issue on a judgment against a survivor and the representative of a deceased party? If this were a judgment at law there would have been more force in this suggestion, but a court of equity can always mould its decrees to meet the difficulties of the case, and do no injustice to anyone.

The decrees is affirmed and the appeal dismissed at the costs of the appellants.

IOWA SUPREME COURT.

J. J. SCHLAWIG

v.

Mariana DE PEYSTER *et al.*, Appts.

(.....Iowa.....)

1. A provision for service of process on a person by leaving a copy with some member of his family at his usual place of residence will not validate a service by delivering a copy to such member at the residence of the family, after defendant has established himself in business in another State with the intention of making that his permanent residence and of removing his family there when convenient.
2. One who has not appealed from a decree cannot ask to have it changed by the appellate court.
3. Where the time limited by the trial court for the making of a redemption authorized by it expires, pending an appeal by the opposite party from the decree, the appellate court, on affirming the decree, will extend the limitation a certain time beyond the entry of judgment in its decree.

(October 7, 1891.)

APPEAL by defendants from a decree of the District Court for Plymouth County, in favor of plaintiff, in a proceeding to redeem certain lands from a mortgage, and from a sheriff's sale under a foreclosure thereof. *Affirmed.*

The facts are stated in the opinion.

Messrs. S. M. Marsh and T. G. Henderson, for appellants:

The place where a married man's family resides is generally to be considered his domicile. And if a married man has his family fixed in one place, and conducts his business in another, the former is considered the place of his residence.

State v. Groome, 10 Iowa, 316; *Story*, Conf. Laws, § 46.

The intention, and the act of making the place home must concur to constitute the residence.

Hinds v. Hinds, 1 Iowa, 46; *Cohen v. Daniels*, 25 Iowa, 89; *Ringgold v. Barley*, 5 Md. 186, 59 Am. Dec. 108.

If a person leaves the place of his residence or home with intent of residing in some other place and making it his fixed place of residence, but never consummates such intent, it cannot be said his residence has been changed thereby.

Vanderpool v. O'Hanlon, 58 Iowa, 246.

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A person may have more than one residence, and it is not necessary that an original notice be served at the one where he is located at the time of service, and in the absence of clear and unmistakable evidence that plaintiff did not have a residence in Sioux City, the return itself must stand as evidence of the fact of his residence there.

Love v. Cherry, 24 Iowa, 204; *Story*, Conf. Laws, §§ 89-49; *Hinds v. Hinds*, *supra*; *Penley v. Waterhouse*, 1 Iowa, 498.

Messrs. O. C. Tredway, Argo & McDuffie and W. G. Clarke for appellee.

Beck, Ch. J., delivered the opinion of the court:

1. The plaintiff executed a mortgage to defendant De Peyster to secure the payment of \$600 and interest payable upon maturity of certain notes given therefor. Upon the maturity and non-payment of interest, an action to foreclose the mortgage was instituted, and a decree of foreclosure was rendered, and a sale of the land thereon was for the amount of the judgment for interest, with attorneys' fees and costs. Plaintiff seeks in this action to redeem from the sale and mortgage, basing his right on the ground, among others, that the decree of foreclosure is void, for the reason that the original notice in the case was not served upon him as required by law. The service was made by copy delivered to a member of his family (his wife) at his alleged usual place of residence in this State. Plaintiff alleges that his usual place of residence at the time of service was in the Black Hills, Dak., and not in Iowa, and insists, therefore, that the decree is void for want of jurisdiction of his person.

2. The record very satisfactorily shows that about eighteen months before the service of the notice defendant, who then lived with his family in Sioux City, went to the Black Hills, intending to make his home there. He left his family consisting of a wife and children, in Sioux City, intending to remove them to the Black Hills as soon as he could do so. He engaged in mining and other business in the Black Hills, and built a house, shop, and other buildings there. He voted at the elections and sat upon juries and discharged other duties of a citizen, but did not remove his family there, though continually intending so to do. He visited his family about two years after he went to the Black Hills, and repeated the visit at long intervals. He never abandoned his purpose of removing his family to Dakota. He seems to have done no act indicating that

he regarded Iowa as the place of his residence. We think that actual residence, with the purpose and intent that it is and shall be permanent, fixes the legal residence contemplated by the Statute providing for service of original notices of actions by a copy delivered to a member of defendant's family at his usual place of residence, without regard to the place of residence of his family. We know of no rule which fixes absolutely a man's residence at the place of residence of his wife and family. A presumption may arise that his residence is with his family, but that presumption may be overcome by evidence showing the fact to be otherwise. Such presumption is in this way overcome by the evidence in this case. In support of these views, see the following cases: *Cohen v. Daniels*, 25 Iowa, 88; *Vanderpool v. O'Hanlon*, 53 Iowa, 246; *Ringgold v. Barley*, 5 Md. 186; *Gilman v. Gilman*, 52 Me. 165; *Hairston v. Hairston*, 27 Miss. 704.

Love v. Cherry, 24 Iowa, 204, cited by counsel for defendant, is not in conflict with our conclusions in this case. Because of absence of intention to make the residence in question permanent, and a continual purpose to return to a prior place of residence, it was held in that case that at such prior place of residence service of notice could be lawfully made by copy upon a member of defendant's family. In this case there was a fixed and constant purpose to

remove plaintiff's family to the Black Hills which was all the time regarded by him as the permanent place of residence and home of plaintiff. This purpose was never relinquished or changed, and there is no evidence showing facts in conflict thereto. It is our conclusion that the decree of foreclosure is void for want of jurisdiction of the person of plaintiff, and for this reason he may redeem from sale and mortgage.

8. Plaintiff complains of the amount which he is required by the decree to pay in order to make the redemption. We think the evidence well supports the correctness of the decree in this regard. Besides, as plaintiff did not appeal, he is not in a condition to complain of the decree, and ask that it be reversed or changed in this court. By the decree of the court below, plaintiff had ninety days from the rendition thereof in which to make redemption. That time has expired pending the appeal which prevented performance by plaintiff. The time for redemption ought to be extended for ninety days after the entering of final decree and judgment upon this appeal.

The decree of the District Court is affirmed, with the modification just suggested, that plaintiff have ninety days in which to redeem. A decree to that effect will be entered in this court.

NEW YORK COURT OF APPEALS (2d Div.).

Christian KUMMEL, *Resp.*,
v.

GERMANIA SAVINGS BANK, Kings
County, *App.*

(.....N. Y.....)

1. That the signature to the receipt by one receiving payment of a savings bank deposit did not seem exactly right to the bank officials is sufficient to make a question for the jury as to negligence in paying over the money to him, especially where the genuine and forged signatures are both in evidence.
2. Active vigilance to detect fraud and forgery is due by savings bank officers to a depositor on paying the deposit to one presenting the pass-book, although the by-laws provide that the bank will not be responsible for fraud in presenting the bank-book and drawing the money, where they also require its presentation by the owner or his agent duly constituted by a writing signed and acknowledged, as a condition of payment.

(October 6, 1901.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Kings County Circuit in favor of plaintiff in an action brought to recover the amount of a savings bank deposit. *Affirmed.*

NOTE.—For liability of bank on payment of forged or altered paper, see *Atlanta Nat. Bank v. Burke* (Ga.) 3 L. R. A. 90, note; *Deposit Bank v. Fayette Nat. Bank* (Ky.) 7 L. R. A. 849, note. 18 L. R. A.

The facts sufficiently appear in the opinion. *Mr. Matthew Hale*, with *Mr. William D. Veeder*, for appellant:

When a savings bank has prescribed rules, and its depositor has assented to them, they are the agreement, and each party must keep it, to preserve rights against the other. The extent of the duty which the savings bank is under will, in some degree, be measured by the strictness or extent of the rule it has put upon itself.

Allen v. Williamsburgh Sav. Bank, 69 N. Y. 314.

It is the duty of a court to give effect to all of the provisions and language used in framing a law, if it is susceptible of such a construction, and they are precluded from giving it such an effect as will render any of its clauses inoperative or ineffectual.

Smith v. Brooklyn Sav. Bank, 1 Cent. Rep. 801, 101 N. Y. 62.

In this case the provision that payments should not be made unless the depositor should call for and receive the same in person or by attorney, should be regarded as qualified by what follows: That the Bank will not be responsible to any depositor for a fraud committed upon the officers in producing the pass-book and drawing the money without the knowledge or consent of the owner.

The mere location of the covenants in a deed does not have any significance.

Phenix Ins. Co. v. Continental Ins. Co. 87 N. Y. 400.

The plaintiff was bound to show affirmatively that the defendant did not exercise ordinary

care and diligence at the time it paid out the money. This he failed to do.

Israel v. Bowery Sav. Bank, 9 Daly, 507.

Where it is sought to hold another liable for negligence, the negligence is to be made out by some positive proof, or by proof of circumstances from which the jury may fairly infer its existence.

Hraney v. Long Island R. Co. 112 N. Y. 122.

Mr. Hugo Hirsh, for respondent:

Fraud does not absolve the bank from liability if it does not take ordinary care and precaution to discover and avoid it.

Smith v. Brooklyn Sav. Bank, 1 Cent. Rep. 801, 101 N. Y. 58; *Leaves v. People's Sav. Bank*, 27 Conn. 233; *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 818; *Boone v. Citizen's Sav. Bank*, 84 N. Y. 88; *Appleby v. Erie County Soc. Bank*, 62 N. Y. 18; *Israel v. Bowery Sav. Bank*, 9 Daly, 509; *Underhill v. Poughkeepsie Sav. Bank*, 32 Hun, 482.

The relation of a depositor to this Bank is that of creditor, and upon an accounting it is liable for all such sums deposited as it has paid away without receiving valid directions therefor.

People v. Mechanics & T. Sav. Inst. 92 N. Y. 9; *Crawford v. West Side Bank*, 1 Cent. Rep. 263, 100 N. Y. 58.

There can be no pretense on the evidence in this case that the Bank believed it was paying the depositor.

The submission to the jury of the question whether the defendant exercised reasonable care and diligence in order to see that the party to whom it paid money was entitled to it, was a more favorable submission than it had a right to receive.

Onderkirk v. Central Nat. Bank, 119 N. Y. 263.

It appears from the entire case that the defendant relied almost exclusively upon its by-law permitting it to pay the money to anyone who produced the pass-book, and upon the case of *Schoenwald v. Metropolitan Sav. Bank*, 57 N. Y. 418.

Haight, J., delivered the opinion of the court:

This action was brought to recover the sum \$450.11, being balance of amount deposited by the plaintiff with the defendant. It appears that this balance had in fact been paid by the Bank upon a forged check or receipt to a stranger, who had stolen the pass-book from the plaintiff. At the time the plaintiff opened his account with the Bank, he subscribed his name in a book kept for that purpose, giving his place of residence, place of birth, the names of his parents, brothers, and sisters, etc. A pass book was issued to him, in which was entered the amounts of deposits made by him from time to time. Among the by-laws printed in the book appears the following: "Payments shall not be made unless the depositor shall call for and receive the same in person, or by an attorney duly constituted by writing, signed and acknowledged. When the payment is made, the pass-book must be produced. When the entire deposit is withdrawn, the pass-book must be surrendered. . . . The Bank will not be responsible to any depositor for any fraud committed on the officers in pro-
13 L. R. A.

ducing the pass-book and drawing money without the knowledge or consent of the owner." The money in controversy was drawn upon two different occasions,—\$100 on the 18th day of April, 1888, and the remaining \$350.11 on the 17th day of April thereafter. The court, in submitting the case to the jury, charged that the by-laws printed in the pass-book constituted a contract between the depositor and the Bank, and governed their relations; that a payment made in good faith, in the exercise of reasonable care and diligence, by the officers of the Bank to a person presenting the pass-book, even though obtained by fraud, and who was not a depositor, was a valid payment. The question thus presented for the determination of the jury was as to whether the officers of the defendant had exercised ordinary care and diligence in seeing that the person to whom the money was paid was authorized to receive it.

The first question which we are called upon to consider is as to whether the evidence was of such a character as to justify the submission of this question to the jury. The \$360 item was paid by the cashier, Frederick Koch. He states that he asked the person presenting the bank-book where he lived, and that he at first answered "New York," and that afterwards he stated that he had lived in Brooklyn before that, at 56 Tillary Street; that he did not ask him any further questions, but paid him the money. The other payment was made by Oscar Thomas, a clerk, who assisted the cashier. He judged from the first that the signature to the receipt was not exactly right, and asked the person presenting it if he could not write with a more fluent hand, and received the answer that he was not feeling well. He thinks he put the other questions to him appearing upon the signature book, and that they were answered correctly. As to the payment of the \$350 receipt, the question of negligence was clearly for the jury. It affirmatively appears that the cashier did not avail himself of the means at hand to identify the person presenting the pass-book and forged receipt. As to the \$100 payment, the question is involved in more doubt; but, in view of the fact that the acting cashier making the payment was an interested witness, that the signature to the receipt was such as to lead him to judge that it was not right, and that upon the trial the signature of the plaintiff, as well as that upon the receipt, was before the court and the jury for comparison, upon which the variance may have been so great as, of itself, to put a prudent person upon inquiry, we are inclined to the view that this question was also one for the jury, and that no error is apparent that would justify a reversal.

In the second place, it is contended that, the Bank having paid in good faith to the party presenting the pass-book, it is not liable, even though negligent; and the case of *Schoenwald v. Metropolitan Sav. Bank*, 57 N. Y. 418, is cited as sustaining such a rule. There are some expressions in the opinion in that case which tend to sustain the appellant's claim; as, for instance: "Nor do I see that it was at all material to the defendant whether the order was a forgery or not. The defendant was at liberty to pay the amount of the deposit to any

person presenting the pass-book. No order of the depositor was required. A forged order, while ordinarily of no legal effect, was at least equal to no order at all; so that it appears to me the bank had the right to make the payment it did on a simple production of the pass-book." But that doctrine has been criticised, and has not been followed, in later cases. *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 314; *Boons v. Citizens Sav. Bank*, 84 N. Y. 88-88; *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 68, 1 Cent. Rep. 801. In the *Schoenwald Case* the chief question litigated was as to whether the order upon which the money was paid was a forgery, and the question of negligence does not appear to have been considered. In the case of *Appleby v. Erie County Sav. Bank*, 62 N. Y. 12, it was held that the rules prescribed by a savings bank for its protection in the payment of deposits do not dispense with the exercise of ordinary care upon the part of its officers; and if, by a custom or regulation adopted by it, designed to prevent fraud, a fact is brought to the knowledge of the officers calculated to excite suspicion and inquiry, a failure to institute such inquiry is negligence for which the bank is liable. It was, however, held that, inasmuch as the charge of negligence rested upon the dissimilarity in the signatures, the discrepancy should be such as could be readily discovered by a competent person; that there was no evidence of that character, and, inasmuch as the trial court had the benefit of a personal inspection, the difference in the letters may not have been such as to indicate a different handwriting; that on review the court had no means of determining but that the trial court properly decided that the dissimilarity was of such a

character that negligence could not be predicated upon a failure to discover it. See cases above cited.

The pass-book of a savings bank cannot be regarded as negotiable, and its possession does not constitute proof of a right to draw money thereon. The book imports a liability of the bank to the depositor for the amount of moneys entered therein as deposited, and an agreement to repay at such time and in such manner as he shall direct. Assuming that the by-laws printed in the book are binding upon the depositor, and constitute a contract between the parties, we still think that the duty devolves upon the officers of the bank to exercise care and diligence, in order that their depositors may be protected from fraud and larceny. The defendant by its by-laws, to which we have called attention, has undertaken with the plaintiff that payment shall not be made unless he shall call for the same in person, or by an attorney duly constituted by writing, signed and acknowledged. Here is a positive and direct agreement, which would absolutely protect the plaintiff from losses of this character. This agreement, however, must be considered as modified by that which follows, to the effect that the bank will not be responsible for fraud committed on its officers in producing the pass-book and drawing money without the knowledge or consent of the owner; but this modification does not permit the officers to carelessly shut their eyes, and pay to any person presenting the pass-book, but, on the contrary, they owe the depositor active vigilance, in order to detect fraud and forgery.

The judgment should be affirmed, with costs.

All concur.

NEW YORK COURT OF APPEALS.

James GALWAY, *Resp't.*,

v.

METROPOLITAN ELEVATED R. CO. *et al.*, *Appts.*

(.....N. Y.....)

1. An equitable remedy to restrain continuous trespasses upon real estate is not barred by the lapse of ten years from the time of the original trespass under Code Civ. Proc., § 888, fixing that limit for actions the time for which is not otherwise specially prescribed. It will not be barred so long as the legal title is in the plaintiff and his right of action at law for injuries is not barred.
2. No estoppel against an injunction to restrain continuing trespasses by the operation of an elevated railroad in a street in front of plaintiff's premises arises out of his mere delay to bring suit for eleven years after the original trespass and his occasional riding on the road as a passenger, although his only protest against the construction of the road was by subscription to pay counsel to prevent it.
3. That an elevated railroad track was intended to be and was in fact made a permanent structure does not prevent its being a continuing trespass upon the easements of landowners abutting upon the street through

which it is constructed so as to take it out of the rule of limitations applicable to actions for continuing trespasses and bar all remedy unless the action is brought within the time after its construction prescribed in case of a single trespass.

(October 6, 1891.)

APPEAL by defendants from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of a Special Term for New York County in favor of plaintiff in an action brought to compel payment of damages because of defendant's alleged interference with plaintiff's easements in a certain street. *Affirmed.*

The facts are stated in the opinion.

Messrs. John F. Dillon, Julien T. Davies and J. C. Thomson, for appellants:

I. The plaintiff's right to maintain an action in equity to enjoin the maintenance and operation of the defendants' railway, and to recover damages to the inheritance by reason of the permanence of the structure, is barred by the ten years' limitation contained in § 888 of the Code of Civil Procedure.

The limitation of ten years is applicable to equitable remedies.

Calhoun v. Millard, 8 L. R. A. 248, 121 N.

Y. 69; *Butler v. Johnson*, 111 N. Y. 204; *Hubbell v. Sibley*, 50 N. Y. 468; *Peters v. Delaplaine*, 49 N. Y. 362; *Oakes v. Howell*, 27 How. Pr. 145; *Roberts v. Sykes*, 30 Barb. 173; *Wood v. Wood*, 26 Barb. 356; *Salisbury v. Morse*, 7 Lans. 359. See also *Venice v. Breed*, 65 Barb. 597; *Hubbell v. Medbury*, 53 N. Y. 98; *Cramer v. Benton*, 60 Barb. 216; *Hoyt v. Putnam*, 39 Hun, 402.

This rule is subject to an important qualification. It is applicable only when courts of equity have exclusive jurisdiction of the action.

Although courts of equity were never deemed to be within the terms of the Statute of Limitations, they were bound by their terms where they exercised only a concurrent jurisdiction with courts of law.

Hocenden v. Annesely, 2 Sch. & Lef. 607; *Kane v. Bloodgood*, 7 Johns. Ch. 89, 2 L. ed. 231; *Murray v. Custer*, 20 Johns. 575; *Borst v. Corey*, 15 N. Y. 505; *Clark v. Ford*, 8 Keyes, 370; *Rundle v. Allison*, 34 N. Y. 180; *Loder v. Hatfield*, 71 N. Y. 92; *Salisbury v. Morse* and *Butler v. Johnson*, *supra*.

A cause of action does not exist at law to recover damages once for all in an action of this character, because the illegal structure cannot be regarded as permanent in a court of law.

Uline v. New York Cent. & H. R. R. Co. 2 Cent. Rep. 116, 101 N. Y. 98; *Lahr v. Metropolitan Elev. R. Co.* 6 Cent. Rep. 371, 104 N. Y. 295; *Pond v. Metropolitan Elev. R. Co.* 112 N. Y. 186.

A cause of action exists in equity in a case of this character.

Henderson v. New York Cent. R. Co. 78 N. Y. 423.

The present suit is within the rules governing purely equitable remedies.

Rundle v. Allison, 34 N. Y. 180; *Peters v. Delaplaine*, 49 N. Y. 362; *Hubbell v. Sibley*, 50 N. Y. 468; *McTeague v. Coulter*, 6 Jones & S. 208; *Morris v. Budlong*, 78 N. Y. 543; *Scott v. Stebbins*, 91 N. Y. 605; *Butler v. Johnson*, 111 N. Y. 204; *Mann v. Fairchild*, 14 Barb. 548; *Still v. Holbrook*, 23 Hun, 517; *Rodman v. Devlin*, 23 Hun, 590; *Hoyt v. Tuthill*, 33 Hun, 196; *Hoyt v. Putnam*, 39 Hun, 402; *Mills v. Mills*, 48 Hun, 97.

A suit in equity may be barred by the equitable limitation, although the plaintiff may have resorted to a court of equity to establish or enforce a legal right which is not barred.

Peters v. Delaplaine, 49 N. Y. 362; *Calhoun v. Millard*, 8 L. R. A. 248, 121 N. Y. 69; *Hubbell v. Sibley*, 50 N. Y. 468; *McTeague v. Coulter*, 6 Jones & S. 208.

Courts of equity have exclusive jurisdiction of suits for injunction.

Tallman v. Metropolitan Elev. R. Co. 8 L. R. A. 173, 121 N. Y. 119; *Knox v. Metropolitan Elev. R. Co.* 58 Hun, 517; *New York Elev. R. Co. v. Fifth Nat. Bank*, 135 U. S. 440, 34 L. ed. 234; *Pond v. Metropolitan Elev. R. Co.* 112 N. Y. 190; 1 Pom. Eq. Jur. § 186.

There can be no recovery in an action at law of future damages for a continuing nuisance or trespass.

The cause of action at law is the injurious effects which have been caused by the unlawful structure in the past.

People v. Clark, 70 N. Y. 518; *Lexington City Nat. Bank v. Guynn*, 6 Bush, 486; *Mc-* 13 L. R. A.

nard v. Hood, 68 Ill. 121; *Wangelin v. Goe*, 50 Ill. 459; *Atty. Gen. v. New Jersey R. & Transp. Co.* 3 N. J. Eq. 136; *Owen v. Ford*, 49 Mo. 436; *Chesapeake & O. R. Co. v. Patton*, 5 W. Va. 234; *Cole v. Duke*, 79 Ind. 107; *Georgia Pac. R. Co. v. Douglassville*, 75 Ga., 828; *East Saginaw Street R. Co. v. Wildman*, 58 Mich. 286; *Smith v. Davis*, 22 Fla. 405; *Ewing v. Rourke*, 14 Or. 514.

There is thus a clearly marked distinction between the causes of action at law and in equity in cases of this kind.

Where the wrong against which relief is sought has been consummated by a single act done with a view to a permanent condition that will continue without change from any cause but human labor, the action is barred by the lapse of the statutory period, and the Statute commences to run from the time when the act causing the original damage was committed. Code Civ. Proc. § 415.

It is against the maintenance of the structure itself that an injunction runs. If the maintenance of the structure were not a trespass upon plaintiff's rights, the operation of the road would be beyond attack, and its effects could not be complained of by abutters, even if consequential injuries were effected.

Story v. New York Elev. R. Co. 90 N. Y. 160; *Fobes v. Rome, W. & O. R. Co.* 8 L. R. A. 453, 121 N. Y. 505; *Kane v. New York Elev. R. Co.* 11 L. R. A. 640, 125 N. Y. 164; *Lahr v. Metropolitan Elev. R. Co.* 6 Cent. Rep. 371, 104 N. Y. 295.

The cause of action in equity which springs into existence upon the erection or threatened erection of an unlawful structure consists in the sum total of the injurious consequences that are reasonably to be anticipated to result from the structure. As time passes, these anticipated consequences sometimes become realities and give rise, from day to day and from hour to hour, to distinct causes of action at law. But it cannot be said that distinct causes of action in equity also arise.

2 Story, Eq. Jur. § 1521a; *Bruce v. Tilton*, 25 N. Y. 194; *Peters v. Delaplaine*, 49 N. Y. 362; High, Inj. §§ 7, 10, 618, 643, 731, 756, 797, 837, 884, 895, 926.

Plaintiff's right to relief accrued "when the defendant began to construct its railway in front of his lots." It necessarily follows that the ten years' limitation began to run against his right to relief at the same time.

Tallman v. Metropolitan Elev. R. Co. 8 L. R. A. 173, 121 N. Y. 119; *Power's App.* 125 Pa. 175; *Wood v. Sutcliffe*, 2 Sim. N. S. 163.

When the Statute has begun to run, its operation will only be suspended by the intervention of some of the statutory exceptions, or by the commencement of an action.

Piper v. Hoard, 9 Cent. Rep. 445, 107 N. Y. 67. See *Henderson v. New York Cent. R. Co.* 78 N. Y. 423; *Uline v. New York Cent. & H. R. Co.* 2 Cent. Rep. 116, 101 N. Y. 98.

The rule which we ask this court to follow in equitable actions is logical and supported by authority.

New York Elev. R. Co. v. Fifth Nat. Bank, 135 U. S. 432, 34 L. ed. 231.

This court has admitted that the adoption of such a rule would have been productive of less inconvenience, even in actions at law.

Pond v. Metropolitan Elev. R. Co. 112 N. Y. 186.

When the nuisance or trespass is continuing in its character, and the original injury was permanent in its effect, so as to give but one cause of action in which complete compensation for the tort may be recovered, the Statute commenced to run when the injury was first effected.

Chicago & E. I. R. Co. v. McAulay, 8 West. Rep. 457, 121 Ill. 160; *Chicago & E. I. R. Co. v. Loeb*, 5 West. Rep. 887, 118 Ill. 308; *Kankakee & S. R. Co. v. Horan*, 181 Ill. 288; *James v. Kansas City*, 88 Mo. 567; *Pratt v. Des Moines N. W. R. Co.* 72 Iowa, 249; *Powers v. Council Bluffs*, 45 Iowa, 652; *Kansas Pac. R. Co. v. Miltman*, 17 Kan. 324; *Frankie v. Jackson*, 30 Fed. Rep. 898; *Lyles v. Texas & N. O. R. Co.* 73 Tex. 95; *Houston & T. C. R. Co. v. Chaffin*, 60 Tex. 554.

II. The plaintiff is precluded by his laches and acquiescence from seeking relief in a court of equity.

Smith v. Clay, 2 Ambl. 645; *Cathoun v. Millard*, 8 L. R. A. 248, 121 N. Y. 69; *Alvord v. Syracuse Sav. Bank*, 98 N. Y. 599; *Re Neilley*, 95 N. Y. 892; *Coit v. Campbell*, 82 N. Y. 509; *Lyon v. Park*, 111 N. Y. 850.

In other jurisdictions the effect of silence, neglect, and delay under similar circumstances has often been before the court, and the decisions have uniformly been that relief by injunction must be refused.

Western U. Teleg. Co. v. Jenkins, 75 Ala. 428; *Bigelow v. Los Angeles*, 85 Cal. 614; *Pensacola & A. R. Co. v. Jackson*, 21 Fla. 146; *Griffin v. Augusta & K. R. Co.* 70 Ga. 164; *Midland R. Co. v. Smith*, 12 West. Rep. 699, 113 Ind. 233; *Logansport v. Uhl*, 99 Ind. 531; *Baltimore & O. R. Co. v. Strauss*, 37 Md. 237; *Spencer v. Falls Turnp. R. Co.* 70 Md. 186; *Osborne v. Missouri Pac. R. Co.* 37 Fed. Rep. 830; *Bassett v. Salisbury Mfg. Co.* 47 N. H. 426; *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 580; *Erie R. Co. v. Delaware, L. & W. R. Co.* 21 N. J. Eq. 283; *Fickert v. Ridgefield Park R. Co.* 25 N. J. Eq. 816; *Traphagen v. Jersey City*, 29 N. J. Eq. 206; *Meredith v. Sayre*, 32 N. J. Eq. 557; *Goodin v. Cincinnati & W. W. Canal Co.* 18 Ohio St. 169; *Pennsylvania Co. v. Platt*, 47 Ohio St. 366; *Pottsgrove Twp. v. Pennsylvania & S. V. R. Co. (Pa.)* 2 Montg. (O. L. Rep. 133; *Pettibone v. La Crosse & M. R. Co.* 14 Wis. 443; *Wood v. Charing Cross R. Co.* 83 Beav. 290; *Greenhalgh v. Manchester & B. R. Co.* 8 Myl. & C. 784.

The applicability of the doctrine of laches to suits to enjoin the maintenance of defendants' elevated railway is conceded in—

Abendroth v. Manhattan R. Co. 11 L. R. A. 634, 122 N. Y. 1. See also *Hentz v. Long Island R. Co.* 13 Barb. 655; *Ninth Ave. R. Co. v. New York Elev. R. Co.* 3 Abb. N. C. 358; *Kincaid v. Indianapolis Nat. Gas Co.* 8 L. R. A. 602, 124 Ind. 577; *Fremont Ferry & B. Co. v. Dodge County Comrs.* 6 Neb. 18; *Atty-Gen. v. New York & L. B. R. Co.* 24 N. J. Eq. 49; *Atty-Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 1; *Meredith v. Sayre*, 32 N. J. Eq. 557; *Andrews v. Farmers L. & T. Co.* 22 Wis. 298.

Messrs. John E. Burrill and George Zabriskie, for respondent:
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The questions of acquiescence and the Statute of Limitations constitute no defense.

I. As to the Statute of Limitations, see—

Haight v. Price, 21 N. Y. 241; *Campbell v. Seaman*, 63 N. Y. 568; *Broiestedt v. South Side R. Co.* 55 N. Y. 220; *Tallman v. Metropolitan Elev. R. Co.* 8 L. R. A. 173, 121 N. Y. 123.

II. As to acquiescence.

The mere fact that the owner of the premises did not take legal proceedings to prevent the defendants from building their road, as they claimed to be authorized to do by various Acts of the Legislature, is no evidence of acquiescence.

Platt v. Platt, 58 N. Y. 646; *Sixth Ave. R. Co. v. Gilbert Elev. R. Co.* 71 N. Y. 480, 3 Abb. N. C. 872.

Mere failure to institute proceedings to restrain or prevent the construction or continued operation of the railroad, cannot deprive an owner of the constitutional right to recover compensation for the taking of his property, and to enjoin the continuance of the wrongful act until such compensation shall be made, unless the right is barred by the Statute of Limitations, or unless the defendants have in some legal manner acquired a title to the property taken, or unless the owner is equitably estopped from asserting his claim.

Abendroth v. Manhattan R. Co. 11 L. R. A. 634, 122 N. Y. 1; *Ode v. Manhattan R. Co.* 56 Hun, 199; *McMurray v. McMurray*, 66 N. Y. 176; *Tallman v. Metropolitan Elev. R. Co.* 8 L. R. A. 173, 121 N. Y. 123; *Chapman v. Rochester*, 1 L. R. A. 296, 110 N. Y. 273; *Haight v. Price*, 21 N. Y. 241; *Ormsby v. Vermont Copper Min. Co.* 56 N. Y. 623; *Powers v. Manhattan R. Co.* 120 N. Y. 178; *Menendez v. Holt*, 128 U. S. 523, 32 L. ed. 528; *Knor v. Manhattan Elev. R. Co.* 58 Hun, 517.

The defendants can never acquire a right by prescription to obstruct the easements in question.

Broiestedt v. South Side R. Co. 55 N. Y. 220; *American Bank Note Co. v. Manhattan Elev. R. Co.* 37 N. Y. S. R. 885.

Ruger, Ch. J., delivered the opinion of the court:

This is one of the usual actions in equity to restrain the defendants from further maintaining and operating an elevated street railroad on Sixth Avenue, in the City of New York, adjacent to the plaintiff's property, thereby unlawfully interfering with it. This property consisted of five vacant lots, extending about 125 feet along the easterly side of the avenue, between Fifty-seventh and Fifty-eighth Streets, and was acquired by the plaintiff by purchase in and previous to 1871. The defendant, the Metropolitan Elevated Railway Company, commenced and completed the structure of its railroad between the months of January and July, 1878, and from the time of its completion to the commencement of this action, in 1889, it has, either by itself or through its lessee, the Manhattan Railway Company, continued to maintain and operate an elevated steam railroad in front of and adjoining the plaintiff's premises on Sixth Avenue. No proceedings were taken by the railroad to acquire the easements of the abutting owners in the avenue, or their consent

to its construction. The plaintiff complained that by reason of the operation of such railroad, in impairing the easements of light, air, and access to his premises, he had been damaged, and demanded judgment for such damages as well as a perpetual injunction against the defendant from further operating and maintaining their railroad in front of his premises. A trial was had at special term and the court declined to award pecuniary damages to the plaintiff, but rendered judgment granting the relief by injunction unless the defendants should pay to the plaintiff, within a limited time, the sum of \$20,000 as the depreciation of the value of the premises caused by the railroad, and upon such payment being made required the plaintiff to execute to the defendants a conveyance of the easements. The depreciation in the value of plaintiff's property by reason of the erection and maintenance of the railroad was found by the trial court to be \$20,000, and the evidence supported that finding. It was also found that the plaintiff saw the railroad in the course of construction in front of his premises, and, from time to time, saw what defendants were doing in respect thereto, and occasionally as a passenger rode upon it. He subscribed money to pay for counsel to prevent the erection of the road, but made no protest otherwise and instituted no legal proceedings to enjoin its construction or operation prior to the commencement of this action. It was also found that, after the commencement of the action, but before the trial, the defendants instituted proceedings for the condemnation of that part of the easements referred to which had been taken for the use of such railroads, and that such proceedings were pending, undetermined, at the time of the trial. The defendants requested the trial court to find the following propositions of law: First, "that this action is barred by the Statute of Limitations;" and, second, "that plaintiff's alleged right of action is barred by his acquiescence in said railroad and its operation, and his use thereof as a passenger," and that he is estopped from maintaining the action. The court refused to find as requested, and it is conceded by the defendants that the exceptions to such refusal raise the only questions to be considered on this appeal.

It is claimed that the ten-year Statute of Limitations commenced to run against an equity action from the time the plaintiff was first entitled to commence such action, and, that period having elapsed, that the plaintiff was barred from maintaining such action by section 388 of the Code of Civil Procedure. This section is the general statute adopted in the Code as a precautionary measure to cover cases inadvertently omitted or otherwise unprovided for. The general right of an abutting owner on a public street to recover damages for an unlawful invasion of his easements by the erection and maintenance of an elevated railroad in the street adjoining his premises is not contested by the defendants; nor is the liability of the defendants to make compensation to the plaintiff for the injury inflicted upon his property by the construction and operation of their railroad disputed, or his right to maintain successive actions at law to recover damages for the injury to his easements; but

it is claimed that he has lost the right to proceed in equity, not only by reason of the Statute of Limitations, but also by virtue of an equitable estoppel arising out of the alleged acquiescence in the admitted trespasses. The case, therefore, involves the question how far, if at all, the owner has forfeited his rights in his property by reason of his alleged laches and inaction during the period of eleven years intervening between the construction of the road and the commencement of the action.

We think it would be impossible to sustain this appeal without unsettling the established law of the State. It is, in effect, an effort to exempt actions in equity from the operation of the well settled principle, that trespasses upon real property, effected by an unlawful structure or nuisance, are continuous in their nature, and give successive causes of action from time to time, as the injuries are perpetrated. The questions raised are answered by elementary principles established in this State by numerous reported cases. They are found in the two propositions that continuous injuries to real estate caused by the maintenance of a nuisance or other unlawful structure create separate causes of action, barred only by the running of the Statute against the successive trespasses; and the further principle that no lapse of time or inaction merely, on the part of the plaintiff during the erection and maintenance of such structure, unless it has continued for the length of time necessary to effect a change of title in the property claimed to have been injured, is sufficient to defeat the right of the owner to damages. It may be that there is no case where the precise question as to the application of section 388 to such causes of action has been directly decided in this State; but the rule follows as a logical conclusion from the cases, and it affords a strong argument against the appellant's theory that, in the numerous cases in this State in which the question has been involved the point has never before been taken by counsel for the trespasser in any case in this court. It is not claimed here that the plaintiff has ceased to be the owner of the easements impaired, or that any other party has acquired title thereto, but it is argued that he has lost the right to employ the equitable power of the courts, by reason of his neglect to demand it within ten years from the time when a cause of action accrued. Thus, although the wrongful acts may be continued and the owner subjected to irreparable injury, and his legal remedy may be either inadequate, or require that it should be sought through repeated and numerous actions at law, it is contended that the jurisdiction of an equity court shall be arrested at the very time when, in the interest of the public, the exercise of its power becomes the most apparent and necessary. This claim we think is altogether untenable. The right of abutting owners to damages for an invasion of their rights in the public streets is predicated upon the constitutional guaranties that no person shall be deprived of life, liberty, or property without due process of law, or have his property taken for public use without just compensation; and it necessarily follows that, so long as such person continues to be the owner of property and liable to be injured in respect thereto by the

unlawful acts of others, he is entitled to invoke the protection of the fundamental law, without regard to the lapse of time that may occur before the commencement of legal proceedings, provided the remedy is claimed within the statutory period of limitation applicable to his legal right, or before adverse possession has barred his title to the property injured. *Uline v. New York Cent. & H. R. Co.* 101 N. Y. 98, 2 Cent. Rep. 118; *Arnold v. Hudson River R. Co.* 55 N. Y. 681; *Colrick v. Swinburne*, 105 N. Y. 503, 8 Cent. Rep. 701; *Tallman v. Metropolitan Elev. R. Co.* 121 N. Y. 123, 8 L. R. A. 173.

The cause of action, both at law and equity, in such cases, arises out of the trespasses committed, and is based on the ownership of the property upon which the injuries are inflicted, and it is obvious that no cause of action can be barred while there is an outstanding legal cause of action for which the party has a legal remedy. The existence of a legal cause of action is not only a prerequisite to the maintenance of the equitable action, but is also the foundation of the jurisdiction which equity courts possess in respect to the subject matter. The questions presented have been so frequently considered and decided in this court, in analogous cases, adversely to the contention of the appellants, that they should no longer be the subject of controversy or debate. The learning and ability, however, with which the counsel for the appellants have pressed their case before us, have induced us to treat the questions argued at greater length than would otherwise have been thought necessary or proper, and we therefore indicate, briefly, the general theory upon which this court has proceeded in the determination of like questions. That theory is concisely expressed by Judge Earl in the *Case of Tallman*, *supra*. It was there said that, "when the defendant began to construct its railway in front of the plaintiff's lots, he could have commenced an action in equity against it, and restrained it until it had made compensation to him for the rights and easements which it took from him, or until it had acquired them by condemnation proceedings. In that way he would, at least in the theory of the law, have been indemnified for all the damage he would suffer by reason of the construction of the railway. Instead of taking his remedy by an equitable action at that time, he could have taken it at any time afterwards, during his ownership of the lots, with the same result. He was not, however, confined to his remedy by such an action. He could suffer the railway to be constructed, and then bring successive actions to recover damages to his lots caused by the construction, maintenance, and operation of the railway." In the *Arnold Case* it was held that an easement to carry water in a trunk over the land of another "was such an interest in land as could not be modified or discharged save by conveyance in writing or by operation of law; that it was property within the meaning of article 1, § 6, of the Constitution, and therefore could not, nor could any portion of it, be taken for public use without compensation;" and "that this right of enjoying such easement was a continuous one, and the unlawful preventing its exercise a continuous injury;" 13 L. R. A.

and that, therefore, the Statute of Limitations did not bar plaintiff's claim for the injuries sustained." It is now the settled law of this State that no action at law can be maintained by an owner to recover prospective damages for injuries inflicted upon real property, and it is equally certain, we think, that an equity action for that purpose alone cannot be sustained. *Uline v. New York Cent. & H. R. Co.* *supra*; *Pond v. Metropolitan Elev. R. Co.* 112 N. Y. 187.

Inasmuch as the equitable remedy depends, among other things, upon the existence of a legal cause of action, it follows that those facts which will bar the legal action will also afford an answer to the equitable remedy, and that so long as a legal remedy exists an equity court is open to aid in the enforcement of the legal claim. Where the trespass is of such a character that it may be discontinued, at the option of the wrong doer, or, if continued, is susceptible of having legal sanction obtained for its continuance, it seems offensive to our sense of right that a wrong-doer should be permitted to allege that his intention to repeat and continue his own unlawful conduct should deprive the owner of any of the remedies which the law has provided for his protection. If it were otherwise, the wrong-doer would be permitted to show the aggravated character of his own conduct as a defense to the action of the legal owner, and thus violate the rule of law as well as the plainest principles of equity. Upon settled principles, a court of equity had unquestioned jurisdiction, by reason of the continuance of the legal right and the inadequacy of the legal remedy, to render the judgment pronounced in this case by the trial court. *Henderson's Case*, 78 N. Y. 423; *Tallman's Case*, *supra*.

That successive causes of action have accrued to the owner for each day's maintenance and operation of the railroad structure adjoining his premises is undisputable, and that he is entitled to recover some damages for each trespass, even though it be nominal only, is equally undeniable. *Colrick v. Swinburne*, *supra*. The plaintiff may delay his action, and join together such causes of action as have not been outlawed, or he may bring an action daily, and recover such damages as he can establish. *Baldwin v. Calkins*, 10 Wend. 167. In the case of unoccupied lands, these damages may be small, but by delay the owner may lose them altogether, and in the mean while his toleration may be laying the foundation of an adverse claim to the property itself, and thus be the cause to him of irreparable injury. While it is indispensable to the protection of his rights that he should assert them before his right is barred, in such case it may not be to his interest to do so as often or as promptly as when his damages are large and immediate; but no bar is available against his laches unless it continues until the legal action is barred. The jurisdiction of equity arises by reason of the necessity of repeated actions at law to redress the owner's grievance, and must, from the nature of the case, continue so long as that necessity exists. The existence of either of the grounds of equity jurisdiction referred to is sufficient to maintain an action, but they in fact are all present here, and indicate the propriety

of the judgment appealed from. It was said by Judge Earl, in *Campbell v. Seaman*, 63 N. Y. 562, that "the right to an injunction, in a proper case, in England and most of the States, is just as fixed and certain as the right to any other provisional remedy. The writ can rightfully be demanded to prevent irreparable injury, interminable litigation, and a multiplicity of suits, and its refusal in a proper case would be error to be corrected by a proper tribunal." The lapse, therefore, of six years after a trespass has been committed upon real estate bars not only the legal action, but also constitutes a practical defense to an equitable action founded upon the necessity of numerous legal actions to obtain redress; because the right to such redress has, as to such wrongs, expired. But, if the trespasses are continued after that period, new causes of action arise, unbarred by any rule of law or equity, which are cognizable not only at law, but also in equity. *Uline's Case*, *supra*.

Section 883 of the Code finds its true interpretation when applied to causes of action founded upon equitable rights alone, or cases not specified in the general Statutes of Limitation. It being conceded, as to legal causes of action for trespass and nuisance, that the injuries thereby occasioned are continuous, and arise from time to time as fresh trespasses are committed, it is difficult to see why the same principle should not apply with at least equal force and propriety to equitable actions. Indeed, it is obvious that it should be held to apply with greater reason to the latter, since otherwise the equity jurisdiction would be practically subverted. While the appellants' contention would permit the equity jurisdiction to be preserved for ten years, it precludes its exercise forever thereafter, and leaves the evils of incessant litigation to harass the public for practically an unlimited period of time. It would seem, therefore, that it is immaterial, either in equity or at law, whether the injuries done to the owner's property were originally intended by the wrong-doer to be perpetual, and of a permanent character, or were of a temporary nature only, and occasional in their operation. The law makes no distinction in the character of the injury, but prescribes one uniform principle for redress, without regard to the nature of the remedy pursued. *Kreht v. Burrell*, L. R. 11 Ch. Div. 146; *Henderson's Case*, *supra*; *Baldwin v. Oalkins*, 10 Wend. 170; *Williams v. New York Cent. R. Co.* 16 N. Y. 111.

The defendants' chief contention is that the relief in equity, as now given against elevated railroads for invasions of the rights of abutting owners in streets, is, practically, an action to recover permanent damages for such injuries, and that, therefore, the Statute of Limitations should commence to run from the time when any cause of action arose. There would be some force in this argument were that the real character of the action or if the equity courts had assumed to exercise the power of awarding damages on that theory, but we know of no instance in which they have done so in this State. The action here is, neither in practice or theory, an action of such a character, and by its fundamental rules, as well as the constitutional requirement that compensation for

such property shall be assessed by a jury or commission alone, an equity court is incapacitated from entertaining actions instituted for the purpose of recovering damages alone. *Bradley v. Bosley*, 1 Barb. Ch. 125, 5 L. ed. 824; *Morris v. Elmendorf*, 11 Paige, 277, 5 L. ed. 185; art. 1, § 7, Const. A court of law is the exclusive tribunal for the determination of such actions.

We have been referred to no case in this State where an equity court has assumed the authority to render judgment for prospective damages against a wrong-doer, and we think, in the nature of the jurisdiction of such courts, a suit brought for such a purpose alone is not authorized. To say, therefore, that an action, in which the plaintiff has no legal right to demand permanent damages and the court owes no legal duty to award them, affords the owner an adequate remedy for such damages, is to pervert the plain character of the action. While equity courts have frequently suspended the remedy, as they did in this case, by injunction upon conditions, as for a specified time or until the wrong-doer has been afforded an opportunity to condemn the property invaded, or has satisfied the owner's damages, they have never, to our knowledge, rendered judgment for such damages, or authorized the collection thereof by the owner. The privilege of securing the right to continue the trespasses complained of has, when authorized, been granted as an act of grace and favor to the offending party and not as matter of right to the injured owner. As was said in the *Henderson Case*, "equitable relief is awarded, not, as the defendant's counsel claims, by way of menace or as a means of compelling the payment of money, but that the defendant may desist from an unauthorized use of the plaintiffs' property, and forbear from any further interference with their rights." Equity courts can, by virtue of their power to grant specific relief, obviate the difficulty attending an action at law in giving permanent damages for an injury to real property, by providing that a title to the easements required shall be conveyed as a condition of the relief granted. The court, having the authority to grant a perpetual injunction, does not impair its exercise of such authority by permitting the offender to escape its effect by voluntarily paying the owner for the property injured. It is thus left optional with the trespasser to remedy the wrong done by him or to suffer the judgment of the court to stand. While the injury inflicted upon the wrong-doer by neglect to comply with the conditions may be so onerous, in many cases, as to inflict great loss upon him, it nevertheless does no more than to place in his hands the means of escaping from the disastrous consequences of a judgment which has been rendered imperative, by his own wrongful conduct. A party who voluntarily prosecutes a public enterprise for his own benefit, without regard to the legal rights of individuals who may be damaged by its operation, must always run a great risk of being placed in a dangerous situation through his unlawful conduct; but this is the result of his own volition, and the injury which necessarily follows such action cannot lawfully be imposed upon the parties injured without disregarding the constitutional provisions intended for their

protection. It furnishes no cause of complaint to the wrong-doer that the court, having power to restrain him altogether from continuing his trespasses, should mitigate the severity of its judgment by authorizing him to repeat them upon complying with special conditions prescribed by the judgment, so long as it is left to his election to perform them or not.

A consideration of the cases generally, in which equity courts have exercised the power of giving damages as an incident of the equitable relief granted, seems to be unnecessary in this case, as such courts in this State have not in this class of actions, so far as we know, assumed to exercise that power. The cases cited by the appellants to sustain the authority of an equity court to award permanent damages to real property were those of foreign jurisdiction where special statutes existed, or those in which no constitutional provision requiring such damages to be assessed by a jury or commissioners were in force. Here such a requirement exists, and the courts decline to assess such damages, but simply say to the corporations, "You may escape the legal consequences of your conduct by complying with certain conditions, as, for instance, by paying the plaintiff a specified sum of money." This sum may represent the actual depreciation in the value of the plaintiff's property, or the amount of damages already suffered, or any other arbitrary sum. The defendant, who has an option to pay it or not, at his own will, cannot justly complain of the action of the court. The option is given to the defendant, and not to the plaintiff. His remedy is confined to his injunction. The injury which results to the defendant, in case the option is not accepted, results from the judgment rendered by the court, and not from his neglect to make payment. The expression, made use of in some of the cases, to the effect that "the only remedy, whereby just compensation for the property taken can be compelled, is an action to restrain the continuous trespasses" (*Pond v. Metropolitan Elev. R. Co.* 112 N. Y. 186; *Tallman Case, supra*), means simply that an injured party can by that means secure the enjoyment of his property, unless the wrong-doer, by making compensation, in some form, for the injury inflicted, has acquired the lawful right to continue it. In this sense only, they may be, not incorrectly, called actions to compel the payment of damages.

The defendants also urge as a reason why the Statute of Limitations should bar this action, that otherwise they will be embarrassed in their efforts to secure a right by prescription. We ascribe but little weight to this suggestion. The law applies a period of limitation to actions for the public benefit. They are termed "statutes of reform," and are founded upon the maxim, *interest reipublice ut sit finis litium*. They are not intended for the benefit of wrong-doers, and while the law tolerates and protects title acquired by prescription, when clearly made out, it does not favor or encourage that mode of acquiring property.

We are therefore of the opinion that the right to bring an equity action to restrain continuous trespasses upon real estate is not barred in ten years from the time of the original trespass, but may be sustained, if brought at any 18 L. R. A

time, so long as the plaintiff has title to the property injured, and a cause of action for such injuries is not barred at law. But the defendants, failing to establish the bar of the Statute of Limitations, still insist that the affiliated principle of acquiescence constitutes a defense to the action. There is no foundation in the case for a claim that the plaintiff's conduct amounted to an estoppel, and, indeed, the claim is not seriously urged by the appellants. It is obvious that such conduct has never led the defendants into a line of action which they would not otherwise have pursued, or encouraged them to expend money or make improvements by reason of their reliance upon the alleged inaction or acquiescence of the plaintiff. They inaugurated their enterprise in the face of persistent opposition by the plaintiff and other abutting owners, and carried it to completion while earnest efforts were being made to prevent them. From the inception of the enterprise to the present time, the claim has been made that the defendants had no right to build their road in the streets of New York without compensating the abutting owners for the damages inflicted upon their property, and the defendants have continued the prosecution of their purpose regardless of their legal liability, and in the face of strenuous opposition, with an apparent intention to wholly ignore the claims of such owners. The judicial annals of the State are filled with the history of the litigations which have sprung out of the efforts of the elevated railroad companies to appropriate the property of the citizens of New York to the benefit of such railroads without compensation. In view of these facts, it is idle to claim that such companies have been induced, in any respect, to prosecute their enterprises in reliance upon the assumed acquiescence of the owners. *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 181. The building and completion of their road in this case occurred in the first half of 1878, and before the numerous parties concerned could have been fully awake to the real consequences of the enterprise. So far as the permanent structure is concerned, their expenditures were all incurred within six months, and while the parties were making earnest efforts to stay any expenditures. The case is entirely destitute of proofs showing the existence of any elements of estoppel, and the defendants are therefore driven to rely, in this respect, upon the mere inaction of the plaintiff to prosecute his claim. This claim comes with little grace from parties who have for a much longer period neglected to take proceedings to acquire the real ownership of the property required by them in the prosecution of their enterprise. But this question we also think is governed by authority equally conclusive with that relating to the Statute of Limitations. The doctrine of acquiescence as a defense to an equity action has been generally limited here to those of an equitable nature exclusively, or to cases where the legal right has expired, or the party has lost his right of property by prescription or adverse possession. Whatever may be the rule in other States, it can be said that here no period of inaction merely has been held sufficient to justify a nuisance or trespass, unless it has continued for such a length of time as will authorize the

presumption of a grant. The principle that so long as the legal right exists the owner is entitled to maintain his action in equity to restrain violation of this right has been uniformly applied in this court. *Tallman v. Metropolitan Elev. R. Co.* and *Arnold v. Hudson River R. Co. supra*; *Broiestadt v. South Side R. Co. Long Island*, 55 N. Y. 220; *Campbell v. Seaman, supra*; *Ormsby v. Vermont Copper Min. Co.* 56 N. Y. 623; *Haight v. Price*, 21 N. Y. 240; *Viele v. Judson*, 82 N. Y. 32; *New York Rubber Co. v. Rothery*, 107 N. Y. 810, 9 Cent. Rep. 827; *Chapman v. Rochester*, 110 N. Y. 273, 1 L. R. A. 296.

In the *Case of Ormsby*, as appears by the head-note, it was held that "the doctrine of laches and acquiescence, as a bar to an action through lapse of time, finds its just application in respect to equitable rights only. As to legal rights, mere lapse of time, before an action to enforce them, is of no moment, unless it comes up to the requirements of the Statute of Limitations." In the *Chapman Case*, this court held that the silence and inaction of the plaintiff while seeing the defendant construct sewers and spend large sums of money in completing a sewage system, which discharged the filth of the city into a stream belonging to the plaintiff, did not constitute a defense to an action for an injunction, no matter how long continued, unless accompanied by circumstances amounting to an estoppel. It was held in *Haight v. Price* "that no acquiescence short of twenty years repels the presumption that the diversion of a water-course was in hostility to the rights of the riparian proprietors, or authorizes the presumption either of a grant or of license." Judge Earl, in the *Campbell Case*, said: "It is claimed that the plaintiffs so far acquiesced in this nuisance as to bar them from equitable relief. I do not perceive how any acquiescence short of twenty years can bar one from complaining of a nuisance, unless his conduct has been such as to estop him. . . . No act or omission of theirs induced the defendant to incur large expenses, or to take any action which could be the basis of an estoppel against them, and therefore there was no acquiescence or laches which should bar the plaintiffs within any rule laid down in any reported case. In *Viele v. Judson*, Judge Finch, in speaking of the cases where acquiescence had been held a bar, says: "In all of these the silence operated as a fraud, and actually itself misled. In all there was both the specific opportunity and apparent duty to speak, and in all the party maintaining silence knew that someone was relying upon that silence, and either acting or about to act as he would not have done had the truth been told." It was held in the *Broiestadt Case* that the possession by a railroad company of a highway, under a license given by statute, is presumed to be subordinate to the rights of the owner of the soil, and cannot be said to be adverse to him. In *New York Rubber Co. v. Rothery* the defendant had built expensive structures for manufacturing purposes, and diverted the water from a stream adjoining plaintiff's premises for the purpose of supplying power to his machinery. It was claimed that the plaintiff, by her silence during the period when this work was going on, was barred of her ac-

tion for damages. Judge Peckham, writing for the case, says: "In this there was no element of an estoppel. To constitute it, the person sought to be estopped must do some act or make some admission with an intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, and which act or omission is inconsistent with the claim he proposes now to make. The other party, too, must have acted upon the strength of such admission or conduct." See also *McMurray v. McMurray*, 66 N. Y. 176.

But we have already referred to a sufficient number of cases in this court to show how uniformly and frequently we have adhered to the doctrine, where a legal right is involved, and, upon grounds of equity jurisdiction, the courts have been called upon to sustain the legal right, that the mere laches of a party, unaccompanied by circumstances amounting to an estoppel, constitutes no defense to such an action. Such is also the doctrine, generally, of the elementary writers. 2 Pom. Eq. Jur. § 617; Bigelow, Estoppel, p. 476 *et seq.* The same general principle has also been held in England. In the case of *Fullwood v. Fullwood*, L. R. 9 Ch. Div. 176, Fry, J., says that "mere lapse of time unaccompanied by anything else, has, in my judgment, just as much effect, and no more, in barring a suit for an injunction, as it has in barring an action for deceit." And the head note in *Re Maddoer*, L. R. 27 Ch. Div. 523, reads: "That, as the plaintiff was coming to enforce a legal right, his mere delay to take proceedings was no defense, as it had not continued long enough to bar his legal right; the case standing on a different footing from a suit to set aside, on equitable grounds, a deed which was valid at law." The Supreme Court of the United States has also laid down the same rule in the recent case of *Menendez v. Holt*, 128 U. S. 523, 32 L. ed. 528, where Chief Justice Fuller, writing for the court, says: "Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself. Hence, upon an application to stay waste, relief will not be refused on the ground that, as the defendant had been allowed to cut down half the trees upon the complainant's land, he had acquired, by that negligence, the right to cut down the remainder. *Atty-Gen. v. Eastlake*, 11 Hare, 205."

Even in a case where laches has been allowed to operate as a defense, the question is to be determined in the discretion of the court, upon all of the circumstances of the case. *Fullwood v. Fullwood, supra*.

There is nothing in the history of this case which induces us to suppose the court committed any error in the exercise of their discretion in granting the injunction appealed from. The plaintiff had reason to suppose the defendants would discontinue their trespasses, or, if they were continued, they would resort to legal means to justify them. They had no reason to believe that the defendants deliberately intended to prosecute their enterprise, altogether regardless of the legal rights of others, and were justified in delaying a reasonable time, in expectation that the defendants would eventu-

ally do justice to those whose property they were appropriating to their own use. The novelty of the questions presented; the vast number of people who were suffering similar injuries; the importance of the projected road for the public convenience,—were all circumstances addressed to the discretion of the court upon the question of laches, and presented strong reasons why a strict rule should not be applied to the delay of the injured parties in seeking redress in this and similar cases. The rule requiring promptness in soliciting the intervention of a court of equity is always addressed to the discretion of the court, and varies much according to the situation of the parties, the nature of the relief demanded, and the circumstances of the case. *Calhoun v. Millard*, 121 N. Y. 82, 8 L. R. A. 248; *Fullwood v. Fullwood*, *supra*; *Rayner v. Pearsall*, 3 Johns. Ch. 578, 1 L. ed. 723; *Atwater v. Fowler*, 1 Edw. Ch. 420, 6 L. ed. 184. What might be considered an unjustifiable delay in one case would be considered reasonable in another, and an equity court which should refuse its aid to a party in protecting a legal right, without a valid and sufficient reason, would be subject to the criticism of shutting the doors of the temple of justice in the face of meritorious suitors, and condemning them to suffer remorseless wrongs. The fact that the defendants intended to make their structure permanent, or made it so in fact, constitutes no defense to the action. *Krehl v. Burrell*, L. R. 7 Ch. Div. 551, on appeal, L. R. 11 Ch. Div. 146.

For the reasons stated, we think *the judgment appealed from should be affirmed*, with costs.

All concur.

Lewis M. TEEL, *Rept.*,

v.

Abraham YOST, *App.*

(.....N. Y.)

1. A judgment duly entered in one State on a warrant of attorney is as conclusive

NOTE.—*Judgments confessed on warrants of attorney; conclusiveness.*

A judgment confessed on a warrant of attorney has the same force as any other. *Keith v. Kellogg*, 97 Ill. 147.

In what cases authorized.

The practice of entering judgment in debt on warrants of attorney is very old, so old that the date of its origin is unknown. 2 Chitty, Pr. 234.

A warrant of attorney may authorize confession of judgment on a note. *Parker v. Poole*, 12 Tex. 86.

In an early English case the use of such warrants in ejectment was involved and it was held that ejectment is not a "personal" action within the meaning of a Statute requiring the presence of an attorney in such actions on the entry of judgment on a warrant. *Doe v. Kingston*, 1 Dowl. P. C. N. S. 233.

Soon after by the same court a judgment on a warrant of attorney was allowed in ejectment. *Doe v. Beaumont*, 2 Dowl. P. C. N. S. 972.

Judgment upon a warrant of attorney contained in a lease cannot be entered in an action of forcible detainer, but is *coram non judice* and void as the statutory proceeding in such cases is exclusive. 13 L. R. A.

in all other States as in the State where it is entered.

2. Jurisdiction to render a judgment on a note containing a warrant of attorney to confess judgment may be acquired by the appearance of the party's authorized agent.

3. The entry of judgment on a note containing a warrant of attorney to confess judgment may be made before maturity of the note.

(October 6, 1891.)

A PPEAL by defendant from a judgment of the General Term of the Superior Court for the City of New York, affirming a judgment of the Trial Term in favor of plaintiff in an action upon a foreign judgment. *Affirmed.*

The judgment upon which the suit was brought was confessed by the prothonotary of the court of common pleas in which the judgment was entered, and the record of the judgment was as follows:

"Continuance Docket Entry of December Term, 1877.

Lewis M. Teel.

v.

Abraham Yost,

—*d. s. b.*, \$2,268 00. And now Jan'y 14, 1878, a single bill, under the hand and seal of the defendant, dated Jan'y 12, 1878, wherein he promises to pay to the plaintiff or order, one year after date, twenty-two hundred and sixty-eight dollars, containing a clause authorizing the entry of judgment, waiving stay of execution, with ten per cent for collection fees. is produced hereto, to have judgment entered thereon.

"Wherefore judgment."

Mr. Lemuel Skidmore, for appellant:

The alleged judgment record shows that there was nothing offered to the Pennsylvania court as the basis of a judicial decision. It is in the nature of a mere memorandum by the clerk, and does not amount to a judgment.

Cromwell v. Bank of Pittsburg, 2 Wall. Jr. 584.

The alleged record here shows that the defendant was not in any way summoned or notified, and there is no waiver by him of such notification.

French v. Willer, 2 L. R. A. 717, 126 Ill. 611, overruling *Johnson v. Crane*, 22 Ill. App. 366; *Links v. Mayer*, 22 Ill. App. 436.

The words "warrant of attorney" in the Pennsylvania Act of April 4, 1877, authorizing an appeal from a decision as to opening judgments thereon, do not refer to anything but money judgments. *Swartz's App.* 13 Cent. Rep. 631, 119 Pa. 506; *Limberty v. Jones*, 11 Cent. Rep. 672, 118 Pa. 539; *Blythe Twp. v. Morris (Pa.)* 11 Cent. Rep. 460.

Form and validity of warrants.

A warrant of attorney need not be by deed but must have an attesting witness. *Kennerley v. Mussen*, 5 Taunt. 264.

It need not be under seal. *Kneedler's App.* 92 Pa. 428.

But the authority of an attorney to confess a judgment, where there is nothing on the record to show that it is by virtue of a warrant of attorney need not be in writing. *Limberty v. Jones*, 11 Cent. Rep. 672, 118 Pa. 539.

A warrant of attorney "to enter" judgment is sufficient to authorize a confession. *Mason v. Smith*, 8 Ind. 73.

It is not within the clause of the Constitution of the United States requiring full faith and credit to be given in each State to the judicial proceedings of another State, because it is not in any sense a judicial proceeding within the meaning of the Constitution or the Act of Congress of 1790.

Thurberv. Blackburne, 1 N. H. 242; *Doughty v. Doughty*, 28 N. J. Eq. 585.

The power of attorney, if not void for indefiniteness, is of an attorney in fact, and therefore special and limited, and must be strictly pursued.

Baldwin v. Freydenhall, 10 Ill. App. 106.

The law plainly does not authorize entry of judgment for an amount not appearing to be due.

The plain and reasonable sense of the word "due" is payable immediately.

Allen v. Patterson, 7 N. Y. 476.

No practice ever existed at common law, before the enactment of this Statute, of entering judgment upon a note or other obligation before it was by its terms payable.

3 Chitty, Gen. Pr. 669; *Allen v. Smillie*, 1 Abb. Pr. 354.

That Statute did not intend to authorize the prothonotary to enter judgment in a case where in no judgment could have previously been entered by "the agency of an attorney," and by "declaration filed." No declaration could have been founded upon the promissory note in the present case before it was due and payable, according to its terms.

Nicholl v. Bromley, 2 Brod. & B. 464.

From the statements of judges in the Penn-

sylvania cases, it appears that prothonotaries are generally men ignorant of law, some of them totally uneducated; and that no uniform routine prevails among them, but each one does what seems best in his own eyes; also that a summary mode of rectifying their mistakes exists by *ex parte* application to a judge at chambers.

Lewis v. Smith, 2 Serg. & R. 142; *Holden v. Bull*, 1 Penn. & W. 460.

It would be absurd to predicate a rule of law upon the doings of such men, contrary to the plain meaning of the statute under which they profess to act, or to hold that the courts of our State are required to give to such loose proceedings the character of a judgment.

Messrs. Edward Lyman Short, Samuel Blythe Rogers, and John C. Thomson, for respondent:

The defendant, being domiciled in Pennsylvania at the time the judgment was entered there, was bound personally by the judgment, provided it was rendered in accordance with the laws of that State.

See *Trebilcock v. McAlpine*, 46 Hun. 469; *Huntley v. Baker*, 38 Hun. 578; *Lafayette Ins. Co. v. French*, 59 U. S. 18 How. 404, 15 L. ed. 451; *Gibbs v. Queen Ins. Co.* 63 N. Y. 114; *Hunt v. Hunt*, 72 N. Y. 238; 1 Wharton, Ev. § 808; *Elsasser v. Haines*, 52 N. J. L. 17; *Douglas v. Forrest*, 4 Bing. 686; *Beguet v. MacCarthy*, 2 Barn. & Ad. 951; *Bank of Australasia v. Nias*, 6 Q. B. 717; *Bank of Australasia v. Harding*, 9 C. B. 661; *Vallee v. Dumergue*, 4 Exch. 290; *Meeus v. Thellusson*, 8 Exch. 638; *Copin v. Adamson*, L. R. 9 Exch. 345;

Strict construction.

A warrant of attorney to confess judgment should be strictly construed. *Spencer v. Emerine*, 46 Ohio St. 483.

The warrant must be strictly pursued. *Henshall v. Matthew*, 1 Dowl. P. C. 217; *Grabbs v. Blum*, 62 Tex. 423.

The rule that the power to confess a judgment must be clearly given and strictly pursued must not be applied to defeat the obvious intentions of the party granting the power. *Keith v. Kellogg*, 97 Ill. 147; *Holmes v. Parker*, 125 Ill. 478; *Holmes v. Bemis*, 14 West. Rep. 383, 124 Ill. 453.

Blanks and omissions.

Blanks in a warrant to confess a judgment will not affect its validity if it is clear and explicit as to the intention. *Links v. Mayer*, 23 Ill. App. 489.

Blanks for "I," "my" and "me" in a power of attorney to confess judgment do not make it void. *Sweeney v. Kitchen*, 80 Pa. 160.

Where the name of the party against whom judgment is authorized is left blank in a note signed by several persons authorizing an attorney to confess judgment, judgment cannot be entered against any of them; the remedy being harsh and stringent no presumption will be indulged in to add the contract. *Morris v. Bank of Commerce*, 67 Tex. 608.

The omission of the name of one debtor from the power of attorney which he executes in common with another is not a ground for setting aside the judgment entered on the warrant against both of them. *Wood v. Ellis*, 10 Mo. 382.

Who authorized to make the confession, and where.

A warrant of attorney in a lease may be to "any attorney" generally. *Poppers v. Meager*, 33 Ill. App. 19; *Mikeška v. Blum*, 63 Tex. 44.

A warrant to a certain person or any other attor-

ney will authorize a confession by him and another attorney. *Patton v. Stewart*, 19 Ind. 233.

The prothonotary may be authorized by a written order to enter a judgment by confession. *McCalmant v. Peters*, 13 Serg. & R. 190; *Cook v. Gilbert*, 8 Serg. & R. 697.

But not where the power in the warrant is given only to the creditor, his executor or administrator. *Rabe v. Heilip*, 4 Pa. 139.

A bond authorizing "any attorney of any court of record in the State of New York or any other State to confess judgment" does not authorize judgment by a prothonotary or clerk under a special law of a State in which the debtor does not reside, but the authority must be strictly pursued. *Grover & B. S. Mach. Co. v. Badcliffe*, 6 Cent. Rep. 679, 66 Md. 511.

A warrant by two residents of Pennsylvania and one of New Jersey to a certain person, "attorney of the court of common pleas at Philadelphia, etc., or of any court there or elsewhere, or to any prothonotary of any of the said courts," does not authorize a confession of judgment in New York. *Manufacturers & M. Bank of Phila. v. St. John*, 3 Hill, 497.

Insanity or death of party.

The insanity of the debtor will not revoke the power of attorney to confess judgment. *Spencer v. Reynolds*, 9 Pa. Co. Ct. 249.

Judgment cannot be signed on such a warrant after the death of the defendant. *Cowie v. Allaway*, 8 T. R. 267; *Heath v. Brindley*, 4 Nev. & M. 235.

Nor after the death of the plaintiff. *Wild v. Sands*, 2 Strange, 718. But see *infra*.

A warrant to two or more persons may be executed by the survivors after the death of one. *Fendall v. May*, 2 Maule & S. 78; *Todd v. Dodd*, 1 Wils. 312; *Futcher v. Smith*, 2 W. Bl. 1301; *Raw v. Alderson*, 1 Moore, 145; *Harper v. Jackson*, 1 Harr. & W.

St. Clair v. Cox, 106 U. S. 850, 27 L. ed. 222; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Cassidy v. Leetch*, 58 How. Pr. 108; *Shepard v. Wright*, 118 N. Y. 582.

The judgment sued on is, under the laws of Pennsylvania, in every respect a valid, binding, personal judgment.

Braddee v. Brownfield, 4 Watts, 474; *St. Bartholomew's Church v. Wood*, 61 Pa. 100; *Colein v. Blymyer*, 121 Pa. 582; *Montague v. McDowell*, 99 Pa. 265; *Hopkins v. West*, 88 Pa. 109; *Rutherford v. Boyer*, 84 Pa. 847; *Hageman v. Salisbury*, 74 Pa. 280.

The record here proved is sufficient to show the rendition of a judgment.

Lewis v. Smith, 2 Serg. & R. 142, 155; *Cromwell v. Bank of Pittsburgh*, 2 Wall. Jr. 569, 581; *Com. v. Conard*, 1 Rawle, 249; *Helote v. Rapp*, 7 Serg. & R. 306.

Such words as "wherefore judgment," taken in connection with other statements, are quite sufficient.

Freem. Judgm. §§ 47, 50; *Cromwell v. Bank of Pittsburgh*, *supra*; *Fish v. Emerson*, 44 N. Y. 878; *Church v. Crossman*, 41 Iowa, 373; *Reg. v. Yeoveley*, 8 Ad. & El. 806, 818; *Leathers v. Cooley*, 49 Me. 387, 348; *Washington, A. & G. Steam Packet Co. v. Sickles*, 65 U. S. 24 How. 383, 340, 16 L. ed. 650.

The record here proved is not a mere memorandum of the clerk, but the only judgment in the case.

Moreover, the prothonotary certifies that this record is "a copy of the judgment." These duly certified recitals are presumptive evidence of the truth of the facts certified to.

214; *Johnson v. Jenkins*, 1 Dowl. P. C. 397; *Build v. Wightman*, 1 Dowl. P. C. 545; *Hind v. Kingston*, 6 Dowl. P. C. 525.

Entry by executors or administrators.

A warrant to a certain person named will not authorize his executors to enter judgment, although it recites that it is to secure payment to him "his heirs, executors, administrators and assigns." *Henshall v. Matthews*, 1 Dowl. P. C. 217.

Nor although the defeasance recites that the warrant authorizes "his executors and administrators" to enter up judgment. *Manville v. Manville*, 1 Dowl. P. C. 544; *Foster v. Clagget*, 6 Dowl. P. C. 524.

A warrant to the creditor alone, although releasing error to him, "his executors and administrators," will not authorize them to enter judgment after his death. *Short v. Coglein*, 1 Anstr. 225.

Against whom judgment may be entered.

A clause in a promissory note authorizing judgment "against me" will authorize it against the maker only and not against indorsers. *Williams v. Merchants Nat. Bank of Kansas City*, 67 Tex. 606.

Judgment may be confessed against both lessees on a provision in a lease that "the party of the second part" authorizes any attorney to enter "their" appearance and confess judgment. *Frank v. Thomas*, 35 Ill. App. 547.

In whose favor.

An indorsee may enter judgment by confession on a note containing a power of attorney in favor of the "holder." *Richards v. Barlow*, 1 New Eng. Rep. 577, 140 Mass. 218.

A transferee without indorsement may enter judgment on a warrant of attorney in a sealed note giving authority to confess judgment in favor of the "holder." *Clements v. Hull*, 36 Ohio St. 141.

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Hatcher v. Rochdaleau, 18 N. Y. 86, 94; *Smith v. Tiffany*, 5 Thomp. & C. 552; *Whitaker v. Bramson*, 2 Paine, 209, 232.

There is nothing in the point that the judgment was entered before the note was due.

It appears that it is customary and according to law to enter such a judgment at once, for the sake of the lien given, though it cannot be enforced by execution, etc., until the note becomes due.

Com. v. Conard, 1 Rawle, 249; *Montelius v. Montelius*, 1 Brightly, 79; *Helote v. Rapp*, 7 Serg. & R. 305; *Cooper v. Shaver*, 101 Pa. 547; *Scudder v. Coryell*, 10 N. J. L. 403; *Sand Blast F. S. Co. v. Parsons*, 54 Conn. 813.

Ruger, Ch. J., delivered the opinion of the court:

This was an action upon a judgment, and the question involved is whether the record in evidence constituted a valid judgment, in another State, by confession. In the case of such a judgment it is, of course, unnecessary that any process should be issued or served, declaration filed, or personal appearance entered by the defendant; as these proceedings are totally inconsistent with the nature of a judgment by confession. The appearance by an attorney, under a written power from the party, authorizing his consent to a judgment, is the legal equivalent of the process and proceedings usually taken in an action *in personam*. In all such cases it is simply a question as to what the principal has authorized to be done in his name, and does not involve any of the

But not where the power is in favor of the "legal holder." *Cushman v. Welsh*, 19 Ohio St. 536.

Nor on a mere power to confess judgment on a note payable to bearer without specifying in whose favor the judgment may be confessed. *Spencer v. Emerine*, 46 Ohio St. 483.

Indorsing a judgment note to a third person merely that judgment may be entered in his name gives him no standing in a court of equity to obtain any affirmative relief based on such judgment. *Chisholm v. McDonald*, 39 Ill. App. 178.

A power of attorney authorizing judgment in favor of "said-[payee] & Bro." while the note is payable to one person only will authorize judgment in his favor and the words "& Bro." may be rejected as surplusage. *Holmes v. Bemis*, 14 West. Rep. 383, 124 Ill. 453.

A lease by an agent "for Patterson Mills" giving authority to confess judgment will not authorize a confession in favor of the executors of "Robert E. Patterson, deceased, trading as R. Patterson & Co." *Patterson v. Pyle*, Pa. Feb. 23, 1889.

When entry of judgment may be made.

A power of attorney to appear before any court of record and confess judgment may be exercised before a clerk of the court in vacation. *Ketch v. Kellogg*, 97 Ill. 147.

Such judgments cannot be entered by the prothonotary, before the warrants reach his office. *Chambers v. Denie*, 2 Pa. 421.

Judgment on a note not due may be entered on a warrant authorizing confession at any time after date. *Sherman v. Baddely*, 11 Ill. 622; *Adam v. Arnold*, 86 Ill. 185; *McDonald v. Chisholm*, 131 Ill. 273; *Aldritt v. First Nat. Bank of Morrison*, 22 Ill. App. 24, 192.

Or on a note payable on a future day certain authorizing confession "at any time hereafter."

questions arising in an action *in invitum* against resident or nonresident defendants. The judgment sued upon purported to have been rendered by the Court of Common Pleas of the State of Pennsylvania on the 14th day of January, 1878, in favor of the plaintiff, Lewis M. Teel, and against the defendant, Abraham Yost, for \$2,268, *d. s. h.*, or as upon debt without process. It was entered upon an instrument, filed in the records of the court, reading as follows:

"South Bethlehem, January 12, 1878.

"\$2,268.

"One year after date I promise to pay Lewis M. Yost twenty-two hundred and sixty-eight dollars, without defalcation, for value received. And I do hereby authorize any attorney of any court of record in Pennsylvania or elsewhere to confess judgment therefor, and release of errors, and I do hereby waive all stay of execution from and after the maturity of the above note. Witness my hand and seal the day and date above written, with ten per cent allowed for collection fees, with interest from date. "Abraham Yost. [L. S.]

"Witness present: Geo. Ziegenfuss."

This instrument is usually called a "judgment note,"—an obligation quite common in the State of Pennsylvania. The parties to the note were both residents of that State, and had been so for a long time previous to and after the rendition of the judgment, and the court of common pleas was a court of general jurisdiction in that State, of which the prothonotary was clerk, and had charge of its records, and authority to enter judgments by confession.

If the court in Pennsylvania had jurisdiction of the person of the defendant and the subject matter of the action, whatever course it might afterwards have pursued in determining the rights of the parties, they cannot be heard now to re-litigate the questions considered in that action. As to such matter, upon the principle of *res adjudicata*, the judgment is binding and conclusive upon the parties. If this was a valid judgment under the laws of the State where it was rendered, it must, under the Constitution of the United States and the laws of Congress, be accorded the same force and effect in this State that it had in the State where rendered. Section 1, art. 4, Const. U. S.; Rev. Stat. U. S. § 905.

The rule laid down in *Shumway v. Stillman*, 6 Wend. 453, was "that the judgment of a court of general jurisdiction, in any State in the Union, is equally conclusive upon the parties in all the other States as in the State in which it was rendered. This, however, is subject to two qualifications: *first*, if it appears by the record that the defendant was not served with process, and did not appear in person or by attorney, such judgment is void; and, *second*, if it appears by the record that the defendant appeared by attorney, the defendant may disprove the authority of such attorney to appear for him." This case has been quite uniformly cited and approved as a leading case in subsequent cases in this State. Under the authority of this rule, we do not see how the defendant could have been seriously prejudiced by the want of notice of the proceedings leading to the judgment, as it was competent for him

Richards v. Barlow, 1 New Eng. Rep. 577, 140 Mass. 218.

A warrant to confess a judgment at any time "after the date" of a note which is on demand will not authorize judgment on the same day. *Waterman v. Jones*, 28 Ill. 54; *White v. Jones*, 38 Ill. 159.

But it is otherwise where judgment is authorized "at any time hereafter." *Thomas v. Mueller*, 106 Ill. 36.

Power to enter judgment on notes for such sum "as may appear to be unpaid" will not authorize a judgment until the notes are due. *Sloane v. Anderson*, 37 Wis. 123; *Reid v. Southworth*, 71 Wis. 238.

Power to enter judgment on such warrants before the maturity of the note must be given in clear and precise language. *Reid v. Southworth*, *supra*.

On entry of appearance one day earlier than is authorized by the power of attorney the judgment will be void for lack of jurisdiction. *White v. Jones*, *supra*.

Contingencies; unadjusted equities or claims.

A warrant to confess judgment for "any rent which may be due by the terms of this lease" is void under a statute authorizing confession for a debt justly due if the amount of the rent under the lease is contingent. *Little v. Dyer* (Ill.) June 15, 1891.

The equities must first be adjusted before judgment can be entered on an instrument making the liability depend on contingencies and equities between the parties. *Dilley v. Van Wie*, 6 Wis. 209.

Unless the amount due can be ascertained from the face of the instrument, the prothonotary cannot enter judgment on it under the Pennsylvania Act of 1863. *Conway v. Halstead*, 73 Pa. 364.

But he can enter judgment on a contract for payment in annual installments, as he can ascertain *prima facie* the amount from the face of the instru-

ment itself and the indorsements thereon. *Whitney v. Hopkins*, 135 Pa. 246.

For what amount; variance; misdescription.

Entry of judgment for the amount of a note, where the complaint claims much larger damages, and the plea of confession admits that the larger amount is due, is not valid. *Tucker v. Gill*, 61 Ill. 236.

Judgment can be entered only for the sum actually due, although the warrant of attorney authorizes it for the "sum appearing to be due." *Dilley v. Van Wie*, 6 Wis. 209; *Sloane v. Anderson*, 37 Wis. 123.

A judgment is not entirely void because entered on a warrant of attorney for an excessive amount. *Davenport v. Wright*, 61 Pa. 202.

The debtor only can complain that the amount of a judgment entered on a warrant of attorney is excessive. It cannot be attacked for that reason by a creditor. *Adam v. Arnold*, 86 Ill. 185.

A judgment confessed under a warrant of attorney in a tax collector's bond must be for the whole penal sum, and one for less will be stricken off with leave to enter one for the whole amount. *Com. v. Evans*, 8 Pa. Co. Ct. 665.

An attorney's fee may be included in a judgment entered by warrant of attorney where the fee is fixed by the warrant, but the attorney has no authority to fix it. *Campbell v. Goddard*, 3 West. Rep. 129, 117 Ill. 251.

Power to confess judgment on a note of a certain date will not sustain a judgment on a note of a different date, although it is claimed that there was a mistake in writing the date. *Chase v. Dana*, 44 Ill. 302.

A mere misdescription of the "foregoing note," which is on the same paper, as to the time when

to show in defense of this action that the power of attorney upon which the judgment proceeded was a forgery, and conferred no authority upon anyone to appear for him and confess judgment thereon; but no such proof was given or offered upon the trial. The presumption, therefore, is that the note was the genuine obligation of the defendant, and gave actual authority to the prothonotary, or any other attorney, to consent to the judgment authorized by it.

Several objections are raised to the recovery in this action, some of them going to the form of the judgment, and others assailing the jurisdiction of the court to render it; but we are of the opinion that none of them are well founded. It was found by the trial court, as a question of fact, that said "judgment was duly rendered and entered according to the laws of Pennsylvania. It is, and was by the laws of Pennsylvania, a valid, binding adjudication, *in personam*, against the defendant herein, and entitled, by the laws of said State, to have the same faith and credit given to it as if it had been entered upon a verdict after a trial in which the defendant had appeared." A finding of law to the same effect was made by the court, and it is upon exceptions to these two findings that

the questions in the case arise. These findings were amply supported by the evidence, and unless, therefore, it appears that some error of law was committed by the court on the trial, the judgment must be sustained. The evidence leaves no room for doubt but that this was considered in form and substance a valid judgment, *in personam*, in the State where it was rendered, and constituted a "judgment," within the meaning of the Acts of Congress requiring faith and credit to be given to it in other States. The reasons for this conclusion are so well stated in the opinions of the supreme court of that State that we shall content ourselves with reference to two reported cases only.

It was said in the case of *Helvet v. Rapp*, 7 Serg. & R. 306: "The evident and sole intention of the Legislature in conferring the power of entering a judgment on the judgment bond without the intervention of an attorney, was to exempt the obligor from the payment of costs to an attorney. This Act was passed on the 24th of February, 1806. It provided that the prothonotary of any court of record, on the application of the original holder, or his assignee, of a bond, note, or other instrument, on which judgment is confessed, or containing a warrant of attorney to confess a judgment,

interest runs, is immaterial. *Osgood v. Blackmore*, 59 Ill. 261.

A misdescription in the declaration on a sealed note, payable at a particular place, describing it as an unsealed note payable generally, will not make the judgment void. *Adam v. Arnold*, 86 Ill. 185.

Proof necessary.

After a year and a day a judgment cannot be entered on a warrant of attorney without leave of the court, and proof that the maker is still alive and an indebtedness still due. *Hinde v. Hopkins*, 28 Ill. 344; *Lushington v. Waller*, 1 H. Bl. 94; *Anonymous*, 6 Mod. 212; *Manufacturers & M. Bank of Phila. v. St. John*, 5 Hill, 497.

But failure of such proof is not alone sufficient to make the judgment void. *Kling v. Brainard*, 36 Ill. 79; *Stuhl v. Shipp*, 44 Ill. 133.

The record must show proof of the execution of the warrant of attorney. *Gambia v. How*, 8 Blackf. 133.

Also the nature of the liability. *1b4d*.

Failure to file proof of the execution of a power of attorney on the entry by a clerk of a court of record, in vacation, of a judgment by confession renders the judgment void for lack of jurisdiction. *Gardner v. Bunn*, 7 L. R. A. 723, 132 Ill. 403; *Durham v. Brown*, 24 Ill. 94; *Iglehart v. Chicago Mut. & F. Ins. Co.* 35 Ill. 514.

The filing of an affidavit is a condition precedent to the entry of judgment on an instrument authorizing the prothonotary to enter judgment for any installment or installments due, "as fixed by the affidavit" of the party. *Koons v. Hendricks*, 6 Kulp, 165.

The written authority of an attorney must be on file, under the Texas statute, at the time of entering judgment thereunder, and the lack is not cured by subsequently putting it on file. *Grubbs v. Blum*, 43 Tex. 423.

This rule applies although the note containing the warrant is lost. *Strasburger v. Heidenheimer*, 43 Tex. 5.

Failure to file with the confession proof of execution of the power of attorney under which it is made is ground for setting aside the judgment and quashing an execution issued thereon. *Stein v. Good*, 1 West. Rep. 604, 115 Ill. 93.

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A judgment entered on a warrant without the required affidavit may be allowed to stand by a *nunc pro tunc* order upon filing it, but an execution previously issued should be set aside if necessary to protect intervening liens. *Woods v. Woods*, 126 Pa. 396.

The affidavit, if made by anyone but the plaintiff, must show the knowledge of the affiant. *McCabe v. Sumner*, 40 Wis. 334; *Sloane v. Anderson*, 57 Wis. 123.

It must also show the amount due. *Sloane v. Anderson*, *supra*.

An affidavit that the affiant is acquainted with the hand-writing of the debtor, and that the signature to the warrant of attorney is genuine, is a sufficient proof of its execution. *Hall v. Jones*, 32 Ill. 38.

The clerk cannot hear evidence and determine the proof of the execution of the warrant. *Rourdy v. Hunt*, 24 Ill. 598.

On a confession of judgment under a warrant in open court, it will be presumed that the authority to confess it was judicially passed upon. *Hall v. Jones*, *supra*; *Iglehart v. Chicago Mut. & F. Ins. Co.* 35 Ill. 514; *Rourdy v. Hunt*, 24 Ill. 598.

So as to the proof of a notice required by statute in order to render the note due. *Bush v. Hanson*, 70 Ill. 480; *Osgood v. Blackmore*, 59 Ill. 261.

To enter judgment on a premium note, under Pa. Act July 23, 1842, a full statement and affidavit of premiums due and account with the assured must be filed. *Barker v. Beeber*, 3 Cent. Rep. 510, 119 Pa. 216.

Consolidation.

The court may consolidate several powers of attorney and enter one judgment thereon. *Iglehart v. Chicago Mut. & F. Ins. Co.* 35 Ill. 514.

Setting aside; correcting.

The court has a discretion as to setting aside judgments entered on warrants of attorney. *Kneeder's App.* 68 Pa. 428; *Hall v. Jones*, 35 Ill. 36.

A new judgment may be entered where the first one is invalid for failure to comply with the terms of the instrument authorizing its entry. *Koons v. Hendricks*, 6 Kulp, 165.

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shall enter judgment against the person or persons who executed the same, for the amount which, from the face of the instrument, appears to be due, without the agency of any attorney, or declaration filed, particularly entering on his docket the date and time of the writing, which shall have the same force and effect as if a declaration had been filed, and judgment had been confessed by an attorney, or given in open court in term time. . . . There being no literal form directed, and no precedent to guide the prothonotary in the exercise of this new duty, each has adopted his own mode. They are as various as their faces, and many of them scarcely present a feature to inform a purchaser or designate a judgment. But here is a substantial entry of a judgment bond, containing all that is necessary to give information. It is entered on the docket in the form of an action, as a judgment bond; the names of the parties; the amount due; the date and time of the writing. It states the entry of a judgment bond, and seal of the defendant. The judgment bond is filed of record, entered the 17th of May, 1815. What is entered? A judgment on the bond filed. No man could be deceived by this mode of entry; for, however inartificial it may be, however defective in the technical words of a judgment, none who called for information would be led into error. The docket entry gave full information. It might have been more formal, but still it is the entry of a judgment entered by the prothonotary, who was authorized to make the entry."

The head-note in the case of *Com. v. Conard*, 1 Rawle, 249, reads that "a prothonotary complies substantially with the directions of the Act of Assembly of the 24th of February, 1806, when, in entering judgment on a bond with warrant of attorney, upon the application of the party he enters on his docket the names of the obligor and obligee in the form of an action as parties, the date of the bond and warrant of attorney, the penal sum, the real debt, the time of entering the judgment, and the date of the judgment on the margin of the record." These clear and explicit announcements by the highest courts of the State, of the force and effect given to such judgments in that State, are entitled to the highest respect, and cannot, without ignoring the requirements of comity and propriety prevailing among sister States, be disregarded by the courts of other States. It should in any event be for the gravest reasons alone, and those demanded by the clearest rules of public policy and justice, that the courts of one State should deliberately deny to the decisions of the courts of another State the authority which they possess in the State where rendered. So far from the questions in this case being of that character, we are of the opinion that judgments by confession, in all material respects similar to the one under consideration, are not only valid judgments at common law, but have been authorized by the statute law of most of the States of the Union, and among others, by our own.

The principal claim made by the defendant on the argument of the case here was that the note did not authorize a confession of judgment upon it before it was due; but it was also claimed that the record produced did not constitute a judgment, inasmuch as it did not ap-

pear thereby that process was issued and served on the defendant, or declaration filed, or personal appearance made by him, or proof taken of the cause of action by the court, and therefore that it had no jurisdiction to render a judgment. We have already stated that in judgments by confession neither process, declaration, nor personal appearance are anywhere required in order to authorize the rendition of a valid personal judgment by a competent court. The appearance of the agent appointed by the party in his warrant of attorney upon the entry of the judgment constitutes, to every intent and purpose, an appearance by the party, and gives the court jurisdiction to render a judgment to the effect authorized against his principal.

We are also of the opinion that the entry of judgment, before the maturity of the note, was sanctioned, not only by the law of Pennsylvania, but by that of every other country where judgments by confession are permitted. The evidence in the case showed that it was the common practice in Pennsylvania to enter judgment on such notes at any time after their date, without respect to the time when they became due; but the prothonotary was not authorized to issue execution for their collection until, by the terms of the note, it became due. The cases of *Com. v. Conard*, 1 Rawle, 249; *Montelius v. Montelius*, 1 Brightly, 79, and *Helvete v. Rapp*, 7 Serg. & R. 305,—are examples of judgment on such notes; and in *Cooper v. Shaver*, 101 Pa. 547, an application to set aside the entry of judgment on a collateral obligation, guaranteeing the collection of a judgment with warrant of attorney, was denied, although no proof was given that an effort had been made by the plaintiff or that he was unable to collect the original judgment. In New Jersey where the practice of giving bonds and notes, with warrant of attorney, is similar to that prevailing in Pennsylvania, the court held that it was not error to enter a judgment by confession upon a note before it became payable.

In this case there is no restriction upon the authority of the attorney to confess judgment, and the waiver of a stay of execution after the maturity of the note constitutes an implied admission on the part of the defendant that judgment could be entered previous to that time. Under the former practice of entering judgments upon a warrant of attorney, it was uniformly held, in England and in this country, that where the warrant is given to secure the payment of money, it is not necessary that the plaintiff should delay the signification of judgment until default be made in the payment, unless there is some restriction as to the time of entry in the warrant. See *Graham*, Pr. 778, and cases cited. We are therefore of the opinion that the entry of the judgment before the maturity of the note was in accordance with the settled practice, not only in Pennsylvania, but also in other jurisdictions where judgments by confession have been authorized.

There are also some authorities in this State, holding, substantially, that judgments, similar to the one in question, when rendered under the authority of the law of the State in which they are entered, may be enforced by action in this State. That doctrine was impliedly held

in *Trebilcock v. McAlpine*, 46 Hun, 471, by the General Term in the Third Department, where a judgment entered upon a Pennsylvania note, similar to that under consideration, was held to be a valid judgment *in personam* in this State under the laws of Congress, provided it was authorized by the law of the State where it was rendered. The judgment in that case was reversed, because it was not shown that the law in Pennsylvania authorized the entry of such a judgment.

In *Huntley v. Baker*, 33 Hun, 578, it was held by the General Term of the Fifth Department that, by reason of the relations between the State and its citizens, which affords protection to him and his property and imposes duties on him as such, he may be charged by judgment *in personam* binding on him everywhere as the result of legal proceedings instituted and carried on in conformity to the statute of the State furnishing a method of service which is not personal, and which, in fact, may not become actual notice to him, even though he is absent from the State where the judgment was entered. In that case the law authorized the service of a summons at the usual place of abode of the defendant, in case of his absence from the State, and the service was made by leaving it there in the presence of his wife.

In *Gibbs v. Queen Ins. Co.*, 63 N. Y. 114, it was held that, where a foreign fire insurance company has designated an agent, in compliance with the State Insurance Laws, making the appointment of an attorney or agent in this State upon whom process in suits against the company may be served a prerequisite to its doing business in the State, it thereby submits itself to the jurisdiction of the state courts having authority to act; and by service of a summons on an agent so designated, the court acquires jurisdiction, and may render a judgment valid and capable of being enforced upon any property within the jurisdiction. The court in that case refers to the case of *Douglas v. Forrest*, 4 Bing. 686, where the decrees sued upon were pronounced in Scotland against a native thereof, who went out of the jurisdiction before the commencement of the action, and never returned, and had no notice of the proceeding. The decrees ordered him to pay certain sums of money. He had been summoned by posting, according to the law of Scotland. The court of common pleas of England held these decrees to be consistent with the principles of justice. The ruling, however, was confined to a case "where the party owed allegiance to the sovereignty which gave the judgment, from being born under it, and from his property being protected by it." The court also cited *Becquet v. McCarthy*, 2 Barn. & Ad. 951, where it was held that a "judgment *in personam* obtained in a British colony against an absent party without notice to him, but by the service, according to local law, upon the king's attorney-general for the colony, was not so contrary to natural justice as to be "void;" and in *Hobhouse v. Courtney*, 35 Eng. Ch. 119, it was held that where a nonresident has created an attorney in fact, to deal with the particular matter afterwards in suit, a service on such attorney will be good service upon the principal. We may also refer to the case of *Vallee v. Dumerque*, 4 Exch. 290, where the defendant, a

resident of England, was a shareholder in a French corporation and was by the law of France required to elect a domicile in France where the directors of the company might notify him of all proceedings of the company or its shareholders. By the law of France, all legal proceedings affecting any party having his real domicile out of that kingdom, left for him at such elected domicile, were as valid as if left at his real domicile in France. A judgment recovered by default upon process served at such elected domicile was held to be a valid judgment *in personam*, *Baron Alderson*, saying: "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have had actual notice of them."

To come, however, more particularly to judgments by confession, I am of the opinion that the one under consideration conforms to all of the requirements of the law in the various countries where such judgments have been authorized. It is stated in *Chitty's General Practice* (vol. 2, p. 333, 1st ed.), in speaking of the jurisdiction of the court of king's bench, that "this court (as well as common pleas and exchequers) has an exclusive summary jurisdiction (as well of an equitable as of a legal nature) over a warrant of attorney authorizing a judgment in the particular court, and all proceedings thereon to entertain a motion to set the same aside if it authorize a judgment in that particular court; and it has been usual to frame that security under seal, enabling certain attorneys, therein named, or any other attorney of a particular court, to appear in that court as attorney for the party, and to receive a declaration in an action, usually of debt, for a named sum at the suit of the creditor, and to confess such action, or suffer judgment by *nil dicit* or otherwise, to be entered up against the party, and also authorizing such attorneys, respectively, to release any errors in the proceeding.

How or when this peculiar security for a debt, authorizing a creditor, as it were, *per saltum*, to sign a judgment and issue an execution without even issuing a writ, was first invented, does not appear; but it has now become one of the most usual collateral securities on loans of money." It is further said, with reference to the form of the warrant of attorney, that "it need not in strictness be under seal, though usually so, in order to authorize the release of errors."

But it will, perhaps, be more satisfactory to show that a practice similar to that prevailing in Pennsylvania obtained in our own State from the earliest times to the adoption of the Code in 1848. The earliest allusion to this practice occurs in chapter 15 of the Colonial Laws of 1774, under the title "An Act for the Better Discovery of Judgments in the Courts of Record in this Colony," wherein it is provided that the clerks of courts of record within six days after every term of court, shall enter in an alphabetical docket the name of the party against whom the judgment is entered, with a particular "of all judgments by confession, *non sum informatus* or *nil dicit*, etc. By chapter 104 of the Laws of 1801, it was provided "that no judgment shall be entered upon

any bond or contract in writing, hereafter to be made, upon the confession of any attorney, by virtue of any authority whatever contained in the same instrument . . . with such bond or contract, and no judgment shall be entered upon any confession taken out of court before any judge," etc. By section 8, chap. 259, Laws 1818, it was provided that a confession of judgment by bond and warrant of attorney should contain a particular statement and specification of the nature and consideration of the debt or demand, and in default thereof the judgment should be adjudged fraudulent as to other bona fide creditors. Certain other provisions, in relation to warrants of attorney, not material to be particularly noticed, are found in chapter 48 of the Laws of 1813, and chapter 50 of the same year, and other years previous to 1828. By section 10, art. 1, title 4, chap. 6, Rev. Stat., it was provided "that judgments may be entered in the supreme court, or in any court of common pleas, in vacation or in term, upon a plea of confession signed by an attorney of such court, although there be no writ then pending between the parties, if the following provisions be complied with, and not otherwise: *first*, the authority of confessing such judgment shall be in some proper instrument, distinct from that containing the bond, contract, or other evidence of the demand for which such judgment is confessed; *second*, such authority shall be produced to the officer signing such judgment, and shall be filed with the clerk of the court in which the judgment shall be entered, at the time of filing and entering such judgment." It was also provided by section 4, title 3, of the same chapter, that in cases of an action upon a written instrument for the payment of money, where the defendant had suffered default, or upon confession, that a reference might be had to the clerk to assess damages, and in assessing such damages the production to the clerk of the instrument set forth in the declaration shall be sufficient evidence of the same, without any other proof.

The practice under the statutes is described by Graham, in his work on Practice, as follows: "A warrant of attorney is a written authority to the attorney to whom it is directed, or, as is more generally the case, to any attorney of the supreme court, or any other court of record, to appear for the party executing it, and receive a declaration for him in an action at the suit of a person therein mentioned, and thereupon to confess the same, or to suffer judgment to pass by default; it also, in general, contains a release of errors. It must be subscribed by the defendant, and must be in some proper instrument (usually by deed in the presence of a subscribing witness, although this is not necessary) distinct from that containing the bond, contract, or other evidence of the demand for which the judgment is confessed; and it must be produced to the officer signing the judgment, and filed with the clerk of the court in which the judgment is entered, at the time of the filing and docketing of such judgment. . . . Within a year and a day from the date of the warrant of attorney, judgment may be entered up as of course, without the leave of court." Graham, Pr. chap. 4, p. 467 *et seq.* I have been unable to find any rule

or precedent in this country or England requiring a power of attorney to confess judgment to be acknowledged, or even to be attested by a subscribing witness. The Code of Procedure effected a change in the mode of procedure, and reinstated the practice of combining in one instrument the authority for a judgment and the proof of debt, and described the process as judgment by confession. By that Code a party could confess judgment either for money due, or to become due, or to secure a person for contingent liability on behalf of the defendant. To do this the defendant was required only to make a statement in writing, signed and verified by him, naming the amount for which judgment might be entered, and authorizing its entry, and stating, concisely, the facts out of which the liability arose. Upon filing this statement with the clerk of the court, he was required to enter the judgment for the amount confessed, with \$5 costs and disbursements, and the statement and affidavit, with judgment indorsed thereon, became the judgment roll. It is thus apparent that, under the practice now existing in this State, judgments are daily entered in our courts without process, declaration, or appearance, and without the intervention of the court, or even an attorney, and without proof of any authority from the defendant except that inferred from his signature to the statement.

This brief historical statement of the condition of the law on the subject in this State will have failed in its purpose if it does not show that heretofore the filing in court of a warrant of attorney, authorizing the confession of a particular judgment, gave the court jurisdiction, over the person of the party executing it, to adjudicate according to its regular practice upon the subject embraced in the warrant. When the warrant is for the confession of judgment for a specific sum, it is, of course, unnecessary to prove the nature, existence, or amount of the debt upon the assessment of damages, as the express authority of the warrant supplies the place of such proof. And, as it is held in Pennsylvania on a warrant authorizing any attorney to confess judgment, the prothonotary may properly be considered such attorney. There would seem to be no valid reason why this should not be so, as the warrant authorizes the plaintiff to select any attorney he may desire, and the exercise of that authority is, at the most, a mere matter of form. Judgment is entered there, as here, on the request of the plaintiff, by the clerk, without the intervention of the judge in term time or vacation, and, in case the debt is not then due, execution is stayed until it matures. The only material difference existing between the present practice in this State and in Pennsylvania, in relation to judgments by confession, is that here a defendant is required to verify his statement as to the nature and circumstances of the indebtedness. This requirement has no relation, however, to the jurisdiction of the court or the authority of the clerk to enter judgment, as its only purpose has frequently been declared to protect creditors from judgments fraudulently confessed by an insolvent debtor. *Sheldon v. Stryker*, 34 Barb. 121; *Chappel v. Chappel*, 19 N. Y. 219; *Dunham v. Waterman*, 17 N. Y. 9. In the latter

case, *Judge Selden* says: "The object of the Statute being to protect the creditors of the party confessing the judgment against fraud, its violation forms a proper subject of equitable jurisdiction." In the case of *Sheldon v. Stryker*, *supra*, *Judge Emott* says, in view of the principles declared in the cases of *Chappel* and *Dunham*, above cited, that such judgment is not "an absolute nullity if it is valid as to any person. It is valid as to the defendant in the judgment, for he cannot even move to set it aside, and such judgments are always amended as to him." It was therefore held that a judgment entered by confession, although it be not confessed in conformity with the provisions of the Code, is not absolutely void, but

is voidable, at the instance of certain creditors, only. In view of these decisions, it would be idle to contend that a defendant can impeach a judgment entered upon a warrant of attorney signed by him, and in conformity thereto, whether his statement be verified or acknowledged or not. It is not easy to point out any difference in principle between the practice now prevailing in this State and that pursued in Pennsylvania. Given a valid warrant of attorney in either State, the rest is matter of form, to be regulated by the laws of the respective States where the cause of action arises.

The judgment should therefore be affirmed.
All concur, except *Finch, J.*, absent.

CONNECTICUT SUPREME COURT OF ERRORS.

STATE OF CONNECTICUT

v.

Edgar M. GEER, *Appt.*

(.....Conn.....)

1. Woodcock, ruffed grouse, or quail need not have been killed for the purpose of conveying them out of the State in order to make it an offense under Gen. Stat., § 2546, to have such birds in possession with intent to procure their transportation out of the State.

2. A state statute prohibiting game birds to be killed for the purpose of conveying them out of the State is not an unlawful interference with interstate commerce.

(October 26, 1891.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for New London County, convicting him of a violation of the Game Laws. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. R. Wheeler and H. A. Hull* for appellant.

Mr. Solomon Lucas, for the State:

This is not one of that class of cases where the law of the State attempts to prohibit the transportation of articles beyond its limits in which the right of property thereto is absolute in the shipper. The assertion of the appellant that the birds had become an article of commerce is based upon a misapprehension and assumes the point in controversy.

American Exp. Co. v. People, 9 L. R. A.

NOTE.—Game Laws as affecting interstate commerce.

The apparently conflicting decisions of the different States on this subject may be mostly reconciled by considering the difference in the language of the statutes.

A statute making it an offense, under a penalty, to have game that has been killed in possession within a certain period of the year, without reference to the time or place of killing, is not, as to game killed in another State, in violation of the Constitution of the United States as an interference with interstate commerce. *Phelps v. Racey*, 60 N. Y. 10; *State v. Randolph*, 1 Mo. App. 15; *Magner v. People*, 97 Ill. 320; *New York Game Prot. Asso. v. Durham*, 19 Jones & S. 306.

And it makes no difference that the game was lawfully killed and purchased before the close season began, if sold afterwards. *Magner v. People*, and *New York Game Prot. Asso. v. Durham*, *supra*.

So in England it has been held that birds killed in Holland and received by a pouterer in England are within the Act of 39 and 40 Vict., chap. 29, § 2, which prohibits any person during a certain portion of the year from having such birds in his possession that have been recently killed. *Whitehead v. Smithers*, L. R. 2 C. P. Div. 553.

A statute making it unlawful to transport game killed within the limits of the State knowing it to have been sold, or to carry it to any place where it is to be sold, or to any place outside of the State, was held valid in a case where the transportation complained of was between places in the same State without any intimation from the court that it would not also be valid as to transportation to places without the State. The court declared that 13 L. R. A.

the Legislature could permit persons to kill game on such terms and conditions as it might dictate, and that the person killing it had only such property interest in the game as the Legislature may confer. *American Exp. Co. v. People*, 9 L. R. A. 126, 133 Ill. 649.

But an important modification of the above decisions, if, indeed, it can be reconciled with the last one, is made by the decision that the interstate transportation of carcasses of animals which had been killed in violation of the Game Laws of a State after it has begun cannot be interrupted by a seizure thereof for violation of such laws. *Bennett v. American Exp. Co.* (Me.), ante, 33.

In several States the Statutes are construed to be intended merely to protect the game of their own State respectively, and not to prohibit the possession of game killed in other States. Thus the possession or offer for sale of "any of said birds" prohibited by Mass. Stat. 1879, chap. 208, § 1, which is prohibited by a clause following the prohibition of taking or killing woodcock, etc., in the Commonwealth, applies only to birds taken or killed within the State. *Com. v. Hall*, 128 Mass. 410.

The possession of game killed in another State is not an offense under the Michigan Act of 1861, which makes it an offense to have game in possession for the purpose of sale during a certain period of the year, since the purpose of the Act as shown by the title is the protection of game within the State. *People v. O'Neill*, 71 Mich. 325.

So the Pennsylvania Act of June 8, 1873, enacting that "no person shall kill or expose for sale or have in his or her possession," etc., after the same has been killed within certain dates, is construed not to apply to the possession of game killed in another State. *Com. v. Wilkinson*, 120 Pa. 208. B. A. R.

188, 188 Ill. 649; *Magner v. People*, 97 Ill. 520.

Seymour, J., delivered the opinion of the court:

The General Statutes (§ 2530) provide that "every person who shall buy, sell, expose for sale, or have in his possession for any purpose, or who shall hunt, pursue, kill, destroy, or attempt to kill, any woodcock, quail, ruffed grouse, called 'partridge,' or gray squirrel, between the first day of January and the first day of October, the killing or having possession of each bird or squirrel to be deemed a separate offense, . . . shall be fined not more than twenty-five dollars," etc. Section 2546 provides that "no person shall at any time kill any woodcock, ruffed grouse, or quail for the purpose of conveying the same beyond the limits of the State; or shall transport, or have in possession with intent to procure the transportation, beyond said limits, any of such birds killed within this State. The reception by any person within this State of any such bird or birds for shipment to a point without the State shall be prima facie evidence that said bird or birds were killed within the State for the purpose of conveying the same beyond its limits." The defendant is prosecuted for unlawfully receiving and having in his possession, on the 19th day of October, A. D. 1889, with force and arms, and with the unlawful intent to procure the transportation beyond the limits of this State, certain woodcock, ruffed grouse, and quail, killed within this State after the 1st day of October, A. D. 1889, against the peace, and contrary to the form of the Statute. He demurred to the complaint because (1) the allegations contained therein do not constitute any offense in law; (2) because in the complaint it is not alleged that said birds were killed for the purpose of conveying the same beyond the limits of the State.

It will be seen from the section of the Statute above quoted that it is unlawful to kill or have in possession for any purpose, woodcock, quail, or ruffed grouse, between the first days of January and October, and that it is unlawful to kill them at any time for the purpose of conveying them out of the State. Is it also unlawful to have them in possession with intent to procure their transportation beyond the limits of the State, if killed between the 1st day of October and the 1st day of January, regardless of the question whether they were killed for the purpose of conveying them out of the State? In other words, if they were lawfully killed,—i. e., between October 1 and January 1, and without any intention of conveying them out of the State,—can they be lawfully held with the intent to procure their transportation beyond the limits of the State? In 1883 an Act was passed as follows: "Section 1. No person shall at any time kill any woodcock, ruffed grouse, or quail for the purpose of conveying the same beyond the limits of this State. Sec. 2. No person, corporation, or company shall transport or convey beyond the limits of this State any woodcock, ruffed grouse, or quail, killed within

this State, or sell or have in his or their possession any of such birds with the intention to procure the same to be conveyed or transported beyond the limits of this State. Sec. 3. The reception by any person, company, or corporation within the limits of this State of any quail, woodcock, or ruffed grouse for shipment to a point without the State shall be prima facie evidence that the said bird or birds were killed within the State for the purpose of carrying the same beyond the limits of this State. Sec. 4. Any person violating any of the provisions of the preceding sections shall be fined not less than seven nor more than fifty dollars and costs of prosecution." Pub. Acts 1883, chap. 103.

It is evident that under the Act as originally passed the complaint would have been good and sufficient. It is claimed by the defendant that under the Act as revised no offense is committed unless the birds, by him held for transportation, were killed for the purpose of being conveyed beyond the limits of the State. He says that the word "such" in the provision of section 2546 against transporting, or having in possession with intent to procure the transportation, beyond said limits, any of such birds, killed within the State, means woodcock, ruffed grouse, or quail, killed for the purpose of conveying the same beyond the limits of the State. As already suggested, that construction involves a change in the law from the original Act, which expressly forbade any person to have in his possession, with the intention to procure the same to be transported beyond the limits of the State, any woodcock, ruffed grouse, or quail killed within the State. It seems to us evident, also, upon the face of the Statute as revised, that the word "such" was used only to obviate the necessity of repeating the words "woodcock, ruffed grouse, or quail," and that to carry its force and operation further, so as to include the purpose for which they were killed, would not only be unnatural, but dangerous as a precedent for construction, in view of the terms of the old Statute. We cannot believe that careful revisers would have undertaken to change the law without some more definite indication of such purpose. Then, again, when the words "such birds" are used in the very next line of the section, it is evident that they are used to take the place only of the words "woodcock, ruffed grouse, or quail," as if it read: "The reception by any person within the State of any woodcock, ruffed grouse, or quail, for shipment to a point without this State, shall be prima facie evidence that said bird or birds were killed within this State for the purpose of conveying the same beyond its limits;" otherwise we should have the absurd provision that the reception by any person within the State, for shipment to any point without the State, of any woodcock, ruffed grouse, or quail killed for the purpose of conveying the same beyond the limits of the State, shall be prima facie evidence that said birds were killed within the State for the purpose of conveying the same beyond its limits,—that is, the fact that they were killed for transportation shall be prima facie evidence that they were killed

for transportation. The word "such" in both sentences refers to the same antecedent. It is plain enough that the revisers intended not to change, but to condense, the sections of the original Statute, and the language should be construed in the light of such intention. We conclude, therefore, that the complaint is sufficient.

We see nothing in the decision of *Com v. Hall*, 128 Mass. 411, to which the defendant refers us, inconsistent with our conclusion. The object of the Act therein involved was to protect the game in that Commonwealth, and not in another; and a construction confining its force to birds killed therein was to be expected, in the absence of controlling words to the contrary. All the reasoning in that case may certainly be held sound without impugning the reasoning upon which we arrive at our conclusion in this.

But in this view of the matter another question arises. The defendant further demurred to the complaint "(3) because section 2546 of the General Statutes is unconstitutional and void so far as it may be construed to forbid the transporting from the State, or having possession of such birds with intent to procure such transportation, to another State, birds described therein, which birds have been sold to parties in such other State, and have begun to move as an article of interstate commerce; and (4) because it is made to appear in said complaint that the defendant is guilty under said section if such birds were bought by the defendant in the markets of this State as merchandise and commerce, and had begun to move as an article of commerce." In short, the defendant insists that the Statute, as construed by us, is unconstitutional as restricting interstate commerce, and refers to *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 80 L. ed. 694; *The Daniel Ball v. United States*, 77 U. S. 10 Wall. 566, 19 L. ed. 1002; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *State v. Saunders*, 19 Kan. 127; *Territory v. Evans*, (Idaho) 7 L. R. A. 288; *Territory v. Nelson* (Idaho) 28 Pac. Rep. 116; *State v. Indiana & O. G. & Min. Co.* 120 Ind. 575, 6 L. R. A. 579, 2 Inters. Com. Rep. 758; *American Exp. Co. v. People*, 138 Ill. 649, 9 L. R. A. 198.

In *State v. Saunders*, 19 Kan. 127, the court says it seems to be finally settled, among other things, that no State can pass a law which will directly interfere with the free transportation from one State to another, or through a State, of anything which is or may be subject to interstate commerce; that a law which prohibits the catching and killing of prairie chickens may be valid, although it may indirectly prevent the transportation of such chickens from the State to any other State; but a law which allows prairie chickens to be caught and killed, and thereby to become the subject of traffic and commerce, and at the same time directly prohibits their transportation from the State, is unconstitutional and void. Without stopping to consider the construction which was given to the constitutional provision under discussion by the earlier commentators, except to suggest, in the language of *Judge Story* 13 L. R. A.

(2 Story Com. 511), that a very material object of its adoption was the relief of the States, which export and import through other States, from the levy of improper contributions on them by the latter,—an object which was shown to be important by the experience of the States during the confederation period,—we feel constrained to hold the provision of the Statute to be constitutional. It being conceded that the State, under its general police power, may lawfully prohibit the killing of the game birds in question, it may of course control such killing, and the times and purposes thereof. It may lawfully enact that they may be killed and sold and held for sale only for domestic consumption. The State, in the exercise of its power, instead of prohibiting the killing altogether, permits the person killing them to acquire only a qualified right in them, namely, the right to appropriate them to his own use, and the right to sell or transport them for domestic use. The birds in question never became articles of commerce within the meaning of the term contended for by the defendant. They became private property of a qualified character. The law limited the purposes for which they might be killed and become private property. The difference between property of this sort and the ordinary private property of commerce is obvious. The apparent assumption of the Kansas court above referred to, that game which the law allows to be caught and killed thereby necessarily becomes the subject of traffic and commerce, meaning interstate commerce, appears to us unsound. If the proposition were true, then the conclusion that a state law interfering with such commerce would be unconstitutional might pass unquestioned. But we cannot acquiesce in a decision which would deny the power of the State to limit the right to kill, sell, and hold its own game by any provision short of an absolute prohibition, without thereby transforming it into that species of property the transportation of which from the State it is unconstitutional to prohibit.

Christopher SPENCER *et al.*

v.

Charles G. ALLERTON, *App't.*

(.....Conn.)

1. A blank indorsement by a stranger to a note, under Gen. Stat., § 1800, which makes it "import the contract of an ordinary indorsement," renders the indorser liable as such precisely in the order in which he stands upon the note, although he signs before and above the payee.

2. Parol evidence is not admissible to vary the effect of a blank indorsement by a stranger to the instrument where the statute provides that it shall have the effect of an ordinary indorsement.

(April 20, 1891.)

NOTE.—See note on "parol evidence," as to indorsement, with case of *Kingsland v. Koeppel* (Ill.) *ante*, 649.

APPEAL by defendant from a judgment of the Superior Court for New Haven County in favor of plaintiffs in an action brought to enforce defendant's alleged liability as indorser of a promissory note. *Affirmed.*

The facts are stated in the opinion.

Mr. S. W. Kellogg, for appellant:

The record discloses no facts or evidence whatever that can render the defendant liable to the payee of the notes as a guarantor.

If it was intended by the parties to the note other than the defendant, that his indorsement was a guaranty for the security of the plaintiffs only, that intention should have been disclosed to the defendant. "Such an indorsement would be sufficient to put the payee, or person to whom it was offered, on his guard, and require of him, before he relies upon it, to make inquiry."

Riddle v. Stevens, 82 Conn. 387.

In the early decisions in this State, as to the effect of a blank indorsement by a third party, there appears to have been an intention or agreement by such third party that the indorsement was made as surety for the maker, for the security of the note to the payee. When such an intention or agreement appeared, the indorsement in blank of the third party was held to be a guaranty to the payee of the note; and the legal import of such an indorsement was held to be that the note when due should be collectible by the use of due diligence.

Beckwith v. Angell, 6 Conn. 815; *Perkins v. Catlin*, 11 Conn. 215; *Laflin v. Pomeroy*, 11 Conn. 440; *Castle v. Candee*, 16 Conn. 228.

Parol evidence has always been held to be admissible to show the real character of the indorsement, whether it was intended to be a guaranty, an ordinary indorsement of negotiable paper, or indorsed merely for the purpose of collection.

Perkins v. Catlin and *Riddle v. Stevens*, *supra*.

Gen. Stat. 1888, § 1860, was passed for the express purpose of changing the law of Connecticut, and making it conform to the settled law of other States. It says that such an indorsement "shall import the contract of an ordinary indorsement of negotiable paper, as between such indorser and the payee or subsequent holders of such paper." Such being now the legal import of such an indorsement, the plaintiff cannot recover in this case when the defendant had no knowledge that his indorsement was, or was intended to be, a guaranty. In every case of guaranty in this court since the enactment of that Statute, an express contract of guaranty was made and approved, to hold a party as a guarantor of a note.

City Sav. Bank v. Hopson, 2 New Eng. Rep. 556, 53 Conn. 453; *Coules v. Peck*, 4 New Eng. Rep. 839, 55 Conn. 251; *Lemmon v. Strong*, 5 New Eng. Rep. 618, 55 Conn. 443; *Loomis Inst. v. Hard*, 57 Conn. 435; *Tyler v. Waddingham*, 8 L. R. A. 657, 58 Conn. 376.

Mr. Lynde Harrison, for appellee:

The contract which is implied from a blank indorsement of a promissory note, whether negotiable or non-negotiable, is that the note is due and payable according to its tenor, and that the maker shall be able to pay it when it comes to maturity, and that it is collectible by the use of due diligence.

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Perkins v. Catlin, 11 Conn. 215; *Clark v. Merriam*, 25 Conn. 576; *Ransom v. Sherwood*, 26 Conn. 437; *Holbrook v. Camp*, 38 Conn. 25; *Forbes v. Rowe*, 48 Conn. 415; *Allen v. Rundle*, 50 Conn. 9; *Lemmon v. Strong*, 5 New Eng. Rep. 618, 55 Conn. 443.

If section 1860 of the General Statutes affects this case, it simply means that the blank indorser of a negotiable note, being a person who is neither its maker nor its payee, before or after the indorsement of the note by the payee, shall be under the same liability as an ordinary indorser of negotiable paper.

The contract which an ordinary indorser of negotiable paper enters into between himself and the payee, or subsequent indorsers, is an undertaking on his part to pay the note or bill on due notice of dishonor, together with certain warranties as to title, genuineness, and validity of the paper, as well as capacity and solvency of the parties.

Randolph, Com. Paper, §§ 18, 700, 705-707.

Seymour, J., delivered the opinion of the court:

On September 24, 1884, the plaintiffs, at the request of one J. C. Stevens, gave him their accommodation note for \$2,000, payable in three months, and agreed to give him another three-months note of the same amount at its maturity. In exchange for this note Stevens gave the plaintiffs his six-months note, of the same date, for \$2,000, indorsed by the defendant. On the 27th of December, 1884, the plaintiffs gave Stevens their second note as agreed, with which he took up the first. When the second note became due the plaintiffs paid it. On the 2d of April, 1885, Stevens, in renewal of his six-months note, gave the plaintiffs his note for \$1,000, payable in two months, and his note, for a like sum, payable in three months, each payable to their order at the Yale National Bank. The defendant indorsed each of these notes in blank before Stevens delivered them to the plaintiffs. Afterwards the plaintiffs indorsed them, writing their names below that of the defendant. These notes were given by Stevens to the plaintiffs as a security for the loan by the plaintiffs of the sum therein mentioned, namely, of the sum to be raised by the discount of the above-mentioned accommodation notes made by the plaintiffs. At each of the times when Stevens signed the notes, namely, on September 24, when he signed the six-months note, for \$2,000, and on April 2, when he signed the two notes in renewal thereof (the indorsement of which is the subject of this suit), he and one of the plaintiffs were together at Stevens' office. Before the notes were delivered to the plaintiffs Stevens called the defendant into the office, and he then indorsed the notes in the presence of Stevens and the plaintiffs. There was no conversation in relation to the indorsements, nor was there any conversation between the defendant and the plaintiffs at any other time in relation thereto. There was no evidence of any agreement between them, except such as the law imports from the blank indorsement which the defendant put upon the notes, as the same appears upon them, under

the circumstances and upon the facts already detailed. Nor was there any other evidence that the defendant had any knowledge that his indorsement of the notes was, or was intended to be, a guaranty to the plaintiffs. There was no evidence that the defendant had any knowledge of the exchange of notes by the plaintiffs and Stevens. The notes of April 2, 1885, were duly presented for payment at the bank, but were not paid. Notice thereof was duly given to the defendant. The plaintiffs still own the notes, and they are still wholly unpaid. At their maturity the maker was insolvent, and without any property exempt from execution. These are the facts in brief as they are stated in the finding. The case, after a short explanation by the counsel for the defendant, was submitted to us on briefs, and the questions discussed relate to the liability of the defendant upon the facts found. The finding is slightly complicated. To simplify the matter we copy one of the notes, with its indorsements, the other being precisely similar, except that it is payable three months after date:

"\$1,000. New Haven, Ct., April 2d, 1885. Two months after date, I promise to pay to the order of I. S. Spencer's Sons one thousand dollars at Yale National Bank, value received, with interest. J. C. Stevens.

[Indorsed:] Chas. G. Allerton. I. S. Spencer's Sons."

In the year 1884 the Legislature passed the following Act: "The blank indorsement of a negotiable or a non-negotiable note, by a person who is neither its maker nor its payee, before or after the indorsement of such note by the payee, shall import the contract of an ordinary indorsement of negotiable paper as between such indorser and the payee or subsequent holders of such paper." Gen. Stat. § 1860. Before the passage of this Act, by the law of this State as declared through a long line of decisions, from *Bradly v. Phelps*, 2 Root, 825, to *Aetna Nat. Bank v. Charter Oak L. Ins. Co.*, 50 Conn. 167, the blank indorsement of either a negotiable or a non-negotiable note by a stranger to the note implied, *prima facie*, a contract on the part of the indorser that the note was due and payable according to its tenor; that the maker should be of ability to pay it when it came to maturity; and that it was collectible by the use of due diligence. And this was the law, it was held in the latter case above cited, whether the indorsement by the third party was for the better security of the payee or for the purpose of getting the note discounted. The same case, commenting upon our long-established law on this subject, speaks of it as peculiar to this State, no part of the law-merchant, and the anomalous existence of which eminent judges, while admitting, have regretted. The Statute was doubtless intended to deliver our law from its anomalous position, and bring it into harmony with the law-merchant as it is interpreted in the great commercial centers of our country with which we are connected in business transactions, involving the daily exchange of notes, bills, and all manner of negotiable securities. The Statute is before

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this court for the first time, and we have given it the consideration commensurate to its importance. Under it, it is at once apparent that the blank indorsement of a negotiable or non-negotiable note by a person who is neither its maker nor payee, whether before or after its indorsement by the payee, no longer imports a contract that the indorser will pay the note if, on the use of due diligence, it is not collected of the maker. It is no longer a contract of guaranty. But it imports, as between such indorser and the payee, or subsequent holders thereof, a contract of an ordinary indorsement of negotiable paper, which is, by the law-merchant a contract for payment conditioned on due presentment to the maker for payment and due notice of dishonor. The full contract which the general commercial law implies from the indorsement of a negotiable promissory note on the part of the indorser, with and in favor of the indorsee, and every subsequent holder to whom the note is transferred, is (1) that the instrument itself, and the antecedent signatures thereon, are genuine; (2) that he (the indorser) has a good title to the instrument; (3) that he is competent to bind himself by the indorsement as indorser; (4) that the maker is competent to bind himself to the payment, and will, upon due presentment of the note, pay it at maturity, or when it is due; (5) that if, when duly presented, it is not paid by the maker, he (the indorser) will, upon due and reasonable notice given him of the dishonor, pay the same to the indorsee or other holder. Story, *Prom. Notes*, § 135. Into this contract, under our Statute, the indorser of a note, either negotiable or non-negotiable, though a stranger thereto, impliedly comes, as between himself and the payee or subsequent holder.

Thus far there is no difficulty, and it is evident that, *prima facie* at least, the defendant is an ordinary indorser, and not a guarantor of the notes. But the facts in this case require us to consider the provision of the Statute that the indorsement therein mentioned shall import a contract of ordinary indorsement between the parties named, whether it stand before or after the indorsement by the payee. Here the plaintiffs indorsed the note after the defendant, and the order of their names upon it accords with the fact. Such an indorsement falls within what Bigelow, *J.*, in *Clapp v. Rice*, 13 Gray, 403, calls "an anomalous class of cases," and which the text-books generally call "irregular indorsements." It is impossible to harmonize the existing decisions in respect to the import of such an indorsement. They are very numerous, diverse, and conflicting. Our statute may render much of the discussion of other jurisdictions valueless to us except as a guide to its construction, if, upon examination, its language should appear ambiguous. Does the Statute, then, intend to go any further than simply to declare that, irrespective of the position of his name, a third person who puts his name on the back of a note is to be held as an ordinary indorser, and not as a guarantor? Or do the other provisions clearly indicate a purpose to leave

no question open which would turn upon the relative position of the indorsements, and to provide that such third party, though indorsing before and above the payee, is, nevertheless, *quoad* him and subsequent holders, impliedly an indorser precisely in the order in which he stands upon the note? We unhesitatingly incline to the latter construction.

The language of the Statute, standing by itself, and also as construed in the light of the greater weight of authority, seems to leave no room for doubt. Daniel, in his work on Negotiable Instruments, treating of the various decisions relating to the transfer of notes by indorsement, says (sec. 713): "When nothing appears but the instrument itself, bearing a third person's name before the payee's, in a suit by the indorsee of the payee, the question next arises, What is to be presumed to have been the contract and liability of such a person? It will be presumed, in the first place, from the fact that the name is before that of the payee in order, that it was placed there before his in point of time, and was placed upon the note in its inception with a view of strengthening its credit with the payee, and inducing him to take it; and, for the reason that such third person never was the legal holder of the paper, it is held by a number of authorities that he cannot be deemed an indorser, and must be regarded, *prima facie*, as a joint maker. By others it is held that he is *prima facie* a surety or guarantor, using those terms as the equivalent of joint maker; others consider that he is *prima facie* only secondarily liable as a guarantor; while very many regard him as assuming the liability of a second indorser." "But," says the author (§ 714), "it would seem to us that such a party ought to be regarded as first indorser. If he intended to be second indorser, he should have refrained from putting his name on the note until it was first indorsed by the payee. By placing it first he enables the payee to place his own afterwards; and *prima facie* the facts would seem to indicate such intention. There is nothing in the objection that there is no title in him to indorse away. Prior parties could not be sued without the payee's indorsement; but he, being an indorser, can be sued by anyone deriving title under him. In fact, his position seems to render his liability strictly analogous to that of the drawer of a bill upon the maker in favor of the payee; and so to regard it simplifies, as it seems to us, a question which, unless such analogy be followed, is exceedingly complicated and difficult." "When (§ 716) the note is sued upon by the payee, it is held that the idea of the party before him being bound as an indorser is excluded. But this doctrine does not seem to us correct. The indorsement, it is true, is an irregular one; but it is quite similar to a bill drawn by the indorser on the maker, and to follow that analogy in all regards seems to us the simplest and most reasonable solution of the question. And there are a number of cases which regard such a party's liability as *prima facie* that of an indorser." *Judge Story*, discussing the various decisions concerning irregular indorsements, says:

"When the note is negotiable, and is indorsed in blank by a third person, not being the payee or a prior indorsee thereof, there, in the absence of any controlling proof, it is presumed that such person means to bind himself in the character of an indorser, and not otherwise, and precisely in the order and manner in which he stands on the note. If the note is not negotiable, and the indorsement in blank is not a part of the original transaction, but subsequently made, then, in the absence of the like controlling proofs, it is deemed a mere guaranty, and the indorser liable only as guarantor." *Story, Prom. Notes*, § 480.

Randolph, in his recent treatise on Commercial Paper, goes extensively into the subject of irregular indorsements. Presuming that it is a matter of frequent occurrence, in the United States especially, that one who is neither maker nor payee of a note places his name on the back of it at the time of its inception, he says the legal effect of such indorsements has been much discussed and variously decided. He discusses the numerous cases which follow the Massachusetts rule, and hold such indorser to be a joint maker, though now, by Statute of 1882, he is entitled, like an indorser, to notice of dishonor; the also numerous cases which hold, as did our courts, such an indorser to be a guarantor; and the cases, in opposition to both of these views, which hold that such indorser contracts and becomes liable as an indorser, his position on the back of the note indicating that intention. In California and Dakota, he adds (§ 836), "he is now by statute liable as an indorser to the payee; and so, by a recent Statute in Connecticut, whether the note is negotiable or not, and whether he indorses before or after the payee." *Randolph, Com. Paper*, § 829, *et seq.*

In *Hall v. Newcomb*, 7 Hill, 416, it was held that one who writes his name in blank on the back of a negotiable note before the payee indorses the same is not liable as maker nor as guarantor; thus, says Woodruff, *J.*, in *Hahn v. Hull*, 4 E. D. Smith, 670, overruling all the previous cases to that effect. It was also held in *Hall v. Newcomb*, that the person so writing his name could be held liable to such payee as indorser. *Spies v. Gilmore*, 1 N. Y. 822, is to the same effect. In *Moore v. Cross*, 19 N. Y. 227, it was held that one who, for the accommodation of the maker, indorses his note payable to the order of a third person, is liable thereon to such payee as indorser. In that case, as in the one at bar, the third party indorsed the paper before it was indorsed by the payee. Thus it would appear that in New York the result reached by our Statute was reached through the courts instead of through the Legislature. The authorities quoted, by showing the various positions which have been taken respecting the matter under consideration, throw light not only upon the presumed intention of the Legislature in passing the statute, and the interpretation which should be given it, but show also the impossibility of harmonizing our law, under any interpretation of it, with the law of all our neighboring States. From this examination of the authorities we

feel the more assured in holding that the defendant, in the case at bar, upon the showing of the note itself, is an ordinary indorser, and may be held as such by the plaintiff, who is payee, and whose name appears as an indorser subsequent to that of the defendant. So much for the contract which the Statute imports.

A third question remains, namely, whether the contract which the Statute imports can be varied by parol evidence, and, if so, when and how. The general expressions scattered through our reports, consequent upon our peculiar law respecting the contract *prima facie* implied by the indorsement of a note by a stranger, make it a little difficult to give an answer that shall at first sight appear consistent with some of our decisions, or rather with some of the expressions used in some of our decisions. Indeed, the principle involved has been variously decided in different jurisdictions and at different times in the same jurisdiction. In *Riddle v. Steens*, 32 Conn. 378, after stating the contract which the law implies from the blank indorsement of a note by a stranger, the case holds that this implication is, however, only *prima facie*, and will yield to proof of the real character of the contract. Notes so indorsed, it says, have not the sanctity of ordinary negotiable paper, and do not fall within the rules of the law-merchant. Any person taking them, therefore, is put upon an inquiry as to the real character of the contract. In *Beckwith v. Angell*, 6 Conn. 315, a third party wrote his name on the back of a non-negotiable note, under, as he claimed, a special parol agreement with the payee. It was decided that he might prove the special agreement when sued by the payee. The court said: "The undertaking of an indorser is always collateral, unless made otherwise by a special agreement. But the defendant was not an indorser, because he was neither promisee nor indorsee. His contract was therefore necessarily special, and whatever the parties chose to make it."

It appears from these and other cases which might be cited that parol evidence has been admitted to prove the real contract entered into by a third party when he made a blank indorsement of a note, because such blank indorsement only *prima facie* implied a contract of guaranty; and because, being anomalous, and not the ordinary indorsement recognized by the law-merchant, it possessed none of its sanctity, but was its own sufficient notice of its irregularity. But our courts have not failed to recognize and uphold the sanctity of a regular indorsement. The law on that subject was admirably stated by Butler, Ch. J., in *Dale v. Gear*, 38 Conn. 15. That case held "that the contract implied by law from a blank indorsement of a negotiable note before its maturity by the payee is as certain and absolute as if written out in full, and parol evidence is not admissible to contradict it. This rule is applicable between indorser and indorsee, and it is not competent for the former to prove a contemporaneous naked agreement that an unrestricted indorsement should be operative as a restricted one only, in bar of an action

by the latter." "There are," says the opinion, "four classes of cases in which, as exceptional cases, and as between the original parties, indorser and indorsee, any relation, antecedent agreement, or state of facts, from which a controlling equity arises, may be pleaded and proved by parol in bar of an action on the warranty. Thus the relation of principal and agent may be shown, for the agent takes no title or warranty from the indorser, but holds as agent. So, *secondly*, it may be shown that the note was indorsed to the holder for some special purpose, and is holden in trust, as where it is indorsed and delivered for collection merely. . . . *Thirdly*, the relation of principal and surety may be shown, and that the indorsement was made at the request and for the accommodation of the immediate indorsee; for the equity of the relation forbids the enforcement of the contract. Such was the case of *Care v. Spaulding*, 24 Conn. 578. So, *fourthly*, it may be shown that there was an equity arising from an antecedent transaction, including an agreement that the note should be taken in sole reliance on the responsibility of the maker, and that it was indorsed in order to transfer the title in pursuance of such agreement, and that the attempt to enforce it is a fraud. Such was *Downer v. Chesebrough*, 36 Conn. 39. These exceptions illustrate the rule."

In *Allen v. Rundle*, 45 Conn. 528, the defendants had signed a writing on the back of the note, as follows: "For value received, we jointly and severally guaranty the within note good and collectible until paid." Held, that it could not be shown by parol that the defendants, though in form guarantors, in fact undertook thereby to obligate themselves to pay the note; nor that they made at the time a verbal promise to pay the debt. The court says: "There is an anomalous class of cases where a third person, neither payee nor maker, puts his name on the back of a note before its indorsement by the payee, where by parol evidence such person may be held liable either as original promisor, guarantor, or indorser, according to the nature of the transaction and the understanding of the parties. [Citing cases.] But in all these cases the indorsement is in blank, and there is no written contract, and none is definitely implied by law from the indorsement. In cases of blank indorsements, where the contract is implied by law, it has the same effect as if written, and parol evidence is not admissible to contradict or vary it. The Supreme Court of Massachusetts, in the recent case of *Allen v. Brown*, 124 Mass. 77, held that parol evidence was not admissible to show that indorsers who indorsed a promissory note before delivery to the payee were accommodation indorsers and sureties only." In Story on Promissory Notes, § 143, note 1, many cases are cited to the point that the contract implied by law, from a regular indorsement, is as certain as if it were expressed in writing, and parol evidence is not admitted to vary it. To the same effect see Daniel, Neg. Inst. § 717 *et seq.* In Randolph on Commercial Paper, where much attention is given to the subject throughout the work,

it is stated (§ 778) that most authorities hold that the implications and intendments which the law-merchant has attached to blank indorsements of negotiable commercial paper render them express and complete contracts which cannot be explained or varied by parol. See also 2 Parsons, Notes & Bills, p. 23, chap. 1, § 6.

Now, under our Statute, the blank indorsement of a negotiable or non-negotiable note, by a person who is neither its maker nor its payee before or after the indorsement of such note by the payee, can no longer be classed as an anomalous or irregular indorsement, nor will the rules applicable to such indorsements any longer apply. They cease to exist as the reason for them ceases. By the very terms and force of the Statute such an indorsement becomes, to all intents, a regular, ordinary indorsement, and the rules applicable to the regular indorsement of negotiable paper apply. Evidently, then, the judgment rendered by the court below for the plaintiffs in this case was correct. The defendant's case comes within none of the exceptions named in *Dale v. Gear*, *supra*. It comes nearest to the third exception. But in the case of *Case v. Spaulding*, 24 Conn. 578, given as an example of what was covered by that exception, the note was only apparently commercial paper, regularly indorsed. In fact, the defendant, a stranger to the note, indorsed it in blank at the request of the plaintiff, who afterwards indorsed it over the defendant's name, and procured it to be discounted at the bank. As between the parties it was the case of a note indorsed in blank by a stranger, the prima facie import of which was that the indorser would pay it if it could not be collected of the maker by the use of due diligence. But the law per-

mitted the defendant to show the real contract, and he proved that his indorsement was intended as security for the bank only, and was made because the bank would not discount the note for the plaintiff on the security of the maker alone, but required an indorser. So the plaintiff, who was the payee, and the first indorser in order of names, though second in order of time, failed to recover. In the case at bar the defendant indorsed the notes in the presence of their maker and the plaintiffs before they were delivered. There was no conversation at that time in relation to such indorsement, nor ever any between the plaintiffs and defendant in relation thereto, nor any evidence of any agreement between them different from that which the law imports from the blank indorsement of the defendant under the circumstances stated. Such circumstances certainly indicate that the indorsement was made for the security of the plaintiffs. At their maturity the notes were duly presented for payment, but were not paid. Due notice of their dishonor was given to the defendant, and subsequently this suit was brought. We see no sufficient reason why, under the Statute, the defendant must not be held as an ordinary indorser of negotiable paper. As the law now stands, if a party intends to contract only as second indorser, he should see to it that the location of his name accords with such intention. If he intends to contract as guarantor, or to make any different contract from that of an ordinary indorser, he should write it out above his signature.

There is no error in the judgment appealed from.

The other Judges concurred.

NEBRASKA SUPREME COURT.

Nicholas WULLENWABER *et al.*

Michael DUNIGAN *et al.*, *Appts.*

(30 Neb. 877.)

***1. A proposition to issue bonds to a railway company is in the nature of a contract, upon the acceptance of which both parties are bound by the agreement.**

2. Where certain petitioners were induced to sign a petition calling an election in K. Township, Seward County, upon the representations of an agent of the railway company that the depot would be located on section 16 of said township, when in fact the depot was afterwards located in section 17,—Held, that the company was bound by the representations of its agents, and that persons who had been deceived thereby, and induced to sign the petition, might set up such facts to enjoin the issuing of the bonds.

*Head notes by the COURT.

NOTE.—For power to issue railroad aid bonds, see *Cantillon v. Dubuque & N. W. R. Co.* (Iowa) 5 L. R. A. 722, *note*.

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3. At least fifty freeholders resident of the township, etc., must sign a petition to the county commissioners requesting them to call an election in said township for the purpose of voting aid for a railway. Without a petition so signed by the full number required the commissioners have no jurisdiction.

(On rehearing.)

4. Where, in the course of the canvassing and electioneering to induce a sufficient number of freeholders of a certain town to become signers of a petition to the county board for an election for the issuance of bonds to be donated to a railroad company, certain representations, promises, and inducements were falsely and fraudulently made and held out by the railroad company to such freeholders, and which resulted in such freeholders becoming signers to said petition,—Held, that such representations, promises, and inducements, although made at a time and meeting previous to the time at which said freeholders became signers, were nevertheless a part of the *res gestæ*.

5. Where two agents of a railroad company were engaged in the common purpose of soliciting the freeholders of a town to become signers to a petition for the calling of

an election to vote bonds, and one of said agents made certain pledges and promises, and held out certain inducements, to said freeholders, who shortly afterwards were by the other of the said agents presented with said petition, and signed the same,—*Held*, that such pledges, promises, and inducements were a part of the *res gestæ*.

(December 22, 1890.)

APPEAL by defendants from a decree of the District Court for Seward County enjoining the issuance of certain railroad aid bonds. *Affirmed*.

The facts are fully stated in the opinions.

Messrs. D. C. McKillip and George W. Post, for appellants:

None of the representations were made by Goehner while soliciting signers to the petition or while he had the petition for that purpose, and no representations appear to have been made at or about the time of signing; and we insist that in such case they are not a part of the *res gestæ* and are inadmissible.

Mechem, Ag. §§ 714, 716, *note*.

All Goehner ever told any of the witnesses was merely where, in his judgment, the depot would be, and this could not have misled, and was not relied on.

Montgomery S. R. Co. v. Matthews, 77 Ala. 357; *Mechem*, Ag. § 743.

A person dealing with an agent is bound to inquire as to his authority.

Wheeler v. Plattsmouth, 7 Neb. 279.

Goehner's promise to locate a depot at any particular place is insufficient to invalidate the signing of the petition as a fraudulent representation cannot be predicated on a promise not performed.

Perkins v. Lougee, 6 Neb. 223; *Ex parte Fisher*, 18 Wend. 609; *Long v. Woodman*, 58 Me. 49; *Grove v. Hodges*, 55 Pa. 504; *Ranney v. People*, 23 N. Y. 417; *Com. v. Brennenman*, 1 Rawle, 311; 1 Wood, Railway Law, pp. 112-114, 120; *Martin v. Pensacola & G. R. Co.* 8 Fla. 370; *Vicksburgh R. Co. v. McKean*, 12 La. Ann. 633; *Carlisle v. Evansville, I. & C. S. L. R. Co.* 18 Ind. 477; *Mississippi, O. & Red River R. Co. v. Cross*, 20 Ark. 443.

The representations must have been made positively as an ascertained and existing fact and so believed to be such existing fact, and must be clearly and distinctly proved as alleged in the petition.

Mechem, Ag. § 743, and *notes*; 1 Wood, Railway Law, 110, 111, *note* 6.

The railroad company did not choose or have the right to choose the persons to circulate the petition and is not bound by representations made to procure signers.

Mechem, Ag. § 747, and *note*; 1 Parsons, Cont. p. 71.

Nor were the representations made as the representations of the railroad company, but were usually made as the individual representations of Goehner, and in such case they could not bind the company, by reason of its claiming the bonds.

Cedar Rapids & M. R. Co. v. Boone County, 34 Iowa, 51; *State v. Lake City*, 25 Minn. 404; *Platteville v. Galena & S. W. R. Co.* 43 Wis. 493; *People v. Cline*, 63 Ill. 394.

Defendant railroad company cannot be held 13 L. R. A.

liable in this suit, by reason of not having adopted and ratified such alleged representations with full knowledge of their having been made before commencement of this suit.

Burns v. Campbell, 71 Ala. 271; *Ewell's Evans*, Ag. 64-71; *Mechem*, Ag. § 750; *Coke*, Inst. IV. 317; *Story*, Ag. §§ 239, 240. See also *Platteville v. Galena & S. W. R. Co.* 43 Wis. 493; *East Line & R. R. Co. v. Garrett*, 52 Tex. 182; *Belfast & M. L. R. Co. v. Brooks*, 60 Me. 568; *Townsend v. Lamb*, 14 Neb. 324; *Chamberlain v. Painsville & H. R. R. Co.* 15 Ohio St. 225; 1 Wood, Railway Law, § 33, pp. 79, 81.

Oral testimony as to declarations as to where a depot will be located being promissory of something to be thereafter done, are generally regarded as expressing only the declarant's opinion, belief, or expectation, although testified to as having been positively represented.

Montgomery & S. R. Co. v. Matthews, 77 Ala. 357, 24 Am. & Eng. R. R. Cas. 9; 1 Redfield, Railways, 5th ed. 172, 173; *Franklin Glass Co. v. Alexander*, 2 N. H. 380, 9 Am. Dec. 92; *Hanover Junction & S. R. Co. v. Grubb*, 82 Pa. 36; *Evansville, I. & C. S. L. R. Co. v. Posey*, 12 Ind. 363; *Morgan v. Hazlehurst Lodge*, 53 Miss. 665; *Onley v. Philadelphia & C. C. R. Co.* 80 Pa. 363; *Kostenbader v. Peters*, 80 Pa. 488; *Lippincott v. Whitman*, 83 Pa. 244; *Walker v. Mobile & O. R. Co.* 84 Miss. 245; *Union Nat. Bank v. Hunt*, 76 Mo. 439; *Bish v. Bradford*, 17 Ind. 490; *Brownlee v. Ohio I. C. I. R. Co.* 18 Ind. 68; *Hardy v. Merrineather*, 14 Ind. 303; *Andrews v. Ohio & M. R. Co.* 14 Ind. 169; *Jones v. St. Louis, K. C. & N. R. Co.* 79 Mo. 92; *Peers v. Davis*, 29 Mo. 184; *Hodges v. Torrey*, 28 Mo. 103; *Cooley*, Torts, 493-497; 1 Story, Eq. § 199.

A party who had the full means of detecting the misrepresentation and ascertaining the truth has no right to complain, unless some illegal means have been resorted to for the purpose of throwing him off his guard.

Wall v. Stubbs, 2 Ves. & B. 354; *Dyer v. Hargrave*, 10 Ves. Jr. 505.

Under no circumstances can Goehner's acts or declarations of his own authority, made after the signing of the petition, be any evidence against the defendant company.

1 Greenl. Ev. 113, 114; *Phelps v. Georges Creek & C. R. Co.* 60 Md. 536; *Franklin Bank v. Pennsylvania D. & M. Steam Nav. Co.* 11 Gill & J. 34; *Drake v. Chicago, B. I. & P. R. Co.* 70 Iowa, 59, 29 Am. & Eng. R. R. Cas. 517.

The admissibility of the declaration of an agent against his principal can be maintained only where what the agent said was in the transaction of the business of his principal and was a part of the transaction itself.

McDermott v. Hannibal & P. R. Co. 87 Mo. 285, 28 Am. & Eng. R. R. Cas. 535.

The location of a depot was no part of the business of getting signers to the petition.

See also *Chapman v. Erie R. Co.* 55 N. Y. 584; *Gilman v. Eastern R. Co.* 13 Allen, 444; *Armist v. Chicago, B. & Q. R. Co.* 70 Iowa, 130, 28 Am. & Eng. R. R. Cas. 467; *Livingston v. Iowa M. R. Co.* 35 Iowa, 556; *Verry v. Burlington, C. R. & M. R. Co.* 47 Iowa, 549.

A parol contemporaneous condition cannot be ingrafted upon the written petition by evidence of the declarations of a party who was

not shown to have other authority than to circulate such petition for signatures.

East Line & R. R. Co. v. Garrett, 52 Tex. 187; *Houston & T. O. R. Co. v. McKinney*, 55 Tex. 176; *Martin v. Farnsworth*, 49 N. Y. 558; *Michigan Cent. R. Co. v. Gougar*, 55 Ill. 508; *Louisville, E. & St. L. R. Co. v. McVay*, 96 Ind. 391; *Bond v. Pontiac, O. & P. A. R. Co.* 63 Mich. 643, 26 Am. & Eng. R. R. Cas. 571. *Trudo v. Anderson*, 10 Mich. 357; *Rice v. Peninsular Club of Grand Rapids*, 52 Mich. 87.

Messrs. R. S. Norval and George W. Lowley, for appellees:

To authorize the board of supervisors to call a special township election for the purpose of voting bonds in a township in aid of works of internal improvements a petition signed by not less than fifty freeholders of such township must be presented to such board of supervisors, setting forth the nature of the work contemplated, etc.

Comp. Stat. 1889, chap. 45, § 14, p. 542; *State v. Babcock*, 21 Neb. 187.

The burden of proof was upon the appellants to show at least fifty freehold petitioners upon the petition before the board would have jurisdiction to submit the question of voting aid to the voters of the town.

Canfield v. Smith, 34 Wis. 381; *Eldred v. Leahy*, 31 Wis. 546; *Williams v. Holmes*, 2 Wis. 129.

The obtaining of the names of petitioners by false representations to locate the depot would make those who signed on account of such promises illegal petitioners, and all such names would have to be disregarded in considering the petition.

Sinnett v. Moles, 38 Iowa, 25; *Curry v. Decatur County Supra*, 61 Iowa, 71; *Henderson v. San Antonio & M. G. R. Co.* 17 Tex. 560, 67 Am. Dec. 675; *Crump v. United States Min. Co.* 7 Gratt. 352, 56 Am. Dec. 116; *Wickham v. Grant*, 28 Kan. 517.

False representations made to the electors in order to induce them to vote bonds to a railroad, may be shown in an action to enjoin the issue of the bonds.

Sinnett v. Moles, *Curry v. Decatur County Supra*, and *Wickham v. Grant*, *supra*; *Melendy v. Keen*, 89 Ill. 395; *Sandford v. Handy*, 23 Wend. 260; *Burhop v. Milwaukee*, 18 Wis. 431; *McClellan v. Scott*, 24 Wis. 81; *Davis v. Dumont*, 37 Iowa, 47; *Vreeland v. New Jersey Stone Co.* 29 N. J. Eq. 188.

The relation of principal and agent may be inferred by implication from the acts of the parties, and this rule applies as well to agents of corporations.

Columbus Co. v. Hurford, 1 Neb. 146; *New England Mortg. Sec. Co. v. Harris*, 18 Neb. 556; *McKeighan v. Hopkins*, 19 Neb. 33; *Rogers v. Empkie Hardware Co.* 24 Neb. 658.

A principal must adopt the acts of his agents as a whole, and will not be permitted to retain that part which is beneficial and reject that which is not.

Rogers v. Empkie Hardware Co. supra; *New England Mortg. Sec. Co. v. Hendrickson*, 13 Neb. 158, and case cited.

Maxwell, J., delivered the opinion of the court:

This is an action to enjoin the issuing of certain bonds of K. Township, in the County of Seward, and to have said bonds canceled, and delivered up, and declared null and void. The pleadings, which are very lengthy, need not be set out in this opinion. On the trial of the cause, the court made findings and rendered judgment as follows: "Now, on this 20th day of December, 1888, this cause, heretofore tried on a former day of the present term of court, and taken under advisement, came on for decision and judgment, and the court, being now fully advised in the premises, does find the issues joined in favor of the plaintiffs; and that the injunction heretofore allowed and granted and issued herein ought to be made perpetual; and that the bonds now under custody of the court, in the hands and keeping of S. C. Langworthy, ought to be canceled, and held for naught; and that the said colorable and the apparent record of the proceedings of the board of supervisors of Seward County, recorded in Commissioner's Record No. 4, pp. 94 to 98, inclusive, and on pages 127 to 131, so far as the same relates to the calling of an election, and the voting of bonds, in said K. Township, is incorrect, unauthorized, and ought to be canceled, set aside, and held for naught. It is therefore by the court considered, ordered, and adjudged that the said bonds, and the proposition for their issue, and the election held, and proceedings had and done in pursuance thereto, in reference to the issue of said bonds of K. Township, in Seward County, Neb., were unauthorized by law and void, and that the same, and all proceedings of the said board of supervisors in reference thereto, be held for naught; that the said defendants, their successors in office or assigns, are perpetually enjoined and restrained from delivering or authorizing the delivery, in any capacity whatever, of the said bonds, or any of them, to the said defendant railroad company, and from negotiating or transferring them, or any of them, at any time, and the said defendant railroad company, its officers, assigns, agents, and successors, are each of them restrained from receiving, claiming, assigning, or negotiating said bonds, or any of them, and from in any way holding the same to be valid; that the said board of supervisors and county clerk, and their successors in office, are severally enjoined and restrained from signing, authenticating, or in any way validating, said election canvass on the question submitted at said special election, or the record of said proposition submitted, or the record of the board of supervisors thereon, and from in any way giving color of validity of said proceedings, or any of them, and from recognizing in any way the same to be valid."

To authorize a precinct, township, or village to issue bonds, the Statute requires "a petition signed by not less than fifty freeholders of the precinct, township, or village to be presented to the county commissioners, or board authorized by law to attend to the business of the county within which such precinct, township, or village is situated. Said petition shall set forth the nature of the work contemplated, the amount of the bonds sought to be voted, the rate of interest, which shall in no event exceed eight per cent per annum, and the date when the principal and interest shall become due; and the said petitioners shall give bond, to be

approved by the county commissioners, for the payment of the expenses of the election, in the event that the proposition shall fail to receive a two-thirds majority of the votes cast at the election." It appears from the record that fifty persons did sign the petition, and that thereupon the election was duly called and held, and the bonds declared carried. This election appears to have been held before the depot in the Township of K., Seward County, was located. There is a large amount of testimony in the record tending to show that a considerable number of the signers of the petition were induced to sign the same by representations of the agents of the railroad company that a freight and passenger depot on the line of said railroad would be located upon section 16 of said township. The depot finally was located upon section 17 of said township. A proposition to issue bonds to aid in the construction of a railway is in the nature of a contract, which, when accepted, is binding upon the respective parties; hence, if the electors, through false or fraudulent representations, have been induced to vote bonds to aid in the construction of such railway, a court of equity, in a proper case, will grant relief. *Curry v. Decatur County Supra.* 61 Iowa, 71; *Sinnett v. Moles*, 38 Iowa, 25; *Henderson v. San Antonio & M. G. R. Co.* 17 Tex. 560, 67 Am. Dec. 675; *Crump v. United States Min. Co.* 7 Gratt. 352, 56 Am. Dec. 116; *Wickham v. Grant*, 28 Kan. 517.

Where parties have been induced, by false representations, to sign a petition calling an election to vote aid to a railway, they may set up such false representations as grounds for enjoining the issuing of the bonds. *Sinnett v. Moles*, *Curry v. Decatur County Supra.* and *Wickham v. Grant*, *supra*; *Melendy v. Kern*, 89 Ill. 395; *Sandford v. Handy*, 23 Wend. 200; *Burhop v. Milwaukee*, 18 Wis. 431; *McOlellan v. Scott*, 24 Wis. 81; *Davis v. Dumont*, 37 Iowa, 47; *Vreeland v. New Jersey Stone Co.* 29 N. J. Eq. 188.

If, therefore, the plaintiffs were induced to sign the petition by false representations, they have a right to set up such representations to prevent the issuing of the bonds. It is claimed, however, that the persons who procured the signatures to the petition were not the agents of the railway company, and therefore such company cannot be affected by their statements. This question was before the Supreme Court of New York in *Sandford v. Handy*, 23 Wend. 200, and the opinion delivered by Chief Justice Nelson, who says: "The distinction between 'general' and 'special' agent has often been the subject of discussion in adjudged cases, and by elementary writers, but it is not particularly important here, as this is conceded to be a case of special agency. Our inquiry is more especially directed to ascertain the extent of the principal's responsibility in cases of this character; or rather, confining it more particularly to the point before us, to what extent and to what circumstances will the principal be held responsible for the representations and declarations of the agent?" Mr. Justice Story, in his recent valuable commentaries on the subject (page 126), lays down the general rule, and which is as applicable to special as to general agents, that, "where the acts of the agent will

bind the principal, there his representations, declarations, and admissions respecting the subject matter will also bind him if made at the same time, and constituting part of the *res gesta*." He further observes that, "for most practical purposes, a party dealing with an agent who is acting within the scope of his authority and employment is to be considered as dealing with the principal himself. If it is the case of a contract, it is the contract of the principal. If the agent, at the time of the contract, makes any representations, declarations, or admissions touching the subject matter of the contract, it is the representation, declaration, or admission of the principal."

These principles are fully borne out by the several authorities referred to: are founded in good sense and with a just conception of the commercial and other business transactions of life from which they have been derived." This, we think, is a correct statement of the law. If a person is employed by a railway company in a special matter, as to procure signatures to a petition for the calling of an election to vote bonds in aid of such railway, the company will be bound by the representations of such agent made in any manner pertaining to his duties. In other words, a principal, by availing himself of the acts of an agent, must adopt the same *in toto*, and cannot adopt that which is beneficial, and reject that which is detrimental. This rule was recently applied by this court in *Doniathorpe v. Fremont, E. & M. V. R. Co.* (Neb.) 46 N. W. Rep. 240, and the company held responsible for the representations of the agent.

In the case at bar it is clearly shown that a number of the petitioners were induced to sign the petition by representations made on behalf of the railway company that the depot would be located on section 16. There is no pretense that the depot had been located on that section. The appellants contend that it was located on section 17, and therefore is more advantageous to some of the plaintiffs than if located on section 16. It is sufficient to say that the original proposition, under which a number of the plaintiffs were induced to sign the petition, was that the depot would be located on section 16. If the company may remove it to section 17, it may remove it to the extreme limits of the township. We cannot make a new contract for the parties. The plaintiffs are entitled to a performance of the condition under which they are induced to sign the petition for the election to vote the aid; and, as it is apparent that the company has not performed its part of the agreement, it is not entitled to the bonds.

It is contended on behalf of the appellants that fraud cannot be predicated on a promise not performed, and *Perkins v. Lougee*, 6 Neb. 220, is cited to sustain that position. That action was brought for the purchase money of the sale of a lot which the defendant had personally examined before purchasing, and he alleged, as a defense, that the plaintiff, to induce him to purchase the same, had falsely represented to him that he was about to erect a large brick hotel on a lot near that sold to the defendant. It was held that such promise was not actionable, and, as the party had personally viewed the lot before purchasing, that he

must pay for the same. In the case at bar, however, the inducement or consideration for signing the petition calling the election was the location of the depot on section 16. The case therefore differs from that of *Perkins v. Lougee*.

Some objection is made to a number of the signers of the petition, on the ground that they are not freeholders. It is unnecessary to examine this question. It is sufficient to say that it is indispensable that a petition requesting the calling of an election must be signed by at least fifty freeholders, and without such petition such commissioners have no jurisdiction.

The judgment of the District Court is right, and is affirmed.

Cobb, Ch. J., concurs. **Norval, J.**, having tried the case in the court below, took no part in the decision.

A rehearing was subsequently granted and on November 25, 1891, **Cobb, Ch. J.**, on behalf of the court, delivered the following opinion:

This cause was brought to this court on appeal from the District Court of Seward County, was argued and submitted at a former term, the judgment of the district court affirmed, and opinion filed, which is published in the thirtieth volume of our Reports, page 877. At the last term a reargument was granted upon the application of the defendant the Fremont, Elkhorn & Missouri Valley Railroad Company. The cause was again argued and submitted at the present term. The object of the action was to restrain and enjoin the issuing and delivery of \$10,000 of the bonds of K Town, in the County of Seward, claimed to have been voted by said town as a donation to the railroad company, at a special election held in said town for that purpose on the 25th day of February, 1897. The grounds of said action were: *First*. Fraudulent representations, promises, and inducements made by the defendant railroad company, its agents and aid solicitors, to induce sixteen of the petitioners who signed the petition asking the board of supervisors to call the special election submitting said question to the voters of said town, whereby they were induced to sign said petition, and without the signatures thus fraudulently obtained there were less than fifty legal freehold petitioners upon said petition. *Second*. That nine of the signers, and whose names appear on said petition, were not freeholders of said town, and that one of the names signed to said petition, to wit, John Draper, was that of an insane man, incompetent to transact any business, and that he did not sign the same, nor authorize any person to sign it for him. *Third*. Fraudulent representations and promises made by the agents, officers, employes, and aid agents of the defendant railroad company to voters of said K Town to vote the said bonds. Upon the trial, the finding of the court, although quite full, was general, and was equally applicable to either of the three grounds covered by the plaintiffs' petition. The opinion of this court hereinbefore referred to is confined to the first proposition stated.

The statute makes it a condition precedent to the submission of a proposition to vote bonds to be donated to a work of internal improve-

ment that a petition praying for such submission be signed by not less than fifty freeholders of the town or other municipality by which the donation is to be made. It appears by the record that fifty-six petitioners signed the petition, which was presented to the county board of Seward County praying the submission of the proposition to vote bonds to the voters of Town K, in said county. The petition upon which the cause was tried alleged that more than sixteen of the petitioners on said petition were induced and prevailed upon to sign, and did sign, said petition solely and wholly upon the promises, representations, and agreements of the defendant Fremont, Elkhorn & Missouri Valley Railroad Company, through and by its officers, agents, attorneys, employes, and aid solicitors, that, in the event of the submitting of said proposition to and the voting by said Town K of the bonds contemplated, said company would, immediately upon the completion of its said road through said town, establish and locate a permanent freight and passenger depot on its said proposed line of road within one-half mile of the center of said town, and upon section 16 therein, with other averments to the effect that by virtue of the said petition a special election was called in said Town K; that at said election the said contemplated bonds were voted; that the said railroad had been constructed through the said town, but that said defendant company has failed and refused to locate and erect such depot at or near the center of said town, or upon said section 16. As stated in the original opinion, there is a large amount of evidence tending to prove that seven of the persons who signed the said petition were induced to do so solely by the promise of persons representing said railroad company that the depot in said Town K would be located at the point named in the petition in this action. This general proposition is scarcely denied or contested by counsel in the brief on the reargument; but they contend that the persons making these promises and inducements were not authorized to bind the railroad company thereby, and that such promises and agreements were not made at such times as to become and be a part of the *res gestae* of the signing of said petition by the said several petitioners. There was evidence before the district court from which it would have found, and doubtless did find, that four of the signers of the petition, to wit, Wullenwaber, Sorter, Hudson, and Barthold, were induced to sign the same by promises as to the location of the said depot, made directly to them severally by J. F. Goehner; that one of said signers, to wit, Fetton, was induced to sign the said petition by promises in relation to the location of said depot, made to him by said J. F. Goehner indirectly through his co-petitioner Wullenwaber; that one of said signers, to wit, Spahr, was induced to sign said petition by promises in relation to the location of said depot, made to them severally by the said J. F. Goehner indirectly through their co-petitioners Wullenwaber, Sorter, and Hudson, and that one of said signers, to wit, Rogge, was induced to sign said petition by promises made to him by the said J. F. Goehner indirectly through his co-petitioner Hudson. It is not contended that the said J. F. Goehner had direct authority from

the board of directors of the defendant railroad company to make the said promises, or any promises, to the said signers, or any of them, to induce them to sign the said petition; but it is contended, and is believed, that the evidence sufficiently proves that he was authorized by the last named defendant, indirectly, through P. E. Hall, the superintendent of construction of the defendant railroad company, to procure the signatures of a sufficient number of the freeholders of said Town K to the petition for said election for voting bonds, and to do the necessary soliciting and electioneering for the accomplishing of that purpose; also that the petition calling for said election, and which was afterwards signed by the freeholders of said Town K, as hereinbefore stated, presented to the county board of Seward County, and upon which said election was in fact called, was, by the attorney of said company, who in concert with the said superintendent of construction was actively engaged in behalf of said railroad company in soliciting and procuring the donation of bonds to said company by the several towns upon the line of its road in Seward County, and especially of Town K, prepared and placed in the hands of said J. F. Goehner, with authority and instruction that he solely, or in connection with W. Q. Dickinson, procure the signatures of the freeholders of said Town K thereto, and take and use all of the necessary, proper, and expedient steps and measures for that purpose; and this, it is believed, conferred sufficient authority upon the said J. F. Goehner to bind the said defendant railroad company, by a promise to the signers of the petition, or those who would afterwards, in consideration thereof, become signers, that a depot of said road should be located at a designated point.

It follows, I think, that Mr. Goehner having authority as above stated, and the object to be accomplished being one of taxation of private property, yet nevertheless was of public township concern, in which one individual voter could alone accomplish but little, his authority was sufficient to operate through and by the aid of his associates, who were his neighbors, and but lately his fellow-emigrants from a foreign country. The promises, therefore, of Goehner made to Fetton, Spahr, and Rogge, through Wullenwaber, Sorter, and Hudson, were the promises of the defendant railroad company, made indirectly in two degrees by its superintendent of construction and attorney.

I might add that it appears from the evidence that many of the signers of the petition for the election were present at a public meeting, and heard the attorney of the railroad company, in a public speech, made within the general scope and plan of the company's solicitation of donations from the several towns of Seward County, and especially Town K, promise on the part of the railroad company that the said company would locate and build a freight and passenger depot within a half mile from the center of section 16, in said K Town, in Seward County. The appellant railroad company contends in the brief on rehearing that the statements and promises made to the petitioners, either directly or indirectly, by or through Goehner, are no part of the *res gesta*.

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In the limited time at my disposal, I have been unable to find any case where the declaration of an agent has been held to be not of the *res gesta* because made before the final consummation of a contract; and I concede that in most of the cases the test has been whether the declaration was made at the time or so soon after the transaction or event as to forbid the conclusion that it was made as the result of study or reflection, and in view of its effect as evidence. I cannot conceive that a declaration made in the course and progress of a negotiation, and for the purpose of effecting the consummation of an agreement, is any the less a part of the *res gesta* because of its being made at a previous interview, shortly before the one at which such declaration or inducement resulted in the consummation of the contract.

It is also contended that because the petition was kept in the store of Mr. Dickinson, and presented to the signers by him, the promises and inducements made and held out by Goehner to procure signers to that paper cannot be considered a part of the *res gesta*, although Dickinson and Goehner were engaged in the common work of soliciting petitioners and voters for the common purpose of obtaining the coveted donation by K Town to the railroad company. I cannot agree to this proposition. It is not deemed necessary to add to what is said in the original opinion, as to the ratification and adoption on the part of the railroad company of the means used by the persons acting as its agents, procurers, and promoters, further than to say that a careful examination of the opinion fails to cast a doubt upon it as a correct exposition of the law in that respect. I conclude, therefore, that there is sufficient evidence in the bill of exceptions to sustain the finding of the trial court that seven of the fifty-six signers of the petition upon which the election for the bonds was called in K Town were induced to become such signers by means of the false, and, in law, fraudulent, representations of the defendant railroad company, in respect to the location and erection of the railroad depot in Town K. This number of signers being eliminated from the petition, leaves but forty-nine signers, less than the number required by statute to authorize the calling of said election.

There is another branch of the case, which, though not treated in the original opinion, is worthy of some notice. It appears from the evidence that six of the signers of the petition upon and by virtue of which the election for the issuance and donation of the railroad bonds in Town K of Seward County, was called and held, to wit, Suddith, Muir, Miner, Pederson, Schultz, and Ebberpacher, were not, nor were either of them, freeholders of said K Town at the time or date of the signing of said petition and the calling of said election, and that one of the signers of said petition, to wit, Draper, was, at the time and date of the placing of his name to the said petition, insane, and legally an inmate of the state hospital for the insane, to which he had been legally committed, and from which he had never been discharged, but was at the time in fact undischarged. Moreover, he had not sign the said petition, but that

his name was without authority written thereon by a Mr. Atwater. Thus, it appears, and was evidently so found by the trial court, that there were not to exceed forty-two legal sign-

ers to the said petition. The judgment of the district court is again affirmed.

Maxwell, J., concurs. Norval, J., did not sit.

IOWA SUPREME COURT.

James MCKEE, Admr., etc., of Joseph M. Brown, Deceased,
v.

CHICAGO, ROCK ISLAND & PACIFIC
R. CO., Appt.

(.....Iowa.....)

1. All ordinary and reasonable care and supervision must be used by a railroad company to keep its roadway safe for its employes.
2. A rule that no lumber, wood, stone, materials, or tools shall be placed within five feet of the rail does not apply to a wing fence at a railroad cattle-guard.
3. Placing wing fences at a cattle-guard three feet ten inches from the rails at the bottom and inclining slightly outward at the top is not negligence which will render a railroad company liable for the death of a brakeman by coming in contact with one of them while hanging low on the side of a freight car looking under it to discover what was causing stones to fly therefrom, where no such accident had ever happened before on the road or had been anticipated and no complaint had been made of the fences.
4. A brakeman must be presumed to know the distance from the rails of wing fences at cattle-guards so as to charge him with the risk of hanging low on a ladder at the side of a car in order to look under it.
(Beck, Ch. J., dissents.)

(October 28, 1891.)

APPEAL by defendant from a judgment of the District Court for Wayne County in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Meers, Freeland & Miles, Cummins & Wright and Thomas S. Wright, for appellant.

The fair intendment of the instructions is that defendant, while it must use ordinary care, must also secure a safe condition; not a reasonably safe condition; not ordinarily safe but a safe condition. Defendant is not bound to secure safety nor provide a safe roadbed.

Burke v. Witherbee, 98 N. Y. 565; *Wood, Mast. & Serv.* § 334; *Chicago, R. I. & P. R. Co. v. Londergan*, 6 West. Rep. 59, 118 Ill. 48.

Defendant was bound to anticipate, not only the emergency of a falling brake-beam, but

also that the train would not be stopped to investigate the difficulty, and that a brakeman would climb down on a side ladder and project his body out from the car in an unusual position. When the act or omission complained of is not in itself a distinct wrong and can only become a wrong to any particular individual through injurious consequence resulting therefrom, this consequence must not only be shown, but it must be so connected by averment and evidence with the act or omission, as to appear to have resulted therefrom, according to the ordinary course of events and as a proximate result of a sufficient cause
Cooley, Torts, pp. 69, 70.

The location and construction of the cattle guard fence was "not in itself a distinct wrong." The injurious consequences did not result "according to the ordinary course of events," but through the conjunction of an extraordinary event.

See *Ryan v. Railroad*, 10 Ont. Rep. C. P. Div. 745; *Skip v. Eastern Counties R. Co.* 9 Exch. 226.

To make the Company liable for the location and construction of this cattle-guard, it should at the time have been aware that its employes, in the usual and ordinary discharge of their duties, would be required to expose themselves to the dangers incident to such location and construction.

Koontz v. Chicago, R. I. & P. R. Co. 65 Iowa, 224.

The duty resting upon the proprietor does not go to the extent of requiring him to make accidental injuries impossible.

Sjogren v. Hall, 53 Mich. 274; *Allison Mfg. Co. v. McCormick*, 118 Pa. 519; *Beatty v. Central Iowa R. Co.* 58 Iowa, 248; *Wabash, St. L. & P. R. Co. v. Locke*, 11 West. Rep. 877, 112 Ind. 404; *Henry v. St. Louis, K. C. & N. R. Co.* 76 Mo. 238; *Clark v. Caledonian R. Co.* 5 Scotch, Sess. Cas. (4th series) 273; *Simons v. Great Western R. Co.* 18 C. B. 50; *Money v. Lower Vein Coal Co.* 55 Iowa, 671.

If defendant was bound to anticipate that brake-beams would get down and that brakemen would hang down on the car ladders to inspect while the train was in motion, then the liability for this to occur is and was a risk and duty incident to the service, which risk and duty deceased assumed when he entered the service.

Mayes v. Chicago, R. I. & P. R. Co. 63 Iowa, 569.

The question whether, under the circumstances, the position of the cattle-guard was

NOTE.—For liability of master for negligence in respect to servant's safety, see *notes* to *Lindvall v. Woods* (Minn.) 4 L. R. A. 733; *Georgia Pac. R. Co. v. Dooley* (Ga.) 12 L. R. A. 342.

As to assumption of risks, see *notes* to *Taylor v. Evansville & T. H. R. Co.* (Ind.) 6 L. R. A. 584; *Hunter v. New York, O. & W. R. Co.* (N. Y.) 6 L. R. A. 243; *Howard v. Delaware & H. Canal Co.* (Vt.) 6 L. R. A. 76; *Foley v. Pettes Mach. Works* (Mass.) 4 L. R. A. 51; *Pidcock v. Union Pac. R. Co.* (Utah) 1 L. R. A. 131. Also *Williamson v. Newport News & M. Valley Co.* (W. Va.) 12 L. R. A. 297.

ter v. New York, O. & W. R. Co. (N. Y.) 6 L. R. A. 243; Howard v. Delaware & H. Canal Co. (Vt.) 6 L. R. A. 76; Foley v. Pettes Mach. Works (Mass.) 4 L. R. A. 51; Pidcock v. Union Pac. R. Co. (Utah) 1 L. R. A. 131. Also Williamson v. Newport News & M. Valley Co. (W. Va.) 12 L. R. A. 297.

the proximate wrongful cause of the accident, was one of law for the court.

Koonts v. Chicago, R. I. & P. R. Co. 65 Iowa, 224; *Illick v. Flint & P. M. R. Co.* 12 West. Rep. 440, 87 Mich. 632; *Lovejoy v. Boston & L. R. Corp.* 125 Mass. 79.

If deceased knew, or by the exercise of ordinary care might have known, of the danger, continuance in service without objection would result in a waiver and assumption of the risk.

Muldorney v. Illinois Cent. R. Co. 39 Iowa, 620; *Hoben v. Burlington & M. River R. Co.* 20 Iowa, 562; *State v. Hartzell*, 58 Iowa, 520; *Preston v. Dubuque & P. R. Co.* 11 Iowa, 15; *Wilson Seving Mach. Co. v. Bull*, 52 Iowa, 554; *Conway v. Illinois Cent. R. Co.* 50 Iowa, 469.

There was error in admitting the rule under the head of "track repairers."

Baldwin v. St. Louis, K. & N. R. Co. 68 Iowa, 37; *Union Pac. R. Co. v. Springsteen*, 41 Kan. 724; *Richardson v. Cooper*, 83 Ill. 270.

All that the law requires of a railroad company to protect itself against claims for personal injuries by its employes is reasonable care in providing safe cars, machinery, and appliances.

Conway v. Illinois Cent. R. Co. supra;

Messrs **George Hall and C. W. Steele**, for appellee:

It was the duty of appellant to furnish appellee's intestate and its servant and employé a reasonably safe track, materials and structures and a safe place in which to work, and to keep the same in repair.

Chicago & N. W. R. Co. v. Swett, 45 Ill. 201; *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593; *Drymala v. Thompson*, 26 Minn. 40; *Coombs v. New Bedford Cordage Co.* 102 Mass. 572, 3 Am. Rep. 506; *Plank v. New York Cent. & H. R. R. Co.* 60 N. Y. 608; *Huhn v. Missouri Pac. R. Co.* 10 West. Rep. 405, 92 Mo. 440; *Dealin v. Wabash, St. L. & P. R. Co.* 4 West. Rep. 54, 87 Mo. 545; *Siela v. Hannibal & St. J. R. Co.* 82 Mo. 433; *Porter v. Hannibal & St. J. R. Co.* 71 Mo. 66; *Long v. Pacific R. Co.* 65 Mo. 225; *Snow v. Housatonic R. Co.* 8 Allen, 441, 85 Am. Dec. 720, note; *Greenleaf v. Illinois Cent. R. Co.* 29 Iowa, 41, 42; *Honic v. Chicago, R. I. & P. R. Co.* 75 Iowa, 683.

The greater the peril and the risk of the employment, the greater must be the care and effort of the appellant in providing for the safety of employes.

Hough v. Texas & P. R. Co. 100 U. S. 217, 25 L. ed. 615; *Cayser v. Taylor*, 10 Gray, 274.

Appellant was guilty of negligence in constructing, and permitting its fence and cattle-guard to remain so close to its track as to endanger the life of appellee's intestate, while in appellant's employ, and aiding and assisting in running and operating its trains over that portion of its road.

Patterson, Railway Acc. Law, 307; *Beach, Contrib. Neg.* § 134; 1 *Shearn. & Redf. Neg.* 4th ed. § 198, note; *Baltimore & O. & C. R. Co. v. Rowan*, 1 West. Rep. 914, 104 Ind. 88, 23 Am. & Eng. R. R. Cas. 390; *Eames v. Texas & N. O. R. Co.* 68 Tex. 660, 22 Am. & Eng. R. R. Cas. 545; *Robel v. Chicago, M. & St. P. R. Co.* 85 Minn. 84; *Chicago & A. R. Co. v. Johnson*, 2 West. Rep. 388, 116 Ill. 206; *Scanton v. Boston & A. R. Co.* 147 Mass. 484; *St. Louis, Ft. S. & W. R. Co. v. Irwin*, 37 Kan. 701; *Louis* 13 L. R. A.

isville, N. A. & C. R. Co. v. Wright, 13 West. Rep. 798, 115 Ind. 878; *Ferren v. Old Colony R. Co.* 8 New Eng. Rep. 330, 143 Mass. 197; *Pidcock v. Union Pac. R. Co.* 5 Utah, 612; *Dorsey v. Phillips*, 42 Wis. 583; *Chicago & I. R. Co. v. Russell*, 91 Ill. 298, 33 Am. Rep. 54; *Kearns v. Chicago, M. & St. P. R. Co.* 66 Iowa, 599; *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593; *Johnson v. St. Paul, M. & M. R. Co.* 43 Minn. 53.

It was the duty of appellant to know of the dangerous proximity of the fence to the track of its road, and whether it knew or not, it is liable if it could have known by the exercise of reasonable diligence.

Gibson v. Pacific R. Co. 46 Mo. 163, 2 Am. Rep. 497; *Hayden v. Smithville Mfg. Co.* 29 Conn. 543; *Chicago & I. R. Co. v. Russell, supra*; *Springfield v. Doyle*, 76 Ill. 202; *Chicago v. Fowler*, 60 Ill. 322.

It was not the duty of the deceased to investigate for himself, or determine the condition of the appliance furnished him, or the distance of the fence from the track. He was not required to know whether appellant's road had been safely and properly constructed, nor was he required to know of all defects and obstructions that existed on the line of road over which he ran, but he had, without investigation, the right to assume that they were safe and sufficient for the purpose, and that appellant had discharged its duties towards its employes.

St. Louis, Ft. S. & W. R. Co. v. Irwin, Dorsey v. Phillips, Gibson v. Pacific R. Co., Snow v. Housatonic R. Co. and Chicago & N. W. R. Co. v. Swett, supra; *Faren v. Sellers*, 39 La. Ann. 1011, 4 Am. St. Rep. 256, note; *Porter v. Hannibal & St. J. R. Co. and Dealin v. Wabash, St. L. & P. R. Co. supra*; *Levis v. St. Louis & I. M. R. Co.* 59 Mo. 506; *Petty v. Hannibal & St. J. R. Co.* 8 West. Rep. 297, 88 Mo. 806.

The deceased did not assume the risk caused by the dangerous proximity of the fence to the track unless he knew of the danger.

Scanton v. Boston & A. R. Co., Pidcock v. Union Pac. R. Co. and Honic v. Chicago, R. I. & P. R. Co. supra.

The knowledge of the deceased as to the dangerous proximity of the fence cannot be presumed in proof of his contributory negligence but must be proven by appellant.

Rummell v. Dilworth, 1 Cent. Rep. 905, 111 Pa. 343; *Smith v. Peninsular Car Works*, 60 Mich. 501; *Dorsey v. Phillips, supra*; *Suoboda v. Ward*, 40 Mich. 420; *Nadau v. White River Log. Co.* 76 Wis. 120; *Wells v. Burlington, C. R. & N. R. Co.* 56 Iowa, 525.

It was not negligence on the part of the deceased not to be on the lookout for the fence that caused his death unless he knew of its dangerous proximity to the track, and there is no evidence that he possessed such knowledge.

Kearns v. Chicago, M. & St. P. R. Co., Chicago & I. R. Co. v. Russell and Chicago & A. R. Co. v. Johnson, supra; *Northern Cent. R. Co. v. State*, 31 Md. 557; *Levis v. Baltimore & O. R. Co.* 38 Md. 538; *Johnson v. St. Paul, M. & M. R. Co. supra*.

If there was any question as to whether the deceased had any knowledge as to the near proximity of the fence to the track of appellant's road, if there was any evidence tending

to show such knowledge or contributory negligence on his part, the determination of that question became a question for the jury, and was properly submitted to it by the court.

Wharton, Neg. § 217; Cooley, Torts, 661, and cases cited; *Rummell v. Dilworth*, *supra*; *Huddleston v. Lowell Mach. Shop*, 106 Mass. 282; *Coombs v. New Bedford Cordage Co.* and *Robel v. Chicago, M. & St. P. R. Co. supra*; *Thompson v. Chicago, M. & St. P. R. Co.* 14 Fed. Rep. 564; *Nadaw v. White River Log. Co.* and *Huhn v. Missouri Pac. R. Co. supra*; *Sioux City & Pac. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 664, 665, 21 L. ed. 745, 749, 750; *Miller v. Union Pac. R. Co.* 12 Fed. Rep. 600; *Franklin v. Winona & St. P. R. Co.* 37 Minn. 409.

Although the deceased may have known of the near proximity of the fence in question to the track, that of itself could not prevent a recovery in this case, unless the same was so close, to his knowledge, that it would be necessarily dangerous to the mind of a prudent person to use the side ladder under the circumstances as shown in this case.

Perigo v. Chicago, R. I. & P. R. Co. 55 Iowa, 326; *Hosie v. Chicago, R. I. & P. R. Co.* and *Snov v. Housatonic R. Co. supra*; Wood, Mast. & Serv. § 327; *Huhn v. Missouri Pac. R. Co. supra*; *Haveley v. Northern Cent. R. Co.* 82 N. Y. 870; *Colorado Cent. R. Co. v. Ogden*, 8 Colo. 500; *Devlin v. Wabash St. L. & P. R. Co. supra*; *Thorp v. Missouri Pac. R. Co.* 6 West. Rep. 671, 89 Mo. 650; *Stoddard v. St. Louis, K. C. & N. R. Co.* 65 Mo. 520; *Flynn v. Kansas City, St. J. & O. B. R. Co.* 78 Mo. 195.

Robinson, J., delivered the opinion of the court:

In September, 1888, Joseph M. Brown was in the employ of defendant as brakeman on a freight train. The division on which he worked extended from Trenton, in Missouri, to Eldon, in this State. On the 20th day of the month named, he left Trenton with his train. When it reached the vicinity of Numa he was in the caboose, and, observing stones which appeared to be thrown from the track under the second car from the caboose, he went forward to ascertain the cause. He first went down on the north side of the car, and then climbed back, and went down on the south side by means of the side ladder. While hanging low on the ladder, with his back towards the locomotive, looking under the car, his head came in contact with a wing fence at the end of a cattle-guard, and he was instantly killed. This action is brought by the administrator of his estate to recover the resulting damages.

It is claimed by plaintiff that the defendant was negligent in allowing the fence to be placed so near the track as it was, and that decedent was killed in consequence, and without fault on his part. Defendant denies the alleged negligence on its part, and the alleged absence of negligence on the part of decedent, and alleges that he had been employed by defendant on the part of its road where the accident occurred for several years; that during that time the fence and cattle-guard of which complaint is made were not changed, and were like the other cattle-guards and appurtenances along

that part of its road,—all of which was well known to decedent long prior to his death.

1. The court charged the jury as follows: "It is the duty of a railroad company, as regards its employees, to use all ordinary care and supervision to keep its roadway, for the operation of its trains by its employees, in a good and safe condition, so that the employees may not be exposed to unnecessary hazards in the operation of its trains." "The deceased . . . had a right to assume that the defendant would use all reasonable care in the keeping of its road in a good and safe condition, for the operation of its trains by its employees. . . ." Defendant complains of the portions of the charge quoted, on the ground that they require defendant to keep its road in a safe condition, while the rule is that it must be kept in a reasonably safe condition. We do not think the jury would so understand the charge. It instructed them that it was the duty of defendant to use all ordinary and all reasonable care and supervision to keep its roadway safe, and that, we think, is the law. If the road could have been made safe by such means, then it was the duty of defendant to make it so.

2. The only charge of wrong against defendant is that it negligently placed the fence with which decedent came in contact too close to the track. That it was a proper appurtenance of the road is not questioned. The evidence shows that all the cattle-guards and cattle-guard fences along the line of defendant's railway, upon which decedent had been employed, were constructed substantially alike. As we understand the record, each cattle-guard was made by digging a pit across the roadbed, about eight feet wide and two feet deep. Across the pit were placed timbers, and on them were laid ties from twelve to fourteen feet in length. At each end of the ties was constructed a wing fence eight feet in length, parallel to the track. It was made of two posts, and boards nailed thereon and to its center was attached the right-of-way fence. The posts of the wing fences inclined outward somewhat, but, as a rule, were nearly perpendicular to the surface of the earth, and were from three feet five inches to four feet seven inches from the rails. The fence which caused the accident in question was three feet ten inches from the rail at the bottom, and inclined outward at the top three inches. There is no competent evidence that it was improperly constructed or located. Certain rules of defendant, designed for the guidance of its track repairers, were, however, introduced in evidence, over the objections of defendant. One of the rules so introduced is as follows: "(2) They must see that no lumber, wood, stone, materials or tools are placed, at any time, within five feet of the rail, and that all gravel and ballast is leveled so as not to endanger the safety of the trains." It is urged by appellee that this rule is evidence that a wing fence should not be placed within five feet of the track and it is claimed that, if the one in question had been placed that distance from it, the accident would not have occurred. But the rule cannot be given the effect claimed for it. It evidently does not refer to permanent structures, but to loose tools and materials. There

would be good reason for requiring articles which might be readily moved by the wind, by animals, or other cause, without the concurrence and against the wish of defendant, to be placed further from the track than appurtenances of the road, which are permanently attached to the earth or roadbed. Other rules required the track repairers to examine their sections daily to ascertain if the track was safe, and to observe closely the fences, and to keep them and the cattle-guards in good repair. It is not claimed that the fence in question was not in good order, and the rules gave the repairers no authority to move it. The rules were therefore improperly admitted. The jury were instructed that they could not presume negligence from the fact that the accident occurred, but there was no other evidence of such negligence.

8. It is said, however, that the cattle-guard and fence could, with reasonable care, have been so constructed that decedent would have passed the fence in safety. That may be conceded, and the question then arises whether the accident was of such a nature that defendant should have guarded against it. The stones and ballast which had attracted the attention of decedent, and caused him to descend the ladder on the side of the car, and look under it, were thrown out by a brake beam which was down and dragging. The evidence shows that, in operating trains, it sometimes happens that a brake-beam or other appurtenance of the trucks of a car gets out of order. When there are indications that such a state of affairs exists, it is the duty of the brakeman who discovers it to report the fact to the conductor, and under his direction to ascertain what, if anything, requires attention, and, if necessary, to stop the train. To make the required examination, it may be proper for the brakeman to descend the ladder at the end or on the side of a car, and look under it while the train is in motion. But the evidence does not show that such an event is of common occurrence, and it does show without contradiction that it is not customary for a brakeman to descend the side of a car while it is in motion between stations. It does not appear that any accident caused by the location of a wing fence had ever happened on the road of defendant before that in question, although its road had been operated many years.

The undisputed facts of this case bring it within the rule announced in *Koontz v. Chicago, R. I. & P. R. Co.*, 65 Iowa, 226. The facts involved in that case were substantially as follows: A train of the defendant was stopped on a bridge because the engineer supposed that some of the cars were off the track, or that one of the brakes was set. A brakeman who had been riding in the cab of the engine got down, and in the discharge of his duty proceeded to walk back beside the train to ascertain what cause, if any, there was, for stopping. While so engaged he fell through the bridge, and received injuries which caused his death. This court held that it was not the duty of the railway company to plank every bridge and cattle-guard to prevent accidents to its employes, although it might have anticipated that trains would be required to stop at other than the usual stopping places; and it was said that

"ordinary care does not require that every possible contingency must be anticipated and guarded against, but only such as are likely to occur." That such is the rule applicable to cases of this kind is well settled by the authorities.

In *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404, it is stated as follows: "The duty imposed does not require the use of every possible precaution to avoid injury to individuals, nor that the company should have employed any particular means which it may appear, after the accident, would have avoided it. It was only required to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident."

In *Loftus v. Union Ferry Co.*, 84 N. Y. 459, the material facts involved were as follows: A child six years of age fell from a bridge or float adjoining the passageway for passengers going upon or leaving the ferry-boat, into the water, and was drowned, in consequence of an alleged defect in the guard at the side of the bridge or float. The guard, at the time of the accident, was in the condition it had been in for years. Many people had passed that place yearly, and no accident like that complained of had happened before. The court held that the ferry company was bound to provide suitable and safe accommodations for the landing of passengers, and that the rule of strictest diligence in that respect was the only one consistent with a due regard to the value of human life, and with the relations of the company to the public. It further held that "the rule does not impose upon the defendant the duty of so providing for the safety of passengers that they shall encounter no possible danger, and meet with no casualty, in the use of the appliances provided by it. It was possible for the defendant so to have constructed the guard that such an accident as this could not have happened, and this, so far as appears, could have been done without unreasonable expense or trouble. If the defendant ought to have foreseen that such an accident might happen, or if such an accident could reasonably have been anticipated, the omission to provide against it would be actionable negligence." The company was held not liable, because it appeared that it had no reason to apprehend an accident like that for which it was sought to make it liable, and that the arrangements it had made were such as experience had, up to that time, shown to be safe and suitable, and sufficient to meet the requirements of its duty.

In *Sjogren v. Hall*, 53 Mich. 274, a case in which an employe in a steam saw-mill sought to recover for injuries sustained in the course of his employment, the Supreme Court of Michigan said it was the duty of the mill-owner to guard against probable dangers, not to make accidental injuries impossible. It was further stated, in effect, that the fact that the employe who was not wanting in intelligence nor incapable of judging of probable danger, continued to expose himself without hesitation, and apparently without fear to such risks as those were, was very conclusive proof either that the employer was not culpable in the matter complained of, or that the employe was inexcusably careless of his own safety. It was further

said, in effect, that the fact that, after the accident occurred, it was seen that it could have been easily guarded against, was no reason for holding the employer liable.

To have guarded against the accident in controversy, it was necessary for defendant to foresee that something might occur to one of its moving trains which would make it proper for an employé to descend a car to look beneath it, and that he would descend, and swing himself out from the car while passing a wing fence, to make the desired examination. It is undoubtedly true that defendant might readily have known that such a combination of circumstances was possible, but it is apparent that it was not likely to occur. So far as the record shows, the accident in question was so improbable, and it was due to causes of such rare occurrence, that defendant, in the exercise of reasonable diligence, was not required to provide against it. It is readily seen now how it could have been avoided, but it does not appear that anyone anticipated it, or anything of that nature. It is not shown that complaint of the wing fences was ever made to the defendant, nor that it had any reason to anticipate accidents from them. They were properly constructed, so far as the record discloses, and defendant had reason to believe, from the length of time during which it had operated the road without accident from them, that they were properly located.

4. Another objection to a recovery by plaintiff on the record submitted is that it clearly appears the accident would have been avoided by the use of ordinary care on the part of decedent. He had been employed as brakeman on the division on which the accident occurred in all about three years, and his runs were usually made in daylight. On that division there were about 400 wing fences, all of which were substantially like that in question, as to plan of construction and distance from the track. The distance between the wing fences and the sides of passing box-cars was about two feet, and it is shown without contradiction that the side ladders could be used with safety in examining as to the condition of trains in passing the wing fences in question. But it must have been apparent to anyone who had observed the width of the spaces between the fences and passing cars, that a person could not safely swing out from a car while passing such a fence, on its level, more than two feet, and that an attempt to do so would be apt to result in serious injury. It is said that there is no evidence that decedent knew the distance of the fence from the passing car, but that claim is in conflict with the approved rules of evidence. It was said in *Muldoney v. Illinois Cent. R. Co.*, 39 Iowa, 620, that "the means of knowing by ordinary care is evidence of knowledge." If it be shown that a given statement was made in the presence and hearing of a person possessed of the ability to hear, the presumption, conclusive in the absence of a showing to the contrary, is that he heard it. If it be shown that an event, capable of being seen by any ordinary observer, occurred in the presence of a person possessed of the ability to see, and that his attention was at the time directed to it, it will be presumed, until the contrary appears, that he saw it. So a person

engaged in a particular employment will be presumed to have that knowledge of the dangers incident to his employment which he could have acquired by the use of ordinary diligence.

In *Mayes v. Chicago, R. I. & P. R. Co.*, 63 Iowa, 563, it was shown that the plaintiff's intestate was a switchman or brakeman in the employment of the defendant, and that his death was caused by the negligence of defendant in failing to place blocks between the rails and the guard-rails at the switches. It was said by this court, in effect, that the knowledge of defects possessed by an employé, and his ability in the exercise of ordinary diligence to acquire knowledge thereof, are questions of fact to be determined on the evidence submitted in cases where the defects or dangers are not open and obvious to everyone serving in the capacity of an employé; but that the rule was not applicable to that case, for the reason that the decedent had worked over the track in question for six weeks, and must be presumed to have known of the defect, and that it was dangerous. The plaintiff in *Money v. Lower Vein Coal Co.*, 55 Iowa, 671, sought to recover for injuries received from a falling roof while working as a miner in the mine of defendant. This court held as follows: "The true rule is that if the plaintiff knew, or by the exercise of ordinary care might have known, of the unsafe condition of the roof, and he continued to work in the dangerous place without protest or complaint, and without being induced to believe that a change would be made, he assumed the risk, and cannot recover." In *Muldoney v. Illinois Cent. R. Co.*, *supra*, this court approved the following: "When an employé has the means of acquiring knowledge, by the exercise of ordinary care and diligence, of the defects or imperfections in the machinery or cars about or upon which he is employed, and continues in his employer's service without objecting to or protesting against the use of such defective or imperfect cars or machinery, he will be held to have assumed all the risks incident to the use of the cars and machinery in such defective condition." The court cited a large number of cases as supporting the rule. In *Perigo v. Chicago, R. I. & P. R. Co.*, 52 Iowa, 276, it appeared that the defendant had erected a coal platform between two of its tracks at Winterset, and, for convenience in unloading and taking on coal, placed it so near one of the tracks that a passenger-car, moving along the track, passed within seven inches of the platform at one end, and within four and a half inches of it at the other end. The platform had been in the position described two years, when a baggage-man in the employment of the defendant, while engaged in the discharge of his duties in helping to make up a train, was knocked off the car by the coal platform, thereby receiving injuries which resulted in his death. He had been in that employment for more than two years, and had assisted in making up the train during nearly every day of that time. In considering an instruction in which the rule under consideration was stated, the court said: "It is now the established doctrine of this court, in harmony with the current of authority elsewhere, that an employé who knows, or by the

exercise of ordinary diligence could know, of any defects or imperfections in the things about which he is employed, and continues in the service without objection, and without promise of change, is presumed to have assumed all the consequences resulting from such defects, and to have waived all right to recover for injuries caused thereby."

The rule, as thus stated, was approved in *Wells v. Burlington, O. R. & N. R. Co.*, 56 Iowa, 524. The facts involved in that case were that the plaintiff's intestate was a brakeman in the employment of defendant, and had been so engaged for more than four years upon that part of its road where the accident occurred. He was killed by being knocked from the top of a freight train by the timbers of a bridge over which the train was passing. The bridge timbers with which he came in contact were a little more than five feet above the top of the car, while he was more than six feet in height. There were other bridges of like construction and height on that part of the road, over which he had often passed. In the opinion written by Beck, J., it was held that an instruction embodying the rule under consideration should have been given. It was also said, in regard to the dangers of the employment, that "the knowledge of the intestate and his failure to make objections may be shown by circumstances and inferred from his conduct. Direct proof on these points is not required. The knowledge of the dangerous character of the bridge may be inferred from opportunities of obtaining such knowledge in the exercise of ordinary care."

In *Gould v. Chicago, B. & Q. R. Co.*, 66 Iowa, 590, it appeared that the plaintiff's intestate, a locomotive engineer in the employment of the defendant, was fatally injured while in the discharge of his duties. He had been instructed to make a certain trip without stopping at any station, unless signaled or specially directed so to do. It was the duty of the conductor or brakeman to make signals to the engineer from the rear end of the train when passing stations. While the train was passing a station on the tip the engineer went to the fireman's side of the engine, and leaned out of the gangway, looking back for the expected signal. He was almost instantly struck by a water crane, and injured as stated. The water crane, or the frame supporting it, was about two feet from the floor of the gangway upon which the engineer was standing when he was struck. This court approved an instruction to the effect that, if the crane was so located as to be reasonably safe for trainmen operating trains in a reasonably safe and prudent manner, then the defendant was not guilty of negligence in the location of the crane, and disapproved one which stated, in effect, that, if the crane was placed in such close proximity to the track as to be dangerous to the persons operating the trains, then defendant might be found guilty of negligence in locating and erecting it. In considering that instruction, the court, again speaking by Beck, Ch. J., stated that "it is not true that a railroad company is to be regarded as negligent in erecting or maintaining contrivances or things for use in the operation of their roads, for the reason that they are dangerous to the persons operating the trains.

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Indeed, the whole business of operating trains is dangerous. It is full of perils to those employed therein. Because there is danger, it does not follow that the companies are negligent as to the things from which the danger springs. The instruction should have expressed the thought that, if the crane was dangerous to persons operating trains in the exercise of ordinary care, the defendant was negligent in constructing it."

The rule under consideration is too well grounded in reason and authority, and has been too long followed by this court without dissent, to be now abandoned. When applied to the facts in this case, its effect cannot be a matter of doubt. The decedent during his long term of service on the road in question, could not have failed to observe, in the use of ordinary diligence, that the wing fences were too near the track to permit a person to swing out from the bottom of the passing car with safety. This is especially true if the trainmen were required to descend the sides of moving cars, and look beneath them, as was done in this case, so frequently that defendant should be charged with knowledge of such examinations, and be required to provide for them. Decedent may not have known the exact distance of any wing fence from the track, but he could not have avoided knowing that he could not safely do that which he attempted if he had given the matter that attention which his duty to his employer and to himself demanded. The accident occurred at about noon of a pleasant day. The track where it occurred was straight. There were no obstructions, and decedent could have seen the fence which caused his death, from his position at the bottom of the ladder, for a distance of 930 feet before it was reached. There was nothing in the condition of the car which he sought to examine, as it appeared at the time, to justify him in exposing himself to any unusual risk. There was nothing to indicate such an impending danger to the employes or property of defendant, nor to passengers, as justified decedent in acting without regard to his own safety. It appears that a break-beam or lever, or a break loose and dragging, might have thrown the stones from the track, or that a swing-beam might have thrown them from ballast filled in too full. It is not shown that when stones were thrown as were those in question it was regarded as indicating unusual danger, or anything of a serious nature, although it made an examination as to the condition of the train necessary. That decedent was not alarmed by what he saw is shown by what he did. It was his duty to report to the conductor if he saw anything wrong with the train. He made no report in this case, but proceeded without orders, evidently not for the purpose of averting an apparent and impending danger, but to ascertain if one existed. The conductor and a fellow-brakeman were near him in the caboose when he left it, but he did not regard the cause of his leaving of sufficient importance to call their attention to it.

In *Honic v. Chicago, R. I. & P. R. Co.*, 75 Iowa, 686, it appeared that a brakeman was injured in attempting to set a brake in obedience to a signal which was unusual, and indicated that prompt action was required. It was held

that under the facts of that case, the brakeman was justified in attempting to obey the signal, although in so doing he knowingly incurred risk to himself; but the rule of that and similar cases has no application to this case. It clearly appears from the undisputed facts of the case and the authorities cited that defendant is not shown to have been negligent in the provision it has made for the safety of its employes in the matter in controversy. The case of *Loftus v. Union Ferry Co.*, *supra*, is even authority for the conclusion that it has exercised that higher degree of care which a passenger might have demanded. On the other hand, it appears that, had decedent used reasonable care to ascertain and avoid the danger to which he exposed himself, the accident which caused his death could not have occurred. What we have said disposes of all questions discussed by counsel which are likely to arise on another trial.

For the reasons indicated the judgment of the District Court is reversed.

Beck, Ch. J., dissenting:

1. The undisputed evidence shows that plaintiff's intestate, Joseph M. Brown, had been for several months employed as a brakeman upon trains running on that part of the road where the accident resulting in his death occurred. The deceased, being in the cupola of the caboose, while the train was running in daylight under ordinary conditions, saw stones flying from the ballast of the roadbed, so that they could be seen by him from the cupola. He knew from this indication that some part of the car was coming in contact with the roadbed, and thereupon went upon the top of the car, thence down its side upon the ladder, and returned to the top, went down the ladder on the other side, and swinging himself from the ladder so that he could do so, looked under the car to see what part of it was dragging upon the roadbed. While in this position, his head came in contact with the upright part of a cattle-guard, and he was instantly killed. There was a panel of fence extending along the cattle-guard on the side furthest from the track, to the middle of which the fence was attached. The fence was three feet ten inches from the rail at the bottom, and four feet and one inch at the top. Other cattle-guards varied, as to the distance from the rails, but little one way or the other from this measurement. It was found that a brake-beam was down, and was dragging upon the roadbed, which caused the stones to be thrown off the track. The deceased was looking backward when he was killed. He was not directed by the conductor to examine and report as to the cause of the stones flying from the track. There was evidence tending to show that an ordinary freight-car projects about two feet beyond the rail, and that it was the duty of a brakeman, upon observing indications of a brake-beam or the like being down, to examine into the matter and ascertain the cause of the indications, and this could be done only by looking under the car in the manner deceased attempted.

2. Was it the duty of deceased, upon observing indications of parts of the car or machinery near the track being out of order, to ascertain what was the cause of the indications

in order to prevent injury to the train from the defective parts of the car? Evidence was submitted to the jury to the effect that upon such an occurrence it was customary for the brakeman to do just as the deceased attempted to do, namely, descend the ladder, and obtain a view of the parts under the car, so that whatever was necessary to avoid danger could be done. A witness for the defendant testified that it was the duty of deceased to report the fact to the conductor, and from him have orders to descend the side of the car. But, if it be assumed that he should have pursued this course, it does not follow he was negligent in acting without the conductor's orders. It was a case of the discharge of duty without waiting for orders. It is very plain that the emergency required prompt action; that the deceased acted just as the emergency required. Now to hold that the deceased, because he did the act he would have been required to do had he reported to the conductor, was negligent, would condemn him for prompt intelligence and faithful services, intended to protect the property of defendant and the lives of himself and other trainmen. But we cannot hold that, in such a case, a trainman must, before he acts, report for orders. Such a rule would often expose life and property to destruction, for in the management of trains which move at a high rate of speed promptness and celerity of action are to be commended, indeed required, in the right discharge of duty by the trainmen. I need not further present reasons for holding that the deceased, in the discharge of his duty, descended the ladder, and attempted to see the parts of the car out of order. But I may repeat what I have before intimated, that preservation of human life and protection to the property of defendant required deceased to do this duty, and do it promptly.

3. Now if it were the duty of deceased to descend the ladder and look under the car, it cannot be doubted that defendant was required to construct the cattle-guards so that his life would not be destroyed in the discharge of duty. Therefore, if the parts of the cattle-guard were so near the car as to expose the body of deceased to contact therewith, they were negligently constructed. A great deal more could be said upon these points, but I refrain from continuing their discussion.

4. It is insisted that, as the act done by defendant was rarely demanded, the indications—the flying of the stones—were something unusual, and the defendant was not required to anticipate the occurrence, and so provide that danger to its employes would not result therefrom. We cannot say, as a matter of law, that the occurrence of the brake-beam or other timber under the car being down is so unusual that it could not or ought not to have been anticipated. Indeed the evidence tends to show that such things were quite familiar to at least one witness who had been a trainman; and it is a matter of common knowledge that the timber and irons of the machinery and trucks are exposed to breaking, and from other causes they become out of order. Timbers, irons or stones, not connected with cars may become fastened to parts of the trucks, and other things of this character may occur, all of which would, if not removed, cause destruction of property

and of life. The character of these dangers can only be known by a view under the cars. Now, surely the defendant ought so to construct its track, cars and cattle-guards that a trainman may in safety so act when such occasions arise that life and property will be protected. The evidence in this case shows that the part of the cattle-guard was about two feet and two inches from the side of the car, and probably even less from the ladder upon which deceased was supporting himself when he was killed. The jury were authorized to find that deceased was killed while in the discharge of his duty, and that the discharge of that duty, and duty of that character, may be required at any time, or at any place, upon a moving train, and therefore that danger from cattle-guards so near the track should have been anticipated and provided against by defendant. The cases and authorities cited in the majority opinion are not in conflict with these views and conclusions.

5. It was the duty of defendant to so construct the cattle-guard as not to endanger the safety or life of the employes operating trains on the railroad, and, under familiar rules, intestate was authorized to believe that defendant had done its duty in this regard and to believe that no danger of the character caused by the cattle-guard existed. He could rest in this belief, and act accordingly until he obtained actual knowledge that the danger existed. *Muldowney v. Illinois Cent. R. Co.* 36 Iowa, 468; *Kearns v. Chicago, M. & St. P. R. Co.* 66 Iowa, 599; *Snow v. Housatonic R. Co.* 8 Allen, 441; *Gibson v. Pacific R. Co.* 46 Mo. 163; *Faren v. Sellers*, 39 La. Ann. 1011; *St. Louis, Ft. S. & W. R. Co. v. Irwin*, 37 Kan. 701; *Dorsey v. Phillips*, 42 Wis. 588; *Chicago & N. W. R. Co. v. Sweet*, 45 Ill. 197; *Porter v. Hannibal & St. J. R. Co.* 71 Mo. 66; *Lewis v. St. Louis & I. M. R. Co.* 59 Mo. 506; *Petty v. Hannibal & St. J. R. Co.* 68 Mo. 806, 8 West. Rep. 297; *Devlin v. Wabash, St. L. & P. R. Co.* 87 Mo. 545, 4 West. Rep. 54.

6. If deceased knew, or could have known in the exercise of reasonable diligence, the danger to which he exposed himself by attempting to discharge the duty he undertook to protect defendant's property, by descending the ladder in

order to discover the cause of the stones from the roadbed flying out from under the car, and thus voluntarily put his life at hazard, he was negligent, and thereby contributed to the injury resulting in his own death, and his representative cannot recover. But there is no evidence tending to show that he had such knowledge, or that in the exercise of reasonable diligence he could have acquired it. It is not shown that he or any other employe of defendant knew the distance the fences of the cattle-guards were from the cars or the rails, nor that he or they knew just what distance between the car and the fence would enable one to do what he attempted to do with safety, or what distance would render the act dangerous. It is not shown that any employe of defendant or the deceased had any reason to believe that he exposed himself to danger from the fences by attempting to look under the car. It is a case where the employes and witnesses of defendant are exceeding wise after a life has been sacrificed and measurements have been made. No one appears to have thought of the danger before. This very view is taken in the opinion of the majority to excuse defendant's negligence, namely, that the accident was so improbable and unexpected that defendant cannot be regarded as negligent in maintaining the fence so near the car; but the victim of the accident is to be held by the majority of the court to have been negligent for not knowing the danger, while the defendant is to be held free of negligence because the accident could not have been anticipated. I protest against such discrimination in favor of defendant. The simple facts are that the fence was dangerously near the track, and there is no evidence tending to show that the intestate knew it, or that in the exercise of reasonable diligence he could have acquired knowledge of such fact. The considerations distinguish the case from *Mayer v. Chicago, R. I. & P. R. Co.* 63 Iowa, 562; *Gould v. Chicago, B. & Q. R. Co.* 66 Iowa, 590; *Wells v. Burlington C. R. & N. R. Co.* 56 Iowa, 524, and other like cases cited in the majority opinion as applicable on this point.

In my opinion the judgment of the district court ought to be affirmed.

NEW HAMPSHIRE SUPREME COURT

Jennie JACQUES

v.

GREAT FALLS MANUFACTURING CO.

(.....N.H.....)

1. A nonsuit is properly refused in an action to recover damages for personal injuries where the evidence shows that plaintiff was a weaver having charge of looms in defendant's mill; that a shuttle could not fly out of a loom unless the machinery was defective or out of repair; that plaintiff had no knowledge of and was not permitted to meddle with the machinery but in case it appeared out of repair must inform a person employed for the purpose of repairing looms; that on the day of the accident one of the looms did not work right, the shuttle flying out and sticking; that the loom-fixer was called three

times to repair the loom, and after making what repairs he thought necessary each time again set the loom running; that plaintiff watched the loom more closely than the others because afraid of its action, and that shortly after it was fixed the last time a shuttle flew out inflicting the injury complained of.

2. A loom-fixer in a cotton mill, whose duty is to look after the looms and keep them in proper repair, is not the fellow servant of weavers employed at the looms, within the rule that the master is not liable for injuries received through the negligence of a fellow servant.

(July 31, 1891.)

EXCEPTIONS by defendant to rulings of the trial term of the Supreme Court for Strafford County (Carpenter, J.,) made during

the trial of an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Exceptions overruled.*

Plaintiff was employed by defendant as a weaver in its cotton mills having charge of six looms.

The further facts sufficiently appear in the opinion.

Messrs. W. S. & D. R. Pierce, for defendant:

In *McAndrews v. Burns*, 89 N. J. L. 117, *Mr. Justice Dalrimple* defined common employment to be service of such kind that, in the exercise of common sagacity, all who engage in it may be able to foresee, when accepting it, that through the negligence of fellow servants it may probably expose them to injury.

Thompson, in his work on Negligence, vol. 2, § 37, p. 1084, adds, after citing the above definition: "The more general view seems to be, that all servants in the employ of the same master, under the same general control, and engaged in promoting the same common object,—such as operating a railroad or a mine,—are to be deemed fellow servants engaged in the same common employment; and if so, the fact that they are engaged in different departments of the same service does not take the case out of the rule."

John C. Burke, the loom-fixer, having been engaged in the same common employment with the plaintiff, was a fellow servant.

McGee v. Boston Cordage Co. 139 Mass. 445; *Johnson v. Boston Tow-Boat Co.* 135 Mass. 209; *King v. Boston & W. R. Corp.* 9 Cush. 112. See *Gilman v. Eastern R. Co.* 13 Allen, 441; *Gillshannon v. Stony Brook R. Corp.* 10 Cush. 223; *Seaver v. Boston & M. R. Co.* 14 Gray, 466; *Killea v. Faxon*, 125 Mass. 485; *Colton v. Richards*, 123 Mass. 484; *Kelley v. Norcross*, 121 Mass. 508; *Hanley v. Grand Trunk R. Co.* 62 N. H. 261; *Nash v. Nashua I. & S. Co.* 62 N. H. 407; *Fifield v. Northfield R. Co.* 42 N. H. 225.

Messrs. Russell & Boyer, for plaintiff:

The question of negligence is one of fact to be found by the jury from the evidence submitted under proper instructions from the court.

Stark v. Lancaster, 57 N. H. 88; *Daniels v. Lebanon*, 58 N. H. 285; *Ruland v. South Newmarket*, 59 N. H. 291; *Paine v. Grand Trunk R. Co.* 58 N. H. 611; *Deerson v. Eastern R. Co.* 58 N. H. 181; *Gordon v. Boston & M. R. Co.* 58 N. H. 396; *Paine v. Grand Trunk R. Co.* 1 New Eng. Rep. 841, 63 N. H. 623.

The evidence was sufficient to raise a reasonable presumption of guilt on the part of the defendants in the minds of the jury.

Moynihan v. Hills Co. 6 New Eng. Rep. 266, 146 Mass. 591; *White v. Boston & A. R. Co.* 4 New Eng. Rep. 267, 144 Mass. 406.

It was the corporation's duty to keep the loom in a reasonable state of repair and free from defects.

Gibson v. Pacific R. Co. 46 Mo. 163; 2 Thomp. Neg. pp. 946, 947, p. 973, § 3, p. 979, § 9; *Shearm. & Redf. Neg.* §§ 194-197, and cases cited.

Burke was not the fellow servant of the plaintiff.

He to whom the corporation delegates any 13 L. R. A.

duty it has to perform towards its servants while in the performance of such duty stands in the place of, and, as to those affected by that duty, is the corporation itself to all intents and purposes.

Beach, Contrib. Neg. §§ 110, 112; 2 Thomp. Neg. § 86, p. 1082; *Shearm. & Redf. Neg.* § 204; *Anderson v. Bennett*, 16 Or. 515, 8 Am. St. Rep. 311; note to *Fisk v. Central Pac. R. Co.* (Cal.) 1 Am. St. Rep. 29.

A corporation cannot escape its duty by delegating it to an agent and then disclaiming all responsibility.

Bushby v. New York, L. E. & W. R. Co. 10 Cent. Rep. 239, 107 N. Y. 374; *Moynihan v. Hills Co.* 6 New Eng. Rep. 266, 146 Mass. 596.

That defendants would perform this duty imposed by law, to the plaintiff in respect to the supply and maintenance of proper machinery, was a part of their contract with the plaintiff, implied by law from the relation of master and servant, existing between plaintiff and defendants.

2 Thomp. Neg. p. 972, § 3, p. 1082; *Shearm. & Redf. Neg.* § 194; *Anderson v. Bennett*, 16 Or. 515, 8 Am. St. Rep. 311. See *Shanny v. Androscoggin Mill*, 66 Me. 490; *Gunter v. Graniteville Mfg. Co.* 18 S. C. 26, 44 Am. Rep. 573.

The facts are not sufficient to charge the plaintiff with contributory negligence in continuing to run the loom after she began to be afraid of it.

Sleeper v. Worcester & N. R. Co. 58 N. H. 520; *Griffin v. Auburn*, 58 N. H. 123.

To have that effect it must appear that she fully realized the danger to herself, if any.

Wharton, Neg. § 215; *Myhan v. Louisiana Elec. L. & P. Co.* 7 L. R. A. 172, 41 La. Ann. 964, 17 Am. St. Rep. 426; *Galveston H. & S. A. R. Co. v. Garrett*, 78 Tex. 262, 15 Am. St. Rep. 781.

Clark, J., delivered the opinion of the court:

The motion for nonsuit presents the question whether the jury could properly find a verdict for the plaintiff upon the evidence submitted. *Paine v. Grand Trunk R.* 58 N. H. 611. The evidence produced by the plaintiff—that the shuttle would not fly out of a loom unless the machinery was defective or out of repair; that the plaintiff had no knowledge of the machinery, and was not allowed to meddle with it, and, in case it did not operate properly, was required to call on Burke, a loom-fixer employed by the defendant to look after the looms operated by the plaintiff, and keep them in proper repair; that the shuttle flew out of one of her looms about 10 o'clock in the forenoon of the day of the injury, and she notified Burke, who examined it, made whatever repairs he thought necessary, and set it running; that at 11 o'clock the shuttle caught in the "binder" or in the "picker" and she again called on Burke, who again examined the loom, repaired it, and put it in operation; and shortly after, and before 12 o'clock, the shuttle flew out, and struck her, putting out one of her eyes; and that she had watched the loom more closely than the others, because its action made her afraid of it,—was evidence tending to show that the plaintiff, exercising reasonable care, was injured by the defendant's negligence in

failing to provide suitable machinery for her use; and, in the absence of rebutting evidence, was sufficient to sustain a verdict for the plaintiff. The motion for a nonsuit was properly denied.

The defendant excepted to the refusal to instruct the jury that Burke, the section-hand and loom-fixer, being engaged in the same common employment and under the same general control, was a fellow servant of the plaintiff, and that the defendant was not liable for his negligence. As the servant assumes the ordinary risks of his employment, including the negligence of his fellow servants, the master is not responsible to the servant for injuries happening from that cause. But the rule of law which exempts the master from responsibility for such injuries does not relieve him from the duty which he owes to the servant to provide suitable and safe machinery and appliances for the use of the servant in his employment. *Fifield v. Northfield R.* 42 N. H. 235; *Hanley v. Grand Trunk R. Co.* 63 N. H. 274; *Ford v. Fitchburg R. Co.* 110 Mass. 240, 260; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612. This duty may be, and in case the employer is a corporation must always be, discharged by agents and servants; and that the agent or servant charged with its performance, whatever his rank of service may be, stands in the place of the employer, who there by becomes responsible for the acts and chargeable with the negligence of such agent or servant. In many kinds of service the care and keeping of tools and machinery in a condition of safety requires merely the attention and repairs occasioned by ordinary use and wear, and is properly a part of the regular business of the servant engaged in the use of such tools and machinery. In such cases the duty of the employer is performed by furnishing safe tools and machinery, and the means of making needed repairs, and the duty of making the repairs may be intrusted to servants, and any neglect in the performance of this service is the negligence of a servant. *McGee v. Boston Cordage Co.* 139 Mass. 445. But in cases where skill and practical knowledge are required in keeping machinery in a reasonable condition as to safety, beyond what is needed in operating it, it is the duty of the employer to supply the necessary intelligence, skill, and experience in the care and inspection of the machinery to protect the servants from injury; and for any failure to exercise proper care and skill the employer is accountable.

The question who are fellow servants, within the rule exempting the employer from consequences of the negligence of fellow servants, is not ordinarily determined by rank or grade of service, but by the character of the service performed or acts complained of. As a general rule, those doing the work of a servant are fellow servants, whatever their grade of service; and a servant, of whatever rank, charged with the performance of the master's duty towards his servants, is, as to the discharge of that duty, a vice-principal, for whose acts and neglects the master is responsible, because he has invested him with the responsibility of doing that which the master is bound to have carefully performed. *Moynihan v. Hills Co.* 146 Mass. 596, 598, 6 New Eng. Rep. 18 L. R. A.

386; *Daley v. Boston & A. R. Co.* 147 Mass. 101, 114, 6 New Eng. Rep. 849; *Fuller v. Jewett*, 80 N. Y. 46; *Davis v. Central Vermont R. Co.* 55 Vt. 84; *Tierney v. Minneapolis & St. L. R. Co.* 83 Minn. 311; *Cincinnati H. & D. R. Co. v. McMullen*, 117 Ind. 439; *Ell v. Northern Pac. R. Co.* (N. Dak.) 48 N. W. Rep. 222.

The test whether the plaintiff and Burke were fellow servants was not whether they were engaged in the common employment of manufacturing cotton cloth under the same general control and paid by the same principal, but whether Burke represented the defendant in the responsibility or performance of any duty which it owed to the plaintiff. It was the duty of the defendant to furnish suitable machinery, and keep it in suitable condition, for the plaintiff's use. The duty of keeping the looms in proper repair required experience and the exercise of mechanical skill, and was specially intrusted to Burke, and, so far as the discharge of that duty was concerned, Burke represented the defendant, and any negligence on his part in the performance of that duty was the negligence of the defendant. It is immaterial that Burke exercised no control or authority over the plaintiff. The negligence of the defendant complained of was not in ordering the plaintiff into a place of danger, but in failing to use ordinary care to prevent the exposure of the plaintiff to unusual hazard in her ordinary employment.

Exceptions overruled.

Carpenter, J., did not sit. The others concurred.

CONNECTICUT RIVER LUMBER CO. et al.

v.

OLCOTT FALLS CO.

(65 N. H. 290.)

1. The right of a riparian owner to construct dams and divert for manufac-

NOTE.—Navigable waters; floatage of logs.

Early Massachusetts decisions sustain the conclusions of the principal case and hold that property rights situate near water highways are subject to the rights and equities of the general public in so far as free passage to and from the waters of the stream are concerned. *Com. v. Essex Co.* 13 Gray, 248; *Stoughton v. Baker*, 4 Mass. 522; *Com. v. Alger*, 7 Cush. 100.

A similar contention has been sustained by the supreme courts of both Maine and New Hampshire. *Parks v. Morse*, 52 Me. 280; *Veazie v. Dwinel*, 50 Me. 479; *Lancey v. Clifford*, 54 Me. 437; *Treat v. Lord*, 42 Me. 553; *Knox v. Chaloner*, 42 Me. 150; *Thompson v. Androscoggin River Imp. Co.* 54 N. H. 558.

It is within the province of the Legislature to determine and regulate the use of all common and public rights and easements. The rights of navigation on tide-waters and of the use of streams not navigable for boats and rafts, are public, and such rights are subject to regulation. Where the full enjoyment of two public rights threaten to interfere with each other, it is for the Legislature to determine which shall yield, and to what extent; and such question will ordinarily be determined by the preponderance of public necessity and con-

turing purposes, the water of a stream which is used by the public for floating logs is limited by the extent to which it can be done without interfering with the public rights, which are measured by the capacity of the stream in its natural condition.

2. The right of the public to float logs on a stream will not be presumed to have been relinquished by the grant of a charter to a manufacturing corporation, giving power to purchase and hold real estate on the stream, improve the water-power, and make and maintain on or across the stream the works necessary to accomplish the corporate objects, unless such relinquishment is absolutely necessary to the exercise of the corporate franchises.
3. The mere fact of the insertion in certain corporate charters of a prohibition to interfere with the navigation of streams is no ground for construing a charter which does not contain such prohibition as authorizing such interference where it would be advantageous to the corporation.
4. Legislative authority to a manufacturing company to purchase, hold, and enjoy the powers and privileges of a corporation which had been organized to con-

struct a canal around the falls in a stream used by the public for floating logs, subject to the duties and liabilities binding on said "rights, powers, and privileges," will subject the manufacturing corporation to a limitation which had been imposed upon the company not to interfere with the free passage of lumber down the stream.

5. The abandonment by the State of the public right to float logs down a stream when it grants a manufacturing corporation the right to make use of the water-power thereon, will not be inferred from the fact that the manufacturing business may be more important than the lumber business.
6. The mere conveyance by the State of the bed of a stream, which has been used by the public for floating logs, will not operate as a relinquishment of the public right. To have that effect the intention must be distinctly expressed.
7. Equity has jurisdiction of a bill to determine as between the public and riparian mill-owners the proper form, dimensions and place in a mill-dam of a sluice for running logs on the stream; and the suit is not barred by the fact that the dam is already erected.
8. If a judicial location of a log-way

venience. The most common case is that where each is required to yield in part, as in the case of a bridge over a navigable river, furnished with a draw, to be raised for the passage of vessels, at the expense of the bridge owners, or by the navigators desiring to pass it. *Com. v. Essex Co.* 79 Mass. 239.

The public right of floatage, and the private right of the riparian proprietors, must each be exercised with due consideration for the other, and any injury which the latter receives in consequence of a proper use of the stream for floatage, he must submit to as incident to his situation upon navigable waters. *Middleton v. Flat River Boom Co.* 27 Mich. 533.

Each right modifies the other, and may, perhaps, render it less valuable; but this fact, if the enjoyment of the right is in itself reasonable and considerate, can furnish no ground for complaint. *Gould v. Boston Duck Co.* 13 Gray, 453; *Snow v. Parsons*, 28 Vt. 459. To the same effect is *White River Log & Boom Co. v. Nelson*, 45 Mich. 578. See also *People's Ice Co. v. The Excelsior*, 44 Mich. 229; *Weise v. Smith*, 3 Or. 445, 8 Am. Rep. 621.

The right to float logs on navigable streams is recognized in *Lorman v. Benson*, 8 Mich. 32; *Thunder Bay River Boom Co. v. Speechly*, 31 Mich. 344; *Middleton v. Flat River Boom Co.* 27 Mich. 533; *Atty-Gen. v. Ewart Boom Co.* 34 Mich. 462; *Brig "City of Erie" v. Canfield*, 27 Mich. 482.

The right of navigation is superior to all other rights. *Brown v. Chadbourne*, 31 Me. 9; *Morgan v. King*, 35 N. Y. 458; *Moore v. Sanborne*, 2 Mich. 526; *Treat v. Lord*, 42 Me. 552.

The question what is a reasonable use of a right depends on the subject matter and the attendant circumstances. *Michigan Cent. R. Co. v. Coleman*, 23 Mich. 440; *Davis v. Winslow*, 51 Me. 296; *Underwood v. Waldron*, 33 Mich. 229; *Weise v. Smith*, 3 Or. 445; *Scrapps v. Reilly*, 33 Mich. 27.

What constitutes a navigable stream.

One thing appears perfectly clear, that the common law of England on this subject is not the common law of America. Rules which reason and convenience may have dictated in reference to such streams as the Thames and the Avon, may be wholly inapplicable to the Mississippi, the Ohio and the Hudson. The timber trade alone, on such a river as the Hudson, running through immense primeval forests, would of itself create an excep-

tion. In granting the public lands of such a State, bounded on such a river, to private individuals, no Legislature, without express words, could be presumed to have intended to divest itself of the power of protecting so important a public interest. *Lumber v. Wells*, 13 How. Pr. 454.

None of the adjudications cover the precise question here involved. In Maine, where the right to float logs in such streams as are suitable is so important, the same general doctrine which was accepted and declared in *Moore v. Sanborn* (2 Mich. 519) has been repeatedly acted upon. *Brown v. Chadbourne*, 31 Me. 9; *Treat v. Lord*, 42 Me. 552. And see *Veazie v. Dwinel*, 50 Me. 484; *Gerrish v. Brown*, 51 Me. 253; *Davis v. Winslow*, 51 Me. 297.

The true rule is, that the public have a right of way in every stream which is capable, in its natural state and its ordinary volume of water, of transporting, in a condition fit for market, the product of the forests, or mines, or of the tillage of the soil upon its banks. It is not essential to the right, that the property to be transported should be carried in vessels, provided it can ordinarily be carried safely without such guidance. Nor is it necessary that the stream should be capable of being navigated against its current as well as in the direction of its current. If it is so far navigable or floatable as to be of public use in the transportation of property, the public claim to such use ought to be liberally supported. Nor is it essential to the easement that the capacity of the stream should be continuous, or that its ordinary state, at all seasons of the year, should be such as to make it navigable. If it is ordinarily subject to periodical fluctuations in the volume of its water, attributable to natural causes, and recurring as regularly as the seasons, and if its periods of high water and navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement. *Morgan v. King*, 35 N. Y. 450. See also same case in the supreme court, —18 Barb. 284, and 30 Barb. 9; *Shaw v. Crawford*, 10 Johns. 236; *Weise v. Smith*, 3 Or. 445, 8 Am. Rep. 621.

No case goes further than these, and they carefully restrict the public easement within the bounds of a capability for use in the ordinary and natural condition of the watercourse. The possibility of occasional use during unusual and brief freshets certainly could not make a stream a pub-

over a dam which has been erected for manufacturing purposes becomes necessary, the convenience of the mill-owners will be consulted so far as it reasonably may be without a violation of the public rights.

(December 2, 1890.)

PILL in equity to restrain defendant from maintaining a dam across the Connecticut River at Olcott Falls in Lebanon, without providing suitable sluiceways for the passage of logs floated by plaintiffs down the river. *Case discharged.*

The facts are fully stated in the opinion.

Messrs. Aldrich & Remick and Drew & Jordan, for complainants:

The Connecticut River is by nature a public highway.

Scott v. Wilson, 3 N. H. 321; *Thompson v. Androscoggin River Imp. Co.* 54 N. H. 548; *Barnes v. Heath* (unpublished op.); Gould, Waters, §§ 107-109; Angell, Highways, §§ 55, 56, 67-72.

The Connecticut River being a natural public highway, the individual or private rights along its banks are "held subject to the risks

(and uses) incident to the exercise of the public right."

Thompson v. Androscoggin River Imp. Co. 54 N. H. 558; *Barnes v. Heath* (unpublished op.); *Knox v. Chaloner*, 42 Me. 150; *Treat v. Lord*, 42 Me. 552; *Dwinel v. Veazie*, 44 Me. 167; *Parks v. Morse*, 52 Me. 260; *Lancey v. Clifford*, 54 Me. 487; *Veazie v. Dwinel*, 50 Me. 479; *Stoughton v. Baker*, 4 Mass. 522; *Com. v. Alger*, 7 Cush. 100; *Com. v. Essex Co.* 13 Gray, 248.

The owner of a mill-dam on such a river is bound to provide a suitable and reasonably convenient passageway for commerce; and if he fails to do so his dam becomes a nuisance, and may be abated by any member of the public having occasion to use the same.

Dwinel v. Veazie, *Parks v. Morse* and *Lancey v. Clifford*, *supra*; *Wood, Nuisances*, § 756, p. 858, also §§ 483, 484, 753, 757-762.

Courts of equity will interfere to restrain and prevent threatened public nuisances at the suit of a private person who may suffer a special injury thereby, as well as to abate those already existing.

Cooley's Bl. Com. bk. 8, 219, 230, note 7; *Adams, Eq.* 485, 487, note 1; *Jeremy's Mitf. Eq.*

lic highway. It is so held in *Hubbard v. Bell*, 54 Ill. 110, a case which unnecessarily criticizes the Maine and Michigan cases as exceptional, though they may well stand with that upon its facts.

Nature is competent, it has been said, to make a navigable river without the aid of the Legislature (*Martin v. Bliss*, 5 Blackf. 35); and it is now fully established in this country, overruling the earlier decisions, that the public have a right of passage over all fresh-water streams which are by nature susceptible of general use, and that those rivers are public and navigable in law which are navigable in fact. *Hale, de Jure Maris*, chaps. 2, 3; *Williams v. Wilcox*, 8 Ad. & El. 314, 333; *Barney v. Keokuk*, 94 U. S. 342, 24 L. ed. 229; *Pound v. Turok*, 95 U. S. 450, 24 L. ed. 525; The "Daniel Ball," 77 U. S. 10 Wall. 557, 19 L. ed. 999; The "Montello," 87 U. S. 20 Wall. 490, 442, 22 L. ed. 391, 394; *Carter v. Thurston*, 58 N. H. 104, 106; *Thompson v. Androscoggin River Imp. Co.* 54 N. H. 545, 58 N. H. 103; *Brown v. Chadbourne*, 31 Me. 9; *Moor v. Veazie*, 32 Me. 343; *Spring v. Russell*, 7 Me. 273, 290; *Wadsworth v. Smith*, 11 Me. 278; *Adams v. Pease*, 2 Conn. 481; *Ingraham v. Wilkinson*, 4 Pick. 268; *Com. v. Chapin*, 5 Pick. 199, 202; *Palmer v. Mulligan*, 3 Cal. 207; *People v. Platt*, 17 Johns. 195, 211; *Hooker v. Cummings*, 20 Johns. 90; *Canal Comrs. v. People*, 5 Wend. 423; *Morgan v. King*, 35 N. Y. 454, 30 Barb. 9, 18 Barb. 277; *Munson v. Hungerford*, 6 Barb. 265; *Moore v. Sanborne*, 2 Mich. 610; *Lorman v. Benson*, 8 Mich. 18; *Rhodes v. Otis*, 33 Ala. 573, 596; *Cox v. State*, 3 Blackf. 193; *Waise v. Smith*, 3 Or. 445, 448; *Godfrey v. Alton*, 12 Ill. 20; *Memphis v. Overton*, 3 Yerger, 389; *Elder v. Burrus*, 6 Humph. 366; *Stuart v. Clark*, 2 Swan, 15; *Sigler v. State*, 7 Bart. 496; *Yates v. Judd*, 18 Wis. 118; *Hickok v. Hine*, 23 Ohio St. 528; *Selman v. Wolfe*, 27 Tex. 63; *Gould, Waters*, § 54.

The law of the State recognizes the right of the public to use such streams, though private property, for rafting and floating logs, as far as necessary for public accommodation. *Palmer v. Mulligan*, 3 Cal. 315; *Shaw v. Crawford*, 10 Johns. 287; *Ex parte Jennings*, 6 Cow. 518; *Browne v. Scofield*, 8 Barb. 239; *Morgan v. King*, 18 Barb. 232, 35 N. Y. 459; *Brown v. Chadbourne*, 31 Me. 9; *Moore v. Sanborne*, 2 Mich. 619.

The riparian owner has a right to use the stream in all ways and for all purposes which are not inconsistent with its use by the public. *Lorman v. 18 L. R. A.*

Benson, 8 Mich. 18, 77 Am. Dec. 435; *Lancey v. Clifford*, 54 Me. 481, 92 Am. Dec. 561; *Morgan v. King*, 18 Barb. 277; *Scofield v. Lansing*, 17 Mich. 437; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984; 6 Lawson, Rights, Remedies & Practice, § 2832.

He may use the water for the purpose of manufacture. He may erect dams across the streams provided he leaves room for the passage of logs and other products. *Scofield v. Lansing*, 17 Mich. 437; *Thurman v. Morrison*, 14 B. Mon. 387; *Douglas v. State*, 4 Wis. 387. 6 Lawson, Rights, Remedies & Practice, § 2832.

Equity will recognize and enforce the rights of riparian proprietors.

By the exercise of the equitable jurisdiction courts may abate a nuisance, at the instance of a party who is a sufferer in a special or particular manner distinct from that suffered by him in common with the public at large; but this injury must be real and such that the legal remedy of damages would not be adequate. 3 Pom. Eq. Jur. § 1849, citing *Soitau v. De Held*, 2 Sim. N. S. 133; *Atty-Gen. v. Sheffield G. C. Co.* 3 DeG. M. & G. 304; *Atty-Gen. v. Cambridge G. C. Co.* L. R. 4 Ch. 71, 80; *Pettibone v. Hamilton*, 40 Wis. 402; *Coast Line R. Co. v. Cohen*, 50 Ga. 451; *Thayer v. New Bedford R. Co.* 125 Mass. 258; *Osborne v. Brooklyn City R. Co.* 5 Blatchf. 368; *Hartshorn v. South Reading*, 8 Allen, 501; *Rowe v. Granite Bridge Corp.* 21 Pick. 844; *Bigelow v. Hartford Bridge Co.* 14 Conn. 563; *Milhan v. Sharp*, 27 N. Y. 611; *Knox v. New York*, 55 Barb. 404; *New York v. Baumberger*, 7 Robt. 219; *Peck v. Elder*, 8 Sandf. 123; *Corning v. Lowerre*, 6 Johns. Ch. 439, 2 L. ed. 178; *Sparhawk v. Union Pass. R. Co.* 54 Pa. 401; *Higbee v. Camden & A. R. Co.* 19 N. J. Eq. 276; *Allen v. Monmouth Co. Board of Chosen Freeholders*, 13 N. J. Eq. 68, 74; *Delaware & M. R. Co. v. Stump*, 8 Gill & J. 479; *Hamilton v. Whitridge*, 11 Md. 123; *Savannah A. & G. R. Co. v. Shielis*, 33 Ga. 601; *Green v. Oakes*, 17 Ill. 249; *Ewell v. Greenwood*, 26 Iowa, 377.

Incidentally this topic has received extended treatment in several notes appended to cases reported in this series. See *Fulmer v. Williams* (Pa.) 1 L. R. A. 608; *Harold v. Jones* (Ala.) 8 L. R. A. 406; *Gaston v. Mace* (W. Va.) 5 L. R. A. 382; and *Swanson v. Mississippi & Rum River Boom Co.* (Minn.) 1 L. R. A. 673.

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PL 144, 145; 2 Story, Eq. Jur. §§ 101, 102, 924, 926; Gould, Waters, §§ 121, 218; High Inj. 760-763, 768, 769, 791, 794, 804, note 2, 812-815, 818; Angell, Highways, §§ 283, 284; Wood, Nuisances, 777-779; Daniell, Ch. Pr. 1635, 1636; Pom. Eq. Jur. § 1349, note 1; *Sampson v. Smith*, 8 Sim. 272; *Corning v. Troy I. & N. Factory*, 40 N. Y. 191; *Pennsylvania v. Wheeling & B. Bridge Co.* 54 U. S. 18 How. 518, 14 L. ed. 249; *Lane v. Newdigate*, 10 Ves. Jr. 193; *Corning v. Louverre*, 6 Johns. Ch. 439, 2 L. ed. 178; *Pettibone v. Hamilton*, 40 Wis. 402; *Rosser v. Randolph*, 7 Port. (Ala.) 298; *Barnes v. Racine*, 4 Wis. 454; *Walker v. Shepardson*, 4 Wis. 486; *Georgetown v. Alexandria Canal Co.* 37 U. S. 12 Pet. 91, 9 L. ed. 1012; *Bigelow v. Hartford Bridge Co.* 14 Conn. 565; *Frink v. Lawrence*, 20 Conn. 117; *Sparhawk v. Union Pass. R. Co.* 54 Pa. 401; *Knox v. New York*, 55 Barb. 404; *Smith v. Lockwood*, 13 Barb. 209; *Excell v. Greenwood*, 26 Iowa, 377; *Hamilton v. Whitridge*, 11 Md. 128; *Soltau v. De Held*, 9 Eng. L. & Eq. 104; *Spencer v. London & B. R. Co.* 8 Sim. 193; *New York v. Baumberger*, 7 Robt. 219; *Hudson River R. Co. v. Loeb*, 7 Robt. 418; *Savannah A. & G. R. Co. v. Shiels*, 33 Ga. 601; *Knox v. Chaloner*, 42 Me. 150.

The Supreme Court of New Hampshire has asserted its full equitable jurisdiction to restrain or abate nuisances in all cases where legal remedies are impracticable or inadequate.

Pom. Eq. § 308; *Coe v. Winnipissee Lake C. & W. Mfg. Co.* 37 N. H. 254; *Webber v. Gage*, 39 N. H. 182; *Burnham v. Kempton*, 44 N. H. 78; *Eastman v. Amoskeag Mfg. Co.* 47 N. H. 71; *Bassett v. Salisbury Mfg. Co.* 47 N. H. 428.

In such cases the right of trial by jury does not exist. *Bellows v. Bellows*, 58 N. H. 60.

The plaintiffs ask for an injunction against the defendants' maintaining a dam across the Connecticut River without providing suitable sluiceways for the reasonable passage of timber. Such an injunction would be mandatory in character, but has been repeatedly granted by courts of equity.

Pom. Eq. § 1359, note 2; *Robinson v. Byron*, 1 Bro. Ch. 588; High. Inj. 2d ed. §§ 792-804, note 2; *Rankin v. Huskisson*, 4 Sim. 18; *Spencer v. London & B. R. Co.* 8 Sim. 193; *Pennsylvania v. Wheeling & B. Bridge Co.* 54 U. S. 18 How. 518, 14 L. ed. 249; *Lane v. Newdigate*, 10 Ves. Jr. 193; Gould, Waters, §§ 552-555.

The construction of their charter claimed by the defendants would be contrary to the well-defined policy of New Hampshire, as expressed by repeated Acts of the Legislature. A construction abridging a public right will not be given to a legislative Act unless such intention is expressly and distinctly stated therein.

Hooksett v. Amoskeag Mfg. Co. 44 N. H. 106; *Treat v. Lord*, 42 Me. 552.

Mr. W. S. Ladd, with Mr. Jeremiah Smith, for defendants:

There was not at the time of the adoption of our Constitution, and is not now, any remedy by private suit in equity in a case like the present; the only remedy was, and is, by public proceeding on behalf of the State; in such public proceeding there was at the time of the adoption of the Constitution an unquestioned right of trial by jury; and the Legislature has 13 L. R. A.

not attempted to take away this right, and could not if it would.

The plaintiffs at the time of filing the bill could not have maintained an action at law.

Bowden v. Lewis, 13 R. I. 189, 43 Am. Rep. 21; *Clark v. Chicago & N. W. R. Co.* 70 Wis. 593.

At the time of commencing this suit, the plaintiffs not only had suffered no damage, but apprehended no damagesave the loss of a public right which they were privileged to enjoy only in common with the rest of the public.

Rose v. Groves, 5 Man. & G. 613.

Undoubtedly a riparian owner has, like every other citizen, the right of navigating the river as one of the public. This, however, is not a right coming to him *qua* owner or occupier of any lands on the bank; nor is it a right which, *per se*, he enjoys in a manner different from any other member of the public.

Lyon v. Fishmongers Co. L. R. 1 App. Cas. 662.

These plaintiffs complain solely of injury to a public right, and the damage liable to be suffered by the plaintiffs differs only in degree, and not in kind, from that liable to be suffered by the rest of the community.

O'Brien v. Norwich & W. R. Co. 17 Conn. 372; *Seeley v. Bishop*, 19 Conn. 128; *Harvard College v. Stearns*, 15 Gray, 1; *Brayton v. Fall River*, 113 Mass. 218; *Blackwell v. Old Colony R. Co.* 122 Mass. 1; *Houck v. Wachter*, 84 Md. 265, 6 Am. Rep. 332; *San José Ranch Co. v. Brooks*, 74 Cal. 463; *Clark v. Chicago & N. W. R. Co.* 70 Wis. 593; *Chicago v. Union Rldg. Assn.* 102 Ill. 379, 40 Am. Rep. 598; *Blackwell v. Old Colony R. Co.* 122 Mass. 1; *Dover v. Portsmouth Bridge*, 17 N. H. 200.

The weight of New Hampshire authority is decidedly against the maintenance of a bill in equity to restrain or abate an alleged nuisance, until after the right has first been established in a suit at law (where there would, of course, be a trial by jury upon all questions of fact).

See *Burnham v. Kempton*, 44 N. H. 78; *Eastman v. Amoskeag Mfg. Co.* 47 N. H. 71; *Perkins v. Poye*, 60 N. H. 496; *Parker v. Winnipissee Lake C. & W. Co.* 67 U. S. 2 Black, 545, 17 L. ed. 333. See also *Motley v. Downman*, 3 Myl. & C. 1; *White v. Cohen*, 1 Drew. 312; *Deuhirst v. Wrigley*, Coop. Pr. Cas. 819.

Where an injunction is granted without a trial at law, it is usually upon the principle of preserving the property until a trial at law can be had.

Parker v. Winnipissee Lake C. & W. Co. *supra*; *Irvine v. Dixon*, 50 U. S. 9 How. 28, 13 L. ed. 33; *Varney v. Pope*, 60 Me. 192.

At common law, when the alleged offense consisted simply in obstructing the public passage, and did not involve an invasion of the proprietary right of the crown, the case was not finally disposed of until after a jury trial.

Atty-Gen. v. Cleaver, 18 Ves. Jr. 211; 2 Story, Eq. § 923; *Atty-Gen. v. New Jersey R. & Transp. Co.* 3 N. J. Eq. 136; *Atty-Gen. v. Richards*, 2 Anstr. 603.

The present case is not a case of purpresture, or invasion of the soil of the State. The bed of the Connecticut River at Lebanon and Norwich belongs to the riparian owners, and not to the State.

Gould, Waters, § 56, p. 118; *Kimball v. Schoff*, 40 N. H. 190.

It is clear that, before recent statutory changes in the law of procedure, this controversy could not have been constitutionally decided adversely to the defendants until after a jury trial. These enactments do not have the effect of depriving the defendants of the constitutional right of trial by jury which they previously had, such a result is beyond the power of the Legislature.

Powers v. Raymond, 137 Mass. 483. See also *Merchants Nat. Bank of Newburyport v. Moulton*, 8 New Eng. Rep. 734, 143 Mass. 545; *North Pennsylvania Coal Co. v. Snowden*, 42 Pa. 488.

The grant of the right to build a dam necessarily implies the right to cause some obstruction to the passage of logs; but the grant must be regarded as subject to the implied limitation that the dam shall be so built as to create no obstructions except such as are reasonably necessary to the beneficial maintenance and use of the dam for manufacturing purposes. In determining this question of reasonable necessity, a jury is to take into account not only the requirements and convenience of floatation, but also the requirements and convenience of manufacturing.

See *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444; *Pearson v. Rolfe*, 76 Me. 386.

The jury, in passing on the question of the reasonable sufficiency of the sluiceway, are not to proceed upon the theory that the public right of floatation is superior to the public right of manufacturing. The reasonableness of the sluiceway is to be determined, not solely in view of the interest and convenience of the log-owner, but in view, also, of the interest and convenience of the manufacturer.

See *Rindge v. Sargent*, 4 New Eng. Rep. 523, 64 N. H. 294; *Foster v. Seavert S. & B. Co.* 5 New Eng. Rep. 236, 79 Me. 508.

We may safely concede that the power conferred by the charter of the manufacturing company must be so exercised as not to injure the interests of others more than is reasonably necessary to accomplish the purpose for which the charter was granted. But this concession only shows that the harm likely to be caused by the dam was intended to be mitigated, so far as reasonably consistent with its erection and beneficial use, and not that the dam was to be so built as to present no material obstruction to navigation.

See *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 325.

The Legislature may fairly be supposed to have taken into account the fact that the stream at the place in question, though in a certain sense navigable, is not capable of general or extended navigation.

Pearson v. Rolfe, 76 Me. 385.

The right of floating is not paramount to the use of water for machinery, and the rights of the public and those of the riparian owners are both to be enjoyed with proper regard to the existence and preservation of the other.

Gould, Waters, § 110; *Middleton v. Flat River Boom Co.* 27 Mich. 558; *Ensworth v. Com.* 52 Pa. 320.

Defendants are not under legal obligation to provide a public way for the passage of logs over their dam, better than would be afforded by the natural condition of the river unobstructed by their dam. A mill-owner is under 13 J. R. A.*

no legal obligation to furnish any public passage for logs over his dam at a time when the river at such place, in its natural condition, does not contain water enough to be floatable if unobstructed by mills, although the river is generally of a floatable character.

Pearson v. Rolfe, 76 Me. 380.

Blodgett, J., delivered the opinion of the court:

In the original bill the Lumber Company were sole plaintiffs. Their complaint is that they annually exercise the public right of floating logs down Connecticut River, and that the defendants have obstructed the way by a dam at Olcott Falls. The prayer is for a decree restraining the defendants from maintaining the dam without suitable sluiceways, for a provision in the decree determining the dimensions and character of the sluiceways, and for general relief. The defendants demurred on the ground that the alleged grievance is a public nuisance for the abatement of which a suit cannot be maintained by a private person. This objection has been avoided by an amendment joining the attorney-general as plaintiff, and the demurrer is overruled without considering the question whether the bill can be maintained by the Lumber Company. *Dorner v. Portsmouth Bridge*, 17 N. H. 200, 215; *Griffin v. Sanborn-ton*, 44 N. H. 246; *Smith v. Putnam*, 62 N. H. 369, 373; *Milarkey v. Foster*, 6 Or. 378, and notes in 25 Am. Rep. 538; *Pennsylvania v. Wheeling & B. Bridge*, 54 U. S. 13 How. 518, 561, 562, 564, 566, 567, 14 L. ed. 249, 267, 268, 269; *Knickerbocker Ice Co. v. Shultz*, 116 N. H. 382; *Steam-Boat Co. v. South Carolina R. Co.* 30 S. C. 539; Gould, Waters, §§ 121-127, 541; Wood, Nuisances, §§ 645-701, 819.

If that question becomes material in the progress of the case, it will be examined when a decision is necessary. The mode of trial on a bill in equity for the abatement of a nuisance is not an open question. *State v. Saunders*, 66 N. H. —.

"The channel of a public navigable river is properly described as a public highway." *Cochester v. Brooke*, 7 Q. B. 389, 373.

"A stream may be a public highway for floatage when it is capable, in its ordinary and natural stage in the seasons of high water, of valuable public use. . . . It is a public highway by nature, but one which is such only periodically, and while the natural condition permits a public use. . . . The public right is measured by the capacity of the stream for valuable public use in its natural condition." *Thunder Bay River Boom Co. v. Speechly*, 31 Mich. 336, 343-345; *Gaston v. Mace*, 33 W. Va. 14; *Koopman v. Blodgett*, 70 Mich. 610, 14 West. Rep. 909; *State v. Gilmanton*, 14 N. H. 467, 479; *Carter v. Thurston*, 58 N. H. 104; *Collins v. Howard*, 65 N. H. 190; Gould, Waters, §§ 54, 86, 107-112; Angell, Highways, §§ 53-72.

The Connecticut River is a natural highway for floating logs. *Thompson v. Androscoog in River Imp. Co.* 54 N. H. 545, 548, 549; *Connecticut River Lumber Co. v. Columbia*, 62 N. H. 286, 287.

At Olcott Falls the public has a right of passage for logs as free and convenient as would be afforded by the river in its natural condition, unless the highway has been wholly or par-

tially discontinued by law. The riparian proprietors, incorporated or unincorporated, in the exercise of their private rights, may change the natural condition of the stream so far as changes are possible without an infringement of the public right. The riparian title, including a right of altering the channel and using the water, does not include a right of total or partial discontinuance of the changeable way of which the capacity of the stream in its natural condition is the measure. "Any person owning the land upon both sides of such a river can maintain a ferry or bridge or dam for his own use, provided he does it so as not to interfere with the public easement, without any authority from the Legislature, and even in defiance of a legislative prohibition. In such case he would not be making a proper use of his own property. . . . What rights did the Legislature give the plaintiff by its Act of incorporation? It made it a corporation, and gave it the corporate right to build its bridge. For that purpose only a corporation was not needed, nor was legislative sanction needed. But, being authorized by the Legislature to build the bridge, it could not be complained of for any necessary interference with the public easement which was under legislative control; for that which is authorized by law cannot be a public nuisance. . . . The Legislature did not empower it to interfere with the stream except so far as it was necessary for the building and maintenance of its bridge." *Chenango Bridge Co. v. Paige*, 88 N. Y. 178, 185, 186; *Groat v. Moak*, 94 N. Y. 115, 128; *Sewall's Falls Bridge v. Fisk*, 23 N. H. 171, 177; *Hooksett v. Amoskeag Mfg. Co.* 44 N. H. 105, 110; *Eastman v. Amoskeag Mfg. Co.* 44 N. H. 143, 160; *Com. v. Alger*, 7 Cush. 53, 99; *Angell, Highways*, §§ 237-241.

"The Statute gives a general authority to the sessions to lay out highways; but the Statute must have a reasonable construction. This authority, therefore, cannot be extended to the laying out of a highway over a navigable river, whether the water be fresh or salt, so that the river may be obstructed by a bridge. A navigable river is, of common right, a public highway; and a general authority to lay out a new highway must not be so extended as to give a power to obstruct an open highway already in the use of the public." *Com. v. Coombs*, 2 Mass. 489, 492; *Arundel v. McCulloch*, 10 Mass. 70; *Com. v. Charlestown*, 1 Pick. 180.

In Connecticut, under a general power to lay out highways, a road may be laid across navigable water where a suitable bridge will not be a serious obstruction to navigation. *Groton v. Hurlburt*, 23 Conn. 178, 186-189; *Brown v. Preston*, 38 Conn. 219.

Such cases are consistent with the rule that authority to lay out a new highway does not warrant an unnecessary obstruction of an old one. A toll-gate of a turnpike, unnecessarily obstructing a free road, is a public nuisance. *Wales v. Stetson*, 2 Mass. 143. A franchise to build a railroad between certain points does not include a right to build it unnecessarily on or along a street. *Springfield v. Connecticut River R. Co.* 4 Cush. 68; *Comrs. on Inland Fisheries v. Holyoke Water P. Co.* 104 Mass. 446, 449.

The charter of the Franklin Falls Company authorizes it to establish and carry on various

manufactures "in the improvement of the water-power of the Winnipiseogee River." Laws 1868, chap. 2797. In *State v. Franklin Falls Co.*, 49 N. H. 240, it was held that the defendants could not lawfully maintain a dam that would prevent the passage of migratory fish from the sea to the lake. Its right to carry on manufacturing business "in the improvement of the water-power" included a right to maintain such a dam and make such a diversion of the water from the natural channel as would not infringe any public right of way. Sometimes the water was "not more than sufficient to carry the machinery;" and the company's works could not be enlarged to such an extent that no water would ordinarily run over the dam. But the requirements of their business were not held to be material. They could build a stairway for the ascent of fish, as they could build a sluiceway for the descent of logs. The necessity of building a dam and diverting the water to their wheels was not deemed a necessity of discontinuing the public right of a fish-way. The right of riparian owners to improve and use the power of the river, with or without a charter, was undisputed; but it was not suggested by the defendants that their charter discontinued the right of way or authorized its discontinuance; and such a construction not being claimed, the legal ground on which it must be rejected is not stated in the decision whether a river is a highway for fish, or for logs, or for both, a grant of the advantages of a corporate organization to persons engaged in the improvement and use of the water-power for manufacturing purposes does not show that a total or partial discontinuance of the way was intended by the Legislature. *Com. v. Essex Co.* 13 Gray, 239, 248; *Commissioners on Inland Fisheries v. Holyoke Water P. Co.* 104 Mass. 446, 450. It merely shows that the franchise asked by the grantees and given by the State is a corporate capacity to exercise common-law rights of riparian owners. A grant to these defendants of a right to do as an unincorporated body what they could do as unincorporated partners was necessary, because "corporations are artificial persons, created for specific purposes, and invested with such, and only such, powers as are conferred by law. While natural persons may do with themselves and their property whatever is not forbidden, artificial persons cannot rightfully do anything that is not expressly or by necessary implication permitted by the law of their being." *Pittsburgh, C. & St. L. R. Co. v. Lyon*, 123 Pa. 140, 150, 2 L. R. A. 489; *Cass v. Kelly*, 133 U. S. 21, 33 L. ed. 518.

An Act authorizing certain persons merely to form themselves into a corporation would be useless. Without an authority conferred by statute upon the Olcott Falls Company to do something, it could do nothing. *Pierce v. Emery*, 32 N. H. 484, 512. In addition to a mere Act of incorporation, a grant of power was indispensable to enable it, as a corporation, to engage in the improvement and manufacturing use of Olcott Falls. Without such a grant it would be restrained by injunction, at the suit of one of the members, from carrying on that business; and on quo warranto, brought by the State, its unanxious usurpation of corporate franchises would be sup-

pressed. It is a corporation for a manufacturing purpose, and can purchase and hold a limited amount of real estate, improve the water-power, make and maintain on and across the river at the falls all such works as are necessary and proper to accomplish the object of its incorporation, and carry on such kinds of manufacturing business as it choose. Laws 1848, chap. 874; Laws 1881, chap. 183.

In the grant of power, without which it could not lawfully acquire or lawfully exercise the private riparian rights that are subject to the public easement, there is no incidental relinquishment or diminution of the easement. The language of such a grant would be the same if the river were not a highway. Of itself alone, it has no tendency to prove that the subject of highway discontinuance was in the mind of the Legislature. If the question of discontinuance is presented to that body and decided in the affirmative, there will naturally be some clear and positive evidence of the decision in the Statute. It cannot be assumed that an exercise of the discontinuing power is concealed, either accidentally or designedly, under an ordinary grant of corporate capacities, expressed in terms equally appropriate whether the river is or is not a highway. The Acts from which the defendants derive their powers contain no express discontinuance of the Connecticut easement, and no express grant of power to discontinue it, either wholly or partially. The incidental power of discontinuance cannot be implied from anything less than necessity; and the case shows no ground for the implication of a discontinuance, or a grant of discontinuing power. In the method of finding the fact of legislative intention by weighing competent evidence, and not by applying technical rules (*Boody v. Watson*, 64 N. H. 163, 189), there is no occasion to resort to the authorities that employ a strict rule to confine business corporations to the privileges plainly given them in their charter. Under that rule the defendants claim that the public right has been affected by their Acts of incorporation could not be sustained. *Charles River Bridge v. Warren Bridge*, 36 U. S. 11 Pet. 420, 544-548, 9 L. ed. 773, 822-824; *Jersey City Water Comrs. v. Hudson*, 13 N. J. Eq. 420, 425; *Selman v. Wolfe*, 27 Tex. 68; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 169, 5 L. R. A. 546; *Sedgw. Stat. & Const. L.* 291-296.

Under authority given by statute, an owner of a lot situated on the margin of the tide-water of East River extended the dry land into the water. Before the extension a street had been laid out over the lot to the river. It was held that the filling of the river by the land owner "carried with it a necessary and legal extension of the street over the new made land" to the edge of the water. The ground of decision was that the Legislature intended to confer a privilege on the owner of the land, but not to destroy the right of the public to reach the river through the street; that the Act should not "be so construed as to work a public mischief unless required by words of the most explicit and unequivocal import;" that the language of the Act did not necessarily or naturally import that the right of passage from the street to the river should be destroyed by fill-

ing up the river; that "in an Act designed chiefly, if not exclusively, to subvert individual interests, the words used must leave no doubt that the Legislature intended to annihilate or abridge an important public right, before a court should put such a construction upon it as would have that effect;" and that public rights are not to be destroyed by equivocal words or provisions. *People v. Lambier*, 5 Denio, 9, 15-17. Whether the extension of the street was rightly or wrongly implied, it illustrates the tendency of the authorities to employ the doctrine of necessary implication in the maintenance, rather than in the abridgment, of public rights. As the Statutes do not show a legislative assent to a total or partial discontinuance of the Connecticut highway, an assent implied from necessity, if it can be shown from extraneous evidence in some cases, must, to say the least, be satisfactorily proved; and, as the facts of a case of necessity are not alleged in pleading, there is no issue on which such evidence is admissible.

In the answer the defendants say that the "falls, when the river ran in its natural course there, were impassable in low stages of the water by logs; that the defendants' works, by ponding back the water, entirely cover and flow out a bad and rocky fall above, where otherwise logs would lodge upon and among the rocks, forming great jams, requiring great labor and expense to break, all which is saved to them in the way described;" that the defendants did, "at very large expense, construct in said dam, in the best place for the passage of logs, a sluiceway of ample and convenient size and construction, being eighteen feet wide and four inches deep at the top of the dam, and fitted the same with an apron of plank thoroughly covered with iron plates, so designed and located as to conduct logs safely into the deep-water channel below; and in the iron facing on the top of their dam, throughout its entire length, made holes for the insertion of iron pins to hold flashboards of any width desired, and at each side of said sluiceway, at the top of the dam, they inserted ring bolts for the attachment of booms to guide logs into said sluiceway; and so it is, by means of the appliances thus provided in the construction of their dam and sluiceway, all the water flowing in the river may at any time, with trifling labor and expense, be turned and compelled to pass through the sluiceway, whereby logs will be easily and conveniently floated over the dam and falls, and passed into the deep water below;" and "that the works of the defendants, in their present condition, greatly facilitate, rather than impede, the passage of logs over said falls, and diminish, rather than increase, the expense thereof." By these averments the defendants deny the necessity of constructing the dam in such a manner as to abridge the public right of log floatation. On this disclaimer it is assumed that the dam with a sluice (including an apron) of proper form, size, and location, and other suitable appliances for turning logs and the whole river through the sluice, would not injure, but would improve, the way for the use made of it by the Lumber Company in June of each year; and, as the benefit that might be derived from a manufacturing diversion and use of the water

is no more a necessity of highway discontinuance in this case than it was in *State v. Franklin Falls Co.*, there seems to be no occasion for serious controversy.

If the consent of the State that "highways may be laid out across any stream or body of water" (Gen. Laws, chap. 67, § 10) had been unqualified, it might have been claimed that it included authority to impair the right of navigation. For that reason, the Legislature added the prohibition: "But no road or bridge shall be so laid out if the reasonable and proper construction thereof may prevent the use of such waters for navigation for boats or rafts, or for running timber." The charters of the Concord, the Northern, and the Boston, Concord & Montreal Railroads, authorizing the erection of bridges across certain rivers, contain a proviso that the bridges shall be so constructed as not unnecessarily to impede navigation. Act of June 27, 1835, § 15; Laws 1844, chap. 190, § 2, 191, § 2. Such provisos may be useful for the purpose of avoiding the question of interpretation. They would be serious defects if they introduced the erroneous construction that, without them, unnecessary obstruction of highways would be authorized by the general law, and by ordinary acts of incorporation.

The Act of 1807, incorporating the White River Falls Company, contains a proviso that nothing in that Act shall authorize the company "to erect any dam . . . so as to prevent the free passage of lumber down Connecticut River as heretofore used and enjoyed." It is alleged in the bill that the defendants derive their powers from that Act, and from the Acts of 1848 and 1881. In their answer the defendants say they constructed their works in the exercise of the powers granted by the Acts of 1848 and 1881, but they do not deny or explain the fact, well alleged in the bill, that they derive their corporate powers from the Act of 1807, as well as the Acts of 1848 and 1881. "All facts well alleged in the bill, and not denied or explained in the answer, will be held to be admitted." Chancery Rule 8, 56 N. H. 605.

There was a special reason for reserving the right of free passage in the Act of 1807. That Act incorporated a canal company, and gave them power to improve the navigation at the falls by a locked canal, and to take toll for the use of the artificial way. But, for the benefit of all who should prefer a free passage in the old way to the use of a canal on payment of toll, the right of free passage in the old way is reserved. It is recited in the preamble that the "erecting locks and cutting canals on White River Falls" (now called "Olcott Falls") "and Connecticut River, so that the same shall be navigable for boats for the transportation of lumber, goods, wares, and merchandise, would be of great public utility," and that "Mills Olcott, of Hanover, has petitioned the general court for the exclusive privilege of locking the same." Thereupon it is "enacted that the said Mills Olcott and his associates, their heirs and assigns forever, be invested with the exclusive privilege of cutting canals and locking said falls, and rendering said Connecticut River navigable for boats and lumber, from the head of said falls at the upper

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bar, so called, to the foot of the falls, at the lower bar of the same, commonly called 'Phelps Bar.'" It was apparently feared that under their exclusive powers the canal company would claim a right to levy toll upon all lumber passing down the river at that point, and to make such alterations in the channel as would compel lumbermen to resort to the canal for the use of which the company is entitled to a toll. The avoidance of all controversy on this subject is the apparent purpose of the reservation of the public right to a free passage of lumber in the old way. From the abundant caution exercised in the insertion of a proviso to prevent all possible contention between the canal company and the lumberman on the question of highway discontinuance, it does not follow that the old highway for logs would have been discontinued if it had not been expressly reserved. However that may be, the reservation in the charter of the canal company has no tendency to show that the subsequent grants of corporate power for manufacturing purposes are a total or practical discontinuance of the old way. Under those grants, which did not authorize the grantees to exact toll, there was no reason to anticipate a claim of toll, and therefore no occasion for such a reservation of the right of free passage as was made in the grant of canal powers. The Act of 1848, chap. 674, § 3, contains the proviso "that this grant shall not be held or construed to impair any rights, powers, and privileges heretofore granted by the Legislature of this State within the limits aforesaid." The same section shows that the limits are the "falls, from the head thereof at the upper bar to the foot of the same at the Phelps bar, so called." The fourth section of the Act is: "Said corporation is hereby authorized and empowered to purchase, hold, and enjoy all the corporate and other rights, powers, and privileges heretofore granted and now enjoyed within the limits of this grant, subject to all the duties and liabilities now legally binding in said corporate rights, powers, and privileges." Upon the proviso, saving the powers granted by the charter of 1807; the grant of authority to the defendants to purchase, hold, and enjoy those powers, subject to all the duties and liabilities by which they continued to be restricted in 1848; and the admission of the defendants, in pleading, that their powers are derived from the Act of 1807 as well as the Acts of 1848 and 1881,—the conclusion seems to be inevitable that the defendants are holders of corporate powers granted by the charter of 1807, and that this power is subject to the reservation of the public right of free passage of lumber down the river as usually enjoyed before 1807. In the absence of evidence, there was no presumption of law or fact that the natural highway was altered before 1807; and until evidence of a change is introduced the continuance of the natural state of things may be inferred.

The defendants contend that the phrase, "subject to all the duties and liabilities now legally binding on said corporate rights, powers, and privileges," does not include the inability to "erect any dam . . . so as to prevent the free passage of lumber down Connecticut River as heretofore used and enjoyed."

They argue that "all the duties and liabilities" thus retained and perpetuated are obligations of an affirmative nature,—to permit logs to pass through the canal on payment of toll, to pay debts, and the like,—are not restrictions of authority. But it would be a violent construction to draw a line between the affirmative and the negative duties and liabilities of the canal company, and hold that by "all the duties and liabilities now legally binding on said corporate rights, powers, and privileges" only those of an affirmative nature were designated. It is not probable that the Legislature employed that inferential distinction as an implied release of the canal company's grantees from one of that company's incapacities, and an implied grant of power to discontinue the highway. Whatever else the proviso in the Act of 1848 may mean, it must be held to express the legislative will that the defendants, if they bought the powers of the canal company, would hold them subject to the proviso of 1807, and that, as a canal company, they should erect no dam so as "to prevent the free passage of lumber down the Connecticut River as . . . used and enjoyed" before the grant of the canal company's charter. The words "subject to all the duties and liabilities now legally binding on said corporate rights, powers, and privileges" do not specially refer to that company's duty of allowing a free passage of lumber, but evince a general resolve to annul none of the limitations of their powers; and among those limitations is the public right of free passage of lumber down the river. By purchasing the old company's franchises, the new company acquired no authority to erect a dam that would infringe that right. This lack of authority is among the incapacities unnecessarily re-enacted by the fourth section of the charter of 1848. The defendants could not obtain, by purchase from the canal company, a power of highway discontinuance that had not been granted to that company. As a canal company, the defendants can build a dam that will turn the whole stream into a canal for the use of which they are entitled to toll; but, if a lumberman chooses a free logway which they choose not to give him in the canal, he is entitled to one over, through, or around the dam, as good as he would have in the old undammed channel at the time he is ready to use it. As a manufacturing company, the defendants can also turn the river to their wheels through a flume. How much of it shall run through the canal for a transportation purpose, how much through the flume for a manufacturing purpose, and how much over the dam, is for them to decide, with this qualification: their control is subject to any public right of way that the Legislature have not relinquished.

On the question whether any such right has been released by grants of manufacturing powers, the intention of the Legislature can be seen in a supposed case in which the defendants use a canal as a canal company, and a flume as a manufacturing company. At the lower end of the flume they have a saw-mill in which one man is employed. In June a lumberman arrives at the falls with a drive. There is water enough to carry his logs over the falls in the natural channel if there was no dam there. All

the water, turned into the canal, would afford a more convenient passage. All the water, turned into the flume, would work the saw-mill. The whole of it is necessary for either of the three purposes to which it may be applied. The flume gate is open, and the mill in operation. There is no water in the canal, and none running over the dam. The lumberman demands a passage through the canal, and tenders the toll. His demand must be complied with. The canal, like a turnpike or a railroad, is a highway. As a canal company, the defendants have not been relieved from the highway duties and liabilities of their predecessors. The canal gate must be opened, and the flume gate must be shut, although for a time the mill will be stopped, and its operator thrown out of employment. As soon as the defendants have performed this canal duty, another lumberman arrives, and demands a passage for his logs without payment of toll. Whether the defendants furnish it in the canal, or through a sluice over the dam, the flume gate remains shut, and the mill and its operator remain idle, while the highway demand of the second lumberman is complied with. Whether the number of his logs is ten or ten million; whether their passage stops their mill an hour or a month; and whether the number of mill operators is one or one thousand,—the lumberman is entitled to a free way as good as he would have if no dam had been built, and no water had been diverted from the ancient channel. There is nothing in the Statute to indicate an intention that the public right shall be restricted to the passage of a fixed number or a reasonable number of logs, or shall depend upon the extent of the defendants' manufacturing industry and the number of persons engaged therein. If the Legislature had meant the public right might be indefinitely impaired, as it would be if a judicial tribunal were authorized to decide each case upon the comparative importance of the logging business of the lumbermen and the manufacturing business of the defendants, it is not probable that they would have been silent on that subject. The reduction of the highway from one measured by the power of the undiverted stream to carry logs over the unobstructed falls to one measured in each particular case, or in this case, by an appraisal of the logging and manufacturing interests, is a piece of legislation that cannot be inferred from the fact that the statutes contain no allusion to so extraordinary an alteration.

On the question whether a wharf in the port of Newcastle is a nuisance, evidence is not admissible to show that the public inconvenience caused by its obstruction of the Tyne is balanced by the public benefit derived from the delivery of coal in the London market in a better condition and at a reduced price in consequence of the shipping facilities afforded by the wharf. The contrary doctrine maintained by a majority of the court in *King v. Russell*, 6 Barn. & C. 566, 569, 570, 590, 591, 593, 594, 597, 598, and by a minority in *Pennsylvania v. Wheeling & B. Bridge*, 54 U. S. 18 How. 518, 591, 605, 14 L. ed. 249-280, 286, has not prevailed. The true view was presented by counsel in *Rea v. Ward*, 4 Ad. & El. 384, 394: "Nor is the principle a just one that a nuisance in

one place may be compensated by any degree of benefit conferred in another; as if a gasometer created a nuisance in Southwark, and it was answered that the gas-lights connected with it were beneficial to a street in London. No comparison can be instituted between accommodation to one set of persons and loss of rights to another." The necessity of slaughter-houses in this country does not legalize the diffusion of an intolerable stench from a structure of that kind in the center of Manchester. The violation of a public right enjoyed by a portion of the community is not justified by offsetting an advantage accruing to others. The State's abandonment of the whole or a part of the Connecticut easement, in consideration of the receipt of a public benefit of equal or greater value, is an exchange which the riparian owners cannot make without the State's consent. *Rez v. Ward*, 4 Ad. & El. 384; *Jolliffe v. Wallasey Local Board*, L. R. 9 C. P. 62, 88; *Atty-Gen. v. Terry*, 29 L. T. N. S. 716, on appeal, L. R. 9 Ch. App. 423, 432; *Pennsylvania v. Wheeling & B. Bridge*, 54 U. S. 18 How. 518, 577, 14 L. ed. 249, 274; Gould, Waters, § 94; Angell, Tide-Waters, 203-228; Angell, Highways, §§ 233, 235.

A bridge across a navigable river may be a more important highway than the river, and "it is for the municipal power . . . to decide which shall be preferred, and how far either shall be made subservient to the other." *Gilman v. Philadelphia*, 70 U. S. 8 Wall. 713, 729, 18 L. ed. 98, 99; *Re Clinton Bridge*, 77 U. S. 10 Wall. 454, 19 L. ed. 969; *Müller v. New York*, 109 U. S. 385, 394-398, 27 L. ed. 971, 974-976.

"The Legislature alone could determine the question of comparative public convenience, and either refuse to lay out a highway which would impede navigation, or grant it upon terms, conditions, and reservations, as the public interests might in their judgment require for the protection of the navigation." *Charlestown v. Middlesex County Comrs.* 8 Met. 202, 206; *Com. v. Essex Co.* 13 Gray, 239, 247; *Com. v. Charlestown*, 1 Pick. 180, 185, 187.

By an exercise of legislative power, authority can be given to wholly or partly discontinue a public way on land or water. The Connecticut easement is public property that can be abandoned by due action of the government. But no power has been conferred on the defendants or the court to exchange any part of it for public benefits derivable from the defendants' manufacturing enterprise.

The forests formerly owned by the State were held by the body politic in trust, in a certain sense, for the common benefit of the people. When the State sold them, the proceeds, like money raised by taxation, went into the vendor's treasury for public, not for private, use. When the title was in the State, it was not held for the several benefit of everybody who desired the timber for the construction of houses or ships. The public right of navigation in navigable water, salt or fresh, is held by the State in a different trust. It is a right that all may exercise for private profit. The State, as trustee, holds the legal title. The State, and the people, as individuals, have the use. The object of the trust is evidence tending to show that the common right of naviga-

tion is not unnecessarily extinguished by a mere conveyance of land, or a mere creation of an imaginary being called a corporation. "The dominion and property in navigable waters" is "held by the king as a public trust." "When the Revolution took place, the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soil under them, for their own common use." *Martin v. Waddell*, 41 U. S. 16 Pet. 367, 401, 410, 10 L. ed. 997. "By the principles of the common law, the title to navigable waters and the soil beneath is vested in the crown in trust for the public. . . . And by the charters under which these colonies were planted there was vested in the grantees not only the crown's title to the lands granted, but its rights and jurisdiction in and over the navigable waters and seashores, to be held, as by the crown, in trust for the public." *Clement v. Burns*, 43 N. H. 609, 616, 619. "By the common law, the king was held to be the owner and proprietor of the soil under the sea, its shores, and all tide-waters, and as such could grant the right of property therein to a subject, though this was not usually done without the previous execution and return of a writ *ad quod damnum*, to ascertain whether such grant would cause any injury to any public right. But it was further held at common law that, beyond a right of property, the king's prerogative extended to the dominion and control of the shores of the sea, as a power held in trust for the security and protection of the public rights in the navigation and fisheries; that these were among the regalia or incidents of sovereignty, which could not be alienated by royal grant alone. . . . Supposing, then, that the Commonwealth does hold all the power which exists anywhere to regulate and dispose of the seashores and tide-waters, and all lands under them, and all public rights connected with them, . . . it must be regarded as held in trust for the best interest of the public, for commerce and navigation, and for all the legitimate and appropriate uses to which it may be made subservient. . . . Two distinct rights are regarded, viz.: (1) *The jus priatum*, or right of property in the soil, which the king may grant, and which may be held by a subject, and the grant of which will confer on the grantee such privileges and benefits as can be enjoyed therein subject to the *jus publicum*. (2) *The jus publicum*, the royal prerogative, by which the king holds such shores and navigable rivers for the common use and benefit. This royal right, or *jus publicum*, is held by the crown in trust for such common use and benefit, and cannot be transferred to a subject, or alienated, limited, or restrained, by mere royal grant, without an Act of Parliament. The king's grant, therefore, although it may vest the right of soil in a subject, will not justify the grantee in erecting such permanent structures thereon as to disturb the common rights of navigation; and such obstruction, notwithstanding such grant, is held to be a public or private nuisance, as the case may be." *Com. v. Alger*, 7 Cush. 53, 82, 83, 90. "The king takes this right of soil in trust for the public, so far as fishing is concerned; and, although the king may grant away this right of soil to another, yet his grantee will take it subject to

the same trust; and by such grant, however comprehensive in its terms, the public . . . cannot be deprived of their common rights." *Weston v. Sampson*, 8 Cush. 347, 352; *Dunham v. Lamphere*, 8 Gray, 268, 271; *Moore v. Sanford*, 151 Mass. 285, 7 L. R. A. 151; *Free Fishers & D. v. Gann*, 11 C. B. N. S. 387, 417; *Angell, Tide-Waters*, 2d ed. 22-25, 27, 64; *Gould, Waters*, §§ 17, 18, 20, 21.

"The right of soil . . . must in all cases be considered as subject to the public right of passage, . . . and any grantee of the crown must of course take subject to such right." *Colchester v. Brooke*, 7 Q. B. 339, 374.

A legal reason for the king's inability to surrender navigation is the establishment of the trust by usage and universal understanding for the maintenance of the common right. For the same reason, the right is not destroyed by the State's conveyance of the basin or bed in which the navigable waters rest, or through which they flow. No federal question being raised, this case is to be determined by the local law which regards the people and the State as holding the beneficial interest in an easement, the legal title of which is vested in the State as trustee. Acting as a body politic and trustee, the beneficiaries, by their legislative agents, can authorize an extinguishment of the trust and an abandonment of the trust estate. *Wales v. Stetson*, 2 Mass. 143, 146; *Com. v. Charlestown*, 1 Pick. 180, 185. But there is a natural presumption that, if the Legislature intend to do this, their purpose will be distinctly expressed, as in the provisions for the discontinuance of highways, and the assessment of damages therefor. Gen. Laws, chap. 71. "An intention to discontinue such a highway [as the Androscoggin] cannot be inferred from a public grant of the land under and around it,—a mere alienation of the ownership of the soil by an ordinary form of conveyance. A sale by the State of all its ungranted land could not be construed as a relinquishment and abolition of the public rights of navigation in Piscataqua River or Lake Winnipisogee." *Thompson v. Androscoggin River Imp. Co.* 54 N. H. 545, 548. Such a sale was authorized by chapter 42, Laws 1887. When the soil under the Connecticut at Olcott Falls passed from the king or the State to the first grantees (under whom the defendants claim), it did not cease to be subject to the easement. An express reservation of the public trust and common use was unnecessary. And the nature of the trust which would have made that reservation superfluous in a state grant of the land to the defendants had the same effect in grants of corporate capacities deemed appropriate for other purposes than the total or partial discontinuance of the highway. Like the riparian rights comprised in the land title, the franchise of their artificial body to exercise those rights is subject to the easement held in trust for common use.

The express refusal of the Legislature to allow the defendants, as a canal company, to extinguish the old free way, if they furnished a new and better one, through a canal subject to tolls, has no tendency to show that the Legislature intended, for the sake of the most insignificant mill, to authorize them to stop the

old way without providing a new one. If they can stop the passage of logs a single day in the dry season because they need all the water on that day for an up and down saw, they can discontinue the old way entirely by building and operating mills large enough to require all the water every day. They do not claim a power of total and absolute discontinuance; and in the statutes on which they rely there is no mention of any discontinuance, total or partial, permanent or temporary, to be accomplished by a manufacturing diversion of the water. There is no expression of a legislative intent to introduce such an uncertainty and such a prolific source of litigation as a corporate power of discontinuing the highway to some extent by turning a reasonable amount of the water from the natural channel for manufacturing purposes. The Acts of 1848 and 1881 enable the defendants to act as a corporate body in the exercise of riparian rights that existed before those Acts were passed, and do not curtail the measure of the public right of flotation which the common law finds in the natural capacity of the stream. If a temporary interruption is unavoidable in the erection or repair of a dam, the right of incorporated or unincorporated riparian owners to bar the way for that purpose without such a license from the State as is given by municipal governments for the occupation of streets during the erection or repair of buildings as a question that need not now be considered. The general rights of the riparian owners and the public may be subject to various qualifications. So far as this suit is concerned, the public right of way is not impaired by the Acts of 1807, 1848, and 1881. It is a right to a way of which the floating capacities of the undiverted river, in its natural channel, is the measure. The defendants' right is to use the river and its bed without an invasion of the public easement. Both rights are established by law. Neither of them can be altered by the trial and determination of any issue of fact. The only question of fact is as to the manner in which the public and the defendants can enjoy their several titles, and exercise their indisputable rights. The prayer of the bill is for a necessary regulation of the common use of the river for commercial and manufacturing purposes by a specific decree that cannot be rendered in a suit at law.

When the defendants were preparing to build the dam, the question necessarily arose by what sluice and what appliances they could avoid an infringement of the public right, and this question they were not compelled to decide at their peril. On their amicable bill, in which the attorney-general, as the representative of the State, would be defendant (*Samson v. Smith*, 8 Sim. 272; *Tasker v. Lord*, 64 N. H. 279, 283), and of which notice would be given to persons specially interested, the defendants could have obtained a provisional decree of regulation operating like a partition, marking the boundary line between the public and the private right, and enabling them to construct their works in a manner authorized by law. The proceeding would have been in the nature of an *ad quod damnum*. *King v. Montague*, 4 Barn. & C. 598; *King v. Russell*, 6 Barn. & C. 566, 568, 600; *Nichols v. Boston*, 98 Mass. 39, 41; *Gould, Waters*, §§ 21, 43. The decree,

virtually laying out a logway over the projected dam would have afforded adequate protection against suits at law for damages, and efforts to abate an alleged nuisance by chancery suits, criminal prosecutions, and force without legal process. If it were found by experiment after the completion of the dam that either or both of the water-rights required an alteration, justice would be done on application of either party. An unalterable adjudication would not be made in a matter in which changes might be rendered necessary by results and circumstances that could not be foreseen and provided for. Either party might be plaintiff, and either party might be defendant. And, if this bill is necessary for a regulation of the manner of exercising the common rights by constituting and using a sluice and other appliances, it is not barred by the defendants' erection of a dam. "Courts of equity have jurisdiction of that class of cases where there is an admitted common right among several owners of the same privilege to regulate the common use, to determine the extent of their respective rights, and the proper mode of exercising and enjoying them, as tending to prevent litigation, and as affording a more complete and perfect remedy than could be obtained at law, and as furnishing, in fact, the only adequate means of ascertaining and determining the respective rights of the parties." *Burnham v. Kempton*, 44 N. H. 78, 100; *Ranlet v. Cook*, 44 N. H. 512-515; *Bean v. Coleman*, 44 N. H. 539, 542; *Lawson v. Menasha Wooden-Ware Co.* 59 Wis. 393; Gould, Waters, § 540, and cases there cited. The ground of equity jurisdiction in many other cases is the want of an adequate process at law for finding lost boundaries (*Story*, Eq. Jur. chap. 11), and locating private ways. In *Gardner v. Webster*, 64 N. H. 520, 6 New Eng. Rep. 394, the defendant had conveyed land, reserving a right of way across to "the point so-called." In the opinion, the court says: "The locations and limits of the reserved ways are not specified. . . . The defendant is entitled to a reasonable, convenient, and suitable way, across the land conveyed, to the point. . . . The defendant's right of way through the plaintiff's pasture does not authorize him to pass over all parts of the pasture at his pleasure. Its route through that lot is determined, not by the sole interest of either of the parties, but by the reasonable convenience of both. If its location were contested, the controversy might not be settled by the negative result of many actions at law. Both parties, or either of them, might need a decree in equity that would fix the route affirmatively and specifically."

In the present case, on the question of proper form, dimensions, and place of a sluice, the jurisdiction of equity is as plain as a partition of water-power between mill-owners, the ascertainment of lost boundaries, or the laying out of a private way. At the trial term, the court can cause the logway to be located and defined by a jury, and put upon them the duty of drawing a report containing a specification for the construction of a dam and sluice. But it has not been shown that the law of any county requires such work to be done by twelve unanimous persons. If a judicial location of a logway over a dam is necessary, the convey-

nience of the defendants will be consulted so far as it reasonably may be without a violation of the public right to a way as good as the stream would furnish in its natural condition, and the location will be alterable, at any future time, on application of either party. No location will be made unless a necessity for it is shown. It would seem that this question of necessity will be best tried and decided upon the experiments annually made at the falls. How long the bill should be retained for a satisfactory settlement of this point is a matter to be considered at the trial term. As either party can obtain equitable relief in vacation without this suit, it is possible that the case will be properly disposed of at the next trial term, or after another annual experiment, by dismissing the bill without costs and without prejudice except so far as equity may require a decree for the adjustment of expenses that have been incurred by either party under interlocutory orders.

If a logway is laid out in this suit, the public will have a right to a reasonable use of it. A controversy as to what would be a reasonable use of it, or of the stream in its natural condition, will not be a dispute about the public right in any sense that will require the right to be settled by the trial of a question of fact before the bill can be maintained for the laying out. As a fee-simple in land is, for many purposes, nothing more than a right of exclusive possession and reasonable use (*Bassett v. Salisbury Mfg. Co.* 43 N. H. 569, 577; *Thompson v. Androscooggin River Imp. Co.* 54 N. H. 545, 551, 552, 555; *Com. v. Alger*, 7 Cush. 53, 84, 87); so an ordinary public or private right of way is a right of using land or water or both as a way, reasonably and with due care (*Sewall's Falls Bridge v. Fisk*, 23 N. H. 171; *George v. Fisk*, 32 N. H. 82; *Graves v. Shattuck*, 35 N. H. 257; *Thompson v. Androscooggin River Imp. Co.* 54 N. H. 545, 555, 58 N. H. 108; *Hall v. Brown*, 54 N. H. 493, 495; *Carter v. Thurston*, 58 N. H. 104, 107; *Varney v. Manchester*, 58 N. H. 430; *Collins v. Howard*, 65 N. H. 190; Gould, Waters, §§ 95, 96, 110). The entire natural capacity of the river for floatation is public property. The lumbermen, as travelers on the highway, are entitled to a reasonable and careful use of the estate. Reasonableness of use and care, attached as a limitation to the ownership and enjoyment of corporeal and incorporeal property, does not permit the lumberman to injure the defendants' works by negligence or an unreasonable use of the entire natural floating power of the river, nor allow the defendants to deprive the lumbermen of the reasonable use of any part of the power. Both parties are bounded by the line established between the incorporeal rights of the public and the other rights of which the defendants' title is composed. There is no question of right or title, in the sense in which these words are used, when it is said that the legal right must be established at law before it is specially enforced in equity. If it is necessary to lay out the undeniable public way over the dam, one question may be how narrow the sluice should be, at different times, to secure a sufficient depth of water. The defendants are apparently as much interested as the lumber company in an economical solution

of such questions. In cases like this and *Gardner v. Webster*, the owner of the servient tenement may sometimes be more relieved than the other party by a laying out of the easement. An equitable power employed in the measurement, location, and adjustment of legal rights before an attempt is made to exercise them is often more useful than any remedial

course that can be taken after controversy has arisen on this alleged violation. In this case, the rights of all parties being known, a regulating process may not be needed.

Case discharged.

Carpenter, J., did not sit. The others concurred.

GEORGIA SUPREME COURT.

Mattie E. GRESHAM, *Plff. in Err.*,

v.

EQUITABLE LIFE & ACCIDENT INSURANCE CO.

(.....Ga.....)

***If both parties engage willingly in a personal rencounter**, it is a mutual combat or fight, and death resulting therefrom is not included in a policy of accident insurance which

♦Head note by BLECKLEY, Ch. J.

excepts from the risk death or injury which may have been caused by fighting. It makes no difference, in such case, whether the slayer was sane or insane.

(July 13, 1891.)

ERROR to the Superior Court for Fulton County to review a judgment in favor of defendant in an action brought to recover the amount alleged to be due on an accident insurance policy. *Affirmed.*

The facts sufficiently appear in the opinion.

NOTE.—*Death resulting from a violation of law avoids an insurance policy.*

A difficult question arises in determining what is the test of death in the violation of law. Obviously the circumstances of any given case are so different in detail from those of any other case that it is impracticable to lay down other than a general rule; and perhaps no better rule can be stated than that the act in violation of law, and the act causing death, must be part of "the same continuous transaction." And it is not clear that an essentially different rule need be applied where the exception is expressed as "in consequence of the violation of law;" though an exception in the last-mentioned form would clearly admit of greater remoteness in time and distance. *Cooke, Life Ins. § 48.*

The breach of law must not only be proximate as a cause of the death, it must be adequate also. If it be inadequate to produce the result, it is not the cause. 3 Kent, Com. 302; Arn. Ins. 764; *Williams v. Suffolk Ins. Co.* 8 Sumn. 276; *New York L. Ins. Co. v. Graham*, 2 Duv. 506; *Livie v. Janson*, 12 East, 648; *Ionides v. Universal M. Ins. Co.* 14 C. B. N. S. 252.

A known violation of a positive law avoids the policy if the natural and reasonable consequences of the violation are to increase the risk; a "violation of law," whether the law is a civil or a criminal one, does not avoid the policy, if the natural and reasonable consequences of the act does not increase the risk. The cases all agree that the wrongful act must have been the proximate cause of the death. The loss of life must be connected with the crime as its consequence. By reason of the guilty act the death must have occurred. Whether the "violation of law" was the proximate cause of death and whether it was an act increasing the risk, must be determined from the facts. There must be some causative connection between the act which constitutes the "violation of law" and the death of the assured. So where the assured robbed the state treasurer and while leaving the building was killed by a policeman, the court held that the words meant death in the actual violation of law, and that as the act had been completed, and the death occurred afterwards, there was no forfeiture. *Griffin v. Western Mut. Ben. Assn.* 20 Neb. 680; *Bacon, Ben. Soc. & L. Ins. § 339*; *Bradley v. Mutual Ben. L. Ins. Co.* 45 N. Y. 423, 3 Lana. 341; *Murray v. New York L. Ins. Co.* 96 N. Y. 614; *Travelers Ins. Co. v. Seaver*, 86 U. S. 19 Wall. 531, 23 L. ed. 155.

13 L. R. A.

The provision excluding liability for injury received while committing an unlawful act refers to such injuries as may happen as the natural consequence of the act,—as its probable and to be anticipated consequences; and the reference to injury received "in consequence of any unlawful act" is to those injuries which flow naturally from the act committed, as its effect or resulting consequence. Attempts to murder, in which lawful resistance may occasion death; attempts to injure or rob the wife or child or parent of another, in which injury might be expected from defense of that other; engaging in a horse-race where horse-racing is unlawful, and where the injury results during the race, or in the efforts to stop one of the horses in its progress; and the like,—are acts illustrating what is meant by "injuries received while insured was engaged in or in consequence of an unlawful act." The law is properly and well settled that such provision does not extend to exempt the insurer from liability because of the infraction by the insured of the law when the act has no connection with the injury, or when the act is in violation of some obligation of morality or rule of policy, not recognized or adopted as law. It has been held, too, that the unlawful act committed must be criminal, and not a mere violation of a civil right or infraction of a law not criminal. *Adams v. Cowles*, 14 West. Rep. 773, 95 Mo. 506; *Cluff v. Mutual Ben. L. Ins. Co.* 13 Allen, 303; *Bradley v. Mutual Ben. L. Ins. Co.* 45 N. Y. 422.

The contrary has been held, so far as it relates to the violation of a positive rule of civil law which proximately leads to the injury, when it is such an act as increased the risk and naturally led to the death. *Bloom v. Franklin L. Ins. Co.* 97 Ind. 478; *Accident Ins. Co. of N. A. v. Bennett* (Tenn.) June 6, 1891.

A policy of insurance is to be construed most liberally in favor of the assured. *Palmer v. Warren Ins. Co.* 1 Story, 360; *Yeaton v. Fry*, 9 U. S. 5 Cranch, 335, 8 L. ed. 117; *Bradley v. Mutual Ben. L. Ins. Co.* 45 N. Y. 422.

And an exception in a policy is to be taken strongest against the insurer. 1 Duer, Ins. 161; *Huidekoper v. Douglass*, 7 U. S. 3 Cranch, 1, 2 L. ed. 347; *Breasted v. Farmers L. & T. Co.* 8 N. Y. 308; *Hoffman v. Aetna F. Ins. Co.* 33 N. Y. 405. See note to *Blackstone v. Standard L. & A. Ins. Co.* (Mich.) 3 L. R. A. 486.

F. S. R.

Messrs. J. B. Cunningham, J. A. Austin and Breyles & Sons for plaintiff in error.
Messrs. Candler & Thomson for defendant in error.

Bleckley, Ch. J., delivered the opinion of the court:

The policy covered bodily injuries inflicted by external, violent, and accidental means. It excepted, however, various classes of accidental injuries which might be embraced in these general terms,—among them, those caused by dueling, fighting, wrestling, etc., and those happening in consequence of voluntary exposure to unnecessary danger, hazard, or perilous adventure, or while engaged in, or in consequence of, any unlawful act, and all injuries, the result of design, either on the part of the claimant or any other person. It may be conceded that the homicide was accidental, within the meaning of the policy, as such policies have generally been construed by the courts. *Ripley v. Railway Pass. Assur. Co.* 2 Bigelow, Ins. Cas. 788; *Hutchcraft v. Traveler's Ins. Co.* 87 Ky. 300; *Phelan v. Traveler's Ins. Co.* 88 Mo. App. 640; *Richards v. Traveler's Ins. Co.* 89 Cal. 170; *Supreme Council O. of C. F. v. Garrigus*, 104 Ind. 183, 1 West. Rep. 861; notes to *Paul v. Traveler's Ins. Co.* (N. Y.) 8 Am. St. Rep. 768; *Bliss, Ins.* §§ 896, 397; 5 Lawson, Rights, Rem. & Pr. § 2140 *et seq.*; 1 Am. & Eng. Encyclop. Law, 87 *et seq.*; 7 Am. Law Rev. 585; same article, 8 Alb. L. J. 85.

It may be conceded also that, though the killing was manifestly willful on the part of the slayer, it was open to question whether it was the result of design,—that is, of rational design,—inasmuch as there was some evidence tending to show that the slayer might have been insane. It may likewise be conceded that, had the case turned alone on the question whether at the time the insured was shot he was engaged in an unlawful act, there was some evidence for consideration by the jury. The evidence as a whole might warrant a negative finding on this point, according to some of the authorities, though not so, perhaps, according to the spirit of others. *Cluff v. Mutual Ben. L. Ins. Co.* 13 Allen, 308; *Bradley v. Mutual Ben. L. Ins. Co.* 45 N. Y. 432; *Harper v. Phoenix Ins. Co.* 19 Mo. 506; *Traveler's Ins. Co. v. Seaver*, 86 U. S. 19 Wall. 582, 22 L. ed. 478; *Bloom v. Franklin L. Ins. Co.* 97 Ind. 478.

But, if the view we entertain of the law is correct, the matter on which after close study there could be no two opinions, no reasonable doubt in impartial and intelligent minds, is that the injury which resulted in death was caused by fighting. Shooting caused the injury, and fighting caused the shooting. The cause of the cause was the real cause of the event. Fighting may cause death by causing a contemporaneous act which causes death. In such case, the first causal agency is not too remote, though the event be related to it only in the second degree of lineal descent. It is not every fight, however, in or from which a mortal injury might be received by the insured, which could be regarded as the cause of the injury or of death resulting therefrom. A faultless and unwilling conflict by the insured

—one which he neither provoked nor invited, one which he did not accept when formally or informally tendered, one in which he was forced to engage for self-defense alone, and from which he withdrew, or endeavored in good faith to withdraw, when his defense was accomplished—ought not to, and would not, be treated as a causative fight on his part, within the meaning and intent of the policy, but would be regarded as right and proper resistance to aggressive or offensive violence. To protect his life from destruction or his person from injury might be as much a matter of duty to the insurance company as of interest to himself. Means of resistance which it would be reasonable for him to employ for his own safety, he could not be excused for neglecting, if an efficient use of them were shown to be within his power. It would be no objection to their use that they involved “fighting back” in order to repel the violence of an assailant. The stipulation against liability for injuries caused by fighting refers to voluntary fighting by the insured, or involuntary fighting brought on wholly or partially by his fault or temerity—fighting for which he is partly responsible, either as a volunteer or as a rash speaker or wrong-doer. It could not be the purpose of the stipulation to cut off the right of self-defense by the use of force,—the right to repel violence with violence of like nature. The exercise of this right might be mutually beneficial to both of the contracting parties, and that either of them had any purpose to restrict a fair and reasonable exercise of it is in the highest degree improbable.

In order to attribute to the insured anything caused by the fight, he must have some voluntary agency in causing the fight itself. If he had such agency, if by improper speech or voluntary conduct he was a material factor in bringing on the fight, he was, as between himself or his wife and the Insurance Company, chargeable with the consequences. If the fight was the cause of the mortal injury, and he was the cause of the fight, whether in whole or in part, he was, to that extent, the cause of his own death. If he begat the fight, and the fight begat the shooting, and the shooting begat the injury, he bore an ancestral relation to the last offspring as well as to the first. At all events, being father to the fight, neither he nor his wife, under the terms of this policy, could profit by the fight or by what it brought forth. That, according to the evidence in this case, there was a fight, admits of no possible question. There was hostile contact, physical collision, an attempt by each combatant to hurt the other; blows were given by one, which took effect; strokes were made by the other, which missed their aim. The origin of the fight is equally manifest. It was not born of the passion of one of the parties, but of a conjunction of the passions of both. It proceeded from an altercation in which each party used rash and insulting language; language calculated to excite anger and provoke conflict. Both being in the same room, but some distance—say twenty feet—apart, the other party spoke abusively of secret societies and their members, referring to them in general terms; no particular society or member (so far as appears) being mentioned. This speech was

made in the hearing of the insured and several others, but was not addressed to him. Some of the others, who were nearer to the speaker, remonstrated with him upon the impropriety of his animadversions. Shortly afterwards, as the speaker was passing by the insured on his way out, the latter, without rising from his seat, said to him mildly, in a tone of mortified resentment: "I heard all you said about secret societies; that no gentleman would belong to a secret society." The other answered: "Yes, I said it; and, by G—d, it is true. Do you want to take it up?" The insured replied, "Well, it's a lie," or "a damned lie;" adding, "Yes, I do." Then followed a blow from one of them, probably the former, and the latter "tumbled off his seat," possibly as the result of receiving the blow. They backed towards one of the entrances to the room, several feet, and the insured was stricken by his antagonist several times with a small walking cane, which was broken over his shoulders. The insured struck back with his hands without effect, several of his blows missing their aim. Then, while the other maintained his position close to where the fight took place, the insured moved back ten or twelve feet to the seat which he had occupied, and looked for and inquired after his hat, which had fallen or been knocked from his head. The other combatant, without changing his position, then drew a pistol, and fired the fatal shot. Before anything above referred to was said or done, the parties were aware of each other's presence in the room; they had spoken together in a friendly way, each calling the other by his first, or Christian, name. In substance, this is the whole story of the quarrel, the fight, and the homicide, as told by the testimony. The first insult came from the slayer, attended with a challenge to fight. The question, "Do you want to take it up?" propounded in anger, does not, according to the common understanding of it in Georgia, import a proposal to debate or discuss, but a challenge to the arbitrament of force, or a trial of the issue by the personal prowess of the disputants. It is the end, not the beginning, of argument. It is no less significant of defiance than was the ceremony of throwing down the glove as a preliminary to trial by battle. The insult was returned by the insured by responding in words of foul opprobrium,—words so irritating that gentlemen rarely address them to their equals, except when they intend to back them with their courage; and, to make the intent clear in this instance, the challenge was accepted in the sureradded phrase, "Yes, I do." Instantly active hostilities commenced, each party having thus declared his willingness to champion his side of the trivial and needless quarrel. Had not both of them acted with hot-headed rashness in passing insults, there would have been no fight. Had the insured squarely objected to fighting, and tried to keep out of it, there is no reason to suppose he would have failed of success. Instead of so doing, he provoked his adversary by giving him the lie, most probably with a profane prefix to the offensive imputation; and, instead of pursuing a pacific policy, he accepted what he must have understood as a challenge to fight. No doubt he was under the influence of strong

passion, but this is no excuse for him in the present litigation. The fighting was in a public place,—that is, a place to which a portion of the public habitually resorted. It was a room occupied and used as a saloon and restaurant, in the City of Atlanta. The fight, merely as such, was a joint offense, and would be classified, under our Code, as an affray. Code, § 4515. This is true, notwithstanding the evidence indicates none of the blows dealt by the insured took effect, and that the first blow, as well as all others which reached their object, came from his antagonist. In so far as the constituents of a fight are concerned, the consent of both parties makes the consequent violence of either chargeable to both. "We think the judge was in error in saying there must be mutual blows to constitute a mutual combat. There must be a mutual intent to fight. But we think, if this exists, and but one blow be stricken, that the mutual combat exists, even though the first blow kills or disables one of the parties." *Tate v. State*, 46 Ga. 157; 158 (McCay, J.). To the like effect is a dictum by Chief Justice Pearson, of North Carolina, who says: "Is it necessary that both parties should give and take blows, or is it sufficient that both parties should voluntarily put their bodies in a position to give and take blows, and with that intent? To illustrate: Suppose Rippy had not been killed. Upon an indictment for an affray, would he not have been convicted? Two men go out to fight. One is knocked down on the 'first pass,' and that is the end of it. Are they not both guilty of an affray?—that is, 'a fight by mutual consent.'" *State v. Gladden*, 73 N. C. 155.

We are no less certain that the fight was a mutual combat, in the legal sense, than if it had been so found by the verdict of a jury under a full and proper charge from the presiding judge; and the palpable truth that fighting caused the shooting, and therefore the injury, needs confirmation by verdict just as little. The evidence is all one way; but one rational inference is possible. The shooting is accounted for easily and naturally by ascribing it to the fight. This is the proper explanation of it, whether it be regarded as a part of the fight proper or as a sequel to it. It was certainly embraced within the *res gestæ* of the combat. It took place on the same stage and within the atmosphere of the antecedent performance. The homicide could well be treated as the culmination of the final scene,—the catastrophe of the drama. At the very least it was a bloody epilogue and not an independent afterpiece. Nor is it material that it was not down on the bill, but was wholly unexpected by one or both of the actors. Rarely, if ever, can the incidents or the result of a personal encounter be foreseen. A deadly weapon may make its appearance at the last moment, and a homicide be the result, although the fight intended and begun was one with "fist and scull" only. To fight at all is dangerous. When the combative passions are aroused and get a taste of gratification, what momentum they will acquire, and to what extremes it will carry them in their lust for more, is always uncertain. Even friendly wrestling is a door by which anger and a mortal wound may come in. Knowing the hazards attendant on physical

competition and contention, this Insurance Company declined to assume the risk of accidental injury or death caused by fighting or wrestling. The insured might fight if he pleased, but he was not allowed to indulge his combative propensities at the expense of the Company; that kind of indulgence was to be at his own risk. Not that the Company might not have borne the risk for him if it had chosen to do so. In the language of *Judge Scott*, in *Harper v. Phoenix Ins. Co.*, 19 Mo. 509, *supra*: "Unless it is otherwise stipulated, the insurer takes the subject insured, with his flesh and blood and passions. The dangers to which the lives of men are exposed from sudden ebullitions of feeling are a lawful matter of insurance." But in the policy before us the Company had "otherwise stipulated." By so doing it has narrowed the range of the policy over the emotions so as to shut out all those of a pugnacious character. If both combatants contributed to bring on the fight, their relative blame or guilt has nothing to do with the relation of cause and effect between it and the homicide. Nor is it of any moment to consider whether the offense committed in the end was murder or manslaughter. With or without malice, in the technical sense of criminal law, the homicide was caused by the fight, as causation is understood and regarded in the law of contracts. The fight occasioned it, for the fight produced the shooting as a direct and

immediate consequence. Who can doubt that the shooting grew out of the fight,—sprang from it directly and immediately? Had there been no fight, there would have been no shooting and no killing. It was the fight that excited the homicidal impulse, generated the desire and the purpose to kill. There was nothing else to do it. Even if the slayer was insane, or subject to homicidal mania, the mania alone was harmless; it required the superadded excitement of the fight to render it destructive. Had the insured abstained from provoking the fight or accepting a challenge, had he contributed nothing towards bringing on a useless combat, there is no probability whatever that he would have been slain. And he could no more provoke a crazy man, or accept his challenge, at the expense of the Insurance Company, than he could so deal with a sane man at the Company's expense. Indeed, it would be more hazardous to engage in an affray with a madman than with a rational being; and any reason for protecting the company against the consequences of the less dangerous fighting will apply with increased force to the more dangerous. Injuries caused by rash or needless fighting with any description of combatant are excluded from the scope of the policy. The nonsuit was properly awarded, and we have stated our reasons very fully for so deciding.

Judgment affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Catharine S. MILES
v.
CITY OF WORCESTER.

(.....Mass.....)

A municipal corporation cannot escape responsibility for the nuisance on the ground that the structure is solely for public use, where by filling a school-yard several feet above its natural level it has pushed over the retaining wall so as to encroach upon and overhang the premises of an adjoining owner.

(October 24, 1891.)

EXCEPTIONS by defendant to rulings of the Superior Court for Worcester County made during the trial of an action brought to recover damages for injuries to plaintiff's property by reason of the alleged improper construction and maintenance of structures on the surface of defendant's land, which resulted in a verdict in favor of plaintiff. *Overruled.*

Defendant's land was devoted to the use of a school-house and grounds. A retaining wall was built by defendant next to, and several feet higher than the surface of, plaintiff's land. The surface of defendant's land was then raised, by filling in earth, as high as, or higher than, the wall. The evidence tended to show that

the wall was originally built on defendant's land but that at the time of the trial it was over the line onto plaintiff's premises in some places a foot at the bottom, and that it had gradually leaned and bulged over so as to overhang plaintiff's premises about a foot. This condition was caused by the weight of earth behind the wall or by the action of surface water or frost.

Mr. Frank P. Goulding, for defendant:

The wall was built and maintained as a part of the estate purchased for and appropriated by the City to the maintenance of a public high-school under the Statutes.

Pub. Stat. chap. 44, §§ 2, 51.

The City is not liable to an action on account of the condition of the wall.

The wall was built and maintained solely for the public use, and with the sole view to the general benefit, and under the requirement of general laws.

In such cases, in the absence of any statute which directly or by implication gives a private remedy, no action lies in favor of a person who has received an injury in consequence of a negligent or defective performance of the public service.

Howard v. Worcester, 12 L. R. A. 160, 158 Mass. 426, and cases cited; *Hill v. Boston*, 122 Mass. 344.

The fact that the injury is to property, whether real or personal, instead of to the person, establishes no distinction.

Havoks v. Charlemont, 107 Mass. 414; *Tindley v. Salem*, 137 Mass. 171.

If cases of trespass committed in the course

NOTE.—As to liability of municipality for a nuisance, see *notes* to *Chapman v. Rochester* (N. Y.) 1 L. R. A. 296; *Seymour v. Cummins* (Ind.) 5 L. R. A. 124; *Bates v. Westborough* (Mass.) 7 L. R. A. 156, 13 L. R. A.

of the discharge of a public duty might be distinguished from the general rule, that would not avail the plaintiff.

The count is in case and not in trespass. And the proof is of a consequential injury resulting from a defective performance of a lawful act.

1 Chitty, Pl. 117, 118.

There is no liability for the consequences of a structure falling or encroaching on another's land if it was properly built on the defendant's own land.

The doctrine of *Fletcher v. Rylands*, L. R. 1 Exch. 265, has never been adopted in this Commonwealth, at least in the extreme application of it found in *Nichols v. Marsland*, L. R. 10 Exch. 255.

Gorham v. Gross, 125 Mass. 232, 239; *Smith v. Boston Gas-Light Co.* 129 Mass. 318; *Bryant v. Bigelow Carpet Co.* 131 Mass. 491, 499.

Messrs. W. S. B. Hopkins and Frank B. Smith, for plaintiff:

The line of cases of which *Hill v. Boston*, 122 Mass. 324, and the much later case of *Howard v. Worcester*, 12 L. R. A. 160, 153 Mass. 428, are types, does not apply. They are actions for personal injury sustained either on the public land or, if off the public land, as the immediate result of an act done thereon in the execution of work to adapt it for public use, or in the performance of acts for the public safety or enjoyment.

Tindley v. Salem, 137 Mass. 171; *Fisher v. Boston*, 104 Mass. 87; *Hafford v. New Bedford*, 16 Gray, 297; *Bigelow v. Randolph*, 14 Gray, 541; *Benton v. Boston City Hospital*, 140 Mass. 13; *Clark v. Waltham*, 128 Mass. 567.

The question here is between adjacent land-owners and relates to their mutual rights as such. If the encroachment on adjacent land depriving its owner of its use and doing him damage "is not necessarily incident to the accomplishment of the public object but to the improper and unskillful manner of doing it, such damage to private property is not warranted by the authority under color of which it is done and is not justifiable by it. It is unlawful and a wrong for the redress of which an action of tort will lie."

Perry v. Worcester, 6 Gray, 544; *Haskell v. New Bedford*, 103 Mass. 208; *Sprague v. Worcester*, 13 Gray, 193.

The same principle applies to the negligent and improper maintenance of public works and makes the damage resulting therefrom an actionable tort, especially when it results in trespass or nuisance on real estate.

Childs v. Boston, 4 Allen, 41; *Bates v. Westborough*, 7 L. R. A. 156, 151 Mass. 174; *Propra. or Locks & Canals v. Lovell*, 7 Gray, 223; *Hildreth v. Lovell*, 11 Gray, 345.

No new or different principles govern this case because this public land was bought by the City instead of being acquired under an exercise of the right of eminent domain.

Wilson v. New Bedford, 103 Mass. 261.

Where there is a physical appropriation and no statutory taking the action of tort lies.

Lund v. New Bedford, 121 Mass. 286.

When, in consequence of a taking of land for public use, injury results to a landowner which is not to be contemplated and does not fall 13 L. R. A.

within the general rule of compensation, an action of tort will lie.

In those cases there was a physical invasion of the real estate of the private owner and a practical ouster of his possession.

Northern Transp. Co. of Ohio v. Chicago, 90 U. S. 635, 642, 25 L. ed. 338, 338; *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166, 20 L. ed. 557; *Eaton v. Boston C. & M. R. Co.* 51 N. H. 504; *Sinnickson v. Johnson*, 17 N. J. L. 129.

An injury of that class need not be intentional or contemplated, and does not imply necessarily any perpetual or permanent occupation of, or right in land, or that any title to it is acquired by the taking. What deprives the owner of the ordinary use and enjoyment of his land is a taking and appropriation.

Cooley, Const. Lim. § 544; *Hooker v. New Haven & N. Co.* 14 Conn. 146; *Canal Appraisers v. People*, 17 Wend. 571, 604; *Lackland v. North Missouri R. Co.* 81 Mo. 180; *Ashley v. Port Huron*, 85 Mich. 296, 301; *Armond v. Green Bay & M. Canal*, 31 Wis. 316; *Thurston v. St. Joseph*, 51 Mo. 510, 516; *Nevins v. Peoria*, 41 Ill. 502, 510; *Stetson v. Faxon*, 19 Pick. 147, 188; *Grand Rapids Boom Co. v. Jarvis*, 80 Mich. 808, 821; *Pettigrew v. Evansville*, 25 Wis. 223; *Dodson v. Cincinnati*, 34 Ohio St. 276; *East Pennsylvania R. Co. v. Schollenberger*, 54 Pa. 144.

Although it has been decided that the Legislature has constitutional power to permit and suffer certain acts to be done which, but for such legislative permission, would amount to a private nuisance, this doctrine has never been carried so far as to extend to a case where the nuisance is so great as practically to deprive the owner of private property of the use and enjoyment of his property.

Sauyer v. Davis, 136 Mass. 239, 242; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 103 U. S. 317, 27 L. ed. 739; *Crump v. Lambert*, L. R. 3 Eq. 409; *Com. v. Kidder*, 107 Mass. 183.

Allen, J., delivered the opinion of the court:

It is obvious that the defendant's wall, in its present position upon the plaintiff's plan, must be deemed an actionable nuisance, unless the defendant can claim exemption from responsibility on some special ground. *Codman v. Evans*, 7 Allen, 431; *Nichols v. Boston*, 98 Mass. 39, 43; *Fay v. Prentice*, 1 C. B. 828.

The defendant suggests that it is not liable, because the wall was built and maintained solely for the public use, and with the sole view to the general benefit, and under the requirement of general laws; and that the case cannot be distinguished in principle from the line of cases beginning with *Hill v. Boston*, 122 Mass. 344, and ending with *Howard v. Worcester*, 153 Mass. 426, 12 L. R. A. 160.

We are not aware, however, that it has ever been held that a private nuisance to property can be justified or excused on that ground. The verdict shows a continuous occupation of the plaintiff's land by the encroachment of the defendant's wall. The question of negligence in the building of the wall is not material. The erection was completed, and was accepted by the defendant, and is now in the defend-

ant's sole charge, and if it is a nuisance the defendant is responsible. *Stuple v. Spring*, 10 Mass. 72, 74; *Nichols v. Boston*, *supra*. Such an occupation of the plaintiff's land cannot be excused, for the reasons assigned. A city cannot enlarge its school grounds by taking in the land of an adjoining owner by means of a wall or fence. The public use and the general benefit will not justify such a nuisance to the property of another. If more land is needed, it must be taken in the regular way, and compensation paid. But if by the action of the elements, or otherwise, without the plaintiff's fault, the defendant's wall comes upon the plaintiff's land and continues there, it becomes a nuisance, for which the defendant is responsible, and so are the authorities. *Gorham v. Gross*, 125 Mass. 282, 289; *Khron v. Brock*, 144 Mass. 516, 4 New Eng. Rep. 424; *Eastman v. Meredith*, 86 N. H. 264, 296; *Hay v. Cohoes Co.* 2 N. Y. 159; *Tremain v. Cohoes Co.* Id. 163; *Weet v. Brockport*, 16 N. Y. 161, 173, in note; *St. Peter v. Denison*, 58 N. Y. 416, 421; *Cumberland v. Willison*, 50 Md. 138; *Harper v. Milwaukee*, 80 Wis. 865; *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 18 Wall. 168, 181, 20 L. ed. 557, 561; *Dillon*, Mun. Corp. § 965.

The case is distinguishable from *Middlesex Co. v. McCue*, 149 Mass. 108, where soil from the defendant's land upon a hill-side was washed into the plaintiff's mill-pond by the rains, when the defendant had built no artificial structure, and had done nothing more than to cultivate his land in the ordinary way.

Exceptions overruled.

Hugh FRANKLIN

v.

Delia May FRANKLIN.

(.....Mass.....)

A divorce will not be denied to a man in case of his wife's adultery by reason of the fact that he married her while under arrest on bastardy process, merely to have the child born in wedlock and on an agreement with her that they should never live together, which they have kept.

(October 24, 1891.)

EXCEPTIONS by libellant to a ruling of the Superior Court for Worcester County dismissing his libel filed to obtain a divorce from his wife because of her alleged adultery. *Sustained.*

The evidence proved that the libellant had had sexual intercourse with the libelee before marriage; that the libelee was pregnant as the result of such intercourse, and the libellant was under arrest, upon a bastardy process, instituted by the libelee, at the time of their marriage; that the libellant married the libelee for the purpose, as he testified, "to give the child a name," and to have it born in lawful wedlock, and under an agreement, made with the libelee, that they should not live together as

husband and wife; that immediately after the marriage the parties separated and have never lived together as husband and wife; that the marriage was performed in this Commonwealth and the libellant has resided here more than five years next preceding the filing of his libel; that since the marriage the libelee had committed the crime of adultery as charged in the libel.

Upon the foregoing evidence the court ruled that the libel could not be maintained, and dismissed it.

Messrs. W. S. B. Hopkins and Frank B. Smith, for libellant:

I. Although the parties married under an agreement that they should not live together as husband and wife, the marriage was legal and binding, and the collateral agreement "not to live together as husband and wife," was a mere nullity, so far as the legality of the marriage was concerned, as contrary to the policy of the law.

Barnett v. Kimmell, 35 Pa. 13; *Harrod v. Harrod*, 1 Kay & J. 4, 16; *Brooke v. Brooke*, 60 Md. 524.

Consensus non concubitus facit matrimonium. Dumaresq v. Fishly, 8 A. K. Marsh. 368; *Jackson v. Winne*, 7 Wend. 47; *Dalrymple v. Dalrymple*, 2 Hagg. Consist. 54; *Sottomayer v. De Barros*, L. R. 5 Prob. Div. 94, 98.

The mere present consent constitutes marriage, except that by statute law certain specific forms may or must be superadded and subsequent copula is not material.

Eaton v. Eaton, 122 Mass. 276; *Lindo v. Belisario*, 1 Hagg. Consist. 216; *Patrick v. Patrick*, 3 Phillim. 496; *Walton v. Rider*, 1 Lee, Eccl. 16; *Potter v. Barclay*, 15 Ala. 439; *Graham's Case*, 2 Lew. C. C. 97; *State v. Patterson*, 24 N. C. 346.

II. The agreement to separate and the living apart do not bar a decree for subsequent adultery.

The fact that the separation was by agreement and mutual consent negatives any finding of desertion on his part.

Thompson v. Thompson, 1 Swab. & T. 231; *Cooper v. Cooper*, 17 Mich. 205; *Lea v. Lea*, 8 Allen, 419; *Orow v. Orow*, 23 Ala. 583.

If libellant has not committed the offense of desertion, this case is taken out of that line of cases which hold that a suitor for a divorce cannot prevail, if open to a valid charge of any matrimonial offense of equal grade under the Statute with that which is the cause for the divorce sought.

Handy v. Handy, 124 Mass. 394; *Cumming v. Cumming*, 185 Mass. 386.

Agreements of separation are interpreted to be on the condition that the parties should live chastely.

Gandy v. Gandy, L. R. 7 Prob. Div. 77, 169, L. R. 30 Ch. Div. 57.

So a divorce may be maintained against either who afterwards commits adultery.

Morrall v. Morrall, L. R. 6 Prob. Div. 98; *Anderson v. Anderson*, 1 Edw. Ch. 380, 6 L. ed. 179; *Galusha v. Galusha*, 50 Hun, 185; *Beedy v. Beedy*, cited in 1 Hagg. Consist. 142, note; *Woodcock v. Woodcock*, cited in 1 Hagg. Consist. 143, note; *Durant v. Durant*, 1 Hagg. Consist. 738; *Parkinson v. Parkinson*, L. R. 2 Prob. & Div. 25, 27; *Mortimer v. Mortimer*,

NOTE.—The briefs and opinion in this case present the authorities on the question involved so fully that a note thereon would be superfluous.
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2 Hagg. Consist. 818; *J. G. v. H. G.* 33 Md. 401.

The consent of either party to the agreement to live separate is revocable at pleasure, and if one of them, otherwise blameless, seeks to renew cohabitation and the other declines, such refusal constitutes desertion.

Hunt v. Hunt, 32 L. J. Mat. N. S. 168; *Hills v. Hills*, 6 L. R. 174; *Lea v. Lea* and *Durant v. Durant*, *supra*.

While husband and wife are living apart under circumstances rendering him liable for her support, if she commits adultery, his liability ceases.

Cooper v. Lloyd, 6 C. B. N. S. 519; *Atkyns v. Pearce*, 2 C. B. N. S. 763.

To hold that this state of facts does not warrant a decree of divorce would be to license adultery of a wife living separate and apart from her husband by agreement between them and to jeopardize property rights, by allowing her to impose spurious issue on her husband.

Morrall v. Morrall and Beby v. Beby, *supra*.

Especially is this so under the stringent Massachusetts rule, which holds that the presumption of the legitimacy of a child born in lawful wedlock can only be rebutted by evidence which proves beyond all reasonable doubt that the husband could not have been the father.

Phillips v. Allen, 2 Allen, 453; *Sullivan v. Kelly*, 3 Allen, 148.

No appearance for libelee.

Knawton, J., delivered the opinion of the court:

The libellant and libelee became husband and wife by virtue of a lawful marriage. The agreement that they would not live together had no effect upon the marriage contract entered into in regular form in the presence of a magistrate or minister authorized to solemnize marriages. It is against the policy of the law that the validity of a contract of marriage or its effect upon the status of the parties should be in any way affected by their preliminary or collateral agreements. *Barnett v. Kimmell*, 35 Pa. 18; *Harrod v. Harrod*, 1 Kay & J. 4, 16.

The consummation of a marriage by coition is not necessary to its validity. The status of the parties is fixed in law when the marriage contract is entered into in the manner prescribed by the Statutes in relation to the solemnization of marriages. *Eaton v. Eaton*, 122 Mass. 276; *Jackson v. Winne*, 7 Wend. 47; *Dumaresny v. Fishly*, 3 A. K. Marsh. 368; *Patrick v. Patrick*, 3 Phillim. 496; *Dalrymple v. Dalrymple*, 2 Hagg. Consist. 54.

The libellant is not guilty of such a marital wrong as will prevent him from obtaining a divorce on the ground of his wife's adultery. The parties lived apart by mutual consent, and on the facts reported neither could have obtained a divorce from the other on the ground of desertion. In such a separation there was no desertion within the meaning of the word in the Statutes in relation to divorce. *Lea v. Lea*, 8 Allen, 419; *Thompson v. Thompson*, 1 Swab. & T. 231; *Cooper v. Cooper*, 17 Mich. 205.

Living apart by agreement is no bar to a suit for divorce brought by either against the other on the ground of adultery. A voluntary separation is not a license to commit adultery; and it has uniformly been held that, in case of adultery under such circumstances, the innocent party may have a remedy against the other in a suit for a divorce. *Morrall v. Morrall*, L. R. 6 Prob. Div. 98; *Beby v. Beby*, cited in 1 Hagg. Consist. 140, note; *Mortimer v. Mortimer*, 2 Hagg. Consist. 310; *J. G. v. H. G.* 33 Md. 401; *Anderson v. Anderson*, 1 Edw. Ch. 380, 6 L. ed. 179.

The court has jurisdiction, notwithstanding that the parties have never lived together as husband and wife within this Commonwealth. The continuous residence of the libellant in the Commonwealth for more than five years next preceding the filing of his libel brings the case within the exception stated in Pub. Stat., chap. 146, § 5.

On the facts stated in the bill of exceptions the divorce should have been granted, and the entry must be, *exceptions sustained*.

KENTUCKY COURT OF APPEALS.

Edward ROBERTS *et al.*, *Appls.*,
v.

CITY OF LOUISVILLE *et al.*

(.....Ky.....)

1. An injunction against the passage of a municipal ordinance to authorize the ille-

NOTE.—*Injunction to prevent passage of a municipal ordinance.*

The decisions generally deny the power of a court to enjoin the passage of a municipal ordinance. *Harrison v. New Orleans*, 39 La. Ann. 222; *Crescent City L. S. L. & S. H. Co. v. Jefferson Police Jury*, 38 La. Ann. 1193; *People v. New York*, 33 Barb. 35, 9 Abb. Pr. 254, 10 Abb. Pr. 144; *Warwick v. New York*, 38 Barb. 223; *Chicago v. Evans*, 24 Ill. 52.

This proposition has been qualified by adding the proviso that the proposed ordinance is not beyond 13 L. R. A.

gal transfer to an insolvent board of commissioners of a wharf owned by the city in trust for the public, may be granted at the suit of taxpayers who by reason of their business have a special or peculiar interest in its use, where the prevention of the transfer might not be possible if the ordinance were passed and its consummation would result in irreparable injury to plaintiffs.

the scope of the corporate powers and will not work irreparable injury. *Murphy v. East Portland*, 42 Fed. Rep. 806.

And it has been expressly held that an injunction may be granted to prevent the board of supervisors of a city from passing an ordinance which is outside of the scope of their powers where it would work an irreparable injury. *Spring Valley Water-Works v. Bartlett*, 8 Sawy. 559, 16 Fed. Rep. 615.

But supervisors will not be restrained by injunction from paying illegal claims if it is not in excess

2. Withdrawal of an illegal ordinance
after commencement of the suit will not defeat
the right to an injunction against its passage.

(October 8, 1891.)

APPEAL by complainants from a decree of the Louisville Chancery Court in favor of defendants in a suit brought to enjoin the passage of a municipal ordinance. *Reversed.*

The facts are fully stated in the opinion.

Messrs. Lane & Burnett and *T. L. Burnett* for appellants.

Mr. H. S. Barker for appellees.

Lewis, J., delivered the opinion of the court:

There was introduced in the general council of the City of Louisville, referred to a joint committee of the board of aldermen and board of councilmen, and a report agreed, by a majority of that committee, to be made in favor of passage of the following ordinance: "That the mayor be and he is hereby authorized to convey by deed of special warranty to the commissioners of the sinking fund of the City of Louisville all of the real property fronting on the Ohio River acquired and held by the City for wharf purposes. Said commissioners are to hold said property upon the same trusts and for the same purposes as it is now held by said city, and to have the same power over, and authority to sell, convey, lease, or otherwise dispose of, the same, or part thereof, which said City now has. This ordinance to go into effect from and after its passage."

But, before the ordinance was reported back by the committee, though on the same day of a regular meeting of the general council, the plaintiffs, now appellants, commenced this action against the City of Louisville, mayor, members of the general council (sued by names), and commissioners of the sinking fund, to obtain an injunction, which was granted temporarily, restraining the general council passing, and the mayor approving, that or any ordinance for like purpose, and the City of Louisville conveying, and commissioners of the sinking fund taking possession of, controlling, or interfering with, any property acquired or

held by the city for wharf purposes. The plaintiffs, who are numerous, state they are residents and owners of property in said City subject to municipal taxation, and engaged there in commercial business; that the City of Louisville has heretofore, by virtue of Acts of the Legislature, and with money procured by taxation, acquired at various places within its corporate limits along Ohio River, land to be held and used, and which has so far been kept and maintained, in aid of its commerce and trade, for public wharfs, those using them for business purposes being required to pay wharfage; that, although the City of Louisville holds said property for public use, without right to transfer to another its power and duty to preserve and maintain public wharfs, and the commissioners of the sinking fund are without right to acquire or hold it for any purpose, yet the general council, mayor, and commissioners of the sinking fund have wrongfully and unlawfully agreed and conspired together for the City of Louisville to abdicate its right to and possession of said property, refuse hereafter to preserve and maintain it for the purpose intended, and by deed convey it to the commissioners of the sinking fund, with a view and to the end the latter may sell, convey, or transfer it at discretion to private individuals, thereby preventing public use of the wharfs, which is indispensable to the business of plaintiffs and others similarly situated. They further state that said ordinance, already prepared and sent by the mayor to the general council, in pursuance of the scheme mentioned, will be at once passed, followed by immediate transfer of the property, and irreparable injury thereby done to the plaintiffs, unless the injunction be granted; and, the commissioners of the sinking fund being insolvent, there will be no adequate remedy at law. No answer was filed by the mayor, nor any member of the general council, except *A. S. Stoll*, of the board of aldermen, who, denying he was in favor of the passage of the ordinance, yet admitted it had been sent by the mayor to the general council for passage, and would have passed both boards thereof, if the injunction had not been granted. The City of Louisville by the city attorney, answered, denying its alleged want of power

of their jurisdiction. *Merriam v. Yuba County*, 72 Cal. 517.

The rule that the legislative action of a municipal corporation cannot be enjoined applies to prevent an injunction against the passage of an ordinance allowing gas companies to lay pipes in streets in violation of an exclusive privilege previously given to another company. *Montgomery Gaslight Co. v. Montgomery*, 4 L. R. A. 615, 32 Ala. 245; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505.

In the absence of bad faith a municipal council cannot be restrained from passing an ordinance within the scope of their authority to vacate a street. *Meredith v. Sayre*, 32 N. J. Eq. 557.

And an ordinance within the scope of the power of the municipality to provide for the payment of money without providing means of payment will not be enjoined although the amount of the proposed indebtedness will exceed the lawful limit. *Murphy v. East Portland*, 42 Fed. Rep. 308.

In California the Statute prohibits an injunction to prevent a legislative Act by a municipal corporation. *Alpers v. San Francisco*, 32 Fed. Rep. 503.

But the grant of a franchise by a city council, 18 L. R. A.

although it takes the form of a resolution, may be restrained by injunction. *People v. Sturtevant*, 9 N. Y. 233; *Davis v. New York*, 1 Duer, 451.

And tax-payers may enjoin the acceptance of an ordinance by a street railway company which would complete a contract in abuse of the corporate powers of the city. *Cincinnati Street R. Co. v. Smith*, 29 Ohio St. 201.

An injunction *in limine* will not lie to prevent a mayor from signing an ordinance passed by the municipal council purporting to repeal a previous ordinance which constituted a contract. *New Orleans Elev. R. Co. v. New Orleans*, 39 La. Ann. 127.

And an injunction will not issue to restrain the approval of an ordinance or resolution declining a trust for a charity where the city is not required by charter or ordinances to accept and administer it. *Dailey v. New Haven (Conn.) post*.

On the same principle that applies to ordinances the proceeding of a council to impeach a city officer is beyond the reach of an injunction. *State v. Orleans Civil Dist. Ct. Judges*, 35 La. Ann. 1075.

B. A. R.

to transfer to another the wharf property; and, though it was averred the ordinance had, since commencement of the action, been withdrawn, there was no denial it was introduced, referred to a committee, and would have been at once passed, and the purpose of it carried out, but for the injunction. The commissioners of the sinking fund in their answer denied that the free and uninterrupted use of the wharves is, as alleged in the petition, indispensable to prosecution of the business of the plaintiffs, and, in substance, averred existence of power in the City of Louisville to transfer, and not only its own power, but, because charged with payment of the City's bonded debt, also its right to hold and control, the wharf property, and revenues arising therefrom.

It seems to us the pleadings in this case, independent of any testimony, placed beyond question that the mayor, members of the general council, or a majority of them, and commissioners of the sinking fund did agree upon the scheme mentioned in the petition for a transfer of the wharf property, and, if not restrained, would have carried it out; and if the power to make such transfer does not exist that scheme was, as charged, wrongful and unlawful; but whether the injunction sought was, in whole or in part, the proper remedy is the question for determination. The power of a municipal corporation to acquire land for the purpose of erecting wharves thereon, and to charge wharfage, is not a necessary incident of its charter, but must, like all its other powers, be derived directly from the Legislature; of course to be exercised within the limits and upon conditions of the grant. *Dillon, Mun. Corp.* § 110. And, looking to the nature and purpose of such special grant, it must be regarded as a trust, involving duties and obligations to the public and individuals which cannot be ignored or shifted; for the power to acquire implies duty of the municipality, through its governing head, to maintain and preserve wharf property for benefit of the public, without discrimination or unreasonable charges for individual use. In every instance, so far as we have observed, wharf property of the City of Louisville has been acquired under Act of the Legislature, and paid for by taxation; and in no case is there evidence of legislative intention that it should be held otherwise than in trust for use of the public, and in aid of trade and commerce. The wharf property being so held, the City of Louisville cannot transfer its title or possession, nor, according to a plain and well settled principle, can the general council, which is by statute invested with power of control, and burdened with duty of maintaining, preserving, and operating the wharves, either delegate the power or disable itself from performing the duties. *Id.* §§ 96, 97. It is even more manifest that "the commissioners of the sinking fund," which is a distinct corporation, created by that name for specified purposes, and invested with limited power, cannot hold or control the wharf property, authority to do so being nowhere given by its charter; nor would it be either provident or consistent with the purpose of its creation to so invest it.

We thus have a case where the defendants have either admitted, or failed to deny, they

were about to jointly do an act, not only, in our opinion, illegal, but of so serious a nature as transfer of the title of real property, held in trust by the City of Louisville, and change of its control from the general council, that has its powers and duties in respect thereto prescribed and defined, to a corporation, without right to own or hold it, and which, according to an uncontroverted charge in the petition, is insolvent. It is moreover apparent there would be, in case of such transfer, great danger of the wharf property being so managed as to impair its usefulness to the public, and seriously injure, if not prevent altogether, the successful prosecution of the business of plaintiffs and others; for it is hard to see what is the purpose of the commissioners of the sinking fund in seeking or accepting possession and control of the property, if not to increase revenue therefrom, by increasing wharfage beyond the present, and, it may be assumed, reasonable, rates, or else, by lease or transfer to particular persons, who, in consideration of special privileges or advantages, not enjoyed generally, would pay more than now received. The plaintiffs in this case are engaged in buying and shipping stove coal to Louisville for sale and delivery, which has to be loaded at the city wharves, and the free use thereof, at reasonable charges, is obviously indispensable to their business. Consequently they would suffer a special and peculiar injury, distinct from that of the public, in case of either excessive wharfage or obstruction of free public use of the wharf property. "It is," says *Dillon*, "the prevailing and almost universal doctrine in this country that property holders or taxable inhabitants have the right to resort to equity to restrain municipal corporations and their officers from transcending their lawful powers, or violating their legal duties, in any mode which will injuriously affect the tax-payers; such as making an unauthorized appropriation of the corporate funds, or an illegal or wrongful disposition of the corporate property, or levying and collecting void and illegal taxes and assessments." *Section 914*. And, though the question of power to enjoin illegal and wrongful disposition of corporate property has not been, at the suit of tax-payers, directly presented to and decided by this court, the power of equity, in such action, to restrain the levying and collecting void and illegal taxes, which is founded on the same principle, has been distinctly recognized and sustained. Therefore, if, when this action was instituted, the ordinance in question had been already passed, it could undoubtedly have been maintained against the mayor and commissioners of the sinking fund, restraining the former from conveying, on behalf of the City of Louisville, title of the property, and the latter from taking possession of or interfering with it; for the plaintiffs had legal capacity to bring and prosecute the action. An act not only illegal, but of irreparable injury to them, was intended, and about to be committed, and they would have had no adequate remedy at law.

But it is contended in argument, and seems to have been the ground for dismissing the action, that a court of equity will not enjoin passage by a municipal body of an ordinance or resolution. In *High on Injunctions* (§ 1243),

relied on by counsel, it is said: "It is unquestionably true that purely legislative Acts, such as the passage of resolutions or the adoption of ordinances by a municipal body, even though alleged to be unconstitutional and void, will not be enjoined, since it is not the province of a court of equity to interfere with the proceedings of municipal bodies in matters resting within their jurisdiction, or to control in any manner the exercise of their discretion. A distinction, however, is properly drawn between the case of restraining an alleged act attempted under the authority and sanction of a municipal body and restraining the corporation itself from granting such authority." But in the same section it is conceded that "the question of equitable interference by injunction with the legislative action of municipal bodies has given rise to some apparent conflict of authority, and is not wholly free from doubt." It is said by Dillon (§ 308) "to be settled that it is competent for the Legislature to delegate to municipal corporations the power to make by-laws and ordinances, with appropriate sanctions, which, when authorized, have the force, in favor of the municipality and against persons bound thereby, of laws passed by the Legislature of the State;" and in a note cases are cited in which is stated the general proposition that courts will not enjoin the passage of unauthorized ordinances, and will ordinarily act only when steps are taken to make them available. Of course, if every municipal ordinance has the quality and force of a law of the State Legislature, courts of equity would be without power to enjoin or otherwise interfere with passage of any; because, on account of the peculiar structure of the state government, each of the three departments thereof is distinct and acts in its own sphere, independent of the others. But the power delegated to a municipality to legislate is not, as to all subjects, absolute even within corporate limits. On the contrary, it is not only restricted by statute, but also subordinate to settled principles of law and equity, in view of which it is presumed to be delegated; for such a corporation is created for a double purpose, and consequently has a dual character,—one governmental or public, the other private or proprietary. As said in *Oliver v. Worcester*, 102 Mass. 489: "The distinction is well established between the responsibilities of towns and cities for acts done in their public capacity, in the discharge of duties imposed on them by the Legislature for their public benefit, and for acts done in what may be called their 'private' character, in the management of property and rights voluntarily held by them for their own immediate profit and advantage as a corporation, although inuring, of course, ultimately for the benefit of the public." It was in reference to its governmental or public character that it was, in the case of *Louisville v. Com.*, 1 Duvall, 295, held that a city or town in this State, "to the extent of the jurisdiction delegated to it by its charter, is but an effluence from the sovereignty of Kentucky, governs for Kentucky, and its authorized legislation and local administration of law are legislation and administration by Kentucky, through the agency of that municipality."

But a municipal corporation, when holding, 13 L. R. A.

in its private or proprietary character, property or funds in trust for taxpayers and inhabitants within its limits, occupies towards them a relation like that of a purely private corporation to its *cestuis que trustent*, who are its shareholders; for in each case the corporation or its governing body is a trustee. And, if creditors or shareholders may maintain an action against the board of directors (the governing body of a private corporation) to prevent or avoid an illegal and wrongful act, as unquestionably they can do, why may not taxable inhabitants maintain one against a municipal corporation and its governing body, the city council or board of trustees, to prevent, as well as avoid, an act, illegal and wrongful, done or about to be done in relation to property, or funds held in trust? In *High on Injunctions* (§ 1241) is this language: "The restrictions thus placed upon equitable interference with the action of municipal corporations do not extend to cases where the act sought to be enjoined is in excess of the corporate power, but are limited to cases of a conceded jurisdiction, within the bounds of which the municipal power is acting; and, while it is thus shown equity will not enjoin the action of municipal corporations while proceeding within limits of their well-defined powers, as fixed by law, it has undoubted jurisdiction to restrain them from acting in excess of their authority, and from the commission of acts *ultra vires*." Though it is not quite clear from the language used whether the test of jurisdiction is meant to apply to acts of municipal corporations done as well in their public as private character, it is manifest such restraining power, to be effectual, must operate upon the general council of a city or board of trustees of a town, for acts done in excess of authority or *ultra vires*, cannot be committed by a corporation except by its governing body or head; and such must have been intended to be the meaning and scope of the proposition, for several leading cases in England are cited in which the power of a court of equity to enjoin passage of an illegal ordinance is distinctly recognized.

The case of *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505, cited by counsel, was as to the power of equity to enjoin passage of an ordinance repealing a former one, under which a contract had been made with the plaintiff. It was held by the court that the municipal council had, in reference to the matter, discretionary power, and was acting within the scope of it, and was neither violating a trust nor doing an irreparable injury to the plaintiff; and, though it was there said, in general terms, that the ordinance in question had the force of an Act of the Legislature, and could not be enjoined, it was still conceded that one creating a public nuisance might be, because it could not be a rightful subject of legislation, and the mischief therefrom might be irreparable, which was in effect a concession of the power in every case of like conditions.

In *People v. Dwyer*, 90 N. Y. 402, it was upon principle and authority of previous decisions in that State, held that, while equity will not ordinarily interfere with matters resting largely in the discretion of municipal authorities, when the threatened action will produce irreparable injury, and consist in an

illegal grant or the disposition of property, by devoting it, in whole or in part, to the use of a private corporation, or where an illegal grant is threatened, or the action attempted is corrupt and fraudulent, and an abuse of trust, the court may interfere by injunction to restrain passage of an ordinance for the purpose. In our opinion, the general proposition, a court of equity may not enjoin passage of a municipal ordinance, must be confined in its application to subjects over which the corporation, in its governmental or public character, has discretionary authority; and, if it be conceded taxable inhabitants have a right to resort to equity at all to restrain a municipal corporation and its officers from making an illegal or wrongful disposition of corporate property, whereby the plaintiffs will be injuriously affected, it reasonably follows the power exists to enjoin passage of the ordinance authorizing the act whenever irreparable injury will be done to the plaintiffs, and they have no adequate remedy at law; for, from its nature, a preventive remedy may be applied at the inception of a wrongful act, in fact when it is about to be done, or is threatened. There may, however, be subjects in relation to which the municipal corporation has discretionary power to legislate, and with which courts of equity, upon grounds of expediency and policy, will not interfere in the absence of fraud or breach of trust. But this is not such case, for the plain legal duty is imposed upon the general

council to hold, control and manage the wharf property for use of the public, which cannot be evaded by transfer of it, or otherwise. Yet passage of the ordinance in question might have been, if it was not, actually intended to be followed so soon by transfer of the property as to put it out of the power of the plaintiffs, and all other parties aggrieved, to prevent consummation of the wrongful act. We think a court of equity has not only the power to restrain passage of an ordinance authorizing an illegal or wrongful disposition of property acquired and held, as is the case of the wharf property, but, if needful, to compel the general council to perform the duty of preserving, protecting and maintaining it for the purpose intended, though of course leaving it to the discretion of that body as to the manner of discharging its trust.

It is stated in the answers that the ordinance was withdrawn after commencement of the action, and was not before the general council when the trial was had. But, as the plaintiffs had a cause of action, withdrawal of the ordinance did not have effect to defeat their right to the relief sought, especially as another ordinance of the same character may be hereafter introduced and passed, unless the right to do so be perpetually enjoined. *The judgment dismissing the action, being, as already indicated, erroneous, is reversed, and cause remanded for proceedings consistent with this opinion.*

MICHIGAN SUPREME COURT.

John COLE

v.

John ROWEN, *Appt.*

(.....Mich.....)

Each hackman may be assigned a separate stand at the depot ground of a railroad company, and may be ejected from the stand as-

signed to another for refusing to leave it if no unnecessary force is used.

(October 30, 1891.)

ERROR to the Circuit Court for Kalamazoo County to review a judgment in favor of plaintiff in an action brought to recover damages for an alleged assault and battery. *Reversed.*

NOTE.—*Rights of hackmen and other collectors of palanquinage at depots, wharves, etc.*

Most recent American decisions deny the right of a carrier to grant a monopoly of the hack, bus, or baggage business at its depot; thus, the exclusive right to use the platform of a railway company for receiving and discharging passengers cannot be granted by the company to one hack owner. *Montana Union R. Co. v. Langlois*, 8 L. R. A. 753, 9 Mont. 419.

Neither can the exclusive use of the more convenient and accessible portion of a platform be given to one bus line, even if the owner has at his own expense constructed an additional platform for such use. *Cravens v. Rodgers*, 101 Mo. 247, 43 Am. & Eng. R. R. Cas. 656.

Neither can a monopoly of a railroad company's grounds for a hack and bus stand and the solicitation of passengers be granted to the owner of one line of hacks. *Kalamazoo H. & B. Co. v. Sootsma*, 10 L. R. A. 819, 84 Mich. 194. *Contra*, *Com. v. Carey*, 6 New Eng. Rep. 371, 147 Mass. 41.

This same rule against a monopoly is denied by a Massachusetts decision in the case also of a baggage expressman. *Old Colony R. Co. v. Tripp*, 6 New Eng. Rep. 386, 147 Mass. 35.

The majority of the English cases, especially the 13 L. R. A.

earlier ones, are in accord with these Massachusetts decisions. Thus it was held that a bus proprietor is not entitled as a matter of right to drive into a station yard, although such privilege is accorded to others. *Barker v. Midland R. Co.* 18 C. B. 16.

And that a railroad company may give an exclusive privilege to one line of public carriages to come within its station yard unless the railroad commissioners have made an order to the contrary. *Hole v. Digby*, 37 Week. Rep. 884.

And an injunction was refused to prevent the exercise of an exclusive privilege sold by a railroad company to the proprietor of public carriages within its station yard where no substantial injury to the public was shown. *Beadell v. Eastern Counties R. Co.* 2 C. B. N. S. 602; *Painter v. London, B. & S. C. R. Co.* 2 C. B. N. S. 702.

But in another case it was held that an exclusive privilege to one bus proprietor of using the station yard of a railroad company is, in the absence of special circumstances to show it to be reasonable, a breach of the prohibition made by 17 & 18 Vict., chap. 31, §2, against granting undue and unreasonable preference. *Marriott v. London & S. W. R. Co.* 1 C. B. N. S. 490.

Preference by a railroad company to its own carrying vans as against other carriers by receiving

The facts are stated in the opinion.

Messrs. Ashley Pond and Henry Russell, with *Messrs. Edwards & Stewart*, for appellant:

The Michigan Central Railroad Company had authority to make and enforce reasonable rules to restrain hackmen, on its station grounds, from committing offenses against the good order of said grounds, and for regulating their conduct while thereon; and its rules so made and enforced for that purpose, were reasonable.

1 Redfield, Railways, 87, par. 1-4 inclusive; *Com. v. Power*, 7 Met. 596; *Markham v. Brown*, 8 N. H. 523.

Messrs. Hawes & Luby for appellee.

Long, J., delivered the opinion of the court:

This is an action for damages for assault and battery, which cause was commenced in justice court, where plaintiff had judgment for \$6 damages and \$3.25 costs of suit. Defendant appealed to the Circuit Court for the County of Kalamazoo, where the cause was tried before a jury on March 6, 1891, and plaintiff had judgment for \$40 damages and costs of suit. Defendant brings case to this court by writ of error. The plaintiff was a hackman, and went to the depot of the Michigan Central Railroad Company in pursuit of his legitimate business of soliciting the carriage of passengers from the incoming trains to the hotels and private residences in the city. He was in the employ of a Mr. Waud, who owned the hack and outfit. Arriving at the depot on the day upon which the assault was committed, he took a place upon the depot grounds of the railroad company with his hack, and, upon being told by the depot master that that place had been assigned to another hack, he refused to yield the

place. The defendant is the depot master at that depot. The depot grounds occupy the space covered by the railroad track of the Michigan Central Railroad Company in what was formerly a street, and which had been vacated for the construction of the railroad. The grounds also include the entire north part of block 15 in the city, bounded north by the vacated street, and south by an alley. The title to this north part of block 15 is in the railroad company, and these are the lands upon which the plaintiff entered and stood with his hack, and from which he refused to remove to another part of said grounds. It appears that the railroad company on April 25, 1890, made certain rules for the management of its depot grounds, and for the regulation of hack and bus drivers thereon, and for assigning stands for their vehicles in their business of soliciting passengers. These rules were promulgated by the depot master, who located the stands for the hack and bus men, telling each where to stand his vehicle. The stands located were indicated by numbers from 1 to 9, respectively, and 1 to 7 had been assigned and occupied by different hackmen prior to the occurrence complained of, and there was space yet left upon said grounds unassigned, which plaintiff might have occupied on that day. On September 15, 1890, plaintiff drove onto the grounds for passengers, and took possession with his hack of stand No. 8, which was not assigned to him, and which he knew had been assigned to another under the rules of the company. The defendant, the depot master, requested him to vacate the stand for a party who wanted and was entitled to it. This plaintiff refused to do, and the defendant pulled him from his hack, and ejected him from that place, offering to assign him another place upon the company's

goods at later hours is an undue and unreasonable preference under the same Act. *Re Palmer*, L. R. 6 C. P. 194.

So as to discrimination between its own agent and others, by requiring a special order from the others describing the particular goods to be delivered to him for a consignee instead of recognising a general order for the delivery of all goods received for the consignee. *Re Parkinson*, L. R. 6 C. P. 534.

An unlicensed hack driver specially ordered for a steamboat passenger is not a trespasser in going to meet him, with his carriage, upon a wharf used by the steamboat company to discharge passengers, although the rules of the wharf forbid any but private carriages or licensed hacks to stand upon it. *Griewold v. Webb*, 7 L. R. A. 803, 16 B. I. 649.

Exclusion from car, vessel or inn.

A carrier which has established for its own profit and the convenience of passengers on its car or vessel an agency for the delivery of baggage can exclude all other persons from entering its own car or vessel to solicit orders in competition. *Barney v. Oyster Bay & H.*, 8 B. Co. 67 N. Y. 301.

A steamboat company has also been upheld in refusing to take on board as a passenger the agent of a line of stage coaches who sought passage merely to solicit business where the company had made a reasonable contract with another line for the transportation of all its passengers who chose to go on that line. *Jencks v. Coleman*, 2 Sumn. 221.

An inn-keeper cannot exclude one stage driver and admit his rival to solicit business in the inn, 18 L. R. A.

but it is otherwise if the driver forfeits his right by misconduct. *Markham v. Brown*, 8 N. H. 523.

General regulations; exclusion from depot or platform.

A railway company cannot suspend the operation at its depot of a municipal ordinance prohibiting licensed hackmen and porters from soliciting business at railway depots. *Chilliothe v. Brown*, 38 Mo. App. 609.

But an ordinance prohibiting hackmen from going within twenty feet of a train at a depot has been held invalid as against a privilege granted to a hackman by the railroad company. *Napman v. People*, 19 Mich. 382.

A railroad company cannot exclude a hackman from every part of the depot while he has a check for baggage of a passenger, although it may eject him from a room other than the baggage room in which he is soliciting business against the rules of the company. *Summitt v. State*, 8 Lea, 413.

The solicitation of the business of passengers by inn-keepers on railroad platforms may also be prohibited. *Com. v. Power*, 7 Met. 596.

And an inn-keeper or his agent soliciting patronage against the rules of the company may be ejected from the platform of a railroad depot. *Landrigan v. State*, 31 Ark. 59.

Injury from defect in platform.

A railroad company is liable to a hackman to the same extent that it would be liable to a passenger for an injury from a defect in the platform when he came there in the prosecution of his business. *Tobin v. Portland, S. & P. R. Co.* 59 Me. 163. B. A. R.

grounds, which plaintiff refused. It is apparent from the record that the defendant used no more force than was necessary to eject the plaintiff from that particular place. The defendant was acting, in thus ejecting plaintiff from that part of the grounds, under the rules of the railroad company. These rules were as follows: "(1) Location for omnibuses and hacks will be assigned to parties, who will occupy them while standing at the depot to get passengers. (2) Drivers must take the stands which are assigned to them, and will not be allowed to take places assigned to others. (3) The positions assigned must not be occupied more than twenty minutes previous to the arriving of passenger trains. (4) Each driver must remain by his hack or omnibus when soliciting passengers. (5) No hacks or omnibuses will be allowed to stand in the porch longer than necessary to load or unload passengers. (6) The drivers of hacks and omnibuses will not be allowed in waiting rooms, except on business. (7) Profane, obscene, boisterous language, or quarreling, will not be allowed on the depot grounds. (8) Only one transfer wagon will be allowed to stand at the baggage-room, which will be the baggage wagon that is hired by the railroad companies to transfer baggage between the different depots."

The court below charged the jury that "it would be competent for the railroad company to make such a rule as is included in these,—that the hackmen should not come to the station for passengers earlier than twenty minutes before train time. That rule would be good, and could be enforced. The company could also make a rule that the hackmen should not stand within a certain distance of the platform of the station. That rule would be good. But, without enlarging upon these, there is one rule which the court, as a matter of law, following what the court conceives to be a decision of the supreme court on the same matter, holds is not good, and that is the rule that hackmen should be assigned places at the platform for the receipt of passengers, and that these places assigned should be occupied by no others." This the court holds, as a matter of law, is not good." It appeared upon the trial that the plaintiff at the time of the assault was not engaged in making any disturbance, or using any boisterous, vulgar, or obscene language, and was in no way offending against the rules of good order and decorum. The only question for consideration, therefore, is whether the rule adopted by the company reserving the right upon its own grounds to assign places to the different hackmen, and excluding from those places others not assigned thereto, is a reasonable one, and which the company had a right to enforce. The court below was in error in supposing that the rules adopted by the railroad company, and which were sought to be enforced by the defendant, were in conflict with the opinion of this court in *Kalamazoo, H. & B. Co. v. Sootsma*, 84 Mich. 194, 10 L. R. A. 819. That was an action of trespass against the defendant for unlawfully entering upon a piece

18 L. R. A.

of ground near the depot in question, the plaintiff claiming in that case to have leased that particular piece of ground, with the right to use it to the exclusion of all others; and it was held by this court that the railroad company had no right to give to one hack and bus company the right to the use and occupancy of a portion of its depot grounds to the exclusion of others in a like business, and that the railroad company could not arbitrarily admit one common carrier of passengers or freight to its depot grounds, and exclude all others, for no other reason than that it is for its own profit or pleasure to do so. In the present case it appears that under the rules adopted by the company these stands were fixed and numbered, and the different carriers assigned to their places, for the sole purpose of accommodating the traveling public in coming to and departing from the depot, and to prevent quarrels among the hackmen as to place, and the annoyance occasioned thereby. Before these rules were adopted it appears that the hackmen came there with their vehicles at all times of the day; sometimes left their hacks to stand a half day at a time, and leaving the depot grounds so foul that in hot weather it was almost impossible for people to pass on account of the odors; and the railroad company was compelled from time to time to remove the gravel to abate the nuisance. The rules adopted were reasonable rules, and were intended by the railroad company to convenience the traveling public. They in no manner give place to one hackman to the exclusion of another, and they deprive no common carrier of necessary approach to the depot grounds to carry on his business of carrier of freight and passengers. The rules touch and affect all alike. The mere fact that the railroad company fixes and determines the place where each particular hack shall stand is not a discrimination between hackmen, but is a necessary rule to prevent quarrels for place, so often seen among hackmen around depots. There can be no doubt that the railroad company has the right and authority to make and enforce all reasonable rules to restrain hackmen from committing offenses against good order on their grounds, and to regulate their conduct while there. *Com. v. Power*, 7 Met. 596; *Markham v. Brown*, 8 N. H. 528.

It must be held that the rules adopted and heretofore set forth are reasonable, and that the court was in error in holding otherwise. Inasmuch as it appears that the defendant acted under the direction of the railroad company, and was only attempting to enforce those rules and regulations, and that he used no more force than was necessary to eject the plaintiff from the place he unlawfully attempted to occupy and hold, the court should have directed the jury to return a verdict in favor of the defendant.

The judgment of the court below must be reversed, with costs of both courts. No new trial will be ordered.

The other Justices concurred.
Rehearing denied.

INDIANA SUPREME COURT.

CITY OF WABASH, *Appt.*,

v.

EH CARVER, Admr., etc., of Joseph Carver,
Deceased.

(.....Ind.....)

1. Attempting to cross a bridge on a public highway which is in constant use, with a traction steam engine, water tank, and threshing machine, is not *per se* negligence as matter of law.
2. A general averment that decedent was without fault in an action brought to recover damages for the death of one killed by the fall of a highway bridge is not overcome by specific averments that he was attempting to cross the bridge with a traction steam engine water tank, and threshing machine, so as to render the complaint bad.
3. A statute imposing upon the county commissioners the duty to build all highway bridges of a certain class does not relieve the town in which one of them is located from damages for injuries resulting from the bridge being out of repair, where another statute gives cities and towns exclusive control over the bridges within their respective limits.

4. A verdict for \$1,000 damages for the negligent killing of a widower seventy-three years old, who was strong and vigorous for his age and actively engaged in business, will not be set aside as excessive although his children are all of mature years and not dependent upon him for support.

(November 17, 1891.)*

A PPEAL by defendant from a judgment of the Circuit Court for Wabash County in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Alvah Taylor and Harry Pettit for appellant.

Messrs. Cowgill, Shively & Cowgill for appellees.

*An opinion was handed down in this case on November 25, 1890, reversing the judgment of the court below. A rehearing was subsequently granted and the decision evidenced by the opinion given herewith was reached. [*rep.*]

NOTE.—Negligence in construction and care of highway bridges.

The fact that a bridge leads up to and joins a street at the corporate line of a town does not make it a town bridge in such a sense as to relieve the county from the general duty of using reasonable care to keep it in a reasonably safe condition for passage. *Owen County v. Washington Twp.* 121 Ind. 379.

It is gross negligence on the part of a city to allow a hole to remain in a bridge on one of the principal streets for a period of from five to twenty days. *Griffin v. Johnson*, 84 Ga. 279.

Whether neglect to keep the flooring of a bridge spiked is negligence warranting recovery for damages depends upon whether bridges with unspiked floors are usually safe. *Zimmerman v. Conemaugh* (Pa.) 2 Cent. Rep. 361.

Liability for neglect to keep in safe condition.

Counties are liable for negligence in constructing bridges, where it results in injury. *Knox County v. Montgomery*, 6 West. Rep. 917, 109 Ind. 69; *Cooper v. Mills County*, 69 Iowa, 350.

Where the intention of the Legislature was to impose the duty of keeping a bridge in repair jointly upon the county and a town, both are liable for damages occasioned by a want of repairs; and the fact that the town officers have always made the necessary repairs, receiving one half of the expenses thereof from the county, does not relieve the county from its liability. *Lyman v. Hampshire County*, 1 New Eng. Rep. 227, 140 Mass. 811.

An action does not lie against a county for damages caused by neglect to repair a bridge, if not appearing that it was a toll bridge, or such a one as was built by a contractor, and that there was a failure to take the proper bond of indemnity required by such sections as were applicable to the subject. *Jackson, Ch. J., and Hall, J., dissent. Gwinnett County v. Dunn*, 74 Ga. 359.

A county is not liable for injury resulting from a horse becoming frightened at a plank standing upright in a bridge out of repair, with actual notice to the county, the horse not having entered the bridge, and the county not being obliged to maintain L. R. A.

tain the highway in repair. *Fulton County v. Ricketts*, 4 West. Rep. 492, 108 Ind. 501.

A township is liable for patent defects in a bridge which the supervisors neglected to repair; it is not liable for latent defects, unless the supervisors had knowledge of defect and time to repair. *Zimmerman v. Conemaugh* (Pa.) 2 Cent. Rep. 361.

Offices, towns and villages.

A city which constructed a bridge is liable for an injury resulting from the defective condition of one side of the bridge, although the other side is safe for travel. *Walker v. Kansas City*, 90 Mo. 647.

A public bridge within the limits, and located upon, a public highway of a city, constitutes a part of such highway so as to render the city, which has taken charge of the latter, liable to a person suffering injury or loss, without fault or negligence, in consequence of the neglect of the city to keep the bridge in repair. *Goshen v. Myers*, 119 Ind. 196.

Finding that the city has taken charge of and graded the highway is sufficient to sustain the conclusion that the city is liable for defects in the bridge. *Ibid.*

To render a town liable for a defect in or the insufficiency of a bridge, it is sufficient that the officers were in fault or guilty of a neglect of duty in not repairing the bridge, which was unsafe, and that the defect or insufficiency or want of repair was the cause of the accident or injury. *Koenig v. Arcadia*, 75 Wis. 62.

No formal acceptance by a village is required to hold it liable for the safety of a bridge within its limits. *Marselles v. Howland*, 14 West. Rep. 664, 124 Ill. 547.

Notice of defect to fix liability.

With reference to defects in a bridge, a county should be held to know what, by the exercise of reasonable care, it might have known. *Howard County v. Legg*, 9 West. Rep. 212, 110 Ind. 479.

Counties, through their proper officers, are chargeable with knowledge of the tendency of timber to decay. *Ibid.*

Where to all appearances a stringer of a bridge, which broke, causing injury to plaintiff's horses

McBride, J., delivered the opinion of the court:

This was a suit by the appellee, as administrator of Joseph Carver, deceased, to recover damages for his death, which was caused, it is alleged, by the actionable negligence of the appellant. The complaint charges that a certain bridge within the corporate limits of the City, "over what is known as the 'Wabash & Erie Canal,' where Miami Street in said City crosses said canal, the said street being a public highway and street of said City, and said bridge, forming a part of said street and highway, and being in almost constant and incessant use by the traveling public of said City and surrounding country in crossing said canal where the same has been erected, was suffered by said City to become and remain greatly out of repair, and in a state of decay and insufficiency for the purposes and uses for which it was erected, and dangerous for all who should pass over the same, the stringers, beams, and timbers under and supporting the floor of said bridge becoming entirely rotten, of which rotten and unsafe condition the officers of said City were informed and well knew, and by reason thereof unfit and unsafe to be traveled over; the same being allowed and suf-

fered to get into such unsafe, dangerous and rotten condition by said City and its officers by the defendant's carelessness, negligence, and the utter disregard of the safety of those who had a right to pass over the same. That on said 8th day of August, 1887, the said Joseph Carver, now deceased, the personal representative of whom is this plaintiff, being then in good health, and without any knowledge of the unsafe and dangerous condition of said bridge, or that the timbers supporting the floor thereof were rotten, and without any fault, want of care, or negligence on his part whatever, and believing it was entirely safe to so do, and as he had a right to do, attempted to pass over said bridge from the north side of said canal to the south side thereof, along said street, with what is known as a 'traction steam-engine' and water-tank and threshing-machine attached thereto. And plaintiff avers that when said engine passed onto said bridge, the same being at the time conducted, guided, and managed in a prudent and careful manner, the said deceased then sitting on a seat provided and used for the purpose, and engaged in guiding and steering said engine, the timbers beneath the floor of said bridge and supporting the same, because of their neglected, decayed,

was sound upon the surface, in the absence of actual knowledge or notice to the township, the question in determining the township's liability is whether due diligence was used in discovering the defect, and as to whether the authorities neglected to do that which common prudence and caution required in order to ascertain the condition of the timber. *McKeller v. Monitor Twp.* 78 Mich. 485.

That, a short time before an accident occasioned by a defective bridge, the town authorities caused certain repairs to be made in the bridge, is evidence of sufficient notice to require them to make a thorough inspection of the structure. *Spaulding v. Sherman*, 75 Wis. 77.

• *Liability for injuries from fall of bridge.*

An instruction in an action against a county for injuries sustained by reason of the falling of an unbound bridge, that the measure of damages is the value of the horses killed, and a sum equal to the amount of damage which the evidence shows to have immediately resulted to plaintiff's other property from the accident, and any expenses necessarily incurred by him as the natural and immediate result of the accident, correctly states the measure of damages. *Ford v. Umatilla County*, 15 Or. 318.

A town is not liable if a bridge falls because of an extraordinary rain storm, when in condition to resist an ordinary storm. *Jordan v. Hannibal*, 3 West. Rep. 795, 87 Mo. 673.

To render a municipality liable for a defect in a bridge it must have had notice of the defect must have existed so long that the municipality, by ordinary care, would have discovered the defect in time to repair it. *Ibid.*

A town is liable for negligent construction of a bridge, as well as for failure to keep it in repair. *Ibid.*

That a person drove upon a bridge at a trot, without stopping and examining it, is not evidence of contributory negligence. *Ibid.*

Not required to provide against extraordinary uses.

A township is not liable for accidents, where a bridge was built and maintained so as to protect 13 L. R. A.

against injuries likely to occur by ordinary use. It is not required to provide against extraordinary uses, as where plaintiff carried an unusually heavy load. *McCormick v. Washington Twp.* 2 Cent. Rep. 584, 112 Pa. 185; *Gregory v. Adams*, 14 Gray, 242; *Clapp v. Ellington*, 20 N. Y. S. R. 418.

Whether a traction engine used for a threshing machine with tank attached is of such unusual and extraordinary weight that no recovery can be had for injury thereto by breaking through a bridge is a question for the jury. *Clapp v. Ellington*, 20 N. Y. S. R. 418; *McCormick v. Washington*, 2 Cent. Rep. 584, 112 Pa. 185.

But by N. Y. Laws 1887, chap. 523, a town is not liable for injury in such cases as to a traction engine weighing four tons or over.

A town is liable for an injury to an elephant by the breaking of a bridge while he was crossing it if the jury find that it was proper to take him across it under the circumstances. *Gregory v. Adams, supra.*

A county is not liable, under Ala. Code 1886, § 1450 for injuries sustained by a horse which has escaped from pasture, by falling through a defective bridge, as the statute requires the bridge to be "safe for the passage of travelers and other persons." *Lee County v. Yarbrough*, 85 Ala. 590.

The owners of the bridge are not liable for injuries from breaking through it, where the load exceeds the limit established by statute. *Dexter v. Canton Tollbridge Co.* 5 New Eng. Rep. 704, 79 Me. 553.

Under a statute limiting the weight which a team may haul across a toll-bridge, the weight of the driver is included. *Ibid.*

The fact that a public bridge gives way and a traveler is injured is not of itself sufficient to charge the county, but it must appear that the authorities were guilty of actionable negligence. *Wabash County v. Pearson*, 120 Ind. 423.

On a trial for a claim for an allowance against a county for injuries sustained by falling through a defective bridge, there can be no inquiry as to the validity of the proceedings by which the board of commissioners assumed to establish the highway. *Knox County v. Montgomery*, 6 West. Rep. 917, 109 Ind. 69.

and rotten condition, broke and gave way, and precipitated said engine into said canal, catching and crushing said Joseph Carver between said engine and the water-tank attached thereto, causing and producing his instant death," etc. The complaint is in two paragraphs, which are substantially alike, except that one paragraph charges actual knowledge by the officers of the City of the defective condition of the bridge, and the other avers facts sufficient to charge them with notice, but does not charge actual notice. The circuit court overruled demurrers to each paragraph. In this the appellant insists the court erred.

The specific defect which the appellant contends makes the complaint bad is that, notwithstanding the averments that the decedent was without fault, the specific averments are sufficient to overcome this, and show that he was guilty of contributory negligence. A reference to the complaint above quoted will show that the averments of freedom from fault on the part of the decedent are much more full than are usual, and more full than required by the precedents in this State.

In the case of *Ohio & M. R. Co. v. Walker*, 113 Ind. 196-198, 12 West. Rep. 731, the court said: "It has long been the rule in this State that the general averment that the plaintiff was without fault is sufficient, unless the facts specially pleaded clearly show that he was guilty of contributory negligence." The writer of the opinion cites many authorities abundantly sustaining the rule thus stated, and, in addition, very clearly vindicates its soundness on principle. The specific averments which it is insisted control the general averments negating contributory negligence are those showing that the decedent attempted to cross the bridge with a traction steam-engine, with water-tank and threshing-machine attached. To sustain the appellee in this contention we would be obliged to hold that to attempt to cross a bridge on a public highway, which is in constant use, with a traction steam-engine, water-tank, and threshing-machine, is in itself negligence *per se*. This we cannot do. In the case of *Wabash, St. L. & P. R. Co. v. Parmer*, 111 Ind. 193, 9 West. Rep. 621, it is stated as a fact of which the court takes judicial notice that such engines have become familiar in every agricultural community; that they are customarily moved from place to place over the public highways; and that such use of the highways has become so common that it must be supposed that horses of ordinary gentleness have become so familiar with them as to be safe under ordinary guidance. Whether this assumption of judicial knowledge is fully justified or not need not be here considered. But it certainly cannot be true that an averment showing that the decedent was using the bridge in a manner that had become usual and common necessarily carries with it an inference of contributory negligence so strong that it overcomes all of the usual averments that he was free from fault. No other objection is made to the complaint, and we think it is clearly good. The appellant filed an answer in three paragraphs, the third paragraph of which avers that the bridge was one the construction of which cost over \$500. To this paragraph the court sustained a demurrer. This answer proceeds on the theory

that because the Statute (Elliott, Supp. § 1521; Acts 1885, p. 74) makes it the duty of boards of county commissioners to build all bridges within the corporate limits of any city or town within the State the estimated cost of which exceeds \$500, this inferentially relieves cities and towns of the duty of keeping such bridge in repair. The answer is plainly bad. Cities and towns are by statute (§§ 3161, 3367, Rev. Stat. 1881) given exclusive power and control over the streets, alleys, highways, and bridges within their respective limits. It was said by this court in the case of *Goshen v. Myers*, 119 Ind. 196, that "it was evidently the intention of the Legislature, by the passage of this Statute, to have all public bridges within the limits of the cities in the State of which they may take control, under the absolute management of the common council of such cities, and to charge them with the duty of keeping such bridges in repair." The Act of March 7, 1885, which includes section 1521, Elliott, Supp., above referred to, while it imposes the duty of construction upon the board of county commissioners in certain cases, does not purport to in any other manner interfere with the absolute control of the city over the bridges; nor does it relieve cities from the duty of keeping them in repair. In our opinion, that duty still rests upon them.

Complaint is also made that the damages assessed are excessive, and that the court erred in instructing the jury as to the measure of damages. There is some confusion in the record over the instructions given and refused, and after the appellant's original brief was filed, a writ of certiorari was awarded for the correction of the record. The corrections and changes in the record made by the return to this writ removed much that previously appeared objectionable. We deem it unnecessary to incumber the record by bringing into this opinion the instructions given and refused. A careful examination of all of them leads us to the opinion that the jury were sufficiently and correctly instructed as to the measure of damages, and that the appellant was not harmed by the refusal of the court to give any instructions asked by it. Indeed, as we understand appellant's counsel, the objection now is not so much that the court erred in giving and refusing instructions as that the jury erred in assessing damages. The decedent was about seventy-three years old, a widower, and his children were all of mature years, and none of them dependent upon him. The jury awarded \$1,000 damages. This, the appellant insists, was so excessive that the verdict should be set aside. The evidence showed that the decedent, notwithstanding his years, was strong and vigorous for his age, and actively engaged in business. In cases of this character, as said by Judge Davis in the case of *Barron v. Illinois Cent. R. Co.*, 1 Biss. 453, "there is no fixed measure of damages, and no artificial rule by which the damages in a given case can be computed." The jury are necessarily given a somewhat wide range of discretion. We cannot say that that discretion has been abused in this case, and that the damages awarded were excessive.

Judgment affirmed.

NEW YORK COURT OF APPEALS.

Frances E. DEMAREST, by Guardian *ad Litem*, App't.,

v.
Hugh J. GRANT *et al.*, *Resp'ts.*

(.....N. Y.....)

1. The defense of incorporation need not be pleaded in an action against defendants as individuals.
2. The election of nonresident directors without the passage of a by-law permitting it will not, *ipso facto*, dissolve a corporation of a State whose statutes provide that every director of its corporations must be a resident of the State unless the corporation has otherwise provided in its by-laws.
3. Whether or not the defense of incorporation in a foreign State, made by persons sued as individuals, is invalid, because the foreign charter was obtained by evasion of the laws either of the State of their residence or of that of their incorporation cannot be submitted to the jury as a question of fact; whether the incorporation is valid or not is a question of law.
4. A foreign corporation will not be held void as an evasion of the laws of the State in which all the incorporators reside, and in which is the principal place of business of the company where there was no fraud or evasion of the law of the State of incorporation and the certificate of incorporation was granted by the secretary of state with knowledge of the facts.

(October 6, 1891.)

APPEAL by plaintiff from a judgment of the General Term of the Court of Common Pleas for the City and County of New York in favor of defendants after considering exceptions, directed to be heard by it in the first instance, to the dismissal by the trial term of the complaint in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. Seaman Miller, for appellant:

The alleged West Virginia Corporation is fraudulent and void, and cannot be recognized by the courts of this State as a legally constituted corporation.

The corporation, being the mere creature of local law, can have no legal existence beyond the limits of the sovereignty where created. The recognition of its existence, even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States.

Bank of Augusta v. Earle, 38 U. S. 18 Pet. 558, 10 L. ed. 298; *Wright v. Bundy*, 11 Ind. 398; *Merrick v. Van Santvoord*, 84 N. Y. 208; *Empire Mills v. Alston Grocery Co.* (Tex. App.) 12 L. R. A. 366.

Four individuals of New Jersey and one

NOTE.—On the subject of comity in respect to foreign corporations, see, in the addition to the cases discussed in the opinion, the note to *Empire Mills v. Alston Grocery Co.* (Tex. App.) 12 L. R. A. 366.

13 L. R. A.

New Yorker once tried to outwit and commit a fraud upon the laws of New York and New Jersey in precisely the same way that the five persons who are the defendants in the case at bar sought to evade the laws of New York and West Virginia. It was decided that the corporation could not be recognized by any court in New Jersey as a legally constituted corporation, nor be dealt with as such.

Hill v. Beach, 13 N. J. Eq. 85.

The court erred in dismissing the complaint and in not allowing the jury to pass upon the facts.

Ridenour v. Mayo, 40 Ohio St. 18; *Empire Mills v. Alston Grocery Co.* (Tex. App.) 12 L. R. A. 366.

Messrs. W. Bourke Cockran and Wales F. Severance for respondents.

Peckham, J., delivered the opinion of the court:

The plaintiff alleged in her complaint that the defendants were a joint-stock company doing business in New York City under the name and style of "America's Winter Carnival Company." It was further alleged that they were the owners of the toboggan slides used at Fleetwood Park, in the City of New York, and that such slides were under their management and control. The plaintiff also alleged that she had, while riding on one of the toboggans upon one of the slides in the possession and management of defendants, been accidentally and seriously injured through the carelessness of defendants or their employes, and she demanded judgment for \$25,000 damages. The defendants, by answer, denied that they were a joint-stock company, and also denied the allegations that they were the owners of the toboggan slides mentioned, or that they were under their control; and they denied all allegations of negligence, either on their own part or on that of any of their employes. Upon the trial the plaintiff gave no evidence as to the defendants being a joint-stock association, but endeavored to prove a joint or partnership liability of defendants, based upon the allegation that the grounds where the accident occurred were owned by the New York Driving Club, and that in the fall of 1887 the grounds were leased by it to the defendants for the purpose of putting up these toboggan slides. The evidence tending to show even a *prima facie* liability on the part of the defendants is of the most meager character. We will assume, however, that the plaintiff proved enough to call upon the defendants for an answer to her cause of action. This answer was, in brief, that the defendants were nothing but individual members of and stockholders in an incorporated company which had hired the grounds, owned the toboggans, and operated the slides; and that whatever liability there was, if any, in favor of the plaintiff, was borne by the incorporated company, and not by the individual stockholders therein. To prove this defense the counsel for defendants offered in evidence a certificate of incorporation of the America's Winter Carnival Company, as organized under the laws of West Virginia, and at the same

time he offered the Code of West Virginia in evidence. The certificate and the Code were objected to by the plaintiff's counsel on the ground that there was no allegation in the answer of the existence of a corporation or the incorporation of the America's Winter Carnival Company, and that it was necessary to plead such fact before defendants could avail themselves of the defense. The certificate was further objected to as incompetent, immaterial, and illegal. The objections were overruled, and plaintiff's counsel duly excepted.

The first ground of objection, as to the necessity of pleading the defense founded on the incorporation, was properly overruled. It was not a defense necessary to be pleaded. It went to the root of the cause of action, and tended to show there never had been any liability on the part of defendants. It was not an affirmative defense which in substance admitted an original cause of action, but showed facts which operated as a satisfaction thereof. It was not like a defense of payment, or a release, or an accord and satisfaction. If operative, it showed there had never been any liability; and hence it was admissible under defendant's denial of any liability as set out in the complaint. The certificate, when read in evidence, showed that it was signed by the secretary of state of West Virginia, and that it was issued under the great seal of that State, and in it the secretary declared that the corporators therein named, and their successors and assigns, were from the 12th day of December, 1887, until the first day of January, 1888, a corporation by the name and for the purpose set forth in the certificate. It was subsequently proved, under objection and exception, that this company was at the time of the happening of the accident in possession of the toboggan slide in question, and was the owner thereof.

As to the second ground of objection taken by plaintiff's counsel to the introduction of the certificate,—that it was incompetent, immaterial, and illegal,—we may assume that it raises the question of the validity of the incorporation itself, and of its sufficiency as a defense. Upon this issue a few additional facts must be stated. The Code of West Virginia, which was received in evidence, shows that a corporation of the kind herein spoken of could be formed under the general laws of that State by five or more persons signing an agreement to the effect stated in the statute, and by the payment by each corporator of at least ten per cent of the par value of the stock subscribed for by him. Affidavits on the part of at least two of the corporators, stating necessary facts, were also required by the Statute. It is further therein provided that the agreement, acknowledgment, and affidavits are to be delivered to the secretary of state, and he issues to the corporators his certificate, under the great seal of the State, declaring, among other things, that they and their successors and assigns are a corporation from that date until a time therein specified. The effect of the certificate is provided for by the Statute, which says that the corporators and their successors and assigns shall, from the date of the certificate until the time designated therein, be a corporation, and the certificate shall be received as evidence of such incorporation. The Statute provides for

the holding of meetings of the corporation, including the first general meeting for purposes of organization, out of the State, and it also provides for keeping the principal office of the corporation in any State or Territory of the United States, and it permits the corporation to adopt by-laws, and to prescribe the qualifications of directors, and, if it be not otherwise provided, every director must be a stockholder and a resident of the State of West Virginia. The certificate in question in this case embodies an agreement among five corporators, by which they agree to become a corporation by the name of "America's Winter Carnival Company," for the purpose of leasing premises for amusements,—among others, for toboggan slides; and they agree that its principal office shall be in the City of New York; and in this agreement they recite that they have subscribed a certain sum (named therein) to the capital of the company, and have paid ten per cent thereof; and that the capital so subscribed was divided into shares of \$100 each, which were held by them. The names of the corporators were signed to the agreement, and their residences were therein stated as being in the City of New York. The agreement, properly signed and acknowledged, was presented to the secretary of state of West Virginia, and a certificate of incorporation duly issued, as already stated. From the evidence it is clear, upon the question of user, that there was a person who acted as president of this company under a so-called election, although it does not appear how or when he was elected. That person was a resident of New York. There was also a person who acted as treasurer of the company, and he also resided in New York. The treasurer kept a check-book, and made disbursements for the company by check, and received what money came to it, and put it in the bank. There were no by-laws. The treasurer once had charge of the stock-book of the company, though at the time when he was sworn on the trial he did not know where it was, and he supposed the company was not then in existence. Admission to the grounds occupied and possessed by this company was charged, and the money that was paid for admission to the toboggan slides went through the treasurer's hands. No one could get in without paying toll, excepting members of the driving club. The president and vice-president were directors, as was also the treasurer and one other stockholder. This company was in possession of the toboggan slides when the accident occurred, "and no other concern or individuals or anybody else." The defendant Grant said he had stock in the company, which he paid for, and that he refused to go into the business at all unless under an incorporation. The books of the company were not produced, and it did not appear what, if any, books had been kept by it, other than the stock and check books spoken of by the treasurer.

This is substantially all that appears in regard to user by the corporation; and the counsel for plaintiff, upon this evidence, moved to strike out the certificate of incorporation, and all the testimony relating thereto, on the ground "that the directors of the concern were residents of New York, and that under the Statute of West Virginia it was necessary, in order

that the corporation be duly incorporated, that the directors of the concern should be residents of West Virginia, unless a special resolution were passed by the corporation permitting persons of any other State to be such directors." The motion was denied; and thereupon, on motion of counsel for defendants, the complaint was dismissed because no cause of action was proved against the defendants personally. There was sufficient evidence of user to make it clear that the company had accepted its charter, with all its privileges and liabilities, whatever they might be. This question of user, although not specifically taken in the above objections, has been urged upon us here by the counsel for the appellant, and we think it well enough to say what we have upon the subject. As to the other points which have been actually raised by the motion to strike out the certificate, we think a proper disposition was made of them by the court below.

By the Statute of West Virginia the incorporation precedes the election of directors. After the incorporation, and subsequent to the issuing of the certificate thereof by the secretary of state, the incorporators named therein, or a majority of them, are directed by statute to appoint a time and place for holding a general meeting of the stockholders to elect directors, make by-laws, and transact other business. A failure to adopt a by-law at the first meeting, permitting the election of nonresident directors, and the election of nonresident directors at such meeting or at a subsequent one, in the absence of a by-law permitting it, would not *ipso facto* dissolve the corporation, or take away its corporate rights or franchises. The company would still remain a legal entity, notwithstanding its failure to adopt the proper by-law, or, in its absence, to elect resident directors. The counsel for plaintiff was therefore in error in his statement as to the law of West Virginia.

We come, then, to the question whether, upon the facts already set out, this corporation was so far valid as to be entitled to recognition as such in the courts of our State. The plaintiff says it clearly appears that the incorporators thereof were citizens of New York, and the corporation was formed by them in the State of West Virginia for the sole purpose of doing business out of that State and in the State of New York, in which latter State its principal office was also to be located. These facts, he says, conclusively prove the invalidity of the West Virginia corporation, so far at least as this State and its citizens are concerned. If mistaken in that view, he still urges that such facts render it a question for the determination of the jury whether the incorporation was attempted to be made in good faith, or as a mere evasion and in fraud of the laws of West Virginia or of New York. He claims, if the jury should find the purpose was one of evasion, that in such case the incorporation would furnish no defense, and the defendants would be liable as individuals. We are quite clear the case should not be submitted to a jury to pass upon the question of evasion as matter of fact. If it were, we might find different juries coming to different conclusions upon the same facts, and we should have a corporation or no corporation according to the view a jury might

take of such facts. One plaintiff might prove the evasion to the satisfaction of one jury, and another plaintiff fail on precisely the same facts; and thus we should have a corporation as to A., and no corporation as to B., and the same question constantly arising as often as the corporation or its members were sued. This would be intolerable. It must be a corporation as to all persons with whom it has business dealings, or as to none. In other words, it must be a question of law, instead of fact. The courts of any country recognize foreign corporations through what is termed "national or state comity" (*Merrick v. Van Santvoord*, 34 N. Y. 208; *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 519, 10 L. ed. 274; *Christian Union v. Fount*, 101 U. S. 352, 25 L. ed. 886); but whether such recognition shall be given must be decided by the courts of the country where the corporation seeks to do business. In our State, as in others, it is a question of domestic policy, and what that policy is must be determined by an examination of our own legislation. If we find any direct enactment upon the subject, it is our duty to obey it; and in its absence we must determine the question with reference to our general legislation, and to the circumstances which surround us as a great and growing commercial community, having need of and employing large amounts of combined capital, and for whose prosperity and growth it is of the utmost importance that such capital should have the greatest facilities extended it for useful employment, with reasonable and proper personal exemptions from liability. We can find no reason for a domestic policy that should exclude from recognition by our courts foreign corporations generally. It may be safely said there can be no such domestic policy at the present day in a civilized State. The question then arises, Shall we go behind the certificate of incorporation or charter of a foreign corporation for the purpose of inquiring under what circumstances, and for what purpose outside the charter, it was incorporated? This can only be claimed on the ground that the charter was obtained in fraud or evasion of the laws of the State which granted it, or for the purpose of evading the provisions of our own laws. It is plain there was in regard to the procurement of this charter no fraud upon or evasion of the laws of West Virginia, even if we should admit that such fact would constitute good ground for our refusal to recognise such corporation, although no proceedings had been taken to annul its charter in the State which granted it. This point is by no means clear. However that may be, it is impossible not to see that the State of West Virginia has adopted a policy which favors the formation of corporations within her borders, and pursuant to her laws, while the members and officers may be nonresidents, and where the principal business of the corporation is to be performed outside of the confines of the State.

The agreement which was signed by the incorporators in this case, and duly acknowledged and presented to the secretary of state of West Virginia, clearly showed that the incorporators were residents of New York, and that the principal office of the corporation was to be in New York; and the inference was a fair one

that the principal business of the corporation was also to be conducted in New York. The secretary of state, to whom the papers for the organization of the corporation were presented, was compelled to pass upon and decide the question whether they conformed to the laws of West Virginia, before he received or filed them, or gave the certificate of incorporation. He did pass upon the question and did thereupon issue the certificate of incorporation under the great seal of the State, and attested by his official signature. So far as the laws of West Virginia are concerned, it is plain that the incorporators thereupon became a corporation, and in that State the certificate was, by the laws thereof, evidence of the existence of such corporation. There was no fraud or evasion of the law of West Virginia in thus becoming incorporated. The references to her laws above made show conclusively that the formation of corporations thus composed, and for the purpose of doing their principal business outside the limits of that State, was contemplated in those laws. This corporation was beyond all question legally incorporated, and entitled to recognition, in the State of West Virginia. Unless, therefore, it can be said that the acts of our citizens in procuring an incorporation under the laws of West Virginia for the purpose of doing business here were, as matter of law, a fraud and an evasion of our own laws, and hence in conflict or inconsistent with our domestic policy, such foreign corporation is entitled to recognition and protection in our own tribunals. *Merrick v. Van Santvoord, supra.*

It is urged that such acts are thus inconsistent and in conflict with our policy, because citizens of our own State are in that way enabled to evade our own laws relative to home corporations, and to avoid personal liability by incorporating under the laws of foreign States, which may be more favorable to members than are our own laws. I think, when this claim is examined in the light of our own legislation, it will be seen that there is no substantial basis for it to rest upon. An examination of our laws shows that it is, and for many years has been, the policy of this State to enlarge the facilities for the formation of corporations. General laws are on our statute-book for the formation of corporations of almost every conceivable kind, and under some one of them a corporation of the kind mentioned in this case could readily be formed. The freedom from personal liability would be as great, and could be as easily attained, under our own as under the laws of West Virginia. The security of the creditor would not be substantially greater in the case of the domestic than in that of the foreign corporation. In the latter the creditor has the remedy by attachment, and he can obtain about as easy access to its property as if it were domestic instead of foreign. There is really nothing to evade by incorporating under a foreign law. No harmful results flow to a creditor or to the community here by such incorporation. Where the corporation formed under another jurisdiction comes here to do business of a kind which we permit to be done by corporations, and where our laws provide for incorporating individuals for the purpose of doing that business, it is difficult to see how

the terms "evasion" and "fraud" can be properly applied to acts of our citizens whereby they obtain incorporation in another State. When they come into our State to do business, they must conform to our laws relating to foreign corporations, and comply with the terms laid down by us as conditions of allowing them to transact business here. In the case of many kinds of corporations such conditions have already been imposed by our laws; and, if there be any kind where none is imposed, it is conclusive evidence that up to this time the Legislature has not thought it conducive to the true interests of the State and its citizens to impose them. I do not intimate that it is necessary for a State to expressly, by statute, exclude foreign corporations from acting within its jurisdiction. The policy of the State may exclude them, and that policy may be clearly established by a reference to the general legislation of a State. I find none such in the laws of this State.

It has been urged that the easy way which our laws provide for forming corporations is itself a reason why we should not recognize as a corporation those of our own citizens who have gone to another State for the purpose of incorporating themselves under the laws thereof, to do business in our own State as such corporation. We think there is very little force in the argument. The public policy which we see in our own State, as evidenced by her laws upon the subject of the formation of corporations, is one which looks to their ready and easy formation as a means of transacting business with an accumulation of capital, and an exemption from personal liability to the largest extent consistent with reasonable supervision by the State. The facilities for incorporation offered by this State are not the result of any desire to promote the formation of corporations here as against their formation in other States. They are offered because of a policy on our part which urges upon the State the propriety of furnishing them as one means of controlling the business done by them, and keeping it within our borders. If, in any particular case, it is thought by those interested in the matter that the business can be done in our own State and by our own citizens with greater facility under the form of a foreign corporation than under that of a domestic one, there is no public policy which forbids its transaction under such form. The supervision of a foreign corporation by this State may easily be exercised by imposing terms as a condition of permitting it to do business here. The absence of any such terms in our legislation forms no reason for refusing to recognize the corporation. The power rests with the Legislature to say whether any, and, if so, what, terms shall be imposed upon such corporations as a condition of granting them permission to do business here. Those terms can only be imposed by the Legislature; and in their absence our courts ought not, merely on that account, to refuse to recognize a foreign corporation. In the absence of legislation, our courts must either refuse absolutely, or else they must recognize the right of such corporations to come to this State and do business here. The courts cannot themselves impose terms or conditions.

The case of *Montgomery v. Forbes*, 148 Mass. 249, is not necessarily in conflict with these views. In that case, the defendant, a resident of Massachusetts, went to New Hampshire, and there executed and filed certain papers, for the purpose of forming a corporation in that State, for the reason that its tax laws were more favorable than those of Massachusetts, and because he desired to avoid personal responsibility. The whole business was to continue to be done in Massachusetts, and these steps were taken in order to avoid the laws of that State. The court held that the defendant had not complied with the terms of the New Hampshire Act, and hence had never become incorporated. There was no tribunal in New Hampshire to which the papers in regard to a proposed corporation could be submitted, and which had power to decide whether the law had been complied with, and, upon compliance to issue a certificate of incorporation. But all persons filed their papers at their peril. If the question ever arose as to a compliance with the law, it had to be decided by comparing the papers with the Statute. The Massachusetts court did that, and decided that the defendant did not comply with the New Hampshire Statute, and that no corporation had ever been formed. In *Hill v. Beach*, 12 N. J. Eq. 31, the court of chancery of New Jersey, in a proceeding for an accounting, said that certain persons who had entered into an agreement with a view to form a company to do business in New Jersey, and who thereupon undertook to form themselves into a corporation under the General Act of this State relative to the formation of manufacturing corporations, passed in 1848, and who complied with the forms of such Act, would nevertheless not be recognized by the courts of New Jersey as a legally constituted corporation. The chancellor said they were not a foreign corporation, "for it is perfectly manifest upon the face of their proceedings that their attempted organization under the general law of New York respecting corporations was a fraud upon the laws of that State." In what respect it was a fraud does not appear unless it were one because the incorporators were residents of New Jersey, and intended to do business in that State under the New York incorporation. From what has already been said, we do not think those facts make out a case for a refusal to recognize a corporation legally constituted and existing in the foreign State.

We recognize corporations formed by the citizens of a foreign State under its laws for the purpose of doing business, among other places in our own State. Where is the essential difference between such a corporation and one legally incorporated under such foreign State for the same purpose, but the members of which are citizens of our own State? Whose rights are jeopardized more in the case where the members of the corporation are our own citizens than where they are citizens of the foreign State? What enlightened policy is violated by the recognition of the foreign corporation composed of residents of this State which would not also and equally suffer by the rec-

ognition thereof when composed of nonresidents? And yet, beyond all cavil, our policy is to recognize the latter. The truth is, foreign corporations are not properly to be regarded with suspicion, nor should unnecessary restraints be imposed upon their doing business in our midst. They carry no black flag, and the policy of all civilized nations is to grant them recognition in their courts. It seems to me that every reason which urges upon us the recognition of foreign corporations organized with power to do business in our State, and composed of citizens of the foreign State, is equally potent when the foreign corporation is composed of our own citizens. It has always been supposed that a State should at least deal as liberally with its own citizens as with those of foreign States. If, therefore, we permit foreign citizens to come within our limits in the form of a foreign corporation organized with power to do business here, and recognized by us, why should we not permit our own citizens to avail themselves of the like privilege? If we impose terms and conditions upon foreign corporations, as such, doing business here, those same terms and conditions still and equally apply to a foreign corporation when composed of our own citizens. Why should they not be placed at least upon an equality with the foreign citizen?

The case of *Land Grant R. & T. Co. v. Coffey Co. Comrs.*, 6 Kan. 245, simply holds that the courts of that State will not recognize a corporation formed under the laws of Pennsylvania, where the corporation is not itself permitted to do business in the State which grants its charter. It was also stated in the above case that the charter, if enacted by the Kansas Legislature, would have been void as contravening two constitutional provisions. In such a case it would scarcely be expected that a foreign State would grant greater recognition and privileges than were accorded by the State under which the corporation was formed. It might readily be supposed that no rule of comity compelled the recognition of a foreign corporation formed to do acts which are prohibited by the laws of the State to its own citizens or corporations. It is upon this principle that *Empire Mills v. Gaston Grocery Co.* was decided by the Court of Appeals of Texas, and reported in 12 L. R. A. 366, and to which our attention has been called. The Legislature of Texas prohibited the operation of corporations in that State of the character of the Iowa corporation, and the court held that comity did not extend to the recognition of such a corporation by the courts of Texas.

After a careful examination of the case, we have come to the conclusion that the defendants sufficiently proved the existence of a valid corporation under the laws of West Virginia, and that there was nothing in the other facts proved which should cause us to refuse recognition of that corporation.

The result is that the complaint was properly dismissed, and the judgment to that effect should be affirmed with costs.

All concur, except Finch, J., absent.

MISSISSIPPI SUPREME COURT.

WESTERN UNION TELEGRAPH CO.,
Appt.,
v.
 W. H. ROGERS.

(..... Miss.)

Mental suffering alone, unaccompanied by physical injury, will not support an award of damages against a telegraph company for mere negligent failure to promptly deliver a message.

(May 25, 1891.)

APPPEAL by defendant from a judgment of the Circuit Court for Lauderdale County in favor of plaintiff in an action brought to recover damages for the alleged negligent failure of defendant to promptly deliver a telegraph message. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. W. P. & J. B. Harris*, for appellant:

Mental suffering is not readily distinguishable from physical suffering and to become an element of damages it must be based on bodily injury or the injury by which it is produced

must be attended by circumstances of malice, insult, or oppression.

Dorrah v. Illinois Cent. R. Co. 65 Miss. 14.

The fact that in Texas, Tennessee, and Kentucky a rule different from the one which prevails in this State has been applied in suits in which telegraph companies are parties misleads some lawyers into the belief that a different or special rule applies in telegraph cases. This view is not sound.

The rule in the *Dorrah Case*, *supra*, is applied in telegraph cases.

See *Logan v. Western U. Tele. Co.* 84 Ill. 468; *Western U. Tele. Co. v. Hamilton*, 50 Ind. 185; *Russell v. Western U. Tele. Co.* 3 Dak. 815; *Chase v. Western U. Tele. Co.* 44 Fed. Rep. 551; *West v. Western U. Tele. Co.* 39 Kan. 93; *Thompson v. Western U. Tele. Co.* 106 N. C. 549.

See also, on the general subject of mental anguish as element of damages—

Wyman v. Leavitt, 71 Me. 227; *Salina v. Troseper*, 27 Kan. 544; *Joch v. Dankwardt*, 85 Ill. 531; *Walsh v. Chicago, M. & St. P. R. Co.* 42 Wis. 23; *Bovee v. Danville*, 53 Vt. 190, 7 Am. & Eng. Encyclop. Law, p. 42, note 2, p. 449, note 2; Grey, Communication by Telegraph, p. 147.

NOTE.—Damages for mental anguish alone not recoverable.

The authorities bearing upon this proposition have been fully collated in a note to *Western U. Tele. Co. v. Brown* (Tex.) 2 L. R. A. 706. The conclusions outlined in that case fully sustain the decision reached in the case under review. See generally on this subject Wood's *Mayne*, Dam. 1st Am. ed. 54, note.

The authorities fully sustain the conclusions of the principal case and hold that where no physical injury is shown, mere mental anguish is not entitled to consideration in estimating the amount of damage. *Johnson v. Wells, Fargo & Co.* 6 Nev. 224; *Keyes v. Minneapolis & St. L. R. Co.* 36 Minn. 233; *Stone v. Evans*, 33 Minn. 243; *Indianapolis & St. L. R. Co. v. Stables*, 63 Ill. 312; *Hyatt v. Adams*, 16 Mich. 180; *Wyman v. Leavitt*, 71 Me. 227; *Lynch v. Knight*, 9 H. L. Cas. 508; *Blake v. Midland R. Co.* 10 Eng. L. & Eq. 443; *Salina v. Troseper*, 27 Kan. 544.

It should be borne in mind, however, that the rule of damages is not the same where the action is for a breach of contract as for a tort. In the case of wrongs, the jury are permitted to consider injury to feelings and many other matters which have no place in questions of damages for a breach of contract. *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342.

The contract to marry, in which injury to feelings may be considered, stands, according to all the authorities, upon peculiar and exceptional grounds. But, "in actions for breaches of contract, the damages must be such as are capable of being appreciated or estimated." *Pollock, C. B. in Hamlin v. Great Northern R. Co.* 1 Hurlst. & N. 408-411.

Each case of this description must be decided with reference to the circumstances peculiar to it; but it may be laid down as a rule that generally in actions upon contracts no damages can be given which cannot be stated specifically, and that the plaintiff is entitled to recover whatever damages naturally result from the breach of the contract, but not 13 L. R. A.

damages for the disappointment of mind occasioned by the breach of the contract. *Ibid.*

The rule almost uniformly laid down by the courts of England and the United States is to the effect that only the pecuniary loss sustained can be compensated for, and that no compensation can be given for the mental anguish or suffering of the heirs or next of kin of the deceased. We cite only a few of the many authorities that might be cited on this point: 3 *Suth. Dam.* 281, 282, and cases; 2 *Rorer Railroads*, 845, 861, 862, 1167, and cases; 3 *Lawson, Rights, Rem. & Pr.* 1729, and cases; 3 *Wood, Railway Law*, 1536-1538, and cases; *Whittaker's Smu. Neg.* 434, and cases; *Wood's Mayne*, Dam. 74; *Gull. C. & S. F. R. Co. v. Levy*, 59 Tex. 542, 12 Am. & Eng. R. R. Cas. 90; *Baltimore & O. B. Co. v. Hauer*, 60 Md. 449, 12 Am. & Eng. R. R. Cas. 154; *Lett v. St. Lawrence & O. R. Co.* 11 Ont. App. 1, 21 Am. & Eng. R. R. Cas. 165; *Holmes v. Oregon & C. R. Co.* 6 Sawy. 232; *Donaldson v. Mississippi & M. R. Co.* 18 Iowa, 280; *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442; *Fleld*, Dam. § 630.

The term "pecuniary loss."

The word "pecuniary" in this connection is not construed in any very strict sense, and the tendency is to still greater liberality, and to include every element of injury that may be deemed to have a pecuniary value, although this value may not be susceptible of positive proof, and can only be vaguely estimated. It may include the loss of nurture, of the intellectual, moral, and physical training which a mother only can give to children. *Tilley v. Hudson River R. Co.* 29 N. Y. 287.

It may include the loss of expected services of children who at the time of their death are too young to render any service (*Ibi v. Forty-second St. & G. St. Ferry R. Co.* 47 N. Y. 317), or of children or persons under no legal or moral obligation to render service or support, if the circumstances shown render it probable it will be rendered. *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205; *Illinois Cent. R. Co. v. Barron*, 72 U. S. 5 Wall. 90, 13 L. ed. 591.

When the text-writers come to treat of the subject of mental anguish or wounded feelings as an element of damages it is generally in connection with exemplary or punitive damages.

See Field, Dam. §§ 26, 72; Sedgw. Damages, p. 654, note 1; 1 Suth. Dam. pp. 156, 732, 736; Shearm. & Redf. Neg.; Grey, Communication by Telegraph, p. 147.

Mr. Lawson's statements in "Rights, Remedies, and Practice," vol. 4, § 1970, that "in the federal courts it has been held that a husband may recover for disappointment and anguish caused by his being unable to be present at his wife's death-bed owing to the failure of the company to deliver a message," is misleading in that it is based on *Beasley v. Western U. Teleg. Co.*, 89 Fed. Rep. 181, which is a Texas case and of no more value than any other Texas case.

See *Chase v. Western U. Teleg. Co.* 44 Fed. Rep. 554.

The rule announced in *Dorrah v. Illinois Cent. R. Co.* is the rule, so far as we have been able to ascertain, in England and in the United States, except in Texas, Kentucky, and probably in Tennessee.

The Texas cases are conflicting and it must be said that the courts of that State have as yet arrived at no satisfactory or fixed rule.

4 Lawson, Rights, Rem. & Pr. § 1969.

It may include the loss of the society of a near relative (*Beeson v. Green Mountain Min. Co.* 57 Cal. 20), and may include damages for the loss of the father by children who are of full age living away from the home of the deceased and supporting themselves. *Lockwood v. New York, L. E. & W. R. Co.* 98 N. Y. 523.

A distinction noted.

The mental distress and anxiety which may be proved in actions for personal injuries is confined to such as is connected with the bodily injury, and is fairly and reasonably the plain consequence of such injury. The mental anguish, like physical pain, to be taken into consideration in such cases, is confined to such as is endured by the plaintiff in consequence of a personal injury to himself. 2 Thomp. Neg. 1258, notes 4, 5; 1 Sedgw. Dam. 7th ed. 47, note a; 2 Sedgw. Dam. 543.

Review of the dissenting opinions.

It is pertinent to note, in this connection, that in several jurisdictions a contrary rule obtains, and the doctrine of the principal case is repudiated. The supreme courts of Alabama, Indiana, Kentucky, North Carolina, Tennessee and Texas have distinctly affirmed the right to recover damages against a telegraph company for failure to transmit and deliver a message, where the only element of damage was mental anguish, and where there was an entire absence of either physical suffering or pecuniary loss. *Western U. Teleg. Co. v. Henderson*, 89 Ala. 510; *Reese v. Western U. Teleg. Co.* 7 L. R. A. 533, 123 Ind. 294; *Chapman v. Western U. Teleg. Co.* (Ky.) 30 Am. & Eng. Corp. Cas. 628; *Thompson v. Western U. Teleg. Co.* 107 N. C. 449; *Young v. Western U. Teleg. Co.* 9 L. R. A. 698, 107 N. C. 370; *Thompson v. Western U. Teleg. Co.* 106 N. C. 549; *Wadsworth v. Western U. Teleg. Co.* 86 Tenn. 695; *Stuart v. Western U. Teleg. Co.* 66 Tex. 580; *Gulf, C. & S. F. R. Co. v. Wilson*, 66 Tex. 736; *Western U. Teleg. Co. v. Cooper*, 1 L. R. A. 726, 71 Tex. 507; *Western U. Teleg. Co. v. Broesche*, 72 Tex. 664; *Western U. Teleg. Co. v. Simpson*, 73 Tex. 423; *Western U. Teleg. 13 L. R. A.*

The court in Tennessee was divided and we submit that the better reason is with the dissenting judge.

See *Wadsworth v. Western U. Teleg. Co.* 86 Tenn. 695.

Western U. Teleg. Co. v. Henderson, 89 Ala. 510, is distinguishable.

Chapman v. Western U. Teleg. Co. (Ky.) 30 Am. & Eng. Corp. Cas. 626, is a clear departure and goes even beyond the Texas rule.

Fright, the most terrible of all mental disturbances, is not a cause of action.

Victorian R. Comrs. v. Coultas, L. R. 13 App. Cas. 232.

Mental suffering can be neither proved nor disproved.

Stowe v. Heywood, 7 Allen, 118. See *Whittaker's Smith*, Neg. p. 432.

Sutherland, in speaking of mental suffering as legal damages, gives as an exception to the general rule the case of breach of marriage promise as the case where it is allowed in suits on contracts (vol. 1, p. 156), and for all other cases into which it is allowed to enter, he refers us to cases of willful wrong.

1 Suth. Dam. pp. 732 *et seq.*, citing *Stowe v. Heywood*, *supra*; *Phillips v. Hoyle*, 4 Gray, 568; *Callin v. Ware*, 9 Mass. 218; *Fillebrown v. Hoar*, 124 Mass. 580.

There are cases making an exception to the general rule and extending the influence of

Co. v. Adams, 8 L. R. A. 844, 75 Tex. 531; *Beasley v. Western U. Teleg. Co.* 89 Fed. Rep. 181.

And in *Larson v. Chase*, not reported, it is said that where a wrongful act constitutes an infringement of a legal right, mental suffering may be recovered for if it is the direct, proximate and natural result of the wrongful act.

Mental anguish not considered in actions for injuries causing death.

Mental suffering and loss of society are not generally elements of damages in an action for injuries causing death. *Little Rock & Ft. S. R. Co. v. Barker*, 38 Ark. 350; *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442; *Donaldson v. Mississippi & M. R. Co.* 16 Iowa, 280; *Chicago, B. & Q. R. Co. v. Harwood*, 60 Ill. 88; *Nashville & C. R. Co. v. Stevens*, 9 Heisk. 12; *State v. Baltimore & O. R. Co.* 24 Md. 84; *Ohio & M. R. Co. v. Tindall*, 18 Ind. 366; *Paulmier v. Erie R. Co.* 84 N. J. L. 151; *Huntingdon & B. T. R. Co. v. Decker*, 84 Pa. 419; *Hartford County Comrs. v. Hamilton*, 60 Md. 340; *Keeler v. Smith*, 66 N. C. 154; *March v. Walker*, 48 Tex. 372; *Southern Cotton Press & Mfg. Co. v. Bradley*, 55 Tex. 567; *Brady v. Chicago, 4 Biss. 448*; *Needham v. Grand Trunk R. Co.* 38 Vt. 304; *Whittaker's Smith*, Neg. 434, note.

And neither the pain and suffering of the deceased nor the grief and wounded feelings of his surviving relatives can be taken into account in the estimate of damages. But as a right of action is given whenever the injured person, had he lived, could have maintained an action, at least nominal damages may be recovered. 3 Suth. Dam. 232, citing *Blake v. Midland R. Co.* 18 Q. B. 93; *Whitford v. Panama R. Co.* 23 N. Y. 465; *Cleveland & P. R. Co. v. Rowan*, 66 Pa. 363; *Telfer v. Northern R. Co.* 20 N. J. L. 188; *Taylor v. Western Pac. R. Co.* 45 Cal. 323; *Castello v. Landwehr*, 38 Wis. 532; *Ohio & M. B. Co. v. Tindall*, 18 Ind. 366; *Chicago & R. L. R. Co. v. Morris*, 26 Ill. 400; *Chicago, B. & Q. R. Co. v. Harwood*, 60 Ill. 88; *Pym v. Great Northern R. Co.* 4 Best. & S. 396; *Chicago v. Scholten*, 75 Ill. 468; *Johnston v. Cleveland & T. R. Co.* 7 Ohio St. 336. See notes to *Western U. Teleg. Co. v. Brown* (Tex.) 2 L. R. A. 766; *Chicago v. McLean* (Ill.) 8 L. R. A. 765.

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mental suffering on the amount of damages to instances of bodily hurt not occasioned by willful wrong where the suffering springs from the hurt.

See Sedgw. Dam. p. 145, *note 1*.

Mr. Woods' note to Mayne on Damages, pp. 78, 74, contains a very clear and accurate statement of the condition of the law.

Dorrah v. Illinois Cent. R. Co. 65 Miss. 17; *Wyman v. Leavitt*, 71 Me. 227; *Bovee v. Danville*, 53 Vt. 190; *Canning v. Williamstown*, 1 Cush. 451; *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 313; *Trigg v. St. Louis, K. C. & N. R. Co.* 74 Mo. 147; *Johnson v. Wells, Fargo & Co.* 6 Nev. 324; *Russell v. Western U. Tel. Co.* 3 Dak. 315; Grey, Communication by Telegraph, p. 147; *Owen v. Henman*, 1 Watts & S. 548.

Messrs. Witherspoon & Witherspoon for appellee.

Cooper, J., delivered the opinion of the court:

A telegram was sent from Chattanooga, Tenn., to the plaintiff, who resides at Meridian, informing him of the death of his brother, and the time and place at which he would be buried. If this dispatch had been seasonably delivered, the plaintiff could and would have attended the burial. By negligence of the agent of the defendant Company at Meridian, it was not delivered until after the last train had left Meridian for Chattanooga, by which the plaintiff could have traveled to attend the funeral services. This suit was brought to recover the damages sustained by the plaintiff by reason of the non-delivery of the message. The facts are undisputed. They are that the message was sent and its transmission paid for by the sender; that it was by the negligence of the agent not delivered; that the plaintiff sustained no pecuniary loss, his damages being merely nominal, unless he is entitled to recover for the disappointment of not being informed of the death of his brother in time to attend his burial. The court below instructed the jury that the plaintiff was entitled to recover as compensation damages for the mental suffering sustained by him by reason of being deprived of the privilege of attending the funeral of his brother, it being conceded that no such negligence was shown as would warrant the infliction of punitive damages. The jury returned a verdict for \$800, and from a judgment thereon the defendant appeals. It thus appears that the single question presented is whether, under the circumstances named, damages for mental suffering may be recovered. It is immaterial, in the determination of the question involved, whether the action be considered as one for the breach of the contract to transmit and deliver the message, or as an action on the case for the tort in failing to perform the duty devolved on the telegraph company under the contract. The substance and nature of the default and the consequent injury are the same in either view, and, in the absence of circumstances warranting the imposition of punitive damages, the measure of damages must be the same, whatever be the form of the action. We have given to the investigation of the question that consideration which its importance demands, and, though the right of the plaintiff

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to recover the damages awarded in this case finds support in the decisions of several of the States, we are unwilling to depart from the long-established and almost universal rule of law that no action lies for the recovery of damages for mere mental suffering, disconnected from physical injury, and not the result of the willful wrong of the defendant. That such damages are recoverable in actions for breach of contract of marriage is well settled; but it is equally true that until recent years this action stood as the marked and single exception in which such damages were recoverable in actions for breach of contract. This action, though in form one for the breach of contract, partakes in several features of the characteristics of an action for the willful tort, and, though the damages recoverable by the plaintiff for mental suffering are spoken of as compensatory, the fervent language of the courts indicates how shadowy is the line that separates them from those strictly punitive. *Harrison v. Swift*, 13 Allen, 144; *Kurtz v. Frank*, 76 Ind. 595; *Thorn v. Knapp*, 42 N. Y. 475; *Johnson v. Jenkins*, 24 N. Y. 352; *Coryell v. Colbaugh*, 1 N. J. L. 77.

So much, indeed, does the motive of the defendant enter into the question of damages that in *Johnson v. Jenkins* he was permitted to give in evidence, in mitigation of damages, the fact that he refused to consummate the marriage because of the settled opposition of his mother, who was in infirm health. Some of the text-writers upon the subject of damages, notably Sutherland, (vol. 1, p. 156,) assuming that the action for breach of contract of marriage is not of an exceptional character, accept the measure of damages therein applied as appropriate in all actions for breach of contract where the losses sustained are not, by reason of the nature of the transaction, of a pecuniary nature. The authorities cited by Sutherland other than those in actions for breach of contract of marriage are *Hobbs v. London & S. W. R. Co.* L. R. 10 Q. B. 111; *Ward v. Smith*, 11 Price, 19; *Williams v. Vanderbilt*, 23 N. Y. 217, and *Jones v. The Cortes*, 17 Cal. 487. The first of these cases decides only that a passenger who, with his wife and two small children, were negligently disembarked by a railway at a point four miles from his destination, on a rainy night, might recover for the inconvenience of having to walk that distance, he being unable to secure a conveyance. In *Ward v. Smith* the damages recovered were for a pecuniary loss. *Jones v. The Cortes* was a case of willful wrong and fraud. In *Williams v. Vanderbilt*, which was an action of tort for breach of duty, the defendant had agreed to transport the plaintiff from New York to San Francisco via Nicaragua. The defendant's vessel, sailing from the Isthmus to San Francisco, was lost at sea, and he negligently omitted to supply transportation over that part of the journey. The result was that the plaintiff was exposed to disease peculiar to the Isthmus, which he contracted, and was eventually compelled to return to New York. It was held that the plaintiff was entitled to recover for loss of time occasioned by and expenses of his sickness; the court saying: "If one of plaintiff's limbs had been broken, through the carelessness of the agents or servants of the defendant

it is settled that he could have recovered the expenses of the sickness occasioned thereby, and for the consequent loss of time, and also compensation for the bodily pain and suffering caused by such breaking of the limb. The principle on which a recovery, in such case, is allowed for bodily pain and suffering, loss of time and expenses, sustains the recovery in this case for the plaintiff's loss of time and loss of health, and his expenses during his sickness." It is upon the suggestions of the text-writers, supported by authorities which have been given a strained construction, and upon a misapplication of the rule that damages for a breach of contract are commensurate with the injury contemplated by the parties, that some courts in recent years have decided that mental pain and anguish, disconnected from physical injury, furnish a substantive cause of action for which recovery may be had.

The principle of limitation applied by the courts in cases involving pecuniary loss, for the necessary protection of defendants against ruin by the infliction of speculative and remote damages, has been perverted, and accepted as the standard of measurement of damages in a class of cases in which the sole injury sustained is confessedly incapable of compensation, and in which any damages awarded must, from the nature of things, be purely speculative and uncertain. In 1881, in the case of *So Relle v. Western U. Tele. Co.* 55 Tex. 308, the Supreme Court of Texas, relying upon the authority of two previous decisions in that State (*Hays v. Houston & G. N. R. Co.* 46 Tex. 279, and *Houston & G. N. R. Co. v. Randall*, 50 Tex. 261) in one of which an assault and battery had been committed on the passenger, and in the other serious and permanent physical injury had been suffered, for which damages for mental pain and anguish had been allowed, and upon a suggestion in the text of Shearman & Redfield on Negligence, unsupported by any authority, decided that the sendee of a message might recover from the company, as compensatory damages, for mental suffering caused by its failure to promptly deliver a message which announced to him the death of his mother, by reason of which default he was not informed of her death and failed to attend her funeral. This decision has been since overruled, upon a subordinate point, but the general proposition thereby established, that mental suffering, disconnected from physical injury, may be compensated for in actions for breach of contract, has been since repeatedly reaffirmed. *Gulf, C. & S. F. R. Co. v. Lery*, 59 Tex. 542, 548; *Stuart v. Western U. Tele. Co.* 66 Tex. 580; *McAllen v. Western U. Tele. Co.* 70 Tex. 243; *Western U. Tele. Co. v. Cooper*, 71 Tex. 507, 1 L. R. A. 728; *Loper v. Western U. Tele. Co.* 70 Tex. 689; *Western U. Tele. Co. v. Simpson*, 73 Tex. 422; *Western U. Tele. Co. v. Adams*, 75 Tex. 587, 6 L. R. A. 844; *Western U. Tele. Co. v. Feebles*, 75 Tex. 587; *Western U. Tele. Co. v. Moore*, 76 Tex. 67; *Western U. Tele. Co. v. Broesche*, 72 Tex. 651.

The courts of Alabama, Tennessee, Indiana and Kentucky have followed the Supreme Court of Texas, relying upon the decisions above noted as authority. *Western U. Tele. Co. v. Henderson*, 89 Ala. 516; *Wadsworth v. West-*

ern U. Tele. Co. 86 Tenn. 695; *Reese v. Western U. Tele. Co.* 123 Ind. 295, 7 L. R. A. 583; *Chapman v. Western U. Tele. Co.* (Ky.) 30 Am. & Eng. Corp. Cas. 626. These cases, so far as we have been able to discover, rest upon the authority of each other, finding no support in the decisions of the other States nor those of England.

In actions for injuries sustained by the negligence of the defendant, where serious bodily harm has resulted, the generally accepted rule is that the jury may, and since it is impossible to draw the line between physical pain and mental suffering in such instances, must, give damages for both. Expressions used by the courts as argument or illustration in those cases, in which damages for mental suffering are recoverable because such suffering is declared to be inseparable from physical pain and injury, have been seized upon as sustaining a right of action for mental suffering alone, or for such suffering coupled with the right in the plaintiff to merely nominal damages. Damages for mental suffering have been very generally allowed in three classes of cases: (1) Where, by the merely negligent act of the defendant, physical injury has been sustained; and in this class of cases they are compensatory, and the reason given for their allowance by all the courts is that the one cannot be separated from the other. (2) In actions for breach of contract of marriage. (3) In cases of willful wrong, especially those affecting the liberty, character, reputation, personal security, or domestic relations of the injured party. The decisions in Texas, Tennessee, Kentucky, Indiana, and Alabama rest upon arguments and illustrations drawn from cases of one or the other of these classes, or upon the general proposition that damages must in all cases be commensurate with the injury sustained to the extent that they were in the contemplation of the parties to a contract, or should have been foreseen as the probable consequences of his conduct by the negligent defendant. These decisions are not in our opinion sustained by any of the analogies by which they are sought to be supported. These cases are totally different from those in which damages for mental suffering have been allowed, and it is notable that in no one of them is there a citation of a single case, decided prior to the *Case of So Relle*, in which an action for breach of contract (except actions for breach of contract of marriage), or in an action on the case for injuries resulting from mere negligence, damages were allowed for mental pain disconnected from physical injury. There is an absence of authority upon the direct question of the right of recovery for mere grief or disappointment, probably for the reason that prior to the *So Relle Case* the bar had not entertained the view that an action therefor could be maintained, but there are several cases in which responsibility for mental disturbance by reason of fright has been considered. It has been held that fright attending an accident, resulting from negligence by which bodily injury was sustained, was properly considered by the jury in awarding damages. *Segor v. Barkhamsted*, 23 Conn. 290; *Masters v. Warren*, 27 Conn. 298; *Cooper v. Mullins*, 30 Ga. 146; *Canning v. Williamstown*, 1 Cush. 451. But where there

is no bodily injury damages for fright should not be given. *Canning v. Williamstown, supra*; *Victorian R. Comrs. v. Coultas*, L. R. 13 App. Cas. 222; *Wyman v. Leavitt*, 71 Me. 227; *Lynch v. Knight*, 9 H. L. Cas. 577, 598.

In *Flemmington v. Smithers*, 2 Car. & P. 292, the plaintiff sued to recover for injuries inflicted upon his minor son and servant by the negligence of the defendant, and claimed compensation for the injury to his parental feelings, but the claim was rejected. We are not disposed to depart from what we consider the old and settled principles of law, nor to follow the few courts in which the new rule has been announced. The difficulty of applying any measure of damages for bodily injury is universally recognized and commented on by the courts. But in that class of cases demands for simulated or imaginary injuries are less likely to be made than will be those in suits for mental pain alone. No one but the plaintiff can know whether he really suffers any mental disturbance, and its extent and severity must depend upon his own mental peculiarity. In the nature of things, money can neither palliate nor compensate the injury he has sustained. "Mental pain and anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone." *Lynch v. Knight*, 9 H. L. Cas. 577.

The rapid multiplication of cases of this character in the State of Texas since the *Case of So Relle* indicates, to some extent, the field of speculative litigation opened up by that decision. The course of decision shows how difficult the subject is of control. In *So Relle's Case* it was held that the sendee of the undelivered message, who had paid nothing for its transmission, might recover for the mental suffering flowing from its non-delivery. In *Gulf, C. & S. F. R. Co. v. Levy*, 59 Tex. 564, that case was overruled, in so far as the right of action was recognized in the sendee, and it was held that only the person entering into the contract with the company might sue. But in *Western U. Teleg. Co. v. Cooper*, 71 Tex. 507, where the husband had sent the dispatch calling a physician to attend his wife in her confinement, it was held that the husband (the sender of the message) could not recover for his mental suffering caused by the negligence of the company in failing to deliver the message, but that, suing in right of his wife (who was not a party to the contract with the company), he might recover for her mental suffering. It is held in that State that the telegraph company must be informed, either by the face of the message or by extraneous notice, of the relationship of the parties and the purport of the message, to warrant the recovery of damages for mental suffering. It has been decided that this dispatch did not sufficiently indicate

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these facts, "Willie died yesterday at six o'clock; will be buried at Marshall, Sunday evening" (*Western U. Teleg. Co. v. Brown*, 71 Tex. 723), while the following one did, "Billy is very low; come at once" (*Western U. Teleg. Co. v. Moore*, 76 Tex. 66). And a distinction seems to be drawn between the negligence of failing to deliver a dispatch which causes mental pain and suffering and failing to deliver one which, if delivered, would relieve such suffering.

In *Rowell v. Western U. Teleg. Co.*, 75 Tex. 26, the plaintiff and his wife had received information of the dangerous illness of her mother. Subsequently a dispatch was sent containing information of the mother's improved condition. This dispatch the company failed to deliver. Suit was brought, but recovery was denied, the court saying: "The demurrer was properly sustained. The damage here complained of was the mere continued anxiety caused by the failure promptly to deliver the message. Some kind of unpleasant emotion in the mind of the injured party is probably the result of a breach of contract in most cases. But the cases are rare in which such emotion can be held to be an element of the damages resulting from the breach. For injury to feelings in such cases, the courts cannot give redress. Any other rule would result in intolerable litigation." The manifest effect of this decision is to deny to a party injured redress for mental suffering contemplated by the parties to the contract as the probable consequence of its breach. The distinction drawn by the court is so unsubstantial that it was evidently resorted to for the purpose of obstructing the tide of "intolerable litigation" flowing from the decisions following the *So Relle Case*. Kentucky, Tennessee, Indiana and Alabama have but recently established the rule, the dangers and difficulties of which are becoming apparent in Texas. The "intolerable litigation" invited and appearing in Texas has not yet fairly commenced in those States. It will, however, appear in due time, and the courts will be forced to resort to refined limitations, as Texas has done, to restrict it. We prefer the safety afforded by the conservatism of the old law, as we understand it to be, and are of opinion that no recovery for mental suffering can be had under the circumstances of this case. *Dorrah v. Illinois Cent. R. Co.* 65 Miss. 14; *Salina v. Troesper*, 27 Kan. 544; *West v. Western U. Teleg. Co.* 39 Kan. 93; *Russell v. Western U. Teleg. Co.* 3 Dak. 315; *Wyman v. Leavitt*, 71 Me. 227; *Lynch v. Knight*, 9 H. L. Cas. 577; *Victorian R. Comrs. v. Coultas*, L. R. 13 App. Cas. 222; *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 313; *Johnson v. Wells, Fargo & Co.* 6 Nev. 224; 2 Greenl. Ev. § 268; *Wood's Mayne*, Dam. 73.

Reversed and remanded.

ILLINOIS SUPREME COURT.

Vladimir CERVENY, *Appt.*,
v.
CHICAGO DAILY NEWS CO.

(.....Ill.....)

Falsely publishing that a person is an "anarchist" is libelous.

(October 31, 1891.)

A PPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County sustaining a demurrer to the complaint in an action brought to recover damages for the alleged publication of a libel. *Reversed.*

The case sufficiently appears in the opinion. *Messrs. Jones & Lusk* for appellant.

Mr. John J. Knickerbocker for appellee.

Per Curiam:

The demurrer admits all such facts alleged in the declaration as are well pleaded. Gould, Pl. chap. 9, § 4. The declaration here alleges with sufficient legal precision, that the defendant falsely and maliciously published of the plaintiff language, which is literally transcribed in the declaration, charging that the plaintiff is an "anarchist." An "anarchist" is defined by Webster to be: "An anarchy; one who excites revolt, or promotes disorder in a State," and this we assume to be a sufficiently accurate definition of the word. It is, moreover, here alleged that, at the time and place of the publication complained of, it was commonly understood and believed that "the doctrines, opinions, beliefs, teachings, and tenets of said class, party, or sect called 'Anarchists,' as aforesaid, and of the persons composing said class, party, or sect, is that the law and order of society then, and ever since then, and now, existing should be overthrown by revolution and force." It cannot therefore be correctly said that this is no more than charging the plaintiff with being a member of a certain political party; for anarchy, being the enemy of all governments, is necessarily the reverse of a political party, which is always in support of some form of government, and, professedly, of that

which is the best. It seems to have been assumed, in the courts below, that it is not libelous to publish, falsely and maliciously, that one entertains principles merely which if carried into practice would be violative of law and destructive of all government and of every right secured by it. It may for the present be conceded that an action would not lie for slander because of the speaking of words, orally only, which would amount to such a charge against an individual; but the rule in regard to libel is different. An action for libel may be sustained for words published which tend to bring the plaintiff into public hatred, contempt, or ridicule, even though the same words spoken would not have been actionable. *Folkard, Starkie, Slander & Libel*, §§ 155, 156; *Newell, Defamation*, p. 78 *et seq.*; *Hare & W. Lead. Cas.* 131; 3 Am. & Eng. Encyclop. Law, 298, and cases cited in notes. And it would seem so apparent that an individual may be brought into hatred, contempt, or ridicule, within the meaning of the law, by professing vicious, degrading, or absurd principles, and especially by professing them and also confederating with others, alike professing them, to give them effect, that it can need no discussion. The following cases may, however, be referred to as illustrative of the correctness of this view of the law: *Hoare v. Sitterlock*, 12 Q. B. 624; *Wakley v. Hesley*, 7 O. B. 591; *Williams v. Karnes*, 4 Humph. 9; *Duncan v. Brown*, 15 B. Mon. 186; *Stow v. Converse*, 3 Conn. 825, 8 Am. Dec. 189; *Giles v. State*, 6 Ga. 276.

Since government is the only guaranty we can have for protection in the enjoyment of life, and of all that makes life desirable, it is inevitable that all good citizens must regard those who advocate its destruction either with feelings of hatred or contempt, in the same measure that they may regard them as powerful or impotent to carry out what they advocate. And admitting, therefore, as this demurrer does, that this publication was made falsely and maliciously, as set out in the declaration, we cannot escape the conclusion that it is libelous. The judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court, with directions to that court to overrule the demurrer to the declaration, and allow the defendant to answer over if it shall so desire; and thereupon to proceed *de novo*.

Judgment reversed, and cause remanded.

NOTE.—For note on libelous publications, see *Morrey v. Morning Journal Assn.* (N. Y.) 9 L. R. A. 621.

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EXTRA ANNOTATIONS

INCLUDING THE CITATIONS OF EACH CASE AS A PRECEDENT: (1) BY ANY COURT OF LAST RESORT IN ANY JURISDICTION OF THIS COUNTRY; (2) BY THE EXTENSIVE AND THOROUGH ANNOTATIONS OF THE LAWYERS REPORTS ANNOTATED, THE AMERICAN STATE REPORTS, THE ENGLISH RULING CASES, THE BRITISH RULING CASES, AND THE UNITED STATES SUPREME COURT REPORTS [LAW. ED.].

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BY LATER CITATIONS OF L.R.A. CASES IN L.R.A. AND A.L.R. ANNOTATIONS. THESE, TO AVOID THEIR BEING OVERLOOKED, FOLLOW IMMEDIATELY BEGINNING ON THE BACK OF THIS COLORED SHEET.

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L. R. A. CASES AS AUTHORITIES.

CASES IN 13 L. R. A.

13 L. R. A. 33, BENNETT v. AMERICAN EXP. CO. 83 Me. 236, 23 Am. St. Rep. 774, 22 Atl. 159.

Duty of carrier as to transportation.

Cited in *State v. J. W. Kelly & Co.* 123 Tenn. 564, 36 L.R.A.(N.S.) 173, 133 S. W. 1011, holding sale in response to mail order completed at time goods are delivered for transportation to carrier which then owes duty of transporting them.

Excuse for nondelivery by carriers.

Cited in *Swiney v. American Exp. Co.* 144 Iowa, 345, 115 N. W. 212, holding that carrier is insurer of goods accepted for transportation, except as to loss as result of act of God or public enemy.

Cited in notes (24 Am. St. Rep. 816) on conversion by carrier; (34 Am. St. Rep. 736) on common carriers and adverse claimants; (21 L.R.A.(N.S.) 731) on action of authorities under police power as defense to carrier for delay or nondelivery of freight; (33 L.R.A.(N.S.) 692) on right to assert against bailor, hostile, adverse, paramount title of third person.

Illegal possession of game.

Cited in *State v. Swett*, 87 Me. 113, 29 L. R. A. 717, 47 Am. St. Rep. 306, 32 Atl. 806, holding common carrier not liable to statutory penalty for having in his possession "short lobsters," without knowledge of fact; *State v. Bucknam*, 88 Me. 393, 34 Atl. 170, holding person collecting by purchase or otherwise, and having in his possession, carcasses of 89 deer in open season, not within statute imposing penalty upon person who "shall take, kill, destroy, or have in possession" more than three deer.

Construction of statutes.

Cited in *Gray v. Cumberland County*, 83 Me. 437, 22 Atl. 376, holding amendment to statute carries with it by implication reference to and adoption of provisions to which it is amendatory.

Cited in notes (14 Eng. Rul. Cas. 832) on rules for interpretation of statute; (78 Am. St. Rep. 249) on acts which legislature may declare criminal.

Interstate commerce.

Cited in *People v. Fargo*, 137 App. Div. 730, 122 N. Y. Supp. 553, to the point that game may be subject of interstate commerce.

Cited in notes (13 L.R.A. 804) on game laws as affecting interstate commerce; (27 Am. St. Rep. 558) on state regulation of interstate commerce; (26 Am. St. Rep. 579) on jurisdiction of Congress over interstate commerce.

13 L. R. A. 37, *ELLIOT v. FESSENDEN*, 83 Me. 197, 22 Atl. 115.

Construction of term "relatives."

Cited in *Lavigne v. Ligue des Patriotes*, 178 Mass. 29, 54 L. R. A. 816, 86 Am. St. Rep. 460, 59 N. E. 674, holding illegitimate daughter not within statute permitting payment of mortuary benefit to "children, relatives of, or persons dependent" upon, member; *Wapello County v. Eikelberg*, 140 Iowa, 738, 117 N. W. 978, on the technical construction of the words "relations" and "relatives" as meaning those connected by ties of blood.

Cited in note (14 L. R. A. 342) on who are relatives and relations.

Disposition of lapsed legacy.

Cited in *Merrill v. Hayden*, 86 Me. 136, 29 Atl. 949, holding proceeds of lapsed legacy descends to heirs as undivided estate.

13 L. R. A. 38, *KANSAS CITY, M. & B. R. CO. v. RILEY*, 68 Miss. 765, 24 Am. St. Rep. 309, 9 So. 443.

Liability for ejection of passenger.

Followed in *Illinois C. R. Co. v. Reid*, 93 Miss. 471, 17 L.R.A.(N.S.) 348, 46 So. 146, holding that pre-emptory refusal of conductor to listen to passenger's explanations constitutes wilfulness which warrants punitive damages for subsequent wrongful ejection.

Cited in *Alabama & V. R. Co. v. Holmes*, 75 Miss. 389, 23 So. 187, holding railroad liable for ejection of passenger receiving wrong ticket from connecting carrier, where passenger's explanation to conductor confirmed by baggage check and waybill; *Cleveland, C. C. & St. L. R. Co. v. Beckett*, 11 Ind. App. 550, 39 N. E. 429, holding ejection of passenger for refusal to pay additional fare required of one without ticket, not justified by fact that conductor acted within rules; *Evansville & T. H. R. Co. v. Cates*, 14 Ind. App. 174, 41 N. E. 712, holding where mistake in ticket is fault of railroad, and situation explained to conductor, passenger entitled to damages for ejection from train; *Illinois C. R. Co. v. Harper*, 83 Miss. 569, 64 L. R. A. 286, footnote p. 283, 35 So. 764, holding conductor bound to listen to explanation of passenger with ticket not specifying route, as to ticket seller's directions; *Hot Springs R. Co. v. Deloney*, 65 Ark. 177, 67 Am. St. Rep. 913, 45 S. W. 351, holding railroad issuing defective ticket, liable for expulsion of passenger, although conductor acted according to rule of company; *Muckle v. Rochester R. Co.* 79 Hun, 37, 29 N. Y. Supp. 732, holding street railway liable for ejection of passenger without fault presenting transfer past time, and refusing to pay fare; *Indianapolis Street R. Co. v. Wilson*, 161 Ind. 159, 100 Am. St. Rep. 261, 66 N. E. 950, holding street railroad liable for ejection of passenger receiving wrong transfer; *Appleby v. St. Paul City R. Co.* 54 Minn. 171, 40 Am. St. Rep. 308, 55 N. W. 1117, holding where street car taken off before reaching passenger's destination, and he took next passing car as directed, railway company liable for ejection for refusal to pay fare; *Alabama & V. R. Co. v. Drummond*, 73 Miss. 819, 20 So. 7, holding passenger receiving second-class ticket by mistake of agent, and submitting to change of cars without explanation to conductor, or offer to pay difference in fare, entitled to nominal damages only; *Morrill v. Minneapolis Street R. Co.* 103 Minn. 380, 123 Am. St. Rep. 341, 115 N. W. 395, holding that fact that conductor acted within company's rule does not excuse carrier for wrongful objection of passenger holding defective ticket; *Illinois C. R. Co. v. Gortikov*, 90 Miss. 805, 14 L.R.A.(N.S.) 467, 122 Am. St. Rep. 324, 45 So. 365, holding it the duty of conductor to listen to explanation of passenger as to mistake in date made by ticket agent.

Cited in footnotes to *Southern R. Co. v. Wood*, 55 L. R. A. 536, which holds

carrier liable for ejection of passenger whose round-trip ticket unstamped from inability to find agent; *Mahoney v. Detroit Street R. Co.* 18 L. R. A. 335, which authorizes ejection of one refusing to pay fare, without having previously obtained transfer; *United R. & Electric Co. v. Hardesty*, 57 L. R. A. 275, which denies carrier's duty to accept coupon detached from commutation book; *Poulin v. Canadian P. R. Co.* 17 L. R. A. 800, which holds face of ticket conclusive evidence to conductor as to terms of contract; *Illinois C. R. Co. v. Harper*, 64 L.R.A. 283, which holds right to eject passenger from train on route which ticket agent directed her to take because of regulations unknown to her requiring taking of another route; *Texas & Pacific R. Co. v. Payne*, 70 L.R.A. 946, which holds refusal of agent at intermediate terminal to make necessary indorsement on return trip ticket "because his instructions were different" not final breach of contract by carrier so as to preclude recovery by passenger for damages from subsequent ejection.

Cited in note (61 Am. St. Rep. 102) on who are passengers and when they become such.

Distinguished in *Mitchell v. Southern R. Co.* 77 Miss. 925, 27 So. 834, holding conductor not required to accept uncorroborated explanation of passenger presenting expired ticket, that delay due to action of railroad.

Punitive damages.

Cited in *Yazoo & M. Valley R. Co. v. Hardie*, — Miss. —, 34 L.R.A. (N.S.) 749, 55 So. 967, to the point that where there is any testimony upon which punitive damages can be based jury should determine.

Reasonable railway regulations.

Cited in footnote to *Watson v. Louisville & N. R. Co.* 49 L. R. A. 454, which holds condition requiring return coupon of round-trip ticket to be stamped, reasonable.

13 L. R. A. 40, *ENGLISH v. DICKEY*, 128 Ind. 174, 27 N. E. 495.

Election contests; statutes of limitation.

Cited in *Falltrick v. Sullivan*, 119 Cal. 614, 51 Pac. 947, holding under statute permitting adjournments of election contest "from day to day," jurisdiction not lost by court's adjournment, on own motion, for six days.

Cited in footnote to *Gillespie v. Dion*, 33 L. R. A. 703, which holds statement in election contest cannot be amended after statutory period for commencing proceeding, by alleging qualification of contestant.

Computations of time.

Cited in *Backer v. Pyne*, 130 Ind. 295, 30 Am. St. Rep. 231, 30 N. E. 21, holding day of sale excluded from computation of time for redemption from sheriff's sale; *Yocum v. First Nat. Bank*, 144 Ind. 276, 43 N. E. 231, holding intervening Sundays included in computation of time for sessions of county board of review; *Van Laer v. Kansas Triphammer Brick Works*, 56 Kan. 548, 43 Pac. 1134, holding intervening Sundays included in computation of time for filing motion for new trial.

Cited in footnote to *Occumpaugh v. Norton*, 68 L.R.A. 272, which holds that aggregate of half holidays shall be added in computing time for taking appeals under statute excluding holidays from number of days specified.

Dismissal.

Cited in *Lyon v. Barnes*, 133 Iowa, 720, 111 N. W. 9, holding dismissal imports the same as discontinuance on sending the case out of court and while disposing of the case does not necessarily terminate the controversy; *Hadwin v. Southern R. Co.* 67 S. C. 466, 45 S. E. 1019, holding that a dismissal of com-

plaint is the same as a nonsuit or involuntary discontinuance within the per-view of the statute on payment of costs.

13 L. R. A. 43, *CARROLL v. SWEET*, 128 N. Y. 19, 27 N. E. 763.

Negotiable paper; when operates as payment.

Cited in *Williams v. Brown*, 53 App. Div. 487, 65 N. Y. Supp. 1049, and *Greenwich Ins. Co. v. Oregon Improv. Co.* 76 Hun, 199, 27 N. Y. Supp. 794, holding check conditional payment only, in absence of agreement to take in absolute satisfaction; *Sage v. Burton*, 84 Hun, 270, 32 N. Y. Supp. 338, holding check accepted in settlement of account, and subsequently paid, is release of liability; *Morris v. Hefferberth*, 81 App. Div. 523, 81 N. Y. Supp. 403 (dissenting opinion), majority holding check given agent in settlement of account, and indorsed and collected by agent, releases debtor; *Providence Steam & Gas Pipe Co. v. Connell*, 86 Hun, 323, 33 N. Y. Supp. 482, raising, without deciding, whether antecedent debt paid by taking notes.

Cited in note (35 L.R.A.(N.S.) 30) on payment by commercial paper.

Distinguished in *Carter, R. & Co. v. Howard*, 17 Misc. 384, 39 N. Y. Supp. 1060, holding simultaneous judgments upon original debt and against maker of indorsed note, accepted in payment, not merger of note as to indorser.

Duty to make due presentment for payment.

Cited in *Schmidt v. Hoffman*, 18 Misc. 226, 41 N. Y. Supp. 477, holding party accepting indorsed note as payment conditionally assumes duty of presenting it for payment at maturity.

Cited in footnote to *Edminsten v. Herpolsheimer*, 59 L. R. A. 934, which requires check to be presented not later than day after receipt, to hold drawer liable.

Effect of delay in presenting for payment.

Reaffirmed on subsequent trial in 9 Misc. 383, 30 N. Y. Supp. 204, holding indorser discharged from original liability as well as on check, by delay in its presentation.

Cited in *Martin v. Home Bank*, 160 N. Y. 196, 54 N. E. 717, Affirming 30 App. Div. 502, 52 N. Y. Supp. 464, holding failure of bank, receiving check from depositor, to present it for payment within reasonable time, operates to discharge drawer and indorser; *Kirkpatrick v. Puryear*, 93 Tenn. 418, 22 L. R. A. 789, 24 S. W. 1130, holding failure to make due presentment of check of third party, accepted as absolute payment, releases debtor as to both check and original indebtedness; *Morris v. Eufaula Nat. Bank*, 122 Ala. 587, 82 Am. St. Rep. 95, 25 So. 499, holding as between holder and drawer of check, delay in presentment does not discharge drawer, unless loss to him has resulted; *Travers v. T. M. Sinclair & Co.* 122 Ill. App. 207, holding endorser discharged from liability on check by unreasonable delay though he suffered no actual damage thereby; *Kramer v. Grant*, 60 Misc. 111, 111 N. Y. Supp. 709, holding failure to deposit for collection or present for payment within 24 hours after receipt discharges maker of check where he is injured by delay; *Hayward v. Empire State Sugar Co.* 105 App. Div. 24, 93 N. Y. Supp. 449, holding failure to present renewal note to maker for payment at maturity discharges accommodation endorser from liability on both note and interest assuming that note would have been paid if properly presented; *Start v. Tupper*, 81 Vt. 21, 15 L.R.A.(N.S.) 214, 130 Am. St. Rep. 1015, 69 Atl. 151, holding that failure of due presentment and notice will discharge endorser on check in all cases except where he passes check with knowledge that there will be no funds to meet it on due presentment.

Cited in note (22 L. R. A. 785) on release of indorser of check by delay in presenting it.

Necessity of demand for payment in cases of insolvency.

Cited in *O'Neill v. Meighan*, 32 Misc. 516, 66 N. Y. Supp. 313, holding mere insolvency of maker of note not sufficient reason for failure to present for payment within reasonable time; *Kelly v. Theiss*, 65 App. Div. 148, 72 N. Y. Supp. 467, holding failure to present note, and give notice of dishonor, until five days after due, discharges indorsers, although maker insolvent.

Due presentment.

Cited in *Gordon v. Levine*, 194 Mass. 421, 10 L.R.A.(N.S.) 1155, 120 Am. St. Rep. 565, 80 N. E. 505, 10 A. & E. Ann. Cas. 1119, holding six days are unreasonable delay in presentment of check drawn in a city on a bank thereof and then delivered, causing loss to fall on the holder; *Dehoust v. Lewis*, 128 App. Div. 132, 112 N. Y. Supp. 559, holding failure to present check before close of business hours of day following its receipt an unreasonable delay discharging drawer to extent of his loss; *Zaloom v. Ganin*, 72 Misc. 40, 129 N. Y. Supp. 85, holding that presentation of check the second day after date is within reasonable time where it was made after banking hours of day it is dated; *Dehoust v. Lewis*, 128 App. Div. 133, 112 N. Y. Supp. 559, holding that the fact that check is indorsed to third person does not extend period of reasonable time as between drawer and payee.

13 L. R. A. 46, *HEATH v. HEWITT*, 127 N. Y. 166, 24 Am. St. Rep. 438, 27 N. E. 959.

Construction of term "heirs."

Cited in *Wood v. Taylor*, 9 Misc. 643, 30 N. Y. Supp. 433, construing word "heirs" to mean "children" in conveyance to grantee named, and at his decease to go "to his own lawful heirs;" *Walsh v. Walsh*, 66 Hun, 301, 20 N. Y. Supp. 935, holding under by-law of benefit association making certificate payable to "legal heirs," proceeds to go to persons entitled to property of deceased in case of intestacy; *Canfield v. Fallon*, 43 App. Div. 565, 57 N. Y. Supp. 149, Affirming 26 Misc. 348, 57 N. Y. Supp. 149, holding in devise of life estate to one, with remainder to his heirs, word "heirs" to be construed to mean children of life tenant; *Seymour v. Bowles*, 172 Ill. 526, 50 N. E. 122, construing deed to specified person and her "minor heirs" as giving estate in remainder to grantee's "minor children;" *Tinder v. Tinder*, 131 Ind. 386, 30 N. E. 1077, construing deed to living grantee and "heirs" by husband named as vesting present estate in grantee and her children; *Gilliam v. Guaranty Trust Co.* 111 App. Div. 660, 97 N. Y. Supp. 758, holding that a deed of trust for life then to life tenants "heirs at law" gives the remainder to heirs at law at time of death and not to those who would be heirs had donee died at time of deed; *Roberson v. Wampler*, 104 Va. 383, 1 L.R.A.(N.S.) 320, 51 S. E. 835, construing the word "heirs" in a deed to heirs of a living person to mean "children" if supporting intent can be found from circumstances or other language; *Griffin v. Fairmont Coal Co.* 59 W. Va. 533, 2 L.R.A.(N.S.) 1140, 53 S. E. 24 (dissenting opinion) on construction of "heirs" in deed to heirs of living person as meaning "children;" *Fullagar v. Stockdale*, 138 Mich. 367, 101 N. W. 576, holding in a deed to remarried "daughter, her husband, her heirs and the heirs and assigns of party of second part" the words "her heirs" to mean her two "children" then living; *Wallace v. Diehl*, 202 N. Y. 159, 33 L.R.A.(N.S.) 14, 95 N. E. 646, holding that devise of life estate, with power to bequeath property upon death of life tenant to such of testator's

heirs as life tenant may prefer, confines selection to testator's legal or actual heirs, at time of death of life tenant.

Cited in footnotes to *Gannon v. Peterson*, 55 L. R. A. 701, which authorizes court to read interchangeably words "heirs," "issue," and "children," used indiscriminately by testator; *Hindry v. Holt*, 39 L. R. A. 351, which holds right of action for death limited to lineal descendants by words "heir or heirs" in statute; *Drake v. Drake*, 17 L. R. A. 664, which construes words "lawful issue" as embracing grandchild; *Mullen v. Reed*, 24 L. R. A. 664, which holds widow not an heir at law.

Cited in note (14 Eng. Rul. Cas. 802) on construing deed so as to take effect if possible.

Construction of deed to "children."

Cited in *Yarbrough v. Whitman*, 50 Tex. Civ. App. 395, 110 S. W. 471, holding that deed to married woman "and to her children jointly" is conveyance to woman and to each of her children, share and share alike.

Distinguished in *Blackburn v. Blackburn*, 109 Tenn. 679, 73 S. W. 100, construing deed to daughter "and her children, forever," as giving after-born children shares in remainder, grantor's intention so appearing.

Construction favoring vesting of estate.

Cited in *Shaw v. English*, 40 Misc. 39, 81 N. Y. Supp. 169, construing devise of remainder to children of life tenant living at his death as vesting fee in child dying before life tenant.

Interpretation of ambiguous instruments.

Cited in *Blumer v. Dyer*, 84 Hun, 93, 32 N. Y. Supp. 78, and *Dexter v. Beard*, 130 N. Y. 556, 29 N. E. 983, holding when contract or deed ambiguous, intention of parties to be ascertained by considering instrument with reference to circumstances surrounding execution, situation of parties, and subject-matter.

13 L. R. A. 50, *NALLE v. PAGGI*, 81 Tex. 201, 16 S. W. 932.

Liability for cost of party wall.

Cited in footnotes to *Lincoln v. Burrage*, 52 L. R. A. 110, which holds grantee's promise to pay part of cost of party wall when used does not run with land; *Swift v. Calnan*, 37 L. R. A. 462, which sustains right to recover on agreement to pay half of expense of party wall on using same; *Mott v. Oppenheimer*, 17 L. R. A. 409, which construes as running with the land agreement for party wall expressly declared to run with land; *Clemens v. Speed*, 19 L. R. A. 240, which denies to party-wall owners reciprocal easement from support of buildings.

Cited in notes (66 L.R.A. 692, 705) on enforcement of obligation to contribute to cost of party walls, by or against grantees or successors in title; (89 Am. St. Rep. 940, 943) on party walls.

Distinguished in *Arnold v. Chamberlain*, 14 Tex. Civ. App. 640, 39 S. W. 201, holding contract in writing fixing cost of party wall, and creating lien on lot for one-half of cost, when duly recorded, is binding as against subsequent grantee; *Hurford v. Smith*, 24 Okla. 453, 103 Pac. 851, holding that under agreement by owners of adjoining lot that one would pay for one-half interest in wall on line, when such person or his successors joined to such wall, payment was due when he or his successors used wall.

Party-wall — use.

Cited in *Bellenot v. Laube*, 104 Va. 847, 52 S. E. 698, holding a party wall to be a dividing wall between two houses and subject to use and extension upward by either party.

13 L. R. A. 52, *BAXTER NAT. BANK v. TALBOT*, 154 Mass. 213, 28 N. E. 163.
Conflict of laws as to contracts.

Cited in *Cooke v. Addicks*, 6 Pa. Super. Ct. 118, holding rule of state where note is made, that irregular indorsement may be shown by parol to be contract of suretyship, will be enforced in state where action brought; *Atwood v. Walker*, 179 Mass. 519, 61 N. E. 58, holding damages for breach of contract made in New York, for conveyance of real estate in Massachusetts, delivery of deed and payment of money to be made in former state, governed by law of New York; *Limerick Nat. Bank v. Howard*, 71 N. H. 17, 93 Am. St. Rep. 489, 51 Atl. 641, holding sufficiency of indorsee's knowledge of fraud of payee in obtaining note to constitute defense, determined by law of place of contract; *Nashua Sav. Bank v. Sayles*, 184 Mass. 522, 100 Am. St. Rep. 573, 69 N. E. 309, holding liability of indorser of renewal note sent with check to take up prior note, governed by law of creditor's state; *Seely v. Manhattan L. Ins. Co.* 72 N. H. 56, 55 Atl. 425, raising, without deciding, question whether affidavit of mailing notice required to forfeit policy, admissible under law of state where policy issued, is admissible in state where action brought.

Cited in footnote to *Gipps Brewing Co. v. De France*, 28 L. R. A. 386, which holds sale of beer shipped into Iowa, an Iowa contract, where agreement fixing terms of sale was forwarded to, and signed in, that state.

Cited in notes (19 L. R. A. 792) on conflict of laws as to statute of frauds; (61 L. R. A. 213, 225) on conflict of laws as to negotiable paper.

Parol evidence as to notes.

Cited in footnote to *Gregg v. Groesbeck*, 32 L. R. A. 266, which holds parol evidence inadmissible that indorser had given instruction to destroy indorsement before note transferred.

Cited in note (13 L. R. A. 650) on parol evidence as between immediate parties to promissory note.

13 L. R. A. 56, *BANK OF NORTH AMERICA v. RINDGE*, 154 Mass. 203, 26 Am. St. Rep. 240, 27 N. E. 1015.

Actions to enforce liability under foreign statute.

Cited in *Higgins v. Central New England & W. R. Co.* 155 Mass. 180, 31 Am. St. Rep. 544, 29 N. E. 534, upholding right to sue in Massachusetts on cause of action given by statute of other state for negligently causing death therein of citizen of former state; *Hancock Nat. Bank v. Ellis*, 172 Mass. 46, 42 L. R. A. 401, 170 Am. St. Rep. 232, 51 N. E. 207, holding that action to enforce liability of stockholders under Kansas statute maintainable in any state where service may be properly made; *Coffing v. Dodge*, 167 Mass. 233, 45 N. E. 928, holding penal liability of stockholder to creditors under foreign statute not enforceable; *Abbott v. Goodall*, 100 Me. 235, 60 Atl. 1030, denying jurisdiction of local courts over the settling of creditor's claims against rights and liabilities of stockholders in foreign corporation of which foreign courts have jurisdiction including non-resident stockholders.

Cited in notes (34 L.R.A. 748, 757; 37 Am. St. Rep. 174) on right to enforce stockholder's liability outside of state of incorporation; (16 L.R.A. 647) on change of decision of state court as unconstitutional impairment of contract; (70 L.R.A. 540) on right of nonresidents to sue foreign corporations.

— Contractual liability.

Distinguished in *Hancock Nat. Bank v. Ellis*, 166 Mass. 418, 55 Am. St. Rep. 414, 44 N. E. 349, holding where individual liability of stockholder is contractual, arising upon contract of subscription, and suable anywhere, it may be en-

forced in foreign state; *Ferguson v. Sherman*, 116 Cal. 175, 37 L. R. A. 625, 47 Pac. 1023, and *Bell v. Farwell*, 176 Ill. 498, 42 L. R. A. 808, 68 Am. St. Rep. 194, 54 N. E. 346, holding contractual liability of resident stockholder to judgment creditor of Kansas corporation, as provided by statute of that state, enforceable; *Latimer v. Citizens State Bank*, 102 Iowa, 165, 71 N. W. 225, holding contractual liability of stockholder for unpaid balance of stock subscription, under statute of foreign state, enforceable.

Disapproved in *Schertz v. First Nat. Bank*, 47 Ill. App. 134, holding contractual liability of stockholder to creditors of corporation, under statute of another state, enforceable; *Pfaff v. Gruen*, 92 Mo. App. 571, and *Guerney v. Moore*, 131 Mo. 674, 32 S. W. 1132, holding contractual liability of resident stockholder to creditors of corporation, under statute of Kansas, enforceable in Missouri.

— **Special statutory remedy.**

Cited in *Marshall v. Sherman*, 148 N. Y. 26, 34 L. R. A. 766, 51 Am. St. Rep. 654, 42 N. E. 419, holding special statutory remedy to enforce individual liability of stockholder of insolvent foreign corporation, under laws of Kansas, not enforceable in New York against resident of that state; *Hancock Nat. Bank v. Farnum*, 20 R. I. 472, 40 Atl. 341; *Crippen v. Loughton*, 69 N. H. 553, 46 L. R. A. 472, 76 Am. St. Rep. 192, 44 Atl. 538; *Finney v. Guy*, 106 Wis. 266, 49 L. R. A. 491, 82 N. W. 595,—holding statutory remedy of creditors against stockholders under laws of another state, will not be enforced, when in contravention of policy of local laws; *Russell v. Pacific R. Co.* 113 Cal. 262, 34 L. R. A. 749, 45 Pac. 323, and *Tuttle v. National Bank*, 161 Ill. 505, 34 L. R. A. 754, 44 N. E. 984, holding special statutory remedy given to creditors of insolvent corporation against shareholders, cannot be enforced outside jurisdiction of corporation; *Fowler v. Lamson*, 146 Ill. 480, 34 N. E. 932, Affirming 44 Ill. App. 188, holding creditor's bill to enforce individual liability of stockholder of foreign corporation, under statute of another state, not maintainable, when other special statutory remedy prescribed; *Howarth v. Lombard*, 175 Mass. 573, 49 L. R. A. 305, 56 N. E. 888, holding assessment upon shares of nonresident stockholder, by courts of state where corporation organized, may be collected by receiver's action in state where shareholder resides; *National Teleph. Mfg. Co. v. Du Bois*, 165 Mass. 118, 30 L. R. A. 630, 52 Am. St. Rep. 503, 42 N. E. 510, holding creditor's bill by foreign corporation, against nonresident, cannot be maintained, when amount small, and to assume jurisdiction would be inequitable to defendant; *Eingartner v. Illinois Steel Co.* 94 Wis. 85, 34 L. R. A. 508, 59 Am. St. Rep. 859, 68 N. W. 664 (dissenting opinion) majority holding error to dismiss action because parties are residents of another state, and cause of action arose there.

Distinguished in *Hancock Nat. Bank v. Ellis*, 172 Mass. 46, 42 L. R. A. 401, 70 Am. St. Rep. 232, 51 N. E. 207, holding individual liability of stockholder under foreign statute may be enforced against person residing within jurisdiction, when liability several, and action transitory; *Miller v. Aldrich*, 202 Mass. 114, 132 Am. St. Rep. 480, 88 N. E. 441, holding Colorado creditors of a Colorado corporation cannot enforce a Colorado statutory liability of stockholder against a Massachusetts stockholder in this court where such statute provides no available remedy for extra territorial enforcement.

Disapproved in *Whitman v. National Bank*, 28 C. C. A. 410, 51 U. S. App. 536, 83 Fed. 294, Affirming 76 Fed. 698, holding action to enforce statutory liability of stockholder to creditor of insolvent corporation is transitory, and maintainable outside state; *Dexter v. Edmands*, 89 Fed. 470, holding that Federal courts will enforce liability of stockholder under state statute, if not repugnant to public policy of United States, though courts of state where Federal court sitting, have declared remedy contrary to state policy; *Love v. Pusey & J. Co.* 3 Penn.

(Del.) 578, 52 Atl. 542, holding a Delaware stockholder in a Kansas corporation to his Kansas statutory liability for corporation's debt.

13 L. R. A. 59, SMITH v. BURRUS, 106 Mo. 94, 27 Am. St. Rep. 329, 16 S. W. 881.

Malicious prosecution; right of action.

Cited in *Lipscomb v. Shofner*, 96 Tenn. 117, 33 S. W. 818, holding action lies for malicious prosecution of civil suit, without probable cause, and resulting in actual damage; *Kolka v. Jones*, 6 N. D. 465, 66 Am. St. Rep. 615, 71 N. W. 558, holding action lies for malicious prosecution of civil suit, without probable cause, although person not arrested, nor property seized; *Mitchell v. Silver Lake Lodge*, 29 Or. 298, 45 Pac. 798, holding action lies, where civil suit, wherein defendant arrested, or property attached, is instituted through malice, and prosecuted without probable cause; *Bosch v. Miller*, 136 Mo. App. 489, 118 S. W. 506, holding that malicious prosecution will lie though defendant is not arrested nor his property attached; *Wilkinson v. Goodfellow-Brooks Shoe Co.* 141 Fed. 219, holding suit to lie for malicious institution of bankruptcy proceedings without probable cause though bankrupt's property is not attached.

Cited in footnotes to *McCormick Harvesting Mach. Co. v. Willan*, 56 L.R.A. 338, which authorizes suit for malicious prosecution of civil action without restraint of person or seizure of property; *Abbott v. Thorn*, 65 L.R.A. 826, which denies right of action for malicious prosecution of civil action in which there was no arrest or attachment of property and no special injuries inflicted.

Cited in notes (30 Am. St. Rep. 758) on malicious prosecution; (93 Am. St. Rep. 461, 463, 467) on liability for malicious prosecution of civil action.

Want of probable cause.

Cited in *Cohn v. Saidel*, 71 N. H. 570, 53 Atl. 800, and *Kolka v. Jones*, 6 N. D. 477, 66 Am. St. Rep. 615, 71 N. W. 558, holding voluntary dismissal of civil suit prima facie evidence of want of probable cause; *Eagleton v. Kabrich*, 66 Mo. App. 237, holding where discharge of prisoner would be necessary result of hearing, and prosecution not reviewed, voluntary dismissal, is evidence of want of probable cause; *Eckerle v. Higgins*, 159 Mo. App. 185, 140 S. W. 616, holding that production of verdict of acquittal is not per se sufficient to originate inference of want of probable cause.

Cited in footnote to *Le Clear v. Perkins*, 26 L. R. A. 627, which holds advice of counsel admissible as defense to malicious prosecution of civil suit.

Cited in note (64 L. R. A. 488) on acquittal or discharge on a criminal charge as evidence of want of probable cause.

Evidence; degree of proof required.

Cited in *Chaney v. Phoenix Ins. Co.* 62 Mo. App. 50, holding in action on parcel contract of insurance, plaintiff not required to establish contract beyond reasonable doubt; *McFarland v. La Force*, 119 Mo. 591, 27 S. W. 1100, holding evidence to establish resulting trust need not be so strong and unequivocal as to leave no room for doubt.

— Prima facie.

Cited in *Gilpin v. Missouri, K. & T. R. Co.* 197 Mo. 325, 94 S. W. 869, as defining prima facie evidence.

Libel and slander; privileged publications.

Cited in *Jarman v. Rea*, 137 Cal. 352, 70 Pac. 216, holding false charge of bribery against candidate for public office not privileged; *Post Pub. Co. v. Hallam*, 8 C. C. A. 212, 16 U. S. App. 613, 59 Fed. 541, holding false allegations of fact in newspaper, attributing disgraceful acts to candidate for public office, not

privileged, though made in good faith; *Yager v. Bruce*, 116 Mo. App. 486, 93 S. W. 307, holding the privilege of political discussion not to warrant the calling of a candidate for office a thief and liability in damage follows on failure of proof of truth of the assertion; *Morris v. Sailer*, 154 Mo. App. 312, 134 S. W. 98, holding that publisher of newspaper is not protected in defaming character of candidate for office.

Cited in footnote to *Hemmens v. Nelson*, 20 L. R. A. 441, which holds statement by principal of deaf-mute institute to executive committee as to improper acts of department superintendent privileged.

Cited in note (104 Am. St. Rep. 136) on what libelous statements are privileged.

Appeal; questions first raised in appellate court.

Cited in *Lilly v. Menke*, 126 Mo. 214, 28 S. W. 643, holding supreme court may reverse for material error affecting merits, when apparent on record, although not raised in court below; *Clough v. Holden*, 115 Mo. 366, 37 Am. St. Rep. 393, 21 S. W. 1071; *Childs v. Kansas City, St. J. & C. B. R. Co.* 117 Mo. 427, 23 S. W. 373; *McPeak v. Missouri P. R. Co.* 128 Mo. 636, 30 S. W. 170; *Bridges v. Stephens*, 132 Mo. 558, 34 S. W. 555, by Burgess, J., dissenting; *Fuchs v. St. Louis*, 133 Mo. 194, 34 L. R. A. 124, 34 S. W. 508, by Sherwood, J., dissenting; *State ex rel. Ziegenhein v. Thompson*, 149 Mo. 445, 51 S. W. 98; *Worthington v. Lindell R. Co.* 72 Mo. App. 169; *Shaver v. Mercantile Town Mut. Ins. Co.* 79 Mo. App. 425; *Chicago, R. I. & P. R. Co. v. Woodworth*, 1 Ind. Terr. 25, 35 S. W. 238,—holding cause may be reversed on appeal for failure of complaint to state cause of action, although question not raised below, unless defect cured by statute of joefails.

13 L. R. A. 64, *PORTER v. WOODHOUSE*, 59 Conn. 568, 21 Am. St. Rep. 131, 22 Atl. 299.

Deeds; what sufficient delivery.

Cited in *White v. White*, 34 Or. 150, 55 Pac. 645, holding intent of grantor to transfer dominion over premises, as well as deed, not necessary to valid delivery; *Williams v. Daubner*, 103 Wis. 523, 74 Am. St. Rep. 902, 79 N. W. 748, holding delivery to third party, with understanding that deed be returned to grantor if she recovers from sickness; if not, grantee to receive it, insufficient; *Copeland v. Copeland*, 60 S. C. 142, 38 S. E. 269, holding delivery to agent of grantor, with instructions to file for record after her death, and have deed forwarded to grantee, not valid delivery; *Grilley v. Atkins*, 78 Conn. 385, 4 L.R.A.(N.S.) 819, 112 Am. St. Rep. 152, 62 Atl. 337, holding an irrevocable delivery in praesenti to take place where grantor executes deed puts it in envelope indorsed for delivery on his death and places it in hands of third person; *Johnson v. Johnson*, 24 R. I. 573, 54 Atl. 378, holding a parting with manual possession of deed, but not with control thereof not to constitute delivery; *Jackson v. Lamar*, 58 Wash. 394, 108 Pac. 946, to the point that in order to constitute delivery of deed there must be a parting with possession and with all control and dominion over it; *Gaylord v. Gaylord*, 150 N. C. 233, 63 S. E. 1028, holding that where deed is deposited with grantee with intent that title should not pass and that it should be subject to recall by grantor, title remains in grantor.

Cited in footnotes to *Martin v. Flaharty*, 19 L. R. A. 243, which holds manual delivery of deed not essential; *Parrot v. Avery*, 22 L. R. A. 153, which holds execution of deed in presence of witness not sufficient delivery.

Cited in notes (54 L.R.A. 872, 873, 883) on delivery of deed to third person; or record, or delivery for record, by grantor; (53 Am. St. Rep. 538, 541, 542,

543, 544, 551, 554) on what is delivery of a deed; (8 Eng. Rul. Cas. 598) on taking effect of deed from date of execution.

13 L. R. A. 66, *Re CLAYTON*, 59 Conn. 510, 21 Am. St. Rep. 128, 21 Atl. 1005. **Witnesses; imprisonment for refusal to answer.**

Cited in *Re Clark*, 65 Conn. 35, 28 L. R. A. 245, 31 Atl. 522, holding commitment of witness, by justice of peace, upon complaint of grand jury, for refusal to answer, not imprisonment without due process of law; *Re Sims*, 54 Kan. 9, 25 L. R. A. 113, 45 Am. St. Rep. 261, 37 Pac. 135, by Horton, Ch. J., concurring specially, who holds statute giving county attorney power to commit for contempt witness summoned to appear for examination respecting violations of prohibitory liquor law, unconstitutional.

Cited in footnote to *Re Clark*, 28 L. R. A. 242, which upholds right to summarily enforce answer by imprisoning witness.

Cited in notes (1 L.R.A.(N.S.) 1138) on power of magistrate to punish witness for contempt; (25 Am. St. Rep. 890) on 14th amendment as to special privileges, burdens and restrictions.

Procedure in criminal cases.

Cited in note (39 L. R. A. 451) on denial of due process of law or other constitutional right of procedure.

13 L. R. A. 70, *FITZGERALD v. GRAND TRUNK R. CO.* 63 Vt. 169, 3 Inters. Com. Rep. 633, 22 Atl. 76.

Carriers; discrimination in rates.

Cited in *Murray v. Chicago & N. W. R. Co.* 35 C. C. A. 66, 92 Fed. 872, holding unjust discrimination by carrier in freight charges, and their payment by shipper, constitute good cause of action, regardless of fraud and deceit, and independent of statute.

Cited in footnote to *Laurel Cotton Mills v. Gulf & S. I. R. Co.* 56 L.R.A. 453, which holds milling in transit agreement between manufacturer and carrier by which former is to be credited, on freight bills for manufactured goods shipped freight paid on raw materials shipped, to mill not prohibited rebate.

Cited in notes (18 L.R.A. 105) on right of carrier at common law to discriminate between passengers or shippers; (5 Eng. Rul. Cas. 378) on carrier's duty as to accepting and carrying goods.

Effect of legislation upon rate contracts.

Cited in *Fitzgerald v. Fitzgerald & M. Constr. Co.* 41 Neb. 463, 59 N. W. 838, holding previously existing contract of railroad with shipper for special freight rate abrogated upon enactment of interstate commerce act; *Louisville & N. R. Co. v. Mottley*, 219 U. S. 484, 55 L. ed. 304, 34 L.R.A.(N.S.) 677, 31 Sup. Ct. Rep. 265, holding that act of Congress which rendered unenforceable prior contract by which interstate carrier agreed to issue annual passes for life in consideration of claim for damages, is not unconstitutional.

Cited in notes (52 L. ed. U. S. 681) on effect of statutory provisions against rebates upon contracts for transportation at less than regular rate; (14 L.R.A.(N.S.) 403) on effect of statutory provisions against rebates upon contracts prescribing less than established rates; (12 L.R.A.(N.S.) 609, 622) on validity of contracts in business which it is misdemeanor to transact.

Distinguished in *Louisville & N. R. Co. v. Mottley*, 133 Ky. 662, 118 S. W. 982, holding special carriage contract not annulled by Federal statute where consideration has entirely passed on side of passenger and it no where appears that contract is discriminatory.

13 L. R. A. 72, *PETERSON v. MAYER*, 46 Minn. 468, 49 N. W. 245.

Forfeiture of compensation of servant or agent by his misconduct.

Cited in *Von Hayne v. Tompkins*, 89 Minn. 81, 93 N. W. 901; *Paul v. Minneapolis Threshing Machine Co.* 87 Mo. App. 654, holding employee wilfully failing to perform terms of contract, and discharged by reason thereof, not entitled to recover upon contract for services rendered; *McGrath v. Cannon*, 55 Minn. 460, 57 N. W. 150, holding rule that party refusing to fully perform contract, cannot recover upon contract for services rendered; *McGrath v. Cannon*, 55 Minn. 460, 57 cover for part performance, not applicable where contract is severable; *Steele v. Crabtree*, 130 Iowa, 317, 106 N. W. 753, holding that fraud and misconduct of the agent is available as a defense in an action by the latter to recover his wages, though not pleaded as a counterclaim; *Spaulding v. Pepper*, 73 Kan. 646, 85 Pac. 754, on the conduct of the agent as forfeiting his right to compensation; *Hahl v. Kellogg*, 42 Tex. Civ. App. 639, 94 S. W. 389, holding that where an agent has been guilty of such conduct as amounts to treachery or has wholly failed to recognize the duties imposed upon him, he is not entitled to compensation; *Wood v. Barker*, 2 Sask. L. R. 403, holding that no recovery could be had by servant under monthly wage contract where he seduced employer's daughter and was guilty of offense each month that he worked.

Distinguished in *Person v. McCargar*, 92 Minn. 296, 99 N. W. 885, holding where the master had continued to accept the services of the agent after notice of his misconduct, he waived his right to insist upon a forfeiture of wages of agent.

Burden of proof of misconduct.

Cited in *Lahr v. Kraemer*, 91 Minn. 28, 97 N. W. 418, holding that the burden of proof of misconduct of agent was on the principal.

13 L. R. A. 74, *FATH v. TOWER GROVE & L. R. CO.* 105 Mo. 537, 16 S. W. 913.

Municipal corporations; legislative power.

Cited in *Bluedorn v. Missouri P. R. Co.* 121 Mo. 271, 24 S. W. 57, holding city ordinance prohibiting running of railroad trains at greater speed than 6 miles an hour, valid; *Glenville v. St. Louis R. Co.* 51 Mo. App. 634, holding city has power to limit speed of all street cars, regardless of motive power employed; *State, Cape May D. B. & S. P. R. Co. Prosecutor, v. Cape May*, 59 N. J. L. 401, 36 L. R. A. 655, 36 Atl. 696, holding ordinance making operation of trolley or electric cars without fenders unlawful, within powers of city; *State ex rel. Reid v. Walbridge*, 119 Mo. 394, 41 Am. St. Rep. 663, 24 S. W. 457, holding ordinance giving mayor power of removing officer for cause, within general-welfare clause of charter, when not inconsistent with general law; *State ex rel. Kansas City v. East Fifth Street R. Co.* 140 Mo. 551, 38 L. R. A. 221, 62 Am. St. Rep. 742, 41 S. W. 955, holding power of state to proceed against street railway by quo warranto for forfeiture of franchise, not abridged by franchise ordinance of city providing for forfeiture, by proceedings in name of city; *J. F. Conrad Grocer Co. v. St. Louis & Suburban R. Co.* 89 Mo. App. 541, holding ordinance requiring vigilance of employee in charge of car to discover peril threatening individual, valid.

Cited in notes (13 L. R. A. 588) on municipal ordinance unconstitutional and void; (36 L. R. A. 33) on municipal power to impose conditions when giving consent to railway in street; (104 Am. St. Rep. 649) on municipal regulations of street railways for protection of public.

Distinguished in *Carpenter v. Reliance Realty Co.* 103 Mo. App. 498, 77 S. W. 1004, denying validity of ordinance requiring persons excavating below certain

depth to protect contiguous buildings; *Senn v. Southern R. Co.* 108 Mo. 152, 18 S. W. 1007, raising without deciding question as to validity of city ordinance requiring street car driver to stop in quickest time possible on appearance of danger to children, in absence of contractual relation between city and company.

Violation of city ordinance as basis of civil liability.

Cited in *Holwerson v. St. Louis & Suburban R. Co.* 157 Mo. 246, 50 L. R. A. 859, 57 S. W. 770, holding city ordinance cannot enlarge common-law liability of railroad or citizen, except by contract; *Murphy v. Lindell R. Co.* 153 Mo. 259, 54 S. W. 442, holding ordinance creating standard for measuring liability of citizens different from common law, enforceable against those only accepting provisions for consideration; *Cooney v. Southern Electric R. Co.* 80 Mo. App. 231, holding contractual relation shown as to general ordinance requiring motoneers upon "first appearance of danger" to stop cars "within shortest time and space possible," when railway bonded to observe "all general ordinances;" *Chouquette v. Southern Electric R. Co.* 152 Mo. 265, 53 S. W. 897, holding operation of railway under city ordinance sufficient acceptance, and binds company to observance of provisions as to speed; *Gebharatt v. St. Louis Transit Co.* 97 Mo. App. 379, 71 S. W. 448, holding person injured through street car company's violation of "vigilant-watch" ordinance need not allege or prove its acceptance by company; *Holwerson v. St. Louis & Suburban R. Co.* 157 Mo. 246, 50 L. R. A. 859, footnote p. 850, 57 S. W. 770, distinguishing liability by reason of burdens imposed by ordinance granting franchise, from effect of ordinance of general application; *Senn v. Southern R. Co.* 108 Mo. 152, 18 S. W. 1007; *Sanders v. Southern Electric R. Co.* 147 Mo. 425, 48 S. W. 855; *Sheehan v. Citizens' R. Co.* 72 Mo. App. 528,—holding violation of ordinance requiring motorman to keep vigilant watch, and to stop car on first appearance of danger, not evidence of negligence, unless railway company accepted provisions; *Byington v. St. Louis R. Co.* 147 Mo. 678, 49 S. W. 876, holding violation of ordinance regulating stoppage of street cars for passengers cannot be made basis of civil liability, unless railway agreed to be bound thereby; *Moran v. Pullman Palace Car Co.* 134 Mo. 651, 33 L. R. A. 758, 56 Am. St. Rep. 543, 36 S. W. 659, holding ordinance requiring owners of property having dangerous places to fence same, does not create civil liability in favor of person injured by violation; *J. F. Conrad Grocer Co. v. St. Louis & M. River R. Co.* 89 Mo. App. 400, holding violation of ordinance requiring vigilant lookout by motorman and conductor of street car is negligence, when degree of care same as required at common law; *Moore v. St. Louis Transit Co.* 95 Mo. App. 745, holding excessive speed of street car, in violation of ordinance regulating speed of cars generally, such negligence as will support action for personal injury; *Skinner v. Stifel*, 55 Mo. App. 15, holding violation of ordinance requiring display of lights at excavations on public highway negligence, without regard to ordinary care exercised; *Cleveland, C. C. & St. L. R. Co. v. Powers*, 173 Ind. 115, 88 N. E. 1073, holding that running railroad train in violation of city ordinance constitutes negligence per se.

Cited in footnotes to *Fielders v. North Jersey Street R. Co.* 59 L.R.A. 455, which denies liability of street railway company for injury by defect in pavement between tracks; *Frontier Steam Laundry Co. v. Connolly*, 68 L.R.A. 425, which holds owner's failure to comply with ordinance requiring fireproof shutters on brick buildings not such negligence as to render him liable for destruction by fire communicated through unprotected windows of goods in his possession as bailee; *Duval v. Atlantic Coast Line R. Co.* 65 L.R.A. 722, which holds railroad company's valuation of contract with municipality as to speed of train evidence of negligence.

Cited in notes (25 L.R.A. 663) on duty imposed on street railroad companies to avoid injuring children on track; (5 L.R.A.(N.S.) 248, 266, 267) on violation of police ordinance as ground for private action.

Distinguished in *Becker v. Schutte*, 85 Mo. App. 63, holding ordinance prohibiting leaving horse in street unfastened and unattended, cannot be made basis of civil action between citizens, save as declaratory of common law.

Held *obiter* and overruled in effect in *Jackson v. Kansas City, Ft. S. & M. R. Co.* 157 Mo. 637, 80 Am. St. Rep. 650, 58 S. W. 32, holding violation of ordinance prohibiting railroad running at speed exceeding 6 miles an hour, such negligence as may form basis of action for damages by party injured; *Sluder v. St. Louis Transit Co.* 189 Mo. 133, 5 L.R.A.(N.S.) 202, 88 S. W. 648, holding that a cause of action can arise to a person injured from the violation by a railway company of a speed ordinance.

13 L. R. A. 79, *STATE ex rel. YANCEY v. HYDE*, 129 Ind. 296, 28 N. E. 186.
Officers; legislative control.

Cited in *Terre Haute v. Evansville & T. H. R. Co.* 149 Ind. 184, 37 L. R. A. 194, 46 N. E. 77, holding power to name persons or functionaries who shall make appointment of city commissioners is legislative function; *Goodwin v. State*, 142 Ind. 121, 41 N. E. 359, holding under statute authorizing city council to create office of city attorney, council may abolish office before expiration of term; *Downey v. State*, 160 Ind. 581, 67 N. E. 450, holding common council may abolish office of city attorney before expiration of term, though such officer may be removed only for cause; *Hawkins v. Roberts & Son*, 122 Ala. 146, 27 So. 327, holding statute abolishing office of county commissioner, not violation of constitutional provision providing for impeachment and removal of state and county officers; *French v. State*, 141 Ind. 634, 29 L. R. A. 118, 41 N. E. 2, holding statute constituting governor and other state officers board for selection of prison inspectors, not unconstitutional; *Scott v. State*, 151 Ind. 568, 52 N. E. 163 (dissenting opinion), majority holding statute postponing date, from September to January, for commencement of term of county treasurer, not unconstitutional as extending term of incumbent; *State ex rel. Taylor v. Mount*, 151 Ind. 700, 51 N. E. 417 (dissenting opinion), majority holding statute extending period of existence of appellate court, and continuing in office judges beyond terms for which they were elected, invalid.

Cited in footnotes to *People ex rel. Burby v. Howland*, 41 L. R. A. 838, which holds void, statute depriving justices of the peace of single town of criminal jurisdiction; *Harmon v. State*, 58 L. R. A. 618, which holds void, act making various distinct examiners exclusive judges as to competency of applicants for license as steam engineers.

Review of legislative action.

Cited in *Vigo County v. Davis*, 136 Ind. 508, 22 L. R. A. 517, 36 N. E. 141, holding under statute authorizing county commissioners, upon petition, to increase salaries of judges, and making action "final and conclusive," no appeal lies from refusal to increase salaries.

Selection of officers.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 659, 33 N. E. 432, and *Cleveland, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 548, 18 L. R. A. 744, 33 N. E. 421, holding members of state board of tax commissioners not administrative state officers required by Constitution to be elected by people; *French v. State*, 141 Ind. 632, 29 L. R. A. 118, 41 N. E. 2, holding constitutional provision that officers not otherwise provided for shall be chosen in such "manner" as is

now prescribed by law, refers to person or functionary to make appointments: *Southern P. Co. v. Bartine*, 170 Fed. 747, sustaining an act delegating the appointment of railroad commissioners to the governor, the lieutenant governor and the attorney general.

Cited in footnote to *Fox v. McDonald*, 21 L. R. A. 529, which holds power to appoint to fill vacancy not inherent in governor.

Effect of erroneous reasoning on validity of conclusion.

Cited in *Terre Haute & I. R. Co. v. State*, 159 Ind. 472, 65 N. E. 401, holding expression of opinion on merits, where action dismissed for prematurity, *non res judicata*.

Title of an act.

Cited in *Southern P. Co. v. Bartine*, 170 Fed. 737, on the purpose of constitutional requirements as to title of act.

Cited in notes (64 Am. St. Rep. 103) on sufficiency of title of statute; (28 Am. St. Rep. 387) on statutes embracing only one subject.

13 L. R. A. 83, *PENNY v. CROUL*, 87 Mich. 15, 49 N. W. 311.

Witnesses; competency as to transactions with deceased persons.

Cited in *O'Neil v. Greenwood*, 106 Mich. 582, 64 N. W. 511, holding heir, though not party to record, disqualified as witness as to matters equally within knowledge of deceased; *Re Lambie*, 97 Mich. 58, 56 N. W. 223, holding contestant of will may testify to conversations with testatrix concerning revocation of former will, and contents of lost will subsequently made; *Lorimer v. Lorimer*, 124 Mich. 637, 83 N. W. 609, holding in ejectment against heirs, brought by alleged wife of deceased, plaintiff not competent witness as to matters equally within knowledge of decedent; *Great Camp K. O. T. M. v. Savage*, 135 Mich. 463, 98 N. W. 26 (dissenting opinion), on competency of witnesses to testify as to matters equally within the knowledge of deceased person in a suit concerning decedent's estate; *Doty v. Doty*, 118 Ky. 214, 2 L.R.A.(N.S.) 718, 80 S. W. 803, 4 A. & E. Ann. Cas. 1064, holding that a guardian may in an action for his ward brought against an administrator, testify as to an agreement in favor of ward made between administrators intestate and such guardian.

— Party interested.

Cited in *People's Nat. Bank v. Wilcox*, 136 Mich. 571, 100 N. W. 24, 4 A. & E. Ann. Cas. 465, holding testimony of debtor and another as to conversation had with deceased president of party to suit to be used against that party in favor of creditors, inadmissible, the persons testifying not being parties in interest but nevertheless interested.

13 L. R. A. 91, *CROSSMAN v. UNIVERSAL RUBBER CO.* 127 N. Y. 34, 27 N. E. 400.

Second appeal in 131 N. Y. 636, 30 N. E. 225, reversing 28 Jones & S. 70, 16 N. Y. Supp. 609.

Election of remedies.

Followed in *Pratt v. Tailer*, 53 Misc. 83, 103 N. Y. Supp. 1094, holding that where plaintiff may use both of two remedies the use of one will not preclude the use of the other.

Cited in *Heilbronn v. Herzog*, 165 N. Y. 103, 58 N. E. 759, *Reversing* 33 App. Div. 317, 53 N. Y. Supp. 841, holding vendor extending credit on false representation of vendee, does not, by affirming sale, waive right to sue for purchase price before credit expired; *Rochester Distilling Co. v. Devendorf*, 72 Hun, 431, 25 N. Y. Supp. 200, holding judgment for purchase price does not preclude replevin

by seller, on ground of false representations, when fraud not discovered until after judgment; *Hess v. Smith*, 16 Misc. 55, 37 N. Y. Supp. 635, holding suit on contract precludes action of conversion for same property; *Johnson-Brinkman Commission Co. v. Missouri P. R. Co.* 52 Mo. App. 414, holding attachment for purchase price precludes subsequent replevin for property, after voluntary dismissal of attachment; *Kolsky v. Loveman*, 97 Ala. 545, 12 So. 720, holding attachment for purchase price, precludes vendor from subsequently claiming that goods were merely consigned to defendant for sale; *Crockett v. Miller*, 50 C. C. A. 453, 112 Fed. 736, holding action for malicious trespass in seizing plaintiff's goods not inconsistent with replevin suit; *Crook v. First Nat. Bank*, 83 Wis. 43, 35 Am. St. Rep. 17, 52 N. W. 1131, holding action to recover money paid by bank to another to plaintiff's use precludes action against bank for unauthorized payment; *Frey v. Torrey*, 70 App. Div. 170, 75 N. Y. Supp. 40, holding that proof in bankruptcy of indebtedness arising in fraudulent transaction does not preclude subsequent action to recover money; *Re Linforth*, 87 Fed. 391, holding permission in bankruptcy to collect claim by foreclosure of mortgage, on condition that no judgment for deficiency be obtained, and subsequent voluntary dismissal, not waiver of right to prove claim against bankrupt estate; *Re C. Moench & Sons Co.* 123 Fed. 979, holding lender instituting action in fraud has standing as creditor to contest bankruptcy proceedings against borrower; *Kansas City Live Stock Commission Co. v. Bank of Hamlin*, 79 Kan. 766, 24 L.R.A.(N.S.) 492, 101 Pac. 617, 17 A. & E. Ann. Cas. 956, holding no inconsistency to exist between remedy by attachment and by chattel mortgage when both are used by same creditor against same debtor for collection of same debt; *Wood v. Claiborne*. 82 Ark. 521, 11 L.R.A.(N.S.) 916, 118 Am. St. Rep. 89, 102 S. W. 219, holding suit against person wrongfully receiving money no bar to action against persons wrongfully giving the money where satisfaction not obtained on former judgment; *Manufacturers' Bottle Co. v. Taylor-Stites Glass Co.* 208 Mass. 596, 95 N. E. 103, to the point that plea in abatement, founded on pendency of former action, for same cause, may be avoided by discontinuance or other termination of former action after plea is filed; *Citizens' Nat. Bank v. Wetzel*, 96 App. Div. 89, 88 N. Y. Supp. 1079, on rule that election to be binding must be of inconsistent remedies.

Annotation cited in *Swinney v. Chicago*, R. I. & P. R. Co. 123 Iowa, 223, 98 N. W. 635, holding that a common law remedy is not precluded by a statutory remedy where the language of the statute cannot be so construed.

Cited in footnotes to *Miller v. Hyde*, 25 L. R. A. 42, which holds replevin of horse not defeated by prior attachment suit for trover; *Johnson-Brinkman Commission Co. v. Missouri P. R. Co.* 26 L. R. A. 840, which holds mere commencement of attachment suit not binding election of remedy; *Crompton v. Beach*, 18 L. R. A. 187, which holds conditional vendor's exercise of option to enforce payment of note, defeats right to retake property; *Barchard v. Kohn*, 29 L. R. A. 803, which holds enforcement of chattel mortgage on exempt property not defeated by prior judgment and attempted levy on exempt property.

Cited in notes (13 L. R. A. 473) on election of remedies; (15 L. R. A. 90) on effect of election of remedies in case of fraudulent purchase; (34 L.R.A. (N.S.) 310) on bringing suit not prosecuted to judgment as election of remedies; (1 Eng. Rul. Cas. 545) on right of action in favor of subject for cause arising in other country notwithstanding alleged proceedings in such country.

Distinguished in *Roberge v. Winne*, 144 N. Y. 712, 39 N. E. 631, holding bill in equity to rescind sale for fraud, and to compel reconveyance, does not preclude specific performance of agreement of vendee to execute and deliver mortgage, when no process in first action ever served; *Colvin v. Shaw*, 79 Hun, 60, 29 N.

Y. Supp. 644, holding claim, in excess of amount due in action on account after refusal of debtor to convey pursuant to contract, in partial satisfaction of indebtedness, not election to abandon such contract.

13 L. R. A. 95, *HIGHLAND AVE. & B. R. CO. v. BURT*, 92 Ala. 291, 9 So. 410.

Carriers; degree of care required as to passengers.

Cited in *Sweet v. Birmingham R. & Electric Co.* 136 Ala. 169, 33 So. 886, holding conductor of dummy train stopping at crossing bound to ascertain before starting whether passenger is alighting; *Anderson v. Citizens' Street R. Co.* 12 Ind. App. 197, 38 N. E. 1109, holding that it is duty of conductor of street car to know that no passenger is in act of alighting, or in dangerous position, before starting; *Gadsden & A. Union R. Co. v. Causler*, 97 Ala. 237, 12 So. 439, holding invitation to alight from train may be inferred from stoppage of car near passenger's destination, without warning; *Illinois C. R. Co. v. Kuhn*, 107 Tenn. 111, 64 S. W. 202, holding obligation of carrier as to safety of transportation of passenger extends to proper construction and maintenance of roadbed and tracks; *Illinois C. R. Co. v. Kuhn*, 107 Tenn. 127, 64 S. W. 202, holding carrier of passengers bound to exercise "utmost degree of care and prudence;" *Shealey v. South Carolina & G. R. Co.* 67 S. C. 67, 45 S. E. 119, denying railroad's duty to ascertain whether passenger is about to alight after stopping reasonable time at regular station; *Birmingham R. Light & Power Co. v. Hawkins*, 153 Ala. 89, 16 L.R.A.(N.S.) 1078, 44 So. 983, holding that ordinarily a motorman may start the car as soon as the passenger has gotten thereon and before he has reached a seat; *Birmingham R. Light & Power Co. v. Jung*, 161 Ala. 470, 49 So. 434, holding that servants of carrier must use due care to determine before moving car that no passenger is in the act of alighting or entering car at place of regular stoppage and same rule applies where passenger is permitted to alight temporarily at place not a regular stop but defendant is not liable for injury of one attempting to board car at such stop who is not already a passenger unless servants have actual knowledge of dangerous position when car is put in motion; *Montgomery v. Colorado Springs & I. R. Co.* 50 Colo. 216, 114 Pac. 659, holding that street car conductor must exercise ordinary care to see that no passenger is in act of alighting before car is set in motion; *Memphis Street R. Co. v. Shaw*, 110 Tenn. 475, 75 S. W. 713, holding that conductor is under duty to see and know that no one is in the act of alighting when he starts the car; *Crump v. Davis*, 33 Ind. App. 90, 70 N. E. 886, holding that it is duty of person in charge of street car to ascertain that no passenger is in act of alighting before putting car in motion; *Indianapolis Traction & Terminal Co. v. Miller*, 43 Ind. App. 722, 88 N. E. 526, on duty of conductor as not executed by stopping for reasonable time but requiring that he know that no person is in act of alighting or in dangerous position at time of starting car; *Nashville, C. & St. L. R. Co. v. Casey*, 1 Ala. App. 347, 56 So. 28, holding that railroad was not guilty of negligence in starting train before passenger alighted where it stopped for usual and reasonable length of time, and infirmity of passenger was not known to servants.

Cited in footnote to *Yarnell v. Kansas City, Ft. S. & M. R. Co.* 18 L. R. A. 599, which holds time to leave train need not be given person entering merely to assist passengers.

Cited in note (11 L.R.A.(N.S.) 140) on duty of street-car conductor to see passenger is off before starting car.

Contributory negligence.

Cited in *Citizens' Street R. Co. v. Spahr*, 7 Ind. App. 27, 33 N. E. 446, holding averment in complaint of want of negligence contributing to injury, not over-

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come by admission that plaintiff boarded electric car while in motion; Birmingham R. L. & P. Co. v. Lee, 153 Ala. 85, 45 So. 292, holding the boarding of a moving car not negligence as a matter of law, but is for the jury under all the evidence.

13 L. R. A. 97, BURT v. ADVERTISER NEWSPAPER CO. 154 Mass. 238, 23 N. E. 1.

Privileged communications.

Cited in Hagnes v. Clinton Printing Co. 169 Mass. 515, 48 N. E. 275, holding that newspaper privilege of comment and criticism on matters of public interest does not extend to false statements; Post Pub. Co. v. Hallam, 8 C. C. A. 212, 16 U. S. App. 613, 59 Fed. 541, holding false allegations of fact concerning candidate for public office, though made in good faith, and with probable cause, not privileged; Howland v. Flood, 160 Mass. 516, 36 N. E. 482, holding report of town committee upon matter of public interest not absolutely privileged, and whether same contained anything in excess of privilege is question for jury; Fay v. Harrington, 176 Mass. 273, 57 N. E. 369, raising without deciding question as to whether publication of articles was justified as a reasonable criticism on matter of public interest; Donahoe v. Star Pub. Co. 4 Penn. (Del.) 183, 55 Atl. 337, holding that the charging of a candidate for office with a specific criminal offense is not privileged and that good faith and probable cause may not be pleaded in defense if charge is false; Dow v. Long, 190 Mass. 142, 76 N. E. 667, holding a publication concerning election to a city office charging plaintiff with supporting candidate by bribery and low politics and that such candidate would facilitate plaintiff's robbery of the city to be unprivileged statements; Com. v. Pratt, 208 Mass. 559, 95 N. E. 105, holding that newspaper publisher is not protected in defaming character of candidate for office; Merrey v. Guardian Printing & Pub. Co. 79 N. J. L. 184, 74 Atl. 464, holding that fair and bona fide comment and criticism upon matters of public concern is privileged; Pfister v. Milwaukee Free Press Co. 139 Wis. 640, 121 N. W. 938, holding false and defamatory publication concerning private citizen not privileged by public interest; Hubbard v. Allyn, 200 Mass. 170, 86 N. E. 356, holding false statements of fact not privileged because of public interest, such privilege being extended only to discussion and criticism of actual acts, which may be done by ridicule, sarcasm and invective; Mertens v. Bee Pub. Co. 5 Neb. (Unof.) 598, 99 N. W. 847, holding a privilege to extend its protection in the absence of express malice to publisher who expresses his opinion however severe or uncomplimentary on certain facts proved or admitted; Russell v. Washington Post Co. 31 App. D. C. 285, 14 A. & E. Ann. Cas. 820, holding a publication not giving source of information and stating positively that the plaintiff a minister was guilty of unmoral conduct which if true would bring him into contempt and ridicule is not privileged but libelous per se.

Cited in footnote to Hemmens v. Nelson, 20 L. R. A. 441, which holds statement by principal of deaf-mute institute to executive committee as to improper acts of department superintendent privileged.

Cited in note (28 L. R. A. 667) on libel or slander by expressing opinions, or comments without misstating facts.

Belief in truth of publication.

Cited in Squires v. Wason Mfg. Co. 182 Mass. 141, 65 N. E. 32, holding malice not shown where there was reasonable ground for privileged statement, and it did not appear that defendant did not believe it, or that it was made for other than business reasons; Faxon v. Jones, 176 Mass. 208, 57 N. E. 359, holding previous or subsequent declarations or conduct of defendant in slander, as well as conduct

and language at time, may be shown in proof of express malice in aggravation of damage; *Hanson v. Globe Newspaper Co.* 159 Mass. 303, 20 L. R. A. 860, 34 N. E. 462 (dissenting opinion) majority holding person named by mistake in libelous publication not entitled to maintain action.

Distinguished in *Conner v. Standard Pub. Co.* 183 Mass. 480, 67 N. E. 596, holding evidence in libel action showing defendant's sources of information admissible where no malice charged; *O'Connell v. Boston Herald Co.* 129 Fed. 840, holding judge's opinion from whence statements taken admissible in action for libel in publishing inaccurate report of judicial proceedings.

Malice.

Cited in *Hubbard v. Allyn*, 200 Mass. 173, 86 N. E. 356, holding question of actual ill will and malice immaterial where statements made are untrue.

Liability for independent acts of others.

Cited in *American Bridge Co. v. Seeds*, 11 L.R.A.(N.S.) 1045, 75 C. C. A. 407, 144 Fed. 610, holding defendant not liable for wrongful act when the act of a third person independently intervenes not relied upon by defendant; *Pierson v. Chicago, R. I. & P. R. Co.* 95 C. C. A. 467, 170 Fed. 274, holding master not bound to anticipate wrongful act of his independent contractor causing unsafe the place of servants' work; *Canadian Northern R. Co. v. Walker*, 24 L.R.A.(N.S.) 1023, 97 C. C. A. 44, 172 Fed. 351, holding the negligence of shippers in loading causing injury to company servants not the natural consequence of their use of the road for which company can be held liable; *Penny v. Atlantic Coast Line R. Co.* 153 N. C. 302, 32 L.R.A.(N.S.) 1212, 69 S. E. 238, to the point that wrongful acts of independent third person, not intended by defendant, are not regarded by law as natural consequences of his wrong; *Tobler v. Pioneer Min. & Mfg. Co.* 166 Ala. 509, 52 So. 86, holding that wrongful act of third person not actually intended or reasonably to be expected by master, causing injury to servant is not result of master's wrong, and master is not liable.

Cited in note (36 Am. St. Rep. 843, 844) on proximate and remote cause.

Measure of damages for tort.

Cited in *Cole v. German Sav. & L. Soc.* 63 L. R. A. 421, 59 C. C. A. 599, 124 Fed. 119, denying liability of owner of building to visitor falling down elevator shaft, the unfastened door of which was thrown open by stranger; *Morrison v. Lawrence*, 186 Mass. 462, 72 N. E. 91, holding that intent may be an element on which a statutory tort rests where at the common-law intent affected only measure of damages.

Cited in note (27 Am. St. Rep. 758) on liability for torts.

— For libel.

Cited in *Bishop v. Journal Newspaper Co.* 168 Mass. 332, 47 N. E. 119, holding defendant in libel responsible for natural consequences of tort, and question of damages is for jury; *Turner v. Hearst*, 115 Cal. 400, 47 Pac. 129, holding injury to feelings from repetition of publication by others not element of damage; *Parker v. Republican Co.* 181 Mass. 397, 63 N. E. 931, holding proof of professional income as physician before and after libel, conduct of patients and acquaintances, and of feelings of plaintiff, admissible on question of damage; *Howland v. Flood*, 160 Mass. 517, 36 N. E. 482, holding fact that libel shows on its face that statements of third persons are relied on, may be shown in mitigation of damage; *Times Pub. Co. v. Carlisle Journal Co.* 36 C. C. A. 489, 94 Fed. 776, holding proof of matter in mitigation of damages not admissible, if not pleaded; *Ellis v. Brockton Pub. Co.* 198 Mass. 543, 126 Am. St. Rep. 454, 84 N. E. 1018, 15 A. & E. Ann. Cas. 83, holding that damages may be recovered including compensation for wounded feelings and loss of reputation in action for slander;

Ellis v. Brocton Pub. Co. 198 Mass. 542, 126 Am. St. Rep. 454, 84 N. E. 1018, 15 Ann. Cas. 83, holding that publication of a proper retraction may have the effect of lessening mischief caused by libel and is admissible in reduction of damages even where punitive damages are not allowed.

Cited in footnote to **Press Pub. Co. v. McDonald**, 26 L. R. A. 531, which authorizes punitive damages for failure of effort to verify truth of libelous despatch before printing in newspaper.

13 L. R. A. 102, **LAWRENCE v. METROPOLITAN ELEV. R. CO.** 126 N. Y. 483, 27 N. E. 765.

Independent wrong as affecting right to relief.

Cited in **Miller v. Enterprise Canal & Land Co.** 142 Cal. 214, 100 Am. St. Rep. 115, 75 Pac. 770, holding fact that dam obstructs navigable stream will not defeat right to enjoin trespasser from interfering therewith.

Damage to real property; evidence of use.

Cited in **Woolsey v. New York Elev. R. Co.** 134 N. Y. 327, 47 N. Y. S. R. 634, 31 N. E. 891, holding in estimating damage to rental value of premises, from operation of elevated railway, evidence as to use of premises immaterial.

Cited in footnote to **Edwards v. American Express Co.** 63 L.R.A. 467, which holds owner's property right in machine not destroyed by mere fact that it was so constructed that it could be used for gambling.

Measure of damages.

Cited in **Kernochan v. New York Elev. R. Co.** 128 N. Y. 567, 29 N. E. 65, and **Mortimer v. Manhattan R. Co.** 129 N. Y. 85, 29 N. E. 5, holding lessor of abutting property entitled to recover diminution in rental value of premises, occasioned by construction and operation of elevated railway, without acquiring easement in street; **Syracuse Solar Salt Co. v. Rome, W. & O. R. Co.** 11 App. Div. 563, 42 N. Y. Supp. 590, holding in action for damage from railway in street and to enjoin same, measure of damage is diminution in rental or usable value of premises, without regard to depreciation in value of land; **Rosenheimer v. Standard Gaslight Co.** 36 App. Div. 11, 55 N. Y. Supp. 192, holding measure of damage from injury continuing only while nuisance lasts, is diminution in rental value; **Covert v. Valentine**, 50 N. Y. S. R. 518, 21 N. Y. Supp. 219, holding that measure of damage for temporarily diminishing flow of water into pond is diminution in rental value or value of use of pond, caused by wrongful act, to time of commencement of suit.

Distinguished in **Pappenheim v. Metropolitan Elev. R. Co.** 128 N. Y. 453, 13 L. R. A. 407, 26 Am. St. Rep. 486, 28 N. E. 518, holding that vendor's right to recover for permanent injury to freehold from construction and operation of elevated railway ceases upon transfer of property.

13 L. R. A. 104, **Re PROUT**, 128 N. Y. 70, 27 N. E. 948.

Administrators; collection of estate.

Cited in **Maas v. German Sav. Bank**, 176 N. Y. 380, 98 Am. St. Rep. 689, 68 N. E. 658, Affirming 78 App. Div. 527, 77 N. Y. Supp. 256, holding foreign administrator cannot maintain action to recover property or collect debt of resident; **Steele v. Connecticut General L. Ins. Co.** 31 App. Div. 397, 53 N. Y. Supp. 373, holding administrator appointed in New York, where intestate died, may maintain action in that state, against Connecticut insurance company, upon policy payable in latter state.

13 L. R. A. 107, *NORFOLK & W. R. CO. v. COM.* 88 Va. 95.

Legislative powers of state.

Cited in *Isaacs v. Richmond*, 90 Va. 32, 17 S. E. 760, holding any act which tends to impair supremacy of Constitution, void, whatever purpose of legislature in enactment.

Cited in note (78 Am. St. Rep. 266) on acts which legislature may declare criminal.

— State statutes affecting interstate commerce.

Cited in *Western U. Teleg. Co. v. Tyler*, 90 Va. 300, 4 Inters. Com. Rep. 482, 44 Am. St. Rep. 910, 18 S. E. 280, holding state statute imposing penalty for failure to promptly deliver telegraph message, not interference with interstate commerce; *Norfolk & W. R. Co. v. Com.* 93 Va. 751, 34 L. R. A. 106, 57 Am. St. Rep. 827, 24 S. E. 837, holding transportation of empty coal cars from one state to another, for use in carrying coal outside latter state, not interstate commerce, and exempt from state regulation; *People v. Lake Shore & M. S. R. Co.* 2 Ill. C. C. 378, holding state legislation providing for manner of weighing and transferring grain shipped, invalid insofar as it applies to interstate shipments.

Cited in footnotes to *Lafarier v. Grand Trunk R. Co.* 17 L.R.A. 111, which holds state statute giving ticket holder stop-over rights not applicable outside of state; *Central Stockyards Co. v. Louisville & N. R. Co.* 63 L.R.A. 213, which holds that state cannot require delivery of interstate freight by one carrier to another within its borders in order that it may reach a particular depot.

Disapproved in *Hennington v. State*, 90 Ga. 402, 4 Inters. Com. Rep. 415, 17 S. E. 1009, sustaining statute prohibiting running of freight trains on Sunday, as applied to interstate traffic.

Overruled in *Norfolk & W. R. Co. v. Com.* 93 Va. 751, 34 L. R. A. 106, 57 Am. St. Rep. 827, 24 S. E. 837, holding statute prohibiting running of freight trains on Sunday, except when containing perishable freight or live stock, valid exercise of police power.

Sunday laws.

Cited in note (14 L. R. A. 184) on Sunday labor.

13 L. R. A. 114, *DOZIER v. FIDELITY & C. CO.* 46 Fed. 446.

What deemed accidental death, within accident policy.

Cited in *Western Commercial Travelers' Asso. v. Smith*, 40 L. R. A. 656, 29 C. C. A. 226, 56 U. S. App. 393, 85 Fed. 404, holding that death from blood poisoning due to abrasion of skin of toe from friction of shoe is from accidental means; *Schmid v. Indiana Travelers Acci. Asso.* 42 Ind. App. 497, 85 N. E. 1032, holding death by violent physical exertion in a rarified atmosphere not accidental within policy meaning; *Columbia Paper Stock Co. v. Fidelity & C. Co.* 104 Mo. App. 172, 78 S. W. 320, holding acute dropsy caused by infection from material given plaintiff to work on to be within indemnity policy for bodily injuries accidentally suffered; *Herdie v. Maryland Casualty Co.* 146 Fed. 398, on the rule that bodily injury by sun-stroke is not accidental; *Sullivan v. Modern Brotherhood*, 167 Mich. 531, — L.R.A.(N.S.) —, 133 N. W. 486, holding that insurer against accident is liable, where death or injury is caused by disease not resulting from any bodily infirmity or disease, existing at time of accident, but is itself caused by accident.

Cited in notes (30 L.R.A. 206, 209) on what constitutes an accident within meaning of accident insurance policy; (14 Eng. Rul. Cas. 25) on rules for construing insurance policies.

Distinguished in *North West Commercial Travellers' Asso. v. London Guar-*

antee & Acci. Co. 10 Manitoba L. Rep. 563, holding that death by exposure to an extraordinary period of cold weather, through breaking of wagon en route, is accidental within meaning of policy.

Exemption from liability in accident policy.

Distinguished in *Thornton v. Travelers Ins. Co.* 116 Ga. 127, 94 Am. St. Rep. 99, 42 S. E. 287, holding insurer liable under policy excepting accident from hernia, for injury rendered more serious by existing hernia; (13 L. R. A. 264) on death by external, violent, and accidental means.

Proximate cause of death.

Cited in note (17 L. R. A. 754) on proximate cause of death within meaning of life insurance policy.

13 L. R. A. 117, *HELFRICH v. CATONSVILLE WATER CO.* 74 Md. 269, 28 Am. St. Rep. 245, 22 Atl. 72.

Pollution of waters.

Cited in *West Arlington Improv. Co. v. Mt. Hope Retreat*, 97 Md. 203, 54 Atl. 982, holding pollution of water by hog pen will not defeat riparian owner's right to enjoin upper proprietor from emptying sewage in stream; *McEvey v. Taylor*, 56 Wash. 359, 26 L.R.A.(N.S.) 225, 105 Pac. 851, holding use of stream and pond to water cattle and keep geese on is not unreasonable, nor an unlawful pollution; *Fahnestock v. Feldner*, 98 Md. 343, 56 Atl. 785, holding that under some circumstances the emptying of kitchen drainage into a stream is not an unlawful pollution; *Aberdeen v. Lytle Logging & Mercantile Co.* 58 Wash. 370, 108 Pac. 945, holding that equity may restrain logging company from polluting stream constituting city water supply, by use of bridge which had settled into water, where bridge could be raised and injury obviated.

Cited in footnotes to *Barrett v. Mt. Greenwood Cemetery Asso.* 31 L. R. A. 109, which authorizes injunction against connecting city drain with spring brook; *Barnard v. Shirley*, 24 L. R. A. 568, which refuses to enjoin flow of water from artesian well into natural water course; *Weston Paper Co. v. Pope*, 56 L. R. A. 899, which sustains liability for pollution of stream by discharge from strawboard works, though business skilfully conducted; *Strobel v. Kerr Salt Co.* 51 L. R. A. 687, which authorizes injunction against diversion of stream for use in salt works, and pollution of stream by return of part of water.

Cited in notes (41 L.R.A. 740) on correlative rights of upper and lower proprietors as to use and flow of water in stream; (11 L.R.A.(N.S.) 1164) on protection from pollution of source of municipal water supply; (10 Eng. Rul. Cas. 244) on right of riparian owner to purity of water.

13 L. R. A. 120, *Ex parte HURN*, 92 Ala. 102, 25 Am. St. Rep. 23, 9 So. 515.

When mandamus will lie.

Cited in *People ex rel. Denison v. Butler*, 24 Colo. 409, 51 Pac. 510, denying application for writ of mandamus to compel inferior court to entertain and determine motion for temporary injunction; *Taylor v. Kolb*, 100 Ala. 606, 13 So. 779, holding appointment of inspectors of election, under statute requiring that two "shall be members of opposing political parties, if practicable," cannot be controlled by mandamus; *State ex rel. Atty. Gen. v. District Ct.* 13 N. D. 219, 100 N. W. 248, holding court cannot be compelled by mandamus to reverse an erroneous decision within jurisdiction also citing annotation on this point.

Cited in footnotes to *People ex rel. Daley v. Rice*, 14 L. R. A. 644, which authorizes mandamus to compel canvassing board to disregard illegal turn;

Jackson v. State, 42 L. R. A. 792, which sustains right to mandamus to compel reinstatement of pupil whose admission arbitrarily or capriciously refused.

Liability to search.

Cited in **Cunningham v. Baker**, 104 Ala. 169, 53 Am. St. Rep. 27, 16 So. 68, holding search of person unlawfully arrested in attachment suit, illegal; **State v. Edwards**, 51 W. Va. 230, 59 L. R. A. 476, 41 S. E. 429, holding that person in custody under criminal charge may be subjected to search to discover evidence of crime; **French v. State**, 94 Ala. 94, 10 So. 553, holding that weapons may be taken from person under arrest, although use thereof not attempted, nor other resistance made; **Newberry v. Carpenter**, 107 Mich. 570, 31 L. R. A. 164, 61 Am. St. Rep. 346, 65 N. W. 530, holding court without power to authorize officers of law to take exploded boiler from private premises, for use as evidence on trial of engineer for manslaughter; **Bessemer v. Eidge**, 162 Ala. 206, 50 So. 270, on the taking of property from the person of one lawfully arrested.

Cited in note (18 L.R.A.(N.S.) 254, 255) on right of officer, in executing criminal process, to take possession of evidentiary articles.

Garnishment of property in custody of law.

Cited in **Coffee v. Haynes**, 124 Cal. 567, 71 Am. St. Rep. 99, 57 Pac. 482, holding property of person charged with murder, taken possession of by chief of police, with consent of accused, but not connected with crime, subject to garnishment; **Holker v. Hennessey**, 141 Mo. 539, 39 L. R. A. 168, 64 Am. St. Rep. 524, 42 S. W. 1090, holding property taken from prisoner, with or without authority of law and in custody of sheriff, not subject to garnishment unless after conviction.

Cited in footnotes to **McAlmond v. Bevington**, 53 L. R. A. 597, which holds money deposited with justice by third person as bail, not subject to garnishment for prisoner's debt; **Allen v. Gerard**, 49 L. R. A. 351, which denies liability to garnishment of balance in hands of clerk of court, of proceeds of sale of perishable property attached; **Dale v. Brumbly**, 64 L. R. A. 112, which holds money in court not subject to attachment after final decree for disbursement.

Liability of officer taking property.

Cited in **Thorn v. Kemp**, 98 Ala. 425, 13 So. 749, holding constable liable for replevied property upon plaintiff's failure to execute bond, though claiming under mortgagee.

13 L. R. A. 126, **O'BRIEN v. BALTIMORE BELT R. CO.** 74 Md. 363, 22 Atl. 141.

Injunction; ex parte application.

Cited in **Chesapeake & P. Teleph. Co. v. Baltimore**, 89 Md. 709, 43 Atl. 784, holding appeal lies from refusal of injunction on *ex parte* application on bill, before answer filed.

What constitutes taking of private property.

Cited in **Garrett v. Lake Roland Elev. R. Co.** 79 Md. 284, 24 L. R. A. 398, 29 Atl. 830, holding constitutional right to compensation for private property taken for public use, does not extend to consequential damages to abutting property from erection in street of abutment for elevated railway; **Poole v. Falls Road Electric R. Co.** 88 Md. 536, 41 Atl. 1069, holding construction of electric railway in street, not such taking of property of abutting proprietor owning bed of street as entitles him to compensation; **De Lauder v. Baltimore County**, 94 Md. 7, 50 Atl. 427, holding destruction of private way by construction of culvert in public road such taking of property as entitles owner to compensation.

Cited in note (36 L.R.A.(N.S.) 696) on abutter's right to compensation for railroads in streets.

Liability for damage from lawful acts.

Cited in *Guest v. Church Hill*, 90 Md. 693, 45 Atl. 882, holding city changing grade of street, liable in damages for diverting surface water from natural channel, and throwing it upon land; *New York, P. & N. R. Co. v. Jones*, 94 Md. 37, 50 Atl. 423, holding railroad liable for damage from discharge of surface water upon land, through construction of embankment and ditches, in making necessary and proper for drainage of its right of way; *Lake Roland Elev. R. Co. v. Webster*, 81 Md. 535, 32 Atl. 186, holding elevated railway in street liable to lessee of near-by property for depreciation in rental value; *Kent County v. Godwin*, 98 Md. 90, 56 Atl. 478, on nonrecovery for injury to property caused by lawful public use of adjacent streets.

Cited in note (1 L.R.A.(N.S.) 56, 70) on effect of legislative authority upon liability for private nuisance.

Implied grants.

Cited in footnotes to *Cummings v. Perry*, 38 L. R. A. 149, which holds right to use elevator to convey goods to basement not appurtenant to lease of basement; *Irvine v. McCreary*, 49 L. R. A. 417, which holds sale of building creates easement in alley across rear of adjacent lot belonging to grantor.

13 L. R. A. 131, *ELECTRIC IMPROV. CO. v. SAN FRANCISCO*, 45 Fed. 593.

Followed, without discussion, in *Electric Improv. Co. v. Scannell*, 45 Fed. 596.

Police regulation of electric companies.

Cited in footnotes to *State ex rel. Wisconsin Teleph. Co. v. Janesville Street R. Co.* 22 L. R. A. 759, which holds right to compel guard wires for uninsulated trolley wires crossing telephone wires; *Jackson v. Wisconsin Teleph. Co.* 26 L. R. A. 101, which holds connection of barn with flag-staff on other building by telephone wire renders company liable for loss of barn by lightning striking flag-staff.

Cited in notes (31 L. R. A. 799) on police regulation of electric companies; (32 L. R. A. 401) on negligence as to electric wires on or in buildings; (39 L. R. A. 620) on municipal control over public nuisances upon public streets and highways created by street railroads and other electric companies; (38 L. R. A. 306) on municipal power over nuisances affecting health, safety, and personal comfort; (36 L. R. A. 601, 612) on power of municipalities to define, prevent, and abate nuisances; (36 L.R.A.(N.S.) 79) on municipal power to regulate installation of electrical work.

13 L. R. A. 134, *FANNING v. CHACE*, 17 R. I. 388, 33 Am. St. Rep. 878, 22 Atl. 275.

Libel and slander; words not actionable.

Cited in *Reid v. Providence Journal Co.* 20 R. I. 123, 37 Atl. 637, holding words not in themselves actionable, and not made so by innuendo, do not become so upon proof of special damage; *Mitchell v. Sharon*, 8 C. C. A. 432, 15 U. S. App. 353, 59 Fed. 983, Affirming 51 Fed. 427, holding charge that proposition to surrender certain letters for money is blackmailing scheme, without charging making of threats, not actionable; *Mitchell v. Donanski*, 28 R. I. 96, 9 L.R.A. (N.S.) 172, 125 Am. St. Rep. 717, 65 Atl. 611, 12 A. & E. Ann. Cas. 1019, holding a statement that a certain person threatened to assault and kill another is not slanderous per se; *Browning v. Com.* 116 Ky. 285, 76 S. W. 19, holding a writing stating that a certain person would purloin a printing outfit if given

a chance is actionable per se when calculated to bring person charged into contempt; *Curtis v. Iseman*, 137 Ky. 801, 127 S. W. 160, holding that to say that person was trying or attempting to steal does not constitute slander; *Whitley v. Newman*, 9 Ga. App. 97, 70 S. E. 686, holding that spoken words charging intention to commit crime in future are not actionable.

Cited in note (116 Am. St. Rep. 809) on what words are libelous per se.

What constitutes criminal intent.

Cited in footnote to *State v. Zichfeld*, 34 L. R. A. 784, which holds man may be guilty of bigamy notwithstanding belief that former marriage annulled.

13 L. R. A. 137, *SPECT v. SPECT*, 88 Cal. 437, 22 Am. St. Rep. 314, 26 Pac. 203.

Findings of fact.

Cited in *Reese v. Bald Mountain Consol. Gold Min. Co.* 133 Cal. 288, 65 Pac. 578, holding that failure of trial judge in finding of facts to find upon material issue is reversible error.

Right to recover mortgaged property.

Cited in *Kelso v. Norton*, 65 Kan. 789, 93 Am. St. Rep. 308, 70 Pac. 896, holding ejectment will not lie against mortgagee in possession while debt is unpaid; *Boyce v. Fisk*, 110 Cal. 113, 42 Pac. 473, holding debtor's title cannot be quieted as against deed given as security, after debt is barred, until debt is paid; *Zellerbach v. Allenberg*, 99 Cal. 69, 33 Pac. 786, holding debtor cannot recover pledged property after debt has become barred, without first paying debt; *Bradley v. Norris*, 63 Minn. 166, 65 N. W. 357, holding time within which action to redeem from mortgage must be begun commences to run from time mortgagee goes into possession; *Barbour v. Flick*, 126 Cal. 634, 59 Pac. 122, holding cancellation of mortgage may be awarded as damages, in action for fraud and deceit in exchange of properties; *McClory v. Ricks*, 11 N. D. 43, 86 N. W. 1042, holding that possession with consent of mortgagor or after valid foreclosure are the only kinds of possession by mortgagee that will preclude ejectment without payment of mortgage debt; *Peshine v. Ord*, 119 Cal. 314, 63 Am. St. Rep. 131, 51 Pac. 536, holding that mortgagor may not obtain recovery of mortgaged property in any event unless he satisfy the mortgage; *Burns v. Hiatt*, 149 Cal. 621, 117 Am. St. Rep. 157, 87 Pac. 196, holding that purchaser of equity of redemption not included in foreclosure process must pay mortgage debt before he may have cloud of foreclosure removed; *Green v. Thornton*, 8 Cal. App. 163, 96 Pac. 382, holding ejection not maintainable against mortgagee in possession except in payment of mortgage debt; *Hooper v. Young*, 140 Cal. 280, 98 Am. St. Rep. 56, 74 Pac. 140, holding that where mortgagee is in possession after condition broken by consent of mortgagor such mortgagee is entitled to possession until debt secured thereby is paid; *Brandt v. Thompson*, 91 Cal. 462, 27 Pac. 763, holding that title can only be quieted as against one holding as a mortgagee in possession by payment of the mortgage; *Investment Securities Co. v. Adams*, 37 Wash. 215, 79 Pac. 625, on possession of mortgagee as entitling him to payment of debt secured though debt is outlawed; *Finlayson v. Peterson*, 11 N. D. 55, 89 N. W. 855, holding that a mortgagee in possession under agreement expressed in mortgage cannot be dispossessed under any circumstances without payment of mortgaged debt though mortgage is a mere lien; *Raggio v. Palmtag*, 155 Cal. 802, 103 Pac. 312, holding that purchaser of equity of redemption cannot quiet title against mortgagee holding premises under purchase at void foreclosure sale unless he pay mortgage debt and this is true though the debt be outlawed; *Burnes v. Hiatt*, 149 Cal. 623, 117 Am. St. Rep. 157, 87 Pac. 196, holding that possession under invalid foreclosure sale by mortgagee will support the rule

that ejectment may not be had against him unless mortgage debt be paid though it be barred by limitation; *Gage v. Riverside Trust Co.* 86 Fed. 998, holding that complainant cannot compel surrender of pledged or mortgaged property held as security for debt without full payment of debt though statute of limitation has completely run out in his favor; *Cameron v. Ah Quong*, 8 Cal. App. 313, 96 Pac. 1025, holding intervener in ejectment states no defense by showing that he is an outlawed mortgagee of the premises where he fails to connect the possession of defendant with himself.

Distinguished in *Sechrist v. Rialto Irrig. Dist.* 129 Cal. 646, 62 Pac. 261, holding action by taxpayer for cancellation of illegal bonds of irrigation district maintainable, without offer to return consideration.

Rights in pledged property.

Cited in *Commercial Sav. Bank v. Hornberger*, 140 Cal. 20, 73 Pac. 625, holding that pledgee may retain pledge until the debt is paid, though such debt be barred by limitation; *Puckhaber v. Henry*, 152 Cal. 423, 125 Am. St. Rep. 75, 93 Pac. 114, 14 A. & E. Ann. Cas. 844, holding that a creditor may sue on a life insurance policy given as security on a debt which is at time of suit unpaid and outlawed, he having rights similar to mortgagee in possession.

Statute of limitations as affecting equitable claim.

Cited in *Farmers' Loan & T. Co. v. Denver, L. & G. R. Co.* 60 C. C. A. 593, 126 Fed. 52, holding statute of limitations will not prevent assertion of equitable claim by lender of money to pay purchase-money mortgage against mortgagor claiming lien on after-acquired property; *Tracy v. Wheeler*, 15 N. D. 250, 6 L.R.A.(N.S.) 519, 107 N. W. 68, holding that cancellation of outlawed mortgage cannot be had at suit of mortgagor or his successor where debt secured is unpaid.

Cited in note (34 L.R.A.(N.S.) 357) as to whether limitation runs against mortgagee in possession.

— As affecting affirmative proceedings.

Cited in *Marshutz v. Seltzor*, 5 Cal. App. 143, 89 Pac. 877, holding that foreclosure of mortgage securing debt barred by limitation cannot be decreed in cross-complaint in action to quiet title, such proceeding being affirmative; *Cassell v. Lowry*, 164 Ind. 5, 72 N. E. 640, holding that title cannot be quieted where plaintiff shows in his pleadings that the debt secured by the lien is unpaid, though the lien holder is barred from affirmative action thereon by limitation.

Equitable prerequisites to recovery.

Cited in *Trippet v. State*, 149 Cal. 521, 8 L.R.A.(N.S.) 1215, 86 Pac. 1084, holding that title may not be quieted unless plaintiff pays outstanding claim against same, though such claim be unenforceable at law; *Payne v. Neuval*, 155 Cal. 51, 99 Pac. 476, holding contract calling for yearly royalty for use of mine whether operated or not, not enforceable on part of user unless he tender or pay royalties accrued though mine not used; *Fitch v. Miller*, 200 Ill. 179, 65 N. E. 650, holding that partition may not be had of an equity of redemption lost by laches of mortgagor where there are no equitable considerations requiring such partition.

Possession of mortgagee by parol agreement with mortgagor.

Approved in *Bullion & Exch. Bank v. Otto*, 59 Fed. 257, holding that an executed parol agreement whereby mortgagor gives possession of mortgaged premises to mortgagee is not within statute of frauds and is binding between the parties.

13 L. R. A. 140, *VOLLAND v. BAKER*, 32 Neb. 391, 49 N. W. 381.

Appeals from county court; pleadings.

Cited in *People's Nat. Bank v. Geisthardt*, 55 Neb. 234, 75 N. W. 582, holding claim of increased amount in petition in district court on appeal from county court, immaterial, if sum within county court's jurisdiction.

Independence of warranty and agreement to pay price.

Cited in *Saunders v. Hammond*, 28 Pa. Co. Ct. 409, holding that suit may be had on a warranty given in sale of chattel even though vendee has paid note given as part payment after notice of breach of warranty.

13 L. R. A. 142, *KENYON v. KNIPE*, 2 Wash. 394, 27 Pac. 227.

Followed, without discussion, in *Kenyon v. Squire*, 2 Wash. 404, 28 Pac. 1025, and *Dearborn v. Moran*, 2 Wash. 406, 27 Pac. 230.

Interest of riparian owner in tide lands.

Cited in *State ex rel. Bartlett v. Forrest*, 12 Wash. 486, 41 Pac. 194, holding purchaser of upland lots according to plat estopped from claiming tide lands beyond line of lots purchased; *Grant v. Oregon R. & Nav. Co.* 49 Or. 330, 90 Pac. 178, holding plaintiff to take without riparian rights by a grant to him of upper part of a tide lot as per city plot according to which there were other lots between grantor's and low water; *Oliver v. Klamath Lake Nav. Co.* 54 Or. 99, 102 Pac. 786, holding that where land is granted as to plat and grantee purchases lots north of a certain street he takes no rights south of the street though the street and south end of his lots are under water; *Chlopeck Fish Co. v. Seattle*, 64 Wash. 333, 117 Pac. 232, holding that abutters on "slip" dedicated to public use cannot claim compensation from city because of erection of wharf thereon.

Distinguished in *Seattle & M. R. Co. v. Carraher*, 21 Wash. 494, 58 Pac. 570, holding under statute giving purchaser of upland preference in right to purchase tide lands, owner conveying upland transfers whatever interest he may have in tide lands.

Certainty of description in deed.

Cited in *League v. Scott*, 25 Tex. Civ. App. 320, 61 S. W. 521, holding deed referring to certain land patent for description, not void for uncertainty.

13 L. R. A. 147, *INDIANAPOLIS v. STATE*, 129 Ind. 14, 28 N. E. 61.

13 L. R. A. 157, *EASTHAMPTON v. HAMPSHIRE COUNTY*, 154 Mass. 424, 28 N. E. 298.

Eminent domain; taking land already devoted to public use.

Cited in *Boston v. Brookline*, 156 Mass. 175, 30 N. E. 611, holding that authority by special act to condemn land for laying water pipes through neighboring town to reservoir does not preclude town from laying out highway over same land under general statute; *Folsom v. Middlesex County*, 173 Mass. 49, 53 N. E. 155, holding under petition for laying out new highway, commissioners may lay out way so as to include portion of old way; *Re Certain Land*, 119 Fed. 455, holding municipality may contest right of Federal government, under authority delegated by state, to condemn for postoffice land dedicated to town for public park; *Re Condemnation of Land*, 128 Fed. 186, holding town entitled to compensation for taking of easement of aqueduct through private land condemned by United States; *United States v. Certain Land*, 165 Fed. 789, on the taking of property already dedicated to public use.

Cited in note (37 L.R.A.(N.S.) 103) on power to take property already devoted to public use.

13 L. R. A. 158, *HAHN v. BAKER LODGE NO. 47*, A. F. & A. M. 21 Or. 30, 28 Am. St. Rep. 723, 27 Pac. 166.

Grants creating easements.

Cited in footnotes to *Irvine v. McCreary*, 49 L. R. A. 417, which holds sale of building creates easement in alley across rear of adjacent lot belonging to grantor; *Cummings v. Perry*, 38 L. R. A. 149, which holds right to use elevator to convey goods to basement not appurtenant to lease of basement; *Barr v. Lamaster*, 32 L. R. A. 451, which denies right to compel partition of reciprocal easements created by agreement in use of stores, hallways, etc.

Cited in note (10 Eng. Rul. Cas. 60) as to when grant of an easement will be implied.

Extinguishment of easement.

Cited in *Dennis Long & Co. v. Louisville*, 98 Ky. 89, 32 S. W. 271, holding easement terminates when purpose for which it was granted ceases; *Southern R. Co. v. Memphis*, 38 C. C. A. 501, 97 Fed. 822, holding when right to operate street railway is lost, right to maintain track ceases; *Shirley v. Crabb*, 138 Ind. 205, 46 Am. St. Rep. 376, 37 N. E. 130, holding right reserved in deed to use of stairways and hall for ingress and egress to upper part of building extinguished by destruction of building; *Badger Lumber Co. v. Stepp*, 157 Mo. 385, 57 S. W. 1059, holding where ownership of lot and that of part of building thereon in different persons, parties are adjoining tenants, not tenants in common.

Cited in note (10 Eng. Rul. Cas. 306) on extinguishment of easement by change in dominant tenement.

Distinguished in *Townsend v. Michigan C. R. Co.* 42 C. C. A. 574, 101 Fed. 761, holding railroad acquiring land for right of way by deed does not forfeit its interest therein by nonuse, so as to entitle another railroad to cross same without compensation.

Grant of rooms.

Cited in *Holzhausen v. Hoskins*, 115 Mo. App. 267, 91 S. W. 410, holding that lease of rooms in a building does not take possession of an outer wall not included in purpose of lease away from possession of lessor to the extent that he cannot sue for forcible entry committed on the wall.

Cited in note (3 L.R.A.(N.S.) 512) on relationship of owners of different floors in building.

13 L. R. A. 161, *YALE v. WEST MIDDLE SCHOOL DIST.* 59 Conn. 489, 22 Atl. 295.

Domicil of children.

Cited in *Board of Education v. Lease*, 64 Ill. App. 61, holding child residing with temporary guardian, by appointment of parent, entitled to admission to public school of district where domiciled; *Board of Education v. Hobbs*, 8 Okla. 296, 56 Pac. 1052, holding right of child to admission to public school in district where he has resided for number of years not destroyed by separation of parents; *Kelsey v. Green*, 69 Conn. 301, 38 L. R. A. 474, 37 Atl. 679, holding probate court of district in which minor has dwelling place has jurisdiction to appoint guardian; *McNish v. State*, 74 Neb. 264, 104 N. W. 186, 12 A. & E. Ann. Cas. 896, sustaining mandamus to compel school board to allow child living in district to attend school free though parents are non-resident and child is living with foster mother, though not legally adopted: *People ex rel.*

Brooklyn Children's Aid Soc. v. Hendrickson, 54 Misc. 343, 104 N. Y. Supp. 122, holding orphan child placed in private home for parental care entitled to free "common school" education in district in which his new home is located; **Stanford Graded Common School Dist. v. Powell**, 145 Ky. 94, 36 L.R.A.(N.S.) 342, 140 S. W. 67, holding residence for school purposes of child whose father, on mother's death, is without home or means, to be with his aunt, with whom he lives.

Cited in notes (26 L. R. A. 581) on what constitutes residence entitling children to privileges of public schools; (36 L.R.A.(N.S.) 342) on residence entitling child to school privileges; (9 Eng. Rul. Cas. 714) on domicile as a permanent home.

Common-school privileges.

Cited in note (41 L. R. A. 605) on right to exclude, suspend, or expel pupils from school for misconduct of pupil or parent.

13 L. R. A. 163, **PEOPLE v. JOHNSON**, 86 Mich. 175, 24 Am. St. Rep. 116, 48 N. W. 870.

Due process of law.

Cited in **Burroughs v. Eastman**, 101 Mich. 420, 24 L. R. A. 861, 45 Am. St. Rep. 419, 59 N. W. 817, holding city charter giving police officers power to arrest, without process, for violation of any ordinance of common council in their presence, not unconstitutional.

Validity of arrest without warrant.

Cited in **McCullough v. Greenfield**, 133 Mich. 467, 62 L. R. A. 908, footnote p. 906, 95 N. W. 532, holding arrest under telephonic instructions from officer holding warrant illegal.

Cited in footnote to **McCullough v. Greenfield**, 62 L.R.A. 906, which holds that possession of warrant by officer will not justify arrest of accused by police department of another town under direction by telephone by such officer.

Cited in note (84 Am. St. Rep. 687) on right of policeman to make arrest.

Breach of peace.

Cited in **People v. Burman**, 154 Mich. 157, 25 L.R.A.(N.S.) 256, 117 N. W. 589, holding that a display of red flags known by persons displaying, to be highly incentive to violence, causing others to break the peace is itself a breach of peace.

Cited in note (32 L.R.A.(N.S.) 507) on disorderly language as disturbance of peace.

13 L. R. A. 166, **FOSTER v. STEVENS**, 63 Vt. 175, 22 Atl. 78.

Taxation of corporations.

Cited in footnote to **State, Singer Mfg. Co., Prosecutor, v. Heppenheimer**, 32 L. R. A. 643, which holds company exempt from taxation under exemption of its shares.

Cited in notes (58 L. R. A. 578, 592, 605) on taxation of capital stock of corporations in the United States; (60 L. R. A. 367) on constitutional equality in the United States in relation to corporate taxation.

Assessment for tax in part illegal.

Cited in **Meacham v. Newport**, 70 Vt. 268, 40 Atl. 729, holding in trespass for taking property to satisfy tax in part illegal, damages not reduced to extent tax valid.

13 L. R. A. 169, *HENDERSON v. STATE SOLDIERS & SAILORS MONUMENT*, 129 Ind. 92, 28 N. E. 127.

State revenues; implied appropriation.

Cited in *State ex rel. Noonan v. King*, 108 Tenn. 277, 67 S. W. 812, and *State ex rel. Henderson v. Burdick*, 4 Wyo. 282, 24 L. R. A. 269, footnote p. 266, 33 Pac. 125, holding statute providing that fixed salary of specified officer shall be paid in "same manner as other salaries and expenses of state officers are paid," operates as appropriation; *Johnson v. Cameron*, 2 Okla. 276, 37 Pac. 1055, holding statute making expenses of sheriff, in care of insane, payable out of territorial treasury, not modified by annual appropriation for commitment and care of insane.

Cited in footnote to *Carter v. Thorson*, 24 L. R. A. 734, which upholds legislative power to incur indebtedness for public printing without prior appropriation.

Cited in notes (13 L. R. A. 223) on preliminaries necessary to withdrawal of public funds; (16 L.R.A.(N.S.) 632) on requisites of appropriation for official salary or expenses.

Distinguished in *State Soldiers' & S. Monument v. Daily*, 150 Ind. 677, 50 N. E. 814, holding expenses essential to construction of soldiers and sailors monument must be paid out of fund created for monument, and not out of general state fund.

Impairment of vested rights.

Cited in footnote to *Allen v. Forrest*, 24 L. R. A. 606, which holds statutory privilege of acquiring tide lands not vested right.

13 L. R. A. 173, *SUMNER v. DARNELL*, 128 Ind. 38, 27 N. E. 162.

Conditions subsequent.

Cited in *Higbee v. Rodeman*, 129 Ind. 247, 28 N. E. 442, holding deed to township for nominal consideration, "for common-school purposes," does not create condition subsequent, preventing sale by township, after maintaining school for thirty years; *Newpoint Lodge v. Newpoint*, 138 Ind. 145, 37 N. E. 650, holding statement that property is conveyed "for the use of the common schools," not condition causing reversion to grantor upon abandonment for use for school; *Hunter v. Murfee*, 126 Ala. 132, 28 So. 7, holding recitals, "for use of" county, and "in consideration of the seat of justice having been permanently established," not condition subsequent, causing reversion on removal of county seat; *Adams v. First Baptist Church*, 148 Mich. 145, 11 L.R.A.(N.S.) 523, 111 N. W. 757, 12 A. & E. Ann. Cas. 224, construing language in a deed specifying use to which property would be put not to create a condition subsequent; *Hanby v. Bailey*, 11 Del. Co. Rep. 374, holding that grant to trustees, their heirs and assigns for religious use conveys fee.

Cited in notes (19 L. R. A. 265) on condition in deed that land is to be used for a specified charitable public or quasi-public purpose; (79 Am. St. Rep. 756) on what words create condition subsequent; (35 L.R.A.(N.S.) 603) on reverter of land dedicated or conveyed for courthouse, upon failure to use or removal of county seat.

13 L. R. A. 177, *STATE ex rel. WORRELL v. CARR*, 129 Ind. 44, 28 Am. St. Rep. 163, 28 N. E. 88.

Officers.

Cited in notes (17 L. R. A. 250) on who are public officers; (13 L. R. A. 676)

on tenure of public office; incompatibility of office; (140 Am. St. Rep. 192) on defacto officers.

Right of officer de jure to salary.

Cited in *Warden v. Bayfield County*, 87 Wis. 185, 58 N. W. 248, holding payment of salary to one usurping county office, no defense to claim of *de jure* officer for salary for same period; *Chicago v. Luthardt*, 191 Ill. 523, 61 N. E. 410, Affirming 91 Ill. App. 331, holding exhaustion of appropriation no defense to claim for salary by *de jure* officer during time office unlawfully held by another; *Rasmussen v. Carbon County*, 8 Wyo. 301, 45 L. R. A. 302, 56 Pac. 1098, holding payment of salary to incumbent of county office, pending election contest, no defense to claim for salary by successful contestant, although duties of office not performed by him; *Stephens v. Campbell*, 67 Ark. 492, 55 S. W. 856, holding officer *de facto*, without legal title to office, not entitled to fees of office during time duties performed by him; *Bullis v. Chicago*, 235 Ill. 480, 85 N. E. 614, holding officer wrongfully kept from office entitled to salary connected therewith for the period of time kept therefrom where it has not been paid to another; *State v. Fabrick*, 16 N. D. 99, 112 N. W. 74, holding that a duly elected school superintendent holding over after term expires pending election and qualification of successor and performing duties of such office is entitled to compensation provided by law for the incumbent of the office; *Gibbs v. Manchester*, 73 N. H. 270, 61 Atl. 128, on non-recovery of salary during time prevented from serving by *de jure* officer, where such salary has been paid in good faith to defacto officer acting in his place; *Stearns v. Sims*, 24 Okla. 632, 24 L.R.A. (N.S.) 479, 104 Pac. 44, holding *de jure* chief of police not entitled to salary for term of wrongful suspension pending suit on charges against him where city has paid salary provided by law to defacto chief; *Tanner v. Edwards*, 31 Utah, 86, 120 Am. St. Rep. 919, 86 Pac. 765, 10 A. & E. Ann. Cas. 1091, holding *de jure* officer entitled to salary connected with office though he does not personally assume the duties thereof and compensation for such period of non-assumption is paid the *de facto* incumbent; *State ex rel. Tolerton v. Gordon*, 236 Mo. 167, 139 S. W. 403, holding that proviso in appropriation bill declaring that money appropriated shall not be available so long as present incumbent retains office is indirect way of removing him from office and invalid.

Cited in notes (19 L. R. A. 690) on right of officer *de jure* to salary for period during which *de facto* officer has acted and received pay; (16 L.R.A.(N.S.) 635) on requisites of appropriation for official salary or expenses.

Legislative usurpation of judicial functions.

Cited in *McSurely v. McGrew*, 140 Iowa, 167, 132 Am. St. Rep. 248, 118 N. W. 415, holding an act declaring certain actions void and without jurisdiction going into effect after commencement of such an action, unconstitutional.

13 L. R. A. 183, *COOK v. STATE*, 90 Tenn. 407, 16 S. W. 471.

Followed, without discussion, in *Swafford v. Tempelton*, 108 Fed. 310.

Constitutional law; class legislation.

Followed in *Turner v. State*, 111 Tenn. 608, 69 S. W. 774, holding that act made applicable only to counties over a certain population is not class legislation; *Murphy v. State*, 114 Tenn. 533, 86 S. W. 711, holding same regarding law made applicable to counties within fixed limits of population.

Cited in *Peterson v. State*, 104 Tenn. 129, 56 S. W. 834, holding statute requiring lands to be fenced in counties of stated population not class legislation; *Condon v. Maloney*, 108 Tenn. 83, 65 S. W. 871, holding statute regulating laying out and working of public roads in counties of stated population, not unconstitu-

tional because applicable to only one county; *Smith v. State*, 54 Tex. Crim. Rep. 308, 113 S. W. 289, sustaining law specifically made applicable only to counties over a certain population; *Burks v. Walker*, 25 Okla. 368, 109 Pac. 544, holding that act creating and establishing county superior court for each county having population of 30,000, is not void as class legislation; *Turner v. State*, 111 Tenn. 602, 69 S. W. 774, holding that jury act applicable only to counties containing certain number of inhabitants is not class legislation; *Russell v. Esmeralda County*, 32 Nev. 315, 107 Pac. 890, holding that statute regulating fees of officers and providing that statute shall not apply to fees of officers of any county wherein total vote of last election did not exceed 800, is constitutional.

Cited in footnotes to *Sutton v. State*, 33 L. R. A. 589, which holds classification of counties according to previous census without respect to actual population void; *Hamilton County v. Rasche Bros.* 19 L. R. A. 584, which holds statute as to taxes not applying to all parts of state unconstitutional; *State, H. Alexander, Prosecutor, v. Elizabeth*, 23 L. R. A. 525, which holds invalid special statute discriminating between municipalities already having and those not having race course; *Milwaukee County v. Isenring*, 53 L. R. A. 635, which holds act regulating sheriff's fees for particular county, local; *Longview v. Crawfordsville*, 68 L.R.A. 623, which holds void classification of cities for purposes of legislation so as to make particular law conferring power to annex territory applicable to those having population between six and seven thousand.

Equality of immunities and privileges.

Cited in *State v. Old*, 95 Tenn. 731, 31 L. R. A. 839, 34 S. W. 690, holding statute prescribing what may be deemed "satisfactory evidence" of payment of poll tax, within constitutional provision prescribing qualification of voters, not unconstitutional; *Atwater v. Hassett*, 27 Okla. 306, — L.R.A.(N.S.) —, 111 Pac. 802, holding that statute regulating preparation of ballot and voting for constitutional amendments is constitutional.

Cited in note (14 L. R. A. 580) on constitutional equality of privileges, immunities, and protection.

Elections; marking ballot.

Cited in *Moore v. Sharp*, 98 Tenn. 506, 41 S. W. 587, holding marking ballot for illiterate, if physically disabled, not illegal.

Cited in footnotes to *State ex rel. Mize v. McElroy*, 16 L. R. A. 279, which holds name written on ballot in place of printed name erased cannot be counted; *State ex rel. Phelan v. Walsh*, 17 L. R. A. 364, in which various decisions as to validity of ballots are made.

Cited in note (47 L. R. A. 806) on marking official ballot.

13 L. R. A. 185, *KATZENBERGER v. LAWO*, 90 Tenn. 235, 25 Am. St. Rep. 681, 16 S. W. 611.

Applicability of railroad statutes to street railways.

Cited in *Chattanooga Rapid Transit Co. v. Walton*, 106 Tenn. 422, 58 S. W. 737, holding statute regulating railroads applicable to dummy lines, whether in or out of city; *Massachusetts Loan & T. Co. v. Hamilton*, 32 C. C. A. 50, 59 U. S. App. 403, 88 Fed. 592, holding statute fixing priority of judgment lien "against any railway corporation" for personal injury not applicable to street railways; *Savannah, T. & I. of H. R. Co. v. Williams*, 117 Ga. 418, 61 L.R.A. 251, footnote, p. 249, 43 S. E. 751, holding chartered street railroad a railroad company within statute as to liability for negligence of fellow servant; *Birmingham Mineral R. Co. v. Jacobs*, 92 Ala. 203, 12 L. R. A. 832, 9 So. 320, holding dummy line a rail-

road within statute requiring trains to stop before crossing another railroad; *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L. R. A. 698, 9 C. C. A. 672, 22 U. S. App. 220, 61 Fed. 611, holding horse railway not a railroad within statute requiring trains to stop before crossing intersecting railroad.

Cited in footnote to *Diebold v. Kentucky Traction Co.* 63 L.R.A. 637, which holds an electric railway for carrying of passengers and freight between cities in different states a trunk railway within exception of such railways from constitutional prohibition against granting franchises to other than the highest bidder.

Conflict of city ordinance with state statute.

Cited in *Little Rock & M. R. Co. v. Wilson*, 90 Tenn. 274, 13 L. R. A. 365, 25 Am. St. Rep. 693, 16 S. W. 613, holding railroad required to observe state statute regulating operation, though running in city having ordinance in conflict therewith.

Cited in notes (25 L. R. A. 292) on duty to maintain lookout on railroad train; (33 L. R. A. 33) on how far proceedings for violation of ordinances are to be regarded as prosecutions for crime.

13 L. R. A. 187, *GESSNER v. PALMATER*, 89 Cal. 89, 24 Pac. 608, 26 Pac. 789.
Vendor's lien.

Followed in *Willman v. Friedman*, 3 Idaho, 738, 35 Pac. 37, holding vendor retaining title until payment of purchase price has security barring resort to attachment; *National Bank v. Lock*, 17 Wash. 531, 61 Am. St. Rep. 923, 50 Pac. 478, holding that where payee of a note executed a bond for deed to make calling for deed on payment of note an assignee of the note acquires lien on property bonded for sale.

Cited in *Longmaid v. Coulter*, 123 Cal. 212, 55 Pac. 701, holding action at law upon notes for purchase money of real estate not waiver of vendor's lien; *Lewis v. Shearer*, 189 Ill. 186, 59 N. E. 580, holding assignment of notes given by vendee under bond for deed to real estate carries with it vendor's lien; *First Nat. Bank v. Edgar*, 65 Neb. 344, 91 N. W. 404, holding lien created by reservation of title in vendor is assignable; *Woolley v. Wickerd*, 97 Cal. 71, 31 Pac. 733, to the point that lien of vendor of land is not assignable; *Claiborne v. Castle*, 98 Cal. 34, 32 Pac. 807, holding that acts and conduct of vendor which indicate a waiver of the lien may be shown by parol.

Cited in footnotes to *Frame v. Sliter*, 34 L. R. A. 690, which denies implied equitable lien to grantor of land for unpaid purchase money; *Doty v. Deposit Bldg. & L. Asso.* 43 L. R. A. 551, which holds vendor's lien enforceable against real estate for entire consideration of sale of real and personal property in gross.

Cited in notes (37 L. ed. U. S. 110) on existence, enforcement and waiver of vendor's lien; (137 Am. St. Rep. 186, 187, 188) on waiver of vendor's lien.

Distinguished in *Vance Redwood Lumber Co. v. Durphy*, 8 Cal. App. 671, 97 Pac. 702, holding that purchaser's agreement to pay taxes on the land is not obnoxious to constitution forbidding contracts by debtor to pay tax on mortgage or lien.

13 L. R. A. 190, *PENNSYLVANIA CO. v. LANGENDORF*, 48 Ohio St. 316, 29 Am. St. Rep. 553, 28 N. E. 172.

Followed without discussion in *Railway Co. v. Moyer*, 53 Ohio St. 664, 44 N. E. 1145.

Risks assumed in performance of duty.

Cited in *Belleville Stone Co. v. Mooney*, 60 N. J. L. 336, 38 Atl. 835, holding L.R.A. Au. Vol. II.—61.

it question for jury whether employee was performing duty to employer before heeding blast signal; *Warren v. Mendenhall*, 77 Minn. 153, 79 N. W. 661, holding it question for jury whether driver of fire-department truck, injured in collision with street car, negligent in fast driving; *Phelon v. Westfield*, 154 Mass. 465, 28 N. E. 899, holding it not contributory negligence *per se* to drive over road known to be dangerous, in effort to get home; *Corbin v. Philadelphia*, 195 Pa. 472, 49 L. R. A. 724, 78 Am. St. Rep. 825, 45 Atl. 1070, holding whether one voluntarily risking life in attempting rescue of another from great and imminent danger, guilty of contributory negligence, is mixed question of law and fact; *Maryland Steel Co. v. Marney*, 88 Md. 498, 42 L. R. A. 842, 71 Am. St. Rep. 441, 42 Atl. 60, holding interposition of servant to avert consequence of negligence of fellow servant not contributory negligence; *Illinois C. R. Co. v. Atwell*, 100 Ill. App. 518, holding section hand attempting to remove hand car from track before approaching train, in obedience to order of foreman, not negligent; *Fort Worth & D. C. Ry. v. Gilstrap*, 25 Tex. Civ. App. 308, 61 S. W. 351, holding error in charge authorizing recovery not immaterial on ground that plaintiff was injured in removing push-car and timber from before approaching train, where such issue was not submitted to jury; *Chicago Terminal Transfer Ry. v. Kotoski*, 101 Ill. App. 306, holding negligence of person delaying his own escape in attempt to aid another from trestle in front of railroad train, question for jury; *Saylor v. Parsons*, 122 Iowa, 681, 64 L. R. A. 542, 101 Am. St. Rep. 284, 98 N. W. 500, holding contributory negligence of one seeking to rescue another from imminent danger, question for jury; *Pittsburg, C. C. & St. L. Ry. v. Lynch*, 69 O. S. 133, 63 L. R. A. 504, 100 Am. St. Rep. 658, 68 N. E. 703, holding railroad liable to watchman at crossing injured while rescuing negligent woman from car negligently switched; *Whitworth v. Shreveport Belt Ry.* 112 La. 373, 65 L. R. A. 129, 36 So. 414, holding lineman grasping charged wire in attempt to save fellow servant not guilty of contributory negligence; *Seymour v. Winnipeg Electric Ry.* 19 Manitoba L. Rep. 418, holding person who rushed in front of rapidly approaching street car to save life of child and was injured had cause of action for negligence against street car company; *Dixon v. New York, N. H. & H. Ry.* 207 Mass. 130, 92 N. E. 1030, declaring it was not negligence as a matter of law for one to attempt to rescue another from a dangerous position at the risk of injury to himself; *Michaels v. Chicago, B. & Q. Ry.* 146 Wis. 476, 131 N. W. 892, holding it could not be said that a person was guilty of contributory negligence as a matter of law, when becoming suddenly aware of the close approach of a train he is killed while attempting to get his team off of the track; *Mobile & O. Ry. v. Ridley*, 114 Tenn. 734, 86 S. W. 606, 4 Ann. Cas. 925, sustaining liability where employee of railroad in attempting to rescue boy from track was himself killed where railroad failed to give statutory signal; *Norris v. Atlantic Coast Line Ry.* 152 N. C. 514, 27 L.R.A.(N.S.) 1068, 67 S. E. 1017, holding it not negligence for one to jump across a railroad track in front of a moving train to rescue one in danger on track because of negligence of railroad company; *Citizens' Motor Car Co. v. Hamilton*, 12 C. C. N. S. 382, 32 C. C. 121, holding that person crossing in front of street car and confronted by automobile running fast is not negligent in attempting to pass beyond it; *Seymour v. Winnipeg Electric Ry.* 19 Manitoba L. Rep. 418, holding that person injured while rescuing child from railroad track, may recover where injury was caused by motorman's negligence in not slowing up; *Dixon v. New York, N. H. & H. R. Co.* 207 Mass. 130, 92 N. E. 1030, holding that question of negligence is for jury where person exposes himself to danger for purpose of rescuing another from peril; *Bracey v. Northwestern Improv. Co.* 41 Mont. 344, 137 Am. St. Rep. 738, 109 Pac. 706, holding that person exposing himself to save another's life

may recover for injury from person whose negligence brought peril about, if exposure is not made under such circumstances as to constitute rashness.

Cited in notes (49 L. R. A. 716, 717, 720; 36 Am. St. Rep. 649) on voluntarily incurring danger to save life of another as contributory negligence.

Distinguished in *Chattanooga Light & P. Co. v. Hodges*, 109 Tenn. 336, 60 L. R. A. 459, 97 Am. St. Rep. 844, 70 S. W. 616, denying employer's liability for death of employee re-entering burning building to telephone alarm of fire; *Bracey v. Northwestern Improv. Co.* 41 Mont. 344, 137 Am. St. Rep. 738, 109 Pac. 706, where question was whether miner's death who sought to rescue other miners from death by inhalation of poisonous gases, was due to alleged cause; *White v. Chicago (City)* 120 Ill. App. 610, holding where perilous situation of party is brought about by contributory negligence of one injured that one attempting to save life cannot recover.

13 L. R. A. 193, *HILL v. C. F. JEWETT PUB. CO.* 154 Mass. 172, 26 Am. St. Rep. 230, 28 N. E. 142.

Corporations; liability for fraud of officers.

Cited in *Farmers' Bank v. Diebold Safe & Lock Co.* 66 Ohio St. 377, 58 L. R. A. 624, 90 Am. St. Rep. 586, 64 N. E. 518, holding where secretary of corporation obtains stock certificate assigned to company, from possession of president, without his knowledge and pledges same to another, pledgee acquires no title as against first assignee.

Cited in notes (19 L. R. A. 332) on liability of corporation for fraud or forgery of its officers in issue of stock; (87 Am. St. Rep. 853, 858) on fraudulent and over-issued corporate stock.

Negligence resulting in forgery.

Cited in *Dollar Sav. Fund & T. Co. v. Pittsburg Plate Glass Co.* 213 Pa. 313, 62 Atl. 916, 5 A. & E. Ann. Cas. 248, holding one not negligent in leaving a stock certificate where his clerk had access to it and forges a transfer on it.

13 L. R. A. 195, *COM. v. BROWN*, 154 Mass. 55, 27 N. E. 776.

Intoxicating liquors; aiding and abetting illegal sale.

Cited in *Com. v. Moore*, 157 Mass. 330, 31 N. E. 1070, holding all persons engaged in violating liquor law are principals; *Com. v. Currier*, 164 Mass. 546, 42 N. E. 96, holding expressman receiving bottled beer at railroad depot for delivery to hotel guilty of bringing intoxicating liquors into town; *Com. v. Ryan*, 160 Mass. 174, 35 N. E. 673, holding one having intoxicating liquors about his person with intent to unlawfully sell same, guilty of unlawfully keeping liquors for sale.

Cited in notes (46 L. R. A. 421) on liability of carrier for transporting intoxicating liquors; (18 L.R.A.(N.S.) 1182) on ignorance of contents of package as defense in prosecution for unlawfully transporting liquor.

13 L. R. A. 198, *MT. ZION BAPTIST CHURCH v. WHITMORE*, 83 Iowa, 138, 49 N. W. 81.

Religious societies; rights as to trust property.

Cited in *Park v. Chapin*, 96 Iowa, 65, 31 L. R. A. 144, 59 Am. St. Rep. 353, 64 N. W. 674, holding property deeded to Free Baptist Church, without declaration of trust, cannot, by vote of less than whole body, be diverted to uses of Baptist Church; *Christian Church v. Carpenter*, 108 Iowa, 650, 79 N. W. 375, holding persons imposing test of fellowship not in accord with previously accepted doctrines of denomination may be enjoined from controlling or interfering with use

of church property; *Smith v. Pedigo*, 145 Ind. 385, 19 L. R. A. 459, 33 N. E. 777, holding that title to church property cannot be diverted by majority of members to uses not in accord with doctrines and practices of denomination; *Franke v. Mann*, 106 Wis. 132, 48 L. R. A. 861, footnote, p. 856, 81 N. W. 1014, holding faction of church, however large, can neither withdraw and claim part of church property, nor remain and divert its use to objects foreign to purposes of corporation; *Cape v. Plymouth Cong. Church*, 117 Wis. 155, 93 N. W. 449, holding majority organizing church of different denomination not entitled to use church property; *Rodgers v. Burnett*, 108 Tenn. 183, 65 S. W. 408, holding church organization uniting with another synod forfeits control to property deeded "for use as church and controlled by the E. L. Church of H. Synod;" *Ramsey v. Hicks*, 44 Ind. App. 512, 87 N. E. 1091, holding that property conveyed to trustees for use of certain church must be held in trust for promulgation of tenets and doctrines of such church; *Monongahela City Baptist Church v. Shawger*, 36 Pa. Co. Ct. 524, holding that individual church of Baptist denomination cannot by majority vote depart from its doctrines and carry property as against minority continuing in faith; *Immaculate Conception v. Murphy*, 89 Neb. 531, 35 L.R.A. (N.S.) 929, 131 N. W. 946, holding that trustees of Roman Catholic church have no authority to permit excommunicated priest to occupy church edifice.

Cited in footnote to *Schlichter v. Keiter*, 22 L. R. A. 161, which holds two thirds majority of those voting on proposition to change constitution of church sufficient.

Cited in notes (32 L. R. A. 92) on power of local-church society to withdraw from general body of church; (24 L.R.A.(N.S.) 701, 703, 704) on litigation growing out of schism in religious society; (3 L.R.A.(N.S.) 875) on enjoining control, use of, or interference with, church property; (5 Eng. Rul. Cas. 702) on property rights on division in religious society; (68 Am. St. Rep. 866) on jurisdiction of equity over voluntary unincorporated associations.

Disapproved in *First Baptist Church v. Fort*, 93 Tex. 225, 49 L. R. A. 621, 54 S. W. 892, holding minority separating from church organization, on ground majority have abandoned faith, not entitled to control of church property.

Right to membership.

Cited in *Smith v. Pedigo*, 145 Ind. 411, 32 L. R. A. 844, 44 N. E. 363, holding that minority faction of church congregation do not cease to be members of church upon expulsion by act of majority, which has departed from original faith; *Marien v. Evangelical Creed Congregation*, 132 Wis. 653, 113 N. W. 66, holding that any member has right to resist diversion of property of religious association to other antagonistic uses; *Yanthis v. Kemp*, 43 Ind. App. 205, 85 N. E. 976, holding that a majority cannot ratify and confirm acts violative of the adopted faith and teachings of a church; *Cape v. Plymouth Congregational Church*, 130 Wis. 182, 109 N. W. 928, on what constitutes a departure from purpose of organization.

Distinguished in *Mack v. Kime*, 129 Ga. 20, 24 L.R.A.(N.S.) 687, 58 S. E. 184, sustaining authority of the highest governing body of the Cumberland Presbyterian Church to unite with another organization having like doctrines and forms of government.

Construction of ecclesiastical law.

Cited in *Smith v. Pedigo*, 145 Ind. 411, 32 L. R. A. 844, 44 N. E. 363, holding construction by ecclesiastical body of its own laws binding upon courts; *Smith v. Pedigo*, 145 Ind. 403, 32 L. R. A. 842, 44 N. E. 363, holding decision of majority faction of church that it adheres to doctrine and practices of denomination, not binding on courts; *Landrith v. Hudgins*, 121 Tenn. 657, 120 S. W. 783, holding that court can determine whether acts of a faction of a church violate the

adopted faith and teachings of church; *Bethany Cong. Church v. Morse*, 151 Iowa, 533, 132 N. W. 14, holding that final determination by church organization of questions of discipline, faith, ecclesiastical rule or custom is binding upon courts; *Ramsey v. Hicks*, 174 Ind. 444, 30 L.R.A. (N.S.) 673, 91 N. E. 344, holding that civil courts have no jurisdiction to examine into validity of church laws and to restrain proceedings in accordance therewith, in matter concerning only spiritual or ecclesiastical rights.

Cited in footnotes to *Lamb v. Cain*, 14 L. R. A. 518, which holds decision of ecclesiastical tribunal as to adoption of revised confession of faith binding on courts; *Bear v. Heasley*, 24 L. R. A. 615, which holds decision of highest church tribunal as to validity of new constitution not binding on courts.

Cited in notes (49 L. R. A. 384, 400) on conclusiveness of decisions of tribunals of association or corporation; (100 Am. St. Rep. 746, 747) on jurisdiction of civil courts over church controversies.

13 L. R. A. 206, *GREENE v. COUSE*, 127 N. Y. 386, 24 Am. St. Rep. 458, 28 N. E. 15.

Estoppel to dispute title of grantor.

Cited in *Rhoades v. Freeman*, 9 App. Div. 24, 41 N. Y. Supp. 135, holding purchaser in possession under contract, if in default, cannot defend against ejectment that vendor is without title, or that he has acquired title by adverse possession; *Zapf v. Carter*, 70 App. Div. 400, 75 N. Y. Supp. 197, holding person buying peace by procuring quitclaim deed from heir not estopped from disputing title derived from heirs; *Barnes v. Barnes*, 113 Iowa, 438, 85 N. W. 629, holding owner of real estate purchasing outstanding titles may repudiate one, and base his claim solely on other; *Coal Creek Consol Coal Co. v. East Tennessee Iron & Coal Co.* 105 Tenn. 574, 59 S. W. 634, holding title by adverse possession may be as effectual for remedies and defenses as title acquired in any other manner; *Berkowitz v. Brown*, 3 Misc. 7, 23 N. Y. Supp. 792, holding, to effect title by adverse possession, dispossessor of him who has legal title must not have recognized legal title within twenty years; *Schmitt v. Traphagen*, 73 N. J. Eq. 401, 69 Atl. 189, 133 Am. St. Rep. 739, holding that grantee is not estopped to deny title of grantor though chain of title be identical with that of grantor; *Knapp v. New York*, 140 App. Div. 296, 125 N. Y. Supp. 201, to the point that rule in relation to estoppel to dispute grantor's title does not apply, where at time of purchase, vendee is in as owner claiming title and his entry was not under grantor; *Nashville, C. & St. L. R. Co. v. Proctor*, 160 Ala. 453, 49 So. 377, holding that a person who is in possession of land may purchase any outstanding claim.

Cited in notes (16 L. R. A. 813) on estoppel in pais upon defendant as basis for action to recover real estate; (95 Am. St. Rep. 675) on effect of bar of statute of limitations.

13 L. R. A. 210, *DAVIS v. SEYMOUR*, 59 Conn. 531, 21 Atl. 1004.

Jurisdiction; amount in controversy.

Cited in *Hannon v. Bramley*, 65 Conn. 200, 32 Atl. 336, holding when highest sum plaintiff entitled to upon face of complaint insufficient to give jurisdiction, case should be dismissed.

Implied contracts; consideration.

Cited in *Masonic Mut. Ben. Asso. v. Tolles*, 70 Conn. 544, 40 Atl. 448, holding consideration essential to implied contract.

13 L. R. A. 212, *DAY v. SLAUGHTER*, 87 Va. 758, 24 Am. St. Rep. 682, 13 S. E. 478.

Report of later appeal in *Garland v. Garland*, 2 Va. Dec. 352, 24 S. E. 505.

Liability of spendthrift trust to claims of creditors.

Cited in *Guernsey v. Lazear*, 51 W. Va. 338, 41 S. E. 405, holding property devised in trust for support of beneficiary, with provision same shall not be bound for debts, not subject to judgment against beneficiary; *Seymour v. McAvoy*, 121 Cal. 442, 41 L. R. A. 547, 53 Pac. 946, holding trust fund for comfortable support and education of beneficiary, with payment of principal contingent upon marriage and surviving mother, not subject to claims of creditors; *Patten v. Herring*, 9 Tex. Civ. App. 646, 29 S. W. 388, holding trust for support of insolvent beneficiary cannot be diverted by creditors, although exemption not expressly declared by testator; *Leigh v. Harrison*, 69 Miss. 933, 18 L. R. A. 51, footnote, p. 49, 11 So. 604, holding that where property to devised in trust, with directions to pay income to insolvent son, interest of latter not subject to claims of creditor; *Re Luscombe*, 109 Wis. 199, 85 N. W. 341, holding trust for support of beneficiary named terminated, under provision of will, upon decree obtained by creditor subjecting income to payment of his claim; *Mattison v. Mattison*, 53 Or. 259, 133 Am. St. Rep. 829, 100 Pac. 4; *Mason v. Rhode Island Hospital Trust Co.* 78 Conn. 85, 61 Atl. 57, 3 A. & E. Ann. Cas. 586,—holding that an equitable life estate may be created by one for the benefit of another which will be inalienable and beyond creditors.

Cited in footnotes to *Roberts v. Stevens*, 17 L. R. A. 266, which authorizes establishment of spendthrift trust free from rights of creditors; *Murphy v. Delano*, 55 L. R. A. 727, which holds income of spendthrift trust not within reach of creditors by void agreement of trustee to pay certain portion of income absolutely to beneficiary; *Hutchinson v. Maxwell*, 57 L. R. A. 384, which denies power to create equitable life estate free from debts of beneficiary; *Requa v. Graham*, 52 L. R. A. 641, which holds annuity in wife's will in lieu of other interest accepted by husband, not trust beyond reach of creditors; *Brown v. McGill*, 39 L. R. A. 806, which denies power to create trust placing one's property beyond reach of creditors while retaining full enjoyment of revenues.

Distinguished in *Young v. Easley*, 94 Va. 194, 26 S. E. 401, holding income from money and personal property deposited with executors for "support" of beneficiary; subject to claims of latter's creditors.

Held obiter and overruled in effect in *Hutchinson v. Maxwell*, 100 Va. 173, 57 L. R. A. 387, 93 Am. St. Rep. 944, 40 S. E. 655, holding property deeded to trustee for maintenance of grantor's husband, with provision that same shall not be liable for debts, may be subjected in equity to claims of creditors.

13 L. R. A. 215, *PULLMAN PALACE CAR CO. v. SMITH*, 79 Tex. 468, 23 Am. St. Rep. 356, 14 S. W. 993.

Carriers; liability to passengers.

Cited in *McKeon v. Chicago, M. & St. P. R. Co.* 94 Wis. 483, 35 L. R. A. 257, 59 Am. St. Rep. 909, 69 N. W. 175, holding railroad liable for failure to awaken passengers in sleeper in time to dress before change of cars, though duty not expressed in contract; *Pullman Co. v. Lutz*, 154 Ala. 521, 14 L.R.A.(N.S.) 909, 129 Am. St. Rep. 67, 45 So. 675, holding it duty of sleeping car company to notify a passenger of arrival at destination; *Pullman Co. v. Hoyle*, 52 Tex. Civ. App. 540, 115 S. W. 315, holding that sleeping car company is liable to same degree of care as railroad, with respect to negligence of its servants causing injury to passengers.

Cited in notes (21 L. R. A. 296) on liability as to passengers on sleeping cars;

(14 L.R.A.(N.S.) 907) on duty to notify sleeping car passenger of arrival; (26 Am. St. Rep. 335) on obligations and liabilities of sleeping car companies.

Evidence; expert testimony.

Cited in *St. Louis S. W. R. Co. v. Freedman*, 18 Tex. Civ. App. 560, 46 S. W. 101, holding testimony of physician as to history of patient's case, in support of opinion, not objectionable as emphasizing hearsay evidence of other witness as to patient's condition.

Cited in footnote to *Tullis v. Rankin*, 35 L. R. A. 449, which holds opinion of surgeon as to cause of fully described condition of limb admissible.

Proof of damage.

Cited in *Knittel v. Schmidt*, 16 Tex. Civ. App. 9, 40 S. W. 507, holding general allegation of damage sufficient to admit evidence of damage from loss of time, though value of time not averred; *Missouri, K. & T. R. Co. v. Davis*, 53 Tex. Civ. App. 553, 116 S. W. 423, holding that testimony, that there was no cause known to witness, other than injuries for which recovery was sought, to account for change of health of plaintiff was admissible over objection that it was conclusive.

13 L. R. A. 217, *SMITH v. WESCOTT*, 17 R. I. 366, 22 Atl. 280.

Municipal corporation as trustee.

Cited in *Ware v. Fitchburg*, 200 Mass. 72, 85 N. E. 951, holding that legislature may prescribe who shall be the officers for the administration of public charities.

Cited in note (16 L. R. A. 695) on authority of legislature to remove municipality from trusteeship.

13 L. R. A. 219, *DEMPSEY v. CHAMBERS*, 154 Mass. 330, 26 Am. St. Rep. 249, 28 N. E. 279.

Ratification of unauthorized acts.

Cited in *Bullard v. Moor*, 158 Mass. 425, 33 N. E. 928, holding ratification of agreement of insane person by his administrator binding upon his heirs; *Nims v. Mt. Hermon Boys' School*, 160 Mass. 182, 22 L. R. A. 367, 39 Am. St. Rep. 467, 35 N. E. 776, holding educational institution ratifying unauthorized act of agents, assuming to operate ferry, liable to personal injury to passenger caused by negligence of ferryman; *Citizens' Gaslight Co. v. Wakefield*, 161 Mass. 439, 31 L. R. A. 461, 37 N. E. 444, holding stockholders' ratification of acts of directors of gaslight company, preliminary to sale of plant to municipality, equivalent to original authority; *Beacon Trust Co. v. Souther*, 183 Mass. 418, 67 N. E. 345, holding director's ratification of corporation note executed by president equivalent to original authorization; *Paquete Habana*, 189 U. S. 465, 47 L. ed. 903, 23 Sup. Ct. Rep. 593, authorizing entry of decree against United States for proceeds of vessels not legally liable to capture; *Ferris v. Snow*, 130 Mich. 258, 90 N. W. 850, holding third person making payments on land contract not liable for purchase price where vendee did not act for him in buying; *Hall v. Concord*, 71 N. H. 373, 58 L. R. A. 460, 52 Atl. 864 (dissenting opinion) majority holding city not liable for injuries from horse being frightened by steam roller, used by agents in improvement of highway under unauthorized contract, although contract ratified by acceptance of work; *O'Reilly de Camara v. Brooke*, 209 U. S. 52, 52 L. ed. 678, 28 Sup. Ct. Rep. 439; *American Banana Co. v. United Fruit Co.* 213 U. S. 359, 53 L. ed. 833, 29 Sup. Ct. Rep. 511, 16 A. & E. Ann. Cas. 1047; *Stuart v. Chapman*, 104 Me. 25, 70 Atl. 1069,—holding that one may become liable in tort by ratifying acts done in his name and for his benefit; *White v. Apsley Rubber Co.* 194 Mass. 100, 8 L.R.A.(N.S.) 485, 80 N. E. 500, holding a corporation liable

for act of bookkeeper who in the discharge of his duties caused a wrongful arrest; *Portland Gold Min. Co. v. Stratton's Independence*, 16 L.R.A.(N.S.) 678, 85 C. C. A. 393, 158 Fed. 65, on retaining proceeds of an illegal act with knowledge of facts as a ratification.

Distinguished in *Russo v. Maresca*, 72 Conn. 56, 43 Atl. 552, holding libelous article written for social organization not ratified by president signing order on treasurer for money to pay for publication thereof, with knowledge of contents.

— **Scope of employment.**

Cited in *Kwiechen v. Holmes & H. Co.* 106 Minn. 153, 19 L.R.A.(N.S.) 257, 118 N. W. 668, holding master not liable where servant tied a horse used in private business behind master's wagon and horse kicked a bystander.

Cited in note (25 Eng. Rul. Cas. 143) on master's liability for tort committed by servant.

13 L. R. A. 222, *HENDERSON v. HOVEY*, 46 Kan. 691, 27 Pac. 177.

Withdrawal of public moneys.

Cited in footnote to *State ex rel. Henderson v. Burdick*, 24 L. R. A. 266, which holds continuing appropriation of amounts of salary made by statute.

Demands against state.

Cited in *Boyd v. Dunbar*, 44 Or. 385, 75 Pac. 695, holding where an appropriation is made for a certain amount for a particular purpose the amount is limit of authority for incurring expense.

Cited in note (42 L. R. A. 37, 38, 49) on what claims constitute valid demands against a state.

13 L. R. A. 224, *MORSE v. MOORE*, 83 Me. 473, 23 Am. St. Rep. 783, 22 Atl. 362.

Sales; what constitutes warranty.

Cited in *Northwestern Cordage Co. v. Rice*, 5 N. D. 434, 57 Am. St. Rep. 563, 67 N. W. 298, holding sale of article by particular description constitutes warranty that article corresponds.

Cited in note (35 L.R.A.(N.S.) 267, 268, 270, 272, 283, 284, 285) on effect of sale with particular description of kind or quality.

Acceptance of goods not waiver of warranty.

Cited in *Noble v. Buswell*, 96 Me. 76, 51 Atl. 244, holding buyer sued for purchase price, entitled to show by way of recoupment, goods were of inferior quality; *White v. Harvey*, 85 Me. 215, 27 Atl. 106, holding notwithstanding buyer's acceptance he may avail himself of any defense to action for price that goes to reduction of damages; *Miamisburg Twine & Cordage Co. v. Wohlhuter*, 71 Minn. 485, 74 N. W. 175, holding where goods sold by sample and by description, if corresponding to sample only, vendee may rely on warranty as to description, while retaining goods; *English v. Spokane Commission Co.* 48 Fed. 197, holding buyer accepting goods in fulfilment of executory contract with warranty may recover on warranty, if goods are inferior; *Cleveland Linseed Oil Co. v. A. F. Buchanan & Sons*, 57 C. C. A. 501, 120 Wend. 909, holding vendor's warranty that linseed oil would be like that previously furnished survives acceptance; *Ponce v. Smith*, 84 Me. 270, 24 Atl. 854, holding caterer failing to furnish dinner of quality agreed, may recover contract price, less cost to make dinners as agreed; *Northwestern Cordage Co. v. Rice*, 5 N. D. 434, 57 Am. St. Rep. 563, 67 N. W. 298, holding whether breach of warranty of quality waived by buyer's acceptance, question of fact to be determined by evidence; *Ward Furniture Mfg. Co. v. Isbell*, 81 Ark. 561, 99 S. W. 845, holding that vendee may accept goods and use breach of warranty by way of recoupment to action for purchase price; *Atkins Bros. Co.*

v. Southern Grain Co. 119 Mo. App. 125, 95 S. W. 949, holding that party may accept goods and rely on his warranty when sued for contract price; Pratt v. Johnson, 100 Me. 445, 62 Atl. 242, allowing breach of warranty to be set up in defense to notes given for warranted goods; Campion v. Marston, 99 Me. 412, 59 Atl. 548, holding an acceptance of ice sold under warranty is only evidence of a waiver of warranty, and not conclusive thereof; Wurzburg v. Andrews, 28 N. S. 402, holding a warranty of inside condition of canned meats survived failure to object to conditions visible on outside at time prior to that had in view.

Evidence disproving acceptance.

Cited in Murchie v. Cornell, 155 Mass. 63, 14 L. R. A. 495, 31 Am. St. Rep. 526, 29 N. E. 207, holding protest sworn to on day of arrival of ice inadmissible to disprove acceptance; Eaton v. Blackburn, 52 Or. 308, 20 L.R.A.(N.S.) 57, 132 Am. St. Rep. 705, 96 Pac. 870, 16 A. & E. Ann. Cas. 1198, holding a mere receipt by consignee of goods and an offer to sell them not an acceptance as a matter of law if a reasonable time to reject has not elapsed; Elliott v. Howison, 146 Ala. 583, 40 So. 1018, holding where goods of a particular description are to be sent by carrier, buyer may receive for purpose of inspection as to their conformity to contract; Watson v. Bigelow Co. 77 Conn. 130, 58 Atl. 741, holding question of acceptance of an article may be a question of fact.

Implied warranties.

Cited in Springfield Shingle Co. v. Edgecomb Mill Co. 52 Wash. 626, 35 L.R.A.(N.S.) 266, 101 Pac. 233, holding where shingles were sold as "Star A Star" shingles there is an implied warranty that they are such; Henry Kupfer & Co. v. Pellman, 67 Misc. 151, 121 N. Y. Supp. 1081, holding that a sale by sample is a sale by description.

Cited in note (102 Am. St. Rep. 614) on implied warranty of quality.

Right to cut ice.

Cited in footnotes to Marsh v. McNiver, 20 L. R. A. 334, which authorizes sale by tenant of right to cut ice on running stream; Mansfield v. Place, 18 L. R. A. 39, which holds prescriptive right to entire ice on pond acquired by cutting from any points desired.

13 L. R. A. 229, *Re DEAN*, 83 Me. 489, 22 Atl. 385.

Naturalisation of aliens.

Cited in *State ex rel. Engelhard v. Weber*, 96 Minn. 429, 113 Am. St. Rep. 630, 105 N. W. 490, holding common pleas court of Meigs county Ohio to have jurisdiction over naturalization.

Cited in note (30 L. R. A. 763) on powers of state legislature and courts as to naturalization.

13 L. R. A. 233, *CLARK v. SULLIVAN*, 2 N. D. 103, 49 N. W. 416.

Set-off; by surety of joint indebtedness.

Cited in footnote to *Wilson v. Exchange Bank*, 69 L.R.A. 97, which sustains right of indorser in suit against maker and indorser to set off individual claim against plaintiff growing out of transaction giving rise to execution of note.

13 L. R. A. 235, *BETZ v. SNYDER*, 48 Ohio St. 492, 28 N. E. 234.

General assignments; title of assignee.

Cited in *Miller v. Waite*, 59 Neb. 321, 80 N. W. 907, holding title to property under general assignment passes to assignee upon delivery of deed, without recording; *Wilder v. Beed*, 4 Ohio N. P. 442, holding assignee under general assignment

not bound by lease of land previously made by assignor, except at his election; *Walker v. Walker*, 4 Ohio N. P. 329, holding general assignment relates back to date of filing of previously recorded mortgage made with intent to defraud creditors; *Ryan v. Root*, 56 Ohio St. 309, 47 N. E. 51, holding judgments rendered after general assignment take *pro rata* in proceeds of property with judgment at same term levied upon before the assignment; *Wilder v. Beed*, 4 Ohio N. P. 442, 7 Ohio S. & C. P. Dec. 392, holding lessee's assignee for benefit of creditors may elect to accept or reject lease; *Ohio Valley Nat. Bank v. Walton Architectural Iron Co.* 30 Ohio L. J. 383, 11 Ohio Dec. Reprint, 906, holding equities existing between parties to contract for mortgage could not be set up against statutory assignee for benefit of creditors; *Foerstner v. Citizens' Sav. & T. Co.* 108 C. C. A. 267, 186 Fed. 5, holding that title of trustee in bankruptcy is superior to mortgage filed for record but which was ineffective because it was not properly witnessed.

Jurisdiction of probate court.

Cited in *Re Jones*, 5 Ohio N. P. 107, holding probate court has exclusive jurisdiction over administration of estates under general assignments; *Kittredge v. Miller*, 12 Ohio C. C. 130, holding court has exclusive jurisdiction of action by attorney to recover compensation for services rendered assignee; *Havens v. Horton*. 53 Ohio St. 345, 41 N. E. 253, holding jurisdiction acquired by filing of deed of general assignment not ousted by proceedings for foreclosure of mortgage in court of common pleas.

Recording acts.

Cited in *Straman v. Rechtime*, 58 Ohio St. 459, 51 N. E. 44, holding mortgage defectively acknowledged not entitled upon reformation after death of mortgagor, to priority over claims of creditors of mortgagor's estate; *Langmade v. Weaver*, 65 Ohio St. 34, 60 N. H. 992, holding record of contract, not properly witnessed, for lease of land for more than three years for development of natural gas and oil, ineffectual as against subsequent purchaser.

Sufficiency of record.

Cited in *Eggleston v. Harrison*, 61 Ohio St. 407, 55 N. E. 993, holding general assignment inoperative as to land lying in another county than that of filing with probate judge, as against innocent purchaser without notice; *Harrison v. Chatfield*, 14 Ohio C. C. 608, holding filing of general assignment with probate judge notice to all the world as to land situated in another county; *Webster v. Clear*, 49 Ohio St. 398, 31 N. E. 744, holding under statute providing for recording of deeds from state in auditor's office, record in such office is effectual as against subsequent purchaser from state without notice.

Effect of failure to file on record.

Cited in *Re Knepfle*, 4 Ohio N. P. 213, holding unrecorded mortgage of real estate of no validity as against title of assignee under deed of general assignment subsequently executed; *Cheney v. Maumee Cycle Co.* 64 Ohio St. 214, 60 N. E. 207, holding receiver's title to real estate of debtor superior to previously executed mortgage, not recorded at time of his appointment; *Re Shirley*, 50 C. C. A. 254, 112 Fed. 303, holding mortgage upon real estate withheld from record void as against attaching creditor; *Cheney v. Maumee Cycle Co.* 20 Ohio C. C. 24, 10 Ohio C. D. 720, holding mortgagee of corporation who did not file his mortgage until after filing of petition for appointment of receiver for corporation, had no rights prior to other creditors; *Foerstner v. Citizens' Sav. & T. Co.* 108 C. C. A. 267, 186 Fed. 5, on effect of bankruptcy on the rights of the holder of an unfilled mortgage of realty; *Baum v. Harrison*, 9 Ohio N. P. N. S. 264, 20 Ohio S. & C. P. Dec. 374, holding title of vendee's assignee for benefit of creditors to

safe sold on conditional sale contract not filed until after assignment is good against conditional vendor; *Re Cook*, 6 Ohio N. P. N. S. 303, 18 Ohio S. & C. P. Dec. 545, holding no lien preserved as against creditors by unfiled contract of sale reserving title of vendor.

Cited in footnote to *Lyon v. Cleveland (City)* 30 L.R.A. 400, which holds revival of judgment effective as against grantee of debtor in unrecorded deed made after judgment but before revival.

13 L. R. A. 241, *SAINT NICHOLAS BANK v. STATE NAT. BANK*, 128 N. Y. 26, 27 N. E. 849.

Banks; liability as collecting agent.

Cited in *Kirkham v. Bank of America*, 26 App. Div. 116, 49 N. Y. Supp. 767, and *Bailie v. Augusta Sav. Bank*, 95 Ga. 282, 51 Am. St. Rep. 74, 21 S. E. 717, holding bank receiving from customer draft drawn by third party, for collection, liable for loss occasioned by acts of correspondents or agents to effect collection; *National Revere Bank v. National Bank*, 172 N. Y. 107, 64 N. E. 799, holding bank mailing to drawee, which is its correspondent, drafts received presumably for collection, receiving therefor after delay drawee's worthless drafts, liable to owner; *Kirkham v. Bank of America*, 165 N. Y. 137, 80 Am. St. Rep. 714, 58 N. E. 753, holding bank receiving from depositor draft of third party for collection, and crediting his account therewith on receipt of drawee's check from agent, cannot cancel credit upon dishonor of check; *Sherman v. Port Huron Engine & Threshing Co.* 8 S. D. 350, 66 N. W. 1077, same case on subsequent appeal, 13 S. D. 101, 82 N. W. 413, holding where note payable at bank receiving it for collection, employment of subagents is at risk of bank; *Martin v. Home Bank*, 160 N. Y. 196, 54 N. E. 717, holding depositor paying by mistake amount of check of third party, dishonored through failure of bank to make presentation in due time, entitled to recover from bank; *American Exch. Nat. Bank v. Metropolitan Nat. Bank*, 71 Mo. App. 459, holding bank sending check to drawee bank by mail for collection, negligent, though within time, and though drawee failed within time allowed for forwarding paper; *Sylvester v. Crohan*, 138 N. Y. 497, 34 N. E. 273, holding duty of payee to drawer, with respect to presentation of draft, not same as duty which bank, in which draft deposited, owes depositor; *Irwin v. Reeves Pulley Co.* 20 Ind. App. 128, 48 N. E. 601 (dissenting opinion), majority holding acceptance of draft for collection binds bank only to exercise of reasonable skill and ordinary care in selection of correspondents; *Winchester Mill. Co. v. Bank of Winchester*, 120 Tenn. 239, 18 L.R.A.(N.S.) 447, 111 S. W. 248, holding a bank receiving a check for collection is negligent in sending it to the drawee bank although only bank in place located; *McBride v. Illinois Nat. Bank*, 138 App. Div. 345, 121 N. Y. Supp. 1041, holding that bank accepting negotiable instrument for collection must upon dishonor take steps necessary to hold indorsers; *Pinkney v. Kanawha County Bank*, 68 W. Va. 268, 32 L.R.A.(N.S.) 995, 69 S. E. 1012, Ann. Cas. 1910 B, 115, holding that action for money had and received lies against collecting bank for amount of check lost through such bank's negligence.

Cited in footnotes to *First Nat. Bank v. Sprague*, 15 L. R. A. 498, which holds bank receiving bill for gratuitous collection not liable for defaults of reputable correspondent; *Beal v. Somerville*, 17 L. R. A. 291, which holds no title to check passes by depositing for collection; *State Bank v. Byrne*, 21 L. R. A. 753, which holds drawee's acceptance of draft presented by collecting bank not payment.

Cited in notes (37 L. ed. U. S. 365) on liability of bank for collections; (3 L.R.A.(N.S.) 1180) on liability of bank for taking check or drafts in payment of paper held for collection; (77 Am. St. Rep. 626) on duties of banks acting

as collecting agents; (18 L.R.A.(N.S.) 445) on sending check directly to drawee bank; (3 Eng. Rul. Cas. 778, 779) on liability of bank for money received by correspondent bank.

Conflict of laws; application of common law.

Cited in *Nathan v. Lee*, 152 Ind. 243, 43 L. R. A. 826, 52 N. E. 987, holding neither principles of equity nor of common law, as expounded by supreme court of another state, binding, in determining validity of mortgage executed by insolvent corporation of that state, upon real estate in this state in absence of local statute controlling question; *Reid v. Albany County*, 128 N. Y. 370, 28 N. E. 367, holding running of statute of limitation not affected by decision of court of last resort giving right of action previously believed not to exist; *Shaw v. Postal Tele. & Cable Co.* 79 Miss. 693, 56 L. R. A. 492, 89 Am. St. Rep. 666, 31 So. 222 (dissenting opinion) majority holding construction of statute not common-law question, and decisions of state statute binding upon courts of another state in determining case arising under statute; *Tennent v. Union Central L. Ins. Co.* 133 Mo. App. 353, 112 S. W. 754, construing common law of a sister state according to the precedents of forum; *Coats v. Chicago, R. I. & P. R. Co.* 134 Ill. App. 225, construing a statute of a foreign state according to the law of the forum.

Cited in notes (61 L. R. A. 195) on conflict of laws as to negotiable paper; (63 L.R.A. 524) on conflict of laws as to carrier's contracts; (67 L.R.A. 39) on how case determined when proper foreign law not proved; (6 L.R.A.(N.S.) 213) on conflicting interpretations of common-law rules in different jurisdictions.

Disapproved in *Sykes v. Citizens' Nat. Bank*, 78 Kan. 690, 19 L.R.A.(N.S.) 670, 98 Pac. 206, holding that the negotiability of a note made in Kansas made payable in Missouri is to be governed by law of Missouri.

13 L. R. A. 244, BARNARD v. KNOX COUNTY, 105 Mo. 332, 16 S. W. 917.

Municipal indebtedness; constitutional limitations.

Cited in *State ex rel. Robinson v. Columbia*, 111 Mo. 378, 20 S. W. 90, enjoining town or less than 10,000 population from issuing waterworks and electric light bonds, where annual levy exceeded 50 cents on the hundred, although indebtedness not equal to 5 per cent of taxable property; *Grand Island & N. W. R. Co. v. Baker*, 6 Wyo. 384, 34 L. R. A. 838, 71 Am. St. Rep. 926, 45 Pac. 494, holding judgment against county in condemnation proceedings for opening public road, within constitutional provision limiting annual taxation for county revenue; *Wilson v. Knox County*, 132 Mo. 398, 34 S. W. 477, holding warrants for indebtedness incurred prior to Constitution of 1875, not charge upon fund levied within constitutional restrictions for annual expenses of county; *Eaton v. Minnaugh*, 43 Or. 469, 73 Pac. 754, holding constitutional limitation of county indebtedness applies to debt for new courthouse authorized by legislature; *State ex rel. Columbia v. Wilder*, 197 Mo. 9, 94 S. W. 495, holding that in construing constitutional limitation of municipal indebtedness all legal debts of municipality are to be included.

Cited in notes (23 L.R.A. 404, 406; 37 L.R.A.(N.S.) 1095, 1096) on what constitutes an "indebtedness" within meaning of constitutional and statutory restrictions of municipal indebtedness; (44 Am. St. Rep. 236) on what is municipal indebtedness within prohibition against.

Distinguished in *Ewing v. Vernon County*, 216 Mo. 688, 116 S. W. 518, holding that constitutional limitation of municipal indebtedness must be set up to be a defense.

Disapproved in *Rauch v. Chapman*, 16 Wash. 584, 36 L. R. A. 412, 58 Am. St. Rep. 52, 48 Pac. 253, holding liabilities for current expenses of county not with-

in constitutional provision limiting indebtedness to 5 per cent of assessed valuation.

Overruled in *Lamar Water & Electric Light Co. v. Lamar*, 128 Mo. 221, 32 L. R. A. 186, 31 S. W. 756, Reversing on hearing in banc 128 Mo. 198, 32 L. R. A. 159, 26 S. W. 1025, holding annual payment falling due under water contract not within constitutional provision limiting annual levy to 50 cents on hundred for all purposes.

Validity with respect to existence of funds when debt contracted.

Cited in *Mountain Grove Bank v. Douglas County*, 146 Mo. 50, 47 S. W. 944, holding when sufficient funds on hand to pay warrants at time of issue, they do not become illegal upon money being paid out on warrants subsequently issued; *Reynolds v. Norman*, 114 Mo. 513, 21 S. W. 845, holding warrant lawfully issued in payment of indebtedness created in one year may be paid out of revenues of subsequent year; *Kane v. School District*, 48 Mo. App. 414, holding school-district warrant for which there is no money on hand, nor any provided for in fiscal year in which it is issued, invalid; *State ex rel. Hill v. Wabash R. Co.* 169 Mo. 576, 70 S. W. 132, holding two-thirds vote of citizens necessary to validity of special levy to pay warrants issued in excess of revenue for same year, though within revenue receivable; *State ex rel. Parsons v. Winkleman*, 96 Mo. App. 230, 69 S. W. 1063, holding levee company levying full amount of tax in years when work done cannot be compelled to make special levy to pay judgment therefor, because less than full levy made in other years; *McAler v. Angell*, 19 R. I. 690, 36 Atl. 588, holding defendant's plea, in action against town, alleging contracting of liability after reaching debt limit, and want of funds, not bad for duplicity.

Stare decisis.

Cited in *Sedalia v. Donohue*, 190 Mo. 416, 89 S. W. 386, 4 A. & E. Ann. Cas. 89, as changing a rule of property relied upon on faith of a prior case.

13 L. R. A. 248, *DANIELS v. NEW YORK & N. E. R. CO.* 154 Mass. 349, 26 Am. St. Rep. 253, 28 N. E. 283.

Injury to trespasser on private premises.

Cited in *McGuinness v. Butler*, 159 Mass. 237, 38 Am. St. Rep. 412, 34 N. E. 259, holding child trespasser cannot recover for personal injury unless wantonly inflicted by, or due to recklessly careless conduct of, owner; *Shea v. Gurney*, 163 Mass. 188, 47 Am. St. Rep. 446, 39 N. E. 996, holding owner of saw-mill owes no duty to boy permitted to visit mill and assist employees, save to abstain from injuring him by active misconduct; *Grindley v. McKechnie*, 163 Mass. 495, 40 N. E. 764, holding owner and contractor maintaining trench near sidewalk, during construction of building, not liable for death of boy five years old, from falling therein; *O'Leary v. Brooks Elevator Co.* 7 N. D. 563, 41 L. R. A. 680, 79 N. W. 919, holding child trespasser injured from contact with exposed revolving shaft, running elevator company's yard, cannot recover; *Ryan v. Towar*, 128 Mich. 475, 55 L. R. A. 314, 92 Am. St. Rep. 481, 87 N. W. 644, holding girl injured in attempt to rescue younger sister caught between wheel and wheel-pit in unused pumphouse, not entitled to recover of owner of premises; *Smith v. Jacob Dold Packing Co.* 82 Mo. App. 14, holding corporation emptying hot ashes on vacant lot not liable for injuries to child four years old, burned by running over ash pile; *Paolino v. McKendall*, 24 R. I. 438, 60 L. R. A. 136, 96 Am. St. Rep. 736, 53 Atl. 268, denying liability of owner burning rubbish in lot where children habitually resorted, for injury to five-year-old child; *Ritz v. Wheeling*, 45 W. Va. 270, 43 L. R. A. 153, 31 S. E. 993, holding city not

liable for death of child from falling into fenced reservoir; *McCabe v. American Woolen Co.* 124 Fed. 286, denying liability for drowning of five-year-old child in unguarded mill race passing through thickly settled district; *Quigley v. Clough*, 173 Mass. 430, 45 L. R. A. 502, 73 Am. St. Rep. 303, 53 N. E. 884, holding pedestrian on sidewalk injured from contact with barbed-wire fence maintained along border of private grounds, cannot recover of owner of premises; *Catlett v. St. Louis, I. M. & S. R. Co.* 57 Ark. 465, 38 Am. St. Rep. 254, 21 S. W. 1062, holding railroad not bound to keep lookout to prevent boys from swinging on ladders of its moving freight trains; *Jefferson v. Birmingham R. & Electric Co.* 116 Ala. 301, 38 L. R. A. 459, 67 Am. St. Rep. 116, 22 So. 546, holding street railway company operating dummy line, not liable for injury received by trespassing child from jumping on and off cars while in motion; *Barney v. Hannibal & St. J. R. Co.* 126 Mo. 387, 26 L. R. A. 851, 28 S. W. 1069, holding railroad not bound to keep watch to prevent child trespasser in its yards from jumping on slowly moving cars; *Sullivan v. Boston & A. R. Co.* 156 Mass. 379, 31 N. E. 128, holding railroad not liable for death of boy killed by contact with electric wire on top of shed, whither he had gone to recover ball; *Savannah, F. & W. R. Co. v. Beavers*, 113 Ga. 411, 54 L. R. A. 320, 39 S. E. 82, holding railroad not liable for drowning of child in unguarded excavation made for water tank, and partially filled with water; *Walsh v. Fitchburg R. Co.* 145 N. Y. 307, 27 L. R. A. 726, 45 Am. St. Rep. 615, 39 N. E. 1068, and *Delaware, L. & W. R. Co. v. Reich*, 61 N. J. L. 638, 41 L. R. A. 833, 68 Am. St. Rep. 727, 40 Atl. 682, holding railroad not liable for injury to child playing about turntable, though situated near street, and unguarded; *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 65 Neb. 900, 59 L. R. A. 923, 91 N. W. 880, holding railroad's liability to child injured while playing with turntable, question for jury; *Duncan v. St. Louis & S. F. R. Co.* 152 Ala. 125, 44 So. 418, holding railroad company not negligent in failing to discover a trespasser on track; *West v. Poor*, 196 Mass. 185, 11 L.R.A.(N.S.) 937, 124 Am. St. Rep. 541, 81 N. E. 960, holding case of one giving a child a ride is that of a gratuitous bailee; *Ziegler v. Friedman & G. Iron Works*, 70 Misc. 556, 127 N. Y. Supp. 457, to the point that owner of property near street owes no duty of active diligence to trespasser upon his property; *Bottum v. Hawks*, 84 Vt. 379, 35 L.R.A.(N.S.) 445, 79 Atl. 858, holding that one maintaining opening into underground mill-race located near highway and school building is not liable for death of child who falls into it, although no barriers are about said opening.

Cited in footnotes to *Cleveland, C. C. & St. L. R. Co. v. Tartt*, 49 L. R. A. 99, which denies duty towards trespassers on track before discovery; *Becker v. Louisville & N. R. Co.* 53 L. R. A. 268, which requires stopping to enable trespasser discovered on railroad bridge to escape.

Cited in notes (14 L.R.A. 783; 4 L.R.A.(N.S.) 82) on liability of railways for injuries to children trespassing on turntable; (25 Eng. Rul. Cas. 112) on liability for injury to trespasser by dangerous instrumentalities; (49 Am. St. Rep. 418) on negligence in dealing with children; (69 L.R.A. 544) on care due to sick, infirm, or helpless persons, with whom no contract relation is sustained; (19 L.R.A.(N.S.) 1105, 1112, 1132, 1135) on attractive nuisance.

Disapproved in *Edgington v. Burlington, C. R. & N. R. Co.* 116 Iowa, 434, 57 L. R. A. 570, 90 N. W. 95, holding railroad liable for injury to child under eight years of age, from playing with unfastened turntable, maintained in unfenced lot near public highway.

Trespasser on obstruction in highway.

Cited in *Fitzgerald v. Rodgers*, 58 App. Div. 301, 68 N. Y. Supp. 946, holding sewer contractor leaving winch used in connection with work, unguarded in high-

way, not liable for injury to child playing thereon; *Kaumeier v. City Electric R. Co.* 116 Mich. 311, 40 L. R. A. 387, 72 Am. St. Rep. 525, 74 N. W. 481, holding street car company leaving car on track in highway, not liable for injury to child falling under wheels, while car pushed by companions; *Gay v. Essex Electric Street R. Co.* 159 Mass. 240, 21 L. R. A. 448, 38 Am. St. Rep. 415, 34 N. E. 186, holding street car company leaving cars standing in street, not liable for death of child from playing with unfastened brake.

Implied invitation.

Cited in *Holbrook v. Aldrich*, 168 Mass. 17, 36 L. R. A. 495, 60 Am. St. Rep. 364, 46 N. E. 115, holding child entering store with parent, to make purchase, and injured from contact with coffee grinder, cannot recover damages from storekeeper; *Leavitt v. Mudge Shoe Co.* 69 N. H. 598, 45 Atl. 558, holding person going upon premises with implied invitation, not extending, however, to elevator, cannot recover for injuries resulting from use of elevator; *Chenery v. Fitchburg R. Co.* 160 Mass. 214, 22 L. R. A. 577, 35 N. E. 554, holding duty of railroad to person crossing track by private way, dependent upon whether reasonably prudent man would understand railroad by implication had declared crossing public; *Driscoll v. Scanlon*, 165 Mass. 349, 52 Am. St. Rep. 523, 43 N. E. 100, holding master not liable for injury to child invited by servant to ride with him on dump cart, and from which he fell; *Thompson v. Baltimore & O. R. Co.* 218 Pa. 451, 19 L.R.A.(N.S.) 1167, 120 Am. St. Rep. 897, 67 Atl. 768, 11 A. & E. Ann. Cas. 894; *Walker v. Potomac, F. & P. R. Co.* (*Pannill v. Potomac, F. & P. R. Co.*) 105 Va. 229, 4 L.R.A.(N.S.) 84, 115 Am. St. Rep. 871, 53 S. E. 113, 8 A. & E. Ann. Cas. 862; *Wheeling & L. E. R. Co. v. Harvey*, 77 Ohio St. 244, 19 L.R.A.(N.S.) 1144, 122 Am. St. Rep. 503, 83 N. E. 66, 11 A. & E. Ann. Cas. 981,—holding railroad company not liable for injury to child playing on a turntable; *Driscoll v. Clark*, 32 Mont. 186, 80 Pac. 1, on doctrine of turntable cases; *Iamurri v. Saginaw City Gas Co.* 148 Mich. 53, 111 N. W. 884 (dissenting opinion), on doctrine of constructive invitation to children; *New York, C. & H. R. R. Co. v. Price*, 16 L.R.A.(N.S.) 1105, 86 C. C. A. 502, 159 Fed. 332, holding railroad not bound to fence tracks to keep children out; *Foster-Herbert Cut Stone Co. v. Pugh*, 115 Tenn. 699, 4 L.R.A.(N.S.) 809, 112 Am. St. Rep. 881, 91 S. W. 199, holding that owner of a stone wagon need not take special precaution to avoid injury to a child attempting to ride upon it; *Wilmot v. McPadden*, 79 Conn. 378, 19 L.R.A.(N.S.) 1111, 65 Atl. 157, holding one tearing down building not bound to anticipate that children will enter premises and undermine chimneys; *O'Leary v. Michigan State Teleph. Co.* 146 Mich. 253, 109 N. W. 434 (dissenting opinion), on the distinction between invitation and temptation; *Briscoe v. Henderson Lighting & Power Co.* 148 N. C. 408, 19 L.R.A.(N.S.) 1129, 62 S. E. 600, holding mere maintenance of a building with large windows through which could be seen machinery in motion not to make owner liable for injury to a child falling into a well of hot water some distance from building.

Cited in footnote to *Com. v. Joslin*, 21 L. R. A. 448, which holds leaving street car in street not invitation to children to play on same.

Disapproved in *Force v. Standard Silk Co.* 160 Fed. 1004, holding that an employer of children is to take precautions against childish instincts.

Proximate cause.

Cited in *Murray v. Boston Ice Co.* 180 Mass. 168, 61 N. E. 1001, holding question of probable cause properly left to jury, where person riding with another injured in collision.

Cited in footnote to *Schreiner v. Great N. R. Co.* 58 L. R. A. 75, which holds

failure to build fence not proximate cause of injury to one pushed on track by cow.

13 L. R. A. 251, *ATTY. GEN. v. ABBOTT*, 154 Mass. 323, 28 N. E. 346.

Other suit rising out of same facts in *Abbott v. Hills*, 158 Mass. 396, 33 N. E. 592.

Dedication; acts constituting.

Cited in *Bates v. Beloit*, 103 Wis. 97, 78 N. W. 1102, holding appropriation of land for public use by act evincing such intent, constitutes dedication in *pais* which becomes absolute by user or acceptance; *Conkling v. Mackinaw City*, 120 Mich. 74, 79 N. W. 6, holding designation of land on plat as public park, sale of lots adjoining, and subsequent user, sufficient dedication, without formal acceptance; *Riley v. Buchanan*, 116 Ky. 633, 63 L. R. A. 645, 76 S. W. 527, holding acceptance of highway beneficial to public effected by long continued user; *Re Bartlett*, 163 Mass. 514, 40 N. E. 890, holding gift of real and personal property for public park is a good public charitable gift; *Cole v. Minnesota Loan & T. Co.* 17 N. D. 421, 117 N. W. 354, 17 A. & E. Ann. Cas. 304; *Florida East Coast R. Co. v. Worley*, 49 Fla. 306, 38 So. 618,—holding where lots were sold with reference to a plat showing a parcel used for park purposes that this is a dedication; *Brewer v. Pine Bluff*, 80 Ark. 493, 97 S. W. 1034, holding that where owner sells lots according to a plat showing street that dedication of street is irrevocable; *Northport Wesleyan Grove Campmeeting Asso. v. Andrews*, 104 Me. 348, 20 L.R.A.(N.S.) 978, 71 Atl. 1027, holding where a dedication to public has been made and public has used it for purpose dedicated owner is estopped to revoke it; *Cassidy v. Sullivan*, 75 Neb. 849, 106 N. W. 1027, holding an acceptance of a dedication by general public sufficient; *Atty. Gen. v. Ellis*, 198 Mass. 98, 15 L.R.A.(N.S.) 1123, 84 N. E. 430, sustaining power of state to secure title to private property by adverse possession.

Cited in footnote to *Archer v. Salinas City*, 16 L. R. A. 145, which holds dedication for park effected by recording map with spaces marked thereon.

Protection of rights under dedication.

Cited in *Prince v. Crocker*, 166 Mass. 363, 32 L. R. A. 613, 44 N. E. 446, holding taxpayer cannot assert right to continue use of property as public park, or to have compensation paid for surrender of use, against combined acts of legislature and public authorizing surrender; *Atty. Gen. v. Williams*, 174 Mass. 484, 47 L. R. A. 319, 55 N. E. 77, holding information in equity to restrain erection of public building, contrary to statute limiting height of buildings on public square, may be maintained by attorney general; *Re Certain Land*, 119 Fed. 454, holding municipality may contest taking of public park for postoffice; *Atty. Gen. v. Vineyard Grove Co.* 181 Mass. 509, 64 N. E. 75, holding dedication of shore lands for purpose of view may be enforced against building interfering with view; *Hamlin ex rel. Maine Baptist Missionary Convention v. Property in Webster*, 106 Me. 134, 76 Atl. 163, holding that owner of fee of land dedicated to pious use cannot be deprived of fee itself unless by eminent domain or other due process of law.

Cited in notes (14 L.R.A.(N.S.) 1068) on effect of conveyance of lots laid down on plats, to prevent change in use or form; (16 L.R.A.(N.S.) 1075) on precedence as between conveyance for nominal or inadequate consideration and senior unrecorded conveyance.

Appearance for the commonwealth.

Cited in *McQuesten v. Atty. Gen.* 187 Mass. 186, 72 N. E. 965, holding that an attorney general could authorize an attorney at law not an assistant to take an appeal in behalf of the commonwealth.

13 L. R. A. 255, *WATUPPA RESERVOIR CO. v. FALL RIVER*, 154 Mass. 305, 28 N. E. 257.

Rights in great ponds.

Cited in *Concord Mfg. Co. v. Robertson*, 66 N. H. 24, 18 L. R. A. 692, 25 Atl. 718, holding removal of limited quantity of ice from large pond not unreasonable use of which governmental grantee of land on stream flowing from pond can complain; *Percy Summer Club v. Astle*, 145 Fed. 58; *Percy Summer Club v. Astle*, 90 C. C. A. 527, 163 Fed. 6,—holding that public has right to fish in lakes and ponds; *Conant v. Jordan*, 107 Me. 233, 31 L.R.A.(N.S.) 437, 77 Atl. 938, holding that right to free fishing and fowling on ponds of more than ten acres in extent, has always belonged to public.

Cited in footnote to *Auburn v. Union Waterpower Co.* 38 L. R. A. 188, which holds taking one-fifteenth water supply of great pond for city not unreasonable as to owners of mill privileges.

Cited in note (50 L. R. A. 746) on state and Federal ownership of waters.

Amendment of pleading.

Cited in *Merrill v. Beckwith*, 168 Mass. 75, 46 N. E. 400, holding bill in equity after entry on docket of "bill dismissed," but before formal decree, may be amended to complaint for damages.

Prescriptive rights.

Cited in *Atty. Gen. v. Ellis*, 198 Mass. 98, 15 L.R.A.(N.S.) 1123, 84 N. E. 430, holding twenty years' possession by lessee of adverse claimant sufficient.

13 L. R. A. 258, *POWERS v. MANNING*, 154 Mass. 370, 28 N. E. 290.

Attorneys; withdrawal from suit.

Cited in *Thompson v. Dickinson*, 159 Mass. 213, 34 N. E. 262, holding evidence, that attorneys withdrew from cause after notice, and that they understood client to consent to it, does not show withdrawal wrongful or without justification.

13 L. R. A. 262, *BENSON v. GRAY*, 154 Mass. 391, 28 N. E. 275.

Custom to vary written contract.

Cited in *Menage v. Rosenthal*, 175 Mass. 361, 56 N. E. 579, holding under contract for services of salesman to be rendered in "New England," not admissible to show custom to render part of service in New York; *People's Ice Co. v. Employers' Liability Assur. Corp.* 161 Mass. 125, 36 N. E. 754, holding custom of ice dealers to erect own ice houses, not sufficient to bring injuries from fall of ice house in course of construction within conditions of employer's liability policy insuring injuries to employees occupied in "all operations connected with business of ice dealers;" *Louisville-Cincinnati Packet Co. v. Rogers*, 20 Ind. App. 599, 49 N. E. 970, holding bill of lading for shipment on particular boat named, cannot be varied by proof of usage to ship by first boat leaving port; *Boruszewski v. Middlesex Mut. Assur. Co.* 186 Mass. 593, 72 N. E. 250, holding evidence of a custom not admissible to change the plain terms of a contract; *Shute v. Bills*, 191 Mass. 438, 7 L.R.A.(N.S.) 967, 114 Am. St. Rep. 631, 78 N. E. 96, refusing to allow evidence to show a custom for property owners to retain control of outside portions of property; *De Friest v. Bradley*, 192 Mass. 353, 78 N. E. 467, holding parol evidence not admissible to show a condition to a specifically stated covenant of a lease.

Carriers; liability for injury to freight.

Cited in footnotes to *Chicago, B. & Q. R. Co. v. Williams*, 55 L. R. A. 289, which holds carrier liable for failure to properly provide for live stock knowingly taken without caretaker; *Betts v. Chicago, R. I. & P. R. Co.* 26 L. R. A.

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248, which holds carrier liable for injuries to live stock by breaking of slats; Illinois C. R. Co. v. Harris, 48 L. R. A. 175, which holds carrier liable for communication of Texas fever by infected cars to cattle transported.

Cited in notes (37 L. ed. U. S. 296) on duty and liability as carrier of livestock; (63 Am. St. Rep. 559) on respective duties of carriers and shippers of livestock.

13 L. R. A. 263, BADENFELD v. MASSACHUSETTS MUT. ACCI. ASSO. 154 Mass. 77, 27 N. E. 769.

Agreements to arbitrate.

Cited in Smith v. Preferred Masonic Mut. Acci. Asso. 51 Fed. 522, holding action on benefit certificate not abated, because of stipulation for arbitration of any claim thereunder; Prudent Patricians of Pompeii v. Marr, 20 App. D. C. 375, holding policy prohibiting proceedings for collection, except "through regular channels of the order," does not preclude assured from having recourse to courts; Lewis v. Brotherhood Acci. Co. 194 Mass. 6, 17 L.R.A.(N.S.) 716, 79 N. E. 802, holding an agreement to abide by an arbitration invalid; Hartford F. Ins. Co. v. Bourbon County, 115 Ky. 117, 72 S. W. 739, holding that one cannot contract not to try his case before the courts; Nolan v. Ocean Acci. & Guarantee Corp. 5 Ont. L. Rep. 549, on invalidity of unlimited agreements to arbitrate and be concluded thereby.

Cited in footnotes to Brock v. Dwelling House Ins. Co. 26 L. R. A. 623, which denies right of insurer uniting in appointment of appraisers to claim appointment premature; Grand Rapids F. Ins. Co. v. Finn, 50 L. R. A. 555, which holds appraisal of loss not required by policy unless demand made by insurer.

Cited in note (15 L.R.A.(N.S.) 1066) on arbitration as condition precedent to action on insurance policy.

Construction of insurance policy.

Cited in Traders' Ins. Co. v. Dobbins, 114 Tenn. 233, 86 S. W. 383, holding a policy of insurance construed most strongly against insurer.

Cited in footnote to Jarnagin v. Travelers' Protective Asso. 68 L.R.A. 499, which holds that failure of police officers to protect insured while in their charge from assaults by other persons will not take his killing out of provision against recovery in case of death from intentional injuries.

Insurance; avoidance of policy for misrepresentation.

Cited in footnotes to Globe Mut. L. Ins. Asso. v. Wagner, 52 L. R. A. 649, which holds policy not avoided by false statement that none of applicant's brothers dead; White v. Providence Sav. Life Assur. Soc. 27 L. R. A. 398, which holds technical warranties as well as representations included in provision against misrepresentations material.

Death or injury by accidental means.

Cited in Noyes v. Commercial Travellers' Eastern Acci. Asso. 190 Mass. 183, 76 N. E. 665, holding it an accident where the foot of one about to take a car gave away allowing him to fall and be injured.

Cited in footnotes to Fidelity & C. Co. v. Lowenstein, 46 L. R. A. 450, which holds death by accidentally inhaling gas while asleep covered by accident policy; American Acci. Co. v. Reigart, 21 L. R. A. 651, which holds death by choking on food covered by accident policy; Dailey v. Preferred Masonic Mut. Acci. Asso. 26 L. R. A. 171, which holds risk of getting on and off moving train by passenger conductor covered by accident policy.

Distinguished in Garcelon v. Commercial Travellers Eastern Acci. Asso. 195 Mass. 537, 10 L.R.A.(N.S.) 963, 81 N. E. 201, holding negligence of plaintiff in

boarding a moving train to bar a recovery where policy stipulated against injury from plaintiff's own negligence.

Burden of proof as to excepted causes of death.

Cited in *Jones v. United States Mut. Acci. Asso.* 92 Iowa, 659, 61 N. W. 485, holding breach of conditions limiting insurance is matter of defense, which insurer must prove; *Keene v. New England Mut. Acci. Asso.* 161 Mass. 150, 36 N. E. 891, holding burden on insurer to show death was from voluntary exposure to unnecessary danger, or to want of due diligence; *Anthony v. Mercantile Mut. Acci. Asso.* 162 Mass. 357, 26 L. R. A. 407, footnote p. 306, 44 Am. St. Rep. 367, 38 N. E. 973, holding burden on insurer to show injury to insured resulted from causes specified in policy as not within insurance; *Meadows v. Pacific Mut. L. Ins. Co.* 129 Mo. 92, 50 Am. St. Rep. 427, 31 S. W. 578, holding where plaintiff shows body of insured found mangled on railroad track, but not cause of accident, burden is on insurer to show death result of breach of conditions of policy; *Canadian R. Acci. Ins. Co. v. McNevin*, 32 Can. S. C. 198, holding burden on insurance company to prove facts which relieve company from liability; *Jamison v. Continental Casualty Co.* 104 Mo. App. 314, 78 S. W. 812, holding that burden was on defendant to show that insured met death in way that would bring into operation minimum indemnity clause where such was defense on accident policy.

Cited in notes (33 L.R.A.(N.S.) 1214) on burden of proof as to contributory negligence; (4 L.R.A.(N.S.) 638) on duty of insured to negative death or accident from excepted cause; (50 Am. St. Rep. 442) on evidence of cause of death of insured.

Distinguished in *Carnes v. Iowa State Traveling Men's Asso.* 106 Iowa, 286, 68 Am. St. Rep. 306, 76 N. W. 683, holding burden on plaintiff to show death resulted from accidental cause, and if evidence in equipoise as to such fact, plaintiff must fail.

Voluntary exposure to unnecessary danger.

Cited in *Ætna L. Ins. Co. v. Hicks*, 23 Tex. Civ. App. 79, 56 S. W. 87, holding voluntary over-exertion and exposure by assured will not defeat recovery on policy, unless proximate cause of accident; *Whalen v. Peerless Casualty Co.* 75 N. H. 299, 139 Am. St. Rep. 695, 73 Atl. 642, holding that "voluntary exposure" in conscious or intentional exposure to known risk and not one which is merely inadvertent or accidental.

Cited in footnotes to *Follis v. United States Mut. Acci. Asso.* 28 L. R. A. 78, which holds attempt to cross bridge on ties voluntary exposure to danger; *Shewlin v. American Mut. Acci. Asso.* 36 L. R. A. 52, which holds jumping in dark from moving freight train exposure to unnecessary danger.

Cited in notes (40 L.R.A. 444) on voluntary exposure to unnecessary danger within meaning of insurance policy; (139 Am. St. Rep. 713) on voluntary exposure of insured to danger; (10 L.R.A.(N.S.) 959) on boarding or alighting from moving train as within provision of accident policy as to exposure to danger.

Presumptions as to cause of death.

Cited in *Meadows v. Pacific Mut. L. Ins. Co.* 129 Mo. 94, 50 Am. St. Rep. 427, 31 S. W. 578, holding presumption that assured was exercising ordinary care at time of accident, not overcome by fact that body was found mangled on railroad track.

Breach of condition subsequent.

Cited in *Westfield Cigar Co. v. Insurance Co. of N. A.* 169 Mass. 385, 47 N. E. 1026, holding breach of condition subsequent not defense, where insurer, after

receipt of proofs of loss, admitted liability, save as to goods not covered by policy.

13 L. R. A. 267, *EQUITABLE ACCI. INS. CO. v. OSBORN*, 90 Ala. 201, 9 So. 869.

Pleading; general issue.

Overruled in *Louisville & N. R. Co. v. Trammell*, 93 Ala. 352, 9 So. 870, holding pleas alleging allegations of complaint are untrue, or denying each and every allegation contained therein, equivalent to general issue.

Construction of conditions in an insurance policy.

Cited in *Thomson v. United States Fidelity & G. Co.* 44 Wash. 391, 87 Pac. 486; *Pacific Union Club v. Commercial Union Assur. Co.* 12 Cal. App. 513, 107 Pac. 728,—holding exceptions in a policy are construed most strongly against the insured; *Starr v. Aetna L. Ins. Co.* 41 Wash. 204, 4 L.R.A.(N.S.) 641, 83 Pac. 113, holding that a provision that an accident policy does not cover being on any railway right of way means on the track.

Cited in note (8 L.R.A.(N.S.) 971) on restriction of insurer's liability where injuries received on "roadbed" of railway.

Insurance; voluntary exposure to unnecessary danger.

Cited in *DeLoy v. Travelers Ins. Co.* 171 Pa. 11, 50 Am. St. Rep. 787, 32 Atl. 1108, holding "voluntary exposure" to unnecessary danger means intentional exposure; *Employers' Liability Assur. Corp. v. Anderson*, 5 Kan. App. 26, 47 Pac. 331, holding to avoid policy there must be unnecessary risk to known danger, which of itself is actual cause of death or injury; *Cornwell v. Fraternal Acci. Asso.* 6 N. D. 204, 40 L. R. A. 440, 69 N. W. 191, holding attempt to scale bluff, with loaded gun in hand while hunting, not voluntary exposure to unnecessary danger; *Hess v. Preferred Masonic Mut. Acci. Asso.* 112 Mich. 207, 40 L. R. A. 451, 70 N. W. 460, holding bank cashier going into planing mill, where he stumbled and fell against buzz-saw, not voluntary exposure; *Fidelity & C. Co. v. Chambers*, 93 Va. 144, 40 L. R. A. 436, 24 S. E. 896, holding not voluntary exposure to sit talking on railroad track and when warned of approaching train to attempt to recover valise from front of train; *Jones v. United States Mut. Acci. Asso.* 92 Iowa, 667, 61 N. W. 485, holding to bring case within exception, act resulting in death must be not only unnecessary, but such as reasonable and ordinary prudence would pronounce dangerous; *Smith v. Aetna L. Ins. Co.* 115 Iowa, 220, 56 L. R. A. 274, 91 Am. St. Rep. 153, 88 N. W. 368, holding, where assured, killed by stepping or falling from steps of moving train, test is whether assured appreciated he was hazarding life or limb; *Payne v. Fraternal Acci. Asso.* 119 Iowa, 346, 93 N. W. 361, holding "voluntary exposure to unnecessary danger" or person injured while crossing track, question for jury; *Jamison v. Continental Casualty Co.* 104 Mo. App. 314, 78 S. W. 812, on what constitutes voluntary exposure to danger; *Diddle v. Continental Casualty Co.* 65 W. Va. 174, 22 L.R.A.(N.S.) 786, 63 S. E. 962, holding inadvertent exposure is not voluntary exposure; *Bateman v. Travelers Ins. Co.* 110 Mo. App. 452, 85 S. W. 128, holding a voluntary exposure covenant clause does not cover every act of negligence; *Whalen v. Peerless Casualty Co.* 75 N. H. 299, 139 Am. St. Rep. 695, 73 Atl. 642, holding that "voluntary exposure" is conscious or intentional exposure to known risk, and not one which is merely inadvertent or accidental.

Cited in notes (13 L. R. A. 265) on voluntary exposure to unnecessary risks; (40 L. R. A. 432) on voluntary exposure to unnecessary danger within meaning of accident insurance policy; (139 Am. St. Rep. 700, 704, 706) on voluntary exposure of insured to danger.

Accidental death.

Cited in *Collins v. Fidelity & C. Co.* 63 Mo. App. 256, holding death from pistol shot fired by another to be from accidental means; *Berliner v. Travelers' Ins. Co.* 121 Cal. 461, 41 L. R. A. 468, 66 Am. St. Rep. 49, 53 Pac. 918, holding death of passenger while temporarily riding upon locomotive, not within exception in accident policy, of death from being on conveyance not provided for transportation of passengers; *Sullivan v. Modern Brotherhood*, 167 Mich. 534, — L.R.A.(N.S.) —, 133 N. W. 486, holding that insurer against accident is liable, where death or injury is caused by disease not resulting from any bodily infirmity or disease existing at time of accident but which disease is itself caused by accident.

Cited in note (30 L. R. A. 213) on what constitutes an accident within meaning of an accident insurance policy.

13 L. R. A. 270, *STEVENS v. LUDLUM*, 46 Minn. 160, 24 Am. St. Rep. 210, 48 N. W. 771.

Estoppel in pais.

Cited in *Myers v. Byars*, 99 Ala. 487, 12 So. 430, holding person representing he holds funds subject to adjudication of conflicting claims by courts, estopped to deny in action to settle claims, that he holds money; *Barchent v. Selleck*, 89 Minn. 516, 95 N. W. 455, holding vendee under land contract, knowing of intended purchase from owner, and surrendering possession to purchaser, estopped to assert claim; *Fergestad v. Gjertsen*, 46 Minn. 371, 49 N. W. 127, holding agreement of subcontractor with owner as condition to permission to erect dwelling, that cost should not exceed stated sum, not estopped against claim for greater sum; *Christian v. Michigan Debenture Co.* 134 Mich. 178, 96 N. W. 22; *Thompson v. Borg*, 90 Minn. 213, 95 N. W. 896,—holding it not necessary that there be an actual intent to mislead or deceive; *Weidemann v. Springfield Breweries Co.* 78 Conn. 664, 63 Atl. 162; *Pleasant Hill Light, Power & Water Co.* 130 Mo. App. 492, 109 S. W. 1061,—holding it cannot be based on statements made to third parties which are not intended to be communicated to party claiming benefit therefor; *Dallett v. Ogden*, 11 Del. Co. Rep. 423, 20 Pa. Dist. R. 850, holding that one who holds himself out as partner, on faith of which others give credit to firm, will be held liable to equitable estoppel for firm debts.

Distinguished in *Irish-American Bank v. Ludlum*, 49 Minn. 348, 51 N. W. 1046, holding merchant not estopped by statement to commercial agency as to one not patron, and having no right to rely and act thereon.

Fraud; representations to commercial agency.

Cited in *P. Cox Shoe Co. v. Adams*, 105 Iowa, 415, 75 N. W. 316, holding patron of commercial agency selling goods to merchant in reliance upon false representations made to agency as to business responsibility, entitled to rescind; *Davis v. Louisville Trust Co.* 30 L.R.A.(N.S.) 1015, 104 C. C. A. 24, 181 Fed. 15, holding that person purchasing treasury stock of corporation on strength of statements made by corporation to mercantile agency, may rescind if statements are false.

Cited in note (14 L. R. A. 264) on fraud in obtaining credit.

Distinguished in *Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb. 805, 56 N. W. 389, holding merchant's statement of liabilities to bank, though false, not fraud constituting ground for attachment, in favor of person selling him goods on faith of statement.

13 L. R. A. 272, HEILIGMANN v. ROSE, 81 Tex. 222, 26 Am. St. Rep. 804, 16 S. W. 931.

Evidence; proof of tortious acts.

Cited in Rider v. Hunt, 6 Tex. Civ. App. 241, 25 S. W. 314; Granrud v. Rea, 24 Tex. Civ. App. 300, 59 S. W. 841, holding fraud may be presumed from facts and circumstances proved; Elliott v. Ferguson, 37 Tex. Civ. App. 49, 83 S. W. 56, holding a criminal act may be proved in a civil case only by clear and satisfactory proof; Cox v. Thompson, 37 Tex. Civ. App. 609, 85 S. W. 34, holding a preponderance of evidence sufficient in civil case to prove criminal act.

Proof of damage.

Cited in Hodges v. Causey, 77 Miss. 358, 48 L. R. A. 96, 78 Am. St. Rep. 525, 26 So. 945, holding in trespass for killing dog, if it has no market value, plaintiff may prove special pecuniary value to himself; Gulf, C. & S. F. R. Co. v. Vancil, 2 Tex. Civ. App. 428, 21 S. W. 303, holding in action against carrier for loss of trunk, plaintiff may testify to value of use of property while deprived of it.

Instructions as to damages.

Cited in Yazoo & M. Valley R. Co. v. Williams, 87 Miss. 359, 39 So. 489, holding that instruction to allow what damages the jury "see fit" in an action for assault to be proper; Western U. Teleg. Co. v. Hamilton, 36 Tex. Civ. App. 304, 81 S. W. 1052, holding same where jury were instructed to allow such damages as would "compensate" for mental suffering.

Right of property in dogs.

Cited in Salley v. Manchester & A. R. Co. 54 S. C. 485, 71 Am. St. Rep. 810, 32 S. E. 526, holding action will lie for damages from negligent killing of dog.

Cited in notes (40 L. R. A. 510) on property right in dogs; (15 L. R. A. 249) on right to kill dogs; (67 Am. St. Rep. 292) on property in dogs and remedies for its enforcement; (9 Eng. Rul. Cas. 687) on property rights in, and liability for, injuries by dogs.

Form of verdict.

Cited in Trimble v. Borroughs, 41 Tex. Civ. App. 559, 95 S. W. 614, holding that a verdict need not itemize damages.

13 L. R. A. 275, ADAMS v. ADAMS, 154 Mass. 290, 28 N. E. 260.

Wills; construction.

Cited in Hayden v. Barrett, 172 Mass. 474, 70 Am. St. Rep. 295, 52 N. E. 530, holding illegitimate son within meaning of will making bequest to "heirs by blood" of his mother; Brandeis v. Atkins, 204 Mass. 475, 26 L.R.A.(N.S.) 231, 90 N. E. 861, holding that the meaning of the term "heirs at law" in an agreement compromising a will is to be determined by the laws of the state where compromise is made.

Cited in notes (25 Eng. Rul. Cas. 531) on right of illegitimate child to take under legacy of children; (2 Brit. Rul. Cas. 563) on law governing ascertainment of members of class taking under will; (2 L.R.A.(N.S.) 453) on conflict of laws as to wills.

Bastards; Subsequent marriage of parents.

Cited in Fowler v. Fowler, 131 N. C. 172, 59 L. R. A. 319, footnote, p. 318, 42 S. E. 563, holding bastard child made legitimate, under laws of domicile, by subsequent marriage of parents, legitimacy follows him to another state having different law; Olmsted v. Olmsted, 190 N. Y. 465, 123 Am. St. Rep. 585, 83 N. E. 569, holding a subsequent illegal marriage of father to mother of his illegitimate child not to render child legitimate.

Cited in footnote to *Ives v. McNicoll*, 43 L. R. A. 772, which holds illegitimate child legitimated by parent's subsequent marriage and acknowledgment, although mother married woman when child begotten.

Judgments; effect on persons not parties.

Cited in *Tucker v. Fisk*, 154 Mass. 577, 28 N. E. 1051, holding decree of adoption not binding upon heirs attacking same for fraud, when not parties to proceeding, nor having any notice thereof.

Effect of judgment in foreign state.

Cited in *Taft v. Com.* 158 Mass. 551, 33 N. E. 1046, holding tribunal cannot establish its own jurisdiction by adjudicating it to exist; *Andrews v. Andrews*, 176 Mass. 94, 57 N. E. 333, holding decree of divorce void, where parties not domiciled in fact in state where rendered, although court rendering decree found to contrary; *VanMatre v. Sankey*, 148 Ill. 554, 23 L. R. A. 671, 36 N. E. 628, holding decree of adoption by court of another state, having jurisdiction of parties and subject-matter, binding, unless attacked for fraud; *Clark v. Clark*, 191 Mass. 132, 77 N. E. 702, holding that where one state has complete jurisdiction of one of parties it may determine status of marriage.

Cited in footnotes to *Felt v. Felt*, 47 L. R. A. 546, which holds divorce on substituted service in other state where complainant domiciled entitled to recognition by interstate comity; *Trowbridge v. Spinning*, 54 L. R. A. 204, which holds judgment for alimony, though subject to alteration, final for enforcement in other state; *Arrington v. Arrington*, 52 L. R. A. 201, which holds foreign decree for alimony after defendant's appearance entitled to full faith and credit; *Williams v. Williams*, 14 L. R. A. 220, which refuses to recognize foreign divorce on personal service.

Cited in notes (19 L. R. A. 814) on validity of decree of divorce obtained on publication or service out of state where defendant did not appear; (59 L. R. A. 183) on conflict of laws on subject of divorce.

13 L. R. A. 282, *BUFFINGTON v. GROSVENOR*, 46 Kan. 730, 27 Pac. 137.

Wife's contingent interest in husband's lands.

Cited in *Chapman v. Chapman*, 48 Kan. 638, 29 Pac. 1071, holding dower not such vested right as to forbid legislature from changing or repealing contingent interest; *Jenkins v. Henry*, 52 Kan. 608, 35 Pac. 216, holding conveyance and subsequent abandonment of land by husband alone, while sole occupant, and while wife nonresident, valid as against dower and homestead claims of wife; *Small v. Small*, 56 Kan. 11, 30 L. R. A. 248, 54 Am. St. Rep. 581, 42 Pac. 323, holding married man as against post-mortem claim of widow, not resident of state, may give bulk of property to children, though effect is to diminish share widow would otherwise have been entitled to; *Union P. R. Co. v. Barnard & L. Mfg. Co.* 1 Kan. App. 29, 41 Pac. 201, holding wife's inchoate interest in husband's equitable estate in lands held under contract of sale not divested by assignment of contract by husband alone.

Distinguished in *Kennedy v. Haskell*, 67 Kan. 617, 73 Pac. 913, holding wife formerly residing in state may inherit interest in husband's land.

Rights of nonresidents.

Cited in *Miner v. Morgan*, 83 Neb. 403, 119 N. W. 781, holding under state law that nonresident wife has no dower interest in lands conveyed by resident husband; *Nagle v. Tieperman*, 74 Kan. 52, 9 L.R.A.(N.S.) 682, 85 Pac. 941, 10 A. & E. Ann. Cas. 977 (dissenting opinion), on rights of a nonresident wife in property.

Cited in footnote to *Bond v. Martin*, 44 L. R. A. 430, which sustains nonresident's right to exemption of household furniture from execution.

Cited in notes (84 Am. St. Rep. 448) on constitutionality of statutes affecting rights based on pre-existing marriage; (25 Am. St. Rep. 884) on 14th amendment as to special privileges, burdens and restrictions.

13 L. R. A. 286, *PEOPLE v. WAGNER*, 86 Mich. 594, 24 Am. St. Rep. 141, 49 N. W. 609.

Police power of states.

Cited in *State v. Hodgson*, 66 Vt. 145, 28 Atl. 1089, holding police power extends to all regulations affecting health, good order, peace and safety of society; *State v. Theriault*, 70 Vt. 627, 43 L. R. A. 294, 67 Am. St. Rep. 702, 41 Atl. 1030, holding statute depriving one of right to fish in stream on own land, save under conditions prescribed, within police power; *State v. Loomis*, 115 Mo. 329, 21 L. R. A. 808, 22 S. W. 350 (dissenting opinion), majority holding statute making payment of wages otherwise than in lawful money of United States, except orders redeemable at option of holder at place of business of employer, misdemeanor, is unconstitutional; *Chicago v. Bartels*, 146 Ill. App. 187, sustaining a weights and measure ordinance; *State v. McCool*, 83 Kan. 430, 111 Pac. 477, holding that statute establishing standard weight for loaf of bread is valid exercise of police power; *House v. Mayes*, 227 Mo. 639, 127 S. W. 305, holding that statute providing for inspection of weights and measures and requiring dealers to use only those so inspected and approved, is within police power; *Chicago v. Schmidinger*, 243 Ill. 171, 90 N. E. 369, 17 A. & E. Ann. Cas. 614, sustaining an ordinance regulating weight of a loaf of bread; *Chicago v. Bowman Dairy Co.* 234 Ill. 298, 17 L.R.A.(N.S.) 687, 123 Am. St. Rep. 100, 84 N. E. 913, 14 A. & E. Ann. Cas. 700, sustaining an ordinance regulating the size of milk bottles or jars; *American Linseed Oil Co. v. Wheaton*, 25 S. D. 65, 41 L.R.A.(N.S.) 151, 125 N. W. 127, holding that political code section 2897, fixing standard of purity for linseed oil, and forbidding sale of oil not complying therewith, is within police power; *State v. Co-operative Store Co.* 123 Tenn. 406, 131 S. W. 867, Ann. Cas. 1912 C, 248, holding that statute fixing standard of corn meal, and regulating its sale in packages is constitutional; *State v. Holton*, 148 Iowa, 726, 126 N. W. 1125, holding that laws providing for prevention and detection of frauds are held, generally, to be free from constitutional objection.

Cited in footnotes to *Slate v. Layton*, 62 L.R.A. 164, which upholds constitutionality of statute prohibiting manufacture or sale of baking powder containing alum; *Arbuckle v. Blackburn*, 65 L.R.A. 864, which upholds statute prohibiting the coloring, coating, or polishing of article intended for food, whereby damage or inferiority is concealed.

Cited in notes (48 L.R.A. 261) on legal restrictions on department stores; (78 Am. St. Rep. 241, 242) on acts which legislature may declare criminal; (48 Am. St. Rep. 236) on equality of right.

Failure to express subject in title as affecting validity of ordinance.

Cited in *Chicago Union Traction Co. v. Chicago*, 207 Ill. 547, 69 N. E. 849, holding constitutional provision requiring expression of subject of law in title inapplicable to municipal ordinances.

13 L. R. A. 289, *KINCAID v. McGOWAN*, 88 Ky. 91, 4 S. W. 802.

Title to minerals as separate estate.

Cited in *Stuart v. Com.* 94 Ky. 596, 23 S. W. 367, holding metals and minerals may be taxed as apart from land, when held as separate estate; *Barrett v. Kansas & T. Coal Co.* 70 Kan. 654, 79 Pac. 150, holding that a grantor might

retain title to coal on land by exception in deed; *Moore v. Griffin*, 72 Kan. 167, 4 L.R.A.(N.S.) 479, 83 Pac. 395, holding that title to oil and gas may be reserved by provision in deed; *Gill v. Fletcher*, 74 Ohio St. 306, 113 Am. St. Rep. 962, 78 N. E. 433, holding where one claims title to minerals a distinct title thereto must be set up and established; *Carlson v. Minnesota Land & Colonization Co.* 113 Minn. 364, 129 N. W. 768, holding that deed of land may operate as conveyance of land with exception of coal and iron contained therein, reserving right to enter land for purpose of exploring and mining minerals excepted; *Pellow v. Arctic Iron Co.* 164 Mich. 105, — L.R.A.(N.S.) —, 128 N. W. 918, Ann. Cas. 1912 B, 827, holding that one of two tenants in common of minerals underlying land may not without consent of cotenant convey interest which he owns in portion of entire estate, so as to create new tenancy in common.

Cited in footnote to *Williams v. South Penn Oil Co.* 60 L. R. A. 795, which holds right to oil and gas does not pass under deed of "surface" retaining right to remove coal.

Cited in note (13 L. R. A. 628) on conveyance of mineral beneath surface of land.

Distinguished in *Snoddy v. Bolen*, 122 Mo. 492, 24 L. R. A. 512, 25 S. W. 932, holding where mineral is reserved in dedication of street, conveyance of abutting lot without reservation carries mineral under street.

Actions to quiet title.

Cited in *Campbell v. Disney*, 93 Ky. 42, 18 S. W. 1027, holding complaint alleging setting up of claim to land by one not owner, without averment that claim is hostile, is demurrable; *Morse v. South*, 80 Fed. 210, holding both legal title and possession necessary to maintenance of suit to quiet title; *Newsome v. Hamilton*, 142 Ky. 7, 133 S. W. 952, to the point that legal owner in actual possession of land may maintain action to quiet title; *Carlson v. Curren*, 48 Wash. 252, 93 Pac. 315, holding in an action to quiet title all adverse claimants may be made parties defendant; *Shouse v. Taylor*, 115 Ky. 25, 72 S. W. 324, holding statute giving party in possession of lands and having legal title the right to sue one claiming title not to authorize suit against mortgagee on ground of fraud in procuring mortgage.

13 L. R. A. 294, *LIME ROCK NAT. BANK v. MOWRY*, 66 N. H. 598, 22 Atl. 555.

Rights of purchaser of notes secured by mortgage.

Cited in footnote to *Kernehan v. Hanns*, 29 L. R. A. 317, which holds bona fide purchaser before maturity of genuine notes secured by mortgage entitled to priority over previous assignee of genuine mortgage and forged copies of notes.

Cited in note (99 Am. St. Rep. 168) on merger of estates.

13 L. R. A. 299, *AMERICAN FREEHOLD LAND MORTG. CO. v. SEWELL*, 92 Ala. 163, 9 So. 143.

Followed without discussion in *Farrior v. New England Mortg. Secur. Co.* 92 Ala. 178, 12 L. R. A. 857, 9 So. 532.

Mortgages; foreclosure by sale under power.

Cited in *Edgell v. Ham*, 35 C. C. A. 588, 93 Fed. 763, holding foreclosure under power of sale in mortgage cuts off equity of redemption as fully as foreclosure by decree of court.

Disaffirmance of sale.

Cited in *Lovelace v. Hutchinson*, 106 Ala. 422, 17 So. 623, holding where mortgagee purchases at own sale, without authority, mortgagor has election to redeem, if seasonably expressed; *American Freehold Land Mortg. Co. v. Pollard*, 120 Ala.

7, 24 So. 736, and *American Freehold Land Mortg. Co. v. Turner*, 95 Ala. 275, 11 So. 211, holding foreclosure sale, at which mortgagee purchaser, can be avoided only by affirmative action of mortgagor and offer to pay debt secured; *New England Mortg. Secur. Co. v. Powell*, 97 Ala. 486, 12 So. 55, holding offer, in bill to cancel mortgage to pay sum due, is substantial offer to do equity; *Diefenbach v. Vaughan*, 116 Ala. 155, 23 So. 88, holding mortgagor cannot set up election to disaffirm foreclosure sale, because mortgagee purchaser, as defense to ejectment by mortgagee; *Marx v. Clisby*, 130 Ala. 509, 30 So. 517, holding beneficiary cannot enforce trust as against purchaser at foreclosure sale of unauthorized mortgage by trustee without accounting for moneys received thereunder and used by trustee to pay debts of testator; *Pollard v. American Freehold Land Mortg. Co.* 103 Ala. 298, 16 So. 801, holding mortgagee bringing bill to compel mortgagor to elect to affirm or avoid sale on account of purchase by mortgagee, must account for and apply purchase money as stranger; *American Freehold Land Mortg. Co. v. Pollard*, 127 Ala. 235, 29 So. 598, holding right of election to disaffirm foreclosure sale cannot become barred pending proceedings to compel election; *Haggart v. Wilczinski*, 74 C. C. A. 176, 143 Fed. 28, holding where a mortgage foreclosure sale is voidable at election of mortgagee or his heirs that purchaser could by suit compel an election.

Cancellation of mortgages.

Cited in *Grider v. American Freehold Land Mortg. Co.* 99 Ala. 291 42 Am. St. Rep. 58, 12 So. 775; *George v. New England Mortg. & Secur. Co.* 109 Ala. 551, 20 So. 331; *Southern Bldg. & L. Asso. v. Casa Grand Stable Co.* 119 Ala. 182, 24 So. 886,—holding mortgagor seeking cancellation of mortgage on ground mortgagee not entitled to do business in state, must offer to repay money with interest; *Ross v. New England Mortg. & Security Co.* 101 Ala. 367, 13 So. 564, holding equity will not cancel mortgage as violative of statute, where complainant offers to pay debt if held valid.

Conflict of laws; construction of contracts.

Cited in *Lomb v. Pioneer Sav. & L. Asso.* 96 Ala. 433, 11 So. 154, holding where bill for foreclosure of mortgage fails to disclose state in which contract made, courts will treat same as Alabama contract; *Dundee Mortg. & Trust Invest. Co. v. Nixon*, 95 Ala. 321, 10 So. 311, holding in absence of other evidence note presumed to have been executed at place where dated; *Ashurst v. Ashurst*, 119 Ala. 230, 24 So. 760, holding note and mortgage providing same should be construed by laws of Alabama where they were made, constitute Alabama contract, though made payable in New York.

Usury.

Cited in *George v. New England Mortg. Secur. Co.* 109 Ala. 552, 20 So. 331, holding loan not usurious because of commission paid broker employed by borrower; *Falls v. United States Sav. Loan & Bldg. Co.* 97 Ala. 434, 24 L. R. A. 182, 38 Am. St. Rep. 194, 13 So. 25, holding where loan made by foreign corporation through local agent, at higher rate of interest than allowed in Alabama, and papers executed, and money paid in that state, contract is usurious; *Pioneer Sav. & L. Co. v. Nonnemacher*, 127 Ala. 545, 30 So. 79, holding contract for loan by resident of Alabama with corporation of Minnesota, at rate of interest allowed in that state, but not allowed in Alabama, debt being made payable in Minnesota, not usurious.

Cited in notes (55 L. R. A. 939) on whether *lex rei sitæ* with respect to interest and usury necessarily controls in action to foreclose real-estate mortgage; (62 L. R. A. 51, 55, 61) on conflict of laws as to interest and usury.

Ejectment.

Cited in *Hambrick v. New England Mortg. Secur. Co.* 100 Ala. 552, 13 So. 778, holding mortgagee purchasing at own sale may maintain ejectment, so long as sale not set aside and mortgagor makes no attempt to redeem by offering to do equity; *Pitts v. American Freehold Land Mortg. Co.* 123 Ala. 473, 26 So. 286, holding mortgagee in possession under voidable foreclosure sale after mortgagor's death, regarded as holding under mortgage in privity of title with heirs; *Southern R. Co. v. Hood*, 126 Ala. 317, 85 Am. St. Rep. 32, 28 So. 662, holding ejectment against railroad taking land without conveyance or condemnation proceedings will not be enjoined without offer to compensate owners.

Equity pleading; sufficiency of bill.

Cited in *Dickerson v. Winslow*, 97 Ala. 494, 11 So. 918, holding bill to cancel mortgage as void, and offering to pay amount due, not demurrable on ground of repugnancy; *Tipton v. Wortham*, 93 Ala. 324, 9 So. 596, holding bill to cancel mortgage not multifarious because of election to disaffirm foreclosure sale and praying for accounting and permission to redeem; *McMinn v. Karter*, 123 Ala. 509, 26 So. 649, and *Brackin v. Newman*, 121 Ala. 312, 26 So. 3, holding when original bill not withdrawn on filing of amendment, two are to be taken together as constituting complaint; *Lanier v. Union Mortg. Bkg. & T. Co.* 64 Ark. 56, 40 S. W. 466, by Bourland, J., dissenting, who holds where bill not attacked on account of repugnance in court below, objection not available on appeal.

Foreign corporations; compliance with local regulations.

Cited in *McLeod v. American Freehold Land Mortg. Co.* 100 Ala. 498, 14 So. 409, holding constitutional requirement that foreign corporation must designate place of business in state, and authorized agent residing thereat, complied with by filing certificate designating agent without place of business; *Ross v. New England Mortg. Security Co.* 101 Ala. 367 13 So. 564, holding mortgage to foreign corporation executed after enactment, but before statute, regulating manner of conducting business by foreign corporations became effective, valid.

13 L. R. A. 304, *GILMAN v. TUCKER*, 128 N. Y. 190, 40 N. Y. S. R. 71, 26 Am. St. Rep. 464, 28 N. E. 1040.

Constitutional law; test of invalidity of statute.

Cited in *Colon v. Lisk*, 153 N. Y. 194, 60 Am. St. Rep. 609, 47 N. E. 302; *Rochester v. West*, 164 N. Y. 514, 53 L. R. A. 550, 79 Am. St. Rep. 659, 58 N. E. 673; *Rathbone v. Wirth*, 6 App. Div. 313, 40 N. Y. Supp. 535,—holding constitutionality of statute to be determined, not by what has been done, but by what may be done, under its authority; *People ex rel. Balcom v. Mosher*, 163 N. Y. 42, 79 Am. St. Rep. 552, 57 N. E. 88; *Rathbone v. Wirth*, 150 N. Y. 494, 34 L. R. A. 421, 45 N. E. 15, Affirming 6 App. Div. 313, 40 N. Y. Supp. 535, per O'Brien, J., concurring opinion, who holds that constitutionality of statute appointing chief of police for municipality determined by nature, character, and scope of powers attempted to be conferred, whether actually exercised or not; *Riglander v. Star Co.* 34 N. Y. Civ. Proc. Rep. 98, 90 N. Y. Supp. 772; *Grout v. Williams*, 34 N. Y. Civ. Proc. Rep. 247, 93 N. Y. Supp. 711; *Cahill v. Hogan*, 44 Misc. 368, 89 N. Y. Supp. 1022; *Re Grout*, 105 App. Div. 110, 93 N. Y. Supp. 711,—holding that the constitutionality of a statute is to be tested not by what has been done under it but by what may be done under it.

Cited in note (104, Am. St. Rep. 643) on municipal regulations of street railways for protection of public.

Statutes impairing rights vested under judgment.

Cited in *People ex rel. Reynolds v. Buffalo*, 48 N. Y. S. R. 635, holding award,

duly confirmed, not affected by subsequent repeal of statute under which proceedings had; *Livingston v. Livingston*, 173 N. Y. 382, 61 L. R. A. 803, 93 Am. St. Rep. 600, 66 N. E. 123, Affirming 74 App. Div. 267, 77 N. Y. Supp. 476, holding statute authorizing modification of judgments for divorce in respect to allowance for support of wife and children, unconstitutional as applied to judgments previously entered, in which right to modification not reserved; *Re Greene*, 166 N. Y. 492, 60 N. E. 183, Affirming 55 App. Div. 482, 67 N. Y. Supp. 291, holding judgment in favor of county against receiver of bank cannot be impaired by subsequent special statute providing for retrial of legality of claim; *Re Handley*, 75 Utah, 221, 62 Am. St. Rep. 926, 49 Pac. 829, declaring unconstitutional, statute requiring courts to grant new trial in cases where polygamous children denied right to inherit; *Merchants Bank v. Ballou*, 98 Va. 118, 44 L. R. A. 310, 81 Am. St. Rep. 715, 32 S. E. 481, holding statute validating deed of corporation cannot impair superior lien of judgment recovered after recording of deed, but before statute enacted; *Evans-Snider-Buel Co. v. McFadden*, 58 L. R. A. 907, 44 C. C. A. 505, 105 Fed. 304 (dissenting opinion), majority giving retrospective operation to statute validating recording of mortgage, as against lien by attachment created prior to enactment of statute, where proceedings to determine priority of liens pending at time of enactment; *Cassard v. Tracy*, 52 La. Ann. 848, 49 L. R. A. 277, 27 So. 368, holding Constitution 1898, conferring upon court of appeals jurisdiction to determine questions of fact as well as of law, not applicable to appeals pending when Constitution adopted (overruled on rehearing); *People ex rel. Rodgers v. Coler*, 56 App. Div. 108, 67 N. Y. Supp. 701, holding where contractor duly performs work under authorized contract with municipality, legislature cannot relieve corporation from obligation to pay; *Spremich v. Maurepas Land & Lumber Co.* 114 La. 1054, 38 So. 827, holding that the legislature cannot divest one of a vested right in a judgment; *People ex rel. American Exch. Nat. Bank v. Purdy*, 196 N. Y. 284, 89 N. E. 838, holding that the legislature has no power to directly or indirectly deprive constitutional courts of jurisdiction in matters then pending; *Farnam v. Farnam*, 83 Conn. 374, 77 Atl. 70, holding that judicial interpretation placed by court upon will twenty-five years ago, under which property rights have become vested, will not be disturbed; *Humphrey v. Gerard*, 83 Conn. 353, 77 Atl. 65, to the point that when rights under statute have been judicially passed upon, they become vested as so declared by judicial decision.

Due process of law.

Cited in *Re Fuller*, 34 Misc. 754, 70 N. Y. Supp. 1050, holding statute allowing tax appraised per centage of tax, deprives taxpayer of property without due process of law; *Parker v. Elmira, C. & N. R. Co.* 165 N. Y. 280, 59 N. E. 81, holding authority of railroad under special act to charge 4 cents per mile, is privilege or franchise in nature of property, which is transferable; *State ex rel. Broatch v. Moores*, 52 Neb. 782, 73 N. W. 299, holding statute requiring clerk of court to pay over to county treasurer unclaimed fees and costs remaining in his hands for two years, deprives persons entitled to funds of property without due process of law; *Bennett v. Davis*, 90 Me. 107, 37 Atl. 864, holding statute making deposit of all taxes with clerk of court, condition to right to contest validity, deprives citizen of property without due process of law; *Barry v. Port Jervis*, 64 App. Div. 291, 72 N. Y. Supp. 104, holding village charter denying right of action for personal injury, unless notice of injuries filed with village clerk within forty-eight hours, deprives person injured of property without due process of law; *Williams v. Port Chester*, 72 App. Div. 513, 76 N. Y. Supp. 631, holding void, provision of village charter denying right of action against village for personal injury, unless notice of injuries be given president of village within thirty days;

Forster v. Scott, 136 N. Y. 584, 18 L. R. A. 547, 82 N. E. 976, holding statute denying compensation for building erected on land taken for street after filing of map, unconstitutional; *Williams v. Port Chester*, 97 App. Div. 101, 89 N. Y. Supp. 671, holding that legislature cannot deprive a party injured through negligent keeping of a sidewalk, of his remedy to recover for injury; *People v. Golding*, 55 Misc. 436, 106 N. Y. Supp. 821, holding that legislature cannot deprive one who has been illegally deprived of his property access to courts; *MacMullen v. Middletown*, 112 App. Div. 89, 98 N. Y. Supp. 145, holding unconstitutional a statute requiring written notice to council to remove snow and ice from sidewalk before suit could be maintained for injury thereby; *People ex rel. Loughran v. Flynn*, 110 App. Div. 291, 96 N. Y. Supp. 655, holding that a liquor tax certificate could not be revoked without an opportunity to be heard; *Riglander v. Star Co.* 98 App. Div. 105, 90 N. Y. Supp. 772, holding a statute unconstitutional which requires a suitor irrespective of circumstance to try his case designated for trial; *Frank L. Fisher Co. v. Woods*, 187 N. Y. 95, 12 L.R.A.(N.S.) 710, 79 N. E. 836, denying authority of legislature to prohibit offering for sale the real property of another without written authority.

Cited in footnote to *Gulf, C. & S. F. R. Co. v. Ellis*, 17 L. R. A. 286, which holds valid act authorizing attorneys' fees against railroad corporations in suits on claims.

(Cited in note (69 L.R.A.) 52) on relief of purchaser upon annulling judicial or execution sale.

13 L. R. A. 311, *HUBBLE v. COLE*, 88 Va. 236, 29 Am. St. Rep. 716, 13 S. E. 441. **Landlord and tenant; breach of covenants.**

Cited in *Knotts v. McGregor*, 47 W. Va. 572, 35 S. E. 899, holding covenant for quiet enjoyment broken by lessor withholding possession from lessee.

13 L. R. A. 313, *WHITE SEWING MACH. CO. v. DAKIN*, 86 Mich. 581, 49 N. W. 583.

Alteration of instruments.

Cited in *Port Huron Engine & Thresher Co. v. Sherman*, 14 S. D. 467, 85 N. W. 1008, holding clerk's insertion of name of bank in note, as memorandum, without knowledge of holder, not such alteration as would avoid note; *Lanum v. Patterson*, 143 Ill. App. 249, holding a material alteration of a judgment note by the attorney for the plaintiff made without authority not to render note void.

Cited in note (86 Am. St. Rep. 103, 105) on unauthorized alteration of written instruments.

Bonds; penalty as measure of liability.

Cited in *People's Sav. Bank v. Campau*, 124 Mich. 110, 82 N. W. 803, holding damages, including interest, cannot exceed amount of bond.

Cited in note (62 L. R. A. 447) on form of judgment on penal bonds.

13 L. R. A. 315, *HALLOWELL v. BLACKSTONE NAT. BANK*, 154 Mass. 359, 28 N. E. 281.

Pledge; consideration.

Cited in *Citizens' Bank & T. Co. v. Thornton*, 98 C. C. A. 478, 174 Fed. 762, holding the renewal of note not to release pledged security.

Cited in note (32 Am. St. Rep. 717) on collateral securities.

Distinguished in *National Safe Deposit Sav. & T. Co. v. Gray*, 12 App. D. C. 293, holding pre-existing debt insufficient to support pledge of stock by one clothed with apparent legal title, as against equities of real owner.

Partnership as legal entity.

Cited in *Hughes v. Gross*, 166 Mass. 65, 32 L. R. A. 621, 55 Am. St. Rep. 375, 43 N. E. 1031, holding contract of service with partnership not dissolved by death of partner; *Waterman v. Alden*, 143 U. S. 202, 36 L. ed. 124, 12 Sup. Ct. Rep. 435, holding that will providing for cancelation of indebtedness of brothers and sisters to testator, does not include debts contracted by beneficiaries jointly with third person, as partners or otherwise; *Re William Hill & Sons*, 186 Fed. 570, holding that agreement, in note secured by collateral, that securities should be applicable to other obligations held by payee, entitle payee to apply surplus to obligation of firm of which maker is partner.

13 L. R. A. 318, *DODGE v. BOSTON & P. R. CO.* 154 Mass. 299, 28 N. E. 243.

Meaning of word "family."

Cited in *Day v. Lawrence*, 167 Miss. 374, 45 N. E. 751, holding permanent boarders members of householder's family, within statute exempting household furniture from taxation; *Townsend v. Townsend*, 156 Mass. 456, 31 N. E. 632, holding where testator twice married, devise providing for equal division of residue of estate to "families" designated by names of his two wives, each family constitutes class, and entitled to one half of estate; *Re Bennett*, 134 Cal. 323, 66 Pac. 370, holding provision of will that in case of death of any legatee, his share should revert to "family" of which legatee is member, means family of legatee, and not that of testator; *People ex rel. Sagazei v. Sagazei*, 27 Misc. 733, 59 N. Y. Supp. 701, holding statute providing husband abandoning "wife and children" may be required to give bond to support them, not authority for bond to support obligor's "family;" *Spear v. Boston Police Relief Asso.* 195 Mass. 353, 81 N. E. 196, holding that children who have married and moved away cannot take under designation in benefit society certificate as "members of family;" *Robbins v. Bangor R. & Electric Co.* 100 Me. 505, 1 L.R.A.(N.S.) 968, 62 Atl. 136, holding a water rate for a "dwelling house containing a family" not to apply to a boarding house.

Construction of written instruments.

Cited in note (29 L. R. A. 737) on receipt as evidence of payment as against third parties.

Annotation in 13 L. R. A. 318, particularly referred to in *Hart v. Gardner*, 74 Miss. 159, 20 So. 877, holding deed should be so construed as to give effect to intention of parties.

13 L. R. A. 321, *BALLENTINE v. WEBB*, 84 Mich. 38, 47 N. E. 485.

Nuisance.

Cited in *Gallagher v. Flury*, 99 Md. 189, 57 Atl. 672, holding a stable in a city not per se a nuisance.

Cited in footnote to *Wade v. Miller*, 69 L.R.A. 820, which holds characteristic noises and odors from chicken house and yard maintained in cleanly manner not a nuisance.

Cited in note (107 Am. St. Rep. 241) on what are public nuisances.

Abatement of nuisances.

Cited in *Northwood v. Barber Asphalt Paving Co.* 126 Mich. 288, 54 L. R. A. 455, 85 N. W. 724, holding defendant not absolved from liability to punishment for contempt in failing to obey general clause of decree for abatement of nuisance by complying with special directions, which prove insufficient; *Lone Star Salt Co. v. Blount*, 49 Tex. Civ. App. 142, 107 S. W. 1163, holding that a decree granting an injunction should specify acts to be done or not to be done; *Schuster v. Mil-*

waukee Electric R. & Light Co. 142 Wis. 585, 126 N. W. 26, holding where great damage would be caused defendant by granting and small damage to plaintiff by not granting that compensation might be granted instead of an injunction.

Cited in footnotes to **Pfingst v. Senn**, 21 L. R. A. 569, which denies right to enjoin as nuisance prospective use of premises as beer garden; **Rowland v. Miller**, 22 L. R. A. 182, which holds undertaking establishment within restrictive agreement against business "injurious or offensive to neighboring inhabitants."

Cited in notes (20 L. R. A. 165) on power of equity to grant mandatory injunctions; (51 L. R. A. 657) on right of municipality to maintain suit to enjoin or abate public nuisance.

Distinguished in **Blagen v. Smith**, 34 Or. 405, 44 L. R. A. 526, 56 Pac. 292, holding equity will enjoin maintenance of bawdy house in business district upon complaint of neighboring proprietor.

13 L. R. A. 325, **STELZ v. SCHRECK**, 128 N. Y. 263, 26 Am. St. Rep. 475, 28 N. E. 510.

Estates by entirety.

Cited in **Banzer v. Banzer**, 10 Misc. 25, 30 N. Y. Supp. 803, holding tenancy by the entirety created only by conveyance to husband and wife; **Reynolds v. Strong**, 82 Hun. 204, 31 N. Y. Supp. 329, holding husband and wife receiving conveyance in their joint names take as tenants by the entirety, and survivor takes whole estate; **Germania Sav. Bank v. Jung**, 28 Abb. N. C. 82, 18 N. Y. Supp. 709, holding by conveyance to husband and wife, "and to their heirs and assigns," they take as tenants by the entirety, and same character attaches to surplus from mortgage sale of property; **Mardt v. Scharmach**, 65 Misc. 126, 119 N. Y. Supp. 449, holding where husband and wife hold estate by entirety and wife acquires husband's interest at an execution sale she holds the entire estate; **Hayes v. Horton**, 46 Or. 600, 81 Pac. 386, holding that a divorce between persons holding land by entirety dissolves that estate and they become tenants in common; **Lerbs v. Lerbs**, 71 Misc. 53, 129 N. Y. Supp. 903, holding that, in absence of words signifying contrary intention, deed to husband and wife creates estate by entirety; **Craig v. Bradley**, 153 Mo. App. 597, 134 S. W. 1081, holding that husband and wife hold note, taken for borrowed money supplied both, as estate by entirety; **Vollaro v. Vollaro**, 144 App. Div. 243, 129 N. Y. Supp. 43, holding that tenancy by entirety while partaking of some of qualities of joint tenancy is different estate both in form and substance.

Cited in footnotes to **Re Albrecht**, 18 L. R. A. 329, which denies tenancy by entirety in bond and mortgage to husband and wife; **Thornburg v. Wiggins**, 22 L. R. A. 42, which holds tenancy by entirety not created by conveyance to husband and wife "in joint tenancy."

Cited in notes (30 L.R.A. 334) on tenancy by entireties; (10 L.R.A.(N.S.) 463) on effect of divorce on tenancy by entireties.

Distinguished in **Jooss v. Fey**, 129 N. Y. 19, 29 N. E. 136, holding where husband and wife equally contribute of own means to purchase price, and conveyance is to them as joint tenants, they do not hold as tenants by the entirety.

13 L. R. A. 329, **O'BRIEN v. CUNARD S. S. CO.** 154 Mass. 272, 28 N. E. 266.

Negligences; respondent superior.

Cited in **Allan v. State S. S. Co.** 132 N. Y. 99, 15 L. R. A. 168, 28 Am. St. Rep. 556, 30 N. E. 482, holding under statute requiring passenger ships to carry "duly qualified medical practitioner," steamship company not liable to passenger for negligence of physician, if duly qualified practitioner employed; **Eighmy v. Union P. R. Co.** 93 Iowa, 541, 27 L. R. A. 297, 61 N. W. 1056; **Atchison, T. & S. F. R.**

Co. v. Zeiler, 54 Kan. 350, 38 Pac. 282; Quinn v. Kansas City, M. & B. R. Co. 94 Tenn. 720, 28 L. R. A. 556, 45 Am. St. Rep. 767, 30 S. W. 1036; Galveston, H. & S. A. R. Co. v. Scott, 18 Tex. Civ. App. 324, 44 S. W. 589; Southern P. Co. v. Mauldin, 19 Tex. Civ. App. 169, 46 S. W. 650; South Florida R. Co. v. Price, 32 Fla. 51, 13 So. 638,—holding if railroad obligated to furnish medical or surgical aid to sick or injured employees, duty is discharged when it employs person of ordinary skill in profession; Haggerty v. St. Louis, K. & N. W. R. Co. 100 Mo. App. 450, 74 S. W. 456, denying liability of railroad selecting surgeon with reasonable care, for his malpractice in treating employee; Pittsburgh, C. C. & St. L. R. Co. v. Sullivan, 141 Ind. 91, 27 L. R. A. 843, 50 Am. St. Rep. 313, 40 N. E. 138, holding railroad furnishing surgical aid to injured employees gratuitously, not liable for negligent amputation of arm; Collins v. New York Post Graduate Medical School, 59 App. Div. 66, 69 N. Y. Supp. 106, holding public charitable hospital not liable for negligence of surgeon performing operation; Joel v. Woman's Hospital, 89 Hun, 74, 35 N. Y. Supp. 37, holding public charitable hospital not liable for injury to inmate from negligence of nurse; Warren v. Merchants Exchange, 52 Mo. App. 171, holding merchants' exchange conducting auction sales at its call board not liable for failure of clerk to record sale, unless negligent in making appointment; Barden v. Atlantic Coast Line R. Co. 152 N. C. 328, 67 S. E. 971, holding railroad company not liable for malpractice of a physician in its hospital; Kellogg v. Church Charity Foundation, 128 App. Div. 216, 112 N. Y. Supp. 566, on nonliability of master for malpractice of physician.

Cited in notes (31 L.R.A. 263) on duty of carrier as to passengers taken ill during journey; (36 L.R.A.(N.S.) 52) on liability of one other than physician or surgeon contracting to provide medical attention; (19 Eng. Rul. Cas. 219) on liability of ship owner for collision due to negligence of qualified pilot.

Distinguished in *Tompkins v. Pacific Mut. L. Ins. Co.* 53 W. Va. 500, 62 L. R. A. 499, 97 Am. St. Rep. 1006, 44 S. E. 439, holding accident insurance company liable for negligence of its examiner, removing and failing to replace plaster cast on sprained foot.

Assault; justification.

Cited in note (15 L. R. A. 854) on consent as justification for assault.

13 L. R. A. 332, *OLD COLONY R. CO. v. FRAMINGHAM WATER CO.* 153 Mass. 561, 27 N. E. 662.

Eminent domain; taking property already devoted to public use.

Cited in *Boston & A. R. Co. v. Cambridge.* 166 Mass. 224, 44 N. E. 140, holding to authorize taking property devoted to public use for another public use, intention to grant authority must be plainly manifested in statute; *Chicago. M. & St. P. R. Co. v. Starkweather,* 97 Iowa, 162, 31 L. R. A. 185, 59 Am. St. Rep. 404, 66 N. W. 87, holding street may be opened across depot grounds of railroad, under general authority of statute; *Boston v. Brookline,* 156 Mass. 175, 30 N. E. 611, holding land used as public highway may be taken under right of eminent domain for purpose of laying water pipes, where two uses not inconsistent; *New Haven Water Co. v. Wallingford,* 72 Conn. 302, 44 Atl. 235, holding statute authorizing borough "to take and use the water of any stream, lake, or pond, in whole or in part;" not authority for taking waters already appropriated to public use; *Prince v. Crocker,* 166 Mass. 362, 32 L. R. A. 612, 44 N. E. 446, holding tax payers not entitled to enjoin construction of subway through Boston Common and Public Garden against combined action of legislature in passing statute, and of city in accepting it; *Framingham Water Co. v. Old Colony R. Co.* 176 Mass. 412, 57 N. E. 680, holding, notwithstanding condemnation of pond by water company, rail-

road has right to use waters of pond, so far as use does not interfere with needs of water company; *Atty. Gen. v. Vineyard Grove Co.* 181 Mass. 509, 64 N. E. 75, holding person licensed to erect building in tide water, not entitled to maintain structure in violation of dedication to public made by predecessor in title; *United States v. Certain Land*, 165 Fed. 789, holding that property previously devoted to public use might be taken by United States; *Codman v. Crocker*, 203 Mass. 150, 25 L.R.A.(N.S.) 990, 89 N. E. 177, sustaining the right of taking of public property for an entirely different use; *Eldredge v. Norfolk County*, 185 Mass. 188, 70 N. E. 36, holding that land acquired by eminent domain might be used for purpose not inconsistent with original purpose.

Cited in notes (58 L.R.A. 246) on acquisition of water supply by right of eminent domain; (24 L.R.A.(N.S.) 384) on right to condemn property previously condemned or purchased for public use, but not actually used.

Payment of compensation.

Cited in *Salt Lake City Water & Electrical Power Co. v. Salt Lake City*, 24 Utah, 296, 67 Pac. 791, holding statute authorizing plaintiff in condemnation to enter upon land pending proceedings, upon filing sufficient bond, not unconstitutional; *Whitman v. Nantucket*, 169 Mass. 149, 47 N. E. 611, holding statute providing in case of disagreement as to damages, same may be determined as in case of laying out of highway, sufficient in providing compensation.

13 L. R. A. 336, *PICO v. COHN*, 91 Cal. 129, 25 Pac. 970, 25 Am. St. Rep. 159, 27 Pac. 537.

Judgment; grounds for relief against perjury.

Cited in *Maryland Steel Co. v. Marney*, 91 Md. 374, 46 Atl. 1077; *Steen v. March*, 132 Cal. 617, 64 Pac. 994, holding use of perjured testimony in obtaining judgment not ground for setting aside; *McDougall v. Walling*, 21 Wash. 487, 75 Am. St. Rep. 849, 58 Pac. 669; *Adamski v. Wiecezorek*, 93 Ill. App. 363, holding perjured testimony merely affecting right of evidence upon issues tried, not sufficient to support bill of review; *Holton v. Davis*, 47 C. C. A. 259, 108 Fed. 150, holding perjured testimony not ground for relief against judgment, unless reasonably certain that judgment would have been different, if such testimony had not been given; *Young v. Leach*, 27 App. Div. 296, 50 N. Y. Supp. 670, holding action will not lie for damages from judgment obtained through perjury or subordination of perjury; *Donovan v. Miller*, 12 Idaho, 607, 9 L.R.A.(N.S.) 527, 88 Pac. 82, 10 A. & E. Ann. Cas. 444; *Graves v. Graves*, 132 Iowa, 203, 10 L.R.A.(N.S.) 224, 109 N. W. 707, 10 A. & E. Ann. Cas. 1104; *Bradbury v. Wells*, 138 Iowa, 678, 16 L.R.A.(N.S.) 242, 115 N. W. 880; *Bleakley v. Barclay*, 75 Kan. 470, 10 L.R.A.(N.S.) 236, 89 Pac. 906; *Electric Plaster Co. v. Blue Rapids City Twp.* 81 Kan. 735, 25 L.R.A.(N.S.) 1239, 106 Pac. 1079; *Nelson v. Meehan*, 12 L.R.A.(N.S.) 380, 83 C. C. A. 597, 155 Fed. 9.—holding perjury not ground for relief against a judgment; *Mahoney v. State Ins. Co.* 133 Iowa, 575, 9 L.R.A.(N.S.) 494, 110 N. W. 1041, on same point; *Steele v. Culver* (*South Haven & E. R. Co. v. Culver*) 157 Mich. 350, 23 L.R.A.(N.S.) 569, 122 N. W. 95, holding that judgment was obtained through perjury no ground for injunction against its enforcement; *Harden v. Card*, 17 Wyo. 220, 97 Pac. 1075; *Reeves v. Reeves*, 24 S. D. 441, 25 L.R.A.(N.S.) 577, 123 N. W. 869,—denying relief from a decree granting divorce on ground that residence was established by perjury; *Zeitlin v. Zeitlin*, 202 Mass. 208, 23 L.R.A.(N.S.) 570, 132 Am. St. Rep. 490, 88 N. W. 762, refusing to vacate a decree of divorce on ground of perjury where a marriage has been entered into on faith of decree and a child born; *El Capitan Land & Cattle Co. v. Lees*, 13 N. M. 415, 86 Pac. 924; *Kennedy v. Dickie*, 34 Mont. 223, 85 Pac. 982,—holding false testimony not sufficient to justify opening up of judgment; *Cragie* L.R.A. Au. Vol. II.—63

v. Roberts, 6 Cal. App. 314, 92 Pac. 97, holding one having a chance to be heard cannot set up false testimony to show a patent was obtained illegally; Cagle v. Dunham, 14 Okla. 621, 78 Pac. 561, refusing to set aside the decision of the land department which was obtained by perjury; Horner v. Schinstock, 80 Kan. 140, 23 L.R.A.(N.S.) 136, 101 Pac. 996, holding a judgment in original action a bar to action for damages for perjury against adverse party; Fealey v. Fealey, 104 Cal. 359, 43 Am. St. Rep. 111, 38 Pac. 49, holding a judgment though obtained by false testimony is binding.

Cited in notes (10 L.R.A.(N.S.) 230) on perjury as ground for relief against judgment; (54 Am. St. Rep. 233) on relief in equity against judgments and other judicial determinations.

Distinguished in Boring v. Ott, 138 Wis. 268, 19 L.R.A.(N.S.) 1083, 119 N. W. 865, holding perjury ground for relief where party could not have discovered or known it at trial; Carpenter v. Sibley, 153 Cal. 218, 15 L.R.A.(N.S.) 1147, 126 Am. St. Rep. 77, 94 Pac. 879, 15 A. & E. Ann. Cas. 484, allowing an action for malicious prosecution where conviction of a crime is procured by fraud and perjury.

Laches defeating relief from judgment.

Cited in Snider v. Rinehart, 20 Colo. 460, 39 Pac. 408, holding that equity would not interfere with a judgment where an adequate remedy by appeal has been lost by laches.

Fraud.

Cited in Bergin v. Haight, 99 Cal. 56, 33 Pac. 760, holding fraud upon jurisdiction of court in procuring sale of real estate in probate, ground for action to set aside sale; Pepin v. Lautman, 28 Ind. App. 78, 62 N. E. 60; Camp v. Ward, 69 Vt. 291, 60 Am. St. Rep. 929, 37 Ati 747, holding fraud for which judgment will be set aside, must have relation to some extrinsic or collateral matter, and not to matter on which judgment rendered; Langdon v. Blackburn, 109 Cal. 26, 41 Pac. 814, holding fraud in procuring execution and probate of will, and concealing same and size of estate from heir, not ground for equitable action to declare trust; Mulcahey v. Dow, 131 Cal. 75, 63 Pac. 158, holding fraud in procuring order of distribution in probate, by representing oneself as sole heir, not ground for declaration of trust; Sullivan v. Lumsden, 118 Cal. 668, 50 Pac. 777, holding mistake and inadvertence of referees in making partition of lands, ground for setting aside decree upon petition filed within year; Hanley v. Hanley, 114 Cal. 693, 46 Pac. 736, holding false representation of widow that real estate was community property, and that declaration of homestead had been filed, not ground for vacating decree in probate setting aside property as homestead; Keith v. Alger, 114 Tenn. 21, 85 S. W. 71, holding that fraud must be extrinsic or collateral to issues in former suit to authorize setting aside the judgment therein; Bacon v. Bacon, 150 Cal. 483, 89 Pac. 317, denying relief where fraud is intrinsic; Friese v. Hummel, 26 Or. 150, 46 Am. St. Rep. 610, 37 Pac. 458, holding a fraud in consideration of merits no ground for new trial; Ametoy Estate Co. v. Los Angeles, 5 Cal. App. 276, 90 Pac. 420, holding fraud to be ground for setting away judgment must not be fraud as to questions determined by the court; Thomason v. Thompson, 129 Ga. 447, 26 L.R.A.(N.S.) 544, 59 S. E. 236, holding fraudulent concealment of evidence not ground for relief where evidence to establish such fraud was given on trial; Campbell-Kawannanakoa v. Campbell, 152 Cal. 209, 92 Pac. 184; Tracy v. Muir, 151 Cal. 373, 121 Am. St. Rep. 117, 90 Pac. 832,—holding fraud in having a forged will probated to be intrinsic fraud; Miller v. Perris Irrig. Dist. 85 Fed. 701, holding organization of an irrigation district conclusive against an attack for fraud; Keyes v. Brackett, 187 Mass. 308, 72 N. E. 986, 3 A. & E. Ann. Cas. 81, can-

celling a bond given to dissolve a mechanic's lien the approval of which by master was obtained by fraud; *Tollefson v. Tollefson*, 137 Iowa, 154, 114 N. W. 631, holding fraud in getting wife to leave country for purpose of procuring divorce from her while away sufficient to set aside a divorce; *Anderson v. Bank of Lassen County*, 140 Cal. 698, 74 Pac. 287, setting aside a judgment obtained by collusion to defraud creditors; *Parsons v. Weis*, 144 Cal. 415, 77 Pac. 1007, setting aside a judgment where a knowing false petition is presented to court and it is acted on by court; *Flood v. Templeton*, 152 Cal. 155, 13 L.R.A. (N.S.) 584, 92 Pac. 78, setting aside a decree of foreclosure of a mortgage where fraud of mortgagor induced him not to interpose a valid defense; *Uecker v. Thiedt*, 133 Wis. 152, 113 N. W. 447, on fraud as basis for setting aside a judgment; *Welch's Estate*, 3 Cof. Prob. Dec. 305, holding allegations did not make out fraud; *Re Burton*, 5 Cof. Prob. Dec. 242, holding bill insufficient to show fraud vitiating a decree; *Michael v. American Nat. Bank*, 84 Ohio St. 382, 38 L.R.A. (N.S.) 223, 95 N. E. 905, holding that equity will set aside judgment only when fraud consists of acts extrinsic and outside matter directly tried and determined.

Cited in note (43 Am. St. Rep. 117) on relief of inequity from judgment at law.

Distinguished in *Silva v. Santos*, 138 Cal. 542, 71 Pac. 703, holding fraudulent concealment of moneys misappropriated by guardian, ground for setting aside decree settling account; *Doyle v. Hampton*, 159 Cal. 734, 116 Pac. 39, holding that judgment quieting title to land which was obtained upon constructive service without any knowledge on part of defendant, and order for which service was based on false statements will be set aside.

13 L. R. A. 340, *FREES v. BAKER*, 81 Tex. 216, 16 S. W. 900.

Conveyances by insolvents.

Cited in *Keating Imp. Cement & Mach. Co. v. Terre Haute Carriage & Buggy Co.* 11 Tex. Civ. App. 219, 32 S. W. 556, holding failing debtor may protect surety by transfer of property reasonably proportioned to amount of debt; *Kessler v. Half*, 21 Tex. Civ. App. 95, 51 S. W. 48, holding goods transferred to creditor absolutely, though with intent to defraud, cannot be attached by notice only.

Contribution among sureties.

Cited in footnote to *Gibson v. Sheehan* 28 L. R. A. 400, which denies right of surety companies indemnifying one surety on official bond, to contribution against co-surety.

Creditors.

Cited in *Welch v. Morris*, 193 Mo. 323, 92 S. W. 98, holding the indemnified party to an indemnity contract a creditor within purview of statute concerning conveyances fraudulent as to creditors from the date of contract, contingent on the happening of event indemnified against.

13 L. R. A. 343, *HOYT v. HOYT*, 143 Pa. 623, 24 Am. St. Rep. 575, 22 Atl. 755.

Trademarks; who are entitled to use.

Cited in *McVey v. Brendel*, 144 Pa. 246, 13 L. R. A. 379, 27 Am. St. Rep. 625, 22 Atl. 912, holding Cigar Makers' International Union, not being trader, can have no distinctive trademark; *Adelburg v. Burkham*, 9 North. Co. Rep. 131, to the point that right to injunction to protect trademark exists though without registration.

Cited in note (85 Am. St. Rep. 121) on what words or phrases may constitute a valid trademark.

Simulating product of another.

Cited in *Lafean v. Weeks*, 177 Pa. 431, 34 L. R. A. 174, 35 Atl. 693, holding

manufacturer not chargeable with infringement of trademark in use of own name or initials, though used in same kind of letters, and upon same colored background; *Clark v. Scott*, 4 Lack. Legal News, 164, holding use of one's name upon tobacco packages in form indicating artifice for producing impression that product identical with that of rival concern, is infringement of trademark; *Tygert-Allen Fertilizer Co. v. J. E. Tygert Co.* 21 Pa. Co. Ct. 195, 7 Pa. Dist. R. 431, holding unfair trading in using name, word, or device adopted by another to distinguish his goods, and in so using it as to put off goods as those of other party.

Cited in note (17 L. R. A. 129, 130) on use of trademarks.

Distinguished in *Shepp v. Jones*, 15 Pa. Co. Ct. 164, 3 Pa. Dist. R. 542, 35 W. N. C. 29, holding equity will enjoin merchant from so simulating product of another merchant as to deceive public.

13 L. R. A. 346, *MOORE v. DARBY*, 6 Del. Ch. 193, 18 Atl. 768.

Tenancy by curtesy.

Cited in notes (112 Am. St. Rep. 589) on tenancy by the curtesy; (128 Am. St. Rep. 475, 489) on nature and existence of estates of tenancy by the curtesy.

13 L. R. A. 349, *MICHIGAN MUT. L. INS. CO. v. REED*, 84 Mich. 524, 47 N. W. 1106.

Insurance; misrepresentations avoiding policy.

Cited in *Ketcham v. American Mut. Acci. Asso.* 117 Mich. 523, 76 N. W. 5, holding agent's knowledge of facts will not avoid forfeiture, if assured knew answers in application were untrue; *Beebe v. Ohio Farmers' Ins. Co.* 93 Mich. 524, 18 L. R. A. 486, 32 Am. St. Rep. 519, 53 N. W. 818, holding policy not avoided by failure of application to show encumbrance, when same known to agent who filled out application, and had insured sign, without reading; *Mudge v. Supreme Court I. O. O. F.* 149 Mich. 469, 14 L.R.A.(N.S.) 282, 119 Am. St. Rep. 686, 112 N. W. 1130, holding insurer not estopped to set up fraud in application made out by its agent with assent of insured.

Cited in notes (67 L.R.A. 708, 736) on retention of policy as waiver of mistake or fraud of insurer or its agent; (22 Am. St. Rep. 883) on waiver or estoppel by insurance agent.

13 L. R. A. 353, *FONES BROS. HARDWARE CO. v. ERB*, 54 Ark. 645, 17 S. W. 7.

Contracts for public works; plans and specifications.

Cited in *Packard v. Hayes*, 94 Md. 250, 51 Atl. 32, holding contract for disposal of garbage, let upon advertisement inviting bidders to submit scheme, feasibility of which was to be determined by city council, void; *Sanitary District v. Lee*, 79 Ill. App. 169, holding advertisement for construction of bridge, costing over \$500, by sanitary district, must leave nothing to discretion of trustees, except to determine who is lowest bidder; *Andrews v. Ada County*, 7 Idaho, 457, 63 Pac. 592, holding plans and specifications for public bridge must be adopted before advertising for competitive bids; *Moran v. Thompson*, 20 Wash. 536, 56 Pac. 29, holding under city charter requiring contract for local improvement to be let to lowest bidder, board of public works without authority, after accepting bid, to modify contract for addition to waterworks; *Holmes v. Detroit*, 120 Mich. 236, 45 L. R. A. 126, 77 Am. St. Rep. 587, 79 N. W. 200, holding advertisement for proposals for paving may limit bidding to material controlled by single dealer; *Saunders v. Iowa City*, 134 Iowa, 142, 9 L.R.A.(N.S.) 397, 111 N. W. 529, holding that a city may contract for use of patented pavement when let to

lowest bidder; *Bluffton v. Miller*, 33 Ind. App. 527, 70 N. E. 989, holding that a resolution for street improvement not stating the exact material to be used but leaving an option of three kinds is invalid for not stating the "kind" to be bid upon; *Baltimore v. Flack*, 104 Md. 136, 64 Atl. 702, holding that a specification may be made for three different kinds of pavement to be used in one notice if the kinds are put in competition against each other and the city may select the lowest bid on any one kind even though there is a lower bid on another kind; *Huntington County v. Pashong*, 41 Ind. App. 77, 83 N. E. 383, holding a contract let by board on plans filed without specifications, the specifications to be supplied by bidder may be enjoined by tax payer; *Goshert v. Seattle*, 57 Wash. 650, 107 Pac. 860, holding a call for bids on a fire alarm system which the city may deem adequate no adequate system being specified, is void; *Healey v. Anglo-California Bank*, 5 Cal. App. 285, 90 Pac. 54, holding that material discrepancies between plans and notice avoid an attempted acceptance and award to a bidder; *Hart v. New York*, 201 N. Y. 53, 94 N. E. 219, holding that contract entered into following competitive bidding is not valid unless plans and specifications furnished intelligent and uniform test for purpose of showing which was lowest bid; *Hilger v. Chrisp*, 98 Ark. 494, 136 S. W. 660, holding that definite plans and specifications must accompany advertisement for bids for building public bridge; *City Street Improv. Co. v. Kroh*, 158 Cal. 317, 110 Pac. 933, holding that plans and specifications for public work must be sufficiently definite to enable bidder reasonably to know outlay to be made in performing work.

Cited in note (30 L.R.A.(N.S.) 215, 219) on sufficiency of specifications for guidance of bidder for public contract.

Necessity for previous appropriation.

Cited in *Wiegel v. Pulaski County*, 61 Ark. 77, 32 S. W. 116, holding contract made by county judge for turnpike road, without previous appropriation therefor, void; *Thompson v. Searcy County*, 6 C. C. A. 678, 12 U. S. 618, 57 Fed. 1035, holding contract for courthouse costing \$29,000 valid, although only \$2,200 previously appropriated.

Distinguished in *Durrett v. Buxton*, 63 Ark. 400, 39 S. W. 56, holding statute requiring appropriation before contract can be made by county, not applicable to contract for building courthouse and jail.

Use of specific fund.

Cited in *Bowman v. Frith*, 73 Ark. 526, 84 S. W. 709, holding that the right of the levying judge to exceed amount appropriated for improvement does not authorize an excess to the extent of building a new court house under a contract purporting to be one for improvement only; *Kerwin v. Caldwell*, 80 Ark. 283, 46 S. W. 1058, holding that an appropriation for building and maintaining a county hospital includes the power to purchase land as a site therefor.

Advertisement for bids.

Cited in footnote to *Crowder v. Sullivan*, 13 L. R. A. 647, which holds notice for bids for electric light contract unnecessary.

Rights of bidders.

Cited in *Hannan v. Board of Education*, 25 Okla. 378, 30 L.R.A.(N.S.) 223, 107 Pac. 646, to the point that all discretion is withheld from contracting officers, and they are bound to give contract to lowest bidder, and cannot let it out for individual gain or reward to another; *Smith v. Rogers County*, 26 Okla. 825, 110 Pac. 669, holding that injunction does not lie to prevent county commissioners to let contract to construct bridge, where appeal from order of commissioners is provided for by statute.

Cited in footnote to *McNeil v. Boston Chamber of Commerce*, 13 L. R. A. 559, which holds rights of bidders not determinable by printed notice where terms orally fixed.

Cited in notes (26 L. R. A. 709) on right of lowest bidder on public contract; (38 L.R.A.(N.S.) 664) on discretion in choosing between bidders for public contract.

Taxpayers right to question public contract.

Followed in *Bowman v. Frith*, 73 Ark. 526, 84 S. W. 709, holding that a taxpayer may maintain a suit to cancel a void contract for public improvement.

Construction favoring statute.

Cited in *Oliver v. Chicago, R. I. & P. R. Co.* 89 Ark. 471, 117 S. W. 238, as illustrating a judicial enforcement of legislative intent although unable to sustain the literal language of the statute.

13 L. R. A. 359, *SNIDER v. BAER*, 144 Pa. 278, 22 Atl. 897.

Wills; life estate.

Cited in *Reynolds's Estate*, 8 Kulp, 190, holding devise of all of testator's estate unto his wife "for and during her natural life," gives wife life estate only. Devise of fee not cut down by subsequent qualifying words.

Cited in *Fidelity Trust Co. v. Bobloski*, 228 Pa. 56, 28 L.R.A.(N.S.) 1099, 76 Atl. 720, holding that a direction in a will that testator's wife take and enjoy all his real and personal estate considered with rest of will passes the fee in the realty to her; *Caslow v. Strausbaugh*, 233 Pa. 71, 81 Atl. 927, holding that devise generally or indefinitely, with power of disposition carries fee.

Cited in footnotes to *Roth v. Rauschenbusch*, 61 L. R. A. 455, which holds fee simple by devise to one absolutely and forever, not cut down by subsequent clause as to disposition of any remainder on devisee's death; *Cornwell v. Wulff*, 45 L. R. A. 53, which holds absolute power of disposition in instrument conveying land carries full power in land itself.

Cited in note (18 L.R.A.(N.S.) 469) on power of disposition bestowed on devisee as indicative of quantum of estate intended to be devised.

Precatory words.

Cited in *Boies's Estate*, 177 Pa. 196, 35 Atl. 724, holding absolute devise, followed by declaration of trust as to same, with directions that income be paid to devisee during life, gives devisee authority to dispose of corpus of estate; *Hendricks v. Senior*, 25 Pa. Co. Ct. 223, 17 Montg. Co. L. Rep. 140, holding under devise to wife for life, with directions that remainder shall go to such of wife's relations as she shall name, wife takes fee; *Byrne v. Weller*, 61 Ark. 376, 33, S. W. 421, holding where testator gives entire property to wife for life, and in subsequent clause, after certain specific bequests, gives to her remainder of estate, wife takes fee.

13 L. R. A. 360, *WENGERD'S APPEAL*, 143 Pa. 615, 22 Atl. 869.

Vesting of legacy.

Cited in *Long's Estate*, 3 Pa. Super. Ct. 330, holding that bequest to sons and to children of deceased son conditioned upon survival of sons after cumulative trust vests an unconditional legacy in children of deceased son; *Jackson's Estate*, 21 Lanc. L. Rev. 146, holding that request to granddaughter, "when she arrives at age of 21 years, but in case of death before that time to others," vested at death of testator; *Blecher's Estate*, 22 Lanc. L. Rev. 17, holding that bequest of personal property relates to time of testator's death unless contrary intention is clearly indicated in will; *Dilworth's Estate*, 58 Pittsb. L. J. 47,

holding that under devise to children fixing certain periods for distribution, shares vested at time fixed for distribution whether paid or not; *Long's Estate*, 228 Pa. 600, 77 Atl. 924, holding that in case of doubtful construction law leans in favor of absolute rather than defeasable estate; of vested rather than contingent one.

Cited in note (10 Eng. Rul. Cas. 820) as to when remainder is vested.

Distinguished in *McClure's Estate*, 221 Pa. 562, 70 Atl. 860, holding that where testator provides that named legatee shall take legacy if living when his estate shall have been settled up it is his plain meaning that the legatee will take only if he be living at the time when the estate is settled.

13 L. R. A. 362, *ATCHISON, T. & S. F. R. CO. v. TEMPLE*, 47 Kan. 7, 27 Pac. 98.

Carriers; notice of damage to freight.

Cited in *Atchison, T. & S. F. R. Co. v. Collins*, 47 Kan. 14, 27 Pac. 99, holding notice of claim for damage for injury to mare given from five to seven days after unloading, sufficient; *Wichita & W. R. Co. v. Koch*, 47 Kan. 756, 28 Pac. 1013, holding notice of damage given nearly two weeks after delivery and removal of stock, insufficient; *Wichita & W. R. Co. v. Koch*, 8 Kan. App. 647, 56 Pac. 538, holding notice unnecessary as to stock dead at time of re-loading by railroad; *Atchison, T. & S. F. R. Co. v. Poole*, 73 Kan. 468, 87 Pac. 465, holding a failure to notify for damage to stock shipped as per limited liability contract does not apply to loss of market caused by carrier's negligent delay; *Missouri K. & T. R. Co. v. Davis*, 24 Okla. 684, 24 L.R.A.(N.S.) 870, 104 Pac. 34, holding that written notice after removal from receiving pens to shippers barns but before mingling with other stock is sufficient compliance with contract for notice before removal where barns were nearer to station than pens and carrier's agent inspected the stock in the barns.

Cited in notes (7 L.R.A.(N.S.) 1043) on reasonableness of time fixed in contract of shipment of live stock for presentation of claim for damages; (24 L.R.A.(N.S.) 867) on removal of live stock from carrier's premises before notice of claim where given in time for examination; (88 Am. St. Rep. 116) on limitation of carrier's liability in bills of lading; (5 Eng. Rul. Cas. 348) on special limitations of liability of carrier.

13 L. R. A. 364, *LITTLE ROCK & M. R. CO. v. WILSON*, 90 Tenn. 271, 25 Am. St. Rep. 693, 16 S. W. 613.

Railroads; liability for nonobservance of statutory precautions to prevent accidents.

Cited in *Knoxville, C. G. & L. R. Co. v. Acuff*, 92 Tenn. 34, 20 S. W. 348, holding statute making railroad liable for damages from running train without lookout, applicable where train pushed by engine; *Iron Mountain R. Co. v. Dies*, 98 Tenn. 660, 41 S. W. 860, holding liability of railroad for injury to person by engine and tender running backwards, is absolute, if not engaged in switching in yards; *Southern R. Co. v. Pugh*, 95 Tenn. 421, 32 S. W. 311, holding statute not applicable where injury occurs during switching in railroad yards, depot grounds, or side tracks; *Towles v. Southern R. Co.* 103 Fed. 406, holding statute not applicable whenever company compelled to run trains or cuts of cars backwards, however remote from switching yard; *Cincinnati, N. O. & T. P. R. Co. v. Davis*, 62 C. C. A. 569, 127 Fed. 937; *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L. R. A. 699, 9 C. C. A. 675, 22 U. S. App. 220, 61 Fed. 613, holding contributory negligence will not defeat action for injuries based on failure of railroad to observe statutory precautions to prevent accident, but may be considered in

mitigation of damages; *Wheeler v. Oregon R. & Nav. Co.* 16 Idaho, 394, 102 Pac. 347, holding that the negligence of carrier by failure to ring bell or blow whistle at crossing does not abrogate the doctrine of contributory negligence; *Louisville & N. R. Co. v. Martin*, 113 Tenn. 287, 87 S. W. 418, holding it error to refuse to charge that noncompliance with statute in running a train constituted negligence; *St. Louis & S. F. R. Co. v. Finley*, 122 Tenn. 133, 118 S. W. 692, 18 Ann. Cas. 1141, holding that statutory precautions to prevent accidents on railroads are declaratory of common law except as to burden of proof and absolute liability.

Cited in notes (25 L.R.A. 292) on duty to maintain lookout on railroad train: (31 L.R.A.(N.S.) 1039) on intoxication of persons on track as affecting applicability of doctrine of last clear chance.

Distinguished in *Southern R. Co. v. Simpson*, 65 C. C. A. 563, 131 Fed. 708, holding the operation of an engine backwards in day time with proper lookout is not a violation of statute requiring lookout ahead; *Gilliam v. Texas & P. R. Co.* 114 La. 276, 38 So. 166, holding that company is not liable for death of intoxicated person sleeping on track caused by pushing of cars with engine behind and without a headlight on the front cars, there being no requiring statute.

Doubtful or erroneous citation.

Cited in *Southern R. Co. v. Hamblen County*, 115 Tenn. 530, 92 S. W. 238, on the powers of county courts.

13 L. R. A. 366, *FEARN v. WEST JERSEY FERRY CO.* 143 Pa. 122, 22 Atl. 708.

Evidence; record in another case.

Cited in *Walker v. Philadelphia*, 195 Pa. 173, 78 Am. St. Rep. 801, 45 Atl. 657, holding verdict and judgment in action by wife for personal injury, not evidence of negligence in action by husband against same defendant, for injury in same accident.

Depositions; admissibility in subsequent proceedings.

Followed in *Roberts v. Powell*, 210 Pa. 597, 60 Atl. 258, holding deposition of former suit inadmissible in partition proceedings for non-identity of parties in latter suit.

Cited in *Kyper v. Sheaffer*, 42 Pa. Super. Ct. 281, holding that identity of subject matter and identity of parties must unite to render testimony in one case admissible in another.

Presumption of negligence.

Cited in *Bernhardt v. West. Pennsylvania R. Co.* 159 Pa. 364, 28 Atl. 140, holding presumption of negligence of railroad not created by passenger stepping upon bung from keg in alighting from train; *Proud v. Philadelphia & R. R. Co.* 64 N. J. L. 707, 50 L. R. A. 470, 46 Atl. 710, holding railroad not negligent because of filth recently deposited on steps of car; *Allen v. Northern P. R. Co.* 35 Wash. 229, 66 L.R.A. 808, 77 Pac. 204, holding fact that passenger is injured by agency under control of carrier is not necessarily prima facie evidence of carrier's negligence; *Green v. Baltimore & O. R. Co.* 32 Pa. Co. Ct. 279, 14 Pa. Dist. R. 293, holding that negligence of railroad company cannot be presumed from proof of the presence of a cuspidor in the aisle of its station which caused injury to plaintiff; *Foster v. American Bitumastic Enamel Co.* 15 Pa. Dist. R. 319, holding that the presence of a bucket of hot enamel on the deck and the spot of enamel on which plaintiff slipped are not alone conclusive of negligence; *Ammon v. Conestoga Traction Co.* 25 Lanc. L. Rev. 98, holding that no presumption of negligence arising from injury to passenger from cut received from broken window glass, which was broken shortly before accident; *Stanford v. Chester Traction*

Co. 11 Del. Co. Rep. 242, holding that presence of transitory foreign obstacle in car, such as banana peel, does not import negligence, unless evidence shows it was there with carrier's employee's knowledge; *Sutton v. Pennsylvania R. Co.* 230 Pa. 526, 79 Atl. 719, holding that no presumption of negligence arises from presence on steps of car of thin layer of ice, in action by passenger for injuries sustained while alighting.

Cited in notes (15 L.R.A. 36) on presumption of negligence from occurrence of accident; (113 Am. St. Rep. 999, 1031) on presumption of negligence from happening of accident causing personal injuries.

Distinguished in *Foster v. Old Colony Street R. Co.* 182 Mass. 380, 65 N. E. 795, holding street car company liable to passenger slipping on ice accumulating on step during storm.

Contributory negligence.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Aldridge*, 27 Ind. App. 500, 61 N. E. 741, holding passenger alighting from rear platform of railroad car, when steps covered with snow and ice, guilty of contributory negligence.

Carrier; duty to passengers.

Cited in *Vancleve v. St. Louis, M. & S. E. R. Co.* 107 Mo. App. 103, 80 S. W. 706, holding company not bound to keep up an inspection of entire train en route and remove mud accumulated on steps from feet of passengers especially when its presence is unknown to operators of train; *Riley v. Rhode Island Co.* 29 R. I. 145, 15 L.R.A. (N.S.) 524, 69 Atl. 338, 17 A. & E. Ann. Cas. 50, holding company not bound to remove ice and snow continually accumulating on exposed steps of train en route.

Cited in footnote to *Sturgis v. Kountz*, 27 L. R. A. 390, which requires ferry-boat owner's duty to provide sufficient bar to driveway.

Cited in notes (68 L.R.A. 168) on ferryman as a common carrier; (33 L.R.A. (N.S.) 532) on duty of steamship company to passengers as to condition of decks; (5 Eng. Rul. Cas. 463) on extent of duty to secure safety of passengers.

13 L. R. A. 370, *HALLSTEAD v. CURTIS*, 143 Pa. 352, 22 Atl. 977.

Banks; liability of stockholder as partner.

Cited in *Gibbs's Estate*, 157 Pa. 68, 22 L. R. A. 281, 27 Atl. 383, holding that creditor seeking to hold stockholders of bank individually liable as partners, has burden of proof as to existence of partnership.

Cited in note (22 L. R. A. 278) on presumption as to incorporation.

Proof of partnership.

Cited in *Re Littman*, 159 Fed. 235, as containing a review of facts necessary to prove a partnership in contemplation of law.

13 L. R. A. 374, *KEHLER v. SCHWENCK*, 144 Pa. 348, 27 Am. St. Rep. 633, 22 Atl. 910.

Master and servant; duty as to character of appliances.

Cited in *Shadford v. Ann Arbor Street R. Co.* 111 Mich. 393, 69 N. W. 661; *Linkitus v. Butler Colliery*, 7 Kulp, 75; *Reese v. Hershey*, 163 Pa. 257, 43 Am. St. Rep. 795, 29 Atl. 907,—holding negligence cannot be imputed to employer from employment of methods or machinery in general use in business; *Mason v. Fourteen Min. Co.* 82 Mo. 370; *Keenan v. Waters*, 181 Pa. 250, 37 Atl. 342; *Hunt v. Graham*, 15 Pa. Super. Ct. 49; *Bonner v. Pittsburgh Bridge Co.* 5 Pa. Super. Ct. 284,—holding test of employer's liability is whether employee exposed to danger through failure to provide reasonably safe machinery, and test of reasonable safety is ordinary use; *Dooner v. Delaware & H. Canal Co.* 171 Pa.

600, 33 Atl. 415, holding railroad not liable for injury to brakeman resulting from absence of steps or handholds on freight car, same being in common use; Higgins v. Fanning, 195 Pa. 602, 46 Atl. 102, holding absence of guard on laundry mangle not negligence, in absence of evidence that guards are in ordinary use; Louisville & N. R. Co. v. Boland, 96 Ala. 629, 18 L. R. A. 261, 11 So. 667, holding railway company receiving from other companies for transportation, cars having couplings inferior to those in use on its own road, but in general use, not negligent; Eckhart & S. Mill Co. v. Schaefer, 101 Ill. App. 508, holding evidence as to other appliances used for certain purpose inadmissible on question of safety of appliance complained of; Gravadahl v. Chicago Ref. Co. 85 Ill. App. 347, holding evidence of better and safer method of constructing scaffold than construction of that causing injury not admissible; Hoffner v. Prettyman, 6 Pa. Super. Ct. 22, 41 W. N. C. 259, holding where evidence conflicting as to proper construction of scaffolding, question for jury; Haines v. Spencer, 92 C. C. A. 658, 167 Fed. 271, holding it not duty of employer to supply newest or safest machinery but only to special due care in supplying such as is reasonably safe.

Cited in footnote to Duntley v. Inman, P. & Co. 59 L. R. A. 785, which denies liability for failure to furnish better belt shifter if one furnished under proper use.

Cited in notes (48 L.R.A. 70) on employer's liability for injuries received by servants owing to want of blocking at switches; (98 Am. St. Rep. 295) on liability to servant for injuries due to defective machinery and appliances; (65 Am. St. Rep. 738) on duty of railroads to furnish improved appliances.

— Apparatus such as commonly used.

Cited in Brands v. St. Louis Car Co. 213 Mo. 711, 18 L.R.A.(N.S.) 706, 112 S. W. 511, on duty of master with respect to character of apparatus used; Pauza v. Lehigh Valley Coal Co. 231 Pa. 580, 80 Atl. 1126; Reeder v. Lehigh Valley Coal Co. 231 Pa. 570, 80 Atl. 1121,—holding that master is only bound to furnish such appliances as are in general use in business, trade or industry in which he is engaged; Soward v. American Car Co. 66 W. Va. 270, 66 S. E. 329, holding that master is not bound to furnish very best and safest machinery and appliances, but only such as are reasonably safe; Boop v. Laurelton Lumber Co. 212 Pa. 525, 61 Atl. 1021, holding proof of repair of wheel as such wheels are ordinarily repaired not sufficient to show that it was in proper condition to be used in saw mill according to ordinary usage in such cases.

Cited in footnote to Service v. Shoneman, 69 L.R.A. 792, which denies master's liability for injuries by boiler furnished where it was one in ordinary use and was procured in exercise of business prudence.

Cited in notes (16 L.R.A.(N.S.) 130) on furnishing servant article in general use as measure of master's duty; (6 L.R.A.(N.S.) 493) on standard of master's duty as to selection between different styles or makes of appliances.

Duty to warn employee of danger.

Cited in Baldwin v. Urner, 206 Pa. 464, 56 Atl. 38, denying employer's liability for failure to instruct boy of eighteen as to danger in walking upon automatic elevator doors; Smith v. Brown, 27 Lanc. L. Rev. 172, holding that it is not negligence to fail to instruct boy of fourteen who had worked around machinery for a year and run machine ten days before injury.

Assumption of risk.

Cited in footnotes to Mensch v. Pennsylvania R. Co. 17 L. R. A. 450, which holds danger from projection of bolt from end of car assumed by brakeman; Stager v. Troy Laundry Co. 53 L. R. A. 459, which holds risk of hand passing

under guard rails into rollers not assumed, as matter of law, by servant operating mangle in laundry.

Contributory negligence.

Cited in *Schmidt v. Cook*, 4 Misc. 87, 23 N. Y. Supp. 799, holding child of eleven years, and in possession of faculties, responsible for observance of care for personal safety, but only of degree proper to age and condition; *Greenway v. Conroy*, 160 Pa. 189, 34 W. N. C. 99, 40 Am. St. Rep. 715, 28 Atl. 692, holding court cannot assume that boy over fourteen, with six months experience in machine shop, incapable of forming judgment of danger of climbing ladder to put belt on pulley. *Dynes v. Bromley*, 208 Pa. 636, 57 Atl. 1123, and *Rachmel v. Clark*, 205 Pa. 321, 62 L. R. A. 962, 54 Atl. 1027, holding whether child exercised care commensurate with age and discretion, question for jury; *Parker v. Washington Electric Street R. Co.* 207 Pa. 441, 56 Atl. 1001, holding contributory negligence of child seven years and eight months old, question for court, where facts settled and inferences clear; *Pennsylvania Co. v. Finney*, 145 Ind. 560, 42 N. E. 816, holding brakeman descending ladder of freight car, without looking out for water plug situated dangerously near track, guilty of contributory negligence; *Daniels v. Johnson*, 39 Colo. 184, 89 Pac. 811, holding that capacity of 14-year-old girl to apprehend danger under conflicting evidence is a question for the jury; *Kirchner v. Oil City Street R. Co.* 210 Pa. 47, 59 Atl. 270, holding that evidence of want of capacity to absolve 15-year-old boy from negligence in riding on car platform must be very clear; *Bice v. Wheeling Electrical Co.* 62 W. Va. 693, 59 S. E. 626, holding that consideration of the age and general information of a minor may be specially required of jury though not to exclusion of all other facts and circumstances; *Sullenberger v. Chester Traction Co.* 33 Pa. Super. Ct. 16, holding that the sending of a child under seven years of age on an errand across a busy street in which the child is killed is conclusive of the negligence of parent; *Bice v. Wheeling Electrical Co.* 62 W. Va. 699, 59 S. E. 626, holding for jury the question of contributory negligence in grasping hold of a highly charged light wire supposed to have been insulated and of small voltage.

Cited in footnote to *Duntley v. Inman, P. & Co.* 59 L. R. A. 785, which holds want of care not shown by breaking of piece of machinery causing servant's death.

Cited in notes 29 L.R.A. (N.S.) 489, 491) on presumption and burden of proof as to capacity of minor servant to comprehend and avoid danger; (49 Am. St. Rep. 410, 411) on negligence in dealing with children.

Distinguished in *Fick v. Jackson*, 3 Pa. Super. Ct. 383, 39 W. N. C. 537, holding where it clearly appears employee had intelligent knowledge of risk, jury should be instructed to find for defendant.

Instructions to jury.

Cited in *Dooner v. Delaware & H. Canal Co.* 164 Pa. 34, 30 Atl. 269, holding instruction on damages stating "no sane man would lose leg for any compensation," prejudicial; *Smith v. Chester Traction Co.* 11 Del. Co. Rep. 393, holding that in submitting to jury question of amount which should be allowed for pain and suffering care should be taken not to inflame but to steady minds of jury.

13 L. R. A. 377, *McVEY v. BRENDDEL*, 144 Pa. 235, 27 Am. St. Rep. 625, 22 Atl. 912.

Union labels; right of union to protect.

Cited in *Schmalz v. Wooley*, 56 N. J. Eq. 651, 39 Atl. 539, holding association of journeymen hatters, not owning or trading in hats to which label applied, cannot enjoin use of counterfeit union label by hat manufacturer; *E. T. Fraim Lock Co. v. Shimer*, 43 Pa. Super. Ct. 231, 12 North. Co. Rep. 11, on trademark

as consisting of words in common use designating locality, section or region of territory.

Cited in footnote to *Cohn v. People*, 23 L. R. A. 821, which holds statute giving right to trade-mark in union label valid.

Cited in notes (29 L.R.A. 200, 206) on protection of trade union labels or trademarks; (25 Eng. Rul. Cas. 239) on subject-matter of trademark; (39 L.R.A. (N.S.) 1199) on law as to union labels.

Disapproved in *Hetterman Bros. v. Powers*, 102 Ky. 140, 39 L. R. A. 213. 80 Am. St. Rep. 348, 43 S. W. 180, holding employee whose skilled labor creates demand for commodity, and increases wages, has property right in exclusive use of label to designate product; *State v. Bishop*, 128 Mo. 381, 29 L. R. A. 205, 49 Am. St. Rep. 569, 31 S. W. 9, holding use of label or cigar makers union may be protected by making use of counterfeit, misdemeanor, though ownership not exclusive.

Label discriminating against nonunion labor.

Cited in *State v. Hagen*, 6 Ind. App. 169, 33 N. E. 223, holding union label declaring opposition to all "inferior rat-shop," etc., "workmanship," not beyond protection of law; *Cohn v. People*, 149 Ill. 493, 23 L. R. A. 824, 41 Am. St. Rep. 304, 37 N. E. 60, holding union label declaring opposition "to inferior rat-shop, coolie, prison, or filthy tenement house workmanship" not contrary to rules of morality or public policy.

— Statute protecting use constitutional.

Cited in *Com. v. Norton*, 16 Pa. Super. Ct. 432, Affirming 9 Pa. Dist. R. 182. 23 Pa. Co. Ct. 386, holding statute making counterfeiting label of cigar maker's union indictable offense, not special legislation; *Com. v. Meads*, 29 Pa. Super. 328, holding "an act to provide for adoption of trademarks, labels, symbols or private stamps by an incorporated or unincorporated association or union of working men and to regulate the same," to be constitutional and not defective in title.

Counterfeiting label; intention.

Cited in *Com. v. Norton*, 16 Pa. Super. Ct. 431, holding innocent intention cannot be claimed by one using counterfeit cigar label; *Com. v. Martin*, 35 Pa. Super. Ct. 247, on the wrongfulness of counterfeiting a union label; *Perham v. Richman*, 158 Fed. 548, holding injunction not to lie against the use of "Order of Railroad Telegrapher's Despatchers, Agents and Signalmen" as name of new order in favor of Order of Railroad Telegraphers in absence of intent to deceive.

Clean hands in equity.

Cited in *Little v. Cunningham*, 116 Mo. App. 549, 92 S. W. 734, on the maxim that "he who comes into equity must come with clean hands."

13 L. R. A. 380, *WILMER v. THOMAS*, 74 Md. 485, 22 Atl. 403.

Good-will.

Cited in *Lindemann v. Rusk*, 125 Wis. 233, 104 N. W. 119, holding that a bank may acquire good will which when acquired constitutes a species of property.

Transfer of trade-mark and good will.

Cited in *Acme Harvester Co. v. Craver*, 110 Ill. App. 419, holding sale of manufacturing plant and everything thereunto appertaining includes good will; *Lothrop Pub. Co. v. Lothrop L. & S. Co.* 191 Mass. 355, 5 L.R.A. (N.S.) 1080, 77 N. E. 841, holding that good will trade name and trademarks pass by the assignment to assignee for creditors, even though no provision made in the assignment for conduct of the business by assignees; *Haugen v. Sundeth*, 106 Minn. 134, 118 N. W. 606, 16 A. & E. Ann. Cas. 259, holding that a transfer of good will is not limited to the original grantees by the mere fact that "successors and assigns"

are not mentioned in contract and also citing annotation on this point; *Seabrook v. Grimes*, 107 Md. 417, 16 L.R.A.(N.S.) 488, 126 Am. St. Rep. 400, 68 Atl. 883, holding that the devise of the name of a publication apart from the specific plant and publishing business passes no property right.

Cited in footnotes to *Slack v. Suddoth*, 45 L. R. A. 589, which denies outgoing partner's right to have first sale of good will of dental business; *Merchants' Ad-Sign Co. v. Sterling*, 46 L. R. A. 142, which holds stockholder's attempt to transfer good will of corporation with stock, invalid; *Hutchinson v. Nay*, 68 L.R.A. 186, which sustains surviving partner's right to enter into competing business and solicit trade from customers of old firm, notwithstanding sale of good will as part of firm assets at instance of personal representative of deceased.

Cited in notes (46 L.R.A. 542, 543, 544) on transfer of trademark by bankruptcy or insolvency assignment; (1 L.R.A.(N.S.) 711, 716) on sale of trademark; (5 L.R.A.(N.S.) 1078) on good will as impliedly passing with transfer of business.

13 L. R. A. 383, *ALTGELT v. SAN ANTONIO*, 81 Tex. 436, 17 S. W. 75.

Exclusive franchise.

Cited in *Scott v. Laporte*, 162 Ind. 59, 69 N. E. 675, holding that an act of a city granting exclusive rights to supply its citizens with water for a given time is void as creating a monopoly.

Cited in footnote to *Vincennes v. Citizens' Gaslight & Coke Co.* 16 L. R. A. 485, which holds exclusive use of streets for gaspipes not implied by grant of privilege to lay same.

Cited in note (16 L. R. A. 259) on power of public officers to make contracts binding on their successors, or for a term of years; (61 L. R. A. 82) on right to confer exclusive franchise for municipal water supply.

Public service contracts, specification of quantity.

Cited in *Cady v. San Bernardino & L. Creek Power Co.* 153 Cal. 28, 94 Pac. 242, holding that on calling for bids for the supplying of a city with light it is not necessary that the council fix an absolute number of lights on which proposals would be received.

Municipal contracts; injunction.

Cited in *Dallas Electric Co. v. Dallas*, 23 Tex. Civ. App. 328, 58 S. W. 153, holding taxpayer not entitled to enjoin performance of contract for electric lighting because of informality, without showing of injury; *Wood v. Victoria*, 18 Tex. Civ. App. 580, 46 S. W. 284, refusing to enjoin performance of illegal contract to furnish water outside city limits, on petition of taxpayer, in absence of showing of injury, for which there is no adequate protection at law.

Cited in footnotes to *Westminster Water Co. v. Westminster*, 64 L.R.A. 630, which denies right of municipality to contract for perpetual water supply; *Zuelly v. Casper*, 63 L.R.A. 133, which upholds right to taxpayer of county to bring suit for restoration to treasury of money illegally appropriated as fees of officers.

Cited in note (61 L. R. A. 76) on rights of taxpayer in relation to municipal water supply.

Distinguished in *Thaison v. Sanchez*, 13 Tex. Civ. App. 76, 35 S. W. 478, holding payment of salary voted mayor during term properly enjoined, where compensation dependent on fees, and thereafter office deprived of fees.

Taxation; illegal exemptions.

Cited in *Tampa v. Kaunitz*, 39 Fla. 699, 63 Am. St. Rep. 202, 23 So. 416, holding entire assessment not invalid because of taxable property placed on as-

assessment roll, and taxes extended, with fraudulent intention not to collect same; *Barbee v. Dallas*, 26 Tex. Civ. App. 573, 64 S. W. 1018, holding personal property of branch of religious publishing house not within constitutional provision exempting "institutions of purely public charity."

Cited in notes (15 L. R. A. 861) on power of municipality to exempt property from taxation; (60 L. R. A. 853) on taxation of municipal waterworks; (61 L. R. A. 67) on consideration for contract for municipal water supply.

13 L. R. A. 388, *DEMPSEY v. PFORZHEIMER*, 86 Mich. 652, 49 N. W. 465.
Validity of unrecorded mortgage as against creditors.

Cited in *Vining v. Millar*, 116 Mich. 146, 74 N. W. 459, holding unrecorded chattel mortgage invalid as against subsequent creditor of mortgagor, who takes mortgage without notice of prior lien; *Landis v. McDonald*, 88 Mo. App. 340, holding recorded mortgage qualified by unrecorded agreement permitting mortgagor to purchase goods, invalid against subsequent creditors; *Blumauer v. Clock*, 24 Wash. 600, 85 Am. St. Rep. 966, 64 Pac. 844, holding servant taking employee's lien for service rendered with actual knowledge of mortgage, has superior lien; *Read v. Horner*, 90 Mich. 157, 51 N. W. 207, holding purchaser of land with actual knowledge of unrecorded mortgage on movable building, not purchaser in good faith within recording statute; *Ruggles v. Cannedy*, 127 Cal. 299, 46 L. R. A. 374, footnote, p. 371, 53 Pac. 911, questioning, without deciding, validity of unrecorded mortgage as against previous creditor; *People use of Esper v. Burns*, 161 Mich. 174, 137 Am. St. Rep. 466, 125 N. W. 740, holding that chattel mortgage, where possession is not given, is void as against mortgagor's creditors, if not put on file in proper office, even though recorded elsewhere by mistake.

Distinguished in *Littauer v. Houck*, 92 Mich. 164, 31 Am. St. Rep. 572, 52 N. W. 464, holding lien of judgment for debt contracted before execution of unrecorded mortgage, and of which agent or attorney of creditor had notice before suit brought, not superior.

Disapproved in *Youngberg v. Walsh*, 72 Kan. 227, 83 Pac. 972, holding that an unrecorded mortgage though void for some purposes becomes valid when recorded and of the same force and effect as a new mortgage then made and recorded.

Right to contest validity of mortgage.

Cited in *Union Nat. Bank v. Oium*, 3 N. D. 200, 44 Am. St. Rep. 533, 54 N. W. 1034, holding general creditor without lien cannot contest validity of prior unrecorded chattel mortgage.

Mortgage of property not in being.

Cited in note (23 L. R. A. 464, 477) on sale or mortgage of future crops.

13 L. R. A. 394, *O'CONNELL v. EAST TENNESSEE, V. & G. R. CO.* 87 Ga. 246, 27 Am. St. Rep. 246, 13 S. E. 489.

Right to protect land from overflow of river.

Followed in *Sullivan v. Dooley*, 31 Tex. Civ. App. 590, 73 S. W. 82, granting injunction against construction of levee increasing overflow of lands of opposite riparian owner.

Cited in *Kansas City, M. & B. R. Co. v. Smith*, 72 Miss. 682, 27 L. R. A. 763, 48 Am. St. Rep. 579, 17 So. 78, holding railroad not liable for increasing overflow of river on opposite side from embankment, when channel left mile to mile and half wide; *Cairo, V. & C. R. Co. v. Brevoort*, 25 L. R. A. 533, 62 Fed. 134, holding overflow of river in times of ordinary flood, constitute waters of river, and are not surface waters which riparian proprietor may turn at will; *Peck v.*

Venghause, 127 Iowa, 532, 103 N. W. 773, 4 A. & E. Ann. Cas. 716, holding that a riparian owner may not embank against the natural overflow of an inland stream where the effect will cause the presence of an increased volume of water on the land of another to his damage.

Cited in footnote to *Payne v. Kansas City*, J. & C. B. R. Co. 17 L. R. A. 628, which holds dam to protect land built by legislative authority in abandoned river bed a lawful public improvement.

Cited in notes (24 L.R.A.(N.S.) 215, 217) on right to confine flood water within banks; (23 Eng. Rul. Cas. 810) on right to erect barriers against the sea; (25 Eng. Rul. Cas. 425) on liability for injury to adjoining land due to protecting one's own land from flood.

Disapproved in *Jean v. Pennsylvania Co.* 9 Ind. App. 57, 36 N. E. 159, holding railroad not liable in damages for construction of embankment to protect right of way from overflow of river in time of high water.

Diverting channel of surface waters.

Cited in *Albany v. Sikes*, 94 Ga. 33, 26 L. R. A. 654, 47 Am. St. Rep. 132, 20 S. E. 257, adopting rule of civil law, that owner of servient estate cannot by diverting natural channel of surface water, cast whole burden upon estate of neighbor, and referring with approval to annotation in 13 L.R.A. 394; *Desberger v. University Heights Realty & Develop. Co.* 126 Mo. App. 219, 102 S. W. 1060, holding that a riparian owner cannot change the ordinary course of a river to benefit his own holdings to the damage of another's; *Cole v. Missouri, K. & O. R. Co.* 20 Okla. 230, 15 L.R.A.(N.S.) 270, 94 Pac. 540, holding that diversion of stream insufficient to provide for flood water doing injury to lower owner is actionable; *Cook v. Seaboard Air Line R. Co.* 107 Va. 38, 10 L.R.A.(N.S.) 968, 122 Am. St. Rep. 825, 57 S. E. 564, holding that the obstruction of the flood course of a stream though such stream is artificial is actionable.

Cited in footnotes to *Champion v. Crandon*, 19 L. R. A. 856, which holds diversion of surface water by changing grade of highway not actionable; *Johnson v. Chicago, St. P. M. & O. R. Co.* 14 L. R. A. 495, which authorizes diversion of surface water.

Cited in note (25 L. R. A. 530, 531) on what is surface water.

Surplus or flood waters.

Approved in *Price v. Oregon R. & Nav. Co.* 47 Or. 359, 83 Pac. 843, holding that waters flowing in one continuous body with main stream are not surface waters.

Cited in *Miller v. Madera Canal & Irrig. Co.* 155 Cal. 78, 22 L.R.A.(N.S.) 398, 99 Pac. 502, holding that water covering low land bordering stream during flood season flowing in continuous stream with main channel is part of the water course; *Fordham v. Northern P. R. Co.* 30 Mont. 429, 66 L.R.A. 559, 104 Am. St. Rep. 729, 76 Pac. 1040, holding that flood waters forming a continuous flowing body with the main channel may not be treated as surface water; *Jefferson v. Hicks*, 23 Okla. 688, 24 L.R.A.(N.S.) 218, 102 Pac. 79, holding that flood waters breaking from the banks and following a well defined course away from and back into main stream are not surface waters; *Uhl v. Ohio River R. Co.* 56 W. Va. 498, 68 L.R.A. 140, 107 Am. St. Rep. 968, 49 S. E. 378, 3 A. & E. Ann. Cas. 201, holding that flood waters do not cease to be part of stream unless so situated as to prevent their return to their natural course.

Distinguished in *Johnson v. Gray's Point Terminal R. Co.* 111 Mo. App. 384, 86 S. W. 941, holding that where water breaks from its natural course into another course causing the latter to exceed even its flood banks such excess water is surface water subject to diversion.

13 L. R. A. 401, PAPPENHEIM v. METROPOLITAN ELEV. R. CO. 128 N. Y. 436, 26 Am. St. Rep. 486, 28 N. E. 518.

Followed without discussion in *Sterry v. New York Elev. R. Co.* 129 N. Y. 620, 29 N. E. 68, and *Odell v. New York Elev. R. Co.* 130 N. Y. 691, 29 N. E. 998, 3 Silv. Ct. App. 669, and *Minton v. New York Elev. R. Co.* 130 N. Y. 340, 29 N. E. 319.

Right of action for damage from construction of railroad in street.

Cited in *Ascher v. South Shore Traction Co.* 144 App. Div. 236, 128 N. Y. Supp. 1044, holding that in suit to enjoin traction company from constructing road in part of street owned by abutter judgment should not provide that upon payment of amount fixed, abutter shall convey right to use street.

Cited in footnotes to *Aldrich v. Metropolitan West Side Elev. R. Co.* 57 L. R. A. 237, which denies right to recover for injury to apartment house from elevated road crossing highway 19 feet away; *De Geofroy v. Merchants' Bridge Terminal R. Co.* 64 L. R. A. 959, sustaining right of abutter, not owning fee in street, to compensation for construction of elevated railroad.

* Cited in note (36 L.R.A.(N.S.) 784, 792) on abutter's right to compensation for railroads in streets.

Disapproved in *Kuhl v. Chicago & N. W. R. Co.* 101 Wis. 53, 77 N. W. 155, holding consent to occupancy of street by railroad makes possession rightful, subject only to right of abutting owner to compensation for property taken, and damages to property not taken.

Right of action for trespass to real property.

Cited in *Hutton v. Metropolitan Elev. R. Co.* 19 App. Div. 245, 46 N. Y. Supp. 169, holding owner's right of action for interference with easements of light, air, and access, ceases, as to him with conveyance of premises; *Badger v. Mayer*, 8 Misc. 534, 28 N. Y. Supp. 765, and *Stokes v. Manhattan R. Co.* 47 App. Div. 60, 62 N. Y. Supp. 333, holding plaintiff in action to enjoin maintenance of elevated railway, who conveys property pending proceedings, loses right to restrain continuance of trespass, although all damages reserved; *Pegram v. New York Elev. R. Co.* 147 N. Y. 146, 41 N. E. 424, holding reservation in conveyance of damages which have accrued, or which may thereafter accrue, from elevated railway, will not entitle grantor to damages accruing subsequent to conveyance; *Israel v. Metropolitan Elev. R. Co.* 58 App. Div. 268, 69 N. Y. Supp. 218, holding plaintiff selling property pending proceeding to enjoin trespass by elevated railway, and for damages, entitled only to damages sustained before action begun; *McKenna v. Brooklyn Union Elev. R. Co.* 184 N. Y. 396, 77 N. E. 615, holding that light, air and access appurtenant to real property abutting on public street go with the estate, and a conveyance of the latter carries with it the former though grantor reserves same in deed including right of action for invasion of same; *Schomacker v. Michaels*, 189 N. Y. 65, 81 N. E. 555, holding that easements of light, air and access in public street, are inseparable from the abutting estate but the grantor may by stipulation in deed make his grantee trustee for damages collected for invasion of same; *Re New York*, 193 N. Y. 126, 85 N. E. 1064, as inapplicable to the question of apportionment of damages resulting to property from condemnation for public use; *Tucker v. Edison Electric Illuminating Co.* 100 App. Div. 410, 91 N. Y. Supp. 439 (dissenting opinion), on remedy by damages and injunction for trespass to realty; *Muller v. Manhattan R. Co.* 124 App. Div. 302, 108 N. Y. Supp. 852, Affirming 58 Misc. 140, 102 N. Y. Supp. 454, holding that the purchasers of property take it with all the rights respecting easements in street abutting that the infant grantors in partition had.

— **Purchasers or lessees after commission of continuing trespass.**

Cited in *Sterry v. New York Elev. R. Co.* 3 Silv. Ct. App. 599, 29 N. E. 68, holding purchasers of premises after construction of elevated railway entitled to fee damage on account of maintenance and operation; *Hughes v. Metropolitan Elev. R. Co.* 180 N. Y. 28, 28 N. E. 765, holding purchaser subsequent to erection of elevated railway entitled to fee damages from time of erection to trial of action; *Shepard v. Manhattan R. Co.* 169 N. Y. 106, 62 N. E. 151, holding reservation in deed of right of action for damages from construction of elevated railway does not deprive subsequent grantee of right to maintain action; *Ward v. Metropolitan Elev. R. Co.* 152 N. Y. 44, 46 N. E. 319, Affirming 82 Hun, 549, 31 N. Y. Supp. 527, holding wrongful character elevated railway's possession of easements of light, air, and access, appurtenant to abutting property, not presumed to continue in support of action for damages by purchaser, without notice of prior release by grantor; *Flammer v. Manhattan R. Co.* 56 App. Div. 184, 67 N. Y. Supp. 617, and *Wallach v. Manhattan R. Co.* 60 N. Y. S. R. 171, 28 N. Y. Supp. 483, holding purchasers pending action to enjoin trespass of elevated railway, and for damages, cannot be joined as parties plaintiff; *Storms v. Manhattan R. Co.* 178 N. Y. 500, 66 L. R. A. 625, 71 N. E. 3, Affirming 77 App. Div. 98, 79 N. Y. Supp. 60, holding tenant owning building, taking renewal lease after construction, may recover damages occasioned by elevated railroad; *Bly v. Edison Electric Illuminating Co.* 172 N. Y. 21, 58 L. R. A. 508, 64 N. E. 745 (dissenting opinion), majority holding tenant entering after creation of nuisance by electric lighting plant, may maintain action to abate nuisance and for damages sustained; *Calkins v. Postal Teleg. Co.* 11 Pa. Dist. R. 307, holding if original taking was on consent or has been purged of illegality before conveyance the grantor is entitled to damages, otherwise they pertain to the grantee.

Distinguished in *Re Grade Crossing*, 64 App. Div. 78, 71 N. Y. Supp. 674, holding owner of equity of redemption, and not purchaser at foreclosure sale, or his assignee, entitled to damages for change of grade made pending foreclosure proceedings; *Burkhalter v. Oliver*, 88 Ga. 479, 14 S. E. 704, holding where person in possession of land at time of construction of railroad not owner, but purchases before action, he cannot recover damages for permanent injury to freehold.

— **Lessor, heirs, remainder-men, etc.**

Cited in *Kernochan v. Manhattan R. Co.* 161 N. Y. 344, 55 N. E. 906, holding underground lease beginning before construction of elevated railway, and continuing for term of years thereafter, with rental to be fixed at stated intervals, lessor entitled to damages for depreciation in rental value from first readjustment of rent after construction of road; *Mitchell v. Metropolitan Elev. R. Co.* 134 N. Y. 14, 31 N. E. 260, holding upon death of owner intestate, right of action for subsequent damage from unlawful construction of elevated railway vests in heirs, and same not barred, although damages erroneously recovered by trustees under will; *Thompson v. Manhattan R. Co.* 130 N. Y. 363, 29 N. E. 264, holding remainder-men may maintain action to enjoin continuance of trespass by elevated railway, as injury to inheritance; *Mortimer v. Manhattan R. Co.* 129 N. Y. 84, 29 N. E. 5, holding executors entitled, as trustees under will, to recover for depreciation in rental value, from wrongful construction of elevated railway, both before and since death of testator.

Distinguished in *Kernochan v. New York Elev. R. Co.* 128 N. Y. 568, 29 N. E. 65, holding owner who has leased premises for term of years, after construction of elevated railway, may maintain action for impairment of easements appurtenant to premises.

Remedy for permanent trespass to real property.

Cited in *Rumsey v. New York & N. E. R. Co.* 63 Hun, 205, 17 N. Y. Supp. 672, holding judgment for damages from construction of railroad cutting off plaintiff's access to river, not bar to action for damages subsequently accruing.

— Damage to fee not recoverable in law action.

Cited in *Paret v. New York Elev. R. Co.* 46 N. Y. S. R. 32, 18 N. Y. Supp. 580, holding damages for loss of fee or selling value cannot be recovered in common-law action for money only; *Mott v. Lewis*, 52 App. Div. 560, 65 N. Y. Supp. 31, holding in trespass for piling dirt upon plaintiff's premises recovery is limited to damages accruing prior to commencement of action; *Reed v. Canastota Northern R. Co.* 47 N. Y. S. R. 601, 20 N. Y. Supp. 241, holding in trespass for unlawful construction of railroad, difference in value of land before and after construction of road not measure of damage; *Mitchell v. White Plains*, 91 Hun, 192, 36 N. Y. Supp. 204, holding unlawful appropriation of land for highway and sewer purposes does not give owner right of action to compel purchase by trespasser at price fixed by court; *Covert v. Valentine*, 50 N. Y. S. R. 518, 21 N. Y. Supp. 219, holding in action for damages for diverting water from pond, plaintiff entitled to recover only damages from diminution in value down to commencement of action.

— Remedy by injunction.

Cited in *Connole v. Boston & M. Consol. Copper & Silver Min. Co.* 20 Mont. 527, 52 Pac. 263, and *Olivella v. New York & H. R. R. Co.* 31 Misc. 205, 64 N. Y. Supp. 1086, holding owner of property affected by illegal structure may resort to equity to prevent continuance of trespass, and to avoid multiplicity of actions at law; *Kornder v. Kings County Elev. R. Co.* 41 App. Div. 359, 58 N. Y. Supp. 518, holding consent of abutting owner to construction of elevated railway, but reserving right to compensation, does not preclude action to restrain operation, unless damages paid; *Black v. Brooklyn Heights R. Co.* 32 App. Div. 472, 53 N. Y. Supp. 312, holding court in its discretion may grant injunction against unauthorized use of street by railway, or give reasonable time to obtain requisite consents; *Hahl v. Sugo*, 27 Misc. 7, 57 N. Y. Supp. 920, holding owner of building encroaching upon adjoining premises, may be compelled by mandatory injunction to remove same, notwithstanding offer to pay value; *Ackerman v. True*, 56 App. Div. 56, 66 N. Y. Supp. 6, and *Goldbacher v. Eggers*, 38 Misc. 39, 76 N. Y. Supp. 881, holding in action to compel removal of wall and for damages, plaintiff entitled to injunction and to damages only to entry of judgment; *Stowers v. Gilbert*, 156 N. Y. 604, 51 N. E. 282, holding recovery for only temporary damage from encroachment of wall over division line, can be had in action for injunction; *Brown v. Ontario Tale Co.* 81 App. Div. 274, 80 N. Y. Supp. 837, holding riparian proprietor entitled to injunction against maintenance of dam of private corporation, causing river to overflow premises in times of high water; *Pratt v. New York C. & H. R. R. Co.* 90 Hun, 88, 35 N. Y. Supp. 557, refusing temporary injunction pending trial of action to enjoin change of grade crossing for railway, without compensation to abutting owner.

Distinguished in *Crescent Min. Co. v. Silver King Min. Co.* 17 Utah, 462, 70 Am. St. Rep. 810, 54 Pac. 244, holding maintenance of pipe line for conveyance of water across land of another will not be enjoined, where no appreciable damage sustained, and trespasser would suffer irreparable injury.

— Damages for permanent injury in lieu of injunction.

Followed in *Shaw v. Rochester, S. & E. R. Co.* 131 App. Div. 531, 115 N. Y. Supp. 1026, holding that where a trolley company has been allowed to operate for years without consent or deed from owner of land abutting and owning to center

of street injunction against its operation will only lie where it refuses to pay damages and costs on submission of deed.

Cited in *Amerman v. Deane*, 132 N. Y. 361, 28 Am. St. Rep. 584, 30 N. E. 741, holding in equity action to enjoin maintenance of tenement house, erected in violation of covenant in deed, damages for permanent injury may be recovered; *Peck v. Schenectady R. Co.* 170 N. Y. 308, 63 N. E. 357, holding in action to enjoin street railway from occupying street, defendant not entitled as of right to alternative relief of paying damages in lieu of perpetual injunction; *Equitable Life Assur. Soc. v. Brennan*, 30 Abb. N. C. 277, 24 N. Y. Supp. 793, holding party erecting undesirable building in violation of covenant may have election to pay damages to avoid permanent injunction; *Gallagher v. Kingston Water Co.* 25 App. Div. 84, 49 N. Y. Supp. 250, sustaining injunction against permanent diversion of waters from mill by water company, unless company elects to make compensation for rights taken; *Herman v. Manhattan R. Co.* 58 App. Div. 372, 68 N. Y. Supp. 1020, holding in action to enjoin maintenance of elevated railway, judgment in gross sum for past and future damages, and giving execution therefor, without injunction, erroneous; *New York v. Pine*, 185 U. S. 104, 46 L. ed. 825, 22 Sup. Ct. Rep. 592, Reversing 103 Fed. 339, holding in action to enjoin diversion of waters of stream, court of equity may award compensation in lieu of cessation of trespass, although trespasser could not have acquired right of appropriating water by condemnation; *St. Paul, M. & N. R. Co. v. Western U. Teleg. Co.* 55 C. C. A. 285, 118 Fed. 519, holding equity may, upon railroad's application for injunction against use of lines on right of way upon expiration of agreement with telegraph company, determine, and permit continued use upon payment thereof, reasonable compensation; *Gaskill v. Washington Water Power Co.* 17 Idaho, 137, 105 Pac. 51, on reference to ascertain damages as upon condemnation where injunction is sought to restrain taking; *Hart v. Seattle*, 45 Wash. 303, 88 Pac. 205, 13 A. & E. Ann. Cas. 438, holding that a court may in lieu of granting an injunction against lowering street level and commanding its restoration to former condition, give the city the privilege of leaving street in altered condition on payment of damage; *McCleery v. Highland Boy Gold Min. Co.* 140 Fed. 954, holding that because of the tardiness in bringing injunction a court of equity may award past uncompensated damages and those to accrue in future in perpetuity and issue injunction only on failure of defendant to pay same.

Cited in note (20 L. R. A. 755) on damages in lieu of injunction.

Distinguished in *Knoth v. Manhattan R. Co.* 109 App. Div. 809, 96 N. Y. Supp. 844, holding that an injunction will not issue on refusal to pass damages against the operation of a third track where although a trespass it is of great public benefit and has been operated for years.

Measure of damages for trespass to real property.

Cited in *Ottawa, O. C. & C. G. R. Co. v. Peterson*, 51 Kan. 607, 33 Pac. 606, and *Chicago, K. & W. R. Co. v. Union Investment Co.* 51 Kan. 603, 33 Pac. 378, holding in action by abutting owner to enjoin construction of railroad in streets, and for damages, plaintiff may recover damages suffered to commencement of action, but not for depreciation in value of property; *Re Brooklyn Union Elev. R. Co.* 95 App. Div. 110, 88 N. Y. Supp. 426, holding measure of damages resulting to abutting property from propinquity of elevated road where no benefit accrues from its erection is difference in value of property before and after construction, as a result of such construction.

— When damage permanent.

Cited in *Krumwiede v. Manhattan R. Co.* 9 Misc. 555, 30 N. Y. Supp. 400,

holding that measure of permanent damage from trespass of elevated railway is difference between fair market value of property without railway, and that with railway, less benefits; *Mitchell v. Metropolitan Elev. R. Co.* 132 N. Y. 554, 30 N. E. 385, holding evidence of value of property without elevated railway, material and relevant, in action for injunction because of wrongful appropriation of easements; *Re New York Elev. R. Co.* 76 Hun, 388, 28 N. Y. Supp. 110, holding in assessment of damages in condemnation proceedings neither past damages, nor past benefits, can be considered.

13 L. R. A. 408, *LEMP v. FULLERTON*, 83 Iowa, 192, 48 N. W. 1034.

Followed without discussion in *Anheuser-Busch Brewing Assn. v. Fullerton*, 83 Iowa, 760, Appx. 50 N. W. 56.

Replevin of property seized under criminal process.

Cited in *P. Schoenhofen Brewing Co. v. Armstrong*, 89 Iowa, 676, 57 N. W. 436, holding replevin will not lie for property taken by sheriff under search warrant.

Cited in notes (20 L.R.A.(N.S.) 1121) on right to levy upon intoxicating liquors; (15 L.R.A.(N.S.) 925) on constitutional right to prohibit sale of intoxicants; (80 Am. St. Rep. 763) as to when replevin or claim and delivery is sustainable.

13 L. R. A. 411, *GILBERT v. ELDRIDGE*, 47 Minn. 210, 49 N. W. 679.

Referred to for facts in *Gilbert v. Emerson*, 60 Minn. 63, 61 N. W. 820.

Riparian rights separated from shore lands.

Cited in *Duluth v. St. Paul & D. R. Co.* 49 Minn. 210, 51 N. W. 1163, holding platting of submerged land beyond street parallel to lake shore, and also under water, indicates intention that streets running into former street should not extend beyond it; *Bradshaw v. Duluth Imperial Mill Co.* 52 Minn. 63, 53 N. W. 1066, holding platting of land partly submerged into blocks and streets, indicates intention to separate same from shore blocks so that conveyance of shore block will not carry riparian rights; *Hobart v. Hall*, 174 Fed. 459, to the point that owner of shore land may legally disassociate therefrom and sell to another his riparian rights; *Gifford v. Horton*, 54 Wash. 604, 103 Pac. 988, to the point that platting and conveyance of land in water beyond shore line disassociated riparian rights from upland.

Cited in note (40 L. R. A. 394) on separation of riparian rights from upland.

Distinguished in *State v. St. Paul & D. R. Co.* 81 Minn. 424, 84 N. W. 302, holding riparian rights cannot be taxed as real estate independent of parent estate to which they belong, until separated therefrom by some act of owner.

Effect of conveyance of shore and submerged lands to different persons.

Cited in *Duluth v. St. Paul & D. R. Co.* 49 Minn. 209, 51 N. W. 1163, holding riparian proprietor may convey fee in land above shore line, and reserve private rights in land under water, originally appurtenant to estate; *Gilbert v. Emerson*, 55 Minn. 259, 43 Am. St. Rep. 502, 56 N. W. 818, holding where submerged land platted into blocks not extending to navigable waters, conveyance of outer-most blocks carries riparian rights as against original proprietor, and his grantee of shore block; *Minneapolis Trust Co. v. Eastman*, 47 Minn. 304, 50 N. W. 82, holding conveyance of submerged land carries with it riparian rights incident thereto, including title to dry land formed beyond natural low-water line by gradual alluvial deposits.

Effect of erosion upon riparian rights.

Cited in *Ocean City Assn. v. Shriver*, 64 N. J. L. 564, 51 L. R. A. 431, 46 Atl.

690, holding grantee of lot according to plat whereon street is designated between lot and ocean, does not become riparian proprietor upon street and part of lot being carried away by erosion, where ocean subsequently recedes; *Peuker v. Canter*, 62 Kan. 371, 63 Pac. 617, holding where land separated from river partly carried away by erosion, owner entitled to equitable proportion of alluvion formed within originally surveyed lines upon river receding.

Cited in footnote to *Webb v. Demopolis*, 21 L. R. A. 62, which holds riparian owner's title extends to low-water mark on navigable river.

Cited in note (51 L. R. A. 426) on right to follow accretions across division line previously submerged by action of water.

13 L. R. A. 415, *ST. PAUL UNION DEPOT CO. v. MINNESOTA & N. W. R. CO.* 47 Minn. 154, 49 N. W. 646.

Cited in *Chicago G. W. R. Co. v. St. Paul Union Depot Co.* 68 Minn. 221, 71 N. W. 23, and *Chicago, St. P. & K. C. R. Co. v. St. Paul Union Depot Co.* 54 Minn. 413, 56 N. W. 129, for other branches of same controversy.

13 L. R. A. 418, *KIESSIG v. ALLSPAUGH*, 91 Cal. 231, 27 Pac. 653.

Discharge of sureties.

Cited in *Eppinger v. Kendrick*, 114 Cal. 626, 46 Pac. 613, holding that the deposit of wheat the proceeds of which would pay a note in hands of holder with instructions that it be so applied discharges an accommodation endorser though it be not so applied.

Cited in footnote to *Schuster v. Weiss*, 19 L. R. A. 183, which holds sureties on appeal bond discharged by change in statute.

— On contractor's bond

Cited in *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 497, 99 Pac. 856, holding that a change of plan from a one story building to a two without consent of surety in contractor's bond will release such surety; *Glenn County v. Jones*, 146 Cal. 523, 80 Pac. 695, 2 A. & E. Ann. Cas. 764, holding that premature payment of contractor without consent of surety on such contractor's bond will release such surety.

Cited in note (5 L.R.A.(N.S.) 418) on release of surety on building contractor's bond by making payments not authorized by contract.

13 L. R. A. 419, *STATE v. ARMSTRONG*, 106 Mo. 395, 27 Am. St. Rep. 361, 16 S. W. 604.

Followed without discussion in *Arnold v. Sayings Co.* 76 Mo. App. 182.

Information; verification.

Cited in *State v. Murlin*, 137 Mo. 307, 38 S. W. 923, holding verification of information sufficient; *State v. Simpson*, 136 Mo. App. 666, 118 S. W. 1187, holding affidavit that facts alleged in information are true to the best knowledge, information and belief of affiant insufficient to support the information.

Time for objection for duplicity.

Cited in *State v. Fox*, 148 Mo. 525, 50 S. W. 98, and *State v. Wilson*, 143 Mo. 344, 44 S. W. 722, holding objection that indictment bad for duplicity, too late after verdict.

Form of information.

Cited in *State v. Niesman*, 101 Mo. App. 512, 74 S. W. 638, holding indictment for selling cigars from boxes bearing counterfeit union label not defective because genuine label pasted in information instead of being set forth in writing.

Libelous publications.

Cited in *McGinnis v. G. Knapp & Co.* 109 Mo. 146, 18 S. W. 1134, holding publication of letter from newspaper correspondent charging member of legislature with using "\$50,000 slush fund" to secure passage of bill, libelous; *State v. McCabe*, 135 Mo. 459, 34 L. R. A. 130, footnote, p. 127, 58 Am. St. Rep. 589, 37 S. W. 123, holding statute making it misdemeanor to send letter threatening credit or reputation of another, does not infringe rights secured by bill of rights; *Kenworthy v. Journal Co.* 117 Mo. App. 335, 93 S. W. 882, holding a publication that three of seven persons named are about to be arrested for perjury is not actionable by any of the seven in absence of proof that he was preferred to the one to be arrested.

Cited in footnotes to *Kansas City, M. & B. R. Co. v. Delaney*, 45 L. R. A. 600, which holds letters of recommendation stating that former employee left employer's service during strike not actionable *per se*; *Mitchell v. Bradstreet Co.* 20 L. R. A. 138, which holds voluntary publication by mercantile agency of false statement that firm has assigned, not privileged.

Cited in note (3 L.R.A.(N.S.) 340) on charging one with refusal to pay debt as libel; (58 Am. St. Rep. 603) on criminal uses of United States mail; (9 Eng. Rul. Cas. 194) on right to show truth of libel on criminal prosecution.

Distinguished in *Denney v. Northwestern Credit Asso.* 55 Wash. 334, 25 L.R.A. (N.S.) 1023, 104 Pac. 769, holding that where the words published are not actionable *per se* a direct traceable loss must be pleaded.

What constitutes publication.

Cited in footnote to *Gambrill v. Schooley*, 52 L. R. A. 87, which holds dictation of libelous letter to confidential stenographer, a publication.

Cited in note (9 Eng. Rul. Cas. 38) on what constitutes a publication of libel.

Jury judges of both law and facts.

Cited in *Heller v. Pulitzer Pub. Co.* 153 Mo. 212, 54 S. W. 457, holding peremptory instruction to jury to find for plaintiff in civil action for libel, error; *State v. Powell*, 66 Mo. App. 615, holding instruction to jury in prosecution for libel "to be guided by the instructions of the court" in determining law of case, error; *State v. Heacock*, 106 Iowa, 201, 76 N. W. 654, holding instruction to jury in prosecution for libel, that they are judges of law and facts, but cautioning them against assuming superior knowledge of law, proper; *Arnold v. Jewett*, 125 Mo. 252, 28 S. W. 614, holding instructions should limit jury's right to judge of law in libel case to question whether publication was libelous; *McCloskey v. Pulitzer Pub. Co.* 152 Mo. 344, 53 S. W. 1087, holding refusal of instruction defining libel according to statute, error, though failing to state truth of publication is defense; *Wagner v. Scott*, 164 Mo. 303, 63 S. W. 1107, holding where issue is one of qualified privilege, and there is evidence that defendant knew of falsity of charge, question is for jury; *Cook v. Globe Printing Co.* 227 Mo. 540, 127 S. W. 332; *Advertiser Co. v. Jones*, 169 Ala. 207, 53 So. 759,—to the point that jury are final judges of both law and fact in prosecution for criminal libel; *Sands v. G. W. Marquardt & Sons*, 113 Mo. App. 497, 87 S. W. 1011, holding that a direction to the jury to determine the law in a libel case "according to instructions of court" and conferring upon the jury the right to adjudge the law of the whole case is prejudicial error; *State v. Simpson*, 136 Mo. App. 666, 118 S. W. 1187, holding an instruction erroneous which states that words quoted constitute a charge of a crime and that if the jury believe them to have been spoken to convict; *Cook v. Globe Printing Co.* 227 Mo. 541, 127 S. W. 332, holding that the jury's right to judge the law as well as fact is limited to the sole question of whether the publication was in fact libelous while on all

other questions the jury are as much bound by instructions as in any other action, this including amount of verdict.

Cited in footnote to *State v. Main*, 36 L. R. A. 623, which holds jury in criminal case must take decision of court as to constitutionality of statute on which prosecution based.

Cited in notes (33 L.R.A.(N.S.) 212) on effect of provision that jury shall determine law and facts in libel cases; (42 Am. St. Rep. 290) on jury as judges of law and fact.

Distinguished in *Grimes v. Thorp*, 113 Mo. App. 658, 88 S. W. 638, holding that an instruction in a civil action for slander that the jury are themselves the judges of the law of slander as well as of the facts and are not required to accept the instructions given by the court as being conclusive of the law of slander, is erroneous.

Transfer of case to court in banc.

Cited in *State v. Orrick*, 106 Mo. 128, 17 S. W. 329, holding failure of member of division of supreme court hearing cause to take part in decision, not ground for transfer to court *in banc*.

13 L. R. A. 427, *GENESEE FORK IMPROV. CO. v. IVES*, 144 Pa. 114, 22 Atl. 887.

Eminent domain bonds.

Cited in *Philadelphia & T. R. Co. v. Neshaminy Elev. R. Co.* 26 Pa. Co. Ct. 516, holding common bond of railroad to indemnify persons whose property may be injured by construction, sufficient to protect individual claimants; *Philadelphia & T. R. Co. v. Neshaminy Elev. R. Co.* 11 Pa. Dist. R. 465, holding that an eminent domain bond filed in favor of the commonwealth sufficiently secures the payment of just compensation to individual land holders for a taking for public use.

Public corporation rates.

Cited in notes (33 L.R.A. 182) on legislative power to fix tolls, rates, or prices; (6 L.R.A.(N.S.) 836) on businesses affected with public interest subjecting them to regulation and control in respect to rates or prices.

Right to collect tolls for navigation improvement.

Cited in *Madunkeunk Dam & Improv. Co. v. E. F. Allen Clothing Co.* 102 Me. 262, 66 Atl. 537, holding a stream improvement company can collect toll for logs if their improvement though not necessary to facilitate the logging.

Cited in note (67 L.R.A. 840) on right to improve navigability of stream.

13 L. R. A. 431, *MIFFLIN BRIDGE CO. v. JUNIATA COUNTY*, 144 Pa. 365, 22 Atl. 896.

Municipality taking property of public corporation; damages.

Referred to in *Re Monongahela Water Co.* 223 Pa. 324, 72 Atl. 625, on the measure of damages recoverable by a public corporation from a municipality.

Cited in *Clarion Turnp. & Bridge Co. v. Clarion County*, 172 Pa. 250, 33 Atl. 580, holding when toll bridge of corporation taken by county, measure of damage is value of property to owners, including cost of structure and value of franchise; *West Chester & W. Pl. Road Co. v. Chester County*, 182 Pa. 48, 37 Atl. 905, holding measure of damage for turnpike road taken by county, is just compensation for loss suffered by owners, including cost of construction and value of franchise; *Re Chambersburg & B. Turnp. Road*, 20 Pa. Super. Ct. 181, holding value, and not cost of construction, should be considered in condemning toll road; *Langquist v. Chicago*, 200 Ill. 74, 65 N. E. 681, holding proof of purchase

price inadmissible in condemnation proceedings, where paid in part by cancellation of indebtedness; *Harrisburg, C. & C. Turnpike Road Co. v. Cumberland County*, 225, Pa. 469, 74 Atl. 340, holding that jury may consider condition of road amount of tolls received or which would be received under proper management and the market value of stock of company as elements of damage for condemnation of turnpike; *Clarion Turnpike & Bridge Co. v. Clarion County*, 26 Pittsb. L. J. N. S. 274, holding that where bridge is taken by county measure of damages is just compensation for loss suffered, being value of bridge, approaches and franchise; *Rea v. Pittsburgh & C. R. Co.* 229 Pa. 118, 140 Am. St. Rep. 721, 78 Atl. 73, to the point that in condemnation of bridge owned by company witness who constructed bridge may testify as to value of bridge but not contract price.

Cited in footnote to *Re Brooklyn*, 26 L. R. A. 270, which upholds act authorizing city to acquire property of water company.

Condemnation of property devoted to public use.

Cited in footnotes to *Diamond Jo Line Steamers v. Davenport*, 54 L. R. A. 859, which authorizes condemnation for public wharf of land used by carrier as landing place; *Butte, A. & P. R. Co. v. Montana U. R. Co.* 31 L. R. A. 298, which holds railroad land not actually used or necessary subject to condemnation by other railroad; *Denver Power & Irrig. Co. v. Colorado & S. R. Co.* 60 L. R. A. 383, which denies power of reservoir company to condemn land devoted to purpose of railroad unless public necessity requires; *Cleveland, C. C. & St. L. R. Co. v. Ohio Postal Teleg. Cable Co.* 62 L. R. A. 941, which holds telegraph company seeking to appropriate part of railroad's right of way must show its use will not materially interfere with use by railroad; *Martin v. Tyler*, 25 L. R. A. 838, which holds order on drainage fund not sufficient payment for land taken for public use.

Bridges; erection by county.

Cited in *Hogsett's Appeal*, 2 Pa. Super. Ct. 277, holding statute authorizing construction of county bridge, when "public road or highway" crosses stream, includes bridging of borough streets.

Control of toll bridges.

Cited in note (58 L. R. A. 169) on rights and duties of toll-bridge proprietors.

Statement admissible to show value.

Cited in *Indiana Union Traction Co. v. Benadum*, 42 Ind. App. 126, 83 N. E. 261, holding sworn statement as to value of property made in April for assessment purpose admissible in August as to value in an action for injury as an admission by plaintiff, though it is not conclusive as to value; *Re Simmons*, 68 Misc. 66, 124 N. Y. Supp. 744, holding that in condemnation proceedings owner may be asked as to price at which she authorized the sale.

Cited in note (25 Eng. Rul. Cas. 297) on value of property taken in eminent domain proceedings.

13 L. R. A. 433, *ULRICH v. REINOEHL*, 143 Pa. 238, 24 Am. St. Rep. 534, 22 Atl. 862.

Insurance; when assignment of policy wagering contract.

Cited in *Shaffer v. Spangler*, 144 Pa. 231, 22 Atl. 865, holding in determining whether insurance disproportioned to debt, regard must be had to age of assured, his expectation of life, and cost of carrying insurance, with interest; *McHale v. McDonnell*, 175 Pa. 646, 34 Atl. 966, holding assignment of policy of \$2,000 to secure debt of \$700 valid, where expectancy of life of assured, and date of policy or of assignment not shown; *Nye v. Grand Lodge*, A. O. U. W. 9 Ind. App. 147, 36 N. E. 429, holding assignment of policy for \$2,000 to one without insurable in-

terest, in consideration of payment of \$300, not wagering contract as matter of law; *Wheeland v. Atwood*, 192 Pa. 240, 73 Am. St. Rep. 803, 43 Atl. 946, holding assignment of policy for \$5,000 on life of wife, as security for debt of husband of \$1,000, not wagering contract, though wife died after payment of two premiums; *White v. Bradley*, 28 Lanc. L. Rev. 366, holding that assignment of policy of life insurance to person not relative or creditor of insured is void, though made in good faith.

Cited in footnotes to *Morris v. Georgia Loan, Sav. & Bkg. Co.* 46 L. R. A. 506, which holds creditor taking assignment of policy entitled to retain from proceeds sufficient to pay debt and advances only; *Mutual Reserve Fund Life Asso. v. Hurst*, 20 L. R. A. 761, which holds assignee's insurable interest as creditor not condition of recovery on policy; *Hurd v. Doty*, 21 L. R. A. 746, which denies right of trustee receiving proceeds of insurance policy to refuse payment to beneficiaries as having no insurable interest.

Cited in note (3 L.R.A.(N.S.) 940, 951) on validity of assignment of interest in life insurance to one paying premiums.

Disapproved in *Exchange Bank v. Loh*, 104 Ga. 454, 44 L. R. A. 376, footnote p. 372, 31 S. E. 450, holding interest of assignee in policy cannot exceed debt and disbursements in carrying policy.

Amount of interest insurable in another's life.

Cited in *Harvey's Estate*, 15 Pa. Dist. R. 300, holding that a policy on life tenants life taken out by his assignee for \$5,000 is not against public policy or unwarranted where he purchased the tenancy for \$4,500.

Cited in footnote to *Gordon v. Ware Nat. Bank*, 67 L.R.A. 550, which holds that creditor has an insurable interest in life of debtor.

Cited in note (52 Am. St. Rep. 560) on mutual or membership life or accident insurance.

13 L. R. A. 438, *CONESTOGA CIGAR CO. v. FINKE*, 144 Pa. 159, 22 Atl. 868.

Custom as part of contract.

Cited in footnotes to *German American Ins. Co. v. Commercial F. Ins. Co.* 16 L. R. A. 291, which holds custom in particular city as to what constitutes "building" or "risk" not presumed to be known to foreign company; *Pennsylvania R. Co. v. Naive*, 64 L. R. A. 443, which denies carrier's liability for failure to deliver perishable freight arriving on 4th of July, when business is customarily suspended; *Delaware Ins. Co. v. S. S. White Dental Mfg. Co.* 65 L.R.A. 388, which holds marine policy providing that no risk shall attach until amount and description is approved and indorsed thereon, not changed into open and unrestricted policy covering all property assured elects to report, by adopting agreement fixing uniform premium, supplying blanks on which to report risks, and a long continued custom of reporting risks by assured when convenient, and their uniform acceptance by insurer.

When custom enforceable.

Cited in footnotes to *Baltimore Base Ball & Exhibition Co. v. Pickett*, 22 L. R. A. 690, which holds special contract for definite time not affected by custom to discharge ball players on ten days' notice; *Harris v. Sharples*, 58 L. R. A. 214, which denies right under contract to add lithographer's name for advertising purposes to lithographed cover design.

Annotation in 13 L. R. A. 438, referred to particularly in *Becker v. Hall*, 116 Iowa, 593, 56 L. R. A. 575, 88 N. W. 324, holding custom to appropriate ice in public waters unreasonable and in conflict with public rights.

13 L. R. A. 441, BLEVINS v. SMITH, 104 Mo. 583, 16 S. W. 213.

Dower; bar of inchoate right.

Cited in *McCreary v. Lewis*, 114 Mo. 591, 21 S. W. 855, holding right to dower not cut off by bond for deed, nor by deed executed in pursuance thereof, to neither of which was wife a party; *Motley v. Motley*, 53 Neb. 379, 68 Am. St. Rep. 608, 73 N. W. 738, and *Lynde v. Wakefield*, 19 Mont. 29, 47 Pac. 5, holding widow's inchoate right of dower not affected by sheriff's sale of lands under judgment against husband alone; *Crosby v. Farmers' Bank*, 107 Mo. 443, 17 S. W. 1004, holding wife may compel offer of land in parcels at sheriff's sale to enable her to protect dower right; *Bartlett v. Ball*, 142 Mo. 37, 34 S. W. 583, holding statute making devisees answerable upon covenant to extent of lands devised, does not affect widow's dower right where she is devisee; *Bartlett v. Tinsley*, 175 Mo. 331, 75 S. E. 143, holding widow may claim dower in lands owned by husband before all claims for damages for breach of his warranty have been ascertained and satisfied; *Thomas v. Woods*, 26 L.R.A. (N.S.) 1188, 97 C. C. A. 535, 173 Fed. 593, holding that wife is entitled to dower rights in property acquired by husband in Missouri, whether the parties are residents or not provided she executes no release thereof; *Lucas v. Purdy*, 142 Iowa, 369, 24 L.R.A. (N.S.) 1299, 120 N. W. 1063, holding that valid tax deed divests wife of the inchoate right of dower.

Cited in footnote to *Lewis v. Apperson*, 68 L.R.A. 867, which holds dower right not barred by deed signed by wife and a court commissioner conveying husband's real estate.

Cited in notes (18 L.R.A. 79) on power of husband or his creditors to defeat wife's right of dower; (24 L.R.A. (N.S.) 1295) on effect of tax sale upon inchoate dower.

Nature of suit to collect tax.

Cited in *State ex rel. Hayes v. Snyder*, 139 Mo. 556, 41 S. W. 216, holding payment of taxes cannot be enforced by personal judgment against owner of land; *State v. Chicago & N. W. R. Co.* 128 Wis. 502, 108 N. W. 594, distinguished taxes from debts on grounds of nature of remedy for enforcement thereof.

Enforcement of tax liens; parties.

Cited in *Perkinson v. Meredith*, 158 Mo. 463, 59 S. W. 1099, holding commencement of suit to enforce special tax lien against record owner after her death, cannot affect title, heirs not parties; *Jaicks v. Sullivan*, 128 Mo. 184, 30 S. W. 890, holding action to foreclose lien for street improvement, begun against record owner after his decease, and to which heirs not made parties until after running of statute of limitations, is barred; *Brickell v. Farrell*, 82 Fed. 221, holding beneficiaries in unforeclosed deed of trust not necessary party to suit to enforce delinquent tax lien; *Longwell v. Kansas City*, 69 Mo. App. 184, holding mortgagee is "owner" within statute requiring owners of property to be made parties to condemnation proceedings for street opening.

Distinguished in *Hilton v. Smith*, 134 Mo. 510, 33 S. W. 464, holding purchaser at tax sale may be divested of title by sale for subsequent taxes before he acquires deed, although not party to proceedings.

Necessary parties.

Distinguished in *Hardy v. Atkinson*, 136 Mo. App. 599, 118 S. W. 516, holding administrator of mortgagor not a necessary party to foreclosure proceedings where the homestead and dower rights of widow entirely consume equity of redemption.

Title under tax sale.

Cited in *Charter Oak Land & Lumber Co. v. Bippus*, 200 Mo. 706, 98 S. W. 546, holding that title obtained at a tax sale subsequent to an unrecorded prior sale

for taxes is superior though the parties thereto knew of the prior sale; *Rothenberger v. Garrett*, 224 Mo. 198, 123 S. W. 574, holding that the purchaser at a tax sale acquires only the title of the recorded owner, which is nothing where he or the tax collector know that title has been transferred to a person not a party to the proceedings.

13 L. R. A. 452, *COOK v. BARTHOLOMEW*, 60 Conn. 24, 22 Atl. 444.

Agreements for support and maintenance.

Cited in *Davison v. Smith*, 36 Pa. Co. Ct. 349, 18 Pa. Dist. R. 712, holding that an amount mentioned as recoverable on breach of a maintenance agreement does not control the amount of recovery therefor such recovery being limited to loss sustained by breach.

Cited in footnote to *Glocke v. Glocke*, 57 L. R. A. 458, which holds land conveyed by aged parent to son promising to support him, reverts to former on breach of agreement.

Mortgage or deed.

Cited in note (18 Eng. Rul. Cas. 13) on test between mortgage and conditional sale.

Difficulty in estimating damage not ground for refusing relief.

Cited in *Broughel v. Southern New England Teleph. Co.* 73 Conn. 622, 84 Am. St. Rep. 176, 48 Atl. 751, holding damages for loss of life, based on value to estate, not too vague and uncertain to be estimated pecuniarily.

Debt.

Cited in *Lothrop v. Parke*, 202 Mass. 106, 88 N. E. 666, holding that a judgment based on a claim founded on fraud is a debt within meaning of statute providing for bond conditioned on payment of debts and legacies.

13 L. R. A. 454, *AMERICAN RAPID TELEG. CO. v. HESS*, 125 N. Y. 641, 21 Am. St. Rep. 764, 26 N. E. 919.

Interest of public service corporations in streets.

Cited in *People ex rel. Western U. Teleg. Co. v. Dolan*, 126 N. Y. 176, 12 L. R. A. 253, 27 N. E. 269, holding interest of telegraph company in street in which right granted to construct line, deemed license merely, in determining value for taxation; *Lake Roland Elev. R. Co. v. Baltimore*, 77 Md. 379, 20 L. R. A. 133, 26 Atl. 510, holding ordinance granting street-railway right to lay double track may be repealed, and company restricted to single track, even after tracks laid, if public interests require it; *Snouffer v. Cedar Rapids & M. C. R. Co.* 118 Iowa, 305, 92 N. W. 79, sustaining right of municipality to require removal of street-car tracks to middle of street, placing at grade, and paving; *Newark v. State Bd. of Taxation*, 66 N. J. L. 469, 49 Atl. 525, holding interest of street railway company in street over which it passes taxable as real estate; *Western New York & P. Traction Co.* 143 App. Div. 718, 128 N. Y. Supp. 363, holding that vested rights of street railroad in streets are subject to reasonable use of street by public for travel and other purposes.

Cited in notes (12 L. R. A. 864) on authority to construct telegraph line as mere license; (34 L. R. A. 370) on grant of franchises to electric subway companies; (50 L. R. A. 147, 150) on privilege of using streets as a contract within constitutional provision against impairing obligation of contracts.

Corporate franchises subject to police power.

Cited in *Geneva v. Geneva Teleph. Co.* 30 Misc. 241, 62 N. Y. Supp. 172, holding legislature may authorize city to require existing electric companies to place wires under ground in conduits constructed by city; *Rochester v. Bell Teleph. Co.*

52 App. Div. 10, 64 N. Y. Supp. 804, holding right of telephone company to use streets, subject to police authority of municipality to require use of conduits of another company; *Electric Power Co. v. New York*, 29 Misc. 51, 60 N. Y. Supp. 590, holding statute requiring electric light wires and cables to be placed under ground within police power, as to electric company operating under franchise previously granted; *Westport v. Mulholland*, 84 Mo. App. 325, sustaining ordinance requiring obtaining permission to dig up city street, as applied to street railway obtaining franchise before inclusion of highway in city limits; *Coverdale v. Edwards*, 155 Ind. 383, 58 N. E. 495, holding poles and wires of electric company not removed upon notice from city, when power reserved to terminate license, become nuisance *per se*, and may be summarily removed by municipality; *Utica v. Utica Teleph. Co.* 24 App. Div. 364, 48 N. Y. Supp. 916, holding statute authorizing telegraph company to construct lines over any streets and highways, not authority for such construction without consent of city and in violation of its ordinances; *American Teleg. & Teleph. Co. v. Harborecreek Twp.* 23 Pa. Super. Ct. 441, sustaining road commissioners' regulation requiring removal of telegraph poles to property line of road; *O'Brien v. Erie*, 20 Pa. Co. Ct. 343, 7 Pa. Dist. R. 495, holding municipality has power to construct conduit for accommodation of electric wires when reasonable and necessary; *Philadelphia v. Postal Teleg. Cable Co.* 67 Hun, 23, 21 N. Y. Supp. 556, holding state taxation of telegraph line extended over military or post road under Federal authority, not interference with interstate commerce; *Brinkman v. Eisler*, 40 N. Y. S. R. 866, 7 N. Y. Supp. 193, holding contractor erecting awning over sidewalk for another, contrary to statute, cannot recover; *Buffalo v. Delaware L. & W. R. Co.* 136 App. Div. 281, 120 N. Y. Supp. 1081, holding that the legislature may require a railroad company operating under franchise from city to change its style of bridge from stationary to swinging over a river to facilitate navigation thereon; *New Union Teleph. Co. v. Marsh*. 96 App. Div. 125, 89 N. Y. Supp. 79, holding that municipal authorities may reasonably regulate use of streets by telephone company but their consent to use of streets is not essential, such right being granted by state; *Carthage v. Central New York Teleph. & Teleg. Co.* 110 App. Div. 627, 96 N. Y. Supp. 919, reversing 48 Misc. 425, 96 N. Y. Supp. 917, on the power and right of legislature to limit, restrict or revoke the right of a telegraph or telephone company to maintain its poles in a street; *New York C. & H. R. R. Co. v. New York*, 142 App. Div. 590, 127 N. Y. Supp. 513, holding that license given by legislature to railroad to use streets may be revoked at will of legislature; *Merced Falls Gas & Electric Co. v. Turner*, 2 Cal. App. 723, 84 Pac. 239, holding that a city may compel removal of poles from street so placed by permission and franchise; such permission and franchise not giving an indefeasible right.

Cited in footnotes to *Northwestern Teleph. Exch. Co. v. Minneapolis*, 53 L. R. A. 175, which requires council's discretion in compelling telegraph company to put underground, wires placed overhead under ordinance, to be reasonably exercised; *Michigan Teleph. Co. v. Benton Harbor*, 47 L. R. A. 104, which holds city's consent unnecessary to use of streets by telephone companies; *Wallace v. Reno*, 63 L.R.A. 337, which upholds statute authorizing revocation of license without notice to licensee.

Cited in notes (31 L. R. A. 800, 801, 804) on police regulation of electric companies; (39 L. R. A. 619) on municipal control over public nuisances on public streets and highways created by street railroads and other electric companies; (24 L. R. A. 165) on power of states to control or impose burdens on interstate telegraph and telephone companies; (14 L.R.A.(N.S.) 655) on right to require underground telegraph or telephone wires.

Contracts with public service corporations.

Cited in *Wright v. Glen Teleph. Co.* 48 Misc. 195, 95 N. Y. Supp. 101, holding that although the right to put wires over streets and highways is conferred by legislature a company may make a binding contract as to rates of service with a city in consideration of being allowed to put line through park and other public places; *Ganz v. Ohio Postal Teleg. Cable Co.* 72 C. C. A. 186, 140 Fed. 695, holding that a county board has no power to contract even for a consideration with respect to a telephone company's use of a highway for a period of time; *People ex rel. New York Electric Lines Co. v. Ellison*, 188 N. Y. 526, 81 N. E. 447, as upholding a contract entered into between a telephone company and board of commissioners of electric subways obligating company to put its conductors in subway; *State ex rel. Townsend v. Park Comrs.* 100 Minn. 154, 9 L.R.A.(N.S.) 1048, 110 N. W. 1121, holding that a park board cannot contract to perpetually maintain certain land dedicated as a parkway and such parkway may be vacated in favor of public interest.

13 L. R. A. 458, *WOODEN v. WESTERN N. Y. & P. R. CO.* 126 N. Y. 10, 22 Am. St. Rep. 803, 26 N. E. 1050.

Enforcement of rights of action arising in foreign jurisdiction.

Cited in *Messler v. Schwarzkopf*, 35 Misc. 73, 71 N. Y. Supp. 241, holding common-law liability of members of joint-stock association as partners, presumed to exist in another state, in absence of proof to contrary; *Burdick v. Missouri P. R. Co.* 123 Mo. 229, 26 L. R. A. 387, 45 Am. St. Rep. 528, 27 S. W. 453, holding proof of law of foreign state, where accident occurred, unnecessary to support action for negligence causing loss of arm; *A. G. Edwards Brokerage Co. v. Stevenson*, 160 Mo. 528, 61 S. W. 617, holding in action upon contract made in another state, presumption obtains that common law prevails in such state, and not that statutes are same as those of *lex fori*; *Harrill v. South Carolina & G. Extension R. Co.* 132 N. C. 658, 44 S. E. 109, sustaining administrator's right of action for killing of intestate in another state having similar statute; *Romaine v. New York, N. H. & H. R. Co.* 87 App. Div. 571, 84 N. Y. Supp. 491, as to administratrix's right of action for negligent killing of decedent in another state; *Christensen v. Floriston Pulp & Paper Co.* 29 Nev. 562, 92 Pac. 210, holding that a right of action growing out of the laws of another state will be here enforced when not contrary to local public policy; *Bain v. Northern P. R. Co.* 120 Wis. 416, 98 N. W. 241, holding cause of action arising by statute for personal injuries is not local but transitory and may be instituted in courts of any state having jurisdiction of parties if statute is not contrary to public policy or law of former; *Re Taylor*, 144 App. Div. 637, 129 N. Y. Supp. 378, to the point that action for wrongful death in another state cannot be enforced here by comity beyond extent of such remedial limitations as public policy attaches to kindred rights of action arising under our laws; *Johnson v. Phoenix Bridge Co.* 197 N. Y. 319, 90 N. E. 953, 2 N. Y. Civ. Proc. Rep. N. S. 39, affirming 133 App. Div. 808, 118 N. Y. Supp. 210, holding that the action authorized by statute of foreign country where death is caused and occurs is maintainable in courts of this state; *Fithian v. St. Louis & S. F. R. Co.* 188 Fed. 844, holding that where right of action for injuries is based entirely upon statute it can be brought only in name of person to whom right is given by statute.

— Proof necessary when action based upon statute.

Cited in *Geoghegan v. Atlas S. S. Co.* 3 Misc. 225, 22 N. Y. Supp. 749, holding burden on plaintiff to prove negligently causing death is actionable wrong in foreign country where accident occurred; *Mexican C. R. Co. v. Goodman*, 20 Tex. Civ. App. 110, 48 S. W. 778, holding action for ejection of passenger from train

in foreign country, cannot be maintained after death of passenger, without proof that action permitted by foreign statute; *The Lamington*, 87 Fed. 753, holding action for injury to seaman aboard British vessel on high seas not maintainable unless permitted by law of Great Britain; *Howlan v. New York & N. J. Teleph. Co.* 131 App. Div. 445, 115 N. Y. Supp. 316, holding that where a right of action for negligence depends on a foreign statute, it can only be maintained in this state on proof that the statute of the foreign state gives the right of action and is similar to local statute; *Zeikus v. Florida East Coast R. Co.* 144 App. Div. 92, 128 N. Y. Supp. 933, 2 N. Y. Civ. Proc. Rep. N. S. 233, affirming 70 Misc. 340, 128 N. Y. Supp. 931, holding that action for death by negligence in another state can only be maintained upon proof that statute of such state gives right of action and that it is similar to ours; *Cuba R. Co. v. Crosby*, 95 C. C. A. 539, 170 Fed. 383, reversing 158 Fed. 147, on pleading and proof of foreign statute on which is based the cause of action as essential.

Cited in notes (15 L.R.A. 583) on right of action for causing death accruing under foreign statutes; (67 L.R.A. 60) on how case determined when proper foreign law not proved.

— Dissimilarity between *lex loci* and *lex fori*.

Cited in *Huntington v. Attrill*, 146 U. S. 670, 36 L. ed. 1129, 13 Sup. Ct. Rep. 224, holding in Federal courts, action may be maintained in one state, for actionable wrong done in another state, although wrong not actionable in *lex fori*, if not contrary to policy of laws; *Evey v. Mexican C. R. Co.* 38 L. R. A. 394, 26 C. C. A. 417, 52 U. S. App. 118, 81 Fed. 304, holding dissimilarity of statute of foreign country, giving right of action for personal injury, from *lex fori*, not ground for Federal court refusing enforcement; *Kiefer v. Grand Trunk R. Co.* 12 App. Div. 30, 42 N. Y. Supp. 171, holding action will lie for negligently causing death in foreign country, where statute of such country possesses general characteristics of statute of this state; *Hanna v. Grand Trunk R. Co.* 41 Ill. App. 130, holding action will lie for negligently causing death in foreign country, although foreign statute does not limit recovery, as does that of *lex fori*, and provisions for distribution of fund are dissimilar; *Boston & M. R. Co. v. McDuffey*, 25 C. C. A. 249, 51 U. S. App. 111, 79 Fed. 936, holding wife and children may sue employer in Vermont, for death of employee from negligence of fellow servant in Canada, under statute of that country, although under Vermont statute action must be by executor or administrator, and negligence of fellow servant would preclude recovery; *Strauss v. New York, N. H. & H. R. Co.* 91 App. Div. 584, 87 N. Y. Supp. 67, holding statute providing for survival to personal representative of causes of action for injury to person not materially different from statute giving personal representative right to maintain suit for negligently causing death; *Marshall v. Sherman*, 148 N. Y. 25, 34 L. R. A. 766, 51 Am. St. Rep. 654, 42 N. E. 419, holding stockholder's liability, under statute of Kansas, to single creditor, for recovery of specific sum, not enforceable in New York; *Cross v. United States Trust Co.* 131 N. Y. 341, 15 L. R. A. 609, 27 Am. St. Rep. 597, 30 N. E. 125, holding trust in personal property created by will, and valid by statutes of state of testator's domicil, enforceable, although in contravention of local statute against perpetuities; *St. Louis, I. M. & S. R. Co. v. Haist*, 71 Ark. 264, 100 Am. St. Rep. 65, 72 S. W. 893, holding that differences in detail are immaterial where the fundamental and main provisions and principles of *lex loci* and *lex fori* are similar; *Keep v. National Tube Co.* 154 Fed. 124, holding a limitation of action under statute sued on in foreign state to two years controls and is not against the policy of the statute of the former having a 12 month limit.

Cited in note (56 L. R. A. 196, 206, 207, 212) on conflict of laws as to action for death or bodily injury.

Criticized in *Boyle v. Southern R. Co.* 36 Misc. 290, 73 N. Y. Supp. 465, holding action for negligently causing death, based upon statute of another state, may be maintained, though statute substantially dissimilar from that of *lex fori*.

— **Right to recover determined by *lex loci*.**

Cited in *Meekin v. Brooklyn Heights R. Co.* 164 N. Y. 149, 51 L. R. A. 236, 79 Am. St. Rep. 635, 58 N. E. 50, holding action brought by father for negligently causing death of daughter, upon death of plaintiff, may be revived for benefit of mother and brothers and sisters; *Stone v. Groton Bridge & Mfg. Co.* 77 Hun, 101, 28 N. Y. Supp. 446, holding administrator not entitled to maintain action for causing death, under statute of another state providing action shall be brought by and in name of state; *Fabel v. Cleveland, C. C. & St. L. R. Co.* 30 Ind. App. 271, 65 N. E. 929, holding father cannot maintain action for son's death in another state, statute of which provides such actions shall be brought by personal representative; *Thorpe v. Union P. Coal Co.* 24 Utah, 481, 68 Pac. 145, holding action for causing death not maintainable by heirs, where laws of state where accident occurred provide such action shall be brought by personal representative; *Dailey v. New York, O. & W. R. Co.* 26 Misc. 540, 57 N. Y. Supp. 485, holding limitation in statute of another state giving next of kin right of action for negligently causing death enforced in this state; *Kiefer v. Grand Trunk R. Co.* 12 App. Div. 32, 42 N. Y. Supp. 171, holding in action for negligently causing death, under statute of another state, interest from date of injury cannot be recovered, unless allowed by foreign statute; *Re Degaramo*, 86 Hun, 395, 33 N. Y. Supp. 502, holding foreign statute under which action brought for negligently causing death controls distribution of fund; *Mundt v. Glöckner*, 24 App. Div. 116, 48 N. Y. Supp. 940, Overruling 20 Misc. 65, 44 N. Y. Supp. 430 (dissenting opinion), majority holding, upon death of plaintiff, in action for causing death, brought by administrator and father, action may be continued by administrator *de bonis non*.

Cited in note (15 L. R. A. 583) on rights of action for causing death occurring under foreign statutes.

— **Law governing damages.**

Cited in *Slater v. Mexican Nat. R. Co.* 194 U. S. 132, 48 L. ed. 905, 24 Sup. Ct. Rep. 581 (dissenting opinion), majority holding assessment of damages for wrongful killing governed by *lex loci*; *Dorr Cattle Co. v. Des Moines Nat. Bank*, 127 Iowa, 163, 98 N. W. 918, 4 A. & E. Ann. Cas. 510, holding that the character and extent of remedy for action arising in foreign jurisdiction is to be determined by the *lex fori* except where the statute creating right of action also contains directly or inferentially the remedy.

Cited in notes (56 L.R.A. 314; 91 Am. St. Rep. 727, 730, 731) on conflict of laws as to measure of damages.

Right of action for causing death — Release of.

Cited in *Mella v. Northern S. S. Co.* 127 Fed. 417, sustaining widow's right to release, prior to appointment as administratrix, cause of action for wrongful killing of husband.

— **Persons entitled to.**

Cited in *Gurofsky v. Lehigh Valley R. Co.* 121 App. Div. 128, 105 N. Y. Supp. 514, on action by person designated in statute as entitled to right of action for negligent death; *Hall v. Southern R. Co.* 149 N. C. 112, 62 S. E. 899, holding that a foreign administrator cannot bring an action for negligent death in state having a statute providing that action be brought by personal representative; *Dodge v. North Hudson*, 177 Fed. 991, holding that the person named in statute sued upon as entitled to bring the action need not bring it since the procedure of the state where the action is brought governs.

Correlation of statutory rights and remedies.

Cited in *Re Comesky*, 83 App. Div. 141, 81 N. Y. Supp. 1049, holding municipality exercising statutory authority to change street grade cannot attack constitutionality of abutter's remedy therein provided; *Rosin v. Lidgerwood Mfg. Co.* 89 App. Div. 253, 86 N. Y. Supp. 49, by Woodward, J., who holds statute requiring notice to employer before bringing action would be unconstitutional, where cause of action existed at common law.

Presumption of the existence of similar foreign law.

Cited in *Waters v. Spencer*, 44 Misc. 17, 89 N. Y. Supp. 693, holding that the presumption that the law of a foreign state is similar to that of forum does not apply to positive statutory law.

13 L. R. A. 462, *MACDONALD v. FIRST NAT. BANK*, 47 Minn. 67, 28 Am. St. Rep. 3, 49 N. W. 395.

Operation of insolvent law upon nonresidents.

Cited in *Re Kahn*, 55 Minn. 512, 57 N. W. 154, holding validity of agreement by insolvent in Minnesota, to give unlawful preference by transfer of goods to creditor in Wisconsin, determined by law of former state, although title vested in Wisconsin.

Cited in notes (23 L. R. A. 34) on transfer of property out of state by bankruptcy proceedings or assignment for creditors; (37 L. R. A. 479) on effect of insolvency statutes on mortgage or sale preferring creditors.

13 L. R. A. 463, *TABERT v. COOLEY*, 46 Minn. 366, 49 N. W. 124.

Malicious prosecution; probable cause.

Cited in *Scott v. Dennett Surpassing Coffee Co.* 51 App. Div. 323, 64 N. Y. Supp. 1016, holding test of probable cause not actual knowledge, but any knowledge which prosecutor could or ought to have gained in exercise of ordinary prudence; *Hutchinson v. Wenzel*, 155 Ind. 55, 56 N. E. 845, holding belief of prosecutor must be honest, and supported by reasonable grounds after such investigation as prudent person would make; *Shafer v. Hertzog*, 92 Minn. 175, 99 N. W. 796, holding that it is not necessary that witnesses to the actual facts make the complaint, if they act without prejudice and malice upon such a degree of impartiality as can be expected from an ordinarily prudent man; *Price v. Denison*, 95 Minn. 113, 103 N. W. 728, holding that the plaintiff had the right to prove such facts as might have come within the prosecutor's knowledge had he made proper investigation and inquiry.

13 L. R. A. 465, *BENNETT v. NORTHERN P. R. CO.* 2 N. D. 112, 49 N. W. 408.

Second appeal in 3 N. D. 92, 54 N. W. 314.

Third appeal in 4 N. D. 350, 61 N. W. 18.

Master's knowledge of defects.

Cited in notes (41 L.R.A. 103) on knowledge as element of employer's liability to injured servant; (16 L.R.A.(N.S.) 134) on furnishing servant article in general use as measure of master's duty; (98 Am. St. Rep. 301, 307, 319) on liability to servant for injuries due to defective machinery and appliances.

Evidence; declarations of pain and suffering.

Cited in *Western Steel Car & Foundry Co. v. Rean*, 163 Ala. 261, 50 So. 1012, holding that an answer by witness, "that plaintiff complained every day of his leg, hip and back hurting him" is admissible and citing annotation on this point; *Puls v. Grand Lodge, A. O. U. W.* 13 N. D. 571, 102 N. W. 165, holding

admissible testimony relating to acts and complaints of deceased expressing nature and degree of pain he was at the time undergoing.

Cited in footnote to *Williams v. Great Northern R. Co.* 37 L. R. A. 199, which holds admissible expressions as to pain and suffering, only when made at time of suffering.

Cited in note (24 L.R.A.(N.S.) 262) on admissibility of expressions or statements, subsequent to injury, of present pain.

Disobedience of rules.

Cited in *Smith v. Centennial Eureka Min. Co.* 27 Utah, 323, 75 Pac. 749, holding that where decedent is killed by taking two cars at once down grade when rules of employer limit number to one there can be no recovery.

Cited in note (37 L. ed. U. S. 150) on liability for injuries received by employee in coupling cars.

13 L. R. A. 472, *MILLS v. PARKHURST*, 126 N. Y. 89, 26 N. E. 1041.

Election of remedies.

Cited in *Roberge v. Winne*, 144 N. Y. 712, 39 N. E. 631, holding filing of bill to rescind agreement, without more, not such election of remedies as to preclude suit for specific performance; *Droege v. Ahrens & O. Mfg. Co.* 163 N. Y. 470, 57 N. E. 747, holding filing of proof of claim, under contract of sale, with assignee under general assignment, with knowledge of fraud of vendee, precludes action to rescind on ground of fraud; *Re Hildebrant*, 120 Fed. 996, holding vendor filing claim in bankruptcy for goods sold and delivered cannot claim return of goods on hand as fraudulently obtained; *Groves v. Rice*, 148 N. Y. 233, 42 N. E. 664, holding creditor requesting assignee to complete contract partly performed by assignor, and performance accordingly by assignee, does not estop creditor from suing to set aside assignment; *Re Garver*, 176 N. Y. 391, 68 N. E. 667, Affirming 84 App. Div. 264, 82 N. Y. Supp. 594, sustaining right of creditor attacking general assignment with partial success, but without benefiting himself, to share in assigned property; *Chase v. New York*, 23 App. Div. 324, 48 N. Y. Supp. 333, holding landowner procuring reduction of void assessment for local improvement, not precluded from suing to recover such reduced assessment paid under protest; *Schoeneman v. Chamberlin*, 55 App. Div. 356, 67 N. Y. Supp. 284, holding replevin by vendor to recover goods obtained by fraud does not preclude action upon implied contract for value of goods not recovered; *Stier v. Harms*, 154 Ill. 480, 40 N. E. 296, holding dismissal of action of replevin for property taken under distress warrant, not bar to subsequent action of trespass for wrongful seizure of property; *McLaughlin v. Gillings*, 18 Misc. 58, 41 N. Y. Supp. 22, holding promisee of third party to pay creditor of promisee, does not preclude creditor from suing original debtor, in absence of election to rely on promise; *Hurst v. Trow Printing & Bookbinding Co.* 2 Misc. 365, 22 N. Y. Supp. 371, holding rescission of contract does not extinguish liability upon notes given thereunder, consideration for which maker had received and retained when contract terminated; *Henry v. Herrington*, 193 N. Y. 221, 20 L.R.A.(N.S.) 251, 86 N. E. 29, holding that the institution of an action never available to the plaintiff does not bar him from the prosecution of an inconsistent available action; *Parker v. Murphy*, 56 Misc. 544, 107 N. Y. Supp. 202, holding an election to cancel insurance policy and sue on proportional part of premium note due precludes an attempt to sue on entire note; *Re Rutaced Co.* 137 App. Div. 718, 122 N. Y. Supp. 454, holding that judgment creditor may maintain supplementary proceedings against assignor for benefit of creditors.

Cited in footnotes to *Miller v. Hyde*, 25 L. R. A. 42, which holds replevin of horse not defeated by prior attachment suit for trover; *Barchard v. Kohn*, 29 L. L.R.A. Au. Vol. II.—65.

R. A. 803, which holds enforcement of chattel mortgage on exempt property not defeated by prior judgment and attempted levy on exempt property.

Cited in notes (54 L.R.A. 345, 348, 349, 351) on right of creditor to participate under assignment or deed of trust for benefit of creditors which he had repudiated; (34 L.R.A.(N.S.) 312) on bringing suit not prosecuted to judgment as election of remedies.

Disapproved in *Moody v. Templeman*, 23 Tex. Civ. App. 378, 56 S. W. 588, holding garnishment of fund belonging to assigned estate precludes creditor from sharing in trust fund.

Assignments for benefit of creditors.

Cited in *Wright v. Seaman*, 32 App. Div. 111, 52 N. Y. Supp. 893, holding assignment for creditors upheld only when all conditions met for prevention of fraud; *Re Dauchy*, 59 App. Div. 386, 69 N. Y. Supp. 827, holding individual general assignment of member of firm, directing payment of all debts and liabilities due from assignor, provides for payment of both individual and partnership debts.

Cited in note (24 L. R. A. 381) on necessity of acceptance of assignment or deed of trust for creditors.

13 L. R. A. 475, *SMITH v. PHOENIX INS. CO.* 91 Cal. 323, 25 Am. St. Rep. 191, 27 Pac. 738.

Title of assured.

Cited in *Loventhal v. Home Ins. Co.* 112 Ala. 118, 33 L. R. A. 262, 57 Am. St. Rep. 17, 20 So. 419, holding party in possession of real estate under executory contract of purchase, has "unconditional and sole ownership" within condition of policy; *Arkansas F. Ins. Co. v. Wilson*, 67 Ark. 558, 48 L. R. A. 512, 77 Am. St. Rep. 584, 55 S. W. 933, holding condition avoiding policy if "interest" of assured become other than entire, not violated by offer to buy and agreement to sell at future time; *Davis v. Phoenix Ins. Co.* 111 Cal. 413, 43 Pac. 1115, holding condition as to ownership waived, where application made part of policy, shows assured not owner; *Allen v. Phoenix Assur. Co.* 12 Idaho, 665, 8 L.R.A.(N.S.) 907, 88 Pac. 245, 10 A. & E. Ann. Cas. 328, holding that title of homesteader in government claim land is sufficient to support a policy on buildings thereon calling for unconditional or fee-simple title.

Cited in note (17 L. R. A. 179) on right of property arising from acceptance of goods.

Passing of title.

Cited in *Finkbohner v. Glens Falls Ins. Co.* 6 Cal. App. 384, 92 Pac. 318, holding that an executory contract of sale putting vendee in possession on payment of part purchase price, title to be conveyed on full payment, constitutes a change in title avoiding policy thereon; *Brickell v. Atlas Assur. Co.* 10 Cal. App. 27, 101 Pac. 16, holding that an executory contract of sale accompanied with possession to vendee and part payment of purchase price remainder to be paid in monthly instalments to be applied as rent on default under contract constitutes change of title avoiding policy; *Swank v. Farmers' Ins. Co.* 128 Iowa, 551, 102 N. W. 429, holding that a contract and deed of insured property being executed and placed in hands of broker to facilitate raising of money on which sale of the property is conditioned such contract and deed not to be used until approved of by owner does not constitute change of title avoiding policy; *Bowdle v. Jencks*, 18 S. D. 94, 99 N. W. 98, holding that on a contract to exchange property to be consummated on delivery of papers at specified bank where the defendant's property is destroyed by fire before he has deposited papers and after

plaintiff has deposited the loss is on defendant; *J. S. Potts Drug Co. v. Benedict*, 156 Cal. 334, 25 L.R.A.(N.S.) 615, 104 Pac. 432, holding that where plaintiff "does by these presents, sell, convey, assign, transfer and set over to defendant a certain indenture of lease to have and to hold" for remainder of term subject to occupancy of vendor for time specified, title passed as of the date of the agreement; *Queen of Arkansas Ins. Co. v. Pendola*, 94 Ark. 598, 128 S. W. 559 (dissenting opinion), on change of possession of personal property from one bailee to another, as affecting validity of policy of insurance.

Cited in notes (17 L.R.A. 179) on essentials to valid sale of goods; (35 L.R.A.(N.S.) 1069) on right to crops on, or rental of, realty sold upon contract; (15 Eng. Rul. Cas. 809) on statutory requirements as excuse for landlord's breach of covenant.

13 L. R. A. 481, *MT. VERNON FIRST NAT. BANK v. SARLLS*, 129 Ind. 201, 28 Am. St. Rep. 185, 28 N. E. 434.

Injunction; public and private injuries.

Cited in *Adams v. Ohio Falls Car Co.* 131 Ind. 379, 31 N. E. 57, holding maintenance of log way at public wharf, and operation of steam engine thereon, such injury to neighboring dwelling as entitled owner to injunction; *People's Gas Co. v. Tyner*, 131 Ind. 283, 16 L. R. A. 445, 31 Am. St. Rep. 433, 31 N. E. 59, sustaining temporary injunction, on petition of private citizen, against explosion of nitro-glycerine in gas well, in center of city, to increase flow of gas; *Griswold v. Brega*, 160 Ill. 495, 52 Am. St. Rep. 350, 43 N. E. 864, Affirming 57 Ill. App. 556, holding grant of permit to remove wooden building within fire limits may be enjoined on petition of neighboring property owners; *Carmien v. Cornell*, 148 Ind. 89, 47 N. E. 216, holding policy holders of mutual insurance company entitled to injunction to prevent assessment to pay invalid claim; *Pollard v. First Ave. Coal Min. Co.* 27 Ind. App. 196, 61 N. E. 9, holding city cannot maintain suit to enjoin erection of wooden building within fire limits, in violation of ordinance, without showing special injury; *O'Brien v. Louer*, 158 Ind. 213, 61 N. E. 1004, holding person not damaged thereby cannot enjoin violation of fire limits ordinance; *O'Bryan v. Highland Apartment Co.* 128 Ky. 292, 15 L.R.A.(N.S.) 422, 108 S. W. 257, holding that a property owner may sue to enjoin the erection of a building in violation of a building ordinance; *Banga v. Dworak*, 75 Neb. 716, 5 L.R.A.(N.S.) 495, 106 N. W. 780, 13 A. & E. Ann. Cas. 202, holding that private person may enjoin erection of a building in violation of an ordinance though such erection is not a nuisance per se provided he can show damage not common to the public; *Caskey v. Edwards*, 128 Mo. App. 241, 107 S. W. 37, holding that a private citizen may enjoin construction of livery stable contrary to ordinance where specially injurious to suitor; *Mason v. Deitering*, 132 Mo. App. 34, 111 S. W. 862, holding that court will enjoin livery stable where facts show that its maintenance would depreciate value of plaintiff's property in vicinity and destroy comfort of homes and endanger health of neighborhood; *Chimene v. Baker*, 32 Tex. Civ. App. 524, 75 S. W. 330, holding that a violation of an ordinance will be enjoined though not a nuisance per se where suitor can show infliction of material injury thereby; *Mason v. Deitering*, 132 Mo. App. 33, 111 S. W. 862, holding the violation of a public right not enjoinable by private person except where private rights are also sustained; *Micks v. Mason*, 145 Mich. 214, 11 L.R.A.(N.S.) 657, 108 N. W. 707, 9 A. & E. Ann. Cas. 291, holding that a city having right to establish fire limits may abate a building constructed in violation of an ordinance without respect to whether it is a nuisance per se or not.

Cited in notes (41 L.R.A. 328) on injunction by municipalities against nuisances affecting public morals, peace, and good order and health and safety; (21

L.R.A.(N.S.) 586) on injunction against crime which is private nuisance or which involves property rights; (5 L.R.A.(N.S.) 493, 495) on injunction by private person against violation of municipal ordinance; (5 L.R.A.(N.S.) 262) on violation of police ordinance as ground for private action.

Distinguished in *Lemmon v. Guthrie Center*, 113 Iowa, 42, 86 Am. St. Rep. 361, 84 N. W. 986, enjoining city from removing wooden building, where owner without adequate remedy at law.

Joinder of plaintiffs.

Cited in *Chicago & S. E. R. Co. v. Kenney*, 159 Ind. 78, 62 N. E. 26, holding common interest in having railroad receiver appointed authorizes joinder of several plaintiffs; *American Plate Glass Co. v. Nicoson*, 34 Ind. App. 648, 73 N. E. 625, holding that the owner of land and one operating a stone quarry thereon may be joined as plaintiffs in an action for the flooding of the quarry.

Police power of cities.

Cited in *Evansville v. Miller*, 146 Ind. 618, 28 L. R. A. 171, 45 N. E. 1054, holding ordinance declaring partially burnt building nuisance, without regard to annoyance as injury to public, invalid; *Rushville Natural Gas Co. v. Morristown*, 30 Ind. App. 460, 66 N. E. 179, and *State ex rel. Indianapolis v. Indianapolis Union R. Co.* 160 Ind. 59, 60 L. R. A. 837, 66 N. E. 163, holding municipality cannot, under general power to define nuisances, declare nuisances *per se* things not recognized as such by common law; *Champer v. Greencastle*, 138 Ind. 346, 24 L. R. A. 772, 46 Am. St. Rep. 390, 35 N. E. 14, holding city ordinance prohibiting use in saloons of screens, colored glass or other obstructions to view, invalid, in absence of legislation conferring power; *Crawfordsville v. Braden*, 130 Ind. 155, 14 L. R. A. 271, 30 Am. St. Rep. 214, 28 N. E. 849, holding erection and operation of electric lighting plant, to furnish light in public places and to private consumers, within police powers of city; *Rushville v. Rushville Natural Gas Co.* 132 Ind. 581, 15 L. R. A. 324, 28 N. E. 853, upholding ordinance fixing maximum rates chargeable by natural gas company.

Cited in footnote to *Bostock v. Sams*, 59 L. R. A. 282, which holds unauthorized, ordinance permitting refusal of permits for erecting buildings not conforming in size, appearance, etc., to existing buildings.

Cited in notes (38 L. R. A. 162, 165) on municipal power of buildings and other structures as nuisances; (36 L. R. A. 598) on power of municipal corporation to define, prevent, and abate nuisances; (47 Am. St. Rep. 545) on quarantine and health laws and regulations; (18 L.R.A.(N.S.) 403) on power of municipality granting permission to build or repair wooden building within fire limits to limit time of continuance of structure; (21 L.R.A.(N.S.) 454, 455) on power to require removal, or to prohibit repairs, of wooden building within fire limits when damaged by fire; (26 L.R.A.(N.S.) 124) on what constitutes repair, reconstruction, alteration, etc., of building within fire-limit statute or ordinance; (16 Eng. Rul. Cas. 529) on what constitutes a building within act relating to fire limits; (16 Eng. Rul. Cas. 515) on right to rebuild after tearing down of building as interfering with street line, etc.

Distinguished in *Chicago v. Jackson*, 196 Ill. 503, 63 N. E. 1013, holding construction of subway in street for railroad, not exercise of police power as to abutting property, relieving city from liability for damage from change of grade.

Reasonableness of fire regulations.

Cited in *O'Bryan v. Highland Apartment Co.* 128 Ky. 291, 15 L.R.A.(N.S.) 422, 108 S. W. 257, holding a fire ordinance reasonable which prohibits construction of a wooden building within 60 feet of a permanent structure the walls of which are of stone, concrete, brick or iron; *Roanoke v. Bolling*, 101 Va. 187,

43 S. E. 343, holding that an arbitrary action of the city council in refusing to allow repairing of a partially burned building may be enjoined; *Harvey v. Elkins*, 65 W. Va. 309, 64 S. E. 247, holding that the refusal of a city to allow the making of minor alterations and repairs in a private building under an ordinance regulating erections and repairs will be enjoined.

13 L. R. A. 487, *BROWNELL v. DURKEE*, 79 Wis. 658, 24 Am. St. Rep. 743, 48 N. W. 241.

Officers; liability for unlawful seizure of property.

Cited in footnote to *Vickery v. Crawford*, 49 L. R. A. 773, which holds sheriff not protected by writ of sequestration in seizing property of stranger.

13 L. R. A. 490, *HINDMAN v. O'CONNER*, 54 Ark. 627, 16 S. W. 1052.

Limitation of actions to set aside voidable judicial sales.

Cited in *Gibson v. Herriott*, 55 Ark. 92, 29 Am. St. Rep. 17, 17 S. W. 589, holding purchase by administratrix at own sale voidable at election of heirs, but right to have set aside may be lost through acquiescence or laches; *Thomas v. Sybert*, 61 Ark. 589, 33 S. W. 1059, holding delay of minor heir for fifteen years after coming of age, before bringing suit to set aside purchase by administrator at own sale, fatal; *Bland v. Fleeman*, 58 Ark. 93, 23 S. W. 4, holding statute requiring action for recovery of lands sold at judicial sale to be brought within five years, applicable to equitable action to set aside administrator's sale; *Salinger v. Black*, 68 Ark. 456, 60 S. W. 229, holding five year limitation applicable to action to set aside collusive sale by administrator, when latter in open and adverse possession from date of sale; *H. B. Claflin Co. v. Middlesex Bkg. Co.* 113 Fed. 961, holding action to redeem from voidable foreclosure sale, barred after seven years, where purchaser holds possession under claim of absolute title.

Existence of fiduciary relation.

Cited in *Thomas v. Sybert*, 61 Ark. 589, 33 S. W. 1059, holding stepfather administering father's estate stands in loco parentis to minor received into family; *Parker v. Bowers*, 37 Tex. Civ. App. 258, 84 S. W. 380, holding that attorney for a guardian and for the estate of the wards occupies a fiduciary relationship to them; *Thoman v. Mills*, 159 Mich. 409, 124 N. W. 33, on directors of corporations as trustees for stockholders and also citing annotation on this point.

Cited in note (89 Am. St. Rep. 397, 308) on common law powers of guardians.

Judicial sales; purchase by person holding fiduciary relation.

Cited in *Dormitzer v. German Sav. & Loan Soc.* 23 Wash. 222, 62 Pac. 842, holding order for sale of interest of minor heirs to father to enable him to mortgage real estate, absolutely void; *Montgomery v. Black*, 75 Ark. 188, 86 S. W. 1006, holding that administrator of estate may not purchase at sheriff's sale of lands sold under judgment in favor of the estate; *Eagle v. Terrell*, 95 Ark. 437, 130 S. W. 550, holding that administrator cannot lawfully become purchaser of property of decedent at sale by commissioner under order of chancery court; *Burel v. Baker*, 89 Ark. 171, 116 S. W. 181, holding that mother occupying homestead with her children cannot purchase it at foreclosure sale so as to have the legal title as against the children; *Thweatt v. Freeman*, 73 Ark. 580, 84 S. W. 720, holding that an attorney may not become a purchaser of his client's estate without the latter's knowledge and without full disclosure; *Reeder v. Meredith*, 78 Ark. 115, 115 Am. St. Rep. 22, 93 S. W. 558, holding invalid a purchase of lands by brother who was administrator of the estate as against sister who received inadequate consideration for her rights; *Haynes v. Montgomery*, 96 Ark. 576, 132 S. W. 651, holding that sale of infant's property by guardian to him-

self either directly or indirectly may be set aside by ward; *Baker v. Seattle-Tacoma Power Co.* 61 Wash. 591, 112 Pac. 647, Ann. Cas. 1912 C, 859 (dissenting opinion), on voidability of acts of person in fiduciary relation where he profits thereby at expense of principal.

Cited in footnotes to *Frazier v. Jeakins*, 57 L. R. A. 575, which holds guardian's sale to her husband void; *Harrison v. Mulvane*, 54 L. R. A. 405, which holds one charged with selling corporate stock to pay encumbrances one of which he owns, not forbidden, as trustee, to buy prior liens to protect own interests.

Cited in note (136 Am. St. Rep. 804) on who may not purchase at judicial, execution, or other compulsory sales because so doing may conflict with their duties.

Accounting upon setting aside voidable sale.

Cited in *Gibson v. Herriott*, 55 Ark. 99, 29 Am. St. Rep. 17, 17 S. W. 589, holding when purchase by administratrix set aside in favor of minor heirs, purchaser entitled to compensation for improvements, less rents, and to be reimbursed for purchase money and taxes paid.

Necessity of jurisdiction to appear in record.

Cited in *Morris v. Dooley*, 59 Ark. 487, 28 S. W. 30, holding decree of adoption void, when face of record does not show child was resident of county.

Distinguished in *Johnson v. Hunter*, 127 Fed. 227, holding decree in statutory proceeding to foreclose tax lien, record not showing jurisdiction of person, not collaterally assailable.

13 L. R. A. 499, *ROBERTS v. NEW YORK ELEV. R. CO.* 128 N. Y. 455, 28 N. E. 486.

Second appeal in 155 N. Y. 35, 49 N. E. 262.

Followed without discussion in *Messenger v. Manhattan R. Co.* 129 N. Y. 649, 29 N. E. 1032; *Keller v. Metropolitan Elev. R. Co.* 129 N. Y. 667, 30 N. E. 65; *Malcom v. Manhattan R. Co.* 133 N. Y. 664, 31 N. E. 424; *Werfelman v. Manhattan R. Co.* 134 N. Y. 614, 31 N. E. 629, and *Bohlen v. Metropolitan Elev. R. Co.* N. Y. 677, 31 N. E. 626.

Opinions of experts.

Cited in *Gray v. Manhattan R. Co.* 128 N. Y. 508, 28 N. E. 496; *Kernochan v. New York Elev. R. Co.* 130 N. Y. 652, 3 Silv. Ct. App. 564, 14 L. R. A. 674, 29 N. E. 245; *Sillcocks v. New York Elev. Co.* 46 N. Y. S. R. 672, 19 N. Y. Supp. 476, —holding opinion of expert as to fee damage to abutting property from interference of elevated railway with easements of air, light, etc., incompetent; *Martin v. Coleman*, 14 Misc. 506, 35 N. Y. Supp. 1069, holding plaintiff's testimony as to amount of his damage from overflow of water, incompetent; *Comesky v. Postal Teleg. Cable Co.* 41 App. Div. 246, 58 N. Y. Supp. 467, holding testimony to depreciation of property from erection and maintenance of telegraph poles in front of premises, incompetent; *Charman v. Hibbler*, 31 App. Div. 480, 52 N. Y. Supp. 212, holding in action for breach of covenant, expert testimony as to value of premises, with or without restrictions upon use of property, incompetent; *Davis v. New York, L. E. & W. R. Co.* 69 Hun, 177, 51 N. Y. S. R. 635, 23 N. Y. Supp. 358, holding testimony as to sufficiency of hemlock timber for partition in coal bin, inadmissible in action for personal injury from giving away of partition; *Flanagan v. New York, L. E. & W. R. Co.* 83 Hun, 525, 32 N. Y. Supp. 84, holding in action for personal injury to employee engaged in operating gates at railroad, testimony as to whether gates could be operated in safe manner, and with safety to operator, incompetent; *Harley v. Buffalo Car Mfg. Co.* 142 N. Y. 38, 36 N. E. 813, holding in action for injury from breaking of belt to move machinery, testi-

mony as to safety and fitness of fastener used for belt, incompetent; *Stoothoff v. Brooklyn Heights R. Co.* 50 App. Div. 588, 64 N. Y. Supp. 243, holding in action for personal injury, testimony of expert as to whether injury is serious or trivial, incompetent; *Dougherty v. Milliken*, 163 N. Y. 534, 79 Am. St. Rep. 608, 57 N. E. 757, holding in action for injury from breaking of eyebolt, to which two derricks were fastened, testimony as to whether eyebolt was sufficient or insufficient, incompetent; *New York Electric Equipment Co. v. Blair*, 25 C. C. A. 219, 51 U. S. App. 81, 79 Fed. 898, holding expert testimony as to necessity, in hoisting iron pipes, by attaching bagging to end of pipe, incompetent; *Pursley v. Edge Moor Bridge Works*, 56 App. Div. 82, 67 N. Y. Supp. 719, holding expert testimony competent as to safety of piles for support by scaffold, and as to safety of scaffold without X braces and cleats; *Union Elevator Co. v. Kansas City Suburban Belt R. Co.* 135 Mo. 375, 36 S. W. 1071, holding admission of opinions of witnesses as to amount of damage from construction of railroad across property, not of itself ground for reversal; *Blashfield v. Empire State Teleph. & Teleg. Co.* 147 N. Y. 524, 42 N. E. 2, as to competency of expert testimony to amount of damage; *Hoagland v. Canfield*, 160 Fed. 168, holding inadmissible expert opinion as to within what distance a truck drawn by horses could be stopped; *Kelly v. Wills*, 116 App. Div. 761, 102 N. Y. Supp. 223, on jury as being at liberty to disregard opinions of experts; *C. W. Hahl & Co. v. Southland Immigration Asso.* 53 Tex. Civ. App. 600, 116 S. W. 831, holding that upon proof of details of transaction if of character that jury could from their own knowledge form intelligent judgment of value of services, verdict will be sustained, although no evidence as to value of services was introduced.

— Effect of act complained of.

Cited in *Peyton v. New York Elev. R. Co.* 62 Hun, 538, 17 N. Y. Supp. 244, and *Blum v. Manhattan R. Co.* 1 Misc. 120, 48 N. Y. S. R. 681, 20 N. Y. Supp. 722, holding testimony of expert that construction of elevated railway has decreased rental value of abutting property, incompetent; *Flynn v. Kings County Elev. R. Co.* 3 App. Div. 255, 38 N. Y. Supp. 204, holding testimony that construction of elevated railway is cause of decline in rental and fee values of real estate, incompetent; *Purdy v. Manhattan R. Co.* 3 Misc. 52, 22 N. Y. Supp. 943, holding testimony directly to fact that benefits were conferred by proximity of elevated railroad, erroneously admitted; *Burditt v. New York C. & H. R. R. Co.* 71 Hun, 363, 24 N. Y. Supp. 1137, holding testimony as to effect of construction of railroad switch upon abutting property, incompetent; *Rorke v. Kings County Elev. R. Co.* 22 App. Div. 516, 48 N. Y. Supp. 42, holding expert may give opinion as to cause of decrease in value of property abutting on elevated railway; *Seufferle v. MacFarland*, 28 App. D. C. 103, holding that jury summoned to assess damages for taking land for public use need not receive and give weight to expert testimony as to value and damage; *Baltimore Belt R. Co. v. Sattler*, 100 Md. 335, 59 Atl. 654, 3 A. & E. Ann. Cas. 660, holding inadmissible expert opinion as to exact amount of damages to property from smoke and gas from tunnel.

— Values of property under past and present conditions.

Cited in *Colton v. New York Elev. R. Co.* 7 Misc. 628, 28 N. Y. Supp. 149, holding expert may testify directly to opinion concerning value of premises at different periods, in action for damages from construction of elevated railway; *Cook v. New York Elev. R. Co.* 144 N. Y. 118, 39 N. E. 2, and *Wright v. Syracuse. O. & N. Y. R. Co.* 92 Hun, 36, 36 N. Y. Supp. 901, holding, in action to enjoin operation of railway, testimony is admissible to show fee and rental values.

Distinguished in *Sixth Ave. R. Co. v. Metropolitan Elev. R. Co.* 138 N. Y. 552, 34 N. E. 400, holding in action for damages from taking property for railway

without compensation, testimony is admissible as to existing value of property, and cause of rentals; *Gerber v. Metropolitan Elev. R. Co.* 3 Misc. 431, 23 N. Y. Supp. 166, holding expert evidence as to increase or decrease in rental values in immediate neighborhood and side streets admissible in action for damages from construction of elevated railroad; *Ft. Collins Development R. Co. v. France*, 41 Colo. 520, 92 Pac. 953, holding admissible expert opinion as to value of property before and after act complained of.

— **Values under hypothetical conditions.**

Cited in *Doyle v. Manhattan R. Co.* 128 N. Y. 494, 28 N. E. 495; *Becker v. Metropolitan Elev. R. Co.* 131 N. Y. 513, 30 N. E. 499; *Jefferson v. New York Elev. R. Co.* 132 N. Y. 486, 30 N. E. 981; *McGay v. Manhattan Elev. R. Co.* 40 N. Y. S. R. 669, 16 N. Y. Supp. 155; *Wallach v. Manhattan R. Co.* 40 N. Y. S. R. 670, 16 N. Y. Supp. 156,—holding in action for damages from construction of elevated railway, evidence as to possible value of abutting property without railway, improper; *Pratt v. New York C. & H. R. R. Co.* 77 Hun, 141, 28 N. Y. Supp. 463, holding expert testimony as to rental value of abutting property, if railroad were absent, not admissible.

Cited in footnote to *Kernochan v. New York Elev. R. Co.* 14 L. R. A. 673, which holds incompetent, opinion as to what rental value would have been without elevated railroad.

Distinguished in *Gallagher v. Kingston Water Co.* 25 App. Div. 85, 49 N. Y. Supp. 250, holding in action for diverting water from mill, expert testimony as to value of mill if water were not diverted, competent; *Beardsley v. Lehigh Valley R. Co.* 142 N. Y. 176, 36 N. E. 877, holding admission of opinions in action to compel construction of farm crossing, showing difference in value with and without crossing, no ground for reversal.

Disapproved in *Blagen v. Thompson*, 23 Or. 256, 18 L. R. A. 321, 31 Pac. 647, holding expert opinion as to what suburban property would be worth, if motor line built as contracted, competent.

— **General conditions and values of other property in same locality.**

Cited in *Hitchings v. Brooklyn Elev. R. Co.* 6 Misc. 430, 27 N. Y. Supp. 132, and *Taber v. New York Elev. R. Co.* 8 Misc. 18, 28 N. Y. Supp. 68, holding expert testimony as to cause of values of similar property in locality since construction of elevated road, admissible; *Schmidt v. New York Elev. R. Co.* 2 App. Div. 481, 37 N. Y. Supp. 1100, holding expert testimony that building of elevated railroad tended to increase value of property upon line of road, incompetent; *Witmark v. New York Elev. R. Co.* 149 N. Y. 399, 44 N. E. 78, holding damage by elevated railway to abutting property cannot be determined by showing rental value of other property in vicinity before and after construction of railway.

Distinguished in *Shaw v. New York Elev. R. Co.* 187 N. Y. 196, 79 N. E. 984, holding admissible evidence of general appreciation in property values elsewhere and that property in question would have increased also but for the construction of the railroad.

— **Objectionable nature of expert testimony.**

Cited in *Frankfort v. Manhattan R. Co.* 12 Misc. 15, 33 N. Y. Supp. 36, holding expert testimony not credited by courts, beyond strict sanction of law.

— **Sufficiency of objection to competency of expert opinion.**

Distinguished in *Kernochan v. New York Elev. R. Co.* 128 N. Y. 570, 29 N. E. 65, and *Mitchell v. Metropolitan Elev. R. Co.* 132 N. Y. 554, 30 N. E. 385, holding competency of opinion of expert as to value of property without elevated railway, not raised by objection that evidence is immaterial, incompetent, irrelevant, and not measure of permanent damage; *Mortimer v. Manhattan R. Co.*

129 N. Y. 85, 29 N. E. 5, holding objection to question as to diminution in rental value, that it is "improper, irrelevant, and immaterial as assuming property has been injured," does not raise question of substitution of opinion for judgment of jury; *Steinmetz v. Metropolitan Elev. R. Co.* 18 N. Y. Supp. 209, holding admission of expert testimony to increased value of property from railway, not subject to complaint, when given on cross-examination, without objection or exception.

Railroad unlawfully taking property; injunction.

Cited in *Blumenthal v. New York Elev. R. Co.* 42 N. Y. S. R. 684, 17 N. Y. Supp. 481, and *Gray v. Manhattan R. Co.* 128 N. Y. 510, 28 N. E. 498, holding where decree for injunction conditioned upon nonpayment of damage by elevated railway to abutting property, judgment reversed where damages awarded based on incompetent evidence; *Mead v. New York Elev. R. Co.* 24 N. Y. Supp. 912, holding where question as to fee damage not raised by pleadings, right of defendant to resort to condemnation proceedings not waived by responding to proceedings for injunction; *Doyle v. Metropolitan Elev. R. Co.* 136 N. Y. 512, 32 N. E. 1008, Affirming 1 Misc. 378, 20 N. Y. Supp. 865, holding compulsory reference of case for injunction against operation of elevated railway, for taking of testimony as to amount of damage to abutting property, error.

Cited in note (20 L. R. A. 756) on damages in lieu of injunction.

Damages; injury to property.

Cited in *Ainsley v. Bank of Piedmont*, 113 Ala. 479, 59 Am. St. Rep. 122, 21 So. 59, holding damage to purchaser of real estate from breach of contract of vendor to make improvements in locality, too speculative to support action; *Eckington & S. H. R. Co. v. McDevitt*, 18 App. D. C. 509, holding measure of damage for breach of contract to build and operate railway to plaintiff's real estate, is difference between value of land with railway in operation, and that with railway abandoned; *Malcolm v. New York Elev. R. Co.* 147 N. Y. 318, 41 N. E. 790 (dissenting opinion), majority holding that where neighborhood has been built up since construction of elevated railway, and fee, and rental values to abutting property increased, damage is not shown.

13 L. R. A. 510, *WERTZ v. WESTERN U. TELEG. CO.* 7 Utah, 446, 27 Pac. 172.

Telegraphs; contracts limiting liability.

Cited in *Wertz v. Western U. Teleg. Co.* 8 Utah, 500, 33 Pac. 136, and *Brooks v. Western U. Teleg. Co.* 26 Utah, 156, 72 Pac. 499, holding contract relieving telegraph company from liability for negligence of agents unless message repeated, invalid; *Shaw v. Postal Teleg. & Cable Co.* 79 Miss. 696, 56 L. R. A. 493, footnote p. 487, 89 Am. St. Rep. 666, 31 So. 222 (dissenting opinion), majority holding Massachusetts contract relieving telegraph company from liability for mistakes in cipher message, unless additional charge paid, being valid in that state, is enforceable in Mississippi.

Cited in footnotes to *Birkett v. Western U. Teleg. Co.* 33 L. R. A. 404 which holds valid, condition against liability beyond amount paid for sending un-repeated message; *Brown v. Postal Teleg. Cable Co.* 17 L. R. A. 648, which holds limitation of amount of liability for mistake in transmitting telegram void as to mistake caused by negligence.

Cited in note (11 L.R.A.(N.S.) 563) on validity of limitation of liability for un-repeated telegrams.

Negligent transmission of telegram.

Cited in *Brooks v. Western U. Teleg. Co.* 26 Utah, 154, 72 Pac. 499, sustaining recovery of damages resulting from nondelivery of messages evidently relating to commercial transaction.

Cited in footnote to *Coit v. Western U. Teleg. Co.* 53 L. R. A. 678, which holds transmission of telegram while wires working badly not gross negligence if wires working well when actually sent.

13 L. R. A. 512. *ALLEN COUNTY v. SIMONS*, 129 Ind. 193, 28 N. E. 420.

Taxation of Indian lands.

Cited in *Revoir v. State*, 137 Ind. 334, 36 N. E. 1109, holding lands of Indians exempt from taxation, under ordinance of 1787, when acquired and held under tribal relation; *Miami County v. Godfroy*, 27 Ind. App. 614, 60 N. E. 177, holding lands of Indian who has become citizen of United States not exempt from taxation.

Cited in note (19 L. R. A. 81) on power of state legislature to exempt from taxation.

13 L. R. A. 515. *HYLAND v. CENTRAL IRON & STEEL CO.* 129 Ind. 68, 28 N. E. 308.

Taxation; necessity for tender of admitted tax before enjoining invalid tax.

Cited in *Smith v. Rude Bros. Mfg. Co.* 131 Ind. 152, 30 N. E. 947, holding complaint to enjoin collection of tax on increased assessment of capital stock of corporation must offer to pay admitted taxes; *Yocum v. First Nat. Bank*, 144 Ind. 275, 43 N. E. 231, holding where whole of increased assessment is invalid, tender or payment of admitted taxes not condition precedent to action to annul; *Thompson v. Lexington*, 104 Ky. 170, 46 S. W. 481, holding action to enjoin irregular assessment on instalment basis for street improvement cannot be maintained without tender of admitted tax on cash basis; *Douglass v. Fargo*, 13 N. D. 484, 101 N. W. 919, holding that in action to set aside tax levy complaint must show payment or tender of taxes justly due.

Taxation of capital stock of corporation.

Cited in *Jones v. Rushville Natural Gas Co.* 135 Ind. 598, 35 N. E. 390, holding it within power and duty of board of equalization to assess capital stock of corporation, where value exceeds that of tangible property; *Smith v. Stephens*, 173 Ind. 570, 30 L.R.A.(N.S.) 707, 91 N. E. 167, to the point that if capital stock exceeds in value that of tangible property, stock is taxable on excess.

Cited in notes (58 L. R. A. 529, 559, 611) on taxation of capital stock on corporations in the United States; (57 L. R. A. 53) on taxation of corporate franchises in the United States.

Distinguished in *Eaton v. Union County Nat. Bank*, 141 Ind. 161, 40 N. E. 693, holding notice to national bank necessary to jurisdiction of county board of equalization to increase valuation.

13 L. R. A. 518. *DEMING v. MERCHANTS' COTTON-PRESS & STORAGE CO.* 90 Tenn. 306, 17 S. W. 89.

Referred to, for history of case, in *Merchants' Cotton-Press & Storage Co. v. Insurance Co. of N. A.* 151 U. S. 373, 38 L. ed. 200, 4 Inters. Com. Rep. 502, 14 Sup. Ct. Rep. 367; *Insurance Co. of N. A. v. Delaware Mut. Ins. Co.* 59 Fed. 246, and *Insurance Co. v. Carrier Cos.* 91 Tenn. 538, 19 S. W. 755.

Carriers; liability for loss of freight.

Cited in *Atlanta Nat. Bank v. Southern R. Co.* 106 Fed. 629, holding railroad delivering cotton to compress in course of transportation liable for misdelivery by compress company, where companies identical; *Stewart v. Gracy*, 93 Tenn. 320, 27 S. W. 664, holding carrier to whom property constructively delivered,

not liable for loss of same by fire while in custody of shipper's warehouseman; *Nashville, C. & St. L. R. Co. v. Stone*, 112 Tenn. 365, 105 Am. St. Rep. 955, 79 S. W. 1031, holding special contract of shipment invalid unless shipper is allowed a reasonable and bona fide chance to choose it or to ship without limitation; *Houtz v. Union P. R. Co.* 33 Utah, 194, 17 L.R.A.(N.S.) 641, 93 Pac. 439, on binding of proving special contract and that it is reasonable being upon carrier setting it up as a defense; *Louisville & N. R. Co. v. Smith*, 123 Tenn. 688, 134 S. W. 866, holding that carrier is not bound to offer, formally, a common law liability, to make valid limited liability contract for shipment of stock; *Robert v. Chicago & A. R. Co.* 148 Mo. App. 116, 127 S. W. 925, holding that carrier must allow shipper to choose between restricted and full liability of carrier.

Cited in footnotes to *Union State Bank v. Fremont, E. & M. Valley R. Co.* 59 L. R. A. 939, which sustains initial carrier's right to limit liability to own line; *Lehman, Stern & Co. v. Morgan's L. & T. R. & S. S. Co.* 70 L.R.A. 562, which holds that carrier must prove that fire was purely accidental and impossible to prevent to escape liability where cotton on railroad platform in course of delivery is damaged by fire.

Cited in notes (32 L.R.A.(N.S.) 314) on what constitutes delivery of freight to carrier; (28 L.R.A.(N.S.) 638, 641) on effect of shipping contract limiting common-law liability, signed under compulsion; (88 Am. St. Rep. 94, 101) on limitation of carrier's liability in bills of lading; (113 Am. St. Rep. 996) on presumption of negligence from happening of accident causing personal injuries.

Distinguished in *Bird v. Southern R. Co.* 99 Tenn. 725, 63 Am. St. Rep. 586, 42 S. W. 451, holding intermediate carrier notified by ultimate carrier of refusal to forward goods without prepayment of freight, and delaying to notify initial carrier or shipper until property had become worthless, liable for loss.

Proximate cause of injury.

Cited in *East Tennessee, V. & G. R. Co. v. Kelly*, 91 Tenn. 705, 17 L. R. A. 695, 30 Am. St. Rep. 902, 20 S. W. 312, holding carrier erroneously informing consignee goods had not arrived, liable for subsequent loss by fire without its fault; *Anderson v. Miller*, 96 Tenn. 44, 31 L. R. A. 606, 54 Am. St. Rep. 812, 33 S. W. 615, holding unauthorized use of premises for storage of cotton, renders lessee liable for damage to adjoining premises by fire, originating without his fault, where fire would not have been communicated but for cotton; *Weeks v. McNulty*, 101 Tenn. 500, 43 L. R. A. 187, 70 Am. St. Rep. 693, 48 S. W. 809, holding absence of fire escapes to hotel not proximate cause of death from fire, of guest locking himself in room, and failing to avail himself of avenues of escape; *Postal Teleg. Cable Co. v. Zopfi*, 93 Tenn. 374, 27 S. W. 633, holding telegraph pole left at road side, proximate cause of injury to one slipping in attempt to step over pole to platform, wet from rain, and falling backwards against pole; *Zopfi v. Postal Teleg. Cable Co.* 9 C. C. A. 311, 22 U. S. App. 136, 60 Fed. 989, holding obstacle in highway not proximate cause of injury to person falling thereon, unless obstacle contributed to cause of fall; *Chattanooga Light & P. Co. v. Hodges*, 109 Tenn. 338, 60 L. R. A. 461, 97 Am. St. Rep. 844, 70 S. W. 616, holding act of employee in entering burning building to telephone alarm proximate cause of death; *Evansville Hoop & Stave Co. v. Bailey*, 43 Ind. App. 157, 84 N. E. 549, holding proximate cause sufficiently alleged where complaint showed machinery unguarded and injury by contact therewith, where statute required machinery to be guarded; *Bales v. McConnell*, 27 Okla. 409, 40 L.R.A.(N.S.) 944, 112 Pac. 978, holding that unguarded cogs were proximate cause of injury, where employee slipped from wagon and upon striking ground threw out his hand to steady himself, and was injured by his hand coming in contact with moving cogwheels; *Bokamp v. Chicago & A. R. Co.* 123 Mo. App. 284, 100

S. W. 689, holding that the slipping of a bar in the hands of a fellow servant by which a beam was permitted to fall, was not as a matter of law the proximate cause of injury to a workman under it where the acts of a foreman had made the place unsafe; *Foley v. McMahon*, 114 Mo. App. 444, 90 S. W. 113, as defining proximate cause.

Cited in note (36 Am. St. Rep. 838) on proximate and remote cause.

Insurance; provisions against double insurance.

Cited in *Carleton v. China Mut. Ins. Co.* 174 Mass. 286, 46 L. R. A. 168, 54 N. E. 559, and *London Assur. Corp. v. Paterson*, 106 Ga. 552, 32 S. E. 650, holding question whether concurrent insurance is prior or subsequent to be determined from date policies issue, and not from time they attach to specific risk; *Gross v. New York & T. S. S. Co.* 107 Fed. 520, holding American clause against double insurance not applicable as between policies upon shipment taken out by carrier and consignee.

Cited in footnote to *Johnston v. Charles Abresch Co.* 68 L.R.A. 924, which sustains right of carriage maker to insure in policy taken in his own name customer's interest in carriage in his possession for repair and sale.

Distinguished in *Peninsular & O. S. S. Co. v. Atlantic Mut. Ins. Co.* 185 Fed. 177, holding that loan of money by insurance company to owner of property destroyed, to be repaid to company if amount was recovered from another company that also had policy covering destroyed property, may be recovered.

Subrogation.

Cited in note (44 Am. St. Rep. 734, 735) on subrogation of insurer.

Parties to action.

Cited in *Insurance Cos. v. Carrier Cos.* 91 Tenn. 538, 19 S. W. 755, holding in action by shipper against compress company, for loss by fire of cotton held by it as agent of common carrier, latter is necessary party; *Lake Street Elev. R. Co. v. Ziegler*, 39 C. C. A. 441, 99 Fed. 124, holding trustee in trust deed of railroad not indispensable parties to action by corporation against holders of stock and bonds, for surrender of same, and for accounting.

13 L. R. A. 533, *COOK v. PORT OF PORTLAND*, 20 Or. 580, 27 Pac. 263.

Municipal corporations; constitutionality.

Cited in *Donahue v. Morgan*, 24 Colo. 397, 50 Pac. 1038, holding consolidation act constituting aldermen of consolidated city trustees of waterworks for whole municipality, within powers of general assembly; *Middel Kittitas Irrig. Dist. v. Peterson*, 4 Wash. 150, 29 Pac. 995, holding irrigation district organized pursuant to statute not municipal corporation within Constitution; *United States v. Port of Portland*, 147 Fed. 866; *The Geo. W. Elder*, 159 Fed. 1006; *The John McCracken*, 145 Fed. 706,—holding act incorporating the port of Portland, constitutional; *Farrell v. Portland*, 52 Or. 584, 98 Pac. 145, on same point.

Cited in footnote to *Stockton v. Powell*, 15 L. R. A. 42, which holds improvement of navigation within county a county purpose.

Distinguished in *Farrell v. Port of Columbia*, 50 Or. 171, 91 Pac. 546, holding act creating Port of Columbia to be a special act and unconstitutional.

Uniformity of taxation.

Cited in *Yamhill County v. Foster*, 53 Or. 130, 99 Pac. 286, holding that rate of taxation must be uniform throughout a taxing district.

Cited in footnotes to *High School Dist. No. 137 v. Lancaster*, 49 L. R. A. 343, which holds void, statute allowing outside pupils to attend high school free, but requiring county to pay specified sum as tuition; *Com. v. Brown*, 28 L. R. A. 110, which sustains weekly tax on sales of oysters; *Nathan v. Spokane Coun-*

ty, 65 L.R.A. 337, which holds property liable to taxation under general laws of state not exempt because returned for taxation for same years in another state.

When statute declared unconstitutional.

Cited in *Ellis v. Frazier*, 38 Or. 464, 53 L. R. A. 456, 63 Pac. 642, holding to declare statute unconstitutional, incompatibility with organic law must be apparent and free from doubt; *Simon v. Northup*, 27 Or. 495, 30 L. R. A. 175, 40 Pac. 560, refusing to declare statute, to enable city to acquire title to bridges, unconstitutional, though validity not free from doubt; *Kadderly v. Portland*, 44 Or. 144, 74 Pac. 710; *Straw v. Harris*, 54 Or. 428, 103 Pac. 777,—holding that all reasonable doubts as to the validity of an act must be resolved in its favor.

Definition of terms.

Cited in *Straw v. Harris*, 54 Or. 429, 103 Pac. 777, holding that "port" as used in act of legislature a district of many places classed together for purpose of revenue; *Acme Dairy Co. v. Astoria*, 49 Or. 524, 90 Pac. 153, on meaning of terms "municipality" and "district," "local" and "special;" *State v. Cochran*, 55 Or. 182, 105 Pac. 884, holding that prohibitions in state constitution must be strictly construed.

Delegation of power.

Cited in *Straw v. Harris*, 54 Or. 432, 103 Pac. 777, holding that power to declare the incorporation of a port may be delegated to the county court.

13 L. R. A. 538, *Re THOMAS*, 16 Colo. 441, 27 Pac. 707.

Admission of women to practise law.

Cited in *Re Leach*, 134 Ind. 671, 21 L. R. A. 706, 34 N. E. 641, holding woman entitled to admission to bar under Constitution and statute providing every person "being a voter," shall be admitted; *Ricker's Petition*, 66 N. H. 247, 24 L. R. A. 759, 29 Atl. 559, holding attorney at law not public officer within common-law rule of New Hampshire disqualifying women from holding public office.

Cited in notes (21 L. R. A. 702) on right of women to practise law; (19 L. R. A. 226) on what is included in term "person."

Right of women to hold office.

Cited in *Atty. Gen. v. Abbott*, 121 Mich. 568, 47 L. R. A. 103, 80 N. W. 372, holding woman, not being elector, cannot hold office of prosecuting attorney.

Cited in footnote to *Opinion of Justices*, 32 L. R. A. 350, which denies right to authorize appointment of women as notaries.

13 L. R. A. 541, *VEASEY v. BRIGMAN*, 93 Ala. 548, 9 So. 728.

Identification of persons from similarity of names.

Cited in *Schlacks v. Johnson*, 13 Colo. App. 133, 56 Pac. 673, holding summons addressed to "Schlacks," returned as served on "Schlack," sufficient to support judgment; *Dolan v. Mutual Reserve Fund Life Asso.* 173 Mass. 202, 53 N. E. 398, holding application for naturalization by "Fardell Dolan" competent evidence upon question whether "Farrell Dolan" misrepresented age in application for insurance; *Abraham v. Miller*, 52 Or. 11, 95 Pac. 814, holding summons to Albert Abraham returned as served upon "Alfred Abraham the defendant" sufficient service; *State v. Porter*, 18 S. D. 28, 99 N. W. 80, holding bail-bond executed by C. M. Porter and sureties sufficient proof that C. M. Porter and Charles Porter were the same where Charles Porter was the name recited in the body of the bond; *Morrow v. Norvell-Shapleigh Hardware Co.* 165 Ala. 334, 51 So. 766, holding that return of officer stating that summons was served upon

"V. M. Morrow, defendant" where defendant's name was B. W. Morrow, was sufficient.

Cited in footnote to *Illinois Watch Case Co. v. Pearson*, 16 L. R. A. 429, which holds license to form corporation under one name not affected by other corporation calling meeting to vote on change to similar name.

Cited in note (17 L. R. A. 824, 825) on presumption of identity of person from identity of name.

13 L. R. A. 542, *MISSOURI P. R. CO. v. CULLERS*, 81 Tex. 382, 17 S. W. 19.

Right of Indian to sue.

Cited in *Whirlwind v. Von der Ahe*, 67 Mo. App. 630, holding tribal Indians when off reservation, entitled to sue for enforcement of contract made during sojourn in states.

Due process of law.

Cited in note (50 L. R. A. 590, 594) on what service of process insufficient to constitute due process of law.

Transitory actions.

Cited in footnote to *Schmaltz v. York Mfg. Co.* 59 L. R. A. 907, which sustains jurisdiction in equity in one state of suit by citizen to enjoin other citizen removing alleged fixtures from land on which former has mortgage.

Cited in note (26 L.R.A.(N.S.) 938, 939, 940) on jurisdiction of action for damages for breach of contract, or for tort concerning realty in another state or country.

Right of action against wrongdoer.

Cited in *East Dallas v. Barksdale*, 83 Tex. 122, 18 S. W. 329, and *Dallas v. Miller*, 7 Tex. Civ. App. 506, 27 S. W. 498, holding proof of actual and exclusive possession of real estate gives prima facie right to recover for damage done by trespasser; *Missouri, K. & T. R. Co. v. Starr*, 22 Tex. Civ. App. 357, 55 S. W. 393, holding innocent purchaser of railroad ties, made from timber taken by trespasser, liable to owner of land for value of ties as received from trespasser; *King v. Great Northern R. Co.* 20 Idaho, 694, 119 Pac. 709, holding that action for destruction of standing timber must be brought by owner of land and not by person merely in possession.

Cited in footnote to *Norfolk & W. R. Co. v. Fritts*, 68 L.R.A. 864, which sustains liability for fire of railroad company unnecessarily running heavy freight train up grade at double its scheduled speed in dry season and during heavy wind.

Cited in notes (21 L.R.A. 261) on liability for setting fires which spread to property of others; (20 L.R.A.(N.S.) 93) on weather conditions as independent, intervening, efficient cause.

Distinguished in *Northern P. R. Co. v. Lewis*, 162 U. S. 382, 40 L. ed. 1008, 16 Sup. Ct. Rep. 831, holding possession of purchaser from trespasser not such prima facie evidence of title as entitles him to maintain action for wrongful destruction of property.

Requests for instructions.

Cited in *Burnham v. Logan*, 88 Tex. 7, 29 S. W. 1067, holding attorneys must take risk of putting requested instructions in proper form to enable court to pass upon same separately.

13 L. R. A. 549, *FORBES v. ESCAMBIA COUNTY BD. OF HEALTH*, 28 Fla. 26, 9 So. 862.

Municipal quarantine regulations.

Cited in notes (26 L.R.A. 486, 490) on quarantine regulations by health

authorities; (47 Am. St. Rep. 548) on quarantine and health laws and regulations; (80 Am. St. Rep. 229) on powers which may be delegated to boards of health.

Liability of municipal corporation for negligence.

Cited in *Nicholson v. Detroit*, 129 Mich. 255, 56 L. R. A. 605, 88 N. W. 695, denying city's liability for death of employee from smallpox contracted while tearing down old pest house to make room for another; *Kirk v. Board of Health* (*Kirk v. Wyman*) 83 S. C. 383, 23 L.R.A. (N.S.) 1194, 65 S. E. 387, on members of Board of Health not being personally liable for errors in the doing of official acts.

Cited in note (5 L.R.A. (N.S.) 636) on personal liability of health authorities.

Distinguished in *Jacksonville v. Smith*, 24 C. C. A. 100, 41 U. S. App. 657, 78 Fed. 295, holding city liable for personal injury sustained by reason of defect in street, although action not authorized by statute.

13 L. R. A. 556, *SULLIVAN v. HALL*, 86 Mich. 7, 48 N. W. 646.

Notary public as attorney.

Cited in *Allen v. West Bay City*, 140 Mich. 114, 103 N. W. 514, 6 A. & E. Ann. Cas. 35, holding verification of claim against city for personal injury valid, though notary before whom made, subsequently became attorney for the claimant in action for the injury.

13 L. R. A. 559, *McNEIL v. BOSTON CHAMBER OF COMMERCE*, 154 Mass. 277, 28 N. E. 245.

Authority for contract of corporation.

Cited in *Merchants' Nat. Bank v. Citizens' Gaslight Co.* 159 Mass. 506, 38 Am. St. Rep. 453, 34 N. E. 1083, holding corporation bound by note signed by treasurer, under authority implied from course of conduct and dealing with knowledge of directors; *Nash v. Minnesota Title Ins. & T. Co.* 159 Mass. 444, 34 N. E. 625, holding president and trust officer, having management of business of title insurance company, may bind it by representation as to title of mortgaged property; *Franklin Sav. Bank v. Cochrane*, 182 Mass. 588, 61 L. R. A. 762, 66 N. E. 200, holding corporation bound by assumption of mortgage by treasurer permitted by directors to manage affairs; *Clarke v. Warwick Cycle Mfg. Co.* 174 Mass. 436, 54 N. E. 887, holding employment of accountant shown by proof of having commenced work under authority of one of three members of committee of stockholders, and of subsequently receiving similar directions from other two; *Scribner v. Flagg Mfg. Co.* 175 Mass. 538, 56 N. E. 603, holding proof of recognition of corporation to make written contract for payment of commissions, sufficient prima facie evidence of authority to enter into subsequent oral agreement as to same subject-matter; *May v. Gloucester*, 174 Mass. 585, 55 N. E. 465, holding contract with city for use of horses supported by evidence that horses were kept in sight at engine house, and vote of standing committee at end of hiring for allowance of bill; *John A. Robeling's Sons Co. v. Barre & M. Traction & Power Co.* 76 Vt. 136, 56 Atl. 530, holding directors of corporation bound by purchase, where chairman of its executive committee made the purchase, another member knew of the bill charging it to the corporation and the third member was ignorant of the transaction; *Eliot Nat. Bank v. Woonsocket Electric Mach. & P. Co.* 31 R. I. 70, 76 Atl. 782, holding that officers of corporation may be empowered to bind corporation by implied consent of directors to course of conduct and dealing by him with others; *Parrot v. Mexican C. R. Co.* 207 Mass. 190, 34 L.R.A. (N.S.) 273, 93 N. E. 590, holding that general passenger agent had au-

thority to contract for publication of guide book to popularize hunting grounds on their line, although he was instructed not to make contracts involving such expenditure without authority of executive officer.

Cited in note (88 Am. St. Rep. 783, 785) on liability of principal for unauthorized acts of agent.

Effect of published proposal to contract.

Distinguished in *Anderson v. Public Schools*, 122 Mo. 67, 26 L. R. A. 712, 27 S. W. 610, holding advertisement of school board for bids for erection of school building, which reserves right to reject bids, does not operate as contract with lowest bidder.

Sufficiency of vote of city council.

Cited in footnote to *Pollasky v. Schmid*, 55 L. R. A. 614, which requires two-thirds majority of all members elected to council to pass ordinance over veto though some seats vacant.

13 L. R. A. 563, *BRYAN v. MILBY*, 6 Del. Ch. 208, 24 Atl. 333.

Wills; sufficiency to create trust.

Cited in *Mead v. Robertson*, 131 Mo. App. 198, 110 S. W. 1095, holding that to create a trust, the property to which it is designed to attach, must be definite and certain; *Smullin v. Wharton*, 73 Neb. 685, 103 N. W. 288, holding no express trust created by a request that "I want the bulk of my property to go to my people;" *St. James v. Bagley*, 138 N. C. 394, 70 L.R.A. 164, 50 S. E. 841, holding that no trust was created by recital in conveyance that it was made "for the purpose of aiding in the establishment of a home for indigent widows or orphans, or in the promotion of any other charitable or religious objects to which the property may be appropriated.

Cited in footnotes to *Jewell v. Louisville Trust Co.* 53 L. R. A. 377, which denies creation of precatory trust by will of merchant expressing desire for retention on liberal terms of specified person in employ of firm of which testator a partner; *Williams v. Baptist Church*, 54 L. R. A. 427, which holds absolute gift, not trust, created by bequest to church and "suggesting" as to application; *Morgan v. Halsey*, 36 L. R. A. 716, which holds power of appointment of property to testatrix's daughter in any manner she may deem proper limited by subsequent clauses of will.

Cited in notes (37 L.R.A.(N.S.) 662) on creation of trust by precatory words in will; (106 Am. St. Rep. 528) on precatory trusts.

13 L. R. A. 565, *HEPLER v. DAVIS*, 32 Neb. 556, 29 Am. St. Rep. 457, 49 N. W. 458.

Judgments; validity of revivor.

Cited in *Betts v. Johnson*, 68 Vt. 555, 35 Atl. 489, holding judgment rendered upon scire facias without notice to defendant, to revive judgment entered upon note containing warrant of attorney, invalid; *Robb v. Anderson*, 43 Ill. App. 576; *Rice v. Moore*, 48 Kan. 592, 16 L. R. A. 199, footnote, p. 199, 30 Am. St. Rep. 318, 30 Pac. 10, and *Owens v. Henry*, 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 693, holding revivor of judgment by scire facias, without personal service or voluntary appearance, insufficient to prevent bar of statute of limitations in favor of defendant residing in another state.

Cited in notes (37 L.R.A.(N.S.) 1164) on service of notice in proceedings to revive judgment; (122 Am. St. Rep. 112) on scire facias.

Distinguished in *Leman v. Cunningham*, 12 Idaho, 142, 85 Pac. 212, holding that revivor of judgment where personal service was made upon defendant, and

he appeared by attorney, prevents statute of limitations from running in favor of defendant in another state where he resides; *Davis v. Davis*, 98 C. C. A. 494, 174 Fed. 791, holding that nonresidence at time of revival of judgment cannot be set up by demurrer, where it does not appear upon the face of the record.

Validity of judgment without personal service.

Cited in *Kirk v. United States*, 124 Fed. 340, enjoining execution on forfeited recognizance, where scire facias not personally served on nonresident complainant.

Limitation of actions.

Cited in note (5 Eng. Rul. Cas. 944) on law governing remedies.

13 L. R. A. 567, *SCHLEY v. COLLIS*, 47 Fed. 250.

Wills; election.

Cited in *Farmington Sav. Bank v. Curran*, 72 Conn. 348, 44 Atl. 473, holding person taking beneficial interest under will, thereby confirms and ratifies every other part of will; *Colvert v. Wood*, 93 Tenn. 463, 25 S. W. 963, holding where testator included partnership property in will, persons interested both as devisees and partners electing to claim partnership property, thereby set free share of testator in partnership property in favor of other devisees; *Young v. Biehl*, 166 Ind. 361, 77 N. E. 406, holding that devisee accepting provisions of will favorable to him cannot set up claims inconsistent with other provisions of the will; *Sparks v. Dorrell*, 151 Mo. App. 186, 131 S. W. 761, holding that he who accepts benefit under will must adopt all its contents and conform to all its provisions.

Cited in footnote to *Tripp v. Nobles*, 67 L.R.A. 449, which holds widow offering for probate and undertaking to carry out as administratrix with the will annexed husband's will devising her own land to her for life with remainder over and an additional sum of money estopped to assert her absolute title to the land.

Cited in note (10 Eng. Rul. Cas. 326) on necessity of devisee who accepts devise relinquishing all claims to estate devised to another.

13 L. R. A. 569, *SCHULTZ v. BYERS*, 53 N. J. L. 442, 26 Am. St. Rep. 435, 22 Atl. 514.

Lateral support; liability for damage from excavations.

Cited in *Church of Holy Communion v. Paterson Extension R. Co.* 63 N. J. L. 474, 43 Atl. 696, holding notice of intended excavation may be requisite, if building upon adjoining property is to be endangered; *Bohrer v. Dienhart Harness Co.* 19 Ind. App. 515, 49 N. E. 296 (dissenting opinion), majority holding party making excavation not bound to extraordinary care to protect adjoining building, when owner has knowledge of intended excavation; *Gildersleeve v. Hammond*, 109 Mich. 436, 33 L. R. A. 49, 67 N. W. 519, holding excavation in sandy soil close to division line, without precautions to protect neighbor's soil, whereby over 4 feet of latter caves in, and undermines foundation of building, creates liability for damage to both soil and superstructure; *Church of the Holy Communion v. Paterson Extension R. Co.* 68 N. J. L. 410, 53 Atl. 1079, by *Collins, J.*, dissenting, who holds owner of building cannot recover for injuries thereto by excavation on adjoining premises; *Pullan v. Stallman*, 70 N. J. L. 12, 56 Atl. 116, denying recovery for personal injury to adjacent owner who, with knowledge that lateral support for his land has been removed, goes too near the edge and is injured by the ground giving way; *McGrath v. St. Louis & H. Constr. Co.* 215 Mo. 209, 114 S. W. 611, holding that the falling of an adjoining wall

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into excavation in alley is not of itself sufficient proof of negligence to justify recovery; *Manning v. New Jersey Short Line R. Co.* 80 N. J. L. 350, 32 L.R.A. (N.S.) 157, 78 Atl. 200, holding that railroad acquiring land by condemnation is entitled to lateral support from remaining land for such weight as operation of road renders necessary; *Pohlman v. Chicago, M. & St. P. R. Co.* 131 Iowa, 95, 6 L.R.A. (N.S.) 149, 107 N. W. 1025, on extent and meaning of term "lateral support."

Cited in footnotes to *Clemens v. Speed*, 19 L.R.A. 240, which denies to party-wall owners reciprocal easement from support of buildings; *Davis v. Summerfield*, 63 L.R.A. 492, which holds lot-owner liable for injury to adjoining building due to negligent excavation on his own lot by an independent contractor.

Cited in notes (33 Am. St. Rep. 470) on right to lateral support; (68 L.R.A. 684) on liability for removal of lateral or subjacent support of land in its natural condition; (10 Eng. Rul. Cas. 163) on right to support of land in its natural state and to support of buildings thereon.

Distinguished in *Hudson County v. Woodcliff Land Improv. Co.* 74 N. J. L. 357, 65 Atl. 844, holding that one conveying land for a road to be built according to a certain plan, burdens his adjoining land with lateral support for the road built according to the terms of the deed.

Criticized in *Larson v. Metropolitan Street R. Co.* 110 Mo. 243, 16 L. R. A. 332, footnote p. 330, 33 Am. St. Rep. 439, 19 S. W. 416, holding one promising adjoining owner to excavate and lay up wall in sections liable for fall of building due to digging dangerous trench without notice after laying one section.

13 L. R. A. 574, *Ex parte VANCE*, 90 Cal. 208, 27 Pac. 209.

Expiration of time of sentence without imprisonment.

Cited in *Miller v. Evans*, 115 Iowa, 105, 56 L. R. A. 103, 91 Am. St. Rep. 143, 88 N. W. 198, holding judgment not satisfied by expiration of time for which defendant sentenced, without imprisonment, through failure of sheriff to execute mittimus; *Neal v. State*, 104 Ga. 517, 42 L. R. A. 194, 69 Am. St. Rep. 175, 30 S. E. 858, holding suspension of sentence by order of court until after expiration of period of commitment, does not preclude defendant being committed subsequently for full term; *Re Collins*, 8 Cal. App. 370, 97 Pac. 188; *Ex parte Eldridge*, 3 Okla. Crim. Rep. 503, 27 L.R.A. (N.S.) 627, 139 Am. St. Rep. 967, 106 Pac. 980, holding that expiration of time without imprisonment does not affect the term of imprisonment provided by the sentence; *Re McCauley*, 123 Wis. 33, 100 N. W. 1031, 3 A. & E. Ann. Cas. 414, holding that, where prisoner escapes from custody and is recaptured, the time he is at liberty is not counted in his favor as part of his term of imprisonment.

Cited in footnote to *Henderson v. James*, 27 L. R. A. 290, which authorizes completion of original sentence of escaped convict after completion of subsequent sentence under other name to same penitentiary.

13 L. R. A. 576, *BULL v. BRAY*, 89 Cal. 286, 26 Pac. 873.

Fraud; sufficiency of evidence.

Cited in *Wolters v. Rossi*, 126 Cal. 653, 59 Pac. 143, holding insolvent's transfer of certificate of deposit to wife, without consideration, and after order for his examination as judgment debtor, raises irresistible inference of intent to defraud; *First Nat. Bank v. Maxwell*, 123 Cal. 372, 69 Am. St. Rep. 64, 55 Pac. 980, holding intent to defraud creditors sufficient to avoid conveyance, although grantor has other property sufficient to satisfy creditors; *Re Benton*, 131 Cal. 475, 63 Pac. 775, holding to support judgment rejecting probate of will, because of fraud and undue influence, such ultimate facts must appear conclusively from

probative facts found by jury; *White v. Besse*, 145 Cal. 226, 78 Pac. 649, holding deeds valid where no fraud is shown, though made without consideration.

Effect of fraudulent intent upon voluntary conveyances.

Cited in *Bekins v. Dieterle*, 5 Cal. App. 694, 91 Pac. 173, holding that where fraudulent intent is found, a voluntary conveyance is void as against creditors, regardless of how much other property grantor may have.

Cited in note (90 Am. St. Rep. 505) on attacks by creditors on conveyances made by husbands to wives.

Intent as question of fact.

Cited in *Winahaus v. Bootz*, 92 Cal. 622, 28 Pac. 557; *Knox v. Moses*, 104 Cal. 505, 38 Pac. 318; *Cook v. Cockins*, 117 Cal. 153, 48 Pac. 1025; *Emmons v. Barton*, 109 Cal. 671, 42 Pac. 303,—holding that to avoid voluntary conveyance as to creditors, a fraudulent intent must be proved as a question of fact; *Laugherty v. Laugherty*, 104 Cal. 223, 37 Pac. 889; *Stevens v. Meyers*, 14 N. D. 403, 104 N. W. 529,—holding intent to be question of fact in action to set aside conveyance as fraudulent; *Haas v. Whittier*, 97 Cal. 420, 32 Pac. 449; *Re Muller*, 118 Cal. 434, 50 Pac. 660,—holding that question of intent of insolvent debtor to make fraudulent preference is one of fact; *Threlkel v. Scott*, 89 Cal. 353, 26 Pac. 879, holding that in action to set aside voluntary conveyance as fraudulent, it is necessary to allege fraudulent intent.

Findings of fact.

Cited in *Barry v. Beamer*, 8 Cal. App. 203, 96 Pac. 373; *Southern P. R. Co. v. Whitaker*, 109 Cal. 274, 41 Pac. 1083,—on sufficiency of findings; *Jules Levy & Bro. v. A. Mautz & Co.* 16 Cal. App. 669, 117 Pac. 936, holding that in absence of statement of case findings of trial court are conclusive, and if conclusions deduced therefrom necessarily follow, judgment must be upheld.

13 L. R. A. 581, *LUKENS'S APPEAL*, 143 Pa. 386, 24 Am. St. Rep. 557, 22 Atl. 892.

Enforcement of antenuptial contracts.

Cited in *Re Devoe*, 113 Iowa, 16, 84 N. W. 923, and *Mauk's Estate*, 19 Pa. Super. Ct. 341, holding antenuptial contract will be sustained, though provision for wife disproportionate to husband's means, if representatives of husband establish there was no concealment of any material fact; *Carr v. Lackland*, 112 Mo. 457, 20 S. W. 624, holding antenuptial contract, if unambiguous and unimpeached, must be enforced according to language employed; *Re Warner*, 33 Pittsb. L. J. N. S. 430, refusing to sustain antenuptial contract containing no provision for wife, though husband's estate fully disclosed at time of execution; *Deller v. Deller*, 141 Wis. 262, 25 L.R.A. (N.S.) 756, 124 N. W. 278, on intention of parties as governing construction of antenuptial contract.

Cited in note (12 Eng. Rul. Cas. 765) on conveyance in fraud of intended husband or wife.

Consideration for agreement.

Cited in *McGlynn v. Scott*, 4 N. D. 29, 58 N. W. 460, holding surrender of imagined lien on personal property, when none exists in fact, not sufficient consideration for promissory note; *Price v. First Nat. Bank*, 62 Kan. 751, 64 Pac. 639, holding agreement to forbear issue of execution on extinguished judgment not sufficient consideration for assignment of life insurance policy as collateral security.

Cited in footnote to *Mutual Reserve Fund Life Asso. v. Hurst*, 20 L. R. A. 761, which holds moral obligation sufficient consideration for promise.

Cited in notes (34 L.R.A. 33) on performance of existing contract obligation

as consideration for new promise; (6 Eng. Rul. Cas. 21) on what may constitute consideration for contract.

Distinguished in *Christie's Estate*, 36 Pa. Super. Ct. 506, holding note based upon good consideration where given by husband to wife upon her promise to remain and resume marital relations after she had for good cause decided to leave him.

13 L. R. A. 584, *TALBOTT v. FIDELITY & C. CO.* 74 Md. 536, 22 Atl. 395.

State control of foreign corporations.

Cited in notes (57 L. R. A. 87) on taxation of corporate franchises in the United States; (24 L. R. A. 305) on restrictions on business of foreign insurance companies.

Distinguished in *Western & Southern L. Ina. Co. v. Com.* 133 Ky. 295, 117 S. W. 376, holding that foreign insurance company cannot be taxed at a higher rate upon its business within the state than is a local company.

Presumption as to legislative intent.

Cited in *State v. Central Trust Co.* 106 Md. 272, 67 Atl. 267, on presumption that legislature intends what it says in clear and plain terms.

13 L. R. A. 587, *RICHMOND v. DUDLEY*, 129 Ind. 112, 28 Am. St. Rep. 180, 28 N. E. 312.

Followed without discussion in *Plymouth v. Schultheis*, 135 Ind. 701, 35 N. E. 14.

City ordinances permitting exercise of arbitrary discrimination.

Cited in *Plymouth v. Schultheis*, 135 Ind. 342, 35 N. E. 12, holding ordinance requiring permit to conduct tannery, and giving board of health power to determine persons entitled to permit, and location and character of building, void; *State v. Tenant*, 110 N. C. 613, 15 L. R. A. 424, 28 Am. St. Rep. 715, 14 S. E. 387, holding ordinance requiring permission of aldermen to erection of any building, without prescribing general rule for exercise of discretion, invalid; *Newbern v. McCann*, 105 Tenn. 165, 50 L. R. A. 477, 58 S. W. 114, holding void ordinance requiring consent of mayor for owner or employee to enter saloon on Sunday for any purpose; *State v. Gerhardt*, 145 Ind. 480, 83 L. R. A. 327, 44 N. E. 469 (dissenting opinion), majority holding statute authorizing county commissioners to consider "personal fitness" of applicant in granting permission to carry on other business in room where liquors sold, valid; *Montgomery v. West*, 149 Ala. 314, 9 L.R.A.(N.S.) 662, 123 Am. St. Rep. 33, 42 So. 1000, 13 A. & E. Ann. Cas. 651, holding invalid an ordinance prohibiting the operation of steam engines within city limits without the consent of the council; *Elkhart v. Murray*, 165 Ind. 305, 1 L.R.A.(N.S.) 943, 112 Am. St. Rep. 228, 75 N. E. 593, 6 A. & E. Ann. Cas. 748, holding invalid ordinance prohibiting the running of street cars without "fender, to be approved by the council or street committee;" *Ensley v. State*, 172 Ind. 209, 88 N. E. 62, holding invalid ordinance for granting of liquor licenses, which conferred upon common council power to determine fitness of applicants; *Bear v. Cedar Rapids*, 147 Iowa, 351, 27 L.R.A.(N.S.) 1155, 126 N. W. 324, holding invalid ordinance granting board of health power to grant or withhold license to milk dealers; *Com. v. Maletsky*, 203 Mass. 248, 24 L.R.A.(N.S.) 1174, 89 N. E. 245, holding invalid an ordinance forbidding the use of any building for picking, sorting or storing rags, without permit from chief of fire-department; *Richmond v. Model Steam Laundry*, 111 Va. 761, 69 S. E. 932, holding that test of validity of ordinance is not what has been done, but what may be done under it.

Cited in footnote to *Crowley v. Ellsworth*, 69 L.R.A. 276, which sustains ordi-

nance prohibiting storage of explosive oils in large quantities within corporate limits though it has effect of putting an end to a business and rendering valueless structures used in connection therewith.

Cited in notes (38 L. R. A. 642) on municipal power over nuisances relating to trade or business; (38 L. R. A. 308) on municipal power over nuisances affecting safety, health, and personal comfort; (1 L.R.A.(N.S.) 940) on validity of ordinance vesting in officer's discretion as to subject-matter; (108 Am. St. Rep. 358) on power of city to regulate or prevent keeping of explosives in city limits; (123 Am. St. Rep. 44) on test of validity of municipal ordinance as denying equal protection of the laws.

Distinguished in *Wilkes-Barre v. Garabed*, 11 Pa. Super. Ct. 371, holding city ordinance authorizing mayor to refuse permit to Salvation Army to hold meetings in streets, valid.

City ordinances creating monopoly.

Cited in *Re Lowe*, 54 Kan. 765, 27 L. R. A. 548, 39 Pac. 710, holding city ordinance restricting scavenger business to two persons to be selected by mayor, invalid; *St. Louis v. Russell*, 116 Mo. 257, 20 L. R. A. 728, 22 S. W. 470, holding city ordinance requiring consent of one half of owners in block to erection of livery stable, invalid.

13 L. R. A. 590, *FARIST STEEL CO. v. BRIDGEPORT*, 60 Conn. 278, 22 Atl. 561.

Taking private property for public use.

Cited in *Keifer v. Bridgeport*, 68 Conn. 407, 36 Atl. 801, holding noncompliance with jurisdictional requirements of charter in laying out of highway prevents city acquiring interest in land, and owner, without appeal, may prove irregularities in action of trespass; *Parker v. Com.* 178 Mass. 205, 59 N. E. 634, questioning whether statute limiting height of building in specified locality, without providing compensation to owners, would be constitutional.

Cited in notes (34 L.R.A.(N.S.) 424) on right to obstruct wharf rights in navigable waters for public purposes, without compensation; (34 L.R.A.(N.S.) 998, 999) on exercise of police power for esthetic purposes; (22 L.R.A.(N.S.) 26, 52, 53, 89, 153) on judicial power over eminent domain; (88 Am. St. Rep. 929, 934, 938) on existence of public use as question for courts; (102 Am. St. Rep. 838) on uses for which power of eminent domain cannot be exercised.

Distinguished in *Henderson v. Lexington*, 132 Ky. 407, 22 L.R.A.(N.S.) 36, 111 S. W. 318, holding that the motive of the council in closing a street will not be enquired into where the record shows that it was for the public good and there is no evidence of any improper motive.

Title to tide lands.

Cited in *Shively v. Bowlby*, 152 U. S. 20, 38 L. ed. 339, 14 Sup. Ct. Rep. 548, holding title to tract of land bounded by navigable river, derived from United States, extends only to high-water mark.

Cited in notes (40 L.R.A. 596) on right of owner of upland to access to navigable water; (23 Eng. Rul. Cas. 186, 187) on ownership of riparian owner to thread of stream.

13 L. R. A. 596, *WARDWELL v. CHICAGO, M. & ST. P. R. CO.* 46 Minn. 514, 24 Am. St. Rep. 246, 49 N. W. 206.

Railroads; ejection of passenger for refusal to pay fare.

Cited in *Lake Shore & M. S. R. Co. v. Orndorff*, 55 Ohio St. 595, 38 L. R. A. 142, 60 Am. St. Rep. 716, 45 N. E. 447, and *Braun v. Northern P. R. Co.* 79 Minn. 408, 49 L.R.A. 320, 79 Am. St. Rep. 497, 82 N. W. 675,—holding return of unused

value of ticket necessary to right to eject passenger for refusal to pay fare for child.

13 L. R. A. 598, *ALSUP v. BANKS*, 68 Miss. 664, 24 Am. St. Rep. 294, 9 So. 895.

Termination of contracts.

Cited in *Cox v. Martin*, 75 Miss. 240, 36 L. R. A. 803, 65 Am. St. Rep. 604, 21 So. 611, holding mortgage upon future crops, in consideration of advances for supplies to be made thereafter, not terminated by death of mortgagor before supplies wholly furnished, or all crops planted.

Cited in note (12 Eng. Rul. Cas. 63) on liability of executor or administrator for rent.

Effect of reletting abandoned premises.

Cited in *Oldewurtel v. Wiesenfeld*, 97 Md. 176, 54 Atl. 969, holding tenant liable for rent of abandoned premises relet by landlord; *Oldewurtel v. Wiesenfeld*, 97 Md. 176, 54 Atl. 969; *Higgins v. Street*, 19 Okla. 49, 13 L.R.A.(N.S.) 405, 92 Pac. 153, 14 A. & E. Ann. Cas. 1086,—holding that tenant wrongfully abandoning leased premises is not released from liability under the lease though lessor sublets the premises and credits lessee with rents received; *Stein v. Hyman-Lewis Co.* 95 Miss. 299, 48 So. 225, holding that absolute and unqualified taking of possession of premises by landlord shows acceptance of surrender, unless landlord expresses purpose to hold tenant for rent.

Cited in footnote to *Gray v. Kaufman Dairy & Ice Cream Co.* 49 L. R. A. 580, which denies right to recover rent of landlord reletting after tenant's abandonment, notwithstanding unanswered letter that premises will be leased at tenant's risk.

Cited in notes (51 L. ed. U. S. 224) on landlord's duty to relet on defaulting tenant's account; (13 L.R.A.(N.S.) 400) on remedy of landlord upon abandonment of premises; (114 Am. St. Rep. 720, 722) on right of landlord on abandonment of premises by tenant.

13 L. R. A. 600, *STRICKER v. LEATHERS*, 68 Miss. 803, 9 So. 821.

Punitive damages against common carrier.

Cited in *Harlan v. Wabash R. Co.* 117 Mo. App. 541, 94 S. W. 737, holding punitive damages recoverable from carrier for wilfully and intentionally carrying a passenger past his point of destination; *Webb v. Atlantic Coast Line R. Co.* 76 S. C. 199, 9 L.R.A.(N.S.) 1220, 66 S. E. 954, 11 A. & E. Ann. Cas. 834, holding punitive damages recoverable from carrier for wilful failure to deliver baggage at destination with reasonable despatch.

13 L. R. A. 601, *SUPREME ASSEMBLY R. SOC. OF G. F. v. CAMPBELL*, 17 R. I. 402, 22 Atl. 307.

Validity of agreements of settlement.

Cited in *Nicholson v. Acme Cement Plaster Co.* 145 Mo. App. 533, 122 S. W. 773, holding party bound by an agreement pursuant to which the other party thereto had acted to his detriment; *Burnes v. Burnes*, 70 C. C. A. 377, 137 Fed. 801, on binding effect of family settlements of conflicting claims; *Martin v. Martin*, 98 Ark. 104, 135 S. W. 348, holding that family settlements will not be disturbed by court unless strong reasons exist.

Distinguished in *Nichols v. Nichols*, 79 Conn. 656, 66 Atl. 161, holding "family agreement" not binding where it deprived a member, who was non compos mentis, of his fair share of the property.

13 L. R. A. 605, *SWIM v. WILSON*, 90 Cal. 126, 25 Am. St. Rep. 110, 27 Pac. 33.

Conversion; liability of parties acting in good faith.

Cited in *Shafer v. Lacy*, 121 Cal. 579, 54 Pac. 72, holding pledge of personal property by bailee for safe keeping, confers no title on innocent pledgee, although pledgeor represented property to be his own; *Farmers' Bank v. Diebold Safe & Lock Co.* 66 Ohio St. 377, 58 L. R. A. 624, 90 Am. St. Rep. 586, 64 N. E. 518, holding pledgee of stock, standing in name of pledgeor, obtains no title as against prior pledgee, from whose possession it was wrongfully taken by pledgeor; *Johnson v. Martin*, 87 Minn. 375, 59 L. R. A. 735, footnote p. 733, 94 Am. St. Rep. 706, 92 N. W. 221, holding owner of wheat wrongfully diverted from destination, and sold by innocent factor under forged bill of lading, entitled to recover value from factor; *Craig v. Hesperia Land & W. Co.* 113 Cal. 13, 35 L. R. A. 308, 54 Am. St. Rep. 316, 45 Pac. 10, holding purchaser of stock takes subject to lien of corporation for payment of delinquent assessment; *Bassett v. Perkins*, 65 Misc. 110, 119 N. Y. Supp. 354, holding broker, selling stock without disclosing his principal, liable to purchaser for forged endorsement thereon.

Cited in footnotes to *Doty v. First Nat. Bank*, 17 L.R.A. 259, which holds right of transferee of national bank stock under unrecorded transfer superior to subsequent attachment; *Greer v. Newland*, 70 L.R.A. 554, which holds commission merchant receiving mortgaged cattle sent to him for sale without mortgagee's knowledge and in violation of terms of mortgage and selling them and paying proceeds less commission to consignor without notice of mortgage not liable to mortgagee on implied contract; *The Jennie Clarkson Home for Children v. Missouri, K. & T. R. Co.* 70 L.R.A. 787, which holds corporation canceling registration of bonds and making them payable to bearer contrary to agreement liable to owner for their value, although transfer agent was deceived by forgeries of owner's agent while acting outside scope of authority.

Cited in notes (50 L.R.A. 655) on liability of servant or agent for conversion, trespass, or other positive act of wrongdoing against third persons under orders of employer; (2 L.R.A.(N.S.) 660) on liability of agent toward principal and third person respectively for money or property received in course of agency; (103 Am. St. Rep. 982) on title acquired by bona fide purchaser of stolen property; (131 Am. St. Rep. 500) on law of auction sales.

Distinguished in *Walker v. First Nat. Bank*, 43 Or. 105, 72 Pac. 635, denying liability for conversion of wheat of bank collecting draft on purchaser of flour made therefrom; *National Safe Deposit Sav. & Trust Co. v. Hibbs*, 32 App. D. C. 478, holding bona fide purchaser and also broker who makes the sale, protected where stocks endorsed in blank are fraudulently sold by employee of trust company holding the bonds for a specific purpose.

13 L. R. A. 607, *STATE v. BUSH*, 47 Kan. 201, 27 Pac. 834.

Elections; right of registration.

Cited in footnote to *Barret v. Taylor*, 36 L. R. A. 129, upholding right to have name registered as voter of unnaturalized minor who becomes qualified voter before revision of registry.

Intent in statutory crimes.

Cited in *State v. Pierce*, 52 Kan. 527, 35 Pac. 19, holding county commissioners may be guilty of misdemeanor in office, in issuing warrant for purchase of bridge, contrary to statute, though acting upon advice of counsel; *Williams v. People*, 26 Colo. 276, 57 Pac. 701, holding information for perjury alleging that defendant did "feloniously" testify, etc., sufficiently charges that false testimony was willfully given; *State v. McDaniel*, 45 La. Ann. 688, 12 So. 751, holding use of word

"feloniously" equivalent to word "wilfully" in charging assault with intent to kill; *Bise v. United States*, 74 C. C. A. 1, 144 Fed. 375, 7 A. & E. Ann. Cas. 165, holding that "unlawfully" and "feloniously" imply a criminal intent; *State v. Fordham*, 13 N. D. 500, 101 N. W. 888, holding intent to steal sufficiently alleged by allegation of "wrongful" taking.

Interpretation of statutes.

Cited in *State v. Kennedy*, 82 Kan. 386, 108 Pac. 837, on criminal statute being interpreted with reference to the mischief it was intended to remedy.

13 L. R. A. 611, *HABERMAN v. BAKER*, 128 N. Y. 253, 28 N. E. 370.

Specific performance of contracts to purchase real estate.

Cited in *Forsyth v. Leslie*, 74 App. Div. 521, 77 N. Y. Supp. 826, decreeing specific performance notwithstanding incompleteness of descriptions of property as to facts ascertainable, and defects in title apparently cured by statute or limitations; *Holly v. Hirsch*, 135 N. Y. 598, 32 N. E. 709, holding doubt as to validity of conveyance in chain of title, involving question of law merely, which is settled by former decision, not ground for refusing specific performance; *Merges v. Ringlet*, 24 Misc. 318, 53 N. Y. Supp. 674, refusing to relieve purchaser at judicial sale from performance, because of encroachment of building upon adjoining premises few inches, where title by adverse possession substantially complete; *Baumeister v. Demuth*, 84 App. Div. 399, 82 N. Y. Supp. 831, holding courts not as liberal in relieving purchaser under private contract on account of technical defects in title, as at judicial sale.

Deeds; construction of conveyance describing land as bounded by street or other way.

Cited in *Hennessy v. Murdock*, 137 N. Y. 322, 33 N. E. 330, holding under deeds to lots described as bounded on alley, grantees take to center of alley, subject to right of passage in common; *Mangam v. Sing Sing*, 11 App. Div. 214, 42 N. Y. Supp. 950, holding under conveyance describing land as bounded on highway, grantee entitled to one half of road upon abandonment of highway for six years; *Mitchell v. Einstein*, 42 Misc. 363, 86 N. Y. Supp. 759, holding conveyance of land bounded by road passes grantor's title to center; *Gere v. McChesney*, 84 App. Div. 40, 82 N. Y. Supp. 191, holding state's conveyance bounding land upon street passes title to center; *India Wharf Brewing Co. v. Brooklyn Wharf & Warehouse Co.* 59 App. Div. 92, 69 N. Y. Supp. 274, holding conveyance of all lots "lying on easterly side" of wharf named, does not include wharf; *Watson v. New York*, 67 App. Div. 579, 73 N. Y. Supp. 1027, holding presumption that conveyance describing land as bounded by streets conveys fee to center of street, rebutted by subsequent deed of streets to town; *Graham v. Stern*, 168 N. Y. 521, 85 Am. St. Rep. 694, 61 N. E. 891, Affirming 51 App. Div. 408, 64 N. Y. Supp. 728, holding presumption that conveyance of land as bounded by street carries fee to center of street does not obtain when conveyance is by municipal corporation; *Paige v. Schenectady R. Co.* 38 Misc. 388, 77 N. Y. Supp. 889, holding presumption that grant bounding on highway carries fee to center does not prevail where fee vested in public; *Johnson v. Grenell*, 188 N. Y. 410, 13 L.R.A. (N.S.) 554, 81 N. E. 161, affirming 112 App. Div. 620, 98 N. Y. Supp. 629, holding that conveyance of a lot abutting upon a boulevard along the waterfront includes the fee to the boulevard and water rights belonging thereto; *Gifford v. Horton*, 54 Wash. 603, 103 Pac. 988, holding that, where a plat dedicates a street along a lake shore to its highwater mark, a purchaser of abutting lots acquires the fee to the entire street; *Inter City Realty Co. v. Newman*, 128 App. Div. 199, 112 N. Y. Supp. 481, holding that fee to unused and unopened street passed by descrip-

tion of lots with reference to map which showed the street as included, though lots were also described as bounded by such street; *Kidder v. Childs*, 130 App. Div. 263, 114 N. Y. Supp. 561 (dissenting opinion), on conveyance of land as including fee to centre of adjoining highway; *Mott v. Eno*, 97 App. Div. 610, 90 N. Y. Supp. 608, on presumption as to ownership of fee in road; *Willetts v. Whitson*, 69 Misc. 232, 125 N. Y. Supp. 135, holding that deed bounding property on creek runs to middle of creek.

Cited in footnote to *Crocker v. Cotting*, 33 L. R. A. 245, which holds no part of passageway included in grant of land "bounded by" such passageway.

Cited in notes (24 L.R.A.(N.S.) 542) on effect of bounding grant on private way to carry title thereto; (30 Am. St. Rep. 853) on highways or streets as boundaries.

Disapproved in *Gould v. Wagner*, 196 Mass. 275, 82 N. E. 10, holding that conveyance of land conveys title to fee to centre of private way wholly in grantor's land, though he own no land on the other side of the way; *Hamlin v. Atty. Gen.* 195 Mass. 312, 81 N. E. 275, on same point.

Validity of conveyances by trustees.

Cited in *McLean v. Ladd*, 66 Hun. 347, 21 N. Y. Supp. 196, holding executor without power to mortgage, may yet make valid mortgage of property coming into his hands in contravention of trust; *Salmon v. Salmon*, 24 Misc. 417, 53 N. Y. Supp. 648, holding executors, without power to sell, may yet sell and convey real estate not acquired from testator, but properly coming into their hands under execution of trust; *Re Bolton*, 20 Misc. 535, 46 N. Y. Supp. 908, holding surrogate's court cannot convert personal estate of ward into real estate, by authorizing guardian to purchase home for ward; *Re Bolton*, 2 Gibbons, Sur. Rep. 224, holding that surrogate's court has no power to authorize guardian to use personal property in purchase of home for ward; *Hine v. Hine*, 118 App. Div. 587, 103 N. Y. Supp. 535, holding that where executors purchase at mortgage foreclosure brought by testator, they hold the land in trust for the estate as personalty; *Werner v. Wheeler*, 142 App. Div. 362, 127 N. Y. Supp. 158, to the point that where attorney of record bids in property sold at foreclosure sale, deed taken would be substitute for security of mortgage.

Cited in notes (78 Am. St. Rep. 178) on common-law powers of executor; (136 Am. St. Rep. 800) on who may not purchase at judicial, execution, or other compulsory sales because so doing may conflict with their duties.

Judicial sales.

Cited in *Heim v. Schwoerer*, 51 Misc. 99, 99 N. Y. Supp. 553, holding that court will favor purchaser at judicial sale to a greater extent than it will a purchaser dealing direct with the parties.

Cited in note (135 Am. St. Rep. 922) as to whether, when, and how a purchaser at a judicial sale may object to title.

13 L. R. A. 614, *BRESSLER v. WAYNE COUNTY*, 32 Neb. 834, 49 N. W. 787.

Taxation of national bank shares.

Cited in *Dutton v. Citizens' Nat. Bank*, 53 Kan. 460, 36 Pac. 719; *First Nat. Bank v. Turner*, 154 Ind. 464, 57 N. E. 110, holding owner of international bank stock not entitled to deduct bona fide indebtedness from value of shares; *Commercial Nat. Bank v. Chambers*, 21 Utah, 344, 56 L. R. A. 351, 61 Pac. 560, holding national bank not entitled, in assessment of stock for taxation, to credit for value of real estate situated in another state, and for debts of nonresident share-

holders; *Johnson County v. Johnson*, 173 Ind. 93, 89 N. E. 590, holding that different classes of property may be differently classified for taxation.

Cited in note (45 L. R. A. 753) on state taxation of national banks.

Banking.

Cited in *Merica v. Burget*, 36 Ind. App. 461, 75 N. E. 1083, on definition of "banking."

13 L. R. A. 619, *SPAULDING v. HARVEY*, 129 Ind. 106, 28 Am. St. Rep. 176, 28 N. E. 323.

Right of subrogation.

Cited in *Fowler v. Maus*, 141 Ind. 55, 40 N. E. 56, subrogating purchaser paying mortgage and judgment liens to protect title, to rights under mortgage executed by grantor to protect former owner against said liens, as against wife claiming dower; *Davis v. Schlemmer*, 150 Ind. 478, 50 N. E. 373, holding replevin bail for stay of execution at request of third party entitled to subrogation upon being required to pay judgment; *Warford v. Hankins*, 150 Ind. 496, 50 N. E. 468, holding party advancing money to take up note for purchase money of real estate, under agreement that note should be transferred uncanceled as security, entitled to enforce lien reserved in deed, as against subsequent mortgagees without notice that note was unpaid; *White River School Twp. v. Dorrell*, 26 Ind. App. 539, 59 N. E. 867, holding party advancing money to school district to pay contractor for schoolhouse, entitled to be subrogated to rights of contractor; *Gooch v. Botts*, 110 Mo. 424, 20 S. W. 192, holding party in possession of real estate under decree of court, afterwards reversed on appeal, entitled to subrogation as to existing encumbrances paid to protect title, before reversal; *Fullerton v. Bailey*, 17 Utah, 98, 53 Pac. 1020, holding claimant against estate of decedent, accepting mortgaged real estate in payment, and paying mortgage to protect title, entitled to subrogation against claim subsequently filed against estate; *Alberti v. Moore*, 20 Okla. 89, 14 L.R.A.(N.S.) 1042, 93 Pac. 543, holding landowner, who is compelled to pay subcontractor entitled to be subrogated to the latter's rights against the main contractor; *Coffinberry v. McClellan*, 164 Ind. 135, 73 N. E. 97, on surety's right of subrogation as not being founded upon contract but upon principle of justice.

Cited in footnote to *Faires v. Cockrill*, 28 L. R. A. 528, which denies right to contribution or subrogation between co-obligors on written contract.

Cited in notes (68 L.R.A. 514) on extinction of judgments against principals by sureties' payment; (99 Am. St. Rep. 478, 481, 521) on right of subrogation; (44 Am. St. Rep. 731) on subrogation of insurer.

Distinguished in *Heiney v. Lontz*, 147 Ind. 423, 46 N. E. 665, holding third party advancing money to pay mortgage, upon mere promise of repayment by mortgagor, without agreement for subrogation, not entitled thereto.

13 L. R. A. 621, *COLLAR v. COLLAR*, 86 Mich. 507, 49 N. W. 551.

Trusts; enforcement.

Cited in *Tanner v. Page*, 106 Mich. 160, 63 N. W. 993, holding person receiving money in trust for another liable to action for money had and received, if he fails to pay it over; *Church v. Anti-Kalsomine Co.* 118 Mich. 240, 76 N. W. 383, holding fiduciary relation not shown by bill alleging destruction of property and profits, which defendant had undertaken to protect, but not claiming defendant has profits, money, or property in its hands belonging to plaintiff; *Lasley v. Delano*, 139 Mich. 607, 102 N. W. 1063, holding that an accounting may be had of proceeds of sale though such sale was made pursuant to parol agreement; *Logan v. Brown*, 20 Okla. 348, 20 L.R.A.(N.S.) 307, 95 Pac. 441, holding that action

will lie to recover proceeds of sale of lands by one in whom title was placed under verbal promise to pay over proceeds; *Valley City Desk Co. v. Travelers' Ins. Co.* 143 Mich. 513, 106 N. W. 1125, holding void a parol trust by which vendee of purchaser at foreclosure sale was to deed a portion of the land to a railroad and hold the proceeds in trust for landowner; *Mitchell v. Bilderback*, 159 Mich. 490, 124 N. W. 557, holding that enforceable parol trust cannot be created in fund not in existence.

Cited in note (20 L.R.A. (N.S.) 299) on parol agreement to take title to realty, sell and account for proceeds, as affected by statute of frauds.

Evidence to vary written contract.

Cited in note (17 L. R. A. 271) on parol evidence to vary, add to, or alter written contract.

13 L. R. A. 625, *CANFIELD v. GREAT CAMP, K. OF M.* 87 Mich. 626, 24 Am. St. Rep. 186, 49 N. W. 878.

Mutual benefit associations; rules affecting right of action.

Cited in *Robinson v. Templar Lodge No. 17, I. O. O. F.* 117 Cal. 375, 59 Am. St. Rep. 193, 49 Pac. 170; *Fillmore v. Great Camp K. of M.* 103 Mich. 441, 61 N. W. 785; *Hembeau v. Great Camp K. of M.* 101 Mich. 163, 40 L. R. A. 593, 45 Am. St. Rep. 400, 59 N. W. 417,—holding by-law of mutual benefit association providing decision of association upon death claim shall be final, and bar action in courts, valid; *Raymond v. Farmers' Mut. F. Ins. Co.* 114 Mich. 392, 72 N. W. 254, holding by-law of mutual fire insurance company providing for settlement of differences with members by arbitration, not invalid; *Russell v. North American Ben. Asso.* 116 Mich. 702, 75 N. W. 137, holding by-law providing for arbitration of disputed claims, that no award shall be valid unless signed by all arbitrators, and prohibiting resort to courts, not unreasonable and oppressive; *Cotter v. Grand Lodge A. O. U. W.* 23 Mont. 90, 57 Pac. 650, holding by-law making decision of association as to allowance of death benefit final, valid to extent of making exhaustion of remedies within order condition precedent to action; *Finnerty v. Supreme Counsel, C. K. of A.* 115 Iowa, 401, 88 N. W. 834, holding failure of member to exhaust remedies within order for reversal of suspension, complete defense to action by beneficiary upon certificate; *Modern Woodmen v. Taylor*, 67 Kan. 373, 71 Pac. 806, upholding benefit association by-law making suspension conclusive on member's failure to appeal; *Hoste v. Dalton*, 137 Mich. 526, 110 N. W. 750, holding agreement for final settlement of dispute in circuit court valid, though review by the supreme court was thereby precluded; *Hogadone v. Grange Mut. F. Ins. Co.* 133 Mich. 343, 94 N. W. 1045, on conclusiveness of decision of fraternal insurance society where the contract of insurance so provides; *Conley v. Supreme Court, I. O. F.* 158 Mich. 197, 122 N. W. 567, on necessity of decision by fraternal order before bringing action in court, and conclusiveness of such decision; *Patrons' Mut. F. Ins. Co. v. Atty. Gen.* 106 Mich. 442, 131 N. W. 1119; *Allen v. Patrons' Mut. F. Ins. Co.* 165 Mich. 22, 130 N. W. 196,—holding that member of mutual fire insurance must as condition precedent to right of action on policy exhaust remedies within society.

Cited in footnotes to *Mead v. Stirling*, 23 L. R. A. 227, which requires exhaustion of remedies in local lodge, against grand master of grand lodge before seeking aid of court; *Reno Lodge No. 99, I. O. O. F. v. Grand Lodge, I. O. O. F.* 26 L. R. A. 98, which denies right to enjoin assessments on subordinate lodges before exercise of right of appeal to grand lodge; *Lavalle v. Société St. Jean Baptiste*, 16 L. R. A. 392, which holds member unlawfully expelled from benefit society no right of action for damages; *Industrial Trust Co. v. Green*, 17 L. R. A. 202,

which holds illegal deposition of president not ground for subsequent dissolution of benevolent association.

Cited in notes (49 L.R.A. 374) on conclusiveness of decisions of tribunals of associations and corporations; (59 Am. St. Rep. 208, 209) on remedies of members of associations; (52 Am. St. Rep. 546) on mutual or membership life or accident insurance.

Distinguished in *Supreme Lodge, O. S. F. v. Raymond*, 57 Kan. 651, 49 L. R. A. 378, 47 Pac. 533, holding constitutional provision of benefit association, that decisions of supreme lodge shall be supreme law of order, not applicable to controversies over contracts of insurance.

Disapproved in *Pepin v. Société St. Jean Baptiste*, 3 R. I. 82, 91 Am. St. Rep. 620, 49 Atl. 387, holding benefit association's by-law requiring submission of member's claims to committee, whose decision final, invalid.

13 L. R. A. 627, *LILLIBRIDGE v. LACKAWANNA COAL CO.* 143 Pa. 293, 24 Am. St. Rep. 544, 22 Atl. 1035.

Respective rights of owner of surface and owner of minerals.

Cited in *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 295, 18 L. R. A. 706, 34 Am. St. Rep. 645, 25 Atl. 597, holding surface owner, who has parted with interest in coal, entitled to way through coal to strata beneath; *Mansfield Coal & Coke Co. v. Royal Gas Co.* 27 Pittsb. L. J. N. S. 73, holding under coal lease reserving right to lessor to drill through coal for water, lessor will not be enjoined from drilling for gas or oil; *Webber v. Vogel*, 189 Pa. 158, 42 Atl. 4, holding owner of land above and below coal strata entitled to reversion of space occupied by coal, within time contemplated by parties to grant; *Catlin Coal Co. v. Lloyd*, 176 Ill. 282, 52 N. E. 144, holding prescriptive title may be acquired in coal and minerals in place, where title thereto has been severed from title to surface; *Virginia Coal & I. Co. v. Kelly*, 93 Va. 337, 24 S. E. 1020, holding owner of surface title and owner of minerals and timber not tenants in common, so as to prevent surface owner acquiring outstanding title to whole estate, and holding adverse to owner of timber and minerals; *Murray v. Allred*, 100 Tenn. 119, 39 L. R. A. 253, 66 Am. St. Rep. 740, 43 S. W. 355, holding possession of land for agricultural purposes, under deed purporting to convey full title, not adverse to owner of minerals; *Williams v. South Penn Oil Co.* 52 W. Va. 187, 60 L. R. A. 798, footnote p. 795, 43 S. E. 214, which holds right to oil and gas does not pass under deed of "surface" retaining right to remove coal; *Fairbanks v. San* possession may be acquired in building, although title to land supporting it re-
Francisco & N. P. R. Co. 115 Cal. 584, 47 Pac. 450, holding title by adverse main in another; *Moore v. Indian Camp Coal Co.* 75 Ohio St. 501, 80 N. E. 6, holding that one purchasing the minerals under land may use the space from which such mineral has been removed until all the supply has been exhausted; *New York & P. Coal Co. v. Hillside Coal & I. Co.* 225 Pa. 214, 74 Atl. 26, holding that lessee of coal cannot be charged rental for the use of gangways on the premises for transporting coal from other lands; *Gloss-Sheffield Steel & I. Co. v. Sampson*, 158 Ala. 594, 48 So. 493, on owner of mineral under land as not being liable for injury to waters under the surface caused by his mining operations; *Armstrong v. Maryland Coal Co.* 67 W. Va. 607, 69 S. E. 195, to the point that grant of mining rights give grantee right to remove through certain tracts coal from other tracts.

Cited in notes (135 Am. St. Rep. 134, 137) on rights of owner of surface as against owner of minerals thereunder; (17 Eng. Rul. Cas. 475) on effect of grant of surface and of mines to different persons; (140 Am. St. Rep. 952) on what constitutes adverse possession by surface owner of severed mineral estate; (40

L.R.A. (N.S.) 826, 828) on right of grantee of coal in place to transport coal from adjoining tract; (91 Am. St. Rep. 855) on covenants in mines.

Distinguished in *Moore v. Price*, 125 Iowa, 355, 101 N. W. 91, holding that conveyance of coal under land will not authorize grantee to take coal from other land out through grantor's land; *Smoot v. Consolidated Coal Co.* 114 Ill. App. 516, holding that conveyance of coal in place under land does not give grantee any right to other minerals under the land.

Estate created by lease or reservation of mineral rights.

Cited in *Rockafellow v. Hanover Coal Co.* 6 Kulp, 508, 12 Pa. Co. Ct. 241, 2 Pa. Dist. R. 109, holding coal lease is sale or conveyance of coal in place, and vests in lessees fee-simple estate; *Kirk v. Mattier*, 140 Mo. 31, 41 S. W. 252, holding grant of right to mine coal creates interest in land, and that ejectment will lie to enforce forfeiture for condition broken; *Jennings Bros. v. Beale*, 158 Pa. 287, 27 Atl. 948, holding conveyance of "perpetual right to mine, dig, and carry away coal," not grant of exclusive right to grantee; *Snoddy v. Bolen*, 122 Mo. 487, 24 L. R. A. 510, 24 S. W. 142, holding minerals reserved from dedication of streets and alleys pass to grantee of lots abutting thereon, if not excepted from conveyance; *Kirker v. Kaufmann*, 31 Pittsb. L. J. N. S. 206, holding reservation in deed of coal, and perpetual right of removing coal from other lands through entries, and without liability for support of surface, not performance of contract to convey with simple reservation of "coal rights;" *Sanford's Appeal*, 75 Conn. 594, 54 Atl. 739, holding lease for forty years for purpose of mining, not taxable as realty; *Verdolite Co. v. Richards*, 7 Northampton Co. Rep. 123, discussing, without deciding, interest created by instrument which gives, grants, demises, and leases "exclusive right" to mine "soapstone only;" *Barrett v. Kansas & T. Coal Co.* 70 Kan. 653, 79 Pac. 150, holding that where deed excepts and reserves minerals under the land, title thereto remains absolutely in grantor; *Gordon v. Park*, 219 Mo. 613, 117 S. W. 1163, holding "premises" to be proper as designation of minerals as owned separate from the land; *Rockwell v. Keefer*, 39 Pa. Super. Ct. 472, holding that mineral right owned as separate from the land itself, may be assessed separately; *Rockwell v. Warren County*, 228 Pa. 432, 139 Am. St. Rep. 1006, 77 Atl. 865, holding that title to oil, gas and minerals may be severed from surface of unseated lands, and may be separately taxed; *Preston v. White*, 57 W. Va. 282, 50 S. E. 236, holding that where conveyance of land reserved oil and gas in and under the land, such oil and gas became a separate estate in land; *Coolbaugh v. Lehigh & W. B. Coal Co.* 213 Pa. 31, 4 L.R.A. (N.S.) 210, 62 Atl. 94, construing instrument in terms a "lease" of coal to be a sale of coal as land; *New York & P. Coal Co. v. Hillside Coal & I. Co.* 13 Luzerne Leg. Reg. Rep. 263; *Lazarus v. Lehigh & W. B. Coal Co.* 13 Luzerne Leg. Reg. Rep. 280; *New York & P. Coal Co. v. Hillside Coal & I. Co.* 14 Luzerne Leg. Reg. Rep. 74,—holding leases or demises of "all" coal in lands amount to fee grant of the coal in place; *Thos. Beck & Sons v. Economy Coal Co.* 149 Iowa, 32, 127 N. W. 1109, to the point that mineral underlying surface is subject to absolute conveyance separate from surface.

Cited in note (4 L.R.A. (N.S.) 207) as to when agreement or instrument conferring right to mine coal is to be regarded as absolute sale or conveyance of coal in place, as distinguished from lease or conditional sale.

Distinguished in *Rockafellow v. Hanover Coal Co.* 6 Kulp, 509, 12 Pa. Co. Ct. 241, 2 Pa. Dist. R. 109, enjoining lessee from removing coal from other lands, and carrying same over lands described in lease.

13 L. R. A. 633, *LEE v. HAWKS*, 68 Miss. 669, 9 So. 828.

Statute of frauds; agreements to transfer real estate.

Cited in *Higgins v. Haberstraw*, 76 Miss. 635, 25 So. 168, holding mortgagee in possession estopped from asserting title in equity in violation of parol agreement to surrender possession to mortgagor when debt paid, though agreement obnoxious to statute of frauds.

13 L. R. A. 634, *CENTRAL R. & BKG. CO. v. RYLEE*, 87 Ga. 491, 13 S. E. 584.

Negligence; capacity of children.

Cited in *Central R. & Bkg. Co. v. Golden*, 93 Ga. 514, 21 S. E. 68, holding whether boy twelve years of age knew it was dangerous to climb upon rapidly moving freight train, question for jury; *Savannah, F. & W. R. Co. v. Smith*, 93 Ga. 746, 21 S. E. 157, holding whether boy of ten negligent in boarding train, question for jury; *Manchester Mfg. Co. v. Polk*, 115 Ga. 545, 41 S. E. 1015, holding minor employee cannot recover for injury from defective machinery, if with sufficient capacity to know of danger, and to observe due care, he voluntarily incurred risk; *Ryan v. Towar*, 128 Mich. 471, 55 L. R. A. 315, 92 Am. St. Rep. 481, 87 N. W. 644, holding no exception exists in favor of children, to rule of nonliability for injury to trespassers from negligence; *Krenzer v. Pittsburg, C. C. & St. L. R. Co.* 151 Ind. 600, 68 Am. St. Rep. 252, 52 N. E. 220 (dissenting opinion), majority holding boy lying on railroad track to sleep, guilty of contributory negligence.

Cited in footnotes to *Lake Erie & W. R. Co. v. Mackey*, 29 L. R. A. 757, which holds negligence of nine-year-old child climbing over coupling of car standing on crossing for jury; *Schmitz v. St. Louis, I. M. & S. R. Co.* 23 L. R. A. 250, which holds young child's right to recover for injuries while passing between cars standing on street; *Rumpel v. Oregon Short Line & U. N. R. Co.* 22 L. R. A. 725, which holds it negligence to crawl under cars across highway.

Implied license to use railroad right of way.

Cited in *Grady v. Georgia R. & Bkg. Co.* 112 Ga. 668, 37 S. E. 861, holding person injured while walking between cars in railroad yard must prove express license, to entitle him to recover unless for wilful injury; *Wagner v. Chicago, & N. W. R. Co.* 122 Iowa, 366, 98 N. W. 141, denying railroad's liability for killing child crawling under cars at place customarily used as crossing; *Southern R. Co. v. Mouchet*, 3 Ga. App. 271, 59 S. E. 927, holding that there can be no implied license to cross between cars in temporary opening while cars are being switched; *Georgia R. & Bkg. Co. v. Fuller*, 6 Ga. App. 457, 65 S. E. 313, holding that no license from user will be implied in case of a railway switch yard; *Curtis v. Southern R. Co.* 130 Ga. 677, 61 S. E. 539, holding no license to be upon track implied from mere knowledge by railroad that persons occasionally did use it; *Bailey v. North Carolina R. Co.* 149 N. C. 173, 62 S. E. 912, holding that no invitation can be implied to stranger to enter railway yard and climb upon moving tender; *Fowler v. Georgia R. & Bkg. Co.* 133 Ga. 668, 66 S. E. 900, holding that one leaving street and crossing through railway switch yard at night cannot recover for injury sustained; *Jones v. Illinois C. R. Co.* 31 Ky. L. Rep. 827, 13 L.R.A.(N.S.) 1071, 104 S. W. 258, holding that one attempting to pass under string of standing cars attached to live engine cannot recover if injured; *Beck v. Southern R. Co.* 146 N. C. 473, 59 S. E. 1015 (dissenting opinion), on no implied license to public to enter upon switching yards of railroad.

Cited in footnotes to *Atehixon, T. & S. F. R. Co. v. Potter*, 50 L. R. A. 575, as to what constitutes license to cross railroad track at place other than public crossing; *Thomas v. Chicago, M. & St. P. R. Co.* 39 L. R. A. 399, which holds implied license to walk on railroad track from long use imposes care in running

trains; *Pennsylvania R. Co. v. Hammill*, 24 L. R. A. 531, which holds duty owed to one using footway alongside railroad bridge in accordance with recognized custom; *Ward v. Southern P. Co.* 23 L. R. A. 715, which holds frequent trespassing on railroad track without steps being taken to prevent same, not license to use track; *Chenery v. Fitchburg R. Co.* 22 L. R. A. 575, which holds invitation to cross railroad not shown by custom of crossing without objection; *Anderson v. Chicago, St. P. M. & O. R. Co.* 23 L. R. A. 203, which holds implied license to cross narrow railroad trestle contrary to public policy.

Cited in notes (32 L.R.A.(N.S.) 565) on duty of property owner to trespassing child; (36 L. ed. U. S. 1066) on trespassers or persons on railroad track.

Wilful injury.

Cited in *Charleston & W. C. R. Co. v. Johnson*, 1 Ga. App. 443, 57 S. E. 1064, on knowledge as being a necessary element of wanton or wilful injury.

13 L. R. A. 637, *DURAN v. STANDARD LIFE & ACCL. INS. CO.* 63 Vt. 437, 25 Am. St. Rep. 773, 22 Atl. 530.

Right of action of person violating Sunday law.

Cited in *Hoadley v. International Paper Co.* 72 Vt. 81, 47 Atl. 169, holding working on Sunday not contributory negligence, nor proximate cause of personal injury; *Boyden v. Fitchburg R. Co.* 70 Vt. 128, 39 Atl. 771, holding plea that plaintiff was in act of traveling on Sabbath not answer to declaration for damages against railroad for negligently injuring him at highway crossing.

Cited in notes (36 L.R.A.(N.S.) 549) on violation of Sunday law as defense to action for personal injuries; (30 L.R.A.(N.S.) 468) on amusements prohibited by Sunday laws.

Right to recover on policy.

Cited in *East Carolina R. Co. v. Maryland Casualty Co.* 145 N. C. 118, 58 S. E. 906, holding that where language is clear, the court will construe an insurance contract according to its terms.

Cited in footnote to *Burt v. Union Cent. L. Ins. Co.* 59 L. R. A. 393, which denies right to recover on policy on life of innocent person executed after conviction of capital offense.

Cited in notes (14 Eng. Rul. Cas. 17, 19) on rules for construing insurance policies; (60 Am. St. Rep. 164) on death of insured in known violation of law, insurance; proximate cause of death.

Cited in note (17 L. R. A. 754) on proximate cause of death within meaning of life insurance policy.

13 L. R. A. 640, *KELSEY v. KELLEY*, 68 Vt. 41, 22 Atl. 597.

Validity of transfers for future support.

Cited in *Smith v. Pierce*, 65 Vt. 204, 25 Atl. 1092, granting specific performance of contract to convey land for future support, as against creditor failing to enforce claim until consideration for agreement fully performed; *Darling v. Ricker*, 68 Vt. 474, 35 Atl. 376, holding transfer of real and personal property for future support valid as against attack by creditors after value of services amount to more than value of property; *Beeman v. Cooper*, 64 Vt. 308, 23 Atl. 794, holding mortgage for present debt may lose priority over mortgage subsequently executed for future support, when latter first recorded, and other mortgagee failed to assert rights until after consideration for junior mortgage fully executed; *Harris v. Brink*, 100 Iowa, 369, 62 Am. St. Rep. 576, 69 N. W. 684, holding real estate conveyed for future support chargeable with claim of cred-

itor, where value exceeds that of services rendered to amount greater than that of claim.

Disapproved in *Massey v. McCoy*, 79 Mo. App. 173, holding conveyance of property for future support invalid as to existing creditors, though rights not asserted until after consideration performed.

Competency of opinions as to value of board.

Cited in *Watriss v. Trendall*, 74 Vt. 57, 52 Atl. 118, holding opinions of witnesses living in vicinity, as to reasonable price of board, competent.

13 L. R. A. 643, *DILLABY v. WILCOX*, 60 Conn. 71, 25 Am. St. Rep. 299, 22 Atl. 491.

Oral promise to pay debt of another.

Cited in *Smith v. Delaney*, 64 Conn. 275, 42 Am. St. Rep. 181, 29 Atl. 496, holding promise to pay existing debt of another may be valid, as original obligation, if based upon transfer of value; *Buchanan v. Moran*, 62 Conn. 88, 25 Atl. 396, holding original agreement of owner of building with subcontractor, made upon insolvency of contractor, need not be in writing; *Warner v. Willoughby*, 60 Conn. 471, 25 Am. St. Rep. 243, 22 Atl. 1014, holding parol promise to pay bill of subcontractor, if he refrains from filing lien and contractor fails to pay, within statute of frauds; *Plumb v. Curtis*, 66 Conn. 171, 33 Atl. 998, holding, where evidence tended to show goods purchased by agent on credit of defendant, instruction that oral promise to pay was within statute of frauds properly refused.

Cited in note (27 Am. St. Rep. 20) on promise to pay debt of another.

13 L. R. A. 646, *BROWN v. THROOP*, 59 Conn. 596, 22 Atl. 436.

Contracts within statute of frauds.

Cited in footnote to *Lewis v. Tapman*, 47 L. R. A. 385, which holds contract to marry "within three years" not within statute of frauds.

Cited in notes (15 L.R.A.(N.S.) 318) on effect of statute of frauds upon parol contracts for services performable within a year, though not so intended; (6 Eng. Rul. Cas. 305) on validity of agreement to be performed on a contingency which may take place within a year.

13 L. R. A. 647, *CROWDER v. SULLIVAN*, 128 Ind. 486, 28 N. E. 94.

Contracting power of municipal corporations.

Cited in *Gosport v. Pritchard*, 156 Ind. 401, 59 N. E. 1058, and *Seward v. Liberty*, 142 Ind. 552, 42 N. E. 39, holding discretion of municipal authorities to contract for street lighting cannot be controlled, in absence of fraud; *Pulaski County v. Shields*, 130 Ind. 8, 29 N. E. 385, holding contract of county commissioners employing superintendent of county asylum and poor farm for five years valid; *Campbell v. Barber Asphalt Paving Co.* 6 Lack. Legal News, 121, holding municipal contract for supplying light or water not invalid because extending over considerable number of years.

Limitations upon indebtedness of municipal corporations; obligations in futuro.

Cited in *Saleno v. Neosho*, 127 Mo. 641, 27 L. R. A. 773, 48 Am. St. Rep. 653, 30 S. W. 190, and *Cain v. Wyoming*, 104 Ill. App. 544, holding twenty-year contract for rental of water hydrants, to be paid for annually at agreed price, not within constitutional limitation upon indebtedness; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 20, 43 L. ed. 349, 19 Sup. Ct. Rep. 77, holding contract for water supply at annual rental not invalid, although aggregate of rentals exceed

amount of indebtedness limited by charter; *Ludington Water-Supply Co. v. Ludington*, 119 Mich. 491, 78 N. W. 558, holding contract with water company for future service, to be paid for as rendered, not incurring indebtedness; *Fidelity Trust & G. Co. v. Fowler Water Co.* 113 Fed. 566, holding ordinance granting franchise to water company, providing for payment of annual rental for hydrants, and giving city option to purchase, does not create indebtedness within constitutional limitation; *Budd v. Budd*, 59 Fed. 740, holding acceptance of devise of lands for public park, conditioned upon payment of \$3,000 annually to testator's widow, not within charter provision prohibiting appropriations in excess of annual revenue; *Denver v. Hubbard*, 17 Colo. App. 352, 68 Pac. 993, holding contract for lighting city for term of years valid where annual payment does not exceed constitutional limitation of municipal indebtedness; *Foland v. Frankton*, 142 Ind. 548, 41 N. E. 1031, holding contract for street lighting for five years, to be paid for annually, not within statute requiring petition of majority of owners of taxable real estate to authorize creation of indebtedness; *Reynolds v. Waterville*, 92 Me. 327, 42 Atl. 553 (dissenting opinion), majority holding contract for rental of building for municipal purposes, amounting to purchase on instalments, indebtedness within constitutional provision; *Toomey v. Bridgeport*, 79 Conn. 236, 64 Atl. 215, 7 A. & E. Ann. Cas. 148, holding valid contract by municipal corporation for a term of years at a fixed annual sum, though the aggregate of such sums exceeded the amount permitted to be expended for a fiscal year; *Scott v. Laporte*, 162 Ind. 59, 69 N. E. 675, holding invalid an ordinance granting franchise to water company, binding city to purchase water from it for 21 years and pledging city's power of taxation for payment of rentals; *Traak v. Livingston County*, 210 Mo. 599, 109 S. W. 656, holding that county becomes indebted for a bridge, built for it, at the time the contract is let and the work directed to be done.

Cited in notes (23 L.R.A. 405, 407; 37 L.R.A. (N.S.) 1066) on what constitutes "indebtedness" within meaning of constitutional and statutory restrictions of municipal indebtedness; (44 Am. St. Rep. 240) on what is municipal indebtedness within prohibition against.

Distinguished in *Earles v. Wells*, 94 Wis. 298, 59 Am. St. Rep. 885, 68 N. W. 964, holding lease of waterworks to city in consideration of annual rental and payment of taxes and repairs, and making same property of city when payments sufficient to cancel bonds, within constitutional limitation; *Windsor v. Des Moines*, 110 Iowa, 193, 80 Am. St. Rep. 280, 81 N. W. 476, holding municipal contract for erection of electric light plant by private corporation, and pledging revenue derived from special tax in payment thereof, indebtedness within constitutional limitation; *Laporte v. Gamewell Fire Alarm Teleg. Co.* 146 Ind. 469, 35 L. R. A. 688, 58 Am. St. Rep. 359, 45 N. E. 588, holding contract for fire alarm system by city indebted in excess of constitutional limit invalid, where city without funds to pay when contract completed and accepted; *Indianapolis v. Warr*, 144 Ind. 184, 31 L. R. A. 745, 42 N. E. 901, holding municipal contract for street lighting for five years invalid, under statute prohibiting contracts beyond existing appropriations, where appropriations had been made for two months only.

Disapproved in *Spilman v. Parkersburg*, 35 W. Va. 619, 14 S. E. 279, holding lease of electric lighting plant by city in consideration of fixed quarterly payment, which in effect is contract to purchase on instalments, indebtedness within constitutional limitation.

License to use streets not monopoly.

Cited in *Rushville v. Rushville Natural Gas Co.* 132 Ind. 578, 15 L. R. A. L.R.A. Au. Vol. II.—67.

323, 28 N. E. 853, holding ordinance specifically granting to natural gas company right to use streets for laying pipes to supply gas to city and inhabitants not invalid; *Vincennes v. Citizens' Gaslight Co.* 132, Ind. 124, 16 L. R. A. 489, 31 N. E. 573, holding ordinance granting franchise to gaslight company for twenty-five years, and obligating city to take gas for stated number of street lamps, not objectionable as giving exclusive privilege; *McPhee & McG. Co. v. Union P. R. Co.* 87 C. C. A. 619, 158 Fed. 17, holding that grant to railway company of right to lay, maintain and operate its railway in the street is a license, not a franchise.

Attacking legality of corporate existence or acts.

Cited in *Gilkey v. How*, 105 Wis. 46, 49 L. R. A. 485, 81 N. W. 120, and *Doty v. Patterson*, 155 Ind. 64, 56 N. E. 608, holding, where there is attempt to comply with statute authorizing creation of corporation, legal existence can be questioned only in directing proceeding; *Smith v. Cleveland, C. C. & St. L. R. Co.* 170 Ind. 398, 81 N. E. 501, holding that corporate existence of de facto consolidated railway company cannot be attacked in proceeding by it to condemn land where it has substantially complied with statute governing consolidation; *Roberts v. Terre Haute Electric Co.* 37 Ind. App. 668, 76 N. E. 323, holding that right of street railway to run freight cars over its line cannot be questioned in action for negligence causing personal injury; *Western Invest. Co. v. Davis*, 7 Ind. Terr. 177, 104 S. W. 573, 15 A. & E. Ann. Cas. 1134, holding that creditor dealing with de facto corporation as a corporation cannot hold the stockholders liable as partners; *Clark v. American Cannel Coal Co.* 35 Ind. App. 71, 73 N. E. 727, on collateral attack on de facto corporation.

13 L. R. A. 649, KINGSLAND v. KOEPPE, 137 Ill. 344, 28 N. E. 48.

Parol evidence to explain indorsement.

Cited in *Featherstone v. Hendrick*, 59 Ill. App. 502, holding character of undertaking of indorser, who is not payee, may be shown by parol evidence; *Atkinson v. Bennett*, 103 Ga. 511, 30 S. E. 599; *Ewen v. Wilbor*, 70 Ill. App. 156; *Holmes v. Williams*, 69 Ill. App. 115; *Smith v. North*, 68 Ill. App. 465; *Condon v. Bruse*, 58 Ill. App. 254.—holding indorsement of note by third party *prima facie* guaranty, but subject to evidence as to real nature of contract; *Chicago Trust & Sav. Bank v. Nordgren*, 57 Ill. App. 349, holding, when maker and indorser of note same party, contract of indorsee cannot be varied by parol evidence; *De Clerque v. Campbell*, 231 Ill. 448, 83 N. E. 224, holding indorsement of note in blank by third party at time of its execution creates a presumption that indorsee intended to assume liability of guarantor although this presumption may be rebutted by parol; *Second Nat. Bank v. Woodruff*, 113 Ill. App. 17, holding ordinarily it is incompetent to show by parol an agreement between indorsers and an indorsee, who has in turn indorsed the note to another, to the effect that such indorsers were not to be held liable as such.

Cited in footnotes to *Spencer v. Allerton*, 13 L. R. A. 806, which holds parol evidence inadmissible as to blank indorsement by stranger; *Young v. Schon*, 62 L. R. A. 499, which holds parol evidence admissible to show extent of liability of promisee and another indorsing non-negotiable note.

Distinguished in *Hately v. Pike*, 162 Ill. 249, 53 Am. St. Rep. 304, 44 N. E. 441, holding, where note made payable to one as president of corporation, and indorsed by payee both with and without word "president," parol evidence inadmissible to show one indorsement as guaranty; *Cozzens v. Chicago Hydraulic-Press Brick Co.* 166 Ill. 219, 46 N. E. 788, holding one liable as indorser only need not be joined as defendant with guarantor, although printed contract of guaranty stamped over his name.

Judgments against defendants sued jointly.

Cited in *Columbian Hard Wood Lumber Co. v. Langley*, 51 Ill. App. 102, holding in action against makers and guarantors of note, recovery must be against all or none of defendants; *Pease v. Appleton*, 75 Ill. App. 347, holding judgment by default against one of several defendants sued jointly in *assumpsit erroneus*; *Schmelzer v. Chicago Ave. Sash & Door Mfg. Co.* 85 Ill. App. 601, holding, where owner and contractor sued jointly upon claim of subcontractor, judgment against owner alone erroneous; *Finance Co. v. Hanlon*, 75 Ill. App. 190, and *Fisk v. Carbonized Stone Co.* 67 Ill. App. 331, holding plaintiff may appeal from judgment in his favor against one of several parties sued jointly on contract; *Leopold v. Steel*, 41 Ill. App. 18, questioning right to amend declaration, after service of summons, without leave, by adding name of party as coplaintiff; *Dickenson v. Simms*, 128 Ill. App. 20, holding a judgment in an action at law against two defendants is an entirety and cannot be affirmed as to one defendant and reversed as to the other; *Merrifield v. Cottage Piano Co.* 238 Ill. 532, 128 Am. St. Rep. 148, 87 N. E. 379, holding if judgment is set aside at instance of one joint defendant it must be set aside as to all; *Merrifield v. Western Cottage Piano & Organ Co.* 149 Ill. App. 6, to the point that it is error to set aside judgment as to one defendant and grant leave to that one to plead unless judgment is set aside as to all defendants; *Williams v. Breitung*, 216 Ill. 303, 74 N. E. 1060, 3 A. & E. Ann. Cas. 506, as to necessity of judgment on joint contract being rendered against all.

13 L. R. A. 652, *TODE v. GROSS*, 127 N. Y. 480, 24 Am. St. Rep. 475, 28 N. E. 469.

Agreements for protection of trade secrets.

Cited in *Stanley v. Pollard*, 5 Misc. 492, 25 N. Y. Supp. 766, holding agreement of employee not to reveal trade secrets, nor engage in same or similar business in prescribed territory for two years after leaving employer, not invalid; *Westervelt v. National Paper & Supply Co.* 154 Ind. 678, 57 N. E. 552, enjoining employee from divulging information as to secret machine which he had been employed to perfect for benefit of employer; *Hackett v. A. L. & J. J. Reynolds Co.* 30 Misc. 735, 62 N. Y. Supp. 1076, holding agreement of employee not to engage in business in competition with employer, within prescribed territory, for six months after employment ceases, not against public policy; *Stone v. Goss* (N. J.) 63 L. R. A. 345, footnote p. 344, 55 Atl. 736, enjoining use of information obtained from employee wrongfully disclosing trade secret; *John D. Park & Sons Co. v. Hartman*, 12 L.R.A. (N.S.) 146, 82 C. C. A. 158, 153 Fed. 40; *Hartman v. John D. Park & Sons Co.* 145 Fed. 378,—holding sale of secret process with covenant that seller will not use process himself or communicate it to any other person, valid; *Witkop & W. Co. v. Boyce*, 61 Misc. 131, 112 N. Y. Supp. 874, holding trade secrets communicated in course of confidential employment will be protected by injunction.

Cited in footnotes to *O. & W. Thum Co. v. Tloczynski*, 38 L. R. A. 200, which sustains right to enjoin breach of agreement by employee not to communicate trade secrets; *Dempsey v. Dobson*, 32 L. R. A. 761, which holds carpet manufacturers entitled to record of recipes prepared by color mixer employed; *Dempsey v. Dobson*, 40 L. R. A. 550, which holds custom giving color mixer exclusive title as against employer, to combinations of color devised, void; *Watkins v. Landon*, 19 L. R. A. 236, which authorizes person lawfully acquiring knowledge of composition of unpatented medicine, to make and sell same; *Stone v. Goss*, 63 L.R.A. 344, which upholds right to injunction against disclosure of trade secret in violation of contract; *Stewart v. Hook*, 63 L.R.A. 255, which upholds property right of discoverer of medical preparation in his discovery.

Cited in notes (12 L.R.A.(N.S.) 103) on protection of trade secrets; (133 Am. St. Rep. 765, 766), on protection of secret processes and trade secrets.

Distinguished in *Mallinckrodt Chemical Works v. Nemnich*, 83 Mo. App. 13, holding agreement of chemist not to engage in sale or manufacture of drugs manufactured by employer, "within territory of United States," for six years after leaving service, invalid; *Lanzit v. J. W. Sefton Mfg. Co.* 184 Ill. 330, 75 Am. St. Rep. 171, 56 N. E. 393, holding agreement of employee to abandon business of manufacturing paper novelties for period of ten years invalid.

Assignment of trade secrets.

Cited in *Grand Rapids Wood Finishing Co. v. Hatt*, 152 Mich. 138, 115 N. W. 714, holding contract to sell secret process valid and binding; *Vulcan Detinning Co. v. American Can Co.* 67 N. J. Eq. 247, 58 Atl. 290, holding trade secret assignable.

Agreements for protection of good will of business.

Cited in *Ru Ton v. Everitt*, 35 App. Div. 415, 54 N. Y. Supp. 896, upholding agreement of vendor not to engage in same or similar business for ten years, and to use influence for benefit of purchaser; *Underwood v. Smith*, 46 N. Y. S. R. 656, 19 N. Y. Supp. 380, upholding similar agreement of vendor, running fifteen years; *Booth v. Seibold*, 37 Misc. 102, 74 N. Y. Supp. 776, upholding agreement of fish company upon sale of property and good will to competitor, not to engage in business again; *Brett v. Ebel*, 29 App. Div. 259, 51 N. Y. Supp. 573, upholding agreement of vendor of freighting vessels, not to solicit freights or do business with certain ports named, during term of not less than five years; *Williams v. Farrand*, 88 Mich. 480, 14 L. R. A. 164, 50 N. W. 446, refusing to enjoin outgoing partner from using firm name similar to that of old firm; *Vonderbank v. Schmidt*, 44 La. Ann. 271, 15 L. R. A. 467, 32 Am. St. Rep. 336, 10 So. 616, enjoining purchaser of hotel from insolvent estate, from using name of insolvent's vendor, who transferred good will with sale of property; *Oakes v. Cattaraugus Water Co.* 143 N. Y. 439, 26 L. R. A. 552, 38 N. E. 461, holding agreement to withdraw application for waterworks franchise, and to assist another to secure same, in consideration of payment of money, not against public policy.

Cited in note (22 L. R. A. 674) on validity of contracts of sale in restraint of trade, without limitation of place.

Distinguished in *Cummings v. Union Blue Stone Co.* 164 N. Y. 404, 52 L. R. A. 263, 79 Am. St. Rep. 655, 58 N. E. 525, holding combination of blue-stone producers to control market and advance prices, invalid; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 130, 29 C. C. A. 151, 54 U. S. App. 723, 85 Fed. 281, holding combination of iron-pipe manufacturers to control prices and prevent competition invalid both at common law and under Federal anti-trust law; *Richards v. American Desk & Seating Co.* 87 Wis. 514, 58 N. W. 787, holding contract prohibiting furniture manufacturer from selling in large part of United States to other than one dealer, for about five years, invalid.

Combinations to stifle competition.

Cited in *Wood v. Whitehead Bros. Co.* 165 N. Y. 552, 59 N. E. 357, upholding agreement to discontinue business, and thereafter to turn over all orders received to competitor; *Excelsior Quilting Co. v. Creter*, 36 Misc. 700, 74 N. Y. Supp. 361, holding agreement of manufacturer of quilting machines, upon which patent expired, not to make more if customer will purchase stock on hand, valid; *Anchor Electric Co. v. Hawkes*, 171 Mass. 106, 41 L. R. A. 192, 68 Am. St. Rep. 403, 50 N. E. 509, holding combination of three corporations, whereby officers agreed not to enter into or conduct any business in competition therewith for

five years, not invalid; *Oakdale Mfg. Co. v. Garst*, 18 R. I. 488, 23 L. R. A. 641, 49 Am. St. Rep. 784, 28 Atl. 973, holding combination of oleomargarine manufacturers, whereby property was transferred to one corporation, and parties agreed not to engage in same business for five years, valid; *People v. Klaw*, 55 Misc. 85, 106 N. Y. Supp. 341, holding agreement between owners of theaters as to booking attractions not in violation of statute against monopolies or conspiring to commit an act injurious to trade or commerce; *Brooklyn Distilling Co. v. Standard Distilling & Distributing Co.* 120 App. Div. 239, 105 N. Y. Supp. 264, holding under state anti trust laws a lease to a corporation organized to create a monopoly is valid although lessor who was not a party to combination knew of motive of lessee in taking lease; *McCall Co. v. Wright*, 198 N. Y. 150, 31 L.R.A.(N.S.) 256, 91 N. E. 516; *New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co.* 180 N. Y. 294, 73 N. E. 48,—holding contract in reasonable restraint of trade valid.

Cited in notes (24 L.R.A.(N.S.) 920, 925) on validity of agreement in restraint of trade, ancillary to sale of business or profession, as affected by territorial scope; (49 Am. St. Rep. 790) on validity of contracts in restraint of trade.

Penalty or liquidated damages.

Cited in *Pastor v. Solomon*, 26 Misc. 126, 55 N. Y. Supp. 956, Affirming 25 Misc. 323, 54 N. Y. Supp. 575, holding penalty of \$500, imposed by contract for breach of actor's engagement, may be recovered as liquidated damages; *New Britain v. New Britain Teleph. Co.* 74 Conn. 333, 50 Atl. 881, sustaining recovery of liquidated damages stipulated for breach of telephone company's agreement to maintain competition with rival; *Re Van Horn*, 167 Fed. 1023, holding where actual damages for a breach are uncertain in their nature and practically impossible to estimate with certainty and if the contract provides for damages in case of breach the provision will be construed as liquidated damages and not a penalty; *General Electric Co. v. Westinghouse Electric & Mfg. Co.* 144 Fed. 464, holding naming of a stipulated sum to be paid for the nonperformance of a covenant is conclusive upon the parties in absence of fraud or mutual mistake.

Cited in footnotes to *Chicago-House Wrecking Co. v. United States*, 53 L. R. A. 122, which holds stipulation for certain sum as damages for failure to remove building by certain time, penalty, when actual damages easily assessable; *Meyer v. Estes*, 32 L. R. A. 283, which holds penalty provided for by contract that purchaser wrongfully using electrotype plates shall pay fine of ten times their price.

Cited in notes (6 Eng. Rul. Cas. 560, 561) as to when stipulation in contract is for a penalty and when for liquidated damages; (108 Am. St. Rep. 51) on agreements purporting to liquidate damages.

Proof of actual damages in action for liquidated damages.

Cited in *Deeves & Son v. Manhattan L. Ins. Co.* 195 N. Y. 338, 88 N. E. 395 (dissenting opinion), as to it not being necessary to prove actual damages in an action on covenant for liquidated damages.

13 L. R. A. 655, *ROTHHOLZ v. DUNKLE*, 53 N. J. L. 438, 26 Am. St. Rep. 432, 22 Atl. 193.

Slander and libel; privileged communications.

Cited in *Butterworth v. Todd*, 76 N. J. L. 324, 70 Atl. 139, holding complaint made by one member of church against another in accordance with discipline of church, and in belief of its truth is qualifiedly privileged and the burden is upon plaintiff to prove express malice; *Bohlinger v. Germania L. Ins. Co.* 100 Ark. 483, 36 L.R.A.(N.S.) 455, 140 S. W. 257, holding communications between principal and agent, relative to agency, privileged, though containing defamatory

matter as to third person; *Ramsdell v. Pennsylvania R. Co.* 79 N. J. L. 381, 75 Atl. 444, holding that notice in writing set up in office of dining car department of railroad, that certain dining car conductor was discharged for breach of rules is privileged as to other employees.

Cited in footnotes to *Sullivan v. Strahorn-Hutton-Evans Commission Co.* 47 L. R. A. 859, which holds imputation of evil motives and dishonesty in letter complaining of nonpayment of debt by third person through bank not privileged; *Hennmens v. Nelson*, 20 L. R. A. 441, which holds statement by principal of deaf mute institute to executive committee as to improper acts of department superintendent privileged; *Nichols v. Eaton*, 47 L. R. A. 483, which holds communication by principal to agent as to business of agency not actionable unless actuated by malice.

Cited in notes (26 L.R.A.(N.S.) 1032) on qualified privilege of communication between members of association or private corporation; (9 Eng. Rul. Cas. 81) as to what communications enjoy a qualified privilege; (104 Am. St. Rep. 112, 148) on what libelous statements are privileged.

13 L. R. A. 657, *SELLERS v. TEXAS C. R. CO.* 81 Tex. 458, 17 S. W. 32.

Implied easements.

Cited in *Kruegel v. Nitschman*, 15 Tex. Civ. App. 642, 40 S. W. 68, holding sale of land not abutting on highway implies grant of right of passage necessary for reasonable use over adjoining land of owner; *St. Louis Southwestern R. Co. v. Long*, 52 Tex. Civ. App. 46, 113 S. W. 316; *Texas & P. R. Co. v. Ford*, 54 Tex. Civ. App. 316, 117 S. W. 201,—holding that it was duty of railroad to keep road-bed in such condition as not to divert waters from natural course to injury of adjoining lands.

Cited in footnotes to *Irvine v. McCreary*, 49 L. R. A. 417, which holds sale of building creates easement in alley across rear of adjacent lot belonging to grantor; *Chappell v. New York, N. H. & H. R. Co.* 17 L. R. A. 420, which holds permanent easement retained by reservation in deed of right of way of privilege of crossing and recrossing.

Cited in notes (59 L. R. A. 868) on liability for damming back water of stream; (20 L.R.A. 637) on exceptions and reservation of easements; (8 L.R.A.(N.S.) 342) on implication from necessity of easement other than of way; (26 L.R.A.(N.S.) 323, 327, 336) on easements created by severance of tract with apparent benefit existing.

13 L. R. A. 659, *ALSTON v. STATE*, 92 Ala. 124, 9 So. 732.

Special and general deposits.

Cited in *Shute v. Hinman*, 34 Or. 583, 47 L. R. A. 266, 58 Pac. 882, holding trustee making general deposit of trust fund not entitled to lien, although character of fund deposited known to bank; *Officer v. Officer*, 120 Iowa, 393, 98 Am. St. Rep. 365, 94 N. W. 947, holding deposit of trust fund subject to check, general; *Anheuser-Busch Brewing Asso. v. Clayton*, 6 C. C. A. 110, 13 U. S. App. 295, 56 Fed. 761, holding bank receiving draft for "collection and return," taking check of drawee in payment, and on same day forwarding exchange to drawer, which is not paid, does not entitle drawer to lien on funds of bank; *Curtis v. Parker*, 136 Ala. 227, 33 So. 935, holding relation of debtor and creditor created between bank and principal by deposit for use of agent instructed to use money for principal's benefit; *Butcher v. Butler*, 134 Mo. App. 69, 114 S. W. 564, holding in the case of a special deposit the bank merely assumes charge and custody of the property without authority to use it and the depositor is entitled to receive back the identical thing deposited; *Allen v. Woodruff*, 2 Ala. App. 420, 56

So. 247, to the point that trust money deposited by holder to his general account still belongs to beneficiary.

Cited in notes (16 L.R.A. 517) on when deposit in bank is special so that title remains in depositor; (33 Am. St. Rep. 226) on general and special deposits.

Officers; liability for loss of funds.

Cited in *Mitchell v. Rice*, 132 Ala. 127, 31 So. 498, holding sureties liable for misappropriation of funds for unauthorized general deposit by register in chancery, charged with duty of receiving proceeds of partition sale of land; *Montgomery County v. Cochran*, 62 C. C. A. 75, 126 Fed. 460, same case on prior appeal in 57 C. C. A. 266, 121 Fed. 22, holding county treasurer liable for amount of check received for bonds, deposited in insolvent drawee bank; *Clisby v. Martin*, 150 Ala. 134, 124 Am. St. Rep. 64, 43 So. 742; *Parks v. Bryant*, 142 Ala. 629, 38 So. 180,—holding fact that register of chancery deposited moneys in bank which afterwards became insolvent no defense to action on his bond.

Cited in notes (36 L.R.A.(N.S.) 286, 287, 289, 294) on public officer's liability for loss of funds by failure of bank; (91 Am. St. Rep. 527) on acts for which sureties on official bonds are liable.

Distinguished in *State v. Gramm*, 7 Wyo. 358, 40 L. R. A. 699, 52 Pac. 533, holding state treasurer not liable for moneys lost, without fault on his part, through failure of depository.

13 L. R. A. 661, *PICKETT v. PACIFIC MUT. L. INS. CO.* 144 Pa. 79, 27 Am. St. Rep. 618, 22 Atl. 871.

Insurance; construction of exceptions in policy.

Cited in *Menneiley v. Employers' Liability Assur. Corp.* 148 N. Y. 600, 31 L. R. A. 688, 51 Am. St. Rep. 716, 43 N. E. 54, holding clause in accident policy excepting death from "inhaling gas" applicable only to cases where gas intentionally inhaled; *Fidelity & C. Co. v. Waterman*, 161 Ill. 635, 32 L. R. A. 655, 44 N. E. 283, holding death from involuntary asphyxiation not within clause of accident policy excepting death from anything accidentally absorbed or inhaled; *Fidelity & C. Co. v. Lowenstein*, 46 L. R. A. 452, 38 C. C. A. 31, 97 Fed. 18, affirming 88 Fed. 476, holding death from involuntary inhalation of illuminating gas not within clause in accident policy excepting injuries from poison or anything accidentally or otherwise taken, absorbed, or inhaled; *Travelers' Ins. Co. v. Dunlap*, 160 Ill. 646, 52 Am. St. Rep. 355, 43 N. E. 766, holding taking poison by mistake not within provision in accident policy excepting death from "taking poison;" *Bole v. New Hampshire F. Ins. Co.* 159 Pa. 57, 28 Atl. 205, holding factory had not ceased to be operated within meaning of fire policy, where machinery not in operation, but factory open for sale of goods by assignee for creditors; *Peterson v. Modern Brotherhood*, 125 Iowa, 572, 67 L.R.A. 635, 101 N. W. 289 (dissenting opinion), as to exceptions against inhalation of gas only applying to voluntary inhalation.

Cited in notes (2 L.R.A.(N.S.) 169) on liability of insurer for death from inhalation of gas; (30 L.R.A.(N.S.) 1182) on death or injury from substance taken internally as caused by external means; (52 Am. St. Rep. 364) on effect of insured's taking poison; (14 Eng. Rul. Cas. 25) on rules for construing insurance policies.

Distinguished in *McGlothter v. Provident Mut. Acci. Co.* 32 C. C. A. 320, 60 U. S. App. 705, 89 Fed. 687, holding death from poison accidentally taken within clause of accident policy excepting from its provisions death from poison; *Kasten v. Interstate Casualty Co.* 99 Wis. 77, 40 L. R. A. 653, 74 N. W. 534, holding clause in accident policy excepting death from poison, or anything accidentally

absorbed or inhaled, applicable to death from absorption of septic poison from cotton used by dentist.

What constitutes accident.

Cited in *Schmid v. Indiana Travelers Acci. Asso.* 42 Ind. App. 494, 85 N. E. 1032, holding death resulting from voluntarily physical exertions not accident; *North West Commercial Travelers' Asso. v. London Guarantee & Acci. Co.* 10 Manitoba L. Rep. 553, holding death by freezing is death through "external, violent and accidental means" within terms of policy; *Sullivan v. Modern Brotherhood*, 167 Mich. 534, — L.R.A. (N.S.) —, 133 N. W. 486, holding that insurer against accident is liable where death or injury is caused by disease not resulting from bodily infirmity or disease existing at time of accident, but which disease is itself caused by accident.

Cited in notes (30 L.R.A. 212) on what constitutes an accident within meaning of accident insurance policy; (5 L.R.A. (N.S.) 660) as to when death or injury primarily caused by insured's voluntary act, deemed caused by accidental means.

Proximate cause of death.

Cited in note (17 L. R. A. 754) on proximate cause of death within meaning of life insurance policy.

Application of assured as evidence.

Cited in *Hendel v. Reverting Fund Assur. Asso.* 2 Pa. Dist. R. 117, holding statute requiring that life policies contain, or have attached to them, copies of application applicable to endowment policy; *Standard Life & Acci. Ins. Co. v. Carroll*, 41 L. R. A. 195, 30 C. C. A. 255, 58 U. S. App. 76, 86 Fed. 570, holding statute providing application shall not be evidence unless attached to life policy not applicable in case of accident insurance; *Zimmer v. Central Acci. Ins. Co.* 207 Pa. 476, 56 Atl. 1003, holding statute declaring application for life insurance not evidence unless attached to policy applicable to insurance against accidents and death caused thereby; *Ellis v. Metropolitan L. Ins. Co.* 228 Pa. 231, 77 Atl. 460, holding that person suing on insurance policy cannot be required to put in evidence an incorrect copy of application which was attached to policy.

Distinguished in *Snyder v. Globe Mut. Live Stock Ins. Co.* 38 Pa. Super. Ct. 631, 11 North. Co. Rep. 132, holding statute requiring application and by-laws to be attached to a policy of insurance in order to make such papers admissible in evidence has no application to policies of insurance issued by a live stock insurance company.

13 L. R. A. 664, *HARRINGTON v. PORT HURON*, 86 Mich. 46, 48 N. W. 641.

Ejectment in cases of trespass.

Cited in *Rasch v. Noth*, 99 Wis. 288, 40 L. R. A. 579, footnote p. 577, 67 Am. St. Rep. 858, 74 N. W. 820, holding ejectment will not lie for projection of eaves of barn 10 or 11 inches over division line, where drip received by roof of plaintiff's barn, and carried thereby to defendant's land.

Cited in footnote to *San Francisco v. Grote*, 41 L. R. A. 335, which sustains city's right of ejectment in land dedicated for street.

Cited in notes (18 L.R.A. 791) on what title or interest will support an action of ejectment; (11 L.R.A. (N.S.) 917) on ejectment for encroachments under surface, or overhead.

Duties and liabilities as to sewers.

Cited in note (61 L. R. A. 681, 683, 692) on duty and liability of municipality with respect to drainage.

Riparian rights.

Cited in *People v. Silberwood*, 110 Mich. 105, 32 L. R. A. 696, 67 N. W. 1067,

holding statute reserving submerged lands in Lake Erie for public shooting grounds, and prohibiting cutting of rushes on such lands, not interference with property rights of riparian owner.

Deeds; construction.

Distinguished in *Ladd v. Johnson*, 32 Or. 200, 49 Pac. 756. holding conveyance to trustee for benefit of creditors not mortgage.

13 L. R. A. 668, *ZABEL v. LOUISVILLE BAPTIST ORPHANS' HOME*, 92 Ky. 89, 17 S. W. 212.

Pleading private statute.

Cited in *Nichols v. Bardwell Lodge No. 179*, I. O. O. F. 105 Ky. 174, 48 S. W. 426, holding act incorporating grand lodge of Odd Fellows, being private, must be specially pleaded where corporate existence in issue; *McHenry v. Selva*, 99 Ky. 235, 35 S. W. 645, holding proof of publication of ordinance for street improvement unnecessary under statute making copy of ordinance and copy of contract, attested by clerk, prima facie evidence of publication.

Taxation; exemption of charitable institutions.

Cited in *Kentucky Female Orphan School v. Louisville*, 100 Ky. 492, 40 L. R. A. 124, 36 S. W. 921, holding property of orphan school leased to tenants, rents of which are devoted to education of destitute orphans, within statute exempting all property and funds devoted to charitable purposes from taxation; *Widows & Orphan Home v. Com.* 126 Ky. 391, 16 L.R.A.(N.S.) 829, 103 S. W. 354, holding home for destitute widows and orphans of members of lodge an "institution of purely public charity," within exemption from taxation clause of constitution.

Validity of special assessments.

Cited in *Owensboro v. Sweeney*, 129 Ky. 616, 18 L.R.A.(N.S.) 185, 130 Am. St. Rep. 477, 111 S. W. 364, holding special assessments cannot be levied unless the property charged receives a corresponding benefit therefrom.

Special assessment not tax.

Cited in *Yates v. Milwaukee*, 92 Wis. 358, 66 N. W. 248, and *Kilgus v. Orphanage of Good Shepherd*, 94 Ky. 442, 22 S. W. 750, holding assessment for local street improvement not within statute exempting charitable institution from assessment and taxation under revenue laws; *Goanell v. Louisville*, 104 Ky. 216, 46 S. W. 722, holding assessment for street improvement not tax within constitutional provisions requiring equality and uniformity in taxation; *Farwell v. Des Moines Brick Mfg. Co.* 97 Iowa, 298, 35 L. R. A. 69, 66 N. W. 176, holding assessment for street improvement not within annexation statute limiting taxation for "any city purpose;" *Dressman v. Farmers' & T. Nat. Bank*, 100 Ky. 574, 36 L. R. A. 122, 38 S. W. 1052, holding, under city charter making assessment for street improvement lien, mortgage is inferior lien to subsequent street assessment; *Ft. Smith v. Sisters of Mercy*, 86 Ark. 115, 109 S. W. 1165, 15 A. & E. Ann. Cas. 347, holding exemption of charitable association from taxation did not exempt it from special assessments; *Hager v. Gast*, 119 Ky. 507, 84 S. W. 556, holding provisions of constitution relating to taxation do not apply to special assessment; *Edwards & W. Constr. Co. v. Jasper County*, 117 Iowa, 379, 94 Am. St. Rep. 301, 90 N. W. 1006, holding that exemption from general taxation does not relieve owner from special assessments.

Cited in notes (35 L.R.A. 38) on liability to local assessments for benefits, of property exempt from general taxation; (3 L.R.A.(N.S.) 838) on special assessment as tax.

Delegation of power to fix street grade.

Cited in note (20 L. R. A. 654) on delegation by city council of power to determine width, grade, material, etc., of street, sidewalk, or sewer improvements.

Validity of street improvement.

Cited in *Richardson v. Mehler*, 111 Ky. 410, 63 S. W. 957, holding extent and character of street improvement must be fixed by ordinance authorizing it.

Distinguished in *Bitzer v. O'Bryan*, 107 Ky. 595, 54 S. W. 951, and *Louisville v. Selva*, 106 Ky. 732, 51 S. W. 447, holding petition for enforcement of street assessment, alleging grade fixed within limits of street to be improved, sufficient.

Sufficiency of petition to enforce lien for street assessment.

Cited in *Barfield v. Gleason*, 111 Ky. 527, 63 S. W. 964, holding averments and prima facie evidence of steps leading to creation of lien for municipal improvement, sufficient basis for judgment as against mere denial; *Bodley v. Finley*, 111 Ky. 618, 64 S. W. 439, as to necessity of alleging street grade fixed by council, in petition to enforce lien for street assessment; *Gaertner v. Louisville Artificial Stone Co.* 114 Ky. 164, 70 S. W. 293, holding averments and prima facie evidence of steps leading to creation of lien for municipal improvements sufficient basis for judgment as against insufficient denial.

13 L. R. A. 670, *ATTY. GEN. v. MARSTON*, 66 N. H. 485, 22 Atl. 560.

Incompatibility of offices.

Cited in *State ex rel. Little v. Slagle*, 115 Tenn. 341, 89 S. W. 326, holding where one accepts a second office incompatible with the one already held by him, the office first held is thereby ipso facto terminated without judicial proceedings of any kind; *Old Dominion Bldg. & L. Asso. v. Sohn*, 54 W. Va. 115, 46 S. E. 222, holding office of notary public and judge of criminal court are incompatible.

Cited in footnotes to *Atty. Gen. ex rel. Moreland v. Detroit*, 37 L. R. A. 211, which holds office of governor incompatible with that of mayor of city; *State ex rel. Walker v. Bus*, 33 L. R. A. 616, which holds deputy sheriff not state officer within prohibition against holding county or municipal office; *Bishop v. State*, 39 L. R. A. 278, which holds postmaster of local postoffice a "deputy postmaster" within provision as to right to hold other office.

When resignation of office complete.

Cited in note (23 L. R. A. 681, 683) on necessity of acceptance to complete resignation of office.

Resignation of one of two incompatible offices.

Cited in footnote to *State ex rel. Childs v. Sutton*, 30 L. R. A. 630, which holds disability of member of legislature to hold other office during term not affected by resignation.

13 L. R. A. 671, *CONDON v. KEMPER*, 47 Kan. 126, 27 Pac. 829.

Followed without discussion in *Rinard v. Gardner*, 49 Kan. 569, 31 Pac. 134; *Cunningham v. Hill*, 80 Kan. 706, 102 Pac. 1102.

Whether stipulated forfeiture regarded as penalty or liquidated damages.

Cited in *Kelly v. Fejervary*, 111 Iowa, 697, 83 N. W. 791, holding stipulation for forfeit of \$10 for each default in performance of building contract, as "liquidated damages," construed as penalty, in absence of evidence to contrary; *Willson v. Baltimore*, 83 Md. 212, 55 Am. St. Rep. 339, 34 Atl. 774, holding deposit by bidder upon municipal contract, conditioned that he will enter into bond for performance if bid accepted, not liquidated damages; *Cimarron Land Co. v. Barton*, 51 Kan. 557, 33 Pac. 317, holding judgment for penalty named in bond for deed,

in default of performance, erroneous, in absence of evidence of actual damage; *St. Louis & S. F. R. Co. v. Gaba*, 78 Kan. 436, 97 Pac. 435, holding extent of a possible future loss to be paid in event of a breach of contract may be agreed upon in advance where there is a difficulty in determining the extent of the loss and the resulting damages are uncertain; *Ross v. Loescher*, 152 Mich. 389, 125 Am. St. Rep. 418, 116 N. W. 103, holding question whether sum named in a building contract was intended as a penalty or as fixed compensation was for jury; *J. I. Case Threshing Mach. Co. v. Fronk*, 105 Minn. 41, 117 N. W. 229, holding that where from nature of contract actual damages are ascertainable the stipulated sum reserved will be construed to be a penalty; *Stony Creek Lumber Co. v. Fields*, 102 Va. 7, 45 S. E. 797, 1 A. & E. Ann. Cas. 242, holding where from the nature of the contract or the work to be performed, it is not difficult or impossible to ascertain and assess the damages resulting from failure to perform, the sum reserved from periodical payments until final settlement or until work is completed, is in nature of penalty and not liquidated damages; *Evans v. Moseley*, 84 Kan. 327, — L.R.A.(N.S.) —, 114 Pac. 374, holding that it will be presumed that parties intended penalty only and not liquidated damages especially where language is susceptible of either construction; *Evans v. Moseley*, 84 Kan. 328, — L.R.A.(N.S.) —, 114 Pac. 374, declaring stipulation for forfeiture in case of breach of contract for sale of cattle to be for a penalty, and not for liquidated damages.

Cited in footnotes to *Wilhelm v. Eaves*, 14 L. R. A. 297, which construes stipulation for liquidated damages as penalty; *Wallis Iron Works v. Monmouth Park Asso.* 19 L. R. A. 456, which holds as liquidated damages amount expressly fixed as damages for default in completing grand stand; *Krutz v. Robbins*, 28 L. R. A. 676, which holds agreement for greater rate of interest on default in paying principal, interest, etc., a penalty; *Meyer v. Estes*, 32 L. R. A. 283, which holds penalty provided for by contract that purchaser wrongfully using electrotype plates shall pay fine of ten times their price; *State v. Larson*, 54 L. R. A. 487, which holds amount of liquor license bond, penalty.

Cited in notes (34 L.R.A.(N.S.) 589, 596, 597, 600, 603) on damage provision in building contract as penalty or liquidated damages; (108 Am. St. Rep. 49, 50, 52) on agreements purporting to liquidate damages.

13 L. R. A. 676, *BURDITT v. COLBURN*, 63 Vt. 231, 22 Atl. 572.

Mortgage by individual to self as representative.

Cited in *Brumby v. Jones*, 72 C. C. A. 466, 141 Fed. 323, holding mortgage from one individual to himself as executor void for want of contracting parties.

13 L. R. A. 678, *CROSSMAN v. JOHNSON*, 63 Vt. 333, 22 Atl. 608.

Sales; warranty of quality.

Cited in note (15 L. R. A. 795) on effect of representing things sold to be "good."

13 L. R. A. 680, *MILLER v. WADDINGHAM*, 91 Cal. 377, 27 Pac. 750.

Fixtures.

Cited in *Jordan v. Myres*, 126 Cal. 509, 58 Pac. 1061, holding laborers working mining claim not entitled to lien on engine and other machinery, attached to realty, but not property of employer; *Dietz v. Mission Transfer Co.* 95 Cal. 102, 30 Pac. 380 (dissenting opinion), as to where article is fixture or not being question of fact to be determined by the circumstances; *McCrillis v. Cole*, 25 R. I. 161, 105 Am. St. Rep. 875, 55 Atl. 196, holding where third person purchased an engine and boiler and placed them in a mill without knowledge on

part of owner of an agreement whereby title was to remain in seller, as between owner and seller the former was entitled to the property; *Anderson v. Englehart*, 18 Wyo. 424, 108 Pac. 977, holding that mortgagee has right to restrain removal of fixtures when removal would have effect of impairing security.

Removal of houses on mortgaged land.

Cited in *Stowell v. Waddingham*, 100 Cal. 7, 34 Pac. 436, holding after houses are removed they become personalty and cease to be under operation of mortgage and mortgager cannot injoin further removal; *Conde v. Sweeney*, 16 Cal. App. 163, 116 Pac. 319; *Conde v. Sweeney*, 14 Cal. App. 24, 110 Pac. 973,—to the point that mortgagee cannot disturb mortgagor in use of land so long as sufficiency of security is unimpaired.

Accountability between vendor and purchaser for taxes and like on land.

Cited in *Swanston v. Clark*, 153 Cal. 306, 95 Pac. 1117, holding seller of land not accountable to purchaser in possession for taxes and charges created after he ceased to have rents and profits.

13 L. R. A. 682, *HEWLETT v. GEORGE*, 68 Miss. 103, 9 So. 885.

Deposition.

Cited in note (14 L.R.A.(N.S.) 489) on admissibility of previously taken testimony or deposition of party relating to personal transaction with adversary, after latter's death.

Punitive damages.

Cited in notes (8 Eng. Rul. Cas. 379) on right to punitive damages; (28 Am. St. Rep. 875) on exemplary or punitive damages.

Distinguished in *Wagner v. Gibbs*, 80 Miss. 62, 92 Am. St. Rep. 598, 31 So. 434, holding punitive damages recoverable of assailant in action for assault and battery, notwithstanding death of party assailed.

Compensatory damages.

Cited in *State ex rel. Hartley v. Evans*, 83 Mo. App. 307, holding damages for disgrace and humiliation may be recovered in action for false imprisonment; *Hickey v. Welch*, 91 Mo. App. 15, holding anxiety, fright, and other injuries, mental or physical, may be considered in estimating actual damages from assault; *Cumberland Teleg. & Teleph. Co. v. Hobart*, 89 Miss. 281, 119 Am. St. Rep. 702, 42 So. 349, holding telephone company wrongfully cutting out a subscriber's telephone liable for inconvenience and annoyance as well as for actual damages.

Emancipation of infants.

Cited in note (16 L. R. A. 579) on how far marriage of infant works his emancipation.

Minor's right of action against parent.

Cited in *Clasen v. Pruhs*, 69 Neb. 286, 95 N. W. 640, 5 A. & E. Ann. Cas. 112, holding where child has been taken from custody of its foster mother it may maintain action against her for assault; *Roller v. Roller*, 37 Wash. 246, 68 L.R.A. 894, 107 Am. St. Rep. 805, 79 Pac. 788, 3 A. & E. Ann. Cas. 1, holding no action in tort lies in favor of child against father for rape.

Cited in footnotes to *McKelvey v. McKelvey*, 64 L.R.A. 991, which denies child's right of action against father and stepmother for cruel and inhuman treatment; *Roller v. Roller*, 68 L.R.A. 893, which denies minor child's right of action against father for damages for rape committed upon her.

Cited in note (21 L.R.A.(N.S.) 218) on liability of parent or custodian for punishment of child.

13 L. R. A. 684, *OLNEY v. GERMAN INS. CO.* 88 Mich. 94, 26 Am. St. Rep. 291, 50 N. W. 100.

Insurance; change of title.

Cited in notes (38 L.R.A. 563) on mortgage as effecting change of title or interest in insured property; (19 L. R. A. 218) on severability of insurance in same policy.

13 L. R. A. 686, *BANGOR v. SMITH*, 83 Me. 422, 22 Atl. 379.

Interstate commerce.

Cited in *Compagnie Francaise De Navigation A Vapeur v. State Board of Health*, 186 U. S. 400, 46 L. ed. 1219, 22 Sup. Ct. Rep. 811 (dissenting opinion), majority holding state statute empowering local board of health to exclude healthy persons from locality infected with contagious disease not in conflict with United States Constitution.

Cited in footnote to *Lafarier v. Grand Trunk R. Co.* 17 L. R. A. 111, which holds state statute giving ticket holder stopover rights not applicable outside of state.

13 L. R. A. 689, *HARALSON v. MCARTHUR*, 87 Ga. 478, 13 S. E. 594.

Relief from judgment.

Cited in note (80 Am. St. Rep. 270) on negligence or inadvertence of attorney as ground for relief from judgment.

13 L. R. A. 690, *WILLIAMSON v. HILL*, 154 Mass. 117, 27 N. E. 1008.

13 L. R. A. 693, *WOLF v. O'CONNOR*, 88 Mich. 124, 50 N. W. 118.

Followed without discussion in *Seely v. O'Conner*, 88 Mich. 134, 50 N. W. 129.

Fraudulent conveyances; laches.

Cited in *Daniel v. Palmer*, 124 Mich. 338, 82 N. W. 1067, holding bill in equity in aid of execution, to set aside alleged fraudulent conveyance of real estate, must be filed within one year after levy.

Cited in note (58 Am. St. Rep. 88) on fraudulent assignments for creditors.

Execution on equitable interest of debtor.

Cited in *Flynn v. Holmes*, 145 Mich. 613, 11 L.R.A.(N.S.) 215, 108 N. W. 685, holding that deed absolute, to secure debt may be levied on under execution against grantor.

13 L. R. A. 698, *AYRES v. DUTTON*, 87 Mich. 528, 49 N. W. 807.

Contributions to secure location of specific enterprises.

Cited in footnotes to *Fort Wayne Electric Light Co. v. Miller*, 14 L. R. A. 804, which authorizes recovery back on removal of subscriptions made to secure location of factory; *Texas & P. R. Co. v. Scott*, 37 L. R. A. 94, which holds agreement to establish depot at particular point not required keeping it there forever.

Cited in note (19 L. R. A. 268) on condition in deed that land is to be used for specified charitable public or quasi-public purpose.

Distinguished in *Flint & P. M. R. Co. v. Rich*, 91 Mich. 297, 51 N. W. 1001, holding that railroad abandoning road must reimburse persons contributing to construction; *Williams v. Flint & P. M. R. Co.* 116 Mich. 396, 74 N. W. 641, holding contributor to railroad who does not present claim in proceeding by company for abandonment of road, precluded from thereafter presenting same.

13 L. R. A. 701, *MILLER v. MEAD*, 127 N. Y. 544, 28 N. E. 387.

Mechanics' liens; improvement with "consent of owner."

Cited in *National Wall Paper Co. v. Sire*, 163 N. Y. 130, 57 N. E. 293, Reversing 37 App. Div. 407, 55 N. Y. Supp. 1009, holding lien for repairs made by lessee attaches to realty, where lease provides lessee shall repair at own cost, and improvements belong to owner upon re-entry; *Jones v. Menke*, 168 N. Y. 64, 60 N. E. 1053, holding consent of owner to laying of tile floor shown by lease stipulating premises to be fitted up by lessee for liquor and restaurant business within time fixed; *Mosher v. Lewis*, 10 Misc. 376, 31 N. Y. Supp. 433, holding consent of owner to improvement by lessee shown by covenant of lessee to improve existing building or erect new one at own expense, although lienor had no knowledge of provisions of lease at time work done; *Steeves v. Sinclair*, 56 App. Div. 452, 67 N. Y. Supp. 776, holding lease stipulating for erection of building by lessee, which shall become property of lessor at expiration of term, shows consent of lessor to improvement; *Carey-Lombard Lumber Co. v. Jones*, 187 Ill. 211, 58 N. E. 347, holding building erected by lessee under lease providing for approval of plans by lessor, and that improvement shall become part of realty, entitles subcontractor to lien; *Vosseller v. Slater*, 25 App. Div. 371, 49 N. Y. Supp. 478, holding privilege given in executory contract of sale for removal of building by vendee, and knowledge of alterations therein, not sufficient proof of "consent" of vendor; *Malmgren v. Phinney*, 50 Minn. 464, 18 L. R. A. 755, 52 N. W. 915, holding lien for improvements by vendee under executory contract of sale not affected by provision that title and lien under mortgages for purchase money should not be affected by claims for labor and material; *Barnard v. Adorjan*, 116 App. Div. 537, 101 N. Y. Supp. 502, holding the interest of an owner in real property is chargeable with value of work performed or materials furnished in the erection or repair of any building thereon when the same is so performed or furnished with his consent, and a requirement in a contract between vendor and vendee or between landlord and tenant that the vendee or tenant shall make certain improvements on the premises is sufficient consent of owner to charge property with claims which accrue in making those improvements; *Tineley v. Smith*, 115 App. Div. 710, 101 N. Y. Supp. 382, holding owner of building by giving a lease wherein lessee covenants to repair "consents" to repairs thereon by third person under contract with lessee, so as to charge building with mechanic's lien under statute.

Cited in footnote to *Beck v. Catholic University of America*, 60 L. R. A. 315, Reversing 62 App. Div. 602, 71 N. Y. Supp. 370, which holds vendor's consent to erection of buildings not shown by clause in land contract giving vendee "right of immediate possession" for erection of buildings.

Cited in note (11 L.R.A.(N.S.) 768) on requiring or permitting another to make improvements at his own expense as rendering land owner's interest subject to lien.

Distinguished in *Cowen v. Paddock*, 137 N. Y. 193, 33 N. E. 154, Affirming 43 N. Y. S. R. 344, 17 N. Y. Supp. 387, holding consent of vendor to improvement not shown where vendee took possession contrary to contract, and erected building against protest of vendor; *Regan v. Borst*, 11 Misc. 96, 32 N. Y. Supp. 810, holding lease of premises for hotel and saloon, for which alterations would be necessary, and provision that improvements shall become part of fee, not sufficient to show consent by implication where lease provides no alterations shall be made without written consent of lessor.

Sufficiency of performance as condition to lien.

Cited in *Hollister v. Mott*, 32 N. Y. S. R. 745, 10 N. Y. Supp. 409, holding

substantial performance sufficient to entitle contractor to claim lien; *New v. Carroll*, 73 Hun, 566, 26 N. Y. Supp. 320, holding subcontractor entitled to lien for work done according to plans of owner's architect, although principal contractor disabled from completing contract with owner.

Rights of subcontractors.

Cited in note (20 L. R. A. 565) on payment to contractors or subcontractors as affecting liens of subordinate claimants.

13 L. R. A. 707, *BURKETT v. GRIFFITH*, 90 Cal. 532, 25 Am. St. Rep. 151, 27 Pac. 527.

Slander of title.

Approved in *Hygienic Fleeced Underwear Co. v. Way*, 35 Pa. Super. Ct. 234, holding to support action for slander of title it must be shown that the false statement was made in bad faith and that special damage resulted therefrom.

Cited in *Butts v. Long*, 94 Mo. App. 609, 68 S. W. 754 (dissenting opinion), majority holding petition alleging slanderous words uttered after completed contract of sale, but before deed issued, whereby plaintiff was compelled to sell for less sum, sufficient on demurrer; *Continental Realty Co. v. Little*, 135 Ky. 623, 117 S. W. 310, holding petition in an action for slander of title must set out the words constituting the slander and the special damage incurred thereby.

Cited in footnote to *Reyes v. Middleton*, 29 L. R. A. 66, which denies injunction against slander of title.

Cited in notes (16 L.R.A. 244) on injunction against false statements as to plaintiff's property or business; (9 Eng. Rul. Cas. 185) on malice as essential to slander of title.

Argumentative pleading.

Cited in *Hibernia Sav. & L. Soc. v. Thornton*, 117 Cal. 483, 49 Pac. 573, holding complaint sufficient to support action upon promissory note not bad because of recital at end of note that same is secured by mortgage; *Re Cook*, 137 Cal. 191, 69 Pac. 968, holding allegation that inventory and appraisement were made with reference to papers and records in clerk's office not sufficient averment of value in petition for sale of real estate of decedent; *Weinberger v. Weidman*, 134 Cal. 601, 66 Pac. 869, holding defendant's admission of allegation in complaint of amount due upon note, coupled with explanation that change in interest was agreed upon at date before note became barred, not sufficient to show renewal in writing before note barred; *Union Sewer Pipe Co. v. Olson*, 82 Minn. 190, 84 N. W. 756, holding on demurrer, sufficiency of contractor's bond, attached as exhibit to complaint thereon, may be determined from inspection of its provisions; *Cave v. Gill*, 59 S. C. 258, 37 S. E. 817, holding on demurrer to complaint for goods sold and delivered, insufficient allegations as to consideration may be cured by taking same in connection with exhibit of account attached to complaint; *Wells, F. & Co. v. McCarthy*, 5 Cal. App. 307, 90 Pac. 203, holding argumentative pleading is no more permissible under the Code than it was at common law.

Reference to exhibits to supply defect in pleadings.

Cited in *San Francisco Sulphur Co. v. Aetna Indemnity Co.* 11 Cal. App. 693, 106 Pac. 111, holding allegations in complaint control recitals in an undertaking attached to complaint as exhibit; *Barton v. Territory*, 10 Ariz. 109, 85 Pac. 730, holding that statement in exhibit filed with and made part of complaint cannot be taken as substantive allegation and supply omissions in complaint; *Ablers v. Smiley*, 11 Cal. App. 345, 104 Pac. 997, holding whatever is an essential element to a cause of action must be presented by distinct averment,

and cannot be left to inference drawn from the construction of a document attached to complaint.

Distinguished in *Santa Rosa Bank v. Paxton*, 149 Cal. 199, 86 Pac. 193, holding power of attorney made part of complaint may be referred to to supply defective allegation in complaint.

Construction of pleadings under Code.

Cited in *Witham v. Blood*, 124 Iowa, 698, 100 N. W. 558, holding under code pleadings are to be construed liberally.

13 L. R. A. 711, *COHEN v. KNOX*, 90 Cal. 266, 27 Pac. 215.

Fraudulent conveyances.

Cited in *Vansickle v. Wells, F. & Co.* 105 Fed. 24, holding conveyance to wife in payment of indebtedness, when husband indebted to others, not presumptively fraudulent; *Welch v. Morris*, 193 Mo. 316, 92 S. W. 98; *Priest v. Brown*, 100 Cal. 634, 35 Pac. 323,—holding title of purchaser in good faith not affected by fact that conveyance was made with intention of defrauding creditors; *Emmons v. Barton*, 109 Cal. 671, 42 Pac. 303, holding conveyance made by husband or father to his wife or child is valid as against creditors although the consideration was love and affection alone, unless it was made with intent to defraud his creditors.

Defective complaint cured by answer.

Cited in *Flinn v. Ferry*, 127 Cal. 654, 60 Pac. 434, holding complaint in replevin alleging plaintiff in possession day before filing cured by answer denying plaintiff's right to possession, and alleging ownership and right of possession at all times in defendant; *Bell v. Murray*, 13 Colo. App. 224, 57 Pac. 488, holding complaint in action to restrain sale of property under execution, and to prevent cloud on title defective in showing record title not in judgment debtor, cured by answer showing such party equitable owner of premises; *Antonelle v. Kennedy & S. Lumber Co.* 140 Cal. 321, 73 Pac. 966, holding variance between plaintiff's pleading and proof immaterial, where defendant set out contract relied on in full; *Vance v. Anderson*, 113 Cal. 536, 45 Pac. 816, holding complaint in ejectment which fails to allege that plaintiff was entitled to possession is cured by denial in answer that plaintiff was entitled to possession; *Kreling v. Kreling*, 118 Cal. 420, 50 Pac. 646; *Abner Doble Co. v. Keystone Consol. Min. Co.* 145 Cal. 496, 78 Pac. 1050; *Mahoney v. American Land & Water Co.* 2 Cal. App. 189, 83 Pac. 267; *Donegan v. Houston*, 5 Cal. App. 632, 90 Pac. 1073; *Daggett v. Gray*, 110 Cal. 172, 42 Pac. 568,—holding complaint which lacks the averment of a fact essential to a cause of action may be so aided by the averment of that fact in the answer as to uphold a judgment thereon.

Distinguished in *Vanalstine v. Whelan*, 135 Cal. 234, 67 Pac. 125, holding complaint in replevin, omitting averment of ownership and right of possession at time action commenced, not cured by answer alleging that plaintiff was not owner or entitled to possession at commencement of action, "or at any other time;" *Hibernia Sav. & L. Soc. v. Thornton*, 123 Cal. 63, 55 Pac. 702, holding complaint for recovery merely of judgment for amount of note will not entitle plaintiff to foreclosure, upon answer alleging note one of several secured by mortgage.

13 L. R. A. 714, *PECK v. REES*, 7 Utah, 467, 27 Pac. 581.

Delivery of deeds.

Cited in footnotes to *King v. Smith*, 54 L. R. A. 708, which sustains delivery of gift to donee by third person after donor's final loss of consciousness; *Martin v. Flaharty*, 19 L. R. A. 243, which holds manual delivery of deed not essential;

Parrot v. Avery, 23 L. R. A. 153, which holds execution of deed in presence of witness not sufficient delivery; *Daggett v. Simonds*, 46 L. R. A. 332, which sustains right of one to whom note delivered in escrow to be delivered on payee's death, to deliver same on happening of condition.

Cited in notes (54 L. R. A. 865, 882) on delivery of deed to third persons; or record, or delivery for record, by grantor; (53 Am. St. Rep. 554) on what is a delivery of a deed; (99 Am. St. Rep. 901, 908) on gifts *causa mortis*.

Distinguished in *Schlicher v. Keeler*, 61 N. J. Eq. 396, 48 Atl. 393, holding delivery to scrivener to hold for grantee until grantor's death, without reservation of control, sufficient.

13 L. R. A. 717, *BAEHR v. CLARK*, 83 Iowa, 313, 49 N. W. 840.

Estoppel to claim title to personal property.

Cited in *Gilman Linseed Oil Co. v. Norton*, 89 Iowa, 444, 48 Am. St. Rep. 400, 56 N. W. 663, holding owner not estopped from claiming personal property against innocent purchaser from owner's agent in possession, but without authority to sell; *Quinton v. Cutlip*, 1 Okla. 310, 32 Pac. 269, holding *de jure* municipal corporation not liable for goods sold *de facto* corporation, where delivery made after former came into being, and officers of latter converted property to own use.

Cited in footnote to *O'Connor v. Clark*, 29 L. R. A. 607, which holds one permitting another to have name and occupation painted on wagon estopped to assert title as against innocent purchaser.

Cited in notes (25 L.R.A.(N.S.) 778) on right of one leaving chattels in another's possession as against latter's vendees or creditors; (2 Eng. Rul. Cas. 436) on title of purchaser from one obtaining property from owner by fraud.

13 L. R. A. 719, *REYNOLDS v. HANES*, 83 Iowa, 342, 32 Am. St. Rep. 311, 49 N. W. 851.

Liberal construction of exemption laws.

Cited in *Puget Sound Dressed Beef & Packing Co. v. Jeffs*, 11 Wash. 471, 27 L. R. A. 810, 48 Am. St. Rep. 885, 39 Pac. 962; *Chase v. Swayne*, 88 Tex. 222, 53 Am. St. Rep. 742, 30 S. W. 1049; *Wright v. Brooks*, 101 Tenn. 604, 49 S. W. 828,—holding proceeds of insurance policy upon exempt property not subject to garnishment for debts of assured; *Ellis v. Pratt City*, 111 Ala. 630, 33 L. R. A. 265, 56 Am. St. Rep. 76, 20 So. 649, holding proceeds of insurance on city hall exempt from garnishment; *Cleveland v. McCanna*, 7 N. D. 459, 41 L. R. A. 854, 66 Am. St. Rep. 670, 75 N. W. 908, and *Treat v. Wilson*, 65 Kan. 733, 70 Pac. 893, refusing to set off judgment against another judgment representing proceeds of exempt property; *Millington v. Laurer*, 89 Iowa, 325, 48 Am. St. Rep. 385, 56 N. W. 533, holding judgment creditor cannot set off judgment against claim of assignee of exempt personal earnings of judgment debtor; *Kinzer v. Stephens*, 121 Iowa, 349, 96 N. W. 858, holding proceeds of heir's voluntary sale of interest in homestead not exempt; *Caldwell v. Ryan*, 210 Mo. 38, 16 L.R.A.(N.S.) 504, 124 Am. St. Rep. 717, 108 S. W. 533, 14 A. & E. Ann. Cas. 314 (dissenting opinion), as to insurance on exempt property from execution being itself exempt.

Cited in footnote to *Equitable Life Assur. Soc. v. Goode*, 35 L. R. A. 690, which holds law library of attorney occupying part of time in legal business exempt.

Cited in notes (19 L. R. A. 34) on how far proceeds of exempt property retain exempt character; (66 Am. St. Rep. 385) on exemption of proceeds of exempt personalty; 45 Am. St. Rep. 238) on exemption of proceeds and produce of homestead.

13 L. R. A. 721, JAMESVILLE & W. R. CO. v. FISHER, 109 N. C. 1, 13 S. E. 698.

Eligibility to office.

Cited in *State v. Toland*, 36 S. C. 520, 15 S. E. 599, holding minor may act as special deputy of sheriff; *Prince v. Dickson*, 39 S. C. 482, 18 S. E. 33, holding appointment of special deputy sheriff to summons to renew judgment authorized; *Somers v. Burke County*, 123 N. C. 584, 68 Am. St. Rep. 834, 31 S. E. 873, upholding that agency of deputy sheriff terminates upon sheriff being adjudged insane.

Cited in footnotes to *State ex rel. Peters v. Davidson*, 20 L. R. A. 311, and *Opinion of Justices*, 32 L. R. A. 350, which hold woman ineligible to office of notary public.

Distinguished in *Atty. Gen. v. Abbott*, 121 Mich. 547, 47 L. R. A. 96, 80 N. W. 372, holding woman ineligible to hold office of prosecuting attorney.

13 L. R. A. 723, McCLURE v. MELTON, 34 S. C. 377, 13 S. E. 615.

Subrogation.

Cited in *Robinson v. Lowery*, 52 S. C. 467, 30 S. E. 487, holding purchaser not entitled to be subrogated to rights of mortgagee upon payment of mortgage of which he had notice.

Running of limitations.

Cited in notes (3 L.R.A.(N.S.) 1188) on effect of injunction against suing on running of limitations; (15 L.R.A.(N.S.) 158) as to whether limitations commence to run at time of breach of contract, or at time actual damages sustained.

13 L. R. A. 728, ROUX v. BLODGETT & D. LUMBER CO. 85 Mich. 519, 24 Am. St. Rep. 102, 48 N. W. 1092.

Assumption of risk by servant.

Cited in *Dempsey v. Sawyer*, 95 Me. 302, 49 Atl. 1035, holding employee using defective circular-saw machine, after complaint to master and promise to repair, works at master's risk; *McFarlan Carriage Co. v. Potter*, 153 Ind. 115, 53 N. E. 465, Affirming 21 Ind. App. 699, 51 N. E. 737, holding servant does not assume risk, where promise made to repair "soon as job completed," and injury occurs before time expires; *Rice v. Eureka Paper Co.* 174 N. Y. 392, 62 L. R. A. 614, 95 Am. St. Rep. 585, 66 N. E. 979, holding master liable for injuries to servant induced to remain at work by promise to fix defective machine within a few days; *Schlacker v. Ashland Iron Min. Co.* 89 Mich. 261, 50 N. W. 839, holding master responsible for injury from fall of roof of mine, where mining captain when warned of danger promised to attend to same, and ordered employees back to work; *Gardner v. Michigan C. R. Co.* 150 U. S. 360, 37 L. ed. 1110, 14 Sup. Ct. Rep. 140, holding employee's assumption of risk of negligence of fellow servants does not relieve railroad from liability for injury to brakeman from defect in planking between tracks; *Ashman v. Flint & P. M. R. Co.* 90 Mich. 571, 51 N. W. 645, holding failure of railroad to keep frogs in yards filled or blocked negligence; *Schroeder v. Flint & P. M. R. Co.* 103 Mich. 222, 29 L. R. A. 325, 50 Am. St. Rep. 354, 61 N. W. 663 (concurring opinion), majority holding master not liable for injury to servant from failure of foreman to give notice when train, which was being unloaded, was about to move; *Lynch v. Chicago, St. L. & P. R. Co.* 8 Ind. App. 520, 36 N. E. 44, holding servant rolling car wheel along track with knowledge of defective condition, and of danger therefrom, assumes risk; *Pittsburgh, C. C. & St. L. R. Co. v. Woodward*, 9 Ind. App. 171, 36 N. E. 442, holding employee not bound, with master, to inspect appliances to discover

latent defects; *Freeman v. Savannah Electric Co.* 130 Ga. 454, 60 S. E. 1042, holding promise of master to repair or replace a defective machine will not excuse employee from exercise of ordinary care in its use before defect is remedied; *Anderson v. Seropian*, 147 Cal. 209, 81 Pac. 521; *Brouseau v. Kellogg Switchboard & Supply Co.* 158 Mich. 317, 27 L.R.A.(N.S.) 1056, 122 N. W. 620; *Sapp v. Christie Bros.* 79 Neb. 709, 115 N. W. 319; *Morgan v. Rainer Beach Lumber Co.* 51 Wash. 342, 22 L.R.A.(N.S.) 477, 98 Pac. 1120; *Foster v. Chicago, R. I. & P. R. Co.* 127 Iowa, 89, 102 N. W. 422, 4 A. & E. Ann. Cas. 150,—holding when master has expressly promised to repair defect the servant can recover for an injury caused thereby within such a period of time as it would be reasonable to allow for its performance.

Cited in footnote to *Stager v. Troy Laundry Co.* 53 L. R. A. 459, which holds risk of hand passing under guard rails into rollers not assumed as matter of law by servant operating mangle in laundry.

Cited in notes (40 L. R. A. 782) on rights of servant who continues work on faith of master's promise to remove specific cause of danger; (17 Eng. Rul. Cas. 239) on assumption of risks by employee; (119 Am. St. Rep. 435) on recovery for injury due to nonrepair of machinery due to master's failure to perform promise to repair.

Distinguished in *Dewey v. Detroit, G. H. & M. R. Co.* 97 Mich. 332, 22 L. R. A. 293, 37 Am. St. Rep. 348, 56 N. W. 756, Reversing on rehearing 97 Mich. 343, 16 L. R. A. 343, 52 N. W. 942, holding railroad not liable for injury to brakeman from neglect of car inspector to observe that car improperly loaded before putting into train.

Contributory negligence.

Cited in *Roux v. Blodgett & D. Lumber Co.* 94 Mich. 608, 54 N. W. 492, and *Ashman v. Flint & P. M. R. Co.* 90 Mich. 573, 51 N. W. 645, holding, when facts respecting negligence are such that different minds may honestly draw different conclusions from them, question for jury; *Haines v. Lake Shore & M. S. R. Co.* 129 Mich. 484, 89 N. W. 349, holding, where evidence as to looking and listening at railroad crossing is conflicting, question of contributory negligence for jury; *Smith v. Spokane*, 16 Wash. 408, 47 Pac. 888, holding contributory negligence of plaintiff using sidewalk covered with snow and ice properly submitted to jury; *Becker v. Detroit Citizens' Street R. Co.* 121 Mich. 587, 80 N. W. 581, holding motorman, who has already made stop required by ordinance, attempting to cross another road with car, when approaching car 150 or 200 feet away, and required also to stop, not negligent; *Saner v. Lake Shore & M. S. R. Co.* 108 Mich. 33, 65 N. W. 624 (dissenting opinion), majority holding section hand injured while passing over moving flat cars, preparatory to getting off train, upon order of conductor, negligent; *Powers v. Thayer Lumber Co.* 92 Mich. 542, 52 N. W. 937 (dissenting opinion), majority holding negligence of brakeman, in so loading logging train as to interfere with tree which he knows stands too near track, proximate cause of injury; *Grostick v. Detroit, L. & N. R. Co.* 90 Mich. 607, 51 N. W. 667 (dissenting opinion), majority holding person looking in one direction only before driving across railroad guilty of contributory negligence.

Distinguished in *Hayball v. Detroit, G. H. & M. R. Co.* 114 Mich. 140, 72 N. W. 145, holding employee continuing to work with defective machinery after repeated complaints, and being told there was no time to fix it, negligent; *Soderstrom v. Holland-Emery Lumber Co.* 114 Mich. 86, 72 N. W. 13, holding employee piling lumber upon dock knowing it to be unsafe, and after orders from superior to refrain from working there, guilty of negligence.

13 L. R. A. 733, *HUNNEWELL v. DUXBURY*, 154 Mass. 286, 28 N. E. 267.
Right of action for deceit.

Cited in *Hunnewell v. Duxbury*, 157 Mass. 2, 31 N. E. 700, holding reference of creditor of corporation to certificate on file, containing false statement of assets, not ground for action of deceit; *Nash v. Minnesota Title, Ins. & T. Co.* 159 Mass. 442, 34 N. E. 625, holding, where letter addressed by title insurance company to trustee of corporation, intended for use in selling bonds, representations concerning value of security deemed made to all persons to whom letter shown; *Henry v. Dennis*, 95 Me. 29, 85 Am. St. Rep. 365, 49 Atl. 58, holding writer of letter containing false representations as to solvency, for purpose of inducing credit, liable in action for deceit to firm of which addressee of letter is member; *Merchants' Nat. Bank v. Armstrong*, 65 Fed. 940, holding bank discounting note, on security of stock on another bank, which had published false statement of condition, without cause of action for deceit; *Dettra v. Kestner*, 147 Pa. 576, 23 Atl. 889, holding misrepresentations of officers of mutual insurance company to induce one to become member no defense to action for assessment where rights of innocent third parties have intervened; *Greene v. Mercantile Trust Co.* 60 Misc. 195, 111 N. Y. Supp. 802, holding to sustain an action for deceit, misrepresentations must have been made to plaintiff individually or as one of a class to whom they are in fact addressed or have been intended to influence his conduct in the particulars of which he complains; *McKee v. Rudd*, 222 Mo. 364, 133 Am. St. Rep. 529, 121 S. W. 312; *Webb v. Rockefeller*, 195 Mo. 70, 6 L.R.A.(N.S.) 878, 93 S. W. 772,—holding filing of false certificate does not render incorporators liable to creditors in action for deceit; *Cheney v. Dickinson*, 28 L.R.A.(N.S.) 359, 96 C. C. A. 314, 172 Fed. 112, holding officers of corporation who issued fraudulent prospectus to sell treasury stock are not liable in damages for the fraud to one who, in reliance upon it, purchased from an individual stock in which corporation had no interest; *McKee v. Rudd*, 222 Mo. 372, 133 Am. St. Rep. 529, 121 S. W. 312, holding that judgment creditor of corporation, whose charter falsely recites that stock is paid up cannot on that ground recover against officers who have not paid their stock in money; *Puffer v. Welch*, 144 Wis. 514, 129 N. W. 525, Ann. Cas. 1912 A, 1120, to the point that person has no right to rely on statements in certificate made by foreign corporation which certificate is required to be filed before doing business in state.

Cited in notes (6 L.R.A.(N.S.) 876) on false statements in required reports to public officers as basis of common law action by individuals for deceit against officers or directors; (85 Am. St. Rep. 390) on liability for misrepresentations indirectly made to complaining party.

Distinguished in *Hindman v. First Nat. Bank*, 57 L. R. A. 117, 50 C. C. A. 634, 112 Fed. 942, Reversing 86 Fed. 1018, holding misrepresentations of bank inducing issue of license to insurance company, ground for action for deceit by one induced to purchase stock, if representation intended also for information of those dealing in shares; *Warfield v. Clark*, 118 Iowa, 72, 91 N. W. 833, holding officer making fraudulent statement of financial condition of insurance company, required by law, liable to purchaser of stock in reliance thereon.

Negligence; proximate cause.

Cited in footnotes to *Vallo v. United States Exp. Co.* 14 L. R. A. 743, which holds throwing trunk from delivery wagon in highway proximate cause of traveler falling over another trunk; *Herr v. Lebanon*, 16 L. R. A. 106, which holds want of barrier not proximate cause of omnibus going over wall, horse attempting to rise; *Chicago, St. P. M. & O. R. Co. v. Elliott*, 20 L. R. A. 582,

as to proximate cause of injury to shipper while stepping from stock car to caboose; *Western R. Co. v. Mutch*, 21 L. R. A. 316, which holds excessive speed not proximate cause of death of boy attempting to catch on train; *McKenna v. Baessler*, 17 L. R. A. 310, which holds original fire cause of destruction of property by back fire.

Statutes requiring foreign corporations to file certificate.

Cited in *Steel v. Webster*, 188 Mass. 480, 74 N. E. 686; *National Fertilizer Co. v. Fall River Five Cents Sav. Bank*, 196 Mass. 461, 14 L.R.A.(N.S.) 564, 82 N. E. 671, 13 A. & E. Ann. Cas. 510,—as to object of statutes requiring foreign corporations to file certificate stating amount of its capital stock, etc.

13 L. R. A. 737, *McCASKILL v. CONNECTICUT SAV. BANK*, 60 Conn. 300, 25 Am. St. Rep. 323, 22 Atl. 568.

Instruments not negotiable.

Cited in *Olson v. Peterson*, 50 Ill. App. 329, holding certificate of superintendent of building as to amount due contractor not negotiable; *Mills v. Albany Exch. Sav. Bank*, 28 Misc. 253, 59 N. Y. Supp. 149, holding pass book of savings bank not negotiable instrument within statute providing for actions on lost negotiable instruments.

Cited in note (105 Am. St. Rep. 744, 745) on duties of savings banks toward depositors.

Estoppel.

Cited in *Marden v. Dorthy*, 160 N. Y. 60, 46 L. R. A. 701, 54 N. E. 728, holding grantor not estopped by deed, when signature obtained by trick or artifice.

13 L. R. A. 740, *HORNTHALL v. BURWELL*, 109 N. C. 10, 26 Am. St. Rep. 556, 13 S. E. 721.

Contract; law of domicile.

Cited in *Armstrong v. Best*, 112 N. C. 61, 25 L. R. A. 189, 34 Am. St. Rep. 473, 17 S. E. 14, holding married woman not liable for goods purchased in another state, where contract enforceable, unless free trader, or consent of husband obtained; *Adams v. Fellers*, 88 S. C. 216, 35 L.R.A.(N.S.) 389, 70 S. E. 722, holding that one renting machine to another for use in certain state, does not where he reclaims property as soon as he learns facts, lose title in favor of purchaser in another state to which lessee removes property without authority.

Statutes of domicile.

Cited in *Holshouser v. Gold Hill Copper Co.* 138 N. C. 257, 70 L.R.A. 187, 50 S. E. 650, holding law of comity does not require courts of one state, which are administering the assets of an insolvent foreign corporation, to give effect to a statute of its domicile imposing a license tax upon it, and making the tax a preferred debt in case of insolvency.

Chattel mortgages; removal of property to another state.

Cited in *Shapard v. Hynes* 52 L. R. A. 678, footnote, p. 675, 45 C. C. A. 275, 104 Fed. 453; *Craig v. Williams*, 90 Va. 506, 44 Am. St. Rep. 934, 18 S. E. 899; *Blythe v. Crump Bros.* 28 Tex. Civ. App. 329, 66 S. W. 885,—holding lien of mortgage duly recorded in state where executed not affected by removal of property to another state, though not recorded there; *Woody v. Jones*, 113 N. C. 255, 18 S. E. 205, and *Wilson v. Rustad*, 7 N. D. 332, 66 Am. St. Rep. 649, 75 N. W. 260, holding bona fide purchaser of personal property chargeable with notice of mortgage duly recorded in another state, in which mortgagor and mortgagee domiciled; *Greenville Nat. Bank v. Evans-Snyder-Buel Co.* 9 Okla.

368, 60 Pac. 249, upholding lien of chattel mortgage, duly executed and recorded, as against attachment in another state, to which property had been removed by mortgagor; *Wall v. Norfolk & W. R. Co.* 52 W. Va. 494, 64 L. R. A. 508, 94 Am. St. Rep. 948, 44 S. E. 294, holding garnishment of railroad cars in possession of company using them does not affect its rights under contract with company owning them; *Re Franklin*, 151 Fed. 644, holding registration of chattel mortgage notice even when property is carried into another state; *American Trust Co. v. W. & A. Fletcher Co.* 97 C. C. A. 477, 173 Fed. 478; *Hammels v. Sentous*, 151 Cal. 524, 91 Pac. 327, 12 A. & E. Ann. Cas. 945; *Studebaker Bros. Co. v. Mau*, 13 Wyo. 370, 110 Am. St. Rep. 1001, 80 Pac. 151,—holding when personal property which at the time is situated in a given state, is there mortgaged by owner and mortgage is duly executed and recorded by mode required by local law, so as to create a valid lien the lien remains good and effectual, although property is removed to another state, although mortgage is not recorded in state to which removal is made.

Cited in notes (64 L. R. A. 357, 366) on conflict of laws as to chattel mortgages; (109 Am. St. Rep. 454) on mortgagees' right of action against third persons for invasion of their rights; (56 Am. St. Rep. 862) on law of *lis pendens*; (69 Am. St. Rep. 113) on situs of debts for purposes of garnishment and of property in transit in hands of carriers.

Validity of judgments.

Cited in *Long v. Home Ins. Co.* 114 N. C. 468, 19 S. E. 347, holding personal service of summons in another state insufficient to give jurisdiction for personal judgment against defendant; *Williams v. Whitaker*, 110 N. C. 395, 14 S. E. 924, holding only persons having actual or constructive notice of proceedings for allotment of homestead, bound thereby.

Cited in footnote to *Allred v. Smith*, 65 L.R.A. 924, which holds judgment in action quasi in rem binding on the parties only.

13 L. R. A. 743, *STULTS v. SALE*, 92 Ky. 5, 36 Am. St. Rep. 575, 17 S. W. 148.
Homestead; effect of loss of family.

Cited in *Towne v. Rumsey*, 5 Wyo. 17, 35 Pac. 1025, and *Gowdy v. Johnson*, 104 Ky. 652, 44 L. R. A. 403, 47 S. W. 624, holding homestead right once acquired, not lost by loss of family; *Davis v. H. Feltman Co.* 112 Ky. 299, 9 Am. St. Rep. 289, 65 S. W. 615, holding loss of family by death and marriage does not divest homestead right; *Weaver v. First Nat. Bank*, 76 Kan. 547, 16 L.R.A.(N.S.) 117, 123 Am. St. Rep. 155, 94 Pac. 273; *Deweese v. Deweese*, 121 Ky. 749, 90 S. W. 256; *Palmer v. Sawyer*, 74 Neb. 114, 103 N. W. 1088, 12 A. & E. Ann. Cas. 715,—holding same; *Eastern Kentucky Asylum v. Cottle*, 143 Ky. 720, 137 S. W. 235, holding that lunatic who at time of commitment has homestead does not lose right thereto by reason of his confinement and death of family.

Cited in footnotes to *Purnell v. Reed*, 21 L. R. A. 839, which authorizes childless holder of homestead to dispose of it by will; *Lyons v. Andry*, 55 L. R. A. 724, which holds eighteen-year-old daughter working for father, dependent person within homestead law.

Cited in notes (4 L.R.A.(N.S.) 370) on what constitutes a "family" under homestead and exemption laws; (16 L.R.A.(N.S.) 113) on continuance of family as condition of continuance of homestead where a condition of inception.

Distinguished in *Fullerton v. Sherrill*, 114 Iowa, 515, 87 N. W. 419, holding widow acquiring homestead after death of husband loses right upon marriage of children, though continuing to occupy premises.

13 L. R. A. 745, *BRYANT v. THOMPSON*, 128 N. Y. 426, 28 N. E. 522.

Appeal; right of review.

Cited in *Merrick v. Kennedy*, 46 Neb. 269, 64 N. W. 989, holding executor without right of appeal from final order of distribution, unless pecuniarily affected by order; *Re Hodgman*, 140 N. Y. 430, 35 N. E. 660, Affirming 69 Hun, 487, 23 N. Y. Supp. 725, holding one of several executors cannot appeal from decree settling accounts, as champion of legatees who have submitted to decree; *Re Coe*, 55 App. Div. 271, 66 N. Y. Supp. 784, holding executor has no right of appeal from decree determining validity of bequest, which, if void, would go to residuary legatees, whom he does not represent; *Re Richmond*, 63 App. Div. 492, 71 N. Y. Supp. 795, holding administrator with will annexed, instituting proceedings for accounting by estate of deceased executor, to which all persons interested made parties, cannot appeal from decree; *Isam v. New York Assn.* 177 N. Y. 222, 69 N. E. 367, denying executor's right to appeal from determination as to what fund transfer tax payable from; *Re Stapleton*, 71 App. Div. 2, 75 N. Y. Supp. 657, holding executor named in will entitled to appeal from refusal of surrogate to admit codicil to will to probate; *Re Woodworth*, 64 Hun, 525, 19 N. Y. Supp. 525, and *Re Manning*, 139 N. Y. 448, 34 N. E. 931, holding appeal will not be entertained when, from lapse of time, no decision would have any practical effect upon controversy or parties; *St. John v. Andrews Institute*, 192 N. Y. 384, 85 N. E. 143, holding executor could not appeal from judgment in action brought by him to construe will; *Stern v. Marcuse*, 128 App. Div. 170, 112 N. Y. Supp. 653; *Betts v. State*, 67 Neb. 206, 93 N. W. 167, 2 A. & E. Ann. Cas. 625,—holding court will refuse to entertain appeals when it is plain nothing can be accomplished by the decision; *People v. Brooklyn Bank*, 140 App. Div. 756, 126 N. Y. Supp. 155 (dissenting opinion) as to when party is "aggrieved" so as to give right to appeal.

Distinguished in *Bliss v. Fosdick*, 76 Hun, 510, 27 N. Y. Supp. 1053, holding executors have right of appeal from adverse decree in action to compel trustee to transfer to them certain certificates of stock belonging to testator; *McLouth v. Hunt*, 164 N. Y. 188, 39 L. R. A. 234, 48 N. E. 548, holding contingency contemplated by will, upon which remainders to immediate beneficiaries of trust may be defeated, sufficient to warrant determination of appeal from decree construing will; *State ex rel. Durner v. Huegin*, 110 Wis. 226, 62 L. R. A. 732, 85 N. W. 1046, holding sheriff entitled to appeal from adjudication in habeas corpus proceeding requiring him to give prisoner liberty.

Wills; effect of proceedings adverse to rights of infants.

Cited in *Re Vandevort*, 62 Hun, 617, 17 N. Y. Supp. 316, holding, where no condition precedent imposed upon legacies to infant grandchildren, same cannot be defeated by action of parent of legatees making claim, which will provides shall have effect to cut off children.

Cited in note (21 L.R.A.(N.S.) 954) on what amounts to contest within forfeiture clause in will.

13 L. R. A. 748, *Re WRIGHT*, 3 Wyo. 478, 31 Am. St. Rep. 94, 27 Pac. 565.

Ex post facto laws.

Cited in *State ex rel. Sherburne v. Baker*, 50 La. Ann. 1249, 69 Am. St. Rep. 472, 24 So. 240, holding constitutional provision for trial of certain offenses without jury, *ex post facto* law as to offense committed before adoption of Constitution; *People ex rel. Chandler v. McDonald*, 5 Wyo. 534, 29 L. R. A. 837, 42 Pac. 15, holding statute taking away right of accused to object to examining magistrate upon information and belief not *ex post facto* law as to felony com-

mitted before enactment; *State v. Kyle*, 16^c Mo. 306, 56 L. R. A. 121, footnote p. 115, 65 S. W. 763, which sustains statute authorizing prosecution by information of crimes already committed; *State v. Rooley*, 12 N. D. 151, 95 N. W. 513, holding statute substituting the penitentiary for county jail as place of confinement pending execution not an *ex post facto* law; *Hallock v. United States*, 107 C. C. A. 487, 185 Fed. 421, holding that statute changing number of grand jurors is not *ex post facto* law as to crimes already committed.

Cited in footnotes to *People v. Hayes*, 23 L. R. A. 830, which holds change in statute, authorizing slighter punishment, not *ex post facto* law; *French v. Deane*, 24 L. R. A. 388, which holds void act giving right to punitive damages as to existing cause of action.

Cited in notes (38 L.R.A.(N.S.) 602) on constitutional or statutory provisions for prosecution of felony upon information without indictment as an *ex post facto* law; (37 Am. St. Rep. 595, 596) on *ex post facto* laws.

Distinguished in *Garnsey v. State*, 4 Okla. Crim. Rep. 555, 38 L.R.A.(N.S.) 606, 112 Pac. 24, holding indictment necessary requisite to give court jurisdiction of crime committed in Oklahoma before its admission as a state.

Due process of law.

Cited in *Re Boulter*, 5 Wyo. 333, 40 Pac. 520, and *State v. Krohne*, 4 Wyo. 359, 34 Pac. 3, holding statute permitting filing of information by county attorney, without preliminary examination of defendant, not unconstitutional; *State v. Tucker*, 36 Or. 296, 51 L. R. A. 249, 61 Pac. 894, holding statute providing for accusation of crime upon information filed by district attorney not violation of 14th Amendment to Federal Constitution.

Cited in footnote to *State v. Guglielmo*, 69 L.R.A. 466, which holds indictment by grand jury unnecessary to due process of law.

Judgments; collateral attack.

Cited in note (39 L. R. A. 452) on decision against constitutional right as nullity subject to collateral attack.

Habeas corpus, what reviewable by.

Cited in *Griffin v. Eaves*, 114 Ga. 66, 39 S. E. 913, holding one indicted, convicted, and sentenced under repealed statute may be discharged by habeas corpus, where question not adjudicated upon trial; *Ex parte Hollman*, 79 S. C. 28, 21 L.R.A.(N.S.) 251, 60 S. E. 19, 14 A. & E. Ann. Cas. 1105 (dissenting opinion), as to void judgment being reviewable by habeas corpus.

Cited in note (87 Am. St. Rep. 175) on release of prisoner on habeas corpus after judgment and sentence.

13 L. R. A. 752, *Re CUMMINS*, 16 Colo. 451, 25 Am. St. Rep. 291, 27 Pac. 887.
Offenses against person particeps criminis.

Cited in *Gilmore v. People*, 87 Ill. App. 141, holding criminal prosecution will lie for obtaining money by false pretenses from one engaged with accused in criminal transaction; *People v. Martin*, 102 Cal. 563, 36 Pac. 952, holding purpose of grantor in conveyance to place property beyond reach of judgment creditor not defense to indictment of grantee procuring such conveyance for obtaining property under false pretenses; *Lovell v. State*, 48 Tex. Crim. Rep. 88, 86 S. W. 758, 13 A. & E. Ann. Cas. 561, holding criminal prosecution wise for obtaining money by false pretenses from one engaged with accused in a criminal transaction.

Cited in note (17 L.R.A.(N.S.) 277) on illegal intent of prosecutor as affecting guilt of one obtaining property by false pretense.

13 L. R. A. 754, *PACIFIC R. CO. v. WADE*, 91 Cal. 449, 25 Am. St. Rep. 201, 27 Pac. 768.

Independent suit against receiver.

Cited in *De Forrest v. Coffey*, 154 Cal. 452, 98 Pac. 27, holding whether the court will permit, upon application, an independent suit to be brought relative to the property in the hands of a receiver, or will compel intervention in the proceedings in which the receiver is appointed, is a matter for its discretion.

Cited in notes (31 L.R.A.(N.S.) 712) on jurisdiction of equity to try claims against its receiver involving purely legal questions; (71 Am. St. Rep. 354, 358, 361) on relation of receivers to pre-existing liens and remedies for their enforcements.

Joint use of railway track.

Cited in note (25 Am. St. Rep. 478) on rights, duties and obligations of street railway companies.

Jury trial.

Cited in *Raymond v. Flavel*, 27 Or. 231, 40 Pac. 158, holding statute which provides that "whenever (in an equity suit) it becomes necessary or proper to inquire of any fact by verdict of a jury, the court may direct a statement thereof, and a jury may be formed to inquire of same," is merely declaratory of common-law equitable procedure, and in such a suit the submission of a question of fact to a jury is within sound discretion of the court, an abuse of which is reversible on appeal.

13 L. R. A. 757, *EMERICK v. EMERICK*, 83 Iowa, 411, 49 N. W. 1017.

What constitutes mental incapacity.

Cited in *Harrison v. Otley*, 101 Iowa, 659, 70 N. W. 724, refusing to set aside conveyances of real and personal property, heavily encumbered, where evidence conflicting as to extent mind of grantor impaired; *Garretson v. Hubbard*, 110 Iowa, 9, 81 N. W. 174, refusing to set aside decree quieting title to land against person showing signs of mental unsoundness; *Guthrie v. Guthrie*, 84 Iowa, 376, 51 N. W. 13, holding petition, in proceeding to determine sanity, alleging unsoundness of mind to extent of being incapacitated for conducting his business safely, sufficient; *Schick v. Stuhr*, 120 Iowa, 399, 94 N. W. 915, refusing to appoint guardian for man of seventy-five, ordinarily prudent in business, because of high temper and immoral habits; *Arment v. Arment*, 134 Ia. 206, 111 N. W. 812, holding deed of farm by woman of 73 years to her son in consideration of his supporting her during her life and sale of stock thereon at less than actual value did not warrant appointment of guardian on ground of her being of unsound mind; *McDermott v. Rahely*, 146 Iowa, 461, 125 N. W. 219, as to what constitutes mental incapacity of person authorizing appointment of guardian to manage his affairs; *Simmons v. Kelsey*, 76 Neb. 128, 107 N. W. 122, holding where plaintiff reasonably understands the nature and purpose of her suit, the effect of her acts with reference thereto and has the will to decide for herself whether it shall be brought and prosecuted, she has sufficient mental capacity to maintain it. Annotation also cited to this point.

13 L. R. A. 760, *SHIELDS v. JACOB*, 88 Mich. 164, 50 N. W. 105.

Elections; restrictions upon manner of voting.

Cited in *Atty. Gen. ex rel. Reynolds v. May*, 99 Mich. 547, 25 L. R. A. 329, 58 N. W. 483, holding statute imposing restrictions upon manner of voting valid, although resulting in inconvenience to voter.

Cited in footnote to *State ex rel. Mize v. McElroy*, 16 L. R. A. 279, which holds name written on ballot in place of printed name erased cannot be counted.

Validity of nominations.

Cited in *Stephenson v. Election Comrs.* 118 Mich. 401, 42 L. R. A. 216, 74 Am. St. Rep. 402, 76 N. W. 914, holding, when candidate nominated by each of two rival factions in political convention, entitled to place on ticket; *State ex rel. Dahlman v. Piper*, 50 Neb. 36, 69 N. W. 378; *Scars v. Kincaid*, 33 Or. 220, 53 Pac. 303; *State ex rel. Blydenburg v. Burdick*, 6 Wyo. 465, 34 L. R. A. 850, 46 Pac. 854; *State ex rel. Wolfe v. Falley*, 9 N. D. 455, 83 N. W. 860; *Sims v. Daniels*, 57 Kan. 563, 35 L. R. A. 150, 46 Pac. 952,—holding that county officers charged with duty of determining objections to certificates of nomination, have no authority to decide which of two rival factions is representative of party; *Phelps v. Piper*, 48 Neb. 732, 33 L. R. A. 55, 67 N. W. 755; *People ex rel. Eaton v. District Court*, 18 Colo. 36, 31 Pac. 339; *People ex rel. Hodges v. McGaffey*, 23 Colo. 158, 46 Pac. 930,—holding secretary of state having two sets of nominations certified to him by rival factions of same convention should certify both tickets to county clerks for places on official ballot; *Baker v. Election Comrs.* 110 Mich. 639, 68 N. W. 752, holding fusion ticket nominated by three party organizations not entitled to place of democratic party on ballot on basis of number of votes cast by such party at last election; *State ex rel. Howells v. Metcalf*, 18 S. D. 412, 67 L.R.A. 338, 100 N. W. 923, as to reluctance of courts to enter into inquiry on questions of fact as to which of two contending factions truly represents a political party; *State ex rel. Cook v. Houser*, 122 Wis. 585, 100 N. W. 964, holding courts in solving the right of political party disputes as regards the execution of election laws should be guided by the decision of the highest authority within the party; *Allen v. Burrow*, 69 Kan. 818, 77 Pac. 555, 2 A. & E. Ann. Cas. 539, holding in absence of fraud a dispute as to which of two persons is the regular nominee of a political party can ordinarily be settled by the special tribunal to which statute commits the determination of such questions.

Cited in footnotes to *Stephenson v. Election Comrs.* 42 L. R. A. 214, which denies right of chairman of political committee calling convention to determine qualifications of contesting delegates against will of convention; *State ex rel. Phelan v. Walsh*, 17 L. R. A. 364, in which various decisions as to validity of ballots are made; *State ex rel. Howells v. Metcalf*, 67 L.R.A. 331, which holds that faction of county convention assembling at place designated by chairman and majority of county committee organizing and proceeding to nominate candidates the regular representative of the party.

Distinguished in *State ex rel. Sturdevant v. Allen*, 43 Neb. 661, 62 N. W. 35, holding secretary of state may ascertain from record, or from extrinsic evidence, whether candidates of rival factions were in fact placed in nomination by convention claiming to represent party.

13 L. R. A. 761, *RUTLEDGE v. CRAWFORD*, 91 Cal. 526, 25 Am. St. Rep. 212, 27 Pac. 779.

Elections; statutory requirements as to ballots.

Cited in *Slaymaker v. Phillips*, 5 Wyo. 490, 47 L. R. A. 855, 42 Pac. 1049, holding ballot without official stamp or judge's name or initials subject to rejection; *Coffey v. Lyman*, 92 Cal. 136, 28 Pac. 91, holding ballot valid although word "for" was omitted from top line of ballot contrary to statutory requirement, as the omission was not for purpose of distinguishing ballots.

Cited in footnotes to *Parvin v. Wimberg*, 15 L. R. A. 775, which holds ballot

counted, although poll clerk's initials indorsed in wrong place; *People ex rel. Nichols v. Onondaga County*, 14 L. R. A. 624, which denies right to count ballots containing wrong indorsement as to polling place; *Shields v. Jacob*, 13 L. R. A. 760, which holds name of political party in vignette at head of ticket sufficient without repetition; *Lindstrom v. Manistee County*, 19 L. R. A. 171, which refuses to exclude ballot with unauthorized vignette; *State ex rel. Law v. Saxon*, 18 L. R. A. 721, which holds ballots marked with name of ticket not illegal; *State ex rel. Mize v. McElroy*, 16 L. R. A. 279, which holds name written on ballot in place of printed name erased cannot be counted; *People ex rel. Bradley v. Shaw*, 16 L. R. A. 606, which requires counting of paster ballots for town officers though they also contain other names which cannot be legally voted for; *Todd v. Election Comrs.* 29 L. R. A. 330, which upholds requirement against candidate having name on official ballot more than once; *State ex rel. Phelan v. Walsh*, 17 L. R. A. 364, in which various decisions as to validity of ballots are made.

Cited in note (16 L. R. A. 755) on constitutionality of "Australian ballot" statutes.

Distinguishing marks on ballots.

Cited in *Houston v. Steele*, 98 Ky. 611, 34 S. W. 6, holding markings on ballot consisting of three crosses, or single cross having two down strokes, not distinguishing marks invalidating ballot; *Maddux v. Walthall*, 141 Cal. 415, 74 Pac. 1026, holding ballots marked after the words "no nomination" are illegal and void as having a distinguishing mark; *Doll v. Bender*, 55 W. Va. 410, 47 S. E. 293, holding distinguishing marks on a ballot will not cause its exclusion from the count; *Eufaula v. Gibson*, 22 Okla. 512, 98 Pac. 565, holding that "distinguished ballot" which cannot be counted is one which bears identification mark.

Cited in footnotes to *Sego v. Stoddard*, 22 L. R. A. 468, and *Tebbe v. Smith*, 29 L. R. A. 673, as to what constitutes a distinguishing mark on ballot; *State ex rel. Baxter v. Ellis*, 17 L. R. A. 382, which requires rejection of ballots in municipal election with device upon them; *Jennings v. Brown*, 34 L. R. A. 45, which holds legality of ballot not destroyed by addition of party name after candidate's name.

Cited in note (49 Am. St. Rep. 249) on distinguishing marks invalidating ballot.

Marking of ballots.

Cited in *Church v. Walker*, 10 S. D. 96, 72 N. W. 101, holding ballots unintentionally blotted, valid; *Easterbrooks v. Atwood*, 83 Vt. 357, 76 Atl. 109, Ann. Cas. 1912 A, 295, holding that ballots cast cannot be shown to have been intended for particular office, in direct contradiction of plain terms of ballots cast.

Annotation cited in *State ex rel. Orr v. Fawcett*, 17 Wash. 207, 49 Pac. 346, holding the use of two or three crosses instead of one will not invalidate the ballot without evidence of intent to distinguish it.

Cited in footnotes to *State ex rel. Waggoner v. Russell*, 15 L. R. A. 740, which holds provision for marking ballots with ink directory only; *Parker v. Orr*, 30 L. R. A. 227, which holds provision as to marking ballot with cross not mandatory.

Filing in election contest.

Cited in *Sawin v. Pease*, 6 Wyo. 103, 42 Pac. 750, holding defective petition in contested election case charging fraud may be remedied by amendment; *Bass v. Leavitt*, 11 Cal. App. 585, 105 Pac. 771, holding contestant cannot recover unless

he alleges his constitutional qualifications for eligibility and contestee cannot recover who answers by mere denials; *Gillespie v. Dion*, 18 Mont. 194, 33 L.R.A. 707, 44 Pac. 954, holding an election contest authorized by statute being a special proceeding, the jurisdictional facts must appear on the face of the proceedings and where statute permits a contest to be instituted by an elector the omission of the contestant to aver on the face of the record that he is an elector, is fatal.

Interpretation of statutes.

Cited in *Nevada Nat. Bank v. Dodge*, 56 C. C. A. 145, 119 Fed. 59; *Re Johnson*, 98 Cal. 536, 21 L.R.A. 381, 33 Pac. 460; *Sires v. Melvin*, 135 Iowa, 472, 113 N. W. 106; Opinion of Justices, 66 N. H. 657, 33 Atl. 1076; *Lynip v. Buckner*, 22 Nev. 440, 30 L.R.A. 357, 41 Pac. 762,—holding the general scope, object, and purpose of the law should be kept in view rather than its mere letter; *Hicks v. Krigbaum*, 13 Ariz. 241, 108 Pac. 482, to the point that spirit of law and intention of makers must be diligently sought after and letter of statute must bend to these.

Cited in notes (14 Eng. Rul. Cas. 831) on rules for interpretation of statute; (30 Am. St. Rep. 265) on construction of statutes.

13 L. R. A. 765, *ROBINSON v. OREGON SHORT LINE & U. N. R. CO.* 7 Utah, 493, 27 Pac. 689.

Negligence; acts inviting trespass of children.

Cited in *Ryan v. Towar*, 128 Mich. 477, 55 L. R. A. 315, 92 Am. St. Rep. 481, 87 N. W. 644, holding manufacturer not liable for injury to child trespassing in pump house containing water-wheel; *Savannah, F. & W. R. Co. v. Beavers*, 113 Ga. 413, 54 L. R. A. 321, 39 S. E. 82, holding railroad maintaining ditch 7 feet deep on grounds 28 feet from place children accustomed to gather not bound to guard same to avoid injury to trespassing children; *Kaumeier v. City Electric R. Co.* 116 Mich. 313, 40 L. R. A. 387, 72 Am. St. Rep. 525, 74 N. W. 481, holding street railway company leaving flat car 14 feet long on side track, without being guarded or brakes set to prevent children moving it, not negligent; *Atchison, T. & S. F. R. Co. v. Slattery*, 57 Kan. 502, 46 Pac. 941, holding railroad not negligent in leaving push car in yard safe distance from track, and blocked in usual way, from which position boys pushed it near track, causing accident.

Cited in footnotes to *Missouri, K. & T. R. Co. v. Edwards*, 32 L. R. A. 825, which denies liability of railroad company for injuries to child playing on bridge ties in fenced railroad yard; *George v. Los Angeles R. Co.* 46 L. R. A. 829, which denies company's liability to boys hurt while playing with trolley car left in street, after loosening brake; *Parker v. Pennsylvania Co.* 23 L. R. A. 552, which holds wilfulness not shown by mere failure to provide for protection of possible trespasser in archway over railroad tracks; *Kopplekon v. Colorado Cement Pipe Co.* 54 L. R. A. 284, which holds owner of uninclosed city lot liable for injury to young child by toppling over of large cement pipe used by children as plaything.

Cited in notes (19 L.R.A.(N.S.) 1138) on attractive nuisance; (26 L.R.A.(N.S.) 721) on proximate cause of injury from car or engine set in motion by third person.

13 L. R. A. 767, *FAIRFIELD COUNTY BAR ex rel. FESSENDEN v. TAYLOR*, 60 Conn. 11, 22 Atl. 441.

Disbarment of attorneys.

Cited in *Re Westcott*, 66 Conn. 587, 34 Atl. 505, holding superior court has

jurisdiction to try charges for disbarment of attorney; *State ex rel. Walker v. Mullins*, 129 Mo. 237, 31 S. W. 744, holding disbarment proceedings for professional misconduct may be instituted on relation of attorney general; *Re Durant*, 80 Conn. 148, 67 Atl. 497, 10 A. & E. Ann. Cas. 539, holding an attorney who is charged with misconduct which unfits him to continue in the practice of his profession is entitled to a fair and dispassionate hearing and to a reasonable exercise of judicial discretion; *State ex rel. Dill v. Martin*, 45 Wash. 84, 87 Pac. 1054, holding proceedings for the disbarment of an attorney at law may be instituted on the information or relation of the bar association composed of attorneys who are members of the bar of the county; *Re O'Sullivan*, 122 App. Div. 534, 107 N. Y. Supp. 462 (dissenting opinion), as to admissibility of judgment for conversion against attorney in disbarment proceedings.

Cited in footnotes to *People ex rel. Atty. Gen. v. MacCabe*, 19 L. R. A. 231, which holds anonymous advertisement as to obtaining divorce ground for disbarment; *Re Kirby*, 39 L. R. A. 850, which authorizes disbarment for receiving stolen government property with intent to convert to own use; *Re Lentz*, 50 L. R. A. 415, which denies right to disbar attorney for single wrongful appropriation without actual intent to defraud, for which full restitution has been made; *Re Evans*, 53 L. R. A. 952, which authorizes disbarment of attorney for champerty; *Re Thompson*, 40 L. R. A. 194, which holds disbarment not precluded by attorney's resignation pending disbarment proceedings; *People ex rel. Deneen v. Gilmore*, 69 L.R.A. 701, which holds that license to practice law secured by fraudulent concealment of a conviction of embezzling funds from client in another state will be revoked.

Cited in notes (45 Am. St. Rep. 81) on grounds for disbarment of attorneys; (19 L.R.A.(N.S.) 416) on disbarment or suspension of attorney for withholding client's money or property.

Necessity of the confidence of community in attorney.

Cited in *Re Applicants for License*, 143 N. C. 27, 10 L.R.A.(N.S.) 301, 55 S. E. 635, 10 A. & E. Ann. Cas. 187; *Re Ebbs*, 150 N. C. 60, 19 L.R.A.(N.S.) 900, 63 S. E. 190, 17 A. & E. Ann. Cas. 592 (dissenting opinion); *O'Brien's Petition*, 79 Conn. 53, 63 Atl. 777,—as to necessity of attorney possessing confidence of community.

Officers; removal from office.

Cited in *State ex rel. Reiley v. Chatfield*, 71 Conn. 112, 40 Atl. 922, holding power of removal from office implied, at will of appointing power, where power of appointment conferred in general terms without restriction.

13 L. R. A. 770, *LOVEJOY v. MICHELS*, 88 Mich. 15, 49 N. W. 901.

Unlawful trade combinations.

Cited in *Jackson v. Stanfield*, 137 Ind. 611, 23 L. R. A. 595, 36 N. E. 345, holding combination of retail lumber merchants to suppress competition of dealers not owning yards unlawful; *Cleland v. Anderson*, 66 Neb. 264, 5 L.R.A.(N.S.) 143; 92 N. W. 306, holding an association of retail dealers in lumber organized, as stated by its constitution, to prevent its members from being subjected to competition by wholesalers, which requires a certain amount of stock continually carried, to entitle a dealer to membership, and levies and collects from wholesale dealers a penalty in case they sell to consumers direct, or to retail dealers not eligible to membership in the association, unlawful.

Cited in footnotes to *Texas Standard Cotton Oil Co. v. Adoue*, 15 L. R. A. 598, which holds combination to fix prices of cotton seed and seed cotton void; *State v. Phipps*, 18 L. R. A. 658, which holds combination by foreign companies to

increase rates of insurance unlawful; *Ford v. Chicago Milk Shipper's Asso.* 27 L. R. A. 298, which holds that corporation and its members may constitute unlawful combination to fix price of merchandise; *Cummings v. Union Blue Stone Co.* 52 L. R. A. 262, which holds void, agreement by persons controlling 90 per cent of sale of blue stone to sell through common agent and maintain agreed prices; *Brown v. Jacobs Pharmacy Co.* 57 L. R. A. 548, which sustains right to injunction against combination of merchants to prevent sales to other dealer unless he sells at fixed prices; *Nester v. Continental Brewing Co.* 24 L. R. A. 247, which holds combination of brewers to stifle competition within specified place void; *Clark v. Needham*, 51 L. R. A. 785, which holds void, lease of manufacturing machinery with agreement against lessor engaging in business for five years; *National Harrow Co. v. Hench*, 39 L. R. A. 299, which holds agreement by owner of patent with corporation organized by rival manufacturers, to sell no harrow for less than schedule price, invalid; *Dennehy & Co. v. McNulta*, 41 L. R. A. 609, which denies right of one voluntarily dealing with corporation constituting monopoly, to retain goods purchased, and sue for return of any part of purchase price; *Herriman v. Menzies*, 35 L. R. A. 318, which sustains association of master stevedores fixing minimum prices, with stipulation again unauthorized discounts; *Com. v. Grinstead*, 56 L. R. A. 709, which holds agreement not to resell goods at less than specified price not within statute for suppression of conspiracies; *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* 62 L. R. A. 632, which holds valid plan for sale of proprietary medicines by manufacturers at fixed prices with rebate only to concerns which may be relied on to maintain selling price; *Slaughter v. Thacker Coal & Coke Co.* 65 L.R.A. 343, which holds void contract by different coal mining companies giving exclusive right to sell entire output at uniform prices to corporation organized as their regular sales agent.

Damages for breach of contract.

Cited in *Johnson-Brinkman Commission Co. v. Wabash R. Co.* 64 Mo. App. 595, holding carrier having knowledge that purpose of shipment is to take advantage of market price on particular day liable in damages based on market price, as distinguished from market value; *Wagoner Undertaking Co. v. Jones*, 134 Mo. App. 107, 114 S. W. 1049, holding in a proceeding in probate court to establish a claim against an estate for the value of a casket and other articles furnished for funeral of deceased, the reasonable market value was the proper measure of recovery, and by market value is meant prices such articles commonly brought at the time; *S. F. Bowser & Co. v. Marks*, 96 Ark. 115, 32 L.R.A.(N.S.) 434, 131 S. W. 334, Ann. Cas. 1912 B, 357, to the point that in executory contract where no price of articles is fixed, vendor can recover from buyer for not accepting them, their reasonable value; *Carey Lithograph Co. v. Magazine & Book Co.* 70 Misc. 542, 127 N. Y. Supp. 300, to the point that market price is price fixed by buyer and seller in open market in usual course of lawful trade and competition.

Cited in footnote to *Jonas v. Noel*, 36 L. R. A. 862, which holds measure of damages for failure to deliver building to tenant difference between agreed rent and rental value.

Cited in note (82 L.R.A.(N.S.) 430) on necessity of meeting of minds as to price on sale of personality.

Charge to jury.

Cited in *Sterling v. Callahan*, 94 Mich. 539, 54 N. W. 495, holding comment upon evidence in charge of court to jury, error.

13 L. R. A. 779, *HAMILTON v. JACKSON*, 144 Pa. 34, 23 Atl. 53.

Corporations; right to question existence of, in private action.

Cited in *Gilkey v. How*, 105 Wis. 46, 49 L. R. A. 485, 81 N. W. 120, holding town cannot set up defective character of incorporation in defense to action on warrants; *Bergeron v. Hobbs*, 96 Wis. 648, 65 Am. St. Rep. 85, 71 N. W. 1056 (dissenting opinion), majority holding failure to record certificate of organization within meaning of statute renders stockholders individually liable to creditors; *Harrison v. Philadelphia Contributionship*, 171 Fed. 184, holding under law of Pennsylvania the validity of a corporate charter or of a particular power apparently conferred thereby cannot be inquired into collaterally; *Chicago City R. Employees' Mut. Aid Asso. v. Hogan*, 124 Ill. App. 451, holding an organization known by a name importing corporate existence, and executing contracts in manner as a corporation executes contracts, is estopped to deny its corporate existence, especially where at the time of the suit it has actually become a corporation.

Enforcement of stockholder's liability.

Cited in *Lexow v. Pennsylvania Diamond Drill Co.* 5 Pa. Dist. R. 494, holding bill in equity in behalf of plaintiff and all other creditors who may come in, proper proceeding for enforcement of stockholder's liability for unpaid subscription.

Consolidation of corporations.

Cited in *Chevra Bnai Israel v. Chevra Bikur Cholim*, 24 Misc. 190, 52 N. Y. Supp. 712, holding attempted consolidation of corporations, without legislative authority, invalid.

Cited in note (52 L. R. A. 390, 391) on right of corporations to consolidate.

13 L. R. A. 785, *SCHLAWIG v. DE PEYSTER*, 83 Iowa, 323, 32 Am. St. Rep. 308, 49 N. W. 843.

Service of process.

Cited in *Wolf v. Shenandoah Nat. Bank*, 84 Iowa, 140, 50 N. W. 561, holding substituted service of original notice upon absconding debtor, who has left his family and never returned, will not give jurisdiction; *Massillon Engine & Threshing Co. v. Hubbard*, 11 S. D. 329, 77 N. W. 588, holding leaving copy of summons at house of defendant's son-in-law, where wife temporarily stopping, not sufficient within statute permitting service by leaving copy at defendant's dwelling house; *Des Moines Sav. Bank v. Kennedy*, 142 Iowa, 278, 120 N. W. 742, holding under statute providing that personal actions must be brought in county in which defendant actually resides service on a resident must be made in county of actual residence and to justify substituted service by leaving copy with a member of his family he must have been an actual resident at that time.

Cited in note ((21 L.R.A.(N.S.) 348) as to where process may be served under statutes providing for service by leaving at usual place of abode, etc.

Power of trial court to modify decree after appeal.

Cited in *Swan v. Harvey*, 123 Iowa, 194, 98 N. W. 641, holding trial court has jurisdiction to extend time to redeem from tax deed after appeal taken.

Conclusiveness of findings on appellee.

Distinguished in *Clark v. Lancaster County*, 69 Neb. 729, 96 N. W. 593, holding on an appeal in equity the appellee is not concluded as to any matter directly involved in the questions raised by appellant.

Residence.

Cited in *McCord v. Rosene*, 39 Wash. 2, 80 Pac. 793, holding man's residence

not necessarily controlled by residence of his family; *State v. Savre*, 129 Iowa, 124, 3 L.R.A.(N.S.) 457, 113 Am. St. Rep. 452, 105 N. W. 387, as to determination of residence of man with a family; *Grant v. Lawrence*, 37 Utah, 455, 108 Pac. 931, Ann. Cas. 1912 C, 280, holding that presumption that man's place of abode is where his family lives is one of fact and may be overcome by evidence to contrary.

13 L. R. A. 786, *KUMMEL v. GERMANIA SAV. BANK*, 127 N. Y. 488, 28 N. E. 398.

Banks; liability for unauthorized payment of deposit.

Cited in *Kress v. East Side Sav. Bank*, 50 N. Y. S. R. 275, 21 N. Y. Supp. 652; *Abramowitz v. Citizens' Sav. Bank*, 17 Misc. 298, 40 N. Y. Supp. 385; *Gearns v. Bowery Sav. Bank*, 135 N. Y. 562, 32 N. E. 249,—holding bank not justified in paying deposit to person in possession of pass book, if proper care not shown in view of circumstances brought to its notice, exciting suspicion; *Clark v. Saugerties Sav. Bank*, 62 Hun, 349, 17 N. Y. Supp. 215, holding payment to depositor's husband, who had possession of bank book, sufficient evidence of negligence to submit question to jury; *Tobin v. Manhattan Sav. Institution*, 6 Misc. 112, 26 N. Y. Supp. 14, holding payment to person in possession of pass book, upon forged draft with signature showing "marked" and "striking" dissimilarity to that of depositor, sufficient evidence of negligence for submission to jury; *Kelly v. Buffalo Sav. Bank*, 88 App. Div. 379, 84 N. Y. Supp. 642, denying savings bank's liability for money paid out on forged signatures, where difference from genuine not marked; *Ladd v. Augusta Sav. Bank*, 96 Me. 515, 58 L. R. A. 291, 52 Atl. 1012, holding sufficient diligence not shown, where signature of depositor not preserved for comparison before payment to person in possession of pass book; *Geitelsohn v. Citizens' Sav. Bank*, 17 Misc. 578, 39 N. Y. Supp. 840, and *Wall v. Emigrant Industrial Sav. Bank*, 64 Hun, 250, 19 N. Y. Supp. 194, holding that failure to ask all of test questions of person in possession of pass book who answers correctly those asked, does not render bank liable though it was put on guard by discrepancies between signatures; *Chase v. Waterbury Sav. Bank*, 77 Conn. 300, 69 L.R.A. 337, 59 Atl. 37, 1 A. & E. Ann. Cas. 96, holding savings bank liable for payment made on a forged order of one who had fraudulently obtained possession of deposit book; *Clark v. Saugerties Sav. Bank*, 62 Hun, 350, 17 N. Y. Supp. 215, holding a savings bank by-law declaring that all payments made to persons presenting a passbook shall be valid does not release the bank from obligation of exercising due care in ascertaining authority of one presenting pass-book of another; *Kelley v. Buffalo Sav. Bank*, 180 N. Y. 178, 69 L.R.A. 325, 105 Am. St. Rep. 720, 72 N. E. 995, holding saving's bank being ignorant of death of depositor not liable where his bank book was produced and draft presented, purporting to bear his signature, which was paid by bank which used ordinary care in making the payment; *Hough Ave. Sav. & Bkg. Co. v. Anderson*, 78 Ohio St. 347, 18 L.R.A.(N.S.) 434, 125 Am. St. Rep. 707, 85 N. E. 498, 14 A. & E. Ann. Cas. 479, holding bank paying money to person other than depositor upon presentation of deposit book and forged order liable if it does not act in good faith and use reasonable care.

Cited in notes (69 L.R.A. 318, 319, 330, 340) on liability of savings bank for payments to fraudulent claimants; (105 Am. St. Rep. 744, 746, 749) on duties of savings banks towards depositors.

Withdrawal of deposit without pass book.

Cited in *Wall v. Emigrant Industrial Sav. Bank*, 64 Hun, 250, 19 N. Y. Supp. 194, holding depositor entitled to withdraw deposit, notwithstanding inability to

produce pass book; *Mills v. Albany Exch. Sav. Bank*, 23 Misc. 253, 59 N. Y. Supp. 149, holding bank cannot refuse payment of deposit because of loss of pass book, although by-law provides bank may decide in such case to whom payment shall be made.

13 L. R. A. 788, *GALWAY v. METROPOLITAN ELEV. R. CO.* 128 N. Y. 132, 28 N. E. 479.

Followed without discussion in *Macy v. Metropolitan Elev. R. Co.* 128 N. Y. 624, 28 N. E. 485, and *Knox v. Metropolitan Elev. R. Co.* 128 N. Y. 625, 28 N. E. 485.

Limitation of action for continuing trespass.

Followed without special discussion in *Doyle v. Manhattan R. Co.* 128 N. Y. 494, 28 N. E. 495.

Cited in *Cheney v. Syracuse, O. & N. Y. R. Co.* 8 App. Div. 620, 40 N. E. 1103, holding lapse of time or inaction of abutting owner not bar to action for damages for maintenance of unlawful structure in highway, unless time sufficient to change title; *Andrews v. Delhi & S. Teleph. Co.* 36 Misc. 26, 72 N. Y. Supp. 50, holding statute of limitations not applicable to abutter's action of ejectment against telephone corporation erecting poles and wires in public highway, outside city or village.

Distinguished in *Boll v. New York & H. R. Co.* 33 Misc. 43, 68 N. Y. Supp. 139, upholding defense, in action to restrain continuing trespass to real property, that cause of action did not accrue within ten years.

Disapproved in *Williams v. Southern P. R. Co.* 150 Cal. 627, 89 Pac. 599, holding the fact that a complaint in an action against a railroad company for trespass prays also for an injunction, does not change the action from trespass to one governed by some other period of limitation.

Ten-year statute of limitation.

Cited in *Peck v. Diskin*, 41 Misc. 477, 84 N. Y. Supp. 1094, holding judgment creditor's right to examine third person as to debtor's property barred in ten years after execution returned; *Peck v. Disken*, 41 Misc. 477, 84 N. Y. Supp. 1094, as to object of statute of.

Estoppel by laches and acquiescence.

Cited in *Kenyon v. National Life Asso.* 39 App. Div. 294, 57 N. Y. Supp. 60, questioning existence of equitable doctrine of laches, as distinguished from statute of limitations; *Coombs v. Salt Lake & Ft. D. Co.* 9 Utah, 327, 34 Pac. 248, and *Jackson v. Slate Belt Electric Street R. Co.* 7 Northampton Co. Rep. 295, holding mere delay in asserting rights will not prevent landowner from maintaining action to enjoin trespass upon land by street railway; *Ackerman v. True*, 175 N. Y. 362, 67 N. E. 629, holding silence of adjacent owner during construction and continuation of bay window encroaching on street, for less than twenty years, does not defeat right to mandatory injunction; *Syracuse Solar Salt Co. v. Rome, W. & O. R. Co.* 67 Hun, 168, 22 N. Y. Supp. 321, holding action by owner of fee to enjoin occupation by railway not of such exclusively equitable nature as is subject to doctrine of laches, and upholding right of action though brought after seventeen years' occupancy by railway; *Kremer v. Chicago, M. & St. P. R. Co.* 51 Minn. 21, 38 Am. St. Rep. 408, 52 N. W. 977, upholding ejectment against railroad, by subsequent grantee of land, where action brought twenty years after construction of road under license from former owner; *Blashfield v. Empire State Teleg. & Teleph. Co.* 18 N. Y. Supp. 254, holding right of action for damage to abutting owner from construction of telephone poles and wires in highway not lost by acquiescence; *Rigney v. Tacoma Light & Water Co.* 9 Wash. 586, 26 L. R. A. 429,

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38 Pac. 147, upholding action of lower riparian owner to enjoin diversion of stream by water company, after delay of nine years, during which time expensive improvements erected; *Sebald v. Mulholland*, 6 Misc. 354, 26 N. Y. Supp. 913, holding anchoring of front extension to party wall not such additional burden as equity will enjoin on complaint of party, remaining silent until wrong completed; *First Nat. Bank v. New York C. & H. R. R. Co.* 85 Hun, 166, 32 N. Y. Supp. 604, holding laches to defeat action for conversion of freight by railroad not presumed from delay of sixty days before presenting bill of lading; *West Hartford v. Water Comrs.* 68 Conn. 334, 36 Atl. 786, holding water company construing charter for thirty years as obligating it to furnish water in certain territory estopped from denying obligation; *Woodbridge v. Bockes*, 59 App. Div. 521, 69 N. Y. Supp. 417, holding beneficiary procuring trustee to give control of trust estate to husband, and giving release from all liability for doing so, estopped after lapse of twenty-five years from asking for accounting; *Rogers v. Van Nortwick*, 87 Wis. 430, 58 N. W. 757, holding equitable action to compel transfer of stock in corporation, not maintainable against one purchasing in behalf of plaintiff, after delay of three years; *Cox v. Stokes*, 156 N. Y. 511, 51 N. E. 316, holding bondholders' right of action for relief from breach by corporation of reorganization agreement not forfeited by laches, where action was seasonably brought by one bondholder in behalf of all; *Verdolite v. Richards*, 7 Northampton Co. Rep. 121, holding lessor not precluded, by acquiescence in continuing breach of covenant of lessee to mine soapstone only, from maintaining action to enjoin further violation; *Chace v. Warsaw Waterworks Co.* 79 Hun, 155, 29 N. Y. Supp. 729, holding patron of water company not estopped, on ground of acquiescence, from complaining of diversion of water from creek, where company's water supply taken from several sources; *West Pub. Co. v. Edward Thompson Co.* 169 Fed. 886, as to distinction between defenses of "laches" and "estoppel;" *Ackerman v. True*, 175 N. Y. 362, 67 N. E. 629, holding injunctive relief against encroachment by adjoining owner into street not barred by any acquiescence short of prescriptive period; *Spring City v. Montgomery & C. Electric Co.* 35 Pa. Super. Ct. 541, holding mere indulgence and delay do not amount to laches when the other party is not prejudiced.

Cited in notes (36 L.R.A.(N.S.) 834, 835), on abutter's right to compensation for railroads in streets; (36 L. ed. U. S. 721) on laches as defense; (1 Eng. Rul. Cas. 448) on right to open long settled account.

— As fact question.

Cited in *Treadwell v. Clark*, 190 N. Y. 60, 82 N. E. 505, holding finding of court on issue of laches by acquiescence was irreviewable fact finding.

Title by adverse possession.

Cited in *American Bank Note Co. v. New York Elev. R. Co.* 129 N. Y. 264, 29 N. E. 302, holding entry by corporation upon private property may be adverse, although charter may provide that compensation shall be made for property taken; *Hindley v. Manhattan R. Co.* 185 N. Y. 352, 78 N. E. 276, holding occupancy by elevated railroad under grant by city of part of street may ripen into possession adverse to abutting owner's easement of light and air.

Injunction against continuing trespass.

Cited in *Syracuse Solar Salt Co. v. Rome, W. & O. R. Co.* 67 Hun, 161, 22 N. Y. Supp. 321, holding abutting owner may maintain equitable action to restrain occupancy of street by steam railroad without compensation; *Gray v. York State Teleph. Co.* 41 Misc. 113, 83 N. Y. Supp. 920, holding abutter may enjoin unlawful placing of telephone poles in highway; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475, 61 U. S. App. 13, 89 Fed. 773, holding riparian owner entitled to enjoin diversion of waters of stream to his injury; *Gallagher v.*

Kingston Water Co. 25 App. Div. 84, 49 N. Y. Supp. 250, holding, where injury from diversion of waters of creek from mill dam continuous, owner entitled to injunction, unless water company elects to pay fee damage; **Carmichael v. Texarkana**, 94 Fed. 574, holding equity will enjoin city from maintaining sewer system so as to discharge contents upon lands of complainant, and near residence; **Dimick v. Shaw**, 36 C. C. A. 349, 94 Fed. 268, holding trespasser may be enjoined from mining ore upon land adjudged to belong to plaintiff; **Barbee v. Shannon**, 1 Ind. Terr. 213, 40 S. W. 584, holding entry upon lands and erection of fences thereon, and threatening to turn cattle upon same to graze, may be enjoined in equity; **McMillian v. Lauer**, 24 N. Y. Supp. 954, holding injunction proper remedy to prevent city building stone pier in mill race, to damage of abutting owners, without compensation; **Gray v. York State Teleph. Co.** 41 Misc. 113, 83 N. Y. Supp. 920, granting injunction restraining construction where a telephone company attempted to construct poles and wires along county highway without consent or payment of compensation to abutting owners.

Alternative relief in cases of continuing trespass.

Cited in **Eggers v. Manhattan R. Co.** 27 Abb. N. C. 469, 18 N. Y. Supp. 181; **Blumenthal v. New York Elev. R. Co.** 42 N. Y. S. R. 684, 17 N. Y. Supp. 481; **Taber v. Manhattan R. Co.** 14 Misc. 191, 35 N. Y. Supp. 465,—holding, in action for injunctive relief against trespass of elevated railway upon easements of air, light, and access, payment of fee damage as alternative relief not right of either party; **Taber v. Manhattan R. Co.** 14 Misc. 194, 35 N. Y. Supp. 465, holding condemnation proceedings and payment of award terminates previous action for injunctive relief against trespass upon easements of air, light, and access by elevated railway; **Mitchell v. White Plains**, 91 Hun, 192, 36 N. Y. Supp. 204, holding unlawful appropriation of land for highway and sewer purposes does not give owner right of action to compel purchase by trespasser at price fixed by court; **Schuster v. Milwaukee Electric R. & Light Co.** 142 Wis. 586, 126 N. W. 26, as to when equity will retain jurisdiction to assess damages and when relegate plaintiff to relief in law.

Damages for continuing trespass.

Cited in **Inderlied v. Whaley**, 85 Hun, 66, 32 N. Y. Supp. 640, holding decree awarding injunction against pollution of stream bar to subsequent action for damages for same cause; **Reisert v. New York**, 69 App. Div. 309, 74 N. Y. Supp. 673, holding successive actions for damages from removal of waters appurtenant to premises maintainable so long as trespass continues; **Wilson v. New York Elev. R. Co.** 9 Misc. 659, 30 N. Y. Supp. 547, holding, in estimating damage to building fronting on three streets, from maintenance of elevated railway on one street, building regarded as entire structure.

Distinguished in **Rumsey v. New York & N. E. R. Co.** 133 N. Y. 82, 15 L. R. A. 619, 28 Am. St. Rep. 600, 30 N. E. 654, Reversing 63 Hun, 205, 17 N. Y. Supp. 672, holding measure of damage for cutting off of abutter's access to water front is diminished rental or usable value of property in manner enjoyed by owner at time road constructed.

Release of easement; rights of subsequent purchaser.

Cited in **Ward v. Metropolitan Elev. R. Co.** 152 N. Y. 44, 46 N. E. 319, Affirming 82 Hun, 549, 31 N. Y. Supp. 527, holding notice to purchaser, of release, by his grantor, of easements of light, air, and access to elevated railway in front of premises, arising from its possession, not avoided by presumption that original trespass continued.

Reference.

Cited in **Doyle v. Metropolitan Elev. R. Co.** 136 N. Y. 812, 32 N. E. 1008, hold-

ing compulsory reference of action to enjoin maintenance of elevated railway, and to recover damage to abutting property, unauthorized.

13 L. R. A. 796, *TEEL v. YOST*, 128 N. Y. 387, 28 N. E. 353.

Judgments; how far conclusive in another state.

Cited in *Van Norman v. Gordon*, 172 Mass. 578, 44 L. R. A. 840, 70 Am. St. Rep. 304, 53 N. E. 267, holding judgment by confession, under warrant of attorney in court of competent jurisdiction in another state, conclusive in absence of fraud; *Re Bruyn*, 17 Misc. 483, 41 N. Y. Supp. 414, holding decree of divorce obtained in another state against resident of this state, who appeared in action, not subject to collateral attack; *American Mut. L. Ins. Co. v. Mason*, 159 Ind. 17, 64 N. E. 525, holding judgment of foreign court having jurisdiction of parties and subject-matter not collaterally assailable; *Trebilcox v. McAlpine*, 82 Hun, 320, 17 N. Y. Supp. 221, holding confessed foreign judgment on note under warrant of attorney open to defense that note was obtained by duress and without consideration; *Re Raymor*, 165 Mich. 265, 130 N. W. 594, holding that judgment entered without service of process in another state is invalid although valid in such other state, because of failure to show that attorney confessed same; *Hodge v. International Registry Co.* 54 Misc. 443, 105 N. Y. Supp. 1067, holding in an action on a foreign judgment of a court of general jurisdiction, jurisdiction over the person of defendant is presumed; *Benedict v. Clarke*, 139 App. Div. 243, 123 N. Y. Supp. 964, holding that allegation that judgment was "duly rendered" in court of another state is sufficient averment of jurisdiction against general demurrer.

Cited in footnotes to *First Nat. Bank v. Garland*, 33 L. R. A. 83, which sustains judgment entered on warrant of attorney without issuing process; *Crim v. Crim*, 54 L. R. A. 502, which holds judgment, valid where rendered, against nonresident on judgment note, with power of attorney, entitled to full faith elsewhere.

Cited in notes (28 L. R. A. 634) on what entry or record is necessary to complete judgment or order; (3 L.R.A.(N.S.) 450) on effect in other states, of judgment confessed on warrant of attorney.

Enforcement of rights acquired under laws of another state.

Cited in *First Nat. Bank v. Garland*, 109 Mich. 519, 33 L. R. A. 85, 63 Am. St. Rep. 597, 67 N. W. 559, holding confession of judgment, upon warrant of attorney authorizing "any attorney" to appear in "any court of record," entered in state where power executed, valid; *Van Norman v. Gordon*, 172 Mass. 580, 44 L. R. A. 841, 70 Am. St. Rep. 304, 53 N. E. 267, holding warrant of attorney authorizing appearance by "any attorney of any court of record," and in "any of the states or territories of the United States," justifies judgment upon appearance of attorney not named; *Cross v. United States Trust Co.* 131 N. Y. 348, 15 L. R. A. 611, 27 Am. St. Rep. 597, 30 N. E. 125, holding bequest creating trust in personal property, by will of nonresident made in foreign state, where same valid, enforceable, though in contravention of local law against perpetuities, and trustee and beneficiaries reside here; *Bath Gaslight Co. v. Rowland*, 84 App. Div. 567, 82 N. Y. Supp. 841, denying sureties' liability on lease *ultra vires* under common law of state where executed, as declared by its courts.

Cited in footnote to *Re Wagoner*, 32 L. R. A. 766, which holds valid, bond with warrant of attorney, to be delivered on donor's death.

Judgment by confession under warrant of attorney

Cited in *Cuykendall v. Doe*, 129 Iowa, 464, 3 L.R.A.(N.S.) 455, 113 Am. St. Rep. 472, 105 N. W. 698; *Anderson v. Shutts*, 114 App. Div. 311, 99 N. Y. Supp.

893,—holding purpose of statutory provision requiring defendant in confession to state nature and circumstances of the indebtedness is to protect creditors from judgments fraudulently confessed; *Hazel v. Jacobs*, 78 N. J. L. 463, 27 L.R.A. (N.S.) 1068, 75 Atl. 903, 20 Ann. Cas. 260; *Hutchinson v. Palmer*, 147 Ala. 520, 40 So. 339,—holding where one executes a note with a power of attorney, authorizing a confession of judgment on failure to pay at maturity, it is a waiver of process, and judgment rendered in accordance with the authority without notice to maker is valid.

13 L. R. A. 804, *STATE v. GEER*, 61 Conn. 144, 3 Inters. Com. Rep. 732, 22 Atl. 1012.

Exercise of police power as to game, etc.

Cited in *State v. Dow*, 70 N. H. 288, 53 L. R. A. 316, 47 Atl. 734, holding statute prohibiting persons engaging in business of catching certain kinds of fish for sale valid exercise of police power; *State v. Rodman*, 58 Minn. 401, 59 N. W. 1098, upholding validity of statute making possession, five days after close of season, of game lawfully killed during open season, penal offense.

Cited in footnotes to *State v. McGuire*, 21 L. R. A. 478, which holds having in possession during close season fish previously caught not an offense; *People v. Buffalo Fish Co.* 52 L. R. A. 803, which holds void, act prohibiting possession of certain fish during close season; *State v. Schuman*, 47 L. R. A. 153, which sustains statute prohibiting sale, or keeping for sale, of trout; *Selkirk v. Stevens*, 40 L. R. A. 759, which holds game killed by Indians on reservation, and sold to other Indian, subject to game laws of state after taken from reservation.

Application of state police power to interstate commerce.

Cited in footnotes to *Burrows v. Delta Transp. Co.* 29 L. R. A. 468, which sustains validity of state statute requiring fire screens on vessels burning wood; *State ex rel. Corcoran v. Chapel*, 32 L. R. A. 131, which holds statute against shipping beer, etc., to any commission merchant valid.

— As to fish and game.

Cited in *Organ v. State*, 56 Ark. 271, 19 S. W. 840, holding statute prohibiting exportation of fish and game from state not violation of commerce clause of Federal Constitution; *State v. Northern P. Exp. Co.* 58 Minn. 405, 59 N. W. 1100, holding statute prohibiting carrier receiving, during open season, for transportation out of state, fish unlawfully caught within state, lawful exercise of legislative power; *Dickhaut v. State*, 85 Md. 464, 36 L. R. A. 767, 60 Am. St. Rep. 332, 37 Atl. 21, holding statute prohibiting killing or having in possession rabbits between dates named not applicable to possession of rabbits imported from another state.

Cited in footnotes to *People v. O'Neil*, 33 L. R. A. 696, which upholds act prohibiting sale of game or fish during closed season as to articles imported from other states; *State v. Harrub*, 15 L. R. A. 761, which holds statute prohibiting shipment of oysters in shells from state not interference with commerce; *State v. Swett*, 29 L. R. A. 714, which denies liability of carrier ignorant that barrels received for shipment contained short lobsters.

Revision of statutes.

Cited in *Stapleberg v. Stapleberg*, 77 Conn. 36, 58 Atl. 233, holding revisers not presumed to have changed the law; *Ross v. Crofutt*, 84 Conn. 377, 80 Atl. 90, Ann. Cas. 1912 C, 1295, holding that change in words by revisers of law will not be deemed to change law unless such was intention.

13 L. R. A. 806, **SPENCER v. ALLERTON**, 60 Conn. 410, 22 Atl. 778.

Liability of indorsers of note.

Cited in *Oley v. Miller*, 74 Conn. 309, 50 Atl. 744, holding statutes making negotiable demand note overdue four months after date, and providing blank indorsement of non-negotiable note should import contract of ordinary indorsement, do not make non-negotiable demand note overdue in four months; *Smith v. Myers*, 207 Ill. 130, 69 N. E. 858, as to Connecticut rule governing liability of indorser of note.

Parol evidence to explain indorsement.

Cited in footnote to *Young v. Sehon*, 62 L. R. A. 499, which holds parol evidence admissible to show extent of liability of promisee and another indorsing non-negotiable note.

13 L. R. A. 811, **WULLENWABER v. DUNIGAN**, 30 Neb. 877, 47 N. W. 420.

Failure of representation inducing issue of bonds to railroad.

Cited in *Nash v. Baker*, 37 Neb. 729, 56 N. W. 376, enjoining delivery of bonds voted railroad, for failure of representation that road would be independent of another railroad.

Validity of bonds for internal improvement.

Cited in *Fullerton v. School District*, 41 Neb. 600, 59 N. W. 896, holding petition of voters suggesting erection of schoolhouse, as required by statute, condition precedent to valid election upon issue of bonds; *Hoxie v. Scott*, 45 Neb. 201, 63 N. W. 387, holding county commissioners without jurisdiction to order election upon issue of bonds to railroad, without petition of electors as required by statute; *Morton v. Carlin*, 51 Neb. 211, 70 N. W. 906, holding bonds in aid of railroad, voted by city organized as single precinct contrary to law, invalid; *Chilton v. Gratton*, 82 Fed. 876, holding bonds in aid of railroad not invalid in hands of innocent purchaser, because of insufficiency of petition calling for election; *Van Horn v. State*, 51 Neb. 235, 70 N. W. 941, holding person not freeholder, or beneficially interested, save as stockholder in corporation, not entitled to mandamus to compel construction of drainage ditch.

Parties to action for failure of railroad company to comply with provisions of railway aid bonds.

Distinguished in *Lincoln Twp. v. Kansas City & O. R. Co.* 77 Neb. 81, 108 N. W. 140, doubting the right of a township to maintain action to recover the value of bonds voted by electors of township to aid in construction of railroad.

13 L. R. A. 817, **McKEE v. CHICAGO, R. I. & P. R. CO.** 83 Iowa, 616, 50 N. W. 209.

Duty of master as to safety of appliances and place to work.

Cited in *Stockwell v. Chicago & N. W. R. Co.* 106 Iowa, 67, 75 N. W. 665, holding railroad not negligent in failing to discover and repair stem of valve to automatic lubricator on engine; *McCarthy v. Mulgrew*, 107 Iowa, 79, 77 N. W. 527, holding master not liable for injury to baker thrown against rollers of "brake" through sudden stoppage of trow because of obstruction on floor; *Branco v. Illinois C. R. Co.* 119 Iowa, 214, 93 N. W. 97, denying railroad's liability to employee on work train injured by the tie jarred from pile in car; *Cleveland, C. C. & St. L. R. Co. v. Haas*, 35 Ind. App. 632, 74 N. E. 1003, holding railroad not negligent which builds a bridge of standard width leaving a space of over two feet between bridge and widest portion of train; *Baltimore & O. S. W. R. Co. v. McOsker*, 44 Ind. App. 260, 88 N. E. 950, holding that railroad is not

guilty of negligence in maintaining bridge whose pillars are four feet eleven inches from rail.

Cited in notes (41 L. R. A. 57, 59) on knowledge as element of employer's liability to injured servant; (6 L.R.A.(N.S.) 605) on different forms of stating general rule with respect to master's duty as to places and appliances; (33 Am. St. Rep. 767) on master's duty to furnish safe place and appliances.

Distinguished in *Keist v. Chicago G. W. R. Co.* 110 Iowa, 37, 81 N. W. 181, holding railroad negligent in constructing stock chute so near track as to leave insufficient space for brakeman ascending ladder on side of car.

Master's liability for nonobservance of rules.

Cited in note (43 L. R. A. 324, 326) on duties of master and servant as to rules promulgated for safe conduct of business.

Contributory negligence of and assumption of risk by injured servant.

Cited in *Haggerty v. Chicago, St. P. & K. C. R. Co.* 90 Iowa, 408, 57 N. W. 896, holding car accountant injured through contact with switch-stand, while hanging on ladder of moving freight car to take number on seal, negligent; *New York, C. & St. L. R. Co. v. Ostman*, 146 Ind. 463, 45 N. E. 651, holding locomotive engineer injured from contact with stock chute 13 inches from cab window, while watching for signals, negligent; *Pennsylvania Co. v. Finney*, 145 Ind. 558, 42 N. E. 816, holding brakeman descending ladder on side of car, without looking to avoid water crane near track, negligent; *Cowles v. Chicago, R. I. & P. R. Co.* 102 Iowa, 510, 71 N. W. 580, holding helper about railway round-house continuing in employment after hole made in plank of tarrtable, without complaint or promise of repair, assumes risk; *Quinn v. Chicago, R. I. & P. R. Co.* 107 Iowa, 716, 77 N. W. 464, holding brakeman injured from having foot caught in defective switch, condition of which should have been known to him, assumed risk; *Box v. Chicago, R. I. & P. R. Co.* 107 Iowa, 668, 78 N. W. 694, holding brakeman continuing in service of railroad using different kinds of drawbars or bumpers, making coupling of cars dangerous, assumes risk; *Galveston, H. & S. A. R. Co. v. Slinkard*, 17 Tex. Civ. App. 589, 44 S. W. 35, holding brakeman injured from falling into open pit of cattle guard in yard limits not precluded from recovering because placed in position where he might have gained knowledge of danger; *Potter v. Detroit, G. H. & M. R. Co.* 122 Mich. 196, 81 N. W. 80 (dissenting opinion), majority holding brakeman not bound to make such close inspection of distance of telegraph pole from track as to enable him to discover same few inches too near track to permit operation of trains in ordinary way.

Cited in footnote to *Coyle v. Griffing Iron Co.* 47 L. R. A. 147, which holds servant assumes obvious risk from using machine from which bolt missing.

Distinguished in *Harker v. Burlington, C. R. & N. R. Co.* 88 Iowa, 415, 45 Am. St. Rep. 242, 55 N. W. 316, holding whether conductor of freight train negligent in climbing ladder on side of car, without looking to avoid awning over station platform, question for jury; *Bryce v. Chicago, M. & St. P. R. Co.* 103 Iowa, 670, 72 N. W. 780, holding brakeman injured from contact with bolt in bridge truss, while descending ladder on side of freight car, in line of duty, entitled to recover damages.

Disapproved in *Murphy v. Wabash R. Co.* 115 Mo. 121, 21 S. W. 862, holding negligence of railroad constructing cattle guard 6 to 16 inches from outside tender, causing injury to locomotive engineer while tightening nut at water tank, while train in motion, question for jury.

Evidence of knowledge of danger.

Cited in *Hall v. Chicago, R. I. & P. R. Co.* 140 Iowa, 32, 116 N. W. 113, hold-

ing evidence of usual construction and filling track admissible on question of ordinary care of injured brakeman; *Keim v. Ft. Dodge*, 126 Iowa, 29, 101 N. W. 443, holding in action by pedestrian against city for injuries caused by alleged defective gutter apron, evidence that apron in question was similar to those in other parts of city admissible to show plaintiff's knowledge and contributory negligence.

13 L. R. A. 824, *JACQUES v. GREAT FALLS MFG. CO.* 66 N. H. 482, 22 Atl. 552.

Nonsuit.

Cited in *Lebarger v. Berlin Mills Co.* 68 N. H. 373, 44 Atl. 533, holding nonsuit properly ordered in action by servant for personal injury, where evidence shows accident due to negligence of fellow servant.

Master's duty as to appliances and place to work.

Cited in *Story v. Concord & M. R. Co.* 70 N. H. 368, 48 Atl. 288, holding railroad not relieved of duty to furnish safe track for locomotive fireman by using track of another corporation; *McLaine v. Head & D. Co.* 71 N. H. 295, 58 L. R. A. 464, 93 Am. St. Rep. 522, 52 Atl. 545, holding duty of master to furnish safe appliances and place to work not applicable where inspection and repair incident to work; *English v. Amidon*, 72 N. H. 301, 56 Atl. 548, holding it duty of employer to make stairway constituting only exit from factory reasonably safe; *Clavin v. William Tinkham Co.* 29 R. I. 602, 132 Am. St. Rep. 836, 73 Atl. 392; *Hatch v. Pike Mfg. Co.* 73 N. H. 522, 63 Atl. 306,—holding negligence of fellow servant in making repairs no defense to action by servant injured by defective appliance.

Fellow servants and their negligence.

Cited in *Cadden v. American Steel Barge Co.* 88 Wis. 420, 60 N. W. 800, holding "riveter" using scaffold on side of vessel not fellow servant to scaffold builders; *McLaine v. Head & D. Co.* 71 N. H. 295, 58 L. R. A. 463, 93 Am. St. Rep. 522, 52 Atl. 545, holding laborer engaged in tamping earth in trench fellow servant with foreman of gang; *Lintott v. Nashua Iron & Steel Co.* 69 N. H. 632, 44 Atl. 98, holding master liable for injury to servant assigned to duty by superior without instructions as to liability of belt to crawl toward pulley; *Galvin v. Pierce*, 72 N. H. 82, 54 Atl. 1014, denying master's liability for injury to employee through foreman's negligent direction to engineer to start hoisting crane; *Wallace v. Boston & M. R. Co.* 72 N. H. 513, 57 Atl. 913, holding railroad liable to brakeman injured through train despatcher's negligence; *Lapelle v. International Paper Co.* 71 N. H. 349, 31 Atl. 1068, holding master's duty to instruct servant as to dangers devolves upon person assigning employee to certain work; *Olney v. Boston & M. R. Co.* 71 N. H. 430, 52 Atl. 1097, holding railroad liable for negligence of foreman of repair shop in failing to repair engine.

Cited in footnote to *Palmer v. Michigan C. R. Co.* 17 L. R. A. 63, which holds assistant roadmaster not fellow servant of gang of men working under him.

Cited in note (54 L. R. A. 39, 81, 158) on vice principalship as determined with reference to character of act which caused injury.

13 L. R. A. 826, *CONNECTICUT RIVER LUMBER CO. v. OLCOTT FALLS CO.* 65 N. H. 290, 21 Atl. 1090.

What streams navigable.

Cited in *Concord Mfg. Co. v. Robertson*, 66 N. H. 5, 18 L. R. A. 682, 25 Atl. 718, holding fresh water navigable, if reasonably capable of valuable use as public way in natural condition.

Cited in footnote to *Heyward v. Farmers' Min. Co.* 28 L. R. A. 42, which holds navigable capacity test of navigability.

Cited in note (126 Am. St. Rep. 727) on what waters are navigable.

Distinguished in *King v. Muller*, 73 N. J. Eq. 43, 67 Atl. 380, holding right of public to navigate lake proper did not extend to adjoining swamp on its being flooded and public was without right to navigate channel dredged by complainants across it.

Franchise as public property.

Cited in *State v. Manchester & L. R.* 69 N. H. 51, 38 Atl. 736, sustaining charter provision for payment to state of excess of railroad's net annual receipts over 10 per cent of total expenditure.

Infringing public and private easements.

Cited in *State v. Sunapee Dam Co.* 70 N. H. 460, 59 L. R. A. 61, 50 Atl. 108, holding state grant of right to lower level of public lake for manufacturing purposes, if reasonably exercised, affords no ground for complaint by public; *Ladd v. Granite State Brick Co.* 68 N. H. 187, 37 Atl. 1041, holding use of land near dwelling house for manufacture of brick not unreasonable use justifying injunction; *Dana v. Craddock*, 66 N. H. 596, 32 Atl. 757, holding diminution of value of right of riparian owner to build wharf, through construction of bridge, included in damages awarded for laying out of highway; *Roberts v. Claremont R. & Lighting Co.* 74 N. H. 219, 124 Am. St. Rep. 962, 66 Atl. 485, holding adjacent riparian owners entitled to partition of water power though one of them was not yet using his share; *Trullinger v. Howe*, 53 Or. 222, 22 L.R.A.(N.S.) 546, 97 Pac. 548, holding riparian owner on floatable stream may maintain dam which does not materially reduce its utility for floating.

Cited in footnote to *Smith v. Atkins*, 53 L. R. A. 790, which denies right of one navigating stream to fasten booms to trees on bank.

Cited in notes (41 L. R. A. 377, 379) on right to use stream for floating logs; (59 L. R. A. 51, 61, 62, 73) on right to obstruct or destroy rights of navigation; (50 L. R. A. 845) on rights acquired in artificial condition of body of water.

Effect of reservation in deed.

Cited in *Smith v. Furbish*, 68 N. H. 127, 47 L. R. A. 229, 44 Atl. 398, holding conveyance of land described as bordering on river, without reservation, gives title to river bed to middle of stream; *Smith v. Furbish*, 68 N. H. 144, 47 L. R. A. 237, 44 Atl. 398, holding reservation in deed of right to build dam, together with right of flowage of land of grantor, gives perpetual easement; *Smith v. Furbish*, 68 N. H. 131, 47 L. R. A. 231, 44 Atl. 398, holding forfeiture of right to timber reserved in deed does not result from neglect to remove it for unreasonable time.

Cited in note (61 L. R. A. 872) on construction and operation of canals, *State v. Sunapee Dam Co.* 72 N. H. 116, 55 Atl. 899, as to jurisdiction of equity to assess damages for unreasonable exercise of right of flowage.

Mode of trial on bill in equity.

Cited in *State ex rel. Rhodes v. Saunders*, 66 N. H. 89, 18 L. R. A. 657, 25 Atl. 588, holding, in proceedings for injunction against liquor nuisance, question of illegal use of premises may be tried to jury; *Shapira v. D'Arcy*, 180 Mass. 378, 62 N. E. 412, holding constitutional right of trial by jury not applicable to suit in equity for specific performance of contract; *Richmond v. Atwood*, 17 L. R. A. 620, 2 C. C. A. 611, 5 U. S. App. 151, 52 Fed. 25, holding on appeal from decree enjoining infringement of patent, and ordering accounting, if injunction dissolved, court may direct dismissal of bill; *State v. Boston & M. R.*

Co. 75 N. H. 337, 74 Atl. 542, to the point that attorney general is proper party to proceedings in equity to restrain public nuisances and kindred wrongs.

Release of public right.

Cited in *New London v. Davis*, 73 N. H. 74, 59 Atl. 369, holding release of the public right in a highway involved in its discontinuance is a legislative and not a judicial function which may be performed by the legislative agents of the state.

13 L. R. A. 838, *GRESHAM v. EQUITABLE LIFE & ACCL. INS. CO.* 87 Ga. 497, 27 Am. St. Rep. 263, 13 S. E. 752.

Cause of death or injury of insured.

Cited in *Travelers Ins. Co. v. Wyness*, 107 Ga. 589, 34 S. E. 113, holding killing of assured by assault, which as to him was unexpected and without fault on his part, is accidental within policy; *Supreme Lodge, K. P. v. Crenshaw*, 129 Ga. 201, 13 L.R.A.(N.S.) 266, 121 Am. St. Rep. 216, 58 S. E. 628, 12 A. & E. Ann. Cas. 307, holding killing of insured by husband while former was attempting to have sexual intercourse with latter's wife was not death caused or superinduced in violation of criminal law within terms of policy.

Cited in footnote to *Burt v. Union Cent. L. Ins. Co.* 59 L. R. A. 393, which denies right to recover on policy on life of innocent person executed after conviction of capital offense.

Cited in notes (30 L. R. A. 208) on what constitutes an accident within meaning of accident insurance policy; (17 L. R. A. 754) on proximate cause of death within meaning of life insurance policy; (60 Am. St. Rep. 163) on death of insured in known violation of law.

Distinguished in *Coles v. New York Casualty Co.* 87 App. Div. 45, 83 N. Y. Supp. 1063, holding exception in accident policy of injuries resulting from fighting does not cover injuries to bartender assaulted by customer ordered out of saloon.

Mutual combat.

Cited in *Findley v. State*, 125 Ga. 583, 54 S. E. 106, holding manual blows not necessary to make combat.

13 L. R. A. 841, *MILES v. WORCESTER*, 154 Mass. 511, 26 Am. St. Rep. 284, 28 N. E. 676.

Nuisance; liability of municipal corporation.

Cited in *Vernon v. Wedgeworth*, 148 Ala. 493, 42 So. 749, as to liability of municipality for nuisance; *Fitzgerald v. Sharon*, 143 Iowa, 732, 121 N. W. 523, holding that city is liable for nuisance consisting of water and filth distributed on land of abutter caused by construction of culverts in streets.

Cited in footnotes to *Hughes v. Auburn*, 46 L. R. A. 636, which denies city's liability for disease due to neglect of proper sanitary precautions as to sewer system; *Long v. Elberton*, 46 L. R. A. 428, which denies liability of city to neighboring property owners for election of prison within city limits, unless so negligently maintained as to constitute nuisance; *Duncan v. Lynchburg*, 48 L. R. A. 331, which denies city's liability for nuisance by pollution of water in unauthorized operation of rock quarry outside city limits.

Liability of municipal corporation for negligence of agents.

Cited in *Johnson v. Somerville*, 195 Mass. 374, 10 L.R.A.(N.S.) 717, 81 N. E. 268, holding municipal corporation not liable for injury to adjoining property caused by act of one employed and paid by it to collect ashes in dumping them into a water course so as to fill it up and cause water to flow into such adjoining

property; *Meynihan v. Todd*, 188 Mass. 306, 108 Am. St. Rep. 473, 74 N. E. 367, as to liability for agents acts.

Cited in footnote to *Snider v. St. Paul*, 18 L. R. A. 151, which holds city not liable for negligence of agents in providing and maintaining city hall.

Cited in note (30 Am. St. Rep. 397) on liability of cities for negligence and other misconduct of officers and agents.

Distinguished in *Rosenblit v. Philadelphia*, 28 Pa. Super. Ct. 598, holding fall of defective plastering of which school authorities knew was not actionable by injured scholar against city.

Nuisance.

Cited in *Waller v. Ross*, 100 Minn. 10, 12 L.R.A.(N.S.) 726, 117 Am. St. Rep. 661, 110 N. W. 252, 10 A. & E. Ann. Cas. 715, as to person being liable for injuries done by falling wall upon principal of nuisance; *Alabama Western R. Co. v. Wilson*, 1 Ala. App. 318, 55 So. 932 holding that railroad embankment so constructed that deposit of sand found its way from embankment over adjoining land is nuisance.

13 L. R. A. 843, *FRANKLIN v. FRANKLIN*, 154 Mass. 515, 26 Am. St. Rep. 266, 28 N. E. 681.

What constitutes valid marriage.

Cited in *Lee v. State*, 44 Tex. Crim. Rep. 368, 61 L. R. A. 911, 72 S. W. 1005 (dissenting opinion), majority holding sham ceremony, followed by carnal intercourse without matrimonial cohabitation, not constitute common-law marriage.

Jurisdiction of actions for divorce.

Cited in *Clark v. Clark*, 191 Mass. 132, 77 N. E. 702, holding every state has jurisdiction to decree a divorce for a proper cause in favor of its own citizens for the purpose of determining the status of the citizen even though the other party to the marriage is a nonresident.

Cited in notes (83 Am. St. Rep. 871, 873) on validity and effect of separation agreements; (53 Am. St. Rep. 183) on jurisdiction over absent citizens.

13 L. R. A. 844, *ROBERTS v. LOUISVILLE*, 92 Ky. 95, 17 S. W. 216.

Equitable interference with action of municipal corporations.

Cited in *State ex rel. Rose v. Superior Court*, 105 Wis. 678, 48 L. R. A. 829, footnote, p. 819, 81 N. W. 1046, holding discretion of city council in passage of ordinance granting street railway franchise cannot be controlled by injunction; *Wabaska Electric Co. v. Wymore*, 60 Neb. 203, 82 N. W. 626, holding mayor and council, but not city, may be enjoined from passing ordinance in violation of contract with electric lighting company; *Trading Stamp Co. v. Memphis*, 101 Tenn. 186, 47 S. W. 136, holding city council may be enjoined from passing ordinance imposing privilege tax upon trading stamp company, and upon merchants using tax, and making violation misdemeanor; *Sherburne v. Portsmouth*, 72 N. H. 540, 58 Atl. 38, holding taxpayer may have injunction against illegal administrative act of city council; *Ramsey v. Shelbyville*, 119 Ky. 184, 68 L.R.A. 300, 83 S. W. 116, holding if act of council creating an obligation on part of city was beyond power of council to pass the taxpayers may maintain action to have it declared invalid; *Chicago, R. I. & P. R. Co. v. Lincoln*, 85 Neb. 735, 124 N. W. 142, as to right to enjoin municipal corporation against passing unauthorized ordinance; *Woodall v. South Covington & C. Street R. Co.* 137 Ky. 524, 124 S. W. 843 (dissenting opinion), on right of taxpayer to enjoin unlawful exercise of municipal power.

Cited in footnote to *Stevens v. St. Mary's Training School*, 18 L. R. A. 832,

which denies injunction to prevent illegal contract or appropriation by county commissioners.

Cited in note (2 L.R.A.(N.S.) 152) on power to enjoin passage of municipal ordinance.

Public and private property of municipal corporations.

Cited in *Huron Waterworks Co. v. Huron*, 7 S. D. 26, 30 L. R. A. 856, 58 Am. St. Rep. 817, 62 N. W. 975, holding waterworks constructed and owned by city cannot be sold and conveyed by city, except by special legislative authority; *Owensboro v. Com.* 105 Ky. 355, 44 L. R. A. 205, 40 S. W. 320, holding city parks and property used by fire department within constitutional provision exempting "public property" from taxation; *Carrollton Furniture Mfg. Co. v. Carrollton*, 104 Ky. 529, 47 S. W. 885, holding city as lessor of public wharf not liable for personal injury from negligent operation of wharf boat; *Murray v. Allegheny*, 69 C. C. A. 65, 136 Fed. 60, holding municipal corporation has no implied power to convey away for private purposes property dedicated to or held by it for the public use on water front; *Com. v. Louisville*, 133 Ky. 847, 119 S. W. 161, holding repurchase of waterfront property after the same had been unwisely alienated by the public authority reinstated the public right in such property so that it was as such exempt from taxation.

Cited in footnotes to *Reighard v. Flinn*, 43 L. R. A. 502, which holds invalid, lease by city of part of public landing to private person; *St. Paul v. Chicago, M. & St. P. R. Co.* 34 L. R. A. 184, which denies power of legislature to give any part of levee as permanent site for freight warehouse.

Cited in note (40 L. R. A. 645) on right to erect wharves.

Injunction after discontinuance of acts complained of.

Cited in *State v. Minneapolis & St. L. R. Co.* 115 Minn. 122, 131 N. W. 1075, holding that injunction should be granted restraining illegal tariff by carrier although operation of tariff was discontinued at time of trial.

13 L. R. A. 848, *COLE v. ROWEN*, 88 Mich. 219, 50 N. W. 138.

Railroads; regulation of solicitors of patronage in or about depot grounds.

Cited in *Lucas v. Herbert*, 148 Ind. 66, 37 L. R. A. 377, 47 N. E. 146, holding railroad may designate place in depot grounds where vehicles of competing omnibus lines shall stand; *Cosgrove v. Augusta*, 103 Ga. 840, 42 L. R. A. 714, 68 Am. St. Rep. 149, 31 S. E. 445, holding city ordinance prohibiting hackmen from entering union depot to solicit patronage, notwithstanding consent of railroad, invalid; *Hedding v. Gallagher*, 72 N. H. 390, 64 L. R. A. 819, 57 Atl. 225, holding railroad may grant exclusive right to solicit baggage on station grounds; *Hot Springs v. Demby*, 90 Ark. 576, 134 Am. St. Rep. 43, 119 S. W. 1126, holding railroad having contract with a hackman could give him the best position at its station and exclude all others.

Cited in footnotes to *New York N. H. & H. R. Co. v. Scovill*, 42 L. R. A. 157; *Kates v. Atlanta Baggage & Cab Co.* 46 L. R. A. 431; *Donovan v. Pennsylvania Co.* 61 L. R. A. 140,—which sustains railroad company's right to give exclusive privilege of soliciting passengers or baggage on trains or on station grounds; *Boston & A. R. Co. v. Brown*, 52 L. R. A. 418, which holds driver of public carriage entering railroad grounds to get passenger ordering carriage, a trespasser on soliciting other passengers; *Godbout v. St. Paul Union Depot Co.* 47 L. R. A. 532, which authorizes discrimination by carrier between hackmen within, but not outside of, depot; *Norfolk & Western R. Co. v. Old Dominion Baggage Transfer Co.* 50 L. R. A. 722, which upholds special privilege to baggage transfer company to

enter depot to solicit business; Indianapolis Union R. Co. v. Dohn, 45 L. R. A. 427, which holds unlawful, grant of exclusive right to stand hacks on area; Pittsburgh, Ft. W. & C. R. Co. v. Cheevers, 24 L. R. A. 156, which denies right of company to enjoin congregation of hotel runners, etc., in front of station; Pennsylvania Co. v. Chicago, 53 L. R. A. 223, which denies carrier's power to prevent others than lessee occupying hack stands in street; Lindsey v. Anniston, 27 L. R. A. 436, which holds ordinance excluding hackmen from depots at train time not limited by prior contract between carrier and hackmen; Barrington v. Commercial Dock Co. 33 L. R. A. 116, which denies power to discriminate between similar vessels using wharf for landing place; State ex rel. Sheets v. Union Depot Co. 63 L.R.A. 792, which sustains right of union depot company to grant transfer company exclusive right to use specified part of depot grounds for hacks and vehicles and soliciting patronage of passengers; Hedding v. Gallagher, 64 L.R.A. 811, which sustains right of railroad company to give exclusive right to one teamster to enter on its grounds, if reasonable requirements of passengers are fully met.

Cited in notes (16 L.R.A. 449) on regulation as to admission of passenger to train house; (15 L.R.A.(N.S.) 716) on right of state or municipality to forbid solicitation of patronage at railway stations; (16 L.R.A.(N.S.) 782) on right to discriminate between solicitors of patronage at depots, wharves, etc.

Distinguished in State v. Reed, 76 Miss. 222, 43 L. R. A. 136, 71 Am. St. Rep. 528, 24 So. 308, holding railroad without authority to give hackman exclusive privilege of entering inclosed grounds to solicit patronage.

13 L. R. A. 851, WABASH v. CARVER, 129 Ind. 552, 29 N. E. 25.

Followed without discussion in Board of Commissioners of Vermillion County v. Chipps, 131 Ind. 59, 16 L. R. A. 228, 29 N. E. 1066.

Negligence; when question for jury.

Cited in footnote to Hardin County v. Coffman, 48 L. R. A. 455, which holds question for jury whether bridge may properly be used for passing of traction engine drawing water tank.

Pleading; general allegation overcome by averment of specific facts.

Cited in Allen County v. Creviston, 133 Ind. 43, 32 N. E. 735, holding averment of plaintiff's freedom from contributory negligence sufficient, unless overcome by specific averments of fact showing negligence; Clark County v. Brod, 3 Ind. App. 591, 29 N. E. 430, holding allegation that plaintiff was without fault not overcome by specific averment that he attempted to cross bridge with steam threshing-machine engine; Louisville, E. & St. L. Consol. R. Co. v. Hanning, 131 Ind. 536, 31 Am. St. Rep. 443, 31 N. E. 187, holding specific averment of freedom from negligence not overcome by allegation that placing of signal flags was necessary to avoid danger, without averring decedent made personal investigation whether signals displayed; Indianapolis, D. & W. R. Co. v. Wilson, 134 Ind. 96, 33 N. E. 793, holding averment that complainant watched detached engine cross highway, and then started across track, "not knowing or observing, and not having time or opportunity to know or observe," that portion of train was following, shows contributory negligence; Stewart v. Pennsylvania Co. 130 Ind. 246, 29 N. E. 916, holding allegation of alighting from train on side where other trains were liable to be passing shows contributory negligence, although alleging that decedent looked and listened for train, and embankment on opposite side afforded no place to alight; De Ruiter v. De Ruiter, 28 Ind. App. 13, 91 Am. St. Rep. 107, 62 N. E. 100, holding in complaint to set aside fraudulent conveyance, allegation of insolvency is overcome by averment that defendant, at time of action, is possessed of

large sum of money and bonds; *Columbian Enameling & Stamping Co. v. Burke*, 37 Ind. App. 522, 117 Am. St. Rep. 337, 77 N. E. 409, holding general allegation of want of knowledge of danger from crated car-boys of acid not overcome by specific allegations as to nature of crates and mode of handling; *Knoefel v. Atkins*, 40 Ind. App. 450, 81 N. E. 600 (dissenting opinion), on specific statements controlling general ones.

Bridges; construction and control.

Cited in *New Albany v. Iron Substructure Co.* 141 Ind. 506, 40 N. E. 44, holding city has power to build bridge, in its discretion, especially when necessary to make street passable and safe to public; *Daviess County v. State*, 141 Ind. 196, 40 N. E. 686, holding city may build bridge of any kind, or at any cost, but cannot compel county to build bridge according to plans prescribed by city.

Cited in footnotes to *Vermillion County v. Chippis*, 16 L. R. A. 228, which holds county officers not negligent in accepting defective bridge which expert believes sufficient; *Thomas v. Flint*, 47 L. K. A. 499, which holds mere existence of defect in bridge for two or three days not constructive notice to city; *Templeton v. Linn County*, 15 L. R. A. 730, which holds county not liable for injury from defect in bridge or highway; *Clulow v. McClelland*, 17 L. R. A. 650, which holds township officer's ignorance of defect of bridge not disclosed by examination by one intending to take traction engine over not negligence.

Distinguished in *Reinhart v. Martin County*, 9 Ind. App. 573, 37 N. E. 38, holding complaint for damages from giving way of bridge spanning ditch for drainage of surface water not sufficient to show county bridge.

Verdict; when excessive.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Burton*, 139 Ind. 378, 37 N. E. 150, holding verdict for \$9,400 for wrongful killing of farmer, having expectancy of thirty-eight years, not excessive; *Indianapolis Traction & Terminal Co. v. Beckman*, 40 Ind. App. 104, 81 N. E. 82, holding \$1,000 for death of seven year old child not excessive.

13 L. R. A. 854, *DEMAREST v. GRANT*, 128 N. Y. 205, 28 N. E. 645.

Pleading special defense.

Cited in *Kuechenmeister v. Brown*, 13 Misc. 142, 34 N. Y. Supp. 180, holding evidence that maintenance of coal hole in sidewalk was with municipal consent admissible under general denial of allegation that same was "wrongfully" and "unlawfully" maintained; *Kiers v. Rathjen*, 60 Misc. 106, 111 N. Y. Supp. 599, holding general denial in action for wrong done by defendant's servant will admit proof that some one did it for whom defendant is not responsible.

Evidence of incorporation.

Cited in *Owen v. Shepard*, 8 C. C. A. 248, 19 U. S. App. 336, 59 Fed. 749, holding adoption of corporate name and feigned compliance with incorporation laws of state not sufficient evidence to show fact of incorporation.

Validity of defense of incorporation, for court.

Cited in *Werner v. Hearst*, 177 N. Y. 67, 69 N. E. 221, holding submission to jury of question whether articles of incorporation were mere forms to avoid liability, error; *State ex rel. Brown Contracting & Bldg. Co. v. Cook*, 181 Mo. 603, 80 S. W. 929, holding question whether corporation was organized in another state for purpose of evading law of this state was one of law for court.

Validity of incorporation.

Cited in *Lancaster v. Amsterdam Improv. Co.* 140 N. Y. 583, 24 L. R. A. 329, 35 N. E. 964, Affirming on this point 72 Hun, 22, 25 N. Y. Supp. 309, holding

validity of foreign corporation not affected by fact that residents of state went into another state to incorporate; *United States Vinegar Co. v. Schlegel*, 143 N. Y. 542, 38 N. E. 729, holding deception in procuring record of papers of incorporation not defense to action by foreign corporation; *Duke v. Taylor*, 37 Fla. 75, 31 L. R. A. 487, 53 Am. St. Rep. 232, 10 So. 172, holding corporation obtaining charter in one state cannot complete organization by electing officers and issuing stock in another.

Cited in note (17 L. R. A. 550) on partnership liability of stockholders in case of defective or illegal incorporation.

Recognition of foreign corporation.

Cited in *O'Reilly v. Greene*, 18 Misc. 426, 41 N. Y. Supp. 1056, Affirming 17 Misc. 303, 40 N. Y. Supp. 360, holding expired foreign corporation permitted to sue, when law of state of organization permits continuance for collection of assets; *Indiana River Mfg. Co. v. Wooten*, 55 Fla. 769, 46 So. 185, holding under comity the courts of this state will entertain a suit in chancery brought by a foreign corporation where the question presented by the bill is the right of such a corporation to protect its real estate from trespass; *Stephenson v. Dodson*, 11 North Co. Rep. 54, holding that members of unregistered foreign corporation having office and doing business here are not liable as partners upon bonds issued under corporate seal.

Cited in footnote to *Oakdale Mfg. Co. v. Garst*, 23 L. R. A. 639, which holds that recognition will not be denied foreign corporation by courts of state because composed exclusively of its own citizens.

Cited in note (24 L. R. A. 292) on recognition or exclusion of foreign corporations.

Distinguished in *Cumberland Teleg. & Teleph. Co. v. Louisville Home Teleph. Co.* 114 Ky. 807, 72 S. W. 4, holding when foreign corporation had spent large sums of money in erection of telephones in the state it had a right to sue in courts of state to protect its rights; *Re Avery*, 45 Misc. 539, 92 N. Y. Supp. 974, holding it against policy of laws of state against foreign corporations for them to act as executors and general recognition of foreign corporations yields thereto.

Supervision of foreign corporations.

Cited in *Novelty Mfg. Co. v. Connell*, 88 Hun, 256, 34 N. Y. Supp. 717, holding statute requiring foreign corporation to obtain certificate of secretary of state as condition to right to sue not applicable to action on contract made outside state; *Providence Steam & Gas Pipe Co. v. Connell*, 86 Hun, 322, 33 N. Y. Supp. 482, holding foreign corporation without certificate entitled to enforce contract made prior to act of 1892; *Providence Steam & Gas Pipe Co. v. Connell*, 86 Hun, 322, 33 N. Y. Supp. 482, holding act 1892, requiring foreign corporation to obtain certificate from secretary of state, not applicable to contract of corporation made before, but completed after, passage of act; *Neuchatel Asphalt Co. v. New York*, 9 Misc. 378, 30 N. Y. Supp. 252, holding statute requiring foreign corporations to obtain certificate of secretary of state, as condition to doing business within state, valid.

Distinguished in *Williams v. Gold Hill Min. Co.* 96 Fed. 461, holding state law requiring mortgage by corporation to be ratified by two thirds of capital stock applicable to mortgage by foreign corporation.

Individual liability of agents of corporation.

Cited in *Van Antwerp v. Linton*, 89 Hun, 419, 35 N. Y. Supp. 318, holding agents of corporation not liable for negligent performance of duties.

13 L. R. A. 859, *WESTERN U. TELEG. CO. v. ROGERS*, 68 Miss. 748, 24 Am. St. Rep. 300, 9 So. 823.

Damages for mental anguish.

Followed in *Duncan v. Western U. Teleg. Co.* 93 Miss. 503, 47 So. 552, holding damages not recoverable for mental anguish caused by negligent transmission of telegraph message.

Cited in *Peay v. Western U. Teleg. Co.* 64 Ark. 543, 39 L. R. A. 466, 43 S. W. 965; *Francis v. Western U. Teleg. Co.* 58 Minn. 263, 25 L. R. A. 412, 49 Am. St. Rep. 507, 57 N. W. 1078; *Newman v. Western U. Teleg. Co.* 54 Mo. App. 443; *International Ocean Teleg. Co. v. Saunders*, 32 Fla. 447, 21 L. R. A. 815, 14 So. 148, —holding sender of telegram cannot recover for mental pain and suffering from failure of telegraph company to make delivery; *Western U. Teleg. Co. v. Wood*, 21 L. R. A. 712, 6 C. C. A. 451, 13 U. S. App. 317, 57 Fed. 478; *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 76, 54 L. R. A. 850, footnote p. 846, 60 N. E. 674, Affirming 26 Ind. App. 219, 59 N. E. 416; *Summerfield v. Western U. Teleg. Co.* 87 Wis. 8, 41 Am. St. Rep. 17, 57 N. W. 973; *Chapman v. Western U. Teleg. Co.* 88 Ga. 765, 17 L. R. A. 431, 30 Am. St. Rep. 183, 15 S. E. 901; *Western U. Teleg. Co. v. Sklar*, 61 C. C. A. 283, 126 Fed. 297,—holding addressee of telegram not entitled to damages for mental pain and suffering from failure to deliver message announcing illness or death of relative; *Connell v. Western U. Teleg. Co.* 116 Mo. 42, 20 L. R. A. 176, 38 Am. St. Rep. 575, 22 S. W. 345, holding telegraph company not liable in damages to addressee for mental pain and suffering from failure to receive message that "child is dying;" *Kester v. Western U. Teleg. Co.* 55 Fed. 604, holding addressee cannot recover damages for mental anguish from failure to deliver message announcing death of father, whereby he was prevented from attending funeral, and consoling mother; *Butner v. Western U. Teleg. Co.* 2 Okla. 239, 4 Inters. Com. Rep. 772, 37 Pac. 1087, holding addressee cannot recover for mental pain and suffering from failure to deliver message announcing death of daughter, when relationship not shown on face of message; *Crawson v. Western U. Teleg. Co.* 47 Fed. 546, holding damages for mental suffering recoverable only in cases of gross negligence in delay of message, indicating wantonness or malicious purpose; *Western U. Teleg. Co. v. Burris*, 102 C. C. A. 386, 179 Fed. 95, holding mental anguish caused by delay alone will not support recovery; *Western U. Teleg. Co. v. Chouteau*, 28 Okla. 680, — L.R.A.(N.S.) —, 115 Pac. 879, holding that damages are not recoverable for mental distress alone caused by negligence in delivering telegram; *Wilson v. St. Louis & S. F. R. Co.* 160 Mo. App. 658, 142 S. W. 775, holding that damages cannot be allowed for mental suffering unconnected with physical injury; *Beaulieu v. Great Northern R. Co.* 103 Minn. 55, 19 L.R.A.(N.S.) 570, 114 N. W. 353, 14 A. & E. Ann. Cas. 462, holding in absence of wilful or malicious misconduct on part of railway company it is not liable for damages for mental anguish caused by negligence in transportation of a corpse; *Koerber v. Patek*, 123 Wis. 465, 68 L.R.A. 961, 102 N. W. 40, holding plaintiff being entitled to custody of body of his deceased mother could recover for damages for mental anguish against one wilfully mutilating the same; *Cumberland Teleph. & Teleg. Co. v. Jackson*, 95 Miss. 84, 48 So. 614, to the point that mental suffering alone will not support award of damages for negligence in operation of telephone.

Cited in footnotes to *Wilcox v. Richmond & D. R. Co.* 17 L. R. A. 804, which denies recovery for mental anguish from nonperformance of contract; *Connelly v. Western U. Teleg. Co.* 56 L. R. A. 663, which denies liability for mere mental suffering from delay in delivering telegram; *Western U. Teleg. Co. v. Crocker*, 59 L. R. A. 398, which sustains recovery for mental anguish for failure to promptly deliver telegram announcing serious illness of grandchild; *Simmons v. Western*

U. Teleg. Co. 57 L. R. A. 607, which sustains statute rendering telegraph companies liable for delay in delivering messages; *Hale v. Bonner*, 14 L. R. A. 336, which allows damages for mental distress for delay in transporting corpse of husband; *Cowan v. Western U. Teleg. Co.* 64 L.R.A. 546, which holds that mental suffering will not sustain an action for breach of a contract promptly to transmit telegram; *Barnes v. Western U. Teleg. Co.* 65 L.R.A. 666, which sustains right to damages for mental anguish from failure to deliver telegram, though unaccompanied by physical suffering; *Green v. Western U. Teleg. Co.* 67 L.R.A. 985, which sustains liability of telegraph company for mental anguish of 16 year old girl in being compelled to drive two miles in strange city after midnight with a strange driver due to its failure to deliver telegram; *Western U. Teleg. Co. v. Reid*, 70 L.R.A. 289, which denies father's right to recover for mental anguish in witnessing suffering of child because of telegraph company's failure promptly to deliver telegram summoning physician; *Hancock v. Western U. Teleg. Co.* 69 L.R.A. 403, which denies right to damages for mere disappointment and regret from failure of telegraph company promptly to deliver a death message.

Cited in notes (30 L.R.A.(N.S.) 1138) on right of addressee of telegram to sue for delay in delivery; (117 Am. St. Rep. 310) on elements of damages recoverable for failure to transmit and deliver telegrams.

Distinguished in *Magouirk v. Western U. Teleg. Co.* 79 Miss. 637, 89 Am. St. Rep. 663, 31 So. 206, holding telegraph company liable for mental suffering caused by injury to reputation of woman, in whose name operator sent forged message to man; *Western U. Teleg. Co. v. Watson*, 82 Miss. 103, 33 So. 76, holding exemplary damages recoverable from telegraph company for negligence amounting to wilfulness in transmitting message to wife announcing husband's death.

Disapproved in *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 756, 28 L. R. A. 73, 57 Am. St. Rep. 294, 62 N. W. 1, holding addressee prevented from attending funeral of mother, by reason of negligent delay in delivery of message, may recover damages for mental anguish; *Green v. Western U. Teleg. Co.* 136 N. C. 505, 67 L.R.A. 992, 103 Am. St. Rep. 955, 49 S. E. 165, 1 A. & E. Ann. Cas. 349, holding damages recoverable for mental anguish on account of negligence in failure to deliver telegram.

13 L. R. A. 864, *CERVENY v. CHICAGO DAILY NEWS CO.* 139 Ill. 345, 28 N. E. 692.

Libelous publications.

Cited in *Lewis v. Daily News Co.* 81 Md. 473, 29 L. R. A. 60, 32 Atl. 246, holding it libelous to falsely publish of one that he would be an anarchist if he thought it would pay; *Kenney v. Illinois State Journal Co.* 64 Ill. App. 44, holding publication charging one with obtaining subscriptions to book by false representations as to organization behind enterprise libelous; *Pfitzinger v. Dubs*, 12 C. C. A. 404, 24 U. S. App. 376, 64 Fed. 700, holding publication comparing minister of gospel to rotten egg libelous *per se*; *Herrick v. Tribune Co.* 108 Ill. App. 248, holding written language tending to bring plaintiff into disgrace actionable *per se*; *Dowie v. Priddle*, 116 Ill. App. 196, holding an action for libel may be sustained for words published, which tend to bring the plaintiff into public hatred, contempt and ridicule, even though the same words spoken would not have been actionable; *Morse v. Times-Republican Printing Co.* 124 Iowa, 716, 100 N. W. 867, holding it not necessary that a crime be imputed to plaintiff to constitute a libel.

Cited in footnote to *Hollenbeck v. Hall*, 39 L. R. A. 734, which holds publication that trader dishonest in pleading statute of limitations not libelous.

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Cited in notes (718 Am. St. Rep. 804) on what words are libelous per se; (9 Eng. Rul. Cas. 16) on distinction between libel and slander.

Effect of default.

Cited in *Chicago v. English*, 198 Ill. 218, 64 N. E. 976, Affirming 97 Ill. App. 601, holding default admits every material and traversable fact alleged in declaration; *Scottish Nat. Bank v. Adams*, 122 Ill. App. 474, holding same.

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LAWYERS' REPORTS,

ANNOTATED.

NEW YORK COURT OF APPEALS (2d Div.).

George H. TILDEN, *Respnt.*,
v.
Andrew H. GREEN *et al.*, *Appts.*
(.....N. Y.)

1. **A bequest cannot be upheld as an executory devise** to a designated institution where the property is given to trustees with complete discretionary power to convey or not to convey it to the suggested beneficiary.
2. **A trust cannot be upheld as a power** in trust, if it is invalid because the power given the trustees as to the disposition of the property is not one recognized by the law.
3. **Lack of a designated beneficiary and the unlawful delegation of the selection thereof** renders void a testamentary gift of the residue of an estate to trustees to be given by them to a corporation to be created for the maintenance of a free library and reading room in New York City, and for the promotion of such scientific and educational objects as they may designate. But in case the institution is not incorporated within two specified lives in being, or if, "for any cause or reason" the trustees "deem it inexpedient" to give to it all or any part of the property, then it is to be given by them "to such charitable, educational, and scientific purposes as in their judgment will render the gift most widely and substantially beneficial to the interests of mankind." The provision as to the proposed corporation is not a primary gift followed by an ulterior or alternative disposition, but there is only a single scheme which gives the trustees unlimited discretion as to the selection of beneficiaries so long as the gift goes to charitable objects.
4. **The invalidity of a charitable trust because of uncertainty** as to the beneficiaries cannot be cured by anything done by the trustees to execute it.

(Bradley, Potter and Vann, JJ., dissent.)

(October 27, 1891.)

APPEAL by defendants from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of a Special Term for New York County in favor of plaintiff in a proceeding instituted to have certain provisions of the will of Samuel J. Tilden, deceased, declared invalid. *Affirmed.*

Statement by Bradley, J.:

The purpose of the action was the construction of certain provisions of the will of Samuel J. Tilden, who died in August, 1886. The will was made April 23, 1884, and admitted to 14 L. R. A.

probate in October, 1886. He left surviving him one sister, two nephews, and four nieces, his only heirs and next of kin. The plaintiff was one of the nephews. The sister died before the commencement of this action, leaving surviving her one daughter, her sole heir and next of kin. The testator, by his will, appointed the defendants Andrew H. Green, John Bigelow, and George W. Smith executors and trustees, to whom letters testamentary were issued, and who qualified as such. His will contains 43 articles; and by it he made certain provisions for his sister, nephews, and nieces and others, and provided for libraries and reading-rooms at New Lebanon and Yonkers. For those purposes he directed the creation of trusts, and the application of income of specific funds. The main controversy arises upon the thirty-fifth article, which is as follows: "Thirty-fifth. I request my said executors and trustees to obtain, as speedily as possible, from the Legislature, an Act of incorporation of an institution to be known as the 'Tilden Trust,' with capacity to establish and maintain a free library and reading-room in the City of New York, and to promote such scientific and educational objects as my said executors and trustees may more particularly designate. Such corporation shall have not less than five trustees, with power to fill vacancies in their number; and, in case said institution shall be incorporated in a form and manner satisfactory to my said executors and trustees during the lifetime of the survivor of the two lives in being upon which the trust of my general estate herein created is limited, to wit, the lives of Ruby S. Tilden and Susie Whittlesey, I hereby authorize my said executors and trustees to organize the said corporation, designate the first trustees thereof, and to convey or apply to the use of the same the rest, residue, and remainder of all my real and personal estate not specifically disposed of by this instrument, or so much thereof as they may deem expedient, but subject, nevertheless, to the special trusts herein directed to be constituted for particular persons, and to the obligations to make and keep good the said special trusts, provided that the said corporation shall be authorized by law to assume the obligation. But in case such institution shall not be so incorporated during the lifetime of the survivor of the said Ruby S. Tilden and Susie Whittlesey, or if for any cause or reason my said executors and trustees shall deem it inexpedient to convey said rest, residue, and remainder, or any part thereof, or to apply the same, or any

part thereof, to said institution, I authorize my said executors and trustees to apply the rest, residue, and remainder of my property, real and personal, after making good the said special trusts herein directed to be constituted, or such portion thereof as they may not deem it expedient to apply to its use, to such charitable, educational, and scientific purposes as in the judgment of my said executors and trustees will render the said rest, residue, and remainder of my property most widely and substantially beneficial to the interests of mankind." And, as bearing, so far as it may, upon the construction of that article, reference is made to the thirty-ninth, which is as follows: "Thirty-ninth. I hereby devise and bequeath to my said executors and trustees, and to their successors in the trust hereby created, and to the survivors or survivor of them, all the rest, residue, and remainder of all the property, real and personal, of whatever name or nature, and wheresoever situated, of which I may be seised or possessed, or to which I may be entitled at the time of my decease, which may remain after instituting the several trusts for the benefit of specific persons; and, after making provision for the specific bequests and objects as herein directed, to have and to hold the same unto my said executors and trustees, and to their successors in the trust hereby created, and the survivors or survivor of them in trust, to possess, hold, manage, and take care of the same during a period not exceeding two lives in being,—that is to say, the lives of my niece Ruby S. Tilden, and my grandniece Susie Whittlesey, and until the decease of the survivor of the said two persons; and, after deducting all necessary and proper expenses, to apply the same, and the proceeds thereof, to the objects and purposes mentioned in this, my will." After the commencement of this action, and on March 23, 1887, the Legislature passed an Act incorporating the "Tilden Trust," and authorizing it to establish and maintain a free library and reading room in the City of New York. The institution was organized, and the executors and trustees made to it a conveyance of the residuary estate, and the conveyance was formally accepted by the trustees of the Tilden Trust. The first trial of the action resulted in a decision of the special term upon which judgment was entered sustaining the validity of the thirty-fifth article of the will. The judgment was reversed by the general term, and a new trial granted. [*Tilden v. Greene*, 54 Hun, 231]. The conclusion of the second trial was a judgment that the thirty-fifth article of the will was invalid, and that as to the residuary estate the testator died intestate. On affirmance of that judgment appeal was taken to this court.

Messrs. Carter & Ledyard, for appellants:

1. The only business which a judicial tribunal can have with this will is to ascertain the intention of the testator and to carry that into effect, if it be in accordance with law.

It is not material, in general, what form the testator adopts for the carrying out of his intentions. It is all the same whether he in terms gives himself or directs his executors to give, or gives to them in trust that they may

give. If his intentions be sufficiently indicated that a particular disposition of his property, or part of it, be made in favor of some designated person, the law will see that it is carried out; and if the particular mode selected is not in accordance with law, but there is a mode in which it may be lawfully effected, it will be carried into effect in such lawful mode.

II. Gov. Tilden, by the thirty-fifth clause of his will, gives the residue of his estate subject to the conditions in that clause distinctly specified, to a corporate body thereafter to be chartered by the Legislature, to be known as the Tilden Trust.

III. The case is that of a gift, not to charitable objects, or purposes, or classes of persons, natural or artificial, but to one artificial person, a corporate body, named the "Tilden Trust," fully competent by its charter to take the bequest. This is valid.

Burrill v. Boardman, 43 N. Y. 254.

The suggestion that a primary devise, otherwise good, may be made void by being associated with an invalid ulterior devise, was decisively rejected by the above decision. The question of the validity of the primary devise is to be determined by itself alone.

The true rule is, that where some of the dispositions of a will are void, and are at the same time so closely tied to the others that they cannot be separated without doing violence to the intention of the testator,—that is to say, when the testator has contemplated one entire scheme, and the striking out of one of the provisions would make the scheme a different one, which he could not be presumed to have intended,—if one is illegal and void, the whole disposition must fall. But where it is consistent with the testator's intention that his valid dispositions should stand, even if the invalid ones should fail, the invalid ones will not be allowed to vitiate those which are free from objection.

Schettler v. Smith, 41 N. Y. 328; *Manice v. Manice*, 43 N. Y. 303; *Savage v. Burnham*, 17 N. Y. 561; *Kennedy v. Hoy*, 6 Cent. Rep. 805, 105 N. Y. 134; *Adams v. Perry*, 43 N. Y. 487; *Selden v. Vermilyen*, 1 Barb. 58.

The difficulty of determining whether the valid and invalid provisions are capable of separation consistently with the testator's intention can never arise, in the slightest degree even, where the valid provision is a primary gift, and the invalidity affects the ulterior and alternative provision alone.

IV. The attempt to distinguish *Burrill v. Boardman*, 43 N. Y. 254, by insisting that in the case at bar an exercise of discretion by the executors in favor of the Tilden Trust was a condition precedent to the vesting of the gift; and, consequently, that until that discretion was exercised, the Tilden Trust could not procure a judicial decree enforcing the gift, and the gift was thus rendered void,—is fruitless.

The legal proposition that a gift otherwise good, which is made to depend upon the exercise as a condition precedent of the discretion of a designated person, is void, expresses nothing but error.

This doctrine assumes that the rule of law that a testamentary gift is void unless it can be enforced by judicial decree means that it must be thus enforceable immediately upon the death of the testator.

We know to the contrary, for whole chapters of the Law of Wills are occupied with the discussion of gifts depending upon conditions precedent, and they are assumed to be as valid as other gifts.

See N. Y. Rev. Stat. §§ 73, 74.

Any disposition of property whether by deed or will, which a man may make absolutely, he may make conditionally, if he pleases, and subject to the exercise of discretion, if he pleases.

See *Hartnett v. Wandell*, 60 N. Y. 849; *Beckman v. Bonsor*, 23 N. Y. 298; *Power v. Cassidy*, 79 N. Y. 602.

The rule that no gift to charity is valid, unless it can be enforced by judicial decree, does not mean that it must be susceptible of being so enforced when the deed is delivered, or, in the case of a will, upon the death of the testator, but, at the time, or upon the event, when, by the terms of the instrument, the conveyance or gift is to take effect.

Holmes v. Mead, 52 N. Y. 382.

The employment of the discretion of designated persons, whether in determining those who are, in the future, to take the property, or the amounts which they are to take, is not in the slightest degree inconsistent with the certainty required.

Nothing can be more certain as to the subject of a gift than to say that it shall be such a sum as a trustee or donee of a power shall in his discretion determine; and nothing more certain in respect to the object than to say that it shall be such a person as such trustee or donee may in his discretion determine.

1 Jarman, Wills, p. 807.

A gift of property may be made by will in either of three ways, and, to a certain extent, indifferently in either of them; first, by a direct gift, second, by a gift to one in trust to give to another; and third, by giving to one a power to give to another.

Inasmuch as in every case of a trust there is something to be done by the trustees in relation to the property, he is necessarily clothed with a power to do it. Hence many of the rules relating to the execution of powers apply equally to the execution of trusts; for instance, the performance of the trust may, in one or more respects, be left to the discretion of the trustee, or be made compulsory; and the same thing is true in relation to the execution of powers.

Trusts for the disposition of property are treated as actual conveyances, taking effect at the time when they are directed to take effect, and in this manner the intention of the testator is carried out.

And, wherever a power is in the nature of a trust, it will be dealt with in the same way as a trust, and be in like manner deemed an actual conveyance.

A discretionary power must be exercised bona fide for the end designed and for no other.

See Lewin, Tr. 524-526, 538-544, 693-709; Perry, Tr. chap. 8, *Trusts that Arise by Construction from Powers*, and *Discretionary Powers*, §§ 508-512; Hill, Trustees, section on *Discretionary Powers*; *Harding v. Glyn*, 2 White & T. Lead. Cas. in Eq. 948.

V. The exercise of the discretion of the ex-

ecutors in favor of the Tilden Trust was not a condition precedent, so that the gift to that corporation would not take effect unless that discretion were so exercised. The title of that corporation to the gift vested immediately upon the granting of the charter, subject, however, to the condition subsequent that it might be defeated by the conclusion of the executors that it was inexpedient to convey to that body.

The authority given trustees to organize the corporation and make a conveyance to it is to be construed as a duty.

Brown v. Higge, 5 Ves. Jr. 495.

The following considerations turn the scale against the construction which makes the discretion of the executors a condition precedent.

1. The law always makes a gift vested where it can.

Jarman, Wills, 683.

2. Where the gift is a residue, the presumption in favor of vesting is stronger, because, otherwise, intestacy would follow.

2 Wms. Exrs. 1105.

3. The law inclines against any construction which tends to render a gift invalid.

2 Redf. Wills, 627.

Gov. Tilden intended that his residuary estate should go to this corporation in every event but one, namely, that his executors should think it inexpedient. He intended to give them a discretion to prevent that deposition. But, of course, unless thus prevented, the gift would take effect.

See 2 Jarman, Wills, 1; 2 Wms. Exrs. 1182 *et seq.*; Hill, Trustees, 490-492; *Wainwright v. Waterman*, 1 Ves. Jr. 311; *Keates v. Burton*, 14 Ves. Jr. 434; *French v. Davidson*, 3 Madd. 896.

That the gift in the present case was made through the form of a direction, or authority to pay over, is quite immaterial. The only question in any case is, Did the testator intend that the party named by him should have the gift.

Jeaming v. Sherratt, 2 Hare, 14.

The gift to the Tilden Trust, when rightly interpreted, is, so far as respects the vesting of it in the corporation, precisely like that in *Burrill v. Boardman*, 43 N. Y. 254, and could be enforced by judicial decree, if the executors took no action.

The Tilden Trust could enforce the duty imposed by the will upon the executors. The court would decree that the executors pay over the residue within a reasonable time unless they determined that it was inexpedient to convey.

It would be incumbent upon the executors to avow in good faith whether they had determined that it was inexpedient to convey; and unless they showed an honest exercise of their discretionary power upon the very grounds stated in the will, their pretended exercise would be set aside, and they would be compelled to make a conveyance in whole or in part as the case might be.

French v. Davidson, 3 Madd. 896.

VI. After reading the thirty-fifth article and observing with what care the testator has provided for the incorporation of a Free Public Library and Reading Room in the City of New York, and in order to secure a single competent taker of his bounty, and made it the duty

of his executors to convey the whole, or such part as they should deem adequate to that corporation, unless for some reason they deemed it inexpedient, and authorized them to make a different application of his residue only in case they deemed it inexpedient to convey to this designated person, it is impossible to suppose that the testator does not make a primary bequest to that institution, with an alternative bequest to other objects in case the primary disposition should fail.

The view that when a discretionary power is conferred, the action of the donees of the power cannot be reviewed, is a gross error. A court of equity will see that discretion is exercised, and in good faith.

Perry, Tr. §§ 511, 511 *a*; *Aleyn v. Belchier*, 1 White & T. Lead. Cas. Eq. 377, and notes.

Where a clause is perfectly distinct and intelligible in itself, we should not go to other parts of the instrument to find expressions which may throw doubt upon its meaning, or show that it is vague and indefinite.

Jackson v. Still, 11 Johns. 201; *Roseboom v. Roseboom*, 81 N. Y. 356; *Freeman v. Coit*, 96 N. Y. 63.

VII. The power bestowed upon the executors to make endowment to, or withhold it from the Tilden Trust corporation is, of course, a trust power, because it is for the benefit of other persons than the grantees of the power. It is, however, not an imperative one, but one expressly depending upon the will of the grantees within the meaning of section 96 of the article of the Revised Statutes upon Powers.

If we accept the view that the condition is precedent, the Tilden Trust corporation could not enforce action by the executors, and the gift to it would wholly fail unless the executors chose to determine that it was expedient to make one. In the case of such determination the gift would take effect, and the corporation, should the property not be actually paid over or delivered, could enforce payment or delivery.

VIII. The corporation actually chartered by the Legislature under the name of the "Tilden Trust," is the very corporation described by the testator, and its title to the residue is perfect.

IX. Although a trust is not permissible in this case, still, if the right to make the bequest existed, the trust, although invalid as such, is valid as a power in trust.

1 Rev. Stat. 729, § 58.

It is a mistake to suppose that the limitation of trusts in our law to a few purposes was intended as a limitation of the power of disposition of property by its owner. Everything which an owner of property could ever do with it through the instrumentality of a trust, he may still do with it through the instrumentality of a trust, or, failing that, a power.

Dowling v. Marshall, 23 N. Y. 366.

The only inquiry, therefore, which needs to be made in a case like the present is, whether the testator had lawful power to make the bequest. If he had, it matters not whether he attempted to do it through the instrumentality of a trust or a power. It is enough that it is valid as a power.

Selden v. Vermilyea, 1 Barb. 58; *Brown v. 14 L. R. A.*

Wilbur, 8 Wend. 661; *Hotchkiss v. Elting*, 36 Barb. 44; *Fellows v. Heermans*, 4 Lans. 230; *Re McLaughlin*, 2 Bradf. 107; *Footler v. Depau*, 26 Barb. 224; *Hutchings v. Baldwin*, 7 Bosw. 286; *Martin v. Martin*, 43 Barb. 172; *Lang v. Ropke*, 5 Sandf. 368.

X. The precise legal description of the disposition made in favor of the Tilden Trust is that it is an executory devise and bequest.

1 Jarman, Wills, p. 784.

Messrs. Daniel C. Rollins and George F. Comstock also for appellants.

Mr. Delos McCurdy, with *Messrs. Vanderpoel, Green & Cuming*, for respondent:

By the thirty-fifth clause of the will, an attempt is made to create a trust to depend for its execution—for its validity or invalidity—upon the mere exercise of the will of the executors and trustees.

No trust can be created or sustained in this State which depends upon the exercise by the trustee of an election, whether he will or will not execute the alleged trust.

The discretionary power in the trustees to give or withhold is incompatible with the existence of a valid trust.

Holland v. Alcock, 11 Cent. Rep. 861, 108 N. Y. 812; *Maddison v. Andrew*, 1 Ves. Sr. 60; *Alexander v. Alexander*, 2 Ves. Sr. 640; *Kemp v. Kemp*, 5 Ves. Jr. 849; *Keats v. Burton*, 14 Ves. Jr. 437; 2 Sugden, Powers, 190; *Gower v. Mainwaring*, 3 Ves. Sr. 88; *Potter v. Chapman*, Amb. 98; *Lee v. Young*, 2 Younge & C. 532; *Caplin's Will*, 11 Jur. N. S. 383; *Prendergast v. Prendergast*, 3 H. L. Cas. 195; *Coc's Trusts*, 4 Kay & J. 199; 2 Perry, Tr. § 510; *Hill, Trustees*, 101; *Morice v. Durham*, 10 Ves. Jr. 536; *Ommaney v. Butcher*, Turn. & Russ. 270; *Gibbs v. Rumsey*, 2 Ves. & B. 297; *Bull v. Varay*, 1 Ves. Jr. 270.

It is absolutely essential to the validity of a trust in this State that the power conferred upon the trustee be so defined and limited by the testator that the courts can either compel or control its exercise, or, in default of its exercise by the trustee, execute the power by an ordinary decree in equity.

Levy v. Levy, 33 N. Y. 104; *Dillaye v. Greenough*, 45 N. Y. 445; *Power v. Cassidy*, 79 N. Y. 602; *Prichard v. Thompson*, 95 N. Y. 81; *Re O'Hara's Will*, 95 N. Y. 418; *Holland v. Alcock*, 11 Cent. Rep. 861, 108 N. Y. 812.

The trust attempted to be created cannot be upheld as a trust for charity by the application of the law relating to charitable uses.

The doctrine of charitable uses does not prevail in this State.

Holmes v. Mead, 52 N. Y. 233; *Yates v. Yates*, 9 Barb. 841; *Ayers v. Methodist Epis. Church Trustees*, 3 Sandf. 851; *Levy v. Levy*, 33 N. Y. 97; *Bascom v. Albertain*, 84 N. Y. 584; *Adams v. Perry*, 43 N. Y. 487; *Holland v. Alcock*, *supra*.

The devise and bequest in the thirty-fifth clause is fatally uncertain, both as to its subject and object.

In the absence of the *cy près* power, a testamentary provision for a charitable use is void, if the scheme of the charity,—the objects to be benefited,—and the amount and value of the property given, are not so clearly and precisely defined in the will itself that the court can, by

decree, in the exercise of its ordinary equity power, carry out and administer the trust.

Holland v. Alcock, *supra*; *Wright v. Atkyns*, Coop. 115; *Pierson v. Garnet*, 2 Bro. Ch. 45; *Cruwey v. Colman*, 9 Ves. Jr. 323; 1 Jarman, Wills, 5th Am. ed. 645; *Levy v. Levy*, 33 N. Y. 107; *Prichard v. Thompson*, 95 N. Y. 80.

Any words by which it is expressed, or from which it may be implied, that the trustee has the discretionary power of withdrawing the whole or any part of the subject from the object of the testator's wish or request will prevent the subject of the gift from being certain.

Knight v. Knight, 3 Beav. 148; *Leckmere v. Lavie*, 2 Myl. & K. 197; *Meredith v. Henenge*, 1 Sim. 556; *Sale v. Moore*, Id. 534; *Eade v. Eade*, 5 Madd. 118; *Pierson v. Garnet*, 2 Bro. Ch. 45; *Sprange v. Barnard*, 2 Bro. Ch. 585; *Bland v. Bland*, 2 Cox. C. C. 349; *Curtis v. Rippon*, 5 Madd. 484; *Wilson v. Major*, 11 Ves. Jr. 205; *Knight v. Boughton*, 11 Clark & F. 513; *Russell v. Jackson*, 10 Hare, 213; *Tibbitts v. Tibbitts*, 19 Ves. Jr. 664; *Flint v. Hughes*, 6 Beav. 342; Hill, Trustees, 3d ed. 116; Boyle, Charities, bk. 2, § 3, p. 316.

The objects of the testator's bounty are entirely uncertain and indefinite.

There is no more necessity for a properly defined grantee in a deed than for a *cestui que trust* capable of taking, and so defined and pointed out that the trust will not be void for uncertainty.

Gallego v. Atty-Gen. 3 Leigh. 457; *Beckman v. Bonvor*, 23 N. Y. 806; *Levy v. Levy*, 33 N. Y. 102; *Morice v. Durham*, 9 Ves. Jr. 400; *Sonley v. Clockmaker's Co.* 1 Bro. Ch. 81; *Phelps v. Pond*, 23 N. Y. 77; *Wheeler v. Smith*, 50 U. S. 9 How. 55, 13 L. ed. 44; *Rose v. Rose*, 4 Abb. App. Dec. 111; *Philadelphia Baptist Asso. Trustees v. Hart*, 17 U. S. 4 Wheat. 1, 4 L. ed. 499.

The beneficiaries must be specifically named in the testator's will, and so defined and limited by the testator himself that the court can read in the will the object of the testator's bounty, and by its decree transmit to the designated persons or class of persons the use of the precise property which the testator has declared that they, and they alone, should enjoy.

Levy v. Levy, 33 N. Y. 104; *Pover v. Cassidy*, 79 N. Y. 602; *Prichard v. Thompson*, 95 N. Y. 81; *Dilloye v. Greenough*, 45 N. Y. 445.

The provisions of this will cannot be upheld as an executory devise of the residuary estate to the Tilden Trust.

Ang. & A. Corp. § 184; *Re Porter*, 1 Coke, 24; *Atty-Gen. v. Bonyer*, 3 Ves. Jr. 714; *Inglis v. Sailors Snug Harbor*, 28 U. S. 8 Pet. 99, 7 L. ed. 617; *Burrill v. Boardman*, 48 N. Y. 254; *Shipman v. Rollins*, 98 N. Y. 311.

An executory devise cannot be prevented or defeated by any alteration of the estate out of which, or after which, it is limited, or by any mode of conveyance.

Jackson v. Robins, 16 Johns. 589; *Jackson v. Bull*, 10 Johns. 19; *Moffat v. Strong*, 10 Johns. 12; *Paterson v. Ellis*, 11 Wend. 289.

There can be no valid disposition of property unless the title is made to vest in some person, natural or artificial, within the prescribed period, by force of the gift itself.

Nherwood v. American Bible Soc. 4 Abb. App. Dec. 233; *Downing v. Marshall*, 28 N. Y. 366; 14 L. R. A.

Owens v. Missionary Soc. of M. E. Church, 14 N. Y. 380.

If the limitation be in such terms that it may or may not take effect within that time it is void.

Paterson v. Ellis, 11 Wend. 259; *Tator v. Tator*, 4 Barb. 481; *Jocelyn v. Nott*, 44 Conn. 55; *Donohue v. McNichol*, 61 Pa. 73; *Sears v. Putnam*, 102 Mass. 5.

If the trust is invalid the disposition of the property cannot be upheld as a power in trust.

Garvey v. McDevitt, 72 N. Y. 562; *Morice v. Durham*, 10 Ves. Jr. 586.

In the thirty-fifth clause there are not two distinct and separate alternative gifts.

Messrs. Lyman D. Brewster and Joseph H. Choate also for respondent.

Brown, J., delivered the opinion of the court:

Samuel J. Tilden died in August, 1886, leaving a last will and testament dated in April, 1884. He left surviving him, as his only next of kin and heirs-at-law, one sister, two nephews, one of whom is the plaintiff in this action, and four nieces. The defendants Bigelow, Green, and Smith were by the will appointed the executors thereof and trustees of the trusts there in created, and, the will having been duly admitted to probate in October, 1886, they immediately qualified, and entered upon the discharge of their duties as such. This action was brought to obtain a construction of the will. By the complaint the 33d, 34th and 35th articles were assailed as being invalid, but upon the trial no question was raised as to the two first named, and no determination in respect thereto was made. The supreme court held that the effect of the 35th and 39th articles of the will was to create one general trust for charitable purposes, embracing the entire residuary estate, and vest in the trustees a discretion with respect to the disposition of such estate by them; that the testator did not intend to and did not confer upon any person or persons any enforceable right to any portion of said residuary estate, and did not designate any beneficiary who was or would be entitled to demand the execution of the trust in his or its behalf, and declared the provision of the will relating to the disposal of the residuary estate for such reasons illegal and void. It is essential to a proper understanding of the will to read the two articles above named together, and they are here quoted, the last being placed first: "Thirty-ninth. I hereby devise and bequeath to my said executors and trustees, and to their successors in the trust hereby created, and to the survivors or survivor of them, all the rest, residue, and remainder of all the property, real and personal, of whatever name or nature, and wheresoever situated, of which I may be seised or possessed, or to which I may be entitled at the time of my decease, which may remain after instituting the several trusts for the benefit of specific persons; and, after making provision for the specific bequests and objects as herein directed, to have and to hold the same unto my said executors and trustees, and to their successors in the trust hereby created, and the survivors or survivor of them in trust, to possess, hold, manage, and take care of the same during a period not exceeding two lives

in being; that is to say, the lives of my niece Ruby S. Tilden, and my grandniece Susie Whittlesey, and until the decease of the survivor of the said two persons, and, after deducting all necessary and proper expenses, to apply the same, and the proceeds thereof, to the objects and purposes mentioned in this, my will."

"*Thirty-fifth.* I request my said executors and trustees to obtain, as speedily as possible, from the Legislature an act of incorporation of an institution to be known as the 'Tilden Trust,' with capacity to establish and maintain a free library and reading-room in the City of New York, and to promote such scientific and educational objects as my said executors and trustees may more particularly designate. Such corporation shall have not less than five trustees, with power to fill vacancies in their number; and in case said institution shall be incorporated in a form and manner satisfactory to my said executors and trustees during the life time of the survivor of the two lives in being upon which the trust of my general estate herein created is limited, to wit, the lives of Ruby S. Tilden and Susie Whittlesey, I hereby authorize my said executors and trustees to organize the said corporation, designate the first trustees thereof, and to convey or apply to the use of the same the rest, residue, and remainder of all of my real and personal estate not specifically disposed of by this instrument, or so much thereof as they may deem expedient; but subject, nevertheless, to the special trusts herein directed to be constituted for particular persons, and to the obligations to make and keep good the said special trusts, provided that the said corporation shall be authorized by law to assume the obligations. But in case such institution shall not be so incorporated during the lifetime of the survivor of the said Ruby S. Tilden and Susie Whittlesey, or if for any cause or reason my said executors and trustees shall deem it inexpedient to convey said rest, residue, and remainder, or any part thereof, or to apply the same, or any part thereof, to said institution, I authorize my said executors and trustees to apply the rest, residue, and remainder of my property, real and personal, after making good the said special trusts herein directed to be constituted, or such portion thereof as they may not deem it expedient to apply to its use, to such charitable, educational and scientific purposes as, in the judgment of my said executors and trustees, will render the said rest, residue, and remainder of my property most widely and substantially beneficial to the interests of mankind."

On March 26, 1887, subsequent to the commencement of this action, the Legislature passed an Act incorporating the Tilden Trust, and authorizing it to establish and maintain a free library and reading-room in the City of New York. The institution was organized, and the executors and trustees made to it a conveyance of the residuary estate, and the conveyance was formally accepted by the trustees thereof.

The law is settled in this State that a certain designated beneficiary is essential to the creation of a valid trust. The remark of Judge Wright in *Levy v. Levy*, 83 N. Y. 107, that "if there is a single postulate of the common law established by an unbroken line of decisions, it is that a trust, without a certain beneficiary

who can claim its enforcement, is void," has been repeated and reiterated by recent decisions of this court (*Prichard v. Thompson*, 95 N. Y. 76; *Holland v. Alcock*, 108 N. Y. 312, 11 Cent. Rep. 861; *Read v. Williams*, 125 N. Y. 560); and the objection is not obviated by the existence of a power in the trustees to select a beneficiary, unless the class of persons in whose favor the power may be exercised has been designated by the testator with such certainty that the court can ascertain who were the objects of the power. The equitable rule that prevailed in the English court of chancery known as the "*cy pres* doctrine," and which was applied to uphold gifts for charitable purposes when no beneficiary was named, has no place in the jurisprudence of this State. *Holmes v. Mead*, 52 N. Y. 832; *Holland v. Alcock*, *supra*. If the Tilden Trust is but one of the beneficiaries which the trustees may select as an object of the testator's bounty, then it is clear and conceded by the appellants that the power conferred by the will upon the executors is void for indefiniteness and uncertainty in objects and purposes. The range of selection is unlimited. It is not confined to charitable institutions of this State, or of the United States, but embraces the whole world. Nothing could be more indefinite or uncertain, and broader and more unlimited power could not be conferred than to apply the estate to "such charitable, educational, and scientific purposes as in the judgment of my executors will render said residue of my property most widely and substantially beneficial to mankind." "A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well doing and well-being of social man." Perry, Tr. § 637. "Such a power is distinctly in contravention of the policy of the Statute of Wills. It substitutes for the will of the testator the will of the donees of the power, and makes the latter controlling in the disposition of the testator's property. That cannot well be said to be a disposition by the will of the testator with which the testator had nothing to do, except to create an authority in another to dispose of the property according to the will of the donees of the power." *Read v. Williams*, 125 N. Y. 569.

Unless, therefore, within the rules which control courts in the construction of wills, we can separate the provision in reference to the Tilden Trust from the general direction as to the disposition of the testator's residuary estate contained in the last clause of the thirty-fifth article, and find therein that a preferential right to some or all of such estate is given to that institution when incorporated, and one which the court, at the suit of said institution, could enforce within the two lives which limit the trust, we must, within the principle of the cases cited, declare such provision of the will invalid, and affirm the judgment of the supreme court. The appellants claim that the power conferred upon the executors to endow the Tilden Trust may be upheld independently of the invalidity of the power given to apply the estate to such charities as would most widely benefit mankind. The proposition is that by the thirty-fifth article the testator made two distinct alternative provisions for the disposition of his residuary estate,—one primary, for the incorporation

and endowment of the Tilden Trust; the other ulterior, and to be effectual only in case the executors deemed it inexpedient to apply the residue to that corporation; and it is claimed that this provision of the will constitutes a trust to be executed for the benefit of the Tilden Trust, or confers upon the trustees a power in trust, or that it constitutes a gift in the nature of an executory devise.

The latter proposition rests upon the assumption that there is by the will a primary gift, complete and perfect in itself, to the Tilden Trust, that vests the title in that corporation immediately upon its creation. That a valid devise or bequest may be limited to a corporation to be created after the death of the testator, provided it is called into being within the time allowed for the vesting of future estates, is not denied. Perry, Tr. p. 872, § 736. That question was decided in *Inglis v. Sailors Snug Harbor*, 28 U. S. 8 Pet. 99, 7 L. ed. 617, and in *Burrill v. Boardman*, 43 N. Y. 254.

In those cases the gift was treated as in the nature of an executory devise, dependent upon the incorporation of the institution contemplated by the will, and which would vest upon the occurrence of that event.

But, in view of the language of the will before us, that proposition cannot be maintained here. By an executory devise, a freehold was limited to commence in the future, and needed no particular estate to support it. It arose upon the happening of a specified event, and the fee descended to the heir at law until the contingency happened. By our Revised Statutes executory devises are abolished, and expectant estates are substituted in their place, and such estates, when the contingency happens upon which they are limited, vest by force of the instrument creating them, and this right in the expectant cannot be defeated by any person. But the testator here intended not to create such an estate. The Tilden Trust takes nothing by virtue of the will. The residuary estate is vested in the trustees, or intended to be, and it is solely by their action that it is to become vested in the Tilden Trust. It is only in case that the executors deem it expedient so to do that they are to convey the whole or any part of the residue to the Tilden Trust. Whether that corporation should take anything rested wholly in the discretion of the executors, as the expediency or inexpediency of an act is always a matter of pure discretion. 2 Perry, Tr. §§ 507, 508. Every expression used in the will indicates the bestowal of complete discretionary power to convey or not to convey, and the creation and bestowal of such a power in the executors is wholly opposed to and fatal to the existence of an executory devise. In this respect the case differs from those cited. In *Inglis v. Sailors Snug Harbor* there was no trust created, no discretion vested in the executor, no conveyance to be made after the testator's death. His intention to give his property to a corporation to be created to carry out his charitable purpose was clear. Such was the fact, also, in *Burrill v. Boardman*. By the will in that case the property was given directly to the corporation, which the testator contemplated should be created after his death. No trust was created, and no discretion was bestowed upon the executors to determine whether the corporation

should or should not have it. Once created, the property, by force of the will, vested in the corporation. The only similarity between that case and this is that the trustees there, as here, were directed to apply to the Legislature for an act of incorporation. In case the Legislature refused to grant a liberal charter, then the trustees were directed to pay over the estate to the government of the United States. But no discretion was given to the executors to determine upon any event whether or not the corporation, once created, should take the property. "Nothing," said *Chief Justice* Church, "can be more certain than that the testator designed that the title to the funds or property in the possession of the trustees or elsewhere, which was included in the residuary clause, should vest in the corporation immediately upon its creation." "An application was to be made to the Legislature after the testator's death for a charter. If obtained, the bequest would take effect; if not, it would go to the ulterior donee. If the charter applied for and granted should not be liberal, and in accordance with the provisions of the will, the ulterior donee or next of kin could challenge its right to take the bequest. It would then become a judicial question." So, clearly, no question in that case was left to the judgment of the trustees. They were not to determine, even, whether the charter was a liberal one. That was a question for the court, that would have been decided in any contest over the property between the corporation and the next of kin or ulterior donee. A discretionary power in executors or trustees was not, therefore, an element in the *Burrill Case*. Not so here. Here we have the unlimited authority delegated to the executors to withhold the entire property from the corporation, if they choose so to do. There the corporation, once created, was vested immediately, by force of the will, with the title to the property. Here, although the corporation may be created in a form and manner satisfactory to trustees, it takes nothing unless the executors, considering every cause and reason, deem it expedient to convey to it some or all of the residuary estate. In the *Burrill Case* the testator made a direct gift to a designated beneficiary, the Roosevelt Hospital. In this case Mr. Tilden gave nothing to the Tilden Trust, but simply authorized his executors to endow it if, in their judgment and discretion, they should deem it expedient. Moreover, after creating numerous special trusts, and setting apart portions of his estate for such several special trust funds, the testator, by the thirty-ninth article of the will, gives the whole of the residuary estate to his executors, in trust for the purposes mentioned in the thirty-fifth article; bestowing upon them, so far as language could do so, the title to all the property, to be held and possessed during the lives of his niece Ruby S. Tilden, and his grandniece Susie Whittlesey, and which he denominated the "general trust" of his estate. He clearly intended by this provision to create an active trust in his whole residuary estate, and to give to his executors a discretionary power to give such part of it as they deemed expedient to the Tilden Trust or to withhold all from it. Having intended to convey, so far as he was able to do, the title to his whole estate to trustees,

nothing was left that could be the subject of a gift to the Tilden Trust.

We come, therefore, to the consideration of the question whether the thirty-fifth article can be upheld as constituting a separate trust or power in trust for the benefit of the Tilden Trust. The affirmative of this question can be maintained only by considering the direction to convey to the Tilden Trust as a power separate by itself, and distinct and independent from the power to convey to such charitable purposes as in the judgment of the trustees would be most widely and substantially beneficial to mankind. The latter provision is eliminated from the will altogether by the appellants, and then the instrument is construed as if the eliminated provision had never existed. The appellants invoke the aid of the principle that where several trusts are created by a will, which are independent of each other, and each complete in itself, some of which are lawful and others unlawful, and which may be separated from each other, the illegal trusts may be cut off, and the legal ones permitted to stand. This rule is of frequent application in the construction of wills, but it can be applied only in aid and assistance of the manifest intent of the testator, and never where it would lead to a result contrary to the purpose of the will, or work injustice among the beneficiaries, or defeat the testator's scheme for the disposal of his property. The rule, as applied in all reported cases, recognizes this limitation, that when some of the trusts in a will are legal, and some illegal, if they are so connected together as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated, if one portion was retained and other portions rejected, or if manifest injustice would result from such construction to the beneficiaries or some of them, then all the trusts must be construed together, and all must be held illegal, and must fail. *Manice v. Manice*, 43 N. Y. 303; *Van Schuyper v. Mulford*, 59 N. Y. 426; *Knox v. Jones*, 47 N. Y. 389; *Benedict v. Webb*, 98 N. Y. 460; *Kennedy v. Hoy*, 105 N. Y. 135, 6 Cent. Rep. 805. The cases cited fairly illustrate the practical application of this rule by the courts.

In *Knox v. Jones* the testator created one trust to receive and pay over the income of his estate to his brother for his life, and then to his sisters, with cross-limitations over as between them, remainder to the children of his sister Georgiana, and, in default of children, to Columbia College. This court held the whole trust invalid, and refused to sustain the provision in behalf of the testator's brother, on the ground that there was but a single trust, which provided for all the beneficiaries, and that they were all embraced in a common purpose; that the several provisions of a single trust could not be severed, and those that violated the Statute against Perpetuities dropped, and the others sustained. In *Van Schuyper v. Mulford* a gift to the testator's wife of the rents and income and profits of the estate during life was upheld, and declared to be valid, although the devise over might be void, on the ground that the gift to the wife was separate and distinct from the other provision of the will, and had no effect beyond her life or upon the ultimate disposition of the estate. In *Benedict v. Webb* 14 L. R. A.

the testator created separate trusts in two thirds of his estate for the benefit of his four children. Three of the trusts were held to be valid and one invalid, on the ground that the trust term transgressed the statute. But the court refused to sustain the valid trusts, on the ground that to do so would defeat the intention of the testator in the disposition of his property, and work injustice among the beneficiaries by permitting three of the children to take under their respective trusts, and also as heirs-at-law in the one fourth as to which the trust was declared invalid.

The result of these and all other cases is that, in applying the rule invoked by the appellants, which permits unlawful trusts to be eliminated from the will, and those that are lawful to be enforced, we must not violate the intention of the testator, or destroy the scheme that he has created for the disposition of his property. We may enforce and effectuate his will, and give full effect to his intent, provided it does not violate any cardinal rule of law; but we cannot make a new will, or build up a scheme, for the purpose of carrying out what might be thought was or would be in accordance with his wishes. At the threshold of every suit for the construction of a will lies the rule that the court must give such construction to its provisions as will effectuate the general intent of the testator, as expressed in the whole instrument. It may transpose words and phrases, and read its provisions in an order different from that in which they appear in the instrument, insert or leave out provisions, if necessary, but only in aid of the testator's intent and purpose; never to devise a new scheme or to make a new will. The fact that the executors of the will applied to the Legislature, and procured the incorporation of the Tilden Trust in a form and manner satisfactory to themselves, and have deemed it expedient to convey to it the whole residuary estate, and have executed a conveyance thereof, is not a matter for consideration in this connection. This point was considered in *Holland v. Alcock* and in *Read v. Williams*, *supra*, and it was held that the validity of the power depended upon its nature, and not on its execution. In the latter case the testator bequeathed the residue of his estate "to such charitable institutions and in such proportion as my executors, by and with the advice of my friend Rev. John Hall, D. D., shall choose and designate." And prior to the commencement of the action the executors, with the advice of Dr. Hall, made a written choice and designation of certain incorporated institutions existing under the laws of this State, among whom they directed the residuary estate to be divided. The fact of selection was not deemed material, and the will was declared invalid.

The rights of heirs and next of kin exist under the Statutes of Descent and Distribution, and vest immediately upon the death of the testator. If the trust or power attempted to be created by the will, or the disposition therein made, is valid, their rights are subject to it; but, if invalid, they immediately become entitled to the property. Hence the existence of a valid trust is essential to one claiming as trustee to withhold the property from the heir or next of kin. What a trustee or donee of a

power may do becomes, therefore, immaterial. What he does must be done under a valid power, or the act is unlawful. If the power exercised is unauthorized, the act is of no force or validity. In such case, there is no trust or power. There is nothing but an unauthorized act, ineffectual for any purpose. It is not deemed material to the decision of the question now under consideration whether the provisions of the will relating to the residuary estate are regarded as constituting a trust or a power in trust, except so far as that fact may be indicative of the testator's intention. If there was a trust, then the executors took title to the residuary estate; but if there is created a valid power in trust, it will be executed with substantially the same effect as if the will created a trust-estate. But section 58 of the Statute of Uses and Trusts, which declares that when an express trust is created for any purpose not enumerated in the foregoing sections no estate shall vest in the trustees, but the trust, if directing the performance of an act which may be lawfully performed under a power, should be valid as a power in trust, is not, of course, susceptible of the construction that a trust, invalid because in conflict with some cardinal rule of law, could be upheld as a power. Every trust necessarily includes a power. There is always something to be done to the trust property, and the trustee is empowered to do it, and, if the trust is invalid because the power to dispose of the property is not one that the law recognizes, it cannot be upheld as a power in trust. The rules applicable to the execution of trusts in this respect are equally applicable to the execution of powers, and, as it is of no particular importance in this case in whom the title to the residuary estate is vested, it is not material to the decision whether the provisions of the will are examined as a trust or as a power in trust. The purpose of the trust is lawful, and personal property which constitutes the greater part of the testator's estate was a proper subject of the trust that the testator intended, and, if it is invalid, it is because the power conferred on the trustees for the disposal of the estate is so uncertain and indefinite that its execution cannot be controlled or enforced by the courts. In *Prichard v. Thompson* the legal title to the fund was vested in the executors in trust. In *Read v. Williams* the executors were given a power in trust. But the court said there was in that respect no legal distinction, and the power in the latter, as the trust in the former, case was declared invalid.

But the nature of the estate which the testator intended to convey to his trustees, and the nature of the power intended to be delegated to them, is of importance in ascertaining his intent, and determining what was the scheme that he had for the disposal of his property. By our Revised Statutes (vol. 1, p. 738), powers as they existed by the common law were abolished, and thereafter their creation, construction, and execution were to be governed by statute. They are classified as general and special, beneficial and in trust. A beneficial power is one that has for its object the grantee of the power, and is executed solely for his benefit. Section 79. Trust powers, on the other hand, have for their object persons other

than the grantee, and are executed solely for the benefit of such other persons. Sections 94, 95. Trust powers are imperative, and their performance may be compelled in equity, unless their execution or non-execution is made expressly to depend on the will of the grantee. Section 96. And a trust power does not cease to be imperative where the grantee of the power has the right of selection among a class of objects. Section 97. And sections 100 and 101 make provision for the execution by a court of equity of trust powers where the trustee dies, or where the testator has created a valid power, but has omitted to designate a person to execute it. A trust power, to be valid, therefore, must designate some person or class of persons other than the grantee of the power as its objects, and it must be exercised for the sole benefit of such designated beneficiary, and its execution may be compelled in equity. A non-enforceable imperative power is an impossibility under our law, unless, by the instrument creating it, it is expressly made to depend for its execution on the will of the grantee. In every case where the trust is valid as a power, the lands to which the trust relates remain in or descend to the persons otherwise entitled, subject to the execution of the trust as a power. 1 Rev. Stat. p. 729, § 59.

Before applying these rules to the case before us, our duty is to ascertain the testator's intent from an inspection of the will, and for this purpose we must read the whole instrument, including the provisions admitted to be void. Those provisions, though ineffectual to dispose of the property, cannot be obliterated when examining it for the purpose of ascertaining the testator's intention. *Van Kleeck v. Reformed Dutch Church*, 20 Wend. 457; *Kiah v. Grenier*, 56 N. Y. 230.

The prominent fact in the testator's will is that he intended to give his property to charity. He intended that none of his heirs or next of kin should take any of it except such as he gave to them through the several special trusts that he created for their benefit. He emphasized this purpose in the last article of his will, by providing that any of them who should institute or share in any proceeding to oppose the probate of the will, or to impeach, impair, or to set aside or invalidate any of its provisions, should be excluded from any participation in the estate, and the portion to which he or she might otherwise be entitled under its provisions should be devoted to such charitable purposes as his executors should designate. To the accomplishment of this purpose he intended to create a trust, and doubtless believed that he created a valid one. He created numerous trusts for the benefit of his relatives, and for the creation of other libraries and reading-rooms. These he denominated "special trusts." In the thirty-ninth article he devised and bequeathed to his executors, and "to their successors in the trust hereby created, and to the survivor and survivors of them," all the rest and residue of his property, "to have and to hold the same unto my said executors and trustees, and to their successors in the trust hereby created, . . . to possess, hold, and manage the same," during the lives of his niece Ruby S. Tilden and his grandniece Susie Whittlesey, and "to apply the same, and the

proceeds thereof, to the objects and purposes mentioned in this my will." He gave to his executors the power to collect the income of the whole estate, that which was set apart in the special trusts and that constituting the trust of the residuary estate. The trust of the residuary estate he denominated the "general trust," and in the twenty-sixth article he gives direction as to the disposition of the surplus income, "during the continuance of the trust of my general estate."

It is clear, therefore, that the testator intended to create a trust of his residuary estate, and in plain, unequivocal language he indicated his purpose to be that the trustees should be vested with the title to the property until they should divest themselves of it in carrying out the purposes mentioned in the will, and which are to be found in the thirty-fifth article. Turning to this article, the important feature is that the power there given to the trustees, and the only power that could absolutely effectuate the testator's intent to devote his property to charity, was an imperative one. There is no discretion to be exercised upon the question whether the property shall go to charitable purposes. There is no act involving that disposition of the property, the execution of which is made to depend on the will of the trustees. Discretion there is as to the objects of the charity, but none as to the general disposition of the estate. If the Tilden Trust is incorporated in a form and manner satisfactory to the trustees, they are authorized to convey to that institution the whole residue, or so much thereof as they shall deem expedient; and if, for "any cause or reason," they deem it inexpedient to endow that institution with the whole or any part of the residue, then to apply the same, or such part as they do not apply to the use of the Tilden Trust, to such charitable purposes as they shall deem most widely beneficial to mankind. The object and purpose in this scheme of the testator is therefore a devotion of his estate to charity.

But it is said that the Tilden Trust represents an intention different from and alternative to the gift to the charitable, educational, and scientific purposes mentioned in the last clause of the article; that the authority to endow it that is vested in the trustees is a primary power, and the power to devote the estate to the other undefined purposes is ulterior; that while the latter is imperative in its character, the former is discretionary wholly, and depends for its execution upon the will of the trustees; and that each power stands alone, separate and distinct from the other, and the power to endow the Tilden Trust is likened to a power of appointment. Powers of appointment are so common in testamentary dispositions of property that no citation of authority is necessary to show their validity. Their execution may depend solely upon the will of the donee of the power, and they are recognized as valid by the ninety-sixth section of the statute already quoted. "I give to A. such portion of my residuary estate as B. shall, within the life time of the survivor of C. and D., designate and appoint," which is the case suggested on the brief, is undoubtedly a good testamentary bequest, and is a good illustration of a naked power of appointment, the execution of which

depends on the will of B., and is not enforceable at the suit of A. In such a case the title to the property descends to the heirs or next of kin, or passes under the will to the ulterior donee, subject to the execution of the power. But there is no similarity between the suggested bequest and the will before us. Follow that bequest by a gift over to charitable uses, or let it stand alone in the will, and you have in one case alternative gifts, and in the other alternative purposes. There is a preference expressed or implied by the testator as to the purpose to which his estate shall go, and the objects that shall be benefited. In the one case, the choice lies between the individual legatee and the heirs; in the other, between the legatee and a disposition to charity.

But in the will before us there is no alternative purpose. There is a single scheme, a gift to charitable uses, and the suggestion of the Tilden Trust indicates no intent in the testator's mind contrary to the intention to devote the estate to charity; and in this respect the will before us is distinguished from the case suggested by the learned counsel for the appellants, of a power to convey the estate to a designated individual at a stated age, and, in the event of the donee of the power deeming it inexpedient so to do, then a gift over to undefined charitable uses. There the primary purpose of the testator is a gift to the designated legatee, and not to charity; and the intent to give the estate to charitable uses is secondary, and limited upon the determination of the trustee not to make the primary gift. Such a will plainly indicates alternative purposes, and contains alternative powers. The two gifts are in no respect connected, and, if the gift over is void, the first may stand, and, if executed, represents the will of the testator. But in the thirty-fifth article of the will under consideration there is no antithesis, so far as the purpose to which the property is to be devoted is concerned. It expresses a single intent only, viz., to devote the estate to charitable uses; and while, of course, in such a scheme, the testator might prefer and designate one corporation over another as the object of his bounty, I shall attempt to show that in this case he has not done that, and has not conferred any preferential right to the estate, or any part of it, upon the Tilden Trust.

What is the Tilden Trust, and how does it stand in the testator's scheme? It may fairly be assumed that the testator, having determined to devote his estate to charity, understood that his object could be accomplished only through the instrumentality of a corporate body. He requested his trustees to cause the Tilden Trust to be incorporated. It was to have the power to establish and maintain a free library and reading-room in the City of New York, and "to promote such scientific and educational objects" as the executors and trustees should designate. The latter power is precisely what the trustees are authorized to do by the so-called ulterior provision, viz., to apply the estate to such "educational and scientific purposes" as they should judge would be most beneficial to mankind. Here, therefore, we have an authority to do the same thing in each provision of the will; and, as the latter could only be worked out through the medium of a

corporation, the so-called two powers are the same. So as to the free library and reading-room. That is plainly within the scientific and educational purposes of the second provision of the will, and could be maintained only through a corporate body. The suggested capacities of the Tilden Trust are therefore precisely the same as the so-called ulterior purposes, and each are expressive of the testator's scheme, so far as he had formulated it in his own mind. The Tilden Trust, therefore, plainly does not represent any alternative or primary purpose in the disposition of the estate, but is simply the suggested instrument to execute the testator's scheme for the disposition of the property. Now, what did the testator intend the trustees should consider when they came to the determination of the expediency or in expediency of endowing that institution? The argument is that they could not consider the ulterior purposes at all until they had disposed of the question whether it was expedient to convey to the Tilden Trust all or a part of the residuary estate. But that is saying that they should determine that question without reference to the substance of the gift, and the object and purposes which the testator had in view; for, as I have already shown, the capacities and powers of the Tilden Trust—in other words, its purposes and objects, or rather the purposes and objects which the testator intended to effectuate through its instrumentality—are precisely the same as the so-called ulterior purposes; and, as the latter must be carried out through the instrumentality of a corporation, the only distinction between the two is in the name of the corporation that is to administer the fund. The question of expediency, therefore, resolves itself into a question whether the trustees should select the Tilden Trust or some other corporation through which to carry out the purposes of the will. Now, how could the trustees, charged with the imperative duty of devoting the estate to charitable and educational purposes, consider the question whether they should endow the Tilden Trust without taking a complete view of the whole field of charity? They were bound to do so if they fairly attempted to carry out the testator's plan.

Take the question of the free library and reading-room. There is no duty or obligation imposed upon them in that respect. They are not bound to create or endow one. They are free to select any other educational object. So with locality. Can it be seriously claimed that there is any duty resting on them to establish a library in the City of New York? Is not the capital of the State, or of the United States, open to their choice of location, if they think a library located there would be more widely beneficial to mankind? Clearly, it appears to me that it was within the scope of the discretion committed to the trustees to determine whether a free library or reading-room should be established at all, and whether that or any other charitable or educational institution that they might select should be located in the City of New York, and that their determination of such question would be among the causes or reasons which might lead them to decide that it was inexpedient to endow the Tilden Trust, and that the testator intended that when the

trustees should consider the Tilden Trust they should consider their power with reference to the disposal of the estate, and the fact that if they did not endow that institution they could still execute his wishes by applying it to such charitable, educational and scientific purposes as they should select. In other words, that if they did not give it to the institution that he suggested, and which would bear his name, they could give it to others, and still execute his will, and carry out his general purpose for the disposal of his estate; and this power meant comparison of all charitable and educational objects, and selection from among them. In substance, he said to his executors: "I have determined to devote my estate to charitable, educational and scientific purposes. I have formed no detailed plan how that purpose can be executed, but under the law of New York it must be done through and by means of a corporation. I request you to cause to be incorporated an institution to be called the 'Tilden Trust,' with capacity to maintain a free library and reading-room in the City of New York, and such other educational and scientific objects as you shall designate; and, if you deem it expedient,—that is, if you think it advisable, and the fit and proper thing to do,—convey to that institution all or such part of my residuary estate as you choose; and if you do not think that course advisable, then apply it to such charitable, educational and scientific purposes as in your judgment will most substantially benefit mankind." Thus was left to the trustees the power to dispose of the estate within the limits defined, and to select the objects that should be benefited; and it is impossible to read the thirty-fifth article and find therein any preference in the way of a separate gift or power to the Tilden Trust, or to separate that institution from the testator's plan to devote his estate to charity. The trustees are free to select the Tilden Trust, and cause it to be incorporated, or to choose any existing corporation as the instrument to carry out the testator's scheme. Again, no event is named upon the happening of which any estate is limited to the Tilden Trust. The only condition suggested is the determination by the trustees of the question whether they deem it expedient to endow that institution. But if the views already expressed are correct, if the Tilden Trust is but one of many instruments through which the testator's charitable purposes may be executed, or is but a suggested beneficiary under the power, then the determination of the question of expediency involves the doing of the very thing which the law condemns, viz., a selection from an undefined and unlimited class of objects, and the power would be void.

It thus becomes apparent how important is the so-called ulterior provision in the plan which the testator had for the disposal of his estate; and effect cannot be given to that plan if that provision is stricken from the will, as it expressly defines the scope of the discretion committed to the trustees. Strike out that provision, and, instead of a discretion in the trustees, limited to the selection of the objects that should be benefited by the will, their power would be confined to the endowment of the Tilden Trust; and if they choose not to act, or

failed to act, the estate would go to the heirs at law. Indeed, the legal effect of the will would be, in that case, to vest the title of the estate in the heirs, subject to the execution of the power to endow the Tilden Trust. But if the provision of the will makes one thing particularly clear, it is that the testator intended his estate to be devoted to charitable purposes, and should in no event go to his heirs, and he did not intend that his trustees should have the power to choose between his heirs and the Tilden Trust. We cannot, therefore, obliterate the so-called ulterior provision, and give effect to the scheme of the will. The discretion plainly conferred on the trustees in the delegation of the power to determine the expediency or inexpediency of endowing the Tilden Trust would be thereby destroyed, and the trustees would be compelled to convey the estate to that institution, or, by permitting the heirs to retain it, thwart the expressed wish of the testator.

Again, the appellants argue that the power to endow the Tilden Trust is one depending for its execution on the will of the trustees, and is not imperative, and hence not subject to the test whether it can be enforced in a court of equity. This argument is perhaps fairly answered when the conclusion is reached that the ulterior purpose cannot be stricken from the will, and that the thirty-fifth article represents but one scheme and one purpose for the disposal of the estate. But it will be apparent, in the view taken, that the testator did not intend that any power conferred upon his trustees should depend for its execution upon their will. Of course, in every power where the trustees have the right to select any and exclude others, there is necessarily involved discretion, and the final choice does, in one sense, rest upon the will of the trustee, but not as that term is used in the statute. The power conferred is the authority to convey the estate. That is imperative. The discretion committed to the trustees was to select the particular object. The choice depends on the trustees' will, but the act of choosing is imperative, else the power could not be executed. It is the result alone, therefore, that depends on the will of the trustees, and not the performance of the act of selection. A power is defined to be "an authority to do some act . . . which the one granting or reserving such power might himself lawfully perform." 1 Rev. Stat. p. 732, § 74. Section 58 provides that if the unauthorized trust there mentioned directs the performance of any act which may be lawfully performed under a power, it shall be valid as a power in trust. Now, the acts authorized by the testator were those of selection and conveyance. The result of selection depended on the will of the trustees,—whether they should choose one corporation or another,—but the performance of the act of selection was just as obligatory as the duty to convey. The testator intended both should be performed, and the trustees could no more refuse or neglect one than the other. It follows from the views here expressed that the authority to endow the Tilden Trust, if that should be deemed expedient by the trustees, was not a separate power, distinct from the purpose to devote the estate to charitable uses, but was

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incidental to the testator's scheme, and involved therein. While we may admit that the testator expressed a preference for a corporation that should bear his name, he conferred no right upon that institution. The purpose to which the estate should be applied he determined and designated, but the persons who should be benefited by the will and the particular institution that should administer the fund were left to the selection of the trustees. The expression of a preference conferred no right, so long as the final choice was left to the trustees. It was simply a suggestion which they might or might not adopt, and imposed no duty upon them, and in no way limited or fettered their action. *Lawrence v. Cooke*, 104 N. Y. 682, 7 Cent. Rep. 101; 2 Pom. Eq. Jur. 1016; *note*.

We are of the opinion, therefore, that the thirty-fifth article of the will does not confer separate powers upon the trustees, and that the so-called ulterior provision cannot be eliminated from the will without destroying the scheme that the testator designed for the disposal of his estate; that the whole article represents one entire and inseparable charitable scheme, and cannot be subdivided, and the power conferred on the trustees is one of selection. This power was, under the statute, special and in trust. Under the sections heretofore quoted, such a power is imperative, and imposes a duty on the grantee, the performance of which may be compelled in equity for the benefit of the parties interested, unless its execution or non-execution is made expressly to depend on the will of the grantee; and it does not cease to be imperative where the grantee has the right to select any and exclude others of the persons designated as the objects of the power. The power conferred by the will, not being made to depend for its execution on the will of the trustee, was therefore imperative; but it is not valid unless it can be enforced by the courts at the suit of some beneficiary. As the selection of the objects of the trust was delegated absolutely to the trustees, there is no person or corporation who could demand any part of the estate, or maintain an action to compel the trustees to execute the power in their favor. This is the fatal defect in the will. The will of the trustees is made controlling, and not the will of the testator. Such an authority is in contravention of the Statute of Wills. That Statute authorizes a person to "devise" his real estate, and "to give and bequeath" his personal property, but it does not permit him to delegate to another the power to make such disposition for him. As was said by the learned presiding justice of the general term, "the radical vice of the entire provision seems to have arisen from the testator's unwillingness to confer any enforceable rights upon any qualified person or body." [*Tilden v. Greene*, 54 Hun, 281] Under the Statute of Powers, there may be a power of selection and exclusion with regard to designated objects, and the duty there imposed is made imperative and enforceable by the court. But the statute presupposes that a power of selection must be so defined in respect to the objects that there are persons who can come into court and say that they are embraced within the class, and demand the enforcement of the power. *Read*

v. Williams, 135 N. Y. 569. The views which Judge Van Brunt expressed in that case on that point, at general term, received direct approval in this court. He said: "It is conceded that the power contained in the clause in question comes under the head of a special power in trust, as defined in the Revised Statutes, but it is said such a power is to be distinguished from a trust; that the words 'in trust' are used for purposes of classification only. We think, however, that, . . . to render a power in trust valid, the same certainty as to beneficiary must exist as in the case of a trust."

These views find full confirmation in the provision of the Statute to the effect that, if the trustee dies leaving the power unexecuted, a court of equity will decree its execution for the benefit equally of all persons designated; and, if the testator fails to designate the person by whom the power is to be executed, its execution devolves upon the court (§§ 100, 101); thus providing a scheme which the failure of a testator's purpose, when its subject is certain and its objects designated. But in this case execution of the power could not be decreed by the court in either of the cases specified in the Statute. By an enforceable trust is meant one in which some person or class of persons have a right to all or a part of a designated fund, and can demand its conveyance to them, and, in case such demand is refused, may sue the trustee in a court of equity, and compel compliance with the demand. In this case the testator devolved upon his executors the duty of selecting the beneficiary, and there is no person who has the right to enforce that duty, or demand any part of the estate in case the executors refuse or neglect to act. The power attempted to be vested in the trustees cannot be controlled or enforced, and, whether the provisions of the will relating to the residuary estate be regarded as creating a trust or power in trust, they are, in either case, void.

The judgment must be affirmed.

Follett, Ch. J., and Haight and Parker, JJ. concur.

Bradley, J., dissenting:

This action for the construction of the will of Samuel J. Tilden, deceased, was founded on the charge that it was ineffectual to dispose of the residuary estate, or to provide for any lawful disposition of it, because the provisions of the thirty-fifth article, by which that was sought to be accomplished, were invalid, in that they were, as to both the object and subject of the trust he had in view, indefinite and uncertain. If this proposition is supported, the conclusion that such was the effect necessarily follows. It is evident that the testator when he made his will intended not to die intestate as to any of his property; and that his purpose to make testamentary disposition of all of it not only appears by the dispositional provisions of his will, but also by those of the forty-third article, by which he declared: "Since I have made a disposition of my property according to my best judgment; and since, as most of the devisees under it are females, it is impossible to foresee under what influences some one or more of them might possibly

come; and since it is desirable to avert unseemly or speculative litigation,—I hereby declare it to be my will that in case any person who, if I had died intestate, would be entitled to any share of my property or estate, shall, under any pretense whatever, institute, take, or share in any proceeding to oppose the probate of this, my last will and testament, or to impeach or impair, or to set aside or invalidate, any of its provisions, any devise or legacy to or for the benefit of such person or persons under this will is hereby revoked, and such person shall be excluded from any participation in, and shall not have any share or portion of, my property or estate, real or personal; and the portion to which such person might be entitled under the provisions of this instrument shall be devoted to such charitable purposes as my said executors and trustees shall designate."

In proceeding to the consideration of the questions presented, it may be observed, as a cardinal rule of construction, that the intent of a testator should be sought for in the provisions of his will, and, when so ascertained, effectuated, if the language used permits, although the transposition, rejection, or supply of words may be required to clearly express such intention; and, when susceptible of it, the construction will be given which renders it operative, rather than invalid. *Hoppeck v. Tucker*, 59 N. Y. 203; *Phillips v. Davies*, 92 N. Y. 199; *Du Bois v. Ray*, 85 N. Y. 162. He had in view the creation and endowment of a Tilden Trust, with the capacity mentioned. He therefore requested the executors and trustees to obtain, as speedily as possible, from the Legislature, an act of incorporation of an institution to be known as the "Tilden Trust;" and in case that should be accomplished within the time limited by the two lives mentioned, he authorized them to organize the institution, and to convey to or apply to its use the rest, residue, and remainder of his estate, or so much of it as they should deem expedient. Thus far he has, in practical effect, directed the application to be made for legislative action, and has made no provision for the disposition of the fund, other than to the use of the corporation in the event of its creation; and because that was a contingency not within the control of the executors and trustees, and for other reasons which might exist at the time of his death to render the endowment of the Tilden Trust, if created, inexpedient, the testator, with a view to entire testacy, added: "But in case such institution shall not be so incorporated, . . . or if for any cause or reason my said executors and trustees shall deem it inexpedient to convey said rest, residue, and remainder, or any part thereof, or to apply the same, or any part thereof, to the said institution, I authorize" them to apply it, "or such portion thereof as they may not deem it expedient to apply to its use, to such charitable, educational, and scientific purposes as in the judgment of my said executors and trustees will render the said rest, residue, and remainder of my property most widely and substantially beneficial to the interests of mankind." This provision, treated independently of any other, requires no consideration. The *cy pres* doctrine, available to give effect to trusts for charitable uses

without any defined beneficiary in England, has no place in the law of this State. The attempt thus made by the testator to provide, in the event mentioned, for a trust dependent upon the selection by the executors and trustees of the charitable, educational, and scientific purposes to which the fund should be applied, was ineffectual, and void for indefiniteness and uncertainty. *Prichard v. Thompson*, 95 N. Y. 76; *Holland v. Alcock*, 108 N. Y. 812, 11 Cent. Rep. 861; *Read v. Williams*, 125 N. Y. 560.

The proposition on the part of the appellants is that by the thirty-fifth article the testator made two distinct alternative provisions for the disposition of the residue of his estate; that the one relating to the incorporation and endowment of the Tilden Trust was primary, and the other, following it, was ulterior, and intended (if that institution was incorporated) to be made effectual in the event only that the executors and trustees deemed it inexpedient to apply such residue, or only a portion of it, to the Tilden Trust. On the contrary, the counsel for the respondent contend that there are no such separate alternative provisions in the article, but that the testator there provided for the disposition by the trustees of his residuary estate to charities, etc., of which the Tilden Trust was one of the objects, and that the power given to the executors and trustees was that of selection merely. In some cases it has seemingly been held that when words of a will expressing a class of beneficiaries or objects of a trust may be taken distributively, and some of them are lawful objects of the trust and others not, it may be effectual as to the former; but the weight of authority is otherwise, and in such case the power of mere selection in execution of the trust, attempted to be so given, is wholly void.

Williams v. Kershaw, 5 Clark & F. 111; *Vezey v. Jamson*, 1 Sim. & S. 69; *Ellis v. Shelby*, 1 Myl. & C. 286; *Mitford v. Reynolds*, 1 Phill. Ch. 190; *Re Jarman's Estate*, L. R. 8 Ch. Div. 584, 25 Moak, Eng. Rep. 496.

If that view, as applied to the present case, is supported, the conclusion must follow that the testator failed by his will to make any valid provision for the disposition of his residuary estate. Then the trusts, and the power which the testator attempted to create and vest in his executors and trustees, would constitute a single scheme for the appropriation of the fund by them to such charitable, educational, and scientific purposes as they should choose to select. But a different question is presented if the provision relating to the creation and endowment of the Tilden Trust may be legitimately treated independently of that following it, by which he sought to make provision for such general undefined purposes. Then the effect of the former would not necessarily be embarrassed by any relation to the latter. *Savage v. Burnham*, 17 N. Y. 561; *Schettler v. Smith*, 41 N. Y. 328; *Manice v. Manice*, 43 N. Y. 808; *Kennedy v. Hoy*, 105 N. Y. 184, 6 Cent. Rep. 805.

The disposition of this question depends upon the construction to which that article of the will may be entitled, having in view the principles applicable to the interpretation of such instruments. As has already been seen, the

first duty imposed upon the executors was to seek, by legislative Act, the incorporation of the Tilden Trust; and it may be assumed that this was not required or designed as a useless ceremony. When that should be effected, they were authorized to organize the corporation, designate its first trustees, and convey to it, or apply to its use, the residue of his estate, or so much of it as they should deem expedient. We need go no further to see the purpose for which the Tilden Trust was intended in its relation to the fund. How is the purpose so represented necessarily qualified by any of the provisions following it? There were certain contingencies in view which would have the effect to defeat the execution of the power to endow such an institution, and upon which the limitation of the fund, or some portion of it, to the general charitable, educational, and scientific purposes was provided for. The first was the failure to obtain the incorporation of the Tilden Trust. In that event, the testamentary disposition of the residue of the estate was dependent upon such provision for application to charitable, etc., purposes. But, if it should be incorporated, the contingency depended upon the determination of the executors and trustees, to the effect that it was expedient to apply a portion only, or inexpedient to apply any part, of the fund to that institution. It quite plainly appears that the testator intended that, if legislative action could be effectually had for that purpose, the Tilden Trust should be incorporated, and, that being accomplished, its endowment should first be considered and determined; and that in the event only that it should by the trustees be deemed inexpedient to apply to it any of the residue of his estate, or expedient to apply to it less than the whole of such estate, would there be any occasion to seek other charitable, educational, or scientific purposes to which to appropriate the fund or any portion of it.

It is urged that, because the gift of the testator is, by the terms of the will, made to the executors and trustees, their power is that of selection, and consequently there is no limitation created by the testator, and can be no primary or ulterior gift, within the import of the language employed. But gifts may be made by a testator by means of powers vested in trustees to whom the estate is devised and bequeathed, and limitations contingent in character may be dependent upon the execution or non-execution by the trustees of powers conferred upon them. The question whether the provisions for the disposition of the residuary estate are or not alternative, primary, and ulterior is one of construction. The fair interpretation of the language of the thirty-fifth article permits, and the evident intent of the testator as there manifested requires, the conclusion that the two are alternative provisions, and that they are primary and ulterior. The former is definite in its object; the latter is otherwise. It is true that by the terms of the thirty-ninth article the testator devised and bequeathed all of his residuary estate to the executors and trustees for the purposes mentioned in the will. This is designated at other places in his will as "general trust," to distinguish the residuary fund from the various special trusts created by the will. But this does not

necessarily qualify or modify the construction to which the provisions of the thirty-fifth article would otherwise be entitled in the respect we are now considering them. The manner in which the fund should be applied was dependent upon contingencies, some of which were within the powers vested in the executors and trustees; yet the purpose of the devise and bequest must be considered in reference to the power conferred upon them by the provisions of that article, and in view of the manner in which it might by virtue of those provisions be properly executed. The arbitrary exercise of power may characterize the effect which may be given to it, rather than its purpose. So, in the present case, the executors and trustees could have unfaithfully exercised their discretion upon the question of expediency. But, while the test of expediency or in expediency was left to their discretion, they could not, consistently with the intent of the testator, as plainly manifested by his will, have applied any part of the fund to the purposes of the general charity mentioned in such ulterior provision, until they had in good faith determined, for "some cause or reason," that it was inexpedient to apply it, or some and what portion of it, to the Tilden Trust. And, although the exercise of discretion may not be subject to judicial control or review, it may be said that, for the purpose of interpretation, it is the intent of the donor so made to appear that properly measures the discretionary power of those who are to execute it, and not the opportunity for its unfaithful execution found in its discretionary character. The power vested in the executors and trustees was not that of mere selection of a beneficiary or beneficiaries among all the objects which were embraced within the scope and meaning of the thirty-fifth article; they were not authorized to reach the consideration of the undefined objects of charity, etc., there referred to, for the purpose of selection from them, until they had disposed of the question whether the specific beneficiary, the Tilden Trust, should or not be endowed. That was the definite object to which their attention was first to be directed, and the question of the application to it of the fund to be determined. This the trustees were to do before any matter of selection from among indefinite charities was reached. The scope of the inquiry for that purpose was to be extended to other objects, "if for any cause or reason" they should deem it inexpedient to apply any part of the residuary fund, or expedient to apply less than the whole of it, to the Tilden Trust, and not otherwise. This seems to have been the purpose the testator had in view, as appears by the provisions of that article. This is not repugnant to any other provision of the will. And his intent, as manifested by the language used, must be effectuated if it can be consistently with the rules of law. *Smith v. Bell*, 81 U. S. 6 Pet. 68, 8 L. ed. 322; *Wager v. Wager*, 96 N. Y. 164; *Roe v. Vingungut*, 117 N. Y. 204.

The provision for the Tilden Trust must therefore be treated as primary, and distinct from that for general charities, etc.; and the question whether or not the former provision was effectually made remains to be considered. It is requisite to the validity of any provision of a will that it is or may become capable of

lawful execution, and that test is applicable as of the time of the death of testator. There may be future contingencies provided for upon which gifts are made to depend, and beneficiaries may not be definitely known or ascertained at the time of the testator's death. It is sufficient that they are so described as to be ascertained in the future, when the right accrues to receive the gift. *Holmes v. Mead*, 52 N. Y. 332; *Shipman v. Rollins*, 98 N. Y. 311. And a devise or bequest may be limited to a corporation not in existence at the time of the death of the testator, provided it is created within the time allowed for vesting of future estates. This question was considered in *Inglis v. Sailors Snug Harbor*, 28 U. S. 8 Pet. 99, 7 L. ed. 617; *Ould v. Washington Hospital for Foundlings*, 95 U. S. 803, 24 L. ed. 450; and in this State it was so determined in *Burrill v. Boardman*, 43 N. Y. 254, and reaffirmed in *Shipman v. Rollins*, 98 N. Y. 324. In the *Burrill Case* it was treated as in the nature of an executory devise, dependent upon incorporation of the institution there contemplated, and it was held that the estate vested on the occurrence of that event. In that respect that case is distinguishable from the present one, as in the latter it was contemplated that the vesting should depend upon the conveyance to the Tilden Trust, or application to its use, by the executors and trustees to whom, by the terms of the will, the residuary estate was devised and bequeathed. This distinction arises out of the fact that, upon the contingency which enabled the institution in the *Burrill Case* to take the fund, the trust upon which the trustees held it terminated, and there was no opportunity remaining for any limitation over, while it was otherwise in the case at bar. But, treating the provisions of the thirty-fifth and thirty-ninth articles of the will as creating a trust power, it is not seen that the fact that the estate did not vest in the corporation on its creation necessarily has, of itself, any essential importance for the purpose of the question now under consideration, provided the power was adequately given to convey or apply it to the use of the institution. While it could not in that case be deemed what was formerly known as an "executory devise," it might, in behalf of the Tilden Trust, be treated as a conditional limitation of the estate, or a power dependent for its execution upon a condition. The testator evidently intended to vest in the executors and trustees all the control he could of the title to his residuary estate. But it cannot, for the purposes of the question here, be assumed that he intended their relation to it should be other than the legal effect of that which they took by the will. As to the realty, no title passed to the trustees, and no trust, within the statute, was created. When by the statute express trusts were reduced to those for the execution of which taking of the title was deemed essential (1 Rev. Stat. p. 728, § 55), it took from others none of the elements of trusts other than such as were dependent upon the title as formerly taken by trustees, and none of the powers of execution not so dependent; and it was provided that, when an express trust should thereafter be created for purposes other than those enumerated in section 55, no title should vest in the trustees, but,

If the trust directed or authorized the performance of any act which might lawfully be performed under a power, it should be valid as a power in trust, *Id.* p. 729, § 58. If, therefore, the provisions of the thirty-fifth article of the will would, but for the statute, have constituted a trust, and authorized the performance of any act which might lawfully be performed as such, they, so far as relates to the real property in the residuary estate of the testator, created a power in trust; and although the larger part of such estate was personality, and the trust as to that is not subject to the statute, the distinction in that respect, for the purposes of the questions requiring consideration, need not be observed, as the subject of powers is substantially applicable alike to both. *Cutting v. Cutting*, 86 N. Y. 522; *Hutton v. Benkard*, 92 N. Y. 295.

It is urged that by the provisions in question the testator neither directed nor authorized the performance of any act of disposition of the residuary estate which could lawfully be performed, within the meaning of a statute defining a power in trust; and that there was not only no party to effectually demand their execution, but they had no enforceable character. It is true the creation of a trust depends upon the nature of the provisions by which its creation is sought. It is also the rule that a trust is imperative; and at common law the same rule is applicable to a power coupled with a trust, although otherwise as to a naked power. 2 Story, Eq. Jur. § 1061. The primary one of those provisions certainly was not enforceable at the time of the death of the testator. There was then no Tilden Trust, and its then future existence was contingent. When it was created its ability to take depended upon its incorporation being in form and manner satisfactory to the executors and trustees, and, that being so, it was made discretionary with them whether the institution should have the whole or any, and what portion, of the residuary fund. It would therefore seem to follow that, upon the incorporation of the Tilden Trust, it could not, without action of the trustees, have enforced conveyance or application to it of the fund or any portion of it. In that view, and upon the construction given to the thirty-fifth article, the question is whether the trustees were enabled to vest the fund in the Tilden Trust, or, by the exercise of discretionary power given to them, could have afforded to that institution the right to demand and enforce in that respect the execution of the provision of the will in its behalf. As already seen, the testator did not intend to die intestate as to any portion of his property; and that he did intend to impose upon his executors and trustees the imperative trust power for the disposition of his residuary estate appears by the provisions of the thirty-ninth article, by which he directed them "to apply the same, and the proceeds thereof, to the objects and purposes mentioned" in the will. This is borne out by the terms of the thirty-fifth article, by imputing to him the understanding that the secondary provision of that article was valid, as upon the contingency there mentioned he provided for the disposition of it. And the latter provision cannot be overlooked, but must be consulted to ascertain his intent, with a view to the aid, so far as it may

furnish it, to the interpretation or the other provision in question. *VanKleeck v. Reformed Dutch Church*, 20 Wend. 457, 471; *Kiah v. Grenier*, 56 N. Y. 220. But if the primary provision was of itself valid in its object, purpose, and effect, it was not invalidated by the fact that the trustees were in terms in the events stated in the article empowered to apply the fund to the indefinite purposes mentioned in the ulterior provision for which testamentary disposition of property could not lawfully be made. *Atty-Gen. v. Lonsdale*, 1 Sim. 105; *Satisbury v. Denton*, 3 K. & J. 529; *Carter v. Green*, *Id.* 591. In other words, the limitation to the indefinite objects did not deny to the former provision for the Tilden Trust the effect to which it otherwise may have been entitled. *Savage v. Burnham*, 17 N. Y. 561; *Kennedy v. Lloyd*, 105 N. Y. 134, 6 Cent. Rep. 805. In such case, the subject would be within the control of the court, and, on proper application, it would restrain the use of power for such unlawful purpose. The contention of the respondent's counsel is that it was essential to the validity of the provision in behalf of the Tilden Trust that the residuary estate should have vested in it at the time it came into corporate existence, or that the institution should then have been entitled to demand and enforce, by decree of the court, the conveyance to it, or the application to its use, of the fund by the trustees. This proposition (upon the construction here given to the provisions in question) in effect, seems to be that a trust or trust power could not exist with or survive the intervention of the discretionary power which the testator intended to give the trustees. But it may be observed that while a valid trust is imperative, attending it may be powers upon which limitations and executory bequests may be contingent, and the exercise of those powers may be in some sense discretionary. *Hawley v. James*, 5 Paige, 318, 468, 3 L. ed. 734-791, 16 Wend. 61, 176; *Mason v. Jones*, 4 Sandf. Ch. 623, 7 L. ed. 1232, 13 Barb. 461; *Costabadie v. Costabadie*, 6 Hare, 410; *French v. Davidson*, 3 Madd. 396; *Walker v. Walker*, 5 Madd. 424; *Cole v. Wade*, 16 Ves. Jr. 27.

It is very likely that, if the testator had apprehended the invalidity of the ulterior provision of the thirty-fifth article, he would have provided a different limitation in the event there mentioned. But it cannot be assumed that the primary provision for the appointment and disposition of the residuary estate to the Tilden Trust would have been other than that which he made. The efficiency of the power given by this provision is not dependent upon the character of the ultimate limitation, nor is it less effectual than it would have been if that had been to a lawful object of testamentary gift. The difference is that in the one case it was within the power of the trustees to defeat the disposition by the will of the residuary estate, and in the other they could not. But in the latter case they, by the execution of the discretionary power, could have rendered the ultimate provision ineffectual, and for the purposes of the disposition of the fund inoperative; and therefore, unless the contingency arose upon which the ultimate limitation of it was dependent, it would not be important, for any practical purpose, whether it was valid or not,

and in that event only would an enforceable character of the trust or trust power be essential to effectuate the intent of the testator. His purpose, it must be assumed in view of the power given, would be accomplished by the disposition to the incorporated institution designated by him. The creation of this power, in nature and purpose, was lawful, and through its execution the gift to the Tilden Trust could legitimately be effected, although in respect to the appointment to that institution it was made dependent upon the will of the executors and trustees. While it is essential to a trust, as such, that it be imperative, and therefore enforceable by decree in equity when the time arrives for its execution, it is not so of a mere power, or necessarily so of a trust power, although the latter is imperative, unless its execution or non-execution is made expressly to depend upon the will of the grantee. The testator intended to make the execution of the power of appointment to the Tilden Trust dependent upon the will of the trustees, as expressly appears by the provision creating it. The contention, therefore, that this power of the primary provision was invalid because its execution was not judicially enforceable in equity on behalf of that institution does not, in the view taken, seem to be maintained. The imperative character intended by the testator to be made applicable, and in a certain event to be applied, to the disposition of the residuary estate, had relation to the ultimate limitation, which was dependent upon the contingency that the trustees, in their discretion, concluded not to appoint to the Tilden Trust any or only a portion of such fund; and, as such limitation was invalid for indefiniteness and uncertainty in its object, the testator failed by it to effectually make any imperative provision for the disposition of the residuary estate by means of a trust power in trust, or trust power enforceable as such, except so far as should be necessary to make and keep good the special trusts as directed. And as the will furnished no support for an ultimate limitation of the fund in the event the trustee should have deemed the execution of the power of appointment to the Tilden Trust inexpedient, the real property within the residuary estate descended to the heirs of the testator, subject to the execution of the power of appointment and disposition to that institution, and the right of his next of kin to the administration in their behalf of the personality of such estate was subject to the execution of the same power.

Now, by reference again to the provisions of the thirty-fifth article, it may be seen, as plainly appears by their terms, that the testator intended that the trustees should exercise the power conferred upon them to consummate the disposition of the residuary estate for the declared purposes of the trust. If they were successful in their effort to obtain the corporate charter, it was their duty to determine whether it was satisfactory, and, in the event it was so, then, unless they deemed it inexpedient to apply any part of the fund to the Tilden Trust, the further duty was imposed upon them to determine whether it should take all of it, and, if not all, to appoint the amount of it so to be appropriated. It is apparent that the testator intended to make the exercise of such power a

duty, and essentially so to carry out his declared purpose. The discretion which he evidently intended to give the trustees, related, not to the execution of the power, but only to the manner of its execution. In that view (which seems well supported), may not the limitation to the Tilden Trust have been lawfully conditional, not only on its incorporation, but as well upon the manner such preliminary power, discretionary only in that respect, should be executed? In *Ould v. Washington Hospital for Foundlings*, 95 U. S. 808, 24 L. ed. 450, the estate, for the purposes of the trust, was devised to trustees, with a view to the incorporation, after the death of the testator, of an institution to which they, in that event, were to convey the estate, provided the corporation was approved by them; otherwise not. The hospital was incorporated, and conveyance made to it by the trustees. The validity of the trust was contested, and the court held that the provision relating to a conveyance upon the creation of a corporation approved by the trustees was a conditional limitation of the estate vested in them. In that was involved the discretionary power of the trustees relating to the approval of the corporation. It is essential that the object and subject of a testamentary dispositional provision be definite, and when so designated that they are or may become such, and properly be ascertained, a limitation may by the testator be made to depend upon a future condition, having regard to the Statute of Perpetuities, and such condition may consist of a power resting in the discretion of a trustee provided for and defined by the will; and, when the condition is fulfilled, the limitation may be enforced. The doctrine of the common law on the subject of powers of appointment and selection, except so far as it permitted the treatment of them as illusory, is consistent with the statute relating to powers, which provides that "a power is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform." 1 Rev. Stat. p. 732, § 74. The powers now under consideration are a special power and a special power in trust, which, as defined by the statute, are those where the persons or class of persons to whom the disposition of lands is to be made under the power are designated, (Id. § 78); and "(1) when the disposition which it authorizes is limited to be made to any person or class of persons other than the grantee of such power entitled to the proceeds, or any portion of the proceeds, or other benefit to result from the execution of the power; (2) when any person or class of persons other than the grantee is designated as entitled to any benefit from the disposition or charge authorized by the power." (Id. p. 734, § 95.)

The provisions of the thirty-fifth article of the will in terms, in view of those of the thirty-ninth article, created a special power in trust; and because the testator intended that his residuary estate should be disposed of, as directed by his will, for the purposes of the trusts there mentioned, the provisions were apparently imperative; such, at all events, would have been their effect if the ulterior disposition to which the estate was conditionally limited had been

valid. And the statute provides that "every trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative, and imposes a duty on the grantee, the performance of which may be compelled in equity, for the benefit of the parties interested." *Id.* p. 734, § 96. The ultimate limitation was, by the terms of the will, imperative, in the event that the trustees failed for any cause to dispose of the fund under the primary one, which alone was made dependent upon their discretionary power. The Tilden Trust could take only through the power in the nature of that of appointment vested in the trustees; and the fact that the exercise of that power was discretionary, and could not be enforced, produced no legal infirmity in the provision relating to that institution, its ability to take, and to the limitation to it dependent upon such appointment. *Chatteris v. Young*, 6 Madd. 80; *Lancashire v. Lancashire*, 1 De G. & S. 288, 2 Phil. Ch. 657; *Cole v. Wade*, 16 Ves. Jr. 27; *Perry, Tr. § 508*; *Hill, Trustees*, 490-492.

So far as the statute relates to the subject of the power of appointment, it provides that where, under a power, a disposition is directed to be made among several designated persons, without specification of the share to be allotted to each, all of them shall be entitled in equal proportion. 1 Rev. Stat. p. 734, § 98. But, when the terms of the power import that the fund is to be distributed between them in such manner or proportions as the trustee may think proper, he may allot the whole to any one or more of such persons in exclusion of the other. *Id.* § 99. The trust power in such case does not cease to be imperative. *Id.* § 97. And if the trustee having such power shall die leaving it unexecuted, its execution shall be decreed in equity, for the benefit equally of all the persons so designated. *Id.* § 100. These provisions of the statute are in that respect substantially declaratory of the common law. *Swift v. Gregson*, 1 T. R. 432. It was there, as it is by our statute, a trust power; and it is not important, for the purposes of the question, whether the designated persons are vested with the fund subject to the execution of the power, or take by reason of the power given. In the one case there is a gift expressed, and in the other implied, which will be executed by decree of the court, in default of the execution of the power by the donee of it. 1 *Perry, Tr. § 250*; *Walsh v. Wallinger*, 2 Russ & M. 78; *Lees v. Whiteley*, L. R. 2 Eq. 151. No such implication arises where there is a limitation over of the estate or fund to other objects in default of the execution of the power by the donee; and in that case the objects of the power take nothing, as their beneficial interest or the limitation to them is wholly dependent upon the execution of the power by him. *Davidson v. Proctor*, 19 L. J. Ch. N. S. 895, 14 Jur. 81; *Pearce v. Vincent*, 2 Myl. & K. 800, 2 Bing. N. C. 828, 2 Keen, 280; *Goldring v. Inwood*, 3 Giff. 189. And, although the power of appointment and selection rests in the discretion of the trustee, it is valid, and may be effectually executed by him. 2 *Perry, Tr. § 508*; *Brown v. Higgin*, 3 Ves. Jr. 561.

In the present case the provision relating to the Tilden Trust conferred upon the trustees a 14 L. R. A.

power of appointment and disposition to a definite object, with a limitation over on default of such appointment; and, so far as by the terms of such provision the execution of the power was left to the judgment or discretion of the trustees, it was expressly made to depend on their will, within the meaning of the statute. And, as before remarked, the apparent purpose and effect of this provision was not qualified or defeated by the fact that the ultimate limitation was to objects so indefinite as to render it ineffectual. In practical effect, it was the same as if the fund had been limited over to the heirs and next of kin of the testator, as they necessarily would take in default of the execution of the power. In *Power v. Cassidy*, 79 N. Y. 602, the fund was bequeathed to the executors, with power of appointment and selection among a designated class of beneficiaries. While the manner of executing it was discretionary, the trust or trust power was imperative, and on default of the executors to execute it, the power would survive them, and the designated objects would then and ultimately be entitled to share equally in the fund, and it would be enforced accordingly. But as to those beneficiaries it would not, in that sense and for that purpose, have been imperative, if there had been a limitation over to other objects on such default, although as to the latter it would have retained its imperative character; yet the power thus given of appointment would have been valid, and may have been effectually executed.

It is essential to the constitution of a valid trust, or special power in trust, by a testator, that the objects be so designated or described that they may be definitely known or ascertained from the provisions of his will. And it was the failure of the testators to so designate or define the objects of the attempted trusts which came to the attention of the court, and were for that reason held invalid, in *Prichard v. Thompson*, 95 N. Y. 76; *Holland v. Alcock*, 108 N. Y. 312, 11 Cent. Rep. 861; *Read v. Williams*, 125 N. Y. 500. In those cases the trust power sought to be given was that of appointment and selection, without limitation over. The infirmity which rendered invalid the provisions of the wills in question in those cases was that no beneficiary was designated or pointed out by, or ascertainable from, the will, having any interest in the execution of the power, or who could assert in court any claim founded upon the trust. Those provisions of the wills were therefore held invalid for indefiniteness of the classes of objects of the trust sought to be created; and in this respect they were distinguished from *Power v. Cassidy*. The present case is distinguishable from them in like manner; and, further, that the power given by the primary provision in question was not that of appointment and selection among members of a class, but was of appointment and disposition to a definitely designated beneficiary. It is also essential that the subject of the power be designated and certain, or that the means be provided by the will to render it properly ascertainable or certain. The provision of the power in that respect is for the application to the Tilden Trust of the residue of the estate, or so much of it as the trustees should deem expedient. The cases before

cited, recognizing as effectual discretionary power given to trustees to regulate, control, or determine the amount which certain beneficiaries should receive of specific funds, to be exercised in reference to circumstances which the donors of the power had in view, have some bearing upon this question. Those are the *Hawley, Mason, Costabadie, French, Walker and Cole Cases*, *supra*. The residuary estate was a definite fund, and, unless the trustees determined that it was inexpedient to endow the Tilden Trust, they were at liberty to apply to it the entire fund; but whether expedient to so apply all or less than the whole of it was a matter of judgment of the trustees, to be founded upon the amount of the residue in reference to the sum suitably available for the purpose of the institution, and that was the amount the testator authorized the trustees to appoint to the institution. This was the means provided by the will to make certain that which, until such action by the trustees, was uncertain. In *Peck v. Halsey*, 2 P. Wms. 888, it was held that a bequest by the testatrix of some of her best linen to A. was void for uncertainty, but that a bequest of such of her best linen as the executor should think fit, or as the legatee should choose, would have been good. In *Kennedy v. Kennedy*, 10 Hare, 438, the testator gave all his household furniture, etc., to trustees, and directed that all his household property be sold by them, except such articles as his wife should desire to retain, and which be authorized her to appropriate to her own use. Held that the power of selection was effectually given to the wife. And *Arthur v. Mackinnon*, L. R. 11 Ch. Div. 385, is to the same effect. It has been seen, by reference to the statute, that the power of appropriation of a fund among the members of a class may be created and the donee of the power be authorized in his discretion to appropriate it in such proportions as he may please. This was so at common law. When the fund is definitely designated, it would seem that power may be conferred upon the donee of the power to determine what portion of it may be appointed to a definite beneficiary designated by the donor. Our attention has been called to no authority to the contrary of that proposition in its application to the present case. The *Prichard, Holland and Read Cases* do not have any necessary application to the question. The reasoning there was had in reference to their contexts, to which it was very apt; and the relief of the provision relating to the Tilden Trust from the alternative ulterior provision which embraces only indefinite objects denies to those cases any practical application to the questions presented in the case at bar. While the statute abolished powers as they before then existed, (1 Rev. Stat. p. 732, § 73,) it, as said by Judge Andrews in *Read v. Williams*, "does not define all the purposes for which a power over property may be created." This appears by section 74, before referred to, and by the reviser's notes (3 Rev. Stat. 2d ed., p. 590,) as to powers other than those which are designated as beneficial. They, except as there enumerated, were abrogated by the Statute, 1 Rev. Stat. p. 733, § 92. Treating that in question as a trust power, those considerations of the statute may not be essentially important here. It must be assumed that the testator,

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through powers conferred on his trustees by the thirty-fifth article, intended to dispose of his entire residuary estate, and therefor its ultimate dispositional provision (in view of article 39) was intended, as by its terms it purported, to be imperative, but that character was not unconditionally applicable to the power of appointment and disposition in the primary provision relating to the Tilden Trust. It had relation to the limitation over to the objects of the ulterior provision, and, in consequence of the invalidity of the latter, his intention, if the trustees had failed to appoint the Tilden Trust as the beneficiary, would have been disappointed. The purpose of the appointment and disposition to that institution is apparently legal, and at common law may have lawfully been accomplished through the execution of a power in the manner the testator sought by his will to do it. It also fairly comes within the purposes for which a power, as defined by the Statute, may be employed. Id. § 74. At common law a trust may have been attended with a discretionary power, upon the non-execution of which the enforceable character of its ultimate limitation might be dependent. This relation of powers to which trusts may have been subjected was preserved and provided for by the statute; and, while a trust power is in its nature imperative, that character of it, in the sense of being enforceable, may, when its execution or non-execution is made expressly to depend upon the will of the donee, be suspended by and during the existence of such discretionary power or determined by its execution. In the present case, there was involved in the provision for the Tilden Trust a power in its terms discretionary; and so far as it was so, its execution or non-execution was made expressly to depend on the will of the trustees; and, the purpose being lawful, it was valid, unless in contravention of the Statute against Perpetuities. It is urged that the limitation provided for by the thirty-fifth article of the will would permit the unlawful suspension of the absolute power of alienation of the realty and of the absolute ownership of the personal property constituting the residuary estate of the testator. 1 Rev. Stat. p. 723, § 15; Id. p. 773, § 1. This would be so, and its effect the invalidity of the limitation, if such suspension would not by the terms of the will necessarily terminate within a period not longer than the continuance of the life of the survivor of the two persons there designated. *Schettler v. Smith*, 41 N. Y. 328. But the thirty-fifth article must be construed in connection with the thirty-ninth article, and by the latter the testator directed that the executors and trustees "possess, hold, manage, and take care" of the residuary estate during a period not exceeding such two lives. This, in view of the further direction that they apply such estate to the objects and purposes mentioned in the will, which was imperative, is not consistent with the suspension of the absolute power of alienation of the real estate, and of the absolute ownership of the personal property beyond that period. It therefore seems that the future estates sought to be created by the testator were so limited that by the terms of those provisions they would necessarily, and beyond any contingency, have terminated within the period prescribed for

that purpose by the statute, and in that respect they may be upheld. These views lead to the conclusion that the provisions of the will relating to the Tilden Trust, and the powers for their execution, given to the executors and trustees, were valid, and, as the consequence, the main purpose of the action must fail.

Since the commencement of the action, and upon the application of the executors and trustees, a Tilden Trust has been incorporated in form and manner satisfactory to them, and organized. They determined to endow it with the entire residuary estate, and made to the institution conveyance and transfer accordingly, subject to provisions contingently made in the will by the testator in behalf of special trusts by him created, and as there directed. It is insisted that the act of incorporation is not such as was intended by the testator, in that it was not given the corporate capacity designed by him, and for the further reason that it designated the executors and testamentary trustees as permanent trustees of the institution. By the will he requested them to obtain "an act of incorporation of an institution to be known as the 'Tilden Trust,' with capacity to establish and maintain a free library and reading-room in the City of New York, and to promote such scientific and educational objects as my said executors and trustees may more particularly designate. Such corporation shall have not less than five trustees, with power to fill vacancies in their number; and, in case said institution be incorporated, . . . I hereby authorize my said executors and trustees to organize the said corporation, designate the first trustees thereof," etc. In the preamble of the Act of incorporation it is stated that the "executors and trustees deem it inexpedient to designate any purposes of the corporation . . . other than the establishment and maintenance of a free library and reading-room in the City of New York, in accordance with the purpose and intention of the said testator," and such was the capacity given by the Act to the corporation. The first section provided that the three persons (naming them) who were the executors and trustees, and such other persons as they should associate with themselves, and their successors, were created a body corporate, under the name and title of the "Tilden Trust;" and by the second section it was provided that those three persons should be permanent trustees of such corporation, and that they designate and appoint other trustees, so that the number should not be less than five. The testator seems to have had in view only one definite purpose of the corporation. That he expressed. Beyond the establishment and maintenance of a free library and reading room, he contemplated that the promotion of some further scientific and educational objects might suitably and properly be added and sustained. He therefore provided that the corporate capacity be adapted to such objects in that respect as the executors and trustees should designate. This, however, would be dependent upon circumstances to be determined by them, and he left it to their discretion. He evidently did not intend that the corporation for the purpose by him definitely appointed should be frustrated by the failure of the executors and trustees to exercise their discretion in such manner as to

give occasion to amplify the corporate capacity of the institution. The question whether, after the creation of the corporation for the free library and reading-rooms, the executors and trustees may, by the designation of such further objects, authorize the enlargement of its capacity accordingly, does not now arise, and is not considered. We think the incorporation was not invalidated by the manner the capacity of the institution was defined in the Act. No power seems to have been given by the will for designation and creation by legislative Act of three permanent trustees of the corporation. It may be that the testator intended, and he very likely did expect, that the executors and trustees of the will should become trustees of the institution, and this may have been accomplished in the way he provided. But it is seen that the manner provided for the selection of the first trustees of the institution, in the event it should be incorporated, was such that they were to be designated by his executors and trustees. The provision made by him for the organization in that respect of the institution was not observed or adopted in the Act of its incorporation. Further than this, the question which may arise upon that situation requires, and has here, no consideration. When the plaintiff commenced this action it may have had support in the invalidity of the ulterior provision of the thirty-fifth article of the will to prevent the application of any portion of the estate to the indefinite objects and purposes there mentioned. But, as the executors and trustees afterwards made a determination which would prevent the application of any part of the fund to those objects and purposes, no relief in that respect is now essential; and the only purpose for which further consideration need be given to that subject has relation to the question of costs, which we think should, on behalf of the several parties, be chargeable to the estate of the testator. The judgment of the court below should therefore be reversed, and the complaint dismissed, with costs in that and this court to all the parties, appellants and respondent, payable out of the estate.

Potter and Vann, *JJ.*, concur.

Petition for rehearing overruled December 8, 1890.

Re Application of Hubert O. THOMPSON, Commissioner of Public Works, etc., to Extinguish Certain Water Rights in Westchester County.

APPEAL OF Charles BUTLER.

(.....N. Y.)

1. A question of fact on conflicting evidence is not reviewable by the Court of Appeals on an appeal from an award of damages in condemnation proceedings under Laws 1877, chap. 445.
2. Evidence of the amount paid by the complainant for other similar proper-

NOTE.—The state of the authorities on the question of proving the value of property by the price paid for other property is so fully shown by the opinion and the briefs of counsel that any further annotation thereon seems unnecessary.

ty is not admissible in condemnation proceedings on the question of the value of the property sought to be taken.

3. A refusal to assess damages for injury to a waterpower is not shown so as to present a question of law on appeal where there was no expression of intention to that effect and evidence was taken on the subject and an award to the claimant made in gross without items.
4. An award of commissioners in condemnation proceedings may be based on their own view of the property as well as on testimony.

(October 6, 1891.)

APPEAL by Charles Butler from an order of the General Term of the Supreme Court, Second Department, affirming an order of the Special Term for Westchester County confirming the report of commissioners who had been appointed to assess damages for certain water rights sought to be acquired by the Commissioner of Public Works of the City of New York. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. William Allen Butler and Willard Parker Butler, for appellant:

The exclusion of evidence of the price paid on an actual purchase by the city of the water-power next adjoining parcel 84 was error.

Re New York, L. & W. R. Co. v. Arnot, 27 Hun, 151; *Gardner v. Brookline*, 127 Mass. 858; *Culbertson & B. Pack. & Prov. Co. v. Chicago*, 111 Ill. 651; *Cherokee v. Sioux City & I. P. T. L. & L. Co.* 52 Iowa, 279; *Concord R. Co. v. Greely*, 23 N. H. 242; *Washburn v. Milwaukee & L. W. R. Co.* 59 Wis. 364; *Langdon v. New York*, 50 Hun, 434; *Re New York, L. & W. R. Co.* 33 Hun, 639; *Shattuck v. Stoneham Branch R. Co.* 6 Allen, 115; *Benham v. Dunbar*, 106 Mass. 363; *Green v. Fall River*, 113 Mass. 262; *Chandler v. Jamaica Pond Aqueduct Corp.* 122 Mass. 306.

Mr. Arthur H. Maaten, with *Mr. William H. Clark*, for respondent:

It was not an error on the part of the commission to reject evidence of what the city had paid for certain water rights appurtenant to a neighboring parcel.

8 Suth. Dam. p. 463; *Gouge v. Roberts*, 58 N. Y. 619; *Blanchard v. New Jersey S. B. Co.* 59 N. Y. 292; *Mark v. Guardian F. Ins. Co.* 14 N. Y. Week. Dig. 388; *East Pennsylvania R. Co. v. Hiester*, 40 Pa. 53.

The evidence of the price paid, or amount received, for land in the neighborhood in particular instances is inadmissible; the market value being the only proper test. Evidence of similar sales would be no test, as these sales might be the result of fancy, caprice, or folly, and would prove nothing on the point in question.

Kansas City & T. R. Co. v. Splitlog, 45 Kan. 62; *Pennsylvania S. V. R. Co. v. Ziemer*, 124 Pa. 571; *Sixth Ave. R. Co. v. Metropolitan Elev. R. Co.* 56 Hun, 187; *Color Printing Attachment Co. v. Brown*, 5 Jones & S. 433.

Even if the value of neighboring property were competent in this case, it could not be properly shown by the offer of a deed showing the price obtained at private sale.

People v. McCarthy, 3 Cent. Rep. 833, 102 N. Y. 630.

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Parker, J., delivered the opinion of the court:

This proceeding was brought pursuant to the powers conferred on the Commissioner of Public Works of the City of New York by chapter 445 of the Laws of 1877, and the various Acts amendatory thereof, to acquire the right to divert and keep diverted from the Bronx River all the water of the river north of and above the dam at Kensico. The commissioners awarded to the claimant, who was the owner of a large and valuable farm through which the river ran, damages in the sum of \$7,370. From the order confirming such report and award successive appeals have been taken by the claimant to this court, the latter appeal being especially authorized by the Act of 1877. But the fact that an appeal to this court is permitted does not bring up for review a question of fact arising upon conflicting evidence, and this court has no jurisdiction to review the decision of the General Term, unless error of law in the proceedings be found. *Re Thompson*, 121 N. Y. 277. That case had its origin in proceedings taken under chapter 490, Laws 1883, but the provision permitting an appeal to the Court of Appeals is the same as in the Act authorizing the proceedings before us, and the decision cited is therefore applicable and controlling. Unless, then, some error of law requires a reversal, the decision of the general term must stand.

The only exception to which our attention is called relates to an effort on the part of the owner to prove what had been paid by the petitioner for water rights appurtenant to a neighboring parcel on the same river. At folio 7467 the counsel for the owner offered to prove that the City of New York purchased from Robert White the right to divert the waters from one half of the water-shed of the Bronx River, and paid him the sum of \$21,991.66 for such rights, and his privileges in connection with a certain mill upon what is known as the "Powder-Mill Property," at Scarsdale. The commission declined to rule on the offer, at the same time, by its chairman, saying, in effect, that a ruling would be made as the evidence should be presented. In that connection no other evidence was offered, and the exception then taken is, of course, not available. But, in view of the stipulation making the evidence as to all parcels applicable to any other, it is claimed that this appellant is entitled to the benefit of any exception taken to the rejection of evidence bearing on the question of the value of his waterpower. We shall assume, without deciding, that this claim is well founded. Robert White was vested in fee with the riparian ownership in such premises at the time of the commencement of the proceedings to acquire title by the city. Pending the proceedings he died. Subsequently, pursuant to an agreement with his heirs, a conveyance was made to the city. Respecting the manner in which the proof was sought to be made, the owner offered in evidence the deed, which expressed a consideration. But, for the purpose of proving the price paid, it was not competent. *People v. McCarthy*, 102 N. Y. 630, 3 Cent. Rep. 833. One or more witnesses were asked to state the sum paid, and, as the objection went solely to

the competency of the evidence for any purpose, it must be assumed that the witnesses were competent to answer the question. And the question, then, is, Was the rejection of the evidence as to the amount paid by the city for the White waterpower error for which a reversal should be had?

This question has been presented to the courts of last resort in several of the States, but not with the same result. In Massachusetts, New Hampshire, Illinois, Iowa, and Wisconsin it is held that actual sales of other similar land in the vicinity, made near the time at which the value of the land taken is to be determined, are admissible as evidence for the purpose of arriving at the amount of compensation. *Gardner v. Brookline*, 127 Mass. 358; *Culbertson & B. Pack & Prov. Co. v. Chicago*, 111 Ill. 651; *Cherokee v. Sioux City & I. F. T. L. & L. Co.* 52 Iowa, 279; *Concord R. Co. v. Greely*, 23 N. H. 242; *Washburn v. Milwaukee & L. W. R. Co.* 59 Wis. 864. While in some of the other jurisdictions, notably Pennsylvania, New Jersey, Georgia, and California, it is held that sales of similar property are not admissible for the purpose of proving the value of property about to be taken. *East Pennsylvania R. Co. v. Hester*, 40 Pa. 53; *Pennsylvania & N. Y. R. Co. v. Bunnell*, 81 Pa. 414; *Pennsylvania & S. V. R. Co. v. Ziemer*, 124 Pa. 580; *Montclair R. Co. v. Benson*, 36 N. J. L. 557; *Central Pac. R. Co. v. Pearson*, 85 Cal. 247-262; *Selma, R. & D. R. Co. v. Keith*, 53 Ga. 178.

The reasons assigned for the conclusion reached in the cases last cited are, in the main, that the test in legal proceedings is, What is the present market value of the property which is the subject of controversy? It may be shown by the testimony of competent witnesses, and on cross-examination, for the purpose of testing their knowledge respecting the market value of land in that vicinity, they may be asked to name such sales of property, and the prices paid therefor, as have come to their attention. But a party may not establish the value of his land by showing what was paid for another parcel similarly situated, because it operates to give to the agreement of the grantor and grantee the effect of evidence by them that the consideration for the conveyance was the market value, without giving to the opposite party the benefit of cross-examination to show that one or both were mistaken. If some evidence of value, then *prima facie* a case may be made out, so far as the question of damages is concerned, by proof of a single sale, and thus the agreement of the parties which may have been the result of necessity or caprice would be evidence of the market value of land similarly situated, and become a standard by which to measure the value of land in controversy. This would lead to an attempt by the opposing party to show:—*first*, the dissimilarity of the two parcels of land; and *second*, the circumstances surrounding the parties which induced the conveyance,—such as a sale by one in danger of insolvency, in order to realize money to support his business, or a sale in any other emergency which forbids a grantor to wait a reasonable time for the public to be informed of the fact that his property is in the market; or, on the other hand, that the price paid was excessive, and occasioned by the fact that the

grantee was not a resident of the locality, nor acquainted with real values, and was thus readily induced to pay a sum far exceeding the market value. Thus each transaction in real estate claimed to be similarly situated might present two side issues, which could be made the subject of as vigorous contention as the main issue, and, if the transactions were numerous, it would result in unduly prolonging the trial, and unnecessarily confusing the issues, with the added disadvantage of rendering preparation for trial difficult.

Our attention has not been called to a case in this court where the question has been passed upon in the manner here presented, but there are a number of decisions indicating the tendency of the court to be against proving value by evidence of the selling price of similar property. In *Huntington v. Atwell*, 118 N. Y. 865, the defendants attempted to prove the value of certain sea-side property by showing the value of other property of the same general character situated in different places, and *Judge Bradley*, speaking for the court, said: "It may be that such evidence would have furnished some guide for estimate of the value of the property, but might not. Such evidence would present collateral issues, which might, and very likely would, involve a variety of considerations having relation to similarity or difference, and to advantages and disadvantages of the different properties in numerous respects, as compared with that in question. It is quite well settled that evidence of that character is not admissible upon the question of the value of property in controversy." The question was not necessarily before the court in *People v. McCarthy*, 102 N. Y. 630-638, 3 Cent. Rep. 833; but *Chief Justice Ruger*, referring to the question whether the price paid on sales of real estate between individuals is admissible as evidence of value, said: "We think it quite clear, however, that such price is not, in any view, competent evidence of value." In *Blanchard v. New Jersey S. B. Co.*, 59 N. Y. 292, the defendant attempted to show the value of a sunken steam-boat by proving the value of other steam-boats with which she could be compared, and it was held that the evidence was not competent. In *Langdon v. New York*, 59 Hun, 434, the objection was that other evidence should be produced to establish the fact sought to be proven, (page 866,) so that the question of the relevancy of the evidence was not before the court. We are of the opinion that the value of property which depends upon the presence or absence of inherent qualities not necessarily present or absent in other and similar property cannot be proved by showing the price paid for such other and similar property. The value of property having a recognized market value, such as No. 1 wheat and corn, may, of course, be proven by showing the market prices; but the value of property which is dependent upon locality, adaptability for a particular use, as well as the use made of property immediately adjoining, may not be shown by evidence of the price paid for similar property. Even under the Massachusetts rule, a reversal would not be justified because of the extent of the discretion vested in the judge or officer presiding at the trial to determine whether such evidence is admissible, depending, of course,

on various elements, such as the nearness or remoteness of the time of sale; whether the premises are far separated; the condition of the property about the parcel sold, and the use made of it, which may have operated to enhance or diminish its selling value; the similarity of the property, not only as to description, but as to its availability for use. *Chandler v. Jamaica Pond Aqueduct Corp.* 123 Mass. 305; *Gardner v. Brookline*, 127 Mass. 358-363, and cases cited.

In point of time, the White sale was a year and one half prior to the date when the offer was made to prove it. The White waterpower was in actual use in the operation of a mill, while the waterpower of Mr. Butler had not been utilized in any degree whatever. True, as much water will be diverted from the Butler property as the White property, but it does not follow that the respective waterpowers are of equal value. The value of a waterpower depends on its availability for use; and it is a matter of common observation, that at certain points along a stream the waterpower can be more readily and cheaply made available for industrial purposes than at others. So, if appellant's contention as to the admissibility of evidence of that character could be allowed, we should necessarily reach the conclusion that the nature of the evidence offered as to similarity was not of such a character as to authorize a court to hold, as a matter of law, that the commission improperly exercised their discretion in refusing to admit proof of the price paid for the White parcel.

The appellant asserts that the commission refused to award damages for the injury to the claimant's waterpower, and insists that in so doing they committed an error in principle which may be reviewed in this court. After a thorough examination of the record, and a careful consideration of the argument in behalf of appellant, the conclusion is reached that this court is not warranted in determining that an award was not made for such damages as, in the judgment of the commission, the claimant will sustain because of injury to his waterpower. The claimant owned about 358 acres of land, covering 4,288 feet on the east bank of the Bronx River, and about 4,636 feet upon the west bank; and for the reduction in the volume of water which naturally flows over this course, occasioned by the diversion on the part of the city, the commission awarded to him \$7,270. This award was made in gross, no items being given, and it is therefore impossible to determine what portion of it was allowed for injury to the tract because of the lessening of the flow of the stream, or what part of it was an award for damages to the waterpower. Neither in the report nor in the conduct of the trial is there any indication that it was determined that the waterpower was of no value. On the contrary, the commission received a large amount of expert testimony offered by the claimant, tending to show that the waterpower was of considerable value. No evidence in that direction was rejected, save that which tended to prove the price paid by the city for the White waterpower; and it should be assumed that they gave to this evidence such weight as it was entitled to. Claimant's experts, it is true, testified

that the waterpower alone was of far greater value than the entire amount of the award, but, on the other hand, the evidence on the part of the city tended to show that it had little or no value. In making their appraisal they were not required to adopt the estimate of claimant's experts, but were manifestly called upon to base their award upon all the information obtained, "not only from the evidence produced before them but from their view of the real estate." *Re Thompson*, 121 N. Y. 277. This we are bound to assume, in the light afforded by the record, was done. Our attention is called to the expressions of opinion, both at special and general term, to the effect that the waterpower has no apparent value. But it does not follow that such was the determination of the commissioner; nor can it be assumed, because of the opinion of the judges sitting in review, that the commission entertained the same view. There are no other questions requiring consideration.

The order should be affirmed.

All concur.

E. Willard BOIES, *Respt.*,

v.

John C. BENHAM, *Exr. etc.*, of Sarah Benham, Deceased, Impleaded, etc., *Appt.*

(..... N. Y.)

A mortgage for the balance of the purchase money is superior to another given to a third person for money borrowed to make a cash payment on the purchase money unless the vendor waives his priority or estops himself from asserting it, and this is not accomplished by agreement of all parties that the deed and both mortgages shall be recorded at the same time.

(Follett, Ch. J., *dissents*.)

(October 13, 1891.)

APPEAL by defendant Benham from a judgment of the General Term of the Supreme Court, Third Department, affirming a judgment of a Special Term for Schoharie County confirming the report of a referee in favor of

NOTE.—Mortgages for loans, how far regarded as for purchase money.

A mortgage for a loan to pay purchase money is superior to the dower of the purchaser's widow. *Kittle v. Van Dyck*, 1 Sandf. Ch. 76, 7 L. ed. 246.

A mortgage for such a loan is superior also to a prior judgment. This applies to a mortgage given to a third person with the seller's assent. *Ibid.*; *Clark v. Munroe*, 14 Mass. 351; *Jackson v. Austin*, 15 Johns. 477; *Haywood v. Nooney*, 8 Barb. 643; *Curtis v. Root*, 20 Ill. 53; *Laidley v. Aiken*, 30 Iowa, 112.

The same is true of a mortgage so far as it is for such a loan, although it includes other indebtedness. *Ray v. Adams*, 4 Hun, 332.

Such a mortgage is superior also to a prior mortgage given before the paramount title which was purchased by the advances was obtained. *Kaiser v. Lambeck*, 55 Iowa, 244.

A contrary doctrine is declared in Ohio and Maryland. In Ohio a mortgage for advances to pay purchase money is held not to be a purchase-

plaintiff in an action brought to foreclose a mortgage and to have it declared to be the first lien upon the mortgaged premises. *Affirmed.*

Statement by **Bradley, J.:**

The plaintiff, by contract with Purple Gardner, agreed to sell and convey to the latter certain premises in Schoharie County for \$1,800. Afterwards, on March 11, 1884, the plaintiff received \$1,000, made deed of conveyance to Gardner, and took from him his bond for \$800, the balance of the purchase money, secured by mortgage on the premises. This action was brought to foreclose that mortgage. The defendant Benham held a mortgage made to her upon the land to secure the payment of \$1,000. The plaintiff alleged that the lien of the Benham mortgage was subsequent to that of his mortgage. This she denied, and alleged that the lien of hers was synchronous with that of the plaintiff's mortgage. The referee determined that issue against her, and by his report found that the two bonds and mortgages were made at the same time by Gardner, who then, in the presence of the plaintiff, borrowed of Benham the \$1,000; that the two mortgages were recorded at the same time; that the plaintiff neither parted, nor intended to part, with his equitable lien; and that the lien of his mortgage was prior to that of the defendant Benham; and upon the request of the defendant the referee further found that before the conveyance was made it was agreed between the plaintiff, Gardner, and Benham that Gardner was to execute to her a mortgage on the premises for \$1,000, and this money to be paid by Benham directly to the plaintiff; that Gardner was also to execute to the plaintiff another mortgage on the premises for \$800; that the deed and the two mortgages should be recorded at the same time; and that, according to the agreement, the deed and mortgages were executed and delivered at the same time as part of the same and one transaction, and the payment was made by Benham directly to the plaintiff. The referee refused to find that the two mortgages were equal liens, and the defendant Benham excepted.

Mr. E. Countryman, with Mr. G. L. Danforth, for appellant:

The grantor waived the equitable lien for the debt by receiving back a mortgage creating a legal lien and extending the time of payment.

Gaylord v. Knapp, 15 Hun, 87; *Fish v. Howland*, 1 Paige, 20, 2 L. ed. 545; *Skirley v. Congress S. S. Refinery*, 2 Edw. Ch. 505, 6 L. ed. 488; *Stuart v. Harrison*, 52 Iowa, 511; *Escher v. Simmons*, 54 Iowa, 269; *Young v. Wood*, 11 B. Mon. 128; *Richards v. McPherson*, 74 Ind. 159; *Little v. Brown*, 2 Leigh, 358; *Wells v. Harter*, 56 Cal. 342.

The equitable lien being waived, the parties must stand upon an equal footing, if such was their real intention, as ascertained from the facts found by the trial court.

It was competent for the parties in interest, as between themselves, to make an arrangement by which Benham could have the benefit of the whole or any portion of the grantor's lien for purchase money.

Dryden v. Frost, 3 Myl. & C. 670; *McGowan v. Smith*, 44 Barb. 238; *Nichols v. Glover*, 41 Ind. 25; *Mitchell v. Butt*, 45 Ga. 162; *Hamilton v. Gilbert*, 2 Helsk. 680; *Latham v. Staples*, 46 Ala. 462.

The rights of the third person advancing the purchase money and receiving the mortgage under the circumstances, are precisely the same as those of the grantor.

Kittle v. Van Dyke, 1 Sandf. Ch. 76, 7 L. ed. 246; *Jackson v. Austin*, 15 Johns. 477; *Ounningham v. Knight*, 1 Barb. 399; *Clark v. Munroe*, 14 Mass. 851.

Whenever the law gives this lien to a vendor, it gives it to him only for the purpose of working out an act of justice for him. The lien does not exist in his favor as an inflexible rule; and if it ever did it ceases to exist when circumstances justify such a conclusion.

Fisk v. Potter, 2 Abb. App. Dec. 140.

An agreement between the parties in interest at the time concerning their respective liens is binding, and will be enforced.

Baikum v. Owens, 47 Ala. 266.

Plaintiff was not entitled to a foreclosure

money mortgage so as to be superior to a second mortgage which was first recorded. *Stansell v. Roberts*, 18 Ohio, 148, 42 Am. Dec. 193.

Nor is it superior to a prior judgment in Maryland. *Heuveler v. Nickum*, 38 Md. 270.

Nor to a prior mortgage given before obtaining title. *Alderson v. Ames*, 6 Md. 52.

A mortgage for purchase money is superior to a prior one given for a loan obtained before getting title and used to make a cash payment, although both were recorded on the same day. *Turk v. Funk*, 68 Mo. 18, 30 Am. Rep. 771.

Also to a prior mortgage made for a loan even if it was obtained by fraudulent representations as to title and ability to give a first lien. *Dusenbury v. Hulbert*, 59 N. Y. 541.

Also to a subsequent mortgage for a loan, although given before the purchase-money mortgage was recorded as against an assignee who took it after the purchase-money mortgage was recorded. *Brower v. Witmeyer*, 121 Ind. 83.

But it is inferior to one given to a third person for money advanced to make a cash payment where the latter receives his mortgage at the time of the delivery of the deed, which is made in his

presence without notice to him of the prior purchase-money mortgage. *Hefron v. Flanigan*, 37 Mich. 274.

A mortgage for purchase money is superior to one given at the same time but first recorded for money to pay the balance of the purchase price. *Brasted v. Sutton*, 29 N. J. Eq. 513.

A purchase-money mortgage is superior to another given at the same time to a third person although both were recorded at once. *Clark v. Brown*, 5 Allen, 509.

A mortgage given to the grantor is superior to one given at the same time to an intermediate purchaser by contract for the amount due him. *Wilmington Nat. Bank's App.* 30 Pa. 163.

A mortgage from grantee to grantor on receiving a deed by arrangement with an intermediate purchaser by contract is a purchase-money mortgage superior to the dower of the purchaser's widow. *McGowan v. Smith*, 44 Barb. 232.

A mortgage for money advanced to make a cash payment on land is not superior to the vendor's lien as to timber, although the deed stipulates that the vendee shall not be restrained from cutting it. *Sikes v. Page*, 12 Ky. L. Rep. 780.

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cutting off the Benham mortgage as a subsequent incumbrance.

Potter v. Crandall, Clarke, Ch. 120, 7 L. ed. 68.

Mears, Hiller & Palmer, for respondent: Conceding that it was agreed that the mortgages should be recorded at the same time, that fact does not make the mortgages of equal lien.

Ellis v. Horrman, 90 N. Y. 466.

Benham's mortgage cannot cut off, or stand equal with, the equitable lien of this plaintiff for his \$800, for the referee settles as a question of fact that by the sale plaintiff was entitled to a lien for the unpaid purchase money, that he did not intend to waive or part with that lien, and that his mortgage was entitled to priority.

Jackson v. Austin, 15 Johns. 477; *French v. LeRoy*, 15 N. Y. Week. Dig. 269.

The giving of the deed by plaintiff to Gardner and taking the \$800 mortgage back was an indivisible transaction. No mortgage or other lien could come in between them.

Dusenbury v. Hulbert, 59 N. Y. 541; *French v. LeRoy*, 15 N. Y. Week. Dig. 269; *Greenpoint Sugar Co. v. Whittin*, 69 N. Y. 337; *Ellis v. Horrman*, 90 N. Y. 466; *Jackson v. McKenny*, 3 Wend. 235, 20 Am. Dec. 690; *Stow v. Tift*, 15 Johns. 468, 8 Am. Dec. 266; *Holbrook v. Finney*, 4 Mass. 569, 8 Am. Dec. 249; *Rau-son v. Lampman*, 5 N. Y. 456.

Bradley, J., delivered the opinion of the court:

The plaintiff had an equitable lien for the purchase money unpaid until the substitution for it of the legal lien of the mortgage taken by him to secure the payment of the balance of the purchase money. *Fish v. Howland*, 1 Paige, 20, 2 L. ed. 545; *Payne v. Wilson*, 74 N. Y. 348. And the conveyance having been made and the mortgage taken by him in the same transaction, the former will be deemed made subject to the latter, and in practical effect the grantee took by the deed the equity of redemption only. *Stow v. Tift*, 15 Johns. 458, 8 Am. Dec. 266; *Jackson v. McKenny*, 3 Wend. 235, 20 Am. Dec. 690; *Rau-son v. Lampman*, 5 N. Y. 456; *Dusenbury v. Hulbert*, 59 N. Y. 541; *Coutant v. Serroose*, 3 Barb. 128. And subject to a mortgage made at the time of conveyance, by the grantee to a third person who advances the purchase money, are dower (although the mortgage is made by the husband alone) and previous judgments against him. 1 Rev. Stat. p. 740, § 5; Id. p. 749, § 5; Code, § 1254; *Jackson v. Austin*, 15 Johns. 477; *Kittle v. Van Dyck*, 1 Sandf. Ch. 76, 7 L. ed. 246; *Cunningham v. Knight*, 1 Barb. 399; *Clark v. Munroe*, 14 Mass. 351.

But by reason of the pre-existing equitable lien of the vendor and grantor, which continues until the substitution for it of the legal lien of the mortgage to secure the unpaid purchase money, the mortgage so taken by him has priority over that of such third person taken at the same time from the grantee. *Clark v. Brown*, 3 Allen, 509; *Turk v. Funk*, 68 Mo. 18, 30 Am. Rep. 771; *Williamsport Nat. Bank's App.* 91 Pa. 163. As to the former, the continuity of the lien is not broken, but merely changed in character from an equitable to a

legal one, perfected by the mortgage to him for the balance of the purchase money. *Stafford v. Van Rensselaer*, 9 Cow. 316; *Payne v. Wilson*, *supra*. And this is not dependent on the Statute. It is unnecessary to inquire whether any different question may have arisen in the present case if no equitable title in the vendee and no equitable lien of the vendor had preceded the time of the execution and delivery of the deed and mortgage. A grantor may, however, by agreement waive such prior right, or estop himself from asserting it, and thus subject the lien of his to the preference of that taken by another at the same time on the property, or place it on an equal footing with it. The question at the trial was whether that was done in the present case. Such may have been the intention of the parties, and it may be that the evidence would have warranted that finding by the referee. But the facts found by him did not require such conclusion. While there was evidence on the part of the defendant tending to prove that such was the purpose of the parties at the time of the transaction, that of the plaintiff was to the contrary. The evidence, and the inferences derivable from it, presented in that respect a question of fact for the referee, whose determination must here be deemed conclusive upon that issue. The understanding of the parties as found, that the deed and mortgages were to be, and accordingly were, made and recorded at the same time, did not necessarily, and as matter of law, place the lien of the two mortgages on an equality, as would have been the case if neither of the mortgages had been the vendor and grantor of the premises. Upon the facts so found, he did not necessarily waive any rights which the relation of vendor and grantor gave him. The inquiry as to the purpose of the understanding that the mortgages should be made and recorded at the same time was for the consideration of the referee upon the evidence, and whether it was intended to confer greater rights upon the defendant Benham than would arise from the mere fact that they were so made and recorded was for him to determine. He found that the plaintiff did not waive, or intend to waive, his equitable lien. By this he meant to be understood that the plaintiff neither waived, nor intended to waive or surrender, any of the rights which the equitable lien existing in his favor up to the time of taking his mortgage afforded him. This was the right of preference of his lien presumptively arising from his equitable lien merged in the legal lien of his mortgage. *Stafford v. Van Rensselaer*, 9 Cow. 316.

The defendant's lien, having been founded upon the security given for that amount of the purchase money advanced by her for the grantee, was secondary only to that of the plaintiff's mortgage. In *Potter v. Crandall*, Clarke, Ch. 120, 7 L. ed. 68, all the mortgagees were grantors of the premises, and in that respect their rights, and consequently, as between themselves, the liens of the mortgages stood on equality. In the case at bar the defendant's claim rests upon an alleged agreement with the plaintiff to place her mortgage in such relation with that of the plaintiff. As that position is not supported by the findings of the referee, the liens of the two mortgages

must here be treated as having the relation in which the law placed them. While it is true, as suggested, that the defendant is entitled to the benefit of the findings of the referee most favorable to her, if there is any material conflict between them, there is no inconsistency in the findings for the application of that rule to substantially aid the defendant. *Kelly v. Leggett*, 122 N. Y. 838.

The judgment should be affirmed.

All concur, except *Follett, Ch. J.*, dissenting, and *Haight and Parker, JJ.*, absent.

Follett, Ch. J., dissenting:

Since 1805, the statutes of this State have provided that the lien of a mortgage given on land to secure the payment of its purchase price is superior to the lien of a prior judgment against the grantee. Laws 1805, chap. 99; 1 Rev. Laws, p. 875, § 15; Rev. Stat. p. 749, § 5; Code Civ. Proc. § 1254. Since 1828 the statutes have provided that the lien of a mortgage in which the wife does not join, given on land purchased during coverture, to secure the payment of its purchase price, is superior to the claim of the widow of the mortgagor to dower in the premises. 1 Rev. Stat. p. 740, § 5. It has been frequently held under these statutes that a mortgage executed by a grantee simultaneously with his grant, on the subject of the grant, to a person other than the grantor, to secure the payment of money loaned with which to pay the purchase price, and which is so applied, is entitled to the same priority over a prior judgment, and also over the widow of the mortgagor, as a mortgage to secure the purchase price, executed by a grantee to the grantor. *Jackson v. Austin*, 15 Johns. 477; *Haywood v. Nooney*, 8 Barb. 643; *Ray v. Adams*, 4 Hun, 332; *Stow v. Tift*, 15 Johns. 458, 8 Am. Dec. 266; *Kittle v. Van Dyck*, 1 Sandf. Ch. 76, 4 L. ed. 246; *McGowan v. Smith*, 44 Barb. 232; 4 Kent, Com. 89; 2 Pom. Eq. Jur. § 725; 1 Jones, Mort. § 464.

In Massachusetts, where there is no such statute, a mortgage taken by a third person to secure the payment of money loaned and applied to the payment of the purchase price of the mortgaged property has the same priority over the widow's right of dower as though the mortgage had been given directly to the grantor. *Clark v. Munroe*, 14 Mass. 351. The statutes cited do not, in terms, include nor exclude mortgages taken by third persons, and the cases referred to rest upon the theory that a person advancing money to pay the purchase price of land, and which is so applied, has the same equity, and is entitled to the same security, as the grantor has under a mortgage to him for the payment of the purchase money. The plaintiff in this action (who was the grantor), by extending the time for the payment of part of the purchase money, and taking a mortgage therefor with knowledge that the remainder of the purchase price was to be raised by a mortgage to Mrs. Benham, exchanged his equitable lien for a legal one. *Payne v. Wilson*, 74 N. Y. 848; *Fish v. Howland*, 1 Paige, 20, 2 L. ed. 545; *Bond v. Kent*, 2 Vern. 281; *Capper v. Spottiswood*, Tam. 21; *Young v. Wood*, 11 B. Mon. 123; *Camden v. Vail*, 23 Cal. 684; *Mackreth v. Symmons*, 15 Ves. Jr. 329; 1 White & T. Lead. Cas. in Eq. 289.

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The referee found that it was agreed between Boies, the grantor, Gardner, the grantee, and Mrs. Benham, that the deed and both mortgages should be executed, delivered, and recorded at the same time, and that, pursuant to this agreement, they were so executed, delivered, and recorded; but he refused to find whether it was agreed that the mortgages should be concurrent liens, or that one should have priority over the other. Eighteen hundred dollars was the purchase price of the land; the payment of \$300 was secured by the mortgage to the plaintiff; and the remainder, \$1,000, was paid to him in cash furnished by Mrs. Benham, the payment of which was secured by her mortgage; and, in the absence of an agreement to the contrary, she stands in his shoes as to this sum, her equity being equal to his in every respect. I am unable to see how the plaintiff, with Mrs. Benham's money in his pocket, obtained in this way, by his concurrence, can be said to have an equity superior to hers. Under the decisions last cited, if Mrs. Benham had loaned Gardner \$1,800 for the purpose of paying the whole of the purchase money to the grantor, and it had been so applied, and she had taken a mortgage for her security on the land, she would have stood in the place of the grantor, and have been entitled to every equity that he would have been entitled to had he taken the mortgage. Instead of advancing the whole purchase price, she advanced but part, and received her mortgage; and why she is not *eo tanto* in the place of the grantor, and invested with all his equities, it is difficult to see. Had there been an outstanding judgment against Gardner when these mortgages were given, Mrs. Benham's mortgage would have had the same priority over the judgment as the plaintiff's mortgage, and in case of Gardner's death her mortgage would be prior to the claim of his widow to dower in the mortgaged premises, the same as the plaintiff's mortgage.

In *Clark v. Brown*, 8 Allen, 509, two mortgages were executed on the same day, and recorded at the same time. One was to secure the payment of part of the purchase price of the mortgaged land, but the other does not appear to have been to secure money applied in payment of the remainder of the purchase money. The mortgage for the purchase money was held the prior lien.

In the case of *Williamsport Nat. Bank's App.*, 91 Pa. 163, land was contracted to be sold by Hall to Nichols, who afterwards contracted to sell it to Potter and Wonderly for \$40,000. At this time there was due Hall from Nichols \$16,000 on contract. Hall conveyed the land to Potter and Wonderly, receiving from them their bonds for \$16,000 due him, secured by mortgage on the property. On the same day Potter and Wonderly gave to Nichols bonds for \$24,000, secured by a mortgage on the premises. The deed and mortgages were executed and recorded on the same day. It was asserted that the mortgages were concurrent liens, but it was held that the one to Hall was prior, because given to him in payment of the purchase price. He had a clear equity against Nichols and his assignee, because Nichols owed him the \$16,000, the purchase price of the land, which he was bound to pay before he

could acquire title, or before he could become entitled to his profit of \$24,000 arising from his sale to P. and W., to secure which he received his mortgage. As was said by the court in discussing this question: "Thus, substantially and in effect, the mortgage to Hall was for the purchase money due him on his legal title, and the mortgage to Nichols was for the value of his equitable interest in the land. . . . Nichols could not assert any equity to defeat the superior right of the mortgage given to Hall."

In *Turk v. Funk*, 68 Mo. 18, 80 Am. Rep. 771, the plaintiff sold land to the defendant by an executory contract for \$2,300, of which \$500 was to be paid on the execution of the deed, and the remainder, \$1,700, was to be secured to be paid by a mortgage on the premises. The purchaser, before receiving his deed, borrowed \$500 of a third person, to secure the payment of which a mortgage was given and placed on record. Subsequently the \$500 was applied in payment of part of the purchase price, a deed was given, and a purchase-money mortgage to secure the \$1,700 was executed. It was held that the mortgage for \$1,700 was prior to the one for \$500, upon the ground that the mortgagor, when he executed the mortgage for \$500, had no title to the land, and could only give a lien upon his then existing interest in it. The grantor did not know of the execution of the mortgage to the third person until after he had conveyed and recorded his mortgage. The three cases last cited do not seem to me decisive of the

one at bar, nor are they nearly related to it. It is not asserted, and under the facts found it cannot be successfully maintained, that the holder of either mortgage had acquired a legal preference over the other. Under the decisions, which rest upon the principles of natural equity, the equities of these mortgagees are equal, each holding a security for the payment of parts of the purchase price of the mortgaged premises.

In *Granger v. Crouch*, 86 N. Y. 494, two mortgages were given by the grantee to the grantor to secure the payment of part of the purchase price of the mortgaged land. Both were executed and recorded at the same time. One, the smallest, and the first to fall due, was assigned, and the assignee claimed priority. It was held that, both being given for the purchase price, the equities were equal, and that, in the absence of an agreement that one should have priority over the other, they were concurrent liens. The presumption being that the mortgages in the case at bar were concurrent liens, the burden of establishing that one was prior to the other rested on the party alleging it, and, the referee having failed to find an agreement that the plaintiff's mortgage was to be prior to Mrs. Benham's, he cannot sustain this judgment. On a retrial it will undoubtedly be determined whether it was agreed that either mortgage, and, if so, which, was to have priority. The parties have the right to have this issue determined.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

NEW YORK COURT OF APPEALS.

Lydia HULBERT *et al.*, Admsrs., etc., of
Reuben D. Hulbert, Deceased, *Repts.*,
vs.

William B. CLARK *et al.*, *Appts.*

(.....N. Y.)

The foreclosure of a mortgage is not barred within twenty years under Code Civ. Proc., § 381, although it contains no covenant to pay and the right of action on notes thereby secured is barred by the statute, which simply bars the remedy without discharging the debt

(October 6, 1891.)

A PPEAL by defendants from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a judgment entered in the office of the Clerk of Seneca County upon the report of a referee in favor of plaintiffs in an action brought to foreclose a mortgage. *Affirmed.*

Statement by Earl, J.:

This action was commenced in July, 1887, to foreclose a mortgage executed and delivered by the defendants to Reuben D. Hulbert, the plaintiff's intestate, on the 8th day of March, 1867. The mortgage, as stated therein, was

given to secure the payment of eight promissory notes, of \$500 each, held by Hulbert, all bearing the same date as the mortgage, and maturing at different times, within nine months from their date. It was provided that the mortgage should become void if the notes, principal and interest, should be paid at maturity; but that in case of default in the payment of the notes, or any part thereof, it should be lawful for the mortgagee to sell the mortgaged premises in the manner prescribed by law, and out of the moneys received upon such sale to retain the amount then due and unpaid upon such notes, and to pay the balance, if any, to the mortgagor William B. Clark. There was no covenant to pay the notes or the mortgage. The answer alleged payment of the notes, a set-off, and the six-years Statute of Limitations. The action was referred, and tried before the referee. He found that two of the notes had not been paid, and that there was due thereon, over and above the set-offs allowed by him, the sum of \$1,810.09; and he decided that the mortgage was a subsisting security for that sum, and ordered judgment of foreclosure. The judgment entered upon the report having been affirmed at the general term, the defendants appealed to this court.

Mr. J. N. Hammond, for appellants:
The mortgage was given expressly to secure

NOTE.—For note on the limitation of time for an action to foreclose a mortgage, see *McKison v. Davenport* (Mich.) 10 L. R. A. 507.
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payment of the notes; so that it is impossible to foreclose this mortgage and order a sale and application of the money without an adjudication by the court of the amount due on the notes.

No action can be maintained upon the notes themselves.

Jackson v. Sackett, 7 Wend. 94.

The mortgage has no life independently of the debt it is given to secure. The discharge of the debt discharges the mortgage.

Aymar v. Bill, 5 Johns. Ch. 570, 1 L. ed. 1178; *Jackson v. Willard*, 4 Johns. 41; *Ross v. Terry*, 63 N. Y. 613; *Kellogg v. Smith*, 26 N. Y. 18.

Where the mortgage 'is given to secure the bond, the nonproduction of the bond will prevent a foreclosure of the mortgage.

Bergen v. Urbahn, 83 N. Y. 50.

A transfer of the debt draws with it the mortgage. A transfer of the mortgage without a transfer of the debt is a nullity and carries nothing.

Merritt v. Bartholick, 36 N. Y. 44.

Accessorium non ducit sed sequitur suum principale.

Broom, Legal Maxims, 369.

Where law and equity have concurrent jurisdiction a claim barred at law is also barred in equity.

Re Neilley, 95 N. Y. 882; *Butler v. Johnson*, 111 N. Y. 204; *Bonney v. Sloughton*, 11 West. Rep. 708, 123 Ill. 536; *Cartwright v. McGown*, 10 West. Rep. 589, 121 Ill. 388; *Hendrickson v. Hendrickson*, 8 Cent. Rep. 809, 42 N. J. Eq. 657; *Hatch v. St. Joseph*, 68 Mich. 220; *Hollister v. York*, 4 New Eng. Rep. 365, 59 Vt. 1; *Humphrey v. Carpenter*, 39 Minn. 115; *Godden v. Kimmell*, 99 U. S. 201, 25 L. ed. 431; *Lewis v. Marshall*, 30 U. S. 5 Pet. 470, 8 L. ed. 195; *Coulton v. Walton*, 34 U. S. 9 Pet. 62, 9 L. ed. 51; *Bank of United States v. Daniel*, 37 U. S. 12 Pet. 32, 9 L. ed. 989; *Badger v. Badner*, 69 U. S. 2 Wall. 87, 17 L. ed. 886; *New Albany v. Burke*, 78 U. S. 11 Wall. 96, 20 L. ed. 155; *First Nat. Bank of Alexandria v. Turnbull*, 83 U. S. 16 Wall. 190, 21 L. ed. 296.

When a party has claim which he can sue in an action at law, or, at his option, could at the same time bring his action in equity to recover the same debt and avail himself of the benefit of some lien or security for the payment of the debt, it is a case of concurrent jurisdiction of law and equity within the above rule, and the equitable relief is limited to the legal limitation of six years.

Jackson v. Sackett, 7 Wend. 94; *Butler v. Johnson*, 111 N. Y. 204; *Borst v. Corey*, 15 N. Y. 505; *Duty v. Graham*, 12 Tex. 427, 62 Am. Dec. 534; *Goldfrank v. Young*, 64 Tex. 432; *Eborn v. Cannon*, 33 Tex. 231; *Ewell v. Daggs*, 108 U. S. 143, 27 L. ed. 682.

Foreclosure will not be decreed when the mortgage debt is barred by limitation.

Booth v. Hoskins, 75 Cal. 271; *McCracken County v. Mercantile Trust Co.* 84 Ky. 344; *Cranford v. Hazelrigg*, 2 L. R. A. 139, 117 Ind. 63; *McMillan v. McCormick*, 4 West. Rep. 210, 117 Ill. 79; *Schifferstein v. Allison*, 12 West. Rep. 847, 123 Ill. 662; *Bridges v. Blake*, 4 West. Rep. 486, 106 Ind. 332; *Van Eaton v. Napier*, 63 Miss. 232; *Chase v. Carveright*, 58 Ark. 358.

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When the debt, to secure which the mortgage was given, is barred, an action upon the mortgage is also barred.

Kyger v. Ryley, 2 Neb. 20; *Peters v. Dunneille*, 5 Neb. 460; *Hurley v. Estes*, 6 Neb. 366; *Henry v. Confidence, G. & S. Min. Co.* 1 Nev. 619; *Chick v. Willets*, 2 Kan. 385; *Schmucker v. Sibert*, 18 Kan. 104; *Gower v. Winchester*, 33 Iowa, 303; *Burton v. Hintrager*, 18 Iowa, 348; *Sangster v. Love*, 11 Iowa, 580; *Crow v. Vance*, 4 Iowa, 434; *Green v. Turner*, 38 Iowa, 112; *Newman v. DeLorimer*, 19 Iowa, 244; *Clinton County v. Cox*, 37 Iowa, 570; *Harris v. Mills*, 28 Ill. 44; *Hagan v. Parsons*, 67 Ill. 170; *Brown v. Devine*, 61 Ill. 260; *Pollock v. Mason*, 41 Ill. 517; *Sutton v. Sutton*, L. R. 22 Ch. Div. 511; *Pearnside v. Flint*, L. R. 23 Ch. Div. 579.

Mr. Frederick L. Manning, for respondent:

The provisions of the Statute of Limitations, making a lapse of six years a bar, in such a case, is in terms confined to an action at law on the note, and does not operate to defeat the remedy on the mortgage by which a court of equity cuts off the equity of redemption.

Pratt v. Huggins, 29 Barb. 277; *Gillette v. Smith*, 18 Hun, 10; *Kincaid v. Richardson*, 9 Abb. N. C. 819; *Re Latz*, 33 Hun, 622.

Earl, J., delivered the opinion of the court:

The sole question for our determination is whether the mortgage continued to be a subsisting lien, and could be foreclosed after an action at law upon the notes was barred by the Statute of Limitations. This is an interesting question, which has given rise to considerable discussion in the courts of this country and England. We do not, however, deem it difficult of solution. The Statute of Limitations does not, after the prescribed period, destroy, discharge, or pay the debt, but it simply bars a remedy thereon. The debt and the obligation to pay the same remain, and the arbitrary bar of the statute alone stands in the way of the creditor seeking to compel payment. The Legislature could repeal the Statute of Limitations, and then the payment of a debt, upon which the right of action was barred at the time of the repeal, could be enforced by action, and the constitutional rights of the debtor are not invaded by such legislation. It was so held in *Campbell v. Holt*, 115 U. S. 620, 29 L. ed. 483. It was held in *Johnson v. Albany & S. R. Co.*, 54 N. Y. 416, that the Statute of Limitations acts only upon the remedy; that it does not impair the obligation of a contract, or pay a debt, or produce a presumption of payment, but that it is merely a statutory bar to a recovery; and so it was held in *Quantock v. England*, 5 Burr. 2628, and so it has ever since been held in the English courts. These notes were therefore not paid, and so the referee found. The condition of the mortgage has therefore not been complied with. The notes being valid in their inception, the only answer to the foreclosure of the mortgage is payment. The mortgage was given to secure payment of the notes, and until they are paid the mortgage is a subsisting security, and can be foreclosed. The mortgage, being under seal, can be foreclosed by action at any time within twenty years. Code, § 381. It is only an ac-

tion upon the notes that is barred after six years. Id. § 382.

It is a general rule, recognized in this country and in England, that when the security for a debt is a lien on property, personal or real, the lien is not impaired because the remedy at law for the recovery of the debt is barred. The subject has several times been under consideration in the courts of this State. In *Jackson v. Sackett*, 7 Wend. 94, ejectment was brought on a mortgage executed as collateral security for the payment of a sum of money secured to be paid by a note. The note had been past due more than twenty years when the action was commenced. Upon the trial it was the contention of the defendant's counsel that from the lapse of time the note must be presumed to have been paid, and on that ground the court nonsuited the plaintiff. The supreme court, upon review, held that the evidence as to payment ought to have been submitted to the jury, and nothing else was decided. It was in fact held that payment of the note was the only defense to the action, but the judge writing the opinion expressed what must now be conceded to be erroneous views as to the presumption of payment furnished by the Statute of Limitations. He appeared to be of opinion that after six years there was a statutory presumption of payment—not a presumption of law, but a presumption of fact, from which, with other evidence, the jury might infer payment. In *Heyer v. Pruyn*, 7 Paige, 465, 4 L. ed. 232, the chancellor said that the intimation of an opinion by Mr. Justice Sutherland in *Jackson v. Sackett*, "that a mortgage to secure a simple contract debt was presumed to be paid in six years, because the Statute of Limitations might at the expiration of that time be pleaded to a suit on the note, certainly cannot be law." The case of *Pratt v. Huggins*, 29 Barb. 277, is quite like this. That was an action to foreclose a mortgage given to secure the payment of \$250 for which the mortgagee at the same time took the mortgagor's promissory note. The note and mortgage were dated February 5, 1835, and were payable February 1, 1836. The action was commenced September 6, 1855. Upon the trial the defendant claimed that the plaintiff could not maintain the action, because an action upon the note was barred by the Statute of Limitations; and so the trial judge held, and gave judgment for the defendant. The plaintiff appealed to the general term, and there, after much discussion and consideration, the judgment was reversed, the court holding that a debt secured by a sealed mortgage and an unsealed note may be enforced by a foreclosure of the mortgage after the expiration of six, but before the expiration of twenty, years from the time when the debt became due; that the lapse of six years is not conclusive evidence that the mortgage has been paid; and that the provision of the Statute of Limitations making the lapse of six years a bar, in such a case, is in terms confined to an action upon the note, and does not operate to defeat a remedy on the mortgage. There, as here, there was no covenant to pay in the mortgage, and the mortgage was collateral to the note. In *New York v. Colgate*, 12 N. Y. 140, it was held that the lien of an assessment, which was to be re-

garded, in effect, as a mortgage, could be enforced after the Statute of Limitations would have barred a common-law action against the person liable to pay the same, for the recovery thereof. In *Morey v. Farmers L. & T. Co.*, 14 N. Y. 302, an action by the vendee for specific performance of a contract under seal to convey land on payment of the purchase money, it was held that the presumption arising from the lapse of twenty years after the money became due was not sufficient evidence of payment to entitle the plaintiff to the relief demanded. To the same effect is *Lawrence v. Ball*, in the same volume, at page 477. In *Borot v. Corey*, 15 N. Y. 505, it was held that an action to enforce the equitable lien for the purchase money of land was barred by the lapse of six years after the debt accrued. The reasoning by which the result was reached in that case is not altogether satisfactory, and yet that decision is not in conflict with the views we now entertain. The judge there writing the opinion said: "The equitable lien [for the purchase money] is neither created nor evidenced by deed but arises by operation of law, and is of no higher nature than the debt which it secures." He distinguished that case from one like this, as follows: "It has, however, been held that, when a mortgage was given to secure the payment of a simple contract debt, the statute limiting the time for commencing actions for the recovery of such debt was no bar to an action to enforce the mortgage;" and he cited, among other cases, *Heyer v. Pruyn*. He said further: "There is a material distinction between a mortgage and the equitable lien for the purchase price of land given by law, and also between an action to foreclose a mortgage and one to enforce a lien. The action to foreclose a mortgage is brought upon an instrument under seal, which acknowledges the existence of the debt to secure which the mortgage is given; and by reason of the seal the debt is not presumed to have been paid until the expiration of twenty years after it became due and payable."

In *Johnson v. Albany & S. R. Co.*, *supra*, the action was to compel defendant to issue its certificate for stock subscribed for after an action to compel the subscribers to pay for the stock had been defeated on the ground that the action was barred by the Statute of Limitations; and it was held that the plaintiff, notwithstanding the statutory bar, could recover only upon proof of actual payment. In *Levis v. Hawkins*, 90 U. S. 23 Wall. 119, 23 L. ed. 113, Mr. Justice Swayne, writing the opinion, recognizes the rule above stated as follows: "That the remedy upon the bond, note or simple contract for the purchase money is barred in cases like this, in no wise affects the right to proceed in equity against the land." *Hardin v. Boyd*, 113 U. S. 756, 28 L. ed. 1141, was a bill in equity to set aside a conveyance of lands, or in the alternative for payment of the purchase money, and to make it a lien on the lands; and it was held that, although the debt for unpaid purchase money was barred by limitation under the local law, the lien therefore on the land was not barred. In *Coldcleugh v. Johnson*, 34 Ark. 313, the supreme court said: "The debt itself would appear to be barred in 1872, and no action could be

brought at law. But the bar of the debt does not necessarily preclude a mortgagee or vendee retaining the legal title from proceeding *in rem* in a court of equity to enforce his specific lien upon the land itself." The case of *Thayer v. Mann*, 19 Pick. 535, is precisely in point. There, in the case of a mortgage of real estate to secure the payment of a promissory note, it was held that, although the note was barred by the Statute of Limitations, yet, because it had not been paid, the mortgagee had his remedy upon the mortgage. In *Hancock v. Franklin Ins. Co.*, 114 Mass. 155, there was a pledge of property to secure a note, and it was held that the pledgee might avail himself of the Statute of Limitations as a defense to a suit upon the note, but that the statute affected merely the remedy on the note, and did not defeat the lien of the pledgee upon the property pledged. In *Hannan v. Hannan*, 128 Mass. 441, in an action to foreclose a mortgage given to secure a note, it was held that the question, in such a case, whether anything is due upon the note, must be conducted in nearly the same way, and depended mainly upon the same evidence, as if the note were in suit, and that in such an action the defendant may show the same matters in defense against the mortgage, except only the Statute of Limitations, that he could against the note. In *Shaw v. Siloway*, 145 Mass. 508, 5 New Eng. Rep. 466, it was said: "If there is an actual pledge, and the debt becomes barred, this does not give to the debtor a right to reclaim the pledged property. The debt is not extinguished; the statute only takes away the remedy. In case of an ordinary mortgage of real or personal property the security is not lost though the debt be barred." In *Joy v. Adams*, 26 Me. 380, it was held that the mortgagor could not defeat the right of the mortgagee to foreclose his mortgage by showing merely that the notes to which the mort-

gage security was collateral had become barred by the Statute of Limitations. In *Bellnap v. Gleason*, 11 Conn. 100, it was held that the Statutes of Limitations, being statutes of repose, suspend the remedy, but do not cancel the debt; that, though such statutes are equally available as a defense at law and in equity, yet where there are two securities for the same debt, one of which is barred by the statute and the other not, the creditor notwithstanding he has lost his remedy at law on the former, may pursue it in equity on the latter; and that where the security for a debt is a lien on property, personal or real, that lien is not impaired because the debt is barred by such statute. In the case of *Ballou v. Taylor*, 14 R. I. 277, it was held that the remedy on a mortgage is not lost because a personal action on the mortgage note is barred by the Statute of Limitations. In *Spears v. Hardy*, 3 Esp. 81, Lord Eldon held that a wharfinger who had a lien upon a log of mahogany could hold the log until his demand was satisfied, although the demand was barred by the Statute of Limitations; and *Higgins v. Scott*, 2 Barn. & Ad. 418, is to the same effect.

We could go much further in these citations. But we have gone far enough to show that the rule applicable to a case like this is based both upon principle and abundant authority, as we have above stated it. There are cases in some of the States of this country which lay down a different rule, but those cases generally depend upon some local statutes, or are to be found in States where it is held that the Statute of Limitations not only bars the remedy, but destroys and annihilates the debt, by the presumption that it has been paid or discharged.

There are no other questions which need examination. Our conclusion, therefore, is that the judgment should be affirmed, with costs.

All concur, except Finch, J., absent.

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY, NORTH
ORANGE BAPTIST CHURCH, Prosecutor,
v.

MAYOR etc., OF ORANGE.

STATE OF NEW JERSEY, MORRIS &
ESSEX R. CO., et al., Prosecutors,
v.

SAME.

(.....N. J. L.....)

*1. A promise made by a citizen to pay
a part of the expense of opening a

*Head notes by REED, J.

NOTE.—*Bribery by gift to public.*

A gift or donation to the public as a consideration for the location of public buildings at a certain place or for the making of a public improvement is not bribery or contrary to public policy.

A donation to secure the location of a county seat has been upheld in many cases, among which are *Lucas County Comrs. v. Hunt*, 5 Ohio St. 488, 67 14 L. R. A.

street is not opposed to public policy, and an ordinance passed by a common council to open such street will not, upon that ground, be set aside.

2. When a notice is required by a statute to be published in a newspaper printed in German, such notice must be printed in that paper in the German language; but when a statute or ordinance is required to be published in such paper it must, in default of a legislative direction to the contrary, be printed in English.

(November 5, 1891.)

WRITS of certiorari to review certain proceedings under an ordinance of the City of Orange relative to the opening of a street,

Am. Dec. 303; *Seebold v. Shittler*, 34 Pa. 132; *Police Jury v. Reeves*, 6 Mart. (La.) N. S. 231; *Harris v. Shaw*, 13 Ill. 456; *Adams v. Logan County*, 11 Ill. 336; *Twiford v. Alamakee County*, 4 G. Greene, 60.

Contributions in land and money to be used for county purposes in consideration of the location of the county seat do not amount to bribery. *Dishon v. Smith*, 10 Iowa, 212; *State v. Elting*, 29 Kan. 397.

and to inquire into the validity of such ordinance. *Ordinance set aside.*

The case sufficiently appears in the opinion. Argued before Depue, Dixon and Reed, *JJ. Messrs. Colie & Tittsworth and Bedle, Muirheid, McGee & Bedle*, for prosecutors:

If the Legislature has declared the use or purposes to be a public one, its judgment will be respected by the courts, unless the use be palpably private or the necessity for taking, plainly without reasonable foundation.

2 Dillon, Mun. Corp. 4th ed. § 600, note 2.

The judgment of a court or commissioners in the exercise of the right of eminent domain must not be determined by donations of land, release from damages, or the fact that the damages are to be paid by anybody else.

Dudley v. Cilley, 5 N. H. 558; *Dudley v. Butler*, 10 N. H. 281; *Gurney v. Edwards*, 26 N. H. 224; *Smith v. Conway*, 17 N. H. 586.

The only people substantially benefited by this improvement will be Mr. Barber and Mr. Matthews, and that this is so is made more apparent by the fact that Mr. Barber induced the common council to pass this ordinance after it had been killed, and to repass it after it had been vetoed by an offer of \$1,000 towards the expense.

The court cannot say that it is reasonable, without compensation, for that is what it will amount to in case of the railroads, seeing that their largest damage will be increased operating expenses and increased danger to employes, passengers and rolling-stock, for the common council to require them to risk the lives of employes and passengers and to be at the expense of several hundred dollars a year additional charge for watchmen and gates, for the accommodation of two men.

An offer to reimburse a county in whole or in part for the expense of the removal of a county seat, made to induce the removal, is not against public policy. *Beham v. Ghio*, 75 Tex. 87; *Hawes v. Miller*, 56 Iowa, 386.

An offer of grounds and buildings, as an inducement to voters for a change of a county seat is not bribery. *Hall v. Marshall*, 80 Ky. 552.

The Legislature may make a donation an express condition of the removal of a county seat. *State v. Portage County Supra*, 24 Wis. 49; *People v. St. Clair County*, 15 Mich. 86; *Calaveras County v. Brockway*, 30 Cal. 325; *Newton v. Mahoning County Comrs.* 26 Ohio St. 618; *Odineal v. Barry*, 24 Miss. 9.

A note given as a donation to prevent the removal of a court-house is valid. *Odineal v. Barry, supra*.

An offer to pay money into the county treasury in consideration of the removal of a country court-house back to a public square from which it had been moved is not valid. *Stillson v. Lawrence County Comrs.* 52 Ind. 213.

A written promise to pay money to the State in consideration of the location of a state reform school at a certain town is not against public policy. *State v. Johnson*, 52 Ind. 197.

For street improvements.

An agreement of property owners to pay the expense of curbing a row of trees in a street if the city would let them stand and protect them by curbing is not illegal. *Springfield v. Harris*, 107 Mass. 532.

Payment by abutters of the damages for laying

Coster v. Tide-Water Co. 18 N. J. Eq. 62; *Hoagland v. Wurts*, 41 N. J. L. 178; *State v. East Orange*, 41 N. J. L. 133, 134; *State v. Jersey City*, 87 N. J. L. 351; *State v. Jersey City*, 34 N. J. L. 481; *Kip v. Paterson*, 26 N. J. L. 298.

Mr. Charles F. Lighthipe for defendants.

Reed, J., delivered the opinion of the court:

The objection most strenuously pressed against this ordinance is that its passage was not a legitimate exercise of the power to take land for public use. It is first insisted that the land of the prosecutor is not taken for the benefit of the public, but to subserve the interests of private individuals. It is secondly insisted that the judgment of the body which was to decide upon the question whether the street should be laid across the land of the prosecutor was improperly influenced by an offer of private persons to pay a portion of the expense of the improvement.

In respect to the first of these points it is observable that it is no part of our functions to decide whether the scheme adopted in this instance was a wise one. We have no power to try the question whether the advantages that would accrue to the public by reason of this improvement would be greater or less than the burden which it would impose; nor whether the degree of public benefit is so small that it does not justify the taking of land against the will of its owner. These questions have been confided by the Legislature to the common council. If it should appear that there could not inure to the public any advantage whatever, and that the scheme is designed solely for the benefit of private individuals, the court

out a street is not against public policy. *Townsend v. Hoyle*, 20 Conn. 1.

An offer to give such portion of one's land as is needed for the widening of a street does not render the decision to widen it invalid. *Crocket v. Boston*, 5 Cush. 182.

The validity of such an arrangement is assumed also in *Bell v. Boston*, 101 Mass. 508.

A bond given by individuals undertaking to grade a street if the city would let a contract for paving it is not invalid as amounting to bribery. *Ford v. North Des Moines*, 80 Iowa, 626.

A bond from individuals guaranteeing the continuance of a proposed road in another town if the commissioners of one town should establish the road to the town line is not against public policy. *Freetown v. Bristol County Comrs.* 9 Pick. 46.

A vote to accept a road provided the expenses do not exceed a certain sum cannot be held invalid on the ground that there was an expectation, or even a stipulation, that a portion of the expense would be paid by interested individuals. *Jones v. Andover*, 9 Pick. 145.

The location of a town-way in Massachusetts is not rendered invalid by a subscription of a portion of the costs by individuals which was known to the inhabitants of the town before the way was approved. *Copeland v. Packard*, 16 Pick. 817.

This case was distinguished, on the ground that it was a town-way for the use of the town only or of one or more individuals thereof and the damages for which are chargeable to the town or persons benefited and not a highway, from earlier cases of *Com. v. Sawin*, 2 Pick. 547, and *Com. v. Cambridge*, 7 Mass. 186, in which the location of a

could interpose in favor of the landowner whose property is menaced. But when it is perceived that there is a degree of public benefit likely to spring out of the enterprise, all questions of policy in executing it are devolved upon the common council.

To employ the language of the chief justice in the case of *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518: "If the public interest be involved in any substantial extent, and if the project contemplated can in any fair sense be said to be promotive of the welfare or convenience of the community, the legislative adoption of such project is a determination of the question from which there is no appeal." This rule is true whether the scheme is adopted by the Legislature directly or by a municipal body by virtue of a delegated authority. *Dillon, Mun. Corp.*, § 95.

It is evident that the street now under consideration is calculated to enhance the convenience of a large portion of the public of Orange. The evidence taken in the cause shows the location of the already existing streets, the relative populousness of the neighboring districts, and the conveniences of passage from one point of the neighborhood to another. This, together with the opinions of a number of citizens, displays unmistakably the public character of the proposed street. Indeed, in the absence of any testimony, this presumption would be almost, if not quite, conclusive. Says *Judge Dillon*: "Municipal uses proper are public uses. Highways are conceded to be, and manifestly are, matters of public concern; and hence the condemnation of property for streets, alleys, and public ways is undeniably for a public use." There is no substance in the point taken that the land over which the street runs is taken for a private, and not for a public, purpose.

highway was held invalid because of the offer of such a consideration and in which, especially the former, the decision turned on the distinction that the court of sessions had not exercised judgment distinctly and independently upon the question whether the highway was of common convenience and necessity, it appearing from the record itself that it was not so considered if made wholly at the cost of the town.

The ground of the decision in *Com. v. Cambridge*, 7 Mass. 158, that a bond of indemnity against the cost of laying out a highway would render invalid a proceeding to take lands for a highway was that by such means lands might be taken really for the benefit of individuals in the name of the public and under the guise of public convenience and necessity, and the modification by *Com. v. Sawin*, and *Com. v. Cambridge*, of the doctrine of the other cases above cited is fairly shown by the decision in *Parks v. Boston*, 8 Pick. 217, 19 Am. Dec. 322, to the effect that a bond from an individual to contribute towards the expense of laying out or altering a street will not vitiate the proceeding if it was not made the basis thereof, and if the proceeding is not really for the benefit of the individual and only colorably for the use of the public.

One New Hampshire case goes still further and decides without modification that donations by the petitioners cannot be made by the court a condition of the acceptance of a report laying out a highway, and therefore a note for the amount of such a donation is without consideration. *Dudley v. Cilley*, 5 N. H. 558.

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The next proposition involves the effect of an offer made by one or more private individuals to pay a portion of the expense of laying out the street. This offer was made by a Mr. Barber, whose property will obviously be much benefited by the opening of the new street. He appeared before the common council, and stated that he would give \$1,000 above his assessment for special benefits. It is contended that this offer to contribute to the expenses of the improvement was calculated to influence the judgment of the common council in its determination whether the street should or should not be opened. It is further insisted that this influence is inimical to a sound rule of public policy. There is a line of cases decided by the courts of the State of New Hampshire in which this view seems to receive support. *Dudley v. Cilley*, 5 N. H. 558; *Dudley v. Butler*, 10 N. H. 281; *Smith v. Conway*, 17 N. H. 586; *Gurnsey v. Edwards*, 28 N. H. 224. Chief Justice Parsons, in the early case of *Com. v. Cambridge*, 7 Mass. 158, seems also to have entertained a similar view. A different view is taken concerning the effect of such an offer in other cases. *Putridge v. Ballard*, 2 Me. 50; *Crocket v. Boston*, 5 Cush. 182. The opinion of Chief Justice Shaw in *Copeland v. Packard*, 16 Pick. 217, is in the same direction as the doctrine announced in the last-named cases. Then there are a number of cases holding that gifts of land or subscriptions of money for the location of public buildings in a certain place are not inimical to public policy. These cases are collected in the opinion in *Pepin Co. v. Prindle*, 61 Wis. 301-311.

I am unable to perceive how the offer made in this case infringes any rule of public policy. It is observable that the offer holds out no personal advantage to any member of the common council. Nor does it, as in the case of *Smith*

Publication of official notices, etc., in foreign language; cases on this subject are very few and inharmonious.

A statute requiring that one at least of two newspapers designated to publish notices be the official paper of the city, "if there be one" is complied with by the selection of a German newspaper as one of them where no official paper had been designated. *Kernitz v. Long Island City*, 50 Hun. 428.

An Act of Assembly providing for the publication of notices in road cases in two newspapers nearest the road does not permit publication in a German newspaper. *Upper Hanover Road*, 44 Pa. 277, citing *Tyler v. Bowen*, 1 Pittsb. Rep. 225.

In some cases publication in German newspapers has been made under express authority. *German Print. & Pub. Co. v. Illinois S. & C. Co.* 55 Ill. 127; *Re North Whitehall Twp.* 47 Pa. 156.

A requirement in a city charter for publication of ordinances in that German newspaper having the largest circulation in the city is impliedly repealed by a later Act requiring the contract for all city printing to be let to the lowest bidder, and is also nullified by a constitutional provision requiring all laws, official writings, etc., to be published in the English language only. *Chicago v. McCoy* (Ill.) 11 L. R. A. 413.

A city has no inherent right to provide for publication of ordinances in a newspaper printed in a foreign language where it is given express power by law to provide for publication in the English language only. *Ibid.*

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v. *Applegate*, 28 N. J. L. 352, offer an inducement to a party to the proceedings to fasten a burden upon the public, after a reviewing body had declared it unnecessary. The offer, in this instance, operated to make the conditions under which the judgment of the common council was to be exercised as to the advisability of opening the street more favorable to the public interests. It is almost always necessary, in deciding upon propriety of a public improvement, to consider, on the one hand, the advantages which are likely to accrue to the public from it, and, on the other hand, the expense and burden which will be imposed by reason of it. These considerations lie at the root of the question whether it shall be done, and, if done, how it shall be done. Where the amount of expense is so great that the undertaking is dropped, a public gain is lost by reason of this unfortunate obstacle. If the expense can in any way be reduced, so that the balance, after weighing these counter-considerations, is in favor of the benefit over the burden, then the public reap the advantage. It seems to follow that an offer to diminish the expense which would fall upon the public is a gain, and not a loss, to the public.

It is, of course, apparent, that, if the public improvement would have been executed without the intervention of the offer, the offer diminishes the amount which would otherwise have to be raised by tax. In fact the offer merely introduces a new factor in the conditions under which the common council is to consider the propriety of opening the proposed street. But it leaves that body untrammelled by any bribe, directly or indirectly, in view of all the conditions and with a regard to the best interests of the public, to exercise that discretion with which it is invested by the Legislature. It may be observed that, if it should be held that an offer to contribute money is opposed to public policy, it must follow that a donation of land must stand upon the same footing. The acceptance of public highways which have been dedicated would come under the ban of such a doctrine. The very same argument could be employed against it, namely, that if it had been necessary to condemn the route and assess the cost upon neighboring owners and upon the public, the street might not have been opened, and so the burden of maintaining it would not have been imposed upon the public. My conclusion is that, upon the grounds mentioned, there exists no valid objection to the proceedings.

There are, however, irregularities which we are constrained to regard as fatal to the present ordinance. These irregularities are to be found in the manner in which the notice of the proposed improvement, as well as the manner

in which the ordinance, after its passage, were printed. The charter (Pub. Laws 1889, p. 212, § 61) requires that public notice of the contemplated improvement shall be given by publishing a copy of the proposed ordinance, and that the said notices shall state the time and place of the meeting of common council at which they will proceed to consider the said ordinance. A supplement to the charter (Pub. Laws 1873, p. 461, § 5) requires that these notices shall be published in all three of the newspapers published at that time in the city of Orange. One of these papers was then, and still is, printed in the German language. The notice of the time and place when the present ordinance would be considered was printed in this paper, as it was in the other two papers, in the English language. This, we think, was a mistake. The primary meaning of the word "publish" is to "make known." The medium through which intelligence is communicated in a German newspaper is the German language. The object to be attained by including such papers in the class of publications is to bring knowledge home to a body of readers by whom, as a rule, the English language is not readily or not at all legible. A notice contained in a German newspaper in a language other than the German is not published, but only printed. Again, the charter requires all ordinances, after their passage, to be published in the same three papers. This ordinance was published in a German translation only. I think this was also a mistake. There is a manifest distinction to be observed between the publication of a notice and the publication of an instrument or statute or ordinance. A notice requires no particular collocation of words, so long as it conveys a clear notion of its subject; but a statute or ordinance has no legal existence except in the language in which it is passed. No translation, however accurate, can be adopted in the place of its original text, for the purposes of construction in a legal proceeding. Until the Legislature makes a provision for the printing of ordinances in German newspapers in translation, it is not perceived how they can be printed otherwise than *litera et verba*. The publication of the translation may be regarded as a proper explanatory adjunct of the English copy, but cannot be accepted as a legal substitute for it. This view of the manner in which an ordinance should be printed under these conditions applies in some degree to the notice also. As already set forth, the charter requires that, as part of such notice, a copy of the proposed ordinance shall be published. For the reasons already stated this copy should appear in English.

The ordinance must be set aside.

CALIFORNIA SUPREME COURT.

M. L. FERGUSON, *Resp't.*,

v.

Alexander McBEAN *et al.*, *Appts.*

(.....Cal.....)

1. A person who is not named in, nor bound by the terms of a written con-

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tract cannot be rendered liable on it by parol evidence of an intention that he should be bound where he was known to, and in direct communication with, the obligee, when the contract was executed.

2. A person cannot relieve himself from his undertaking to pay a certain consideration for the assignment to him of a land

contract in case he completes the purchase and receives title to the land by fraudulently turning the contract over to third persons and permitting them to procure the title under it; especially if he participates in the benefits so obtained.

3. **Statements to an attorney**, which are made to be communicated to others, cannot be excluded from evidence on the ground that they are frivolous.

4. **One who obtains a valid assignment of a land contract cannot excuse himself from paying to his assignor the price which he agreed to pay him for it by showing that the latter might be compelled to account to a third person for the proceeds.**

(September 5, 1891.)

A PPEAL by defendants from a judgment of the Superior Court for San Bernardino County, in favor of plaintiff and from an order denying a motion for a new trial in an action brought to recover the amount alleged to be due under a contract for the assignment of a contract conveying the right to purchase real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. E. Crossman and Hendrick & Younken, for appellants:

The alleged oral agreement set out in the complaint cannot be considered in this action.

When the terms of an agreement have been reduced to writing by the parties, the writing is the sole evidence of the agreement unless a mistake or imperfection in the writing is put in issue by the pleadings.

Wadert v. State Ins. Co. 19 Or. 261; Code Civ. Proc. § 1856; Civil Code, § 1625; *Schurtz v. Romer*, 82 Cal. 477; *Booth v. Hoskins*, 75 Cal. 274; *Jungerman v. Bovee*, 19 Cal. 354; *Goldman v. Davis*, 23 Cal. 256; *Guy v. Bibend*, 41 Cal. 325; *Tyler v. Stone*, 81 Cal. 236; *De Witt v. Berry*, 134 U. S. 306, 33 L. ed. 896; *Ward v. McNaughton*, 43 Cal. 159; *Osborn v. Hendrickson*, 7 Cal. 285; *Kritzer v. Mills*, 9 Cal. 22; *Peabody v. Phelps*, Id. 223; *Sidney School Furniture Co. v. Warsaw Twp. School Dist.* 130 Pa. 76; *Liebscher v. Kraus*, 5 L. R. A. 496, 75 Wis. 387; *Pickett v. Green*, 120 Ind. 584; *Coppstick v. Bosworth*, 121 Ind. 6; 2 Smith, Lead. Cas. 223, note; *Chitty*, Cont. 103; *Bishop*, Cont. 169; 1 Greenl. Ev. 278-282.

Where one makes a written contract, intending to act therein as the agent of another, and to bind his principal, it is necessary that it should appear in the contract itself that he acts as such agent.

Stackpole v. Arnold, 11 Mass. 27; *Bradlee v. Boston Glass Mfg. Co.* 16 Pick. 347; 1 Greenl. Ev. Redfield's ed. 281; *Hunt v. Adams*, 7 Mass. 518; *Shankland v. Washington*, 30 U. S. 5 Pet. 894, 8 L. ed. 167; *Myrick v. Dame*, 9 Cush. 248.

Moreover, the very cases cited in respondent's brief, from the second volume of Smith's Leading Cases, establish clearly the principle that when the principal is known, but the credit is given to the agent, the principal is not liable.

Paterson v. Gandasequi, 15 East, 62, 2 Smith, Lead. Cas. 8th Am. ed. especially the opinion of Lord Ellenborough, at page 390; *Addison v. Gandasequi*, 4 Taunt. 574, 2 14 L. R. A.

Smith, Lead. Cas. 8th Am. ed. 893; *Thomson v. Davenport*, 9 Barn. & C. 78, 2 Smith, Lead. Cas. 8th Am. ed. 898.

Respondent admits that the fact that plaintiff omitted to require Bills' signature to the contract would show that she intended to exonerate him, unless such intention were repelled by the circumstances and proof in the case. We can find no circumstance that would negative such intention.

See note to *Thomson v. Davenport*, 2 Smith, Lead. Cas. 8th Am. ed. 435; *Sage v. Sherman*, Hill & D. 147; *Union Ins. Co. v. Grant*, 68 Me. 229.

Where the vendor takes the note of the agent for the purchase money at the time of the sale, the implication will be strong, if not irresistible, that the goods were sold exclusively on the credit of the agent.

2 Smith, Lead. Cas. 8th Am. ed. p. 485; *Hyde v. Paige*, 9 Barb. 150.

Messrs. Hunsaker, Britt & Goodrich, for respondent:

Parol evidence is admissible to charge an unnamed principal (except in the case of negotiable instruments), and to introduce a new party, but never to discharge an apparent party to a contract.

Trueman v. Loder, 11 Ad. & El. 595; *Jones v. Littleddale*, 6 Ad. & El. 486; *Sims v. Bond*, 5 Barn. & Ad. 893; *Wilson v. Hart*, 7 Taunt. 293; *Ford v. Williams*, 62 U. S. 21 How. 287, 16 L. ed. 36; *Stowell v. Eldred*, 39 Wis. 614; *Weston v. McMillan*, 42 Wis. 567; *Masterson v. Boyce*, 29 Hun, 456; *Briggs v. Munchon*, 56 Mo. 467; *Chandler v. Coe*, 54 N. H. 561; *Hefron v. Pollard*, 73 Tex. 96, and cases cited; *Deitz v. Providence Washington Ins. Co.* 31 W. Va. 851; *Brooks v. Minturn*, 1 Cal. 482.

Such parol evidence does not vary the contract, because those whom the contract on its face purports to bind are still bound and by the very terms of the contract; but it shows that the contract binds another not named for the reason that the act of the agent is the act of the principal.

See Hare & Wallace's notes to *Thomson v. Davenport*, 2 Smith, Lead. Cas. 8th Am. ed. top pp. 418-421, and especially pp. 429, 430.

Appellants' claim that the court erred in not permitting defendants to prove that Raynor and not plaintiff was the real owner of the contract between plaintiff and the Colton Land & Water Company, and that plaintiff perpetrated a fraud in assigning the contract to them, is not worthy of serious consideration. If Raynor was the owner he alone could complain and not defendants.

Cross v. Sacramento Sav. Bank, 66 Cal. 463; *Larco v. Casanueva*, 30 Cal. 568; *Payne v. Treadwell*, 16 Cal. 241; *Secrist v. Green*, 70 U. S. 8 Wall. 744, 18 L. ed. 153; *Comstock v. Ames*, 3 Keyes, 357; *Ritter v. Brendlinger*, 53 Pa. 69.

Messrs. Rowell & Rowell also for respondent.

Beatty, Ch. J., delivered the opinion of the court:

In order to a proper understanding of the various questions involved in this appeal it is necessary to state pretty fully the facts out of which the case arises. On June 7, 1887, the

plaintiff, a married woman, living separate from her husband, entered into a written contract with the Colton Land & Water Company, whereby said company agreed to sell and she agreed to purchase certain real estate, situate in San Bernardino County, for the sum of \$57,000, to be paid \$1,000 cash on the delivery of the agreement, one third of the balance in fifteen days, and the remaining two thirds in six and twelve months. It was stipulated that time was of the essence of the contract, and that failure by the vendee to comply with its terms should release the vendor from all obligation to convey, and work a forfeiture of all sums paid. It was further stipulated that at the time of paying the first one third of the money the vendee should procure from one P. A. Raynor a release and settlement of certain claims of Raynor against the vendor then in litigation. In pursuance of the contract, and at the date of its delivery, Mrs. Ferguson made the cash payment therein provided of \$1,000, and thereafter obtained the consent of the vendor, indorsed in writing on the contract, extending the time for making the second payment to and including the 12th day of July, 1887. At the time of obtaining the extension she assigned the contract to the defendant McBean,—that is to say, her written assignment was to McBean alone; but she claims that it was in fact made to the defendants McBean and Bills jointly, such being the understanding and intention of the parties. In consideration of said assignment she received from McBean a contract in writing, signed by him alone, in the following terms: "It is hereby agreed on the part of Alexander McBean, of Oakland, California, to and with Mrs. M. L. Ferguson, that in case the said Alexander McBean shall sell or purchase the interest of the Colton Land & Water Company in and to certain lands, water, and agreements held in common with P. A. Raynor, under and by virtue of an agreement by and between said company and M. L. Ferguson, dated June 7, 1887, or any extension of time granted by said company or which may be given to said McBean, that he will pay to said Mrs. M. L. Ferguson or assigns the sum of three thousand dollars at the time of the consummation of said sale or purchase. Witness my hand and seal this 30th day of June, 1887. [Seal.] Alexander McBean." But, although executed only by McBean, the plaintiff claims that this was understood to be and was equally the contract of Bills. Bills is a step-son of McBean, and it clearly appears that they were not only connected very closely in their personal relations, but that they were at and about this time engaged in the same kind of speculation in the same locality, and generally conversant each with the doings of the other; but they both deny that Bills had anything to do with the transaction between McBean and the plaintiff. Shortly before the time for making the second payment, McBean, who had gone to San Francisco, as he says, for the purpose of raising money or interesting parties with means to conclude the purchase, telegraphed to Colton announcing his failure, whereupon the plaintiff exerted herself, as she claims, to procure money for Bills, in order that he might make the second payment, and prevent a forfeiture of the contract. She claims

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that she did raise this money, and that Bills used it in making the second payment, and in obtaining a conveyance of the property in pursuance of the contract. The defendants deny this, and claim on the contrary that the money procured through the exertions of plaintiff was obtained for P. A. Raynor, who, in conjunction with Bills, subsequently purchased the same property mentioned in the contract, not, however, in pursuance of its terms, but under a separate and independent agreement entered into between them and the owner after the expiration of the time, as extended for plaintiff's second payment. As to all these matters, the evidence is extremely conflicting, but it is not disputed that on the 12th day of July, the very last day for making the second payment under plaintiff's contract, Bills went to the office of the Colton Land & Water Company, and proposed to purchase the identical property described in the contract, and offered to pay on the purchase the same amount stipulated in the contract as a second payment. The company refused to entertain his proposition unless he produced the release of Raynor's claims, as provided by the contract. He offered to comply with this condition if they would give him until the next day to get the release, to which offer the company assented; and accordingly, on the following day, July 18th, Bills delivered Raynor's release, paid the sum of \$19,000, and received a conveyance of the land to himself. In making the purchase he claimed and received credit for the \$1,000 originally paid by the plaintiff; that is to say, he was credited on the purchase price of \$57,000 with the full sum of \$20,000, although he paid but \$19,000, and gave his notes for the balance of \$37,000, secured by mortgage on the land. After the conclusion of the purchase, and on the same day, he conveyed a half interest in the land to P. A. Raynor. The plaintiff thereafter demanded of each of the defendants payment of the sum of \$3,000, as provided in the written contract of June 30th, above quoted, and, payment being refused, she brings this action to recover that sum with interest.

In her complaint, after setting out her agreement for the purchase of the land, and alleging the payment of \$1,000 at the date of its delivery, she proceeds as follows: "That on the 30th day of June, A. D. 1887, plaintiff, at the special instance and request of defendants, assigned to them the contract aforesaid, and all her interest therein, the said defendants and each of them promising and agreeing that in case they or either of them should purchase or sell the property of the said Colton Land & Water Company, and make the payments to said company as in said contract specified, and within any extension of time granted in which the same might be made, that they or either of them would pay to plaintiff the sum of three thousand dollars. And at the time of the making of said agreement between plaintiff and defendants it was agreed that the written evidence thereof should be between plaintiff and defendant McBean, but that defendant A. Bills should be equally interested therein, and that such written agreement should be binding upon both of defendants alike. And in case of either of the defendants purchasing or selling the said property of the said Colton Land

& Water Company they would pay to plaintiff the sum of three thousand dollars. And that pursuant to said understanding defendant Alexander McBean drew and signed the instrument in writing of which the following is a copy [here follows a copy of the contract of June 30, above quoted]: And that the consideration for which said assignment was so made to defendants was their agreement to pay said sum of three thousand dollars, as aforesaid." She then alleges a purchase of the property by defendants on July 12; demand on them for payment of \$3,000, as provided by the contract of June 30, and their refusal to pay; and prays judgment for that sum and interest. To this complaint each of the defendants demurred, generally for the want of facts, and specially on the ground of misjoinder of defendants, in that it appeared that Bills was not a party to or interested in the contract set out in the complaint. Their demurrers being overruled, the defendants answered separately, McBean denying that he ever bought any of the lands described in the contract, and Bills denying any connection with the contract of June 30, or that he ever bought any land under or by virtue of plaintiff's contract with the Colton Land & Water Company. But neither defendant denied that said contract had been assigned to them. Upon these pleadings the parties went to trial, but during the progress of the trial, and after most of the evidence was in, the defendants, by leave of the court, filed amended answers, in which they separately denied any assignment of the contract of the Colton Land & Water Company to Bills, amplified their original denials on other points, and set up two additional defenses: *First*. That plaintiff was at the commencement of the action the wife of one J. B. Ferguson, and that the action did not concern her separate property. *Second*. That plaintiff was never the real owner of the contract of June 7, which she pretended to assign to McBean, but that said contract, with all its rights and privileges, belonged to P. A. Raynor; and that plaintiff, knowing that Raynor was such owner, in making said pretended assignment was willfully and knowingly attempting to defraud McBean out of the sum of \$3,000. The case was tried by the court without a jury, and the findings and judgment were for the plaintiff. Defendants moved for a new trial, which was denied, and they unite in an appeal from the judgment and said order.

The most important question involved in the appeal is as to the liability of Bills on the contract upon which the action is founded. This question is raised not only by the demurrers to the complaint, but by numerous exceptions taken at the trial to rulings of the superior judge admitting oral testimony to the effect that Bills, although not named therein, was nevertheless a party to said contract. According to plaintiff's testimony, she knew at the time of the assignment of her contract that Bills was to be equally interested with McBean in the rights assigned, and was to be equally bound to pay the \$3,000. According to all the testimony, Bills was then present in San Bernardino, and in direct communication with the plaintiff. His interest, in other words, was fully disclosed at the time; and no reason existed—at least none is alleged—why he was

not named as an assignee, and as a party to the agreement to pay for the assignment. In short, it appears by the testimony more fully than by the complaint, though we think not more plainly, that the plaintiff deliberately chose to accept a contract in writing which did not name, nor by any of its terms bind, one of her intended assignees. Can she, under such circumstances, claim that he is bound? This is a question upon which there is a great conflict of authority in this country and England, and an adequate review of the cases in which it has been agitated would require a volume. We have neither time nor inclination to enter upon any such review, but content ourselves with saying that in our opinion the better reason and sounder policy are against the proposition. In England the rule seems to be pretty well settled, after much debate, the other way: but in the United States the weight of authority seems to be against the English rule. The cases in which the question has arisen are those in which an agent has contracted in his own name, and his principal has afterwards sued or been sued on the contract; and *Judge Story*, in his work on Agency, § 160a, says that the doctrine maintained in the more recent authorities is that, "if the agent possesses due authority to make a written contract not under seal, and he makes it in his own name, whether he describes himself to be an agent or not, or whether the principal be known or unknown, he, the agent, will be liable to be sued and be entitled to sue thereon, and his principal also will be liable to be sued and be entitled to sue thereon in all cases, unless from the attendant circumstances it is clearly manifested that an exclusive credit is given to the agent, and it is intended by both parties that no resort shall in any event be had by or against the principal upon it." But an examination of the authorities cited in support of this statement shows that they do not support it, as has been frequently pointed out. It is undoubtedly true that when the principal is undisclosed he may sue or be sued, but not when he is known, and especially not when he is present at the making of the contract. For a full and able discussion of the whole subject, see *Chandler v. Coe*, 54 N. H. 581, and *Gillis v. Lake Bigler Road Co.* 2 Nev. 216, and cases therein cited. Considered independent of authority, we think sound policy requires the enforcement, in cases such as these, of the general rule that a writing cannot be varied by parol. It is as important to know who has made a contract as to know its terms, and when the parties put it in writing there is no more reason or excuse for omitting the name of a known party, whom it is the intention to bind, than there is for omitting its most important stipulation. To allow such a practice opens the door in every case to such conflicts of evidence as this case illustrates, upon a point which can be easily and forever set at rest by simply making the written evidence of the contract conform to the mutual understanding of the parties as to matters fully within their knowledge. We think the superior court erred in overruling the demurrers, and in admitting the testimony referred to. This error compels a reversal of the judgment and order appealed from; but, as a new trial will be necessary, it is proper that we should

dispose of some other questions likely to arise in the further progress of the case.

Although the plaintiff cannot recover on this contract against Bills, we see no reason why she may not recover against McBean upon pleadings properly amended. All the evidence in the record indicates pretty clearly collusion between McBean and Bills and Raynor, by means of which the two last named obtained the benefit of plaintiff's assignment to McBean. If in fact McBean turned the contract over to Bills and Raynor without a formal assignment of it, and they got the benefit of the assignment, and especially if McBean was a participant in their purchase, he became liable on his promise to pay the \$3,000.

The court erred in sustaining an objection to the offer to prove what plaintiff told Crossman, on the ground that it was a privileged communication. Crossman, as to that matter at least, was not the attorney, if he was her attorney at all; and moreover, the statement, if made, was not intended to be confidential, but was made with the purpose of having it communicated to others.

The court did not err in excluding evidence that the contract with the Colton Land & Water Company was the property of Raynor. Whether it was or not is a question between

Raynor and the plaintiff, to be litigated by them or their representatives. McBean got a valid assignment, and cannot be excused from paying the price because someone else may have a right to claim it from his assignor.

There is barely sufficient, but certainly not very satisfactory, evidence to sustain the finding that the plaintiff was, at the beginning of the action, living separate and apart from her husband, by reason of his desertion of her. There is no positive or direct evidence that he went away without or against her consent. And the evidence is likewise rather unsatisfactory on the point of the contract being her separate property, but we cannot say that it does not support the finding.

Other points made in the briefs are comparatively unimportant, and need not be particularly referred to.

Judgment and order reversed, and cause remanded, with directions to the superior court to sustain the demurrers to the complaint, with leave to the plaintiff to amend as she may be advised.

We concur: *De Haven, J.; Paterson, J.; Sharpstein, J.; McFarland, J.; Harrison, J.; Garoutte, J.*

CONNECTICUT SUPREME COURT OF ERRORS.

Hugh DAILEY *et al.*

CITY OF NEW HAVEN *et al.*

(.....Conn.....)

1. A city cannot be restrained by injunction from declining a trust for charitable purposes which it is not required by

its charter or ordinances to accept and administer.

2. A city had no implied power to accept a trust "for deserving persons not paupers" whom it has no legal power to support or aid.

3. The refusal or inability of a city to accept a trust "for deserving persons not paupers" will not defeat the gift under a will

NOTE.—Municipal corporation as trustee of a charity.

The cities of New Orleans and Baltimore being authorized to establish public schools are entitled to take a legacy for educating the poor therein. *McDonogh v. Murdoch*, 56 U. S. 15 How. 367, 14 L. ed. 732; *State v. McDonogh*, 8 La. Ann. 171.

A city may take property in trust for the education of boys and girls, and to apply the surplus of the income, if any, to the support of poor white orphans. *Perin v. Carey*, 65 U. S. 24 How. 435, 16 L. ed. 701.

The city of Philadelphia in the well-known Girard College Case was held capable of taking a trust to establish a college for "poor white male orphans" under a charter giving the general power for "the suppression of vice and immorality, advancement of the public health and order, and the promotion of trade, industry, and happiness." *Vidal v. Girard*, 43 U. S. 2 How. 127, 11 L. ed. 205.

The city of St. Louis was held entitled to take a devise for the relief of "all poor emigrants and travelers coming to St. Louis on their way bona fide to settle in the west," although the lands devised were outside the city. *Chambers v. St. Louis*, 29 Mo. 543.

A bequest to a city in trust to apply the income to aid worthy and industrious persons who are not supported in whole or in part at the public expense to sustain themselves and their families during the inclement season of the year in case of need may be accepted by the city as fairly within its legitimate corporate power, as the effect of the gift is to prevent persons from becoming a public charge. *Webb v. Neal*, 5 Allen, 575.

So the city of Philadelphia was held entitled to take a trust for the establishment of a hospital for indigent, blind, and lame persons, and to apply the income of the residue to the comfort and accommodation of such persons preferring residences. *Philadelphia v. Elliott*, 3 Rawle, 170.

Likewise to take a bequest for planting and renewing "shade trees, especially in situations now exposing my fellow citizens to the heat of the sun." *Cresson's App.* 30 Pa. 437.

A fund given to the orphans of the first municipality of New Orleans was held rightly claimed under the Louisiana Civil Code by the city council of that municipality. *Mary's Succession*, 2 Rob. (La.) 488.

The city of Baltimore is expressly given power by its charter to take trusts for charity. *Barnum v. Baltimore*, 62 Md. 275.

Under the Statute 39 Eliz., chap. 5, a municipal corporation is a "person" entitled to found a hospital for the poor. *New Castle v. Atty-Gen.* 12 Clark & F. 402.

A bequest to a municipality for a purpose not specified cannot be upheld on the ground that it must be for public purposes, as the municipality would be entitled to take a trust for charity, al-

making other gifts to various trustees, one of whom at least is also the beneficiary, and providing that in case any trust is not accepted a proportionate distribution shall be made among the others of the amount intended for it.

4. **The superior court has power, as a court of equity, to supply trustees** when necessary to preserve a trust, but will exercise the power only when necessary to prevent the trust from being defeated, and it will first give the probate court a chance to make such an appointment where it has the power.
5. **The State's attorney for a county has the right to bring suits to enforce public charitable trusts.**

(March 3, 1891.)

CASE reserved from the Superior Court for New Haven County for the advice of the Supreme Court of Errors in a proceeding instituted to compel the City of New Haven to accept and execute a trust. *Appointment of another trustee advised.*

though private. *Gloucester v. Osborn*, 1 H. L. Cas. 272.

A trust to a foreign city for charitable purposes is valid. *Peynado v. Peynado*, 82 Ky. 5.

A bequest of personality to a community in a foreign country which has capacity to take by the laws of that country is valid. *Re Huss*, 12 L. R. A. 620, 126 N. Y. 537.

The board of water commissioners of a city having power to obtain any property "needful or convenient" for its purposes and with consent of the council to erect fountains, etc., may take by will a fund of which the income is to be used for ornamenting the grounds where the waterworks are established and maintaining a reference library of books on science, arts, discoveries, etc. *Penny v. Croul*, 5 L. R. A. 868, 76 Mich. 471.

A lease to a city is not invalid because perpetual where the lands are devised in perpetuity for charitable purposes. *Richmond v. Davis*, 1 West. Rep. 464, 108 Ind. 449.

A bequest in trust to the mayor of a city and the presidents of two incorporated societies and their successors forever is to them as individuals and not to the corporations. *Cottman v. Grace*, 3 L. R. A. 145, 112 N. Y. 299.

A city as trustee has no vested right in a trust, but the Legislature, unless restrained by the Constitution, may interfere to change the trustee. *Girard v. Philadelphia*, 74 U. S. 7 Wall. 14, 19 L. ed. 56; *Philadelphia v. Fox*, 64 Pa. 169.

Counties.

A county may take a bequest for public schools. *Bell County v. Alexander*, 22 Tex. 360.

A grant to the supervisors of a county in trust for any other use or purpose than that of the county which they represent is invalid, as for instance a grant of land for a church and school-house for the benefit of a particular town. *Jackson v. Hartwell*, 8 Johns. 422.

County commissioners cannot be seised to the use of a town. *Sloane v. McConahy*, 4 Ohio. 154.

A county in Oregon may take a grant of lands for a free college or institution of learning under a statute giving power to purchase and hold lands for the use of the county. *Raley v. Umatilla County*, 15 Or. 172.

Towns.

A town cannot take and hold a fund in perpetuity the income of which is to be applied to an object which is not within the corporate or administrative purposes of the town, such as the support of persons towards whom the town is under no statutory or other legal obligation. *Foodlok v. Hempstead*, 11 L. R. A. 715, 125 N. Y. 581.

The facts are fully stated in the opinion *Messrs. Lynde Harrison and John W. Ailing*, for complainants:

This trust being for a public charity, the proposed action of the city, having in view, either the non administration by any person of the trust, or its destruction, the state's attorney is the proper party to bring the facts to the attention of a court of equity.

Proprietors of White School House v. Post, 31 Conn. 258; 2 Perry, Tr. § 782.

The gift to the City of New Haven "to be held in trust, by the proper authorities, and the income to be applied through such agencies as they see fit, for the supply of fuel and other necessities to deserving indigent persons, not paupers, preferring such as are aged and "infirm," is a valid public charity.

Bronson v. Strouse, 57 Conn. 148; *Goodrick's App. Id.* 275; *Beardsley v. Bridgeport*, 1 New Eng. Rep. 639, 53 Conn. 489; *Tappan's App.* 52 Conn. 412; *Camp v. Crocker*, 2 New Eng. Rep. 184, 54 Conn. 21; *Storr's Agr. School v.*

But a town in New Hampshire has been held entitled to hold funds in trust for the support of religion. *Atty-Gen. v. Dublin*, 38 N. H. 469; *Orford Union Cong. Soc. v. West Cong. Soc.* 53 N. H. 468.

And in that State it is said that unless specially restrained a town may take a trust for any purpose not foreign to its institution or incompatible with the object of its organization. *Sargent v. Cornish*, 54 N. H. 18.

Thus it may take a trust the income of which is to be applied to the purchase and use of United States flags. *Ibid.*

Township trustees may take a devise for the "poor, needy, and fatherless of" the township. *Urney v. Wooden*, 1 Ohio St. 160.

A town corporation may take as a charitable use, under the Statute of Elizabeth, a grant of certain tolls to keep bridges in repair. *Atty-Gen. v. Shrewsbury*, 6 Beav. 220.

A devise of lands to a town in trust to repair highways and bridges yearly is public and charitable and is valid under a statute authorizing devices of lands for public use. *Hamden v. Rice*, 24 Conn. 380.

A reservation in a deed of the right of the inhabitants of an unincorporated town to cut wood on the land is void. *Hornbeck v. Westbrook*, 9 Johns. 73.

Other quasi municipalities.

A school district is a good trustee to hold lands for school purposes. *Chapin v. Winchester School Dist. No. 2*, 35 N. H. 445.

A school society being a public corporation under the Connecticut statutes is competent to take a trust for educational purposes. *First Cong. Soc. of Southington v. Atwater*, 23 Conn. 84.

A parish which can legally establish and maintain schools and raise taxes therefor may receive a devise to be applied to the use of schools. *First Parish in Sutton v. Cole*, 3 Pick. 232.

A devise to school commissioners and their successors who are unincorporated, for educating poor children, is not valid. *Janey v. Latane*, 4 Leigh, 327.

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Whitney, 3 New Eng. Rep. 573, 54 Conn. 342; *Coil v. Comstock*, 51 Conn. 377; *Fairfield v. Lawson*, 50 Conn. 501; *Hughes v. Dady*, 49 Conn. 34; *Adye v. Smith*, 44 Conn. 60; *White v. Howard*, 38 Conn. 354; *Treat's App.* 30 Conn. 116; *Bull v. Bull*, 8 Conn. 47-51; *Erskine v. Whitehead*, 84 Ind. 357; *Hesketh v. Murphy*, 35 N. J. Eq. 23; *Jackson v. Phillips*, 14 Allen, 556; 2 Perry, Tr. § 697; *Suter v. Hilliard*, 132 Mass. 412; *Fellows v. Miner*, 119 Mass. 541; *Clement v. Hyde*, 50 Vt. 716; *McAllister v. McAllister*, 46 Vt. 272; *Hesketh v. Murphy*, 38 N. J. Eq. 309.

It is no objection to the validity of this trust for public charity that the deserving indigent persons not paupers are not expressly limited as to residence.

Webb v. Neal, 5 Allen, 575; *Erskine v. Whitehead*, 84 Ind. 357.

A gift to "poorhouse keepers" has been sustained.

Atty-Gen. v. Pearce, 2 Atk. 87. See also *Nash v. Morley*, 5 Beav. 177; *Loring v. Marsh*, 78 U. S. 6 Wall. 337, 18 L. ed. 802; *Brown v. Kelsey*, 2 Cush. 244; 2 Perry, Tr. § 299.

The City of New Haven had power to become the trustee of this fund, to carry out the provisions of this will.

Webb v. Neal, 5 Allen, 575; *Jones v. Habersham*, 107 U. S. 174-189, 27 L. ed. 401, 407; *Hamden v. Rice*, 24 Conn. 350; *First Cong. Soc. of Southington v. Atwater*, 23 Conn. 34; *Storrs' Agr. School v. Whitney*, 3 New Eng. Rep. 573, 54 Conn. 342; 2 Dillon, Mun. Corp. 3d ed. §§ 566-572, citing *Vidal v. Girard*, 43 U. S. 2 How. 127, 11 L. ed. 205; *McDonogh v. Murdoch*, 56 U. S. 15 How. 367, 14 L. ed. 732, and many other cases; *Perin v. Carey*, 65 U. S. 24 How. 465, 16 L. ed. 701; *Stevens v. Shippen*, 28 N. J. Eq. 487; *Clement v. Hyde*, 50 Vt. 716; *Craig v. Secrist*, 54 Ind. 419.

It is the duty of the City of New Haven to accept the performance of the duties of this trust.

Langdon v. Congregational Soc. of Plymouth, 12 Conn. 113; *Craig v. Secrist*, supra; 1 Perry, Tr. §§ 42, 43; 2 Perry, Tr. § 370.

It is not to be supposed that the testator intended to confer upon the mere trustee power to refuse to accept the trust, and so deprive the beneficiaries of its benefit.

Mason v. Trustees of M. E. Church at Tuckerton, 27 N. J. Eq. 47; 1 Perry, Tr. §§ 42-44; 2 Perry, Tr. §§ 721-731.

If the City should be permitted to refuse to accept the management of this trust, and should in fact refuse it, a court of equity will, upon application of the attorney of the State, or perhaps of a person claiming to be a beneficiary, appoint suitable persons to manage the trust.

1 Dillon, Mun. Corp. 3d ed. § 64, p. 87; *Storrs' Agr. School v. Whitney*, 3 New Eng. Rep. 573, 54 Conn. 342-345; *Bartlett v. Nye*, 4 Met. 378; *Goodrich's App.* 57 Conn. 275, 285.

Mr. William K. Townsend, for the City of New Haven:

Neither of the plaintiffs has any interest in this bequest. This is not the question of the acceptance or refusal of a trust, but the question as to whether the trust for the benefit of the public institutions of New Haven shall be carried out as provided for in said will, or the 44 L. R. A.

trust for the benefit of indigent persons not paupers. The testator having created two trusts and prescribed the conditions upon which either of such trusts may be carried out, such conditions are binding upon all parties.

Irish v. Antioch College, 126 Ill. 474, 9 Am. St. Rep. 638; *Storrs' Agr. School v. Whitney*, 3 New Eng. Rep. 573, 54 Conn. 342.

The City has power to decline the trust for indigent persons not paupers. A trustee cannot be compelled either to accept or decline a trust. While the administration of a trust for the benefit of indigent persons not paupers is within the power of municipal corporations, it is not a trust which they can be compelled to execute.

Vidal v. Girard, 43 U. S. 2 How. 127, 11 L. ed. 230; *Webb v. Neal*, 5 Allen, 576.

Courts will not interfere with a municipality or its officials in the exercise of the discretion and judgment incidental to the performance of its powers, except in case of gross abuse of power or violation of law.

Sheldon v. Centre School Dist. 25 Conn. 224; *Goddard v. Seymour*, 30 Conn. 394; *Freeman v. New Haven*, 34 Conn. 406; *Fellows v. New Haven*, 44 Conn. 240; *Dibble v. New Haven*, 6 New Eng. Rep. 481, 56 Conn. 199; *Whitney v. New Haven*, 58 Conn. 457; 1 Dillon, Mun. Corp. §§ 94, 882, 848, 949.

Mr. Henry T. Blake, for trustees of the estate of Philip Marett, deceased:

A corporation has only such rights and powers as are expressly granted, or as are necessary to carry into effect the rights and powers so granted.

New York F. Ins. Co. v. Ely, 5 Conn. 560; *Philadelphia Loan Co. v. Towner*, 13 Conn. 249; *Mechanics & W. Mut. Sav. Bank & Bldg. Assn. v. Meriden Agency Co.* 24 Conn. 159; *Bridgeport v. Housatonic R. Co.* 15 Conn. 475; *Greene v. Dennis*, 6 Conn. 293; *Hamden v. Rice*, 24 Conn. 355; *First Cong. Soc. of Southington v. Atwater*, 23 Conn. 40; *Beardsley v. Bridgeport*, 1 New Eng. Rep. 639, 53 Conn. 489.

Municipal corporations are capable, unless specially restrained, of taking property real and personal in trust for purposes germane to the objects of the corporation, or which will promote, aid, or assist in carrying out those objects. And where the trust reposed in the corporation is for the benefit of the corporation or for a charity within the scope of its duties, it may be compelled in equity to administer and execute it.

2 Dillon, Mun. Corp. § 567; *Philadelphia v. Fox*, 64 Pa. 169; *Webb v. Neal*, 5 Allen, 575; *First Parish in Sutton v. Cole*, 3 Pick. 232.

But municipal corporations cannot hold lands or funds in trust for any object or matter foreign to the purpose for which they were created and in which they have no interest.

2 Dillon, Mun. Corp. § 573; *Jackson v. Hartwell*, 8 Johns. 422; *South New Market Methodist Sem. Trustees v. Peaslee*, 15 N. H. 317. See also *Vidal v. Girard*, 43 U. S. 2 How. 127, 11 L. ed. 205; *McDonogh v. Murdoch*, 56 U. S. 15 How. 367, 14 L. ed. 732; *Perin v. Carey*, 65 U. S. 24 How. 465, 16 L. ed. 701; *Philadelphia v. Elliott*, 8 Rawle, 170; *Bell County v. Alexander*, 22 Tex. 850.

Mr. Simeon E. Baldwin for the executors and residuary legatees of **Ellen M. Gifford**.
Messrs. Henry Stoddard and J. W. Bristol for Yale University.

Seymour, J., delivered the opinion of the court:

The will of Philip Marett, late of the City of New Haven, gives one fifth of the remainder of certain estate "to the City of New Haven, to be held in trust by the proper authorities, and the income to be applied, through such agencies as they see fit, for the supply of fuel and other necessities to deserving indigent persons not paupers, preferring such as are aged or infirm." On the 10th day of June, 1890, acting upon the report to the court of common council of a committee to whom was referred "the matter of the acceptance or rejection of the trust of \$130,000 bequeathed to the City by Philip Marett, deceased, for the use of indigent poor not paupers," the board of aldermen of the City passed a resolution "that the City of New Haven do not accept the bequest to it for the benefit of indigent poor not paupers under and by the will of the late Philip Marett." Thereupon a complaint was brought by Hugh Dailey, a resident tax-payer and elector of the City and Town of New Haven, and Tilton E. Doolittle, as the state's attorney for New Haven County, against the City, its mayor, and the other parties interested in the remainder, one fifth of which was given to the City of New Haven as aforesaid.

The complaint contained, among other allegations, the following: "(7) A resolution is pending before the court of common council of the City of New Haven in and by which it is proposed that the City of New Haven shall refuse to accept the trust of said one-fifth part of said residuary estate so given in trust as aforesaid. Such resolution has been adopted by the individuals who compose the board of aldermen, part of said court of common council, and such resolution is likely to be adopted by the individuals who compose the board of councilmen of said City, and is likely to be approved by the individual who holds the position of mayor of said City. (8) The members of said court of common council and the mayor of said City have no authority to decline the acceptance of said one-fifth part of said residuary estate, so given in trust as aforesaid. (9) The trust above mentioned, created by the will of said Marett, is a public charity, and the beneficiaries of said charity are not represented by the members of said court of common council or the mayor of said City, nor have such members of said court or said mayor any right to annul and destroy the public charity created by said will. (10) The due administration of the public charity created by said will will tend to largely decrease the expenses for the care of paupers in the City and Town of New Haven, and thus render unnecessary to a considerable extent the imposition of taxes to be paid for the support of such paupers; and the City of New Haven is wholly embraced within the limits of the Town of New Haven, and includes nineteen-twentieths of the population and taxable property of the Town of New Haven. (11) The City of New Haven and the Young Men's Institute [naming the

other beneficiaries of said residuary estate], all claim an interest in said fifth part of said residuary estate in case the City of New Haven declines and refuses to accept the trust created by said will, but none of said corporations propose to carry out the charitable intentions of the testator, as stated in the clause of said will herein referred to, even if they receive the funds in question. (12) In case the City of New Haven refuses to accept the performance of the duties of said trust, the said Blake and Beardsley [trustees, who now hold the remainder ready for distribution] propose to regard the trust in favor of the public charity, as above described, terminated, and to pay over said sum of over \$130,000, being the amount of said trust fund, to the City of New Haven in trust, for library purposes, to [naming the other beneficiaries of said residuary estate], for purposes other than the supply of fuel and other necessities to deserving and indigent persons not paupers, in the City of New Haven, preferring such as are aged and infirm, as stated in said will." Following these allegations was a prayer for judgment: "(1) That the City of New Haven, and its mayor, and the members of its court of common council, be enjoined from declining to accept said trust fund, or from declining to carry out the provisions of said will relating to the administration of said trust fund. (2) If it shall be held that the court of common council of the City of New Haven have the power to refuse to accept said trust and to refuse to administer the same, and if the City of New Haven does refuse to accept or administer said trust, then the plaintiffs pray this court, as a court of equity, to take said fund so given for public charity, as stated in said will, into its own care, and to appoint suitable trustees to receive the same from said Beardsley and said Blake, and administer said fund according to the true intent and meaning of the said will of Philip Marett."

A temporary injunction was granted restraining the mayor of New Haven from approving any resolution or vote of the court of common council of the City, whereby the City shall decline to accept the funds so given to the City by the will of Philip Marett, in trust for the public charity stated in the complaint. Thereupon a statement of facts was agreed upon by the plaintiffs, the City of New Haven, and Henry F. Peck, Mayor of the City, they being the only parties that, up to that time, had entered an appearance. At their request the superior court reserved the case and the questions of law thereon arising for the consideration of this court. Subsequently, by leave of the court, the complaint was amended, and E. Edwards Beardsley and Simeon E. Baldwin were made parties defendant thereto, and duly cited to appear. They appeared, assented and agreed to the agreed statement of facts theretofore filed, made answer to the complaint, and filed a cross-complaint. Afterwards the City of New Haven and the mayor filed a demurrer to the complaint, and the case stands before us upon the questions arising upon the pleadings and upon the agreed statement of facts. The statement contains a series of questions which the court of common council instructed the city attorney to incorporate therein, and which, it is agreed in the state-

ment, shall be reserved for the advice of this court.

The first question in natural order relates to the power of the superior court to grant the prayer of the complaint and enjoin the City of New Haven and its mayor and the members of its court of common council from declining to accept the trust fund, or from declining to carry out the provisions of the will relating to the administration of the trust fund. We unhesitatingly advise the superior court that it has no such power. If the City has a right to accept a trust of this character and administer it, which we shall presently consider, yet it has an undoubted right to decline to accept it. How can it be otherwise? It is not a duty imposed upon it by its charter or ordinances to accept and administer it. No one can compel another to accept a trust by naming him as trustee. If, in a given case, a refusal to accept would defeat the trust, it would be because the instrument creating it so provided. Courts will see to it that trusts do not fail because of the refusal of the trustee named to act, unless it is certain that the settlor so intended; and this rule, which is a universal one, would have no meaning if trustees were legally bound to act when appointed. The law is well settled in respect to the power of courts to restrain the action of bodies like courts of common council. In the very recent case of *Whitney v. New Haven*, 58 Conn. 450, this court held that whenever such bodies are acting within the limits of the powers conferred upon them, and in due form of law the right of courts to supervise, review, or restrain is exceedingly limited. With the exercise of discretionary powers courts rarely, and only for grave reasons, interfere. Those grave reasons are found only where fraud, corruption, improper motives or influences, plain disregard of duty, gross abuse of power, or violation of law enter into or characterize the result. Difference in opinion or judgment is never a sufficient ground for interference. Courts of common council exercise an authority delegated by the General Assembly, which carries with it corresponding duties, and vests the delegated body with the right and duty to exercise the discretion and judgment incidental to the proper performance of what is delegated. Several other decisions in our State recognize the same sound doctrine.

The next question to be considered is whether the City of New Haven can legally become trustee of the fund and administer the same. We shall look in vain in its charter for any express authority authorizing it to accept and administer trusts of the nature of that created by the will under consideration. Nor is the City of New Haven under any legal liability to support or aid "deserving persons not paupers;" indeed, it has no legal power so to do. The rule is well established, and supported by numerous well-considered cases, that municipal corporations have only such powers as are expressly granted in their charters, or are necessary to carry into effect the powers so granted. It is a rule of great public utility, and courts should recognize and enforce it as a safeguard against the tendency of municipalities to embark in enterprises not germane to the objects for which they are incorporated.

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Even towns which, under our peculiar political history and policy, it was strongly urged in *Webster v. Harwinton*, 32 Conn. 131, possessed, because of their independent character, large original powers, were held to have no original or inherent powers whatever, but only such as are either expressly granted by the legislative power of the State or are necessary to the performance of their duties as territorial and municipal corporations. We conclude, then, without further discussion, that the City of New Haven cannot legally become trustee of the fund under consideration, and administer the same. Numerous other cases might be cited in support of this position, but we only refer to *Bridgeport v. Housatonic R. Co.* 15 Conn. 475; *New London v. Brainard*, 23 Conn. 553; *Abendroth v. Greenwich*, 29 Conn. 356; *Gregory v. Bridgeport*, 41 Conn. 76.

It was claimed in the argument that, if the City has no power to accept and administer the trust, then it has no power to decline it. We do not see the force of this claim. An offered trust may surely be declined upon the very ground of want of legal power to accept. That the effect of a refusal of what could not be legally accepted might be open to discussion cannot limit the right. A case might easily arise where it would be highly proper that a trust should be publicly declined for that reason, so as to leave other questions which might arise under it unembarrassed by any claim which might be made from the failure of the trustee to decline.

It may be fairly assumed that when the temporary injunction is removed the City of New Haven will decline in terms the trust in dispute; but, whether it declines it or not, yet having no legal power to accept and administer it, the question remains whether, in accordance with the second prayer of the complaint, the superior court, as a court of equity, will take the fund into its own care, and appoint a trustee to administer it under the will. This can only be answered after a careful consideration of the true meaning and effect of the words, "should any of the trusts not be accepted," which precede the provision made for that emergency. The will, after making certain bequests and devises, continues as follows: "The balance or remainder of such trust estate . . . I hereby direct shall . . . be appropriated, distributed, and disposed of as follows, namely: One fifth part to the Connecticut Hospital Society in trust, the income to be applied to the support of free beds for the benefit of poor patients in said institution, giving preference to those incurably afflicted, if such are admissible. One fifth part to the City of New Haven [being the clause in controversy, and already herein quoted at length]. One fifth part to the president and fellows of Yale College, in trust, the income to be applied to the support of scholarships, or to such other purposes in the academical department as they may judge expedient. One tenth part to the New Haven Orphan Asylum, to be held in trust, and the income applied to the support of poor inmates therein. One tenth part to the St. Francis (Catholic) Orphan Asylum in New Haven, to be held in trust, and the income to be applied to the support of poor inmates therein. One tenth part to the City of New

Haven in trust, the income to be applied by the proper authorities to the purchase of books for the Young Men's Institute, or any public library which may from time to time exist in said City. One tenth part to the State of Connecticut, in trust, the income to be applied towards the maintenance of any institution for the cure or relief of idiots, imbeciles, and feeble-minded persons. The appropriations specified above are to be made effective, notwithstanding any deficiencies or inaccuracy of description, so that my objects may not be defeated by any technicality or informality. Should any of the trusts not be accepted, the amount intended therefor shall be proportionately distributed in augmentation of such as may be accepted." Does the language of the testator, taken alone, or in connection with all the provisions respecting the remainder, indicate a purpose and intention on his part that the failure of the City of New Haven to accept the trusteeship should defeat the trust? Was he probably more interested in the question who should administer it than whether it should be made effective? The intent to have the specified appropriations made effective is distinctly expressed. Except for the clause we are considering, the refusal to accept the trust would not affect it. The trust would not be allowed to fail for want of a trustee to administer it.

In *Storrs' Agri. School v. Whitney*, 54 Conn. 342, 3 New Eng. Rep. 573, land was conveyed to a charitable corporation for a charitable purpose, with a proviso that if it should abandon such use it should pay the market value of the property as it received it to the selectmen of Mansfield, to constitute a fund, of which the selectmen and their successors in office should be trustees, the interest of which should be applied by them to the aid of indigent young men fitting themselves for the ministry. This court said (page 345, 54 Conn.): "If the persons who should at any time hold office as selectmen of that town should decline the trust, such declination would not affect it. The trust remains, and the court would supply trustees upon proper application in behalf of any member of the specified class of beneficiaries. A charitable use will not be permitted to fall because the named trustee declines, nor because of delay upon the part of the beneficiaries in asking for their rights."

It is a rule which admits of no exception that equity never wants a trustee; or, in other words, that if a trust is once properly created, the incompetency, disability, death, or non-appointment of a trustee shall not defeat it. 1 Perry, Tr. § 38; *Donalds v. Plumb*, 8 Conn. 453. Flint, in his work on Trusts and Trustees (§ 274), says courts will execute a charitable trust if possible, even if vague, or apparently tinged with illegality, if any other construction can be put upon it; and cites many cases in support of the proposition.

Upon the question of intent it may be fairly argued that it would be more natural for the charitable man, which the will shows the testator to have been, to be chiefly solicitous that the beneficiaries should receive the assistance, and not who should administer it. The fact that he provides, in the very next clause after those above quoted, for the case of vacancy at

any time in the trusteeship by death, resignation or otherwise, tends to show that he had no such partiality for the trustees named by him as to make the continuance of the trust depend upon its being administered by them in those cases where the trustees and the beneficiaries were really distinct and separate. The testator evidently had in mind two classes of beneficiaries,—one where the real purpose was to benefit the trustee, and one where the trustee had no independent duty towards the beneficiaries, and was considered only as a medium through which the benefit would be applied to them; that is to say, some of the trusts were in effect, and evidently so intended, gifts to the trustee. The question whether it would be of advantage to the trustee to accept or not was the only real question, and a refusal might properly end the matter. Certainly the bequest to the president and fellows of Yale College, for the support of scholarships, or other such purposes in the academical department as they may deem expedient, is of that nature. The direct benefit is to the college. By its very terms the trust is incapable of being administered by another. A refusal by the trustee named to accept would end the matter, and make a case for the sensible application of the provision in the will regarding non-accepted trusts. But, as already suggested, in the clause under discussion the intent was to help only the beneficiaries. As the City had no corporate duty in respect to them, it could have been inserted only for their benefit, and it is almost certain that the testator did not intend to provide that in this case the charity should fail unless administered by the city. It is stated, moreover, in one of the briefs, that this testator drew his own will. Now, it would not be at all unnatural, nor an unusual use of words, for a layman to refer to the action of the beneficiaries of a trust by the language, "should any of the trusts not be accepted." In this case he does not necessarily mean "should any of the trustees decline to act." Taking into account the fact that, in one instance at least, as already shown, the trustee was also the beneficiary, it seems more natural to suppose that the testator, when he penned the words just quoted, had in mind only those cases where the party really intended to be benefited declined to be benefited. On the whole, then, influenced, as we must be, by the salutary rule regarding bequests to public charities, that of two possible constructions that which sustains the charity should be adopted, if not inconsistent with the intent of the testator, and being satisfied that the intent of Mr. Marrett was not to hinge his bequest to the "deserving indigent persons" on the action of the City in accepting or declining the trust, we hold that neither the refusal nor inability of the trustee to accept the trust defeats the same, but that the same is a good and valid trust notwithstanding.

The question now occurs whether the superior court, as a court of equity, will take the fund into its own care, and appoint a trustee to administer it under the will. There can be no question of the power of the court so to do. In 1822 a statute was passed, providing that when a testator had not provided for the contingency of the death, incapacity, or refusal of

a trustee appointed by him to accept and execute the trust, the court of probate having the probate of his will should have power to appoint a trustee. This statute was not understood to deprive a court of equity of its jurisdiction over the appointment of trustees. Judge Swift, in the second volume of his Digest, published in 1828, page 119, treating of the appointment and removal of trustees, says: "The deviser or donor, in the instrument creating the trust, should appoint the trustees, and prescribe the mode of appointing others where they refuse to accept, die, or become incompetent to act; but in case of neglect to do it a court of equity may supply the deficiency by the appointment of proper trustees to execute the trust; and by statute courts of probate have that power." Other statutes have since been passed regulating the proceedings of courts of probate with trustees, but this court has meantime repeatedly affirmed the power of the superior court, as a court of equity, to supply trustees, when necessary in order to preserve a trust. The Statute now in force (Gen. Stat. § 491) authorizes courts of probate, in certain cases, to appoint trustees. Under it the proper court of probate would be authorized to appoint a trustee to administer the fund in question. It does not, however, strip the superior court of jurisdiction. The two courts may be regarded as having concurrent jurisdiction. In the present state of the law there is a manifest propriety and convenience in leaving the matter to courts of probate, and it is the duty of those courts to act. While, then, the superior court retains its jurisdiction, it will exercise it only in cases where, except for its action, a legal trust would be defeated for want of a trustee to administer it.

As to the appearance of the attorney for the State as a party plaintiff, we see no valid objection. In *Proprs. White School House v. Post*, 81 Conn. 240, while it was not necessary to decide the question of the duty of the state's attorney, as guardian of the rights of the public, in respect to public charitable trusts, yet the court clearly intimates that ordinarily it

would be his duty, or at least his right, to bring suits to enforce them, in analogy to the practice in England, where the attorney-general acts in such cases. We have been referred to no case to the contrary. The New York courts seem to take a like view of the matter, and it is approved in Perry on Trusts. We think also that in this case the attorney for the State should apply to the probate court for the appointment of a trustee or trustees. In case of his failure so to do, such application may be made by any individual of the specified class of beneficiaries. We have now considered all the points that are necessary to the decision of this case. Perhaps we have covered more ground than was absolutely necessary for that purpose; but in consideration of the fact that here was a great public charity, in which a large number of indigent persons are interested, we have felt constrained to make our decision comprehensive enough to embrace whatever was fairly before us. The points decided all arise upon the pleadings and findings of fact, irrespective of the questions proposed by the corporation's counsel under the instructions of the common council, which, it is objected, are not properly before us. We have no occasion to discuss that objection, inasmuch as our conclusions seem to cover substantially the points raised by them, and either to furnish material for their answer or render answers unnecessary.

The Superior Court is advised to dismiss the temporary injunction, and if, within a reasonable time, it shall appear that the court of probate having jurisdiction of the matter has duly appointed a trustee, and that such trustee has accepted and given bonds according to law, then to dismiss the complaint. If within a reasonable time the court of probate does not appoint a trustee as aforesaid, who shall duly qualify, then the superior court, as a court of equity, is advised to make such appointment, and take a good and sufficient bond conditioned upon the discharge of the duties of said trust according to law.

The other Judges concurred.

MARYLAND COURT OF APPEALS.

WESTERN MARYLAND R. CO., *Appt.*,
v.

Antone J. HEROLD *et al.*

(.....Md.....)

1. A woman who enters a car left standing with brakes set on the ground of a sanitarium, a few minutes before the time for it to start and when no one is in charge of it, but when other women and children are already in it, is not guilty of negligence as matter of law which will prevent her recovery for injuries occasioned by the starting of the car when a small boy let off the brakes, especially where rules

against entering the car before notice had never been published or posted and she had no actual knowledge of them.

2. Whether or not the circumstances justify a woman in jumping from a car running down a steep grade with no one in charge of it and with no one in it but women and children, some of whom she sees getting off, is a question for the jury.

(June 17, 1891.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Baltimore City in favor of plaintiffs in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Argued before the full bench.

Mr. Charles Marshall, for appellant:

NOTE.—For notes as to negligence of passenger in getting off from train in motion, see New York, P. & N. R. Co. v. Coubourn (Md.) 1 L. R. A. 541; Hunter v. Cooperstown & S. V. R. Co. (N. Y.) 2 L. R. A. 382.

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One who has a contract to be carried by a railroad company in its cars is not entitled to enter any car, but must take the car provided by the company, and take it at the time the company has it ready for his use; and if he takes a car not intended for his use, or before the company offers it to him, the company is not bound to provide for his carriage by such a car.

Flint & P. M. R. Co. v. Stark, 38 Mich. 714-718; *Chicago & A. R. Co. v. McLaughlin*, 47 Ill. 265.

The admitted negligence of the female plaintiff precluded her from recovery.

Pennsylvania R. Co. v. State, 61 Md. 109.

Mr. D. Meredith Reese, for appellee:

It was only incumbent on the female plaintiff to have acted as a person of ordinary prudence, placed in the same situation, would have done, and it was incumbent on the defendant to have used the most exact care and diligence to have prevented the car from running down the grade.

Stokes v. Saltonstall, 38 U. S. 13 Pet. 181, 10 L. ed. 115; *Trumley v. Central Park N. & E. R. Co.* 69 N. Y. 158; *Iron R. Co. v. Mowery*, 36 Ohio St. 418.

Though the female plaintiff may have acted erroneously in jumping from the car, and though if she had remained in the car she would not have been injured, yet by so jumping therefrom, she would not be guilty of contributory negligence, provided, in jumping therefrom she acted as a person of ordinary prudence would have acted under the same circumstances.

Iron R. Co. v. Mowery, *supra*; *Coulter v. American M. U. Exp. Co.* 56 N. Y. 585; *Trumley v. Central Park N. & E. R. Co.* and *Stokes v. Saltonstall*, *supra*; *Flier v. New York Cent. R. Co.* 49 N. Y. 47; *Buel v. New York Cent. R. Co.* 81 N. Y. 814.

She was justified in jumping if she had reasonable grounds for fearing bodily injury, and in jumping acted as a prudent person would do under the same circumstances.

Stokes v. Saltonstall, *Trumley v. Central Park N. & E. R. Co.* and *Iron R. Co. v. Mowery*, *supra*.

Considering the fact that the car was overcrowded in coming out, Mrs. Herold would have been justified in entering the car at any time that she might deem it necessary so as to procure a seat, provided that she knew of no rule or regulation of the defendant against her doing so.

McDonald v. Chicago & N. W. R. Co. 26 Iowa, 124; 2 Redfield Railways, p. 245, *note E*; *Shannon v. Boston & A. R. Co.* 1 New Eng. Rep. 681, 78 Me. 52, 23 Am. & Eng. R. R. Cas. 511; *Willis v. Long Island R. Co.* 34 N. Y. 677.

The proprietors of a railroad, as passenger carriers, are bound to the most exact care and diligence, not only in management of their trains and cars, but also in the structure and care of them, and in all subsidiary arrangements necessary to the safety of passengers.

McElroy v. Nashua & L. R. Corp. 4 Cush. 400; *Baltimore & O. R. Co. v. Breinig*, 25 Md. 378; *Baltimore & O. R. Co. v. Worthington*, 21 Md. 275.

The female plaintiff would not have been bound by it if there had been a rule against her

entering the car when she did, unless she had actual knowledge of the rule, or knowingly violated it.

Baltimore City Pass. R. Co. v. Wilkinson, 30 Md. 232; *McDonald v. Chicago & N. W. R. Co.* *supra*; *Patterson, Railway Acc. Law*, p. 250; *Burlington & M. River R. Co. v. Rose*, 11 Neb. 177; 2 Wood, *Railway Law*, § 304; 1 Redfield, *Railways*, p. 96; *Great Western R. Co. v. Goodman*, 11 Eng. L. & Eq. 546.

Robinson, J., delivered the opinion of the court:

This is an action to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant.

On the morning of the accident, the female plaintiff went, in company with Mrs. Shradle and in charge of one of her children, to the Wilson Sanitarium, a resort for sick children, situated near the main line of the defendant Company. The car in which the plaintiff was seated was attached to a train that went beyond the Sanitarium, and when it reached the switch leading from the main track into the grounds of the Sanitarium, it was detached and pushed by an engine into the grounds near the building in which was the office of the agents of the Sanitarium, who have charge of the visitors, and here it was left on the track, with brakes set to secure it.

Just before the time for the visitors to return, a brakeman in the employ of the Railroad Company went into the grounds and took charge of the car thus left on the switch. The switch has a down grade towards the main track, and all the brakeman had to do was to unfasten the brake, and the car, by its own momentum, ran down the switch to a point near the main track, where it was attached to the east-bound train and taken to the city. Upon their arrival at the Sanitarium, the visitors are required to leave their wraps at the house, near which the car stops, and for which they receive checks, which are surrendered when the visitors are ready to return to the city. By certain rules and regulations of the Sanitarium, adopted with the consent of the Railroad Company, the wraps of the visitors are not to be given out until the brakeman has arrived and has taken charge of the car in which the visitors are to return, and after the wraps have been given out, the visitors are not to go into the car until notice is given by one of the officers of the Sanitarium. These rules and regulations are not published, nor were they posted in the grounds, or put up in the car, and the only information or notice that the visitors had of those rules was by announcement made by one of the officers of the Sanitarium to the visitors while they were at lunch or at tea.

The defendant proved that on the evening of the day of the accident, and while the visitors were at the tea-table, one of the officials of the Sanitarium gave notice that the wraps would be given out at twenty minutes before six o'clock, and that no one was to go to the car until the official had given the orders. Somewhere about six in the evening, Mrs. Shradle told the plaintiff to go with the child she had in charge and secure seats in the car, saying at

the same time that she, witness, would get the plaintiff's wraps when they were given out. In going out to the Sanitarium, the car was so crowded that the plaintiff was obliged to stand with a sick child in her arms, and this was the reason why Mrs. Shradle directed her to go to the car in advance of the visitors. When she reached the car, the plaintiff found about a dozen persons inside, all of whom were women and children; and a few minutes after she was seated a small boy about seven or eight years old unfastened the brake, and the car by its own momentum started down the grade, going at the rate of about ten miles an hour. Finding no one in charge of the car, the plaintiff becoming alarmed and apprehensive of danger, first pushed the child off she had in charge, and then jumped off herself, and in doing so broke her ankle and shoulder-blade. She had never been at the Sanitarium before, and had no knowledge of the rules and regulations about going to the car, and if such rules were announced at the tea-table, she did not, she says, hear the announcement.

Now, upon this evidence the court at the request of the defendant, instructed the jury:

First, if they should find that by a regulation for the conduct of persons visiting the Sanitarium, adopted with the consent and authority of the railroad company, that the bonnets and wraps of the female plaintiff and of other visitors were not to be returned to her until the car of the company was ready for occupancy by passengers, and until the brakeman had arrived to take charge and control of the car, and if they find that the female plaintiff, knowing that the time appointed by the official who received her wraps and bonnets for the delivery thereof had not arrived, nevertheless went and entered said car, without her bonnet and wraps, and before the time when the brakeman who was to take charge of the car had arrived; and if they further find that at the time she entered the car it was so secured by the brakes that it could not be moved unless someone should unloose the brakes; and if they further find that after she so entered a boy having no relation to the company unloosed the brakes, and in consequence thereof the car was set in motion, and the female plaintiff jumped from the car and was injured,—she contributed thereby to her own injury, and the verdict must be for the defendant.

Secondly, if they find that the injury complained of resulted directly from the act of the female plaintiff in jumping from the car, and would not have happened but for that act; and if they further find that she jumped from the car from the apprehension of danger that did not exist in fact; if they further find, that the circumstances under which she jumped from the car, were not such as to make it a reasonable act of prudence on her part to jump from the car,—then their verdict must be for the defendant.

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In granting these prayers offered by the defendant, the court instructed the jury that if the female plaintiff knowingly entered the car in violation of the rules of the Sanitarium and of the Company, or if having entered even without knowledge of such rules, she jumped from the car from an apprehension of danger, which did not in fact exist, or which would cause a person of ordinary prudence to jump from the car, then the plaintiff was not entitled to recover.

The defense used by the Company was thus fully and fairly submitted to the jury, and whatever ground of complaint there may be as to the verdict, it does not seem to us the defendant has any just grounds of complaint as to the instructions granted by the court. It is insisted, however, that the court ought further to have instructed the jury that the evidence of the female plaintiff shows that her own negligence directly contributed to the injury, and she was not therefore entitled to recover. To this we cannot agree. Taking all the facts into consideration, the court could not say, as a matter of law, that the plaintiff's own negligence directly contributed to the injury. The court could not say, as matter of law, that she was guilty of negligence in entering the car in advance of the other visitors. The rules and regulations which it is insisted she violated, were never published, nor even posted in a place where visitors could see and read them. And if they were announced at the tea-table she did not, she says, hear the announcement. She went to the car a few minutes only before the time for the visitors to return, and this she did because there were not seats enough for all the passengers, and having a sick child in charge she was anxious to secure a seat. She found the car open and persons inside, and in going into the car under these circumstances, it cannot be said, as matter of law, that she was guilty of negligence.

Then again, in jumping from the car, she found it going down the grade at a rapid rate, with no one in charge of it. The only persons inside were women and children, some of whom she saw getting off. So, whether the circumstances were such as to justify a prudent person in jumping from the car was a question for the jury. And besides, if the Railroad Company did not mean that the visitors should enter the car until the brakeman had arrived and taken charge of it, common prudence would have suggested, it seems to us, the necessity of locking the car door, and further, of securing the brakes in a manner such as a boy eight years old could not have unlocked them, especially as the car was standing on a switch with a grade steep enough to allow it, by its own momentum, to run down it at the speed of ten miles an hour. But be all this as it may, the defendant has no ground to complain of the rulings of the court below.

Judgment affirmed.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES

v.

James A. SIMMONS.

(47 Fed. Rep. 575.)

Persons who have been indemnified by the accused should not be accepted as bail for one convicted and sentenced to imprisonment for embezzlement, pending his appeal from the judgment of conviction.

(September 1, 1891.)

APPPLICATION for approval of bail tendered by one convicted and sentenced to imprisonment for embezzlement. *Application refused.**

The facts are sufficiently stated in the opinion.

Mr. John J. Joyce, for defendant, in support of the application.

Messrs. Edward Mitchell, U. S. Dist. Atty., and Maxwell Evarts, Asst. U. S. Dist. Atty., contra:

A recognizance upon which the sureties have been indemnified should not be approved.

See *United States v. Ryder*, 110 U. S. 729, 28 L. ed. 308.

The proper course to pursue is to require such bail as will probably secure the attendance of the person.

Wharton, Crim. Pr. & Pl. 9th ed. § 76.

The indemnification of the bail in a criminal case is distinctly disapproved of in the courts of England.

Herman v. Jeuchner, L. R. 15 Q. B. Div.

* Subsequently on October 21, 1891, the application was renewed upon affidavits that the persons tendered as bail had surrendered their agreement in regard to indemnification. The court, however, decided that since the Supreme Court of the United States, before which the appeal was pending, was then in session, and since the fact that defendant was in confinement would be good ground for an application to advance his case, the bail would not be accepted unless it was shown that an application for an advancement of the case had been made and refused. 47 Fed. Rep. 723.

NOTE.—Indemnity to bail in criminal cases.

The question involved in the above case does not appear to have been discussed in the text-books on Criminal Procedure and the decisions on the question are few and conflicting.

The question decided in *United States v. Ryder*, 110 U. S. 729, 28 L. ed. 308, was that no such contract of indemnity was implied, distinguishing criminal from civil cases in this respect. This was also the doctrine of *Cripps v. Hartnoll*, 4 Best & S. 414, decided by the English Court of Exchequer Chamber which in denying such implied agreement for indemnity assumed that an express agreement therefor would be valid.

The earlier English case of *Jones v. Orchard*, 16 C. B. 614, was decided on other grounds although one of the judges said: "We are inclined to think . . . such a contract would be contrary to public policy."

The case of *Reynolds v. Harral*, 2 Strobb. L. 87, is in direct conflict with *United States v. Ryder* and *Cripps v. Hartnoll*. The latter cases both repudiate the statement in *Petersdorf on Bail*, p. 517, which is 14 L. R. A.

561; *Wilson v. Strugnell*, L. R. 7 Q. B. Div. 548; *Jones v. Orchard*, 16 C. B. 614.

Benedict, J., delivered the opinion of the court:

The above defendant, having been convicted of aiding and abetting Peter J. Claassen, president of the Sixth National Bank, in embezzling the funds of that institution to a large amount, was, on the 26th day of June, 1891, sentenced to be imprisoned for a term of six years. Thereupon, by virtue of the recent Statute providing for appeals to the Circuit Court of the United States in criminal cases, the accused sued out a writ of error from the Supreme Court of the United States, and upon such writ obtained a supersedeas and stay of execution pending his appeal. Afterwards an order was made admitting him to bail in the sum of \$50,000, and now, on the 25th day of August, he presents for approval as his bail, pending his appeal to the Supreme Court of the United States, the following named persons: Cornelius H. Tallman and Jacob B. Tallman. The district attorney objects to the acceptance of the above persons as bail for the accused, upon the ground that it appears by an examination of the proposed bail that by an instrument in writing signed by the defendant, and also by Siegmund T. Meyer, Aaron Raymond, Kaufman Simon, and Helen E. Howell, the persons proposed as bail have been indemnified against any loss or damage by reason of their becoming bail for the accused in case he fails to appear to undergo his sentence in the event of his appeal being unsuccessful. The precise question thus presented is new in this court. It is said to have been decided elsewhere in accordance with the contention of the district attorney, but I have not been able to find the point adjudged in any reported case. Contracts indemnifying bail in criminal cases have, however, on more than one occasion, been before the courts, and by the courts they have been declared to be illegal and against public policy.

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relied on in *Reynolds v. Harral*, in support of the implied indemnity on the ground that it was based only on decisions with respect to indemnity in civil cases and that it is not true as to criminal cases.

In exact conflict with the main case is a Georgia decision in favor of the validity of a mortgage given to indemnify sureties to a recognizance. *Simpson v. Robert*, 35 Ga. 123.

In this case the court said: "That a principal should in case of default not indemnify his bail against the effects of his forfeiture has never been doubted by anybody, and no authority is offered to support the proposition." *Ibid.*

On the other hand, the case of *Herman v. Jeuchner*, L. R. 15 Q. B. Div. 561, supports the main case, although the bail there in question was for the good behavior of the principal and not for his appearance in court.

It has also been said, in deciding that bail should not be rejected on account of personal character or opinions, that the duty of a judge is strictly confined to ascertaining their pecuniary sufficiency. *Reg. v. Broome*, 18 L. T. 19; *Reg. v. Badger*, 4 Q. B. 468.

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561, was an action to recover back bail money deposited with the bail to indemnify the bail against loss by reason of having signed a bail bond for the good behavior of the plaintiff. The court refused to permit a recovery; and, speaking of the contract of indemnity, Brett, *M. R.*, says: "It is illegal, because it takes away the protection which the law affords for securing the good behavior of the plaintiff. When a man is ordered to find bail, and a surety becomes responsible for him, the surety is bound at his peril to see that his principal obeys the order of the court,—at least, this is the rule in the criminal law; but, if money to the amount for which the surety is bound is deposited with him as indemnity against any loss which he may sustain by reason of his principal's conduct, the surety has no interest in taking care that the condition of the recognizance is performed."

In *Jones v. Orchard*, 16 C. B. 614, Maule, *J.*, says: "The public has a right that the bail should be persons of ability and vigilance sufficient to secure the appearance, and prevent the absconding, of the delinquent."

In *United States v. Ryder*, 110 U. S. 729, 28 L. ed. 308, where it was held that the sureties on a recognizance given to the United States are not entitled on a forfeiture thereof, and, upon payment of the amount secured, to be subrogated to the rights and remedies of the United States against the principal, the doctrine that a contract to indemnify bail is contrary to public policy is approved by the Supreme Court of the United States; and it is said to permit sureties to be subrogated would be to aid the bail to get rid of their obligation; and to "relieve them of the motives to exert themselves in securing the appearance of the principal." In none of these cases was the precise question under consideration decided, but the reasons given for the decisions referred to are equally valid reasons for a decision in this case that persons indemnified by the accused ought not to be accepted as bail for the accused after conviction; for, if, as these cases hold, the contract to indemnify bail in a criminal case is against public policy, it follows as a matter of course that no court can be asked to approve and give effect to such a contract by accepting persons who propose themselves as bail in pursuance of such a contract. The cases that I have referred to seem to me, therefore, to furnish authority for a decision adverse to the approval of the sureties presented by the accused.

Upon principle, also, the approval of indemnified persons as bail in a case like this should not be granted. Were it not for Rule 36 of the Supreme Court of the United States, it might well be argued that no bail should be accepted from a person already convicted under sentence to be imprisoned for

a term of six years. But assuming, as must be assumed, that, by virtue of the rule referred to, the accused is entitled to be admitted to bail, it is nevertheless the duty of the court to exercise extreme caution, both as to the amount of the bail and the persons proposed as sureties, because of the extraordinary temptation to flee that will be presented to the accused in the event of his appeal proving unsuccessful, when flight alone will save him from incarceration in the penitentiary for a term of six years. Surely it would show a lack of caution to accept as bail, under such circumstances, persons who have taken from the accused a bond of indemnity, whereby, so far as within their power, they have relieved themselves from all responsibility for the accused. Bail, when accepted in criminal cases, become in law the custodians of the prisoner for the court. They have the right and are charged with the duty to arrest the prisoner in case he contemplates flight. The court looks to their vigilance to secure the attendance and prevent the absconding of the delinquent. The object of accepting them as bail is not to enable the prisoner to escape punishment by paying money to his bail, put to secure his appearance at the proper time, in order that he may receive punishment. When persons offering themselves as bail have entered into a contract of indemnity with the accused, they have endeavored to relieve themselves of responsibility for him. It is true that the contract of indemnity which they have secured will not be enforced by the courts, but nevertheless they have made themselves parties to such a contract, they stand before the court relying upon the performance of a contract of indemnity by the defendant, and by taking such a contract they have disclosed an intention to avoid, as far as in them lies, any pecuniary loss on their part, in case the accused should flee, and to deprive themselves of any motive for vigilance to prevent his flight. The possibility of flight by the defendant has been a subject of contemplation by them, and they have done all that they can do to enable him to flee without notice to them, and to relieve him from all sense of obligation towards them, to avoid making them responsible upon their recognizance. Not only have they contemplated the possibility of flight by the prisoner, but they have also contemplated a defense on their part to an action by them on the recognizance; for, while the amount of their proposed obligation as bail is \$50,000, they have taken a bond of indemnity, signed by the accused and by four other persons, each bound in the sum of \$50,000, which bond in terms provided for their costs and counsel fees.

It seems to me entirely plain that it is my duty to decline to accept a bail so situated in a case like this.

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VERMONT SUPREME COURT.

Aaron DROWN *et al.*

v.

John FORREST, Jr

(.....Vt.....)

1. Mere failure to prove damages sufficient in amount to give the court jurisdiction will not necessarily oust the jurisdiction where, as laid in the declaration, they are sufficiently large. To have that effect, plaintiff's good faith in laying his damages at so large an amount must be negated.
2. A contract by one selling his business, not to re-engage in the same business in the same town, is not discharged, as matter of law, by the mere fact that he subsequently forms a partnership with the purchaser in such business, so that, in case the partnership is dissolved, he will be at liberty to establish a business on his own account; even although the partnership agreement stipulated that if the parties could not agree, the property should be put up at auction between them and sold to the one bidding highest.
3. A fatal variance is not necessarily created where the complaint alleges that in consideration that plaintiff "would purchase," defendant's business, the latter "then and there promised" that he would not thereafter carry on the same business, and the writing introduced to prove the allegation states that defendant agreed in consideration of plaintiff's "having bought the business."

(August 1, 1891.)

EXCEPTIONS by defendant to rulings of the County Court for Orleans County, made during the trial of an action brought to recover damages for the alleged breach of a contract not to carry on a certain business in a certain town, which resulted in a verdict in favor of plaintiffs. *Judgment affirmed.*

The plaintiffs sought to recover for a breach of the following written instrument:

"Barton, June 19, 1876. In consideration of Aaron Drown and O. T. Willard having bought my blacksmith shop, I hereby agree that I will not hereafter practice or carry on the blacksmith shop, at South Barton as long as said Drown or Willard occupies or carry on that business at said So. Barton, except for my own use, or the mill which I now occupy; and for the fulfillment of the above agreement I bind myself to said Drown and Willard in the penal sum of \$400. John Forrest, Jr. Witness: J. C. Tibbetts."

When this instrument was offered upon the trial the defendant objected to its admission, upon the ground of a variance, for that the declaration alleged that the promise was made upon consideration that the plaintiff "would purchase," whereas the writing set forth that it was upon consideration of his "having bought."

Upon the trial of this cause, there was no evidence, either upon the part of plaintiff or defendant, tending to prove that the damage resulting from the alleged breach of said contract amounted to \$200, for which reason the defendant moved the court to dismiss said cause for want of jurisdiction. After the above contract was executed plaintiff and defendant entered into a co-partnership in this same business, by the terms of which the plaintiff sold the defendant a one-half interest. As a part of the articles of co-partnership, it was stipulated that if at any time the parties could not agree the property should be put up at auction between them, and sold to the one bidding the most. Some time afterwards the plaintiff bought out the defendant's interest in the partnership. The defendant claimed that the contract of partnership discharged the agreement sued upon.

Further facts appear in the opinion.
Mezra. F. W. Baldwin and W. W. Miles, for defendant:

The consideration alleged in the declaration was executory, while the consideration in the contract offered in evidence was executed. A slight material variation in setting out the consideration of a contract is fatal, because it does not appear that the promise given in evidence is that upon which the plaintiff has declared.

1 Chitty, Pl. pp. 298, 304, 384; 1 Greenl. Ev. 12th ed. pp. 78, par. 66, 68, note 6; *Birkley v. London*, 2 Conn. 404; *Curley v. Dean*, 4 Conn. 259, 10 Am. Dec. 140; *Russell v. South Britain Soc.* 9 Conn. 508; *Robertson v. Lynch*, 18 Johns. 451; *Ferguson v. Harwood*, 11 U. S. 7 Cranch, 408, 3 L. ed. 386.

In cases where, by the writ, the court *prima facie* might have jurisdiction, but it appears on trial, from the plaintiff's own showing, that his claim is not of sufficient amount to give the court jurisdiction, the court is to dismiss the action on motion.

Morrison v. Moore, 4 Vt. 284; *Putney v. Bellows*, 8 Vt. 272; *Brainard v. Austin*, 17 Vt. 650; *Kittredge v. Rollins*, 12 Vt. 541; *Joyal v. Barney*, 20 Vt. 154; *Miller v. Livingston*, 37 Vt. 467; *Weld v. Randall*, 51 Vt. 33.

When defendant bought back one half of said blacksmith shop and business and went into co-partnership with the plaintiff Drown in August, 1878, the contract in suit terminated.

McDaniels v. Robinson, 26 Vt. 316, 63 Am. Dec. 574; *Buffum v. Breed*, 116 Mass. 582.

Mr. O. H. Austin, for plaintiffs:

1. The consideration for the promise and undertaking of the defendant, was the engagement on the part of Drown and Willard to purchase his shop, and in both the declaration and the contract offered in proof, this element of the trade is stated, and the nature of the consideration alleged in the declaration agrees precisely with that specified in the contract; hence, on this ground, there is no material variance between the declaration and the contract as to this matter, the fair construction of the contract being, that the plaintiff would purchase provided the defendant would engage not to practice or

NOTE.—For contracts in partial restraint of trade or business, see *note to Herreshoff v. Boutineau* (R. I.) 8 L. R. A. 469.

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carry on the business mentioned for the limited time mentioned.

Gottlieb v. Leach, 40 Vt. 278.

The language used in the declaration is a fair statement of the consideration of the contract, and not misleading, and therefore the consideration might be alleged in pleading, either as an executed or executory consideration.

1 Chitty, Pl. § 208, note t; *Payne v. Wilson*, 7 Barn. & C. 423; *Kettle v. Harvey*, 21 Vt. 301; *Nash v. Towne*, 73 U. S. 5 Wall. 639, 18 L. ed. 527.

The variance is immaterial, if any exists, because the mode of expression used in the declaration does not change the nature of the contract, nor disclose any other cause of action than what would be indicated by a recital of the exact language of the contract in place of the language used.

Ferguson v. Harwood, 11 U. S. 7 Cranch, 408, 3 L. ed. 386.

In declaring upon a contract a party is not compelled to follow the precise form of words in which the contract was made; it is sufficient if the declaration states the true legal effect and operation of such a contract.

1 Chitty, Pl. § 305; *Maxfield v. Scott*, 17 Vt. 634; *Allen v. Lyman*, 27 Vt. 20; *Ammel v. Noonan*, 50 Vt. 402.

Variance means material difference and cannot be predicated on the description of a contract which, though defective and partial, is yet true so far as it goes.

Skinner v. Grout, 12 Vt. 456; *Everts v. Bostwick*, 4 Vt. 349; *Brackett v. Evans*, 1 Cush. 79.

II. A release or discharge of the contract is in issue under the circumstances of this case, and in all cases of a pre-existing contract affecting the same matter, can only be by an accord and satisfaction; and in order to establish such, it must appear affirmatively that a new agreement contemporaneous with the contract of copartnership was made, which was fully understood to discharge from all liability under the pre-existing contract.

Cutler v. Smith, 43 Vt. 577.

In case of a substituted contract or security there must be an agreement upon sufficient consideration, fully executed and understood to be a full satisfaction and settlement of a pre-existing contract or obligation and accepted as such.

Babcock v. Hawkins, 23 Vt. 561; *Flagg v. Mann*, 30 Vt. 573; *Cobb v. Cowdery*, 40 Vt. 25, 34 Am. Dec. 870; *Derby v. Johnson*, 21 Vt. 17.

III. In *Gale v. Bonyea*, 1 D. Chipman, 208, it is held that in actions for uncertain damages the finding of the jury can in no case out the county court of jurisdiction.

It is always a matter of discretion whether the court will dismiss an action sounding in damages when the *ad damnum* brings the case within the jurisdiction of the county court.

Learned v. Bellows, 8 Vt. 79; *Ladd v. Hill*, 4 Vt. 164; *Henry v. Tilson*, 17 Vt. 479; *Cooley v. Aiken*, 15 Vt. 328; *Manwell v. Friggs*, 17 Vt. 176; *Sanborn v. Crittenden*, 27 Vt. 171; *Joyal v. Bonney*, 20 Vt. 154.

When from the proof produced it appears that the damages are less than \$200, a motion to dismiss for want of jurisdiction is addressed 14 L. R. A.

to the discretion of the county court and is not revisable upon exceptions.

McGray v. Wheeler, 18 Vt. 502; *Clark v. Crosby*, 37 Vt. 183.

Rowell, J., delivered the opinion of the court:

As the declaration brings the case within the jurisdiction of the county court, the mere fact that the testimony did not was not decisive against jurisdiction. It was necessary to go further, and negative plaintiff's good faith in bringing the suit, by showing, at least, a probable consciousness on his part that he was not entitled to recover more than a justice could award. *Spafford v. Richardson*, 13 Vt. 224; *Joyal v. Barney*, 20 Vt. 154.

By the Roman law, a new contract between the original contracting parties only, that dissolved an existing contract, was regarded as a novation. But there was no novation unless the second contract contained something new, as, for instance, the addition or suppression of a condition, a term, or a surety, and was performed. Some of the ancient jurists were of the opinion that novation took place only when the second contract was entered into for the purpose of making the novation, and consequently doubts arose as to when such intention was to be supposed to exist, and different presumptions were laid down by those who treated the subject according to the different cases they had to settle. In consequence a constitution was published, in which it was clearly decided that novation should take place only when the contracting parties expressly declared that their object in making the new contract was to extinguish the old contract; otherwise the old contract remained in force, and the new contract was added to it, and each gave rise to an obligation still in force. Inst. lib. 3, title 29, pl. 3. But by the common law, if the parties to a contract make a new and an independent agreement concerning the same matter, and the terms of the latter are so inconsistent with those of the former that they cannot stand together, the latter may be construed to discharge the former. Benjamin, Cont. 114.

On August 19, 1879, Drown, having previously bought out Willard, sold to Forrest an undivided half of the blacksmith shop mentioned in the agreement sued upon, and they two then went into partnership in the business of blacksmithing therein, and carried on the business awhile, and then dissolved. There is nothing in the record, outside of the contracts of sale and of partnership, that shows whether it was or was not the intention of the parties that the contract sued upon should be discharged; but it is claimed that the new contracts discharged it as matter of law. But we do not think so. There is nothing in the new contracts inconsistent with the former contract, the purpose of which was to prevent Forrest from becoming a competitor, but by the new contracts he was not to become a competitor, but a coadjutor, and as the contracts could well stand together, and each remain in full force.

The declaration alleges that on June 19, 1876, plaintiffs bought defendant's blacksmith shop. It then goes on to allege that, in con-

sideration that plaintiffs "would purchase said shop as aforesaid," defendant then and there promised them that he would not thereafter engage in or carry on the business, etc., and that, relying on said promise, they purchased said shop. To prove the promise alleged, plaintiffs introduced in evidence a written agreement, dated the 19th of said June, signed by defendant, whereby he agreed, in consideration of plaintiffs' "having bought" his blacksmith shop, not to practice or carry on the business, etc. The defendant claims a variance, for that the consideration of the promise declared upon is executory, while that of the promise proved was executed. The declaration sets up, in the first place, and, as it were, by way of inducement, the sale of the shop at a time and place named; and, when afterwards it alleges that the defendant "then and there promised," the time of the promise is referable to the time of the sale, as there is no other time antecedently alleged to which it can refer; and so the declaration makes the promise a part of the contract of sale. The date of the promise proved is the same as the alleged date of the sale, and, although the words "having bought" indicate past time, they are not construed to mean that the sale was then a past and completed transaction, independent and disconnected from the within agreement, and so to import a past consideration, but to mean that the sale had then been made as one step in a transaction of which the making of the written agreement was another and a further step, this making it all one transaction, as the declaration does. This is the fair import of the record, and accords with the usual course of doing such business.

Judgment affirmed.

Peach THOMAS *et al*

v.
Rodney F. CARTER

(.....Vt.....)

1. The pendency of insolvency proceedings does not prevent bringing an action against the insolvent.
2. A joint deposit made by the sureties to secure their obligation as such is a joint fund without regard to the way in which it was made up so that on payment of the obligation therefrom their right of action against the principal may be joint.

(October 17, 1891.)

EXCEPTIONS by both plaintiffs and defendant to rulings of the Caledonia County Court made during the trial of an action brought to recover money which plaintiffs had been compelled to pay as sureties for defendant, which resulted in a judgment in favor of plaintiffs for a less amount than they claimed. *Judgment affirmed.*

The facts are stated in the opinion.

Mr. Alexander Dunnnett for plaintiffs.
Messrs. Bates & May, for defendant:

NOTE.—The authorities on the main question presented by the above case are so fully presented by the opinion and briefs of counsel that no further annotation is desirable.

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The plaintiff must show that the money used to pay the judgment was paid from a joint fund.

They claim that the amount deposited was a joint fund within the meaning of the law.

In this State the same doctrine applies as to parties, as does in case of suits between co-sureties.

Whipple v. Briggs, 28 Vt. 65.

When payment is made of a debt by sureties, from a joint fund, they may join in an action against a co-surety or principal.

Fletcher v. Jackson, 23 Vt. 581, 56 Am. Dec. 98; *Prescott v. Newell*, 39 Vt. 82.

This fund of \$1,250 is not a joint fund as laid down in the books; to make it joint something more is required than the mere deposit of money in the joint names of plaintiffs, and the agreement to make or lose together in the transaction.

The authorities in which the case shows how the joint fund came may be divided into two classes:

(1) Those by a joint judgment: *Fletcher v. Jackson*, *supra*; *Clapp v. Rice*, 15 Gray, 557, 77 Am. Dec. 387; *Hadwell v. Hancock*, 3 Gray, 526.

(2) Those by a joint note or joint credit: *Prescott v. Newell*, 39 Vt. 82; *Chandler v. Brainard*, 14 Pick. 245; *Doolittle v. Dwight*, 2 Met. 561; *Neale v. Newland*, 4 Ark. 506, 38 Am. Dec. 42; *Bunker v. Tufts*, 55 Me. 180; *Lombard v. Cobb*, 14 Me. 222; 1 Parsons, Cont. 34, 35; *Whipple v. Briggs*, 28 Vt. 65; *Doremus v. Selden*, 19 Johns. 218; *Osborne v. Harper*, 5 East, 225.

Gould v. Gould, 8 Cow. 168, 6 Wend. 203, disclosed that the money paid by co-sureties was partnership money, and it was held that the partners could not jointly sue their co-surety for contribution; that one partner taking the partnership funds to pay had thereby appropriated them *pro tanto* to his individual purposes.

Angus v. Robinson, 59 Vt. 585, 59 Am. Rep. 758; *Cartwright v. Gardner*, 5 Cush. 273; *Brewer v. Stone*, 11 Gray, 238.

A joint fund "is one that comes from some joint credit or action where each assumes toward the others a joint liability; where the fund is made up by some joint action; the mere deposit of money that each plaintiff had acquired upon his own credit—took out of his own pocket—in their joint names, does not make such a deposit a 'joint fund.'"

MUNSON, J., delivered the opinion of the court:

It is claimed that this judgment cannot be sustained because of the proceedings against the defendant in insolvency. This claim is not based upon the final adjudication, for the debtor did not obtain his discharge. It is not contended but that, if the suit had been pending at the time the petition was filed, it could have been kept alive until the question of discharge was settled, and judgment have then been taken. But the suit was brought after the filing of the petition, and it is insisted that from the filing of the petition until the failure to obtain a discharge the plaintiffs were not entitled to sue. The purpose of the Insolvent Law is to secure the equal distribution of the debtor's

estate among his creditors, and, if certain requirements of the law are met, to relieve the debtor from further liability. There is always the possibility that the debtor may be left liable for the debts not satisfied by his estate. In some instances the creditor may lose the benefit of this liability if the commencement of a suit be deferred until the right to take final judgment is established. The bringing of a suit during insolvency proceedings by a creditor who does not present his claim is nowhere expressly prohibited, and we see nothing in the general tenor of the law which indicates an intention to prohibit it. It seems to have been considered that nothing more was needed for the protection of the debtor than the obligation placed upon the court to stay suits upon application as long as the determination of the question of discharge is not unreasonably delayed. The language of the section which provides for a stay of suits is not inconsistent with its application to suits brought after petition. Rev. Laws, § 1797.

It is also claimed that the defendant is not liable to the plaintiffs jointly. The suit grows out of a contract of suretyship. The plaintiffs, with Jones and Hall, were sureties for the defendant on a note given to the Passumpsic Savings Bank. The bank brought suit on the note, and obtained judgment against all the signers. An execution taken out on this judgment was in part satisfied from the property of the defendant. The balance of the judgment was paid by the plaintiffs in the manner hereafter stated. Hall having been adjudged insolvent, his assignee paid the plaintiffs \$600; they agreeing to save the estate from further loss. At the time of this arrangement the plaintiffs entered into an agreement among themselves to share equally the profits or losses arising from their liability as sureties. Before it was known what amount would be needed, the plaintiffs placed in the bank to their joint credit a deposit of \$1,250, which was to be held by the bank as collateral security for the payment of such part of the judgment as might not be satisfied from the property of the principal. This deposit was made up of the \$600 received from Hall's assignee, \$230 furnished by the plaintiff Dunnett, and three sums of \$140 furnished severally by the other plaintiffs. The balance of the judgment was satisfied from the money so deposited, and this suit is brought to recover the amount paid.

It is well settled that if sureties pay the debt of their principal from a joint fund they have a joint action against him; but considerable difficulty has arisen in determining what shall be considered a joint fund, and it is insisted that the deposit from which this payment was made does not come within the rule established by the decisions. We are not aware of any case in which the fund presented the characteristics of the one in question; but a reference to some of the cases may aid us in giving to this fund a proper classification. In *Osborne v. Harper*, 5 East, 235, a judgment had been recovered against the plaintiffs jointly, and the case showed that this judgment had been paid by the plaintiffs' attorney at their request. During the argument the court expressed great doubt as to the right to a joint recovery. *Lora Ellenborough* finally said that, if the plaintiffs

had borrowed the money jointly of their attorney, it might be considered a joint payment by them, and so support a joint action, but that if each of the plaintiffs contributed his share of the money put into the attorney's hands the demand against the defendant would not be joint, and each must sue separately for his advancement. The attorney was then directed to make an affidavit stating in what manner the money paid by him had been obtained; whether he had paid it out of his own pocket upon the joint credit of the plaintiffs, making them jointly liable to him for the whole, or whether each of the plaintiffs had in the first instance contributed so much of his own money. The affidavit disclosed that the attorney had advanced a part of the money upon the joint credit of the plaintiffs, and had borrowed the remainder upon their joint note. It was thereupon held that this created a joint fund for the discharge of the execution, and that consequently the plaintiffs were entitled to maintain a joint action.

In *Lombard v. Cobb*, 14 Me. 222, the plaintiffs had become sureties for the defendant on a bond given by him to the town of which he was collector, and the town had afterwards taken the plaintiffs' note, and indorsed the amount of it on the bond. The plaintiffs had subsequently paid their note, but it was not shown by whom the amount was paid, nor from what fund. The court held that inasmuch as it did not appear whether the payment was made from a joint fund, or separately by each, nor that there was any partnership or joint interest, the presumption was that each fulfilled his duty by paying his own share. It was asserted in argument that the payment was in fact made out of a joint fund obtained by the plaintiffs' performing a joint contract for the support of the poor, and it was said that if this had been shown it would have been sufficient to enable them to maintain a joint action.

In *Pearson v. Parker*, 3 N. H. 366, the plaintiffs, being called upon to take up a note which they had signed as sureties for the defendant, paid a part of the demand with money obtained on their joint note, and satisfied the balance by giving their joint note. The court considered that this was payment from a common stock, and that the joint action was properly brought.

In *Doremus v. Selden*, 19 Johns. 213, which was a suit by indorsers against prior indorsers, the plaintiffs, although jointly liable on the note as partners, had paid it by giving their separate notes, and it was held that, as there was no community of interest in the money paid, a joint action could not be maintained.

In *Clapp v. Rice*, 15 Gray, 557, the holder of the note on which the plaintiffs and defendant's intestate were indorsers had recovered judgment against the plaintiffs, and issued execution thereon, and this execution had been satisfied in one payment made by the plaintiffs, each contributing an equal share of the part which it was for the defendant's intestate to pay. The court said: "We are of opinion that when three persons, each of whom is responsible for an entire sum due from another, join in making the payment of that sum by a contribution agreed on among themselves for that purpose, they may join in one action to

recover it from the person for whose benefit the payment has been made."

There are but few cases in this State in which the question has been considered. *Fletcher v. Jackson*, 23 Vt. 581, 56 Am. Dec. 98, was a bill to compel contribution. The bill set up that a judgment had been recovered against the orators, and that it had been paid by them. The opinion is referred to for a statement of the facts established by the testimony taken, but without stating the manner of payment the court says: "We entertain no doubt, upon the proofs in the case, that the plaintiffs paid the judgment against them jointly, and may well sustain this suit in their favor jointly."

Whipple v. Briggs, 28 Vt. 65, was a joint action by sureties against their principal. The plaintiffs had given their own notes to the holders of the paper on which they were sureties, and the notes so given had been taken as payment. This was considered to be clearly a payment from a joint fund. In *Prescott v. Newell*, 39 Vt. 82, the plaintiffs had made payments for their co-surety from their individual resources, but under an arrangement that they would stand together and share the burden equally; and it was held that as to these payments a joint action could not be maintained.

If the character of this fund is to be determined by the relation of the plaintiffs to it after the deposit was made, it must be considered a joint fund. It stood in their joint names, was held by the bank as collateral against them jointly, and could be disposed of by them only through a joint order. But if the origin of the fund is controlling, the situation is different. Leaving the \$600 out of consideration for the present, the remainder of the fund was made up of the several and unequal contributions of the plaintiffs. It was not a joint fund except as made so by the action of the plaintiffs among themselves. It was not the result of any joint liability assumed by the plaintiffs to some other person, nor the product of any undertaking in which they were jointly interested. It is evident that, upon the authority of many of the cases, this deposit could not be considered a joint fund, within the meaning of the rule.

The foundation of the suit is the implied promise of the principal to indemnify his sureties. The undertaking of the sureties is several and the promise of indemnity which the law raises at the time of the undertaking is therefore several. It was only with hesitation that sureties were permitted to sue jointly on the ground of joint payment. As late as the decisions in *Gould v. Gould*, 8 Cow. 168, and 6 Wend. 263, it was doubted whether sureties could so shape a payment as to give themselves a joint claim; and *Osborne v. Harper* was spoken of as a case decided upon its peculiar circumstances, and a doubtful precedent in 14 L. R. A.

cases not identical. But the rule which permits sureties to sue jointly when they have paid the claim by their joint note, or with money obtained upon their joint credit, is well established, and has been fully approved in this State. So much having been decided, we see no objection to going further. It is evident that the law as now settled permits sureties to so shape a payment as to give themselves a joint claim upon their principal. If these plaintiffs had provided the deposit by discounting their joint note, instead of making up the deposit from the money they severally had on hand, there would have been no question as to their right to maintain a joint action. The practical result of the doctrine is to make the liability of the principal several or joint at the option of the sureties; and so long as sureties can make their principal liable to them jointly by borrowing upon this joint note the money used in payment, we see no reason why they may not be permitted to accomplish the same end by making a joint deposit to meet the liability. The fund from which this payment was made having been joint in fact, we are not disposed to follow the authorities which would deprive it of that character by looking to the several payments of which it was made up. We hold that the payment from this deposit was such as to entitle the sureties to maintain a joint action.

A question is raised by the plaintiffs as to the amount they are entitled to recover. The transaction between Hall's assignee and the plaintiffs has been stated. The plaintiffs also received \$125 from their co-surety Jones, in his notes, which were afterwards paid to the plaintiff's use. There was no agreement between the plaintiffs and the parties making these payments that the payments should be applied on this indebtedness. Nothing further appears in regard to the matter. In entering judgment for the plaintiffs, the court below deducted from the amount paid by them the sums they had received as above stated. This is claimed to have been error. It is true that the plaintiffs have paid a certain amount to the holder of this note. But a part of this amount they have received from their co-sureties. The loss which the plaintiffs have sustained by reason of their liability for the defendant is measured by what they have paid above the sums so received. The obligation of the defendant is to recompense the plaintiffs for the loss they have actually suffered. That obligation is satisfied by the judgment rendered below. The sums excluded from that recovery, although not paid by Hall's assignee and Jones to the creditor, were properly paid by them on account of their suretyship liability, and are losses which the principal is holden to make good to them.

Judgment affirmed

MINNESOTA SUPREME COURT.

Lena LARSON, *Resp't.*,Charles A. CHASE, Impleaded, etc., *Appt.*

(.....Minn.....)

- *1. The right to the possession of a dead body** for the purposes of preservation and burial belongs, in the absence of any testamentary disposition, to the surviving husband or wife or next of kin, and the right of the surviving wife (if living with her husband at the time of his death), is paramount to that of the next of kin.
- *2. This right is one which the law recognizes and will protect,** and for any infraction of it,—such as an unlawful mutilation of the remains,—an action for damages will lie. In such an action a recovery may be had for injury to the feelings and mental suffering resulting directly and proximately from the wrongful act, although no actual pecuniary damage is alleged or proven.

(November 10, 1891.)

APPPEAL by defendant Chase from an order of the District Court for Hennepin County

*Head notes by MITCHELL, J.

NOTE.—Rights and duties in regard to the burial of the dead.

It is universally recognized that there is a duty owing either to society or decedent that the body of a deceased person shall be decently buried. *Pierce v. Swan Pt. Cemetery & M. Proprs.* 10 R. L. 238, 14 Am. Rep. 607; *Chapple v. Cooper*, 13 Mees. & W. 252; *Queen v. Stewart*, 12 Ad. & El. 778; *Gilbert v. Buzzard*, 2 Hagg. Consist. 333; *Patterson v. Patterson*, 59 N. Y. 533, 17 Am. Rep. 384.

This duty is imposed primarily on the executor where there is a testamentary disposition. 2 Bl. Com. 508; *Patterson v. Patterson*, *supra*; *Wynkoop v. Wynkoop*, 42 Pa. 301, 82 Am. Dec. 508; *Williams v. Williams*, L. R. 20 Ch. Div. 659.

The executor has the right to direct in what way the funeral is to be conducted and there is an obligation on him to pay the expenses. *Hewett v. Bronson*, 5 Daly, 7.

It seems that the executor in directing the form of the burial should obey the expressed reasonable wishes of the testator as to the disposition of his remains even though they are not in accord with the wishes of the next of kin. *Re Denison*, 31 Leg. Int. 196.

The estate of the decedent is bound in the hands of his executor for the payment of the expenses of the funeral, though there is some conflict in authority as to whether the estate is liable directly to the one furnishing the services or to the executor after he has settled the expenses. See *Hagood v. Houghton*, 10 Pick. 156; *Campfield v. Ely*, 18 N. J. L. 150; *Myer v. Cole*, 12 Johns. 349; *Dermott v. Field*, 7 Cow. 58; *Edwards v. Edwards*, 2 Crompt. & M. 612; *Moak's notes to Re Bettison*, 12 Eng. Rep. 658; *Re St. George in the East*, 18 Eng. Rep. 423.

The right and duty of the personal representative terminate with the burial. *Wynkoop v. Wynkoop*, 42 Pa. 301, 82 Am. Dec. 508.

Griffith v. Charlotte, C. & A. R. Co. 23 S. C. 25, 24 Am. Law Reg. N. S. 593, holds that the administrator has no such property in the body of his decedent as will enable him to recover damages for its mutilation through the negligence of a railroad company.

In the absence of a testamentary disposition the duty of burial is cast upon other persons depending 14 L. R. A.

overruling a demurrer to the complaint in an action brought to recover damages because of the alleged wrongful mutilation by defendants of the dead body of plaintiff's husband. *Affirmed.*

The facts are stated in the opinion.

Messrs. Bradish & Dunn and Babcock & Garrigues, for appellant;

Damages for the alleged trespass upon the body of the deceased husband, if any, should go, not to the surviving widow, but to the general estate of the deceased, which must pay the funeral expenses in preference to any other claim. "The administrator must bury the deceased in a manner suitable to the estate he leaves behind him."

Wms. Exrs. pp. 829, 1528; 2 Bl. Com. 508.

An administrator cannot maintain an action for damages for the mutilation of the body of his intestate, because when mutilated "the man was dead, suffered no pain, no mental anguish, incurred no doctor bills, lost no time, and because a corpse has no value and cannot therefore be injured or damaged."

Griffith v. Charlotte, C. & A. R. Co. 23 S. C. 25; *Bishop*, *Crim. Law*, § 780; 4 Bl. Com. 235;

largely upon the circumstances of the particular case. It may fall upon the administrator. *Wynkoop v. Wynkoop*, *supra*.

A parent must bury his deceased child. *Reg. v. Vann*, 2 Denison, *Crim. Cas.* 325.

In case the person is without property it seems that he must be buried by the one under whose roof he died. *Queen v. Stewart*, 12 Ad. & El. 778.

The husband must bury his wife. *Jenkins v. Tucker*, 1 H. Bl. 90; *Ambrose v. Kerrison*, 10 C. B. 776; *Chapple v. Cooper*, 13 Mees. & W. 252. See also *Sears v. Gladdy*, 41 Mich. 590.

Right to control disposition of body.

Controversies as to the disposition of the bodies of deceased persons are within the jurisdiction of equity. *Weld v. Walker*, 130 Mass. 423, 39 Am. Rep. 465; *Pierce v. Swan Pt. Cemetery & M. Proprs.* 10 R. L. 227, 14 Am. Rep. 607.

In conflicts between the husband and next of kin as to the disposition of the body of the deceased wife, it would seem that the duty imposed upon the husband to bury the remains carries with it the right to dictate as to the manner and place of their disposition, and so is the authority. *Durell v. Hayward*, 9 Gray, 248, 69 Am. Dec. 248; *Lakin v. Ames*, 10 Cush. 221; *Cunningham v. Reardon*, 98 Mass. 538, 96 Am. Dec. 670; *Cook v. Walley* (Colo.) Oct. 26, 1891; *Johnston v. Marinus*, 18 Abb. N. C. 72.

In an Ohio case reported in 4 Am. Law Times, 127, it was held that a husband might recover damages for the maltreating of the dead body of his wife by physicians to whom the body had been delivered for the purpose of dissecting and examining the throat. See also 4 Alb. L. J. 56; 3 Chicago, Legal News, 378.

In analogy to the right of a husband, some early cases hold that the wife has the duty and right of arranging the burial of her deceased husband, it being held that decent Christian burial of her husband is of such benefit to a widow that though an infant she is bound by her contract for the furnishing of it. *Chapple v. Cooper*, 13 Mees. & W. 252.

The doctrine that the next of kin have rights as to the disposition of the body of a decedent if not originating in, at least are given definite form by, the report of the referee in the Case of the

Wynkoop v. Wynkoop, 42 Pa. 300, 82 Am. Dec. 506; 2 East, P. C. 652; 12 Coke, 106, Frazier's note; *Guthrie v. Weaver*, 1 Mo. App. 136; *Snyder v. Snyder*, 60 How. Pr. 368; *Pierce v. Swan Pt. Cemetery & M. Propra.* 10 R. I. 227, 242, 14 Am. Rep. 667.

How, then, can a surviving widow maintain such action, who is not next of kin, is not charged with the burial or burial expenses, and has no right or control over the body of her deceased husband after burial?

16 Am. & Eng. Encyclop. Law, p. 704, and cases cited: *Wynkoop v. Wynkoop*, *supra*; Minn. Gen. Stat. chap. 46, § 3, subsecs. 9, 10, and § 7, chap. 51, § 3, subsecs. 1, 2.

To entitle one to bring an action for an injury to any specific object or thing, he must have a property therein absolute or qualified. If he has no such property, he can have no cause of action, however flagrant or reprehensible the act complained of may be.

Bishop, Non-cont. Law, § 22; *Griffith v. Charlotte, C. & A. R. Co. supra*; 1 Addison, Torts, § 10.

In the absence of physical injury, injury to feelings and sensibilities is not an element of damages.

Keys v. Minneapolis & St. L. R. Co. 36 Minn. 293; *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 313; *Stone v. Evans*, 32 Minn.

243; *Hyatt v. Adams*, 16 Mich. 180; *Johnson v. Wells, Fargo & Co.* 6 Nev. 224, 8 Am. Rep. 245; *Wyman v. Leavitt*, 71 Me. 237, 36 Am. Rep. 303; *Salina v. Trooper*, 27 Kan. 564; *Blake v. Midland R. Co.* 10 Eng. L. & Eq. 443; *Lynch v. Knight*, 9 H. L. Cas. 598; Sedgw. Dam. *37, and note; *Wood's Mayne*, Dam. 1st Am. ed. 74, note; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Rowell v. Western U. Tele. Co.* 75 Tex. 26.

For the law to furnish redress, there must be an act which under the circumstances is wrongful, and it must take effect upon the person, the property or some other legal interest of the party complaining. Neither one without the other is sufficient.

Bishop, Non-cont. Law, § 22; 1 Addison, Torts, § 10.

The wrongful act of defendants, admitting it to be such, did not take effect upon any property belonging to the plaintiff. A dead body is not property.

2 Bl. Com. 429; *Meagher v. Driscoll, supra*; *Weld v. Walker*, 130 Mass. 423, 39 Am. Rep. 465; *Snyder v. Snyder*, 60 How. Pr. 368; *Guthrie v. Weaver*, 1 Mo. App. 136, 141; *Pierce v. Swan Pt. Cemetery & M. Propra.* 10 R. I. 227, 242, 14 Am. Rep. 667.

Nor did the act take effect upon a legal interest. The only property or interest which

Widening of Beekman Street, which is reported in a note to 4 Bradf. 504, in which two of the conclusions are that the right to bury a corpse and to preserve its remains is a legal right which the courts of law will recognize and protect, and that such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin. This report was afterward adopted by the court. It has been bitterly opposed. One recent writer in 10 Central Law Journal, p. 304, asserts that it is an *obiter* opinion full of errors and opposed to the long line of decisions which hold that there is no property in a corpse. It has, however, received recognition by the courts.

Bogert v. Indianapolis, 13 Ind. 138, holds that the right of burial belongs to the surviving relatives in the order of inheritance, and it cannot be taken out of their hands if they are able and willing to perform the duty. And in *Renihan v. Wright*, 9 L. R. A. 614, 125 Ind. 536, the court says that the right to the custody of the corpse and the right to superintend its burial do not belong to the executor or administrator but next of kin.

The conclusion reached by the learned referee in the Beekman Street Case seems to have thrown doubt upon the question as to whether the widow or next of kin have preference in the disposition of the body of the deceased husband.

Authors of notes and articles in legal periodicals have taken opposite sides upon the question arguing for the most part from the same premises. Francis King Carey, in 19 Am. Law Rev. 263, concludes that the husband and wife are required by law, and have the right, to bury each other.

John F. Baker in 10 Albany Law Journal, 71, concludes (1) that the right to protect and bury a corpse is in the executor; (2) in the absence of testamentary disposition it devolves upon the widow, husband, or next of kin; . . . (6) during her lifetime the widow has control of the place of interment of her deceased husband and so the husband has control over the remains of his wife.

On the other hand, Mr. Moak, in a note to *Re Bettison*, 13 Eng. Rep. 658, concludes that upon principle, is a contest between the widow and the heir, 14 L. R. A.

the right to select and control the place of burial should belong to the heir, giving as his reasons that the heir might protect the remains from harm if they were buried upon his own land; while in case of the death of the widow the land upon which the burial took place would pass to strangers who would have no interest in protecting the remains, and that the heir could then afford no protection.

Of the recent cases *Secord v. Secor*, 31 Leg. Int. 268, and *Lester v. Lester*, referred to by Mr. Moak, in his note to *Re St. George in the East*, 18 Eng. Rep. 427, both decided by the New York Supreme Court, state that the right to control the burial of the husband rests with the widow.

From the report of the Special Term decision in *Secord v. Secor*, 18 Abb. N. C. 78, note, it appears, however, that the controversy arose after burial when of course considerations arise different from those existing before burial.

Wynkoop v. Wynkoop, 43 Pa. 301, 83 Am. Dec. 506, seems to recognize the superior right of the widow prior to the interment.

In *Snyder v. Snyder*, 60 How. Pr. 368, the court states that in the absence of a contention prior to burial as to the right between relatives to designate the place of burial the broad doctrine that it rests exclusively with the next of kin can hardly be considered as a judicial conclusion of the right of the widow, that in case of contention the question must be solved upon equitable grounds that to lay down the inflexible rule that the widow is to be preferred to the children must sometimes result in great harshness and outrage, and conclude that, under the circumstances of that case, the claim of the son should be preferred to that of the widow.

In States where the first right to administer upon the deceased husband's property rests with the widow, it would seem that under the authorities cited above she would have the right and duty to control the burial.

For a very full index to the text-books and magazine articles upon the subject of burial, see note by Mr. W. H. Winters, assistant librarian of the New York Law Institute, in 18 Abb. N. C. 75. H. P. F.

the law recognizes in the body of a deceased person, is the right of possession of the body by the next of kin for the purposes of burial only. That right it is not claimed by the plaintiff, has been interfered with by defendants.

5 Am. & Eng. Encyclop. Law, 115, and note.

The rule of *injuria sine damno* applies with full force to this case.

1 Sedgw. Dam. 40; *Hutchins v. Hutchins*, 7 Hill, 104; *Swan v. Tappan*, 5 Cush. 104; *Cook v. Cook*, 100 Mass. 194.

No value can be placed on mental pain and anxiety, and therefore courts will not attempt to redress such injuries.

Lynch v. Knight, 9 H. L. Cas. 577, 598; *Hutchins v. St. Paul M. & M. R. Co.* 44 Minn. 5; *Hyatt v. Adams*, 16 Mich. 197.

Messrs. Arcander & Arcander, for respondent:

As to whether or not there can be any property right in a dead body, and if there is such a right in whom it would rest, see article by Mr. Francis King Carey, on the Disposition of the Body after Death, found in 19 Am. Law Rev. 251; also article on the Ownership of a Corpse before Burial, by R. S. Guernsey, in 10 Cent. L. J. 803, 825.

The bodies of the dead belong to the surviving relations, in the order of inheritance, as property, and they have the right to dispose of them as such.

Bogert v. Indianapolis, 13 Ind. 184. See also *Pierce v. Swan Pt. Cemetery & M. Proprs.* 10 R. I. 227, 238, 14 Am. Rep. 667.

A surviving wife or husband has the right of burial, and in fact the duty of burial is thrown upon her or him, as the case may be, and where there is no expressed wish of the testator as to the disposition of the remains, the wishes of the surviving husband or widow will control against the next of kin even.

Durrell v. Hayward, 9 Gray, 248, 69 Am. Dec. 284; *Wynkoop v. Wynkoop*, 42 Pa. 203, 82 Am. Dec. 506; *Secord v. Secor*, 31 Leg. Int. 268; *Ambrose v. Kerrison*, 10 C. B. 776; *Chapple v. Cooper*, 13 Mees. & W. 259; *Jenkins v. Tucker*, 1 H. Bl. 91; 4 Am. Law Times, 127.

We take issue with the statement that injury to the feelings and mental anguish and distress will not support an action for damages independent of an actual bodily injury to the person and property.

5th article on Injury to the Feelings, in Thompson's Law of Electricity, pp. 369-389.

The Supreme Courts of Texas, Tennessee, Alabama, Indiana, North Carolina and Kentucky and several federal courts have recently held that damages may be given in an action against a telegraph company for the failure to transmit and deliver a telegram, where the only element of damages consists in injury to the feelings, and where there is no element of physical suffering or pecuniary loss.

Stuart v. Western U. Teleg. Co. 66 Tex. 580, 59 Am. Rep. 628; *Gulf C. & S. F. R. Co. v. Wilson*, 69 Tex. 739; *Western U. Teleg. Co. v. Cooper*, 71 Tex. 507; *Western U. Teleg. Co. v. Bruesche*, 72 Tex. 654; *Western U. Teleg. Co. v. Simpson*, 73 Tex. 423; *Western U. Teleg. Co. v. Adams*, 75 Tex. 531; *Wadsworth v. Western U. Teleg. Co.* 86 Tenn. 695; *Reese v.* 14 L. R. A.

Western U. Teleg. Co. 7 L. R. A. 583, 123 Ind. 294; *Beasley v. Western U. Teleg. Co.* 39 Fed. Rep. 181; *Western U. Teleg. Co. v. Henderson*, 87 Ala. 510; *Thompson v. Western U. Teleg. Co.* 106 N. C. 549; *Young v. Western U. Teleg. Co.* 107 N. C. 870; *Thompson v. Western U. Teleg. Co.* 107 N. C. 449; *Chapman v. Western U. Teleg. Co.* (Ky.) June 14, 1890.

Mitchell, J., delivered the opinion of the court:

This was an action for damages for the unlawful mutilation and dissection of the body of plaintiff's deceased husband. The complaint alleges that she was the person charged with the burial of the body, and entitled to the exclusive charge and control of the same. The only damages alleged are mental suffering and nervous shock. A demurrer to the complaint, as not stating a cause of action, was overruled, and the defendant appealed.

The contentions of defendant may be resolved into two propositions: *First*, That the widow has no legal interest in or right to the body of her deceased husband, so as to enable her to maintain an action for damages for its mutilation or disturbance; that if anyone can maintain such an action, it is the personal representative. *Second*, That a dead body is not property, and that mental anguish and injury to the feelings, independent of any actual tangible injury to person or property, constitute no ground of action. Time will not permit, and the occasion does not require, us to enter into any extended discussion of the history of the law, civil, common, or ecclesiastical, of burial and the disposition of the body after death. A quite full and interesting discussion of the subject will be found in the report of the referee (Hon. S. B. Ruggles) in *Re Beekman Street*, 4 Bradf. 503. See also *Pierce v. Swan Pt. Cemetery & M. Proprs.* 10 R. I. 227, 14 Am. Rep. 667; 19 Am. L. Rev. 251.

Upon the questions who has the right to the custody of a dead body for the purpose of burial, and what remedies such person has to protect that right, the English common-law authorities are not very helpful or particularly in point, for the reason that from a very early date in that country the ecclesiastical courts assumed exclusive jurisdiction of such matters. It is easy to see, therefore, why the common-law in its early stages refused to recognize the idea of property in a corpse, and treated it as belonging to no one unless it was the church. The repudiation of the ecclesiastical law and of ecclesiastical courts by the American colonies left the temporal courts the sole protector of the dead and of the living in their dead. Inclined to follow the precedents of the English common-law, these courts were at first slow to realize the changed condition of things, and the consequent necessity that they should take cognizance of these matters and administer remedies as in other analogous cases. This has been accomplished by a process of gradual development, and all courts now concur in holding that the right to the possession of a dead body for the purposes of decent burial belongs to those most intimately and closely connected with the deceased by domestic ties, and that this is a right which the law will recognize and protect. The general, if not univer-

sal, doctrine is that this right belongs to the surviving husband or wife or to the next of kin; and while there are few direct authorities upon the subject, yet we think the general tendency of the courts is to hold that, in the absence of any testamentary disposition, the right of the surviving wife (if living with her husband at the time of his death) is paramount to that of the next of kin. This is in accordance, not only with common custom and general sentiment, but also, as we think, with reason. The wife is certainly nearer in point of relationship and affection than any other person. She is the constant companion of her husband during life, bound to him by the closest ties of love, and should have the paramount right to render the last sacred services to his remains after death. But this right is in the nature of a sacred trust, in the performance of which all are interested who were allied to the deceased by the ties of family or friendship, and, if she should neglect or misuse it, of course the courts would have the power to regulate and control its exercise. We have no doubt, therefore, that the plaintiff had the legal right to the custody of the body of her husband for the purposes of preservation, preparation, and burial, and can maintain this action if maintainable at all.

The doctrine that a corpse is not property seems to have had its origin in the dictum of Lord Coke (3 Co. Inst. 203), where, in asserting the authority of the church, he says: "It is to be observed that in every sepulchre that hath a monument two things are to be considered, viz., the monument, and the sepulture or burial of the dead. The burial of the cadaver that is *caro data vermibus* [flesh given to worms] is *nullius in bonis*, and belongs to ecclesiastical cognizance; but as to the monument action is given, as hath been said, at the common law, for the defacing thereof." If the proposition that a dead body is not property rests on no better foundation than this etymology of the word "cadaver," its correctness would be more than doubtful. But while a portion of this dictum, severed from its context, has been repeatedly quoted as authority for the proposition, yet it will be observed that it is not asserted that no individual can have any legal interest in a corpse, but merely that the burial is *nullius in bonis*, which was legally true at common law at that time, as the whole matter of sepulture and custody of the body after burial was within the exclusive cognizance of the church and the ecclesiastical courts. But whatever may have been the rule in England under the ecclesiastical law, and while it may be true still that a dead body is not property in the common commercial sense of that term, yet in this country it is, so far as we know, universally held that those who are entitled to the possession and custody of it for purposes of decent burial have certain legal rights to and in it which the law recognizes and will protect. Indeed, the mere fact that a person has exclusive rights over a body for the purposes of burial leads necessarily to the conclusion that it is his property in the broadest and most general sense of that term, viz., something over which the law accords him exclusive control. But this whole subject is only obscured and confused by discussing the ques-

tion whether a corpse is property in the ordinary commercial sense, or whether it has any value as an article of traffic. The important fact is that the custodian of it has a legal right to its possession for the purposes of preservation and burial, and that any interference with that right by mutilating or otherwise disturbing the body is an actionable wrong. And we think it may be safely laid down as a general rule that an injury to any right recognized and protected by the common law will, if the direct and proximate consequence of an actionable wrong, be a subject for compensation.

It is also elementary that while the law as a general rule only gives compensation for actual injury, yet, whenever the breach of a contract or the invasion of a legal right is established, the law infers some damage, and, if no evidence is given of any particular amount of loss, it declares the right by awarding nominal damages. Every injury imports a damage. Hence the complaint stated a cause of action for at least nominal damages. We think it states more. There has been a great deal of misconception and confusion as to when, if ever, mental suffering, as a distinct element of damage, is a subject for compensation. This has frequently resulted from courts giving a wrong reason for a correct conclusion that in a given case no recovery could be had for mental suffering, placing it on the ground that mental suffering, as a distinct element of damage, is never a proper subject of compensation, when the correct ground was that the act complained of was not an infraction of any legal right, and hence not an actionable wrong at all, or else that the mental suffering was not the direct and proximate effect of the wrongful act. Council cites the leading case of *Lynch v. Knight*, 9 H. L. Cas. 577-598. We think he is laboring under the same misconception of the meaning of the language used in that case into which courts have not infrequently fallen. Taking the language in connection with the question actually before the court, that case is not authority for defendant's position. It is unquestionably the law, as claimed by appellant, that "for the law to furnish redress there must be an act which, under the circumstances, is wrongful; and it must take effect upon the person, the property, or some other legal interest, of the party complaining. Neither one without the other is sufficient." This is but another way of saying that no action for damages will lie for an act which, though wrongful, infringing no legal right of the plaintiff, although it may have caused him mental suffering. But, where the wrongful act constitutes an infringement on a legal right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act.

It was early settled that substantial damages might be recovered in a class of torts where the only injury suffered is mental,—as for example, an assault without physical contact. So, too, in actions for false imprisonment, where the plaintiff was not touched by the defendant, substantial damages have been recovered, though physically the plaintiff did not suffer any actual detriment. In an action for seduction substantial damages are allowed for mental sufferings, although there be no proof

of actual pecuniary damages other than the nominal damages which the law presumes. The same is true in actions for breach of promise of marriage. Wherever the act complained of constitutes a violation of some legal right of the plaintiff, which always, in contemplation of law, causes injury, he is entitled to recover all damages which are the proximate and natural consequence of the wrongful act. That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated is too plain to admit of argument. In *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759, where the defendant entered upon plaintiff's land, and dug up and removed the dead body of his child, it

was held that plaintiff might recover compensation for the mental anguish caused thereby. It is true that in that case the court takes occasion to repeat the old saying that a dead body is not property, and makes the gist of the action the trespass upon plaintiff's land; but it would be a reproach to the law if a plaintiff's right to recover for mental anguish resulting from the mutilation or other disturbance of the remains of his dead should be made to depend upon whether in committing the act the defendant also committed a technical trespass upon plaintiff's premises, while everybody's common sense would tell him that the real and substantial wrong was not the trespass on the land, but the indignity to the dead.

Order affirmed.

PENNSYLVANIA SUPREME COURT.

COMMONWEALTH OF PENNSYLVANIA

v.

John McMANUS, *Appt.*

(.....Pa.....)

1. **On a trial for murder in a quarrel about a woman who was in company with the prisoner and deceased** at or immediately previous to the killing, evidence that the prisoner an hour previous to the homicide had put a pistol to the woman's head is admissible on the question of motive, where the theory of the Commonwealth is that the motive was jealousy.
2. **An inaccuracy in an instruction on an immaterial point, and not prejudicial, is not ground for reversal.**
3. **Upon a trial for murder for shooting with a pistol upon a street corner, an instruction that to convict of murder in the first degree the jury must be satisfied that "premeditation and the deliberate intent were there not merely when the shot was fired but previously" is all the prisoner is entitled to ask, and a request that the jury must find "that the prisoner acted upon as clear and premeditated a motive as he who kills by poison or by lying in wait," is properly refused.**
4. **A prisoner has no right to have the jury instructed in any particular form of words under a statute requiring the court to answer his points fully. It is sufficient if the law applicable to his case is plainly, fully, and accurately stated in such form as the judge may choose.**
5. **A request to charge in a murder trial "that the jury are judges of the law as well as of the facts, and may, upon the whole case, determine the grade of the offense," is properly answered by charging that "the statement of the law by the court is the best evidence of the law within the jury's reach, and viewing it as evidence only the jury must be guided by what the court has said with reference to the law," under**

a constitutional provision that the jury in indictments for libels are to determine "the law and the facts as in other cases."

(June 5, 1891.)

A PPEAL by defendant from a judgment of the Court of Oyer and Terminer for Philadelphia County convicting him of the murder of Eugene McGinnis. *Affirmed.*

The points raised for the consideration of the court sufficiently appear in the opinion.

Messrs. James L. Stanton and Maxwell Stevenson for appellant.

Mr. George S. Graham for the Commonwealth.

Paxson, Ch. J., delivered the opinion of the court:

The first assignment of error is to the admission of the conduct of the prisoner and the woman Cross an hour before the murder. It was an undisputed fact that the prisoner, the same woman Cross, and the deceased were together when the killing took place, or immediately before, even if the woman did, as she testified, run away before the shot was actually fired. Both the prisoner and the woman, as well as some other witnesses, testified that the quarrel was about the woman, though the exact cause of it is differently related. The theory of the Commonwealth was that the killing was done from jealousy; and under these circumstances the conduct of the prisoner an hour previous, in putting a pistol to her head, had a bearing on his state of mind towards her, and therefore on the existence of the supposed motive for the killing. For such purpose it was clearly admissible.

The second and eighth assignments, inclusive, and the tenth, may be grouped together. They are minute criticisms on the language of the charge. Thus the second is based on the statement of the judge of the quantity of beer as two gallons, instead of two kettles,—an inaccuracy not material to the point of the case, and, so far as it had any bearing, not unfavorable to the prisoner. The evidence as to the history of the transaction

NOTE.—On the question of the right of a jury in a criminal case to determine the law as well as the facts the exhaustive discussion by Mitchell, J., in his concurring opinion makes further annotation superfluous.

was, as the learned judge said, at first harmonious, then divergent, and finally contradictory. "The jury, as has been often said, were bound to reconcile the discrepancies, if it could reasonably be done, and the judge aided them in the performance of that duty by a review of the evidence in general terms, and with substantial accuracy, making suggestions fairly warranted by the evidence, to show the jury how it might be reconciled in some parts, and the difficulty of doing so in others. Nothing but hypercriticism can find any error in this part of the charge.

The ninth assignment we understand to be abandoned. Even if correctly reported, the omission of the element of premeditation in the first general description of murder of the first degree was immediately cured by the full, explicit, and accurate definition given in connection with the facts of the case in hand.

The eleventh to the twenty-third assignments may be taken together and disposed of by saying that, so far as they were correct and pertinent statements of the law, they were affirmed in the charge. Points, even though taken *verbatim* from the decisions of this court, cannot always properly be answered by a simple affirmation. However accurately and carefully stated in their connection, and applied to the case under discussion, they may, when taken as detached sentences, and applied to different circumstances, convey erroneous ideas, especially to unlearned jurors. For example the prisoner's fourth point was that "before the jury in this case can convict of murder of the first degree they must find that the prisoner acted upon a clear and premeditated motive as he who kills by poison or by lying in wait." This is said to be taken from the language of this court, though the case is not given, which is a very unsatisfactory mode of citing authority. It may be there are cases in which this would be a correct statement of the law; but separated from its context, and applied to the present case of shooting at a street corner, and answered by a simple affirmation, it would be dangerously liable to convey to the jury the idea that a prolonged premeditation, such as is necessarily involved in killing by poison or lying in wait, was essential to the case they had in hand. The learned judge told the jury that the design and the resolve to kill must be formed before the shot was fired; that no specific time was requisite to make premeditation; the time might be short, but that shortness of time was an argument against premeditation; and that the jury must be satisfied from the evidence that premeditation and the deliberate intent were there not merely when the shot was fired, but were there previously. This was all the prisoner was entitled to ask. He had no right to dictate the language of the court. To convey the proper ideas to the jury, language often must vary with the circumstances of the particular case. Neither under the Act of the 31st of March, 1860, or otherwise, has the prisoner a right to have answers to his points in any set form. The Statute (section 58) provides that "it shall be the duty of the court to answer the same fully;" and this is 14 L. R. A.

the measure, not only of the court's duty, but the prisoner's right. If the law applicable to his case is plainly, fully, and accurately stated, he has no cause of complaint, though the judge choose to express it in his own words.

There remains only the twenty-fourth assignment,—that the judge erred in his answer to the point that "the jury are judges of the law as well as of the facts, and may, upon the whole case, determine the grade of the offense." The learned judge answered this point by saying that the jury had been sworn to decide the case on the law and the evidence; that the statement of the law by the court was the best evidence of the law within the jury's reach; and that therefore, in view of that evidence, and viewing it as evidence only, the jury was to be guided by what the court had said with reference to the law. This was an accurate and carefully considered answer to the point, and is entirely in harmony with *Kane v. Com.*, 89 Pa. 522. It left the jury to decide the whole case upon the law and the evidence,—not upon the law as distinct from the evidence,—and they were instructed as to what was the best evidence of the law. That is to say, in the language of the Constitution, they were to determine "the law and the facts as in other cases," under the advice and direction of the court. They were to look to the court for the best evidence of the law, just as they look to the witnesses for the best evidence of the facts. Thus interpreted and thus administered, this seeming paradox in our criminal law becomes intelligible. A judge who instructs a jury in a criminal case that they may disregard the law as laid down by the court errs as widely as the judge who gives them a binding instruction upon the law. It is the duty of the jury to take the best evidence of the law as it is to take the best evidence of the facts. When they refuse to do either, they disregard their duty and their oaths.

The judgment is affirmed, and it is ordered that the record be remitted to theoyer and terminer for the purpose of execution.

Mitchell, J., concurring (filed October 5, 1891):

I concur in affirming this judgment, and in the reasons given; but upon one point I would go further, and put an end, once for all, to a doctrine that I regard as unsound in every point of view,—historical, logical, or technical. The prisoner at the trial requested the judge to charge the jury that they were "judges of the law as well as of the facts." The learned judge, feeling himself bound by the language of *Kane v. Com.*, 89 Pa. 522, answered that the jury had been sworn to decide the case on the law and the evidence; that the statement of the law by the court was the best evidence of the law within the jury's reach; and that therefore, in view of that evidence, and viewing it as evidence only, the jury was to be guided by what the court had said with reference to the law. The point should, in my opinion, have been answered with an unqualified negative. The jury are not judges of the law in any case, civil or criminal. Neither at common law

nor under the Constitution of Pennsylvania is the determination of the law any part of their duty or their right. The notion is of modern growth, and arises undoubtedly from a perversion of the history and results of the celebrated contest over the right to return a general verdict, especially in cases of libel, which ended in Fox's Bill, 32 Geo. III. chap. 60. In the early days of jury trials, issues that went to the country were usually simple, and were probably submitted to the jury without much separation of law and fact by the judge, and in that sense juries decided the law. But the distinction between questions of law and fact, and the tribunals for their decision, respectively, lies at the foundation of juridical system, and there was no time when it did not exist. The rule, *ad questionem facti non respondent iudices, ad questionem juris non respondent juratores*, was an ancient maxim in the days of Coke (Co. Litt. 155a; *Altham's Case*, 8 Coke, 153a; *Donnan's Case*, 9 Coke, 13a); and Mr. Bigelow, treating of the class of cases raising questions of law or some question of fact properly belonging to the court to decide, quotes the case of *Archbishop of Canterbury v. Abbott of Battle Abbey*, 1 Rotul. 143, temp. Steph., which "turned upon a question of law, and was decided (without appointment of a trial term) just as a modern case of the kind would be decided, by a submission of the point of law in the question to the determination of the court, and not to some test imposed by the parties." History of Procedure in England during the Norman Period, by M. M. Bigelow, p. 286.

Nor was there any distinction, in respect to the merely incidental way in which juries passed upon matters of law, between civil and criminal cases. They might return a general or a special verdict in either, but they early sought to escape the obligation of giving a general verdict, because it subjected them to the risk of an attainr; and Coke says: "Some justices did rule over the recognitors to give a precise or direct verdict, without finding the special matter." 2 Inst. 422 To relieve juries from the burden the Statute of Westminster II., chap. 30, enacted, "*Quod iudicariis ad assisas curiendo assignati, non compellantur juratores dicere precise si sit delictina vel non, dummodo dicere voluerint veritatem facti et petere auxilium iustic*," and, commenting upon this section, Coke says: "In the end it hath been resolved that in all actions, real, personal, and mixed, and upon all issues joined, general or special, the jury might find the matter of fact pertinent, . . . and thereupon pray the discretion of the court for the law; and this the jurors might do at the common law, not only in cases between party and party whereof this act putteth an example of the assise, but also in pleas of the crown." 2 Inst. 425.

It is a striking illustration of the uniformity of human motives at all periods, that, while the attainr remained as a remedy for perversity or favoritism, the struggle of juries was to escape the obligation of general verdicts, and to maintain the right of special findings of fact; but, when the de-

cline and final disuse of the attainr rendered them practically irresponsible, the struggle was reversed, and juries asserted stoutly the right to give general verdicts, while the tendency of lawyers and judges was to confine them to special findings of fact, and to have the court pronounce the result as a matter of law. The period of transition was long, and changes slow. It was clearly and justly felt that juries as judges of the law, in any but an incidental way, were an anomaly in the system, and perhaps those who endeavored to do away with it claimed too much. Safety was thought to reside in the retention by juries of the right to give general verdicts. In view of the constant and notorious failure of justice in certain classes of cases, by the occasional perversity and the frequent cowardice of juries, it may be doubted whether it would not have produced better results to have enlarged the power of judges to compel special verdicts. But, however this may be, the right of juries to give general verdicts, especially in criminal cases, has been maintained, and the last contest made on it was in regard to libel. The exact line between law and fact, not always easy to draw, presented in the case of libel some special difficulties, technical and other. The alleged libel being in writing, its terms were not in dispute, and naturally fell to the court to pass upon, as other writings did; and the intent, libelous or otherwise, being claimed as a legal inference, there was nothing left in dispute but the fact of publication and the truth of the innuendo. Accordingly the juries in *Dean of St. Asaph's Case*, 3 T. R. 428, note, and *King v. Withers*, Id., were confined to these two points; and it was to counteract these rulings of Buller and Mansfield and Kenyon, (though it cannot be disputed that they were in accordance with long-settled practice,) and to secure, in libel as in other cases, the right of the jury to find a general verdict upon the whole matter in issue, that the Act of 32 Geo. III., chap. 60, was passed. The text of that famous statute is worth quoting to show how little foundation it affords for the superstructure that is sought to be built upon it. It is entitled "An Act to Remove Doubts Respecting the Functions of Juries in Cases of Libel," and its language is: "Whereas, doubts have arisen whether on the trial of an indictment . . . for the making or publishing any libel, where an issue is joined . . . on the plea of not guilty pleaded, it be competent to the jury impaneled to try the same to give their verdict upon the whole matter in issue, be it therefore declared . . . that, on every such trial, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information; and shall not be required or directed by the court or judge before whom such indictment or information shall be tried to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information: provided, always, that, on every such trial, the

court or judge before whom such indictment or information shall be tried shall, according to their or his discretion, give their or his opinion and directions to the jury on the matter in issue between the king and the defendant or defendants, in like manner as in other criminal cases: provided, also, that nothing herein contained shall extend, or be construed to extend, to prevent the jury from finding a special verdict, in their discretion, as in other criminal cases: provided, also, that in case the jury shall find the defendant or defendants guilty, it shall and may be lawful for the said defendant or defendants to move in arrest of judgment, on such ground and in such manner as by law he or they might have done before the passing of this Act, anything herein contained to the contrary notwithstanding."

Nothing could be clearer than the care with which this Act was directed to the exact point in controversy, the right to render a general verdict of guilty or not guilty upon the whole issue in case of libel, and the equal care with which the right of the court to pass finally upon the questions of law was preserved by the provisos that the judge should give the jury his "opinion and directions," and that a verdict should still not be conclusive of the law against a defendant, but he should have his right to an arrest of judgment, as theretofore enjoyed. The claim that juries were to be judges of the law was thus intentionally and carefully excluded. The Constitution of Pennsylvania was made in 1790, two years before Fox's Libel Act. The controversy was then at its height, and the subject commanded popular attention. In fact, Pennsylvania had borne rather a distinguished part in the discussion, and the speech of Andrew Hamilton in the trial of John Peter Zenger was regarded as the vindication of popular rights, and not only quoted as such by Erskine, but referred to, among other authorities, by Hargrave. Co. Litt. 155b. "No lawyer," says Mr. Binney, "can read that argument without perceiving that while it was a spirited and vigorous, though rather overbearing, harangue, which carried the jury away from the instruction of the court, and from the established law of both the colony and the mother country, he argued elaborately what was not law anywhere with the same confidence as he did the better points of his case. It is, however, worth remembering, and to his honor, that he was half a century before Mr. Erskine, and the declaratory act of Mr. Fox in asserting the right of the jury to give a general verdict in libel as much as in murder." Leaders of the Old Bar of Philadelphia, p. 15. The members of our convention of 1790 were familiar with the subject, and the minutes show that much care was given to framing the clause in the Declaration of Rights which refers to it. Section 7 of article 9, relating to liberty of the press, was originally reported to the convention by the committee to draft a proposed constitution, on December 21, 1789, in the following form: "That the printing presses shall be free to every person who undertakes to examine the proceeding of the Legislature, or any branch

of government, and no law shall ever be made restraining the right thereof. The free communication of thoughts and opinions is one of the most invaluable rights of men, and every citizen may freely speak, write, and print, being responsible for the abuse of that liberty." Proceedings of Convention, p. 163 (Harrisburg, 1825). This was reported from committee of the whole on February 5, 1790, in the same form, (dropping only the word "most" before the word "invaluable,") but with the addition: "But upon indictments for the publication of papers investigating the conduct of individuals in their public capacity, or of those applying or canvassing for office, the truth of the facts may be given in evidence in justification upon the general issue." Id. 174. On February 22d, this section being under consideration, Mr. Addison offered as a substitute for the sentence last quoted: "In prosecutions for libels, their truth or design may be given in evidence on the general issue, and their nature and tendency, whether proper for public information or only for private ridicule or malice, be determined by the jury." To this an amendment offered by Mr. McKean to add, "under the directions of the court, as in other cases," was adopted almost unanimously, the vote being 56 to 3, but the substitute itself received a bare majority, 32 to 27, the strong minority being in favor of restricting the truth as a justification to cases of publication upon the conduct of persons in their public capacity or of candidates for office. Id. 220-222. The convention, having ordered the proposed constitution to be published for the consideration of the citizens, adjourned on February 26th to the following August. On reconvening, the instrument was again taken up for discussion, section by section, and the minority made strenuous further efforts to restrict the justification to cases of public officers, at one time failing only by the close vote of 30 to 32. During the progress of the debate, an amendment offered by Mr. Lewis, and seconded by Mr. McKean, that "the jury shall have the same right to determine the law and the fact, under the direction of the court, as in other cases, was carried, and the clause finally adopted in the form: "In prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is necessary or proper for public information, the truth thereof may be given in evidence; and, in all indictments for libels, the jury shall have a right to determine the law and the facts, under the directions of the court, as in other cases." Id. 274, 279. It is impossible to read these various steps in the formulation of our fundamental law without seeing that there was never at any time the intention to make or to consider juries as in any sense judges of the law. No such possible construction seems to have been apprehended until suggested by McKean, and the practically unanimous vote on his motion to add, "under the direction of the court, as in other cases," shows the feeling of the convention on this subject. McKean was at that time one of

foremost personages of the Commonwealth, perhaps its best-trained lawyer. He studied in the Temple, and was familiar with the details of the legal controversy between Buller and Mansfield on the one side, Erskine on the other, before Fox took up as a matter of politics; and he knew, Lewis and Wilson and Ross and Sitgreaves, Addison and Findley and other leaders of the convention knew, that the contest was for any control by the jury as judges of law,—even Junius hardly ventured to his denunciations of Mansfield in that sense,—but for the right of applying the law to the facts, and pronouncing the result by a general verdict. And such was the understanding of the convention, as it was of parliament two years later, and such the natural meaning of the language on which they finally settled to express their purpose. It puts beyond question the right to return a general verdict, nothing more. To cut the sentence in two, and say the jury are “to determine the law,” is not only to pervert the meaning, to nullify the other command, that they “to determine ‘under the direction of the court.’” What they are to determine is “the law and the facts as in other cases;” that is, the law as given to them by the court, and facts as shown by the evidence. They are bound to take the law from the court, and so taking it, they have the right to apply it to the facts as they may find them proved, and to announce the result of the whole by a general verdict of guilty or guilty. Any other construction would totally at variance with the fundamental principles of our system of jurisprudence, with our settled and uncontested practice.

It had never been claimed that the jury are to determine what evidence is admissible or what witness competent, yet, if they are judges of the law, they should decide these often most important law points in every case. So as to the sufficiency of an indictment. Again the jury have a right to return a special verdict, even in a criminal case.

Dowman's Case, 9 Coke, 126; 2 Inst. Hargrave's note to Co. Litt. 155b. It is settled that they must decide the facts, and they are judges of the law, then it is their duty to decide it, and they cannot transfer that duty to the court. The prisoner might have his right that they should exercise all the full functions. But all the authorities to the contrary, and, if the finding of fact can be separated from the conclusion of law, the latter will be decided by the judges on their own views. “When a jury find the prisoner committed to their charge at large, and further conclude against law, the verdict is good, and the conclusion ill.” *Heydon's Case*, 4 Coke, 42b. “The office of twelve is no other than to inquire of matters in fact, and not to adjudge what the law is, but that is the office of the court, and not of the jury; and if they find the matter of fact, and further say that thereupon the law is so, where in truth the law is not so, the judges shall adjudge according to the matter of fact, and not according to the conclusion of the jury.” *Townsend's Case*, 1

Plowd. 114a. And see 2 Hale, P. C. 302; 1 Chitty, Crim. Law, 645.

Much misunderstanding has, in my judgment, been caused in this State by the case of *Kane v. Com.*, 89 Pa. 522. In that case the point was put to the court below that “the jury are the judges of the law and the facts,” and all that this court decided was that the point should have been affirmed. The language of *Chief Justice Sharswood* was, however, less guarded than was usual with that eminent jurist; and, following *State v. Oroteau*, 23 Vt. 14, 54 Am. Dec. 90, he dismisses the perfectly clear and substantial distinction between “power” and “right” with a brevity that is scarcely consistent with the weight of the subject. “The distinction between ‘power’ and ‘right,’” he says, “whatever may be its value in ethics, in law is very shadowy and unsubstantial. He who has legal power to do anything has the legal right. No court should give a binding instruction to a jury which they are powerless to enforce by granting a new trial if it should be disregarded.” It is somewhat remarkable that the chief justice should assume, as is so commonly done by counsel, that the jury will construe the law more favorably for the prisoner than the court would. It is only such a construction, too favorable to the prisoner, that the court is powerless to remedy by a new trial; and that lack of power arises, not because the jury's legal power is the same as a legal right, but because, for reasons of general policy, one verdict of acquittal is a final and irreversible termination of the case. If legal power means legal right, then the jury has a right to acquit any prisoner without regard to either law or evidence; for their power to do so is beyond question, and they cannot be held to any accountability, though they follow the maxim of lynch law,—that the murdered man deserved to die anyhow, and therefore his murderer should not be punished, even though he no longer seeks refuge behind the thin veil of transitory insanity that began when the shot was fired, and ended when it had killed its man. Whether the distinction between power and right be shadowy and unsubstantial in practice or not, it is clear and vital, and I must repudiate such a confusion of logical as well as moral ideas. A jury may disregard the evidence, but no judge has ever said it had the legal right to do so, and, if the disregard is of the weight of the evidence favorable to the prisoner, the court sets aside the verdict without hesitation; and even this court, though it does not pass upon the weight of evidence, does examine its sufficiency, and may on that ground reverse without a new venire. *Com. v. Fleming*, 130 Pa. 163; *Com. v. Knarr*, 135 Pa. 47; *Com. v. Philadelphia & R. R. Co.* 135 Pa. 256; *Com. v. Brown*, 138 Pa. 452; *Com. v. Ruddle*, 142 Pa. 144, are a few recent instances of the exercise of this power.

So the jury may disregard the law favorable to the prisoner. As was suggested by the learned judge at the trial of the case in hand, the jury had the legal power to find murder of the first degree, without regard to

the element of premeditation; but no judge would contend that they had the legal right to do so, and, if the evidence of premeditation was below the legal standard determined by the court as matter of law, not only would the trial court set aside the verdict, but this court would be bound to review the evidence, and determine if the legal elements of murder of the first degree existed in the case. Such powers and such duties in the courts are absolutely inconsistent with the right of the jury to be in any sense judges of the law.

This is not new doctrine, but the long-established law of the State. Alexander Addison was one of the staunchest asserters of the rights of juries in the constitutional convention, and was one of the minority of three who voted against McKean's amendment to insert the words, "under the direction of the court, as in other cases;" but when, three years later, he presided in theoyer and terminator of Washington County, he laid down the law in these precise and forcible terms: "Whether the facts are so or so, it lies with you to determine, according as you believe the testimony. Supposing them so or so, whether they amount to murder or manslaughter is a question of law for the court to determine. You may find according as you believe or disbelieve the facts; and, comparing the facts with the rules of law, that the prisoner is guilty or not guilty, [of murder,] or guilty of manslaughter; or you may find the facts specially, without drawing any conclusion of guilt or innocence, leaving it to the court to pronounce the construction which the law puts on the facts found; but you cannot, but at the peril of violation of duty, believing the facts, say that they are not what the law declares them to be, for this would be taking upon you to make the law, which is the province of the Legislature, or to construe the law, which is the province of the court." *Pennsylvania v. Bell*, Add. 160. And in *Sherry's Case*, and indictment for murder growing out of the riots of 1844, removed by certiorari from the quarter sessions of Philadelphia, and tried in the *non prius* in April, 1845, Justice Rogers charged the jury as follows: "You are, it is true, judges, in a criminal case, in one sense, of both law and fact; for your verdict, as in civil cases, must pass on law and fact together. If you acquit, you interpose a final bar to a second prosecution. . . .

The popular impression is that this power . . . arises from a right on the jury's part to decide the law, as well as the facts, according to their own sense of right. But it arises from no such thing. It rests upon a fundamental principle of the common law that no man can twice be put in jeopardy for the same offense. . . . It is important for you to keep this distinction in mind, remembering that, while you have the physical power by an acquittal to discharge a defendant from further prosecution, you have no moral power to do so against the law laid down by the court. The sanctity of your conclusions in case of an acquittal arises, not from any inherent dominion on your part over the law, but from the principle that no

man shall be twice put in jeopardy for the same offense,—a principle that attaches equal sanctity to an acquittal produced by a blunder of the clerk or an error of the attorney-general. . . . You will see from these considerations the great importance of the preservation, in criminal as well as in civil cases, of the maxim that the law belongs to the court, and the facts to the jury. My duty is therefore to charge you that, while you will in this case form your own judgment of the facts, you will receive the law as it is given to you by the court." Whart. Hom. Append. 721. To the same effect, though less explicitly developed, are the rulings by Sergeant, J., of this court, in *Com. v. Van Sickie*, Brightly, 73; and by Gibson, Ch. J., in *Com. v. Harman*, 4 Pa. 269. And this, also, seems to have been the later and better considered opinion of Judge Baldwin, whose charge in *United States v. Wilson*, Baldw. 99, is commonly quoted as authority on the other side. See his charge in *United States v. Shise*, Baldw. 512. I do not understand that the case of *Kane v. Com.* was intended to overrule or conflict with these decisions, and, notwithstanding the latitude of the language of the opinion, the real point decided did not go beyond the affirmation of the right to an instruction that "the jury are the judges of the law and the facts." In the present case it will be observed that the instruction asked was that the jury are "judges of the law as well as of the fact;" that is, of each, not merely of the joint result of both. For myself, I think even the formula that the jury are judges of the law and the facts objectionable, as tending to convey to the jury a wrong idea. The language of the Constitution is that the jury shall have the right to determine the law and the facts under the direction of the court. This is the accurate formula, and it means only that they have the right to determine the joint result of the law and the facts by a general verdict. This is the form which ought to be used when instruction on the subject is asked, and it ought to be accompanied by explicit instruction that the jury are not judges of the law, in all cases where there is any apparent danger that the jury will arrogate to themselves such function.

My conclusions on the general subject, therefore, are: (1) That the jury never were judges of the law in any case, civil or criminal, except incidentally, as involved in the mixed determination of law and fact by a general verdict. (2) Even if it could be conceded that they may have been so in primitive times, their right certainly ceased after the introduction of bills of exception and the granting of new trials, and admittedly has not existed in civil cases for centuries. (3) That there was not originally, nor is now, any distinction in this respect between civil and criminal cases, the true rule as to both being that "the immediate and direct right of deciding upon questions of law is intrusted to the judges; in a jury it is only incidental." Hargrave's note to Co. Litt. 155b.

The idea of a difference in the rights and functions of juries in civil and criminal cases, as to the determination of the law,

from a misconception of the controversy the right to give a general verdict, and an error for which there is no respectable English authority, and which the best criminal authorities have overwhelmingly approved. And, even if the jury had originally had such right in criminal cases it was anomalous, belonging to the period when juries were selected from the vicinage because of their knowledge of the case, and, its congener, has changed and disappeared, because totally inconsistent with the notions of courts and juries, as now understood, with sound reason, and with common sense. And such change, if change it be, has the sanction of the constitutional provision that the jury shall determine, "under the direction of the court," of the legislative provisions for bills of exception, the review of evidence in cases of murder, etc., of the long-settled and incontestable right of courts to decide questions of evidence, to set aside verdicts and grant new trials without limit, except when controlled by the ancient maxim of the common law, that in our constitutional Declaration of Rights, that no man shall be twice vexed for the same offense.

The whole subject is discussed with extensive learning and ability in *State v. Mun, 23 Vt. 14, 54 Am. Dec. 90.* The opinion of the court by Hall, J., is the only attempt that I have been able to find to support the dogma for which it is now responsible, and, with great respect to an eminent jurist, it appears to me that the whole argument is based on the confusion of the right to determine the law with the right to render a general verdict. A careful nation of all the authorities cited by me and they include everything which the learned and diligent research could discover shows that they only go so far as to support the right of the jury not to be judges of the law, but only to apply

it through a general verdict. The dissenting opinion of Bennett, J., in the same case, displays equal learning and sounder reasoning. It is a store-house of information on the subject, and has anticipated everything that can be said upon it. A masterly analysis and review by Chief Justice Shaw will also be found in *Com. v. Anthes, 5 Gray, 185.* There are less elaborate, but equally clear and forcible, statements of the argument by Story, J., in *United States v. Bullist, 2 Sumn. 240*; by B. R. Curtis, J., in *United States v. Morris, 1 Curt. 23, 49*; by Gilchrist, J., in *Pierce v. State, 13 N. H. 536*; and by Shaw, Ch. J., in *Com. v. Porter, 10 Met. 263.* See also *Montgomery v. State, 11 Ohio, 427*; *Montee v. Com. 3 J. J. Marsh. 149*; *Townsend v. State, 2 Blackf. 151*; but see *Armstrong v. State, 4 Blackf. 247*; *Pierson v. State, 12 Ala. 153*; *Hardy v. State, 7 Mo. 607*; *Nels v. State, 2 Tex. 280*; *Brown v. Com. 86 Va. 406*; a very able and compendious statement of the controversy in England while still raging, before the passage of the Libel Act, by Mr. Hargrave in his *note to Co. Litt. 155b*; an article by Chief Justice Wade, of Montana, in 3 *Crim. Law Mag. 484*; and one by the late Dr. Francis Wharton in 5 *South. Law Rev. (N. S.) 352*, (reprinted in 36 *Leg. Int. 405* and 1 *Crim. Law Mag. 47*); 7 *Dane, Abr. 381-383*; 2 *Law Rep. 187*; 15 *Law Rep. 1*; and *State v. Buckley, 40 Conn. 246.*

As already said, there is not a single respectable English authority for the doctrine in question, and against the foregoing solid phalanx of the best American judicial and professional opinion I have not been able to find a single well-considered case, except *State v. Croteau*, which, as already seen, was by a divided court. Under these circumstances, whether the doctrine be of much practical importance or not, I cannot help thinking it a matter of regret that any vestige of it should be left in Pennsylvania.

GEORGIA SUPREME COURT.

J. M. GRAY, *Plff. in Err.*,
v.
WESTERN UNION TELEGRAPH CO.
(.....Ga.....)

receiving a telegram for transmission, and accepting payment for the same, the company cannot defend an action for the statutory penalty incurred by failure to deliver the same with due promptness, on the ground that the contents of the telegram related to a sale of future goods and consequently to an illegal transaction.

(July 8, 1891.)

Appeal to the Superior Court for Houston County to review a judgment in favor of the defendant.

note by BLACKLEY, Ch. J.

-For notes on illegality of transaction as a sale of future goods see *Busch Brew. Assn. v. Mason, 1 L. R. A. 506*; *Jackson v. City Nat. Bank, 1 L. R. A. 657.*

A.,

defendant in an action brought to recover the statutory penalty for delay in delivering a telegram message. *Reversed.*

The facts are stated in the opinion.

Messrs. W. C. Winslow and Hardeman, Davis & Turner, for plaintiff in error:

Conceding that dealing in futures is against public policy, contracts therefor are illegal, and that therefore the contract between the plaintiff and vendee could not be enforced (*Augusta Nat. Bank v. Cunningham, 75 Ga. 866*; *Walters v. Comer, 79 Ga. 796*); the defendant could before transmitting the message, and while its contract was merely executory, have refused to go on and perform it, but after it executed the contract, by transmitting and delivering the telegram, it would be estopped from setting up its illegality to protect itself against rights acquired by plaintiff.

Parrott v. Baker, 82 Ga. 365.

The contract, however, between plaintiff and defendant was not illegal. Defendant could have recovered the charge for transmitting the

dispatch if it had not been prepaid, and it was therefore bound to transmit and deliver.

Western U. Teleg. Co. v. Blanchard, 68 Ga. 300, 45 Am. Rep. 480.

While the contract between plaintiff and defendant was legal, yet if plaintiff was compelled to invoke the illegal contract with the sendee, to have measured his damages, he could not have recovered because the contract for futures being illegal, no legal damages could grow out of it.

Cothran v. Western U. Teleg. Co. 83 Ga. 25.

But if plaintiff could establish his damages without invoking the illegal contract, though they grew out of the contract, he could recover.

Clarke v. Brown, 77 Ga. 606; *Ingram v. Mitchell*, 30 Ga. 547.

If this action be treated as in contract, plaintiff's damages are fixed by statute, and the illegal contract need not be invoked to measure the damages.

Plaintiff and defendant are not *in pari delicto*. The telegrams do not disclose on their face that they relate to dealings in cotton futures. Defendant knew nothing about the illegality of the contract between plaintiff and sendee at the time of transmitting the dispatches and was not intentionally aiding plaintiff in violating the public policy; it could not therefore set up plaintiff's illegal contract to excuse its negligence to plaintiff.

Reed v. Muscogee R. Co. 48 Ga. 102.

This is not an action for damages *ex contractu*, but to recover a penalty imposed by statute for the violation of a public duty and therefore in tort.

Western U. Teleg. Co. v. Taylor, 8 L. R. A. 189, 84 Ga. 408.

Messrs. Gustin, Guerry & Hall for defendant in error.

Bleckley, Ch. J., delivered the opinion of the court:

That the United States mail might lawfully carry either a sealed letter or an open circular from Ft. Valley to Macon, though the contents of the document related to the purchase and sale of futures, is certain. Equally certain is it that a common carrier between these points might innocently transport a passenger whose known business was to make a trip for the exclusive purpose of buying or selling futures, or might carry and deliver a bundle of stationery intended by the consignee for use in his business as a dealer in futures. In each of these cases the object sought to be subverted by the writer, the passenger, or the consignee would simply be irrelevant. To consider it would be to introduce moral distinctions not pertinent to the function which the mail or the carrier was designed to perform. In like manner, under the Statute on which the present action is founded the moral purpose of a telegram is immaterial, provided it is not designed to prompt or promote the commission of a crime or a tort. Telegraph companies, like common carriers, are voluntary servants of the general public. They exercise a public employment, and offer themselves for the transaction of business in behalf of every person who seeks to engage their skill and their special facilities for a peculiar class of work. Their relation

to the public imposes upon them the duty of undertaking as well as the duty of performing, and the violation of either duty is a misfeasance,—a tort. It is the equivalent, therefore, of an affirmative interference by a mere private person to hinder or obstruct communication. For one of these companies not to receive or not to transmit and deliver a dispatch when it ought to do so, is more than a refusal to contract, or than the breach of a contract; it is a wrong as pronounced as would be that of a person who should forcibly exclude another from the telegraph office, and prevent him from handing in a dispatch which he desired to lodge for transmission. In dealing with the wrong as such, the element of contract is not involved. Why should this Company not have transmitted and delivered the reply which the plaintiff sent to his correspondent in answer to a dispatch from the latter which the Company had brought to him by telegraph? The dispatch was: "Shall I draw for more bonus? Answer quick." The reply was: "If necessary, draw for more bonus." It is admitted that the subject of this correspondence was a transaction in futures,—a species of gambling of the worst description,—and it is on this ground that the failure of the Company is sought to be justified. But the statute which we are considering makes by its letter no exception. It declares that every company of this description "shall, during the usual office hours, receive dispatches, whether from other telegraphic lines or from individuals; and on payment or tender of the usual charge, according to the regulations of such company, shall transmit and deliver the same with impartiality and good faith, and with due diligence, under penalty of \$100," etc. Acts 1887, p. 111. In construing and administering the statute, what exceptions can the courts make by implication? Doubtless a dispatch, to be entitled to transmission, must be free from open indecency or profanity, and perhaps other vices of language might condemn it, but, supposing it to be proper in tone and expression, we should say that the Company would have no concern with its import unless it sought to subserve either crime or tort. If it disclosed either of these objects, it seems to us that the Company, for its own protection, might and should refuse to handle it. It would be unreasonable to suppose that the Legislature intended telegraph companies to aid in the perpetration of crimes or actionable wrongs, for this would be to constrain them to do by legislative mandate what they would have no right to do by their own choice. But, on the other hand, any dispatch which a company could lawfully transmit by its own choice the statute obliges it to transmit and deliver. The power of voluntary selection is denied, for every company is required to transmit and deliver "with impartiality and good faith." A dispatch cannot be rejected on account of its subject matter, unless by sending it the Company would or might subject itself or its servants either to indictment or a civil action. This is a rational test, and one that may fairly be presumed to coincide with legislative intention. If, before the statute was enacted, a telegraph company could at its own will serve one customer and decline to serve another, the dis-

ches of the two being exactly similar, this one no longer exists. All customers are now treated alike. If one can correspond by graph touching his speculations in futures, may do so. There can be no discrimination, favoritism. The company cannot waive liability for one, and stand on it against the other. Now, in this State, it is neither a tort nor a tort to speculate in futures. It is an immorality, and conflicts with public policy, but it is not indictable nor actionable. On the contrary, by a recent statute dealers are recognized and tolerated on condition of registering themselves and paying a fixed tax, 1888, p. 22. It was certainly the legal duty of the company to transmit and deliver a dispatch sent by the plaintiff if it had agreed to do so. It would have incurred no liability, subjected itself to no action or indictment. Moreover, it actually undertook to do so and received pay for the service; and it had actually transmitted and delivered the dispatch which this was a reply. Why serve one of parties and not the other? But we hold it was bound to serve both, for the reason the law leaves it free to serve them. Where there is such a statute as we are considering, it cannot be a matter of option to obey or disobey. On the contrary, unless some other statute forbids what the letter of the Statute commands, the latter must prevail. In adjudication upon a like statute, the Supreme Court of Indiana, in *Western U. Teleg. Co. v. Ferguson*, 1895, held that the company, when sued for a penalty incurred by failing and refusing to transmit a dispatch expressed in these terms: "I am four girls, on first train to Francis to attend fair,"—could not defend by setting up that the dispatch was ambiguous, and on account of certain extrinsic facts, the company had reasonable cause to believe and believe that the girls wanted were prostitutes to the fair. It seems to us this decision was correct. It did not appear that the company or its servants would be subject either to indictment or to suit if the girls called for had been sent and attended the fair. When a dispatch is ambiguous, the law would give the benefit of ambiguity to the company dealing with it civilly or criminally for transmitting the dispatch; and hence it would be the duty of the company, in deciding whether to transmit, to give the benefit of the doubt to the company. On no other rule would it be practical for telegraph companies to perform legitimate functions as servants of the public. They could not wait to question and investigate the motives of those who send ambiguous dispatches for transmission.

Indeed, in this State they are required by the same statute we are now discussing to forward dispatches written in cipher, and this enables the sender not only to conceal his motives partially, but to conceal them altogether. This may serve to suggest how little the company is concerned with unlawful or improper motives, unless they are plainly disclosed on the face of the dispatch. The cases of *Bryant v. Western U. Teleg. Co.* 17 Fed. Rep. 825, and *Smith v. Western U. Teleg. Co.* 84 Ky. 664, were not ruled upon any statute, but upon principles of general law.

Doubtless it is true that a telegraph company is not bound, even when it contracts to do so, to furnish to "bucket-shops" reports of the market prices of stock and provisions, nor to allow "tickers" for the purpose to remain in the offices of these immoral establishments. But were the supplying of market reports and "tickers" for all applicants, "with impartiality and good faith," enjoined by statute, a different question, and one more germane to the present case, might arise.

The Sunday messages adjudicated upon in some of the cases are also without relevancy, for the statute does not purport to prescribe duties except as to dispatches offered "during the usual office hours,"—meaning, of course, legal office hours. So far as we are aware, no decision of any court is to be found which holds it illegal for a telegraph company to receive and transmit messages relating to speculative transactions in futures, where that class of business has not been made penal by statute. That damages for the breach of a contract to correctly transmit a message of that nature cannot be measured by the results of such dealings was decided in *Cothran v. Western U. Teleg. Co.*, 83 Ga. 25, but there is no suggestion in that decision that the broken contract was unlawful. On the contrary, this language will be found in the opinion: "We think this standard cannot be invoked, for the reason that contracts relating to 'futures' are illegal; and we see not how an illegal contract can be called in to measure the damages sustained by reason of the breach of a legal contract." There may be strong reasons of public policy why legislation ought to prohibit all dealings in futures, and all communication by telegraph tending to foster or facilitate such dealings; but in the present state of the law, no matter how reluctant telegraph companies may be to transmit and deliver messages of this class, especially if their reluctance arises after they have accepted pay for doing it, they have no option but to perform the service or pay the penalty.

Judgment reversed.

Lumpkin, J., not presiding.

ED STATES CIRCUIT COURT, EASTERN DISTRICT OF NORTH CAROLINA.

Re A. SPAIN et al.

(47 Fed. Rep. 208.)

Persons engaged in showing samples

Peddlers and drummers as related to interstate commerce.

Excise tax on peddlers who carry goods and deliver them.

of goods manufactured by their principal at his residence in another State, and in taking orders for such goods, which are transmitted to the principal to be filled, cannot be compelled to pay a license tax by the State in

deliver them when they sell them is not unconstitutional as a regulation of interstate commerce if no discrimination is made against persons or property

which they are operating whether they are within its statutory definition of peddlers or not.

2. **Filling orders taken from house to house by an agent in another State** by sending the articles in bulk to the agent to be distributed by him does not subject the latter to the payment of a license tax as a peddler when he breaks the bulk and begins the distribution.

(July 3, 1891.)

APPPLICATION by A. Spain and W. G. McCune for a writ of habeas corpus to obtain release from imprisonment. *Prisoners discharged.*

The facts sufficiently appear in the opinion.

Bond, J., delivered the opinion of the court:

The above-named parties were employed by Gately & Conroy, manufacturers and dealers in agents' specialties, to sell their goods, which consisted of lamps, lamp shades, castors, lam-brequins, and every variety of household goods.

Gately & Conroy were citizens of West Virginia, and their manufactory was at Charleston in that State. The petitioners, in pursuit of their business, reached Raleigh, North Carolina, and proceeded to sell the goods of Gately & Conroy on the installment plan by samples. Their method was to carry their samples from door to door, and if they found anything they

exhibited was wanted by the householder, the householder or purchaser ordered it by written order direct from the manufacturers at Charleston, West Virginia. No sample in the hands of the petitioner was ever sold. When the purchaser's orders reached Charleston, the variety of household articles were all packed in one or more boxes, and were consigned to petitioners, to be by them delivered. Upon their delivery, the purchaser signed another contract with the manufacturers respecting future payments, which was forwarded to them at Charleston. The form of the order and agreement to pay on the installment plan is here inserted:

Date..... 189..	Place.....	Date..... 189..
Subscriber.....	This is to certify that I have	
Address.....	this day ordered from Gately	
Article.....	& Conroy, through their agent	
Price.....	One	
Delivered... 189..	To be delivered.....	
Amount paid.....	Signed	
Agent.....	Address	
	Occupation	

NOTE.—All canvassing required to be done by sample and above spaces filled.

Collect.....

No agreement recognized that is not contained in this contract.

For the sum of \$—, to be paid by me, the undersigned, Gately & Conroy have this day sold and delivered to me the following chattels:

..... I have paid on account of said purchase price, the sum of \$—, cash, and I am to pay the balance as follows: \$—

of other States. *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754; *Re Wilson* (D. C.) 12 L. R. A. 624; *State v. Emert*, 11 L. R. A. 219, 3 Inters. Com. Rep. 527, 103 Mo. 241; *Com. v. Gardner*, 7 L. R. A. 666, 133 Pa. 234.

But a sale by sample of goods not yet brought into the State and owned by a nonresident cannot be subjected to a state tax or license fee as that would constitute a regulation of interstate commerce. *Robbins v. Shelby County Taxing Dist.* 120 U. S. 490, 30 L. ed. 695; *Corson v. Maryland*, 120 U. S. 562, 30 L. ed. 699; *Asher v. Texas*, 2 Inters. Com. Rep. 241, 123 U. S. 130, 32 L. ed. 369, reversing *Ex parte Asher*, 23 Tex. App. 665; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, affg. *Re Hennick*, 7 Cent. Rep. 337, 5 Mackey, 489; *Ex parte Murray* (Ala.) 3 Inters. Com. Rep. 574; *McLaughlin v. South Bend*, 10 L. R. A. 357, 126 Ind. 471; *State v. Agee*, 33 Ala. 110; *State v. Bracco*, 103 N. C. 349; *Ft. Scott v. Pelton*, 39 Kan. 764; *Ex parte Stockton*, 38 Fed. Rep. 95; *Ferraris v. Kyle*, 19 Nev. 435; *Simmons Hardware Co. v. McGuire*, 39 La. Ann. 848.

An ordinance requiring a license tax from peddlers and declaring that all persons selling from house to house by retail from samples or otherwise shall be deemed peddlers is void as a regulation of commerce so far as it relates to sales by residents of other States. *Re Kimmel*, 3 Inters. Com. Rep. 114, 41 Fed. Rep. 775.

The same rule applies to the solicitation of orders for books not yet brought into the State and owned by a nonresident. *Re White*, 11 L. R. A. 284, 3 Inters. Com. Rep. 531, 43 Fed. Rep. 913; *Bloomington v. Bourland* (Ill.) May 11, 1891.

The same is true as to a canvasser for goods or books as an agent for a person doing business in another State, even though he has a branch office within the State to supply canvassers. *Re Nichols*, 48 Fed. Rep. 164.

But one bringing goods into a State for the purpose of peddling them is subject to a state statute requiring a license for peddling. *Blach v. Farley* (Ky.) 12 Ky. L. Rep. 912.

14 L. R. A.

A state tax on stove range agents selling goods which are within the State is not a regulation of interstate commerce. *Hynes v. Briggs*, 41 Fed. Rep. 468.

An occupation tax required from every person or firm who peddles clocks is not a regulation of commerce. *Ex parte Butin*, 28 Tex. App. 304.

But such a tax by a territory levied upon each peddler of watches, clocks or other wares not manufactured within the territory is unconstitutional as an attempted discrimination against manufactures of other States. *Rogers v. McCoy* (Dak.) May, 1890.

An ordinance imposing a tax upon traveling merchants vending merchandise other than the manufactures of the State is an unconstitutional regulation of interstate commerce. *Ex parte Thomas*, 71 Cal. 204.

A state statute requiring a license of a person peddling tea which is the growth of a foreign country is unconstitutional. *State v. Pratt*, 4 New Eng. Rep. 357, 50 Vt. 390.

A state tax on peddlers of sewing machines is not unconstitutional if it applies alike to those manufactured in the State and out of it. *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754; *Singer Mfg. Co. v. Wright*, 38 Fed. Rep. 121.

The same is true of a statute requiring a state license for "any agent traveling with one or more horses" to "sell any lightning rod, sewing machine or organ or other musical instrument." *State v. Richards*, 3 L. R. A. 705, 32 W. Va. 348.

But a discrimination between citizens of the State and citizens of other States as to the price of license is prohibited by U. S. Const., art. 4, § 2. *State v. Wiggin*, 1 L. R. A. 54, 64 N. H. 508.

A state statute requiring a license from every peddler or itinerant trader by sample or otherwise unless he is a disabled soldier of the State, is unconstitutional as a regulation of commerce. *Wrought Iron Range Co. v. Johnson*, 5 L. R. A. 273, 3 Inters. Com. Rep. 146, 34 Ga. 754.

B. A. R.

each and every—until the full amount is paid. To secure deferred payments, I hereby relinquish unto the said Gately & Conroy, all my right, title and ownership, in and to said chattels, to have and to hold the same until said indebtedness is paid; and in consideration that I will meet said payments promptly, and will safely keep said chattels and use the same with care at—, and that I will not remove the same therefrom, without their knowledge and consent first obtained, the said Gately & Conroy hereby permit me to hold said chattels for them, and to enjoy the use of the same, while in my possession, on the following conditions:

If I fail to promptly pay any one of said deferred payments when the same become due, or if I misuse said chattels, or remove, or attempt to remove, the same, or any part thereof, from said location, or in case of the seizure of the same by process of law, or in case the said Gately & Conroy have, in their opinion, good reason to fear for the safety of their interest in said chattels, the said Gately & Conroy are to have, and are hereby conceded the right, to take said chattels back into their possession, without previous demand and without legal writ, and for that purpose I hereby give them, or their agents, the authority to enter my premises without legal process, at any reasonable hour of the day, and carry said chattels away.

It is expressly understood, however, that if, for any of the foregoing reasons, said chattels are retaken by said Gately & Conroy, under the terms of this instrument, the said Gately & Conroy may repair and store the same at my expense, and may sell the same within a reasonable time at private sale or otherwise, in the regular course of business, and pay over to me, or my assigns, the proceeds of such sale remaining after first deducting therefrom all sums still owing by me on account of the above mentioned deferred payments, together with all reasonable charges and expenses attending the recovery, repair, storage and sale of said chattels (including court costs and attorney's fees).

Party's name in full.....

Home address:	Witness our hands and
No. Street.	seals this day of 189 .
Postoffice	Gately & Conroy. [Seal]
State,	[Seal]
Agent,	

There is no dispute about the facts. For conducting this business, the petitioners were arrested by the authorities of North Carolina, and being held in custody have petitioned to be released on habeas corpus, because their arrest and imprisonment are in violation of the Constitution of the United States.

The charge against the petitioners is that they violated chap. 216, § 24, of the Laws of North Carolina of 1889.

This chapter and section, so far as this case is concerned, is in the words following:

"Every person a citizen of the United States authorized to do business in this State, who, as principal or agent, peddles..... goods, wares or merchandise, shall pay a license tax as follows—"

14 L. R. A.

The tax prescribed, petitioners refused to pay.

The question then to be determined is whether or not this Act is in violation of the provision of the Constitution which gives to Congress the power to regulate commerce between the States.

In the case of *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 30 L. ed. 694, the supreme court has said in a most elaborate opinion by Justice Bradley, that the negotiation of sales of goods which are in another State for the purpose of introducing them into the State where the negotiation is made, is interstate commerce. The Carolina statute applies to every person a citizen of the United States, and makes no discrimination between the citizens of that State and those of the other States. But in the same opinion, the supreme court determines that this is of no consequence because interstate commerce cannot be taxed at all, whatever a State may choose to do in the way of taxing its own citizens engaged in trade.

We may conclude then, safely, that these petitioners, when engaged in showing the samples of goods manufactured by their principals in West Virginia, were engaged in interstate commerce, and that whether or not they came within North Carolina's statutory definition of peddlers, they could not be taxed by that State.

So far, the facts in this case coincide with those in *Robbins v. Shelby County Tax. Dist. supra*. There is a fact, however, in this case which it is argued distinguishes it from that. It is admitted here that while these petitioners, "drummers," as they are styled in the *Shelby County Taxing District Case*, were engaged in the sale of goods from the West Virginia factory, which were ordered by the purchaser directly from that State, nevertheless the whole of the articles sold, comprising every variety of small household stuff, was placed in a box or boxes, consigned in bulk to petitioners for distribution, and that when the box containing them was opened, the property became intermingled with the property of the State and was taxable, and the peddling of it liable to the tax prescribed.

We are of opinion that under the decisions of the supreme court, this property did not become taxable in North Carolina until it reached the purchaser. It is idle to say, as the supreme court does in the case quoted, that a nonresident may send drummers or persons to solicit sales in a sister State, but that the State may tax him for making delivery of the goods sold. If these goods, which petitioners sold in North Carolina, had been placed in charge of an express company, packed in boxes, with directions to open the box at the point of consignment and to deliver to the parties whose names were on a descriptive book, the several articles set down therein to them as purchasers, could the express company have been a peddler? The right to sell implies the obligation and right to deliver. It is as much interstate commerce to do one as the other.

We are of opinion that the arrest of these parties was illegal, for the reasons above given, and direct their discharge from custody.

PENNSYLVANIA SUPREME COURT.

CITY OF TITUSVILLE

v.

J. W. BRENNAN, Appt.

(.....Pa.....)

One soliciting orders for goods from house to house cannot refuse to comply with the terms of a police ordinance regulating such business, which applies to all alike, on the ground that he is engaged in interstate commerce, because he is working for a person domiciled in another State and simply exhibits samples and takes orders which are filled by another agent or by express.

(October 5, 1891.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Crawford County in favor of plaintiff in an action brought to recover a penalty for defendant's alleged violation of a city ordinance. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. Roger Sherman and Samuel Grumbine, for appellant:

The power of the State to regulate the sale within her limits of commodities injurious to public health, morals or peace, is recognized as existing, superior to the power of Congress to regulate commerce among the States; but the exercise of this power can begin only when the article sold ceases to be in the ownership of the citizen of another State.

Leisy v. Hardin, 185 U. S. 100-124, 34 L. ed. 128, 187; *Robbins v. Shelby County Tax. Dist.* 120 U. S. 497, 80 L. ed. 697.

The courts of Pennsylvania have not decided contrary to what is now the prevailing opinion as to the law.

Warren v. Geer, 9 Cent. Rep. 307, 117 Pa.

207; *Com. v. Gardner*, 7 L. R. A. 666, 183 Pa. 284.

This case is precisely like, but in some respects stronger than, *Robbins v. Shelby County Tax. Dist.* 120 U. S. 489, 80 L. ed. 694. See also *Rothermel v. Meyerle*, 9 L. R. A. 386, 3 Intera. Com. Rep. 815, 136 Pa. 250-256.

This was an indirect tax upon Mr. Shepard's business and property.

Wellton v. Missouri, 91 U. S. 275, 28 L. ed. 847; *Walling v. Michigan*, 116 U. S. 448, 29 L. ed. 691.

Mr. George A. Chase, for appellee:

The fee required to be paid by the ordinance is not a tax, but a license fee. It is not a tax upon either the business or property of Shepard & Co., but a condition precedent before the defendant Brennan shall pursue the occupation of canvasser, hawker, peddler or agent.

See *Cooley*, Taxn. 386; *Burroughs*, Taxn. § 79; *Cooley*, Const. Lim. 202, and *note*.

If it be a license fee or tax it cannot be a regulation of commerce.

License Tax Cases, 72 U. S. 5 Wall. 471, 18 L. ed. 500; *Osborne v. Mobile*, 83 U. S. 16 Wall. 479, 21 L. ed. 470; *Ward v. Maryland*, 79 U. S. 12 Wall. 418, 20 L. ed. 499. See *Boston v. Schaffer*, 9 Pick. 415; *Dillon*, Mun. Corp. 4th ed. § 857, *note* 3, and cases cited; *Tenney v. Lenz*, 16 Wis. 566.

Under a power to "license, tax, regulate, suppress and prohibit hawkers, peddlers, pawnbrokers," etc., a city may grant licenses imposing such conditions and burdens as it sees fit.

Laundry v. Chicago, 111 Ill. 291. See also *Warren v. Geer*, 9 Cent. Rep. 307, 117 Pa. 207; *Com. v. Gardner*, 7 L. R. A. 666, 183 Pa. 284.

Williams, J., delivered the opinion of the court:

There are two questions presented by this

NOTE.—Validity of ordinances regulating hawking and peddling.

A municipal corporation may regulate and license the business of peddling, but is not warranted in imposing a tax upon such business, especially when it discriminates against nonresidents. *Muhlenbrink v. Long Branch Comrs.* 42 N. J. L. 365, 36 Am. Rep. 518.

In *Kip v. Paterson*, 36 L. J. L. 206, under authority in the charter of the city to pass ordinances regulating its general police, an ordinance passed exacting a fee of five cents for each use of the public streets of Paterson, to sell hay, wood, or country produce, or other articles usually sold in open market, was held to be unreasonable as a regulation, and illegal, because it was a tax.

So in *New York v. Second Ave. R. Co.*, 32 N. Y. 261, the Court of Appeals of the State of New York held that an ordinance of the common council of New York, requiring a payment of \$50 annually for a license for every passenger car running in the city below 125th street was not a police regulation under the general powers of the city to make laws and ordinances for the good government of the city, but a tax upon the company for revenue purposes in derogation of its rights of property, and on that account unlawful and void. 14 L. R. A.

Authority under a charter to pass by-laws and ordinances to license, control, regulate, or prohibit a business or traffic within a municipality gives no power to impose a tax for revenue purposes. The powers are essentially different and distinct. They may be unitedly exercised, if such appears to be the legislative will, but between them there is no necessary or legal connection. *Essex County Freeholders v. Barber*, 7 N. J. L. 78.

In the case of *State v. Hoboken*, 41 N. J. L. 71, where this question received full consideration, and many authorities are collected, the prevailing opinion is in denial of the ability of municipal governments to use the power of licensing as a revenue measure, unless a legislative intent is manifested that such power may be used for that purpose. *Muhlenbrink v. Long Branch Comrs.* 42 N. J. L. 364, 36 Am. Rep. 518.

The fact that the license fee is payable into the treasury of the municipality, provided the fee be a reasonable fee, does not impress it with the character of a tax. *Johnson v. Philadelphia*, 60 Pa. 445.

All ordinances must be reasonable, and not inconsistent with the laws of the State. 3 Kyd, Corp. 104; *Dillon*, Mun. Corp. § 819; *Kip v. Paterson*, 36 N. J. L. 206; *Cooley*, Const. Lim. 200, 201.

F. S. R.

ord. The first is whether the court below is correct in finding as a fact that the defendant was a peddler. The other is whether, as a matter of law, the defendant is engaged in interstate commerce and is under the protection of the national government. If the defendant is a peddler, the law is settled in this State that it is not above the obligation to conform to the requirements of the laws of the State regulating business of peddling. The Legislature has denounced his business to be injurious in tendency, and has forbidden anyone to engage in it except under certain regulations intended to bring such person under the notice of the local authorities, and afford some little security for his good behavior. These regulations have been made in the exercise of the police power, to protect the public from fraud and violence, and they are constitutional and valid. *Com. v. Gardner*, 138 Pa. 284, 7 L. R. A. 666.

What is the defendant's business as gathered from the facts appearing in the case stated? certainly is not an importer, or a wholesaler supplying the trade in this State, from a place of supply beyond the state lines, in original or unbroken packages. He is not a "drum" or traveling agent acting as an intermediary between the importer or the wholesaler, and the local trade. Although he carries a few articles on his back or in his wagon he would hardly ask us to hold that he was engaged in interstate transportation. He comes into this State, according to the case stated, in order that he may here engage in the business of going from house to house to sell frames and pictures. He is a dealer who resides in another State. He has his customers in their own homes. To intrude upon the homes into which he intrudes himself he exhibits what he alleges to be a sample of the goods he is prepared to supply. The apparent difference between him and the ordinary pack peddler is that the peddler proposes the precise article he offers for sale, and offers it to the purchaser on the spot; while the defendant produces from his pack a sample, the customer buys on his assurance that the article will be like it, and the article is subsequently received by some itinerant, or by express, if it is ever lived at all. There is in each case the intrusive domiciliary visitation, the same aimless personal pursuit of a purchaser, the same practiced and persistent itinerant salesman, and the pressing his wares on the attention of one who neither need nor wish for them, but who is unable to resist the wiles or penetrate the deceptions practiced upon them. The business of both is, in general character, the same. Whether the difference in mode of delivery is sufficient to distinguish the one from the other is, in this case, a matter of no consequence whatever.

The ordinance under which this suit was brought is not directed against peddlers but against a particular method of making sales of goods. It forbids any person, whether a citizen of this or any other State, to engage in the business of canvassing or soliciting in the City of Titusville for orders for books, paintings, wares or merchandise of any kind, without first obtaining a license from the mayor for that purpose. It does not discriminate against citizens of other States, or goods grown or manufactured in other States. It does not wholly prohibit the exercise of any

trade or business. It regulates a particular business in such a manner as to bring those who engage in it under the notice, and so far as possible under the supervision, of the police authorities of the City. Whether the defendant is a peddler is therefore not the question to be settled. It is whether the defendant is engaged in the business described in the ordinance. If he is, and the agreed facts show clearly that he is, then he must obey it or show that it is not binding on him. We do not understand that he denies the power of the city to pass such an ordinance upon the authority of any of our own cases.

The case of *Warren v. Geer*, 117 Pa. 307, 9 Cent. Rep. 307, involved the validity of an ordinance drawn in almost the identical words found in this one. The court below held that the borough had not power to pass such an ordinance because it interfered with the exercise of a common right. This court held otherwise, and distinctly asserted the power of the borough to make and the duty of the courts to enforce, the ordinance. But it is urged that the United States courts have held another doctrine, and that we should put ourselves in harmony with the law as held by them. We recognize the duty to which our attention is thus called and shall discharge it with great pleasure wherever we find ourselves in conflict with the decisions of the Supreme Court of the United States upon this or any other subject. We are thus brought to consider the so-called "federal question,"—the question whether the man who sells ready-made clothing, pinch-neck jewelry, picture frames, or other articles, from house to house, by personal solicitation addressed to one whom he has brought to bay, in the privacy of his or her own home, is engaged in interstate commerce, and therefore superior to the police power of the States. We shall not undertake a definition of interstate commerce. It is perhaps too early to attempt it. But the Supreme Court of the United States has provided us with abundant authority upon the real question we have to consider, which is, whether the business of the defendant is subject to the police power? In *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989, that court laid down the broad proposition that "all rights are held subject to the police power of the State." In the course of a very satisfactory discussion of the subject by the learned justice delivering the opinion of the court, this language is employed: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and how difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizen, and to the preservation of good order and the public morals. The Legislature cannot by any contract divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex*. In *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, a law which did not regulate but absolutely prohibited the manufacture and sale of liquors in Kansas was sustained as a valid exercise of the police power. To the same effect is *Hoster v. Kansas*, 119 U. S. 201, 205, 28 L. ed. 629, 696. Equally conclusive upon this

point are the oleomargarine cases. This State forbade both the manufacture and sale of that commodity except under restrictions which were destructive to the business. We held the law valid as an exercise of the police power, and, on appeal, the Supreme Court of the United States affirmed the decision. The fact that the article, the manufacture and sale of which is regulated or prohibited, is made under the authority of letters patent granted by the United States does not prevent the exercise of the police power of the States.

In *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115, this question was raised, and it was held that letters patent confer no new or independent right of sale but secure an exclusive right in the discovery to the inventor or his representative. This right is incorporeal, but "the use of the tangible property that comes into existence by the application of the discovery is not beyond the control of State Legislature."

On the other hand, it was distinctly held in *Patterson v. Kentucky*, "that the right which the patentee or his assignee possesses in the property created by the application of a patented discovery must be enjoyed subject to the complete and salutary power, with which the States have never parted, of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few."

In *Webber v. Virginia*, 108 U. S. 844, 26 L. ed. 565, it was said by Justice Field, delivering the opinion of the court, that "the patent for a dynamite powder does not prevent the State from prescribing the conditions of its manufacture, storage, and sale so as to protect the community from the danger of explosion."

But while the existence of the police power is thus clearly recognized by the courts of the United States, it must be exercised by means of laws that are equal and uniform in their operation. It must not be made use of as a means for discriminating between citizens of the different States. If it is, it loses its police character and becomes an unconstitutional trade regulation. Thus the State of Missouri passed a law prohibiting the sale of goods grown or produced or manufactured outside of that State without a license. To sell the same goods grown, produced or manufactured within the State no license was required. This law was held to be void because it was designed to operate against the citizens of other States and in favor of the citizens of Missouri. *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347.

When the burden imposed is equal, without regard to citizenship, similar laws have been upheld. *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715.

If the defendant was an importer of frames there could be no doubt of his right to ship them in original bales or packages into the State and in that condition to sell them. There is just as little doubt of his right to ship into the State one frame, for there is no law of the State which prohibits his sale of a single frame.

What the law is aimed at is not the sale of frames at wholesale or at retail, but personal solicitation from house to house by canvassers, who, like peddlers, are here to-day and gone

to-morrow; whose flippant representations cannot be stopped, and whose frauds cannot be punished, unless they are brought under the notice and to some extent under the control of the local authorities. What trades need to be restricted and forbidden to all who have not obtained a license, is purely a legislative question. The sale of liquors, the keeping of a hotel, the running of a cab, the keeping of a lottery, the sale of lottery tickets, the practice of medicine, the manufacture of oleomargarine, peddling from house to house, and many other kinds of business have been the subject of regulation, restriction or prohibition by an exercise of the police power of the several States. Where the courts have interfered in such cases it has been, not to prevent the abuse of the police power; and to see that its hand was laid impartially, and without discrimination between States, on the evil to be corrected. Whether the solicitation from house to house by itinerant venders or canvassers is an evil to be suppressed, or reduced in its proportions by appropriate legislation is, under ordinary circumstances, as we have said, a legislative question. If it was for us to determine a glance at our own cases would determine it. The books are full of cases arising out of the efforts of those who have been defrauded, to recover their money to be relieved from their bonds, or notes given under the influence of a bold fraud, or wheedled out of them under pretense that they were signing a receipt, an order, a promise to act as agent, or the like. There is probably not a county in the Commonwealth into whose courts the victims of the frauds of traveling canvassers for Moris Multicaulis trees, patent churns, hay forks, washing-machines, self-hooking or self-unhooking whiffle-trees, and a hundred more equally worthless things, have not come by petition to open judgment, or by affidavit of defense to an action, seeking relief. It is the same story. A well-dressed, plausible stranger, with flattery and promise of enormous gains, induces some honest but inexperienced man to sign a paper promising to exhibit some worthless article left with him, to his neighbors or to pay for it at a small price, when he has sold it at a large one, or the like, and goes his way. Not long after some other stranger presents to the astonished victim his promissory note for one or two or five hundred dollars and demands payment. It next turns up in the hands of some note-shaver and then litigation begins. The loss to industrious, well meaning people by these practices reaches many thousands of dollars every year. It goes to support in idleness a class of swindlers who should be in prison. The subject is as fairly within the scope of police legislation as cheating by false pretenses, or larceny by a ballee. We should as soon expect the thief, who stole goods in one State to be sold in another, to be protected under the interstate commerce powers of the general government, as that the traveling cheats who live by drawing the blood of the hard-working but too confiding farmers and mechanica, should be so protected. It may be that the defendant is honest and sells a good frame for an honest price. There are, no doubt, some honest peddlers and canvassers, worthy men and women, who are needy and find this a convenient way

earn money. The trouble in such cases is that they are in a business that men and women are not honest employ as a means of inding; and that the business is therefore properly put under some regulations and restrictions that seem to them, and that in their eyes may really be, unnecessary and burdensome. If they choose to embark in the sale of long drink, or in the sale of goods as pedlers, or as canvassers, or of oleomargarine, they must take notice of the restrictions laid on the business they select and comply with them.

The judgment is affirmed.

STATE OF William W. LAW, a Minor.

APPEAL OF PHILADELPHIA FINANCE CO.

(.....Pa.....)

money placed in a bank by a trustee merely for safe keeping until an investment can be found, although at a small rate of interest and with a requirement of two weeks' notice for withdrawal, is, when treated by the bank as a deposit and so entered on its books, merely a deposit, and not a loan to the bank, and is not at the trustee's risk if he has used due care in selecting the bank.

(October 23, 1891.)

APPEAL by the Philadelphia Finance Company, surety upon the bond of Henry W.

Scott, former guardian of the estate of William W. Law, from a decree of the Orphan's Court for Philadelphia County, charging Scott with the amount of certain money lost by the failure of a bank. *Reversed.*

The facts sufficiently appear in the opinion. *Morra John Douglass Brown, Jr., Warren G. Griffith and J. Levering Jones*, for appellant:

A trustee is not liable for a loss resulting to the fund where he has shown ordinary capacity and care and good faith.

Neff's App. 57 Pa. 91, 96; *Palmer v. Jones*, 1 Vern. 144; *Knight v. Plymouth*, 3 Atk. 480, 1 Dickens, 120; *Pybus v. Smith*, 1 Ves. Jr. 193; *Rowth v. Howell*, 3 Ves. Jr. 563; *Osgood v. Franklin*, 2 Johns. Ch. 1, 1 L. ed. 275; *Thompson v. Brown*, 4 Johns. Ch. 619, 1 L. ed. 957; *Pim v. Downing*, 11 Serg. & R. 66; *Johnson's App.* 18 Serg. & R. 817; *Konigmacher v. Kimmel*, 1 Pa. 215; *Stem's App.* 5 Whart. 472; *Cathoun's Estate*, 6 Watts, 185; *Crist v. Brindle*, 2 Rawle, 123; *Eyster's App.* 16 Pa. 376; *Ves v. Emery*, 5 Ves. Jr. 144; *Keller's App.* 8 Pa. 288; *Witmer's App.* 87 Pa. 120-123.

The measure of diligence and care required of a trustee is precisely that which a man of ordinary prudence would practice in the case of his own estate. A reasonable degree of vigilance and the exercise of good faith is the standard of the trustee's duty.

Fahnestock's App. 104 Pa. 46, 52; *Feamire's Estate*, 134 Pa. 67, 85.

Undoubtedly there is an exception to the rule, and it is as well settled as the rule itself; a trustee who invests the funds belonging to

NOTE.—Liability of executor or trustee for loss of funds by failure of bank.

Some right to deposit trust funds in bank with accompanying freedom from liability for its loss is universally recognized.

In *Bairymple v. Gamble*, 10 Cent. Rep. 531, 68 Md. (), the court says that trust money should have been placed in the bank and charges the trustee with the amount of interest which he would have received if the funds had been so deposited.

In *Johnston's App.* (Pa.) 10 Cent. Rep. 60, the court recognizes the principle that it is always safer to have money in a solid bank than to attempt to keep it under the personal care of the trustee.

Although an executor has admitted assets he may sometimes discharge himself by showing that money was placed in his bankers' hands and lost through the failure of the bank. *Horsley v. Chalmer*, 2 Ves. Sr. 34.

In many cases where a man has lodged trust money with his banker he has been discharged although the money was lost. *Jones v. Lewis*, 2 Ves. 240.

Where a trustee has money in his hands which does not improperly omit to invest he is not liable for a loss occurring by failure of the bankers to whom he places it, where he has not mixed it with other moneys nor left it in the bankers' hands for an unreasonable time. *Wilks v. Groom*, 3 New. 584.

A special administrator must deposit the trust money in a solvent bank where it may be kept safely and paid promptly. *Baskin v. Baskin*, 4 New. 94.

If the deposit has been made from necessity or conformity to the common usage of mankind the trustee will not be responsible for the loss upon the failure of the bank. *Churchill v. Hobson*, 1 P. New. 243.

L. R. A.

Thus where the trustee took bills in the country of persons at that time in good credit in order to return funds to London, and the money was lost by the failure of such persons, the trustee was discharged. *Knight v. Plymouth*, 3 Atk. 480. This case has, however, been questioned to some extent, and in *Rowth v. Howell*, 3 Ves. Jr. 563, the Lord Chancellor cites it as a case where the trustee placed funds in the hands of a banker when he came to London to pass his accounts asserting his intention to draw for that money specifically and was relieved from liability for the loss of the money occasioned by the banker's failure.

So if the trustee appoints rents to be paid to a banker at that time in credit, and the banker afterwards fails, the trustee is not answerable. *Belchier v. Parsons*, 1 Amb. 230.

So where the trustee desiring to be discharged caused money received to be deposited with a banker until a new trustee should be appointed, he was not charged with loss of the money occasioned by the banker's failure. *Adams v. Claxton*, 6 Ves. Jr. 226.

Deposit awaiting investment.

Where trustees had contracted to purchase real estate and to raise the necessary funds, sold stocks and deposited the proceeds at the bankers when the purchase seemed to be near completion, they were not liable to make good the money although it was lost by the failure of the bankers. *France v. Woods*, 1 Tambl. 172.

So where a will gave legacies, some immediate and others to be paid to persons in succession, and directed all the trust moneys to be invested in public funds or in real securities, and the executors twelve months after the testator's death paid the immediate legacies and deposited the remainder of the trust funds in a neighboring bank pending an

the trust on personal security does so at his own risk.

The deposit of trust funds at interest is not in every case to be forbidden where the depositor requires that a reasonable notice is to be given before drawing.

A trustee should place uninvested trust funds on deposit in a bank of good reputation while seeking an investment for them.

Perry, Tr. § 443.

Messrs. Frank T. Lloyd and Preston K. Erdman, for appellee:

If this had been an ordinary deposit, subject to the check of the depositor from the day it was made, it is very probable the appellant would not have been liable. But it was not such a deposit.

Frankenfield's App. 103 Pa. 589; *Baer's App.* 4 L. R. A. 609, 127 Pa. 389.

The money could not be withdrawn except upon the giving of two weeks' notice, and for this, and the agreement to let it remain until he found an investment, the bank allowed him the unusual rate of 8 per cent, and so credited it on his book of deposit. The bank, according to accountant's testimony, allowed no interest on deposits at call.

On this condition of facts, the bank having failed three months after the making of the contract and the money being lost, the guardian was liable.

Frankenfield's App. and *Baer's App. supra.*

opportunity of investing it, and two months afterward the bank stopped payment, the trustees were held not liable. *Fenwick v. Clarke*, 51 L. J. Eq. N. S. 728.

But the amount lying in the bank at one time must not be too large. What amount is reasonable will depend largely on the circumstances of each case, and the needs of administration as well as the amount of the trust property will be considered in determining the question.

Thus, where the testator at his death had £3,000 in the hands of his banker which the executors left there drawing out from time to time such funds as they required, and nine months after the testator's death the bankers failed having at the time a balance of £2,000 in their hands, the court held that the executors were not liable for the loss although the master found that there were no purposes of the trust to render it necessary for the executors to retain the balance with the bankers, the court saying that the executors had a year in which to pay debts and they could not tell what the amount of such debts might be. *Johnson v. Newton*, 11 Haro, 168.

An executrix allowed £190 to remain at the bankers in her own name as executrix. A loss occurred by their bankruptcy a year after the testator's death. It was held that she was not liable since the amount was not an unreasonable one to keep on deposit nor was the time unreasonable. *Swinfen v. Swinfen*, 20 Beav. 211.

Executors had three years after the death of the testator £3,000 at their bankers. Upon the failure of the bank it was held that the executors were not justified in keeping a balance of more than £1,000 and the loss upon the excess above that sum must be borne by them. *Astbury v. Beasley*, 17 Week. Rep. 638.

So the deposit must not be allowed to remain an unreasonable time.

Hence where investments in mortgages were obtainable at any time and the trustees left the principal of the estate on deposit more than five months

Clark, J., delivered the opinion of the court:

This is an appeal by the Philadelphia Finance Company, surety upon the guardianship bond of Henry W. Scott, guardian of William W. Law, from the adjudication by the Orphans' Court of Philadelphia County, upon the account of said guardian. On the 29th January, 1890, Scott received \$3,839.12 of the money of his ward, and immediately deposited the same in the Bank of America. The accountant had kept his personal account as a depositor in the same institution for several years, and had been advised by an officer of the Finance Company, which latter Company was surety on his bond as guardian, that the Bank of America was entirely solvent and safe. The deposit was in a separate account, in the name of the guardian as such. No certificate was issued. The whole transaction was evidenced only by an entry of credit upon the books of the bank in usual form. The accountant was in search of an investment, and the deposit was only to remain until he could find one. The bank agreed to allow him 3 per cent interest, but he was to give two weeks' notice before withdrawing it. The bank failed on the 30th day of April following. At the time of the deposit the bank was in good repute, and there is no allegation of bad faith, or want of due care or diligence. The only question for our consideration is whether or not, under

they were held liable for losses occurring through the failure of the bank, though they were relieved as to current collections which had been placed to the same account. *Barney v. Saunders*, 57 U. S. 18 How. 535, 14 L. ed. 1047.

So where the trustees left £500 on deposit in bank while looking for a mortgage for fourteen months when the bank failed the court held that fourteen months was too long to leave money on deposit at a bank and held the trustees liable for the loss. *Cann v. Cann*, 61 L. T. N. S. 770, 33 Week. Rep. 40.

So where the trustees for upwards of a year after the testator's death allowed a considerable portion of the assets to lie unproductive in the hands of a banker, who failed, they were charged with the loss. *Moyle v. Moyle*, 2 Russ. & M. 710.

On the other hand, an administrator who had deposited trust moneys in a private bank on a separate account current, using ordinary prudence, was held not liable for the loss of the moneys through the failure of the bank although the moneys had been suffered to remain so deposited for three and a half years after the death of the testator. *Re Maroon's Estate*, 40 L. J. N. S. 557.

Continuing deposit made by testator.

The mere fact that an executor continues a deposit in a bank upon the same terms originally made by his decedent will not make him responsible for its loss by failure of the bank. *Hanbest's App.* 92 Pa. 482.

Where the executors deposited money belonging to the estate with the same persons whom testator had intrusted with his money in his lifetime they are not liable for a loss sustained by their bankruptcy, although they are not bankers. *Dorchester v. Eppingham*, 1 Taml. 279.

Where securities were at the testator's death in the hands of his banker and were left there by the executors until the banker sold them and made improper use of the proceeds and then failed, the executors were not charged with the loss. *Rowth v. Howell*, 3 Ves Jr. 565.

such circumstances, the trustee is responsible for the amount of the deposit. As a general rule, the measure of care and diligence required of a trustee is such as would be pursued by a man of ordinary prudence and skill in the management of his own estate. *Fulmerstock's App.* 104 Pa. 46. It is equally well settled, however, that a trustee who invests the funds belonging to a trust on personal security does so at his own risk. This is so well settled that a citation of authorities is unnecessary. Trustees are not bound to transact personally such business connected with the trust as, according to general usage, prudent persons, acting for themselves, would ordinarily transact through mercantile agents. Upon this principle it has been held that a trustee investing trust funds is justified in employing a broker to procure securities authorized by the trust, and in paying the purchase money to a broker if he follows the usual and regular course of business adopted by ordinary prudent men in making such investments. So, also, executors, trustees, or guardians will not be liable if, in the ordinary discharge of their duty, they deposit the assets temporarily in a bank, although the bank may fail; but the trustee must be careful to make the deposits in the name of the trust-estate, and not to his personal credit, and not to mix the trust funds with his own; otherwise he will be liable. *Com. v. McAlister*, 28 Pa. 486; *Rees v. Berrington*, 2 White & T. Lead. Cas. 983, 987.

Requisite character of deposit.

If the funds are deposited in the trustee's individual name and not as trustee, and with his own private funds, he becomes responsible for them if they are lost by the failure of the bank. *Re Stafford*, 11 Barb. 383.

And it is immaterial that he informed the officers at the time of making the deposit that the funds were held by him in trust. *Williams v. Williams*, 55 Wis. 300, 43 Am. Rep. 708.

A trustee can escape liability only by making the deposit in his principal's name or by so distinguishing it on the books of the bank as to indicate in some way the principal's money. *Naltner v. Dolan*, 5 West. Rep. 686, 108 Ind. 500.

The deposit must not be made in the name of the trustee individually. *Jenkins v. Walter*, 8 Gill & J. 218, 29 Am. Dec. 539; *Com. v. McAlister*, 28 Pa. 480.

And the tendency of some courts is to hold that it must be made in the name of the principal. *Norris v. Hero*, 23 La. Ann. 606; *Cartmell v. Allard*, 7 Bush. 482; *Robinson v. Ward*, 3 Car. & P. 69.

If the trustee place trust funds in the bank to his individual credit it is an appropriation of them to his individual use and he becomes liable for them upon failure of the bank; and this is so although he has no money of his own in deposit in the bank. *Summers v. Reynolds*, 95 N. C. 404.

If he deposits funds in his own name it cannot be said that he has not used them. *Peyton v. Smith*, 22 N. C. 342; *Rooke v. Hart*, 11 Ves. Jr. 60.

And the deposit must be made to the separate account of the trust. *Wren v. Kirton*, 11 Ves. Jr. 377; *Salp v. Hettrick*, 63 N. C. 329.

If the trustee mixes the trust moneys with his own or pays them into his own account he will be held liable in case of the banker's failure. *Massey v. Banner*, 1 Jac. & W. 241; *Mason v. Whitthorne*, 2 Coldw. 242; *Fletcher v. Walker*, 3 Madd. 73.

A trustee depositing money with the banker to his own individual account cannot relieve himself from liability by informing the *cestui que trust* of 14 L. R. A.

"If the subject of the trust be money, it may be deposited for temporary purposes in some responsible banking-house, but in such a manner that the *cestui que trust* may follow the fund into the hands of the bankers; and it is no objection that the bank allows interest on the deposits. . . . If the trustee put the money to his own credit, and not to the separate account of the trust-estate, or if he allow the drafts of another person to be honored, who draws upon the account and misapplies the money, the trustee will be personally liable for the consequences." *Lewin*, Tr. 417.

Banks of deposit are a recognized necessity in the commercial world. A trustee who would continuously keep for any considerable length of time a large sum of money about his person or in his house, rather than deposit it for safe-keeping in a solvent and reputable bank or trust company, where all the precautions may be exercised for its safety, might justly be regarded as derelict in duty. No one would be accredited with the exercise of common prudence who would keep his own money in this way; and a trustee, as we have said, is held generally for such care and diligence as an ordinarily prudent man would exercise in the conduct and management of his own business. "A trustee will not be liable for the failure of a bank in which trust funds have been deposited if he has suffered them to remain there only for a reasonable time;

the deposit without a correct specification of the particulars. *Massey v. Banner*, 1 Jac. & W. 241.

Thus where the trustees' agent and solicitor placed the trust money with his bankers to the credit of his general account, and informed the *cestui que trust* that the money was lying idle at the bankers' and the bankers afterwards failed, the trustees were held liable for the loss of the money on the ground that the payment to the bankers was not necessary to the winding up of the trust, and since the notice to the *cestui que trust* did not state that the money was placed to the general account of the agent, acquiescence on his part could not be implied. *Macdonnell v. Harding*, 7 Sim. 177.

The deposit must not be contrary to an order of court.

Where the trustee was relieved from his trusteeship and directed to pay the money over to a new trustee, but instead of obeying the order he kept the money with his own banker, who afterwards failed, he was held liable for the loss. *Lunham v. Bunnell*, 4 Jur. N. S. 3, 27 L. J. Eq. N. S. 179.

Where trustees were ordered to pay into court the amount of certain sums included in their account and which stood in their names in the bank, and they ultimately did so, partly out of money subsequently received, leaving in the bank a portion of the sum found due on the account, they were, upon failure of the bank, charged with the loss of the sums included in the account but not for sums subsequently paid in. *Wilkinson v. Bewick*, 4 Jur. N. S. 1010.

The trustee must not lose control of the funds.

If a receiver deposits trust moneys with the banker in such a way that he parts with the absolute control over the fund he will be liable if it is lost through the banker's failure. So held where the sum was deposited to the joint account of the receiver and his sureties under an arrangement by which all the drafts should be written by one of the sureties and signed by himself. *Salway v. Salway*, 2 Russ. & M. 215.

but if he allows it to lie there by way of investment he will be liable to make good the loss. But he must be careful to make the deposit in the name of the trust-estate, and not to his own credit, and not to mix the trust funds with his own; otherwise he will be liable." Bispham, Eq. 189; Perry, Tr. § 448. Of course, there is no duty to convert securities if, by the terms of the trust instrument, there is sufficient indication that the *cestui que trust* was intended to enjoy the interest, income, or dividends of the specific securities. Perry, Tr. 450; Hill, Trustees, 582; Bispham, Eq. 139.

Was this transaction with the Bank of America a deposit of the money, or was it a loan or investment of it? A deposit is where a sum of money is left with a banker for safe-keeping, subject to order, and payable, not in the specific money deposited, but in an equal sum. It may or may not bear interest, according to the agreement. While the relation between the depositor and his banker is that of debtor or creditor simply, the transaction cannot in any proper sense be regarded as a loan, unless the money is left, not for safe-keeping, but for a fixed period at interest, in which case the transaction assumes all the characteristics of a loan. The orphans' court decided this case upon the rulings of this court in *Frankenfield's App.* 102 Pa. 589; and *Baer's App.* 127 Pa. 360, 4 L. R. A. 609; but we think these cases are readily distinguishable from the case at bar. In *Frankenfield's Appeal*, supra, there was a loan by the trustee of \$2,000 of trust funds to the Franklin Savings Bank for three months, with interest at 6 per cent; thirty days' notice to be given of the trustee's intention to withdraw the deposits. The bank was in good repute, and there was no evidence of bad faith or want of care on the part of the trustee. Our Brother Green, in the opinion filed, said: "If it had been an ordinary deposit, subject to the check of the depositor from the day it was made, the appellant would probably not have been liable; but it was not a deposit, it was a loan upon merely personal security for a fixed period, at interest; and during that period the money, because of the loan, was entirely beyond the trustee's control. The 25th section of the Act of 13th June, 1896, expressly provides that such investments must be made under the direction of the court

of common pleas, and only exempts the trustee from liability when he pursues this course in good faith."

In *Baer's App.*, supra, the banker's certificate of deposit was substantially in the same form as in *Frankenfield's Appeal*, supra, excepting that there was no stipulation for notice of the withdrawal of the deposit. The transaction possessed all the qualities of a loan of money for a year at 4 per cent interest. It is of no consequence that the borrower is a bank, for a bank may borrow money. Parties engaged in the banking business, whether as individuals or as members of a partnership or of a corporation, may take a loan of money for a fixed period of time at interest, with like effect as persons engaged in other pursuits. The transaction may be termed a "time deposit," but it is none the less a loan, and subjects the lender to that degree of responsibility. In the present case the money was placed in the bank, not as an investment for any fixed period, but merely for safe-keeping, and at a small rate of interest, until a suitable investment could be found. This was the express understanding of both parties at the time. The transaction was entered upon the books of the bank as a deposit merely. It was treated as a temporary, provisional, or precautionary arrangement. No person would speak of this as an investment. An investment carries with it a greater or less degree of permanency, which does not characterize this transaction. It is true that two weeks' notice was to be given of the withdrawal of the deposit, but this was a reasonable provision, and not inconsistent with a bank deposit. Almost all savings institutions stipulate for notice of withdrawal with their depositors, and such a stipulation is for the benefit not only of the bank, but also of its depositors. The reasonableness of the time is a question in each case to be determined by the court. It is said the trustee thereby loses control of the money; but that is not the true test. The depositor always, in a certain sense, loses control of the money when he places it in a bank; for the bank may refuse payment of his checks, and, as he then has no claim upon the specific money, he stands upon the footing of a creditor merely. It is true, a trustee, as a general rule, is not allowed to part with the control of trust money; (*White v. Baugh*, 8 Clark & F.

If the deposit is made under an agreement to pay at a future time that will render the transaction a loan and make the administrator liable. *Baskin v. Baskin*, 4 Lans. 94.

So where the trustee placed money on deposit with a banker as an investment he was held liable for loss arising from the banker's failure. *Rehden v. Wesley*, 29 Beav. 213.

So where trustees deposited assets in the hands of their bankers on their notes carrying interest, no necessity having been shown for such deposit, the trustees were liable in case the bankers failed. *Darke v. Martyn*, 1 Beav. 525.

So where the trustee purchased exchequer bills and left them remaining undistinguished in the hands of brokers who in some respects acted as bankers, and who had absolute power of disposing of them, it was held improper action on the part of the trustee which would render him liable for loss occasioned by failure of the brokers. *Matthews v. Bries*, 6 Beav. 220.

But in *Re Hunt*, 2 New Eng. Rep. 94, 141 Mass. 515, 14 L. R. A.

the court held that trust funds might properly be invested in time certificates of deposit, and that in case of loss by failure of the bank the trustee would not be responsible in the absence of circumstances showing want of prudence in making such investment.

Loss caused by war.

In cases where money was deposited by trustees in banks just prior to the late civil war the trustees have been relieved from liability for its loss. *Crane v. Moses*, 18 S. C. 561; *Parsley v. Martin*, 77 Va. 373, 46 Am. Rep. 733.

In the latter case the court says that a bona fide deposit by the trustee in his individual name will protect him from responsibility for loss which ensues, not by form of deposit, but by the general destruction of the whole currency of the country; the court also make a point upon the fact that at no time was the money so deposited but that it could be shown to belong to the *cestui que trust*.

H. P. F.

44;) but he may do so by way of precaution against loss, by a deposit in a solvent and reputable bank. A deposit, as we have said, is a temporary disposition of money for safe-keeping; and it is upon this ground alone that the trustee is justified in depositing trust funds in bank, and it is upon the same ground that a deposit is distinguishable from an investment. We are of opinion, for the reasons stated, that the trustee was not properly chargeable with this loss.

The decree of the Orphans' Court is reversed and the record remitted in order that the account may be restated and a decree entered in accordance with this opinion; the appellee to pay the costs of this appeal.

COMMONWEALTH OF PENNSYLVANIA

NORTHERN ELECTRIC LIGHT & POWER CO., Appt.

(.....Pa.)

A company which produces electricity and sells it to customers for the generation of light, heat, or power, is not, a "manufacturing corporation" within the meaning of the Act of June 30, 1886, exempting the stock of such companies from taxation. The term includes only that class of productive industries which the Legislature by previous statutes had sought to encourage and bring within the State to employ capital and labor in the development of mineral wealth and the production of the staples of commerce.

NOTE.—Manufacture, what constitutes.

Making fish lines, ropes, etc., from raw material is a manufacture. *New Orleans v. Arthur*, 36 La. Ann. 83.

So is the making of cordage rope and twine. *Waterbury v. Atlas Cordage Co.* 43 La. Ann. 723.

Cutting ice on a pond and storing it in a building is not a manufacture so that machinery therein is not taxable as "employed in any branch of manufacture." *Hittinger v. Westford*, 135 Mass. 258. See also *infra*, *People v. Knickerbocker Ice Co.* 99 N. Y. 181.

A rice mill is property employed in manufacturing. *New Orleans v. Ernst*, 35 La. Ann. 746.

Manufactures.

An ice-cream confectioner is not a manufacturer within the meaning of a law exempting manufactures from taxation. *New Orleans v. Mannesier*, 33 La. Ann. 1075.

A cooper who makes barrels, hogsheads, etc., is a manufacturer entitled to the exemption from taxation given by La. Const., art. 207. *New Orleans v. Le Blanc*, 34 La. Ann. 596.

A book binder may have an exemption from execution on implements of his trade which are personally used by him although he is also a manufacturer, but the exemption will not extend to machinery used by him as a manufacturer merely. *Seely v. Gwillin*, 40 Conn. 108.

One engaged in cutting and making coats and pants out of jean cloth which has already been manufactured by another is not a manufacturer of textile fabrics so as to be entitled to the exemption provided by La. Const., art. 207. *Cohn v. Parker*, 41 La. Ann. 694.

14 L. R. A.

(October 5, 1891.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Dauphin County in favor of complainant in an action brought to compel the payment of a tax. *Affirmed.*

The facts are fully stated in the finding of the court below by SIMONTON, P. J., which was as follows:

1. Defendant is a Pennsylvania corporation, chartered under the provisions of the Corporation Act of 1874 (Pub. Laws, 73), and its several supplements, for the purpose, as stated in the application for a charter, of "carrying on the business of manufacturing, procuring, owning, and operating various and different kinds of apparatus and machinery used in producing light, heat, or power by electricity, and to establish, put up, and run circuits; to use electricity in lighting streets and buildings, or to furnish there for heat or power, and to construct, erect, or set up all kinds and character of machinery and supplies used directly or indirectly as a part or in connection with or incidental to an electric plant for the arc or incandescent light, and necessary for the establishment, maintaining, and running of such a plant." The business in which defendant is actually engaged is in furnishing light by electricity by the Thomson-Houston system only, to customers at an agreed price.

2. Defendant made a report for the year embraced in the settlement, as required by the Act of 1879, appraising its capital stock, upon which a dividend for a less amount than six per cent had been made during the tax year at \$100,000, and on January 31, 1888, the auditor

A pork packer who carries on a large establishment and cures all his own meats is a manufacturer under Ohio Rev. Stat., §2742, and not required to list raw or partly manufactured material for taxation. *Engle v. Sohn*, 41 Ohio St. 691, 62 Am. Rep. 103. See also *infra*, *Re Chandler*, 1 Low. 478.

Manufacturing companies.

A dry dock company whose main object is the building, raising, repairing and coppering of vessels is not a manufacturing company within the exemption from taxation of the New York Act of 1880, §3. *People v. New York Float*, D. D. Co. 92 N. Y. 487.

A corporation formed for collecting, storing and preserving ice, preparing it for market, transporting and selling it, is not a manufacturing corporation within the meaning of such a statute. *People v. Knickerbocker Ice Co.* 99 N. Y. 181.

An aqueduct corporation is not a manufacturing corporation so as to render its pipes shut-off, cocks and faucets within a certain town taxable there as machinery. *Dudley v. Jamaica Pond Aqueduct Co.* 100 Mass. 183.

The court distinguished this case from that of *Com. v. Lowell Gas Light Co.* 12 Allen, 75, saying that a gas company is strictly a manufacturing corporation.

A company engaged in manufacturing and supplying illuminating gas is a manufacturing corporation entitled to exemption from taxation, under N. Y. Laws 1880, chap. 542, §3. *Nassau Gas Light Co. v. Brooklyn*, 89 N. Y. 406.

A corporation for the supply of natural gas is not authorized by a statute authorizing corporations for carrying on "mechanical, mining, quarry-

general settled an account against it for tax on capital stock, in accordance with said report, amounting to \$300, under section 4 of the Act of 1879 (Pub. Laws, 114), and this is an appeal from said settlement.

8. The report, containing the appraisal, was made under protest, defendant claiming to be exempt from taxation, because it is, as it avers, a manufacturing corporation, and, therefore, within the terms of section 20 of the supplement to the Act of June 7, 1879, passed June 30, 1885, which repeals the Revenue Laws of this Commonwealth so far as they apply to manufacturing corporations. (Pub. Laws 1885, p. 104.)

4. Defendant claims, in its specifications of appeal, that a considerable portion of its capital stock is invested in, and represents, patent rights granted by the government of the United States, and that the portion of its stock so invested is not taxable. But no evidence was given on the trial to establish this allegation, or which tended to show that the value of any patent rights was included in the appraisal or that any capital investment in patent rights is taxed by the settlement appealed from. On the contrary, the proof showed, and we find as a fact, that the patent rights are worthless, and that the said settlement does not tax any capital so invested.

5. In addition to the foregoing facts we adopt the facts found in the opinion filed herewith in the case of *Com. v. United States Electric Light Co.*, 427, June Term, 1888, taken from the testimony of Prof. Henry Morton, as fully as if set out at length herein; this testimony being, by agreement of counsel, considered as taken in this case also.

For the reasons given in the opinion just

cited, which we adopt as if filed in this case, we find the following

CONCLUSIONS OF LAW.

First. Defendant is not a manufacturing corporation, and is not exempt from taxation on its capital stock by section 20 of the Act of June 30, 1885, but is subject to the tax on capital stock imposed by section 4 of the Act of June 7, 1879.

Second. The 4th section of the Act of June 7, 1879, is not unconstitutional because in conflict with section 1, of article 9, of the Constitution of Pennsylvania.

Third. Said section is not unconstitutional and void because in conflict with section 1, of article 14, of the Amendments to the Constitution of the United States.

Fourth. Defendant is not taxable upon so much of its capital stock as is invested in patent rights, and the appraisal made by the officers of defendant does not include any valuation upon said rights, nor is any capital invested in them taxed or intended to be by the judgment directed to be entered in this case.

Fifth. The Commonwealth is entitled to judgment as follows:

Tax at three mills on \$100,000,.....	\$300 00
Interest at 12 per cent, from April 27, 1888,.....	36 60
Attorney-general's commission,.....	15 00

Total,..... \$351 60

—For which amount judgment is directed to be entered against defendant if exceptions be not filed within the time limited by law.

The following are the findings and opinion above referred to:

ing, or manufacturing business." *Emerson v. Com.* 106 Pa. 111.

Exemption of "machinery in manufactories," from taxation does not extend to pipes, lamp-posts, and meters of a gas company. *Covington Gas Light Co. v. Covington*, 84 Ky. 94.

A mining company is not a manufacturing corporation within the meaning of a statute relating to the liabilities of officers and stockholders of manufacturing corporations. *Byers v. Franklin Coal Co. of Lykens Valley*, 106 Mass. 131.

Cutting saw-logs for the owners and driving them to the place of manufacture is not a business covered by a statute as to wages due from the owners, etc., of "any works, mines, manufactory or other business where clerks, miners or mechanics are employed." *Pardee's App.* 100 Pa. 406.

But one who prepares for market and sells lumber which is the growth of his own land is a manufacturer within the meaning of the Bankrupt Act as amended by the Act of July 14, 1870. *Re Chandler*, 1 Low. 478.

Newspapers and publishers.

A company printing and publishing a newspaper is not a manufacturer, but one doing the business of job printing, engraving, electrotyping and lithographing is. *Evening Journal Assn. v. State Board of Assessors*, 47 N. J. L. 36.

And a company incorporated for the purpose of printing and publishing books, and general job printing, and publishing a newspaper is not a manufacturing company with respect to its business of printing and publishing a newspaper, but is as to the other part of its business. *Press Printing Co. v. State Board of Assessors*, 51 N. J. L. 75. 14 L. R. A.

Newspaper publishers are exempt from license tax under La. Const., art. 203, which expressly exempts not only manufacturers but "editors" and "agencies for publication" without expressly mentioning publishers of either newspapers or books. *State v. Dupre*, 42 La. Ann. 561.

A publisher of a weekly newspaper is not a manufacturer within the meaning of the Bankrupt Act. *Re Capital Pub. Co.* 18 Nat. Bankr. Reg. 319.

But publishers of a daily paper who are proprietors of a book and job printing office are manufacturers within the meaning of that Act and it is an act of bankruptcy to allow their commercial paper to go to protest no matter whether it was given by them as publishers of either paper or as manufacturers of books, etc. *Re Kenyon*, 9 Nat. Bankr. Reg. 266.

Manufactured articles.

India rubber made into shapes suitable for use, as shoes, by simply dipping moulds or lasts into the milky liquid is "manufactured" within the meaning of the Tariff Act although it is sometimes melted for importation for other use. *Lawrence v. Allen*, 48 U. S. 7 How. 795, 13 L. ed. 914.

Wool is not dutiable as a manufactured article under U. S. Rev. Stat., § 2516. *Frazee v. Frazee*, 30 Blatchf. 237.

Wool tops prepared for spinning and broken up into small fragments do not constitute a "manufacture" within the meaning of the Tariff Act. *United States v. Patton*, 46 Fed. Rep. 461.

Animal charcoal or bone black made by burning or pulverizing bone is "manufacture of bone" under the Internal Revenue Act. *Schrieffer v. Wood*, 5 Blatchf. 215.

1. Defendant is a Pennsylvania corporation, chartered under the provisions of the Corporation Act of 1874 (Pub. Laws, 73), and its several supplements, and is engaged, in Philadelphia, in the business of furnishing light to customers by electricity through the medium of the arc electric lamp, for which the customers pay a fixed rate per day. The manner in which the light is produced is stated as follows, in his testimony, by Prof. Henry Morton, president of the Stevens Institute of Technology, Hoboken, New Jersey, an expert in electricity and electric science of very great experience: "The coal is burned in a furnace under a steam boiler; the steam is used in a steam engine to produce motion—produce power, as we call it, and the power is used to rotate the armature in a certain relation with what we call the magnetic field. Now, when the armature turns around in the presence of the magnetism of the magnetic field, currents are produced in the wires of which the armature consists, and those currents are carried along the wire, and affect the lamps when they reach them. And it is by that means that the electric force, or electricity, or electric power is generated; and generated, you see, in consequence of the operation of those instrumentalities, the source being the coal burned under the boiler, and the result being those various transformations by which we finally reach the current which passes into the lamp, and is then again transformed into light."

"The electricity, which furnishes the light, does not exist until the armature revolves. The revolution of the armature brings into being something that did not exist before—that is, this electric energy, or energy in this electric form. When the motion begins in most machines it begins by development from a

minute quantity. From that minute and insignificant quantity the revolution of the apparatus causes a development and the accumulation of the fluid, and accumulating as the result of that, and developing the current of electricity; and then this passes out and on to the wires, and there is the moment of creation—we may say its creation. But its source in the philosophic sense is the latent energy of the coal. If the coal is not burned we cannot have the engine moved, nor the dynamo, and therefore we cannot get the electricity; and the electricity is derived, as its prime origin, from the coal; but not, however, extracted from the coal—it was not there, but created by utilizing the latent energy of the coal."

"The electricity which is created and gathered passes into the wire, and clear through the wire. A dynamo machine may be likened—as being perfectly analogous, in one sense—to a pump, which pumps something through a series of pumps; and when we want to explain and work out problems on this subject of electricity, it is common for everyone to turn from books, and to take the pumping of water through pipes as an analogy, and better than books."

In the arc system, light is thus produced: "The two points in the ordinary lamp—the two poles of the current, or the two carbon rods, which are suspended in it, are first brought in contact, so as to allow the electricity to gain a full, abundant play through their points. Being in connection, the electricity begins to flow. Having established this flow, the points are slowly separated by a slight interval. As they are separated, the distance being infinitesimal, and very slowly, the energy of the current enables it to spring across the minute interval, and when it does so it pro-

Coral cut into the form of a cameo but not set is "manufactured" coral within the meaning of the Tariff Act. *Bailey v. Sobell*, 5 Blatchf. 195.

Copper plates turned up and raised at the edges by labor to fit them for subsequent use in the manufacture of copper vessels, but which are still bought for such use by the pound as copper, are not manufactured copper. *United States v. Potts*, 9 U. S. 5 Cranch, 284, 3 L. ed. 102.

Marble cut into blocks for transportation is not dutiable as manufactured marble. *United States v. Wilson*, Hunt's Merch. Mag. 167.

The removal of the outer surfaces of shells by acids or mechanical means does not make them manufactures of shells under the Tariff Act. *Hartman v. Weigmann*, 121 U. S. 602, 30 L. ed. 1012.

The central core left after stripping off rattan is included under the Tariff Act in "reeds unmanufactured," but oval reeds made therefrom by a subsequent process are "reeds manufactured." *Poppes v. Magone*, 40 Fed. Rep. 570.

Shingles are manufactured of wood within the meaning of the Tariff Act. *Stockwell v. United States*, 3 Cliff. 284.

Gun blocks cut from planks planed on the sides are manufactured articles in a crude form "not rough bawn or sawed only" under the Tariff Act. *United States v. Windmiller*, 42 Fed. Rep. 232.

Split timbers chiefly designed to be used in making shovel handles are dutiable as "articles manufactured in whole or in part." *United States v. Quimby*, 71 U. S. 4 Wall. 403, 18 L. ed. 397. So are staves. *United States v. Hathaway*, 71 U. S. 4 Wall. 404, 18 L. ed. 395.

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Timber cut so that it can be used without although needing to be recut and fitted in using it is "not shaped" within the meaning of the Canada Tariff Act. *Magan v. Reg.* 2 Canada Exchequer, 64.

A saw-mill is not properly employed in the manufacture of "articles of wood" within the meaning of La. Const., art. 207, as the words "articles of wood" are construed to mean articles which like furniture are made from lumber either sawed or split. *Jones v. Raines*, 35 La. Ann. 996.

Fire wood is not an article "manufactured" for a particular purpose so as to raise an implied warranty under Cal. Civ. Code, § 1770, on the sale of it. *Correio v. Lynch*, 65 Cal. 273.

Cabins and planks are not manufactured articles of wood under La. Const., art. 207, but door sashes and blinds are. *Carre v. New Orleans*, 41 La. Ann. 996.

Shooks or pieces of wood cut or sawed into size or shape to be put together into boxes and packed in bundles either for shipment or manufacture into boxes are manufactured articles of wood under the Louisiana Constitution. *Washburn v. New Orleans*, 43 La. Ann. —.

The words "manufactured goods" must mean not merely goods produced from a raw state by manual skill and labor, but such as are ordinarily produced in manufacture, when used in a statute authorizing a railroad company to charge certain rates for "all cotton and other wools, drugs and manufactured goods." *Parker v. Great Western R. Co.* 6 El. & Bl. 77. B. A. R.

duces a great heat, both at the point which it leaps from, and which it leaps to, and it vaporizes the carbon, and also, by special electric action through the points, and tearing through the particles of carbon, it evolves gas; and so the space between the poles, as they are slowly drawn apart, is filled with an amount of gas vapor, and the vapor becomes intensely hot by the action of the current upon it, and also the carbon, a very combustible body in the presence of air, burns—and that is the true flame of gas, different only in degree in the candle—the solid matter of the gas is first burned in the vapor, and this burns—and that is the burning of the candle.”

“In the case of the electric light, we have some combustion, or a portion of the combustion, by the carbons themselves, which burning, forms carbonic acid, and that gives a part of the light; but only a portion. Considerably the larger proportion of the light developed in the arc, as we call it, is the light produced by the passage of electricity through that vapor; but the light so developed has its origin—the energy which there becomes light has its origin—in the burning of coal under the boiler of the engine.”

The return and appraisalment was made under protest, defendant claiming that “the character of the business of the company, to wit: engaging in and carrying on the business of buying, manufacturing, and selling machinery for the production and distribution of electricity, and of producing electricity and of selling and furnishing the same for light, heat, and power or for any other purpose, entitled it to exemption from taxation as a manufacturing corporation.” But no evidence was given upon the trial to show that the company was in any way engaged in manufacturing machinery of any kind.

By section 4 of the Act of June 7, 1879 (Pub. Laws, 112), all corporations, with certain exceptions that could not include the corporation defendant, were made liable to a tax on capital stock. Section 20 of the Act of June 30th, 1885 (Pub. Laws, 198) which is a further supplement to the Act of 1879, enacts: “That the tax laid upon manufacturing corporations by and under the Revenue Laws of this Commonwealth be and the same are hereby abolished as to such corporations, and the laws under which such taxes are laid and collected be and the same are hereby repealed so far and so far only as they apply to and affect manufacturing corporations,” with certain provisos, which cannot affect this case.

Defendant claims that it is a manufacturing corporation and is exempted from the tax on capital stock by this section of the Act of 1885.

It is a well-settled principle that when a tax is claimed, a clear warrant of law for its imposition must be shown before it can be collected. And it is equally well settled that when a tax is clearly imposed by general Act, anyone claiming exemption must show clearly that such exemption exists. The principle, as stated in *Cooley on Taxation*, 146, is: “The intention to exempt must in any case be expressed in clear and unambiguous terms; taxation is the rule, exemption is the exception. All exemptions are to be strictly construed. They embrace only what is within their terms.”

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To the same effect is *Academy of Fine Arts v. Philadelphia County*, 22 Pa. 495, where it is said: “No interests, falling within the general description of taxable property, can claim exemption from bearing their just proportion of public charges, unless the exemption be so clearly expressed in the statute as to admit of no other construction. It is never to be presumed that the Legislature intend to lay unequal burdens upon the people; and their enactments are not to be construed so as to produce that result, unless the intent is so plainly expressed as to render it unavoidable.”

Defendant is clearly included in section 4 of the Act of 1879; it must therefore, to be relieved, show that it is unmistakably included in the exemption provided for in section 20 of the Act of 1885. In other words, it must show clearly that it is a manufacturing corporation.

We have not been referred to, nor have we been able to find, any definition of the terms “manufacture” or “manufacturing” that do not limit them to the production of material substances. In *Brande’s Encyclopædia*, “manufacture” is defined: “The term employed to designate the changes or modifications made by art or industry in the form or substance of material articles, in the view of rendering them capable of satisfying some want or desire of man; and ‘manufacturing industry’ consists in the application of art, science, or labor to bring about certain changes or modifications of already existing materials.” Webster defines manufacture to be “the operation of making wares of any kind, the process of reducing raw materials to a form suitable for use, by the hands, by art, or by machinery;” and a manufactured article to be “anything made from raw materials by the hand, by machinery, or by art;” and practically the same definition is given by Worcester, who, explaining merchandise, goods, wares, and produce as synonyms, says that “wares are manufactured and may be goods or merchandise.”

In an extended note to *Engle v. Sohn*, 41 Ohio St. 691, 52 Am. Rep. 108, reference is made to a large number of cases in which the question arose what was a manufacture or who was a manufacturer? And in every case in which it was held that either term applied it was assumed that the articles produced must be material substances.

Whatever electricity may be, it is manifestly and admittedly not a material substance, and whatever electric light companies do, they do not, in generating or evolving electricity, “make changes or modifications by art or industry in the form or substance of material articles.” They do not make “wares of any kind,” nor “reduce raw materials to a form fit for use.”

Because of the novelty of the subject, and of our desire to do justice to the defendant, we have adopted the language of its expert witness at considerable length in the finding of facts; but when all has been heard that can be said on the subject, nothing has been said to lead to the belief that electricity is a material substance, nor is it claimed by anyone so to be; therefore, its production or generation or evolution does not come within the authoritative lexicographic, scientific, or legal defini-

tion of the terms "manufacture" or "manufacturing;" and hence we cannot say that defendant manufactures electricity. It is, however, strenuously contended by defendant's counsel that, even if it does not manufacture electricity, it does manufacture and sell light, and for that reason is a manufacturing company. But what is light? In 14 Encyclop. Brit. 576, it is said: "Sound may be defined as any effect on the sense of hearing; and in the same way light may be defined as any effect on the sense of sight." And in the same authority, VIII., 569, in the article "Ether," it is said: "That light is not itself a substance may be proved from the phenomenon of interference. A beam of light from a single source is divided by certain optical methods into two parts, and these, after traveling by different paths, are made to reunite and fall upon a screen. If either half of the beam is stopped, the other falls on the screen and illuminates it, but if both are allowed to pass, the screen in certain places becomes dark, and thus shows that the two portions of light have destroyed each other. Now, we cannot suppose that two bodies when put together can annihilate each other; therefore light cannot be a substance."

So far as is at present known, it is the undulations of that which, because they do not know what it is, scientists call the "luminiferous ether" which produce "on the sense of sight" the effect of light. But the undulations are no more material substances than the light itself. They are to the ether what waves are to water, successive motion of different particles. Another analogy is the undulations in the air, which produces the "effect on the sense of hearing" which we call a sound. These undulations with the telephone by electricity produce the effect of sound at great distances, and if we might judge by analogy we should be inclined to say that it is the undulations of the "luminiferous ether" which, by the use of electricity, by means of electric wires, are induced and extended to the lamps and "produce the effect of light." And that it might, with the same reason, be said, that in the use of the telephone sound is manufactured, as that in the use of the electric lighting apparatus there is a manufacture of light.

Without enlarging further upon a subject of which we confessedly know very little, we content ourselves with saying that defendant has not, in our opinion, so clearly shown itself to be a manufacturing corporation as to warrant us in holding that it is exempt from taxation upon its capital stock.

We do not overlook the argument of counsel, based upon the language used by the Legislature in the Incorporation Act of 1874, which in section 84, provided, among other things, that gas companies, or companies for the supply of light and heat, may erect and maintain "the necessary buildings, machinery, and apparatus for 'manufacturing' gas, heat, or light from coal or other material, and distributing the same;" and in the supplement thereto, of June 2, 1887, that "where any such company shall be incorporated for the supply of heat, light, and fuel, or any of them, by any process of 'manufacture,' it shall have authority," etc.; but we understand that, in these acts, the term

"manufacture" is used in the sense of producing or furnishing, and as a convenient single term sufficient for the purpose in view, but not intended as a legal definition or extension of the terms "manufacture" or "manufacturing."

The same argument is made from the language of *Mr. Justice Green*, in *Emerson v. Com.*, 108 Pa. 111, in which he says: "Neither light, nor heat can be produced by any human agency except by some species of manufacture. If either is the result of the mere combustion of natural substances, that very combustion is a method of manufacture." But it is manifest that the term "manufacture" is here used in its widest sense, as the antithesis to production by natural causes, and that it does not and was not intended to furnish any authority or criterion for the construction of section 20 of the Act of 1885.

We do not think that corporations of the kind to which defendant belongs come within the policy of the Legislature in enacting section 20, which we understand to be the proposed encouragement to manufacturing corporations to establish themselves and carry on their operations within the limits of the Commonwealth rather than beyond its borders; a policy which could apply only to manufacturing corporations of such a nature that they might be located in one place or another as interest and preference might dictate. But electric light companies, if they exist at all, must exist in the towns and cities to be supplied with light, and cannot choose whether they will carry on their operations within or without the Commonwealth. Therefore, exempting them from taxation would probably not bring capital into the State, and taxing them would certainly not drive it out.

We have recently decided that capital stock invested in patent rights is not taxable, and if the evidence showed that any part of the amount of the appraisement represented the value of patent rights and was taxed in the settlement, we would say that, to that extent, the settlement was erroneous. *Com. v. United Gas Imp. Co.* Dauphin County Common Pleas.

But as we hold that the tax must be calculated upon the amount of the appraisement as made by defendant's officers, and as this does not include the valuation of any patent rights, the tax must be calculated upon the whole amount of the appraisement.

Defendant specifies, as objections to the settlement, in its appeal, that the 4th section of the Act of June 7, 1879, is unconstitutional and void, because in conflict with section 1, article 9, of the Constitution of Pennsylvania, which requires that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the same, and also because it is in conflict with section 1, of article 14, of the Amendments to the Constitution of the United States, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of these citizens, etc. We do not think that either of these objections can be sustained.

Messrs. M. E. Olmsted and Morgan & Lewis, for appellant:

Very few of the articles now known as man

ufactures could properly be called so within the original and strict meaning of the term, as shown by its derivation.

See *Lawrence v. Allen*, 48 U. S. 7 How. 793, 794, 12 L. ed. 917; *Corning v. Burden*, 56 U. S. 15 How. 267, 14 L. ed. 690; *Murphy v. Arnsperg*, 96 U. S. 131, 24 L. ed. 773.

So much has the meaning of the term changed that Dr. Ure in his *Philosophy of Manufactures*, published more than fifty years ago (1835), said: "'Manufacture' is a word which, in the vicissitude of language, has come to signify the reverse of its intrinsic meaning."

See also Johnson's *New Universal Cyclopedia* (1880); *Bouvier, Law Dict.* 1888; *Wright's Universal Pronouncing Dictionary*; *Burrill, Law Dict.*; *Curtis, Law of Patents*; *Anderson, Law Dict.* 1839; *Carlin v. Western Assur. Co. of Toronto*, 57 Md. 515, 526, 40 Am. Rep. 440.

Numerous cases have arisen requiring the judicial interpretation of the term, and it has from time to time been expanded.

People v. Knickerbocker Ice Co. 99 N. Y. 181; *Nassau Gas Light Co. v. Brooklyn*, 89 N. Y. 400; *Western U. Tel. Co. v. Texas*, 105 U. S. 460-464, 26 L. ed. 1667, 1663.

The Legislature in the Acts of Assembly, which constitute the charter of the company, has distinctly defined light as the subject of manufacture.

Corp. Act 1874, § 34, cl. 1 (Pub. Laws, 73); Emerson v. Com. 108 Pa. 111-125.

The decision in the *Emerson Case* was rendered November 11, 1884. When, subsequently, in the twentieth section of the Act of June 30, 1885, the Legislature enacted generally concerning manufacturing corporations, it must be presumed to have acted with full knowledge of the interpretation put by this court upon the language of the Act of 1874.

Fulmer v. Com. 97 Pa. 508-509; *Truabury's App.* 87 Me. 267; *Cota v. Ross*, 66 Me. 165; *Krink v. Pnd*, 46 N. H. 126; *Com. v. Hartnett*, 8 Gray, 450; *Ex parte Cathcart*, L. R. 5 Ch. App. 703; *Com. v. Standard Oil Co.* 101 Pa. 119; *Com. v. Trenton Bridge Co.* 9 Am. L. Reg. 298; *Philadelphia & E. R. Co. v. Catawissa R. Co.* 59 Pa. 20.

Not only do the judicial and the legislative interpretations of the term, "manufacture" as applied to light, agree with the appellant's contention, but it has also received a construction from another source, entitled, in a case of this kind, to almost equal consideration.

The construction given to a statute by those charged with the duty of executing it, is always entitled to respectful consideration, and ought not to be overruled without cogent reasons.

United States v. Moor, 95 U. S. 763, 24 L. ed. 589; *Edward v. Darby*, 25 U. S. 12 Wheat. 210, 6 L. ed. 604; *United States v. Gilmore*, 75 U. S. 8 Wall. 330, 19 L. ed. 396; *Greely v. Thompson*, 51 U. S. 10 How. 225, 13 L. ed. 397; *Union Ins. Co. v. Hoge*, 62 U. S. 21 How. 66, 16 L. ed. 68; *Mathews v. Shore*, 24 Ill. 35; *Graham's App.* 1 U. S. 1 Dall. 136, 1 L. ed. 70; *Steiner v. Cox*, 4 Pa. 18; *Goddard v. Gloninger*, 5 Watts, 209; *United States v. Ship Recorder*, 1 Blatchf. 218; *Packard v. Richardson*, 17 Mass. 121; *Sedgw. Stat.* 216.

The courts have charged with the duty of executing the laws have uniformly regarded these companies as manufacturing companies.

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Messrs. W. U. Hensel, Atty. Gen., and James A. Stranahan, Deputy Atty. Gen., for respondent.

Williams, J., delivered the opinion of the court:

This case presents a new and an interesting question, viz.: Is a company that produces electricity, and sells it to customers for the generation of light, heat, or power, a manufacturing company, within the meaning of the Act of 1885, exempting the capital stock of manufacturing companies from taxation? This case was tried without a jury, and the facts upon which the judgment was based appear in the findings of the court below. One of these, which was based upon the opinion, and largely expressed in the words of an expert electrician, who was called as a witness, asserts that the electricity sold by the company was created by the process adopted by the company. The learned judge says: "The electricity which furnishes the light does not exist until the armature revolves. The revolution of the armature brings into being something that did not exist before,—that is, this electric energy, or energy in this electric form." In the same finding he describes the process by which this product is evolved or created as follows: "Coal is burned under the boilers, producing heat. The heat generates steam in the boilers, which moves the engine. The engine supplies the power by which the armature is made to revolve. The revolution of the armature produces electric currents where they did not exist before. The electricity thus generated is carried over wires provided by the Company, and delivered to its customers, where it is used to produce light. The process by which electricity is made to furnish light is found to consist of the movement of an electric current from one carbon point to another, which are made part of its circuit. In leaping from one point to another great heat is developed by the energy of the current. This heat liberates or evolves from the carbon a gas, which it burns. The light is thus found to be due partly to the passage of the electric current between the carbon points, and partly to the combustion of the gas furnished by the heated carbons." Notwithstanding these findings, which showed a creation, or "bringing into being" where it did not exist before, of the electricity sold by the Company, the learned judge held as matter of law that the process was not one of manufacture, because the product was not a material substance. Conceding that the thing sold was "brought into being," made,—"manufactured," in the common use of that word,—he denied that such making was in a legal sense a manufacture, because it did not appear affirmatively of what the mysterious product was made, and that it was material, as matter is now defined. This conclusion appears to have been drawn from the derivation and definition of the word "manufacture," and is forcibly presented in a learned opinion, in which lexicons and books of reference are largely drawn upon. It is very clear that the word originally meant "hand-made." It is equally clear, in the light of the definitions collated by the learned judge, that its meaning has expanded with the advance of the

arts and sciences, until it has come to mean, as a verb, the making of anything by human art or skill (Burrill, Law Dict.), and as a noun, anything made by art or skill (Rapahe & L. Law Dict.). The mere appropriation of an article which is furnished by nature is not a manufacture. That the liberation of natural gas or oil from the earth, and its transportation to consumers, is not a manufacture; but the production of illuminating gas is. *Nassau Gas-Light Co. v. Brooklyn*, 89 N. Y. 409; also *Emerson v. Com.* 108 Pa. 111. The collection, storage, preparation for market, and transportation of ice is not a manufacture, but the production of ice by artificial means is. *People v. Knickerbocker Ice Co.* 99 N. Y. 181. A telegraph company produces electricity by artificial means, but it uses it in its own business as a carrier of messages for the public; so does a telephone company. Both receive messages for carriage, and deliver them at the point of destination. They transport for their customers. This Company whose character we are considering sells the electricity it makes, or "brings into being," as a commodity. It provides the lamps or appliances for the use of its customers, by means of which the light is produced. It sells them the electricity, measures it as it is delivered, and is paid according to the quantity furnished. Whatever electricity may be, it seems to be absolutely within the power and under the control of the company that brings it into being. It is compelled by the process employed to come into being. It is secured, stored, poured out, or liberated at will. Its manifestations are both seen and felt. It moves with incredible velocity and power. It carries the tones and inflections of the human voice, or moves loaded cars, depending on the volume of the current and the manner of its application. It may be, in the hands of the physician, a soothing remedial agent, and, in the hands of the law, an instrument of execution swifter and surer than the headsman's axe. It may be too early to say just what it is. The scientists whose views the learned judge adopted may be right or wrong. We have no need to decide that question. Laws are written ordinarily in the language of the people, and not in that of science; and, if this case depended on the question on which it turned in the court below, we should be led by the findings of fact to a different conclusion of law from that which was there reached, and hold that this company was a manufacturing company.

But we think the controlling question in this case is that of the sense in which the words "manufacturing companies" are used in the statute under consideration. It provides that the taxes laid on corporations by the Revenue Laws of the Commonwealth are repealed or abolished as to manufacturing corporations. Now, if there were a class of corporations existing at that date known by the name of "manufacturing companies or corporations," we must assume that the Legislature intended that class when it used the name by which the class had been known in previous legislation; and we need go no further than the statute book to determine the legislative intent in the Act of 1885. The Act of 1879 imposed a capital-stock tax on all corporations alike, so that we get no help from it.

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Looking back to the laws under which corporations have been created, we find that in 1885 an Act was passed providing for the organization of corporations for the manufacture of iron from the ores with coke or mineral coal, which was subsequently extended so as to include companies using charcoal. This was followed in 1849 by a law which provided for the organization of "manufacturing companies" as a class of corporations. It included the manufacture of woolen, cotton, flax, or silk goods, of iron, paper, lumber, or salt. In 1850 it was extended so as to include the manufacture of glass. In 1851 printing and publishing were taken into the class. In 1852 the making of mineral paints and artificial slute was included. In 1853 quarrying and mining. In 1859 the manufacture of leather and leather goods. Mineral and carbon oils were included by a series of Acts passed in 1856, 1859, and 1860. It will thus be seen that the words "manufacturing corporations" had been employed as the name of a definite class of corporations for many years, and that the kinds of manufacture embraced within the class were not left to be settled by conjecture, or by reasoning built upon definitions, but had been settled by actual enumeration in the statutes referred to and some others. When the Constitution of 1873 was adopted, and when the general Corporation Act of 1874 was passed in obedience to its requirements, manufacturing corporations as a class were provided for, and the kinds of manufacture included made certain by a long series of statutes. The Act of 1874 provided a uniform mode for the incorporation of companies formed for profit, describing them as corporations of the second class, while corporations not for profit composed the first class. In the second class were included, among others, companies formed for "carrying on any mechanical, mining, quarrying, or manufacturing business, including all the purposes covered by the provisions of the Act of General Assembly entitled "An Act to Encourage Manufacturing Operations in This Commonwealth, Approved April 7, 1849," and its several supplements. Thereafter any company formed for the prosecution of the objects enumerated in the Act of 1849 and its supplements entered the class of manufacturing corporations through the gate opened by the Act of 1874, instead of through previous legislation. But, whether they came in the one way or the other, if they were within the class as the Legislature had made it, the Act of 1885 relieved them from the tax imposed by the Act of 1879. A company supplying illuminating gas is, in the general sense of the word, a manufacturing company (*Nassau Gas-Light Co. v. Brooklyn*, *supra*), but it is not a member of the statutory class built up under the Act of 1849, nor is any corporation engaged in the service of its customers in a quasi public capacity. A municipality may furnish water and light to its citizens. A company performing this service may be said to perform a quasi public or municipal function, which the municipality may disturb at its pleasure, or supersede altogether. Such companies have never been included in any of the legislation provided for the encouragement and protection of manufacturing cor-

porations, and have no right to share in the benefits of such legislation. They really form a class by themselves. When the Act of 1885 was passed laws had been made in adjoining States which gave encouragement to the establishment of factories by exempting them from certain forms of taxation. The mischief to be remedied was the danger that such legislation might lead to the removal of capital and labor from this State to others, to the detriment of the business and prosperity of our own. The remedy provided was the removal of the tax imposed by the Act of 1879, so as to remove the inducement to leave the State. It was as broad as the mischief which it was intended to meet, and made applicable to the class which since 1886 it had been the policy of the State to encourage, viz., "manufacturing corporations." It did not reach financial corporations like banks and insurance companies, nor trans-

portation companies, nor companies performing functions partaking of a municipal character, but that class of productive industries which the Legislature had sought to encourage as a means of bringing and keeping within our borders capital and labor, to be employed in the development of our mineral wealth, and in the production of the staples of commerce. We think the learned judge reached a correct conclusion in this case. The appellant is not within the exemption or immunity provided by the Act of 1885, but we prefer to rest our judgment on the definition of "manufacturing corporations" which the Legislature has adopted and adhered to for more than half a century, rather than upon the meaning of the word "manufacture" as it is given by lexicographers.

The judgment is affirmed.

MICHIGAN SUPREME COURT.

BOARD OF HEALTH OF PORTAGE TOWNSHIP

v.

Jacob VAN HOESEN, *App't.*

(.....Mich.....)

1. **The power of eminent domain cannot be given to a corporation formed for the purpose of establishing a rural cemetery and providing for its care and maintenance, where the land is to be under its absolute control and it may sell lots at whatever price may be agreed on to private individuals for burial purposes, if in its judgment the land is not needed for that, or, for any other purpose.**
2. **An amendment to an Act providing for the organization of a certain class of corporations, which attempts to confer on them a power which they cannot constitutionally exercise, cannot be upheld as to other corporations incidentally mentioned therein, but not alluded to in, or subjected by the amendment to, any of the provisions of the original Act.**

(October 9, 1891.)

CERTIORARI to the Circuit Court for Kalamazoo County to review proceedings condemning land for cemetery purposes. *Proceedings quashed.*

The facts sufficiently appear in the opinion. *Messrs. Howard & Roos*, for plaintiff in certiorari:

The section of the statute under which it is sought to proceed in this case must be limited, construed, and held to apply only to such cemeteries as is embraced in the title of the Act. Amendments to Acts, although their language may be broad and general, are necessarily limited by the title of the Act which they purport to amend.

Booth v. Eddy, 38 Mich. 245; *Bates v. Nelson*, 49 Mich. 459; *Bissell v. Durfee*, 58 Mich. 237.

NOTE.—For notes on right of eminent domain, see *Pittsburg, W. & K. R. Co. v. Benwood Iron Works (W. Va.)* 2 L. R. A. 690; *Barre R. Co. v. Montpelier & W. River M. Co. (Vt.)* 4 L. R. A. 785; 14 L. R. A.

Hence there is no authority for this proceeding by the Board of Health.

Messrs. Osborn & Mills and Thomas R. Sherwood, for defendant in certiorari:

The amendment to the original Act was intended, not only to afford rural cemetery corporations organized pursuant to that law the right to condemn lands for its purposes, but also the same right to township and cities.

The title of the original Act being broad enough to embrace all rural cemeteries, the addition is germane to the object expressed in the amended Act, and is therefore valid.

See *People v. State Ins. Co.* 19 Mich. 393; *People v. State Treasurer*, 31 Mich. 6; *Stockle v. Silbee*, 41 Mich. 615.

An amendment to a statute which contains matter which might appropriately have been incorporated in the original Act under its title as germane to its provisions, may be added by an amending Act entitled substantially as was the Act involved in this litigation.

Swartwout v. Michigan Air Line R. Co. 34 Mich. 398; *Chippewa County Supra. v. Auditor General*, 8 West. Rep. 840, 65 Mich. 412.

McGrath, J., delivered the opinion of the court:

This matter comes here by certiorari, to test the validity of certain proceedings to condemn land for cemetery purposes. The Board of Health of Portage Township filed a petition in the Circuit Court for the County of Kalamazoo, under chapter 181, How. Stat., to condemn certain land belonging to respondent, for cemetery purposes. Respondent demurred to said petition, alleging, among others, the following grounds: "That said petition is insufficient to confer upon said court jurisdiction of the subject matter of said petition, (1) for the reason that the statutes confer no authority upon said court to summon a jury in cases of the kind alleged and set forth in said petition; (2) for the reason that it appears by said petition that said cemetery which it is proposed to enlarge is not owned by a corporation organized to establish a rural cemetery, and provide for the

care and maintenance thereof." Chapter 39, How. Stat., makes it the duty of the Township Board of Health to provide and maintain burial grounds, but contains no provisions for the condemnation of land for cemetery purposes. In 1869 the Legislature passed an Act entitled "An Act to Authorize and Encourage the Formation of Corporations to Establish Rural Cemeteries, and Provide for the Care and Maintenance thereof." This Act contained no provision for the acquirement of lands, except by purchase or gift. It provided for the formation of stock companies for the purpose of establishing and maintaining cemeteries. That the articles should contain a statement of the amount of land to be purchased, and of the amount of capital necessary to make the purchase and improve the grounds. It provided for the issue of scrip or certificates of stock to the subscribers. That such scrip should be personal property, and transferable by the holder. It empowered the board of trustees to purchase land for the use of such association; to levy assessments upon subscribers to the articles of association, not exceeding the amount subscribed; to dispose of the rights of burial, fix the prices thereof, make conditions in relation to the burials within the cemetery grounds, and guarantee to the grantees burial rights, and the care and preservation of the grounds; to establish such rules and regulations for the control and management of the grounds, and all matters and things incident thereto, as they shall deem for the best interests of the corporation; to sell any part or portion of land owned by such corporation, in case the same shall not be occupied or required for burial purposes, or for the use of burial rights; and to prescribe from time to time any interest or dividends which shall be paid to the holders of the scrip. It provides for the reservation out of the proceeds of sale of burial rights of an amount which, in the opinion of the board of trustees, shall be sufficient to create a fund which, when invested, shall produce an income sufficiently large to meet the expense of keeping the grounds in good condition. It further provides that all grants of rights of burial shall be transferable only upon compliance with such conditions as shall be prescribed by the board of trustees. In 1875 the last-named Act was amended by adding ten new sections (How. Stat. Mich. § 4778), providing that, "whenever the board of directors of said corporation, the board of health of any township, or the common council, board of health, or board of trustees of any city or village, shall deem it to be desirable and necessary to enlarge the limits of any cemetery which has been or may be hereafter established," application may be made to a circuit judge for a jury, to ascertain and determine the compensation to be made, and the necessity for using the same; and, after providing for the summoning of a jury, notice to the owners, a hearing and a determination by said jury, the amending Act provides that judgment shall be rendered by the court for the amounts found by the jury, and, upon proof of payment of such amounts, the court "shall by an order or decree adjudge that the title in fee of such real estate shall forever thereafter be vested in such board of directors, board of health," etc.

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The contention of respondent is that there is no valid statute which authorizes or permits the condemnation of private property for the enlargement of this cemetery; that the Act of 1869 authorized the formation of corporations to establish rural cemeteries, and provided for the care and maintenance of rural cemeteries so established, and only such as are so established. In my judgment, although the point is not made in the briefs, the Amendment of 1875 is, as applicable to rural cemeteries established by corporations formed under the Act of 1869, unconstitutional and void, as it attempts to invoke the exercise of the power of eminent domain for the condemnation of lands, at the instigation of a private corporation, for private uses. Eminent domain is that sovereign power vested in the people by which they can, for any public purpose, take possession of the property of any individual upon a just compensation paid to him. 6 Am. & Eng. Encyclop. Law, 511; 2 Kent, Com. 839. It has been defined by this court to be "the rightful authority which exists in the sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, and welfare may demand. *People v. Humphrey*, 23 Mich. 471-474. It was held in that case that the State had no authority by virtue of its eminent domain to condemn lands for the purpose of turning them over to the United States for the erection and maintenance of light-houses; that the Act which undertook to authorize the government to do this was unconstitutional, as appropriating property of individuals without due process of law; and that the right of eminent domain in any sovereignty exists only for its own purposes.

In *Ryerson v. Brown*, 35 Mich. 333, 24 Am. Rep. 564, the court says that, in authorizing condemnation proceedings, it is essential that the statute should require the use to be public in fact; in other words, that it should contain provisions entitling the public to accommodation; that property can never be condemned for private improvements, except where they belong to a class that cannot usually exist without the exercise of that power, and where the public welfare requires that they shall be encouraged. The exercise of the right of eminent domain is limited to cases in which the public have an interest. *Coty v. Rider* (Ky.) 1 S. W. Rep. 2. It can never be just to take property under pretense of public benefit which is not needed by the public, however much it may advance the interests in which the public have no concern. *Paul v. Detroit*, 33 Mich. 108-119. The State has no right to take the property of one citizen, and give it to another, whether with or without compensation. 2 Washb. Real Prop. 539; Tiedeman, Pol. Powers, § 121b, 390. As has been said, "when one man wants the property of another, the Legislature will not aid him in the acquisition." *Taylor v. Porter*, 4 Hill, 147. See *Wilkinson v. Island*, 27 U. S. 2 Pet. 658, 7 L. ed. 553; *Hayward v. New York*, 7 N. Y. 324.

It was held in *People v. Salem*, 20 Mich. 454, 4 Am. Rep. 400, that a legislative Act original-

ing proceedings by or in pursuance of which individual property was to be taken, under the forms of taxation, for the benefit of a private corporation, could not be justified as an exercise of legislative power. It was not, therefore, due process of law. Mr. Cooley says: "The public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies; and the due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another, on vague grounds of public benefit, to spring from a more profitable use to which the latter may devote it." Cooley, Const. Lim. 654. The use must be by the general public of the locality, and not by particular individuals. *McQuillen v. Hutton*, 42 Ohio St. 202; *Ross v. Davis*, 97 Ind. 79. A use which may be monopolized or absorbed by the few, and from which the general public may and must ultimately be excluded, is in no sense a public use. Land cannot be condemned for the purpose of enabling those instigating the proceedings to parcel it out to private individuals; nor is a use which is not common to the public, and over which the State has surrendered that control and regulation necessary to secure such common use, a public use. The use of land for railways and turnpikes has been declared to be a public use, because it is open to all upon the payment of tolls which are regulated by law, and the law requires such ways to be kept open for use by the public impartially.

As has been said, the question whether the use is public or private depends upon the right of the public to use the property, and to require the corporation, as a common carrier, to transport passengers or freight over the same. *Kettle River R. Co. v. Eastern R. Co.* 41 Minn. 461; *De Camp v. Hibernia U. R. Co.* 47 N. J. L. 47; *Phillips v. Watson*, 63 Iowa, 88; *Clarke v. Blackmar*, 47 N. Y. 156; *Lewis*, Em. Dom. § 160.

It has been held that condemnation proceedings cannot be resorted to to take lands for the construction of spur tracks which are made for the accommodation of individual shippers. *Re Niagara Falls & W. R. Co.* 108 N. Y. 875, 11 Cent. Rep. 272; *Rochester, H. & L. R. Co. v. Babcock*, 110 N. Y. 119; *Chicago & E. I. R. Co. v. Wiltsie*, 116 Ill. 449, 4 West. Rep. 121; *Pittsburgh, W. & K. R. Co. v. Benwood Iron Works*, 81 W. Va. 710, 2 L. R. A. 660.

To justify the condemnation of lands for a private corporation, not only must the purpose be one in which the public has an interest, but the State must have a voice in the manner in which the public may avail itself of that use. In *Gilmer v. Lime Point*, 18 Cal. 229, a public use is defined to be a use which concerns the whole community, as distinguished from a particular individual. The use which the public is to have of such property must be fixed and definite. The general public must have a right to a certain definite use of the private property on terms and for charges fixed by law, and the owner of the property must be compelled by law to permit the general public to enjoy it. It will not suffice that the general prosperity of the community is promoted by the taking of private property from the owner, and transferring its title and control to a cor-

poration, to be used by such corporation as its private property, uncontrolled by law as to its use; in other words, a use is private so long as the land is to remain under private ownership and control, and no right to its user or to direct its management is conferred upon the public. *Re Eureka Basin W. & Mfg. Co.* 96 N. Y. 42. It is for the court to determine whether or not the use is a public one. *Re Deansville Cemetery Assn.* 66 N. Y. 569, 23 Am. Rep. 86; *Re New York Cent. & H. R. R. Co.* 77 N. Y. 248; *Savannah v. Hancock*, 91 Mo. 54, 8 West. Rep. 248; *Pittsburg, W. & K. R. Co. v. Benwood Iron Works*, 81 W. Va. 710, 2 L. R. A. 660; *Tiedeman*, Pol. Powers, § 121a, p. 378; Cooley, Const. Lim. p. 660.

This very question arose in *Evergreen Cemetery Assn. v. Beecher*, 53 Conn. 551, 2 New Eng. Rep. 808, and the court says: "The complaint alleges that the plaintiff is an association duly organized under the laws of this State, for the purpose of establishing a burial ground; that it now owns one; that it desires to enlarge it; and that such enlargement is necessary and proper. There is no allegation that the land which it desires to take for such enlargement is for the public use in the sense indicated in this opinion. The demurrer, for the reason that the complaint does not set out any right in the plaintiff to acquire title to the land of the defendants, otherwise than by their voluntary deed, must be sustained."

In *Re Deansville Cemetery Assn.*, *supra*, it was held that the statute authorizing rural cemetery associations to acquire land by exercising the right of eminent domain was unconstitutional and void, for the reason that the use was a private one. The court says: "The land is to be vested in trustees, with power to divide into lots, and sell these lots to individual owners. It is difficult to see what interest the public will have in the lands or in their use. No right on the part of the public to buy lots or bury their dead there is secured. The prices at which the lots are to be sold are to be fixed by private agreement. The corporation is to be managed by trustees elected by the lot-owners. The lots, or the rights of the owners therein, are to descend as private property to the heirs of these owners; and, by the Act of 1874, the owners may, by leave of the courts, sell their lots, and put the proceeds in their pockets. The substantial right of enjoyment of the property is vested in the individual lot-owners, and the whole effect of the incorporation of these cemetery associations is to enable a number of private individuals to unite in purchasing property for their own use, and that of their descendants, as a place of burial, and to secure a permanent management of it, through the instrumentality of trustees appointed by themselves, and subject to no other control, with the privilege, when they cease to use their lots as a place of burial, to sell them, and receive the proceeds for their own benefit. It is argued that the property is to be used as a place of burial, and that the burial of the dead is a public benefit, and therefore the use is public. But the answer to this argument is that the right of burial in these grounds is not vested in the public, or in the public authorities, or subject to their control, but only in the individual lot-owners. If the

fact that it is a benefit to the public that the dead should be buried is sufficient to make a cemetery a public use, the Legislature might authorize A to take the land of B for a private burial place of A and his family. The fact that this land is taken for the benefit of a number of individuals, for division among themselves or their grantees, for their own use as a cemetery, makes the case no stronger than if taken for the benefit of a single individual." Precisely the same may be said of a corporation formed under the Act in question. The lands owned by it are under the absolute control and dominion of the corporation. It may sell to A and refuse to sell to B, and by its sale to A it excludes every other person from that parcel. Not only may it sell to A for burial purposes but it may sell to any other person for any purpose, if in its judgment the lands are not occupied or required for burial purposes.

It may be urged that petitioner here is not a private corporation, but I think that the entire amendment must fail. The original Act provided for the formation of corporations to establish rural cemeteries. An amendment is made which is intended to confer certain powers upon these corporations, and also upon other corporations and agencies not alluded to in the original Act. The power sought to be conferred upon the corporations organized under the original Act cannot be exercised, be-

cause not warranted by the Constitution. It is very clear that the only purpose had in view by the Legislature in attaching this amendment to this Act was to confer this very power upon these corporations, and that the only purpose of the introduction by the amendment of these other corporations and agencies was to enable such agencies to exercise this power. Thus we have an Act providing for the organization of a certain class of corporations, which is amended by conferring a power, the exercise of which, by the corporations so formed, is prohibited by the Constitution, and at the same time the amendment introduces another class of corporations, which are created by virtue of other statutory provisions, for the purpose of clothing them with the very powers which cannot be exercised by the corporations formed under the original Act. The amendment confers no additional powers upon the corporations created by the Act, and it does not subject the other agencies introduced to any of the provisions thereof. Inapplicable to corporations formed under the Act, the amendment is clearly irrelevant, and its incongruity apparent. The petition filed in the court below must therefore be dismissed, with costs to respondent.

Morse, Long, and Grant, JJ., concurred with McGrath, J.; Champlin, Ch. J., concurred in the result.

WISCONSIN SUPREME COURT.

Alice EVANS, *Resp't.*,
v.
Minnie FOSTER, *Appt.*

(.....Wis.....)

1. An executrix becomes personally liable to pay a legacy on an implied promise where she accepts a devise made subject thereto, sells the property and converts the proceeds, although she is expressly exempted by the will from giving bond.
2. A testator's charging the support of a person during her natural life upon the proceeds, issues, and profits of a farm which he has already charged with the payment of a pecuniary legacy to a third person does not postpone the time for payment of such legacy until the death of the one entitled for support although the farm is not sufficient for both; but the legacy or such portion thereof as the court may direct is payable at the time limited by the court for the payment of debts and legacies generally.
3. A remission of the excess cannot be allowed under the Wisconsin practice in order to prevent reversal of a judgment which is excessive, although it is due to a mistake in reckoning.

(November 17, 1891.)

A PPEAL by defendant from a judgment of the Circuit Court for Waukesha County

in favor of plaintiff in an action brought to recover the unpaid balance of a legacy given by the will of Sarah Evans, deceased. *Reversed.*

Statement by Cassoday, J.:

It appears from the record that Sarah Evans died November 3, 1878, leaving a will executed September 21, 1878, and which was admitted to probate April 7, 1879, and in and by which she, in effect, gave, devised, and bequeathed to her son Marcenas the sum of \$2,000, the same to be a lien upon her Pewaukee farm of eighty acres, therein described, until satisfied and paid; that she also devised to her said son a lot in Waukesha, therein described; that she therein also gave, devised, and ordained that her daughter Mary Ann should have her support and maintenance out of the proceeds, issues, and profits of said farm for and during her natural life, and that the same should be a lien on said farm; that she also therein devised said farm to the said defendant, her daughter Minnie, for her own use and behoof forever, subject, however, to the foregoing liens and legacies; that she also therein devised to the said defendant, Minnie, three lots, and the homestead thereon, therein described, for her own benefit and behoof forever; that she also therein devised and bequeathed to the said defendant, Minnie, all the rest, residue, and remainder of her real estate, wherever the same might be located, for her own use, benefit, and be-

NOTE.—The rule that an executor who is the devisee of land becomes personally bound to pay a legacy charged thereon if he accepts the devise is well settled, and the interest of the above decision is in 14 L. R. A.

the application of the rule to the peculiar circumstances of the case in which the executrix being exempted from giving bond had turned the land into money and converted the proceeds. B. A. R.

hoof forever; that she also therein devised and bequeathed unto the defendant, Minnie, all her personal estate and effects, of every name and description, for her own use and benefit forever, after the payment of her just debts, funeral expenses, and the expenses of the administration of her estate; that she also therein constituted and appointed the said defendant, Minnie, the sole executrix of her said last will and testament, and directed that she should not be required to give any security or bonds, other than her own personal obligation as such executrix, in any manner connected with said administration, or in the execution and performance of any duty or trust under the provisions and conditions of said will; that March 13, 1888, the said Marcenas assigned to his wife, the plaintiff herein, the balance due on said legacy of \$2,000 so bequeathed to him as aforesaid; that this action was commenced in the circuit court on or about May 21, 1889, for the recovery of said legacy of \$2,000, and interest thereon, upon the facts stated; that the defendant answered by way of admissions and denials, and alleged, in effect, that, of the whole amount of personal property which came to her hands as such executrix, the net amount was only \$87.25, after paying the funeral expenses and the expenses of administration, which said sum was paid to said Marcenas, and that she also paid him the further sum of \$200 over and above the amount admitted in the complaint, and, as a separate defense, she alleged that there was no other property or income out of which to pay said legacy except said farm; that the income thereof was barely sufficient to pay the taxes and repairs thereon, and the maintenance of said Mary Ann, as directed in the will; that said \$2,000 legacy did not become due or payable until after the death of said Mary Ann, except in case of the sale of said farm for a sufficient amount to guarantee the maintenance of said Mary Ann and to pay said legacy; that the farm was unsold, and was insufficient to pay such amounts; that, upon the trial of said cause, a jury was waived, and, at the close of the trial, the court found, in addition to the facts stated, that the property left by said testatrix, and which came to the hands of the defendant as such executrix, was sufficient to pay all debts, legacies, and claims against the estate; that the county court, by an order, limited the time for the payment of legacies to one year from and after April 7, 1879; that Marcenas died after having assigned his interest in said legacy to the plaintiff, and prior to the commencement of this action; that divers sums had been paid to Marcenas on the legacy by the defendant, amounting in all to \$1,150; that the unpaid balance, with interest thereon, amounted at the time of the trial, February 4, 1891, to \$2,380.05; that, as conclusions of law, the court found, in effect, that the legacy to Marcenas became due at the end of the year limited by the order of the county court for the payment of debts and legacies, and drew interest from that time according to the rule in partial payments, and that the plaintiff was entitled to judgment for \$2,380.05, besides costs. From the judgment entered thereon the defendant brings this appeal.

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Mr. C. H. Van Alstine, with Mr. P. H. Carnay, for appellant:

The farm is not devised to defendant upon condition that she pay the legacy bequeathed to Marcenas D. Evans, and she is not in any manner directed by the will to pay the legacy. The farm was simply devised to her "subject to the liens" thereon created by the will. By her acceptance of the farm, therefore, no promise on her part to pay the legacy could arise, and she did not become personally liable for its payment.

Langstroth v. Golding, 41 N. J. Eq. 49; *Wallington v. Taylor*, 1 N. J. Eq. 814.

There are numerous cases where devisees have been held personally liable for the payment of legacies charged upon lands devised, where they have accepted the devise, but it will be found in every case that the devise was upon condition that the devisee pay the legacy, or that the devisee was directed to pay the legacy.

This is not such a case, but is strictly analogous to a sale of land "subject" to a mortgage where it is well settled that the purchaser is not personally liable.

Belmont v. Conan, 22 N. Y. 488; *Equitable L. Assur. Soc. v. Bostwick*, 1 Cent. Rep. 528, 100 N. Y. 628; *Smith v. Cornell*, 111 N. Y. 554; *Woodbury v. Swan*, 58 N. H. 880; *Laurence v. Towle*, 69 N. H. 28; *Finke v. Tolman*, 124 Mass. 254; *Patton v. Adkins*, 42 Ark. 197; *Hall v. Morgan*, 79 Mo. 47.

By the construction due to the will the payment of the legacy is postponed to the death of Mary Ann Evans. If it is not due interest is not recoverable.

The other real estate left by the testatrix having been specifically devised, it could not be sold to pay the legacy charged upon another piece specifically devised.

(*see v. Case*, Kirby (Conn.) 284.

If, therefore, the legacy to Marcenas D. Evans could not, for any sufficient reason, be paid out of the Pewaukee farm during the life of Mary Ann Evans, the testatrix intended that the legacy to Marcenas should not be paid until the death of Mary Ann.

The bequest to Mary Ann Evans having been given for her support and maintenance, and the legacy to Marcenas D. Evans not having been given for any such purpose, nothing can be more plain than that the testatrix intended that Mary Ann should have her support and maintenance out of the farm and that she should have the whole net income, if necessary.

Donnelly v. Edelen, 40 Md. 117; *Is Goodrich's Estate*, 38 Wis. 492.

The testatrix did not intend that the farm should be sold, and it could not have been sold without the consent of Marcenas and Mary Ann, except subject to his and Mary Ann's lien.

Borst v. Crommie, 19 Hun, 209.

From these facts the court may very properly infer that it was understood, tacitly at least, by Marcenas and the defendant, that interest should not be claimed on his legacy during the life of Mary Ann Evans.

Cobb v. McCormick, 3 Dem. 606.

Messrs. Turner, Sutherland & Timlin, with Mr. C. E. Armin, for respondent:

Plaintiff is entitled to recover because she has

a claim against the defendant as assignee of a legacy under the will of one Sarah Evans, deceased, there having come into the hands of the defendant more than sufficient property to pay all the debts, legacies, and expenses in said estate and the year limited by statute and fixed by the order of court for settling the estate and paying the legacies having expired long before the commencement of this action.

Brooks v. Lynde, 7 Allen, 64; *Thorn v. Garner*, 113 N. Y. 262; *Glen v. Fisher*, 6 Johns. Ch. 38, 2 L. ed. 45; *Birdsall v. Hewlett*, 1 Paige, 82, 2 L. ed. 550; *Tole v. Hardy*, 6 Cow. 338.

Interest is payable upon pecuniary legacies from the time when, by the terms of the will or by the rule of law, they become due and ought to be paid. It is incident to the principal demands and not imposed upon the executor for his neglect.

Kent v. Dunham, 106 Mass. 590; 2 Redf. Wills, 2d ed. p. 465; *Davison v. Rake*, 44 N. J. Eq. 506.

Plaintiff is entitled to interest upon the balance unpaid upon the legacy since the expiration of the year limiting the time of the executor to pay the debts and legacies.

2 Wms. Exrs. bottom p. 1424; *Smith v. Field*, 6 Dana, 861; *Rotch v. Emerson*, 105 Mass. 481; *Lawrence v. Embree*, 3 Bradf. 364; *Cooke v. Meeker*, 86 N. Y. 15; *Williamson v. Williamson*, 6 Paige, 304, 3 L. ed. 997; Am. Law of Administration, § 458.

If the devisee accept the devise he becomes personally bound to pay the legacy, and he becomes thus bound even if the land devised to him proves to be less in value than the amount of the legacy.

Brown v. Knapp, 79 N. Y. 148; *Gridley v. Gridley*, 24 N. Y. 180; *Adams v. Adams*, 14 Allen, 65; 3 Wms. Exrs. bottom p. 193, note K.

Cassoday, J., delivered the opinion of the court:

It is contended by the learned counsel for the defendant that this action cannot be maintained for the recovery of the unpaid balance of the legacy in question. It will be observed from the foregoing statement that the legacy mentioned, and the provision for the support and maintenance of Mary Ann, were, respectively, made liens upon the Pewaukee farm; that, subject to such liens and legacies, the testatrix gave, devised, and bequeathed to the defendant the said farm, and also three village lots, including the homestead, and also all other property, both real and personal, except one village lot devised to Marcenias. By the will the defendant was also made sole executrix of the same, and was there expressly relieved from giving any security or bonds, other than her own personal obligation as such executrix in the administration of the estate, or the execution and performance of any duty or trust under the will. The defendant, in her testimony, admitted that she had rented the Pewaukee farm for \$325 annually; that the year before the trial she had sold it for \$6,100; that the three lots which she obtained under the will were worth about \$550 each, or \$1,650, and that the house thereon was worth about \$1,000; that she had mortgaged the lots for \$1,600; and that there was personal property as mentioned in the foregoing statement. It

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may be conceded that the mere fact that a person named in a will as an executor has qualified as such does not, at common law, render him liable in an action at law to a legatee therein for his legacy. *Deeks v. Strutt*, 5 T. R. 690; *Jones v. Tanner*, 7 Barn. & C. 542. But it was held, even at common law, by *Lord Mansfield, O'K. J.*, that an action of assumpsit would lie upon a promise by an executor to pay a legacy in consideration of assets. *Atkins v. Hill*, Cowp. 284; *Hawkes v. Saunders*, Id. 280.

An ordinary executor, under our Statute, is bound to administer the estate according to law and the will of the testator, sell his goods, chattels, rights, credits, and estate, and out of the same pay and discharge all debts, legacies, and charges properly chargeable thereon, or such dividends thereon as may be ordered and adjudged by the county court, and to perform all the orders and judgments of that court. Rev. Stat. § 8794; *Scott v. West*, 63 Wis. 555. But the statute goes further, and provides that, "if the executor shall be sole or residuary legatee, instead of the bond prescribed in the preceding section, he may give a bond, in such form and with such sureties as the court may direct, with a condition only to pay all the debts and legacies of the testator, and in such case he shall not be required to return an inventory." Rev. Stat. § 8795. The same section provides that "an executor named in any will may be exempt from giving bond when the testator has so ordered or requested in his will, unless the county court shall order otherwise." Here the executrix was so exempted from giving such bond. Having sold and conveyed the estate thus charged with the payment of the legacy in question, and converted the proceeds thereof to her own use, and become a resident of another State, the defendant must be regarded as having accepted the devise and bequests on condition that she would pay the debts and legacies as in the will prescribed. In other words, by such acceptance she became personally liable upon an implied promise to pay. *Gridley v. Gridley*, 24 N. Y. 180; *Brown v. Knapp*, 79 N. Y. 148; *Adams v. Adams*, 14 Allen, 65.

Under the provisions of the will and the statutes, we think the trial court was right in holding that the legacy became due and payable at the end of the year limited for the payment of debts and legacies; and hence that the plaintiff is entitled to interest from that date, and upon unpaid balances created by partial payments. This is the rule which seems to be indicated by the authorities. *Thorn v. Garner*, 113 N. Y. 198; *Kent v. Dunham*, 106 Mass. 586; *Davison v. Rake*, 44 N. J. Eq. 506.

It is conceded that, by some mistake in reckoning interest, there was allowed to the plaintiff an excess of \$55.55, which the plaintiff expresses a willingness to remit. But, under our practice, such remission can only be made in the trial court. *Page v. Sumpter*, 53 Wis. 657; *Wylie v. Karner*, 54 Wis. 598; *West v. Milwaukee, L. S. & W. R. Co.* 56 Wis. 324.

The judgment of the Circuit Court is reversed, with costs, and the cause remanded, with directions to enter judgment in favor of the plaintiff, and against the defendant, less any excess of interest that may have been included.

COLORADO SUPREME COURT.

Callahill BROWN, *Resp't.*
v.
William T. VAILES, *App't.*

(.....Colo.....)

*1. Under the Act of 1885 the county judge, sitting in term-time in his regular capacity as the county court, is invested with jurisdiction to try and determine contested election cases of county officers. Whether the county judge sitting in vacation may exercise such jurisdiction, not determined.

2. Section 14 of the Act is to be construed as a statute of limitations upon a summary proceeding; and when the period for filing the statement under said section has fully elapsed, excluding the day when the votes are canvassed, the time cannot be extended merely on the ground that the last day happens to fall on Sunday.

(October 19, 1891.)

APPEAL by defendant from a judgment of the County Court for La Plata County in favor of contestant in a proceeding instituted to contest defendants right to act as commissioner for La Plata County. *Reversed.*

Statement by Elliott, J.:

William T. Vailes and Callahill Brown were opposing candidates for the office of commis-

*Head notes by ELLIOTT, J.

sioner of La Plata County at the general election in November, 1890. The vote being canvassed, it appeared that the total number of votes cast for said office was 1,223, of which Vailes received 614; Brown, 608; scattering, 1. Vailes received the certificate of election. This proceeding was instituted in the county court by Brown for the purpose of contesting the election of Vailes. The case being tried, the court found in favor of the contestor, Brown, and rendered judgment declaring him to have been duly elected. Vailes brings the case to this court by appeal. *Reversed.*

Messrs. N. C. Miller, W. C. Davidson, and Spickard & Pike, for appellant:

The fact that the tenth day fell on Sunday did not give the contestor another day upon which to file his statement.

The Act relating to contested elections (1885) is not only special in character but it furnishes a complete system of procedure within itself. The jurisdiction of the court, under such a statute, depends entirely upon the terms of the Act.

Schwartz v. Garfield County Ct. 14 Colo. 44.

Where a rule to plead expires on Sunday, the defendant has the next day in which to plead.

Cock v. Bunn, 6 Johns. 326.

In the computation of statute time, an intervening Sunday is counted.

Easton v. Chamberlin, 3 How. Pr. 412.

NOTE.—Time; extension of, when last day falls on Sunday.

A power that may be exercised up to and including a certain day of the month may generally be exercised on the following Monday when that day falls on Sunday. *Street v. United States*, 193 U. S. 299, 38 L. ed. 681.

If the last day of the year within which a devisee as a condition of the gift is required by will to pay a legacy comes on Sunday he may pay on the next day. *Sands v. Lyon*, 18 Conn. 18.

Rule as to contracts.

In general performance on the following Monday is in time where by the terms of a contract it is due on Sunday. *Avery v. Stewart*, 2 Conn. 60, 7 Am. Dec. 240; *Salter v. Burt*, 20 Wend. 205, 82 Am. Dec. 580; *Howard v. Ives*, 1 Hill, 263; *Campbell v. International L. Assur. Soc.* 4 Bosw. 299; *Kilgour v. Miles*, 6 Gill & J. 268.

If the last day for the delivery of property sold falls on Sunday the time will be extended to the next day. *Kilgour v. Miles*, *supra*.

But a seller's option on the sale of 100,000 gallons of oil to deliver at the rate of 40,000 gallons per week "during the month of May" will not permit a delivery of the whole 100,000 gallons on the first day of June although the last day of May falls on Sunday. *Brooklyn Oil Refinery v. Brown*, 38 How. Pr. 444.

If the last day given by an insurance policy for the payment of premium falls on Sunday, payment may be made on the following day. *Hammond v. American Mut. L. Ins. Co.* 10 Gray, 307.

So also as to the last of the thirty days of grace for the payment of such premium. *Campbell v. International L. Assur. Soc.* *supra*.

The sixty days allowed by an assignment for creditors for a release of claims by creditors desir- 14 L. R. A.

ing to share in the assignment is not extended because the last day falls on Sunday. *Pearpoint v. Graham*, 4 Wash. C. C. 241.

To the contrary, is a decision that if the last day of the six months allowed to creditors of an insolvent for proving claims falls on Sunday it is excluded. *Barns v. Eddy*, 12 R. I. 25.

As to bills and notes.

This rule as to extending the time applies to a tender on a non-negotiable note which falls due on Sunday. *Avery v. Stewart*, 2 Conn. 60, 7 Am. Dec. 240; *Barrett v. Allen*, 10 Ohio, 456.

So a note drawn on Saturday payable one day after date becomes due on the following Monday if no days of grace are allowed. *Sanders v. Ochil-tree*, 5 Port. (Ala.) 73.

And a post-dated check entitled to no days of grace, which is dated on Sunday, is not due until the following Monday. *Salter v. Burt*, 20 Wend. 205, 82 Am. Dec. 580.

And a bill of exchange if not entitled to days of grace may be protested on Monday if it falls due on Sunday. *Commercial Bank of Ky. v. Varnum*, 40 N. Y. 209.

But a negotiable note, although not entitled to days of grace, falls due on Saturday if the day of payment is Sunday according to the terms of the note. *Barker v. Parker*, 6 Pick. 80.

And a note having days of grace is due on Saturday if by its terms it is payable on Sunday. *West v. Lea*, 50 How. Pr. 313; *Kuntz v. Tempel*, 48 Mo. 71.

So where days of grace are waived on a negotiable note which falls due on Sunday the day of payment is on Saturday. *Doremus v. Burton*, 5 Bks. 57.

The "next day" after protest on which to mail notice is Monday where protest was on Saturday.

Where a statute prescribes that an act shall be done within a certain number of days, if the last day falls on Sunday, the party has not until the following day to do the act.

Anonymous, 2 Hill, 375; *Moot v. Parkhurst*, 2 Hill, 378, and *note*; *Ex parte Dodge*, 7 Cow. 146; *Cooley v. Cook*, 125 Mass. 406; *Haley v. Young*, 184 Mass. 364; *Conklin v. Marshalltown*, 66 Iowa, 122; *Robinson v. Foster*, 12 Iowa, 186.

A statutory provision requiring notice of contest to be given within a given time, from the date of the official count, or from the declaration of the result or the issuing of the certificate of election, or the like, is peremptory and the time cannot be enlarged.

McCrary, Elections, § 392, and citations.

Where an act must necessarily be done within a given time fixed by statute, and the last day of that time falls on Sunday, the party has not until the following day to perform the act.

Senate Resolution, 9 Colo. 632.

Messrs. Russell & McCloskey for appellee.

Elliot, J., delivered the opinion of the court:

This was a contested election case under the Act of April 10, 1885 (Sess. Laws, p. 193). The contestor having filed his statement and served his summons, the contestee appeared, and, first by demurrer and afterwards by answer, challenged the jurisdiction of the court over the proceeding. The grounds of objection to the jurisdiction of the court were:

Howard v. Ives, 1 Hull, 263; *Haynes v. Birks*, 3 Bos. & P. 600; *Eagle Bank v. Chapin*, 3 Pick. 180.

Time for pleading.

When the time to plead expires on Sunday, the party has the next day in which to plead. *Cock v. Bunn*, 6 Johns. 323; *Borst v. Griffin*, 5 Wend. 84; *Anonymous*. 1 Strange, 90; *Lee v. Carlton*, 3 T. R. 341; *Catherwood v. Shepard*, 30 La. Ann. 677; *Marks v. Russell*, 40 Pa. 372. (This might perhaps be otherwise where the time for pleading is expressly fixed by statute.)

The twenty-four hours for pleading after the demand of a plea is reckoned exclusive of Sunday. *Solomons v. Freeman*, 4 T. R. 220.

Statutory time.

The general rule, subject to some exceptions and denied altogether in Pennsylvania, is that statutory time cannot be extended because the last day falls on Sunday. *Ex parte Dodge*, 7 Cow. 147; *People v. Luther*, 1 Wend. 42; *Broome v. Wellington*, 1 Sandf. 664; *King v. Dowdall*, 2 Sandf. 133; *Ready Roof Co. v. Chamberlin*, 52 How. Pr. 123; *Alderman v. Phelps*, 15 Mass. 225; *Thayer v. Felt*, 4 Pick. 364; *Rowberry v. Morgan*, 9 Exch. 730.

The thirty days of a statutory lien created by attachment on a lien process during which an execution can be levied is not extended because the last day falls on Sunday. *Alderman v. Phelps*, 15 Mass. 225.

Sunday is included in computing the twenty-four hours within which a creditor under R. L. Pub. Stat. 1882, chap. 270, must pay the board of the debtor after written notice from the bail of his commitment. *Casey v. Viall*, 17 B. L. —.

But Sunday is to be excluded in computing the twenty-four hours within which a putative father must give notice of appeal against an order of aff- 14 I. R. A.

first, that the proceeding was tried and determined by the county court instead of by the county judge; *second*, that the written statement of contest was not filed in the office of the clerk of the county court within ten days after the day when the votes were canvassed.

1. The Act of 1885, *supra*, is somewhat ambiguous as to whether the county judge or the county court shall exercise jurisdiction in contested election cases of county officers. Upon careful consideration of its various provisions from section 13 to section 23, inclusive, we are satisfied that the county judge, sitting in term-time, in his regular capacity as the county court, is invested with jurisdiction to try and determine such election contests. Whether the county judge sitting in vacation may or may not exercise such jurisdiction, we need not now determine. The court did not err in overruling the challenge to its jurisdiction on the ground that the proceedings were had before the county court instead of the county judge.

2. From the record it appears that the votes were canvassed on November 6, 1890. The contestor did not file the written statement of his intention to contest the election until November 17, 1890. Section 14 of the Statute requires that the statement shall be filed "within ten days after the day when the votes are canvassed." Hence it is contended by appellant that the court below was without jurisdiction over the proceeding. On the other hand, it is claimed by appellee that, as November 16, 1890, fell on Sunday, the contestor was entitled to file his statement on the following Monday.

In a recent contested election case under the

filiation under 7 & 8 Vict., chap. 101, § 4, since such service cannot be made under the Statute 20 Car. II, chap. 7, § 6, on that day. *Reg. v. Justices of Middlesex*, 17 L. J. N. 8. (Magistrate's Cases) 111.

And the twenty-four hours allowed by statute for an appeal from a conviction after entering into a recognizance is to be computed by excluding Sunday where it would be unlawful to perfect his appeal on that day. *Ridgley v. State*, 7 Wis. 661.

And the twenty-four hours within which execution can be issued after entry of a judgment are exclusive of Sunday under a Statute prohibiting all secular labor and business on that day, because the debtor is entitled to the twenty-four hours in which to examine the correctness of the judgment. *Penniman v. Cole*, 8 Met. 496.

If the last day of the four months given by statute for filing a mechanics' lien falls on Sunday, a lien must be filed on Saturday. *Patrick v. Faulke*, 45 Mo. 312.

If the last of four days on which the statute requires property seized for taxes to be sold falls on Sunday, the sale must be made on the next day. *Creesey v. Parks*, 75 Me. 387, 45 Am. Rep. 408.

The last day of the time for which a short summons can run cannot be excluded because it is Sunday so as to allow making it returnable on Monday. *King v. Dowdall*, 2 Sandf. 131.

A short summons issued and served on Friday cannot be made returnable on Monday under a statute providing that it shall not be returnable in less than two days. *Simonson v. Durfee*, 40 Mich. 80.

The time allowed a justice of the peace to enter judgment in his docket cannot be extended because the last day falls on Sunday. *Harrison v. Sager*, 27 Mich. 476; *Bissell v. Bissell*, 11 Barb. 97; *Ready Roof Co. v. Chamberlin*, 52 How. Pr. 123.

But when the time stipulated for the entry of

Act of 1885 *Mr. Justice Hayt*, in delivering the opinion of this court, used the following language: "The proceedings upon an election contest before the county judge, under the statute, are special and summary in their nature, and it is a general rule that a strict observance of the statute, so far as regards the steps necessary to give jurisdiction, must be required in such cases. . . . The Act is not only special in character, but it furnishes a complete system of procedure within itself. . . . It provides for a written statement as the basis of the proceedings." See *Schwartz v. Garfield County Ct.* 14 Colo. 47, 48, and authorities there cited.

In *McCrary, Elections*, 2d ed. § 276, it is said: "A statutory provision requiring notice

of contest to be given within a given time from the date of the official count, or from the declaration of the result, or the issuing of the certificate of election, or the like, is peremptory, and the time cannot be enlarged. And it may be added that there is the strongest reason for enforcing this rule most rigidly in cases of contested elections, because promptness in commencing and prosecuting the proceedings is of the utmost importance, to the end that a decision may be reached before the term has wholly or in great part expired."

It has been held that where a rule to plead expires on Sunday the party has the next day in which to plead; but this rule has generally been limited in its application to causes over which the court has already acquired jurisdiction.

Judgment ends on Sunday that day is excluded, as it is fixed by contract and not by statute. *Keating v. Serrell*, 5 Daly, 273.

The ten days allowed by statute for serving a protest on the collector by an importer is not extended because the last day falls on Sunday. *Sheffer v. Magone*, 47 Fed. Rep. 872.

Six days publication of a notice of the filing of an assessment roll to be confirmed at the next meeting thereafter where all objections must be filed one day prior to the meeting is insufficient if the next day falls on Sunday, as one day must be allowed in which to file such objections. *Chicago v. Vulcan Iron Works*, 93 Ill. 222.

The time allowed by statute for an appeal cannot be extended because the last day falls on Sunday. *Ex parte Dodge*, 7 Cow. 147; *Reg. v. Middlesex*, 7 Jur. 398; *Contra in Pennsylvania*, *Re Goswiler's Estate*, 3 Penn. & W. 300; *Sims v. Hampton*, 1 Serg. & R. 411; *Harker v. Addis*, 4 Pa. 515.

If the last day of the statutory period for beginning an action falls on Sunday it may, in Pennsylvania, be brought on the following Monday. *Edmundson v. Wrang*, 104 Pa. 500.

Sunday is not counted when it is the last of the days given by statute for replevying property distrained for rent. *M'Kinney v. Reader*, 6 Watts, 34.

If the last of the eight days allowed by statute to a defendant in certain proceedings before judgment and execution falls on Sunday that day must be included in the computation. *Kowberry v. Morgan*, 9 Exch. 730.

The ten days given by the Constitution for the return of a bill by the governor, in default of which it may become a law without his signature, include the following Monday where the last day falls on Sunday, and the Legislature is therefore not in session. *Re Computation of Time*, 9 Colo. 622.

Change of rule by statute.

A statute providing that the last day for an act is to be excluded if it falls on Sunday applies to the ten days before a term of court for which papers must be served or filed. *Conklin v. Marshalltown*, 66 Iowa, 122; *Robinson v. Foeter*, 12 Iowa, 188.

Under a similar statute the ten years limited for the sale on execution under a judgment extends to the following day when the last day falls on Sunday. *Spencer v. Haug*, 45 Minn. 231.

New York Code Civ. Proc., § 768, providing that if the last day of the time within which an act is required by law to be done falls on Sunday it must be excluded applies to the time for taking an appeal from the municipal court of Rochester. *Dorsey v. Pike*, 46 Hun. 113.

Under Oregon statutes the last day for an appeal is excluded if it falls on Sunday. *Carothers v. Wheeler*, 1 Or. 194.

So also under Wash. Code, § 743. *Spokane Falls v. Browne* (Wash.) Nov. 12, 1891.

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If the last day of the four months preceding a bankruptcy proceeding within which an attachment is voidable falls on Sunday, that day is excluded from the computation in accordance with the general rule in U. S. Rev. Stat., § 5012. *Cooley v. Cook*, 123 Mass. 406.

So the ten days allowed by the Bankrupt Act for an appeal from the district to the circuit court is reckoned by excluding Sunday when that is the last day. *Re York*, 4 Nat. Bankr. Reg. 479.

If the last of the thirty days for service of process out of the State or by publication falls on Sunday, a publication commenced on the thirty-first day is sufficient, under N. Y. Code Civ. Proc., § 738. *Gibbon v. Freel*, 65 How. Fr. 273.

For redemption.

A redemption on Monday is too late where the last day of the time limited by statute for the redemption from a mortgage falls on Sunday. *Haley v. Young*, 184 Mass. 364.

But the right in such a case continues until Monday under a statute providing that where the last day for an act comes on Sunday that day is to be excluded from the computation. *Gage v. Davis* (Ill.) 11 West. Rep. 612; *Hicks v. Nelson*, 45 Kan. 51.

Redemption may be made on Monday from a prior redeeming creditor who redeems from an execution sale on Saturday where the statute gives the junior creditor twenty-four hours to redeem and the law does not require the sheriff's office to be kept open on Sunday. *Porter v. Pierce*, 7 L. R. A. 847, 120 N. Y. 217.

It will be noticed that the exceptions to the general rule, which denies an extension of time limited by statute because the last day falls on Sunday are chiefly cases in which the enforcement of the rule would require an act to be done on Sunday which it would not be lawful to do on that day or else would deprive a person of his opportunity to protect his rights, as in the case last above cited.

For court proceedings.

As in case of pleadings mentioned above, the rule is that the last day given by an order of court is excluded if it falls on Sunday; the last day of the time fixed by an order of court for service of papers for new trial is not to be computed if it falls on Sunday. *Muir v. Galloway*, 61 Cal. 486.

If the last day for bail falls on Sunday the party has all of the next day to put in bail. *Bullock v. Lincoln*, 2 Strange, 900; *Broome v. Wellington*, 1 Sandf. 664.

Sunday is not included in the four days in which to move in arrest of judgment. *Hales v. Owen*, 3 Salk. 635.

If the last day for an act by the court (here the issue of a capias) falls on Sunday or a holiday it is excluded. *Hughes v. Griffiths*, 13 C. B. N. S. 284.

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tion. *Cock v. Bunn*, 6 Johns. 826. So, where administrative or judicial acts are required to be performed within a specified time, if the last day falls on Sunday, the succeeding Monday becomes the return-day or court day, unless the same be also a legal holiday. *Re Computation of Time*, 9 Colo. 632.

So, also, the Civil Code of this State (section 382) provides that "the time within which an act is to be done as provided in this Act" shall exclude the last day if it be Sunday; but the rule is expressly limited to matters provided for in the Code. The Act of 1885, regulating proceedings in contested election cases, contains no such provision; and it is, as we have seen, "a complete system of procedure within itself." Its provisions, therefore, must be construed by general rules applicable to statutory construction. There is, undoubtedly, some conflict of authority in respect to the rule by which time as applied to statutes is to be computed. The question has sometimes been resolved by considering whether from the nature of the case a rigorous or liberal construction should be given. See opinion by Chief Justice Tilghman in *Sims v. Hampton*, 1 Serg. & R. 411. In Kansas, for the purpose of allowing a party to redeem his lands from a tax-sale, and in Pennsylvania, for the purpose of enabling a party to perfect an appeal, a method of computing time has been adopted which excludes the last day when it falls on Sunday. *English v. Williamson*, 34 Kan. 212; *Re Goswiler*, 3 Penn. & W. 200. In Massachusetts a similar rule has been declared for the purpose of preventing the forfeiture of life insurance policies. *Hammond v. American Mut. L. Ins. Co.* 10 Gray, 806. But the latter case, like others cited in the brief of counsel for appellee, pertains to the construction of contracts rather than statutes. When the computation of time under statutes becomes necessary, an entirely different rule prevails in Massachusetts. See *Cooley v. Cook*, 125 Mass. 406, where Chief Justice Gray states the rule as follows: "Whenever the time limited by statute for a particular purpose is such as must necessarily include one or more Sundays, Sundays are to be included in the computation, even if the last day of the time limited happens to fall on Sunday, unless they are expressly excluded, or the intention of the Legislature to exclude them appears manifest." The case of *Halcy v. Young*, 184 Mass. 366, was a bill in equity to redeem land from a mortgage. The last day of the three years fell on Sunday. The court, in its opinion, referring to the life insurance case in 10 Gray, *supra*, used the following language: "It is said that at common law, when the time for the performance of a contract according to its terms

expires on Sunday, a performance on the following Monday is good. But this rule, whatever may be the extent of it, has not been applied to acts which by statute are required to be done within a time therein limited." The Massachusetts rule for computing time under statutes is fully sustained by the New York cases. The case of *People v. Luther*, 1 Wend. 42, related to the redemption of lands sold under execution. The last day of the fifteen months happening on Sunday, an offer to redeem on the next day was held to be too late. So in *Re parte Dodge*, 7 Cow. 147, where the time fixed by statute within which an appeal might be taken was ten days, and the last day fell on Sunday, the court said: "Sunday has in no case, we believe, been excluded in the computation of statute time." The case at bar involves the construction of section 14 of the Act of 1885, *supra*, as a Statute of Limitations upon a summary proceeding. There has been much discussion whether the statutory period for commencing actions or proceedings should be held to include or to exclude the first day; and the decisions upon this subject have generally been arrived at by considering whether the time begins to run from or after an act done, or from or after a particular day. Wood, Lim. Act. p. 95 *et seq.*; *Arnold v. United States*, 13 U. S. 9 Cranch, 120, 3 L. ed. 676; *Re Tyson*, 18 Colo. 499. From the wording of section 14, *supra*, it is clear that the first day must be excluded. The statute gives the contestor "ten days after the day when the votes are canvassed" to file his statement. After much consideration we are satisfied, both upon principle and authority, that when the statutory period for filing the statement of an election contest for county officers under the Act of 1885 has fully elapsed, excluding the day when the votes are canvassed, the time cannot be extended merely on the ground that the last day happens to fall on Sunday. This is the reasonable, as well as the natural and literal, interpretation of the statute. Any other construction of such an act would be unwarranted. Whenever recourse to the courts becomes necessary to determine the result of an election, public and individual interests alike require that the proceeding should be commenced and prosecuted promptly. *McCrary, Elections, supra*.

The statement of contest not having been filed within the time required by the statute, the court below erred in entertaining jurisdiction of the case.

The judgment is accordingly reversed, and the cause remanded, with directions to the county court to dismiss the proceeding.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Daniel DONAHUE *et al.*, Apprs.,
v.

George E. HUBBARD;

(.....Mass.....)

1. A husband can convey his title as

NOTE.—For note on tenancy in entirety, see *Baker v. Stewart* (Kan.) 2 L. R. A. 434.
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tenant in entirety through a third person to his wife.

2. A husband and wife cannot in a joint action recover the proceeds of the wife's individual property.

3. A wife may be given judgment on striking out the name of her husband as co-plaintiff in an action by them jointly to recover the proceeds of her individual property.

(October 23, 1891.)

APPEAL by plaintiff from a judgment of the Superior Court for Worcester County in favor of defendant in an action brought to recover a balance remaining after the satisfaction of a mortgage from the proceeds of a foreclosure sale. *Affirmed upon condition.*

The facts sufficiently appear in the opinion.

Mr. H. L. Parker, for appellants:

The premises sold under the foreclosure sale were originally conveyed to the plaintiffs jointly as husband and wife. They held the estate therefore under the common-law tenure as "one indivisible" estate in them both and the survivor of them.

Wales v. Coffin, 13 Allen, 218; *Shaw v. Hearsay*, 5 Mass. 521; *Fox v. Fletcher*, 8 Mass. 274; *Knapp v. Windsor*, 6 Cush. 156; *Pierce v. Chace*, 108 Mass. 254; *Draper v. Jackson*, 16 Mass. 480. See also *Cruise Digest*, chap. 1, title 18, § 45.

If at the time the second mortgages were executed by Anna Donahue alone the estate was still held jointly by the plaintiffs as husband and wife, they are not effectual, because they purport to convey only her own estate, which is indivisible. The mortgages cannot operate by way of estoppel, either at law or in equity, because there can be no estoppel from a void conveyance.

Mason v. Mason, 1 New Eng. Rep. 106, 140 Mass. 63; *Stoples v. Brown*, 13 Allen, 64; *Lynde v. McGregor*, 13 Allen, 182, 90 Am. Dec. 188; *Pierce v. Chace*, 108 Mass. 254.

The recent statutes for the better protection of the separate property of married women have no relation to or effect upon real estate conveyed to husband and wife jointly.

Pray v. Stebbins, 1 New Eng. Rep. 521, 141 Mass. 219, 55 Am. Rep. 462; *Furness & M. Bank of Rochester v. Gregory*, 49 Barb. 155; *Wright v. Saddler*, 20 N. Y. 320; *Hemingway v. Seales*, 42 Miss. 1, 2 Am. Rep. 586, 97 Am. Dec. 425.

In States where it has been held that the husband's interest might be taken on execution and that he might mortgage his interest, it is to be inferred that the interest which can be thus taken or aliened is not the husband's right to the estate *sui generis*, but his interest *jure uxoris*, or his right to the usufruct during his wife's life.

Rogers v. Grider, 1 Dana, 242; *Barber v. Harris*, 15 Wend. 615; *Brown v. Gale*, 5 N. H. 416; *Schermerhorn v. Miller*, 2 Cow. 439; *Bennett v. Child*, 19 Wis. 362, 88 Am. Dec. 692.

Hence it would seem that the deed of Daniel Donahue to Keane, and of Keane to Anna Donahue, if it conveyed anything, was not a conveyance of his own estate *sui generis*, but could only operate to convey or release his right to control his wife's estate.

If at the time when the second mortgages are executed there has been no severance of the estate, and the husband and wife still hold by entireties, the fact that the husband has orally assented to the conveyances, and signed them in release of curtesy, does not add to their validity. They are void and not voidable.

Pierce v. Chace and *Anthony v. Pierce*, 108 Mass. 254; *Lowell v. Daniels*, 2 Gray, 161, 61 Am. Dec. 448; *Jewett v. Davis*, 10 Allen, 83; 14 L. R. A.

Lithgow v. Kavenagh, 9 Mass. 161; *Bruce v. Wood*, 1 Met. 542, 35 Am. Dec. 390; *Concord Bank v. Bellis*, 10 Cush. 276; *Lathrop v. Foster*, 51 Me. 367; *Boach v. White*, 94 Ind. 510.

Mr. E. J. McMahon, for appellees:

Where an estate is held by a husband and wife as tenants by entirety, during coverture the husband has all of the rights in the premises which are incident to his own sole property, excepting only a right of survivorship, which exists in his wife. The husband without the consent of the wife has the absolute control and usufruct of such an estate during his life. He can convey it and in case he survives his wife his conveyance becomes as effective to pass the whole estate as it would have been had the husband been sole seized.

Pray v. Stebbins, 1 New Eng. Rep. 521, 141 Mass. 219, 55 Am. Rep. 462; *Barber v. Harris*, 15 Wend. 615; 1 Preston, Estates, 132.

The husband can charge such an estate with his debts, and it may be seized and sold by his creditors. The purchaser, or assignee of the husband, can acquire no greater interest than was vested in the husband, and consequently he would hold in subordination to the contingent right of the wife.

Ames v. Norman, 4 Sneed, 683, 70 Am. Dec. 269; *French v. Mehan*, 56 Pa. 266; *Bennett v. Child*, 19 Wis. 362, 88 Am. Dec. 692.

The conveyance of the husband to Keane was good. Its effect was to give to Keane the absolute use of the estate during the life of the grantor, and also the entire estate in case the husband should survive the wife.

The title of Keane in the estate was complete, excepting the right of survivorship in the wife, Anna Donahue. Keane conveyed all of his interest or title to the wife, Anna Donahue. The wife was then seized of the entire estate.

Allen, J., delivered the opinion of the court:

Prior to Stat. 1835, chap. 237, a conveyance of land to husband and wife created the peculiar title sometimes called an "estate by entireties" or "in entirety." Neither could sever this title so as to defeat or prejudice the title of the survivor. *Pray v. Stebbins*, 141 Mass. 219, 1 New Eng. Rep. 521, 55 Am. Rep. 462, and cases cited. We find nothing, however, to show that it has ever been considered that a husband could not convey his title through a third person to his wife. On the other hand, the peculiar feature of this kind of estate is that each is secure against an impairment of rights through the sole act of the other. 2 Bl. Com. 182; *Cruise, Dig.* title 18, chap. 1, §§ 44-49; *Preston, Estates*, 131; 2 Kent, Com. 132; 4 Kent, Com. 362; 1 Washb. Real Prop. 3d ed. 577.

There is nothing in this to prevent the wife's acquiring the title of her husband; and in *Meeker v. Wright*, 76 N. Y. 262, 272, it was held that this might be done. This part of the decision in *Meeker v. Wright* was not questioned in *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361, or in *Zornitain v. Bram*, 100 N. Y. 12, 1 Cent. Rep. 66, and we have found nothing in any of the books denying the doctrine. Such a transfer of the husband's title appears to have been made in the present case.

by the deeds of Daniel Donahue to Keane, and of Keane to Mrs. Donahue. It is true that the statement of facts does not show, in express terms, that both of these deeds were a part of one and the same transaction, as it properly should have done. But the plaintiffs in their brief recite that the husband had released all his rights to his wife through a conduit. The deeds were both executed on the same date. The consideration expressed was one dollar and other valuable considerations. The statement of facts recites that both of these conveyances were made with the knowledge and oral assent of Mrs. Donahue. We believe we should defeat the intention of the parties if we did not assume that the deeds were parts of one transaction, as the counsel for both parties have assumed in their arguments. The effect was that the title vested in Mrs. Donahue. Her subsequent mortgages to George E. Hubbard were therefore valid, and he, upon a sale made under the power of sale contained in the first mortgage, might legally retain from the proceeds the sums due to himself under the two subsequent mortgages. This would still leave a small balance of \$19.64 in his hands to be paid over to Mrs. Donahue. This, however, cannot be recovered in an action brought by her husband and herself jointly. Application may be made in the superior court for leave to amend by striking out the name of Daniel Donahue as co-plaintiff, and, if granted, Mrs. Donahue may have judgment for said sum. *Fay v. Duggan*, 135 Mass. 242. Otherwise the order must be, *judgment affirmed*.

Francis G. BALCH, Trustee, etc., under the Will of Daniel Hammond, Deceased,
v.

William H. PICKERING *et al*.

(.....Mass.....)

The literal meaning of a will giving the income of any share which a child was to enjoy for life to the surviving children for their several lives "and the principal to their children" will not prevail to the exclusion of the issue of other children who are deceased where the general purpose of the will is equality among the branches of the family taking advances into account, and a literal construction might result in intestacy as to part of the estate.

(September 3, 1891.)

RESERVATION by the Supreme Judicial Court for Suffolk County, (W. Allen, J.) for the opinion of the full bench, of an action brought to obtain construction of a clause in a will. *Decree accordingly*.

The case sufficiently appears in the opinion. *Mr. Richard Olney* for Ellen Hammond *et al*.

Messrs. Horace G. Allen and William R. Howland for George Francis Hammond.

NOTE.—For notes on interpretation of wills, see *Boston S. D. & T. Co. v. Coffin* (Mass.) 8 L. R. A. 740; *Davidson v. Coon* (Ind.) 9 L. R. A. 584; *Master-son v. Townshend* (N. Y.) 10 L. R. A. 516. 14 L. R. A.

Holmes, J., delivered the opinion of the court:

This is a bill brought by the trustees under the will of Daniel Hammond for the construction of a part of the fifth clause of his will. The testator left one son and six daughters. One daughter, Sally S. Pickering, has now died leaving no child living at the time of her death. The son had died before her, leaving one child, the defendant, George Francis Hammond. The question is whether the defendant is entitled to a share in the principal of the share of which Sally Pickering received the income. The words to be construed are "if any one or more of my said daughters or son shall decease, leaving no child or children living at the time of such decease, the principal sum of which such deceased daughter or son may have had the income for life shall be distributed to the surviving daughters and son, that is to say, the income for their several lives and the principal to their children as above provided and arranged."

The literal meaning of the words is that when a child of the testator shall die leaving children the latter shall receive the principal sum of which their parents had received the income and thereupon their interest in the joint fund shall cease, although as the result of such cessation they may happen to lose the secondary and accidental advantage of sharing in the division of some other child's share if another child of the testator should chance to die later and leave no children of his or her own. See *Re Horner's Estate*, L. R. 19 Ch. Div. 186; *Re Bern*, L. R. 29 Ch. Div. 839.

On the other hand, there is the same unlikelihood that the testator intended as an aleatory gift which has led to the statutory construction against joint tenancies. Probably the testator did not have it in mind to deprive any set of grandchildren of this secondary advantage because of the previous death of their parent. If that is the result of the words it is an accidental result, not the object of his disposition. The general purpose manifested is that the grandchildren should stand as well with regard to the principal as their parents stood with regard to the income, and that the division between the different branches of the testator's family should be equal, taking advances into account. It should be added that so far as the present question is concerned the different branches stand exactly alike—the children of daughters equal *per stirpes* and the child of the son equal to the children of a daughter. If the literal meaning of the words is adopted, then if the last sister who died should leave no children living the limitation would fail altogether and there would be an intestacy, as the fifth clause is a residuary.

Although I have not been able to free my mind from doubt, the latter considerations have prevailed with the court in favor of equality of distribution and against the disinheritance *pro tanto* of grandchildren whose parents were not living. We read the last words of the fifth clause as meaning that the income of their proportion of the deceased child's share shall be paid to the other children of the testator who are alive and that the principal of a like proportion shall be paid to the children of his other children who are dead as well as to

the children of the surviving children when the latter shall die. Whether the interest of grand-children would be devested by death before the death of the childless daughter we need not determine. See *Bowker v. Bowker*, 148 Mass. 198; *Minot v. Taylor*, 129 Mass. 160; *Re Bowman*, L. R. 41 Ch. Div. 525.

We cannot agree that the effect of the will is modified by the fourth codicil giving to the testator's son George one seventh instead of one half of one seventh given him by the will. *Decree accordingly.*

IOWA SUPREME COURT.

SANDWICH MANUFACTURING CO.,

Appl.,

T. J. B. ROBINSON, Intervenor, etc.

(.....Iowa.....)

1. Claims for money not yet earned may be the subject of a valid chattel mortgage.
2. A mortgage on threshing machine accounts not yet earned is void as to them for lack of definite description where they are described only as all such accounts which shall be earned up to the time the mortgage debt is fully paid by a threshing machine which is also included in the mortgage.

(Beck, Ch. J., dissents from proposition 2.)

(October 21, 1891.)

A PPEAL by complainant from an order of the District Court for Franklin County overruling a demurrer to a petition of inter-

vention filed by Robinson in garnishment proceedings instituted by complainant to collect a claim against Frank Menzie, by which Robinson claimed the garnished funds under a chattel mortgage. *Reversed.*

Statement by **Robinson, J.:**

The plaintiff caused an execution to be issued for the satisfaction of a judgment which it held against one Frank Menzie. It was served by garnishing certain persons as supposed creditors of Menzie. They were required to appear in court and make answer to the garnishment. At the term at which they were required to answer appellee appeared and filed a petition of intervention, in which he claimed the money of Menzie in the hands of the garnishees by virtue of a chattel mortgage thereon, executed and recorded in Franklin County prior to the garnishment. A demurrer to the petition of intervention was overruled, and from that ruling plaintiff appeals.

NOTE.—*Mortgage or assignment of future accounts or earnings.*

Future earnings under an existing contract may be assigned. *Payne v. Mobile*, 4 Ala. 333; *Fields v. New York*, 6 N. Y. 179, 37 Am. Dec. 455; *Devlin v. New York*, 63 N. Y. 8; *Hall v. Buffalo*, 1 Keyes, 193; *People v. Dayton*, 30 How. Pr. 143; *Emery v. Lawrence*, 8 Cush. 151; *Macomber v. Doane*, 2 Allen, 541; *Boylan v. Leonard*, Id. 407; *Taylor v. Lynch*, 5 Gray, 49; *Lannen v. Smith*, 7 Gray, 150; *Weed v. Jewett*, 2 Met. 608, 37 Am. Dec. 115; *James v. Newton*, 2 New Eng. Rep. 820, 142 Mass. 336; *Garland v. Huntington*, 51 N. H. 408; *Hawley v. Bristol*, 39 Conn. 26; *Augur v. New York Belting & P. Co.* 39 Conn. 535; *Haynes v. Thompson*, 6 New Eng. Rep. 141, 80 Me. 125; *Ruple v. Bindley*, 91 Pa. 296; *McManaman v. Hanover Coal Co.* 9 Kulp, 181; *State Bank v. Hastings*, 15 Wis. 83; *Greene v. Bartholomew*, 34 Ind. 205.

This is true although the contract is indefinite as to time and amount, and liable to be terminated at any time. *Wade v. Beesey*, 75 Me. 412; *Thayer v. Kelly*, 28 Vt. 19, 65 Am. Dec. 220; *Kane v. Clough*, 36 Mich. 436, 24 Am. Rep. 569.

And although the workman works by the piece and the amount of his wages varies. *Hartley v. Tapley*, 2 Gray, 563; *Twiss v. Cheever*, 2 Allen, 41.

An assignment as security of wages to be earned of a specified employer within a specified time, for whom the assignor is then working although he is discharged the next day but afterwards re-employed, is good in equity. *Edwards v. Peterson*, 6 New Eng. Rep. 737, 80 Me. 387.

An assignment of a quarter's salary before the expiration of the quarter can be made by a municipal officer appointed for a year, although he is removable at will. *Brackett v. Blake*, 7 Met. 335, 41 Am. Dec. 442. [But the objection on grounds of public policy to the assignment by an officer of his unearned salary make a distinct question not here raised.]

An assignment by a policeman at the beginning 14 L. R. A.

of a month of his wages for the month is valid. *Manly v. Bitzer* (Ky.) 18 Ky. L. Rep. 163.

An agreement in articles of partnership that all earned by either as an officer shall belong to the partnership is valid. *Thurston v. Fairman*, 9 Hun, 584.

An assignment for what is to become due for boarding persons then boarding with the assignor, without an agreement for any specified time, is good. *Farnsworth v. Jackson*, 32 Me. 419.

But the mere possibility of future employment where there is no present employment will not sustain an assignment of future wages. *Mulhall v. Quinn*, 1 Gray, 105, 61 Am. Dec. 114.

And an assignment of wages to be earned under future employment by any person is invalid. *Jermyn v. Moffitt*, 75 Pa. 390; *Lehigh Valley R. Co. v. Woodring*, 7 Cent. Rep. 208, 116 Pa. 513.

Future earnings by a fireman in a fire department of a city are not assignable if there was no present engagement as fireman or agreement therefor. *Twiss v. Cheever*, 2 Allen, 40.

An assignment of future wages under an existing employment is valid as to wages earned after the expiration of the existing contract upon a continuation of service under a new agreement for less wages. *Wallace v. Walter Heywood Chair Co.* 16 Gray, 209.

A transfer of future accounts to be made by a physician will not sustain an action by the transferee in his own name. *Skipper v. Stokes*, 42 Ala. 255.

An assignment of money to be earned under a contract does not pass the legal title so as to make it subject to garnishment. *Hessie v. God* is with *Us Congregation*, 85 Cal. 373.

Mortgages.

An assignment of future wages under an existing contract may be good also when made merely

Messrs. Andrews & Bedell, for appellant:

The description is insufficient in that it fails to locate the accounts, or debts to be contracted, not confining them to the earnings of this certain machine, for any county, or even State, and there is nothing in the mortgage to indicate the locality, or territory in which these accounts are to be made.

Muir v. Blake, 57 Iowa, 663; *Barrett v. Fisch*, 76 Iowa, 553; *Sperry v. Clarke*, Id. 504. **Mr. William Hoy**, for appellee:

All kinds of property, real or personal, which are capable of an absolute sale may be the subject of a mortgage.

2 Bouvier, Law Dict. p. 198.

The earnings of a steamboat may be the subject of a chattel mortgage.

Jones, Chat. Mort. ed. 1881, p. 141.

The earnings of a horse may be the subject of a mortgage.

McArthur v. Garman, 71 Iowa, 84.

A book account may be the subject of a mortgage.

Lorner v. Allyn, 64 Iowa, 725.

It was held in *Sperry v. Clarke*, 76 Iowa, 503, that "the description of the property as contained in the chattel mortgage must direct the mind to evidence where the precise thing conveyed may be ascertained and if thereby absolute certainty may be attained the instrument is valid."

The appellant claims the accounts under a levy by virtue of an execution issued upon a judgment that was rendered in 1888. The mortgagors in the case at bar had no interest

in the accounts. And appellant did not acquire any greater interest by the levy than the mortgagors possessed at the time of the levy.

Manny v. Adams, 32 Iowa, 163; *Harshberger v. Harshberger*, 26 Iowa, 508; *Bacon v. Thompson*, 60 Iowa, 284; *Rogers v. Highland*, 69 Iowa, 504, 58 Am. Rep. 280.

Robinson, J., delivered the opinion of the court:

The matter in controversy is presented in a certificate of the trial judge in words as follows: " . . . Is the following description contained in a chattel mortgage a sufficient description to impart notice to third parties as to the accounts therein described, to wit: 'One J. I. Case Threshing Machine Co's separator, No. 10,921, with trucks, etc., and twelve-horse power, complete, with all the belts and tools owned by Menzie and Norvell. All the threshing machine accounts which we shall earn or shall become due us by the work of the above machine from now till this debt is paid in full. All of which property I now own, clear of all incumbrance, and the same is now in my possession in section 11-8, township No. 91-2, range No. 21 1/2' " It is claimed by appellant that the description is insufficient for the reason that demands for money not earned cannot be mortgaged. We do not think the claim is well founded. As a general rule, every species of personal property which may be sold, and which has an actual or prospective existence, may be mortgaged. 6 Lawson, Rights, Rem. & Pr. § 3079.

It is the well-settled rule in this State that a

as security for a debt. *Emery v. Lawrence*, 8 Cush. 151, *Taylor v. Lynch*, 5 Gray, 49.

Except as affected by statutes requiring chattel mortgages to be recorded the question is much the same whether the assignment is absolute or for security.

A mortgage by a railroad company of all property, etc., does not cover earnings from a contract not earned or contemplated. *Emerson v. European & N. A. R. Co.* 67 Me. 392.

A chattel mortgage on a horse "to cover all earnings of the horse, whether by premiums or otherwise," was construed not to include premiums earned after the mortgage was executed. *McArthur v. Garman*, 71 Iowa, 84.

A specific lien will not attach to future earnings until they are earned and then not by force merely of the original contract but of some new act. *Cooper v. Douglas*, 44 Barb. 409.

A mortgage by a blacksmith of accounts to be made by certain persons named is at most an executory agreement and insufficient to transfer the ownership of the accounts. *Purcell v. Mather* 35 Ala. 570, 76 Am. Dec. 307.

A conveyance to trustees for debts of shop accounts to be created by labor may be protected in equity when sued on by the assignee in the assignor's name but not as to one owing such account who without notice has acquired a valid set-off. *Stewart v. Kirkland*, 19 Ala. 162.

A mortgage of personal property including the hire of certain negroes or their use for the year and whatever negroes the mortgagor may hire the next year is not void on its face. *Floyd v. Morrow*, 36 Ala. 353.

Future earnings of ships or seamen.

The profits to be made by a steamboat may be mortgaged. *Stewart v. Fry*, 3 Ala. 573. 14 L. R. A.

An assignment of freight to be earned by a certain voyage in trust to pay debts is good. *Leslie v. Guthrie*, 1 Bing. (N. C.) 697; *Douglas v. Russell*, 4 Sim. 524; *Lindsay v. Gibbs*, 22 Beav. 522; *Curtis v. Auber*, 1 Jac. & W. 526.

The assignment in *Douglas v. Russell*, *supra*, seems to be indefinite as to the number of voyages.

An assignment to secure an advancement of the freight earnings and profits of a ship then under a charter does not include whale oil obtained on a later voyage. *Robinson v. Macdonell*, 5 Maule & S. 228.

An assignment of future wages by a seaman is good. *Crouch v. Martin*, 2 Vern. 586.

In this case the assignment was for advances.

The lay or share in the profits which a seaman in a whaling voyage receives is assignable. *Gardner v. Hoeg*, 18 Pick. 188; *Tripp v. Brownell*, 12 Cush. 376.

An order by a whaling seaman made as security for future advance for the balance that may be due him on settlement of his voyage may be valid as against him so as to defeat his right to recover against the owner of the vessel. *Tripp v. Brownell*, *supra*.

But a sale of the fish to be caught by a schooner on a certain voyage does not pass title to the fish when caught. *Low v. Pew*, 108 Mass. 347.

This last decision, although not strictly within the class of cases as to future accounts or earnings, but rather in that kindred class as to after-acquired property illustrates the principle on which the cases largely seem to turn, and is based on the fact that the fish represented only a possibility or expectancy not coupled with any interest. On a similar ground is the distinction between earnings of an existing specified contract which are held to be assignable and those of any future employment generally which are not.

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valid mortgage may be given on personal property not owned by the mortgagor, and not then in existence, if he afterwards acquired it. That rule has been applied to additions to stocks of merchandise. *Scharfenburg v. Bishop*, 35 Iowa, 63; *Stephens v. Pence*, 56 Iowa, 258. It has also been applied to crops to be planted and grown. *Norris v. Hix*, 74 Iowa, 525; *Wheeler v. Becker*, 68 Iowa, 723; *Fejavarly v. Broesch*, 52 Iowa, 88.

The right of a railroad company to mortgage its future earnings was affirmed in *Jessup v. Bridge*, 11 Iowa, 575, although the decision was founded to some extent on considerations of public policy. See also *Dunham v. Iselt*, 15 Iowa, 298. The principles which govern the cases cited are applicable to the one under consideration. That an account for money due may be sold cannot be questioned, and an interest in such an account less than the unqualified ownership of it may be transferred. Since a valid mortgage may be given on merchandise not in existence, and on crops neither grown nor planted, we must hold that one may be given on a claim for money not earned. In such cases the mortgage attaches to the property designed to be included therein when it is brought into existence. What relation a mortgage of accounts has to the Recording Act is a question not presented for our consideration, and not determined. We are of the opinion, however, that the question certified must be answered in the negative. The description given specifies the machine with which the accounts were to be earned, and the time during which they were to be earned, but there is no suggestion as to the county or State in which they were to be earned, nor of the persons against whom they may accrue, and no certainty as to the persons who shall earn them by operating the machine. The test of the sufficiency of a description in a chattel mortgage to charge third parties with notice approved by this court is stated as follows: "That description which will enable third persons, aided by inquiries which the instrument itself indicates and directs, to identify the property, is sufficient." *Smith v. McLean*, 24 Iowa, 332.

It was said in *Muir v. Blake*, 57 Iowa, 665, that a chattel mortgage which described the mortgaged property as "all the crops raised by me in any part of Jones County for the term

of three years," was insufficient, and that "a chattel mortgage ought not to be a drag-net, covering a whole county, in any such general terms." But the description involved in that case was much more definite and certain than the one in controversy. This contains nothing which would direct third persons to the property sought to be mortgaged. It is true, if a debtor of the mortgagor were found, he might be interrogated as to the origin of the indebtedness, and by pursuing that or some other method it might be ascertained that the debt was owing to the mortgagor by reason of work done with a separator bearing the number given in the mortgage; but the law imposes no such burden upon third persons. They are under no obligation to exhaust every possible means of information before they can safely proceed to treat the property of the mortgagor as unincumbered. See *Sperry v. Clarke*, 76 Iowa, 506; *Barrett v. Fisch*, 76 Iowa, 558, and cases therein cited; *Warner v. Wilson*, 73 Iowa, 719.

Other questions are discussed by counsel, but are not involved in the appeal, and cannot be decided.

For the reasons indicated the order of the District Court is reversed.

Beck, Ch. J., dissenting:

In my opinion the description of the accounts covered by the mortgage is just as definite as it could possibly have been made. It describes and specifies the machine for the services of which the mortgaged accounts should accrue, and the time in which such debts should be incurred. Who the persons owing the accounts shall be, and where they live, and therefore where the locality of the account mortgaged shall be, could not have been known, and therefore could not have been stated. The opinion defeats the right of the holder of the mortgage upon a ground which could not have been provided against. The mortgage puts upon inquiry which may be readily answered as to the facts relating to the names of the persons who shall own the accounts, and the locality thereof, for the accounts are against those who have threshing done by the machine. All accounts for such services are covered by the mortgage. In my opinion, the judgment of the district court should be affirmed.

OHIO SUPREME COURT.

Ex Parte Hiram P. McKNIGHT.

(.....Ohio St.)

*1. A person surrendered to the authorities of this State by another State

*Head notes by the COURT.

NOTE.—Extradition from sister State; right to try prisoner for other crime than that for which he was surrendered.

In conflict with the principal case a majority of the cases hold that a person brought from another State on requisition under a requisition on a criminal charge may be tried for a different crime committed before he left the State without allowing him time and opportunity to leave the State. *Williams v. Weber* (Colo.) Nov. 9, 1891; *State v. Stewart*, 60 Wis. 587; *Re Noyes* (N. J.) 17 Alb. L. J. 407; *Re Miles*, 52 Vt. 609; *Ham v. State*, 4 Tex. App. 645; *Dowd Case*, 18 Pa. 37.

or Territory on extradition proceedings cannot, while held in custody thereunder, be lawfully tried for a different crime than the one upon which his extradition was obtained, unless he voluntarily waives his privilege.

2. The privilege is not waived by failure to plead it in abatement of the indictment for such different crime, nor by entering a

A slight difference between the charge on which

plea of not guilty thereto, when, before the trial, the accused asserts his privilege, and objects to the trial on that ground.

3. While the writ of habeas corpus cannot properly be employed to review and correct errors committed by courts when acting within the sphere of their authority, it is the appropriate remedy to obtain discharge from imprisonment under an order or process of a court, which it was without jurisdiction to make or issue.

(November 17, 1891.)

APPPLICATION for a writ of habeas corpus to obtain petitioner's discharge from custody in the Ohio penitentiary. *Commitment adjudged unlawful.*

Statement by **Williams, Ch. J.**:

Upon the application of **Hiram P. McKnight**, a prisoner in the Ohio penitentiary, who claims he is there unlawfully deprived of his liberty, a writ of habeas corpus was issued to inquire into the cause of such deprivation. The warden, to whom the writ was directed, in his return sets forth at large the cause of the imprisonment, and the warrant for the same. Both the petition for the writ and the officer's return refer to the record in the case of *Hiram P. McKnight v. State*, now pending in this court, and make that record a part of the petition and return. That is a case in error to reverse the judgment of conviction and sentence under which the prisoner is held. The facts shown by the record, so far as they are material to the present inquiry, are as follows: On the 3d day of December, 1890, the prisoner was indicted by the grand jury of the County of Wood for the crime of forgery. The indictment contains two counts, one for forging an indorsement on a bill of exchange, and the other for uttering and publishing the same as true and genuine, knowing it to be forged. Upon this indictment an application was made to the governor of this State for a requisition on the executive of the State of New York, where the accused then was, for his surrender, as a fugitive from justice, to the authorities of this State. The application was accompanied by a duly attested copy of the indictment, as the statute requires, and was based upon no other charge. The requisition was accordingly made, reciting the indictment of the ac-

cused for the crime charged, and designating an agent to receive him and convey him to the County of Wood for trial thereon. The requisition was honored, and the accused was arrested and delivered into the custody of the agent appointed for that purpose, by whom he was taken to the county where the indictment was returned, and there lodged in jail to await his trial. On the 4th day of December, 1890, the same grand jury which had returned the indictment upon which the prisoner was extradited, as above stated, also indicted him for the crime of obtaining property by false pretenses. The accused has had no trial on the first indictment. It appears that when the case was called for trial, on the 9th day of March, 1891, he was ready and willing to proceed, but it was postponed on the application of the prosecuting attorney; and thereupon, at the request of the prosecuting attorney, the case upon the indictment for obtaining property by false pretenses was called for trial. Before entering upon the trial, the prisoner interposed the objection that since his extradition he had been continuously imprisoned in the county jail without opportunity to return to the State from which he had been surrendered, and therefore he could not lawfully be subjected to trial upon that indictment, it being for a crime different from that for which he was extradited. Upon the hearing of the objection the facts hereinbefore stated were established, and also the prisoner's continuous imprisonment since his extradition. The court overruled the objection, and, as the record shows, against the prisoner's protest, "put him immediately on trial;" whereupon, a plea of not guilty having been entered, the trial proceeded, and resulted in the conviction and sentence under which the prisoner is now confined in the penitentiary. He claims the proceedings are void, and his imprisonment unlawful.

Mr. Hiram P. McKnight, in propria persona, for the writ.

Messrs. D. K. Watson, Atty-Gen., and R. S. Parker, contra.

Williams, Ch. J., delivered the opinion of the court:

1. There is some conflict of authority upon the general question whether, in a case of in-

a criminal is tried and that on which he was extradited from another State was held immaterial in the absence of anything to suggest fraud in procuring the extradition. *Harland v. Territory*, 3 Wash. Terr. 131.

On the contrary, other cases hold that a prisoner is entitled to a reasonable time on termination of proceedings against him after being brought from another State within which to return before he can be arrested on a different charge. *Re Cannon*, 47 Mich. 481; *Re Hope*, 10 N. Y. Supp. 28; *Re Fitton*, 45 Fed. Rep. 471; *State v. Hall*, 40 Kan. 338.

This rule has been also applied to his arrest on civil process. *Moleator v. Sinnen*, 7 L. R. A. 817, 76 Wis. 308; *Compton v. Wilder*, 40 Ohio St. 130. *Contra* (in the absence of bad faith), *Williams v. Bacon*, 10 Wend. 636, also *Browning v. Abrams*, 51 How. Pr. 172, following *Adrian v. Lagrave*, 59 N. Y. 110 (the latter being a case of extradition from a foreign country).

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But this reasonable opportunity to return is only for a present return and does not extend until the end of the proceedings on which he was brought if he is not restrained on that charge. *Re Fitton*, 45 Fed. Rep. 471.

A waiver by the fugitive of defects in the papers calling for his surrender does not deprive him of the right to object to being tried for a different offense. *Ibid.*

In line with the authorities first cited above are decisions that a criminal brought on requisition to one State to answer for a crime committed there may be taken to a third State on another requisition for an earlier crime. *People v. Sennott* (Ill.), 20 Alb. L. J. 230; *Haackney v. Welsh*, 5 West. Rep. 235, 107 Ind. 253.

For extensive note on the general subject of "extradition," see note to *State v. Jackson* (Tenn.) 1 L. R. A. 370.

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terstate extradition, the extradited person can lawfully be tried for any offense other than the one upon which he was surrendered, until he shall have had a reasonable time and opportunity to return to the surrendering State after his trial and acquittal on the charge upon which he was extradited, or the expiration of his imprisonment under a conviction thereof; and there is also upon the same question, in cases of international extradition. It is not deemed necessary or important to enter upon an extended review or discussion here of the many cases on the subject. This court has held that a person extradited under the treaty between the United States and Great Britain, known as the "Ashburton Treaty," cannot be prosecuted for a different crime than that specified in the warrant of extradition. *State v. Vanderpool*, 39 Ohio St. 273. And such has since been declared to be the law by the Supreme Court of the United States. *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425. These decisions are based upon the interpretation of the treaty and the Acts of Congress on the subject. The only provision of the treaty which relates to the extradition of criminals is contained in the tenth article, which is as follows: "It is agreed that the United States and her Britannic majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other; provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive."

This provision of the treaty, and its effect, are discussed at some length by *Mr. Justice Miller* in the opinion of the court in *United States v. Rauscher*, *supra*. After showing that, in the absence of treaty, it was the recognized rule of public law that the country receiving the offender against its laws from another country had no right to proceed against him for any other offense than that for which he had been delivered up, and that, under the Constitution, treaties made by the United States become, like that instrument, and laws passed in pursuance thereof, the supreme law of the land, governing courts in appropriate proceedings for the

enforcement of the rights of persons growing out of them, the learned justice proceeds to the discussion of the rights of a person extradited under the particular treaty in question. On that subject he says: "It is unreasonable to suppose that any demand for rendition framed upon a general representation to the government of the asylum (if we may use such an expression) that the party for whom the demand was made was guilty of some violation of the laws of the country which demanded him, without specifying any particular offense with which he was charged, and even without specifying an offense mentioned in the treaty, would receive any serious attention; and yet such is the effect of the construction that the party is properly liable to trial for any other offense than that for which he was demanded, and which is described in the treaty. There would, under that view of the subject, seem to be no need of a description of a specific offense in making the demand. But, so far from this being admissible, the treaty not only provides that the party shall be charged with one of the crimes mentioned, to wit, murder, assault with intent to commit murder, piracy, arson, robbery, forgery, or the utterance of forged paper, but that evidence shall be produced to the judge or magistrate of the country of which such demand is made, of the commission of such an offense, and that this would justify the apprehension and commitment for trial of the person so charged. If the proceedings under which the party is arrested, in a country where he is peacefully and quietly living, and to the protection of whose laws he is entitled, are to have no influence in limiting the prosecution in the country where the offense is charged to have been committed, there is very little use for this particularity in charging a specific offense, requiring that offense to be one mentioned in the treaty, as well as sufficient evidence of the party's guilt to put him upon trial for it. Nor can it be said that, in the exercise of such a delicate power under a treaty so well guarded in every particular its provisions are obligatory alone on the State which makes the surrender of the fugitive, and that that fugitive passes into the hands of the country which charges him with the offense, free from all the positive requirements and just implications of the treaty under which the transfer of his person takes place. A moment before he is under the protection of a government which has afforded him an asylum from which he can only be taken under a very limited form of procedure, and a moment after he is found in the possession of another sovereignty by virtue of that proceeding, but divested of all the rights which he had the moment before, and of all the rights which the law governing that proceeding was intended to secure. If upon the face of this treaty it could be seen that its sole object was to secure the transfer of an individual from the jurisdiction of one sovereignty to that of another, the argument might be sound; but as this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other pur-

than that mentioned in the treaty, and sustained by the proceedings under which the person is extradited, without an implication of the rights of the party extradited, of bad faith to the country which permits extradition."

Answering the view which some authorities in this country have advanced, that, because the treaty contains no express stipulation limiting the right of the country in which the person was committed to the trial of the particular crime for which he is extradited, he is, when brought into the country, liable to be tried for any offense within its laws, the learned justice says: "The proposition of the absence of express mention in the treaty of the right to try him for offenses other than that for which he was extradited is met by the manifest scope and intent of the treaty itself. The caption of the treaty, already quoted, declaring that its purpose is to settle the boundary line between two governments: to provide for the final suppression of the African slave trade,—adds, for the giving up of criminals, fugitives, justice, in certain cases." The treaty requires, as we have already said, that the person shall be given up, upon requisitions received from the two governments, all persons charged with any of the seven crimes enumerated, and the provisions giving a party a hearing before a proper tribunal, in the country, before he shall be delivered up on this point, it must be shown that the offense for which he is demanded is one of those enumerated, and that the proof is sufficient to satisfy the court or magistrate before whom this extradition takes place that he is guilty, and that the law of the State of the asylum requires to establish such guilt, leave no room for doubt that the fair purpose of the treaty is that the person shall be delivered up to be tried for the offense, and for no other." When a demand made by a foreign government for the extradition of a person from this country, it has been ascertained on inquiry had for that purpose that a case is made for the extradition of the person demanded, it is made lawful for "the secretary of state, under his hand and seal of office, to deliver the person so committed to be delivered to a person or persons as shall be authorized by the name and on behalf of such foreign government, to be tried for the crime of which the person shall be accused, and such person shall be delivered up accordingly." U. S. Stat. § 5272. And "whenever any person is delivered by any foreign government to an agent of the United States for the purpose of being brought within the United States and tried for any crime of which he is accused, the president shall have authority to take all necessary measures for the protection and safe-keeping of such person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the treaty of extradition, and until his final removal from custody or imprisonment for or punishment of such crimes or offenses, and for a reasonable time thereafter, and may employ the militia of the land and naval forces of the United States, or the militia thereof, as may be necessary for the safe-keeping and protection of the accused."

U. S. Rev. Stat. § 5275. These are the only provisions of the Acts of Congress referred to in the decision of the cases cited as having any bearing upon the question in hand, and they are not referred to as controlling the interpretation of the treaty, but rather as confirming and emphasizing the construction it should receive independent of those provisions. After a careful examination of the various decisions of the federal and state courts on the subject, Mr. Justice Miller concludes his opinion on this question in the *Rauscher Case* as follows: "Upon a review of these decisions of the federal and state courts, to which may be added the opinions of the distinguished writers which we have cited in the earlier part of this opinion, we feel authorized to state that the weight of authority and of sound principle are in favor of the proposition that a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had forcibly been taken under those proceedings." And Johnson, *Ch. J.*, in the *Vanderpool Case*, by much the same process of reasoning, reaches the same conclusion. Some courts have attempted to distinguish between cases of international and those of interstate extradition, holding that, while in the former the extradited person cannot be tried for a different offense, he may be in the latter. This distinction is based upon a supposed guaranty of return contained in the treaty stipulations. The case of *State v. Stearns*, 60 Wis. 587, was decided upon that theory. It is there said that "treaty stipulations between nations frequently guarantee to the fugitive the right to leave the demanding country after the trial of the offense for which the fugitive was extradited in case of acquittal, or in case of conviction after his endurance of the punishment. When not so guaranteed, it is sometimes made the subject of executive pledge." And it was held in that case, which was one of interstate extradition, that since the Constitution and Act of Congress contain no provision securing to the fugitive the right of return, but are silent on the subject, the adjudications in cases of international extradition were not applicable. "This distinction between international and interstate extradition," says that court, "seems to be very marked."

Notwithstanding this declaration of the court, we venture to inquire what foundation there is, if any, for the alleged distinction, especially between an interstate extradition and an extradition under the Ashburton Treaty. The provision of the Constitution is: "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." U. S. Const. art. 4, § 2. Section 5278 of the Revised Statutes of the United States, which is

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the Act of Congress relating to that subject, provides as follows: "Whenever the executive authority of any State or Territory demands any person, as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand shall be paid by such State or Territory." It is true that neither the Constitution nor Federal Statute contains any express guaranty that the person surrendered shall not be tried for any crime except the one upon which he was surrendered, nor that he shall be returned when discharged from custody on that charge. Neither does the Ashburton Treaty contain such guaranty. It, like the constitutional and statutory provisions, is silent on the subject. And its provisions are no more susceptible of a construction that will raise such guaranty by implication than are those of the Federal Constitution and laws. Such construction of the treaty has never been claimed. The extent of the contention of those who assert the right of the demanding country to try the person extradited under it for an offense different from the one on which the extradition was procured is that, because there is no express limitation in the treaty restricting the right of the country in which the offense was committed to the trial of the offender for the crime specified in the warrant of extradition, he may therefore be tried for any violation of its criminal laws. This view has been sustained by some courts, but is, as we have seen, at variance with the decisions of this court and of the Supreme Court of the United States. Neither of these decisions recognize the existence of an executive pledge of return of the extradited person, nor is any contained in the treaty or law. Certainly none can be found in the provisions of the treaty, and it is equally clear that none is contained in the Acts of Congress. Section 5275 of the Revised Statutes of the United States has no other purpose or effect than to empower the president to use all necessary measures to protect those extradited from lawless violence until a reasonable time after discharge from custody under the charge specified in the warrant of extradition. There appears, therefore, to be no foundation for any distinction, on the ground of guaranty or pledge of return, between an extradition under this treaty and one between the States, with re-

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spect to the right of those extradited to exemption from trial for any other crime than that upon which the rendition was obtained. Nor do we think there is upon any other ground. It is evident both the Constitution and the Act of Congress contemplate that the demand made by one State upon another shall be for the extradition of the accused person to answer the specific crime charged, and that his surrender shall be for that purpose. In the language of the Constitution, it is "a person charged with a crime" who shall be delivered up to be removed to the State "having jurisdiction of the crime." And the Federal Statute requires the application for the surrender to be accompanied by an authenticated copy of the indictment or affidavit charging the crime. The Ashburton Treaty is not more definite in its requirement that the extradition thereunder shall be for a specific crime therein named. And if, as said by *Mr. Justice Miller* in *Rauscher's Case*, it is unreasonable to suppose that any demand for rendition under the treaty, framed upon a general representation that the party was guilty of some violation of the laws of the country demanding him, without specifying any particular offense with which he was charged, would receive any serious attention, it is none the less unreasonable to suppose such general demand by one State upon another would be acceded to or entertained.

The criminal laws of a State have no operation beyond its territorial bounds, and its jurisdiction to enforce them is equally limited. But for the provisions of the Federal Constitution, no State would be under obligation to surrender to another any person within its borders. The right of asylum in each would be as complete and inviolable as it is in independent nationalities in the absence of treaty stipulations. Extradition granted by one nationality to another, in the absence of treaty, is matter of comity; and it is the settled doctrine that in such case the person surrendered can be held only for the offense for which he was extradited. And hence we think the reasons controlling the decisions of the *Vanderpool* and *Rauscher Cases*, and the grounds upon which those decisions rest, so far as they relate to the questions before us, apply with equal force to interstate extraditions; and, in their application to the case under consideration, they lose none of their force if reference is had to our state legislation on the subject.

Our statute providing for the surrender by the executive of this State of fugitives from justice, when demanded by any other State, requires the demand to be accompanied by a duly attested copy of the indictment or complaint, and also by "affidavits to the facts constituting the offense charged, by persons having knowledge thereof," and "by a statement in writing from the prosecuting attorney of the proper county, who shall briefly set forth all the facts of the case." And, before making the surrender, the governor may require the attorney-general, or prosecuting attorney, to investigate the grounds of the demand, and report to him "all the material facts which may come to his knowledge, with an abstract of the evidence in the case." The statute further provides that, in case the governor complies

with the demand, the accused, when arrested, shall be taken before a judge, to be examined on the charge;" which judge shall "proceed to hear and examine the charge, and upon proof made in such examination, by him adjudged sufficient, shall commit" the accused to jail, to be delivered to the agent appointed to receive him. It is further required, as a condition precedent to the delivery of the accused to the agent, that the latter deposit with the clerk of the court a sum of money "equal to ten cents a mile from the place where the arrest has been made to the proper place for the prosecution;" and, "in case the supposed fugitive should not be found guilty of the crime charged in the warrant for his arrest, such deposit shall be paid to him."

There could be no reason for the particularity required in the investigation of the specific crime charged in the warrant for the arrest, previous to the surrender, if the accused, when extradited, might be put upon trial for any other offense. And that it was not contemplated he could be so tried is further indicated by the provision requiring a deposit of money to be paid over to him if he shall be acquitted of the charge. This not only recognizes the privilege of return, but also his right to the reimbursement of his expenses in so doing. One object of these statutory regulations, if not the only one, evidently was to limit, so far as it is within the power of the State to do so, the right of the demanding State to the trial of the surrendered fugitive for the particular crime for which his extradition was obtained; and it cannot be admitted that the legislative intent and policy thus declared will be violated or disregarded by this State when acting in similar cases. It is our opinion, therefore, that a person surrendered to the authorities of this State by another State or Territory on extradition proceedings cannot, while held in custody thereunder, be lawfully tried for any other crime than the one upon which his extradition was obtained, unless he voluntarily waives his privilege.

2. Is the privilege waived by failure to plead it in abatement of the indictment for such different crime, or by entering a plea of not guilty thereto? We think it is not, when, before the trial, the accused asserts his privilege, and objects to the trial on that ground. Properly speaking, the assertion, by the accused, of his

privilege, or his objection to a trial on such indictment, is not in the nature of a plea in abatement. The office of that plea is to raise an exception to the indictment for some defect in the record which is shown by facts extrinsic thereto. Rev. Stat. §§ 7248, 7250. But the privilege of the accused remains, though the indictment and record be unassailable. His right is not to have the indictment set aside, but only to exemption from trial upon it. It is true that in some cases of the kind the plea in abatement has been resorted to as a mode of raising the question. But the manner of the objection is not material, so it be interposed before the trial. Proceeding to trial without objection would undoubtedly be a waiver, for the privilege is personal, and may be waived. But we are not satisfied that it is waived by failure to plead it in abatement, nor by entering a plea of not guilty. The maintenance of the privilege does not involve an attack on the indictment. The court is simply without power to try the accused on such indictment against his objection. A plea that he is not guilty of the crime charged in the indictment is not inconsistent with his right of exemption from trial upon it, and where that right is distinctly asserted, in some mode, before trial, it comes, we think, in time. This was done by the prisoner before us, and his imprisonment is therefore unlawful.

3. The remaining question relates to the remedy, and that is, whether the prisoner can have an inquiry into the cause of his imprisonment, and a discharge therefrom, on habeas corpus. It is conceded that the writ cannot properly be employed for the review and correction of errors committed by courts while acting within the sphere of their authority. That must be done by a proceeding in error. But there can be no doubt that habeas corpus is the appropriate remedy to obtain discharge from imprisonment under an order or process of a court which it was without jurisdiction to make or issue. The imprisonment of the *petitioner* in the penitentiary is of this character, and he is entitled to be discharged therefrom. But, as the indictment upon which he was extradited is still pending, he will be remanded to the custody of the sheriff, to be held for further proceedings thereon. *Judgment accordingly.*

NEW YORK COURT OF APPEALS.

John REINING *et al.*, *Repts.*,
2.

NEW YORK, LACKAWANNA & WEST-
ERN R. CO., *Appt.*

(.....N. Y.)

1. Abutting owners although not owning the fee in a street are entitled to compensation when it is practically and sub-

NOTE.—For notes relating to the question involved in the above case, see *Vanderlip v. Grand Rapids* (Mich.) 3 L. R. A. 247; *Trinity & S. R. Co. v. Meadows* (Tex.) 3 L. R. A. 565.

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stantially closed against them for ordinary street purposes under authority of the municipality which owns the fee by a railroad embankment therein several feet high with perpendicular stone walls leaving a space only 8 or 9 feet wide for a carriage-way.

2. A railroad embankment in a street which appropriates that part of it to the practically exclusive use of a railroad is not a mere change of grade which can be made without compensation to an abutting owner, at least where the grant of authority to occupy the street did not purport to be an exercise of that power.

(*Earl and Finch, JJ., dissent.*)

(October 9, 1891.)

APPPEAL by defendant from a judgment of the General Term of the Superior Court of Buffalo, affirming a judgment of the Trial Term in favor of plaintiffs in an action brought to recover damages for an interference with plaintiffs' easements in the street in front of their property. *Affirmed.*

The facts are stated in the opinion.

Mr. John G. Milburn, for appellant:

The defendant is not liable in this action for any diminution of the value of the use of the plaintiffs' premises caused by the raising of the grade of a portion of Water Street, and the construction and operation of its railroad thereon.

Fobes v. Rome, W. & O. R. Co. 8 L. R. A. 458, 121 N. Y. 505; *Kane v. New York Elev. R. Co.* 11 L. R. A. 640, 125 N. Y. 164; *Ottenot v. New York, L. & W. R. Co.* 119 N. Y. 608.

The city was the owner of the fee of Water Street, having acquired it through condemnation proceedings authorized by the charter of the city.

Ottenot v. New York, L. & W. R. Co. supra.

In any event the plaintiffs never owned any part of Water Street as their boundary line on that street was the exterior line of the street.

White's Bank of Buffalo v. Nichols, 64 N. Y. 65; *English v. Brennan*, 60 N. Y. 609; *Kings County F. Ins. Co. v. Stevens*, 87 N. Y. 292, 41 Am. Rep. 361.

The defendant was authorized to build its road across or along any street with the assent of the municipality, and across any state canal subject to the powers vested in the canal commissioners by Laws of 1884, chap. 276, § 17.

Laws of 1850, chap. 140, § 28, subdiv. 5.

A change of the grade of a street, or of a portion of a street, confers no right to compensation upon an adjoining owner whose property is damaged in the absence of specific legislation imposing the duty of making compensation.

Radcliff v. Brooklyn, 4 N. Y. 195, 58 A. D. Dec. 357; *Conklin v. New York, O. & W. R. Co.* 3 Cent. Rep. 194, 102 N. Y. 107; *O'Connor v. Pittsburgh*, 18 Pa. 187; *Brooklyn Park Comrs. v. Armstrong*, 45 N. Y. 284, 6 Am. Rep. 70; *Lansing v. Smith*, 8 Cow. 146.

Under the charter of the city of Buffalo if adjacent owners suffer damage by a change of grade provision is made for ascertaining their damages and for raising a fund for their payment.

Laws of 1870, chap. 519, title 9, § 17.

This remedy is exclusive.

Heiser v. New York, 6 Cent. Rep. 85, 104 N. Y. 68; *Dillon*, Mun. Corp. 3d ed. § 686.

As the city had the right and power to change the grade of a portion of Water Street it could authorize the defendant to make the change and the defendant would have the same immunity from liability to abutting owners which the city would have.

Ottenot v. New York, L. & W. R. Co. 119 N. Y. 608; *Briggs v. Lewiston & A. H. R. Co.* 4 New Eng. Rep. 546, 79 Me. 363; *Wolfe v. Cornington & L. R. Co.* 15 B. Mon. 404; *Slatten v. Des Moines Valley R. Co.* 29 Iowa, 148, 4 Am. Rep. 205.

The grant of the common council was an 14 L. R. A.

authorized change of the grade of a portion of Water Street.

Slatten v. Des Moines Valley R. Co. Briggs v. Lewiston & A. H. R. Co. and Wolfe v. Cornington & L. R. Co. supra; *Pierce, Railroads*, pp. 246-248.

Mr. David F. Day for respondents.

Andrews, J., delivered the opinion of the court:

The principal question in this case respects the rights of the plaintiffs, as abutting owners, to recover damages occasioned by the construction of the defendant's road in Water Street, in the city of Buffalo. The plaintiffs' premises are situated on the northerly side of Water Street, and are bounded easterly by Commercial Street, westerly by Maiden Lane, and southerly by Water Street, and occupying the whole lot is a four-story brick building used as a store and residence, constructed before the railroad was placed in Water Street. Water Street runs easterly and westerly, and has existed for more than forty years. Up to 1875, the plaintiffs owned the fee to the center of the street opposite their premises, subject to the public easement. In that year proceedings were taken by the city of Buffalo to acquire the title to a large number of streets in Buffalo, including Water Street, by condemnation, and resulted in the city acquiring the title, upon payment of a uniform and nominal award of five cents damages to each of several hundred owners of lots on the streets taken, including the plaintiffs. In 1883 the common council of the city of Buffalo by ordinance granted to the defendant the right to construct and maintain two railroad tracks "along Prince Street, to a point midway between Hanover Street and Lloyd Street; thence across Lloyd Street, at such grade as will permit said Company, with a practical construction, to cross Commercial slip at the height fixed by the state engineer; thence, to and along the center of Water Street, to the docks of the Delaware, Lackawanna & Western Railroad Company at the foot of Erie Street." Commercial slip is a part of the Erie Canal, and separates Prince Street and Water Street, and together they form a continuous street, except as it is interrupted by Commercial slip. The defendant, in pursuance of the permission of the common council, and in accordance with the map and profile approved by the council, and under the direction of the city engineer, proceeded to raise the grade on Prince Street so as to enable the Company to cross Commercial slip by a bridge 14 feet above the waterline, the height fixed by the state engineer, and to meet this grade of the bridge constructed an embankment in the center of Water Street from the bridge westerly for the distance of 800 feet, passing the plaintiffs' premises. Water Street is 66 feet wide. The sidewalk on the Water Street side of the plaintiffs' lot occupies 14 feet. The embankment of the defendant is 24 feet wide, and at the junction of Water and Commercial Streets (at the corner of which is the plaintiffs' lot) it is 5 feet 9 inches high, and from that point descends westerly, by a gradual descent, passes the plaintiffs' lot, and across Maiden

Lane, and reaches the original level of the street nearly 300 feet west of the corner of Commercial and Water Streets. The embankment is supported laterally by solid, perpendicular stone walls, which extend along Water Street in front of the plaintiffs' lot, and across the entrance of Maiden Lane. Between the perpendicular stone wall, on the northerly side of the embankment and the sidewalk in front of the plaintiffs' building is a space only 8 to 9 feet wide, which is the only carriage-way left on the Water Street side of the plaintiffs' premises. Commercial Street extends northerly and southerly from Main Street to Buffalo Harbor. The raising of the embankment in Water Street rendered it necessary to make an embankment in Commercial Street to meet the grade of the railroad, and this was done by the defendant. The defendant paved the surface of the 24-foot strip in Water Street occupied by its embankment, and laid there on part of the way one track, and part of the way two tracks, for the accommodation of its business. Carriages or teams cannot cross Water Street in front of plaintiffs' premises. This is prevented by the embankment. Access to their premises on the Water Street side, from Commercial Street south of Water Street, is also prevented, except by first crossing Water Street, and then passing along the embankment on Commercial Street 130 feet, and then turning into the roadway on Commercial Street between the embankment in that street and the sidewalk, and thence into Water Street, or else, when reaching the junction of Commercial and Water Streets, by turning west, and driving down the embankment along the railroad tracks, about 300 feet, to the end of the grade, and then turning, and going westerly along the narrow roadway, 8 or 9 feet wide, on the northerly side of the embankment. This space is not sufficient to allow wagons to pass each other, nor can a single wagon with horses be turned around in this space, except with difficulty. It was conceded that the plaintiffs, up to the time of the trial, had sustained damages, in the diminished rental value of their premises by reason of the embankment, in the sum of \$525, for which sum a verdict was rendered, and no question now arises as to the rule of damages or the amount, provided, upon the facts, damages are legally recoverable.

The counsel for the defendant rests his claim that the judgment should be reversed upon two general propositions: *first*, that the laying of tracks for the running of cars by steam on the grade of a city street, and the operation of trains thereon under legislative and municipal authority, where the fee of the soil is in the municipality, violates no property rights of an abutting owner, and consequently, in the absence of a special statute authorizing compensation, he is without remedy, although his property may be injured; and, *second*, that the erection of the embankment to accommodate the street to the use of the defendant was merely a change of grade which it was competent for the city to authorize in its discretion, and that such change of grade, although it damaged the plaintiffs' property was within the *Case of* 14 L. R. A.

Radcliff's Ears, 4 N. Y. 195, *damnum absque injuria*. The tracks, it is said, were placed on the new grade, and therefore on the surface of the street; and the case, it is claimed, is not distinguishable in principle from what it would have been if, without any change of grade, the tracks had been laid on the original surface of the street. There is a third subordinate defense insisted upon, viz., that the charter of Buffalo gives a special remedy for injuries to lot-owners from a change of grade of streets, and that this remedy is exclusive, and was the only one open to the plaintiffs.

The first proposition is sustained by our recent decision in *Robes v. Rome, W. & O. R. Co.*, 121 N. Y. 505, 8 L. R. A. 458. Prior to that decision it had been decided in *People v. Kerr*, 27 N. Y. 188, and in *Kellinger v. Forty Second St. & G. S. P. R. Co.*, 50 N. Y. 206, which followed it, that the laying of horse railroad tracks in the streets of the city of New York, the fee of which was in the city, was consistent with their use as public, open streets, and with the trust upon which the streets were held, and that abutting owners had no remedy for any consequential injuries they might sustain from the construction and operation, under legislative authority, of a horse railroad in the street, in the absence of any negligence. The case of *Williams v. New York Cent. R. Co.*, 16 N. Y. 97, was that of steam railroad over lands previously dedicated by the owner for a street, where he retained the fee; and it was held that such a use was not within the scope of the dedication, and that the Legislature could not authorize such use except on condition of making compensation to the owner of the fee. The same doctrine was applied, under similar circumstances, to the case of a horse railroad in *Craig v. Rochester City & B. R. Co.*, 89 N. Y. 404. These latter cases, as will be observed, decide the principle that neither a horse nor steam railroad can be authorized, in streets the fee of which is in the adjacent owner, without his consent; while the former cases hold that, where the fee is in the municipality, horse railroads may be authorized against the will of the abutting owner, and without making compensation. The distinction is made to rest on the location of the fee. The case of *Fobes v. Rome, W. & O. R. Co.*, *supra*, presented the distinct question whether the construction of a steam surface railroad, part of a long line of railroad, on the ordinary grade of a street, under legislative authority, subjected the company to liability for consequential injuries to the lot of an abutting owner whose lot was bounded by the side of the street, and who had no title to the soil therein. It was urged on behalf of the plaintiff that the cases relating to horse railroads were not applicable by reason of their different purpose, such railroads being primarily designed for street traffic, and steam railroads, such as that then in question, for ordinary railroad traffic, and also that the one, by reason of the different motor, imposed a different and increased burden on the street from that imposed by the other, and interfered to a much greater extent with the enjoyment of the street by abutting

owners. The opinion of *Judge Peckham* in that case contains a careful review of the street-railway cases in this State, both in this court and the supreme court, and it was shown that it had become the settled doctrine of our courts that, as against abutting owners having no title to the bed of the street, it was competent for the Legislature to authorize the construction of a steam surface railroad therein, without making compensation to the owners of the abutting property injured by such construction, and that there was no legal distinction between the case of a railroad operated by horses and one operated by steam-power and the court reversed the judgments below in favor of the plaintiff. The court in its opinion distinctly limits the doctrine to cases where the railroad is laid on the same grade as the street, leaving the street substantially free and unobstructed for ordinary travel. The learned judge, after referring to the law as established in this State on the subject, says: "The company was therefore not liable to such an owner for any consequential damages arising from a reasonable use of the street for railroad purposes, not exclusive in its nature, and substantially on the same grade as the street itself, and leaving the passage across and through the same free and unobstructed for the public use." And again, after showing that there was no difference in principle between the cases of a steam and horse railroad, he says: "If the use of either becomes unreasonable, excessive, or exclusive, or such as would not leave the passage of the street substantially free and unobstructed, then such excessive, improper, or unreasonable use would be enjoined, and the adjoining owner would be entitled to recover damages sustained by him therefrom, in his means of access, etc., to his land."

It is no longer open to debate in this State that owners of lots abutting on a city street, the fee of which is in the municipality for street uses, although they have no title to the soil, are nevertheless entitled to the benefit of the street in front of their premises for access and other purposes, of which they cannot be deprived except upon compensation. The right of abutting owners in the streets is not, however, of that absolute character that they can resist or prevent any and all interference with the street to their detriment, or which can be asserted to stay the hand of the municipality in the control, regulation, or improvement of the streets in the public interests although it may be made to appear that the privileges which they had theretofore enjoyed, and the benefits they had derived from the street in its existing condition, would be curtailed or impaired to their injury by the changes proposed. The cases of change of grade furnish apposite illustrations. They proceed on the ground that individual interests in streets are subordinate to public interests, and that a lot-owner, although he may have built upon and improved his property with a view to the existing and established grade of the street, and relying upon its continuance, has no legal redress for any injury to his property, however serious, caused by a change of grade, provided only

that the change is made under lawful authority. This, it is held, is not a taking of the abutting owner's property, and the injury requires no compensation. The hardships arising from the application of this rule of law have led to constitutional amendments in many of the States, providing for compensation for property damaged as well as taken in the prosecution of public improvements. In this State the law and the Constitution are unchanged. But that there is a limitation to public powers over the streets of a city, which cannot be transgressed without invading the constitutional rights of abutting owners, was a principle announced in the *Story Case*, 90 N. Y. 122, and confirmed and broadened so as to apply to other circumstances in the subsequent cases. The elevated railroad structure, the subject of complaint in the *Story Case*, occupied, with its supports and stairways, portions of the street, and such occupation was necessarily exclusive, and this fact was prominently brought into view in the opinions delivered. The parts of the street so occupied could not be used for general street purposes. This fact, it is claimed, distinguishes the present case from that, and it is insisted that this case is more nearly allied to the *Fobes Case* than to that of *Story*. It is true that the part of the street occupied by the embankment of the defendant is still a part of Water Street. It is also true that the occupation of the embankment by the tracks of the defendant was not necessarily exclusive,—that is to say, it is possible for ordinary vehicles to traverse the embankment longitudinally,—but such travel would subject the traveler to the risk of meeting railway trains on the narrow causeway, and he would have no opportunity to turn off the embankment, except by driving over the perpendicular wall which supports it. The plaintiffs are practically excluded from the use of that portion of the street by the presence of the railroad there. They and their customers cannot drive across it, and, if they had the temerity to drive along it, nevertheless they would be compelled to make a long circuit to reach the plaintiffs' premises from the streets south of the embankment. The only practicable roadway in front on Water Street is but a few feet in width, quite insufficient for a safe and convenient way to and from their lot.

We think the public cannot justly demand such a sacrifice of private interests, or justify such an appropriation of a street by a municipality in aid of a railroad enterprise. The *Fobes Case* gives no countenance to the defendant's contention. The limitations upon legislative and municipal authority, so carefully stated in the passages quoted from the opinion, are distinctly opposed to such an assumption. That case, and those of *Kerr* and *Kellinger*, were cases of railroad tracks laid upon the general grade of city streets as such grade existed when the tracks were authorized. There was no exclusive appropriation in fact of any portion of the surface by the companies, except that the rails were imbedded in the soil. The whole street in each of these cases remained open and unobstructed, except that the existence

of the tracks, and the operation of the respective roads thereon, rendered access to the lots of the abutting owners somewhat less safe and convenient than before. Here, as the evidence tends to show, the city of Buffalo, for the convenience, and presumably upon the application, of the defendant, devoted the center of Water Street to what is practically the exclusive use of the defendant, leaving for the use of the plaintiffs a narrow and inconvenient roadway, separated from the center of the street by a barrier therein impassable for carriages from east to west, opposite the plaintiffs' lot on Water Street, and only theoretically open from north to south, and then only by a circuitous route. It is quite probable that the general interests of Buffalo and of the larger public are promoted by this appropriation of the street, but it by no means follows that a lot-owner whose property is injured should bear the loss for the public benefit. We think the case falls within the principle of the *Story Case*, and that while the law now is that it is competent for the Legislature to authorize railroad tracks, either for steam or horse railroads, to be laid on the ordinary grade of streets, the fee of which is in the State or municipality, without making compensation to abutting owners for consequential injuries to their property, the Legislature cannot legally authorize structures for railroad purposes to be erected therein for the use and convenience of railroads which practically exclude the abutting owners from the part of the street so occupied, without compensating them for the injury suffered, and that it is not necessary that there should be an actual physical exclusion of the lot-owners from the use of that part of the street occupied by such structures in order to entitle them to a legal remedy. It is enough if such part of the street is practically and substantially closed against them for ordinary street uses.

The power conferred by the charter of Buffalo upon the common council, to "permit the track of a railroad to be laid in, along, or across any street or public ground," (Laws 1870, chap. 519, tit. 3, § 19,) must be construed as subject to the qualification that no property rights of abutting owners are thereby invaded. The present controversy could not have arisen prior to 1875, when the plaintiffs were owners of the fee to the center of Water Street. They would then, under the settled law, have been entitled to compensation. The city of Buffalo, having in that year acquired, for the nominal consideration of five cents, the technical fee in the street, proceeded afterwards to authorize the laying of the tracks in question, and it is now claimed that this change in the title defeats the plaintiffs' right to compensation. This is probably true if what has been done by the defendant under license of the city was simply the laying of its tracks on the surface of the street at its ordinary grade; but this was not the character of the change effected.

The second proposition of the counsel of the defendant, that the building of the embankment was a mere change of grade of Water Street, made under the authority of the city, is, we think, untenable. The charter of

Buffalo gives plenary power to the city to fix and change the grade of streets by formal proceedings, and provides that, when a grade is established or altered, a description of such grade shall be made and recorded by the city clerk. Charter 1870, title 9, §§ 1, 2, 6. The action of the common council, granting permission to the defendant to occupy Water Street, while it involved, as a consequence, the construction of an embankment in Water Street, did not purport to be an exercise of the power to change the grade of the street under the charter. It does not appear that any description was made or recorded, as is required when a new grade is established. It would be a strained construction to regard the action of the council as a change of grade of Water Street under the charter provisions. The defendant desired to lay its tracks in Water Street, and the other streets mentioned in the grant; and to enable it to do this, and to cross Commercial slip, an embankment in the street was authorized. The grade of Water Street was not altered, but the defendant was permitted to build an embankment in the street for its railway. The fact that what was done did effect a change in the grade of that part of the street occupied by the embankment does not prove that what was done was in the execution of the power to alter the grade of streets conferred on the council. The primary object of this power contained in municipal charters is to enable the municipal authorities to render a street more safe and convenient for public travel; to afford drainage; in short to adapt it more perfectly for the purposes of a public way. It is claimed that the city under this power could lawfully authorize an embankment in part of the street, leaving the other part on a lower level. We are not called upon to say whether there is any limit to the exercise of municipal authority, or that they cannot, in exercising the power to establish and alter the grade of streets, raise an embankment in a part of a street, if in their judgment this will promote the public convenience and the purposes of the street as a highway. But we think they cannot, under the guise of exercising this power, appropriate a part of a street to the exclusive, or practically to the exclusive, use of a railroad company, or so as to cut off abutting owners from the use of any part of the street in the accustomed way, without making compensation for the injury sustained.

We have held that the authority conferred by the General Railroad Law upon railroad companies to cross highways in the construction of their lines authorizes their construction on, over, or below the grade of the highway crossed, and that incidental changes of the grade of the street, rendered necessary to accommodate railroad crossings, gives no right of action to abutting owners who may sustain injury. *Conklin v. New York, O. & W. R. Co.*, 102 N. Y. 107, 8 Cent. Rep. 194. The practice of permitting railroads to cross highways is coeval with the introduction of the railroad system in the State, and the decision comports with the general understanding of the bench and the bar. In case of railroad crossings the highway is left as

before. No part of it is taken or exclusively appropriated by the railroad company. In these cases there is no use of the highway for railroad purposes. Railroads, of necessity, intersect highways; and it is held that the State may permit them to be crossed by a railroad company, and that this involves an invasion of no substantial right of the owner of the fee. We ought not to extend the doctrine of the crossing cases to unreasonable limits, and we think it cannot be applied to justify the exercise of the public powers attempted in the present case. The *Ottenot Case*, 119 N. Y. 604, related to the right of an abutting owner on Commercial Street to recover damages for the raising of the embankment on that street in front of his premises to meet the grade on Water Street. The members of the court agreed that the judgment should be reversed under the *Line Case*, 101 N. Y. 98, 2 Cent. Rep. 116, for error in the rule of damages. It was the opinion of the learned judge who wrote in that case that the plaintiff could not recover, for two additional reasons: first, that as the plaintiff "was not an abutting owner on Water Street, and had no rights therein," he had no right to complain because of the construction of the railroad therein; and, second, that the raising of the embankment in Commercial Street was, in legal effect, a change of grade by the city, and therefore there was no actionable injury. The plaintiffs here are abutting owners on Water Street, and their claim is not subject to the objection made to the claim of Ottenot in the first ground mentioned. If the second ground is tenable, it must rest, we think, on the point that the plaintiff Ottenot had no right to question the legality of the structure in Water Street, and therefore that the accommodation of the grade in Commercial Street to meet the grade on Water Street was, in a proper sense, a change of grade for street purposes. The *Ottenot Case* does not, we think, control the present one, and, assuming that in that case the embankment on Commercial Street could be regarded as a change of grade under charter powers, the embankment on Water Street cannot be so regarded. The point that the charter confines the plaintiffs to a remedy against the city is based upon a provision of the charter (title 9, § 17) that, "when the city shall alter the recorded grade of any street or alley, the owner of any house or lot fronting thereon may, within one year thereafter, claim damages by reason of such alteration." The conclusion we have reached, that the action of the city in granting permission to the defendant to construct an embankment in Water Street was not a change of grade in the street within the charter provisions, disposes of this question. The charter provision was intended to afford a remedy for damages from changes of grade where none existed before, and to cases to which it applies the remedy is necessarily exclusive. *Lesser v. New York*, 104 N. Y. 68, 6 Cent. Rep. 35. Here the plaintiff, as we hold, has a common-law remedy for his injury, and this is not cut off by the provision in the charter.

We think the judgment should be affirmed.
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Gray, J.:

I concur with Judge Andrews. In Judge Earl's opinion in the *Ottenot Case*, 119 N. Y. 608, in which I also agreed, the street, a portion only of the grade of which was changed by raising, was not subjected to or burdened by other uses. It remained, as much as ever, in other respects, an ordinary street. The change of the grade was in the general public interests, and the moving cause for the change did not affect the complexion of the question in the case. The plaintiff's property in that case did not abut upon Water Street, and he had no right to complain of the railroad structure or embankment in question. Here the object was to subserve the railroad use, and the appropriation by the defendant of this embankment is practically exclusive. The street was subjected to a new use, with consequences as direct, in the permanent deprivation of the abutting property owners' appurtenant easement as though the railroad was operated in front of his premises upon a structure physically incapable of other uses. I think we have, in the present case, the element of an appropriation by the defendant of the street by a permanent structure and obstruction, and hence it must fall within the spirit, if not the letter, of our decision in the *Story Case*.

All concur, except Earle and Finch, JJ., dissenting.

Dempster C. AUSTIN, *Recept.*,

Charles C. VROOMAN *et al.*, *Appts.*

(.....N. Y.)

1. The jurisdiction conferred upon courts of special sessions by Laws 1888.

NOTE.—*Liability of judicial officer to civil action for acts of a judicial nature.*

Beasley, Ch. J., says: "The doctrine that an action will not lie against a judge for a wrongful commitment or for an erroneous judgment or for any other act made or done by him in his judicial capacity is as thoroughly established as any other of the primary maxims of the law. Embarrassment arises where an attempt is made to express with perfect definiteness when it is that acts done by a judge which are purported to be judicial acts are such within the meaning of the rule." *Grove v. VanDuyn*, 44 N. J. L. 664.

General rules.

Notwithstanding the emphasis placed by judges upon the words "general" and "special" or "limited," in describing the jurisdiction of the officer whose liability is being determined, there is really little or no difference in principle or precedent in the rules applicable to the two classes.

To be free from liability the act must have been done by the judge as judge in his judicial capacity in a matter within his jurisdiction, which means that when assuming to act as judge he must have had judicial jurisdiction of the person acted upon and of the subject matter as to which it was done. *Lange v. Benedict*, 73 N. Y. 27, 29 Am. Rep. 80.

When those requirements exist there is as a rule freedom from liability.

With regard to courts of general jurisdiction the presumption is that they have jurisdiction of the

chap. 183, § 14, as to offenses arising under that act, is not exclusive.

A justice of the peace is not personally liable in damages for erroneously deciding in good faith that he has jurisdiction to try a defendant who has offered bail for appearance before the grand jury and demanded trial by jury after indictment where the justice ad jurisdiction of the offense and of the defendant except for such offer and demand.

(October 6, 1891.)

APPEAL by defendants from a judgment of the General Term of the Supreme Court, fourth Department, reversing a judgment of suit entered by the Jefferson County Circuit in an action brought to recover damages an alleged false imprisonment. *Reversed.* The facts are stated in the opinion.

Mr. Watson M. Rogers, for appellant
18c:

The justice had jurisdiction to entertain the information and issue the warrant for plaintiff's arrest.

Laws 1885, chap. 183, § 14.

Assuming for the argument that the justice committed an error in not accepting bail and filing the case to the grand jury, it is submitted that no responsibility to the plaintiff exists by reason thereof.

1) A justice of the peace has general original jurisdiction to apprehend and examine all persons charged with crime against the State.

secular action, until the contrary is shown. *Ex v. Pearson*, 2 Gray, 120, 61 Am. Dec. 438.

It has been said that the doctrine that when powers of special and limited jurisdiction exceed powers all concerned in the proceedings are in trespass has never been carried so far as to give a suit against the members of superior courts of general jurisdiction for any act done by them in a judicial capacity. *Yates v. Lansing*, 5 N. Y. 230, affirmed, 9 Johns. 395, 6 Am. Dec. 290.

Many of the English cases assert the total exemption of judges of record from responsibility or accountability in any way except to the king by whom they were appointed. *Cunningham v. Buck-Cow*, 173, 18 Am. Dec. 432, citing *Hamond v. Bell*, 3 Mod. 218; *Miller v. Searle*, 2 W. Bl. 1141.

Where as by law made judges of another shall be criminally accused or liable to action by the king for what they do as judges. *Grenville v. King of Physicians*, 12 Mod. 388, 1 Ld. Raym. 454, c. 296, citing Year Books, 43 Edw. III. 9; 9 Edw. c. 296.

See also *Taaffe v. Downes*, 3 Moore, P. C. 26. It is said in courts of general jurisdiction an action never lies against the judge because he has no fiction of all causes: in courts of limited jurisdiction, it lies only when he exceeds that jurisdiction and therefore is not in the exercise of his judicial authority. *Little v. Moore*, 4 N. J. L. 74, 7 Dec. 574.

It is not to justify an inferior magistrate in committing an action he must have jurisdiction not only of the subject matter of the complaint but also of the person and the person of defendant. *Bigelow v. State*, 19 Johns. 39, 10 Am. Dec. 189.

It is in regard to judges of general jurisdiction no action must be observed between excessive jurisdiction and a clear absence of all jurisdiction in the subject matter. *Bradley v. Fisher*, 80 U. S. 13, 335, 20 L. ed. 646.

Jurisdiction is necessary to protect.

It is the court has not jurisdiction the whole **R. A.**

2 Rev. Stat. 706; Code Crim. Proc. §§ 56, 147, sub-sec. 5.

(b) Jurisdiction of the subject matter is the power lawfully conferred to deal with the general subject involved in the action.

Hunt v. Hunt, 72 N. Y. 230, 28 Am. Rep. 129.

The defendant's jurisdiction was purposely extended to enable him to do precisely what he did.

Laws 1885, chap. 183, § 14.

(c) While it is not claimed he could acquire jurisdiction by so deciding, it is submitted that when the question of jurisdiction was presented to him, he was called upon to exercise judgment, and to determine whether he had jurisdiction or not. In deciding, therefore, that he had jurisdiction (though erroneously) he determined a question of law; he acted judicially and may not be punished for a mistake in so doing.

King v. Poole, 36 Barb. 242; *Miller v. Adams*, 7 Lans. 131, 136, affirmed, 53 N. Y. 409; *Nowak v. Waller*, 31 N. Y. S. R. 458; *Stewart v. Hawley*, 21 Wend. 552; *Bocock v. Cochran*, 32 Hun, 531; *Hallcock v. Dorniny*, 60 N. Y. 238.

A judge is exempt from a civil suit or indictment for any act done or omitted to be done by him, sitting as judge.

Yates v. Lansing, 5 Johns. 282, 291, 298, affirmed, 9 Johns. 395, 6 Am. Dec. 290; *Lange v. Benedict*, 73 N. Y. 12; *Harman v. Brother-ton*, 1 Denio, 587; *Landt v. Hiltz*, 19 Barb. 283;

proceeding is *coram non judice*. *Marshalsea's Case*, 10 Coke, 76a.

The judge is liable where he exercises an authority not within the scope of his jurisdiction. *Craig v. Burnett*, 32 Ala. 723.

A judge of a court of record is answerable for an act done by his command when he has no jurisdiction and is not misinformed as to the facts on which jurisdiction depends; thus, where a person living out of the territorial jurisdiction of a county court was committed for contempt for not obeying a summons from such court and the judge was held liable. *Houlden v. Smith*, 14 Q. B. 841, 19 L. J. Q. B. N. S. 170.

Where a justice tried an action for assault and battery of which he had no jurisdiction, and gave judgment for plaintiff, under which execution was issued and defendant's property sold, he was held liable for trespass although he acted in good faith and under mistake as to the extent of his jurisdiction. *Woodward v. Paine*, 15 Johns. 493.

If a court of limited jurisdiction issues a process which is illegal and not merely erroneous the magistrate attempting to enforce a proceeding founded on any judgment, sentence or conviction in such case becomes a trespasser. *Bigelow v. Stearns*, 19 Johns. 39, 10 Am. Dec. 189.

But trespass will not lie against a judge for acting judicially without jurisdiction unless he knew or had the means of knowing of the defect of jurisdiction. *Calder v. Halket*, 3 Moore, P. C. 28.

So a justice was held not liable where he had reason to believe that he had jurisdiction, although there was an arrest in an action which arose beyond the territorial limits of his jurisdiction. *Gwinne v. Poole*, 3 Lutw. 387.

So if a magistrate has no jurisdiction by reason of the existence of facts which he cannot be supposed to know, but which are peculiarly within the knowledge of the party aggrieved, no action can be maintained against him, if he had no actual knowledge of them. *Pike v. Carter*, 3 Bing. 78.

Clark v. Holdridge, 58 Barb. 61; *Minahan v. Thomas*, 9 N. Y. Week. Dig. 32; *Kenner v. Morrison*, 12 Hun, 204; *Ayers v. Russell*, 50 Hun, 288; *Day v. Bach*, 87 N. Y. 56; *Marks v. Townsend*, 97 N. Y. 530; *Everts v. Kiehl*, 8 Cent. Rep. 334, 103 N. Y. 297; *Fischer v. Langbein*, 4 Cent. Rep. 215, 103 N. Y. 84; *Mostyn v. Fabrigas*, Cowp. 172, 1 Smith, Lead. Cas. 765; *Calder v. Halket*, 3 Moore, P. C. 28.

Mr. J. A. McConnell, for appellant, Vrooman:

The action cannot stand as against the justice or the complainant for the following reasons:

(1) An action for false imprisonment cannot be maintained for an arrest made under a sufficient warrant issued by a magistrate having jurisdiction against the parties upon whose complaint the warrant was issued.

Waldheim v. Nichol, 1 Hilt. 45; *Campbell v. Ewalt*, 7 How. Pr. 399; *Freeman v. Adams*, 9 Johns. 117; *Taylor v. Trask*, 7 Cow. 249; *Beatty v. Perkins*, 6 Wend. 382; *Barker v. Stetson*, 7 Gray, 58, 66 Am. Dec. 457; *Nowak v. Waller*, 31 N. Y. S. R. 458.

(2) A judicial officer is protected whenever he has jurisdiction and enough is shown to call upon him to decide, even though he errs grossly and intentionally.

Landt v. Hiltz, *Marks v. Townsend*, and *Fischer v. Langbein*, *supra*; *Hallock v. Dorniny*, 69 N. Y. 238; *Lewis v. Rose*, 6 Lans. 206; *Nowak v. Waller*, *supra*.

(3) Where a justice of the peace has jurisdiction of the person and of the subject matter of the proceedings, the doctrine of judicial irresponsibility protects him from any action of false imprisonment.

Kenner v. Morrison, 12 Hun, 204, and cases therein cited; *Nowak v. Waller*, *supra*.

(4) And when in the course of a judicial proceeding a judge is required to pass upon a question, the law as to which is in such a condition as to afford ostensible support to each side of the proposition presented, so that different minds might well be led to different conclusions as to the proper course to pursue in disposing of the case, the judge cannot be held liable for a decision made by him in good faith and without malice.

Lange v. Benedict, 8 Hun, 362, affirmed, 73 N. Y. 12; *Minahan v. Thomas*, 9 N. Y. Week. Dig. 32; *Landt v. Hiltz*, 19 Barb. 288; *Ayers v. Russell*, 50 Hun, 282.

Mr. William H. Gilman, for respondent:

When courts of special and limited jurisdiction exceed their power, the whole proceedings are *coram non jure* and void, and all concerned are liable.

Lange v. Benedict, 73 N. Y. 84; *Yates v. Lansing*, 5 Johns. 289; *Randall v. Brigham*, 74 U. S. 7 Wall. 523, 19 L. ed. 285; *Wallsworth v. McCullough*, 10 Johns. 93; *Bigelow v. Stearns*, 19 Johns. 39, 10 Am. Dec. 189; *Case v. Shepherd*, 2 Johns. Cas. 27; *Warner v. Perry*, 14 Hun, 337; *Mygatt v. Washburn*, 15

Conclusiveness of determination by judge of question of jurisdiction.

The distinction here seems to be that if the judge decides that the subject matter is within his jurisdiction when it is not he is liable, but if, having jurisdiction of the subject matter generally, he erroneously decides that the facts of the particular case bring it within such jurisdiction, he is not liable.

Thus an action does not lie against a judge where he had jurisdiction of the subject matter for errors of judgment in determining that the facts of the particular case bring it within that jurisdiction. *Busteed v. Parsons*, 54 Ala. 393, 25 Am. Rep. 638.

If an action is brought in a court of limited jurisdiction, and the defendant pleads to the jurisdiction, the court must decide whether they have it or not, and if they decide that they have in a case where they clearly have not, and proceed to give judgment against defendant and act on that decision they are liable. *Wingate v. Waite*, 6 Mees. & W. 748.

A magistrate who commits a party in a case where he has no jurisdiction is liable to an action of trespass; but where, if the facts alleged are true the magistrate has jurisdiction, his liability cannot be affected by the truth or falsity of the facts. *Cave v. Mountain*, 1 Mann. & G. 257.

Where a court of special sessions has no jurisdiction of a charge of "willfully and maliciously unhitching the horses from a wagon," but takes jurisdiction and causes the arrest of the accused, the justice will be liable for false imprisonment. *Wait v. Green*, 5 Park. Crim. Cas. 185.

Where the judicial officer has jurisdiction of the subject matter and he is called upon to make a determination of the question whether or not the case is a proper one for him to act upon, the decision is a judicial one and he will be protected whether he decides correctly or erroneously. *Landt v. Hiltz*, 19 Barb. 283.

When an information is presented to a magistrate 14 L. R. A.

that it is his duty to decide what to do with respect to it. He has jurisdiction of that question and his wrong decision upon it will be a judicial error for which the law will not punish him. *Ayers v. Russell*, 50 Hun, 282.

A justice will not be liable if upon examination of the facts set out in an affidavit he concludes that they are sufficient to warrant the arrest, though they may be slight and inconclusive yet tending to prove the offense charged. *Gillett v. Thiebold*, 9 Kan. 427.

Where a judge in a proceeding before him as to the commitment of an alleged insane person errs in his judgment as to whether the facts presented to him do or do not confer jurisdiction upon him to act, he is not liable to an action for false imprisonment by the person committed by him as insane though he errs in judgment. *Ayers v. Russell*, 50 Hun, 282.

The doctrine that an officer having general powers of judicature must at his peril pass upon the question, which is often one difficult of solution, whether the facts before him place the given case under his cognizance or not, is as unreasonable as it is impolitic. But a judge of special and limited jurisdiction is responsible for taking jurisdiction in a case unless by the complaint or other proceeding the case is put at least colorably under his jurisdiction. *Grove v. Van Duyn*, 44 N. J. L. 654.

Where a justice has jurisdiction only to commit, he is liable if he inflicts a penal sentence for the offense; and the fact that the justice had jurisdiction over the subject matter for one purpose is of no avail in an action against him for the exercise of excessive jurisdiction. *Patzack v. Von Gerichten*, 10 Mo. App. 424.

Judge concluded by statutory grant of jurisdiction.

Where the statute enables a justice to issue a writ of domestic attachment upon the filing of a bond by the party applying for the writ, the justice acts in excess of the jurisdiction if he issues the

N. Y. 316-321; *Doyle v. Russell*, 30 Barb. 300.

The refusal of defendant Chase to permit plaintiff to have a trial after the intervention of a grand jury was not a judicial error. It was a jurisdictional defect that rendered the subsequent proceedings entirely void.

It was an assumption of power that the court did not possess.

People v. Austin, 49 Hun. 396; Code Crim. Proc. §§ 56, 211, chap. 7. See *Tracy v. Seamans*, 7 N. Y. S. R. 144; *Fischer v. Langbein*, 4 Cent. Rep. 215, 103 N. Y. 84.

If defendant Chase could be said to have originally possessed jurisdiction, his proceedings after the bond was offered were in excess of and beyond his jurisdiction and were *coram non judice*.

Gordon v. Longest, 41 U. S. 16 Pet. 104, 10 L. ed. 902; *Striker v. Mott*, 6 Wend. 465; *Cass v. Shepherd*, 2 Johns. Cas. 27.

Peckham, J., delivered the opinion of the court:

The defendant Chase was a justice of the peace in Jefferson County; and the defendant Vrooman, in August, 1887, appeared before him, and made a sworn complaint against the above plaintiff, charging that he supplied to a certain butter manufactory diluted milk, etc. The justice issued a warrant for the arrest of the plaintiff upon such complaint, and he was

thereupon arrested and brought before the justice. The offense charged against the plaintiff was a violation of chapter 183 of the Laws of 1885, which was a misdemeanor. The plaintiff, when arraigned before the justice, pleaded not guilty. The district attorney appeared for the people. The record shows that the plaintiff waived a preliminary examination, and offered to give bail for his appearance at the next grand jury of Jefferson County. The justice overruled the offer. The plaintiff then demanded a jury, which was summoned, the case was tried, and the plaintiff found guilty and sentenced to pay a fine of \$100, and to be imprisoned until it was paid, not to exceed ninety days. He was thereupon taken by a constable to the county jail, and was there in confinement from early in the morning until some time in the afternoon, when his counsel procured his discharge. The case was taken to the Court of Sessions of Jefferson County, where the conviction was affirmed, but upon appeal to the general term of the supreme court it was reversed, and the plaintiff discharged, upon the ground that, after the plaintiff had offered to give bail to the grand jury, the justice should have accepted it, and that he erred in then deciding to try the plaintiff. The plaintiff commenced this action for false imprisonment and malicious prosecution, and upon the trial he abandoned the latter ground, and sought to recover for the false imprisonment. Upon these facts the trial court non-

writ without a bond and becomes liable as a trespasser. *Barkeloo v. Randall*, 4 Blackf. 478.

So where the statute permitted execution to issue at any time after twenty-four hours, and the justice issued an execution in two or three hours after rendering judgment, he was held liable in an action of trespass. *Briggs v. Wardwell*, 10 Mass. 356.

So where the justice, who had no authority to order a person accused of a criminal offense to be committed until a subsequent day for examination, without the accused being first brought before him, issued a warrant for the arrest of an individual upon a criminal charge on Saturday night, with directions that the accused be committed until the following Monday, the justice was held liable. *Pratt v. Hill*, 16 Barb. 303.

Where a justice issues execution containing a command to arrest the body of the judgment debtor, knowing that the law prohibits such arrest, he will be liable to the debtor in trespass. *Sullivan v. Jones*, 2 Gray, 570.

Where the statute provided that in a certain class of cases two magistrates should sit, and one only attempted to act and after a mistrial charged defendant with the costs and issued his execution and caused property to be sold, he was held liable for trespass. *Rembert v. Kelly*, Harp. L. 65.

Where a statute required the justice to cause every offender in a certain class of cases to be brought before him before proceeding, if he proceeds in the absence of an offender, he will be liable for trespass. *Bigelow v. Stearns*, 19 Johns. 39, 10 Am. Dec. 139.

Where the statute required that a warrant for the examination of a pauper must be executed by a constable of the town where the pauper resided, and it was issued to and executed by the constable of another town and the pauper brought before justices who made an order for the pauper's removal, the proceedings were held to be *coram non judice* and void, and the justices liable. *Reynolds v. Orvia*, 7 Cow. 269.

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Under a statute authorizing the imposition of a fine on the conviction of certain offenses "to be made of the property of defendant if any such can be found," and if not, then imprisonment, a judgment that in case defendant did not pay the fine and costs he should be at once committed to the county jail is unauthorized, and the justice will be liable in case it is executed. *Sheldon v. Hill*, 38 Mich. 171.

Where the statute barred prosecutions for theft in six years, and the complaint filed November 12, 1890, showed that the offense was committed September 20, 1874, the justice was held liable for taking jurisdiction. *Vaughn v. Congdon*, 56 Vt. 111, 48 Am. Rep. 758.

To take up and remand a man to another State upon a prosecution for maintenance of a bastard is false imprisonment in the justice. *Burlingham v. Wylee*, 2 Root, 152.

A person can commit but one offense on the same day by exercising his ordinary calling on Sunday contrary to Statute 29 Car. II., chap. 7; and if a justice proceeds to convict him in more than one penalty for the same day he is liable. *Crepps v. Durden*, 2 Cowp. 640.

Where the statute gives one accused of assault and battery twenty-four hours within which to elect to give bail for his appearance before the next criminal court for trial, and in default of such election requires his trial before a court of special sessions, in a case where one was brought before a justice upon such charge and was ordered to give bail for his appearance at the next criminal court and neither gave bail nor requested a trial by a court of special sessions, the justice was held not liable for omitting to proceed to try him at the expiration of the twenty-four hours and leaving him still in custody. *Kenner v. Morrison*, 12 Hun. 204.

Where a justice on complaint of violation of the Sunday Law had the offender arrested and imposed a fine on him he was held not liable for trespass, although the facts alleged were not within the

sued the plaintiff, and upon appeal the judgment of nonsuit was set aside, and a new trial granted, by the general term, and from the order granting the new trial the defendants appeal here, giving the usual stipulation for judgment absolute, in case the order be affirmed. The plaintiff contends that upon his arraignment he had the option to submit to a trial before the justice, or to demand a trial by jury after indictment, and, if he chose the latter, it was the duty of the justice to hold him to answer the charge before a court having the authority to inquire by a grand jury in regard to the alleged offense. Having elected, as he says, to give bail, the justice was bound to accept it, if sufficient, and he had no longer any jurisdiction over the subject matter or over the plaintiff's person, and the proceedings of the justice were thereafter wholly without jurisdiction, and he and all else concerned therein were liable in damages to the plaintiff.

The right of the justice to proceed depends upon the construction given to the Statute of 1885, above mentioned. If that statute gave exclusive jurisdiction to a court of special sessions to try alleged offenders against its provisions, then the justice was right in his decision to try the plaintiff, notwithstanding his demand to be held to bail to the next grand jury. Section 14 of the Act provides that "courts of special sessions shall have jurisdiction of all cases arising under this Act, and

their jurisdiction is hereby extended so as to enable them to enforce the penalties imposed by any or all sections thereof." The proper construction to be given this section is not now an open question. In *People v. Harris*, 123 N. Y. 70, we have held that exclusive jurisdiction was not conferred upon courts of special sessions by such language. This decision had not been made when the justice proceeded to try the plaintiff. As the statute did not confer this exclusive jurisdiction upon courts of special sessions, the justice was bound by the provisions of section 211 of the Code of Criminal Procedure, which directs the magistrate, when the person accused is brought before him, to inform him of his right to be tried by a jury after indictment, and, in case he shall elect to be so tried, the magistrate can only hold him to answer to a court having authority to inquire by the intervention of a grand jury into offenses triable in the county. We think the plaintiff complied, in substance, with the provisions of that section, when he pleaded not guilty, and waived preliminary examination, and offered to give bail for his appearance at the next grand jury of Jefferson County. There can be no room for any doubt that the plaintiff did, by this language, ask to be tried by a jury after indictment. It was the duty, therefore, of the justice to have taken bail and proceeded no further.

In trying the plaintiff, and, upon his conviction

meaning of the law. *Stewart v. Hawley*, 21 Wend. 552.

When justices of the peace have an authority given to them by statute and appear to have acted within the jurisdiction so given and to have done all that there was required by the Act to do in order to originate their jurisdiction, they are not liable for a conviction. *Basten v. Carew*, 3 Barn. & C. 652.

Instances of jurisdiction taken upon alleged facts.

Where the facts were positively sworn to in the case of a class within the jurisdiction of the justice, and he decided that they were sufficient to give him jurisdiction, he is not liable in a civil action although he was mistaken. *Bocock v. Cochran*, 32 Hun, 523; *Lowther v. Radnor*, 8 East, 113.

A justice is not liable for causing the arrest of an innocent person if the arrest is made upon complaint duly made. *Bailey v. Wiggins*, 5 Har. 462.

Where the officer was authorized to hold to bail he is not liable for false imprisonment in consequence of an arrest upon process which he had issued upon an insufficient affidavit where it presented a case for the exercise of his judgment. *Harman v. Brotherson*, 1 Denio, 686.

Where a justice of the peace granted a warrant without any information upon a supposed charge of felony he was held liable. *Morgan v. Hughes*, 2 T. R. 225.

Where a justice of the peace, before whom an offender against the Riot Act arrested on view was brought, made an order without a previous complaint in writing requiring defendant to be bound over for trial, and on his refusal to comply with such order committed him to prison, he was held liable. *Tracy v. Williams*, 4 Conn. 107, 10 Am. Dec. 102.

A magistrate having no authority to issue a warrant for arrest in a criminal case upon a complaint the facts of which are stated upon information and belief will, if he causes the accused to be arrested, be liable. *R. A.*

rested upon such complaint, be liable. *Comfort v. Fulton*, 13 Abb. Pr. 276.

The fact that the complaint which charges the commission of an offense in positive terms in a subsequent part of it states on information and belief how complainant supposes it to have been committed, does not deprive the justice of the duty of exercising his judgment as to the existence of the facts and he will not be liable for an error of judgment. *Carter v. Dow*, 16 Wis. 298.

In an action for assault and imprisonment against a magistrate he pleaded that at the time of the trespass a felony had been committed by certain persons making, forging and counterfeiting, and that a reasonable suspicion existed that the persons arrested were guilty. It was held that the plea was bad if it omitted to set out the ground upon which the suspicion was founded. *Wasson v. Canfield*, 6 Blackf. 406.

In case of a warrant against one as the father of a bastard child, if the child was not then born or the complaint was not reduced to writing and the mother had failed to prosecute for the child's maintenance, or the warrant was not in due form, the magistrate is liable. *Poult v. Slocum*, 3 Blackf. 421.

But where complaint was made to a justice that a man was seen to shoot a dog, and there was nothing to show that the act was malicious or needless, no defense under the Acts relating to cruelty to animals was made out; and if the justice issued a warrant for the arrest of the one who did the shooting he is liable in an action for the assault and false imprisonment. *Warner v. Perry*, 14 Hun, 387.

Issuing warrants, attachments, etc.

A justice acts ministerially in issuing and delivering a criminal warrant to an officer to be executed, and if it is not valid on its face the justice is liable. *Blythe v. Tompkins*, 2 Abb. Pr. 468.

A justice in issuing a warrant against the putative father of a bastard child, under N. Y. Stat.

tion, committing him to prison, has the justice rendered himself liable in damages to the plaintiff? He did erroneously decide that he had the right to try the plaintiff notwithstanding his demand; but has such erroneous decision rendered him, as to all future acts, a trespasser? The answer depends upon a matter of jurisdiction. It is not a question of jurisdiction to proceed with the trial notwithstanding the demand, but it is a question of jurisdiction to decide whether he has or has not that right. Manifestly, he does not, as a matter of law, acquire jurisdiction to proceed by deciding that he has it; but, being confronted with the question of jurisdiction, has he the power to decide it so far that his erroneous decision that he has it exempts him from liability on the ground that he has only made a judicial error or an error of judgment upon a question of law which he was bound to decide? In such a case as this, it must be remembered that the justice had in the first instance, at all events, jurisdiction of the subject matter, viz., the inquiry into alleged offenses against the provisions of this Act, and the trial of alleged offenders. He also had jurisdiction of the person of the plaintiff. Full jurisdiction had thus been contided to the justice over the subject matter and person at the time when the plaintiff was arraigned before him. In the absence of a proper demand and the giving of sufficient bail, it was the duty of the justice, and his jurisdiction continued, to try the accused.

This would seem to be the case where jurisdiction having thus attached, the decision of the justice to try the plaintiff was only an erroneous exercise of such jurisdiction. It is unlike the case where jurisdiction has never been conferred, and the justice decided to exercise a power that he does not, and never did, possess. Here, in the course of proceedings which he was forced to institute, and in the case of one over whose person he has properly acquired jurisdiction, the justice is confronted with the necessity of deciding a question depending upon the construction to be given to a statute, and that question must be decided by him one way or the other before he can take another step in those proceedings which up to that moment have been legally and properly pending before him, and over which he has had full and complete jurisdiction. It seems plain that his decision upon the question is one in the course of a proper exercise of the jurisdiction first committed to him, and that his error in deciding that he had jurisdiction to proceed was an error of judgment upon a question of law, and that he is therefore not responsible for such error in a civil action. It is unlike the case where a justice of the peace proceeded to try a civil action for assault and battery. *Woodward v. Paine*, 15 Johns. 492. The justice never had in such case obtained jurisdiction over the subject matter, and he could not obtain it by deciding that he had it. The case falls under the principle of law that,

Acts, 24, chap. 18, acts ministerially and if he issues a warrant without a proper complaint he will be liable for false imprisonment. *Wallsworth v. McCullough*, 10 Johns. 93.

Where a justice without authority of law issues a process for arrest he will be guilty for the trespass; and honesty of purpose cannot justify him. *Truesdell v. Combs*, 33 Ohio St. 186.

But where a justice wrongfully issued a warrant without oath against a freeholder at the instigation of the complainant and with no means of knowing that the defendant was a freeholder he was held not liable. *Rogers v. Mulliner*, 6 Wend. 597, 22 Am. Dec. 546.

A justice is not liable for causing the arrest of a person merely because he made a mistake in failing to take an examination of the complainant and to reduce the same to writing as required by statute. *Nowak v. Waller*, 31 N. Y. S. R. 458.

When a justice with full knowledge of the facts issues a warrant for arrest in case of an assault and battery committed in another State, which is executed, he is liable. *Miller v. Grice*, 2 Rich. L. 27.

In contrast with the weight of authority elsewhere is the following:

The error of a magistrate in issuing a warrant without affidavit will not render him liable for damages if he acted in good faith and for what he deemed to be for the public good. *Maguire v. Hughes*, 13 La. Ann. 281.

The mere informality of the warrant upon which a person is arrested for a breach of the peace is not sufficient to render the justice liable. *Cooper v. Adams*, 2 Blackf. 294.

Where to give a justice jurisdiction to issue an attachment proof must be made that defendant is concealed or has departed, etc., if the attachment issues without such proof the justice will be a trespasser. *Adkins v. Brewer*, 3 Cow. 208, 15 Am. Dec. 234.

If a magistrate issues a search warrant without the proper oath to support it, and it is executed, he 14 L. R. A.

will be liable for trespass. *Grumon v. Raymond*, 1 Conn. 40, 6 Am. Dec. 200.

A warrant in the form provided in criminal cases against a party proceeded against for a forfeiture enforceable only by civil action though irregular does not render the justice liable. *Carter v. Dow*, 16 Wis. 298.

Errors occurring after acquiring jurisdiction.

Action does not lie against a justice for error in judgment. *Ambler v. Church*, 1 Root, 21; *Reld v. Hood*, 2 Nott & McC. 188, 10 Am. Dec. 532.

Where a magistrate has jurisdiction but mistakes the law he cannot be sued for an illegal act without previous notice under the Pennsylvania statutes. *Jones v. Hughes*, 5 Serg. & R. 298, 9 Am. Dec. 364.

An action will not lie against a judge of probate for neglecting to take security from the guardian of an infant although the infant had personal estate and the guardian was a bankrupt. *Phelps v. Still*, 1 Day, 315.

No action can be maintained against a county judge for failure to require a guardian to renew his bond or to give further security on account of the insolvency or removal of his original sureties. *Hamilton v. Williams*, 26 Ala. 527.

A justice of the peace who, having jurisdiction over the subject matter of a criminal charge, errs in the judgment rendered against the defendant as to the character and extent of his jurisdiction, will not be held liable in damages if he acted in good faith. *Bell v. McKinney*, 63 Miss. 187.

So where the justice has authority to inflict a fine in a particular case the mere fact that he imposes a larger fine than he has authority to impose will not render him liable. *Clark v. Holbridge*, 58 Barb. 61.

Where the justice had jurisdiction of the subject matter and gave judgment for more than \$5 costs, while the statute limits the whole costs to that sum, the justice could not be held liable for trespass to a person imprisoned under an execution issued on the judgment. *Butler v. Potter*, 17 Johns. 145.

where a judge never has had jurisdiction over the subject matter, he acts as a trespasser from the beginning in assuming it, and his decision that he has it is no protection to him. I know it was stated in *Gordon v. Longest*, 41 U. S. 16 Pet. 97, 10 L. ed. 900, in a case where the defendant took the proper steps to remove an action brought against him in the state court to the United States court, and where the judge of the state court persisted, notwithstanding those steps, in trying the cause, that every step subsequently taken by the state court in the exercise of jurisdiction was *coram non jure*. Yet in such a case the question is put whether the state judge would be liable for proceeding with the case in the honest exercise of his judgment. *Lange v. Benedict*, 73 N. Y. 12, 86.

And in a case where a plea of title to real estate is put in before a justice of the peace, which ousts him of jurisdiction, would the justice be liable in case he erroneously decided that he continued to have jurisdiction? This question is also put in the course of the opinion in the case of *Lange v. Benedict*, *supra*, and with, as I think, a leaning on the part of the learned judge towards the position of non-responsibility. The jurisdiction existed in both cases at one period, and it was on account of the steps taken in the course of the proceedings in the cases that the court or judge was called upon to say whether his jurisdiction had ceased or not. It seems to me that the erroneous decision of that question did not render the judge liable in either case. Unless

the proper steps were taken, the judge had power in each case to proceed and try it; and so, although the application to remove is properly made, it is addressed to the legal discretion of the judge upon the papers presented, and a question of law is presented for him to decide. His erroneous decision, while conferring no jurisdiction upon him, is still such a judicial determination of a matter already properly pending before him, and over which, up to that moment, he had jurisdiction, that he must be protected from a civil action in regard to it.

It has been held (*Butler v. Potter*, 17 Johns. 145) that where a justice entered judgment for more than five dollars costs, when the statute prohibited judgment for more than that sum for costs, the judgment was voidable, but not void. He had jurisdiction to give judgment for some amount, and hence his decision to give it for more than the statute allowed was not void. The case of *Prigg v. Adams*, 2 Salk. 674, was cited as sustaining the principle. The judgment in that case was declared to be void, as in violation of an act of parliament, because rendered in a case arising in Bristol, where the act provided that in such a case no judgment should be entered in a court of Westminster for less than a certain sum, and this judgment was for less. The defendant, an officer, took the plaintiff on a *ca. sc.* issued on the judgment, and it was held that the same was a protection to the officer. See also *Clark v. Holdridge*, 58 Barb. 61.

So it has been held that granting an adjourn-

The justice is not liable for adjourning a cause although no verified answer has been interposed. *Merwin v. Rogers*, 28 N. Y. S. R. 404.

No action lies against a justice for refusing to take bail on a charge of misdemeanor, since his duty in that respect is not merely ministerial. *Linford v. Fitzroy*, 13 Q. R. 240.

Where a judge acting in a matter within his jurisdiction enters an order reinstating a cause without notice he is not liable to the party aggrieved although he had no right to do so. *Hughes v. McCoy*, 11 Colo. 591.

So when a justice grants an adjournment to a plaintiff not entitled to it, and subsequently renders judgment and issues execution on which the property of the defendant is sold, he is not liable as a trespasser. *Horton v. Auchmoody*, 7 Wend. 300.

A justice is not liable to an individual because of failure to render judgment in an action tried before him within four days after its final submission. *Evarts v. Kiehl*, 3 Cent. Rep. 334, 103 N. Y. 206.

Enforcement of authority; contempt.

An action will lie against a judge of the ecclesiastical court who excommunicates a person for refusing to obey an order which the court was not authorized to make. *Beaurain v. Scott*, 3 Campb. 338.

But where the vicar-general had jurisdiction to grant administration and directed a certain person to act as administrator and the latter refused, whereupon, he was excommunicated, it was held there was no liability. *Aokerley v. Parkinson*, 3 Maule & S. 411.

A justice of the peace is not liable for causing the arrest and imprisonment of one who has failed to obey a subpoena issued by him though the subpoena was insufficient to require the attendance of the person served and the warrant was directed to the J. L. R. A.

sheriff or any constable, when by statute it should have been directed to the sheriff alone. *Allee v. Reece*, 39 Fed. Rep. 341.

A justice of the peace may commit for contempt and is not liable to an action on the case for what he does in his judicial capacity. *Lining v. Bentham*, 2 Bay, 1.

Where a magistrate fines a witness for contempt the amount is not recoverable back before another justice. *Moor v. Ameer*, 3 Cal. 170.

Where a juror returned a verdict of not guilty contrary to the direction of the court and was committed to jail for contempt the judge was held not liable to an action although the commitment was erroneous. *Hamond v. Howell*, 1 Mod. 184, 3 Mod. 218.

Where a justice is given power to punish a witness for contempt for refusing to answer a proper and pertinent question, when there is an oath of the materiality of the testimony, a justice is liable for false imprisonment for committing one for contempt where no oath was made. *Rutherford v. Holmes*, 66 N. Y. 368.

So where a justice of the peace committed a witness to prison for contempt in the course of a trial of a case of which a police court had exclusive jurisdiction he was held liable to an action by the witness. *Piper v. Pearson*, 2 Gray, 120, 61 Am. Dec. 438.

Conflicting with higher court.

Where a justice after certiorari to bring up proceedings before him proceeded to try the issue and found the defendant guilty he was held liable in trespass. *Case v. Shepherd*, 2 Johns. Cas. 27.

Where, after trial of a writ of replevin in which judgment of restitution was rendered, defendant appealed and the justice determined that the jurisdiction of the appellate court had not attached because of defect in the appeal bond, and ordered

ment to the plaintiff in a justice's court in a case where, by law, he was not entitled to it, acted as a discontinuance, and that the case, as between the parties, was out of court, and the justice had no jurisdiction to proceed further. *Proudfit v. Henman*, 8 Johns. 391. In such case, the justice, notwithstanding the adjournment, assumed to retain jurisdiction, and rendered judgment and issued execution, and defendant's property was sold under it. It was held that the justice was not liable as a trespasser. It was said the court had jurisdiction over the parties and over the question of adjournment; and although he had, in reality, no legal power to grant the adjournment, and the case was thereby discontinued as between the parties, and any judgment thereafter rendered liable to be reversed, yet the justice was not liable, because his decision to grant the adjournment, although in a case where he legally had no power, was yet an error of judgment, and he was not liable, because he had jurisdiction, and was called upon to decide. *Horton v. Auchmoody*, 7 Wend. 200. So in the case in *Re Faulkner*, 4 Hill, 598, it was held that, in order to give jurisdiction to the officer to whom an application is made for a warrant against a person as an absconding or a concealed debtor, the affidavits of the two witnesses required by 2 Rev. Stat., p. 3, § 5, must state facts, and mere information and belief will not answer. And yet in *Harman v. Brother-son*, 1 Denio, 537, the affidavit stated the facts only on information and belief; and it was held that, though insufficient to sustain the or-

der to hold to bail against a motion to set it aside, it protected an officer making the arrest against an action for false imprisonment. The court said it was a case where, upon proper proof, an order to hold to bail might be made. The officer had jurisdiction of the matter, and acted judicially in making the order, and it was clear he could not be made answerable as a trespasser for an error in judgment. In *Stewart v. Hawley*, 21 Wend. 552, the case arose upon the statute in regard to the observance of the Sabbath, which prohibited servile laboring or working on that day. The defendant, who was a magistrate, issued his warrant for the arrest of the plaintiff upon a complaint charging that he was on the Sabbath day personally engaged in circulating a memorial to the Legislature at its next session; and, upon proof made of that fact on the trial, the plaintiff was convicted of a violation of the statute. The plaintiff brought his action of trespass to recover damages, but the court held that, when complaint was made, the defendant was bound to entertain it, and exercise his judgment on it, and whether the facts disclosed showed prima facie a violation of the statute was a question of law, for the erroneous decision of which the defendant was not liable; that he had jurisdiction to try a person for a violation of the law, and he was therefore compelled to decide in a case where jurisdiction over the subject matter belonged to him. Other cases of a somewhat similar import are cited in the learned opinion of *Mr. Justice Hardin* in the court below.

restitution of the property in good faith, exemplary damages were not recoverable from him. *Smith v. Holland* (Tex. App.) May 20, 1891.

A judge of a superior court is not liable for committing a defendant for contempt for refusal to pay alimony pending an appeal from a former order of the same kind. *Ross v. Griffin*, 53 Mich. 5.

Where the chancellor, who had committed a person for contempt of court, recommitted him after he had been discharged by the supreme court on habeas corpus, he was held exempt from suit although the judgment was erroneous. *Yates v. Lansing*, 5 Johns. 290, affirmed, 9 Johns. 395, 6 Am. Dec. 290.

So where a justice of the peace having power to commit for contempt commits a person and on such person's being liberated recommits him for the same offense, such justice is not liable. *Cooke v. Bangs*, 31 Fed. Rep. 640.

Where a judge, after acquiring jurisdiction of an application for a warrant of commitment, is served with an injunction staying further proceedings and suspends the matter instead of adjourning it, and after the dissolution of the injunction pronounces judgment in the absence of the defendant, there is a mere error of judgment and not lack of jurisdiction so as to render him liable. *Stanton v. Schell*, 3 Sandf. 323.

Malice or impure motives.

Much of the authority upon this question is found in general expressions which amount to little more than dicta, as —

Judges of superior courts are not civilly liable for anything done by them in a judicial capacity. *Borden v. State*, 11 Ark. 519, 54 Am. Dec. 217.

No action lies in any case for misconduct or delinquency, however gross, in the performance of judicial duties. *Wilson v. New York*, 1 Denio, 599.

A justice of the peace for any act done in his ju-

dicial capacity is not liable in a civil action. *Tyler v. Alford*, 28 Me. 530.

Or, coming a little closer to the question, —

A judicial officer is not liable civilly unless he acts willfully or corruptly. *Wasson v. Mitchell*, 18 Iowa, 153.

No action lies against a justice of the peace for an act done judicially and within the scope of his jurisdiction, unless he acts corruptly or from impure motives (*Gregory v. Brown*, 4 Bibb, 28, 7 Am. Dec. 731); or unless fraud or collusion is shown. *Peake v. Cantey*, 3 McCord, L. 71.

But there are some direct expressions of opinion upon the subject. In *Bradley v. Fisher*, 80 U. S. 13 Wall. 335, 20 L. ed. 646, the Supreme Court of the United States calls particular attention to the subject by correcting an expression in *Randall v. Brigham*, 74 U. S. 7 Wall. 523, 19 L. ed. 235, and states: "Judges of courts of superior and general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction and are alleged to have been done maliciously or corruptly." See also *Fray v. Blackburn*, 3 Best & S. 575; *Stone v. Graves*, 8 Mo. 148, 40 Am. Dec. 181; *Elmore v. Overton*, 2 West. Rep. 300, 104 Ind. 543, 54 Am. Rep. 343.

A declaration charging a justice of the peace with willfully and maliciously receiving a false and groundless complaint which resulted in the willful and malicious conviction and sentencing of complainant to pay a fine and his committal to prison was held bad. *Pratt v. Gardner*, 2 Cush. 63, 48 Am. Dec. 652.

An action will not lie for official misconduct in a judicial officer, though of special and limited jurisdiction, and though such misconduct be corrupt and malicious, if a statute declare his own record to be conclusive evidence in all courts of the facts therein contained. *Cunningham v. Bucklin*, 8 Cow. 173, 18 Am. Dec. 432.

We are inclined to think that this was not a case for holding the magistrate liable to an action on the part of the plaintiff in the nature of trespass to recover damages for his illegal imprisonment. In this case there seems to have been no question but that the justice, in all that he did, acted in entire good faith. The district attorney appeared for the people before the magistrate, and contended that the magistrate had exclusive jurisdiction to try the case under the particular statute. The justice so decided. The Court of Sessions of Jefferson County, upon appeal, concurred in that construction of the statute; and although the general term of the supreme court came to a different conclusion, in the correctness of which we concur, it is yet manifest that there was at least color for different constructions of the terms of the Act. It would be a pretty hard rule which, under such circumstances, should hold a magistrate liable to be cast in damages for an honest mistake in judgment

upon a question of law in a proceeding over which he had jurisdiction up to the moment when he was called upon to decide the question. It seems to us there is no public policy which demands such a measure of liability on the part of inferior magistrates, and we think we are not overruling any case in this or in the old supreme court. The rule is clear enough; but in this as in so many other cases the difficulty consists in its proper application. We have, as we believe, properly applied it in this case. We have also looked at the other questions appearing in the record, the exceptions of the plaintiff taken on the trial, and the rulings of the court thereon, and we think no error was committed calling for a new trial.

The order of the General Term granting a new trial must therefore be reversed, and the judgment of nonsuit affirmed, with costs to the defendants in all courts.

All concur, except Finch, J., absent.

An action will lie against a justice who corruptly refuses to take security required to be given on the prosecution of an appeal, such proceedings being of a ministerial and not a judicial character. *Tompkins v. Sands*, 8 Wend. 462, 24 Am. Dec. 46; *Hardison v. Jordan*, Cam. & N. (N. C.) 454.

Officiousness; intermeddling; corrupt use of authority.

If the magistrate acts officiously in issuing a warrant for arrest without a complaint on oath or personal knowledge that a complaint has been made he is liable. *Flack v. Harrington*, 1 Ill. 165, 12 Am. Dec. 170.

Where a justice issued an execution against the body of a defendant who was by law privileged from imprisonment voluntarily, and without the request or authority of the plaintiff, he was held liable to an action of false imprisonment. *Percival v. Jones*, 2 Johns. Cas. 49.

Where a justice of the peace instigated the execution of a state warrant for felony nine months after the warrant had issued, the party who procured it having made no recent application to have it executed, doing so from motives of personal ill-will, he was held liable. *Garvin v. Blocker*, 2 Brev. 157.

Where a justice of the peace caused an action to be instituted upon a promissory note of which he was the owner returnable before himself, and rendered judgment, issued execution, and caused defendant's arrest and commitment to jail, he was held liable in trespass. *Dyer v. Smith*, 12 Conn. 364.

So in an action of unlawful imprisonment evidence is competent that defendant as a trial justice suffered plaintiff, whom he had sentenced to pay a fine, to go at large and ten weeks after committed him to jail for the purpose of extorting money from him. *Fisher v. Deans*, 107 Mass. 118, 14 L. R. A.

Proceedings after judgment.

The rendition of a final judgment terminates the judicial duty of a justice, and all further acts in the cause are ministerial. *Sullivan v. Jones*, 2 Gray. 570.

So where the justice, after finally disposing of a cause, committed a witness to prison for contempt at the trial, he was held liable to an action by the witness. *Clarke v. May*, 2 Gray, 410.

Where a justice, after finding one guilty of destroying game who had effects which might have been distrained, sent him immediately to prison without endeavoring to levy a distrain, he was liable. *Hill v. Bateman*, 1 Strange, 710.

If upon regular conviction the magistrate proceeds to commit the party, an action will lie if the warrant of commitment does not show an offense over which he had jurisdiction. *Wickes v. Cluttenbuck*, 2 Bing. 483.

Where a justice regularly imposed a fine with imprisonment for ten days in default of payment, and issued his warrant of commitment reciting judgment for the fine and that in default of payment defendant be imprisoned until the fine was paid or until discharged by due course of law, he was held liable for issuing the warrant. *La Roe v. Roeer*, 8 Mich. 537.

In receiving a bond for the prosecution of an appeal, a justice acts as ministerial officer, and if he refuses it without objection to its legal sufficiency, he will be liable. *People v. Dutchess County Ct. Judges*, 7 Cow. 437; *Tompkins v. Sands*, 8 Wend. 463, 24 Am. Dec. 46.

Taking insufficient security upon an appeal bond will not render a justice liable unless he acted from corrupt motives. *Lester v. Governor*, 12 Ala. 624.

H. P. F.

NEW YORK COURT OF APPEALS (3d Div.).

CROWN POINT IRON CO., *Appt.*,

v.

ÆTNA INSURANCE CO., *Respt.*—
SAME, *Appt.*,

v.

BOATMANS FIRE & MARINE INSURANCE CO., *Respt.*—
SAME, *Appt.*,

v.

LANCASHIRE INSURANCE CO., *Respt.*—
SAME, *Appt.*,

v.

PENNSYLVANIA INSURANCE CO. of
Pittsburg, *Respt.*—
SAME, *Appt.*,

v.

PEOPLE'S INSURANCE CO., *Respt.*—
SAME, *Appt.*,

v.

HAMBURG-BREMEN FIRE INSURANCE
CO., *Respt.*

(.....N. Y.....)

1. The surrender of a policy with a request that it be terminated operates *ipso facto* as a cancellation where the policy provides that the "insurance may be terminated at any time at the request of the assured."
2. Mailing a letter inclosing policies for cancellation will effect such cancellation only when it is actually received by the insurer or his representative, and the policies will be binding in case of loss while the letter is in the mails.

(October 13, 1891.)

APPEALS by plaintiff from orders of the General Term of the Supreme Court, Third Department, reversing judgments entered in the office of the clerk of Essex County upon reports of the referee in favor of plaintiff in actions brought to recover the amounts alleged to be due on certain fire insurance policies. *First case affirmed. Others reversed.*

Statement by Vann, J.:

Appeals, in each of these actions, from an order of the General Term of the Supreme Court of the Third Judicial Department, reversing a judgment in favor of the plaintiff entered on the report of a referee. Each action was based on a policy of fire insurance issued by the defendant against whom it was brought, upon a quantity of charcoal belonging to the plaintiff. The defense, aside from a specific denial of certain allegations in the re-

spective complaints, was that prior to the fire the plaintiff surrendered the several policies for cancellation, and thereby terminated the insurance thereunder. The actions were tried and argued together, and only one appeal-book was laid before the court. During the year 1886 George Page was the agent of the Ætina Insurance Company at Crown Point, and Meredith B. Little was the agent of the other defendants at Glens Falls. Each was authorized by the company that he represented to issue policies, accept policies for cancellation, and terminate insurance at the request of the insured. Page issued the policy in behalf of the Ætina, and, as the agent of the plaintiff, procured Little to issue the others. Alvin L. Inman was the general manager and Henry L. Reed the assistant general manager of the plaintiff, and the name and position of each was printed on the letter-heads used by that corporation and its officers. On July 26, 1886, the plaintiff had twelve policies of insurance, including the six issued by the defendants, amounting to \$14,000, upon a quantity of charcoal that it used in its business of manufacturing iron. About that time Inman and Reed visited the mines of the plaintiff, and there learned that its stock of charcoal was much reduced, whereupon Inman told Reed to cancel some of the policies, and, if he could procure a return of the unearned premiums *pro rata*, to cancel them all, but in any event to cancel some. July 28th, Reed, as assistant general manager, wrote to Page as follows: "Herewith I send you insurance policies on charcoal for cancellation. Our stock is nearly used up. We should be allowed for the unexpired time *pro rata* on amount paid. . . . Please attend to it at once." The names, numbers, amounts, and dates of expiration of nine insurance policies, including the six in question, were enumerated in the letter, and the policies themselves were inclosed therewith in an envelope, and sent by mail to Page, who received the package July 29 at 1:30 P. M. Page made no reply to this letter, but laid aside the Ætina policy, and about 4 o'clock that afternoon mailed the others to Little at Glens Falls, with a letter in which he stated: "I inclose the following policies for cancellation, as the stock of charcoal is used up." After giving the names, etc., of the eight policies, he continued: "Make the rebate as high as you can. . . . Please make out a bill stating the amount you can allow on each policy for me to show Mr. Reed, the agent of the Crown Point Iron Company." Three of the policies thus inclosed, but including none involved in this action, were not issued by Little, but were procured by him at the request of Page, acting for the plaintiff. The other five were the policies in suit, that issued by the Ætina excepted. During the evening of the 29th or the morning of the 30th,—the referee failed to determine which,—Little took the package containing these policies from his drawer in the postoffice, opened it, and found it contained policies of the plaintiff, which he supposed were sent to him for cancellation. Being on his way home, he replaced the package in the drawer, locked it, and went home.

NOTE.—For note on cancellation of insurance policy, see *Quong Tue Sing v. Anglo-Nevada Assur. Corp.* (Cal.) 10 L. R. A. 144.
14 L. R. A.

Between 9 and 10 o'clock on the morning of the 30th he took the package from the post office to his own office, and, after reading the letter from Page, laid it down with other letters to be answered in its turn. About two hours later he received a telegram from Page to "return all policies to-day sent you last night on charcoal," and he at once mailed the policies and the dispatch to Page, who received them the next day. In the mean time, at half past 10 on the evening of the 29th, the coal shed containing the charcoal was struck by lightning, and a fire resulted that injured the property in question to the amount of \$4,681.29. Little had not heard of the fire when he mailed the policies to Page, but both Page and Reed knew of it when the former, at the request of the latter, sent the telegram to Little. When Page received the policies back he delivered them, together with the *Ætna* policy, to the plaintiff, but a day or two afterwards Reed returned the latter to him at his request, and upon his assurance that it would not affect the liability of the parties, and he wrote "canceled" opposite the entry thereof on his policy register. When he made his next monthly report he forwarded it to the home office. Page did not assume to terminate the policy issued by him, except in the manner stated, and Little took no action whatever towards terminating the policies that he issued. The plaintiff made no attempt to surrender three of the twelve policies that covered the charcoal on the 28th of July, when Reed wrote the letter of that date to Page. It was conceded that those three policies, covering the charcoal to the amount of \$2,838.84, were in force at the time of the fire.

Mr. Richard L. Hand, with Messrs. Waldo & McLaughlin, for appellant:

There was no "complete surrender." The policies were not sent in for cancellation without conditions. Reed had neither authority nor intention so to do. The language, "I send you policies for cancellation. We should be allowed *pro rata* on the amount paid," is a proposition for cancellation on those terms. At all events, it may be found as a fact that it was such, and having been so found, the general term could not reverse, because, perchance, it would have found differently.

Aldridge v. Aldridge, 120 N. Y. 614; *Roberts v. Tobias*, Id. 1.

The construction of these letters, in the light of the situation, became a question of fact; and the referee has found the facts supporting our contention.

First Nat. Bank of Springfield v. Dana, 79 N. Y. 108; *White v. Hoyt*, 73 N. Y. 505.

To terminate the policy requires action by the underwriter. He is not obliged to, but, in his own language, "may" do so, if he assent to that request. Here there is no pretense of an assent.

In case of the *Ætna*, the agent forwarded notice of loss and called for an adjuster, after returning this policy, and the defendant sent on its adjuster, thus distinctly recognizing the fact that there had been no termination and that the risk existed at the time of the fire.

Like a forfeiture, if the underwriter does any act based upon the policy, this is a waiver.

Titus v. Glens Falls Ins. Co. 81 N. Y. 410; 14 L. R. A. •

Shearman v. Niagara F. Ins. Co. 46 N. Y. 526, 7 Am. Rep. 880; *Roby v. American Cent. Ins. Co.* 120 N. Y. 510; *Armstrong v. Agricultural Ins. Co. of Watertown*, 56 Hun, 899.

But to effect a termination, under the language of these contracts, the minds of the parties must meet. The proposal by the insured must be accepted by the underwriter.

Train v. Holland P. Ins. Co. 62 N. Y. 598, 68 N. Y. 208; *Stevens v. Comstock*, 12 Cent. Rep. 327, 109 N. Y. 655; *Eliason v. Henshaw*, 17 U. S. 4 Wheat. 225, 4 L. ed. 556. See also *Harnickell v. New York L. Ins. Co.* 3 L. R. A. 150, 111 N. Y. 390; *Von Wien v. Scottish U. & Nat. Ins. Co.* 118 N. Y. 94.

Actual payment, or tender, of the return premium is necessary to effect cancellation of the policy, in case of termination at the request of the insured as well as where the underwriter exercises its option to cancel.

1 Wood, Fire Ins. 2d ed. p. 288.

The plaintiff never assumed to cancel or to declare the policies terminated. The policies were simply sent in "for cancellation." This could not terminate the risk, if the assured had power to terminate.

Van Valkenburgh v. Leno F. Ins. Co. 51 N. Y. 465.

Mr. A. H. Sawyer, for respondents:

The forwarding of these policies by mail with information that they were surrendered for cancellation and without any conditions whatever, is analogous to the acceptance by mail by one party of a proposition made by another, and in such case when a proposition for a contract of any description has been made by one party to another, and the acceptance of such proposition has been made by the other party by mail, the contract is complete the moment that the letter accepting such proposition is deposited in the postoffice.

Taylor v. Merchants F. Ins. Co. of Baltimore, 50 U. S. 9 How. 890, 13 L. ed. 187; *Vassar v. Camp*, 11 N. Y. 441; *Mattier v. Prith*, 6 Wend 103, 21 Am. Dec. 262; *Brisban v. Boyd*, 4 Paige, 17, 8 L. ed. 322; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Ruggles v. American Cent. Ins. Co.* 114 N. Y. 415.

The return of the policies in question by Little, upon Page's direction, in ignorance of the fact that the property covered by the policies had been destroyed by fire, did not restore the policies to life.

Wood, Fire Ins. 2d ed. 506; May, Ins. § 200.

Failure to disclose facts is such a concealment as would vitiate a policy.

New York Bowery F. Ins. Co. v. New York F. Ins. Co. 17 Wend. 359; *Rebec v. Hartford County Mut. F. Ins. Co.* 25 Conn. 51, 65 Am. Dec. 553.

If the policies had been once surrendered, the taking them back after the fire would not revive the contract or make a new one.

Train v. Holland P. Ins. Co. 62 N. Y. 598.

Vann, J., delivered the opinion of the court:

The question presented by these appeals is whether the policies were canceled or terminated before the fire occurred. The Statute regulating the cancellation of fire insurance policies provides that "any corporation transacting the business of fire insurance in this State shall cancel any policy

of insurance hereafter issued or renewed at any time by request of the party insured." Laws 1880, chap. 110, § 3. The command of the statute is clear, and no discretion or option is left to the Company. The sole requirement to set the command in motion is a request by the insured, and, after that request is made, the further continuance of the contract would be in contravention of the statute. Each of the policies in question contains a provision that the "insurance may be terminated at any time at the request of the assured." While the method of terminating the insurance, upon the motion of the insured, is not specified except that the insured party is to request it, the language of the contract indicates that the subject is within his control, and that the terminating act is to be done by him alone, without any concurrent or supplemental act on the part of the Company. The word "may" is the language of the insurer, used for the benefit of the insured, and should receive a liberal construction to that end. As thus used it is not permissive, but imperative, and is in the nature of "must" or "shall." Otherwise the provision in which it occurs is useless, because the parties who made the contract could, of course, terminate it by mutual consent without any such stipulation. But while it takes two to make a contract, one may end it, if the contract itself so provides. Thus, by the next sentence of the policies, provision is made for the termination of the insurance on motion of the insurer in these words: "The insurance may also be terminated at any time at the option of the Company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term." Here the method of effecting the termination is specified by requiring the insurer to give notice to the assured, and return the unearned premium. *Griffey v. New York Cent. Ins. Co.* 100 N. Y. 417, 1 Cent. Rep. 523, 53 Am. Rep. 202; *Van Valkenburgh v. Lenox F. Ins. Co.* 51 N. Y. 465. No consent of the insured is essential. No meeting of minds is required. No act on his part is necessary. The contract, through the force of its own provisions, is ended by the action of the insurer only. *Stone v. Franklin F. Ins. Co. of Boston*, 105 N. Y. 543, 7 Cent. Rep. 749.

Although the language of the parties is at the "request" of the assured in the one instance, and on "notice" to the assured in the other, we think that in both it is within the power of the party desiring to end the contract to do so without either consent or action on the part of the other. When the insured surrenders the policy and requests that it be canceled, he can do no more. Unless that ends the contract he is powerless to end it, and the company, while able itself to hang on or let go as it wishes, can hold him against his will. An insolvent insurer, by refusing to cancel, would prevent the insured from procuring other insurance. The right of action for the unearned premium would not be complete without the assent of the insurer, and that, in effect, would be a new agreement. It was not necessary, as we think, that there should be any action on the part of the Company. No formal cancellation or physical defacement of the policy was required, because, by virtue of the contract and the stat-

ute, the surrender of a policy with a request that it be terminated operates as a cancellation, even if the insurer absolutely refuses to permit it to be canceled.

In *Train v. Holland P. Ins. Co.*, 62 N. Y. 598, 63 N. Y. 208, it was held that a surrender of a policy by the insured, and the acceptance of it by the authorized agent of the insurer, with the intention on the part of both that it should no longer be a contract, was in effect a cancellation of it. In that case, which arose prior to the passage of the statute, it did not appear on either occasion when it was before this court, as an examination of both appeal-books shows, that the policy surrendered contained any provision upon the subject of surrender or cancellation. Hence the decision proceeded upon the theory of a new arrangement involving a meeting of minds, but even then nothing was required to be done by the company to terminate the contract. See also *Atlantic Ins. Co. v. Goodall*, 85 N. H. 328, 336; *Walters v. St. Joseph F. Ins. Co.* 59 Wis. 489.

In order to terminate the insurance it was necessary that the "request" required by the statute and the contract should be made by one authorized to act in the matter in behalf of the plaintiff to one having adequate authority from the defendants. The act of Reed in surrendering the policies was the act of the plaintiff, because, aside from the authority plainly to be implied from the position he held, he was expressly authorized to surrender some of the policies covering the charcoal, and, as he surrendered but part, the act came within the authorization. So the acts of Page and Little in receiving the policies for cancellation were the acts of the respective defendants whom they represented, as it was conceded on the trial that they "had authority to accept policies of insurance for cancellation and to terminate insurance at the request of the insured." As to the Ætina policy, therefore, the case stands as if the insured had handed it to the insurer, and had stated, as Reed wrote to Page on July 28, 1886, that it was "for cancellation. Our stock is nearly used up. We should be allowed for the unexpired time *pro rata* on amount paid. . . . Please attend to it at once." Thus we have an absolute surrender of the policy, with an unqualified request that it be canceled "at once" because it was no longer needed. No condition was involved, for neither surrender nor request was dependent on the rate of the return premium. The writer simply expressed the opinion that there should be a *pro rata* allowance, but did not request cancellation if, nor forbid it unless, the amount suggested was allowed. Hence we unite with the learned general term in saying that "the plaintiff had done in respect to the Ætina Company all that was needed." It had given up its policy to a person authorized to receive it, and had requested cancellation. The policy, having been actually terminated, was not revived by taking it back under the circumstances stated. *Train v. Holland P. Ins. Co. supra*.

The order appealed from in the action against that company should therefore be affirmed, and judgment absolute rendered against the plaintiff, in accordance with the stipulation contained in its notice of appeal.

The cases against the other defendants are

less clear, and the result reached less satisfactory, because it rests, of necessity, upon an arbitrary presumption, and may or may not be in accordance with justice. What has already been said applies to those cases down to the time that the policies involved therein reached the hands of Page, who, as to those policies, was not the agent of the insurer, but of the insured. When they reached his hands, therefore, his possession was the possession of the plaintiff. He promptly mailed them, however, to Little, who stood in the place of the insurer, so far as the receipt of policies for cancellation was concerned. Page had no power to impose conditions, and, as we read his letter, he assumed none. He followed the language of his instructions by stating that he inclosed the policies "for cancellation," giving as the reason that the stock of charcoal was used up. He requested as high a rebate as possible, and that a statement of the amount allowed on each policy should be sent him to show to Reed, but he named neither sum nor rate, even by way of suggestion, and left nothing open so that he could recede if the allowance was not satisfactory. If he was simply trying to find out what terms he could get in case of a surrender, why did he send on the policies before he knew what the companies would do?

It is contended by the defendants that the mailing of the policies with a letter stating the object sufficed to cancel them, because it was equivalent to the acceptance of a proposition by mail; and the following cases are cited, among others, in support of the position. *Treor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Vassar v. Camp*, 11 N. Y. 441; *Mactier v. Frith*, 6 Wend. 103, 21 Am. Dec. 262; *Brisban v. Boyd*, 4 Paige, 17, 3 L. ed. 322. These were cases of contracting wholly by letter or telegram. It was long ago held that, if an offer made by mail is accepted by mail, the contract is complete from the moment the letter of acceptance is mailed, even if it is never received. *Vassar v. Camp*, *supra*. Those cases have no application here, because no negotiation was pending, and no contract was proposed. The plaintiff did not make an offer to the insurance companies that might or might not be accepted. It sought to do an act that would be binding on the companies, whether they were willing or not. That act was a surrender of the policies with the request that they be terminated, and the act could not be complete until the request reached the companies or their agent. The policies and notice might have been sent by a messenger, who would have been the agent of the plaintiff for that purpose. Having been sent by mail it was none the less the agency of the plaintiff than if a messenger had been selected. It was necessary for the plaintiff, in order to terminate the policies, to have its notice actually reach the companies or their representatives, and the instrument selected for that purpose was the agent of the plaintiff, not of the defendant. If the plaintiff lost control of the letter as soon as it was mailed, that fact has no bearing except upon the nature of its relation to the agent that it empowered to deliver the package. It seems, however, that the writer of a letter may withdraw it from the office in which it is deposited, or from the office to which it is sent. U. S. Postal Laws

& Regulations, §§ 531, 533. If the letter never reached the companies, they would not have been bound, or, if it reached them after a long delay, they would have been bound only from the date of receipt. So far as the delivery of such a letter is concerned, the law does not recognize the agency of the mail as of any higher or more binding character than that of an express company or a private individual, although it may presume that a letter duly mailed was received by the person to whom it was properly addressed. 2 Wharton, Ev. § 1324; Pow. Ev. 81-86. When did the notice reach the companies or their agent Mr. Little? If it reached him before the fire, the policies were terminated *ipso facto*, and were not in force when the loss occurred. If it reached him after the fire, then the policies were in force when the loss occurred, and the character of the contract was thereby changed from a contingent to a certain liability on the part of the insurer. A cause of action based on an absolute debt forthwith accrued to the plaintiff that was not extinguished by the subsequent receipt of the policies by Little. *Stone v. Franklin F. Ins. Co. of Boston*, 105 N. Y. 543, 550, 7 Cent. Rep. 749; *Van Valkenburgh v. Lenox F. Ins. Co.* 51 N. Y. 465, 467. Whether such receipt would take effect from its date, as to losses subsequently occurring, is not here involved, and it is only necessary now to decide that it had no retroactive effect as to losses that had already occurred. If the letter was in process of transmission at the time of the fire, the request required both by statute and by contract had not been effectually made, and the cancellation was incomplete. Unfortunately the learned referee did not determine whether the policies reached Little before or after the fire. He was requested by the defendants to find in these words: "At or about nine o'clock in the evening of July 29, Mr. Little, while on his way to his residence, called at the post office and opened his post-office drawer, and found therein the package containing the policies in question forwarded to him by George Page, opened the said package, and found that it contained policies of the Crown Point Iron Company, supposed they were sent him for cancellation, and placed the package back in his post-office drawer, locked it, and went home." The referee refused to so find unless the proposed finding was amended by inserting after "July 29" the words, "or morning of July 30." The defendants excepted to the refusal, but the testimony of Mr. Little, the only witness upon the subject, was almost in the words of the finding as amended. The referee was clearly justified in refusing to find that the letter reached the agent of the defendants on the 29th. Whether this refusal to find is equivalent to a finding against the fact or not (*Standard Oil Co. v. Triumph Ins. Co.* 64 N. Y. 85), there was a failure to find the fact essential to a successful defense. The plaintiff was entitled to recover unless the defendants established, and the referee found, either that the policies had been terminated, or the facts from which the law would infer a termination. The burden of proof was upon them to establish the facts necessary to make out that defense, and one of them was that Page's letter reached Little before the fire occurred. Hav-

ing failed to do this, they failed utterly, and therefore the order appealed from in each of the actions, except that against the *Aetna Insurance Company*, should be reversed, and the judgment

entered on the report of the referee *affirmed*, with costs.

All concur.

CALIFORNIA SUPREME COURT.

Henry BONETTI, *Resp.*,

v.

J. M. TREAT and William R. Porter,
App.

(.....Cal.)

1. One who enters into possession of a leasehold under a written assignment of the lease, by which he undertakes to pay all rent that may become due under the lease, thereby becomes tenant of the lessor by privity of estate, and is bound to pay the rent provided by the covenants in the lease, which are covenants running with the land.
2. A lessee who has covenanted to pay rent is not released from his covenant by a written assignment of his lease and delivery of the premises to his assignee, who is accepted as tenant by the lessor.
3. The abandonment of the leased premises by one who has entered into possession under a written assignment from the lessee

will not relieve him from liability to pay the rent under covenants in the lease.

4. A parol surrender of premises held under a written lease for five years upon a condition which is never fulfilled, does not operate as a dissolution of the tenancy, especially where the landlord subsequently tenders back the keys and insists on holding the tenant liable.

(September 16, 1891.)

A PPEAL by defendant Porter from a judgment of the Superior Court for Santa Barbara County, in favor of plaintiff in an action brought to recover rent. *Affirmed*.

The facts are stated in the opinion.

Messrs. Philip Stewart and Richards & Carrier, for appellaut:

Re assignment of lease to a stranger by assignee, or surrender of possession by him to the landlord, terminates the relation between them without the landlord's consent.

The remedies of the lessor against his les-

NOTE.—Liability of assignee of leasehold for rent.

The performance of covenants in the lease, which run with the land, devolves upon the assignee. *Johnson v. Sherman*, 15 Cal. 290, 78 Am. Dec. 481.

The assignee of a leasehold is liable to the lessor for rent. *Myers v. Silljacks*, 58 Md. 327; *Legierse v. Green*, 61 Tex. 181; *D'Aquin v. Armant*, 14 La. Ann. 213; *Sutliff v. Atwood*, 15 Ohio St. 188; *Harvey v. McGrew*, 44 Tex. 412; *Carley v. Lewis*, 24 Ind. 23; *Martineau v. Steele*, 14 Wis. 272; *Webster v. Nichols*, 104 Ill. 160; *Farnam v. Hohman*, 90 Ill. 312; *Herbaugh v. Zentmyer*, 2 Rawle, 159; *Royer v. Ake*, 3 Penn. & W. 461; *Jacques v. Short*, 20 Barb. 280; *Stewart v. Long Island R. Co.* 4 Cent. Rep. 115, 102 N. Y. 607; *Demainville v. Maun*, 32 N. Y. 201; *Redford v. Terhune*, 30 N. Y. 453, 86 Am. Dec. 304; *Danels v. Richardson*, 22 Pick. 569; *Patten v. Deahon*, 1 Gray, 326; *Pitcher v. Tovey*, 4 Mod. 71, 1 Salk. 81; *Valliant v. Dodemede*, 2 Atk. 546; *Gray v. Clement*, 12 Mo. App. 579; *Hurst v. Rodney*, 1 Wash. C. C. 375; *Sexton v. Chicago Storage Co.* 129 Ill. 318; *Giddings v. Felker*, 70 Tex. 176; *Springs v. Schenck*, 39 N. C. 551; *Fennell v. Guffey*, 139 Pa. 34.

It is immaterial that the demise is in fee reserving a rent. *Main v. Feathers*, 21 Barb. 646; *Van Rensselaer v. Bonesteel*, 24 Barb. 365; *Tyler v. Heldorn*, 46 Barb. 439; *Van Rensselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278.

The assignee is liable upon the covenants although the assignment itself contains no covenants. *Port v. Jackson*, 17 Johns. 239, *affirmed*, 17 Johns. 479.

Liability of equitable assignee.

One who owns the equitable interest in land, who is in the constructive possession and receiving the income of it, is liable in covenant as assignee for a ground rent charged thereon, although the legal title is in another, and no trust appears by deed. *Berry v. McMullen*, 17 Serg. & R. 84.

14 L. R. A.

Ground of the liability.

The assignment of the term by the lessee creates a privity of estate between the lessor and the assignee, at least after the acceptance of the leasehold by the latter. *Salisbury v. Shirley*, 66 Cal. 225.

The assignee is only liable personally from privity of estate, that is from its actual or beneficial enjoyment or the right to it. *Thomas v. Connell*, 5 Pa. 13.

The relations of landlord and assignee of a term do not result from the contract but from privity of estate. *Sexton v. Chicago Storage Co.* 129 Ill. 327.

Privity of contract is not transmitted on an assignment by the lessee. *Congregational Soc. of Sharon v. Rix* (Vt.) April 22, 1889.

But where the lessee assigns the lease, subject to the rents and conditions thereof to persons who enter into possession and pay the rent in his name, and he subsequently assigns to the lessor all his claim against the assignees, privity of contract between the lessor and the lessee is established. *Marshall v. Lippman*, 16 Hun. 110.

The assignee of a lease by indenture is estopped by the deed which estops his assignor. *Taylor v. Needham*, 2 Taunt. 279.

In Louisiana where the thing assigned is simply the right of occupancy for the remainder of the term, the right is severed from the obligation and the assignee is not liable to the landlord for the rent. *Walker v. Dohan*, 30 La. Ann. 743.

Necessity for possession.

The liability of the assignee is determined by the extent of his right of possession under the assignment, and not by his actual possession. *St. Louis Public Schools v. Boatmen's Ins. & T. Co.* 5 Mo. App. 91.

To render the assignee of the lessee liable for rent on the ground of privity of estate only the assignee must be in possession of the demised

see's assignee are the same as those existing against the original lessee only when they accrue while he is such assignee.

Civil Code, § 822.

" A covenant to pay rent is one running with the land.

Civil Code, §§ 1462, 1463.

No one, merely by reason of having acquired an estate subject to a covenant running with the land, is liable for a breach of the covenant after he has parted with the estate or ceased to enjoy its benefits.

Civil Code, § 1466; *Martin v. Black*, 9 Paige, 645, 4 L. ed. 850; *Young v. Peyser*, 3 Bosw. 308; *Armstrong v. Wheeler*, 9 Cow. 88; *Childs v. Clark*, 3 Barb. Ch. 52, 5 L. ed. 814; *Wolveridge v. Stewart*, 3 Maule & S. 561; *Astor v. L'Amoreux*, 4 Sandf. 524; *Carter v. Hammett*, 18 Barb. 608; *McIntyre v. Scott*, 8 Johns. 159; *Eaton v. Jacques*, 2 Dougl. 461.

The assignee may discharge himself from all further liability by assigning his interest in the premises to a stranger, even if the assignee is a beggar, provided he actually relinquishes the possession of the premises.

Johnson v. Sherman, 15 Cal. 290, 76 Am. Dec. 481; *Childs v. Clark*, 3 Barb. Ch. 52, 5 L. ed. 814; *Armstrong v. Wheeler*, 9 Cow. 88; *Taylor v. Shum*, 1 Bos. & P. 21; *Astor v. L'Amoreux*, *supra*; *Walton v. Cronly*, 14 Wend. 63.

Mere legal title without beneficial enjoyment is not sufficient to create privity of estate.

premises. *Durand v. Curtis*, 57 N. Y. 11; *Demainville v. Mann*, 32 N. Y. 201.

The taking possession is immaterial if there has been a valid and binding absolute assignment. *Pingry v. Watkins*, 17 Vt. 379; *University of Vermont v. Joslyn*, 21 Vt. 52; *Walton v. Cronly*, 14 Wend. 64; *Babcock v. Scoville*, 56 Ill. 461; *Smith v. Brinker*, 17 Mo. 148; *Willi v. Dryden*, 52 Mo. 319.

Under such circumstances the assignee is liable for rent accruing before actual possession. *Hannen v. Ewalt*, 18 Pa. 9; *Weidner v. Foster*, 2 Peur. & W. 23.

If an absolute assignment the title and possessory right pass and the assignee becomes possessed in law, and is liable without taking actual possession. *Walker v. Reeves*, reported as note to *Eaton v. Jacques*, 2 Dougl. 455.

If the assignee receives the lease pursuant to the assignment, and also the deed of assignment itself, and retains possession of them, this is equivalent to taking possession of the property and renders him liable, and the liability for the rent is then to be governed by the terms of the lease and not restricted to actual occupation. *Burton v. Barclay*, 7 Bing. 745; *Blake v. Sanderson*, 1 Gray, 335.

But it has been held that the proposition that an actual entry upon the demised premises by an assignee is not requisite in order to charge him with performance of the covenants running with the land will hold good only in respect of assignments by deed recorded and delivered. *Sanders v. Partridge*, 108 Mass. 558.

There is a distinction between a specific assignment and an assignment for benefit of creditors. In the former case the assignee by accepting the lease becomes liable whether he enters and enjoys the land or not, but in the case of a general assignment for creditors there must be an acceptance to create a liability. *Journey v. Brackley*, 1 Hill. 447.

Necessity for a valid assignment.

Conceding an assignment of a lease to be void 14 L. R. A.

Wetherell v. Hamilton, 15 Pa. 195; *Demainville v. Mann*, 32 N. Y. 197.

Were the obligations of the assignee to the landlord as fixed and continuing as those of the conventional lessee, nevertheless a surrender by him and acceptance by the landlord of the key of the leased premises, and any act indicative of his intention to hold them divested of any interest or estate of the party surrendering, would determine the tenancy and discharge the assignee or the lessee.

Hegeman v. McArthur, 1 E. D. Smith, 147; *Dos Santos v. Hollinshead*, 4 Phila. 57; *Hof v. Baum*, 21 Cal. 120.

Mr. B. F. Thomas, for respondent:

Whatever remedies plaintiff had against Pierce after the assignment he had against Porter.

Civil Code, § 822; *Wood, Land. & T.* §§ 332, 334, 335, 339; *Taylor, Land. & T.* 6th ed. §§ 449-451.

The covenant to pay the rent runs with the land.

Civil Code, §§ 1462, 1463.

A tenant cannot voluntarily quit the leased premises and thereby avoid the covenant to pay the rent.

Re Bell, 85 Cal. 119; *Wood, Land. & T.* § 339; 12 Am. & Eng. Encyclop. Law, p. 75; *Thomas v. Nelson*, 69 N. Y. 121; *Laughran v. Smith*, 75 N. Y. 205.

Surrender of a lease for the unexpired term must be by the mutual consent of the parties.

within the Statute of Frauds, a recovery may be had by the lessor for the rent accruing while the assignee is in actual possession of the premises. *Wolke v. Fleming*, 1 West. Rep. 166, 103 Ind. 110, 53 Am. Rep. 495.

The landlord cannot recover against one as assignee in an action of covenant where it is shown that no assignment was ever made, but may resort to one of his several other remedies to recover rent. *Quackenbos v. Clarke*, 12 Wend. 555.

The valid assignment of the instrument creating the liability for rent is not necessary to an assignment of the estate (*Brewer v. Dyer*, 7 Chab. 338), or the maintenance of an action. *Sanders v. Partridge*, 108 Mass. 558.

The right of the landlord to recover rent from the assignee does not depend upon the fact of a valid assignment from the lessor; if the assignee takes possession and has all the benefits of an actual assignee he is estopped from setting up the invalidity of his title. *Carter v. Hammett*, 12 Barb. 232.

But this case was questioned in a later one where it was held that it must be shown that there has been an assignment valid in law, and where the assignment is required to be in writing it is not sufficient to show one by parol. *Welsh v. Schuyler*, 6 Daly, 412.

How assignment may be established.

To prove that defendant is an assignee it is enough to show either an assignment or occupancy of the premises or payment of rent by him. *Provost v. Calder*, 2 Wend. 522; *Armstrong v. Wheeler*, 9 Cow. 88.

One in possession is prima facie liable. *Ebling v. Fuytman*, 2 Mo. App. 252.

But the presumption may be rebutted by proof that there never was in fact an assignment (*Cross v. Upson*, 17 Wis. 618; *Mariner v. Crocker*, 18 Wis. 251); or by showing that he is only under-tenant (*Williams v. Woodward*, 2 Wend. 438; *Acker v. With-*

Civil Code, § 1933; Wood, Land. & T. § 488; Taylor, Land. & T. 6th ed. § 517; *Bedford v. Terhune*, 30 N. Y. 453, 86 Am. Dec. 395, and notes. See subsec. 6 of § 1624, Civil Code, and § 1971, Code Civ. Proc.; *Fisher v. Milliken*, 8 Pa. 111, 49 Am. Dec. 497; *Bailey v. Wells*, 8 Wis. 141, 76 Am. Dec. 238.

The payment of the money and the delivery of the dairy fixtures were conditions precedent to the release and surrender. The obligation would not be extinguished until the terms of the accord or compromise were executed.

Civil Code, §§ 1521, 1522; *Simmens v. Hamilton*, 56 Cal. 493; *Re Bell*, 85 Cal. 119.

The surrender, if made, would not have operated as a release from rent already accrued.

See Taylor, Land. & T. § 518; *Shepard v. Merrill*, 2 Johns. Ch. 376, 1 L. ed. 377; *Sperry v. Miller*, 8 N. Y. 336; *Roe v. Conway*, 74 N. Y. 201; *Johnson v. Oppenheim*, 55 N. Y. 280.

Fitzgerald, C., filed the following opinion:

Action for rent alleged to be due and unpaid on certain demised premises described in the complaint. The answer specifically denies the material allegations of the complaint, and avers the neglect and refusal of plaintiff to obtain his lessor's consent to the assignment, after having expressly agreed to do so, rescission of the lease, and surrender of the premises

by the defendant Treat, and the acceptance of and entry thereon by plaintiff.

The facts disclosed by the testimony of the witnesses for the plaintiff are as follows: On the 9th day of January, 1889, the plaintiff executed to the defendant Treat, in conjunction with one Pierce, a written lease of the premises therein described for the term of five years from the 1st day of August, 1888, at the annual rent of \$1,800 for the first year, and \$2,000 for each and every year thereafter, payable in two equal installments, semi-annually, in advance, on the 1st days of February and August of each year during the term of the lease. Subsequent to the execution of the lease, but on the same day, Pierce executed, with the consent of the plaintiff, a written assignment of all his right, title, and interest in the demised premises to the defendant Porter, who, as part of the consideration "of such sale or transfer, agreed to pay all rent that may fall due from time to time by virtue of the provisions of said lease." Porter immediately entered into possession of the premises as assignee under the assignment of the lease, and paid by his individual check a part, if not all, of the first installment of rent. Treat and Porter continued their joint occupancy of the premises until the latter part of July of that year, when they without the knowledge or consent of the plaintiff, wholly abandoned the possession of the same; and afterwards,

erill, 4 Hill, 112; *Coit v. Planer*, 51 N. Y. 647; *Bedford v. Terhune*, 30 N. Y. 453, 86 Am. Dec. 394; or that he has no interest in the estate. *Kain v. Hoxie*, 2 Hill, 311; *Bagley v. Freeman*, 1 Hill, 196.

Assignment may be presumed from the circumstances (*Kernochan v. Whiting*, 10 Jones & S. 490; as from exclusive occupancy (*Guinzburg v. Claude*, 23 Mo. App. 259); or from acceptance of the assignment and entering into the enjoyment of the estate (*Sanders v. Partridge*, 108 Mass. 558); or from entering upon the premises and occupying them during the term (*Waller v. Thomas*, 42 How. Pr. 346); or from occupancy and acknowledgment that it is under the lease. *Main v. Davis*, 32 Barb. 461.

Facts which have been held sufficient to establish assignment.

The purchaser of a leasehold becomes the assignee by operation of law if not by express covenant, and undertakes the responsibility of an assignee of the unexpired term. *Trabue v. McAdams*, 8 Bush, 74.

A purchaser under the foreclosure of a mortgage or trust conveyance of the leasehold interest becomes an assignee of the lease liable during his enjoyment of the demised premises. *State v. Martin*, 14 Lea, 92.

The possession of a person soon after the departure of the original lessee, and his exercise of such acts as would be natural in an assignee, furnish presumptive evidence of an actual assignment. *Adams v. French*, 2 N. H. 387.

A lease of all the property rights and franchises of a railroad in such a general assignment as will bind the person taking thereunder as assignee of a lease made to the road if the assignee accepts the assignment by entering into possession. *Ecker v. Chicago, B. & Q. R. Co.* 3 Mo. App. 223.

Where the tenant under a yearly hiring dies leaving his widow in possession of the premises and she remains in occupation during the unexpired term she is prima facie an assignee of the term. *Michenfelder v. Gunther*, 66 How. Pr. 464.

¶ **L. R. A.**

When the lessee of lots after the erection of buildings thereon sells them together with the unexpired term, and the purchaser takes possession and rents out the lots and pays the original lessor the rent reserved in the original lease, which is accepted, such purchaser is to be regarded as an assignee of the lease. *Webster v. Nichols*, 104 Ill. 160.

Where the lease was executed for a year at a quarterly rent, and a third person entered under the lease at the commencement of the term and occupied for the whole year paying the first three quarters' rent to the lessor, a jury might infer an agreement to pay the rent to the lessor so as to sustain an action in his name for use and occupation during the latter quarter of the term. *McFarlan v. Watson*, 3 N. Y. 228.

On the other hand, it has been held that the mere facts that an occupant of real estate claimed to hold under a lease, that he paid rent and taxes according to its terms, that he had the lease in his possession and acted as assignee thereof, do not make him liable on the covenants of the lease nor tend to prove a written assignment nor an assignment by operation of law. *Bailey v. Ofenstein*, 7 Mo. App. 577.

Extent and duration of liability.

A constructive assignee is not liable for rent accruing before he takes possession. *Church Wardens of St. Saviour's Southwark v. Smith*, 3 Burr. 1271.

The legal duty of an assignee arising from an assignment executed without covenant on his part to perform the covenants of the lessee is limited to the time of the continuance of his interest. *Sutcliffe v. Atwood*, 15 Ohio St. 192.

The liability as assignee continues only so long as the privity of estate continues. *Durand v. Curtis*, 57 N. Y. 11; *Hintze v. Thomas*, 7 Md. 346; *Donelson v. Polk*, 64 Md. 501.

The assignee is liable only for breaches occurring after he has acquired the estate and before he has

upon demand being made for the rent due and payable on the 1st day of August, 1889, they refused to pay the same. The reason given by the defendant Treat to plaintiff for the abandonment of the possession of the premises and the refusal to pay the rent when it became due was to the effect that Porter declined to pay any further rent until plaintiff obtained the consent of his lessor to the assignment, and that he (Treat) could not do anything alone. The evidence shows that plaintiff never promised or agreed to furnish such consent to Porter or to anyone for him. In the early part of August, 1889, the defendant Treat delivered the keys of the house and surrendered the premises to plaintiff, in pursuance of an agreement entered into between them, by which Treat agreed to turn over to him the "dairy fixtures" on the place, and to pay in addition thereto the sum of \$200. Treat having failed and refused to perform any part of his agreement, the plaintiff handed the keys to his attorney, with instructions to turn them over to Treat, unless he complied with his agreement. The attorney called upon Treat, and made the demand of him, in accordance with such instructions, and, upon Treat failing to accede thereto, offered to return to him the keys, which he refused to accept, saying "that he did not want them; that he had surrendered them, and had no use for them." Afterwards, on the 2d day of September follow-

ing, plaintiff served written notice on Treat and Pierce, mailed another to Porter, and posted one on the dairy-house on the premises, demanding the payment of the rent or the delivery to him of the possession of the premises on or before the 8th day of September, 1889. Plaintiff re-entered into possession about the last of October following.

At the conclusion of the plaintiff's testimony the defendant Porter moved for a judgment of nonsuit upon the following grounds: "The evidence shows that he is not a party to the lease of plaintiff to Treat and Pierce; that plaintiff refused and never did release Pierce from said lease as lessee, and defendant Porter never executed the same; that the plaintiff never accepted defendant Porter as lessee upon the original lease; that the defendant Porter, as well as the defendant Treat, surrendered the premises within one year from the date of their occupation of said premises upon the terms specified in said lease, having first paid all rents for the use and occupation thereof during said period; that defendant Porter's tenancy as assignee of said Pierce, if the court holds that he was such, before the 1st day of August, 1889, terminated, and he had then ceased to be beneficially or in any way interested in said leasehold, or said premises, the subject thereof; that by mutual consent of the parties the relations of landlord and tenant existing between plaintiff and defendants was deter-

mined by assigning the lease. *Stern v. Florence Sewing Mach. Co.* 53 How. Pr. 432.

It is of no consequence whether the assignee is a person responsible in law for the payment of the rent or not provided the assignment be fully executed. *Johnson v. Sherman*, 15 Cal. 290, 76 Am. Dec. 481.

An assignment to an insolvent is good (*Onslow v. Corrie*, 2 Madd. 380); or to a beggar (*Lekeux v. Nash*, 2 Strange, 1221 (18 Geo. II.)); or to a married woman. *Barnfather v. Jordan*, 2 Dougl. 452.

There is no fraud in the assignee of a term assigning over his interest with a view to getting rid of the lease, although such person neither takes actual possession nor receives the lease. *Taylor v. Shum*, 1 Bos. & P. 21.

And where the assignment is by deed-poll the assignee may discharge himself from liability by assigning over, although the original lessor joined in the deed, if the instrument was intended as an assignment and not a new lease. *Chancellor v. Poole*, 2 Dougl. 764,—though this is doubted in the subsequent case of *Steward v. Wolveridge*, 9 Bing. 60.

An assignee may discharge himself from liability to the lessor for rent by reassigning to the original lessee (*Dengler v. Michelsen*, 76 Cal. 125); or by taking out a new lease. *Prestons v. McCall*, 7 Gratt. 121.

Where half-yearly rent, for premises occupied by an assignee of a lease thereon, became due October 1, and he remained in possession until the last day of September, not finally removing until that day, he was held liable for the rent, notwithstanding an assignment of his interest in the premises two or three days before. *Negley v. Morgan*, 46 Pa. 281.

Sufficiency of assignment.

Where the assignee puts up his lease at auction and it is purchased by one who pays a deposit and orders an assignment to himself to be prepared, which is accordingly done but kept by the solicitor for the satisfaction of a lien for the expense of

parted with it or ceased to enjoy its benefits. *Bailey v. Richardson*, 66 Cal. 421; *Armstrong v. Wheeler*, 9 Cow. 88; *Childs v. Clark*, 3 Barb. Ch. 52.

Although where an assignee enters in the middle of a quarter and occupies the premises until the rent of the current quarter becomes payable he is liable for the rent of the whole quarter. *Young v. Peyster*, 3 Bosw. 308.

When the assignee assigns to a third person, who accepts the assignment, all further liability on the part of the assignee is at an end. *Siefke v. Koeh*, 31 How. Pr. 383.

The assignee is not liable after an assignment over. *Johnson v. Bates*, 16 Jones & S. 180; *Astor v. L'Amoreux*, 4 Sandf. 524.

A grant under and subject to the payment of ground rents which had been reserved in the original grant binds the grantee to indemnify the grantor no longer than his tenancy of the freehold. *Walker v. Physick*, 5 Pa. 188; *American Acad. of Music v. Smith*, 54 Pa. 130.

Each successive occupant of the demised premises other than the original lessee is liable for rent to the lessor only for the term of his own possession, and for the purpose of rendering him liable the possession of his tenant is his possession. *Carter v. Hammett*, 18 Barb. 608.

Methods of terminating liability.

The assignee of a term and lease cannot discharge or release himself from liability to pay the rental accruing after the transfer to him by anything short of an actual absolute transfer or assignment of the unexpired term. *Trabue v. McAdams*, 8 Bush. 74.

The absolute assignment by the assignee relieves him from all further liability. *Stoppani v. Richard*, 1 Hilt. 509; *Day v. Swackhamer*, 2 Hilt. 4; *Borland's App.* 66 Pa. 470; *Re Wiloy's Estate*, 12 Phila. 152.

The assignee may free himself from liability by making assignment of all his interest. *Walton v. Croxley*, 14 Wend. 64.

The assignee may at any time terminate his liability. *L. R. A.*

mined, and said lease rescinded, and defendants surrendered possession of all the premises, and plaintiff went into possession thereof; that the plaintiff himself elected to rescind and work a forfeiture of said lease, and notified defendants to pay the accruing rent in advance, or to surrender possession of the premises, and did consummate and execute said rescission, and did take possession of said premises; that at the time of the commencement of this action said lease set forth in the complaint was fully rescinded, determined, and cancelled, and no cause of action existed for the enforcement of its covenants. The court denied the motion, and the defendant Porter excepted." The case was tried by a jury, and a verdict found in favor of the plaintiff, and from the judgment rendered thereon this appeal is taken by the defendant Porter upon the judgment role alone.

The only error complained of relates to the ruling of the court denying the motion of the defendant Porter for judgment of nonsuit. Porter's covenant, contained in the assignment to him, "to pay all rent that may fall due from time to time by virtue of the provision of the lease," and his entry into possession as assignee under the assignment, created the relation of landlord and tenant between him and the lessor, and his holding was by privity of estate, and not by privity of contract, as claimed by respondent. The lessor was not a

party to, nor was he in any way benefited by, the contract of assignment. The liability of Porter to the lessor was, therefore, created solely by the covenant of the lease to pay the rent, which is a covenant running with the land, and not by the contract of assignment, the nonperformance of which is enforceable only by the lessee. The assignee is answerable for the rent during his ownership of the term under the assignment, and his liability therefore arises out of the privity of estate, and this without reference to any obligation assumed by him in the contract of assignment. Nor did the assignment to Porter and the acceptance by the lessor of him as tenant release Pierce from his covenant to pay the rent, but his liability to the lessor continues, notwithstanding the assignment by privity of contract, to the end of the term of the lease, unless sooner terminated.

The evidence shows that Porter, shortly before the installment of rent sued for became due, abandoned possession of the premises, and refused to pay the rent, upon the pretext that the plaintiff had failed to furnish, as he agreed to do, the consent of his lessor to the assignment. This, of course, was a mere subterfuge. The contention that by the abandonment of the possession of the premises by Porter he parted with the beneficial interest, and yielded the possession to the beneficial owner, is unsupported by reason or authority. The legal

preparing it, the assignment is sufficiently complete to release the original assignee. *Odell v. Wake*, 3 Campb. 304.

Retention of possession by the assignee after assignment is not alone sufficient to establish the invalidity of the assignment and render the assignee liable for the rent thereafter accruing. *Tate v. McCormick*, 28 Hun. 218.

In 1 Vent. 329, there is a case (*Knight v. Peady & Freeman*) in which the court held that if the assignment was made for the purpose of defrauding the lessor that fact might be pleaded to nullify the effect of the assignment. (30 Car. II.)

Equity will give relief to the landlord where the assignment is merely colorable and fictitious the possession remaining with the assignor, and where there is a real assignment which has been made for the purpose of depriving the landlord of legal remedies for rent due previous to the assignment. *Onalow v. Corrie*, 2 Madd. 380; *Treackle v. Coke*, 1 Vern. 165; *London v. Richmond*, 2 Vern. 421; *Philpot v. Hoare*, 2 Atk. 219.

Liability after assignment for rent accruing during term.

The assignee is liable to an action of covenant for a breach of covenant running with the land incurred in his own time though the action is not commenced until after he has assigned. *Harley v. King*, 2 Crompt. M. & R. 18; *Quackenboss v. Clarke*, 12 Wend. 557; *Brolasky v. Furey*, 12 Phila. 428; *Sutliff v. Atwood*, 15 Ohio St. 197.

On the other hand, it has been held that a suit at law cannot be maintained against the assignee after he has assigned over for the rent falling due subsequent to the assignment to him and before the assignment over; the remedy is in equity alone. *Hintze v. Thomas*, 7 Md. 346; *Donelson v. Polk*, 64 Md. 501, following *Fagg v. Dobie*, 3 Younge & C. 96.

Remedies of lessee against assignee.

Where the assignee covenants under seal with his assignor to perform all covenants of the lease, his 14 L. R. A.

assignment to a third person and the acceptance of the latter by the lessor as tenant will not discharge the original assignee from his liability upon his covenants to his assignor. *Port v. Jackson*, 17 Johns. 239, affirmed, 17 Johns. 478.

An assignee who takes from the lessee leasehold premises by indenture indorsed on the lease "subject to the rent reserved in the lease," is liable in covenant to the lessee for rent, which the latter is compelled to pay to the lessor after the assignee has assigned over. *Steward v. Wolverdidge*, 9 Bing. 60.

A lessee being sued for rent may prosecute a cross-action against his assignee to compel him to discharge the land and release him from responsibility. *Trabue v. McAdams*, 8 Bush. 74.

Where the assignee signed and delivered to the lessee an instrument by which he undertook to pay rent at the time specified in the lease, he became liable to pay all rent which accrued on the lease for the entire term. *Martineau v. Steele*, 14 Wis. 272.

The covenant of a lessee to pay rent binds his assignee for the rent due after the assignment, and an action of debt can be maintained against him by the assignor. *McCormick v. Young*, 2 Dana, 294.

Where the lessee executed an agreement, not under seal, to assign the residue of his interest to a stranger, who entered and occupied the farm, but was never recognized as tenant by the lessor, the lessee, upon being compelled to pay the rent accruing after the assignee's abandonment of possession, cannot recover the same from the assignee. *Crouch v. Tregoning*, L. R. 7 Exch. 88.

Form of remedy.

In *Journey v. Brackley*, 1 Hilt. 451, *Daly, J.*, says that in virtue of the privity of the estate the assignee was always chargeable in an action of debt at the suit of the lessor for the rent which became due while the privity of estate continued, and if the demise was by a deed and contained a covenant by the lessee to pay the rent, the lessor might, by the Statute of 32 Hen. VIII., chap. 34,

title and the possession of the leasehold were in Treat and Porter, and he (Porter) could only divest himself thereof and dissolve the privity of estate by a reassignment in writing to the lessee, or by assignment of his interest to another, accompanied by surrender of possession, or by the working of forfeiture of the lease for breach of its covenants, and re-entry for such breach, as provided for by the terms thereof. The surrender of the premises by Treat was conditional, and the condition was never fulfilled, nor was it in writing, as required by the Statute of Frauds; therefore such surrender did not operate as a dissolution of the tenancy. As the tenancy was only terminated by the lessor's notice to quit or pay the rent, and re-entry of possession under the right reserved by the lease for breach of its covenants, the motion for judgment of nonsuit was properly denied, for the reason that there was evidence tending to show the liability of appellant for that part of the rent at

least which had accrued up to the time of the re-entry, and the sufficiency of it was properly left to the jury.

The only error assigned, as we have stated, was the refusal of the court to grant the motion for a nonsuit. As the case was one which had to be submitted to the jury on the evidence, if defendants desired to limit the recovery in any event to the amount of rent which had accrued at the time of the re-entry, it was their duty to ask the court to submit to the jury proper instructions upon that matter. Upon the record before us no error can be predicated. We therefore recommend that the judgment appealed from be affirmed.

I concur: **Vanelief, C.**

Per Curiam:

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.
Re-hearing denied.

sue upon the covenant, and further states that in New York the distinction between debt and covenant no longer exists, but the ground of action is the general liability of the assignee if he accepts the assignment.

Privity of estate alone would not sustain the action of covenant without the aid of Statute 32 Hen. VIII. *Sutliff v. Atwood*, 15 Ohio St. 192.

But since that Act covenant has usually been recognized as a proper remedy. *Palmer v. Edwards*, reported as a note to *Holford v. Hatch*, 1 Dougl. 183; *Keeling v. Morrice*, 12 Mod. 371 (12 Wm. III.); *Donelson v. Polk*, 64 Md. 504; *Lee v. Payne*, 4 Mich. 118; *Pingry v. Watkins*, 17 Vt. 379.

In *Brewster v. Kitchell*, 1 Salk. 198, Holt, Ch. J., ventures the opinion that covenant will not lie against one merely as assignee of the land, but in this he was opposed by the other three judges on the bench.

When the duty of paying rent arose out of the privity of estate without privity of contract, the cause of action was local at common law. *Patten v. Deshon*, 1 Gray, 829.

It is not so under the Vermont statutes. *University of Vermont v. Joslyn*, 21 Vt. 52.

Since the covenant to pay rent runs with the land (*Hannen v. Ewalt*, 18 Pa. 19; *Allen v. Culver*, 3 Denio, 290; *Post v. Kearney*, 2 N. Y. 364), an action for breach of the covenants of the lease will lie against the assignee. *Salisbury v. Shirley*, 66 Cal. 225.

Upon covenants in an indenture of lease, the lessor may have an action of covenant or debt against the assignee of the lease at common law, but the action is founded on privity of estate and is local. It will not lie where, by proof rebutting the presumption arising from possession, it appears that there has been no assignment under seal of the lease. *Bowdre v. Hampton*, 6 Rich. L. 208.

The action of covenant does not lie without some privity of contract, but debt or distress lies on mere privity of estate. *Adams v. French*, 2 N. H. 267.

14 L. R. A.

The assignee is liable in an action of debt. *Howland v. Coffin*, 9 Pick. 53; *McDowell v. Hendrix*, 67 Ind. 518.

In case of a demise in fee reserving rent the grantor, in the event of nonpayment, may bring covenant to recover the rent itself, either against his lessee or the latter's assignee, or he may bring ejectment to recover possession for nonpayment of rent. *Main v. Davis*, 32 Barb. 401.

The goods of the assignee are liable to the landlord's distress, although they have been removed from the premises before any rent becomes due. *Acker v. Witherell*, 4 Hill, 112.

Use and occupation.

To entitle the landlord to maintain an action for use and occupation the relation of landlord and tenant must have existed. *De Perc Co. v. Reynen*, 65 Wis. 271; *Lankford v. Green*, 33 Ala. 108; *Richmond & L. T. Road Co. v. Rogers*, 7 Bush. 532; *Moore v. Harvey*, 51 Vt. 297; *Hall v. Southmayd*, 15 Barb. 32; *Richey v. Hinde*, 6 Ohio, 371; *Wiggin v. Wiggin*, 6 N. H. 298.

But the contract may be implied. *Brolasky v. Ferguson*, 48 Pa. 434; *Stewart v. Fitch*, 31 N. J. L. 17; *Edmonson v. Kite*, 43 Mo. 176; *Dalton v. Landahn*, 30 Mich. 849; *Nance v. Alexander*, 49 Ind. 516; *Espy v. Fenton*, 5 Or. 423; *Marquette, H. & O. R. Co. v. Harlow*, 37 Mich. 554; *Pierce v. Pierce*, 25 Barb. 243; *Henwood v. Chessman*, 3 Serg. & R. 500.

There must be proof of some circumstances authorizing the inference that the parties intended to assume the relation of landlord and tenant towards each other. *Preston v. Hawley*, 2 Cent. Rep. 762, 101 N. Y. 588.

Occupation by the tenant with the assent of the landlord is indispensable to the maintenance of the action. *Central Mills v. Harr*, 124 Mass. 125.

Where the entry is peaceable and the occupation acquiesced in without any agreement as to rent the owner may bring an action for the use and occupation. *Dell v. Gardner*, 25 Ark. 134.

H. P. F.

OREGON SUPREME COURT.

Bert MORSE, *Respt.*,
v.
UNION STOCK YARDS, *Appt.*

(.....Or.....)

- *1. Where goods or chattels are sold by description, there is an implied condition that the goods or chattels delivered shall correspond to that description. By some authorities this is treated as a condition precedent; by others, as an implied warranty.
2. When the sale becomes in part executed or consummated, the same facts which before constituted conditions precedent then become warranties.
3. In the sales of goods or chattels by description, when the buyer has not inspected the goods, there is, in addition to the condition precedent that the goods or chattels shall answer the description, an implied warranty that they shall be fit for the particular purpose to which they are to be applied, when that purpose is known to the vendor.
4. When a dealer undertakes to supply goods or chattels in which he deals that are to be applied to a particular purpose, and the buyer necessarily trusts to the judgment of the dealer, there is an implied warranty that they shall be reasonably fit for the purpose for which they are intended.

(November 17, 1801.)

APPEAL by defendant from a judgment of the Circuit Court for Multnomah County in favor of plaintiff in an action brought to recover damages for breach of warranty in the sale of certain cattle. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. Gilbert & Snow for appellant.

Mr. Glenn O. Holman, for respondent;

When defendant undertook to fill the order the law implied a warranty that the cattle should be of a kind suitable for the purpose for which they were ordered.

Hargous v. Stone, 5 N. Y. 78.

In a contract of sale words of description are held to constitute a warranty that the articles so sold are of the species and quality so described.

Hogins v. Plympton, 11 Pick. 100; *Winsor v. Lombard*, 18 Pick. 60; *Henshaw v. Robins*, 9 Met. 87, 48 Am. Dec. 367; *Osgood v. Lewis*, 2 Harr. & G. 495, 18 Am. Dec. 317; *Borrekins v. Bevan*, 3 Rawle, 28, 28 Am. Dec. 85; *Lamb v. Crafts*, 12 Met. 355; *Bradford v. Manly*, 18 Mass. 139, 7 Am. Dec. 122; *Buchanan v. Beck*, 15 Or. 570; *Wolcott v. Mount*, 36 N. J. L. 262, 18 Am. Rep. 488; *Hawkins v. Pemberton*, 51 N. Y. 204, 10 Am. Rep. 595.

The selling upon a demand for a horse with particular qualities is an affirmation that he possesses those qualities.

Passinger v. Thorburn, 84 N. Y. 636, 90 Am. Dec. 753. See also *White v. Miller*, 71 N. Y. 129, 27 Am. Rep. 13; *Benjamin, Sales*, § 656.

The vendee may retain the property after notice to vendor and sue on the warranty.

*Head notes by LORD, J.

NOTE—The opinion in this case so fully reviews the authorities on the question of implied warranty on a sale by description that a note on the subject will not be desired.

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Muller v. Eno, 14 N. Y. 597; *Getty v. Rountree*, 2 Pion. 379, 54 Am. Dec. 188; *Voorhees v. Earl*, 2 Hill, 288, 38 Am. Dec. 589; *Howard v. Hoey*, 23 Wend. 350, 35 Am. Dec. 573; *Rust v. Eckler*, 41 N. Y. 488; *Chapin v. Dobson*, 78 N. Y. 82, 34 Am. Rep. 512; *Door v. Fisher*, 1 Cush. 271; *Hyatt v. Boyle*, 5 Gill & J. 121, 25 Am. Dec. 276; *Day v. Pool*, 52 N. Y. 418, 11 Am. Rep. 719; *Benjamin, Sales*, §§ 893-897.

Lord, J., delivered the opinion of the court:

This was an action brought by the plaintiff against the defendant to recover damages for a breach of an implied warranty in the sale of a lot of cattle. The contract consisted of an order contained in a letter directing the defendant to "get two car-loads of good beef cattle," and to "consign them to Centralia," and "to draw on Wooding & Co. for the amount." The cattle not being of the quality ordered, or fit for the purpose intended, the defendant was notified upon their delivery, but, refusing to take any action in the premises, this action was brought, which resulted in a verdict and judgment for the plaintiff. The contention for the defendant is that, upon the facts of the transaction, there was no implied warranty that the cattle shipped upon the order were good beef cattle, and fit for the purpose intended, as asserted by the charge of the court. There can be no doubt but that the general rule of law is that, upon the sale of any article of merchandise, the seller does not become responsible for the quality of the article sold, unless he expressly warranted the quality, or made some false and fraudulent representation in regard to it. "No principle of the common law," said *Mr. Justice Davis*, "has been better established, or more often affirmed, both in this country and in England, than that the sales of personal property, in the absence of an express warranty, where the buyer has an opportunity to inspect the goods, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim *caveat emptor* applies." This maxim, under the exceptions and limitations which the law has fastened upon it, furnishes a just and equitable rule for the transaction of business. It proceeds upon the hypothesis that, where the purchaser has had an opportunity of inspecting the goods or chattels, and their defects could have been discovered by him, he is bound to exercise his judgment, and take all reasonable precautions to protect his interest. In cases of this sort, where the purchaser has had the opportunity of inspecting and selecting the goods or chattels, the presumption is that he relies upon his own judgment, and takes upon himself the risk of their answering his purpose; otherwise he would have secured himself against loss by requiring an express warranty of them. But when the purchaser has not had an equal opportunity of inspecting such goods or chattels with the seller, or, under the circumstances, he has been compelled to rely upon his judgment, the maxim can have no application, and an implied warranty of their quality, or of their being marketable, or of their fitness for the purpose intended, when such purpose is known

to the seller, is raised or recognized in his behalf. It is where the facts fall within the principle of exceptions of this sort that the reason of the maxim falls, and an implied warranty of the goods sold is recognized in favor of the buyer. When, then, the question is whether or not, in a given case, an implied warranty exists, it can only be determined by a full consideration of all the facts.

The evidence shows that the plaintiff was a butcher, and that he used beef cattle for retail in his market; that he gave an order to the defendant for two carloads of "good beef cattle," who accepted it, and selected and shipped the cattle to the place designated; that the plaintiff paid for the cattle before delivery by draft drawn on him by the defendant; that the plaintiff was not present to inspect the cattle, nor had any opportunity to examine them until their arrival; that the defendant knew what the business of plaintiff was, and the purpose for which he wanted good beef cattle; that the cattle were not good beef cattle, or beef cattle, but only stock cattle, and not fit for the purpose intended; that as soon as plaintiff saw the cattle he notified the defendant of their not being the quality and kind of cattle he ordered, and unfit for his business purposes, but at the same time made a proposition as to part of them, which the defendant refused to accept, claiming that the cattle shipped fully complied with the order.

The relation which the defendant as seller, and the plaintiff as buyer, bear to these acts, when analyzed, is that the defendant undertook to supply cattle of the description ordered, knowing the particular purpose for which they were to be used, with full opportunity of inspecting them, and discovering their defects, or of ascertaining that they were not beef cattle, and fit for the particular purpose for which they were ordered; that the plaintiff was not present to inspect them, nor did he know, or have any opportunity of knowing, their defects, or ascertaining that they were not beef cattle, and not fit for the purpose for which they were intended, until after the cattle were delivered and paid for. In applying the law to this state of facts, the trial court asserted, in effect, by its charge, that there was an implied warranty on the part of the defendant that the cattle should be of the quality or answer the description ordered, and when so ordered, for a particular purpose, known to the defendant, that it, by undertaking to furnish the cattle, impliedly undertook that they should be reasonably fit for the purpose for which they were intended.

The principle is stated that, where goods are sold by description or particular designation, there is always an implied condition that the article or goods delivered shall correspond strictly with that description or designation. This is regarded by some of the authorities, especially in the United States, as an implied warranty that the article sold is of that description, and by others as a condition precedent. But the facts in this case obviate the consideration of that aspect of the question. The defendant had received the full consideration for the cattle and consequently the contract had become in part executed when the cattle were delivered, and repudiation by the plaintiff of the

contract, for non-compliance with its terms in not furnishing good beef cattle, had become impossible. The language of Depue, J., in *Wolcott v. Mount*, 86 N. J. L. 262, 18 Am. Rep. 438, goes to this point: "The right to repudiate the purchase," he says, "for non-conformity of the article delivered to the description under which it was sold, is universally conceded. That right is founded on the engagement of the vendor by such description, that the article delivered shall correspond with the description. The obligation rests upon the contract. Substantially the description is warranted. It will comport with sound legal principles to treat such engagements as conditions in order to afford the purchaser a more enlarged remedy by rescission than he would have on a simple warranty; but when his situation has been changed, and the remedy by repudiation has become impossible, no reason supported by principle can be adduced why he should not have upon his contract such redress as is practical under the circumstances. In that situation of affairs, the only available means of redress is a legal action for damages. Whether the action shall be technically considered an action on a warranty or an action for the non-performance of a contract is entirely immaterial." Reversing the order, he further says: "But in a number of instances it has been held that statements descriptive of the subject matter, if intended as a substantive part of the contract, will be regarded in the first instance as conditions, on the failure of which the other party may repudiate *in toto*, by a refusal to accept or return the article, if that be practicable; or if a part of the consideration has been received, and rescission has become impossible, such representations change their character as conditions, and become warranties, for the breach of which an action will lie to recover damages."

As has been suggested, strictly speaking, the conditions do not become warranties, but, the sale having become consummated, the same facts which before constituted conditions precedent now constitute warranties. That is our case. The description of the article sold ceases to be a condition, but becomes a warranty, rendering the authorities holding the doctrine that the sale of a chattel, as being of a particular description, implies a warranty that the article is of that description, in point, in support of the principle asserted in the instructions. In *Winsor v. Lombard*, 18 Pick. 60, Shaw, Ch. J., said: "Every person who sells goods of a certain denomination or description undertakes, as a part of his contract, that the thing delivered corresponds to the description, and is in fact an article of the kind, species, and quality thus expressed in the contract of sale; the rule being that, upon a sale of goods by a written memorandum or bill of parcels, the vendor undertakes, in the nature of warranting, that the thing sold and delivered is that which is described. This rule applies whether the description be more or less particular and exact in enumerating the qualities of the goods sold." In *White v. Miller*, 71 N. Y. 129, 37 Am. Rep. 18, Andrews, J., said: "The doctrine that the bargain and sale of a chattel of a particular description imports a contract or warranty that the article sold is of that description, is sus-

tained by a great mass of authority." So in *Wolcott v. Mount*, *supra*, Depue, J., said: "The doctrine that on the sale of a chattel as being of a particular kind or description, a contract is implied that the article is of that kind or description, is also sustained by the following English cases: *Powell v. Horton*, 2 Bing. N. C. 668; *Barr v. Gibson*, 8 Mees. & W. 390; *Chanter v. Hopkins*, 4 Mees. & W. 389; *Nichol v. Godts*, 10 Exch. 191; *Gompertz v. Bartlett*, 2 El. & Bl. 849." In *Foss v. Sablin*, 84 Ill. 564, the contract of sale was for "fat cattle," to be shipped for delivery at a future day; and the court held, where a contract is to sell "fat cattle," to be shipped for the market at a future day, he will be bound to pasture them so that they will, at the time agreed on for delivery, be in a suitable condition for sale as "fat cattle" in the market. While, therefore, in the sale of an existing chattel, the law does not, in the absence of fraud, imply a warranty of the quality or condition, yet where the sale is of a chattel, as being of a particular description, it does imply a warranty that the article sold is of that description. See also *Hogins v. Plympton*, 11 Pick. 97; *Bradford v. Manly*, 13 Mass. 139, 7 Am. Dec. 122; *Hyatt v. Boyle*, 5 Gill & J. 110, 25 Am. Dec. 276; *Bunnel v. Whitlaw*, 14 U. C. Q. B. 241.

There is however, where an article is sold by description, besides the condition or warranty, as it may be classed, an implied warranty, that the article sold shall be marketable under the terms of the description, or reasonably fit for the purpose for which it was intended. "In some contracts," said Brett, L. J. "the undertaking of the seller is said to be only that the article shall be merchantable; in others that it shall be reasonably fit for the purpose to which it is to be applied. In all, it seems to us, it is either assumed or expressly stated that the fundamental undertaking is that the article offered or delivered shall answer the description of it contained in the contract. That rule comprises all others. They are adaptations of it to particular kinds of contracts of purchase and sale." *Randall v. Newson*, L. R. 2 Q. B. Div. 102. In *Jones v. Just*, L. R. 3 Q. B. 197, a leading case, it was decided under a contract to supply goods of a specified description, which the buyer has no opportunity of inspecting, the goods must not only in fact answer the specific description, but must be salable or merchantable under that description. "If a man," said Best, C. J., in *Jones v. Bright*, 5 Bing. 533, "sells an article, he thereby warrants that it is merchantable; that is, fit for some purpose. If he sells it for a particular purpose, he thereby warrants it fit for that purpose." If the contract is to supply a certain kind and quality of chattels for a particular purpose known to the seller, which the buyer has no opportunity to examine before delivery, there is usually an implied warranty that the chattels supplied shall be reasonably fit for the special purpose intended by the buyer. 2 Benjamin, Sales, § 645. "Where the purchaser," said Staples, J., "does not designate any specific article, but orders goods of a particular quality, or for a particular purpose, and that purpose is known to the seller, the presumption is the purchaser relies upon the judgment of the seller, and the latter, by un-

dertaking to furnish the goods, impliedly undertakes they shall be reasonably fit for the purpose for which they were intended." *Garst v. Jones*, 32 Gratt. 521, 34 Am. Rep. 273. Likewise in *Best v. Flint*, 58 Vt. 543, 2 New Eng. Rep. 604, 56 Am. Rep. 570, it was held that there is an implied warranty in the sale of hogs purchased for the market that they are fit for that purpose, when the vendee, having no opportunity of inspection, trusts to the judgment of the vendor to select them, and both parties understand for what they are intended. See also *Beals v. Olmstead*, 24 Vt. 114, 58 Am. Dec. 150; *Street v. Chapman*, 29 Ind. 143; *Howard v. Hoey*, 23 Wend. 850, 35 Am. Dec. 572; *Hanger v. Evans*, 38 Ark. 334; *Gammell v. Gunby*, 52 Ga. 504. While this rule applies with particular force where the vendors are the manufacturers, it is not limited to them, but is extended to cases where one merchant or dealer contracts to supply goods of a specific description to another merchant or dealer. *Jones v. Just*, *supra*; *Levis v. Rountree*, 78 N. C. 323; *Hanks v. McKee*, 2 Litt. 227, 18 Am. Dec. 265; *Ketchum v. Wells*, 19 Wis. 34; *Whitaker v. McCormick*, 6 Mo. App. 114; *Flint v. Lyon*, 4 Cal. 17; *Chicago Packing & P. Co. v. Tilton*, 87 Ill. 547; *Messenger v. Pratt*, 8 Lans. 284. Nor is it material whether the goods or chattels are to be made or supplied to order. There is always an implied warranty that they are reasonably fit or suitable for the particular use intended by the purchaser, provided the use or purpose to which they are to be applied is known to the seller when the order was given. "Where a buyer," says Cockburn, J., "buys a specific article, the maxim *caveat emptor* applies; but where the buyer orders goods which shall be applicable for the purpose for which they are ordered, there is an implied warranty that they shall be reasonably fit for that purpose." *Bigge v. Parkinson*, 7 Hurlst. & N. 955. So that when a dealer undertakes by contract to supply goods or chattels in which he deals that are to be used, or are intended, for a particular purpose, and the purchaser necessarily, under the circumstances, trusts to his judgment, there is an implied warranty that they shall be reasonably fit for the use or purpose to which they are to be applied. The plaintiff had no opportunity to inspect the cattle, but the defendant undertook to select and supply them. Knowing the purpose for which he wanted them, and that no other than beef cattle would be fit for that purpose. The defendant could not have undertaken to supply the cattle on any other supposition than that they were salable as beef cattle, and fit for the purpose to which they were to be applied. Necessarily, then, the defendant had knowledge and information in the premises, and the plaintiff must have relied upon his judgment to fill the order, as he clearly could exercise no judgment of his own. As Mr. Justice Mellor said: "This appears to us to be at the root of the doctrine of implied warranty, and in this view it makes no difference whether the sale is of goods specially appropriated to a particular contract, or to goods answering to a particular description." *Jones v. Just*, *supra*. We do not think, upon the facts as disclosed by this record, there was any error in the instructions excepted to. This re-

sult renders it necessary to consider but one other objection, namely, that the plaintiff must betaken to have accepted one half of the cattle as good beef cattle, and fit for the purpose for which he wanted them, as disclosed by his letter upon the delivery of the cattle, making a proposition to keep half of them, if the defendant would furnish another car-load of good cattle. His order, and the facts as disclosed, indicate that the plaintiff needed beef cattle quite badly for the supply of his market, as he states in his order that he had only "two head of cattle left." But in his letter making this proposition he also says and charges that the defendant had taken "his hard money for property that, for my use, you know is per-

fectly worthless." So that it is clear that he did not think he had received such cattle as he had ordered, and as were fit for the purpose intended; but as he had paid for them as good beef cattle, and was out of his money, he was in a position to compromise, and betrayed a disposition by his proposition to adjust the matter without further trouble or difficulty; but, however that may be, the defendant declined to entertain or consider his proposition, claiming that the cattle were such as complied with the order, and the defendant cannot avail itself of its benefits now, as its conduct relegated the matter to its original status, and necessitated this suit for the adjustment of their differences.

We think that the judgment must be affirmed.

GEORGIA SUPREME COURT.

John W. BROOKS, *Plff. in Err.*,

Lula WOODSON *et al.*

(.....Ga.....)

*1. According to the doctrine of *Duffie v. Corridon*, 40 Ga. 122, the witnesses to a will must subscribe their names as witnesses after the will is signed by the testator, there being nothing to attest until his signature has been annexed. It makes no difference that the signing and attestation are each a part of one and the same transaction.

(July 8, 1891.)

ERROR to the Superior Court for Bibb County to review a judgment in favor of defendants in a proceeding seeking to establish the validity of a will. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. Hill & Harris for plaintiff in error.

Messrs. Hardeman, Davis & Turner and *Dessau & Bartlett* for defendants in error.

Bleckley, Ch. J., delivered the opinion of the court:

There is nothing to distinguish this case from *Duffie v. Corridon*, 40 Ga. 122, except that in the execution and attestation of this will there was but one transaction, the witnesses all subscribing the unsigned will in the presence of the testator, and he, at the same time and place, and immediately after they affixed their signatures, signing the document in their presence. In *Duffie v. Corridon*, there

*Head note by **BLECKLEY, Ch. J.**

NOTE.—Signature of witnesses to will before testator signs it.

The signature of attesting witnesses to a will before it is signed by the testator does not constitute a valid attestation. *Jackson v. Jackson*, 39 N. Y. 158; *Sisters of Charity v. Kelly*, 67 N. Y. 409; *Hindmarsh v. Carlton*, 8 H. L. Cas. 160; *Shaw v. Neville*, 1 Jur. N. S. 408; *Hudson v. Parker*, 1 Robb. Ecol. 38; *Cooper v. Bockett*, 3 Curt. Ecol. 659; *Re Olding*, 2 Curt. Ecol. 885; *Re Hoskins*, 32 L. J. N. S. 158; *Pearson v. Pearson*, L. R. 2 Prob. & Div. 451; *McMulkins' Case*, 6 Dem. 347; *Fischer v. Popham*, L. R. 3 Prob. & Div. 248; *Reed v. Watson*, 27 Ind. 443; *Hagland v. Huntington*, 23 N. C. 383.

On the contrary, some cases have held that it is not material whether the testator or the witnesses sign first. If all sign during one continuous transaction. *Sechrest v. Edwards*, 4 Met. (Ky.) 163; *Rosser v. Franklin*, 6 Gratt. 1, 53 Am. Dec. 97; *Swift v. Wiley*, 14 L. R. A.

were two interviews, at the first of which two of the witnesses (together with another who was not afterwards present) subscribed, and at the second the testator and the third witness. But is this difference in the facts of the two cases material? The doctrine distinctly held by the court in ruling *Duffie v. Corridon*, is that, until the testator signs, there is nothing to attest; the signature of the testator being the principal, if not the only, matter to which the attestation contemplated by law applies. It is obvious that, if this be the true reason why the witnesses cannot subscribe their names until after the testator has signed his, it is of no consequence, when the form of attesting an unsigned will is gone through with, whether on the same occasion of the testator's added signature or on a previous occasion. In either case the attesting act would be performed when there was no signature in existence to be attested, and therefore no subject matter to which the act could apply. To witness a future event is equally impossible, whether it occur the next moment or the next week. We rule the present case on the authority of the prior one above cited; being satisfied, after careful examination, that to abide by the principle of that decision we must regard the order of time in which the respective signatures occur, rather than the interval of time by which they are separated. The manifest teaching of *Duffie v. Corridon* is that the testator must sign first. That teaching is not followed, but directly violated, when the witnesses sign first.

Judgment affirmed.

Lumpkin, J., not presiding.

1 B. Mon. 117; *Vaughan v. Burford*, 3 Bradf. 78; overruled by later New York cases above cited.

And in Pennsylvania where subscribing witnesses are not necessary an attestation before the signature of the testator is sufficient. *Miller v. McNeill*, 35 Pa. 217, 78 Am. Dec. 833.

A subsequent acknowledgment or adoption by an attesting witness of his signature cannot be held sufficient or equivalent to attestation at that time where his signature was before that of the testator. *Hindmarsh v. Carlton*, 8 H. L. Cas. 160; *Re Byrd*, 3 Curt. Ecol. 117; *Re Cox's Will*, 46 N. C. 321; *Chase v. Kittredge*, 11 Allen, 48, 37 Am. Dec. 687. *Contra*, *Sturdivant v. Brobett*, 10 Gratt. 67; *Pollock v. Glaessel*, 2 Gratt. 439; *Swift v. Wiley*, 1 B. Mon. 117; *O'Brien v. Gallagher*, 25 Conn. 229.

Especially if they did not sign in the testator's presence. *Chase v. Kittredge*, 11 Allen, 48, 37 Am. Dec. 687; *Re Cox's Will*, 46 N. C. 321; *Barland v. Huntington*, 23 N. C. 553.

MICHIGAN SUPREME COURT.

William C. WILLIAMS *et al.*, *Appls.*,

v.

Jacob S. FARRAND *et al.*

(.....Mich.....)

1. Retiring partners who engage again in the same kind of business after transferring their interest in the old business to the other partners, whether the good-will be included in the transfer or not, have the right not only to advertise their new business, but also to solicit the customers of the old firm personally unless they have bound themselves not to do so by their contract.

2. The right of retiring partners to engage again in business under their own names or any collocation of their own names after selling their interest in the firm is not restricted except by their own agreement, even if the collocation of their names which they adopt as the name of a new firm which they organize is similar or identical with the old firm name where there is no attempt at deception. But they have no right to represent their business as a continuation of that of the old firm.

(Champlin, Ch. J., dissents.)

(November 20, 1891.)

APPEAL by complainants from a decree of the Circuit Court of Wayne County in favor of respondents in a suit brought to enjoin the use of a certain trade-name from interfering with certain trade-marks, and generally from interfering with the good-will of complainants' business. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Bowen, Douglas & Whiting, for appellants:

The real value of the good-will depends in some cases entirely, and in all very much, on the absence of competition on the part of those by whom the business has been previously carried on.

Bates, Partn. §§ 659, 670; Lindley, Partn. § 439; Story, Partn. § 100; *Wedderburn v. Wedderburn*, 22 Beav. 84.

The good-will of a partnership is a valuable asset.

Churton v. Douglas, Johns. V. C. (Eng.) 174; *Banks v. Gibson*, 11 Jur. 680; *Wedderburn v. Wedderburn*, *supra*; High, Inj. §§ 30, 1345; Kerr, Inj. 168; Bates, Partn. § 663, and cases.

Where a partner sells out all his share of the stock in a going concern, the presumption is that he means to include whatever is included in the word "good-will," though the latter be not specifically mentioned.

Churton v. Douglas, *supra*; *Bury v. Bedford*, 33 L. J. Ch. 465; *Hall v. Hall*, 20 Beav. 139; Browne, Trade-marks, §§ 359, 360, 23 Am. L. Reg. p. 649.

The appropriation by one partner of a firm

NOTE.—The exhaustive discussion and citation of authorities in the opinion of the court and in the dissenting opinion in this so fully present the authorities on each side that any annotation would be largely a reproduction of them.

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name so closely imitating that of the original as to mislead purchasers and direct trade from the original firm will be enjoined.

High, Inj. § 1345; *Banks v. Gibson*, 34 Beav. 566; Bates, Partn. § 663; *Hall v. Barrows*, 10 Jur. N. S. 55; *Chissum v. Devoe*, 5 Russ. 30; *Shipwright v. Clements*, 19 Week. Rep. 599; *Pearson v. Pearson*, L. R. 27 Ch. Div. 145; *Kellogg v. Totten*, 16 Abb. Pr. 35; *Hall v. Hall*, *supra*; *Merry v. Hoopes*, 111 N. Y. 415; *Hegeman v. Cutter*, 8 Daly, 1; *McGowan Pump & Mach. Co. v. McGowan*, 22 Ohio St. 370.

We can see there is a marked distinction between a sale by partners to a third party and a sale between retiring and continuing partners, in which latter case it is known and expected that the vendees shall continue the uninterrupted going business.

Ayer v. Rushon, 7 Daly, 9; *Cassell v. Davis*, 58 N. Y. 223, 17 Am. Rep. 238; *Congress & E. Spring Co. v. High Rock C. Spring Co.* 45 N. Y. 302, 6 Am. Rep. 82; *Sohier v. Johnson*, 111 Mass. 238; *Haris v. Chaney*, 3 New Eng. Rep. 709, 143 Mass. 592, 58 Am. Rep. 149; *Parsons*, Partn. § 409; *Cassell v. Hazard*, 121 N. Y. 484; *Smith v. Walker*, 57 Mich. 456; *Chittenden v. Wilbeck*, 50 Mich. 401; *Grow v. Seligman*, 47 Mich. 607, 41 Am. Rep. 737; *Myers v. Kalamazoo Buggy Co.* 54 Mich. 215, 52 Am. Rep. 811.

As the testimony in this case is conclusive that the two names of Farrand, Williams & Co. and Farrand, Williams & Clark, with the combination in conjunction of the distinctive words "Farrand" and "Williams" are so similar as to confuse the mind of the public, and as the business methods of defendants are such as to cause such a confusion of business as to lead to loss and impairment of the property sold, the defendants should be enjoined from this use as prayed for in the bill.

Lindley, Partn. 439; Kerr, Inj. § 167; *Parsons*, Partn. 409; Bates, Partn. 63, and cases cited; *Hookham v. Pottage*, L. R. 8 Ch. App. 94; *Glenny v. Smith*, 2 Drew & S. 476; *Lee v. Haley*, L. R. 5 Ch. 155; *Crittwell v. Lye*, 17 Ves. Jr. 335; *Levy v. Walker*, L. R. 10 Ch. Div. 488; *Taylor v. Taylor*, L. R. 20 Eq. 297; *Churton v. Douglas*, 7 Johns. V. C. (Eng.) 174; *Fullwood v. Fullwood*, L. R. 9 Ch. Div. 176; *Croft v. Day*, 7 Beav. 84; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 279; *Hegeman v. Cutter*, 8 Daly, 1; *Cottrell v. Babcock Print. Press Mfg. Co.* 2 New Eng. Rep. 916, 54 Conn. 122; *Biningner v. Clark*, 60 Barb. 118; *Myers v. Kalamazoo Buggy Co.* *supra*; *Hall's* App. 60 Pa. 462, 100 Am. Dec. 584; *Ginesi v. Cooper*, L. R. 14 Ch. Div. 596; *Collyer*, Partn. §§ 162, 168; *Shaver v. Shaver*, 54 Iowa, 208, 37 Am. Rep. 594.

It is not necessary that a name should be copied with fullest accuracy, exactly. The rule is that if an imitation is calculated to deceive the public and may be taken for the original its use will be enjoined.

Gage v. Publishing Co. 11 Ont. App. 481; *Iowa Seed Co. v. Dorr*, 70 Iowa, 481, 50 Am. Rep. 440; *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828; *Meneely v. Meneely*, 62 N. Y. 431, 20 Am. Rep. 489; 11 Cent. L. J. 25 *et seq.*; 28 Am. L. J. 72.

Mr. Ashley Pond, with Mr. William H. Wells, also for appellants.

Messrs. F. H. Canfield and Henry H. Swan, with Messrs. Moore & Canfield, for appellees:

Every man has a legal right to engage in any lawful business in his own name, or in connection with others, although by so doing he may interfere with the business of others previously established and carried on under the same name.

Sutton v. Turlon, L. R. 42 Ch. Div. 128; *Burgess v. Burgess*, 3 DeG. M. & G. 896; *Mcneely v. Menecly*, 62 N. Y. 427, 20 Am. Rep. 489; *Russia Cement Co. v. Le Page*, 8 New Eng. Rep. 577, 147 Mass. 206; *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.* 128 U. S. 598, 32 L. ed. 535; *Lathrop v. Lathrop*, 47 How. Pr. 532; *Decker v. Decker*, 52 How. Pr. 218; *Rogers v. Taintor*, 97 Mass. 291; *Gulman v. Hunnewell*, 122 Mass. 143.

The fact that the parties were once co-partners is in no wise material. Upon dissolution of a partnership each partner may re-engage in the same business and compete with the others.

After dissolution, in the absence of an express agreement, neither can carry on business under the old firm name, unless the firm name was identical with the name of the partner.

The retiring members of a firm may not only engage in the same business in the same locality, but they may advertise their business and solicit the customers of the old firm, and to the same extent that other business competitors may do. They may personally solicit the customers of the old firm.

Labouchere v. Dawson, L. R. 13 Eq. 322, 1 Monk, Eng. Rep. 711; *Pearson v. Pearson*, L. R. 27 Ch. Div. 145. See also *Hoove v. Searing*, 19 How. Pr. 14, 10 Abb. Pr. 264; 1 Collyer, Partn. 236, 239; *Peterson v. Humphrey*, 4 Abb. Pr. 394; *Reeves v. Denicke*, 12 Abb. Pr. N. S. 92; *Melionan Pump & Mach. Co. v. McGowan*, 22 Ohio St. 870; *Lindley*, Partn. 363, 437; 80 Cent. L. J. 157, article *Good-will*; *Bates*, Partn. §§ 585, 586; *Heath v. Sansom*, 4 Barn. & Ad. 172; 1 Parsons, Cont. 157; *Parsons*, Partn. 400; *Cochran v. Perry*, 8 Watts & S. 262; *Edens v. Williams*, 36 Ill. 252; *Rogers v. Nichols*, 20 Tex. 719; *Collyer*, Partn. § 101; *Fourth Nat. Bank of N. Y. v. New Orleans & C. R. Co.* 78 U. S. 11 Wall. 624, 20 L. ed. 83; *Carroll v. Evans*, 27 Tex. 262; *Parkhurst v. Kinsman*, 1 Blatchf. 488; *Horton's App.* 18 Pa. 67; *Clark v. Wilson*, 19 Pa. 414; *Power v. Kirk*, 1 Pittsb. 510.

To entitle the complainants in this case to the relief prayed for in the bill, and to the injunction restraining defendants from doing business under their firm name of Farrand, Williams & Clark, it is necessary that they should show some contract between them and the defendants by which the latter have parted with the right to use such firm name.

The agreement upon which the complainants rely, being with Mr. Sheley personally, was not assignable.

Davies v. Davies, L. R. 36 Ch. Div. 359; *Houland v. Roosevelt*, 5 N. Y. Supp. 75.

The bill of sale is not sufficient to convey the defendants' interest in the good-will of the old firm of Farrand, Williams & Co., nor to

prevent or estop them from doing business under their own names.

Chittenden v. Witbeck, 50 Mich. 420; *Myers v. Kalamazoo Buggy Co.* 54 Mich. 222, 53 Am. Rep. 811; *Story*, Partn. § 99; *Parsons*, Partn. 409-425; *Pearson v. Pearson*, L. R. 27 Ch. Div. 145; *Cottrell v. Babcock Print. Press Mfg. Co.* 2 New Eng. Rep. 916, 54 Conn. 122; *Lathrop v. Lathrop*, 47 How. Pr. 532; *Reeves v. Denicke*, 12 Abb. Pr. N. S. 92; *Hazard v. Caswell*, 93 N. Y. 259, 45 Am. Rep. 198; *Caswell v. Hazard*, 121 N. Y. 484; *Harzer v. Dannenhofen*, 82 N. Y. 499; *Morgan v. Shugler*, 79 N. Y. 490, 35 Am. Rep. 543; *Hallett v. Cumston*, 110 Mass. 29.

A court of equity will not restrain a person from doing business in his own name, at the instance of another who is using a different name.

Iowa Seed Co. v. Dorr, 70 Iowa, 481, 59 Am. Rep. 446; *Bassett v. Percival*, 5 Allen, 345; *Rice v. Angell*, 78 Tex. 350. See also *Smith v. Gibbs*, 44 N. H. 835.

If Mr. Sheley had supposed that he was to receive, or that the complainants were to receive, the defendants' interest in the good-will as a consideration for the \$20,000, he certainly would never have directed Mr. Stevens to scratch out from the bill of sale the clause relating to the good-will.

Philpot v. Gruninger, 81 U. S. 14 Wall. 577, 20 L. ed. 744; *Ellis v. Clark*, 110 Mass. 389, 14 Am. Rep. 609; *Wald's Pollock*, Cont. 9; *Oates v. First Nat. Bank of Montgomery*, 100 U. S. 239, 25 L. ed. 580; *Anthony v. Boyd*, 3 New Eng. Rep. 867, 15 R. I. 495; *Irwin v. Wilson*, 12 West. Rep. 873, 45 Ohio St. 426.

The only ground upon which a court of equity has jurisdiction to interfere in such cases is to prevent a fraudulent invasion of an established business by one who is piratically seeking to represent such business to be his own.

Levy v. Walker, L. R. 10 Ch. Div. 436, 27 Monk, Eng. Rep. 6; *Goodyear India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.* 128 U. S. 598, 32 L. ed. 585; *William Rogers Mfg. Co. v. Simpson*, 4 New Eng. Rep. 75, 54 Conn. 527; *Burgess v. Burgess*, 3 DeG. M. & G. 896; *Massam v. Thorley's Cattle Food Co.* L. R. 14 Ch. Div. 748; *England v. New York Pub. Co.* 8 Daly, 875; *Singer Mfg. Co. v. Wilson*, L. R. 2 Ch. Div. 434; *Singer Mfg. Co. v. Loog*, L. R. 8 App. Cas. 15.

Complainants must show affirmatively an injury wrongfully done by the defendants, and damage resulting from such injury.

Harkinson's App. 78 Pa. 196, 21 Am. Rep. 9; *Bonaparte v. Camden & A. R. Co.* 1 Baldw. C. C. 218; *Richard's App.* 57 Pa. 105; *Butler v. Burleson*, 16 Vt. 176; *Richardson & B. Co. v. Richardson & M. Co.* 8 N. Y. Supp. 52. See also High. Inj. §§ 9, 10, 720, 743; *Story*, Eq. Jur. § 959b.

McGrath, J., delivered the opinion of the court:

Complainants and defendants had been for some years engaged as wholesale druggists on Larned Street east, in the city of Detroit, as co-partners, under the name and style of Farrand, Williams & Co. There were no articles of co-partnership, and no term fixed for which the partnership was to continue. Prior to the

taking of the annual inventory in January, 1890, defendant Jacob S. Farrand expressed to complainant Sheley a desire to dissolve the co-partnership. Mr. Sheley declined to say anything until the annual inventory should be taken, and the business of the year settled up. On the 25th of January, 1890, after the completion of the inventory, defendants made a proposition in writing to "pay Messrs. Sheley & Brooks, for their interest in the firm of Farrand, Williams & Co., for the amount of their interest, being fifty thousand dollars (\$50,000), the sum of sixty thousand dollars (\$60,000), or they will take for their interest, the amount being one hundred thousand dollars (\$100,000), the sum of one hundred and twenty thousand dollars (\$120,000), the sum to be paid in cash, or in notes acceptable to the parties who sell, one week from to-day, Saturday, the first day of February next. The store to be leased to the party purchasing for a term of five years, at a rent of eight thousand dollars (\$8,000) a year, and the warehouse to be rented to the party purchasing, at a net rental of 6% a year on the cost of their interest therein." On the following Monday Mr. Sheley accepted defendants' offer to sell, and on the 1st day of February following a bill of sale was prepared, reciting, among other things, that defendants, in consideration of the sum of \$120,000, paid to them by Alanson Sheley, party of the second part, "have bargained and sold unto the said party of the second part all our right, title, and interest to the within-mentioned resources of said firm, including the good-will attendant upon the business." This bill of sale was not executed, objection being made to the clause, "including the good-will attendant upon the business;" and a new instrument was prepared, reciting that defendants, parties of the first part, "for and in consideration of the sum of one hundred and twenty thousand dollars, to them paid by Alanson Sheley, of the second part, have bargained and sold, and by these presents do grant and convey, unto the said party of the second part, his executors, administrators, or assigns, all our right, title, and interest in the firm of Farrand, Williams & Company." This instrument was executed, the insurance policies were assigned by Farrand, Williams & Co. to Williams, Sheley & Brooks, and an agreement to assume and pay all the debts of the old firm was executed by Williams, Sheley & Brooks, and delivered to defendants. Defendants afterwards formed a co-partnership under the firm name of Farrand, Williams & Clark, and opened a wholesale drug establishment at No. 32 Woodward Avenue. Complainants adopted the name and style of Williams, Sheley & Brooks, posted their firm name, as successor to Farrand, Williams & Co., over their place of business; had the words "Williams, Sheley & Brooks, Successors to" printed in red ink over the words "Farrand, Williams & Co." wherever the latter appeared upon letter-heads, bill-heads, labels, and on other stationery; advertised themselves in the newspapers and trade journals as Williams, Sheley & Brooks, successors to Farrand, Williams & Co.; and sent out circulars to the trade containing not only their firm name, but the names of the individual members of the new firm. Defendants also

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extensively advertised the new enterprise through the same mediums, calling special attention to the names of the members of the new firm, their long connection with the drug business, and the dissolution of the old firm, and soliciting trade.

The complainants contend that the assignment by defendants of all interest in the business carried with it the good-will of the business, and, having purchased the good-will of that business, they are entitled to the exclusive use of the old firm name; that, while defendants have the right to engage in the same line of business, they have not the right to such a collocation of their own names as will produce confusion, attract customers, and secure orders, letters, and goods intended for the old firm; that defendants have no right to simulate their labels, to solicit their customers, or entice away their employes. "Good-will" has been defined by this court to be "the favor which the management of a business wins from the public, and the probability that old customers will continue their patronage." *Chittenden v. Witbeck*, 50 Mich. 401. *Eldon*, in *Crittwell v. Lye*, 17 Ves. Jr. 335, defined it as simply the probability that old customers will resort to the old place.

The following propositions must be regarded as established by the clear weight of authority:

1. Though a retiring partner may have assigned his interest in the partnership business, including the good-will thereof, to his copartner, he may, in the absence of an express agreement to the contrary, engage in the same line of business in the same locality, and in his own name.

2. He may, by newspaper advertisements, cards, and general circulars, invite the general public to trade with him, and through the same mediums advertise his long connection with the old business, and his retirement therefrom.

3. He will not be allowed, however, to use his own name, or to advertise his business, in such a way as to lead the public to suppose that he is continuing the old business; hence, will not be allowed to advertise himself as its successor.

4. The purchaser will not, in the absence of an express agreement, be allowed to continue the business in the name of the old firm.

5. That no man has a right to sell or advertise his own business or goods as those of another, and so mislead the public, and injure such other person.

In *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215, 52 Am. Rep. 811, A, B, and C had been carrying on business as copartners at Kalamazoo, under the name and style of "The Kalamazoo Wagon Company." A, B, and C sold to complainant "all their interest in the property, money assets, and good-will," etc., in and to their business. After such sale complainant's assignors formed a corporation under the name of "The Kalamazoo Buggy Company," pitched their plant in the same locality; commenced the manufacture of the same class of goods; issued circulars to the trade, with descriptive cuts of the same character and appearance as those contained in complainant's circulars, and advertised their place of business as being in the same locality. In that case the name of

"The Kalamazoo Wagon Company" was an assumed name. The only distinctive feature in the name adopted by defendant was the use of a word of similar meaning to that for which it had been substituted. The defendants were not using their own names. It was a pure case of piracy, and the facts clearly indicated an intention to deceive the public. As was said in *Burgess v. Burgess*, 3 DeG. M. & G. 896: "Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by him as the goods of the person whose name he uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that defendant is selling his goods as the goods of the plaintiff." In *Lee v. Haley*, L. R. 5 Ch. App. 155, plaintiff had been doing business at No. 22 Pall Mall, under the artificial name of "Guinea Coal Company." Defendant, who had been their manager, set up a rival business under the name of "Pall Mall Guinea Coal Company," at 45 Pall Mall. His envelopes and business cards were printed in such a way as to resemble the plaintiffs'. In *Glenny v. Smith*, 2 Drew & S. 476, defendant had been in plaintiff's employ, and started in business on his own account. Over his shop he had his own name, Frank P. Smith, printed in large, black letters on a white ground, but on the brass plates in the windows of his shop he had engraved the word "from," in small letters, and the words "Thrasher & Glenny" (the name of plaintiff's firm) in large letters. He had an awning, also, in front of his shop, which, when let down, would cover his own name, and expose only the name of plaintiff's firm. The court held that defendant was deceiving the public, and an injunction was issued. *Croft v. Day*, 7 Beav. 84; *Levy v. Walker*, L. R. 10 Ch. Div. 438; *Turton v. Turton*, L. R. 42 Ch. Div. 128; *Hookham v. Pottage*, L. R. 8 Ch. App. 91; *Meneely v. Meneely*, 62 N. Y. 431, 20 Am. Rep. 489; *Fullwood v. Fullwood*, L. R. 9 Ch. Div. 176.

6. That when an express contract has been made to remain out of business, or for the use by a purchaser of a fictitious name, or a trade-name, or a trade-mark, the courts will enjoin the continued violation of such agreement. In *Grov v. Seligman*, 47 Mich. 607, 41 Am. Rep. 737, defendant had carried on the clothing business at Bay City, under the name and style of "Little Jake," and sold out to complainant, and expressly conveyed the right to use the name and style of "Little Jake," and agreed that he would not again engage in that business at Bay City, and defendant was enjoined from violating his agreement. In *Shackle v. Baker*, 14 Ves. Jr. 468, defendant agreed that he would not, for the space of ten years, carry on or permit any other person to carry on the same business in Middlesex, London, or Westminster, and that he would use his best endeavors to assist plaintiff, and procure customers for him. In *Hitchcock v. Coker*, 6 Ad. & El. 488, Coker had agreed to enter the services of plaintiff, and that he would not at any time thereafter engage in the business in which his employer was engaged. To the same effect are *Beal v. Chase*, 81 Mich. 14 L. R. A.

490; *Doty v. Martin*, 83 Mich. 462; *Burckhardt v. Burckhardt*, 38 Ohio St. 261; *Vernon v. Hallam*, L. R. 84 Ch. Div. 752; *Tode v. Gross*, 127 N. Y. 480, 13 L. R. A. 653.

7. That an assignment of all the stock, property, and effects of a business, or the exclusive right to manufacture a given article, carries with it the exclusive right to use a fictitious name in which such business has been carried on, and such trade-marks and trade-names as have been in use in such business. These incidents attach to the business or right of manufacture, and pass with it. Courts have uniformly held that a trade-mark has no separate existence, that there is no property in words, as detached from the thing to which they are applied; and that a conveyance of the thing to which it is attached carries with it the name. *Dixon Crucible Co. v. Guggenheim*, 3 Brewst. 321; *Lockwood v. Bostwick*, 2 Daly, 571; *Derringer v. Plate*, 29 Cal. 292, 87 Am. Dec. 170. In *Gage v. Publishing Co.*, 11 Ont. App. 402, Gage and Beatty were copartners, and, among other things, were engaged in publishing "Beatty's Headline Copy-Books." Beatty sold out to Gage all his interest in the business, and engaged in the drug business. Gage continued for some years the sale of the copy-books, when Beatty licensed defendant to publish "Beatty's New and Improved Headline Copy-Books." In *Hoxie v. Chaney*, 143 Mass. 593, 3 New Eng. Rep. 709, 58 Am. Rep. 149, Hoxie and Chaney were copartners, engaged in the manufacture of soaps, two brands of which were known as "Hoxie's Mineral Soap" and "Hoxie's Pumice Soap." These were simply trade-names, by which the articles were known, and the right to use them passed with the right to manufacture the articles. In *Russia Cement Co. v. Le Page*, 147 Mass. 206, 6 New Eng. Rep. 577, Brooks and Le Page, as copartners, sold to plaintiff the good-will of their business, and the right to use their trade-marks. They were engaged in the manufacture of glues. Their light glues they named "Le Page's Liquid Glues." The court held that the right to use the name by which the articles were known to the trade passed with the right to manufacture the articles. In *Merry v. Hoopes*, 111 N. Y. 415, the parties were formerly partners. Hoopes sold to Merry, but afterwards undertook to use certain trade-marks, viz., the "Lion Brand" and "Phoenix Brand," but the court held that these trade-marks passed to the assignee. In *Hall v. Barrows*, 4 De G. J. & S. 150, the firm had marked the chief part of their output of iron with the initial letters of their partnership name, "B. B. & H.," surmounted by a crown, and the court held the letters and crown had become a trade-mark, and, as such, should be included as a subject of value. Browne, Trade marks, 358; *Millington v. Fox*, 3 Myl. & C. 338-353; *Myers v. Kalamazoo Buggy Co.* 54 Mich. 215, 52 Am. Rep. 811; *Sohier v. Johnson*, 111 Mass. 242; *Shipwright v. Clements*, 19 Week. Rep. 599; *Rogers v. Taintor*, 97 Mass. 291.

8. A corporate name is regarded as in the nature of a trade-mark, even though composed of individual names, and its simulation may be restrained. After adoption it follows the corporation. Statutes providing for the or-

ganization of corporations usually prohibit the adoption of the same name by two companies. *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 278, 9 Am. Rep. 824.

These propositions are sustained by a long line of authorities, but in none of the cases cited does the question hinge upon a grant of good-will. Complainants insist, however, that a grant of good-will may be implied, and, when express or implied, it imposes certain restraints upon the vendors, viz.: (1) that they cannot afterwards personally solicit customers of the old firm, and (2) that they are restricted in the use that may be made of their own names.

I. The doctrine that a retiring partner, who has conveyed his interest in an established business, whether the good-will be included or not, cannot personally solicit the customers of the old firm, has no support in principle. A retiring partner conveys, in addition to his interest in the tangible effects, simply the advantages that an established business possesses over a new enterprise. The old business is an assured success, the new an experiment. The old business is a going business and produces its accustomed profits on the day after the transfer. It is capital already invested, and earning profits. The continuing partner gets these advantages. The new business must be built up. The capital taken out of the old concern will earn nothing for months, and in all probability the first year's business will show loss instead of profit. For a time at least it is capital awaiting investment, or invested, but earning nothing. The retiring partner takes these chances or disadvantages. He does not agree that the benefit derived from his connection with that business shall continue. He does not agree that the old business shall continue to have the benefit of his name, reputation, or service: nor does he guarantee the continuation of that patronage which may have been attracted by his name or reputation. He does not pledge a continuance of conditions. He takes out of the business an element that has contributed to the success of that business. He sells only those advantages and incidents which attach to the property and location, rather than those which attach to the person of the vendor. *T. Parsons, Partn.* *409. He sells only so much of the custom as will continue in spite of his retirement and activity.

He sells probabilities, not assurances. It is urged that by the solicitation of the customers of the old firm he is endeavoring to impair the value of that which he has sold, but every act of his in the direction of the establishment of the new business tends to divert the customers of the old firm. The right to enter into the same line of business in the same locality,—next door, if you please,—to advertise his former connection with the old business, and to solicit generally the patronage of the public, is conceded by the clear weight of authority. The exercise of these rights necessarily involves the diversion of custom to the new firm. Does not the right to again engage in the same line of business include all of the incidents of that right? Upon what principle is the line arbitrarily drawn at the personal solicitation of the customers of the old firm? The right to engage in business in his own name attaches to the retiring partner, and, unless expressly so 14 L. R. A.

agreed there is no restraint upon that right. In the present case, Jacob S. Farrand had been at the head of the old house for half a century. His name could not be subsequently used in the same line of business without attracting the attention of the entire trade, nor without affecting the probabilities of a continuance of the patronage of the old house. He gave no hint that he did not intend to again engage in business. All of the circumstances pointed in the direction of a new business. The retirement was not of Jacob S. Farrand alone, but of his son-in-law and Mr. Clark also. The proposition made to complainants was not only to sell, but to buy. In *Gines v. Cooper*, L. R. 14 Ch. Div. 596, the court went so far as to insist that a retiring partner had no right to deal with the customers of the old firm; but that rule would operate as a restriction upon the public, and the case is without support in that respect. In *Labouchere v. Dawson*, L. R. 18 Eq. 322, the court says that a retiring partner who sells the good-will of a business is entitled to engage in a similar business, may publish any advertisement he pleases in the papers, stating that he is carrying on such a business; he may publish circulars to all the world, and say that he is carrying on such a business; but he is not entitled, by private letter, or by visit by himself or agent, to solicit the customers of the old firm. But in *Pearson v. Pearson*, L. R. 27 Ch. Div. 145, *Labouchere v. Dawson* is expressly overruled. The court says: "The case of the plaintiff is founded on contract, and the question is, What are his rights under the contract? There is no express covenant not to solicit the customers of the old business, but it is said that such a covenant is to be implied. I have a great objection to straining words so as to make them imply a contract as to a point upon which the parties have said nothing, particularly when it is a point which was in their contemplation. It is said that there was a sale of the good-will. I think that there was, taking good-will as defined by Lord Eldon in *Oruttuall v. Lyc*, 17 Ves. Jr. 335. The purchaser has a right to the place and a right to get in the old bills; so the purchaser gets the good-will, as defined by Lord Eldon. But the term 'good-will' is not used; and when a contract is sought to be implied we must not substitute one word for another. But suppose the word did occur, what is the effect of the sale of good-will? It does not, *per se*, prevent the vendor from carrying on the same class of business." *Vernon v. Hallam*, L. R. 34 Ch. Div. 752, held that a covenant by a vendor of a business, including the good-will thereof, that he would not for a term of years carry on the business of a manufacturer, either by himself or jointly with any other person, under the name or style of J. H. or H. Bros., (the name of the business which he had sold,) is not a covenant that the vendor would not carry on business as a manufacturer, but against using a particular name or style in trade; and the injunction was granted to restrain a breach of that covenant. The court says: "When a vendor sells his business, and commences a similar business in the same locality, and solicits customers of the old house to deal with him, the court, following the decision in *Pearson v. Pearson*, and being of

opinion that the case of *Labouchere v. Dawson*, had been overruled by the decision in that case, refused to grant an injunction to restrain such solicitation." *Leggott v. Barrett*, L. R. 15 Ch. Div. 806, *Ginsey v. Cooper*, L. R. 14 Ch. Div. 596, and a number of other cases cited follow *Labouchere v. Dawson*.

The correct rule is, we think, laid down in *Cottrell v. Babcock Print. Press Mfg. Co.*, 54 Conn. 138, 2 New Eng. Rep. 916. The court says: "Cottrell did not require Babcock to agree, and the latter did not agree, to abstain from the manufacturing of printing-presses. By purchasing the good-will merely Cottrell secured the right to conduct the old business at the old stand, with the probability in his favor that old customers would continue to go there. If he desired more, he should have secured it by positive agreement. The matter of good-will was in his mind. Presumptively he obtained all that he desired. At any rate, the express contract is the measure of his right; and since that conveys a good-will in terms, but says no more, the court will not upon inference deny to the vendor the possibility of successful competition by all lawful means with the vendee in the same business. No restraint upon trade may rest upon inference. Therefore, in the absence of any express stipulation to the contrary, Babcock might lawfully establish a similar business at the next door, and by advertisement, circular, card, and personal solicitation invite all the world, including the old customers of Cottrell & Babcock, to come there and purchase of him; being very careful always when addressing individuals or the public, either through the eye or the ear, not to lead anyone to believe that the presses which he offered for sale were manufactured by the plaintiffs, or that he was the successor to the business of Cottrell & Babcock, or that Cottrell was not carrying on the business formerly conducted by that firm. That he may do this by advertisements and general circulars courts are substantially agreed, we think. But some have drawn the line here and barred personal solicitation. They permit the vendor of a good-will to establish a like business at the next door, and, by the potential instrumentalities of the newspapers and general circulars ask old customers to buy at the old place, and withhold from him only the instrumentality of highest power, viz., personal solicitation. To deny him the use of the newspapers and general circulars is to make successful business impossible and therefore is to impose an absolute restraint upon the right to trade. This the courts could not do, except upon express agreement. But possibly the old customers might not see these; and in some cases the courts have undertaken to preserve this possibility for the advantage of the vendor, and found a legal principle upon it. Other courts have been of the opinion that no legal principle can be made to rest upon this distinction; that to deny the vendor personal access to old customers even would put him at such disadvantage in competition as to endanger his success; that they ought not upon inference to bar him from trade, either totally or partially; and that all restraint of that nature must come from his positive agreement. And such, we think, is the present tendency of the law." 14 L. R. A.

Good-will may be said to be those intangible advantages or incidents which are impersonal, so far as the grantor is concerned, and attach to the thing conveyed. Where it consists of the advantages of location, it follows an assignment of the lease of location. Again, it may not depend at all upon location, as in the case of a newspaper, and it would follow an assignment of all interest in the plant, property, effects, and business. A partnership name may become impersonal, after the death of the partners, and it is then treated like a fictitious or corporate name. A surname may become impersonal when it is attached to an article of manufacture, and becomes the name by which such article is known in the market, and the right to use the name may in consequence follow a grant of the right to manufacture that article, or a sale of the business of manufacturing such article; and where the right to manufacture is exclusive, the right to the use of the name as applied to that article becomes likewise exclusive. It appears, however, that in the first bill of sale which was prepared the words "including the good-will attendant upon said business," were inserted, but were objected to, stricken out, and a new bill of sale prepared, omitting any reference to good-will. But it is said that this clause was objected to because, in the opinion of the objector, it might preclude him from engaging in the same business, whereas, under the law, he would have such a right had the clause remained. The only use, however, which complainants now propose to make of the clause, treated as a part of the instrument, is to restrict that right to engage in business by taking away one of its incidents. Adopting the language used in *Churton v. Douglas, Johns*, V. C. (Eng.) 174, with reference to the right of plaintiff to continue the use of the old firm name, "I think the defendant is fully entitled to the benefit of the observation that it was proposed to him to insert such a provision, and that he refused it. I think, therefore, that this case goes a step higher than the authorities, and the defendant is entitled to put his case in the highest possible form with regard to his right" to engage in the same line of business.

II. The next question relates to the use by defendants of the firm name of Farrand, Williams & Clark. It is clear that complainants have no right to continue their business under the old firm name. The rule that upon a dissolution of a firm neither partner has the right to use the firm name, as well as the other rule that a retiring partner has no right to use the old firm name, are both subject to the exception that a person has the right to use his own name unless he has expressly covenanted otherwise. In case A. B. should sell out his business to C. D., in the absence of a grant to C. D. of the right to use the name of A. B., or an agreement to the contrary, is there any doubt but that A. B. would have the right to engage in the same line of business in his own name? In that case, such a probability would naturally suggest itself to C. D., and if he desired to get the advantage of A. B.'s abstinence from business, he would insist upon an agreement to that effect. In the present case, Mr. Farrand's name had been at the head of the firm

name for nearly half a century, and the name of another of the retiring members corresponded with the only other surname used in the old firm name. It must have been evident to complainants that in any event the name of the new firm would be similar to that of the old firm. If complainants desired any protection against such a use of the names of the retiring members, they should have inserted a provision to that effect in the bill of sale. The right to continue the use of a firm name, as well as a restriction upon the use by a retiring partner of his own name, are proper subjects of bargain, sale, and agreement. Here neither have been purchased. Complainants have purchased the business of the old firm. They have the right to advertise themselves as succeeding to and continuing that business. The exercise of such a right does not conflict with any right reserved by defendants. Complainants, by such a holding out, commit no fraud, misrepresentation, or deception. They publish the truth only. Defendants have the right to use their own names, or any collocation of their own names. They have not adopted the old firm name, although it would have been appropriate. They have adopted no fictitious name. There is no deception in the use of the name adopted by them. The business of the old firm is a separate and distinct business. Defendants have no right to advertise their business as a continuation of the old firm business. They are subject to the rule already laid down, that no man has the right to sell or advertise his own goods or business as that of another, and so mislead the public and injure such other person. In *Lathrop v. Lathrop*, 47 How. Pr. 532, after dissolution J. Lathrop formed a copartnership with one Tisdale, and adopted the name of J. Lathrop & Co., which was the style of the old firm. Held that, in the absence of any covenant with his late partner, he might legally do so. In *Reeves v. Denicke*, 12 Abb. Pr. N. S. 92, the court says: "In this case, the firm name was not sold or transferred to defendants as constituting a part of the partnership property; nor did the sale, in terms or by necessary implication, include the good-will; and it is therefore unnecessary to determine whether the partnership name was a part of such good-will. There was no restraint upon a retiring partner holding him from engaging in a similar business, and he violated no obligation by forming a new firm under his own name, and transacting a business in all respects like that he had released to them. It is quite clear that defendants acquired no right to continue the use of the partnership name of the old firm. If the good reputation of that firm was intended to pass and become a part of defendant's new firm, it should have been provided for in the conveyance. That it was not intended that it should pass is evident from the omission to include it." *Iowa Seed Co. v. Dorr*, 70 Iowa, 481, 59 Am. Rep. 446; *Bassett v. Percival*, 5 Allen, 345; *McGowan Pump & Mach. Co. v. McGowan*, 22 Ohio St. 370. In *Turton v. Turton*, L. R. 43 Ch. Div. 128, although there were no contract relations between the parties, the court says: "No man can have the right to represent his goods as the goods of another; therefore, if a man uses his own name, that is no prima facie

case, but if he, besides using his own name, does other things which show that he is intending to represent, and is in point of fact making his goods represent, the goods of another, then he is so prohibited; but not otherwise." In *Hookham v. Pottage*, L. R. 8 Ch. App. 91; plaintiff and defendant had been copartners as Hookham & Pottage. Plaintiff succeeded to the business, and defendant afterwards set up a shop only a few doors away, and printed over the door the words, "Pottage, from Hookham & Pottage." The court held that "defendant had a right to state that he was formerly manager, and afterwards a partner, in the firm of Hookham & Pottage, and that he had a right to avail himself by the statement of that fact of the reputation which he had so acquired, but that he had no right to make that statement, or to avail himself of that reputation, in such a way as was calculated to represent to the world that the business which he was carrying on was the business of Hookham & Pottage, or that Hookham had any interest in it." In *Meneely v. Meneely*, 62 N. Y. 431, 20 Am. Rep. 489, the court says: "If defendants were using the name with the intention of holding themselves out as the successors of Andrew Meneely, and as the proprietors of the old established foundry which was being conducted by plaintiffs, and thus enticing away customers, and if with that intention they used the name in such a way as to make it appear that of the plaintiff's firm, or resorted to any artifice to induce the belief that defendant's establishment was the same as that of plaintiff, and, perhaps, without actual fraudulent intent, they had done acts calculated to mislead the public as to the identity of the establishment, and produce injury beyond that which resulted from similarity in name, then the court would enjoin them, not from the use of the name, but from using it in such a way as would deceive the public. . . . Every man has the absolute right to his own name in his own business, even though he may thereby interfere with or injure the business of another bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do anything calculated to mislead." In *Fullwood v. Fullwood*, L. R. 9 Ch. Div. 176, R. J. Fullwood carried on business as manufacturer of annatto at 24 Somerset Place, Hexton, from 1785 to 1832. Plaintiff and three brothers, one of whom was the defendant, succeeded to the business, but ultimately the right to carry on the business vested in the plaintiff. Defendant, Mathew Fullwood, and another brother formed a copartnership in the name of E. Fullwood & Co., and issued and distributed in various ways cards containing the following: "Established over 85 years. E. Fullwood & Co., (late of Somerset Place, Hexton,) Original Manufacturers of Liquid and Cake Annatto." They also placed around the bottles containing the annatto a wrapper resembling that which plaintiff used. The court says: "Defendants are entitled to carry on their business under the firm name which they have adopted, if they are so minded, provided they do not represent themselves to be carrying on the business which has descended to plaintiff." In

Binsinger v. Clark, 60 Barb. 118, the defendant wrongfully advertised himself as successor to the old firm, and made such a use of his own name as to indicate a fraudulent intent. *Hegeman v. Hegeman*, 8 Daly, 1; *Levy v. Walker*, 10 Ch. Div. 486. In *Churton v. Douglas*, Johns. V. C. (Eng.) 174, 5 Jur. N. S. 887, plaintiff and defendant had carried on the business as stuff manufacturers at Bradford, in a building owned by defendant, and known as "Hall Ings," under the name and style of John Douglas & Co. Defendant sold out to plaintiff all his share, right and title in the business, including the good-will, and executed to plaintiff a seven-years lease of the premises occupied by the firm. Within a short period defendant set up in the same line of business, next door to plaintiff, in a part of the same building known as "Hall Ings," adopting the old firm name of John Douglas & Co. The court held that defendant, by the use of the old firm name, and the surroundings, would be obtaining the custom of the old firm, by inducing the belief that his was a continuation of the old establishment. The court says: "The authorities, I think, are conclusive upon this point that the mere expression of parting with or selling the good-will does not imply a contract on the part of the person parting with that good-will not to set up again in a similar business; but I use the expression 'similar' to avoid including the case . . . of the vendor seeking to carry on the identical business. He does not contract that he will not carry on an exactly similar business, with all the advantages which he might acquire from his industry and labor, and from the regard people may have of him, and that in a place next door, if you like, to the very place where the former business was carried on. . . . It is settled that it is the fault of those who wish any protection against such a class that they do not take care to insert the provision to that effect in the deed."

The same principle obtains with reference to trade-marks. One may have a right in his own name as a trade-mark, but he cannot have such a right as against another person of the same name, unless the defendant use a form of stamp or label so like that used by the plaintiff as to represent that the defendant's goods are of the plaintiff's manufacture. *Sykes v. Sykes*, 8 Barn. & C. 541; *Holloway v. Holloway*, 13 Beav. 209; *Rogers v. Taintor*, 97 Mass. 291; *Giltman v. Hunnewell*, 122 Mass. 139; *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.* 128 U. S. 598, 32 L. ed. 535. The tests applied by all the authorities in this class of cases are: Is a corporate or trade or fictitious name simulated? Is the name assumed or adopted false in fact? Is it used in connection with locality or other representations, so as to convey the impression that the business is a continuation of the old business? Defendants are not responsible for the blunders made by clerks, postal clerks, mail carriers, telephone employes, or newspaper reporters. In *Meneely v. Meneely*, the court says: "When the only confusion created is that which results from the similarity of names, the court will not interfere." In *Turton v. Turton* it is said that "defendants are not responsible for blunders made by the business community in not distinguishing between John Turton &

Sons and Thomas Turton & Sons." See also *Richardson & B. Co. v. Richardson & M. Co.* 8 N. Y. Supp. 52; *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co. supra*.

Any collocation of the names of Farrand and Williams would create some confusion. Defendant Clark had been connected with the old business for thirty years, and Williams, the son-in-law of Mr. Farrand, for twenty-one years. Defendants are using their own names only. They went into business on Woodward Avenue, several blocks from the old stand. In every letter-head, bill-head, card or advertisement in which their firm name appears they give the individual names of the members of the firm, the new place of business, and in no case have they represented that they are successors to the old firm. The bill-heads used by the old firm had a cut of the old stand on the left-hand upper corner, about three inches square. Those of the new firm contain no cut, and less than half of the amount of matter. It would be exceedingly difficult to prepare two bill-heads more unlike. The letter-heads of the old firm contained two cuts—one of the old stand, at the left hand, and one of the Peninsular White Lead & Color Works, on the right. The dissimilarity is marked. The envelopes used by the old firm contain eight printed lines on the upper left-hand corner, occupying an inch and three-quarters of space. Those used by the new firm contain five lines, occupying about three-quarters of an inch. There has been no attempt at imitation in words or type. On March 15, they announced, through circulars distributed generally, that they had engaged in business at 83 and 34 Woodward Avenue; that they expected to have their new store ready for occupancy in a few days; and that the work of getting a new stock of goods would be pushed as fast as possible. On April 7 they issued another circular announcing that they were now prepared to fill orders, and hoping that the friendly acquaintance of many years would be continued. An advertisement is produced, wherein defendants say: "Though it may seem paradoxical, it is nevertheless true, that the wholesale drug house of Farrand, Williams & Clark is both the oldest and the newest representative of this important commercial line in Detroit." But in the same advertisement they announce the dissolution of the old firm, their retirement from said firm, and the formation and business location of the new firm. It is difficult to imagine how such an advertisement would mislead the public. It contains no false colors. Both parties advertised extensively in the city and state papers and in the trade journals; complainants giving the names of their individual members, and their new firm name and advertising themselves as the successors to Farrand, Williams & Co.; and defendants giving the names of their individual members, and the name and business location of the new firm. Complainants sent out circulars to the trade generally, informing it of the dissolution of the old firm, the fact that they were the successors, and giving their firm name; and defendants sent out circulars announcing their withdrawal and the formation of a new firm. There is no doubt but that the dissolution of this firm, the fact that complainants had

bought out the interests of defendants, the name adopted by complainants, the formation of the new firm, the names of its members and the defendants' firm name, have been most extensively advertised by both parties, not only in the city, but throughout the State and Union. Nearly fifty letters have been received by the old firm, since the dissolution, addressed to Farrand & Williams; Farrand & Williams Paint Co.; Farrand & Williams Drug Co.; Farrand, Sheley & Brooks; Farrand, Williams & Sheley; Farrand, Williams, Sheley & Co.; Farrand, Williams & Brooks; Farrand & Co.; Williams, Farrand & Co.; Farrand, Sheley & Brooks; Williams & Farrand; Williams, Farrand & Co.; and Williams & Co. It cannot be said that any act of defendants is responsible for these blunders. Confusion is inseparable from the dissolution of an old firm and the composition of two firms from its membership, especially when the name of but one of those who remain has appeared in the firm name, and the new firm is composed of one whose name for nearly half a century has stood at the head of the firm name, and the surname of another retiring member is the same as the only other name used in the old firm name. It appears that at the outset defendant Clark by mistake opened two or three letters addressed "Farrand, Williams & Co.," but in every other instance defendants refused to receive mail directed to Farrand, Williams & Co., unless directed to defendants' street and number; that in a single instance Clark inadvertently signed a letter "Farrand, Williams & Co.," that two checks were sent to defendants in payment for goods bought from them, which were payable to the order of Farrand, Williams & Co., and Mr. Farrand indorsed them Farrand, Williams & Co., and guaranteed the indorsements; that in four instances merchandise or articles not marked, but intended for defendants, were delivered to complainants, and afterwards taken away; that in two instances complainants were notified by freight agents that freight awaited delivery; that in both the goods were manifested to Farrand, Williams & Co., but marked and were afterwards delivered, to Farrand, Williams & Clark for whom they were intended; that complainants were notified that a sample box of glassware had been shipped to them, but they had not received it; that defendants received a sample box of glassware from the same house, which was billed to Farrand, Williams & Clark and the latter were notified of the shipment by the assignors; that similar boxes of samples had been sent to other drug houses at Detroit; that in one or two instances merchandise had been delivered to defendants which was intended for complainants; that in a single instance a customer at Port Huron who knew of the dissolution, intending to call up the old house by telephone, asked for Farrand & Williams, was given Farrand, Williams & Clark, and told that it was Farrand, Williams & Clark, asked the price of oil, and ordered one barrel; that one hundred and twelve letters, telegrams, receipts, or bills were received by complainants directed to Farrand, Williams & Co., which were intended for defendants; that of these thirty-five were directed on the inside to Farrand, Williams & Clark; that all of the

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letters so received were from business houses from which defendants were buying goods, and none were from customers of either house. These proofs do not tend to show any appropriation by defendants of the old firm name, or any attempt to secure the correspondence addressed to the old firm, or that the customers had been misled, or that defendants have practiced any fraud, concealment, or deception.

Complaint is made in the bill that defendants have enticed away certain of complainants' salesmen, but this charge is not made out by the proofs. It is also charged that defendants have simulated certain trade-marks and labels used by the old firm, but no instance of piracy has been established. Complainants have, under the authorities cited, an undoubted right to protection in the proprietary rights acquired by the old firm, and in the use of such trade-marks as were in use by the old firm, and defendants have no right to so imitate the labels in use by the old firm as to convey the belief that the goods labeled are from the old house. The use, however, of the words, "Sold by Farrand, Williams & Co.," or "Prepared by Farrand, Williams & Co.," upon a label, will not be protected as a trade-mark or trade-name, and the right to use that name in that connection did not pass under the bill of sale.

The decree of the court below must be affirmed as of February 27, 1891, and the bill dismissed with costs to defendants.

Morse and Grant, JJ., concurred with McGrath, J. Long, J., did not sit.

Champlin, Ch. J., dissenting:

I cannot concur with the conclusion reached by the majority of the court in this cause. In order to arrive at a correct understanding of the issues involved, I have deemed it necessary to set out with considerable particularity the pleadings in the case, and to refer to the testimony in a general way by which the allegations of the complainants are substantiated; and, at the risk of repetition of what is contained in the opinion handed down by the majority of the court, I will proceed to state my views upon the merits of this controversy.

The complainants in this suit are copartners in the wholesale drug trade, under the firm name of Williams, Sheley & Brooks. Their place of business is at Nos. 11 and 17 East Larned Street, in Detroit. The defendants are also copartners in the wholesale drug business under the firm name of Farrand, Williams & Clark. Their place of business is at Nos. 32 and 34 Woodward Avenue, in Detroit. The bill is filed to enjoin the defendants from using any combination of the names Farrand and Williams as a part of their firm name, and from receiving and appropriating any letters, packages or other thing addressed upon the outside to Farrand, Williams & Co., or to Farrand & Williams, or to Farrand Williams, and to turn over to the complainants any letters, packages or other things so addressed, which may come to their hands; also from in any way interfering with the business of the complainants as successors of the firm of Farrand, Williams & Co., and from interfering in any way with their receiving and enjoying the bus-

iness which belonged to the firm of Farrand, Williams & Co., and from interfering with the continuance of said business by complainants; and that they be perpetually enjoined from using or simulating any trade-marks, trade-names, brands, labels, or monograms used by the firm of Farrand, Williams & Co., and for general relief. The bill of complaint alleges that the complainants are doing business under the firm name of Williams, Sheley & Brooks, as successors to Farrand, Williams & Co. The answer of the defendants admits that the complainants are copartners doing business under the firm name of Williams, Sheley & Brooks, and that they advertise themselves as successors of Farrand, Williams & Co., but denies that they are the legal successors of Farrand, Williams & Co., and that they have a legal right to claim to be such successors. The bill further states that the defendants are partners doing business under the firm name of Farrand, Williams & Clark, and that they are using said firm name as against the rights and equities of the complainants. The defendants in their answer, admit that they are doing business under the firm name of Farrand, Williams & Clark, but deny that they are using such firm name as against the rights or the equities of the complainants. The bill charges that from 1860 to 1870 Alanson Sheley, William C. Williams and Jacob S. Farrand were partners in the wholesale drug business under the firm name of Farrand, Sheley & Co., in the city of Detroit; and that in 1870 the style of the firm was changed to Farrand, Williams & Co. That defendant Clark was admitted into the firm in 1870. That Richard P. Williams purchased an interest in the firm, owned by James E. Davis, and was admitted as a partner and continued as such from 1880. That in 1884, Jacob S. Farrand, Jr., and Alanson Sheley Brooks were admitted into the firm; and that in January, 1890, the interests of the several partners in the firm were as follows, the whole capital stock being \$200,000; Jacob S. Farrand owned three twentieths; Alanson Sheley, three twentieths; William C. Williams, five twentieths; Harvey C. Clark, two twentieths; Richard P. Williams, two twentieths; Jacob S. Farrand, Jr., two twentieths; and Alanson Sheley Brooks, two twentieths. That, notwithstanding the addition and change of partners in the business, the firm name continued the same from 1870 until the dissolution by sale hereinafter stated in 1890, the firm name being at that time Farrand, Williams & Co. This firm had done business at the corner of Larned and Bates Streets, in Detroit, from the year 1872 down to the time of the dissolution in 1890. The building was erected and owned by Jacob S. Farrand and Alanson Sheley; and the said firm also occupied a store-house on Bates Street, adjoining, which store-house, and the land on which it was erected, was owned as follows; Alanson Sheley, one fourth; Jacob S. Farrand, one fourth; William C. Williams, one fourth; Harvey C. Clark, three twentieths; and Richard P. Williams, two twentieths. That from the year 1880, the fiscal year of the firm ended on the 1st of January each year, inventory being taken soon after that date annually, and the profits being ascertained according to

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the respective interests. There was no new agreement that the firm should continue for another year, but the firm and business went on from year to year by common consent.

The bill further alleges that on the 25th day of January, 1890, the defendant Jacob S. Farrand delivered to Alanson Sheley a certain instrument in writing, of which the following is a copy: "Detroit, Jan. 25, 1890. J. S. Farrand, R. P. Williams, J. S. Farrand, Jr., H. C. Clark, will pay Messrs. Sheley & Brooks, for their interest in the firm of Farrand, Williams & Co., the amount of their interest, being fifty thousand dollars (\$50,000) the sum of sixty thousand dollars (\$60,000) or they will take for their interest, the amount being one hundred thousand dollars (\$100,000) the sum of one hundred and twenty thousand dollars (\$120,000) the same to be paid in cash, or in notes acceptable to the parties who sell, one week from to-day, Saturday, the first day of February next; the store to be leased to the party purchasing for a term of five years at a rent of eight thousand dollars (\$8,000) a year, and the warehouse to be rented to the party purchasing at a net rental of six per cent a year of the cost of their interest therein. In case Messrs. Sheley and Brooks sell, the accounts of Mr. and Mrs. Brooks and George A. Sheley are to be paid at the time of the transfer of their interests." On the back of this instrument was the following indorsement: "Detroit, January 25, 1890. We hereby agree to carry out the memorandum of agreement on the other side of this paper as therein stated. [Signed] J. S. Farrand, R. P. Williams, J. S. Farrand, Jr., H. C. Clark." Below which was indorsed the following: "I hereby agree to carry out the memorandum of agreement on the other side of this paper as therein stated. [Signed] A. Sheley." That afterwards said Alanson Sheley accepted the proposition made by said defendants which was contained in said instrument, and purchased from said defendants all of their rights, title, and interest in the said firm of Farrand, Williams & Co. upon the terms in said instrument mentioned; and on the 1st day of February, 1890, the defendants duly sold all their rights, title, and interest in the firm of Farrand, Williams & Co. to said Alanson Sheley for the sum of \$120,000, on that day paid to them, and in evidence of said sale the said defendants on the 1st day of February executed under their hands and seals and delivered to the said Sheley a certain instrument in writing, of which the following is a copy, namely:

"Know all men by these presents, that we, Jacob S. Farrand, Harvey C. Clark, Richard P. Williams, and Jacob S. Farrand, Jr., of the City of Detroit, in the County of Wayne, and State of Michigan, of the first part, for and in consideration of the sum of one hundred and twenty thousand dollars, lawful money of the United States, to them paid by Alanson Sheley of the city, county, and State aforesaid, of the second part, the receipt whereof is hereby acknowledged, have bargained, sold, and by these presents do grant and convey, unto the said party of the second part, his executors, administrators, and assigns, all our right, title, and interest in the firm of Farrand, Williams & Company. This does not include any real estate

they may own. To have and to hold the same unto the said party of the second part, his executors, administrators, and assigns forever. And the said parties of the first part, for themselves, their heirs, executors, and administrators, do covenant and agree to and with the said party of the second part, his executors, administrators, and assigns, to warrant and defend the sale of said property, goods, and chattels hereby made unto the said party of the second part, his executors, administrators, and assigns, against all and every person or persons whatsoever. In witness whereof we have hereunto set our hands and seals, this first day of February, one thousand eight hundred and ninety (1890).

J. S. Farrand, [L. s.]

Harvey C. Clark, [L. s.]

R. P. Williams, [L. s.]

J. S. Farrand, Junior, [L. s.]

"Signed, sealed, and delivered in the presence of
F. J. Stevens,
Frank A. Luce."

This allegation of the bill is admitted by the answer of the defendants. The bill further alleges that it was the intention of the defendants, in making said proposition evidenced by the said writing dated January 25, 1890, either to sell all their interest in said firm of Farrand, Williams & Co., or to buy all the interest of the complainants, said William C. Williams, said Alanson Sheley, and said Alanson Sheley Brooks, in the said firm of Farrand, Williams & Co.; and that it was further the intention of all the parties to said proposition, and of all the parties to said purchase and sale, that whichever party should purchase the interest of the other in the said firm should continue the business then being conducted by the said firm at its then place of business or stand; and that it was well known to the said defendants, and was intended by them when the said proposition was so made, that the complainant the said William C. Williams should remain with whichever party to the said proposition should purchase the interest of the others in the said firm of Farrand, Williams & Co., and should join the purchasers in the continuance of the business of the said firm at said stand; and that it was also known and intended by all the parties to the said proposition that, in case the said Alanson Sheley should purchase the interest of the said defendants in the said firm, and so continue the business of the said firm at its said site, the complainant the said Alanson Sheley Brooks should be associated with said Alanson Sheley and the said William C. Williams in the said business, and that the interest in the said firm, so purchased, should be distributed among them as they might agree.

Replying to these allegations of the bill, the defendants claim that their negotiations were carried on with Alanson Sheley personally, and that they had no negotiations or agreement in regard to the continuance of the business with William C. Williams; that he was not a party to the negotiations or sale; that there was no arrangement or understanding or intention on the part of the defendants in regard to the future business of William C. Williams, or as to whether he should remain with the complainants; that Alanson Sheley, person-

ally and individually, was the party to whom they agreed to sell, and who agreed to become the purchaser, and who paid the consideration, and that nothing was said by the defendants or any of the complainants respecting the manner in which the complainants should carry on said business after the purchase of the said Sheley, or as to whether William C. Williams should be a partner with Sheley or with Sheley and Brooks. The bill further alleges that upon the execution of the bill of sale above set forth, dated February 1st, complainants Williams and Brooks received transfers of and paid for the shares of the rights, property, and interests so purchased, and entered into a copartnership on that day under the name of Williams, Sheley & Brooks, in which Sheley and Brooks were each to have a quarter interest and Williams a half interest in the firm; which firm has continued the business of said firm of Farrand, Williams & Co. at the said stand. The defendants deny any knowledge of this statement contained in the bill so far as to the purchase of the shares of Williams and Brooks and the formation of the partnership by Williams, Sheley, and Brooks. They admit that the complainants entered into a partnership under the name of Williams, Sheley & Brooks, and that they advertised themselves as the successors of Farrand, Williams & Co., but without any legal right or claim to be such successors.

The complainants charge in their bill that they were put in possession by defendants of the premises occupied by Farrand, Williams & Co., and the assets of said firm, and that they have since continued therein, as successors of Farrand, Williams & Co., except as they have been interfered with by the defendants; that they have advertised themselves as the successors of Farrand, Williams & Co. The defendants deny that they were such successors. They deny that they put the complainants in possession, and they deny that they have acquiesced in the claim of the complainants that they are the successors of Farrand, Williams & Co. They also deny that they have interfered with the complainants making such a claim. The complainants further state that on the 1st day of February, 1890, the firm of Farrand, Williams & Co. was indebted to various persons in an amount exceeding \$55,000, and that it was the intention and legal effect of the said purchase and sale that the complainants should assume and pay all of the said indebtedness, and that they gave to the retiring partners a memorandum in writing, to the effect that said retiring partners were released from the liabilities of the said firm; and they further state that they have paid all of the said indebtedness which has matured since said date. The defendants, in their answer, admit the indebtedness of Farrand, Williams & Co., and state that the same was considered in fixing the price at which defendants were to sell to Sheley. They deny that it was the intention or legal effect of such sale that the complainants should pay said indebtedness, and they deny that the complainants gave to the defendants said written memorandum.

The bill further states that on February 1st the annual inventory had been taken, and when they bought all the right, title, and interest in the said firm of Farrand, Williams & Co. of

the defendants, the retiring partners, the profits for the fiscal year had been ascertained and paid to the members of the firm in money or notes, in the customary manner with the firm, and the capital stock of the firm stood at the sum of \$200,000. That the shares therein of the defendants aggregated one half thereof, or the sum of \$100,000. That in the proposition of sale made by the defendants, and in the price of \$120,000 so paid to them, there was included the sum of \$20,000 in addition to the par value of their aggregate shares of the capital stock as a bonus or consideration for their shares of the good-will of the said firm, and for their share of those certain valuable rights appurtenant to the name and business of said firm, and which all passed, and the said purchase and sale intended should be sold, with the other assets of said firm, and should be acquired, possessed, and enjoyed by the purchasers, among which the complainants claim were the the following valuable rights and appurtenances: *First.* That the said firm of Farrand, Williams & Co., during the twenty years of its existence, had built up an extensive trade, and had secured a name and reputation with its customers and with manufacturers and dealers from whom said firm obtained its stock in trade, which is of great value and advantage to said firm, and would be of great value to its lawful successors. *Second.* That the firm was broadly known to the drug and other trades throughout the United States by advertisements in pharmaceutical, medical, and trade journals. That its name appeared in trade circulars, directories, and commercial reports printed in the trade centers of the world; as an instance of which they cite "The Annual of Chemical Products and Drugs," published in Paris, in the French language, having a large circulation, and thus reaching dealers and purchasers everywhere. That said firm purchased goods extensively in England, France, and Germany, and that its name was reputably known to the trade of those countries. That it was a great advantage to said firm that its name was so widely circulated. That valuable discoveries were constantly making in the sciences and trades to which its business related. That new remedies and new goods were constantly appearing and being placed on the market, and the attention of said firm called to them through the instrumentality of letters and circulars received through the mails, addressed to said firm, because its name appeared in said trade circulars, directories, and commercial reports. That for a long period of time, and because many of such directories were published and circulated but annually, it is probable that the name of Farrand, Williams & Co. will appear therein, and that advertisements of new preparations, remedies, and manufactures will continue to be sent by mail to said firm of Farrand, Williams & Co., and that the right to receive the same is a valuable right. *Third.* That the firm of Farrand, Williams & Co. manufactured or had manufactured for it a large number of pharmaceutical and proprietary preparations with which the name of the firm was directly connected, and which were made and placed upon the market by no other dealer in drugs, and which in the drug trade were known to be a part of

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the business of said firm. Certain of said preparations were named as follows: "Conger's Regulator," "Conger's Liver Pills," "Farrand's Extract of Jamaica Ginger," "Farrand's White Rose Tooth Powder," "Davis' Carbolic Oil Liniment." And that there were other of said preparations; and the exclusive right to sell said remedies was possessed by the said firm, and that said right was valuable, and would be valuable, to its lawful owners. *Fourth.* The firm was also largely engaged in the manufacture and sale of medical fluid extracts. That it sold many tons thereof yearly, and that they were well and favorably known to the trade as "Farrand, Williams & Company's Fluid Extracts." That physicians in prescribing fluid extracts as component parts of medicines, commonly designate fluid extracts of a manufacturer with which they are familiar, on account of the variation in strength and efficiency of the extracts made by different manufacturers; and that Farrand, Williams & Co's fluid extracts were widely known by physicians to be of uniform strength, and were largely prescribed for that reason; and that said extracts were commonly ordered and referred to in the trade by the use of the abbreviations "F. W. & Co.;" and that said name and abbreviations became valuable trade-marks, possessed by said firm, and which passed to the legal successors of said firm. *Fifth.* That the firm dealt in certain ochres, which were known as "Farrand, Williams & Co's Ochres," and in other goods, which were distinctly known and referred to in the trade in connection with the name of said firm. *Sixth.* That goods were generally shipped to said firm addressed to "F. W. & Co.;" that said abbreviation was known upon the labels of said firm, and was blown into the bottles used by it. *Seventh.* That the said firm possessed certain exclusive and valuable agencies. That it was the duly appointed exclusive agent for Michigan of J. C. Ayer & Co., of Lowell, Mass., for the sale of "Ayer's Sarsaparilla" and "Ayer's Pills," and the other medical preparations of the said Ayer; and were also the exclusive agents for Michigan of the Peninsular White Lead & Color Works, of Detroit, selling the products of said works through traveling agents of said firm at a profit. *Eighth.* That the firm also had manufactured for it certain other goods in the line of its trade, which were sold exclusively by said firm under the name or brand adopted by said firm, which became a trade-mark of said firm; and in particular that said firm dealt in certain lyes, which were made expressly for said firm, and for no other dealers, which were well known to the trade by the names "Castle Lye" and "Empire Lye," and that the exclusive right to sell said brands of lyes was valuable. *Ninth.* The firm for many years had used a monogram composed of the letters "F" and "W" and the abbreviation "Co." placed within them; and that said monogram was well-known to the trade as representing the name of said firm.

The complainants further allege in their bill that by the said purchase and sale they have become the lawful successors of the said firm of Farrand, Williams & Co., and entitled to the use of the said firm name, and to advertise

themselves as the successors of said firm, and become entitled to all the trade-names, trade-marks, brands, agencies, formulae, monograms, and exclusive rights hereinbefore referred to, and all other rights pertaining to or arising out of the names or business of said firm of Farrand, Williams & Co. The defendants deny that the complainants bought all title and interest of the defendants in the firm of Farrand, Williams & Co. They admit that the annual inventory had been taken prior to the sale to said Sheley, the profits for the fiscal year had been divided, and the capital stock was inventoried at \$200,000, one half of which fell to the defendants. They deny that the \$120,000 paid by the said Sheley for said interest included any bonus or consideration for defendants' share in the good-will of the firm, or their share in any rights appertaining to the name and business of said firm, or that it was intended that the defendants' interest in such good will or the right to use the name of Farrand, Williams & Co. was sold or included in the defendants' transfer to said Sheley. They show that the bill of sale first prepared by and under the direction of Sheley included all the name and good-will of the said firm; and that the defendant Clark expressly refused to execute said bill of sale or any bill of sale which included said good-will. Subsequently the words "good-will" were stricken out of said bill of sale, and were afterwards erased, and that subsequently, by mutual consent, a new bill of sale was drawn under the direction of said Sheley, and executed by the defendants; and they aver that it was expressly understood by the defendants and said Sheley that said defendants would not and that they had not by said bill of sale conveyed or intended to convey to said Sheley defendants' interest in the good will of the firm of Farrand, Williams & Co., or in the name of said firm, or in the right on the part of Sheley and his assigns to do business as the successors of said firm. They admit that Farrand, Williams & Co. had built up an extensive trade and reputation, but whether the same would be of value to its successors would depend upon the character and business reputation of the successors. They admit that new goods are constantly appearing and being placed on the market through the instrumentality of letters and circulars received by said firm, and that said advertisements are sent to Farrand, Williams & Co. by mail, but deny that the right of receiving said advertisements is of any particular value. They admit that Farrand, Williams & Co. manufacture certain preparations mentioned in the bill, but do not admit that the exclusive right to sell such preparations was possessed by said firm. They deny that the names or abbreviations used by the firm of Farrand, Williams & Co. were valuable to the trade, or that the same passed to the complainants. They admit that Farrand, Williams & Co. had dealt in ochres known as "Farrand, Williams & Co's Ochres," and that goods were frequently shipped, addressed to "F. W. & Co.," and that said abbreviation was used on labels; but they deny that the abbreviation constituted a trade-mark. They admit that the firm was agent for J. C. Ayer & Co., but claim that such agency was revocable at any time, and they deny that it was

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transferred to the complainants. They admit that the firm manufactured certain goods; that the same sold by the name or brand adopted by the firm, but they deny that the same became a valid trade mark. They deny that the names "Castle" and "Empire" constituted valid trade-marks, or that the right to sell lyes under said brands could be made exclusive to said complainants. They admit that the said firm used a monogram, but deny that the same constituted a valid trade-mark.

The complainants further charge in their bill of complaint that said William C. Williams is the person whose name was included in the firm name of Farrand, Williams & Co.; that said combination of names became a valuable trade-mark or trade-name; that his name contributed as much to the value of said combination as did the name of said Farrand; and that he has never sold or otherwise parted with his interest in the said combination of names, but, on the contrary, the complainants have purchased and paid for the interest of said Farrand therein. And they claim that it is inequitable and unlawful for the said Jacob S. Farrand and the other defendants to continue to use the name of said Farrand in combination with that of Williams to create a firm name which so closely resembles the name of the former firm of Farrand, Williams & Co. as to deceive the public, and deprive the complainant William C. Williams of the value to him of the use and combination of his name with that of Farrand. The defendants, in their answer, admit that William C. Williams' name was used in the firm of Farrand, Williams & Co., but they allege that Richard P. Williams was also a member of said firm, and that on the letter-heads and stationery used by the said firm the name of Richard P. Williams appeared as well as the names of the other members of the firm. They deny that William C. Williams' name contributed as much to the value of the firm name of Farrand, Williams & Co. as did the name of Jacob S. Farrand, who had been engaged in business, and had acquired a reputation, before said William C. Williams became interested therein. They allege that William C. Williams knew of the sale made by the defendants to said Sheley, and did not object to the sale or dissolution of the firm of Farrand, Williams & Co., which resulted therefrom. They further allege that the said Jacob S. Farrand, Jacob S. Farrand, Jr., Richard P. Williams, and Harvey C. Clark had the legal and equitable right to use their own names in any legitimate business, as individuals or in connection with each other as a firm. They deny that they have used their names so as to interfere with any legal right said William C. Williams, the complainant, may have to the use of his own name; and they deny that he has a right to use the name of said Farrand in combination with his own name or otherwise. The complainants further allege in their bill that the distinctive names in the firm name of Farrand, Williams & Co. were the names of Farrand and Williams, and they allege that letters were frequently received by the firm of Farrand, Williams & Co., which were addressed to Farrand & Williams, or to Farrand Williams, or to Williams & Farrand, or to William Farrand, and that letters continue to come

so addressed; that on or about the 9th of April, 1890, the complainants received a letter addressed to Farrand & Williams; on or about the 1st day of April they received a postal-card addressed to Williams, Farrand & Co.; on the 4th day of April they received a letter addressed to Farrand Williams; about the same time they received another letter addressed to Farrand & Williams, that on or about the 24th of March, 1890, they received a postal-card from Cleveland, addressed to Farrand & Williams; that on or about the 23d of March, they received a letter from Norwalk, Ohio, addressed to Farrand & Williams; that on or about the 1st day of April they received a letter from Detroit, addressed to Farrand Williams; on the 28th of March they received a letter addressed to Farrand, Williams & Brooks; that all the letters so received were letters pertaining to the business to be transacted by complainants; and that in all such cases the senders of such letters believed they were dealing with the firm of Farrand, Williams & Co. and their lawful successors. They also set out a great number of like instances. They further charge that, notwithstanding they purchased all the right, title, and interest of the said defendants in the said firm of Farrand, Williams & Co., and paid them a large bonus or consideration for the right to become successors of said firm, and to have and enjoy a continuance of the business of said firm, and the rights before mentioned, and although the said William C. Williams has never parted with his interest in the combination of his name with that of the defendant Farrand, yet the said defendants, inequitably and unlawfully contriving to deprive the complainants of the value of the property and rights so acquired and possessed by them, and to gain the benefit of the combination of the names Farrand and Williams, have commenced business at Nos. 32 and 34 Woodward Avenue, in the city of Detroit, as near in character as possible to the business which was conducted by the said firm of Farrand, Williams & Co., and which is being continued by the defendants, and have assumed the firm name of Farrand, Williams & Clark, and by the assumption of said firm name, and by various devices and means hereinafter set forth, have attempted to lead the public to believe that said firm of Farrand, Williams & Clark were the successors of said firm of Farrand, Williams & Co., and withdraw from the complainants and secure for themselves business which otherwise naturally would have fallen to the complainants as successors of said firm of Farrand, Williams & Co. The defendants, answering, deny that complainants ever purchased the interest of the defendants in the firm of Farrand, Williams & Co., or paid a bonus or consideration for the right to become the successors of said firm, or to continue its business. They deny that William C. Williams has not parted with his interest in the combination of the names of Farrand and Williams; admit that they have commenced business, as stated, under the name of Farrand, Williams & Clark. They deny that in doing so they have contrived to deprive the complainants of any right to which they are entitled, and they deny that by the assumption of said firm name defendants have sought

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to lead the public to believe that they are the successors of Farrand, Williams & Co., and deny that they have sought to secure to themselves business by means or devices which they are not legally entitled to employ, or that they have attempted to interfere with the complainants doing business under the firm name of Williams, Sibley & Brooks.

The complainants charge that Farrand, Williams & Co. used a blue envelope, with the firm name printed at the corner, with the customary request for return; that no other jobber in drugs in Michigan used a blue envelope; that such envelope, so printed, was well known to the trade, and indicated a letter from Farrand, Williams & Co.; that, intending to deceive the public, defendants have adopted and are using an envelope of the same color, size, and that the printing thereon is arranged as nearly as possible as upon the envelope of said firm of Farrand, Williams & Co. The defendants, in their answer to this charge, admit that Farrand, Williams & Co. used a blue envelope, and that defendants also used blue envelopes or white ones. They deny that the use of such blue envelopes is calculated to deceive the public, or that they were intended to deceive; and deny the charges with reference to such envelopes. The complainants further charge in their bill of complaint that the defendants contrived by the arrangement of their firm name to have it resemble as nearly as possible the name of Farrand, Williams & Co. That upon their letter-heads the defendants' names were in the following order: Jacob S. Farrand, Richard P. Williams, Harvey C. Clark, Jacob S. Farrand, Jr. That said Clark has been engaged in the drug business a longer time than Richard P. Williams, and ordinarily his name would precede that of R. P. Williams. That the defendants have placed purposely the name of said Williams before that of Clark, in order that the combination might lead the public to believe that they were the old firm of Farrand, Williams & Co.; and they aver that said defendants were actually making use of the name "F. W. & Co." That on April 8, 1890, they addressed a letter to W. Parks, of Breeze, Mich., signed "Farrand, Williams & Co." Defendants, in their answer, deny that in adopting their firm name defendants intended to adopt a name resembling as nearly as possible the name of Farrand, Williams & Co.; that the arrangement of the names was for convenience and euphony. They deny that the name of Richard P. Williams was placed before that of said Clark for the purpose of leading the public to suppose that the firm was the old firm of Farrand, Williams & Co. They deny that they adopted their firm name for any fraudulent purpose. They admit writing a letter to Parks, and that it was signed "Farrand, Williams & Co." through mistake and inadvertence of the defendant Clark.

The complainants charge that the defendants have enticed certain traveling salesmen formerly employed by Farrand, Williams & Co. from the employment of the complainants into the employment of defendants. The answer denies this allegation, and states that the salesmen solicited employment from defendants without any suggestion on their part.

The bill further alleges several specific acts of the defendants, which they claim were intended to and did deceive the public, and lead them to believe that Farrand, Williams & Clark were the successors of Farrand, Williams & Co., and that the public were misled thereby.

The testimony in the case was taken in open court, as in a suit at law, and, while it is not my purpose to refer at any great length to the testimony introduced in the case upon either side, some of the testimony will be referred to in the course of my opinion. The gist of the complaint is that by the purchase of the defendants' interests in the stock and business of the firm of Farrand, Williams & Co. the complainants obtained and are entitled to what is sometimes designated as the "good-will" of the firm of Farrand, Williams & Co., and that they had a right to succeed to the trade and business carried on by that firm, and to hold themselves out to the public as the successors of Farrand, Williams & Co., and to receive all the benefits to be derived from that position, including the receiving and opening of the mail addressed to Farrand, Williams & Co.

The first question, therefore, to be determined is whether the complainants did purchase of the defendants what is usually denominated the "good-will" pertaining to the old firm of Farrand, Williams & Co., and the right to denominate themselves as successors to such firm; and to arrive at a correct solution of this question it is necessary to consider the contract and negotiations entered into between the parties; and first I may say that, in view of the circumstances surrounding the transaction, I have no hesitation in reaching the conclusion that Alanson Sheley represented, to all intents and purposes, the firm of Williams, Sheley & Brooks, the complainants in this case. Those facts and circumstances show that Mr. Sheley, at his age and condition of life, did not intend to make this purchase for himself individually, but that the defendants knew, from all the surrounding facts and circumstances, that he was acting for himself and Mr. Brooks, and that Mr. Williams, the complainant, would go with and be concerned in business with whichever party should finally make the purchase. So it is unnecessary to consider the point raised by the defendants that this sale was made to Alanson Sheley individually, and that he could not convey, even if he purchased the good will of the partnership, that incident of the purchase to the firm of Williams, Sheley & Brooks. It is claimed on the part of the complainants that by virtue of the bill of sale executed by the defendants to Alanson Sheley the good-will of the firm of Farrand, Williams & Co. was conveyed to Alanson Sheley, and, in effect, to them. The bill of sale referred to, which bears date the 1st day of February, 1890, states that, in consideration of the sum of \$120,000, the defendants, by the name of J. S. Farrand, Harvey C. Clark, R. P. Williams, J. S. Farrand, Jr., thereby granted and conveyed unto the said Sheley, his executors, administrators, or assigns, all of their right, title, and interest in the firm of Farrand, Williams & Co., not, however, including any real estate which they owned. The complainants insist that this bill of sale includes in its terms what is known as

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the "good-will" of the firm, and in support of their position they point to the facts and circumstances which preceded the execution of the bill of sale, and which tend to throw light upon what property was intended to be conveyed by it. They point to the fact that the inventory which had been recently completed, and which formed the basis of the sale between the parties, inventoried at the sum of \$200,000, which covered all the property of a personal nature belonging to the firm. They also point to the fact that Mr. Jacob S. Farrand, in his offer for sale or purchase, included therein as a purchase price 20 per cent upon the value of the property as inventoried. This, they claim, was intended to cover the good-will of the firm,—that property, intangible in its nature, and which, as they claim, formed an asset of the firm which was not included in the inventory. They claim further that it was intended to cover the benefit and advantage which would accrue to the partners who bought the concern as a going concern in continuing its business at the old stand, which is one of the elements included in the term "good-will." On the contrary, the defendants insist that it was not intended to convey to the complainants or to Sheley what is known as the "good-will" of the old firm of Farrand, Williams & Co.; and they claim, and one of them so testified, that the 20 per cent included in the purchase price above the amount of the inventory was merely included for the reason that the outgoing partners would necessarily be out of business for more or less time, and it was intended by including this advance in the purchase price to afford them something to live upon in the mean time. But further, and more significant than that, they claim, and it is not disputed, that the first bill of sale prepared under Mr. Farrand's direction, and which was signed by Mr. Farrand and Mr. R. P. Williams, included in its very terms the expression, "and the good-will attendant upon said firm's business;" that this was struck out of the bill of sale and erased, upon objection made by Mr. Clark, one of the partners, and that the bill of sale that was actually executed did not contain that expression.

This leads us to an examination of the facts, in order to determine the intent of the parties in striking out from the bill of sale the words referred to. The testimony shows that when the first bill of sale was prepared and presented to Mr. Clark for his signature after Mr. Jacob S. Farrand and R. P. Williams had signed it, upon reading it over he objected to the words quoted above, for the reason, as he stated in his testimony when taken in open court, that he was not very well acquainted with legal phraseology, and he feared that if those words remained in the bill of sale it would prevent him from engaging in business of the kind which he was then engaged in. This was his sole and only reason for wishing those words to be erased from the bill of sale. Upon the objection being brought to the attention of Mr. Sheley that Mr. Clark objected to those words in the bill of sale, he directed that they be stricken out for the reason that he was unacquainted with the legal significance of those words, and supposed that they had no other meaning than a good wish or good will on the

part of Clark for the success of the purchaser in carrying on the business; and, so regarding them, it appears that he called upon the mother of Mr. Clark and stated to her that he was surprised that her son, between whom and himself had always existed the most kindly and friendly feeling, should not be willing to wish him good luck; but, as Mr. Clark objected to the words, he directed Mr. Stevens to scratch out that good-will, saying that it did not make any difference to him; that he knew Mr. Clark had good wishes for him; so it was struck out. It therefore appears, respecting this change in the language in the bill of sale, that neither Mr. Sheley nor Mr. Clark understood the legal significance of the term, and both supposed it to amount to something different from what the actual significance is when applied to a business carried on by a person or firm; and it appears to me from the testimony that it was the intention of the parties at the time of the sale and purchase that the purchasing partners intended to and did, the one to purchase, and the others to convey, the good-will of the firm of Farrand, Williams & Co.; and, in order to more fully understand this position, it were perhaps well that we should define what we understand by the term "good-will of a business." The good-will of a business is the property of the firm, since it is the result of the joint labors of the partners. It includes within its signification the reputation of the firm for fair dealing and probity. It is more extended in its signification at the present day than it was in the time of *Lord Eldon*. The manner of conducting business has changed since that day. Wholesale houses now carry on the mass of their business by means of agents, or persons soliciting trade, or through the medium of the mails; and customers rarely, if ever, visit the place of business. We think that the definition given by *Story* in his work on Partnerships, at section 99, is a fair one. He describes "good-will" as being "the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general patronage and encouragement which it receives from constant or habitual customers on account of its local position or common celebrity, or reputation for skill, affluence or punctuality, or from other accidental circumstances, or even from ancient partialities or prejudice." See also *Carey v. Gunnison*, 65 Iowa, 702. As showing the later view entertained of the term "good-will" in the English courts, I quote what was said by the court in the case of *Churton v. Douglas*, *Johns. V. C. (Eng.)* 174: "It was argued that in *Shackie v. Baker*, 14 Ves. Jr. 468; *Crutwell v. Lye*, 17 Ves. Jr. 835; and *Kennedy v. Lee*, 3 Meriv. 452,—*Lord Eldon* has laid down the principle that an assignment of the good-will of a trade *simpliciter* carries no more with it than the advantage of occupying premises which were occupied by the former firm, and the chance you have thereby of the customers of the former firm being attracted to those premises; but it would be taking too narrow a view of what is there laid down by *Lord Eldon* to say that it is confined to that. 'Good-will,' I apprehend, must mean every advantage—every positive advantage, if I may so express it, as

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contrasted with the negative advantage of the late partner in carrying on the business himself—that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business. . . . It would be absurd to say that when a large wholesale business is conducted the public are mindful whether it is carried on at one end of the Strand or the other, or in Fleet Street, or in the Strand, or any place adjoining, and that they regard that, and do not regard the identity of the house of business, namely, the firm." Such good-will is measured by the value placed upon that which may be special about a business, or the mode of conducting it, or the place in which it is conducted, or the place of business, as to give it peculiar prominence and profit in the estimation of business men. *Fay v. Fay* (N. J.) 4 Cent. Rep. 241. So in applying the signification of the term to the sale of the defendants' interests in the firm of Farrand, Williams & Co., it is proper to consider the facts with reference to the situation of the firm at the time the sale was made. It had been a long time in existence, and had acquired a reputation among business men in the trade throughout the United States, and seems to have been regarded as one of the leading firms in that business in the country. The contract between the parties was that the purchasers should continue the business at the stand then occupied by Farrand, Williams & Co. for a term of five years. It was known to all the partners that persons who had been in the habit of dealing with this firm would, for a considerable time at least, continue to address their communications to Farrand, Williams & Co. as they had been in the habit of doing in the past. That was an interest in the firm which was valuable, and which, by the bill of sale, passed to the purchaser. Moreover, it is difficult to escape the conclusion that the added price above the inventory was to cover the value of just such property as that which I have been describing.

The testimony shows that complainants claimed the right, immediately upon the purchase, of advertising themselves as the successors of the firm of Farrand, Williams & Co.; that they had their name, with that appellation added, immediately upon the bill-heads and the letter-heads, and upon the envelopes which they had purchased from the retiring partners under the bill of sale mentioned. It is also in evidence that the defendants, until they filed their answer in this case, did not claim the right to receive and open the correspondence addressed to Farrand, Williams & Co., but that, when they did so by mistake, they forwarded such correspondence to the complainants in this case. The testimony shows that the property included in the inventory which the complainants purchased consisted not only of the drugs, medicines, paints, glassware, etc., on hand, but the bills receivable, and the "Conger Regulator" trade mark, and further packages, price catalogues, bottles, bottle-moulds, were inventoried, as well as the printed matter, labels, wrappers and circulars. This printed matter was invento-

ried at \$1,000, and the glassware having the "F., W. & Co.," or Farrand, Williams & Co. imprint, at \$5,000. And, as further bearing upon the question as to what was sold by defendants and purchased by complainants, it is proper to take into account and consider the negotiations which preceded the actual execution of the bill of sale, of date February 1, 1890. It appears in evidence that the talk about the sale of the property commenced some time in the month of January, at which time Mr. Farrand, Sr., proposed to sell out, or in some way bring about a dissolution of the firm. Mr. Sheley refused to consider any offers until after the inventory was completed and they ascertained the value of the stock on hand, and the property belonging to the firm. This was finished in January, just previous to the time when the first proposition, of date January 25th, was made in writing by Mr. Farrand, Sr., to Mr. Sheley. That proposition was considered, and was finally accepted on the 27th day of January, at which time it was agreed that the retiring partners should remain and work for the new firm until the first of the next month,—February. That immediately upon the acceptance of the proposition \$2,000 was paid down, and the complainants, among themselves, formed the new firm of Williams, Sheley & Brooks, and immediately the stationery, consisting of envelopes, letter-heads, bill-heads, etc., was piled in large baskets and sent to the printers', and the firm name, Williams, Sheley & Brooks, successors to Farrand, Williams & Co., was printed upon them, and they were returned on the 29th, and were used in the store while the defendants were still there. In addition to this, Mr. Farrand testified, when pressed upon cross-examination, that he had no doubt there would some one go on with the business; and that the purchase was made, as he understood it, "in the sense that the business was to be carried right on by their concern as successors of the old concern." I have already called attention to the fact that the offer of sale included a lease of the store for five years and the warehouse to the purchasing party.

The complainants testify that the purchase was that of a going concern, and that they were to continue the business as the successors of Farrand, Williams & Co.; and, when all the facts and circumstances concerning the transaction of the sale and delivery are considered, there can be no doubt but that the purchase by the complainants included the right to continue the business at the old stand, the right to advertise themselves as the successors of the old firm, and the right to use the monogram "F., W. & Co.," and the names "Farrand, Williams & Co." blown in the bottles, and all the trade marks and *indicia* made use of by the firm of Farrand, Williams & Co. as an advertising medium to the public, to indicate the proprietorship of the articles manufactured by them under the names which were then in vogue in the business.

It is strenuously contended by counsel for the defendants that, if the good-will was sold by them, it was sold to Alanson Sheley individually, and therefore the firm of Williams, Sheley & Brooks had no right to the good-will of the old concern, for the reason, as

alleged, that the covenant by which the property was conveyed to Sheley was personal, and the good-will of the old concern was not assignable. I have already stated that the testimony shows without doubt that, although Mr. Sheley negotiated the purchase in his individual name, yet it was well understood by all the parties that he was making the purchase for the benefit, not only of himself, but of Mr. Williams, and also of his grandson, Mr. Brooks. This is evident from what transpired during the negotiations. In the first place, it appears from the testimony that Mr. Williams, the complainant in this suit, did not desire to sell his interest in the partnership, whoever of the partners sold their interests to their copartners; that he desired to continue in the business, and was willing to remain in the business with the purchaser; and that all parties also were willing that he should do so. This is evident from the proposition that was first made by Mr. Farrand, which was signed by each of the defendants individually, and stated that they would pay Messrs. Sheley and Brooks for their interest in the firm of Farrand, Williams & Co., but they would take for their interests a certain amount stated. In these propositions Mr. William C. Williams' name is not mentioned, thus corroborating the testimony of Mr. Williams and others that he was willing to continue in business with the purchasing party. It also further shows that these parties who made the proposition well knew that Mr. Sheley was not intending to purchase individually, for their proposition was made to Sheley and Brooks; and that, coupled with the understanding that Mr. William C. Williams would continue with the purchasing party, demonstrates that they knew, and that the parties all intended, that the sale should be made to the three persons who compose the present firm of the complainants, and that Mr. Sheley was merely acting in their interest and behalf. Further than this, after that proposition was accepted by Mr. Sheley as an individual, and the complainants had inaugurated their firm, and agreed upon the firm name of Williams, Sheley & Brooks, and before the bill of sale was executed, the policies of insurance, which had formerly been in charge of Mr. Farrand, were looked over by him, and by him indorsed in behalf of the firm of Farrand, Williams & Co. to the firm of Williams, Sheley & Brooks. The testimony shows that he was some three or four days in making these assignments of the policies, and preparing them for his final signature on the 1st of February. Further than that, it appears that Mr. Farrand, Sr. required that the new firm should give to the retiring partners an undertaking to assume and pay the legal liabilities and obligations existing against the firm of Farrand, Williams & Co., and, although it is true that the defendants denied under oath that such was their requirement, or that any such paper was given, yet upon the witness stand they are forced to admit and produce the document, which bears the date and reads as follows: "Detroit, Jany. 31st, 1890. For value received, we hereby assume all the legal liabilities and obligations against the firm of Farrand, Williams & Co. Williams, Sheley & Brooks." This shows that they knew at the time the bill of sale of date

February 1st was executed that they were selling to the new firm of Williams, Sheley & Brooks, the complainants in this suit. The bill of sale, running to Mr. Sheley individually, was dated February 1st, but here is a paper which shows what the mutual understanding and agreement was, in addition to the fact that the policies of insurance were assigned to Williams, Sheley & Brooks; and it is idle for the defendants now to claim that their agreement and covenant for the sale of the business of the old firm was made to Mr. Sheley individually, and that, therefore, the complainants in this suit are not entitled to insist that they purchased the property, including the good-will, of the old firm. Immediately after the execution of the bill of sale the complainants advertised themselves as successors of Farrand, Williams & Co. throughout the State, in daily, weekly, and trade journals, and defendants never objected.

The complainants claim that the \$20,000 which they paid to the defendants over and above the value of the goods inventoried was intended to cover the rights which they acquired in purchasing the going business of the old firm, and including the good-will of that firm. The defendants do not agree with each other, nor with the complainants, as to what the \$20,000 over and above the value of the goods was paid to them for. Mr. Clark testifies that the firm had usually made a profit of about 20 per cent a year, and this 20 per cent was to go to the parties selling, so that they would have something to live on, as by selling out they would necessarily have to remain out of business a certain period. If his version of the matter and the inference to be drawn therefrom are correct, it would seem to show that the parties did not intend to go into business again under a year, if they were receiving from the purchasing party the usual profit of 20 per cent upon the business. Mr. R. P. Williams, when inquired of respecting what this \$20,000 was for, replied, "Mr. Farrand can tell you better than I can," but stated that his view of it was this: That "the offer was positive, and that was the offer to give or take; and that the expense of starting a new business would be worth fully twenty thousand dollars to start a new business." He was then asked: "Question. That the right to go on with the business at the location was worth twenty thousand dollars? Answer. Yes; that is, one-half interest. Mr. Farrand only represented one half." Mr. Jacob S. Farrand testifies that he understood that the bonus of \$20,000 was paid and the interest was purchased in the sense that the business was to be carried on by the new concern as the successors of the old firm. Messrs. Sheley, Williams, and Brooks all testify that this bonus of \$20,000 was for the retiring partners' interest in the going business, in the knowledge that it was to be continued uninterruptedly, with the exclusive right to the use of the name Farrand, Williams & Co. It appears that during the negotiations which had taken place in December it was suggested by Mr. Farrand that, if they make a sale, they would agree not to go into business again for a term of five years; but this proposition was not accepted, finally culminating in this, which followed in January. The defendants each

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and all testify that at the time they made the sale, and for some time after, nothing was said between them as to resuming business in the City of Detroit, but it appears from the testimony that soon after the new firm purchased their interests there was casual talk between the retiring partners, and also between them and three, at least, of the former employes of the firm of Farrand, Williams & Co., who, after the dissolution of the old firm, were continued in the employment of Williams, Sheley & Brooks, in which these employes manifested a willingness and a desire to go into the employment of the new firm, if it should be formed by the defendants. These were important agents of the firm of Williams, Sheley & Brooks, as they were traveling salesmen, at least two of them, and had been in the employ of the old firm for a number of years, and were well acquainted with its customers. To transfer their influence to a rival firm could not have resulted otherwise than in an injury to the firm of Williams, Sheley & Brooks; and, while the defendants deny any effort to entice these employes away from the firm of Williams, Sheley & Brooks, yet they admit that they told them that if they left the employment of Williams, Sheley & Brooks they would be very glad to take them into their service. The motive for doing so is apparent. The result was that about the 6th or 8th of March following the sale of their interests in the old firm they formed a new firm under the name of Farrand, Williams & Clark, and entered into a competitive business at 32 and 34 Woodward Avenue, Detroit.

With reference to the firm name adopted by the new associates, it appears from Mr. Farrand's testimony that the reason for using the names in the succession which appears in their new firm of Farrand, Williams & Clark was simply for the sake of euphony. He testifies that he thought it was a good name, a natural one, and he suggested it. He was asked this question: "Question. You say, Mr. Farrand, that the fact that the names of Farrand and Williams had been connected with the old firm had nothing to do with it? Do you say that, Mr. Farrand? Answer. I won't say that it had nothing to do with it. I say that it was familiar, and came naturally to me, and that is the way I answered them." Mr. Richard P. Williams testifies, with reference to their adopting the name of Farrand, Williams & Clark, as follows: "It was a family name. I will tell you there was this about it: It had been a family name, and we wished to continue it that way. If Mr. Clark wanted to retire any time, the firm could be Farrand & Williams. Question. How about the family name? Answer. We have a boy named Farrand Williams. Q. That boy was named long after the name was established? A. Yes, sir. Q. How long had the name Farrand & Williams been in existence before you became connected with the firm? A. Eight years. Q. That grew out of Jacob S. Farrand and W. C. Williams? A. Yes, sir." After adopting this name, the defendants proceeded to advertise their business, in an advertising medium called "The Industries of Detroit," in which they inserted quite a lengthy article. In it they stated as follows: "Though it may seem paradoxical

cal, it is nevertheless true, that the wholesale drug-house of Farrand, Williams & Clark is both the oldest and newest representative of this important commercial industry in Detroit. Its proprietors are old and well known to the business. The location of the enterprise and its entire stock are entirely new." The article then proceeds to give a short biography of Mr. Jacob S. Farrand, the head of the firm, and then states: "On February 6th of the present year, the firm of Farrand, Williams & Co. having been dissolved, Messrs. Jacob S. Farrand, Harvey C. Clark, Richard P. Williams, and Jacob S. Farrand, Jr., withdrew from the house, and formed the new firm of Farrand, Williams & Clark, which, by the time this reaches the eye of the reader, will have been ready to supply their extensive and widespread trade with everything in the line of drugs, medicines, chemicals, paints and oils, druggists' sundries, etc., in the same prompt and enterprising manner as has always distinguished their operations during the past." Then, after describing their new place of business, the article proceeds: "The trade needs no introduction to the members of this firm, nor to the methods which have been so long in vogue with it. The junior members of the firm have long been the active managers of the business, and none are better qualified to conduct it; and the senior, though now past the allotted age of man, is still, 'Ixon-like,' the man at the wheel. Throughout the entire territory in which this firm's business radiates the trade, in contemplating the important change made, may rest assured that the future of the new house will be fully in keeping with the record of its projectors." They afterwards caused the same article to be published in the Michigan Tradesman, as "An Announcement to the Drug Trade." That journal is published in the interest of the drug and grocery trades, and has a large circulation. It is claimed that this article had no tendency to confuse the public, or to lead them to believe that the new firm of Farrand, Williams & Clark was a successor to the old firm of Farrand, Williams & Co., and yet the bill for publishing this very article in the Michigan Tradesman was made out and sent to Farrand, Williams & Co., and came into the possession of the complainants.

The testimony is quite voluminous and very convincing that since the organization of the new firm of Farrand, Williams & Clark a great deal of confusion has been caused by the use of a name so similar to that of the old firm of Farrand, Williams & Co., and that the public has been greatly misled thereby. It was shown that one Halstead had been a customer of Farrand, Williams & Co. for many years. He dealt with Farrand, Williams & Clark after the formation of that firm, and there is no testimony showing that he supposed that this firm of Farrand, Williams & Clark was a successor of the firm of Farrand, Williams & Co. other than the fact that he remitted a draft payable to the order of Farrand, Williams & Co. The defendants received this draft, and indorsed it with the name of Farrand, Williams & Co. A great many other instances of mistakes made in ordering goods or in paying for them appear in the record. It was also in 14 L. R. A.

evidence that the old firm of Farrand, Williams & Co. used a peculiar envelope of a blue color during the entire time the firm existed. Upon this envelope was printed the usual request for return, if not delivered within a certain time, to Farrand, Williams & Co. Very soon after the new firm of Farrand, Williams & Clark organized, they, too, procured and had printed a blue envelope, with a like request for return printed thereon, to Farrand, Williams & Clark. Mr. Richard P. Williams testified with reference to the selection of envelopes that Mr. Bogart, who was one of the persons who had formerly been in the employ of Farrand, Williams & Co., and Mr. Carver were given directions to get up the stationery, and they brought him a sample of envelopes that they got from somewhere in Detroit, and they had some talk about the color, and Mr. Bogart decided that the blue was the best, and asked his opinion. He replied that blue was good, and would not show dirt. "Bogart said, 'Suppose we get some blue,' and I said, 'All right,' and they were gotten." He further testified that when he made the selection it did not occur to him that the firm of Farrand, Williams & Co. had been using an envelope of that color, and he further testified as follows: "But when I came to think of it, and when I heard the old firm objected to it, I saw right off we had made a mistake." The blue envelopes used by the firm of Farrand, Williams & Co. and Farrand, Williams & Clark were made exhibits, and their general appearance is such that the distinction would scarcely be recognized by anyone unless his attention was specially called to the names. Mr. Bogart testified that it occurred to him at the time that blue was the color used by Farrand, Williams & Co. Farrand, Williams & Co. also sold "Brooks' Genuine Dalmatian Insect Powder." The form of the tin box and style of yellow label were adopted by the firm of Farrand, Williams & Clark. Farrand, Williams & Clark sold "Carver's Strictly Pure Insect Powder." Samples of each of these were produced, which show a striking similarity. They were identical in size, shape, and color of label, and contained similar arrangement of printing. Bogart selected the boxes and the labels. Farrand, Williams & Co. had sold for many years "Marseilles Ochre." Farrand, Williams & Clark commenced to sell "Marseilles Ochre." Mr. Williams testified that "it is a name that we put on the brand that we used to sell at Farrand, Williams & Co's. We simply adopted it."

In reference to confusion of mail matter instances without number are given in the testimony where letters addressed to Farrand, Williams & Co. have been delivered to Farrand, Williams & Clark; also where letters and packages have been addressed to Farrand, Williams & Co. at the place of business of the new firm, 82 and 84 Woodward Avenue; also where letters have been addressed to Farrand, Williams & Clark, and been intended for Williams, Sheley & Brooks, successors to the old firm of Farrand, Williams & Co.; also where letters directed to Farrand, Williams & Co. were intended for Farrand, Williams & Clark. Mr. Hance stated: "I have had brought to my personal attention between

ten and twenty letters with the name Farrand Williams with either Co. or Cl. in combination. If intended for Clark, it looked so much like Co. that it might be taken for & Co. Letters addressed to Farrand, Williams & Co., with the street and number of Farrand, Williams & Clark, would be delivered to Farrand, Williams & Clark; letters addressed to Farrand, Williams & Co., Detroit, Mich., would be delivered to Williams, Sheley & Brooks." The case of a letter of Glidden & Gage, using an old envelope of Farrand, Williams & Co., and simply striking out the old address and inserting the numbers 82 and 84 Woodward Avenue, shows that the writer, although intending the letter for Williams, Sheley & Brooks, successors of the old firm, supposed that they had simply changed their address. The case of Mr. Boyce, a druggist of Port Huron, who testified that, although intending to give his business to Farrand, Williams & Co., he was put into communication through the telephone with Farrand, Williams & Clark, and gave it to them, supposing he was giving it to the partners who were continuing the old business at the old place. Letters were received by the firm of Farrand, Williams & Co. at the store of Williams, Sheley & Brooks, directed to Farrand, Williams & Co., which were clearly intended for the firm of Farrand, Williams & Clark. It was also shown that there was a misdelivery of freight brought about by the similarity of names. Large scrap-books were introduced as exhibits in evidence, containing envelopes, letters, bills, statements, etc., in great numbers, addressed to Farrand, Williams & Co., which were received in due course of mail by complainants, and which were intended for defendants, Farrand, Williams & Clark. Some of these were directed to Farrand, Williams & Co., upon the letter or other matter contained in the envelope; others were addressed to Farrand, Williams & Co. upon the envelope, and Farrand, Williams & Clark inside, that did not relate to the business of the complainants. The testimony shows that well-known Detroit firms fell into error in attempting to distinguish the firms. George Campbell sent a letter and draft intended for complainants, which fell into the hands of the defendants, though addressed to Farrand, Williams & Co. Similar confusion exists with reference to goods. Goods intended for Williams, Sheley & Brooks, or Farrand, Williams & Co., were sometimes delivered to Farrand, Williams & Clark. G. & R. McMillan delivered wines, which had never been ordered, and Berry Bros. turpentine, which was afterwards taken to defendants. The Detroit Free Press sent Farrand, Williams & Co. a large bundle of its issue of the day after defendants' answer was filed, and the bill was likewise sent to Farrand, Williams & Co., which was intended for defendants. James Vernor also delivered goods to complainants intended for defendants. A consignment to Farrand, Williams & Co. of glassware from McKee Bros., and of goods from Flora Jones, New York, were received by defendants. Fairbanks' scales came to Farrand, Williams & Co., which had never been ordered. Ten boxes of tissue paper were offered to defendants, though manifested to Farrand, Williams

& Co. The same confusion existed of orders through the telephone.

Without citing further instances with which the testimony abounds, I think the following propositions are conclusively proven:

First. The name Farrand, Williams & Co. was a valuable asset of that firm, its value depending upon the firm's reputation, both as to its goods and credit, as formed by the long years of extensive business.

Second. The value of the name "Williams" to the combination of the words "Farrand" and "Williams" was given to the firm by the complainant W. C. Williams by his connection with Mr. Farrand in business, and the name "Farrand, Williams & Co." was to him a very valuable asset.

Third. The defendants, wishing to retire from the business, sold voluntarily to the remaining partners, the complainants, who saw fit to remain and continue the business, all their rights and interests in the going business. The interest of the retiring partners was an undivided interest in the joint property, a large part of which was so indelibly marked with the firm name as to make it valueless unless the vendees had the exclusive right to the use of that firm name. The sale by these retiring partners, therefore, necessarily comprised so much of the good-will as would attach to the goods sold.

Fourth. The right to the use of the name Farrand, Williams & Co. belongs exclusively to the complainants by sale of the business to them; and the right to continue the going business as successors to the firm of Farrand, Williams & Co., and enjoy all the benefits attached to the same in any way, is exclusively the property of the complainants.

Fifth. The property sold, aside from the property in the right to the name Farrand, Williams & Co., was, at the highest market value put upon it by all parties, worth no more than \$200,000. A large part of the property inventoried was worth far less than this sum. Its value depended largely upon the right of the purchasers to use the name Farrand, Williams & Co. by reason of the imprint of this name or the initials on a large part of the stock so inventoried. The defendants owned a one-half interest in this property, which by the inventory was valued at \$100,000, and payment of a bonus of \$20,000 over and above this half interest was clearly for the right to use the old name exclusively. There could have been no other consideration for this large sum of money. That the defendants have adopted the name of Farrand, Williams & Clark is admitted, and they claim the right to do so upon the following proposition: "Every man has the legal right to engage in any lawful business in his own name, or in connection with others, although by so doing he may interfere with the business of others previously established, and carried on under the same name." And they claim further that no man can be deprived of the absolute right to carry on any legal business in his own name, except by express contract, founded upon a sufficient consideration: and the only limit to this right is that he shall not represent his business to be the business of another, nor the goods which he offers for sale to be the goods of another. In other words, he

must not make sales under false colors, or simulate the business of another. The exception stated to the proposition above is quite important in this case, for, in the first instance, the complainants claim that by the contract under which they purchased the business and property of the firm of Farrand, Williams & Co. there was, if not an express, an implied, inhibition against using a name so similar to that of the old firm as would deprive them of the benefits of the property purchased; and they claim further that by the representations made by the defendants to the public, through advertisements, and in simulating the trademarks and envelopes and packages used by the old firm, they have simulated the business carried on by the complainants.

The defendants refer us, in support of the proposition which they have laid down, to the case of *Turton v. Turton*, L. R. 42 Ch. Div. 128. In this case the plaintiffs had for many years carried on the business of steel manufacturers under the name of Thomas Turton & Sons, down to 1866, when a company was organized under the name of Thomas Turton & Sons, Limited. Previous to the organization of the company they had adopted four trademarks, which were transferred to the limited company with all the good-will belonging to the business of Thomas Turton & Sons. Their business had been very extensive. The defendant John Turton had for many years carried on a business similar to that of the plaintiffs in the same town, first as John Turton, and then John Turton & Co. In 1868 he took his two sons into partnership, and continued his business as John Turton & Sons. It was shown that the plaintiffs were generally referred to as Turton & Sons; that their letters and correspondence were often addressed to them as Turton & Sons, or Thomas Turton & Sons, without the word "Limited," and that checks intended for them were frequently made payable to the name of Turton & Sons; and it was claimed that the name adopted by the defendants had led to confusion between their firm and plaintiffs', and that persons who intended to give orders to the plaintiffs would be misled into sending their orders to the defendants. It was also shown that letters intended for the plaintiffs had in several instances been delivered to the defendants, who sent them to the plaintiffs. Other evidence of confusion of names was produced. The plaintiffs filed a bill asking for an injunction to restrain defendants from carrying on business as merchants and steel manufacturers under the name of John Turton & Sons, or under any style so closely resembling the plaintiffs' name as to be calculated to deceive. It was held in that case that the plaintiffs were not entitled to an injunction; that the defendants had a right to engage in business, and carry it on in their own names; and that they were not responsible for the blunders made by the business community in not distinguishing John Turton & Sons from Thomas Turton & Sons. It was stated by Lord Esher, M. R., in the course of his opinion, that "no man can have a right to represent his goods as the goods of another person. Therefore, if a man uses his own name, that is no *prima facie* case, but if he, besides using his own name, does other

things which show that he is intending to represent, and is in point of fact making his goods represent, the goods of another person, then he is so prohibited; but not otherwise." This would be a strong case in favor of the defendants' position were it not that one important element is lacking to make it a parallel case to this. Thomas Turton & Sons had no connection in business with John Turton & Sons. They had never been partners. John Turton & Sons had never been in partnership with Thomas Turton. Neither he nor the members of his firm had sold their interest in the going firm to their partners. These facts distinguish this case from the one under consideration, and from those cases which hold that when partners sell a going business to another member of the firm, including the good-will, they are not at liberty to adopt a name, in continuing the business further, that is so near in resemblance to the sound as to deceive the public, and deprive the purchasers of the benefits to be derived from purchasing the business and carrying it on at the old stand. But this case is applicable in one respect, and that is, to that portion of the complaint which sets forth and insists that the defendants had imitated their labels, envelopes, and packages, and by their advertisements held themselves out in such manner as to deceive the public, and lead them to believe that they are the successors to Farrand, Williams & Co. In so far as they made their goods to represent the goods dealt in by complainants, and which they purchased from the firm, under the authority of Lord Esher they are to be prohibited.

In *Burgess v. Burgess*, 3 De Gex, M. & G. 896, the defendant had for many years been employed by the plaintiff, but he was not a partner. He had not sold the good-will of the business to the plaintiff, and it was held that he had a right to start in business at another place in his own name. The case of *Meneely v. Meneely*, 62 N. Y. 427, 20 Am. Rep. 489, is cited by the defendants. That was not a case where the defendants had sold their interest in the partnership to the plaintiffs, including their good-will; but it was a case where one of the defendants was of the same name as the complainants, the defendants' firm name being Meneely & Kimberly, and they advertised their business under this firm name; the plaintiffs carrying on their business under the name of Andrew Meneely's Sons until 1863, and after that time in the name of E. A. & G. R. Meneely. In deciding the case, Rapallo, J., said: "If the defendants were using the name of Meneely with the intention of holding themselves out as the successors of Andrew Meneely, and as the proprietors and managers of the old established foundry which was being conducted by the plaintiffs, and thus enticing away the plaintiffs' customers; and if, with that intention, they used the name in such a way as to make it appear to be that of the plaintiffs' firm, or resorted to any artifice to induce the belief that the establishment of the defendants was the same as that of the plaintiffs; and perhaps if, without any fraudulent intent they had done acts calculated to mislead the public as to the identity of the establishments, and produce injury to the plaintiffs be-

yond that which resulted from the similarity of names,—then the cases referred to sustain the proposition; not that a court of equity would absolutely restrain the defendant Meeneely from the use of his own name in any way or form, but simply that the court would enjoin him from using it in such a way as to deceive the public and injure the plaintiffs. The manner of using the name is all that would be enjoined, not the simple use of it, for every man has the absolute right to use his own name in his own business, even though he may thereby interfere with or injure the business of another person bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do anything calculated to mislead. Where the only conclusion created is that which results from the similarity of names, the courts will not interfere." The distinction between this case and the one under consideration is quite clear. Here there were not relations between the parties arising out of a partnership, and the selling by retiring partners to the other members of the firm the business of the firm. The principle contended for and decided in this case is not disputed by the complainants. To the same effect are *Russia Cement Co. v. Le Page*, 147 Mass. 206, 6 New Eng. Rep. 577; and *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.* 128 U. S. 598, 32 L. ed. 535.

In *Rogers v. Taintor*, 97 Mass. 291, Taintor had become the purchaser of the good-will of an insolvent partnership doing business under the name of J. A. Fay & Co., at Worcester, Mass. He had been a member of the firm. After he so became the purchaser, he used the name of J. A. Fay & Co. in various ways. He attached the name to machines which he had sold and sent to foreign countries. He circulated price-lists, with the name printed at the head of the first page, and at the same time printed it below, with the additional words "E. C. Taintor, succeeding partner." In deciding the case, Mr. Justice Hoar said: "We were inclined to the opinion that the sale of the good-will of the business of the Worcester firm, J. A. Fay & Co., to the defendant upon its dissolution in 1861, in which two of the complainants, who had been his partners, joined, would have the effect, as against them, to give him the right to continue and use the name upon the facts which appear in the case; but, finding the considerations decisive which have been already stated, we do not think it necessary to enter upon that discussion." We are also referred by the defendants' counsel to the case of *Gilman v. Hunnewell*, 122 Mass. 148. That was not a case where the retiring partners had made a sale of the good-will of the business, but was a case where the plaintiffs had purchased the good-will of the business of John L. Hunnewell, including certain trademarks, labels, etc. The defendant, Edwin Hunnewell, had been in the employ of John L. Hunnewell for a long time, and after the sale to the plaintiffs entered into partnership with one John H. Dunbar, and commenced the same business under the style of Hunnewell & Co. There being no contract relations between the parties, the court held that there

did not appear to them to be anything, either in the general appearance or in the contents or form of the marks or the arrangement of words on the defendant's labels, which would lead anyone using reasonable care and observation to the belief that the defendants' remedy was manufactured by the complainants, or that it was the same medicine as that sold by them; and denied the injunction.

It is insisted on behalf of the defendants that the fact that the parties were once copartners is in no wise material, but I think otherwise. I think the complainants' case rests entirely upon the fact that the parties were once copartners, and that the defendants sold to the other members of the firm the entire business, including a lease of the premises, and the good will of the business; and that it was to continue as a going concern in the same line of business. They also contend, which is not disputed, that upon the dissolution of a partnership each partner may re-engage in the same business, and compete with the others; that after dissolution, in the absence of an express agreement, neither can carry on business under the old firm name, unless the firm name be identical with the names of the partners. I do not think that it requires an express agreement to authorize the carrying on of a business under the old firm name. I think such agreement may be implied from the facts and circumstances, at least to the extent of carrying on the business as successors of the old firm. They also contend that the retiring members of a firm may not only engage in the same business in the same locality, but they may advertise their business, and solicit the customers of the old firm, to the same extent that other business competitors may do; they may personally solicit the customers of the old firm. There is no doubt that they may engage in the same business, and in the same locality, and that they may advertise their business; but where they have sold the good-will of the business to the other members of the firm they are precluded from personally soliciting the customers of the old firm.

Counsel for defendants cite the case of *La-bouchere v. Dawson*, L. R. 13 Eq. 322, 1 Moak. Eng. Rep. 711. In that case one of the parties had sold his interest in the business, including "the good-will of the brewery business hitherto carried on at the premises in Kirkstall, hereinbefore mentioned, and the exclusive right to use the name of Benjamin Dawson & Co. in connection with the business of breweries." After this sale the vendor commenced to carry on the business of a brewer at another place, and by travelers and agents solicited the customers of the firm of Benjamin Dawson & Co. The court held that the defendant was not at liberty to apply to any of the old customers privately by letter, personally, or by travelers, asking them to continue their custom to the defendant, and not to go to the vendees.

The case of *Pearson v. Pearson*, L. R. 27 Ch. Div. 145, is also cited in support of the defendants' contention, and it must be admitted that the majority of the court who gave their opinions in that case went probably to the full extent contended for by the defendants, but it was not a unanimous opinion. Justices Bag-gallay and Cotton concurred in overruling the case of *Labouchere v. Dawson*, but Lord Jus-

rice Lindley stated it to be his opinion that *Labouchere v. Dawson* was rightly decided, and I call attention to what he said upon page 158: "Although the good-will is not in terms mentioned in the agreement, I think that it is included; for a man who sells all his interest in a business cannot retain any interest in the good-will." This remark states my view of the agreement in this case, and I wish further to quote from *Lord Westbury in Hall v. Barrows*, 33 L. J. Ch. 204, wherein he said: "Inasmuch as the defendant and surviving partner has by his counsel submitted and agreed to accept and take all the stock belonging to the partnership according to the construction which the court shall put upon the word 'stock' . . . I declare that the words 'stock belonging to the partnership' include and denote the partnership business; . . . also that the exclusive right to use a trade-mark of a partnership is part of the property of a partnership, and ought to be included in the valuation; and that the good-will of the business of the partnership ought also to be valued, and that the same is to be valued on the footing of the surviving partner being at liberty to set up and carry on the same business as the partnership."

The case of *Levy v. Walker*, L. R. 10 Ch. Div. 436, 27 Moak, Eng. Rep. 6, supports the same view. There the firm of Charbonell & Walker had been transacting business under that name, and upon the dissolution of the firm the retiring partner assigned her interest in the business to the other partner, Walker, who continued to carry it on in the same name of Charbonell & Walker. The retiring partner filed a bill to enjoin the use of the name. *Lord Chief Justice James* said: "But there is another point upon which I myself cannot entertain any doubt, which is this: that the assignment of the good-will of the business of Charbonell & Walker did convey the right to use the name of Charbonell & Walker, and the exclusive right to use that name, as between the vendor and the purchaser of that business. Whether it would prevent another person from afterwards using the name of Charbonell, I do not say; but the trade-name, made up of parts of two real names, as the master of the rolls says, the trade-name of Charbonell & Walker (whether it was entirely a fictitious name can make no difference), was the name of the business, and that business was sold. That was the name with which every article sold might have been impressed; just as in the case of *Millington v. Fox*, 3 Myl. & C. 338, where the name was continued as part of the designation of the article sold. I think it right to say that the sale of the good-will of the business conveyed the right to the use of the partnership name as a description of the articles sold in that trade, and that that right is an exclusive right as against the person who sold it, and an exclusive right as against all the world, so that no other person could represent himself as carrying on the same business."

Lord Westbury, in the case of *Hall v. Barrows*, above referred to, says: "But it must be borne in mind that a name, although the original name of the first maker, may in time become a mere trade-mark or sign of quality, and cease to denote or to be current as indicating that any particular person is the maker.

In many cases a name once affixed to a manufactured article continues to be used for generations after the death of the individual who first affixed it. In such cases the name is either accepted on the market as a brand of quality, or it becomes a denomination of the commodity itself, and is no longer a representation that the article is the manufacture of any particular person. . . . This distinction between a name and a trade-mark must be observed. It may be true that, if a name impressed upon a vendible commodity passes current in the market, not as an *indicium* of quality, but simply as a statement or assurance that the commodity has been manufactured by a particular person, the court would not sell and transfer to another person the right to use the name simply on that condition; but if the court sell the business or manufacture carried on by the owner of the name, it would give to the purchaser the right to represent himself as the successor in business of the first maker, and in that character use the name."

In *Churton v. Douglas*, Johns. V. C. (Eng.) 174, the defendant, John Douglas, formerly a member of the firm of John Douglas & Co., had sold all his share in the "good-will" of the partnership to the plaintiffs, who were his former partners. He was restrained from using the firm name of John Douglas & Co., although his own name was John Douglas, and he was associated in partnership with others; and the vice-chancellor went on to say that, if the old firm name had been merely "John Douglas," and there had been a sale, by the individual of that name, of all his share in the good-will of the firm, "and that he had secured the three managing men in the former business, and was going, as here, to set up the old firm of John Douglas with these three men, I should hold then, as I hold now, that he was not at liberty to trade under such misrepresentations." And the vice-chancellor, in deciding that case, further said: "When you are parting with the good-will of a business you mean to part with all that good disposition which customers entertain towards the house and business identified by the particular name or firm, and which may induce them to continue giving their custom to it." Upon the same principle as that announced in *Churton v. Douglas*, it was held in *Rodgers v. Nowill*, 3 De G. M. & G. 614, that defendants' firm, composed of John and William Nowill and William Rodgers, had no right to use upon articles of cutlery manufactured by them the name or mark "J. Rodgers & Sons," with the crown and the royal initials following it. This was a case where the defendants were restrained from using a firm name so near like that of the complainants that it would be apt to mislead the public, although the defendants' firm name included the actual name of one of the members of the firm.

In the case of *Burckhardt v. Burckhardt*, 36 Ohio St. 261, by the agreement the property, including the good-will, was required to be put up, bid off, and sold as a "going concern," to the highest bidder among the partners. The defendant became the purchaser, and plaintiff gave the defendant the exclusive possession of the concern, and conveyed and transferred to him the property purchased. The considera-

tion was entire for all that was purchased, and there was no separation in contemplation of the parties of the good-will from the other property. The court held that the good-will of the concern passed to the purchaser, and that he was entitled to his damages for the injuries sustained by the defendant in depriving the complainant of the good-will. The old firm had been conducting business under the firm name of Burckhardt & Co. The agreement reserved the right for the defendant to engage in business in his own name, but he agreed that he would not engage in business under the firm name. He assumed the name of Leopold Burckhardt & Co., and advertised his business in such a manner as to lead the customers of the old firm to believe that he was carrying on the business, and he solicited their customers by letters, circulars, and agents or traveling salesmen. He also hired the salesmen who had been employed by the old firm to sell his goods, and he engaged in the same kind of business that the old firm had been engaged in. The court held that he was liable for the actual damages which he had caused to the extent to which he had obtained the old customers of the firm to cease trading with it, and to trade with him; in other words, to the extent to which he had obtained a transfer of their patronage. It has been held that the good-will of a business is the subject of sale, like other personal property. *Churton v. Douglas*, Johns. V. C. (Eng.) 174; *Banks v. Gibson*, 11 Jur. N. S. 680; *Hitchcock v. Coker*, 6 Ad. & El. 488; *Wedderburn v. Wedderburn*, 22 Beav. 84; *Johnson v. Helleley*, 84 Beav. 68; *Bradbury v. Dickens*, 27 Beav. 58; *Mellersh v. Keen*, 28 Beav. 458; *Turner v. Major*, 3 Giff. 442; *Crutwell v. Lye*, 17 Ves. Jr. 885; *Shackle v. Baker*, 14 Ves. Jr. 468; *Hall v. Barrows*, 83 L. J. Ch. 204; *McFarland v. Stewart*, 2 Watts, 111, 28 Am. Dec. 109; *Holden v. M'Kain*, 1 Pars. Eq. Cas. 270; *Musselman's App.* 62 Pa. 81; *Williams v. Wilson*, 4 Sandf. Ch. 379, 7 L. ed. 1141; *Dougherty v. Van Nostrand*, 1 Hoffm. Ch. 68, 6 L. ed. 1066. It may be bequeathed by will. *Hitchcock v. Coker*, 6 Ad. & El. 488; *Smith v. Everett*, 27 Beav. 446. It

will pass under a creditor's deed, by which the separate estate of the partners, as well as the firm's assets, are conveyed to trustees. *Bury v. Bedford*, 4 De G. J. & S. 352. It is an asset of the copartnership. *MacDonald v. Richardson*, 1 Giff. 81; *Banks v. Gibson*, 11 Jur. N. S. 680; *Austen v. Boys*, 3 De G. J. & S. 626; *Willett v. Blanford*, 1 Hare, 271; *Musselman's App.* 62 Pa. 81; *Cravenshay v. Collins*, 15 Ves. Jr. 218; *Mellersh v. Keen*, 27 Beav. 286, and 28 Beav. 458. These authorities establish the proposition that the good-will as well as the trade-marks and trade-name is property which is entitled to the protection of a court of equity. Other authorities sustaining the contention of the complainants are found in the following cases: *Myers v. Kalamazoo Buggy Co.* 54 Mich. 215, 52 Am. Rep. 811; *Gron v. Seligman*, 47 Mich. 607, 41 Am. Rep. 737; *Mogford v. Courtenay*, 45 L. T. N. S. 808; *Kerr, Inj.* 167 *et seq.*; *High Inj.* § 822; *Bates, Partn.* §§ 570, 663, 669, 672; *Gage v. Pub. Co.* 11 Ont. App. 402; *Merry v. Hoopes*, 111 N. Y. 415; *Hoxie v. Chaney*, 143 Mass. 592, 3 New Eng. Rep. 709, 58 Am. Rep. 149; *Shipwright v. Clements*, 19 Week. Rep. 599; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 278, 9 Am. Rep. 824; *Russia Cement Co. v. Le Page*, 147 Mass. 206, 6 New Eng. Rep. 577; *Lindley, Partn.* 489; *Hall's App.* 60 Pa. 462; *Collyer, Partn.* §§ 162, 168; *Shaver v. Shaver*, 54 Iowa, 208, 87 Am. Rep. 194; *Liggett & M. Tobacco Co. v. Sam Reid Tobacco Co.* 104 Mo. 53.

The complainants' case may be safely rested upon the principles recognized and acted upon in *Myers v. Kalamazoo Buggy Co.* above cited. The record in this case is voluminous, and this opinion has already been drawn out to greater length than I intended; but whoever will take the trouble to read the proofs will find that a plain case for equitable relief is made out under well-recognized principles of equitable jurisdiction. The complainants are entitled substantially to the relief prayed for, and the decree of the court below should be reversed, and a decree entered here in accordance with the prayer of the bill.

UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF ARKANSAS.

Lewis G. STEPHENS

v.

ST. LOUIS & SAN FRANCISCO R. CO.

(47 Fed. Rep. 580.)

1. On a motion to remand a case sought to be brought to a federal court from a

state court by removal, when it is alleged the record of the state court misstates the facts because of an error on the part of a ministerial officer of the state court in making up the record, parol testimony is competent to show the fact, though the same may contradict the record as made up by the clerk.

2. The St. Louis & San Francisco Rail-

NOTE.—Corporations; residence or citizenship for purpose of federal jurisdiction in State other than that where created.

A corporation doing business in a State other than that by which it was chartered cannot thereby become a citizen within the meaning of the law regulating removals to federal courts. *Germania F. Ins. Co. v. Francis*, 78 U. S. 11 Wall. 210, 20 L. ed. 77.

Or within the meaning of other statutes giving jurisdiction to federal courts on the ground of citizenship. *Land & River Imp. Co. v. Bardon*, 45 14 L. R. A.

Fed. Rep. 706; *Miller v. Wheeler & W. Mfg. Co.* 46 Fed. Rep. 882.

Although all the officers of a corporation reside in another State and its business is transacted there, it cannot be held a resident for the purpose of federal jurisdiction if it was created by another State. *Booth v. St. Louis Fire E. Mfg. Co.* 40 Fed. Rep. 1.

Filing its articles of incorporation with the secretary of state, as required by 18 Iowa Gen. Assem., chap. 123, cannot prevent a foreign corporation from removing to a federal court an action against

road Company was first chartered by the State of Missouri. Then it was adopted as a corporation of Arkansas. Such adoption does not take away its character as a Missouri corporation, and, as such, the same is a citizen of the State of Missouri, and, as a citizen of such State, when sued by a citizen of Arkansas in a state court of Arkansas, it may secure the removal of a suit to the federal court.

(October 5, 1891.)

MOTION to remand to the State Court an action which had been removed therefrom and which was brought to recover damages for an alleged wrongful ejection from defendant's train. *Motion overruled.*

The facts sufficiently appear in the opinion. *Messrs. Walker, Walker & Walker and Rogers & Read*, for plaintiff, in support of the motion.

Messrs. B. R. Davidson and Clayton, Brissolara & Forrester, contra:

A corporation may do business elsewhere, but cannot migrate for the purpose of federal jurisdiction. It is recognized as a citizen of the State creating, and no averment to the contrary is permitted. This is a conclusive presumption of law.

It by a resident corporation of Iowa. *Chicago, I. & N. P. R. Co. v. Minnesota & N. W. R. Co.* 29 Fed. Rep. 337.

A railroad company created by one State does not become a citizen of another, into which it is permitted to construct an extension of its line, so as to prevent it from removing a cause of the latter State to the federal court. *Goodlett v. Louisville & N. R. Co.* 128 U. S. 391, 30 L. ed. 1230.

Adoption or new incorporation.

A railroad corporation of one State permitted by another to extend its road into the latter State, doing nothing more than to give it a mere grant of privileges or powers as an existing corporation, does not make it a citizen of the State conferring such powers for purposes of federal jurisdiction. *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 295, 30 L. ed. 87.

A Maryland corporation, by taking from a Virginia corporation with the assent of Virginia a lease of a railroad in Virginia, does not become a corporation of that State so as to prevent its removal to a federal court of a suit brought by a citizen of Virginia. *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 5, 26 L. ed. 643.

A statute which merely confers upon a corporation created in another State a license to transact business in the State does not make it a citizen so as to prevent it from removing a suit to a federal court on the ground of citizenship. *Taylor County v. Baltimore & O. R. Co.* 35 Fed. Rep. 161.

A corporation duly organized under the laws of two States may be a citizen of each within the law as to federal jurisdiction based on citizenship. *Colglazier v. Louisville, N. A. & C. R. Co.* 22 Fed. Rep. 568; *Chicago & W. I. R. Co. v. Lake Shore & M. S. R. Co.* 5 Fed. Rep. 19.

A railroad company incorporated in a State becomes a citizen thereof so as to prevent removal of a cause to a federal court on the ground of citizenship in another State. *Memphis & C. R. Co. v. Alabama*, 107 U. S. 581, 27 L. ed. 518.

A railroad company operating a continuous line from Massachusetts through New Hampshire into Maine and having its charter powers from each of the three States cannot remove a suit from a New Hampshire court to a federal court on the ground 14 L. R. A.

Harris v. Bunnels, 53 U. S. 12 How. 81, 18 L. ed. 902; *Marshall v. Baltimore & O. R. Co.* 57 U. S. 16 How. 314, 14 L. ed. 953; *Germania F. Ins. Co. v. Francis*, 78 U. S. 11 Wall. 210, 20 L. ed. 77; *Chicago & N. W. R. Co. v. Whitton*, 80 U. S. 13 Wall. 285, 20 L. ed. 578.

An allegation in the complaint that the corporation was created by the State is sufficient to show jurisdiction.

Chicago & N. W. R. Co. v. Whitton, 80 U. S. 13 Wall. 270, 20 L. ed. 571; *United States Exp. Co. v. Kountze Bros.* 75 U. S. 8 Wall. 848, 19 L. ed. 459.

The law requiring a foreign corporation to file agreement to be treated as a domestic corporation does not affect the jurisdiction. The agreement is void.

Rees v. Newport News & M. V. Co. 8 L. R. A. 572, 32 W. Va. 164; *Southern Pac. R. Co. v. Harrison*, 73 Tex. 103; *Barron v. Burnside*, 121 U. S. 186, 30 L. ed. 915.

The court could not allow amendment and defeat transfer; that is "proceeding further."

Kanouse v. Martin, 56 U. S. 15 How. 198, 14 L. ed. 660.

When the right to removal has become perfect, it is not within the power of either party to defeat it by amendment.

that it is not a citizen of New Hampshire. *Horne v. Boston & M. R. Co.* 63 N. H. 454.

Consolidation with domestic corporation.

A company formed by consolidation of several corporations chartered by different States is a citizen of each of those States within the meaning of the laws as to jurisdiction of federal courts on the ground of citizenship. *Fitzgerald v. Missouri Pac. R. Co.* 45 Fed. Rep. 812.

A corporation consolidated from corporations of different States under a statute of a State providing that it should be treated as a corporation of that State must be held to be such on an application for removal of a suit to a federal court. *Cohn v. Louisville, N. O. & T. R. Co.* 39 Fed. Rep. 227.

A corporation consolidated by Ohio Laws from Ohio and Indiana corporations is nevertheless an Indiana corporation, and cannot remove a suit from an Indiana court to a federal court on the ground that it is not a citizen of the State. *Paul v. Baltimore, O. & C. R. Co.* 44 Fed. Rep. 513.

But consolidation of a foreign corporation with a domestic one pending the suit will not prevent removal to a federal court. *Chicago, I. & N. P. R. Co. v. Minnesota & N. W. R. Co.* 29 Fed. Rep. 337.

And the separate identity of corporations of different States is not lost by the mere union of their interests whereby the stockholders of one become the stockholders of the other and the business is done by one set of directors and their citizenship for purposes of jurisdiction remains unchanged. *Nassau & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 356, 34 L. ed. 363.

Residence; an "inhabitant," where?

A corporation chartered by a foreign country does not become a resident of a State so as to prevent its removal of a suit to a federal court as a nonresident defendant, by the fact that it has an office and an agent within the State for the purpose of carrying on business therein. *Purcell v. British Land & Mortg. Co.* 42 Fed. Rep. 465.

Neither does it become a resident so as to defeat such removal by filing statements required by a state statute authorizing its agents to acknowledge service of process and consenting to service upon such agents. *Amaden v. Nor* A. U. F. Ins. Soc.

Dillon, Removal of Causes, 45, 66, 93, 94; *Kanouse v. Martin*, *supra*; *Wright v. Wells*, 1 Pet. C. C. 220; *Green v. Custard*, 64 U. S. 23; How. 484, 16 L. ed. 471; *Roberts v. Nelson*, 8 Blatchf. 74; *Hatch v. Chicago, R. I. & P. R. Co.* 6 Blatchf. 105; *Fish v. Union Pac. R. Co.* Id. 863, 8 Blatchf. 248; *Gordon v. Longest*, 41 U. S. 16 Pet. 97, 10 L. ed. 900; *Stimley v. Chicago, R. I. & P. R. Co.* 8 Cent. L. J. 430.

A corporation has no legal existence except in the State creating it.

Marshall v. Baltimore & O. R. Co. 57 U. S. 16 How. 325, 14 L. ed. 958; *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 519, 10 L. ed. 274; *Chicago & N. W. R. Co. v. Whitten*, 80 U. S. 13 Wall. 270, 20 L. ed. 571.

Parker, J., delivered the opinion of the court:

This is a suit for the recovery of damages of the defendant, which was brought in the Circuit Court of the State of Arkansas for Washington County, and, as a foundation for damages, the plaintiff states that he bought a ticket

of defendant's agent, authorizing him, as a passenger, to pass over said road in defendant's cars from St. Louis, in Missouri, to Newburg, in said State, a distance of 120 miles; that the agents and servants of defendant, acting for it, before he had reached the end of his journey, to wit, at St. Louis, wrongfully, forcibly, and unlawfully forced, drove, threw, and expelled the said plaintiff from the cars of defendant; that they struck, beat, kicked, choked, and wounded him; that they tore his clothes, and prevented him from riding in defendant's cars; that he was prevented from completing his journey. For this the plaintiff claimed damages to the amount of \$4,999. On the 15th of May, 1891, defendant filed a petition and the necessary bond with the circuit clerk of Washington County for the removal of the case to this court. On the same day plaintiff asked permission of the court, and was allowed to amend his complaint, so that the amount of damages prayed for would be \$1,999. By the record as made up by the clerk it appears that on the 15th of May, 1891, the plaintiff asked leave to

44 Fed. Rep. 515. *Contra*, *Scott v. Texas Land & C. Co.* 41 Fed. Rep. 225.

A corporation created by a foreign government is not an inhabitant of the Southern District of New York for purposes of federal jurisdiction under the Act of 1887 because its usual monetary and financial transactions are conducted there when the piers to which its vessels come are in New Jersey, where it receives and discharges cargo and maintains an office for the transaction of the matters immediately connected with its actual industrial operations in this country. *Hoborst v. Hamburg Amer. Packet Co.* 38 Fed. Rep. 273.

A corporation created by a foreign government is an inhabitant of a State for the purpose of federal jurisdiction under the Judiciary Act of 1888, where all its property and business are in that State. *Miller v. Eastern Oregon G. Min. Co.* 45 Fed. Rep. 345.

A corporation created by one State cannot become a resident of another although doing business therein so as to deprive it of the right to remove a cause to a federal court from a state court as a nonresident. *Myers v. Murray*, 11 L. R. A. 216, 43 Fed. Rep. 695; *Henning v. Western U. Teleg. Co.* 43 Fed. Rep. 97; *Baughman v. National Water Works Co.* 46 Fed. Rep. 4; *Pacific R. Co. v. Missouri Pac. R. Co.* 23 Fed. Rep. 564; *Fales v. Chicago, M. & St. P. R. Co.* 32 Fed. Rep. 673.

An averment in a petition for removal that petitioner is a corporation created under the laws of a State other than that in which the suit is brought sufficiently shows that it is a nonresident of the State without explicitly averring that it has not become such. *Myers v. Murray*, *supra*. *Contra*, *Overman Wheel Co. v. Pope Mfg. Co.* 46 Fed. Rep. 577; *Hirschl v. J. I. Case Threshing Mach. Co.* 42 Fed. Rep. 808.

The fact that a corporation created by one State has an office and an agent in another does not constitute it an inhabitant of the federal district at that place so that a civil action can be brought against it there under the Act of Congress of March 3, 1887. *Connor v. Vicksburgh & M. R. Co.* 1 L. R. A. 331, 2 Inters. Com. Rep. 177, 36 Fed. Rep. 273; *Preston v. Fire Extinguisher Mfg. Co.* 36 Fed. Rep. 721; *Gormully & J. Mfg. Co. v. Pope Mfg. Co.* 34 Fed. Rep. 818; *Hailestead v. Manning*, 34 Fed. Rep. 565; *Denton v. International Co. of New Mexico*, 36 Fed. Rep. 1; *Booth v. St. Louis Fire E. Mfg. Co.* 40 Fed. Rep. 1; *Bensinger Self Adding Cash Reg. Co. v. National O-* Reg. Co. 42 Fed. Rep. 81; *National Typographic Co. v. New York Typographic Co.* 44 Fed. Rep. 711. *Contra*, *Riddle v. New York, L. E. & W. R. Co.* 39 Fed. Rep. 320.

Nor can a corporation be an inhabitant so as to be suable under the Act of 1887, in a federal court in any State except that by which it was created, although its principal office and the greater part of its property are in another State. *Full v. Delaware, L. & W. R. Co.* 37 Fed. Rep. 66.

A corporation organized under the laws of the United States and doing business in a Territory is a domestic corporation of the Territory, on which an attachment from a district court of the Territory may be rightly served in such district. *Loose v. McCarty*, 5 Utah, 628.

Where "found" under Act of 1875.

A railroad company having its principal office in the eastern district of Texas, but whose railroad extends in to the western district, where it transacts ordinary business and has agents, is an inhabitant of the western district within the meaning of the Act of 1875, allowing suit to be brought in the district where defendant is "found." *Zambrino v. Galveston, H. & S. A. R. Co.* 38 Fed. Rep. 449.

A corporation of one State doing business in another is found there within the meaning of the Act of Congress allowing it to be sued in the district where it is found. *United States v. American Bell Teleph. Co.* 29 Fed. Rep. 17.

But the mere presence of the officers of a foreign corporation in another State, as in case of running a train of cars into the State for purposes of exhibition and advertisement only, does not make it an inhabitant of the State or authorize it to be considered as found there within the Act of Congress. *Carpenter v. Westinghouse A. R. Co.* 32 Fed. Rep. 424.

Neither will sending an agent into another State to make purchases for the corporation. *St. Louis Wire Mill Co. v. Consolidated Barb Wire Co.* 32 Fed. Rep. 802; *Good Hope Co. v. Railway Barb Fencing Co.* 22 Fed. Rep. 635.

A fire insurance company of another State is "found" within a State in which it has designated the insurance superintendent as its attorney on whom process may be served as required by the laws of that State so that an action may be brought against it in that district. *Wotherspoon v. Massachusetts Ben. Asso.* 38 Fed. Rep. 625. R. A. R.

amend his complaint by striking out the sum of \$4,999, as the amount of damages claimed by the plaintiff, and to insert in lieu thereof the sum of \$1,999, "which [as the record recites] is by the court granted, and it is ordered that the same be so amended."

The record further recites: "Whereupon comes the defendant, and files its answer, and also files and presents to the court its petition and bond in due form of law, praying in said petition to transfer this cause to the United States court for the Western District of Arkansas, which petition is by the court denied, for the reason that the amount of damages claimed by plaintiff in his amended complaint herein is not in amount sufficient to authorize such transfer to said United States court."

The defendant obtained a transcript of the proceedings, and on July 31, 1891, filed the same in this court. The plaintiff filed his motion to remand the cause to the state court, because: *first*, the amount in controversy is less than \$2,000; and, *second*, because the court has no jurisdiction over the parties to this action. To sustain the first cause the plaintiff claims that the amendment to the complaint, changing the amount of damages prayed for so that it was less than \$2,000, was made prior to the time the defendant filed its petition and bond for removal, so that at the time of filing the same the amount was not sufficient to authorize a removal. The record, as set out above, shows that petition and bond for removal were filed after the amendment changing the amount of damages had been made. The defendant says this is not correct; that the petition and bond for removal were filed about 1:30 o'clock P. M. on the 15th of May; that the amendment was not asked for and was not made until between 5 and 6 o'clock of the afternoon of that day. The petition for removal, which is a part of the record, states "that the matter and amount in dispute in the above-entitled cause exceeds, exclusive of costs, the sum of \$2,000." The clerk of the court (Mr. Scott) was called as a witness by the defendant, and he testified, on the hearing of the motion to remand, that the petition and bond for removal were filed at about 1:30 o'clock P. M. on the 15th of May, and that the order amending the complaint was not made until about 5 o'clock P. M. of that day. The plaintiff claims this evidence cannot be heard against the record of the state court, because it cannot be attacked by parol evidence. This is not a collateral attack of the record,—that is, where a thing done is questioned in an independent proceeding; but it is an attack upon its correctness in the same case, and as though it was made in the same court which made the record. This proceeding stands as though it was a motion made in the same court which made the record to correct the same because a mistake had been made, for this court takes up the case where the state court left off, and proceeds in it as that court would have proceeded. The effort here is to make the record speak the truth as to what was done, upon the suggestion that its ministerial officer by mistake has not correctly recorded the proceedings in the order in which they occurred. When this is sought to be done, the fact of the error having been committed may be shown by parol evidence. *Jenkins v. Long*, 14 L. R. A.

23 Ind. 460; *Brown v. Van Deuzer*, 10 Johns. 51; *Trafton v. Rogers*, 13 Me. 315; 2 Wharton, Ev. § 983. This being the rule, under it the evidence of the clerk is admissible. He states as a witness that the amendment to the complaint reducing the amount of damages claimed below \$2,000 was not made by the court until some time after 5 o'clock P. M. of the 15th day of May last, and that the petition and bond for removal were filed about 1:30 o'clock P. M. of that day. This evidence of the clerk is strengthened by the petition for removal. I must take the fact that this amount of \$1,999 was not the amount claimed in the complaint at the time of the filing of the petition and bond for removal as being established, and that at that time the amount was in excess of \$2,000. The case as made by the complaint, and as it stood at the time of the filing of the petition and bond for removal, is the test of the right to a removal. *Graves v. Corbin*, 182 U. S. 571, 33 L. ed. 463; *Jackson v. Allen*, 182 U. S. 27, 33 L. ed. 249. If the amount was \$2,000 at 1:30 o'clock P. M., when defendant filed its petition and bond for removal, and the other fact in the shape of the proper citizenship of the parties existed at that time, the effect was to work a removal of the case, and the rightful jurisdiction of the state court over the case ceased *eo instanti*. Section 75, chap. 17, Dillon, Removal of Causes. When the right of removal has become perfect, it cannot be taken away by a subsequent amendment in the state court, such as by a release of part of the debt or damages. *Nashville v. Cooper*, 78 U. S. 6 Wall. 250, 18 L. ed. 852; *Penrose v. Penrose*, 1 Fed. Rep. 479; Dillon, Removal of Causes, chap. 18, § 75. As far as amount is concerned, it was sufficient, under the law, to give the defendant the right of removal at the time it filed its petition and bond. But plaintiff in his motion sets out that the court has no jurisdiction of the parties. This is because the defendant is a corporation of the State of Arkansas, and the petition for removal shows that plaintiff is a citizen of Arkansas. The complaint also alleges that the defendant is a citizen of Missouri. This court held in *James v. St. Louis & S. F. R. Co.*, 46 Fed. Rep. 47, that defendant, a corporation of Missouri, had, by virtue of the Act of the Arkansas Legislature of March 13, 1889, become also a corporation of Arkansas. But did this Act make it any less a corporation of Missouri, by which State it was first incorporated? The fact that the defendant holds and exercises chartered powers by the common legislation of two States, and exercises a common citizenship of those States, does not destroy its right as a citizen of Missouri, for it does not take away the fact of its citizenship in such State. *Horne v. Boston & M. R. Co.* 62 N. H. 454, and *Horne v. Boston & M. R. Co.* 18 Fed. Rep. 50; *Chicago & N. W. R. Co. v. Whitton*, 80 U. S. 13 Wall. 270, 20 L. ed. 571. The reasoning of the court in *Chicago & W. I. R. Co. v. Lake Shore & M. S. R. Co.* 5 Fed. Rep. 19, and in *Uphoff v. Chicago, St. L. & N. O. R. Co.* 5 Fed. Rep. 545, and *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 356, 34 L. ed. 868, as I conceive, fully sustains the above position. The supreme court in the last-named case said: "From the cases we have cited, it is evident that, by the general

law, railroad companies created by two or more States, though joined in their interests, in the operations of their roads, in the issue of their stock, and in the division of their profits, so as practically to be a single corporation, do not lose their identity, and that each one has its existence and its standing in the courts of the country only by virtue of the legislation of the State by which it is created."

The effect of the legislation of Arkansas making the defendant a corporation of the State of Arkansas cannot be so construed as to take

away the right of the defendant, created by law a citizen of Missouri, from going into the federal court, or hindering a citizen from bringing a suit against it in such courts, as to do so would be an exercise of power by the Legislature of the State, which, under the Constitution of the United States, belongs alone to Congress,—that of defusing the jurisdiction of the federal courts. I believe the situation of the parties in the case is such that jurisdiction exists in this court.

The motion to remand will be overruled.

OREGON SUPREME COURT.

D. D. LEVENS, Admr., etc., of D. A.
Levens, Deceased, *Recept.*,

v.

W. F. BRIGGS and Wife, Impleaded, etc.,
Appts.

(.....Or.....)

1. An agreement in a note to pay interest on arrears of interest is iniquitous and invalid.

2. An agreement for a specified percentage in case a note is "collected by process of law or by an attorney" is invalid although a provision for a reasonable attorney's fee to be ascertained by the court would be good.

(November 24, 1891.)

APPEAL by defendants Briggs and Wife from a decree of the Circuit Court for Douglass County in favor of plaintiff in a suit brought to foreclose a mortgage. *Modified.*

Statement by **Strahan, Ch. J.**

The complaint alleges that on the 25th day of April, 1881, at Canyonville, Douglas County, Or., the defendants W. F. Briggs, and Elizabeth Briggs made their promissory note of that date, and thereby promised to pay to Dan A. Levens or order \$2,500, ten years after date, with interest thereon at the rate of 10 per cent per annum from date until paid, the interest to be paid annually, and, if not so paid, to be considered as an additional amount of principal, and to bear like interest per annum, and a reasonable attorney's fee to be added if collected by process of law or by an attorney, for value received. The complaint then alleges the making of the mortgage to secure the payment of the note, describes the premises, and contains the necessary facts to entitle the plaintiff to a decree of foreclosure, and demands a decree for the sum of \$4,030.43 and \$400 attorney's fees. Marks & Co. and Manning were made defendants as subsequent lienholders. They answered, alleging the nature of their respective liens. Briggs and wife answered, admitting that they executed a note to said D. A. Levens in the sum of \$2,500, payable ten years after date, with interest thereon at the rate of ten per cent per annum; but

deny that by the terms of said note they promised or agreed to pay a reasonable attorney's fee, or any attorney's fee, if said note should be collected by process of law or by an attorney; admit the execution of the mortgage to secure the payment of said note, but deny that there is due or unpaid on said indebtedness the sum of \$4,030.43, or any other or greater sum than \$3,531.23; deny also the reasonableness of the attorney's fee claimed. For a separate defense the answer then sets out a copy of said note as follows:

"\$2,500.00

Canyonville, Oregon,
April 25, 1881.

"For value received, ten years after date, we, or either of us, promise to pay to Dan A. Levens or order two thousand five hundred dollars, U. S. gold coin, with interest thereon in like gold coin at the rate of ten per cent per annum from date until paid; and we hereby further agree that, if the interest shall not be paid at the expiration of each year, that said accrued interest shall be considered as an additional amount of principal to the original, and bear like interest per annum from the date of the expiration of each year. The interest on the latter is to be paid in like manner as the original, and ten per cent to be added for attorney's fees if collected by process of law or by an attorney.

W. F. Briggs,
Elizabeth Briggs."

That thereafter the said defendants paid upon said promissory note the following sums, to wit: April 25, 1883, \$26 90; July 25, 1883, \$300; June 23, 1884, \$800; October 22, 1885, \$100. That there is now due, owing, and unpaid upon the said promissory note the sum of \$3,531.23, and no more. The answer contained another separate defense, alleging, in effect, that said note was usurious by reason of the particular provisions therein, in substance, that accrued interest, after due, might bear interest. These defenses were demurred to, and on the 15th day of July, 1891, the court, being in doubt what judgment ought to be entered thereon, took the same under advisement, so the record recites; but the demurrers are not in the transcript, nor does the record disclose what disposition the court made of them. But on the 19th day of July, 1891, a decree of foreclosure was entered in favor of plaintiff for the sum of \$4,130 and \$400 attorney's fees, from which the defendants Briggs and wife have appealed.

NOTE.—For notes on stipulations as to attorney's fees, see *Bowie v. Hall* (Md.), 1 L. R. A. 546; *Wright v. Traver* (Mich.), 3 L. R. A. 30; *Exchange Bank of Dallas v. Tuttle* (N. M.), 7 L. R. A. 445.
14 L. R. A.

Mr. J. C. Fullerton, for appellants:

This court held in the case of *Balfour v. Davis*, 14 Or. 47, that the court would not allow an attorney's fee where the parties contracted for a certain per cent in case suit was brought to enforce the claim.

See also *Commercial Nat. Bank of Ogden v. Davidson*, 18 Or. 57.

Where a note is given payable on long time, with interest payable annually, such interest cannot be added to the principal and draw interest, unless when the interest becomes due the parties agree that the same shall be added to the principal. Nor will a contract in advance to pay compound interest be enforced in law or in equity, but after simple interest has accrued, a contract that it shall thereafter bear interest is valid.

1 Suth. Dam. pp. 678, 680; 1 Jones, Mort. § 650; *Murray v. Oliver*, 8 Or. 539; Edwards, Notes and Bills, 15th ed. § 499; 3 Parsons, Cont. * 152; *Drury v. Wolfe*, 134 Ill. 294; *Van Benschooten v. Lawson*, 6 Johns. Ch. 818, 2 L. ed. 136, 10 Am. Dec. 333; *Connecticut v. Jackson*, 1 Johns. Ch. 18, 1 L. ed. 41, 7 Am. Dec. 471; *Mason v. Callender*, 2 Minn. 360, 72 Am. Dec. 102; *Breckenridge v. Brooks*, 2 A. K. Marsh. 835, 12 Am. Dec. 401; *Cox v. Smith*, 2 Nev. 161, 90 Am. Dec. 476; *Banks v. McOlellan*, 24 Md. 63, 87 Am. Dec. 594; *Bowman v. Neeley* (Ill.) May 11, 1891.

Mr. William R. Willis, for respondent:

This note provides that if the interest is not paid annually it shall bear interest at the same rate as the principal. This agreement is valid and founded upon a sufficient consideration.

Hathaway v. Meads, 11 Or. 66; *Carter v. Carter*, 76 Iowa, 474; *Wood v. Whisler*, 67 Iowa, 676; *Riz v. Strants*, 59 Mich. 364; *Bowen v. Barkedale*, 33 S. C. 142; *Kurs v. Suppiger*, 18 Ill. App. 680; *Vaughan v. Kennan*, 83 Ark. 114; *Thayer v. Wilmington S. Min. Co.* 105 Ill. 540; *Mueller v. McGregor*, 38 Ohio St. 265.

A stipulation for attorney's fees in a note is valid.

Peyserr v. Cole, 11 Or. 39, 50 Am. Rep. 451; *Huling v. Drexell*, 7 Watts, 126; *Smith v. Silvers*, 33 Ind. 321.

Strahan, Ch. J., delivered the opinion of the court:

Upon this appeal two questions were argued. The first was that the court erred in finding the amount due on said note and mortgage to be \$4,180, instead of \$3,531.23, and the second was that the court erred in allowing \$400, or any sum, as attorney's fees. These questions will be separately considered.

1. The only contention of the appellants on the first proposition is that the court should not have computed interest upon interest after it annually became due and remained unpaid agreeably to the terms of the note. It was conceded upon the argument here that, if the plaintiff was entitled to interest on the accrued interest after it became due and remained unpaid, then that the amount of the decree is correct. On the other hand, it was conceded by the plaintiff's counsel that, if the plaintiff was not entitled to said interest on the accrued interest after it became due, then that the decree would have to be modified, as claimed by 14 L. R. A.

appellant; in other words, the amount of interest upon overdue interest would have to be deducted from the amount found due by the lower court. The sole question, therefore, is whether or not it is lawful for parties to contract in the same writing evidencing the principal debt for interest upon interest after it shall become due and remain unpaid. The general trend and effect of all the earlier cases and authorities are against the validity of that part of such a contract which attempts to provide for compounding the interest. Though not usurious, such contracts are said to be iniquitous, and will neither be enforced in courts of law nor equity. *Tyler, Usury*, 241. And *Chancellor Kent* said, in *Van Benschooten v. Lawson*, 6 Johns. Ch. 818, 2 L. ed. 136, 10 Am. Dec. 333, that an agreement, made at the time of the original contract of loan, that interest shall begin and run upon the lawful interest from the period stipulated for its payment, is not valid. *Breckenridge v. Brooks*, 2 A. K. Marsh. 835, 12 Am. Dec. 401, is to the same effect. *Connecticut v. Johnson*, 1 Johns. Ch. 18, 1 L. ed. 41, 7 Am. Dec. 741, holds the same doctrine, and the following authorities announce the same view: 3 Randolph, Com. Paper, § 1706; *Bowman v. Neeley* (Ill.) 27 N. E. Rep. 758; *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99; *Thayer v. Wilmington S. Min. Co.* 105 Ill. 540; *Stokely v. Thompson*, 84 Pa. 210; *Rose v. Bridgeport*, 17 Conn. 243; *Drury v. Wolfe*, 134 Ill. 294; *Perkins v. Coleman*, 51 Miss. 298; *Callin v. Lyman*, 16 Vt. 44, and *Judge Redfield's notes*. On the other hand, a very respectable array of authorities hold the contrary rule. In *Hale v. Hale*, 1 Coldw. 233, it was held that parties to a loan may lawfully agree, when it is made, that, if the interest is not paid at the time stipulated, it shall be treated as principal, and bear interest. See also authorities cited in *note to Calhoun v. Marshall*, 84 Am. Rep. 101; *Vaughan v. Kennan*, 83 Ark. 114; *Wood v. Whisler*, 67 Iowa, 676; 5 Lawson, Rights, Rem. & Pr. § 2443; *Mueller v. McGregor*, 38 Ohio St. 265; *Bowen v. Barkedale*, 33 S. C. 142; *Doig v. Barkley*, 3 Rich. L. 125, 45 Am. Dec. 762; *Talliferro v. King*, 9 Dana, 331, 35 Am. Dec. 140; *Bledsoe v. Nison*, 69 N. C. 89, 12 Am. Rep. 642; *Pearce v. Hennessy*, 10 R. I. 223; *Peirce v. Rowe*, 1 N. H. 179; *Townsend v. Riley*, 46 N. H. 300.

There have been two cases in this court in which the question of compound interest was referred to. The first is *Murray v. Oliver*, 8 Or. 539; but the question in that case turned upon the construction of the Statute of 1854. That statute expressly allowed interest to be compounded, but prohibited it oftener than once a year. In an action upon a note, which provided for the payment of interest half-yearly, and to be compounded if not paid when due, the court held the contract severable, and enforced the note in all respects, except the interest was not compounded. *Hathaway v. Meades*, 11 Or. 66, was an action on a note given for interest upon interest after it had accrued and had become due according to a previous agreement to pay it, and it was held that the claim to interest upon interest was regarded so far an equitable one that a note given for the payment of it would be sus-

tained and enforced as founded upon a sufficient consideration. In *New England Mortg. Secur. Co. v. Vader*, 12 Sawy. 62, 28 Fed. Rep. 265, it was held that a contract to pay interest on a coupon or interest note after maturity would be enforced, but the more stringent line of authorities on the subject allow this as an exception. Looking at the policy of this State on the subject of usury and interest, as well as the general principles upon which the rule referred to is founded, we are led to follow the cases first cited in this opinion, and to hold that interest upon interest is not collectible when it is stipulated and provided for in the same instrument securing the principal debt.

2. The remaining question is whether any attorney's fee is collectible under this note. In *Balfour v. Davis*, 14 Or. 47, the parties contracted for a specified percentage in case of suit, and we refused to enforce it, or to allow any attorney's fee. Had the note provided for a reasonable attorney's fee, to be ascertained by the court, as was done in *Peyser v. Cole*, 11 Or. 89, there could have been no legal objection; but where the parties stipulated for an oppressive and unconscionable amount no court ought to enforce it. And because that method had grown into an oppressive abuse, and the courts were being used to make it effectual, we thought best to announce the rule that no attorney's fee would be allowed by the courts if the amount thereof is specified in the contract. The reasons are obvious. No one can know beforehand the value of legal services in enforcing collection until their extent is certainly known. If a stubborn defense were interposed, and the case should be carried to the highest court, certainly a somewhat more liberal amount ought to be paid than if the defendant made default. Besides, if it be conceded that the parties may specify the amount, if it be reasonable, it is somewhat difficult on principle to say they shall not determine for themselves what is reasonable. This case falls within *Balfour v. Davis*, *supra*, and must be controlled by it. It therefore follows that there must be a foreclosure for the amount due upon the note and simple interest, and there will be no allowance for attorney's fees.

The decree appealed from will be modified according to this opinion.

S. MARKS *et al.*, Appts.,

v.

S. O. MILLER, Resp't.

(.... Or.)

*1. In most of the States it is provided that chattel mortgages shall be filed in a designated office, or recorded, or else they shall not be valid as against creditors of the mortgagor or subsequent purchasers or incumbrancers with notice, unless the property mortgaged is delivered to and retained by the mortgagees.

*Head notes by LORD, J.

NOTE.—For note on effect of mortgagors retaining possession of mortgaged chattels, see *Hangen v. Hachmeister* (N. Y.) 5 L. R. A. 137.

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2. Under our statute, when a chattel mortgage has not been filed, a presumption of fraud is created from the retention of possession of the mortgaged property by the mortgagor, which may be rebutted by showing that it was made in good faith and for a valuable consideration.

(November 24, 1891.)

APPEAL by plaintiffs from a judgment of the Circuit Court from Douglas County in favor of defendants in an action brought to recover possession of certain personal property. *Reversed.*

The facts sufficiently appear in the opinion. Mr. William B. Willis, for appellants:

The plaintiffs, mortgagees, are entitled to the possession of this property, and to recover it in this form of action.

Hill's Code, p. 258, § 3837, p. 1640; *J. I. Case Threshing Mach. Co. v. Campbell* (Or.) Feb. 1, 1887.

Wells, at the time this action was commenced, had no interest in this property subject to levy or sale by his creditors.

Leadbetter v. Leadbetter, 125 N. Y. 298; *Manchester v. Tibbitts*, 21 N. Y. 219; *Hall v. Sampson*, 35 N. Y. 374; *Galen v. Brown*, 22 N. Y. 37.

The question of fraudulent intent is a question of fact, and not of law.

Code, § 3063, p. 1873; *Cornahan v. Schwab*, 127 Ind. 507; *Kitzgerald v. Meyer*, 25 Neb. 77; *Siedenbach v. Riley*, 111 N. Y. 560.

The allegation of ownership in the complaint can be proven by showing a chattel mortgage and a breach of its conditions.

Miller v. Adamson, 45 Minn. 99.

Mr. J. W. Hamilton, for respondent:

All deeds of gift, all conveyances and all transfers or assignments verbal or written, of goods and chattels or things in action, made in trust for the person making the same, shall be void as against the creditors existing or subsequent, of such person.

2 Hill's Code, § 3053, p. 1871.

It shall be the duty of the county clerk, upon the presentation for that purpose of any mortgage or conveyance intended to operate as a mortgage of goods and chattels, or a copy of any such instrument, and the payment of his fees, to indorse thereon the time of receiving the same, and to deposit such instrument or copy in his office, to be kept for the inspection of all persons interested.

2 Hill, Code, § 3054.

Every such mortgage shall cease to be valid as against creditors of the person making the same, or subsequent purchasers or mortgagors in good faith after the expiration of one year from the filing of the same, etc.

2 Hill, Code, §§ 3054, 3056, pp. 1871, 1872.

A chattel mortgage is void as against execution creditors, who levy after the making of the mortgage, but prior to its recording.

8 Am. & Eng. Encyclop. Law, p. 192, note 3, cases cited; *Herrmann, Chat. Mort.* § 75, p. 159, cases cited.

A mortgage does not become a valid lien against creditors of the mortgagor until it is recorded.

Jones, Chat. Mort. 3d ed. §§ 237, 263; *Nichols v. Betts Spring Co.* 11 Or. 416, 30 Am. Rep. 477;

Cooper v. Brock, 41 Mich. 491; *Hurd v. Brown*, 37 Mich. 484; *Pittcock v. Jordan*, 19 Or. 8; *Kelley v. Highfield*, 15 Or. 294.

Notice by a debtor to a sheriff when he was proceeding to attach or to levy upon property is not notice to the creditor for whom the levy is made.

Jones, Chat. Mort. § 311; *Freem. Executions*, § 343; *Bochreinger v. Creighton*, 10 Or. 46; *Stowe v. Meserve*, 13 N. H. 46; *McCarthy v. Grace*, 23 Minn. 182.

Lord, J., delivered the opinion of the court:

This is an action to recover personal property. The complaint alleges, in substance, that plaintiffs are partners in the firm of S. Marks & Co.; that at the time mentioned the plaintiffs were and still are the owners and entitled to the immediate possession of the personal property mentioned in the complaint, of the aggregate value of \$678; that said property was in the possession of W. R. Wells, with whom the plaintiffs had left the same for care and safekeeping; that on the 10th day of February, 1891, defendant wrongfully took said goods from the possession of said Wells, and wrongfully detained the same, to plaintiff's damage of \$100; that plaintiffs demanded the possession of the defendant; that before this action the time for which Wells was to keep said goods had expired; and demands the possession of such chattels, or the sum of \$678, their value, and \$100 damages. After denying the allegations of the complaint, for a further and separate answer, the defendant, in substance, alleges that he was sheriff of Douglas County; that Caro Bros. recovered a judgment against W. R. Wells for \$677; that execution was issued thereon, and delivered to the defendant, and that by his deputy he duly levied upon and took possession of the property mentioned, etc.; that it was the sole property of said Wells, and in his possession; and demands costs, etc. The reply denied the allegations of the answer. The bill of exceptions shows that the plaintiffs, to maintain the issues on their part, called as a witness A. Marks, who testified that he was a member of the firm of S. Marks & Co., plaintiffs; that on the 9th day of February, 1891, William R. Wells owed S. Marks & Co. \$2,000, and on that day gave S. Marks & Co. a chattel mortgage on the property mentioned in the complaint to secure the payment of the same. The chattel mortgage is in the usual form, and provides that if default be made in the payment of the amounts due, or should said Wells injure, sell or dispose of the same, or remove any part out of the said county, without the written consent of said Marks & Co., etc., the plaintiffs shall take possession of the same, wherever such property may be found, and sell the same at public or private sale, as they may see fit. The plaintiffs then offered in evidence the said mortgage, which the defendant objected to as immaterial and irrelevant, and the courts sustained the same. The plaintiffs then called as a witness William R. Wells, who testified that he gave said mortgage to the plaintiffs, and was present when the sheriff levied upon the property mentioned in the complaint; and he was then asked to state whether he did or did not tell the sheriff before he levied upon this property that the property did not belong to him,

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but that it belonged to S. Marks & Co., which question being objected to as irrelevant and immaterial, the courts sustained the objection. The plaintiffs then rested, when the defendant moved for a nonsuit for want of evidence to support the action, which the court allowed, and dismissed the jury.

In regard to the chattel mortgage offered in evidence, the record discloses that it was executed on the 9th day of February, 1891, but that it was not filed until the 12th day of February, 1891, and that the writ of execution issued upon the judgment in favor of Caro Bros. was executed by the defendant on the 10th day of February, 1891, by taking the said property into his possession. It is thus seen that this is a controversy between the plaintiffs, who claim under a chattel mortgage which had not been filed, and the defendant, who had levied upon the property in behalf of execution creditors. The contention of the plaintiffs is that they are entitled to the possession of the property mortgaged, and to recover it in this form of action, while the defendant claims that he has a right to the possession of the property by virtue of the levy of the execution against the mortgagor, Wells. The ground of their difference is this: The plaintiffs contend that the possession of mortgaged chattels by the mortgagor creates a presumption of fraud only, which is disputable, but which presumption does not exist when the mortgage is duly filed, but that the failure or neglect to file it does not invalidate it, but simply creates a presumption of fraud; while the defendant contends that the chattel mortgage is valid only as between the parties to it, without any filing or change of possession, but that it is void as against subsequent purchasers or execution creditors who levy after the making of the mortgage, but before its filing. In respect to filing mortgages, it is provided by the Code that "it shall be the duty of the county clerk, upon the presentation for that purpose of any mortgage or conveyance intended to operate as a mortgage of goods and chattels, or a copy of any such instrument, and the payment of his fees, to indorse thereon the time of receiving the same, and to deposit such instrument or copy in his office, to be kept for the inspection of all persons interested." 2 Hill Code, § 3064. By this provision a chattel mortgage is not declared void as against creditors or subsequent purchasers, because not filed; but when such mortgage has been filed it ceases to be valid as against such creditors and purchasers after the expiration of one year from the filing of the same, unless the provisions of section 3056 are complied with. Prior to 1862 a chattel mortgage not filed was void (Code 1855, § 18, p. 528), but this section was repealed by the Statute of October 17, 1862 (Stat. 1862, p. 126). So that it appears formerly our statutes, like those of nearly all the other States relating to the filing of chattel mortgages, declare them void as to third persons, unless they were accompanied by delivery and possession, or they were filed as prescribed by law. Now, when a chattel mortgage is not filed, and the chattels mortgaged are left in the possession of the mortgagor, it creates a presumption of fraud, which is disputable, and may be removed by proving the bona fides of the transaction.

This change was wrought by section 776 subsec. 40, which provides that "every sale of personal property, capable of immediate delivery to the purchaser, and every assignment of such property, by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, creates a presumption of fraud as against the creditors of the seller or assignor, during his possession, or as against subsequent purchasers in good faith and for a valuable consideration, disputable only by making it appear upon the part of the person claiming under such sale or assignment that the same was made in good faith, for a sufficient consideration, and without intent to defraud such creditors or purchasers; but the presumption herein specified does not exist in the case of a mortgage duly filed or recorded as provided by law." "The presumption," as Boise, J., said, "raised by this section, which may be rebutted, is as to mortgages that have not been recorded." *Orton v. Orton*, 7 Or. 482, 88 Am. Rep. 717.

When the mortgage has been filed as prescribed by the law, the presumption of fraud does not exist, although the possession of the property has been retained by the mortgagor; but when such mortgage has not been filed, a presumption of fraud is raised, as against creditors and subsequent purchasers, not conclusive, however, but which may be rebutted "by making it appear that it was made in good faith." *McCully v. Swackhamer*, 6 Or. 439. Hence a chattel mortgage under our statutes, given in good faith, although not filed, is valid as against creditors and subsequent purchasers. In nearly all the other States it is provided that chattel mortgages shall be filed in a designated office, or recorded, or else they shall not be valid as against creditors of the mortgagor or subsequent purchasers or incumbancers without notice, unless the property mortgaged is delivered to and retained by the mortgagee. An excellent reference to the statutes of the several States may be found in a note under title *Chattel Mortgages*, 8 Am. & Eng. Encyclop. Law, 191. Under statutes of this sort, the failure or neglect to file or record the mortgages, as may be prescribed, is to render it void as against third persons, when the mortgagor retains possession of the mortgaged property, although it is valid as between the

parties to it, without any filing or change of possession. The filing or recording of the mortgage is a substitute for the mortgagee's possession, or obviates its necessity. The distinction between such statutes and our own is that in the former the mortgage is declared to be void as against creditors and subsequent purchasers, unless filed or recorded, or is accompanied by delivery and possession; while in the same case under the latter, or our statute, it raises a presumption of fraud which may be rebutted and its validity sustained. As our statute now stands, when a chattel mortgage is not filed, and the possession of the property mortgaged is retained by the mortgagor, the case stands very much as it did at common law. It is true in the earlier decisions the presumption of fraud from possession was held to be conclusive, but the later and better considered cases hold that the fact of possession by the mortgagor is only *prima facie* a badge of fraud; that it may be rebutted by explanation, showing the transaction to be fair and honest, and consistent with the terms of the contract; and that the presumption of fraud arising from the circumstances of such possession is not an absolute inference of law, but one of fact for a jury. *Homes v. Crane*, 2 Pick. 607; *Jordan v. Turner*, 8 Blackf. 310; *Thornton v. Davenport*, 2 Ill. 296; *Watson v. Williams*, 4 Blackf. 26, 28 Am. Dec. 86.

So now, when a chattel mortgage has not been filed, our statute raises a presumption of fraud from the retention of possession of the mortgaged property by the mortgagor, which may be rebutted by showing that it was made upon a good and valuable consideration, and was bona fide; that such possession was fair and consistent with the terms of the mortgage and the nature of the transaction. In this way the whole transaction is examined, and every honest explanation that the party can show is admitted, and referred to the jury for their decision. It is clear, then, that the plaintiffs had a right to introduce their mortgage, although it had not been filed, and show that the possession of the mortgagor was consistent with its terms and the nature of the transaction, and that it was made in good faith, and for a valuable consideration.

It results that there was error, and that the judgment of the court below must be reversed, and a new trial ordered.

ARKANSAS SUPREME COURT.

H. C. QUARLES, *Appt.*,

STATE OF ARKANSAS.

(.....Ark.....)

Selling theatre tickets and managing the entertainment on Sunday is "laboring" within the prohibition of the Arkansas Statute.

(October 17, 1891.)

NOTE.—Sunday labor.

The clauses relating to labor in the Sunday Laws of the various States are somewhat dissimilar and decisions interpreting similar clauses are not entirely harmonious. The courts have made the following decisions as to what is and what is not unlawful Sunday labor:

APPEAL by defendant from a judgment of the Circuit Court for Pulaski County convicting him of a violation of the Statute prohibiting laboring on Sunday. *Affirmed*.

The facts sufficiently appear in the opinion. *Mr. J. M. Rose*, for appellant: Sabbath breaking is not a common-law offense.

2 Chitty, Crim. Law, 20.

As the statute is in derogation of the com-

mon-law, it is in derogation of the common-law. Acts necessary to secure public safety and safe

on law and inflicts penalties on the citizen, it must be strictly construed.

Bishop, Stat. Crimes, §§ 216, 218.

In the Arkansas statute the word used is "labor," and Webster defines "labor" as follows:

1. Physical toil or bodily exertion, especially when fatiguing, irksome or unavoidable, in distinction from sportive exercise; hard, muscular effort directed to some useful end, as agriculture, manufactures and the like; servile oil, exertion.

2. Intellectual exertion, mental effort, as the labor of compiling a history.

keeping of a felon, or delivering him to hail, are not unlawful. *Johnston v. People*, 81 Ill. 469.

But an arrest cannot be made on Sunday for violation of the corporation ordinance. *Wood v. Brooklyn*, 14 Barb. 425.

And seizing and impounding swine unlawfully at large upon a highway is unlawful. *Frost v. Hull*, 4 N. H. 153.

Commercial transactions.

The prohibition of common labor embraces the business of trading, bartering, selling, or buying any goods, wares, or merchandises. *Cincinnati v. Rice*, 15 Ohio, 223.

A contract for the sale of a horse and the execution and delivery of a promissory note for its price on Sunday in the presence of two other persons is business of a secular calling tending to the disturbance of others within the prohibition of the Sunday Law. *Barney v. French*, 19 N. H. 233.

Giving a note on Sunday for the difference in value of horses traded on Sunday is in violation of the Sunday Law. *Adams v. Hamell*, 2 Doug. (Mich.) 73.

The execution and delivery of a promissory note on Sunday is business of a person's secular calling. *Allen v. Deming*, 14 N. H. 133.

Giving a promissory note on Sunday in consideration for articles purchased on that day is unlawful. *Towle v. Larrabee*, 26 Me. 464.

Making a promissory note on Sunday is common labor. *Reynolds v. Stevenson*, 4 Ind. 619.

Making a draft on Sunday in order that a man about to leave home may receive pay for labor done is not a work of necessity or charity so as to take the case out of the statute. *Mace v. Putnam*, 71 Me. 233.

Selling or exchanging horses on Sunday is unlawful. *Lyon v. Strong*, 6 Vt. 219.

Loaning money on Sunday is unlawful. *Finn v. Donahue*, 35 Conn. 216; *Troewert v. Decker*, 51 Wis. 44; *Meador v. White*, 65 Me. 90.

To prevent loss or injury.

If property is exposed to imminent danger it may be lawfully preserved and removed to a place of safety on Sunday. *Parmalee v. Wilks*, 22 Barb. 539.

Pumping out oil wells on Sunday is not unlawful where if they are not pumped out loss would result to the owners by reason of salt water getting into the wells (Com. v. Gillespie, 21 Pittsb. L. J. N. S. 213); but it is unlawful to pump all day if the loss can be averted by pumping a shorter time. *Id.* 467.

Where pumping the water out of oil wells on Sunday is not an absolute necessity but merely a work of convenience and profit, it is unlawful. *Com. v. Fusk*, 9 Pa. Co. Ct. Rep. 277.

Shoeing stage horses on Sunday is not unlawful. *Nelson v. State*, 26 Tex. App. 569.

But gathering seaweed on Sunday is unlawful although if left to the following day it would 14 L. R. A.

3. That which requires hard work for its accomplishment; that which demands effort.

In strict construction, no case is to be brought within the statute unless completely within the words.

Bishop, Stat. Crimes, § 220; Bloom v. Richards, 2 Ohio St. 405.

I cannot find a single case where a man was ever convicted for running a Sunday show under the word "labor" or anything synonymous with it.

There is a Pennsylvania case (*Com. v. Weidner*, 5 Pa. Co. Ct. 10), where a man was convicted of selling camp-meeting tickets, but the

probably float away. *Com. v. Sampson*, 97 Mass. 407.

The necessary turning of malt in the process of making beer is not unlawful on Sunday. *Crocket v. State*, 33 Ind. 416.

It seems that the necessary operations by a smelting furnace are not unlawful. *Manhattan Iron Works v. French*, 12 Abb. N. C. 443.

The operation of an ice manufactory on Sunday is not unlawful. *Hennersdors v. State*, 25 Tex. App. 597.

Keeping a hotel on Sunday in the same way that it is usually kept on a week day is not unlawful. *Carver v. State*, 69 Ind. 62.

Agricultural operations.

It is not unlawful to make maple sugar on Sunday where it is necessary to prevent a great waste of sap. *Whitcomb v. Gilman*, 35 Vt. 297; *Morris v. State*, 31 Ind. 189.

Hoeing potatoes on Sunday is unlawful although it would be inconvenient, if not impossible, to do it on any other day. *Com. v. Josselyn*, 97 Mass. 411.

In Indiana the harvesting on Sunday of "dead ripe" wheat which could not be cut sooner, and which might be spoiled by rain if left until a later day, is not a desecration of the Sabbath. *Turner v. State*, 67 Ind. 595.

But in Arkansas cutting wheat on Sunday was held unlawful although it was wasting from over-ripeness and defendant was too poor to procure implements of his own and worked out until Saturday night when he borrowed the necessary tools and cut his own wheat on Sunday. *State v. Goff*, 20 Ark. 239.

Gathering necessary feed for hogs in the field, hauling it to the feeding place, and there feeding the hogs is not unlawful. *Edgerton v. State*, 67 Ind. 538.

Where a melon grower lived twenty-six miles from market and could make a trip only once in two days and could hire no assistance it was not unlawful for him to gather and haul a load to market on Sunday where he could carry only about one hundred melons to the load and there were five or six hundred ripe and ready for market, and melons were decaying much faster than he could possibly get them to a place of sale. *Wilkinson v. State*, 59 Ind. 422.

Other secular employments.

It is unlawful for an attorney's clerk to engage in the regular occupation of the office on Sunday. *Watts v. Van Ness*, 1 Hill, 76.

Performing the ordinary duties of a street-car conductor on Sunday is unlawful. *Day v. Highland St. R. Co.* 135 Mass. 113.

It is unlawful to drive a stage-coach for the accommodation of passengers on Sunday. *Com. v. Knox*, 6 Mass. 76.

Driving an omnibus as a public conveyance on Sunday in pursuit of one's ordinary employment is unlawful. *Johnston v. Com.* 23 Pa. 103.

Pennsylvania statute says "worldly employment or business," and those words might well cover running a camp meeting for revenue.

See *People v. Dennis*, 35 Hun. 827; *State v. Conger*, 14 Ind. 396; *Rucker v. State*, 67 Miss. 328; *State v. Pennessy*, 22 Week. Law Bull. 328.

Messrs. W. E. Atkinson, Atty-Gen., and Charles T. Coleman, for the State.

Hughes, J., delivered the opinion of the court:

The appellant was convicted upon an indictment in which he was charged with a vio-

lation of section 1883 of Mansfield's Digest, which provides that "every person, who shall on the Sabbath or Sunday be found laboring, or shall compel his apprentice or servant to labor or to perform other services than customary household duties of daily necessity, comfort, or charity, on conviction thereof, shall be fined one dollar for each separate offense." There were two counts in the indictment, in the first of which the charge is that "the said H. C. Quarles, on the 30th day of November, 1890, said day being Sunday, unlawfully was found laboring, to wit, selling theater tickets, said labor then and there being other than

But it is not unlawful for a hired domestic servant to drive his employer's private conveyance on the Lord's day for the purpose of conveying the family to church. *Com. v. Nesbit*, 34 Pa. 398.

One having a contract with the postoffice department for the carrying of mail may lawfully perform his duties on Sunday. *Com. v. Knox*, 6 Mass. 78.

Giving instructions in art is unlawful. *Bilordeaux v. H. Bencke Lithographing Co.* 30 N. Y. S. R. 656.

It is not lawful to keep a barber shop open and shave customers on Sunday. *Com. v. Waldman*, 11 L. R. A. 563, 140 Pa. 80.

And the fact that they were sick on Saturday and the barber shaved them the next day as a matter of accommodation, without compensation, is immaterial. *Com. v. Williams*, 1 Pears. 61.

In Arkansas the court will take judicial notice that carrying on the work of a barber on Sunday is not necessary. *State v. Frederick*, 45 Ark. 347.

But in Indiana whether or not the shaving of a customer by a barber on Sunday is a work of necessity is for the determination of the jury. *Ungericht v. State*, 119 Ind. 879.

The court refused to pass upon the question of the validity of cutting hair and shaving beards on Sunday in a case where the facts brought the case within the clause of the statute prohibiting the keeping open of a shop on Sunday. *Com. v. Dexter*, 3 New Eng. Rep. 132, 143 Mass. 28.

However keeping open a barber shop on Sunday is not indictable nuisance. *State v. Lorry*, 7 Baxt. 95.

A lock-keeper in the employ of the Schuylkill Navigation Company is not liable to conviction for violating the Sunday Law in opening the lock gates to admit the passage of boats on Sunday on the demand of owners or captains of boats navigating the canal. *Murray v. Com.* 24 Pa. 270.

It is not unlawful to load railroad cars and trucks upon a vessel for shipment on Sunday where the master of the vessel would not take them unless shipped on that day, and it was a matter of great necessity that they should be shipped as speedily as possible as navigation was about closing. *McGatryck v. Wason*, 4 Ohio St. 568.

It is unlawful to pilot a canal boat laden with coal in discharge of the party's ordinary occupation. *Scully v. Com.* 35 Pa. 511.

Or a steamboat engaged in carrying passengers to and from pleasure parties. *Dugan v. State*, 9 L. R. A. 321, 125 Ind. 130.

Publishing and issuing a newspaper is unlawful. *Handy v. St. Paul Globe Pub. Co.* 4 L. R. A. 466, 41 Minn. 188.

Publishing an advertisement in a Sunday newspaper is unlawful. *Smith v. Wilcox*, 24 N. Y. 353.

Crying newspapers on the public streets on Sunday is unlawful. *Com. v. Teamann*, 1 Phila. 460.

To store time.

Repairing a mill on Sunday to avoid the loss of a 14 L. R. A.

week day is not work of necessity. *Hamilton v. Austin*, 62 N. H. 575.

Clearing out a wheel pit on Sunday for the purpose of preventing a stoppage on a week day of mills employing many hands is not lawful. *Mo-Grath v. Merwin*, 112 Mass. 468.

Drawing fresh meat to market is not lawful although done by a servant who in connection with his regular work did not have time on Monday, and although the master was unable to do it by reason of sickness. *Jones v. Andover*, 10 Allen, 18.

The castration of a horse on Sunday is unlawful. *Slade v. Arnold*, 14 B. Mon. 237.

Decisions affecting carriers.

Running railway trains with their accompanying noises is unlawful. *First Baptist Church v. Sobenectady & T. R. Co.* 5 Barb. 79.

Unless the running of the train is a work of necessity or charity. *Read v. Boston & A. R. Co.* 1 New Eng. Rep. 390, 140 Mass. 199. *Contra, State v. Norfolk & W. R. Co.* 33 W. Va. 440; *Com. v. Louisville & N. R. Co.* 80 Ky. 291.

It is lawful for a common carrier to transport cattle on Sunday. *Philadelphia, W. & B. R. Co. v. Lehman*, 56 Md. 209.

A state statute prohibiting the running of freight trains on Sunday between sunrise and sunset, except with livestock or perishable freight, or to complete a trip, is in conflict with the United States Constitution. *Norfolk & W. R. Co. v. Com.* (Va.) 13 L. R. A. 107.

Making a special trip with a steamboat for the carriage of freight on Sunday is unlawful. *Gauthier v. Cole*, 17 Fed. Rep. 716.

Running street-cars on Sunday is unlawful. *Com. v. Jeandell*, 2 Grant, Cas. 506; *Sparhawk v. Union Pass. R. Co.* 54 Pa. 401; *Day v. Highland St. R. Co.* 135 Mass. 118.

In *Augusta & S. R. Co. v. Rens*, 55 Ga. 126, the court said it was not prepared to hold that the running of street-cars on Sunday was unlawful.

An incoming ship may lawfully take on a pilot on Sunday. *Perkins v. O'Mahoney*, 181 Mass. 546.

Procuring subscriptions; making will.

Raising subscriptions from a congregation on Sunday to pay off a church debt or purchase a house of worship is not unlawful. *Allen v. Duffie*, 43 Mich. 1; *Dale v. Knepp*, 98 Pa. 389; *Bryan v. Watson*, 11 L. R. A. 63, 127 Ind. 42, overruling *Cutlett v. Sweetser Station M. E. Church*, 63 Ind. 265.

Subscribing in aid of a railroad on Sunday is unlawful. *Saginaw T. & H. R. Co. v. Chappell*, 35 Mich. 190.

So, procuring and affixing signatures of taxpayers to a petition for the issuance of railroad aid bonds is unlawful. *De Forth v. Wisconsin & M. R. Co.* 52 Wis. 320.

The execution of a will is not work, labor, or business, within the meaning of the Sunday Law. *Bennett v. Brooks*, 9 Allen, 18; *Bettelman's App.*

customary household duties of daily necessity, comfort, or charity." In the second count the appellant is charged with "laboring on Sunday by managing and superintending the Capital Theater for the purpose of producing and having produced a certain play and performance in said Capital Theater," etc. The case was tried by the court upon an agreed statement of facts, that the defendant "is the manager of the Capital Theater, where theatrical exhibitions are given for profit, and at the time and place mentioned in the indictment did open said Capital Theater, and did give a public theatrical entertainment therein, and did sell tickets, and manage and superintend said exhibition." The appellant asked

the court to declare the law to be that "the opening, superintending, and managing a public theater, giving a theatrical entertainment, and selling tickets therefor, is not labor, within the meaning of section 1883 of Mansfield's Digest." This the court refused to do; as we think, very properly. The appellant excepted and appealed. The only question presented here is, Did the acts charged and admitted to have been performed constitute labor, within the meaning of the statute? It was decided in *Tucker v. West*, 29 Ark. 401, that the execution of a promissory note on Sunday was a violation of the statute, and that the note was therefore illegal and void. This was approved in *Stewart v. Davis*, 81 Ark. 518, where a

55 Pa. 183; *George v. George*, 47 N. H. 27; *Perkins v. George*, 45 N. H. 458, cited in 1 Am. Law Rev. 755; *Rapp v. Reehling*, 7 L. R. A. 498, 124 Ind. 38.

Miscellaneous decisions.

Gaming is not common labor or usual avocation within the prohibition of the Sunday Law. *State v. Conger*, 14 Ind. 386.

Hunting is not working within the meaning of the Sunday Law. *State v. Carpenter*, 62 Mo. 594.

It is not unlawful for the overseers of the poor to make a contract on Sunday for the relief of a sick pauper. *Aldrich v. Blackstone*, 128 Mass. 148.

Repairing a defect in a highway is not unlawful where its existence was first discovered on that day. *Flagg v. Millbury*, 4 Cush. 243.

Where it is shown that there is real necessity for the repairs of a railroad track and that they could be made only on Sunday without delaying trains, such work is not unlawful. *Yoncoski v. State*, 70 Ind. 393.

Letting a horse on Sunday for purposes not of necessity or charity is unlawful. *Morton v. Glosster*, 46 Me. 520.

But letting a carriage on Sunday under a mistaken belief that it is to be used in a case of necessity or charity is not unlawful. *Myers v. State*, 1 Conn. 502.

It is not unlawful for a husband and wife to hire a conveyance on Sunday to attend the funeral of the husband's brother-in-law. *Horne v. Meakin*, 115 Mass. 386.

It is not unlawful for a son to hire a carriage on Sunday for the purpose of visiting his father. *Logan v. Mathews*, 6 Pa. 420.

Telegrams may lawfully be sent for the purpose of relieving suffering, averting harm, or preventing serious loss. *Western U. Teleg. Co. v. Yopst*, 3 L. R. A. 227, 118 Ind. 248.

So sending a telegram on Sunday by a husband away from home to his wife explaining his protracted absence and to announce the time of his return is not unlawful. *Burnett v. Western U. Teleg. Co.* 89 Mo. App. 599.

English decisions.

The labor clause of the English Sunday Law is found in 20 Charles II., chap. 7, § 1, which provides that "no tradesman, artificer, workman, laborer, or other person whatsoever shall do or exercise any worldly labor, business, or work of their ordinary callings upon the Lord's day, or any part thereof, works of necessity and charity alone excepting."

The earlier cases interpreted the statute as meaning that to be unlawful the act must be done in the ordinary calling of the doer; thus, the private sale of a horse at the request of its owner, a baker, by one whose business was to sell horses at public auction was held lawful. *Drury v. Defontaine*, 1 Taunt. 181.

14 L. R. A.

So it was not unlawful to buy a horse of a horse dealer on Sunday in ignorance of the fact that he was such dealer, although it was unlawful for him to sell on that day. *Bloxsome v. Williams*, 3 Barn. & C. 232.

But the purchase of a horse by a horse dealer on that day is unlawful. *Fennell v. Riddler*, 5 Barn. & C. 406.

And in *Rex v. Whitnab*, 7 Barn. & C. 600, the court says that the statute only prohibits the exercise of the ordinary calling and that the hiring of a servant on that day which occurs only once a year on the average is not unlawful.

An effort was made later to give a different interpretation to the statute, and in *Smith v. Sparrow*, 4 Bing. 89, Park. J., says that the expression "any worldly labor" cannot be confined to a man's ordinary calling but applies to any business he may carry on whether it is his ordinary calling or not; and the case decides that a contract by a broker for the sale of nutmegs, made on Sunday, is unlawful.

So in *Williams v. Paul*, 6 Bing. 653, it was held unlawful to inspect cattle which a man had agreed to buy.

But the effort to establish that interpretation was not entirely successful, for a subsequent case held that a farmer owning a stallion might lawfully serve mares on Sunday. *Scarfe v. Morgan*, 4 Mees. & W. 270.

It has been held that the word "laborer" signified hired labor, and did not extend to the employer; hence, that a farmer might lawfully work with his own hands in getting in hay on Sunday although his hired servant could not. *Rex v. Silvester*, 10 Jur. N. S. 380, 33 L. J. M. C. 79, 4 Best & S. 927.

It has been held that a stage-coach might properly be run on Sunday, and that the driver thereof could not be convicted for a breach of the Sunday Law. *Sandiman v. Breach*, 7 Barn. & C. 96.

That a baker might bake puddings and pies for Sunday dinner, but that he could not bake bread in the ordinary course of his business. *Rex v. Younger*, 5 T. R. 448; *Rex v. Cox*, 3 Burr. 785.

It is unlawful to follow the calling of a barber on Sunday. *Phillips v. Innes*, 4 Clark & F. 284.

An enlistment may be made on Sunday. *Wolton v. Gavin*, 16 Q. B. 248, 20 L. J. Q. B. N. S. 73, 15 Jur. 329.

And an undertaking by an attorney to become surety for his client is not unlawful. *Peate v. Dickens*, 3 Dowl. P. C. 171; 1 Cramp. M. & R. 422, 5 Tyr. 116.

A guaranty may lawfully be given to a tradesman on Sunday for the faithful services of a commercial traveler to be employed by him. *Norton v. Powell*, 4 Man. & G. 42.

A railroad company may lawfully transact the ordinary business of checking baggage on Sunday. *Stahard v. Great Western R. Co.* 2 Best & S. 419, 31 L. J. Q. B. 187.

H. P. F. :

contract by a livery-stable keeper to hire a horse on Sunday was decided to be in violation of the statute, and void. In the case of *State v. Frederick*, 45 Ark. 848, it was decided that the usual services of a barber in shaving, hair-cutting, etc., amount to labor, within the meaning of the statute. The cases of *Tucker v. West*, and *Stewart v. Davis*, were put on

the ground that the acts done were in violation of the spirit and intention of the statute.

In the case at bar the acts done were in violation of the letter of the statute, as they, in the opinion of the court, constituted laboring on Sunday, within the meaning of the statute.

The judgment is affirmed.

GEORGIA SUPREME COURT.

Edward S. CONWAY, *Plf. in Err.*,

v.

Martha GRANT.

(.....Ga.....)

***One who, in a city, enters the back yard of another through an open gate on lawful business, and is bitten by ferocious dogs running loose in the yard, of which he has no notice, has a right of action against the owner if the latter knew that the dogs were accustomed to bite, and nevertheless permitted them to run loose in such yard, with the gate of the same standing open.**

(November 10, 1891.)

ERROR to the City Court of Atlanta to review a judgment in favor of defendant in an action brought to recover damages for injuries inflicted upon plaintiff by dogs belonging to defendant. *Reversed.*

*Head note by BLECKLEY, Ch. J.

NOTE.—*Liability of owner of animal for injuries inflicted by it upon one coming upon the owner's premises.*

The English cases.

In *Smith v. Pelah*, 2 Strange, 1264, it was ruled that if the owner of a dog has notice that it has once bitten a person and lets it go at large or lie at his door an action will lie against him at the suit of a stranger bitten by it, although the latter stepped on the dog's toe, for the damage was owing to the owner's not hanging the dog at the first notice.

In *Brook v. Copeland*, 1 Esp. 203, the court said that everyone has a right to keep a dog for the protection of his grounds or house, and that, where one went upon the grounds after a dog had been let out for the night and was bitten, he could not recover; but that if the owner of the premises suffered the public to use a way over them he would be liable for injuries inflicted on anyone by an animal which he knew to be vicious.

Again in *Sarah v. Blackburn*, 4 Car. & P. 297, the court said that a man has a right to keep a fierce dog for the protection of his property, but he has no right to keep it in such a situation near the way of access to his house that a person in coming for a lawful purpose may be injured by it. That a person cannot recover for injuries received from the bite of a dog placed in a yard for the protection of out-houses, unless he had reasonable and justifiable cause for being where the dog was, such as might be pleaded in answer to an action for trespass. That notice in large letters placed on a board warning persons to beware of the dog will not relieve the owner from liability for injury to one unable to read.

So where the dog was chained near the path between the yard gate and the stable, and plaintiff 14 L. R. A.

The case sufficiently appears in the opinion. *Mr. John A. Wimpy* for plaintiff in error. *Mr. John T. Glenn* for defendant in error.

Bleckley, Ch. J., delivered the opinion of the court:

The ferocious character of the dogs and the knowledge of the owner are sufficiently alleged. The only matter of controversy is touching the fault of the plaintiff in exposing himself to attack by entering the premises of the defendant where the dogs were kept. There was an open gate in rear of the premises, and the plaintiff, according to his declaration, was on lawful business. Being in search of employment as a carpenter, and seeing indications that such work was probably carried on in a certain house, he entered the premises for the purpose of making engagement or to work, having no notice or knowledge of the dogs. In this way he became exposed and was bitten. We think a cause of action is substantially set forth. Code, § 2964, declares: "A

was bitten by him while carrying some planks along the path, the jury were instructed that plaintiff was entitled to recover notwithstanding he had previously been cautioned to beware the dog, unless he had run himself into the mischief by his own carelessness and want of caution. *Curtis v. Mills*, 5 Car. & P. 489.

The American cases; liability in general.

In *Lynch v. McNally*, 7 Daly, 128, Daly, J., after a very full review of the cases, concludes that the cause of action for injuries inflicted by an animal does not depend upon the negligence of either plaintiff or defendant but upon the fact that defendant with a knowledge of the vicious propensities of the animal which he kept or harbored suffered it to go at large and that it inflicted the injury for which the action was brought.

Thus a person who keeps a dog upon his premises known to be so vicious and ferocious as to endanger the safety of strangers is liable for injuries inflicted by the dog upon one who is innocently upon the premises without notice of the character of the dog. *Rider v. White*, 65 N. Y. 54, 22 Am. Rep. 600.

So where the injured person was passing through a yard used in common by the owner of the dog and a family which occupied an adjoining house, with a view to call at such adjoining house, and was bitten, the owner of the dog was held liable. *Buckley v. Leonard*, 4 Denio, 500.

So where a junk-dealer was called upon defendant's premises to examine and make a bid for some old iron, and a ferocious dog which was kept chained on the premises broke loose and attacked and injured him, the owner was held liable. *Kelly v. Tilton*, 3 Keyes, 288.

So where plaintiff was going into defendant's house on lawful business and a ferocious dog was

person who owns or keeps a vicious or dangerous animal of any kind, and, by the careless management of the same, or by allowing the same to go at liberty, another, without fault on his part, is injured thereby, such owner or keeper shall be liable in damages for such injury." The fault here referred to is not that of being a trespasser, but that of being in some way instrumental in provoking or bringing on the attack complained of. "It must, at the same time, be understood that the right of redress of the injured person will be defeated if the injury was caused by his own fault. A person who irritates an animal, and is bitten or kicked in turn, is deemed in law to have consented to the damage sustained, and cannot recover. But if the fault of the injured party had no necessary or natural and usual connection with the injury, operating to produce the injury as cause produces effect, the owner of the animal will be liable. For example, the defendant keeps upon his premises a ferocious dog, and the plaintiff, having no notice that such dog is there, trespasses in the day-time upon the premises, and the dog rushes upon him and bites him. The defendant is liable, since it is not the necessary or natural and usual consequence of a person's trespassing upon a man's premises by day that he should be attacked by a savage dog." Bigelow, Torts, pp. 249, 250.

Though the gate was open, and the plaintiff was on lawful business, it may be that he had no strict legal right to enter the premises from

the rear. But this would be no justification for leaving dangerous dogs loose on the premises to bite him or others that might so intrude. Such dangerous means of defense against mere trespassers the law will not countenance. As general authorities on the subject, see *Brook v. Copeland*, 1 Esp. 203; *Sarah v. Blackburn*, 4 Car. & P. 297; *Curtis v. Mills*, 5 Car. & P. 489; *Loomis v. Terry*, 17 Wend. 496, 81 Am. Dec. 306; *Pierret v. Moller*, 8 E. D. Smith, 574; *Kelly v. Tilton*, 3 Keyes, 263; *Sherfey v. Bartley*, 4 Sneed, 58, 67 Am. Dec. 597; *Woolf v. Chalker*, 81 Conn. 121, 81 Am. Dec. 175; *Laverone v. Mangianti*, 41 Cal. 138, 10 Am. Rep. 269; *Knowles v. Mulder*, 74 Mich. 202; *Cooley, Torts*, *845; *Bishop, Non-Cont. Law*, 1285 & seq.; 1 Thomp. Neg. p. 220, § 34; *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123; *Rider v. White*, 65 N. Y. 54, 22 Am. Rep. 600. It will be observed that the most that could possibly be said against the plaintiff is that he trespassed by going upon the premises. This is a milder fault than going there to commit a trespass. If his purpose had been to commit a crime, the dogs would have been properly employed in resisting him. But he seems to have had a virtuous and worthy object, although his mode of executing it was doubtless injudicious. It was not lawful to bite him by the instrumentality of dogs or other dangerous animals. The court erred in dismissing the action.

Judgment reversed.

chained under the steps, one of which gave way and let plaintiff's foot and leg through the opening when it was seized and bitten by the dog, the owner was held liable. *Laverone v. Mangianti*, 41 Cal. 138, 10 Am. Rep. 269.

Where defendant kept a ferocious dog chained in a private alley easy of access and frequented more or less by the public, and a policeman in pursuit of a suspicious character entered the alley and without seeing the dog approached it and was seriously bitten, the owner was held liable. *Melscheimer v. Sullivan* (Colo.) June 23, 1891.

Where the driver of a grocery delivery wagon entered defendant's yard for the purpose of delivering some groceries which defendant had ordered, and was bitten while placing them on a table standing on the rear porch by a dog running at large on the premises, he was held not entitled to recover where it did not appear that the owner had previous knowledge of a malicious disposition on the part of the animal. *Staetter v. McArthur*, 33 Mo. App. 218.

A ferocious dog cannot be kept on the owner's premises in the day-time in such manner that a person by accident, mistake, or a voluntary or involuntary trespass may be exposed to his fury and injured. *Woolf v. Chalker*, 81 Conn. 121, 81 Am. Dec. 175.

Liability to trespasser.

The fact that the injured person was trespassing at the time the injury was received is immaterial. *Pierret v. Moller*, 8 E. D. Smith, 576.

The keeping of a ferocious dog to protect against trespassers is unlawful upon the same principle that spring guns, concealed spears, or placing poisoned food is unlawful. *Johnson v. Patterson*, 14 Conn. 1, 35 Am. Dec. 96.

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Where a peddler entered, without permission, into the house of the owner of a ferocious dog and was set upon and bitten by it, although guilty of a technical trespass, it was held that this was no defense to an action against the owner of the dog. *Woolf v. Chalker*, 81 Conn. 121, 81 Am. Dec. 175.

So where plaintiff was gathering berries without permission upon defendant's land, and was thus guilty of a trespass, it was held that notwithstanding this defendant, who was the owner of a vicious dog, was liable for injuries inflicted by it. *Sherfey v. Bartley*, 4 Sneed, 58, 67 Am. Dec. 597.

So where a boy was hunting in defendant's woods and was attacked and bitten by a ferocious dog harbored by defendant, he was held entitled to recover for the damages although he was technically a trespasser. *Loomis v. Terry*, 17 Wend. 496, 81 Am. Dec. 306.

The law holds the keeper of an animal known to be dangerous which injures another to the same degree of responsibility as in cases of wanton injury, and the fact that the person injured is trespassing does not exonerate such owner from the consequences of his negligence. *Marble v. Ross*, 124 Mass. 44.

If a man keep a watch dog which is fierce and dangerous and a trespasser is injured the latter may recover against the owner of the dog. *Carroll v. Staten Island R. Co.* 58 N. Y. 136, 17 Am. Rep. 221.

So where a man left a ferocious dog to guard his sleigh, which was left standing in a village street, he was held liable for the injuries inflicted by it upon a child who meddled with a whip lying there-in. *Meibus v. Dodge*, 38 Wis. 306, 20 Am. Rep. 6.

H. P. F.

NEW YORK COURT OF APPEALS.

George G. MANNING *et al.*, *Respts.*,Louis P. BECK *et al.*, *Appts.*

(.....N. Y.)

1. A creditor who does not know of his debtor's intention to make a general assignment for creditors at the time of taking a bill of sale for an honest debt is not affected by such intention so as to make the transfer a part of the subsequent assignment and bring it within the N. Y. Act of 1867 restricting preferences in such assignments.
2. A finding that a son to whom a bill of sale was made by his father shortly before a general assignment had knowledge of the father's intent to hinder and defraud creditors, and also that he conspired with him to prefer creditors in violation of the statute, cannot be construed as a finding of fraud as to creditors irrespective of the statute as to preferences where the case was decided on the theory that the bill of sale must be construed with the assignment.

(December 1, 1891.)

A PPEAL by defendants from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a judgment of a Special Term for Monroe County, in favor of plaintiffs, in an action brought to set aside a bill of sale and general assignment for benefit of creditors and to procure an accounting for the property and its delivery to a receiver and to have plaintiffs' judgment declared a first lien thereon. *Reversed.*

Statement by Peckham, J.:

The appellants in this action were, at the time of the commencement thereof, judgment creditors of the defendant Louis P. Beck, and they brought the action against him and William H. Beck and H. Israel Weinberg for the purpose of setting aside a bill of sale executed by Louis P. to William H. Beck, and an assignment without preferences for the benefit of creditors, executed by Louis P. Beck to the defendant H. Israel Weinberg. The complaint alleged that the bill of sale and the assignment were executed for the purpose of hindering, delaying, and defrauding the creditors of the defendant Louis P. Beck, and it set forth various facts supporting, as the plaintiffs alleged, that statement. The complaint also alleged that the making of the bill of sale by Louis P., and its delivery to the defendant William H. Beck, and the making of the general assignment to the defendant Weinberg, were all parts of one transaction, and that such papers were executed in order to avoid the statute of the State of New York forbidding the preferring of creditors in a general assignment to an extent greater than one third of the assets of the person making the same. The plaintiffs demanded judgment that the assignment to

the defendant Weinberg should be adjudged fraudulent and set aside; also that the bill of sale should be adjudged fraudulent as against these plaintiffs; and that the defendant William H. Beck should be directed to transfer and deliver the property mentioned in the bill of sale, or so much thereof as might remain in his hands at the commencement of this action, to a receiver to be appointed by the court, and that he should in the meantime be enjoined from disposing of or meddling or interfering with such property; also that the defendant William H. Beck should be directed to account for and deliver to the receiver the proceeds of the sale of any property which had been or might thereafter be made by him; also that the defendant Weinberg should be directed and required to account for and transfer to the receiver all the property which had already or which might thereafter come into his hands as such assignee; and that the receiver should, after paying out of the fund so coming into his hands, his lawful commissions and expenses, dispose of the same in payment of these plaintiffs' judgments, and that such judgments should be declared a lien superior to all other claims upon the funds and property coming into the hands of such receiver. The defendants by their answer denied all allegations of fraud, and also any intention to hinder, delay, or defraud the creditors of Louis P. Beck; and also denied various other of the allegations in the complaint. Upon motion at special term, a receiver of the defendant Louis P. Beck was appointed to take possession of and hold all the estate, debts, property, equitable interests, and things in action of the defendant Louis P. Beck, transferred to the defendant William H. Beck, or to the defendant H. Israel Weinberg, by the general assignment already referred to. The receiver was directed to hold such property pending this action. The action was tried before one of the justices of the supreme court, sitting in equity, and judgment was thereupon ordered for the plaintiffs, and a decree was entered setting aside the bill of sale from Louis P. Beck to the defendant William H. Beck, and also the general assignment from Louis P. Beck to the defendant Weinberg, as fraudulent and void as to these plaintiffs. It was further decreed that the defendant William H. Beck should account for and deliver to the receiver appointed in the action all the property transferred to him by the bill of sale, as well as the proceeds of all sales of such property, or any part thereof, as might have been made by him, and that he should account for all the property sold by him before the appointment of the receiver, to the full value thereof. It was further decreed that the defendant Weinberg should account for and turn over to the receiver all the property which passed to him by the assignment; that the several judgments so recovered by these plaintiffs against Louis P. Beck were, and each of them was, a lien superior to all other claims upon the funds

NOTE.—As to how far a bill of sale constitutes an assignment for creditors, see note to *Akers v. Rowan* (S. C.) 10 L. R. A. 707.

As to validity of preferences, see notes to *Berger* 14 L. R. A.

v. Varrelmann (N. Y.) 12 L. R. A. 808; *Hancock v. Wooten* (N. C.) 11 L. R. A. 466; *Powell v. Kelly* (Ga.) 3 L. R. A. 129; *Milliken v. Hathaway* (Mass.) 1 L. R. A. 510.

nd property coming into the hands of the receiver; that the receiver should, after paying the lawful commissions and expenses, pay to the plaintiffs in this action, respectively, the amounts of their several judgments, with interest upon each from the time of recovering the same; and within 30 days from the entering of the judgment the receiver was directed to make and render an account, and distribute the funds in his hands in accordance with the judgment herein. It was further adjudged that the plaintiffs should recover of the defendants Beck their costs of the action. Upon the trial the court found, among other things, these facts, viz.: The defendant William H. Beck is a son of Louis P. Beck, and on the 8d of January, 1889, the father was indebted to the son to the extent of nearly \$5,000. The father was the owner of a stock of goods in a store, and of the fixtures therein, and on the above-mentioned day he conveyed them all to his son by a bill of sale. The consideration for the execution of such bill was an agreement of the son to take the goods described in it as payment of the debt due him, and his assumption of certain indebtedness of the father, which he agreed to pay, and the payment of a small amount in cash to the father. The son was entirely solvent, and able to pay the debts which he assumed. There was no question but that the consideration for the bill of sale fully equaled the value of the goods and fixtures which passed under it. At the time of the execution of the bill of sale the son had not the slightest knowledge that the father intended to make a general assignment for the benefit of creditors. Weinberg, the assignee, received certain notes from the father, but at that time he did not know that he contemplated making an assignment, and the assignee was at all times ignorant of any fraudulent intent on the part of the father. The assignment for the benefit of creditors was made by Louis P. Beck to the defendant Weinberg on the 4th day of January, 1889, in the afternoon, and the assignee duly accepted the trust, and executed a bond for the faithful discharge of his duties; and the first knowledge William H. Beck had of the making of the assignment was on the morning of the 5th of January, 1889, when he was informed of the fact by the assignee. At the time of the making of the bill of sale the defendant William H. Beck knew that Louis P. Beck was insolvent. The findings of the court in relation to the intent of the father, which accompanied the execution of the bill of sale and the assignment, are particularly set forth in the opinion. There is no finding that Louis P. Beck executed the bill of sale in contemplation of making an assignment for the benefit of his creditors. Other facts are set forth in the opinion.

Mr. George F. Danforth, for appellants:

The Act in question must be confined in its operation to the thing expressly mentioned or described, and that is an assignment in trust for the benefit of creditors.

United States v. McLellan, 8 Sumn. 346.

At common law no creditor in the absence of fraud has a right to complain of the disposition which an insolvent makes of his prop-

erty in the payment of one debt rather than another, or giving security which shall operate as a preference.

Coals v. Donnell, 94 N. Y. 178; *Williams v. Whedon*, 12 Cent. Rep. 227, 109 N. Y. 837; *Citizens Bank of Perry v. Williams*, 88 N. Y. S. R. 836.

The omission in the Assignment Act of words of special prohibition, and especially the omission of any reference to the various other modes by which a debtor might lawfully give preference and which are condemned by other statutes, is as significant as the positive requirements of the statute.

Varnum v. Hart, 119 N. Y. 105.

Statutes changing the common law must be strictly construed, and the common law must be held no further abrogated than the clear import of the language used in the statute absolutely requires.

Fitzgerald v. Quann, 12 Cent. Rep. 745, 109 N. Y. 441; *Dean v. Metropolitan Elec. R. Co.*, 119 N. Y. 547.

The intent and object of the statute are to regulate proceedings subsequent to the assignment.

It cannot be supposed that the Legislature intended, by a mere "side wind" as it were, to put an end to those other dealings between a debtor and creditor, by which, at his option, and without the intervention of a trustee or the medium of a trust, the debtor had given one debt a preference over another.

Juliand v. Rathbone, 89 N. Y. 369; *Royer Wheel Co. v. Fielding*, 2 Cent. Rep. 511, 101 N. Y. 504; *Brown v. Guthrie*, 110 N. Y. 435.

It cannot be gathered from its words that there was any intention on the part of the Legislature to prohibit preferences or to include in its provision any mode of disposing of a debtor's property except a general assignment to a trustee,—but if there had been such intention, and the language of the Act fell short of expressing it, if the limitation is so worded as to extend to one method of dealing with creditors only, then other methods might be adopted with impunity.

Edwards v. Hall, 6 DeG. M. & G. 89; *Alexander v. Brame*, 7 DeG. M. & G. 589; *Jeffries v. Alexander*, 8 H. L. Cas. 646; *United States v. McLellan*, 8 Sumn. 345. See *Lampson v. Arnold*, 19 Iowa, 479; *Van Patten v. Burr*, 52 Iowa, 518.

Mr. Edward F. Wellington, for respondents:

The attempt on the part of the defendants to dispose of substantially the whole estate of Louis P. Beck among creditors whom he wished to prefer in the distribution of his assets, so that the illegal preferences would not abate, as provided for in Laws of 1887, chap. 503, was a fraud upon the statute, and a fraud upon these plaintiffs, whom they sought by indirection and management to deprive of its protection.

Manning v. Beck, 54 Hun, 102; *Berger v. Varrelmann*, 12 L. R. A. 808, 127 N. Y. 281; *White v. Cottaussen*, 129 U. S. 333, 32 L. ed. 678; *Spelman v. Freedman*, 54 Hun, 410; *Davis v. Harrington*, 55 Hun, 109; *Wilcox v. Payne*, 28 N. Y. S. R. 712; *Illinois Watch Co. v. Payne*, 38 N. Y. S. R. 967.

The assignment and bill of sale must be con-

strued as one instrument and transaction. Both were properly attacked in this suit.

Loos v. Wilkinson, 1 L. R. A. 250, 110 N. Y. 195; *Sweetser v. Smith*, 20 N. Y. S. R. 62; *Southard v. Benner*, 72 N. Y. 424; *Berger v. Varrelmann*, *supra*; *First Nat. Bank of Jersey City v. Bard*, 59 Hun, 529.

A conveyance to one having knowledge of his grantor's intent to defraud is void as against creditors, though such grantee pays full value, and he is not entitled to relief as to the payments made by him.

Union Nat. Bank of Albany v. Warner, 12 Hun, 306; *Wood v. Hunt*, 88 Barb. 302; *Briggs v. Merrill*, 58 Barb. 400; *Fullerton v. Viall*, 42 How. Pr. 294.

Peckham, J., delivered the opinion of the court:

By chapter 508 of the laws of this State, passed in 1887, it was enacted that, "in all general assignments of the estates of debtors for the benefit of creditors hereafter made, any preference created therein . . . shall not be

valid except to the amount of one third in value of the assigned estate left after deducting . . . the costs and expenses of executing

such trust; and should one third of the assets of the assignor be insufficient to pay in full the preferred claims to which, under the provisions of this section, the same are applicable, then the said assets shall be applied to the payment of the same *pro rata* to the amount of said preferred claims." The provisions of this Act have been under review in the second division of this court in the case of *Berger v. Varrelmann*, 127 N. Y. 281, 12 L. R. A. 808,

and whatever has been therein decided we regard as conclusive upon us to the same extent as if decided by us. That action was brought by judgment creditors of the assignor, to set aside a judgment entered against them by confession as in fraud of an assignment by them executed immediately after the confession of such judgment, and to recover for the benefit of the estate of the assignors the amount realized on the sale under the judgment. The ground of the action was that the judgment was confessed by the judgment debtors in contemplation of the subsequent assignment made by them, and for the purpose of creating a preference by such judgment for more than the amount permitted by the statute. It was held that the provisions of the Act were not confined to preferences in the assignment itself, but that they applied to those created by a separate instrument in contemplation of the assignment, including all the instrumentalities which the insolvent debtor, in contemplation of such general assignment, voluntarily employed to give a preference. But a question arose in the case whether the Act applied as against a judgment creditor by confession, who had no knowledge that the debtor confessing the judgment intended to follow it with an assignment. The learned chief judge, in the course of the opinion, considered (not decided) the case upon the theory that the creditor had no knowledge when he took his confession of judgment that the debtor contemplated making a general assignment, and said that he thought it might well be decided upon that theory; but because some of his brethren

thought, in the absence of a finding of fact that the creditor had this knowledge, the judgment by confession should not be set aside, but allowed to stand as a valid preference to the extent of one third of the estate of the assignors, he proceeded to discuss the question of knowledge by the creditor, and from the whole evidence he came to the conclusion that the creditor had such knowledge, and that the court was required, under the rule as to implying facts, to infer, in support of the judgment under review, that the creditor knew, when he took his confession of judgment and made his levy, that the judgment debtor then contemplated making a general assignment. A majority of the court agreed in this view, and the judgment by confession was set aside. Some of the members, however, thought that the fact of knowledge could not be implied, and, as it had not been found, they dissented from the views of the majority. This case is therefore authority for holding that, when the creditor has knowledge that the judgment is confessed by the debtor in contemplation of his assignment for the benefit of creditors, the judgment, under the facts set forth in the case, will be regarded as in violation of the statute.

The case under discussion here does not come within the authority of that just cited. A careful examination of some additional facts found by the learned court herein is necessary in order to determine precisely what is the status of the case before us. By the fifty-first finding, the court found that the bill of sale and the assignment to Weinberg were one transaction, and were both made for the purpose and with the intent on the part of the vendor and assignor to cheat, hinder, and defraud his creditors, and to divide his property among creditors whom he wished to prefer, in violation of the laws of the State of New York forbidding the creation of preferences in any assignment to an extent greater than the assets of the person making such assignment, and for the purpose of evading such statute, and cheating and defrauding his said other creditors. By the fifty-second finding the court found that the vendee William H. Beck had, at the time of the making of the bill of sale and of transferring and disposing of the notes, (heretofore mentioned,) actual knowledge of the intent of the vendor and assignor (his father) to cheat, hinder, delay, and defraud his creditors. By the fifty-third finding the court found that the two Becks, father and son, at the time when the bill of sale was executed and for a long time prior thereto, had connived and conspired together to cheat and defraud the creditors of the father, and to dispose of all his property of any value among his friends whom he wished to prefer, in violation of the laws of the State of New York prohibiting any preference beyond the amount of one third of the assets of the person making the general assignment. In the first of these three findings the intention of the vendor and assignor Beck is alone spoken of. The finding, in substance, is that it was his intention to cheat some of his creditors by dividing his property among other creditors whom he wished to prefer, in violation of the laws of New York, and by evading those laws. The court finds that this intention of the elder Beck, the son, William H.

Beck, had actual knowledge of at the time of the making of the bill of sale. It is not claimed that the first above-mentioned finding was intended to refer to these instruments as having been executed with the intent to hinder, delay, or defraud creditors under those sections of the statute relating to fraudulent conveyances. 3 Rev. Stat. p. 187, §§ 1-8. The learned counsel for the plaintiff cites the finding for the sole purpose of sustaining his claim that the bill of sale and assignment were set aside because upon their face they were a fraud upon the statute relating to preferences in general assignments.

The exact extent of the knowledge imputed to the son by the second of these findings is rendered somewhat plainer by referring to the sixteenth and one hundred and first findings of fact made by the court upon the request of the defendants. Those findings are, respectively, (1) that, at the time of the purchase by the son from the father through this bill of sale, the son did not know that the father intended making a general assignment for the benefit of his creditors; (2) that the son first learned of the assignment made by his father to Weinberg the day after it was made, when he was told of it by the assignee. So far as the son is concerned, taking into consideration his ignorance of the existence of any intention on the part of his father to thereafter make an assignment, all the knowledge that can be imputed to the son by the fifty-second finding is that he knew of his father's intention to execute the bill of sale, and that it would operate as a preference to those creditors benefiting by it. Of any intention on the part of the father to hinder and defraud creditors, by making an assignment upon the heels of the bill of sale, the son is by the express finding of the court entirely acquitted. The court, in order to characterize the intent of the father, connects the execution of the bill of sale on one day, with the execution of the assignment on a subsequent day, and calls them one transaction: and then finds that both were made for the purpose of hindering and defrauding the creditors of the father by dividing his property in a manner not permitted by the statute. These findings show the fact that a preference was intentionally given to the son and others by the execution of the bill of sale by the insolvent father, and, unless that fact constituted a violation of the statute as to preferences, there is no finding that the son was aware of any intent on the part of the father to violate that statute.

It is claimed that the fifty-third finding is a finding of actual fraud and conspiracy separated from the bill of sale and assignment, and in which fraud they were the culminating acts. Bearing in mind the ignorance of the son as to any intent on the part of the father to make an assignment, the result of the finding is that the father meant to pay or secure some of his creditors by making this bill of sale, and the son conspired with the father to that end, the effect of which, the court says, would be to prefer some of the creditors to a greater amount than one third of the property of the vendor; and this connivance and action the court characterizes as a conspiracy to cheat and defraud creditors, and a violation of the laws of New York in regard to preferences.

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There was no conspiracy to execute this bill of sale, and to thereafter make an assignment, for the court finds the son was ignorant of an intent by the father to execute such an instrument, and, indeed, it fails to find even that the father had such intention when the bill of sale was made. Of course a mere conspiracy to cheat and defraud amounts to nothing (*Bruckett v. Grinnold*, 112 N. Y. 451); and, if an intent to defraud creditors is only proved by the doing of perfectly lawful acts, the mere fact that such acts are charged as being done pursuant to a conspiracy is immaterial. The finding of the court of an intent to cheat and defraud creditors is based upon the finding of a conspiracy to dispose of all the father's property among his friends, in violation of this statute; and the alleged intent to illegally dispose of the property or to violate the statute is based, so far as the son is concerned, upon the fact of the execution of the bill of sale by the father, with the knowledge and connivance of the son, the result of which was to give a preference to the son and those other creditors whose debts were to be paid by the son. If this were an illegal act, where the son was in ignorance of any intent on the part of the father to thereafter execute a general assignment, then such act might be characterized as one which did hinder, delay and defraud creditors; otherwise not.

My examination of these findings of fact has been quite minute, because of the claim made by the learned counsel for the plaintiffs that there was a substantial finding of fraud under the statutes relating to fraudulent conveyances, irrespective of any alleged fraud arising from any intentional evasion, or attempt at evasion, of the Act of 1887; but I cannot see that any such construction can be fairly placed upon what has been found by the trial court. A reference to the opinions of the court makes the matter still more clear, as it there appears that the case was decided upon the theory that the bill of sale and the assignment must be construed together; and, although there was a cunningly devised scheme to accomplish by indirection what he was prohibited by statute from doing directly, the vendor and assignor must be held to have failed in such purpose.

The question is therefore now fairly before us, whether a creditor who procures a bill of sale from an insolvent debtor in payment of, or as security for, an honest and subsisting debt, and in ignorance of any intention on the part of the debtor to make thereafter a general assignment, can hold it as against the world, even though the property passing under the bill of sale exceed one third of the assets of the vendor. If the preference were contained in the general assignment itself, we have no trouble in concluding that it would be unlawful if in excess of the one third of the assets of the assignor, entirely irrespective of the question whether the creditor was ignorant of the preference when the assignment was made, or whether he was ignorant of the intention of the assignor to make such assignment. In that case the assignor attempts to do in the very instrument itself that which the statute says he shall not do in such an instrument. The inhibition of the statute is not limited to the condition that the creditor shall be in ig-

norance of the preference. Such preference shall not be made, says the statute, and, if made, it shall be void for the excess over one third the assets. If the creditor attempts to take the preference, he does it by virtue of the very instrument which the statute says shall not give it, or, if it do give it, that it shall be void for the excess. There is no room for argument in such case. But it is an entirely different matter where a preference is given by reason of an instrument which the debtor ordinarily has full power to execute and deliver for the very purpose of thereby giving a preference, and which a creditor has like full power to receive for the purpose of thereby receiving such preference. In such case it seems to me an important consideration to inquire whether at the time the security was taken or the debt paid, the creditor knew the debtor was insolvent, and intended to follow the bill of sale by an assignment for the benefit of his creditors, and to thus divest himself of all control over his property. If he had such knowledge, it would be entirely proper, as was held by the second division, to regard the confession of judgment as one of the instrumentalities employed by the debtor in contemplation of making an assignment, for the purpose of giving a preference in violation of the Act. Whether it should be regarded as one of such instrumentalities ought, as it seems to us, to depend somewhat upon the state of mind of the creditor. If he had knowledge that the debtor intended to make an assignment, and that the security was given with the intent that it should result in consequence of the assignment in a violation of the provisions of the Act, then we think the security should be adjudged ineffectual. In such case the creditor, in effect, participates with the debtor in an attempt to violate the Act. But even then, how far the judgment should go is worthy of some inquiry when the question shall arise. Whether it should set aside the whole security, or leave it to fare with the rest under the assignment, to the extent of one third of the debtor's assets, in accordance with the Act, we do not now determine.

It is said that the statute is aimed at the debtor and his action alone, and that it does not affect the creditor; and hence, if the debtor makes an illegal preference, and thus violate the statute, the intent or knowledge of the creditor is immaterial, and the preference in excess of the amount permitted by the statute must be disregarded. This may well be true when the preference which the debtor makes is contained in the very instrument described in the statute. Any preference the debtor therein makes which runs counter to the statute must be treated as the statute directs, and the intent of the assignor in giving the preference is wholly immaterial. But the statute does not, and was not intended to, prevent a creditor from obtaining payment of, or a security and thereby a preference for, his debt, even from an insolvent debtor; and where a court is asked to set aside a security which is disconnected from and prior to any general assignment, on the ground that it is in violation of the Act in relation to preferences in general assignments, it at once becomes a question whether that Act was ever intended to cover a

case where the creditor obtaining or availing himself of such securities was ignorant of any existing intention on the part of the debtor to thereafter perform an entirely separate act and make a general assignment. It does not, in terms, cover such a case, and we think it should not be thus extended by construction.

In *White v. Cotzhausen*, 129 U. S. 329, 33 L. ed. 677, it appeared that it was the intention of the debtor, by the means he adopted, to give to his mother and relatives, and it was their intention to obtain, a preference over all other creditors; and what was done was in execution of a scheme for the appropriation of the estate by the debtor's family, to the exclusion of the other creditors, thereby avoiding a general assignment. In that case the supreme court was administering the law of Illinois, and the learned judge, in the course of his opinion, said that where an insolvent debtor recognizes the fact that he can no longer go on in business, and determines to yield the dominion of his entire estate, and in execution of that purpose, or with intent to evade the statute, transfers all, or substantially all, his property to a part of his creditors, in order to provide for them in preference to other creditors, the instrument or instruments by which transfers are made and that result is reached, whatever their form, will be held to operate as an assignment, the benefits of which may be claimed by any creditor, not so preferred, who will take appropriate steps in a court of equity to enforce the equality contemplated by the statute. Such, said the judge, we think is the necessary result of the decisions in the highest court of Illinois. The Act there under consideration was a statute of Illinois prohibiting the preference in an assignment of any debt or liability over another, and declaring such preference void. Taking the facts into consideration as shown in that case, viz., a scheme entered into by all the family, debtor and creditors, to give and to obtain a preference over all other creditors, and by means of such scheme to appropriate the entire estate of such debtor to his own family, and to the exclusion of all other creditors, it does not seem a great strain upon the statute to hold such a scheme void. But we have no such case. Instead of a scheme shared in by the creditors to appropriate property in evasion of the statute, there is entire ignorance upon the part of the creditor of any such scheme, and there is the fact that the creditor is only doing an act which has always heretofore been entirely legal, viz., obtaining security, and probably thereby a preference in the payment of his debt from an insolvent debtor. In the case in the supreme court it is recognized that the statute of Illinois does not contravene the general rule that a debtor, when financially embarrassed, may in good faith compromise his liabilities, sell or transfer property in payment of debts, or mortgage or pledge it as security for debts, or create a lien upon it by means of a judgment confessed in favor of his creditor. But all these acts which might otherwise be valid, and which a creditor would have the right to avail himself of, are to be declared void if the debtor has at that time recognized the fact that he can no longer go on with his business. Our statute does not in terms cover such a case,

and differs also from the Illinois statute, which declares void all preferences. It does not seem to us that either the letter or the spirit of our statute covers a case where the creditor is ignorant of any intended violation of the statute by the debtor, and where the act of the creditor is simply to obtain security for the payment of an honest debt due from the debtor to himself.

We are disposed to agree with the Supreme Court of Pennsylvania, as the doctrine of that court is announced in *Lake Shore Bkg. Co. v. Fuller*, 110 Pa. 156, 1 Cent. Rep. 109, where the court says: "Nor can we agree that a mere intent of the debtor, unexpressed to the creditor, to give him a preference by paying or securing the debt, although he at the time contemplated and soon after executed a general assignment, operated to defeat such preference on the ground that it is contrary to the Act of 1848. Such an intent is not unlawful, and cannot be inferred from a proper act. But, even if it were, the creditor, who has a perfect right to accept payment or security of his debt, and has not participated in the illegal, unlawful intent, should not be compelled to forfeit his preference in that amount. He, at least, is innocent, and may in good conscience hold the advantage he has obtained."

It has been urged that by this construction the statute may be easily evaded. It is said a failing debtor may prefer his favorite creditors by separate instruments, and then make a general assignment and as a result his favored creditors will be paid in full, and those provided for in the assignment will get nothing. Those creditors, however, who participated in or were cognizant of the intent of the debtor, could not avail themselves of their securities beyond, at any rate, the statutory rate (*Berger*

v. Varrelmann, above referred to); and as to those creditors who were ignorant of any such intent it is not perceived that any great misfortune would attend the allowance of their securities in the same way as has been legal for hundreds of years past. The debtor might neglect to make an assignment at all, and then it would look as if the acts of preference would be legal. The Statute of 1887, at any rate, does not cover such a state of facts, and we do not feel at liberty to enlarge its provisions by construction, so as to bring such facts within the condemnation of the statute. If it be thought good policy so to do, the Legislature, and not this court, is the body to which application should be made to effect such change in the law.

There are many other facts found by the trial court, and not herein alluded to, which the counsel for plaintiffs claims are evidence of actual fraud on the part of the defendants herein, within the statute relative to fraudulent conveyances. The findings of the court, as we have seen, go upon the ground that the intent of the debtor to violate the Statute of 1887 was a fraud, and hence a hindrance and delay to creditors. The actual fraud has not been found, and we do not feel like disposing of this case upon a fact not found or passed upon by the court below, while repudiating the real ground upon which the judgment was founded. The actual fraud claimed by the counsel for the plaintiffs may be proved on the new trial, and, if found as a fact by the court or jury, will dispose of the case in favor of plaintiffs.

We think the judgment should be reversed, and a new trial ordered, with costs to abide the event.

All concur, except *Earl, J.*, not voting.

WISCONSIN SUPREME COURT.

Mary STREET, *Respt.*,

v.

J. A. JOHNSON, *Appt.*

(..... Wis.)

1. One who sells and delivers a paper containing a libel is presumed to know that it contains the libel in the absence of proof to the contrary.
2. A complaint for libel charging the sale of papers containing a libelous article need not affirmatively allege that defendant knew that such articles were contained in the papers sold.

(November 17, 1891.)

A PPEAL by defendant from an order of the Circuit Court for Douglas County overruling a demurrer to the complaint in an action brought to recover damages for the alleged publication of a libel. *Affirmed.*

NOTE.—For notes on inference or presumption of malice in case of libel or slander, see *Byam v. Collins* (N. Y.) 2 L. R. A. 129; *John W. Lovell Co. v. Houghton* (Mass.) 6 L. R. A. 368.

14 L. R. A.

Statement by *Cassoday, J.*:

This is an action for libel. The complaint alleges, in effect, that October 20, 1890, the defendant was the owner and keeper of a newsstand and the vendor of newspapers at the city of Superior; that as such he willfully and intentionally sold and delivered at said stand, to a large number of the people of said city who read the same, copies of a newspaper named "The Sunday Sun," of the date of October 18, 1890, containing a false, defamatory, scandalous, and libelous article in the false, libelous, and defamatory words therein set forth, and which were printed and published of and concerning the plaintiff; that the article referred to, among other things, contained statements to the effect that with a contracted fanaticism, which has done more in the past than the weakness or vices, so considered, of mankind, to retard Christian progress and sobriety, the alleged ladies of the W. C. T. U. have been perambulating the streets of West Superior in an ineffectual attempt to prevent the Sunday Sun being purchased by the inhabitants of that place; that these alleged ladies, ignorantly, no doubt, brazenly lowered themselves to a level which they would or should

blush, if they possessed the modesty which society women are presumed to possess, to see that level described in black type; that the time used up by these women in visiting news-dealers to urge them to sell the Sun no longer might undoubtedly be more profitably used by them had they been scrubbing their filthy kitchens, patching their husband's trousers, or hemming handkerchiefs for the little cold, moist noses of their children during the coming winter; that women like the West Superior brand of the W. C. T. U. have little Christianity except that which they flaunt on dress parade; that this sort of W. C. T. U. women are usually indifferently good mothers, wives, or daughters, and are intermeddlers, who accomplish nothing, and neglect the duties God has created them for; that it surely cannot be possible that a pushing, thriving young city like West Superior is to be circumscribed within the circumference of such a pair of petticoats; that their companions were tarred with their company; that we feel certain that the Sun is right. To that complaint the defendant demurred upon the ground that the same did not state facts sufficient to constitute a cause of action. From the order overruling that demurrer, the defendant brings this appeal.

Messrs. Knowles, Dickinson, Buchanan, Graham & Wilson, with Messrs. Thorson & Skinvik, for appellant:

An action for libel cannot be maintained against the publisher of a newspaper, if he has no knowledge, at the time of the publication, that the article complained of is libelous.

Smith v. Ashley, 11 Met. 367, 45 Am. Dec. 216; *Dexter v. Spear*, 4 Mason, 115; *Emmens v. Pottle*, L. R. 16 Q. B. Div. 354; *Chubb v. Flannagan*, 6 Car. & P. 431; *Smith v. Wood*, 3 Campb. 328.

Knowledge is not presumed.

Prescott v. Touzey, 18 Jones & S. 12.

It was not proper to omit from the complaint the averment of knowledge.

Starkie, Slander & Libel, p. 487.

The gist of the action so far as news-dealers are concerned is the knowledge. It becomes a fact material to the support of the action and under our statute, which requires "a plain and concise statement of the facts constituting each cause of action," it becomes a fact constituting a cause of action which it is necessary to aver.

See Newell, Slander & Libel, p. 239.

Messrs. Ross, Dwyer & Smith, for respondent:

The article tends to expose plaintiff to contempt or ridicule at the best, and is hence libelous *per se*.

Odgers, Libel & Slander, 20; *Moley v. Barager*, 77 Wis. 48.

Plaintiff should not be called upon to prove what is locked up in the bosom of defendant. He should be presumed to know the character of his wares.

Odgers, Libel & Slander, *160; *Chubb v. Flannagan*, 6 Car. & P. 431; *Staub v. Van Benthuyzen*, 36 La. Ann. 467.

Cassoday, J., delivered the opinion of the court:

Within the rules of law frequently announced by this court we must hold that the

article in question was libelous *per se*. *Bradley v. Cramer*, 59 Wis. 309, 48 Am. Rep. 511, and cases there cited; *Gauvreau v. Superior Pub. Co.* 62 Wis. 409; *Moley v. Barager*, 77 Wis. 48. The principles upon which such rules are based, and the reasons for the same, need not be here repeated. The question presented is one of pleading. Upon this demurrer the allegations of the complaint must be taken as true. 62 Wis. 407. This being so, we must assume for the purpose of this appeal that the article was published of and concerning the plaintiff; that it was false; and that the defendant willfully and intentionally sold and delivered the paper containing the article as therein alleged. The learned counsel for the defendant contends with much ingenuity that the defendant can only be held liable in case he so sold and delivered the paper knowing that it contained the article in question; and hence, that the complaint is defective, in not alleging that he knew the paper contained such article at the time of making such sale and delivery. The authorities are to the effect that the mere seller of newspapers is not liable for selling and delivering a newspaper containing a libel upon the plaintiff if he can prove upon the trial to the satisfaction of the jury that he did not know that the paper contained a libel; that his ignorance was not due to any negligence on his part; and that he did not know, and had no ground for supposing, that the paper was likely to contain libelous matter. *Emmens v. Pottle*, L. R. 16 Q. B. Div. 354; *Reg. v. Judd*, 37 Week. Rep. 143; *Chubb v. Flannagan*, 6 Car. & P. 431; *Smith v. Ashley*, 11 Met. 367, 45 Am. Dec. 216.

But it seems to be equally well settled that such sale and delivery of a newspaper containing a libel is *prima facie* the publication of such libel, and hence makes such vendor *prima facie* liable therefor. Thus, in *Emmens v. Pottle*, *supra*, Lord Esher, M. R., speaking for the court, said: "I agree that the defendants are *prima facie* liable. They have handed to other people a newspaper in which there is a libel on the plaintiff. I am inclined to think that this called upon the defendants to show some circumstances which absolved them from liability, not by way of privilege, but facts which show that they did not publish the libel." To the same effect is *King v. Amphlett*, 4 Barn. & C. 35.

It is stated as elementary law that "every sale and delivery of a written or printed copy of a libel is a fresh publication; and every person who sells or gives away a written or printed copy of a libel may be made a defendant, unless, indeed, he can satisfy the jury that he was ignorant of the contents. The *onus* of proving this lies on the defendant." Odger, Slander & Libel, 160. Since, under the authorities cited, proof of sale and delivery of the paper containing the article in question would be *prima facie* evidence of the willful and malicious publication of the libel, the allegation to the effect that the defendant willfully and intentionally sold and delivered the paper containing the article would be an allegation of the only fact the plaintiff would be required to prove in order to make out a *prima facie* case. This being so, such allegation would

seem to be sufficient, without going further and alleging that the defendant knew that the paper contained the libel; otherwise the plaintiff would be required to allege what he would not be required to prove. Besides, the question whether the defendant knew that the

paper contained the article was a fact within his own knowledge, and hence his want of such knowledge is peculiarly a matter of defense.

The order of the Circuit Court is affirmed.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA

W. E. BLACK, *Appt.*

(.....N. C.)

1. A certiorari will not be granted to incorporate in a case settled an exception which appellant has waived by failure to set it out in his statement of case on appeal.

2. An assault on an officer in charge of a pound, who forbids a person from tearing down the pound to regain possession of his hogs, which are therein, and threatens to arrest him if he does not desist, is not justified by the fact that the hogs were taken and impounded under an illegal ordinance.

(November 17, 1891.)

A PPEAL by defendant from a judgment of the Superior Court for Moore County convicting him upon an indictment for assault and battery. *Affirmed.*

Statement by Clark, J.:

It appeared in evidence that defendant's hogs had been impounded by the town marshal of Carthage, and were in his custody. The marshal and two of the town commissioners, who were near the pound, saw the defendant going in the direction of the pound at night, and the defendant swore in their presence that, unless the marshal turned his hogs out, he would liberate them, and thereupon proceeded to the pound, and attempted to break the pound to turn the hogs out. The marshal and the two commissioners came up, and the marshal ordered the defendant to desist. He refused to desist. The marshal threatened to arrest him if he persisted in breaking the pound. There was also evidence that the marshal flourished a pistol when he threatened to arrest the defendant, who thereupon assaulted the marshal with a piece of scantling drawn in a striking attitude within striking distance. The marshal had no warrant. The defendant offered to introduce the ordinance under which his hogs had been impounded, for the purpose of showing that said ordinance was void. The court refused to admit the evidence. The exception for such refusal is the only exception presented for review. The case states that there was no exception to the charge. The defendant moved for a certiorari, as stated in the opinion.

NOTE.—For note on assault on defense or recapture of property, see Kirby v. Foster (H. T.) post.

Messrs. Douglass & Shaw and J. W. Hinsdale for appellant.

Mr. Theodore F. Davidson, Atty-Gen., for the State:

The proposed evidence was irrelevant in this case. This is an indictment for a violation of the criminal law. The assault was made, not in protection of defendant's property, but from rage induced by threats to arrest him. Even if his hogs had been illegally impounded, he was not justified in releasing them by force and thereby endangering the public peace; he had a perfect remedy by civil action. But he made the assault before any attempt was made to arrest; there had been only notice that if he persisted in his violent conduct, he would be arrested. Thereupon he made a dangerous attack upon the officer. How could the validity or invalidity of the ordinance affect the legal consequences of this act?

State v. Morgan, 25 N. C. 186; *State v. Brandon*, 53 N. C. 463; *State v. Hedrick*, 95 N. C. 635.

Clark, J., delivered the opinion of the court:

The affidavit in the petition for certiorari avers that a special prayer for instruction was asked in writing, and in proper time; that it was refused, and exception noted, but it is not alleged that such exception was set out in appellant's statement of case on appeal. As the appellant did not set it out as an exception in his case on appeal, he cannot complain that the judge did not incorporate it in the "case settled" by him. In *Taylor v. Plummer*, 105 N. C. 56, it is said: "Exceptions noted on the trial, and exceptions which, after the verdict, the losing party desires to assign to the charge, or to the refusal or granting of special instructions, must be set out by appellant in making out his statement of the case on appeal (as required by Code, § 550), or they are deemed waived." Had the exception for refusal of the special instruction (if asked in writing, and in apt time) been set out by appellant in making up his case on appeal (Code, § 550, and Rule 27, Supreme Court), and the judge had omitted such prayer, and the exception for its refusal from the "case settled," a certiorari would lie to have them incorporated. *Loise v. Elliott*, 107 N. C. 718. By not setting out such an exception in his statement of case on appeal, the appellant has waived the right to insist on it.

The only exception stated in the case on appeal is the refusal to admit the town ordinance in evidence, which was offered for the purpose of showing its invalidity. For the purpose of the exception, it must be taken that the hogs were impounded under an invalid ordinance;

but they were in the custody of the officer, and the owner had no right to take the law in his own hands, and regain possession of his property by violence, and by tearing down the pound. The officer had a right to forbid him, and to prevent the property being taken out of his custody by force. This is not a case where the officer is on trial for using excessive force. Nor is it a case where property is attempted to be taken under a void warrant, and the owner resists by force. For all that appears, the hogs were taken on process valid on its face, which the officer was compelled to execute, though issued, possibly, without sufficient legal ground; but that was not a matter for the officer to decide, nor the defendant. It was a matter to be settled by the court. Besides, the hogs had been taken previously, and were in the peaceable possession of the officer. The case presented is as to the right of the defendant to tear down the town pound to regain possession of his hogs (taken under an illegal ordinance), after being forbidden to do so, and his right to assault the officer who bade him desist, and who, when the defendant did not stop, with a flourish of his pistol had threatened to arrest him. That the defendant made an assault is uncontroverted. The defense set up by the exception, that the hogs had been taken under an invalid ordinance, is not sufficient. The defendant, after being forbidden by the officer, should have desisted, and have sought to get back his hogs by lawful process. He had no right to regain them by means of a breach of the peace." "Two wrongs will not make a right."

In *State v. Hedrick*, 95 N. C. 624, an arrest was made by one who had been illegally deputed to serve a warrant in a civil action. On the party arrested attempting to escape, another party tripped up the acting officer, who was pursuing. It was held that such other party was guilty of an assault. In *State v. Armistead*, 106 N. C. 639, it is said that no one has a right to take a prisoner from the custody of an officer on the ground that such prisoner is unlawfully in arrest, since the lawfulness of the arrest must be inquired into without resort to force. The property being committed to the custody of the officer by process of law, he had the right to arrest anyone attempting to take it from him, and without warrant. *Braddy v. Hodges*, 99 N. C. 819. The exigency would not permit him to get a warrant; for, while he was off looking up an officer to issue it, the property with whose safe-keeping he was charged would be taken.

No error.

STATE OF NORTH CAROLINA, *Appt.*

J. A. DAVIS *et al.*

(..... N. C.)

The breaking open of the door of a blacksmith shop and taking posses-

NOTE.—In connection with the full discussion in the opinion of forcible entry as a crime, see note on forcible entry as a civil remedy, in *Moselle v. Deaver* (N. C.) 8 L. R. A. 587.

14 L. R. A.

sion by five persons after being forbidden by the lessee, whose original lease from one of them had expired, and who claims possession under a new lease from a co-tenant of the former lessor, is a forcible entry, although he was a hundred yards distant.

(November 24, 1891.)

APPEAL by the State from a judgment of the Superior Court for Iredell County in favor of defendants upon trial of an indictment for forcible entry. *Reversed.*

Statement by **Clark, J.:**

Indictment for forcible entry. It is found by the special verdict that the prosecutor was in possession and daily use of a blacksmith shop; that he had come from his home that morning, intending to work in the shop that day, and, while standing at a mill about 100 yards from the shop, the defendant Davis, with a crow-bar, and the other four defendants came down to a point half-way between the mill and the shop; that, leaving the other defendants there, Davis approached the prosecutor, and demanded the key of the shop, which was refused, and Davis then indicated his purpose to open it by force, and prosecutor forbade it. The defendants then went to the shop, pried the door open, threw down a part of the chimney, displaced the bellows, and took possession. The prosecutor had rented the shop for two years from defendant Davis, but, the term having expired, he had, without surrendering possession, leased the premises from one Morrison, who was a co-tenant of the premises with Davis; that, while defendants were at the shop, the prosecutor's son was present at the shop. The prosecutor himself went to the miller's house, within seventy-five yards of the shop. He testified that he was not afraid of the defendants, but did not go to the shop because he feared it might lead to a difficulty. The court adjudged the defendants not guilty on the special verdict.

Mr. Theodore F. Davidson, Atty-Gen., for the State:

1. According to the law as stated in *Moselle v. Deaver*, 8 L. R. A. 587, 106 N. C. 494, the defendants are guilty upon both counts.

State v. Smith, 100 N. C. 466; *State v. Howell*, 107 N. C. 835.

2. It was not necessary to charge in the bill or to show upon the trial that the prosecutor was present at the time of the alleged unlawful entry.

State v. Shepard, 82 N. C. 614; *State v. Jacobs*, 94 N. C. 950.

Messrs. Bingham & Caldwell, for appellees:

Forcible trespass is the high-handed invasion of the actual possession of another, he being present.

There must be something done at the time of the entry which tends to a breach of the peace.

State v. Laney, 87 N. C. 535.

The indictment for forcible trespass must charge who was present at the time of the alleged trespass, and if on the trial it appears that such person was not present, the defendant must be acquitted.

State v. Walker, 32 N. C. 284.

To constitute the offense of forcible trespass, there must be either actual violence used, or such demonstration of force as is calculated to intimidate or alarm.

State v. Mills, 104 N. C. 905.

The prosecutor at time of the alleged offense was a tenant, by sufferance, of the defendant J. A. Davis. The defendant had a right to enter—and having the right of entry, could at common law use force, provided it did not amount to an actual breach of the peace. In the case at bar there was no breach of the peace and defendants are not guilty.

State v. Ross, 49 N. C. 815, 69 Am. Dec. 751.

Clark, J., delivered the opinion of the court:

The question was discussed before us whether this was a case of forcible entry or forcible trespass. In *State v. Jacobs*, 94 N. C. 950, attention is called to the fact that forcible trespass applies to personal property, and forcible entry to land; but the distinction has not always been adverted to, and it is not very material what the offense is called in argument, if the indictment sufficiently charges a violation of the criminal law, and it is proven by evidence. To constitute either offense, there must be either actual violence used, or such demonstration of force as was calculated to intimidate or tend to a breach of the peace. It is not necessary that the party be actually "put in fear." *State v. Pearman*, 61 N. C. 371. It is sufficient if there is such a demonstration of force as to create a reasonable apprehension that the party in possession must yield to avoid a breach of the peace. *State v. Pollok*, 26 N. C. 305, 42 Am. Dec. 140; *State v. Armfield*, 27 N. C. 207. Such demonstration of force may be by a "multitude," or by weapons. *State v. Ray*, 32 N. C. 89, citing *State v. Flowers*, 6 N. C. 325; *State v. Mills*, 13 N. C. 420.

The Statute (Code, § 1028) provides: "No one shall make entry into any lands and tenements or term for years but in case where entry is given by law, and in such case not with a strong hand, nor with a multitude of people, but only in a peaceable and easy manner; and if any man do the contrary he shall be guilty of a misdemeanor." The same, in effect, was the common-law rule: "Where the entry is lawful, it must not be made with a strong hand, or with a number of assailants; where it is not lawful, it must not be done at all." 2 Wharton, Crim. Law, 9th ed. 1098. Following the analogy as to riots, three persons have been held enough to support the averment of a "multitude." *State v. Simpson*, 12 N. C. 504. If a breach of the peace did not actually take place, it was doubtless due to the defendant Davis' declaration of his purpose to enter, backed with a sufficient force to accomplish it in spite of the prohibition of the prosecutor. *State v. Smith*, 100 N. C. 466. The prosecutor need not have been on the exact spot. That he did not get closer than seventy-five yards was, he says, to avoid a breach of the peace. The defendants had shown themselves able by their numbers to render his closer approach of no avail. He

forbade them, and in effect was present. In *State v. Lawson*, 98 N. C. 759, it was held that where the prosecutor was fifty or seventy-five yards distant when he forbade the entry, and the defendants persisted notwithstanding in making such entry, they were guilty; that it was not necessary for the party in possession to be on the very spot. Besides, in this case, the son of the prosecutor, after the prohibition to the defendants given by his father, was present at the shop when being forced open by them. The title to the premises could not be called in question. The offense is the high-handed invasion of the possession of another, though such other need not be at all times personally present on the premises, if in actual exercise of authority and control over the same (*State v. Bryant*, 103 N. C. 436) and if present in person, or by some member of his family, at the time of the entry, and forbidding it. It is true that when the premises are withheld by one having a bare charge or custody, as a servant of a mere trespasser or intruder, the owner may break open doors, and forcibly enter, if unnecessary force is not used (Wharton, Crim. Law, 1087; 1 Russ. Crimes, 9th ed. 420; 2 Bishop, Crim. Law, 501); but a landlord who violently dispossesses a tenant whose lease has expired is guilty of forcible entry (Wharton, Crim. Law, 9th ed. 1087); and a co-tenant may commit the offense of forcible entry, if the other co-tenant is in possession, and resists. 2 Bishop, Crim. Law, 501. So, whether the prosecutor is treated as a tenant holding over, or as the lessee of the co-tenant, the taking the shop out of his possession by a multitude of persons in the manner stated, he being present, and forbidding, made the defendants guilty.

This case differs from *State v. Mills*, 104 N. C. 905, which is relied on by the defendants. In *State v. Mills*, the defendant, accompanied only by an old negro man, went to the house, and entered against remonstrance of the prosecutor, but without violence, or the display of weapons, of numbers, or other signs of force calculated to intimidate or create a breach of the peace; and the court held, citing *State v. Covington*, 70 N. C. 71, and *State v. Lloyd*, 85 N. C. 578, that "mere rudeness of language or slight demonstrations of force, against which ordinary firmness is a sufficient protection," was not indictable. Hence, though there the prosecutor left to avoid a breach of the peace, the demonstration of force was not sufficient ground for such apprehension. Here there were five men, one of them armed with a crow-bar. The language and conduct of the defendants indicated their purpose to take possession of the shop by force, though the prosecutor forbade them. This case differs also from *State v. Laney*, 87 N. C. 585, in that there, though the entry was made by numbers, there was no one present and forbidding the entry; hence no danger of a breach of the peace by such entry. Still the court intimated strongly that the defendants in that case were guilty of the forcible detainer. Upon the special verdict, the court should have rendered judgment against the defendants.

Error.

VERMONT SUPREME COURT.

Charlotte SANBORN

John T. COLE.

(.....Vt.....)

1. **A note signed by mark, the execution of which is denied, is sufficiently proved** for admission in evidence by proof of the handwriting of a deceased subscribing witness.
2. **A wife is not competent to prove her agency for her husband** in order to make her a competent witness for him under Rev. Laws, § 1005, as to a contract with a person who has since died.
3. **Testimony that a wife did all her husband's business** is admissible on the question of her agency in a particular transaction within that time.
4. **An indorsement reading "received on the within notes,"** written on the back of a sheet on the face of which several notes of the same date are written, is to be treated as an application of payment upon all the notes no matter whether the writing extends over the back of more than one of the notes or not, provided the payment was so made as to justify such an application.
5. **A debtor's forgetfulness of the number of notes** given to his creditor, and his consequent belief that there are only three instead of five, will not prevent application of a payment made by him without direction upon all the notes.
6. **A note that is barred may be revived by an indorsement** made by the creditor without the debtor's direction or knowledge when a general payment is made by the debtor without specifying its application.
7. **The debtor's blindness does not entitle him to any special protection** in respect to the application of a general payment on notes, one of which is barred, in the absence of any fraud or concealment by the creditor.
8. **An erroneous instruction** as to the effect of usury is harmless where the jury have found there was no usury.

NOTE.—Revival of barred debt by application of general payment.

There is a noticeable dearth of authority upon this subject. In England it is held that a creditor who holds several claims against his debtor, part of which are barred by the Statute of Limitations, and who receives a general payment from the debtor, may apply it to the debt which is barred, but such application will not take the balance of the debt out of the statute. *Mills v. Fowkes*, 5 Bing. N. C. 455, 7 Scott, 444, 8 Jur. 408. See also *Nash v. Hodgson*, 6 DeG. M. & G. 474.

In Massachusetts the same doctrine has been followed, the court holding that a payment made by a debtor to a creditor to whom he owed several distinct debts without any direction as to its application, and immediately applied by the creditor to a debt barred by the Statute of Limitations, will not take the remainder of the debt out of the operation of the statute. *Pond v. Williams*, 1 Gray, 630.

And the same doctrine was again recognized in *Ramsay v. Warner*, 97 Mass. 13.

This rule has been followed in Maine, the court holding that an application of payment by a creditor to a debt already barred by statute will not re-

(September 25, 1891.)

EXCEPTIONS by defendant to rulings of the County Court for Caledonia County made during the trial of an action brought to recover the amount alleged to be due upon five promissory notes, which resulted in a judgment in favor of plaintiff. *Judgment affirmed.*

The facts sufficiently appear in the opinion.

Mr. J. P. Lamson, for defendant:

The defendant offered himself as a witness to prove the agency of his wife to transact the business with Sanborn. If he was not a competent witness, it is because the statute excludes him. Does the statute exclude him from testifying to the offer made? We say it does not.

Rev. Laws, § 1002.

He was not offered to prove "any contract or cause of action in issue." No administrator or executor is a party. As against this plaintiff, the defendant could have testified to payments made by him upon the notes in suit, if they had not been indorsed.

Taylor v. Finley, 48 Vt. 78.

The wife was a competent witness to prove her own agency. Section 1005 provides, the wife may testify to business transactions done by her as the agent of her husband. That agency must be proved by the wife or the husband. The case shows such a state of facts that the wife is the agent of the husband as a matter of necessity.

Martin v. Hurlburt, 6 New Eng. Rep. 661, 60 Vt. 364.

The indorsements found upon the notes were not sufficient evidence of themselves, as against a blind man, that they were made with his knowledge and approval.

Austin v. McClure, 6 New Eng. Rep. 875, 60 Vt. 463.

In order to take the notes out of the statute, the plaintiff must prove that the indorsements were made by the defendant or by his direction. It was not sufficient that the indorsements appear on the notes.

Pond v. Williams, 1 Gray, 630; *Ramsay v.*

move the bar as to the balance of the debt. *Blake v. Sawyer*, 12 L. R. A. 712, 83 Me. 129.

In Vermont, on the other hand, the law appears to be well established in accordance with the doctrine of the principal case. In *Ayer v. Hawkins*, 19 Vt. 26, the court decided that where the creditor held three notes, all of which were barred, and received a general payment, he was entitled to apply it to either one he chose and thereby take that one out of the statute, but he could not divide the payment and apply a portion upon each of the notes so as to remove the bar as to all.

In *Robie v. Briggs*, 4 New Eng. Rep. 506, 39 Vt. 448, the doctrine was stated that an application which may be legally made, whether by the debtor, the creditor, or the law, will remove the bar from the debt or debts covered by it. The only limitation seems to be that the creditor cannot make an application contrary to the intent, express or implied, of the debtor. *Austin v. McClure*, 6 New Eng. Rep. 875, 60 Vt. 463.

The Vermont doctrine appears to be followed by the Missouri Court of Appeals in *Beck v. Haas*, 31 Mo. App. 180, although the English case of *Mills v. Fowkes*, *supra*, is cited as authority for the decision.

H. P. F.

Warner, 97 Mass. 8; *Haynes v. Nice*, 100 Mass. 327, 1 Am. Rep. 109.

The indorsements made after the statute had run have no effect to remove the statute bar.

Rev. Laws, § 975, p. 238.

Messrs. Bates & May, for plaintiff:

It was competent to show that Mr. Perkins was dead and to prove by persons who knew his signature that the ones on notes in dispute were his.

Dan. Neg. Inst. § 112; *Kimball v. Davis*, 19 Wend. 437; *Lyons v. Holmes*, 11 S. C. 429, 32 Am. Rep. 488.

The defendant was an incompetent witness as to all matters occurring prior to the appointment of the administrator of Mr. Sanborn.

Rev. Laws, § 1003.

Mrs. Cole was the wife of one of the parties and unless she could bring herself within the provisions of section 1005, Rev. Laws, she could not properly testify.

Crocker v. Chase, 57 Vt. 413.

That Mrs. Cole had had and conducted other business transactions for her husband did not prove that she was his agent in this particular one, for the statute seems to be explicit that she must have had authority to conduct and manage the transaction in dispute.

Eastabrooks v. Prentiss, 34 Vt. 457; *Orcutt v. Cook*, 37 Vt. 515.

The wife being incompetent could not remove that incompetency by her own unaided evidence.

Poultney v. Fair Haven, Brayt. 185; *Presby v. Blodgett*, Gen. Term. 1887; *Fay v. Green*, 1 Aiken, 71; *Miles v. United States*, 103 U. S. 304, 26 L. ed. 481.

In case a witness before trial has denied the existence of a God, and so rendered himself incompetent, his evidence is not admissible to prove his competency.

Jackson v. Gridley, 18 Johns. 98; *Com. v. Wyman*, Thach. Cr. Cas. 482; *State v. Townsend*, 2 Harr. (Del.) 543; *Smith v. Coffin*, 18 Me. 157.

Nor can a witness by his own evidence prove that his disability has been removed.

Denn v. Jones, 1 N. J. L. 181; *Mott v. Hicks*, 1 Cow. 535, 18 Am. Dec. 550; *Barr v. Armstrong*, 56 Mo. 577, 9 Am. & Eng. Encyclop. Law, 840.

Munson, J., delivered the opinion of the court:

The defendant is sued as the maker of five promissory notes. The signature to the notes consists of the defendant's name, with a cross designated as his mark. The name of H. Perkins appears upon each note as the signature of a witness. The defendant denied the execution of the notes, and put the plaintiff upon her proof. To establish the controverted fact, the plaintiff was permitted to show that the name "H. Perkins" was in the handwriting of one Hiram Perkins, and that said Perkins had deceased; and upon this showing, without other proof of execution, the notes were received in evidence. The English rule requires that the execution of an attested writing shall be established by the testimony of the attesting witness, or, in case of his death, disability, or absence from the jurisdiction, by proof of his handwriting. *Barnes v. Trompowsky*, 7 T. R. 14 L. R. A.

265; *Call v. Dunning*, 4 East, 53; *Rex v. Harringtonworth*, 4 Maule & S. 350; *Whyman v. Garth*, 8 Exch. 803. In this country the English rule has been closely adhered to in some States, while in others it has been variously modified and restricted. *Brigham v. Palmer*, 3 Allen, 450; *Hall v. Phelps*, 2 Johns. 451. It has been held in this State that, when an attestation is not necessary to the operative effect of the instrument, proof of the handwriting of a witness who cannot be produced may be dispensed with, and the paper be received in evidence upon proof of the hand of the contracting party. *Sherman v. Champlain Transp. Co.* 31 Vt. 162. But the case contains no intimation that proof of the handwriting of a deceased or absent witness is not sufficient evidence of the execution of an attested writing. We think the rule that a writing shall be admitted in evidence upon such proof remains undisturbed in this State. This being the evidence upon which papers signed in the ordinary way are admitted, we see no reason why other or further proof should be required when the signature is by mark. It is considered that the attesting witness is selected by the party as the person through whose testimony, or by proof of whose hand in the event of his decease, the authenticity of his own signature may be shown. Especial value attaches to proof of the hand of the witness when the signature of the contracting party is by mark, from the fact that in such cases evidence as to the signature is more difficult to procure, and of less certainty when obtained. If it were the general rule that proof of the signature of the maker should be required in addition to proof of the handwriting of the witness, it might well be urged that the rule should be relaxed when the signature is a cross. There is so little room in the use of this simple character for the development of settled individual peculiarities, that proof of such a signature by identification or comparison must ordinarily be very unsatisfactory. It has, indeed, been questioned whether such evidence is of sufficient value to be entitled to admission. We find no support for the claim that the holder of a paper thus signed must furnish more evidence of its execution than is required in the case of an ordinary signature. 1 Best, Ev. *327; 1 Dan. Neg. Inst. § 112; *Lyons v. Holmes*, 11 S. C. 429, 32 Am. Rep. 488.

Sanborn, the payee of the notes, died long before the suit was brought, and the plaintiff became the owner of the notes upon the settlement of his estate. The defendant claimed that his wife, as his agent, did whatever business had been done with Sanborn in connection with the notes. His offers to prove this agency by his own testimony and that of his wife were properly excluded. The defendant could not testify in his own favor, because the other party to the contract in issue was dead. Rev. Laws, § 1003; *Farmers Mut. F. Ins. Co. v. Wells*, 58 Vt. 14. His wife could not be a witness in the suit unless she was the agent of her husband in the transaction of the business. Rev. Laws, § 1005; *Carpenter v. Moore*, 43 Vt. 392. It was therefore necessary to establish her agency before she could become a witness. She was not a competent witness to show herself within the exception to the general dis-

qualification. Persons prima facie competent, whose competency is questioned, may be examined on the *voir dire* in support of their competency, but persons prima facie incompetent cannot testify until their competency has been otherwise established. In *Fay v. Green*, 1 Aiken, 71, the depositions of certain persons disqualified by interest, unless their interest had been discharged, were received in evidence on the strength of their own testimony therein that such interest had been discharged. The court considered that the testimony by which the interest was removed was the testimony of interested witnesses, and should not have been received. The rule has been recognized in many cases. *Botham v. Swingle*, 1 Esp. 164; *State v. Townsend*, 2 Harr. (Del.) 548; *Mott v. Hicks*, 1 Cow. 518, 585, 13 Am. Dec. 550; *Stevenson v. Mudgett*, 10 N. H. 388, 34 Am. Dec. 155; *Bank of Utica v. Merereau*, 3 Barb. Ch. 528, 5 L. ed. 998.

Testimony that for a period covering the time of the transaction the defendant's wife did all his business, would be evidence tending to show that she was his agent in this transaction. If the testimony which could have been given by the son under the defendant's offer would have covered such a period, it was error to exclude it. But, if his testimony could have related only to a later period, its exclusion was not error. The exceptions are not clear upon this point, but from what appears in them it seems probable that the age of the son was such that the proposed testimony could have referred only to a later period.

The five notes are all of the same date, and are written one below another upon the same sheet. The note maturing last fell due in 1876. The indorsements made previous to October, 1879, are so entered upon the back of the sheet as to be placed on separate notes, and are without words indicating an intention to extend the application to other notes. The indorsements dated October 8 and December 27, 1879, are so entered as to be upon one note, but are written where entries would naturally be made upon the paper as folded and read, "Received on the within notes." The last two indorsements are so extended across the sheet as to be upon all the notes but one, and read, "Received on the within notes." Upon the note not reached by the writing so extended a separate indorsement was made. The defendant claims that the indorsements of October 8th and December 27th must be treated as applied on the note upon the back of which they are written, and that the indorsements extended across the back of four of the notes must be treated as applied upon the note on which the entries commence. It is insisted that, when a payment is so made as to justify an application by the creditor upon more than one note, such an application can be accomplished only by indorsing the amount paid in separate sums upon the several notes. We are not disposed to so hold. The application here is made in terms upon the "within notes," and we do not think the language of the indorsement is made ineffectual by its position. When notes are held in the form shown here, and an indorsement is made in the words and in either of the methods above stated, we think it must be treated

as a valid application upon all the notes covered, provided the payment was so made as to justify such an application.

It is held in this State that, when a debtor makes a general payment to a creditor who holds several notes against him, the creditor may apply the payment upon any one of the notes, but cannot divide it among them all. *Ayer v. Hawkins*, 19 Vt. 26; *Wheeler v. House*, 27 Vt. 735. This is upon the ground that, although no application is directed, regard must nevertheless be had to the intention of the debtor, and that he cannot be presumed to have intended an application upon more than one of the notes. It is evident, however, that these cases would not be controlling where the debtor had regarded and treated the several notes as constituting one demand, and made the payment in that view. The treatment of the indebtedness in this case seems to have been such as to afford no ground for claiming the general payments to be within the doctrine of the cases above cited. The jury was instructed that if the payments were general payments, made to apply on these notes, without specifying any application upon particular notes, the creditor had a right to apply them, as he has upon the notes generally, and that such application would renew the debt; and, although a general exception was taken to so much of the charge as related to the application of payments made generally, this exception was waived in argument. The case states that the evidence of the defendant tended to show that he supposed he was making payments upon three \$100 notes, and no more; and the question raised as to the effect of these payments was whether they were a recognition of three notes, or of all the notes. It is not claimed but that the payments were so made that the creditor was justified in applying each payment upon all the notes which the debtor then understood were held against him. The points specially urged upon the court below, and relied upon here, relate to the matter of intent, as affected by the defendant's claimed ignorance of the situation, and by the fact of his physical infirmity.

The defendant was blind at the date of the notes, and has since remained so. On trial, he admitted giving three notes, but denied that more were given. He also admitted making the payments represented by the indorsements, and that he gave no express direction as to their application. But he claimed that, inasmuch as he had knowledge of only three notes, the payments were necessarily made upon those notes, and that there could be no valid application upon any other. In this view, the court was asked to instruct the jury that, to entitle the plaintiff to the benefit of the indorsements on the other two notes as against the statute, it was incumbent on her to prove that the payments were made with knowledge on the part of the defendant that the creditor held such notes against him. The court declined so to charge, and we think properly.

The question whether the defendant executed all the notes was submitted to the jury, and the verdict has established the fact that he did. He knew at the time of the transaction how many signatures he affixed as well as if able to see. If he afterwards understood it

differently, it was because of forgetfulness. His claim is not based upon any supposed cancellation of a part of the notes, or supposed transfer of a part to other parties. He made each payment as a general payment upon the Sanborn indebtedness, whatever it was. The general intention with which the payment was made will not be controlled by a consideration of what his action might have been if he had then had in mind that there were five notes instead of three. The payment having been so made as to justify an application upon the notes generally, and that disposition having been made of it, the application cannot now be overthrown on the plea that the debtor was under a misapprehension as to the number of the notes, when his misapprehension was not caused by any act or omission of the creditor. The defendant cites, in support of the contrary view, *Roakes v. Bailey*, 55 Vt. 542, where it is said that "if the debtor pays with one intent, and the creditor receives with another, the intent of the debtor shall govern." But the proper application of the doctrine is apparent from the facts of that case, and the further views expressed. There, a firm with which the debtor had been dealing was dissolved, and was succeeded by one of its members. The debtor received no notice of the dissolution of the firm, and its successor continued to deliver goods and credit payments upon the same pass-book, as if there had been no change. The debtor supposed he was making payments upon the account of the firm, and the successor of the firm treated them as paid upon the subsequent account. The court considered that the debtor was deprived of an opportunity to expressly direct an application by the fault of the creditor, that the circumstances under which the payments were made showed conclusively what the debtor's intention was, and that no right ever existed in the creditor to make the attempted application. It is evident that the facts of the case at bar do not bring it within the decision.

Effect being given to the above applications as made by the creditor, none of the notes have ever been barred except the first one, of which a small part remained unpaid by previous indorsements. It is insisted that a recovery cannot be had upon a note which has been barred unless the payment relied upon to remove the bar was indorsed by the debtor or by his direction; and *Pond v. Williams*, 1 Gray, 630, and *Ramsay v. Warner*, 97 Mass. 13, are cited in this connection. It is held in Massa-

chusetts that a general payment may be applied by the creditor upon a claim that is barred, but that such application will not revive the unpaid balance of the debt. It is said that no promise to pay the balance of a debt can be implied from a payment which is not intentionally made upon that particular debt. We think, however, that any application which the creditor is justified in making must be followed by the ordinary consequences of a part payment. When the debtor leaves the application to be made by the creditor, or, in default of action on the part of the creditor, by the law, he must be held to have intended such application as may finally be made by the creditor or by the law. *Robie v. Briggs*, 59 Vt. 443, 4 New Eng. Rep. 506. If we correctly understand the exceptions, the point was raised that the creditor would have no right to indorse anything upon a barred note, unless the defendant knew at the time of the payment, or was informed before the application, that such note was barred. This claim seems to have been made upon the ground that the defendant's blindness entitled him to some special protection. But the creditor's right to make the application does not depend upon the correctness or completeness of the debtor's understanding as to the situation of the demand; and, in the absence of any question of fraud or concealment on the part of the holders of the paper, we do not see how the debtor's deprivation of one of the ordinary means of acquiring information can affect the action which he was willing to take upon such information as he had.

The defendant claimed that if there was a \$50 note it was given for usury. The jury was instructed that if it was given for usury no recovery could be had upon it. This was correct. The jury was further instructed that if the note was given for usury, and the amounts indorsed upon it were paid with an intention that they be so applied, the defendant could not recover them in this suit by receiving credit for them in ascertaining the general balance. If this was erroneous, no harm came from it, for the jury returned a verdict for all the notes, which they could not have done under the instructions given without finding that the note was not usurious. Having found the note was not given for usury, they did not reach the matter in which the instruction complained of was given.

Judgment affirmed.

NEW YORK COURT OF APPEALS (3d Div.).

WALDEN NATIONAL BANK, *Resp't.*,
v.

Caleb BIRCH *et al.*, *Appts.*

(.....N. Y.)

1. The validity of a purchase by the cashier of a national bank of its own

NOTE.—For notes on election of remedies, see *Fowler v. Bowers Sav. Bank* (N. Y.) 4 L. R. A. 145; *Conrow v. Little* (N. Y.) 5 L. R. A. 686; *Terry v. Munger* (N. Y.) 9 L. R. A. 216.
14 L. R. A.

stock for it in violation of U. S. Rev. Stat., § 5201, cannot be denied by sureties of the cashier as a defense to an action on his bond for misappropriation of the stock since only the federal government can set up the invalidity of that transaction.

2. The cashier of a national bank who misappropriates its stock which he has taken in his own name as security for a note to the bank which he indorses in order to evade the prohibition against loans by the bank on the security of its own stock, is guilty of mis-

appropriating the property of the bank intrusted to him as cashier and his sureties are liable therefor.

- 3. Recovering judgment against the cashier of a national bank on his indorsement of a note** secured by a transfer of the bank's stock to him individually, which indorsement and transfer were merely an evasion of the law against loans on the security of the stock is not a bar to an action on his bond for misappropriating the stock, as the remedies are concurrent and not inconsistent.

(December 1, 1891.)

A PPEAL by defendants from a judgment of the General Term of the Supreme Court, Second Department, affirming the judgment of a Special Term for Orange County in favor of plaintiff in an action brought to enforce the liability of sureties upon the bond of a bank cashier. *Affirmed.*

Statement by **Vann, J.:**

This was an action to recover from the defendants, as sureties of one Rutherford, cashier of the plaintiff Bank, the value of certain of its securities, alleged to have been converted by him. The trial court found the following facts: Said Rutherford was cashier of the plaintiff, a national bank, from its organization until March 19, 1887, except during a few months in the year 1886, when he was ill. The bond in question, dated February 2, 1887, is in the penalty of \$4,000, and contains the condition that if said Rutherford "honestly and in good faith performs all the duties of cashier in the Walden National Bank, and all the duties in any manner incident thereto while acting as such cashier, and also all such duties, acts, and work as may be required of the said William G. Rutherford by the said Bank or its board of directors which shall from time to time be assented to on his part, and in all respects conduct honestly and in good faith towards or in respect to said Bank, its moneys and securities, and the moneys and securities of any other person or persons left in any manner with said Bank, then the above obligation to be void; otherwise to remain in full force and virtue." Prior to December 12, 1882, one Terbell owned thirty shares of the stock of said Bank, of the par value of \$100 per share, and on that day he assigned and delivered the same to said Rutherford in his "individual name," and thereupon it was transferred to him on the books of the Bank, and three new certificates for ten shares each were issued to him therefor. At this time Terbell was indebted to the Bank to an amount exceeding \$9,000 upon certain notes made or indorsed by him, and discounted by the plaintiff for his benefit. He was not indebted to said Rutherford, but was in financial difficulties, and wanted to secure the Bank. Said stock was thus transferred to said Rutherford upon the understanding "that it was to be held for the Bank as collateral security for the payment of" said notes. The transfer "took place over the counter of the Bank, while said Rutherford was acting as its cashier; and the transaction was with him in that capacity." Said Terbell, "understood he was dealing with the Bank, and not Rutherford personally; and the

only reason given at any time for assigning the stock to Rutherford instead of the Bank was, as Rutherford told Terbell, because the Banking Act prohibited the Bank from making loans upon the security of its own stock." "Said cashier, after the transfer aforesaid, put said stock in an envelope, and informed the president of the Bank that it belonged to Terbell, and the Bank thereafter held such stock as security for Terbell's paper, although it held it in Rutherford's name." December 20, 1883, Terbell made his note for \$1,000, and April 1, 1884, another for the same amount, each payable to the order of Rutherford, and indorsed by him, and the plaintiff discounted both for said Terbell, and at the time "held said bank-stock as security for the payment" thereof, under the aforesaid agreement. The indorsements of Rutherford "were in form only, and were only done to make the transaction appear regular under the National Banking Laws." The note dated April 1, 1884, was given to take up a note made by Terbell and held by the plaintiff on December 12, 1882, or in renewal of a note given for that purpose. September 1, 1886, at the request of Terbell and the plaintiff, Rutherford sold ten shares of said stock to the defendant Snyder for \$1,210, which was applied on the indebtedness of Terbell to the Bank, except a small sum, which was placed to his credit on the books. Up to this time the dividends upon the stock had been credited to Terbell, and after this sale the dividends upon the twenty shares remaining were equal to the interest on said two notes, and "they were balanced in that way by the cashier, said Rutherford." January 18, 1887, Rutherford borrowed \$1,000 upon his own note, and for his own use, from the Goshen National Bank, to which he gave as collateral security ten shares of said stock. The note was not paid, and the Bank last named sold said collateral, and with the proceeds paid the note. March 18, 1887, Rutherford borrowed another \$1,000 upon his own note, and for his own use, from the Chase National Bank, and assigned to it the remaining ten shares of said stock as collateral. That note was not paid, and that Bank sold its collateral, and paid its note out of the proceeds. Neither of the notes so held by the plaintiff was ever paid, although payment was duly demanded; and no part of said twenty shares of stock was ever returned to the plaintiff, notwithstanding due demand made of said Rutherford. September 10, 1887, the plaintiff recovered judgment on its notes against Terbell and Rutherford, but, no part thereof having been paid, an offer was made to the defendants to assign the same to them, "but they declined to do anything about the matter." Upon the request of the defendants the court also found that the notes made or indorsed by Terbell and held by the plaintiff on December 12, 1882, with two or three unimportant exceptions, had upon them the name of a responsible maker or indorser, in addition to that of Terbell. The trial judge refused to find, upon the like request, that "the transfer of said stock by said Terbell was made to said Rutherford, and held by him in his individual capacity, as a personal matter, and he did not take and hold the stock as cashier for the plaintiff, and as collateral

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security to the indebtedness to and for said Bank," and, after so refusing, added: "Rutherford was not liable as an indorser, though one in form." The defendants excepted generally, but did not except specifically to the addition, as found. After finding these facts, the trial court found as conclusions of law that the transaction was not prohibited by the National Banking Act, and, if it was, that the defendants could not take advantage of it in this action; that Rutherford was not liable to the Bank as indorser on said notes; and that the recovery of said judgment does not help the defendants, because the rule as to election of remedies does not apply; that the defendants were not liable for the stock given to the Goshen Bank on the 18th of January, 1897, because they were not then the sureties of said Rutherford, but that they were liable for the value of the other ten shares, delivered to the Chase Bank March 18, 1887, as that was after they had signed said bond. Rutherford died in March, 1888, and this action was commenced about two months afterwards.

Messrs. A. S. & W. F. Casedy, for appellants:

Under the Banking Act, Rutherford was a stockholder individually, and if the Bank had failed with the stock standing in his name he would have been liable to the creditors for an amount equal to the stock, and it would have been no defense to him to say that he held it for the Bank.

Wheelock v. Kest, 77 Ill. 296; *Magruder v. Colston*, 44 Md. 849, 23 Am. Rep. 47; *Hale v. Walker*, 31 Iowa, 344, 7 Am. Rep. 187.

The judgment recovered by the Bank against Rutherford forever fixed their position as to the notes.

Dedham Bank v. Chickering, 4 Pick. 314; *Brandt, Suretyship*, p. 314.

As to the strictness with which courts have construed bonds of this character, see—

Miller v. Stewart, 23 U. S. 9 Wheat. 680, 6 L. ed. 189; *Boston Hat Mfg. Co. v. Messenger*, 2 Pick. 223; *People v. Pennock*, 60 N. Y. 421; *McCluskey v. Cromwell*, 11 N. Y. 598.

The transaction if as claimed by the Bank and found by the court was not in line of the regular duties of Rutherford as cashier, was out of the ordinary course of business, was not contemplated by the sureties and covered by the bond.

Where one of two innocent parties must sustain a loss by the fraud of a third, such loss should fall upon the one, if either, whose act has enabled such fraud to be committed.

Moore v. Metropolitan Nat. Bank, 55 N. Y. 41.

The Bank cannot do indirectly, in holding its own stock as collateral, what it cannot do directly, and thus evade the Act. If Rutherford held it as collateral for the Bank, it was taken and held without authority for several years, and it was doing an act prohibited by the laws of the United States, and which would be good cause for forfeiture of its charter.

First Nat. Bank of South Bend v. Lanier, 78 U. S. 11 Wall. 859, 20 L. ed. 172.

Mr. B. R. Champion, for respondent:
Defendants cannot take any advantage of
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the failure to comply with the law, even if it had been violated by the Bank.

First Nat. Bank of Xenia v. Stewart, 107 U. S. 676, 27 L. ed. 592; *National Bank of Genesee v. Whitney*, 103 U. S. 99, 26 L. ed. 443; *Fortier v. New Orleans Nat. Bank*, 112 U. S. 489, 28 L. ed. 764; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank of Central City*, 96 U. S. 640, 24 L. ed. 618; *Wyman v. Citizens Nat. Bank of Haribault*, 29 Fed. Rep. 734; *Thompson v. St. Nicholas Nat. Bank*, 118 N. Y. 323; *Atlantic State Bank of Brooklyn v. Saery*, 82 N. Y. 291.

The contract of the defendants in their bond covered the acts of Rutherford in appropriating the stock.

Barrington v. Bank of Washington, 14 Serg. & R. 405; *Rochester City Bank v. Elwood*, 21 N. Y. 88; *Roschick v. Van Voorhis*, 91 N. Y. 353; *Fourth Nat. Bank v. Spinney*, 120 N. Y. 560; *Belloni v. Freeborn*, 68 N. Y. 383; *Tompkins County Suprs. v. Bristol*, 99 N. Y. 316; *German American Bank v. Auth*, 87 Pa. 419, 30 Am. Rep. 374.

A party may prosecute as many remedies as he legally has, provided they are consistent and concurrent. This the plaintiff has done and no more.

Emery v. Baltz, 22 Hun, 484; *Stowell v. Chamberlain*, 60 N. Y. 272; *Boven v. Mandeville*, 95 N. Y. 287; *Richards v. La Tourette*, 119 N. Y. 54; *Mills v. Parkhurst*, 126 N. Y. 89.

Vann, J., delivered the opinion of the court:

The appellants claim that the transaction whereby the stock in question was transferred to Rutherford was in violation of the National Banking Act, which provides that no banking association "shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser of any such shares unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith." U. S. Rev. Stat. § 5201. Assuming this to be true, the defendants cannot take advantage of it, because the Act "imposes no penalty, either upon the bank or borrower, if a loan upon such security be made." *First Nat. Bank of Xenia v. Stewart*, 107 U. S. 676, 27 L. ed. 592. The case cited was an action by the personal representatives of a borrower to recover from a national bank the value of certain shares of its capital stock, delivered to it as collateral at the time the loan was made, and, after default in payment of the note, sold by the bank, and applied on the debt. The court held that, if the prohibition of the statute could be urged against the validity of the transaction by anyone except the government, it could only be done before the contract was executed, and while the security was still subsisting in the hands of the bank. The decisions of the federal courts, construing the provision of said act which prohibits national banks from purchasing, holding, or conveying real estate, except for certain purposes, are analogous, because no penalty is provided for a violation of that section. U. S. Rev. Stat. § 5137. While it permits banks to purchase and hold such real estate "as shall be mortgaged to it in good faith by way of security for debts previously contracted," it prohibits the taking of a mortgage to secure future

advances, but does not declare void any security taken in violation of the Act. It has been repeatedly held that a mortgagor, although taken to secure future advances, is a valid and enforceable security, notwithstanding the prohibition; and that only the federal government can take advantage of the violation of the statute. *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 183; *National Bank of St. Louis v. Whitney*, 108 U. S. 99, 26 L. ed. 448; *Fortier v. New Orleans Nat. Bank of Genesee*, 112 U. S. 439, 28 L. ed. 764. In *Wyman v. Citizens Nat. Bank of Faribault*, 29 Fed. Rep. 734, it was held that a contract was not void if entered into by a national bank in violation of section 5200, which provides that "the total liabilities" to such a bank of any person, corporation, or firm shall not exceed one tenth of its capital stock actually paid in. The court said that "the decisions of the United States Supreme Court heretofore made warrant the conclusion that objections of the character presented to a breach of the Banking Law by a national bank can only be urged by the government." Similar decisions have been made by this court under somewhat similar circumstances. *Thompson v. St. Nicholas Nat. Bank*, 113 N. Y. 325, 334; *Atlantic State Bank of Brooklyn v. Savery*, 82 N. Y. 291. The principle on which these cases rest applies to the point under consideration, and requires us to hold that, even if the transaction with Rutherford was a mere evasion, and hence a violation of the provisions of the National Banking Act, the fact is not available as a defense to this action.

The claim of the defendants that Rutherford held the stock to secure him for indorsing the note in question is not supported either by the findings or the evidence. The transaction was not with Rutherford as an individual, but as cashier of the bank. No evidence was given upon the subject except by Mr. Terbell, who testified: "When I go to the bank, and a man comes to the hole, and I tell him anything, I consider I am saying it to the bank. This conversation was over the counter in the Walden Bank. . . . I so transferred it [the stock] to him individually to secure the bank. I did not make it directly to the Bank, because I supposed he was the Bank. He indorsed these two notes. . . . When I wanted him to pin the stock on these notes he said: 'When the government official comes here we can't take our own stock, and when he comes here and sees this stock pinned on these notes he will say: "You sell it right off and pay this" I will indorse them and will tell the board how it is.' The object was to get rid of the provision forbidding banks to take their own stock, and so I made the stock to him. He indorsed the paper to get around that. . . . When Rutherford took this stock away he put it in an envelope, and I think told Mr. Scofield, then president of the Bank, if anything happened, that belonged to me." Thus it is clear that Rutherford, as cashier, took and held the stock in trust for the Bank, and indorsed the notes simply to deceive the government. He had no personal interest in the matter. All that he did was for the benefit of the Bank in the transaction of its business as its officer. His object was to get

security for the Bank, which was in the line of his duty. The method adopted by him to effect his object was the transfer of the stock, not to the bank directly, as that was deemed inadvisable, but to himself, still acting as cashier for the benefit of the Bank. His indorsement, although a contract in form, was no contract in reality, unless made so by subsequent adjudication, but an artifice resorted to by him, while doing the business of the Bank, to deceive the official inspector for its protection. In no part of the transaction did he act for himself. The plaintiff, therefore, became the equitable owner of the stock, subject to the right of Mr. Terbell to redeem. When Rutherford appropriated the stock to his own use, he deprived the Bank of that which belonged to it as the beneficial owner, and which was in his name, and the evidence thereof in his custody, by virtue of his official relation to the Bank. Although he may not have been guilty, under the circumstances, of strict conversion, he was guilty of misappropriating the property of the bank that had been intrusted to him as its cashier. This was in violation of his duty to the plaintiff and of the bond given by the defendants in his behalf.

The defendants further claim that, even if Rutherford held the stock for the benefit of the Bank, and in his capacity as cashier, still by recovering judgment against him as indorser the plaintiff waived its right to sue him in tort and thereby deprived the defendants of a substantial right in case they should pay the bond. Although Rutherford, upon the facts herein as found by the special term, had a perfect defense to the action brought against him on the notes, still the judgment entered by default was an adjudication irrevocably establishing a contract of indorsement between him and the plaintiff. *Lorillard v. Clyde*, 122 N. Y. 41; *Brown v. New York*, 66 N. Y. 345; *Newton v. Hook*, 48 N. Y. 676; *Gates v. Preston*, 41 N. Y. 113. If this was a waiver by the bank of its right to sue him for misappropriating its property, it was also a waiver of its right to sue his sureties for the damages caused by such misappropriation. *Pitts v. Congdon*, 2 N. Y. 352; *Chester v. Bank of Kingston*, 16 N. Y. 336; *Bank of Albion v. Burns*, 46 N. Y. 170; *Barnes v. Mott*, 64 N. Y. 397; *Ludlow v. Simond*, 2 Cal. Cas. 1; *Coleman v. Lamb*, 15 Wend. 329; *Stevens v. Cooper*, 1 Johns. Ch. 425, 1 L. ed. 196; *Harr. Subrogation*, § 17.

It must be assumed on the facts found—that the plaintiff had two causes of action against Rutherford,—one on the note, and the other for misappropriating the security collateral to the note. If they were concurrent, the defendants cannot complain, as both could be prosecuted until one or the other was satisfied. If they were necessarily inconsistent, so that a judgment in one was a defense to the other, their liability on the bond ceased when the judgment was entered. We think that the remedies were concurrent, and not inconsistent. By indorsing the notes, not formally, but, as it must now be assumed, with the intention of binding himself, Rutherford became liable to the plaintiff on his contract. Subsequently, by misappropriating the security that he had taken and was holding as cashier for the plaintiff's benefit, he violated his fiduciary

relation to the Bank, and made himself liable in tort. The latter cause of action accrued nearly five years after the former, to which it had only an accidental relation. His liability on the notes did not prevent him from wrongfully disposing of the Bank's collateral, and making himself liable on that account also. The casual circumstance that one payment would discharge both liabilities does not affect their independent origin and nature, because no fact essential to liability on the note was essential to liability for the misappropriation. There was a breach of contract, and also a breach of duty, in no manner dependent on such contract. Under no circumstances, no election of remedies was required, for both were available. *Manning v. Keenan*, 73 N. Y. 45, 51; *Morgan v. Skidmore*, 3 Abb. N. C. 92; *Morgan v. Powers*, 66 Barb. 42; *White v. Whiting*, 8 Daly, 23, 25; 6 Am. & Eng. Encyclop. Law, 248.

It may be that the error of the learned trial judge in his legal conclusion that Rutherford was not liable as indorser affected his finding of the fact that Rutherford held the stock as cashier for the benefit of the Bank. We find no exception to the facts as found that is specific enough to raise this point. While said conclusion of law was wrong, it did not constitute reversible error, because the final result reached in the judgment order was right.

We think that the judgment should be affirmed with costs.

All concur, except **Brown, J.**, not voting.

Thomas T. STEWART, *Appt.*,

v.

Benjamin S. STONE, *Respnt.*

(.....N. Y.....)

1. The burden of proof of negligence of a bailee in whose factory milk and its prod-

NOTE.—*Contracts; effect of intervening impossibility to perform as a relief from the obligation.*

The distinction between a contract and a duty created by law, made in *Paradine v. Jane*, Aleyn, 24, in which the expulsion of a tenant by alien enemies was held not to relieve him from his agreement, has been followed in a multitude of subsequent cases establishing the general doctrine that impossibility of performing an absolute promise will not relieve from the obligation.

Where no express or implied provision as to the event of impossibility can be found in the terms or circumstances of an agreement, a supervening impossibility will not relieve the promisor from liability for failure to perform. *Switzer v. Pinconning Mfg. Co.* 59 Mich. 488.

The real intention of the parties is the test in determining the liability for failure to perform a contract which it has become impossible to perform. *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388.

If an event such as cannot reasonably be supposed to have been in contemplation of the parties when the contract was made makes performance impossible, the parties will not be bound by general words, which, though large enough to include it, were not used with reference to the possibility of the particular contingency. *Baily v. DeCrespigny*, L. R. 4 Q. B. 180.

If it is apparent that parties contracted on the

facts are destroyed by fire is on the party alleging it.

2. The destruction by fire of milk and its products while in possession of a bailee who has contracted to manufacture and sell butter and cheese relieves him from his contract so far as the subject thereof is destroyed by the fire if it occurred without his fault.

(October 6, 1891.)

APPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Fourth Department, affirming a judgment entered in the Oswego County Clerk's office upon the report of a referee in favor of defendant in an action brought to recover the value of a quantity of milk, butter and cheese, manufactured and in process of manufacture from milk furnished by plaintiff to defendant, for that purpose, at his cheese factory. *Affirmed.*

Statement by **Bradley, J.**:

The plaintiff and his assignors were patrons of the defendant's factory, where they and others delivered milk to be manufactured into cheese and butter, marketed, and the proceeds deposited by him for them respectively at a stipulated compensation. This was done by the defendant up to October 28, 1888, when the factory was destroyed by fire, and a quantity of milk, butter and cheese thereby lost. Several of the patrons suffering such loss assigned their asserted claims against the defendant to the plaintiff, who brought this action, and in his complaint alleged that the destruction and loss by the fire were occasioned by the negligence of the defendant or his agents and servants. The referee found that such negligence was not established, and directed judgment for the defendant.

Mr. J. W. Shea, for appellant:

A party who has entered into a contract to make and deliver a manufactured article,

on the basis of the continued existence of a given person or thing, a condition is implied that if performance becomes impossible from the perishing of the person or thing, the performance shall be excused. *Walker v. Tucker*, 70 Ill. 527.

If performance is rendered impossible by the destruction of the subject matter of a contract or by the death of the person upon whose life performance depends, and the like, the obligor will be discharged; but events against which the parties could have provided in their contract can never be set up as an excuse for nonperformance of the obligation. *Union District Twp. v. Smith*, 39 Iowa, 11.

Governmental interference.

A contract is invalidated by the subsequent enactment of police regulations which render its performance illegal as to one of the parties. *Jamieson v. Indiana Nat. Gas Co. (Ind.)* 12 L. R. A. 652.

An act of parliament compelling one to transfer premises to a railroad company releases him from a covenant not to permit erections thereon. *Baily v. DeCrespigny*, L. R. 4 Q. B. 180.

An embargo for an indefinite time will not dissolve, but only suspend, the contract of a ship to carry goods. *Hadley v. Clarke*, 8 T. R. 259; *Baylies v. Pettyplace*, 7 Mass. 324.

A hostile embargo will not relieve from liability

cannot excuse nonperformance upon the plea of accident. If protection is sought from such a contingency, it must be specified in the contract.

Booth v. Spuyten Duyvil R. Mill. Co. 60 N. Y. 487; *Ward v. New York Cent. R. Co.* 47 N. Y. 88; *Nelson v. Odiorne*, 45 N. Y. 498; *Read v. Spaulding*, 80 N. Y. 639, 86 Am. Dec. 426; *Price v. Hartshorn*, 44 N. Y. 99, 4 Am. Rep. 645; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *New York Cent. & H. R. R. Co. v. Standard Oil Co.* 87 N. Y. 492; *Tompkins v. Dudley*, 25 N. Y. 272, 62 Am. Dec. 849.

This action is founded solely on an express contract; the plaintiff proved the contract, and the breach and failure to pay the money on demand.

Graves v. Waite, 59 N. Y. 156; *Ross v. Terry*, 63 N. Y. 613; *Neszel v. Lightstone*, 77 N. Y. 96; *Harris v. Todd*, 16 Hun, 249.

The burden therefore rests on defendant to show due diligence, or a loss for which he is not liable.

Schuerin v. McKie, 5 Robt. 404; *Arent v. Squire*, 1 Daly, 847; *Edw. Bailm.* § 62; *Wharton, Neg.* § 422; *Collins v. Bennett*, 46 N. Y. 480.

Where a party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.

for breach of an express contract to load a vessel. *Atkinson v. Ritchie*, 10 East, 530.

An embargo will not relieve from an express warranty that a ship will sail on a certain day. *Hore v. Whitmore*, 2 Cowp. 784.

Seizure and confiscation of goods in transit on board a ship in a foreign port on the ground that they are contraband goods will not relieve a carrier from an express contract to carry and deliver them. *Spenoek v. Chodwick*, 10 Q. B. 517.

Refusal of the authorities to permit a vessel to receive a cargo on board will not excuse an absolute engagement to take it. *Holyoke v. Depew*, 2 Ben. 334.

The above cases may be harmonized on the theory that hostile embargoes, confiscation, and the like must be regarded as among the possible contingencies contemplated by the parties.

Carriers' contracts.

An express contract to carry goods and deliver them within the prescribed time is not dissolved by the impossibility of performing it. *Hand v. Baynes*, 4 Whart. 204, 38 Am. Dec. 54; *Place v. Union Exp. Co.* 2 Hilt. 19.

An inevitable accident will not relieve a carrier from liability on an express contract to deliver goods within a specified time. *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142.

An unexpected rush of freight will not excuse a carrier from an express contract to carry at a certain time. *Deming v. Grand Trunk R. Co.* 48 N. H. 455.

An unavoidable accident is no excuse for breach of an express contract of a railroad company to furnish cars on a certain day. *Harrison v. Missouri Pac. R. Co.* 74 Mo. 364.

An express covenant to have a ship at a certain port by a certain day is not excused by inability to fulfill it because of contrary winds and bad weather. *Shubrick v. Salmoud*, 3 Burr. 1637.

An act of God does not excuse a carrier for failure to perform its express contract to transport a passenger within a reasonable time. *Van Buskirk v. Roberts*, 31 N. Y. 661.
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Story, Bailm. 38, § 86; *Platt, Covenants*, pt. 6, chap. 2, § 1, p. 583; *Chitty, Cont.* p. 567, Am. ed. by Perkins, 1839; *Cobb v. Harmon*, 28 N. Y. 150; *Tompkins v. Dudley and Read v. Spaulding*, *supra*; *Wheeler v. Connecticut Mut. L. Ins. Co.* 89 N. Y. 550; *Nelson v. Odiorne*, 45 N. Y. 498; *Booth v. Spuyten Duyvil R. Mill. Co.* 60 N. Y. 487; *Spaulding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7.

Negligence will be presumed from the fact that the money for the milk, butter, cheese, etc., was not paid to plaintiff, on demand.

Fairfax v. New York Cent. & H. R. Co. 67 N. Y. 11; *Curtiss v. Delaware, L. & W. R. Co.* 74 N. Y. 124, 80 Am. Rep. 271; *Wescott v. Fargo*, 6 Lans. 819; *Burnell v. New York Cent. R. Co.* 45 N. Y. 184; *Collins v. Bennett*, 46 N. Y. 490.

Plaintiff was not required to point out the precise act or omission in which the negligence of the defendant, his servants or agents consisted.

The J. Russell Mfg. Co. v. New Haven R. R. Co. 50 N. Y. 127; *Seybold v. New York, L. E. & W. R. Co.* 95 N. Y. 669, 47 Am. Rep. 75.

A party is not required to prove a fact which is necessarily much better known to his adversary than to himself.

Field v. New York Cent. R. 32 N. Y. 369; *Searles v. Manhattan Elev. R. Co.* 2 Cent. Rep. 442, 101 N. Y. 661.

Defendant being the owner and in possession

A carrier is not relieved from its obligation on a special contract of shipment because the existence of a mob prevents its performance. *White v. Missouri P. R. Co.* 2 West. Rep. 152, 19 Mo. App. 400. (But the rule is otherwise where there is no time fixed for completing the transportation. See, as illustrating that class of cases, *International & G. N. R. Co. v. Tisdale*, 4 L. R. A. 545, 74 Tex. 8.)

A strike of laborers does not relieve consignees from liability for failure to unload a ship within the number of days expressly fixed by the bill of lading. *Budgett v. Binnington* (C. A.) [1891] 1 Q. B. 35.

Rut it is otherwise if no time is stipulated. *Hlek v. Rodocanachi* (C. A.) 2 Q. B. 628.

An agreement by a carrier to procure the renewal of notes or return them is not excused by the refusal of an indorser to whom they have been delivered to give them up or renew them because he has been summoned as trustee of a subsequent indorser. *Wareham Bank v. Burt*, 87 Mass. 112.

One who contracts to furnish a full cargo for a ship is not excused from performance because it is difficult or even impossible. *Nelson v. Odiorne*, 45 N. Y. 480.

The prior destruction of a vessel relieves from liability on a contract to carry a person thereon as a passenger. *Bonsteel v. Vanderbilt*, 21 Bar. 28.

This decision, which may seemingly conflict with the preceding ones, is clearly within the exception as to destruction of the subject matter.

Destruction of subject matter.

The destruction of a music hall releases both parties from the contract for the use of it for certain future dates. *Taylor v. Caldwell*, 3 Best & 8. 698.

The destruction of a building discharges a contract for the lease of apartments therein. *Graves v. Berdan*, 29 Barb. 100; *Kerr v. Merchants Rich. Co.* 3 Edw. Ch. 315, 6 L. ed. 672; *Stockwell v. Hunter*, 11 Met. 448, 45 Am. Dec. 230; *Winton v. Cornish*, 5 Ohio, 477; *Womaek v. McQuarry*, 28 Ind. 103, 32 Am. Dec. 308; *Alexander v. Dorsey*, 12 Ga. 12, 36 Am. Dec. 443.

of the premises and carrying on the business which he contracted to carry on there, was bound to keep his premises and the machinery therein contained in suitable order for the business, and is liable for any injury consequent thereon under the circumstances.

Leary v. Woodruff, 4 Hun, 99; *Radwoy v. Briggs*, 87 N. Y. 256; *Swords v. Edgar*, 59 N. Y. 37, 17 Am. Rep. 295; *Bunnell v. Stern*, 34 N. Y. S. R. 221; *Kennedy v. New York*, 73 N. Y. 868, 29 Am. Rep. 169; *Cannavan v. Conklin*, 1 Daly, 509; *Tousey v. Roberts*, 21 Jones & S. 446; *Ritterman v. Ropes*, 19 Jones & S. 25; *Camp v. Wood*, 76 N. Y. 92, 32 Am. Rep. 28; *Clusman v. Long Island R. Co.* 9 Hun, 618; *Pollett v. Long*, 56 N. Y. 200; *Lovery v. Manhattan Ry. Co.* 99 N. Y. 166.

Destruction by an accidental fire not caused by lightning is not the act of God.

Miller v. Steam Nav. Co. 10 N. Y. 431; *Goold v. Chapin*, 20 N. Y. 259, 75 Am. Dec. 398; *Chamberlain v. Western Transp. Co.* 44 N. Y. 307, 4 Am. Rep. 681; *Fenner v. Buffalo & S. L. R. Co.* 44 N. Y. 507; *Lamb v. Camden & A. R. & Transp. Co.* 46 N. Y. 236.

Merely showing that a fire occurred and consumed the property, makes no defense without adding the proof of the exercise of proper care.

Curtis v. Rochester & S. Co. 18 N. Y. 543; *Scott v. London Dock Co.* 3 Hurlst. & C. 596. Unless the evidence shows the exercise of

due care by the bailee according to the nature of the bailment he will be held responsible for the breach of his contract to return the property bailed.

Ouderkirk v. Central Nat. Bank, 119 N. Y. 267; *Caldwell v. National Mohawk Valley Bank*, 64 Barb. 333; *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 96, 36 Am. Rep. 582; *Collins v. Bennett*, 46 N. Y. 490; *Cutting v. Marlor*, 78 N. Y. 454; *The J. Russell Mfg. Co. v. New Haven S. B. Co.* 50 N. Y. 121; *Bank of Oswego v. Doyle*, 91 N. Y. 41, 48 Am. Rep. 634; *Hathorn v. Ely*, 28 N. Y. 78; *Platt v. Hubbard*, 7 Cow. 497; *Beardslee v. Richardson*, 11 Wend. 25, 25 Am. Dec. 596.

In an action of this character where plaintiff has shown a situation which could not have been produced except by the operation of abnormal causes, the onus rests upon the defendant to prove that the injury was without his fault.

Seybolt v. New York, L. E. & W. R. Co. 95 N. Y. 568, 47 Am. Rep. 75; *Caldwell v. New Jersey S. B. Co.* 47 N. Y. 291; *Cosulich v. Standard Oil Co.* 123 N. Y. 118; *Smith v. British & N. A. Royal Mail Steam Packet Co.* 86 N. Y. 408.

The law makes the defendant liable, unless he shall show affirmatively that the injury was by an act of God or the public enemy, and was without any fault on the part of defendant.

These cases are easily distinguishable from those in which land and buildings together are rented, and in which the loss of the building is the loss of part only of the subject matter.

The falling of the walls of a brick building releases one from a contract to do the wood work on the building. *Schwartz v. Saunders*, 43 Ill. 13.

A contract to repair a house is discharged by the destruction of the house by fire before the repairs are completed. *Lord v. Wheeler*, 67 Mass. 232.

A contract to furnish part only of the labor and materials for the erection of a building is discharged on the destruction of the building by fire before it is completed. *Butterfield v. Byron* (Mass.) 12 L. R. A. 571.

But a contract to build a house on another's land within a certain time is not discharged by the destruction of the house when nearly completed. *Cutcliff v. McAnally*, 38 Ala. 507; *School Dist. No. 1 v. Dauchy*, 25 Conn. 530, 66 Am. Dec. 371; *Adams v. Nichols*, 19 Pick. 375, 31 Am. Dec. 137; *Commercial F. Ins. Co. v. Capital City Ins. Co.* 31 Ala. 320, 60 Am. Rep. 162; *Tompkins v. Dudley*, 26 N. Y. 272, 82 Am. Dec. 349; *School Trustees of Trenton v. Bennett*, 27 N. J. L. 513.

The destruction of a building which one is bound by contract to erect is not the destruction of the subject matter on which the contract is to operate, as would be the case if the ground on which it was to be built were to disappear in an earthquake, but is merely the destruction of the contractor's own materials and labor.

The destruction of personal property before title has passed, but after a contract for the sale of that specific property, relieves the vendor from liability for failure to deliver. *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 416.

The exhaustion of a coal mine excuses further performance of the contract of a lessee to work it during the continuance of the lease in a good and workmanlike manner. *Walker v. Tucker*, 70 Ill. 567.

Contracts of employment.

The discontinuance of a voyage caused by dam-

ages to a vessel relieves the owner from his contract with the captain for the remainder of the voyage where he is under a contract for monthly wages. *Jenkins v. Wheeler*, 3 Keyes, 645.

Small-pox breaking up a school does not relieve the district from a contract with a teacher. *Dewey v. Alpena Union School Dist.* 43 Mich. 430, 38 Am. Rep. 206.

But the burning of a school-house relieves the school district from its contract employing a teacher where the parties must have contemplated the continued existence of the school-house as the basis of performance. *Hall v. School Dist. No. 10*, 24 Mo. App. 213.

The inability of a corporation to continue business is no excuse for its breach of a contract of employment of an agent. *Lewis v. Atlas Mut. L. Ins. Co.* 61 Mo. 534.

Effect of sickness or death.

Sickness will not excuse for breach of a contract to finish carpenter work on a building by a certain day. *Cassady v. Clarke*, 7 Ark. 123.

But the sickness of a person relieves him from liability for failure to perform a contract for services which can be performed by him alone. *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 368; *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189; *Faby v. North*, 19 Barb. 341.

The death of a consulting engineer during the period of his employment excuses further performance and authorizes a recovery for what was already earned. *Stubbs v. Holywell R. Co.* L. R. 2 Exch. 211.

The illness of an apprentice excuses performance of a covenant to serve. *Boast v. Firth*, L. R. 4 C. P. 1; *Caden v. Farwell*, 96 Mass. 137.

An agreement to play a piano at a concert is excused by the illness of the promisor. *Robinson v. Davison*, L. R. 6 Exch. 238.

A bond in replevin to prosecute a suit to effect is complied with by prosecuting it until the death of the plaintiff. *Ormond v. Bierly*, Carth. 630.

Story, *Bailm.* p. 88, § 86, p. 405, § 411; *Cobb v. Harmon*, 28 N. Y. 150; *Wheeler v. Conn. Mut. L. Ins. Co.* 82 N. Y. 550.

Defendant can comply with his contract to deposit the amount of money due the plaintiff quite as well as though the factory had not burned.

Booth v. Spuyten Duyvil R. Mill. Co. 60 N. Y. 491; *Spalding v. Rosa*, 71 N. Y. 44, 27 Am. Rep. 7; *Wheeler v. Connecticut Mut. L. Ins. Co. supra*; *Cornell v. Cornell*, 96 N. Y. 115.

This is not a case in which the act of God can be resorted to as an excuse for neglect to perform a contract.

2 Parsons, Cont. 184; *Bees v. Johnson*, 19 Wend. 500, 82 Am. Dec. 518; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142.

When the identical thing delivered, although in an altered form, is to be restored, the contract is one of bailment, and the title to the property is not changed; but where there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor, to make the return, and the title to the property is changed. It is a sale.

Smith v. Clark, 21 Wend. 83; *Norton v. Woodruff*, 2 N. Y. 153; *Andrews v. Richmond*, 84 Hun, 20; *Buffum v. Merry*, 8 Mason, 478; *Hurd v. West*, 7 Cow. 752.

The property was not to be returned to plain-

tiff; nor his assignors, under any circumstances. Defendant was to pay therefor the amount he should receive in the market for it, when he should choose to sell in his factory name.

Cooke v. Millard, 65 N. Y. 352; *Burrows v. Whitaker*, 71 N. Y. 291, 27 Am. Rep. 42.

Plaintiff is entitled to recover in case the transaction amounted to a sale.

Goodwin v. Griggs, 88 N. Y. 629; *Austin v. Rarodon*, 44 N. Y. 68; *McDonough v. Dillingham*, 48 Hun, 498; *Allen v. Allen*, 52 Hun, 398; *Segelken v. Meyer*, 94 N. Y. 478; *Greentree v. Roenstock*, 61 N. Y. 583; *Vilmar v. Schall*, 61 N. Y. 568; *Conaughty v. Nichols*, 42 N. Y. 88.

Mr. W. A. Poucher, with Mr. C. C. Brown, for respondent:

The relation of bailor and bailee existed in this case, being a bailment for the benefit of both.

Foster v. Pettibone, 7 N. Y. 493; *Mallory v. Wilhis*, 4 N. Y. 76; *Andrews v. Richmond*, 84 Hun, 20; *Bradley v. Mirick*, 25 Hun, 273.

The bailee in such a case is simply bound to exercise ordinary care about the preservation of the property bailed and in the management of the business intrusted to his care.

The plaintiff not having shown that the defendant was guilty of negligence, cannot recover.

1 Parsons, Cont. 3d ed. 570; 2 Parsons, Cont.

Or of the defendant. *Badlam v. Tucker*, 18 Mass. 235.

The death of a daughter, to whom her father has bound himself by covenant with her husband to leave a share of his property at his own death, releases him from the covenant. *Jones v. How*, 9 C. B. 1, 7 Hare, 267.

A contract for the services of an animal is abrogated by the death or inability of the animal to perform the services if there was nothing to indicate that a substituted performance was contemplated. *Shear v. Wright*, 80 Mich. 159.

The death of an animal replevied relieves from liability on a replevin bond for its return. *Carpenter v. Stevens*, 12 Wend. 589.

Other instances.

Prevention of the performance of a contract by the neglect or omission of some other person who has been depended upon is no excuse for non-performance. *Van Etten v. Newton* (N. Y.) 29 N. Y. S. R. 411.

Unforeseen contingencies, no matter of what nature, constitute no defense for failure to complete buildings on or before a certain date as expressly agreed. *Ward v. Hudson River Bldg. Co.* 125 N. Y. 230.

A covenant to teach a trade to an apprentice is not excused by the impossibility of performing it, but will not be construed to insure a learning capacity of the apprentice. *Clancy v. Overman*, 18 N. C. 402.

Inability by reason of accident, want of means, insolvency or other cause to deliver a quantity of timber according to contract does not excuse non-performance. *Jones v. Anderson*, 82 Ala. 802.

Inability to deliver property as agreed because of a levy thereon is no excuse for breach of the contract. *Reid v. Edwards*, 7 Port. (Ala.) 503, 31 Am. Dec. 720.

An accident cannot excuse failure to deliver at the time specified an article to be manufactured, where the party had ample time to perform, if he had begun promptly. *Booth v. Spuyten Duyvil R. Mill Co.* 60 N. Y. 487.

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The impossibility of delivering corn to a purchaser because transportation could not be obtained will not excuse a breach of the contract. *Bacon v. Cobb*, 45 Ill. 47.

But the destruction by an unprecedented flood of the only medium of transporting coal to fill a contract relieves from liability for failure during the time of necessary interruption where the parties understood the situation as to the means of transportation at the time of making the contract. *Lovering v. Buck Mountain Coal Co.* 54 Pa. 291.

A contract to sell "200 tons of regent potatoes grown on land" of the promisor is discharged by failure of the crop where ground enough was planted to amply fill the contract in an ordinary season. *Howell v. Coupland*, L. R. 1 Q. B. Div. 232.

A contract to deliver teas of the first quality is not excused by the impossibility of obtaining such teas in the market. *Youqua v. Nixon*, 1 Pet. C. C. 221.

The inability to furnish money as agreed because of a financial panic is no excuse for failure. *McCreary v. Green*, 38 Mich. 173.

A covenant including the construction of a canal on certain lands is not excused by inability to get from the landowners the right to construct it. *Stone v. Dennis*, 3 Port. (Ala.) 231.

A line of decisions similar to those above cited, as to the destruction of the subject matter of a contract, but which turn on the question who must bear the loss in case of accident, etc.—will be treated in a subsequent note.

The same is true of decisions as to the right to recover compensation for partial performance of a contract where full performance has become impossible including cases as to death or sickness of an employé during his term, and cases as to effect of destruction of building on covenant to repair.

Another class of cases concerning the effect of death, sickness, etc., to relieve sureties on a bail bond or recognizance may be strictly within the scope of this note but are sufficiently distinct to make their separate treatment proper.

B. A. R.

6th ed. § 88; *Claffin v. Meyer*, 75 N. Y. 260, 31 Am. Rep. 467; *Searles v. Manhattan Elev. R. Co.* 2 Cent. Rep. 442, 101 N. Y. 661; *Hale v. Smith*, 78 N. Y. 480; *Hart v. Hudson River Bridge Co.* 80 N. Y. 622; *The J. Russell Mfg. Co. v. New Haven S. B. Co.* 50 N. Y. 121; *Baulec v. New York & H. R. Co.* 59 N. Y. 357; *Lamb v. Camden & A. R. & Transp. Co.* 46 N. Y. 271; *Jones v. Morgan*, 90 N. Y. 2, 43 Am. Rep. 181.

The bailment in this case is one requiring ordinary care on the part of the bailee and his servants and nothing more.

1 Parsons, Cont. 571; *Jones v. Morgan*, *supra*.

Proof of negligence is thrown upon bailor before he can recover.

1 Parsons, Cont. 606; *Hale v. Smith*, *Claffin v. Meyer*, and *Lamb v. Camden & A. R. & Transp. Co. supra*.

Plaintiff must fail if the proof does not show that the fire occurred and the damage was occasioned by the one cause for which the defendant is liable, to wit, his or his servants' negligence causing the fire.

Searles v. Manhattan Elev. R. Co. supra.

Negligence cannot be presumed from the mere fact that a fire occurred.

Curtis v. Rochester & S. R. Co. 18 N. Y. 584, Abbott, Tr. Ev. 556; *Baulec v. New York & H. R. Co.*, *Hart v. Hudson River Bridge Co.*, *Hale v. Smith* and *Lamb v. Camden & A. R. & Transp. Co. supra*.

The title to the milk, butter and cheese remained at all times in the patrons, and was destroyed by an accident without the fault of the defendant, who was merely a bailee for hire.

Ouderkirk v. Central Nat. Bank, 119 N. Y. 263; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142.

Bradley, J., delivered the opinion of the court:

The plaintiff and his assignors agreed to deliver their milk at the defendant's factory for the purpose, and he undertook for a stipulated compensation, to there manufacture from it butter and cheese, sell such products, and distribute between them the proceeds in the manner provided for by the agreement. The contract was one of bailment, involving the performance of service by the defendant, and in the result the parties were mutually and beneficially interested. *Mallory v. Willis*, 4 N. Y. 76; *Poster v. Pettibone*, 7 N. Y. 488. The duty assumed by the defendant was to exercise ordinary care for the protection and preservation of the subject of the bailment, with a view of the faithful performance of his contract; and he was chargeable with liability to his patrons for any loss to them occasioned by his failure to observe and discharge such duty.

It is urged that the referee erred in his conclusion that the plaintiff had failed to show that the damages were caused by the negligence of the defendant. This contention is not only on the alleged ground that it did appear that the latter was in fact chargeable with negligence as the cause of the loss, but that the burden was with the defendant to relieve himself from the imputation of want of care. After a careful examination of the evi-

dence, we are satisfied that the question whether the loss was attributable to his negligence was one of fact, to be determined by the referee upon evidence somewhat conflicting, and that his conclusion in that respect is not here the subject of review. The action was founded upon the charge of negligence of the defendant, and the burden was with the plaintiff to establish it. *Lamb v. Camden & A. R. & Transp. Co.* 46 N. Y. 271, 7 Am. Rep. 327. As a general rule, when a bailee fails, on demand, to deliver to the bailor property to which the latter is entitled, the presumption of liability arises; and, if the goods cannot be found, it furnishes the imputation of negligence as the cause. *Fairfax v. New York Cent. & H. R. R. Co.* 67 N. Y. 11. But such prima facie case may be overcome when it is made to appear that the loss was occasioned by some misfortune or accident not within the control of the bailee. Then the *onus* continues upon the bailor to prove that it was chargeable to the want of care of the bailee. *Claffin v. Meyer*, 75 N. Y. 260, 31 Am. Rep. 467; *Mills v. Gilbreth*, 47 Me. 830, 74 Am. Dec. 487. And although it may be that proof given by him explanatory of the reason for non-delivery may disclose circumstances which in their nature permit or require the inference of negligence on his part (*The J. Russell Mfg. Co. v. New Haven S. B. Co.* 50 N. Y. 121), the affirmative of the issue is not shifted to the defendant, but remains through the trial with the plaintiff. *Heinemann v. Herd*, 62 N. Y. 448; *Bhant v. Barrett*, 124 N. Y. 117. In the present case the plaintiff alleged in his complaint, and it so appeared, that the loss resulted from the destruction of the factory by fire. From that fact alone no presumption arose to furnish a prima facie case against the defendant; but upon the main issue—whether it was attributable to the negligence of the defendant—the burden was with the plaintiff. *Whitworth v. Erie R. Co.* 87 N. Y. 418. The referee found that the charge was not sustained by the evidence. For the purposes of this review, that question of fact must be deemed disposed of in the court below.

It is also urged that the defendant, having undertaken to manufacture the butter and cheese from the milk furnished him at the factory by the plaintiff and his assignors, market the product and pay to them the proceeds, is liable for breach of his contract, irrespective of the question of negligence. This proposition, in view of the issue made by the pleadings, cannot now, for the predication of error, be treated as in the case; although, to sustain a judgment, issues may be deemed so broadened as to conform the pleadings to the facts proved, when it can be done without violation of any rule of law. But upon the basis of an alleged breach of contract, the plaintiff's action would not be supported upon the evidence and facts as found by the referee. It is true that, where an absolute executory contract is made, the contractor is not excused by inability to execute it, caused by unforeseen accident or misfortune, but must perform or pay damages, unless he has protected himself against such contingency by stipulation in the contract. *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Tompkins v. Dudley*, 35 N. Y. 273,

82 Am. Dec. 849; *Wheeler v. Connecticut Mut. L. Ins. Co.* 82 N. Y. 548.

But there may be in the nature of a contract an implied condition by which he will be relieved from such unqualified obligation; and when, in such case, without his fault, performance is rendered impossible, it may be excused. That is so when it inherently appears by it to have been known to the parties to the contract, and contemplated by them, when it was made, that its fulfillment would be dependent upon the continuance or existence, at the time for performance, of certain things or conditions essential to its execution. Then, in the event they cease, before default, to exist or continue, and thereby performance becomes impossible without his fault, the contractor is, by force of the implied condition to which his contract is subject, relieved from liability for the consequences of his failure to perform. *People v. Bartlett*, 3 Hill, 570; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Booth v. Spuyten Duyvil R. Mill Co.* 60 N. Y. 491; *Taylor v. Caldwell*, 3 Best & S. 826.

By the contract under consideration, the cheese and butter were to be manufactured at this factory, and to be made from the milk furnished by the patrons, of whom the plaintiff and his assignors were members. The existence of that particular factory was terminated by its destruction, and the loss with it of the manufactured product, and of the milk then remaining there unconverted into cheese and butter, rendered it impossible for the defendant to further proceed with the performance of his contract in respect to those articles of material and product. And as the nature of the agreement was such that it must be deemed to have been contemplated by the parties to it that the articles to be manufactured should be made only from the materials furnished by the patrons, and at the factory referred to, there was necessarily an implied condition so qualifying the defendant's undertaking as to relieve him from performance rendered impossible without his fault, and from the consequences of his inability, thus occasioned, to fulfill his contract in respect to the subject of the bailment, which was destroyed by the fire. There was no error to the prejudice of the plaintiff in any of the rulings of the referee to which exceptions were taken in the reception or rejection of evidence.

These views lead to the conclusion that the judgment should be affirmed.

All concur, except Follett, Ch. J., not sitting.

May WILLIAMS, *Resp't.*,

v.

Cornelius WILLIAMS, *Appt.*

(.....N. Y.....)

1. Refusal of a wife for a time to live with her husband on the harsh condition imposed by him that she should not visit her mother will not constitute desertion on her

NOTE.—For note on desertion as ground for divorce, see *Herold v. Herold* (N. J.) 9 L. R. A. 606.

As to effect of divorce in foreign jurisdiction, see *Adams v. Adams* (Mass.) 13 L. R. A. 275.

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part which will prevent her from obtaining a divorce for desertion where an unconditional offer by her to return to him has been rejected and he has left the State and procured a divorce from her in another State.

2. A divorce in Minnesota, obtained on personal service outside of that State without personal appearance of the defendant, will not be recognized in New York where the defendant resides.

3. A decree of divorce obtained in another State is not admissible in evidence against a party as to whom it is void for lack of jurisdiction.

(December 1, 1891.)

A PPEAL by defendant from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the Special Term for New York County granting plaintiff a divorce from defendant. *Affirmed.*

Statement by **Brown, J.**:

This action was brought to obtain a judgment separating the parties from bed and board forever, and was based upon an allegation that the defendant had abandoned the plaintiff in August, 1882, and refused to permit her to return to him. The defendant denied the allegation of abandonment, and alleged that the plaintiff had abandoned him in 1880. He further set up in his defense a judgment of divorce in his favor from the plaintiff, rendered in the District Court of Ramsey County in the State of Minnesota, in January, 1884, which court was alleged to be a court of general jurisdiction under the laws of that State. The parties were married in this State in 1879, and the defendant resided here until August, 1882, when he removed to Minnesota. The plaintiff continued to reside in New York, and was at the commencement of this action a resident of this State. The summons and complaint in the Minnesota action were personally delivered to her while temporarily stopping in Philadelphia. The judgment roll in the Minnesota action was offered in evidence upon the trial and excluded. The court found as a fact that the defendant abandoned the plaintiff in August, 1882, and gave judgment in accordance with the prayer of the complaint.

Mr. Frank H. Platt, for appellant:

The judgment of the Minnesota court, granting an absolute divorce to the husband, was valid and binding on the wife in the State of New York, even though the summons was not served on the wife in Minnesota.

Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654; *Cheely v. Clayton*, 110 U. S. 701, 28 L. ed. 298.

In the latter case the court says: "The courts of the State of the domicile of the parties doubtless have jurisdiction to decree a divorce in accordance with its laws, for any cause allowed by those laws, without regard to the place of the marriage, or to that of the commission of the offense for which the divorce is granted, and a divorce so obtained is valid anywhere."

Story, Conf. L. § 230a; *Cheever v. Wilson*, 76 U. S. 9 Wall. 108, 19 L. ed. 604; *Harvey v. Farnie*, L. R. 8 App. Cas. 48.

If a wife is living apart from her husband

without sufficient cause, a divorce obtained by him in the State of his domicile, after reasonable notice to her, either by personal service or by publication, in accordance with its laws, is valid, although she never in fact resided in that State.

Burten v. Shannon, 115 Mass. 488; *Hunt v. Hunt*, 72 N. Y. 218, 28 Am. Rep. 129; *Free-man, Executions*, § 585.

If Mrs. Williams was domiciled in a State where the New York rule does not prevail when the Minnesota summons was served on her, the law of her domicile would have governed upon the trial of this case.

Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505; *Moore v. Hegeman*, 92 N. Y. 521, 44 Am. Rep. 408.

The court should have found, as a conclusion of law, from the facts found, that the wife abandoned the husband in 1880.

Bishop, Mar. & Div. 6th ed. § 776; Uhlmann v. Uhlmann, 17 Abb. N. C. 261; *Clearman v. Clearman*, 18 N. Y. S. R. 278.

The court has not to determine whether a husband's forcible separation of his wife and her mother is justification for her to leave her husband, but to decide whether a mere demand of such separation made in temper, during a quarrel under provocation, is cause enough for a woman to desert her husband and carry away from him his child. That it is not, see—

Barlow v. Barlow, 2 Abb. N. S. 259; *Waring v. Waring*, 2 Phill. Eccl. 187; *Shaw v. Shaw*, 17 Conn. 195; *Fulton v. Fulton*, 86 Miss. 518; *Bishop, Mar. & Div. 6th ed. § 796; Yeatman v. Yeatman*, L. R. 1 Prob. & Div. 489; *Butler v. Butler*, 1 Pars. Eq. 829; *Grove's App.* 37 Pa. 443; *Black v. Black*, 30 N. J. Eq. 215; *Moore v. Moore*, 16 N. J. Eq. 275; *Pierce v. Pierce*, 33 Iowa, 238; *Logan v. Logan*, 2 B. Mon. 147; *Shaw v. Shaw*, 17 Conn. 189.

A husband is under no obligation to support his wife, where she leaves him for a cause not constituting a ground of divorce.

Blowers v. Sturtevant, 4 Denio, 46; *People v. Pettit*, 74 N. Y. 320.

Dr. Williams's act did not amount to such cruelty as would justify a divorce from him. The mere attempt to restrict her intercourse with her mother would not be such cruelty, even if carried to extremes.

Kennedy v. Kennedy, 73 N. Y. 869; *Shaw v. Shaw and Fulton v. Fulton*, *supra*; *Davies v. Davies*, 55 Barb. 183.

The wife having completely abandoned her husband in 1880, and having remained away from him for a long period, his defense on that ground, and even his right to a decree of separation, cannot be defeated by her later offers to return to him.

Uhlmann v. Uhlmann, 17 Abb. N. C. 261; *Cargill v. Cargill*, 1 Swab. & T. 235; 1 Bishop, Mar. & Div. § 810; *Benkert v. Benkert*, 82 Cal. 467; *Basing v. Basing*, 3 Swab. & T. 516; *Hanberry v. Hanberry*, 29 Ala. 720.

Mr. Austen G. Fox, with Messrs. Elliot Smith and S. Sidney Smith, for respondent:

The defendant's conduct in changing his residence from New York to St. Paul, Minnesota, with the intention of residing there permanently, his refusal to allow the plaintiff to accompany him, and his institution in Minne-

sota of proceedings to secure a divorce from the plaintiff, all show that before the commencement of this action he had abandoned the plaintiff.

1 Bishop, Mar. & Div. 6th ed. p. 594, §§ 784, 786; *Magrath v. Magrath*, 103 Mass. 577, 4 Am. Rep. 579; *Clearman v. Clearman*, 18 N. Y. S. R. 272; *Ahrenfeldt v. Ahrenfeldt*, Hoffm. Ch. 47, 7 L. ed. 1059; *Uhlmann v. Uhlmann*, 17 Abb. N. C. 287; *Mallinson v. Mallinson*, L. R. 1 Prob. & Div. 94; *Yeatman v. Yeatman*, Id. 489; *Dallas v. Dallas*, 31 L. T. 271.

In order to establish his affirmative defense that the plaintiff was guilty of abandoning him in April, 1880, the defendant was bound to prove, by a preponderance of evidence, that when the plaintiff took lodgings with her mother she did so finally and with the intention of not returning to the defendant, and the court having passed upon this question of fact adversely to the defendant this court will not review the determination thereof.

Clearman v. Clearman and Uhlmann v. Uhlmann, *supra*; 1 Bishop, Mar. & Div. (1891) § 1672; *De Meli v. De Meli*, 120 N. Y. 485; *Justice v. Lang*, 52 N. Y. 328.

The plaintiff's unconditional offer to return and her petition to be permitted to do so made it defendant's duty to receive her, and his refusal to do so coupled with his conduct already stated, would themselves have justified the finding that he abandoned the plaintiff.

1 Bishop, Mar. & Div. 6th ed. § 810; *Fellows v. Fellows*, 31 Me. 342; *Grove's App.* 37 Pa. 443; *Miller v. Miller*, 1 N. J. Eq. 396; *Hanberry v. Hanberry*, 29 Ala. 719; *Orow v. Crow*, 28 Ala. 583; *English v. English*, 6 Grant, Ch. 580. See also *McCutchen v. McGahay*, 11 Johns. 231; *Blowers v. Sturtevant*, 4 Denio, 46; *Ounningham v. Irwin*, 7 Serg. & R. 247, 10 Am. Dec. 458.

The copy of a so-called judgment of a court in Minnesota was rejected properly.

Plaintiff was not served with process, and never appeared in the Minnesota suit, and the judgment was therefore of no effect against her.

O'Dea v. O'Dea, 1 Cent. Rep. 785, 101 N. Y. 28; *Jones v. Jones*, 11 Cent. Rep. 456, 108 N. Y. 424; *Cross v. Cross*, 11 Cent. Rep. 871, 108 N. Y. 630; *People v. Baker*, 76 N. Y. 78; *De Meli v. De Meli*, 120 N. Y. 485.

The mere fact that the plaintiff in the Minnesota action had acquired a domicile there did not give the courts of that State jurisdiction over his wife in that action.

Mellen v. Mellen, 10 Abb. N. C. 829.

Brown, J., delivered the opinion of the court:

The chief ground upon which the appellant asks a reversal of the judgment in this action is that the court erred in refusing to find as a conclusion of law that the plaintiff had abandoned him two years prior to his leaving this State and taking up his residence in Minnesota. The evidence is substantially undisputed that the defendant refused to permit the plaintiff to live with him unless she absolutely gave up all intercourse with her mother. The parties were married in June, 1879, and lived together in a house in Fifty-Ninth Street in New York

until the latter part of April, 1880, when the lease thereof expired. When preparing to remove from this house the defendant's command to his wife was: "When you leave this house you are not to see your mother. . . . You shall not go where she is; you will have no communication with her; you shall not write to her; have no communication with her whatever. If you want to see your mother you cannot go with me." The condition thus imposed upon the plaintiff was never withdrawn; and under it she refused to live with the defendant. The cause for this disagreement is not disclosed in the record, but the evidence amply justified the conclusion that the plaintiff was always willing to live with the defendant if he would permit her occasionally to visit her mother; and before he left the State she offered unconditionally and in good faith to return to him, and this he refused to permit her to do, but left New York, and took up his residence in Minnesota, where he procured a decree of divorce against her. Under these circumstances, it is clear that the defendant never had a cause of action in this State against the plaintiff for desertion. That term, as used in the law of divorce, contemplates a voluntary separation of one party from the other without justification, with the intention of not returning. It could not be said in this case that the plaintiff's act in leaving her husband was voluntary. It was coerced by a harsh and unnatural condition, and she was at no time unwilling to return and live with him as his wife if that condition was withdrawn. The evidence discloses nothing more than a temporary separation of the parties because of a disagreement. There was no desertion by either party, and neither, up to the time of the husband's refusal to receive the plaintiff in the summer of 1882, had a cause of action against the other. But upon the plaintiff's offer to return unconditionally the defendant was without legal excuse in refusing to receive her.

It is also claimed that it was error to refuse to admit in evidence the record of the Minnesota decree, and upon this point it is claimed that the rule heretofore prevailing in this State with reference to judgments of divorce rendered in other States against residents of this State, where there was no personal service of process within the State rendering the decree, and no personal appearance by the defendant in the action, has been changed by recent decisions of the Supreme Court of the United States. In support of this claim we are referred by the appellant to *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654, and *Cheely v. Clayton*, 110 U. S. 701, 28 L. ed. 298.

The latter case turned upon the construction of the statutes of the territory of Colorado relating to the service of a summons upon a non-resident, and, following the decision of the highest court of the territory, the supreme court held the service in the case before it defective, and the decree void. *Maynard v. Hill* was an action in equity to charge the defendants as trustees of certain lands in Washington Territory, and to compel a conveyance thereof to the plaintiffs. The case involved the legality of a legislative divorce granted by the Legislature of the territory of Oregon, but the

consideration of this question was by the facts of the case confined wholly to the territory within which the decree was granted. Neither case questioned the rule prevailing in this State, and the decree in *Maynard v. Hill* goes no further than that a divorce granted without service upon or personal appearance of the defendant establishes the status of the parties to it within the State in which it is rendered. It does not overrule the decisions of this State, but is in harmony with them, and it has never been denied by our courts that a State may adjudicate the status of its citizens towards a non-resident, and that, so long as the operation of the judgment is kept within its own confines, other States must acquiesce. *People v. Baker*, 78 N. Y. 78-84. This subject had very full and careful consideration in the case cited, which was an extreme one; and, until it is squarely overruled by a court of ultimate authority, must and will be regarded as settling the law in this State. *O'Dea v. O'Dea*, 101 N. Y. 23, 1 Cent. Rep. 785; *Jones v. Jones*, 108 N. Y. 415-424, 11 Cent. Rep. 871; *De Meli v. De Meli*, 120 N. Y. 485-495. It is also claimed by the defendant that the Minnesota decree should have been admitted in evidence for the purpose of limiting the effect of the judgment in this State. This argument is based upon the anticipation that the plaintiff may seek to enforce the judgment for alimony in the jurisdiction where the defendant resides, and is based upon the fact that the plaintiff had actual notice of the pendency of the Minnesota action. The argument is fully answered in the cases of *O'Dea v. O'Dea* and *Jones v. Jones*, *supra*. In the former case it appeared that the process of the Ohio court was actually delivered to the defendant, and she had notice of and was personally present at the taking of depositions on the part of the plaintiff in Toronto. This court held, however, that the Ohio court acquired no jurisdiction over her person, and that the decree was void. In *Jones v. Jones* a decree of divorce granted in Texas, where service was made out of the State, was held valid on the sole ground that defendant appeared in the action, and submitted herself to the jurisdiction of the court, but it was said in that case that "the marriage relation is not a *res* within the State of the party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted service or actual notice of the proceedings given without the jurisdiction of the court where the proceeding is pending." The decree granted in Minnesota, being void, was properly excluded. It could not be considered as having any effect upon the status of the plaintiff. Being legally the wife of the defendant within this State, she must be considered as legally entitled to all the rights flowing from that relation under the constitution and laws of the State and of the United States, and, if the result be to compel defendant in the jurisdiction where he now resides to comply with our decree, that is a right to which she is entitled under the Constitution of the United States, and the courts of this State have no power to deny it to her.

The judgment must be affirmed.

All concur except *Vann, J.*, not voting.

MICHIGAN SUPREME COURT.

Thomas EVANS, *Appt.*,

v.

LAKE SHORE & MICHIGAN SOUTHERN R. CO. *et al.*

(.....Mich.....)

1. When a gate provided at a railroad crossing is open a traveler has a right to presume that it is safe to cross, in the absence of knowledge to the contrary.
2. Whether or not there was negligence in attempting to cross a railroad track without the usual precautions where a gate was open and a person in the gate keeper's place made a signal to the traveler the meaning of which is in dispute, is a question for the jury.

(Grant, J., dissents.)

(November 20, 1891.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of defendants in an action brought to recover damages for personal injuries alleged to have resulted from defendants' negligence. *Reversed.*

The facts sufficiently appear in the opinions.

Messrs. Corliss, Andrus & Leete, for appellant:

If a servant request another person to do his duty, or assist him therein, the master is liable for any injury resulting from such person's acts.

Wood, Mast. & Serv. § 308, p. 588; *Althoff v. Wolfe*, 22 N. Y. 355; *Simons v. Monier*, 29 Barb. 419; *James v. Muehlebach*, 34 Mo. App. 512.

The absence of the gateman from the gate was gross negligence on the part of the defendant.

St. Louis, V. & T. H. R. Co. v. Dunn, 78 Ill. 197.

Where a gateman is permanently stationed by a railroad at a crossing, the negligence of the gateman in discharge of his duties, or absents himself from his post, is imputable to the company, and where parties approaching such crossing exercise due care, the company is liable for any injury arising from the negligence of the gateman.

Dolan v. Delaware & H. Canal Co. 71 N. Y. 285; *Kissenger v. New York & H. R. Co.* 58 N. Y. 538. See *Peck v. Michigan Cent. R. Co.* 57 Mich. 3.

The question of negligence in this case, on the part of the defendant's gateman as well as the plaintiff, was a question of fact which should have been submitted to the jury.

Carver v. Detroit & S. Pl. Road Co. 61 Mich. 593; *Smith v. Peninsular Car Works*, 60 Mich. 503; *Mynning v. Detroit, L. & N. R. Co.* 59 Mich. 257; *Hassenger v. Michigan Cent. R. Co.* 48 Mich. 207, 42 Am. Rep. 470; *Hathaway v. East Tennessee, V. & G. R. Co.* 29 Fed. Rep. 489; *Philadelphia & R. R. Co. v. Killips*, 88 Pa. 405.

Mr. A. C. Angell, for Lake Shore & Michigan Southern Railroad Company, appellee:

If the plaintiff was guilty of contributory

negligence, the direction of a verdict for defendants was not erroneous.

Eakins v. American White Bronze Co. 75 Mich. 568.

A master is not liable, as for a servant's act, for the conduct of one whom he has not employed or to whose employment he has not consented.

Mangan v. Foley, 38 Mo. App. 250, and cases cited; *Jewell v. Grand Trunk R. Co.* 55 N. H. 84.

Hurley was in no sense a servant, unless he did what he did because someone representing the defendants had asked him to do it. His own testimony is clear that he did not hear Dilworth ask him to stop the car; that he acted as a volunteer.

James v. Muehlebach, 34 Mo. App. 512.

Messrs. L. C. Stanley and George Jerome also for appellees.

McGrath, J., delivered the opinion of the court:

This is an action on the case for negligence. Defendants' road crosses Croghan Street about 300 feet east of Orleans Street, in the City of Detroit, at grade. The southerly side of the street, west of the track, is occupied by frame dwelling-houses, two stories high, built close together, and flush with the northerly line of Croghan Street; and the most easterly house is about forty feet from the westerly track. Cars going north on defendants' track climb a heavy grade. A gate-keeper and drop-gate are maintained by defendants at the crossing. A street railway is operated on Croghan Street. Plaintiff claimed that, while driving easterly upon one of the street-cars, he stopped his car at Orleans Street, to allow a passenger to alight; that in approaching the crossing the street-car conductor usually jumped off, and ran forward to the crossing, and signaled him whether to come on or stop; that in this instance the conductor went forward as usual, and plaintiff turned on the brake to check his car, so as to give the conductor time to report; that as he did so, one Hurley, who was at the gate, and whom plaintiff supposed to be the gateman, beckoned him to come on, and he turned off the brake, and started forward; that it was quite usual for the gate-keeper to signal him as he approached the crossing; that he could not see any distance south of Croghan on defendants' tracks until his horses had passed the last dwelling on the south side of the street; that the grade of the street at the tracks is considerably lower than it is forty feet west of the crossing; that, as he approached the crossing, Hurley called out to him to hurry up, and he started up his horses; that he had no knowledge or warning of the approach of cars until the heads of his horses were within a few feet of the tracks, that when he discovered the train, he was too late to stop his car, and the only course open was to get across before the engine, that as he attempted this, a locomotive with tender attached, going north, tender first, struck the rear part of his car, killing one passenger, injuring others, and seriously injuring plaintiff; that the engine was running at a rate

of speed prohibited by the city ordinances; that the gate was open at the crossing, and no whistle or bell was sounded. Defendants claimed that the whistle was blown, and that the locomotive had a steam-bell attached; that Hurley was not the gate-man or their agent; that the gate-man and Hurley were together in the gate-keeper's shanty when the engineer of the approaching locomotive whistled for a switch, which was north of and near the crossing; that the gate-man and Hurley then came out of the shanty, the former going to open the switch, and the latter going to the locality of the drop gate. The gate-man says that he told Hurley to attend the gate or look out for the street-cars; but Hurley says that he received no instructions from the gate-man, denies that he signaled the plaintiff to come on, and claims that he would have dropped the gate, but did not do so, because the horses were in the way when he thought of it. The gate stood thirty-eight feet west of the tracks.

The court submitted the case to the jury, but after the jury had retired, and it became evident that they could not agree, the jury were recalled, and directed by the court, upon its own motion, to bring in a verdict for defendants. The court erred in directing a verdict. The case comes clearly within the principles laid down in *Richmond v. Chicago & W. M. R. Co.*, 87 Mich. 374. In that case there was no gate, but there was a flagman, whose duty it was to notify the public of approaching trains. He was in the shanty, and ran out too late to avert the collision. It was shown that he could be seen sitting in the shanty from the street-car. In the present case there was a gate, which was open, and thereat a person, who not only did not close it, but who, it is claimed, signaled the plaintiff to come on; in other words, assured him that it was safe to cross the railroad tracks. The testimony tended to show that the gate-man had up to this time been present at his post, and that usually, when trains were approaching, the gate was closed, or dropped across the street-car tracks. The gate-keeper was clearly negligent in leaving his post, knowing that the engine was approaching the crossing, without closing the gate, or giving some signal of danger. It has been frequently held that when gates are provided the public have a right, the gates being open, to presume, in the absence of knowledge to the contrary, that the gate-men were properly discharging their duties, and that it was not negligent on their part to act on the presumption that they were not exposed to a danger which could only arise from a disregard of their duties by the gate-men. *Glushing v. Sharp*, 98 N. Y. 678; *Cleveland, C. C. & I. R. Co. v. Schneider*, 45 Ohio St. 678, 14 West. Rep. 538.

It is urged that gate-men cannot be present at all times, but the gate is always present, and, when open, it tends to assure the public of the absence of danger. Railroad companies can protect themselves and the public by closing the gate in the temporary absence of the gate-man. In the present case it is urged that Hurley was not a servant of the defendants, and hence defendants are not responsible for his act in assuring plaintiff that it was safe to cross. Conceding that Hurley was not the

servant of the Company, and was a mere bystander, his conduct bears upon the question of the contributory negligence of the defendants. It is one of the circumstances properly to be considered by the jury in determining that question. If, as he claims, he did not signal plaintiff to come on, but did signal him to stop, the jury would be entitled to consider that fact in determining the question of plaintiff's negligence, and its weight would not be materially affected by the fact that he was not the servant of the Company. Hurley occupied the place usually occupied by the gate-man. His presence there, the plaintiff's belief that he was the gate-man, his conduct there, and the open gate, are all circumstances to be considered by the jury in determining the question of plaintiff's negligence. An open gate would not excuse plaintiff's advance upon the crossing in the face of a signal of danger, or the protests of a bystander; and an assurance of safety, although given by a stranger, is entitled to consideration and weight in explanation of the conduct of one to whom the assurance is given.

It is insisted that the testimony tends to show that the rules of the street-car company provided that, before attempting to cross the tracks, the driver should stop the car, and wait until the conductor should go ahead and see that it was safe to cross; that the driver did not observe this rule, and was therefore guilty of negligence, and cannot recover. A careful examination of this testimony, and a fair construction of it, will not disclose the existence of such a rule, or testimony tending to establish its existence. The company's orders undoubtedly were, if the gates were up, and no gate-man was present, that the driver should stop, and the conductor should first see that it was safe to cross; but, if the gate was closed, or the gate-man was present, and signaled them to come on, such signal was to be considered as an assurance of safety, and they were to go on. This was the testimony of the plaintiff, the conductor, and of other witnesses. Upon this point it is only necessary to quote an extract from the testimony of G. S. Hazard, the superintendent of the street-railway company, who says: "The order of the company was for the men to see that the way was clear before they crossed. That was the written order they had; so that, whenever the gate-man gave them the right of way, by either telling them or directing them to proceed, it was our instruction to rely upon his order. The instructions were, if the man at the gate waved them to come on, to go on. At that time there were no instructions to get down to run ahead, but the instructions were to see that the way was clear, and, if he waved them on, to go on. We do not now rely upon anybody but ourselves. Everybody runs ahead. But at that time we were relying upon the railroad. We depended upon the day watchman for safety." It is urged that the man at the gate told the driver to "hurry up," and that that of itself was a warning; but this was after the gate-man had beckoned the driver to come on, after the driver had started up the horses, after he had reached the line of defendants' right of way, on a down grade, and before either driver or conductor had seen the engine approaching. It cannot

be presumed that the driver was possessed of the same knowledge as was possessed by the gate-man. In determining the question of plaintiff's negligence, all the circumstances must be considered. The facts disclosed by this record respecting plaintiff's conduct were not such as to warrant the court in determining as a matter of law that plaintiff was guilty of contributory negligence. That matter should have been submitted to the jury.

Respecting defendants' negligence, the act which induced plaintiff to approach the crossing without the usual precautions was not necessary to sustain the charge. Their negligence was established by the showing as to what they failed to do. If they failed to close the gate, and to warn plaintiff of the danger, a case was made out, and plaintiff was entitled to recover, unless plaintiff was shown to have been negligent. If plaintiff was warned not to approach the crossing, and the warning was of such a nature that an ordinarily watchful and prudent person could have seen and understood it, and plaintiff did not heed it, but drove upon the tracks in the face of it, he was guilty of contributory negligence, and cannot recover. If, however, the plaintiff was assured by a signal from any person, whether he was a servant of defendants or a stranger, that it was safe to cross, that circumstance is entitled to be considered by the jury as excusing his failure to observe the precautions ordinarily taken, especially as the person giving the signal occupied the place usually occupied by the gate-keeper, and plaintiff believed him to be the gate-keeper. In view of what has been already said, it is unnecessary to discuss the instructions given to the jury, before they were recalled.

The judgment is reversed, and a new trial ordered, with costs.

Morse and Long, JJ., concurred with **McGrath, J.**

Champlin, Ch. J., concurred in the result.

Grant, J., dissenting:

I cannot concur in the conclusion reached by my brethren. The following facts are established by the plaintiff's case:

1. Plaintiff was familiar with the crossing, and had for some time crossed it sixteen times a day. Thirty-eight regular trains passed each day, besides switch trains. He knew that one was liable to come at any moment; that there was a slight descent between the gate and the track; and that the track was wet, thus rendering it more difficult to stop the car.

2. On reaching a point 41 feet from the track he could see the engine 700 feet away.

3. He approached this point at a high rate of speed.

4. The rules of the street-railway company, in whose employ plaintiff was, required their employés to see that the way was clear before they crossed. It appears that written instructions were given, but these were not produced. The conductor, who was with the plaintiff at the time of the accident, says: "The orders were, when we came to that crossing to have the cars slack down, and the conductor to run ahead, and to see if the way was clear." It is

to be regretted that these instructions, being in writing, were not produced, so as to remove all doubt as to what they were. Mr. Hazard, the superintendent of the street-railway company, testified upon this point as follows: "The order of my company was for the men to see that the way was clear before they crossed. That was the written order they had; so that, whenever the gate man gave them the right of way by either telling them or directing them to proceed, it was our instruction to rely upon his order. The instructions were, if the man at the gate waved them to come on, to go on. At that time there were no instructions to get down and run ahead; but the instructions were to see that the way was clear, and, if he waved them, to go on. We do not now depend upon anybody but ourselves. Everybody runs ahead." On cross examination he testified as follows: "There was a written order on the time-table; a time-table put up; and there was an order saying, if the way was clear before attempting to cross—that is, the order that was on the time-table; also on the time-table that was written. There were sometimes—not then, before that time—there were times there that there was no watchman there at all, and during the day sometimes a watchman had to step out for something, and we see the order was given in case they did not see him there, or he was there, and waved them on. It was the order to see that the way was clear before attempting to cross; that is what was meant. The matter of the watchman beckoning came up. Probably some of the men asked me in case he motioned ahead to go ahead, and I told them, 'Why, yes.'" He further testified that he did not remember of having said to Mr. Evans to go ahead if the watchman beckoned, nor could he remember any particular one to whom he made such statement. He says: "I know some of them have spoken to me about it. I know I have said so to some of them." It is very significant, as bearing upon the question of these instructions and the conduct of the plaintiff, that the conductor on this occasion jumped from the car at the usual place for the purpose of running ahead and ascertaining if the track was clear; but the horses were going nearly as fast as he could run. He succeeded in getting nearly abreast of the horses' heads, when he saw the engine approaching, and halloed to the driver to stop. The testimony of Mr. Hazard, above quoted, is very indefinite. It is very difficult to determine from it just what he means. It is certain, however, from his testimony that there was imminent danger in crossing this place, and that special instructions were given to their employés for the purpose of avoiding it. Under his own testimony, how could the conductor and driver see if the way was clear before they crossed, except by going sufficiently near the track and looking? Plaintiff says that he received instructions in regard to this crossing from his employer, but does not state what those instructions were.

5. The gates were up, and the gateman, plaintiff knew, was not there.

6. The accident would have been avoided if the plaintiff had approached the crossing with his horses upon a walk.

7. The only excuse given by plaintiff for not

approaching this dangerous place with his horses under control is that Hurley, who did not represent either of the defendants, and was not in their employ, motioned to him to go ahead, and hallooed to him to hurry up. Plaintiff testifies that, if a stranger had waved to him, and said, "Hurry up," he would have gone across without stopping or looking. This is precisely what he did do in this case. It is difficult to imagine a case where common prudence required greater care of a street-car driver than in the present one. He had no right to rely upon the signal from a stranger, and, if it be a fact that this stranger called him to hurry up, and stood at the gate motioning him forward, this of itself was a warning that there was danger approaching. The safety and lives of passengers were under his control in approaching this most dangerous place, and

a proper regard for the safety of his passengers and of himself required him to approach this crossing with his horses under control. I think the plaintiff was not only guilty of negligence, but that his negligence approached to recklessness. In my judgment, a common and proper regard for the safety of those traveling upon street railways or in the street-cars repudiates a rule which sanctions such blind reliance as plaintiff displayed in this case, and permits him to rush into danger without any actual knowledge of the situation, which he might easily and readily have obtained, and thus have avoided the accident. I do not think this case comes within the rule of *Richmond v. Chicago & W. M. R. Co.* There the driver was approaching the crossing upon a walk. Judgment should be affirmed.

WISCONSIN SUPREME COURT.

Andrew VOSBURG, by Guardian *ad Litem*,
Respnt.,
v.
George PUTNEY, *Appt.*

(.....Wis.....)

(November 17, 1891.)

APPEAL by defendant from a judgment of the Circuit Court for Waukesha County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from a kick received from plaintiff. *Reversed.*

Statement by Lyon, J.:

The action was brought to recover damages for an assault and battery, alleged to have been committed by the defendant upon the plaintiff on February 20, 1889. The answer is a general denial. At the date of the alleged assault the plaintiff was a little more than fourteen years of age, and the defendant a little less than twelve years of age. The injury complained of was caused by a kick inflicted by defendant upon the leg of the plaintiff, a little below the knee. The transaction occurred in a school-room in Waukesha, during school

1. A kick upon the leg given by one pupil to another in school in violation of the order and decorum of the school while in session, being unlawful, renders the one giving it liable for damages caused thereby regardless of any intention to inflict an injury.
2. An opinion as to the exciting cause of inflammation in a leg, given on a hypothetical question based only on testimony as to a kick, while there was also evidence as to a different cause, is error.
3. The measure of damages for injuries caused by a kick is not what defendant might reasonably be supposed to have contemplated as likely to result, but what actually did result.

NOTE.—*Intent as an element of simple assault or assault and battery.*

An actual or specific intent to injure is not necessary to make an actionable assault and battery. *Mercer v. Corbin*, 3 L. R. A. 221, 117 Ind. 450; *Peterson v. Haffner*, 50 Ind. 130, 26 Am. Rep. 81; *State v. Myers*, 19 Iowa, 517; *Bullock v. Babcock*, 3 Wend. 391; *Com. v. Lister*, 15 Phila. 406; *Weaver v. Ward*, Hobart, 184.

An injury to constitute an assault must have been unwarranted, and need not have been in anger. *Johnson v. McConnel*, 15 Hun, 298.

Unintentional injury to one person while attempting to injure another is an actionable assault. *James v. Campbell*, 5 Car. & P. 372; *Corning v. Corning*, 6 N. Y. 97.

But shooting a person while aiming at another in lawful self-defense is not an actionable trespass. *Morris v. Platt*, 32 Conn. 75.

A boy thirteen years old who wantonly threw a piece of mortar at another boy is liable for accidentally hitting and hurting a third boy. *Peterson v. Haffner*, *supra*.

So is a twelve year old boy who shoots an arrow at a basket and hits a school fellow whom he had followed threatening to shoot, and who had hidden 11 L. R. A.

behind a fire board, but raised up just in time to be hit. *Bullock v. Babcock*, 3 Wend. 391.

So it is an assault on a person injured where one throws a lighted squib among the people in a market place, although before it strikes the person injured, it is struck by others in warding it off from themselves. *Scott v. Shepherd*, 2 W. Bl. 693.

It is an assault for a man to hold a woman in his arms pressing her against her will, although without an intention to hurt her. *Norris v. State*, 87 Ala. 85.

The injury intended, which is sufficient as an element of an assault, may be a constraint, sense of shame or other disagreeable emotion of the mind. *Flournoy v. State*, 26 Tex. App. 244.

For a man to put his arm around the neck of another man's wife against her will is an assault and battery. *Goodrum v. State*, 60 Ga. 508.

Squeezing another's testicles in play without intent to do bodily harm is not an assault if the play was by mutual consent and the act was not outside the range of the play which might be reasonably anticipated. *Fitzgerald v. Cavin*, 110 Mass. 153.

Seizing another by the arm and swinging him violently around and letting him go when he is

hours, both parties being pupils in the school. A former trial of the cause resulted in the verdict and judgment for the plaintiff for \$2,800. The defendant appealed from such judgment to this court, and the same was reversed for error, and a new trial awarded. 78 Wis. 84. The case has been again tried in the circuit court, and the trial resulted in a verdict for plaintiff for \$2,500. The facts of the case, as they appeared on both trials, are sufficiently stated in the opinion by *Mr. Justice Orton* on the former appeal, and require no repetition.* On the last trial the jury found a special verdict, as follows: "(1) Had the plaintiff during the month of January, 1889, received an injury just above the knee, which became

inflamed, and produced pus? Answer. Yes. (2) Had such injury on the 20th day of February, 1889, nearly healed at the point of the injury? A. Yes. (3) Was the plaintiff, before said 20th of February, lame, as the result of such injury? A. No. (4) Had the tibia in the plaintiff's right leg become inflamed or diseased to some extent before he received the blow or kick from the defendant? A. No. (5) What was the exciting cause of the injury to the plaintiff's leg? A. Kick. (6) Did the defendant, in touching the plaintiff with his foot, intend to do him any harm? A. No. (7) At what sum do you assess the damages of the plaintiff? A. Twenty-five hundred dollars." The defendant moved for judgment

*The statement referred to was as follows:

The plaintiff was about fourteen years of age, and the defendant about eleven years of age. On the 20th day of February, 1889, they were sitting opposite to each other across an aisle in the high school of the village of Waukesha. The defendant reached across the aisle with his foot, and hit with his toe the shin of the right leg of the plaintiff. The touch was slight. The plaintiff did not feel it, either on account of its being so slight or of loss of sensation produced by the shock. In a few moments he felt a violent pain in that place, which caused him to cry out loudly. The next day he was sick, and had to be helped to school. On the fourth day he was vomiting, and Dr. Bacon was sent for, but could not come, and he sent medicine to stop the vomiting, and came to see him the next day, on the 25th. There was a slight discoloration of the skin entirely over the inner surface of the tibia an inch below the bend of the knee. The doctor applied fomentations, and gave him anodynes to quiet the pain. This treatment was continued, and the swelling so increased by the 5th day of March that counsel was called, and on the 8th of March an operation was performed on the limb by making an incision, and a moderate amount of pus escaped. A drainage tube was inserted, and an iodoform dressing put on. On the

sixth day after this another incision was made to the bone, and it was found that destruction was going on in the bone, and so it has continued exfoliating pieces of bone. He will never recover the use of his limb. There were black and blue spots on the shin bone, indicating that there had been a blow. On the 1st day of January before, the plaintiff received an injury just above the knee of the same leg by coasting, which appeared to be healing up and drying down at the time of the last injury. The theory of at least one of the medical witnesses was that the limb was in a diseased condition when this touch or kick was given, caused by microbes entering in through the wound above the knee, and which were revived by the touch, and that the touch was the exciting or remote cause of the destruction of the bone or of the plaintiff's injury. It does not appear that there was any visible mark made or left by this touch or kick of the defendant's foot, or any appearance of injury, until the black and blue spots were discovered by the physician several days afterwards, and then there were more spots than one. There was no proof of any other hurt, and the medical testimony seems to have been agreed that this touch or kick was the exciting cause of the injury to the plaintiff.

made dizzy, which results in an injury to him after striking violently against a third person, who pushed him off, constitutes an actionable trespass of arms. *Ricker v. Freeman*, 50 N. H. 420.

Whipping another at his request with the purpose of saving him from greater punishment is not an assault and battery. *State v. Beck*, 1 Hill, 363, 26 Am. Dec. 190.

Merely laying hands on one to attract his attention is not an assault. *Coward v. Baddeley*, 4 Hurlst. & N. 473.

Nor is an injury to an intoxicated person while honestly attempting to help him from one place to another. *Krall v. Lull*, 49 Wis. 405.

The violation of an ordinance as to fast driving does not support the criminal intent necessary to convict of criminal assault and battery by negligently running over a person. *Com. v. Adams*, 114 Mass. 323, 19 Am. Rep. 322.

Accidental or reckless injuries.

Accidental injury caused by doing a lawful act does not create a liability for an assault. *Brown v. Kendall*, 6 Cush. 232; *Alderson v. Wastell*, 1 Car. & K. 358.

Accidentally hitting another with a stick while attempting to part two dogs which are fighting does not constitute an assault. *Brown v. Kendall*, *supra*.

But accidentally striking a third person while fighting is an assault and battery, because the fighting is unlawful. *James v. Campbell*, 5 Car. & P. 267.

The rider of a horse which runs away without his

fault and injures another is not thereby made liable for an assault. *Gibbons v. Pepper*, 4 Mod. 405.

But recklessly running a bicycle against a person who could be avoided with even slight care is an assault and battery. *Mercer v. Corbin*, 3 L. R. A. 231, 117 Ind. 480.

An assault need not have been intentional if it was recklessly committed. *Hoffman v. Eppers*, 41 Wis. 251.

Accidentally shooting another through gross and culpable negligence is an actionable trespass. *Welch v. Durand*, 35 Conn. 182, 4 Am. Rep. 55.

Wounding a bystander by the accidental discharge of a gun while uncocking it is an actionable trespass. (The report in this case does not give the particulars so as to show whether the question of negligence was or was not involved.) *Underwood v. Hewson*, 1 Strange, 522.

So a soldier is liable for an assault, where his musket accidentally goes off while training and injures another unless the accident was entirely without his fault. *Weaver v. Ward*, Hobart, 184.

So recklessly shooting a pistol at a tree in a public park has been held even to constitute manslaughter where the shot killed a person at a distance. *Flinn v. State*, 24 Ind. 226.

So of reckless shooting, on rifle practice, at a target in a tree near a house. *Reg. v. Salmon*, 43 L. T. N. S. 573.

So of recklessly shooting into a crowd although not intending to injure any particular person. *State v. Myers*, 19 Iowa, 517.

Accidentally hitting a bystander by attempting to fire through the floor of a Pullman car is an assault and battery. *Com. v. Lister*, 15 Phila. 406.

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in his favor on the verdict, and also for a new trial. The plaintiff moved for judgment on the verdict in his favor. The motions of defendant were overruled, and that of the plaintiff granted. Thereupon judgment for plaintiff, for \$2,500 damages and costs of suit, was duly entered. The defendant appeals from the judgment.

Mr. T. W. Haight, for appellant:

If the testimony was such as to establish a reasonable inference that the alleged kick was in any way the cause of the plaintiff's misfortune, then it may likewise be reasonably assumed that, as among boys, it was an unavoidable accident, or at most an excusable one.

Harvey v. Dunlop, Hill & D. Supp. 195; *Bullock v. Babcock*, 3 Wend. 391; Webster, Dict. title, *Accident*; *United States Acc. Assn. v. Barry*, 131 U. S. 100, 33 L. ed. 60, 23 Fed. Rep. 712; *Brown v. Kendall*, 6 Cush. 292.

Where an injury is free from all negligence—as if it arise from inevitable accident—then trespass does not lie.

2 Thomp. Neg. 1125; *Hartfield v. Roper*, 21 Wend. 615; *Conway v. Reed*, 66 Mo. 348, 27 Am. Rep. 354.

In order to warrant a finding that negligence, or an act not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the wrongful act, and that it ought to have been foreseen in the light of attending circumstances.

Atkinson v. Goodrich Transp. Co. 60 Wis. 141; *Milwaukee & St. P. R. Co. v. Kellogg*, 84 U. S. 469, 24 L. ed. 256.

That the bone inflammation suffered by plaintiff was not a natural, or probable, or ordinary result of defendant's act, is conceded by all, and therefore a nonsuit should have been granted.

Vedder v. Hildreth, 2 Wis. 427; Cooley, Torts, pp. 62, 69; Addison, Torts (Wood's ed.) 1, 5, and note; Bigelow, Torts, 812; *Miles v. Atlantic, M. & O. R. Co. Receivers*, 4 Hughes, 172; *Scheffer v. Washington City M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070; *Moak's Underhill*, Torts, p. 16.

There was an implied license for hitting plaintiff with his foot.

Hooker v. Chicago, M. & St. P. R. Co. 76 Wis. 546.

There being no evil intent, or its equivalent, shown, there should be no recovery.

2 Greenl. Ev. §§ 82-85; 2 Addison, Torts, § 790; Cooley, Torts, p. 162; *Coward v. Baddeley*, 4 Hurlst. & N. 478; *Christopherson v. Bare*, 11 Q. B. N. 8. 473; *Hoffman v. Eppers*, 41 Wis. 251; *Krall v. Lull*, 49 Wis. 405.

And the burden is on the plaintiff to show such intent or negligence.

2 Greenl. Ev. § 85; *Crandall v. Goodrich, Transp. Co.* 16 Fed. Rep. 75; *Brown v. Kendall*, 6 Cush. 292.

Negligence is the real ground of possible recovery in a case like this.

Conway v. Reed, 66 Mo. 348, 27 Am. Rep. 354.

And the rule governing liability as well as damages should be the same as in cases of negligence.

Crandall v. Goodrich Transp. Co. supra; *Mc-*
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Grew v. Stone, 53 Pa. 441; *Putnam v. Broadway & S. A. R. Co.* 55 N. Y. 118; *Servatius v. Pichel*, 34 Wis. 299; *Stewart v. Ripon*, 38 Wis. 590, cited approvingly in *Ingram v. Rankin*, 47 Wis. 409; *Harvey v. Dunlop*, Hill & D. Supp. 195, cited approvingly in *Loose v. Buchanan*, 51 N. Y. 488; *Pazton v. Boyer*, 67 Ill. 132; *Morris v. Platt*, 32 Conn. 75; *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 307; *Martin v. Chicago, M. & St. P. R. Co.* 11 L. R. A. 506, 79 Wis. —.

Defendant can only be held liable for the ordinary and usual results of his act committed without discretion to judge between right and wrong, as shown by his tender age.

Stewart v. Ripon, 38 Wis. 590.

Mr. J. V. Quarles, also for appellant:

This is an action of tort, and the defendant, who is a mere child, is accused of assaulting the plaintiff. It must appear, therefore, that the defendant was guilty of a trespass, or the judgment must be reversed.

There can be no such thing as a tort without evil intent or its equivalent.

2 Greenl. Ev. § 88; *Alderson v. Waistell*, 1 Car. & K. 357; Cooley, Torts, p. 162; 2 Addison, Torts, § 790; *Brown v. Kendall*, 6 Cush. 292; *Coward v. Baddeley*, 4 Hurlst. & N. 478; *Christopherson v. Bare*, 11 Q. B. 473; *Hoffman v. Eppers*, 41 Wis. 251; *Krall v. Lull*, 49 Wis. 405; *Morris v. Platt*, 32 Conn. 75-86.

A man is not liable in an action of trespass on the case for any unintentional consequential injury resulting from a lawful act where neither negligence nor folly can be imputed to him and the burden of proving the negligence or folly, where the act is lawful, is upon the plaintiff.

The friendly scuffles, the trials of strength among school children are indispensable to their physical growth and development. They are not only natural but lawful, and the law implies, from the very nature of the case, a license to lay hands upon each other as long as the motive and purpose are innocent and harmless.

See Hooker v. Chicago, M. & St. P. R. Co. 76 Wis. 546; *Adams v. Freeman*, 12 Johns. 408, 7 Am. Dec. 327; Cooley, Torts, p. 303; *Thayer v. Jarvis*, 44 Wis. 390.

The verdict is conclusive as to the innocence of the defendant's purpose.

Cooley, Torts, 163.

No finding or proof of negligence was made, and certainly negligence cannot be presumed by the court. The conclusion, therefore, is irresistible from this record that the injury to the plaintiff was, in the eye of the law, accidental.

An accident may be the unexpected result of a voluntary act.

Schneider v. Provident L. Ins. Co. 24 Wis. 30; *Pierce v. Travelers L. Ins. Co.* 34 Wis. 396; *Barry v. United States Mut. Acc. Assn.* 23 Fed. Rep. 712, 131 U. S. 100, 33 L. ed. 60.

If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action.

Cooley, Torts, p. 69. See Addison, Torts, p. 6; Moak's Underhill, Torts, p. 16.

No case or principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without fault on his part. All the cases concede that an injury arising from inevitable accident, or, which in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility.

Harvey v. Dunlop, 1 Hill & D. Supp. 194; *Wakeman v. Robinson*, 1 Bing. 213; *Bullock v. Babcock*, 3 Wend. 391.

There was no negligence in this case.

See *Baltimore & P. R. Co. v. Jones*, 95 U. S. 441, 24 L. ed. 506; *Whittaker's Smith*, Neg. p. 2; Ray, *Negligence of Imposed Duties*, p. 133; *Hubbell v. Yonkers*, 6 Cent. Rep. 499, 104 N. Y. 434, 58 Am. Rep. 522; *Dougan v. Champlain Transp. Co.* 55 N. Y. 6; *Leftus v. Union Ferry Co.* 84 N. Y. 460, 38 Am. Rep. 533; *Bullock v. Babcock*, *supra*.

The action of the bacilli according to all the testimony produced the bone destruction.

Here was an intervening cause that could not have been apprehended and for which defendant was in no way responsible.

Crandall v. Goodrich Transp. Co. 16 Fed. Rep. 84; *Marcin v. Chicago, M. & St. P. R. Co.* 11 L. R. A. 506, 79 Wis. 140; *Allegheny City v. Zimmerman*, 85 Pa. 287, 40 Am. Rep. 649; *Servatius v. Pichel*, 34 Wis. 299; *Stewart v. Ripon*, 38 Wis. 590; *Ingram v. Rankin*, 47 Wis. 409, 32 Am. Rep. 762.

Messrs. Ryan & Merton, for respondent:

Infants are liable in actions arising *ex delicto*, whether founded on positive wrongs, as trespass, or assault, or constructive torts or frauds.

2 Kent, Com. 241; 3 Cooley, Bl. Com. 120, note 4; *Hutching v. Engel*, 17 Wis. 237.

Where an infant commits a wrong to another, whether under seven years of age or upwards, whether willfully or negligently, or by the direct application of force, or the indirect results of force, the law, while regarding his youth or inexperience, and making due allowance for absence of evil intent or capacity for evil intent, proceeds upon the reason that damages directly resulting to another from the wrong he has committed ought to be recompensed.

Cooley, Torts, pp. 98, 99; *Hutching v. Engel*, *supra*; *Milton School Dist. No. 1 v. Bragdon*, 23 N. H. 507; *Zouch v. Parsons*, 8 Burr. 1802; *Jennings v. Rundall*, 8 T. R. 335; *Conney v. Reed*, 66 Mo. 848, 27 Am. Rep. 354; *Oliver v. McClellan*, 21 Ala. 675; *Barham v. Turbeville*, 1 Swan, 437, 57 Am. Dec. 782; *Bullock v. Babcock*, 8 Wend. 391; *Peterson v. Haifner*, 59 Ind. 130, 26 Am. Rep. 81; *Conklin v. Thompson*, 29 Barb. 218; *Neal v. Gillett*, 23 Conn. 437.

The party who commits a trespass, or other wrongful act, is liable for all the direct injury resulting from such act; although such resulting injury could not have been contemplated as the probable result of the act.

8 Suth. Dam. 714; *McNamara v. Clintonville*, 63 Wis. 307; 51 Am. Rep. 723; *Oliver v. La Valle*, 86 Wis. 592; *Steenort v. Ripon*, 8 Wis. 584; *Brown v. Chicago, M. & St. P. R.* 14 L. R. A.

Co. 54 Wis. 342; Ehrgott v. New York, 96 N. Y. 280.

Lyon, J., delivered the opinion of the court: Several errors are assigned, only three of which will be considered.

I. The jury having found that the defendant, in touching the plaintiff with his foot, did not intend to do him any harm, counsel for defendant maintain that the plaintiff has no cause of action, and that defendant's motion for judgment on the special verdict should have been granted. In support of this proposition counsel quote from 2 Greenleaf on Evidence, § 83, the rule that "that the intention to do harm is of the essence of an assault." Such is the rule, no doubt, in actions or prosecutions for mere assaults. But this is an action to recover damages for an alleged assault and battery. In such case the rule is correctly stated, in many of the authorities cited by counsel, that plaintiff must show either that the intention was unlawful, or that the defendant is in fault. If the intended act is unlawful, the intention to commit it must necessarily be unlawful. Hence, as applied to this case, if the kicking of the plaintiff by the defendant was an unlawful act, the intention of the defendant to kick him was also unlawful. Had the parties been upon the play-grounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness, or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of the defendant unlawful, or that he could be held liable in this action. Some consideration is due to the implied license of the play-grounds. But it appears that the injury was inflicted in the school, after it had been called to order by the teacher, and after the regular exercises of the school had commenced. Under these circumstances, no implied license to do the act complained of existed; and such act was a violation of the order and decorum of the school, and necessarily unlawful. Hence we are of the opinion that, under the evidence and verdict, the action may be sustained.

II. The plaintiff testified, as a witness in his own behalf, as to the circumstances of the alleged injury inflicted upon him by the defendant, and also in regard to the wound he received in January, near the same knee, mentioned in the special verdict. The defendant claimed that such wound was the proximate cause of the injury to plaintiff's leg, in that it produced a diseased condition of the bone, which disease was in active progress when he received the kick, and that such kick did nothing more than to change the location, and perhaps somewhat hasten the progress, of the disease. The testimony of Dr. Bacon, a witness for plaintiff, (who was plaintiff's attending physician,) elicited on cross examination, tends to some extent to establish such claim. Dr. Bacon first saw the injured leg on February 25, and Dr. Philler, also one of plaintiff's witnesses, first saw it March 8. Dr. Philler was called as a witness after the examination of the plaintiff and Dr. Bacon. On his direct examination he testified as follows: "I heard the testimony of Andrew Voseburgh in regard to how he received the kick, on February 20, from his playmate. I heard read the testimony

of Miss More, and heard where he said he received this kick on that day." (Miss More had already testified that she was the teacher of the school, and saw defendant standing in the aisle, by his seat, and kicking across the aisle, hitting the plaintiff.) The following question was then propounded to Dr. Philler: "After hearing that testimony, and what you know of the case of the boy, seeing it on the 8th day of March, what, in your opinion, was the exciting cause that produced the inflammation that you saw in that boy's leg on that day?" An objection to this question was overruled, and the witness answered: "The exciting cause was the injury received at that day by the kick on the shin-bone." It will be observed that the above question to Dr. Philler calls for his opinion as a medical expert, based in part upon the testimony of the plaintiff, as to what was the proximate cause of the injury to plaintiff's leg. The plaintiff testified to two wounds upon his leg, either of which might have been such proximate cause. Without taking both of these wounds into consideration, the expert could give no intelligent or reliable opinion as to which of them caused the injury complained of; yet, in the hypothetical question propounded to him, one of these probable causes was excluded from the consideration of the witness, and he was required to give his opinion upon an imperfect and insufficient hypothesis,—one which excluded from his consideration a material fact essential to an intelligent opinion. A consideration by the witness of the wound received by the plaintiff in January being thus prevented, the witness had but one fact upon which to base his opinion, to wit, the fact that defendant kicked plaintiff on the shin-bone. Based, as it necessarily was, on that fact alone, the opinion of Dr. Philler that the kick caused the injury was inevitable, when had the proper hypothesis been submitted to him, his opinion might have been different. The answer of Dr. Philler to the hypothetical question put to him may have had, probably did have, a controlling influence with the jury, for they found by their verdict

that his opinion was correct. Surely there can be no rule of evidence which will tolerate a hypothetical question to an expert, calling for his opinion in a matter vital to the case, which excludes from his consideration facts already proved by a witness upon whose testimony such hypothetical question is based, when a consideration of such facts by the expert is absolutely essential to enable him to form an intelligent opinion concerning such matter. The objection to the question put to Dr. Philler should have been sustained. The error in permitting the witness to answer the question is material, and necessarily fatal to the judgment.

III. Certain questions were proposed on behalf of defendant to be submitted to the jury, founded upon the theory that only such damages could be recovered as the defendant might reasonably be supposed to have contemplated as likely to result from his kicking the plaintiff. The court refused to submit such questions to the jury. The ruling was correct. The rule of damages in actions for torts was held in *Brown v. Chicago, M. & St. P. R. Co.*, 54 Wis. 342, to be that the wrong-doer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him. The chief justice and the writer of this opinion dissented from the judgment in that case, chiefly because we were of the opinion that the complaint stated a cause of action *ex contractu*, and not *ex delicto*, and hence that a different rule of damages—the rule here contended for—was applicable. We did not question that the rule in actions for tort was correctly stated. That case rules this on the question of damages. The remaining errors assigned are upon the rulings of the court on objections to testimony. These rulings are not very likely to be repeated on another trial, and are not of sufficient importance to require a review of them on this appeal.

The judgment of the circuit court must be reversed, and the cause will be remanded for a new trial.

CALIFORNIA SUPREME COURT.

Thomas FLYNN, *Appt.*,
v.
W. P. DOUGHERTY, *Respnt.*
(.....Cal.....)

1. A contract to cut, furnish and deliver the stone work of a building is ex-

cepted from the Statute of Frauds under Civ. Code, § 1740, as "an agreement to manufacture a thing from materials furnished by the manufacturer or another person."

2. A nonsuit cannot stand on a ground not called to the attention of the court and the plaintiff at the time the motion therefor was made.

NOTE.—*Statute of Frauds; distinction between sales of personality and agreements for work and labor.*

The earlier English cases held that executory contracts for the sale of personal property were not within the Statute of Frauds. *Towers v. Osborne*, 1 Strange, 508; *Alexander v. Comber*, 1 H. Bl. 20; *Clayton v. Andrews*, 4 Burr. 2101.

But these cases have been overruled by later English decisions. *Rondeau v. Wyatt*, 3 H. Bl. 68; *Cooper v. Elston*, 7 T. R. 10.

And made absolute also by the express terms of the later Statute of 9 Geo. IV., chap. 14, § 7.

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And they are also in conflict with the whole current of American cases. See among many others, *Bennett v. Nye*, 4 G. Greene, 410; *Newman v. Morris*, 4 Harr. & Moh. 421; *Edwards v. Grand Trunk R. Co.* 48 Me. 379; *Pitkin v. Noyes*, 48 N. H. 294; *Casson v. Cheely*, 6 Ga. 554; *Bennett v. Hull*, 10 Johns. 364.

Tests and rules.

The English rule for distinguishing between sales and agreements for work and labor is quite clearly indicated by the language of the Statute 9 Geo. IV., chap. 14, § 7, which expressly includes all con-

(November 19, 1891.)*

A PPEAL by plaintiff from a judgment of the Superior Court for the City and County of San Francisco in favor of defendant in an action brought to recover damages for an alleged breach of contract. *Reversed.*

The case sufficiently appears in the opinion. *Mr. Edward R. Taylor*, with *Mr. W. S. Goodfellow*, for appellant:

The present case is without the Statute of Frauds, because it did not cover an agreement for the sale of goods within the meaning of the statute; and because the contract was essentially one for labor and materials to be sup-

*A decision was reached in this case in department on May 30, 1891, and the judgment of the court below was affirmed. A rehearing in banc was subsequently applied for and granted, after which the opinion given herewith was handed down. [Rep.]

tracts of sale, although the goods "may not at the time be actually made, procured or provided or fit or ready for delivery," and is as follows: "If the contract be such that it will result in the sale of a chattel then it constitutes a sale, but if the work and labor be bestowed in such a manner as that the result would not be anything which could be properly said to be the subject of sale the action is for work and labor." *Lee v. Griffin*, 1 Best & S. 372.

But on the other hand, under Iowa Revised Statutes the provision as to writing on a sale of personal property does not apply where the property is not at the time owned by the vendor and ready for delivery, but labor, skill or money are necessary to be expended in producing or procuring it. *Brown v. Allen*, 35 Iowa, 306; *Partridge v. Wiltsey*, 8 Iowa, 459.

The simplicity of the English rule has commended it to many judges in this country even when they have been unable to adopt it fully because of precedents in their own jurisdiction.

In Massachusetts the rule is that a contract for the sale of articles which the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is for a sale of goods to which the statute applies, but if the goods are to be manufactured especially for the purchaser and upon his special order, and not for the general market, the case is not within the statute. *Goddard v. Binney*, 115 Mass. 456, 15 Am. Rep. 112.

A careful examination of the specific cases collected below will show that as to the latter part of this statement relating to goods made on special orders, there is little if any conflict in the American cases, although it is plainly a limitation of the English doctrine. As to the first part of the statement concerning contracts for articles of general merchandise yet to be manufactured or procured there is more conflict, although it may be said to represent quite fairly the weight of the modern American authorities. In New York it is said that the criterion is whether the work and labor required to prepare the subject matter of the contract for delivery is to be done for the vendor himself or for the vendee. *Court v. Stewart*, 19 Barb. 455; *Flint v. Corbitt*, 6 Daly, 439. To the same effect see *Cason v. Cheely*, 6 Ga. 554.

This rule as interpreted by many New York decisions makes any agreement to manufacture an article a contract for work and labor only. But some of the later cases in the lower courts in that State favor the Massachusetts distinction and hold that a contract for the manufacture of ordinary merchandise is a sale. No decision of the New York Court of Appeals, however, has

pled to a building, and not one for supply of movable goods.

Mizer v. Howarth, 21 Pick. 205, 32 Am. Dec. 256.

The subject matter of the contract is for furnishing material, which, in the contemplation of the contracting parties, was to enter into the composition of a building. This furnishes a broad distinction between this case and the ordinary sale of a chattel.

Benjamin, Sales, 4th Am. ed. § 108; *Cotterell v. Apsey*, 6 Taunt. 322; *Tripp v. Armitage*, 4 Mees. & W. 687; *Clark v. Bulmer*, 11 Mees. & W. 248; *Courtright v. Stewart*, 19 Barb. 455; *Phipps v. McKarlane*, 3 Minn. 109, 74 Am. Dec. 748; *Dutch v. Mead*, 4 Jones & S. 429; *Low v. Andrews*, 1 Story, 42; *Bennett v. Nye*, 4 G. Greene, 410; *Crockett v. Scribner*, 64 Me. 447; *Cummings v. Dennett*, 26 Me. 397; *Mead v. Case*, 38 Barb. 202; *Ferren v. O'Hara*, 62

sanctioned any change in the earlier rule, and this particular question has not been before that court in many years.

Another rule of the New York courts applies only to chattels in existence and holds that the contract for such a chattel should be deemed one of sale even though it may have been ordered from a seller who is to do some work upon it to adapt it to the uses of the purchaser. *Cooke v. Millard*, 65 N. Y. 262; *Downs v. Ross*, 23 Wend. 274; *Bates v. Coster*, 1 Hun, 400.

This rule is now pretty generally established both in England and America, and the only exceptions are a few early cases, which are now overwhelmingly submerged by later decisions.

Another test, now generally abandoned, was whether the work and labor constituted the essential part of the contract. This rule was favored in *Cason v. Cheely*, 8 Ga. 554, and *Pitkin v. Noyes*, 49 N. H. 294, as well as some early English cases, but is now rarely mentioned as a practical test.

Special orders.

A contract to manufacture a set of circus tents of a specified kind and dimensions for another person is not a sale within the Statute of Frauds. *Higgins v. Murray*, 78 N. Y. 252.

A contract to manufacture a pump differing in some respects from those which the vendor then had is not within the Statute of Frauds. *Parker v. Schenck*, 23 Barb. 38.

An agreement to manufacture certain "circulars" and wraps for exclusive use in the purchaser's business and not adapted to any other purpose is not within the Statute of Frauds. *Hinds v. Kellogg*, 37 N. Y. S. R. 364.

A contract to manufacture lamps different from those usually kept in stock is not within the statute. *Bonnell v. Hearn*, 12 Daly, 236.

A contract to procure and deliver a vessel frame hewn and prepared according to certain moulds is not within the statute. *Abbott v. Gilchrist*, 38 Me. 280.

A contract to make the wood work of a wagon is not within the Statute of Frauds. *Crookshank v. Burrell*, 18 Johns. 58, 9 Am. Dec. 187.

An agreement to make ten stave machines for another person and to find the materials therefor is not within the Statute of Frauds. *Spencer v. Cone*, 42 Mass. 283.

A contract for a carriage to be manufactured upon special order according to a particular model is not within the statute. *Metzke v. Falk*, 55 Wis. 427, 42 Am. Rep. 723.

A contract for a chariot to be made is not within the statute. (The decision is put on the ground, which is abandoned in later cases, that the statute

Barb. 517; *Crookshank v. Burrell*, 18 Johns. 58, 9 Am. Dec. 187; *Donovan v. Willson*, 26 Barb. 138; *Sewall v. Fitch*, 8 Cow. 215; *Bronson v. Wiman*, 10 Barb. 406; *Goddard v. Binney*, 115 Mass. 450, 451, 15 Am. Rep. 112; *Parsons v. Loucks*, 4 Robt. 216; *Mixer v. Howarth*, *supra*; *Cason v. Cheely*, 6 Ga. 554.

Mr. J. R. Patton, with **Mr. Charles F. Wilcox**, for respondent:

There are three different rules of construction of the 17th section of the Statute of Frauds, viz.: the English, Massachusetts, and New York. The English rule lays stress upon the point as to whether the article bargained for can be regarded as goods and chattels capable of sale at the time of delivery.

Lee v. Griffin, 1 Best & S. 272, cited in Benjamin, Sales, 6th ed. p. 119.

The Massachusetts rule mainly regards the point whether the products, at the time stipulated for delivery, be regarded as "goods and wares" in the sense of being generally marketable.

Goddard v. Binney, 115 Mass. 450, 15 Am. Rep. 112.

The New York rule is still different and is substantially to the effect that an agreement for the sale of a commodity not in existence at the time of the making of the contract is not a contract of sale.

Crookshank v. Burrell, 18 Johns. 58, 9 Am. Dec. 187; *Sewall v. Fitch*, 8 Cow. 215; *Parsons v. Loucks*, 4 Robt. 216; *Donovan v. Willson*, 26 Barb. 138.

The English rule seems to be the most logical and least confusing, and was recognized as

does not apply to executory contracts.) *Towers v. Osborne*, 1 Strange, 506.

A contract to build a carriage for another partly under his direction is not within the Statute of Frauds. *Goddard v. Binney*, 115 Mass. 450, 15 Am. Rep. 112.

A contract for a carriage which is then only partly finished, and which is ordered to be finished according to specific directions, is not a contract of sale within the Statute of Frauds. (In this case it was proved that the manufacturer at the time of the order did not intend to finish any carriages that season unless on special orders.) *Mixer v. Howarth*, 38 Mass. 205, 32 Am. Dec. 256.

An agreement to furnish a marble monument to be constructed of several pieces then in existence, and to polish, letter and finish the monument and set it up, is an agreement to manufacture the monument and is not within the Statute of Frauds. *Mead v. Case*, 33 Barb. 202.

A contract for grave-stones to be made is not within the statute. *Mattison v. Westcott*, 13 Vt. 254. *Contra*, *Wolfenden v. Wilson*, 35 U. C. Q. B. 442.

The Canada statute under which this last case is decided is similar to that of England, above quoted, and may serve to explain the conflict here.

A contract for surgical instruments to be made from the vendor's materials is not within the statute. *Allen v. Jarvis*, 30 Conn. 28.

A contract to make brick and deliver them to one who is to select the spot and the clay for the manufacture is not for a sale but for manufacture. *O'Neil v. New York & Silver Peak Min. Co.* 3 Nev. 141.

A contract to print 500 copies of a certain treatise, to which a dedication is to be prefixed at a certain price per sheet including paper, is not a sale. *Clay v. Yates*, 1 Hurlst. & N. 173.

A contract to procure materials of a specified quality and manufacture stocking shoddy is not within the statute. *Deal v. Maxwell*, 51 N. Y. 662.

An agreement to furnish material for, and prepare, fit and put up portable houses is not a contract of sale. *Phipps v. McFarlane*, 8 Minn. 100, 74 Am. Dec. 743.

An agreement to furnish materials and do the carpenter work and turning for certain buildings is not for a sale of goods within the statute. *Court-right v. Stewart*, 19 Barb. 455.

A contract for a set of teeth to be manufactured for a person is a sale. *Lee v. Griffin*, 1 Best & S. 277, 30 L. J. Q. B. 262.

This would clearly be decided otherwise under any rule of the American courts.

A contract for furnishing boilers to a ship, which includes the performance of complicated work, is a contract for work and labor. *Anglo-Egyptian Nav. Co. v. Rennie*, L. R. 10 C. P. 271.

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A contract to send abroad and order goods for another is not within the statute. *Bird v. Muhlinbrink*, 1 Rich. L. 190.

Manufacture of ordinary articles not according to special directions.

A contract for candles not yet manufactured is for the sale of goods within the meaning of the Statute of Frauds. *Gardner v. Joy*, 9 Met. 177.

A contract to furnish another with tallow to be prepared or manufactured is for a sale within the meaning of the Statute of Frauds. *Lamb v. Crafts*, 53 Mass. 353.

A contract for a quantity of planks for ship building to be delivered at a future time is for a sale of goods. *Waterman v. Meigs*, 53 Mass. 497.

A contract to furnish blocks for blocking a ship is a sale. *Pickett v. Swift*, 41 Me. 65, 66 Am. Dec. 214.

A contract to buy the spokes that should be sawn at a mill is a sale within the meaning of the statute. *Prescott v. Locke*, 51 N. H. 94, 12 Am. Rep. 55.

A contract for all the pelts that may be taken off within a certain time is a sale within the statute. *Gilman v. Hill*, 36 N. H. 311.

A contract for goods not yet manufactured, made with any other person than the manufacturer, is a sale. *Millar v. Fitzgibbons*, 9 Daly, 508; *Joy v. Schloss*, 12 Daly, 533.

A contract for the manufacture of ordinary merchandise, made with one who manufactures it for all who traffic in it, is a sale. *Pastac Mfg. Co. v. Hoffman*, 3 Daly, 495.

In conflict with the rule laid down in the above cases are the following, of which it will be noticed that none are recent:

A contract for nails which are not yet made is not within the Statute of Frauds. *Sewall v. Fitch*, 8 Cow. 215.

A contract to manufacture and deliver a quantity of paper is not within the Statute of Frauds. *Parsons v. Loucks*, 48 N. Y. 17, 8 Am. Rep. 517.

A contract for 1,000 molasses shooks and heads to be manufactured is not within the statute. *Robertson v. Vaughn*, 5 Sandf. 1.

A contract to manufacture, furnish and deliver a certain quantity of beer each week for a certain period is not within the Statute of Frauds. *Donovan v. Willson*, 26 Barb. 138.

A contract to deliver flour to be ground out of wheat which the promisor has bargained for, but not yet received, is for work and labor only, and not within the Statute of Frauds. *Bronson v. Wiman*, 10 Barb. 404.

A contract for oak pins to be made from stabs is not within the statute. *Groves v. Buck*, 3 Maule & S. 173.

An agreement to manufacture staves out of a particular lot of lumber already cut for that pur-

the true rule in *Cooke v. Millard*, 65 N. Y. 352, and as far as possible was followed by the court in that case, while not overturning the rule already established in that State by precedents.

See *Smith v. New York Cent. R. Co.* 4 Keyes, 180; *Downs v. Ross*, 23 Wend. 270; *Garbutt v. Watson*, 5 Barn. & Ald. 613; *Smith v. Surnam*, 9 Barn. & C. 561; *Brown v. Sanborn*, 21 Minn. 402; *Prescott v. Locke*, 51 N. H. 94, 12 Am. Rep. 55; *Wolfenden v. Wilson*, 33 U. C. Q. B. 442; *Isaacs v. Hardy*, 1 Cab. & E. 287.

Paterson, J., delivered the opinion of the court:

The only question involved in this appeal is whether the contract of the plaintiff "to cut, furnish, and deliver" to defendant "the stone-work of the asylum to be built at Agnew station, according to the plans and specifications of Mr. Jacob Leuzen & Son, architects," is within

the Statute of Frauds. Section 1789, Civil Code. There is no doubt that it is within the provisions of the statute, unless excepted therefrom by section 1740, Id., which is as follows: "An agreement to manufacture a thing from materials furnished by the manufacturer or by another person is not within the provisions of the last section." The plaintiff testified that, "if the stone had been cut according to his bid and the specifications, and had not been used in the construction of the asylum, it would not have been available for other purposes, or have been salable in the general market." On the subject of contracts of sale and contracts for labor there is much conflict of decision, but the weight of authority in this country supports the proposition that, where the seller is to furnish materials and fashion them according to specifications furnished by the purchaser, or according to some model selected, and when, without the special contract entered into by

pose, is not within the statute. *Crockett v. Scribner*, 64 Me. 47.

A contract for the future delivery of 140 backs and stripes for belting not then on hand is not within the statute. *Cummings v. Denbitt*, 26 Me. 397.

A contract for cider to be procured and refined is a sale. *Seymour v. Davis*, 2 Sandf. 280.

Finishing articles already in existence.

A contract for an unfinished article to be finished and delivered, which the vendor keeps in that state to give the purchaser a choice as to the finishing, is a sale. *Flint v. Corbitt*, 6 Daly. 420.

A contract for the sale of lumber then existing but to be dressed and cut into required sizes for surface boards, clap boards and matched ceiling, is one of sale within the Statute of Frauds. *Cooke v. Millard*, 65 N. Y. 352.

A contract for a marble mantel to be set up with certain alterations and fixtures is an agreement for sale. *Fitzsimmons v. Woodruff*, 1 Thomp. & C. 3.

A contract for plank is for a sale of goods although it is stipulated that the vendor shall saw them into plank of various dimensions under direction of the purchaser. *Clark v. Nichols*, 107 Mass. 547.

A contract for the sale of wheat part of which was then in a granary and the rest unthreshed, but which was to be got ready and delivered with that in the granary after giving it a second cleaning is for a sale within the meaning of the Statute of Frauds. *Downs v. Ross*, 23 Wend. 270.

A contract for the future delivery of wheat then unthreshed is a sale. *Hardell v. McClure*, Chand. (Wis.) 271. *Contra*, *Richelberger v. McCauley*, 5 Har. & J. 171, 9 Am. Dec. 514.

A contract for the future delivery of corn then in the field ungathered and unhusked is not within the statute. *Rentch v. Long*, 27 Md. 188. (These two cases from Maryland seem to stand alone on this particular branch of the question.)

A contract for flour, although not yet prepared for delivery, is a sale. *Garbutt v. Watson*, 5 Barn. & Ald. 613.

A contract for the delivery of cotton, although work is yet to be done to prepare it for market, is within the statute. *Oason v. Cheely*, 6 Ga. 554.

For crops to be raised.

A contract for three acres of potatoes to be raised will be left to the jury to determine whether it is essentially for work, labor and materials or for a sale of the potatoes. *Pitkin v. Noyes*, 43 N. H. 204.

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A contract for a crop to be raised from turnip seed, although the seed is furnished by the purchaser, is a sale. *Watts v. Friend*, 10 Barn. & C. 446.

A contract for flax straw to be raised from a certain quantity of flax seed is for a sale and not for a manufacture. *Brown v. Sanborn*, 21 Minn. 402.

For timber to be cut or for logs.

A contract to cut, saw, and deliver lumber to be made from timber on government land is for work and labor, and not a sale of goods. *Orman v. Hager*, 3 N. M. 381.

A contract for the timber of standing trees to be cut is a sale. *Smith v. Surnam*, 9 Barn. & C. 561.

A contract for the sale and delivery of wood, though at that time it is in standing trees, is not a contract for work and labor so as to take it out of the Statute of Frauds. *Smith v. New York Cent. R. Co.* 4 Keyes, 180.

A contract for all the logs a party can get out and deliver at a certain point during the season is a sale. *Pike v. Vaughn*, 39 Wis. 499; *Hansen v. Roter*, 64 Wis. 622.

A contract for all the wood a party may get out on the line of a road is within the statute. *Edwards v. Grand Trunk R. Co. of Canada*, 64 Me. 106.

A contract to furnish railroad ties is a contract for a sale of goods and chattels within the meaning of the Statute of Frauds. *Russell v. Wisconsin*, M. & P. R. Co. 39 Minn. 145.

A contract to procure for another and deliver to him oak and hickory sticks called butts is an agreement to sell and not to manufacture. *Dedrich v. Leonard*, 3 N. Y. S. R. 780.

The result of a critical comparison of all the American decisions, which we believe are all included in the above collection, shows that while the question has been regarded as a much vexed one (and in repeated instances courts have commented on the impossibility of reconciling the decisions), the actual conflict among recent decisions is slight. Should the courts of last resort in New York and Maine accept such a modification of their former decisions in respect to the manufacture of ordinary merchandise in the usual course of business as is adopted in the very able opinions in the above cases from Daly's reports, there would no longer be any appreciable conflict of principles among the American courts on this subject, except that made by the two Maryland decisions above noted on that branch of the subject concerning the sale of unfinished articles both of which were made many years ago, and which, even if they should not be overruled by the next case on the subject in that State, would make but one break in the otherwise continuous current of decisions in this country. B. A. R.

the parties, the thing furnished would never have been put in the particular shape or condition in which it was furnished, then the contract is essentially one for labor, and is not within the Statute of Frauds. The subject is carefully treated and the authorities fully reviewed in 1 Reed, Stat. Fr. chap. 9. The evidence in the case before us shows that the work which was to be performed by the plaintiff would have left the material unfit for the general market. The contract is one for labor,—work and labor were the main things. The material upon which the work and labor were to be done was simply the incident. The stone to be furnished was of no value to the defendant until shaped and carved according to the plans and specifications of the architect. Upon the authorities referred to above, we think the court erred in granting the defendant's motion for a nonsuit. The only grounds stated by the defendant in his motion for a nonsuit were that the contract was one for the sale of goods and

chattels, "and that there was no note or memorandum thereof signed by the defendants, nor any acceptance or receipt of the goods, or any part thereof, nor any payment of purchase money, or any part thereof, as required by the provisions of section 1624, subd. 4, of the Civil Code; and on the further ground that plaintiff has failed to show that he has sustained any damage in any sum whatever." The rule is well settled here that a nonsuit cannot stand unless the ground upon which it is supported was called to the attention of the court and the plaintiffs at the time the motion was made. *Judgment and order reversed, and cause remanded for a new trial.*

We concur: **Beatty, Ch. J.; Sharpstein, J.; De Haven, J.; Garoutte, J.; McFarland, J.**

Harrison, J., being disqualified, did not participate in the foregoing opinion.

NEW YORK COURT OF APPEALS (2d Div.).

Sarah M. GERARD *et al.*, *Respts.*,

v.

James McCORMICK, *Appt.*

(.....N. Y.)

1. **Good faith in receiving payment of a debt with notice that the money belongs to the debtor's principal** will not relieve the creditor from liability to refund it to the principal if the agent had no authority to use it for such payment.
2. **The words "Agt. Glass Buildings" added to the signature to a check** are enough to put one who receives it in payment of a debt from the signer on inquiry as to his authority to use the fund for such payment.

(December 1, 1891.)

A PPEAL by defendant from a judgment of the General Term of the Court of Com-

Pleas for the City and County of New York, affirming a judgment of the Trial Term in favor of plaintiffs and an order denying defendant's motion for a new trial in an action brought to recover money alleged to have been received by defendant to plaintiffs' use. *Affirmed.*

Statement by **Follett, Ch. J.**:

The action was brought to recover \$501.25, money received by the defendant September 19, 1892, alleged to belong to the plaintiffs. For many years the plaintiffs have owned Nos. 87 and 89 Wall Street, New York, known as "Glass Buildings." From 1872 to February, 1887, William Boswell was the agent of the plaintiffs, having authority to collect and deposit the sums received for rents in the Corn Exchange Bank to the credit of an account kept in the name of "William Boswell, Agent Glass Buildings," and to draw therefrom sums due

NOTE.—*Agent's power to use property of his principal for payment of his own debt.*

A check on a bank by a person "as agent," drawn against a fund consisting of the proceeds of his principal's goods, can be collected by the principal without regard to the agent's individual indebtedness to the bank, even if the agent has consented to an application of the fund by the bank to such indebtedness. *Baker v. New York Nat. Exch. Bank*, 1 Cent. Rep. 14, 100 N. Y. 31, 16 Abb. N. C. 458. A bank accepting checks in payment to itself of a debt from an agent drawn on a fund deposited by him as general agent when chargeable with actual knowledge of the sources of the deposit and of the agent's duty in respect thereto takes the payment subject to the equities of the principal. *Central Nat. Bank of Baltimore v. Connecticut Mut. L. Ins. Co.*, 104 U. S. 54, 26 L. ed. 693.

And a bank may become liable to the principal for his money deposited by an agent in his own name if the bank knew the character of the fund. *Commercial & C. Bank v. Jones*, 18 Tex. 811.

On sale of property.

An agent has no implied authority to accept a cancellation of his own debt in payment on a sale 14 L. R. A.

of property of his principal. *Smith v. James*, 58 Ark. 135; *Tripp & M. B. & S. Co. v. Martin* (Kan.), April 11, 1891; *Talboys v. Boston* (Minn.) May 2, 1891; *Deatherage v. Henderson*, 43 Kan. 654; *Stewart v. Woodward*, 30 Vt. 73, 23 Am. Rep. 488; *Belton Compress Co. v. Belton Brick Mfg. Co.*, 64 Tex. 387; *Holton v. Smith*, 7 N. H. 446; *Rodick v. Coburn*, 66 Me. 170.

This rule applies to a factor. *Benny v. Rhodes*, 18 Mo. 147, 151, 59 Am. Dec. 293, 296; *Catterall v. Hindle*, L. R. 2 C. P. 398.

And one who deals with an agent with knowledge of his agency is bound to know the extent of his agency in this respect. *Hurley v. Watson*, 66 Mich. 531, 18 West. Rep. 542.

An agent cannot accept his own note in payment of a debt to his principal. *Wilcox & W. Organ Co. v. Lasley*, 40 Kan. 521.

Nor can he take in payment property for his individual use. *Williams v. Johnson*, 92, N. C. 522, 52 Am. Rep. 428.

But if an agent actually pays his principal a debt which he has canceled for a consideration personal to himself, the payment is good. *Roseville Union Bank v. Gilbert*, 24 Ill. App. 384.

for repairs, insurance, taxes, interest on incumbrances, his own commissions, and for the usual expenses of such buildings, and then to divide by checks on the account the remainder among the plaintiffs, according to their respective interests. The checks drawn against this account were signed, "William Boswell, Agt. Glass Buildings." August 31, 1882, William Boswell borrowed \$500 of the defendant upon securities deposited as collateral, and on the 19th of September, 1882, he paid the loan, amounting, with interest, to \$501.25, by the following check: "No. —. New York, Sept. 19th, 1882. Corn Exchange Bank, pay to the order of James McCormick five hundred and one 25 dollars. William Boswell, Agt. Glass Buildings. \$501.25." Upon receiving the check the defendant surrendered to Boswell the collateral pledged as security for the loan, and thereupon the check was thus indorsed: "James McCormick. For deposit to the credit of James McCormick & Co. Per John C. Fink, Atty." Thereafter the check was paid by the Corn Exchange Bank pursuant to the above order indorsed thereon, and charged to the account of "William Boswell, Agt. Glass Buildings." In 1887 the plaintiffs learned that Boswell had from time to time appropriated large sums of money arising from the rents to his own use. The appropriations were made by drawing checks for his own benefit, like the one given to the defendant, and by neglecting to keep down the taxes and interest, which he reported to the owners as paid. After Boswell's frauds were discovered, this action was begun, September 5, 1888, to recover from the defendant the sum received by him by this check. The defenses interposed were (1) that the money secured by means of it did not belong to the plaintiffs; (2) that the defendant received it for value, in good faith, and without notice of the plaintiffs' rights, if any they had. When the plaintiffs rested, and again at the close of the evidence, the defendant asked the court to dismiss the complaint, on the grounds, among others, that the evidence was insufficient to

authorize the jury to find that the money received belonged to the plaintiffs, and was insufficient to authorize them to find that the defendants had knowledge that the check was drawn against money belonging to the plaintiffs. The motion was denied, and an exception taken. The questions were submitted to the jury under instructions which are not contained in the case, and must have been satisfactory to both parties. A verdict was found for the plaintiffs, on which a judgment was entered, which was affirmed by the general term, and from that judgment the defendant appealed to this court.

Mr. Samuel Fleischman, for appellant:

The action being one for money had and received, it was essential that plaintiff, in order to recover, should prove that the defendant received money belonging to plaintiffs.

De Peyster v. Winter, 4 How. Pr. 449; *National Trust Co. v. Gleason*, 77 N. Y. 403, 33 Am. Rep. 632; *Chapman v. Forbes*, 123 N. Y. 586; *Decker v. Saltzman*, 59 N. Y. 277. See also *New York v. Scott*, 1 Cal. 548; *Dutchess County Suprs. v. Sison*, 24 Wend. 387.

To enable a principal to recover his money paid by his agent in discharge of the latter's debt, the former must show that the defendant knew that the agent had no right thus to use the money.

Ford v. Union Nat. Bank of Albany, 88 N. Y. 672, affirming 25 Hun, 564, 18 N. Y. Week. Dig. 353.

The payment by check should be treated the same as if made in bank bills. The defendant's position in taking the check and drawing the money should be no different than if he had declined the check and accepted the money drawn by Boswell himself on the check made payable to bearer. A check is regarded the same as money.

Story, Ag. § 228; *Justh v. Nat. Bank of Commonwealth*, 56 N. Y. 478; *Laubach v. Leibert*, 87 Pa. 55.

The plaintiffs gave their agent power to

On collections.

An attorney to collect a claim has no authority to accept a cancellation of his own debt on such payment. *Whitson v. Holloway*, 7 Leigh. 277; *Wiley v. Mahood*, 10 W. Va. 208; *Scott v. Irving*, 1 Barn. & Ad. 606; *Arnett v. Glenn*, 59 Ark. 233; *Greenwood v. Burns*, 80 Mo. 52; *McCormick v. Keith*, 8 Neb. 143.

Pledging property.

An agent for the sale of goods has no authority to pledge them for his own debt. *Buckley v. Packard*, 20 Johns. 431; *Ullman v. Myrick* (Ala.) Nov. 25, 1890; *Whitney v. State Bank*, 7 Wis. 620; *Ryan v. Stowell*, 1 Neb. L. J. 597; *Stevens v. Cunningham*, 3 Allen, 422; *Nash v. Mosher*, 19 Wend. 431; *Trudo v. Anderson*, 10 Mich. 373; *Bailou v. O'Brien*, 20 Mich. 304; *Chicago T. & P. Press Co. v. Lowell*, 60 Cal. 454.

A power of attorney to act in every species of business gives no authority to pledge the principal's goods for the agent's debt. *Hewes v. Dodridge*, 1 Rob. (Va.) 143.

A factor at common law and except as modified by statute cannot pledge his principal's goods for his own debt. (This rule has been more or less modified in England and in many of the States in this country for the protection of bona fide pledgees.) *Paterson v. Tash*, 3 Strange, 1173; *Mc-14 L. R. A.*

Combie v. Davies, 6 East, 538; *Daubigny v. Duval*, 5 T. R. 604; *Phillips v. Huth*, 6 Mees. & W. 572; *Martini v. Coles*, 1 Maule & S. 145; *Shipley v. Kymmer*, 1 Maule & S. 484; *Cole v. Northwestern Bank*, L. R. 10 C. P. 354, 12 Moak, Eng. Rep. 418; *Kinderv. Shaw*, 2 Mass. 397; *Warner v. Martin*, 52 U. S. 11 How. 209, 13 L. ed. 667; *Hoffman v. Noble*, 6 Met. 68, 39 Am. Dec. 711; *Bott v. McCoy*, 20 Ala. 578, 56 Am. Dec. 223; *Kennedy v. Strong*, 14 Johns. 128; *Rodriguez v. Heffernan*, 5 Johns. Ch. 417, 1 L. ed. 1127; *Stevens v. Wilson*, 3 Denio, 478; *First Nat. Bank of Macon v. Nelson*, 38 Ga. 391, 95 Am. Dec. 400; *Newbold v. Wright*, 4 Rawle, 195; *Merchants Nat. Bank of Memphis v. Trenholm*, 12 Heisk. 520; *Gray v. Agnew*, 95 Ill. 315; *First Nat. Bank of Louisville v. Boyce*, 78 Ky. 42, 39 Am. Rep. 198; *McCreary v. Gaines*, 55 Tex. 485, 40 Am. Rep. 518; *Miller v. Schneider*, 19 La. Ann. 300, 92 Am. Dec. 635; *Young v. Scott*, 25 La. Ann. 313; *Mechanics & T. Ins. Co. v. Kiger*, 108 U. S. 252, 23 L. ed. 423; *Bowie v. Napier*, 1 McCord, L. 1, 10 Am. Dec. 641; *Allen v. St. Louis Bank*, 120 U. S. 20, 30 L. ed. 573; *Union Stock Yards Nat. Bank v. Gillespie*, 137 U. S. 411, 34 L. ed. 724; *Lallande v. Creditors*, 42 La. Ann. 706; *Skinner v. Dodge*, 4 Hen. & M. 432; *Wright v. Solomon*, 19 Cal. 64, 79 Am. Dec. 196, overruling *Hutchinson v. Boura*, 6 Cal. 386; *Gidden v. Lucas*, 7 Cal. 26; *Horr v. Barker*, 11 Cal. 393, 70 Am. Dec. 791.

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draw checks and pay out this money. They are estopped from denying his authority to the prejudice of an innocent third party dealing with him in reliance upon his apparent authority.

Bank of Batavia v. New York, L. E. & W. R. Co. 7 Cent. Rep. 822, 106 N. Y. 195, 60 Am. Rep. 440; *Griswold v. Hazen*, 25 N. Y. 595, 82 Am. Dec. 380; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 80; *Armour v. Michigan Cent. R. Co.* 65 N. Y. 111, 22 Am. Rep. 603; *Story, Ag. §§ 227, 228*; *North River Bank v. Aymer*, 3 Hill, 262; *Farmers & M. Bank v. Butchers & D. Bank*, 16 N. Y. 125.

The drawing of the check by plaintiffs' agent was an express declaration that he had authority to check out this money, and the plaintiffs cannot claim that he actually exceeded his authority as against the defendant, who was an innocent holder and gave value for the check.

Anidion v. Wheeler, 3 Hill, 187; *Ely v. Norton*, 2 Abb. App. Dec. 19; *Stephens v. Board of Education*, 79 N. Y. 183, 35 Am. Rep. 511; *Greenfield School Dist. v. First Nat. Bank in Greenfield*, 102 Mass. 174; *Le Breton v. Peirce*, 2 Allen, 8; *Case v. Mechanics Bkg. Asso.* 4 N. Y. 166. See also *Gray v. Johnston*, L. R. 3 H. L. 1; *Lime Rock Bank v. Plimton*, 17 Pick. 159, 23 Am. Dec. 286; *Clement v. Leverett*, 12 N. H. 317.

The words "Agt. Glass Building," added to Boswell's name were but *descriptio personæ*, and defendant had a right to regard the check as Boswell's individual check.

De Witt v. Walton, 9 N. Y. 571; *Pentz v. Stanton*, 10 Wend. 271, 25 Am. Dec. 558; *Reznor v. Webb*, 36 How. Pr. 353; *Hills v. Banuister*, 8 Cow. 82; *Taft v. Brewster*, 9 Johns. 334, 6 Am. Dec. 280.

The defendant having giving up security upon receipt of the check as a purchaser for value.

Bank of Salina v. Babcock, 21 Wend. 499; *Mohawk Bank v. Corey*, 1 Hill, 513; *Bank of Sandusky v. Scoville*, 24 Wend. 115; *Meads v. Merchants' Bank of Albany*, 25 N. Y. 143, 82 Am. Dec. 331; *Ford v. Union Nat. Bank of Albany*, 88 N. Y. 672, affirming 25 Hun, 564; *Chapman v. Forbes*, 123 N. Y. 536.

This action being for money had and received is in the nature of an equitable action; and plaintiffs can recover only by showing that they are *ex æquo et bono* entitled to the money.

Eddy v. Smith, 18 Wend. 490; *Kington Bank v. Eltinge*, 66 N. Y. 625; *Chapman v. Forbes*, and *Ford v. Union Nat. Bank of Albany*, *supra*.

Mr. H. Kettell, for respondents:

A deposit made by a depositor as agent is *prima facie* the property of the principal.

Arnold v. Macungie Sav. Bank, 71 Pa. 287.

The signature to the check, to wit, "William Boswell, Agt. Glass Buildings," was sufficient notice to defendant to put him on inquiry.

Carpenter v. Farnsworth, 106 Mass. 561, 8 Am. Rep. 360; *Wright v. Cabot*, 89 N. Y. 574; *Budd v. Munroe*, 18 Hun, 316, and cases cited; *Pendleton v. Fay*, 2 Paige, 202, 2 L. ed. 874; *Anderson v. Van Alen*, 12 Johns. 343; *Merchants Bank of Canada v. Livingston*, 74 N. Y. 223; *Moore v. American L. & T. Co.* 115 14 L. R. A.

N. Y. 65; *Stephens v. Board of Education*, 79 N. Y. 187, 35 Am. Rep. 511; *Argersinger v. McNaughton*, 114 N. Y. 535.

The words of the signature after the name were not merely descriptive of the person.

Fellous v. Longyor, 91 N. Y. 331; *Sutherland v. Carr*, 85 N. Y. 110; *Central Nat. Bank of Baltimore v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693.

The defendant being the one whose acts made the occurrence possible must bear the loss, and is liable to the plaintiffs.

Wright v. Cabot, 89 N. Y. 574; *Gloucester Bank v. Salem Bank*, 17 Mass. 43; *Koot v. French*, 13 Wend. 572, 28 Am. Dec. 482; *Sandford v. Handy*, 23 Wend. 268; *Argersinger v. McNaughton*, *supra*.

To bind a principal, the authority of the agent must be proved, and it is incumbent on defendant to show that Boswell had authority to borrow money.

Bernheimer v. Herrman, 44 Hun, 112; *Central Nat. Bank v. North River Bank*, 44 Hun, 116.

The authority of the agent cannot be proved by the agent's declarations nor increased by the agent's acts.

Snook v. Lord, 56 N. Y. 605; *Marvin v. Wilber*, 52 N. Y. 270; *Eaton v. Delaware, L. & W. R. Co.* 57 N. Y. 890, 15 Am. Rep. 513; *House Mach. Co. v. Farrington*, 83 N. Y. 127; *Budd v. Munroe*, 18 Hun, 317; *Griswold v. Haven*, 25 N. Y. 599, 82 Am. Dec. 380; *O'Laughlin v. Hammond*, 21 N. Y. S. R. 647; *Briggs v. Davis*, 20 N. Y. 15, 75 Am. Dec. 363; *Farmers & M. Bank v. Butchers & D. Bank*, 16 N. Y. 134; *Seaworth v. Curtis*, 5 N. Y. 801, 55 Am. Dec. 345; *Moore v. American L. & T. Co.* 115 N. Y. 65.

Defendant was bound to inquire into the authority of Boswell, and must be presumed to know the limitations of the agent's authority.

Martin v. Farnsworth, 49 N. Y. 558, and cases cited; *Sage v. Sherman, Hill & D. Supp.* 147, affirmed, 2 N. Y. 417; *Crane v. Evans*, 1 N. Y. S. R. 217; *Argersinger v. McNaughton*, 114 N. Y. 535.

Trust funds can always be recovered unless against a bona fide purchaser for consideration without notice.

Weaver v. Barden, 49 N. Y. 286; *Webster v. Porter*, 92 N. Y. 81; *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Stephens v. Board of Education*, 79 N. Y. 186, 35 Am. Rep. 511; *Just v. National Bank of Commonwealth*, 56 N. Y. 478; *Pierson v. McCurdy*, 83 Hun, 530, affirmed, 1 Cent. Rep. 175, 100 N. Y. 606; *James v. Oving*, 82 N. Y. 449; *Falkland v. St. Nicholas Bank*, 84 N. Y. 145; *Baker v. New York Nat. Exch. Bank*, 16 Abb. N. C. 458; *Atma Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314; *Central Nat. Bank of Baltimore v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693; *Duncan v. Jaudon*, 82 U. S. 15 Wall. 175, 21 L. ed. 145; *Shaw v. Spencer*, 100 Mass. 389, 1 Am. Rep. 115; *Grand Trunk R. Co. v. Edwards*, 56 Barb. 408.

Follett, Ch. J., delivered the opinion of the court:

The evidence was abundant to authorize the jury to find that the amount standing to the credit of "William Boswell, Agt. Glass Build-

ings" in the Corn Exchange Bank belonged to the plaintiffs, and that by means of the check the sum represented by it was, by the fraud of Boswell, withdrawn from the account, and paid to and received by the defendant. The remaining question is whether the evidence authorized the court to submit to the jury the question of good faith, or was sufficient to authorize the jury to find that the defendant had notice that the check was drawn against an account not owned by Boswell. The defendant testified, and his evidence was not disputed, that he received the check from Boswell in payment of \$500 loaned August 31, 1882, and at the same time surrendered securities pledged as collateral to the loan. He was a holder of the check and of the money received by it for value. The defendant also testified that he took the check in good faith, and there is nothing in the case which tends to raise any question about his personal good faith, except that he received a check from Boswell in payment of his individual debt, signed "William Boswell, Agt. Glass Buildings," without inquiry as to the right of Boswell to so use the fund. The learned counsel for the appellant cites *Ford v. Union Nat. Bank of Albany*, 13 N. Y. Week. Dig. 352, affirmed, 88 N. Y. 672, as decisive of the case at bar. That case arose out of the following facts: An account was kept by "C. F. Norton, Agt.," with the defendant bank, whose cashier knew that it belonged to some principal, whose name was to him unknown, for whom Norton was acting as agent. Norton, being indebted to the bank, drew his check, signed "C. F. Norton, Agt.," in its favor on this account for \$1,000. The check was charged to the account, and the sum represented by it applied on Norton's debt. When Norton's principal learned of this misappropriation he sued the bank, and recovered a judgment for the sum on a trial before the court without a jury, which was reversed by the general term, and a new trial granted. On an appeal from the order it was affirmed by the court of appeals without an opinion, and without making any reference to the opinion of the court below. 88 N. Y. 672. The learned general term correctly stated the abstract rule "that to entitle a principal to recover his money wrongfully paid by his agent upon the agent's debt the person receiving the money must have known that the agent was acting in violation of his authority." But the court overlooked the rule that a person who knowingly receives the money or property of a principal from an agent in payment of the latter's debt does so at his peril; and, if the agent acted without authority, the principal may, on proof of these facts, recover his money. *Central Nat. Bank of Baltimore v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 20 L. ed. 686, and the cases there cited; *Wright v. Cabot*, 89 N. Y. 570; *Baker v. New York Nt. Ereh. Bank*, 16 Abb. N. C. 458. Story states the rule as follows: "Thus a person dealing with a factor or broker is bound to know that by law a factor or broker, although a general agent, is not clothed with authority to pledge, deposit, or transfer the property of his principal for his own debt; and, if he receives such a deposit or pledge, the title is invalid, and the

property may be reclaimed by the principal." Story, Ag. § 235.

The affirmance of the order by the court of appeals in *Ford's Case*, there being exceptions in the record, cannot be regarded as an approval of the opinion of the general term, as applied to the facts of that case. It is a legal, though a rebuttable, presumption, that one who holds money or property as agent, trustee, executor, administrator, guardian, or partner, has no authority to dispose of it in payment of his own debt.

This brings us to the question whether the form of the check was sufficient to put the defendant upon inquiry as to the authority of Boswell to use the money in payment of his debt. A certificate for shares of stock running to "A. B., trustee," or to "A. B., in trust," without disclosing the names of the beneficiaries or the particulars of the trust, is notice to a purchaser of the shares that "A. B." does not hold them in his own right, but as a trustee. *Sturtevant v. Jacques*, 14 Allen, 523; *Shaw v. Spencer*, 100 Mass. 882, 1 Am. Rep. 115; *Budd v. Munroe*, 18 Hun, 816; *Gaston v. American Ereh. Nat. Bank*, 29 N. J. Eq. 98; *Perry, Tr.* §§ 225, 814; *Low, Tr. Stocks*, § 69; *Morawetz, Priv. Corp.* 2d ed. §§ 181-184; *Cook, Stock & Stockholders*, § 325.

In *Fellows v. Longyor*, 91 N. Y. 331, it was said: "The words, 'guardian, etc.,' in the securities in question, operated as notice to the defendant Longy or of the rights of the wards of whom Downer was guardian." In California it is held that a certificate for shares running to "A. B., trustee," without disclosing the beneficiaries, or the particulars of the trust, is not sufficient to put a proposed purchaser upon inquiry. *Brewster v. Sime*, 43 Cal. 189; *Thompson v. Toland*, 48 Cal. 99.

The two cases last cited are not in accordance with the current of authority, and do not, as we think, lay down a rule best adapted to protect the interest of owners as well as dealers in such securities. The check gave the defendant notice that William Boswell did not assume to be the beneficial owner of the account against which he drew, but that he held it as agent, and also as agent for the "Glass Buildings." Had he signed as agent for Sarah N. Gerard and others, owners of "Glass Buildings," the efficiency of the notice that the drawer of the check was not the owner of the fund against which it was drawn could not be questioned under any well-considered authority. We think that the form of the signature to the check was sufficient to put the payee on inquiry as to the right of the agent to pay his personal debt out of the fund. The buildings and the bank were both well known, were in the same city, and very near to the place where the check was received by the defendant; and, had an inquiry been made at the bank or at the buildings, it would have been ascertained that the account was held by William Boswell, not as owner, but as agent for these plaintiffs. In case a person having notice that money or property is held by another in a fiduciary capacity receives it without inquiry from the agent in satisfaction of his personal debt, the sum or property so received may be recovered by the true owner, unless the agent was au-

thorized to so dispose of it. The court did not err in refusing to nonsuit, or in submitting the case to the jury. None of the exceptions to the admission or exclusion of evidence required consideration.

The judgment should be affirmed, with costs. All concur.

Thomas DOLLARD, *Respt.*,
v.

Edward ROBERTS, *Appt.*

(..... N. Y.)

1. The fall of plaster from the ceiling of a hallway in a tenement house used in common by various tenants renders the landlord liable for injuries to an occupant of the building who is struck and injured thereby if the landlord had notice that there was danger of its falling.

2. Notice to one who collects rents in a

tenement building, and who also gives attention to repairs on it, of the danger that plastering on the ceiling of a hallway will fall will charge the owner with notice of the danger.

3. A girl is not necessarily chargeable with negligence in failing to keep in mind the danger of the fall of plaster from the ceiling of a hallway in a tenement under which she has to pass in going to her apartments.

4. Damages for loss of service because of personal injuries may include prospective damages.

(December 1, 1891.)

A PPEAL by defendant from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the Circuit Court for New York County in favor of plaintiff in an action brought to recover damages for injuries to plaintiff's minor daughter which were alleged to have resulted from defendant's negligence. *Affirmed.*

NOTE.—*Responsibility of landlord for injuries resulting from defects in portions of the building remaining in his possession.*

As regards strangers there can be no doubt on either principle or authority that the liability of a landlord for injuries caused by the negligent maintenance of the portions of the building which are in his possession cannot be in any way affected by the fact that other portions of it have been leased to and are in possession of tenants.

Thus a landlord who leases the several parts of his building to different tenants, and who retains control of the roof, will be liable for injuries resulting to persons passing on the street from ice and snow sliding upon them therefrom. *Shipley v. Fifty Associates*, 101 Mass. 251, 8 Am. Rep. 345; *Kirby v. Boylston Market Asso.* 14 Gray, 349, 74 Am. Dec. 682.

So the landlord is liable to third persons for injuries resulting from the fall of side walls of the building which is leased to several different tenants where the wall was not in the possession of any of the lessees. *O'Connor v. Andrews* (Tex.) May 12, 1891.

So where the owner of a building leased the lower story for shops and portions of the upper story for other purposes and himself remained in possession of the residue, he is, in the absence of an express agreement with the tenants to the contrary, responsible for the safety of an awning erected along the whole front of the building for the benefit of the shops, but which also protects the entrance to the upper stories. *Milford v. Holbrook*, 9 Allen, 17, 85 Am. Dec. 735.

The owner of a building abutting on a highway in which are three shops and which has a wooden platform extending from it to the sidewalk with no barrier separating it into parts, and which is constructed for the common use of all the shops and used by the public as a common passageway, is liable for injuries caused by defects in it in the absence of an agreement by the tenants to keep it in repair. *Readman v. Conway*, 125 Mass. 374.

So when a building appurtenant to which a coal-hole is constructed in the sidewalk, is rented in apartments, but the owner remains in control of the halls and coal vaults and employs a janitor to take care of the buildings of whose duties one is to supervise the reception of coal through the coal-hole, the owner of the building is liable for injuries received by a passer-by because of the coal-hole being left open and unguarded. *Jennings v. Van Schaick*, 11 Cent. Rep. 317, 108 N. Y. 530, 14 L. R. A.

Liability to tenants.

In 1872 an article appeared in the *American Law Review*, (vol. 6, p. 614,) which undertook to establish the proposition that as to the condition and repair, as well as to the construction of portions of the premises which were not expressly demised, but which the tenant was merely licensed to use in connection with his own tenement, the principle of *caveat emptor* applied and restricted recovery for whatever he could have discovered or could remedy by due inquiry or inspection. This article is very elaborate and represents much learning and research. There are, however, few cases cited which are directly in point and the conclusion is based upon premises representing general principles in the law of landlord and tenant. In the light of subsequent decisions the conclusion reached must be regarded as much modified if not completely overthrown.

Duty to rebuild.

Where a tenant hires rooms only his interest ceases with the destruction of the building. *Kerr v. Merchants Exch. Co.* 3 Edw. Ch. 215, 6 L. ed. 672; *Winton v. Cornish*, 5 Ohio, 477; *Stockwell v. Hunter*, 11 Met. 448, 45 Am. Dec. 230.

When a building has been injured by fire the landlord cannot be compelled to rebuild or repair it for the benefit of his tenant unless he has so covenanted, and he holds no greater obligation to one the use of whose tenement is impaired in consequence of the fire than to one whose premises are destroyed or directly injured by it. And it is immaterial that the building itself was rented to several different tenants. *Doupe v. Genin*, 45 N. Y. 119, 6 Am. Rep. 47.

Duty to repair.

There are decisions which tend to establish a duty on the part of the landlord to use reasonable care to maintain the portions of the building in his possession at all times in such a state of repair that no injury shall result to the tenant.

Thus the landlord, so far as the tenant is concerned, where the latter occupies but a small part of the tenement, is bound to keep the parts of the tenement under his control in such a state of repair that the tenant may occupy his premises in safety. *Bold v. O'Brien*, 15 Daly, 163.

A tenant from year to year renting part of a dwelling-house, the residue of which is occupied by other tenants, is under no obligation to make repairs of such general and substantial a nature as

Statement by Bradley, J.:

This action was brought to recover damages for the loss of service of the plaintiff's minor daughter, resulting from a personal injury to her by the falling upon her of plaster from the ceiling of the hallway of a tenement-house fronting on East 104th Street, in the city of New York, and for the expense of medical attendance on account of such injury. The defendant was the owner of the building, and the occupants were his tenants. The plaintiff with his family occupied apartments on the top floor, and below that were two floors, also occupied by families; and the next below,—the ground floor,—was used as a drug-store. The hallway on the ground floor was common to all the occupants of the three floors above it, and was their only means of access to their apartments from the street, and of passage into from them. On August 26, 1884, when passing along in this hallway, the plaintiff's daughter was struck on the head by plaster falling from the ceiling,

eleven feet in height, and in that manner received the injury by which the alleged disability was produced.

Mr. Jacob F. Miller, for appellant:

The obligation of a landlord to repair demised premises rests solely upon express contract, and a covenant to repair will not be implied, nor will an express covenant be enlarged by construction. There are no implied covenants in a lease, except as to quiet enjoyment, which "has reference to the title and not to the quality or condition of the property."

Witty v. Matthews, 52 N. Y. 512; *Mumford v. Brown*, 6 Cow. 475, 16 Am. Dec. 440; *Arden v. Pullen*, 10 Mees. & W. 331; *Taylor, Land. & Ten.* 7th ed. 337; *Ahern v. Steele*, 5 L. R. A. 449, 115 N. Y. 209; *Franklin v. Brown*, 6 L. R. A. 770, 118 N. Y. 115.

If premises are in good repair when demised, but afterwards become ruinous and dangerous, the landlord is not responsible therefor.

the rebuilding of a chimney which has fallen down. If the landlord negligently suffers a chimney to remain in so defective condition that it tumbles down causing loss to his tenant, he is answerable for the consequences. *Eagle v. Swayze*, 2 Daly, 141.

Where the lessee of a store-room in the building covenants to make all the needed repairs in and about such room, the lessor by implication undertakes to keep the remainder of the building in repair so as to protect such room. *Bissell v. Lloyd*, 100 Ill. 214.

The doctrine as thus broadly stated is not, however, fully supported by the cases hereafter cited, and will need further adjudication to establish it if it is to become law.

Whatever may be the actual duty of the landlord to repair in order to render him liable for injuries resulting from defects, he must have been guilty of actual negligence. *Alperin v. Earle*, 55 Hun, 211; *Henkel v. Murr*, 31 Hun, 30; *Eakin v. Brown*, 1 E. D. Smith, 33.

So the landlord is not liable for injuries caused by the negligence of the tenant. *Kaiser v. Hirth*, 46 How. Pr. 162. But see *Macon & A. R. Co. v. Georgia R. Co.* 69 Ga. 112; *Jones v. Freidenburg*, 66 Ga. 505, Am. Rep. 36; *Marshall v. Cohen*, 44 Ga. 489, 9 Am. p. 170.

Duty as to hallways, stairways, etc.

Where a portion of a building is let and the tenant has rights of passageway over staircases and entries in common with the landlord and other tenants, there is no such leasing as will exonerate the landlord from all responsibility for the safe condition of that portion of the building which he still controls; as to such portion he still retains the responsibility of a general owner to all persons including the tenants of the building. *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 236.

It is the duty of the landlord of a tenement house to keep in good repair the stairways, etc., intended for common use, and he is liable to his tenants as well as to strangers lawfully on the premises for damages caused by neglect of the obligation. *Donohue v. Kendall*, 18 Jones & S. 336, affirmed, 98 N. Y. 635; *Hilsenbeck v. Gubring*, 35 N. Y. S. R. 452; *Lindsey v. Leighton*, 150 Mass. 235.

The owner of a building who leases parts of it to different tenants who have a single stairway in common is under implied covenant to keep it in safe and convenient repair. *Sawyer v. McGillsuddy*, 3 L. R. A. 453, 81 Me. 313.

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Thus the landlord is liable for injuries sustained by one of his tenants by tripping and falling in consequence of a hole in the oilcloth laid upon stairs in a hall which is reserved for the common use of all the tenants of the building. *Henkel v. Murr*, 31 Hun, 30; *Gilloon v. Reilly*, 10 Cent. Rep. 428, 50 N. J. L. 36; *Palmer v. Dearing*, 98 N. Y. 7.

So permitting a stairway carpet with holes in it to remain on the stairs of a tenement house with notice of its condition renders the owner liable for injuries to a tenant from a fall caused by catching her foot in one of the holes. *Pell v. Reinhardt*, 12 L. R. A. 843, 127 N. Y. 331.

So the landlord was held liable for injuries caused by a fall received by reason of the unsafe condition of a mat in the entrance hall of an apartment house which was used in common by all the tenants of the building. *Neyer v. Miller*, 19 Jones & S. 516.

So where the owner of a tenement let out to twelve different families had provided a common stairway for the use of all he was held liable for the injuries resulting to tenants from its being out of repair. *M'Martin v. Hannay*, 10 Ct. Sess. Cases, 3d Series, 411.

So the landlord is answerable for a defective condition in a stairway intended to furnish access to the roof of a shed used in common by all the tenants for drying clothes. *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 236.

The landlord is responsible for the safety of slats upon the roof of a tenement house for the common use of the tenants in drying their clothes. *Alperin v. Earle*, 55 Hun, 211.

But it seems that the place where the accident happens must have been intended by the landlord for the use to which it is being put in order to hold him liable.

So where the tenants were simply given permission to dry clothes on the roof the landlord was under no obligation to keep it in repair. *Ivay v. Hedges*, L. R. 9 Q. B. Div. 80.

The landlord is not bound to repair premises in the exclusive possession of a tenant.

So the landlord is not liable for injuries caused by a defective condition of a platform which was rented with, and intended for the exclusive use of the occupants of, a suite of apartments. *Donner v. Ogilvie*, 49 Hun, 223.

Nor is the landlord liable for injuries caused by a piazza across the front of a suite of rooms becoming out of repair, where it was designed for the exclusive use of the occupants of such suite and constituted no part of the common passages or

Cheney v. Byrne, 56 N. Y. 129, 15 Am. Rep. 391; *Jaffe v. Hartau*, 56 N. Y. 898, 15 Am. Rep. 488; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; Taylor, Land. & Ten. 2d ed. §§ 827-829; *Cleaves v. Wroughton*, 7 Hill, 83; *Lockron v. Horgan*, 58 N. Y. 635; *O'Brien v. Caprock*, 59 Barb. 497; *Laffin v. Buffalo & S. W. R. Co.* 7 Cent. Rep. 793, 106 N. Y. 141.

In the contract of letting there is no implied warranty that the premises are tenable.

Mayer v. Moller, 1 Hill, 491; *Post v. Vetter*, 2 E. D. Smith, 248; *Wallace v. Lent*, 1 Daly, 481; *Neyer v. Miller*, 19 Jones & S. 546; *Kabus v. Frost*, 18 Jones & S. 72.

Even where the landlord has covenanted to keep the premises in tenable repair it is the duty of the tenant to notify him of the want of repairs.

McAdam, Land. & Ten. 451; *Wolcott v. Sullivan*, 6 Paige, 117, 8 L. ed. 929.

If the interest which the plaintiff had in the hallway was that of a licensee, he took the

premises as they were and cannot hold the defendant liable for damages resulting from their alleged defective condition.

Washb. Real Prop. 5th ed. 577; *Carstairs v. Taylor*, L. R. 6 Exch. 217; *Anderson v. Oppenheimer*, L. R. 5 Q. B. Div. 602; *Humphrey v. Wait*, 22 U. C. C. P. 580; *Purcell v. English*, 86 Ind. 84, 44 Am. Rep. 255; *Iray v. Hedges*, L. R. 9 Q. B. Div. 80; *Burchell v. Hickison*, 50 L. J. Q. B. 101; *Cusick v. Adams*, 115 N. Y. 55; *Reardon v. Thompson*, 149 Mass. 267, and cases cited; *Ahern v. Steele*, 5 L. R. A. 449, 115 N. Y. 209; *Donner v. Ogilvie*, 49 Hun, 229. See *Gaffney v. Brown*, 150 Mass. 481; *Wilkinson v. Fairrie*, 9 Jur. N. S. 280, 1 Hurlst. & C. 633.

A licensee goes upon land at his own risk and must take the premises as he finds them.

Sweeney v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644; *Zorbiach v. Tarbell*, 10 Allen, 385, 87 Am. Dec. 660; *Heinlein v. Boston & P. R. Co.* 6 New Eng. Rep. 326, 147

other appurtenances or conveniences of the house. *Flynn v. Hutton*, 43 How. Pr. 348.

The landlord's duty in respect to a common passageway is that of due care to keep it in such condition as it was in, or purported to be in, at the time of the letting. *Quinn v. Perham*, 161 Mass. 122.

So the duty to repair and keep in good condition the common hallways does not require the reconstruction of steps and passageways which may be allowed to remain in the condition in which they were when the building was leased. *Woods v. Naumkeag S. C. Mill Co.* 134 Mass. 359, 45 Am. Rep. 344.

And where, at the time of letting, the common platform from the defect in which the injury resulted was constructed of old, rough boards which were coming to pieces, of which the tenant had notice, she was held not entitled to recover. *Quinn v. Perham*, *supra*.

The landlord is liable for obstructions negligently caused by him but not for not removing obstructions arising from natural causes and not constituting a defect in the passageway itself. *Watkins v. Goodall*, 138 Mass. 536.

Consequently the landlord is not compelled to remove ice and snow from the steps leading to the tenement house. *Woods v. Naumkeag Steam C. Mill Co.* 134 Mass. 359, 45 Am. Rep. 344.

But where an uncovered piazza annexed to the rear of a building over which was a right of way for the common use of all the tenants of the building became covered with ice by reason of water flowing on it from a defective pipe connected with the roof of the building, the owner was held liable for injuries received by a tenant in slipping on it. *Watkins v. Goodall*, *supra*.

Failure to furnish proper light may render the landlord liable. *Marwedel v. Cook* (Mass.) June 29, 1891.

In apparent conflict with the foregoing are the three following cases. In each of these cases the reasoning is directly opposed to the former cases but in each also there was an element which would, under the above rules, have compelled the rendition of the decision reached without antagonizing the main doctrine of the landlord's liability.

In *Purcell v. English*, 86 Ind. 84, 44 Am. Rep. 255, the court said: "It is difficult to perceive how the fact that the landlord hires out apartments to separate tenants, and that the common stairway was the common passage for all, can exert a controlling influence upon the question of the landlord's liability. The landlord's duty is the same whether he demises to one or to many so far as

concerns his liability to the tenant for personal injuries caused by a failure to repair." And the landlord was held not liable to a tenant injured by a fall caused by the accumulation of ice and snow on the common stairway. But the court recognized a possible liability for defects which are permanent or grow out of the character of the structure, and under the cases of *Watkins v. Goodall*, and *Woods v. Naumkeag Steam C. Mill Co.*, *supra*, the landlord is not compelled to remove ice and snow.

In *Cole v. McKee*, 68 Wis. 500, 57 Am. Rep. 393, the court holds that the landlord cannot be held liable for injuries caused by the leased premises getting out of repair during the term unless it was by reason of his own wrongful act or failure to perform a known duty, although the premises were let to several tenants and the injury is caused by a want of repairs in a passageway common to all; and that there is no duty on his part to repair. But it appeared in that case that the landlord was ignorant of the defect and that the tenant was occupying without any rightful authority.

So in *Humphrey v. Wait*, 22 U. C. C. P. 580, where one of several tenants of an apartment house sustained injuries by stepping through a hole in the floor of a common passage, the landlord was held not liable. But in that case it appeared that the tenant knew of the defect when she took possession.

Duty as to sinks, water pipes, etc.

In a modern tenement house the sinks and water-closets are things which the landlord is required to look after and keep in good condition as a matter of necessity, since no occupant of rooms whose term is necessarily short and uncertain can be required to perform the duty. *Fash v. Kavanagh*, 24 How. Pr. 348.

The landlord of a tenement is bound to keep in condition the pipes used in common by the occupants of several different flats. *Fitch v. Armour*, 39 N. Y. S. R. 246.

Where a tenant of a portion of the building suffers loss by reason of the escape of water from pipes for the use and under the control of the landlord who occupies the remainder of the building, the landlord will be liable therefor. *Priest v. Nichols*, 116 Mass. 401.

But where a water-service pipe which was reasonably sufficient for the purpose for which it was designed burst without any negligence on the part of the landlord, he was not liable. *Anderson v. Oppenheimer*, L. R. 5 Q. B. Div. 602.

Mass. 136; *Hounsell v. Smyth*, 7 C. B. N. S. 731; *Sullivan v. Waters*, 14 Ir. C. L. 460; *Parker v. Portland Pub. Co.* 69 Me. 173, 31 Am. Rep. 262; *Donner v. Ogilvie*, 49 Hun, 229.

Even if Hoyt promised to have the ceiling mended, that would not bind the defendant, for he was not authorized to make such a promise.

Marsh v. Chickering, 2 Cent. Rep. 419, 101 N. Y. 396.

If the defendant were guilty of negligence, then the plaintiff and the daughter were. If the daughter thought the ceiling would fall, as she said it would, it was negligence in her to risk herself under it. She might not go under the ceiling, take her chances of a fall, and then allege negligence on the part of defendant.

Cahill v. Hilton, 9 Cent. Rep. 255, 106 N. Y. 518.

The plaintiff's daughter was fourteen years of age, and hence *sui juris*.

Tucker v. New York Cent. & H. R. Co. 124 N. Y. 316.

The landlord is not liable in the absence of a statute enjoining the duty to keep the ceilings safe. The common-law rule prevails.

Willy v. Mulledy, 78 N. Y. 311, 34 Am. Rep. 536; *Brennan v. Lachat*, 6 N. Y. S. R. 279.

Even if Hoyt promised and had power by

promise to bind defendant, that did not relieve the plaintiff or his daughter from the duty to exercise care and keep out of the way of danger.

Marsh v. Chickering, 2 Cent. Rep. 419, 101 N. Y. 396; *Morrison v. Erie R. Co.* 56 N. Y. 802; *Hunter v. Cooperstown & S. V. R. Co.* 2 L. R. A. 832, 112 N. Y. 377, 12 L. R. A. 429, 126 N. Y. 23; *Kelly v. Manhattan R. Co.* 3 L. R. A. 74, 112 N. Y. 451; *Martin v. Pettit*, 5 L. R. A. 794, 117 N. Y. 123.

The owner is not an insurer.

Loose v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; *Loose v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Tallman v. Murphy*, 120 N. Y. 350; *Tucker v. New York Cent. & H. R. Co.* 124 N. Y. 317; *Timlin v. Standard Oil Co.* 126 N. Y. 524.

When premises are let, to which access can only be had over other property of the landlord, a way to the demised premises is implied. Hence the right to use the hallway passed to the plaintiff as tenant under the lease.

Willard, Real Estate, 194; *Holmes v. Seely*, 19 Wend. 507; *New York L. Ins. & T. Co. v. Milnor*, 1 Barb. Ch. 353, 5 L. ed. 414.

Mr. Clifford A. H. Bartlett, for respondent:

The action is maintainable.

I. The hallway was a common passage used by all the tenants as the only means of ingress and egress to and from their rooms.

Duty to repair roof.

In *Pomfret v. Riccroft*, 1 Saund. 321, the holding of the court that an action would lie against the landlord for permitting a pump used in common to become out of repair was reversed, and it seems that the principle of the illustration given by the judge in argument that if a man demises the middle room of a house and afterwards will not repair the roof whereby the lessee cannot enjoy the middle room an action will lie, was overruled by the reversal. See also *Tenant v. Goldwin*, 1 Salk. 361.

In this country the decisions are by no means uniform. Thus it has been held that the duty of maintaining a roof in reasonably good condition for the benefit of the occupants of the building is imposed upon the landlord where he has exclusive possession of it and the building is leased in separate holdings to several different tenants. *Baith v. Davenport*, 37 N. Y. S. R. 674, distinguishing *Doupe v. Genin*, 45 N. Y. 119, 6 Am. Rep. 47. See also *Glickauf v. Maurer*, 75 Ill. 289, 20 Am. Rep. 238.

Also that an action lies by the tenant of the lower story of a building against the landlord, who has the care and control of the upper stories, for an injury to his goods caused by the rain descending through the roof, if it happens through the landlord's negligence in the management of the part of the building in his control. *Toole v. Beckett*, 67 Me. 544, 24 Am. Rep. 64. *Contra*, *Krueger v. Ferrant*, 29 Minn. 285, 49 Am. Rep. 223; *Walker v. Gilbert*, 2 Bobt. 214.

In any event the landlord in possession of the upper floors is not bound to guard against accidents such as a rat gnawing through a water tank and letting the water run down on the tenant below, doing damage. *Carstairs v. Taylor*, L. R. 6 Exch. 217.

Where the statute requires the landlord to repair, and he occupied a room in the building over that of the tenant, notice to him of a defective roof was held unnecessary. *Guthman v. Castleberry*, 49 Ga. 172.

14 L. R. A.

Duty as to side walls.

There is also much conflict in regard to the landlord's duty as to side walls.

In Missouri there was an attempt to extend the doctrine of *Looney v. McLean*, 120 Mass. 33, 37 Am. Rep. 286, to the case of the fall of the main wall of a tenement house which remained in the exclusive possession of the landlord, and the court held that if the fall of the wall was caused by the landlord's negligence the tenant could recover for the resulting injury. *Ward v. Fagan*, 28 Mo. App. 116.

But that case was transferred to the supreme court, which held that "a landlord is not bound to keep the leased premises in repair in the absence of express covenant, and it is immaterial whether the tenant be the lessee of the whole premises or of only a part thereof," and that "where the main wall of the building fell through the negligence of the landlord he was not liable for the injuries thereby caused to a tenant of certain rooms in the building. *Ward v. Fagin*, 10 L. R. A. 149, 101 Mo. 669, 20 Am. St. Rep. 650.

So the lessee of a store-room of a building was held not entitled to recover for damages caused by the swelling and bulging out of the side walls of the building whereby the store-room became untenable. *Kline v. McLain*, 5 L. R. A. 400, 38 W. Va. 32.

The court applied the general rule of non-liability to the case of a building falling because of excavations on an adjoining lot and crushing furniture belonging to a tenant, who occupied only the basement story, in *Sherwood v. Seaman*, 2 Bow. 127.

On the other hand it has been held that a tenant of part of a dwelling-house, the residue of which is occupied by other tenants, is not, in the absence of express agreement, bound to repair defects in the building of a general character extending beyond the premises occupied by him; and if the landlord negligently suffers the building to become unsafe and fall he is liable to the tenant for injuries thereby caused to the property of the latter. *Bold v. O'Brien*, 42 Daly, 163.

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II. To neither of the tenants was the hallway demised.

III. Its control remained in the appellant as landlord.

IV. The ceiling was unsafe.

V. Of which the landlord had notice.

Henkel v. Murr, 31 Hun, 28; *Donohue v. Kendall*, 18 Jones & S. 388; *Bold v. O'Brien*, 12 Daly, 168; *Spellman v. Bannigan*, 36 Hun, 176.

Bradley, J., delivered the opinion of the court:

The alleged cause of action was for loss of service and medical expenses in consequence of the injury to the plaintiff's daughter; and the liability of the defendant was dependent upon the fact that the injury was solely attributable to his negligent failure to perform a duty assumed by him in his relation of landlord to the plaintiff as his tenant. If the hallway had been part of the premises demised to the plaintiff there would have been no liability of the defendant to him. But the argument of the defendant's counsel, founded upon the proposition that such was the relation of the parties to that portion of the building, does not seem to be applicable to the present case. It was a four-floor tenement house. The apartments on the second, third and fourth floors were separately rented for use by families as dwelling places. The plaintiff had rented, and with his family occupied, the fourth or top floor. Other families occupied the second and third, and on the ground floor was a drug-store, and a hallway common to the occupants of the floors above. It was the means provided for their passageway for ingress and egress into and from the building in going to and from the apartments from and into the street. It was essentially provided for that purpose, and necessarily common to the use of such occupants. Their right of passage through it was necessary to the availability for occupancy of the apartments rented by them. It was provided for their use in passing to and from the apartments demised to them, of which it constituted no part. It was therefore subject to their right of passage in it, under the control of the defendant, who was the owner, and their landlord, and upon him was the duty of exercising reasonable care in keeping the hallway in suitable repair and condition for the use in safety by his tenants of apartments on the floors above it. *Donahue v. Kendall*, 18 Jones & S. 388, 98 N. Y. 635; *Palmer v. Dearing*, 98 N. Y. 7; *Looney v. McLean*, 129 Mass. 73, 37 Am. Rep. 295; *Lindsey v. Leighton*, 150 Mass. 285; *Peil v. Reinhardt*, 127 N. Y. 381, 12 L. R. A. 843.

The evidence permitted the conclusion of negligence of the defendant. For some time prior to the injury water had been leaking through the plastered ceiling at the place from which the plaster fell and struck the girl; and the plaintiff, his wife, and the daughter testified that they had called the attention, to the condition of the ceiling at that place, of Mr. Hoyt, who collected the rents for the defendant, and to whom the plaintiff was referred by the defendant when he sought to rent apartments in the building, and who also gave attention to the repairs made on it; and that Hoyt's attention was also called to the danger that the plas-

tering would fall from the place so affected, and he said it would be repaired. Although there was some controversy about the relation of Hoyt to the plaintiff in respect to the business about the building, the conclusion was warranted that his knowledge of this condition of this ceiling, as between the plaintiff and defendant, was such as to charge the latter with notice of it, and with negligence for omission to repair it prior to the time of the injury, and it was a fair question for the jury whether the yielding and falling of the plaster was reasonably to be apprehended from the fact that water was leaking through and dropping from it as it did. The question of the defendant's negligence was properly submitted to the jury. The fact that the plaintiff and his daughter had been advised of the condition, and may have apprehended that the plaster might fall from that place in the ceiling, did not necessarily charge them or the daughter with contributory negligence in passing under it at the time in question. While the duty was imposed upon her of using due care to avoid danger, it cannot, as matter of law, be said that she failed in that respect by not constantly having in mind the condition of the ceiling when passing through the hallway. This was her only passageway into the street, and from it in going to the apartment in which she dwelt. She had been out and was returning when the accident occurred. The impaired condition of the ceiling was not in the line of her vision as she proceeded through the hall, but to see it she would be required to look upward rather than forward. And, as was said in *Palmer v. Dearing*, 98 N. Y. 11: "It would be an extremely harsh rule which should require" her "who was called so often to pass this place to have kept her mind invariably fixed upon its character, and to make her responsible for an omission to exercise incessant vigilance in passing" it. The girl was not necessarily chargeable with negligence for having for the time being forgotten the condition of the ceiling, or for having her thoughts or attention diverted from it at the time of the occurrence. *Weed v. Ballston Spa*, 76 N. Y. 329; *Bassett v. Fish*, 75 N. Y. 803, 807.

On this review all questions of fact arising upon a conflict of evidence must be deemed disposed of by the verdict, and in its support the plaintiff is entitled to the benefit of the inferences legitimately derivable from the evidence. There was no error in the charge or refusal of the court to charge on the subject of damages for loss of service. It appeared that the daughter, who was then between thirteen and fourteen years of age, was accustomed to perform services in doing housework. This question was for the jury, and the recovery of damages for loss of service is not in such cases limited to those sustained prior to the trial; but, when the evidence justifies the conclusion that they will continue thereafter, prospective damages may be awarded. *Drew v. Irish Ave. R. Co.* 26 N. Y. 49; *Cumming v. Brooklyn City R. Co.* 109 N. Y. 95, 12 Cent. Rep. 212.

The case was fairly submitted to the jury, and there was no error in any of the rulings to which exception was taken.

The judgment should be affirmed.

All concur.

Jay WICKS, Treasurer of Local Assembly,
No. 4119, of the Knights of Labor, *Respt.*,

Edward H. MONIHAN *et al.*, *Appls.*

(.....N. Y.....)

The general assembly of an unincorporated organization cannot be invested by the constitution of the order with governmental power which will enable it by its own edict, without a hearing, not only to dissolve a local assembly, but divest the latter of its title to property derived from its own members and vest it in itself.

(December 1, 1891.)

APPPEAL by defendants from a judgment of the General Term of the Supreme Court, Third Department, affirming a judgment entered in the office of the clerk of Montgomery County upon the report of a referee in favor of plaintiff in an action brought to recover the amount alleged to be due upon a promissory note. *Affirmed.*

The facts are stated in the opinion.

Mr. Edward J. Meegan with Mr. N. H. Anibal, for appellants:

A refusal of officers of a national organization to comply with the constitution or a repudiation of the general order deprives said officers of the right to act as such.

McFadden v. Murphy, 149 Mass. 341.

If the subordinate lodge is incorporated, the general body cannot revoke the charter, but it is otherwise where it is unincorporated.

District Grand Lodge B. B. v. Jedidjah Lodge, 2 Cent. Rep. 651, 65 Md. 236.

Withdrawing from the order forfeits all rights under the charter.

Altman v. Benz, 27 N. J. Eq. 331.

Where a lodge of odd fellows determines who are not members, the courts will not interfere.

State v. Odd Fellows Grand Lodge, 8 Mo. App. 148.

Courts should not, as a general rule, interfere with the contentions and quarrels of voluntary associations, and those who have grievances should be required in the first instance to resort to the remedies for redress provided by their rules and regulations.

Lafond v. Deems, 81 N. Y. 514; *Chamberlain v. Lincoln*, 129 Mass. 70; *Fischer v. Raab*, 57 How. Pr. 87; *Harrington v. Workmen's B'n. Assn.* 70 Ga. 340; *Olery v. Brown*, 51 How. Pr. 93; *White v. Brownell*, 2 Daly, 329, 4 Abb. Pr. N. S. 163. See also *Burns v. Bricklayers Ben. Union*, 24 Abb. N. C. 150.

The legal effect of the unreversed action of the general executive board was to deprive the plaintiff and his associates as knights of labor of the title to the note in suit.

White v. Brownell, *supra*.

With regard to the decisions of ecclesiastical tribunals, civil courts cannot inquire whether they have proceeded according to the laws and usages of their church or whether they have

decided correctly, but their decisions are final and binding upon the parties and courts.

Connitt v. Reformed P. D. Church of New Prospect, 54 N. Y. 551. See also *Watson v. Jones*, 80 U. S. 13 Wall. 679, 20 L. ed. 666; *Belton v. Hatch*, 12 Cent. Rep. 606, 109 N. Y. 598.

The members of a voluntary unincorporated society are bound by the rules of such society, whether they are reasonable or not.

Grosvenor v. United Soc. of Believers, 118 Mass. 78; *Brinc v. Board of Trade*, 2 Am. L. Rec. 268; *Thompson v. Adams*, 7 W. N. C. 281; *Elias v. Alford*, 1 City Ct. Rep. 123; *Hirschl, Societies*, 63.

Members having agreed to the terms are bound by them, unless they conflict with the laws of the State.

Hyde v. Woods, 2 Sawy. 655, 94 U. S. 523, 24 L. ed. 264; *Poultney v. Bachman*, 81 Hun, 49; *McKane v. Adams*, 51 Hun, 629; *White v. Brownell*, 2 Daly, 329; *People v. Young Men's F. M. Ben. Soc.* 65 Barb. 357; *Snow v. Wheeler*, 118 Mass. 179; *Thompson v. Adams*, 12 Phila. 484; *Ebbinghausen v. Worth Club*, 4 Abb. N. C. 301, and *note*; *Robinson v. Yates City Lodge*, 86 Ill. 598; *Oseola Tribe No. 11 I. O. of R. M. v. Schmidt*, 57 Md. 98; *Karcher v. Supreme Lodge K. of H.* 137 Mass. 368; *Sperry's App.* 116 Pa. 391; *State v. Williams*, 75 N. C. 184.

The subordinate lodges are bound by the constitution, by-laws, rules and regulations of the grand lodge, because by reference and adoption they are made parts of the laws of the subordinate lodges.

Chamberlain v. Lincoln, 129 Mass. 70; *Altman v. Benz*, 27 N. J. Eq. 331; *Oseola Tribe No. 11 I. O. of R. M. v. Schmidt*, *supra*; *Hall v. Supreme Lodge K. of H.* 24 Fed. Rep. 450.

Mr. Charles S. Nisbet, for respondent:
Where the note is the property of the association the action may be brought in the name of the treasurer.

Tybbetts v. Blood, 21 Barb. 650; *Poultney v. Bachman*, 10 Abb. N. C. 254; *Ebbinghausen v. Worth Club*, 4 Abb. N. C. 300, and *note*; *McCabe v. Goodfellow*, 39 N. Y. S. R. 941; *National Bank of Schuylerville v. VanDerwerker*, 74 N. Y. 234.

The provisions confiscating the property of the local assembly are void as against public policy, and courts will not aid in enforcing them.

Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 685; *New York Protective Assn. v. McGrath*, 23 N. Y. S. R. 209, and cases cited.

Follett, Ch. J., delivered the opinion of the court:

This action was begun August 1, 1887, to recover the amount due on the following note: "\$500. Amsterdam, N. Y., Nov. 23d, 1886.

"Six months after date we promise to pay to the order of William Perrv, William Ryland, John Silber, trustees, and Jay Wicks, treasurer, five hundred dollars at the First National Bank of Amsterdam, value received, with three per cent. use. E. H. Monihan, John C. Stack."

It is conceded that the note was given for money owned by the society, and loaned to the defendants, and that no part of it has been paid. The defenses interposed were: (1) that the note was given for money advanced and

NOTE.—There seems to be no authority on the precise question involved in the above case except that cited by the court. (*Austin v. Searing*, 16 N. Y. 112, 69 Am. Dec. 685.)
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used to sustain a strike, upon the agreement that it was not to be paid if the strike failed, and that it did fail; (2) that the plaintiff, as treasurer, could not maintain the action; (3) that Local Assembly No. 4,119 has been dissolved by a decree of the General Assembly of the Knights of Labor of America, and all of the property of the former has become vested in the latter. The defendant testified that the money was advanced to promote a strike, upon the agreement that it was not to be paid in case the strike failed, and that it did fail. This was denied by the plaintiff's treasurer, who made the loan, and this issue of fact was determined by the referee in favor of the plaintiff. The referee found that Local Assembly No. 4,119 was, when the note was given, and when the action was brought and tried, an unincorporated association, consisting of seven or more persons; and if these facts were well found, the action was properly brought in the name of the treasurer. Code Civ. Proc. § 1919. It is conceded that when the note was given and when this action was tried an unincorporated voluntary association, with more than seven members, existed at Amsterdam under the name of "Local Assembly No. 4,119 of the Knights of Labor." While the existence of the association is not denied, it is urged as a defense that the associated persons had ceased to be a local assembly of the knights of labor by reason of a decree of the General Assembly of the Order of Knights of Labor of America, which assumed to annul the charter of Local Assembly No. 4,119, and directed that all of its property should be turned over to the secretary of the general assembly. There exists in America a voluntary unincorporated association of persons known as "Knights of Labor," having a written constitution, sections 1 and 2 of article 1 of which provide: "Section 1. This body shall be known as the 'General Assembly of the Knights of Labor of America,' and shall be composed of representatives or alternates selected according to article 11 of this constitution. Sec. 2. This general assembly has full and final jurisdiction, and is the highest tribunal of the order of the knights of labor. It alone possesses the power and authority to make, amend, or repeal the fundamental and general laws and regulations of the order; to finally decide all controversies arising in the order; to issue all charters to the state, district, and local assemblies. . . ." How the "representatives or alternates" composing the general assembly are selected does not appear, as the second article of the constitution is not given. The constitution also provides: "A district assembly shall be composed of duly accredited delegates from at least five local assemblies;" but how they are selected is not disclosed. It does appear that the organizations known as "local assemblies" are the units of the society, and that they are connected, in some manner not shown by the record, with district assemblies, and that both local and district assemblies are attached and owe allegiance to the general assembly. It does not appear from the record that any contractual relations exist between the district and local associations; or between them, or either of them, and the general assembly. The case was defended on the theory that the general assembly

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possessed, and could rightfully exercise, autocratic governmental powers over all subordinate branches of the society; and that it could, by its order, without a hearing, expel from the organization any local or district assembly, and by that act become entitled to all the property of the assembly whose charter should be revoked. . . .

In August, 1887, more than seven residents of Amsterdam, after having effected a preliminary organization, were chartered under the name of "Local Assembly No. 4,119 of the Knights of Labor" by the General Assembly of Knights of Labor of America, and were attached to District Assembly No. 126. The district and local assembly continued attached to the general assembly until May 26, 1887, when the charter of District Assembly No. 126, and the charters of all of the local assemblies attached thereto (including No. 4,119), were revoked and annulled for disobedience of the orders of the general assembly, and the master workmen of the district and local assemblies were directed to deliver their property to the general secretary of the general assembly, pursuant to section 1 of article 5 of the Constitution of the general assembly, which provides: "Art. 5, § 1. It shall be the duty of the district recording secretary to collect and take charge of the charter, seals, books, money, and other property of any locals attached to the district assembly that may lapse, and shall give receipt to the officer of the local surrendering the same." Local Assembly No. 4,119 declined to surrender its property, including the note in suit, to the general secretary, but continued its local organization, and retained possession of its property, in defiance of the order of the general assembly.

It is asserted that the order of the general assembly *ipso facto* divested the local assembly of its title to the note in suit, as well as to all other property held by it. This contention cannot be sustained, on principle or authority. The precise question was determined in *Auburn v. Searing*, 16 N. Y. 112, 69 Am. Dec. 665, which arose over the title of Cayuga Lodge No. 80 of the Independent Order of Odd Fellows to certain property in its possession. In that case, as in this, there was a supreme tribunal called the "Grand Lodge of the Independent Order of Odd-Fellows in the United States of America," and, like the knights of labor, it had district organizations. By the constitution of the odd-fellows, the grand lodge of the district had power to revoke the charters of all local lodges, and, when revoked, to take possession of their property. The charter of Cayuga Lodge No. 80 was revoked for an alleged act of insubordination, and a decree confiscating its property was promulgated. Nevertheless the members of the lodge refused to surrender their property, but retained possession of it. Afterwards a new lodge was chartered at Auburn by the grand lodge of the United States, and given the same name and number as the old lodge, but composed of different persons from those associated as members of the first lodge. By the charter granted to the new lodge all of the property which the grand lodge claimed to have acquired title to by confiscation was, in form, transferred to the new lodge. An action was brought by the persons asso-

ciated and represented by the new lodge against the persons associated and represented by the old lodge for the recovery of the property in the possession of the old lodge. It was held that the provision in the constitution of the order, giving to the grand lodge power to confiscate the property of subordinate lodges, could not be enforced in the courts; and that the decree of the grand lodge, revoking the charter of the insubordinate local lodge, did not divest it of its property, and that the plaintiff could not recover. This judgment has remained unquestioned for more than a third of a century, and is the law of this State to-day.

As before stated, this case was not tried upon the theory that the organizations which constitute the order of knights of labor are bound together by any contract, or that Local Assembly No. 4,119 had contracted with the general assembly that, under certain circumstances, its property should be transferred to and become that of the general assembly, but upon the theory that the general assembly was vested with governmental powers, and could, by its edicts, divest the title of any district or local assembly to its property, and vest it in itself, without a hearing. This position cannot be sustained. The property of Local Assembly No. 4,119 was not derived from the general assembly, but was

contributed and owned by the associated members of No. 4,119, and held by an absolute title, as perfect and unconditional, so far as is shown by the case, as is the title by which any person or corporation holds its individual property. To hold that the general assembly can by a decree divest the title to property, and vest it in itself, is giving to it a power which is forbidden to be exercised by Congress, or by the Legislature of any State. Bills confiscating the property of citizens, or of associations, without judicial process, are forbidden by the Constitution; and no person, corporation, or association authorized to acquire and hold property can be divested of it by the fiat of any organization, nor in any way without its consent, or by due process of law. This case is quite different from those arising over the expulsion of members from clubs and voluntary associations for violations of rules. In those cases the rights of the individual members are fixed by contract, and it is held that a member may be expelled by the association for violating the terms of the compact, provided, however, that due notice of the proposed action and an opportunity for defense be given.

The judgment should be affirmed, with costs.

All concur.

NEW YORK COURT OF APPEALS.

George MUNRO, *Resp't.*,

Frank TOUSEY, *App't*

(.....N. Y.....)

The appropriation and use of the name "Old Sleuth" to designate serial publications of detective stories does not give a right in the word "Sleuth," which will be protected against the use of that word by others in entitling similar stories.

(December 1, 1891.)

A PPEAL by defendant from a judgment of the General Term of the Supreme Court,

First Department, affirming a judgment of a Special Term for New York County, enjoining defendant from using the name "Sleuth" in connection with the publication of works of fiction, and awarding plaintiff a certain sum as profits derived by defendant from the unlawful use of such word. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. William H. Townley, for appellant:

To entitle one to an injunction there must be such a similarity of designation on the part of defendant as to be likely to mislead purchasers.

"Punch," published at 3d., was not infringed by "Punch and Judy," published at 1d. "Our Young Folks, an Illustrated Magazine for

NOTE.—Trade-marks; infringement by similarity of names of articles.

In addition to the numerous instances given in the briefs, we add the following instances of similarity of names of articles alleged to constitute infringement:

The words "golden chain" on a box of cigars is not in itself an infringement of the words "olden crown" similarly used; but may be so with other similarities of the label. *Parlett v. Guggenheimer*, 8 Cent. Rep. 736, 57 Md. 342.

The words "LePage's Liquid Glue" are infringed by "LePage's Improved Liquid Glue." *Russia Cement Co. v. LePage*, 6 New Eng. Rep. 577, 147 Mass. 308.

The words "New York Dental Rooms" on a business sign are infringed by the words "Newark Dental Rooms." *Sanders v. Jacob*, 2 West. Rep. 439, 20 Mo. App. 98.

The words "German Sweet Chocolate" are infringed by the words "Sweet German Chocolate." *Pierce v. Guttard*, 68 Cal. 68, 58 Am. Rep. 14 L. R. A.

The words "Brown's Iron Bitters" were held not infringed by the words "Brown's Iron Tonic" on different bottles and labels. *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 35 L. ed. 247.

The words "The Good Things of Life" as the title of a collection of illustrations taken from the journal "Life" are not infringed by the "Spice of Life" taken from a different paper where the makeup of the two collections is quite dissimilar. *Stokes v. Allen*, 56 Hun, 526.

The words "Perry's Medicated Balm" were held infringed by "Truefit's Medicated Balm." *Perry v. Truefit*, 6 Beav. 66.

The words "London Conveyance Co." used on a line of public carriages, were held infringed by the use of the words "London Conveyance" together with the words "Original Conveyance" for company, on another part of the carriage. *Knott v. Morgan*, 2 Keen, 213.

It will be remembered, of course, that a name which in itself does not infringe may do so with other points of resemblance in labels or any style of packages.

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Boys and Girls," held not to be an infringement on the title "Our Young Folk's Illustrated Paper."

See *Browne*, Trade-marks, ed. 1885, § 547, and cases cited, p. 563.

The title "The National Advocate" was not infringed by the title "The New York National Advocate."

Snowden v. Noah, Hopk. Ch. 347, 2 L. ed. 446.

The title "The Democratic Republican New Era" was not injured by the publication "The New Era."

Bell v. Locke, 8 Paige, 74, 4 L. ed. 850, 34 Am. Dec. 371; *Talcott v. Moore*, 6 Hun, 108.

Mr. Roger Foster, for respondent:

There can be no doubt of the plaintiff's right to the injunction granted.

Munro v. Beadle, 55 Hun, 312; *A. F. Pike Mfg. Co. v. Cleveland Stone Co.* 35 Fed. Rep. 896.

Books of this sort are not usually purchased in shops by persons with a capacity for nice discrimination, acting with care after deliberation, but are usually picked up hastily on news stands by men with untrained minds who desire a means of occupying an idle hour.

Similarity, not identity, is the usual resource when one party seeks to benefit himself by the good name of another.

Celluloid Mfg. Co. v. Cellonite Mfg. Co. 32 Fed. Rep. 94.

The "Real John Bull" was held infringed by the "Old Real John Bull."

Edmunds v. Benbow, Seton on Decrees, 4th ed. 238.

"Bell's Life in London" was held infringed by "The Penny Bell's Life and Sporting News."

Clement v. Maddick, 1 Giff. 98, 5 Jur. N. S. 592.

"The London Journal," by "The London Daily Journal."

Ingram v. Stiff, 5 Jur. N. S. 947.

"London Society," by "English Society."

Olmes v. Hogg, W. N. (1870) p. 268.

"The American Grocer," by "The Grocer."

American Grocer Pub. Assn. v. Grocer Pub. Co. 25 Hun, 398.

"The Birthday Scripture Text Book," by "The Children's Birthday Text Book."

Mack v. Petter, L. R. 14 Eq. 431.

"The Britannia," by "The New Britannia."

Prouett v. Mortimer, 2 Jur. N. S. 414.

"Celluloid" by "Cellonite."

Celluloid Mfg. Co. v. Cellonite Mfg. Co. 32 Fed. Rep. 94.

If a thing contains twenty-five parts and but one is taken, an imitation of that one will be sufficient to contribute to a deception, and the law will hold those responsible who have contributed to the fraud.

Guinness v. Ullmer, 10 L. T. 127.

An imitation of the "Christmas Carol" published under the title "A Christmas Ghost Story," reoriginated from the original by Charles Dickens, was enjoined in *Dickens v. Lee*, 8 Jur. 183.

Gray, J., delivered the opinion of the court:

The plaintiff was the publisher of a series of pamphlet works of fiction entitled as the "Old

Sleuth Library," and in this action he has sought to restrain the defendant, who was the publisher in a like way of the "New York Detective Library," from publishing and selling any book or pamphlet containing in its title, or in any part of it, the word "Sleuth," or purporting to be by the author of any story with any such title, and to compel an accounting for all profits realized. The defendant's publications which are especially aimed at by name in this action were variously entitled as "Young Sleuth, the Detective, in Chicago;" or as "Young Sleuth, the Keen Detective;" or as "The Broken Button, or Young Sleuth on the Trail;" and by other titles, which contained the words "Young Sleuth," or "Sleuth." The foundation for plaintiff's claim to an exclusive right to the use of the word or name "Sleuth," in any application of it to the title or authorship of a work of fiction, seems to consist in his having selected and made use of the name "Old Sleuth Library" to designate a series of pamphlet publications of detective stories. Previously he had published a story called "Old Sleuth, the Detective," which proved so unusually attractive to some portion of the reading public as to cause the plaintiff to start an "Old Sleuth Library" series, and to suggest to his author that in his future contributions of detective romances to that library he should describe their authorship as being by "Old Sleuth." The plaintiff now contends that "Sleuth," as a word or name, has become his property and a trade-mark, which designates, as he puts it, "a certain kind and quality of goods, namely, books describing the detection of crimes, manufactured and sold by him;" and his counsel argues that the plaintiff's title to such a trade-mark is conclusively established by the findings in the case. But with respect to this argument of ownership, it is sufficient to say that we may not so read the findings of the learned trial judge. What he does find is that the pseudonym "Old Sleuth" was the plaintiff's property, and was used by him to identify his publications. There may have been some evidence to warrant such a finding, and in the view I take of this case it may be assumed that it was the fact. The question, then, which we have actually presented is whether, by the appropriation and use of the name "Old Sleuth," to designate his serial publications of detective stories, the plaintiff has acquired a property right in the word "Sleuth" which the law will protect against the use of by others, in entitling works of fiction. I think we cannot agree with the court below in such a view. There is no proof to support a finding of an intention on the part of the defendant to defraud the plaintiff or the public, except as it may be inferred by the court from the mere use of the name "Sleuth," and as to any similarity in the pamphlet publications, in covers or pictorial illustrations, by which a purchaser might be misled, nothing in the evidence, or in a personal inspection of the exhibits, would warrant the finding that it existed. The differences in the titles of the series in which the stories appear, and in the illustrations upon the covers, are marked. That the plaintiff would be entitled to the protection of the law against the use by others of the words "Old Sleuth Library,"

as used to describe a series of publications, or against the use of the name "Old Sleuth, the Detective," for a work of fiction, must be conceded. That is plainly right; and, in order to afford a protection more adequate than would be afforded by an action at law, the equity power of the courts might be successfully invoked to restrain a similar use by others of such names, and to prevent a species of literary piracy. This power is exerted upon the same principle upon which the court acts in trademark cases, in restraining the unauthorized use of the label or sign constituting the trademark. The theory upon which a court of equity has long acted is that a resemblance in or an imitation of the names, signs or marks, under which another conducts a business, is a deception practiced upon the public, and an injury to the proprietor, in the loss of custom and patronage, to redress which an action at law for damages is not a sufficiently satisfactory remedy. That is the principle we may extract from the often-cited opinions of Lord Eldon, in *Hogg v. Kirby*, 8 Ves. Jr. 215; of Lord Langdale in *Knott v. Morgan*, 3 Keen, 213, and of our own chancellors in the early cases of *Snowden v. Noah*, Hopk. Ch. 347, 2 L. ed. 446, and of *Bell v. Locke*, 8 Paige, 75, 4 L. ed. 350, 34 Am. Dec. 371.

A publication is the subject of property, and there is no reason why, like every other kind of property, it should not be the subject of the law's protection. To put out a colorable imitation of it, by which the public may be easily misled into supposing that it is the literary article they had in mind to obtain and read, is an act of deception, which injures the publisher. In *Snowden v. Noah*, *supra*, Chancellor Walworth said, of the injury to the right of a publisher of books by acts of deception and piracy, that, like that which is done, to the good-will of an established trade, or to the custom of an inn, "the injury for which redress is given in such cases results from the in posture practiced upon the customers of an existing establishment, or upon the public." So that, if there was such a simulation of the plaintiff's publications for the fraudulent purpose of imposing upon the reading public, a court of equity would protect him against the continuance of such encroachment upon his rights. But the difficulty in the way of the plaintiff's case is that there is no such resemblance between the defendant's publications and those of the plaintiff as to prevent the ordinary and natural use of one's senses in ascertaining the difference before buying; and unless that actually exists, in a similarity in their caption and appearance, there is no just reason for the interference of equity. The difference in the caption of the story, as well as the difference in the name of the series and

in the illustrations upon the covers, should indicate to the most ordinary intelligence that the defendant's publications were not of tales of "Old Sleuth, the Detective," or parts of the "Old Sleuth Library." No admirer of that hero of fiction, and a follower of those serial publications, could be misled when buying numbers of the defendant's "New York Detective Library," containing tales of "Young Sleuth, the Detective, in Chicago," or of "Phoebe Paullin's Fate, or Tracked by Young Sleuth," or any others of those named. If the character and prowess of Old Sleuth have captivated the literary fancy of a portion of the public, and a magic in the name secures the public patronage to the "Old Sleuth Library," how can it be imposed upon by the caption of stories of "Young Sleuth," or of "The Broken Button, or Young Sleuth on the Trail?" And the illustrations of Young Sleuth and of his rescued subjects convey no idea of Old Sleuth. Both to the eye and to the ear the differences are marked. The youth of the detective hero in the defendant's tales, as indicated in the title, sufficiently warns an intending purchaser that the original Old Sleuth is not the subject of the author's imagination. If he deems Mr. Munro's "Old Sleuth Library" more reliable as a depository of exciting detective tales why or how should he select from Mr. Tousey's "New York Detective Library?" However attractive the caption of the tales published by Mr. Tousey, neither they, nor the illustrations designed to fasten the public eye, can fairly be said to so resemble the plaintiff's series or titles as to amount to an imposture upon the reading public. That is what the question is here, as it is in every case where it is sought to restrain the prosecution of a business charged with being an encroachment upon the complainant's property rights. A court of equity should proceed in the exercise of its power with a wise and judicial discretion. In cases such as this, it should presume that the public makes use of the senses of sight and hearing, and that it is possessed of a sufficient amount of intelligence to note the differences these senses convey. The court ought not to interfere with the freedom of conduct of trade, and with general business competition. Its power to restrain should be reserved to prevent fraud and imposture from some real resemblance in the name and appearance of the publications.

I think the judgments of the special and general terms should be reversed, and, as a new trial would be useless, judgment should be ordered for the defendant dismissing the complaint, with costs in all the courts.

All concur, except Ruger, Ch. J., not voting.

14 L. R. A.

IOWA SUPREME COURT.

UNION BUILDING ASSOCIATION, of
Clinton, Iowa,

ROCKFORD INSURANCE CO., of Rock-
ford, Illinois, *Appl.*

(.....Iowa.....)

1. An assignment of error in sustaining an objection to testimony offered to prove a certain material fact need not name the witnesses or state what questions were asked them.
2. Sending a policy to the assured on his promise to remit the premium does not estop the insurer from denying its validity for non-payment of premium as against a mortgagee to whom "loss if any is payable" although he received the policy which acknowledged receipt of the premium, from the assured, without notice that the premium was unpaid.

(October 24, 1891.)

APPEAL by defendant from a judgment of the District Court for Jones County, in favor of plaintiff in an action upon a policy of fire insurance. *Reversed.*

Statement by Granger, J.:

Action on a policy of insurance. The petition shows that on the 16th of October, 1888, the defendant company issued to one George R. Moore its policy of insurance against loss by fire on certain property in Oxford Junction, Iowa; that at the time the plaintiff Company held a mortgage on the property for \$2,500; and the policy contained a provision as follows: "Loss, if any, is payable to Union Building Association of Clinton, Iowa, as its interest may appear;" that on the 5th day of February, 1889, the building was partially destroyed by fire, resulting in damage to the plaintiff in the sum of \$1,500. The policy also contained a provision as follows: "This Company shall not be liable by virtue of this policy, or any renewal thereof, until the premium thereon is actually paid." It is pleaded in the answer, as a defense, that the premium for the policy in question was never paid. Plaintiff, to avoid this defensive plea, replied as follows: "That said policy of insurance set out in plaintiff's petition was obtained by said George R. Moore for the purpose of protecting the interest of plaintiff in said property therein insured, as mortgagee, of which fact defendant had full knowledge at said time; that defendant issued said policy, and sent the same to plaintiff, and recited in the policy that the same was issued 'in consideration of \$42 to them in hand paid by the insured hereinafter named, the receipt whereof is hereby acknowledged;' that at no time, either prior to or subsequent to said loss, has defendant notified plaintiff that said premium was not paid; nor has defendant ever demanded the same of plaintiff, and plaintiff had no knowledge that the same was not paid, or that defendant claimed the same was not paid; and said defendant is now estopped from asserting that said premium is unpaid, as against this plaintiff." The cause was submitted to a jury, that returned a verdict for the plaintiff, and from a judgment thereon the defendant Company appealed.

14 J. R. A.

Moore, Marshall & Tappert and Sheehan & McCara, for appellant:

The defendant had no contract or transaction with plaintiff. Its contract was with Geo. R. Moore, and not with plaintiff.

The words "loss, if any, payable to the Union Building Association of Clinton, Iowa, as its interest may appear," are a mere designation of the party to whom any money otherwise accruing to George R. Moore might be paid.

Continental Ins. Co. v. Hulman, 92 Ill. 154, 84 Am. Rep. 122; *Borgess v. Builders Ins. Co.* 88 Cal. 541; *Franklin Sav. Inst. v. Central Mut. F. Ins. Co.* 119 Mass. 249; *Henck v. Agricultural Ins. Co.* 182 Pa. 128; *Grossenor v. Atlantic F. Ins. Co.* 17 N. Y. 891; *Kogg v. Middlesex Mut. F. Ins. Co.* 10 Cosh. 387; *Hale v. Mechanics Mut. F. Ins. Co.* 6 Gray, 169; *Loring v. Manufacturers Ins. Co.* 8 Gray, 38.

The mortgagor must sustain a loss for which the insurers were liable before the party appointed to receive the money would have a right to claim it. The right of such a party, being wholly derivative, cannot exceed the right of the party under whom he claims.

Grossenor v. Atlantic F. Ins. Co. supra; *Carpenter v. Providence W. Ins. Co.* 41 U. S. 16 Pet. 495; 10 L. ed. 1044; *Forster v. Equitable Mut. F. Ins. Co.* 2 Gray, 216.

Such an appointment or assignment ought not to be construed so as to vary, in any respect, the liabilities of the insurer upon their original contract.

Henck v. Agricultural Ins. Co. 123 Pa. 128. Any defense good against Geo. R. Moore is good against plaintiff.

See *Brumswick Sav. Inst. v. Commercial U. Ins. Co.* 68 Me. 813, 28 Am. Rep. 56, and the numerous authorities there cited.

The recital in the policy of the receipt of the consideration was of no more force than any other receipt, only prima facie evidence of payment, and may be inquired into or contradicted by parol evidence.

Whiting v. Mississippi Valley Mfrs. Mut. Ins. Co. 76 Wis. 592; *Hall v. Perry*, 8 Iowa, 579; *Taylor v. Wightman*, 51 Iowa, 411; *Osgood v. Bringolf*, 82 Iowa, 870; *Bergson v. Builders Ins. Co.* 88 Cal. 541; *Sheldon v. Atlantic F. & M. Ins. Co.* 26 N. Y. 461, 84 Am. Dec. 231.

A stipulation in a policy of insurance to the effect that no insurance shall be considered as binding until the actual payment of the premium in cash or by note, and that the company shall not be liable for any loss or damage accruing when such note or any part thereof is past due and unpaid, is valid and binding, and the assured cannot recover for a loss thus occurring.

Watrous v. Mississippi Valley Ins. Co. 85 Iowa, 582; *Nedrow v. Farmers Ins. Co.* 43 Iowa, 24; *Gartick v. Mississippi Valley Ins. Co.* 44 Iowa, 558; *Orichell v. American Ins. Co.* 53 Iowa, 404, 36 Am. Rep. 280; *Williams v. Albany City Ins. Co.* 19 Mich. 451, 2 Am. Rep. 95.

Where, by the terms of the policy, prepayment of the premium is a condition precedent, unless such condition is waived such payment

must be shown, or the risk does not attach, and part payment thereof, unless credit is given for the balance, will not render the contract obligatory.

Sandford v. Trust Fire Ins. Co. 11 Paige, 547, 5 L. ed. 831; *Bergson v. Builders Ins. Co.* 88 Cal. 541; *Baerue v. Piedmont & A. L. Ins. Co.* 74 N. C. 22; *Lehanon Mut. Ins. Co. v. Humes*, 5 Cent. Rep. 211, 118 Pa. 591, 57 Am. Rep. 511.

Messrs. Remley & Ercanbrack, for appellee:

Where, by a policy of fire insurance, a portion of the loss is made payable to a third person "as his interest may appear," the language imports an ownership in the property in such third person, to the extent of his interest. The insurance is for his benefit, and he or his assignee may maintain an action upon the policy in case of loss.

Piney v. Glen Falls Ins. Co. 65 N. Y. 6.

If after the loss the mortgage debt is paid and the mortgage is canceled, the mortgagee can still recover on the policy.

Bartlett v. Iowa State Ins. Co. 77 Iowa, 86.

In case the loss exceeds the interest of the mortgagee, he cannot receive the surplus, but it must be paid to the owner of the title. When this is the case, both may join as plaintiffs.

Home Ins. Co. of N. Y. v. Gilman, 10 West. Rep. 842, 112 Ind. 7.

There are three parties to the original contract, each having interests and rights.

Where a duly authorized agent of an insurance company delivers a policy of insurance, which acknowledges on its face that the premium has been paid, such acknowledgment concludes the company from thereafter denying that the premium was paid, for the mere purpose of assailing the legal existence of the policy.

Home Ins. Co. of N. Y. v. Gilman, *supra*; *Basch v. Humboldt Mut. F. & M. Ins. Co.* 35 N. J. L. 429; *Provident L. Ins. Co. v. Fennell*, 49 Ill. 180; *Teutonia L. Ins. Co. v. Mueller*, 77 Ill. 22; *National Ben. Assn. v. Jackson*, 1 West. Rep. 600, 114 Ill. 538; *Kline v. National Ben. Assn.* 9 West. Rep. 284, 111 Ind. 462.

The failure to pay the premium does not render the policy absolutely void, but only at the option of the defendant, and if delivered to the assured a presumption is raised that a short credit was intended.

Young v. Hartford F. Ins. Co. 45 Iowa, 377, 24 Am. Rep. 784.

A receipt, when acted upon by a third person, may estop the party giving it from denying its purport.

6 Wait, Act. & Def. § 16, p. 701.

Granger, J., delivered the opinion of the court:

1. It is urged by appellee that the assignments of error by appellant are not sufficiently specific to justify us in a consideration of them. With our view of the case, it is only important that we consider the fourth, which is as follows: "The court erred . . . in sustaining plaintiff's objections to the testimony and evidence offered by defendant tending to prove that the premium named in the policy sued on had never been paid by plaintiff, or by anyone else, 14 L. R. A.

nor any part thereof, and in refusing to permit defendant to prove that no part of said premium had ever been paid; which ruling and proceeding were prejudicial to defendant, and to which ruling and proceeding defendant excepted at the time." It is said this assignment "does not state what questions were asked to which the objections made by plaintiff were sustained, nor to what witnesses the questions were put." In case of an assignment as to the admission or exclusion of evidence, the law does not require that the questions shall be embodied therein. It is not the province of the assignment to contain the part of the record relied upon as showing error, nor is the name of the witness of whom questions are asked material. The error, if any, consists in the exclusion of the evidence offered to establish a material fact in issue. The assignment specifies the fact, and states wherein the court erred, as by refusing evidence proper to sustain such fact. We think the assignment sufficiently specific.

2. We have omitted from the statement of the case issues not essential to the question which we think it important to consider. The application for the policy was by letter, and concluded as follows: "If you wish to renew at compact rates, you can send renewal to yours truly, and I will remit, and am, George R. Moore." In pursuance of the application the policy was sent from Rockford, Ill., to George R. Moore, at Oxford Junction, Iowa, with a letter requesting him to remit the amount of the premium due, and the policy was by Moore delivered to the plaintiff company. To sustain the allegation of the answer, that the premium had never been paid, the defendant offered the deposition of one Charles E. Sheldon, who was secretary of the company, in which appears the following question: "State whether or not the premium mentioned in said policy has been paid." There was an objection to the question "as being incompetent and immaterial, for the defendant is estopped from denying the receipt of the premium as stated in the policy." The court sustained the objection, and the ruling is made a ground of complaint to us.

As we view the record and the arguments, we are brought fairly to consider the question whether the defendant company, by issuing the policy as it did, with an acknowledgment of a receipt of the premium, and a statement therein that the "loss, if any, is payable" to the plaintiff company, estops the defendant, as against the plaintiff, from proving non-payment of the premium. It will be seen that the policy was not delivered to Moore upon a credit, but that the parties to the contract of insurance intended it as a cash transaction. Moore agreed to remit the premium on receipt of the policy, and the policy was sent to him with a direction to remit. Until the premium was paid, there was not a complete transaction between the defendant company and Moore; and it is not questioned but that, as to Moore, the policy would be void if the premium was not paid. It is then a question, How does the relation of the plaintiff company to the transaction change the rule as to the defendant company's liability? The defendant company sent to Moore the policy, with the words therein, "Loss, if any, is payable to Union Building Assn-

ciation of Clinton, Iowa, as its interest may appear." Mr. Flanders, in his work on Fire Insurance (page 441), says: "Where the policy provides that the loss, if any, is payable to another, to a mortgagee, for example, instead of the assured, it is merely a designation of the person to whom it is to be paid, and is not an assignment of the policy. Hence it is the damage sustained by the party insured, and not by the party appointed to receive payment, that is recoverable from the insurers. The insurance being upon the interest of the insured, if he parts with that interest before the fire no loss is sustained by him, and, of course, none is recoverable by his assignee or appointee." In other words, a policy made "payable to A., in case of loss," is an agreement on the part of the insurers that "A." shall recover whatever the person originally insured may be entitled to receive in case of loss; that is, it is a contingent order or assignment of what may become due under the contract, and not an absolute transfer, by virtue of which the assignee acquires the full rights of an assignee of a chose in action."

The rule thus stated has the support of many well-considered cases. In *Continental Ins. Co. v. Hulman*, 93 Ill. 154, 34 Am. Rep. 123, where this principle in question was involved, the language above is quoted, and the court says: "Making the loss, if any, payable to Hulman & Cox, mortgagees, was not an insurance of their mortgage interest in the property." The Supreme Court of Massachusetts has repeatedly held to such a rule. In *Franklin Sav. Inst. v. Central Mut. F. Ins. Co.*, 119 Mass. 240, the plaintiff was a mortgagee; and the policy provided that it was to be payable, in case of loss or damage, to the mortgagees, "as their mortgage claim may appear." The policy was declared void because, in violation of its terms, the property afterwards became unoccupied. The court says: "It has been repeatedly held by this court that such an indorsement does not operate as an assignment of the policy, nor as a contract to insure the interest of the mortgagees, but that they can claim only what the party originally insured is entitled to recover under this contract." The case cites *Fogg v. Middlesex Mut. F. Ins. Co.* 10 Cush. 387; *Hale v. Mechanics Mut. F. Ins. Co.* 6 Gray, 169, and *Loring v. Manufacturers Ins. Co.* 8 Gray, 28. *Bergson v. Builders Ins. Co.* 38 Cal. 541, involves the essential facts and the principles that should govern in this case. The non-liability of the company was held because of a failure to pay the premium. The policy had been assigned, and contained a receipt for the premium. After the assignment, the company gave notice to the assured that, if the premium was not paid by a certain day, the policy would be canceled, which was done. The case, in harmony with other cases, marks a distinction between those involving an assignment of the property insured and an assignment of the policy. In case of a mere assignment of the policy, the case says: "The assignee cannot claim any benefit from the fact that he is a bona fide holder without notice." The notice referred to must have been that of the non-payment of the premium for which the policy contained a receipt. Such are the facts upon which the estoppel is claimed in this case. In *Grosvenor* 14 L. R. A.

v. Atlantic F. Ins. Co., 17 N. Y. 391, the policy had issued to one McCarty, with the clause: "Loss, if any, payable to Seth Grosvenor, mortgagee." Afterwards McCarty, in violation of the terms of the policy, transferred the property so as to defeat the policy as to him. As to Grosvenor, the court says: "The mortgagor must sustain a loss for what the insurers are liable before the party appointed to receive the money would have a right to claim it. It is the damage sustained by the party insured, and not by the party appointed to receive the payment, that is recoverable from the insurers." In *Carpenter v. Providence W. Ins. Co.*, 41 U. S. 16 Pet. 495, 10 L. ed. 1044; speaking of the assignment of a policy, the court says: "The rights of the assignee under the policy cannot be more extensive than the rights of the assignor." Many other authorities are of like import. Appellee cites some cases as holding a contrary doctrine, but we think, when carefully examined, they do not. We notice two on which we think most reliance is placed.

In *Bauch v. Humboldt Mut. F. & M. Ins. Co.*, 35 N. J. L. 429, the policy was sent to the agent of the company containing a clause that "the policy is to have no effect until the premium shall have been paid." The agent delivered the policy to the assured, with the understanding that the premium, with other premiums, should be paid. The case holds that evidence to show that the premium was not paid was incompetent, and contradicting the receipt in the policy, and the court, by Beasley, *J.*, says: "I think, when the assured received this policy, he had a right to presume either that the agent had settled the premiums with the company, or that they, by their receipt, intended to relinquish the clause requiring payment." The record in that case does not show that the company, in sending the policy to the agent, required a payment, and from the record that court regarded the facts sufficient to justify the assured in assuming that the payment had been made by the agent of the company or waived. In this case, Moore, in receiving the policy, acted directly with the company, and he knew that its delivery was conditional upon his promise to remit the premium. In this case, the policy was retained, if the premium was not paid, in plain violation of the understanding of the parties, and there is no ground whatever for assuming either a payment or a waiver, as held in the *New Jersey case*.

In *Home Ins. Co. of N. Y. v. Gilman*, 112 Ind. 7, 10 West. Rep. 842, the company sought to escape liability because of non-payment of the premium, when the facts were that the assured gave to the agent of the company a credit for which the agent agreed to pay the premiums, and "transmitted the amount of the premium to the company in due course." The case holds that, "for all that appears, the assured was fully justified in presuming that the agent was authorized to make the arrangement disclosed." While the state of the law on this subject is somewhat confused by a statement in some cases of abstract rules, we have found no case in which the party designated in a policy to which the loss, if any, is made payable, whether he be designated an assignee or an appointee to receive the money (both of

such terms are employed in the cases), is entitled to recover where, under the facts, the assured could not. The language under which the payment can be claimed and the authorities lead to the conclusion that the rights of such a party depend on the liability of the Company to the assured. Such a liability being established, the payment is to be made to the party designated to receive it. If this premium has not been paid, the case as to Moore is this: The Company, relying on his promise to pay the premium on receipt of the policy, sent it to him. No credit was intended, nor had the Company reason to suppose he would wrongfully deliver it to others. Properly speaking, it was not a delivery to Moore, because not intended as such without the payment. The case is not different in principle from what it

would be if Moore had been present at the office of the Company, and the policy had been handed to him with the intent that the premium would then be paid, and he wrongfully detained it without payment. We believe no case has or will hold that with such facts the Company would be estopped to deny and prove non-payment of the premium. If not estopped as to Moore, it would not be as to the person entitled to receive the loss, if any, in his stead. If not estopped, it must follow that the testimony was admissible to show the fact of non-payment, and that the court erred in excluding it. Believing that this discussion of the case will be a sufficient guide on another trial, other questions need not be considered.

The judgment is reversed.

KENTUCKY COURT OF APPEALS.

James A. McKENZIE, Secretary of State,
Appt.,

J. D. MOORE *et al.*

(.....Ky.....)

A bill does not become a law although it is delivered to the governor and never returned by him to the Legislature if it is immediately withdrawn by the member who introduced it with knowledge that the governor objected to it, in accordance with a custom allowing such withdrawals and under the statement that leave to withdraw had been given by the house, under a constitutional provision that

any bill shall be a law if not returned by the governor within ten days.

(November 7, 1891.)

APP^{EAL} by defendant from a judgment of the Circuit Court for Franklin County in favor of complainants in an application for a writ of mandamus to compel the admission to the files of enrolled Acts of the General Assembly of the State in defendant's office of a certain bill for the incorporation of the Paducah Wooden-Ware Manufacturing Company.
Reversed.

The facts sufficiently appear in the opinion.
Mr. P. W. Hardin for appellant.

NOTE.—*Withdrawal of bill from governor.*

In *People v. Devlin*, 83 N. Y. 208, after a bill had been acted on by both branches of the Legislature and sent to the governor the Assembly requested the governor to return it to them and the governor complied with the request sending with the bill a message stating that it was returned in accordance with the request of the Assembly. The court in considering the validity of this action determined that when a bill has passed both branches of the Legislature and been signed by the appropriate officers and sent to the governor for his approval and signature it has passed beyond the control of either House and cannot be recalled except perhaps by the joint action of the two Houses, the court saying that if the power to recall it exists it is not found in the Constitution, nor in a statute, nor is it shown to be custom or usage, and that although each House has power to determine the rules of its own proceedings no rule permitting the recall of a bill was shown to exist, and that the act of courtesy of the governor in returning a bill conferred no power upon the House of the Assembly to further act upon it.

The question again arose in Virginia, in *Wolfe v. McCaull*, 78 Va. 878, in which it appears that the Legislature passed a bill and presented it to the governor but before action by him it was recalled by a joint resolution. It will be seen that here the point was distinctly raised which was not passed upon in the New York case, and the court viewed the matter in two lights: First, as to the effect of the governor's returning the bill at the request of the Legislature, and it was decided that the governor's duty was fixed by Constitution and that he

could not evade it by allowing the Legislature to recall the bill from his hands and to defeat by mere nonaction a measure which they have once declared with due solemnity to have passed; that the governor must choose one of two courses, he must act by either approving or disapproving a bill or allowing it to become a law without his approval by the force and effect of the Constitution itself; that no power is given him to return a bill to the Legislature except in a case of veto and by failing to veto it or return it with his objections he allowed it to become a law without his approval; that an act of courtesy in returning the bill was of no legal effect and in contemplation of law the bill never left the governor's hands until it was placed in the hands of the keeper of the rolls. Secondly, as to the right of the Legislature to withdraw a bill, it was decided that a construction in favor of the powers of the Legislature which would permit it to recall a bill from the hands of the governor would trench upon the latter's power and prerogative.

The question was subsequently presented to the Colorado Supreme Court and it answered that there was nothing in the Constitution or statutes which forbade the Legislature's requesting by joint or concurrent resolution of both Houses the return of a bill in the hands of the governor for his approval, or which directed or controlled the action of the latter in response to such request. That there was nothing which inhibited a reconsideration and amendment of a bill so returned if it was done in accordance with the parliamentary practice adopted by the respective Houses. Recalling Bills, 9 Colo. 680.

H. P. F.

Messrs. Hallam & Myers, for appellees, relied upon the letter of Constitution, and on *Wolfe v. McCaull*, 76 Va. 876.

Pryor, J., delivered the opinion of the court:

This case has been under submission since the 16th of February in the year 1888, but for some reason has not found its way to the judges until a few days past. The appellees, who were the plaintiffs in the court below, asked that the writ of mandamus issue commanding James A. McKenzie, then Secretary of State, to admit to the files of enrolled Acts of the General Assembly of the State in his office a bill entitled "An Act to Incorporate the Paducah Wooden-Ware Manufacturing Company, of the City of Paducah," that was passed, as is alleged, by both Houses of the General Assembly of the Commonwealth, at its session in March of the year 1882. It is further alleged that the bill was duly enrolled and signed by the speakers of both Houses of the General Assembly, was properly indorsed, and then presented to the governor for his approval or rejection; that the General Assembly and each House was in continuous session (Sundays excepted) for more than ten days after the delivery of the bill to the governor, and it was never returned to either House by the governor or his secretary, nor has it ever been admitted to the files of the Acts of the General Assembly in the office of Secretary of State. The statements of the petition show the passage of the bill as required by the laws and Constitution of the State, and allege a presentation to the governor, and the fact that it was never returned by him is admitted by the pleadings. It is alleged that within the ten days—the time given the executive to consider the bill—he delivered it to a member of the House of Representatives, who claimed to have obtained leave of the House to withdraw the bill, and that this member retained it for a year, and then delivered it to the plaintiffs, who are the incorporators. The defense is that the bill was introduced in the House by the member from the county of McCracken, the city of Paducah being the county seat, and, that member being informed by the governor that in his opinion the bill conferred certain lottery privileges, and for that reason he should veto it, the member, within the three days allowed therefor, asked leave of the House to withdraw the bill from the hands of the governor, and the leave was granted without objection. That the clerk of the House made a clerical mistake by making the following entry: "H. B. 776. Corbett asked leave to withdraw from governor. Granted." That bill 776 was not then in the governor's hands, and was not delivered to him until the 20th of April following. That was a bill authorizing the construction of turnpikes in the county of Davis, and became a law with the approval of the governor. That the member from McCracken, on the 23d of March, 1882, notified the governor that he had obtained leave to withdraw the bill, and in accordance with this request by the House the governor delivered the bill to the member from McCracken, that it might be returned, and his objections removed, of which fact the incorporators, or some

of them, were notified. That a bill was then introduced of a like character, but under a different title, and passed, that the governor failed to approve. That said Corbett and the incorporators, regarding the bill as worthless, kept it in their pockets, and never returned it to the governor, or to either House. And for further response the Secretary of State says that the representative from McCracken and the incorporators, regarding the bill as withdrawn, by leave of the House introduced on the 18th of April of the same session a bill entitled "An Act to Incorporate the Farmers' Agricultural Implement Manufacturing Company of Paducah," containing the same objectionable section that was regarded by the executive as against public policy, and met with his disapproval; that he found no such bill as is set forth in the petition of the plaintiffs on file in his office, or anything to show that it had ever been filed, or returned since its withdrawal. This is, in substance, the answer filed by the Secretary of State to the demand of the appellees, and, a demurrer having been sustained to this answer, the writ was ordered to go.

The Constitution of 1850 [art. 3, § 22] provides: "If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, it shall be a law, in like manner as if he had signed it, unless the General Assembly by their adjournment prevent its return, in which case it shall be a law, unless sent back within three days after their next meeting." It is insisted by counsel for the appellees that, as the bill was presented to the governor, it must be returned to the Legislature by him within the ten days if that body is in session, and, if he fails to do so, the bill becomes a law. This position cannot be doubted, but in our opinion there are several reasons why the writ of mandamus should not go in this case, if the facts alleged in the answer are true; and the facts alleged in the answer are all admitted by the general demurrer. The first question that arises is as to what facts constitute a presentation of a bill to the executive. There is but little formality in such a proceeding, and no fixed rule on the subject. The custom in this State is for the secretary to indorse on the bill the date of its receipt by the governor, so as to show when the bill came to his hands, and there appears to be nothing on this bill indicating that the governor ever had possession of it. The bill was found a year after in the possession of those interested in its passage, and no evidence whatever that it was ever in the possession of the Secretary of State. It is said that the Secretary, in his answer, admits its delivery to the governor, and that fact does appear from this pleading, although there is a subsequent denial that the bill was ever delivered to the governor in what purports to be an amended pleading that seems never to have been filed. We shall regard the pleadings, therefore, as admitting that the bill was delivered to the governor; but at the same time it is alleged that the bill was taken at once from the executive by the member from McCracken, who introduced the bill with a knowledge on the part of both the member and the incorporators that the executive was then urging some

objection to certain sections of the bill, and not only withdrawn, but upon the statement that leave had been given by the House to withdraw the bill from his hands. The object in presenting a bill to the executive is to enable him to consider its various features, that he may understandingly approve or reject it. He must have time to consider its provisions, and with the courtesy extended members of the Legislature by the executives of the State that has grown into a custom, in permitting them to withdraw bills before mature consideration by him that appear to be objectionable, it would be a singular ruling to adopt, and one productive of much evil, to permit a member, however honest in his motives, to withdraw a bill from the consideration of the executive, that the member himself has introduced, and, after the lapse of months, with the Legislature adjourned, to declare the bill a law because it was once in the governor's hands. It is no such presentation as contemplated by the Constitution for the member or the custodian of the bill to deliver it to the governor, then immediately withdraw it, and claim that it becomes a law because the governor failed to return it within the ten days. In the case of *Harpending v. Haight*, 39 Cal. 199, it is said that the bill is presented to the governor "to afford him an opportunity to deliberately consider its provisions and prepare his objections," and such a presentation as would deprive him of this right, in the language of the court in that case, is "merely spurious." Certainly those interested in its passage who withdraw the bill ought not to be heard to say that the neglect of the governor in intrusting the custody of the bill to them made it a law. Again, it is evident that leave was given to withdraw the bill from the hands of the executive,

and in so adjudging this court is not undertaking to correct the legislative records, or to invade the legitimate exercise of power by the legislative branch of the government. There was no other bill, as is admitted by the demurrer, from the county of McCracken in the hands of the governor; and the bill numbered 776, for which leave was given to withdraw, had not then reached his hands, and related to the construction of turnpikes in Davis County, and was approved by him when presented. Another bill was introduced shortly after this leave to withdraw was given, by the same member, containing a like objectionable feature, and for the benefit of the same corporators of the same city, showing plainly that leave was given to withdraw this particular bill. The record corrects itself, if truly set forth in the answer, and therefore the court should have overruled the demurrer to the response of the Secretary of State. The bill was never presented to the governor, as contemplated by the Constitution, and, if the bill had in fact been considered by the governor, leave had been given to withdraw it if the facts alleged in the answer are established. Besides, there was no such bill in the office of Secretary of State, and after the lapse of more than a year from the adjournment of the Legislature the parties in interest who knew of the circumstances connected with the passage of the bill, having all this time the custody of that paper, offered it to the Secretary of State, for the first time asking that it be filed with the enrolled bills. The chancellor should have overruled the demurrer, and held the response of the secretary sufficient.

Judgment reversed, and remanded for proceedings consistent with this opinion.

FLORIDA SUPREME COURT.

STATE OF FLORIDA, *et rel. Francis P. FLEMING,*

John L. CRAWFORD.

(.....Fla.....)

- *1. The performance of a clear ministerial duty may be required of the secretary of state by mandamus.
2. Neither the secretary of state nor the Supreme Court of Florida has power to pass upon the legality of an election of a United States senator by the Legislature, or of an appointment of a senator by the executive of the State. The power is in the United States Senate alone.
3. The commission of a United States senator appointed by the governor should be signed by the governor, and sealed with the great seal of state, and countersigned by the

Head notes by RANNEY, Ch. J.

NOTE.—For notes on mandamus to compel performance of official duties, see *United States v. Hall* (D. C.) 1 L. R. A. 738; *People v. Highway Comrs.* (Ill.) 6 L. R. A. 181; *Territory v. Cascade County Comrs.* (Mont.) 7 L. R. A. 105.

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secretary of state, in accordance with section 14, art. 4, of the Constitution of this State.

4. Where there has been an election of a United States senator by the Legislature and afterwards the governor, holding that there is a vacancy in the office on account of the illegality of such election, signs an appointment or commission of a United States senator, and requests the secretary of state to seal the same with the great seal of state, and to countersign it, it is the duty of the secretary to do so, and he has no right to refuse because he deems the governor's action illegal. If he refuses the performance of the duty, it may be required by mandamus.
5. A commission is not complete until it has been signed, countersigned, and sealed in accordance with section 14 of article 4, nor is a copy of an uncompleted commission, or of the record thereof, evidence of any appointment to office.
6. Affixing the seal of state to an executive appointment of a United States senator, and countersigning the same, does not commit the secretary of state to the legality of such appointment. It implies no opinion as to the legality of either such appointment or of a previous election of another person to the same place by the Legislature.
7. The commissioning of a United

States senator or other public officer is a matter of public interest, and it is the duty of the executive to see that his commissions of persons appointed to office are completed; and as the chief magistrate, charged with seeing that the laws are faithfully executed, he is a proper relator in a proceeding by mandamus to require the sealing and countersigning of a commission.

(November 13, 1891.)

PETITION for a writ of mandamus to compel defendant to seal and countersign the appointment and commission of Robert H. M. Davidson as United States senator. *Granted.*

Statement by **Raney, Ch. J.**:

The alternative writ, the declaration in causes of this character, states in substance that, on the 22d day of September of the present year, the relator, Francis P. Fleming, the governor of this State, he having ascertained and determined that a vacancy existed in the office of United States senator from this State, did, in exercise of the power conferred upon him by law, proceed to appoint Robert H. M. Davidson, a citizen of the State, having all the legal qualifications for such office, to be United States senator from Florida, to fill such vacancy until the meeting of the next Legislature; and that, to evidence and give effect to such appointment, the petitioner prepared and signed an appointment or commission in the words and figures following, to wit:

"In the name of the State of Florida. To all whom these presents may come greeting:

"Whereas, the term of office of Wilkinson Call, as United States senator from Florida, expired on the third day of March, A. D. 1891, during the recess of the Legislature of said State, whereby a vacancy then happened in the office of United States senator from Florida during such recess as aforesaid; and whereas, a senator has not been chosen by the Legislature of the State of Florida to fill such vacancy; and whereas, the Legislature of the State of Florida is not now in session, and a recess thereof exists at this time:

"Now, therefore, I, Francis P. Fleming, governor of the State of Florida, by virtue of the authority in me vested by the Constitution of the United States, have appointed, and by these presents do hereby appoint, Robert H. M. Davidson to be United States senator from the State of Florida, until the next meeting of the Legislature of the State of Florida.

"In testimony whereof I have hereunto set my hand, and caused the great seal of the State to be affixed, at Tallahassee, this twenty-second day of September, A. D. one thousand eight hundred and ninety-one, and of the independence of the United States the one hundred and sixteenth year.

"Francis P. Fleming,
Governor of Florida.

"Attest: _____

"Secretary of State."

That thereupon the said governor caused the said appointment or commission to be transmitted to the defendant, John L. Crawford, secretary of state of this State, and instructed and directed him to seal it with the great seal of the State, and to countersign the same as a due and proper attestation of the executive act 14 L. R. A.

of such appointment, to be delivered to said Davidson as his full and complete appointment to be such United States senator, and the evidence thereof; but that the said Crawford, secretary of state, in disregard of his duty in the premises, failed and refused to seal the said appointment or commission with the great seal of the State, and to countersign the same, and has failed and refused, and still refuses, so to do, to the great prejudice and injury of the people of the State.

That afterwards, on or about October 13, 1891, the said governor required and instructed William B. Lamar, the attorney-general of the State, to institute proceedings in this court to procure the writ of mandamus to require the said secretary of state to seal such appointment or commission with such seal and to countersign the same, but the attorney-general has failed and refused, and still refuses, to institute the proceedings.

The writ then recites the prayer of the petition: That, in order to protect and secure the public interests in the premises, and to enforce and carry into effect his said executive act as such governor, the writ may issue, and, in compliance with such prayer, directs the secretary of state to seal and countersign the said appointment or commission, or to show cause, on the day and at the time mentioned therein, why he had not done so.

On the 29th day of October, at the time stated in such writ, the secretary of state made return to such writ, stating in effect:

(1) That this court has no jurisdiction of the respondent on the case made by the writ in respect to the specific act sought to be enforced.

(2) That the relator, the governor, has no such interest in or relation to the specific act sought to be enforced, upon the allegations of the writ, as authorizes or justifies him in instituting this proceeding.

(3) That the State has no such interest in or relation to the specific act sought to be enforced, upon the allegations of the writ, as authorizes the institution of the proceeding by the State, or on its behalf, or by or on relation of the governor of the State.

(4) That there is no law enjoining upon this respondent the performance of the specific act sought to be enforced.

(5) That it does not appear that the performance of the specific act therein sought to be enforced is necessary to make effectual the alleged appointment.

(6) That the allegations of the writ are not sufficient to show that the relator has a right to enforcement of the specific act sought to be enforced.

(7) That the petitioner is now, and was on September 22, 1891, governor of the State; that defendant has no means of knowing, and does not know, whether, on or before the day mentioned, the petitioner claimed to have ascertained and determined there was a vacancy in the office of United States senator from the State of Florida, nor the several grounds, methods, and processes, upon and through which such alleged ascertainment and determination was had, other than as proclaimed by said petitioner to the people of Florida, under a writing made and published by him on the 4th day of August of the present year, a copy

of which writing is annexed as a part of this return, for the purpose of showing merely the claim therein set up, and the alleged grounds and the reasoning upon and by which the alleged ascertainment and determination was reached.

That no vacancy in the office of the United States senator existed on the said 22d day of September; that "theretofore" the vacancy created by the expiration of the term of office of Wilkinson Call, United States senator, had been filled by the Legislature of the State, by whom Wilkinson Call was duly and constitutionally elected United States senator, "as shown by a duly certified copy of said legislative proceedings," filed as a part of the return; and that Wilkinson Call applied for and obtained from the respondent a duly certified copy of said proceedings, to be presented to the senate of the United States, as the due and legal evidence of his election as such senator.

That it is true that the governor did prepare and sign "the document in writing," a copy of which is set out in the alternative writ, and thereupon caused the same to be transmitted to respondent, with instructions to him to seal with the great seal of state and countersign the same, and that this respondent refused so to do.

That the communications and transactions by and between the governor and the attorney-general, constituting the former's alleged demand, and the latter's alleged refusal, to institute proceedings to procure from this court the writ of mandamus for the purposes alleged, were conducted in writing, and a copy of the same is annexed as a part of the answer.

All of this return, except the paragraphs numbered from 1 to 6, inclusive, was demurred to as not setting up facts sufficient in law to bar the writ, and the six paragraphs were treated as a demurrer, and the demurrer joined in.

Mr. Fred. T. Myers for plaintiff.

Messrs. A. W. Cockrell & Son for defendant.

Raney, Ch. J., delivered the opinion of the court:

That the writ of mandamus lies to require the performance of a clear official duty, not involving discretion, by any one of the "administrative officers of the executive department" of this State, (§§ 3, 17, 20, 26, art. 4, Const. 1885,) is a settled proposition of law in Florida. *Toule v. State*, 8 Fla. 202; *State v. Gamble*, 13 Fla. 9; *State v. Gibbs*, Id. 55; *State v. Board of State Canvassers*, 16 Fla. 17; *State v. Board of State Canvassers*, 17 Fla. 29; *State v. Drew*, Id. 67; *State v. Barnes*, 25 Fla. 298.

To hold that the mere fact of these officers belonging to the executive department of the government should exempt them from this judicial process, as to a plain ministerial duty, or where they are given no official discretion, would be in irreconcilable antagonism to a consistent line of judgments running back over forty years. There is, moreover, nothing in the five cases specially called to our attention in behalf of the defendant, and noticed in the next paragraph of this opinion, to cause us to doubt the correctness of the conclusion reached by our predecessors, even though the conclu-

sion was arrived at in the face of conflict of authority,—a condition not unfrequently confronting appellate courts.

The case of *Com. v. Wickersham*, 90 Pa. 311, holds that the writ did not lie in the court of common pleas against the defendant, who was superintendent of public instruction, as that court had never been given power to issue it against state officers. It is stated, however, in the opinion of the judge of the common pleas, which opinion is adopted by the supreme court, that by an Act of May 22, 1792, which continued in force until abrogated by a convention held in 1872-73, for forming a new constitution (*Com. v. Hartranft*, 77 Pa. 154), such power had existed in the supreme court, and that no inconvenience was ever felt from its exercise by that tribunal; but the convention limited the power, as an exercise of original jurisdiction, to cases against inferior courts, and that the Legislature had not given to any inferior court the power now invoked. The decision in *State v. Hobart*, 12 Nev. 408, is that the office of state comptroller, which Hobart held, was one of public trust, and conferred upon the individual for the benefit of the public; and if the acts which he refused to perform concern the public interests, and are such as the law requires to be performed by him, the writ of mandamus should issue to compel the performance of the duty. The writ was issued. In *State v. Hayne*, 8 S. C. 567, it was decided that the supreme court has jurisdiction by mandamus over the executive officers of the State, as, for instance, the secretary of state, and might by such writ supervise, control, and direct their duties, the duty in the particular case being ministerial. The conclusion reached in *Bleissoe v. International E. Co.*, 40 Tex. 537, in so far as the comptroller was concerned, was that the duty in question was not a mere ministerial duty, but it was his duty to see that preliminary work proper to be done had been performed; and that the district court had not power under the Constitution to compel an officer of the executive department of the government to perform an official duty; and that whereas, under the former Constitution, the supreme executive power was vested in the chief magistrate, under that then in force it was vested in the entire body of magistracy, composing the executive department with the powers of each separately defined. The remaining one of the particular cases cited in behalf of defendant (*Dane v. Derby*, 54 Me. 95, 89 Am. Dec. 729) does not involve the question of a mandamus against a state officer, and need not be noticed; and of the Texas case, the only one requiring comment, it is necessary to say merely that in Florida the "supreme executive power is vested in a chief magistrate, who shall be styled the 'Governor of Florida.'" (§ 1, art. 4, Const.) and that two of the judges dissented from the conclusion reached by the other three.

It is not within the possibilities of any one opinion to review all the authorities referred to in the note to *Dane v. Derby* in the eightyninth volume of the American Decisions. This court long ago decided the question and in doing so, and in adhering consistently in past years to that decision, it has followed in the footsteps of Marshall and his associates and

others who have rested their conclusion upon the ground that ours is "a government of laws and not of men," and that where there is no right to exercise discretion in the premises any officer less than a governor, acting as such, (as in *State v. Drew*, 17 Fla. 67, and cases therein cited,) is not exempt from this process of the law; and upon this theory it was held in *Marbury v. Madison*, 5 U. S. 1 Cranch, 137, 2 L. ed. 60, that the secretary of state would be the subject of a mandamus to compel him to deliver a commission which had been signed and sealed, and upon the same principle peremptory writs of mandamus have been awarded against other secretaries of departments of the general government. *Kendall v. United States*, 37 U. S. 12 Pet. 524, 9 L. ed. 1181; *United States v. Schurz*, 102 U. S. 378, 26 L. ed. 167. See also *Butterworth v. United States*, 112 U. S. 50, 28 L. ed. 656.

In *Com. v. Hartranft*, 77 Pa. 154, the supreme court deplored the limitation, referred to above upon its former jurisdiction, as a result which deprived the people of one of the forms of remedy essential to the interests of a republic; and we feel assured that it will not be denied that the history and practical utility of the writ in Florida entitles it to the highest consideration for effectually securing the performance of public official duty and establishing public right. It is the character of the duty, and not the nature of the office, which must, as long as the law is regarded, always control a court in deciding whether or not it will award a peremptory mandamus against an officer of the character of the respondent (*Marbury v. Madison*, *supra*; *United States v. Windom*, 137 U. S. 636, 34 L. ed. 811; *United States v. Blaine*, 189 U. S. 806, 35 L. ed. 183); and this would be a late day for the supreme court of Florida to depart from this rule.

II. It appears that on the 4th day of August last the governor issued an address to the people of Florida, announcing as his judgment and conclusion that the action of the joint assembly of the Legislature taken on the 26th of May last, at which Mr. Call received the votes of fourteen senators and of thirty-seven representatives, and Mr. Mays received the vote of one representative, and at which the president of the joint assembly announced that, Mr. Call having received a majority of all the votes of the joint assembly, a majority of all the members elected to both Houses being present and voting, was duly elected United States senator for the term beginning March 4, 1891, was not an election of Mr. Call; and the reason, as is shown by the return before us, is that a majority or quorum of the Senate was not present at, and did not participate in, such election. In this paper the governor also announced that he could not, "in the discharge of his duty," certify that Mr. Call was elected, and gives a full statement of the grounds upon which his conclusions are based. On the 22d day of September the governor prepared and signed the appointment of Mr. Davidson, set out in the preceding statement of the case before us: and it will be observed that this appointment recites that a term of office of United States senator held by Mr. Call had expired on the 8d day of March last, during a recess of the Legislature, and that thereby a vacancy

happened in such office, and that no senator had been chosen by the Legislature to fill such vacancy, and that the Legislature was not in session, but, on the contrary, a recess thereof existed at the time; and, upon these premises so recited, the governor, by virtue of the authority vested in him by the Constitution of the United States, appoints Mr. Davidson to be United States senator from Florida until the next meeting of the Legislature.

The election mentioned is set up by respondent as a bar to the allowance of a peremptory writ. He says that, by virtue of this action of the joint assembly on the 26th day of May, Mr. Call was duly and constitutionally elected United States senator, and that consequently no vacancy existed when the governor made the alleged appointment, the vacancy occurring on expiration of Mr. Call's previous term having been filled by such election. The respondent also supplements this defense with the statement that Mr. Call applied to and obtained from him, as secretary of state, a duly certified copy of said proceedings, to be presented to the senate of the United States as the due and legal evidence of his election as such senator.

The Constitution of the United States provides that the Senate of the United States shall be composed of two senators from each State, chosen by the Legislature thereof, and (after directing how they shall be classified as to length of terms) ordains that, if vacancies happen by resignation or otherwise during the recess of the Legislature of any State, the executive thereof may make temporary appointment until the next meeting of the Legislature, which shall then fill such vacancies, (§3, art. 1;) and that the times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the Legislature thereof, but Congress may at any time by law make or alter such regulations, except as to the place of choosing senators, (§4, art. 1;) and that each House shall be the judge of the elections, returns and qualifications of its own members. §8, art. 1.

The Constitution of the United States has not elsewhere given to this court the power to pass upon the question of the legality of the election of a United States senator, but by the last of the provisions quoted above it has expressly excluded from it the right to do so. The Constitution of the State has not attempted to confer any such power upon us, nor has Congress, nor our own Legislature, nor is it to be imagined that any such attempt would be made. Whether Mr. Call was legally elected by the Legislature is not for us to say. Our predecessors, when asked in January, 1869, under the power given the governor by the Constitution to require their opinions "upon any point of law," whether the election of Mr. Abijah Gilbert, as senator, in 1863, was legal, replied, in effect, that the Senate of the United States was the exclusive judge of the elections, returns and qualifications of its own members; and whether an election of a senator by a state Legislature was in conformity with such regulations as are prescribed by Congress, or whether for want of strict conformity therewith it was illegal and void, were questions which the court had no jurisdiction to decide.

Advisory Opinion, 12 Fla. 686. That we have not jurisdiction to entertain the question of the legality or illegality of Mr. Call's election is palpable, and that anything we might decide about it, should we so far forget ourselves as to enter upon its consideration, would be inexcusable usurpation, and of no effect whatsoever, cannot be denied. Whether the Legislature has in its action so far complied with the true intent and meaning of the statute of the United States governing such election, or whether the statute, if it contemplates legal action in the absence of a quorum of either of the Houses where the organic law makes a quorum essential to the transaction of business, is constitutional, are questions for the Senate alone to decide.

The question occurs to us, however, that admitting we cannot decide upon the legality of the election, is it not a sufficient answer to the application for this writ that the joint assembly is shown to have done what it in fact did, and as it was constituted, and to have announced through its presiding officer the same to be a legal election? It is, we find, after the most careful consideration, impossible to pursue this course without usurping the functions of the Senate. As shown above, the executive of a State may, if a vacancy happens during the recess of the Legislature, make temporary appointments until the next meeting of the Legislature, which shall then fill the vacancy; and it is unquestionably the primary function of the executive, subject solely to the judgment of the United States Senate, to decide when any such vacancy exists. The correctness of his decision, and the legality of his action in making an appointment, are matters entirely beyond our jurisdiction. Whether the Constitution gave the governor power after the adjournment of the Legislature, to appoint, was a question which addressed itself primarily to the governor, and, however erroneous may be the conclusion which he has reached, he has in fact made a decision in favor of his power, and has proceeded, to the extent indicated by this record, in making an appointment to fill what he holds to be a vacancy, within the meaning of that clause of the Constitution which confers upon him the power of appointment. We cannot close our eyes to this fact as an existing feature in the case before us, any more than to the action of the Legislature or any other fact shown by the record. It cannot be said that, as between the governor and this court, it was not a matter for his decision. We cannot hold, then, that the simple fact of the Legislature having taken the action set up constitutes a bar to the proceeding sought at our hands, without usurping the power to decide that this action, however illegal or ineffectual it may be held by the Senate, precluded any action by the governor, or, in other words, deprived him of the power to act. To decide the question would be to do what the Constitution has devolved upon the Senate exclusively. It is a question as to the relative validity of legislative and executive action, of which we have no jurisdiction. What we cannot do the secretary of state cannot do; and for the same reason that the power has not been placed in him, unless it is implied by the imposition upon him of the duty to seal

and countersign this commission, if such duties have been put upon him,—questions to be hereafter considered. He cannot, unless the power to do so is implied by the imposition of the stated duties, decide that the appointment of Mr. Davidson is illegal, or that it is so because the election of Mr. Call was legal, and no vacancy existed, and consequently the governor had no power to appoint. The erroneous exercise of power by either the governor or the Legislature confers no power on either the secretary of state or us, and in our conduct we should leave the action of each to be judged of by the Senate, and perform such duties as the law has placed upon us, without assuming any responsibility not imposed upon us. Knowledge on our part of what may have been the decision of the Senate in any analogous case does not create power or jurisdiction in this court. Unless there is, in the nature of the act of sealing and countersigning, the implied power of passing upon the legality of the governor's action, the secretary has no more power to do so, and refuse to attest the governor's act, than he would have had to refuse Mr. Call a certified copy of the proceedings of the Legislature, of whose records he is, under section 21, art. 4, of the Constitution, the keeper, had it been his judgment that the election by the Legislature was illegal and void. In certifying and giving such copy he performed a duty imposed upon him, which in no wise involved or implied what his personal judgment of the validity of that election is, and the law does not give him any official judgment as secretary of state in the premises.

III. It is, however, contended, in effect, that the right to have this writ issued is dependent upon the right of Mr. Davidson to the office of senator; or, in other words, the legal right of the governor to make the appointment. In support of this contention, counsel for respondent cites the case of *State v. Trenton Common Council*, 49 N. J. L. 849; 6 Cent. Rep. 819, which was an application by Clarke for a mandamus to compel the board of health of the city of Trenton to admit him as a member of such board. It was a proceeding to put him in physical possession of an office. Clarke had been nominated by the president of the council, who had assumed to act as mayor when he understood the mayor was absent from the city, and his nomination had been confirmed by the city council to succeed one Cloke, whose term of four years had expired, but who, under the law, was authorized to hold until his successor should be appointed and qualify. Cloke still held his seat on the board, and was recognized by it as a member; and it was contended by the board, the defendant, that the president of the council had no authority to make the nomination, as the mayor was not, at the time it was made, really absent from the city, such absence being a contingency necessary to the president's power, and the one which was assumed by him to exist and authorize the action taken. The court held that, as it was shown that the mayor was not absent, there was no power in the president of the council to nominate, or in the council to recognize it, and that the nomination and confirmation were not proof of such absence, and that a mandamus would

not issue. It was held that, as the charter of the city had not provided that any particular certificate of appointment should be evidence of title to the office, therefore the case differed from those where the law provides that the certificate of an election board shall be evidence of the result of an election; but, if the charter had provided for issuing a commission evidencing a right to membership in the board, the contention that the nomination by an acting mayor, and confirmation by the council, would make out a conclusive title, on an application of this kind, might be sustained.

It is true that mandamus will lie to compel the surrender of books and papers and buildings to one possessing certain prima facie evidence of title to the office; and this, even though quo warranto may be pending to test the real title to the office; and the award of the writ of mandamus will have no effect upon the other proceeding, for mandamus is not the proper proceeding to determine the title to office as between contestants, and, where the party seeking the latter writ has not muniments of title to the office which the law has made prima facie evidence, relief, even to the extent indicated above, will not be given if his right to the office is even doubtful. High, Extr. Rem. §§ 70, 73, et seq.; *State v. Duman*, 39 N. J. L. 677; *State v. Saxon*, 25 Fla. 792, 796. It is, however, established, by the overwhelming current of authority, that where an office is already filled by an actual incumbent, exercising the functions of the office *de facto* and under color of right, mandamus will not lie to compel the admission of another claimant, or to determine the disputed question of title, and for the reason that an adequate and specific remedy at law exists, which is quo warranto (High, Extr. Rem. §§ 49, 67;) and in the New Jersey case relied on by respondent it is admitted that the relief in such cases is usually sought by quo warranto. See also *State v. Gamble*, 13 Fla. 9, 28; *People v. New York*, 3 Johns. Cas. 79.

The distinction between the New Jersey case and the one before us is unmistakable. There the claimant to an office was seeking to oust one holding possession of it, and obtain possession himself, not in the ordinary way, but by a remedy never available except under peculiar circumstances, not then existing, and, when available, not conclusive of the question of title to the office. Here there is no question of the right of possession to the office. Besides our not having jurisdiction to try this question of title, neither of the parties who may claim the office of senator, under the election or the appointment, is before us; and whatever we may decide can in no wise affect the decision of the right to the office by the only tribunal which has any power or jurisdiction to decide that question. The contest before us is between the governor, as governor, and the secretary of state. The governor, claiming that he has, as the "executive" of the State, the right to appoint a senator, has exercised that power to the extent of signing an appointment, and placing it with the secretary, and requested him to seal and countersign it. We have shown that the power to review the legality of the governor's act is beyond our jurisdiction, as it is beyond that of the secretary of state. In the case

of *State v. Atchua Board of County Canvassers*, 17 Fla. 9, it was contended that this court had no jurisdiction to award the writ of mandamus to compel the board of canvassers to canvass the returns and declare the result as shown by the precinct returns, because the particular office as to which the relator sought the relief was that of representative in the Congress of the United States. Replying to this objection, the court, after remarking that it was not pretended by the relator that the canvassing of the votes determines his right to this office, said: "That must be determined by the House of Representatives. But the relator says that the law of the State under which the election was held entitles him, if he shall appear to have a majority of the votes according to the election returns, to a certificate of that fact." The relator was seeking to lay the basis for getting a certificate of election by having the county canvassers canvass the precinct returns, and to transmit to the capital their own returns to be canvassed by the state board with other county returns. All he could get as even the remote result of his litigation was a certificate of his election. The legality of that election could not be passed upon by the court, and this was the real substance of the board's objection, but it was held to be no reason for refusing the writ. The legality of the election could not be considered, but the evidence of the result of an election held under the laws of the State, and by its authority, could be enforced; and this, although it is the Constitution of the United States, and not the State Constitution, which provides that "the House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature," (§ 2, art. 1;) and that "the times, places, and manner of holding elections for . . . representatives shall be prescribed in each State by the Legislature thereof, but Congress may at any time by law make or alter such regulations." § 4, art. 1.

Again, in *State v. Board of State Canvassers*, 17 Fla. 39, where the relator was seeking a canvass by the state board, it was objected that he did not show that he had the requisite age for a member of Congress, and the court replied: "This proceeding seeks only to procure such certificate as the candidate voted for may be entitled to under the laws of this State, which certificate is a property which the person obtaining the most votes is authorized by law to demand. Upon this inquiry the right to take and hold the office is not in question, and a slight examination of the rules laid down in the books does not show that such a question has ever been entertained by the courts. Whether the relator possesses all the qualifications necessary to entitle him to a seat in Congress can only be inquired into by the House, in which he may present a certificate of election." Thus again the court does not permit its jurisdiction, and the right of the relator in procuring the evidence of an actual election, to be defeated or interfered with by its inability to consider questions of the legality of such election.

That there can be any reason why the ina-

bility to inquire into the legality of the appointment of a senator should bar the power to award a mandamus to require the perfection of the evidence of the actual appointment of a senator, when it does not do so where evidence of election as a member of the other branch of the national Legislature is concerned, or why in the one case it should be necessary to pass upon the legality of the appointment before the relief can be granted, and not on the legality of the election in the other, and this, too, when the authority to appoint is to be found in the same article of the same constitution of the general government, is something which is not only beyond the comprehension of the court, but for which no explanation has even been attempted.

The case of *People v. Forquer*, 1 Breese, 104, is also relied upon in behalf of respondent. A careful consideration of it will disclose that the commission of one as paymaster general, which it was sought to have the secretary seal and countersign, had been signed by the lieutenant governor after the return of the governor to the State. The lieutenant governor had, upon notice from the governor that he would be absent from the State, assumed the duties of governor, and, although the governor had returned and resumed the duties thereof, the lieutenant governor was still claiming to be the lawful executive of the State, upon the theory that the governor had by his absence from the State forfeited his office. It was held by the court that, even assuming the lieutenant governor to be the rightful governor, the Constitution did not authorize him to make the appointment, as the office had never been filled or occupied. In answer to this, it was contended by the relator that the secretary was still compelled to affix the seal and countersign it. The court met this by relying upon the language of the statute, which was that "all commissions required by law to be issued by the governor shall be countersigned by the secretary of state," and holding that the secretary was "only required to countersign those commissions 'required to be issued by law.'" This language was, in effect, held to vest a discretion in the secretary of state, yet not without the court's suggesting that, if it was wrong on the point, there was still ground for refusing the mandamus.

The marked distinction between this case and the one at bar is that neither we nor the secretary of state have the power to pass upon the legality of the governor's act. It is a question between him and the United States Senate. The Illinois court, by assuming that the lieutenant governor was rightfully the executive, could, as against the relator applying for relief, decide that the relator's appointment was illegal, there being no other person occupying the office of paymaster general, (*State v. Gamble*, 18 Fla. 9, 21, 28;) but we cannot say that the governor's act is illegal without usurping the jurisdiction of another tribunal.

If it is the legal duty of the secretary of state to seal and countersign the appointment of Mr. Davidson, we are entirely satisfied, both upon reason and authority, not only that the inability of the court to inquire into the legality of the appointment is not a reason for refusing the writ, but also that a decision upon the le-

gality of the appointment is not necessary to an adjudication of the question of awarding the writ.

IV. The foregoing conclusions bring us to the question whether or not, under the law obtaining in this State, it is the duty of the secretary of state to affix the seal of state to this commission, and countersign the same.

The declaration of the Constitution, (§ 12, art. 16) that "the present seal of the State shall be and remain the seal of the State of Florida," implies that there is such a seal, as does the provision that "the secretary of state . . . shall be the custodian of the great seal of the State." § 21, art. 4. It is not denied that there is such a seal, nor that the respondent is the actual and legal custodian of it. There can be no doubt that the purpose of a seal of state is to authenticate or prove the genuineness of charters, grants, and other public instruments emanating from the State. England, from whom we inherit governmental customs of law not peculiar to ourselves, first adopted a great seal in the eleventh century, and its general use for authenticating grants and charters and other public instruments became established about the middle of the thirteenth century. The United States and every State has a great seal, and the adoption of one by the government is for the purpose of authenticating its acts, and securing public recognition of the same as genuine. The public seal of a State proves itself, it is a matter of notoriety, and may be taken notice of as a part of the laws of nations acknowledged by all. The public national seal of a kingdom or a sovereign state is, by common consent and the usage of civilized communities, the highest evidence and the most solemn sanction of authenticity in relation to proceedings, either diplomatic or judicial, that is known in the intercourse of nations. *Griswold v. Pittsairn*, 2 Conn. 85; *Church v. Hubbard*, 5 U. S. 2; *Oranch*, 287, 2 L. ed. 249; *The Santissima v. Trinidad*, 20 U. S. 7; *Wheat*, 268, 5 L. ed. 454, 2 Bl. Com. 346, 347; *Story*, Conf. Laws, § 643; *Toml. Law Dict.* title *Great Seal of England*. The Constitution of our own State (§ 14, art. 4) has directed that "all grants and commissions shall be in the name and under the authority of the State of Florida, sealed with the great seal of the state, signed by the governor, and countersigned by the secretary of state;" and our statute law has made it the duty of the secretary of state to record all . . . orders, messages, and other official acts and proceedings of the governor; and it is made the duty of the governor before issuing any order, or other promulgation of any official act or proceeding, (except military orders,) to deliver the same, or a copy thereof, to the secretary of state to be recorded. § 2, p. 933, McClell. Dig.

We see from the provision of our own Constitution last quoted that the purpose of its framers, and the people who adopted it, was that all commissions issued by the State should be sealed with the great seal of state, signed by the governor, and countersigned by the secretary of state. That it is, under this section, the official duty of the officers named to sign and countersign, and the duty of the secretary of state, who, by another section of the same article, is made the custodian of the seal, and

whose countersigning is an attending testimony of the authorized use of such seal, to seal all commissions emanating from the State, is the only interpretation of the organic law that would not violate common reason. What is a "commission," in the sense in which it is here used? It is written authority or letters patent issued or granted by the government to a person appointed to an office, or conferring public authority or jurisdiction upon him. Bouvier's, Tomlin's and Abbott's Law Dictionaries, *Commission*; *United States v. Reyburn*, 31 U. S. 6 Pet. 352, 8 L. ed. 424. The commission is not the appointment itself, but it is the evidence of the appointment. *Jeter v. State*, 1 McCord, L. 238. Where the appointment is evidenced by no act but the commission, the two, says Judge Marshall in *Marbury v. Madison*, *supra*, seem inseparable, it being impossible to show an appointment otherwise than by proving the existence of the commission, which though not necessarily the appointment, is the conclusive evidence of it. The president's signature, said he, is the warrant for affixing the great seal to the commission, and it attests the verity of the president's signature; and that in all cases of letters patent certain solemnities are required by law as evidence of the validity of the instrument, and that in cases of commissions the sign-manual of the president and the seal of the United States are these solemnities. In *United States v. Le Baron*, 60 U. S. 19 How. 73, 15 L. ed. 525, it was held that when a person has been nominated to an office by the president, confirmed by the Senate, and his commission has been signed by the president, and the seal of the United States affixed thereto, his appointment to that office is complete; that Congress might provide, as it had done in that case, that certain acts should be done by the appointee before he should enter upon the possession of the office under his appointment; that such acts became conditions precedent to the complete investiture of the office, but they were to be performed by the appointee, not by the executive; that all the executive could do to invest the person with his office has been completed when the commission has been signed and sealed; and when the person has performed the required conditions his title to enter on the possession of the office is also complete. Judge Westcott, speaking for the justices of this court under date of October 28, 1875, said: "When the commission of a justice of the peace is signed and sealed, all that is necessary to his investiture of the office is complete. Under the practice in this State, all the conditions as to taking oaths, etc., are complied with before the commission issues. To him, upon the signing and sealing the commission, belongs the office." *Advisory Opinion*, 15 Fla. 736, 738. See also *People v. Murray*, 70 N. Y. 521; Mechem, Pub. Off. § 114.

In *Conger v. Gilmer*, 32 Cal. 75, it was held that an appointment to office by a board of supervisors was not complete until the appointee had received the certificate of the same under the seal of the board, signed by the proper officers, but the rule was different in cases of election by the people; and in *State v. Allen*, 21 Ind. 516, that where the title to an office is derived solely by executive appoint-

ment the commission of the executive is the only legal evidence of such title. See also *People v. Whitman*, 10 Cal. 88.

There can be no doubt that the word "commissions," as used in the above section of our Constitution, at least includes appointments to office. The provision in the Constitution of the United States, that the executive of any State may, under the circumstances therein specified, "make temporary appointments" of senators, carries with it the power to issue written evidence of any such appointment, and, not only this, but it also implies the duty to do so. It imports that the executive authority of the State shall execute such evidence of the authority of the appointee as can be presented to the Senate of the United States, and be passed upon by that body. Such credentials must, in the very nature of things, to serve these ends, be written, and cannot be in parol. In the case of *People v. Murray*, *supra*, the view of the court is that there cannot be an appointment to office by parol or word of mouth, unless it was permitted by the terms conferring the power; and we are satisfied that none other than a written appointment is practicable, or is within the meaning of the words of the Constitution. The way in which things have for a long series of years been done by those legally authorized and required to do them is a safe index to the intention of the law-makers as to how it was intended they should be done; and an examination of the proceedings of the Senate shows in each of the numerous cases we have been able to find that the "credentials" of the appointees were presented to the Senate, and in every instance but one the entry is that they were also read before the appointee was seated, and the oath of office was administered to him, the excepted case being one where the Senate was not organized when the credentials were presented. See *Case of Niles*, Senate Jour. Dec. 21, 1835, p. 43; *Case of Atherton*, Cong. Globe, Dec. 1, 1845, p. 1; *Case of Whyte*, Cong. Globe, July 14, 1864, p. 4024; and the *Case of Key*, Cong. Rec. Dec. 6, 1875, p. 165.

Any written appointment of a person to an office by the governor of this State is a commission, and the express fiat of the Constitution is that all commissions issued under the authority of the State shall be signed by the governor, and sealed with the great seal of state, and countersigned by the secretary of state. The purpose of the Constitution is that the warrant of all persons professing to represent the authority of the State shall be in the form indicated, and none other. The authority to appoint to an office, or to delegate the exercise of the State's power, contemplates conformity to this section of the Constitution in making the appointment; and this section makes it the duty of the officers named, whenever the power of appointing is exercised, to see that the commission or written evidence of the appointment is signed and authenticated as there-in directed.

It is contended that this provision of the State Constitution is not applicable to the case at bar, for the reason that the power to appoint is not found in, or conferred by, the State Constitution or any law of the State; or, as it is otherwise put, because it is found in, or "conferred solely by, the Constitution of the United

States, the supreme law of the land." Counsel for respondent, while conceding that, under the Federal Constitution, the time, place, and manner of holding elections for senators and representatives are to be prescribed by the State Legislatures, subject to the paramount right of Congress to make or alter such regulations, except as to the place of choosing senators, yet says: "But Congress has no right to prescribe, nor has the State any right to prescribe, the time or manner or mode of certifying the appointment by the governor of senators to fill vacancies. In the exercise of his appointing power the governor of a State, under the Constitution of the United States, is exempted from any interference or control by any authority, legislative or judicial, federal or state. It is purely political;" and upon this theory he asserts the entire federal legislation is based, it regulating the manner of certifying an election, but saying nothing as to certifying an appointment.

The governor of a State, in appointing a senator, exercises an executive function of the State; and it is none the less so because the power is conferred by the Constitution of the United States upon "the executive." The authority is conferred upon the executive power of the State, and is inherent in that power, however it may be constituted by the State, and not upon any functionary or creature of the federal government, and whether it be lodged in one governor, or an executive council of three or more, or otherwise. The purpose of the provision is to preserve the perpetual representation of the State in the Senate, and an appointment made by the governor of Florida is the exercise of state authority, and none the less so because the State derives it from the Federal Constitution. He does it as the executive and officer of a State, and not as an officer of the United States. The Legislature of a State, in electing a senator, acts for and represents the State, and does so as the Legislature of the State, and in the exercise of the State's right to be represented in the Senate or government of the United States by senators thus chosen. That it is the duty of the Legislature to elect,—a duty not only to the State, but also to the general government,—in view of the nature of our government, cannot be denied, but the duty does not change the character of the body and make it a Federal Legislature. The grant to Congress of power to alter and make regulations as to the elections of representatives and senators was founded on the possibility that the State Legislatures, agencies of the State, might be remiss in the premises. The authority given to the state executive to appoint is not, except as to the mode of appointment, a limitation upon the state's power to choose its senator, but was to preserve and execute that power, and secure representation to the State, through the action of its own executive under certain contingencies, and by the two processes the power of the State to choose its senators at all times and under all circumstances preserved. Mr. Madison, in speaking of the selection of senators by state legislatures, said: "It is recommended by the double advantage of favoring a select appointment and of giving to the state governments such an agency in the formation of the federal govern-

ment as must secure the authority of the former, and may form a convenient link between the two systems." And, as to the equal number of senators allowed each State, he observes that it "is at once a constitutional recognition of the portion of the sovereignty remaining in the individual States for preserving that residuary sovereignty. So far as to the equality it ought to be no less acceptable to the large than to the small states, since they are not less solicitous to guard, by every possible expedient against any improper consolidation of the states into one simple republic." The Federalist, No. 63, pp. 346, 347.

In the absence of legislation by Congress providing the form in which the appointment of a senator shall be authenticated, it is unnecessary to discuss the power of Congress to legislate upon the subject. If it has not such power, its deprivation of it is no reason why the State cannot exercise it. The Senate has as much power to inquire into the legality of the appointment of a senator by the executive power of a State as into that of the election of one by a Legislature. If it has not, any appointee can take his seat in the Senate upon the assumption that the governor has appointed him, and given him evidence of the appointment satisfactory to executive discretion. In all cases of any alleged executive appointment a primary question for the Senate is, Has the executive authority of the State made an appointment? Its validity as an executive appointment cannot be investigated until it is satisfactorily shown that there has been an appointment in fact by the executive. Under the Constitution and laws of the United States, and of this State, there is no known mode of evidencing or proving that an appointment of a United States senator, or any other officer, has been made by the executive of this State, except, or unless and until, a commission has been duly signed, sealed, and countersigned in accordance with the above-quoted provision of our organic law. § 14, art. 4, Const. It is true that it is the duty of the secretary, under a statute referred to above, to record all commissions, like any other executive act; but this duty does not arise, nor can it be legally performed, until the commission has been signed, sealed, and countersigned, as is clearly established by the cases of *Marbury v. Madison*, and *United States v. Le Baron*, *supra*, and implied in the Advisory Opinion of October 28, 1875; for until then it is not complete, and, even if the incomplete commission should be permitted by the appointee to remain in the secretary's office, no certified copy of it would be effectual to prove the appointment, for until complete it is not legal evidence of the title to the office. The law does not contemplate that it shall remain in the office, but that it shall be recorded as soon as complete, and be delivered to the appointee, as the evidence of his title. When complete, it is the appointee's property, and its surrender to him may be compelled by mandamus brought on his relation. *Marbury v. Madison*, *supra*.

In the absence of any provision in the Constitution or statutes of the United States, when a governor of this State wishes to appoint a senator, the only legal way of evidencing his act, so as to command the recognition of it by

the United States Senate as his official act, is to comply with the formula which the people of the state have in our Constitution declared to be the proper form for exercising the executive power of appointing to office. Any appointment of a senator not thus signed, sealed, and countersigned is not authenticated in the manner which our organic law—the only law regulating the subject—provides, and is not entitled to recognition by the Senate of the United States as a commission or appointment as United States senator from the State of Florida, or its executive authority acting for the State. Assuming that Congress has the authority to prescribe how such an appointment should be authenticated, until it does so the only reasonable conclusion is that this executive act of the state government shall be evidenced in the manner provided by state law in such cases, and the only appointments or commissions of senators extended upon the proceedings of Congress within our reach appear to have been signed by the governor, sealed with the great seal of state, and attested or countersigned by the secretary of state. We have been unable to find anything that suggests any other possible way of evidencing the executive act than that provided by the provision of our own organic law, nor is there in the Constitution of the United States anything that prevents the State from regulating the evidence of this official act, at least until Congress shall act in the premises. The governor, as the representative of the State, and her chief executive power, whose duty it is to see that the laws are enforced, is seeking to have an act done by him as her chief magistrate, authenticated in the only manner that it can be done to command recognition of it as done by him, and, in our judgment, he is, as her representative, entitled to have it done, unless there is in the nature of the act required of the secretary of state something involving the exercise of official discretion.

It is in our judgment clearly the official duty of the secretary to affix the seal of the State to the appointment, and to countersign or attest the same as evidencing the official act of the executive authority of the State in appointing a senator in the Congress of the United States, and this duty is one involving no official discretion or judgment on his part. In the case of *State v. Wrotnowski*, 17 La. Ann. 156, a mandamus was sought to require the secretary of State of Louisiana to affix the seal of state, and countersign a commission signed by the governor appointing the relator sheriff of the parish of Orleans. The secretary replied that the governor was attempting to issue the commission without warrant or authority of law, and in direct violation of the Constitution and laws of the State; that the office of sheriff was then held by another person under a commission which would not expire until the next regular election for the office in question; and that the governor had no authority to supersede the incumbent sheriff. The statutes of Louisiana enacted that there should be a public seal for authenticating the acts of the government, and that the secretary of state, who, as in Florida, was a constitutional officer, should be its keeper, and affix it to all official acts, the laws alone excepted. The governor was

vested with the appointing power in certain cases; but it was not shown or pretended in the opinion that he had legally exercised it in the case. "The secretary of state," said the court, "is not to suspend his action to inquire why and wherefore any appointment by the governor is made. His duty is plain. He is not directed, but ordered, by law, to perform it. When commissions from the governor need authentication, he shall affix his official signature and the public seal of state, for these are official acts. Whatever improvidence or illegality there may be in the issuing of commissions, that concerns him not. His authenticating any official act can never compromise him; for he has no discretion to exercise regarding it."

Where this right of supervision, which is almost equivalent to a veto power, in the secretary of state, as it is seriously contended it is, it would, indeed, produce startling consequences. The secretary of state could paralyze at will constitutional appointments made by the executive. . . . The secretary of state cannot go behind commissions officially presented to him for authentication.

When two commissions, duly authenticated, for the same office, are extant, and it becomes necessary to determine which of the two appointees is legally entitled to the office, that issue, presented in a proper manner and at a proper time, can be entertained; . . . but the courts will not inquisitively seek to know upon what evidence the executive acted in the performance of a constitutional duty; at all events, in advance of the consummation of an official act."

The distinction between the above case and that of *People v. Forquer*, 1 Breese, 104, is clear. There is no language in the Constitution of the United States or in our own, which can be construed to give the secretary any discretion or judgment as to whether the governor's action in appointing a senator is legal.

The duty devolved upon the secretary of state in the case before us is merely to authenticate the commission signed and presented to him by the admitted rightful executive of the State. It is purely ministerial, and involves no exercise of discretion. There is from the very nature of the duty no place in it for the exercise of judgment. It involves nothing but affixing the seal and signing officially. It is entirely impossible for anyone to infer from, or to find implied in, the simple duty of authenticating this evidence of an appointment to an office known to exist, and which, under certain circumstances, the executive of the State has authority to fill, the further duty or the power to question the legality of the exercise of the authority to appoint. If such duty or power of inquiry exists at all, then it covers every question as to legality of the appointment that can be made. It extends not only to the question of whether or not there is a vacancy, but also to the appointee's qualifications as to age, residence, or citizenship. If it exists at all, then the power conferred by the Constitution of the United States upon the executive of a State to appoint a senator is not subject simply to the exclusive jurisdiction of the Senate as to the election or appointment and qualifications of its members, but to another jurisdiction, which is the judgment of the secretary of state

and has the power to deny to the governor the right of the constitutional evidence that he has even made an appointment. If this power obtains in the case of the appointment of a senator; it, arising as it must and alone can from the mere duty to authenticate a commission, exists also in the case of every justice of the peace, county commissioner, or other county officer, and of every State officer of whom under any contingency the governor may have the power to make an appointment. In so far as the existence of the power is concerned there is no possible distinction in the several cases. To say that it would not be exercised is no answer, but is an assumption of the existence of the power. Knowledge as to when or by whom the power, if its exercise is recognized, will be used or renounced, is not a subject for our consideration.

In authenticating the executive appointment of a senator, the secretary of state in no wise commits himself to the legality of such act. The governor is not responsible to the secretary, nor the secretary for him. If the act is illegal, the authentication of the secretary is the evidence of its consummation; it proves what the governor has done, but it does not involve the secretary in responsibility for it. The secretary's certificate to the transcript of the legislative proceedings furnished Mr. Call is official evidence of what those proceedings in fact were, and nothing more, and in no wise implies any opinion of his as to the regularity or legality of such proceedings; and the same is true, no less nor any more, of his authentication of the executive act in question. Nor does the appointment, though duly authenticated, have any effect upon the legality of Mr. Call's election, or towards creating any vacancy which does not otherwise exist. If an award of the writ would have any such effect, we would, and upon the plainest principles should, refuse to award it, and for the reason that Mr. Call is not before the court, nor is Mr. Davidson, and mandamus is not the remedy for settling a conflict for an office, even where the right to decide such a contest is in the court, which is not the case here. *People v. Forquer, supra*; *People v. New York*, 3 Johns. Cas. 79; *State v. Hyams*, 12 La. Ann. 719, cited in *State v. Wrotnowski*, 17 La. Ann. 168.

V. It is also contended that neither the State nor the governor has any such interest in relation to the specific act sought to be enforced as authorizes or justifies the institution of this suit.

It is entirely clear from the authorities, (*Marbury v. Madison*, *United States v. LeBaron* and *Advisory Opinion, supra*), and what has been announced in preceding portions of this opinion, that the executive or governmental duty of completing a commission is not consummated until it has been sealed and countersigned. Even admitting that, when a commission has been signed and delivered by the governor to the secretary of state, the appointee named therein, who may have previously taken the oath and given bond or done anything necessary to justify him in entering into the office upon the perfection of the commission, has such a private interest therein as gives him a status to require, through the instrumentality of this writ, the sealing and

countersigning, or admitting that the executive power of revoking his action has passed, as soon as a commission so signed has been delivered to the secretary, or even as soon as it has been signed with the intention of such delivery, these positions and concessions, if proper, are in no way inconsistent with, nor do they affect, the interest of the public in the appointment and commissioning of public-officers, nor do they remove the fact that the governor is charged with the "care that the laws be faithfully administered." § 6, art. 4, Const.

The commissioning of a public officer is not at any stage of its progress a mere matter of private interest. The entire public are directly interested in the consummation of his appointment, in order that he may perform the duties of his office, which duties and the necessity of the performance thereof to the public account, not only for the appointment, but for the creation of the office itself. Of this interest of the public in having offices filled, and commissions sealed and countersigned or completed, so that the title to the office shall vest in, and the performance of its duties become incumbent upon, the appointees, the governor is the constitutionally designated representative or trustee of the people, and as such he has the right, and it is his duty, to take such measures as will secure the benefits of the same to the people. The duty of commissioning officers cannot in reason, nor without great detriment to the public, be transferred to inchoate appointees. If it is thus transferred, and the secretary of state shall refuse to authenticate appointments which the governor may deem it his duty to make, the filling of offices will depend, not upon official duty, but on the financial ability and the disposition of appointees to litigate. It will remit to the private citizen and impose upon private resources, a public duty which the supreme court of the United States and our own court tells us is not performed until the commission is complete. The governor, in presenting the petition for this writ, has acted in his official capacity, and in behalf of the State, and not in behalf of any private interests. In *Kentucky v. Dennison*, 65 U. S. 24 How. 66, 97, 16 L. ed. 717, 725, it is said: "In the case of *Georgia v. Madrazo*, 26 U. S. 1 Pet. 110, 7 L. ed. 78, it was decided that, in a case where the chief magistrate of a State issued, not by his name as an individual but by his style of office, and the claim made upon him is entirely in his official character, the State itself may be considered a party on the record. This was a case where the State was the defendant. The practice, where it is plaintiff, has been frequently adopted of suing in the name of the governor in behalf of the State, and was indeed the form originally used and always recognized as the suit of the State." It is the settled law that where writs of mandamus issue, as they may, upon the relation of a private citizen, to compel the performance of a public duty, the interest in which is common to the whole community, the State is the real plaintiff. *State v. Jefferson County Comrs.* 17 Fla. 707; *Hamilton v. State*, 3 Ind. 452; *Pike County v. People*, 11 Ill. 202; *Ottawa v. People*, 48 Ill. 238; *People v. Collins*, 19 Wend. 56; *People v. Halsey*, 37 N. Y. 314; *State v. Marshall County Judge*, 7 Iowa, 186, 202.

The special interest of the private relator is important only where the matter is one solely of private right. Whether we hold the State or the governor, as the chief executive, to be the real plaintiff in this case, we have no doubt of the power or duty of the governor to act. *State v. Dubudet*, 22 La. Ann. 602.

VI. That there is no other adequate remedy is clear from the fact that the commission must be complete before it can be recorded, or a copy of the original can be evidence of the appointment. "In the case of commissions, the law orders the secretary of state to record them. When, therefore, they are signed and

sealed, the order for their being recorded is given." *Marbury v. Madison*, 5 U. S. 1 Cranch, 161, 2 L. ed. 68. Until signed, sealed, and countersigned, there is no legal evidence of an appointment of which a certified copy can be made.

VII. Upon the case made by the pleadings, our conclusion is that *the peremptory writ should be awarded*; but, in view of the character of the parties, we will suspend until Monday next any formal order in the premises, further than one adjudging the return of the respondent insufficient, and sustaining the demurrer thereto.

VERMONT SUPREME COURT.

Asaph P. CHILDS

v.

J. Edward MERRILL.

(.....Vt.....)

1. False representations as to the specific articles of property which be pos-

NOTE.—*Fraud in obtaining credit.*

False statements as to his debts and means, made by a purchaser to induce credit, are fraudulent. *Johnson v. Peck*, 1 Woodb. & M. 34.

False statements made to procure credit that a purchaser is solvent and able to pay his debts are fraudulent. *Ensign v. Hoffield* (Pa.) 3 Cent. Rep. 584.

False statements by an insolvent purchaser of goods as to the amount of his capital and the condition of his business constitute fraud. *Nichols v. Michael*, 23 N. Y. 264, 80 Am. Dec. 259.

A man's statement that a note indorsed by his own firm is as good as the bank of England constitutes a fraud if the firm is in fact insolvent and the note worthless whether he knew of the insolvency or not. *Rothschild v. Mack*, 115 N. Y. 1.

A false statement by an active partner as to the assets and liabilities of his firm is, though made without knowledge of its falsity, fraudulent if made without inquiry which good faith requires of him. *Morrison v. Adoue*, 78 Tex. 225.

A man's statement, to obtain credit, that he is "doing a safe business" and that his note is sure to be paid if false, constitutes fraud. *Thompson v. Rose*, 16 Conn. 71, 41 Am. Dec. 121.

So of statements made by a purchaser knowingly insolvent, that he is "doing a good business." *Hunter v. Hudson River I. & M. Co.* 20 Barb. 494.

But in Vermont a false statement by a purchaser that he was "safe to be trusted and given credit to" was held not sufficient to constitute fraud. *Jude v. Woodburn*, 27 Vt. 415.

Also that a false statement by a person for the purpose of obtaining credit, that he has bank bills of a certain amount, and that another person named owes him a specified sum, will not sustain an action on the case. *Dyer v. Tilton*, 23 Vt. 813.

On the other hand it was held to be a question for the jury whether one's statement that he could pay all his debts and not have his real estate incumbered more than a stated sum was a fraudulent statement of fact or a mere matter of opinion. *Morse v. Shaw*, 124 Mass. 59.

And to similar effect as to statements concerning a third person. *Stubbs v. Johnson*, 127 Mass. 212.

A false statement that a purchasing corporation was out of debt and had unincumbered property of a stated value was also held fraudulent. *McClellan v. Scott*, 24 Wis. 81.
14 L. R. A.

sesses, knowingly made by one for the purpose of, and which result in, inducing another to indorse for him, are actionable if they cause damage to the latter.

2. A heavily incumbered condition of real estate will be presumed to continue unless something to the contrary appears so that its existence at a certain date is sufficiently averred

False statements as to the ownership of specified property, such as a team, farm, etc., made to obtain credit, are fraudulent. *Hodgden v. Hubbard*, 18 Vt. 804, 46 Am. Dec. 181.

This seems to state fairly the general rule on the subject, and to be supported by all the authorities, unless it may be that of *Dyer v. Tilton*, *supra*.

A false statement of a specific fact as to the capital of a firm, made by one member in order to obtain credit, is fraudulent although he expected that payment would be made and the vendor suffer no loss. *Judd v. Weber*, 5 New Eng. Rep. 225, 55 Conn. 267.

But the statement of a purchaser of goods, who is in fact insolvent, that his assets far exceed his liabilities, if made in good faith believing it to be true, is not fraudulent. *Johnson v. Bent* (Ala.) June 24, 1891.

A statement by a purchaser of that part only of his indebtedness which is connected with the business for which a purchase is made, without including his other indebtedness, is fraudulent when made in reply to an inquiry by his vendor as to his financial condition. *Collins v. Cooley* (N. J.) 12 Cent. Rep. 538.

Representations to commercial agencies.

False representations as to financial condition, made to a commercial agency for the purpose of obtaining credit, may constitute fraud (*Eaton v. Avery*, 65 N. Y. 81; *Naugatuck Outtery Co. v. Babcock*, 22 Hun, 483; or estoppel. *Stevens v. Ludlum*, 12 L. R. A. 270, 46 Minn. 160).

A representation of insolvency made to a commercial agency is a continuing one and becomes fraudulent as to those who give credit on the faith of it after refusal to make another report without withdrawing the first one. *Claflin v. Flack*, 26 N. Y. 8. R. 728.

A statement made to a commercial agency as to the financial condition of a trader, which afterwards becomes worse, does not thereby become fraudulent unless he knows or should know that the credit is extended upon the strength of his original rating in the agency. *Cortland Mfg. Co. v. Platt*, 83 Mich. 419.

Intent; concealment of insolvency.

A preconceived design not to pay for goods purchased constitutes a fraud on the part of the

by an allegation of its existence two or three weeks earlier.

3. That one is compelled to pay a note which he was induced to indorse for another through fraudulent misrepresentations of the latter as to his property imports some damage within the rule that damage must exist to sustain an action for fraud.

4. Retention of some security which he has received from defendant by one who was to his damage fraudulently induced to indorse notes for the latter will not preclude the maintenance of an action for the fraud.

(July 28, 1891.)

EXCEPTION by defendant to a ruling of the Bennington County Court overruling a demurrer to the declaration in an action

brought to recover damages for losses alleged to have been caused by false and fraudulent representations made by defendant. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. C. H. Darling, for defendant:

The misrepresentation is in the alleged fact that the land was incumbered on said 26th day of November.

The allegation is that the mortgage was given on the 12th day of December, and as there is no averment that the land was then incumbered it will be presumed that it was not.

1 Chitty, Pl. 283, 237; *Vaughan v. Everts*, 40 Vt. 556; *Wooster v. Bullock*, 52 Vt. 48.

The pleader has made the time descriptive and therefore material.

Derragon v. Rutland, 2 New Eng. Rep. 197, 58 Vt. 128; *State v. O'Keefe*, 41 Vt. 691; *State v. Cook*, 38 Vt. 437; *Gates v. Bowker*, 18 Vt. 23.

purchaser, which will invalidate the sale as between the original parties. *Donaldson v. Farwell*, 98 U. S. 681, 23 L. ed. 898; *Hall v. Naylor*, 18 N. Y. 588, 75 Am. Dec. 299; *Hennequin v. Naylor*, 24 N. Y. 129; *Buckley v. Artcher*, 21 Barb. 585; *Ash v. Putnam*, 1 Hill, 308; *Roth v. Palmer*, 27 Barb. 652; *Meacham v. Collignon*, 7 Daly, 402; *Durell v. Haley*, 1 Paige, 492, 2 L. ed. 727, 19 Am. Dec. 444; *Cary v. Hotelling*, 1 Hill, 311, 37 Am. Dec. 823; *Barnard v. Campbell*, 65 Barb. 286; *Wiggin v. Day*, 9 Gray, 97; *Dow v. Sanborn*, 3 Allen, 181; *Parker v. Byrnes*, 1 Lowell, 539; *Morrison v. Shuster*, 1 Maackey, 190; *Ross v. Miner*, 11 West. Rep. 161, 67 Mich. 410; *Taylor v. Mississippi Mills*, 47 Ark. 247; *Farwell v. Hanchett*, 6 West. Rep. 349, 120 Ill. 573; *Johnson v. O'Donnell*, 75 Ga. 453; *Bidauld v. Wales*, 19 Mo. 36, 36 Am. Dec. 327; *Fox v. Webster*, 46 Mo. 181; *Thompson v. Ross*, 16 Conn. 71, 41 Am. Dec. 121; *Robinson v. Levi*, 81 Ala. 134; *Ferguson v. Carrington*, 9 Barn. & C. 59; *King v. Phillips*, 8 Bosw. 603; *Stewart v. Emerson*, 53 N. H. 301; *Burrill v. Stevens*, 73 Me. 365, 40 Am. Rep. 368; *Oswego Starch Factory v. Lendrum*, 57 Iowa, 573; *Loeb v. Flash*, 65 Ala. 526; *Spira v. Hornthall*, 77 Ala. 137; *Wabash, St. L. & P. R. Co. v. Shryock*, 9 Ill. App. 323; *Shipman v. Seymour*, 40 Mich. 275; *Des Farges v. Fugh*, 98 N. C. 31, 53 Am. Rep. 246; *Brower v. Goodyer*, 38 Ind. 572; *Davis v. McWhirter*, 40 U. C. Q. B. 568.

In Massachusetts such intent is made fraudulent by statute. *Dow v. Sanborn*, 3 Allen, 181.

For a creditor to purchase from a third person on a promise to pay at a certain day, but with intent to offset his claim against the vendor instead of paying as agreed, is a fraud which prevents him from obtaining a good title. *Harner v. Fisher*, 58 Pa. 453.

But the mere failure of a purchaser of goods to disclose his insolvency to the vendor is not fraudulent in the absence of an intent not to pay for the goods. *Nichols v. Pinner*, 18 N. Y. 296; *Hall v. Naylor*, 18 N. Y. 588, 75 Am. Dec. 299; *Hennequin v. Naylor*, 24 N. Y. 129; *Johnson v. Monell*, 2 Abb. App. Dec. 470; *Mitchell v. Worden*, 20 Barb. 253; *Fish v. Payne*, 7 Hun, 568; *Morris v. Talcott*, 96 N. Y. 100; *Conyers v. Ennis*, 2 Mason, 226; *Biggs v. Barry*, 2 Curt. C. C. 259; *Kitson v. Farwell*, 132 Ill. 327; *Dalton v. Thurston*, 3 New Eng. Rep. 383, 15 R. I. 419; *LeGrand v. Bufaula Nat. Bank*, 81 Ala. 123, 60 Am. Rep. 140; *Kyle v. Ward*, 81 Ala. 129; *Loeb v. Flash*, 65 Ala. 523; *McCormick v. Joseph*, 77 Ala. 228; *Spira v. Hornthall*, 77 Ala. 137; *Hornthall v. Schonfeld*, 79 Ala. 107; *Powell v. Bradlee*, 9 Gill & J. 220; *Talcott v. Henderson*, 31 Ohio St. 163; *Morrill v. Blackman*, 48 Conn. 234; *Kelsey v. Harrison*, 20 Kan. 142; *Mears v. Wales*, 3 Houst. 581; *Bedington v. Roberts*, 25 Vt. 686; *Ex parte Whittaker*, L. R. 10 Ch. App. 444; *Cross v. Peters*, 1 Me. 373, 10 14 L. R. A.

Am. Dec. 78; *Garbutt v. Prairie Du Chien Bank*, 23 Wis. 384; *Bell v. Ellis*, 33 Cal. 620, overruling *Seligman v. Kalkman*, 8 Cal. 207.

Yet the circumstances may show that a concealment of insolvency by a purchaser of goods was fraudulent evincing an intent not to pay for them. *Fechheimer v. Baum*, 2 L. R. A. 153, 37 Fed. Rep. 167; *Johnson v. Monell*, 2 Abb. App. Dec. 470; *Wright v. Brown*, 67 N. Y. 1; *Powell v. Bradlee*, 9 Gill & J. 220; *Hall v. Naylor*, 6 Duer, 71; *Mulliken v. Miller*, 12 R. I. 296; *Davis v. McWhirter*, 40 U. C. Q. B. 568; *Van Kleek v. Leroy*, 4 Abb. Pr. 431; *Talcott v. Henderson*, 31 Ohio St. 163. *Contra*, *Backentoss v. Speicher*, 31 Pa. 323; *Smith v. Smith*, 21 Pa. 372, 60 Am. Dec. 51; *Rodman v. Thalheimer*, 75 Pa. 232.

These Pennsylvania cases hold that there must be artifice practiced which is intended and fitted to deceive in order to constitute fraud.

Concealment of insolvency by one who obtains securities to use in making good his own defalcation to a bank with a promise to replace them, which is utterly beyond his ability to do, constitutes a fraud on his part. *Rawdon v. Blatchford*, 1 Sandf. Ch. 344, 7 L. ed. 353.

The intent of a purchaser to be fraudulent must be never to pay for the goods and not to pay at the time agreed. *Bidauld v. Wales*, 20 Mo. 347.

A debtor must have known that he must fail before the time for payment should come in order to make his concealment of his insolvency a fraud on one of whom he purchases goods. *Bach v. Tuch*, 32 N. Y. S. R. 941.

Purchase of goods by an insolvent in the course of a business, knowing that he cannot continue it and that the property must be surrendered to his creditors is equivalent to fraud which will prevent the property purchased from passing under his assignment for creditors. *Chaffee v. Forc*, 2 Lana. 61.

Although a preconceived design not to pay with failure to disclose insolvency are held not sufficient in North Carolina to constitute fraud unless there is a request for information on the subject, if after such request one fails to give the information, but diverts inquiry and immediately after the purchase goes into bankruptcy, a case of fraud is made out. *Wilson v. White*, 80 N. C. 280.

It is a question of fact for the jury whether a purchaser of goods had such preconceived design not to pay for them. *Byrd v. Hall*, 2 Keyes, 646; *Hall v. Naylor*, 18 N. Y. 588, 75 Am. Dec. 299; *Hennequin v. Naylor*, 24 N. Y. 129; *Buckley v. Artcher*, 21 Barb. 585; *Johnson v. Monell*, 2 Abb. App. Dec. 470; *Biggs v. Barry*, 2 Curt. C. C. 259; *Bristol v. Wilmore*, 1 Barn. & C. 515; *Wabash, St. L. & P. R. Co. v. Shryock*, 9 Ill. App. 323. B. A. R.

Fraud is not presumed to have entered into or tainted any transaction.

1 Chitty, Pl. 231; 1 Bigelow, Fraud, ed. 1890, p. 115, *Pleading; Hamblet v. Bliss*, 55 Vt. 538; *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 650; *Shepherd v. Worthing*, 1 Aik. 186.

Nor can the court presume that the incumbrance had not been discharged when the mortgage was given nor since and the plaintiff was injured thereby.

Doolittle v. Holton, 26 Vt. 598; *Nye v. Merriam*, 85 Vt. 488.

Before bringing this action the plaintiff must surrender the mortgage or exhaust his remedy thereunder.

Poor v. Woodburn, 25 Vt. 234; *Mallory v. Leach*, 85 Vt. 156, 82 Am. Dec. 625; *Kelly v. Pember*, 85 Vt. 183.

The averment as to the railroad stock or horses sets out simply a promise to be performed in future, and will not support this action.

Best v. Smith, 54 Vt. 617; *Kilton v. People*, 132 Ill. 827; *Davis v. Morris*, 4 L. R. A. 158, 149 Mass. 188; *People v. Healey*, 128 Ill. 9; *Knockton v. Keenan*, 5 New Eng. Rep. 589, 146 Mass. 86; *Lamb v. Stone*, 11 Pick. 527.

The damages must depend immediately upon the tort and not upon a breach of promise.

Nye v. Merriam, 85 Vt. 438; *Lamb v. Stone*, 11 Pick. 527.

Mearns, Batchelder & Bates and J. B. Meacham for plaintiff.

Ross, Ch. J., delivered the opinion of the court:

The contention is whether the declaration, when encountered by a general demurrer, discloses a cause of action. It sets forth that the defendant, being pecuniarily embarrassed and desirous of raising money, procured the plaintiff, as a matter of accommodation, to indorse his promissory note for \$600; and, to induce the plaintiff to make the indorsement, the defendant falsely and fraudulently represented to him that he owned, unincumbered and in fee, certain lands in California, and certain shares of railroad stock, and two horses; and, to secure him for making such indorsement, he would mortgage to him the lands, and give him a lien on the railroad stock and horses; that in reliance upon the truth of the representations, he made the indorsement; that the defendant gave him afterwards a mortgage of the California land, but it was heavily incumbered, so that his mortgage was of little or no value; that the defendant did not own the railroad stock nor horses, and did not and would not give him a lien thereon; that the defendant well knew the falsity of his representations, and made them to deceive the plaintiff; that the plaintiff thereby was deceived, and has had to pay the note; and that the defendant was and is wholly insolvent, and irresponsible.

The representations and indorsement are alleged to have been made on the 26th day of November, 1888, and the mortgage of the California lands to have been given December 12th following. The averment is that they were incumbered on November 26th. The defendant contends that it is not a good averment that these lands were incumbered when the mortgage to the plaintiff was given, December 12th. But the averment that they were heavily

incumbered at the date of the representations declares the falsity of the representations then made, and their condition at that date would be presumed to exist, unless something to the contrary appears at the time the mortgage was given to the plaintiff.

The material averments, however, are the falsity of the representations when made, and that the plaintiff has been damaged thereby. The damage is declared by the allegation that the lands were heavily incumbered by mortgage, by reason whereof the mortgage deed thereof to the plaintiff became and was of little or no value. To sustain an action of this nature, deceit and damage must concur. In these allegations we have known misrepresentations, deceit, and damage. These are the only required elements of an action of fraud, if the misrepresentations are of an actionable character. As said by Croke, J., (*Baily v. Merrell*, 3 Bulst. 95.) "fraud without damage, or damage without fraud, gives no cause of action, but where these two do concur then an action lieth." *Pasley v. Freeman*, 3 T. R. 51. This form of action does not rest upon the defendant's non-performance of his promise to give the plaintiff a lien upon the railroad stock and horses, but upon the deceit consequent upon his misrepresentation that the California lands were free from incumbrance, and that he owned the railroad stock and horses, and the damage resulting therefrom. The plaintiff avers that the misrepresentations were made to induce him to indorse the defendant's \$600 note, and did induce him to indorse it, whereby he has had to pay the note, and has no means of enforcing payment from the defendant. He might have had no means of enforcing payment from the defendant if his inducing representations had been true, but he would be more likely to have. While damage must concur to support the action, the gist of the action is the inducing misrepresentations knowingly made by the defendant. That the plaintiff has had to pay the defendant's note imports some damage, even if he could enforce payment from the defendant. Hence the allegations in regard to both classes of property are sufficient to sustain the action, if they were of an actionable character. Nor would the plaintiff have to rescind, by tendering back the mortgage he received of the previously incumbered California land, to entitle himself to maintain this form of action. *Mallory v. Leach*, 85 Vt. 156, 82 Am. Dec. 625; *Kelly v. Pember*, 85 Vt. 183.

On the allegations, that mortgage, subsequently given, was not the inducing consideration for the plaintiff's indorsement, but the representations that the defendant owned the railroad stock and horses, and owned the land free from incumbrance, and would give the plaintiff security upon all of them. Retention of the slight security, if any, he thereby obtained would not waive the tort. The plaintiff, by tendering back the mortgage, upon learning the falsity of the defendant's representations, could not have relieved himself from his liability as indorser upon the defendant's note to the bank. Rescission is required only in cases in which it would place the parties *in statu quo*.

But it is further contended that the defendant's false representations were of his own pe-

cuniary resources, and that an action for deceit does not lie for such misrepresentations; and he cites in support of this proposition *Fisher v. Brown*, 1 Tyler, 387, 4 Am. Dec. 726; *Williams v. Hicks*, 2 Vt. 36, 19 Am. Dec. 693; *Dyer v. Tilton*, 23 Vt. 313; *Jude v. Woodburn*, 27 Vt. 415, and *Best v. Smith*, 54 Vt. 617. *Fisher v. Brown* was heard on demurrer to the declaration. The declaration alleged that the defendant purchased of the plaintiff a horse on credit, and gave his note therefor on time, by falsely representing that he owned a farm in an adjoining town, and had a debt due him there. The suit was brought before the note fell due. The declaration contained no allegation of special damage. The court held the declaration insufficient on three grounds: (1) when a man seeks to obtain credit for a chattel, and boasts his ability to pay, the vendor should exercise discretion and vigilance, and make inquiry, and not rely solely upon the representations of the purchaser as to his pecuniary responsibility; (2) that there was no allegation of special damage arising from the misrepresentations; (3) where the credit is a part of the contract, it is so material a part of it that, if the action be brought within the time limited for credit, it cannot legally be supported, unless it was not a bona fide purchase at the time by the vendee.

Williams v. Hicks was an action upon a promissory note given for a patent-right for the manufacture and sale of saddles. The misrepresentations relied upon in defense related to what the vendor claimed to have been offered for the right to manufacture and sell in certain counties, and that he had a uniform price for a license to manufacture saddles in New Hampshire. It did not appear that the note was given for the right to manufacture and sell in the counties named. It was held that these representations, if false, did not show a defense to the note; that they did not show that the defendant suffered any damage, nor did he say that they induced the purchase. It is intimated that they did not extend beyond the right of a vendor to recommend his property, and should not be relied upon by the purchaser.

In *Dyer v. Tilton* the defendant obtained credit of the plaintiff by falsely representing that he possessed two bank bills, one for \$100 and the other for \$20, and that a certain person owed him. Before bringing his action for fraud, the plaintiff had recovered on the contract, but failed to collect his judgment. The court held that the action was of novel impression; that the testimony showed nothing more than the ordinary evasions to which men always do and may be expected to resort, when reluctant to disclose the state of their property; and that the plaintiff had elected to treat the matter as one of contract. This case is criticised in *Poor v. Woodburn*, 25 Vt. 234. It is there said that the case of *Dyer v. Tilton* was effectually concluded as one of contract by the judgment. Judge Isaac F. Redfield, speaking for the court, says: "In regard to fraud, the question must be determined a good deal upon the cases. There is doubtless a considerable difference between fraudulent representations in regard to the extent of one's property in the general and in the detail. In one case you

have the means of forming your own opinion, and in the other you trust altogether to the estimate of one's own resources, which is proverbially a very poor reliance. But how far a man is justified in asserting clear falsehoods, even upon matters resting in opinion, may be questionable. One may as surely perpetrate fraud in the one as in the other mode of misrepresentation."

Jude v. Woodburn is an action for fraud predicated upon a representation, by a person asking for credit, that he is safe to be trusted and given credit to. It was held that such representation should be regarded as merely a matter of opinion, and should not be relied upon as matter of fact. But Judge Bennett is careful to say: "Fan [the purchaser] did not make any false representation as to any item of property which he possessed, but simply that he was safe to be trusted and given credit to."

In *Best v. Smith* the defendant obtained credit of the plaintiffs on his promises to reimburse them from the avails of the road which he was under a contract to furnish to the railroad company, and on his promise to assign the pay coming from his future performance of the contract to the plaintiffs. It is held that the duties and obligations of the defendant rested altogether in promise; that there was no representation of the defendant that he had property in possession; but that he had a contract which, if performed, would be of value.

From this review of the authorities cited by the defendant, it will be seen that only in *Fisher v. Brown* and *Dyer v. Tilton* were there any false representations of property in possession. The latter is criticised subsequently, and made to rest upon being concluded by the judgment as resting in contract. The first had other sufficient grounds upon which to rest. So far as they held that false representations of property in possession causing damage, made by a purchaser to obtain credit, are not actionable, they must be considered, not only in the light of the criticism of one, by Judge Isaac F. Redfield, already alluded to, but in the light of other cases upon the same subject.

In *Hodgeson v. Hubbard*, 18 Vt. 504, 46 Am. Dec. 181, the plaintiff purchased a stove on credit, falsely representing that he owned a farm in Cabot and considerable stock upon it; that he owned the team he had with him, and carried on a large business manufacturing butter firkins, and gave his note for it on six months' time. The purchase was at Montpelier, from a clerk. The clerk, learning that the plaintiff was peculiarly irresponsible, and that his representations of property in possession were false, pursued him, and forcibly retook the stove. The action was trespass for assault and for taking and carrying away the stove. The representations having been found knowingly to be false, and to have induced the purchase and credit, it was held that no property in the stove vested in the plaintiff, and that the defendant might, lawfully, forcibly retake it.

To much the same legal effect are *Pittsmons v. Joslin*, 21 Vt. 120, 53 Am. Dec. 46, and *Chamberlain v. Miller*, 50 Vt. 247, 4 New Eng. Rep. 614. These cases hold that when a person asking for credit obtains it by making false representations in regard to property in

his possession and ownership, which are relied upon, and induce the credit, he does not, because of the fraud, obtain title to the property purchased on credit. In other words, they, in effect, hold that by such representations the purchaser commits an actionable fraud. The vendor may elect to waive the fraud, and hold the purchaser on his contract, and generally does so if he does not rescind the contract as soon as he is made aware of the falsity of the representations, or of the fraud.

We think the cases last cited must be held to have so far modified and overruled the apparent holdings in *Fisher v. Brown and Dyer v. Tilton*, that a person purchasing upon credit does not commit an actionable fraud when he induces the purchase by false representations in regard to his property in possession. Such representations are not expressions of opinion or estimates of one's ability to pay, but statements of facts in regard to his property in detail, on which the vendor has the right to rely, and form his own opinion or estimate of the purchaser's right to credit. All these cases apparently rest upon the leading case of *Pauley v. Freeman*, 3 T. R. 57, decided in 1789. In that case the defendant, knowingly, falsely represented that the proposed purchaser on credit was a man of good credit. Such representations, relied upon, were vigorously contended not to be fraudulent; that the maker gained nothing by making them. Buller, J., replying to this contention, says: "But let us see what is contended for. It is nothing less than that a man may assert that which he knows to be false, and thereby do an everlasting injury to his neighbor, and yet not be an-

swerable for it. This is as repugnant to law as it is to morality." And Lord Kenyon, *OK. J.*, says: "All laws stand on the best and broadest basis which go to enforce moral and social duties." The repugnancy to law and morality is not any the less when the proposed purchaser knowingly resorts to false representations of facts in regard to himself to acquire property upon credit. The proposed purchaser on credit may recommend himself as a man of credit; may overestimate the value of his property in possession without legal liability. These statements rest largely in opinion, and are so understood between the parties. His credit often depends as much upon his habits of frugality and industry, upon his good health and unwavering integrity, as upon his possession of property. He is expected to place a high estimate upon the value of his property. The vendor of a horse may overvalue it. The proposed purchaser expects he will. This is a matter of judgment, and the purchaser relies upon his own. On representations of matters of judgment and opinion, each party forms and relies upon his own. But when the vendor or purchaser calls upon the other for a statement of facts, he is entitled to have them given as the party honestly believes them to exist; and if he knowingly makes a false statement of facts to secure a sale or purchase, and thereby secures it to the damage of the other party to the transaction, he not only disregards his moral and social duties, but commits an actionable fraud, which the law will redress.

The judgment is affirmed, and cause remanded.

INDIANA SUPREME COURT.

CITY OF CRAWFORDSVILLE, *Appt.*,

v.

Hector S. BRADEN.

(.....Ind.....)

1. A city may provide and maintain the necessary plant to generate and supply the electricity needed for electric lights therein.
2. Judicial notice will be taken of electricity and its properties and the fact that it is not a commodity which can be brought in the market and transported from place to place, as well as of the fact that an incandescent electric light is safer to property and more conducive to health than the ordinary light.

3. Electric lights may be furnished by a city to its citizens for their private use as well as for public places.

4. A city council may accomplish its purpose by resolution as well as by ordinance where it has power to act and its charter does not prescribe the manner of action.

(October 27, 1891.)

APPPEAL by defendant from a judgment of the Circuit Court for Montgomery County overruling a demurrer to the complaint in an action brought to enjoin defendant from purchasing and operating an electric-light plant for lighting the streets and public buildings of

NOTE.—*Power of municipal corporations to own and operate electric-light plants.*

This subject is so new that few decisions have been rendered on the subject. In addition to the cases cited in the principal case, it has been decided that power to manufacture and distribute electricity for public use in lighting streets and public buildings may lawfully be conferred by the Legislature on cities and towns together with the power to raise money by taxation for the construction and maintenance of the necessary works; and that the cities and towns may be empowered to furnish light to their own citizens for the lighting of private property if the Legislature is of the opinion that the convenience and welfare of such citizens will be promoted thereby; at least, where all the inhabitants are given the same or similar rights to be

so supplied and are compelled to pay therefor a sum sufficient to reimburse the cities and towns for the reasonable cost of what is furnished. Opinion of Justices, 8 L. R. A. 487, 150 Mass. 522.

Also that the issuance of bonds to establish an electric-light system for the purpose of supplying the city and its inhabitants with light is not prohibited by the New York Constitution limiting the incurrence of indebtedness by cities to city purposes, the court holding that light in dwellings is as important and essential as upon the streets and promotes the general comfort and welfare of the inhabitants, and when it is supplied in connection with that which is furnished by the municipality under its duty to the public, it may be regarded as a city purpose. *Hequembourg v. Dunkirk*, 9 Hun, 560.

H. P. F.

City, and from using it for lighting private residences. *Reversed.*

The case sufficiently appears in the opinion. *Messrs. W. T. Brush, Davidson & East and Kennedy & Kennedy* for appellant.

Messrs. Crane & Anderson, for appellee: the matter embraced in the resolution can only be considered by the common council at regular or special session duly called.

Dillon, Mun. Corp. § 96; Birdsall v. Clark, 73 Y. 73, 29 Am. Rep. 105.

The mayor and common council can only when and as the law directs, and the powers conferred by this resolution cannot be delegated by any part of the council or to any individual, without further action of the common council. *Dillon, Mun. Corp. § 96; Birdsall v. Clark, 73 Y. 73.*

As this ordinance contemplates the purchase and erection of a plant, for the double purpose of lighting the streets, alleys and public places, and also of furnishing the inhabitants with light in their residences and places of business, the whole ordinance must fail, because the ill and vicious part is inseparably joined with the good or valid part.

Dillon, Mun. Corp. 4th ed. § 918, and note; Birdall v. Missouri & K. Teleph. Co. 31 Mo. 23; Brown v. Harmon, 73 Ind. 412; Es v. Campbell, 37 Minn. 498.

At the time of the passage of the Municipal Incorporation Law and its amendments the use of electricity for lighting purposes had not been devised by the most visionary inventor and consequently was not in the mind of the Legislature when these Acts were passed. Electricity as a means of light furnished a new branch of industry and created a new subject for legislation and litigation.

Uggart v. Newport Street R. Co. 7 L. R. A. 16 R. I. 668, held that electricity as a new power was embraced in the term "other power," in a charter granted in 1885.

Apple v. Newton, 3 L. R. A. 174, 112 N. Y. 102, holds that a street-car company has no right to substitute the cable system in the place of horses and mules, although the charter only permits the use of steam power on the road repelling the cars.

Also *Indianapolis Cable St. R. Co. v. Citizens St. R. Co. 8 L. R. A. 539, 127 Ind. 393; St. Louis Rapid Transit Co. v. Dash, 10 L. R. A. 25 N. Y. 102.*

The City has no power to construct and establish an electric-light plant for furnishing light to the inhabitants thereof with electric lights in their dwelling houses and places of business, on such terms and conditions as may be prescribed by the common council. The power is not expressly granted by any statute, and we do not think it can be claimed, that it is "necessarily or fairly implied in or incident to the powers expressly granted, or essential to the declared objects and purposes of the city government."

1 Dillon, Mun. Corp. 4th ed. § 89; Nash v. Hay, 86 U. S. 19 Wall. 475, 22 L. ed. 672; Carey v. Carey, 108 U. S. 121, 27 L. ed. 312; Larnum v. Larue, 64 U. S. 23 How. 487, 15 L. ed. 575; Lafayette v. Cox, 5 Ind. 39; Smith v. Smith, 7 L. ed. 87; Kyle v. Mahan, 8 Ind. 37. The absence of a statute expressly authorizing the City, to engage in the business of lighting the residences and places of business within the City with electric lights for hire, the question then arises, Is this power necessarily or fairly implied in or incident to the powers expressly granted? No one will contend that this power is essential to the declared objects and purposes of the corporation.

Our general law for the incorporation of cities contains no "general welfare clauses" usually found in special charters and referred to by Judge Dillon in his work on Municipal Corporations.

In *Spaulding v. Penbody, 10 L. R. A. 397, 153 Mass. 129*, the court held that this right is not implied in the general or special powers granted to towns or cities.

It is the duty of the cities of Indiana to construct and maintain bridges and sewers.

Cummins v. Seymour, 79 Ind. 491, and Platter v. Seymour, 86 Ind. 324, held that the city need not let the work out to contractors, but may do such work through its own officers and servants. Would anyone claim that a city of Indiana, as a power of right incident to the duty or power of building bridges or sewers, could erect and operate a factory for constructing iron bridges and enter upon the extensive business this new enterprise would require.

The purchase, by the City, of an electric-light plant for the double purpose of lighting the streets, etc., of the City and of furnishing incandescent light for use in the interior of private residences and places of business, is void as to the latter purpose.

Mauldin v. Greenville, 8 L. R. A. 291, 33 S. C. 1.

Thompson-Houston Electric L. Co. v. Newton, 42 Fed. Rep. 723, is placed upon the language of the statute, which authorizes the city to "establish and maintain an electric light plant."

A class of cases have been referred to holding that cities may erect buildings in excess of present needs, and may anticipate future growth and requirements, and that they may rent rooms for which they have no present use.

French v. Quincy, 3 Allen, 9, and Spaulding v. Lowell, 23 Pick. 71, are limited in *Kingman v. Brockton, 11 L. R. A. 123, 153 Mass. 253.*

There are limits to the exercise of the police power.

Re Jacobs, 98 N. Y. 99.

McBride, J., delivered the opinion of the court:

The question we are required to decide in this case is, Has a municipal corporation in this State the power to erect, maintain and operate the necessary buildings, machinery and appliances to light its streets, alleys and other public places with the electric light, and at the same time, and in connection therewith, to supply electricity to its inhabitants for the lighting of their residences and places of business? Some other questions are incidentally involved, but the principal controversy is as above stated.

That a city, or an incorporated town, may buy and operate the necessary plant and machinery to light its streets, alleys and other public places, is not controverted by the appellee; but he denies the right to furnish the light to the individual for his private use.

The question is argued on the theory that, if the city has such power it must be by virtue of some express legislative grant, and is not among the implied powers possessed by municipal corporations; that statutes conferring powers upon municipal corporations, especially those involving the exercise of the taxing power, must be strictly construed, and that, strictly construed, no statute confers the necessary authority.

The purchase of the necessary land, machinery and material, and the erection and maintenance of such a plant, do involve the exercise of the taxing power. The necessary funds must be supplied by taxing the tax-payers of the municipality.

The only statute bearing directly upon this question is the Act of March 8, 1888 (Elliott's Supp. § 794 *et seq.*) Section 794 contains the following: "That the common council of any city in this State, incorporated either under the General Act for the incorporation of cities, or under a special charter, and the board of trustees of all incorporated towns in this State, shall have the power to light the streets, alleys and other public places of such city and town with the electric light and other form of light, and to contract with any individual or corporation for lighting such streets, alleys and other public places, with the electric light or other forms of light, on such terms and for such times, not exceeding ten years, as may be agreed upon.

Section 795 provides that for the purpose of effecting such lighting, the common council of a city or board of trustees of a town may provide by resolution or ordinance for the erection and maintenance in the streets, etc., of the necessary poles and appliances.

Section 796 authorizes granting to any person or corporation the right to erect and maintain in the streets, etc., the necessary poles and appliances, for the purpose of supplying the electric or other lights to the inhabitants of the corporation.

Section 797 validates contracts of a certain character, made before the enactment of the Statute, and section 798 provides for the appropriation of lands and right of way by corporations engaged in the business of lighting cities or towns, "or the public and private places of their inhabitants, with the electric light," etc.

It will be observed that while section 796 provides for granting to third persons the right to furnish the light to the inhabitants, it does not in terms give any such power to the corporation. It will therefore be necessary for us to inquire if the corporation possesses such power independently of the Statute, or, if not, if the Statute is susceptible of a fair construction, in accordance with established rules, which clothes the corporation with such power.

In the case of *Rushville Gas Co. v. Rushville*, 121 Ind. 206, 6 L. R. A. 815, this Statute was considered, in so far as relates to the right of the city to buy and operate the necessary plant and machinery to light its streets, alleys and other public places, and it was held that the Statute was sufficient to confer that power. In that case the court, after announcing the conclusion above stated, used the following language: "If there were any doubt as to the meaning of the Act, it would be removed 14 L. R. A.

by considering it, as it is our duty to do, in connection with the general Act for the incorporation of cities, for that Act confers very comprehensive powers upon municipal corporations as respects streets and public works, and contains many broad general clauses akin to those which Judge Dillon designates as 'general welfare' clauses. Our own decisions fully recognize the doctrine that municipal corporations do possess, under the General Act, authority as broad as that here exercised, and the operation of that Act is certainly not limited or restricted by the Act of 1883."

The eminent author above referred to thus defines the powers of municipal corporations: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic Act. Neither the corporation nor its officers can do any act, nor make any contract, or incur any liability not authorized thereby, or by some legislative Act applicable thereto. All acts beyond the scope of the powers granted are void." Dillon, *Mun. Corp.* 4th ed. § 89.

Judge Dillon, however, quotes approvingly from the Supreme Court of Connecticut as follows, section 90, page 147: "All corporations, whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given or may not be reasonably inferred. But if we were to say that they can do nothing for which a warrant cannot be found in the language of their charters, we should deny them in some cases the power of self preservation, as well as many of the means necessary to effect the essential objects of their incorporation. And therefore it has long been an established principle in the law of corporations that they may exercise all the powers within the fair intent and purpose of their creation which are reasonably proper to give effect to powers expressly granted. In doing this they must (unless restricted in this respect) have a choice of means adapted to ends, and are not to be confined to any one mode of operation." *Bridgeport v. Housatonic R. Co.* 15 Conn. 475-501.

This principle has been repeatedly recognized by this court. Thus in *Smith v. Madison*, 7 Ind. 83, it is said: "The strictness, then, to be observed in giving construction to municipal charters should be such as to carry into effect every power clearly intended to be conferred on the municipality, and every power necessarily implied, in order to the complete exercise of the powers granted."

Again, in *Kyle v. Main*, 8 Ind. 34-37, the court said: "The action of municipal corporations is to be held strictly within the limits prescribed by the statute. Within these limits they are to be favored by the courts. Powers expressly granted or necessarily implied, are

not to be defeated or impaired by a stringent construction."

Among the implied powers possessed by municipal corporations in this State are those grouped under the somewhat comprehensive title of Police Powers,—a power which it is difficult either to precisely define or limit; a power which authorizes the municipality in certain cases to place restrictions upon the power of the individual, both in respect to his personal conduct and his property, and also furnishes the only authority for doing many things not restrictive in their character, the tendency of which is to promote the comfort, health, convenience, good order and general welfare of the inhabitants.

The police power primarily inheres in the State; but the Legislature may, and in common practice does, delegate a large measure of it to municipal corporations. The power thus delegated may be conferred in express terms, or it may be inferred from the mere fact of the creation of the corporation. The so-called inferred or inherent police powers of such corporations are as much delegated powers as are those conferred in express terms, the inference of their delegation growing out of the fact of the creation of the corporation, and the additional fact that the corporation can only fully accomplish the objects of its creation by exercising such powers.

Special charters, as well as general statutes for the incorporation of cities and towns, usually contain a specific enumeration of powers granted to, and which may be exercised by, such corporations. In many cases the powers thus enumerated are such as would be implied by the mere fact of the incorporation. Where powers are thus enumerated in a statute which would belong to the corporation without specific enumeration, the specific statute is to be regarded, not as the source of the power, but as merely declaratory of a pre-existing power, or rather of a power which is inherent in the very nature of a municipal corporation, and which is essential to enable it to accomplish the end for which it is created. And the enumeration of powers, including a portion of those usually implied, does not necessarily operate as a limitation of corporate powers, excluding those not enumerated. *Clark v. South Bend*, 85 Ind. 276, 44 Am. Rep. 13; *First Nat. Bank of Mt. Vernon v. Sarria* (Ind.) 18 L. R. A. 481.

The corporation, notwithstanding such enumeration, still possesses all of the usually implied powers, unless the intent to exclude them is apparent either from express declaration or by reason of inconsistency between the specific powers conferred and those which would otherwise be implied. The Legislature can unquestionably take from municipal corporations powers which would inferentially be conferred upon them by their creation, or it can restrict the exercise of such powers, or in any manner control their exercise, the legislative will being as to such matters supreme.

Among the implied powers possessed by municipal corporations is the power to enact and enforce reasonable by-laws and ordinances for the protection of health, life and property. Thus, in this State it has been held that independently of any statutory authority, such corporations possess the inherent power to enact

ordinances for the protection of the property of its citizens against fire. *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 880; *First Nat. Bank of Mt. Vernon v. Sarria*, *supra*; *Hasty v. Huntington*, 105 Ind. 540, 3 West. Rep. 322; *Clark v. South Bend*, 85 Ind. 276, 44 Am. Rep. 13; *Bluffton v. Studabaker*, 106 Ind. 129, 8 West. Rep. 977.

This power will not only authorize the enactment and enforcement of ordinances establishing fire limits, regulating building and repairing buildings, and regulating the storage and traffic in inflammable or explosive substances, but the purchase of apparatus for extinguishing fires and furnishing a supply of water. *Bluffton v. Studabaker*, *supra*.

In the case of *St. Paul v. Laidler*, 2 Minn. 190, the Supreme Court of Minnesota, after holding that a municipal corporation is "a creature of the law, and in the exercise of its authority cannot exceed the limits therein prescribed," says: "It is a body of special and limited jurisdiction; its powers cannot be extended by intendment or implication, but must be confined within the express grant of the Legislature;" and then says further: "Incidental to the ordinary powers of a municipal corporation and necessary to a proper exercise of its functions, is the power of enacting sanitary regulations for the preservation of the lives and health of those residing within its corporate limits."

If this statement is correct, it follows that to concede to municipal corporations the possession of such powers does not involve any extension, either by intendment or implication, of the powers expressly conferred by statute, but that by the Act authorizing the organization of the corporation the Legislature expressly delegates to the municipality the power to take such steps as are necessary to preserve the health and safety (and we will add the property) of its inhabitants. The inference of the delegation of such powers follows inevitably and irresistibly because their exercise is necessary to the accomplishment of the objects of the incorporation.

When a municipal corporation attempts to exercise any of the powers thus implied, or inferentially conferred, it is within the rule of *Kyle v. Malin*, *supra*, as fully as it is when attempting to exercise those powers the warrant for which is found in the express letter of its organic law. It is to be favored by the courts, and such powers are not to be defeated or impaired by a stringent construction.

It is of course important and necessary to know in each case that the power claimed is in fact included in the implied powers of the corporation.

There can be little or no doubt that the power to light the streets and public places of a city is one of its implied and inherent powers, as being necessary to properly protect the lives and property of its inhabitants and as a check on immorality. This is forcibly set forth by Judge Dillon in his work on Municipal Corporations as follows: "In a most important particular, however, Rome suffers by comparison with modern cities. Its public places were not lighted. All business closed with the daylight. The streets at night were dangerous. Property was insecure. No at-

tempt at public illumination was made. The idea does not seem to have occurred to them. Persons who ventured abroad on dark nights were dimly lighted by lanterns and torches.

No more forcible illustration of the necessity and advantages of lighting a city can be given than the pictures drawn by Lanciani and Macauley, of the state of a great city, buried in the darkness of night; and they show how clearly the power to provide for this is essentially and peculiarly one pertaining to municipal rule and regulation. Nor are these studies and the facts that they reveal without practical value to the jurist. They demonstrate that a large and dense collection of human beings occupying a limited area have needs peculiar to themselves, which create the necessity for municipal or local government and regulation, and this in its turn the necessity for corporate organization. The body thus organized, as it has duties, so it acquires rights peculiar to itself, as distinguished from the nation or state at large." Dillon, Mun. Corp. 4th ed. § 8 a.

While Judge Dillon's remarks have, of course, special reference to great cities, the difference in that respect between the greater and the minor municipal corporations is a difference in degree, and not in kind. Wherever men herd together in villages, towns or cities, will be found more or less of the lawless and vicious, and crime and vice are plants which flourish best in the darkness.

So far as lighting the streets, alleys and public places of a municipal corporation is concerned, we think that, independently of any statutory power, the municipal authorities have inherent power to provide for lighting them. If so, unless their discretion is controlled by some express statutory restriction, they may in their discretion provide that form of light which is best suited to the wants and the financial condition of the corporation. It is well settled that the discretion of municipal corporations within the sphere of their powers is not subject to judicial control, except in cases where fraud is shown, or where the power or discretion is being grossly abused, to the oppression of the citizen. *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; 15 Am. & Eng. Encyclop. Law, 1046, and authorities there cited.

We can see no good reason why they may not also, without statutory authority, provide and maintain the necessary plant to generate and supply the electricity required. Possessing authority to do the lighting, that power carries with it incidentally the further power to procure or furnish whatever is necessary for the production and dissemination of the light. The only authority cited which holds a contrary doctrine is that of *Spaulding v. Peabody*, 153 Mass. 129, 10 L. R. A. 357.

We are, however, unable to recognize the validity of the reasoning in that case. We are unable to see the analogy between the City of Boston, because authorized to light its streets, engaging in a whale fishery to procure oil for that purpose, or the other supposed cases, and the generation and supply of electricity. Electricity is not a commodity which can be bought in the markets and transported from place to place like oil. We take judicial notice of the

laws of nature and of nature's powers and forces, and therefore take judicial notice of that which is known as electricity, and of its properties. Not of course of the various methods of generating and transmitting or using it, but of the thing itself and of its nature. As in many other cases, here the judicial presumption outruns the fact, and we are supposed to know and to take judicial notice of more than we can in fact know in the present state of scientific knowledge. We must know, however, that it cannot be generated and transported from place to place as we can procure and transport oil, clothing, etc., and that it can only be conveyed from the place where it is generated to where it is needed for lighting the streets or to the numerous inhabitants of a city, so as to enable them to use it as a general illuminant by invoking and exercising the power of eminent domain.

The corporation, possessing as it does, the power to generate and distribute throughout its limits electricity for the lighting of its streets and other public places, we can see no good reason why it may not also at the same time furnish it to the inhabitants to light their residences and places of business. To do so is, in our opinion, a legitimate exercise of the police power for the preservation of property and health. It is averred in the complaint that the light which the city proposes to furnish for individual use is the incandescent light. Here, again, is a fact of which we are authorized to take judicial knowledge. A light thus produced is safer to property and more conducive to health than the ordinary light. Produced by the heating of a filament of carbon to the point of incandescence in a vacuum, there is nothing to set property on fire or to consume the oxygen in the surrounding air and thus render it less capable of sustaining life and preserving health.

But little authority has been cited bearing on the precise question, and we have been able to find but little. The case of *Mauldin v. Greenville*, 83 S. C. 1, 8 L. R. A. 291, has been cited by the appellee. That was, like this, a suit by taxpayers of the City of Greenville to restrain the city council from purchasing and operating an electric-light plant to light the streets and public buildings of the city, and from using it for lighting private residences. In that case the court says: "The city has the express power to own property and the implied power to light the city. . . . Considering that some discretion as to the mode and manner should be allowed the municipality in carrying out the conceded power to light the streets of the city, we hold that the purchase of the plant was not *ultra vires* and void, so far as it was designed to produce electricity suitable for and used in lighting the streets and public buildings of the city."

The court, however, denied the right to furnish the light to the individual citizen on the ground that to do so would be entering into private business, outside of the scope of the city government. The court refers to the lack of authority on the precise question and that it is largely a question of first impression without authority.

The case of *Thompson-Houston Electric Co. v. Newton*, 42 Fed. Rep. 723, was a suit to

enjoin the City of Newton from purchasing and operating an electric-light plant and furnishing the light to the inhabitants.

The only statutory authority claimed by the City is as follows: "To establish and maintain gas-works or electric-light plants, with all the necessary poles, wires, burners and other requisites of said gas-works or electric-light plants." Acts 23 Gen. Assem. (Iowa) p. 16.

It will be observed that this Statute does not in terms confer any power not, in our opinion, as above stated, included among the implied powers of municipal corporations. The court says: "It is also urged that the city has only the authority to erect an electric plant for the purpose of lighting the streets and public places of the city and is not authorized to furnish light for use in the houses and stores of its citizens. . . . It has been the uniform rule that a city, in erecting gas-works or water-works, is not limited to furnishing gas or water for use only upon the streets and other public places of the city, but may furnish the same for private use; and the statutes of Iowa now place electric-light plants in the same category."

The case of *Smith v. Nashville*, 88 Tenn. 464, 7 L. R. A. 469, is also in point as to the principle involved. The charter of the City of Nashville contained the following in its enumeration of the powers conferred upon the city: "To provide the city with water by water-works, within or beyond the boundaries of the city, and to provide for the prevention and extinguishment of fires and organize and establish fire companies."

Acting under the authority thus conferred, the city established water-works, and in addition to making provision for the extinguishment of fires, it furnished water to the citizens. The right to do this was disputed and formed the principal subject of controversy. The court said: "Nothing should be of greater concern to a municipal corporation than the preservation of the good health of the inhabitants. Nothing can be more conducive to that end than a regular and sufficient supply of wholesome water, which common observation teaches all can be furnished in populous cities

only through the instrumentality of well equipped water-works. Hence, for a city to meet such a demand is to perform a public act and confer a public blessing. It is not strictly a governmental or municipal function, which every municipality is under obligations to assume and perform, but it is very closely akin to it and should always be recognized as within the scope of its authority, unless excluded by some positive law. . . . It is the doing of an act for the public weal—a lending of corporate property to a public use. . . . It cannot be held that the city in doing so is engaging in a private enterprise, or performing a municipal function for a private end.

While the authorities on the precise question are meager, we think the weight of authority as well as of reason tends to sustain the right of the municipality through its proper officers, acting in the exercise of a sound discretion, to furnish light as well as water to its inhabitants, not only in its public places, but in their private houses and places of business.

An additional question is presented and discussed. It is shown by the averments of the complaint that such action as the city authorities have taken and are proposing to take is by virtue of a resolution adopted by the city council, and not by virtue of an ordinance, and that if the City is authorized to erect and operate an electric-light plant, it can only do so by virtue of an ordinance duly enacted.

In so far as the city derives any authority from the Act of March 3, 1883 (Elliott's Supp. § 794 *et seq.*), it is authorized to act either by resolution or ordinance; but aside from the statute, where the city council has power to act in a given case, and its charter does not prescribe the manner of action, it may accomplish its purpose by resolution as well as by ordinance. *Note to Robinson v. Franklin*, 34 Am. Dec. 632, and authorities there cited.

The court erred in overruling the demurrer to the complaint.

The cause is reversed, at the costs of the appellee, with instructions to the circuit court to sustain the demurrer.

Rehearing denied.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Edward M. LOMBARD, Guardian of Pelatiah Ely,

v.
Lucy A. MORSE.

(.....Mass.....)

1. An action in the name of an insane ward may be brought by his guardian to set aside transfers obtained from him by fraud while he was insane by a woman whom he married the next day; but the guardian cannot maintain the action in his own name.

2. A bill by the guardian of an insane person to set aside transfers of his property

NOTE.—The very extensive review in the above opinion of the authorities on the question of bringing actions in the name of insane persons forestalls annotation on the subject.

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obtained by fraud may be amended by substituting the ward as plaintiff.

(December 10, 1891.)

REPORT by the Superior Court for Hampden County of a suit brought by the guardian of an insane person to set aside a transfer of property alleged to have been fraudulently procured from him, after making a ruling that the bill could not be maintained in the name of the guardian. *Dismissed unless amended in accordance with the permission given by the court.*

The bill alleged that Ely made conveyances and transfers to defendant, and that on the next day a pretended marriage was entered into between them; that at the time of said transfers he was and ever since has been an

insane person and that said conveyances and transfers were procured by undue influence and fraud, and prayed that the conveyances and transfers be set aside and for an accounting. The answer set up the validity of the marriage, denied the insanity, undue influence, and fraud, and further denied the right of plaintiff as guardian to maintain the bill. The court below ruled in accordance with the last contention and at plaintiff's request reported the case for the consideration of the Supreme Judicial Court.

Further facts appear in the opinion.

Messrs. James Bliss and George M. Stearns for plaintiff.

Messrs. Robinson & Robinson, for defendant:

A guardian appointed by our laws is the mere agent of his ward, having an authority not coupled with an interest.

Granby v. Amherst, 7 Mass. 1; *Manson v. Felton*, 13 Pick. 211.

The action should be in the name of the ward by his guardian as next friend.

Somes v. Skinner, 16 Mass. 348; *Hicks v. Chapman*, 10 Allen, 463; *Jennings v. Collins*, 29 Mass. 29; *French v. Marshall*, 136 Mass. 564; *Chandler v. Simmons*, 97 Mass. 508.

In Massachusetts probate courts appoint guardians of lunatics, and lunatics sue and defend in equity by their guardians.

Story, Eq. Pl. 8th ed. § 65, and *note*.

In New York, by statute, the court of chancery has the care and custody of lunatics and entire jurisdiction over the subject in all its general relations.

Ibid.

Therefore, the decisions in New York are not in point under our statute.

The lunatic should be made a party to the suit, otherwise he cannot be bound by the decree.

1 Dan. Ch. Pr. pp. 11, 79, and *notes*.

In reference to the maxim, that no man can be heard to stultify himself, see—

1 Story, Eq. Jur. 8th ed. § 225, and *note*.

In modern times, the English courts of law seem inclined to escape from it.

See Dan. Ch. Pr. pp. 11, 79, and *notes*;

Mitchell v. Kingman, 5 Pick. 481.

Even in the New York courts it is to be observed that the suit must be in the name of the ward, with the single exception of the suit by a committee of a lunatic to set aside a deed or the act of such lunatic upon the ground of his incompetency.

Bradley v. Amidon, 10 Paige, 235, 4 L. ed. 958; *McKillop v. McKillop*, 8 Barb. 552; *Person v. Warren*, 14 Barb. 488; *Gorham v. Gorham*, 3 Barb. Ch. 24, 5 L. ed. 801.

The rule is to be understood of acts done by the lunatic to the prejudice of others, but not as to acts done by him to the prejudice of himself.

Atty Gen. v. Parkhurst, 1 Cas. in Ch. 112; *Ridler v. Ridler*, 1 Eq. Cas. Abr. 279; 1 Story, Eq. Jur. § 226.

In New Hampshire, it was early held that a suit may be instituted by the guardian in the name of the ward.

Lang v. Whidden, 2 N. H. 485.

The rule has never been applied or knowingly recognized in equity in Massachusetts.

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Barker, J., delivered the opinion of the court:

The defendant is the wife of the plaintiff's ward. The bill alleges that while the ward was insane, and incapable of making transfers of property, on the day before the marriage, the defendant fraudulently procured conveyances and transfers of all his property to herself. The question raised is whether the bill to avoid these conveyances and transfers can be maintained by the guardian in his own name. There is no allegation that he had made expenditures or incurred obligations, expecting to be reimbursed out of the property. The title to the property of the ward does not pass to the guardian. He has its care and management only. His position is that of an agent or attorney, not that of an assignee or trustee. Pub. Stat. chap. 139, §§ 4, 11, 80. He is to "appear for and represent his ward in all legal suits and proceedings, unless another person is appointed for that purpose as guardian *ad litem* or next friend." Pub. Stat. chap. 139, § 29.

The general rule that the ward is to be made the party in suits which concern his title is clear and well settled. *Brown v. Chase*, 4 Mass. 486; *Winslow v. Winslow*, 7 Mass. 96; *Granby v. Amherst*, Id. 1; *Somes v. Skinner*, 16 Mass. 348; *Manson v. Felton*, 13 Pick. 211; *Hicks v. Chapman*, 10 Allen, 463; *Chandler v. Simmons*, 97 Mass. 508; *Jennings v. Collins*, 29 Mass. 29; *French v. Marshall*, 136 Mass. 564; *Myer v. Tighe*, 151 Mass. 854.

With the exception of the cases of *Warfield v. Fisk*, 136 Mass. 219, and *Richmond v. Adams Nat. Bank*, 152 Mass. 859, there has come to our attention no instance of such an action in our courts in the name of the guardian. In the former case the point was not raised or open, and in the latter, as there were other grounds for dismissing the bill, the court expressly declined to consider how far, if at all, the exception, which the plaintiff claimed to authorize the bringing of the bill in his own name, prevailed in this Commonwealth. The precedents favoring such an exception are found in England and in New York, where committees are appointed for persons of unsound mind, and are founded in part upon the doctrine that the committee acquires some right in the ward's estate, and in part upon the ancient theory that no man can be heard to stultify himself. 1 Daniell, Ch. Pr. 9, 83; 1 Story, Eq. Pl. 64, 65; *Ortley v. Messere*, 7 Johns. Ch. 139, 2 L. ed. 247; *Gorham v. Gorham*, 3 Barb. Ch. 24, 5 L. ed. 801.

We have seen that here the guardian has no title or interest in the ward's estate. Both in England and in New York the lunatic may be joined with his committee; the rule against self-stultification being held inapplicable to acts done to the prejudice of one's self. *Ridler v. Ridler*, 1 Eq. Cas. Abr. 275, pl. 5; *Gorham v. Gorham*, *supra*.

In *Lang v. Whidden*, 2 N. H. 485, the reasons for the rule itself were declared to be "so exceedingly quaint and sophistical" as to make it unnecessary to examine their fallacy, and it was held that an action at law may be brought by an insane person in his own name to avoid his deed. In *Somes v. Skinner*, *supra*, the demandant was permitted to show, upon the

question of avoiding his deed, that he was of feeble understanding. There is therefore no good reason for making a general exception allowing a guardian to sue in his own name to avoid the deed of his insane ward; and there is the grave objection that, the ward not being a party, the decree would not bind him should he recover his reason, nor those who would succeed to his estate upon his death. *Gorham v. Gorham*, 8 Barb. Ch. 35, 5 L. ed. 806.

In the present case, upon the allegations of the bill, the defendant perpetrated a gross fraud by which she obtained a colorable title to all the property of an insane old man, and then led him immediately into marrying her. The marriage can only be declared void in proceedings instituted for that purpose in the lifetime of both parties, (Pub. Stat. chap. 145, § 9;) although, if the allegations of the bill are true, there was no marriage. Pub. Stat. chap. 145, § 5.

The bill implies that proceedings to test the validity of the marriage have been instituted. But it may well be that, while there was such fraud or undue influence as would be sufficient to avoid the transfer of property, it would not be sufficient to avoid the marriage. As was said in *Foss v. Foss*, 12 Allen, 26, 28, the law regards the marriage contract as one which, "from its peculiar nature, and on the grounds of public policy," is "especially sacred and inviolable, and which cannot be avoided or set aside on the ground of fraud except on the most plenary and satisfactory proof of deceit and imposition touching matters which constitute the *essentialia* of the marriage relation." The rule with reference to property is not the same; and it is possible that where one has been despoiled of his property by the fraud or undue influence of a woman, and a continuation of the same fraud or influences induces him to marry her, the rules of law may avoid the conveyances, but not the marriage. If a further continuation of the same fraud prevents him from moving to set the conveyance aside during his life, whether the widow would be estopped from claiming her usual rights, is a question on which we intimate no opinion. However that may be, there must be some way in which the man in his lifetime may be restored to the possession of his own, without regard to what may become of the property after his death, and notwithstanding the fact that the marriage may not be void. If it were true that marriage, *ipso facto*, condones fraud perpetrated by either of the contracting parties upon the other before the marriage, that doctrine would equally bar the remedy, whether pursued in the name of the ward or of the guardian. But there is no such doctrine. Transactions by which the property of a woman, while marriage is in contemplation, is put away in fraud of the settlement, are clearly remediable in equity during the coverture. Marriage cannot have the effect of condoning a previous fraud unless the husband has mental capacity to enable him, if unmarried, to make a valid condonation. Condonation cannot spring from a mind incapable of ratifying. Whether or not there has been condonation depends, not upon the fact of the validity of a marriage, but upon whether there have been acts or words which

would work condonation; and the effect of even an express ratification would be destroyed by showing unsoundness of mind or undue influence. Upon the allegations of the bill, the plaintiff's ward has been deprived of his whole property by a fraud which stands uncondoned and from the effects of which it would be gross injustice to deny him practicable relief. If he cannot sue in his own name, it might be better to allow the guardian to maintain the present bill than to deny the ward justice, although this remedy, as we have seen, would be incomplete. The doctrine that husband and wife could not sue each other was founded upon the theory that they were one person in law, and is supported by weighty considerations. Our statute which authorizes a married woman to sue and be sued in the same manner as if she were sole, expressly provides that the section which confers the authority shall not be construed to authorize suits between husband and wife. Pub. Stat. chap. 147, § 7. This court has pointed out difficulties which may arise in such suits, (*Lord v. Parker*, 8 Allen, 127, 130,) and has in one case impliedly intimated an opinion that they may prevent a wife from maintaining any action whatever against her husband. *Bassett v. Bassett*, 112 Mass. 99. But there are cases in our reports in which a husband and wife have been adversary parties in suits in equity. *Ayer v. Ayer*, 16 Pick. 337; *Scott v. Rand*, 115 Mass. 104.

It is thoroughly settled in England that the husband and wife may sue each other in equity in cases concerning separate property. 1 Fonbl. Eq. bk. 1, chap. 2, § 6, *note p*; Mitf. Ch. Pl. 6th Am. ed. p. 29, *note 1*; Calv. Parties, 2d ed. p. 408, 416; 1 Daniell, Ch. Fr. 179; *Warner v. Warner*, 1 Dick. 90; *Brooks v. Brooks*, Prec. in Ch. 26; *Annie v. Mallicott*, 13 Ves. Jr. 266; *Earl v. Ferris*, 19 Beav. 67; *Wake v. Parker*, 2 Keen, 59; *Davis v. Prout*, 7 Beav. 288; *Brooke v. Brooke*, 37 L. J. Ch. 639. And in consequence of the Married Woman's Property Act (1882), they may maintain actions at law against each other in respect of separate property. *Butler v. Butler*, L. R. 16 Q. B. Div. 874, 878; L. R. 14 Q. B. Div. 831.

In New York and in Michigan bills in equity have been maintained by a wife against her husband to set aside conveyances of her separate estate obtained after coverture by his fraud. *Fry v. Fry*, 7 Paige. 461, 4 L. ed. 231; *Stiles v. Stiles*, 14 Mich. 73. The doctrine is sometimes stated in general words that husband and wife may sue each other in equity. *Canuel v. Buckle*, 2 P. Wms. 242, 244; Story, Eq. Pl. §§ 62, 63; 2 Story, Eq. Jur. § 1868. The doctrine of the English authorities cited above does not go so far, and other authorities limit the right to cases in which questions concerning property arise between husband and wife. 1 Pom. Eq. § 90.

But the contention here is whether the property which the bill seeks to reclaim is the separate property of the defendant, or whether it is in fact the property of the husband, and ought to be restored to him. This is a question which, under the more limited view, may be tried in a suit in equity between the husband and wife.

Without going further, we think that, upon

the facts alleged, the guardian may maintain a bill for relief in the name of his ward. If, therefore, he shall ask to amend by substituting the name of his ward as plaintiff, he is to be allowed so to do. Otherwise, the bill is to be dismissed, with costs.

So ordered.

Annie REDIGAN, by Next Friend,

v.

BOSTON & MAINE RAILROAD.

(.....Mass.....)

A mere licensee injured in the dark by falling through an open trap door while crossing the platform of a railroad station which the company allows people to use as a short cut between public streets cannot recover damages from the company although no light or barrier was placed at the opening.

(November 23, 1891.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Worcester County directing a verdict in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Overruled.*

The facts sufficiently appear in the opinion.

Messrs. Thomas G. Kent and George T. Dewey for plaintiff.

Mr. Frank P. Goulding, for defendant:

The case is clearly distinguishable from cases where a crossing has been constructed, and a way laid out, or suffered to exist, connecting public ways or squares, such as—

Sweeney v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644; *Murphy v. Boston & A. R. Co.* 138 Mass. 121; *O'Connor v. Boston & L. R. Corp.* 135 Mass. 352; *Hanks v. Boston & A. R. Co.* 147 Mass. 495; *Holmes v. Drew*, 151 Mass. 578.

The use of the premises as a passageway by strangers was a matter in which the defendant was absolutely passive, and from which nothing is to be inferred in favor or in aid of the plaintiff.

Johnson v. Boston & M. R. Co. 125 Mass. 75; *McCreary v. Boston & M. R. Co.* 11 L. R. A. 859, 158 Mass. 800.

The following cases are cited upon the general proposition that the premises were, in no sense, apparently, a public way:

Gillis v. Pennsylvania R. Co. 59 Pa. 129, 98 Am. Dec. 317; *Morgan v. Pennsylvania R. Co.* 19 Blatchf. 289; *Nicholson v. Erie R. Co.* 41 N. Y. 525.

The plaintiff being either a trespasser, or on the premises merely by the permission or sufferance of the defendant, cannot recover for any unsafe condition of the platform.

NOTE.—For notes on duty to keep railway platforms safe, see *Kelly v. Manhattan R. Co.* (N. Y.) 3 L. R. A. 74; *Louisville, N. A. & C. R. Co. v. Lucas* (Ind.) 6 L. R. A. 193; *Walker v. Vicksburg, S. & P. R. Co.* (La. Ann.) 7 L. R. A. 111; *Pennsylvania Co. v. Marrien* (Ind.) 7 L. R. A. 787.

For note on liability of owner of premises for injuries to mere licensees, see *Gordon v. Cummings* (Mass.) 9 L. R. A. 640.

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Morrissey v. Eastern R. Co. 126 Mass. 377, 80 Am. Rep. 686; *Wright v. Boston & M. R.* 129 Mass. 440; *Johnson v. Boston & M. R. Co.* *supra*; *Wright v. Boston & A. R. Co.* 2 New Eng. Rep. 725, 142 Mass. 296.

Barker, J., delivered the opinion of the court:

The railroad station at which the accident happened is so situated that its grounds upon the west and south are contiguous to public streets, Prescott Street on the west, and Lincoln Square on the south. The grounds are uninclosed, and their surface is of substantially the same level and appearance with the streets, so that no line of demarcation is apparent. The station building is surrounded by a platform elevated one step above the ground, and the platform continues southerly alongside the railroad track to the street. In the other direction the platform is distant at its northwest corner about 25 feet from the easterly line of the other street. The surface of the station grounds between the streets and the platform was in a suitable condition for public travel, and was very much used by teams and foot passengers in going to and from the station, and in traveling across the station grounds from one street to the other. There was no sidewalk or other defined footpath on the east side of Prescott Street next the station grounds, but there was a brick sidewalk on the west side of Prescott Street extending to Lincoln Square. There was a path trodden by foot passengers extending diagonally across Prescott Street and the northerly portion of the open station grounds towards the northwest corner of the platform. The route by this path and the platform on the west and south sides of the station building and thence southerly, by the platform next the tracks between the northerly part of Prescott Street and the square at the end of the platform, was a hundred or more feet shorter than that by the public streets. A large number of persons, not passengers or having business at the station, went over the platform daily in passing by this short cut from one street to the other. There was no evidence whether the defendant made any attempt to prevent this travel, and none that it permitted it, except that it existed in fact. There was also evidence that many people went over the platform on the east side of the station, and some along or between the railroad tracks, when going to Lincoln Square from points northerly of the station. The plaintiff, for seven weeks previous to the accident, had walked over the platform twice daily each way, in going between her home and the place where she worked. On the night of the accident she was walking home from the shop by her usual route, leaving the shop at 6 o'clock with two other working girls. It was very dark. They walked on the sidewalk on the west side of Prescott Street until they came to the footpath. Then walked over the path across Prescott Street and the station grounds to the north end of the platform, and then a short distance along the platform on the west side of the station, when she fell into a hole or opening which she did not before know of and did not see, and so was injured. The opening into which she fell was made by the raising of

a trap door, which formed part of the platform, and which opened upon stone steps leading to the cellar of the station building. The trap-door had been open for an hour or more before the accident, and the opening was not guarded by any barrier or light, and there was no person in charge of it nor other warning. The plaintiff knew that this was a railroad passenger station, had seen teams drive up to the platform to get passengers and trunks, and had been to this and other passenger stations constructed in a similar manner with platforms on the outside. The question is whether, upon the facts shown, the plaintiff was entitled to go to the jury, a verdict for the defendant having been ordered in the superior court.

It cannot be said, as matter of law, that the plaintiff was a trespasser. She knew that the place where she was travelling was not a public way, but the platform of a railroad passenger station. She was not a passenger of the railroad, and had no business to do at the station, but was merely using the station grounds and platform as a short cut to facilitate her passage home. Whether her act was or was not a trespass depends upon the attitude of the defendant towards her and those who were accustomed to use the station in a similar manner. It may properly be inferred that the defendant knew of, and passively allowed, the plaintiff and the public to pass at their pleasure across the station grounds and the platforms from one street to the other. On the other hand, it cannot be said that any invitation or inducement was extended by the defendant to the plaintiff or to the public to use the station grounds and platforms as a short cut in traveling from street to street, or for any other purpose than that for which they were designed and adapted in connection with the railroad. It was apparent that the place was a railway passenger station, and not a way for foot travel. No arrangement or fitting of the grounds or platforms is shown which would convey to anyone the idea that the platform was a part of Prescott Street or of Lincoln Square, or of any public way, or that those in charge of it invited its use for other than railroad purposes. The platform was not contiguous to Prescott Street. It led from Lincoln Square to the station building, and did not connect the two streets. It was obviously a part of the railroad station, and for the use of railroad passengers. The use for which it was apparently designed required the land to be left open and easily accessible from the public streets. Besides this, the plaintiff knew that it was a passenger station, and was not in fact induced to believe that she was walking over a public way. The fact that the defendant made no attempt to prevent travel across the station grounds and platform, as a short cut between the public streets, was not an invitation to use them for that purpose. *Galligan v. Metacomet Mfg. Co.* 148 Mass. 527, 3 New Eng. Rep. 705; *Reardon v. Thompson*, 149 Mass. 267.

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It follows that the plaintiff's rights are to be determined upon the theory that she was neither a trespasser nor a person induced or invited by the defendant to enter its premises, but a licensee merely, knowingly using the defendant's land and structures for a purpose solely in her own interest, and for which she knew they were not intended, and entering upon them without invitation, and without right, by her voluntary act, and with the bare sufficiency of the owner. The case is not one of a concealed peril or of a trap designedly laid. The exceptions do not show that the door was not easily distinguishable from the platform of which it formed a part, and the use for which it was designed must have been apparent upon inspection. The general rule is that a bare licensee has no cause of action on account of dangers existing in the place he is permitted to enter, but goes there at his own risk, and must take the premises as he finds them. *Reardon v. Thompson*, 149 Mass. 268; *Parker v. Portland Pub. Co.* 69 Me. 173, 31 Am. Rep. 262.

No duty is cast upon the owner to take care of the licensee, or to see that he does not go to a dangerous place, but he must take his permission with its concomitant conditions and perils, and cannot recover for injuries caused by obstructions or pitfalls. *Hounsell v. Smyth*, 7 C. B. N. S. 781; *Batchelor v. Fortescue*, L. R. 11 Q. B. Div. 474; *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 868, 373, 87 Am. Dec. 644.

"An opening not concealed otherwise than by the darkness of the night is a danger which a licensee must avoid at his peril." Holmes, *J.*, in *Reardon v. Thompson*, *supra*; *Sullivan v. Waters*, 14 Ir. C. L. 460, 475.

The plaintiff cannot complain that the defendant, in lawfully using its station and appliances as they were apparently designed and adapted to be used, so changed their condition without her knowledge as to make the place dangerous to her when she attempted to use it in a manner inconsistent with the use which the owner chose to make of it. The defendant was under no obligation to her to light the place or put up a barrier, or to give warning that the condition of the door made it dangerous for her to attempt to pass. The opening was not a trap, but an ordinary and usual means of access to a cellar, and, so far as the plaintiff was concerned, the defendant owed her no duty to keep it closed rather than open. *Metcalfe v. Cunard Steamship Co.* 147 Mass. 66, 6 New Eng. Rep. 109; *Heinlein v. Boston & P. R. Co.* 147 Mass. 136, 6 New Eng. Rep. 426.

The fact that the jury viewed the premises makes no difference in the power of the court to deal with the case upon the evidence presented in court, or with our decision of the question whether the justice presiding at the trial was right in directing a verdict for the defendant.

Exceptions overruled.

TEXAS SUPREME COURT.

NEW YORK LIFE INSURANCE CO.,

Appt.,

v.

John IRELAND.

(.....Tex.....)

One whose life is insured for the benefit of his wife and children by a tontine policy which agrees to pay to them as "the assured" has neither the legal title to the policy nor any right as trustee which will entitle him to the benefits of the policy on its maturity, although he has always retained possession and control of the policy and paid the premiums, and the beneficiaries have never known of the insurance.

(November 24, 1891.)

APPEAL by defendant from a judgment of the District Court for Bexar County in favor of plaintiff in an action brought to recover the amount alleged to be due upon a policy of life insurance. *Reversed.*

The facts are fully stated in the Commissioner's opinion.

Mr. Frederick N. Judson, with **Mr. H. B. Magruder**, for appellant:

An individual, who takes out a policy of insurance on his own life for the benefit of his wife and children, which by its terms is made expressly payable to his wife and children, cannot sue for and recover the proceeds of such policy (although payable in his lifetime) in his own name.

Mullins v. Thompson, 51 Tex. 7; *Splawn v. Chew*, 60 Tex. 532; *Ricker v. Charter Oak L. Ins. Co.* 27 Minn. 193, 38 Am. Rep. 289; *Evans v. Opperman*, 76 Tex. 293.

If the appellant had complied with the demands of the plaintiff and paid him the amount of the policy, it would still have been liable to the beneficiaries as the rightful owners of the policy.

Pacific Mut. L. Ins. Co. v. Williams, 79 Tex. 633; *Bliss, Life Ins.* 2d ed. p. 517; 2 May, Ins. § 399; *Cook, Life Ins.* § 57; *Central Nat. Bank of Washington v. Hume*, 128 U. S. 195, 32 L. ed. 370; *Glanz v. Gloeckler*, 104 Ill. 543, 44 Am. Rep. 94; *Chapin v. Follones*, 36 Conn. 132, 4 Am. Rep. 49; *Pingrey v. National L. Ins. Co.* 4 New Eng. Rep. 229, 144 Mass. 874; *Garner v. Germania L. Ins. Co.* 1 L. R. A. 256, 110 N. Y. 266.

The plaintiff is the insured in the policy but not the assured.

See *Connecticut Mut. L. Ins. Co. v. Luchs*, 108 U. S. 498, 27 L. ed. 800.

The promise of the Company was to pay the assured, to wit, the beneficiaries and none other; and the policy recites that it was issued and accepted by the assured on the agreements

relative to the tontine investment policy plan, and that the tontine investment benefits were secured to the assured.

Mr. George C. Altgelt, for appellee:

The policy of insurance sued upon, never having been delivered by appellee to the beneficiaries, and the premiums having all been paid by him, was his property, and the action was properly brought by him.

Bacon, Benefit Soc. & L. Ins. § 296, p. 449; *Lemon v. Phoenix Mut. L. Ins. Co.* 38 Conn. 301; *Roberts v. Roberts*, 64 N. C. 695; *Robinson v. Duceall*, 79 Ky. 84; *Pennsylvania Mut. L. Ins. Co. v. Watson*, 3 W. N. C. 518; *Weston v. Richardson*, 47 L. T. N. S. 514; *Garner v. Germania L. Ins. Co.* 18 Daly, 257, 17 Abb. N. C. 7; *East St. Louis v. Millard*, 14 Ill. App. 484; *Johnson v. Van Epe*, 110 Ill. 551.

The legal title to the policy being in appellee, the suit was properly brought by him without regard to equities that might arise as between appellee and his children.

New York L. Ins. Co. v. Bonner, 11 Neb. 160.

Hobby, P. J., filed the following opinion:

This suit was brought in the District Court of Bexar County by the appellee on August 15, 1888, against the appellant on a life insurance policy to recover in his own right \$1,000, with 12 per cent interest thereon from the 8th day of June, 1888, and for attorney's fees and costs, etc. It was alleged in the petition that on the 8th day of June, 1878, the petitioner entered into a contract of life insurance with the appellant, by which the latter agreed to insure the petitioner's life for the period of his natural life, or for 10 years, if he should survive said period,—the contract being on the tontine investment policy plan, and was to expire June 8th, 1888. That under the contract petitioner paid to the company \$98.80 annually for ten years. That the policy is for the sum of \$2,000, and it expired by its own limitation on the date last mentioned, and the company became thereby liable to pay petitioner the sum of \$1,000. It is further alleged that at the proper time, June 8, 1888, as he had a right to do, the petitioner elected to "withdraw the entire equity—the accumulations—belonging to this policy, in cash," which is \$1,000. That this withdrawal was one of the conditions and privileges reserved to petitioner on the face of the policy, etc. That he demanded the sum, after notifying the company of his election, and payment is refused. He further alleges that the policy was "intended for the benefit of the wife and children of petitioner, Anna M. Ireland, Matilda C. Carpenter, Mary F. Graves, and Rosalie Hurt, in whose names said sum has been demanded and selection of benefit selected;" wherefore suit is brought, etc. The defendant answered September 7, 1889, and excepted specially to the petition: "(1) Because it appeared on its face that there are other persons, to wit, Mrs. Anna Ireland, Mrs. Matilda Carpenter, Mrs. Mary Graves, and Mrs. Rosalie Hurt, who should be joined with plaintiff, as parties plaintiff. (2) Because the petition is vague, inconsistent, and uncertain, etc., in this: Plaintiff claims under an alleged contract that

NOTE.—The law is so well settled against the power of one who insures his life for the benefit of his family to defeat their right to the insurance that annotation on the question is unnecessary, and the main interest in the above case is in the striking character as an illustration of the rule on account of the exclusiveness of the control of the policy by the insured and the total ignorance of the entire transaction on the part of the assured.

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defendant is liable to him individually, and under same contract that it is liable in full amount to other parties, for whom he sues, and defendant cannot safely answer until plaintiff elects to sue as principal or agent." The answer contained also a general denial, except as to certain facts admitted. These admissions were: The execution of the contract of insurance, and that it was intended for the benefit of the wife and children of appellee. There was a special denial that on the expiration of the policy appellant was indebted to petitioner in any sum, and an averment that the contract sued on was made not with Ireland, but with his wife and children; and that it was agreed with them in that contract, wherein they are designated as the "assured," that on the expiration of the policy, they should have the option of one of five enumerated benefits, among which was the right "to withdraw the entire equity, (i. e., the cash accumulations which belong to the policy,) which accumulations are admitted to amount to \$1,000, provided they notified the Company in writing of their selection at least three months prior to the expiration of the tontine period. It was averred that, while the right to make a selection of one of the five enumerated benefits was lost to the assured by not being exercised in time, appellant was willing to waive its rights, allow the selection to be made, and pay over \$1,000 to the assured, provided they, or the appellee for them, would give appellant their receipts; but appellee refused this offer, insisting that appellant should accept his individual receipt. It was denied that appellee demanded the \$1,000 as agent of the assured, but claimed it in his own right. Appellant's exceptions were overruled. Appellee filed a replication, setting up that, if it were true, as alleged in the answer, that right of action in the case was vested in the parties named as beneficiaries in the policy, yet appellee had been consulted in all things touching the policy, and recognized as the party to control everything relative thereto; that appellant recognized him not only as the agent of the beneficiaries, but as the owner of the policy; that his right was never questioned until he persisted in withdrawing from the company the money due on the policy; that, though the suit is brought as well for the use of his wife and children, yet the contract was made between himself and plaintiff, and his wife and children were ignorant of it; that, as to the supposed right of plaintiff to make the selection of a benefit in case the parties entitled to do so failed up to the period mentioned in the policy, the defendant has expressly waived, etc. On January 26, 1889, the case went to trial on the merits, and judgment was rendered against appellant for \$1,000 principal, 12 per cent damages thereon, and \$100 attorneys' fees; making a total of \$1,220, with interest at 8 per cent from date of judgment, and costs.

The controlling question in the case is, Who were the owners of the policy, and entitled to the benefits secured by it? The correct determination of this question depends upon the terms of the original contract of insurance, which is but a contract, in this case, upon its face, between the appellant and appellee for the benefit of third persons. There is and can

be no controversy on this point. Whether the rights and interest of such third persons are so vested that the parties to it cannot thereafter divest them without their consent must depend upon the application of well-known rules of the law of contracts generally to the contract in this case. The recognition of the law of the value to a person of life and property has originated insurance contracts, which are "contracts to make compensation on the happening of an injury to life or property." Cook, Life Ins. p. 2. Being a contract for the payment of money to an individual on the happening of a contingency, it is to be governed by the rules applicable to contracts generally, and not by any principles supposed to be peculiar to them; the most prominent exception to this rule in many cases being that, where there is doubt, a construction most unfavorable to the insurer is adopted, because by universal custom it appears that he prepares the contract. See note 2, Cook, Life Ins. p. 4.

The contract of insurance provides that the appellant, in consideration of the statements, etc., contained in the subjoined application, and \$98.80 paid annually during the continuance of the policy, "doth insure the life of John Ireland. . . . hereinafter called 'the insured,' in the sum of \$2,000, for the term of his natural life, commencing on the 8th day of June, 1878, . . . and the said company doth hereby promise and agree to pay the amount of said insurance at its office, in the City of N. Y., to the assured under this policy, to wit, Anna M. Ireland, wife, and Matilda C. Carpenter, daughter, of said John Ireland, and his other children by said Anna M. Ireland, share and share alike, or their legal representatives, in sixty days after due notice and satisfactory proof of the death during the continuance of this policy of the said person, whose life is hereby insured. This policy is issued, and accepted by the assured on the following special agreements and conditions relative to policies on the tontine investment policy plan: *Second.* That the tontine dividend period for this policy shall be completed on the 8th June, 1888. . . . *Fifth.* That, after the completion of the tontine dividend period on June 8th, 1888, provided this policy shall not have been previously terminated by lapse or death, the accumulations apportioned to this policy shall secure to the assured one of the following benefits." Five are specified. The third is: "To withdraw the entire equity in the accumulations that belong to this policy in cash." The benefits were at the option of the assured upon their notifying the company in writing, not less than three months prior to the termination of the tontine period, which benefit is selected.

The question presented for our decision—the construction of an insurance policy, by the terms of which the rights of beneficiaries therein named attach—has undergone extended discussion in numerous cases in the different States. In some of them the rights of the wife and children under policies essentially the same as the present are regulated by statute, and in the case cited by appellee's counsel—*Robinson v. Dural*, 79 Ky. 86—it appears that by statutory provision in Kentucky, where a married woman is made the beneficiary, the policy becomes her

separate property. "Where the question arises as to the rights of third persons in a contract like the one before us between others for their benefit, such rights are generally determined by the law of the jurisdiction." *Cook, Life Ins.* § 374. We have no legislative enactment similar to that of Massachusetts or Kentucky, cited in the above cases. But in *Mullins v. Thompson*, 51 Tex. 13, it was held "that a life insurance policy, payable to the heirs of the insured, forms no part of his estate for the payment of his debts, and, although assignable in that case, not having been in fact assigned, the heirs were entitled to it." So also in *Evans v. Opperman*, 76 Tex. 293, it was held that it was "manifest that when a husband insures his life, and makes it payable to his wife, his intention is that it should inure to her separate use and benefit." There can be no doubt that an insurance contract may declare in terms for the divestiture of the interest of the beneficiaries without their consent; or, if this right is not so reserved on its face, it may, in certain cases, be established by circumstances showing such reservation, as the circumstances attending the execution of the insurance policy are as open to inquiry as they would be with reference to other contracts. But in their absence the law of the place of the jurisdiction as to the power to divest the rights of a person in a contract between others, made for his benefit, must apply. *Cook, Life Ins. supra*. The prevailing rule on this subject is that the rights and interest of the beneficiaries cannot be divested without their assent by any act of the insured or insurer. *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. ed. 370. See cases cited in *note 2*, p. 123, *Cook, Life Ins.*, and authorities, *supra*.

"Where the contract of insurance designates the person to whom the insurance money is to be paid, the party who obtains the insurance and pays the premium has no authority to change the designation or title to the money." Any change must be with the concurrence of all of the beneficiaries. If the policy be for the benefit of the woman and her children, the consent of the latter as well as that of the woman is essential." *Bliss, Ins.* §§ 317-337; *Succession of Kugler*, 28 La. Ann. 455. The cases rest upon the ground generally that the rights of the beneficiaries are vested immediately upon the issuance of the policy, and hence cannot be divested by any act, will, or deed of the insured. *Splawn v. Chew*, 60 Tex. 534; *May, Ins.* § 592. An irrevocable, executed, voluntary settlement upon the wife and children of the amount to be paid is made. "To make the intended settlement effectual as against himself and volunteers claiming under him, nothing remained to be done by the husband. All was done that could be done (and there is no clause in the policy, or other circumstance to negative this) to vest in the wife and children all the rights attaching under the policy." See *Ricker v. Charter Oak L. Ins. Co.* 27 Minn. 193, 38 Am. Rep. 269. See also *May, Ins.* § 392; *Splawn v. Chew*, 60 Tex. 534.

In the case before us it is urged that it is distinguished from the current of cases announcing the rule above mentioned in that it was always in the possession and under the ex-

clusive control of the appellee, was never delivered by him to the beneficiaries, and the premiums were paid only by him, and they knew nothing of it. Upon this subject it is said that the "beneficiary's right would be generally complete without regard to whether the insured retains possession of the policy and pays the premium." See *note*, page 1, *Cook, Life Ins.* So, also, it is held that "the possession of the policy is not conclusive proof of the right to receive the insurance money." *Bliss, Ins.* p. 546. The mere manual possession of the policy is of little importance, whether it be in the hands of the insurer, insured or assured. It is the completion of the contract which controls. If the rights are fixed by the policy, they are none the less secure although the possession of the same may be in the company. The possession alone of a deed or title of any character to land by one person, it would not, we think, be claimed, affects the right to the land itself, vested in another by that deed or title. In the case cited of *Ricker v. Charter Oak L. Ins. Co.*, *supra*, where it was held that a policy procured by the husband for the benefit of the wife and children was an executed, voluntary settlement, irrevocable by any act of his, it was further held that "what he did was a clear and distinct act, divesting himself of all ownership or control over the money paid for the insurance; disclaiming any interest in the policy, or purpose to hold it for himself, by the stipulation to pay the sum named to the beneficiaries;" that "taking the delivery of the policy from the company under these circumstances can only be construed as an act of acceptance for the designated beneficiaries; and his subsequent holding of the same was as a naked depository, without interest, for those entitled thereto. Such conduct was both natural and proper, and raises no presumption against the theory of a completed transaction on his part as evidenced by his other acts." The rights under this policy having vested absolutely in the beneficiaries upon its execution, the possession by another of the evidence of their rights could not change or affect them. On the other hand, if the benefits contended for were not vested in appellee by the insurance contract, the possession and control of the same could not clothe him with such benefits. If they had no rights because he had possession and control of the policy and paid the premium without their knowledge, there would be no contract. In this case, on which he could recover, for these circumstances alone would not operate to change a contract which on its face is for the benefit of others to one for his own benefit. Neither the possession and control of the policy by appellee nor ignorance of its execution by the beneficiaries would have the effect which would result from the position contended for; and this is so because neither of these things were essential to the validity of the contract. The policy, we are of opinion, was a contract without ambiguity, and obviously with the "assured," who are designated by its language. He (the appellee) is as plainly described by its terms as the "insured,"—the subject matter of the contract. These terms are sometimes used indiscriminately in works on insurance; and in some instances it becomes important to de-

termine their meaning, and to whom they apply, as in *Connecticut Mut. L. Ins. Co. v. Luchs*, 109 U. S. 498, 27 L. ed. 800. But in the case under consideration there is no occasion for interpretation; the contract defines them. To hold in this case that the appellee is entitled to the benefits under the contract would be to hold a doctrine contrary to that announced in our own State, and against the great weight of adjudicated cases (see *Re Britung's Estate*, 78 Wis. 83), and would, in effect, make a contract for the appellee and appellant, which they did not make for themselves. It is an elementary rule that the courts will not do this.

The remaining assignments refer to the right of appellee to maintain this action in his individual capacity. It is claimed by appellee that, the legal title being in him, he can sue to recover under the policy. The decision in the case of *New York L. Ins. Co. v. Benner*, 11 Neb. 172, cited by appellee's counsel, was controlled by a statute of that State providing that "a person with whom a contract is made for the benefit of another may bring an action without joining with him the person for whose benefit it is prosecuted." We do not understand that the legal title is in him, but that the policy or rights under it, in so far as the interest of the wife is involved, constitute her separate property. That the husband may sue to

recover such property is not to be denied. But this is not such a suit. It is not instituted for her benefit. It is alleged that the money was demanded in her name and that of the other beneficiaries. But the action was predicated on the right of appellee to recover for himself alone. If this was a suit for the wife's interest, it is still apparent that there are other married women whose rights cannot be adjudicated unless they are made parties. The view we have taken of the case obviates the necessity for discussing the question of waiver. That defense is only pleaded against the appellee, who, according to our view, is not entitled to recover in his own right. It is not insisted on or claimed as against the beneficiaries, whose rights are admitted by the appellant, and to whom it expresses the anxiety and readiness to pay what is rightfully theirs. The judgment in this case is in favor of appellee individually. Hence it could not impair the rights of the beneficiaries, nor would it afford any protection to the appellant from a subsequent recovery by them. We think the judgment should be reversed, and the cause remanded.

Stanton, Ch. J., delivered the opinion of the court:

Reversed and remanded, as per report of the Commission of Appeals.

GEORGIA SUPREME COURT.

EAST TENNESSEE, VIRGINIA &
GEORGIA R. CO., *Plf. in*
Err.,

v.
Anna MARKENS.

(.....Ga.....)

*1. Where there is no evidence that a passenger in a public hack knew of danger from an approaching train on a public crossing, the judge may so state to the jury, and may say that there is no evidence of any failure in duty on the part of such passenger to avoid the injury.

2. In the case of a female passenger in a public hack, a charge to the jury as follows was correct: "I do charge you that the negligence of the driver, if he was negligent, is not imputable in law to her. A person who hires a public hack, and gives the driver directions as to the place where he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts of negligence, or prevented from recovering against the railroad company for injuries suffered from

a collision of its train with the hack, if the same was caused by the concurring negligence of both the manager of the train and the driver of the hack. The only negligence on the part of the driver which will defeat or otherwise affect the right of Mrs. Markens to recover is embodied in the following proposition: If the negligence of the driver was the sole cause and the real cause of the collision, she cannot recover. If the driver and the manager of the train were guilty of negligence, both concurring to bring the collision about, such negligence on the part of the driver cannot have the effect either to defeat or diminish the plaintiff's right to recover."

3. A female passenger in a public hack is under no duty to supervise the driver at a public crossing, nor to look or listen for approaching trains, unless she has some reason to distrust the diligence of the driver himself in respect to these matters.

4. The statute requiring the checking of trains and ringing of bells in approaching public crossings is applicable to this case, without reference to the distance from the crossing to the point at which the train started.

5. Though the court committed some slight errors in ruling upon the minor points of the case as set out in the motion for a

*Head notes by LUMPKIN, J.

NOTE.—For notes as to imputing the negligence of a driver to a passenger, see *Nisbet v. Garner* (Iowa) 1 L. R. A. 152; *Dean v. Pennsylvania R. Co.* (Pa.) 6 L. R. A. 148; *Becke v. Missouri Pac. R. Co.* (Mo.) 9 L. R. A. 157.

For additional cases on the same point, see *Phillips v. New York C. & H. R. R. Co.* 127 N. Y. 657; *Dickson v. Missouri Pac. R. Co.* 104 Mo. 491; *Carr v. Easton*, 142 Pa. 158; *Bunting v. Hogsett*, 12 14 L. R. A.

L. R. A. 268, 139 Pa. 363; *Woodley v. Baltimore & P. R. Co.* 8 Maakey, D. C. 542.

But that a passenger cannot blindly trust to the driver without the exercise of proper prudence on his own part, where he is fully aware of the danger, see *Dean v. Pennsylvania R. Co.* *supra*; *Crescent Twp. v. Anderson*, 6 Cent. Rep. 616, 114 Pa. 643.

new trial, there was no error in refusing a new trial upon any of the grounds stated in the motion.

(November 10, 1891.)

ERROR to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Dorsey, Brewster & Howell* for plaintiff in error.

Messrs. Hoke Smith, Burton Smith and J. R. Whiteside, for defendant in error:

The negligence of the driver of a public conveyance, or the negligence of the common carrier or its servant, could not be imputed to plaintiff.

Little v. Hackett, 116 U. S. 386, 29 L. ed. 652, and cases cited; *Nisbet v. Garner*, 1 L. R. A. 153, 75 Iowa, 814; *Becke v. Missouri Pac. R. Co.* 9 L. R. A. 157, 102 Mo. 544.

The exceptions to the charge in reference to the duty of railroads at public crossings were not well taken, because such charge was a correct exposition of the law in that regard, and was a proper charge to make under the facts and evidence of this case.

Georgia R. Co. v. Carr, 78 Ga. 557; *Atlanta & W. P. R. Co. v. Wyly*, 65 Ga. 120; *Central R. Co. v. Russell*, 75 Ga. 810; *Morgan v. Central R. Co.* 77 Ga. 788; *Western & A. R. Co. v. Young*, 81 Ga. 417, 83 Ga. 512.

Lumpkin, J., delivered the opinion of the court:

1. While a judge is forbidden to express or intimate his opinion concerning a question of fact about which there is any doubt whatever, he may with propriety say to the jury that there is no evidence to support an alleged fact, when such statement is unquestionably true. The object of section 3248 of the Code is to prevent judges from interfering with the functions of juries in determining contested issues of fact when there is proof on both sides; but when an alleged fact is entirely unsupported by evidence the judge may aid the jury by so informing them, thus relieving them of that much difficulty in reaching a correct conclusion in the case.

2 and 8. Whatever the law formerly may have been, it is now well settled that the propositions contained in the charge of the court below quoted in the second head note are correct and sound. So well are we convinced of this, we deem an elaborate discussion of the questions involved unnecessary. In the *American & English Encyclopedia of Law* (vol. 4, p. 83) we find the following: "It is now the rule in the United States courts, in England, and in most of the states of the United States, that the contributory negligence of a carrier is not attributable to a passenger." In volume 16, p. 447, of the same work, it is stated that "there can be no such thing as imputable negligence, except in cases where that privity which exists in law between master and servant and principal and agent is found. In order for the negligence of one person to be properly imputable to another, the one to whom it is imputed must stand in such a rela-

tion of privity to the negligent person that the maxim *qui facit per alium facit per se* is directly applicable. It follows that all the cases in which the negligence of one person has been imputed to another in the absence of just this relation of privity are wrongly decided, and such is the effect of overwhelming recent cases." See also *Flaherty v. Northern Pac. R. Co.* 39 Minn. 828, 1 L. R. A. 660; *Becke v. Missouri Pac. R. Co.* 102 Mo. 544, 9 L. R. A. 157; *Little v. Hackett*, 116 U. S. 386, 29 L. ed. 652, and authorities cited therein. And particularly see note by reporter (Irving Browne) to case of *Borough of Carlisle v. Brisbane*, 57 Am. Rep. 388-511, inclusive, which treats of the subject in a most comprehensive manner. Also the following text-books: *Deer. Neg.* § 27; 1 *Shearm. & Redf. Neg.* 4th ed. § 66; *Whittaker's Smith. Neg.* 405-407; *Beach, Contrib. Neg.* §§ 82-86; 1 *Thomp. Neg.* § 88; *Thomp. Carr.* 284 et seq.; *Cooley, Torts*, 684; *Add. Torts*, § 38; *Whart. Neg.* § 844a.

These citations might be multiplied indefinitely, but even a casual examination of those above mentioned will suffice to establish the rule laid down by the court below. It will also appear from the foregoing authorities, and is entirely consistent with every-day experience, that a female passenger in a public hack may trust that the driver thereof will exercise proper caution and diligence in avoiding collisions with railroad trains or other things which would naturally result in injury to the vehicle or its occupants. If such driver were drunk, plainly incompetent to manage his team, or manifestly reckless, or if for any other reason it was apparent to the passenger that she could not safely rely upon him, probably the duty would be upon her to supervise his conduct, and compel him if possible, to observe the requirements of ordinary care and prudence in the management of his vehicle, or else leave the same. No reason why the plaintiff should do either appeared in this case, and we therefore think she was under no obligation to overlook or undertake to control the driver's movements, or get out of the hack.

4. Section 708 of the Code, relating to the erection of blow-posts, the blowing of whistles, and the checking of trains in approaching public crossings, was by the Act of 1875 (incorporated in section 710 of the Code) modified, so far as cities, towns, and villages are concerned, by dispensing with the posts, by substituting the tolling of bells for the blowing of whistles, and by requiring engineers to signal the approach of their trains to public crossings, no matter whether such trains were put in motion at a distance of 400 yards from such crossings or at a point less than that distance. We do not mean to say the act in precise terms makes these changes, but it seems unquestionable that they were intended to be made thereby. In the very nature of things, the Legislature could not have intended that the approach of trains to public crossings in towns and cities should be signaled only when the train began to move at a point 400 yards or more distant therefrom. The absolute absurdity of such intention in the legislative mind shows conclusively that it did not exist. The purpose of the Act undoubtedly was to protect persons and property on street cross-

ings in towns and cities, and this could not possibly be accomplished if warnings of the approach of trains and locomotives need be given only when they were set in motion nearly a quarter of a mile from any particular street crossing in question. The law meant that in towns and cities engineers and other persons in control of trains should always be cautious in approaching crossings, and have their powerful machines under such control as in every instance to be able to prevent collisions in such places. That this court has so regarded and construed the law is evident from its rulings in the following cases: *Atlanta & W. P. R. Co. v. Wyly*, 65 Ga. 120; *Georgia R. Co. v. Carr*, 73 Ga. 557; *Central R. Co. v. Russell*, 75 Ga. 810; *Western & A. R. Co. v. Young*, 81 Ga. 417; *Georgia Midland & G. R. Co. v. Evans* (Ga.) 13 S. E. Rep. 580.

Numerous other decisions of this court might be cited, but the above will suffice. The case of *Morgan v. Central R. Co.* 77 Ga. 788, even if correct in holding that section 706 of the Code does not apply to trains operating between points where blow-posts are or should be located, and public crossings, is not applicable here, because in that case the injury did not take place in a city, town, or village, and the case was not, therefore, within the Act of 1875, above mentioned.

5. The motion for a new trial contains thirty-five grounds. We have carefully considered all of them, and find that the court did commit some slight errors in its rulings upon questions of minor importance, but none of them are sufficiently serious to authorize or require the granting of a new trial. The controlling questions in the case are those which we have already discussed, and, the court having ruled correctly upon these, we are of the opinion that *the judgment below should be, and accordingly it is, affirmed.*

Mary F. WRIGHT, *Plff. in Err.*,

v.

Supreme Commandery of the KNIGHTS OF THE GOLDEN RULE.

(.....Ga.....)

*The terms of the certificate of membership binding the assured to pay such assessment

*Head note by BLECKLEY, Ch. J.

NOTE.—*Life insurance; payment of premium after death to keep insurance in force.*

Tentier after death of premium due in the life of the insured will not prevent a forfeiture according to the terms of the policy for nonpayment. *Ruse v. Mutual Ben. L. Ins. Co.* 23 N. Y. 516.

An agreement extending the time for payment of premium will make payment within that time sufficient even if the insured dies in the meantime. *Homer v. Guardian Mut. L. Ins. Co.* 67 N. Y. 478; *Howell v. Knickerbocker L. Ins. Co.* 44 N. Y. 278; *Kansas Protective Union v. Whitt*, 85 Kan. 760, 69 Am. Rep. 607.

If credit is given for premiums the death of the insured before the expiration of the time of credit will of course permit the subsequent payment of the premium or its deduction from the proceeds of 14 L. R. A.

as should be levied and required by the supreme commandery, and the declaration alleging that the assessment not paid was one of which the assured had no notice whatever, and also that under the charter and by-laws of the association thirty days after the assessment is due were allowed holders of certificates and beneficiaries thereof to pay such assessment, that the assured died within the thirty days, and that before the thirty days had expired the beneficiaries tendered the unpaid assessment, and the association refused to receive it, there was enough in the declaration to show prima facie that no forfeiture of the policy resulted from the nonpayment of the assessment, more especially as the declaration also alleged that the association continued to treat the assured as a member in good standing, by making a subsequent assessment against him.

(July 8, 1891.)

ERROR to the Superior Court for Bibb County to review a judgment in favor of defendant in an action brought to recover the amount alleged to be due on a benefit certificate. *Reversed.*

The case sufficiently appears in the opinion. *Messrs. Lanier & Anderson* for plaintiff in error.

Messrs. J. G. Chandler and A. A. Dozier for defendant in error.

Bleckley, Ch. J., delivered the opinion of the court:

A useful collection of authorities on the general subject matter may be seen in 88 Cent. L. J. 43, 65, 87. The contract of insurance declared upon stipulated for the payment "of all assessments levied and required by the Supreme Commandery," and provided that "any violation of the above mentioned conditions, or of the requirements of the laws now in force or hereafter enacted governing the order of this class, shall render this certificate and all claims under it or upon the order null and void." The certificate says nothing of giving notice of assessments, and nothing with regard to the time at or within which assessments had to be paid. They were to be paid "as levied and required by the Supreme Commandery." The declaration, as it stood at first, alleged that Wright, the assured, had no notice whatever, up to the time of his death, of the making of the unpaid assessment, or that any assessment against him remained unpaid. In the case of ordinary life policies, the success-

the policy. *Tennant v. Travelers Ins. Co.* 81 Fed. Rep. 322.

This is assumed to be the law in many other cases. Under N. Y. Act 1877 the notice required thereby must be given before a forfeiture can be declared for nonpayment of premium, and if this has not been given before the insured dies, although premium was due it may be deducted from the proceeds of the policy. *Baxter v. Brooklyn L. Ins. Co.* 7 L. R. A. 233, 119 N. Y. 450.

A provision in a certificate of membership that assessments shall be payable within thirty days after notice makes payment within that time sufficient although made by the beneficiary after the death of the member. *Bankers & M. Mut. Ben. Asso. v. Stapp*, 77 Tex. 517.

If the insured dies on the day on which the premium is due by the terms of the contract, but that

sive premiums or installments of premium are uniform in amount, and mature at fixed times. No occasion for notice, therefore, exists, unless it shall be created by custom or course of dealing between the parties. But a different rule prevails touching contingent and irregular assessments made by mutual aid associations upon their members. Unless notice is dispensed with by the contract, no liability to pay an assessment becomes fixed until notice has been given. *Bacon, Benefit Societies*, § 879. If any special law applicable to the given association, or any by-law, dispenses with notice, this is matter of defense, unless it is disclosed in the pleadings of the plaintiff. Here no such disclosure is made. By an amendment to the declaration it was alleged that within less than thirty days after the unpaid assessment was due, the full amount of it was tendered to the defendant, but was refused, "although, under the charter and by-laws of the said defendant, thirty days after an assessment was due were allowed holders of insurance certificates and the beneficiaries thereof . . . in which to pay an assessment past due, and such payment relieves from any default or suspension caused by failure to pay an assessment when due." The demurrer to the declaration as amended admits this allegation to be true. It will be noticed that it is

alleged that the by-laws allow the beneficiaries to make payment within thirty days after an assessment becomes due. We think this implies, if nothing to the contrary appears in the by-laws, that the beneficiaries can make this payment though the assured be dead. In this instance he was dead, but his death occurred within the thirty days, and therefore before the time allowed by the by-laws for payment of the assessment had expired. Perhaps the declaration is also somewhat aided by another allegation in the amendment, to the effect that the association continued to treat the assured as a member in good standing by making a subsequent assessment against him. *Niblack, Mut. Ben. Soc.* § 345. At all events, taking the declaration as it stood after amendment, it set forth a cause of action sufficiently to put the defendant on pleading anything contained in its by-laws, or any extrinsic facts tending to negative its liability. We do not at present see what the promise of Adams, the agent, had to do with the merits of the case. But this, though a seeming irrelevancy, would not vitiate the declaration. The court erred in sustaining the demurrer and in dismissing the action.

Judgment reversed.

Lumpkin, J., not presiding.

day is Sunday and the time thereby extended until the next day, payment on Monday, although after death, is sufficient. *Hammond v. American Mut. L. Ins. Co.* 10 Gray, 303.

Where a premium note for three months came due on Sunday and the insured died that day at 1 P. M., although the policy said that the premium must be paid at noon on the day it became due, payment of the note on Monday at any time during business hours is sufficient although it may be afternoon. The rule as to payment at noon does not apply where such a note has been given, but payment thereof must be made at its maturity according to the general rule applicable to such paper. *Leigh v. Knickerbocker L. Ins. Co.* 26 La. Ann. 423.

An offer to pay after the death of the insured may be in time although the premium became due in his lifetime if the insurer had by its contract become estopped from enforcing the condition in the policy as to forfeiture for failure to pay at a certain time. *Mayer v. Mutual L. Ins. Co.* 38 Iowa, 304, 18 Am. Rep. 34.

Receiving premium after the death of the insured, if done with knowledge of the facts, keeps the insurance alive. *Froehlich v. Atlas L. Ins. Co.* 47 Mo. 407.

The same rule applies to a receipt of dues for a member of a mutual insurance company after his death. *Erdmann v. Mutual Ins. Co.* 44 Wis. 376.

But accepting an overdue payment of premium after the death of the insured, of which both parties are ignorant, does not bind the insurer and keep the policy alive. *Miller v. Union Cent. L. Ins. Co.* 110 Ill. 102; *Pritchard v. Merchants & T. Mut. L. Assur. Soc.* 3 C. B. N. B. 622.

Days of grace.

Under a provision that if a member neglects to pay quarterly premiums for fifteen days after the same become due, the policy will be void, and that 14 L. R. A.

he "shall pay or cause to be paid" within that time, the death of the insured during such fifteen days and before payment defeats the insurance, and a tender of the premium thereafter, though within the fifteen days, is insufficient. *Went v. Blunt*, 12 East, 183.

This rule has been followed in other cases where a certain number of days is given for payment after the premium is due. *Simpson v. Accidental Death Ins. Co.* 2 C. B. N. B. 267; *Mutual Ben. L. Ins. Co. v. Ruse*, 8 Ga. 584.

In the case of *Simpson v. Accidental Death Ins. Co.*, *supra*, payment was in fact not offered until after those days had expired, but the court said that even within that time payment could not be made after his death.

To the contrary is a much more modern decision holding that a condition that the insured shall pay when due "or within thirty-five days thereafter" is not violated by failure to pay until the thirty-five days have elapsed, and that payment within that time is sufficient although the insured is dead. *Worden v. Guardian Mut. L. Ins. Co.* 7 Jones & S. 317.

Reinstatement after death.

Under a certificate authorizing reinstatement for "valid reasons to the officers of the association" payment after the death of the member may be made where his failure to pay within thirty days after notice was due to a stroke of apoplexy which rendered him unconscious until he died. *Dennis v. Massachusetts Ben. Asso.* 9 L. R. A. 139, 120 N. Y. 496.

The death of the insured in a mutual relief association after mailing past dues and papers for reinstatement and before the papers had been acted on by the company will not defeat the right to reinstatement. *Jackson v. Northwestern Mut. Relief Asso.* 78 Wis. 463.

B. A. R.

MICHIGAN SUPREME COURT.

PEOPLE OF the State of MICHIGAN

Daniel CUMMINGS, *Appt.*

(.....Mich.....)

1. A statute authorizing a parole or conditional release by the board of control of prisons of a prisoner who is sentenced for an indefinite term, whereby he remains in the legal custody of the board although outside the prison and subject to be taken back on order of the board if he violates the conditions of his parole or release, is in violation of Mich. Const., art. 6, § 1, giving the judicial power to the courts, or art. 5, § 11, giving pardoning power to the governor.
2. A sentence of not less than two nor more than four years in the discretion of the board of control of prisons may be good for two years although void as far as it attempts to give discretion to the board.

(Grant, J., dissents from proposition 1.)

(November 18, 1891.)

ERROR to the Circuit Court for Muskegon County to review a judgment convicting defendant of larceny and sentencing him to be confined in the State House of Correction and Reformatory at hard labor for a period of not less than two, nor more than four, years, in the discretion of the board of control of prisoners in the State of Michigan. *Reversed.*

The facts sufficiently appear in the opinion.

Kr. James E. McBride for plaintiff in error.

NOTE.—Suspension of sentence for good behavior, conditional pardons and parole of prisoner.

1. Suspension of sentences.

The weight of authority is now against the power of the courts to suspend sentence for good behavior except for short periods pending the determination of motions or other considerations arising in the cause after verdict. *United States v. Wilson*, 46 Fed. Rep. 748; *People v. Blackburn* (Utah) Jan. 21, 1890; *People v. Morrisette*, 20 How. Pr. 118.

In each of these cases the question was squarely presented and the decision made that there was no power in a court to suspend a sentence indefinitely and thus in effect relieve a person who is convicted of punishment; but in the case of *People v. Blackburn*, *supra*, where the punishment fixed for a crime was imprisonment "not to exceed five years," a mandamus to compel sentence was denied on the ground that the judge in his discretion had evidently intended to impose the minimum punishment, which was purely nominal, and therefore that the merely perfunctory duty and useless expense of passing sentence would not be compelled by mandamus.

There has been, however, some authority on the other side. In the case of *People v. Mueller* (Ill.) reported in 4 Crim. L. Mag. 725, the court in an extensive opinion declared that upon principle and precedent such power of suspension existed. In that case, however, the sentence might be for "any number of years" in the penitentiary, and the court said the difference between a suspension of sentence and any punishment that might be imposed was an incalculable minimum. This decision, like that in the case of *People v. Blackburn*, 14 L. R. A.

Morse, A. A. Ellis, Atty-Gen., and W. J. Turner, Proc-Atty., for the People.

Morse, J., delivered the opinion of the court:

This case involves the constitutionality of Act No. 228, Pub. Acts 1889. The Act, in full, is as follows: "An Act to Provide for Indeterminate Sentences, and Disposition, Management, and Release of Criminals under Such Sentence. Section 1. The People of the State of Michigan enact that every sentence to state-prison at Jackson, the state house of correction and reformatory at Ionia, and the state house of correction and branch of the state-prison in the Upper Peninsula, of any person hereafter convicted of a crime, except of a person sentenced for life, or a child under fifteen years of age, may be, in the discretion of the court, a general sentence of imprisonment in that one of the prisons provided by law for the offense of which he is convicted. The term of such imprisonment of any person so convicted and sentenced may be terminated by the board as authorized by this Act; but such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced; and no prisoner shall be released until after he shall have served at least the minimum term provided by law for the crime for which he is convicted. Sec. 2. Every clerk of any court by which a criminal shall be sentenced to any prison, whenever the term of sentence may not be fixed by the court, shall furnish the warden or other officer having such criminal in charge a record con-

burn, *supra*, might be justified on the ground that the minimum sentence allowable was practically nothing. Nevertheless the court fully discussed and committed itself to the doctrine that it had power to suspend sentence entirely.

Among the cases cited in support of this doctrine that of *State v. Addy*, 43 N. J. L. 113, 39 Am. Rep. 547, which was on an indictment for nuisance, while pronouncing in favor of the power to suspend sentence, nevertheless decided that there was in fact not a suspension of sentence but that what was in form such a suspension on condition of payment of costs was in effect an order to abate the nuisance and pay the costs.

Another case cited to support the doctrine was *Com. v. Dowdican*, 115 Mass. 186, but the opinion in this case states that while the practice of suspending sentence has long been common in that State it has been recognized there by statute.

Another case cited is that of *Weaver v. People*, 33 Mich. 206, in which a sentence by another judge after the trial judge had suspended sentence until the next term on the criminal's own recognizance and had failed to take any action at that term was reversed on the ground that the action of the trial judge indicated an intent to let him off without punishment. This amounted to an approval of the doctrine that a judge might suspend sentence; but in the later case of *People v. Reilly*, 53 Mich. 203, the court was equally divided as to such power and *Champlin, J.*, declared that it would incorporate into the administration of criminal law the "ticket of leave system" of the English jurisdiction without its surveillance and checks.

Again, in *People v. Brown*, 54 Mich. 15, although the question was not strictly before the court,

taining a copy of the information or complaint, of any such plea, the name and residence of the judge presiding at the trial, also of the jurors and witnesses sworn on the trial, with a statement of any fact or facts which the presiding judge may deem important or necessary for the full comprehension of the case and of his reasons for the sentence inflicted; and such copy, statement, and abstract, signed by the clerk of the court, shall be prima facie evidence against the convicted person in all proceedings for the relief of such person by a writ of habeas corpus or otherwise. The clerk of the court shall be entitled to such compensation in every case in which he shall perform the duties required by this Act as shall be certified to be just by the presiding judge at the trial, and shall be paid by the county in which the trial is had, as a part of the court expenses. The clerk shall also, upon any conviction and sentence, forthwith transmit to the warden of the prison to which sentenced notice thereof. Sec. 3. The board of control of prisons shall have power to establish rules and regulations under which prisoners sentenced under this Act may be allowed to go upon parole outside of the buildings and inclosures, but to remain, while on parole, in the legal custody and under the control of the board, and subject at any time to be taken back within the inclosure of said prison; and full power to enforce such rules and regulations, and to retake and reimprison any convict so upon parole, is hereby conferred upon said board, whose written order, by its clerk, shall be sufficient warrant for all officers named therein, to authorize such offi-

cer to return to actual custody any conditionally released or paroled prisoner; and it is hereby made the duty of all officers to execute such order the same as in any ordinary criminal process. Sec. 4. The board shall make such rules and regulations for the separation and classification of prisoners sentenced under this Act into different grades, with promotion and degradation according to the merits of the prisoners, their employment and instruction in industry, and generally, as may from time to time appear to be necessary or promotive of the purposes of this Act. Sec. 5. And it is hereby provided that when any prisoner violating the conditions of his parole or conditional release (by whatever name) is, by a formal order, entered in the board's proceedings, declared a delinquent, he shall thereafter be treated as an escaped prisoner owing service to the State, and shall be liable when arrested to serve out the unexpired period of the maximum possible imprisonment, and the time from the date of his declared delinquency to the date of his arrest shall not be counted as any part or portion of the time served; and any prisoner at large upon parole or conditional release, committing a fresh crime, and upon conviction thereof being sentenced anew to the prison, shall be subject to serve the second sentence after the first sentence is served or annulled, to commence from the date of the termination of the first sentence. Sec. 6. Nothing in this Act contained shall be construed to impair the power to grant a pardon or commutation in any case. Approved July 1, 1899."

It is not clear from the reading of this statute

Chief Justice Cooley in commenting on a petition to the lower court for suspension of sentence said that this was a request to the judge "to grasp at a power not confided to him and usurp authority."

While criminal courts frequently assume this power and some of the opinions in the above cases recite that the practice has been common, it must be conceded on a careful review of the authorities that the right of any court to make such a suspension of sentence does not exist in the absence of statutory authority.

2. Conditional pardons.

From the earliest period conditional pardons have been held valid in England. *Guilliam's Case*, cited by Coke from *Rolls of 8 Hen. VI.*, Co. Litt. 274 B; *Clerk of Hangley's Case*, Y. B. 3 n. 6, fol. 7, no. 5. *Cole's Case*, Sir T. Moore, 466; Vin. Abr. Prerog. P. A. 3; *Copeland's Case*, J. Kel. 45; *Rex v. Miller*, 1 Leach, C. C. 74, 2 H. Bl. 797; *Madan's Case*, 1 Leach, C. C. 223; *Rex v. Aickles*, Id. 294, 391, 396; *Reg. v. Foxworthy*, 7 Mod. 153.

In the United States also it is settled law that conditional pardons are included in the power to pardon given by general terms provided the conditions be compatible with the genius of the Constitution and laws. *Com. v. Haggerty*, 4 Brewst. 326; *Flavell's Case*, 8 Watts & S. 197; *United States v. Six Lots of Ground*, 1 Woods, 234, 1 Ops. Atty-Gen. 342; *People v. Potter*, 1 Park. Crim. Rep. 47; *Arthur v. Craik*, 48 Iowa, 284, 30 Am. Rep. 366; *Lee v. Murphy*, 22 Gratt. 789, 12 Am. Rep. 563; *Ex parte Wells*, 59 U. S. 18 How. 307, 15 L. ed. 421.

The constitutional power to pardon in several states expressly authorizes pardons on such terms and under such restrictions as the governor shall think proper. *State v. Fuller*, 1 McCord, L. 118; *Ex parte Marks*, 64 Cal. 29, 49 Am. Rep. 684.

So a statute authorizing pardons on conditions

makes the conditions allowable under a constitutional provision to grant pardons on "rules and regulations prescribed by law." *Ex parte Hunt*, 10 Ark. 284.

What conditions are allowable.

An illegal, immoral, or impossible condition in a pardon would be void. *People v. Potter*, 1 Park. Crim. Rep. 47; *Ex parte Marks*, 64 Cal. 29, 49 Am. Rep. 684.

A condition in a pardon that the criminal be put to labor on public works is void under a general constitutional provision giving the governor power to pardon. *Com. v. Fowler*, 4 Call. 35. The opinion in this case merely declares without giving reasons that the condition is void, and the case has been cited as authority against the power to pardon on condition, but as interpreted in the light of the later case of *Lee v. Murphy*, 22 Gratt. 789, 12 Am. Rep. 63, it cannot be so considered, but regarded rather as condemning the particular condition there in question.

But in England pardon on condition that the criminal shall serve three years on one of the Queen's ships was held valid. *Reg. v. Foxworthy*, 7 Mod. 153.

So in a very early English case a pardon was on condition that the criminal go beyond the seas and serve for five years. *Copeland's Case*, J. Kel. 45.

Banishment from the United States may be the condition of a pardon. *People v. Potter*, 1 Park. Crim. Rep. 47; *Com. v. Haggerty*, 4 Brewst. 326; *State v. Addington*, 2 Ball. L. 516, 23 Am. Dec. 150.

So of a condition of transportation for life or for a term of years. *Madan's Case*, 1 Leach, C. C. 223; *Rex v. Aickles*, Id. 294.

And of a condition that the criminal shall leave the State if pardoned. *Ex parte Hunt*, 10 Ark. 284.

The condition of a pardon that the prisoner shall

whether the board of control is given the power of absolute discharge from imprisonment, or not. If so, it would be clearly unconstitutional, as the exercise of such power would be certainly one of two things. It would be either the exercise of judicial power in determining the term of imprisonment of a citizen, or an act of grace, to wit, the bestowing of a pardon and release of a prisoner before his term of imprisonment had expired. The judicial power of this State, by the Constitution, is vested in certain specified courts (sec. 1, art. 6), and the pardoning power is vested absolutely in the governor of the State (sec. 11, art. 5). The first section of the Act provides that "the term of such imprisonment of any person so convicted and sentenced may be terminated by the board as authorized by this Act, but such imprisonment shall not exceed the maximum term provided by law for the term for which the prisoner was convicted and sentenced, and no prisoner shall be released until after he shall have served at least the minimum term provided by law for the crime for which he is convicted." But from the other clauses of the statute it may be inferred, perhaps, that this release is in all cases to be a conditional one, and that it is a system of parole that is contemplated by the law. Yet if it be considered that the only power conferred is a conditional release upon parole, still, if the prisoner keeps his parole, or, rather, if the board are of the opinion that he does, the release is in fact an absolute one. By what refinement of reasoning it can be made to appear that this is not in effect a pardon of the prisoner, is beyond my com-

prehension. And, in my opinion, this Act also confers upon the board judicial power. The term of imprisonment is fixed by the board, and not by the court. The sentence is to confinement in the prison generally,—no term is fixed by the judge. How long that term shall be, rests entirely in the will of the board. It may be one day or fifteen years, as they see fit; in some cases. It is in the power of the Legislature to fix all punishment for crime, and to provide for a minimum and maximum punishment, and to give the courts in which the prisoners are convicted a discretion to fix a term between these limits, but it cannot be contended for a moment that this discretion can be given to any other person or persons. To do so would imperil the liberties of the citizen by putting his punishment for wrongs committed into the arbitrary power of unauthorized persons, without any right of remedy in the courts. Nor can the Legislature authorize a circuit judge to delegate his power and discretion in such a case to any other person or persons than himself.

Under this Act, the general sentence, without interference from other parties, must stand for the length of time fixed by the maximum term. The court imposing this sentence has no discretion. It may be truly said that he has a discretion in the first place as to whether he will sentence under the Act or not. But this discretion is whether he will delegate his power and authority in the premises to the board of control or not, and we are now dealing with a case where he has exercised this first discretion. It is said that this Act "is evi-

leave the State within two weeks is not impossible or invalid although the prisoner is a married woman and therefore subject to her husband's control. *State v. Fuller*, 1 McCord, L. 118.

In case of pardon and amnesty an express condition that the person pardoned will not claim property sold under confiscation is good. *United States v. Six Lots of Ground*, 1 Woods, 234.

A condition on a pardon of one sentenced to be hung for murder that he be imprisoned during life is valid and operates as a commutation of the sentence which makes the imprisonment lawful if the pardon is accepted. *Ex parte Wells*, 59 U. S. 18 How. 307, 15 L. ed. 421.

A condition that a pardon shall relieve the criminal only from imprisonment and not from the legal disabilities arising from the conviction and sentence is repugnant to the pardon and void. *People v. Pease*, 3 Johns. Cas. 333.

Acceptance.

A prisoner may reject a pardon offered on condition. *People v. Potter*, 1 Park. Crim. Rep. 47; *State v. Smith*, 1 Ball. L. 283, 19 Am. Dec. 673; *United States v. Wilson*, 32 U. S. 7 Pet. 157, 8 L. ed. 642; *Ex parte Marks*, 64 Cal. 24, 49 Am. Rep. 684.

The fact that a person pardoned on condition is at the time in prison and must accept the condition in order to receive the benefit of the pardon is not such duress as will prevent his acceptance of the condition from being binding upon him. *Great-house's Case*, 2 Abb. U. S. 382.

Compliance with condition; construction.

A condition of a pardon that the recipient shall "leave the country forthwith" means that he shall remain away for at least the term of his sentence. *Com. v. Haggerty*, 4 Brewst. 326.

But where there was a statutory provision au-

thorizing a pardon on condition that the criminal shall leave the State and never return, a pardon on condition simply that he should leave the State was held to be an exercise of the general discretion of the governor and not within the statute, and the condition was held not broken by an immediate return to the State after leaving it. *Ex parte Hunt*, 10 Ark. 284.

A pardon "to begin and take effect" from the day on which a prescribed oath is taken will not take effect until such oath is taken. *Waring v. United States*, 7 Ct. Cl. 501.

And in such case an oath taken before the pardon was granted is insufficient. *Hayn v. United States*, 7 Ct. Cl. 443; *Scott v. United States*, 8 Ct. Cl. 457.

An oath taken under the amnesty proclamation of May 29, 1865, is not insufficient because it omits the word "protect" and uses the words "late rebellion" for "existing rebellion." *Hamilton v. United States*, 7 Ct. Cl. 444.

But the condition of a pardon for participation in the rebellion that the recipient shall not claim any property or proceeds of any property sold in confiscation proceedings does not prevent him from applying for the proceeds of a money bond secured by a confiscated mortgage of which the proceeds were collected in part by voluntary payment and in part by sale of the land mortgaged, as the condition is only intended to protect the purchasers at judicial sales in confiscation proceedings. *Osborn v. United States*, 91 U. S. 474, 23 L. ed. 388.

The condition of a pardon that the criminal shall "absolutely abstain from visiting places where intoxicating liquors are sold" is intended to prevent him from resorting to saloons for the purposes of drink or social recreation and amusement, and is not broken by merely passing through a saloon for business purposes. *People v. Moore*, 63 Mich. 496.

A pardon on condition that the remainder of the

dently promoted by a desire to reform as well as to punish; to make better those under sentence as well as to protect society." Let us see how it will work in the interest of reform, and what will be the discretion of the trial judge,—the one person best calculated, from his knowledge of all the incidents and circumstances of the commission of the crime and of the character of the prisoner, to exercise a discretion in fixing the term of imprisonment. Take, for instance, a person convicted of manslaughter. The maximum penalty is imprisonment in the state's prison for fifteen years; the minimum a fine not exceeding \$1,000; the sentence may be one day's imprisonment; it may be a fine of one cent. If the crime appears to be somewhat of an aggravated character, and the prisoner a bad man and an old offender, the circuit judge may reason, "There is no hope of reforming this man, so I will sentence him to ten years in state's prison." At the end of ten years the prisoner is released unconditionally. In another case the nature of the crime may be such that the circuit judge may think the prisoner ought not to be let off with a fine, but deserves some imprisonment; but there is hope for reform, and he therefore concludes to sentence him under the indeterminate law. The moment he pronounces this sentence the term of imprisonment is entirely, not only at the discretion of the board of control, but at their will and pleasure. No court can review their action. They may discharge him the next day after he arrives at the prison; but, worse than this, they may keep him confined for fifteen years. If the board are honest men, the term of imprisonment depends on his behavior after he enters the prison. If they are not honest, it depends solely on their will. When the convict, in whose interest so-called humanitarians have devised this manner of indeterminate sentence for his reform, enters the prison, he be-

comes the servant and slave of the prison board, and no court in the country has any power to protect his rights or redress his wrongs. Their discretion is not reviewable by the courts; it is arbitrary.

The supposed action of the judge in manslaughter cases is exemplified by the action of the circuit judge in the case before us. He was desirous of sentencing Cummings under the indeterminate law. If he had imposed the sentence in accordance with the statute, the maximum term would have been five years, and the minimum imprisonment for one day, or a fine of one cent. The court thought, however, he ought to go to prison two years at least, and not more than four years, so the sentence was to be "confined in the state house of correction and reformatory at hard labor for a period of not less than two, nor more than four, years, from and including this date, in the discretion of the board of control of prisons of the State of Michigan." The court fixed the minimum and maximum and gave the board a leeway between in which to use their discretion. Here the circuit judge used some discretion and delegated some to the board; but, under the Act, he must delegate it all to them, or not sentence under the statute at all. We have held that a circuit court commissioner could not, although going through the forms of a judicial proceeding, release a prisoner from confinement by a writ of habeas corpus, because no judicial power is vested in such officer. *Buddington's Case*, 29 Mich. 472; *Burger's Case*, 39 Mich. 208. The Legislature cannot confer judicial power upon any officers not specified in the Constitution. *Chandler v. Nash*, 5 Mich. 409. It was held in *People v. Brown*, 54 Mich. 15, that the pardoning power in this State belongs to the governor alone, and that no judge can exercise it by indefinitely suspending the sentence of a convicted criminal.

sentence shall be served in case of a second sentence, will not authorize imprisonment under the first sentence after the date when it would have expired except for the pardon, although the second sentence is within that time. *West's Case*, 111 Mass. 443.

Breach of condition.

On breach of the condition of a pardon the pardon becomes null. *Flavell's Case*, 3 Watts & S. 197; *People v. Potter*, 1 Park. Cr. Rep. 47.

The breach of the condition leaves the criminal in the same situation that he was in before the pardon. *Madan's Case*, 1 Leach, C. C. 223; *Rex v. Aickles*, Id. 294.

Failure to perform the condition of a pardon which requires the criminal to leave the State forfeits the pardon and the original sentence may be enforced. *State v. Addington*, 2 Ball. L. 516; *Ex parte Marks*, 64 Cal. 29, 49 Am. Rep. 684.

So if he returns after leaving and before the time permitted by the condition of the pardon. *State v. Smith*, 1 Ball. L. 288, 19 Am. Dec. 679; *Com. v. Haggerty*, 4 Brewst. 326.

But remaining in the kingdom after the time for transportation may be excused by sickness or inability to get transportation. *Rex v. Aickles*, 1 Leach, C. C. 391, 398.

So where the prisoner had been insane part of the time and all the time in ill health and poverty, he was held excused for failure to leave within the time fixed by the condition in his pardon and an extension of time was given. *People v. James*, 2 Cal. 57.

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How forfeiture enforced.

In an early English case an indictment was found for being at large contrary to a condition in a pardon. *Rex v. Miller*, 1 Leach, C. C. 74, 2 H. Bl. 797.

But in another case an order to show cause was issued and a jury summoned to try the identity of the prisoner and he was remanded on his original sentence. *Madan's Case*, 1 Leach, C. C. 223.

So according to several decisions in this country a prisoner may be remanded on his original sentence in case of a breach of the condition of a pardon. *People v. Potter*, 1 Park. Crim. Rep. 47.

He may be remanded as if escaped. *Com. v. Haggerty*, 4 Brewst. 326.

Thus a criminal who fails to leave the state as the condition of his pardon requires, may be again taken into custody by the warden of the prison from which he was released. *Ex parte Marks*, 64 Cal. 29, 49 Am. Rep. 684.

A motion may be made that sentence be passed on failure to comply with such condition. *State v. Fuller*, 1 McCord, L. 118.

So a bench warrant may issue, even without any written rule, to arrest a criminal on his return to the State in violation of a condition in his pardon, and he is not entitled to an indictment. *State v. Chancellor*, 1 Strobb. L. 347, 47 Am. Dec. 557.

Any court of superior criminal jurisdiction may remand a criminal on breach of the condition of a pardon. *People v. Potter*, 1 Park. Crim. Rep. 47.

The legal status of the criminal on violation of the condition of his pardon is the same as before pardon where the stipulation in the pardon was

nal; yet, under the law before us, the circuit judge by his sentence may delegate the power to the prison board to release a prisoner, and, in effect, pardon him in many cases the first day that he is imprisoned.

But it is claimed that the pardoning power is not granted to the board of control by this statute, because there is no authority to discharge prisoners absolutely conferred upon the board. It is argued that the power granted by this Act is only to permit prisoners sentenced under it to go upon parole in the legal custody and control of the board, subject at any time to be taken back within the inclosure of the prison. If this be so, what is meant by this parole, and what is the power of the board? Can they let one man out, not to go beyond a five-mile limit, another to keep within the county where the prison is located, the third to keep within the congressional district, the fourth not to go outside the State, the fifth to keep himself within the limits of certain states of the Union, the sixth not to leave the United States, and the seventh not to visit England, and the others confined to certain localities, at the will and pleasure of this board? Or does the law contemplate that this parole shall be in fact a release from prison with only the condition that the board may bring the person on parole back again if they see fit, and make him serve his whole unexpired maximum term within the prison walls? In any event, this parole system is as obnoxious to the Constitution as an unconditional release by the board would be; and, if they have the power to release on conditions, those conditions may be made so trifling as in fact to be no conditions at all. In the case of *People v. Reilly*, 53 Mich. 263, the present chief justice of this court, in speaking of the action of the circuit judge in permitting a convicted person to go upon his own recognizance for over a year, and then calling him into court and sending him to state's prison for four years, said: "If the judge entertained serious doubts of his guilt, he should

have recommended the governor to pardon the respondent; and, if he entertained no serious doubt of his guilt, he should have pronounced judgment instead of setting the criminal at large upon his own recognizance. If such power can be exercised by a judge, it incorporates into our administration of the criminal law the 'ticket-of-leave' system of the English judiciary, without its surveillance and checks, and places the criminal at the caprice of the judge, subject to be called up for sentence at any time. If the judge can delay the sentence one year, I do not see why he may not fifteen years. An exercise of such power, in this age, would be no less revolting to our sense of justice than was the exercise of such power in the reign of James I., when he sent Sir Walter Raleigh to the block fifteen years after his conviction." This law introduces the "ticket-of-leave" system, and places despotic power in the hands of the prison board over the persons sentenced under this statute. If all there is to this law is this system of parole, as contended by the counsel for the people, then it cannot stand under our ruling in *People v. Moore*, 62 Mich. 497. In that case it was held that the agent or keeper of a prison could not arrest and bring back into the prison a convict pardoned by the governor on conditions, for a violation of such conditions, without such convict was arrested, held, and tried for such violation in the same manner as other offenders against the criminal laws. The governor has the undoubted right to pardon. He may pardon on conditions, but neither he nor any other person can have, under our laws, the sole right to determine whether or not such conditions have been violated. This must be determined by the courts by the usual and proper proceedings. The Act of the Legislature in that case, authorizing the arrest of such a pardoned convict, without a warrant, for an alleged violation of the conditions of his pardon, was held unconstitutional and void. The writer of this opinion said in that case: "When a person has

that he should be liable to summary arrest and the judgment of the executive conclusive as to the violation of the condition. *Arthur v. Craig*, 48 Iowa, 264, 80 Am. Rep. 386.

So in Massachusetts under a statutory power of the governor and council to remand a criminal on breach of the condition of his pardon to serve the unexpired term of his sentence they may determine the question as to breach of the condition without notice to the convict or order for him to appear. *Kennedy's Case*, 135 Mass. 48.

This decision is based on the theory that the pardon is an act of grace subject to withdrawal if clemency is abused, and that such withdrawal is not a penalty as to which the criminal has a constitutional right to the usual proceedings in criminal cases.

But, on the other hand, it is held in Michigan that a statutory provision authorizing the agent of a state prison or keeper of a penal institution to arrest and remand a criminal to prison for breach of the condition of his pardon without a preliminary examination to await a trial is unconstitutional and void, but he must be arrested, held and tried in the same manner as other offenders. *People v. Moore*, 62 Mich. 496.

It will be noticed that the main case cites and follows this earlier Michigan case and that the decisions in that State seem to be at variance on this 14 L. R. A.

question with those elsewhere, and to be based on a theory quite different from that of the Massachusetts case *supra*, being in substance that the procedure to retake a prisoner on breach of the condition of a pardon is like a prosecution for crime in respect to the constitutional rights of the prisoner.

3. Parole of prisoner.

In exact conflict with the main case, it is held in Ohio that a statute giving a prison board power to allow a prisoner to go outside the buildings and enclosures, but still remaining in their legal custody and under their control, is constitutional being neither a commutation nor a conditional pardon, but the substitution of a lower for a higher grade of punishment presumably for the culprit's benefit. *State v. Peters*, 3 West. Rep. 103, 48 Ohio St. 629.

A discharge by city officers of a person under arrest for vagrancy on a condition that he will leave the city within a specified time is on a void condition and his subsequent arrest for violation of the condition is illegal. *Roberts v. State*, 14 Mo. 138, 55 Am. Dec. 97.

This last case manifestly stands on different ground from all the preceding ones in respect to the kind and authority of the officers whose acts were involved.

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been set at liberty under the pardon or the commutation of his sentence by the executive, he becomes once more a full citizen, clothed with all the rights, privileges, and prerogatives that belong to any other freeman. He cannot be sent out half free and half slave. He is not to be let out with a rope around his body, as it were, with one end in the hands of the warden, to be hauled back at the caprice of that officer. He must go out a free man, and remain a free man until he breaks the condition of his pardon. He must enjoy the blessings and benefits that belong to an American citizen until he has violated the law of his release. His character may be tarnished and his reputation soiled by his imprisonment, but his rights as a citizen are unimpaired. He is clothed, as he passes out of the prison door, with the same garb of freedom that was removed from him when he went in. He has a right to his liberty the same as any other citizen, so long as he keeps the conditions of his pardon, and he cannot be deprived of that liberty save in the mode prescribed by the Constitution and laws of our State, as applied to any other citizen. If the breaking of the condition is in the nature of a crime, or punished as such, with penal consequences, that crime, or act punished as a crime, must be established as any other crime would be. He is presumptively innocent until proven guilty, and his guilt must be established under the due forms of law, and by the same processes applied to others. There can be no special legislation separating him, in his rights and privileges, from his fellows, and shackling some of his prerogatives. As none, under our institutions, are entitled to special privileges, so none can be shorn by special legislation of any portion of their rights and franchises as freemen. If a condition is imposed that he shall not do any thing or things, this does not hamper or abridge his rights or liberties until the condition is broken; and, in order to remand and confine him in prison again, the fact of the violation of such condition must be established by the due administration of the law, as in other cases of the violation of the penal statutes. The authority conferred upon the agent of the state-prison, or the keeper of any other penal institution, to arrest and detain such person in his prison or house of correction, without complaint or warrant, and to keep him there without bail, and without preliminary examination, as a convict, until the prosecuting attorney of the county may choose, when the next term of court opens, to file an information against him, cannot be tolerated or permitted under our Constitution, and is repugnant to the spirit of our institutions. By the operation of this statute, the person pardoned and absolved from the penal consequences of his crime, we must presume for a good cause, is not free upon his release. He is subject to the will of a master. The warden or other official can reach out his hand at any moment, and pull him back into prison, governed by no restrictions save the will of the officer. When the warden's hand is laid upon the released convict, he becomes his absolute servant and prisoner until the prosecuting attorney gets time or sees fit to move. This arbitrary power over the liberty of another is possessed by no 14 L. R. A.

other officer in our government, in times of peace. It cannot lawfully exist in a free country."

This language applies with still more force to the act before us, for here neither the prosecuting attorney nor the court can intervene between the board and the convict. This law is subject to the same infirmity and is more pernicious. Any convict thus released on parole can at any time be brought back into the prison upon the written order of the board, which all officers must obey. All that is necessary is for the board to enter a formal order that the convict is a delinquent,—has violated the conditions of his parole,—and that is the end of it. The convict is not to have a hearing, and no court has power to interfere in his behalf, if this law is constitutional. Nor is this all. He is to be treated thereafter as an escaped prisoner, owing service to the State, and loses the time even that he has earned by keeping the conditions of his parole perhaps for years, and if he commits another crime while he is at large upon his parole, and is convicted thereof, his new sentence is deferred until he has served out his old, meeting out to him double punishment for his last crime. I have not sufficient words at my command to use in condemnation of this statute. It would fill our State with convicts—they could not be called freemen—running at large outside of our prison walls, all liable at any moment to be taken back inside at the will of four individuals, no better probably in their impulses and caprices than the average man. These people thus at large would not only be subject to the will and pleasure of their masters, without hope of redress if wronged by them, but they would be out of prison under various conditions, and such as the board might impose upon them, without regulation or restriction from any other power or authority,—one under the condition that he shall drink no intoxicating liquor, and another that he shall not chew tobacco, and still another that he shall not use opium or drink strong coffee. There is no limit or qualification to the conditions that may be imposed. In looking upon this law, it is difficult to see in what respect this system of parole differs from a pardon by the governor upon conditions. Is it not in fact a pardon,—a release upon conditions? If it is not, if the faith of the board of control is not to be kept and the convict has no certainty that if he keeps the conditions he will not be again imprisoned, then the whole scheme is a delusion and a snare, and unworthy a place upon the statute books. But, as it is, the only guaranty of a person so released of such good faith is the pleasure of the board. This system of parole is either a pardon upon conditions, and therefore unconstitutional, or it is no release at all, and only a permission to go outside of the walls, and stay as long as the board may will. If it is the latter,—a simple leave to stay outside until the board sees fit to call them in,—the law evidently does not meet the intention of the Legislature, and is not only undesirable, but indefensible. If it is a pardon upon conditions, as the Legislature no doubt intended it should be, then it is open to all the constitutional objections mentioned in *People v. Moore*, 22 Mich. 502. The terms of imprisonment un-

der this law depends, not upon the character of the crime committed, but upon the behavior of the prisoner after he enters upon his sentence. The prisoners are to be classified into different grades, "with promotion or degradation according to the merits of the prisoners, their employment and instruction in industry, and generally as may from time to time appear to be necessary or promotive of the purposes of this Act." The hardened criminal may more easily submit to the discipline of the prison than the younger, but more impulsive, offender, and therefore get his release sooner. The term of imprisonment depends upon the ability of the convict to please the prison officials in his deportment; and not upon the enormity of his offense. This law, if permitted to stand, would be a convenient one for judges who might dislike to perform an unpleasant duty. When a person of influence or wealth was convicted, and the usual pressure in such cases brought to bear upon the trial judge to impose a light sentence, how easy it would be to impose a general sentence, and shift the responsibility of fixing its actual term upon the board of control of prisons, and let them stand the siege, which would at once commence, to procure his release. The law, in my opinion, is not only unconstitutional, as heretofore pointed out, but also wrong in theory and dangerous in practice. That such laws have been adopted by some of the states of the Union has no bearing in favor of this act. A similar statute was sustained in Ohio, but the reasoning of the opinion is not at all satisfactory to me, and does not meet the objections raised against the law. See *State v. Peters*, 48 Ohio St. 629, 8 West. Rep. 103.

It is also urged in support of this law that it is no more despotic or arbitrary than the law providing for a deduction of time from each year of the sentence of a convict who has not infringed the rules of the prison during that time, and it is asserted that the constitutionality of such law has lately been recognized by this court, in *Re Walsh*, 87 Mich. 466. But there is a material difference between the two enactments. How. Stat. §§ 9708, 9704, provide for a certain reduction of the sentence for good behavior. It is not left at the will or caprice of anyone. It is provided that the rules of the prison shall be known to the convict, and that they shall provide what the penalty shall be for an infraction of such rules; that a record shall be kept; and that the rules shall be definite and certain, and apply to all the convicts alike. Such a law was sustained in Massachusetts (18 Gray, 618), upon the ground that the sentences were not rendered indefinite or uncertain thereby, the judges saying in the opinion: "The scale of deduction is not to depend on any varying or capricious notions which any officer or superintendents of the prison may entertain of the good behavior or good disposition of a convict. It is made to depend upon a fact, ascertained by a fixed rule, entered on the journals of the prison, recorded each month, that is entered in a book, permanent in its character, fixed and unchangeable when once entered. These books are always accessible, and, although the officers may all change, the record is there." We also held in the *Walsh Case* that the enforcement

of our statute, and the deduction of lost time under it, could not be left to the will or caprice of any prison official, and that the prison board could not alter or change a record once made to militate against a prisoner; that it must be enforced under fixed rules, known to the convicts; and that the record must be so kept that the convicts would not be left at the mercy of the mistakes of prison officials; yet, as plain as these statutes are, in the *Walsh Case* it was found that, ever since the passage of this law allowing deductions, the prison board had disregarded the statute, and built up a system of their own, which was unjust and pernicious, as well as indefinite and uncertain in its operation. But the law under consideration goes further, and proposes, without regulation or restriction, to give the prison board almost unlimited authority as to the release and discharge of prisoners, without the control of the courts, and without any appeal to any earthly power. It may further be said that the statute in relation to deductions does not give any power to the board to extend the term of imprisonment. The law under consideration does. In order to sustain the statute, it must be argued and considered that the convict is really under sentence all the while; that he is still a convict, although outside the walls of the prison. He is as much under the control of the authorities as is the "trusty" convict who is allowed at times to be outside at work or to run errands; yet, if he violates the conditions of his parole after he has been out ten years,—if his maximum term has not expired,—he can be taken back without trial, or any investigation save by the prison board, and made to serve the ten years beyond his maximum term. See section 5 of the Act. It is a wonder to me that such a law as this, giving such unheard of power to four men, not elected by the people, but holding their offices by appointment, could have been enacted, in view of our Constitution, and the whole theory of our state government, and in the light and example of the history of the establishment and growth of constitutional liberty in this country.

In this case the sentence of Cummings is good, under our previous decisions, for two years; at the end of that period he must be discharged.

Champlin, Ch. J., and McGrath and Long, JJ., concurred.

Grant, J., dissenting:

Upon conviction for the crime of larceny, the respondent was sentenced by the court "to be confined in the state house of correction and reformatory, at hard labor, for a period of not less than two, nor more than four, years, from and including this date, in the discretion of the board of control of prisons of the State of Michigan." In imposing this sentence, the court evidently intended a compliance with Act No. 223, Pub. Acts 1889. I do not think this conforms to the statute. The sentence there provided is a general one, and does not confer upon the court the power to fix a minimum sentence. The only sentence provided in this Act is that the convict be confined in one of the places mentioned. He can then only be released before the expiration of the maximum term of confinement fixed by law by the board

of control, unless pardoned by the governor. The sentence, however, is an absolute one for two years, is therefore legal, and must be sustained. While the constitutionality of this Act is not necessarily involved, yet as it has been presented by counsel, and a speedy determination of the question seems to be required by public interests, we have concluded to dispose of it. Its constitutionality is challenged on two grounds: (1) because it interferes with the pardoning power, which is alone possessed by the governor; and (2) because it confers judicial powers upon the board of control, which, by the Constitution, are solely vested in the courts. Sentence under this Act is not made compulsory, nor does it take away the discretion lodged by the Constitution in the courts. It but gives to the courts the power to sentence under this Act if, in their judicial discretion, they choose to do so. They may still impose a determinate sentence under other statutes, in which cases the provisions of this Act do not apply. But if, in their judgment, in view of the circumstances of the particular crime, and the character of the criminal, they deem it for the interests of the criminal, as well as of society, they may impose sentence under this Act. The constitutional power of the courts is neither abridged nor enlarged. The character and extent of the punishment are clearly within the exclusive control of the Legislature. If, therefore, the Act is to be declared unconstitutional, it must be because it warrants an unconstitutional interference with the judgments of the courts. A careful examination, therefore, of the power conferred upon the board of control, is necessary to a proper determination of the question. We may pass without discussion the claim that it interferes with the pardoning power of the governor. The Act does not attempt to confer any power upon the board to pardon. "A pardon is an act of grace, proceeding from the power intrusted with the execution of the law, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed." *United States v. Wilson*, 32 U. S. 7 Pet. 150, 8 L. ed. 640. Section 6 expressly declares that nothing in the Act shall be construed to impair the power to grant a pardon or commutation in any case. This Act was copied from that enacted in Ohio in 1884, which was held constitutional by the supreme court of that State. *State v. Peters*, 43 Ohio St. 629, 3 West. Rep. 103. Other states have also adopted similar provisions. The object of this law is well stated in the opinion in the Ohio case, viz.: "It is evidently prompted by a desire to reform, as well as to punish; to make better those under sentence, as well as to protect society." A similar law has been sustained by the Supreme Court of Massachusetts. *Condon's Case*, 148 Mass. 168. The only additional power conferred upon the board by this Act is to allow prisoners sentenced under it to go upon parole outside the buildings and inclosures, remaining while on parole in the legal custody and under the control of the board, subject at any time to be taken back within the inclosure of the prison. This is the power, if any, which is judicial, and therefore unconstitutional. The term of his release depends upon the observance of the conditions of his parole.

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This is left with the board to determine, but I do not think this a judicial act. If the power exists to let a convict out on parole, upon such terms and conditions as the board shall establish and the convict agrees to, I think it competent to clothe the board with the power to determine when his parole is broken. The convict agrees to this as one of the terms of his parole. The power of the Legislature to interfere with and modify the sentence of prisoners by the courts has long been recognized in this and other states, and in so doing it has never been thought that the legislative authority was encroaching upon the judicial authority. The following are illustrations from our own statutes: The law requires the courts to sentence murderers of the first degree to solitary confinement at hard labor in the state-prison for life. The law also confers upon inspectors of the state-prison the power to release such convicts from solitary confinement, to employ them as other convicts, and to allow them to correspond with their relatives and friends. For fourteen years the law of this State has provided that every prisoner, who shall have no infraction of the rules of the prison or laws of the State recorded against him, shall be entitled to a deduction for each year of his sentence. The validity of this Act has been recognized in mandamus proceedings brought to this court by a prisoner in the Jackson prison, and the board directed to allow the prisoner his good time. *Re Walsh*, 87 Mich. 406. This deduction is two months each year for the first three years, and finally amounts to six months each year. How. Stat. § 9704. This record must be kept by the warden, and then the inspectors are required to determine how much of the good time earned shall be forfeited for one or more violations of the prison rules. Is it not apparent that these two Acts of the Legislature constitute as much of an interference with the judgments of the courts as does the Act under consideration? The effect of both is to modify the sentence of the court. In both, discretion is lodged with the prison managers. Yet the validity of the former acts has never been questioned. The power vested in our prison managers is just as "despotic" in the one case as in the other. In fact, all these laws are humane, and their tendency is to reform criminals and protect society. Such laws should only be held unconstitutional when there is a clear infraction of the Constitution. It is clearly the prerogative of the Legislature under the Constitution, to fix all punishments for crime, and to provide for a minimum and maximum punishment. It is only limited by the Constitution to the rule that they must not be cruel or unusual. The Legislature by this Act has given the courts the power and discretion to sentence a dangerous criminal to prison for the maximum term, and conferred the power and discretion upon the board of control, whose duty it is to watch the conduct and character of the convict, to so modify that sentence as to give him temporary and conditional liberty. I am unable to see in this any cruel or unusual punishment, or any usurpation of, or encroachment upon, judicial powers as fixed by our Constitution. If the constitutional power exists in the Legislature to provide for the absolute discharge of a prisoner before the

expiration of his term of imprisonment, fixed by the court, it must follow that the right exists to provide for his conditional release. No constitutional right of the prisoner is infringed, for his term of imprisonment may be thereby shortened, while society may be benefited by his reformation. The right to shorten terms of imprisonment was sustained by the Supreme Court of Massachusetts, *Chief Justice Shaw* being then upon the bench. 18 Gray, 618. To declare this Act unconstitutional would result

in the abrogation of our most salutary laws, holding out wise inducements for the reformation of criminals. It would result in the discharge of many prisoners who have been sentenced under this Act, the validity of which appears to have been generally recognized by the circuit judges. It should be accordingly certified to the state house of correction and reformatory at Ionia that the sentence of the court is valid for two years, subject to the deduction provided in How. Stat. § 9704.

VERMONT SUPREME COURT.

Horton W. JONES, Admr., etc., of Loyal C. Remele,

Ashmun A. KNAPPEN *et al.*

(.....Vt.....)

1. The remaindermen take a vested interest at the death of the testator, un-

der a will giving the use of the estate to testator's wife for life, and continuing, "At her decease I give and bequeath all my estate that may remain" in specific amounts to certain designated persons, with the residue to the next of kin of testator and his wife.

2. The election of the widow, who is made life tenant of her husband's property, to take against his will, does

NORM.—Effect on third persons of widow's election to take against the will.

The usual effect of the widow's rejection of provisions made for her in the will in lieu of her dower rights, and her enforcement of the latter, is to disappoint legatees to whom the property to which such rights have attached has been bequeathed. This is manifestly a hardship and the courts have attempted to make it as light as possible by using the property rejected by the widow for the benefit of the disappointed legatee; and now the principle of compensation is applied in the case of election against the will by the widow equally with that of a similar election by any other devisee. *Jennings v. Jennings*, 21 Ohio St. 81; *Dean v. Hart*, 62 Ala. 810; *Kinniard v. Williams*, 8 Leigh, 309, 31 Am. Dec. 658; *Batlone's Estate*, 136 Pa. 307; *Rogers v. Jones*, L. R. 3 Ch. Div. 688.

If the widow elects to take against the will she must surrender to the disappointed devisees all the bequests under the will or their value, and chancery will sequester such property for the purposes of the will. *Cauffman v. Cauffman*, 17 Serg. & R. 26.

Equity treats the substituted devise and bequests to the wife as a trust for the benefit of the disappointed claimant to the amount of their interest therein, and the court will assume jurisdiction and sequester the benefit intended for the refusing wife in order to secure compensation to those whom her election disappoints. *Sandoe's App.* 65 Pa. 316.

So where testator gave his wife all of his estate for life and at her death directed it, after paying certain legacies, to be equally divided among certain persons named, if the widow elects to take against the will thereby receiving one half of the estate absolutely, the court will order the legacies paid out of the other one half and will distribute the remainder according to the provisions of the will. *Allen v. Hannum*, 15 Kan. 625.

Opposed to this line of authority are two cases, one from South Carolina holding that if the dower land is devised and the widow elects to take against the will the loss must fall on the devisees of the land. *Witherspoon v. Watts*, 18 S. C. 306, the decision in that case rests principally on the opinion of the *ad prius* court, and there is little if any consideration given to the doctrine of compensation.

The other case is a peculiar one from Iowa in 14 L. R. A.

which the widow was given a life estate in all of testator's property, real and personal, with a devise to a third person of the homestead, and legacies in certain amounts to twelve other legatees. The widow took against the will and thereby became entitled to the homestead devised to the third person. The court, without discussing the question of using the life estate renounced by the widow for the benefit of the disappointed devisee of the homestead, decided that the testator must have known that he could not will the homestead without the wife's assent and must have intended that in case she decided to take the homestead that it was not to go to the devisee and consequently that he took nothing under the will. *Gainer v. Gates*, 78 Iowa, 149.

Of course the renounced portion cannot go to increase specific legacies. *Ford v. Ford*, 70 Wis. 55.

It does not become intestate. *Brandenburg v. Thorndike*, 189 Mass. 102. *Contra*, *Witherspoon v. Watts*, 18 S. C. 306.

Acceleration in case of renunciation of life estate.

The renunciation by the widow inures to the benefit of the legatees in remainder by hastening the time of enjoyment without otherwise affecting the limitations of the will. *Robinson v. Harrison*, 2 Tenn. Ch. 15; *Armstrong v. Park*, 9 Humph. 207.

The authority seems unanimous that, in the absence of a controlling equity or an express or implied provision in the will to the contrary, the renunciation of a life estate accelerates the remainder. *Brown v. Hunt*, 12 Helsk. 404; *Piercy v. Piercy*, 19 Ind. 407; *Witherspoon v. Watts*, 18 S. C. 306; *Annandale v. Mavniwen*, 9 Ct. Sess. Case, 2d Series, 1201.

If legacies are contingent on the death of the widow to whom a life estate is given, her renunciation is the same as determining the contingency as her death. *Coover's App.* 74 Pa. 143; *Sterret's App.* 27 Pa. 62.

Where the will gives a widow a life estate with remainder to residuary legatees, but the widow takes against the will, the residuary legatees are entitled to a distribution upon the satisfaction of the widow's claim for dower and the rights of creditors. *Rawlings' Estate* (Iowa) Jan. 27, 1891.

Where the devise was to the widow for life with remainder to an adopted son, the renunciation of the widow was held to make the remainder pay-

not accelerate the time for distribution so that it may be made during her lifetime; where the remainder is to be divided between specific and residuary devisees and the result of her election would work inequity by diminishing the residuary, and leaving the specific devisees to be paid in full.

3. The power of the supreme court to allow a defeated appellant costs out of the fund in a suit for the construction of a will which came to it from the circuit court on exceptions after an appeal from the probate court is limited, under Rev. Laws, §2280, to the allowance of the costs in that court.

(July 28, 1891.)

EXCEPTIONS by defendants to rulings of the Addison County Court made during the trial of an action brought for the construction of a will and appealed from the Probate Court. *Judgment affirmed.*

Messrs. Stewart & Wilds, for plaintiff:

Where a gift over is made to take effect in favor of a class, it is in general held that the gift in remainder is contingent, as to the individual devisees, since the persons composing the class are not to be ascertained until the period of the determination of the intervening estate, and there could be no vesting until the devisees are ascertained.

2 Redf. Wills, 621, § 39.

Why defeat the intent of the testator, as to the amount which the residuary legatees should take, by accelerating the payment of the definite legacies? If their payment is deferred until the widow's death, they will get precisely the same sum, at precisely the same time, intended by the testator.

Firth v. Denny, 2 Allen, 468; *Fox v. Rumery*, 68 Me. 121.

The court, in distributing the balance of the property after the widow's assignment, will

work as little derangement of the will as possible.

Adams v. Gillespie, 55 N. C. 244.

The material parts of the will are as follows: "First. I give, devise, and bequeath to my wife, Alma Remele, the sum of one thousand dollars, and direct that my administrator in addition thereto pay to her and for her benefit the use and income of all my estate as long as she shall live. At her decease, I give, devise and bequeath all my estate that may be remaining as follows, namely:

"To Hiram Alden of Brandon the sum of five hundred dollars (\$500.00).

"And the rest, residue and remainder of my estate I give, devise and bequeath to the next of kin of myself and my wife, one half to the next of kin of myself, to be distributed according to the law of intestate estates, and the other half of said residue to the next of kin of my wife, Alma, as if it was her estate, to be distributed according to the law of intestate estates."

The widow, within eight months after proof of said will, waived in writing the provisions made for her in and by said will and elected to take her share of said estate under the statute, and thereupon dower and homestead were duly set out to her from the lands of the testator, and the sum of \$4,500 was assigned to her by said probate court out of the personal property of said estate.

It is also found that the said Hiram Alden, in said will mentioned, died before the testator.

A *pro forma* decree was entered as follows:

1st. That the said legacy of five hundred dollars to said Hiram Alden lapsed by his decease before the testator.

2d. That all the legacies given by said will, as well the pecuniary as the residuary legacies, excepting only said legacy to Hiram Alden and the legacies given to said widow, vested in the

able immediately. *Fox v. Rumery*, 68 Me. 121. See also *Holderby v. Walker*, 56 N. C. 48; *Adams v. Gillespie*, 55 N. C. 244.

So where the devise was to charity after the life estate to the widow the estate was accelerated. *State v. Smith*, 16 Lea, 667.

So if the bequest of the remainder after the widow's life estate is to A and B there is no reason for postponing the time of distribution until the death of the widow if she elects to take against the will. *Capron v. Capron*, 6 Mackey, 225, 12 Cent. Rep. 43.

Where the final distribution of the trust estate is to be made on the death of the annuitant, and the purpose of postponing the time of division is to secure the annuity, there may be an immediate division upon the annuitant's renunciation; but in order to justify such course the remaindermen must have a vested and indefeasible interest in the provisions of the will. *Robertson v. Davidson*, 9 Ct. Sess. Case, 2d series, 152; *Bainsford v. Maxwell*, 14 Ct. Sess. Case, 2d series, 450; *Pretty v. Newbigging*, 16 Ct. Sess. Case, 2d series, 667.

And there must be nothing to show an intention to have the distribution postponed at all events until the widow's death.

Thus where a certain portion of the income of the estate was directed to be paid to the wife for life and three years after her death the principal should be paid in equal shares to testator's nieces and nephews then surviving, or the issue of the nieces and nephews then deceased, it was held that 14 L. R. A.

upon the widow's renunciation of the provisions of the will the nephews and nieces were not entitled to have the trust terminated. *Brandenburg v. Thorndike*, 239 Mass. 102.

So where in lieu of dower testator provided a fund which should be so invested as to give a home to the wife during life or widowhood and to his children until the youngest shall reach the age of twenty-one years, and the widow elected to take against the will, it was held that the fund could not be distributed during the minority of the children for whose home it was provided. *Roe v. Roe*, 21 N. J. Eq. 253.

So where the testator has given a positive direction that the accumulation of revenue shall be continued until the death of his widow, the estate cannot be distributed before that time. *Muirhead v. Muirhead*, L. R. 15 App. Cas. 229.

But where the income was to be accumulated for the benefit of a charity, which was given the remainder after the annuitant's life estate, the property might be turned over to the trustees of the charity upon the renunciation of the annuitant provided the duty was imposed upon them to accumulate the income as directed by the testator. *Lucas v. Lucas*, 8 Ct. Sess. Cas. 4th series, 502; as explained in *Muirhead v. Muirhead*, L. R. 15 App. Cas. 301.

Conflict of the two rules.

It frequently happens that by renouncing a life estate the widow disappoints a legatee to whom

legatees respectively at the decease of the testator, but that the enjoyment of the same is postponed to the time of the decease of said widow.

1. That the period of enjoyment of said legacies is in no case accelerated by the election of the widow declining to accept the provisions made for her in and by said will; but that the period of enjoyment of each and all of said legacies as well residuary as pecuniary, remains the same as if said widow had taken the provisions made for her in and by said will.

Case. *Bliss & Royce*, for appellants: All the legacies, as well the residuary as the pecuniary legacies, vested at the decease of the testator.

The residuary gift is to two classes, both equally ascertainable at the death of the testator; it is absolute in terms and is only qualified and shown to be postponed as to enjoyment by this language in the first clause: "At (the widow's) decease, I give, devise and bequeath all my estate that may be remaining as follows." This is a postponement of the enjoyment only.

Redf. Wills, 215, *et seq.*, 266, 267; 1 Jarman, *Wills*, ed. 1861, 758; *Weatherhead v. Ward*, 2 New Eng. Rep. 772, 59 Vt. 629, 3 m. Rep. 578; *Neilon v. Bishop*, 45 N. J. 473; *Dale v. White*, 83 Conn. 294; *Eldredge v. Redge*, 3 Cent. Rep. 344, 41 N. J. Eq. 86; *v. Bull*, 8 Conn. 47, 20 Am. Dec. 86; *n's Estate*, 70 Wis. 522; *Eagles v. LeFevre*, 1 R. 15 Eq. Cas. 148, 5 Moak, Eng. Rep.

The effect of the widow's renunciation of provisions of the will is to accelerate the payment of all the legacies, as well as the residuary, payment of which was, in terms of the will, postponed to the time of her death, so that they become immediately payable.

Where property was given, and then the question was whether the life estate will be sequestered for his benefit under the first rule above or the remainderman let into possession under the second rule.

Whether or not the estate will be distributed at the time of the renunciation by the widow will depend upon the effect it produces on the rights of devisees in the will. *Wood v. Wood*, 1 Met. 15.

Where certain property was given to the widow and after her death to another, and she took against the will and by so doing the property which had been devised to the court held that the remaindermen of the widow's life estate could not obtain possession of the residue during the lifetime of the widow, but would be used to compensate those disappointed by the widow's election. *Timberlake v. Dana*, 352.

Where the will gave the widow the real estate for a remainder to a son, and directed the division of the personal estate among the other children, and the widow took against the will, the residue going to the son by the renunciation, the court held out for a sufficient time to compensate the children for the loss sustained by their renunciation. *McReynolds v. Counts*, 9 Met. 62.

Where the payment was postponed where it was necessary to protect the rights of an annuitant. *Young's v. Pa. 17.*

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2 *Redf. Wills*, 257, pl. 66; 8 Jarman, *Wills*, 689, and note; *Holderby v. Walker*, 56 N. C. 46; *Adams v. Gillespie*, 55 N. C. 244; *Dean v. Hart*, 63 Ala. 306; *Wood v. Wood*, 1 Met. (Ky.) 512; *Piercy v. Piercy*, 19 Ind. 467; *State v. Smith*, 16 Lea, 661; *Robinson v. Robinson*, 2 Tenn. Ch. 11; *Armstrong v. Park*, 9 Humph. 195; *Fox v. Rumery*, 68 Me. 121; *Cooper's App.* 74 Pa. 143; *Re Ferguson's Estate*, 139 Pa. 208; *Capron v. Capron*, 12 Cent. Rep. 43, 6 Mackey, 226.

This is practically a suit to get construction of the will and directions to the administrator as to the distribution of the estate. It is proper therefore, that the expenses of the suit, including counsel fees, be paid by the administrator out of the estate.

Park v. American Home Miss. Soc. 62 Vt. 19; *Fox v. Rumery*, 68 Me. 121.

Ross, Ch. J., delivered the opinion of the court:

Hiram Alden died before the testator. The legacy was to him alone, and not to him or his heirs. It lapsed by his decease antedating the testator's. It is not otherwise contended. *Ourelon v. Massey*, 13 Rich. Eq. 104, 94 Am. Dec. 152, and note.

2. The testator, in addition to a specific devise to his wife, gave her the use and income of his estate during her natural life. He then proceeds: "At her decease I give, devise, and bequeath all my estate that may be remaining as follows." He then gives certain sums to individual legatees, and the residue to the next of kin of himself and of his wife, to be divided one half to the next of kin of each. The next of kin of each were ascertainable at the decease of the testator. The contention is whether the estate vested at the death of the testator or at the decease of the taker for life. The language used is as consistent with an intention to post-

Where testator devised certain land to his sister and after providing for his widow left the residuary estate to his nephews and nieces and the widow refused to take under the will, the sister was held entitled to have a sum set apart to relieve the land devised to her from the burden of the widow's interest. *Gallagher's App.* 87 Pa. 200.

Whether or not the residuary legatees have an equity which will require the life estate to be sequestered for their benefit as against specific devisees is not settled.

The widow's renounced life estate was sequestered in favor of the residuary as against specific legatees, in *Firth v. Denny*, 2 Allen, 468.

But in Pennsylvania the rule is settled the other way (*Gallagher's Estate*, 76 Pa. 200; *Re Ferguson's Estate*, 139 Pa. 208); the court saying in *Re Vance's Estate*, 12 L. R. A. 227, 161 Pa. 201, that the disappointed legatees will be protected of necessity in order to preserve the wishes of the testator, but such necessity does not extend to interference with any beneficiaries prior in rank for the sake of the residuaries, unless upon a plain implication in the will that the residuary legatee was in fact a preferred object of testator's bounty.

Where by statute the estate renounced by the widow becomes intestate and does not go into the residue it will not be sequestered for the benefit of the residuary legatees, but may be transferred at once to the heirs. *Wood v. Wood*, 1 Met. (Ky.) 515.

H. P. F.

pone the enjoyment only as to postpone the vesting of the remainder. Unless the language of the testator, when applied to the circumstances of the case, clearly indicates a contrary intention, the law favors the vesting of remainders on the death of the testator, when the will becomes operative. Such is presumed to be the testator's intention unless the contrary appears. *Re Tucker's Will* (Vt.) 21 Atl. Rep. 272; *Nodine v. Greenfield*, 7 Paige, 544, 4 L. ed. 267, and note; *De Peyster v. Clendinning*, 8 Paige, 295, 4 L. ed. 434, and note. If the language of the will imports a present bequest of property to be distributed at a period subsequent to the death of testator, the persons *in esse* at the time of his death will as a rule take a vested interest. *Collin v. Collin*, 1 Barb. Ch. 630, 5 L. ed. 523, and note. So where the benefit of a legacy is given for life to one, and, after his decease, to another, the interest of the second legatee is generally vested, and passes to the heirs of the second legatee, though he die during the existence of the life of the first taker. *Barker v. Woods*, 1 Sandf. Ch. 129, 7 L. ed. 265, and note.

We think the language used by the testator was intended only to postpone the enjoyment of the estate, the life use of which was given to his wife; and that the legatees, including the next of kin, took a vested interest in the estate, if the estate was sufficiently large to reach the next of kin, under the clause disposing of the residue.

3. The widow waived the provisions of the will, and took the share of the estate allowed by law. The contention is whether this waiver accelerated the time when the special legatees and next of kin are to come into the enjoyment of the respective proportions of the estate. Generally the termination of the life estate before the decease of the life tenant lets the reversioner into immediate enjoyment of the estate. When the widow waives the provisions of the will, and takes under the law, such action usually diminishes the amount of the estate available for the other legatees or devisees *pro rata*, and it is equitable that they should come earlier into the enjoyment of their diminished legacies to compensate them for the diminution caused by such action. Such waiver blots out all the provisions of the will for the widow, and leaves the remaining provisions of the will in force, to be accommodated equitably to the state of the testator's property as left by such action. The testator in the present case left about \$18,000 in property. He gave his wife \$1,000 of this, and the use and income of all of his estate during life. In specific pecuniary legacies to be paid at her decease he disposes of \$7,500 of the estate of which she was given the use for life, and the residue he gave to be divided half and half between his next of kin and her next of kin. The action of the widow in waiving the provisions of the will and taking what the law allows operated to diminish largely the residue of the estate given to the next of kin of the testator and of his wife, if distribution is to be made at once. There is enough of the estate remaining to pay the specific pecuniary legacies in full. But these legatees will receive just what the testator set apart for them if the 14 L. R. A.

payment of their legacies is postponed until the decease of the widow. Such postponement would to some extent, and perhaps wholly, compensate the next of kin for the diminution caused by the action of the widow of that part of the estate given by the testator to them. I have found very few decided cases where the action of the widow has affected the relative rights of the specific and residuary legatees as it does in this case. It is the first time this precise question has been considered by this court. *Firth v. Denny*, 3 Allen, 468, presented this identical question. Without any discussion of the question of acceleration of payment of specific pecuniary legacies, it was held that the estate should be held to accumulate for the benefit of the residuary legatees until the decease of the widow. This question is raised and decided in *Re Ferguson's Estate*, 188 Pa. 208. It is there held that the election of the widow to take under the law was equivalent to her death, and that what remained of the estate after the widow took what the law allowed should be distributed at once, although such holding operated wholly to disappoint the residuary legatee. The court rests this decision largely upon *Coover's App.*, 74 Pa. 148. An examination of that case shows that it did not present the identical contention under consideration. The testator gave his wife a life estate, and the remainder he divided into ten equal shares, and gave each share to a particular individual or her lawful issue, with a further provision for its distribution in case the individual died without issue. It did not present the question of the effect of such election, when it operated to diminish the portion given to one class of legatees only. In *Sandoe's App.*, 65 Pa. 314, the election of the widow operated to affect some of the specific legatees unequally. The court states this to be the rule in such a case: "The rule in equity treats the substituted devisees and bequests to the wife as a trust in her for the benefit of the disappointed claimants, to the amount of their interest therein; and the court will assume jurisdiction to sequester the benefit intended for the refusing wife, in order to secure compensation in those whom her election disappoints." Woerner, Administration, 119, says, on this subject: "The rejection by the widow of the provisions made for her by will generally results in the diminution or contravention of devisees and legacies to other parties. The rule in such case is that the devise or legacy which the widow rejects is to be applied in compensation of those whom her election disappoints." To the same effect are *Wood v. Wood*, 1 Met. (Ky.) 512, and *Dean v. Hart*, 69 Ala. 308. This same result in principle is reached by accelerating the enjoyment of the remainder, when the election of the widow only affects equally those to whom the remainder is given. *Fox v. Rumery*, 68 Me. 121; *State v. Smith*, 16 Lea, 632; *Holderby v. Walker*, 56 N. C. 46; *Robinson v. Harrison*, 2 Tenn. Ch. 11; *Armstrong v. Park*, 9 Humph. 195; *Capron v. Capron*, 6 Mackey, 225, 12 Cent. Rep. 43.

In *Adams v. Gillespie*, 55 N. C. 245, the facts appear to raise the question raised by the case at bar, but the decision does not touch upon it further than to hold that the election of the

widow removed her life estate from the property, and accelerated the enjoyment of the next life taker. The other cases cited by the counsel for the appellant do not bear specially upon the point under consideration. The controlling, and, we think, the more reasonable, principle announced in most of these cases, is the one expressed by Woerner, *supra*, viz., to use the renounced devises and legacies given by the will to the widow, to compensate, so far as may be, the devises and legacies diminished by such renunciation. When the remaindermen are affected *pro rata* by such renunciation, acceleration of the enjoyment of their devises or legacies, diminished proportionally, will equitably compensate them, so far as possible, for such diminution. But in this case acceleration of enjoyment would increase the specific pecuniary legacies, to the detriment of the residuary legatees, whose shares only are diminished by the renunciation. Applying the principle stated, the life use of the property given by the will to the widow, and renounced by her, should be used to compensate the residuary legatees, the next of kin of the testator and of his wife. This may be accomplished by allowing that portion of the estate not taken by the widow to accumulate during her natural life, or, by the consent of the parties interested, the same result could be reached by reducing to their present worth the specific pecuniary legacies on the basis of the

expectation of the life of the widow, and distributing the estate at once. The latter could only be done by consent, but would save the expense of caring for that portion of the estate which is available for the specific and residuary legatees, and avoid liability of loss from keeping it invested. This result affirms the judgment of the county court.

We are asked to make an order that the costs of both parties, including attorney's charges, be paid out of the fund. This is, in effect, a proceeding to obtain construction of the will, and, if in equity, we should make such an order. But this is an appeal from the decree of the probate court to the county court, coming to this court on exceptions. The only power over costs in such a case is that given by the Revised Laws, § 2280.* Under this section, by consent of the appellee, we allow the appellant to recover costs in this court. Further than this we do not understand we have power over costs and expenses of this litigation.

Judgment affirmed, with costs *pro forma* to the appellant in this court ordered to be certified to the probate court.

*Rev. Laws Vt. § 2280: "The county court or supreme court may tax costs for the party prevailing: or when, in the opinion of the court, justice requires it, it may deny such costs, and may tax costs for either party; and if costs are taxed against an executor or administrator they shall be allowed to him in his administration account."

OREGON SUPREME COURT.

Peter WILHELM, *Reapt.*,
v.
D. W. EAVES *et al.*, *Appls.*

(.....Or.....)

A stipulation for the payment of \$200 as liquidated damages on the breach of any of several promises and agreements which are of varying degrees of importance, and the damages for the breach of some of which would be easily ascertainable, must be construed as a penalty.

(November 2, 1901.)

A PPEAL by defendants from a judgment of the Circuit Court for Multnomah County in favor of plaintiff in an action brought to recover stipulated damages for breach of contract. *Reversed.*

Statement by **Bean, J.**:

This is an action to recover damages for a breach of the following agreement between plaintiff and defendants:

"This agreement, made the fourteenth day of August, in the year of our Lord one thousand eight hundred and ninety, between David W. Eaves and A. M. Plato, doing business as Eaves & Plato, of the Metropolitan Market, parties of the first part, and Peter Wilhelm, the party of the second part, witnesseth, that the said party of the first part, in considera-

tion of the covenants, promises, and agreements on the part of the said party of the second part hereinafter contained, hereby covenant, promise, and agree to and with the said party of the second part that the said party of the first part will, as soon as they become possessed of the Metropolitan Market, its lease, stock, fixtures, and appurtenances, all in clear title, from the administrator or representative of Todd's interest in said market, then the party of the first part will and hereby agree to make said Peter Wilhelm the superintendent of said market, with such duties as will be hereinafter described. The said party of the first part also agrees, in consideration of the services of said Peter Wilhelm as superintendent, to give said Wilhelm the free and full use of the room (known as the 'restaurant') in the east end of said market for use as a coffee-room during the continuance of said lease, and the faithful fulfillment of duties as said superintendent. And it is further agreed that whenever the rental income from stalls shall equal (\$500) five hundred dollars per month, then said Wilhelm is to receive, in addition to use of said coffee room, in the sum of fifty dollars (\$50) per month, and when income from stalls shall equal or exceed one thousand dollars per month said Wilhelm shall receive one hundred dollars (\$100) per month, for services as superintendent; and said Wilhelm agrees at such time to maintain a special night watchman in said Metropolitan Market. And the said party of the second part, in consideration of said covenants, promises, and agreements on the part of said party of the first part hereinafter

NOTE.—For note on liquidated damages, see *Condon v. Kemper* (Kan.) 13 L. R. A. 671.

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contained, covenants, promises, and agrees to and with the said party of the first part that the said party of the second part will and hereby agrees to act as superintendent of said Metropolitan Market; and the duties to be performed and accepted as share of the work is to see that the said market shall at all times be kept clean and in a wholesome sanitary condition; that he will have said market properly opened every morning at five o'clock; and that said market shall be kept open for the transaction of business until the hour of eight at night, excepting Saturday nights, when the market must be kept open until eleven o'clock at night. He agrees further to see that rules and regulations governing said market shall be strictly enforced; that all occupants of stalls are to keep their premises in good order; and the said Wilhelm agrees to obey the parties of the first part in all matters relating to the welfare of the said market; and in the business it is understood that the said Wilhelm shall not contract any bills, order any labor performed, or do anything to bind or make the said party of the first part liable for money, excepting on the written order or authority of said party of the first part; nor shall the said Wilhelm collect any money, unless authorized to do so. Said Wilhelm accepts as pay in full such sums as hereinbefore agreed. And for the true and faithful performance of all and every of the said covenants, promises, and agreements, the said parties to these presents bind themselves, each unto the other, in the penal sum of two hundred dollars of the United States of America, as fixed, settled, and liquidated damages to be paid by the failing party to the other, their heirs or assigns; and if at any time either of the said parties shall be guilty of gross misconduct, drunkenness, or engaged in any dishonest or criminal matter, then agreement shall be void. In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written. D. W. Eaves. [Seal.] Arthur M. Plato. [Seal.] P. Wilhelm. [Seal.] Signed, sealed, and delivered in the presence of Willie Gill."

The breach of the agreement complained of was the discharge of plaintiff by defendants. Without any proof of actual damages a recovery was allowed of the stipulated sum of \$200, and hence this appeal.

Mr. T. J. Geisler, for appellants:

Where the equity of the case makes it necessary, the language of the parties will be disregarded, and it makes no difference what they call the sum payable, "liquidated," "stated," "ascertained" or "stipulated" damages. The court will not regard it so, and consider the parties as not meaning what they say.

Bagley v. Peddie, 16 N. Y. 469, 69 Am. Dec. 714, and cases there cited.

Where the parties make an agreement, but not in such wise that the law adopts it, then the damages agreed upon are a penalty, or in the nature of a penalty, although they call it liquidated damages.

See *Wilbaur v. Grinnell Live Stock Co.* 9 Mont. 164, citing 8 Parsons, Cont. 156 et seq., and numerous authorities.

When phrases of such widely different signification as "penalty," or "penal sum," and 14 L. R. A.

"liquidated damages," are coupled together, the former will generally be accepted as giving the true expression.

Bagley v. Peddie, *supra*. See, to same effect, *Sedgw. Damages*, 431.

When a party may be responsible for the whole amount of the damages for the breach of an unimportant part of a contract, and so be made to pay a sum by way of damages, grossly disproportionate to the injury sustained, there is plausible ground for withholding the doctrine of liquidated damages.

See *Cottrill v. Lawrence*, 43 N. Y. 75, citing *Kemble v. Farren*, 6 Bing. 141; *Moras v. Rathburn*, 42 Mo. 594, 97 Am. Dec. 859; *Long v. Towl*, 42 Mo. 545, 97 Am. Dec. 855; *Cottrill v. Talmage*, 9 N. Y. 554, 61 Am. Dec. 716.

If the sum stipulated is to be paid on the nonpayment of a less sum which is certain in amount, and made payable by the same instrument, then it will be treated as a penalty.

Bagley v. Peddie and *Kemble v. Farren*, *supra*; *Astley v. Weldon*, 3 Bos. & P. 846; *Davis v. Penton*, 6 Barn. & C. 316; *Spar v. Smith*, 1 Denio, 464. See *Long v. Towl* and *Morse v. Rathburn*, *supra*; *Clement v. Cusk*, 21 N. Y. 259; *Sedgw. Damages*, 431; *Cottrill v. Talmage*, *supra*; *Hardee v. Howard*, 38 Ga. 533; *Mason v. Callender*, 2 Minn. 350, 72 Am. Dec. 110, 111.

If the sum fixed in a contract by way of damages is intended as a penalty as to some of the things agreed to be performed by the parties, it must be held to stand as a penalty as to all.

Staples v. Parker, 41 Barb. 648; *Carter v. Storm*, 41 Minn. 522.

The stipulation in this action being a mere penalty, plaintiff can recover no other sum than that which will compensate for his actual loss.

Gower v. Carter, 3 Iowa, 244, 66 Am. Dec. 71. *Messrs. V. K. Strode and McGinn*.

Snare & Simon, for respondent:

The use of the words "penal sum," followed by the words "liquidated damages," is not conclusive that the sum named is a penalty.

Criados v. Bolton, 3 Car. & P. 240, opinion per Best, Ch. J., overruling some previous decisions; *Sedgw. Damages*, 5th ed. 466; *People v. Love*, 19 Cal. 662; *Pierce v. Fuller*, 8 Mass. 238, 5 Am. Dec. 102.

Where an agreement is for the performance or non-performance of only one act, and there is no adequate means of ascertaining the precise damage which may result from a violation, the parties may, if they please, by a separate clause of the contract, fix upon the amount of compensation payable by the defaulting party in case of a breach.

Pom. Eq. § 442.

A contract may come within the scope and operation of this last rule which includes various particulars, differing in kind and importance, providing they are in effect one, all taken together only making up one whole, the violation of which is to be compensated by a fixed sum.

Pom. Eq. § 442, p. 486, note 1, and cases cited.

Although an agreement may contain two or more provisions for the doing or not doing different acts, still, where all of the provisions

are of such a nature that the damages occasioned by their breach cannot be measured, and a certain sum is made payable upon a default generally in any of them, the sum so agreed to be paid may be considered as liquidated damage.

Pom. Eq. § 445. See generally, *Mundy v. Culver*, 18 Barb. 336; *Clement v. Cash*, 21 N. Y. 253; *Williams v. Green*, 14 Ark. 320; *Bagley v. Paddie*, 16 N. Y. 469, 69 Am. Dec. 714; *Cothrel v. Talmage*, 9 N. Y. 551, 61 Am. Dec. 716; *Galeworthy v. Strutt*, 1 Exch. 659; *Atkins v. Kinpior*, 4 Exch. 776, opinion of Parke, B., criticising *Kemble v. Farren*, 6 Bing. 141, cited by appellants.

The intention of the parties is the question to be determined.

Jaquith v. Hudson, 5 Mich. 138; *Mathews v. Sharp*, 99 Pa. 580; *Texas & St. L. R. Co. v. Rust*, 19 Fed. Rep. 239; *Wolf v. Des Moines & Ft. D. R. Co.* 64 Iowa, 380; *Noyes v. Phillips*, 60 N. Y. 408; *Leary v. Laffin*, 101 Mass. 334; *Lynde v. Thompson*, 2 Allen, 459.

Bean, J., delivered the opinion of the court:

The decision of the question as to whether a given sum, provided in a contract to be paid on a breach thereof, shall be considered as liquidated damages or a penalty, is often inherently difficult, and there is much apparent conflict in the adjudged cases. The words "liquidated damages" are not at all conclusive as to the character of the stipulation. Compensation for a breach of a contract is always desirable, and the courts are not bound by the language used by the parties; and, if the construction is at all doubtful, the tendency of the courts is in favor of the interpretation which makes the sum a penalty. *Cushing v. Drew*, 97 Mass. 445.

While it is usually said that the intention of the parties, as gathered from the subject matter of the contract, the language used, and surrounding circumstances, is to govern in cases of this kind, "such intention," says Mr. Sutherland, "under the artificial rules that have been adopted, is determined by very latitudinarian construction. To be potential and controlling that a stated sum is liquidated damages, that sum must be fixed as the basis of compensation, and substantially limited to it, for just compensation is recognized as the universal measure of damages not punitive. Parties may liquidate the amount by previous agreement; but where a stipulated sum is evidently not based on that principle, the intention to liquidate damages will either be found not to exist or will be disregarded, and the stated sum treated as a penalty." 1 Suth. Dam. 450.

In *Jaquith v. Hudson*, 5 Mich. 138, Christlaney, J., says: "The law, following the dictates of equity and natural justice in cases of this kind, adopts the principle of just compensation for the loss or injury actually sustained, considering it no greater violation of this principle to confine the injured party to the recovery of less than to enable him, by the aid of a court, to extort more. . . . This principle of natural justice, the courts of law, following courts of equity have, in this class of cases, adopted as the law of the contract; and they

will not permit the parties, by express stipulation, or any form of language, however clear the intent, to set it aside." From the confused array of individual cases upon this question there may be deduced certain general rules that are recognized and enforced by the courts, and the apparent conflict in the cases arises rather from the application of these rules to the facts of the individual case than in the principles themselves. One of these rules is that when a contract specifying one certain sum as liquidated damages contains various stipulations of different degrees of importance, and the damages from a breach of some of which would be easily ascertainable, though the remainder might belong to that class which justifies such arrangement as to damages, and by the terms of the contract such sum would be payable equally on the failure to perform the least as of that to perform the most important, or equally on the failure to perform that one the damage from the violation of which would be easily ascertainable as to that, from the breach of which the loss would be difficult of ascertainment, the stipulated sum will be regarded as a penalty, and not liquidated damages, though the language of the parties be the strongest which could be employed to evince a contrary intent. *Kemble v. Farren*, 6 Bing. 141; *Carter v. Strom*, 41 Minn. 522; *Lampman v. Cochran*, 16 N. Y. 275; *Daily v. Litchfield*, 10 Mich. 29; *Cheddick v. Marsh*, 21 N. J. L. 463; *Traver v. Elder*, 77 Ill. 452; *Lyman v. Babcock*, 40 Wis. 503; *Nyer v. Rossman*, 18 Barb. 50; 3 Parsons, Cont. 161; 2 Pom. Eq. Jur. § 443; 1 Suth. Dam. 521; 19 Cent. L. J. 232—where the authorities are fully collated.

This rule is decisive of this case. The contract provides, in effect, that, in default of any of the covenants, promises, or agreements contained therein, the sum of \$200 shall be paid by the failing party to the other. If, then, this be regarded as liquidated damages, that precise sum would be recoverable for the breach of any of the covenants, however unimportant or however easily the damages for a breach thereof could be ascertained,—such as the failure by defendants to pay the fifty or one hundred dollars per month as agreed upon, or of the plaintiff to keep the market clean and in a wholesome sanitary condition, or to keep it open during the stipulated hours, or not to observe the prohibition against contracting bills, ordering labor performed, or collecting money or any other of the numerous stipulations on his part to be performed, even though the damages for such breach might be no more than a very small fraction of the stipulated damages. The contract, when analyzed, contains some sixteen different stipulations of varying degrees of importance, the damages for a breach of some of which would be easily ascertainable; and yet it is provided that \$200 shall be paid as stipulated damages for a breach of any of them, even the most unimportant. It is not to be supposed the parties intended their agreement to have any such effect, and, following the above well-established rule in such cases, the stipulated sum must be construed as a penalty, and the judgment of the court below reversed, and a new trial ordered.

RHODE ISLAND SUPREME COURT.

John CADWALADER

William Easton BAILEY *et al.*

(..... R. L.)

1. A covenant restricting erections on a strip of beach retained by the grantor but overlooked by the land conveyed, which was obviously intended to preserve an unobstructed view of the sea, creates a negative easement appurtenant.
2. A negative easement appurtenant such as a restriction on building to obstruct a view of the sea from certain premises cannot be reserved on conveyance of such premises but is extinguished if severed therefrom by an attempted reservation.

(September 28, 1891.)

BILL in equity to enforce specific performance of certain covenants contained in a conveyance of lands, and to enjoin interference with certain alleged rights belonging to complainant thereunder. *Dismissed.*

The facts are stated in the opinion.

Mr. Arnold Green, for complainant:

Any right in the reality of another may be, if the law permits, a right appurtenant, otherwise it must be a right in gross, and if the latter it may be a personal right or a right in fee. What it is depends on the intentions of the grantor and grantee and on the language of the constituting instrument. The traditional language of the books (3 Kent, Com. *420), to the contrary, is not supported by the decisions.

Senhouse v. Christian, 1 T. R. 560; *White v. Crawford*, 10 Mass. 188. See also *Bowen v. Connor*, 6 Cush. 132, 137; *Holms v. Sells*, 3 Lev. 305; *Welcome v. Upton*, 6 Mees. & W. 536.

The right to enter on another's land and draw

from it running water is recognized as an easement proper and not a "profit *à prendre*," for water is not a part or produce of the soil nor is it the property of the owner of the land over which it flows, and becomes such property only when confined in tanks.

Race v. Ward, 4 El. & Bl. 702; *Manning v. Wasdale*, 5 Ad. & El. 758.

And yet a right to draw or to take water may be given to one and his heirs in gross.

De Witt v. Harvey, 4 Gray, 486; *Goodrich v. Burbank*, 12 Allen, 459; *Lonsdale Co. v. Moies*, 21 Law Rep. 658.

It thus appears that Washburn's statement, Easements, *10, is quite erroneous.

Goddard (Easements, p. 6, Bennett's ed. p. 8), says: "There is no such right known to the law as an easement in gross."

Per Cairns, *L. J.*, in *Rangleys v. Midland R. Co.* L. R. 3 Ch. App. 306, 310, 311.

An easement cannot be severed from the land to which it is annexed and made a right in gross.

Goddard, Easem. p. 8, Bennett's ed. p. 10; *Ackroyd v. Smith*, 10 C. B. 164.

The law will not recognize any new species of easements, for "a new species of incorporeal hereditament cannot be created at the will and pleasure of an individual owner of an estate. He must be contented to take the sort of estate and the right to dispose of it as he finds the law settled by decisions or controlled by Act of Parliament."

Goddard, Easem. p. 16, Bennett's ed. p. 21; *Hill v. Tupper*, 2 Hurlst. & C. 121; *Keppel v. Bailey*, 2 Myl. & K. 535.

But it must be remembered that although any burden of a new species which the owner thinks proper to impose on his land is not an

NOTE.—Effect of attempt to sever appurtenant easement from the premises for the benefit of which it exists.

In 4 Vin. Abr., p. 504 O, it is stated that a right of common appendant cannot be made a right in gross, for this is for cattle levant and couchant upon the lands to which the common is attached, and therefore it cannot be severed without extinction,—citing *Y. B. 9 Edw. IV. 30. 28 Hen. VIII. 3.*

Also that common appurtenant for cattle levant and couchant upon the lands cannot be made in gross,—citing *Nevill*, 384, 19 Hen. VI. 33. *Contra*, 33 Hen. VIII. 4.

This is further illustrated by *Drury v. Kent*, Cro. Jac. 14, in which it was held that a common appurtenant for all the owner's beasts cannot be granted over. In that case, however, a distinction was taken in case the common was to pasture a certain number of cattle, in which it was observed that this might be granted over, and this distinction is also noted by *Viner*, who states (Abr. 504 O, pl. 3) that where the common appurtenant was for a certain number of cattle it might be assigned over, and he cites *Spooner v. Day*, Cro. Car. 432, which was a case where the right of common did not require the cattle to be levant and couchant on the lands and the grant was attempted to be made to a grantee of a portion of the dominant tenement to whom was granted the right to depasture a certain number of cattle on the servient tenement, and it was therefore merely a case of apportionment.

In *Bunn v. Channen*, 5 Taunt. 244, it was ob-

served that the owners of commons appurtenant were in the habit of letting them and thus for a time converting them into commons in gross.

Viner further states that where a man has a way to his manor or house it cannot be made in gross because it is appendant to the manor or house,—citing 5 Hen. VII. 7.

These principles have been recognised by later cases, *Ackroyd v. Smith*, 10 C. B. 187, holding that a way appendant to a house or lands cannot be granted away or made in gross. See also *Boatman v. Lasley*, 23 Ohio St. 614; *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 697.

A common appurtenant cannot be severed from the estate and retained for the benefit of the grantor; if it exist at all it must exist with the estate the uses of which it has to attend and administer to. *Hall v. Lawrence*, 2 R. L. 242, 57 Am. Dec. 715.

In that case there is an implication that the right may have been extinguished by an attempted reservation.

Nor can the right be sold separate from the estate. Such a sale of the easement to a stranger will either be void or will extinguish the right. *Phillips v. Rhodes*, 7 Met. 324.

In *Reise v. Enos*, 8 L. E. A. 617, 75 Wis. 694, it was held that a reservation in a conveyance of a lot which has a right of way appurtenant of such right of way to the grantor is ineffectual. He cannot retain any interest in the right of way as separate and distinct from the lot to which it belongs.

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ment which can be made appurtenant to it, yet such an obligation is perfectly valid between the grantor and grantee of the it. And if the grantee is disturbed in his enjoyment by the grantor the law will afford ample remedy by action on covenant for injury.

Coddard, Easem. p. 18, *Bennett's ed.* p. 21, also *Bennett's ed.* p. 78.

The prayer of the bill is for the same relief on the same grounds as that given in *Midown v. Newport Hospital*, 1 L. R. A. 191, 16 I. 819.

feers. W. P. Sheffield and F. B. Beck-
m. for defendants:

The covenant in suit created a negative easement appurtenant to the land described in the deed of October 15, 1852, and the reservation in the deed of George Cadwalader of August 1864, severed the easement from the estate which it was appurtenant and by operation of law extinguished the easement.

A negative easement by which the owner of lands is restricted in their use can only be created by covenant in favor of other lands not owned by the grantor and covenantor.

Columbia College Trustees v. Lynch, 70 N. Y. 26 Am. Rep. 619; *Hills v. Miller*, 3 Paige, 8 L. ed. 141, 24 Am. Dec. 218; 2 Washb. *Easem.* p. 29; *Spencer's Case*, 1 Smith, Lead. 1, 187-147.

An easement appurtenant or appurtenant can be turned into a right in gross by the act of the owner of the dominant estate.

Washb. Easem. p. 26, § 14; *Hall v. Lawrence*, 1 I. 242, 57 Am. Dec. 715.

When a person having a common annexed to a messuage or tenement conveys away the messuage or tenement excepting the common this creates an extinguishment of the common.

Greenl. Cruise, 88; 4 Vin. Abr. 594 O, pl. 1. The Statute of 18 Edw. I., known as The Statute *Quia Emptores Terrarum* (1290) took from the grantor the power to impose upon the land the total alienation thereof, burdens in form of covenants and conditions.

Bingham & Colvin, Rents, pp. 216, 217; *neer's Case*, 5 Coke, 16.

Covenants which are not beneficial to the owner without regard to his ownership of the estate will not pass to an assignee.

Fernon v. Smith, 5 Barn. & Ald. 1. See *Kep-*
v. Bailey, 8 Eng. Ch. 120, 2 Myl. & K. 517. A vendor cannot create rights not connected with the enjoyment of the land and annex them to it, nor can the owner of land render it subject to a new species of burden so as to bind the hands of an assignee.

Leckroy v. Smith, 10 C. B. 164.

A right in gross in another's land from its nature is a personal right, not assignable or inheritable, nor can it be made so by any terms he grant any more than a collateral and independent covenant can be made to run with land.

Washb. Easem. p. 8.

In all contracts restricting the control of property the restrictions must be made to appear to the court "to be reasonable and useful in building."

See *Pierce v. Fuller*, 8 Mass. 228, 5 Am. Dec. 1; *Gale v. Reed*, 8 East, 88; *Wallis v. Day*, 1 L. R. A.

2 Mees. & W. 278; *Pilkington v. Scott*, 15 Mees. & W. 657; *Whitney v. Chan R. Co.* 11 Gray, 363, 71 Am. Dec. 715.

There is what is sometimes called an easement, which may be appurtenant to a dominant estate, or may be in gross, which is the right to take from a servient estate a profit.

Gale & What. Easem. p. 6.

When a neighborhood is so changed as to render the granting of an injunction against a covenantor inequitable, a court of equity in the exercise of its discretion will deny the injunction.

Columbia College Trustees v. Thacker, 87 N. Y. 311; *Bowes v. Law*, 39 L. J. Ch. 483, L. R. 9 Eq. 686; *Columbia College Trustees v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 619. See also *Bedford v. British Museum*, 2 Myl. & K. 552.

If this restriction is not void it is so unreasonable and so far against public policy that it will not be enforced in a court of equity.

1 Story, *Eq. Jur.* § 769.

Tillinghast, J., delivered the opinion of the court:

This is a bill in equity brought by John Cadwalader, of Philadelphia, in the State of Pennsylvania, against William Easton Bailey and others, devisees under the will of Joseph I. Bailey, and the heirs-at-law of Alfred Smith, to have the respondents enjoined from violating a covenant contained in a deed from the said Joseph I. Bailey and Alfred Smith to George Cadwalader, dated October 15, 1852. The bill shows that at the time of the making of said deed the said Joseph I. Bailey and the said Alfred Smith were seized and possessed, as tenants in common in fee-simple, of a certain tract of land situate in the southeastern part of the then town of Newport, which tract included the land described in and conveyed by the deed aforesaid, and also included Bailey's Beach, so called; and that, being so seized and possessed, they executed and delivered to said George Cadwalader said deed of October 15, 1852. That, in and by said deed, the said Bailey and Smith conveyed to the said George Cadwalader, to him and his heirs, certain land therein described, "together with a right to place a bathing car, not to exceed eight feet by six in size, on the east half of the Bailey beach, to be placed so as not to interfere with any rights the Olyphant farm may have to take sand or sea-weed from said beach, with the rights to use said beach for the purpose of bathing." And that in and by said deed the said Bailey and Smith covenanted as follows: "And we, the said Joseph I. Bailey and Alfred Smith, for ourselves, our heirs, executors, and administrators, do hereby covenant to and with the said George Cadwalader, his heirs and assigns, that no building, excepting bathing-cars, shall ever be placed upon the marsh or beach called 'Bailey Beach'; that no building shall ever be placed to the westward of a line drawn southerly from Bellevue Street, parallel to and distant five hundred and thirty-one feet westerly from the Ledge road; and that none shall be placed on a knob overlooking said beach, and just north of the lower end of Bellevue Street; and, further, that we will not, nor shall any person claiming under us, or by our authority, go upon the east half of the said Bailey beach

for the purpose of collecting, securing, or taking away any sand or sea weed from said beach between the hours of sunrise and ten o'clock A. M., during the months of July, August, and September in each and every year, nor permit any act or thing to be done which might reasonably obstruct the free use and enjoyment of said beach for bathing."

The bill further shows that the said George Cadwalader entered upon and took possession of the land to him conveyed, and thereafterwards, on the 18th day of August, 1864, by deed duly executed, sold and conveyed to one William W. Tucker, his heirs and assigns, the land which the said George Cadwalader had received as grantee in the said deed of October 15, 1852; but that the said deed from Cadwalader to Tucker contains the clause: "It is understood and agreed that the grantor reserves to himself, his heirs and assigns, the covenants and stipulations contained in a deed from J. I. Bailey and A. Smith, dated October 15, 1852, against building on certain sites near the bathing beach, and the right of bathing on said beach." The bill further shows that the respondents are now seised and possessed of said marsh or beach called "Bailey's Beach," and of the land adjacent thereto, as heirs of the said Bailey and Smith, both of whom are deceased, or as heirs or devisees of the said Bailey, and as heirs of the said Smith, and have been so seised and possessed since the deaths, respectively, of said Bailey and of said Smith; that the said George Cadwalader died February 3, 1879, testate, leaving his wife, Frances Cadwalader, his sole devisee and legatee; that she died testate, January 9, 1880, leaving the complainant, John Cadwalader, her residuary devisee and legatee. The bill further shows that the respondents, notwithstanding said covenants in said deed of October 15, 1852, contained, did, in the year 1890, erect, on the marsh or beach called "Bailey's Beach," a permanent building of large size, and not bathing-cars, which building was placed, and is by the respondents still maintained, on said marsh or beach, to the detriment of the complainant, and in violation of his rights under the said covenants, and without his consent, and in defiance of his protests. The prayer of the bill is that the covenants contained in said deed of October 15, 1852, may be declared valid and existent obligations upon the respondents; that they may be required to make specific performance thereof; that said covenants may be declared in favor of the complainant, his heirs and assigns, as valid restrictions upon said marsh and beach; and for an injunction. A plat of the premises is attached to and made part of said bill.

The answer admits the material allegations in the bill to be true, except as to any wrongful or unlawful acts therein charged; but avers and sets up that the complainant has no title to the easements granted in and by said deed of October 15, 1852; *first*, because the same were wholly severed and extinguished by the reservation in the deed from George Cadwalader to said William W. Tucker of August 18, 1864; or, *second*, because said easements were appurtenant to the land conveyed by said deed to Cadwalader, of which land no portion is owned or possessed by the complainant; or, *third*, be-

cause said easements were not appurtenant to said land (nor any land), but were rights in gross belonging to said George, and not assignable nor inheritable nor devisable. A ground plan of the building is attached to and made part of the answer.

The case is before us on bill and answer, together with such evidence as to the situation and circumstances of the premises as the court was able to obtain from a personal view of the premises, which was had at the request of the parties, and from the statements of counsel. The grounds upon which the complainant bases his claim to the relief prayed for are: *first*, that the incorporeal rights given to George Cadwalader were not necessarily rights appurtenant to the land conveyed; *second*, that, if appurtenant, they were not extinguished by severance; and, *third*, that if they were rights in gross, and personal to said Cadwalader, they were not extinguished by his death.

The first question which arises, therefore, is whether the rights granted to the said George Cadwalader by the deed of October 15, 1852, constituted an appurtenant easement to the land conveyed, or an easement in gross. An appurtenant easement is an incorporeal right which, as the term implies, is attached to and belongs with some greater or superior right;—something annexed to another thing more worthy, and which passes as incident to it. It is a species of what the civil law calls a "servitude." Bouv. Inst. note 1600 *et seq.*; 3 Kent, Com. 844. It is incapable of existence separate and apart from the particular messuage or land to which it is annexed, there being nothing for it to act upon. In order to the existence of an easement of this sort, there must be two distinct tenements,—the dominant, to which the right belongs, and the servient, upon which the obligation rests. *Woffe v. Frost*, 4 Sandf. Ch. 72, 7 L. ed. 1927; *Wagner v. Hanna*, 38 Cal. 111, 116, 99 Am. Dec. 354.

In *Keppell v. Bailey*, 2 Myl. & K. 517, the subject of covenants running with the land was fully considered by Lord Chancellor Brougham. He there says: "The covenant [that is, such as will run with the land] must be of such a nature as to inhere in the land, to use the language of some cases; or it must concern the demised premises, and the mode of occupying them, as it is laid down in others; 'it must be *quodam modo*, annexed and appurtenant to them,' as one authority has it; or as another says, 'it must both concern the thing demised, and tend to support it, and support the reversioner's estate.'" See also *Spencer's Case*, 5 Coke, 16, 1 Smith, Lead. Cas. 187-187.

An easement in gross is a mere personal interest in the real estate of another, and is not assignable or inheritable. Washb. Easem. 4th ed. 12.

Chancellor Kent, in speaking of such an easement, says: "It dies with the person, and it is so exclusively personal that the owner of the right cannot take another person in company with him." 3 Kent, Com. 496. See also *Ackroyd v. Smith*, 19 C. B. 164; *Garrison v. Rudd*, 19 Ill. 556; *Post v. Peasnell*, 23 Wend. 425, 432; *Woolrych v. Ways*, 20; 2 Bl. Com. 35; *Boatman v. Lasley*, 26 Ohio St. 614. Whether an easement in a given case is appurtenant or in gross is to be determined mainly by the nat-

ure of the right and the intention of the parties creating it. *Kramer v. Knauff*, 12 Ill. App. 115, 118; *White v. Crawford*, 10 Mass. 183. If it be in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its use; and there being nothing to show that the parties intended it to be a mere personal right, it should be held to be an easement appurtenant to the land, and not an easement in gross; the rule for the construction of such grants being more favorable to the former than to the latter class. Says Washb., *Easem.*, 45: "Though an easement, like a right of way, may be created by grant in gross, as it is called, or attached to the person of the grantee, this is never presumed when it can fairly be construed to be appurtenant to some other estate; and, if it is in gross, it cannot extend beyond the life of the grantee. Nor can it be granted over, being attached to the person of the grantee alone." The same author, on page 8: "A man may have a way in gross over another's land, but it must from its nature be a personal right, not assignable nor inheritable: nor can it be made so by any terms in the grant, any more than a collateral and dependent covenant can be made to run with the land." See also *Boatman v. Lasley*, *supra*; *Spensley v. Valentine*, 34 Wis. 164; Angell, *Highways*, § 1, and cases cited.

The cases of *White v. Crawford*, 10 Mass. 183, and *Senhouse v. Christian*, 1 T. R. 560, cited by the complainant, seem to be in conflict with this general statement concerning an easement in gross. In the former case the court says: "As to ways in gross, that they may be granted or may accrue in various forms to one and his heirs and assigns, there can be no doubt. There is a strong example of such grant in the case of *Senhouse v. Christian*, upon which the defendants justified as heirs of the original grantee." See also *Lonsdale Co. v. Moies*, 31 Law Rep. 658, 664.

Whether or not these cases can be reconciled with the general doctrine before stated, Mr. Washburn seems to think they can (*Washb. Easem.* 112); but see, to the contrary, *Goodrich v. Burdank*, 12 Allen, 460. We think the greater weight of the authorities supports the doctrine announced, that easements in gross, properly so called, are not assignable or inheritable. If, however, a right to take soil, gravel, minerals, water from a spring, and the like, from another's land, may properly be designated an "easement," then it is proper to say that an easement in gross—for such it might doubtless be constituted—might be both assignable and inheritable; for the rights enumerated are "so far of the character of an estate or interest in the land itself that, if granted to one in gross, it is treated as an estate, and may therefore be one for life or inheritance." See *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597.

In *Post v. Pearshall*, 22 Wend. 425, it is said of easements in gross that they are either personal, and confined to an individual for life merely, or are claimed in reference to an estate or interest of the claimant in other lands, as the dominant tenement; for a profit *à prendre* in the lands of another, when not granted in favor of a dominant tenement, cannot properly be said

to be an easement, but an estate or interest in land itself."

In *Boatman v. Lasley*, *supra*, the court says: "A very marked distinction also exists between a way in gross and an easement of profit *à prendre*; such as the right to enter upon the lands of another, and remove gravel or other materials therefrom."

With the foregoing principles in mind, we come now to consider the deed from Bailey and Smith to Cadwalader, together with the location, condition, and circumstances connected with the land conveyed, and also with that which remained in the grantors, upon which the burden was imposed, in order to determine the question first propounded, viz., whether the easement created was appurtenant or in gross. In its granting part, the deed grants to Cadwalader the right to keep a bathing car on the east half of Bailey's Beach, with the right to use said beach for bathing. Near the end of the deed are the covenants for the specific performance of which the bill is brought. The grant and the covenants run to Cadwalader, his heirs and assigns. It is noticeable, in examining the deed, that it contains mutual covenants,—a covenant in favor of the grantors and covenants in favor of the grantees. The former is as follows: "And it is expressly understood between the parties to this deed that this grantee shall keep twenty-five feet along the whole westerly line of these granted premises fenced out for a road or street forever." This covenant was evidently intended as a benefit to the remaining land of the grantors, this strip of land forming the eastern boundary of their remaining land, and, together with a strip of similar dimensions, thrown out on the west side thereof by the grantor as shown by the plat, constituting a street upon which said remaining land abuts. The covenants of the grantors were to the effect that no building, excepting bathing cars, should ever be placed upon the marsh or beach called "Bailey's Beach;" that no building should ever be placed thereon to the westward of a certain specified line; that none should be placed on a knoll overlooking said beach, and just north of the lower end of Bellevue Street; that no one should go upon the east half of said beach to get sea-weed or sand during certain hours of the day, in the months of July, August, and September in each year; and that nothing should be done by their permission to obstruct the free use and enjoyment of said beach for bathing. These covenants, in so far, at any rate, as they constitute a restriction against building upon the remaining land of the grantors,—and this is as far as we are called upon to consider them in this case,—we think were manifestly intended by the parties to be restrictions in favor of the estate granted; or, in other words, that said covenant against building created a negative easement appurtenant to the premises conveyed. We cannot see that the parties in making this restriction could reasonably have had any other object in view than that of securing and preserving to the granted premises an unobstructed prospect or view of the beach and sea,—a most desirable right, in connection with summer residents in Newport. Said restrictions were well adapted

to the accomplishment of that object. It was a useful and desirable object. Between the granted premises and the sea was the land of the grantors, out of which this estate was carved, and there was nothing to obstruct the view of the beach on which the grantees had stipulated for the right to place a bathing-car. It is apparent, from an inspection of the premises; that buildings placed upon that part of the land included in the restrictions mentioned, and particularly upon the "knoll," would, to a greater or less extent, obstruct the prospect seaward from the granted premises. It was the possibility of such an obstruction, we think, which it was the intention of the parties to guard against. Furthermore, we fail to see that this restriction could have been intended for the purpose of making the bathing rights granted by said deed "available and pleasant," as is contended by the complainant. For such buildings as might be constructed upon the restricted premises would not, so far as we are able to discover, in any way interfere with said bathing rights. Said "knoll," in particular, is so situated that no building placed thereon could by any possibility obstruct or prejudice said right. Moreover, the building which has been erected by the respondents upon the restricted premises (a large and commodious bathing pavilion) does not in any manner whatever interfere with said bathing right. The complainant is not the owner of any of the land conveyed by the respondents' ancestors in title to George Cadwalader in October, 1852, and has no interest in the execution of the covenant in suit; for, as already stated, said George Cadwalader conveyed the premises to which the easement in question was appurtenant to William W. Tucker in August, 1864, reserving to himself, his heirs and assigns, the covenants and stipulations contained in the deed from Bailey and Smith of 1852, against building on certain sites near the bathing beach, and the right of bathing on said beach. We think it not improbable that the purpose of said George Cadwalader in severing the easement from the estate was to prevent said Tucker and his successors in title from setting up the same against his (said Cadwalader's) right to build upon a lot of land which he purchased in October, 1852, which, as the record shows, was a part of the restricted premises, and upon which he subsequently built and occupied a house, which house the complain-

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ant is now occupying. But, however this may be, the easement, being a negative easement appurtenant to the land conveyed, was extinguished by operation of law upon being severed therefrom, and hence is no longer in existence. The easement, being appurtenant to the land, cannot exist alone. It has no standing apart from the dominant estate to which it was attached. Thus, as stated in *Woolrych on Ways*, 18: "A way appurtenant cannot be turned into a way in gross, because it is inseparably united to the manor or land to the which it is incident." And, as stated in *Washb. Easem.* 4th ed. 26: "Though a man may acquire an easement in gross, like a right of way over another's land, separate and distinct from the ownership of any other estate to which it is appendant, yet, if his right to such way result from his ownership of a parcel of land to which it is appendant, he cannot by grant separate the easement from the principal estate to which it is appendant, so as to turn it into a way in gross in the hands of his grantee. See also *Garrison v. Budd*, 19 Ill. 558, 564, and cases cited; 8 Greenl. Cruise, 83; *Ackroyd v. Smith*, 10 O. B. 164; *Hall v. Lawrence*, 2 R. I. 218, 242, 57 Am. Dec. 715. Furthermore, as stated in *Columbia College Trustees v. Lynch*, 70 N. Y. 440, 36 Am. Rep. 619. "A negative easement, by which the owner of lands is restricted in their use, can only be created by covenant in favor of other lands not owned by the grantor and covenantor." See also *Hills v. Miller*, 8 Paige, 254, 8 L. ed. 141, 24 Am. Dec. 218. But for the reservation in the deed from Cadwalader to Tucker, the easement created would doubtless have passed to the latter, whether the grant in terms had embraced it or not, and this would also be so whether such grant, in terms, embraced privileges and appurtenances or not. *Washb. Easem.* 4th ed. p. 40, and cases cited.

It follows, then, that the complainant, never having owned the dominant estate described in the bill, has no standing in a court of equity to enforce rights which were appurtenant thereto. So far as the bathing rights are concerned, no question is made in this case concerning the right of enjoyment thereof by the complainant. For the reason above stated we are of the opinion that the complainant has not made out a case which entitles him to relief.

The bill must therefore be dismissed.

ALABAMA SUPREME COURT.

T. P. WIMBERLEY, Impleaded, etc.; *Appel.*H. H. MAYBERRY *et al.*

(..... Ala.)

1. A mechanics' lien for the completion of a building partly erected on mortgaged premises is superior to the mortgage as to what is added by the lienor but inferior to it as to what was previously covered by the mortgage, under Code, § 3018, providing for such liens "to the extent in ownership" of the person who creates the lien, and § 3019 giving them priority as to the land over liens, mortgages and incumbrances created after the work commences and "as to the building or improvement" over all other liens, etc., whether prior or subsequent.
2. Giving a mechanics' lien superiority over a prior mortgage as to the building or improvement added by the lienor is not unconstitutional as impairing the obligation of a contract.
3. The adjustment of priorities between mechanics' liens and prior mortgages under the Alabama statutes can be made only in a court of equity.

(Stone, Ch. J., and Clopton, J., dissent.)

(November 25, 1891.)

APPEAL by defendant, Wimberley, from a judgment of the Birmingham City Court in favor of plaintiffs in a suit brought to en-

force a mechanics' lien for materials furnished and labor performed in repairing a building owned by R. M. Mulford upon which Wimberley held a mortgage. *Reversed.*

The facts are stated in the opinion.

Messrs. Garrett & Underwood for appellant.

Messrs. Cabaniss & Weakley, for appellees:

A lien created by section 3018 of the Code of 1886, in favor of mechanics and materialmen, may be enforced by bill in equity without alleging or proving any special ground of equitable jurisdiction.

Code 1886, § 3048.

This section changes the law as ruled in—

Chandler v. Hanna, 73 Ala. 390; *Walker v. Daimwood*, 80 Ala. 245.

Since sections 3018 and 3019 were in force when Wimberley took his mortgage from Mulford, he cannot contend that these sections impair the obligation of his contract.

Phillips, Mechanics' Liens, § 30; *Newark Lime & C. Co. v. Morrison*, 13 N. J. Eq. 133; *Stockwell v. Carpenter*, 27 Iowa, 119; *Edwards v. Williamson*, 70 Ala. 145, and authorities cited.

Section 3019 of the Code of 1886, giving to lien holders priority of right as to the building or improvement over a pre-existing mortgage is a valid exercise of legislative power.

Brooks v. Burlington & S. W. R. Co. 101 U. S. 443, 25 L. ed. 1057; *Newark Lime & C. Co. v. Morrison*, *supra*; *McLaughlin v. Green*, 48

NOTE.—*Mechanics' Liens; when superior to earlier mortgages.*

The general rule is that a mechanics' lien is inferior to a prior mortgage. *Preston v. Sonora Lodge No. 10* L. O. of O. F. 39 Cal. 116; *Hershee v. Hershey*, 15 Iowa, 185; *Munger v. Curtis*, 42 Hun, 466; *Coe v. New Jersey Midland R. Co.* 31 N. J. Eq. 107, 128; *Folsom v. Cragen*, 11 Colo. 205; *Choteau v. Thompson*, 2 Ohio St. 114; *Brooks v. Lester*, 36 Md. 65; *Ryder v. Cobb*, 68 Iowa, 235; *Lyle v. Ducombe*, 5 Blinn. 585; *Hoover v. Wheeler*, 23 Miss. 114; *Jessup v. Stone*, 18 Wis. 466.

This is true as to an equitable mortgage. *Payne v. Wilson*, 74 N. Y. 348.

Under California Code Civ. Proc., 1186, a mechanics' lien is inferior to a prior recorded mortgage but superior to an unrecorded one of which the lienor had no notice. *Williams v. Santa Clara Min. Assn.* 68 Cal. 193.

Under Ga. Code, §§ 1979, 1980, repealing the Lien Law of 1873, which gave liens on improvements without regard to title, a mechanics' lien is inferior to a duly recorded prior lien or incumbrance. *National Bank of Athens v. Danforth*, 80 Ga. 55.

In Minnesota it is held that a statute attempting to make a mechanics' lien superior to prior mortgages without the consent of the mortgagees is unconstitutional, and it cannot be sustained as giving such priority in respect to the building alone, although the provision is that no prior incumbrances shall operate "upon the building erected or material furnished" until the lien is satisfied. The court says the constitutional objection would not be obviated by limiting the lien to the building. *Meyer v. Berlandi*, 1 L. R. A. 777, 39 Minn. 426.

Exceptions to the rule, as to buildings, etc.

But in several states statutes similar to that held unconstitutional in Minnesota have been enforced 14 L. R. A.

without serious question on constitutional grounds.

Under the Iowa statute a lien on "buildings, erections or improvements" made is as to the lien inferior, but as to buildings for erecting which the lien is claimed superior, to prior mortgages. *Stockwell v. Carpenter*, 27 Iowa, 119.

Under the Illinois statutes no incumbrance on land can operate on a "building erected or materials furnished" as against a lien for the erection of the building or for materials furnished. *Gaty v. Casey*, 15 Ill. 180; *Smith v. Moore*, 26 Ill. 332; *Haymond v. Ewing*, Id. 343.

The Mississippi statutes providing for a "lien on buildings and materials" which shall "not be subject to any other lien whatever" created in the erection of a building is paramount to all prior liens on the premises so far as the building is concerned, but subsequent to them as to the land. *McLaughlin v. Green*, 48 Miss. 175; *Otley v. Haviland*, 38 Miss. 19; *Ivey v. White*, 50 Miss. 142; *McAlister v. Clopton*, 51 Miss. 257.

Under the Missouri statutes a sale to enforce a mechanics' lien may give title to the buildings and erections superior to a prior mortgage on the land. *Crandall v. Cooper*, 62 Mo. 478; *Smith v. Phelps*, 63 Mo. 565; *Kansas City Hotel Co. v. Sauer*, 65 Mo. 238.

So under a New Jersey Statute declaring that on a sale to enforce the lien the deed shall convey the building "free from any former incumbrance on the land" and the estate in the lands which the owner had at or after the commencement of the building subject to prior incumbrances a mechanics' lien on the building is superior to a prior mortgage. *Newark Lime & C. Co. v. Morrison*, 13 N. J. Eq. 133.

"Buildings, erections or improvements," within the meaning of statutes giving a lien upon them, superior to a prior mortgage, do not include mere repairs or improvements to a building which was op-

Miss. 175; *Ioey v. White*, 50 Miss. 146; *McAllister v. Clopton*, 51 Miss. 257; *Otley v. Haviland*, 33 Miss. 19; *Stockwell v. Carpenter*, *supra*; *Bradley v. Simpson*, 93 Ill. 98; *Gaty v. Casey*, 15 Ill. 190; *Grandall v. Cooper*, 62 Mo. 479; *Hall v. Mullanphy P. M. Co.* 16 Mo. App. 454; *Welch v. Porter*, 63 Ala. 225; *Turner v. Robbins*, 78 Ala. 599; *Phillips, Mechanics' Liens*, § 238. See also *East Tennessee, V. & G. R. Co. v. Frasier*, 189 U. S. 288, 85 L. ed. 196.

Opposed to this array of authority *Meyer v. Berlandi*, 1 L. R. A. 777, 89 Minn. 438, stands alone.

Where the lien exists for material used in completing an unfinished building, the lien exists on the entire building.

Code 18-6, §§ 3018, 3019; *Equitable Life Ins. Co. v. Slye*, 45 Iowa, 615.

Where a lien attaches to a building, that is prior to a mortgage, a foreclosure of the mortgage will not affect a lien.

Hall v. St. Louis Mfg. Co. 4 West. Rep. 813, 22 Mo. App. 33; *Gaty v. Casey*, *supra*.

While the mortgagee had priority as to the land, yet the lien-holder had priority as to the building or improvement.

Grandall v. Cooper, *Welch v. Porter*, *Otley v. Haviland*, *Ioey v. White*, *Stockwell v. Carpenter* and *Turner v. Robbins*, *supra*.

There need be no stipulation for a lien, nor

need the contract of supply be made with a view to charging the property. If the material was furnished "for the building" and nothing appears "negating the lien," the law supplies the security of the lien and will enforce it against the property.

Bufoala Water Co. v. Addyston P. & S. Co. 89 Ala. 552.

T. P. Wimberley permitted Mulford to rebuild and allowed him to exceed the insurance money in the cost of the dwelling. While the indebtedness did not accrue on Wimberley's credit and he is not personally liable therefore, he is estopped to deny the validity and priority of these liens, enforced in this cause. There is no injustice in this, since Wimberley's mortgage security is thereby enhanced. Under this state of facts, no statute is necessary to give priority.

Bohn Mfg. Co. v. Kountze, 12 L. R. A. 83, 30 Neb. 719; *Millap v. Ball*, 30 Neb. 738; *Henderson v. Connelly*, 11 West. Rep. 729, 133 Ill. 98; *Hill v. Gill*, 40 Minn. 441; *Paulsen v. Manske*, 128 Ill. 72.

A mortgagor in possession is the "owner" within the meaning of the law and may put a lien upon the property by a contract for materials.

Otley v. Haviland, 36 Miss. 19; *Stockwell v. Carpenter*, 27 Iowa, 119.

the land when the mortgage was made. *Getchell v. Allen*, 84 Iowa, 579; *Dugan v. Scott*, 37 Mo. App. 668; *Haoussler v. Thomas*, 4 Mo. App. 465; *Taylor v. Burlington, C. R. & M. R. Co.* 4 Cent. L. J. 536.

But under the Illinois statute preferring a lien on a "building erected or materials furnished" to any prior liens a lien for the improvement of a building already on the ground and covered by a mortgage is, under the Illinois statute, prior to the mortgage as to such proportion of the total proceeds of the premises as the value added by the improvement is to the value of the premises before improvement. *Croskey v. Northwestern Mfg. Co.* 48 Ill. 481.

And a lien for machinery furnished as part of a building in process of construction is for a "building or improvement" which is superior under the Missouri statutes to a prior mortgage on the land. *Hall v. Mullanphy, P. Mill Co.* 16 Mo. App. 454; *Hall v. St. Louis Mfg. Co.* 4 West. Rep. 813, 22 Mo. App. 33.

So a lien for mantels and grates used in the construction of buildings is superior to a prior mortgage so far as the buildings are concerned. *McAdow v. Sturtevant*, 41 Mo. App. 220.

And bolting cloth used in the machinery of a flouring mill may be the subject for a mechanics' lien which will be superior to a prior incumbrance so far as the building is concerned. *Heidegger v. Atlantic Mill Co.* 16 Mo. App. 327.

But a mechanics' lien for materials furnished for the improvement or enlargement of a building is not superior to an existing mortgage, as a lien for "buildings, erections, or improvements," even though the building be changed so that very little of the original structure remains. *Equitable Life Ins. Co. v. Slye*, 45 Iowa, 615.

A mechanics' lien on a railroad is superior to a prior mortgage as to what the lienor puts upon the land under the Iowa statute giving such liens a preference to all other liens, etc., as to the building, erection and improvement for which the lien is claimed. *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 443, 25 L. ed. 1067.

The provision of the Iowa statutes as to the superior

priority of a mechanics' lien over prior mortgages as to buildings has no application where foreclosure and sale have taken place before any materials are furnished. *Low v. Barnes*, 60 Iowa, 229.

The discretion of the court under Miller's Code Iowa, § 577, to direct the separate sale under execution of an independent building, erection or improvement placed upon mortgaged land will not be exercised where the premises are not sufficient to pay both the lien and the mortgage, but in such case the mortgage is a first lien on the whole property. *Miller v. Seal*, 71 Iowa, 322.

The word "land" in the Illinois statutes giving previous incumbrances a preference as to the value of the land at the time of making a contract by which a lien is created means premises including such buildings as are then upon it. *Croskey v. Northwestern Mfg. Co.* 48 Ill. 481; *Bradley v. Simpson*, 93 Ill. 93.

The distributive shares of a lien for new buildings erected on mortgaged premises and of the mortgage are according to the proportionate values of the buildings and of the land. *North Presby. Church v. Jevns*, 32 Ill. 214, 83 Am. Dec. 361.

A statute preferring mechanics' liens to mortgages for advances, except for the actual value of the land, is inapplicable to ground rents although reserved to secure future advances for buildings, as well as for the value of the lots. *Hinchman v. Mishoe and Cunningham v. Gibson*, 47 Phila. Leg. Int. 414.

In connection with these cases which sever buildings from land as to priority of liens, it may be noticed that under the Alabama Code, §§ 2440-2461, a lien on buildings may be perfected without perfecting it on the land, as for instance where the land is not sufficiently described. *Turner v. Robbins*, 78 Ala. 602.

Unrecorded mortgages.

A contractor's notice of an unrecorded prior mortgage will prevent him from obtaining a lien superior thereto. *Kelly's App. (Pa.)* 2 Cent. Rep. 77.

the lien is spread over all the property with which the materials have become inseparably connected. Phillips, *Mechanics' Liens*, §§ 181, 201; 2 *es*, *Liens*, § 1373.

Wolman, J., delivered the opinion of the court: The agreed facts, as we construe them, are substantially as follows: On the 26th day of October, 1889, one R. M. Mulford, being then owner in fee of a lot and dwelling and other improvements thereon in the city of Birmingham, obtained a loan of \$4,000 from T. P. Wimberley, and secured the same by a mortgage of lot, dwelling, and improvements; and, as a part security, the mortgage provided that the dwelling should be insured for the benefit of mortgagees. The mortgage was regularly recorded and recorded. Before the 21st of June, 1890, the dwelling was partly destroyed by fire, and from the policy of insurance \$2,664 was realized. By agreement between Wimberley, the mortgagee, and Mulford, the mortgagor, Mulford was permitted to use the insurance money in rebuilding the dwelling; it being expressly agreed that the building should stand in the place of the destroyed dwelling, and be subject to the mortgage in the same manner. Mulford expended insurance money without completing the building, and, without the consent or knowl-

edge of his mortgagee, incurred the indebtedness sued upon, for its completion. Complainants Mayberry and others, whose claims aggregate about \$600, filed their bill to enforce a lien for material furnished for the completion of the building. The city court granted relief to the complainants, holding that their lien for materials extended to the entire building, and was superior and prior to that of the mortgage. The decree of the court is assigned as error.

Section 3018, Code, declares that every mechanic or other person who shall do or perform any work or labor upon, or furnish any material, fixtures, . . . for, any building or improvements upon land, or for repairing the same, . . . shall have a lien thereon on such building or improvement, and on the land on which the same is situated, to the extent in ownership of all the right, title, and interest owned therein by such owner or proprietor, etc. The lien for repairs, by this section, is as extensive as that given for materials or fixtures furnished for the building or improvement. Section 3019 of the Code, fixing the priority of liens, declares: "Such lien as to the land shall have priority over all other liens, mortgages, or incumbrances created subsequently to the commencement of the work on the building or improvement, or repairs thereon; and, as to the building or improvement, it shall have priority over all other liens, mortgages, or incumbrances, whether existing at

When mortgage is prior or earlier in time.

A matter depends of course upon the statutory provisions under which the liens are created. Under the Massachusetts statutes a lien created by a contract has priority over a mortgage executed after the contract was made. *Dunklee v. . .*, 103 Mass. 470.

Work done after a mortgage was made under contract made before the mortgage gives a lien prior to the mortgage under the New Hampshire statute giving a lien for work or materials in virtue of a contract with the owner." *Cheerov. Inst. v. Stone*, 52 N. H. 365. A lien attaches under the North Carolina statute the time materials begin to be furnished so make it superior to a mortgage made after me and before notice of the lien was filed. *Our v. Williams*, 71 N. C. 44.

Colorado. *Mellor v. Valentine*, 3 Colo. 233. Mechanics' lien for work done and materials used in constructing a building without intention is superior for the whole amount to a mortgage given after the cellar was dug and the foundation commenced, where the statute provides such liens shall extend for materials, work, furnished before any other lien which originated after the commencement of the erection or erection of a building, etc. *Bassett v. Swarts*, —.

Under North Dakota statute a lien for and materials furnished after a mortgage given, but which are used in the construction of a building commenced before it was given, is prior to the mortgage. *Haxton Steam Heater Co. v. Jordan* (N. Dak.) Nov. 13, 1891.

So far as to purchase-money mortgages. A lien for materials furnished to the owner relates back to the time a building was commenced under a contract with a third person to do the work only. *Welch v. Porter*, 63 Ala. 225. For additional buildings on a change of the ownership of a manufacturing establishment attach at the time of the change so as to be inferior to a lien for materials furnished before the change. *A. A.*

mortgage given before that time. *Norris's App.* 30 Pa. 122.

Where the statutes provide that a lien shall take effect upon filing, it would seem that the time of filing would control in determining the question of priority between the lien and a mortgage.

Mortgage for advances.

A mortgage made in good faith for advances of money for building, which are actually made afterwards, is superior to the lien of a contractor who has notice of the mortgage. *Platt v. Griffith*, 27 N. J. Eq. 207; *Taylor v. LaBar*, 25 N. J. Eq. 222; *Wigconsin P. Mill Co. v. Schuda*, 72 Wis. 277.

A recorded mortgage for subsequent advances to be used for building is superior to liens for building, although the mortgage did not show for what it was given and the accompanying contract was not recorded. *Moroney's App.* 24 Pa. 383.

A defeasible deed of premises on which an uncompleted building stands, given to secure a loan used in completing the building, is subject to liens made in such completion. *Fuquay v. Stickney*, 41 Cal. 583.

Purchase-money mortgage.

A purchase-money mortgage, recorded when the deed to the premises is recorded, is superior to a lien for work done before such recording. *Oliver v. Davy*, 34 Minn. 232.

A purchase-money mortgage given simultaneously with the deed, is superior to a mechanic's lien created by the purchaser, although work may have previously begun. *Steininger v. Bauman*, 28 Mo. App. 594; *Bees v. Ludington*, 13 Wis. 276; 60 Am. Dec. 741.

But under a statute providing that mechanics' liens shall be preferred to any lien, mortgage, or other incumbrance which attaches after materials are commenced to be furnished, such a lien is superior to a purchase-money mortgage executed at the time of the conveyance, but after some materials for which the lien is claimed are furnished. *Avery v. Clark*, 37 Cal. 619.

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the time of the commencement of such work or subsequently created." The terms "building or improvement," as here used, are not necessarily synonymous, and have a different signification from "repairs thereto," although repairs ordinarily may be an improvement. The term "building" refers to an independent erection upon the land. An improvement may be an independent structure or addition, and it may be an addition to or mere betterment of a building or improvement already made, and not included in "repairs thereto."

The statute contemplates different conditions of the realty at the time of the commencement of work by the mechanic, or when the materials are furnished, or repairs thereto are made: *first*, when there is no lien or incumbrance upon the land at the time the building or improvement or repairs are commenced; *second*, when there is a lien upon the land, and other and independent buildings or improvements are subsequently commenced; *third*, when there is a lien upon the land, and building or improvements thereon, and further improvements or repairs are subsequently commenced. The word "land," as used in sections 3018 and 3019, has its common-law meaning, and includes all buildings or improvements on the land at the time of the commencement of the work, or when materials are furnished. Under the first condition, by virtue of section 3018 of the Code, a lien is given upon the building or improvement and land, not only for the work done and materials furnished, but for repairs made; and by section 3019 of the Code, this lien has preference over all subsequent liens or mortgages. The lien may be enforced, if necessary, by a sale of the entire property. Under the second condition, for the erection of an independent building or improvement, a mechanic's or materialman's lien is given upon the building or improvement, which is declared to be superior to any existing lien upon the land. The statute provides that this lien may be enforced by a sale of the building or improvement, and, if necessary, the purchaser has authority to remove it from the land. The other condition is when there is a lien for an improvement, which is a mere betterment of a building or improvement, or when there is a lien for "repairs thereto," upon which there is an existing mortgage or lien, before or at the time the improvements or repairs are commenced. The statute as clearly declares the lien for an improvement which is a mere addition or betterment of a building or improvement, or for repairs thereto, as it does upon a building or improvement "wholly erected; and it is the duty of the courts to protect and enforce the liens as far as it can be done legally, and without interfering with vested interests or impairing the obligation of contracts.

To determine the respective rights of the holders of the different liens in the cases last enumerated is the question presented by the record for adjudication. Section 3019, *supra*, fixing the priority of the liens, uses the term "such lien." The lien given to which the words "such lien" refer, and its extent, is declared and defined in the previous section, 3018, in the following words: "Shall have a lien therefor on such building or improvement,

and on the land on which the same is situated, to the extent *in ownership* of all the right, title, and interest owned therein by such owner or proprietor." The italics are ours. "Such lien," the priority of which is fixed, and provision for its enforcement made in section 3019, is limited by section 3018 to the right, title and interest of the owner or proprietor in the "building or improvement, and the land on which the same is situated." This must necessarily be correct, otherwise the owner of a life estate in a block of buildings, by a contract for improvements or repairs, might have all the buildings sold and removed from the premises, to the entire destruction of the property of the remainderman; or a vendor who retains the vendor's lien, might be improved out of his security, without fault or neglect on his part. Under this view, the question arises, What operation will be given to that part of section 3019 which provides, "as to the building or improvement, it shall have priority over all other liens," etc.? The lien can have no force beyond its extent, and its extent is upon the whole building or improvement, except as declared and limited by section 3018. There are many conditions in which the lien can be enforced by a sale of the buildings or improvements, as provided in the statutes, and without injury to any creditor or owner of the land or remainder interest. To have a proper understanding of the statute, the two sections must be construed together, and with reference to the existing law intended to be changed, and the protection to mechanics and materialmen intended by the statute. At common law, a mortgage or lien upon land carried with it not only the buildings or improvements erected thereon at the time, but all subsequent buildings, improvements, or repairs thereto, merged into the realty, and became subject to the mortgage, and this is the law now, except so far as changed by statute or agreement of parties. The lien of mechanic or materialmen is purely statutory, and its operation and extent are defined and limited by statute. *Copeland v. Kehoe*, 67 Ala. 597.

There was no injustice or injury in giving to mechanics and materialmen a prior lien upon buildings or improvements wholly erected by them against existing mortgages or liens, or in declaring a prior lien upon the land as against the mortgages and liens subsequently obtained. As against a prior mortgage or incumbrance of the land, the equity and policy of the statute which secures the mechanic's and materialman's lien rest upon the principle that no injustice is done in preventing the holder of the older lien from appropriating the labor and material of others, by which his security is enhanced, without compensation. It would be inequitable to hold that a mechanic or materialman can appropriate, as compensation for his labor and material, the estate of an innocent prior mortgagee; or, as was forcibly stated in *Weich v. Porter*, 68 Ala. 283, "to hold that a subsequent contractor or materialman could acquire a lien which would take precedence over an intervening incumbrance . . . would shock the moral sense of the profession, and fail to carry out the intention of the Legislature." The purpose of the Act was to intervene in favor of the mechanic or ma-

terialman, and secure to him a paramount lien upon what he put upon the land in the way of "buildings or improvements or repairs thereto," and to prevent the operation of the common law, which, without the Act, would give an existing mortgage or lien a priority over it. The property improved in such cases merges into the realty, but subject to the mechanics' lien to the extent of the value of the improvements. It was to protect those by whose labor and materials the value of the property was increased, as far as possible, to the extent of the enhanced value of the property. When a building or improvement, as an entirety, is placed upon or added to land under mortgage, such building or improvement may be sold and removed without affecting the mortgage security. Where the improvement is a mere betterment, or where repairs are made upon a building, or improvement upon which there is a valid lien, and the owner has only a qualified right, it would be unjust and inequitable in many cases, and against the plain provision of section 3018, to enforce the lien, and give it priority on the entire building or improvement. It would be appropriating one man's property to pay the debts of another, without his knowledge and consent.

The statute of Iowa, in regard to mechanics' liens, is very similar to the statute of this State. See Revision Iowa, §§ 1846, 1855. In the case of *Gatchell v. Allen*, 84 Iowa, 559, it was held a mechanics' lien for work or material furnished in making additions or repairs to a building is not entitled to preference, as against the entire building, over a prior mortgage on the premises; that the word "improvement," as used in the statute, did not apply to an addition or betterment of a building, but to some independent structure on the land. This ruling was afterwards affirmed in *Neilson v. Iowa Eastern R. Co.*, 44 Iowa, 77. In the case of *Equitable L. Ins. Co. v. Slye*, 45 Iowa, 615, it was held that a mechanics' lien for materials furnished for the improvement or enlargement of a building does not take priority over an existing mortgage, and this rule prevails, even though the building be changed so that very little of the original structure remains. The Iowa courts have not given to the word "improvement" the same extensive definition as that given to it by this court. We do not see that the difficulty of construing and applying the statute is in any way relieved by confining "improvement" to independent structures or erections. The Iowa statute provides a lien for "repairs" to the same extent as our statute, and the lien given for repairs like ours is the same as that for "building or improvements."

The Missouri statute is also substantially the same as that of this State. In the case of *Orandall v. Cooper*, 62 Mo. 478, the facts were that Cooper, a mortgagor, contracted for improvements in putting up a fence on the mortgaged premises. The question arose as to the priority of the mortgage lien and the mechanics' lien. The court held the mechanic acquired no greater interest in the realty than Cooper, the mortgagor, possessed, viz., the equity of redemption, or a right to the premises after the trust lien was paid off. The court further held that the mechanic might have en-

forced his lien upon the fence and recovered it. The case is cited to show that the mechanics' lien is limited to the extent of ownership of the owner of the land as against a prior mortgage. In the case of *Haeussler v. Thomas*, 4 Mo. App. 468, the same question was directly involved. The different sections of the Missouri statute are set out in the opinion, and we find no material difference in the statutes quoted from that of this State. The second section of the Missouri statute, as section 3018 of the Code of Alabama, limits the mechanics' lien "to the extent, and only to the extent of all the right, title, and interest owned therein by the owner or proprietor of such building, erection or improvement," etc. The third section of the Missouri statute declares that "the lien for the things aforesaid or work shall attach to the buildings, erections or improvements, for which they were furnished or the work was done, in preference to any prior lien upon the land upon which said buildings, erections, improvements have been erected or put," etc. The statute goes on to prescribe for the sale and removal of the buildings or improvements in the same language as that used by our statute. The court held that the two sections must be construed together, and that the second section could not be set at naught in construing the third section, giving priority to the lien, and to hold otherwise would impair the obligation of a contract. The conclusion of the court is that the third section does not give a mechanics' lien for repairs upon an existing building, to the prejudice of rights previously acquired by a mortgagee, though it does give him a lien upon a building erected by him subsequent to the mortgage. We approve of the conclusion of the court, as we have stated that conclusion above. The same general principle is recognized in the case of *Steininger v. Raeman*, 28 Mo. App. 594.

The Supreme Court of Minnesota, in the case of *Meyer v. Berlandt*, and of *Bohn Mfg. Co. v. Jameson*, 39 Minn. 488, 1 L. R. A. 777, held the statute of the State, in so far as it assumes to give a mechanics' lien precedence over prior incumbrances, to be unconstitutional and void. The reasoning of the court in this opinion is to the effect that such an act impairs the obligation of contracts, and divests settled rights of property. The view we take of our statute, as applied to the facts of this case, do not require a decision of this question, as we are of opinion that the lien may be enforced without divesting vested rights, or impairing the obligations of a contract. We hold the meaning and intention of our statute is to give the anterior incumbrance priority upon what it embraced when the mechanics' lien commenced, and the mechanic's or materialman's lien or for "repairs thereto" priority over what is added, either as a building or improvement or repairs. It would be in violation of the plain language of the statute to permit a mortgagee to appropriate to the payment of his debt not only the property covered by his mortgage, and upon which he relied as security, but also the additional security furnished by the mechanic or materialman; and it would be inequitable and contrary to law to apply the mortgagee's prior security to the payment of the mechanic's or materialman's claim.

The rights of both may be adjusted and preserved in a court of equity. This conclusion is entirely consistent with the case of *Turner v. Robbins*, 78 Ala. 502. The facts in that case show that the mortgage was upon a naked lot, and the mechanics' lien was given a preference upon a building subsequently erected. The same principle applied in the case of *Stockwell v. Carpenter*, 27 Iowa, 119, to which we have been referred. There the vendors' lien was upon a naked lot, and the buildings afterwards erected.

Cases will arise under our construction which involve difficulty in the adjustment of the equities of the parties, and enforcing their respective priorities; but the statute is plain in declaring the lien for materials and repairs and fixing its priority. The statute is not unconstitutional, as we construe it, and should be enforced in all cases where it can be done within constitutional limits. The statute makes no provision for adjusting priorities of liens in courts of common law, and the power of a court of law, without additional legislation, is not sufficient in all cases. If the building or improvement is a separate, independent erection or structure, it may be sold under execution from a court of law, and removed. If the mechanics' lien be for a mere betterment of a building or improvement or for repairs thereto, upon which there is an existing mortgage, the priority of the lien cannot be adjusted and protected in a court of law. A purchaser at a mortgage sale, foreclosed by a power contained in the mortgage, would not destroy the mechanics' lien, further than as to his right to redeem. Any other lien the statute gives him would continue and follow the property. There is no doubt but that the mortgagee may also redeem the property from under the mechanics' lien which is prior to his lien. The mortgagee's lien is superior and prior to the property covered by the mortgage before the mechanics' or materialman's lien attached, and subordinate to the lien given to the mechanic or materialman for what he added, and so the lien of the mechanic or materialman is upon the whole property, but subordinate to the mortgage as to the property covered by the mortgage when his lien attached. This is the condition of the property, and the relative rights of both are fixed by statute, and the only question is as to the power of a court of equity to preserve, adjust, and enforce the respective rights of all.

When the jurisdiction of a court of equity is invoked, all parties in interest may be made parties, and the court of chancery, by reason of its elastic power, has authority to so frame its orders and decrees as to ascertain, adjust and protect every interest and priority. In adjusting the equities between a prior bona fide mortgagee of the land, as we have defined "land," and the holder of a mechanics' or materialman's lien for betterment of or repairs to a building or improvement, the court is not bound by the contract between a contractor or the owner of the land and the mechanic or materialman. As between the latter, judgment will be rendered accordingly to contract, but as to the mortgagee this contract is *res inter alios acta*. It is clear, under general principles, the mortgagee, by paying the mechanics' lien, could

subject the whole property to his lien; and there is no reason why the mechanic or materialman could not redeem the property from under the mortgage, so as to subject the entire property to his claim. Under the rule declared, to adjust the equities of the mortgagee and mechanic or materialman, the court should order a reference, to ascertain the value of the building or improvement, without estimating the increased value added by the improvements or repairs which are subject to the prior lien of the mechanic or materialman, and also its value including that added by the material or repairs. If the proof shows the value has not been enhanced by the material furnished or repairs made, the materialman or mechanic gets nothing as against the prior mortgage. On the other hand, if the proof shows that without the improvements or repairs the property would not be so valuable as with them, the mechanic's or materialman's lien has priority on the increased value; and, in proportion as the building or improvement is increased in value by the material furnished or repairs made, the rule is furnished for declaring the relative rights and interest of the parties in the building or improvement. If the building or improvements are sold by the decree of the court, the proceeds can be easily adjusted. As stated before, the power of the chancery court is not limited to a sale of the property. In some cases, as where the mechanics' claim was due, and the property was covered by a mortgage of prior date, but which did not mature until some time in the future, or where the owner had only a life-time estate in the building, it might be more equitable and necessary, in order to protect the interest of all parties, to adopt the rule laid down in *Heat v. Sorrell*, 11 Ala. 386, and rent out the property. The refusal of a mortgagee to foreclose his mortgage cannot operate to defeat the power of a court of equity to take care of the prior lien of a mechanic or materialman. The form of the decree enforcing the liens will depend more or less upon the proof as to the particular estate of the owner, the condition of the property, and the character of the conflicting liens. All these must be considered, and perhaps cases will arise into which other considerations will enter. *Ware v. Hamilton B. Shoe Co.* 93 Ala. 145.

Where the mortgage has been legally foreclosed by a power of sale contained in the mortgage, it would seem the better time for fixing the respective valuations would be at the date of the foreclosure. Ordinarily, when there has been no foreclosure, it would seem the better time would be when the reference is ordered by the court; but we lay down no inflexible rule on this point, as we cannot anticipate circumstances. A mortgagor in possession before foreclosure is an owner or proprietor, within the meaning of the statute, and authorized to contract for building or improvements or repairs. The description of the property in the bill of complaint is a substantial compliance with the statute. The demurrer to the bill was properly overruled. The cause is reversed, and remanded, that the trial court may proceed in accordance with the principles of law herein declared. Nothing in this opinion is to be construed as having reference to

the statute as amended by the Act of 1890-91, p. 578, passed by the last Legislature. The rights herein involved had vested before the passage of that amendatory Act.

Reversed and remanded.

Since the foregoing opinion was prepared, the chief justice has written a dissenting opinion, and we do not deem it improper to notice the argument adduced by him for holding to a contrary conclusion. If the learned chief justice, in his able dissenting opinion, had explained how it is that the lien for a building wholly erected upon land under a mortgage is prior and superior to the mortgage, and the lien for an improvement or "repairs thereto" is secondary and subordinate to the mortgage, his conclusion would be much more satisfactory. The statute which declares and fixes the priority of the former is that which declares and fixes the priority of the latter, and the statute makes no distinction as to the extent and priority of either. The lien for either stands upon the same footing, and both liens are of equal dignity and entitled to the same priority as to existing mortgages. The authority for holding that one is senior and superior to the mortgage, and the other junior and subordinate to the mortgage, and as attaching only to the equity of redemption of the mortgagor, we submit cannot be found in the statute itself. That this is true is clearly manifest from the statute, and from its extent and operation upon the property of the owner when there are no intervening incumbrances. In such case the lien for repairs may be enforced against the whole building and the land. It is the qualified interest of the owner, or the prior incumbrance, which limits the priority of the mechanics' lien to that which was added by his material or labor, and prevents it from operating on the whole property. The court has not conceded, as stated by the chief justice, that the lien of claimant for materials is subordinate to that of the mortgagee. We expressly hold, in the language of the statute, that it has priority to the extent of the value of the improvement, and is secondary only as to the property covered by the mortgage before the materials were added. The fact that the building wholly erected may be sold and removed goes merely to the remedy. This in no way enlarges or diminishes the force and extent of the lien as declared by the statute, nor can the mere right to remove the building operate to prevent the common-law principle from applying which would subject buildings subsequently erected to a prior mortgage. It is the statute which has this effect, and, if available to protect a building from the operation of the common-law principle, which would subject it to a prior mortgage, it is equally effective to protect additions to the realty, whether by way of "improvements or repairs thereto." If the one is constitutional, the other is, for the same principle is involved in both, and the language of the statute as to both is the same. At common law, a building is merged into and becomes as much a part of the realty as "repairs thereto;" no more, no less. No fair construction of the statute will lead to any other conclusion. The fact that one may be severed and the other not, has nothing to do with the principle of

law. Whether the powers of the court are competent to protect and enforce both liens is a different question. If a case should arise in which the courts would be unable to afford relief, it would be simply a case of a right without a remedy. We cannot yet see that this case is one of that character. It is conceded that if \$600, for which the materialman's lien is claimed, had been expended in the erection of an independent building, the statute would prevent the appropriation of the building to the payment of the mortgage in preference to the payment of the materialman's claim. Now, if, by reason of the material added, the property will sell for more, by \$600, than it would have sold for without the material, why should the mortgagee in the one case, any more than in the other, be permitted to appropriate the additional \$600? How is the mortgagee injured, if he gets all he would have received if the material had not been added, and what injustice is there in the rule which secures to the materialman compensation for his labor and materials by which the value of the property was enhanced. Suppose in this case there had been no insurance, and after the almost total destruction of the mortgage security by fire the mortgagor had procured by contract the rebuilding of the house, expending over \$3,000, for which the mechanics' lien attached, could the mortgagee, in the face of the statute, have appropriated the whole property to the payment of his mortgage? Such a construction would convert the statute into a snare to catch the unwary mechanic. This is the rule which seems to apply in the State of Illinois. The statutes are not exactly alike, but there is no difference so far as the application of the principle is involved. Code Ill. p. 665, chap. 83, § 1, is as follows: "That any person who shall, by contract . . . with the owner of any lot or piece of land, furnish labor or materials, . . . in building, altering, repairing, any house, building, or appurtenances thereto, shall have a lien upon the whole of such lot, and upon such house or building and appurtenances," etc. Section 2 extends the lien to the interest of the owner, etc. Section 17: "No incumbrances upon the land created before or after making of a contract, under the provisions of this Act, shall operate upon the building erected or material furnished until the lien in favor of the person doing the work shall have been satisfied; and, upon questions arising between previous incumbrances and creditors, the previous incumbrance shall be preferred to the extent of the value of the land at the time of making the contract, and the court shall ascertain by the jury or otherwise, as the case may require, what proportion of the proceeds of any sale shall be paid to the several parties in interest."

In the case of *Bradley v. Simpson*, 93 Ill. 93, construing the Mechanics' Lien Law, the court declared that, "where land is sold under a decree for a mechanics' lien upon which there is a prior incumbrance, and the proceeds of the sale are not sufficient to pay both the claims as found by the decree, they will be apportioned, and the mortgagees will take such a share of the net proceeds of the sale as the value of the property before the improvements were put upon it bears to the total value of the property

after the improvements were made, and no more;" "the parties have the same proportionate interest in the proceeds that they had in the property before it was sold."

In the case of *Croakey v. Northwestern Mfg. Co.*, 48 Ill. 483, the court uses this language: "If, for example, the owner of unincumbered realty, with a building upon it, executes a mortgage thereon, and afterwards has repairs made upon the building, for which a mechanics' lien is enforced, such lien would take priority over the mortgage only to the extent of the additional value given to the property by the improvements. Thus, if to a house and lot worth fifteen thousand dollars, and subject to a mortgage, additions or improvements, are made by the mortgagor in such mode as to make the premises worth eighteen thousand dollars, the mechanics and materialmen . . . would have a prior lien to the extent of three eightieths of the proceeds of the sale, and the increased market value added to the property would measure the extent of the priority of their lien, without reference to the cost of the materials or labor actually furnished." We think these are adjudged cases, direct in point and by respectable authorities, and are conclusive, as far as that court can be regarded as authority, that our construction of the statute does not impart to the lien given for the materials or repairs a force or right which affects vested rights, or in any manner conflict with *Magna Charta*. The fact that the Illinois statute made special provision that the relative rights of the parties might be ascertained "by a jury or otherwise, as the case may require," in no way affects the question of the extent and priority of the respective liens, as given by the statute; nor does the declaration in the statute that, upon "questions arising between previous incumbrances and creditors, the previous incumbrance shall be preferred to the extent of the value of the land at the time of making the contract." This is the legal effect of sections 8018 and 8019 of the Code, when construed together, and each part of the Act is given some effect, and our courts of equity are fully competent to afford the same relief.

The construction contended for by the chief justice would render entirely nugatory the lien given for the betterment to a building, or repairs thereto, upon which there was a prior incumbrance. We all agree the statute is not unconstitutional. It must have some operation. It cannot be controverted that the powers of a chancery court, as exercised in this State, are sufficient to ascertain the proportionate rights of the parties, and by appropriate decrees, either by a sale or by renting, or permitting the one or the other to redeem, according to the circumstances of the case, protect the respective interests of all parties. Each of the cases cited by the chief justice, including the case of *Gatchell v. Allen*, 34 Iowa, 559, so largely quoted from, was a case where the whole property upon which there was a prior lien at the time of the commencement of the work or when the materials were furnished, was subjected by the decree of the lower court to the payment of the mechanics' lien. We hold the same conclusion, and have cited those cases to that point, as showing the court erred

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in giving complainant a prior lien upon the whole building. Furthermore, in the Iowa cases, we are not informed whether the court in which those cases originated had equitable jurisdiction and power to apportion the priorities of the respective liens, as has the chancery court. If, in the case before us, it was pending in the circuit court, and no remedy afforded except the statutory remedy, we would hold the circuit court had no authority to have the property sold, and apply the entire proceeds to the mechanics' lien. It would present a case in which the remedy could not be found in a court of law. But, even if those authorities held to a different rule, we feel constrained to construe our statute as we have, and to hold that, where our statute says "such lien shall have priority," it means "priority" in its usual sense, and not "junior lien" or "subsequent incumbrance," as assumed in the dissenting opinion, and upon which assumption his argument entirely rests. We think it is the duty of the court to protect and enforce their respective priorities as fixed by the statute, in all cases where the power of the court is competent for this purpose.

The chief justice asks in his opinion why it was the Legislature conferred jurisdiction upon courts of equity when the amount claimed is not less than \$100. We have made no investigation of the reasons which influenced the Legislature. We take the law as it is, and we find that section 8048 provides that "any lien provided for under the provisions of this chapter, where the amount claimed is not less than one hundred dollars, may also be enforced by bill in equity." The Act confers the jurisdiction generally upon a court of equity, and, having jurisdiction, it may enforce the lien according to its own powers. In the present suit the sum involved exceeds \$100, and the only question is whether the chancery court is competent to adjust the equities of the different liens. When the present Act was originally adopted the Legislature may have thought that, under the authority of *Montandon v. Deas*, 14 Ala. 33, 48 Am. Dec. 84, the chancery court had jurisdiction without having it specially conferred by statute. It may have been supposed that, under the authority of the case of *Westmoreland v. Foster*, 60 Ala. 448, a decision rendered by the present chief justice, where it is held that the chancery court had jurisdiction to enforce the landlord's lien, independent of the statutory remedy furnished by a court of law. Be this as it may, this court decided in *Walker v. Dismwood*, 90 Ala. 246, and *Chandler v. Hanna*, 78 Ala. 892, that the chancery court did not have jurisdiction to enforce the mechanics' lien, "in the absence of some special ground of equitable interposition, such as would render inadequate the remedy prescribed in a court of law;" and after these decisions were rendered the Legislature saw proper to confer jurisdiction generally upon a court of equity to enforce the lien, "without alleging or proving any special ground of equitable jurisdiction." It is impliedly conceded in both the authorities (80 Ala. and 78 Ala., *supra*) that cases might arise in which the remedy prescribed in a court of law would be inadequate, and it would be necessary to resort to a court of equity. When

these decisions were rendered, it would seem the court had in view that the necessity to adjust different equities and conflicting liens might arise under the statute.

The chief justice states as follows: "Under the opinion of the majority of the court, the right and remedy for repairs put on a building which was on the premises at the date of the mortgage would be much more compensating—much more nearly adequate—than if the claim were for an improvement entirely new. Can the Legislature have intended this advantage to him who only repairs an old building, over the materialman and mechanic who furnishes materials and constructs a new one? Did the Legislature intend to give to the builder this inadequate compensation for an improvement entirely new and leave it to the courts to secure to the repairer, by interpretation, a full *quantum valeret* for what he may have added?"

We would reply by asking, Did the Legislature intend to compensate, in whole or in part, one who constructs a new building, by permitting him to remove it from the premises, and did the Legislature intend to deny all compensation to one who makes the repairs thereto? If so, in what part of the statute is this intent to be found which makes this difference? Why were liens for repairs put upon the same plane as liens for building a structure, if it was expected that the courts would give the two liens, by judicial interpretation, a different plane, making the one a prior lien and the other secondary and subordinate,—a mere "well without water?" The opinion further proceeds: "Can it be that the Legislature intended to grant the special relief my brothers have awarded to complainant in this case when the value of the repairs amounts to one hundred dollars or upwards, and to withhold it when it falls below that sum? Would there be any justice in such discrimination?" If the Act is plain, it is not for this court to impugn the intent of the Legislature. But we call attention to the statement of the chief justice when he summarizes his conclusion under the third proposition. It is as follows: "The only remedy or resource left to the materialman and mechanic was the right to redeem from Wimberly by paying off the older incumbrance, and then enforcing the collective liens for their benefit; or they could enforce their claim against Mulford's equity of redemption, or await Wimberly's foreclosure, and claim payment out of the surplus, should anything be left." We ask, In what court can "the collective liens for their benefit" be enforced? or In what court can they "enforce their claim against Mulford's equity of redemption?" The statute itself furnishes no such remedy. A chancery court alone has jurisdiction of these questions, and we reply, in the language of the chief justice: "Can it be that the Legislature intended to grant the special relief the chief justice contends for where the collective liens amount to one hundred dollars or upwards, and without it when it falls below that sum? Would there be any justice in such discrimination?" The summary of the chief justice necessarily concedes that the rights granted to the mechanic and materialman are, as we hold, independent of the statutory remedy, "specially provided for its enforcement in the statute," as stated in 14 L. R. A.

another part of his opinion; and without regard to the limitation of \$100, as prescribed in section 8048 of the Code, may be enforced in a court of chancery, under section 720 of the Code, which gives jurisdiction to the chancery court "in all civil cases in which a plain and adequate remedy is not provided in other judicial tribunals."

The second proposition of the chief justice in his summary is "that the materialman's and mechanics' lien is inferior to Wimberly's lien [the mortgage], and bound only Mulford's equity of redemption." As to the property covered by the mortgage when the materials were added or a building wholly erected, this is true; but this is not true, and is directly in the face of the statute, as to a new building, or materials furnished, or repairs made. As to these, the statute directly declares this lien "shall have priority over all other liens, mortgages, whether existing at the time the materials are furnished or subsequently created." To hold that the words "such lien," as used in section 8019, refers only to the lien given upon a building wholly erected, would impute to the Legislature a want of knowledge of the ordinary meaning of words, and resolve the section into an absurdity; for, unless the words "such lien" include the lien for material and repairs, then there is no provision in the statute for enforcing the lien for material and repairs, even in cases where the mortgage was subsequently created. No one contends that this would be a proper construction of the statute. We have given the statute a great deal of study. It should be so construed as to give some effect to every clause, and a construction which leaves to a sentence or clause no field of operation should be avoided as far as possible. *Lehman v. Robinson*, 59 Ala. 219; *Ex parte Dunlap*, 71 Ala. 73. Our conclusion is the only solution of the difficult question involved, as we understand the purpose of the statute. It does no injustice to either party; it rests upon equitable principles, and does not violate *Magna Charta*.

Stone, Ch. J., dissenting:

Our Statute (Code 1886, § 8018,) provides that mechanics and materialmen, "who shall do or perform any work or labor upon, or furnish any material, fixtures . . . for any building or improvement on land, or for repairing the same, under or by virtue of any contract with the owner or proprietor thereof . . . shall have a lien therefor on such building or improvement, and on the land on which the same is situated, to the extent in ownership of all the right, title, and interest owned therein by such owner or proprietor." Section 8019: "Such lien, as to the land, shall have priority over all other liens, mortgages, or incumbrances created subsequently to the commencement of the work on the building or improvement, or repairs thereto; and, as to the building or improvement, it shall have priority over all other liens, mortgages, or incumbrances, whether existing at the time of the commencement of such work or subsequently created; and the person entitled to such lien may, when there is a prior lien, mortgage, or incumbrance on the land, have it enforced by a sale of the building or improvement, under

the provisions of this chapter, and the purchaser may, within a reasonable time thereafter, remove the same." Section 3021: "When a lien attaches under the preceding section [section 3020, which relates to buildings or improvements on land held under lease], the lessor, at any time before a sale of the property, shall have the right to discharge the same by paying to the holder the amount secured thereby." The purpose of this section is to enable the lessor to prevent the removal of the building or improvement from the land, by paying off the lien upon it. The foregoing are all the statutory provisions which are material to a correct decision of this case. The facts of this case are all clearly shown in the pleadings and in the agreed statement of facts. There is no dispute of fact about anything this court need decide. R. M. Mulford occupied as a residence a lot within the city of Birmingham, on which were a dwelling house and other improvements necessary for its occupancy as a dwelling. Mulford had executed a mortgage on the lot, "together with all and singular the tenements, hereditaments, and appurtenances thereto belonging," to T. P. Wimberley, to secure the payment of a note of \$4,000, payable at a bank. The mortgage was executed in October, 1889, and was properly recorded in the probate office of Jefferson County, the county in which the lot is situated. At the time the mortgage was executed Mulford was the owner of the property in fee, and resided on it. The dwelling was almost destroyed by fire in 1890, but the kitchen part of the dwelling was only partially consumed, and out-houses in the yard were left unharmed. At and before that time the property was under insurance for the benefit of Wimberley, the mortgagee; and when the amount of the loss was adjusted in August, 1890, the sum of \$2,664 was ascertained to be the amount of the loss suffered by the fire, and this was paid by the insurance company. It was then agreed between Wimberley and Mulford that the said insurance money should be expended in restoring the dwelling-house to a habitable condition, the house, when restored, to still continue under the mortgage; and if any sum beyond the \$2,664 was expended on the building, Mulford was to supply it, and was to continue in the occupancy of the house subject to the mortgage. Under this agreement the house was rebuilt on the site of the one burned and the \$2,664 were exhausted in the erection. The house not being completed, or not being finished up to the satisfaction of Mulford, he incurred additional expense in material and workmanship which went into the body of the house. The debt thus incurred is some \$600. This additional expense was incurred on credit without the knowledge or consent of Wimberley, and the act has never been ratified by him. It is not shown that he even knew that the expense being incurred was in excess of the \$2,664. The verified statement of materials and workmanship required under sections 3023-3024, Code, were made out against R. M. Mulford, without any notice whatever of Wimberley's claim or mortgage. The mechanics who did the work, having acquired the ownership of the material-men's claim, filed the present bill to enforce

both claims by a sale of the property on which the house was erected, properly, in the present case, on which the house was repaired or completed. The bill was filed January 29, 1891, and sets forth that Mulford was a citizen of Jefferson County,—the county in which the property is situated,—and that Wimberley resided in Lee County, a hundred miles or more away. While the suit was pending, and after Wimberley had answered the bill, to wit, on March 28, 1891, he sold the property under the power of sale contained in the mortgage, having previously given the requisite notice, and one Hyde was set down as the purchaser at \$4,910.41; the amount of the mortgage debt, and the expense of the foreclosure. A deed was made to Hyde, and on the same day the property was reconveyed by Hyde to Wimberley. No money was paid, and it was practically a purchase by Wimberley at his own sale. The mortgage gives to the mortgagee no right to purchase at his own sale.

There are two reasons why the sale under the power can exert no influence in this case: first, when the bill was filed (January 29, 1891) no attempt to foreclose the mortgage by sale under the power had been made. If the bill, when filed, contained no equity, the subsequent act of Wimberley cannot give it equity. To authorize a suit in chancery for relief, the facts on which complainant relies for recovery must be existent. It is not enough that they come into existence afterwards. *Planters & M. Mut. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585; *Rapier v. Gulf City Paper Co.* 64 Ala. 330; *Banks v. Thompson*, 75 Ala. 531; *Malone v. Marriott*, 64 Ala. 486; *Peasey v. Cabaniss*, 70 Ala. 258; 8 Brick. Dig. p. 679. Second, Wimberley, for all equitable purposes, being the purchaser at his own sale, the sale and conveyances made did not in the slightest degree impair or change the equitable rights, or the manner of their assertion, that any third person may have had. Subsequent incumbrancers had precisely the same equitable rights after the said sale as they could have asserted before. The statutes under consideration do not attempt to secure to mechanics or materialmen a lien paramount to olderv valid liens. If it did so attempt, we would be forced to deny such relief, for the attempt would be to deprive the owner of his property without "due process of law." The lien the statute confers is only "to the extent in ownership of all the right, title, and interest owned therein by such owner or proprietor;" that is, the one who procures the materials to be furnished, or the mechanic's labor to be performed, thereby gives a lien co-extensive with his ownership, and no more. If he have only a leasehold estate, a part interest less than the whole, an equity of redemption, or an equitable right to demand, or receive title on payment of the purchase money, the mechanic or materialman acquires a lien on that title or right, and nothing more. He does not and cannot acquire a larger right or interest than his employer owned. It is axiomatic that no one can convey or incur property beyond the extent of his ownership. I understand Justice Coleman in his opinion to concede what is stated above.

If the employer (owner or proprietor, as he

is designated in the statute) own the unincumbered fee, then no difficulty will be encountered in enforcing the lien. The statute gives a lien, not only on the building or improvement erected, or added to or repaired, but also on the lot on which it stands. The entire property, lot and all, if necessary, can be sold in discharge of the lien, even though that lien be only for repairs put on the building. Such is the statute. If, however, the owner or proprietor, procuring the work to be done or materials furnished, have not an unincumbered title to the lot, then the statute provides a different rule. If the workmanship and materials are employed in the erection of a new building or improvement, which can be removed and leave the property as it was before the building or improvement was commenced, then there is a first and paramount lien on the building or improvement, which can be enforced by a sale of such building or improvement, "and the purchaser may, within a reasonable time thereafter, remove the same." And, in such case, the mechanic and materialman each has an additional lien on whatever title to or interest in the lot the owner or proprietor owned at the time the lien commenced to attach. In the two categories stated above, the rights and remedies of the several parties are clearly defined in the statute, and are easy of enforcement. Cases arise in which the claim of the mechanic or materialman is for labor done or materials furnished for the completion of an unfinished building or improvement, or for repairs on such building or improvement, at a time when the fee-simple title is not in the person who procures the materials to be furnished or the services to be rendered, and yet both the material and services become so incorporated in the building as not to be separable from it, so as to leave it in the condition it was in before the repairs were made. That is this case. It is manifest that neither a sale of the entire property, nor of the building on which the repairs were put, nor a removal of the building, can be resorted to in such case. Either course would deprive the older lienor, the mortgagee, of his property, without due process of law. It results that for the case we have in hand the statute points out no specific mode of enforcing the lien. It must therefore be determined on equitable principles. The claim of a mechanic or materialman is, at least, but a lien,—a right to have the claim enforced as a charge. The statute makes it subordinate to all older valid liens; and, if it did not, the constitutional barrier would have made it so. *Magna Charta* made it so. Except to the extent the statute provides specially for its enforcement, it stands on no higher plane than other valid liens; and we have seen there is no statutory provision which points out the remedy in a case like this. We have simply the case of a junior lienor attempting to collect his claim out of property that is subject to an older valid lien. In the opinion of my Brother Coleman, it is admitted that Wimberley's claim is the older, and its bona fides is not questioned. Suppose the complainants in this case filled the position of a junior mortgagee, and, to make the analogy striking, suppose the consideration of such junior mortgage had been for money which was expended in repairs on the house

covered by the senior mortgage. Or suppose the case of a vendor's lien for unpaid purchase money, no title being made, and a mechanic asserting a lien against the vendee in possession for repairs put upon and incorporated in a dwelling that was on the premises before the agreement of sale. Can ingenuity draw a distinction in principle between either of the cases supposed and the case we have in hand? And would anyone contend, in either of the cases supposed, that any other principle was involved than that which always obtains when there is a junior and a senior mortgagee?

I hold the following propositions are so clearly established that not a respectable authority can be found in opposition to either of them: *First*. The mortgage to Wimberley being duly spread on the records of the county in which the lot was situated, and that mortgage being the older lien, this, in law, was and is the equivalent of actual notice to the mechanic and materialman of the existence of that older lien. 8 Brickell, Dig. p. 679, §§ 8, 9. *Second*. The complainants in this case, being only subsequent incumbrancers, had no right, either at law or in equity, to compel that older mortgagee to enforce his lien, either by foreclosure or otherwise, in order that their junior interests might be carved out of it. Their only right, like that of any other junior incumbrancer, was to redeem the property from the older lienor, and thereby secure their subrogation to his rights. *Kelly v. Longshore*, 78 Ala. 208, and authorities cited. *Third*. There is not an adjudged case, not even excluding those cited by my Brother Coleman, which holds that a junior incumbrancer, although his labor or money may have enhanced the value of the security, can coerce the enforcement of the lien, as a means of carving his alleged interest or lien out of it, unless there is a statute conferring the right. Our statute giving to mechanics and materialmen a lien was approved March 6, 1876. Before that time we had no statute on the subject that was like the present one. Code 1887, §§ 3101-3104. Its provisions, so far as the principles necessary to be decided in this case are concerned, are identical with those of Code Iowa, §§ 2130, 2139, 2140, 2141. The Iowa Code was adopted in 1873, three years before our statute was enacted. The complete identity of language found in each of the systems, on the points material to this case, demonstrates that our statute, being the later, must have been copied from the Iowa statute. Such identity of expression could not be accidental. The substantial re-enactment of a statute which has been construed, and has acquired a fixed judicial construction, is a legislative adoption of the construction. 3 Brickell, Dig. p. 749, § 16. Seven of our decisions are cited in favor of this principle. *Getchell v. Allen*, 34 Iowa, 559, was decided in 1872, four years before our statute was enacted. The Iowa statute was of force before that time. Code Iowa, 1851, § 981 *et seq.* The Iowa case was not distinguishable in purpose or principle from the one we have in hand. The court said: "In the case of a mortgage upon land and the buildings thereon, made before the mechanics' lien attaches, the mortgagee will hold the property as against the mechanic. How is it when im-

improvements in the way of additions or repairs to the building are made after such mortgage? The mortgage binds the house; the improvements of the character indicated become a part of the house, and are, as it were, incorporated with it. After the improvements are made, they do not remain separate and distinct from the building. They have lost their distinctive character; the house includes them; they are a part of the house; the mechanics' lien cannot defeat the mortgagee's right; and, for the same reason, section 1855 does not apply to such a case. That section simply provides that a mechanics' lien for work or materials furnished to erect buildings, after the execution of a mortgage on the land, is a paramount lien against the buildings, but is not a lien on the land. But, if the mortgage covers the building, the mechanic cannot enforce his lien against it, and cause it to be sold and separated from the land. These views, we think, are based upon sound principles, and lead to equitable results. Should a contrary doctrine prevail, it would be within the power of a mortgagor to ruin the security of his creditor by making improvements upon the building covered by his mortgage, which, in fact and in law, would but become a part of the building itself. The case before us serves to illustrate the injustice of such a rule. Another story is added to a house already bound by the mortgage. The story cannot be separated from the house; it is a part of it. It would be a great hardship to the mortgagee to permit his security to be defeated or impaired by the act of the mortgagor in thus adding to his building. The mechanic or materialman cannot complain. He had notice of the mortgage, and knew, or was bound to know, the purposes for which the materials were furnished or work was done by him."

The language copied is taken entirely from *Chief Justice Beck's* opinion, on a statute from which ours was in substance copied, and in a case from which ours is not distinguishable in principle. Is there any hitch or faulty link in the reasoning of *Chief Justice Beck*? Can it be answered? As I understand the opinion of my Brother Coleman, he concedes that Wimberley's mortgage has an older and paramount lien; and he does not contend that the mechanic or materialman can claim a lien for the value or agreed price of the materials and work put into the house. Their lien extends, according to his views, only to the enhancement of price caused thereby, which the house and other property covered by the mortgage will bring when put to sale. Now, how is this to be ascertained? The house must needs be sold as an entirety, and hence the sale will furnish no data for determining the enhancement of price. Is it to be ascertained by a reference, and on opinion evidence? Is it just to a paramount lien, nay, is it lawful, to carve out of his security a junior incumbrance, placed there without his knowledge, and without his consent, and to fix its value or amount on testimony such as this? The statute gives a lien—a junior lien—for the value of the materials and mechanical labor, and it gives it for the whole value. It gives it in no other form. In a case like this, that lien is on the equity of redemption,—Mulford's ownership of the prop-

erty. On what principle can that lien be transformed into a lien on the whole property for the enhanced value imparted to it by the material and workmanship furnished, and that lien made enforceable *pari passu* with the older mortgage lien? The statute confers no such lien, and provides no machinery for carving it out. No adjudged case can be found which justifies such proceeding under a statute like ours. The Illinois cases cited by my Brother Coleman are rested on the express language of their statute, which directs in what manner the lien for repairs must be enforced. That court simply followed the statute of that State. We have no such statute, and yet the majority opinion of my brothers supplies the omitted clause, and construes our statute as if it were a copy of the Illinois statute.

An additional argument: When an entirely new building or improvement is erected at the instance of the mortgagor, on land previously mortgaged by him, the statute declares a lien in favor of the mechanic and materialman, and the extent of it. It is on the building or improvement so erected which may be sold and removed from the premises. This is the remedy given by statute, and it gives no other, except a lien on the mortgagor's equity of redemption. It is manifest that the lien on the building, with the right to sell and remove it, would in most cases be very inadequate security. All men know that the sale of a building,—even of a frame building,—if the purchaser be required to remove it from the premises, would yield only a fraction of the value of the materials and workmanship employed in its construction; and, if the building were of brick, this disparity would be much greater. Yet it is manifest that in case of an entirely new building, on land previously mortgaged, sale and removal would be the only means of enforcing the lien of the mechanic and materialman. This, because this statute which secures the lien gives this remedy for its enforcement. Now, under the opinion of the majority of the court, the right and remedy for repairs put on a building which was on the premises at the date of the mortgage would be much more compensating—much more nearly adequate—than if the claim were for an improvement entirely new. Can the Legislature have intended this advantage to him who only repairs an old building over the materialman and mechanic who furnish materials and construct a new one? Did the Legislature intend to give to the builder this inadequate compensation for an improvement entirely new, and leave it to the courts to secure to the repairer, by interpretation, a full *quantum valebat* for what he may have added? The present proceeding is in equity. The very nature of the relief granted in the majority opinion in this case forbids that it shall or can be awarded in any court other than one having chancery jurisdiction. Liens secured to mechanics and materialmen, under our statutes, are enforceable in equity only—"when the amount claimed is not less than one hundred dollars," unless a special ground of equity jurisdiction is alleged and proved. Code 1894, § 3046. I have shown that the complainant is without semblance of equitable right to compel Wimberley to foreclose his mortgage, and have

thus shown that the present bill is without "special ground of equitable jurisdiction." Can it be that the Legislature intended to grant the special relief my brothers have awarded to complainant in this case, when the value of the repairs amounts to \$100 or upwards, and to withhold it when it falls below that sum? Would there be any justice in such discrimination? We presume the Legislature intended to deal equally and fairly, and hence should not, by interpretation, stretch this purely statutory, yet beneficial, system to consequences the Legislature did not express and could not have intended.

I summarize my own conclusions: *First.* At the time when the materials and workmanship were furnished in this case, Wimberley's mortgage was on record. This, in law, was the same as if the materialman and mechanic had

had actual notice of the mortgage, and that Mulford's ownership was only an equity of redemption. *Second.* The materialman and mechanic each acquired a lien, but it was inferior to Wimberley's lien, and bound only Mulford's equity of redemption. *Third.* The only remedy or recourse left to the materialman and mechanic was the right to redeem from Wimberley by paying off the older incumbrance, and then enforcing the collective liens for their benefit; or they could have enforced their claim against Mulford's equity of redemption; or they could await Wimberley's foreclosure, and claim payment out of the surplus, should anything be left. It is my conclusion that the decree in this case should be reversed, and the bill dismissed.

Clopton, J., concurs in this opinion.

RHODE ISLAND SUPREME COURT.

George J. KIRBY, by Next Friend,

Samuel J. FOSTER *et al.*

(.....R. I.....)

An assault on an employe to recover money voluntarily given him to pay other help is not justified by his refusal to use it as directed and his claim of right to retain it in order to make good a deduction from his wages which he claims to have been unlawful.

(July 25, 1891.)

EXCEPTIONS by defendants to rulings made by the presiding justice upon the trial of an action brought to recover damages for an

alleged assault and battery which resulted in a judgment in favor of plaintiff, and application for a new trial of such action. *Overruled.*

The facts are stated in the opinion.

Messrs. Charles A. Wilson and Thomas A. Jenckes, for defendants:

When an article is delivered to a servant by his master, the servant becomes vested with the custody merely, while the master retains the possession in himself, and the servant may be guilty of trespass and larceny in fraudulently converting the same to his own use.

3 Russell, Crimes, 9th ed. chap. 18, p. 382; 2 Bishop, Crim. Law, 7th ed. § 824; Wharton, Crim. Law, 8th ed. art. 956, *et seq.*; May, Crim. Law, arts. 97, 98, 152.

NOTE.—Assault in recapture of property.

The right to use force to retake one's personal property from the possession of another has been affirmed in some cases and denied in others without clearly showing any rule of decision by which the cases can be harmonized, while the rules of decision which they state do not exactly harmonize. Thus it is said on one side that, one from whom property has been wrongfully taken may regain his momentarily interrupted possession by reasonable force short of wounding or the use of a dangerous weapon, especially after a demand for its return. *Com. v. Donahue*, 2 L. R. A. 623, 148 Mass. 539.

On the other side, it is said that unless personal property is seized forcibly the owner has a right to do no more than lay his hands gently on the wrongdoer to recover it. *Scribner v. Beach*, 4 Denio, 448, 47 Am. Dec. 265.

Also that force cannot be used to regain possession of property which is in the peaceable possession of another no matter which has the better right to it. *Bobb v. Bosworth*, Litt. Sel. Cas. 81, 12 Am. Dec. 373.

And again that the owner of property cannot by force take it from the peaceable though wrongful possession of another. *Huppert v. Morrison*, 27 Wis. 385; *Andre v. Johnson*, 6 Blackf. 375.

When force allowable.

But a comparison of the cases shows that where force has been justified in retaking property, the property had been obtained by the other party by force, fraud or wrongful and lawless trespass, or else has been momentarily intrusted to the other party for examination merely. In all these cases 14 L. R. A.

there was a wrongful taking or else a possession which was in effect fraudulent, thus:

As much force as is necessary may be used to retain one's property which a trespasser has obtained possession of and is trying to carry away. *Gyre v. Culver*, 47 Barb. 692; *Johnson v. Perry*, 56 Vt. 708, 43 Am. Rep. 828.

Or to resist an unlawful attempt to drive away defendant's cow from his close. *Polkinhorn v. Wright*, 8 Q. B. 197.

Such force as is necessary may be justified in retaking windows which a person has taken and is carrying away without right. *State v. Elliot*, 11 N. H. 540.

Servants are justified in using necessary force to retake rabbits from a trespasser who has shot them on the master's premises. *Blades v. Higgs*, 10 C. B. 713, 30 L. J. C. P. 347.

One whose chattel is wrongfully taken from his possession may retake it using no more force than is necessary. *Hopkins v. Dickson*, 50 N. H. 235.

It is a good defense to an assault that it was made to recover money of which another had fraudulently obtained possession with intent to apply it on an execution. *Anderson v. State*, 6 Bart. 608.

One may use such force as is necessary to retake a paper which another whom he has allowed to take it to read is undertaking to carry away. *Baldwin v. Hayden*, 6 Conn. 458.

An officer may take away a search warrant from one who refuses to return it after being allowed to take it to read. *Rex v. Milton*, 3 Car. & P. 31.

Force may be used to retake property from a purchaser who has obtained possession of it by fraud and is overtaken while carrying it away.

This doctrine applies equally to civil as to criminal cases.

Holmes, *Com. Law*, pp. 226, 227, and cases cited under *note* as follows: Moore, 248, pl. 892; *Bloss v. Holman*, Owen, 52; *Brymer v. Atkins*, 1 H. Bl. 181, 184; *Ludden v. Leavitt*, 9 Mass. 104, 6 Am. Dec. 45; *Dillenback v. Jerome*, 7 Cow. 204; *People v. Mayer*, 16 Barb. 362; 1 Gray, *Select Cases on Property*, pp. 334, 335; Dicey, *Parties*, 358; *Hopkinson v. Gibson*, 2 Smith, 202; Pollock, *Torts*, *277; Stephen, *Crim. Law*, p. 217; 1 Chitty, Pl. 1st ed. 170; Addison, *Torts*, 6th ed. 523, and cases cited under *note b*.

The plaintiff acquired no possession of the money as against the defendant, even by his assertion of an adverse claim to it, as he had, at the time, the mere custody, and the owner had the possession and immediately resisted the assertion of the plaintiff's wrongful claim.

Blades v. Higgs, 10 C. B. N. S. 718; *Baldwin v. Hayden*, 6 Conn. 453.

A person may defend property of which he has the possession.

Bigelow, *Torts*, 106; *Cluff v. Mutual Ben. L. Ins. Co.* 13 Allen, 308, 99 Mass. 317; 1 Waterman, *Trespass*, art. 158; 1 Addison, *Torts*, 6th ed. art. 148; 2 Bishop, *Crim. Law*, 7th ed. art. 87.

The money was never delivered into the plaintiff's possession and his assertion of his wrongful claim to it was a taking, against the defendant's will, of money of which the defendant had possession. The defendant was therefore warranted in immediately following it, and in using sufficient force to regain the possession.

Blades v. Higgs, 10 C. B. N. S. 718; *Baldwin v. Hayden*, 6 Conn. 453; *Com. v. McQue*,

Hodgeden v. Hubbard, 18 Vt. 504, 46 Am. Dec. 167. This is an exceptionally strong case as the possession was surrendered to the purchaser on his fraudulent representations of solvency.

When force not allowable.

If the cases cannot be entirely reconciled it will be seen at least that the following cases for the most part involve an element of disputed right to the possession of the property, which is wanting in the cases collected in the preceding division.

A person cannot forcibly take exempt property away from an officer who has levied on it. *Sims v. Reed*, 12 B. Mon. 51.

An assault to rescue a bull from one driving him to a pound because he was found trespassing is not justifiable. *Green v. Goddard*, 2 Salk. 640.

So a cow taken up while trespassing and held in peaceable possession cannot be retaken by force whether the detention was lawful or not. *Barnes v. Martin*, 15 Wis. 240, 52 Am. Dec. 678.

And an assault on a field driver to retake cattle taken up by him while at large in a highway, is illegal, even if he demanded illegal fees as a condition of giving it up. *Com. v. McQue*, 16 Gray, 227.

A refusal of a person to give up a mare which he is riding to one who claims her does not justify an assault. *Hendrix v. State*, 50 Ala. 149.

One who has let a horse for a certain time to go to a certain place cannot within that time retake it from the hirer although he was going to another place. *Lee v. Atkinson*, 2 Cro. Jac. 238.

In another case in which force in retaking a horse was held unlawful, the circumstances are not shown, and there was merely an allegation that 14 L. R. A.

16 Gray, 228; *State v. Elliot*, 11 N. H. 545; *Johnson v. Perry*, 56 Vt. 708, 48 Am. Rep. 826. See also *Gyre v. Outcort*, 47 Barb. 502; *Goodwin v. Avery*, 26 Conn. 585, 68 Am. Dec. 410.

Defendant was justified in using some force to immediately repossess himself of his property. Whether he used a reasonable amount or not was a question for the jury.

Com. v. Clark, 2 Met. 23.

Whether the plaintiff acted with a fraudulent intent was a question of fact for the jury.

Hardy v. Simpson, 35 N. C. 132; *Cheney v. Palmer*, 6 Cal. 119, 65 Am. Dec. 493; *Doe v. Manning*, 9 East, 59; Proffatt, *Jury Trials*, art. 366; *Huntzinger v. Harper*, 44 Pa. 206.

If this fraudulent intention was found, then under our statute (Pub. Stat. chap. 548, § 16) the plaintiff would be guilty of larceny; and also at common law.

2 Brusellion, *Crimes*, chap. 10; 2 Bishop, *Crim. Law*, chap. 25; *Reg. v. Bunce*, 1 Fost. & F. 523; *Reg. v. Holloway*, 3 Cox, Cr. Cas. 241; *Reg. v. Middleton*, 12 Cox, Cr. Cas. 260; *Com. v. O'Malley*, 97 Mass. 584; *Com. v. Berry*, 99 Mass. 428, 90 Am. Dec. 767.

A detention of the plaintiff by the defendant, if his act was criminal, until he could be handed over to the proper authorities, was warranted.

Addison, *Torts*, chap. 12, p. 700, § 2.

A man is justified in retaking his property taken from him by trickery, device, etc.

Anderson v. State, 6 Baxt. 608; *Hodgeden v. Hubbard*, 18 Vt. 504, 46 Am. Dec. 167.

Mr. Stephen A. Cooke, Jr., also for defendants.

Mr. Edward D. Bassett for plaintiff.

plaintiff had the horse tortiously in his possession in the street. *Andre v. Johnson*, 6 Blackf. 375.

So an assault to obtain possession of a slave claimed by both parties is unlawful. *Robb v. Bosworth*, Litt. Sel. Cas. 81, 12 Am. Dec. 273.

Otherwise an assault to obtain straw on another's land. *Huppert v. Morrison*, 27 Wis. 385.

A banker's clerk who has cashed a check and laid the money therefor on the counter cannot forcibly retake the money from the person to whom he has paid it although he has made a mistake in paying it. *Chambers v. Miller*, 3 Fost. & F. 202.

The rule laid down in *Scribner v. Beach*, 4 Deno. 448, 47 Am. Dec. 208, although not reconcilable with the cases which justify force, should not be regarded as there was no assault to recapture property involved in that case, but instead, an assault on the owner of an article who merely took hold of it to take it from one who had it in his hands.

It is suggested in the light of above comparison of authorities that the rule may be fairly stated to be that necessary force to recapture personal property is allowable when the other party has not possession by wrong or fraud and the right of possession is not involved.

Prior demand.

A demand should be made before attempting to take personal property from another by force. *Dyk v. DeYoung*, 35 Ill. App. 123.

Degree of force.

Whether force used in the recapture of property is excessive or not is a question for the jury. *Com. v. Donahue*, 2 L. R. A. 623, 148 Mass. 532; *Gyre v. Culver*, 47 Barb. 502.

B. A. R.

Stinson, J., delivered the opinion of the court:

The plaintiff was in the employ of the Providence Warehouse Company, of which the defendant Samuel J. Foster was the agent, and his son, the other defendant, an employé. A sum of \$50, belonging to the corporation, had been lost; for which the plaintiff, a book-keeper, was held responsible, and the amount was deducted from his pay. On January 30, 1888, Mr. Foster handed the plaintiff some money to pay the help. The plaintiff, acting under the advice of counsel, took from this money the amount due him at the time, including what had been deducted from his pay, put it into his pocket, and returned the balance to Mr. Foster saying he had received his pay and was going to leave, and that he did this under advice of counsel. The defendants then seized the plaintiff, and attempted to take the money from him. A struggle ensued, in which the plaintiff claims to have received injury, for which this suit is brought. The jury having returned a verdict for the plaintiff, the defendants' petition for a new trial on exceptions to the rulings and refusals to rule of the presiding justice. It is unnecessary to repeat the several exceptions, since they involve substantially but one question, viz., whether the defendants were justified in the use of force upon the plaintiff to retake the money from him. As the defendants only pleaded the general issue, all requests relating to justification might properly have been refused on that ground. 1 Chitty, Pl. *501; 2 Greenl. Ev. § 92. The case, however, having been tried upon the defense of justification, we will consider the exceptions as though that defense had been pleaded. The defendants contended that the relation of master and servant subsisted between the plaintiff and Samuel J. Foster, the manager of the warehouse, whereby possession of money by the plaintiff was constructively possession by the manager acting in behalf of the company; and that, the money having been delivered to the plaintiff for the specific purpose of paying the help, his conversion of it to his own use was a wrongful conversion, amounting to embezzlement, which justified the defendants in using force in defense of the property under their charge. Unquestionably, if one takes another's property from his possession, without right and against his will, the owner or person in charge may protect his possession, or retake the property, by the use of necessary force. He is not bound to stand by and submit to wrongful dispossession or larceny when he can stop it, and he is not guilty of assault, in thus defending his right, by using force to prevent his property from being carried away. But this right of defense and recapture involves two things: *first*, possession by the owner; and *second*, a purely wrongful taking or conversion without a claim of right. If one has intrusted his property to another, who, afterwards, honestly though erroneously, claims it as his own, the owner has no right to retake it by personal force. If he has, the actions of replevin and trover in many cases are of little use. The law does not permit parties to take the settlement of conflicting claims into their own hands. It gives the right of defense, but not of redress. The circumstances may be exasperating; the

remedy at law may seem to be inadequate; but still the injured party cannot be arbiter of his own claim. Public order and the public peace are of greater consequence than a private right or an occasional hardship. Inadequacy of remedy is of frequent occurrence, but it cannot find its complement in personal violence. Upon these grounds the doctrine contended for by the defendants is limited to the defense of one's possession and the right of recapture as against a mere wrong doer. It is therefore to be noted in this case that the money was in the actual possession of the plaintiff, to whom it had been intrusted for the purpose of paying help, who thereupon claimed the right to appropriate it to his own payment, supposing he might lawfully do so. Conceding that the advice was bad, nevertheless, upon such appropriation, the plaintiff held the money adversely, as his own, and not as the servant or agent of the company. If his possession was the company's possession, then the company was not deprived of its property, and there could be neither occasion nor justification for violence. Possession by the company would be constructive merely, which would cease when the plaintiff exercised dominion and control on his own behalf under an honest claim of right. It is only in this way, in many cases, that conversion is established. Having thus appropriated the money to himself, it is urged that the act amounted to embezzlement, which justified the intervention of the defendants to prevent the consummation of the crime. We do not think this is so. The plaintiff stated what he had done, and the grounds upon which he claimed the right to do it, handing back the balance above what was due him. A controversy followed. He started to go out, but was stopped by the defendants, and then the assault took place. The sincerity of the plaintiff's belief that he had a right to retain the money is unquestionable. Hence as stated in *Cluff v. Mutual Ben. L. Ins. Co.*, 18 Allen, 808, cited by the defendants, even a forcible taking of property, "if done under an honest claim of right, however ill founded, would not constitute the crime of robbery or larceny; because when a party sincerely, though erroneously, believes that he is legally justified in taking property, he is not guilty of the felonious intent which is an essential ingredient of these crimes."

In the most favorable view of the case for the defendants, the plaintiff, having obtained the money by no crime, misrepresentation, or violence, nor against the will of its owner, retained it wrongfully. In such cases the rule is clearly stated in *Bliss v. Johnson*, 78 N. Y. 529: "The general rule is that a right of property merely, not joined with the possession, will not justify the owner in committing an assault and battery upon the person in possession, for the purpose of regaining possession, although the possession is wrongfully withheld." See also *Harris v. Marco*, 16 S. C. 575; *Barnes v. Martin*, 15 Wia. 240, 82 Am. Dec. 670; *Andre v. Johnson*, 6 Blackf. 375.

In *Com. v. McCue*, 16 Gray, 226, it was held that an owner of cattle, which had been taken up by one who claimed to be a field driver, had no right to commit an assault in retaking his property, even though the complainant acted only as an officer *de facto*, and demanded illegal

fees. But, it is said, the plaintiff was about to carry away the money against the will of the owner. Undoubtedly this was so; but this is true in every case of wrongful conversion of property. If it be not taken against the will of the owner, it cannot be retaken by force, but only by the usual civil remedy.

The defendants cite the following cases, which, it will be seen, are plainly distinguishable from the case at bar: *Blades v. Higgs*, 10 C. B. N. S. 713. This was on demurrer to a plea which set up that the plaintiff had possession, wrongfully and against the will of the owner, of certain property, which the plaintiff was about to carry away. The plea was held to be a good justification for necessary force, upon the assumed ground that the defendants had actual possession of the chattels, which the plaintiff took against their will. In *Johnson v. Perry*, 56 Vt. 703, 48 Am. Rep. 826, and *Gyre v. Oulver*, 47 Barb. 592, there was no claim of right on the part of the plaintiff to the property he had taken. In *Hodgeson v. Hubbard*, 18 Vt. 504, 46 Am. Dec. 167, the plaintiff obtained the property by false representations. *Baldwin v. Hayden*, 6 Conn. 453, apparently sustains the defendant's contention that an owner has a right to retake property intrusted to another, if he is about to carry it away; yet it does not appear in that case that the defendant made any claim of title to the paper in question, only that he supposed he had permission to take it away. *State v. Elliot*, 11 N. H. 540, is in the same line, but extremely guarded in expression. It

appears to have been a very slight assault, which the court was quite willing to justify, without consideration of authorities. But the court says the right of recapture of property is far more limited than that of its defense, and recognizes the question whether the person removing it is a mere wrong-doer as one of the questions to be determined.

The defendants object to the charge of the court, that, where a person has come into the peaceable possession of a chattel from another, the latter has no right to retake it by violence, whether the possession is lawful or unlawful, upon the ground that this rule would prevent the recapture of property obtained by trickery or fraud. The instruction must be considered, not as an abstract proposition, but with reference to the case before the jury. Nothing appeared to show that the money had been procured by misrepresentation, trickery, or fraud. It was delivered to the plaintiff voluntarily, in the usual course of business. True, under the advice of a lawyer whom he had consulted, the plaintiff had previously determined to apply the money to his own payment when he should receive it; but this did not make the delivery itself fraudulent, nor did his intent to assert what he believed to be his right make that intent criminal. We think, therefore, with reference to the case as it stood, there was no error in the charge as given, nor in the refusal to charge as requested.

Exceptions overruled.

CALIFORNIA SUPREME COURT.

Henry JANIN, *Recept.*,
v.

LONDON & SAN FRANCISCO BANK,
Limited, *Appt.*

(.....Cal.....)

1. A depositor owes to the bank the duty of examining his checks within a reasonable time after they are returned to him, in order to discover and give notice of any forgery.
2. A depositor's delay in returning a forged check sent him by the bank, which had paid it and charged it up to his account, or in giving notice of the forgery after he discovers it, will not be a defense to his action against the bank to recover the amount of the check, unless the bank was injured by the delay.

(*Paterson, J., dissents.*)

(November 19, 1891.)

APPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco in favor of plaintiff in an action brought to recover money deposited by plaintiff with defendant and paid by the latter on a forged check. *Affirmed.*

The facts are stated in the opinion.

Mr. John B. Harmon, with *Mr. D. P. Belknap*, for appellant:

When the Bank, at the request of the plaintiff, balanced his pass-book on September 4, 1878, and returned it to him with the checks paid as vouchers, he was under an obligation to the Bank, from the usages of business, to examine it, or have it examined, within a reasonable time, and give timely notice of his objections, if any, thereto; and if he failed to make, by himself or agent, such examination and give such notice, and if the Bank was not in fault, he was estopped from questioning the correctness of the account.

Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 96, 29 L. ed. 811, and cases cited; *Redington v. Woods*, 45 Cal. 426, 427; *Weinstein v. National Bank of Jefferson*, 69 Tex. 38; *First Nat. Bank of Quincy v. Ricker*, 71 Ill. 439, 444; *Frank v. Chemical Nat. Bank*, 34 N. Y. 209; *Dana v. National Bank of the Republic*, 152 Mass. 156, 158; *Hardy v. Chesapeake Bank*, 51 Md. 591, 34 Am. Rep. 325; *Bank of United States v. Bank of Georgia*, 23 U. S. 10 Wheat. 838, 6 L. ed. 334; 2 Morse, *Banks & Banking*, 8d ed. §§ 467, 472, 473, 489 *e*; 2 Parsons, *Notes & Bills*, 599, 600.

Such estoppel does not depend on whether

NOTE.—In addition to the exhaustive discussion, in the two opinions and the briefs in this case, of the specific question involved as to the effect of delay by the depositor, see also, generally, as to a 14 L. R. A.

bank's liability for payment of forged checks, the notes to *Atlanta Nat. Bank v. Burke* (Ga.) 2 L. R. A. 96, and *Deposit Bank v. Fayette Nat. Bank* (Ky.) 1 L. R. A. 642.

the forger, at the time of committing the forgery or since, had or has sufficient property to meet the demands of the Bank. The right to seek and compel restoration and payment from him is, in itself, a valuable one; and it is sufficient if it appears that the Bank, by reason of the negligence of plaintiff, was prevented from promptly, and it may be effectively, exercising that right.

Leather Mfrs. Nat. Bank v. Morgan, supra; Continental Nat. Bank v. National Bank, 50 N. Y. 585, 590; *Knights v. Wiffen*, L. R. 5 Q. B. 660; *Morse, Banks & Banking*, 3d ed. § 478; *Bank of United States v. Bank of Georgia*, 23 U. S. 10 Wheat. 844, 356, 6 L. ed. 338, 340; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Redington v. Woods*, 45 Cal. 424, 425, 427, 428.

Plaintiff was under obligation to the Bank to exercise due diligence to give it information that the payment of the check was unauthorized; and this included not only diligence in giving notice after knowledge of the forgery, but also due diligence in discovering it; and if, by the exercise of due care and diligence, he could have discovered the forgery soon after September 4, 1878, he failed in his duty, and the adoption of the check and ratification of its payment would be implied, and the jury should have been so instructed.

Redington v. Woods and *Dana v. National Bank of the Republic, supra*.

Mr. H. L. Gear, with **Mr. W. H. L. Barnes**, for respondent:

A bank is bound to know the signature of its depositor, and is guilty of negligence in failing to discover a forged signature; and if it pays a forged check out of the depositor's funds, without the authority or ratification of the depositor, it does so at its peril, and is liable to pay the amount thereof to the depositor upon demand.

Weiser v. Denison, 10 N. Y. 75, 77, 61 Am. Dec. 731; *Morgan v. Bank of State*, 11 N. Y. 404; *Welsch v. German American Bank*, 73 N. Y. 420, 29 Am. Rep. 175; *Bank of British North America v. Merchants Nat. Bank*, 91 N. Y. 106; *Frank v. Chemical Nat. Bank*, 84 N. Y. 213, 214, 38 Am. Rep. 501; *First Nat. Bank of Washington v. Whitman*, 94 U. S. 347, 24 L. ed. 231; *Thomson v. Bank of British North America*, 83 N. Y. 8; *Leavitt v. Stanton*, 1 Hill & D. Supp. 415; *Manufacturer's Nat. Bank v. Barnes*, 65 Ill. 69, 16 Am. Rep. 576; *Hardy v. Chesapeake Bank*, 51 Md. 585, 34 Am. Rep. 325; *Mackintosh v. Eliot Nat. Bank*, 123 Mass. 395; *August v. Fourth Nat. Bank*, 15 N. Y. S. R. 956; *Georgia R. & Bkg. Co. v. Love & G. W. Soc.* 85 Ga. 293; *Atlanta Nat. Bank v. Burke*, 81 Ga. 597.

Negligence *per se* is imputable to a bank which pays a check with a forged signature without previous fault of its depositor inducing the payment, and it can have no relief either against such depositor or against a bona fide holder to whom it has paid the money.

Price v. Neale, 3 Burr. 1355; *Smith v. Mercer*, 6 Taunt. 76; *Laborde v. Consolidated Assn.* 4 Rob. (La.) 190, 39 Am. Dec. 517, and note; *Goddard v. Merchants Bank*, 4 N. Y. 147; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 81, and cases cited; *Salt Springs* 14 L. R. A.

Bank v. Syracuse Sav. Inst. 62 Barb. 101; *First Nat. Bank of Quincy v. Ricker*, 71 Ill. 439; *Bernheimer v. Marshall*, 2 Minn. 78, 72 Am. Dec. 79; *National Bank v. Grocers Nat. Bank*, 35 How. Pr. 412; *People's Bank v. Franklin Bank*, 6 L. R. A. 725, 88 Tenn. 299; *Georgia R. & Bkg. Co. v. Love & G. W. Soc. supra*; *First Nat. Bank of Danvers v. First Nat. Bank of Salem*, 151 Mass. 290.

It is true that where prior negligence of the drawer or holder has induced the loss, the party guilty of the first negligence must bear the loss.

Bernheimer v. Marshall, supra; *Gloucester Bank v. Salem Bank*, 17 Mass. 41; *People's Bank v. Franklin Bank, supra*; *Deposit Bank v. Fayette Nat. Bank (Ky.)* 7 L. R. A. 849; *Young v. Grote*, 4 Bing. 253; *First Nat. Bank of Orleans v. State Bank of Alma*, 22 Neb. 769, 3 Am. St. Rep. 294; *First Nat. Bank of Quincy v. Ricker, supra*; *National Bank of North America v. Bangs*, 106 Mass. 441.

But there is no pretense in this case of any prior negligence of the plaintiff, or that his negligence induced the payment of the check.

A clear discrimination between the case of a skillfully altered check and one whose signature is forged, as in the present case, is all that is necessary to disclose the fallacy of appellant's position upon the question of estoppel, and of the assertion that the case of *Leather Mfrs. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, sustains all the propositions for which appellant contends.

See *Redington v. Woods*, 45 Cal. 418; *Bank of Commerce v. Union Bank*, 3 N. Y. 234.

There can be no estoppel upon the plaintiff from asserting the forgery of the check, growing out of his failure immediately to discover and notify the defendant of the forgery when the check was returned to him September 11, 1878. Because:

1. The payment of the forged check was an act of negligence *per se* on the part of the Bank, and was at its peril, not having been induced by any prior act or neglect of the plaintiff.

2. The lapse of time from May 28, 1878, to September 11, 1878, before any means was furnished to plaintiff of suspecting the forgery by the return of the forged check, was amply sufficient to preclude any possible trace of the perfect stranger to whom the bank had negligently and unlawfully paid such a large sum of money, without any inquiry as to his identity, and without the preservation of any evidence of his handwriting or any means of tracing him.

3. The entire absence of evidence as to any attempt on the part of the defendant to detect or trace out the forgery at any time or in any manner, and its constant and persistent insistence that the check was genuine from the date of its payment in May, 1878, until the verdict of the jury in December, 1885, in the full face of the positive and explicit notice of the forgery finally given to it by the plaintiff in January, 1879, and its persistent confidence in the honesty of Hooper, whom it not only refused to suspect of the forgery, but put forward as a witness in its own behalf against the plaintiff, conclusively shows that the defendant could not have been injured by any neglect of the

plaintiff to inform it fully of the fact of the forgery between the 11th day of September, 1878, and the 31st day of January, 1879.

He who invokes an estoppel *in pais* must be able to show some act or omission by which he was misled to his injury.

Bigelow, Estoppel, pp. 549-561, and cases cited; *Barstow v. Savage Min. Co.* 64 Cal. 388, 49 Am. Rep. 705; *Martin v. Zellerbach*, 88 Cal. 800, 99 Am. Dec. 865; *Bowman v. Cudworth*, 21 Cal. 149; *Weisser v. Denison*, 10 N. Y. 64, 70, 61 Am. Dec. 731; *Welsh v. German American Bank*, 73 N. Y. 428, 29 Am. Rep. 175; *Frank v. Chemical Nat. Bank*, 84 N. Y. 213, 214, approved in *Leather Mfrs. Bank v. Morgan*, 117 U. S. 117, 29 L. ed. 819; *Bank of British North America v. Merchants Nat. Bank*, 91 N. Y. 111; *August v. Fourth Nat. Bank*, 15 N. Y. S. R. 956; *First Nat. Bank v. Tappan*, 6 Kan. 467, 7 Am. Rep. 568; *Manufacturers Nat. Bank v. Barnes*, 65 Ill. 71, 16 Am. Rep. 576; *Hardy v. Chesapeake Bank*, 51 Md. 587, 34 Am. Rep. 325.

De Haven, J., delivered the opinion of the court:

The plaintiff was a depositor in the bank of defendant, and the controversy in this action grows out of the payment by defendant of a check for \$10,700, purporting to have been signed by plaintiff, and for which amount defendant claims that it is entitled to debit the account of plaintiff. The complaint alleges that this check was a forgery. This is denied in the answer; and as another and separate defense it is averred, in substance, that the plaintiff is estopped to deny the genuineness of said check, because of his negligence in not examining his balanced pass-book and returned checks, including the one in dispute, within a reasonable time, and giving notice that such check was forged, "by reason of which laches defendant was prevented from tracing out the forger of said check or said signature, if it was a forgery, and proceeding against him, for a period of nearly five months, and until all trace of said forger was lost." The defendant also avers that the account between itself and plaintiff had become a stated one. The check was paid on May 29, 1878, and on September 4, 1878, the defendant returned to plaintiff his pass-book, showing the statement of his account at that date, and that he was charged with the amount of this check, which was also returned to him as one of the vouchers. On December 11, 1878, another statement of plaintiff's account was rendered by defendant, in which appeared the balance shown by the previous account. The evidence also tended to show that plaintiff did not at once examine the check in dispute when it was returned to him with his balanced pass-book on September 4, 1878, nor until some time in the month of December, 1878, and that he first intimated to defendant a doubt of its genuineness about December 28, 1878, but did not give notice that he actually claimed it to be a forgery until February 1, 1879. The verdict of the jury in favor of plaintiff must be deemed, on this appeal, to have conclusively established the fact that the check was a forgery, as there was evidence sufficient to establish such a finding, and it is not claimed that there was any error in 14 L. R. A.

the instructions of the court, so far as they relate to that particular point. It is well settled that a bank in receiving ordinary deposits becomes the debtor of the depositor, and its implied contract with him is to discharge this indebtedness by honoring such checks as he may draw upon it, and it is not entitled to debit his account with any payments except such as are made by his order or direction. *Crawford v. West Side Bank*, 100 N. Y. 50, 1 Cent. Rep. 253; *Phoenix Bank v. Ristey*, 111 U. S. 125, 28 L. ed. 374. All unauthorized payments, such as upon forged checks, are therefore made at the peril of the bank, and it is not justified in charging them against the depositor's account unless some negligent act of his in some way contributed to induce such payment in the first instance, or unless by his subsequent conduct in relation to the matter he is upon equitable principles estopped to deny the correctness of such payments. This view of the law cannot be well questioned, and finds abundant support in the decisions of courts. *Shipman v. Bank of State*, 126 N. Y. 318, 12 L. R. A. 791; *Hardy v. Chesapeake Bank*, 51 Md. 582, 34 Am. Rep. 325; *Weinstein v. National Bank of Jefferson*, 69 Tex. 88; *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811.

It is not claimed in this case that plaintiff was guilty of any prior negligence which induced the defendant to pay the check in dispute, and we are therefore to consider only the one general question, whether, upon the evidence before it, the court committed any error to the prejudice of the defendant in giving or refusing instructions relating to the defense of estoppel, and this we proceed to do. The plaintiff was in no manner responsible for the action of the defendant in paying the check. In making such payment it parted with its own money, and not that of plaintiff; and the loss consequent thereon was its own, and should not be transferred to the plaintiff, unless, from all the circumstances in the case, it appears reasonably probable that, but for his alleged negligence, the defendant could have protected itself. The defendant has not in fact discharged its indebtedness to plaintiff, and should not be permitted to debit him with any amount as an offset thereto unless it appears that by reason of the negligent conduct of plaintiff it has omitted to take proceedings which it otherwise would and could have taken to indemnify itself from loss. This seems to us clear upon the plainest principles of justice. The balancing of the pass-book in September, and charging the plaintiff therein with the amount of this check, and its return to him at the same time, constituted a statement of the account between himself and the defendant; and it thereupon became the duty of the plaintiff to examine the same within a reasonable time, and give to defendant, without unreasonable delay, notice of any objection which he had to it; and, unless such objection was made within a reasonable time, it became an account stated, and there was imposed upon the plaintiff the burden of showing that the check with which he was debited was a forgery; and, in addition to this, if the circumstances attending the entire transaction were such as to make it reasonably probable that the Bank had suffered prejudice by plaintiff's unreasonable acquiescence in the

account as stated, he would not be permitted to open the account by proof of its incorrectness.

Upon the trial the court instructed the jury, in substance, that, if they found that the check in dispute was a forged one, they must find for the plaintiff, unless it was shown that plaintiff's failure to examine his checks deprived the defendant of an opportunity to save itself from loss on account of the money paid thereon; and they were further instructed that, if "the plaintiff was guilty of negligence in respect to his treatment of his checks, including the disputed check, after he received them at the September balancing and the December balancing, or by reason of his making the discovery of the forgery, or of the facts which put him on inquiry respecting it some months before he gave any notice to the bank of such discovery, whereby the Bank was or may have been injured, they may find for the defendant." So far, this was a correct statement of the law, and, with other instructions given, conveyed to the jury with sufficient clearness the law as we have declared it. But the court also gave the following: "In considering the fact that Mr. Janin's bank-book was balanced, and that the Bank's statement of the balance was apparently acquiesced in for a considerable length of time, I instruct you that the plaintiff was under no contract to the Bank to examine with diligence his returned checks and bank-book. In contemplation of law, the book was balanced and the checks returned for the protection of the depositor, not for the protection of the Bank; and when Mr. Janin failed to examine it, the only consequence was that the burden of proof was shifted. Mr. Janin then became bound to show that the account was wrongly stated. This right he has preserved so long as the claim was not barred by the Statute of Limitations." This instruction, although supported by the authority of *Weiser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731, is not, in our opinion, entirely correct, and is in conflict with other instructions referred to. When considered in connection with a portion of another instruction given, to the effect that it "was sufficient to give notice when the forgery was discovered," this clearly implied that plaintiff could not be charged with negligence in not examining his checks within a reasonable time, and that the jury were only to consider whether he was guilty of unreasonable delay in giving notice after he made the examination and discovered the forgery. This is not the true rule. This error, however, will not, in view of the undisputed evidence, justify a reversal of the judgment. Conceding that the plaintiff was guilty of negligence in not earlier examining his checks, discovering the forgery, and giving notice thereof, there is nothing in the evidence from which it can be reasonably inferred that the defendant sustained any loss thereby, or that its position with reference to the check, because of not having earlier notice, was in any manner changed to its disadvantage, and the court would have been justified in so charging the jury. The check was paid on May 29, 1878; and it was not until September 4, 1878, that it was returned to plaintiff. The check was payable to "currency or bearer," and

when paid the person who presented it was not identified, or required to indorse it. This case was tried in 1886, and there is nothing in the evidence pointing to the fact that, if notice had been given on the very day the check was returned, the defendant would have been in any better position to discover the forger, or the person who uttered it, or to avail itself of any of the coercive measures known to the law by which to retrieve its loss, than it was at the time it received notice. If plaintiff was negligent, it was not shown that the defendant suffered any damage thereby, and for that reason such negligence cannot be allowed as a defense to plaintiff's right to recover in this action.

There may be some general language in the case of *Leaher Mfrs. Nat. Bank v. Morgan*, 117 U. S. 115, 29 L. ed. 818, which would seem to imply that it is not necessary that the evidence should tend to show that any pecuniary benefit would have accrued to the defendant if reasonable notice had been given it; but this general language is limited by the facts of that case, and the more specific rule which the court announced, viz.: "Still further, if the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the Bank was thereby prejudiced, because it was thereby prevented from taking steps, by the arrest of the criminal, or by an attachment of his property, or other form of proceeding, to compel restitution." In the case of *Continental Nat. Bank v. National Bank*, 50 N. Y. 578, cited by appellant, it is said that the arrest and detention of a swindler are powerful means of coercing restoration of property, and that the loss of this means in relying upon the declaration of another would estop such person from denying the truth of the statement upon which reliance was made. But this language is to be considered in connection with the particular facts then before the court, from which it appears that the declaration held to be an estoppel was the direct admission of the genuineness of the check afterwards claimed to be forged, and that, "had the teller of the certifying bank disclaimed the forged certificate and pronounced it a forgery when presented, the holder of the check would have had ample time to arrest the swindler at the Bank of the State of New York before he had received the money on the gold checks, and before he went to the subtreasury with his gold certificates." *White v. Continental Nat. Bank*, 64 N. Y. 322, 21 Am. Rep. 612.

The distinction between such a case as that and one like this, in which there is nothing in the evidence to indicate that all trace of the forger was not lost before the check in controversy was returned to plaintiff months after its payment, is a marked one; and in *White v. Continental Nat. Bank*, just cited, what we conceive to be the rule applicable to the facts in this record is thus stated: "In the case at bar it is the merest conjecture, with scarcely a possibility to support it, that the defendant, or those from whom it received the bill, could at any time after the transmission of the foreign bill of exchange to Baltimore have taken any effectual measures either for arresting the swindler or reclaiming the bill bought and paid for upon the credit of the bill. Estoppels cannot be based upon mere conjecture."

even if a proper foundation is laid for them in other respects." There is nothing in *Casco Bank v. Keene*, 58 Me. 103, in conflict with this. In that case, and upon its peculiar facts, it was held proper to instruct the jury "that, if the plaintiffs, relying on the defendant's admission, were induced to refrain from obtaining security from Judson by his arrest or by an attachment of his property, and they thereby sustained an injury, then the defendant would be estopped from denying his signature." But, of course, to justify such an instruction, there must be some evidence tending to show the facts upon which it is predicated. In this case the burden of proof to show that it sustained damage or injury by the negligence of plaintiff was upon the defendant, and this it was required to show by evidence having some reasonable tendency to establish such fact. In order to justify the submission of any question of fact to the jury the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists, and when the evidence is not sufficient to justify such an inference the court may properly refuse to submit the question to the jury, and in our opinion the evidence in this case was not such as would have warranted the jury in finding as a fact that the delay of plaintiff in giving it notice that the check in question was a forgery, lost to it any rights or remedies which otherwise it might have resorted to, in order to save itself from the loss incurred by its own mistake or negligence in the first instance, and which it now asks the plaintiff to bear, and therefore the error we have pointed out in the instruction of the court was without prejudice to the defendant.

Judgment and order affirmed.

We concur: **Beatty, Ch. J.; Sharpstein, J.; Garoutte, J.; McFarland, J.**

Harrison, J., being disqualified, did not participate in the foregoing opinion.

Paterson, J., dissenting:

I concur in the views of *Mr. Justice De Haven* on the main questions of law-discussed in the opinion, but think that the question whether the defendant sustained any loss by reason of the plaintiff's failure to notify the defendant earlier of the discovery of the forgery should have been left to the jury. The evidence shows that the plaintiff had notice of the forgery several months prior to the time when he informed the officers of the Bank of the fact, and, when asked why he had not before spoken of the matter, he replied that he had been working up the case himself. It seems to me that, whatever may be said of the duty of a depositor to examine his checks promptly, it must be conceded that when he has discovered the fact that his signature has been forged, or is informed of circumstances which would put him upon inquiry as to the fact, it is his duty to report the matter immediately to the officers of the Bank. If he has willfully withheld from the Bank any infor-

mation he may have had, he ought to be estopped from claiming that the Bank could not have protected itself. Under the decision of the majority it seems to me a dishonest depositor will be enabled without peril to himself to perpetrate a fraud upon the Bank. If he discover that he has been negligent in examining his checks he will nevertheless be entitled to recover unless the Bank can show that it was prejudiced by his negligence. Now he will know that the longer he withholds notice of the forgery from the Bank, the more difficult it will be for the Bank to prove that it could have detected and arrested the forger, and therefore the easier it will be for him to recover. This, it seems to me, is putting a premium upon laches, and encouraging a dishonest depositor even to assist the forger in covering up his tracks. There is no doubt in my mind that *Mr. Janin* acted in the utmost good faith, but it is a question of fact which should be left to the jury whether his long delay in giving the Bank notice of the forgery did or did not prejudice the Bank. The latter was entitled to immediate notice of plaintiff's discovery, and it does not follow that because plaintiff failed to detect the forger the officers of the Bank also would have failed to do so. The arrest and detention of a forger is often a strong and effectual means for the restoration of the money, and, although it may be a difficult question to determine in certain cases whether the injured party has been deprived of or delayed in the exercise of this coercive power by the negligence of the depositor, it is for the jury, reasoning to practical results from all the circumstances, to say whether it is fairly probable that the defendant could and would have taken effective measures to protect itself. *Continental Nat. Bank v. National Bank*, 50 N. Y. 575; *Voorhis v. Olmstead*, 66 N. Y. 113.

In *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 98, 29 L. ed. 811, the court said: "If the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was prevented from taking steps, by the arrest of the criminal, or by an attachment of his property, or other form of proceeding, to compel restitution. It is not necessary that it should be made to appear by evidence that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. Whether the depositor is to be held as having ratified what his clerk did, or to have adopted the checks paid by the bank and charged to him, cannot be made, in this action, to depend upon a calculation whether the criminal had at the time the forgeries were committed, or subsequently, property sufficient to meet the demands of the bank. An inquiry as to the damages in money actually sustained by the bank by reason of the neglect of the depositor to give notice of the forgeries might be proper if this were an action by it to recover damages for a violation of his duty; but it is a suit by the depositor, in effect, to falsify a stated account, to the injury of the bank, whose defense is that the depositor has, by his conduct, ratified or adopted the payment of the altered checks, and thereby induced it to forbear taking steps for its protection against the person committing the forgeries. As the

right to seek and compel restoration and payment from the person committing the forgeries was in itself a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly and, it may be, effectively, exercising it. . . . It seems to us that if the case had been submitted to the jury, and they had found such negligence upon the part of the depositor as precluded him from disputing the correctness of the account rendered by the bank, the verdict could not have been set aside as wholly unsupported by the evidence. In their relations with depositors, banks are held, as they ought to be, to a rigid responsibility; but the principles governing those relations ought not to be so extended as to invite or encourage such negligence by depositors in the examination of their bank accounts as is inconsistent with the relations of the parties, or with those established rules and usages sanctioned by business men of ordinary prudence and sagacity, which are, or ought to be, known to depositors." See also *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325; *Casco Bank v. Keene*, 53 Me. 103.

It is true that was the case of an altered check, and this is a case of forged signature, but the principles announced by *Mr. Justice Harlan* are as applicable on the question before us to one case as to the other. A banker is not bound to know the hand writing of the body of the check, but is bound to know the depositor's signature. He is not bound to detect a skillful alteration, which can only be known to the drawer of the check; and the latter is therefore bound to detect the alteration at the earliest opportunity, and inform the bank thereof. In these and many other respects the principles applicable to the two cases are different; but when it appears that the plaintiff's negligence contributed to the injury the question whether the bank was prejudiced by the failure of the plaintiff to exercise ordinary care is as material in one case as in the other, and must be determined by the same rules. I do not claim, as intimated in the opinion above quoted, that the law would presume the bank was prejudiced by the long delay and negligence of the depositor in failing to detect and report the forgery. That is a question, I think, which should be left to the jury. *Dana v. National Bank of the Republic*, 152 Mass. 156.

It is claimed by respondent that there is no evidence tending to show that the bank was prevented from tracing and discovering the forger, or from exercising its right to recover

the money, through reliance on plaintiff's implied admission of the correctness of the account rendered. On the other hand, it is claimed by appellant to be clearly shown by the evidence that the Bank was misled to its prejudice through such negligence. The fact that the Bank did not require the signature of the stranger to whom the money was paid, that it took no evidence as to his identity, and made no effort to detect the forgery at any time, but constantly insisted that the check was genuine, although possessed of evidence tending to show that Hooper was the forger, are matters for the consideration of the jury. So also the fact that the plaintiff allowed long periods of time to elapse between the occasions when he presented his bank-book to be balanced, and that he frequently asked the teller of the Bank for his balance, instead of consulting his bank-book; that he neglected to examine the book with the return checks for several months after September 4, 1878; that he had expressed surprise at the smallness of the balance, as shown by the books of the Bank; and his failure to notify the Bank until February, 1879, eight months after he began to doubt the genuineness of the check, — are all matters to be considered by the jury in determining the questions at issue. The court cannot say, it seems to me, that as a matter of law, under such circumstances, the plaintiff is entitled to recover. I am unable to see any force in the suggestion that the officers of the Bank took no steps at the time the check was paid to identify the person who presented it. Unless the paying teller has a suspicion as to the genuineness of the signature of a check payable to bearer, he is not called upon to make and preserve evidence as to such identity, and, if such precautions had been taken in this case, that fact would have been conclusive evidence that the Bank had notice of facts which put it upon inquiry. In such a case, of course, the Bank would have no defense, even if the depositor was guilty of negligence. It is said that there is no evidence from which it can be reasonably inferred that the plaintiff's delay prejudiced the defendant; but the inability of the defendant to produce such evidence may have been caused by the lapse of time between the time when plaintiff, acting as a prudent man, ought to have discovered and given notice of the forgery, and the time when such notice was in fact given. This is peculiarly a question for the jury under proper instructions from the court.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH OF MASSACHUSETTS

v.

Josiah PERRY

(.....Mass.....)

A statute forbidding an employer to impose a fine upon or to withhold wages

NOTE.—Statutory restrictions on contracts between master and servant.

The constitutionality of statutes restricting the freedom of contract between masters and servants
14 L. R. A.

from an employee engaged in weaving for any imperfections in the weaving is in violation of a constitutional provision which enumerates among the natural and inalienable rights of men the rights of acquiring, possessing, and protecting property, as this right includes the right to make reasonable contracts which shall be under the protection of the law.

(Holmes, J., dissents.)

has been raised in several cases in recent years, and in most cases, as in the main case above, the courts have held such statutes void. In Indiana, however, in an important case, it was held that a

(December 2, 1891.)

EXCEPTIONS by defendant to rulings of the Superior Court for Worcester County made during the trial of an indictment for violation of a statute forbidding the imposing of a fine upon or making deductions from the wages of cloth weavers, which resulted in a verdict of guilty. *Sustained.*

The facts sufficiently appear in the opinion. *Mr. A. J. Bartholomew*, for defendant: The statute is unconstitutional and void.

The statute cannot be held to be classed with those which have been adjudged within the police power of the State, for the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State, embracing authority to establish for the intercourse of citizen with citizen, those rules of good conduct and neighborhood, which are calculated to prevent conflict, and to secure to each an uninterrupted enjoyment of his own, so far as may be consistent with a like enjoyment of the rights of others.

Com. v. Alger, 7 Cush. 53-55; *Com. v. Tewksbury*, 11 Met. 55; *Munn v. Illinois*, 94 U. S. 118-124, 24 L. ed. 77-83; *Thorpe v. Rutland, & B. R. Co.* 27 Vt. 140; *Cooley, Const. Lim.* 6th ed. p. 704 *et seq.*

It must be classed with those Acts of the Legislature, sometimes called sumptuary statutes. *Cooley, Const. Lim.* p. 474 *et seq.*, and *notes*.

If valid, it creates for weavers, as a class, a legal exemption of their wages earned in weaving, from being taken, held, or used, to pay

any damages caused by their negligent, unskillful or willful acts to the property of their employer, and secures to them a special privilege and advantage contrary to their rights under standing laws.

In legal effect, the statute deprives the employer of weavers of his common-law right to withhold any part of such wages as compensation for damage caused to him by negligent, unskillful or willful acts of his employé.

Such a statute, so applying to a class of workmen, violates the fundamental principle of the Constitution that all shall "be governed by certain laws for the common good" to the end "that every man may at all times find his security in them." Preamble to Constitution.

It violates certain general principles stated in articles 1, 6, 7, and 11 of the Declaration of Rights in the Constitution, designed to secure the equal, natural rights of all citizens in acquiring, possessing and protecting property, and seeking and obtaining safety and happiness, under laws enacted for the common good, and not for the profit, honor or private interest of any one man, family, or class of men, in which every subject may find a certain remedy for all injuries and wrongs.

Those who make the laws must govern by promulgated laws not to be varied in particular cases.

Cooley, Const. Lim. p. 488; *Holden v. James*, 71 Mass. 396, 6 Am. Dec. 174; *Dreison v. Jonnonot*, 7 Met. 386, 41 Am. Dec. 448.

No statute can be sustained which deprives the citizen of his liberty to pursue a lawful

statute prohibiting employé from making any contracts in advance to accept anything else than lawful money of the United States is not unconstitutional. *Hancock v. Yaden*, 6 L. R. A. 576, 121 Ind. 366.

The same case holds that no special privileges are conferred nor any unjust discrimination made by such a statute although it is made applicable only to those engaged in mining or manufacturing and in addition requires them to pay their employé at least every two weeks. *Ibid.*

But, on the other hand, in West Virginia it is held that a similar statute prohibiting those engaged in mining and manufacturing from issuing for the payment of labor any order or paper which is not redeemable within thirty days in lawful money with interest is unconstitutional. *State v. Goodwill*, 6 L. R. A. 621, 33 W. Va. 179.

And also that a statute prohibiting those engaged in mining and manufacturing and also in selling merchandise and supplies, from selling any merchandise to their employé at a greater per cent profit than they sell to others not employed by them, is unconstitutional, because it is class legislation and an unjust interference with private contracts and business. *State v. Fire Creek Coal & C. Co.* 6 L. R. A. 369, 33 W. Va. 188.

And in Pennsylvania where the Constitution prohibited local or special laws "regulating labor trade, mining or manufacturing," a similar statute prohibiting the issue of store orders to pay laborers in mining and manufacturing is void as to persons who are *not* *generis* and capable of making their own contracts. *Godcharles v. Wigeman*, 4 Cent. Rep. 387, 113 Pa. 431.

And a statute prohibiting certain corporations from withholding wages by reason of the sale or furnishing of goods by any person except under due process of law does not prohibit applying such

wages under an assignment made by an employé for a debt incurred at a store kept by stockholders of the corporation or others than the corporation itself or its officials. *McManaman v. Hanover Coal Co.* 6 Kulp, 181.

So in Illinois a statute prohibiting coal mine owners from making contracts for mining, in which the weighing of coal as required by statute to furnish a basis for the wages of employé is dispensed with, is held void. *Millett v. People*, 5 West. Rep. 155, 117 Ill. 294.

And a statute making it unlawful to employ Chinese on public works except as a punishment, and making all contracts for such works void if the contractors employ Chinese labor, is void. *Baker v. Portland*, 5 Sawy. 564.

But in Massachusetts a statute prohibiting the employment of any woman or minor under eighteen in a manufacturing establishment more than ten hours per day except in certain cases, and in no case more than sixty hours per week, is held to be a valid health and police regulation. *Com. v. Hamilton Mfg. Co.* 120 Mass. 283.

In England where the constitutional question does not arise, a statute prohibiting the imposition of any condition on an employé as to the expenditure of his wages is held not to apply to a deduction for medicine or medical attendance made under a contract in writing signed by the employé. *Lamb v. Great Northern R. Co.* (1891) 2 Q. B. 261.

And also that the guard of a goods train whose main duty it is to guard and conduct the train and to marshal the trucks, but at times also to assist in coupling and uncoupling and in unloading them, is not a "workman," that is one "engaged in manual labor" within the meaning of the statute as to such deductions. *Hunt v. Great Northern R. Co.* (C. A. 1891) 1 Q. B. 601.

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calling in his own way not encroaching upon the rights of all others, or which forbids one class of persons from offering and performing services in such lawful callings, according to their own notions as to what is fair and proper, and subjects their employers to penalties for so employing them.

Baker v. Portland, 5 Sawy. 536; *Hair v. Kilpatrick*, 40 Ind. 812; *Com. v. Hamilton Mfg. Co.* 120 Mass. 883; *Cooley*, Const. Lim. p. 745.

The law authorizing recoupment in this Commonwealth has always been recognized and applied, in all cases where the damages sought to be set off spring from the same transaction or contract as that on which the plaintiff relies, and where the claim for damages is against the plaintiff, so that the allowance of such a claim by way of set-off or defense shall operate to avoid circuity of action.

Hunt v. Otis Co. 4 Met. 464; *Austin v. Foster*, 9 Pick. 341; *Moulton v. Trask*, 9 Met. 577; *Potter v. Cain*, 117 Mass. 240; *Stacy v. Kemp*, 97 Mass. 166; *Cary v. Guillon*, 105 Mass. 18.

The following cases afford ample authority for the objections urged against the constitutionality of this Act:

Lewis v. Webb, 8 Mo. 326; *Godcharles v. Wigman*, 4 Cent. Rep. 887, 118 Pa. 481; *Millet v. People*, 5 West. Rep. 155, 117 Ill. 294; *People v. Salem*, 20 Mich. 452, 4 Am. Rep. 400; *Vanzant v. Waddel*, 2 Yerg. 270; *Wally v. Kennedy*, 2 Yerg. 554-559; *Dunham v. Levison*, 4 Me. 140; *Piquet, Appellant*, 5 Pick. 60; *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500; *Memphis v. Fisher*, 9 Baxt. 240; *Re Nichols*, 8 R. I. 50; *Gordon v. Winchester Bldg. & A. F. Assn.* 12 Bush, 110; *United States v. Union Pac. R. Co.* 98 U. S. 569, 25 L. ed. 143.

Mr. A. E. Pillsbury, Atty-Gen., for the Commonwealth:

That the statute applies only to a particular class is true of a great variety of statutes; but this does not infringe the uniformity and equality required by the fundamental law.

Hewitt v. Charier, 16 Pick. 553; *Davis v. State*, 3 Lea, 376; *Missouri Pac. R. Co. v. Mackey*, 38 Kan. 298; *McAunich v. Mississippi & M. R. Co.* 20 Iowa, 343; *Cooley*, Const. Lim. 6th ed. 479.

The statute may well rest upon the police powers of the Legislature, or the powers vested in it by the "good and welfare" clause of the Constitution, chapter 1, sec. 1, art. 4.

Cooley, Const. Lim. 6th ed. 704; *Com. v. Hamilton Mfg. Co.* 120 Mass. 883; *Com. v. Bearse*, 132 Mass. 542, 42 Am. Rep. 450; *Savoy v. Davis*, 136 Mass. 239, 49 Am. Rep. 27; *Com. v. People's Five Cents Sav. Bank*, 5 Allen, 428, 432. See also *Hewitt v. Charier*, *Davis v. State*, *Missouri Pac. R. Co. v. Mackey*, and *McAunich v. Mississippi & M. R. Co. supra*.

Knowlton, J., delivered the opinion of the court:

This is an indictment under the Statute of 1891, chap. 125, the first section of which is as follows: "No employer shall impose a fine upon or withhold the wages, or any part of the wages, of an employé engaged at weaving, for imperfections that may arise during the process of weaving." Section 2 provides a punishment for a violation of the provisions of the statute by the imposition of a fine of not exceeding \$100 for the first offense, and not ex-

ceeding \$800 for the second or any subsequent offense. The act recognizes the fact that imperfections may arise in weaving cloth, and it is evident that a common cause of such imperfections may be the negligence or want of skill of the weaver. When an employer has contracted with his employé for the exercise of skill and care in tending looms, it forbids the withholding of any part of the contract price for non-performance of the contract, and seeks to compel the payment of the same price for work which in quality falls far short of the requirements of the contract as for that which is properly done. It does not purport to preclude the employer from bringing a suit for damages against the employé for a breach of the contract, but he must pay in the first instance the wages to which the employé would have been entitled if he had done such work as the contract called for. It is obvious that a suit for damages against an employé for failure to do good work would be in most cases of no practical value to the employer, and a theoretical remedy of this sort does not justify a requirement that a party to such a contract shall pay the consideration for performance of it when it has not been performed. The defendant contends that the statute is unconstitutional, and it becomes necessary to consider the question thus presented.

The employer is forbidden either to impose a fine or to withhold the wages or any part of them. If the act went no further than to forbid the imposition of a fine by an employer for imperfect work, it might be sustained as within the legislative power conferred by the constitution of this Commonwealth, in chapter 1, § 1, art. 4, which authorizes the general court "to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same." It might well be held that if the Legislature should determine it to be for the best interest of the people that a certain class of employés should not be permitted to subject themselves to an arbitrary imposition of a fine or penalty by their employer, it might pass a law to that effect. But when the attempt is to compel payment under a contract of the price for good work where only inferior work is done, a different question is presented. There are certain fundamental rights of every citizen which are recognized in the organic law of all of our free American states. A statute which violates any of these rights is unconstitutional and void, even though the enactment of it is not expressly forbidden. Article 1 of the Declaration of Rights of the Constitution of Massachusetts enumerates, among the natural, inalienable rights of men, the right "of acquiring, possessing, and protecting property." Article 1, § 10, of the Constitution of the United States provides, among other things, that no State shall pass "any law impairing the obligation of contracts." The right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the

protection of the law. The manufacture of cloth is an important industry, essential to the welfare of the community. There is no reason why men should not be permitted to engage in it. Indeed, the statute before us recognizes it as a legitimate business into which anybody may freely enter. The right to employ weavers, and to make proper contracts with them, is therefore protected by our Constitution; and a statute which forbids the making of such contracts, or attempts to nullify them or impair the obligation of them, violates fundamental principles of right which are expressly recognized in our Constitution. If the statute is held to permit a manufacturer to hire weavers and agree to pay them a certain price per yard for weaving cloth with proper skill and care, it renders the contract of no effect when it requires him, under a penalty, to pay the contract price if the employé does his work negligently, and fails to perform his contract. For it is an essential element of such a contract that full payment is to be made only when the contract is performed. If it be held to forbid the making of such contracts, and to permit the hiring of weavers only upon terms that prompt payment shall be made of the price for good work, however badly their work may be done, and that the remedy of the employer for their derelictions shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business, which the Constitution guarantees to everyone when it declares that he has a "natural inalienable right" of "acquiring, possessing, and protecting property." Whichever interpretation be given to this part of the Act, we are of opinion that it is unconstitutional; and, inasmuch as the instructions of the judge permitted the jury to find the defendant guilty on the second count, a new trial must be granted.

We do not deem it important to consider the other exceptions taken by the defendant, further than to say that we are of opinion that the motion to quash was rightly overruled. For the cases supporting the view we have taken, and for a further discussion of the principles involved in the decision, see *Godcharles v. Wigeman*, 118 Pa. 431, 4 Cent. Rep. 887; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621; *Re Jacobs*, 98 N. Y. 98; *People v. Marx*, 99 N. Y. 877, 53 Am. Rep. 34; *People v. Gillson*, 109 N. Y. 389, 12 Cent. Rep. 616; *Millet v. People*, 117 Ill. 294, 5 West. Rep. 155.

Exceptions sustained.

Holmes, J., dissenting:

I have the misfortune to differ from my brethren. I have submitted my views to them at length, and, considering the importance of the question, feel bound to make public a brief statement, notwithstanding the respect and deference I feel for the judgment of those from whom I differ.

In the first place, if the statute is unconstitutional as construed by the majority, I think it should be construed more narrowly and literally, so as to save it.

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Taking it literally, it is not infringed, and there is no withholding of wages when the employer only promises to pay a reasonable price for imperfect work, or a price less than the price paid for perfect work, and does pay that price in fact.

But I agree that the Act should be construed more broadly, and should be taken to prohibit palpable evasions, because I am of opinion that, even so construed, it is constitutional, so far as any argument goes which I have heard.

The prohibition, if any, must be found in the words of the Constitution, either expressed or implied, upon a fair and historical construction. What words of the United States or State Constitutions are relied on?

The statute cannot be said to impair the obligation of contracts made after it went into effect. *Lehigh Water Co. v. Eriston*, 121 U. S. 388, 391, 30 L. ed. 1059. So far as has been pointed out to me, I do not see that it interferes with the right of acquiring, possessing, and protecting property any more than the laws against usury or gaming. In truth, I do not think that that clause of the Bill of Rights has any application. It might be urged, perhaps, that the power to make reasonable laws impliedly prohibits the making of unreasonable ones, and that this law is unreasonable. If I assume that this construction of the Constitution is correct and that speaking as a political economist, I should agree in condemning the law, still I should not be willing or think myself authorized to overturn legislation on that ground, unless I thought that an honest difference of opinion was impossible, or pretty nearly so.

If the statute does no more than to abolish contracts for a *quantum meruit*, and recompense for defective quality not amounting to a failure of consideration, I suppose that it only put an end to what are, relatively speaking, innovations in the common law, and I know of nothing to hinder it. But I do not confine myself to technical considerations.

I suppose that this Act was passed because the operatives, or some of them, thought that they often were cheated out of a part of their wages under a false pretense that the work done by them was imperfect, and persuaded the Legislature that their view was true.

If their view was true, I cannot doubt that the Legislature could deprive the employers of an honest tool which they were using for a dishonest purpose, and I cannot pronounce the legislation void, as based on a false assumption, since I know nothing about the matter one way or the other.

The statute, however construed, leaves the employers their remedy for imperfect work by action.

The objection that this remedy is practically worthless is, I apprehend, no less true, although for different reasons, if the workmen's wages should be detained unjustly.

My opinion seems to me to be favored by *Hancock v. Yaden*, 121 Ind. 366, 6 L. R. A. 576; *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 80, 81, 21 L. ed. 394, 409, 410.

PENNSYLVANIA SUPREME COURT.

Adam ROBB

v.

CARNEGIE BROTHERS & CO., Limited,
App't.

(.....Pa.)

1. One owning and operating ovens for manufacturing coke from coal obtained from strangers and not mined in the land on which the ovens stand, the natural effect of which is to substantially injure property in their vicinity, must pay to the owners of such property the damages sustained by them, although the ovens are located on his own land at a place so well adapted to the business that they would not be enjoined.
2. No damages can be recovered by the owner of a farm for injuries to crops growing thereon, by gases from a manufacturing establishment in the vicinity, during years in which the farm was in the possession of a tenant who paid a full rent for it.
3. Diminution in quantity or value of crops as shown by a comparison with years when the establishment was not there, and in the value of the farm by the deposit thereon of foreign and sterilizing substances as shown by chemical analysis, are proper elements of damages to be recovered by the owner of a farm from the proprietor of a manufacturing establishment located in the vicinity, the operation of which causes such diminution.
4. That a home is less desirable, and its selling value has been reduced, are not proper subjects of consideration in determining the damages to be paid to its owner by one locating a manufacturing establishment in its vicinity.
5. Opinions as to the diminution in value of property by reason of the location in its vicinity of a manufacturing establishment and a comparison by witnesses of the value before and after such location are not admissible on the question of the amount of damage which must be paid the owner because of injuries done by the establishment.
6. On the question what damages the owner of a coke oven must pay adjoining landowners for injuries done their property by the operation of the oven, evidence as to where the material from which the coke was made came from, what was paid for it, and what wages the miners received, is immaterial.
7. Questions as to the adaptability of a farm for producing fruit are not admissible upon an inquiry as to what damages the proprietor of a manufacturing establishment which has been located in the vicinity must pay the owner of the farm, because of injuries done it by the manufactory, where the farm has not been put to such use.
8. A concession of exemption from liability under certain circumstances of parties situated similarly to defendant by the judge in charging the jury in an action to recover damages for injuries to adjoining property by a manufacturing establishment, although erroneous, is not ground for complaint by defendant, where it

places no burden on him, because he is, at all events, within the general rule and not within the exception.

9. Benefits realized by a person because of the establishment in his vicinity of a manufacturing concern are to be considered in determining the damages which must be paid him for injuries done to his property by such concern.

(October 5, 1891.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Westmoreland County, in favor of plaintiff in an action brought to recover damages for injuries to plaintiff's farm, by reason of the smoke and gases from defendant's coke ovens erected on adjoining land. *Reversed.*

At the trial, for the purpose of showing that the soil of plaintiff's farm was suitable for fruit growing, a witness was asked "How would this farm be for producing fruit, in your judgment, leaving the smoke out of the question?" An objection was sustained to this question, and it was ruled out. This ruling became the subject of the 9th assignment of error.

The further facts sufficiently appear in the opinion.

Messrs. Marchand & Gaither and Wentling & Miller for appellant.

Messrs. Atkinson & Peoples for appellee.

Messrs. George Shiras, Jr., for Southwest Coal & Coke Co., W. F. McCook, for H. C. Frick Coke Co. and Knox & Reed, for United Coal & Coke Co., by permission of the court, submitted a brief in favor of reversal:

An action does not lie for a reasonable use of one's right though it be to the injury of another. For the lawful use of his own property a party is not answerable in damages, unless on proof of negligence.

Philadelphia & R. R. Co. v. Yoiser, 8 Pa. 366; *Collins v. Chartiers Valley Gas Co.* 6 L. R. A. 280, 181 Pa. 148.

Compensation shall be made for all damages arising from immediate injury to property, but not for any damages where there is no legal injury, which is called *damnum absque injuria*.

Shrunk v. Schuykill Nav. Co. 14 Serg. & R. 71; *Pennsylvania R. Co. v. Lippincott*, 8 Cent. Rep. 818, 116 Pa. 472.

It may be suggested that these cases are those of suits against corporations having the power of taking private property for public use. But it will be found, on examining the cases, that the effect was not to visit such corporations with a greater degree of responsibility than that attached to private persons, and that the court held that the companies, with respect to property not taken but merely damaged, were subject to no other or greater liability than that to which individuals, in like cases, were liable.

Edmondson v. Pittsburgh, M. & Y. R. Co. 1 Cent. Rep. 868, 111 Pa. 816.

If corporations are not responsible for such indirect damages, *a fortiori*, are individuals and private companies exempt.

NOTE—For note on nuisance by carrying on lawful business, see *Bohan v. Fort Jervis Gas Light Co.* (N. Y.) 9 L. R. A. 711.

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Pennsylvania Lead Co's App. 96 Pa. 116, 42 Am. Rep. 534, is distinguishable.

Huckentstine's App. 70 Pa. 102, 10 Am. Rep. 669, more resembles this case. See also *Pennsylvania Coal Co. v. Sanderson*, 4 Cent. Rep. 475, 113 Pa. 126.

Everyone who chooses to live in a mining or manufacturing district must endure the necessary inconvenience and results of those industries.

To such a man we may well apply the language used by Judge Paxson in his dissenting opinion filed in *Sanderson v. Pennsylvania Coal Co.* 86 Pa. 401.

Having enjoyed the advantages which coal mining confers, I see no great hardship, nor violence to equity, in his also accepting the inconvenience necessarily resulting from the business.

Williams, J., delivered the opinion of the court:

This case was tried with considerable care in the court below, and was in most respects well tried. Some questions were, however, raised and considered on the trial which were not necessarily involved, and which hindered, rather than helped, the court and jury in reaching a correct result. For this reason, and because the case as it is presented is one of considerable general importance, it seems desirable that the position of the parties, and principles by which their relative rights are to be adjusted, should be briefly considered. This may be done by answering the following questions: *First*. Has the plaintiff shown a cause of action for which he can recover in a court of law? *Second*. If he has, what is the measure of his damages? *Third*. Was the evidence, which was admitted under objection, relevant to the issue before the jury? The plaintiff shows that prior to 1871 he was the owner of a farm in Westmoreland County on the uplands north of Brush Creek. His cultivated fields began about 1,000 feet from, and about 800 feet above, the stream, and extended back to and beyond his dwelling and farm buildings, which were about one half mile from the stream. He shows that in 1871 the defendants bought a tract of land in the valley, and extending up the slope some three or four hundred feet, on which they erected coke-ovens on the flat on the north side of the creek. He alleges that the smoke and gas from these ovens passed over his farm, injuring thereby his crops, diminishing the productiveness of the soil, and the desirability of his house as a place of residence. Evidence was given on the trial in support of this allegation. The defendants deny that the plaintiff has suffered injury in his crops, his soil or the comfort of his home; and they further deny that the injuries alleged, if actually sustained, would entitle the plaintiff to recover, and for this they give the following reasons: (a) such injuries are the natural and necessary result of the development by the owner of the resources of his own land, as in *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 4 Cent. Rep. 475; (b) they result from a reasonable use of his own land for a lawful purpose, as in *Huckentstine's App.*, 70 Pa. 102; (c) they result from the pursuit of a lawful calling in a lawful manner, without either neg-

ligence or malice on the part of the owner or his employees, as in *Pennsylvania R. Co. v. Lippincott*, 116 Pa. 472, 8 Cent. Rep. 818. In *Sanderson's Case*, the land of the coal company was coal land. Its value could be realized by the owners in no other way than by bringing the coal to the surface, so that it could be prepared for the market. In the process of mining, subterranean veins of water are necessarily open, and the water accumulating in the mines must be brought to the surface, where it naturally finds its way into the surface streams, and pollutes them. If this could not be done, a great industry would be interfered with, and the owner of the coal land denied the exercise of the rights of ownership on his land for the benefit of a neighboring owner whose title was no greater or higher than his own. The maxim, *sic utere tuo ut alienum non laedas*, was therefore neither suspended nor modified in *Sanderson's Case*.

The coal company was using its own land in the only manner practicable to it. The harm done thereby to others was the least in amount consistent with the natural and lawful use of its own. If this use was to be denied to the coal company, because some injury or inconvenience to others was unavoidable, then the result would be practical confiscation of the coal lands for the benefit of householders living on lower ground. But the defendants are not developing the minerals in their land, or cultivating its surface. They have erected coke-ovens upon it, and are engaged in the manufacture of coke. Their selection of this site, rather than some other, is due to its location, and to their convenience, and has no relation to the character of the soil, or to the presence or absence of underlying minerals. The selection was no doubt a wise one, quite secluded, and quite convenient to the several mines from which the material was to be obtained for the making of coke; but it was the selection of a manufacturing site, and is subject to the same considerations as though glass, or lumber or iron had been the commodity to be produced instead of coke. The rule in *Sanderson's Case* has therefore no application to the facts of this case. The injury, if any, resulting from the manufacture of coke at this site, is in no sense the natural and necessary consequence of the exercise of the legal rights of the owner to develop the resources of his property, but is the consequence of his election to devote his land to the establishment of a particular sort of manufacturing having no natural connection with the soil or the subjacent strata.

The rule in *Huckentstine's App.* is equally inapplicable. The land of the appellant in that case had upon it a deposit of fine brick clay, which could be made into bricks with profit, if this was done near the pit from which the clay was taken. This is the usual, and probably a necessary, way of converting the clay into bricks. An effort was made to enjoin against the burning of the bricks by *Huckentstine* on the field where the clay was obtained. The injunction was refused, and it was held that, upon the case as presented, *Huckentstine* was making a reasonable use of his own land, which equity would not interfere with. Whether he would have been liable in an ac-

tion at law for any substantial injury he might do to a neighbor by the burning of bricks was not before the court, and was not considered. We think it is true, as held by the judge of the court below, that the evidence in this case would not justify an injunction. It shows a selection of a site as well adapted to the business, and as remote from dwellings as any in that region. To enjoin the manufacture of coke at such a site would amount to a prohibition of its manufacture, and the destruction of vast allied and dependent industries of immense value to the public as well as to those directly engaged in them. An injunction is not of right, but of grace, and will never be issued by a court of equity when it will inflict a greater injury than it will prevent. In such a case the injured party will be left to his redress at law. No more than this is fairly covered by *Huckensline's Case*. The plaintiff in this case is therefore in the right court, and if he is substantially hurt by the use to which the defendants have seen fit to devote their land, we see no reason why he may not recover, unless it is found in the last of the positions taken by the defendants for which *Lippincott's Case* is cited.

It is a fundamental principle of our system of government that the interest of the public is higher than that of the individual, so that when these interests are in conflict the latter must give way. If the individual is thereby deprived of his property without fault on his part, he is entitled to compensation; but if he is affected only in his tastes, his personal comfort, or pleasure, or preferences, these he must surrender for the comfort and preferences of the many. Thus highways are necessary to the public business and comfort. Some noise and dust are necessarily occasioned by the legitimate use of them. This may be disagreeable, perhaps in some cases positively harmful, to some one or more of the persons living along them; but for this there is no remedy, at law or in equity. It is one of the necessary consequences of subjecting the individual to the public in those things as to which their interests are in conflict. Railroads have become the great highways of travel and commerce. The turnpike and canal have been superseded, and the people and their products are transported at a great advance in speed and comfort over the modern highway by the power of steam. The law recognizes the public character of these highways. Their presence is necessary to the prosperity and comfort of the public. To some persons who live near them, as to some persons who live upon a busy city street, the incessant roar of business and the dust of passing vehicles or trains may be unpleasant or painful; but whether such persons live upon a country road, a paved street, or a railroad they are alike remediless. No action will lie against the municipality, the turnpike, or the railroad company for the noise and dust caused by the legitimate use or operation of the highway in either case. For negligence or malice the wrong doer is liable to the party injured, but for the lawful use of the road, in the customary manner, no liability attaches to the traveler or owner. The railroads are built, as is the turnpike or the street, under laws regulating their construction and use in the interest

of the public which is to be served by them. The right to operate railroads is a necessary incident to the right to build them, and this was held in *Lippincott's Case*. But the production of iron or steel or glass or coke, while of great public importance, stands on no different ground from any other branch of manufacturing, or from the cultivation of agricultural products. They are needed for use and consumption by the public, but they are the results of private enterprise, conducted for private profit and under the absolute control of the producer. He may increase his business at will, or diminish it. He may transfer it to another person, or place, or state, or abandon it. He may sell to whom he pleases, at such price as he pleases, or he may board his productions, and refuse to sell to any person or at any price. He is serving himself in his own way, and has no right to claim exemption from the natural consequence of his own act. The interests in conflict in this case are therefore not those of the public and of an individual, but those of two private owners who stand on equal ground as engaged in their own private business. *Lippincott's Case* is therefore no reply to the plaintiff's case.

What, then, is the measure of damages? The declaration charges an injury to the trees and crops growing on the surface, and a permanent injury to the soil by the deposit upon it from the passing smoke and gas of sterilizing and poisonous substances. To the first of these the Statute of Limitations was properly applied. During two of the six years open to inquiry the farm was in the possession of a tenant who paid what is admitted to have been a full rent for it. The crops for those two years should therefore be excluded from consideration. As to the remaining four years, if the crops were so affected as to reduce their quantity or value, the shrinkage upon each year's crops should be shown in bushels or tons, or approximated as nearly as possible. For the acreage in wheat or corn in any one of these four years, for example, being shown, and the yield per acre, a comparison of the crop with that raised on the same farm before the ovens were built could be made, and, so far as the difference was shown to be due to the smoke or gas, it would afford some basis for an estimate of the damage sustained on that year's crops. In this manner the actual injury to the crops, if any, could be gotten at pretty nearly. As to the permanent injury to the soil by the deposit of injurious particles upon it, a chemical analysis will afford the only safe guide. Differences in the amount of the crop might be due to the effect of the smoke on the growing plant, to negligent tillage, to exhaustion of the soil by long cropping, or to many other causes; but if, as some of the witnesses have testified, a crust of foreign and sterilizing substances has been deposited over this farm varying from a quarter to a third of an inch in thickness, specimens of it can and should be produced, and its composition, and the effect of its presence, ascertained and explained to the jury by those competent to speak on the subject. This is a question susceptible of a clear and satisfactory solution by the application of scientific tests which the court and jury should have the benefit of. If the result is to show a

permanent injury to the soil which impairs its productiveness to an appreciable degree, the extent of the loss in the value of the farm can be readily computed. If such permanent impairment is not made to appear, this part of the plaintiff's claim should be rejected altogether. The fact that the plaintiff may regard his home as less desirable than before, because of the proximity of an undesirable business or of undesirable neighbors, or the further fact that its selling value has been reduced by reason of such proximity, affords no ground for a recovery. The location of a livery stable, a restaurant, a distillery, and many other kinds of business close to one's home might diminish its comfort and its market value, but the owner would be without legal redress, so far as the effect of mere proximity is concerned.

If, however, the business was so conducted as to affect the use of adjoining property or the health of its occupants, these tangible and substantial injuries capable of measurement by a pecuniary standard might sustain an action for damages. The ordinary rule for the ascertainment of damages, where land has been entered and appropriated under the right of eminent domain, does not furnish a measure of the plaintiff's right to recover in this case, for the reason already given. When an entry and seizure has been made, the effect of the seizure and appropriation of part of the land of the owner to a particular use is to be considered, as well as the value of what is taken. This can be best adjusted by ascertaining the selling value of the whole property before the entry, and after it has been made. The difference, if any, shows the actual loss which the owner has suffered. But in this case there has been no entry upon or appropriation of the plaintiff's land. What he alleges is that the prosecution of the business of making coke by the defendants on their own land has hurt his crops and injured his soil. They have the right to make coke. If the establishment of that business near the plaintiff affects the selling value of his farm, he can no more recover for that than he could recover against the saloon-keeper or the liveryman because the location of their business near him had made his property unsalable. The nature of the business is therefore to be left out of view. The sole question is, What harm had been done to the plaintiff by, or as the direct result of, the prosecution of the defendants' business at a place where they had a legal right to carry it on? The plaintiff might honestly think, and his neighbors might be willing to testify, that the mere location of the ovens on adjoining land reduced the value of his farm 30 or 50 per cent or more, and a comparison by them of the value before and after the building of these ovens would include this element, for which there can be no recovery. What has been now said substantially disposes of our question relating to the testimony objected to. The second assignment of error is sustained. The question objected to should have been excluded because it called for no fact, but for a lumping estimate which opened the way for the witness to introduce considerations that we have seen had no place in the adjustment of the damages. The question referred to in the third

assignment should have been excluded for reasons already given.

The seventh assignment is also sustained. It was no sort of consequence where the defendants obtained the material which they used in making coke, or what price they paid for it, or what the miners who brought it to the surface were paid for mining it, and such questions should have been excluded. The ninth assignment must also be sustained. The question was not what purposes the plaintiff might have devoted his farm to, and what damages he would have sustained in that case, but to what purposes had he devoted it, and to what extent had he been interfered with by the defendants' business. An examination of the evidence shows that the plaintiff purchased his farm, containing 83 acres, for \$4,000 a few years before the ovens were built. Several years after they were built he bought twenty acres adjoining, which contained coal, which he mined and sold to the employees of the defendants. So far as the evidence indicates, the latter piece was not farmed, but kept and used for mining coal. For the injury to four years' crops, and for permanent injury to his soil, the plaintiff recovered nearly \$1,000 more than his farm proper cost him, and still finds it to his advantage to reside upon it and to cultivate it. The fact that such a verdict was rendered shows that the court and jury must have been misled to some extent by the irrelevant testimony, and by the improper measure of damages which the jury was thus left to apply.

It only remains to consider briefly the twelfth assignment of error. The learned judge said to the jury: "After much thought we have arrived at this conclusion: *first*, that the owners of coal lands may develop and operate the same, even to the injury of adjoining landowners, without remedy on the part of the latter, unless malice or negligence be shown; *second*, that a court of equity will not restrain the operation of works of an injurious nature where the best possible place to do the least injury to others has been selected; *third*, that, while equity will not restrain, law will give a remedy, where actual, positive, serious injury has been done to another, by bringing upon adjacent land any manufacturing material not part of the land, whether such harm be done to health or property." We cannot see that the appellants were hurt by this instruction. The first proposition is no more than a statement of the rule which was held in *Sanderson's Case*. The second is all that the appellants could ask, and, as a general rule, is well settled. If there is any error in the third, it is in the concession that the mine-owner is under less obligation to his neighbors when he makes coke upon the tract from which the coal is mined than when he makes it elsewhere. If this concession was mistaken, as perhaps it was, it did not lay any burden on the appellants, and they have no right to complain of it. Whether one who mines coal or petroleum or lead on his own land has, by virtue of that fact alone, a right to manufacture or refine such product on the tract from which it was obtained, under circumstances which would prevent its manufacture, or render him liable for damages if he manufactured on some other tract, is a ques-

tion not raised by the facts of this case. If the relation of the miner to his product, or the surface to the underlying minerals, could confer exemption from liability from the consequences of the manufacture of the material mined, where the process was conducted on the same tract, the defendants were not within the range of such exemption. They did not mine the coal they used. It was not mined on the land upon which the coke-ovens stood. They were therefore under the general rule, and not within the exemption, if such exemption really exists. At the same time, the location of these parties and the industries of the region are not to be lost sight of. The plaintiff's farm is in a region in which bituminous coal is obtained in large quantities. He himself mines coal upon his own land for sale. The conversion of coal into coke to supply fuel for the great iron and steel mills of western Pennsylvania is one of the great industries of the region. Many millions of money are invested in, and many thousands of men are employed about, its production. It has been largely instrumental in the development, growth, and general prosperity of the region. The plaintiff shares the general

benefits, and seems to possess some advantages that are special, and grow directly out of the establishment of these works near him; for he has been thereby provided with customers for his coal and his farm products at his own door. These considerations should be borne in mind in adjusting the damages, if any have been sustained; so that the plaintiff, while he recovers for his actual loss in the products of his farm or the destruction of his soil, as the evidence may show the facts to be, shall not be allowed exemplary damages, and so that the defendants shall not be treated as wrong-doers in the establishment of their plant on a well-selected and secluded tract of land belonging to themselves. As this case goes back for a new trial, it is quite proper for us to add that the trial judge is, in an important sense, the thirteenth juror; and, when the amount of the verdict shows that it must have been arrived at by the adoption of an erroneous measure of damages or a mistake in computation, he should not hesitate to set it aside.

The judgment is reversed, and a venire facias de novo awarded.

SOUTH CAROLINA SUPREME COURT.

W. C. FISHER, *Appt.*,

v.

Mary D. FAIR *et al.*, *Repts.*

(.....S. C.....)

1. Where a right of way through a private alley laid out entirely on the grantor's

land is granted to the owner of property adjacent thereto which fronts on a public street, and to his heirs and assigns forever, it does not become appurtenant to such property but is a right of way in gross.

2. A right of way in gross is a mere personal privilege and dies with the grantee although the instrument creating it conveys it to the grantee and his heirs and assigns forever.

NOTE.—*Easement in gross; right to assign or transmit.*

The text-writers are quite unanimous in stating that an easement as defined in 2 Jacob, Law Dict. p. 382, i. e., "a service or convenience which one neighbor has of another by charter or prescription, without profit," if acquired in gross is a personal right which cannot be granted over, and is extinguished by the death of its owner. See 2 Bl. Com. 35; 3 Kent, Com. *420; 6 Walt, Act. & Def. 348; Woolrych, Ways, 13, 20; Angell, Highways, § 1; Washb. Easem. *10.

The expression "easement in gross" is here used in the sense in which it is generally used and understood without reference to the refinement attempted to be established by Gale (Easem. 5) and Goddard (Easem. 6) to the effect that there is no such thing known to the law.

Licenses and authorities are grantable at first for the lives of the persons or for years, but the grantees of them cannot assign them over. If a license be granted me to walk in another man's garden or to go through another man's ground, I may not give or grant this right to another. Shep. Touch. 230.

The doctrine as stated above is supported by the decided weight of authority. Ackroyd v. Smith, 10 C. B. 187; Garrison v. Rudd, 19 Ill. 564; Post v. Pearsall, 22 Wend. 432; Cadwalader v. Bailey, ante, 300.

A right of way in gross is a right personal to the grantee and cannot be made assignable, or inheritable by any words in the deed by which it was granted. Boatman v. Lasley, 23 Ohio St. 614; Tini- 14 L. R. A.

cum Fishing Co. v. Carter, 61 Pa. 22, 100 Am. Dec. 597.

Hence the right of way to a store in favor of the storekeepers will be extinguished by an assignment for benefit of creditors, and it cannot be in any way revived for the benefit of a corporation to which the stock is transferred and which attempts to continue business at the old stand. Hall v. Armstrong, 1 New Eng. Rep. 831, 53 Conn. 554.

Even if a right of way in gross could be assigned it is impossible to make the public the assignee. White v. Wiley, 36 N. Y. S. R. 102.

A right of way confers no interest in the land. Garrison v. Rudd, 19 Ill. 564.

And a right in gross is so far a mere personal right that it cannot be taxed with land. Spensley v. Valentine, 34 Wis. 104.

Rule where the grantee acquires a profit in the grantor's land.

A distinction has been drawn in favor of grantees who have acquired a right of profit in the grantor's land.

A profit *à prendre* in the land of another when not granted in favor of some dominant tenement cannot properly be said to be an easement, but is an interest or estate in the land itself. Post v. Pearsall, 22 Wend. 432.

A profit or interest in the soil of another forms part of the inheritance of its owner as an estate in the freehold and goes to the man and his heirs. Id. 441.

If the easement consists of a right of profit *à prendre* and is granted to one in gross it is treated

3. A power not coupled with an interest to convey a right to use a private alley which is laid out entirely on land of the donor of the power cannot be exercised after the donor has parted with his title to the land upon which the alley is situated.

(July 18, 1891.)

APPEAL by plaintiff from a judgment of the Common Pleas Circuit Court for Richland County in favor of defendants in an action brought to recover damages for the alleged illegal obstruction of an alley-way. *Affirmed.*

The facts are stated in the opinion.

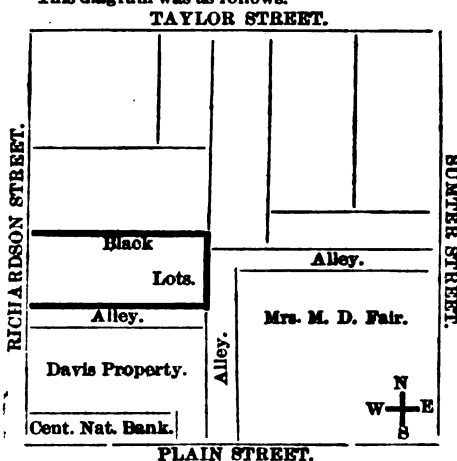
Mr. Allen J. Green for appellant.

Messrs. F. H. Weston and Lyles & Haynsworth for respondents.

McIver, J., delivered the opinion of the court:

This was an action to recover damages for the obstruction of an alleged right of way over the lands of defendants, and to perpetually enjoin the defendants from obstructing the same. The diagram annexed to the "case" shows distinctly the situation of the premises, and the course of the way claimed by the plaintiff, and should be incorporated in the report of this case.*

*This diagram was as follows:



It is sufficient to state generally that the alleged way is an alley between adjacent lots in the city of Columbia, plaintiff being the owner of the two lots designated on the diagram as the "Black Lots," and defendants being the owners—the one for life and the other the remainder in fee—of the lots designated the "Fair Lots," which was originally owned by Dr. Samuel Fair; Thomas Davis having been formerly the owner of the other lots adjoining the alley on the west, designated as the Davis property, a part or the whole of which is now owned by the Central Bank. The evidence tends to show that originally Davis was in some way entitled to a right of way through and along the alley separating the Davis property from the Fair lot, 10 feet wide, up to a point where it intersected an alley running east from Richardson Street, and separating the Davis property from the Black lots. So that Davis had a right of way, but whether in gross or appurtenant does not appear, all around his property, by an alley beginning on Plain Street, and running north to the point where it intersected the alley running west into Richardson Street. While things were in this situation, to wit, on the 29th of February, 1856, Dr. Fair and Davis executed a deed of indenture, whereby, in consideration of certain covenants therein stated on the part of Davis, Dr. Fair, acknowledging the right of way of Davis through the alley leading from Plain Street north to the point where it intersected the alley running from Richardson Street above mentioned, conveyed to said Davis a further right of way through an alley running from Sumter Street west over the northern edge of the Fair lot, and agreed to extend the right of way already owned by Davis north to the Alley leading from Sumter Street west; the practical result being to give Davis a right of way from Plain Street around the western and northern sides of the Fair lot to Sumter Street. This conveyance of the right of way was to Thomas Davis, his heirs and assigns, forever; and the deed of indenture contains the following clause: "And the said Samuel Fair further agrees to allow the said Thomas Davis, and his heirs and assigns to have the right, at his or their discretion, of conveying to Charles H. Black, and his heirs and assigns, or to the owners for the time being of the lot adjoining the lot of Thomas

as an estate in the land and may therefore be for life or inheritance. *Tinicum Fishing Co. v. Carter*, 61 Pa. 22, 100 Am. Dec. 597.

Thus an easement of pasturage may be acquired in fee. *Welcome v. Upton*, 6 Mees. & W. 583.

The right to take fish is a profit *à prendre* and may be acquired in fee. *Tinicum Fishing Co. v. Carter*, 61 Pa. 22, 100 Am. Dec. 597. But see *Turner v. Hebron*, *post*, 398.

The right of the exclusive privilege to shoot, take, and kill wild fowl on the premises of the grantor may be granted to a man and his heirs and assigns forever, and the grantee may transfer the right in good faith, but he will have no authority to indiscriminately give passes and permits to strangers to exercise the right. *Bingham v. Selene*, 15 Or. 303.

So the grant to a person, his heirs and assigns, of "free liberty, with servants or otherwise, to enter into and upon the lands and there to hawk, hunt, fish and fowl," is a grant of a license of profit and not of a mere license of pleasure, and therefore it 14 L. R. A.

authorizes the grantee, his heirs and assigns to hawk, hunt, etc., by his servants in his absence. *Wickham v. Hawker*, 7 Mees. & W. 62.

So it is almost universally recognized that the right to take water is such an interest in land that it may become the subject of an easement in gross in fee. *Lonsdale Co. v. Molea*, 31 Law. Rep. 664.

In *Weekly v. Wildman*, 1 Ld. Raym. 407, it is stated that a grantee of a right of common in gross without stint cannot grant it over, but whether the ground of the statement is the indefinite right or the character of the grant as being without words of inheritance does not appear.

Shephard's Touchstone, 233, says that if a common in gross and without number be granted to a man and his heirs, it seems this is not grantable over to another, but *Spencer, J.*, in *Layman v. Abeel*, 16 Johns. 32, says this opinion may be questioned, and that a right in gross to cut wood and take stone was defendible and alienable, but that it could not be aliened in such a way as to give the entire right to several persons to be enjoyed by

Davis (which lies on the west side of the above-described lot of Samuel Fair) on the north, the right of way through the two alleys running into Plain and Sumter Streets, to be enjoyed as fully as by the said Thomas Davis, his heirs and assigns." In March, 1872, Thomas Davis conveyed to the Central Bank the property designated as his on the diagram, together with the right of way secured to Davis by the deed of indenture above mentioned. This conveyance contains the following clause: "The unobstructed use and right of way of these two alleys last mentioned, to be held and used in common by the heirs, successors and assigns of the said Dr. Fair, and of said Central National Bank, and also by the said Charles H. Black, his heirs and assigns, who may be the owner of the said lot on Richardson Street adjoining the alley on the north of the lot herein conveyed. This limitation of the use of said alley, which runs around two sides of said Dr. Fair's lot, on the part of the said Charles H. Black, his heirs and assigns, is herein specified, upon the supposition that I may have heretofore granted to them this right of way. But, if I have not granted to them this right by deed, the right is not herein confirmed by me, but is especially reserved to the said Central National Bank, which is hereby invested with all the rights I hold in and by reason of an agreement entered into between Dr. Samuel Fair, and myself, February 29, 1856, which said agreement is duly recorded in the office of the register of mesne conveyances for Richland County." The conveyance also contains a clause forbidding the bank from violating the covenants on the part of Davis contained in the deed of indenture of 29th February, 1856.

On the 23d of July, 1889, the Central National Bank conveyed to the plaintiff and another the right of way, through the two alleys above mentioned secured to Davis by the deed of indenture aforesaid; and the plaintiff, having become the owner of the Black lots, bases his claim to the right of way upon the several conveyances above stated; there being no evidence that Davis had ever conveyed to Black the said right of way, as he supposed he might have done. It further appears that on the 16th of June, 1863, Dr. Fair executed a paper, which was adjudged by this court in *Brazel v. Fair*, 26 S. C. 370, to take the absolute title to the

Fair lot out of Dr. Fair, and vest it in a trustee for the benefit of the defendants herein. At the close of plaintiff's testimony, a nonsuit was moved for and granted; the circuit judge holding that the right of way conveyed to Davis by Dr. Fair was not a right of way appurtenant to any tenement owned by Thomas Davis, "and that the power conferred upon Thomas Davis to grant the right of way to the owner of the lot now owned by the plaintiff was a mere naked power, not coupled with an interest in the land, and that it was not exercised by Thomas Davis in his lifetime, or by anyone in the lifetime of the said Dr. Fair," and therefore plaintiff's claim of a right of way could not be sustained. From this judgment plaintiff appeals upon the several grounds set out in the record, which need not be repeated here, as we propose to consider the several points which we understand to be raised thereby.

The first, and perhaps the most material, question in the case is as to the character of the right of way in question,—whether it was a right of way appurtenant to the premises of the original grantee, Davis, or whether it was a right of way in gross. In the case of *Whaley v. Stevens*, 21 S. C. 221, it was held that a right of way appurtenant is a right which inheres in the land to which it is appurtenant, it is necessary to its enjoyment, and passes with the land, while a right of way in gross is a mere personal privilege, which dies with the person who may have acquired it; and the same doctrine was reaffirmed in the same case, (27 S. C. 549,) when it was again before this court, the chief justice in delivering the opinion quoting the following language from Washburn on Easements (chap. 2, par. 5, p. 257): "Ways are said to be appendant or appurtenant when they are incident to an estate, one terminus being on the land of the party claiming. They must inhere to the land, concern the premises, and be essentially necessary to their enjoyment." In view of these authoritative declarations as to what is requisite to constitute a right of way appurtenant, it seems to us very clear that the right of way secured to Davis by the deed of indenture above mentioned cannot be regarded as a right of way appurtenant to any premises owned by Davis. It does not appear that it had either of its termini on such premises, nor that it was essentially necessary to their enjoyment.

each separately. *Mountjoy v. Huntington*, Godb. 17.

The Massachusetts rule.

¶ In Massachusetts the doctrine would doubtless be considered as established that ways in gross may be granted to one and his heirs and assigns, but the cases relied upon in support of it come far short of placing the matter beyond debate ground. See *Phillips v. Rhodes*, 7 Met. 324.

In *White v. Crawford*, 10 Mass. 183, the case in which the doctrine first finds expression, the way granted was without doubt appurtenant and the authority relied upon is *Senhouse v. Christian*, 1 T. R. 500.

In *Senhouse v. Christian*, *supra*, defendant justified for an alleged trespass under a grant of a right of way in gross to his grandfather and his heirs or assigns, but the only question brought to the attention of the court was as to the proper construction of the grant as to what rights passed, and neither counsel nor court considered the question whether the grant in gross inured to the benefit of the heirs. 14 L. R. A.

In *Bowen v. Conner*, 6 Cush. 132, the court says that the law is settled in Massachusetts by a series of decisions that a right of way may be as well created by a reservation or exception in the deed of the grantor reserving or retaining to himself and his heirs a right of way either in gross or as annexed to the land owned by him so as to charge the lands granted with such easement and servitude, as by a deed from the owner of the land to be charged. If this was intended to state that a right in gross might be granted to one and his heirs it was unnecessary in that case and the decisions mentioned do not support it.

In *Goodrich v. Burbank*, 13 Allen, 459, 90 Am. Dec. 161, where it is stated that it would be difficult to establish the doctrine that an easement proper cannot be created in gross so as to be assignable or inheritable in that Commonwealth, the subject under consideration was the power to reserve the right to take water forever from a spring.

H. P. F.

On the contrary it was a right of way in gross, a mere privilege personal to him, and incapable of transfer by him; for as is said in Washb. Easem. chap. 1, par. 2, p. 2: "A man may have a way in gross over another's land, but it must, from its nature, be a personal right not assignable nor inheritable; nor can it be made so by any terms in the grant." Hence, though by the indenture Fair "agrees to allow Thomas Davis to have for himself, and his heirs and assigns, forever, a right of way," etc., the same not being appurtenant to any premises then owned by Davis, the right secured is a right of way in gross, a mere personal privilege, which is not assignable, and dies with the person. It follows, therefore, that the attempt of Davis to convey this right of way to the bank was futile, and transferred no right.

It is urged however, that, even if this be so, yet as the deed of indenture invested Davis with power to convey this right of way "to Charles H. Black, and his heirs and assigns, or to the owners for the time being of the lot adjoining the lot of Thomas Davis (which lies on the west side of the above-described lot of Samuel Fair) on the north." Davis could, by virtue of this power, convey the right of way to the bank, as he undertook to do, and the bank could convey the same to the plaintiff, by virtue of a similar power contained in its deed from Davis. There are several objections to this view: (1) Davis is only invested with power to convey to Black, his heirs or assigns or to the owners of the Black lots, and we are unable to find any evidence that the bank ever was owner of those lots; and therefore, when Davis undertook to invest the bank with the power conferred upon him to convey the right of way to one who was not the owner of the Black lots, he exceeded the terms of his power. But we do not rest our decision upon this point, inasmuch as by the indenture the power to convey was vested in Davis, and his heirs and assigns; and it may be that after the bank became the assignee (so to speak) of Davis, it would have had the power to convey to the plaintiff, who was then the owner of the Black lots. But, in the second place we agree with the circuit judge that the power conferred upon Davis, not being coupled with the interest, could not survive and could not be exercised after the donor of the power had parted with his title to the land over which the power was to be exercised. While, therefore, the circuit judge may possibly have erred in assigning as

the reason for his conclusion that the power of conveying to the plaintiff was not exercised during the life-time either of Davis or Fair, inasmuch as the "case" fails to contain any evidence as to the death of either of those persons, yet, as it does show that the power was never exercised until after Fair had parted with his title to the land over which the right of way was to be enjoyed, the conclusion reached by the circuit judge was undoubtedly correct. Assuming that the owner of land having the right to convey to another a right of way in gross over his land may invest a third person with power to make such conveyance, yet such a power, when not coupled with an interest, does not survive, nor can it be exercised after the donor of the power parts with his title to the land to be subjected to such easement. In such a case the donee of the power acts as a mere attorney in fact, and must convey in the name of his principal. Hence when the principal is dead, or has parted with his title to the land, neither he nor his attorney in fact can fix any burden of servitude upon the land. That the power in this case was not coupled with an interest is abundantly shown by the definition of that phrase as given by Marshall, Ch. J., in *Hunt v. Rousmanier*, 21 U. S. 8 Wheat. 205, 5 L. ed. 597, quoted with approval by Mr. Justice McGowan in *Johnson v. Johnson*, 27 S. C. 316.

The equitable right which appellant sets up in his argument presents a question which does not appear to have been presented to or considered by the court below, nor is it mentioned in the exceptions, and therefore that matter is not properly before us. We may add, however, that the case, as made by the plaintiff, does not seem to us sufficient to warrant the court in extending to him the equitable relief demanded. The judgment of this court is that the judgment of the Circuit Court be affirmed.

McGowan, J., concurs.

A petition for rehearing having been filed, on November 27, 1891, the following response was handed down:

Per Curiam:

We have carefully examined this petition, and, finding that no material fact or important principle of law has been either overlooked or misunderstood, there is no ground for a rehearing. It is therefore ordered that the petition be dismissed.

TEXAS SUPREME COURT.

Mattie HALE, Appt.,
v.
BONNER et al.
(.....Tex.....)

Damages for mental distress are recoverable for negligent delay in the transportation of the corpse of plaintiff's husband.

NOTE—For note on the question of damages for mental distress, see *Western U. Teleg. Co. v. Rogers* (Miss.) 13 L. R. A. 859.

For note on the right to control the disposition of a corpse, see *Larson v. Chase* (Minn.) ante, 85, 14 L. R. A.

(October 30, 1891.)

APPEAL by plaintiff from a judgment of the District Court for Gregg County sustaining a demurrer to her petition in an action brought to recover damages for defendants' failure to promptly forward her deceased husband's corpse which had been delivered to them for transportation. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Todd & Rowell* and *L. S. Schlueter* for appellant.

Messrs. Gould & Camp for appellees.

Gaines, J., delivered the opinion of the court:

The appellant brought this suit in the court below to recover of the appellees, as receivers of the International Great Northern Railroad Company, damages for a failure to deliver promptly the body of her deceased husband under a contract with her for its carriage from San Antonio to Jefferson. She alleged in her petition, in substance, that her husband died at Boerne; that at the time they were sojourning at that place on account of his health, but that their home was in Jefferson; that she caused his body to be inclosed in a metallic casket, and conveyed to San Antonio, where she immediately entered into contract with the agent of defendants for its carriage to Jefferson, by paying for and procuring a first-class passenger ticket to that place, known and marked as a "corpse" ticket; and that at the same time she procured tickets for herself and attendants over the same line to the same place. It was also alleged that on the 12th day of the same month the body was delivered to the agents of the defendants, and placed on board the train; that she took the same train, and arrived at an early hour the next morning at the depot at Jefferson, where her relatives and many friends were in waiting to accompany her dead husband to her home; but that, to her great mortification and distress of mind, she then ascertained that the casket containing the body had not arrived. It was further averred that, as she subsequently ascertained, the body, instead of having been sent forward by the train upon which she was carried, as should have been done, was, through the negligence of the defendants' agents or servants, placed in a box-car, and left upon the side track at Palestine, an intermediate station, that did not reach Jefferson until the 14th day of the month; and that on account of its advanced state of decomposition, resulting from the delay, "it was with great difficulty and much additional pain and distress of mind, that her and his friends could decently inter the said remains." The petition claims damages for mental distress and prayed also for a recovery of exemplary damages. A demurrer to the petition was sustained by the court, and the plaintiff having declined to amend, her suit was dismissed.

She here complains of the ruling of the court upon the demurrer and asks a reversal of the judgment. We are unable to distinguish in principle this case from those in which recoveries against telegraph companies have been allowed for failure to deliver with promptness messages announcing the death or mortal illness of near relatives. Such cases are exceptional. As a rule, mental suffering is not an element of the damages which are recoverable for breach of a contract, or, in an action for tort, founded upon a right growing out of a contract. Ordinarily, the object of sending a telegraphic message announcing the death or sickness of a relative is to afford the person to be benefited the solace that may result from being present during the last illness of the relative, or attending his obsequies, as the case may be. The direct result of the failure to perform the duty of delivering the message being to deprive the person addressed of this solace, and to cause distress of mind, it is not unreasonable that he should have his compensation therefor. It is upon this principle, in my own opinion, that the decisions of this court in the telegraphic cases are to be maintained. The same principle applies in this case. But, however that may be, we see no valid reason why, if a recovery can be had for mental suffering resulting from the failure to deliver a telegraph message announcing the death, like damages should be here denied.

In the case of *Western U. Tele. Co. v. Simpson*, 73 Tex. 422, the resulting injury was somewhat similar to that in the present case. But it is insisted that the mental suffering for which a recovery was sustained in that case was the immediate result of the delay in securing the money which the company had contracted to deliver. Some disagreeable mental emotion is the ordinary result of the failure to pay or deliver money according to promise. But the measure of damages for the breach of the contract is the money to be paid or delivered with the interest. It was the fact that the plaintiff was detained in a distant State, watching over the body of her deceased husband, which sustained the recovery in that case.

The judgment is reversed, and the cause remanded.

WEST VIRGINIA SUPREME COURT OF APPEALS.

S. C. BURDETT

Dover ALLEN, *Pf.* in *Err.*

(..... W. Va.)

* The charter of a city or town located in this State, and the ordinances ordained by its council in pursuance of the provisions of sections 23 and 29 of chapter 47 of the Code, may, as an act of police regulation and power, provide for the taking up and impounding

*Head note by ENGLISH, J.

ing cattle, hogs, horses, sheep, and other animals found running at large in the public streets during the night, and for selling them to pay charges for impounding, etc., without judicial inquiry or determination, upon notice being given to the owner; and such provisions will not be unconstitutional, as authorizing the forfeiture or confiscation of property without due process of law, or without compensation.

(December 7, 1891.)

ERROR to the Circuit Court for Kanawha County to review a judgment in favor of plaintiff in an action brought to recover possession of a cow and damages for its detention. *Reversed.*

NOTE.—As to the impounding of stray animals, see note to *Ft. Smith v. Dodson* (Ark.) 4 L. R. A. 222.
14 L. R. A.

The facts are stated in the opinion.

Mr. W. S. Laidley, for plaintiff in error: Chapter 47, § 28, of the Code, expressly gives the council power to prevent animals from running at large.

That this chapter is authority for the passage of the ordinance, see section 1 of said chapter, and *Douglas v. Harrisville*, 9 W. Va. 165, 27 Am. Rep. 548; *Probasco v. Moundsville*, 11 W. Va. 501; *Powell v. Parkersburg*, 28 W. Va. 699.

The power conferred by the Code is to prevent animals from running at large in said city. The ordinance, or that part of it which was violated, prevents certain animals, cows included, from running at large at night. This is not the exercise of all the power granted, but this does not render the ordinance invalid.

Horr & Bemis, Mun. Pol. Ord. § 83, p. 84.

The ordinance does not forfeit the property within the meaning of the Constitution of the State, art. 8, § 18, which provides that "no conviction shall work corruption of blood or forfeiture of estate."

Gelston v. Hoyt, 16 U. S. 8 Wheat. 246, 4 L. ed. 381; *United States v. One Hundred Barrels Distilled Spirits*, 81 U. S. 14 Wall. 56, 20 L. ed. 815; *Horr & Bemis*, Mun. Pol. Ord. pp. 159-163; *Brophy v. Hyatt*, 10 Colo. 223.

Due process of law and the law of the land are decided to be synonymous. It does not require a court to have resort to.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

When the party has an opportunity to question the validity or the amount before it is determined, or in subsequent proceedings for its collection, it is due process of law.

Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 669.

Dillon on Municipal Corporations, § 350, says the objection that the ordinance does not provide for a judicial investigation before taking the property is insufficient, as the owner may, if he choose, have a full investigation of the case by an action of replevin, as in any other distress.

Nor can it be said that plaintiff's rights have been abridged. He applied to the justice's court, was then carried to the circuit court, and is now on before this the supreme court of appeals. What more process of law, and judicial investigation he may desire, is difficult to imagine.

See **Dillon**, Mun. Corp. 4th ed. § 350, and *notes*.

For validity of such ordinance, see—

Stewart v. Hunter, 16 Or. 62, 8 Am. St. Rep. 271, and *notes*; *Ft. Smith v. Dodson*, 46 Ark. 296, 55 Am. Rep. 689; *Blair v. Forehand*, 100 Mass. 186, 97 Am. Dec. 88, and *notes*; *Folmar v. Curtis*, 86 Ala. 354; *Brophy v. Hyatt*, 10 Colo. 223; *Sedgw. Stat. & Const. Law*, 435, and *note*; *Hard v. Neaving*, 44 Barb. 472; *Campbell v. Evans*, 45 N. Y. 356; *Squares v. Campbell*, 60 Barb. 391; *Goesselink v. Campbell*, 4 Iowa. 296; *Roberts v. Ogle*, 30 Ill. 459, 83 Am. Dec. 201; *Cooley*, Const. Lim. chap. 16, pp. 586, 587, *note*; *McKee v. McKee*, 8 B. Mon. 433; *Third Municipality v. Blanc*, 1 La. Ann. 885; *Whitfield v. Longest*, 28 N. C. 268; *Com. v. Curtis*, 9 Allen, 266.

Of authorities cited by plaintiff, *Collins v. 14 L. R. A.*

Hatch, 18 Ohio, 528, 51 Am. Dec. 465, decides that the Legislature had not given the corporation the power to pass the ordinance, and the power could not be implied or enforced.

White v. Tallman, 26 N. J. L. 67, was to the same effect.

Varden v. Mount, 73 Ky. 86, 89 Am. Rep. 208, held that the charter did not authorize the action taken by the marshal.

Blessman v. Crozier, 80 Ind. 487, held that the general law of the State provided for the mode and manner of procedure and the ordinance could not provide another.

Mr. S. C. Burdett, defendant in error, *in propria persona*.

English, J., delivered the opinion of the court:

On the 7th day of August, 1889, S. C. Burdett instituted an action of detinue against Dover Allen before C. W. Hall, a justice of the peace of Kanawha County, in which the plaintiff complained that the defendant unlawfully withheld from him one brindle cow of the value of \$50. The plaintiff filed affidavit and gave bond for the immediate possession of the property. On the 28th day of August the case was heard, and judgment was rendered for the plaintiff that he retain possession of the property, and that he recover from defendant his costs in said suit. From this judgment the defendant took an appeal to the circuit court of said county, and on the 10th day of April, 1890, said appeal was submitted to the Circuit Court of Kanawha County upon an agreed statement of the facts, upon consideration whereof, and after hearing the argument of counsel thereon, the said court was of opinion that the ordinance of the city of Charleston in relation to the impounding and sale of animals is unconstitutional, and rendered judgment for the plaintiff for said property claimed in said action, and for costs, and from this judgment the defendant applied for and obtained this writ of error.

It was agreed between the plaintiff and the defendant that the following are the facts to be taken as proven by the respective parties: By the plaintiff: That he lives in Charleston, and that he is the owner of the cow which the suit is about; that on the evening of the 7th day of August, 1889, the plaintiff found his said cow in charge of Dover Allen, the city pound-master, and that he demanded the release of his cow, which was refused until the charges thereon were paid, and to pay the same or any sum the plaintiff declined, and thereupon he brought said action, and the said cow was delivered to him by the constable on the order of the justice aforesaid, and that on the trial of said action before the said justice judgment was given for the plaintiff, the said court holding that said ordinance under which the said cow was held was unconstitutional and void. Also the charter and ordinances of the city were put in evidence. By the defendant: That he was on the 6th day of August, 1889, and has since been, and is yet, pound-master of the city of Charleston; that he was then, and is yet, exercising the duties of said office under and by virtue of the ordinances of said city; that on the night of the 6th day of August, 1889, between 10 and 12 o'clock, the said Allen,

with two boys he had to assist him in hunting for and driving in stray cows, were out on the street, and found said cow of plaintiff in the public street, and that they drove her to the city pound, and fastened her therein that night, and kept her in said pound until taken away by the constable the next day; that on the evening of the 7th of August the plaintiff came and demanded his cow, claiming her, and defendant demanded his fees, etc., allowed him by the city ordinance, which at that time amounted to \$2, and the plaintiff refused to pay the same, and thereupon the defendant refused to give up the cow, and the plaintiff brought said action before Justice Hall, and upon his order the constable took the cow from defendant; that the said charges of \$2 are still unpaid; that upon the trial before the said justice his decision was that the said city ordinance was unconstitutional and void, and he gave judgment for the plaintiff, from which judgment the said defendant appealed; that the said lot in which said cow was impounded was the city pound, made so under and by virtue of an ordinance adopted June 30, 1887; and this was all the evidence adduced.

The counsel for the defendant in error contends that the ordinance of the city of Charleston under which the property of said defendant in error was seized and impounded is void because (1) there is no express authority conferred by the charter, either in chapter 47 of the Code or the special charter of the city of Charleston; that the power to impound and sell animals must be expressly conferred, and a general authority given to prevent animals from running at large is not sufficient. The first section of chapter 47 of the Code provides that "a city, town, or village heretofore established, (other than the city of Wheeling,) may exercise all the powers conferred by this chapter, although the same may not be conferred by their charter, and that, so far as said chapter confers powers on the municipal authorities of a city, town, or village, other than said city of Wheeling,) not conferred by the charter of any such city, town, or village, the same shall be deemed an amendment to said charter," and section 28, which prescribes the powers and duties of the council, provides, among other things, that such council shall have power therein "to prevent hogs, cattle, horses, sheep, and other animals and fowls of all kinds from going at large in such city, town, or village;" and section 29 of said chapter provides that, "to carry into effect these enumerated powers and all others conferred upon such city, town, or village, or its council, by this chapter, or by any future Act of the Legislature of this State, the council shall have the power to make and pass all needful orders, by-laws, ordinances, resolutions, rules, and regulations not contrary to the Constitution and laws of the State, and to prescribe, impose, and enact reasonable fines, penalties, and imprisonments in the county jail. . . . Such fines, penalties, and imprisonments shall be recovered and enforced under the judgment of the mayor of such city, town, or village or the person lawfully exercising his functions." The ordinance of the city of Charleston in reference to the public pound was put in evidence in this case, and the first section thereof provides

that the inclosure attached to the city hall be, until otherwise ordained by the council, constituted the public pound for the impounding of animals therein subject to be impounded. It also provides in section 2 that "it shall be unlawful for any person being the owner or having charge of any cow, calf, or ox to allow the same to run at large between sunset and sunrise in any of the streets, lanes, alleys, or commons of said city below the Elk and Piedmont roads;" and section 4 provides: "It shall be the duty of the pound-master, on view or information, forthwith to take up all or any such animals running at large as aforesaid, and shut up the same in the public pound," there to be retained and fed until disposed of as thereafter provided. Section 5 provides that the owner shall be notified forthwith; and section 6 provides that, in case the owner shall not within forty-eight hours after giving said notice appear and prove his right to such animal, the pound-master shall make his return to the mayor, setting forth the number and kind of animals taken up, time when taken, owner of the animal, if known, the fact of giving the notice, and that forty-eight hours have passed since such notice was given or posted, and that the animal or animals still remain in the pound unclaimed. Section 7 provides that the mayor shall then direct the sergeant to advertise and sell said animals, and prescribes the mode of advertisement; and further directs that the sergeant shall make return to the mayor of his proceedings, and shall pay all surplus money arising from said sales to the treasurer; and section 9 provides that "any person being the owner . . . of such animal," who shall within one year show to the mayor that he was such owner, shall have any surplus in the hands of the treasurer arising from the sale of such animal paid over to him, said surplus to be paid on the order of the council. These ordinances, enacted under the power so to do, conferred by section 29 of chapter 47 of the Code, appear to me to confer express authority upon the pound-master, acting in connection with, and under the supervision of, the mayor, to impound cattle found running at large in the city, and hold them until the fees and costs are paid, or to sell the same after notice to the owner, and, after deducting said cost and fees, to pay the residue to the owner when he asserts his claim thereto. It is true that Dillon on Municipal Corporations (vol. 1, § 150) states that "power to impound and forfeit domestic animals must be expressly granted to the corporation, and that laws or ordinances authorizing the officers of the corporation to impound, and, upon taking specified proceedings, to sell the property, are penal in their nature, and, where doubtful in their meaning, will not be construed to produce a forfeiture of the property, but rather the reverse;" and then proceeds to state that the powers conferred must be strictly followed in order to constitute a valid sale of such animal. In the case under consideration, however, no sale took place; the animal was only taken up and impounded, and, under section 28 of chapter 47, providing that the council of such city, etc., shall have power therein to prevent cattle from going at large therein, taken in connection with section 29 of the same chapter, authorizing the council to make and pass all

needful orders, by-laws, ordinances, and resolutions, etc., not contrary to the Constitution and laws of the State, to carry into effect said power, the impounding officer, under the provisions of the ordinances above mentioned, would surely have the authority to take up and impound such animal found running at large at night in the streets of the city.

There were no steps taken in this case, so far as the evidence discloses, to sell the cow that had been impounded, and the question raised by the action of detinue was simply whether the animal was unlawfully detained by the pound-master at the time said action of detinue was instituted. The evidence shows that the cow was impounded on the night of the 6th of August; that the plaintiff demanded her on the 7th, and, said demand being refused unless the charges were paid, said plaintiff at once brought his action of detinue; so that the only question really presented for our consideration is whether the cow was lawfully detained at the time said action was brought. As is suggested by counsel for the plaintiff, however, our Code, chap. 61, provides for taking up estrays found upon the land of a person, and, after giving the notice therein prescribed, if the owner does not appear in four weeks, the person taking up such estray may have the same appraised, as therein provided, by three freeholders, who shall return their certificate with the warrant to the clerk of the county court, who shall record it, and post a copy at the front door of the court-house on the next court day, and, if the owner of such property shall not appear in thirty days after said copy has been so posted, and the valuation thereof be under \$15, or if such value be as much as \$15, and the owner does not appear after the said certificate has been published as aforesaid, and also three times in a newspaper published nearest to the place where such property was taken up, it shall belong to the owner of the land on which it was taken, and the former owner may at any time recover the valuation money after deducting the fees and charges. This has been the law of Virginia and of this State for many years, and, so far as we know, no question has been raised in regard to the constitutionality or validity of the law. Again, it is an every-day occurrence in the cities of our State that men are arrested for disorderly conduct and violation of the city ordinances, and, if found guilty, they are not only locked up, but are compelled to work on the streets to pay their fines, and thus their labor, which is their property as much as anything else they have, is taken from them to discharge the penalty. Under the common law the right of distress damage feasant existed, and the cattle found trespassing were liable to distress, and it was held in the case of *Anscomb v. Shore*, 1 Taunt. 261, that no action lies against one who distrains cattle damage feasant for impounding them, instead of accepting compensation for the damages tendered before the cattle were impounded. See 6 Wait, Act. & Def. chap. 17, p. 639, where the authorities are collated upon this subject, so that this matter of impounding cattle is not a mere creature of the statute, but existed at common law.

Counsel for the defendant in error contends that the property taken, as the cow in this case 14 L. R. A.

was, was so taken without due process of law, and refers to Cooley, Const. Lim. pp. 363, 364; but we find the author says: "A statute which authorizes a party to seize the property of another without process or warrant, and to sell without notification to the owner for the punishment of a private trespass, and in order to enforce a penalty against the owner, can find no justification in the Constitution." Cattle running at large at night in a public street of a city or town cannot, however, be regarded as committing a private trespass. Section 5 of the ordinance proven in this case provides that the pound-master shall forthwith notify the owner, etc., and section 7 of the same ordinance provides that the mayor shall direct the sergeant to advertise and sell, etc. Thus it appears that the pound-master's duty is to take up the animal, notify the owner, and report the facts to the mayor; and when a sale is to be made it is made by the sergeant under the direction of the mayor, who, by section 39 of chapter 47 of the Code, is *ex officio* a justice and conservator of the peace within the limits of the city. In the case of *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, the court holds in the second point of the syllabus as follows: "The court suggests the difficulty and danger of attempting an authoritative definition of what it is for a State to deprive a person of life, liberty, or property without due process of law, within the meaning of the Fourteenth Amendment, and holds that the enunciation of the principles which govern each case as it arises is the better mode of arriving at a sound definition;" and in point 8 the court says: "This court has heretofore decided that due process of law does not in all cases require a resort to a court of justice to assert the rights of the parties against the individual, or to impose burdens upon his property for the public use,"—citing *Murray v. Hoboken Land & Imp. Co.* 59 U. S. 18 How. 272, 15 L. ed. 872, and *McMillen v. Anderson*, 95 U. S. 87, 24 L. ed. 385.

In 1 Dill. Mun. Corp. 481, note 2, we find "an ordinance directing the impounding and sale of animals for costs and expenses," but not imposing a penalty, held valid under a charter authorizing the impounding and sale "for any penalty imposed by any ordinance or regulation and all costs,"—citing *Pt. Smith v. Dodson*, 46 Ark. 296, 55 Am. Rep. 569; that "such an ordinance is valid and takes effect whether the owner resides in the town or not,"—citing *Ross v. Hurdie*, 98 N. C. 44.

We also find that Tiedeman, in his valuable work on Limitations of Police Power, says on page 506: "The clash of interest between stock-raising and farming calls for the interference of the State by the institution of police regulations; and whether the regulations shall subordinate the stock-raising interest to that of farming, or *vice versa*, in the case of an irreconcilable difference, as is the case with respect to the going at large of cattle, is a matter for the legislative discretion, and is not a judicial question. In the exercise of this general power of control over the keeping of live-stock the State or municipal corporation may prohibit altogether the running at large of such animals, and compel the owners to keep them within their own inclosures, and provide as a

remedy for enforcing the law that the animals found astray shall be sold, after proper notice to the owner, and time allowed for redemption, paying over to the owner the proceeds of sale, after deducting what is due to the State in the shape of penalty."

The power granted by the Legislature to the cities and towns of our State to prevent cattle and other animals from running at large in their streets is a police power, intended for the protection of the citizens, and to enable them to enjoy the streets and public thoroughfares and to prevent depredations on yards and gardens by breachy stock during the night, when the same are unwatched and unprotected. There is necessity for immediate action when cattle are found upon the public street at night. As is frequently the case, the officer may be ignorant as to the ownership of the cattle thus found on the street, and, in order that the object of the ordinance may be made effective, he must proceed at once, and arrest the animal, without waiting for any judicial investigation as to whether the seizure may be lawful. If it were otherwise, and the officer waited until a judicial investigation should take place, the animal would be gone, and the ordinance would prove abortive and inoperative. In order, then, to enforce the ordinance, such cattle must be impounded; they must also be cared for and fed, and, if no owner comes for them, they must be sold, to use a common expression, "to prevent them from eating their heads off."

This question has been before the courts in the State of New York, and in the case of *Cook v. Gregg*, 46 N. Y. 489, the court held that the provisions of the Acts authorizing the seizure of animals trespassing upon private premises are constitutional; that "the Act does not impose a penalty for the trespass, but simply prescribes and fixes a remedy therefor; and remedies are clearly within the peculiar province of legislation. The temporary seizure and detention of property as authorized by the statute, awaiting judicial action, is not violative of the provision of article 1, section 6, of the Constitution, directing that no person shall be deprived of property without due process of law." See also *Hard v. Nearing*, 44 Barb. 472. Also, in the case of *Campau v. Langley*, 39 Mich. 451, 38 Am. Rep. 414, it was held that "a statute allowing animals running at large in a public highway to be taken by any person and publicly sold by a public officer, and providing that, after the expenses of the proceedings and of keeping the animals were paid, the remainder should be paid over to the owner, who should be allowed a certain time within which to redeem them, is to remedy a public grievance, and is not unconstitutional, as divesting property rights without due pro-

cess of law." Also, in the case of *Wilcox v. Hemming*, 58 Wis. 144, 46 Am. Rep. 625, it was held that "a city charter and ordinances may, as an exercise of police power, provide for the taking up and impounding of animals found running at large in the public streets, and for selling them to pay the expenses of impounding, etc., without judicial inquiry or determination; and such provisions will not be unconstitutional, as authorizing the forfeiture, condemnation, or confiscation of property without due process of law or without compensation." Judge Cooley, in his work on Constitutional Limitations, p. 588, says: "So beasts may be prohibited from running at large under the penalty of being seized or sold,"—citing numerous authorities in support of the proposition. And Sedgwick on the Construction of Statutory and Constitutional Law, p. 485, under the head of "Police Powers," says: "The clause prohibiting the taking of private property without compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquillity of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments;" and in a note we find that "summary statutory proceedings for the seizure, detention, and sale of stray animals running at large have been sustained,"—citing numerous authorities. Numerous other authorities might be cited in support of the validity of such laws and ordinances, but, as we think, enough have been mentioned to show how said statutes and ordinances are regarded, and how the question is considered by the elementary authors upon the subject and by the highest courts of the different states, at least to indicate the weight of authority so far as I have had an opportunity of examining them upon the subject. There can be no question that the city of Charleston, under its charter as amended by chapter 47 of the Code, and the ordinances which were in evidence, had the right to take up and impound the cow of the defendant in error, which was all that had been done at the time the owner took possession of her by giving the required bond in his action of detinue; but, if the defendant in error had not seen proper to bring said action, and had allowed said cow to be sold after the requirements of said ordinance had been complied with, in my opinion a sale of said animal under the provisions of said ordinance, and a disposition of the proceeds of said sale as therein directed, would have violated no provision of the Constitution.

For these reasons the judgment complained of must be reversed, and the defendant in error must pay the costs, and the cause is remanded to the Circuit Court of Kanawha County.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Martha C. BENNETT *et al.*, *Appts.*,
v.
Alonzo VAN RIPER *et al.*, Impleaded, etc.,
Respds.

(47 N. J. Eq. 568.)

The words "related to" in a provision permitting persons related to a member of a benefit society to be named as beneficiaries, include relatives by affinity as well as by blood.

(November Term, 1890.)

APPEAL by defendant Martha C. Bennett and her husband from a decree of the Chancery Court advised by Vice-Chancellor Van Fleet entered in an interpleader proceeding instituted by the Supreme Council of Chosen Friends to determine to whom a sum due on a benefit certificate issued to Alonzo Van Riper, Sr., was payable, which rejected the claim of Mrs. Bennett. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. Samuel Kalisch, for appellants:

It is true that the word "relations," when found in a will or the Statutes of Distribution, has been construed to mean relations of blood only, because from the indefinite extent of the word "relations" it has been found necessary to narrow it by a construction, confining it to the next of kin, under the statute.

Smith v. Campbell, 19 Ves. Jr. 403.

Where the reason of the rule ceases, the rule itself ceases.

Where technical terms are not employed in a contract, the law presumes that the parties to the contract entered into it, upon the common and popular meaning of the words. The words "related to" are certainly not technical in any sense. They bear the popular meaning ascribed to them by Webster and Worcester

and other lexicographers, as a relationship by consanguinity or affinity.

Darrow v. Family Fund Soc., 6 L. R. A. 498, 116 N. Y. 537; *McMaster v. North America Ins. Co.*, 55 N. Y. 222, 14 Am. Rep. 289; *Dileber v. Home L. Ins. Co.*, 69 N. Y. 256, 25 Am. Rep. 182.

When its terms permit more than one construction, that one will be adopted which supports its validity.

Coyne v. Weaver, 84 N. Y. 386; *Hitchcock v. Northwestern Ins. Co.*, 26 N. Y. 69; *Grifey v. New York Cent. Ins. Co.*, 1 Cent. Rep. 528, 100 N. Y. 417, 53 Am. Rep. 202; *Varick v. Crane*, 4 N. J. Eq. 128.

The reason assigned for such a rule of construction is that the insurer is supposed to have chosen the language to express the terms of the contract.

See also *Hoffman v. Aetna F. Ins. Co.*, 32 N. Y. 405.

A society will not be allowed to assert in defense that the designation of the beneficiary in the certificate was one of a class of persons not included in the enumeration in the charter of those for whom benefits were to be provided.

Fuller v. Boston Mut. F. Ins. Co., 4 Met. 206.

Mr. Charles E. Hill, for appellees:

The contract is contained and comprised in the articles of association, relief fund, by-law, and benefit certificate.

Supreme Council A. L. of H. v. Smith, 45 N. J. Eq. 472; *Gray v. Supreme Lodge K. of H.*, 118 Ind. 299; *Supreme Lodge K. of P. v. Knight*, 3 L. R. A. 409, 117 Ind. 489.

The holdings of the courts have been uniform that under like contracts made by and between beneficial orders and their members, only kindred—blood relations—can take. Relations by affinity cannot.

And although the order or society has is-

NOTE.—Who are relatives or relations.

By blood.

The term "relations," in a will, includes only those persons who would take according to the Statute of Distributions. *Thomas v. Hole Forest*, 251; *Roach v. Hammond*, *Proc. in Ch.* 402; *Anonymous*, 1 P. Wms. 327; *Edge v. Salisbury*, *Ambl.* 70; *Green v. Howard*, 1 Bro. Ch. 81; *Widmore v. Woodroffe*, *Ambl.* 686; *Rayner v. Mowbray*, 3 Bro. Ch. 234; *Doe v. Over*, 1 Taunt. 263; *Stamp v. Cooke*, 1 Cox. Ch. 234; *Smith v. Campbell*, 19 Ves. Jr. 400; *Varrell v. Wendell*, 20 N. H. 481.

"Relations" in a will, mean next of kin. *Pope v. Whitcombe*, 3 Meriv. 689; *Harding v. Glyn*, 1 Atk. 468; *M'Neilledge v. Barclay*, 11 Serg. & R. 103. This is so unless from the nature of the bequest or from a power of selection authorized by the testator a different construction is allowed. *Drew v. Wakefield*, 54 Me. 294.

Under a bequest to "near relations" such relations only as would be entitled to a distributive share of the testator's personal estate will take. *Whithorne v. Harris*, 2 Ves. Sr. 527.

A relative by blood who was *in ventre sa mère* at the death of the testator cannot claim under a bequest to "relations," unless such relative be a child of the testator. *Bennett v. Honywood*, *Ambl.* 708.

Under a devise to "relations" great nephews and 14 L. R. A.

great nieces will take in the absence of nearer next of kin. *Jones v. Colbeck*, 8 Ves. Jr. 37.

As between nephews and great nephews claiming under a bequest to relations, the nephews only are entitled to take. *Isaac v. Defriez*, *Ambl.* 593.

By affinity.

A devise to "relations" does not include those by affinity. *Maitland v. Adair*, 3 Ves. Jr. 231.

A wife is no "relation" by blood nor by affinity to her husband. *Worseley v. Johnson*, 3 Atk. 761.

A residuary bequest to "nearest relations or connections" does not include the testator's widow. *Storer v. Wheatley*, 1 Pa. 503.

A devise to "relations by blood or marriage" includes those entitled to take under the Statute of Distributions and those who have married those so entitled. *Devisme v. Mellish*, 5 Ves. Jr. 529.

"Relation" or "relative" in a statute providing that a devise to a relative who died before the testator shall not lapse if such relative leave lineal descendants, means blood relatives only and not those by marriage. *Elliott v. Fessenden*, 13 L. R. A. 37, 83 Me. 197.

It does not include a husband. *Keniston v. Adams*, 6 New Eng. Rep. 547, 86 Me. 200.

Nor wife. *Cleaver v. Cleaver*, 39 Wia. 98, 39 Am. Rep. 30; *Esty v. Clark*, 101 Mass. 36.

Nor a step-son. *Re Estate of Pfuelb*, 45 Cal. 643; *Kimball v. Story*, 108 Mass. 382, J. G. G.

sued its certificate, it cannot be held to pay to a wrongfully named person—to one not entitled under its laws to receive.

Supreme Council A. L. of H. v. Smith, 45 N. J. Eq. 473.

A creditor cannot take.

Bri ton v. Supreme Council of R. A. 46 N. J. Eq. 103.

Nor can a *fancé*.

Supreme Council A. L. of H. v. Perry, 1 New Eng. Rep. 715, 140 Mass. 580.

And where the rules of the order provide that the benefit is payable to heirs or member of the family, a mother, who does not reside with the member, cannot take.

Esley v. Odd Fellows Mut. Rel. Assn. 2 New Eng. Rep. 667, 143 Mass. 224.

And the same as to a sister.

Tyler v. Odd Fellows Mut. Rel. Assn. 5 New Eng. Rep. 191, 145 Mass. 184.

The word "relation" means, when used in connection with the descent or disposition of property, related by consanguinity, and does not extend to relations by affinity.

2 Wms. Exrs. 6th Am. ed. 1118; *Katy v. Clark*, 101 Mass. 36; *Kimball v. Story*, 106 Mass. 383.

A stepson is not a relative. "Related to" is synonymous with "next of kin."

Bacon, Ben. Soc. § 260a.

Relative is used the same as kindred.

Powell, Devices, *288.

Relations by affinity are not included in the the general term "relations."

Ward, Legacies, *112; *Maitland v. Adair*, 3 Ves. Jr. 231.

Scudder, J., delivered the opinion of the court:

On the death of Alonzo Van Riper, a member of Alpha Council No. 3, of New York, a duly constituted branch of the Supreme Council of the Order of Chosen Friends, a benefit certificate for the sum of \$3,000 became payable. He had in his lifetime named as the beneficiaries under said policy his grandson, Raymond Van Riper, for \$1,000, and Martha C. Bennett, for \$2,000. She is the wife of Lewis W. Bennett, a grand-nephew by consanguinity, of Alonzo Van Riper, deceased. After his death, on claim made by the children and representatives of the deceased, a bill of interpleader was filed by the council, and, on decree of interpleader, an issue between the parties defendant was formed, and a decree entered against Martha C. Bennett, who has taken her appeal therefrom to this court. Her right is based on the certificate above mentioned, which is a duly authenticated relief-fund certificate of the order. By the Revised Statutes of Indiana authorizing the incorporation of such societies (§ 3850) a certificate of membership, policy, or other evidence of interest shall be regarded as a contract, and the names of payees and beneficiaries may be changed on such terms and conditions as the parties to the contract may agree. By section 3 of the articles of association of the supreme council of the order one of the principal objects shall be to establish a relief fund, from which members of this association who have complied with all its rules and regulations, or persons by such members lawfully designated,

or the legal heirs of such members, may receive a benefit in a sum not exceeding \$3,000 on satisfactory proof of death and conditions complied with. By article 1 of the Relief Fund Law, "each beneficiary member, the person or persons designated by said member, related to or dependent upon him or her, or the legal representatives of such person or persons, shall be entitled, under the prescribed regulations and conditions, to draw the sum not exceeding the amount named in his or her certificate, as thereafter specified." Taking these different parts of the contract together, the question to be determined is, Does the intended beneficiary, Martha C. Bennett, come within its terms, so as to entitle her to the payment of \$2,000 under the certificate? It is not claimed that she was dependent upon the deceased, but her claim is that she was related to him, within the meaning of the contract. I think there was error in confining the meaning of this term "related to" within the narrow limit which has been adopted in the construction of wills and in some statutes. From the indefinite extent of the word "relations" it has been found necessary to limit it in these cases by confining it to the next of kin under the Statute of Distributions. *Smith v. Campbell*, 19 Ves. Jr. 400; *Bennett v. Honeywood*, Ambl. 708. This includes relations by blood and not by affinity, and is applied unless the testator has subjoined to the gift expressions declaratory of an intention to include them. 2 Jarm. Wills, 636; *Esley v. Clark*, 101 Mass. 36. In Bacon on Benefit Societies, § 260, it is said: "It has long been settled that the word 'relatives,' when used in a will or statute, includes those persons who are next of kin under the Statute of Distributions; unless from the nature of the bequest, or from the testator having authorized a power of selection, a different construction is allowed." *Mahon v. Savage*, 1 Sch. & Lef. 111, cases in notes to *Harding v. Glyn* (1 Atk. 469) 8 White & T. Lead. Cas. 810; *Drew v. Wakefield*, 54 Me. 291.

In this certificate there is a power of selection given, not by will, but by the contract between the parties. There are, therefore, qualifications to this rule of construction, even in cases of wills, when a contrary intention is manifested. There can be no question about the intention of the holder in this case upon the face of the certificate. In *Craig v. Lamb*, 1 Colly. Ch. Cas. 489, 495, *Vice-Chancellor Shadwell* says that "in Johnson's Dictionary, in Richardson's Dictionary, and in Bailey's Edition of Facciolati, the word 'relations' is treated as extending to affinity; and the expressions 'a relation by marriage,' and 'a relation in the law,' as denoting connections by affinity, are popularly, whether correct or incorrect, of occasional, if not of frequent, use." In our more modern dictionaries we find that a "relation" or "relative" is defined as a person connected by blood or affinity. When used in a contract, as in this case, I do not find that it has such a fixed and definite meaning that we must thwart the purpose of this decedent, who supposed that, by the terms of the article giving him control of his benefit in the relief fund, he could bestow it on any one of those popularly called "relatives" whom he might select. It seems also that a liberal, rather than

a restricted, meaning given to the word "relative," used in this article of the association, would better comport with its benevolent purpose. The construction contended for against this certificate would exclude a member's wife, unless she came within the other part of the phrase by being dependent on him for her support. The ties of affinity are often stronger than those between collateral, or even lineal, kinsmen by blood; and there is nothing unreasonable in saying that this certificate was made payable to one whom the holder supposed was properly classed among his relatives, and that the council so intended. Where there is no fixed legal or technical meaning which the court must follow in the construction of a contract, then "the best construction," says Chief Justice Gibson, "is that which is made

by viewing the subject of the contract as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it. A result thus obtained is exactly what is obtained from the cardinal rule of intention." *Schuyllkill Nav. Co. v. Moore*, 2 Whart. 491. It seems that the objects of this association will be best attained by the adoption of a common, though it may be an inexact, interpretation of the words "related to" as used in the article above referred to, rather than by a restricted meaning that may not have been known, and is certain to defeat the purpose of this deceased member; and that no rule of legal construction will be violated by giving it such meaning.

For this reason the decree will be reversed. All concur.

NEW YORK COURT OF APPEALS.

Peter SOMERS, *Respnt.*,

v.

METROPOLITAN ELEVATED R. CO.
et al., *Appts.*

Nathan BOHM *et al.*, *Respts.*,

v.

METROPOLITAN ELEVATED R. CO. *et al.*, *Appts.*

(.....N. Y.)

Interference with easements of light and air by an elevated railroad in a street gives an owner of abutting property no right to damages if the building of the road has actually caused an increase in the value of such property, even if it has benefited other abutting owners still more.

(January 20, 1882.)

APPEALS by defendants from judgments of the General Term of the Superior Court for the City of New York, affirming a judgment of the Special Term in favor of plaintiffs in suits brought to enjoin the maintenance and operation of defendants' elevated railroad in the street in front of plaintiffs' property until compensation should be made for the taking of plaintiffs' easements in the street. *Reversed.*

Statement by Peckham, J.:

These two cases were argued together as involving only the same questions. The plaintiffs in the actions brought suit to recover damages which they alleged they had sustained by reason of the operation of the railway of defendants through Second Avenue, in the city of New York. The plaintiff Somers was the owner by conveyance to him in March, 1882, of certain premises known as numbers 2271 and 2273 on Second Avenue, in that city, and between One Hundred and Sixteenth and One Hundred and Seventeenth Streets. He alleged that the defendants had unlawfully in-

terfered with, trespassed upon and illegally taken his easements (or some portion thereof), of light, air and access to his property by the illegal erection and operation of their elevated railway in such avenue. He demanded judgment restraining defendants from further maintaining their structure in front of his premises, and compelling them to remove the same. He also asked to recover the amount of his damage already sustained by reason of the maintenance and operation of the road past his premises, and that if defendants were permitted to maintain and operate the road in the future it should only be upon the condition that they should pay plaintiff the amount of the permanent loss he would suffer by reason of such maintenance and operation.

The plaintiff Bohm made substantially the same allegations in relation to his property, which was also situated in Second Avenue, and a short distance from plaintiff Somers.

The defendants answered, and particularly put in issue the allegations in the complaint in each case as to the damages resulting from the acts of the defendants.

Both actions were tried at a special term of the court without a jury, and the court, among other matters, found the following facts. They are in substance the same in each case:

In the Somers case the defendants were duly incorporated, and before they proceeded to construct their railroad through Second Avenue they obtained the authority of the Legislature and the consent of the municipal authorities of the city of New York to do so, but such authorization did not entitle them to take the property of plaintiff without compensation. In 1883, and prior to April first, the plaintiff erected on his lots two large and valuable brick buildings, and to them and to the lots on which they rested were attached as appurtenant thereto certain easements of light, air and access from Second Avenue. Since April 1, 1883, the elevated railway structure of defendants has greatly cut off the light, air and access which otherwise would have come to plaintiff's premises from that avenue. By the acts of the defendants in depriving the plaintiff in part of the beneficial use and enjoyment of his easements above mentioned

NOTE.—The elaborate and exhaustive briefs of counsel, together with the opinion of the court, render annotation of this case superfluous.

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from April, 1888, to the time of trial, April, 1890, the rental value of plaintiff's premises has been reduced \$2,100, and the plaintiff has sustained a loss thereby to that amount. The damage is of a continuous character, arising from the maintenance and operation of the road by defendants. The road was opened for public use in March, 1880, and has been ever since so maintained and operated. The permanent damage caused by the operation and maintenance of defendants' road was found to be \$3,000, upon payment of which no injunction was to issue. The money was only to be paid in case the plaintiff conveyed to the defendants all the rights and easements appurtenant to his lots which had been taken by them.

In the Bohm case the same general facts were found, differing only as to the different lots and as to the amount of damages. Judgments upon the decisions of the judge were duly entered and the defendants appealed therefrom to the general term where the judgments were affirmed, and from the judgments of affirmance the defendants have appealed to this court.

Messrs. John F. Dillon, Julien T. Davies and Samuel Blythe Rogers, for appellant:

In compensating the landowner for the injury to the remainder of the tract not taken, all the effects of the railway, "all its advantages and disadvantages," are to be considered.

Re Furman, 17 Wend. 649; *Troy & B. R. Co. v. Lee*, 13 Barb. 169; *Re Utica, C. & S. V. R. Co.* 56 Barb. 456; *People v. Eldredge*, 8 Hun, 541; *Henderson v. New York Cent. R. Co.* 78 N. Y. 423; *Re New York, W. S. & B. R. Co.* 29 Hun, 609; *Drucker v. Manhattan R. Co.* 8 Cent. Rep. 66, 106 N. Y. 157, 60 Am. Rep. 437; *Re Brooklyn Elev. R. Co.* 55 Hun, 165.

The statutory restrictions have no application whatever upon actions such as this, because here the land taken has no value, and the plaintiff's case rests wholly upon proof of consequential damage, as to the computation of which all advantages or disadvantages necessarily enter into consideration.

Re Brooklyn Elev. R. Co. supra; *Newman v. Metropolitan Elev. R. Co.* 7 L. R. A. 289, 118 N. Y. 618.

The supposed distinction between "general" and "special" benefits is inconsistent with the established rule for computing consequential damage; is inconsistent with the legislative sanction and adoption of that rule; has never been recognized in this State in any class of cases; is illogical, and required by no principle of justice to the person damaged; cannot be practically applied in most cases; is against public policy, as hampering the sovereign power of eminent domain, and imposing an inequitable burden upon the instruments through which it is exercised; and finally, has never been invoked in other States, except in obedience to constitutional or statutory limitations which we do not have, or, in cases where it is sought to actually analyze and estimate benefits as compensation for the value of the land taken.

If no property be taken damage may be inflicted for public uses without compensation.

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Radcliff v. Brooklyn, 4 N. Y. 195, 58 Am. Dec. 357; *Fobes v. Rome, W. & O. R. Co.* 8 L. R. A. 453, 121 N. Y. 505.

A simple award of the value of the strip taken would therefore have satisfied all the demands of the Constitution.

Albany N. R. Co. v. Lansing, 16 Barb. 68.

But ever since the passage of the General Railroad Act (in 1850), the rule has been frequently announced, and steadily adhered to, that in all proceedings coming under its purview, the measure of compensation was: (1) the intrinsic value of the land taken, in money, without allowance or deduction for benefits of any sort; and (2) the consequential injury, if any, to the remainder of the land, taking all the advantages and disadvantages together, without a separate calculation or analysis of either.

Troy & B. R. Co. v. Lee, 13 Barb. 169; *Re Utica, C. & S. V. R. Co.* 56 Barb. 456; *People v. Eldredge*, 8 Hun, 541; *Black River & M. R. Co. v. Barnard*, 9 Hun, 104; *Re New York Cent. & H. R. Co.* 15 Hun, 63; *Henderson v. New York Cent. R. Co.* 78 N. Y. 423; *Re New York, L. & W. R. Co.* 27 Hun, 151, 29 Hun, 1; *Re New York, W. S. & B. R. Co.* 29 Hun, 609; *Drucker v. Manhattan R. Co.* 8 Cent. Rep. 66, 106 N. Y. 157; *Re New York, L. & W. R. Co.* 49 Hun, 542; *Re Brooklyn Elev. R. Co.* 55 Hun, 165; *Newman v. Metropolitan Elev. R. Co.* 7 L. R. A. 289, 118 N. Y. 618; *Roberts v. Metropolitan Elev. R. Co.* (N. Y.) 13 L. R. A. 499; *Doyle v. Manhattan R. Co.* 40 N. Y. S. R. 474.

The supposed distinction between general and special benefits has never been recognized in this State.

Lewis, Em. Dom. § 479; 1 Redf. Railways, 6th ed. pp. 272, 275.

The point has been directly involved in the decisions upholding the constitutionality of Acts requiring the consideration of general benefits in street openings and the acquisition of lands for canals.

Livingston v. New York, 8 Wend. 85, 22 Am. Dec. 622; *Genet v. Brooklyn*, 99 N. Y. 298; *Betts v. Williamsburgh*, 15 Barb. 256; *Roxford v. Knight*, 15 Barb. 627; *Burbank v. Fay*, 65 N. Y. 57; *Whitney v. State*, 96 N. Y. 240.

The fact that plaintiff's neighbors on the side streets may have been benefited more than he is no reason for enhancing the award herein.

Livingston v. New York and Betts v. Williamsburgh, supra; *James River & K. Co. v. Turner*, 9 Leigh, 318; *M'Intire v. State*, 5 Blackf. 384; *Chicago & P. R. Co. v. Francis*, 70 Ill. 238; *Oregon Cent. R. Co. v. Wait*, 8 Or. 91; *Henderson & N. R. Co. v. Dickerson*, 17 B. Mon. 173, 66 Am. Dec. 148; *Young v. Harrison*, 17 Ga. 30.

In other States, benefits of no sort are disregarded in computing consequential damage, except in obedience to the requirements of the Constitution or some statute.

An analysis of the decisions in other States will show they may be divided into the following classes:

1. States where, under a Constitution and a railroad Act similar to our own, precisely the rule for which we contend has been applied to the computation of consequential damages,

and even sometimes to the computation of the whole compensation. Such States are:

- Alabama.
Alabama & F. R. Co. v. Burkett, 42 Ala. 83;
Hooper v. Savannah & M. R. Co. 69 Ala. 529.
 California (under former Constitution).
California Pac. R. Co. v. Armstrong, 46 Cal. 85; *San Francisco, A. & S. R. Co. v. Caldwell*, 81 Cal. 867.
 Delaware.
Whiteman v. Wilmington & S. R. Co. 2 Harr. (Del.) 514, 83 Am. Dec. 411.
 Georgia.
Young v. Harrison, 17 Ga. 80; *Jones v. Wils Valley R. Co.* 80 Ga. 43.
 Illinois.
Chicago & P. R. Co. v. Francis, 70 Ill. 258;
Page v. Chicago, M. & St. P. R. Co. Id. 324;
Dupuis v. Chicago & N. W. R. Co. 1 West. Rep. 656, 115 Ill. 97.
 Indiana.
M'Intire v. State, 5 Blackf. 884; *Indiana Cent. R. Co. v. Hunter*, 8 Ind. 74; *Hagaman v. Moore*, 84 Ind. 496; *Vanblaricum v. State*, 7 Blackf. 209.
 Kansas (probably).
Leroy & W. R. Co. v. Ross, 40 Kan. 598.
 Kentucky.
Henderson & N. R. Co. v. Dickerson, 17 B. Mon. 178, 66 Am. Dec. 148; *Jacob v. Louisville*, 9 Dana, 114, 83 Am. Dec. 533.
 Louisiana.
New Orleans Pac. R. Co. v. Gay, 81 La. Ann. 480; *New Orleans, O. & G. W. R. Co. v. Lagarde*, 10 La. Ann. 150; *Vicksburg, S. & T. R. Co. v. Calderwood*, 15 La. Ann. 481.
 Maryland (probably).
Shipley v. Baltimore & P. R. Co. 34 Md. 386.
 Minnesota (probably).
Arbush v. Oakdale, 28 Minn. 61; *Winona & St. P. R. Co. v. Waldron*, 11 Minn. 515, 88 Am. Dec. 100; *Winona & St. P. R. Co. v. Denman*, 10 Minn. 287. See also *Morin v. St. Paul, M. & M. R. Co.* 80 Minn. 100.
 Mississippi (probably).
Balfour v. Louisville, N. O. & T. R. Co. 62 Miss. 508.
 Ohio (under former Constitution, and probably still).
Symonds v. Cincinnati, 14 Ohio, 147, 45 Am. Dec. 529; *Brown v. Cincinnati*, Id. 541; *Kramer v. Cleveland & P. R. Co.* 5 Ohio St. 140; *Columbus, P. & I. R. Co. v. Simpson*, Id. 251; *Cleveland & P. R. Co. v. Ball*, Id. 568; *Cincinnati & S. R. Co. v. Longworth*, 30 Ohio St. 106.
 Oregon.
Willamet Falls Canal & D. Co. v. Kelly, 8 Or. 99; *Oregon Cent. R. Co. v. Wait*, Id. 428.
 Pennsylvania (probably).
Baltimore & P. R. Co. v. Springer (Pa.) 11 Cent. Rep. 635; *Danville & W. R. Co. v. Gearhart*, 81* Pa. 280; *East Brandywine & W. R. Co. v. Rank*, 78 Pa. 454.
 South Carolina.
Greenville & O. R. Co. v. Partlow, 5 Rich. L. 428.
 Tennessee.
Woodfolk v. Nashville & C. R. Co. 2 Swan, 432; *Memphis v. Bolton*, 9 Heisk. 508; *Paducah & M. R. Co. v. Stovall*, 12 Heisk. 1; *Chattanooga v. Geiler*, 18 Lea, 611.
 Virginia.
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James River & K. Co. v. Turner, 9 Leigh, 318.

3. States where under a Constitution similar to ours, the courts have held that a statute providing for an assessment for benefits for land taken, even in municipal street opening proceedings, is unconstitutional. Some of these states, however, would permit the consideration of "special" benefits under such circumstances. The States where this is the rule are:
 Iowa (where no benefits may be considered).
Frederick v. Shane, 82 Iowa, 254; *Deaton v. Polk County*, 9 Iowa, 594; *Israel v. Jewett*, 20 Iowa, 475.
 Massachusetts (where only "special" ones are allowed).
Meacham v. Fitchburg R. Co. 4 Cush. 291; *Whitman v. Boston & M. R. Co.* 7 Allen, 318; *Hilbourne v. Suffolk County*, 120 Mass. 393, 21 Am. Rep. 523; *Presbrey v. Old Colony & N. R. Co.* 103 Mass. 1; *Proprs. of Locks & Canals v. Nashua & L. R. Corp.* 10 Cush. 855.
 Minnesota (same as Massachusetts).
Arbush v. Oakdale, 28 Minn. 61; *Winona & St. P. R. Co. v. Waldron*, 11 Minn. 515, 88 Am. Dec. 100; *Winona & St. P. R. Co. v. Denman*, 10 Minn. 287. See also *Morin v. St. Paul, M. & M. R. Co.* 80 Minn. 100.
 Missouri (same).
Newby v. Platte County, 25 Mo. 256; *Dougherty v. Brown*, 8 West. Rep. 246, 91 Mo. 26; *Springfield v. Schmoock*, 68 Mo. 894; *Sedalia, W. & S. R. Co. v. Abell*, 18 Mo. App. 632.
 New Hampshire (same).
Carpenter v. Landaff, 42 N. H. 218; *Adden v. White Mountains N. H. R. Co.* 55 N. H. 418, 20 Am. Rep. 220.
 New Jersey (no sort of benefits considered).
Carson v. Coleman, 11 N. J. Eq. 106; *State v. Ravine Road Sever Comrs.* 89 N. J. L. 663.

4. States where the Constitution or a statute expressly forbids, in unmistakable terms, consideration of such benefits, where land is taken for any public use. These are:
 Arkansas.
St. Louis, A. & T. R. Co. v. Anderson, 39 Ark. 167.
 California (under its new Constitution, but only so far as private corporations are concerned).
Tehama County v. Bryan, 68 Cal. 57.
 Iowa.
Frederick v. Shane, 82 Iowa, 254; *Deaton v. Polk County*, 9 Iowa, 594; *Israel v. Jewett*, 20 Iowa, 475.

5. States (many of them belonging also to the two preceding classes) where the distinction between actually setting off benefits which have been valued separately, against the value of land taken, and merely permitting them to neutralize consequential damage, is still an open question. In many of these, however, the tendency is very marked towards taking all the results of the road in computing consequential damage. These are:

Arkansas.
St. Louis, A. & T. R. Co. v. Anderson, 39 Ark. 167.
 California.
Tehama County v. Bryan, 68 Cal. 57.
 Connecticut.
Trinity College v. Hartford, 82 Conn. 453; *Wilcox v. Meriden*, 57 Conn. 120.

Iowa.

Frederick v. Shane, 33 Iowa, 254; *Deaton v. Polk County*, 9 Iowa, 594; *Israel v. Jewett*, 29 Iowa, 475.

Massachusetts.

Meacham v. Fitchburg R. Co. 4 Cush. 291; *Whitman v. Boston & M. R. Co.* 7 Allen, 313; *Hilbourne v. Suffolk County*, 120 Mass. 393, 21 Am. Rep. 523; *Frederick v. Old Colony & N. R. Co.* 103 Mass. 1; *Proprs. of Locks & Canals v. Nashua & L. R. Corp.* 10 Cush. 385.

Minnesota.

Arbrush v. Oakdale, 28 Minn. 61; *Winona & St. P. R. Co. v. Waldron*, 11 Minn. 515, 88 Am. Dec. 100; *Winona & St. P. R. Co. v. Denman*, 10 Minn. 267.

New Hampshire.

Carpenter v. Landaff, 42 N. H. 218; *Adden v. White Mountains N. H. R. Co.* 55 N. H. 418, 20 Am. Rep. 220.

New Jersey.

Carson v. Coleman, 11 N. J. Eq. 106; *State v. Ravine River Sewer Comrs.* 39 N. J. L. 665.

5. States where consequential damages may not be considered. Of course under that rule consequential benefits are properly disregarded also. Such States are:

Maine.

Rogers v. Kennebec & P. R. Co. 35 Me. 319. Massachusetts (to some extent). *Meacham v. Fitchburg R. Co.* 4 Cush. 291; *Whitman v. Boston & M. R. Co.* 7 Allen, 313; *Hilbourne v. Suffolk County*, 120 Mass. 393; *Frederick v. Old Colony & N. R. Co.* 103 Mass. 1; *Proprs. of Locks & Canals v. Nashua & L. R. Corp.* 10 Cush. 385.

Missouri (where only consequential damage which is "special" is allowed, and where the same rule is applied to benefits).

Newby v. Platte County, 25 Mo. 258; *Dougherty v. Brown*, 8 West. Rep. 246, 91 Mo. 26; *Springfield v. Schmoock*, 68 Mo. 394; *Sedalia, W. & S. R. Co. v. Abell*, 18 Mo. App. 632.

North Carolina.

Freddie v. North Carolina R. Co. 49 N. C. 89; *Raleigh & A. A. L. R. Co. v. Wicker*, 74 N. C. 220.

Mr. Charles Gibson Bennett, for respondents:

Under the provision of the Constitution, as construed by the courts, and the provisions of the General Railroad Act and the Rapid Transit Act, in estimating the compensation to be made for private property taken for public use by a private railroad corporation, benefits or advantages from the proposed improvement cannot be considered or set off.

There is a marked and long-established distinction between the public policy of our State in respect of the taking of private property for public use by the public, and that in respect of the taking of private property for public use by a private railroad corporation.

Where the property is taken by the public, benefits or advantages of the proposed improvement are to be considered.

Genet v. Brooklyn, 99 N. Y. 296; *People v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Roxford v. Knight*, 15 Barb. 637.

Where the property is taken by a private corporation, the policy has long been expressly to prohibit the consideration of benefits or advantages.

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Plaintiff's easements in the street are "real estate" within the meaning of our statutes of eminent domain.

Re Watson, 53 Hun, 563; *Metropolitan Elev. R. Co. v. Dominick*, 55 Hun, 198; *Re Prospect Park & C. I. R. Co.* 67 N. Y. 371; *Re New York Elev. R. Co.* 70 N. Y. 327; *Sixth Ave. R. Co. v. Kerr*, 72 N. Y. 330; *Story v. New York Elev. R. Co.* 90 N. Y. 123, 43 Am. Rep. 146; *Lahr v. Metropolitan Elev. R. Co.* 6 Cent. Rep. 371, 104 N. Y. 268; *Drucker v. Manhattan R. Co.* 8 Cent. Rep. 66, 106 N. Y. 157.

A wrong-doer cannot pay for damages to property in collateral benefits.

Francis v. Schoellkopf, 53 N. Y. 153; *Gerrish v. New Market Mfg. Co.* 30 N. H. 478; *Tillotson v. Smith*, 32 N. H. 90, 64 Am. Dec. 355; *Marcy v. Fries*, 18 Kan. 353; *Sanderson v. Pennsylvania Coal Co.* 103 Pa. 370; *Talbot v. Whipple*, 7 Gra. 122; *Gile v. Stevens*, 18 Gray, 146; *Armstrong v. St. Louis*, 69 Mo. 309, 33 Am. Rep. 499.

In estimating the damage to the land not taken, it is not admissible to make an allowance for general benefits; that is, benefits which merely affect the market value of the land not taken, in common with other land in the locality, but not at all its direct physical use and enjoyment.

Re New York, W. S. & B. R. Co. 35 Hun, 260; *New York Nat. Exch. Bank v. Metropolitan Elev. R. Co.* 31 Jones & S. 511, affirmed 108 N. Y. 680; *Roberts v. Brown County Comrs.* 21 Kan. 247; *Jeffersonville, M. & I. R. Co. v. Esterle*, 18 Bush, 667; *Palmer Co. v. Ferrill*, 17 Pick. 58; *Brower v. Morrill*, 3 Chand. 46; *Brown v. Providence, W. & B. R. Co.* 5 Gray, 35; *Paine v. Woods*, 103 Mass. 160; *Hilbourne v. Suffolk County*, 120 Mass. 393, 21 Am. Rep. 523.

Nicholson v. New York & N. H. R. Co. 22 Conn. 74, 56 Am. Dec. 390, seems to establish the rule of distinction as follows: "That in their (the jury's) estimate of damages, they should allow the defendants the local, personal, and particular advantage to the plaintiffs' premises, occurring from the construction and use of the road."

See also *Newby v. Platte County*, 25 Mo. 258; *Schaller v. Omaha*, 23 Neb. 325.

Pockham, J., delivered the opinion of the court:

The defendants seek upon these appeals to obtain from this court some decisive statement as to the rule which should obtain in actions like these, in arriving at the amount of damages which should be paid by defendants to abutting lotowners on account of the building and maintenance of defendants' roads in the City of New York. To that end they have waived every other exception in the cases.

There are it is said large numbers of cases in which the decision of the question is of the greatest importance to both parties.

The defendants claim that if the correct rule for the ascertainment of damages had been followed in these cases, the uncontradicted evidence showed that the plaintiff had not sustained any damage whatever. At the outset the plaintiffs' counsel sets up a bar to our entering upon an examination of the subject by alleging that the question is not raised and that

there is no exception which brings the matter before us.

In the Somers case the defendants requested the court to find as follows:

Twentieth. The existence and operation of the defendants' railroad in Second Avenue has greatly increased the population of the locality in which the plaintiff's property is situated, and has brought traffic into Second Avenue. The plaintiff's property has thereby incidentally been benefited.

Twenty-first. Since the year 1880 there has been a general rise in the value of real estate situated upon Second Avenue, and this increase in value is largely attributable to the existence and operation of the defendants' railroad.

Substantially the same requests were made in the Bohm case. These requests the defendants state are founded upon uncontradicted evidence.

Upon a careful perusal of the evidence in the cases I think this contention is well founded. The court refused to make the findings as requested and the defendants excepted.

Motions were made by the defendants in each case for a dismissal of the complaint on the merits, because, among other grounds, it appeared that the plaintiff's property had been benefited by the railroad and had increased in value since its erection and by reason thereof. The motions were denied and exceptions taken.

We think upon the whole that the question was sufficiently raised. It is true that exceptions are unavailing when they are taken to the refusal of a judge to find as facts matters which are merely evidence and which are immaterial. In these cases, however, we must remember that the sole question at issue between the parties upon this branch of the case was as to the proper rule to be observed in ascertaining the amount of damages the plaintiffs had sustained, if they had sustained any. The amount of damages would be materially affected by the rule which should be observed in determining their existence. And yet in making the bare finding of the amount of damage sustained, it would not appear that any particular rule had been followed and hence it would not appear that any erroneous rule had been adopted. It might in such cases be urged perhaps that there was no evidence upon which to base a finding of damage if a correct rule had been adopted, and yet a perusal of the testimony might show some slight amount and hence the exception would fail. The judgment might at the same time be really founded upon the incorrect rule.

There would in almost any event be a difficulty in determining whether a wrong rule had or had not been adopted. If it were a trial by jury the judge would be requested to instruct the jurors as to the true rule and an exception would lie to his refusal and to the rule actually adopted and the question brought up in that way. In a trial before the court it is more awkward. The requests in these cases were to find certain facts which had been established by uncontradicted evidence and upon those facts the defendants seek to draw an inference in the nature of a conclusion of fact or of law, or both, that the plaintiffs have sustained no damage. The court has in truth refused to find the facts as requested, and such

refusal added to the circumstance that he has found the plaintiffs have sustained substantial damage and to an amount stated by him, lead to the inevitable conclusion that he refused to find them because they were in his judgment immaterial. A request to find that the plaintiffs had sustained no damage, or a motion for a non-suit on the ground that no damage had been proved, might not alone bring up the question. Taking all the means together, which the defendants adopted in their perfectly legitimate attempt to bring up for review the question as to what is the proper rule of damages in these cases, we must say that if their able counsel has not yet succeeded, it is difficult to see how success in that line can be achieved hereafter.

Without overruling the cases upon the subject of exceptions to refusals to find upon mere matters of evidence we think the cases before us are distinguishable. The question sought to be raised here is so difficult of presentation by way of exception or request upon a trial before a court or referee, and is withal so important, that we are disposed to say the various requests to find and the exceptions taken to the judge's refusals, together with the motion for a non-suit on the ground that no damage had been proved, and the exceptions taken to the denial of such motion, should in these cases and under the circumstances be regarded as sufficient to enable us to review and pass upon the question on its merits. Justice, we think, demands this.

Although these are suits in equity, commenced to obtain equitable relief and to prevent the defendants from operating their road unless they pay the plaintiffs the damages they will sustain from the permanent interference by the railroad with their easements of light, air and access, yet the rules upon which such damages are to be awarded are so well settled as to enable us to say that those damages are only such as would be given in a proceeding for the condemnation of lands for a railroad use, regard being had to the different characteristics of the property to be taken in these cases.

This rule was last announced in this court in the recent case of *American Bank Note Co. v. New York Elev. R. Co.*, 41 N. Y. S. R. 531. What rule obtains in this State in condemnation proceedings and in regard to the kind of property which has been taken by the defendants in these cases is now made the subject of inquiry. Generally in regard to the taking of land the rule may be said to be to pay the full value of the land taken at its market price, and no deductions can be made from that value for any purpose whatever. Then as to the land remaining, the question has been to some extent mooted whether the company should pay for the injury caused to such land by the mere taking of the other property, or whether, in case the proposed use of the property taken would depreciate the value of that which was not taken, such proposed use could be regarded and the depreciation arising therefrom be awarded as part of the consequential damages suffered from the taking. I think the latter is the true rule. *Henderson v. New York Cent. R. Co.* 78 N. Y. 423, 438; *Newman v. Metropolitan Elev. R. Co.* 118 N. Y. 618, 7 L. R. A. 289;

Re Petition Brooklyn Elev. R. Co. 55 Hun, 165-167.

The case of *Re New York Elev. R. Co.*, 36 Hun, 427, is cited for the other rule. The question might be of great importance where there was an injury to the remaining land, but if there have been no injury, the inquiry as to the scope of the liability for damages is not material. There is no question made but that the defendants are liable to pay the full value of any property taken by them, subject to no deduction whatever. How the value of the particular kind of property which is here taken shall be arrived at is the main and indeed the only question in these cases. Included in that inquiry and growing out of it arises the question, Shall only special benefits to the remaining property be regarded, or may what is termed general benefits be also taken into consideration? Before entering on a discussion of these matters, I think it proper to say that I should hesitate to admit the correctness of the claim made by defendants, that where private property is taken by a mere business corporation as for a public use under the granted power of eminent domain, the Legislature could provide that such property could be paid for by benefits accruing to the landowner's adjacent property consequent upon the taking. This is the case in regard to municipal corporations where land is taken for a public street or other public and municipal purpose, and where the benefits arising to the adjacent lands of the owner whose property is taken may be set off against the value of the land taken. So in the case of the property taken by the State for canal or other public purposes, where the owner of the land taken was frequently paid its value by the benefits received to his adjacent land not taken. The principle underlying these cases is, however, the right of the municipality or State to tax the owners of the land left in order to pay for the land taken, on the ground that they are specially benefited by the taking, and hence should be specially taxed for the payment of the land. The case of *Genet v. Brooklyn*, 99 N. Y. 296, is no authority for a contrary view, for I think it supports that which I have suggested. A mere trading or business corporation has no power of taxation, and the State could not delegate such power to it. If such company desire another's property, it must pay a just compensation for it, and that just compensation would not consist in its doing the owner some benefit upon his remaining property. The question, although argued by appellant's counsel, or rather perhaps stated, becomes unimportant, and is, therefore, undecided here, because the statute provides for just compensation for the property taken, and prohibits any deduction therefrom on account of real or supposed benefits accruing to the property which is not taken. The defendants, so far as regards this question, make no claim of restricted liability to pay such full value.

In determining the question now presented, it is well to recur briefly to the character of the property which is taken, and the circumstances under which it has been taken.

The plaintiffs own no land in the street. Their ownership of the land is bounded by the exterior lines of the street itself. Hence when

under legislative and municipal authority the railroad structure was built, it was supposed by many there was no liability to abutting owners because no land of theirs was taken and any damage they sustained was indirect only and *damnum absque injuria*. When the courts acquired possession of the question and it was seen that abutting land which before the erection of the road was worth, for instance, \$10,000, might be reduced to a half or a quarter of that sum in value, or even rendered practically worthless by reason of the building of the road, it became necessary to ascertain if there were not some principle of law which could be resorted to in order to render those who wrought such damage liable for their work. It has now been decided that although the land itself was not taken, yet the abutting owner, by reason of his situation, had a kind of property in the public street for the purpose of giving to such land facilities of light, of air and of access from such street. These rights of obtaining for the adjacent lands facilities of light, etc., were called easements, and were held to be appurtenant to the land which fronted on the public street. These easements were decided to be property and were protected by the Constitution from being taken without just compensation. It was held that the defendants by the erection of their structure and the operation of their trains interfered with the beneficial enjoyment of these easements by the adjacent landowner and in law took a portion of them. By this mode of reasoning the difficulty of regarding the whole damage done to the adjacent owner as consequential only (because none of his property was taken) and therefore not collectible from the defendants was overcome. The interference with these easements became a taking of them *pro tanto* and their value was to be paid for, and in addition the damage done the remaining and adjoining land by reason of the taking was also to be paid for, and this damage was in reality the one great injury which owners sustained from the building and operation of the defendants' road. For the purpose of permitting such a recovery the taking of property had to be shown. The cases of *Story*, *Lahr*, *Drucker*, *Abendroth* and *Kane* (the last of which is reported in 125 N. Y. 164, 11 L. R. A. 640, and in which the others are referred to), finally and completely settled these matters.

It seems to me plain from this review of the law that the real injury (if any) suffered by the landowner in any particular case, lies in the effect produced upon his abutting land by the wrongful interference of defendants with these easements of light, air and access to such land, and where they are interfered with, and in legal effect taken to any extent, it is not possible to think of them as of any value in and of themselves separate from the adjoining land, but their value is to be measured by the injury which such taking inflicts upon the land which is left and to which they were appurtenant.

This is a consequential damage. It is not the light or the air that is valuable separated from the land adjoining. With regard to the subject under discussion there is and can be no value in a given quantity of air, or space, or light in the public street, except as it may be used in connection with and as appurtenant to the

abutting land. When a person interferes with such light, air or access, and takes it, he takes nothing which is alone and intrinsically valuable, but only as its loss affects the adjoining land. This loss, while purely consequential, is, nevertheless, a liability which the person proposing to take the property is bound to discharge.

The rule which the counsel for the plaintiffs contends for is a pure abstraction and liable in many instances to cause injustice in its application, because it would fly in the face of the actual facts. Easements, he says, are worth exactly the amount which they add to the value of the premises to which they are appurtenant, and no reference to the particular agency by which the taking or interference with such easements has been accomplished should be permitted, even for the purpose of determining the damage that has been thereby caused. The pure abstraction of a curtailment or destruction of the easement must be indulged in and no effect other than such curtailment or destruction upon the property left is to be regarded. Carrying out this principle it might appear that a lot on Second Avenue with its easements of light, air and access unimpaired would be worth \$5,000. To deprive it in some undefined way other than by defendants, of a portion of such easements equal to the amount taken by the defendants, might detract from the value of the lot \$2,500. Therefore \$2,500 is the value of the easement which the defendants must pay. This is as I have said a pure abstraction. No such case exists or can exist. The same property cannot be taken by some other agency and by defendants at the same time. Adopting the theory of the plaintiffs' counsel, it can be easily seen how in fact the injustice imagined might be perpetrated. A plaintiff after proving that the damage to his property, if the easement had been taken by some process, and by some person other than defendant would upon such hypothesis have been \$2,500, might be met by defendants with proof of the fact that he had sustained no damage whatever, and on the contrary, by reason of the erection of the road, he had been specially and peculiarly benefited, his property being in actual fact worth fifty or one hundred per cent more than it was before. Would there not be great injustice in awarding to such an owner \$2,500 for damages which in truth he had never suffered? The separate value of light and air upon the facts existing in all these cases can in the nature of things be nothing but nominal. They must be joined to the land to be of value.

A theoretical course of reasoning may be adopted by which it could be claimed, as plaintiffs' counsel urges, that the value of these easements in and of themselves is represented by the amount of depreciation in value to the adjoining land their taking would occasion, with no reference to the agency by which such taking was accomplished. In fact, such value would be arrived at by reference to what was a purely consequential damage to land. If the taking by the railroad actually had the effect of enhancing the value of the remaining land, the inquiry as to the amount of loss that might otherwise have been occasioned (if there had not happened to be the actual benefit) would be the purest guess and speculation in

the world, and even when arrived at would be but proof of what might have happened if something else had not occurred which prevented it and caused the contrary to happen. To permit a recovery of this conjectural and wholly theoretical amount of damage which was never sustained would be to legalize a mere raid upon the treasury of defendants.

The real question to be considered is, in truth, one of damage to the abutting land (*Newman v. Metropolitan Elec. R. Co.* 118 N. Y. 618, 7 L. R. A. 289). What facts may be regarded upon such an inquiry has not been finally decided.

In the *Case of Newman, supra*, a portion of the subject was involved and discussed and we must recognize the authority of that case upon the question actually therein decided. A reference to the report is necessary in order to learn that fact. That action was brought and tried as one to recover the whole damage in one action which the plaintiff had sustained by reason of the erection and operation of defendants' road in front of his premises in Church, near Rector, Street. The court was asked to charge the jury "that in estimating the damages to the leasehold interest of the plaintiff caused by the interference by the defendants with the light, air and access appurtenant to the premises, the jury may take into consideration any benefits peculiar to his house which have arisen by the construction of the road as shown by the evidence." The court refused to charge as requested, and said: "On the contrary, the jury have no right to take any such fact into consideration." There was an exception to that refusal, and upon appeal this court in the second division held that such refusal was erroneous and therefore the judgment was reversed and a new trial granted.

The so-called Rapid Transit Acts, under which the defendants were organized, provided that the commissioners of appraisal should not, in determining the amount of compensation, make any allowance or deduction on account of any real or supposed benefits which the party in interest may derive from the construction of the proposed railroad. The *Case of Newman* decides that this provision does not mean that in examining the question whether injury has resulted to the abutting owner's remaining land by reason of the taking of a portion of the easements spoken of, the courts cannot regard the fact that, so far from injury, the land remaining has been specially enhanced in value by reason of the taking. On the contrary, it decides that such fact of special enhancement in value is material and may and must be considered upon a question of damage. It is not offsetting injury against benefits. It is discovering whether in reality there has been any injury to the remaining land. To prove that the land has been specially benefited it may be proof that it has not been diminished in value. If it would have increased still more in value but for this taking by the road, that difference it must pay because to that extent there would be damage. The *Newman Case* is authority for the proposition that the easements are only of nominal value in and of themselves, and that the result of taking them must be looked for in the effect upon the adjoining land. If, instead of loss or in-

jury, that land has been specially benefited by the taking by the railroad company, then no damage has been sustained by the landowner. Although adding nothing to the weight of the authority of the *Newman Case*, I must say that as far as it goes the decision receives my unqualified approval. The remarks of the learned judge in the latter part of the opinion as to general benefits from the growth of the city, etc., were no part of the decision itself, and were merely suggestions as to matters not really involved in the case. They raised the question as to how far general benefits to the land may be regarded, and also whether, assuming them to exist, they must have been caused by the railroad company in order to be noticed. I shall add a word or two later on upon that subject. At any rate the case decides that it is a defense to the action to recover damages, if it be true that in fact the owner's remaining land has been specially benefited by the taking. In these cases there is no claim that plaintiffs have received benefits from the taking which were special and peculiar to their lots and not shared in by the owners of lots generally in the avenue. I confess I have been and am wholly unable to see the least materiality in the distinction between what are termed special and general benefits to the property left, or whether such benefits have been caused by the defendants. Strictly speaking it is not a question of benefits at all, except that proof of benefits may be one way of showing there has been no injury. The value of the easements taken, we have seen, was merely nominal—and the sole question which remains is, therefore, Has the owner suffered any damage or injury whatever which has been caused by this taking?—for if there has been no damage there can be no recovery. To ascertain the fact whether there has been damage, an excursion into the realms of possibilities as to what might have happened but did not, is not permitted. The inquiry whether the land would have been injured if certain circumstances had not occurred which not only prevented such injury, but enhanced its value, is wholly immaterial. The question is, What in fact has been the actual result upon the land remaining? Has its actual market value been decreased by the taking, or has the taking prevented an enhancement in value greater than has actually occurred, and if so, to what extent? The amount of such decrease in the value of the remaining land, or the amount of the difference between its actual market value and what it would have been worth if the railroad had not taken the other property, is the amount of the damage which the defendants should pay. If on the contrary there has been neither decrease in value caused by the railroad, nor any prevention of an increase from the same cause, how can it be truly said that the lotowner has been injured to the extent of a farthing? The absence of injury may have been the result of the general growth of the city by reason of which the particular property has grown in value with the rest of the city. It is the fact, not the cause, which is material. Where it appears that the property left has actually advanced in value, unless it can be shown that but for the act of defendants in taking these easements it

would have grown still more in value, the fact is plain that it has not been damaged.

It is said the lotowner is himself entitled to the benefits accruing to him from the general rise of property caused by a general growth of the city in that vicinity, and that the causes of such growth are too indefinite and uncertain and problematical to permit the railroad to take advantage of it upon the question of damages. Of course the lotowner is entitled to the benefits arising from these sources. I propose to take no course which shall rob him of them. None other ought to or in fact can have them. It is not a question of permitting the lotowner to have these benefits. How is he despoiled of them when upon an inquiry whether he has sustained damage from the conduct of the defendants it clearly appears that he has not? If it appear that he would have sustained damage but for the fact that the general growth of the city in that direction prevented it and caused an increase in value, what materiality lies in the fact that this growth was not caused by the railroad? As I have already remarked, the fact that there has been no damage is the material fact, and not the reasons which in truth prevented the injury from occurring. If it did not occur, then clearly the lotowner has suffered nothing. He receives all the benefits attaching to the general growth of the city which causes the enhancement in value of his own lots, but he is not permitted to recover from defendants alleged damages which in fact he has never sustained.

In the other view what is to be the rule or measure of damages which is to prevail? Is the owner to be permitted to recover as damages the amount which it is guessed at or surmised he would have sustained by the depreciation in value of his land if it had not been for the fact that it had in truth increased in value? What semblance of justice would there be in such a rule? The only possible injury which the defendants could cause him by their action lies in the injury they might do his remaining land. An investigation of that question reveals the fact that this land has actually increased in value since the taking spoken of, and the fact is not claimed or proved that it would have increased as much but for such taking, and yet by a course of what may be called abstract reasoning the defendants are to be compelled to pay such a plaintiff an amount of money as representing damages he never suffered. Any reasoning, abstract or otherwise, which permits such a result, is lame somewhere.

The defendants are not, however, compelled to base their claims of exemption upon quite so broad a foundation. They say it appears by the uncontradicted evidence that the railroad largely caused the increase in value of all the lands on Second Avenue, including the plaintiffs' lots, and as I have said the evidence bears out such claim. If this be the fact, how can it be said the plaintiffs have suffered damage? There is no shadow of evidence that if the defendants had not taken this property and built their railroad, the property of the plaintiffs would have been as valuable or anything like as valuable as it is. The plaintiffs have in truth been specially benefited by this rail-

road, although quite a number of others have also participated therein. This special cause is the railroad and a special benefit may result to many from such special cause. The fact that the other property in the vicinity and in the side streets has been more than proportionately increased in value by reason of the existence of the defendants' road is not of the slightest importance upon the question of whether the plaintiffs have been injured by defendants' conduct.

The probability is very high that the property in the side streets would have been immeasurably below what it now is in value but for the operation of these elevated roads. The same high degree of probability exists in regard to the property on Second Avenue, as is gathered from the evidence of witnesses in these cases. It is, however, abundantly clear from the evidence actually given that the property of plaintiffs has not suffered injury or damage by the wrongful acts of the defendants, and where the plaintiffs have in fact sustained no loss it is no hardship which prevents their recovering anything from defendants. The plaintiffs, upon a new trial, and under this view of the rule of damages, may, perhaps, be able to show they have nevertheless suffered damages from the illegal action of defendants. It is only necessary for us in this case to decide that if the property of the plaintiffs has increased in value since the taking of these easements or a portion of them, and if such increase is largely due to the building and operation of the defendants' road, and if such increase would not have been greater but for the action of defendants, then the plaintiffs have suffered no damage. Whether the increase is common to every other owner in the avenue, and is greater in proportion with some owners of property in the side streets than with the plaintiffs are matters of no importance. The plaintiffs are not damaged because their neighbors are benefited to an even greater extent than they are by the defendants' road.

It is not necessary to refer to the adjudications in other states upon this subject. This is a matter upon which we must be controlled by our own views of the meaning of our own laws and of what is consistent with a proper construction of them. It is, too, a work of

supererogation to cite and comment upon, separately, the various cases decided in this and other courts of our own State during the last forty years upon the subject of damages in condemnation proceedings. We are quite familiar with them and their conclusions, and we think we do not depart from the general trend thereof in laying down our own views in these cases now before us. The *Newman Case*, *supra*, stands as authority for the principle upon which we must proceed in our examination of the question of the value of these easements. Upon the further question as to the consideration to be given the fact of general benefits (so called) which have been caused by the railroad company, we are confident that the rule herein laid down is calculated to do full justice to both sides, and is in entire harmony with the language and meaning of the statute providing for the taking of property under the Rapid Transit Acts. The rule permits a recovery by the abutting owners of the full amount of the actual damage sustained by them, while, at the same time, it will not permit such owners to recover by some theoretical or abstract mode of reasoning, alleged damages which, in plain truth, they have never suffered.

The case of *Francis v. Schoellkopf*, 53 N. Y. 152, has no bearing on the question whatever. The language of the head note is a contradiction in terms. The rental value of a house cannot at the same time be injured and enhanced. The offer of proof was in regard to dwellings in the vicinity, and proof that their rental value was increased was no answer to the proof that in the plaintiff's case the effect of the nuisance was to decrease the rental value of his own property. It is, of course, plain that the modifying words of the opinion were inadvertently dropped from the head note, a slip which will sometimes happen in spite of all the vigilance that can be exercised.

After a careful consideration of the subject, we think it appears that *errors occurred upon the trial of these actions which demanded a reversal of the respective judgments, and they are therefore reversed*, and a new trial granted in each of the above entitled actions, costs to abide the event.

All concur, except **Gray, J.**, not voting.

UNITED STATES COURT OF APPEALS, EIGHTH DISTRICT.

Regina JAFFEE *et al.*, by Next Friend,
Appts.,
v.

Annie W. JACOBSON *et al.*

(48 Fed. Rep. 21.)

An agreement by an uncle to leave to his nieces a certain portion of his estate at his decease in consideration of the relinquishment of control over them by their father and upon the understanding that they should become members of his family cannot be specifically enforced where he dies before they

come into his family or under his control, although a relinquishment of their father's rights has been procured by a surrender of all their claims upon their deceased mother's estate.

(October Term, 1891.)

A PPEAL by complainants from a decree of the Circuit Court of the United States for the District of Colorado sustaining a demurrer to, and dismissing, a bill filed to compel specific performance of an alleged agreement made by Eugene P. Jacobson, deceased, to

NOTE.—For the validity of contracts to pay, by devise or otherwise, after the death of the promisor, see *note to Krall v. Codman* (Mass.) post, p. —, 14 L. R. A.

For the question of specific performance involved in this case, see the extensive brief for appellees.

leave complainants a portion of his estate. *Affirmed.*

Before Caldwell, Nelson and Thayer, JJ.

Statement by Thayer, J.:

In this case the Circuit Court for the District of Colorado sustained a general demurrer both to an original and amended bill of complaint, and subsequently dismissed the cause, complainants having declined to plead further. The substantial averments of the bill may be stated as follows: Eugene P. Jacobson, the husband of Annie W. Jacobson, the appellee, in August, 1878, was a lawyer of large means residing in Denver, Colo. Though married for many years, he was at the time childless. The complainants, Regina and Helena Jaffee, were his nieces, being children of a deceased sister. They were then quite young, and resided at Posen, in the kingdom of Prussia, under the care, as it seems, of a guardian by the name of Samuel Bernstein, their mother having died but a short time previously. The bill then proceeds to aver as follows:

"That, soon after the death of their mother, their uncle Eugene P. Jacobson expressed a strong desire to adopt these complainants as his own children, he being childless and without expectation of ever having any children of his own blood; and to that end the said Eugene P. Jacobson personally solicited their guardian, Samuel Bernstein, and father, while in Europe in 1879, to procure these complainants for him, and immediately thereafter, for said purpose, did enter into correspondence with said Samuel Bernstein, the uncle of complainants, and their guardian under the will of complainants' mother, which said correspondence covered a period from the month of September, 1879, to late in the month of March, 1881; that in said correspondence said Jacobson represented to said Bernstein, complainants' guardian, that he, the said Jacobson, was very desirous of adopting these complainants as his own children, because he and his wife, the defendant Annie, were childless, and because of the love he bore to the deceased mother, his sister, and constantly urged said Bernstein to obtain the consent of complainants' father to surrender complainants to him, so that he, the said Jacobson, might have the control and dominion of complainants as though he were their father, and provide for and take care of them as his own children; that in the last letter written by the said Jacobson to the said Bernstein, which was on the 24th day of February, A. D. 1881, said Jacobson requested said Bernstein, if he procured the consent of the father of these complainants as aforesaid, to take said children from the care and control of their said father, and place the complainant Helena, who was then an infant only three years old, with her grandmother, the mother of said Eugene P. Jacobson, and leave said complainant with her said grandmother until the death of her the said complainant Helena's grandmother, or until he, the said Jacobson, otherwise directed; and to take the complainant Regina from the custody and control of her father, if he so consented, and prepare her for the voyage to America which he, the said Jacobson, was then arranging, or about to arrange, for having the said complainant Regina

come to Denver as soon as possible after her father had so consented as aforesaid."

It is then stated, in substance, that in the year 1879, at the time of Col. Jacobson's visit to the old country, litigation had arisen between the complainants and their father, relative to the division of the mother's estate, of which the children claimed a portion equal in value to \$4,000, and that the father was not willing to relinquish his parental control over the complainants, or consent to their coming to America, until such litigation was settled to the father's satisfaction. It is next averred:

"That in about the month of February, 1881, said Jacobson, in order to procure the consent of the father of complainants in the matters and things aforesaid, directed and requested the said guardian, Bernstein, to settle and compromise the suit between the father and these complainants, by waiving and surrendering all rights which these complainants had had or might have in their deceased mother's estate, or which they had or might have against their said father, to him, the father, at the same time he, the said Jacobson, promising and agreeing that if, by settling the said litigation in the manner aforesaid, said Bernstein shall obtain the consent of complainants' father to give complainants into the charge and care of him, the said Jacobson, he would, upon his death, leave to these complainants his entire estate, except that portion thereof, to wit, the undivided one-half interest, which under the laws of the State of Colorado at that time was and ever since hitherto had been the widow's absolute interest in the estate of her deceased husband; . . . that their said guardian faithfully performed and carried out said directions and instructions in the premises given by the said Eugene P. Jacobson, and did settle the litigation hereinbefore referred to between complainants and their father, dismissing said suit and surrendering to complainants' father all claims which these complainants had or might have against him, and all interest which they had or might have in their mother's estate, and did obtain in consideration thereof the consent of complainants' father to all and singular the matters hereinbefore stated, which were by the said Jacobson required, and did thereby obtain possession of complainants for said Jacobson on the 25th day of March, A. D. 1881, and immediately removed complainants from the town of Posen, where they had theretofore resided, to the town of Inowrazlau, where complainants' said guardian resided, and did place the complainant Helena in the care and custody of the mother of him, the said Eugene P. Jacobson, as by him directed, where she remained until the death of said mother, in about the year 1887; and complainants' said guardian immediately advised said Eugene P. Jacobson of all his doings in the premises."

The remaining portions of the bill show that Col. Jacobson, on being advised of what had been done, directed his brother, who lived in Wisconsin, to proceed to the old country and bring the complainant Regina to his home in Denver; but before his brother left the country on such mission Col. Jacobson died, and neither of the complainants ever in fact became members of his household. At his death the

deceased left an estate of the value of \$115,000, consisting largely of real estate in Denver and Gunnison County, Colo. Mrs. Jacobson, after the death of her husband, took possession of all his estate, and is still in possession of it, claiming it as her own under the laws of descent of Colorado; and has declined, and still declines, to recognize the validity of her husband's promise to leave to the complainants the undivided one half thereof. Complainants, therefore, pray for the specific enforcement of the alleged promise, and that they may each be decreed to be the owners of an undivided one fourth of the real estate of which the said Col. Jacobson died seized and possessed.

Messrs. George H. Kohn and R. S. Morrison, for appellants:

Where parties have contracted to do a lawful thing for a valid consideration, and have proceeded in the execution of it so far that it has been partly or practically performed by one party, so that he is not *in statu quo*, and is in no default for not performing the residue, he shall have the specific execution of the agreement from the other.

Waterman, Spec. Perf. § 427; *Hays v. Hall*, 4 Port. (Ala.) 374, 30 Am. Dec. 530; *Wynn v. Garland*, 19 Ark. 23, 68 Am. Dec. 190; *Meredith v. Wynn*, 1 Eq. Abr. 70; Prec. in Ch. 312; 1 Story, Eq. Jur. 9th ed. § 774.

Every contract, the subject of which is susceptible of substantial enjoyment, should be enforced, provided always the circumstances surrounding and connected with the contract bring it within the rules entitling the party to equitable relief.

Waterman, Spec. Perf. § 11; *Chance v. Reall*, 20 Ga. 143; *Foyers v. Saunders*, 16 Me. 92, 33 Am. Dec. 685; *Hopper v. Hopper*, 16 N. J. Eq. 147.

A consideration of loss or inconvenience sustained by one party at the request of another is as good a consideration in law for the promise by such other as a consideration of profit or convenience to himself. It is sufficient if there be any damage or detriment to the plaintiff, even if no actual benefit accrue to the party undertaking.

1 Addison, Cont. p. 21; *Hinman v. Moulton*, 14 Johns. 466.

Therefore, the release by these children to their father, at Colonel Jacobson's request, of the 20,000 marks, left them by their mother's will, was a good consideration for Colonel Jacobson's promises.

Contracts to leave or give property by will or otherwise are capable of being specifically enforced.

Wright v. Tinsley, 30 Mo. 389; *Sutton v. Hayden*, 62 Mo. 101; *Sharkey v. McDermott*, 8 West. Rep. 787, 91 Mo. 647, 60 Am. Rep. 270; *Van Dyne v. Vreeland*, 11 N. J. Eq. 370, 12 N. J. Eq. 142; *Rhodes v. Rhodes*, 8 Sandf. Ch. 279, 7 L. ed. 852; *Haines v. Haines*, 6 Md. 435; *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773.

If a consideration of loss sustained by one party at the request of another is as good a consideration for a promise by such other as a consideration of profit to himself, then defendant, as heir of Colonel Jacobson, has received

the benefit, at least in theory if not in fact, of the loss which the complainants suffered.

Denver City I. W. Co. v. Middaugh, 12 Colo. 433.

Messrs. E. T. Wells, H. M. Furman and Thomas Macon, for appellees:

The promise, being to adopt complainants and make them his heirs, and in that way confer upon them the rightful capacity to inherit his estate, was absolutely void for want of conformity with the statute.

At the common law the parent was bound to nurture, sustain and retain his children. He was absolutely incapable to deprive himself of their custody or his discretion in regard to their rearing and education.

Johnson v. Terry, 34 Conn. 259; *Albert v. Perry*, 14 N. J. Eq. 540; *Gates v. Renfroe*, 7 La. Ann. 569; *People v. Mercain*, 3 Hill. 399; *Torrington v. Norwich*, 21 Conn. 543; *Greenhood*, Pub. Pol. 493; *Cunningham v. Cunningham*, 18 B. Mon. 19, 68 Am. Dec. 718; *State v. Baldwin*, 5 N. J. Eq. 454; *Schouler*, Dom. Rel. 342.

Those countries in which a father has general power to dispose of his children have always been considered barbarous.

People v. Mercain, 3 Hill. 411.

In Colorado whoever asserts his title by inheritance to the estate of one not his lawful parent must show a literal compliance with Gen. Laws 1877, p. 87.

Long v. Hewitt, 44 Iowa, 363; *Tyler v. Reynolds*, 58 Iowa, 146; *Shearer v. Weaver*, 56 Iowa, 578; *Ex parte Clark*, 87 Cal. 633; *Re Jessup's Estate*, 6 L. R. A. 594, 81 Cal. 406; *Ferguson v. Jones*, 8 L. R. A. 620, 17 Or. 204; *Wallace v. Rappelye*, 103 Ill. 258; *Shahan v. Swan*, 32 Cent. L. J. 205.

The authority of *Van Dyne v. Vreeland*, 11 N. J. Eq. 371, and *Gupton v. Gupton*, 47 Mo. 41, has been expressly repudiated by other courts of equal respectability.

Wallace v. Rappelye, and *Shahan v. Swan*, *supra*; *Wallace v. Long*, 3 West. Rep. 870, 105 Ind. 522.

The case stated in the bill is not a case for the remedy of specific performance.

This remedy is never granted as a matter of right, but always in the discretion of the court.

Pom. Spec. Perf. §§ 35-46; Waterman, Spec. Perf. § 6.

Among other conditions precedent to granting this remedy there must be a clear, definite and precise understanding of all the terms of the contract. They must be exactly ascertained before specific performance can be enforced.

Pom. Spec. Perf. § 159.

Every such promise or assurance as this one "in its nature leaves to the donor a *locus penitentiae*, the right to change, revoke, or modify the gift. A right which the exigency of his fortune or his family may make it proper at any time for him to exercise.

Cox v. Cox, 26 Gratt. 312; *Taylor v. Staples*, 8 R. I. 70, 5 Am. Rep. 563.

It would be injurious to that freedom of intercourse and the operation of those kind and generous affections which ought to be cherished in the circle of domestic connections, to deduce a promise from the loose and general

expressions in a confidential correspondence between one part of a family and another, and give them the force of legal obligations.

Steele v. Steele, 5 Johns. Ch. 13, 1 L. ed. 991; *Pigg v. Corder*, 12 Leigh, 69; *Shelhammer v. Ashbaugh*, 83 Pa. 28.

In order to the award of specific performance there must be mutuality both in the right and in the remedy—that is, at the time of the conclusion of the alleged contract the party who seeks specific performance must have been in such situation that if he were refusing, specific performance might have been had against him.

Pom. Spec. Perf. §§ 162-166.

In the present case there never was, and is not now, any mutuality either of right or remedy. For anything the court can know, the transaction between the father and the guardian of these infants, the attempted delivery of them into the custody of a citizen of a foreign and distant State, were absolutely prohibited by the laws of that kingdom; yet in order to a valid adoption of these infants, in order to confer upon Colonel Jacobson the right to retain them, even for an instant, all the prerequisites prescribed by the laws of the kingdom of Prussia must have been complied with.

Wharton, Conf. L. §§ 242, 243, 251.

In order to entitle one to the remedy of specific performance, it must appear that the contract was, in its inception, fair, reasonable and just.

5 Lawson, Rights & Rem. § 2606; Pom. Remedies, § 185; *note 1*, and cases cited; *Lear v. Chouteau*, 23 Ill. 39; *Stone v. Pratt*, 25 Ill. 34; *Willard v. Tayloe*, 75 U. S. 8 Wall. 557, 19 L. ed. 501.

A change in the circumstances of the parties, intervening between the date of entry into the contract and the date of exhibiting the bill, even though such change occurred without fault of either party, will have the effect to defeat the remedy.

1 Story, Eq. Jur. §§ 736, 750, 750a; Pom. Spec. Perf. §§ 185-187; *Willard v. Tayloe*, *supra*.

Impossibility of performance of a material part of a contract, occasioned by the act of God after entry into the contract, is always a defense against specific performance of the residue.

Laughter's Case, 5 Coke, 21b; *Eaton v. Laughter*, Cro. Eliz. 396; Pom. Spec. Perf. § 299.

Specific performance cannot be decreed unless the contract can be executed *in toto*.

Waterman, Spec. Perf. 389, 392; *Goring v. Nash*, 3 Atk. 190; *Rutland Marble Co. v. Ripley*, 77 U. S. 10 Wall. 339, 19 L. ed. 955.

Impossibility of performance by or on behalf of the plaintiff of any substantial and material portion of the contract, although such impossibility arise without his default, defeats the remedy of specific performance.

Pom. Spec. Perf. § 827.

The relinquishment of the interests of the children in the mother's estate was not a part of the agreement, and what was done in that behalf is to be regarded as a preparation merely and not a partial performance entitling the complainants to the equitable remedy of specific performance.

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Browne, Stat. Fr. § 460; 3 Reed, Stat. Fr. § 568; *Wilson v. Chicago*, R. I. & P. R. Co. 41 Iowa, 443; *Smith v. Bouck*, 33 Wis. 25; *Williams v. Morris*, 95 U. S. 456, 24 L. ed. 362.

Specific performance cannot be granted where the legal remedy in damages is sufficient.

Pom. Spec. Perf. §§ 9-27, 47-50; Waterman, Spec. Perf. § 9.

Who can doubt that an action at law would afford absolute compensation for the plaintiffs for all they have lost.

Hertzog v. Hertzog, 34 Pa. 418; *Jack v. McKee*, 9 Pa. 285; *Wallace v. Long*, 8 West. Rep. 870, 105 Ind. 523; Story, Eq. Jur. 716, 717, 746; 3 Pom. Eq. Jur. § 1401.

Thayer, J., delivered the opinion of the court:

We find it necessary to determine in the first instance upon what consideration the promise rests which the circuit court was asked to specifically enforce. There is an evident attempt made in the amended bill to make it appear that Col. Jacobson promised to leave his nieces one half of his large estate if Bernstein, their guardian, merely obtained their father's consent to give them into his charge and custody; that the obtaining of such consent by the settlement of pending litigation between the children and their father was the sole consideration upon which their uncle's promise was based; and that, as such consent was obtained prior to Jacobson's death, therefore the whole consideration for the promise sought to be enforced has been duly rendered and received. We are wholly unable to take that view of the case, even as it is stated in the amended bill. The complaint as amended shows that the promise counted upon is extracted from conversations and letters of Col. Jacobson concerning family matters, and undoubtedly the latter were written with that freedom which usually characterizes correspondence on such subjects. It also appears that he represented, in the course of the same correspondence, that he was desirous of adopting the complainants as his own children, because he and his wife were childless, and because of the love he bore their mother, his deceased sister. We think it manifest, therefore, from the face of the bill, construing it, as we must, in the light of these facts, that the consideration moving Col. Jacobson to promise to leave the complainants one half of his state, was not merely the consent obtained by the guardian from the father that he might have their custody, but certain benefits and advantages that were to accrue to him after his nieces came into his custody.

It must have been obvious to Mr. Bernstein, the guardian, as it is to us, that the promise in question was based upon the understanding that one or both of the complainants should become members of Col. Jacobson's household, and for a certain period (dependent, of course, upon the duration of his own and their lives) should assume, with respect to himself and his wife, the relation of parents and children, with all that that relation implies. It was of no advantage to Col. Jacobson, as the guardian must have known, that the father's consent was ob-

tained that he might have their care and custody, unless one or both of them were actually placed in his custody and became members of his family, yielding to him in the mean time such service, affection, and obedience as a dutiful child ordinarily yields to its parents. It was the pleasure and mutual benefits which the deceased expected would result from the establishment and continuance of that relation until his death, that induced the deceased to promise to leave to his nieces an undivided one half of his estate. We are accordingly of the opinion that the bill shows that the substantial consideration upon which the alleged promise rests was not rendered in Col. Jacobson's lifetime. He died before either of the children became members of his family, before either of them emigrated to this country, and before he acquired any actual or legal control over their persons.

Viewing the case in that light, we have next to determine whether a court of equity should specifically enforce the alleged contract, and we are all agreed that this question must be answered in the negative.

We concede the law to be that a court of equity will specifically enforce a promise to leave to another the whole or a definite portion of one's estate as a reward for peculiar personal services rendered, or other acts done by the promisee, which are not susceptible of a money valuation, and were not intended to be paid for in money, provided the consideration has been substantially received at the promisor's death; and it is no objection to the enforcement of such a contract that it was entered into with a third party for the promisee's benefit if the

latter has acted under it and executed it. Such seems to be the substance of the rule fairly deducible from the authorities cited, and relied upon by appellants' counsel. *Rhodes v. Rhodes*, 3 Sandf. Ch. 279, 7 L. ed. 852; *Van Dune v. Vreeland*, 11 N. J. Eq. 371; *Sutton v. Hayden*, 62 Mo. 102; *Sharkey v. McDermott*, 91 Mo. 648, 8 West. Rep. 737; *Haines v. Haines*, 6 Md. 435; Pom. Cont. § 114, and citations.

But we are of the opinion that a court would not be justified in decreeing specific performance in a case like the one at bar, where by reason of his untimely death the promisor did not in fact enjoy any of the pleasures, benefits, or advantages which he hoped to realize from the society, companionship, or services of his nieces. We find no precedent for decreeing specific performance under such circumstances. In all of the cases called to our attention in which relief was afforded, it appears that the promisees had substantially discharged the obligations which they had severally assumed. In most, if not all, instances they had lived in the promisor's household as members of his family, and had rendered faithful and affectionate services for a long period of years. It was not possible, therefore, to administer adequate relief, otherwise than by decreeing specific performance.

For the reasons thus indicated, that the bill does not show such a substantial discharge by the complainants, during Col. Jacobson's lifetime, of the obligations which the agreement contemplated were to be discharged, as will justify the specific enforcement of the alleged promise, the demurrer was properly sustained, and the decree dismissing the bill is affirmed.

NEW HAMPSHIRE SUPREME COURT.

Robert P. WAIT *et al.*

NASHUA ARMORY ASSOCIATION.

(.....N. H.....)

The president of a corporation has no implied authority to act as its agent.

(July 31, 1891.)

NOTE.—Powers of president and vice-president of a corporation.

That the president of a corporation acted as secretary as well as chairman of a meeting of the board of trustees does not invalidate the proceedings. *Budd v. Walla Walla P. Co.* 2 Wash. 347.

The president of a corporation cannot be regarded as the whole corporation for the purpose of ratifying his own act any more than for conferring authority upon himself in the first instance to make a contract. *Bl-Spool Sewing Mach. Co. v. Acme Mfg. Co.* 153 Mass. 404.

As to contracts generally.

An Act requiring the use of the common seal of a corporation cannot be made by the president of a corporation without the assent and authority of the board of directors, unless he has been held out by them as having such authority. *Hoyt v. Thompson*, 5 N. Y. 329.

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EXCEPTIONS by plaintiffs to rulings of the justice presiding at the Trial Term for Hillsborough County made during the trial of an action brought to recover for services of plaintiffs as architects in preparing plans and specifications for a proposed armory. *Overruled.*

At the trial before a jury it appeared that the defendant corporation was organized for the purpose of building and maintaining an

Manifestly he cannot bind the corporation by a contract which is *ultra vires*. *Getty v. C. R. Barnes Mill Co.* 40 Kan. 281.

The president of a water and mining company cannot make a contract except in the ordinary course of its business. *Blen v. Bear River & A. W. & M. Co.* 20 Cal. 602.

He cannot purchase additional ditch property for an extension of its business. *Ibid.* See also *infra*, *Siebe v. Joshua Hendy Mach. Works*, 86 Cal. 390; *Castle v. Belfast Foundry Co.* 73 Me. 187, and *Bliss v. Kaweah C. & I. Co.* 65 Cal. 502.

Letting a contract for the construction of a railroad is not within the implied authority of the president of a railroad company. *Griffith v. Chicago, B. & P. R. Co.* 74 Iowa, 85; *Templin v. Chicago, B. & P. R. Co.* 73 Iowa, 543.

Neither has he implied power to contract in its behalf for services in procuring contractors to build a railroad. *Risley v. Indianapolis, B. & W. R. Co.* 1 Hun, 302.

armory in Nashua for the use of a portion of the state militia. The plaintiffs introduced evidence tending to show that they were employed to render such services by Copp, the president of and assuming to act in behalf of the corporation. The defendants offered in evidence the by-laws of the corporation for the purpose of showing that under the by-laws the

president had no power to make contracts in behalf of the corporation without the sanction of the directors, and the same were admitted against the objection of the plaintiffs. It did not appear that the plaintiffs had any knowledge of the by-laws of the corporation. The instructions to the jury were not excepted to. To the admission of the aforesaid evidence,

But where the president of a railroad company appears as an active agent in the work, persons employed by him have a right to assume that he is acting for the company and not as a contractor. *Solomon R. Co. v. Johnson*, 30 Kan. 601.

And the president and superintendent of a boom company have power to hire the necessary laborers to carry on the business except as restricted by the directors. *Hardy v. Tittabawassee Boom Co.* 52 Mich. 45.

And the president, who is also the superintendent and general manager as well as the principal stockholder of a mining company, having full control of its business, may bind it by a contract for the working of a mine. *Crowley v. Genesee Min. Co.* 55 Cal. 273.

A contract by the president of a coal company as to demurrage and freight is not within his implied powers. *Farmers Bank of Bucks County v. McKee*, 2 Pa. 318.

The president with the cashier of a bank cannot pledge its responsibility for their own individual engagement, nor is his assent to a misappropriation by the cashier any protection to the latter. *Austin v. Daniels*, 4 Denio, 299.

The president of railroad company cannot bind it to pay a larger salary to one of the directors than the directors have voted. *Hodges v. Rutland & B. R. Co.* 20 Vt. 220.

The president of a railroad company may bind it by accepting a conditional subscription to its stock. *Pittsburgh & C. R. Co. v. Stewart*, 41 Pa. 54.

The president of a bank cannot bind it by his receipt for money to be invested in bonds. *First Nat. Bank of Allentown v. Hoch*, 39 Pa. 324.

And in an action on a written contract of a lumber company it was conceded that the president, who was the general agent of the corporation, had no authority as such to execute the contract. *Murray v. Nelson Lumber Co.* 3 New Eng. Rep. 419, 143 Mass. 250.

Effect of express provisions to limit authority.

The president of a market company under a by-law giving him general charge and direction of its business cannot exercise powers given by a separate by-law to a finance company. *Twelfth St. Market Co. v. Jackson*, 102 Pa. 269.

The president of a corporation cannot act alone in the matter of a contract as to which he is appointed one of a committee of three. *Third Ave. R. Co. v. Ebling*, 12 Daly, 99.

The president of a manufacturing corporation whose business is according to its articles to be managed by the trustees has no power to bind it in the purchase of goods required in its business. *Westerfield v. Radde*, 7 Daly, 326.

Where the charter of a bank requires an act of the board to make discounts the board cannot confer that power on the president. *Percy v. Millaudon*, 3 La. 568.

So where an act of incorporation provided that there should be thirteen directors, of whom a majority should be a quorum for its business, but that ordinary discounts may be made by the president and four directors, he cannot act without the specified number of directors. *Manderson v. Commercial Bank*, 28 Pa. 579.

The president of a railroad company, who with 14 L. R. A.

certain directors is given express authority to make a contract, has no implied authority to modify it. *Western R. Co. v. Bayne*, 11 Hun, 166. See also *in/ra*, *Crump v. United States Min. Co.* 7 Gratt. 352, 56 Am. Dec. 116.

As to borrowing money.

The president of an insurance company has no implied authority to borrow money on behalf of the company. *Life & F. Ins. Co. v. Mechanics F. Ins. Co.* 7 Wend. 31.

The president of a savings bank, who has authority to carry on its general business, is not thereby authorized to borrow money in behalf of the institution. *Fifth Ward Sav. Bank v. First Nat. Bank*, 1 Cent. Rep. 438, 47 N. J. L. 357.

But the president of a corporation who has the general if not exclusive control of its finances, and is in the frequent habit of borrowing money for its business, had implied authority to bind the company for borrowed money. *Kraft v. Freeman P. & Pub. Asso.* 87 N. Y. 628.

As to drawing or paying checks.

The president of a corporation has no implied power as such to draw checks for moneys in a bank in the name of the company, unless it is given by an established usage of the place. *Fulton Bank v. New York & S. Canal Co.* 4 Paige, 127, 3 L. ed. 372.

The president of a bank has authority to draw checks when the cashier is absent, although there is a temporary cashier present. *Neiffer v. Knoxville Bank*, 1 Head, 1162.

The president cannot authorize the cashier of a bank to pay checks to one who has no deposit in the bank but has a claim against the president, unless the directors have given authority to do so. *Dowd v. Stephenson*, 105 N. C. 467.

As to making notes.

The president of an insurance company has no implied power to make a note for the corporation. *Bacon v. Mississippi Ins. Co.* 31 Miss. 116.

Nor to make an accommodation indorsement. *Etna Nat. Bank v. Charter Oak L. Ins. Co.* 50 Conn. 187.

The president and secretary of a mining company have no implied authority to make a promissory note for the corporation. *McCullough v. Moss*, 5 Denio, 567.

A note signed by the president and secretary of a religious corporation will not bind the corporation without proof of authority to make it. *People's Bank v. St. Anthony's R. C. Church*, 109 N. Y. 512.

But under a vote giving him full control of the business the president of a manufacturing business may purchase materials and give the note of the corporation for borrowed money. *Castle v. Belfast Foundry Co.* 72 Me. 167.

So the president of a corporation engaged in the business of buying and selling machinery, who is authorized by by-laws to transact its ordinary business without consulting the directors, has authority to buy machinery for the corporation and give its promissory note therefor. *Siebs v. Joshua Hendy Mach. Works*, 86 Cal. 890.

And the president who is superintendent and general agent of a mill and lumber company, clothed

against their objection, the defendants excepted.

Messrs. C. W. Hoitt and Z. S. Arnold for plaintiffs.

Mr. George B. French, for defendant:

The implied powers of the president of a corporation depend on the nature of the company's business, and the measure of authority delegated to him by the board of directors.

with all lawful power to carry on its business, may give notes for an amount paid at his request to save the corporation from a law-suit. *Sealey v. San José Independent M. & L. Co.* 59 Cal. 22.

To transfer negotiable paper.

The indorsement of notes is not within the power of the president of a corporation under by-laws merely conferring power to preside at meetings of the board of trustees. *Fifth Nat. Bank of Providence v. Navassa Phosphate Co.* 6 N. Y. Supp. 1.

The president of a bank has no authority as such to sell notes belonging to the bank. *First Nat. Bank of Central City v. Lucas*, 21 Neb. 280.

The president of an insurance company cannot indorse its notes without authority expressly given or implied from habitual exeroise thereof. *Marine Bank v. Clements*, 3 Bosw. 600.

The president of an insurance company is presumed to have authority to indorse its notes where it is the usual custom of the corporation to transfer its notes by his mere indorsement. *Clark v. Titcomb*, 42 Barb. 125; *Scott v. Johnson*, 5 Bosw. 213.

By-laws authorizing the president of an insurance company to adjust and pay losses give him power to transfer and dispose of its funds including negotiable paper for that purpose. *Baker v. Cotter*, 45 Me. 236.

So the president of a mutual insurance company, who is authorized by the by-laws to make contracts and transact the ordinary business of the company, may transfer a premium note without a previous resolution of the board of directors. *Howland v. Myer*, 3 N. Y. 290, affirming *Aspinwall v. Meyer*, 2 Sandf. 180; *Caryl v. McElrath*, 3 Sandf. 176.

Under a resolution for the sale of bonds at a certain price, the president of a railroad company has no power to loan them. *Second Ave. R. Co. v. Mehrbach*, 17 Jones & S. 267.

A general power to the president of a corporation to borrow money includes authority to transfer the ordinary securities such as bonds for the sum borrowed. *Hatch v. Oodington*, 95 U. S. 48, 24 L. ed. 839.

See also *infra* as to vice-president.

The president of a railroad company may be authorized by resolution or by habit and course of business to transfer its negotiable paper. *Mitchell v. Deeds*, 49 Ill. 416, 95 Am. Dec. 621.

So he has the right to indorse and assign notes and mortgages given to it to aid in its construction, where he is the financial agent of the company to make negotiations of its assets to raise money. *Irwin v. Bailey*, 8 Biss. 523.

Employment of agents.

See also *infra* as to vice-president.

The president and secretary of a cattle and land company, under authority to purchase ranches with the horses and stock thereon, have power to give stock of the company as a commission for procuring a loan to make such purchase. *Arapahoe C. & L. Co. v. Stevens*, 18 Colo. 534.

The president, who is the general manager of a coal and mining company, the business of which was mining, shipping and selling coal, is presumed to have authority to create an agency for the sale

of the coal. *Lee v. Pittsburgh Coal & Min. Co.* 56 How. Pr. 873.

The president of a mining company, who is permitted for years to hold himself out to the world as the general manager and director of its business, has authority to appoint an agent for the sale of coal at a distance from the company's headquarters and give him authority to indorse paper taken on the sale of coal as an agent of the company. *Marine Bank v. Butler Colliery Company*, 23 N. Y. S. R. 319.

The president of a bank has implied authority to agree that a certain person shall as agent receive payment of a note at another place than that designated in the note. *Vilas Nat. Bank v. Straff*, 2 New Eng. Rep. 112, 58 Vt. 448.

The acting president of a railroad company, to whom the secretary refers a broker to answer an advertisement for a sale of old rails, has presumed authority to promise commissions on the sale thereof. *Northern Cent. R. Co. v. Bastian*, 15 Md. 494.

But the president of a railroad company has no implied authority to give a power of attorney for the sale of its bonds. *Titus v. Cairo & F. R. Co.* 37 N. J. L. 98.

As to transfers of property.

The president of a manufacturing corporation, who under authority of its by-laws was also treasurer and general superintendent with the general supervision and management of its affairs and power to make all contracts except when otherwise provided by the by-laws, has power to assign accounts to a bank as collateral security for existing and future indebtedness. *Preston Nat. Bank v. Geo. T. Smith Middlings Purifier Co.* 84 Mich. 364.

But the president and cashier of a canal and banking company whose management is vested in directors have no implied authority to assign the choses in action of the corporation to a creditor as security for a precedent debt. *Hoyt v. Thompson*, 5 N. Y. 320.

The president of a railroad company has as such no implied authority to sell and dispose of its personal property in payment of its debts. *Walworth County Bank v. Farmers Loan & T. Co.* 14 Wis. 323.

The president of a mining company cannot bind it in respect to the sale of stock which has been directed to be sold by an agent. *Crump v. United States Min. Co.* 7 Gratt. 352, 56 Am. Dec. 116.

The president of a bank has no implied power to sell a safe. *Asher v. Sutton*, 51 Kan. 236.

A conveyance of land for the benefit of creditors cannot be made by the president on behalf of a bank without express authority. *McKeag v. Collins*, 2 West. Rep. 499, 87 Mo. 164.

Under by-laws providing that the president of a corporation shall execute leases or other instruments required to be made or executed by authority of the board, he has no power to make a lease or an agreement for a lease of real estate. *Koch v. National Union Bldg. Assn.* 36 Ill. App. 465.

The president of a canal company has no power as such to purchase or sell real property. *Bliss v. Kaweah C. & I. Co.* 65 Cal. 562.

The president and secretary of the board of trustees of an educational institution have no implied power to make a deed of its real estate. *Mott v. Danville Seminary*, 129 Ill. 408.

Walworth County Bank v. Farmers L. & T. Co. 14 Wis. 325.

The case of *Smith v. Smith*, 69 Ill. 493, cited by plaintiff, comes from the State of Illinois, which is solitary and alone in its announcement on this matter.

Cook, Stock & Stockholders, § 716.

In this State, the legal head of the corporation is the board of directors, by statute.

The president and cashier of a bank have as such no power to execute a mortgage or conveyance of its real estate. *Leggett v. New Jersey Mfg. & Bkg. Co.* 1 N. J. Eq. 541.

But where the resolution of a development company gave the president power to convey town lots to "purchasers at his discretion" he was authorized to make a conveyance as a donation for county buildings. *State v. Glenn*, 18 Nev. 34.

As to mortgages.

A by-law giving the president of a railroad company power to act as its business and financial agent does not authorize him to mortgage a locomotive to secure a corporate debt. *Luse v. Isthmus Transit Ry. Co.* 6 Or. 125.

The president, who is also treasurer and general manager of a manufacturing company, has no implied authority to mortgage all the personal property of the corporation, although he owned nearly all the stock. *England v. Dearborn*, 2 New Eng. Rep. 567, 141 Mass. 500.

A mortgage of all the personal property of a corporation except its book accounts to secure payment of a pre-existing debt is not within the implied powers of the president and treasurer without authority of the directors. *England v. Dearborn*, 2 New Eng. Rep. 567, 141 Mass. 500.

But the authority of the president of a manufacturing corporation to execute a mortgage may be inferred from the conduct or acquiescence of the directors. *Sherman v. Fitch*, 98 Mass. 59.

A resolution authorizing the president and secretary of a mining company to borrow money on a mortgage to pay debts will not authorize them to make a mortgage to the president to pay claims against the company which had been bought by his firm. *Davis v. Rock Creek, L. F. & M. Co.* 55 Cal. 359, 36 Am. Rep. 40.

A mortgage executed by the president and secretary of a mining company without a resolution of the board of directors, though ratified by the holders of two thirds of the stock, is void under a statute providing that the powers of a corporation must be exercised and its property controlled by a board of directors, and the decision of a majority duly assembled shall be valid as a corporate act. *Alta Silver Min. Co. v. Alta Placer Min. Co.* 78 Cal. 429.

As to admissions and representations.

The admissions of the president of a bank cannot create a liability against it. *Henry v. Northern Bank of Ala.* 63 Ala. 327.

The president of a bank has no implied power to bind it by admissions so as to release the maker of a note from his legal responsibility to the bank. *Hodge v. Richmond First Nat. Bank*, 22 Gratt. 51.

But the admission of the president of a corporation, who manages its business affairs, as to the correctness of an account and his promise to pay it are binding on the corporation. *Dobbins v. Pyrolusite Manganese Co.* 75 Ga. 460.

The admission of the president of a railroad company at its main office on refusing to pay a claim upon a contract which he had power to make may be regarded as within the scope of his authority. *Chicago, B. & Q. R. Co. v. Coleman*, 18 Ill. 297.

The president of a railroad company has pre-

Gen. Laws, chap. 148, § 3.

Whoever contracts with the president stands charged with the knowledge that, saving to preside, his duties are confined to those things specified by the by-laws, votes of the directors, and to such matters as by usage and knowledge the directors have sanctioned.

The only source of knowledge of the president's authority, outside of presiding at meet-

sumptive authority to make representations as to the location of the proposed line to persons who are asked to vote a tax for its benefit. *Curry v. Decatur County*, 61 Iowa, 71.

As to settlement or surrender of claims.

The promise of the president of a mining company to pay money borrowed by its superintendent was conceded not to bind the corporation. *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565.

The president of a loan and trust company has presumptive power to settle with an agent who has been employed for many years in which he has dealt with the president alone. *Farmers Loan & T. Co. v. Mann*, 4 Robt. 356.

The president of a bank has as such no power to make an accord and satisfaction. *First Nat. Bank of Wellsburg v. Kimberlands*, 16 W. Va. 578.

But under ordinary circumstances he has power to receive payment of a note or of a judgment recovered upon it on behalf of the bank and give a satisfaction of such judgment. *Booth v. Farmers & M. Nat. Bank*, 50 N. Y. 396.

The president of a quarry company, who is in the habit of making sales and collections, may satisfy a debt by taking a note payable to him "or order" in "full satisfaction." *Dougherty v. Hunter*, 54 Pa. 380.

The refusal of the president of a mining corporation to accept a tender of money at the office of the company during business hours is the act of the corporation. *Mitchell v. Vermont Copper Min. Co.* 67 N. Y. 230.

The president, who is also the superintendent of a corporation, with power to buy and sell material and make all contracts for the same and for work, has authority to make a valid release of a contract for the sale of its manufactures. *Indianapolis Rolling Mill Co. v. St. Louis, Ft. S. & W. R. Co.* 120 U. S. 253, 30 L. ed. 539.

But unrestricted authority to the president and cashier of a bank to do its business does not include power to surrender a note owned by the bank for an individual debt of one of them. *Rhodes v. Webb*, 24 Minn. 233.

And an agreement by them that the indorser of a note shall not be liable upon it to the bank does not bind the bank. *Bank of United States v. Dunn*, 31 U. S. 6 Pet. 51, 8 L. ed. 816.

Nor has the president of a bank any authority to promise that the maker of paper which he discounts need not pay it, or that the bank will not enforce it against him. *First Nat. Bank of Whitehall v. Tisdale*, 18 Hun, 151.

Neither has the president of an insurance company any power to agree that a premium note shall be surrendered at maturity. *Brouwer v. Appleby*, 1 Sandf. 159.

But the president of a bank taking a new note in settlement of matured paper acts within the apparent scope of his authority so as to bind the bank. *Cake v. Pottsville Bank*, 6 Cent. Rep. 392, 116 Pa. 284.

And the president of an insurance corporation has power to extend the time for redemption on foreclosure of a mortgage upon property in a state distant from the company's headquarters. *Union Mut. L. Ins. Co. v. White*, 108 Ill. 67.

ings, was in the by-laws, and the votes of the directors.

The evidence was competent as in harmony with Gen. Laws, chap. 148, § 3, and even though it had limited the management more than the general law, it might have been competent as one piece of evidence, not controlling, to be given to the jury with proper qualifications in the instructions.

Mahoney Min. Co. v. Anglo-California Bank, 104 U. S. 192, 26 L. ed. 707; *Commercial Mut.*

M. Ins. Co. v. Union Mut. Ins. Co. of N. Y. 60 U. S. 19 How. 822, 15 L. ed. 684.

The powers of a corporation shall be exercised in the manner provided by Gen. Laws, chap. 148, § 3.

Charlestown Boot & Shoe Co. v. Dunsmore, 60 N. H. 85.

It must be shown, moreover, that the business has been actually confided to an officer by vote or well recognized usage.

Cochecho Nat. Bank v. Haskell, 51 N. H. 121.

The president of an insurance company has power to bind it in waiving conditions in a policy. *Hayner v. American Popular L. Ins. Co.* 3 Jones & S. 206.

But under a statute providing that he with one third of the directors shall constitute a quorum and transact business, he has no power to dispense with the preliminary proofs of loss. *Dawes v. North River Ins. Co.* 7 Cow. 462.

The president and secretary of a hydraulic company have authority to agree for the corporation on an arbitration as to damages for the flowage of land by its dam. *Fitch v. Constantine Hydraulic Co.* 44 Mich. 74.

As to litigation and employment of attorneys.

In the absence of proof to the contrary, it must be assumed that the president of a bank was duly authorized to institute and carry on a legal proceeding to enforce a claim of the bank. *Mumford v. Hawkins*, 5 Denio, 355.

The president of a manufacturing company, who is also a trustee, may bring an action in the name of the company without authority of the board of trustees, to prevent or obtain an accounting for the conversion of corporate funds by a majority of the trustees. *Recamier Mfg. Co. v. Seymour*, 5 N. Y. Supp. 648.

The president of a water company has authority to institute a suit for an injunction against the use of water belonging to the company. *Reno Water Co. v. Leete*, 17 Nev. 203.

The president of an oil and land company, doing a large amount of business in which frequent litigations are necessary, has implied authority to employ counsel to obtain a writ of error from a judgment against the corporation and also to dismiss such writ of error. *Colman v. West Virginia O. & O. L. Co.* 25 W. Va. 148.

On the other hand, it is held that the president of a manufacturing company has no authority as such to commence an action in the name of the corporation. *Asbuelot Mfg. Co. v. Marsh*, 1 Cush. 507.

The president of a corporation (infant asylum), who is shown to control litigation of the corporation, has power to employ an attorney for the company. *Potter v. New York Infant Asylum*, 44 Hun. 367.

The employment of an attorney by the president of a bank was held sufficient without any formal resolution of the board of directors, where the court was satisfied that the directors must have been aware of the proceedings taken by the attorney. *American Ins. Co. v. Oakley*, 9 Paige, 425, 4 L. ed. 789, 38 Am. Dec. 551.

The employment of attorneys for a corporation is within the power given to its president by by-laws making it his duty to exercise a general supervision over its entire business, and providing that all the property of the company shall be under his control. *Wetherbee v. Fitch*, 4 West. Rep. 280, 117 Ill. 67.

The president of a railroad company can bind it by employing attorneys without any contract. 14 L. R. A.

der seal or other formal action by the directors. *Davis v. Memphis City R. Co.* 22 Fed. Rep. 963.

On the other hand, it has been held that the president of a cemetery association cannot, without authority of the board of directors, employ an attorney to relieve the corporation by legal proceedings from the payment of a drainage tax. *Bright v. Metairie Cemetery Asso.* 36 La. Ann. 58.

And the president of a savings bank cannot authorize an attorney to accept service on the bank when the corporation is accustomed to appoint attorneys by vote of the directors. *Bridgeport Sav. Bank v. Eldredge*, 28 Conn. 556.

The president of a bank in employing an agent to bring suit upon a draft deposited with the bank for collection is not the agent of his own bank so as to render it liable to such attorney for false representations of the president. *Ryan v. Manufacturers & M. Bank*, 9 Daly, 808.

The president of a corporation has not implied authority to confess judgment against it or execute a warrant of attorney empowering another so to do. *Joliet Electric L. & P. Co. v. Ingalls*, 23 Ill. App. 45; *Stokes v. New Jersey Pottery Co.* 46 N. J. L. 237; *Thew v. Porcelain Mfg. Co.* 58 C. 415.

Neither have the president and treasurer together. *Adams v. Cross Wood Print. Co.* 27 Ill. App. 313.

But in one case it was held that the president of a mining company being the proper person on whom to serve process and to defend an action might confess judgment therein where it was commenced by process. *Chamberlin v. Mammoth Min. Co.* 20 Mo. 96.

In a later case in the same State a judgment confessed on a note by the president of a corporation without service of process and without stating the consideration was said to be void, but without stating the reason. *McMurray v. St. Louis Oil Mfg. Co.* 33 Mo. 377.

Vice-president.

The vice-president of a corporation may act on the death of the president, although the law does not expressly provide for any vice-president, but mentions simply a president and other officers. *Colman v. West Virginia O. & O. L. Co.* 25 W. Va. 148.

The vice-president of a corporation may act as president in signing a deed if there is no president. *Smith v. Smith*, 62 Ill. 493.

The vice-president of a corporation has no implied power to appoint agents to protect its lands or to sell its lands and timber. *Chicago & N. W. R. Co. v. James*, 22 Wis. 194.

But where he has for years been in the habit of appointing local agents to look after its timber lands he may be presumed to have authority to appoint such an agent. *Chicago & N. W. R. Co. v. James*, 24 Wis. 383.

The vice-president of a bank authorized to pay its debts and give security for such debts, when authorized by law, has power to turn over collateral securities to a county treasurer as security for a deposit of public moneys. *Richards v. Osceola*, 79 Iowa, 707.

R. A. R.

Blodgett, J., delivered the opinion of the court:

The plaintiffs have no ground of complaint, for, even if the by-laws were improperly admitted for the purpose of showing that the president had no power to make contracts in its behalf without the sanction of the directors, it does not show sufficient cause for setting aside the verdict. The evidence for the plaintiffs simply tended to show that they were employed by the president to prepare plans and specifications for the proposed armory, and that he assumed to act for the corporation, but there was no evidence that the corporation in any way authorized him to procure such plans and specifications, nor was there any evidence of such authority on his part from any source unless it could be implied from his office. But no such authority is incident to the office. The directors, and not the president, have the powers of the corporation, and exercise an original, rather than a delegated, authority; and the president has no implied authority, as such, to act as the agent of the corporation, but, like other agents, he must derive his power

from the board of directors, or from the corporation. Gen. Laws, chap. 148, § 8; *Morrill v. Boston & M. R. Co.* 58 N. H. 68; *Charlestown Boot & Shoe Co. v. Dunsmore*, 60 N. H. 85, 86; *Goodspeed v. East Haddam Bank*, 22 Conn. 580-558; *Mahone v. Manchester & L. R. Corp.* 111 Mass. 75; *Walworth County Bank v. Farmers L. & T. Co.* 14 Wis. 325; *Titus v. Cairo & P. R. Co.* 37 N. J. L. 98, 102; *Burrill v. Nahant Bank*, 3 Met. 163; *Mt. Sterling Turnp. R. Co. v. Looney*, 1 Met. (Ky.) 550; *Pierce, Railroads*, 82-84; 2 Morawetz, Priv. Corp. § 587; *Cook, Stock & Stockholders*, § 716.

The by-law put in evidence was therefore but the statement of the general rule of law which obtains in such cases, and, if wrongly admitted, it is not susceptible of perception how the verdict could have been improperly influenced or the plaintiffs in any manner prejudiced by putting in evidence precisely what the jury must have been instructed as matter of law if the evidence had been excluded.

Exceptions overruled.

Clark, J., did not sit; the others concurred.

WISCONSIN SUPREME COURT.

F. E. ALLEN, *Reppt.*,

v.

William A. WEBER *et al.*, *Appts.*

(.....Wis.....)

1. A boundary described as running "to low-water mark, thence northerly along the low-water mark" of a pond or river, fixes that mark as the permanent boundary and does not convey any land below the water mark.
2. A statute declaring a stream to be navigable cannot affect the existing rights of individuals as fixed by their deeds.
3. That the object of the purchase of a strip of land was to build ice-houses thereon cannot affect the construction of the deed so as to extend the boundary below low-water mark where it is expressly fixed by the language of the deed.
4. The reservation of the right of flowage on conveyance of land bounded by low-water mark and bordering on a dam does not imply any extension of the boundary below such mark where there is a margin between high and low water marks to which the right of flowage may apply.

(November 17, 1891.)

A PPEAL by defendants from a judgment of the Circuit Court for Waukesha County in favor of plaintiff in an action brought to enjoin defendants from cutting ice upon a certain pond and for an accounting of profits realized from ice cut and sold. *Affirmed.*

The facts sufficiently appear in the opinion. *Meurs. Ryan & Merton*, for appellants:

When lands conveyed by deed extend to and cover the banks of a navigable stream, the presumption is that the intention was to convey all of the rights of the grantors to the bed of the stream to the center thereof.

Jones v. Pettibone, 2 Wis. 308; *Wright v. Day*, 38 Wis. 280; *Pettibone v. Hamilton*, 40 Wis. 402; *Kneeland v. Van Valkenburgh*, 46 Wis. 487, 32 Am. Rep. 719; *Norcross v. Griffiths*, 65 Wis. 599, 56 Am. Rep. 642; *Dovaston v. Pain*, 2 H. Bl. 527, 2 Smith, Lead. Cas. 4th Am. ed. 90; *Codman v. Evans*, 1 Allen, 446; *Bay City Gas Light Co. v. Industrial Works*, 28 Mich. 188.

Even if Fox River was not a navigable stream it does not change the rule which we contend for in connection with navigable streams. It is held that a grant of land bounded by a non-navigable stream extends to the thread of the stream.

Norcross v. Griffiths, 65 Wis. 599, 56 Am. Rep. 642; *Ex parte Jennings*, 6 Cow. 518, 16 Am. Dec. 447; *Case v. Haight*, 3 Wend. 635; *Canal Comrs. v. People*, 5 Wend. 448; *People v. Canal Appraisers*, 13 Wend. 371; *Starr v. Child*, 20 Wend. 152; *Walton v. Tift*, 14 Barb. 219; *Lowndes v. Dickerson*, 34 Barb. 592; *Farrick v. Smith*, 5 Paige, 143, 3 L. ed. 663, 28 Am. Dec. 417; *Ingraham v. Wilkinson*, 4 Pick. 269, 16 Am. Dec. 842; *Home v. Richards*, 4 Call. 441, 2 Am. Dec. 574.

The appellants had the right to use the river for fishing, fowling, rowing, skating, cutting ice for use or sale.

Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 830; *Hittinger v. Eames*, 121 Mass. 539; *Gage v. Steinkrauss*, 131 Mass. 322; *Rosell v. Doy's*, 181 Mass. 474; *People's Ice Co. v. Davenport*,

NOTE.—As to ownership of ice in its natural state on the river or pond where it formed, see note to *Brown v. Cunningham* (Iowa) 12 L. R. A. 583.

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As to effect of bounding a grant of land on a stream, see note to *Chandee v. Mackay* (Wis.) 10 L. R. A. 207.

149 Mass. 322; *Brastow v. Rockport Ice Co.* 77 Me. 100; *Woodman v. Pitman*, 79 Me. 456, 1 Am. St. Rep. 842; *State v. Pottmeyer*, 83 Ind. 402, 5 Am. Rep. 224; *Mill River Woolen Mfg. Co. v. Smith*, 84 Conn. 462; *Marshall v. Peters*, 12 How. Pr. 218; *Myer v. Whitaker*, 55 How. Pr. 876; *Higgins v. Kusterer*, 41 Mich. 318, 32 Am. Rep. 160; *People's Ice Co. v. The Excelsior*, 44 Mich. 329, 38 Am. Rep. 246; *Paine v. Woods*, 108 Mass. 178; *Gage v. Steinkrauss*, 181 Mass. 222; *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196.

Mr. C. E. Armin, for respondent:

It is a fact, notwithstanding the Act of the Legislature, that the Fox River from Waukesha to Waterford is not a navigable stream in the true sense of that term, and would not during much of the year float a birch-bark canoe, and it cannot be presumed that the sole object of the Legislature was to interfere with vested rights. The Legislature cannot, by declaring a non-navigable stream navigable, divest previously acquired rights without compensation.

Morgan v. King, 85 N. Y. 458, 91 Am. Dec. 58, and cases cited in note to same.

The ownership of lands on the bank and under the water next thereto, may be several.

Smith v. Ford, 48 Wis. 159.

When a call in a deed carried the line east to Pine Creek; thence northeasterly up the west bank of Pine Creek to the place of beginning,—held the land conveyed only extended to the west bank of the creek and not to the middle of the stream.

Murphy v. Copeland, 51 Iowa, 515, 58 Iowa, 409, 43 Am. Rep. 118, and cases there cited.

One whose premises are bounded by the bank of a river is not a riparian proprietor and has not the rights of one.

Greene v. Nunnemacher, 36 Wis. 50.

Bounds along or to a bank exclude river bed.

Halsey v. McCormick, 18 N. Y. 296; *People v. Madison County Supra*, 125 Ill. 9.

Conveyances of land covered by a mill-pond as far as high-water mark cover all of the bed overflowed.

Jones v. Parker, 99 N. C. 18.

A non-navigable inland lake is the subject of private ownership, and when it so owned neither the public nor an owner of adjacent lands whose title extends only to the margin thereof, has a right to boat thereon or to take fish from its waters.

Lembeck v. Nye, 8 L. R. A. 578, 47 Ohio St. 336.

Where in the conveyance of a mill-lot beginning, etc., and running eastwardly to the Genesee River; thence northwardly along the shore of said river to Buffalo Street, etc.,—held, that no part of the bed of the river passed under the conveyance, but that the grantee took only to low-water mark.

Child v. Starr, 4 Hill, 369; *Halsey v. McCormick*, 18 N. Y. 296; *Cook v. McClure*, 58 N. Y. 437, 17 Am. Rep. 270.

Ice formed on water belongs to the owner of the stream or to the riparian owners in proportion.

Brantley, Pers. Prop. § 98; *Lawson*, Rights, Rem. & Pr. § 1845.
14 L. R. A.

Orton, J., delivered the opinion of the court:

The respondent is the owner of that part of the N. E $\frac{1}{4}$ of section 3, township 6, range 19 E., which is known as the "Saratoga Mills Property," at Waukesha, and of that portion of the mill reserve and water used in connection therewith on the Fox River not heretofore conveyed to others. The appellants are the owners of a strip of land containing about two acres on the westerly side of the mill-pond of the plaintiff, on which they have erected an ice-house for the storage of ice cut from Fox River or said mill-pond, for the use of Bethesda Brewery, and for other purposes. This strip is described in their deeds as follows: "Beginning at a point on the center of Union Street, where the same presumably intersects the easterly line of lot 4, in the northwest addition to the plat of Prairieville [now village of Waukesha]; thence running easterly on the continuation of the center line of Union Street to low-water mark, on the west side of Fox River; thence running northerly along the low-water mark on the said westerly side of Fox River to the town line, where said town line presumably intersects and divides the towns of Pewaukee and Waukesha; thence running west along the said town line to the northeast corner of block X; thence southerly along the east line of said block X, and southerly along the corner of said block X (or the center of Union Street), being the place of beginning; containing two acres, be the same more or less." The respondent brings this suit to restrain the appellants from cutting ice on said mill-pond, and for an accounting of ice already taken away from said pond. His action is predicated upon his ownership of the bed of the river or pond, and to low-water mark on the west side thereof, the east line of the appellants' land. The appellants defend (1) as the owners of the fee in the soil covered by the river or pond to the center thread thereof, by virtue of the above description of their strip of land on the west side of said river or pond; (2) as riparian owners of the shore of said river or pond as a navigable stream; (3) on the ground that the purchase and ownership of the said strip of land were solely for the purpose of building ice-houses thereon, and to obtain ice from said pond. The judgment is that the plaintiff is the owner in fee of all that portion of the bed of Fox River embraced within the limits of the mill reserve in the town of Waukesha, and was at the commencement of the action, and that the east boundary of the lands owned by the defendants upon the west side of Fox River is limited to low-water mark upon the westerly side of Fox River, and that by the conveyance they took no title in fee as riparian proprietors to any part or portion of the bed of said Fox River easterly from the line fixed in said deed as low-water mark, on the west side of Fox River. It is further adjudged that the plaintiff recover of and from the defendants his damages, assessed at the sum of six cents, and his costs, etc., and that the injunction be dissolved. The mills and mill-pond at Waukesha are so ancient that in all the later conveyances the pond is called the "Fox River" at that place, and the low-

water mark of the river means the low-water mark of the pond. The above-stated defenses constitute the points made by the learned counsel of the appellants on this appeal from the above judgment, and they will be considered in their order.

1. The above description in the conveyances to the appellants makes their strip of land extend to the center of the pond. The description of their east line is peculiar. It is "the continuation of the center line of said Union Street to the low-water mark on the west side of Fox River; thence northerly along the low-water mark on the said westerly side of Fox River to the town line," etc. The doctrine asserted by the learned counsel, that as to lands which extend to and cover the banks of navigable streams, the presumption is that it was the intention to convey all the rights of the grantors to the bed of the stream to the center thereof, is undoubtedly correct. But this a mere presumption, and may be rebutted by the strong language of the deed, clearly indicating the intention to establish the line at the margin of the stream. There could be no language of description more clearly indicating the exact line than is found in the conveyances of this strip of land: "To low-water mark; thence northerly along the low-water mark." This language could have no other meaning than to indicate the intention of the grantors to limit the premises, and establish their boundary at that line "along low-water mark." In principle this case is decided in *Greene v. Nunemacher*, 86 Wis. 50. That was a case for abatement of the nuisance created by a distillery. One part of the damages was for corrupting the waters of the Kinnickinnic River, and rendering them unfit for use by the plaintiff as a riparian proprietor on said river. The deed by which the plaintiff held his premises described his land as "running along the bank" of said river. The present chief justice said in his opinion: "For, according to the description of the premises as given in the deed, there is reason for saying that they are limited to the river bank, and do not in fact include the bed of the stream or the waters of the same." Chief Justice Ryan, then at the bar, was counsel for the appellant, and cited the following authorities to the point that the description of plaintiff's land limits the same to the bank of the creek: *Ang. Watercourses*, §§ 8, 26; *Cary v. Daniels*, 5 Met. 236; *Crittenton v. Alger*, 11 Met. 281; *Starr v. Child*, 20 Wend. 149, 4 Hill, 869; *Hatch v. Dwight*, 17 Mass. 289, 9 Am. Dec. 145; *Starr v. Child*, 5 Denio, 599. This shows that the point was well considered by the court. The language "along the bank" is not as certain and specific as the language "along low-water mark."

In the following cases the line is limited by the description, and no part of the bed of the stream is conveyed: "Thence northeasterly up the west bank of Pine Creek." *Murphy v. Copeland*, 51 Iowa, 515, 58 Iowa, 409, 43 Am. Rep. 118, and cases cited. "To and along the bank." *Halsey v. McCormick*, 13 N. Y. 296; *People v. Madison County Supra*, 125 Ill. 9. "As far as high-water mark," is the outer line of the overflow of a mill-pond, so described in the conveyance. *Jones v. Parker*, 99 N. C. 18. "To the Genesee River; thence northwardly

along the shore of said river." *Starr v. Child, supra*. In *Murphy v. Copeland, supra*, it was held that "along the bank" was equivalent to "along low-water mark;" and the same in *Halsey v. McCormick, supra*. In *Cook v. McCure*, 58 N. Y. 487, 17 Am. Rep. 270, the language is: "To a stake near the high-water mark of the pond, running thence along the high-water mark of said pond to," etc.—and it was held that the line was limited at high-water mark, and would not extend even to low-water mark. This case is exactly in point. In *Bradford v. Cressey*, 45 Me. 9, the language is: "Thence east until it strikes the creek on which the mill stands; thence southwesterly on the west bank of said creek," and it was held that "the grantee was restricted to the bank of the creek." The line so described is a monument and fixed boundary. *Ang. Watercourses*, § 25. From the language of the description of the defendants' strip of land itself, it is perfectly clear that low-water mark was made a fixed and permanent boundary. If the situation of the strip on the pond is consulted, that would evince the same intention. It was contiguous to a very old mill-dam, belonging to the grantors, now called the "Fox River" at that point. It was not likely that it was intended to give the grantees of this strip any interest in the waters of the pond, or any control over the water-power, or interference with it. Such a situation of the strip clearly indicates the intention to so limit the eastern line to low-water mark, and not have it extend *ad flum aquae* of the pond. Such a reason was held to prevail in *Smith v. Ford*, 48 Wis. 115. The owners of the water-power and mill-dam are the only riparian proprietors of the land covered by the pond to low-water mark on the west, and therefore owned the ice formed on the pond. *Brantley, Pers. Prop.* § 98; *Lawson, Rights, Rem. & Pr.* § 1845.

2. The declaration made by the Legislature of 1863, that Fox River is a navigable stream, could not possibly affect the rights of the owners of the dam, acquired long before, or make the dam navigable, or any other part of Fox River, in any other sense than mere theory. The defendants' rights are fixed by their deeds, and that Act certainly could not change them in the least.

3. The object of the purchase of the strip,—to build ice-houses on it,—would not imply ownership of the ice, for he could procure from the owner the right to cut ice on the pond, or buy the ice cut by others, and fill his ice-house in that way. But at best such a purpose would not affect the deed, or the natural construction of its language. Deeds would be very inconclusive if they were to be governed by the use the purchaser intended to make of the land. Such a use might require twice the quantity of the land conveyed, with a complete change of its boundaries.

4. It is contended that a reservation in the first deed of this strip of the right of flowage by the owner of the dam indicates an intention to convey to the center of the pond. By that reservation the grantor reserved the right to flow the whole strip, and not merely the land thus covered by the pond. But there is a margin between high and low water marks the grantor reserved the right to flow, which

would be entirely consistent with the grantees' line being limited to low-water mark. That reservation need not affect the construction of the deed in respect to its conveyance to the center of the pond, for it would have full and

complete operation and effect over the land granted. We can find no error in the record. The judgment is evidently correct.

The judgment of the Circuit Court is affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Clarkson A. COLLINS, Guardian, etc., of
Gardner T. Voorhees *et al.*, *Appts.*,

Charles E. VOORHEES, *Rept.*

(.....N. J. Eq.....)

A continuance of cohabitation after the removal of an obstacle to a valid marriage will not be sufficient to constitute such a

marriage where the cohabitation began under an illegal marriage entered into in good faith by one of the parties only.

(November Term, 1890.)

A PPEAL by defendants from a decree of the Chancery Court advised by *Vice-Chancellor* Van Fleet in favor of complainant in a proceeding brought to obtain possession of a por-

NOTE.—Cohabitation as proof of marriage where it begins unlawfully.

The presumption is that a connection which was meretricious in the beginning continues so. *Clayton v. Wardell*, 4 N. Y. 230; *Ferrall v. Broadway*, 95 N. C. 651; *Reading Fire Ins. & T. Co. v. Riegel*, 4 Cent. Rep. 678, 113 Pa. 204, 57 Am. Rep. 448; *Thompson v. Thompson*, 114 Mass. 568.

But this presumption is not conclusive. *White v. White*, 7 L. R. A. 799, 82 Cal. 427; *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677; *Rose v. Clark*, 8 Paige, 574, 4 L. ed. 548; *Re Taylor*, 9 Paige, 611, 4 L. ed. 836; *Caujolle v. Ferrie*, 23 N. Y. 90.

The rule amounts to this,—that evidence of a change in the relations is necessary where the connection was illicit at first, and that a mere continuance of cohabitation will not raise a presumption of marriage. *Dysart Peerage Case*, L. R. 6 App. Cas. 539; *Harbeck v. Harbeck*, 3 Cent. Rep. 490, 102 N. Y. 714; *Fagan v. Fagan*, 32 N. Y. S. R. 994; *Rundle v. Pegram*, 49 Miss. 751; *Floyd v. Calvert*, 53 Miss. 37; *Barnum v. Barnum*, 42 Md. 297; *Jones v. Jones*, 45 Md. 144.

A few cases hold that an actual contract of marriage is necessary to change the character of cohabitation which was illicit at the beginning. *Williams v. Williams*, 46 Wis. 464, 32 Am. Rep. 732; *Reading F. Ins. & T. Co. v. Riegel*, 4 Cent. Rep. 678, 113 Pa. 204, 57 Am. Rep. 448; *Hunt's App.* 86 Pa. 294.

But according to the weight of the authorities this should not be held to require a ceremonial marriage, or anything more than presumptive proof of a marriage in fact. In many cases it is held that proof of circumstances and of the holding out of the parties as husband and wife may establish a marriage although the connection was originally illicit. *Bond v. Bond*, 2 Lee, 45, 6 Eng. Eccl. Rep. 28; *Physick's Estate*, 2 Brewst. 179; *Jones v. Jones*, 45 Md. 144; *Cargile v. Wood*, 63 Mo. 501.

Thus where parties were openly living together as husband and wife and recognized as such by all who had either social or business relations with them, and a child born to them was acknowledged by the father as his daughter, a marriage was held to be established although their connection was purely licentious at the beginning. *Gall v. Gall*, 114 N. Y. 109.

And this is so although the circumstances fail to show when or how the change from concubinage to matrimony took place if the circumstances show that a change in fact has taken place. *Caujolle v. Ferrie*, 23 N. Y. 90; *Badger v. Badger*, 38 N. Y. 546, 42 Am. Rep. 233.

In two cases, however, it is said, although perhaps not exactly decided, that it must be proved when and how the character of the illicit connec-

tion was changed. *Barnum v. Barnum*, 42 Md. 297; *Cargile v. Wood*, 63 Mo. 501.

A change of residence may be shown to be the beginning of a new relation, although the connection of the parties was previously illicit. *Cargile v. Wood*, *supra*; *Yates v. Houston*, 3 Tex. 433; *Bonds v. Foster*, 36 Tex. 63.

In such a case where the relation was unlawful at the beginning but after the removal of the parties to a different place the woman was treated in all respects as a wife and the parties lived together as husband and wife for years having several children born to them, a marriage was presumed. *White v. White*, 7 L. R. A. 799, 82 Cal. 427.

Living together as man and wife for one week prior to the man's death with the explicit intention of having a marriage ceremony performed the next week, which was prevented by his death, does not show a valid marriage. *Grimm's App.* 6 L. R. A. 717, 131 Pa. 199.

And a meretricious connection continued on a mere promise to marry upon some future condition will not constitute a valid marriage. *Turpin v. Public Administrator*, 2 Bradf. 424.

After removal of impediment.

A change in the nature of confessedly illicit cohabitation after the death of a lawful husband is known to all parties must be proved, and a mere continuance of the cohabitation is not enough to show a valid marriage. *Lapeley v. Grierson*, 1 H. L. Cas. 468.

Where the connection was confessedly illicit at first, continued cohabitation and reputation of marriage will not be sufficient to prove marriage after a legal impediment thereto is removed by a divorce. *Rose v. Rose*, 12 West. Rep. 497, 57 Mich. 619.

A woman's saying, "To be sure he is my husband good enough," where the parties were advised by a lawyer to marry after the removal of an impediment by the divorce of a former wife, is not sufficient, together with continued cohabitation, to show a valid marriage. *Hantz v. Sealy*, 6 Minn. 405.

Cohabitation with another woman under a pretended marriage by a man having a lawful wife living, which continues after her death, is not enough to prove a valid marriage on which he can establish any rights as husband. *Cram v. Burnham*, 5 Me. 213, 17 Am. Dec. 218.

The circumstances must be sufficient to establish an actual contract of marriage after the removal of the impediment where the illegal relations were based on a promise of marriage as soon as a divorce could be obtained. *Poster v. Hawley*, 3 Hun. 66.

Whether cohabitation in such a case shows a valid marriage after removal of the impediment is a

tion of his grandfather's estate which he claimed by right of representation of his deceased father. *Affirmed*.

This case was originally affirmed without an opinion written for affirmance, and appears in 47 N. J. Eq. 315, where the dissenting opinion of Garrison, J., also appears. A motion for reargument was subsequently made after which the prevailing opinion written by the chief justice and printed below was handed down. The facts sufficiently appear in the dissenting opinion.

Mr. Cortlandt Parker, with *Mr. T. D. Hodges*, for appellants.

Mr. H. E. Richards for respondent.

Beasley, Ch. J., delivered the opinion of the court:

This motion is refused, and the record is ordered to be remitted. Inasmuch as it appears that the counsel has misconceived the ground

on which this case was decided by this court, it seems proper that I should state that ground as it was understood by me. This court was called upon to apply the law to the following facts, viz.: In the year 1867 one Abraham Voorhees brought suit in the Superior Court of Connecticut for divorce against his wife, Camilla, for desertion. This proceeding was a fraud from beginning to end on the part of the plaintiff. No notice of it was given to the wife, who at the time was a resident of this State, and consequently, according to the decision of this court in the case of *Doughty v. Doughty*, 28 N. J. Eq. 581, the decree that ensued was, in this jurisdiction, an absolute nullity. This being the situation, Voorhees married the second time, and the question to be decided was with respect to the validity of this latter marriage. On that subject this court held, in the first place, that inasmuch as the divorce granted in Connecticut was absolutely

question for the jury. *State v. Worthingham*, 23 Minn. 528.

A ceremonial marriage is not necessary to establish a valid contract of marriage after the removal of an impediment thereto, although the intercourse was meretricious in its inception. A lawful marriage may be presumed from the circumstances where the parties are living together as man and wife and holding themselves out as such to their acquaintances. *Hyde v. Hyde*, 3 Bradf. 509; *Donnelly v. Donnelly*, 8 B. Mon. 113; *Blanchard v. Lambert*, 43 Iowa, 228, 22 Am. Rep. 245; *North v. North*, 1 Barb. Ch. 241, 5 L. ed. 370, 43 Am. Dec. 778; *Fenton v. Reed*, 4 Johns. 52, 4 Am. Dec. 244.

An actual marriage may be presumed where there was for twenty-seven years cohabitation, reputation of marriage and good character in society, even if the union began in a marriage which was void, because of a former wife then living but who soon went abroad and was never heard of after. *Jackson v. Claw*, 18 Johns. 346.

So a continuation of a connection illicit at first by living together as husband and wife for many years and after removal to a different State, and after a presumption of the death of a former wife who had gone away and was never heard from was held to show a valid marriage. *Yates v. Houston*, 3 Tex. 433.

And where after the death of her legal husband a woman continued to live with another man as his wife and was recognized by him and his children as such, a marriage was held to be established. *Rose v. Clark*, 8 Paige, 574, 4 L. ed. 548.

A jury may find that a legal marriage existed after thirty years cohabitation as husband and wife, although the original marriage was invalid. *Breakey v. Breakey*, 2 U. C. Q. R. 349.

So whether a subsequent marriage took place after the removal of an impediment by the death of a former husband where the relation was illicit at the beginning, is a question for the jury. *Northfield v. Plymouth*, 20 Vt. 582. See also *State v. Worthingham*, 23 Minn. 528.

The illicit relation of a white man and colored woman may be changed to marriage by their conduct as husband and wife on removal to a State where their marriage will be valid. *Bonds v. Foster*, 36 Tex. 68.

The cohabitation as husband and wife of a white man with a colored woman incapable of lawful marriage with him, if continued after the legal barrier is removed with mutual assent to the relation of husband and wife, makes a valid marriage. *Dickerson v. Brown*, 49 Miss. 367.

Where parties entered into a marriage supposing

that a divorce of one of them from a former marriage had taken effect, but it did not actually take effect until afterwards, and they continued to live together as husband and wife and were so regarded by all their acquaintances, a valid marriage was held established. *De Thoren v. Atty-Gen.* L. R. 1 App. Cas. 686.

Where the marriage was entered into on the faith of a void divorce obtained by the husband, both parties being innocent, a continuance of the cohabitation after a valid divorce obtained by the former wife raises the presumption of a subsequent marriage. *Teter v. Teter*, 88 Ind. 494.

In apparent conflict with some of the above cases is a decision that proof of a subsequent actual marriage is necessary where the connection was at first unlawful, although it began under a pretended marriage in which one party was deceived, and that the mere continuance of cohabitation after the impediment was removed by a divorce will not make it valid. *Hunt's App.* 86 Pa. 294.

Also the lack of knowledge that the impediment is removed has been held to defeat a presumption of marriage from continuance of cohabitation as husband and wife under a void marriage, although one of the parties was ignorant also of the existence of any impediment and believed the marriage lawful. *Rice v. Handlett*, 2 New Eng. Rep. 404, 141 Mass. 285; *O'Garra v. Eisenlohr*, 38 N. Y. 295; *Cartwright v. McGown*, 10 West. Rep. 539, 121 Ill. 339.

And where the solemnization of a marriage before an officer or minister of the gospel is necessary, cohabitation after the barrier is removed will not make a valid marriage although the parties believed it to be legal. *Thompson v. Thompson*, 114 Mass. 568.

Legalized by statute.

The continuation of cohabitation after emancipation and at the date of the South Carolina Act of 1865 makes a valid marriage between former slaves who had entered into an invalid marriage while slaves. *State v. Whaley*, 10 S. C. 500; *Davenport v. Coldwell*, Id. 317.

An illicit connection begun while the man had a lawful wife living under an agreement of the parties to live together until death, is changed, after the legal wife's death, to a valid marriage where they live together as husband and wife and hold themselves out as such to the world, until the adoption of Miss. Const., art. 12, § 22, by which persons living together, cohabiting as husband and wife, are held to be in law married, although there is no new consent or formal ceremony. *Adams v. Adams*, 57 Miss. 267.

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void in this State, such second marriage had no legal force whatever. This was a necessary conclusion, as long as the case just cited remained unreversed. But another question arose. It appeared that after this second marriage the first wife obtained a divorce from her husband, and that subsequently to that occurrence Voorhees cohabited with his so-called "second wife," and treated her before the world as though he were married to her. And it was urged that such cohabitation formed the basis of an inference that there had been an interchange of consent to marriage after the dissolution of the first marriage. This inference was rejected by this court on two grounds: First, that an interchange of consent was not to be deduced from cohabitation accompanied with matrimonial habit and repute, in a case wherein it appeared that the parties had been living together as husband and wife, and by force of a ceremonious marriage, to which, as a valid act, one of the parties, in point of fact, had not assented. The court found as a fact in this case that the husband, Voorhees, knew that he had no legal power or right to contract this second marriage; that he was aware that the divorce fraudulently obtained by him was a nullity. What he did consent to was to deceive the so-called "second wife," and to live with her with the appearance of being married to her. He did not consent to marry her in any legal sense whatever. Under these circumstances, this court decided that his continued cohabitation with this woman, after the obstacle to their marriage had been removed, did not prove that he had changed his original intent, which was to live with her without being legally married to her. It was deemed that cohabitation with habit and repute, being accompaniments of the original status, could not *per se* be taken as proof that a new status had been agreed to by the parties. Voorhees, as just stated, had consented to an illegitimate connection attended with the concomitants of habit and repute. The continuance of such concomitants could not, by their unassisted probative force, lead, with any show of reasoning, to the conclusion that the man, when he was at liberty to form a legal connection with the woman, had embraced the opportunity. To treat evidence which was in all respects and to the utmost degree in accord with the original purpose as proving, *proprio vigore*, a change of such purpose, appeared to be not only inadmissible according to the legal rules, but as being in logic ridiculous. This construction of the evidence, it was believed, stood opposed to but a single case, which is that of *Breadalbane Peckage*, reported in L. R. 2 H. L. 269. The doctrine of that case is supported by nothing that preceded or that has followed it, and is altogether anomalous, and, as it seems to me, it was properly rejected by this court. In that case the court acted upon the principle that, if a man and woman agreed to live together adulterously, with a simulation of marriage, there should be an inference of a subsequent valid marriage from the fact that such simulation had been continued after the death of the husband of the adulteress. Why such an inference is to be thus deduced is not apparent, unless it be for the promotion of adultery. By its prevalence the adulterous

purpose is converted into a matrimonial purpose, without a particle of reasonable evidence in support of the alleged change of intention. Such a course is opposed, as it seems to me, to morals and public policy. Lord Westbury read the opinion in the case, and he has no better reason to offer in favor of the principle adopted than that he can find no ruling the other way. He does not pretend that he can find anything in its favor, and in his remarks he strangely compares the case before him with those instances where the parties intended originally to marry, and not to commit adultery, their intent being frustrated by the existence of some unknown obstacle; and yet it is presumed that no one who will look with any care into the subject will have the slightest doubt that these two classes of cases, with respect to the methods of their proof, respectively, rest upon entirely different foundations; for when the parties have intended marriage, being ignorant of an existing impediment, all that is to be established by cohabitation apparently matrimonial, subsequent to the removal of such impediment, is the carrying into effect by the parties of their original purpose; but, when the original purpose was to live in adultery, the evidence, under similar circumstances, must be sufficient to show an abandonment of such purpose and the execution of a new one. These lines of cases can be confounded only by want of careful observation of the principles upon which they rest. Nor in the present case would the result have been changed if the rule thus rejected had been adopted, for the evidence before the court, reasonably construed, would have been deemed to be opposed to the contention of the appellant. The proofs on the subject amount to demonstration. The second wife was one of the witnesses in the cause, and she testified that she never knew or had the least intimation until after the death of her husband that the validity of their marriage was in any respect called in question; and when she was asked, "Was any other marriage ceremony ever performed, in which you and Abraham Voorhees were the contracting parties?" her answer was, "There was not." Further than this, she was then fully examined by her own counsel, and she made no pretense of any other interchange of consent to marriage between herself and the man she cohabited with except such as had been given at the time of their ceremonious nuptials. Most certainly this evidence, if we apply to it the ordinary legal tests, is entirely conclusive, and absolutely proves that there never was any second marriage, in any form whatever, between these parties. It is to be borne in mind that cohabitation, with matrimonial habit and repute, is, standing alone, nothing more than testimony in proof of marriage; the conduct of the persons to whom it relates does not constitute marriage; and consequently, from its evidential nature, it is liable to be rebutted by other proofs. This, as has been already said, was done in the present instance.

Garrison, J., dissenting:

The attitude of dissenting from the otherwise unanimous opinion of the court, upon so grave a subject as the law of marriage, is so

istasteful that I have expended far more efforts in endeavors to concur than I have in the formulation of these views, which, after all, I find myself constrained to hold.

The question to be determined upon this appeal is the legitimacy of the children of Abraham and Caroline Voorhees, and that, in turn, depends upon whether the relation of marriage existed between their parents.

The claim of these appellants is, that their father and mother were publicly married, and that they afterwards lived together as husband and wife, and were universally and always so reputed. The respondent, on the contrary, asserts that the ceremonial marriage was void, and that, therefore, no presumption of marriage can be drawn from the subsequent matrimonial conduct and reputation of the parties thereto. The court of chancery adopted this latter view, and declared against the legitimacy of the appellants.

The facts are not in dispute. Abraham Voorhees was married to a wife in New Jersey, and had by her one child, a son. After a time Voorhees separated from his wife, taking up his residence in the City of New York, while she remained in this State. Shortly after this separation, Voorhees brought a suit against his wife for divorce in the Superior Court of Connecticut. Notice of the pendency of this suit was mailed to the defendant, addressed to the husband's residence in New York, and, consequently, she did not receive it. A month later a decree of divorce was pronounced. Within a short time Voorhees proposed marriage to a lady who resided in West Newton, Massachusetts, to whom, as evidence of his capacity to contract a lawful marriage, he produced a certified copy of the record of the decree rendered in the courts of Connecticut. A marriage was thereupon consented to, and was solemnized by a public church wedding in the presence of a large congregation of the friends and acquaintances of the parties. Two months later the divorced wife learned, for the first time, of the Connecticut suit, and thereupon made an application to that court which resulted in the opening of the decree of divorce, the filing of a cross-bill against her husband, the annulling of the first decree and the granting of an absolute divorce to the wife upon her cross-suit. Of these proceedings Caroline, who was residing with Voorhees in West Newton, was kept in entire ignorance, and down to the time of his death, which occurred some years later, was openly and unequivocally acknowledged and reputed to be his wife. Two children were the result of this union, both born after the second decree of divorce. Abraham Voorhees died in 1832. The father of Abraham was John F. Voorhees. He, by his last will, had given his residuary estate equally to all his children, the children of a deceased child to take the parent's share. The present contest has arisen upon the filing of a bill in the court of chancery of New Jersey by the son of Abraham by his first marriage, the prayer of which is, that that portion of the grandfather's estate which would have come to the said Abraham Voorhees, if living, be paid over to the complainant as the only lawful child of the said Abraham.

From this statement it is evident that the sole
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question is whether, upon the facts stated, the law raises, in favor of the legitimacy of the appellants, a presumption of marriage between Caroline and Abraham from and after the time when he became capable of lawfully contracting marriage. The court of chancery answered this question in the negative. That decision this court now affirms, for the reasons given by the court below.

The principle of law propounded by the learned judge who heard the case is, that "where an actual marriage is shown, whether legal or illegal, the subsequent cohabitation of the parties and their reputation as husband and wife must necessarily be understood as having had their origin in such marriage, and cannot be treated as presumptive evidence of a second marriage at a later date."

The clearness of the language here employed, and the line of reasoning pursued, permit no doubt as to the precise meaning and force ascribed to presumptions of marriage. The reasoning is this: Marriage may be entered into by mutual consent—that consent will be presumed from conduct and repute in cases where actual consent has not been shown—where an actual contract is shown the parties cannot in fact be supposed to have consented a second time, hence their conduct gives rise to no presumption of marriage. In fine, there can be no presumption of marriage where consent is not a logical inference from the facts proved; and where matrimonial cohabitation commenced by consent it is illogical to refer its continuance to a subsequent consent.

The fallacy of this argument is, that it assumes that the rule by which the law, from matrimonial conduct, presumes matrimonial consent, is a canon of evidence having for its object the ascertainment of whether in point of fact consent was interchanged, and, if so, at what period of time; whereas, it is easily demonstrable that the doctrine in question is founded on public policy and is uniformly applied upon principles other than those which regulate the laws of proof or prescribe the form of the syllogism.

The narrower rule promulgated by the court appears to me to be subversive of this important principle of public law, and to be out of harmony with the entire weight of authority upon this subject.

A somewhat similar view of the law was, it is true, at one time supposed to receive support from the cases of *Re Ounynghame's Settlement*, L. R. 11 Eq. 324, decided in Lord Eldon's time, and *Lapsley v. Grierson* (1 H. L. Cas. 498), which was before Lord Cottenham in 1848. The proposition which these cases were thought to hold was, that if parties, either because of legal impediments or from mere wantonness, entered upon a course of illicit cohabitation, their subsequent matrimonial conduct, with its resulting reputation, would, as matter of law, be so colored by its original meretriciousness that no matrimonial consent could be presumed. In 1867 the case of *Campbell v. Campbell* (L. R. 1 H. L. 183), was before the house of lords upon this precise point, and it was the opinion of every judge that the doctrine above stated received no support whatsoever from either of the cases cited or from any case; while the doctrine itself was distinctly and emphati-

cally repudiated. This case (*Campbell v. Campbell*), oftener spoken of as "*The Breadalbane Case*," has, since its decision, been universally accepted as the leading authority upon the doctrine of presumption of marriage. The facts of the case were these: James Campbell had eloped with the young wife of a middle-aged grocer named Ludlow. They fled to Canada, where they lived in connubial constancy and repute until after the death of Ludlow, of which, however, there was no proof that either of them ever heard. They returned to England, and, after the birth of a son, settled in Scotland, where they passed themselves off uniformly, unequivocally and constantly as man and wife. The case came before the courts, and ultimately before the house of lords, upon the claim of the grandson to the estates of Breadalbane in the right of his father. The claimant's father was born in England after the return of his parents from Canada, and after the death of Ludlow, the first husband of his mother. The case turned, therefore, upon the question of the legitimacy of the claimant's father, and that depended upon whether his parents were lawfully intermarried. The chief contention pressed, as matter of law, against the presumption of marriage was, that the original coming together of the parties having been meretricious, their subsequent conduct must be referred to that illicit relationship, and could not, in law, raise the presumption that the parties had contracted a subsequent marriage. In his opinion to the house of lords upon this point, Lord Westbury said: "The appellant objects that the cohabitation, which began when the parties were incapable of contracting marriage, and which was continued without change, is ineffectual to form the basis of the conclusion that consent to marry was interchanged after the impediment to marriage had been removed. That would be a very important rule if it were proved to be well founded; but I am unable to find any principle to justify the introduction of such a rule, and, what is more material to the purpose, I am unable to find any case or any book of authority in which that principle has been either followed out into a decision or has been laid down as a rule of Scotch law. It appears to be almost entirely derived by the appellant from what I conceive to be a misapprehension of certain words found in the judgments delivered in *Cunynghame's Settlement*, and *Lapsley v. Grierson*, or rather (if I may venture to say so), from a misapprehension of part of a marginal note in one of those cases. There is nothing (in those cases), to warrant the proposition that the subsequent conduct of the parties shall be rendered ineffectual to prove marriage by reason of the existence at a previous period of some bar to the interchange of consent. It would be very unfortunate if it were so. There is no foundation for the argument that the matrimonial consent must, of necessity, be referred to the commencement of the cohabitation, nor any warrant for the appellant's ingenious argument, that as the consent interchanged must be referred to some particular point—which he insisted was at the commencement of the cohabitation, and therefore insufficient—the cohabitation which continued afterwards without interruption would warrant no other conclusion

than that which would be warranted by the consent interchanged at a time when it was insufficient. I should undoubtedly oppose to that another, and, I think, a sounder rule and principle of law, namely, that you must infer consent to have been given at the first moment when you find the parties able to enter into the contract.

To the same effect were the opinions delivered by Lord Chelmsford, Lord Chancellor, and Lord Cranworth.

The *Breadalbane Case* was decided in 1867. (L. R. 1 H. L. Sc. 182.) At a later period, in 1876, the house of lords was called upon, in the case of *DeThoren v. Atty-Gen.*, to deal with a set of facts in all respects the exact counterpart of the case which is now before this court. The case is reported in L. R. 1 App. Cas. 686.

The point before the court in that case is thus stated by Lord Chelmsford: "The question," he says, "to be determined is, whether there was a consent to a marriage between William Ellis Wall and Sarah Ogg, evinced by habit and repute, prior to the birth of the elder of their sons. If there were no other question than this in the case, there would be no difficulty in giving an answer in the affirmative. But the appellant, although he admits that there had been such cohabitation of the parties as husband and wife as in ordinary cases would have conclusively established the presumption of marriage by consent, yet contends that the circumstance of a previous ceremony of marriage having taken place between the parties which was invalid, though unknown to them to be so, prevented that presumption. The ground of this argument is, that the living together of the parties as husband and wife must be attributed to the invalid ceremony, and therefore that the habit and repute could not be evidence of any other consent."

The invalidity of the ceremonial marriage alluded to was, that the husband was not, at the time of his second marriage, lawfully divorced from his first wife, and although he became a divorced man shortly afterwards, neither he nor his second wife appear to have known of the removal of the impediment. It is evident that every question raised by the case in hand was presented also upon the facts of that case. By the unanimous judgment of the house of lords it was decided:

1. That the subsequent cohabitation and reputation were not to be referred to the inefficient ceremony, even though the parties did not know of the removal of the impediment to their original marriage.

2. Where parties are cohabiting matrimonially but unlawfully, because of an impediment to their marriage, matrimonial consent must be presumed to have been interchanged as soon as the parties were enabled, by the removal of the impediment, to enter into the contract.

3. The ceremony, although invalid, was a consent by the parties to a cohabitation which was matrimonial in character, and their subsequent cohabitation was proof of a continuing consent thereto.

To the principles thus announced I give an unqualified assent. It is especially material to the matter in hand to note that in every opinion delivered the doctrine of presumption of

consent is treated as a principle having its root in public policy. At no time was it regarded as a rule of evidence for determining whether the parties had interchanged consent. Such a consideration is evidently out of place, for the reason that the whole fabric of the doctrine rests upon the necessity of presuming something which is not proven, and that something is consent, and consent at a time favorable to the end which the rule of public policy has in view. That end is the uniform reference of matrimonial conduct to the status of marriage, for it is with the status of marriage that society is chiefly concerned. The contract is made by the parties without consulting society; the status is imposed by society without consulting the parties. The contract may be actual and ceremonial, or actual and nonceremonial, or it may be neither actual nor ceremonial, but simply presumed from the policy of the law. That policy is, as I have said, that all matrimonial conduct shall, if possible, be referred to a matrimonial status. Where the marriage is actual the status at once arises, in order that connubial conduct and repute may be under its sanction; and where the conduct and repute are matrimonial, consent is presumed in order that the status may at once arise. If, at the time of the commencement of matrimonial conduct and reputation, there is impediment to the application of this doctrine, the rule of public policy is not thereby defeated; it remains in abeyance, to be imposed at the first moment when conduct and capacity shall so coexist as to render it possible. If an actual marriage has been solemnized, that circumstance, so far from frustrating the policy of the law, affords the strongest possible case for its application; for where the character of the consent is not in question, but simply its legality, the status of marriage should arise at the earliest moment when the parties are enabled lawfully to do that which they had theretofore ineffectually attempted.

From the broad principle thus laid down we turn to the decision of the case in hand, the doctrine of which is, that consent cannot be presumed from matrimonial conduct and reputation in any case in which the parties have actually celebrated a marriage to which, in their own minds, they referred their conduct. In support of this proposition two cases are cited in the opinion adopted by this court,—*O'Gara v. Eisenlohr*, 88 N. Y. 296, and *Cartwright v. McGown*, 121 Ill. 388, 10 West. Rep. 589. No such doctrine is laid down by these cases, nor do the facts of either case call for or admit of such a conclusion.

O'Gara v. Eisenlohr was a case in which the original union of the parties was illicit, because the man had a wife living the date of whose death was unknown. The court was asked to raise the presumption that her death had occurred between certain years. The case

turned entirely upon the law relative to presumption of death, and does not touch the doctrine concerning the presumptions of marriage. If it is possible to regard this case as an authority upon the proposition now before us, its weight is entirely against the position of the court below, in that it mentions with approval the cases of *Fenton v. Reed*, 4 Johns. 52, and *Rose v. Clark*, 8 Paige, 574, 4 L. ed. 548, in both of which the doctrine which I am now seeking to enforce is declared in the clearest manner.

In *Fenton v. Reed* the facts were, that after the prolonged absence of her husband the plaintiff married Reed. Subsequently the first husband came back, the plaintiff and Reed continuing, however, to live together as man and wife until and after the death of plaintiff's first husband. The court held that, upon this state of facts, it was a question for the jury whether the circumstance of this cohabitation evinced a marriage, other than the actual one, occurring after the death of the first husband.

In *Rose v. Clark* the facts were substantially those of *Fenton v. Reed*. Chancellor Walworth, in reviewing the cases, says: "It appears from the decisions in our own courts, as well as in England, that a subsequent marriage may be inferred from acts of recognition, continued matrimonial cohabitation and general reputation, even where the parties originally came together under a void contract of marriage."

It may, I think, be safely asserted that no case can be found in the New York reports from 1809, when *Fenton v. Reed* was decided, down to *Gall v. Gall*, 114 N. Y. 109, decided in 1889, in which any different doctrine has been held or even intimated.

The other case relied upon is *Cartwright v. McGown*, in which the facts did not raise the question presented by the case before us, but in which, strangely enough, the judge who delivered the opinion of the court imagined, as an illustration, just such a state of facts as that with which we have to deal, and said "that in such a case the presumption of marriage would apply even though the parties may not have known of the removal of the impediment to their original marriage."

The doctrine of the present case derives, therefore, no support from the only cases cited as sustaining it. If any authority for such a doctrine exists elsewhere I have failed to discover it. It stands, as it appears to me, as an innovation upon established law upon a most important branch of jurisprudence, and is radically destructive of the principle of public policy to which I have alluded, the uniform application of which is illustrated, amongst others, by the distinguished authorities to which I have referred.

For these reasons I cannot vote to affirm the judgment rendered in the court of chancery.

FLORIDA SUPREME COURT.

George SELDEN *et al.*, *Appts.*,
v.
CITY OF JACKSONVILLE *et al.*

(.....Fla.....)

*1. The guaranty of a constitution, that private property shall not be "taken" or "appropriated" without compensation, does not extend to mere consequential damages resulting to property abutting on a street from a change of grade of the street, or other improvement thereof not constituting a diversion of the street from street purposes, by municipal authorities acting within the scope of their charter powers, but only to a trespass upon or physical invasion of the abutting property.

2. The provisions of the Constitution of 1885, that private property shall not be "taken" without just compensation (section 12, Declaration of Rights); that the Legislature may provide for the drainage of the land of one person over or through that of another upon just compensation therefor to the owner of the land over which such drainage is had; and that no private property nor right of way shall be "appropriated" to the use of any corporation or individual until full compensation shall first be made to the owner, or first secured to him by deposit of money, which compensation irrespective of any benefit from any improvement proposed by such corporation or individual (sections 28, 29, art. XVI.) do not of themselves render a municipality liable for mere consequential damages resulting

*Head notes by RANNEY, Ch. J.

NOTE.—*Injury to abutter's easements of light, air and access by vacating street, changing grade, etc.*

The fact that persons owning lots on a city street had some rights in the street which were different from those of the public at large was early recognized. The Supreme Court of the United States clearly indicates it in 1832 in the case of *Cincinnati v. White*, 31 U. S. 6 Pet. 438, 8 L. ed. 456.

In 1839 the Kentucky Supreme Court says that the title to lands on a city street carries with it the right to certain services and easements as inviolable as the property in the lands themselves. *Lexington & O. R. Co. v. Applegate*, 8 Dana, 294, 38 Am. Dec. 497.

In 1857 the Ohio Supreme Court said the abutting owner's rights in the street are property which are protected by the Constitution. *Crawford v. Delaware*, 7 Ohio St. 467.

This doctrine has been reiterated more or less strongly and in reference to different things which have been alleged to be invasions of such rights until the present time. *White's Bank of Buffalo v. Nichols*, 64 N. Y. 73; *Drake v. Hudson River R. Co.* 7 Barb. 535; *State v. Berdett*, 78 Ind. 185, 38 Am. Rep. 117; *Ross v. Thompson*, 78 Ind. 90; *Rensselaer v. Leopold*, 3 West. Rep. 874, 106 Ind. 30; *Grand Rapids & I. R. Co. v. Heisel*, 88 Mich. 62, 31 Am. Rep. 366; *Port Huron & S. W. R. Co. v. Voorhees*, 50 Mich. 503.

In *Kane v. New York Elev. R. Co.* 11 L. R. A. 640, 125 N. Y. 164, the court said that if the owner of property bordering on a public street in which a trust has been established to have the same kept open for the benefit of the public, accepts and acts upon such trust by erecting buildings on his property he thereby acquires easements which cannot be taken from him without compensation.

Just when the claim for compensation was first 14 L. R. A.

to property abutting on a street from the lawful change of grade or other authorized improvement of the street by the municipality.

3. Upon the voluntary dedication of land to the purposes of a street, it becomes, to the extent that it is necessary to be used for a street, the property of the people of the State; and the dedication carries with it the continuing power to change its grade or otherwise improve it in so far as such improvements are for street purposes. This power may be delegated by the Legislature to a municipality as one of its governmental agencies, and to the exercise of these powers the fee of the owners of abutting lots, in the street to its center, is at all times subject.

4. There are incident to the ownership of property abutting on a street certain property rights which the public generally do not possess, viz.: The right of egress and ingress from and to the lot by the way of the street, and of light and air which the street affords. These incidental rights are under a constitutional prohibition, simply against the "taking" or "appropriation" of private property, subordinate to the right of the State, or of any duly authorized governmental agency acting for it, to alter a grade or otherwise improve a street for street purposes. The original and all subsequent purchasers of abutting lots take with the implied understanding that the public shall have the right to improve or alter the street so far as may be necessary for its use as a street, and that they can sustain no claim for damages resulting to their lots or property from the improvement or destruction of such incidental rights as a mere conse-

made for a taking of property by interfering with easements in the street is difficult to determine. It was alleged that "all access was cut off" in *Simmons v. Camden*, 28 Ark. 276 (1870), but it does not appear that the claim was made that the right of access was property which could not be taken without compensation.

Vacation of street.

The doctrine of the abutter's easements has been discussed and developed with reference to the vacation and the obstruction of streets and to the change of grade. The first two are generally held to be an interference with the abutter's property for which compensation must be made, while the reverse is held as to the third.

Each owner of a lot on a public street has a right to the common and unrestricted use of the contiguous street so far as is necessary for affording him incidental services and easements. This appurtenant right partakes of the character of private property and is protected by the fundamental law as such. And the street cannot be closed without making compensation to him. *Transylvania University v. Lexington*, 8 B. Mon. 27, 38 Am. Dec. 173; *Indianapolis v. Kingsbury*, 101 Ind. 200; *LeClercq v. Gallipolis*, 7 Ohio, 217; *Indianapolis v. Cross*, 7 Ind. 9; *Butterworth v. Bartlett*, 50 Ind. 587; *Pearall v. Eaton County*, 4 L. R. A. 193, 71 Mich. 68; *Cook v. Quick*, 127 Ind. 477.

An Act which closes an alley over which abutting owners have a right of way is invalid if it does not provide for compensating such owners or obtaining their consent to vacation. *Bannon v. Robinson* (Ky.) 11 Ky. L. Rep. 987.

Pennsylvania and Iowa have taken the opposite side of this question.

When the government sees fit to vacate public

quence from the lawful use or improvement of the street as a highway.

5. The erection by a municipal government within the limits of a street, and for street purposes and under street conditions justifying it, of a viaduct for the purpose of changing the grade of the street, and in the exercise of its power to change such grades, is not a "taking" or "appropriation" of private property within the constitutional guaranty against such taking or appropriation, even though the abutting owners' rights of ingress, egress, light and air are destroyed thereby; nor is this result of law changed by the mere fact that other corporate bodies than the municipality have contributed to the expense of the erection of the viaduct. Whether, however, it would not be a diversion of the street from the street purposes, and a "taking" and "appropriation" for which compensation must be made, if the necessity for the viaduct was created by railroad tracks crossing the street, not presented.

(December 23, 1891.)

A PPEAL by complainants from a decree of the Circuit Court for Duval County dismissing a bill filed to enjoin the construction of a viaduct on a street in the City of Jacksonville. *Affirmed.*

Commercial Street is a public street in the corporate limits of Jacksonville. It is crossed by railroad tracks of several companies. For the alleged purpose of removing the danger to the public from being compelled to cross these tracks at grade the City undertook to construct a viaduct on the street above the tracks and carry the street over the top of the viaduct.

streets the consequential loss, if any, must be borne by those who suffer. *McGee's App.* 114 Pa. 471; *Paul v. Carver*, 24 Pa. 211, 64 Am. Dec. 649.

The vacation of a highway does not take from a person abutting thereon any property either for a public or private use for which he can recover compensation. *Barr v. Oakaloosa*, 45 Iowa, 273.

It is quite commonly held, however, that although one public way to property is closed if there is another left the property owner sustains no actionable damage. *Coster v. Albany*, 43 N. Y. 399; *Fearling v. Irwin*, 55 N. Y. 456; *Gerhard v. Seekonk River Bridge Commrs.* 2 New Eng. Rep. 619, 15 R. I. 334; *Smith v. Boston*, 7 Cush. 254; *Polaek v. San Francisco Orphan Asylum*, 48 Cal. 490; *Kings County F. Ins. Co. v. Stevens*, 2 Cent. Rep. 430, 101 N. Y. 417; *Heller v. Atchison, T. & S. F. R. Co.* 28 Kan. 625; *Castle v. Berkshire*, 11 Gray, 26; *East St. Louis v. O'Flynn*, 8 West. Rep. 85, 119 Ill. 200; *Chicago v. Union Bldg. Assn.* 102 Ill. 379, 40 Am. Rep. 598; *Wilson v. New York Cent. & H. R. R. Co.* 2 N. Y. Supp. 65; *Hier v. New York W. S. & B. R. Co.* 109 N. Y. 659.

So the mere fact that by the discontinuance of a street complainant, instead of being able to reach a certain point by an unbroken separate line, has to make a short turn and select other roads running in the same direction, is not sufficient to entitle him to compensation. *Kimball v. Homan*, 74 Mich. 609.

Changing grade.

The abutter's claims to compensation for a taking of his easements by changing the grade of a street have been almost wholly rejected by the same courts, which have held that he was entitled to compensation if the street was vacated; and the rule is that a municipality may, in the absence of a constitutional or statutory provision, change the

The approaches were to be built up solidly of mason work. Complainants own lots abutting on the portion of the street which will be occupied by the viaduct and the grade of the street will be raised in front of their premises to a considerable extent. To prevent the construction of this structure without making compensation this bill was filed.

Further facts appear in the opinion.

Messrs. A. W. Cockrell & Son, for appellants:

The making of compensation is an indispensable attendant of the exercise of public right, and the Legislature could not have intended, by the general powers conferred upon the city, to violate or interfere with private rights.

Gardner v. Newburgh, 2 Johns. Ch. 162, 1 L. ed. 832; *United States v. Fisher*, 6 U. S. 2 Cranch, 390, 2 L. ed. 314.

The whole of the opinion in the latter case is valuable, and substantially repudiates decisions relied on, to the extent they tend to support defendants' contention in this case.

Cognell v. New York, N. H. & H. R. R. Co. 4 Cent. Rep. 225, 103 N. Y. 10; *Terre Haute & I. R. Co. v. Russell*, 6 West. Rep. 253, 108 Ind. 113.

When the wrong done arises from the construction, as distinguished from the operation of the "improvement," it stands upon the same footing, as to "consequential injuries, as if there had been an actual taking of a portion of plaintiff's property."

Pennsylvania S. V. R. Co. v. Walsh, 124 Pa. 544; *Pennsylvania R. Co. v. Marchant*, 12 Cent. Rep. 261, 119 Pa. 541; *Chester County v. Brower*, 10 Cent. Rep. 909, 117 Pa. 647; *Pennsylvania*

grade of its streets without liability to abutting landowners. *Radcliff v. Brooklyn*, 4 N. Y. 205, 58 Am. Dec. 357, overruling *Fletcher v. Auburn & S. R. Co.* 25 Wend. 462; *Callender v. Marsh*, 1 Pick. 430; *Burlington v. Gilbert*, 31 Iowa, 356, 7 Am. Rep. 148; *Fellowes v. New Haven*, 44 Conn. 240, 26 Am. Rep. 447; *Delphi v. Evans*, 36 Ind. 90, 10 Am. Rep. 12; *Shawneetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321; *Snyder v. Rockport*, 6 Ind. 237; *Gossler v. Georgetown*, 19 U. S. 6 Wheat. 593, 5 L. ed. 339; *Quincy v. Jones*, 76 Ill. 231; *Kepple v. Keokuk*, 61 Iowa, 653, 2 Am. & Eng. Corp. Cas. 447, and note; *Green v. Heading*, 9 Watts, 382; *O'Connor v. Pittsburgh*, 13 Pa. 187; *Taylor v. St. Louis*, 14 Mo. 20, 55 Am. Dec. 80; *Rounds v. Mumford*, 2 R. I. 154; *Humes v. Knoxville*, 1 Humph. 403, 84 Am. Dec. 657; *Hovey v. Mayo*, 43 Me. 322; *Schattner v. Kansas City*, 53 Mo. 162; *Tate v. Missouri, K. & T. R. Co.* 64 Mo. 149; *Dorman v. Jacksonville*, 13 Fla. 545, 7 Am. Rep. 253; *Kehrer v. Richmond*, 81 Va. 745.

This rule is so firmly established that it is laid down almost without qualification by the textbooks (Lewis, Em. Dom. § 98; Dillon, Mun. Corp. § 900; Elliott, Roads & Streets, p. 338; Ang. Highways, § 211 et seq.), which cite authorities almost without number, many of which however do not discuss or allude to the question of how far the abutter's easements are property. Since the New York Elevated Railroad Cases were decided the question has been brought up anew, but it is said that decisions sustaining the right of an individual proprietor of lands upon a street to the use of the same for access to his premises and giving him a remedy for interference with such rights are not applicable to cases of change of grade. *Henderson v. Minneapolis*, 32 Minn. 319, 6 Am. & Eng. Corp. Cas. 4.

Even the *Story Case*, 90 N. Y. 123, 43 Am. Rep. 146, recognized the right of the municipality to alter

R. Co. v. Lippinoot, 8 Cent. Rep. 818, 116 Pa. 472; *Edmundson v. Pittsburgh*, M. & Y. R. Co. 1 Cent. Rep. 868, 111 Pa. 316; *Shrunk v. Schuylkill Nav. Co.* 14 Serg. & R. 71.

Dorman v. Jacksonville, 13 Fla. 545, 7 Am. Rep. 253, decided that, under the clause in the Bill of Rights "inhibiting the taking of private property, without just compensation," the easement of the abutting owner on a public street was not protected unless some tangible property of the abutting owner was taken. But the suggestion was made, that "it might be proper for the Legislature by some general Act" to provide compensation to the abutting owner.

There was, when the decision of *Dorman v. Jacksonville*, 13 Fla. 545, 7 Am. Rep. 253, was made, a conflict in the authorities as to whether the easement of the abutting owner,—his right of way—of ingress and egress to and from the street in and upon his premises, was such property as came within this clause of the Bill of Rights, and in the *Case of Story*, 90 N. Y. 122, 43 Am.

Rep. 146, decided in 1882, it was held, after elaborate arguments by the ablest lawyers in the country, this right of way was property protected by the constitutional provision, inhibiting the "taking of private property" without just compensation.

The Legislature of the State of Florida did not respond to the appeal of the supreme court, but the *Story Case*, *supra*, gave in part the relief demanded, by declaring against Judge Gibson's views in *O'Connor v. Pittsburgh*, 18 Pa. 189, and against Judge Randall's views in *Dorman v. Jacksonville*, *supra*, that the constitutional protection inhibiting the taking of private property did extend to the easement or right of way of an abutting owner, in and upon and over his premises from and over the highway.

When the constitutional convention of 1885 met, it determined to avoid, on the one hand, holding those who were authorized to condemn property for a public purpose responsible for direct or indirect damages or injuries to adja-

the grade of the street by raising or lowering it without liability to the adjoining property owner.

A city is not liable for change of grade because it is presumed that the owner has been compensated for loss resulting from such change. *Buchner v. Chicago*, M. & N. R. Co. 56 Wis. 414.

Rule in Ohio and Kentucky.

In Ohio the owner of a lot on an unimproved street in erecting buildings thereon assumes the risk of all damages which may result from a subsequent reasonable grading and improvement of it. But if buildings have been erected with reference to a grade once established the city is liable for damages resulting to their owners from a change of grade. *Akron v. Chamberlain County*, 34 Ohio St. 328, 32 Am. Rep. 367; *McCombe v. Akron*, 15 Ohio, 474; *Akron v. McComb*, 18 Ohio, 220, 51 Am. Dec. 468; *Crawford v. Delaware*, 7 Ohio St. 450.

In Kentucky the general rule was at first followed. *Keasey v. Louisville*, 4 Dana, 154, 29 Am. Dec. 365.

But in *Louisville v. Louisville Rolling Mill Co.*, 3 Bush, 427, 96 Am. Dec. 243 (1867), the private rights of light, air, and access were distinctly recognized, although it was not expressly ruled that they alone constituted property which could not be destroyed without compensation. In that case the street was to be filled about twelve feet above the grade of plaintiff's lot, and he was directed by the city authorities to fill his lot even with that grade so as to support it or to build a supporting wall, either of which would have practically destroyed the value of his property, and the court held it could not be done.

The result of that case leaves it rather doubtful how far a city might destroy an easement of access by changing a grade, without liability.

Grading to cross bridges or railroads.

Where a city authorizes a railroad company to raise the grade of a street to carry it over the company's tracks which cross the street at right angles, an abutting property owner whose easements are thereby interfered with has no right of action against the company. *Uline v. New York Cent. & H. R. R. Co.* 2 Cent. Rep. 116, 101 N. Y. 108.

Where a railroad crossed a highway below grade and for the purpose of restoring the highway to the use of the public bridged its tracks and graded up the highway to the bridge level thereby raising the surface of the street in front of plaintiff's property so as to interfere with his easements, it was held 14 L. R. A.

that although he owned the fee to the center of the street there was no actionable injury. *Conklin v. New York, O. & W. R. Co.* 3 Cent. Rep. 194, 102 N. Y. 107.

So where the grade in front of plaintiff's property was raised to carry the street over a railroad track, laid five feet and nine inches above the grade of an intersecting street in such manner that a space of but eighteen feet was left in front of plaintiff's property as a carriage-way on the old grade, while the centre of the street was raised from two to four feet, three of the judges thought there was no ground for damages, although the remainder of the judges concurred in reversing on other grounds. *Ottenot v. New York, L. E. & W. R. Co.* 119 N. Y. 608.

No damages can be recovered by an abutting property owner for the lowering of the grade of a street in order to separate it from the grade of a railroad which crossed it. *Wilson v. New York, Cent. & H. R. R. Co.* 2 N. Y. Supp. 65.

The city could permit a bridge company to construct a bridge over a river and grade the street to reach the bridge, even though a railroad company was permitted to place its rails on the street and over the bridge where a space of twelve or fifteen feet was left between the supporting wall of the grade and the sidewalk in front of plaintiff's property. *Newport & C. Bridge Co. v. Foote*, 9 Bush, 206.

In conflict with the doctrine of the above cases is the following:

Where the grade of the street is lowered to make the street conform to a railroad crossing compensation must be made. *Buchner v. Chicago, M. & N. R. Co.* 56 Wis. 414.

Obstructing or destroying street.

Nether the municipality nor the State can appropriate a street to any purpose which will render valueless the abutting real estate. *St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 272, 19 L. ed. 74; *McCaffrey v. Smith*, 41 Hun, 117; *Mahon v. New York Cent. R. Co.* 24 N. Y. 658.

A sale for the benefit of a town cannot be made of all of a street except an alley, even though it owns the fee. *Moose v. Carson*, 7 L. R. A. 548, 104 N. C. 431.

This question will be further developed in the note to the case next following this.

The rules as laid down above have been much changed by constitutional and statutory provisions in many of the States. H. P. F.

ent property not actually taken, and on the other to guard and protect the easement, or right of way of an abutting owner, in and upon and over a public highway, from an invasion by any corporation whatever, municipal or otherwise, by placing such right of way upon the same footing as actual tangible "private property."

Art. 16, § 29.

Constitutional provisions for the security of person and property should be liberally construed.

Boyd v. United States, 116 U. S. 685, 29 L. ed. 52. See *Giesy v. Cincinnati, W. & Z. R. Co.* Ohio St. 806; *Cincinnati & S. G. A. St. R. Co. v. Cummins*, 14 Ohio St. 528; *McComb v. Akron*, 15 Ohio, 474; *Akron v. McComb*, 18 Ohio, 229, 51 Am. Dec. 458.

Independently of the change in the Constitution of Florida enlarging the inviolability of private rights, the following propositions are established by the weight of authority.

The fee is in complainants to the center of commercial street; the distinction as to the rights of abutting owners who do not own, compared with those who own, is drawn in *Florida & R. Co. v. Brown*, 23 Fla. 104.

Every lot-owner, whose premises abut on the street, has a peculiar interest in the adjacent street, which neither the local nor the general public can pretend to claim, a private right in the nature of an incorporeal hereditament legally attached to his contiguous ground; an incidental title to certain facilities and franchises, which is in the nature of property, and which can no more be appropriated against his will than any tangible property of which he may be owner.

Grand Rapids & I. R. Co. v. Heisel, 88 Mich. 31 Am. Rep. 312; *Elisabeth, L. & B. S. R. Co. v. Combs*, 10 Bush, 852, 19 Am. Rep. 67.

The abutters upon a public street, owning soil and fee to the center thereof, have an easement in the bed of the street for ingress and egress to and from their premises and also the free and uninterrupted circulation of light and air through and over such street, for the benefit of their property.

Storry v. New York Elev. R. Co. 90 N. Y. 122, Am. Rep. 146.

The ownership of such easement is an interest in real estate, constituting property, within the meaning of the constitutional provision.

Jahr v. Metropolitan Elev. R. Co. 6 Cent. 371, 104 N. Y. 268, affirming *Storry v. New York Elev. R. Co.* 90 N. Y. 122, 48 Am. Rep. 146.

The right of an owner of land abutting on a public street is property in such a sense as to entitle him to compensation, in case the street is appropriated to a use which deprives it of character as a public way.

Elliott, Roads & Streets, p. 156; *Chicago, E. & W. R. Co. v. Hazels*, 26 Neb. 864; *Central N. Y. P. R. Co. v. Andrews*, 41 Kan. 370; *Grand Rapids & I. R. Co. v. Heisel*, 88 Mich. 31; *Stone v. Fairbury, P. & N. R. Co.* 68 Ill. 18 Am. Rep. 556; *Imlay v. Union Branch Co.* 26 Conn. 249, 68 Am. Dec. 892; *Starr v. Camden & A. R. Co.* 24 N. J. L. 592; *Morrell & E. R. Co. v. Newark*, 10 N. J. Eq. 852; *Huron & S. W. R. Co. v. Voorheis*, 50 Mich. 506.

R. A.

The right of access to abutting premises is so far regarded as "private property" that not even the Legislature can take it away and deprive the owner of it without compensation.

Elliott, Roads & Streets, p. 526, and notes 3, 4, and cases cited; *Transylvania University v. Lexington*, 8 B. Mon. 25, 38 Am. Dec. 178; *Abendroth v. New York Elev. R. Co.* 11 L. R. A. 634, 122 N. Y. 1.

Mr. W. B. Young, with *Mr. J. M. Barra*, City Atty., for appellees:

Unless changed by Constitution, or some statute of the State, no liability for compensation accrues unless there is an "appropriation," a taking of the particular property.

Montgomery v. Townsend, 80 Ala. 489; *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Louek v. Hawkins*, 1 Rich. L. 417; *Smith v. Washington Corp.* 61 U. S. 20 How. 185, 15 L. ed. 858; *Dorman v. Jacksonville*, 13 Fla. 545, 7 Am. Rep. 253; *Montgomery v. Maddox*, 89 Ala. 181.

The consequential injury to property resulting from the lawful use of an independent right is never held to be a taking.

Tiedeman, Pol. Powers, p. 397 et seq.

What is it the city proposes to do in this case? It is simply in effect to raise the grade of the street.

St. Paul v. Wilkin (Minn.) 7 Am. & Eng. Corp. Cas. 522.

An injunction will not be granted to restrain the raising of the grade of a street.

Callender v. Marsh, 1 Pick. 417; *Smith v. Washington Corp.* supra; *Kepple v. Keokuk*, 61 Iowa, 653, 2 Am. & Eng. Corp. Cas. 443.

Whatever right an abutter has in the street is subject to the paramount authority of the State to regulate and control the street for all the purposes of a street, and to make it more suitable for the wants of the public.

Radcliff v. Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357, dissenting opinion in *Storry v. New York Elev. R. Co.* 90 N. Y. 122, 48 Am. Rep. 146.

Raney, Oh. J., delivered the opinion of the court:

The last clause in the 12th section of the Declaration of Rights of our Constitution is: "Nor shall private property be taken without just compensation." This is not, however, the only provision of that instrument relating to the exercise of the right of eminent domain. There are two sections in the "Miscellaneous Provisions," or 16th article, which read as follows:

"Sec. 28. The Legislature may provide for the drainage of the land of one person over or through that of another upon just compensation therefor to the owner of the land over which such drainage is had.

"Sec. 29. No private property nor right of way shall be appropriated to the use of any corporation or individual until full compensation shall be first made to the owner or first secured to him by deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation or individual, shall be ascertained by a jury of twelve men in a court of competent jurisdiction, as shall be provided by law."

It cannot be denied that the almost uniform

course of decision has been that a municipal government was not liable for any consequential damages resulting to dwelling lots from an authorized or lawful change of grade of the street by the municipal authorities, where the constitutional provision obtaining has been like that of our Declaration of Rights: "Nor shall private property be taken without just compensation." Such seems to have been this court's understanding of the law twenty years ago, as is shown by *Dorman v. Jacksonville*, 18 Fla. 588, 7 Am. Rep. 258.

The meaning given by the courts and commentators to the words "taken" or "appropriated," as used in such provision, is that there must be a trespass upon or a physical invasion of the abutting property to bring municipal authorities within the constitutional prohibition, as long as such authorities keep within the scope of their powers in using or improving the street. If they do no illegal act, as by creating a nuisance, or do not appropriate the street to other than street purposes, or do not invade, or do physical injury to, the abutting property, there is, in the absence of negligence, or of the want of due skill and care in making improvements (which negligence or want of care or skill may of itself be a ground of corporate responsibility for damages), no liability to the owners of such property for any damage resulting from a change of grade or other improvement in the street made by the municipal powers for the convenience or benefit of the public in using the highway as such. The voluntary dedication of the street as a highway creates certain rights in the public; the land so dedicated becomes to the extent that it is necessary to be used for a street, the property of the people of the State, and the dedication of it to such purpose carries in this country, as well as in England, the continuing power to change its grade or otherwise improve it, in so far as such improvements are for street purposes. This power may be delegated by the Legislature to a municipality as one of its governmental agencies, and to the exercise of these powers the fee of the abutting owner in the street to its centre is at all times subject, in the manner or to the extent indicated above, under a constitutional provision like that in our Bill of Rights.

In some cases holding these views there has been an omission; at least, to notice any distinction between the rights of an abutting owner as such, and the public generally in or as to the streets, but there can be no doubt that there is a substantial and clearly defined difference. There is incident to abutting property, or its ownership, even where the abutter's fee or title does not extend to the middle of the street, but only to its boundary, certain property rights which the public generally do not possess. They are the right of egress and ingress from and to the lot by the way of the street, and the right of light and air which the street affords. Viewing property to be not the mere corporal subject of ownership, but as being all the rights legally incidental to the ownership of such subject, which rights are generally said to be those of user, exclusion and disposition, or the right to use, possess and dispose of (*Lewis, Em. Dom. §§ 54, 55; Dillon, Mun. Corp. § 587b; Cooley, Const. Lim. 675, 676;* 14 L. R. A.

we are satisfied that the rights just mentioned are within the meaning of the word "property," as it is used in this constitutional provision. These incidental rights of property are under a constitutional guaranty simply against the "taking" or "appropriation" of property, subordinate to the right of the State, or any duly authorized governmental agency acting for it, to alter the grade or otherwise improve the streets for street purposes. An original purchaser of an abutting lot, and all subsequent purchasers, take with the implied understanding, or as tacitly agreeing that the public shall have the right to thus improve or alter the street so far as may be necessary for its use as a street, and that they can sustain no claim for damages resulting to their lots or property from the impairment or destruction of such incidental rights, as a mere consequence from the use or improvement of the streets as highways. Ohio and Kentucky alone, of all the courts of this country, have denied such subordination of these incidental rights to the highway rights of the public. The doctrine of the courts of the other states and of the United States is that so long as there is no application of the street to purposes other than those of a highway, or no diversion of it from street purposes, any changes of grade made lawfully and in the exercise of good faith, or not maliciously, or for the purpose of doing injury to the abutter, is not within the constitutional inhibition against taking property without compensation, nor the basis for an action for damages. *Lewis, Em. Dom. § 96, and authorities cited in note; Dorman v. Jacksonville, supra.*

The Ohio doctrine as summarized by Lewis in his work on Eminent Domain, section 98, pp. 121, 122, gives a right of recovery not only under the circumstances indicated above, but also where one builds to an established grade and it is changed to his damage; or where one builds before a grade is established, but succeeds in anticipating the grade which is afterwards established, and the grade after being so established is changed; or where one builds before a grade is established, and afterwards an unreasonable grade is established. The right of recovery is based in the later cases there upon the guaranty that private property shall not be taken for public use without just compensation (*Lewis, Em. Dom. p. 122*), and the property taken is spoken of in these cases as the right of access. In the earlier cases, however, the ground of the decision was that of natural right and justice. *Judge Dillon, in a note to his work on Municipal Corporations, § 990, p. 1226, says of the doctrine obtaining in this State, that the common-law measure of the liability of municipal corporations has been designedly and deliberately carried beyond the limits established by the current of decision elsewhere.*

In Kentucky, in the case of *Louisville v. Louisville Rolling Mill Co.*, 8 Bush, 418, the grade of the street was to be raised twelve feet above the mill company's lot at the only point of ingress and egress, the improvement entirely closing the passway, and in the *Newport & C. Bridge Co. v. Foote*, 9 Bush, 264, there was sufficient space left between the appellee's lot and the bridge for two wagons to pass abreast:

d in the former the abutting owner was held entitled to relief on the ground that there was taking of his private property, an interference with his private right of air, light and sway, while in the latter, relief was denied, there was no interference with the private rights of the appellee, the lessening in value of lots from the lawful construction of the edge and the avenues leading to it being regarded as mere consequential damages, not constituting a cause of action. See also *Kemmer v. Louisville*, 14 Bush, 87; Lewis, Em. m. § 99; 2 Dillon, Mun. Corp. note to § 900, 1226. Both Judge Dillon and Mr. Lewis at the Kentucky doctrine as virtually making the extent of the injury, and not the fact of injury, the basis of municipal liability.

The provision of the Kentucky Constitution "Nor shall any man's property be taken applied to public use without the consent of representatives and without just compensation being previously made to him."

In Ohio there are two sections on the subject in the Constitution of 1851. They are the 4th section of the Bill of Rights, and the 5th section of the 18th, or "Corporations," article, they read as follows:

Private property shall never be held inviolable but subservient to the public welfare. When taken in time of war or other public emergency, imperatively requiring its immediate use, or for the purpose of making or repairing roads which shall be open to the public without charge, a compensation shall be made to the owner in money, and in all other cases where private property shall be taken for public use a compensation therefor shall be made in money or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner." Bill of Rights, art. 1, § 19.

No right of way shall be appropriated to the use of any corporation, until full compensation shall be first made in money, or first secured by a deposit of money, to the owner, in proportion to any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of free men, in a court of record as shall be prescribed by law." *Corporations*, art. 18, § 5. The courts of Ohio do not attempt to sustain this peculiar doctrine upon the theory that there is anything exceptional in the Constitution of that State. They hold, as indicated above, that there is a "taking" of property, such as the decisions of Ohio have been issued by other courts and by commentaries, there can be found neither in those decisions nor in the decisions themselves, any suggestion that the Ohio doctrine is referable to anything peculiar in the Constitution of that State. The same is true of the Kentucky decisions.

It is not to be denied that much hardship has resulted to individuals in their property rights from time to time from the established doctrine; nor have the courts failed to appreciate these hardships. In *O'Connor v. Pittsburg*, 18 Pa. 187, a case in which the city authorities reduced the previously established right, with reference to which the church of the plaintiff had been constructed, and cut

down the street seventeen feet in front of the church, Chief Justice Gibson delivering the opinion of the court said: "We have had this cause reargued in order to discover if possible some way to relieve the plaintiff consistently with law; but I grieve to say we have discovered none." Still this doctrine has been so firmly established as law, based upon the principle of the rights of the State in highways and the immunity of itself, and of governmental agencies acting for it and for the benefit of the people, that, notwithstanding the departure of the Ohio courts, they have found themselves unable to ignore or change it, though suggestions have at times fallen from them as to the advisability of the law-making power doing so. These suggestions, and doubtless a growing sense of the harsh consequences of the doctrine, have led to not only legislative action, but also to changes in the organic law of many states, as shown by the Constitutions of Pennsylvania of 1873, and that of Alabama of 1875, by which it is provided that municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for the property taken, injured or destroyed, etc.; and that of Arkansas of 1874, providing that private property shall not be "taken, appropriated or damaged;" and those of Illinois of 1870, West Virginia of 1872, Missouri of 1875, Colorado and Texas of 1876, Georgia of 1877, and California of 1879, that it shall not be "taken or damaged." The purpose and the effect of this introduction of the words "injured," "destroyed," or "damaged" was to give compensation for damages often resulting to private property where there was not a "taking" of the property. There being no taking of private property and consequently no infraction of the constitutional guaranty against taking without making just compensation, there were yet, as just intimated, many cases in which damages resulted to property owners, although the works or improvements were constitutionally authorized by the law-making power of a State, and carefully and skillfully executed by governmental agencies. Such damage, not being occasioned by any illegal or wrong act, has found expression in the phrase, *damnum absque injuria*. It has also become the custom to speak of such damages as consequential damages, meaning that they are simply the consequence of a legal act, and therefore are not a basis of recovery in the courts, nor of a lawful claim for compensation. It seems not to have been the purpose of these amendments to give a right of recovery for all damaging consequences, resulting from the improvement, to the owner of the property affected, but only for such as effect physically some right of property incident to the abutting property.

This is illustrated by the cases of *Edmundson v. Pittsburgh, M. & Y. R. Co.* 111 Pa. 816, 1 Cent. Rep. 868; *Pennsylvania R. Co. v. Lippincott*, 116 Pa. 472, 8 Cent. Rep. 818; *Hester County v. Brower*, 117 Pa. 647, 10 Cent. Rep. 909; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541, 12 Cent. Rep. 261; *Pennsylvania S. V. R. Co. v. Walsh*, 124 Pa. 544,—cited by appellant's counsel, and which are decisions under the new provision of the Constitution of Penn-

sylvania, referred to above. This provision, so far as it need be given now, is as follows: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed, by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction." The first case was an action for damages done to plaintiff's buildings and land by negligent blasting and the reckless and careless construction of the road by the contractors. The company had been given the right to enter and construct, and did not enter or construct under the right of eminent domain. It was held, upon the facts of the case, that the company was not liable for the negligence of its contractor, who was exercising an independent employment, and to whom the maxim *respondet superior* applied; and that a railroad company to which one grants the right to enter upon his land and construct a road is not liable for damages resulting as a consequence of the company's entering and constructing; and that the above provision of the Constitution did not apply to damages resulting from carelessness or negligence in constructing a railroad. "The words 'injured or destroyed,' as found in this section, as everyone knows," says the opinion, "were not designed to change, alter, or limit the nature and effect of corporate contracts, but to impose on those having the right of eminent domain a liability for consequential damages from which they had been previously exempt. . . . To create a liability for injuries of this kind, and to make corporations responsible for such damages, was the object, and only object, of the section under discussion." In the second of the above cases (*Pennsylvania R. Co. v. Lippincott*), a railroad company erected on its own land a viaduct, and operated a railroad thereon, and it was held that there could be no recovery for damages resulting to plaintiff's property, lying on the opposite side of the street, from noise, smoke and dust, and necessary consequence of a due operation of the railroad, no portion of his property having been taken or used in the construction of the viaduct; and that except on proof of negligence the lawful use by a railroad company of a lawful erection entirely upon its own property was not the subject of damages under the above section of the Constitution. It was said by the court that none of the plaintiff's property had been taken, nor any of his rights infringed, so that neither by the Constitution, nor by the case quoted, was there warrant for his contention; that over and beyond the damage which arises from the taking of property, whether in the shape of land or a right, the Constitution imposed on corporations a direct responsibility for every injury for which a natural person would be liable at common law, and that this was held in the preceding case, but that beyond this they could not go. The third of the above cases (*Chester County v. Brower*), is one in which the county erected a bridge with stone abutments and piers on a street and over a creek in a borough. The approach or abutment of the bridge was of solid masonry and extended in front of

Brower's lot and house. It is stated that the street could no longer be used except for travel on foot, the travel now passing over the approach and upon the bridge. The conclusion reached was that the county was liable in an action on the case for the consequential damages to the property, and this, though the Legislature had not provided a remedy to enforce the right given by the provision of the Constitution. "There was," observes the opinion, "no taking of the property of the plaintiff by the county for the purpose of constructing the bridge. . . . The claim was for consequential damages caused by the erection of the abutments of the bridge some fourteen feet above the grade of the street in front of the plaintiff's house. It follows that under the law as it stood at and prior to the adoption of the Constitution he would have been without remedy. *Struthers v. Dunkirk, W. & P. R. Co.* 87 Pa. 282, and cases there cited. The Constitution of 1874 made a radical change in the law as regards consequential damages." In the fourth case (*Pennsylvania R. Co. v. Marchant*), in which the facts were quite similar to those in the second case, the decision was that the mischief which the constitutional convention had before it in adopting the above section was the want of a remedy under previous Constitutions to obtain compensation when property was injured or destroyed in the construction or enlargement of corporate works, though no portion of it was actually taken by the corporation; and that the remedy provided thereby to secure just compensation by corporations for property "injured or destroyed," has relation to injuries which, though properly termed consequential, are yet to be understood as confined to such injuries to one's property as are actual, positive and visible, and are the natural and necessary results of the original construction or enlargement of its works by a corporation, and of such certain character that compensation therefor may be ascertained at the time the works are being constructed or enlarged, and paid or secured, as provided in the Constitution, in advance. That a railroad corporation which has constructed its railroad on its own property in a city without taking any portion of another's property, is not liable for those indirect injuries which are the result merely of the operation of its road in a lawful manner and without negligence, unskillfulness or malice. That the provision was not intended to impose on corporations a liability in the operation of their works which has never been imposed on individuals. The remaining case, *Pennsylvania S. V. R. Co. v. Walsh*, decides that where a railroad is laid down upon a public street and, though at grade, is so constructed with reference to the property of an abutting owner that by its operation in a lawful manner access to the property, if not cut off, is rendered dangerous, the company is liable for consequential damages under the Constitution. The distinction between this case and those of *Lippincott* and *Marchant* is, that in the latter there was no injury by reason of the construction of the road, whereas here it was the direct result of the construction, the track being laid close to the curbstone on the side of the street next to plaintiff's property, with the effect indicated.

See also *Pennsylvania S. V. R. Co. v. Zeimer*, 124 Pa. 560. The case cited from Alabama (*Montgomery v. Maddox*, 69 Ala. 181), holds, under a constitutional provision similar to that of Pennsylvania, omitting the words "or secured," that the liability of a municipal corporation extends to all cases of injury caused by grading or cutting down streets or sidewalks without regard to the original dedication or condemnation or to damages paid on former occasions; the measure of damages in every case being the difference in the market value of the property before and after grading.

There is in these Pennsylvania and Alabama decisions nothing, considering the provisions of our Constitution, that aids appellants.

We are unable to find in either or all of the three sections of our Constitution a justification for the theory of appellant's counsel that the use of the term "right of way," in the last of the three sections was intended as an adoption of the rule allowing indirect or consequential damages. We do not doubt that the abutting owner's right of access, or of ingress and egress to and from the street, and of light and air from the open space above or over the surface of the street, are easements and private property incidental to the ownership of the abutting lot, nor that these easements cannot be "taken" or "appropriated" without just compensation being made for them as such property. This is fully demonstrated by the *New York Elevated Railroad Cases: Story v. New York Elev. R. Co.* 90 N. Y. 123, decided in 1883; *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 168, 6 Cent. Rep. 371, and *Abendroth v. Manhattan R. Co.* 122 N. Y. 1, 11 L. R. A. 684, hereafter to be noticed, and by other authorities, as indicated both above and hereafter.

Whatever meaning we give to the expression "right of way," we still find nothing in the Constitution that places it within the protection or inhibition of that instrument unless such right of way is "taken" or "appropriated." These words "taken" and "appropriated," it seems to us, were used in their well defined sense, and in no other. There is nothing in the proceedings of the constitutional convention which justifies an inference that these words were used in any other sense, or that the framers of that instrument intended to give compensation for damages or injury other than such as should result from a taking or appropriation, as distinguished from consequential damages.

An examination of these proceedings proves that the clause of the Bill of Rights was adopted on the third day of July, and without anything to distinguish its consideration. *Journal of the Constitutional Convention of 1885*, pp. 239, 230.

The first time anything like the 29th section of article 16 "Miscellaneous Provisions," appears to have been brought to the attention of the Convention was the eleventh day of the same month, and in the 7th section of an article reported by the minority of the committee on private corporations. The majority had recommended two sections to constitute an article to be entitled "Private Corporations," and substantially the same as those finally adopted 14 L. R. A.

July 21, and now constituting sections 80 and 81 of article 16; they being intended to prevent unjust discrimination and unjust charges by common carriers and others performing services of a public nature, and prohibiting common carriers from granting free passes or discounting fares of members of the Legislature and salaried officers of the State. The 7th section of the article reported by the minority of the committee as an article to be entitled "Private Corporations," uses the words "no property," instead of "no private property nor right of way," and does not use the word "individual." This minority report was indefinitely postponed on the 18th of July, notice of motion for a reconsideration of the vote being given.

On the 21st of July, the 16th article being under consideration, the following were offered as additional sections, and were referred to the committee on miscellaneous provisions:

"The right of drainage and the means to secure it shall be promoted and protected, and the right of way through inferior lands for the drainage of superior by the direct as well as by the natural course shall be provided for and enforced: *provided*, that the cost and damage of such easement may be assessed in proportion to benefit upon the lands of the parties applying for the same; and, *provided further*, that the owners of lands bearing the servitude shall be entitled to just compensation from the parties so applying."

"The right to collect rates or compensation for the use of water supplies to any county, city or town, or the inhabitants thereof, is a franchise and cannot be exercised except by authority of and in the manner prescribed by law."

The committee, on the 24th of July, reported these sections back to the convention, recommending the former to the favorable consideration of the convention, but the latter "without recommendation," and on the next day they were referred to the judiciary committee. On the 29th of the month this committee reported, as a substitute for the same, what is now the 28th section of article 16, as it is given above, it having been adopted by the convention on the last day of July.

On the 24th of July, the 16th article being under consideration, there was offered a section to be entitled "Private Property, How Taken for Public Use," the first paragraph of it being: "No private property of persons or corporations shall be taken nor damaged for public use in the construction of railroads, canals, or if taken for other purposes, under chartered rights without just compensation to be paid for the same." This proposed section was also referred to the committee on miscellaneous provisions, and on the 28th day of that month it reported as a substitute for the same what is now the 29th section of the 16th article, as given at the outset of this opinion, it having been adopted on the last day of July.

These proceedings, if they indicate anything, tend to the conviction that the purpose of the convention was, as shown by its final action, to exclude from the Constitution any provision for compensation for damage other than where there was a "taking" or "appropriation" of property. If such was not the intention, the word "damaged" or its equivalent would have been

put in the 29th section, such word being in the proposed provision for which it was a substitute.

It is not to be assumed that the judges and lawyers who sat in the convention did not understand what the meaning of the words "taken" or "appropriated" was then, which it is now, or did not know that the abutting owner's right of access and other easements indicated were private property. The expression "private property," in so far as we can see, certainly includes any right of way which is the subject of private property, and unless the words "right of way" mean a public right of way, we can find in them nothing that adds to the effect which the expression "private property," or the entire section would have without them. We however do not mean to intimate that the expression "right of way" includes or applies to a mere public right of way; and we may remark that it does not occur to us that the purpose of the section in which these words are to be found was so much to specify what should never be taken without just compensation, as it was to declare the cases in which there shall be no taking without either previous payment, or a security by deposit of money, of the compensation for such taking ascertained in the manner indicated. It is entirely clear that the State acting for itself is not, even if a municipal corporation is, within the terms or spirit of this section, in so far as it prescribes anything not implied by the more general provision of the 12th section of the "Declaration of Rights." We state these views not as committing ourselves finally to the meaning of the words "right of way" in connection with any future case distinguishable from this, nor as precluding the recognition of any now undiscovered legal effect they may have been intended to establish. *Giesey v. Cincinnati*, W. & Z. R. Co. 4 Ohio St. 309, 328 *et seq.*

The *New York Elevated Railroad Cases*, mentioned above, and decided under a constitutional provision similar to that in our Declaration of Rights, are relied upon as sustaining the appellant's cause. In the second of these cases, that of *Lahr*, 104 N. Y. 298, 6 Cent. Rep. 371, the conclusions of the *Story Case* are stated to be in effect as follows: 1st. That an elevated railroad in the streets of a city operated by steam and constructed as there described—(about fifteen feet above the surface of the street, supported on columns placed along and partly inside of the outer edge of the sidewalk, and about eleven feet from *Story's* building, a warehouse, and extending across the whole traveled track of the street, the structure and passing trains to some extent, as found by the trial court, obscuring the light and impairing the usefulness of the premises, and the line of columns abridging the sidewalk and interfering with the street as a thoroughfare)—was a perversion of the use of the street from the purposes for which it was originally designed, and a use which neither the city authorities nor the Legislature could legalize or sanction without providing compensation for the injury inflicted upon abutting owners. 2d. That abutters upon a public street, claiming title to their premises by grant from the municipality, it covenanted that a street to be laid out

in front of the premises should forever continue for the free and common passage and as public streets and ways for all persons passing or returning through or by the same in like manner as the existing streets in the city are or ought to be, acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of property situated thereon. 3d. That the ownership of such easement is as interest in the real estate constituting property within the meaning of that term, as used in the Constitution, and for which compensation must be made before it can be lawfully taken. 4th. That the erection of an elevated railroad, the use of which was intended to be permanent, in a public street, and upon which cars are propelled by steam engines generating gas, steam and smoke and distributing in the air cinders, dust, ashes and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the easement and its appropriation by the railroad corporation, rendering it liable to the abutters for the damages occasioned by such taking.

It was further held in *Lahr's Case*, that no legal difference exists with reference to the interest acquired by abutting owners in a public street where the title is like that held by *Story*, and where it is one acquired through mesne conveyances from the original owner whose property has been taken by proceedings *in invitum*, instituted by the municipality under a public statute for acquiring land for street purposes. Such statute providing that the land thus taken shall be held "in trust nevertheless that the same be appropriated and kept open for or as a part of a public street . . . forever in the like manner as the other public streets . . . in said city are and of right ought to be." In *Abendroth's Case*, 123 N. Y. 1, 11 L. R. A. 684, the decision was that though the title of the owner of the abutting lot extends only to the side of the street, and the owner thereof has no interest in the street except as the owner of such abutting lot, he has incorporeal private rights in the street which are incident to his lot and are private property within the meaning of the constitutional provision forbidding their being taken for public use without just compensation; and that it is no justification for their impairment that the act complained of is done pursuant to legislative authority.

It is apparent from the above statement of these decisions,—and no one giving a careful and fair consideration of the opinions can fail to be so impressed,—that the appropriation of the streets to the use of such railroads is held to be a diversion of the streets from highway purposes, to the new and inconsistent purpose of an elevated railroad, and that this diversion is what, in the judgment of the court, constitutes the legal invasion, and unlawful taking or appropriation of the easements incident to the abutting lot; and it is equally apparent upon the face of the opinions that the doctrine they sustain does not and was not intended to conflict with the views announced in the previous portions of this opinion as to the power

of a municipality over streets so long as it does not divert the street from the original purposes for which it was established, or seek to apply it to other than street uses. The importance of the principle and interests involved justify proofs of this assertion by extracts from the opinions. Answering the argument of the railroad company made upon the basis of *Northern Transp. Co. of Ohio v. Chicago*, 90 U. S. 685, 25 L. ed. 386, where the claim against the city was for damages for an obstruction to the plaintiff's docks, by the deposit of materials, the construction of a coffer-dam and other work necessary to the building of a tunnel for the extension of a street, it is said in *Story's Case*: "The work was a necessary city improvement, and the interruption and obstruction were temporary—ceasing with the completion of the work. It was held that the plaintiff could not recover, and this upon the principle applied and practiced upon in all our cities, that the municipality whether owners of the fee of the street or vested with an easement only, may repair or improve it 'to adapt it to easy and safe passage.' It permits the leveling of a street by filling up or digging away, and if intersected by a stream the erection of a bridge or tunnel. If in doing either of these things materials are necessarily collected or an excavation made to the present and temporary detriment of a lot-owner, he cannot complain. His ownership is subject to the exercise of this public right, and he must submit to the inconvenience in order that the street may be preserved. So, in placing a pavement or excavating for a sewer, the stone for the one, or the dirt from the other, may for a time inconvenience the lotowner. To this in like manner he must submit, as to a burden provided for in his grant, or as one of the terms implied by his location upon a public avenue." Again it is observed: "It is no doubt true that the grade of a street or highway may be altered by raising it or lowering it, without liability on the part of the municipality to the abutter, but this is on the ground that the public had already paid a full compensation for all damage to be done by them to the adjacent owners by any reasonable or convenient mode of grading the way. But the principle applicable to such a case does not aid the defendant. There is no change in the street surface intended, but the elevation of a structure useless for general street purposes and as foreign thereto as the house in Vesey Street (*Corning v. Louwerre*, 6 Johns. Ch. 489, 2 L. ed. 178), or the freight depot (*Burney v. Keokuk*, 94 U. S. 824, 24 L. ed. 224). And speaking of the surface railway cases (*People v. Kerr*, 27 N. Y. 188, and *Kellinger v. Forty-second St. & G. S. F. R. Co.* 50 N. Y. 206), it is said "the use of the streets permitted was not inconsistent with the purposes of the trust." It is also remarked in the opinion delivered by Judge Tracy, (80 N. Y. 170) that while the Legislature may regulate the uses of the street as a street, it has no power to authorize a structure thereon which is subversive of and repugnant to the uses of a street as an open public street, and that whether a particular structure authorized by the Legislature is consistent or inconsistent with the uses of a street as a street must be largely a question of fact depending upon the nature

and character of the structure authorized. In *Lahr's Case*, it is observed that an abutting owner necessarily enjoys certain advantages from the open street, which belong to him by reason of the location of his property, and are not enjoyed by the general public, such as the easements referred to above, and that they are not only valuable to him for sanitary purposes, but indispensable to the proper and beneficial enjoyment of his property, and are legitimate subjects of estimate by the public authorities in raising a fund necessary to defray the cost of constructing the street; and that he is compelled to pay for these advantages and rights at their full value, and if in the next instant they may by legislative authority be taken away and diverted to inconsistent uses a system has been inaugurated which resembles more nearly legalized robbery than any other form of acquiring property. And it is also further said that the right which the municipality acquires is limited by the public necessity, and, in the case before the court, could not extend beyond its use for street purposes, and all other uses which might be enjoyed therein consistent with its use as a street must from necessity have remained in and resided with the person from whom it was taken, even after the transfer of the fee to the municipality. Afterwards it is declared that "the logical effect of the decision in the *Story Case* is to so construe the Constitution as to operate as a restriction upon the legislative power over the public streets opened under the Act of 1813, and confine its exercise to such legislation as shall authorize their use for street purposes alone. Whenever any other use is attempted to be authorized, it exceeds its constitutional authority. Statutes relating to public streets which attempt to authorize their use for additional street uses, are obviously within the power of the Legislature to enact, but questions arising under such legislation are inapplicable to the questions here involved. Such are the cases in respect to the changes of grade; the use of a street for a surface horse railroad; the laying of sewers, gas and water pipes beneath the soil; the erection of street lamps and hitching posts, and of poles for electric lights used for street lighting. All of these relate to street uses sanctioned as much by their obvious purpose, and long continued usage, and authorized by the appropriation of land for a public street." *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 291, 298, 6 Cent. Rep. 871.

These extracts clearly sustain the assertion in behalf of which they are invoked.

The practical deduction to be made from the preceding discussion is, that if what is sought to be enjoined is only an application of the street to additional street purposes, there is, in the absence of any physical invasion of the abutting lots, no taking or appropriation of any property or right of way of complainants, within the meaning of the prohibition of the Constitution. Without intimating what effect allegations charging malice, negligence or unskillfulness would have in an equitable suit of this character, it is clear that there are no such allegations in the record.

The theory of the bill is, that the viaduct is being erected by the four railroad companies

and the County of Duval and City of Jacksonville, under and in accordance with the agreement there set out, and that the purpose of the agreement was to erect the viaduct over and above the numerous railroad tracks crossing said street, and to put the street railway on the viaduct, and make the surface of the viaduct, instead of the original surface of the street, the grade for the passage of the public as they should come and go. It would be idle to contend that the complainants are not damaged, at least consequentially, independent of any benefits which may accrue from the improvement. In so far as we can understand the facts, they are completely shut in and cut off from any communication with the other portions of Jacksonville and the rest of the world, except by the St. Johns River, unless they shall at their own expense construct some way to reach the surface of the viaduct from their lots or improvements on the same, and there will be also an abridgment of light and air. The appellant's case, however, presented by the record before us, is not that the necessity of constructing the viaduct was produced by the laying of railroad tracks across Commercial Street, and that as a result of such railroad construction, that portion of said street was converted by the municipal agency into other than street purposes, and the object of the viaduct was to accomplish this end. We express no opinion on such a case, as it is not presented. If it be that the construction of this viaduct under and pursuant to the agreement is a diversion of the street from its highway purposes, there can be no doubt or question that there has been a taking of complainants' easements without compensation, and in violation of the provision of the Bill of Rights, and of the 29th section of the 16th article of our Organic Law; but under the state of the pleadings, and the manner of the submission of the cause before us, we cannot consider this question, but are confined to a judgment of the case as one in which the municipal government of Jacksonville is erecting the viaduct, not as a joint party with the others to the agreement, and acting under it, to meet a result necessitated by the existence of the railway track, but in the exercise of its chartered powers to change the grade of the street, though under an agreement with the several parties named as co-defendants, by which they are to contribute to the expense of the construction of the viaduct, by which the grade will be so changed. It is not contended that if the conditions exist which will justify the City in the exercise of its powers, as such, to change the grade of the street, that the change cannot be made by means of a viaduct; nor that the street conditions are not such as authorize the City to erect a viaduct for the purpose of changing the grade, if it has power to do so without first compensating complainants for the alleged taking of or damage to their property. The City appearing alone has tendered issue upon the theory that it is doing the work of itself, and under and by virtue solely of its own organic powers to grade streets, with, it is true, pecuniary aid from the parties named as co-defendants, and complainants have excepted the issue and contend that

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the City has not under its charter and the Constitution of the State, power to change a grade of a street without first making compensation for damages resulting from an interference with the complainants' easement of access, light and air, although there is no encroachment upon or invasion of complainants' premises.

The Charter Act, chapter 3775 of the Statutes, approved May 31, 1887, provides, in section 4 of article 8, that the mayor and city council shall have power by ordinance to make appropriations to alter, widen, extend, grade or otherwise improve, clean and keep in repair streets, alleys and sidewalks; and also enacts that it shall have power, in like manner, to take and appropriate grounds for widening streets or parts thereof, when the public convenience may require it, provided the owner or owners thereof shall receive compensation for the same. The Act further provides, section 8 of article 5, that the board of public works shall have exclusive power and control over the construction, supervision, cleaning, repairing, grading and improving of all streets, and to fix and establish the grades of all streets and alleys, avenues and thoroughfares. These provisions give full power to fix and change the grade of streets, and they do not provide that any compensation shall be made by the City to abutting owners for any taking of or damage to their property, in fixing or changing the grade, and hence none can be required of the City against its will, or in the absence of a binding stipulation, unless there is a diversion of the street from street purposes, or other appropriation of the abutter's property within the meaning of the constitutional provision heretofore mentioned.

The fact that a street railway may be put on a viaduct which a city lawfully erects, as a means of duly grading a street, will not render the viaduct otherwise or alone a diversion of the street from highway purposes, or be a ground for enjoining the erection of the viaduct for street purposes, even if the erection of the viaduct for the purpose of such a railway would be a diversion of the street, and the subject for an injunction. The construction of a viaduct for street purposes should not be interfered with, although the subsequent erection thereon of a street railway should when about to be begun, be the subject of an injunction.

If the viaduct is being erected under the agreement among other purposes for that of a street railroad, or if it is being erected under the agreement for the purposes of carrying the street over the railroad tracks, which railroad companies are authorized under certain circumstances to do, but whether independent of or subject to the constitutional provision as to making compensation for taking the easements of abutting owners we do not say, the railroad companies were entitled to be heard. No such case has, however, been made before us. We have discussed and decided the only case presented, and our judgment is, that the order refusing the injunction was proper, and should be affirmed.

It will be ordered accordingly.

NEW YORK COURT OF APPEALS (2d Div.).

Frederika EGERER, *Appt.*

v.

NEW YORK CENTRAL & HUDSON
RIVER R. CO., *Resp't.*

(.....N. Y.)

1. An abutting owner cannot be deprived of the street affording him access to his premises unless there is left for his use and enjoyment other suitable means of access or just compensation is paid him for the deprivation of the same.
2. Erecting an embankment about fourteen feet high for a railroad in a street, thereby cutting off access to abutting premises and damaging the light and air incident thereto, although done under legislative and municipal authority and after the municipal corporation had discontinued that part of the street but without making the necessary compensation to the abutting owners, renders the railroad company liable for the resulting damages to such owners.

(December 1, 1891.)

A PPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Fifth Department, in favor of defendant after hearing exceptions ordered to be argued before it in the first instance, which were taken to an

order of the Circuit Court for Monroe County directing a verdict in favor of defendant in an action brought to recover damages for the alleged wrongful closing of a street in front of plaintiff's premises. *Reversed.*

Statement by Potter, J.:

This action was tried at the Monroe Circuit on January 25, 1886. At the close of the evidence the court directed a verdict for defendant, to which plaintiff excepted, and the court thereupon ordered the exceptions to be heard at the general term in the first instance. The principal facts in the case are that plaintiff's premises are situated upon North Avenue, formerly North Street, which has been a street in use by the general public for many years, and afforded access to plaintiff's premises. Under the Act of the Legislature (Laws 1880, chap. 147), the defendant was allowed to agree with commissioners appointed by the Act upon behalf of the city of Rochester, upon a plan to elevate the track along and across the streets in said city, to close up streets and to change the location of defendant's tracks. In carrying out the plan, the portion of said street in front of plaintiff's premises was discontinued, and the defendant erected at that point an abutment of stone and an earth embankment about fourteen feet in height, and upon it placed its rails and struc-

NOTE.—*Injury to abutter's easements by railroad in street.*

Easements regarded as property.

The title to lands on a city street carries with it certain services and easements as inviolable as the property in the lands themselves. *Lexington & O. R. Co. v. Applegate*, 8 Dana, 294, 83 Am. Dec. 497.

The right of an abutting lotowner to use a street is as much property as the lot itself, and the Legislature has as little power to take away the one as the other. *Haynes v. Thomas*, 7 Ind. 43; *Lackland v. North Missouri R. Co.* 31 Mo. 187.

The right of the contiguous lotowner to the free use of the street on which his property bounds is within the constitutional protection, and if railroad tracks are placed so as to unreasonably obstruct the right, an action for damages will lie. *Jeffersonville, M. & I. R. Co. v. Esterle*, 13 Bush, 607.

When easements attach.

The mere fact that the street bounds the property entitles the owner to the use and enjoyment of the easements regardless of the ownership of the street. *Mattlage v. New York Elev. R. Co.* 38 N. Y. S. R. 918.

Although the abutting owner's interest extends only to the side of the street the fee of which is in the city, he has easements in the street which cannot be taken without making him compensation. *Abendroth v. Manhattan R. Co.* 11 L. R. A. 634, 122 N. Y. L.

The fact that the title to the bed of a street is in private individuals will not prevent the acquisition by an abutting owner of easements of which he cannot be deprived without compensation. *Kane v. New York Elev. R. Co.* 11 L. R. A. 640, 125 N. Y. 164.

Easement of access.

The abutter's easements include the right to
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have the street kept open and free from any obstruction which prevents or materially interferes with the ordinary means of ingress to and egress from his lots. *Indiana, B. & W. R. Co. v. Eberle*, 9 West. Rep. 208, 110 Ind. 542, 50 Am. Rep. 225.

An abutting lotowner may maintain an action against one who obstructs the street so as to cut him off from access to his property. *Brakken v. Minneapolis & St. L. R. Co.* 29 Minn. 41; *Phipps v. West Maryland R. Co.* 66 Md. 324; *McQuaid v. Portland & V. R. Co.* 18 Or. 237; *South Carolina R. Co. v. Steiner*, 44 Ga. 546.

If a railroad company in laying its tracks in the street changed the grade or otherwise permanently obstructed access, an adjoining lotowner must be paid damages. *Central Branch U. P. R. Co. v. Twine*, 23 Kan. 585; *Atchison & N. R. Co. v. Gariside*, 10 Kan. 552; *Virginia & T. R. Co. v. Lynch*, 13 Nev. 92.

The abutting lotowner may recover for loss of his special right to pass and repass over the way taken by a railroad company. *Central Branch U. P. R. Co. v. Andrews*, 30 Kan. 690, 41 Kan. 370.

While the Legislature may regulate the uses of the street as a street it has no power to authorize a structure thereon which is subversive of, and repugnant to, the uses of the street as an open street. Whether a particular structure authorized by Legislature is consistent or inconsistent with the uses of a street as a street must be largely a question of fact depending upon the nature and character of the structure authorized. *Story v. New York Elev. R. Co.* 90 N. Y. 146, 43 Am. Rep. 146.

A city cannot authorize a railroad to permanently obstruct a street without making compensation to abutting property owners. *Burlington & M. R. Co. v. Reinbackle*, 15 Neb. 279, 48 Am. Rep. 342.

A lotowner is entitled to damages for an obstruction to the street by earth, gravel, timber, or rails, put there by a railroad company which substantially affects his use of the street as appurtenant to

ture and operated its road, leaving but a narrow space between it and plaintiff's premises, insufficient to admit of the approach of a team and carriage to them. The defendant had acquired, previously to the time of discontinuing the street, the fee of the same for railroad purposes, subject to a use for the general public. The plaintiff's premises had for several years previously, and at the time of said change, been used as a hotel and boarding-house, and the rental value of the same had been diminished in consequence of these changes, and compensation had not been made to plaintiff for the alleged interference with plaintiff's rights and the injuries.

Other facts will be found in the opinion.

Mr. Thomas Raines, for appellant:

The plaintiff, as an abutting owner upon a street which was an ancient highway, had an easement in North Avenue for access to her lot and for light and air across the open space. These easements were property within the meaning of the constitutional provision which prohibits the taking of private property for public use without just compensation; and neither the Legislature nor the city of Rochester nor both combined could devote the street to pur-

poses inconsistent with such street uses without compensation.

Abendroth v. Manhattan R. Co. 11 L. R. A. 634, 122 N. Y. 11; *Kane v. New York Elec. R. Co.* 11 L. R. A. 640, 125 N. Y. 164; *Powers v. Manhattan R. Co.* 120 N. Y. 183; *Fobes v. Rome, W. & O. R. Co.* 8 L. R. A. 453, 121 N. Y. 505; *Lahr v. Metropolitan Elec. R. Co.* 6 Cent. Rep. 371, 104 N. Y. 268; *Cosswell v. New York, N. H. & H. R. Co.* 4 Cent. Rep. 225, 103 N. Y. 10; *Story v. New York Elec. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146; *Mahady v. Bushwick R. Co.* 91 N. Y. 148, 43 Am. Rep. 661.

The acts of defendant were not authorized by the law, under which defendant justifies.

Laws 1830, chap. 147; *Cosswell v. New York, N. H. & H. R. Co. supra*; *Bohan v. Port Jervis Gaslight Co.* 9 L. R. A. 711, 122 N. Y. 18.

Cases holding that though one public way to property be closed, if there is another left the property owner sustains no actionable damage, do not apply in this case.

Kings County F. Ins. Co. v. Stevens, 2 Cent. Rep. 480, 101 N. Y. 411; *Ooster v. Albany*, 43 N. Y. 399; *Fearing v. Irving*, 55 N. Y. 490; *Hier v. New York, W. S. & B. R. Co.* 40 Hun, 810.

his premises. *Parrot v. Cincinnati, H. & D. R. Co.* 10 Ohio St. 624.

Recovery may be had for appropriation of the street in front of plaintiff's house although it was accessible through another street. *Ft. Scott, W. & W. R. Co. v. Fox*, 42 Kan. 490.

But the taking of the easement of access is not such a taking as to justify the statutory remedy, and the only remedy left for the property owner is one at law for the recovery of damages for a consequential injury. *Protzman v. Indianapolis & C. R. Co.* 9 Ind. 460, 68 Am. Dec. 660.

In Pennsylvania there could be no recovery for damages to access. *Struthers v. Dunkirk, W. & P. R. Co.* 87 Pa. 282.

What is a taking.

The rule that a municipal corporation may lawfully allow a railroad to lay its tracks through a public street without making compensation only applies where the tracks are laid on the grade of the street, and not where an embankment is raised nor where the street is used for the storage of cars, etc. *Tate v. Missouri, K. & T. R. Co.* 64 Mo. 142.

Abutting owners, although not owning the fee in the street, are entitled to compensation when it is practically and substantially closed against them for ordinary street purposes, under authority of the municipality which owns the fee by a railroad embankment therein several feet high with perpendicular stone walls leaving a space only eight or nine feet for a carriage-way. *Reining v. New York, L. & W. R. Co.* (N. Y.) *ante*, 138.

A railroad embankment in a street which appropriates that part of it to the practical exclusive use of a railroad is not a mere change of grade which can be made without compensation to an abutting owner, at least where the grant of authority to occupy the street did not purport to be an exercise of that power. *Ibid.*

Where by the construction of a railroad the lot-owner and the general public were practically excluded from the part of the street in front of plaintiff's lot, compensation must be made. So when the character of the street and railroad was such that the street could not be used when a train was running through it, the exclusion was suffi-

ciently complete to support an action. *Elisabethtown, L. & B. R. Co. v. Combs*, 10 Bush, 322, 19 Am. Rep. 87.

Placing a street railway so near the edge of the street as to interfere with the access to an abutter's lots is a taking of private property. *Cincinnati & S. G. A. St. R. Co. v. Cumminsville*, 14 Ohio St. 652.

When the taking is incomplete.

Mere inconvenience is not sufficient to entitle the abutter to a recovery of damages. *Fulton v. Short-Route R. Transfer Co.* 85 Ky. 642; *Hyland v. Short-Route R. Transfer Co.* 10 Ky. L. Rep. 902.

A railroad is not responsible for slightly changing the grade of a street through which it runs if the change is not enough to obstruct the access to the abutter's property. *Jackson v. Chicago, S. F. & C. R. Co.* 41 Fed. Rep. 666.

A horse railroad constructed on the surface of a street is not an unlawful interference with the easements of the abutting owner, but if the company constructs a switch which it uses for storing cars in front of an abutter's property it will render it liable to an action. *Mahady v. Bushwick R. Co.* 91 N. Y. 148, 43 Am. Rep. 661.

The mere construction and operation of a surface railroad along and upon the city street substantially upon the same grade therewith is not the taking of easements of the abutting owner for which he will be entitled to compensation. But if the use of the street becomes unreasonable, excessive, or exclusive, or such as not to leave the passage of the street substantially free and unobstructed, a case for damages will arise. *Fobes v. Rome, W. & O. R. Co.* 8 L. R. A. 453, 121 N. Y. 505.

The construction on the opposite side of a road-bed of an embankment five and a half feet high and eleven feet wide, which reduces the roadbed to a width of twenty-nine feet in front of an abutter's lot, upon which embankment a railway is constructed, is not such an interference with the abutter's easement as will give him a right of action. *Indiana, B. & W. R. Co. v. Eberle*, 9 West. Rep. 206, 110 Ind. 542, 59 Am. Rep. 225.

Where a railroad embankment raised in the middle of a city street left a passageway on each side from six to thirteen feet wide exclusive of the side-

Cases wherein the plaintiff sought to recover damages for injuries to their lots by reason of the change of grade of the highway in front of their premises, rendering less convenient the access thereto, thereby causing serious damage to the property, are not applicable.

Utine v. New York Cent. & H. R. R. Co. 2 Cent. Rep. 116, 101 N. Y. 98; *Conklin v. New York, O. & W. R. Co.* 3 Cent. Rep. 194, 103 N. Y. 107.

The plaintiff, having for twenty-five years paid taxes for the construction of various improvements on this street and having erected expensive buildings on her lot and having only this street as an outlet, cannot now be deprived of its use.

Am. Const. Law, 372-376; Dillon, Mun. Corp. 4th ed. § 666, *note*.

Mr. Edward Harris, for respondent:

The plaintiff is not entitled to any damages by reason of any obstruction of means of access to her premises from the street, because it appears that she has just as complete access to the street in front of her premises as she ever had. This is not the case of user by defendant of any part of a highway, and therefore does not fall within *Story v. New York Elev. R. Co.* 90 N. Y. 123, 43 Am. Rep. 146. See also *Conklin v. New York, O. & W. R. Co.* 3 Cent.

walk, so that vehicles meeting could in most places pass without difficulty, the railroad was held free from liability. *Crosby v. Owensboro & R. R. Co.* 10 Bush, 239.

So excavations made by a railroad company on a part of a street not abutting on plaintiff's property, and which do not cut him off from access to his property, are not a ground for damages. *Rochette v. Chicago, M. & St. P. R. Co.* 32 Minn. 201.

The Minnesota rule.

An abutting owner independently of the ownership of the fee in the street has an easement therein in front of his lot to the whole width of it for the purposes of access, light, and air, which is property and cannot be taken from him without compensation; and it is such an interference with the easements to construct a railroad on the surface of the street, although on the side opposite to the complaining lotowner, as to render the railroad liable for damages. *Lamm v. Chicago, St. P. M. & O. R. Co.* 10 L. R. A. 271, 45 Minn. 71; *Adams v. Chicago, B. & N. R. Co.* 39 Minn. 291.

The Mississippi rule.

It seems that in Mississippi the mere construction of a railroad in a street is such a destruction of an abutter's easements of access that compensation must be made. *Theobald v. Louisville, N. O. & T. R. Co.* 4 L. R. A. 735, 66 Miss. 279.

Easements of light and air.

An abutting lotowner on a public street has an easement to have the street kept open so that from it access may be had to the lot, and light and air furnished across the open way above the surface. There can be no lawful obstruction to the access of light and air to the owner's detriment. This easement is property within the meaning of the Constitution which cannot be taken without compensation. When it is sought to close a street or any part of it above its surface so that light is in any measure prevented from reaching the abutter's property to his injury, compensation must be 14 L. R. A.

Rep. 194, 103 N. Y. 107; *Fobes v. Rome, W. & O. R. Co.* 8 L. R. A. 453, 121 N. Y. 505.

Potter, J., delivered the opinion of the court:

The action is brought to recover damages occasioned to plaintiff's means of access to her building and premises, and to the air and light incident thereto, in consequence of the structure of defendant in front of or near plaintiff's premises. A street or highway is principally designed and devoted to the use of the public to travel upon with teams and carriages and upon foot, and it may not be used for any other purpose, except it be a quasi public use, such as a railroad carrying persons and freight under certain limitation. *People v. Kerr*, 27 N. Y. 188; *Kane v. New York Elev. R. Co.* 125 N. Y. 164, 11 L. R. A. 640.

Certain town and city officers are made by law trustees of highways and streets, and are charged with the care of them, and their legitimate use for the purpose of ordinary travel and passage by teams, vehicles, and persons on foot. The officers having charge of ordinary country roads have not the absolute power to lay out a new or to close an old highway. They cannot do either of said acts without the consent of the owners or abutters, or a course

made. *Story v. New York Elev. R. Co.* 90 N. Y. 146, 43 Am. Rep. 146.

In the *Story Case*, a frame work had been erected in such manner as to fill so much of the carriage-way of the street as is above fifteen feet above the roadway.

The mere disturbance of the rights of light and access by the imposition of a new street use gives no right of action. *Kane v. New York Elev. R. Co.* 11 L. R. A. 640, 125 N. Y. 164.

Damages.

Where the use of the street is permanently obstructed by a railroad the damages will be the same as they would be in proceedings by the company to condemn the property. *Grafton v. Baltimore & O. R. Co.* 21 Fed. Rep. 309.

Consequential injuries to an abutter's property from the operation of an elevated railroad which has been constructed without extinguishing his easements of light, air, and access may be considered by the jury in determining the amount to be awarded to him. *Kane v. New York Elev. R. Co.* 11 L. R. A. 640, 125 N. Y. 164.

Where the easements are taken, consequential damages which are caused by smoke and soot may be taken into consideration. *Elizabethtown, I. & B. R. Co. v. Combs*, 10 Bush, 292, 19 Am. Rep. 67.

In conflict with the above, it has been held that where a railroad is placed on the surface of the street without the extinguishment of the lotowner's easements of access, light, and air, a recovery can only be had for the damages resulting from the destruction or interference with the easements, and cannot extend to damages resulting from the unlawful maintenance and operation of the road, or consequential injuries from smoke and soot. *Lamm v. Chicago, St. P. M. & O. R. Co.* 10 L. R. A. 271, 45 Minn. 71.

Damages cannot be allowed which arise from noise, smoke, vibration, ashes, or dust, or the unsightly character of the structure. *Re New York Elev. R. Co.* 36 Hun, 477.

There can be no recovery of damages if the value of the property is not diminished. *Bohm v. Metropolitan Elev. R. Co.* ante, p. 344.

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of legal procedure prescribed by statute after notice to the owners, abutters, and those interested, and the verdict of a jury, and the assessment and payment of the damages sustained in consequence of the laying out of a new, or the discontinuance of an old, road. See the various provisions of article 4, title 1, chap. 14, pt. 1, Rev. Stat., and the Laws of 1882, chap. 317.

The charters of all cities, so far as I have had occasion to examine or observe them, contain similar provisions restricting the exercise of the power to open or close streets by municipal authority. I find the following in section 167, subd. 4, of the charter of the city of Rochester upon this subject, viz.: "The executive board, whenever authorized by the common council, shall have the same power with respect to said city to discontinue any street therein, as is now by law possessed by commissioners of highways of towns, with respect to roads in towns; and the same proceedings shall be had, and the same appeal shall lie, from the decision of the said executive board, and the same proceedings shall be had on such appeal as are now provided by law in reference to towns so far as applicable." I do not at all question the power of the Legislature to open and to close streets and highways within the constitutional limits, but I refer to these restrictions to show the safeguards and protection to the citizen which the Legislature has imposed upon the public officers in the exercise of the power to open and close streets and highways. But the Legislature itself may not exercise this power absolutely and without regard to the rights of the citizen. The Constitution imposes the restraint upon the Legislature that it shall not appropriate private property to public uses without just compensation therefor to the owner of the property. Article 1, § 6; *Abendroth v. Manhattan R. Co.* 122 N. Y. 1, 11 L. R. A. 634.

Had the plaintiff any rights to air, light, or access as "abutting owner" of lands bounded upon the street which was closed as a street, and upon which "all the structures of the defendant complained of in this case are situate?" The street which was occupied by defendant's structures in this case had been in the use of the general public as a street for more than fifty years, and the plaintiff and her grantors had used the access which it afforded to her house and premises for that period of time. The structures complained of practically destroyed the only access to the plaintiff's premises with a team and wagon; and the annual rental value of the plaintiff's premises was diminished in consequence of the defendant's structures by the sum of \$400 or \$500. It has been held by this court, and recently by each division of it, that an owner of a lot adjoining a city street, although his title extends only to the side of the street, and he has no ownership of the land or interest therein save as abutting owner, has incorporeal private rights therein, which are incident to his property, and which may be so impaired as to entitle him to damages. Such rights are private property within the provision of the State Constitution (art. 1, § 6) which forbid the taking of private property for public use without just compensation. It is no justification, therefore, for the impair-

ment that the act complained of was done pursuant to legislative authority. *Abendroth v. Manhattan R. Co. supra.*

"The owners of lots abutting on a city street, the fee of which is in the municipality, have, by virtue of proximity, special and peculiar rights, facilities and privileges therein, in the nature of easements, which are not common to the citizen, and constitute property of which they cannot be deprived by the Legislature or the municipality, or both without compensation; and any use of such street inconsistent with its use as a public street, which interferes with these easements, is a taking of property, for which said owners are entitled to compensation to the extent of the damages occasioned thereby." *Kane v. New York Elec. R. Co.* 125 N. Y. 165, 11 L. R. A. 640.

Since the able and exhaustive examination which this question has received in the opinions of the court in the two cases last referred to, there is no occasion for further discussion of it. These cases hold, and they are supported by numerous authorities, that though the defendants therein had constructed and run their roads under authority of the Legislature and of the municipality, yet there was a right of access to the plaintiff's premises, for substantial interference with which defendant was liable, and that the plaintiff could not be deprived of such right without just compensation.

We come, now, to the more particular consideration of the question whether a party enjoying the rights of light, air, or access may be deprived of such rights by the action of the municipal authority in the discontinuance of the street in respect to which such rights exist, without compensation therefor or any provision for compensation. This question may be considered as simply a discontinuance of the street in question, within the power and discretion possessed by the proper officers of the city of Rochester, or as a discontinuance or an alteration of this street by municipal authority or by commissioners acting for the municipality, under an Act of the Legislature in connection with and in furtherance of the convenience and advantages of the defendant's railroad. Can the city exercise such power in a manner that shall deprive a citizen of the right of access to his premises while affording or leaving him no other access? We have seen, from the cases above cited, that a municipality cannot divest the citizen of such rights, even where the municipality grants the right of laying the tracks and running the cars of a railroad along one of the streets of a city which is still devoted to and used by the general public as a street. Under the provisions of the statute in relation to country roads, and, as I apprehend, under those of most city and village charters as to streets and roads in cities and villages, the officers having them in charge cannot arbitrarily abandon or discontinue them. The statute provides a regular mode of procedure, with compensation, to effect a discontinuance of them. The question of the right or power of a municipality to discontinue a street has frequently been presented to the courts of this State, and it has been held that the authorities might do so when it is done in the manner prescribed by law, and when there

is left to the private citizen other and suitable means of access. To that effect are the cases of *Radeiff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Coster v. Albany*, 43 N. Y. 399; *Fearing v. Irwin*, 55 N. Y. 490.

But it will be observed, upon an examination of these cases, that they clearly and distinctly recognize the right of access, and that the owner of such rights cannot be deprived of a street affording him access to his premises unless there is left for his use and enjoyment other suitable means of access, or the payment of a just compensation for the deprivation of the same. Such was the character of the case of *Wilson v. New York Cent. & H. R. R. Co.*, 2 N. Y. Supp. 65, forming a part of the brief of respondent's counsel, and upon the authority of which the learned general term seems to have relied in the decision of this case. In that case the plaintiff's lot extended from King to Litchfield Streets, in the city of Rochester. The defendant, under chapter 147, Laws 1880, (the Act in question in this case,) closed up Litchfield Street, but left the access afforded by King Street; in short, did not deprive the plaintiff of the means of access to his lot. I am not disposed to adopt the doctrine that a municipality may close up a street upon which abutting owners have built expensive structures for residences and business, and enjoyed access to them from the street so closed for many years, arbitrarily, and without compensation for the injuries done to such rights. Such rights are substantial and essential rights for the enjoyment of property and are appurtenances thereto. *Abendroth v. Manhattan R. Co.* 123 N. Y. 15, 11 L. R. A. 634, and the cases there cited; *Kane v. New York Elec. R. Co.* 125 N. Y. 183, 11 L. R. A. 640, and cases there cited.

It would thus seem that the plaintiff could not be deprived of her rights if the city of Rochester itself, under any power that may reside in its municipal charter, had closed the street, and debarred the plaintiff from the enjoyment of those rights without making or providing compensation therefor. But it may be contended that that view is not the real aspect in which this case is to be considered and decided. The municipality of the city of Rochester did not directly close this street, and in that way interfere with the plaintiff's right, and that we need not here discuss, or decide the liability of the city for that act, as it is not a party to the action. The defendant, the Railroad Company, did the act complained of; and this action is brought against that Company for its agency in interfering with and violating plaintiff's rights. The Railroad Company had laid its track upon this street with the consent of the city of Rochester, and by virtue of its right under condemnation proceedings. The right it acquired under the latter proceeding was the right to use this street to lay its track and run its cars, subject to the older and superior rights of the general public to use the street, and, as we have seen, subject to the rights of the abutters to access, air and light.

Now, it seems to follow, as a conclusion from these premises, that if neither the State
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nor the city of Rochester could legally close this street, without making compensation to the abutting owners the defendant Railroad Company acquired no right to erect its structures in such abandoned or discontinued street. *Stetson v. Faxon*, 19 Pick. 147, 31 Am. Dec. 123. And if the street has not been legally discontinued, then the right of the Railroad Company is still limited as it was when it was first acquired, and is subject to the rights of the plaintiff in respect to the easements, and the rights of the general public in respect to travel and passage. When, therefore, the defendant placed the structures complained of in the street, it violated the rights of the plaintiff in a much more marked manner than was done by the elevated railroad companies in the *Abendroth* and *Kane* Cases, *supra*, and for which this court held them liable in damages. Since examining this case, and writing the views and the conclusion above expressed, I have had an opportunity of perusing the very able and interesting opinion of Judge Andrews in the case of *Riening v. New York, L. & W. R. Co.* (N. Y.) (recently decided, but not yet in the State Reports). The facts in that case were briefly these: The defendant road was located upon Water Street in the city of Buffalo. Plaintiff's building was located upon premises fronting and abutting said street. Upon the east of plaintiff's premises was Commercial Street, and upon the west was Maiden Lane Street. The municipal authorities of the city of Buffalo authorized the defendant in that case to raise the grade of Water Street some five or six feet in front of plaintiff's premises, and extending beyond the crossing of Commercial Street, and leaving a strip of some nine feet in width along the north side of Water Street for a wagon-way and a strip fourteen feet wide for a sidewalk at the former grade. The raised grade was twenty-four feet wide, and was supported by stone walls, and was paved and used as a street when that action was commenced. The learned judge in his opinion reviewed the cases bearing upon this subject, and distinguished it from the case of *Fobbes v. Rome, W. & O. R. Co.*, 121 N. Y. 505, 8 L. R. A. 453, upon which the defendant in that case sought to sustain the defense; and held that the raising of the grade of the street in that manner, even under the license of the authorities of the city of Buffalo, was a violation of the plaintiff's rights of access, though the plaintiff had no title to the land within the lines of the street; and that the defendant was liable for the damages plaintiff had sustained. The case under consideration is a much stronger case than the case cited. In the case under consideration the obstruction prevented access to plaintiff's premises with a team and vehicle. In the case referred to it made it inconvenient to approach plaintiff's premises in that manner. We think the direction of a verdict for the defendant was error, and that the question of plaintiff's damages should have been submitted to the jury.

The judgment should be reversed, and a new trial granted, with costs to abide event.

All concur except **Bradley and Haught, JJ.**, not sitting.

CONNECTICUT SUPREME COURT OF ERRORS.

P. W. TURNER, *Appt.*,

TOWN OF HEBRON.

(.....Conn.....)

1. **The unorganized public cannot acquire the right of fishing** in a pond either by grant or by prescription, even if each individual member of such public acquires the right.
2. **The right to take fish in any water which is not navigable**, although it belongs *prima facie* to the owner of the soil, follows the ownership of the water if that is separated from the ownership of the soil.
3. **The exclusive right to fish in a pond may be gained by one who excludes all others** from fishing therein without his permission during the whole period of the Statute of Limitations, although from time immemorial all members of the unorganized public had fished therein as a matter of right and a part of the soil under the pond belongs to a town and the title to another part has been lost or abandoned.

(October 23, 1891.)

APPPEAL by a landowner from a judgment of the Superior Court for Tolland County dismissing his application for relief from the action of the selectmen of the Town of Hebron in laying out a public highway across his land. *Reversed.*

NOTE.—Prescriptive rights of fishery.

In public navigable waters.

There is a common right on behalf of the public to fish in public navigable waters such as the sea and its arms and rivers where the tide ebbs and flows. *Warren v. Mathews*, 6 Mod. 73; *Com. v. Charleston*, 1 Pick. 180, 11 Am. Dec. 161; *Royal Fisheries of the Banne, Davies*, 149; *Malcolmon v. O'Dea*, 10 H. L. Cas. 593; *Lay v. King*, 5 Day, 72; *Wooley v. Campbell*, 37 N. J. L. 153; *Browne v. Kennedy*, 5 Harr. & J. 203, 9 Am. Dec. 503; *Preble v. Brown*, 47 Me. 234; *Lakeman v. Burnham*, 7 Gray, 440; *Gough v. Bill*, 21 N. J. L. 153; *Collins v. Benbury*, 3 Ired. L. 277, 38 Am. Dec. 722; *Bickel v. Polk*, 5 Harr. (Del.) 325; *Murphy v. Ryan*, 2 Ir. C. L. 143.

This right extends to the taking of shell fish. *Peck v. Lockwood*, 5 Day, 22; *Martin v. Waddell*, 41 U. S. 16 Pet. 397, 10 L. ed. 1004; *Parker v. Cutler M. Co.*, 30 Me. 383, 37 Am. Dec. 55; *Bagott v. Orr*, 2 Bos. & P. 472; *Paul v. Hazelton*, 37 N. J. L. 103; *Moulton v. Libbey*, 37 Me. 423, 59 Am. Dec. 57; *Weston v. Sampson*, 8 Oush. 347, 54 Am. Dec. 764; *Proctor v. Wells*, 103 Mass. 216.

This being so, of course a right on the part of the public to prescribe a fishery in public waters would be valueless and cannot be said to exist.

In regard to a right of common of fishery in public waters as appurtenant to an estate, it has been held not to exist, the court stating that it would be needless, the same as prescribing for a right of common appurtenant in the king's highway. *Ward v. Crosswell, Willes*, 255.

But if the right has been once acquired by prescription to a several fishery in navigable water it may pass as appurtenant to the owner's estate. *Rogers v. Allen*, 1 Campb. 302.

It is established by the overwhelming weight of authority that an individual may establish a prescriptive right to an exclusive fishery in public

The facts are stated in the opinion.

Messrs. Solomon Lucas and Charles E. Perkins, for appellant:

It appears from the report of the committee that Mr. Turner owned the land all around the pond more than fifteen years, when the selectmen laid out this road. The pond and the land around and under it were his in fact for all purposes, and while the committee hold he had no title to any but a small portion of the land under the pond, the report shows upon its face that he had acquired all the land under the pond.

Ridgway v. Ludlow, 58 Ind. 243; *Eastern R. Co. v. Allen*, 135 Mass. 13; *Tufta v. Charlestown*, 117 Mass. 401, and authorities cited.

Mr. Turner owned the land to low-water line before he raised the pond for the purposes of pondage and flowage. The raising of the pond increased its size fifty-five acres. On this new ground fish put into the pond by Mr. Turner would breed and feed. No one has a right to fish on that land but Mr. Turner.

Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428.

There is not, and cannot be, any such entity as "an unorganized public," outside of the State or its subordinate representatives, which can hold and own rights to fish, or anything else.

Washb. Easem. p. 119; *Rogers v. Brenton*, L. R. 10 Q. B. 26-60; *Ang. Watercourses*,

navigable waters. *Hale, De Jure Maris*, chap. 8, found in *Hargrave, Law Tracts*, p. 18; also in notes to *Mather v. Chapman*, 40 Conn. 332, 16 Am. Rep. 56; *Orford v. Richardson*, 4 T. R. 437; *Carter v. Murcot*, 4 Burr. 2162; *Gould v. James*, 6 Cow. 308; *Brookhaven v. Strong*, 60 N. Y. 55; *Jackson v. Lewis, Cheves, L.* 230; *Chalker v. Dickinson*, 1 Conn. 332, 6 Am. Dec. 350; *Rogers v. Jones*, 1 Wend. 259, 19 Am. Dec. 433.

Although in Pennsylvania there can be no prescriptive right of fishery in navigable water. *Tinticum Fish. Co. v. Carter*, 61 Pa. 35, 100 Am. Dec. 597.

An adverse and exclusive use is indispensable to the acquisition of several right of fishery. *Day v. Day*, 4 Md. 270; *Delaware & M. R. Co. v. Stump*, 8 Gill & J. 479; *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57; *Chalker v. Dickinson*, 1 Conn. 334, 6 Am. Dec. 250.

For the purpose of establishing the presumption of a grant of exclusive right in a public fishery it should appear that all others have been kept out by the claimant and his grantors. *Collins v. Benbury*, 5 Ired. L. 113, 42 Am. Dec. 155.

A several fishery in a tide river the waters of which have permanently receded from one channel and flow in another, cannot be followed from the old to the new channel. *Cariyale v. Graham*, L. R. 4 Exch. 261.

If one claims a prescriptive right of fishing in navigable waters he has the burden of showing it. *Fitzwalter's Case*, 1 Mod. 105.

To prove a prescriptive right of fishery old licenses on the court rolls granted by owners of the right in consideration of certain rents to fish in the locus in quo are evidence without proof of the rents being paid in connection with proof that such rents have been paid in modern times or that the claimants have exercised their rights of ownership over the fishery. *Rogers v. Allen*, 1 Campb. 302.

§ 61; *Mervin v. Wheeler*, 41 Conn. 23, 24; *Pearsall v. Post*, 22 Wend. 425, 432.

Until within some twenty years people used to fish and hunt, shoot, gather nuts, etc., all over wild lands, and in most places do till this day; but this gave no rights to anyone.

Cobb v. Davenport, 33 N. J. L. 228, 97 Am. Dec. 718.

A right to fish is not an easement, but a *profit à prendre* which cannot be obtained by a use or custom, except as connected with some real estate, or, in technical language, cannot be prescribed for in gross, but only in a *que estate*, except so far as it may be gained by adverse possession as a personal right by some individual or corporation which is competent to hold title to land.

Goddard, Easem. p. 6; Washb. Easem. pp. 7, 125, § 20; *Mervin v. Wheeler*, 41 Conn. 14; *Waters v. Lilley*, 4 Pick. 145, 16 Am. Dec. 338; *Sale v. Pratt*, 19 Pick. 191.

There can be no such thing as obtaining a right of *profit à prendre* by custom.

Mervin v. Wheeler and *Waters v. Lilley*, *supra*; *Gateward's Case*, 6 Coke, 59b; *Grimstead v. Marlowe*, 4 T. R. 718; Gould, Waters, § 184, p. 825.

A right of *profit à prendre*, like any other interest in or concerning real estate, may be obtained by adverse occupation.

Washb. Easem. *530-533; *Melvin v. Whiting*, 13 Pick. 1-4, 20 Am. Dec. 524; Gould, Waters, § 189, p. 832, note 6.

When Mr. Turner purchased all the lands

around the pond he posted notices forbidding all persons fishing in the same, and on one occasion he drove a party with force and arms from the pond whom he found fishing there. He sought to prevent all persons fishing in the pond without leave, and did so as far as it was within his power.

Such conduct has been held to give such an occupier an exclusive right to fish in navigable waters.

Washb. Easem. *526, citing many authorities; *Chalker v. Dickinson*, 1 Conn. 382-384, 6 Am. Dec. 250; Gould, Waters, § 189; Ang. Watercourses, § 65a, note 1.

The ownership in the waters, and the lands under the waters, of ponds not navigable, belong to the adjoining proprietors.

Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 398; *Leedyard v. Ten Eyck*, 86 Barb. 102; *Cobb v. Davenport*, 33 N. J. L. 228, 97 Am. Dec. 718; Gould, Waters, § 80 *et seq.*; *Tute v. Fisher*, 8 West. Rep. 121, 65 Mich. 43; *State v. Roberts*, 59 N. H. 256, 47 Am. Rep. 199; *Hodges v. Williams*, 95 N. C. 381, 59 Am. Rep. 242; *Bristow v. Cormican*, L. R. 3 App. Cas. 641; *Ridgway v. Ludlow*, 58 Ind. 24; *Hardin v. Jordan*, 140 U. S. 371, 85 L. ed. 428.

Messrs. John R. Buck, Arthur F. Eggleston and Charles Phelps, for appellee:

Turner's deeds would not give him any rights beyond the edge of the water, for the reason that deeds of land bounding on the shore of an inland lake or pond carry title only to the shore.

In private waters.

A custom on the part of the public to fish in private waters is not a lawful custom and cannot establish the right to do so. *Waters v. Lilley*, 4 Pick. 145, 16 Am. Dec. 338; *Grimstead v. Marlowe*, 4 T. R. 718.

The case of *Saltash v. Goodman*, L. R. 5 C. P. Div. 431, is an instructive one on the question of acquiring a prescriptive right in a fishery on behalf of the public. In it certain persons were sued in trespass for interfering with plaintiff's several right of fishery and justified *inter alia* by setting up an immemorial usage on the part of inhabitants of the borough to which they belonged to fish in such water and claimed that the court must presume the grant of a right for them to do so. The court, however, adopted the reasoning of *Rivers v. Adams*, L. R. 3 Exch. Div. 361, in which there was a claim of usage to take fire-wood; and of *Gateward's Case*, 6 Coke, 59b; and *Chilton v. London*, L. R. 7 Ch. Div. 735, to the effect that such a right could not exist by custom, prescription or grant, unless it be a crown grant which incorporated the inhabitants; that such a grant will not be presumed from proof of usage by the inhabitants, if such presumption is inconsistent with the present or past state of things and cannot be made if there is no evidence of such a corporation having existed at any time. It was also held that proof of usage on the part of the inhabitants generally will not establish a right in favor of the owners of a particular tenement. This case was subsequently reversed in L. R. 7 App. Cas. 633, the court inventing an ingenious origin for the custom by supposing a grant to a corporation in trust for certain persons, the free inhabitants of the ancient tenements within the borough who were the persons claiming the right of fishery. But in the subsequent case of *Tilbury v. Silva*, L. R. 45 Ch. Div. 93, the question again came up and there being no facts in the case upon which the fiction of a grant to a corporation

in trust could be rested, the court practically follows the ruling of the common pleas decision in the above case and hold that the right of fishery could not be claimed by prescription on behalf of a large and indefinite class, such as "owners and occupiers."

The ordinary common of piscary in private waters was well established at common law and the same rules with regard to prescription applied to it as to other rights in common.

There appears to be no doubt of the right of an individual to acquire by prescription rights of fishery in private waters. *Melvin v. Whiting*, 10 Pick. 395, 20 Am. Dec. 524, 13 Pick. 183.

Judge Sharwood questioned whether the right could be prescribed for when not pleaded in a *que estate*, but in a man and his ancestors, stating that that kind of a usage for twenty-one years or upwards which may be sufficient to raise the presumption of a grant of a mere easement, will not support a claim for an interest in the land itself or its profits, and held that at all events the evidence in that case was not sufficient to establish a right of fishery in gross. *Tinicum Fish. Co. v. Carter*, 61 Pa. 36, 100 Am. Dec. 537.

The court also raised the same question in *McFarlin v. Essex Co.*, 10 Cush. 310, and held that at all events claimant must prove satisfactorily an actual, exclusive possession of the fishery adverse to the right of the riparian owner, against his interest, uninterrupted and continuous for at least twenty years.

But in analogy with other rights of profit in land it would seem that a right of fishery might be prescribed for in gross. See note to *Fisher v. Fair*, *ante*, 333.

Whoever claims the right to fish in private waters has the burden of showing the foundation of such right. *Fitzwater's Case*, 1 Mod. 106.

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Ang. Watercourses, 5th ed. p. 41; *Mill v. Woolen Mfg. Co. v. Smith*, 84 Conn. 463; *Hurmerman v. Johnson*, 18 Pick. 281; *Patne v. Wood*, 108 Mass. 169; *Ketcher v. Phelps*, 28 Vt. 258, 260; *State v. Gilmanston*, 9 N. H. 461; *Bradley v. Rice*, 18 Me. 201, 29 Am. Dec. 501; *Hathorn v. Stinson*, 10 Me. 234, 238, 25 Am. Dec. 228; *Mansur v. Blake*, 62 Me. 38; *Wood v. Kelley*, 30 Me. 47, 54; *Canal Comrs. v. People*, 5 Wend. 446; *Wheeler v. Spinola*, 54 N. Y. 378; *Gouverneur v. National Ice Co.* 25 Abb. N. C. 276; *Child v. Starr*, 4 Hill, 832; *Kingman v. Sparrows*, 12 Barb. 206; *Smith v. Rochester*, 93 N. Y. 463, 44 Am. Rep. 393; *Champlain & St. L. R. Co. v. Valentine*, 19 Barb. 484; 3 Washb. Real Prop. 5th ed. § 47, p. 443; Gould, Waters, 203, and cases there cited.

In Indiana and Michigan there are two or three cases which make no distinction between unnavigable streams and inland ponds and lakes, in reference to deeds bounding on the shore, but these decisions are not in accord with the current of authorities on this question.

Ang. Watercourses, 5th ed. 42; *State v. Gilmanston*, 9 N. H. 461.

A highway may be laid out even for pleasure driving.

Bryan v. Dranford, 50 Conn. 254; *Higginson v. Nahant*, 11 Allen, 530; *Smith v. Rochester*, 92 N. Y. 478, 44 Am. Rep. 393.

Andrews, Ch. J., delivered the opinion of the court:

On the 18th day of May, 1888, the selectmen of the Town of Hebron laid out a public highway in that town over the land of Phineas W. Turner, which lay-out was accepted by the town at a town meeting holden on the 6th day of June following. On the 2d day of July Mr. Turner made application for relief in the nature of an appeal from the doings of the selectmen in laying out said highway to the Superior Court in Tolland County, alleging as a reason for said application that the said highway was not of common convenience and necessity. In the superior court a committee was appointed pursuant to the Statute (Gen. Stat. § 2701) to hear and determine said application, and to make report thereon. The committee heard the parties, and made their report to the court. Mr. Turner remonstrated against the acceptance of the report, but the court overruled the remonstrance, accepted the report, and dismissed the application of Mr. Turner, with costs. From that judgment he now appeals to this court, and assigns various reasons of appeal.

The statute above cited provides that, "if said committee shall find that the highway is not a common convenience and necessity. . . . said court shall set aside such lay-out thereof; but if they shall find that such highway is of common convenience and necessity . . . the application shall be dismissed, with costs." The said committee, after setting forth the facts at some length, concluded their report in these words: "These are the essential facts in the case; and if on these facts the law is so that all members of the unorganized public have the right as against the plaintiff to fish in North Pond, except the part owned by the plaintiff as aforesaid, then the committee are of opinion 14 L. R. A.

and find that the laid-out way is of common convenience and necessity; but if on these facts the law is otherwise, then the committee are of opinion and find that the laid-out way is not of common convenience and necessity."

The only question we purpose to consider is whether or not the law is so on the facts stated that all members of the unorganized public have the right, as against Mr. Turner, to fish in said pond. North Pond is a natural pond, situated in the towns of Hebron and Lebanon. By deeds which were confirmed by the Colonial Legislature the title to said pond and the soil beneath it become vested in the proprietors of said towns,—much the larger part in the proprietors of the town of Lebanon. This part, by sundry conveyances, came to Abigail Bosworth in the year 1773. There is no record on the town records or probate records or other record that the title to said land ever passed from said Abigail; and so the committee find that the title to said land "never passed from said Abigail Bosworth to any party or parties, but the same has become lost and abandoned." Of that part which once belonged to the proprietors of Hebron a portion has come to and now belongs to Mr. Turner, and the remainder, so far as the records disclose the title, still belongs to that town. In 1865 the plaintiff became the owner of all the land surrounding the pond. He raised the dam at the outlet so much that he thereby raised the water of the pond seven and a half feet. The present area of the pond is 188 acres, of which more than one fourth is caused by such raising of its waters. The plaintiff applied the water of the pond to manufacturing, in which he employs 130 persons. Prior to the time when the plaintiff so became owner, and "from time immemorial, all members of the great unorganized public, both near the pond and remote from it, whenever and wherever disposed so to do, fished in North Pond as a matter of right at all seasons of the year; in boats during the spring, summer and fall, and through the ice during the winter. This was done without objection from any source whatever down to the time when the plaintiff bought all the land adjoining the pond." "When the plaintiff became the owner of all the land surrounding and adjoining the pond, he posted notices forbidding all persons fishing in the same, and on one occasion he drove a party with force and arms from the pond, whom he found fishing there. He sought to prevent all persons fishing in the pond without his leave, and did so as far as it was in his power." "At one time he spent the sum of one hundred dollars stocking the pond with fish. His objection to fishing was not on account of the value of the fish, for he freely gave permission to fish whenever requested, but through fear that the public might acquire the right by prescription to fish there." These facts, while they may not be sufficient to show that the plaintiff has acquired title to the soil under the original pond, do show that he has acquired the right to keep that soil covered with water. The easement of flowing he owns, and so he owns the water. *Mill River Woolen Mfg. Co. v. Smith*, 84 Conn. 463. These facts also show that the plaintiff as such owner of the water and of the land surrounding the water had been for more

than twenty years in the actual, exclusive, and uninterrupted possession and occupation of the right of fishing in the entire pond, claiming it as his own, and keeping all others away. There is no evidence that since 1865 any person whatever has succeeded in fishing in that pond, except he did it by the permission of the plaintiff. Whoever has attempted to fish there without such permission has been driven away.

By the action of the Colonial Legislature in confirming the title deeds of the land under and around North Pond, no public or common right of fishing therein remained, if such a right had ever existed. *Smith v. Miller*, 5 Mason, 191; *Adams v. Pease*, 2 Conn. 481. Nor could the unorganized public, as such, acquire the right of fishing there, either by grant or prescription. A deed or devise to the unorganized public by that name would be void for uncertainty; and there can be no prescription where there can be no grant. *Merwin v. Wheeler*, 41 Conn. 28; *Pearson v. Post*, 23 Wend. 425; *Washb. Easem.* 119; *Rogers v. Brenton*, 10 Q. B. 26-60.

Doubtless any member or each member of the unorganized public might obtain the right of fishing in that pond in either of the ways mentioned. There is no suggestion of any grant. The right which the committee say was exercised by all the members of the great unorganized public was "to fish in the pond at all seasons of the year; in boats during the spring, summer and fall, and through the ice during the winter." If the right so exercised had been completely acquired by long use, it would be a right in the nature of a *profit à prendre in alieno solo*, and must have belonged to each member in gross. The facts showed the right was not exercised as appurtenant to a freehold. Such a right is a mere personal one. It cannot be assigned, and it does not descend to heirs. We are not, however, interested so much to discuss what right of fishing in North Pond the unorganized public may have had in 1865 as to ascertain what right of fishing in that pond Mr. Turner did in fact have in 1888. *Prima facie*, the right to take fish in any water, other than navigable rivers, belongs to the owners of the soil over which the water flows. This is because in ordinary cases the ownership of the soil carries with it the ownership of the water. But the ownership of the water may be separated from the ownership of the soil, and where this is done the right of fishing

goes with the ownership of the water. The law is stated in Co. Litt. 4b: "If a man be seised of a river, and by deed do grant *separalem piscariam* in the same, and maketh livery of seisin *secundum formam charte*, the soil doth not pass, nor the water, for the grantor may take water there, and, if the river becomes dry, he may take the benefit of the soil, for there passeth to the grantee but a particular right, and the livery, being made *secundum formam charte*, cannot enlarge the grant. For the same reason, if a man grant *aquam suam*, the soil shall not pass, but the piscary within the water passeth therewith." See also Com. Dig. *Grant*, E. 5; *Jackson v. Halstead*, 5 Cow. 216. Whenever the ownership of water is in one person and the ownership of the soil under the water is in another, the right of fishing in the water belongs to the former, for he owns that element in which alone the fish can exist. Mr. Turner, being the owner of the water of North Pond, was the owner of the right of fishing therein. Co. Litt. 5b.

A several or exclusive right of fishing in the estate of another may also be gained by an adverse, uninterrupted, and exclusive use and enjoyment of it for the period required by the Statute of Limitations. 2 Washb. Real Prop. 4th ed. 386; *Tynicum Fish. Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597. In such case the one so using it acquires title to the right of fishing against all the world (*Chalker v. Dickinson*, 1 Conn. 382, 6 Am. Dec. 250; *Church v. Meeker*, 84 Conn. 421; *Preble v. Brown*, 47 Me. 284; 3 Kent, Com. 43); and can maintain trespass against anyone, even the owner of the soil, for taking the fish. *Adams v. Pease*, 2 Conn. 481; *Smith v. Kemp*, 4 Mod. 187, 2 Salk. 637; *Holford v. Bailey*, 18 Q. B. 426; *Collins v. Benbury*, 5 Ired. L. 118, 42 Am. Dec. 155; *Delaware & M. R. Co. v. Stump*, 8 Gill & J. 479; *Phipps v. State*, 29 Md. 380, 85 Am. Dec. 654.

Whether we regard the plaintiff as the owner of the water of North Pond, and so the sole owner of the right of fishing therein, or as having acquired the exclusive right to fish there by adverse use, we are clearly of the opinion that as against him no member of the unorganized public has the right to fish in that pond. It follows from this that the report of the committee finds said highway not to be of common convenience and necessity.

There is error in the judgment of the Superior Court.

The other Judges concurred.

NORTH CAROLINA SUPREME COURT.

William H. SNEEDEN, *Appl.*,
v.

George HARRISS *et al.*

(.....N. C.)

1. Merely signing the usual undertaking required in arrest and bail at

NOTE.—For notes on actions for malicious prosecution, including the question of the termination of the malicious proceeding before action, see *Pope v. Pollock* (Ohio) 4 L. R. A. 255; *Antcliff v. June* (Mich.) 10 L. R. A. 621.
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the request of plaintiff in the action does not make one liable for malicious prosecution although the plaintiff may be liable for abuse of civil process.

2. An action for malicious abuse of civil process in order to compel a party to do a collateral thing or to accomplish an ulterior purpose may be maintained without alleging that the process improperly employed is at an end.

(December 1, 1891.)

APPPEAL by plaintiff from a judgment of the Superior Court for New Hanover

County sustaining a demurrer to the complaint in an action brought to recover damages for the alleged malicious prosecution of an action for slander of title. *Reversed.*

Statement by Davis, J.:

The complaint is as follows: "That during the summer and fall of 1887 plaintiff was in possession of a certain tract of land or island in New Hanover County, in Wrightsville Sound, near the ocean, and known as 'Sneeden's Hammocks,' occupying same under a claim of title which he believed to be good and valid; that during that period there was a considerable discussion in the community about the probability of two railroads being constructed to the sound and it was understood that both were desirous of securing possession of said property known as 'Sneeden's Hammocks,' the one the Wilmington Sea-Coast Railroad Company, intending it as their terminus, the other the Wilmington, Onslow & East Carolina Railroad Company, intending to make it the terminus of a branch road to the ocean as plaintiff is informed and believes, and states for this reason the market value of his property became greatly enhanced. (3) That defendants George and Julia Harries also claim title to said island, and were negotiating with the railroad companies to make sale of it to one of them, and some time in October or November in that year entered into a contract with the Wilmington, Onslow & East Carolina Railroad Company, through defendant D. L. Russell, who was largely interested in said road, and its financial agent, projector, and manager, to sell one half of said island to said railroad company, or to him and certain other divers persons interested with him, for \$25,000, and, as the plaintiff has been informed by defendants Harries and Russell, the said contract would have been executed at that time but for the possession of the property by the plaintiff. (4) But, finding their bargain blocked by plaintiff's possession, the defendants George and Julia Harries (through her agent and husband George Harries) and D. L. Russell consulted together as to the best means to carry out their common object, and to obtain immediate possession of the property, so that they might make a sale thereof; and, well knowing there was no lawful means of accomplishing this, they determined upon and proceeded to execute the base, malicious and illegal plan of suing out a writ of arrest and bail under the false and malicious pretense that plaintiff was slandering their title to the property by claiming it to be his own, and of having him arrested and removed from the property and imprisoned, so that they might take possession as soon as the plaintiff was removed; by which wrongful and malicious act the process of the court was abused and used for a purpose not set forth in the affidavit upon which the order of arrest was obtained. (5) In pursuance of this unlawful, base, and malicious design and purpose, they applied to Henry P. West, the other defendant, and induced him to sign a bond required by law, and then sued out before the clerk a writ of arrest and bail, and had the same placed in the sheriff's hands, who late in the afternoon, about the 1st day of November in said year, assaulted, arrested, and

removed the plaintiff from the possession of the property which he was quietly enjoying, and believed to be his own; and, as soon as plaintiff was removed, the defendants took possession of and held the property until they sold it to the Wilmington Sea-Coast Railroad Company. (6) That defendants well knew at the time they made said affidavit that plaintiff was a very poor man, and that no damages could be obtained from him, and that the statements made in said affidavit that he was slandering their title were false, and that the purpose and object in bringing this suit was not to hold him to answer a claim for damages, but that it was, in truth and in fact, as above alleged, and as has been acknowledged by defendant George Harries, for the express and deliberate purpose of suing out a writ of arrest to obtain immediate possession of the property which they could not otherwise secure, and in so doing they purposely and deliberately abused the process of the court. (7) That plaintiff was removed from possession as aforesaid, carried a distance of eight miles, to the common jail of the county, and then and there was incarcerated and restrained of his liberty for a period of ten days. (8) That plaintiff was an old man about 65 years of age, and at the time of his said imprisonment his wife was extremely ill of a sickness from which she shortly afterwards died, and at the time of his imprisonment he was daily expecting her death; and in order to avoid being separated from her, and to enable him to be present at her bedside to administer to her wants, and also to avoid the pain, suffering, and disgrace of going to jail, fearing the ill effects of close confinement upon one so old and infirm as himself, add well knowing his innocence of any unlawful act, and being too poor to give bond, he applied to several persons, through his friends, to give bail for him, but each of the persons applied to refused his petition. (9) That by reason of his imprisonment he was separated from his wife, and unable to be with her in her last days, and was prevented from attending to his ordinary affairs, and greatly suffered in mind and body; by all of which he was damaged \$5,000. (10) That as aforesaid, in pursuance of their illegal and evil purpose, immediately upon the removal of the plaintiff from the property, the defendants took possession, broke open his house, removed and scattered his effects, leveled his house with the ground, shot and destroyed his hogs and poultry, and committed other acts of violence, abuse, and spoliation, thereby showing their ill feelings, and the malice influencing the defendants towards the plaintiff; by all of which acts of violence the plaintiff was damaged five thousand dollars. Wherefore plaintiff demands judgment against defendants for \$5,500 damages actually sustained by him from defendant's unlawful act; five thousand dollars punitive damages for suing out a writ contrary to law, and having plaintiff arrested and imprisoned upon a charge so false, and with a purpose so wrongful, illegal, and malicious; and for costs."

The defendants demurred to the complaint, and assigned several grounds of demurrer, but the only one relied upon in this court was "that the complaint does not allege or show upon its face that the civil action in which the

warrant or writ of arrest was issued, whereunder the plaintiff was arrested and imprisoned, has been finally and legally determined and ended before the commencement of this action;" and, as to the defendant West, upon the additional ground that the complaint did not allege facts sufficient to constitute a cause of action as against him.

Mr. Thomas W. Strange, for appellant:

If there was a wrong in issuing the process against plaintiff, then there should and must be some punishment for the wrong-doer, and some remedy to the one wronged, furnished by the law. There was a wrong—a great and cruel wrong. They used the process of the court to attain an end not set forth in said process. They prostituted the process of the court and used it for oppression; they committed a fraud upon the court, such as it should not and will not submit to.

Wanzer v. Bright, 52 Ill. 35.

The remedy which the law provides is an action on the case for the malicious abuse of the process of the court. And if this be plaintiff's remedy, it is perfectly immaterial whether the writ was issued for a just cause of action, or whether the former suit—the suit in which the writ was sued out—was legally terminated, whether it was decided in plaintiff's favor or against him.

Mayer v. Walter, 64 Pa. 283; *Grainger v. Hill*, 4 Bing. N. C. 212; *Heywood v. Collinge*, 9 Ad. & El. 268; *Wells v. Gurney*, 8 Barn. & C. 769; Bigelow, Torts, pp. 89, 90; Addison, Torts, § 868; *Wanzer v. Bright*, 52 Ill. 35; *Wood v. Graves*, 4 New Eng. Rep. 246, 144 Mass. 365, 59 Am. Rep. 95; *Breck v. Blanchard*, 20 N. H. 323, 51 Am. Dec. 222; *Hewit v. Wooten*, 53 N. C. 182.

Plaintiff's complaint sets forth as his cause of action "a perversion of the process of the court," and that it was used not "for the purpose the law intended to effect," but "it was enforced for an ulterior purpose—to obtain property by duress to which the defendants had no right."

Grainger v. Hill, 4 Bing. N. C. 212.

If this allegation appears in said complaint, in substance, if not in form, it is sufficient, and the demurrer should be overruled.

Strange v. Manning, 99 N. C. 165.

Plaintiff admits that it is true that it matters not how improper the motives are that prompt, or the objects expected to be accomplished by suing out the writ; if the exigency of the writ is followed, and no ulterior object is carried out, or the writ not used for some purpose not set forth in the writ, the proper remedy is an action of malicious prosecution.

Breck v. Blanchard, 20 N. H. 323, 51 Am. Dec. 224.

If Sneedeen had been only arrested and imprisoned as the result of the process, it would not have mattered how evil were the motives that induced his arrest or the issuing of the process, but the remedy would have been an action for malicious prosecution. But when it was avowedly used for an ulterior purpose, to acquire possession of defendant's property, it was evidently an abuse of process, and an ac-

tion for abuse of process is the proper and only remedy.

See *Wells v. Gurney*, 8 Barn. & C. 769; *Wanzer v. Bright*, 52 Ill. 35.

There is no wrong known to the law for which there is not some remedy provided, and the court will examine the record, and if it appears therefrom that the plaintiff has been wronged, it will provide the remedy; and it will allow such amendments to plaintiff's complaint as may be necessary to correctly set forth his cause of action.

Strange v. Manning, 99 N. C. 165.

An action for malicious prosecution will not lie, because the defendant cannot allege want of probable cause, or that the former suit was terminated at the time of the commencement of this suit, or has even been decided in favor of the plaintiff. And this is necessary.

1 Addison, Torts, p. 229.

Nor can an action for malicious use of the process of the court be maintained, for a similar reason.

Mayer v. Walter, 64 Pa. 283.

An action for malicious arrest or false imprisonment will not lie, because the defendants are protected by the judicial order of the court.

1 Addison, Torts, p. 220.

Mr. Janius Davis, for appellees:

In all actions for malicious prosecution and arrest the complaint must allege the final determination of the original action before the commencement of the counter-action.

Howell v. Edwards, 30 N. C. 517; *Johnson v. Finch*, 93 N. C. 205; *Barfield v. Turner*, 101 N. C. 357.

There is a broad distinction between the malicious use of the process of the court and an abuse of it. In the former case the remedy under the old practice was case; while in the latter it was trespass.

1 Chitty, Gen. Pr. 187, 188; *Allen v. Greenlee*, 13 N. C. 370; *Rogers v. Pitman*, 47 N. C. 56.

Abuse of process is the misuse of the process in the manner of its execution; while in malicious prosecution "the injury," to use the language of Pearson, *J.*, in *Rogers v. Pitman*, *supra*, "consists in wrongfully suing out the process in consequence whereof the plaintiff sustained damages."

Where there has been abuse of process, an action lies at once without reference to the determination of the original action in which the process issued. In malicious prosecution to sustain his action the plaintiff must prove want of probable cause and malice; both must exist before he can recover. And a judgment passed against him in the original action is a conclusive estoppel as to probable cause and an absolute defense to the action, however base or vindictive may have been the malice which prompted it.

Williams v. Woodhouse, 14 N. C. 259; *Grisle v. Sellars*, 4 Dev. & B. L. 176.

In all actions for malicious prosecution or arrest the final determination of the original action must be pleaded and proved.

Thornton v. Thornton, 63 N. C. 212; *Plummer v. Gheen*, 10 N. C. 68; *O'Brien v. Barry*, 106 Mass. 300.

In actions for abuse of process, the rule is otherwise. It is not the motive or purpose which prompted the plaintiff in suing out his writ, that marks the distinction between the two classes, but the use to which the writ itself is put by the officer charged with its execution, or the party suing out.

Grainger v. Hill, 4 Bing. N. C. 212; *Hewitt v. Wooten*, 52 N. C. 184; *Baldwin v. Weed*, 17 Wend. 224; 2 Greenl. Ev. § 452; *Bigelow, Torts*, 89, 90; *Allen v. Greenlee*, 13 N. C. 871.

Malice alone will not support an action for the abuse of legal process of arrest. There must also be a want of probable cause for suing it out.

Tucker v. Davis, 77 N. C. 332. See also *Watkins v. Baird*, 6 Mass. 506, 4 Am. Dec. 170; *Wood v. Graves*, 4 New Eng. Rep. 246, 144 Mass. 385, 59 Am. Rep. 95; *Breck v. Blanchard*, 22 N. H. 323, 51 Am. Dec. 223.

In the cases in which the action of abuse of process has been sustained, the plaintiff was compelled in the original action by pressure brought to bear upon him by the officer or the party under cover of the writ to do some collateral act. There is no allegation or pretense whatever that the plaintiff was asked, or compelled, or that any effort was made to induce or compel him, to deliver up the possession of the land in dispute, or to do any act whatever.

See *Barfield v. Turner*, 101 N. C. 358.

Davis, J., delivered the opinion of the court:

The substance of the allegation, as to defendant West, is that, at the request of defendant Harriess, he signed the usual undertaking required in arrest and bail, and it is not alleged that he participated in the torts alleged, nor does it appear that he was in any way liable for them except as surety on said undertaking which would be *ex contractu*, and the demurrer as to him must be sustained.

As to the other defendants, the complaint clearly and distinctly alleges, in substance, that the plaintiff was in the quiet and peaceable possession of certain real property which he believed to be his own, but to which the defendants also claimed title; and that the defendants desiring to get speedy possession of the said property without the risk and delay attending an action for the recovery of real property, conceived and executed a plan to have the plaintiff removed from the possession by falsely and maliciously suing out a writ of arrest and bail for alleged slander of their title and causing him to be arrested and imprisoned, and, while so removed from the possession and imprisoned, they entered upon the property, "broke open his house, removed and scattered his effects, leveled his house with the ground, shot and destroyed his hogs and poultry, and committed other acts of violence, abuse, and spoliation." The action of *Harriess v. Sneed*, in which the plaintiff in this action was taken under arrest and bail for "slander of title," was before this court at its September Term, 1888 (101 N. C. 273), and the court said it was questionable whether an action for slander of title was embraced by the statute on arrest and bail (Code, § 290 *et seq.*); but the court did not decide the question, and, for the 14 L. R. A.

reason presently to be stated, its decision is not necessary in this action.

It is proper to state that this court sustained the judgment of the court below in vacating the order of arrest, but the plaintiffs in that action (defendants in this), had accomplished their purpose to get possession, while the defendant in that action (plaintiff in this), was in custody. The demurrer admits, for the purpose of this action, that Sneed was in the quiet possession of the land, and that he believed it to be his; and whether an action for slander of title could be maintained, or whether the true title was in the plaintiff or defendants, is immaterial to the question now before the court, which is whether the plaintiff can maintain this action without alleging the final legal determination of the action of the defendants against the plaintiff, in which the warrant or writ of arrest was issued and the plaintiff was imprisoned. This is not an action for malicious prosecution for an alleged crime, in which it would be necessary to allege and show a judicial determination of the prosecution in favor of the accused. Every good citizen is interested in the suppression of crime, and, if there be probable cause, may prosecute in the name of the State; and if the accused be adjudged guilty he will not be heard to complain of the prosecution, nor can he maintain an action against the prosecutor, whatever may have been his motive. This is an action for alleged malicious use and abuse of civil process.

But the counsel for the defendant says: "There is not the slightest proof [allegation] that the defendants gave the sheriff any instructions not enjoined by the exigency of the writ which he had in his hands." This action is not against the sheriff for abuse of the process in his hands, but against the defendants for having maliciously and fraudulently sued out a writ of arrest and bail for a purpose falsely alleged therein, when their real purpose, admitted by the demurrer, was not that named in the affidavit or process, but the ulterior object to get speedy possession of the land, and no instructions from them to the sheriff were necessary. They expected that he, in the discharge of his duty, would arrest Sneed under the writ which they had sued out, and thereby enable them to get possession of the land, and level Sneed's house with the ground, and destroy his property, so that he could not regain or reoccupy it.

Counsel for the defendants say: "Let us take it that Harriess recovered judgment against the plaintiff in the original action of slander of title in which the writ was issued. Such a judgment would establish, as against the plaintiff, that the land in dispute belonged to Harriess; that this plaintiff had no interest in it, and had taken possession of it, and set up title in himself, with the false and malicious intent to injure Harriess. Then, if this action is sustained, we would have the singular spectacle of the plaintiff recovering damages from Harriess because he basely and maliciously took possession of his own land after it had been left vacant in consequence of the lawful arrest and imprisonment of the plaintiff." It is true the sheriff did no wrong in discharging his duty, and arresting Sneed in obedience to the command of the writ; but does it follow that, because it

was the duty of the sheriff to arrest under the writ, the defendants could lawfully sue out the writ to enable them to procure the arrest of Sneed, not for the purpose named in the writ, but for the admitted, ulterior, collateral purpose to get possession of the land, in dispute, as soon as it was made vacant by the arrest and imprisonment of the claimant in adverse possession, under the writ which they had falsely and fraudulently sued out for that purpose, instead of instituting an action to try the title to the land in dispute, and recover possession upon their title, if they had any? If, in their affidavit for arrest and bail, they had stated that their real, and, it appears, only, purpose was, as is admitted by the demurrer, to procure the arrest of Sneed, to enable them to get possession of the land in dispute, instead of the recovery of damages for slander of title, no writ could have issued, and Sneed could not have been lawfully arrested by the sheriff. Counsel for the defendants failed to note the marked distinction between a prosecution for the malicious use and abuse of process for ulterior purposes not named in the process and a prosecution for alleged crime. In the latter, there must be a final determination of the prosecution before an action for malicious prosecution can be maintained, and no citation of authority was needed for this; but in the former this is not necessary. In the one, the public have an interest; in the other, the individual only. And while it is true, as a general rule of law, that imprisonment under legal process is not duress, yet if one falsely, maliciously, and without probable cause procures the arrest and imprisonment of another on process legal and regular in form, and obtains thereby a deed from the party so arrested, such deed is void by reason of duress. *Watkins v. Baird*, 6 Mass. 506, and cases cited. When an action is for malicious abuse of legal process in order to compel a party to do a collateral thing or to accomplish an ulterior purpose, it is not necessary to allege that the process improperly employed is at an end. *Prough v. Enriken*, 11 Pa. 81, and the numerous cases there cited; *Grainger v. Hill*, 4 Bing. N. C. 212. Conceding that the defendants were the true owners of the property in dispute, the plaintiff was in possession claiming it as his own, and if, without any process, they had gone and taken forcible possession, and demolished the house claimed by him, and destroyed his property as alleged, it will not be denied that they would have subjected themselves to both civil and criminal actions. Did the fact that they got possession by the fraudulent use of legal process justify their acts, or were they not aggravated by making the strong arm of the law the instrument by which they were enabled to perpetrate them? "The law is just and good," and entitled to the obedience of all, the strong as well as the weak, and cannot sustain the perversion of its process to shield lawlessness and wrong, or permit it to be made the tool of trickery and cunning. The defendants admit that their purpose was not that named in their affidavit, but to get speedy possession of the land by having the plaintiff arrested and removed from it by the sheriff to enable them to enter upon it.

This case is distinguishable from that of 14 L. R. A.

Hewitt v. Wooten, 52 N. C. 182. In that case it did not appear that the writ was sued out for the purpose of extorting money or any ulterior purpose. In this case the ulterior and wrongful purpose is alleged and admitted, which brings it clearly within the principle laid down in *Grainger v. Hill*, *supra*, and sanctioned in *Hewitt v. Wooten*. Whether, under the old practice, the remedy of the plaintiff would have been trespass or case, is now immaterial, as the old technical distinctions in the form of actions (as between trespass and case), which so often perplex the profession, have been abolished (Code, § 133), and the civil action, with its complaint stating clearly and concisely the facts constituting the cause of action, substituted (Code, § 231 *et seq.*); and, while the plaintiff's cause of action might have been more concisely stated, *utile per inutile non vitiatur* and the demurrer must be overruled. Let this be certified, to the end that the defendants may answer if they shall be so advised, the action proceeded with according to law.

Error.

Charles DEWEY *et al.*, Appts.,
v.

B. F. SUGG *et al.*, J. A. K. Tucker, Intervenor, Appelles.

(.....N. C.)

Failure to index a judgment as to one of the defendants therein prevents its operation

**NOTE.—Index as part of the records of title.
Of judgments.**

The indexing of a judgment as required by statute is necessary to constitute it a lien. *Nye v. Moody*, 70 Tex. 434; *Metz v. State Bank of Brownfield*, 7 Neb. 165; *Sterling Mfg. Co. v. Early*, 69 Iowa, 94; *Holman v. Miller*, 103 N. C. 118; *Landon v. Ferguson*, 3 Russ. Ch. 849; *Bell v. Davis*, 75 Ind. 314.

But the contrary is held under Virginia Code, which makes a clear distinction between the docket and index and provides that the judgment shall be a lien until "docketed." *Old Dominion Granite Co. v. Clarke*, 28 Gratt. 617.

An index is not required of a judgment on a transcript from a justice of the peace where the statute requires an index of instruments authorized by law to be recorded in the clerk's office. *Laughlin v. Hawley*, 9 Colo. 170.

The docket of a judgment makes it a lien only for the amount therein stated although the judgment is actually larger. *Hanco's App.* 1 Pa. 408.

Docketing the issue does not amount to the docket of a judgment. *Brathwaite v. Watts*, 3 Crompt. & J. 318.

And under a statute requiring the index of a judgment to state the county, city or town in which the action was laid and the number roll of the entry, and providing that "no judgment not docketed and entered in the books as aforesaid" shall affect any lands, etc., a failure to enter the number roll is fatal to a lien and the omission is not supplied by inserting it in another part of the docket book where the issue was entered. *Branding v. Plummer*, 26 L. J. Ch. N. S. 828.

But indexing a judgment out of the order of its date will not prevent it from operating as a lien. *Hastings School Dist. v. Caldwell*, 16 Neb. 68; *Hesse v. Mann*, 40 Wis. 568.

Neither will error in stating the time of its entry. *Sears v. Burnham*, 17 N. Y. 445.

as a lien upon his property where the entry of a judgment is required by statute to contain among other things the names of the parties and the clerk is required to keep an index of the whole.

(December 1, 1891.)

APPPEAL by plaintiffs from a judgment of the Superior Court for Pitt County denying their application to be awarded a portion of funds in the hands of J. A. K. Tucker, sheriff, which arose from the sale of property belonging to I. A. Sugg. *Affirmed.*

Statement by *Merrimon, Ch. J.:*

It appears: (1) That previous to June Term, 1887, of Pitt Superior Court, the plaintiffs brought their action in said court against B. F. Sugg for the recovery of certain personal property. (2) That B. F. Sugg gave bond for the return of the property seized by the sheriff, and I. A. Sugg and William Whitehead became his sureties upon said bond. (3) That at June Term, 1887, the plaintiffs recovered a judgment against B. F. Sugg for the delivery of the property seized, and, in case a return thereof could not be had, then for five hundred and ten dollars, (\$510), the value thereof, both as against the said B. F. Sugg and his

sureties, I. A. Sugg and William Whitehead. (4) That this judgment was entitled, "Charles Dewey, George W. Dewey, and E. B. Dewey, trading as Dewey Brothers, against B. F. Sugg," and there was no reference in the caption to the said I. A. Sugg or the said William Whitehead, and nothing in said caption to indicate that either of them were parties to the said judgment. (5) That this judgment was shortly thereafter, and within ten days after the said June Term, copied upon the judgment docket, in book No. 9, exactly as it was originally written, and with no reference to the said I. A. Sugg or William Whitehead in the caption thereof, and with no minute of either of their names on the margin of the docket. (6) That the following is a copy of the judgment as it appears on the judgment docket No. 9, and as it was rendered, namely: "Charles Dewey, George W. Dewey, and E. B. Dewey, trading as Dewey Brothers, v. B. F. Sugg. Pitt County Superior Court.—June Term, 1887. Before J. H. Merrimon, Judge. Judgment was rendered in favor of the plaintiff, and against the defendants, for the possession of the property described in the complaint, and, if a return of the property cannot be had, that he recover of the defendant B. F. Sugg and William Whitehead and I. A. Sugg,

A purchaser in Iowa is not bound to look beyond the index. *Howe v. Thayer*, 49 Iowa, 154.

And the indexing of plaintiff's name as "Burkhead" instead of "Bankhead" is not sufficient to make the judgment a lien where the statute requires a judgment to be "recorded and indexed." *Anthony v. Taylor*, 68 Tex. 408.

But the mis-spelling of defendant's name will not prevent the operation of a judgment against a fraudulent grantee. *Fuller v. Nelson*, 35 Minn. 213.

The omission of "Jr." from the name of a defendant in a judgment is immaterial. *Bidwell v. Coleman*, 11 Minn. 78.

A mistake in the middle initial of defendant's name in a judgment index is fatal to a lien. *Hutchinson's App.* 92 Pa. 186. *Contra*, *Geller v. Hoyt*, 7 How. Pr. 265.

So is the omission of such middle initial. *Wood v. Reynolds*, 7 Watts & S. 408; *Crouse v. Murphy*, 12 L. R. A. 58, 140 Pa. 335. *Contra*, *Clute v. Emmerich*, 26 Hun, 10.

And in harmony with the New York case last cited is another decision in that State that a superfluous middle initial is immaterial in an index of a *lis pendens*. *Weber v. Fowler*, 11 How. Pr. 453. See *Haverly v. Alcott*, 57 Iowa, 171.

In California it is held that the omission of the Christian name of a defendant is not fatal to the docket of a judgment. *Hibberd v. Smith*, 50 Cal. 511.

Neither is the failure to put defendants' names in alphabetical order as required by statute. *Ibid.*

On the other hand, in most of the states the first name of a defendant, as well as the surname, must be properly indexed; thus an index giving defendant's first name as "Ellen" will not constitute notice of a lien against the lands of "Helen." *Thomas v. Desney*, 57 Iowa, 58.

So the docket of a judgment giving defendant's first name as "Charles" will not affect the land of "Conrad" if the records do not show that they are the same person. *Grundies v. Reid*, 107 Ill. 404.

And one against "John" is not good as against "Jacob." *Zimmerman v. Briggans*, 5 Watts, 186.

And the entry of a judgment giving the defendant's first name as "William" is not sufficient to

make it a lien on land conveyed to him by a deed giving his name except his surname only as "H. W." while those two initials stand for Henry William and there is nothing on record to show that H. W. and William were the same person. *Johnson v. Hess*, 9 L. R. A. 471, 126 Ind. 238.

But a judgment against "A. Jones" was held good against "Abel Jones" where there was no other A. or Abel Jones in the county. *Jones's Estate*, 27 Pa. 336.

In the respect to the surname, accuracy is of course essential. An index of a judgment as against "Freeman" instead of "Furman" does not make it a lien. *Howe v. Thayer*, 49 Iowa, 154.

An index of a judgment as against "J. H. Hesse" is not constructive notice of a judgment against "J. H. Hesser." *Aetna L. Ins. Co. v. Hesser*, 4 L. R. A. 122, 77 Iowa, 381.

And a judgment against the defendant as "Joest" is not a lien against the property of the defendant, whose real name was "Yeast," although both names were pronounced alike. *Hell's App.* 40 Pa. 453, 80 Am. Dec. 590.

But in seeming conflict with this it was held by the same court that a judgment against "John Bobb" was held good as against "John Bubb" where according to the German pronunciation of the locality both had the same sound. *Myer v. Fegaly*, 39 Pa. 429, 80 Am. Dec. 534.

And an index of a judgment as against "F. Zehnder" was held good against "John Jacob Fredrick Zehnder" on proof that he was known among his neighbors as "Fred Zehnder." *Jenny v. Zehnder*, 101 Pa. 296.

But this case was disapproved in the later case of *Crouse v. Murphy*, 12 L. R. A. 58, 140 Pa. 335.

So the docketing of a judgment against Palmer Sumner under the letter P instead of under the letter S, which is the initial of defendant's surname, is not sufficient to make the judgment a lien. *Buchan v. Sumner*, 2 Barb. Ch. 265, 5 L. ed. 599.

An index of a judgment stating the name of one defendant "et al." does not make it a lien against defendants not named. *Cummings v. Long*, 18 Iowa, 41, 35 Am. Dec. 552.

And an index of a judgment giving the name of a firm as the defendant, without stating the names

the sureties on defendant's replevin bond, the sum of five hundred and ten dollars, with interest on same from 1st day of December, 1886, and the costs of this action." (7) That the docket upon which it is recorded, as set forth above, contains an index, but no cross-index, and upon said index there appears this entry, made at or about the time when said judgment was copied upon said docket, as follows: "Dewey Bros.—B. F. Sugg;" but there nowhere appears in said index the entry of said judgment as against the said I. A. Sugg and the said William Whitehead, nor was it ever indexed as to them. (8) That an index and a cross-index of judgments is kept in a separate book by the clerk of the Superior Court of Pitt County, and have been kept by him for more than five years, the names of the plaintiffs, followed by the names of the defendants, being written on the left-hand page, and the names of the defendants, followed by the names of the plaintiffs, being written on the opposite or right-hand page, under the appropriate letter of the alphabet. (9) That this judgment was, at or about the time of its being written on the docket, indexed on the said index under the letter "D," and on the left-hand page, and it is as follows: "Dewey Bros.—Sugg, B. F. & I. A.;" and the name of White-

head did not appear as one of the defendants in said index. (10) That at the same time it was indexed on the cross-index under the letter "S," and on the right-hand page, as follows: "Sugg, B. F.—Dewey Bros.;" and the name of Whitehead did not appear in said index as one of the defendants in said judgment. (11) That the said judgment was not at that time cross-indexed either under the letter "W" or elsewhere, as to Whitehead. (12) That on the 15th day of December, 1890, the clerk of the superior court, under the letter "D," after the words "B. F. Sugg," added the words, "I. A. Sugg and William Whitehead," and on the cross-index on the right-hand page, under the letter "W," the said clerk, on the 15th day of December, 1890, made this entry: "Whitehead, William *et al.*—Dewey Bros." (13) That up to and until the said 15th day of December, 1890, it did not appear, either from the index to docket No. 9, upon which the original judgment was recorded, or from the index or cross-index kept by the clerk of the Superior Court of Pitt County of all judgments filed in his office, that Charles Dewey, George W. Dewey, and E. B. Dewey, trading as Dewey Bros., had recovered any judgment against the said Whitehead for any amount, or that Dewey Bros. had recovered a judg-

of the individual partners, does not make the judgment a lien as against subsequent lien creditors without notice. Hamilton's App. 103 Pa. 368; Smith's App. 47 Pa. 128; Ridgway's App. 15 Pa. 177, 53 Am. Dec. 586; Guillett Gin Co. v. Oliver, 78 Tex. 182.

But a defect in the index will not affect the lien of the judgment as to parties having actual notice of it. York Bank's App. 36 Pa. 468; Hamilton v. Whitney, 19 Neb. 303.

Of lis pendens.

The lack of a proper index of a *lis pendens* will not defeat the notice if the petition is duly entered in an appearance docket where the statute provides that the *lis pendens* shall be notice when the petition is filed, although the clerk is required to index the appearance docket. Haverly v. Alcott, 57 Iowa. 171. See also Weber v. Fowler, 11 How. Pr. 458.

Of attachment.

Failure to index an attachment entered in an incumbrance book is not fatal to the lien, although an index is required by law where the statute changing the old law by which the return was a sufficient record requires an entry of the attachment, but does not mention the index. Blodgett v. Huiscamp, 64 Iowa, 548.

Of deeds and mortgages.

Necessity of index.

In the absence of a statute requiring the failure to index a deed in the general index of all the deed books as well as in a separate index of the book in which it is recorded is not fatal. Schell v. Stein, 75 Pa. 398, 18 Am. Rep. 416.

Nor is any index necessary in the absence of a statutory requirement. Chatham v. Bradford, 50 Ga. 327, 15 Am. Rep. 622.

In Ohio and Oregon it is held that an index to a record of a conveyance is not necessary although the statute requires an index to all records where it does not declare the index a part of the record. Green v. Garrington, 16 Ohio St. 548, 91 Am. Dec. 108; Board of School Land Comrs. v. Babcock, 5 Or. 472.

In New York where the statutes did not for a 14 L. R. A.

long time require any index, and the statute which afterwards made it the duty of an officer to index the records did not purport to amend, repeal, or alter the Recording Acts, the index is not a part of the record. Mutual L. Ins. Co. v. Dake, 87 N. Y. 267, affirming 1 Abb. N. C. 381.

So in Vermont, where the statute says that conveyances "recorded at length" "shall be valid to pass," etc., although the statute makes it the duty of the officer to keep also an index or alphabet of the records, the index is no part of the record, and a mortgage recorded but not indexed is a lien. Curtis v. Lyman, 24 Vt. 338, 58 Am. Dec. 174.

And therefore the failure of a town clerk to index a mortgage as required by statute makes the town liable for damages to one who purchased in ignorance of the mortgage, relying on the records. Hunter v. Windsor, 24 Vt. 327.

And in Missouri a statute requiring an index to be kept containing names of the parties, etc., under a penalty of double damages to the party aggrieved for failure to do so does not make the index a part of the record or prevent a deed from being duly recorded without being indexed. Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533.

So in a State where leaving a deed or mortgage for record is held to be in contemplation of law a recording, a failure to index an instrument will not prevent it from being regarded as recorded. Wood's App. 82 Pa. 116; Throckmorton v. Price, 28 Tex. 609, 91 Am. Dec. 334.

Nor will the recording be invalidated by failure to index it in the right book. Schell v. Bryden, 4 Cent. Rep. 667, 114 Pa. 147.

The lack of an index is not material as to a party who has actual knowledge of the instrument. Speer v. Evans, 47 Pa. 141.

On the other hand, the total omission to index a mortgage is held fatal in Iowa where the statute provides that it shall become a lien from the time it is "filed," and also requires a complete alphabetical index giving names of parties, etc. Barney v. McCarty, 15 Iowa, 510.

So under Washington Laws 1890, the record of a deed is not complete so as to constitute constructive notice until the record is indexed. Ritchie v. Griffiths, 13 L. R. A. 384, 1 Wash. 423.

ment for any amount against said Whitehead. Upon this state of facts, the court held that the plaintiffs' judgment mentioned was not sufficiently docketed until the 15th of December, 1890; that it created and constituted no lien upon the lands of the said Whitehead in the County of Pitt prior to that time; and that the plaintiffs were not entitled to share in a fund the proceeds of his land sold by the sheriff under proper process, to satisfy divers judgments against him duly docketed before that time; and gave judgment accordingly. The plaintiffs excepted, and appealed to this court.

Messrs. C. M. Bernard and Swift Gal-laway for appellants.

Messrs. Jarvis & Blow and Theodore F. Davidson, for appellees:

A judgment is not a lien on real property until it is docketed.

Code, § 485.

Code, § 83, requires to be kept "a judgment docket" and "a direct and reverse alphabetical index of all final judgments in civil actions." There must be a strict compliance with this section before any lien can be created.

Holman v. Miller, 103 N. C. 118.

No lien was created against the lands of Whitehead by the docketing of the judgment of Dewey Bros. against B. F. Sugg.

In States where index and cross-index are

required by law to be kept, the indexing is a necessary part of the docketing.

1 Black, Judgments, §§ 404-406.

The purpose of docketing being not only the creation of a lien, but to give notice thereof, it is essential that all the requirements of the statutes in that respect shall be closely followed, and it has frequently been held that the indexing is such a material element that it cannot be omitted.

Metz v. State Bank of Brownville, 7 Neb. 165; *Cummings v. Long*, 16 Iowa, 41, 85 Am. Dec. 502; *Thomas v. Desney*, 57 Iowa, 58; *Nye v. Moody*, 70 Tex. 484; *Ridgway's App.* 15 Pa. 177, 53 Am. Dec. 586; *Hamilton's App.* 103 Pa. 368.

Merrimon, Ch. J., delivered the opinion of the court:

The records of the court are very important and essential in the administration of public justice. Appropriate statutes and general principles of law to some extent require the courts to make them, prescribe their purpose, where and by whom they shall be kept, and when and where they may be seen by every person interested to see them. While they are of great general utility, they import verity, and constitute the highest evidence of the rights and liabilities of all persons whom they directly concern and affect, and serve to give notice and information for the use and benefit of the public

So in Wisconsin by express provision of the statute a general index is required, and it is held that an instrument is not recorded until entry thereof is made in the general index. *Lombard v. Culbertson*, 59 Wis. 433; *Hay v. Hill*, 24 Wis. 235.

Going a step beyond this, this statute provides that an instrument is recorded as soon as it is indexed in the general index. *Shove v. Larsen*, 23 Wis. 142.

Under this statute a failure to keep also a separate index to each volume of records will not prevent the general index from operating as constructive notice. *Oconto County v. Jerrard*, 46 Wis. 317.

Somewhat analogous to this is a decision in Tennessee that the noting of a deed (for a slave) in the registrar book pursuant to statute constituted registration. *Flowers v. Wilkes*, 1 Swan, 408.

Sufficiency of index.

Under the Wisconsin statute above noted a full description in a general index supplies a defective description of premises in the record itself. *Shove v. Larsen*, 23 Wis. 142.

And on the other hand, a defective description in the general index, although it is a failure to comply with the statute, will not be fatal if the record referred to sufficiently describes the property. *Oconto County v. Jerrard*, 46 Wis. 316; *St. Croix Land & L. Co. v. Ritchie*, 73 Wis. 409; *Lane v. Duchao*, Id. 646; *Land River Imp. Co. v. Bardon*, 45 Fed. Rep. 708.

So the omission of any description in the index with only a reference to the record for the description is not fatal if the record gives the description. *Calvin v. Bowman*, 10 Iowa, 529; *White v. Hampton*, 13 Iowa, 200.

And a description in the index of a mortgage as "certain lots of land" is sufficient if the record referred to describes them. *Boetwick v. Powers*, 12 Iowa, 456.

But indexing the description of a mortgage only as to one of two parcels mortgaged does not make 14 L. R. A.

it a lien on the other. *Noyes v. Horr*, 13 Iowa, 570.

But if the index and mortgage recorded incorrectly describe the wrong premises, recitals in the mortgage which are not noted in the index, to the effect that the mortgage is given for the purchase price of the premises, will not put a person on inquiry as to the wrong description. *Scotles v. Wilsey*, 11 Iowa, 261.

An index noting the character of an instrument as an "agreement," and the description of the premises merely as "with regard to swamp and overflowed land," was held sufficient. *American Emigrant Co. v. Call*, 22 Fed. Rep. 765.

The name of the county only, without that of the State, sufficiently gives the name of the grantor in a tax deed in the index. *Hall v. Baker*, 74 Wis. 118.

The index correctly stating the amount of a mortgage, which is not required by statute, will not operate as notice of the amount, if it is wrongly stated on the record itself. *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 260.

An index of a mortgage showing the names of grantor and grantee and in substance stating the nature of the instrument as required by statute, with the volume where it is recorded, is sufficient, although it gives the wrong page of the volume. *Barney v. Little*, 15 Iowa, 587.

And an index of the mortgage, naming the mortgagor as "A. J. Stringham," was held sufficient notice where the mortgage had a caption showing that it was from "Almira J. Stringham," which was the name in which the land was conveyed to her, although she signed her name to the mortgage as "J. A. Stringham." *Huston v. Seeley*, 27 Iowa, 183.

For a note with an exhaustive collection of authorities on the question whether or not an instrument left for record is to be regarded as recorded before it is actually spread on the records, see *Ritchie v. Griffiths* (Wash.) 12 L. R. A. 864.

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in many ways and for a variety of valuable purposes. It is hence essential that they should be made and kept substantially in all material respects as the law prescribes and requires. Otherwise they might fail of their purpose, and some person in some way interested must suffer detriment more or less serious. The Statute (Code, § 83) requires the clerks of the several superior courts of this State to keep certain books specified, in which entries of the records of that court shall be made and preserved, and among them is "a judgment docket in which the substance of the judgment shall be recorded, and every proceeding subsequent thereto noted." The distinct judgment docket—its nature and purpose—is prescribed, and it is required to be kept for the purposes of the court. The law prescribes what shall be recorded on it, and everybody has notice that he may find there whatever ought to be there recorded, if, indeed, it exists. He is not required to look elsewhere for such matters. But he is required and bound to take notice, in proper connections, of what is there. The law charges him with such notice. The Statute (Code, § 473) further prescribes and requires that "every judgment of the superior court, affecting the right of real property, and any judgment requiring in whole or in part the payment of money, shall be entered by the clerk of said superior court on the judgment docket of said court. The entry shall contain the name of the parties, and the relief granted, date of judgment, and date of docketing; and the clerk shall keep a cross-index of the whole, with the dates and numbers thereof. All judgments rendered in any county by the superior court thereof, during a term of the court, and docketed during the same term, or within ten day thereafter, shall be held and deemed to have been rendered and docketed on the first day of said term." This section requires the classes of judgments specified to be docketed on the judgment docket, and directs how they shall be entered. It is not simply required that they shall be docketed, but it is further and of purpose required that they shall be docketed substantially in the way and manner prescribed. They are to be so entered, and in this way: "The entry shall contain the names of the parties, and the relief granted, date of judgment, and date of docketing; and the clerk shall keep a cross-index of the whole, with the dates and numbers thereof." The particularity thus required as to details is not merely directory and meaningless; it is intended to serve a substantial purpose,—that of giving information and notice, as to the particulars specified, to the public, everybody interested to have such information. It would be orderly, and much better that such particulars should be set forth in the order directed by the statute. Still, if they appear in their substance but disorderly, from the entry, this will be sufficient. The requirement that a cross-index shall be kept is not merely directory; it is important and necessary. It is intended to enable any person to learn that there is a docketed judgment in favor of a certain party or parties, and against certain other parties, and where to find it on the docket. The inquirer is not required to look through the whole docket, to learn if there be a judgment against a particular person.

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He must be able to learn from such index that there is a judgment against him, and where he can find it on the docket, its nature, purpose, etc. When there are several judgment debtors in a docketed judgment, the index should and must specify the name of each one, because the index as to one would not point to all or any one of the others. The purpose is that the index shall point to a judgment against the particular person inquired about, if there be a judgment on the docket against him. A judgment not thus fully docketed does not serve the purpose of the statute, and is not docketed in contemplation of law. The Statute (Code, § 434) further prescribes and requires a judgment roll to be made up and filed as prescribed. It further prescribes, (section 435) that "upon filing a judgment roll upon a judgment affecting the title of real property, or directing in whole or in part the payment of money, it shall be docketed on the judgment docket of the superior court of the county where the judgment roll was filed, and may be docketed on the judgment docket of the superior court of any other county upon filing with the clerk thereof a transcript of the original docket, and shall be a lien on the real property in the county where the same is docketed, of every person against whom any such judgment shall be rendered, and which he may have at the time of the docketing thereof, in the county in which such real property is situated, or which he shall acquire at any time thereafter, for ten years from the date of the rendition of the judgment." A docketed judgment hence creates and secures a lien upon the judgment debtor's land. But a judgment, in order to create such lien, must be docketed in the way and manner above pointed out; otherwise, as we have seen, the judgment is not docketed, and no such or any lien arises. *Holman v. Miller*, 103 N. C. 118; 1 Black, Judgm. §§ 404, 406; *Cummings v. Long*, 16 Iowa, 41; *Thomas v. Denney*, 57 Iowa, 58; *Nye v. Moody*, 70 Tex. 434; *Ridgway's App.* 15 Pa. 177; *Hamilton's App.* 103 Pa. 408; *Mets v. State Bank of Brownville*, 7 Neb. 165.

The important statutory provisions, above recited and referred to, prescribed and established a method of creating judgment liens upon real property, and they must receive such reasonable interpretation as will give strength, certainty, and uniformity to that method, and effectuate its purpose. This can only be done by a strict observance of at least the substance of the requirements prescribed. Otherwise, uncertainty, confusion, and injustice must prevail to a greater or less extent in its administration. In the present case, we think the plaintiff's judgment was not sufficiently docketed to create a lien upon the real property of the defendant judgment debtor, William Whitehead. The judgment entered on the judgment docket is informal and disorderly; but granting that it is a judgment, and the entry contains sufficiently the names of the parties to it, the relief granted, the date of it, and the time of its docketing, still the index makes no mention whatever of this or any judgment against Whitehead. Any person looking on the index with a view to learn if there were a docketed judgment against him

would have found nothing whatever leading him to examine or believe there was any such judgment. Thus such person would have been misled; such a person may have been misled; numerous persons may have been misled. The law intends to prevent this, and that no such lien shall be created or exist to prejudice any person who cannot have the benefit of the means so provided to prevent prejudice thus arising. The judgment must be properly indexed as to each and all of the

parties, in order to create the lien. The statute expressly makes it the duty of the clerk to make such entries, and he fails to do so at his peril. As the plaintiffs' judgment was not effectually docketed as to the defendant Whitehead, they could not share in the fund the proceeds of the sale of his lands under valid process issuing upon duly docketed judgments, to the prejudice of the latter.

Judgment affirmed.

NEW YORK COURT OF APPEALS (2d Div.).

Edwin F. BABBAGE, *Appt.*,

v.

Daniel W. POWERS, *Respnt.*

(.....N. Y.....)

1. For the breaking of a flag-stone in the sidewalk over a vault in front of a business block, the owner of the premises is not liable, in the absence of negligence, if the vault was made with consent of the authorities.
2. Consent to the construction of a vault under a sidewalk in front of a business block must be conclusively inferred by the acquiescence with actual knowledge thereof of those having charge of the street for the public for so long a period as nine years.
3. A court may take judicial notice of the custom in cities to construct vaults under sidewalks in front of business blocks.

(December 8, 1891.)

APPPEAL by plaintiff from a judgment of the General Term of the Supreme Court,

Fifth Department, in favor of defendant after hearing exceptions, ordered to be argued before it in the first instance, to the action of the Circuit Court for Monroe County, in directing a nonsuit in an action brought to recover damages for personal injuries received in consequence of a defective sidewalk for which defendant was alleged to be responsible. *Affirmed.*

Statement by Vann, J.:

Action to recover damages for a personal injury to the plaintiff caused, as alleged, by a nuisance maintained by the defendant in a public street. The complaint alleged that on the 7th of November, 1885, the defendant being the owner, and, through his tenant, in possession of certain premises situate on State Street in the city of Rochester, "without authority of law or permission from the municipal authorities of said city" maintained and continued under the sidewalk immediately in front of said premises "a certain vault excavated under said sidewalk, . . . covered only

NOTE.—Excavations under highways.

Right to make.

Adjoining owners who own to the center of the highway may excavate thereunder in any way that does not conflict with the right of passage of the public. *McCarthy v. Syracuse*, 46 N. Y. 194.

The owner of lands on both sides of a highway has the right to a passage under the highway in no way disturbing the public use. *Pemberton v. Dooley*, 48 Mo. App. 176.

Liability as affected by consent of municipality.

The effect of a permit from the municipality to maintain a covered excavation under a sidewalk is to modify the owner's absolute liability for injuries to liability depending upon his care in constructing and maintaining it. *Clifford v. Dam*, 81 N. Y. 52; *Port Jervis v. First Nat. Bank*, 36 N. Y. 550; *Caldor v. Smalley*, 66 Iowa, 219, 55 Am. Rep. 270.

A covered scuttle-hole constructed by a private individual in his sidewalk without the consent of the municipal authorities, is a nuisance. *Caldor v. Smalley*, *supra*.

One who, without authority, excavates beneath the sidewalk and places a grating in the walk, is liable for injuries received by breaking through such grating. *Stephani v. Brown*, 40 Ill. 428.

One who maintains an area beneath an opening into a sidewalk in a manner different from that prescribed by the municipal authorities, is liable for injuries caused by falling therein, irrespective of his negligence in leaving the area open. *Barry v. Terkideson*, 73 Cal. 284, 1 Am. St. Rep. 35.

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One who, without special authority, maintains a covered excavation under a sidewalk, is liable for injuries occasioned by a fall therein without negligence on his part being shown. *Congreve v. Smith*, 18 N. Y. 70; *Creed v. Hartmann*, 23 N. Y. 591, 26 Am. Dec. 241; *Mairs v. Manhattan R. E. Assn.*, 39 N. Y. 498; *Irvine v. Wood*, 61 N. Y. 228, 10 Am. Rep. 608.

A contrary doctrine is stated in the two following cases:

One who constructs and maintains a covered scuttle-hole in the sidewalk in front of his premises, although without municipal authority, is not liable for injuries received therefrom in the absence of negligence on his part. *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422.

One who makes a temporary excavation into a sidewalk for building purposes, although without consent of the municipality, is not liable for injuries received by falling therein, in the absence of negligence on his part. *Clark v. Fry*, 3 Ohio St. 356, 73 Am. Dec. 380.

Duties of one maintaining.

A temporary elevated passageway for the public, while a vault beneath a sidewalk is being lawfully constructed, need not be absolutely as safe as the permanent walk, but must be constructed with reasonable care, so as to impose as little risk as possible on travelers. *Nolan v. King*, 97 N. Y. 161.

A coal-hole in the sidewalk left open and unguarded is a nuisance, although constructed with

the stone flagging used by the public for paving and repaving;" that said stone flagging "was insufficient and inadequate in length, through deficiency in quality or fitness, or by reason of some other defect of which the plaintiff was ignorant, to sustain the ordinary travel of the public;" that by reason of the insufficiency and by the sudden breaking of one of the flag-stones upon which the plaintiff was standing, he fell into the vault and sustained serious injuries. The defendant, by answer, denied certain allegations of the plaintiff, admitted that he owned the premises therein mentioned, but alleged that he did not own to the center of the street, nor beyond its center line. He further alleged that said excavation was made, and the flagging over the same was laid, with the consent of the proper authorities, before he became the owner of the building; that the area and flagging were well sufficiently made and maintained; that he had no knowledge or notice of any imperfection therein, and that the accident happened without any negligence or default on his part. On the trial it appeared that the plaintiff was injured in front of a building known as "Ashley Block," consisting of three stories, erected in 1876. A vault ten or twelve feet deep, excavated at the same time in front of the store, was walled up on three sides in a substantial manner, and connected on the fourth by an archway opening into the cellar of the store. Each vault was covered with flag-stones, supported by solid iron girders running lengthwise of the sidewalk and resting on the walls. In the sidewalk were three openings, closed by iron doors, one in front of the store, for the purpose of raising and lowering goods. The sidewalk was ten or twelve feet wide, with three rows of flag-stones. Over the covered area was thus constructed, in 1883 or 1884, the defendant purchased

said block, and has owned it ever since. At the date of the purchase the store in question was rented to one Harris, who thereupon attorned to the defendant, and he has since occupied the store under renewals of the lease. November 7, 1885, the plaintiff, a man weighing 235 pounds, was walking with a friend in front of said store, and, meeting some ladies, turned towards the west, while his friend turned to the east, to allow them to pass. In thus turning out the plaintiff stepped on a flag-stone next to the curb, and thereupon fell into the vault underneath, the stone, in two pieces, one a little longer than the other, falling with him; and he was seriously injured. Said stone was from two to two and one-half feet wide by four or five feet long and four or five inches thick. It did not appear when or how it was broken, nor whether it was defective in any respect, nor was the cause of the accident shown, except as thus stated. The plaintiff, who had an office and lodging-rooms next door to the Ashley block, and had for years passed over the walk, testified that at the time of the accident it "was apparently just as he had always seen it." It did not appear expressly that the defendant had ever seen said block, or that he knew or had heard of the existence of said excavation. The evidence, from which it is claimed that notice of its existence should be inferred, is the purchase of the block by him, the receipt of rent therefor through his clerk, the renewal of the Harris lease by him in person, and his presence on one occasion in the city of Rochester, where a witness met him "as he was coming out of his bank." It was admitted that "no evidence was given of any negligence on the part of the defendant, or of his grantor, in constructing or maintaining the flagging which gave way, any further than such negligence is inferable from the accident itself."

decision of the municipal authorities. *Jennings v. Schaeck*, 11 Cent. Rep. 517, 108 N. Y. 580.

The owner of property, who, by permission of authorities, maintains a coal-hole in the sidewalk, is liable for negligently allowing the cover thereof to become insecure. *Whalen v. Rochester*, 4 Hun, 24.

One who constructs a vault under a sidewalk is liable at his peril to keep it covered in such a manner that the sidewalk will be as safe as if the vault had not been built. *Congreve v. Morgan*, 18 N. Y. 2 Am. Dec. 426; *Anderson v. Dickie*, 1 Robt. 236, 10 W. Pr. 117.

One who makes an excavation in a public highway is bound to make and keep it as safe as it would be without such interference. *Portland v. Anderson*, 54 Me. 44, 39 Am. Dec. 720.

The owner of land through which a highway runs, who digs a mill-race across it and bridges it, is liable for injury occasioned by the bridge being less safe than the highway originally was. *Bert v. Schenck*, 23 Wend. 445, 35 Am. Dec. 575.

One who for his own convenience keeps an opening covered by a grating in a public sidewalk, is liable to see that the grating is properly and safely constructed, and that it is afterwards kept in proper repair. *Kirkpatrick v. Knapp*, 28 Mo. App.

A person who uses an opening in the sidewalk in front of his premises for his private convenience is bound to exercise reasonable care and diligence in both in making and keeping it safe and secure for travel. *R. A.*

era. Dickson v. Hollister, 123 Pa. 421; *Ellis v. McNaughton*, 76 Mich. 237.

The owner of a hotel is liable for injuries to one passing along a street and falling into an area arranged for lowering trunks into the basement, where the fall is caused by a defect or looseness in the fastenings of the guard-rail, of which he had notice. *Hotel Asso. of Omaha v. Walter*, 23 Neb. 280.

The owner of a theatre, who constructs a sidewalk along the side of the building and permits the public to use it, is liable to one injured by falling into an area or hole between the building and sidewalk, which was defectively guarded. *Breeze v. Powers*, 80 Mich. 172.

One who excavates under his sidewalk, and by reason of his negligent prosecution of the work water flows in, is liable to his neighbor for the damage done by the water. *Nelson v. Godfrey*, 12 Ill. 20.

Where a private passageway opening into a cellar, within the street limits, becomes unsafe, the owner of the premises is liable to a traveler injured thereby, notwithstanding the municipality is also liable. *Landru v. Lund*, 38 Minn. 538.

The degree of care required to be exercised by a property owner in caring for a coal-hole in the sidewalk in front of his premises, is not satisfied by providing a proper coal-hole and cover without taking any pains to see that they are kept in proper condition. *Stevenson v. Joy*, 155 Mass. 45.

J. G. G.

Mr. Theodore Bacon, for appellant:

The excavation under the highway, into which the plaintiff fell, was a common and public nuisance; or, more strictly and properly, a purpresture.

4 Bl. Com. 167; Co. Litt. 277b; 3 Inst. 38, 271; 2 Story, Eq. Jur. §§ 921, 922; Bacon, *Abr. Highways*, D.

An unauthorized excavation in a street of a city for the benefit of adjoining premises is a nuisance, and all persons who continue or in any way become responsible for it are liable to any person who is injured thereby, irrespective of any question of negligence.

Irvine v. Wood, 51 N. Y. 224, 10 Am. Rep. 603; *Dybert v. Schenck*, 23 Wend. 446, 35 Am. Dec. 575.

A person who, without special authority, makes or continues a covered excavation in a public street or highway, for a private purpose, is, in the absence of negligence in the party injured, responsible for all injuries resulting from the way being thereby rendered less safe, irrespective of any degree of care or skill in the party who makes or continues the excavation.

Congree v. Smith, 18 N. Y. 79.

The owner of premises having an area, or vault, under the highway in front thereof, and communicating therewith by an underground passage, is bound, at his peril, to provide such a covering for an opening into such vault from the highway that the latter will be as safe to pass over as it would have been if no such area or vault and opening had existed.

Anderson v. Dickie, 1 Robt. 238; *Whalen v. Gloucester*, 4 Hun, 24; *Conklin v. Phoenix Mills of Seneca Falls*, 62 Barb. 299; *Hotel Assn. of Omaha v. Walter*, 28 Neb. 280; *Dillon, Mun. Corp.* §§ 1032, 1033.

Even "when permission is given, by a municipal authority, to interfere with a street solely for private use and convenience in no way connected with the public use, the person obtaining such permission must see to it that the street is restored to its original safety and usefulness."

Clifford v. Dam, 81 N. Y. 52.

This defendant though he did not originally construct the vault which on the evening in question was shown to be a nuisance, nevertheless is liable as one who "maintained" or "continued" it, within the authority of the cases cited above.

See also Bacon, *Abr. Highways*, D; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Davenport v. Ruckman*, 10 Bosw. 20, affirmed, 37 N. Y. 568; *Rex v. Peddy*, 1 Ad. & El. 822; *Clark v. Fry*, 8 Ohio St. 359, 72 Am. Dec. 590; *Bush v. Steinman*, 1 Bos. & P. 404; *Gandy v. Jubber* 5 Best & S. 78, 9 Best. & S. 15; *Dalay v. Savage*, 4 New Eng. Rep. 863, 145 Mass. 38; *Sandford v. Clarke*, 59 L. T. N. S. 236.

If a solemn resolution of the executive board had been produced giving authority to the defendant's predecessor in title to construct the vault, and to cover it unsafely, it would hardly be deemed by the court sufficient to discharge the person acting under it from responsibility for an unsafe covering.

Vairs v. Manhattan R. E. Assn. 39 N. Y. 498.

Mr. Albert H. Harris, for respondent:

The area was not a nuisance *per se*. It was

constructed under a license from the municipal authorities.

It is not necessary that any particular form of license for such an excavation should be given, and permission will be presumed, where the area is shown to have existed for a period of years without objection.

Jennings v. Van Schaick, 11 Cent. Rep. 817, 108 N. Y. 530; *Chicago v. Robbins*, 67 U. S. 2 Black, 418, 17 L. ed. 298; *Robbins v. Chicago*, 71 U. S. 4 Wall. 657, 18 L. ed. 427.

At this day, when such areas as this are so common in large cities, it will not do to condemn them as nuisances, without any regard to the manner of their construction.

See *Dybert v. Schenck*, 23 Wend. 445, 35 Am. Dec. 575.

Where an area is excavated and covered over with flags, so safely and securely that a traveler passing over it is just as free from danger as though he trod the ground itself, there is no interference with the public right and no nuisance. It is going far enough to hold that an area under the walk becomes a nuisance when, by reason of improper construction or want of repair, it is not sufficient to carry in safety the traffic or travel of the street; when it in no way jeopardizes the traveler in his passage over it it is not a nuisance.

Bond v. Smith, 113 N. Y. 378; *Congree v. Moran*, 18 N. Y. 84, 72 Am. Dec. 459; *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422.

In nuisance cases, in order to be liable the defendant must be brought within one of the following classes: it must be shown that he owned or had a right in the premises, and had leased them with the nuisance upon them; that he was in possession of the premises, and used them in their defective condition; that he was under a contract, enforceable by plaintiff, to keep the premises in repair, and failed to do so; that he in the first instance, created the nuisance, and put it in the power of others to continue it; or that being a municipal corporation there was a duty upon it to repair.

Clancy v. Bryne, 56 N. Y. 129, 15 Am. Rep. 391. See *Woram v. Noble*, 41 Hun, 398; *Wenzlick v. McCotter*, 87 N. Y. 123, 41 Am. Rep. 358; *Benoick v. Cunden*, Cro. Eliz. 520; *Wolf v. Kilpatrick*, 2 Cent. Rep. 81, 101 N. Y. 146; *Ahern v. Steele*, 5 L. R. A. 449, 115 N. Y. 203; *Miller v. New York, L. E. & W. R. Co.* 125 N. Y. 122.

The duty of keeping this area safe and in repair rested upon the occupant and not upon the defendant.

When real estate is leased, in the absence of covenants to the contrary, it is for the tenant and not the landlord to make repairs.

Swords v. Edgar, 59 N. Y. 23, 17 Am. Rep. 295; *Pretty v. Bickmore*, L. R. 8 C. P. 401; *Kirby v. Boylston M. Assn.* 80 Mass. 249, 74 Am. Dec. 682; *Lowell v. Spaulding*, 59 Mass. 277, 50 Am. Dec. 775.

The tenant is only responsible for the condition of such parts as he exclusively occupies.

Shipley v. Fifty Associates, 101 Mass. 251, 3 Am. Rep. 346, 106 Mass. 194, 8 Am. Rep. 518.

If this area properly cared for and repaired would not become a nuisance, the defendant is not liable.

Swords v. Edgar, *supra*; *Clifford v. Atlantic*

Cotton Mills, 5 New Eng. Rep. 566, 146 Mass. 47.

If this area was originally a nuisance, having bought the property with the area existing upon it, the defendant is not responsible to the plaintiff, unless notice to him of the existence of the nuisance is shown.

Cohocton Stone Road v. Buffalo, N. Y. & E. R. Co. 51 N. Y. 578; *Bond v. Smith*, 44 Hun, 219, reversing 22 N. Y. S. R. 666; *Haggerty v. Thomson*, 45 Hun, 398; *Nichols v. Boston*, 98 Mass. 39, 98 Am. Dec. 132.

Vann, J., delivered the opinion of the court:

The plaintiff does not claim that the defendant was negligent, but seeks to make him liable as a trespasser, upon the ground that the covered excavation in the street had never been authorized or consented to by the municipal authorities. The law holds those who impair the safety of a public street to a strict liability. Thus in *Congreve v. Smith*, 18 N. Y. 79, it was said that "persons who, without special authority, make or continue a covered excavation in a public street or highway for a private purpose, should be responsible for all injuries to individuals resulting from the street or highway being thereby less safe for its appropriate use. . . . The general doctrine is that the public are entitled to the street or highway in the condition in which they placed it; and whoever, without special authority, materially obstructs it or renders its use hazardous by doing anything upon, above or below the surface, is guilty of a nuisance. . . . No question of negligence can arise, the act being wrongful. . . . There can be no difference in regard to the nature of the act or the rule of liability, whether the fee of the land within the limits of the easement is in a municipal corporation, or in him by whom the act complained of was done." In another case, arising out of the same accident, it was held that, even if the stone covering the excavation was broken, after it was laid, by the wrongful act of others, the defendants would still be liable, because they were bound at their peril to keep the area covered in such a manner that it would be as safe as if it had not been built. *Congreve v. Morgan*, 18 N. Y. 84, 72 Am. Dec. 459. These cases have been followed and made the basis of judgment in many others. *Creed v. Hartmann*, 39 N. Y. 591, 86 Am. Dec. 341; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Dec. 603; *Whalen v. Gloucester*, 4 Hun, 24; *Anderson v. Dickie*, 26 How. Pr. 105; *Wendell v. Troy*, 39 Barb. 329, 4 Keyes, 261. Although called to the attention of the court, they seem to have been disregarded in *McCarthy v. Syracuse*, 46 N. Y. 194, 199, where it was said: "The excavation by the plaintiffs of the area under the sidewalk was not unlawful. They owned to the center of the street, subject to the right of way of the public over the surface. For any interference with this right of way the plaintiffs would have been responsible, but so long as they did no injury to the street they were at liberty to use the space under it, as they might any other part of their property." Assuming, however, the rule to be as stated in the *Congreve Cases*, *supra*, when the excavation is made without authority, (*Clifford v. Dam*, 81 N. Y.

52, 56), it is clear that when it was made with the consent of the proper municipal officers the rule of liability relaxes its severity, and rests upon the ordinary principles governing actions of negligence. The person receiving the license is held to impliedly agree to perform the act permitted with due care for the safety of the public, and is made liable for any violation of duty in this regard. *Port Jervis v. First Nat. Bank*, 96 N. Y. 550, 556; *Clifford v. Dam*, 81 N. Y. 52; *Dickinson v. New York*, 92 N. Y. 584, 587; *Seneca Falls v. Zalinski*, 8 Hun, 571, 574; *Newton v. Ellis*, 5 El. & Bl. 115.

When conditions, whether express or implied, are annexed to the license, substantial compliance therewith is essential to the protection of the licensee; but consent and compliance relieve the owner from the imputation of trespassing in doing the act consented to, and place him in the position of one liable for negligence only. *Wolf v. Kilpatrick*, 101 N. Y. 146, 2 Cent. Rep. 81; *Nolan v. King*, 97 N. Y. 565; *Elliot, Roads & Streets*, p. 541.

It did not appear on the trial of this action that express authority had been given by the city of Rochester, or in its behalf, either to the defendant or his grantor, to construct or maintain the covered area in question. On the contrary, a witness called by the plaintiff testified that during and prior to the year 1876 he was a member and a clerk of the board of public works, which had charge of "public matters, streets, walks and such things," and the members of which were commissioners of highways; that such board expired in April or May of that year, and was succeeded by the executive board, possessing similar powers, and that he was also clerk of that board; that upon examining the records of both boards kept by him for the year 1876 "and about that time," he did not find that any written permission had been given by either of those bodies "to excavate and construct a vault under the sidewalk in front of the premises known as the 'Ashley Block,'" and that at this time "the common council did not exercise jurisdiction over such subjects." On the cross-examination of this witness, however, it appeared that while he was a member of one or the other of said boards he observed the work of constructing the Ashley block as it was going on; that in 1876, and for some years prior, it was the common practice to make excavations, such as that in question, under the sidewalks, to cover them with flagstones, and to make openings therein as means of access thereto and to the cellars of stores; that this was very common on State Street, in the neighborhood of the Ashley block; that one Thompson, who, as contractor, built the vault in front of that block, was at the time a member of the board of public works; that another member did business a little below said block, and other members in the same locality, and that all of the members were accustomed to go about the city for the purpose, as it is assumed, of inspecting the streets and sidewalks. It appeared from other testimony that State Street was a business street, and that covered excavations, such as the one under consideration, were common all over the city. There was no evidence of any objection on the part of the city or

its officers. At the close of the evidence a motion to non-suit was made and granted upon the ground, among others, that the plaintiff had failed to make out a cause of action against the defendant. No request to submit any question to the jury was made by the counsel for the plaintiff, who contented himself with an exception to the decision of the court in granting the motion.

The foregoing facts, which were undisputed, were deemed sufficient by the courts below to justify the non-suit upon the ground, as stated by the learned general term, that, "while it does not appear by positive proof that the owner obtained a license or permit from the municipal authorities to excavate the space under the sidewalk, such authority may reasonably be inferred from the use of the same for the period of nine years, without objection, with actual knowledge on the part of the city officials that the same existed." The question presented for our determination, therefore, is whether consent to the maintenance of this vault may be inferred from the long acquiescence of the municipal authorities, under the circumstances stated. A similar question was under consideration by this court in the case of *Jennings v. Van Schaick*, 106 N. Y. 580, 11 Cent. Rep. 317, where the plaintiff fell through an uncovered and unguarded coal-hole in the sidewalk. Although the building was rented for flats or apartments to tenants who used the coal-hole, the owner was held liable, because he remained in control of the halls and a part of the basement, and employed a janitor to take care of the premises, who, in the discharge of his duty as such, controlled the coal-vault and the opening thereto in the sidewalk, and through his negligence in leaving the hole unguarded the accident happened. The court, in discussing an exception to the charge of the court that the action was based on a wrongful act, said: "It does not appear that the defendant, who owned the premises, had ever obtained from the municipal authorities any formal license or permission to construct the opening in the sidewalk, but such authority was a reasonable inference from an acquiescence of eighteen years without objection from the city. Assuming, however, that authority for the construction had been granted, the duty of safe covering and of protection when open, remained, and, if not performed, the unguarded opening became at once a wrong and a nuisance."

We have assumed that from long use and acquiescence the consent of the municipal authorities to the construction of the coal-vault and its aperture should be inferred, and so the structure was not, in and of itself, a nuisance. But the consent of the city is conditional upon certain modes of use, and, if the opening is left unguarded, it becomes at once a trap and a nuisance." Thus, while the court held the owner liable on the ground of negligence, it also held that he was not liable as an original trespasser, because it inferred from the acquiescence of the municipal officers that they had consented to construction and maintenance of the covered area. The question was presented to the Supreme Court of the United States in *Chicago v. Robbins*, 87 U. S. 2 14 L. R. A.

Black, 418, 425, 17 L. ed. 298, 303, and also in *Robbins v. Chicago*, 71 U. S. 4 Wall. 657, 679, 18 L. ed. 427, 432, where it was held that permission to build and maintain an area in a public sidewalk might be inferred from the fact of its construction and maintenance without objection from the officers of the city. So it has been held that the deposit of building materials in a street for use in the erection of a house, with the full knowledge of the superintendent and trustees of the village, is sufficient to authorize and even compel a jury to find consent by implication to such use of the street. *Seneca Falls v. Zalinski*, 8 Hun, 571, 573. The Supreme Court of Massachusetts, in laying down a similar rule, said: "What may be deemed a reasonable and proper use of a way, public or private, must depend much on the local situation and much on public usage. The general use and the acquiescence of the public is evidence of the right. The owner may make such a reasonable use of a way adjoining his land as is usually made by others similarly situated. As to the reasonableness of the use it may well be laid down that in a populous town, where land is very valuable, . . . where the owner of a lot . . . has occasion to build, and for that purpose to dig cellars, he may rightfully lay his building materials and earth within the limits on the street, provided he takes care not to improperly obstruct the same, and to remove them in a reasonable time." *Van O'Linda v. Lothrop*, 21 Pick. 292, 297. The Supreme Court of Michigan holds that excavations, properly and safely constructed under the public streets of cities for the convenience of the owners of premises adjoining, are not unlawful, even in the absence of permission from the municipal authorities. *Fisher v. Thirkell*, 21 Mich. 21, 4 Am. Rep. 422. In Illinois, the rule as laid down by its supreme court is that, where the corporate authorities of a city have knowledge of the fact that a lotowner is constructing a vault under the sidewalk for his own convenience, and make no objection, authority to construct the same may be inferred, and, when the same is continued for many years without objection the acquiescence on the part of the city will be regarded as sufficient authority to construct and maintain it in a careful and prudent manner. *Gridley v. Bloomington*, 68 Ill. 47, 50. In an earlier case, involving the same question, that learned court said: "We are not prepared to admit that the defendant could, by reason of his ownership of the adjoining property, claim the absolute right to take up the sidewalk and extend the coal-cellar under it; but, as such a privilege is of great convenience in a city, and may, with proper care, be exercised with little or no inconvenience to the public, we think that authority to make such cellars may be implied in the absence of any action of the corporate authorities to the contrary, they having been aware of the progress of the work." *Nelson v. Godfrey*, 12 Ill. 20, 23. See also *Clark v. Fry*, 8 Ohio St. 353, 72 Am. Dec. 590; *Wood v. Mears*, 12 Ind. 515, 74 Am. Dec. 222; *Mallory v. Grifey*, 85 Pa. 275; *Hundhausen v. Bond*, 36 Wis. 51; *Irvine v. Fowler*, 5 Robt. 432; 2 Dillon, Mun. Corp. §§ 699, 700; *Cooley, Torts*, 743. We have been

referred to no case, and have found none, criticising or condemning the doctrine of implied consent as thus laid down by the courts.

The giving of consent is an executive act, which from its nature does not require an ordinance or resolution, as in the case of a legislative act, or a written entry or decision, as in the case of a judicial act. Where the power resides in a single officer, and there is no statute regulating the subject, no reason is apparent why his verbal consent would not suffice the same as a verbal license from an adjoining owner to his next neighbor, to construct, on the land of the latter, a wall or anything which without consent would be a trespass. *Miller v. Auburn & S. R. Co.* 6 Hill, 61; *Murray v. Gibson*, 21 Ill. App. 488; 18 Am. & Encyclop. Law, 546.

So consent by a board might be given orally by the assembled body when inspecting the premises. An individual proprietor standing by and witnessing an erection on his land by the adjoining owner, which would be a trespass if not consented to by not objecting, impliedly consents. Why should not actual knowledge by city officers, having the power to give consent, and their persistent acquiescence for year after year, both before and after the premises had changed owners, in the maintenance of said vault, be given the effect of actual consent thereto? In answering this question due consideration should be given to the convenience of commerce and the necessities of business in crowded cities. Due regard should also be had to the custom with reference to constructing vaults under sidewalks, so universal in the erection of modern buildings for business purposes in the cities of this State that the court may take judicial notice of the fact, as a matter of constant observation and common knowledge. *Gibson v. Stevens*, 49 U. S. 8 How. 884, 899, 12 L. ed. 1128, 1129; *Raymond v. Lowell*, 6 Cush. 524, 534, 53 Am. Dec. 57; Wade, Notice, 2d ed. §§ 1408, 1410, 1417.

We think that both upon principle and authority consent to an act so common and necessary as the construction of a vault under the sidewalk in front of a block erected and used for business purposes must be conclusively inferred from the acquiescence of those having charge of the street for the public for so long a period as nine years.

The judgment should be affirmed, with costs.

All concur, except *Bradley and Parker, JJ.*, not voting.

George W. SMITH *et al.*, *Appts.*,

v.

Wilbur H. PROCTOR *et al.*, *Repts.*

(.....N. Y.)

A majority of those who vote, though less than a majority of those actually present at the meeting, is sufficient to carry a resolution at a school meeting for the issue of bonds, under a statute requiring "a majority of

NOTE—For note on the question, What constitutes a majority?—see *Lawrence v. Ingersoll* (Tenn.) 6 L. R. A. 208.
14 L. R. A.

all the inhabitants . . . entitled to vote to be ascertained by taking and recording the ayes and noes of such inhabitants attending" the meeting.

(*Parker, J., dissents.*)

(December 15, 1891.)

A PPEAL by plaintiffs from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of a Special Term for Queens County dismissing the complaint in a suit brought to enjoin the issuance of bonds for the erection of a new school-house, and to prevent the levying and collection of a tax for the same object. *Affirmed.*

The facts are stated in the opinion.

Mr. John E. Parsons, for appellant:

The proceeding rests wholly upon the statute, is in derogation of the common law, and affects the rights and property of individuals. The statute must be strictly pursued.

Solon v. Williamsburgh Sav. Bank, 114 N. Y. 123.

According to the supreme court a minority may authorize the bonding. To prevent it a majority must vote adversely. This is not what the statute says. It requires that a majority shall vote favorably. They can equally protect the district by attending and voting adversely, or by staying away and in that manner preventing a majority vote.

Action of legislative bodies is equally prevented by preventing a quorum as by an adverse vote.

State v. Winkelmeier, 35 Mo. 103.

It is the policy of the law in this State to give effect to provisions intended for the protection of municipalities against any attempt by a small minority of inhabitants to create indebtedness.

Starin v. Genoa, 28 N. Y. 439; *Gould v. Sterling*, 23 N. Y. 456; *Venice v. Woodruff*, 62 N. Y. 482, 20 Am. Rep. 495; *People v. Allen*, 52 N. Y. 588; *Springport v. Teutonia Sav. Bank*, 75 N. Y. 397; *Solon v. Williamsburgh Sav. Bank*, *supra*; *St. Joseph Twp. v. Rogers*, 88 U. S. 16 Wall. 644, 21 L. ed. 328; *Walnut v. Wade*, 103 U. S. 688, 26 L. ed. 526; *Carroll County v. Smith*, 111 U. S. 556, 28 L. ed. 517.

The difference between the policy of the law as administered in this State and as established by the decisions of the United States Supreme Court, and the courts of some of the western states, is well illustrated in *Cass County v. Johnston*, 95 U. S. 360, 24 L. ed. 416.

The decisions of the United States Supreme Court yield in authority in this case to the law as established by our own courts.

Rich v. Menie, 134 U. S. 632, 33 L. ed. 1074.

Mr. Marquis D. Gould, for respondents:

The resolutions of the meeting are determined by a majority of the votes of those present and voting, and do not require the votes of a majority of all present and not voting.

Oldknow v. Wainwright, 2 Burr. 1021; *Gosling v. Voley*, 7 Q. B. 454.

Vann, J., delivered the opinion of the court:

The only question brought before us by this appeal is whether the resolution to bond the

district was adopted by a majority of the qualified voters, within the meaning of the statute governing the subject. The trial court found that there were 800 residents of the district entitled to vote at school meetings at the time the resolution was adopted, and that all of them had been duly notified of the meeting and its purposes, which included, by specific mention, the voting of "a tax to be raised by installments, . . . to be expended in the erection of" a new school-house. At a meeting held only a few days before, it had been determined by a vote of 69 to 47 that it "was advisable to erect a new school building," and a committee was thereupon appointed to procure information respecting the site, cost, etc., with instructions to report at a future meeting. An adjournment was then taken, and on the adjourned day 115 voting inhabitants were present, when the resolution in question was adopted by a vote of 84 for, to 88 against, the same, only 67 having voted upon the question. The statute regulating the course to be pursued in order to issue valid bonds is as follows: "Whenever a majority of all the inhabitants of any school-district entitled to vote, to be ascertained by taking and recording the ayes and noes of such inhabitants attending at any annual, special, or adjourned school-district meeting legally called or held, shall determine that the sum proposed and provided for in the next preceding section shall be raised by installments, it shall be the duty of the trustees of such district, and they are hereby authorized, to cause the same to be raised, levied, and collected in equal installments, in the same manner, and with the like authority, that other school taxes are raised, levied, and collected; and, . . . whenever a tax shall have been voted to be collected in installments for the purpose of building a new school-house, to borrow so much of the sum voted as may be necessary, at a rate of interest not exceeding six per cent, and to issue bonds or other evidences of indebtedness therefor, which shall be a charge upon the district and be paid at maturity, and which shall not be sold below par." Laws 1864, chap. 555, p. 1245, § 19; Laws 1875, chap. 567, p. 642, § 18; Laws 1881, chap. 528, p. 706, § 2.

As the 84 electors who voted in favor of the proposition were less than a majority of the 115 qualified voters who attended the meeting, it is contended in behalf of the plaintiffs that the resolution did not receive the majority required by statute, and hence that the trustees were without lawful authority to issue the bonds. The argument is conclusive, unless the Legislature has provided some means of ascertaining a majority of the legal voters other than a simple enumeration of all the qualified voters of the district, or even of all who attended the meeting.

An analysis of the statute suggests the inquiry whether it requires a majority of all entitled to vote, or a majority of all present and entitled to vote, or a majority of all present and entitled to vote and actually voting. The answer to this question is to be found in the words "to be ascertained," as used in the statute. What is to be ascertained? Obviously the majority required to make the determination. How is it to be ascertained? The statute

answers: "By taking and recording the ayes and noes of such inhabitants attending"—that is, as attend—the meeting. How is a vote by ayes and noes taken and recorded? By calling the names of those present, and recording such as vote "Aye" as in favor of, and such as vote "No" as opposed to, the pending resolution. As those who do not vote cannot be recorded as voting, the majority must be determined by comparing the number of those who vote "Aye" with the number of those who vote "No." Those who did not vote at all cannot be recorded as voting "No," because they did not vote "No," and to so record them would falsify the record. When a vote is taken under a statute which provides that a majority is to be ascertained by taking and recording the ayes and noes of those present at the meeting, we think that those who do not respond as their names are called should not be counted at all, and that certainly they should not be counted as if they had voted "No." The rule of the common law pertaining to the subject, as declared by Lord Mansfield, is that "whenever electors are present, and do not vote at all, they virtually acquiesce in the election made by those who do," (*Oldknow v. Wainwright*, 2 Burr. 1017;) and by Lord Denman, that a vote by a majority of a meeting means "a majority of those who choose to take a part in the proceedings of the assembly." (*Gosling v. Veley*, 7 Q. B. 406.) The language of the Supreme Court of the United States in a recent case has a bearing upon the subject. Speaking through its chief justice, that learned court said that "all qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares." *Cass County v. Johnston*, 95 U. S. 360, 24 L. ed. 416.

For many years it has been the established policy of the State to cherish common schools, and for this purpose it annually expends large sums of money. The statute of which the section under consideration forms a part is an elaborate and comprehensive Act, designed to furnish instruction, free of expense, to all the children in the State. Great care is taken to provide for the erection of suitable buildings for school purposes; and, if a district needs a new school-house, and will not voluntarily build one, agencies are provided by which it may be compelled to build one even against the wishes of a majority of the tax-payers. Laws 1887, chap. 592, p. 805, § 1. The statute should receive a reasonable construction, keeping in view its general purpose to promote the efficiency of the common schools. It would not be reasonable to hold that the majority required is an absolute majority of all the qualified voters of the district, because the statute does not so command, and on that basis it would be difficult, if not impossible, to tell whether a resolution had been carried or not. No enumeration or registration of voters is provided for, and the qualifications of persons entitled to vote at school meetings differ materially from those of electors at general elections. Hence a dangerous question of fact would always be open, and the value of the bonds would be seriously affected thereby.

Prudent men would hesitate before investing in securities resting on such a precarious foundation. So, as we think, it would be unreasonable to hold, in the absence of an express provision to that effect, that a majority is required of all who were present at the meeting, whether they voted or not, as this also might leave the result uncertain and invite controversy. By following the plain language of the statute, and ascertaining a majority by comparing the affirmative and negative votes as actually given and recorded, these difficulties are avoided, and the beneficent aim of the Legislature is accomplished. This is the construction which has been uniformly given to the section under review by the department of public instruction, and is in accordance with the general usage that has followed its rulings.

Code Pub. Instr. p. 263. It does not permit the absent or indifferent to neutralize the efforts of the public-spirited and enterprising, but compels everyone who would make his influence effective to attend the meeting and vote in the manner provided by law. In order to adopt a resolution such as that under consideration, the statute, as we interpret it, requires simply a majority of the qualified voters in attendance, pursuant to legal notice, who actually vote upon the question submitted by answering "Aye" or "No," as the names of all present are called.

We think that the complaint was properly dismissed, and that the judgment appealed from should be affirmed, with costs.

All concur, except **Parker, J.**, dissenting.

MARYLAND SUPREME COURT.

Razen H. GRIFFITH, *Appt.*,

Grove A. SHIPLEY.

(.....Md.....)

1. Knowledge of the purchaser of a note at 80 per cent discount, who asked the seller to keep quiet about it, that it was given for "hulless oats" to a company which he knew was engaged in selling such oats, with proof that the seller of the note knew the oats were worthless, is sufficient to justify a finding that he was not a bona fide purchaser, where the oats were purchased at an exorbitant price with an agreement that the company should sell again for the maker of the note a still larger quantity of oats at the same price per bushel.

2. Evidence that the plaintiff claiming to be a bona fide purchaser of the note sued on, which was given in a fraudulent transaction for hulless oats, knew previously of the dealing in such oats in the neighborhood, and that people were liable to be swindled therein as he alleged his son to have been, is admissible on the question of good faith.

(November 12, 1891.)

APPEAL by defendant from a judgment of the Circuit Court for Montgomery County in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note. *Reversed.*

The facts are stated in the opinion.

Argued before Alvey, *Ch. J.*, and Miller, Irving, Bryan, McSherry and Fowler, *JJ.*

Messrs. Thomas Anderson and W. Veirs Bouie, Jr., for appellant.

Messrs. Edward C. Peter and Peter & Henderson for appellee.

Alvey, *Ch. J.*, delivered the opinion of the court:

This action was brought by the appellee, as indorser and holder, to recover the amount of a

promissory note made by the appellant on the 20th of February, 1888, payable to F. N. Hook, or bearer, on or before the 1st of March, 1889, for \$160. The note was made payable at the Union National Bank of Westminster, Md., and on failure of payment it was protested. The note itself is in ordinary form, but on the back of it there are certain printed forms of certificates or statements which have not been filled up. The purpose of one of these blank forms, it appears, was to show, when filled up, for what the note was given. The note is also indorsed in blank with the name of Francis J. Classon. Hook, the payee of the note, was at the time president of the Carroll County Industrial Grain & Seed Company, and the agent who obtained the note from the defendant was a person by the name of Forney. It appears that the note was given upon an agreement on the part of the seed company to sell to the defendant, to be thereafter delivered, twenty bushels of hulless oats, at \$10 per bushel, upon the representation made by the agent, Forney, that they were of extraordinary species and productiveness. And at the time of the agreement for sale the agent produced what he represented as a fair sample of such oats, which indicated an extraordinary species or quality of that cereal, and which, he represented, would yield at least four times as much as any other oats, and would grow without hulls. He also represented to the defendant that the company would sell for him 40 bushels of hulless oats, according to the terms and prices set forth in a certain bond of the company, delivered to the defendant at the time of the making of the note, at least thirty days prior to the maturity of the note, and would from the proceeds of such sale pay off the note; that the defendant, acting upon these representations, and upon the faith of the bond, purchased the twenty bushels of "hulless oats," for which he paid the agent in cash \$40, and gave the note for the balance of the price, \$160; that the agent then and there assured the defend-

NOTE.—For notes on Bohemian oat transactions, which are substantially like the "hulless" oat transaction involved in the above case, and on negotiable paper given therein, see *Evans v. Stuhr*, 14 L. R. A.

berg (Mich.) 6 L. R. A. 501; *Hess v. Culver (Mich.)* 6 L. R. A. 498. See also *Knight v. Linzey (Mich.)* 8 L. R. A. 478.

ant that he would fill up the blank entry or printed indorsement on the back of the note so as to show that the note had been given for "hulless oats." This, however, the agent failed to do, and the note was transferred by Hook to Classon a few days after its date. The bond referred to in the testimony of the witnesses, and which was given to the defendant at the time he made the note sued on, is set out in the record, and is in this form: "No. 17. Feb. 20, 1898. The Carroll County Industrial Grain and Seed Company, incorporated under the laws of Maryland, F. W. Hook, Secy., W. A. Mikesell, Treas., doth hereby agree to sell 40 bushels of hulless oats for Mr. R. H. Griffith, of 7 Dist., Montgomery County, State of Maryland, at ten dollars per bushel, in good order, less \$2.50 per bushel commission, on or before the 1st day of Feb., 1899. We make no monetary statements, and the person accepting this bond acknowledges to have purchased the grain at a speculative value. [Seal of Co.] F. N. Hook, President. R. H. Griffith, Buyer."

The defendant then proved that he, shortly after the date of the note and the bond, received twenty bushels of oats from the seed company, but that they were in no respect similar to the sample shown at the time of the contract; that he prepared ground and seeded the oats, giving them the most favorable chances for good yield, but that the product was not more than thirty-five bushels, and that of a most inferior quality; that the oats in fact were worthless; and that instead of being hulless oats they turned out to be oatless hulls, and of no value whatever. And, this being the case, of course there was no attempt on the part of the company to comply with the terms of its bond. Frauds and deceptions of the character here complained of had become so frequent in some parts of the State that the Legislature, by the Act of 1888, chap. 415, passed only a little more than a month after the date of the note sued on, has undertaken to put a restraint upon such transactions by bringing parties perpetrating such fraud within the purview of the Penal Code; and, while the provision of that statute cannot apply to this case, they furnish evidence of how such transactions are and have been regarded, and of the necessity of denouncing them as criminal by the law. In deciding this case as presented on the instruction of the court below, we must allow to the undisputed facts their full force and effect, and, so treating them, no other conclusion can be drawn than that there was gross fraud perpetrated upon the defendant in obtaining from him the note sued on; and the material question is whether there was evidence legally sufficient to be submitted to the jury from which they could find that the plaintiff was not a bona fide holder of the note for value. The court below instructed the jury that there was no evidence legally sufficient from which they could find that the plaintiff had any knowledge or notice of fraud or want of consideration in the making of the note, and that, therefore, their verdict must be for the plaintiff for the amount of the note. In this, we think, there was error.

Fraud in the inception of the note being established by incontrovertible evidence, it was 14 L. R. A.

incumbent upon the plaintiff to show that the note came to him before maturity, bona fide, and for value; for, even though he may have paid the full face value of the note, still, if he had knowledge, at the time, of the fraudulent inception of the note, or of the want of consideration for the same, he would not be a bona fide holder, and could stand in no better position than the party from whom he obtained the note. This is the settled doctrine in this State, as it is elsewhere. *Totten v. Bucy*, 57 Md. 446; *Williams v. Huntington*, 68 Md. 591, 11 Cent. Rep. 538.

In *Stewart v. Lansing*, 104 U. S. 505, 26 L. ed. 866, it was held by the supreme court that the indorsee of negotiable paper which has a fraudulent or illegal inception must, in order to entitle him to recover thereon, prove that he is a bona fide holder thereof for value; and many other authorities to the same effect might be cited, but it is unnecessary. Here there is evidence to show that Classon, who obtained the note from Hook, the payee, indorsed and transferred the note to the plaintiff before its maturity. But Classon swears that he knew at the time he obtained the note from Hook "that it was given for hulless oats, and that said oats were worthless, and that this was the prevalent opinion in and around Westminster, where he and the plaintiff resided." There can be no doubt, therefore, that Classon possessed knowledge of the fraudulent inception and character of the note. It is true, the knowledge possessed by Classon would not affect the validity of the note in the hands of the plaintiff if the latter acquired title to the note before maturity, in good faith, and for value. But if the plaintiff had notice at the time he purchased the note that it was void, or was subject to impeachment for fraud or want of consideration, in the hands of Classon, he took it subject to the same equities and defenses that it was subject to in the hands of Classon. Classon not being a bona fide holder, neither could the plaintiff be, if he took the note with knowledge of the facts that affected it in the hands of Classon. *Story, Prom. Notes*, §§ 190, 191.

"And it is agreed on all sides," says *Judge Story*, in his work on *Promissory Notes*, § 197, "that express notice is not indispensable; but it will be sufficient if the circumstances are of such a strong and pointed character as necessarily to cast a shade upon the transaction, and to put the holder upon inquiry." Mere negligence or want of caution, such as may exist without the imputation of bad faith, will not do; but a party must not be willfully blind and inattentive to such facts and circumstances as would lead him directly to the knowledge of the infirmities of the paper. The note, as has been stated, was, by its terms, made payable on or before the 1st of March, 1899; and the bond to the defendant obligated the seed company to sell for the defendant the forty bushels of hulless oats, at \$10 per bushel, on or before the 1st of February, 1899. And, according to the proof, the proceeds of this sale of oats were in part to be applied in taking up the note. As between the original parties to the note, and as against all who subsequently took it after maturity, or who took it by transfer before maturity with notice or knowledge

of the facts of the transaction out of which the note had its origin, the bond and note must be taken together as forming parts of one and the same contract, and must be construed together as constituting the entire contract between the parties. It is very apparent that the note would not have been given without the bond, and that the bond formed the principal, if not the entire, inducement to the making of the note. The stipulations of the bond have not been performed, and, with the knowledge of the deception in regard to the oats, it is most improbable that the party giving it ever supposed that the bond could be performed. The consideration for the note, therefore, has utterly failed, or, rather, no valid or substantial consideration for it ever existed; and therefore no holder of the note is entitled to recover thereon except a party who may have in good faith acquired title to the note before maturity, and for value. See *Sutton v. Berkwith*, 68 Mich. 308; *McNamara v. Garrett*, 68 Mich. 454.

Was there evidence, then, legally sufficient that ought to have been submitted to the jury from which they could have found that there was notice on the part of the plaintiff at the time of obtaining the note of the want of consideration, or of fraud in its inception? We think there was such evidence, and that there was error in not submitting it to the jury. The plaintiff admits that he knew of the seed company, and of its dealing in hullless oats, though he swears that he obtained the note innocently, and without any knowledge of the want of consideration or of fraud. He was a note shaver, and Classon, from whom he obtained

the note, swears that at the time he transferred the note to the plaintiff he told him that the note was given for "hullless oats." This witness Classon also swears that he offered the note to the plaintiff at a discount of 15 per cent, but that the plaintiff would not take it at that rate, but offered to and did take it at a discount of 20 per cent, though the note bore interest from its date. He also swears that at the time of selling the note to the plaintiff the latter requested him to keep quiet about it. The witness himself knew that the note had been given for "hullless oats," and that the oats were worthless, though, he says, he did not tell the plaintiff that he knew the oats were worthless. This was evidence, certainly, from which the jury might or might not have concluded that the plaintiff had knowledge of the fraudulent character of the note at the time he discounted it at the rather heavy shave of 20 per cent, and it was evidence, we think, that the jury should have been allowed to consider.

And we are of opinion, moreover, that there was error in striking out the testimony set forth in the first exception. That testimony furnished evidence that the plaintiff as far back as January, 1886, knew of the dealing in hullless oats in his neighborhood, and that they were things about which people were liable to be swindled, as he alleged his son to have been. This proof was of a circumstance that should have been permitted to go to the jury, in connection with the proof of the other facts of the case.

The judgment must therefore be reversed, and a new trial awarded.

MISSOURI SUPREME COURT (2d Div.).

Re J. L. BUSKETT.

(.....Mo.....)

The constitutional exemption of a witness from testifying against himself does not justify his refusal to testify as to criminal acts of others, such as gaming, although he also may have been engaged therein and they may, if discovered, be used as witnesses against him, where there is a statutory prohibition against the use of his own testimony against himself.

NOTE.—*Exemption from self-crimination; effect of statutes prohibiting use of testimony against the witness.*

A witness before the grand jury cannot be excused from telling what persons other than himself he has seen engaged in gambling, on the ground that his answer would criminate himself. *Ward v. State*, 2 Mo. 120, 22 Am. Dec. 449. *Contra*, *Minter v. People* (Ill.) Nov. 4, 1891.

In neither of these cases was any suggestion made as to the effect of statutes prohibiting the use of testimony in future prosecutions against the witness. It will be seen from the cases cited below that the courts of different states take different views of the requisites of such statutes.

A witness is exempt from testifying as to criminal acts of others, on the ground that his testimony may tend to criminate himself, notwithstanding a statute providing that his evidence cannot be used against him, unless full indemnity against prosecution is guaranteed to him by the statute. *Kendrick v. Com.* 78 Va. 463; *Cullen v. Com.* 24 Gratt. 624; *State v. Nowell*, 56 N. H. 314; *Emery's Case*, 107 Mass. 172, 9 Am. Rep. 22.

The constitutional exemption of a witness from self-crimination does not excuse him from answering, where it is provided by statute that his testi-

mony can never be used in any prosecution against him for the offense disclosed. *State v. Quarles*, 13 Ark. 307; *Higdon v. Heard*, 14 Ga. 255; *Kneeland v. State*, 62 Ga. 395; *Wilkins v. Malone*, 14 Ind. 153; *Frazee v. State*, 58 Ind. 8; *People v. Kelly*, 24 N. Y. 74; *People v. Sharp*, 9 Cent. Rep. 699, 107 N. Y. 427; *Ex parte Rowe*, 7 Cal. 184; *Bedgood v. State*, 115 Ind. 275; *La Fontaine v. Southern Underwriters' Assn.* 83 N. C. 132.

In *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. —, reversing *Re Counselman*, 44 Fed. Rep. 238, a case arising out of the refusal of a witness to answer incriminating questions before the grand jury as to violations of the Interstate Commerce Act, it was held by the supreme court of the United States, after an exhaustive review of the authorities, that the witness need not answer, although the answers were prohibited by statute from being used in any criminal proceeding against him; since the constitutional protection is infringed, unless prosecution of the witness for the offense disclosed is absolutely prohibited by the statute; thus overruling *United States v. McCarthy*, 18 Fed. Rep. 87; *United States v. Brown*, 1 Sawy. 531; *United States v. Three Tons of Coal*, 6 Biss. 379, upon this point.

J. G. G.

(November 10, 1891.)

PETITION for a writ of habeas corpus to obtain release of petitioner from the custody of the sheriff of Phelps County to which he had been committed for refusal to answer questions propounded to him by the grand jury. *Petitioner remanded to custody.*

The facts are stated in the opinion.

Messrs. J. B. Harrison and T. J. Jones, for relator:

The relator was not bound to answer the question propounded to him by the grand jury for the reason that the answer would inform the grand jury of the names of the other parties in any game of cards with himself, which knowledge would enable the grand jury to summon said parties before them and compel them to give evidence of relator's gambling. All of which the grand jury could not do unless the relator furnished them with sources of evidence.

The relator was not bound to furnish evidence that would lead to his conviction.

State v. Talbott, 73 Mo. 347; 1 Greenl. Ev. § 451, and authorities cited; *Henry v. Bank of Salina*, 1 N. Y. 83; *State v. Lonedale*, 48 Wis. 364; *Kirschner v. State*, 9 Wis. 140; *Printz v. Cheeney*, 11 Iowa, 469; *State v. Duffy*, 15 Iowa, 426; *People v. Mather*, 4 Wend. 230, 21 Am. Dec. 122; *Southard v. Rexford*, 6 Cow. 255; *Reg. v. Garbett*, 2 Car. & K. 474; *Mahanke v. Cleland*, 76 Iowa, 401.

It was in the judge's instruction to the grand jury that one party may be called upon to discover the other party to a game of cards and with his evidence convict them, and they then (after he has informed the grand jury of the names) be subpoenaed to give evidence against him and lead to his conviction.

This does indirectly what cannot be done directly, which is unconstitutional.

Taylor v. Ross County Comrs. 23 Ohio St. 22.

McFarlane, J., delivered the opinion of the court:

This is an application by petition of J. L. Buskett for release on writ of habeas corpus from the custody of John W. Cooper, sheriff of Phelps County, and from the common jail of said county, in which he is confined. The petition and attached record show that petitioner was summoned before the grand jury of Phelps County as a witness, and was asked if he knew the names of any parties or person who have been gambling with cards or otherwise in Phelps County within the last year. To this question he answered, "Yes." Petitioner was then asked who they were, other than himself. This question the witness refused to answer, giving as a reason for such refusal that the answer would criminate himself, and "would lead to the divulging of evidence that would convict" him of the misdemeanor. The fact of the refusal to answer was duly communicated to the court. The court decided that the question was proper, and that petitioner should answer, informing him at the same time that his testimony should in no case, be used against him. Still refusing to answer, he was adjudged guilty of a con-

tempt, and a fine of \$25 imposed upon him. In default of payment of the fine, he was ordered committed to the county jail until the fine should be paid. From this confinement he asks to be discharged.

Petitioner insists that he was privileged to refuse to answer the question, on the ground of the protection guaranteed him by section 23 of the Bill of Rights, which provides that "no person shall be compelled to testify against himself in a criminal cause." On the other hand, the State contends that ample protection was afforded petitioner under section 3819, which is as follows: "No person shall be incapacitated or excused from testifying touching any offense committed by another, against any of the provisions relating to gaming, by reason of his having betted or played at any of the prohibited games or gaming devices, but the testimony which may be given by such person shall in no case be used against him." Petitioner insists that this statute infringes his rights under the said section of the Constitution, and is therefore void. Waiving the inquiry in this case whether the validity of the judgment imposing the fine on petitioner could be inquired into or impeached in this collateral proceeding, and whether an appeal or writ of error would lie from the judgment, we will consider the real question in the case. Petitioner claims that section 23 of the Bill of Rights, providing that "no person shall be compelled to testify against himself in a criminal cause," gives him the absolute right to refuse answering any question, or giving any testimony, which would either tend directly to prove him guilty of a crime or would afford information or point out sources of information which might lead to fastening a crime upon himself; that section 3819 falls short of giving him that full and complete indemnity against prosecutions for crimes about which he may be called to testify, and which may be indirectly disclosed by the evidence given; and that said section is, for that reason, in conflict with section 23 of the Bill of Rights, and is without force and validity. The common-law maxim, which is thus incorporated in the Constitution of the State, has ever been estimated and held as one of the most sacred personal rights guaranteed the citizens of this country and of England. It finds a place in every state constitution, as well as in that of the United States, and should therefore receive such liberal construction as will secure to the citizen its full protection against inquisitorial oppression. The right thus secured would be but an empty mockery if its privileges could be impaired under a pretense of legislative regulation.

It becomes proper, then, briefly to inquire into the extent of the privilege thus accorded, in the absence of any statutory protection, and see what, if any, rights are infringed. In *People v. Kelly*, 24 N. Y. 74, Denio, J., in considering a like provision of the Constitution of New York, says: "The history of England in early periods furnishes abundant instances of unjustifiable and cruel methods of extorting confessions; and the practice at this day in the criminal tribunals of the most polished countries in continental Europe is to subject an accused person to a course of interrogatories

which would be quite revolting to a mind accustomed only to the more humane system of English and American criminal law. It was not, therefore, unreasonable to guard, by constitutional sanctions against repetition of such practices in this State; and it is not at all improbable that the true intention of the provision in question corresponds with the natural construction of the language. But there is great force in the argument that constitutional provisions, devised against governmental oppressions, and especially against such as may be exercised under pretense of judicial power, ought to be construed with the utmost liberality, and to be extended so as to accomplish the full object which the author apparently had in view, so far as it can be done consistently with any fair interpretation of the language employed. The mandate that an accused person should not be compelled to give evidence against himself would fail to secure the whole object intended, if a prosecutor might call an accomplice or confederate in a criminal offense, and afterwards use the evidence he might give to procure a conviction on the trial of an indictment against him." The question came before this court in a very early day in *Ward v. State*, 2 Mo. 120, 22 Am. Dec. 449, in which McGirk, Ch. J., wrote the opinion of the court. The facts in the case were similar to those shown by this record. A witness before the grand jury was asked, "Do you know of any person or persons having bet at a faro table in this county within the last twelve months?" to which the witness answered, "I do." The witness was then asked to tell what person or persons have so bet other than himself. The witness declined answering this question, saying he could not answer without implicating himself. The question before the court was whether the witness could be required to answer. The court adopted the rule laid down by Chief Justice Marshall in *Burr's Trial*, 245: "That it is the province of the court to judge whether any direct answer to the question that may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in a chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such case the witness must himself judge what his answer will be, and, if he say on his oath he cannot answer without accusing himself, he cannot be compelled to answer." It is said by the Supreme Court of Virginia (*Kendrick v. Com.* 78 Va. 493), in speaking of a similar provision of the Constitution of that State: "It ought to be construed with the utmost liberality consistent with the due execution of the laws and the safety of society. But, while it is a settled maxim of law that no man is bound to criminate himself, it is also a rule of law and necessity of public justice that every person is compellable to bear testimony in the administration of the laws of the duly constituted courts of the country." This court, in *State v. Tabbutt*, 73 Mo. 357, cites approvingly the rule given by Greenleaf in his work on Evidence (§ 456): "Where the answer will have a tendency to expose the witness to a penal liability, or to any

kind of punishment, or to a criminal charge, the witness is not bound to answer."

It will be seen by these decisions that the protection given the witness under the Constitution has not been construed literally, and confined to an exemption from testifying in a criminal proceeding in which he himself is prosecuted, but has been extended to protect him in all cases in which his evidence would prove "a necessary and essential link in a chain of testimony, which would be sufficient to convict him of crime."

The question then arises, Does the statute afford the witness protection and immunity equal to that afforded him under the Constitution? If it does so, then section 8819 does not deprive petitioner of any constitutional right or privilege, and is valid. There can be no doubt that the language of the statute granting protection, that "the testimony which may be given by such person shall in no case be used against him," is as broad as the constitutional privilege, "that no person shall be compelled to testify against himself in a criminal cause." It might therefore be sufficient to hold, as was done by Brown, J., in *United States v. McCarthy*, 18 Fed. Rep. 89: "The reason of the former rule exempting witnesses from giving compulsory testimony against themselves was that their testimony might be used to convict them. The statute above quoted, in preventing all possible use of testimony thus given, does away with the reason of the rule; and there is therefore no longer any ground for its application."

But in this case what fact could have been disclosed by petitioner in his testimony which could have been used as a link in a chain of evidence, upon which he might have been convicted of a criminal offense, against the use of which, in a trial against himself, he was not given as full protection as the Constitution afforded him? He was fully protected against the use of any admissions or declarations he may have made against himself. Suppose he had answered that he had seen A. and B. gambling with cards. What fact would have been disclosed that could have "formed a link in a chain of evidence" against himself. To look on at others gaming is not a criminal offense, subjecting the observer to prosecution.

It is insisted, however, and this is the main ground of contention, that facts might be disclosed which would afford facilities for fastening the guilt upon the witness. Thus, it is contended, if witness should have answered that he had seen A. and B. gaming, then they could be called as witnesses to prove that petitioner was at the same time engaged in gaming. It will be seen that this illustration assumes a case outside the protection of the Constitution itself, as most liberally interpreted. The court, in the case of *People v. Kelly*, *supra*, speaking on this possibility, says: "But neither the law nor the Constitution is so sedulous to screen the guilty as the argument supposes. If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own guilt apparent, or, at least, capable of proof, though his account of the transaction should never be used as evidence,

it is the misfortune of his condition, and not any want of humanity in the law."

Referring again to the opinion of McGirk, *Ch. J.*, in case of *Ward v. State*, *supra*, his concluding observations meet directly the point here urged: "But in this case it is said, if the witness is bound to tell who bet at the game, without meaning himself, then those persons who are named will be examined as to the fact whether he bet; and, if the witness is not compelled to name who did bet, then they will remain unknown to the grand jury, and cannot be examined whether the witness bet. I understand this doctrine to be grounded more on the fear of retaliation than on any sound prin-

ciple of law. Will the law permit a man to keep offenses and offenders a secret, lest the offenders should in their turn give evidence against him?" We think the protection of the statute co-extensive with that intended to be afforded by the Constitution. We are supported in this conclusion by the following cases, and others cited in 32 Cent. L. J. 366, construing like statutes: *State v. Quarles*, 13 Ark. 307; *Kneeland v. State*, 62 Ga. 307; *Wilkins v. Malone*, 14 Ind. 153; *Ex Obenshagen*, 44 Fed. Rep. 266.

Ordered that petitioner be remanded to custody.

All concur.

NEW YORK COURT OF APPEALS.

Henrietta A. LOUGHEED, *Appt.*,

vs.
DYKEMAN'S BAPTIST CHURCH AND
SOCIETY, Impleaded, etc., *Rept.*

(.....N. Y.....)

An unincorporated church to which "at the death" of testator's wife, to whom a life estate is given, property is devised for use as a parsonage only, to revert to testator's heirs if such use ceases, may take the property if it becomes incorporated before her death, as the devise does not vest until that time.

(December 1, 1891.)

APPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of a Special Term for Putnam County in favor of defendants in an action brought to obtain partition of certain land owned by Amos C. Dykeman, deceased, and by him devised to the defendant church; the partition being claimed

upon the ground that the devise was void. *Affirmed.*

Statement by **Peckham, J.**:

The action was brought to partition certain real estate in Putnam County among the heirs of one Amos Dykeman, who died April 17, 1882. The plaintiff alleged in her complaint that she was the owner in remainder of the real estate in question as a tenant in common with another, subject to the life estate therein of the widow of the deceased, Dykeman, and notwithstanding the apparent devise of such real estate by the decedent to another. This apparent devise the plaintiff alleged was void, and the allegations in her complaint brought her within the provisions of sections 1533 and 1537 of the Code of Civil Procedure. The testator at the time of his death left a widow, Iva Jane Dykeman; also the plaintiff, who was his niece; and the defendant Laura A. Mable, his sister; the niece and sister being the sole heirs-at-law. He left a will, which was duly admitted to probate, by which he gave to his

NOTE.—Effect of subsequent incorporation to make valid a gift to an unincorporated association.

The capacity of an unincorporated society to take a particular charitable bequest cannot be enlarged by statute after the testator's death. *Green v. Allen*, 5 Humph. 170; *Rhodes v. Rhodes*, 88 Tenn. 637.

Nor by its becoming incorporated after his death. *State v. Warren*, 28 Md. 338; *Lutheran Reformed Church v. Mook*, 4 Redf. 513; *Ruth v. Oberbrunner*, 40 Wis. 238; *Owens v. Missionary Soc. of M. R. Church*, 14 N. Y. 380, 67 Am. Dec. 100; *White v. Howard*, 46 N. Y. 144; *Re Roman Catholic Soc.* 4 Lans. 14.

As apparent exceptions to the above authorities, are *American Bible Soc. v. Wetmore*, 17 Conn. 181; *Zimmerman v. Anders*, 6 Watts & S. 218, 40 Am. Dec. 552.

Also that a gift in trust to establish a school, without providing for its incorporation, may authorize the trustees to become incorporated if that is not inconsistent with the trust. *Sanderson v. White*, 18 Pick. 323, 29 Am. Dec. 501.

And that a grant to trustees for the use and benefit of a church to be organized may be upheld on its subsequently coming into existence and becoming incorporated. *Miller v. Chittenden*, 2 Iowa, 315, *aff'd on rehearing*, 4 Iowa, 62.

But it is to be observed that in Pennsylvania, Massachusetts and Iowa, the decisions uphold 14 L. R. A.

also gifts to unincorporated charitable associations which do not become at any time incorporated, and in the Connecticut case the court declares that such gifts will be upheld in equity although not good at law.

In most if not all of the above cases the gift was made without providing for or contemplating any future incorporation.

By analogy the following decisions as to corporations may be important:

The subsequent amendment of the charter of a corporation which was not authorized to take a devise at the death of the testator can impart no vitality to the devise. *White v. Howard*, 46 N. Y. 144.

A corporation not authorized to take real estate by devise at the death of a testator cannot take a contingent remainder under his will, although it had been given power by statute before such contingency happened to take by devise, where testator did not contemplate that any additional capacity should be conferred upon the devise. *Leslie v. Marshall*, 31 Barb. 650.

But a corporation which had no power to take a legacy at the time of testator's death, but had been given authority to take it before the time of its vesting, which was at the expiration of a life estate, is entitled to it. *Plymouth Soc. v. Hepburn*, 57 Hun. 161. Compare *Shipman v. Rollins*, *infra*.

wife the use of all his real estate during her natural life. The second paragraph of his will is as follows: "Second. At the death of my wife I give and devise all that part of my real estate situate in the said town of South-east, which lies southerly of the new road leading westerly from Dykeman's Station, past the dwelling-house of Coles B. Fowler, to the Baptist Church and Society of Dykeman Station, to be used by said church and society, as a parsonage forever; and whenever said society ceases to use the same as a parsonage the same shall revert to my heirs-at law. The real estate so intended as a parsonage includes my present dwelling-house and eighty acres of land, more or less." The widow took possession of the real estate upon the death of the deceased, and was still in possession at the time of the commencement of this action. The church organization known as the "Baptist Church and Society of Dykeman's Station" was organized about 1866, and the deceased was a member of the society, and contributed to its support; and it continued to exist as a church organization up to May, 1889, when it became incorporated under the name of the "Dykeman's Baptist Church and Society," and it is the same organization as is mentioned in the second paragraph of the will of the deceased.

Mr. Frederic S. Barnum, for appellant:

A will does not take effect until the testator's death, and then, if his property is not legally devised or bequeathed, no title vests for a single moment in the devisee or legatee, but it vests instantly in the heir or next of kin.

Re McGraw, 2 L. R. A. 387, 111 N. Y. 110.

The words "after" and "upon the death" of my wife, and like words, "do not make a contingency, but merely indicate when the remainder shall take effect in possession, the commencement of the enjoyment of the estate."

Livingston v. Greene, 52 N. Y. 118.

Adverbs of time, in a devise of a remainder limited upon a particular estate determinable,

on an event which must necessarily happen, are construed to relate merely to the time of the enjoyment of the estate and not to the time of its vesting in interest.

Moore v. Lyons, 25 Wend. 144; *Jarman, Wills*, 5th Am. ed. 385; *Shipman v. Rollins*, 98 N. Y. 324; *Marx v. McGlynn*, 88 N. Y. 368; *Owens v. Missionary Soc. of M. E. Church*, 14 N. Y. 380, 67 Am. Dec. 160.

Where bequests are made to unincorporated societies, incapable of taking the title, a subsequent incorporation will not vitalize a bequest which was void at the time it was made.

Burrill v. Boardman, 43 N. Y. 260, 3 Am. Rep. 694.

The devise in Dykeman's will was immediate, and designed to become vested on the decease of the testator, and as the society was unincorporated the devise was void, and the remainder vested at once in the heirs-at law, and after having so vested their title could not be disturbed or divested by means of the subsequent action of the society.

Sherwood v. American Bible Soc. 1 Keyes, 561; *Bascom v. Albertson*, 34 N. Y. 584; *White v. Howard*, 49 N. Y. 144; *Holmes v. Mead*, 52 N. Y. 332; *Re Abbott*, 3 Redf. 303; *McKeon v. Kearney*, 57 How. Pr. 349; *First Presbyterian Soc. v. Bowen*, 21 Hun, 389; *Downing v. Marshall*, 28 N. Y. 366, 80 Am. Dec. 290; *Betts v. Betts*, 4 Abb. N. C. 317; *Leslie v. Marshall*, 81 Barb. 560; *Philadelphia Baptist Assn. v. Hart*, 17 U. S. 4 Wheat. 1, 4 L. ed. 499; *Inglis v. Sailors Snug Harbor*, 28 U. S. 3 Pet. 99, 7 L. ed. 617; *Owens v. Missionary Soc. of M. E. Church*, 14 N. Y. 380, 67 Am. Dec. 160; *Burrill v. Boardman*, 43 N. Y. 260, 3 Am. Rep. 694; *Re McGraw*, 2 L. R. A. 387, 111 N. Y. 112.

When legacies are payable in the future, without condition annexed or any expressed intention of the testator to the contrary, whether they are of personal property or real estate directed to be sold to discharge them they vest at the death of the testator.

Betts v. Betts, 4 Abb. N. C. 387; *Sweet v. Chase*, 2 N. Y. 78; *Loder v. Hatfield*, 71 N. Y.

Subsequent reincorporation may give capacity to take a trust for a charitable use as an executory devise under a will, though at testator's death the corporation had no legal capacity to take. *MoIntire v. Zanesville Can. & Mfg. Co.* 9 Ohio, 208, 34 Am. Dec. 436.

Future incorporation provided for or contemplated.

A devise to a charity on its subsequently becoming incorporated is valid. *Inglis v. Sailors Snug Harbor*, 28 U. S. 3 Pet. 99, 7 L. ed. 618; *Jones v. Habersham*, 107 U. S. 174, 27 L. ed. 401; *Ould v. Washington Hospital*, 95 U. S. 303, 24 L. ed. 450; *Field v. Drew Theolog. Sem.* 41 Fed. Rep. 371.

A gift by will to purchase grounds and build a college to be incorporated is valid. *Atty-Gen. v. Downing*, Amb. 571; *Atty-Gen. v. Bowyer*, 3 Ves. Jr. 714.

The New York cases state the doctrine with a limitation as follows: a bequest for a charity to be incorporated within the period allowed for the vesting of future estates is valid. *Burrill v. Boardman*, 43 N. Y. 264, 3 Am. Rep. 694; *Holmes v. Mead*, 52 N. Y. 332.

This is explained by the fact that in New York the rule against perpetuities applies to charities, as it does in other cases.

But a bequest to trustees to be appointed by a 14 L. R. A.

court, to found and establish an institution for the education of females, but with no time limited therefor, is not valid because there is no competent donee. *Bascom v. Albertson*, 34 N. Y. 584.

A bequest to an unincorporated association which does not vest until the death of testator's widow, and which shows that he had in contemplation the future incorporation of the association, is valid if the incorporation takes place during the widow's life. *Shipman v. Rollins*, 98 N. Y. 311. (This decision, it will be seen, is very nearly like that in the main case above.)

A devise to establish a home for destitute, aged and infirm women, directing the trustees, if they think best, to become incorporated, is valid under Md. Act 1883, chap. 249, § 2, declaring that uncertainty as to the donees shall not defeat a charitable devise where the death of the testator was after the passage of the Act, although the will was made prior thereto. *Chase v. Stockett*, 75 Md. 286.

A bequest to a corporation which is empowered to take it in trust for a school to be created and incorporated is valid. *Kinnaird v. Miller*, 35 Gratt. 107.

The general question of the validity of a gift for charity to an unincorporated association on which the authorities are in conflict will be treated in a future note.

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100; *Warner v. Durant*, 76 N. Y. 133; *Manice v. Manice*, 43 N. Y. 303; *Philadelphia Baptist Assn. v. Hart*, 17 U. S. 4 Wheat. 27, 4 L. ed. 506. See *Da Costa v. Bass*, 48 Hun, 32; *Snell v. Tuttle*, 44 Hun, 331; *Coit v. Rolston*, 44 Hun, 548.

A very clear intention must be indicated in order to postpone the vesting.

Mitchell v. Knapp, 54 Hun, 503; *Re Mahan*, 98 N. Y. 372; *Avery v. Everett*, 1 L. R. A. 264, 110 N. Y. 317; *Haynes v. Sherman*, 51 Hun, 585; 4 R. S. 8th ed. 2432, § 13; *Black v. Williams*, 51 Hun, 233; *Searles v. Brace*, 19 Abb. N. C. 10; *American Bible Soc. v. American Col. Soc.* 50 Hun, 197.

A will takes effect at the death of the testator where there is no contingency provided for in the will.

Manice v. Manice, 43 N. Y. 303.

The mere presence of a provision that the estate shall revert to the grantor will not cause a conditional limitation to be construed as a condition.

Henderson v. Hunter, 59 Pa. 335.

If this devise over to the heirs of the testator is a conditional limitation, it is surely void as being too remote. If a limitation over is void by reason of remoteness, it places all prior gifts in the same situation as if the devise over had been wholly omitted.

If incorporated at the death of the testator, the society would have taken a fee simple absolute subject to the life estate of testator's widow.

1 Jarman, Wills, 200, 783; Lewis, Perp. 657; 2 Bl. Com. 156; 4 Kent, Com. 130; Co. Litt. 206a, 206b, 223a; *Brattle Square Church Props. v. Grant*, 3 Gray, 142, 63 Am. Dec. 725; 1 Sharswood, L. C. 168; *Storrs Agr. School v. Whitney*, 3 New Eng. Rep. 573, 54 Conn. 345; *Wel's v. Heath*, 10 Gray, 17; *Society for Promoting Theological Education v. Atty-Gen.* 135 Mass. 235.

Mr. Abram J. Miller, for respondent:

It was no doubt the intent of the testator that both parts of the estate should vest at the same time, and clearly this time was upon the death of the widow. It is equally clear that there should be no vesting of any estate until the death of the widow.

The whole instrument should be construed together to determine the intent of the testator.

Goebel v. Wolf, 113 N. Y. 405; *Everitt v. Everitt*, 29 N. Y. 67; *Warner v. Durant*, 76 N. Y. 133; *Leake v. Robinson*, 2 Meriv. 363; *Smith v. Edwards*, 88 N. Y. 92.

The bequests of the latter clause of the will do not and cannot vest until the death of the widow, when the land is to be sold.

Vincent v. Newhouse, 83 N. Y. 505; *Warner v. Durant*, 76 N. Y. 136; *Patchen v. Patchen*, 121 N. Y. 432.

The incorporation of the society previous to the death of the testator's widow enables it to take under the will.

Holmes v. Mead, 52 N. Y. 332; *Burrill v. Boardman*, 43 N. Y. 254, 3 Am. Rep. 694; *Shipman v. Rollins*, 98 N. Y. 311; *Plymouth Soc. v. Hepburn*, 57 Hun, 161.

Peckham, J., delivered the opinion of the court:

The plaintiff maintains that the devise to 14 L. R. A.

the Baptist Church, as set forth in the second clause of the will of Dykeman, deceased, is void, because the testator, by the language used in the will, intended to vest in the above-mentioned church, immediately upon his death, the portion of the real estate mentioned by him, and of which he died seised, subject to the life estate of his wife; and that, as the church was at the time of the death of the testator an unincorporated organization, and unable to take property by devise, the devise itself was void, and the property descended to the heirs-at-law of the testator. The question is primarily one as to the intent of the testator. Did he, by the language he used, intend to vest the title to the portion of his estate described by him in the church at the moment of his death, or did he intend that such vesting should not take place until the death of his wife? If he intended that it should at once vest in the church society the devise is void, for at that time the society was not incorporated, and was unable to take under the will. What his intention was must of course be discovered from a perusal of the language used by him in the will itself. It is urged that if at the death of the testator the real estate at once vested in the heirs-at-law, it becomes of no importance whether thereafter or prior to the death of the widow the church should become incorporated, and thereby rendered capable of taking property by devise. The property, having once vested in the heirs, could not, it is claimed, be thereafter divested, and go to the incorporated church upon the death of the wife. Cases are cited by counsel for appellant which he says uphold this contention. The most that is decided in any of the cases he has called our attention to is that, when the testator intends that the devise or bequest shall vest in the devisee or legatee at once upon his own death, although to be enjoyed in possession at some future time, if at the decease of the testator the devisee or legatee is incapable of taking, the devise or bequest is void, and the devisee or legatee cannot thereafter take, even though capable of taking when the period of enjoyment would otherwise have arrived.

The very question to be here decided is, When does the devise vest in the devisee? If it were intended that it should vest immediately upon the death of the testator, then we can say that, on account of the inability of the devisee to take at that time, the devise was void, and the land would go to and vest in the heirs-at-law, unless otherwise provided in the will; and, once having unconditionally vested, the subsequent capacity to take on the part of the devisee would not divest the property from the heirs. I have, however, been unable to find any case which holds that a testator may not so provide for the future vesting of the title to real estate in his devisee that in the mean while it will vest in his heirs by operation of law, subject to be divested upon the happening of a contingency subsequent to his death, and provided for in the will. If the testator had in so many words devised his real estate to his wife for life, and remainder in fee to his heirs-at-law, but if, at the death of his wife, the Dykeman's Baptist Church should then be a duly incorporated society, capable of taking property by devise, then, in that case, he de-

vised the real estate to it to use the same as a parsonage, etc., can there be any doubt that the church, although unincorporated at the death of the testator, yet, if incorporated at the time of the death of the wife, would take the property devised? The principle decided in *Burrill v. Boardman*, 48 N. Y. 254, 8 Am. Rep. 694, and *Shipman v. Rollins*, 98 N. Y. 311, upholds such a devise. A fee may be devoted upon the happening of a certain event provided for by the testator. *Leonard v. Burr*, 18 N. Y. 96. Although such words are not made use of, if from the whole language of the will and the implications which naturally arise therefrom the intention of the testator appears to have been to vest the estate in the devisee at his wife's death, and not before, and if the devisee at that time shall be able to take, we think the devise is valid, and the judgment must be affirmed. This would leave the title to the remainder of the estate, from the time of the death of the testator to that of his wife, in the heirs of the testator, subject to be devested if at her death the devisee were an existing corporation. The question then recurs, When does the estate vest? As was well said by the learned judge in delivering the opinion of the court below in this case, the devise herein is of such a nature that the devisee could not alien or dispose of it; certainly not in the life-time of the tenant for life. The property was devised provided it should be used as a parsonage by the church society, and, if the society ceased to use it as such, the property was to revert to the testator's heirs-at-law; and thus it is clear the testator never intended the devisee should have any possible benefit from the devise until his wife's death. The right of property and the right of enjoyment were to come into being together, and there could be no right of property separated from the right of enjoyment. It seems to me that, as the testator only contemplated that the society should have the right to use this property after the death of his wife, and then only as a parsonage, and that when it ceased to be used as such the land should revert to the heirs of the testator, he meant that the estate should not vest until the death of the wife. If at that time the society could take, it was all that was necessary. It may be the testator did not contemplate the necessity of an incorporation of his devisee. He intended, as we must assume, to make a valid devise, and to that end he intended and supposed that his devisee should and would be capable of taking the devise when the time came, and, if anything were necessary to be done before that time arrived in order to render itself capable of taking, it must be presumed the testator intended it should be

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done. Hence, if the formation of a corporation were a condition precedent to the possibility of the vesting of the estate under the devise, it would follow that the formation of such corporation was not outside of or counter to the intention of the testator. Construing his intention from the language used in the will to be that the estate should not vest in the devisee until the death of his wife, it would in the meantime vest in the heirs; and if, upon the death of the wife, there is a devisee capable of taking, the estate is devested from the heirs and passes to the devisee. The law provides for this to exactly the same extent as if the testator had conveyed the fee in so many words to the heirs upon the conditions mentioned. The learned counsel for the appellant has cited some cases where the language used as to the time of enjoyment of the devise was much the same as that used here, and where it had been held that the testator meant that the devise or bequest should vest in the devisee or legatee at once, and simply the actual enjoyment in possession be postponed to a future time. But the limitations as to the future enjoyment and possession of this real estate by the church are of such a nature as to clearly distinguish this case from all the others cited by counsel. Generally it may be said that the language as to the time of enjoyment as used here would be regarded by the courts as causing a vesting of the estate immediately upon the death of the testator. The counsel for the appellant also claims the condition upon which the devise was made was void, and that, therefore, no argument can be drawn as to the intended postponement of the vesting until the death of the wife, founded upon the inability of the devisee to deal with the estate as a vested one. If we were to assume the invalidity of the condition, still the time when the devise would vest would not be thereby affected. It would still be a question of intention on the part of the testator, and upon that question even a void provision in a will may be looked to for light. It would still appear the testator intended the devisee to take no interest in the land, excepting upon the condition and for the purpose and at the time expressed by him; and that intention would still be entitled to the same weight as if the condition were legal. We are of the opinion that the devise does not vest the estate in the devisee until the death of the wife of the testator, and if at that time the devisee shall be in existence, and capable of taking, it will take the estate under the devise.

The devise is therefore not void, and the judgments of the special and general terms must be affirmed, with costs.

All concur.

RHODE ISLAND SUPREME COURT.

Arabella T. PARKER, Exrx. of Charles W. Parker, Deceased,

PROVIDENCE & STONINGTON STEAM-SHIP CO.

(.....R. I.....)

The power of an executor or administrator to compromise disputed claims applies to a purely statutory cause of action for causing the death of the intestate to be brought for the use of his widow and next of kin.

(November 21, 1891.)

ACTION to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. On demurrer to plea in bar of a settlement and receipt of plaintiff in full of all demands by reason of the injury complained of. *Demurrer overruled.*

The facts sufficiently appear in the opinion. *Messrs. Stephen A. Cooke, Jr., Louis L. Angell, W. C. Parker and W. M. Butler* for plaintiff.

Mr. Walter B. Vincent, for defendant: A similar statute in Tennessee is permissive like ours.

Tenn. Code 1872, §§ 2291, 2292.

In *Stephens v. Nashville, C. & St. L. R. Co.*, 10 Lea, 448, it was held that when suit was brought under this statute by the widow of the

deceased she had the right to compromise or settle the suit, as she might see fit, without the consent of the guardian of the child of the deceased, and against the consent of her attorney.

While § 82, chap. 184, of Pub. Stat., specifically authorizes executors and administrators to compromise, it is simply intended to afford them additional protection and not in any manner to take away or abridge their common-law rights.

Mass. Gen. Stat. chap. 101, § 10, or 1892, chap. 142, § 12; *Croswell, Exrs. & Adms. § 433; Chadbourn v. Chadbourn*, 9 Allen, 173; *Wood v. Tunnicliff*, 74 N. Y. 38; *Chouteau v. Suydam*, 21 N. Y. 179; *Chase v. Bradley*, 36 Me. 581; *Murray v. Blatchford*, 1 Wend. 583, 19 Am. Dec. 537.

Tillinghast, J., delivered the opinion of the court:

After the overruling of the defendant's demurrer to the plaintiff's declaration in this case (Index II. 24) the defendant pleaded the following release in bar of said action:

"New Bedford, Mass., July 16, 1889.

"Received from the Providence & Stonington Steam-Boat Co. the sum of one (1) thousand dollars, the same being in full settlement of all claims and demands which I, as executrix of the last will and testament of Charles W. Parker, deceased, and as legatee named in said will, may have against the Providence & Stonington Steam-Ship Co., its agents and servants,

NOTE.—Compromise or release by personal representatives of claim due the estate.

The executor is considered as completely representing the testator. *Hudson v. Hudson*, 1 Atk. 460.

At common law an executor or administrator had the same powers over the personal effects and estate of his decedent that the latter himself had at and before his death. *Weyer v. Franklin Second Nat. Bank*, 57 Ind. 196; *Whale v. Booth*, 4 T. R. 626.

He has power to compound the debt. *DeDlemar v. Van Wagenen*, 7 Johns. 411; *Stuyvesant v. Hall*, 3 Barb. Ch. 151, 5 L. ed. 592.

To make settlement and compromise. *Boyd v. Oglesby*, 23 Gratt. 684; *Braxton v. Harrison*, 11 Gratt. 54; *Moulton v. Holmes*, 57 Cal. 342; *Bruner's App.* 57 Pa. 52; *Wyman's App.* 13 N. H. 18.

To release debts. *Douglass v. Satterlee*, 11 Johns. 21; *Pierson v. Hooker*, 8 Johns. 70; *Davenport v. First Cong. Soc.* 33 Wis. 300; *Ewing v. Handley*, 4 Litt. 246.

May release or discharge at pleasure choses in action of his testator. *Chase v. Bradley*, 36 Me. 538. If done bona fide. *Woolfork v. Sullivan*, 29 Ala. 548, 58 Am. Dec. 306.

And he acts discreetly and in good faith. *Meeker v. Vanderveer*, 15 N. J. L. 302; *Rogers v. Hand*, 39 N. J. Eq. 275.

In *Re Scott*, 1 Redf. 236, the court said the authority of an executor or administrator to compound or release a debt has never been questioned; that an executor is not only bound to compound or release a debt when the interest of the estate requires it, but he would be guilty of culpable neglect if he should fail to do so and lose the debt.

But he cannot compromise a debt due from himself. *DeCordova v. DeCordova*, 41 L. T. N. S. 45; *Cook v. Collingridge*, 1 Jac. 607.

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Distinction between executors and administrators.

At one time a distinction was attempted to be drawn between the authority of an executor and an administrator which denied the administrator certain powers possessed by the executor.

In *Jacomb v. Harwood*, 2 Ves. Sr. 285, Sir John Strange said he had never heard it questioned that the executor has entire control of the estate and may release any debt; and that although it had been questioned, nevertheless an administrator stood on the same ground as the executor.

The power of an administrator is equal to that of an executor. *Murray v. Blatchford*, 1 Wend. 583, 19 Am. Dec. 537.

Effect of statutory provisions.

In many of the states statutes regulating the compromising of claims by executors or administrators are said not to have taken away the common-law powers of personal representatives. *Moulton v. Holmes*, 57 Cal. 342; *Wyman's App.* 13 N. H. 18; *Chouteau v. Suydam*, 21 N. Y. 179; *Chadbourn v. Chadbourn*, 9 Allen, 173; *Geiger v. Kaigler*, 9 S. C. 426.

But in some of the States the statutes have supplanted the common-law powers and taken them away completely. *Ætna L. Ins. Co. v. Swayne*, 30 Kan. 120.

Following the statutory requirements is generally an additional protection to the executor or administrator.

Although they could compromise a claim or compound a debt without the aid of the statute, still they might perhaps be held responsible for any serious error in judgment in so doing, which responsibility the statute relieves them from. *Chouteau v. Suydam*, 21 N. Y. 184.

for loss of life in consequence of the collision on the 14th day of May, 1889, between the schooner Nelson Harvey and the steamer Nashua, owned by the said Providence & Stonington Steam-Ship Co.; and I do hereby covenant and agree, to and with said company, that no suit shall at any time be brought or prosecuted against said company therefor.

"Arabella T. Parker, Executrix.

"Witness: Frank N. Howes."

To this plea the plaintiff has demurred, as follows: "And the said plaintiff, as to the first plea, or plea of settlement of said cause of action comes," etc., "when" etc., "and says that the said plea, and the matter therein contained, in manner and form as therein set forth, are not sufficient in law for a bar to said action, and the said plaintiff is not bound by law to answer the same, because said right of action is given to said plaintiff in her said capacity as a representative of her children as well as herself, and is not included in the powers given by statute to administrators to compromise claims such as appear in favor of ordinary estates, and is such a claim as cannot be compromised or settled by her as administratrix without concurrence of her children, if of age, or their duly qualified guardians of such of them as are minors, and this she is ready to verify. Wherefore, for want of a sufficient plea in this behalf, she prays judgment of this court, and that said defendant may further answer the said declaration."

The only question raised by the demurrer is whether an executrix has the power to com-

promise and settle such a cause of action as is set out in the plaintiff's declaration without the assent of the next of kin.

Pub. Stat. R. I. chap. 184, § 32, provides as follows: "Executors and administrators may submit to arbitration or may adjust by compromise any claims in favor of or against the estates by them represented, in the same manner and with the same effect as the testator or intestate might have done." The defendant contends that this statute authorizes the plaintiff in her said capacity to compromise and settle a claim like the one in suit, and that, having done so, as set up in the plea in bar, she is precluded from maintaining her action. The defendant further contends that said statute is simply intended to afford executors and administrators additional protection, and not in any manner to take away or abridge their common-law powers, among which is that of compromising and adjusting disputed claims in favor of or against the estates which they represent. The plaintiff, on the other hand, contends that said statute does not confer any authority upon her to make said compromise, and also that it has no bearing upon the case at bar, because she is merely a representative of the widow and next of kin, and sues exclusively for their benefit, the damages to be recovered not being assets in her hands, with which to pay the debts or liabilities of the testator, but to go to the widow and next of kin under the statute. She further contends that the action is brought under the provisions of Pub. Stat. R. I., chap. 204, § 15, and that section 20 of said chapter has no application. Said sec-

Binding effect of release or compromise.

The compromise of a matter in dispute is a sufficient consideration for a contract and will bind both parties when made and entered into without fraud. *Long v. Shackleford*, 25 Miss. 606.

The compromise is final unless impeached for fraud, duress, or undue influence. *Larue v. White*, 8 Dana, 45.

No bona fide dealings with him can be impeached — no remedy can be pursued against those to whom he releases or with whom he may compound a chose in action unless fraud or collusion can be imputed to them. *Waring v. Lewis*, 53 Ala. 631.

Although a personal representative could not lawfully surrender securities on real estate and take in place thereof personal security at the time insufficient, if he does so he will be estopped to afterwards impeach the transaction. *Butler v. Gazzam*, 61 Ala. 493.

Where an administrator having doubt of the ability of one, to whom funds of the estate had been loaned, to pay the amount when it became due, agreed that if he would procure funds and make a payment of one half of the principal and accrued interest two months before the maturity of the note, he would release him from all liability on the note, such agreement being entered into in good faith and fully executed by the debtor procuring the money, which he did not have, this will operate as a discharge of the indebtedness. *Latta v. Miller*, 7 West. Rep. 540, 109 Ind. 302.

Where at the trial of an issue as to the existence of a debt the executor with the approbation of the court entered into a compromise which subsequently proved to be improper and not binding on the legatees, the court refused to hold the executor to the compromise and ordered the parties to proceed to try the issue. *Leph v. Holloway*, 3 Ves. Jr. 212.

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In California an agreement by an executor or administrator to receive in full satisfaction of a judgment in favor of the estate an amount less than is due thereon is void. *Siddall v. Clark*, 89 Cal. 321.

Effect of fraud or collusion.

As appears from the authorities above cited, the release will only be binding when there is no fraud or collusion, and it is generally stated that the representative's acts will be upheld.

If they are fair, beneficial to the estate, and free from fraud or misconduct. *Bailey v. Dilworth*, 10 Smedes & M. 404, 48 Am. Dec. 790; *Underwood v. Sample*, 70 Ind. 448.

If there is collusion equity may relieve. *Newland v. Champion*, 1 Ves. Sr. 108; *Doran v. Simpson*, 4 Ves. Jr. 665; *Alsager v. Rowley*, 6 Ves. Jr. 748.

A bill may be filed in equity to set aside the compromise for fraud. *Henry County v. Taylor*, 36 Iowa, 259.

Parties interested in the estate may, upon a proper case, set aside an arrangement between an executor and debtor for the settlement or satisfaction of a debt without actual payment. *Geiger v. Kaigler*, 9 S. C. 420; *Thomas v. Gage*, *Harpers' Eq.* 197.

In no case will a mere release without consideration discharge the claim, but a dispute as to the validity of a claim is both a good and valuable consideration and will support a release by an executor or administrator. *Higginson v. Second Nat. Bank of N. Y.* 59 Hun, 183.

One who consents with an executor by fraud to obtain a compromise of a debt owing to the estate will be answerable to the amount he has benefited by the arrangement. *Verdier v. Simons*, 2 McCord, Eq. 394.

A court of equity will not assist in carrying into effect compositions of claims by executors unless

tions are as follows: "Sec. 15. If the life of any person, being a passenger in any stage-coach or other conveyance, when used by common carriers, or the life of any person, whether a passenger or not, in the care of proprietors of, or common carriers by means of, railroads or steam-boats, or the life of any person crossing upon a public highway with reasonable care, shall be lost by reason of the negligence or carelessness of such common carriers, proprietor, or proprietors, or by the unfitness or negligence or carelessness of their servants or agents. In this State, such common carriers, proprietor, or proprietors shall be liable to damages for the injury caused by the loss of life of such person, to be recovered by action of the case, for the benefit of the husband or widow and next of kin of the deceased person, one half thereof to go to the husband or widow, and one half thereof to the children of the deceased." "Sec. 20. In all cases in which the death of any person ensues from injury inflicted by the wrongful act of another, and in which an action for damages might have been maintained at the common law had death not ensued, the person inflicting such injury shall be liable to an action for damages for the injury caused by the death of such person to be recovered by action of the case for the use of the husband, widow, children, or next of kin, in like manner and with like effect as in the preceding five sections provided."

The power of an executor or administrator at common law to compromise or submit to arbitration disputed claims in favor of or against the estate which he represents is un-

doubted. *Chadbourn v. Chadbourn*, 9 Allen, 173; *Bean v. Farnam*, 6 Pick. 269; *Chase v. Bradley*, 26 Me. 531; *Chouteau v. Sugdam*, 21 N. Y. 179, 184; *Wood v. Tunnickliff*, 74 N. Y. 38; *Murray v. Blatchford*, 1 Wend. 593, 616, 19 Am. Dec. 537; *Rogers v. Hand*, 39 N. J. Eq. 270, 271, and note. Pub. Stat. R. I. chap. 204, §§ 15-20, are printed in Index II, pp. 115, 116.

It is also well settled that a statute like the one under consideration does not change the power of the executor or administrator existing at common law, but simply reinforces and affirms the same. If, in the exercise of this power, the executor or administrator, by reason of negligence or any serious error in judgment, obtains a less sum than he would clearly be entitled to recover at law, he may be held to be guilty of a *devastavit*, and be required to make up the loss out of his own estate; but still the compromise, if made in good faith, would be binding upon the parties thereto.

In *Rogers v. Hand*, 39 N. J. Eq. 270, 275, which was a case in which the executors compromised and settled a claim against the estate, without suit, the court says: "When they act in good faith, those who would impeach their conduct must show fraud or mistake, or that they have acted without authority or contrary to law." "They may compromise a lawsuit, may buy the peace of the estate, and extinguish even doubtful claims against it, provided they act discreetly and in good faith." See also *Meeker v. Vanderpoer*, 15 N. J. L. 392.

It will be seen that what we have said thus far relates to the power of executors and ad-

the party praying will first unfold and disclose the whole circumstances of the case to the court that it may see that there is no fraud and that everything is fair. *Clay v. Williams*, 2 Munt. 105, 5 Am. Dec. 453.

A compromise which the court would have sanctioned if application had been made beforehand will be upheld. *Geiger v. Kaigler*, 9 S. C. 423.

Liability of representative to estate.

At common law the personal representative's responsibility for failure to collect assets was very strict.

Acknowledging satisfaction on a bond when only the principal and damages were paid and not the penalty would be a *devastavit*. Com. Dig. *Administration*, (I, 1).

So if he released or acquitted a bond which had once been forfeited. *Ibid*.

Or canceled or delivered it to the obligor. *Ibid*.

If an executor released a debt the amount would be adjudged assets in his hands. *Ibid*.

So if he released an action to one who took the goods or did a wrong to the testator. *Ibid*.

If an executor or administrator release a debt by which his testator or intestate was entitled to a sum of money or other advantage, the release is in his own wrong and he is chargeable with the amount or value. *Dawes v. Boylston*, 9 Mass. 352, 6 Am. Dec. 72.

But largely through the influence of equity there soon appeared a disposition to relieve the executor from liability when his action was bona fide and done for the benefit of the estate and did not appear to have resulted in loss.

If an executor release an account and it is not certain that he could recover it, it is not assets but if it be proved that so much was due it is assets. *Brightman v. Keighley*, Cro. Eliz. 43.

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Receiving payment on forfeiture of a bond, of the principal, interest, and costs for which the bond was given, is not a *devastavit* as to the penalty, and as to an executor of full age will be binding, but not as to an infant executor. *Kniveton v. Latham*, Cro. Car. 490.

The modern doctrine is much less severe on him. An executor or administrator may, in the absence of fraud or collusion, release, compound, or discharge choses in action of decedent's estate as fully as if they were absolute owners, being answerable only for any imprudence in the exercise of the power. *Butler v. Gazzam*, 31 Ala. 426; *Waring v. Lewis*, 53 Ala. 615.

He may release or compromise a debt and if in so doing he appears to have acted for the benefit of the estate he will not be charged with it as assets. *Berry v. Parkes*, 3 Smedes & M. 625.

If the compromise was intended for the benefit of the estate and has actually been for its benefit the executor ought not to be charged with the debt. *Pusey v. Clemons*, 9 Serg. & R. 211.

Where executors in making a compromise of a claim due the estate acted diligently, in good faith, and with all the prudence, care, and skill that a prudent man with the light then obtainable in regard to the value of the security, the situation of the debtor's affairs and the relation they sustained to the obligation which the estate held against them, could have exercised, in a manner which then seemed to be for the best interests of the estate, the executor will not be held personally responsible for the loss although subsequent events show that he was mistaken and that he might have made the whole of the debt compromised. *Jacobs v. Jacobs*, 90 Mo. 425; *Roberts v. Johns*, 24 S. C. 565.

But if authority of the probate court is not obtained the executor has the burden of showing that

ministrators generally to compromise claims in favor of and against the "estates" which they represent, as that term is ordinarily understood; and the question which now presents itself is whether the law, as above stated, is applicable to a case like the one before us, in which the cause of action is purely statutory, and where the damages do not accrue to the "estate" of the deceased, properly so called, but to the widow and next of kin. We fail to see, upon principle, that any distinction can properly be made between the two classes referred to. The reasons which underlie and support the law above laid down, in its application to executors and administrators, generally, are equally applicable and cogent in a case in which the claim arises by statute. The plaintiff, in her capacity as executrix, had a claim against the defendant corporation growing out of its alleged negligence and wrongful acts in causing the death of her husband. She could prosecute this claim or not, at her option. No one else had any power to prosecute it. *Goodwin v. Nickerson*, 17 R. I. —. If suit is brought upon said claim, it is her suit, and she may discontinue, compromise, or settle the same at her pleasure. And if she has power to compromise the suit after it is brought, why should she not also have power to compromise the claim upon which it is based without bringing a suit? We cannot see that any reason can be urged in support of the existence of the power in the former case which does not also apply with equal, if not added, force to the existence thereof in the latter. In *Greenlee v. East Tennessee, V. & G. R. Co.*, 5 Lea, 418, which was

a case brought by a widow, under a statute quite similar to the one under which this suit is brought, it was held that she had power to control the suit by compromise. The court says: "The question is, Can the widow, under the statutes authorizing the suit, dismiss it against or without the consent of the children?"

It is true, as argued, that the suit is for the benefit of the widow and children. It is also true, the widow alone has the right to sue in the first instance. The children have the right only when there is no widow. The widow may sue or not, at her option. We have holden that, if she fail to sue for the period of twelve months, the suit is barred even as to minors. Having, then, the right to sue, to be exercised at her own election, it follows, as a necessary incident to that right, that she may control the suit by compromise, abandonment, prosecution, or dismissal." In *Stephens v. Nashville, C. & St. L. R. Co.*, 10 Lea, 448, which was a suit for the benefit of the widow and children of deceased, it was held that she had the right to compromise or settle the suit as she saw fit, without the consent of the guardian of the child of the deceased, and against the consent of her own attorneys who managed the case.

As to the contention of the plaintiff that the action is brought under the provisions of Pub. Stat. R. I., chap. 204, § 15, and hence that section 20 of said chapter has no application, two answers suggest themselves: *first*, the second count in the declaration is evidently framed upon both of said sections, as it not only charges that the deceased came to his death by

the compromise was judicious and beneficial to the estate. *Wyman's App.* 13 N. H. 18.

It has been held that a compromise will not be allowed except where the debtor is insolvent or there is doubt thrown on the validity of the claim. *Re Patten's Goods*, 1 Tuck. 58.

Illustrations of the rule.

A compromise with a debtor in jail, where he was liberated upon payment of a sum less than the amount of the costs of the suit, was held not to render the executor liable for the amount released. *Pennington v. Healey*, 1 Crump. & M. 402.

Executors were held justified in making a compromise with a person having assets of the estate in his hands for the purpose of getting possession of such assets. *Kee v. Kee*, 2 Gratt. 118.

So where to get possession of a term of years in possession of an insolvent tenant he released all arrears of rent. *Blue v. Marshall*, 3 P. Wms. 381.

Where the administrator had no means to carry on an expensive suit and believed there was real doubt as to his ability to collect the debt, a compromise was held proper. *Alexander v. Kelso*, 3 Baxt. 311.

Where a debt which was inventoried as worthless was compromised the executor was not charged with more than he had received there being no evidence of bad faith or a great error of judgment. *Gillespie v. Brooks*, 2 Redf. 360.

But where executors without judicial sanction compromise a note given for the purchase of property of the succession they will be liable for its full amount unless they can show that there was a defense to the note or that the person bound to pay it was insolvent. *Fridge v. Buhler*, 6 La. Ann. 272.

Controversies relating to real estate.

An administrator has no authority as such to
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waive or release a contract relating to real estate. *Hunt v. Thorn*, 2 Mich. 213.

Nor to pay a cash amount to obtain a release of the widow's dower. *Needham v. Belote*, 30 Mich. 487.

But the administrator of a deceased partner may relinquish his claim to the real estate of the firm. *Ludlow v. Cooper*, 4 Ohio St. 1.

And where the contract for purchase of real estate is executory and the legal title to the property has not passed the administrator has power to compromise and rescind the contract where it may be reasonably considered for the benefit of the estate. *Howard v. Babcock*, 7 Ohio. 73.

So where executors are given a power of sale they may pay the widow a certain amount for a release of dower. *Eagle v. Emmet*, 4 Bradf. 125.

Suits for damages for causing death.

An administrator who has sued to recover damages for the death of his intestate for the benefit of the widow and next of kin may compromise the action without obtaining the order of the probate court, since statutes requiring the procuring of such an order by executors in order to compromise claims due the intestate have no application to claims in favor of the widow and next of kin for the death of the intestate. *Washington v. Louisville & N. R. Co.* 34 Ill. App. 658.

A suit instituted by an administrator to recover damages for the negligent killing of his intestate may be dismissed by him upon a settlement by which he receives less than the amount claimed in his declaration. *Henchey v. Chicago*, 41 Ill. 136.

It may be dismissed by the widow where she is given the right to sue. *Greenlee v. East Tennessee, V. & G. R. Co.* 5 Lea, 418.

Or she may compromise. *Stephens v. Nashville, C. & St. L. R. Co.* 10 Lea, 448.

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reason of the carelessness and negligence of the defendant, but also by the wrongful acts of said defendant; and, *second* that, even though the declaration were framed solely upon section 15, as contended, yet so long as the two sections give but one remedy, and the declaration might as well have been framed under the one section as under the other, or even under both together, we think they should clearly be construed together in determining the question whether the plaintiff had power to compromise the claim upon which this suit is based before any suit was brought. If the injury had not resulted in the death of the plaintiff's testator, he would undoubtedly have had power to compromise and adjust the claim against the defendant. Furthermore, the injury here complained of was not occasioned by the mere passive neglect of the defendant, as was the case in *Bradbury v. Furlong*, 13 R. I. 15, cited by the plaintiff, but might properly be described as an injury "inflicted by a wrongful act." See also *Chase v. American Steam Boat Co.* 10 R. I. 79, and *McCaughy v. Tripp*, 12 R. I. 449. Furthermore, the law favors the compromise of disputed claims, (1 Bouv. Law Dict. 15th ed. title *Compromise*, and cases cited,) and will sustain the same as far as possible, when fairly made. But the plaintiff argues that the settlement in question, if allowed to stand, will have the effect to bind living parties, who are competent to act for themselves, which is very different from the settlement of claims in favor of or against the estate of a person who is dead, and which is necessarily represented by the executor or administrator as the only one who can represent it. We do not think that this is so. There are no parties to this suit, except-

ing the plaintiff and defendant. The next of kin are not and cannot be made parties thereto. And while the settlement made, if allowed to stand, will doubtless incidentally affect their interest, still it is not a proceeding in which they have any right as parties thereto. Nor is the case materially different in this respect from that of an ordinary claim in favor of an estate in the hands of an executor or administrator; for, as we have already seen, they have power to compromise claims, and by so doing they incidentally affect the interest of the heirs or devisees, as the case may be, in the estate. If a large amount is realized it inures to their benefit, assuming, of course, that the estate is solvent, while if only a small amount is realized they will suffer the loss, if such it may properly be called. In other words, the executor or administrator has full power to settle the estate in conformity to law, and, this being done, the heirs or devisees have no legal cause of complaint, whether they receive much or little therefrom. But no one would contend that because of their interest they either are, or have the right to be made, parties to a suit, or a proceeding of compromise. In conclusion, we think that the statute in question, being evidently intended to facilitate the settlement of disputed claims growing out of or appertaining to the estates of deceased persons, should be liberally construed in favor of the object sought to be attained, and that, thus construed, it may fairly be held to include such a compromise as the one under consideration. The demurrer to the defendant's said plea in bar must therefore be overruled.

Demurrer overruled.

SOUTH DAKOTA SUPREME COURT.

SYNOD OF DAKOTA

STATE OF SOUTH DAKOTA.

(.....S. Dak.....)

*1. Section 3, article 6, of the Constitution of this State provides that "no

*Head notes by CORSON, J.

NORM.—Public aid to sectarian institutions.

The decisions on this question are few and have been rendered under different constitutional provisions.

A school maintained by a Roman Catholic orphan asylum is not a "common school" within the meaning of N. Y. Const., art. 9, providing that the revenue of the common-school fund shall be applied to the support of common schools. *People v. Brooklyn Board of Education*, 13 Barb. 400; *St. Patrick's Orphan Asylum v. Rochester Board of Education*, 34 How. Pr. 227, citing manuscript opinion of court of appeals in *People, Brooklyn Orph. Asylum v. Board of Education of Brooklyn*.

A school connected with an orphan asylum controlled exclusively by officers of the latter, who are sisters of charity of the Roman Catholic Church, in which religious instruction is given to Roman Catholic children, is a sectarian institution within a constitutional provision against using public funds for "sectarian purposes." *State v. Hallock*, 16 Nev. 373.

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money or property of the State shall be given or appropriated for the benefit of any sectarian or religious society or institution;" and section 16, article 8, provides: "No appropriation of lands, money, or credits to aid any sectarian school shall ever be made by the State or any county or municipality within the State, . . . and no sectarian instruction shall be

Temporarily leasing the basement of a church for a public school, which remains under the control of the school board and is taught by their teachers and under the system of instruction prescribed by them, does not make the school a sectarian one under a constitution declaring against the use of public funds to aid sectarian schools. *Millard v. Board of Education*, 8 West. Rep. 372, 121 Ill. 297.

A free school maintained as a charity under the direction of trustees elected by the town, who are to be members of certain religious societies, is not a public school entitled, under the Massachusetts Constitution, to money raised by taxation "for the support of public schools," which it provides shall never be appropriated to any religious sect for the maintenance exclusively of its own school. *Jenkins v. Andover*, 108 Mass. 94.

The inhibition of section 3, article 8, of the Illinois Constitution against any payment from public funds in aid of any sectarian institution prohibits payments by Cook County for the tuition and maintenance of dependent girls committed by the

allowed in any school or institution aided or supported by the State." *Held*, that these provisions of the Constitution were intended to be and are self-executing, and require no Act of the Legislature to become operative, but of themselves control all legislation upon the subject of appropriating money or other property for "the benefit of" or "to aid" any sectarian school, society, or institution, and control and limit the powers of all state, county, and municipal officers in auditing or paying any such appropriation.

2. Held, further, that the prohibition in the Constitution of the appropriation of any money or other property "to aid" any sectarian school applies to all appropriations to such schools, whether made as a donation or in payment for services rendered the State by such school.

3. The purpose for which the plaintiff corporation was organized and exists was and generally is to maintain and promulgate the doctrine and belief of the Christian religion of the sect known as "Presbyterians," and that it has offered and given secular and sectarian instruction to divers and numerous students in the Pierre University, under its control. Held, that such university, under the control of plaintiff, and in which a class of students was instructed in the methods of teaching for the State, and for the tuition of which the money sued for in this action is claimed, is a sectarian school, within the meaning of the term "sectarian school" as used in the State Constitution.

4. By a law of 1887, prior to the adoption of the State Constitution, the territorial board of education was au-

thorized to designate private universities, colleges, and academies in which instruction should be given to classes of pupils in such institutions in the methods of teaching, under such rules and regulations as the said board of education should prescribe; the tuition of which students should be paid by the territory. Held, that the law, so far as it authorized the designation of sectarian universities, colleges, or academies by said board of education in which such classes should be taught, was inconsistent with and repugnant to the provisions of the State Constitution, and became inoperative and ceased to be of binding force or effect after the adoption of the State Constitution, within the State.

5. A contract was made by said territorial board of education with the plaintiff in 1887 for the instruction of a class of students in the methods of teaching at the Pierre University, providing that such contract should only be terminated by three months' notice by the said board of education. Held, that the board of education was not authorized by the law to make a contract for any definite term, and that the clause in the contract above referred to, fixing such limitation of time, did not survive the repeal of the law, and was not, therefore, binding upon the State, and that such contract was not one protected by section 10, art. 1, Const. U. S., which provides that no State . . . shall pass any law impairing the obligations of contracts.

6. The rules and regulations prescribed by the board of education for the universities, colleges, and academies designated by said board in which classes of students should be taught the methods of teaching provided that the course of instruction for such

county court, under the Act of May 28, 1879, to the Chicago Industrial School for Girls, a corporation which does not own or lease any building or conduct a school, but which places the girls committed to it in certain institutions under the control of the Roman Catholic Church, and to which institutions such payments would in fact go. *Cook County v. Chicago Industrial School for Girls*, 1 L. R. A. 437, 125 Ill. 540. (See more extended review of this case in the opinion of the court in the main case above.)

The use of the Bible as a text-book, and the stated reading thereof in the public schools without restriction, is "sectarian instruction" within the meaning of § 8, article 10, of the Constitution, which ordains that no such instruction shall be allowed in such schools; and the fact that children are not compelled to remain in the school-room during such reading does not remove the cause for complaint on the part of one feeling himself aggrieved thereby. *State v. Edgerton School Dist.* No. 8, 7 L. R. A. 330, 78 Wis. 177.

The stated reading of the Bible in a public school also renders it a religious seminary within the meaning of Wis. Const., art. 1, § 18, which prohibits the drawing of money from the treasury for the benefit of religious seminaries. *Ibid.*

It also violates a constitutional provision that no man shall be compelled to support a place of worship against his will. *Ibid.*

In conflict with this Wisconsin case to a considerable extent is a Maine decision that the use of the Bible as a reading book does not violate a constitutional provision against interfering with the worship by any person according to his conscience or against subordination or preference of sects. *Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 236.

Also an Iowa decision: that reading the Bible in a school does not make it a place of worship within the meaning of a constitutional provision against

taxation for building or repairing places of worship. *Moore v. Monroe*, 64 Iowa, 367, 53 Am. Rep. 444.

So in Massachusetts it has been held, but without raising any constitutional question, that a school committee may order that the Bible be read and prayer offered in school. *Spiller v. Woburn*, 12 Allen, 127.

To a similar effect, see *McCormick v. Burt*, 95 Ill. 263, 35 Am. Rep. 163.

But the enforcement of the rules of a school board prohibiting religious instruction or the reading of the Bible in schools cannot be enjoined in Ohio. One of the constitutional provisions of that State is that no sect shall ever have any exclusive right to or control of any part of the school funds of the State. *Board of Education of Cincinnati v. Minor*, 23 Ohio St. 211, 18 Am. Rep. 223.

Somewhat connected with this subject also are decisions that a schoolhouse cannot be used for religious services and a Sunday school against the objection of any tax-payer. *Schofield v. Eighth School Dist.* 27 Conn. 499; *Dorton v. Hearn*, 67 Mo. 301.

These decisions seem to be based, not on any constitutional provision, but on the restricted powers of the school district as a corporation.

Of peculiar interest in connection with many modern constitutional provisions against the use of public money for religious purposes is a Massachusetts decision that a teacher of an unincorporated religious society cannot be regarded as a public Protestant religious teacher so as to be entitled to any part of the funds raised by a town, parish, precinct, etc., for such a teacher, which was based on the Constitution of the State as it existed until 1833, providing for the choice of such a teacher by each town, precinct, parish, etc. See *Barbee v. First Parish in Falmouth*, 6 Mass. 401. B. A. R.

students should be as prescribed by the said board of education; that the principal and teachers of the normal department of the school so designated should be approved by such board; and that the students of the normal department should be excused, if they so desired, from any exercises where sectarian doctrines should be taught, or any comments made upon the Scriptures. *Held*, that, notwithstanding these and other similar rules and regulations, as the teachers in such normal department in the Pierre University were selected, employed, and paid by the plaintiff, subject only to the approval of the board of education, and constituted a part of its faculty, and that the money claimed in this action, if paid, will go to the plaintiff, and not to the teachers directly, its payment to plaintiff would be "to aid" the plaintiff, and therefore comes within the prohibition of the Constitution of this State.

(December 22, 1891.)

ACTION to recover \$370.50 as compensation for tuition and instruction furnished in plaintiff's university and by plaintiff's instructors to certain students who were being educated by the State. *Judgment for defendant.*

The facts are stated in the opinion.

Messrs. Crawford & DeLand for plaintiff.

Mr. Robert Dollard, Atty. Gen., for the State:

To the claim of contract between the plaintiff and the Territory of Dakota the obligations of which descended to the State, it may be answered that the Territory possessed no power to bind its successors in such matters.

See *Cooley, Const. Lim.* 151, and *note*, 381-348, and *notes*; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079.

Corson, J., delivered the opinion of the court:

The plaintiff, in pursuance of the provisions of chapter 1, Laws 1890, commenced this action in this court to recover from the State the amount alleged to be due to it for the tuition and instruction of a class of students during the year 1890 at the Pierre University, located in the city of Pierre, under the control and management of the plaintiff, which said tuition and instruction was given to said class of students by virtue of an alleged contract made with said plaintiff by the board of education of the late Territory of Dakota in 1897, in pursuance of the powers conferred upon said board of education by the provisions of sections 1840-1845, inclusive, Comp. Laws. An answer was filed on behalf of the State by the *Hon. Robert Dollard*, its attorney-general, setting up as a defense, briefly stated, that the plaintiff was a sectarian corporation, and the Pierre University was a sectarian school, under the control and management of the plaintiff, and that, under the provisions of the Constitution of the State, the State is prohibited from making any appropriation or paying any state funds for "the benefit of" or "to aid" any sectarian school. The case was presented to the court upon the complaint and answer and a stipulation as to the facts, which, so far as may be necessary to be stated, are, in substance, as follows: "First. That the plaintiff is a corporation organized and existing under

and by virtue of the laws of the former Territory of Dakota and of the present State of South Dakota, and that it has so existed as such corporation during all the times hereinafter mentioned, and that the purpose for which said corporation was organized and does so exist was and is generally to maintain and promulgate the doctrines and belief of the Christian religion, and of the sect known as 'Presbyterians.' *Second.* That during all of said times the said plaintiff has been, and is now, the owner and proprietor of certain grounds, buildings, furniture, books and apparatus, and has had in its employ a faculty of divers professors and instructors, and with and through and by means of the same has maintained and conducted a certain educational institution in the city of Pierre, in Hughes County, in said State, under the name of 'Pierre University.' That during all of said time it has maintained and supported said institution, and provided the necessary funds to equip and conduct the same and pay the expenses thereof, and has offered and given secular and sectarian instruction to divers numerous students therein at regular rates of tuition. That the board of education of the said Territory of Dakota, in the year 1887, in pursuance of section 1841, Comp. Laws, designated the said Pierre University as one of the educational institutions in which a class of students should be taught the methods and practice of teaching in the common schools. That plaintiff duly accepted said designation and appointment, and agreed to and did comply with all the provisions of the law and the rules and regulations adopted and promulgated by said board of education. That it received into its said institution during the winter and spring of 1890 a designated number of students, to be, and which were, instructed as required by the board of education, in accordance with the terms of said agreement. That the account for the tuition and instruction of said class of students was duly presented to the state auditor for allowance, and that he refused to audit or allow the same; and that the sum claimed by the plaintiff is the proper amount to be paid, in case the State is authorized to pay the same."

The territorial Act referred to as sections 1840-1845, provides, in substance, that the territorial board of education shall designate private universities, colleges, and academies in which instruction shall be given to classes of not less than ten nor more than twenty-five, whose tuition shall be paid by the territorial treasurer; that the board shall prescribe the conditions of admission to the class, the course of instruction, and the rules and regulations under which instruction shall be given; that the board shall establish in the institutions designated, subject to their visitation, examinations in such branches of study as are taught, and shall determine the rules and regulations in accordance with which the same shall be conducted, and shall confer such honorary certificates or diplomas as they may deem expedient upon those pupils who satisfactorily pass such examination. Such examinations shall be prescribed in such studies, and shall be arranged and conducted in such a manner, as in the judgment of the board shall furnish a suitable preparation for teachers' work in the com-

mon schools, prominent among which shall be method of teaching and practice. Pursuant to the provisions of the statute referred to, the board adopted and promulgated a number of rules, the more important of which are as follows: "Each school so designated shall adopt the course of study for its normal department that is prescribed by the territorial board of education. The principal of the normal department, and all teachers in that department, must be approved by the territorial board. None of the classes whose tuition is paid by the territory shall be taught by any person not a graduate of some college or normal school of recognized merit, and who shall not have been approved by this board as before provided. Each school accepting this appointment binds itself to designate one member of its faculty as principal of the normal department, whose first and most important duty it shall be to teach the classes of the department, and supervise the work of any assistants he may have in the department; but nothing in this clause shall prevent his teaching classes in other departments of the school if his time permits, nor from receiving into the classes of the normal department any pupils of other departments that may be pursuing the same studies as normal class. The principal of the normal department of any institution accepting this appointment shall make an annual report to the territorial board, upon blanks furnished by this department. The pupils of this department of the school shall be excused, if they desire, from any exercises where sectarian doctrines are taught, or any comment made upon the Scriptures. The territorial board may at any time, when, in its opinion, any school accepting this appointment is not doing satisfactory work, or when any of the rules and provisions of this agreement are not being observed, withdraw from such school, after a three-months notice, any pupil whose tuition is being paid by territorial funds. At the close of each term of twelve weeks the president or principal of any school so designated and the president of its board of trustees shall certify to the territorial board the name of each pupil in attendance in the normal department, together with the length of time attended by each; and the territorial board will audit the amount due each school, allowing the sum of one dollar for each week's attendance of each pupil. The faculty of any of these schools may require of any pupils admitted on these conditions the same obedience to the rules and regulations of the school as are required of pupils in other departments, except as otherwise provided, and may inflict the same punishments and penalties for violation or infraction of rules and for neglect of duty."

1. It is contended by the learned counsel for the plaintiff that, as the alleged contract under which plaintiff claims was made in 1887, prior to the adoption of our State Constitution, and was by its terms only to be terminated on three months' notice by the board of education, and, no such notice having been given by said board or their successor, the superintendent of public schools, prior to the performance of the services rendered by plaintiff, compensation for which is claimed in this action, the contract remained in force, and is protected by section 14 L. R. A.

10, art. 1, Const. U. S., notwithstanding the adoption of the State Constitution, and could not be affected or impaired by that instrument. The counsel cite the *Dartmouth College Case*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629, and the numerous cases in which the doctrine established in that case has been affirmed. That the obligations of contracts are fully protected by the Constitution of the United States is now well established. If the contract in this case was a definite one as to time, and one that the board was authorized to make, then there would be much force in the position of counsel, for neither the people in their aggregate capacity in forming a State Constitution, nor through their representatives in the State Legislature, can pass any law impairing the obligations of contracts. But an examination of the sections of the statute referred to discloses the fact that the board was not authorized to make any contract binding upon the territory for any definite term. The board was authorized to designate certain educational institutions in which classes of pupils should be instructed, but the law does not confer upon the board the power to make any contract binding upon the territory for any specified length of time. All that part of the alleged contract, therefore, providing for a continuance of the contract until terminated by notice of three months,—if the contract can properly be construed as such as to time,—was beyond the power of the board, and not binding upon the territory or its successor,—the State. It would have been competent for the Legislature of the territory to have repealed the law at any time, and thereby put an end to the contract; and it was equally competent for the framers of the Constitution to supersede it by provisions in the Constitution with which the law conflicts. The laws in force when the Constitution was adopted not inconsistent with that instrument, remained in force until changed by the State Legislature; but all laws in conflict with that instrument upon its adoption became inoperative, and ceased to be of binding force within the State. See Enabling Act, Laws 1889, p. 34.

There being, therefore, no contract between the board of education and the plaintiff that would be protected under the Constitution of the United States, it becomes necessary to determine whether or not the State can be required to pay for the services rendered by the plaintiff in view of the provisions of the State Constitution. The provisions of the Constitution of the State bearing upon the question are the last clause of section 8, art. 6, and section 16, art. 8. Section 8, art. 6, provides that "no money or property of the State shall be given or appropriated for the benefit of any sectarian or religious society or institution;" and section 16, art. 8, provides that "no appropriation of lands, money, or other property or credits to aid any sectarian school shall ever be made by the State or any county or municipality within the State. . . . No sectarian instruction shall be allowed in any school aided or supported by the State." These provisions of the Constitution were intended to be, and are, self-executing. They require no act of the Legislature to become operative, but of themselves control all legislation upon the subject of appropriating money or other property for

"the benefit of" or "to aid" any sectarian school or institution, made after the adoption of the State Constitution, and also control and limit the powers of all state, county, or municipal officers in auditing or paying any such appropriation. That the Pierre University is a sectarian school or institution, within the meaning of these provisions of the Constitution, is not seriously controverted. The question, then, is, What constitutes an appropriation for "the benefit of" or "aid to" a sectarian school or institution? That such an appropriation is not limited to a gift or donation on the part of the State is clearly shown in section 8, art. 6, which provides: "No money or property of the State shall be given or appropriated." The State is not only prohibited from giving or donating state funds, but from appropriating them. This term "appropriation," used in this connection with "gift," was evidently intended to mean something different from gift or donation. The provision found in the Bill of Rights is limited to gifts or appropriations by the State. The provision in section 16, art. 8, includes counties and municipalities, as well as the State, and limits the prohibition to schools,—article 8 being devoted to education and school lands; but the language is equally emphatic. "No appropriation . . . to aid any sectarian school shall ever be made;" and the section concludes with the provision: "And no sectarian instruction shall be allowed in any school or institution aided or supported by the State." It is apparent from these various provisions that the framers of our State Constitution intended to guard with zealous care the funds of the State, counties, and municipalities, collected from taxes imposed upon all the members of the community, composing the various religious sects, from being appropriated for the benefit of or to aid any one or more sectarian schools or institutions, or in fostering or building up any one or more sects within the State. The policy of prohibiting the use of funds belonging to all for the benefit of one or more religious sects has been adopted in most of the states. No one, we think, can mistake the intention of the framers of the Constitution, as expressed in these various sections of that instrument, to prohibit in every form, whether as a gift or otherwise, the appropriation of the public funds for the benefit of or to aid any sectarian school or institution. What, then, constitutes benefit or aid? Webster defines "benefit" to mean "whatever contributes to promote prosperity; . . . add value to property; advantage; profit." "To aid" is defined by the same author "to support, either by furnishing strength or means to help to success." The demand of plaintiff is for money due for the tuition of a class of students alleged to have been instructed under a contract with the board of education. Would not the payment of this demand be for the benefit of or to aid the university? Is not the tuition received from every student for the benefit of or to aid the school, to support, to strengthen it? Do not such institutions depend mainly upon the tuition fees of students they can obtain for their support? But the learned counsel for plaintiff strenuously contends that the sum due plaintiff will not be contributed for the benefit

of or to aid the university, but in payment for services rendered the State, or to its students, in preparing them for teaching in the public schools. This contention, while plausible, is, we think, unsound, and leads to absurd results. If the State can pay the tuition of twenty-five students, why may it not maintain at the institution all that the institution can accommodate, and thereby support the institution entirely by state funds? The theory contended for by counsel would, in effect, render nugatory the provisions of the Constitution, as the claim that the appropriation was made as compensation for services rendered could be made in all cases. This theory, carried out to its legitimate results, would enable any one leading sect to control the schools, institutions, and funds of the State, as it could claim it was rendering services for the funds appropriated. It was undoubtedly to prevent such possible results that these provisions were inserted in the Constitution. It matters not how much consideration has been given by services rendered, the language is emphatic and unqualified that no money shall be given or appropriated for the benefit of or to aid any sectarian school, society, or institution. The paying of the tuition of pupils in the Pierre University to the plaintiff in this case will, in our opinion, be for the benefit of or to aid such school or institution, and is clearly within the prohibition of the Constitution.

This view of the provisions of our Constitution is supported by two recent decisions, that we will now proceed to notice. The first is the case of *State v. Hallock*, 16 Nev. 378. It appears from the statement in that case that the Constitution of the State of Nevada, as originally adopted, contained no provisions such as are found in our State Constitution; but in 1880 the following provision was adopted as an amendment, being section 10, art. 11: "No public funds of any kind or character, whether state, county, or municipal, shall be used for sectarian purposes." After this section was adopted, the Legislature of that State passed an Act providing that certain orphans of the State should be supported at the expense of the State in a certain orphan asylum, under the control of a religious sect. A certain sum becoming due for the support, clothing, and care of orphans under the law, a mandamus was applied for to compel the state auditor to audit and allow the account, which he had refused to do on the ground that the law was in conflict with the State Constitution. It was urged in that case, as in the case at bar, in support of the application, that the appropriation was not for sectarian purposes, but to pay for the care and support of the orphans placed in the institution by the State. The court, in closing its opinion, says: "The seventy-five dollars appropriated for each orphan is a contribution, and, should it be given, it will be used for the relief and support of a sectarian institution, and, in part, at least, for sectarian purposes." And the writ was denied. In *Cook County v. Chicago Industrial School for Girls*, 125 Ill. 540, 1 L. R. A. 487, decided in 1888 by the supreme court of that State, the question was discussed and decided as to what constitutes "aid" to an institution under section 3, art. 8, of the Illinois Constitution, which is as follows: "Neither

the General Assembly, nor any county, city, town, township, school-district, or other public corporation, shall ever make any appropriation, or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose." By an Act of the Legislature of that State certain female infants were required to be committed to the Industrial School of Chicago. The industrial school seems to have been a corporation, but was conducted in connection with two institutions,—one known as "The House of the Good Shepherd," and the other as "St. Joseph's Orphan Asylum," both under the control of a sectarian organization. An action was brought by the industrial school to recover of Cook County some \$15,000 for the care and support of the female infants committed to that institution under the law. The defense was that the industrial school had no real existence, but that the care and maintenance of those committed was furnished by the two institutions above named, and that the money, when collected, would go to them; and, as they were sectarian in character, the county was prohibited by the section of the Constitution quoted from paying to them any public funds in aid of sectarian purposes. The court sustained the defense in a very able opinion delivered by Justice Magruder, in which he says: "It cannot be said that a contribution is no aid to an institution because such contribution is made in return for services or work done. A school is aided by the patronage of its pupils, even if they do pay for their tuition." It was contended in that case, as in the case at bar, that these institutions furnished tuition, clothing, care, etc., in return for the money received by them, and, as they earned what they received, and were not the recipients of any gift or donation, nothing was paid in aid of or to help support or sustain them. In discussing this proposition, the court says, on pages 570, 571, 125 Ill.: "If they are entitled to be paid out of the public funds, even though they are under the control of sectarian denominations, simply because they relieve the State of a burden which it would otherwise be itself required to bear, then there is nothing to prevent all public education from becoming subjected, by hasty and unwise legislation, to sectarian influences. By section 1 of article 8 of the Constitution it is made the duty of the State to provide a thorough and efficient system of free schools. If statutes are passed, under which the management of these schools shall get into the hands of sectarian institutions, then, under the theory contended for, the prohibition of the Constitution will be powerless to prevent the money of the tax-payers from being used to support such institutions, inasmuch as they will render a service to the State by performing for it its duty of educating the children of the people. It is an untenable position that public funds may be paid out to

help support sectarian schools, provided only such schools shall render a *quid pro quo* for the payments made to them. The Constitution declares against the use of public funds to aid sectarian schools, independently of the question whether there is or is not a consideration furnished in return for the funds so used." Our attention was called by the learned counsel for plaintiff to *Millard v. Board of Education*, 121 Ill. 297, 8 West. Rep. 372. But the decision in that case does not, we think, affect the case at bar, and it is commented on by the court in the *Cook County Case* as follows: "There is nothing in the doctrine here announced which conflicts with the case of *Millard v. Board of Education*, 121 Ill. 297, 8 West. Rep. 372. There the proceeding was by an individual tax-payer against a board of education, and a majority of the court sustained the act of the board, which had no school-house, in temporarily leasing the basement of a Catholic Church for the purpose of holding one of the public schools therein. But the board did not part with its control of the school. The scholars were taught by teachers, whom the board appointed, and under a system of instruction which the board prescribed."

It is further contended by the counsel for plaintiff that by the provisions of the law and the regulations of the board of education the normal department in the Pierre University was a distinct and separate department, under the control of the board of education; and they call our attention to the regulations, which provide that "the pupils of this department of the school shall be excused, if they desire, from any exercises where sectarian doctrines are taught, or any comment made upon the Scriptures;" that the territorial board shall prescribe the course of study in the normal department; and that the principal and all teachers in that department must be approved by the board of education, etc. But while, by these and other provisions in the law and the regulations, the board of education reserved to itself large powers in the control and management of this department, it nevertheless clearly appears that the teachers in this department were employed and selected by the plaintiff, subject to the approval of the board of education. They were paid by the plaintiff, and under the control of plaintiff as to all matters not specially reserved to the board of education. They constituted a part of the faculty of a sectarian school, and the funds claimed in this action are not to be paid to such teachers specifically, but, if paid, will be received by the plaintiff, and used for its institution. The fact, therefore, that the purpose for which plaintiff was organized and exists was and is generally to maintain and promulgate the doctrines and belief of one particular sect, constitutes the university under its control a sectarian school or institution, within the meaning of section 3, art. 6, and section 16, art. 8, of our State Constitution; and the State is therefore prohibited from appropriating to it any of the public funds collected from taxes paid by the public and contributed by members of all the different religious sects of the State. We recognize fully the learning and ability of the faculty of the Pierre University,

and the noble work in which they are engaged. We recognize also the faithfulness and fidelity with which the work of instruction was performed under its alleged contract with the board of education, but, with our view of the mandate of the Constitution, we are compelled

to deny to the plaintiff any relief against the State.

Judgment must therefore be entered in favor of the defendant, and it is so ordered.

All the Judges concur.

OREGON SUPREME COURT.

Iven S. HANGEN, *Resp't.*,

v.

ALBINA LIGHT & WATER CO., *App't.*

(.....Or.....)

1. A corporation organized to supply water to a city and its inhabitants and given the right to lay its pipes in the streets for that purpose is engaged in a public business and may be compelled to furnish water on reasonable terms to all inhabitants who apply for it, although there is no express provision in its grant of franchise to that effect.
2. The fact that a pipe laid by a water company along a street in the exercise of its franchise was laid under an agreement with certain persons who paid the expense that they should have the exclusive use of the water and that the company should not tap the pipe without their consent unless it first repaid them for the pipe will not relieve the company from its obligation to supply water to all persons living on said street who may apply for it on reasonable terms.
3. Mandamus is an appropriate remedy to compel a water company to supply water to a person who has a right to it.

(December 14, 1901.)

APPEAL by the defendant from a judgment of the Circuit Court for Multnomah County sustaining a demurrer to the answering and awarding a peremptory writ of mandamus compelling the defendant to permit plaintiff to tap a water main for the purpose of securing a water supply. *Affirmed.*

Statement by Lord, J.:

This is an action for a writ of mandamus to require the defendant to supply the plaintiff with water by tapping a certain water-main on Tillamook Street, and allowing him to connect therewith a service-pipe, etc. The facts alleged, in substance, are these: That the defendant is a corporation, the business of which, among other things, is to furnish the city of Albina, and the inhabitants thereof, with water. That it is operating under a franchise granted to said company by the council of the city of Albina by virtue of an ordinance, as follows: "An ordinance granting the right of way through the streets for laying pipes for the purpose of conveying water through the city. The city of Albina does ordain as follows: Section 1. That the Albina Water Company, its successors and assigns, be, and are hereby granted the right and privilege of laying pipes through the streets

of the city of Albina, for the purpose of conducting water through the city. Sec. 2. That the ditches for laying pipes shall be sunk two feet, and the pipes for conducting the water shall be under the surface or level of the established grade eighteen to twenty inches on all improved streets, and no pipe shall be laid so as to interfere with the construction of sewers: provided, that nothing in this ordinance shall be construed so as to grant any exclusive right or privilege of conducting water into the city: provided, further, that said water company shall in no case charge more than one dollar per month for the first faucet, and fifty cents for each additional faucet, in the same building, for family use, or at a private dwelling-house," etc. That the purpose and object of granting to said company the right to lay water-mains in the streets of said city was that the citizens of said city might be furnished with a supply of pure and wholesome water. That by virtue of the authority conferred by said ordinance, the defendant laid down a four-inch water-main in and through Tillamook Street, in the then city of Albina, from the east line of the original town-site of the city of Albina to the west line of Twenty-Fourth Street, in Irvington, and connected the said main with the main on Margaretta Avenue, in said city, and for nearly a year past has been pumping water, and conducting it through said main on Tillamook Street, to supply the citizens of Irvington residing east of Fourteenth Street. That the defendant utterly refuses to allow anyone residing on Tillamook Street, between the east line of the original town-site of Albina and Fourteenth Street, in Irvington, to tap said main, and refuses to supply them with water therefrom. That the plaintiff resided on Tillamook Street between the points above named, and is the owner of lot 2, block 126, of Irvington. That said lot abuts on said Tillamook Street, and the plaintiff is constructing thereon a dwelling, and is desirous of securing a supply of water from the water-mains of said street, that being the only source of water supply for said premises. That the plaintiff has repeatedly requested the defendant to supply him with water from said main, but has always been refused. That on the 11th day of July the plaintiff tendered said defendant \$2.50, the regular fee charged by the defendant for tapping a water-main with a service-pipe, and demanded from the defendant to be connected with said water-main in Tillamook Street, and to be supplied therefrom with water; and that said defendant refused to accept said tender, and refused to connect the plaintiff's premises with said main, and refused to supply him with water therefrom. That said refusal is willful, and is

NOTE.—For notes on mandamus, see Fleming v. Guthrie (W. Va.) 3 L. R. A. 63; Commercial Union Teleg. Co. v. New England Teleg. & Teleph. Co. (Vt.) 5 L. R. A. 161.

done for the avowed purpose of debarring the residents on said Tillamook Street, between the original town-site of Albina and Fourteenth Street, and particularly the plaintiff, from the use of water from said main. That the plaintiff is without any legal remedy in the premises except the writ of mandamus, etc. The defendant denies that, under the authority conferred by said ordinance, it laid down a four-inch or any water-main in or through Tillamook Street, in said city, as alleged; or connected the said alleged main with the main on Margaretta Avenue, in said city; or for nearly a year past, or for any time, has been pumping water through said alleged main; but the defendant alleges the fact to be that Ellis G. Hughes and C. H. Prescott are owners of the tract of land known as "Irvington" and "John Irving's First Addition," east of Fourteenth Street, in Albina; and that in pursuance of an agreement entered into between the said Hughes and Prescott, for the purpose of supplying water to the property in Irvington, and said John Irving's First Addition, the defendant laid down in said Tillamook Street a supply pipe for said Hughes and Prescott, for which pipe the said Hughes and Prescott paid, for the sole purpose of supplying said lands with water. That said pipe is owned by said Hughes and Prescott, and is under their absolute control. That the defendant has no right to tap the same, except with the consent of Hughes and Prescott, without paying the said Hughes and Prescott the sum of \$3,600, the cost of laying the same. That the business along the line will not justify the defendant in incurring the expense of purchasing said service-pipe and converting it into a main. That defendant has repeatedly applied to said Hughes and Prescott for leave to tap said service pipe, without having to pay the price charged therefor, but they wholly refuse to give consent for the defendant to do so. Denies that the defendant's refusal to tap said main or refusal to supply the plaintiff with water is willful, or without lawful cause, or that the same is done with the avowed or any purpose of depriving the residents of Tillamook Street, or the plaintiff, from the use of water from the alleged main, but alleged that the reason for not supplying the plaintiff with water from said service-pipe of said Hughes and Prescott is that it cannot do so without becoming liable to pay said Hughes and Prescott for said pipe the sum of \$3,600, which sum the defendant is not now prepared or able to pay, and for the further reason that the water which would be used along said street will not justify the expenditure, etc. The plaintiff demurred to the new matter stated in the answer, and when the cause was heard the court sustained the demurrer, and gave judgment making the writ peremptory, from which this appeal is taken.

Messrs. Dolph, Bellinger, Mallory & Simon, for appellant:

The rights conferred are defined, and in terms too specific to admit of dispute. The language is: "That the Albina Water Company, its successors and assigns be and are hereby granted the right and privilege of laying pipes through the streets of the city of

Albina for the purpose of conducting water through the city."

There is no provision requiring the company to supply the inhabitants of the city with water.

It cannot be successfully claimed that by the act of laying down a pipe in the streets of Albina and conducting water through it in the exercise of a right conferred by this ordinance, the company thereby placed itself under obligation to any inhabitant of Albina to supply him with water.

The fact that the defendant was organized to supply the inhabitants of Albina with water does not of itself impose a duty upon the company to supply whoever may apply.

Puterson Gas-Light Co. v. Brady, 27 N. J. L. 245, 72 Am. Dec. 380.

Innkeepers and common carriers are bound to receive all who properly apply to them, but this is a duty peculiar to them.

Other bailees and persons engaged in other employments are at liberty to demand an unreasonable price before they will undertake any work or trust, or to reject employment altogether.

See Redfield, Railways, 298, 294, and *note*.

Having enumerated certain obligations, none other can be imposed by implication. The maxim *expressio unius est exclusio alterius* applies.

Mr. J. C. Moreland for respondent.

Lord, J., delivered the opinion of the court:

From this statement of the case, as presented by the pleadings, the court below held that, when the defendant entered upon and laid down its water mains in the street, in pursuance of the privilege granted by the ordinance, it became bound to supply every abutter upon the street with water. The contention for the defendant is that the ordinance does not impose the duty upon it to furnish water, but only, if it shall furnish water, that the charge therefor shall not exceed a certain sum herein specified; that the grant is to lay pipes through the streets for the purpose of conducting water through the city in the mode prescribed, and so as not to interfere with the construction of sewers; but that it contains no provision requiring it to supply the city or its inhabitants with water; hence the ordinance imposes no duty upon the company to furnish water to anyone. In whatever form the argument is presented, it rests essentially upon this contention. While admitting that it is a corporation organized to supply the city and its inhabitants with water, and that the city, by its ordinance, granted it the right to lay water-mains through its streets for the purpose of carrying into effect the objects of its incorporation, it insists that the ordinance is the measure of the rights conferred and the obligation imposed, which, by its terms, only grants "the right and privilege of laying pipes through the streets of the city of Albina for the purpose of conducting water through the city," under the conditions imposed, without "a word in the language of the grant from which it could be inferred that the company is placed under any obligation whatever to supply any inhabitant of the city with water." Counsel says: "If

the ordinance had imposed upon the company the duty of supplying the inhabitants with water as a part of the conditions of the grant, such a conclusion might be supported; but where no such duty is imposed, and nothing is said except that, when the company furnishes water, it shall charge no more than a certain rate per month, they fail to see the soundness of the reasoning which makes it the duty of the company to furnish water." It is thus seen that it is the absence of any express provision in the ordinance, imposing the duty upon the defendant to supply water, upon which the argument and the case for the defendant is predicated. The effect to be given to the fact that the defendant company was incorporated, under the law, to furnish water to the city and its inhabitants, and the implied obligation which the defendant assumed by accepting the grant or franchise under the ordinance, is entirely overlooked. The defendant is treated as a private corporation, the business of which is private, and not of a public nature, and to meet a public necessity; and, as a consequence, that it should not be subjected to duties or obligations that are not binding upon other private corporations. In support of this view, the only authority cited and relied upon by the defendant is *Paterson Gas-Light Co. v. Brady*, 27 N. J. L. 245, 72 Am. Dec. 380. In that case the court was urged to assert the doctrine that gas companies, like common carriers and innkeepers, were bound to accommodate the public, but refused on the ground that the lack of precedents upon the subject could only be based upon the strong presumption that there was no principle of law upon which such a view could be supported. The court says: "The company may organize; may make and sell gas or not, at their pleasure; and I see no more reason to hold that the duty of doing so is meant to be imperative than to hold that other companies incorporated to carry on manufactories, or to do any other business, are bound to serve the public any further than they find it to be their interest to do so. It was earnestly insisted on the argument that the community have a great interest in the use of gas, and that companies set up to furnish it ought to be treated like innkeepers and common carriers, and that, if no precedent can be found for such a decision, this court ought to make one. But that there is no authority for so holding in England, or America, where companies have been so long incorporated for supplying water and gas to the inhabitants of numerous towns and cities, affords a strong presumption that there is no principle of law upon which it can be supported." But this case and its reasoning was directly disapproved and overruled in the subsequent case of *Olmsted v. Morris Aqueduct Props.*, 47 N. J. L. 333, in which the court says: "In that case [*Paterson Gas-Light Co. v. Brady*] Mr. Justice Elmer declared that the company was under no legal obligation to supply gas to all persons having buildings on the line of their pipes, upon tender of reasonable compensation. He rested this view on the absence of any express provision in the charter imposing such duty upon the company. This decision fails, however, to give due effect to the purpose of the Legislature in creating the

company, and to the implied obligation assumed by the company in accepting the grant. If it were a grant for mere private uses, empowering the corporate body to withhold service at pleasure from all persons, the company would be without the right to occupy the public streets for the laying of its pipes, and, of course, the grant of eminent domain for such private purpose would be void. In this respect, in my judgment, the conclusion in the *Paterson Case* was erroneous, and in conflict with the views expressed in the *Tide-Water Case*, 18 N. J. Eq. 518; 90 Am. Dec. 634, and in *National Dock R. Co. v. Central R. Co.* 32 N. J. Eq. 755."

This view is certainly more in accord with recent decisions establishing the doctrine that it is mandatory upon corporations of this sort to supply one and all without distinction. The defendant by incorporating, under the statute, for the purpose of supplying water to the city and its inhabitants, undertook a business which it could not have carried on without the grant of eminent domain over the streets in which to lay its pipes. It was by incorporating for this purpose, and in accepting the grant, it became invested with a franchise belonging to the public, and not enjoyed of common right, for the accomplishment of public objects, and the promotion of the public convenience and comfort. Its business was not of a private, but of a public nature, and designed, under the conditions of the grant, as well for the benefit of the public as the company. "Such a business," says Mr. Justice Harlan, "is not like that of an ordinary corporation, engaged in the manufacture of articles that may be quite as indispensable to some persons as are gas-lights. The former articles may be supplied by individual effort, and with their supply the government has no such concern that it can grant an exclusive right to engage in their manufacture and sale; but as the distribution of gas in thickly populated districts is, for the reason stated in other cases, a matter of which the public may assume control, services rendered in supplying it for public and private use constitute, in our opinion, such public services as, under the Constitution of Kentucky, authorized the Legislature to grant to the defendant the exclusive privileges in question." *Louisville Gas Co. v. Citizens Gas-Light Co.*, 115 U. S. 683, 29 L. ed. 510. And, in another case, the same eminent judge said: "The manufacture of gas, and its distribution for public and private use, by means of pipes laid down under legislative authority, in the streets and ways of a city, is not an ordinary business in which everyone may engage, but is a franchise belonging to the government, to be granted for the accomplishment of public objects, to whomsoever, and upon what terms it pleases. It is a business of a public nature, and meets a public necessity, for which the State may make provision." *New Orleans Gas-Light Co. v. Louisiana Light & H. P. Mfg. Co.* 115 U. S. 650, 29 L. ed. 516. It must, then be conceded that the defendant is engaged in a business of a public, and not of a private, nature, like that of ordinary corporations, engaged in the manufacture of articles for sale; and that the right to dig up the streets, and place therein pipes or mains for the purpose of

conducting water for the supply of the city and its inhabitants, according to the express purpose of its incorporation, and the business in which it is engaged, is a franchise, the exercise of which could only be granted by the State, or the municipality acting under legislative authority. In such case, how can the defendant refuse to supply water to one and all, without distinction, whose property abuts upon the street in which their pipes are laid, upon the tender of the proper compensation? The defendant company was organized to supply water to the city and its inhabitants, and the franchise granted by the city authorities was the means necessary to enable it to effect that purpose. Without the franchise, the object for which the company was incorporated would fail and come to naught. It could not carry on the business of supplying the city and its inhabitants with water without authority from the city to dig its streets and lay pipe therein for conducting or distributing water for public and private use. It was not organized to lay pipes, but to supply water, and the grant was to enable it to do it, and thereby effect the public purpose contemplated. When the defendant incorporated to carry on such a business, we may reasonably assume that it was with the expectation of receiving a franchise from the city, which, when conferred, it would undertake to carry on according to the purposes for which it was organized. By its acceptance of the grant, under the terms of its incorporation, it assumed the obligation of supplying the city and its inhabitants with water along the line of its mains. It could not dig up the streets and lay pipes therein for conducting water except to furnish the city and its inhabitants with water. That was the purpose for which it became a corporation and the grant of the city was to enable it to carry it into effect. And "if the supplying of a city or town with water," as VanSyckel, J., said, "is not a public purpose, it is difficult to conceive of any enterprise intrusted to a private corporation that could be classed under that head." *Olmsted v. Morris Aqueduct Props.*, *supra*.

As the defendant could not carry on the business of supplying water without the franchise, the city must have intended in granting such franchise to charge it with the performance of the duty it undertook for the public by the terms of its incorporation, and the defendant, in accepting the benefits of the grant, must have assumed the performance of such duty. In a word, the acceptance of a franchise, under such conditions, carries with it the corresponding duty of supplying the public with the commodity which the corporation was organized to supply to all persons without discrimination. "It may be laid down as a general rule," says Mr. Morawetz, "that whenever the aid of the government is granted to a private company, in the form of a monopoly or a donation of public property or funds, or a delegation of the power of eminent domain, the grant is subject to an implied condition that the company shall assume an obligation to fulfill the public purpose on account of which the grant was made. . . . The same rule applies to companies invested with special privileges, at the expense of the public, for the

purpose of supplying cities with water." *2 Morawetz, Priv. Corp.* §1129. The books are replete with illustrations of this principle as applied to water companies, gas companies, telephone companies and others in the performance of public duties. In *Lumbard v. Stearns*, 4 Cush. 61, it was held that if an aqueduct corporation, established for the purpose of supplying a village with pure water, should undertake, capriciously and oppressively, to enhance the value of certain estates by furnishing them with a supply of water, and depreciate that of others by refusing it to them, such conduct would be a plain abuse of their franchise. Shaw, Ch. J., said: "We can perceive no ground on which to sustain the argument that this act does not declare a public use. The supply of a large number of inhabitants with pure water is a public purpose. But it is urged that there is no express provision therein requiring the corporation to supply all families and persons who should apply for water on reasonable terms; that they may act capriciously and oppressively; and that by furnishing some houses and lots, and refusing to supply others, they may thus give a value to some lots and deny it to others. This would be a plain abuse of their franchise. By accepting the act of incorporation, they undertake to do all the public duties required by it." This is cited with approval in *Lowell v. Boston*, 111 Mass. 464, 15 Am. Rep. 39, and in *Olmsted v. Morris Aqueduct Props.*, *supra*, in which *Pater-son Gas-Light Co. v. Brady*, 27 N. J. L. 245, 72 Am. Dec. 360, is distinctly disapproved and overruled. In *Shepard v. Milwaukee Gas-Light Co.*, 6 Wis. 539, 70 Am. Dec. 479, the company had the exclusive right of supplying the city of Milwaukee with gas. The plaintiff, a merchant doing business on a street containing one of the defendant's mains, fitted up his establishment with the necessary pipes and fixtures for lighting the same with gas. He applied to the company for a supply, tendering at the same time five dollars in advance payment therefor. He was required, as a condition precedent, to sign the printed rules and regulations of the company. He declined to do so. The company refused to waive the point, and suit was brought to recover damages suffered by the plaintiff because of such refusal. After discussing the question at great length, the court held that the company was bound to furnish gas to the citizen who has made all necessary preparation to receive the same, upon compliance by the citizen with such reasonable terms as the company may rightfully impose. But the court declares that the fact of an exclusive right to manufacture and sell gas in the city would imply an obligation on the part of the company to furnish the city and citizens with a reasonable supply upon reasonable terms; that when the nature and objects of the corporation are considered, namely, the exclusive right to manufacture and sell gas for the purpose of lighting the city and dwellings and business places of its inhabitants, how can it be urged that this is a mere private corporation for the manufacture and sale of a commercial commodity. In *Williams v. Mutual Gas Co.*, 52 Mich. 499, 50 Am. Rep. 266, the action was for damages for the failure of the defendant to furnish the plaintiff with gas, as plaintiff

claimed was the defendant's duty. The court says: "The questions presented and argued before the judge of the superior court by counsel for the defendant were: *First*, the plaintiff could not recover, for the reason that the defendant was under no legal obligation or duty to supply any citizen of Detroit with gas.

The court below disagreed with the defendant's counsel upon this point.

I agreed with the judge of the superior court that it is the duty of the defendant, upon reasonable conditions, to supply the citizens of Detroit who have their residences and places of business east of the center of Woodward Avenue with gas, wherever the defendant has connected its mains and service pipes with the pipes and fixtures used at such residences and places of business, and the owners or occupants shall desire the same. The defendant is a corporation in the enjoyment of certain rights and privileges under the statutes of the State and charter and by-laws of the city, and derived therefrom. These rights and privileges were granted, that the corresponding duties and benefits might inure to the citizens when the rights and privileges conferred should be exercised. The benefits are the compensation for the rights conferred and privileges granted, and are more in the nature of convenience than necessity; and the duty of this corporation imposed cannot, therefore, be well likened to that of an innkeeper or common carrier, but more nearly approximates that of the telegraph, telephone, or mill owner." *Price v. Riverside Land & L. Co.* 56 Cal. 481; *McCrory v. Beaudry*, 67 Cal. 120; *Lloyd v. Washington Gaslight Co.* 1 Mackey, 381; *People v. Manhattan Gaslight Co.* 45 Barb. 136; *Gaslight Co. of Baltimore v. Celliday*, 25 Md. 1; *New Orleans Gaslight & B. Co. v. Paulding*, 12 Rob. (La.) 878.

The same principle applies to telephone companies, which are regarded so far as common carriers in their relation to the public that they must serve all members thereof alike in the transmission of messages. In *Central U. Teleph. Co. v. State*, 118 Ind. 206, the court says: "While it may not supply and take the place of the telegraph in many instances and for many purposes, yet in others it far surpasses it, and is and can be put to many uses for which the telegraph is unfitted, and by persons wholly unable to operate and use the telegraph. It has been held universally by the courts, considering its use and purpose, to be an instrument of commerce, and a common carrier of news, the same as the telegraph; and by reason of being a common carrier, it is subject to proper obligations, and to conduct its business in a manner conducive to the public benefit, and to be controlled by law. It is by reason of the fact that business men can have them in their offices and residences, and, without leaving their homes or their places of business, call up another at a great distance, with whom they have important business, and converse without loss of valuable time on the part of either, that the telephone is particularly valuable as an instrument of commerce. It being an instrument of commerce, and persons or corporations engaged in the general telephone

business being common carriers of news, what are the rights of the public, independent of the statute, as regards discrimination? Any person or corporation engaged in the telephone business, operating telephone lines, furnishing telephonic connections, facilities and services to business houses, persons and companies and discriminating against any person or company can be compelled by mandate, on the petition of such person or company discriminated against, to furnish the petitioner a like service as furnished to others." *State v. Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 404; *Commercial U. Teleph. Co. v. New England Teleph. & Tel. Co.* 61 Vt. 241, 5 L. R. A. 161; *State v. Bell Teleph. Co.* 36 Ohio St. 296.

A corporation undertaking by its acceptance of a public franchise, to perform a certain service, can be by mandamus compelled to perform that service. *People v. New York, L. E. & W. R. Co.* 104 N. Y. 58, 6 Cent. Rep. 39, 58 Am. Rep. 484; *Vincent v. Chicago & A. R. Co.* 49 Ill. 38; *Forman L. & T. Co. v. Henning* (Kan.) 17 Am. L. Reg. N. S. 266.

The pipe which was laid by the defendant in Tillamook Street was laid under the franchise granted by the city, and it had no authority to lay any other kind of pipe or main than prescribed by the ordinance, or for any other purpose than conducting water to supply the city and its inhabitants, without discrimination, to all persons having buildings or lots on the lines of their pipe, upon tender of the proper compensation. There is no claim that Hughes and Prescott had any right to dig up the street and to lay such pipe. It could only be done by the defendant, so far as disclosed by this record, under the grant, in the mode prescribed, and for the purposes already stated. It is true it is alleged, in effect, that the pipe was laid along the street and in front of the property of the plaintiff for the exclusive benefit of Hughes' and Prescott's property, and for the sole purpose of supplying their lands with water. The street in front of the plaintiff's property was subjected to this public use for the special benefit of aiding in the sale of their property. Their object was to induce purchasers to buy land from them for homes in places of others whose property along the street abutted on the main. To favor them, the defendant, by virtue of the franchise granted, laid the pipe, but refused to supply the plaintiff with water from it upon the tender of the amount usually charged for such service. As neither Hughes nor Prescott are parties to this record, what rights or contractual relations they may bear to the defendant we neither know nor decide. We attach no significance to the words "supply-pipe" used in the answer. The pipe was laid along the street and in front of the lot of the plaintiff under the franchise granted by the city, and by the terms of its incorporation, to supply water to the city and its inhabitants. This being a public purpose, and the business of a public nature, the defendant must serve all alike, and for any discrimination mandamus is the appropriate remedy.

We discover no error, and the judgment must be affirmed.

NEW YORK COURT OF APPEALS (2d Div.).

Henry W. DU BOIS, *Recept.*,

v.

William H. DECKER, *Appt.*

(.....N. Y.....)

1. **Aggravation of an injury caused by the malpractice of a surgeon** will only mitigate damages and not defeat a cause of action for the malpractice.
2. **A physician employed by a city to treat patients in an almshouse** will not be relieved from liability to a patient therein for failure to exercise ordinary care and skill, although he is paid by the city and not by the patient.

(December 15, 1891.)

APP^{EAL} by defendant from a judgment of the General Term of the Supreme Court, Third Department, affirming a judgment of the Ulster County Circuit, in favor of plaintiff in an action brought to recover damages against a physician for alleged malpractice. *Affirmed.*

The facts are stated in the opinion.

Mr. A. T. Clearwater, for appellant:

A physician is to be gauged only according

to the school and kind of practice he professes.

Wharton, Neg. § 733; Shearm. & Redf. Neg. § 437.

The defendant was an adherent of the school of conservative surgery one of the canons of which, as agreed by all the medical testimony, is, that amputation,—removing and destroying bone and tissue which nature can never replace,—should never be resorted to so long as a possibility of saving exists.

Having followed the established tenets of his school in treating the plaintiff he is not liable for the results.

Leighton v. Sargent, 27 N. H. 460, 59 Am. Dec. 388.

To render the defendant liable, it is not enough that there has been a less degree of skill than some other medical men might have shown.

Shearm. & Redf. Neg. § 434; *Rich v. Pierpont*, 3 Post. & F. 35.

A physician, like an attorney, is not answerable in a given case for errors of judgment.

Shearm. & Redf. Neg. §§ 435, 437, 439, 440, 442.

If a doubt exists in the mind of the surgeon on the question of immediate amputation, he should wait, unless the patient be old, in which case let him act promptly.

NOTE.—*Liability for malpractice of physicians serving gratuitously or employed by third party.*

The action against a physician for malpractice need not be based on contract but on breach of duty founded upon his legal obligation. *Nelson v. Harrington*, 1 L. R. A. 721, 72 Wis. 591, 7 Am. St. Rep. 903.

The fact that the action is *ex delicto* and not on contract makes it immaterial by whom the physician was employed. *Gladwell v. Stegall*, 5 Bing. N. C. 734, *Pippin v. Sheppard*, 11 Price, 400.

On the other hand, it has been held that the action is so far based on contract that physicians in partnership are all liable for the negligence or malpractice of one of them. *Hyne v. Erwin*, 23 S. C. 225, 55 Am. Rep. 15.

And even that one of them cannot be sued alone in such a case for his own negligence although his partner, who also treated the patient part of the time, was guilty of no negligence or lack of skill. *Whittaker v. Collins*, 34 Minn. 299, 37 Am. Rep. 55.

Nevertheless most of the cases proceed on the theory that the action is not based on contract.

In harmony with this theory also is a decision that physicians called upon as expert under authority of law to determine as to a person's sanity are liable to him for negligence in signing a commitment to an asylum without the exercise of due care. *Ayers v. Russell*, 60 Hun, 232.

And bearing somewhat on the same question is a decision holding that a dealer in drugs and medicines is liable for negligently putting up a poison labeled as a harmless medicine although the plaintiff bought it of a druggist after several intermediate sales. *Thomas v. Winchester*, 6 N. Y. 397, 37 Am. Dec. 455.

Of interest in connection with the main case is a decision that a county which employs a physician to attend poor persons is not liable for his negligence in his treatment of them. But this decision is based on the public character of the defendant, and has not much bearing on the question of the physician's liability. *Summers v. Davies County*, West. Rep. 227, 103 Ind. 563, 35 Am. Rep. 512.

In case of gratuitous services.

The fact that a physician's services are rendered gratuitously in no respect qualifies his liability for negligent or wrongful treatment. *McNevin v. Lowe*, 40 Ill. 203; *Becker v. Janinaki*, 27 Abb. N. C. 43.

This New York case was not in the court of last resort, but an action against a charitable corporation organized for the treatment of the eye and ear, and also against one of its physicians, based on the negligence of the latter, was taken by the plaintiff on certain exceptions to evidence and instructions to the New York Court of Appeals, in which court no suggestion seems to have been made that the gratuitousness of his services would affect the question. *Doyle v. New York Eye & Ear Infirmary*, 30 N. Y. 631 (not reported in full).

Hospital surgeons giving their services gratuitously cannot be held liable, however, for the unskillful administration to a patient by nurses of a hot bath which they ordered, but which was administered in their absence. *Perionowsky v. Freeman*, 4 Post. & F. 977.

So one attempting to act as a veterinary surgeon is liable for gross negligence or gross ignorance although he acts without compensation; and an instruction that if he acts as a friend or otherwise without compensation he cannot be held liable was held erroneous. *Conver v. Winton*, 8 Ind. 315, 65 Am. Dec. 761.

But one who does not profess to be a physician or to practice as such, and is merely asked for advice as a friend or neighbor, does not incur any professional responsibility. *McNevin v. Lowe*, 40 Ill. 203.

Further illustrating this question is a decision that evidence that a physician has not asked for pay is immaterial in an action for malpractice. *Baird v. Gillett*, 47 N. Y. 186.

The admission of such evidence, however, is not error prejudicial to the plaintiff as it would raise an implication against the physician. *Jones v. Angell*, 65 Ind. 576.

B. A. R.

Bryant, Surgery, 8d Am. ed. 1881, p. 820.

The question as to when the amputation is to be performed must remain an open one for the consideration of the surgeon in each particular case.

Humuth, Surgery, 4th ed. 1887, §§ 276, 277.

Amputation is the opprobrium of surgery, and indeed the proposal to cut off a limb must be considered as an acknowledgment of failure on the part of the surgeon to effect a cure in any other way.

2 Franklin, Surgery, 1873, p. 765.

Delaying the operation was purely a matter of judgment.

The plaintiff was guilty of contributory negligence.

If the patient by refusing to adopt the remedies of the physician frustrates the latter's endeavors, or if he aggravates the case by his misconduct, he cannot charge to the physician the consequences due distinctively to himself.

Wharton, Neg. § 787; *McCandless v. McWha*, 22 Pa. 261, 25 Pa. 95.

A patient cannot recover either in contract or in tort for injuries consequent upon unskillful or negligent treatment by his physician if his own negligence directly contributed to them to an extent which cannot be distinguished and separated.

Hibbard v. Thompson, 109 Mass. 286; 2 Thompson, Neg. p. 1215.

The degree of the plaintiff's negligence is immaterial, and any degree of contributory negligence upon his part is a complete defense.

Shearm. & Redf. Neg. § 37; *Button v. Hudson River R. Co.* 18 N. Y. 248; *Curran v. Warren Chemical & Mfg. Co.* 36 N. Y. 153.

The existence of contributory negligence may be inferred from the circumstances of the case.

Wood v. Andes, 11 Hun, 548.

The greatest negligence on the part of the defendant will not cure the defect of the least negligence on the part of the plaintiff contributing to the injury.

Wilds v. Hudson River R. Co. 24 N. Y. 480.

It is the duty of the patient to co-operate with his professional adviser and to conform to the necessary prescriptions. No man may take advantage of his own wrong or charge his misfortune to the account of another.

2 Thompson, Neg. p. 1216; *Geiselman v. Scott*, 25 Ohio St. 86; *McCandless v. McWha*, 22 Pa. 261; *Haire v. Reese*, 7 Phila. 183.

As defendant treated the plaintiff gratuitously he is liable, if at all, only for gross negligence.

Shearm. & Redf. Neg. § 432.

Mearns, William D. Brinnier and S. T. Hull for respondent.

Haight, J., delivered the opinion of the court:

This action was brought to recover damages of the defendant, a physician and surgeon, for alleged malpractice suffered by the plaintiff while undergoing treatment as a patient. On the 1st day of December, 1889, the plaintiff undertook to jump onto an engine of the Ulster & Delaware Railroad, in the city of Kingston, and in doing so slipped, and his left foot was caught by the tender, and a portion thereof crushed. Being destitute, he was taken to the

city almshouse, where he was treated by the defendant, who was one of the city physicians having the care of the patients therein, and who was employed for that purpose. Thereafter, and on the 10th day of December, he amputated the plaintiff's leg above the ankle-joint, and six or seven days thereafter, gangrene having set in, he again amputated the leg, at the knee-joint. After the second amputation the leg did not properly heal, but became a running sore, and at the time of the trial the bone protruded some three or four inches. Evidence was given upon the trial from which the jury might find that the bones of the foot were so crushed that immediate amputation of the injured portions was necessary, and that the appearance of gangrene was in consequence of the delay of ten days in the operation; and that in the second operation the defendant neglected to save flap enough to cover the end of the limb and bone, and that the subsequent protrusion of the bone was owing to this neglect. The question of the defendant's liability consequently became one for the jury. We are aware that he claimed to have waited ten days before operating for the purpose of seeing whether the foot could not be saved, and that a physician and surgeon will not be held liable for mere errors in judgment. But his judgment must be founded upon his intelligence. He engages to bring to the treatment of his patient care, skill, and knowledge, and he should have known the probable consequences that would follow from the crushing of the bones and tissues of the foot.

In submitting the case to the jury, the defendant asked the court to charge that, "if the plaintiff did not obey the defendant's instructions, and this contributed to an aggravation of the injury, the plaintiff cannot recover." The court declined to charge in the form in which the request was put, and an exception was taken by the defendant. It appears from the testimony of the defendant that after the second amputation he dressed the stump, and put the plaintiff in position by elevating the limb so as to prevent hemorrhage, and too much pressure upon the arteries; that the plaintiff did not keep in the position in which he was placed, and got his leg to bleeding; and that he presumed that this bleeding interfered with the healing of the limb. It also appears that some time after the second amputation the plaintiff refused and neglected to take the medicine that was left for him by the defendant, and that subsequently, after the defendant had ordered him to be removed to another room, so as to avoid liability of contracting erysipelas from a patient that had been brought to the almshouse afflicted with that disease, he left and went away. While the removing of the limb from the position in which it was placed may have produced the bleeding, and thus to some extent impeded the healing, and his going away at the time that he did may also have further aggravated the difficulty, these facts would only tend to mitigate the damages, and would not relieve the defendant from the consequence of previous neglect or unskillful treatment. As to the prescription, we are not told what it was, or what it was for, and the jury was therefore unable to determine whether or not the condition of the

patient would have been materially changed by its use.

The request to charge, as we have seen, was to the effect that if the plaintiff did not obey the instructions, and this contributed in aggravation of the injury, the plaintiff cannot recover. This was too broad, if the jury found that the defendant was guilty of malpractice prior to the disobedience complained of. In the case of *Carpenter v. Blake*, 75 N. Y. 12, the court was requested to charge that, if the plaintiff was guilty of any negligence in the management of the arm, through or without the fault of the attending surgeon, after the defendant ceased to have charge of the case, and such negligence contributed in any material degree to produce the present bad condition of the arm, the defendant was not responsible. This request was refused, and it was held properly, for the reason that the request was too broad; that, if there had been subsequent negligence, the cause of action for defendant's negligence would simply go in mitigation of damages. In the case of *McCandless v. McWha*, 22 Pa. 261-272, Lewis, J., in delivering the opinion of the court, says: "A patient is bound to submit to such treatment as his surgeon prescribes, provided the treatment be such as a surgeon of ordinary skill would adopt or sanction: but, if it be painful, injurious, and unskillful, he is not bound to peril his health, and perhaps his life, by submission to it. It follows that before the surgeon can shift the responsibility from himself to the patient, on the ground that the latter did not submit to the course recommended, it must be shown that the prescriptions were proper, and adapted to the end in view. It is

incumbent on the surgeon to satisfy the jury on this point, and in doing so he has the right to call to his aid the science and experience of his professional brethren. It will not do to cover his own want of skill by raising a mist out of the refractory disposition of the patient."

The defendant moved to dismiss the complaint upon the ground that it failed to show a contract relation between the parties, whereby the defendant was employed to attend the plaintiff, and that no facts were alleged showing it to be the duty of the defendant to treat him in a skillful manner. This motion being denied, the defendant asked the court to charge that, as the defendant treated the plaintiff gratuitously, he is liable, if at all, only for gross negligence, which was refused. It has been held that the fact that a physician or surgeon renders services gratuitously does not affect his duty to exercise reasonable and ordinary care, skill, and diligence. *McCandless v. McWha*, 22 Pa. 261; *McNevin v. Lowe*, 40 Ill. 209; *Gladwell v. Steggall*, 5 Bing. N. C. 733. But we do not deem it necessary to consider or determine this question, for it appears that the plaintiff's services were not gratuitously rendered. He was employed by the city as one of the physicians to attend and treat the patients that should be sent to the almshouse. The fact that he was paid by the city instead of the plaintiff did not relieve him from the duty to exercise ordinary care and skill. Exceptions were taken to the admission and rejection of evidence. We have examined them, and find none that require a new trial.

The judgment should be affirmed, with costs.
All concur, except **Parker, J.**, not sitting.

OHIO SUPREME COURT.

Henry BLACKWELL, *Pff. in Err.*,

MIAMI VALLEY INSURANCE CO.

(.....Ohio St.....)

- *1. A provision in a policy of fire insurance, to the effect that a sale or transfer of the property insured shall forfeit the policy, does not become operative to avoid the policy, unless the entire interest of the assured in the property insured is sold or transferred.
2. If the property insured consists of the stock of goods of a merchant doing business alone, the taking in by him of a partner in the business is not such a sale or transfer by him of his entire interest in the property as will avoid the policy.
3. Where the policy has not been assigned or transferred, and the property thus insured is destroyed or damaged by fire after the partnership had been formed and had assumed the management of the busi-

ness, the assured may maintain an action on the policy in his own name to recover the damages sustained by him on account of the injury done to his share of the property.

(October 20, 1891.)

ERROR to the General Term of the Superior Court of Cincinnati to review a judgment affirming a judgment of the Special Term in favor of defendant in an action brought to recover the amount alleged to be due upon a policy of fire insurance, payment of which defendant resisted because of an alleged transfer of the property in violation of a provision in the policy. *Reversed.*

Statement by **Bradbury, J.**:

The plaintiff in error brought an action in the Superior Court of Cincinnati against the defendant in error, upon a policy of insurance issued by it to him upon a stock of dry-goods, notions, etc., owned by him in said city. The defendant admitted issuing the policy and the loss of the goods by fire, and set up, in bar of a recovery for the loss, that the policy contained a provision that it should become "null and void," if the property insured should be sold or transferred by the assured; and aver-

*Head notes by the Court.

NOTE.—For notes on effect of sale to forfeit insurance on property, see *Russell v. Cedar Rapids Ins. Co.* (Iowa) 4 L. R. A. 533, and *Coddington v. Fireman's Fund Ins. Co.* (Ky.) 9 L. R. A. 537.
14 L. R. A.

ring that, in violation of this condition, after the policy was issued, and before the fire, he sold and transferred the goods and business to a firm composed of himself and one Horman; and that at the time of the loss the goods were owned, and the business was conducted, by said firm, by which sale and transfer the policy became forfeited and void. The plaintiff interposed a demurrer to this defense, and upon its being overruled, declined to plead further, and suffered judgment to be entered against him. This judgment was affirmed by the superior court in general term; whereupon this proceeding was brought to reverse both judgments.

Mr. Joseph W. O'Hara, for plaintiff in error:

Any person who has an interest in property may insure the same, and this includes partners.

Wood, Fire Ins. §§ 257, 266, 267, 283, 287, 292, 306; *Conover v. Citizens Mut. Ins. Co.* 10 Cush. 87; *Manhattan Ins. Co. v. Webster*, 59 Pa. 227, 98 Am. Dec. 332.

This action is in the proper form.

Cowan v. Iowa State Ins. Co. 40 Iowa, 551, 20 Am. Rep. 583; *Seanton v. Union F. Ins. Co.* 4 Biss. 511; *West v. Citizens Ins. Co.* 27 Ohio St. 1, 22 Am. Rep. 294.

As long as the insured retains any interest in the property, he may recover to the extent of that interest.

Wood, Fire Ins. § 311; *Jackson v. Massachusetts Mut. F. Ins. Co.* 23 Pick. 418, 34 Am. Dec. 69; *Van Deusen v. Charter Oak F. & M. Ins. Co.* 1 Robt. (N. Y.) 55; *West Branch Ins. Co. v. Helfenstein*, 40 Pa. 289; *Gordon v. Massachusetts F. & M. Ins. Co.* 2 Pick. 249; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *Hobbs v. Memphis Ins. Co.* 1 Sneed, 444; *May, Ins. § 381*; *Phillips, Ins. § 208*.

The decisions turn upon the construction to be given to the language in the condition. In the case at bar the language is the broadest known to the law; in fact it is nothing more than a declaration of the undisputed principle that when the insured parts with all his interest in the property he cannot recover, nor can his assignee or transferee.

West v. Citizens Ins. Co. 27 Ohio St. 1, 22 Am. Rep. 294; *Dix v. Mercantile Ins. Co.* 23 Ill. 277; *Hartford F. Ins. Co. v. Ross*, 23 Ind. 179, 85 Am. Dec. 452.

If the assured still retains such an insurable interest in the property as that he sustains a loss by the fire, he can to the extent of that loss recover.

Stetson v. Massachusetts Mut. F. Ins. Co. 4 Mass. 330, 8 Am. Dec. 217.

We have been able to find only two cases where the language in the policy was exactly or substantially the same as in this, and they were both decided in favor of the insured.

Cowan v. Iowa State Ins. Co. 40 Iowa, 551, 20 Am. Rep. 583; *Seanton v. Union F. Ins. Co.* 4 Biss. 511.

In *Malley v. Atlantic F. & M. Ins. Co.* 51 Conn. 222, and *Drennen v. London Assur. Corp.* 20 Fed. Rep. 657, the language in the condition is as follows: "If the property be sold or transferred . . . or any change take

place in the title or possession, etc., the policy shall be void."

The distinction between these clauses is shown by *Hathaway v. State Ins. Co.* 64 Iowa, 229, 52 Am. Rep. 438.

Messrs. Ramsey, Maxwell & Ramsey for defendant in error.

Bradbury, J., delivered the opinion of the court:

The record in this case raises two questions, both of which must be determined in favor of the plaintiff in error to entitle him to relief: (1) Did the act of the assured, who before was a sole trader, in receiving a partner, constitute a sale and transfer of the insured property, within the meaning of the policy, and was the policy thereby rendered void? (2) If it was not such a sale as to render the policy void, may the plaintiff maintain an action on the policy in his own name to recover for the loss?

There is some conflict among the authorities upon the first question. It is discussed by May in his work on Insurance, and by the courts of a number of the states, notably in *Dix v. Mercantile Ins. Co.* 23 Ill. 272; *Finley v. Lycoming County Mut. Ins. Co.* 30 Pa. 311, 73 Am. Dec. 705; *Hartford F. Ins. Co. v. Ross*, 23 Ind. 179, 85 Am. Dec. 452; *West Massachusetts Ins. Co. v. Biker*, 10 Mich. 279; *Drennen v. London Assur. Corp.* 20 Fed. Rep. 657; *Malley v. Atlantic F. & M. Ins. Co.* 51 Conn. 222; *Seanton v. Union F. Ins. Co.* 4 Biss. 511; *Cowan v. Iowa State Ins. Co.* 40 Iowa, 551, 20 Am. Rep. 583; *Hathaway v. State Ins. Co.* 64 Iowa, 229, 52 Am. Rep. 438; *Keeler v. Niagara F. Ins. Co.* 16 Wis. 523, 84 Am. Dec. 714; *Wood v. Rutland & A. Mut. F. Ins. Co.* 31 Vt. 552.

An examination of the cases above cited will disclose that the conditions in the policies, where forfeiture for alienation was sustained, were materially different from the one involved in this action, except, perhaps, in the case in 30 Pa. 311, and that in 16 Wis. 523, where the language of the condition was very similar to that now under consideration. In the other cases sustaining the forfeiture, the condition contained a provision forfeiting the policy, not merely for a "sale or transfer" of the property, but in case of "a change of title" or the sale of "any undivided interest therein" (23 Ind. 179), in case of a "change of title" (10 Mich. 279), "or any change took place in the title or possession" (51 Conn. 222; 20 Fed. Rep. 657), and therefore they cannot be rightfully claimed as direct authorities for the insurance company in the case at bar. In the case in 40 Iowa, 551, the condition against alienation was very similar to those quoted above; but the Supreme Court of Iowa held "that nothing less than a sale of the entire interest of the party insured would defeat the policy." This doctrine was maintained by *Drummond, J.*, in 4 Biss. 511.

Heretofore this precise question has not been before this court, and in the conflict of authorities respecting it we feel at liberty to adopt that rule upon the subject which most nearly accords with the policy of our decisions and the presumed intention of the parties. It is the policy of this court to strictly construe those clauses in an insurance policy which forfeit the indemnity provided for the assured. *West v. Citizens Ins. Co.* 27 Ohio St. 1, 22 Am. Rep.

294. In this case, on page 10, Johnson, J., refers with approval and in the following language to the views on the subject contained on page 74 of May on Insurance: "Exceptions in a policy should be strictly construed, and, where there are two interpretations equally fair, that which gives the greater indemnity should prevail." And on page 18 (27 Ohio St.) the same learned jurist says: "Stipulations in a contract providing for disabilities or forfeitures are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced." Let us recur to the exact words of forfeiture as they are set forth in the defendant's answer: "If . . . said assured should sell or transfer the property thereby insured, that said policy should become null and void." It was competent for the policy to provide, expressly, that a sale of a part of the property or of an interest therein should avoid the policy. This they did not do. The absence of a specific provision to that effect, when it could have been so easily inserted, together with the rule before referred to, that conditions which defeat a policy should be construed strictly against the forfeiture, leads us to hold that a sale of the entire interest of the party insured was necessary to avoid the policy. In a strict legal sense, perhaps, wherever one engaged in business alone takes a partner into his business, or a firm receives a new member, or a member goes out, the transaction results in the formation of a new concern, accompanied by a sale and transfer of all the property of the old establishment to the new one; but it is at least doubtful whether this strict legal result is contemplated by the business world generally. That the parties in the case before us intended the policy should be avoided in case the assured received a partner into his business is uncertain. That the plaintiff understood the transaction to be a sale of an undivided half of the property and business to Horman, rather than a sale of the whole of it to a firm composed of himself and Horman, is quite probable. It was competent for the parties to provide in unambig-

uous terms that, if the assured received into the business, without the consent of the insurer, a partner, the policy should become void. This was not done, and we think the principles already announced require us to hold that the sale and transfer resulting from the reception of a partner did not avoid the policy. Notwithstanding the transaction, the plaintiff retained a substantial and insurable interest in the property covered by the policy, while, to avoid the policy on account of the provision against alienation, it should have divested him of his entire interest.

The defendant contends that this construction disregards the rule that, in construing an instrument, effect should be given to all its parts; and that to hold that the plaintiff must divest himself of his entire interest to avoid the policy renders the provision against alienation nugatory, because, if the policy contained no such provision, yet he could not recover for a loss that occurred after he had sold his entire interest, as in that event he suffered no injury, and the contract of insurance is one of indemnity. Whether the construction we have adopted renders the provision against alienation nugatory or not, or whether circumstances may not arise under which it might be operative, we do not deem it necessary to inquire, for the rule thus urged upon our consideration is only one of many rules applied by courts to ascertain the meaning of the words adopted by parties to express their intentions, and in many instances it readily yields to other rules of construction, as we think it should in the case now under consideration.

The remaining question presents no difficulty. Section 4993, Rev. Stat., requires an action to be brought in the name of the real party in interest. Here the plaintiff alone is interested in the policy of insurance set forth by him in his petition; the contract it contains is to indemnify him; he can recover, of course, only to the extent he has been damaged; but, as no question is before us as to its proper measure, it will not receive consideration.

Judgment reversed.

RHODE ISLAND SUPREME COURT.

William L. BALLOU

v.

William H. EARLE *et al.*

(..... R. I.)

1. A shipper is presumed to know and assent to the terms of an express company's receipt which is given him for goods,

especially where those terms are made prominent and noticeable and a book of such blank receipts is in his own possession.

2. A contract limiting the amount of liability of a common carrier for loss of goods carried, even if the loss is due to negligence, is not contrary to public policy

(July 25, 1891.)

NOTE.—Carrier's power to limit amount of liability in cases of negligence.

According to the decided weight of modern authority, a valid contract limiting the liability of a carrier to a certain agreed valuation of the property carried may be made where it is just and reasonable in its terms and a reduced rate of freight is made the consideration for it. *Richmond & D. R. Co. v. Payne* (Va.) 8 L. R. A. 849; *Railway Co. v. Manchester Mills*, 38 Tenn. 653; *Louisville & N. R. Co. v. Sherrod*, 24 Ala. 124; *Hart v. Pennsylvania* S. 381, 23 L. ed. 717; *Brown v. Quard*

S. S. Co. 6 New Eng. Rep. 238, 147 Mass. 58; *Belger v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575; *Brown v. Wabash*, St. L. & P. R. Co. 13 Mo. App. 568; *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397; *St. Louis, I. M. & S. R. Co. v. Lesser*, 46 Ark. 236; *Squire v. New York Cent. R. Co.* 98 Mass. 230, 36 Am. Dec. 162; *Earnest v. Southern Exp. Co.* 1 Woods, 573; *Muser v. Holland*, 17 Blatchf. 412; *Muser v. American Exp. Co.* 1 Fed. Rep. 382; *Zimmer v. New York Cent. & H. R. Co.* 42 N. Y. S. 2. 62; *Stears v. Liverpool, N. Y. & P. S. S. Co.* 57 N. Y. 1, 15 Am. Rep. 453; *Nicholson v. Willan*, 5 East, 507; *Izett v.*

ACTION to recover from defendants, doing business as the Earle & Prew Express Company, the value of a package delivered to them by plaintiff and lost through their negligence. Judgment for plaintiff for amount limited by the carriage contract.

The facts are stated in the opinion.

Messrs. Stephen A. Cooke, Jr., and Louis L. Angell for plaintiff.

Mr. Arnold Green, for defendants:

By accepting the signed receipt the plaintiff bound himself to its terms and assented to them.

Burke v. South-Eastern R. Co. L. R. 5 C. P. Div. 1; *Harris v. Great Western R. Co.* L. R. 1 Q. B. Div. 515; *Steers v. Liverpool N. Y. & P. S. S. Co.* 57 N. Y. 1, 15 Am. Rep. 458; *Germania F. Ins. Co. v. Memphis & C. R. Co.* 72 N. Y. 90, 28 Am. Rep. 113; *Hill v. Syracuse R. & N. Y. R. Co.* 73 N. Y. 351, 29 Am. Rep. 168; *Grace v. Adams*, 100 Mass. 505, 1 Am. Rep. 131, 97 Am. Dec. 117; *Monitor Mut. F. Ins. Co. v. Buffum*, 115 Mass. 348; *Quimby v. Boston & M. R. Co.* 5 L. R. A. 846, 150 Mass. 365.

The defendants were entitled to contract in limitation of their common-law liability. This right of limitation is now everywhere recognized.

Hutchinson, Carriers, § 119.

This right of limitation extends to negligence also, and to the right of contract for a measure of damages in fixing the value of the goods bailed to the defendants as bailees and carriers.

Hart v. Pennsylvania R. Co. 112 U. S. 831, 28 L. ed. 717.

The amount of \$50 named in the contract binds the plaintiff.

Belger v. Dinamore, 51 N. Y. 166, 10 Am. Rep. 675; *Hart v. Pennsylvania R. Co.* 112

U. S. 331, 28 L. ed. 717; *Squire v. New York Cent. R. Co.* 93 Mass. 289, 245, 93 Am. Dec. 157; *Oppenheimer v. United States Exp. Co.* 69 Ill. 62, 18 Am. Rep. 596; *Kallman v. United States Exp. Co.* 3 Kan. 205; *Brehme v. Adams Exp. Co.* 25 Md. 328; *Snider v. Adams Exp. Co.* 63 Mo. 376; *Levy v. Southern Exp. Co.* 4 S. C. 234; *Boorman v. American Exp. Co.* 21 Wis. 154.

This is emphasized by the fact that the bailor commits a fraud on the bailee carrier by failure to disclose the real value of a package delivered for transportation. Valuable packages require special care in guarding them and costly precaution in carriage and "the compensation for carriage is based on the value."

Hart v. Pennsylvania R. Co. 112 U. S. 831, 340, 341, 28 L. ed. 717, 721; *Oppenheimer v. United States Exp. Co.* 69 Ill. 62, 18 Am. Rep. 596; *Gibson v. Paynton*, 4 Burr. 2296; *Bateson v. Donovan*, 4 Barn. & Ald. 21; *Hutchinson, Carriers*, §§ 218, 214.

Tillinghast, J., delivered the opinion of the court:

This is assumpsit to recover the sum of \$579, being the value of a box of diamonds which the plaintiff delivered to the servant and agent of the defendants to be by them transported by express to New Bedford, in the State of Massachusetts. Jury trial is waived, and the case is to be tried to the court on the law and the facts. The defendants, who are common carriers of merchandise for hire, received from the plaintiff at Providence, on the 26th day of July, 1890, a package containing diamonds of the value aforesaid, to be by them delivered to O. W. Haskins, at New Bedford, Mass. The plaintiff had, and for a considerable time previous to the above-named date had had, in his possession and constant use a book of the de-

Mountain, 4 East, 371; *Clay v. Willan*, 1 H. Bl. 236; *M'Cance v. London & N. W. R. Co.* 7 Hurlst. & N. 477; *Kallman v. United States Exp. Co.* 3 Kan. 205.

On the contrary some cases hold that such a contract is invalid on grounds of public policy so far as it applies to negligence of the carrier. *Grogan v. Adams Exp. Co.* 5 Cent. Rep. 298, 114 Pa. 523, 60 Am. Rep. 360; *American Exp. Co. v. Sands*, 55 Pa. 140; *Farnum v. Camden & A. R. Co.* 55 Pa. 53; *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300; *St. Louis, A. & T. R. Co. v. Robbins* (Tex. App.) Dec. 14, 1899; *The City of Norwich*, 4 Ben. 271.

In other cases which also deny the validity of such contracts the limitation did not purport to be based on the value of the property. *Moulton v. St. Paul, M. & M. R. Co.* 31 Minn. 85, 47 Am. Rep. 731; *Southern Exp. Co. v. Moon*, 39 Miss. 822; *Chicago, St. L. & N. O. R. Co. v. Abels*, 60 Miss. 1017; *Railway Co. v. Wynn*, 86 Tenn. 320; *Georgia Pac. R. Co. v. Hughart*, 90 Ala. 36; *Levy v. Southern Exp. Co.* 4 S. C. 234.

So an amount inserted in a bill of lading by the carrier's agent without any questions as to the value of the property and without notice to the shipper of any difference in rates in case of such limitation was held not to limit the carrier's liability. *Chicago & N. W. Co. v. Chapman*, 8 L. R. A. 566, 136 Ill. 46.

Still other cases deny the validity of such limitation where the value is obviously greater than the amount fixed. *Kansas City, St. J. & C. E. R. Co. v. Simpson*, 30 Kan. 645, 46 Am. Rep. 106; *United States Exp. Co. v. Bhakman*, 30 Ohio St. 124; *Beck v. Evans*, 16 East, 243, 14 L. R. A.

And a stipulation limiting the amount of liability did not prevent recovery for the full value in case of loss by negligence where the shipper refused to state the value, although a larger charge would have been made if he had stated it. *Conover v. Pacific Exp. Co.* 40 Mo. App. 31.

That a fair bona fide valuation of goods as a basis for the charges of a carrier is binding on the shipper is decided in many cases and no case to the contrary has been found. *Newburger v. Howard & Co's Exp.* 6 Phila. 174; *South & N. Alabama R. Co. v. Henlein*, 52 Ala. 606, 28 Am. Rep. 573; *Durgin v. American Exp. Co.* (N. H.) 9 L. R. A. 458; *Louisville & N. R. Co. v. Oden*, 80 Ala. 33; *Hill v. Boston, H. T. & W. R. Co.* 3 New Eng. Rep. 216, 144 Mass. 224; *Harvey v. Terre Haute & I. R. Co.* 74 Mo. 538; *Graves v. Lake Shore & M. S. R. Co.* 137 Mass. 33, 50 Am. Rep. 222.

A consideration such as a reduction of rates or some other advantage or benefit is necessary to support a special agreement limiting the amount of liability in case of negligence. *Doan v. St. Louis, K. & N. W. R. Co.* 38 Mo. App. 406; *Adams Exp. Co. v. Harris*, 120 Ind. 72; *McFadden v. Missouri Pac. R. Co.* 10 West. Rep. 372, 92 Mo. 393.

An arbitrary valuation put upon goods by the carrier without any request or any valuable consideration will not be binding on the shipper. *Rosenfeld v. Peoria, D. & E. R. Co.* 1 West. Rep. 150, 106 Ind. 121, 53 Am. Rep. 589.

There must not be an unreasonable difference between the charges made with and without the limitation of liability. *Harrison v. London, B. & S. C. R. Co.* 3 Best & S. 122.

lants' contract receipt blanks, at the top of a page of which was printed what purports to be a mutual agreement between the shipper and the common carrier, which agreement, in so far as it is material for our present consideration, provides that the defendants "are not to be held liable or responsible for any loss or damage to said property . . . unless in any case the same be proved to have occurred through the fraud or gross negligence of said express company, or their servants; nor in any case shall the holder hereof demand beyond the sum of \$50, at which the article forwarded thereby valued, unless otherwise herein expressed or unless especially insured by them as so specified in this receipt, which insurance shall constitute the limit of the liability of the & Prew's Express." One of these blanks the plaintiff filled out for the addressed package in question, but gave no value thereof, although there was a blank column in said receipt marked "value." This receipt was signed by the defendants' agent when the plaintiff presented the package to the agent. The defendants had no knowledge of the contents or value of said package except as stated in said receipt at the time of its delivery to them, nor did they make any inquiry of the plaintiff concerning the same. This package was lost by the negligence of the defendants' servant before it reached their office, and said defendants disavow their liability therefor under said agreement, and offer to pay the said sum of \$50, which, they contend, is the limit of their liability. The plaintiff testifies that his reason for giving any value to the package was because the expressage was to be paid by the consignee. The defendants, on the other hand, deny that the reasons given them by the plaintiff for not giving any value to the pack-

age in said receipt were that it cost more money, and that the consignee had previously complained of the charges of expressage in cases where the values had been given, and that he adopted this mode to lessen said charges.

We think it is very evident that the purpose of the plaintiff in not giving any value to the package was to save, either to himself or to the consignee, and it matters not which, the additional expressage which would have been charged by the defendants if the real value had been given; for it must be presumed from the terms of the receipt that, as the defendants assume a liability only to the extent of the valuation therein named, the rate of expressage is graduated by said valuation. Under this state of facts the plaintiff's final contention, which logically should be the first, and hence we will consider it first, is that the express assent of the owner of the goods to the restrictions of the carrier's liability must be found to give effect to it in any case. We think the decided preponderance of the authorities is to the contrary; and that the well settled rule now is that in the absence of fraud, concealment, or improper practice the legal presumption is that stipulations limiting the common-law liability of common carriers contained in a receipt given by them for freight were known and assented to by the party receiving it. *Belger v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575; *Steers v. Liverpool, N. Y. & P. S. S. Co.* 51 N. Y. 1, 15 Am. Rep. 453; *Harris v. Great Western R. Co.* L. R. 1 Q. B. Div. 515; *Germania F. Ins. Co. v. Memphis & C. R. Co.* 72 N. Y. 90, 28 Am. Rep. 113; *Quimby v. Boston & M. R. Co.* 150 Mass. 865, 5 L. R. A. 846; *Burke v. South-Eastern R. Co.* L. R. 5 C. P. Div. 1; *Maghee v. Camden & A. R. Transp. Co.* 45 N.

limitation of the recovery to the amount of the loss or declared value of the goods is reasonable and may be enforced although the loss was occasioned by negligence. *The Lydian Monarch*, 23 Rep. 208; *The Hadji*, 16 Fed. Rep. 429.

It is an arbitrary limitation of the amount of liability which is not made with reference to the actual value of the property is not valid in case of the negligence of the carrier. *Moulton v. St. M. & M. R. Co.* 31 Minn. 85, 47 Am. Rep. 781; *Gia Pac. R. Co. v. Hughart*, 90 Ala. 36; *Levy v. Northern Exp. Co.* 4 S. C. 234.

A general provision limiting the amount of recovery will not apply in case of the negligence of the carrier where the amount is not fixed with reference to the value of the property. *Adams Exp. Co. v. Stettin*, 61 Ill. 184, 14 Am. Rep. 87; *Alabama G. & S. R. Co. v. Little*, 71 Ala. 611; *Mobile & O. R. Co. v. Hopkins*, 41 Ala. 498; *Orndorff v. Adams Exp. Co.* 3 Bush. 194, 96 Am. Dec. 207; *Kirby v. Adams Exp. Co.* 2 Mo. App. 399.

A value voluntarily fixed by the shipper without the carrier's knowledge that the property was of greater value will be binding where the contract provides for the recovery to the sum agreed upon. *Hart v. Terre Haute & I. R. Co.* 74 Mo. 698; *Rosen v. Peoria, D. & E. R. Co.* 1 West. Rep. 150, 108 Ill. 61, 35 Am. Rep. 500.

A general limitation of the amount of liability to the value of the goods is stated in valid contracts where the shipper undertakes to send articles of greater value without notice to the carrier. *Neubauer v. United States Exp. Co.* 69 Ill. 62, 1 Rep. 606; *Brehme v. Adams Exp. Co.* 25 Md. R. A.

328; *Magnin v. Dinsmore*, 62 N. Y. 35, 20 Am. Rep. 442.

And a carrier may contract for exemption from liability for freight beyond a stipulated sum unless its just and true value is stated. *Boorman v. American Exp. Co.* 21 Wis. 184.

General words limiting the amount of liability will not extend to losses occasioned by negligence. Such a limitation as to negligence must be clear and explicit. *Black v. Goodrich Transp. Co.* 55 Wis. 319, 42 Am. Rep. 713; *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300.

A limitation of amount of liability is valid also in respect to baggage where extra compensation is required for greater value. *New York Cent. & H. R. R. Co. v. Fraloff*, 100 U. S. 24, 25 L. ed. 531; *Hopkins v. Westcott*, 6 Blatch. 64.

Limiting the amount of recovery for wearing apparel to \$100 in case of the loss of baggage is invalid under Iowa Code, §§ 1808, 2184. *Davis v. Chicago, R. I. & P. R. Co.* (Iowa) June 1, 1891.

A contract limiting the liability of a carrier to an amount less than the actual value of the property carried is invalid where a statute prohibits contracts exempting a carrier from the liability which would exist without a contract. *Hart v. Chicago & N. W. R. Co.* 69 Iowa. 485.

Limitation of a carrier's liability for goods lost in transportation to the value at the place of shipment is invalid under the Texas statute. *Gulf, C. & S. F. R. Co. v. Borton* (Tex. App.) March 18, 1891; *Taylor, B. & H. R. Co. v. Montgomery* (Tex. App.) April 29, 1891; *Taylor, B. & H. R. Co. v. Sublett* (Tex. App.) April 29, 1891.

B. A. R.

Y. 514, 6 Am. Rep. 124; *Grace v. Adams*, 100 Mass. 505, 1 Am. Rep. 181, 97 Am. Dec. 117; *Monitor Mut. F. Ins. Co. v. Buffum*, 115 Mass. 343; *Hill v. Syracuse, B. & N. Y. R. Co.* 73 N. Y. 851, 29 Am. Rep. 163.

For a full discussion of the contrary doctrine, see *Hollister v. Noulén*, 19 Wend. 234, 82 Am. Dec. 455, and cases cited. In the case at bar a printed *fac simile* of the receipt in question is before us, which shows that the terms and conditions upon which the defendants received the goods in question must have been well known to the plaintiff. And more especially is this to be taken for granted from the fact that a book of the defendants, filled with receipt blanks identical with this, was in the plaintiff's possession, and in almost daily use by him. From an examination of said *fac simile* it is evident that there was not only no attempt to conceal the terms and conditions of the bailment on the part of the defendants, but, on the other hand, that it had been their purpose to make the same specially prominent and noticeable. It is all printed on one side of the paper, and at the top thereof. It is headed by the caution, printed in bold type, "Read the Conditions of this Receipt," and all the printed matter precedes the signature of the agent of the defendants. We think, therefore, that the receipt in question ought to be regarded as having received the assent of the plaintiff, and as being, as its language purports, the mutual agreement of the parties touching the package in question.

Having found, then, that there was an agreement between the parties as to the limit of the defendants' liability in case of loss, we come to the main question in the case, viz., was said agreement valid and binding upon the parties thereto? or, to state the question more broadly, To what extent is a common carrier entitled to contract in limitation of his common-law liability? This is a question, in so far as it applies to carriers by land, upon which there has been great contrariety of opinion in different courts, the earlier cases holding that it was against public policy, and hence impossible, for common carriers to guard themselves by any stipulations whatever against liability from loss arising from any other cause than the act of God or the public enemy. This question is discussed in *Edwards on Bailments*, (section 552, and cases cited in note 5,) while the later cases have materially modified this rule in the carrier's favor, and permitted him not only to contract so as to change the extent of his liability as fixed by the common law, but such contracts, when made with his employer, became almost entirely the measure of his responsibility. "And this custom," says *Hutchinson on Carriers*, (§ 119), "has become so universal in transactions with carriers that his liability may now be said to depend almost exclusively upon contract. He still stands, however, in the relation of common carrier to the goods entrusted to him, notwithstanding his contract, however much it may lessen his common-law liability, and he cannot, even by the most express contract, divest himself of that character, and change it to that of a mere private carrier or ordinary bailee." *Dickson v. Graham*, 2 Ohio St. 181, 140; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 567, 21 L.

ed. 627; *Hooper v. Wells, Fargo & Co.* 37 Cal. 11, 85 Am. Dec. 211; *Christenson v. American Exp. Co.* 15 Minn. 270 (Gil. 208), 2 Am. Rep. 122; *Bank of Kentucky v. Adams Exp. Co.* 38 U. S. 174, 180, 23 L. ed. 874, 875; *Kirby v. Adams Exp. Co.* 2 Mo. App. 369. But see *American Exp. Co. v. Sands*, 55 Pa. 140; *Grogan v. Adams Exp. Co.* 114 Pa. 523, 5 Cent. Rep. 298, 60 Am. Rep. 360. Without attempting a review of the conflicting authorities upon the question before us, which would answer no useful purpose here, we will only say that upon an examination thereof we have come to the conclusion that the decided weight of the authorities, as well as the better reason, favors the rule that a common carrier may, to a great extent at least, contract in limitation of his common-law liability, "provided," as stated in *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 264, 23 L. ed. 556, "the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy." The shipper and the common carrier are thus authorized to enter into an express agreement, within certain limits, as to the terms upon which the latter will transport and convey for the former a certain article of personal property of an agreed value to a designated place for an agreed price. We fail to see that the recognition of the validity of such an agreement is violative of any sound rule of public policy. Indeed, it seems to us that public policy requires the upholding of such an agreement as tending to the honest disclosure of value on the part of the shipper, and the exercise of that degree of diligence on the part of the carrier which is commensurate with the value of the particular article conveyed, and the price paid for such conveyance. To illustrate. A. has a box of tinware of the value of five dollars, which he wishes to send to Boston by B., a common carrier. The box is delivered to B. under an agreement similar to the one before us, no information being given as to the contents of said box. What is the degree of care which B. is expected to exercise in the transportation of this box? Manifestly that degree of care which is commensurate with a box whose value does not exceed that stipulated in the contract, to wit, \$50. B's maximum liability in case of loss being known to him beforehand, he will naturally exercise such a degree of care as would ordinarily insure the safe delivery at its destination of an article of this value. Moreover, he is only paid for assuming a risk to the extent of \$50, and he has graduated his charge for carriage accordingly. Such an agreement certainly strikes one as eminently fair and reasonable. Neither party is deceived or misled thereby. The shipper on the one hand is insured of the safe delivery of his goods at their destination, or their value in money, in case of loss, and the carrier, on the other hand, proportions his care to the liability which he has assumed. Both parties thus act understandingly and intelligently. There is little opportunity for fraud on the part of the shipper, and none for overcharge on the part of the carrier. To illustrate again: A. wishes to send a box of diamonds, valued at \$500, to Boston, Mass., and employs B., a common carrier, to transport the same thence under an express agree-

ment which stipulates, among other things, that the value thereof is \$50, the charge for expressage being based upon that valuation. As in the former case, B. assumes, and has the right to assume, that the value of this package does not exceed the sum of \$50, and he therefore proportions his care accordingly. The package is lost by B., whereupon A. seeks to hold him liable for the actual value of said package, which was many times larger than that agreed upon. B. was only paid for the care and transportation of a package of the value of \$50, and the degree of care which he used was sufficient for a transaction of that sort, while it was quite insufficient for a transaction of the sort which he was induced by misrepresentation on the part of A. to undertake. Had he been apprised of the actual value of this package, he would have exercised that degree of care which was commensurate therewith, and would also have graduated his charge accordingly. To allow A. to repudiate his contract with B. in case of loss, and hold the latter to his strict common-law liability, under the circumstances, is little less than to permit him to perpetrate a fraud under the guise of enforcing a legal right.

If this illustration fairly represents the case at bar, and it seems to us that it does, it shows the unreasonableness and injustice of the rule of liability contended for by the plaintiff. But the main contention of the plaintiff is that an express company cannot limit its liability for loss of goods occasioned by its own negligence, and in support thereof he cites the following cases, viz.: *Grogan v. Adams Exp. Co.* 114 Pa. 523, 5 Cent. Rep. 298; *Brown v. Adams Exp. Co.* 15 W. Va. 812; *Martin v. Baltimore & O. R. Co.* 14 W. Va. 180, 191, 35 Am. Rep. 748; *Newborn v. Just*, 2 Car. & P. 76; *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 344, 12 L. ed. 465; *Snider v. Adams Exp. Co.* 63 Mo. 376, 383; *Union Exp. Co. v. Graham*, 26 Ohio St. 595, 598; *Michigan Cent. R. Co. v. Hale*, 6 Mich. 243; *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760; *Graham v. Davis*, 4 Ohio St. 363, 63 Am. Dec. 285; *Muser v. American Exp. Co.* 1 Fed. Rep. 383; *Southern Exp. Co. v. Seide*, 67 Miss. 609.

These cases undoubtedly sustain the position of the plaintiff in this respect, and we are not only not disposed to question their authority upon this point, but to agree entirely therewith. We do not think that it is competent for a common carrier to stipulate for exemption from loss occasioned by his own negligence or that of his servants. Such an exemption is not just and reasonable in the eye of the law. Nor is it necessary for us to so hold in order to sustain the contract under consideration; for, as stated by Blatchford, J., in *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 340, 28 L. ed. 717, 721, "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carriers the measure of care due to the value agreed on. The carrier is bound to respond in that value for any negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purposes

of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing, and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." The case from which we have thus quoted was one in which the loss happened from the negligence of the defendant. The court had previously declared in the same case (page 388) that "It is the law of this court that a common carrier may by special contract limit his common-law liability; but he cannot stipulate for exemption from the consequences of his own negligence, or that of his servants," thus expressly affirming the doctrine previously laid down by that learned court in *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 344, 12 L. ed. 465; *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 264, 22 L. ed. 556; *Opdensburgh & L. O. R. Co. v. Pratt*, 89 U. S. 23 Wall. 123, 23 L. ed. 827; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 872; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. ed. 585.

But although the loss did occur from the negligence of the defendant, the court upheld the agreement as to the value of the property on the ground, as forcibly stated in the opinion, that there is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. "The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract." The rule laid down in *Grogan v. Adams Exp. Co.*, 114 Pa. 523, 5 Cent. Rep. 298, 60 Am. Rep. 360, a case much relied on by the plaintiff, that "an express company cannot by special contract or special acceptance limit its liability for loss of goods, resulting from the negligence of the company or its servants," is not in conflict with the case just quoted from upon this point, and, with all due respect to the learned court which rendered this decision, we think that it misapprehended the decision in *Hart v. Railroad Co.*, *supra*, in declaring that that case had decided that a common carrier could limit its liability even as against

its own negligence. The real distinction between these two cases, as it seems to us, is not in the rule adopted by each, but in the application thereof. In the *Grogan Case* the court holds that an agreement as to value in case of loss by negligence is not binding on the parties, on the ground, as we understand the decision, that to hold the contrary would be to uphold the carrier in stipulating against his own negligence, although it holds at the same time that an agreement as to value "would be a protection against liability beyond that amount except for negligence." In this respect the court followed the case of *American Exp. Co. v. Sands*, 55 Pa. 140, and *Farnham v. Camden & A. R. Co.* Id. 53; that is to say, these cases hold that an agreement as to value in case of loss is valid and binding, excepting only where the loss is occasioned by the negligence of the common carrier or his servant; while in the *Hart Case*, before referred to, the court holds that the agreement as to value is

also valid and binding where the loss is occasioned by the negligence of the common carrier, and that so to hold "has no tendency to exempt from liability for negligence." The reasoning in the last-named case is cogent and convincing, and we are disposed to adopt the same in preference to the authorities which hold to the contrary. See also *Oppenheimer v. United States Exp. Co.* 69 Ill. 62, 18 Am. Rep. 596; *Kallman v. United States Exp. Co.* 3 Kan. 205; *Brehme v. Adams Exp. Co.* 25 Md. 328; *Snider v. Adams Exp. Co.* 63 Mo. 376; *Levy v. Southern Exp. Co.* 4 S. C. 284; *Boorman v. American Exp. Co.* 21 Wis. 154.

We therefore decide that it was competent for the parties to agree as to the value of the package in question in case of loss by negligence, and that, having thus agreed they are bound thereby.

Judgment must therefore be entered for the plaintiff for the sum of \$60.

GEORGIA SPECIAL JUDICIAL COMMISSION

WESTERN & ATLANTIC R. CO.

STATE OF GEORGIA.

(.....Ga.....)

***1. Trade fixtures.** In 1870 the State of Georgia leased the Western & Atlantic Railroad, being the property of the State, to a certain lessee known as the Western & Atlantic Railroad Company for the period of twenty years. The Act providing for the lease required the lessee to return the road in "as good condition" as when it was received. *Held*, that at the expiration of the lease the lessee was not entitled, under the rule of trade fixtures as between landlord and tenant, to remove new side tracks and erections of various sorts which the lessee had built upon the line of the road, nor to remove steel rails and other improved appliances which the lessee had put upon the road, and substitute rails and appliances similar in character to those in use in 1870.

2. Public obligations of railroad companies. The public obligations resting upon the lessee as a common carrier of freight and passengers are inconsistent with the exercise of such right of removal and substitution.

3. Tests of removability of fixtures. The intention of the parties in the annexation of fixtures to the leased property, the injury to the latter which would result from the removal, the similarity in the character of the annexations to the *res principalis*, and the readiness with which they went with it, - discussed as tests of the removability of trade fixtures.

4. Taxes as between lessor and lessee. The contract being silent, the lessor is liable for taxes imposed upon the leased property in another State, although at the time of the lease such other State did not tax such property; but where the lessee for nine years after the imposition of such tax, and under a system of tax-

ation which required a return to be made by the lessee, paid the taxes without demanding reimbursement or deducting from the rental, such payments must be deemed voluntary as between the lessor and lessee and cannot be recovered back.

5. Statutes permitting suits against State. Such statutes must be strictly construed. Party suing thereunder must comply strictly with terms of Act.

6. Public history of legislation. The history of the times when an Act was passed may be looked to, in aid of its proper construction.

7. Legal and equitable rights. Under an Act submitting to a commission or court the "legal rights" of the parties, claims alleged to rest upon "equity and good conscience," but not shown to be recognized by any established doctrine of equity jurisprudence, cannot be considered.

8. Interest against sovereign. Where a State permits itself to be sued, it is not liable for interest upon the demand set up, unless the statute specifically so provides.

9. Limitations in favor of sovereign. Where a State permits itself to be sued and thus creates a right of action which the plaintiff could not previously assert, the plaintiff's right is not subject to be barred by time which has elapsed between the origin of his claim and the Act permitting the suit.

10. The words "public burdens" used in a statute of a State, are construed to mean taxes of that State and not to embrace taxes in another State upon continuous property extending into such other State.

(May 23, 1891.)

PROCEEDING before a special commission to recover sums alleged to be due to plaintiff by the State for property belonging to plaintiff and delivered under compulsion to the State upon the surrender of a railroad which

*Head notes by BILL, Commissioner.

NOTE.—The elaborate briefs on the subject of trade fixtures, given in the report of the above case, leave little chance for annotation.

See also, on the question of the right of a tenant 14 L. R. A.

to remove trade fixtures, *Collamore v. Gillis*, 5 L. R. A. 150, and note, 149 Mass. 596; *Overman v. Foster*, 10 L. R. A. 722, 107 N. C. 622.

plaintiff has leased from the State, and also on account of taxes on the property which plaintiff had been compelled to pay. A portion of the claim for taxes allowed.

The facts are fully stated in the opinion.

Mr. Julius L. Brown, for plaintiff:

It was the landlord's duty, among other things, (1) to pay all taxes due and to become due upon his estate, and (2) as declared in Code of 1878, § 2284: "The landlord must keep the premises in repair, and is liable for all substantial improvements placed there by his consent."

Driver v. Maxwell, 56 Ga. 14.

Whether this be a technical lease or not, the State was liable for repairs.

Center v. Davis, 39 Ga. 222; *Meyers v. Myrell*, 57 Ga. 516; *Vason v. Augusta*, 88 Ga. 542; *White v. Montgomery*, 58 Ga. 207.

Under the old law "whatever is affixed to the realty is thereby made parcel of it and partakes of all its incidents and properties."

Grady, Fixtures, 2; *Co. Litt. Lib. 1*, chap. 7, §§ 58a, 67; *Herlakenden's Case*, cited in 4 Coke, 62; *Coke*, Abr. 114.

The old law was so utterly at variance with the principles of common honesty, equity and of justice, that the courts began to make inroads upon the doctrine of the old law, and to build upon it and adapt it to the more enlightened business methods and consciences of the day, so that the present law of fixtures has grown up by judicial legislation.

2 Kent, Com. 7th ed., 402; *McAdam, Landlord & Tenant*, p. 223 et seq.

A fixture is defined, by a late authority, to be "an article which was a chattel, but which, by being physically annexed or affixed to the realty by someone having an interest in the soil, becomes a part and parcel of it. The annexation may be actual or constructive. Removable fixtures are those which the persons annexing them to the freehold may legally remove against the will of the owner of the land."

8 Am. & Eng. Encyclop. Law, 41.

In order to make a thing a part of the realty by merely annexing, it is necessary that both the thing and the soil to which it is attached should belong to the same owner.

McCall v. Walter, 71 Ga. 289; *Herman, Chat. Mort.* § 9.

A still in Tennessee has been held to be removable.

Pilow v. Love, 5 Hayw. 109.

In this case we have to deal only with fixtures as between landlord and tenant, and primarily with trade fixtures.

In 8 Am. & Eng. Encyclop. Law, 43, it is said: "In order to ascertain whether or not a particular thing is a fixture, it is necessary to apply certain rules which can be reduced to three, which require that the articles under consideration shall be: (1) actually annexed to the realty, or to something appurtenant thereto; (2) appropriate to the use or purpose of that part of the realty with which it is connected; (3) intended by the party making the annexation to be a permanent accession to the freehold, and what that intention was in making the annexation is inferred from the following facts: (a) the nature of the article annexed; (b) the relation of the party making the

annexation; (c) the structure and mode of annexation; (d) the purpose, or use, for which the annexation has been made."

Many cases hold that the intention of the party making the annexation is the chief element to be considered in determining what are fixtures.

8 Am. & Eng. Encyclop. Law, 44, note; *Hill v. Sevard*, 53 Pa. 271, 91 Am. Dec. 209; *Seeger v. Pettit*, 77 Pa. 437, 18 Am. Rep. 452; *McDavid v. Wood*, 5 Heisk. 95; *Perkins v. Swanek*, 43 Miss. 349; *Allen v. Mooney*, 130 Mass. 155; *Ottumwa W. M. Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *Jones v. Ramsey*, 3 Ill. App. 303; *Hutchins v. Masterson*, 46 Tex. 551, 26 Am. Rep. 286; *Huebschmann v. McHenry*, 29 Wis. 665; *Taylor v. Collins*, 51 Wis. 123, 129; *Hill v. Wentworth*, 28 Vt. 428; *Ewell, Fixtures*, 21, 22. And the matter of intention is a question of fact for the jury.

Seeger v. Pettit, 77 Pa. 437, 18 Am. Rep. 452; *Atchison, T. & S. F. R. Co. v. Morgan*, 4 L. R. A. 284, 42 Kan. 23; *Negro v. Hatch* (Ariz.) June 12, 1886; *Wheeler v. Bedell*, 40 Mich. 693; *Adams v. Lee*, 31 Mich. 440, 442; *Robertson v. Corbett*, 39 Mich. 777.

Railroad cars are not fixtures.

Speiden v. Parker, 46 N. J. Eq. 292.

A tenant may remove his trade fixtures, although by so doing the freehold or the fixture itself is not left in the same condition it was before its removal, but is injured.

8 Am. & Eng. Encyclop. Law, 44, note; 1 Washb. Real Prop. 24, 53d; *Voorhees v. McGinnis*, 48 N. Y. 278; *Morrison v. Berry*, 42 Mich. 399, 36 Am. Rep. 446; *Quinby v. Manhattan O. & P. Co.* 24 N. J. Eq. 280; *DeGraffenreid v. Scruggs*, 4 Humph. 451, 40 Am. Dec. 653.

In 8 Am. & Eng. Encyclop. Law, 60, trade fixtures are defined as follows: "Fixtures erected by a tenant on leased premises for the purpose of carrying on a trade or a manufactory and removable by him during the term. They include buildings, machinery, store fixtures, steam engines and boilers, gas fixtures, bowling alleys and appurtenances."

See *Youngblood v. Eubank*, 68 Ga. 630; *Du Bois v. Kelly*, 10 Barb. 486; *McAdam, Landlord & Tenant*, 227.

A depot building, erected by a railroad, not for the purpose of improving the inheritance, but to aid and assist the company in carrying on its business, is a trade fixture.

Carr v. Georgia R. Co. 74 Ga. 74.

As between landlord and tenant, trade fixtures, although securely fastened to the freehold, may be removed by the tenant or his assignee, if the removal can be effected without material injury to the freehold.

Cubbins v. Ayres, 4 Lea, 329; *McDavid v. Wood*, 5 Heisk. 95; *Pilow v. Love*, 5 Hayw. 109.

Analogous to the tenant's right of removal are cases where railroad companies have gone upon lands without exercising their charter powers of condemnation properly.

The courts in all such cases treat the railroad company as having gone there by some sort of consent, express or implied, of the owner, and that they are similar to tenants while there. The principles, therefore, of these cases are similar to those controlling tenant fixtures.

Morgan's App. 89 Mich. 475; *Dietrich v. Murdock*, 42 Mo. 279; *Lyon v. Green Bay & M. R. Co.* 42 Wis. 589; *Northern Cent. R. Co. v. Canton Co.* 80 Md. 354; *California Pac. R. Co. v. Armstrong*, 46 Cal. 90; *Toledo, A. A. & G. T. R. Co. v. Dunlap*, 47 Mich. 456, 5 Am. & Eng. R. Cas. 378; *California S. R. Co. v. Southern Pac. R. Co.* 67 Cal. 59; *Hendy v. Trinity & S. R. Co.* 24 Am. & Eng. R. Cas. 287; *Daniels v. C. I. & N. R. Co.* 41 Iowa, 52; *Wagner v. Cleveland & T. R. Co.* 23 Ohio St. 576, 10 Am. Rep. 770; *Jones v. New Orleans & S. R. Co.* 70 Ala. 228; cases of rails removed—*Northern Cent. R. Co. v. Canton Co.* 80 Md. 347; *Justice v. Nequehoning Valley R. Co.* 87 Pa. 26; *Dietrich v. Murdock*, 42 Mo. 279; *Pierce, Railroads (1881)*, 131; *Covington, etc., v. Piel*, 33 Am. & Eng. R. Cas. 214, note; cases of railroad piers removed—*Pierce, Railroads (1881)*, 161; *Wagner v. Cleveland & T. R. Co.* 23 Ohio St. 568, 10 Am. Rep. 770; *Justice v. Nequehoning Valley R. Co.* 87 Pa. 28.

The following are trade fixtures which have been held to be removable:

Agricultural fixtures fall within the trade exception. See *Van Ness v. Pacard*, 27 U. S. 2 Pet. 137-144, 7 L. ed. 874-877; *Dubois v. Kelly*, 10 Barb. 496.

Awning and shed—*Devin v. Dougherty*, 27 How. Pr. 455.

Bark mill—*Heermance v. Vernoy*, 6 Johns. 5. Belting—*Moore v. Wood*, 13 Abb. Pr. 398; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *Hey v. Bruner*, 61 Pa. 87.

Boilers—*Kelsey v. Durkee*, 33 Barb. 410; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *Davis v. Moss*, 38 Pa. 346, 61 Pa. 87; *Moore v. Wood*, 13 Abb. Pr. 398; *Lacey v. Giboney*, 36 Mo. 320, 88 Am. Dec. 145.

Bowling alleys—*Hanrahan v. O'Reilly*, 102 Mass. 201; but see *O'Brien v. Kuslerer*, 27 Mich. 287.

Box stalls—*Dingley v. Buffum*, 57 Me. 381.

Brewing vessels—*Kelsey v. Durkee*, 33 Barb. 410.

Buildings accessory to removable fixtures. See *Dudley v. Wards*, 1 Ambl. 113; *Devin v. Dougherty*, 27 How. Pr. 455; *Smith v. Benson*, 1 Hill, 176; *Dubois v. Kelly*, 10 Barb. 496; *Fisher v. Saffer*, 1 E. D. Smith, 611; *Van Ness v. Pacard*, 27 U. S. 2 Pet. 137, 7 L. ed. 37.

Chimneys—*Moore v. Wood*, 12 Abb. Pr. 398. Cider mills—*Holmes v. Tremper*, 20 Johns. 29.

Cisterns of a refinery—*Bidder v. Trinidad P. Co.* 17 W. R. 153.

Closets—*Seeger v. Pettit*, 77 Pa. 437, 18 Am. Rep. 452.

Coal bin—*Seeger v. Pettit*, *supra*.

Colliery machines—*Lawton v. Lawton*, 3 Atk. 13.

Corn mill—*Lacey v. Giboney*, 36 Mo. 320, 88 Am. Dec. 145.

Counter—*Guthrie v. Jones*, 108 Mass. 191.

Dairyman's fixtures—*Van Ness v. Pacard*, 27 U. S. 2 Pet. 137, 7 L. ed. 874.

Distillery fixtures—*Reynolds v. Shuler*, 5 Cow. 823; *Moore v. Smith*, 24 Ill. 512; *Smith v. Moore*, 26 Ill. 892; *Terry v. Robbins*, 5 Smedes & M. 291.

Dyer's fixtures—*Day v. Austin*, Owen, 70.

Engines—*Cook v. Champlain Transp. Co.* 1 Denio, 91, 102; *Kelsey v. Durkee*, 33 Barb. 410; 14 L. R. A.

Lemar v. Miles, 4 Watts; 830; *Lawton v. Lawton*, 3 Atk. 13; *Dudley v. Wards*, 1 Ambl. 113; *Moore v. Wood*, 12 Abb. Pr. 398; *Merritt v. Judd*, 14 Cal. 59; *Lacey v. Giboney*, 36 Mo. 320; *Hey v. Bruner*, 61 Pa. 87; *Davis v. Moss*, 38 Pa. 346.

Furnaces—*Kelsey v. Durkee*, 33 Barb. 410. Gas fixtures—*Lawrence v. Kemp*, 1 Duer, 363; *Shaw v. Lenke*, 1 Daly, 487; 1 Law Dec. 389; *Guthrie v. Jones*, 108 Mass. 191; *McKeage v. Hanover F. Ins. Co.* 81 N. Y. 38, 87 Am. Rep. 471.

Greenhouses, by a gardener—*Van Ness v. Pacard*, 27 U. S. 2 Pet. 137, 7 L. ed. 374.

Hothouses, by a gardener—*Van Ness v. Pacard*, 27 U. S. 2 Pet. 137, 7 L. ed. 374.

Hydraulic presses—*Finnery v. Watkins*, 13 Mo. 291.

Iron rails in a mine—*Heffner v. Lewis*, 73 Pa. 302.

Jibs—*Davis v. Jones*, 2 Barn. & Ald. 165.

Kettles—*Reynolds v. Shuler*, 5 Cow. 823; *Moore v. Smith*, 24 Ill. 512; *Terry v. Robbins*, 5 Smedes & M. 291.

Machinery—*Kelsey v. Durkee*, 33 Barb. 410; *Cook v. Champlain Transp. Co.* 1 Denio, 91, 102; *Reynolds v. Shuler*, 5 Cow. 823.

Mill stones—8 Ir. C. L. 355; *Moore v. Smith*, 24 Ill. 512.

Oysters and lunch counter—*Guthrie v. Jones*, 108 Mass. 191.

Pans—*Kelsey v. Durkee*, 33 Barb. 410; *Reynolds v. Shuler*, 5 Cow. 823; *Moore v. Smith*, 24 Ill. 512; *Terry v. Robbins*, 5 Smedes & M. 291.

Partitions and box stalls in a saloon—*Dingley v. Buffum*, 57 Me. 381.

Platform scales—*Seeger v. Pettit*, 77 Pa. 437, 18 Am. Rep. 452; *Allen v. Kennedy*, 40 Ind. 142; *Bliss v. Whitney*, 9 Allen, 114, 85 Am. Dec. 745.

Rails—*Mott v. Palmer*, 1 N. Y. 564; *Ford v. Obb*, 30 N. Y. 344.

Railings—*Seeger v. Pettit*, 77 Pa. 437, 18 Am. Rep. 452.

Railroad iron, frogs, spikes and bolts—*Northern Cent. R. Co. v. Canton Co.* 80 Md. 347.

Salt pans—*Lawton v. Salmon*, 1 H. Bl. 259; *Kelsey v. Durkee*, 33 Barb. 410; *Reynolds v. Shuler*, 5 Cow. 823; *Mansfield v. Blackburne*, 6 Bing. N. C. 426.

Shafting—*Moore v. Wood*, 12 Abb. Pr. 398; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *Hey v. Bruner*, 61 Pa. 87.

Shanty if not permanently annexed—*Fisher v. Saffer*, 1 E. D. Smith, 611.

Sheds—*Devin v. Dougherty*, 27 How. Pr. 455.

Shelves in a store—*Seeger v. Pettit*, 77 Pa. 437, 18 Am. Rep. 452.

Shrubs planted for sale—*Penton v. Robart*, 2 East, 88; *Miller v. Baker*, 1 Met. 27.

Soap work—*Poole's Case*, 1 Salk. 368.

Steam engine. See *Engine*.

Still—*Reynolds v. Shuler*, 5 Cow. 823; *Raymond v. White*, 7 Cow. 819; *Bark v. Baxter*, 3 Mo. 207; *Heermance v. Vernoy*, 6 Johns. 5.

Stools—*Lawrence v. Kemp*, 1 Duer, 363.

Trees planted for sale—*Penton v. Robart*, 2 East, 88; *Miller v. Baker*, 1 Met. 27; *King v. Wilcomb*, 7 Barb. 266.

Varnish house—*Penton v. Robart*, 2 East, 88.

Vats—*Pool's Case*, 1 Salk. 368.

The following are things held to be removable, though not trade fixtures:

Arras hanging—1 Rolle, 216.

Barns resting by weight alone upon foundations let into the ground or upon blocks—*Wansbrough v. Maton*, 4 Ad. & El. 884; 2 Smith, Lead. Cas. *239.

Beds fastened to the ceiling—*Ex parte Quincy*, 1 Atk. 477.

Buildings sold apart from the land with the intention to sever them—*Shaw v. Cardrey*, 13 Allen, 462. *Contra*, where the intention is not to sever—*Curtis v. Biddle*, 7 Allen, 185; *Wansbrough v. Maton*, 4 Ad. & El. 884; Buller, Nisi Prius, 34.

Carding machines—*Walker v. Sherman*, 20 Wend. 686; *Taffe v. Warwick*, 3 Blackf. 111, 23 Am. Dec. 383; *Cresson v. Stout*, 17 Johns. 116; *Gale v. Ward*, 14 Mass. 352, 7 Am. Dec. 223; *Tobias v. Francis*, 3 Vt. 425.

Cotton spinning machines screwed to the floor—*Hellawell v. Rastwood*, 8 Eng. L. & Eq. 562, 6 Exch. 295.

Fire frame—*Gaffield v. Haygood*, 17 Pick. 192.

Furnaces—Freem. Ch. 316; *Squire v. Mayer*, 2 Eq. Cas. Abr. 430.

Gas fixtures—*Lawrence v. Kemp*, 1 Duer, 863; *Shaw v. Lenke*, 1 Daly, 487; *McKeage v. Hanover F. Ins. Co.* 81 N. Y. 83, 37 Am. Rep. 471.

Ice chest, though it could not be removed without taking to pieces—*Park v. Baker*, 7 Allen, 78.

Iron backs to chimneys—*Harvey v. Harvey*, Strange, 1141.

Ladder fixed to the ground—*Wilde v. Waters*, 32 Eng. L. & Eq. 422.

Looking glasses—*Beck v. Rebow*, 1 P. Wms. 94.

Machinery—*Vanderpoel v. Van Allen*, 10 Barb. 157.

Meters—*Reg. v. Lee*, L. R. 1 Q. B. 241, 14 W. R. 811.

Mills on posts—4 Leon. 201.

Movable boards fitted and used for putting up corn in bins—*Whiting v. Brastow*, 4 Pick. 310.

Ornamental chimney pieces—*Grymes v. Bowczen*, 6 Bing. 437.

Ornamental cornices—*Avery v. Creslyn*, 3 Ad. & El. 75.

Ornamental fixtures—*Beck v. Rebow*, 1 P. Wms. 94.

Padlock for a corn house—*Whiting v. Brastow*, 4 Pick. 310.

Plants, flowers, etc.—*Wintermute v. Light*, 46 Barb. 278.

Pumps slightly attached—*Merritt v. Judd*, 14 Cal. 59; *Davis v. Moss*, 38 Pa. 346.

Rails and posts—*Fitzherbert v. Shaw*, 1 H. Bl. 258.

Shanty, if not permanently annexed—*Fisher v. Saffer*, 1 E. D. Smith, 611.

Stables and outhouses—*Dubois v. Kelly*, 10 Barb. 496.

Stoves—*Gray v. Holdship*, 17 Serg. & R. 413; *Greene v. Malden First Parish*, 10 Pick. 500; *Wilson v. Green*, 20 Wend. 139.

Tapestry—*D'Eyncourt v. Gregory*, L. R. 3 Eq. 382.

Windmill on posts—*Rex v. Londonthorpe*, 6 T. R. 377; 4 Leon. 241.

Window blinds, stoves, bell-pulls, and such 14 L. R. A.

articles, generally considered as tenants' fixtures, pass under a bequest of household furniture—*Paton v. Shippord*, 10 Sim. 186.

The removal must be made without serious injury to the freehold, and while the tenant is still in possession of the premises as a tenant. But the time of removal may be extended by agreement.

8 Am. & Eng. Encyclop. Law. p. 48, and notes; *Elwes v. Maw*, 3 East, 88; *Youngblood v. Eubank*, 68 Ga. 630; *Carr v. Georgia R. Co.* 74 Ga. 74; *Van Ness v. Pacard*, 27 U. S. 2 Pet. 137, 7 L. ed. 374, and other authorities hereinbefore cited; *Second Nat. Bank v. O. E. Merrill Co.* 69 Wis. 501.

If a landlord prevents his tenant from removing his fixtures he is guilty of a conversion and may be sued in trover.

8 Am. & Eng. Encyclop. Law. 64; *Watts v. Lehman*, 107 Pa. 108; *Hilborne v. Brown*, 12 Me. 162; *Russell v. Richards*, 10 Me. 429, 25 Am. Dec. 234; *Wansbrough v. Maton*, 4 Ad. & El. 884; *Wilgus v. Gettings*, 21 Iowa, 177; *Noble v. Sylvester*, 42 Vt. 146.

No legal obligation arises out of the relation of landlord and tenant, compelling tenant to pay taxes imposed upon the land of the landlord.

Williams v. Hilton, 35 Me. 547, 58 Am. Dec. 729; *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94; *Bettison v. Budd*, 17 Ark. 546, 45 Am. Dec. 442.

There was no covenant for the tenant to pay taxes. We had not assumed that burden for our landlord. The landlord, in such cases, and not the tenant, must pay all taxes.

Ga. Code, §873; *McAdam, Landlord & Tenant*, § 89, pp. 161, 162; *Taylor, Landlord & Tenant*, §§ 341, 342; *Parsons, Contracts*, 502; *Speed v. St. Louis County Ct.* 42 Mo. 382.

Having paid these taxes we had one of two remedies, either to deduct the amount of the tax paid from the rent or bring an action to recover what we paid.

Gear, *Landlord & Tenant*, § 101; *McAdam, Landlord & Tenant*, p. 162; *Graham v. Allop*, 3 Exch. 186, 18 L. J. Exch. 85; *Jones v. Morris*, 18 L. J. Exch. 477; *Franklin v. Carter*, 1 C. B. 750; *Palmer v. Earith*, 14 Mees. & W. 431; *Griffinhoofe v. Daubuz*, 4 Bl. & Bl. 290, on appeal, 5 El. & Bl. 746, 25 L. J. Q. B. 237.

Mr. Boykin Wright, also for plaintiff:

In face of the authorities I do not believe the right of removal will be any longer doubted by those who are in the habit of yielding at all to authority.

Concede to the lessees the ownership of the property and the right to remove it, the State could not, consistently with its dignity, honor and sovereignty, be willing to keep and use this property for its own gain, and avail itself of the necessities of the lessees to refuse to pay them for it.

The suggestion that the law is different in cases where the tenant removes one fixture and substitutes in place of it one of his own—a better one,—could not be sustained.

If the tenant remove a fixture for the purpose of substituting one of his own, he should restore the former article or substitute a similar one for it on removing his own.

Tyler, Fixtures, 247, 248; *Seeger v. Pettit*, 77 Pa. 437, 18 Am. Rep. 452.

When there was an agreement on the sub-

ject between the landlord and tenant; the agreement prevailed even in those jurisdictions where the law was strictly construed in favor of the annexations to the realty.

Fortman v. Goepper, 14 Ohio St. 564; *Ford v. Cobb*, 20 N. Y. 844; *Taff v. Hewitt*, 1 Ohio, 511, 59 Am. Dec. 648; *Frederick v. Devol*, 15 Ind. 357; *Mansfield v. Blackburne*, 6 Bing. N. C. 426; *Holmes v. Tremper*, 20 Johns. 29, 11 Am. Dec. 243, 244.

Here there was a contract on the subject. The lessee's obligation was to return the railroad in the condition it received it; it was to deliver no better road and return no more fixtures or improvements than it received—if it delivered less it was to pay the difference in money.

Bridges, stone piers, rails and ties, etc., each and all have been passed upon by the courts, and placed in the category of removable fixtures or chattels.

See *Wagner v. Cleveland & T. R. Co.* 22 Ohio St. 563, 10 Am. Rep. 770; *Corwin v. Cowan*, 12 Ohio St. 629; *Northern Cent. R. Co. v. Canton Co.* 30 Md. 347; *Hefner v. Lewis*, 73 Pa. 808-310; *Justice v. Nequehoning Valley R. Co.* 87 Pa. 28.

Mr. Joseph B. Cumming also for plaintiff.

Mr. Clifford Anderson, for the State:

The cases, both English and American, upon the subject of fixtures, are so thoroughly in conflict that any attempt to reconcile them, or to draw from them any rules of general application, as to what articles are or are not fixtures, as between heir and executor, landlord and tenant, or mortgagor and mortgagee, would be of more than doubtful success.

Rapalje & Lawrence, Law Dict. title *Fixtures*, p. 524.

There are many cases which hold that the true test of a fixture (or immovable article) is the adaptation of the article to the use or purpose to which the realty is appropriated, however slight its physical connection with it may be.

Farrar v. Stackpole, 6 Me. 157, 19 Am. Dec. 201; *Gray v. Holdship*, 17 Serg. & R. 413, 17 Am. Dec. 680.

Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, rules that actual annexation and adaptation to the purpose to which the realty is appropriated must both unite. These tests are so manifestly appropriate that they need no argument to commend them.

Other authorities add a third test to the two above mentioned, viz., the intention of the tenant in making the annexation.

3 Dane, Abr. p. 156; *Taff v. Hewitt*, 1 Ohio St. 527, 59 Am. Dec. 648; *Hutchins v. Masterton*, 46 Tex. 551, 26 Am. Rep. 286.

As to the first two tests—annexation and adaptation both confessedly exist in this case. It is clear that the third test exists also.

A tenant who has rented a farm is under an implied obligation, even if the contract is silent on the subject, to conduct his farm operations according to the requirements of good husbandry.

Lewis v. Jones, 17 Pa. 262, 55 Am. Dec. 550; *Brown v. Crump*, 1 Marsh. 567.

A like implied obligation rests on the lessee of a railroad; he must manage the railroad ac-

cording to the laws governing such a business—he must conduct it with a due regard to safety and success; or, as Governor Brown says in his letter to Governor Gordon, according to the "practice of railroading."

The realty and the business which the State conveyed, by the contract of lease, were inseparable.

As to the distinction between structures, etc., erected by a tenant for use in his own trade and which may not be useful to a succeeding tenant, whose business may be different, the rule is stated to be, that if equally adapted to the use of every succeeding tenant of the property they become part of the freehold and are not removable; they are fixtures.

Hill, Fixt. §§ 23-24; *Hoyle v. Plattsburgh & M. R. Co.* 51 Barb. 62, 18 Am. Rep. 595; *Brown, Fixtures*, § 18.

The fixtures having been put there in lieu of others already used by former tenants, they are the landlord's property.

Whiting v. Draxton, 4 Pick. 310; *Ex parte Hemenway*, 2 Low. 496; *Hay v. Tillyer* (N. J. Eq.) 12 Cent. Rep. 240.

The lessees understood the contract as not only requiring them to make repairs and to put and keep the road in an improved condition, but they acted on that understanding and provided the means for the purpose of making these repairs and improvements, from time to time, as the necessities of the road might require.

When a tenant erects buildings in accordance with the terms of his lease, he will not be allowed to remove them at the expiration of his term.

Deane v. Hutchinson, 40 N. J. Eq. 83; *Wheeler v. Bedell*, 40 Mich. 698; *Coleman v. Stearns Mfg. Co.* 38 Mich. 30; *Jones v. Detroit Chair Co.* 38 Mich. 92, 31 Am. Rep. 314; *Robertson v. Corsett*, 39 Mich. 777.

Mr. W. Y. Atkinson, also for the State:

The things sued for are not trade fixtures but a part of the realty.

(a) Anything intended to remain permanently in its place though not actually attached to the land, such as a rail fence, is a part of the realty and passes with it.

Code, § 2219. See also Code, §§ 2218, 2287.

(b) All fixtures are prima facie a part of the realty.

Ewell, *Fixtures*, pp. 66, 67; *Elliott v. May*, 2 Smith, Lead. Cas. 9th ed. 1433, 8 East, 39; *Wood, Landlord & Tenant*, §§ 520, 521, pp. 889, 890; 1 *Schouler*, Pers. Prop. p. 144; *Gear, Landlord & Tenant*, § 114; 1 *Addison, Torts*, § 342; *Smith v. Odom*, 68 Ga. 503.

Road-bed, rails, tank-house, turn-table and rolling stock are held to be realty.

Lannay v. Wilson, 30 Md. 547; *Titus v. Mabee*, 25 Ill. 237; *Titus v. Ginheimer*, 27 Ill. 462; *Brantly, Personalty*, § 20, p. 34.

There can be no removal when it will destroy or seriously injure the principal thing let.

1 *Addison, Torts*, § 345, also p. 356; *Elliott v. May*; 2 *Smith, Lead. Cas.* 9th ed. 1433, 8 East, 38; *Herman, Executions*, p. 167; 8 *Encyclop. Law*, pp. 46-49; *Ewell, Fixtures*, pp. 88, 89, and note, 91, 92, 133, 156; *Brantly, Personalty*, § 11; *Wood, Landlord & Tenant*,

§ 521, and pp. 887-898; Gear, Landlord & Tenant, § 114; Code, 2212, 2281; *Reid v. Butt*, 25 Ga. 33; *Swift v. Thompson*, 9 Conn. 68, 31 Am. Dec. 718; Tyler, Fixtures, pp. 267, 268; *Mejers v. Myrrell*, 37 Ga. 520; *Milledgeville v. Thomas*, 69 Ga. 535; *Grizzle v. Gaddis*, 75 Ga. 850; *McVail v. Walter*, 71 Ga. 289; *Carr v. Georgia R. Co.* 74 Ga. 73; *Woodward v. Payne*, 16 Cal. 444; 4 Jacobs' *Fisher's Digest*, pp. 54-98.

As to what fixtures are movable by a tenant is a mixed question of law and fact, and must be decided according to the circumstances in each case.

Ewell, Fixtures, pp. 94, 180; Brantly, Personality, §§ 10, 26; Wood, Landlord & Tenant, p. 876, §§ 521, 525, p. 889; Gear, Landlord & Tenant, § 114; *Tiltman v. De Lacey*, 80 Ala. 103; *Allen v. Mooney*, 130 Mass. 155; *Campbell v. O'Neil*, 64 Pa. 290; *Wheeler v. Bedell*, 40 Mich. 698.

When the articles consist in changes and substitutions, so made as to change the character of the establishment, they are fixtures.

Tyler, Fixtures, p. 248; *O'Brien v. Kusterer*, 27 Mich. 289; *Whiting v. Brastow*, 4 Pick. 310; *Ex parte Hemenway*, 2 Low. 496.

The lessee is not entitled to recover for completion of the depot at Atlanta. It leased the road knowing that it was incomplete and that it must be completed by lessee, before it could be used for railroad purposes.

Code, 2275, 2277; Taylor, Landlord & Tenant, § 547; Schouler, Pers. Prop. p. 145; *Poole's Case*, 1 Balk. 367; Bulstr. Rep. 102.

The State is not liable to pay the lessee for amounts paid by it for taxes in the State of Tennessee.

The fact that the lease contract covenants to pay all amounts due prior to the lease, and also pledges the faith of the State to redeem all mortgage bonds given by the State on that road, put the lessee on notice that all other liabilities or burdens coming against the Western & Atlantic Railroad must be met by it.

Hughes v. Young, 5 Gill & J. 67.

If either of the railroad companies named in section 11th owned property in Tennessee, or any other State, it would be liable to taxes on it, and the lease Act puts the plaintiff in this case in the same position as that occupied by them.

Western & A. R. Co. v. State, 54 Ga. 489; *State v. Western & A. R. Co.* 66 Ga. 568.

Mr. John I. Hall also for the State.

Opinion:

Plaintiff states its case as follows:

"The State of Georgia was, on the 24th day of October, 1870, the proprietor of a railroad, extending from the west side of Loyd Street, in the city of Atlanta, Georgia, to the southern side of Ninth Street, in the city of Chattanooga, Tennessee. This property, at that time, was so much out of repair and in such condition of dilapidation, that its proprietor was confronted with the alternative of laying out a large sum of money to put it in good working order, or to lease it for a term of years to persons who would make the necessary outlay. The proprietor elected to act upon the latter alternative, and, in pursuance of an Act of the Legislature of the State of

Georgia, approved October 24, 1870, and after taking the steps prescribed by said Act, leased said railroad December 27, 1870, for a term of twenty years, to certain natural persons, who, thereupon, by operations of the Act aforesaid, became the Western & Atlantic Railroad Company.

There was no essential peculiarity nor anything exceptional in this transaction. It had the ordinary and usual incidents of a lease contract. The State of Georgia, as proprietor of the railroad, had no attributes of sovereignty, and in this transaction figured as any ordinary lessor. The kind of property leased was even then not an uncommon subject of such a contract, and the leasing of railroads has since that time become a frequent transaction.

The relation established by this particular transaction between the State of Georgia, as proprietor of the railroad, and the Western & Atlantic Railroad Company, to which the railroad was leased, was the relation of landlord and tenant; and the usual incidents of that relation generally attached to the relation established in this particular instance. One of the usual and most important of the incidents of the relation of landlord and tenant is the right of the tenant to remove during his term his trade fixtures. In the exercise of this right, the Western & Atlantic Railroad Company, if not unlawfully prevented, could have removed, during the term, all structures of every kind whatsoever which it had annexed to the soil of the demised premises for the purpose of carrying on its business of operating a railroad.

There would, however, have been a difference in the practical enjoyment of this right according to the circumstances under which it was exercised. To make a more particular statement of this proposition (first), the Western & Atlantic Railroad Company had the right, during the term of lease, to remove absolutely any structure of any character whatsoever, which it had annexed to the soil and which was an original creation of said company, and which was in addition to structures already on the soil, and not in substitution for structures already there; and there was no qualification of this right except the obligation to avoid doing damage to the freehold (second), where the Western & Atlantic Railroad Company had removed structures already on the soil and belonging to the landlord, and had substituted for such structures others of its own erection, it could remove such substituted structures, but was under obligation to restore the former structures or replace them with others of like kind and in as good condition.

In the exercise of the right as above claimed, unqualified except by the inhibition of damage to the freehold, the Western & Atlantic Railroad Company could, during the term of the lease, lawfully remove the property which was valued at \$84,244.80 (afterwards changed by amendment to \$243,461.83 by transferring items from other schedules), and included, twenty-one miles of spurs and sidings (steel rails, iron rails, cross-ties, joints, bolts, spikes, switches), freight sheds, an oil room, store room, sand house, coal bin, car-builder's office, repair shelter, water-closet, shed for iron, another wooden building and a sliding section for shifting cars, an iron circular tank, nine

watchmen's houses, and one hoist for breaking scrap iron, with windlass and crank, and a wooden bridge at Jones Avenue seventy feet long, stone abutment, all in Atlanta, Georgia; also seven depots, one turn-table, one sand house, one oil and waste house, one warehouse, two platforms, twenty-two water tanks, seven stationary engines and pumps, stand pipes and iron piping connecting with tanks, twelve coal chutes, twenty-five houses, one set of track scales and two bridges, one being across the railroad at Dalton. These were located on the railroad right-of-way from Atlanta to Chattanooga inclusive.

The petitioners also claimed the right above claimed as to substituted structures as follows:

Twelve thousand one hundred and thirty-eight tons of steel rails, \$368,995.20.

Sixteen hundred and eighty tons of iron rails, \$81,752.00.

One hundred and twenty-seven thousand three hundred and seventy-three cubic yards of ballast, \$159,216.25 (afterwards transferred by amendment to preceding schedule).

Four hundred and seventy-four thousand and five hundred cross-ties, \$111,507.50.

Wire fencing, 5,120 panels, \$2,560.00, and seventeen bridges, of which two over the Chatahoochee and Etowah rivers, were of iron, valued at \$14,400 each, and the others were of wood over creeks between Atlanta, Georgia, and Chattanooga, Tennessee, with an alleged value to each, making a total of \$131,652.95.

The petition proceeded as follows:

"But against this right there must be offset the obligation to replace the structures originally on the soil and for which the present structures were substituted, and against the valuation last above mentioned, must be set off the cost of the property so replaced, to wit, the sum of \$323,569.30."

The petition averred that—

"The rights hereinbefore claimed for the Western & Atlantic Railroad Company as tenant exist under the common law of force in the State of Georgia. They are also expressly recognized in the contract made by the State of Georgia, the proprietor of the railroad, and the Western & Atlantic Railroad Company, its lessees, and in the other instruments and laws relating thereto. The second section of the Act of October 24, 1870, providing for the lease of the railroad, directs the governor of the State to take a bond from the lessee, which 'bond shall bind the lessees and their securities . . . for the prompt return of the road and its appurtenances at the expiration or termination or forfeiture of the lease, in as good condition as it was in when received by the company from the State under said lease.'"

The third section of the Act provides: "In case the road and its appurtenances are not returned at the expiration or forfeiture of the lease in as good condition as when received, the company and the securities on their bond shall be liable to make good the difference to the State."

The contract of lease itself provided as follows: "The Western & Atlantic Railroad Company . . . covenants and agrees for itself, successors, representatives and assigns . . . to return said road and its appurtenances at the expiration, termination or forfeiture of this

lease in as good condition as it was in when received by said Company from said State under said lease."

The bond given in compliance with the requirements of said lease Act is on the following condition: "Now, therefore, if the said Western & Atlantic Railroad Company shall . . . return said road and appurtenances as required by said Act and said agreement thereunder . . . then this bond shall be void."

Your petitioners aver that under these provisions of law and of contract, the Western & Atlantic Railroad Company had, during the term of the lease, the unimpeachable right (first) by absolute removal in proper cases, as hereinbefore stated, (second) by the removal of new trade fixtures and the replacement of the old, and (third) by the removal of the new trade fixtures and the substitution thereof of others similar to the old ones, which had been taken away, destroyed or worn out, to make such saving for itself of property and money as those lawful proceedings would produce.

The Western & Atlantic Railroad Company also had the right to sell its improvements on the leased premises to its landlord.

Your petitioners show that by a letter addressed to "His Excellency John B. Gordon, Governor, etc., Atlanta, Ga.," dated July 8, 1887, Joseph E. Brown, then President of the Western & Atlantic Railroad Company, "called the attention of the State to the claims of the lessee," and requested that the State, the landlord, consider the subject with the view to an adjustment mutually fair and advantageous of the claims.

The response of the landlord to this request of the lessee was a peremptory denial by the landlord of the existence of any claims on the part of the lessee, and a declaration in the most positive terms that no such claim would be entertained or allowed by the landlord. This denial and this declaration were made October 24, 1887, and from that day until the 22d day of December, 1890, the Western & Atlantic Railroad Company was unable to carry into effect any of its rights of removal and substitution as hereinbefore set forth. For the landlord was directed by the Legislature of the State, in the same legislative resolution which made the denial and declaration aforesaid, to use all of the executive power of the State of Georgia, to prevent the Western & Atlantic Railroad Company from exercising any of the rights hereinbefore claimed.

Not only did the landlord, by duress and the constructive use of force, interfere with the Western & Atlantic Railroad Company in the exercise of its rights as aforesaid; but the landlord went further and treated all the trade fixtures erected by said company and all the property, which said company under the law and under its lease contract had the right to remove, as the property of the landlord, and leased the same to a new tenant by a lease contract dated June, 1890, the delivery of said property to be made December 27, 1890.

Because of these differences the landlord entered into an agreement with the railroad company on December 22, 1890, the substance of which was as follows:

1. The Western & Atlantic Railroad Company to deliver to the landlord, December 27,

1890, the Western & Atlantic Railroad in its then condition and its appurtenances, and thus enable the landlord to deliver to the new tenant the property which the landlord had undertaken to lease to said new tenant.

2. The landlord stipulated that such surrender of the railroad and its appurtenances by the Western & Atlantic Railroad Company was not to impair any right which said company had while in possession during the continuance of its lease.

3. The landlord to submit to the finding or award which might be made under the provisions of the resolution creating this commission.

Your petitioners show that by virtue of all the foregoing the landlord elected to become the purchaser and owner of all of the property, which the old tenant had the right to remove from the demised premises. Whereby, the landlord became bound to pay, and, in consideration of said obligation, promised to pay, to your petitioners the sum of money which said property, appropriated by the landlord as aforesaid, is reasonably worth.

Your petitioners show that at the time of the lease made to the Western & Atlantic Railroad Company, December 27, 1870, the building known as the Union Passenger Depot was in process of construction of the cost of which the State of Georgia, as proprietor of the Western & Atlantic Railroad, was to pay three tenths.

At the date of the lease aforesaid, this building was not finished. The State of Georgia's share of the sum necessary to complete it was \$7,291.30. This last-named sum was paid by the lessee, the Western & Atlantic Railroad Company, and was money laid out and expended by said company for the State of Georgia. Whereby, the State of Georgia became liable to pay, and, in consideration of said liability, undertook and promised to pay said sum.

A part of the premises leased by the State of Georgia, as proprietor of the Western & Atlantic Railroad, to the Western & Atlantic Railroad Company, December 27, 1870, was situated in the State of Tennessee. The property so situated was taxed by the State of Tennessee, by the county of Hamilton in said State, and by the city of Chattanooga in said State, all three holding said property in their respective jurisdictions. All these taxes were lawfully assessed against the property aforesaid, by said taxing powers aforesaid respectively. There was no legal obligation on the part of the lessee to pay these taxes. It was the legal obligation, however, of the State of Georgia to pay all taxes lawfully imposed—its obligation both to the taxing authority, and to its tenant, for the protection of the latter in the enjoyment of the leased premises.

The attention of the State of Georgia was called to these taxes as early as 1879, and the State through its governor was requested to pay the same. The State through its governor expressly refused to pay them. Thereupon the lessee notified the governor that the property in Tennessee might be sold for taxes. The governor replied to the lessee, intimating, if not threatening, that if the lessee permitted the property in Tennessee to be sold by reason of the lessee failing to pay the taxes, the State of

Georgia would seize the railroad, and dispossess the lessee. Whereby the Western & Atlantic Railroad Company was compelled for its own protection to pay said taxes. And the State of Georgia has admitted its legal liability to pay said taxes by actually paying the taxes assessed for the year 1890.

The amount of taxes thus exacted from the Western & Atlantic Railroad Company is the principal sum of \$124,277.50, which sum, with interest, is due to plaintiff by the State of Georgia.

[Here follows a schedule of taxes from the year 1872 to 1889, inclusive, amounting to \$124,277.50.]

Besides the sums of money which the State of Georgia owes the Western & Atlantic Railroad Company on the accounts hereinbefore set forth, it is, in equity and good conscience, indebted to said company in the sum of \$87,993.62, for certain permanent and valuable improvements (including culverts, piers, rock drains, abutments, etc.), which could not be removed, and which the Western & Atlantic Railroad Company made to the demised premises.

Upon all which petitioners prayed judgment against the State of Georgia for \$711,800.87, besides interest.

This foregoing petition was filed on the 9th day of February, 1891, in the name of Joseph E. Brown and E. B. Stahlman as receivers of the Western & Atlantic Railroad Company, appointed by the United States court on allegation that by expiration of its charter said company had ceased to be a corporation.

On the 23d of February, 1891, the State moved to dismiss the cause unless the Western & Atlantic Railroad Company would sue in its own name.

On the 9th of March petitioners amended, alleging when and how and why they were made receivers. On the next day the Commission ordered the case dismissed unless amended so as to make the case proceed in the name of the Western & Atlantic Railroad Company.

Thereupon the plaintiff's counsel agreed so to amend, and it was formally done on the 12th of March.

On the 10th of March, 1891, the State filed a plea that under said resolution of 22d December, 1890, no authority existed in the Commission to "inquire into and decide what structures and property placed upon said railroad or its right of way are trade fixtures, or to decide upon the right of the lessee to remove the same during the term of its lease," and that therefore, all questions as to trade fixtures raised by the petition were beyond the jurisdiction of the Commission.

For further plea the State claimed that the extreme limit to which said company was by said resolution to sue was \$550,000.00, and therefore the Commission has not authority to inquire into alleged claims aggregating more than that amount.

On the 10th of March, 1891, the State also filed a plea of the general issue and also: "That on December 27, 1870, when said Western & Atlantic Railroad was leased to a company of persons, who, thereupon became incorporated under the name of the Western &

Atlantic Railroad Company, there was no law of the State of Tennessee, which imposed a tax upon the property of this defendant, lying within said State, either for state, county, or municipal purposes, and that the taxes thereafter exacted were imposed upon the Western & Atlantic Railroad Company, which was then controlling and operating said Western & Atlantic Railroad and property, and doing business in the State of Tennessee, and were taxes for which said company were liable and not this defendant."

And for further plea this defendant says, that if the Western & Atlantic Railroad Company paid any taxes upon said property, in the State of Tennessee, either to the State of Tennessee, Hamilton or city of Chattanooga, that said taxes were voluntarily paid by said lease company without complaint to this defendant, without its consent or knowledge, and with no authority to do so for or on behalf of this defendant, and that said taxes, having been voluntarily paid, do not constitute a legal claim against the State of Georgia, and that the defendant is not indebted and cannot be held liable for such payment of taxes, if any were so paid, nor for any claim or claims for such taxes, on account of such payments, if any were made.

And for further plea this defendant says, that if plaintiffs have paid any taxes to the State of Tennessee, the county of Hamilton, in said State, or to the city of Chattanooga, in said State, upon the said property of this defendant since 1879, they have done so with the full knowledge that this defendant had positively refused to pay the same and denied its liability therefor.

And for further plea this defendant says, that it is due to plaintiffs nothing on account of the payment of taxes by said plaintiffs, for that the taxes alleged in said petition to have been paid by the Western & Atlantic Railroad Company, were assessed under the laws of Tennessee against the Western & Atlantic Railroad Company, and not against the property of the State of Georgia, and that if said taxes were paid by the Western & Atlantic Railroad Company, this defendant is not in any manner indebted to plaintiff on account of taxes, or the payment thereof.

And for further plea this defendant says, that plaintiffs' right of action, if any they ever had, for and on account of taxes alleged to have been paid to the State of Tennessee, the county of Hamilton, and the city of Chattanooga, prior to February 10, 1887, accrued more than four years before the filing of their said petition, and that their right of action, if any they ever had, as to all such items and amounts, is barred by the Statute of Limitations."

On the 17th of March, 1891, the State filed pleas of counterclaims for office furniture, road equipment, tools, etc., which were delivered under the lease and not returned, aggregating \$608,710.75.

The plaintiff, on the 30th of April, 1891, amended the petition by striking out 1879 and inserting 1872 as to taxes, so that the petition will read: "The attention of the State of Georgia was called to these taxes as early as

1872, and the State was requested, through its governor, to pay the same."

AS TO JURISDICTION.

This Commission was created by and under a resolution, approved December 22, 1890, and has no jurisdiction not thereby conferred. Upon that resolution only this case must stand. Georgia is not suable under any general law. States are not suable except by their consent. "It is well settled that no action of any kind can be sustained against the government itself for any supposed debt, unless by its own consent, under some special statute allowing it." *Reenide v. Walker*, 52 U. S. 11 How. 290, 13 L. ed. 700 (1850); *Briscoe v. Bank of Commonwealth of Ky.* 36 U. S. 11 Pet. 257, 9 L. ed. 709; *United States v. McLemore*, 45 U. S. 4 How. 288, 11 L. ed. 977. Our supreme court, in 1856, said: "It is an act of great condescension for the State to disrobe itself of its sovereignty and litigate, in its own courts, with a private individual upon terms of perfect equality. Surely the party, under such circumstances, should comply strictly with the terms of the Act conferring jurisdiction." *Mason v. Cooper*, 19 Ga. 544. See also *Wallace v. Thomas*, 84 Ga. 548; *Dobbins v. Orange & A. R. Co.* 87 Ga. 240, and *Thweatt's Case*, 66 Ga. 678. The resolution declares that, "in considering any claim, question or issue, arising out of said lease, regard shall be had to the rights of the sovereign State of Georgia." Res. 4.

The law is plain. To know how to interpret the resolution it is needful to recall the history of the matter.

That this is a legitimate and necessary aid to construction we quote, "In construing an Act of Congress the court may recur to the history of the times when it was passed, in order to ascertain the reason for, as well as the meaning of, particular provisions of it." *United States v. Union Pac. R. Co.* 91 U. S. 72, 23 L. ed. 224 (4).

Look "if necessary to the public history of the times in which it (the Act) passed." *Aldridge v. Williams*, 44 U. S. 8 How. 24, 11 L. ed. 475.

"In the construction of the statutory or local laws of a State, it is frequently necessary to recur to the history and situation of the country, in order to ascertain the reason, as well as the meaning, of many of the provisions in them, to enable a court to apply, with propriety, the different rules of construing statutes." *Preston v. Browder*, 14 U. S. 1 Wheat. 121, 4 L. ed. 51 (1816).

[The opinion proceeds to set out at length the public history of the presentation of the claim of the lessees to the General Assembly of Georgia; arriving at the conclusion that the question of *trade fixtures*, as declared for by plaintiffs, was submitted to the jurisdiction of the Commission.]

EQUITABLE CLAIMS.

In a letter to Governor Gordon, Senator Brown said: "Now, it is true that there is no provision in the Act of the Legislature which gives the company anything for betterments, though the strong principles of nat-

ural equity and justice dictate, and it would seem that common honesty requires, that the company should receive some reasonable compensation for these improvements."

The General Assembly of 1887 refused to entertain any claim for betterments. And the resolution under which we act recognizes no equitable claim. That resolution recites that, "whereas the lessees claim that they are not legally bound by the lease contract, or otherwise, to deliver the road" in better condition than when leased, etc., this Commission shall be made "to hear, consider and determine the claims set forth in the foregoing preamble according to the legal rights of the lessees under the lease Act and their contract with the State," etc. (Resolution 1st.) The resolution requires that "regard shall be had to the sovereign State of Georgia." (Resolution 4th.) And the 11th Resolution declares that "the legal rights of the lessees shall remain the same as they were" at the date of the letter of 1887 to Governor Gordon.

A like question was decided by the Supreme Court of the United States in *Bonuer v. United States*, 76 U. S. 9 Wall. 158, 19 L. ed. 666. The United States court of claims, by statute (§ 1059, Rev. Stat. U. S.), has jurisdiction of "all claims founded upon any law of Congress or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States," etc. It was claimed that the United States had wrongfully appropriated lands which could not be delivered to petitioner, and, therefore, he prayed payment of their proceeds then in the treasury, or that he be indemnified by "such other mode, if any there be, as will be equitable and just." The Supreme Court said: "This makes a case for the interposition of a court of equity, and if it were a controversy between two private suitors, it would have to be settled there, for a court of law could not afford the proper mode and measure of relief. But the court of claims has no equitable jurisdiction given it, and was not created to inquire into rights in equity set up by claimants against the United States. Congress did not think proper to part with the consideration of such questions, but wisely reserved to itself the power to dispose of them. Immunity from suit is an incident of sovereignty, but the government of the United States, in a spirit of great liberality, waived that immunity in favor of those persons who had claims against it, which were founded upon any law of Congress or regulation of an executive department or upon any contract with it, express or implied, and gave the court of claims the power to hear and determine cases of this nature." *Id.* 159. Therefore, the court rejected the claim without passing upon whether it was "equitable and just."

The principle seems to cover that part of the plaintiff's petition which claims that the State is "in equity and good conscience indebted to said company \$105,815.30 for certain permanent and valuable improvements which could not be removed and which said company made to the demised premises." By amendment, that amount, \$105,815.30, is changed to \$87,993.62, and certain items aggregating

\$22,294.42 have been taken therefrom and transferred to another account.

Therefore, we find against the whole claim for equitable relief, because we are restricted to the consideration of "legal" claims only, by the resolution defining and limiting our jurisdiction.

The plaintiff did not show us any rule or doctrine of equity jurisprudence upon which these improvements are chargeable to the State. A right recognized by an established principle of equity jurisprudence might be regarded as a legal right; but it is evident that the plaintiff in his petition does not use the words "equity and good conscience" in this limited sense, but in the loose and general signification of those terms. We cannot take cognizance of claims resting upon "equity and good conscience" in the latter meaning of these words.

COMPLETION OF PASSENGER DEPOT AT ATLANTA.

Plaintiff claims that at the date of its lease this building was not finished, that Georgia's share of what was necessary to complete it was \$7,291.30, which was paid by plaintiff, whereby the State became liable to pay plaintiff for said sum laid out and expended for the State.

That that sum was expended by the lessees was proved. But Georgia's contract touching said building was not in evidence. Nothing appeared on the subject save the following:

"The lease Act was approved on the 24th day of October, 1870. Its third section required the governor to appoint three 'railroad men of experience, who shall examine the road and appurtenances carefully, and shall make out in writing a schedule or inventory of the same, carefully describing and setting forth the true condition of the road and its rolling stock and appurtenances, and property of every character, which shall be recorded in the office of the secretary of state and filed in the executive office.' (Acts 1870, 243.) Governor Bullock, then in office, on the 27th of December, 1870, after the lease was made, appointed A. L. Harris, W. L. Clark and I. N. Du Barry, to make such inventory. They filed the same on the 10th of January, 1871. In it they put this: 'No. 21. *One Large Passenger Building.* Located between initial post and Pryor Street, Atlanta, now in course of erection; contract made by the State, and to be completed under the contract, and at the expense of the State; also by contract, the proper sidings, track approaches, etc., to be made at the State's expense. The interest of the Western & Atlantic Railroad is represented to be (§) three eighths of the whole.'"

Senator Brown, as President of the Western & Atlantic Railroad Company, on November 3, 1871, in calling the attention of Governor Conley to certain omissions, etc., in the report of 1871, on other matters, called attention to the above remarks and said: "And I remark that the State's part of the car-shed (said building) had, as I am informed, at that time been paid for by the State. But this company and the other railroad companies have been obliged to complete the underworks of the passenger shed, including the laying down of the track-

the flooring, the stone pavements around it, gas fixtures, heating apparatus, and other like matters connected with the depot, at their own expense, they not having been paid for by the State. This company pays promptly its *pro rata* proportion as the work progresses, and has received no part of it from the State. In this particular, also, I wish the proper preservation of the evidence showing the facts."

Afterwards, for reasons hereinafter explained, but immaterial on this point, a new inventory was made by persons chosen, one by each party, and an umpire. They were authorized and required to "hear evidence as to the condition of the road, its rolling stock and appurtenances of every character, at the date of said lease, and shall make out, from the best evidence which they can obtain bearing on the question, a just and fair inventory between the State and the lessee, and return it for record as aforesaid, describing the condition of the track, and putting a fair valuation upon the rolling stock and material and appurtenances on hand at the date of the lease." (Acts of 1872, 531, 531.)

That report was made to Gov. Smith, on the 19th of December, 1872. They "recommend that said inventory (of 1871) be taken as correct with the following alterations, and as thus amended it shall stand as the true inventory by which the lessees shall make their final settlement with the State at the end of the lease." And all they said about that depot was that they found that it had been completed since the date of the lease, "and that the lessees have paid \$7,191.83, being the proportion due by the Western & Atlantic Railroad of the amount expended in finishing said building."

It will be observed that the contract of the State as to building that depot is not in evidence. Senator Brown, as president of the lessees, when the matter was fresh, stated that the State's part for the building had been paid for by the State. The Harris inventory said that the building was then (10th January, 1871) in process of erection under the State's contract, and under that contract was to be completed at the expense of the State. But the Hull inventory, of 1872, does not reiterate that as a charge against the State, though *ad interim* Senator Brown had called special attention thereto. Their mention of the Western & Atlantic Railroad's proportion showed what the amount was, but was silent as to whether the State or the lessees should bear the burden. There is no other evidence on the subject indicating any greater authority by the lessees to charge up the expenses of laying tracks and fixing approaches, etc., to that depot, than they would have had to charge like expenses at other depots to the State, unless the quoted remarks from the inventory of 1871 make the basis for such a claim.

It will be observed that neither of said board of appraisers had any more authority than to make inventories showing the condition of the property leased at the date of the lease, under the law providing for their appointment. They could just as well have undertaken to decide any other difference on any other claim between the parties as this depot matter.

A public servant has no authority to bind
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the State or deal with its business beyond the scope of his authority. *Case v. Terrell*, 78 U. S. 11 Wall. 202, 30 L. ed. 185; *Reeside v. Walker*, 52 U. S. 11 How. 291, 18 L. ed. 701.

The general rule is well stated by Judge Story. After stating the law of private agents, that "the principals are in many cases bound where they have not authorized the declarations and representations to be made," he says: "But in cases of public agents, the government, or other public authority, is not bound unless it manifestly appears that the agent is acting within the scope of his authority, or he is held out as having authority to do the act, or is employed in his capacity as public agent to make the declaration or representation for the government." Story, *Agency*, § 307 (a).

It is put in a head note to the decision of our Supreme Court thus: "The power of such officer (governor) is specified and limited; and inasmuch as it grows out of the laws of the State, the sureties signing the bond are conclusively presumed to know its extent. The law enters into and becomes a part of such contract as effectually as if set out therein. The consent of an officer acting under such *dedimus potestatem* to stipulations beyond this grant of power, would be in excess of his authority and void." *Lewis v. Gordon County Comrs.* 70 Ga. 487 (4). And it is strongly put in the text of the decision. Id. 495, 496.

Therefore that statement of Harris and others in the inventory of 1871, that the State should pay for completing that depot, being beyond their authority, is void and amounts to nothing. And in the absence of any evidence that the State contracted with plaintiff to pay therefor, we see not why the lessees were not bound to pay for the specified tracks, etc., which were put there after they accepted the road in its then condition.

RIGHT OF SUBSTITUTION.

To decide the remaining questions requires a careful examination of the lease contract; and to fully understand that we must consider the circumstances in which it was made, its subject-matter, etc. "The surrounding circumstances are always proper subjects of proof to aid in the construction of contracts." Ga. Code, § 3804. Contracts must be "read in view of the subject-matter and the attendant circumstances in order more perfectly to understand the meaning and intent of the parties." 1 Greenl. Ev. 12th ed. § 277. For the same purpose it is proper to "prove facts and circumstances respecting the relations of the parties, the nature, quality and condition of the property which constitutes the subject-matter, respecting which it may be made." *Knight v. New England Worsted Co.* 2 Cush. 271-283. So such evidence is used "for the purpose of applying the terms to the subject-matter, and removing or explaining any uncertainty or ambiguity which arises from such application." *Stoops v. Smith*, 160 Mass. 63-66, 1 Am. Rep. 85. The above quotations, except that from our Code, are taken from *West v. Smith*, 101 U. S. 271, 272, 35 L. ed. 812-813, where these cases are cited as sound law, universally applied.

Much of such evidence appears on this rec-

ord, and much in the law books, of which we take judicial notice.

In 1836 Georgia began "a railroad communication as a state work, and with the funds of the State," which is known as the Western & Atlantic Railroad. The legislation as to it, embracing statutes of almost every year up to 1850, are in Cobb's New Digest, as are also the Statutes of Tennessee granting the privilege of going to the Tennessee River, and the tax exemptions herein mentioned. Those laws, as modified by subsequent legislation, were codified in §§ 967-1016, inclusive of the Code of Georgia, 1868, of force when the lease was made to plaintiff.

That "railroad communication" is the property of this State exclusively (§ 967): "the State occupies the same relation to said road, as owner, that any company or incorporation does to its railroad, and the obligations of the State to the public concerning said road and of the public to said road, are the same as govern other railroads of this State, so far as is consistent with the sovereign attributes of this State and the laws of force for its conduct." § 968. By Act of 1863 it was made liable as other railroad companies in Georgia for damage done by the running of locomotives, cars and other machinery. § 970. The other sections relate mainly to the running of the same by the State. Its tracks had been destroyed by the federal army in 1865, but it had been rehabilitated, and was in operation under state control.

In the language of Senator Brown in a letter of July 8, 1867, in December, 1870, "the road held a monopoly of western business. It was like a funnel that almost everything from the west had to come through to get into Georgia, the Carolinas and Alabama."

On the 1st of September, 1870, A. L. Harris, its master of transportation, reported to Foster Blodgett, its superintendent, upon the condition of the road. Therein he said: "It will be impossible to run the road through the coming winter on anything like time without many fearful casualties, unless the above mentioned track shall have been relaid."

And he concluded with the following recapitulation of what must be expended on the road:

"Allatoona Creek rock-work.....	\$ 6,500 00
Allatoona Creek bridge cover.....	1,200 00
Unpaid bills for cars, engines, iron, etc.....	132,871 69
40 miles of new track.....	483,000 00
Total	\$522,071 69"

It was presented to the General Assembly. Assuming that or something like that to be the condition of the road at that time, the State was confronted with the necessity to sell the same, or take from the treasury sufficient money to put it in a condition of safety, etc., or lease it to some person who would do that and assume to the public with respect to the road the responsibility held by the State. That such was its condition was proved by plaintiff's witnesses, and Mr. Thompson, president of lessee of 1890, testified that in 1870 the road was "all to pieces," in bad order, very poor indeed. The proposal to leave was fa-

vored. The bill authorizing its lease had in it a clause in these words:

"But if the road and rolling stock and appurtenances are returned in better condition than when received by the company, the State shall compensate the company for the difference, by allowing a credit for the same out of any payment or amount due the State, or paying the same in cash to the company when the State again takes possession of the road." Before the bill was passed that was stricken out by a vote of 107 to 2 in the House of Representatives. After that the lease Act was passed and approved October 24, 1870. So much of it as is needful for the present purpose is that the governor should lease the road "with all its houses, work-shops, depots, rolling stock, and appurtenances of every character to a company to be formed, for a term of twenty years, for a sum not less than \$25,000 per month, to be paid monthly into the treasury of this State, for the use of the State," and it provided for taking immediate possession of the road and suit on the bond upon failure to pay. That section added, "But the faith of the State is hereby pledged to said company that they shall in no case be disturbed by the authority of the State so long as they keep the contract on their part, and make the payments when due" and also forbade subletting. The lessees were required to give a bond for \$8,000,000; that the lessee should swear that it was worth \$500,000 above its debts; that \$5,000,000 of the security should reside in Georgia, and that the "balance of the security, if out of the State, shall be upon real estate or railroad property." About this security the governor was required to be very particular. The bond was to be for the payment of the rent at the end of each month, and "for the return of the road and its appurtenances at the expiration or termination or forfeiture of the lease, in as good condition as it was in when received by the company from the State under said lease," and the sureties must swear that they were worth \$3,000,000 above their liabilities of every kind. Additional security might be required from time to time. Appraisal was provided for as mentioned elsewhere herein.

The Act required that the persons who compose the company to lease the road shall not be less than seven in number, a majority of whom shall be bona fide citizens and residents of Georgia, who shall represent a majority of the whole interest in the lease. So soon as the terms of the lease are agreed upon, said persons shall then, and from that time be and become a body corporate and politic. And said company shall have the same exemptions, privileges, rights, immunities and guarantees, and shall be subject to the same liabilities, disabilities and public burdens of other railroad companies mentioned, and no more, in all cases where this Act is silent and has made no provision on the subject. See Acts 1870, 428-427.

A proposal for said lease at \$25,000 per month, which was accepted and bond given with seven railroad companies in Georgia and two out of Georgia as securities thereon, and the lease was completed and possession delivered to the lessees on the 27th of December, 1870. On the 10th of January, 1871, the West-

ern and Atlantic Railroad Company passed a resolution to raise \$460,000 for the following purposes, etc.

"Whereas, the committee appointed by his excellency, the governor of Georgia, have reported to him as to the condition of the road way, its tracks, depots, shops, equipments, and all other property of the road that will come into the possession of the company, under the terms and conditions of the lease from the State of Georgia; and

"Whereas, it appears that the property is greatly depreciated and particularly that many of the bridges and much of the track is not in safe and efficient condition to meet the demands of the people of Georgia and the public generally, requiring prompt transportation over the line; and as it is the determination of the lessees to place the property in effective condition to meet promptly all reasonable demands upon it, be it

"Resolved, that, in order to provide the funds needful, from time to time, to secure new rails and other property required to put the road in safe and efficient condition, an assessment being made of twenty thousand dollars, on each one-twenty-third interest and ratably there held in greater or less amounts, which shall be subject to call for such purposes, when demanded by action of the board, and all parties to the lease be duly notified thereof; *provided*, however, that calls for said assessment shall not exceed ten per cent of the amount due from each lessee, oftener than once in thirty days."

Here was a direct recognition of the duty of the new company to meet the requirements put upon railroad companies in Georgia. One of the "public burdens" it assumed was to be a common carrier over that road. *Western & A. R. Co. v. State*, 54 Ga. 437. *McCay, J.*, said the Act and contract bound plaintiff to pay rental and taxes to the statutory limit "and perform other duties undertaken in the contract." 54 Ga. 437. The common law required of every such company to have a safe road, good machinery, etc. *Logan v. Central R. Co.* 74 Ga. 685 (1a) and (4) 689. There our supreme court mentioned *Peoria & P. C. R. Co. v. Chicago, R. I. & P. R. Co.* 109 Ill. 135, 50 Am. Rep. 605, 19 Cent. L. J. 143, and also *Mackin v. Boston & A. R. Co.* 135 Mass. 201, and *McCoy v. Chicago, I. St. L. & C. R. Co.* 13 Fed. Rep. 9, and said they stated "general duties" required of railroads, "as founded on common usage and recognized generally by section 2069 of our Code." The case in 74 Ga. 685, was put on our Act requiring connecting railroads to receive freight from each other. But it recognized the common-law requirement. In the cited case of *Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co.*, 109 Ill. 135, 50 Am. R. 605, the Supreme Court of Illinois said: "No proof is needed to show the extent and importance of the interests involved in the decision. It is a matter of so much public concern that judicial notice may be taken of the fact that cars belonging to different companies are interchangeably used by all the principal railroads in the United States, and that no company could do any considerable freighting business that did not come to this general usage. Without such usage it would be diffi-

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cult, if, indeed, it would be possible, to transact the business of the country."

That case relates to carrying freights. But the rule is even stronger as to passengers. A good statement of it comes from the decision of the Court of Appeals of Kentucky, made in 1881, to this effect: "They (railroad companies) are bound to provide a road and engines and cars free from all defects which endanger the lives of passengers. . . . Nor have they discharged their whole duty when they have provided the things just mentioned. They are bound to add to them such apparatus and appliances as science and skill shall from time to time make known and experience shall prove to be valuable in a considerable degree in diminishing the dangers of railroad travel, provided such improvements can be procured at an expense not greater than ought to be incurred by them. *Taylor v. Grand Trunk R. Co.* 48 N. H. 316, 2 Am. Rep. 229; *Tuller v. Talbot*, 23 Ill. 357, 76 Am. Dec. 695; *Costello v. Syracuse, B. & N. Y. R. Co.* 65 Barb. 92; *Smith v. New York & H. R. Co.* 19 N. Y. 127; 2 Redf. Railways, 3d ed. 187, 189; *Ford v. London & S. W. R. Co.* 2 Fost. & F. 730; *Meier v. Pennsylvania R. Co.* 64 Pa. 230; *Steinweg v. Erie R. Co.* 43 N. Y. 123; *Caldwell v. New Jersey Steamboat Co.* 47 N. Y. 282." *Kentucky Cent. R. Co. v. Thomas*, 79 Ky. 160, 42 Am. Rep. 208.

Plaintiff's counsel insisted that the Act only required security for the return of the road "in as good condition as it was when received," and that no more was required by the lease. The lease was to the body corporate, and the bond was signed by its president for it. The lease, after mentioning the covenant to pay rent, added:

"Also, to return said road and its appurtenances at the expiration, termination or forfeiture of this lease, in as good condition as it was when received by said company from said State under this lease. This lease is given and accepted under all the provisions, grants and conditions prescribed by the Act of the General Assembly of Georgia, entitled, 'An Act to authorize the lease of the Western and Atlantic Railroad and for other purposes therein mentioned,' approved October the 24th, A. D. 1870, and hereinafter referred to."

The lease was thus accepted under "all the provisions, grants and conditions prescribed" by said lease Act.

Had the company paid its rental and returned the road in as good condition as when received, no recovery could have been had on the bond. But that was not the measure of all plaintiff's liability. The Treasurer of Georgia and other public officers give bonds with certain conditions and in certain sums, but those bonds do not measure their liabilities. The Treasurer cannot take what the treasury holds and pay up his bond in full discharge. The construction of the contract contended for by plaintiff's counsel seems to us too narrow; it ignores the plaintiff's obligation and undertaking to be a common carrier with all the liabilities and disabilities and public burdens thereof. The company did not understand its contract. Their said resolution of January 10, 1871, to raise \$460,000 was put upon the ground "that many

of the bridges and much of the track is not in a safe condition to meet the demands of the people of Georgia and the public generally requiring prompt transportation over the line," and they proposed to put the road "in safe and efficient condition."

Later the company, in 1873, defending the integrity of the lease, published a pamphlet with this preface:

"The company to whom the lease is made, desiring that all the facts be fully known to the public, have collected and herewith publish the Act of the Legislature, etc. . . . The people of the State are respectfully requested to read the whole and judge for themselves.

"The road and rolling stock is in such bad condition as to require a very large outlay to put it in order. To meet this exigency the company have assessed each of the twenty-three shares in the sum of \$20,000, making in the aggregate \$460,000 for the repairs of the road. Their risk is a very heavy one, and they must manage well for years to come to pay \$25,000 per month and pay back this heavy outlay. They will pay the \$25,000 per month promptly, whether they make it or not. The taxpayers of Georgia are most benefited, as they will receive \$6,000,000, besides interest on the amount paid in monthly for the use of the road twenty years; and it will be returned in better condition than they received it. Had it been retained in politics, they would have received nothing. Let every citizen read all the facts. The company respectfully invites thorough investigation. They have nothing to conceal."

They then expected payment to come from good management, not from the State. They then expected to return the road in better condition, not to run it down.

The plaintiff's witness, Engineer Greene, swore that the road in 1890 was in "no better condition than would be necessary to operate successfully and safely the business of that company. . . . It was necessary to put on the steel rails or some other heavy rail, in order to do the business done by the railroad for the last eight or ten years."

The witness, Martin Dooley, swore that all the side tracks and all the extensions put in at Atlanta are a part of the terminals, and were necessary to be in the road to conduct the business and even with all the improvements they made, were not yet enough.

He said that changing the width of the track was for the purpose of shipping over the roads north and south without transferring the freight.

He swore that the defects in the wall and arch of the tunnel were there when lessees took possession, continually getting worse, bricks falling down from cars rubbing the bank.

And Senator Brown, in his said letter of July 8, 1890, said that the exigencies of business required heavy engines and that they demanded new track of steel; that the same thing called for heavy cars. He said: "The company has taken up all of the old rails, most of which it was dangerous to pass over with a train running at any considerable speed, and has laid down the whole length of the road with an excellent article of Bessemer

steel. The company has laid down twenty-one miles of side-track, which was found necessary. Part of this is in Atlanta, part in Chattanooga, and part at different points along the line of road. The company has expended a very large sum of money in thoroughly ballasting the track, greatly improving the condition of the road. It has removed bridges when worn out, and replaced them with iron bridges."

It may be true that all this may have been done because it was profitable to do it, but the company was bound by the law of its being and by the liabilities, disabilities and public burdens expressly assumed to do all these things to the extent of its ability, even though it might not have been done profitably in a pecuniary sense.

The plaintiff's petition declares that in 1870 this road "was so much out of repair and in such condition of delapidation that its proprietor (the State) was confronted with the alternative of laying out a large sum of money to put it in good working order or to lease it for a term of years to persons who would make the necessary outlay."

That is true. Because it was true the State said to the world that it would not make the necessary outlay to do the work then, nor would at the end of the lease pay anybody who would. But the State proposed to lease it at a rental of \$25,000 per month or more, not to be bid for in open market by those in that business, but mainly by Georgians, and excluding all railroads and express companies, and upon such other terms as that few could compete therefor. All these facts were known to the lessees. They got it at \$25,000 because of its condition, because the State would not make, and they must assume to make, all the necessary outlays and keep the road in proper condition, as was required of the other named roads. To require the State now to pay for such improvements would be giving a construction to the contract which in advance she declared against, and which the lessees knew was not the contract, as is shown by the facts and their conduct in the premises.

It may be presumed that the rental was smaller than it would otherwise have been, because the leasing was so hedged in and clogged with legal obligations. If so, the State has already indirectly paid for all those things. But whether that be true or not, such was the duty of plaintiff under its contract, and that duty continued to the end of its term. To remove the steel rails (\$368,995.20), the ballast (\$159,216.25) and sound bridges, and put back the old rails and restore the road to its condition of unsafety of property and life, and call that a compliance with the contract of the company, seems to us unsound construction. The State, with relation to that road, owed a duty to the public, which the plaintiff contracted to perform. It has not gone beyond its performance.

TRADE FIXTURES.

But plaintiff contends that many things, even though necessary to be there while it ran the road, were its trade fixtures, and removable during the tenancy, and that if the State prevented their removal it should pay

therefor. That follows from the reservation of rights under said resolution of 1890, *supra*, giving plaintiff here all rights it had in 1887.

The cases as to trade fixtures are innumerable, and apparently not all reconcilable on principle. Many of them turn on special contracts. The decisions are affected by the relationship of the parties, as between executors and heirs, mortgagor and mortgagee, purchaser and seller, landlord and tenant, etc. Some turn on the mode of annexation, while that is ignored by others.

A review of all cited in argument, *pro* and *con.*, would be impracticable and unprofitable. As a rule they concerned the relation of the owners of land, onto which tenants brought something not to improve the land but to carry on their business. Such was the leading case of *Eliot v. Maw*, 3 East, 88. That case was approved by the Supreme Court of the United States in *Van Ness v. Packard*, 27 U. S. 2 Pet. 187, 7 L. ed. 374, and by our Supreme Court in *Carr v. Georgia R. Co.* 74 Ga. 74, where a brick depot was (*obiter*) said to be removable under certain circumstances.

A railroad is real estate, including its road-bed, rails, ties in track, depots, tanks, etc. *Northern Cent. R. Co. v. Canton Co.* 30 Md. 347; *Hunt v. Bay State Iron Co.* 97 Mass. 283; *Hart v. Benton-Bellefontaine R. Co.* 7 Mo. App. 446; *Union Trust Co. v. Weber*, 96 Ill. 346.

But none of the cases cited or found by us seem to touch the case under investigation. This record shows that Georgia owned some land in Atlanta, Georgia, and at Chattanooga, Tennessee, besides its depot grounds, and some other lands along the road. But they are so inconsiderable as not to be mentioned in the lease Act or the advertisement or lease, but passed only as "appurtenances" to the railroad. We are not even informed how the State owns the right of way. The statute cited says the State's property is the "railroad communication" only. It was when leased simply a railroad in operation by the State and rented to be used as such during the lease and returned as a railroad to be again used as such at the end or forfeiture of the lease. The things put upon it are in no wise separate therefrom, but were put upon it from time to time to keep it in condition to be used as a railroad, because the tenant was bound by contract so to use the same, and could not do so without such appliances.

As iron rails wore out steel rails were put down in their places; so old bridges were patched or renewed, and many of these were again replaced by others during this long lease of twenty years. When old rails, etc., were taken up they were not laid aside and kept for the landlord, but were sold and the tenant kept the proceeds for its own use.

This "railroad communication" was valuable only as a railroad; the things put upon it were to improve it as a railroad. Very few if any of the specified things could be removed without great injury to themselves. Their removal would unfit the railroad for its allotted work.

Some cases make these two facts a final test as against removability. That has been recognized in this State. *Wade v. Johnston*, 35 Ga. 33.

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The petition claims \$492,328.45 for what it calls trade fixtures. Among the items which make that sum, are ballast \$159,216.25; steel rails \$368,995.20, and other things, aggregating \$781,652.95; minus the cost of certain other specified things which would have to be restored in these places to bring the road back to the condition which the plaintiff claims would be satisfactory under their lease contract. The plaintiff insists that that right exists in virtue of the law, that, as between landlord and tenant, trade fixtures put upon the land in the interest of trade are removable upon the ground of public policy in order to encourage trade. That would be a strange public policy which, in order to encourage trade, would allow the Central Railroad & Banking Company, or the Southwestern Railroad Company to tear up their present tracks and reduce themselves to the condition of 1870, and, if they desired, to make their roads unsafe for the transportation of property and persons. Yet the plaintiff by its contract is as much under obligations to keep its road in such condition as to be able to safely transport property and persons as either of those roads. By contract it has undertaken to do that very thing.

The above stated case of *Northern Cent. R. Co. v. Canton Co.*, 30 Md. 347, was much relied on by plaintiff's counsel. It held that attachment to the soil was not decisive in such matters; 2d, "The road-bed of the railway and the rails fastened to it and the buildings at the depots are real property, but under certain circumstances they may be but fixtures and be treated as personal property." In that particular case, the owner of land had consented that the railroad should be built thereon, and then revoked his decision, and sought to hold the railroad as his property. The language of the court in that case was: "The railway of which it formed an important and necessary part cannot be rationally supposed to have been designed for any other purpose than that of trade connected with the ordinary business pursuits of a railway company. It certainly was not accessory to the enjoyment of the freehold, or in any manner necessary and convenient for the occupation of the land by the party entitled to the inheritance. Had it been voluntarily abandoned it is not pretended that it would and could have been used by the appellee as a railway."

(Hill on Fixtures, §§ 23-24, treats of the distinction between movable and immovable fixtures, and declares that, if they be equally adapted to the use of every succeeding tenant of the property, they become part of the freehold, and not removable.)

The marked distinctions between that case and this are: (1) that that railroad was built without knowledge that the landlord could or would at any time revoke his permission, or that at any time the railroad would have to be left on his land; (2) that the landlord had no use for that part of the railroad on his land. Here every piece of rail and every other thing put upon this railroad became part and parcel of it, with the understanding that the road was to be returned as a railroad, and to one whose interests and obligations both compelled its use as a railroad.

no other test made by the cases is that where a fixture is not accessory to the land or, but accessory to a trade, which is the principal thing, then it is removable. That notion is well stated in *Fortman v. Goepfer*, 150 Mo. 506, by the court as follows: "The rule to be kept in view underlying all notions of this kind is the distinction between the business which is carried on in or on the premises and the premises or *locus*. The former is personal in its nature, and is that which is merely accessory to the business and have been put on the premises for purpose and not as accessory to the real estate, retain the personal character of the principal to which they appropriately belong are subservient."

the like effect we quote from Brown's of Fixtures, section 18, as follows:

Having regard in each case to the nature of the principal subject-matter, all such things to it as partake of its own nature, in consequence of that similarity of character, readily unite with it, are prima facie regarded as becoming instantly, upon their union with it, part and parcel with it, subject to the one qualification that they are not extravagant, unnecessary or temporary fixtures. . . . It becomes, in all cases, preliminary, and, indeed, an indispensable one in determining whether and by whom a particular fixture is removable, to first ascertain the proper and distinctive character of the principal itself."

is proper for us to remark that we have personally inspected Brown's Law of Fixtures because we could not obtain the book, took this quotation from the brief of Mr. Brown, who examined the book in the law office at Washington city. At any rate the principle is sound.

is the principal thing in this case was a piece of land, but only the "railroad track" running from Atlanta to Ansooga, rented as a railroad, to be used as a railroad and returned as a railroad.

cases say that intention of the party who the fixtures has much to do with deciding the question. But that intention is to be derived from what the tenant may intend to be "inferred from the nature of the title annexed, the relation and situation of the party making the annexation, the structural mode of annexing it, and the purpose for which the annexation was made." is the language of Chief Justice Bartley, *ff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec.

believe that, tested by each of those we are bound to find, under the circumstances of this case, that there was no intention, when these articles were placed upon came a part of the Western & Atlantic road, to remove the same.

the letter of Senator Brown, dated July 1, above alluded to, in which he was trying to persuade the governor that it was better for the State to pay a consideration to plaintiff to remove the railroad in what he then called "its high standard of improvement," he said that as he construed the contract he removed many specified things therefrom without violating his contract. He added this

language: "For instance, the company might do all this, and the State would then receive the benefit, without compensation, of over \$100,000 that the company has put into ballast, and also twenty-one miles of grading for side-tracks put down by the company, and a large number of new and expensive culverts put down by the company in the track, with the change of gauge, which was made at heavy expense, to fit the present standard gauges, with numerous other smaller things that are permanent, and have been put in improved condition by the company." From that it appears that a very large part of what plaintiff now claims to be removable, Senator Brown then declared to be permanent. The Code of Georgia, section 2281, declares permanent fixtures not subject to removal.

At that date, though discussing at length the claimed right of changing the structure of the railroad, Senator Brown mentioned no such thing as trade fixtures. That letter seems to have meant that he would fail to keep the road up, and let it run down, and not dismantle it. So far as this record shows, the claim of right to remove any part of this road as a trade fixture was never made until 1887, and then by one of the plaintiff's attorneys, in an argument before the committee of the General Assembly.

The petition does not aver that any portion of the things claimed as trade fixtures would have been removed had the State not passed the resolution of 1887, about which there is so much complaint. No one has sworn, and so far as we know, no one has ever said, that such removals would have been made.

The only claim made by plaintiff's president and by the petition is that they could have been made. Plaintiff's engineers swear that they could have been made, and if begun some two years before the end of the lease, could have been made without seriously interfering with the business of plaintiff, and at some profit by substitution of scrap steel for steel, carting away rock ballast and substituting earth and the like.

What engineers might be able to do, if allowed, we cannot decide, but feel safe in saying that under the law no common carrier in Georgia would have been allowed to have dismantled any road in the State, thereby endangering property and life. Certainly this company was under obligation not to do so, unless we are in error as to the construction of their contract with the State.

It is worth consideration that in the same petition which makes these claims against the State is a claim for money advanced in payment of taxes for which the plaintiff says that the State was liable, because they were paid in Tennessee on the property of the State. Those taxes, by the petition and evidence, seem to have increased greatly in later years, when the road had been improved by steel rails and these other improvements. If the State owned this property for purposes of taxation, surely it should own it when the question of restoration arises between it and the plaintiff in this case.

We think the contention that the State, by passing the resolution of 1880, under which this Commission was created, became the purchaser of any of the improvements or betterments left on the railroad, is untenable.

Neither by the consent of the State nor by operation of law can we find any such actual or implied contract with regard to these things existing between the parties in this case.

For these reasons, we feel constrained to deny any claim for any improvements which have been put upon the road by the lessees during their lease.

TAXES.

In 1837 Georgia, by authority of a resolution of her General Assembly, sent "a special agent to negotiate, in behalf of this State, with the Legislature of Tennessee, for the purpose of authorizing the extension of the Western & Atlantic Railroad to the Tennessee River." Acts 1837, 270. And in the same year Georgia offered to any railroad coming from Tennessee into the State similar privileges to such as Tennessee would grant to this railroad. Id. 271. Accordingly, by an Act approved January 24, 1838, Tennessee granted the right to extend the Western & Atlantic Railroad "to the eastern margin of the Tennessee River," giving to Georgia the right of way to that point and declaring "that she shall be entitled to all privileges, rights and immunities (except the subscription on the part of Tennessee), and be subject to the same restrictions, as far as they are applicable, as are granted, made and prescribed, for the benefit, government and direction of the Hiwassee Railroad Company." These grants were on the condition that Georgia would, "upon request, grant and concede similar ones, and to as great an extent, to the State of Tennessee, or her incorporated companies." By another Act of Tennessee, Georgia was given until October 18, 1849, to complete this road, and by still another approved February 3, 1845, Tennessee granted "all the rights, privileges and immunities, with the same restrictions which are given and granted to the Nashville and Chattanooga Railroad Company (by Act of Tennessee, December 11, 1845) to Georgia to be enjoyed and exercised by that State in the construction of that road in Tennessee and management of its business there."

So much of the Act incorporating the Nashville & Chattanooga Railroad Company as is pertinent is as follows: It has the right of eminent domain to build a railroad, with usual grants to railroad companies and exemption from jury duty and road duty for its employees and its 38th section declared, "that the capital stock of said company shall be forever exempt from taxation and the road, with all of its fixtures and appurtenances, including workshops, warehouses and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road and no longer."

All these facts are set forth in Cobb's Digest of the Laws of Georgia (made in 1850) at the end of the chapter on "state railroads." Cobb's N. D. 419-422 inclusive. Mr. Cobb did not put in his book the tax exemption of the Hiwassee Railroad Company. It was before us and is as follows: "The capital of said company shall be forever exempt from taxation, and all other property of every description situated within the State, including the road and rails, shall be exempt from taxa-

tion for and during the period of twenty years from the completion of said road and no longer." Mr. Cobb's codifying the tax exemption of the Nashville & Chattanooga Railroad Company and not that of the Hiwassee Railroad Company indicated that he understood this exemption from taxation in Tennessee would last until 1874.

It was shown that the Hiwassee Railroad was completed on the 11th 185, the Nashville & Chattanooga Railroad was completed in February, 1854, and the Western & Atlantic Railroad was completed on the 11th of May, 1850. At the date of lease and for many years before then (December 27, 1870) Georgia taxed her railroads $\frac{1}{4}$ per cent on net income only, and did not tax said Hiwassee Railroad, (now East Tennessee, Virginia & Georgia Railroad from Cleveland, Tenn., to Dalton, Ga.) See Acts of Georgia 1853, 105; Act 1861, 81; Act of 1866, 165; Act 1869, 160.

Nor up to the lease did Tennessee tax the Western & Atlantic Railroad or its property there. But in March, 1870, her new Constitution went into effect. It required that all property should be taxed and according to its value upon an equal and uniform basis.

Such was the situation as to the taxation of railroads in the two States when the lease was made. The lease Act was approved on the 24th of October, 1870. Neither in the advertisement nor lease was any mention of taxes directly or indirectly: the lease Act made the stipulations, rights and obligations of the parties to the lease. The Act required payment of not less than \$25,000 per month to the State during the term of twenty years, and pledged the faith of the State that the company should "in no wise be disturbed by the authority of the State so long as they keep the contract on their part and make the payments when due." (§ 1.) It provided that upon the completion of the lease said persons shall then and from that time be and become a body corporate and politic for the term of twenty years under the name and style of the Western & Atlantic Railroad Company," etc. (§ 4.) It was made the State's agent to settle with connecting railroads and authorized to deduct any balance against the Western & Atlantic Railroad out of the monthly rental. (§ 7.) The State pledged its faith to save the company harmless from the mortgage on the road made to secure the bonds. (§ 12.) And besides those things the Act contained this also, viz.: "Section 11. *And be it further enacted*, That said lessees shall never charge a higher rate of local freights on said road than the average rate charged by the Georgia Railroad & Banking Company, the Central Railroad & Banking Company, and the Macon & Western Railroad Company, for like local freights over said roads. And said company shall have the same exemptions, privileges, immunities, rights and guarantees, and shall be subject to the same liabilities, disabilities and public burdens of said railroad companies last mentioned, and no more, in all cases where this Act is silent and has made no provision on the subject; *Provided*, this Act shall not be construed to confer banking privileges on said company."

By an Act approved February 24, 1873, Georgia taxed each railroad company located

other States, but having a terminus or part thereof in Georgia, on all its property in Georgia except its right of way and track, including bridges; if without a terminus in Georgia, in proportion to the length of the whole road in the State; but it should pay on net income, if that would make a greater than the tax upon its property. Acts 1863, 63, 64. The General Tax Act of February 20, 1873, had levied a tax of 1 per cent on annual net earnings of all railroad companies incorporated in this State. Id. 65, § 8. The General Tax Act of 1874, in Georgia, levied a tax of $\frac{1}{4}$ per cent on annual net earnings of road companies incorporated in this State. Acts 1874, § 8, p. 108. That Act was approved February 20, 1874. But by another Act, approved February 28, 1874, railroad companies were required to return their property to be valued *ad valorem* as other property. Acts 1874, 107, 108. Under that Act a tax was laid on the Western & Atlantic Railroad Company, which it resisted, as was allowed by that court.

The question of its liability to this property tax was decided by our supreme court at its January Term, 1875. The court held that under the "guarantees" in said first and tenth sections, the Western & Atlantic Railroad Company was not taxable beyond half of one per cent on its net income, because that was the limit in the charters of the railroad companies in said eleventh section and because the lease made a contract in regard binding upon the State. *Western R. Co. v. State*, 54 Ga. 428. This was stated in the case between the same parties, 1881. See 66 Ga. 563.

In those cases held that the words "public burdens" included taxes, but neither case required anything to do with the taxes outside of Georgia.

Generally, perhaps universally, where the word "tax" does not require a different meaning, the word "the public" means that public which is in the law under examination. See §§ 12, 14, 85, 139, 146, 129, 4993, 5035, 5180, 5182.

In this quoted eleventh section, the State does not undertake to limit other than "local" in the tenth section it protected the connecting railroads "in this State." Roads by which these local rates were to be measured were wholly within this State.

Liabilities, disabilities and public burdens as well as their exemptions, privileges, duties, rights and guarantees, were all by the laws of Georgia and by them.

We think, therefore, that the lease Act, it spoke of public burdens, spoke of Georgia burdens only; the "subject" under consideration related to Georgia only.

It was silent as to burdens and taxes in Tennessee. It was a contract tendered by the State for acceptance, and therefore is to be used, when doubtful, against the State. Code, § 2757(4).

When the lease or statute is silent on the subject, the payment of all state, city and county taxes and assessments, during which term may become chargeable upon the lessee, fall upon the landlord. Taylor, Landlord & Tenant, 8th ed. § 341. Many cases are cited. See also *McCarr*. 2. A.

roll v. Weeks, 5 Hayw. 254, saying: "Persons owning taxable property are bound to pay the taxes," etc. The Code of Tennessee for 1872, section 561, declares, "The person who on the 10th of January in any year is owner of real or personal property liable to taxation, shall be bound to pay the taxes assessed thereon for that year; and the same shall be assessed in the name of such person, if he can be discovered." If, therefore, the taxes in question were laid upon Georgia's property, Georgia would be liable therefor to Tennessee primarily.

And Taylor further lays down that: "As a general rule, the tenant is liable in the first instance, to pay all taxes unpaid upon the demised premises. The land itself, in the hands of the occupant, is in fact debtor to the public, and *prima facie* it is the tenant's tax, because all the remedies are against him. He is, therefore, for his own protection, authorized to pay all such taxes and assessments laid upon the premises for public improvements as may be demanded of him, and to charge them to account of rent." Taylor, Landlord & Tenant, section 895. It is generally understood that the landlord bears the tax, though his tenant may have first to pay the same. Such is the rule fixed by decisions in England, New York and elsewhere, and accepted by all text-writers. See McAdam, Landlord & Tenant, § 89, p. 161; Ga. Code, § 873; Gear, Landlord & Tenant, 311, § 101; *Speed v. St. Louis County Ct.* 42 Mo. 382; "The tenant is not bound to pay taxes unless he agrees to." 1 Parsons, Contracts, 502; *Kitchen v. Smith*, 101 Pa. 454. And the tenant paying taxes may retain the same out of his rent or may have an action therefor. Taylor, Landlord & Tenant, § 895. His failure to retain the amount paid, out of annual rental by statute in England, loses a lien on rent but not the right of action for the amount. *Dawson v. Linton*, 5 Barn. & Ald. 521.

But the State's plea averred that "there was no law of the State of Tennessee which imposed a tax upon the property of this defendant lying within said State, either for state, county or municipal purposes, and that the taxes thereafter (December 27, 1870) exacted were imposed upon the Western & Atlantic Railroad Company" then controlling and operating the road in Tennessee and for which the plaintiff was, and defendant was not, liable.

Let us examine into the facts: [Here follows an exhaustive discussion of the tax laws of the State of Tennessee—which are quoted in full—between the years 1870 and 1890. The conclusion reached overrules the plea just mentioned; and the opinion continues:]

So far as the evidence discloses, the attention of no officer of Georgia was called to Tennessee's claim of back taxes until November 26th, 1885, Senator Brown, plaintiff's president, wrote Governor McDaniel, then in office, that "Messrs. J. B. & T. H. Cook, attorneys of Chattanooga, have presented to the Western & Atlantic Railroad Company, a bill for five hundred dollars for fee for services before the comptroller at Nashville, in cases of the notice of proceeding to assess that portion of the Western & Atlantic Railroad Company's prop-

erty in Tennessee, for back taxes due the State from 1850 to 1874 inclusive, and in compromising and adjusting said demand for back taxes, etc. . . . I respectfully ask your excellency, . . . that you refund from the state treasury the sum of \$500 to the Western & Atlantic on account of the payment of said fee of five hundred dollars to the Messrs. Cook. The comptroller, was induced by the attorneys to relinquish the claim of the State of Tennessee for back taxes from 1850 to 1871 inclusive, and the Western & Atlantic Railroad Company has paid, as in other cases, the balance of the assessment." He then asked that Gov. McDaniel also recognize Georgia's responsibility to repay the taxes.

On 11th November, 1879, Senator Brown wrote Governor Colquitt:

"DEAR SIR—Almost a year ago I called your attention to the fact that the Western & Atlantic Railroad Company is charged with a very heavy tax in the State of Tennessee upon the road, which I deny we are under any obligation to pay. We have paid this for several years past, intending at the proper time to have a settlement with the State about it. I brought the matter to your attention by the communication above referred to on the—day of—, but have not been so fortunate as to have your reply."

The Governor failed to reply until he had a second letter on the same subject, dated 10th December, 1879. On the 12th December, 1879, Governor Colquitt replied and said: "*For nine years the lessees* have, so far as I am informed, paid to the authorities of Tennessee the taxes in question, and without complaint or protest, *until about a year ago.*" Senator Brown replied on the 15th of December, 1879, that it was "the first reply I have had the honor to receive to my three letters of January 7, 1878, November 18, 1879, and December 10, 1879, upon the subject of the taxation of the Western & Atlantic Railroad in the State of Tennessee," and later, alluding to the same first letter, he said it was "dated January 7, 1878, about two years ago," and again spoke of "two years" further on in the letter. Later on, November 22, 1884, Senator Brown wrote Gov. McDaniel that he had "called the attention of *two* of your (his) predecessors" to this tax matter, and that his "predecessors had simply neglected to act." Again he wrote Gov. McDaniel on January 1, 1885. On January 3, 1885, Gov. McDaniel replied and said, "As indicated by you, my two predecessors declined to pay these taxes, and I do not feel authorized to reverse their rulings, but prefer that the matter should be left over for such settlement as the General Assembly may direct." On the 25th of November, 1885, Senator Brown again wrote to Gov. McDaniel and asked him to pay Messrs. Cook \$500 for fee for the fight over back taxes. To this last Gov. McDaniel replied January 5, 1885, saying he had written on January 3, 1885, and reaffirmed what was then written, but agreed to pay the \$500 fee.

Senator Brown and Governors Colquitt and McDaniel are all accessible, but neither is examined to throw any light upon the question when the State was first notified that the Western & Atlantic Railroad Company would look

to it for repayment of taxes. Counsel for plaintiff offered to prove by Senator Brown that he, in Gov. Smith's lifetime, talked with him on the subject. But Gov. Smith being dead, that was incompetent testimony under Act of 24th October, 1889, as to competency of witnesses, Sec. 1 (c). From the letters alone, the plaintiff's counsel contended that the fact was proved that notice of this claim of taxes was given to the State during Gov. Smith's term of office, because he was one of Gov. McDaniel's "two predecessors," for that Gov. McDaniel's letter admitted such notice. We do not think Gov. McDaniel's language can fairly mean any more than that he did not take issue with Senator Brown about a fact of which he (McDaniel), as governor, could have no official information.

Besides no officer can admit away any right of the State or bind it except in matters especially intrusted to him by law. *Reeside v. Walker*, 52 U. S. 11 How. 201, 13 L. ed. 701; *State v. Southwestern R. Co.* 70 Ga. 12, (28) 23. "A governor of a State is a mere executive officer; his general authority very narrowly limited by the Constitution of the State; with no undefined or disputable prerogatives, without power to affect one shilling of the public money, but as he is authorized under the Constitution or by a particular law; having no color to represent the sovereignty of the State so as to bind it in any manner to its prejudice, unless specially authorized thereto." *Iredell, J., in Chisolm v. Georgia*, 2 U. S. 2 Dall. 446, 1 L. ed. 451.

The State's counsel objected to Senator Brown's letter as evidence of anything but a "demand." The governor was competent to accept notice, we presume. *Blair, J., Id.* 452.

Senator Brown's letter, of November 11, 1879, said his first notice was "almost a year ago," and Governor Colquitt said he protested "about a year ago." Later Senator Brown spoke of his letter of January, "1878." The evidence shows no letter of a "date almost a year ago" before November 11, 1879. Writing on November 11, 1879, it was natural for him to say "almost a year ago," if he alluded to January, 1879, but that expression would have been wholly inappropriate if his letter had been written almost two years before. If it had been written in January, 1878, Governor Colquitt would hardly have spoken of his letter of "about a year ago." So early in January, 1879, from habit during the past year, it was easy to make the mistake and write 1878 for 1879. After the mistake was made the continuance of the mistaken date in subsequent correspondence was not strange. When replying to Governor Colquitt's charge of long acquiescence without complaint, Senator Brown did not claim to have given any notice before the date of his said letter. From all the evidence we find that the letter was written in January, 1879, and was the first notice of this tax controversy given to the State by plaintiff. Now let us examine how, prior to January, 1879, this matter had been regarded by plaintiff. In said letter of November, 1879, Senator Brown urged the pressure for taxes by Georgia at home, which he felt was unjust, "as the stronger reason why we should be unwilling to pay a tax for which we are not liable in an-

er State." That was repeated in his letter 5th December, 1879. "We are unwilling to pay in Tennessee taxes that are not owing this company." In that letter of 15th December, 1879, Senator Brown wrote, "I stated in my first communication on that subject that the lessees of the Western & Atlantic Railroad, *hoping that it would not become burdensome*, have already paid taxes in Tennessee which have been claimed to this date." That he put in quotation marks. It came from the letter of the dispute, doubtless. He did not pretend to have anything then inconsistent with that language. In another part of that letter he spoke of those payments prior to that date as an "act of liberality on our part." It seems to us plain in the evidence that up to that time this whole matter of Tennessee taxation against the property and the company controlling it was in an unsettled condition; that resisting Georgia taxation at a time when a change in the States was being made as to taxing railroads, the plaintiff chose to make no claim on Georgia as to Tennessee taxes, and consented to bear the tax, "*hoping it would not become burdensome*." We do not know that any of these taxes were actually laid or for too much; perhaps they were not. For one year, at least (1876), they were paid wholly on plaintiff's income. Plaintiff's agents helped to increase those taxes to an indefinite extent. They were based on returns made by plaintiff's agent, who knew that this agent had no notice of any intended claim on the part of the State to refund them, and, therefore, no reason for looking after her interests in that regard. Under all these circumstances, plaintiff paid the taxes as "an act of liberality" and because *hoping they would not become burdensome*, the payment was voluntary and on its own account. This is not changed by the fact that in that letter of the 15th of December, 1879, Senator Brown added just after the above quotation these words: "And I may here add that I did it, not doubting that the State, when attention was called to the subject, would at any time, in the settlement of the monthly bill or otherwise, refund the money so paid." Now your Excellency quotes this act of liberality on our part as an act of acquiescence in the burden and refuses either to refund to us what we have already paid or to pay the taxes in the future." (Plaintiff did not try *ad interim* to get it back out of rental or otherwise.) Under the circumstances, plaintiff was surprised when he wrote that letter of "almost a year ago," no subsequent notice of an expectation can avail to remove the estoppel. For all reasons we hold that plaintiff cannot recover for any of the taxes paid prior to 1879. It does not include the \$2,375.08 for taxes in 1871 and 1872 paid in 1884 on the judgment of the Comptroller. The taxes paid after that notice cannot be treated as voluntary. As to Tennessee, the State forced their payment. As to Georgia, Senator Colquitt, in response to Senator Hanger, threatened to hold his company to account if they were not paid. Considering the position of the Governor to that road, the advantage held by the State in any

contest about the same, the plaintiff was compelled to pay the taxes and wait for reimbursement. It was contended that these taxes should have been retained out of the monthly rental. That would not have been allowed. The contract compelled prompt payment of the full rental monthly. It was part of the regular revenue of the State, part of its school fund, and counted in all appropriation bills, and could suffer no diminution by plaintiff not provided by law. Any apparent discrepancy between the accounts of taxes sued for which were proven by the vouchers and those amounts appearing in the certificates made by the county and city officers, is explained by the fact that the certificates do not cover the taxes assessed by the state board of railroad assessors except for the year 1882. In that year it seems that some changes were made in the law. There was no unnecessary confusion of property in making plaintiff's returns for taxation. The statute required the schedules so made. And the evidence enables us to get at a satisfactory separation of all plaintiff's interests from those of the State. The table on page 448 of the record furnishes the basis of our proportions. [The opinion here proceeds to indicate the data by which the commission separated the property of the lessees and the State in the tax returns. From 1879 to 1889 inclusive, the taxes paid by the lessees on the State's property are found to be \$100,139.68.] In 1890 the plaintiff left all the tax to be paid by Georgia. Plaintiff's proportion having been paid by the State, should be repaid. The plaintiff's part of that tax we reckon at \$495.64. Deducting that from \$100,139.68 due from the State leaves net balance of \$99,644.04 which the State must pay on tax account to plaintiff.

INTEREST.

Though interest is claimed in the petition, we know of no law which authorizes interest to be adjudged against the State in the absence of a statute specifically providing therefor. *United States v. Bank of United States*, 46 U. S. 5 How. 383-399, 12 L. ed. 200-207; *Todd v. United States*, 1 Dev. Ct. Cl. 95; *United States v. McKee*, 91 U. S. 450, 23 L. ed. 327; *Gordon v. United States*, 74 U. S. 7 Wall. 188, 19 L. ed. 35, and many opinions of the Attorneys-General of the United States cited in 5 Lawrence (Comptroller of Treasury U. S.), page 495, abundantly sustain that proposition.

STATUTE OF LIMITATIONS.

The plea of the Statute of Limitations seeks to bar recovery for the taxes paid more than four years before the bringing of this suit. The cases above mentioned show that the State could not be sued on these demands until this resolution of 22d December, 1890, was passed. Statutes of Limitations run not against persons unable to sue. For instance, the war suspended the Statutes of Limitations against those thus prevented from suing. *Hanger v. Abbott*, 78 U. S. 6 Wall. 532, 18 L. ed. 989. The Statute of Limitations begins

to run "after right of action accrues." Ga. Code, §§ 2915, 2916, 2922, 2923. Until the State authorized this suit no right of action accrued to this plaintiff.

True the Western & Atlantic Railroad Company had been held to be a corporation in Tennessee by her supreme court. (*Hutchison v. Western & A. R. Co.* 6 Heisk. 637, and *Taylor v. Western & A. R. Co.* 6 Heisk. 408.) But those cases stood upon the doctrine that when the State went into the business of a public carrier she consented to be sued as to matters growing out of that relation. See *Briscoe v. Bank of Commonwealth of Ky.* 36 U. S. 11 Pet. 324, 9 L. ed. 735, *supra*; *Bank of Commonwealth of Ky. v. Wister*, 27 U. S. 3 Pet. 326, 7 L. ed. 489, 28 U. S. 3 Pet. 431, 7 L. ed. 731. But that would not have authorized the Western & Atlantic Railroad Company (which had taken that business out of the hands of the State) to sue the State for money paid out for its use and benefit. Could the Western & Atlantic Railroad have sued the State thus in Tennessee and have obtained judgment there, the judgment could not have been enforced except by levy upon the very property which the State had leased to the Western & Atlantic Railroad Company, and the sale of which would have defeated part of the Western & Atlantic Railroad Company's rights under that lease. The plea of the Statute of Limitations is therefore of no avail to the State in this case.

COUNTER-CLAIMS BY THE STATE.

The counter-claims of the State for the taxes of 1890, which the State paid because the plaintiff refused to do so, is disposed of in our finding on the question of taxes, above mentioned. We find that item against the State, except the credit above allowed on that item on plaintiff's account, and for the reasons there stated.

We find against the State upon the claim for \$100,000 on account of alleged cutting and removing trees for cross-ties and other unauthorized purposes from lands belonging to the State in Cobb, Bartow and Gordon counties, and elsewhere specified in the claim—alleged to have been appropriated without the State's consent and without legal authority. The same is not supported by any proof.

We understand from the evidence that the State has received from plaintiff on December 27, 1890, the road and all its appurtenances and turned over the same to the new lessees. The road was leased with its appurtenances as an entirety in 1870 and again in 1890, and the obligation of the plaintiff was to return the same as an entirety.

The valuation in the inventory of 1873, which is binding upon both parties to this case, was made as a means of arriving at the condition of the railroad and appurtenances when leased, so as to ascertain in 1890 whether there was a breach of the bond to restore it in as good condition as when received.

Believing that the evidence shows that it was received in 1890 by the State with its appurtenances in a condition so much better as to cover any difference in value to which the

State might otherwise have been entitled, we do not find it necessary to state an itemized comparison of the values of railroad supplies, and of cars and engines, or quantity of wood on the track, condition of office furniture, and buildings on the right of way and in Atlanta and Chattanooga, as they existed at the date of the lease in 1870, with their value in 1890 at the termination of the lease.

We are satisfied from the evidence that the condition of the road and its appurtenances, when delivered in 1890, was so much better than when leased in 1870, as to cover the difference claimed by the State in its counter-charges, touching which there was evidence, even if the same were proven.

We do not mean, however, to find that the other counter-claims were all proven. For instance, the \$42,140.60 for wood on line of road as per inventory, and the \$4,743.00 for cross-ties, and the \$3,750.00 for lumber,—seem to have been properly accounted for in the evidence. Nor do we mean to be understood as finding that the amounts for the other things claimed by the State are found as claimed.

The obligation was not to deliver at the end of the time any particular car or number of cars, engine or number of engines, tools, machinery, or other things, but to deliver the road and its appurtenances in its entirety in as good condition as when received from the State.

Whereupon, upon consideration of the pleadings and evidence, after argument had by counsel for the parties, for the reasons above stated, we, the Special Commission organized under the Resolution of the General Assembly, approved December 22d, 1890, do find and adjudge upon the issues made between the parties by the pleadings as follows:

1st.—The Commission has no jurisdiction to determine upon the plaintiff's claim of \$87,993.62 for certain alleged "permanent and valuable improvements which could not be removed" from the road founded solely upon an allegation that the claim is due in "equity and good conscience" because the resolution under which this Commission is organized limits its jurisdiction to *legal rights* only.

2d.—We find against plaintiff's claims for the value of alleged improvements put upon the road by plaintiff.

3d.—We find against plaintiff's claim for trade fixtures or the value thereof.

4th.—We find that the State did not buy from plaintiff any of said improvements nor any of said so called trade fixtures.

5th.—We find against plaintiff's claim for money expended in completing the passenger depot at Atlanta, Georgia, by putting tracks, etc., therein and pavements, etc., about the same.

6th.—We find and adjudge that the State of Georgia owes plaintiff a balance of ninety-nine thousand six hundred and forty-four and 4-100 dollars (\$99,644.04), on account of taxes on the property of Georgia in Tennessee paid by plaintiff during 1879 and since. The remainder of plaintiff's claim for taxes is disallowed. We find against the claim of interest on any part of said taxes.

7th.—We allowed out of the counter-claim

taxes paid by it in 1890 four hundred and fifty-five and 84-100 dollars (\$495.84) to the state, which being deducted from the amount paid by said plaintiff on this State's property Tennessee for taxes there for 1879 and since, is due to plaintiff from defendant said amount ninety-nine thousand six hundred and forty-four dollars and 4-100 (\$99,644.04) as above stated.

And, All other claims, *pro and con*, not in the

above seven items are disallowed. This 28d May, 1891.

N. J. HAMMOND, Clerk,
JAS. C. C. BLACK,
WALTER B. HILL,
G. GUNBY JORDAN,
DAVID G. HUGHES,
J. L. WARREN,
C. D. McCUTCHEN,
GEORGE A. MERCKE,

Comrs.

CALIFORNIA SUPREME COURT.

Jonathan D. STEVENSON, *Resp't.*,

v.

ward P. COLGAN, State Comptroller,
App't.

(.....Cal.....)

passing upon the constitutionality of a statute the court must confine itself to a consideration of those matters which appear upon the face of the law and of those of which it can take judicial notice and cannot con-

sider evidence *attunde* to show the invalidity of the statute.

(November 14, 1891.)

APPPEAL by defendant from the judgment of the Superior Court for the City and County of San Francisco granting a writ of mandamus to compel defendant to draw a warrant on the state treasurer for money appropriated by the Legislature to the use of plaintiff.
Affirmed.

RE.—Consideration of extrinsic evidence to show unconstitutionality of statute.

he courts cannot go into an inquiry as to the truth or falsity of facts upon which an Act of legislature is predicated where the latter has sole jurisdiction of the subject. *Lusher v. Scites*, 4 W. Va. 11.

In *DeCamp v. Eveland*, 19 Barb. 89, the court says it would be strange if any judicial tribunal were permitted to review a decision of the Legislature upon a question of fact on the exercise of which their power to legislate in a particular case is made to depend.

Then the validity of an Act depends upon the ascertainment of facts which must have existed antecedent to the law all that courts can do is to inspect the Act and determine from its scope and prior and concurrent history, of which they take judicial notice, whether or not it is apparently within the power conferred assuming that the requisite facts were ascertained. *Hovey v. Foster*, Ind. 502.

where an Act for the execution of criminals by electricity was attacked as in conflict with the use of the Constitution providing against cruel and unusual punishments the court held that in so far as the question whether the Act was cruel depended on the evidence of witnesses the determination of the Legislature was conclusive, and that the court could not take evidence for the purpose of condemning it. *People v. Durston*, 7 L. R. A. 119 N. Y. 569.

where an Act to authorize the levy of a tax for the payment of bonds to volunteer soldiers and refund subscriptions made for the purpose was attacked as unconstitutional the court held that whether or not a state of facts existed which created an exigency for the defense of the State was a question for the Legislature and its determination the affirmative was not to be reviewed by the court. *Case Twp. v. Dillon*, 16 Ohio St. 41; *Franklin v. State Board of Examiners*, 23 Cal. 173.

where the power of the Legislature to authorize a contract to be contracted in behalf of the State did not exist until a certain contingency arose, yet in the Legislature had determined that such contingency had arisen without any apparent purpose to evade the Constitution, its determination is conclusive. *Hovey v. Foster*, 118 Ind. 502.

L. R. A.

The purpose of the Legislature to appropriate public money for the benefit of an individual cannot be determined by the courts on testimony of witnesses when it has expressed its purpose in the bill itself to be the enlargement or improvement of a public canal. *Waterloo Woolen Mfg. Co. v. Shanahan*, post.—

Statutes incorporating counties or towns.

No evidence can be admitted in court to contradict the facts assumed by the passage of Acts creating counties. *Lusher v. Scites*, 4 W. Va. 11.

Where the constitutionality of an Act creating a new county is questioned because it contains less land or fewer inhabitants than the Constitution requires, the courts cannot look beyond the Act itself or some other official records of like grade or character or official surveys or maps of which they are bound to take judicial notice. *State v. Dorsey County*, 28 Ark. 378.

The Legislature was the appropriate tribunal to make the necessary inquiry in order to ascertain whether their Act is within the constitutional provision, and it will be presumed that sufficient inquiry was made and there is no power in the judicial tribunal to review the conclusion of the Legislature upon that question. *Rumsey v. People*, 19 N. Y. 41; *DeCamp v. Eveland*, 19 Barb. 89.

Where a statute incorporating a city was attacked on the ground that the city did not have the number of inhabitants required by the Constitution, the court held that the matter was within the exclusive jurisdiction of legislative power which required the ascertainment of a fact upon which legislative authority to act depended, and that the exercise of that authority carried with it the exclusive presumption that the fact had been ascertained. *Judson v. Plattaburg*, 3 Dill. 181.

But in *Bradley v. Comrs.* 2 Humph. 428, 37 Am. Dec. 563, the court admitted evidence that the county did not contain the constitutional number of square miles without discussing their power to do so.

Statutes attacked as local.

Where a provision of an Act providing for the construction of elevated railways, which related to the operation of roads then in existence, was at-

The facts are stated in the opinion.

Messrs. Barham & Bolton, for appellant:

The validity of the Acts of the Legislature depends upon its power to act, and the existence of that power or its nonexistence depends upon the real facts, not what the Legislature may have thought, found, or determined the facts to be.

Cooley, Const. Lim. p. 186.

Should the Legislature provide that private property might be taken for a private use—that is, should the Legislature determine a certain use to be a public use, when, in fact, it was a private use—under the claim of petitioner this would conclude the courts as to the character of the use. But in such case the courts are not concluded.

Citizens Sav. & L. Asso. v. Topeka, 87 U. S. 20 Wall. 664, 22 L. ed. 461; *Consolidated Channel Co. v. Central Pac. R. Co.* 51 Cal. 271; *Amador Queen Min. Co. v. Devitt*, 79 Cal. 492; *People v. Parks*, 58 Cal. 689; *Re Townsend*, 39 N. Y. 174; *Re Deaneville Cemetery Asso.* 66 N. Y. 571, 23 Am. Rep. 86; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 197; *Logan v. Stogdale*, 8 L. R. A. 58, 128 Ind. 879.

The existence of the public use in any class of cases is a question reviewable by the courts.

Mills, Em. Dom. class 2, § 11; Brooklyn Park

tacked on the ground that it was private and local for the reason that there was but one road in operation at the time of its passage, the court held that it must be presumed that the Legislature had found the necessary facts to authorize the passage of such a law, and that the court could not take proof of facts *alibunde* for the purpose of showing the statute, which was valid and regular upon its face, to be unconstitutional. *Re New York Elev. R. Co.* 70 N. Y. 327.

Where an Act applicable to counties containing cities of a designated size was attacked on the ground that it was local the court held that the Act was valid on its face as applicable to a class of counties and that invalidity would not be imputed nor would testimony be taken to determine that it was applicable to one only. *Re Church*, 28 Hun, 476.

Apparent exceptions to the rule.

Where an act for the improvement of the Bouquet River was attacked on the ground that it was local and had not received the vote of the members of the Legislature made necessary by Constitution the court held that, since the Act did not disclose the character of the river, and its name and location were not found upon a general map or in a general history of the country nor defined in the public statutes, it was not of such notoriety that the court could take judicial notice of it and that from the knowledge gained by what appeared in the case submitted they would hold an Act for its improvement to be local. *People v. Allen*, 42 N. Y. 378.

In *Yosemite Stage & Turnp. Co. v. Dunn*, 83 Cal. 264, where an Act which on its face purported to appropriate money for the purchase of a road was attacked as being in conflict with the constitutional provision against making gifts, the court examined the facts before it for the purpose of determining whether or not the transaction was in fact a gift and reached the conclusion that it was not.

Statutes affecting private rights.

An exception to the rule appears to exist in favor of individuals whose rights are affected by a statute, and in that case the recitals of the Act are held 14 L. R. A.

Demre. v. Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; *Seemee v. Mitoswikes & St. P. R. Co.* 90 U. S. 23 Wall. 106, 23 L. ed. 67; *Tyler v. Beach*, 44 Vt. 648, 8 Am. Rep. 400; *Lowell v. Boston*, 111 Mass. 461, 15 Am. Rep. 39; *People v. Gunn*, 85 Cal. 247. See also *DeCassap v. Kivland*, 19 Barb. 84; *Rumsey v. People*, 19 N. Y. 41.

Parol evidence will be admitted in such cases, and the courts have the inherent power at all times to get to the Constitution.

Jones v. Jones, 12 Pa. 350, 51 Am. Dec. 611; *People v. Riverside*, 66 Cal. 290; *Pittsburg, W. & K. R. Co. v. Benwood Iron Works*, 2 L. R. A. 680, 31 W. Va. 710; *Craig v. Philadelphia*, 89 Pa. 269. See also *State v. Newark*, 87 N. J. L. 415; *Re Niagara Falls & W. R. Co.* 11 Cent. Rep. 272, 108 N. Y. 374; *People v. Johnson*, 6 Cal. 499; *Neques v. Douglas*, 7 Cal. 66; *Yosemite Stage & Turnp. Co. v. Dunn*, 83 Cal. 264.

With the Act here at bar, was there a claim against the State in law or equity? If so, the Legislature had the power. If there was no such claim, the Legislature had not the power. The fact determines the power.

Ex parte Westerfield, 55 Cal. 550, 36 Am. Rep. 47; *Earle v. San Francisco Board of Education*, 55 Cal. 489.

Our Constitution provides that corporations

not to be conclusive. This exception seems to depend largely on the weight to be afforded to a statute as evidence.

The facts recited in the preamble of a private Act may be evidence between the Commonwealth and the applicant or person for whose benefit it was passed, but as between the applicant and another individual whose rights are affected the facts recited are not evidence. *Elmendorff v. Carmichael*, 3 Litt. 480, 14 Am. Dec. 86.

The recitals in the preamble to an Act of the Legislature embracing statements of fact affecting the rights of third persons do not import absolute verity, nor are they conclusive proof of the truthfulness of such statements. *Duncombe v. Prindle*, 12 Iowa, 2.

But in the *Duncombe Case*, *supra*, the exhibits offered to contradict the preamble were other Acts of the Legislature of equal standing with the preamble itself.

Where the Legislature had constitutional power to grant divorces in certain specified cases and granted one without specifying upon what ground, the effect of which was to affect the property rights of individuals, evidence was held admissible to show that the cause for which the divorce was granted was one over which the Legislature had no jurisdiction. The court, however, stated that a different case would be presented if the Legislature had specified a cause which was one within its jurisdiction. *Jones v. Jones*, 12 Pa. 350, 51 Am. Dec. 611.

Where a statute for widening a street, which provided for assessing the cost on the abutting property was assailed on the ground that it was unconstitutional as a local assessment for public improvements, evidence that the improvement was not called for by any reason save public improvement was held admissible. *Craig v. Philadelphia*, 89 Pa. 265.

Within this exception are the decisions which hold that in case of an attempted exercise of the powers of eminent domain the court will consider the facts for the purpose of determining whether or not the use for which the property is desired is a public one, which decisions will be collected in a future note.

H. F. F.

or municipal purposes shall not be created by special laws, but by general laws providing for the incorporation of cities and towns.

An Act providing for the incorporation of cities with a population of over one hundred thousand was held special, and not within the power of the Legislature to enact.

Desmond v. Dunn, 55 Cal. 242. See also *monds v. Simonds*, 108 Mass. 573; *White v. White*, 105 Mass. 825; 7 Am. Rep. 526; *Chicago, & C. Co. v. Garrity*, 1 West. Rep. 670, 115 155.

Messrs. George A. Wentworth and A. Van Duser for respondent.

De Haven, J., delivered the opinion of the court:

This is an application for a writ of mandamus to be directed to the defendant as state comptroller, and commanding him to draw a warrant on the state treasurer for the sum of \$25, to which amount petitioner claims that he is entitled by virtue of the provisions of an act of the Legislature approved March 31, 1911. The Act is entitled "An Act for the Relief of Jonathan D. Stevenson, and to appropriate Money Therefor," and, so far as necessary to be stated here, it is as follows: "Section 1. The sum of one hundred and twenty-five dollars per month, payable monthly, for a period of twenty-one months, is hereby appropriated out of any moneys in the state treasury not otherwise appropriated, for the relief of Col. Jonathan D. Stevenson: provided, however, that said appropriation shall cease upon the death of said Stevenson, if he shall die before said period has elapsed; the moneys paid under the provisions of this Act to be accepted by the said Stevenson in full payment and satisfaction of all claims of every kind and nature that he may have, or claim to have, against said State for services or otherwise." The answer of the defendant alleges that petitioner never at any time had or has any claim of any kind or nature whatsoever against the State of California for services rendered, or for any other thing done, had, performed by the said Jonathan Stevenson, or anything of value furnished to the State of California; and that the appropriation made by the said Act of the Legislature was intended as a gift to the petitioner. The answer then proceeds in an informal way to allege that, prior to the admission of California to the Union, the petitioner expended money and performed services "in surveying and preparing charts of the bay of Suisun and the Sacramento and San Joaquin Rivers," and, in substance, avers that this service and expenditure of money constitute the foundation of petitioner's alleged claim against the State, and which the appropriation contained in the act referred to was made. A demurrer to the answer was sustained by the court below, and upon judgment was rendered in favor of petitioner, as demanded in his petition. The defendant appeals.

Section 31, art. 4, of the Constitution, provides that the Legislature shall have no power to make any gift, or authorize the making of a gift, of any public money or thing of value to any individual; and section 22 of the same article also declares: "The Legislature

shall have no power to grant, or authorize any county or municipal authority to grant any extra compensation or allowance to any public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part." By these provisions of the Constitution there is denied to the Legislature the right to make direct appropriations to individuals from general considerations of charity or gratitude, or because of some supposed moral obligation resting upon the people of the State, and such as a just and generous man, although under no legal liability so to do, might be willing to recognize in his dealings with others less fortunate than himself. It was because of abuses which had crept into legislation by reason of the unlimited power theretofore exercised by the Legislature in determining what individual claims should be recognized by private act, and to relieve in some degree legislators from the importunities of persons interested in securing such appropriations, that the power of the Legislature was thus limited by the present Constitution of this State. In this view there can be no doubt that if the facts are as alleged in the answer of defendant the Act under consideration ought never to have been passed. But these facts do not appear upon the face of the Act itself, and the question is thus presented whether it is competent for the court in this or any form of action to receive evidence *abundant* to establish such facts, and thus to impeach and overthrow a law which, upon its face and independent of proof, is presumptively valid. This case, as thus presented, is to be distinguished from those in which it has been held that the court may look into the journals of the Legislature for the purpose of determining whether a statute was in fact passed by the requisite votes required by the Constitution. In such cases the question is whether the law was in fact enacted, and not whether the Legislature in passing the statute properly discharged its duty by the preliminary ascertainment of facts which alone would justify such legislative action.

In our opinion, the question which we have stated as the one for decision here must be answered in the negative. While the courts have undoubted power to declare a statute invalid, when it appears to them in the course of judicial action to be in conflict with the Constitution, yet they can only do so when the question arises as a pure question of law, unmingled with matters of fact, the existence of which must be determined upon a trial, and as the result of, it may be, conflicting evidence. When the right to enact a law depends upon the existence of facts, it is the duty of the Legislature before passing the bill, and of the governor before approving it, to become satisfied, in some appropriate way, that the facts exist, and no authority is conferred upon the courts to hear evidence and determine, as a question of fact, whether these co-ordinate departments of the state government have properly discharged such duty. The authority and duty to ascertain the facts which ought to control legislative action are, from the necessity of the case, devolved by the Constitution upon those to whom it has given the power to legislate, and their decision that the facts exist is

conclusive upon the courts, in the absence of an explicit provision in the Constitution giving the judiciary the right to review such action. We therefore hold that, in passing upon the constitutionality of a statute, the court must confine itself to a consideration of those matters which appear upon the face of the law, and those facts of which it can take judicial notice. If the law, when thus considered, does not appear to be unconstitutional, the court will not go behind it, and by a resort to evidence undertake to ascertain whether the Legislature in its enactment observed the restrictions which the Constitution imposed upon it as a duty to do, and to the performance of which its members were bound by their oaths of office. "If evidence was required, it must be supposed that it was before the Legislature when the Act was passed; and, if any special finding was required to warrant the passage of the particular Act, it would seem that the passage of the Act itself might be equivalent to such finding." Cooley, Const. Lim. *187. This view seems to be sustained by the decisions of the highest courts of other states, and is in harmony with the central idea of the Constitution in prescribing the independence and equality of the three great departments of state. The following are some of the cases which in principle sustain the conclusions we have reached. *Waterloo Woolen Mfg. Co. v. Shanahan*, 128 N. Y. 345; *Rumsey v. People*, 19 N. Y. 41; *Hoeey v. Foster*, 118 Ind. 503;

Lusher v. Scites, 4 W. Va. 11; *De Camp v. Eueland*, 19 Barb. 81.

If experience shall demonstrate that further restriction upon legislative power over the subject of appropriations of public money is necessary, it is within the power of the people to so amend the Constitution as to provide that, notwithstanding an appropriation made by the Legislature for its payment, the legality of every claim against the State shall or may be the subject of judicial investigation as to the facts upon which it rests. But, in the absence of a plain direction to that effect, the courts are not authorized to institute such an inquiry. As already stated, the Act in question does not show upon its face the nature of the claim which the petitioner made against the State, or that the appropriation thereby made is a gift. The statute is unusual in form, and it may be difficult to assign any good reason for the singular provision that the State shall discharge by monthly installments the indebtedness which the Act admits, and, in the event of petitioner's death before it is fully paid, shall be released from the payment of any balance then due; but this does not affect the question of the power of the Legislature to so provide, nor authorize the court to declare that the Act was enacted in absolute disregard of the Constitution. *Judgment affirmed.*

We concur: *Garoutte, J.; McFarland, J.; Sharpstein, J.; Paterson, J.*

ALABAMA SUPREME COURT.

HIGHLAND AVENUE & BELT RAILROAD, *Appt.*,

Jonathan MATTHEWS *et al.*

(.....Ala.....)

1. An action at law will lie to recover damages for obstructing ingress and egress to and from abutting property by a railroad embankment in a street.
2. Damages may be recovered for the entire injury to abutting property by a railroad embankment in a street, and the recovery is not limited to such damages as had been sustained up to the commencement of the action.

(December 2, 1891.)

APPEAL by defendant from a judgment of the City Court of Birmingham in favor of plaintiffs in an action brought to recover damages for injuries alleged to have been caused by the construction of a railroad in the street in front of plaintiffs' property. *Affirmed.*

There was evidence tending to show that plaintiffs owned the fee to the centre of the avenue and such ownership was stated in the petition, but it was subsequently stated to have

been alleged merely by way of inducement and that the real object of the suit was to recover damages done to the appurtenant property, the plaintiffs in open court waiving any claim for the land actually taken. The Railroad went through the avenue upon an embankment between five and six feet in height in front of plaintiffs' property.

Further facts appear in the opinion.

Mr. Alexander T. London for appellant.

Messrs. Chisolm & Whaley, for appellees:

The action to recover damages done by a corporation clothed with right of eminent domain in the construction of its works is conferred by our Constitution, art. 14, § 7, and can be maintained by the owner of the property in the common-law action of trespass or case.

City Council of Montgomery v. Townsend, 80 Ala. 489, 84 Ala. 478; *Evans v. Savannah & W. R. Co.* 90 Ala. 54; *Little Rock & Ft. S. R. Co. v. McGehee*, 41 Ark. 202, 20 Am. & Eng. R. R. Cas. 83; *Cohen v. St. Louis, Ft. S. & W. R. Co.* 84 Kan. 188, 55 Am. Rep. 242, 22 Am. & Eng. R. R. Cas. 118; *Shepherd v. Baltimore & O. R. Co.* 180 U. S. 426, 32 L. ed. 970; *Columbus, H. V. & T. R. Co. v. Gardner*, 32 Am. & Eng. R. R. Cas. 243; *United States v. Great Falls Mfg. Co.* 113 U. S. 645, 28 L. ed. 846;

NOTE.—The review of the differing authorities on the question of the right to recover the entire damages, prospective as well as past, in the case of injury to abutting property by a railroad in a 14 L. R. A.

street, is so extensive in the above opinion and briefs that no annotation to this case would be thought profitable.

Chicago & W. I. R. Co. v. Ayres, 106 Ill. 511, 14 Am. & Eng. R. R. Cas. 152.

The constitutional provision of Pennsylvania is the same as that of Alabama, and the line of authorities is complete, that the action for such damages is one and indivisible, and case is proper.

O'Brien v. Pennsylvania S. V. R. Co. 11 Cent. Rep. 679, 119 Pa. 184; *Pennsylvania R. Co. v. Merchant*, 12 Cent. Rep. 261, 119 Pa. 541; *Pennsylvania R. Co. v. Duncan*, 2 Cent. Rep. 551, 111 Pa. 480, 29 Am. & Eng. R. R. Cas. 354; *Pennsylvania R. Co. v. Lippincott*, 8 Cent. Rep. 818, 116 Pa. 472, 30 Am. & Eng. R. R. Cas. 399; *Beale v. Pennsylvania R. Co.* 86 Pa. 509; *Indiana, B. & W. R. Co. v. Eberle*, 9 West. Rep. 206, 110 Ind. 542, 59 Am. Rep. 225.

In Mississippi the court has construed "taken" in the Constitution to include injury done to abutting property, damages to such being recoverable by action.

Theobald v. Louisville, N. O. & T. R. Co. 66 Miss. 279, 88 Am. & Eng. R. R. Cas. 462, and cases cited.

In looking at cases, it must be remembered that the constitutions of Pennsylvania and Alabama alone contain words "property taken, injured, or destroyed;" Kentucky and South Carolina "taken or applied to;" Illinois, Colorado, Georgia, Nebraska, and West Virginia, "taken or damaged;" Massachusetts, "appropriated to;" Maine, New Hampshire, Vermont, Connecticut, Rhode Island, New Jersey, Florida, Mississippi, Arkansas, Missouri, New York, Maryland, Iowa, Wisconsin, Minnesota, Michigan, Indiana, Ohio, Nevada, California and Oregon, "taken."

Defendant, in opposition to the maintenance of this action to recover permanent damages, relies on—

Atlantic & G. W. R. Co. v. Robbins, 35 Ohio St. 581; *Chri v. Sheboygan & P. du L. R. Co.* 46 Wis. 625; *Pond v. Metropolitan Elev. R. Co.* 112 N. Y. 186.

The reason for the rule that permanent injuries cannot be recovered by a property owner in an action of trespass or case from corporations in Wisconsin and Ohio, is because in those States either the property holder or the railroad company can institute condemnation proceedings, which is the special remedy provided for getting those damages.

Wis. Rev. Stat. § 1852; *Hanlin v. Chicago & N. W. R. Co.* 61 Wis. 515, 20 Am. & Eng. R. R. Cas. 70; Ohio Rev. Stat. §§ 8283, 5448; *Grafton v. Baltimore & O. R. Co.* 21 Fed. Rep. 309, 17 Am. & Eng. R. R. Cas. 200.

It is true that the rule in New York is that in suits of this kind plaintiff can only recover damages up to time of bringing action or time of trial.

Pond v. Metropolitan Elev. R. Co. 112 N. Y. 186. See also *Utne v. New York Cent. & H. R. R. Co.* 2 Cent. Rep. 116, 101 N. Y. 98; *Tallman v. Metropolitan Elev. R. Co.* 8 L. R. A. 173, 121 N. Y. 119, 48 Am. & Eng. R. R. Cas. 411.

But in New York the Constitution provides that compensation shall be made for property "taken" for public use, and Justice Gray takes occasion, in delivering the opinion in case of *New York Elev. R. Co. v. Fifth Nat. Bank*, 135 U. S. 483, 34 L. ed. 261, to say: "This rule 14 L. R. A.

of damages at law has not prevailed in analogous cases decided in other jurisdictions," and in *Pond's Case*, the New York Court of Appeals says "it might be productive of less inconvenience, on the whole, if an opposite rule could be adopted.

Whatever the rule elsewhere, the Constitution of Alabama (art. 14, § 7.) gives the right to compensation for property "taken, injured or destroyed" by corporation clothed with right of eminent domain in the construction or enlargement of its works. We rely upon our own decisions, in the *Townsend* and *Smith Evans Cases*, and in analogous decisions by the Pennsylvania court, to sustain our right.

O'Brien v. Pennsylvania S. V. R. Co. 11 Cent. Rep. 679, 119 Pa. 184.

The measure of damages is the diminution in value caused by the injury.

Hooper v. Savannah & M. R. Co. 69 Ala. 532; *City Council of Montgomery v. Townsend*, 80 Ala. 496; *Evans v. Savannah & W. R. Co.* 90 Ala. 54; *Grafton v. Baltimore & O. R. Co.* 21 Fed. Rep. 309, 17 Am. & Eng. R. R. Cas. 200.

General and incidental benefits that come to all alike, either on the particular street or outside, are not to be regarded in determining the amount of actual injury.

Sullivan v. North Hudson County R. Co. 51 N. J. L. 518, 40 Am. & Eng. R. R. Cas. 326; *Chicago & E. R. Co. v. Blake*, 2 West. Rep. 815, 116 Ill. 163, 24 Am. & Eng. R. R. Cas. 291; *Pittsburg B. & B. R. Co. v. McCloskey*, 1 Cent. Rep. 619, 110 Pa. 435, 23 Am. & Eng. R. R. Cas. 88; *Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb. 542, 36 Am. & Eng. R. R. Cas. 644; *Grafton & G. R. Co. v. Foreman*, 24 W. Va. 662, 20 Am. & Eng. R. R. Cas. 223; *Chicago, P. & St. L. R. Co. v. Aldrich*, 134 Ill. 2, 44 Am. & Eng. R. R. Cas. 118, note; *Whitely v. Mississippi, W. P. & B. Co.* 36 Minn. 523, 36 Am. & Eng. R. R. Cas. 626, and cases cited in note, pp. 623, 629.

If plaintiff was entitled in this action to recover damages claimed in the complaint, the smoke, rumbling, shaking, or noise incident to the operation of the railroad in the avenue were all circumstances to be considered by a jury in so far as they affected the market value of the lot in assessing the plaintiff's damages.

Hooper v. Savannah & M. R. Co. 69 Ala. 534; *Wilson v. Des Moines, O. & S. R. Co.* 87 Iowa, 509; *Little Rock, M. R. & T. R. Co. v. Allen*, 41 Ark. 451; *Gainessville, H. & W. R. Co. v. Hall*, 9 L. R. A. 298, 78 Tex. 169, 44 Am. & Eng. R. R. Cas. 51, and cases in note.

Walker, J., delivered the opinion of the court:

This was an action to recover damages caused to the plaintiffs' lot near the city of Birmingham by the construction of an embankment for the track of the defendant's railroad in the street or highway upon which the lot abutted. It was alleged in the complaint, and there was evidence tending to show, that the defendant is a corporation clothed with the right to call into exercise the power of eminent domain, and authorized by its charter to build its railroad along the street or highway in question, and that, without the consent of the plaintiffs and without making them compensation, it built its railroad upon

a fill or embankment made in front of the plaintiffs' lot, and thereby obstructed the ingress and egress to and from such lot, and otherwise injured it. The averments and proof show that a corporation invested with the privilege of taking private property for public use has, in the construction of its works, injured such property without first paying compensation for such injury. This constitutes a violation of the rights secured by section 7 of article 14 of the Constitution of Alabama. For the redress of such a wrong an action at law lies. The jurisdiction of a court of equity to prevent the commission of such a wrong is not based upon the absence or inadequacy of legal remedies for the recovery of damages for the wrong when it has been consummated. The recognized equitable remedies may find support upon either of two grounds: (1) Upon the special jurisdiction of courts of equity to confine corporations to the exercise of the powers conferred upon them by law; and (2) upon the inadequacy of legal remedies to protect the constitutional right in its entirety, courts of law being unable to compel the payment of compensation to the property owner before his property is taken, injured, or destroyed. *Columbus & W. E. Co. v. Witherow*, 82 Ala. 190; *East & West R. Co. v. East Tennessee, V. & G. R. Co.* 75 Ala. 275.

The property owner, however, may fail to avail himself of the preventive equitable remedies, and rely upon his action at law for the redress of the wrong after it has been committed. If his land has been taken without his consent, and without having been duly acquired by condemnation proceedings, he can maintain ejectment for its recovery. *Hooper v. New Orleans & S. R. Co.* 78 Ala. 213; *New Orleans & S. R. Co. & Imp. Asso. v. Jones*, 68 Ala. 48.

If his property has not been so taken, but has been injured by the construction of the defendant's works, he may sue at law to recover damages for such injury. *Jones v. New Orleans & S. R. Co. & Imp. Asso.* 70 Ala. 227.

Such actions have been maintained in this court without question, and we are unable to discover any reasonable ground upon which the right to maintain them can be controverted. *Alabama M. R. Co. v. Coskry* (Ala.) 9 So. Rep. 202; *Alabama M. R. Co. v. Williams*, Id. 203; *Evans v. Savannah & W. R. Co.* 90 Ala. 54; *City Council of Montgomery v. Townsend*, 80 Ala. 489; *City Council of Montgomery v. Maddox*, 89 Ala. 181.

The property owner may waive formal condemnation proceedings, and yet recover such damages as he may suffer in his property by reason of the building of the railroad upon or near it. *Little Rock & Ft. S. R. Co. v. McGhee*, 41 Ark. 202; *United States v. Great Falls Mfg. Co.* 112 U. S. 645, 28 L. ed. 846; *Cohen v. St. Louis, Ft. S. & W. R. Co.* 84 Kan. 158.

A claim in the complaint of damages which the plaintiffs are not entitled to recover in this action does not impair the right to maintain the suit. A demurrer to a complaint which states a good cause of action is not the proper mode of evoking a decision of the court as to the rule to govern in the admeasurement of damages for the injury alleged. *Kennon v.* 14 L. R. A.

Western U. Teleg. Co. (Ala.) 9 So. Rep. 200; *Carl v. Sheboygan & F. du L. R. Co.* 46 Wis. 625.

There was no error in overruling the demurrers to the complaint.

The principal contention in the case is upon the rulings of the trial court on the question of the measure of damages. The appellant insists that the plaintiffs could not be entitled to recover prospective damages, that they were treating the obstruction complained of as a nuisance, and that in an action for the injury caused thereby their recovery could not go beyond the damages sustained prior to the commencement of the suit. In the Alabama cases against municipal corporations, the measure of damages for injury caused to abutting property by changes in the grades of streets or sidewalks has been stated to be the difference in the market value of the property before and after the act complained of. *City Council of Montgomery v. Maddox*, 89 Ala. 181; *City Council of Montgomery v. Townsend*, 80 Ala. 489.

The appellant contends that those authorities are not applicable here. It is true that the rule contended for by the appellant is supported by the decisions in several states. In *Uline v. New York Cent. & H. R. R. Co.* 101 N. Y. 98, 2 Cent. Rep. 116, the suit was by an abutting owner to recover damages sustained from the construction of a railway in the street fronting his premises, and, after a full consideration of the question of the measure of damages, it was held that the plaintiff could recover only temporary damages; that is, such damages as have been sustained up to the commencement of the action. This ruling has been adhered to in later cases arising in that court, and some other courts have reached similar conclusions. *Carl v. Sheboygan & F. du L. R. Co.* 46 Wis. 625; 6 Am. & Eng. Encyclop. Law, 595, note 4.

There are evidences in the later New York cases that that court has not remained satisfied with the decisions in the *Uline Case*. The inconveniences which have been developed in the attempts to adhere to that ruling have, however, been obviated, in a great measure, by encouraging such shifts as permitting damages for permanent injury to property to be assessed in such cases if the defendant failed to invoke the benefit of the decision against the propriety of the course, thus allowing the rule as to the measure of damages to be determined by the acquiescence of the parties, rather than by the law; or by allowing a judgment for past loss of rentals, and in the same case granting an injunction restraining the further operation and maintenance of the road, unless the defendant paid a certain sum equal to the amount of depreciation in the value of the property, as for a permanent appropriation. *Pond v. Metropolitan Elec. R. Co.* 112 N. Y. 186; 3 Sedgw. Dam. 8th ed. 465-476, where there is a review and criticism of the New York cases.

The principal reasons suggested for limiting the recovery in a case like this one to the damages sustained up to the commencement of the suit are (1) that when the defendant has paid the permanent damages it should have a clear title to the property taken, and; such title can-

be acquired as a result of a judgment, not in an action for trespass or for a nuisance; and (2) that the person injured by a nuisance may have it abated, and it would be just to allow the plaintiff to recover damages for permanent injury caused to his property by the nuisance, and still retain the right of subsequent actions for damages caused by continuance of the nuisance, and also the right to have the nuisance itself abated at any time.

The first of these reasons can have no weight on this case. The counsel for the plaintiffs expressly waived the right to recover compensation for the property which was injured by the defendant. The claim was for damages for the injury to the lot abutting on the street where the obstruction was made, plaintiffs' entire claim would be satisfied by the payment of damages. If the defendant had those damages assessed in condemnation proceedings, it would have acquired no compensation for the injured property. It is no objection to the judgment for the whole damages in this case that the defendant does not thereby get compensation for property which it has not taken, and which it does not seek to acquire. When compensation has been made to the plaintiffs for injury to their property, they can no longer disturb the defendant on that account. Another reason suggested implies that the action complained of must be treated as a permanent nuisance. It was not so treated in this case. There is nothing in the complaint or the evidence to indicate that the embankment or fill was constructed otherwise than as the defendant would have been authorized to construct it if the damages occasioned thereby to plaintiffs' property had been first assessed and paid. If the injury was such that final compensation therefor could have been made in condemnation proceedings, its character would not have been changed by the fact that such proceedings were not resorted to. There is no authority in such proceedings to compel a resort to an order to obtain an assessment of damages for an injury, the full damages from which in any other proceeding would be recoverable as legally unascertainable or as incapable of recovery. Damages which can be recovered in condemnation proceedings can be recovered just as well in an ordinary action at law. It is not perceived why the payment of damages awarded on a formal condemnation proceeding should be any more effectual to prevent the bringing of subsequent suits by the plaintiff than would the payment of damages by a court of law for damages for the same injury. The grievance of the plaintiffs is that they have not been paid for the injury caused to their lot. That claim can be satisfied by payment of a judgment for damages. There is nothing to indicate that the nuisance in its present condition of the structure erected by the defendant in front of plaintiffs' lot will furnish them with any use or use of complaint after they shall have paid for the injury to their property. Plaintiffs' entire cause of action can be satisfied just as effectually in this suit as in any other form of proceeding. If the structure in question is of a permanent character,

its existence and continuance in its present condition constitute but one wrong. Future and past damages on account of it are attributable to but one cause. To allow successive suits for the recovery of such damages in separate actions would amount to giving several causes of action for a single tort. This would be in violation of the principle that fresh damage, without a fresh injury, does not authorize a second or subsequent action. That cases like the present one come within this principle is the generally accepted view. The New York rule of damages recoverable at law has not prevailed in analogous cases decided in other jurisdictions. *New York Elev. R. Co. v. Fifth Nat. Bank*, 135 U. S. 432, 34 L. ed. 231.

In *O'Brien v. Pennsylvania S. V. R. Co.*, 119 Pa. 184, 11 Cent. Rep. 673, the action was for damages to property caused by excavations made along the street upon which the property abutted. It was held that the injury was single and indivisible, and that the damages could not be severed. In *Foote v. New Haven & N. R. Co.*, 112 Mass. 334, 17 Am. Rep. 106, it was held that the plaintiff could recover for prospective as well as past injury caused by the construction of a roadbed in such a manner as unnecessarily to turn the current of a stream against his land and wash away his soil. In *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 5 West. Rep. 837, it was decided that for taking or injuring land by the permanent structures of a railroad there should be but one response in damages. The reasonable rule on the subject, and the one which is maintained by the preponderance of the authorities, is that, where permanent structures are erected so as to cause a depreciation in value of adjacent or contiguous realty, the injured party may, and therefore must, recover compensation in one action for the entire loss, (1 Sedg. Dam. 8th ed. § 95; 5 Am. & Eng. Encyclop. Law, 20; *Indiana, B. & W. R. Co. v. Eberle*, 110 Ind. 542, 9 West. Rep. 206, 59 Am. Rep. 225; *North Vernon v. Voegler*, 108 Ind. 314, 1 West. Rep. 566; *Troy v. Cheshire R. Co.* 23 N. H. 83, 55 Am. Dec. 177,) and that the damages in such a case are to be measured by the depreciation in the market value of the property caused by the structure in question (3 Sedg. Dam. 414). The result is that the rule as to the measure of damages which has been stated in the Alabama cases against municipal corporations for similar injuries to property is equally applicable here. The charges given by the trial court on the question of the measure of damages are in harmony with the rule above announced. The charges upon that subject which were requested by the defendant, and refused by the court, were to the effect that prospective damages were to be excluded. As the evidence tended to show that the obstruction complained of is of a permanent character, causing permanent injury to plaintiffs' lot, those charges were properly refused. The rulings of the court involving other questions, though assigned as errors, were not insisted upon in the argument for the appellant, and for that reason will not be considered.

Affirmed.

NEW YORK COURT OF APPEALS.

Michael McQUIGAN, *Resp't.*,

v.

DELAWARE, LACKAWANNA & WEST-
ERN R. CO., *Appl't.*

(.....N. Y.....)

A physical examination before trial of a party to a civil action cannot be compelled by a court in the absence of a statutory enactment.

(December 1, 1901.)

A PPEAL by defendant from an order of the General Term of the Supreme Court, Fourth Department, affirming an order of a Special Term for Chemung County denying a motion for an order directing the plaintiff to submit before trial to a physical examination by physicians to be appointed by the court, for the purpose of enabling defendant to ascertain the extent of injuries for which he brought suit to recover damages. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. Robert T. Turner, for appellant:

The court erred in holding it had not the power or authority to grant an order to compel a personal examination of the plaintiff.

NOTE.—Power to compel plaintiff in a suit to submit to a physical examination.

In case of suits for annulment of marriage.

In a suit for the annulment of a marriage on the ground of impotence a court of chancery has power to compel the parties to submit to a surgical examination whenever it is necessary to ascertain facts which are essential to the proper decision of the causes. *Devanbagh v. Devanbagh*, 5 Paige, 554, 8 L. ed. 827.

So in a suit for the annulment of a marriage on the ground of malformation or abnormal physical proportions amounting to physical inability on the part of the male, the court may order a personal examination by physicians or matrons of the plaintiff. *Anonymous*, 7 L. R. A. 425, 80 Ala. 291.

So where plaintiff sued to be restored to conjugal rights and his wife alleged his impotence, the court appointed examiners to ascertain the truth of her allegations. *C. v. C.* 82 L. J. Mat. 12.

It seems that in a suit by a woman for annulment of marriage on the ground of impotence there must be a report by sworn medical inspectors as to her state. *Stagg v. Edgecombe*, 32 L. J. Mat. 159.

So in a case for divorce on the ground of the impotence of the husband, examiners were appointed for both parties. *B. v. C.* 32 L. J. Mat. 135.

But in *B. v. L.*, 16 Week. Rep. 943, in a suit for annulment of marriage because of malformation of the wife, the court made an order for her inspection without ordering the husband to submit to inspection.

In civil suits generally.

Blackstone states (3 Com. 222) that upon an appeal of mayhem where the issue joined is whether it is mayhem or no mayhem this shall be decided by the court upon inspection, for which purpose they may call in the assistance of surgeons. The decisions upon this subject are collected in 2 Rolle, Abr. 572.

This seems to be the closest analogy to be found in the common law to a compulsory physical examination of plaintiff, as practiced by some of the courts of to-day. The appeal of mayhem was abolished 14 L. R. A.

That the court has power to order such an examination, the following cases established:

Walsh v. Sayre, 52 How. Pr. 334; *Beckwith v. New York Cent. R. Co.* 64 Barb. 299; *Devanbagh v. Devanbagh*, 5 Paige, 554, 8 L. ed. 827; *Newell v. Newell*, 9 Paige, 25, 4 L. ed. 596.

Cases in other states holding such power exists are as follows:

Schroeder v. Chicago, R. I. & P. R. Co. 47 Iowa, 375; *Miami & M. Turnp. Co. v. Bailey*, 87 Ohio St. 104; *White v. Milwaukee, City R. Co.* 61 Wis. 536, 50 Am. Rep. 154; *State v. Ah Chuay*, 14 Nev. 79, 33 Am. Rep. 530; *Hatfield v. St. Paul & D. R. Co.* 33 Minn. 130; *State v. Graham*, 74 N. C. 646, 21 Am. Rep. 498; *Walker v. State*, 7 Tex. App. 245, 33 Am. Rep. 595; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 49 Am. Rep. 724; *Kinney v. Springfield*, 35 Mo. App. 97; *Galesburg v. Benedict*, 23 Ill. App. 111; *Hess v. Lake Shore & M. S. R. Co.* 7 Pa. Co. Ct. Rep. 565.

Mr. Andrew Hamilton, with *Mr. Jacob Schwartz*, for respondent:

Examinations have been ordered in certain exceptional instances where the question of conjugal impotence and like issues were raised. The power as exercised there rested on the

lashed by Stat. 59 Geo. III., chap. 46, and there is not a sufficient description of its object and procedure in the books at our command to demonstrate the closeness or remoteness of the analogy.

Upon the question of the right of defendant to demand and the power of the courts to enforce a surgical examination of plaintiff's person either before or during the trial the decisions are in hopeless conflict.

Doubtless a majority of the courts which have expressed an opinion upon the question are in favor of recognizing the existence of such right and power, but that the weight of authority is in favor of it may be questioned.

The leading cases in favor of the power are *Walsh v. Sayre*, 52 How. Pr. 334, and *Schroeder v. Chicago, R. I. & P. R. Co.* 47 Iowa, 375; against it, *Roberts v. Ogdenburg & L. C. R. Co.* 29 Hun, 154, and *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, 35 L. ed. 734.

Decisions as to power to order examination before trial.

The earliest expression on the question appears to have been in 1285, when there is a dictum of the New York Supreme Court that in an action to recover damages for personal injuries arising from negligence it is not erroneous for the judge to charge the jury that the defendant had it in his power to examine the actual condition of the plaintiff before trial, and that if he refused to permit an examination the defendant might prove it on the trial. *Beckwith v. New York Cent. R. Co.* 64 Barb. 200.

In 1808 it was decided that in an action for malpractice against a surgeon to recover damages for alleged unskillful operation upon the body of plaintiff the court has power on the application of defendant to order plaintiff to submit to a physical examination by skillful and competent physicians named by defendant under direction of a referee appointed by the court for that purpose. *Walsh v. Sayre*, 52 How. Pr. 334.

The Special Term of the New York Court of Common Pleas held in *Shaw v. Van Rensselaer*, 60 How. Pr. 143, that after issue joined defendant may examine plaintiff as to the extent of his injuries and

ial nature of the actions. The reason for exercise there has no application to cases the one at bar.

here is no authority to compel a plaintiff case of this nature to exhibit his person for examination by his adversaries.

uman v. Third Ave. R. Co. 18 Jones & S. *Roberts v. Ogdensburgh & L. C. R. Co.* 29, 154; *Elfers v. Woolley*, 116 N. Y. 294; *wyng v. Broadway & S. A. R. Co.* 27 N. Y. R. 868.

ndrews, J., delivered the opinion of the t:

he sole question presented by this record is whether the supreme court has power, in addition to the trial of an action for a personal physical injury, to compel the plaintiff, on application made in behalf of the defendant, to submit to a surgical examination of person by surgeons appointed by the court, as a view of enabling them to testify on the basis to the existence and extent of the alleged injury. The question is not new in the law, although, so far as we know, it was first presented in 1868, before a judge of the New York superior court at special term, in the case of *Walah v. Sayre*, 52 How. Pr. 334. It affirmed the existence of the power. The same was held by the General Term of the

obtain from the court the aid of physicians to verify by an inspection of the plaintiff's person the marks of a permanent character were left by accident upon plaintiff's body.

the court afterwards granted such an order. *in v. Manhattan R. Co.* 5 Weekly Law. Bull. & plaintiff may be required by the court upon application therefor made by defendant to let his person to an examination for the purpose of ascertaining the character and extent of injuries. *Schroeder v. Chicago, R. I. & P. R. Co.* 375.

where plaintiff claims damages by reason of an alleged spinal injury received through defendant's negligence, such injuries being latent in their nature, the court will, on defendant's application, order plaintiff to submit to examination by inspection of medical experts produced on the part of defendant. *Hess v. Lake Shore & M. S. R. Co.* 7 Pa. Rep. 565.

within the discretion of the trial court to require plaintiff, suing for a physical injury alleged to be permanent, to submit to an examination by competent physicians at the instance and at the expense of the defendant in the action, to ascertain the nature, extent, and probable duration of the injury, so as to afford means of proving the same at the trial. *Richmond & D. R. Co. v. Child*, 8 L. R. A. 303, 32 Ga. 719.

On the other hand, in 1888 the New York supreme court after a careful consideration of the question reviewed of the cases, reached the conclusion that the court has no power to order plaintiff to submit before trial to a physical examination at the instance of the defendant to ascertain the extent of the damages received. *Roberts v. Ogdensburgh & L. C. R. Co.* 29 Hun, 154.

This decision has since been followed in that *Neuman v. Third Ave. R. Co.* 18 Jones & S. 154; *vage v. Murray*, March Spec. Term Brooklyn, 1890.

In an action for slander, the alleged publication of which plaintiff, an unmarried female, was unaware and that she had become pregnant and had had an abortion, an order requiring her to let her person to a medical examination for R. A.

Third Department in *Roberts v. Ogdensburgh & L. C. R. Co.* 29 Hun, 154. In 1877 the Supreme Court of Iowa, in the case of *Schroeder v. Chicago, R. I. & P. R. Co.* 47 Iowa, 375, sustained the doctrine that the court had an inherent jurisdiction to grant a compulsory order that the plaintiff submit to such examination, and this decision has been followed by the courts of several of the western and southern states, and in others the power has been denied. The same question was considered in the United States Supreme Court in the recent case of *Union Pac. R. Co. v. Botaford*, 141 U. S. 250, 85 L. ed. 734, decided in May, 1901, and the court (two judges dissenting) decided adversely to the claim that the court had power to compel such examination. The opinions of the several courts which have passed upon the question present very fully the considerations bearing upon it. We concur with the view taken by the supreme court of the State and the Supreme Court of the United States, and we can add very little to the full discussion to be found in the opinions of those courts. The powers of courts are either statutory or those which appertain to them by force of the common law, or they are partly statutory and partly derived from immemorial usage, which latter constitutes their inherent jurisdiction. They are organized for the protection of public and

the purpose of furnishing evidence under defendant's plea of justification, was properly refused. *Kern v. Bridwell*, 119 Ind. 226.

In *Union Pac. R. Co. v. Botaford*, 141 U. S. 250, 35 L. ed. 734, 1901, the Supreme Court of the United States went into the question very fully, and, after considering most of the cases then reported on the subject, decided that in civil actions for an injury to the person the court on application of defendant and in defense of the trial has no legal right or power to order the plaintiff without his or her consent to submit to a surgical examination as to the extent of the injury sued for.

Decisions as to power to order examination at the trial.

In an action for personal injuries the court may, in a proper case, at the trial, direct the plaintiff to submit to a personal examination by physicians on behalf of defendant. *White v. Milwaukee City R. Co.* 61 Wis. 538, 50 Am. Rep. 154.

Where plaintiff in an action for damages for personal injuries alleges that they are of a permanent nature defendant is entitled as a matter of right to have the opinion of a surgeon upon his condition, based upon personal examination; and the court may, upon demand of defendant, compel plaintiff to submit to it. Where the evidence of experts is already abundant the court must exercise a discretion in compelling or refusing the examination which is subject to review in case of abuse. *Sibley v. Smith*, 46 Ark. 273, 55 Am. Rep. 584.

In an action for damages for a personal injury to the eyes, the plaintiff having testified, and no medical expert having testified, the court may order the plaintiff to submit to an examination by a competent expert. *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 669.

In contrast with the above are the following:

In a suit to recover damages for injuries to plaintiff's eyes the court has no power to compel the plaintiff to submit his eyes to the examination of a physician in the presence of the jury. *Parker v. Enelow*, 106 Ill. 372, 40 Am. Rep. 568.

The proposal in a damage suit to have two surgeons called in during progress of the trial to ex-

private rights and the enforcement of remedies. Presumptively, therefore, whatever judicial procedure is essential to enable courts to exercise their function is authorized. The maxim that there is no right without a remedy justified the courts, in the earlier periods of the common law, in inventing writs and modes of procedure adapted to present for adjudication in proper form every question of judicial cognizance. The powers and jurisdiction of the courts of common law, and chancery in England are to be found in the English statutes, and in the rules, precedents, decisions, and procedure of the courts. The power which the courts actually exercised, supplemented by statutory powers, constitutes in a general sense their jurisdiction. Upon the organization here of the federal and state governments, courts were constituted, and in this State they succeeded to the powers theretofore exercised by the courts of law and chancery in England so far as they were applicable to our situation. It is a significant fact that not a trace can be found in the decisions of the common-law courts of England, either before or since the Revolution, of the exercise of a power to compel a party to a personal action to submit his person to examination at the instance of the other party. If the power existed, it is difficult to suppose that it would not have been fre-

quently invoked. Actions for assault and battery, for injuries arising from negligence, and generally for personal torts, were among the most common known to the law, and yet, so far as we can discover, in no case was it supposed or claimed that the court was armed with this jurisdiction. The nonexercise of a power is not conclusive against its existence, but it is inconceivable that, if the power in question existed, it should have been unused for centuries, and never have been called into activity. In two cases cited by Justice Gray in his opinion in *Union Pac. R. Co. v. Botsford*, *supra*, the court of common bench in England refused an order for the inspection of a building, on the application of the plaintiff in an action for work and labor performed by him thereon, on the ground of want of power. *Newham v. Tate*, 1 Arnold, 244; *Turquand v. Strand Union*, 8 Dow, 201. These cases tend to negative the existence of the power in the English courts; claimed for our courts in the case at bar. The only authority in the English common-law courts in any degree analogous is found in the power which the courts of England have occasionally, though rarely, exercised,—to issue, on the application of apparent heirs, the writ *de ventre suspiciendo*, to compel a widow claiming to be with child by her deceased husband to submit her person to exami-

amine plaintiff as to the extent of his injuries is unknown to the law and the court has no power to enforce such order. *Lloyd v. Hannibal & St. J. R. Co.* 58 Mo. 509.

An application made during the trial may be denied; if desired it should be made before the trial begins. *Stewart v. Havens*, 17 Neb. 211.

Where the application was not made until after the close of plaintiff's evidence in chief and the commencement of the introduction of defendant's evidence, and no reason is shown for the delay, the motion is properly refused. *Miami & M. Turnp. Co. v. Bally*, 37 Ohio St. 104.

Where the application is not made until after the close of plaintiff's evidence, and no reason is shown for the delay in making the application, it will not be error to refuse to order it, especially where the plaintiff offers to submit to a private examination as soon as the attendance of medical experts on his behalf can be secured. *Hess v. Lowrey*, 7 L. R. A. 90, 122 Ind. 225.

It is proper for plaintiff's counsel to refuse to permit her to be subjected to examination by physicians. *McSwyny v. Broadway & S. A. R. Co.* 27 N. Y. S. R. 583.

In analogy to those cases it has been held that on a prosecution for the carnal knowledge or abuse of a female child under ten years of age the defendant cannot insist as matter of right that she shall submit to an examination of her person by medical experts, and if such examination can be compelled in any case it is a matter of judicial discretion and not revisable; the court stating that it may be well doubted in cases of rape and cognate offenses whether the court has the power to make an order compelling the inspection of the private person of a prosecutrix in the event of her refusal to submit to such examination. *McGuff v. State*, 88 Ala. 147.

Application of the rules.

It will be noted that although many courts are strenuous in asserting the existence of the power, the instances where its exercise has been held to be necessary are rare.

The defendant has no absolute right to insist on

an examination of plaintiff. *Norton v. St. Louis & H. R. Co.* 40 Mo. App. 642.

It is not an abuse of discretion to overrule a motion for an examination of plaintiff's person when the application was made only one day before the cause was called for trial and two days after the day for which it was docketed. *Klaney v. Springfield*, 35 Mo. App. 97.

Where a motion to compel plaintiff to submit to an examination is filed on the day before the trial and denied at that time, with the statement that if during the progress of the trial it appeared necessary to ascertain the real condition of the plaintiff, such examination would be granted, the failure of defendant to renew the motion after the plaintiff's testimony was in will be an abandonment of it. *Sidekum v. Wabash, St. L. & P. R. Co.* 10 West. Rep. 277, 95 Mo. 400.

In *Owens v. Kansas City, St. J. & C. B. R. Co.* 95 Mo. 169, the trial court overruled a motion to require plaintiff to submit her person to an examination by medical experts in advance of the trial, and the supreme court held that there was no abuse of discretion since the evidence in the case showed a history of plaintiff's health for a large part of her life and also her physical condition since the accident, and what acts she could and what she could not do, and it did not appear that a medical examination could add information which would be of value in the case.

On the trial of an action for damages for personal injury the court may refuse to order the plaintiff to submit to a physical examination by the defendant's medical witnesses in private, it not appearing to be necessary and the plaintiff having already submitted to an examination by such witnesses in the presence of the jury. *Stoux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 49 Am. Rep. 734.

In *Shepard v. Missouri Pac. R. Co.* 85 Mo. 685, 55 Am. Rep. 290, where the trial court had overruled a motion for the examination of the plaintiff before trial, the court stated that it was inclined to hold that the court had power to order the examination but that there was no absolute right on the part of defendant to have it; and the court held that in that case where a lady had already once submitted

tion. The practice in England *issui generis*, it has never been adopted here. It may have originated in the peculiar favor shown to heirs by the law of England, but, whatever its origin, seems repugnant to common right, and the fact that in this instance only have the courts of England exercised the power to compel the examination of the person in a civil proceeding tends to show that the power is not there regarded as general, but special and peculiar, and limited to the particular case. The doctrine in the cases in chancery, (*Briggs v. Morgan*, 2 gg. Const. 324; *Devanbagh v. Devanbagh*, 5 gg. 554, 8 L. ed. 827; *Newell v. Newell*, 9 gg. 26, 4 L. ed. 596,) that in an action to cure a decree of nullity of marriage on the ground of impotence or sexual incapacity the chancellor may compel the defendant to submit to a surgical examination, is a graft from civil and canon law, and, as has been said, "rests upon the interests which the public as well as the parties, have in the question upholding or dissolving the marriage state, upon the necessity of such evidence to enable the court to exercise its jurisdiction." *Wright, J.*, in *Union Pac. R. Co. v. Botsford*, *supra*.

When we examine the history of the power of common-law courts to compel the production and inspection of books and papers in pos-

session of the opposite party in a civil action, we find that originally the courts disclaimed any power in the matter, and the remedy by bill of discovery was the only resource of the party desiring such discovery. Finally the common-law courts assumed a limited equitable jurisdiction over the subject, and, in addition to the rule that a party pleading a deed should make proof of the instrument which enabled the other party to demand over, the courts by order compelled a party who in his pleading relied upon a written instrument, not a deed, to give inspection to the other party if required, and so in other special cases. The courts in this State, prior to any statute, exercised a limited equitable jurisdiction of the same character. *Lawrence v. Ocean Ins. Co.* 11 Johns. 245; *Denslow v. Fowler*, 2 Cow. 592, *note*. But this limited jurisdiction was exercised sparingly and with hesitation, and it was not until statutes were enacted in England and in this State, conferring upon common-law courts the same power to compel the discovery and inspection of books and papers which was exercised by courts of chancery on bills of discovery, that courts of common-law claimed or exercised full power over the subject. Stat. 14 & 15 Vict. chap. 99; Stat. 17 & 18 Vict. chap. 125; Rev. Stat. p. 199, § 31. The limited jurisdiction exercised by these courts before

an examination which she stated to have been very painful, and that she feared the result of another, she would not be compelled to submit to examination by three physicians, especially the one she named one to whose examination she had submitted.

It is not error to refuse to compel plaintiff to be examined by a physician to whom he expressed objection although this objection did not go to the competency or integrity of the physician proposed. *Union Pac. R. Co. v. Johnson*, 72 Tex. 95.

There was no abuse of discretion in refusing to permit physicians to visit and examine plaintiff at bedside upon a motion made while the case was on trial and plaintiff had introduced all his evidence, where there was nothing in the evidence or circumstances which justified it and no affidavit showing that plaintiff had been feigning an injury and not received. *Galeburg v. Benedict*, 22 Ill. 114.

The refusal of the trial court to grant an order compelling plaintiff to submit before trial to a physical examination at the instance of defendant is ground for reversal where plaintiff subsequently submitted to an examination by three physicians selected by defendant, where it does appear that damage resulted from the delay in making the examination. *Chicago & E. L. R. Co. v. Holland*, 11 West. Rep. 51, 122 Ill. 461.

A cause will not be reversed for refusal to order examination, in the absence of a showing that it is necessary to the presentation of all the facts, where it was not shown that plaintiff was unwilling to submit to an examination by any competent person. *International & G. N. R. Co. v. Woodward*, 64 Tex. 483.

Where the application was made after the jury impaneled the court, without deciding whether the defendant could in any case demand an examination of plaintiff's person, held that an application should in no case be granted unless the justice imperatively demand it, and never where the party is willing to be examined by competent and disinterested men without such order. *C. & S. F. R. Co. v. Norfleet*, 78 Tex. 321.

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An expert surgical examination of plaintiff's person is necessary to the attainment of justice in an action to recover for personal injuries where her physician after an examination of her person testifies to a certain condition of disability as resulting from the facts which he found in the case, and his conclusion is disputed by several other reputable surgeons and physicians who have been examined as to their conclusions from facts stated by him; and should be ordered where it will not involve any ill consequences to plaintiff. *Alabama G. S. R. Co. v. Hill*, 9 L. R. A. 442, 90 Ala. 71.

Neither nervous temperament on the part of plaintiff nor delicacy and refinement of feeling is a ground for refusing the motion. *Ibid*.

In *Hatfield v. St. Paul & D. R. Co.* 32 Minn. 130, the court used the cases permitting a physical examination of plaintiff as an analogy for requiring the plaintiff to perform a physical act before the jury.

Manner of enforcing the power and effect of disobedience.

The court will enforce such order by refusing to try the cause until a compliance is had with the order. *Hess v. Lake Shore & M. S. R. Co.* 7 Pa. Co. Ct. Rep. 565.

On the refusal of the plaintiff to comply with the order when properly made the court may dismiss the action or refuse plaintiff the right to give evidence to establish the injury. *Miami & M. Turnp. Co. v. Bailey*, 37 Ohio St. 104.

If the court makes an order for the physical examination of plaintiff, and plaintiff refuses to permit an examination, if the court permits him to further prosecute his suit the fact of plaintiff's refusal will be competent and very potent evidence against him. *Kinney v. Springfield*, 35 Mo. App. 97.

If plaintiff unreasonably refuses to show his injuries when asked to do so that fact may be considered by the jury as bearing on his good faith. *Union Pac. R. Co. v. Botsford*, 141 U. S. 260, 35 L. ed. 734.

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the statute was in the nature of a usurpation, and, so far as we can discover, it was never considered that they possessed an inherent power in aid of justice to grant relief in cases outside of the narrow limit mentioned. The power to compel an inspection of books and papers relevant to the controversy, in possession of either party, is of a similar nature to that invoked in the present case, and, if the inherent power of the court did not extend to the one case, it is difficult to suppose that it embraced the other. The power to compel a party to submit to an examination of his person has never been conferred by any statute. The provisions of the Revised Statutes authorizing the court to compel the production of books or papers have been re-enacted in the Codes of Procedure. The statutes also contain specific provisions for the examination of a party on oath before trial, at the instance of the other party. The omission in these statutes of any reference to the power now under consideration is quite significant. We cannot say that the exercise of the power claimed might not in some cases promote the cause of justice, and prevent the consummation of fraud. On the other hand, unless carefully guarded, it would be subject to grave objections. But we have to deal only with the question of the power of the courts in the absence of any legislation. It is very clear that the power is not a part of the recognized and customary jurisdiction of courts of law or equity. The doctrine that courts have an inherent jurisdiction to mould the proceedings to meet new conditions and exigencies is true, but in a limited sense. They cannot, under cover of procedure or to accomplish justice in a particular case, invade recognized rights of person or property.

No court, we suppose, can abrogate an established rule of evidence, as, for example, the rule that hearsay evidence is inadmissible, or the rule of the common law that parties shall not be witnesses, or that interest disqualifies. They may apply existing rules to new circumstances. Nor is it, we conceive, within the power of the court to create remedies unknown to the common law, or institute a procedure not according to the course of the common law. It is most important that courts should proceed under the sanction of an orderly and regulated jurisdiction, and that as little as possible should be left to the discretion of a judge. The exercise by the court of the power now invoked, as has been shown, is not sanctioned by any usage in the courts of England or of this State. Its existence is not indispensable to the due administration of justice. Its exercise depending on the discretion of the judge, would be subject to great abuse. We think the assumption by the court of this jurisdiction, in the absence of statutory authority, would be an arbitrary extension of its powers. It is a just inference that an alleged power which has lain dormant during the whole period of English jurisprudence, and never attempted to be exercised in America until within a very recent period, never in fact had any existence. We have purposely omitted to repeat the views and authorities upon this question set forth in the opinions in *Roberts v. Opdenburgh & L. O. R. Co.* and in *Union Pac. R. Co. v. Botsford*, and we refer to those opinions for a fuller discussion of the grounds upon which the denial of the power claimed proceeds.

The order should be affirmed.

All concur.

ILLINOIS SUPREME COURT.

Antonie E. CARTIER, *Appt.*,
v.

TROY LUMBER CO.

(.....III.....)

1. No presumption can be indulged against a party for failure to produce

NOTE.—*Presumption against a party from failure to produce evidence.*

Failure to show a fact which rests in the knowledge of the party and which is necessary to clear up the case authorizes the jury to draw inferences against him. *First National Bank of Winston v. Atlanta Rubber Co.* 77 Ga. 781; *Fitschen v. Thomas*, 9 Mont. 52; *Lake v. Nolan*, 81 Mich. 112; *VanStyke v. Chicago, St. P. & K. C. R. Co.* 80 Iowa, 620.

The failure of defendant to put in evidence the matting on which plaintiff tripped and which was alleged to have been in defective condition may be considered by the jury as a circumstance, although it had remained on the stairs for two years after the accident; it is for the jury to say how far this fact constitutes a reason for failure to produce it. *McGuire v. Joslyn*, 31 N. Y. S. R. 990.

The rule requiring a party to produce evidence to contradict or explain circumstantial evidence against him applies only when he is pressed by such evidence having it in his power to destroy its apparent force. *People v. McWhorter*, 4 Barb. 438. 14 L. R. A.

books or papers where secondary evidence fully establishes their contents so far as they are material.

2. The rule as to presumptions which may be indulged against a party to a suit for refusing to produce documents in his possession does not apply to such documents as he has no right to give in evidence with-

The court may call attention to the fact that important testimony is withheld although no notice to produce it has been given. *Prick v. Barber*, 64 Pa. 120.

Where the *onus probandi* is thrown on the plaintiff in proceedings for forfeiture of a vessel by a prima facie case, failure to explain the difficulties of the case by the production of papers and other evidence which must be in the claimant's possession or under his control justifies condemnation. *The Luminary*, 21 U. S. 8 *Wheat*, 407, 5 L. ed. 647.

But in an action of debt for a statutory penalty under the Internal Revenue Act, an instruction that failure of the defendant to produce his books of account, which would show proof of the matters in issue, will justify a verdict of guilty after a prima facie case has been made out, although the proof must be beyond a reasonable doubt, is erroneous as casting the burden of proof on the defense. *Chaffee v. United States*, 85 U. S. 18 *Wall* 516, 21 L. ed. 908.

If papers called for are not produced the other

at the consent of his adversary and which he is called upon to produce.

An instruction indicating to the jury the views of the court as to the presumption arising from the facts is erroneous.

An erroneous charge as to the presumption against a party from failure to produce books or papers under his control will require a reversal where the evidence was conflicting and irreconcilable.

(October 31, 1891.)

APPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of plaintiff in an action brought to recover damages against defendant for corrupting and bribing certain arbitrators to determine a question at issue between the parties and thereby inducing them to bring in a false and fraudulent report or report concerning the matter submitted to them to the injury of plaintiff. *Reversed.*

may argue the jury as to inference to be drawn therefrom. *Bas v. Steele*, 3 Wash. C. C. 881. Where secondary evidence is imperfect, vague and uncertain, every intent and presumption is made against the party who might remove the original by producing the higher evidence, which he is to produce after notice. *Cross v. Bell*, 34 Ky. 82; *Benjamin v. Ellinger*, 80 Ky. 472; *Rector v. Rector*, 8 Ill. 105.

The non-production of a deed which is in the possession of a party is strong presumptive evidence against him who has it, the other party will not be excused from testifying as to its contents because he cannot recollect the contents of the description in the deed. *Jackson v. M'Vey*, 18 Johns. 330.

This reason also the refusal of a party to produce a letter addressed to him by the other party, which was competent evidence, may be proved. *Wood v. Rose*, 125 Ind. 538.

The inference warranted by the evidence that a party has been induced against a party who refuses to produce written contracts which are material to the case upon notice to do so. *Wylde v. Northern of New Jersey*, 58 N. Y. 156.

Inferences in connection with the proof of contents of a document must be taken most strongly against a party who declines to produce the document after notice. *Barber v. Lyons*, 22 Barb. 622.

The evidence as to the terms of a contract in dispute will be taken most strongly against a party who has the papers in his possession and fails to produce them under notice. *Francis v. Barry*, 14 Rep. 38, 69 Mich. 311.

The refusal to produce a note or bond after notice is a circumstance which the jury may consider on the question whether it had been assigned after maturity. *Orenshaw*, 105 N. C. 399.

An instrument may be presumed to be stamped in the hands of a party who refuses to produce it after notice. *Crisp v. Anderson*, 1 Stark. 34.

The proper execution of a deed may also be presumed against a party who keeps it back. *Atty. Gen. v. Windsor*, 24 Beav. 706.

The refusal of a plaintiff in ejectment by advice of counsel and contrary to the recommendation of the jury to produce a deed which he has in his possession although no prior notice to produce it had been given, because the other party had no knowledge of it, was said by Lord Mansfield to warrant the strongest presumption that it would show that the plaintiff had no title. *Roe v. Harvey*, 4 Burr. 2484.

In such a case, however, the other judges held also that without such deed plaintiff had proved no

title, and that a nonsuit was consequently proper. *Ibid.*

Plaintiff owned a saw-mill and tract of land containing pine timber. It entered into a contract with defendant to sell him this property for the price of \$190,000, providing the amount of timber and logs on the land should be 50,000,000 feet or more; the amount to be determined by an agreed estimate, each party selecting an estimator, and if they could not agree those two to select a third, and in case the estimate is found to be less than 50,000,000 feet, a reduction of \$2.25 per thousand was to be made from the amount of purchase money. The estimators were selected and finally agreed upon an estimate of 26,500,000 feet of standing timber and 165,441 feet of logs. Complainant charged that from facts subsequently coming to its notice it appeared that defendant had bribed the estimators by paying them \$2,000 each to bring in a false estimate much below the true one so that he might gain thereby to complainant's damage. Complainant further contended that the facts of this bribery and false estimate could be shown from the books

title, and that a nonsuit was consequently proper. *Ibid.*

As limiting the generality of some of the expressions above used it has been also decided that the refusal to produce books and papers under a notice does not raise a presumption that if produced they would establish the fact which the party calling for them alleges they would prove, but such refusal merely lays the foundation for secondary evidence. *Hanson v. Eustace*, 42 U. S. 2 How. 653, 11 L. ed. 416; *Life & F. Ins. Co. v. Mechanics F. Ins. Co.* 7 Wend. 31.

This rule was applied where the fact sought to be proved was the existence of a deed. *Hanson v. Eustace*, 42 U. S. 2 How. 653, 11 L. ed. 416.

Also that as to a book which a party could not himself give in evidence without permission of the other party his failure to produce it on notice was declared to raise no legal presumption against him but only to authorize secondary evidence of the contents. *Merwin v. Ward*, 15 Conn. 377.

The question actually raised in this case was whether a refusal to charge that a presumption could be drawn in such case by the jury was or was not error, and it was decided in the negative. *Ibid.*

And again that the nonproduction of books containing an entry of a sale after notice merely entitles the other party to give parol evidence thereof, and the jury are not authorized to draw any inference as to whether the entry would show that the credit was given to one person alone or jointly to two where this was in dispute. *Cooper v. Gibbons*, 3 Campb. 363.

Bad faith of a party to a contract cannot be inferred merely from non-production of papers called for on the trial where the party has previously offered books and papers which have been objected to and in several cases rejected. *Burr v. American Spiral S. B. Co.* 81 N. Y. 175.

The rule which might be drawn from the above decisions, and which would conflict with scarcely any of them, is that such nonproduction of material evidence which a party has in his possession, and which is called for by the other party, justifies all inferences against him which can be drawn from the evidence actually in the case and that such evidence be taken most strongly against him, but does not create a presumption of any distinct fact as to which there is no evidence.

The presumptions from failure to produce witnesses as well as those from the spoliation or manufacture of evidence, although closely connected with this subject, will be treated in other notes.

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and documents in defendant's possession, which he refused to produce at the trial when called upon to do so.

The further facts appear in the opinion.

Messrs. Thomas Bates, Ramsdell & Benedict and D. V. Samuels for appellant.

Messrs. Tenney, Hawley & Coffeen, for appellee:

Instructions must not only be based upon evidence, but must be construed and considered in the light of the evidence upon which they are based.

Worden v. Salter, 90 Ill. 160; *Dacy v. People*, 4 West. Rep. 180, 116 Ill. 555.

Upon the theory of Cartier's innocence, books and other documents in his possession would have been well-nigh conclusive in his favor. If there had been a dispute about any of these facts the same evidence which proved the existence of the documents proved also that, as a matter of fact and without reference to any presumption, the documents "if produced in evidence, would be injurious to his case."

It was proved by independent evidence that the matters contained in these documents were utterly inconsistent with Cartier's innocence. So if the jury believed the plaintiff's evidence as to these documents, Cartier's guilt followed as a legal conclusion, though the instruction by no means goes to that extent.

The principle of the instruction is that the failure to produce, the suppression of, the documents is legal evidence from which it may be inferred that their contents would be injurious to the party suppressing them.

This principle is well sustained by the authorities. If it be "found that there is any better evidence existing than is produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed."

8 Bl. Com. 368.

In Wharton on Evidence, § 1287, it is said that the mere non-production of written evidence which is in the power of a party generally operates as a strong presumption against him.

See also 2 Best, Ev. § 411; 1 Greenl. Ev. 37.

When a party fails to produce a document after notice—or, having the power to decline producing it, elects to exercise the power—everything touching the contents of the document, and its execution, will be presumed against him which the case fairly admits of.

1 Thomp. Trials, § 794. See also *Winchell v. Edwards*, 57 Ill. 41; *Downing v. Plate*, 90 Ill. 268; *Chicago City R. Co. v. McMahon*, 103 Ill. 485, 42 Am. Rep. 29; *Clifton v. United States*, 45 U. S. 4 How. 242, 11 L. ed. 957; *United States Exp. Co. v. Jenkins*, 73 Wis. 476; *Cross v. Bell*, 84 N. H. 82; *Wheeler v. Schroeder*, 4 R. I. 383.

Where the adverse party has it in his power to produce evidence that would settle the question at issue, although not compelled to produce it, every intentment and presumption is to be made against the party who might remove all doubt on the question. When a party is charged with fraud or misconduct, and the production of papers would establish his guilt or innocence, the jury will be amply

justified in inferring guilt from the unexplained fact of their non-production.

Benjamin v. Ellinger, 89 Ky. 472; *Jackson v. M'Fey*, 18 Johns. 389; *Gale v. Lake Shore & M. S. R. Co.* 81 Mich. 156; *Van Slyke v. Chicago, St. P. & K. O. R. Co.* 80 Iowa, 680.

The omission of a party to an action to testify to facts, or to produce evidence in explanation of or to contradict adverse testimony, raises a presumption against his claims, unless the evidence is not peculiarly within his power, or is privileged.

Lawson, Presumptive Ev. pp. 120, 121. See also *Com. v. Webster*, 5 Cush. 316, 52 Am. Dec. 711.

The principle of the instruction given in no way differs from that of instructions constantly given, even in criminal cases in which certain facts are stated to be or not to be evidence of some other fact.

Ackerson v. People, 14 West. Rep. 694, 124 Ill. 563; *Bean v. People*, 14 West. Rep. 689, 124 Ill. 576; *Smith v. People*, 108 Ill. 82.

While a presumption of dedication is one of fact and not an artificial inference of mere law to be made by the court, yet it is the duty of the court to state what facts, if proved, will justify such a presumption.

Boston v. Lecraw, 58 U. S. 17 How. 426, 15 L. ed. 118; *McKean v. Salem*, 148 Mass. 109.

It is proper for the court "to instruct that, where a party knows that evidence is likely to be introduced at a trial inconsistent with his own claim, and, if his claim is well founded, it is in his power to produce other evidence which will control that brought against him, his failure to produce such other evidence should be considered as a circumstance against him."

1 Thomp. Trials, § 1045.

While it is error for the court to submit a question of law to the jury, or to decide a question of fact himself, yet if he do either and the decision upon the question is correct, the error is not prejudicial and not ground for reversal of the judgment.

2 Thomp. Trials, § 2402.

Although an instruction may be objectionable, a judgment will not be reversed for that cause, when, upon the whole record, it appears that the right is with the party in whose favor the instruction was given, and that justice has been done.

Newkirk v. Cons, 18 Ill. 449; *Dishon v. Schorr*, 19 Ill. 59; *Elam v. Badger*, 23 Ill. 498; *New England F. & M. Ins. Co. v. Wetmore*, 32 Ill. 221; *Dacy v. People*, 4 West. Rep. 180, 116 Ill. 555.

Wilkin, J., delivered the opinion of the court:

Among the instructions given to the jury by the trial court was the following: "If you believe from the evidence that the defendant, Cartier, has in his possession or under his control, so that he might have produced them, books or papers which contain evidence material to this case, which he has not produced in evidence, you have a right to presume that such books and papers, if produced in evidence, would be injurious to his case, unless you find that such presumption has been re-

futed by the other credible evidence in the case." It is now insisted by appellant that the giving of this instruction was manifest error, calculated to mislead the jury and prejudice his case. It was condemned by the appellate court, a majority of its members, however, holding that the giving of it was not, under the facts of the case, reversible error. We fully concur in the view that the instruction does not correctly state the law of evidence, as applicable to the facts in proof. It clearly authorized the jury to indulge a presumption not legally arising from the facts on which it is based. It will be observed that, according to its terms, however innocent may have been the omission on the part of defendant to produce each and every book and paper in his possession or under his control containing evidence material to the case on either side, the damaging presumption might be indulged. It left the jury free to determine for itself what would be material evidence in the case. That which it might presume was not merely facts which the absent evidence would tend to prove, but that all such books and papers, if produced, would be injurious to the defendant's case generally. It is said, however, the instruction must be construed in the light of the evidence on which it is based. That is doubtless true, if it can be definitely determined what that evidence is. On the trial the plaintiff called upon defendant to produce one of his books, which it was claimed showed certain estimates of the timber on the lands sold, and particularly the entry, "To bills payable, 'N.', \$2,000." One Bearman, a witness for plaintiff, and former book-keeper for defendant, testified that he made the entries, and he swore to the estimates as shown by the book. Also that the entry, "To bills payable," etc., meant \$2,000 paid to the estimator, Neilan, by the defendant. The defendant admitted that the entry appeared on the book, and said that he could give no explanation of it. Construing the instruction under consideration as being based on the failure to produce this book,—and it must have been so based, at least in part,—the jury were told that, notwithstanding the secondary proof of the entries sought to be introduced by plaintiff, still they might presume the book, if it had been produced, would have been injurious to defendant's case. Such is clearly not the law. Greenleaf says, in his work on Evidence (vol. 1, §87): "Neither has the mere nonproduction of books upon notice any other legal effect than to admit the other party to prove their contents by parol, unless under special circumstances." Sutherland, J., said in *Life & F. Ins. Co. v. Mechanics' F. Ins. Co.*, 7 Wend. 31: "I do not understand the rule to be that a party has the right to infer, from the refusal of his adversary to produce books or papers which may have been called for, that, if produced, they would establish the fact which he alleges they would prove. The rule is this: The party in such a case may give secondary or parol proof of the contents of such books or papers if they are shown or admitted to be in the possession of the opposite party, and, if such secondary evidence is imperfect, vague and uncertain as to dates, sums, boundaries, etc., every intentment and presumption shall be against the

14 L. R. A.

party who might remove all doubt by producing the higher evidence." The rule thus stated is quoted with approval by this court in *Rector v. Rector*, 8 Ill. 120. Here appellee got the full benefit of all that it claimed the book would prove, (nothing being left vague or uncertain,) and still had the benefit of an instruction from the court that the jury might presume further injury to the defendant's case because the book itself was not produced.

It is said, however, that other books, maps, contracts, etc., were withheld. Some of these were pointed out in the argument; but it is not shown that they were called for by the plaintiff, nor that they would have been competent evidence on behalf of defendant if they had been offered. We are unable to see how they could have been introduced on his behalf as primary proof without the consent of plaintiff. No presumption against him could, therefore, arise from his failure to produce them. Whatever inferences may be drawn against the party by reason of his failure to produce evidence in his possession or under his control are allowed on the theory that he willfully withholds such evidence. His conduct, says Greenleaf, is attributed to his supposed knowledge that the truth would have operated against him. Section 37, *supra*. He is treated in law as a "spoliator of evidence." Lawson, *Presumptive Ev.* 120 *et seq.* He must, therefore, suffer under the maxim, "*omnia presumuntur contra spoliatores*." It will not be seriously contended that a party is to be treated as a "spoliator of evidence" merely because he does not produce books and papers which he could only offer in evidence by consent of his adversary, or because some fact might be developed on the trial which would render them competent. It was said in *Mervin v. Ward*, 15 Conn. 377: "Where a party has in his possession a deed or other instrument necessary to support his title, and he refuses to produce it, and attempts to make out his title by other evidence, such refusal raises a strong presumption that the legitimate evidence would operate against him. But this rule does not apply to such documents as a party has no right to give in evidence without the consent of his adversary."

The instruction is also subject to the criticism that it clearly indicates to the jury the views of the court as to the presumption arising from the facts stated, and in that regard violates the rule announced in *Elston & W. G. Road Co. v. People*, 96 Ill. 584. See also *Graves v. Colwell*, 90 Ill. 620. We cannot agree with the appellate court in its conclusion that, notwithstanding the error of this instruction, the judgment of the circuit court should be affirmed. Justice Gary, speaking for a majority of that court, says: "It is undoubtedly true, as appellant's counsel allege, that much of the testimony on the part of appellee came from very suspicious sources; but the credibility of witnesses is for the jury." Justice Moran says: "The evidence is conflicting, and upon the points essential to appellee's case it does not seem to me to at all preponderate in their favor." These remarks, coming from the court, whose special province it was to review the evidence and determine the facts in the case, are significant. The case is certainly one falling within the rule that, where the evidence is conflicting and irrecon-

cilable, the instructions to the jury must be accurate. Here, on the evidence actually before the jury, a verdict might well have been rendered either way. The jury is told, however, that from the mere absence of evidence they may presume against the defendant to the injury of his case. To what extent that injury may have been carried in the minds of the jury no one can tell. It furnished a broad ground on which to condemn the entire defense. No one can say with confidence that it may

not have seriously prejudiced the defendant's rights. The giving of it was manifest and prejudicial error, for which the judgments of the circuit and appellate courts are reversed, and the cause remanded to the circuit court for another trial. In this view of the record it will be unnecessary to notice other errors assigned. They do not go to the merits of the action, and will not, probably, again arise.

Reversed and remanded.

CALIFORNIA SUPREME COURT.

DAGGETT *et al.*, Composing the California World's Fair Commission,
v.

E. P. COLGAN, State Comptroller.

(.....Cal.....)

1. The court will take judicial notice that the world's fair, Columbian exposition, referred to in Cal. Stat. 1891, p. 24, is to be held under and by virtue of the Act of Congress of April 25, 1890.
2. An appropriation for the purpose of "erecting buildings and collecting and maintaining an exhibit, of the products of the State" at the world's fair, Columbian exposition, does not violate Const., art. 4, § 22, prohibiting appropriations for the benefit of any institution not under the exclusive management and control of the State, although the private

corporation in charge of the world's fair may be incidentally benefited thereby as the main object of the statute is to promote a public concern for the public good.

3. An appropriation for a state exhibit at the Columbian exposition is not unconstitutional on the ground that it is not for a public use.

(November 23, 1891.)

APPPLICATION for a writ of mandamus to compel the State Comptroller to draw an order upon the State Treasury for the payment of expenses incurred by the World's Fair Commission. *Granted.*

The facts sufficiently appear in the opinion.

Mr. E. W. McKinstry for plaintiff.

Messrs. Barham & Bolton and *William R. Davis*, for defendant:

The object in view in expending public

NOTE.—Public purposes for which money may be appropriated or raised by taxation.

Assumed powers of doubtful legality have gone unchallenged more often perhaps in this class of cases than in any other. Practically the power of the Legislature over state funds and property has been absolute, while cities, counties and towns have in many instances assumed the right to make gifts to worthy institutions or to expend money for purposes of more or less general interest which were perhaps not strictly public. So far as restrictions on the legislative power to appropriate money are concerned there is almost a dearth of authority, except under particular constitutional provisions as in a matter of aid to sectarian institutions, for which, see note to *Synod of Dakota v. State*, ante, 418.

Of the decisions herein given concerning towns, counties and cities, it should be noticed that some turn on the lack of statutory authority without involving the deeper question of constitutional right.

A tax to pay the expense of a state canal is not unconstitutional although individuals had made themselves personally liable therefor in order to secure its construction. *Thomas v. Leland*, 24 Wend. 65.

In another case an appropriation for various purposes including money for new work and repairs on a state canal was held invalid for failing to comply with the State Constitution but without intimating that such purposes were not public. *People v. King's County Suprs.*, 52 N. Y. 556.

The disposal of sewage from a number of cities and towns containing one sixth of the population of the State is a matter of general public utility for which the Legislature can properly appropriate money from the state treasury, especially when a provision is made for its subsequent repayment by 14 L. R. A.

the localities benefited. *Re Kingman (Mass.)* 12 L. R. A. 417.

Support of schools.

Normal schools are public institutions for which the power of taxation may be invoked. *Briggs v. Johnson County*, 4 Dill. 148.

Taxation for the support of high schools is valid. *Richards v. Raymond*, 92 Ill. 612, 34 Am. Rep. 151.

A tax for common schools is for a public purpose. *Com. v. Hartman*, 17 Pa. 118; Opinion of the Judges, 58 Me. 582.

This, like many other subjects, has become too well settled to permit opportunity for decisions upon it.

But a private educational institution although incorporated cannot be aided by a town by moneys raised by taxation. *Curtiss v. Whipple*, 24 Wis. 260, 1 Am. Rep. 187.

Public buildings, parks and improvements.

The maintenance and support of a post of the Grand Army of the Republic or the construction of a building therefor is not a public purpose for which money can be raised by taxation. *Kingman v. Brockton (Mass.)* 11 L. R. A. 123.

But the erection of a memorial hall to be used and maintained as a memorial to the soldiers and sailors of the war of the rebellion may properly be deemed a public purpose for which money may be raised under legislative authority by taxation. *Ibid.*

Cities and towns may appropriate money to build a market place. *Spaulding v. Lowell*, 23 Pick. 71.

The establishment of a public park is a public purpose for which public money may be expended. *People v. Detroit*, 28 Mich. 228, 15 Am. Rep. 308; *People v. Chicago*, 51 Ill. 17, 2 Am. Rep. 373.

The Legislature has a right to impose a tax to

money determines whether it is for a public use. If the object be either not a public use, or being a public use be inhibited by the Constitution, the appropriation is void.

People v. Kings County Suprs. 52 N. Y. 561; *Lowell v. Boston*, 111 Mass. 461, 15 Am. Rep. 39.

Negations of power in statutes and constitutions are strictly upheld.

Hawley v. James, 16 Wend. 121; 4 Kent, Com. 283; 4 Cruise, Dig. 449; *Tide Water Co. v. Coster*, 18 N. J. Eq. 529, 90 Am. Dec. 634; *Hone v. Van Shaick*, 20 Wend. 596; *Jennings v. Jennings*, 7 N. Y. 549; *Amory v. Lord*, 9 N. Y. 403.

A thing within the intent of a constitutional or statutory enactment is for all purposes to be regarded as within the words and terms of the law.

People v. Albertson, 55 N. Y. 55; *Cooley*, Const. Lim. 8d ed. p. 174; *Huber v. People*, 49 N. Y. 186; *Menges v. Albany*, 56 N. Y. 377; *Floyd v. Perrin*, 3 L. R. A. 242, 80 S. C. 1; *French v. Teschemaker*, 24 Cal. 599; *Taylor v. Ross County Comrs.* 23 Ohio St. 22.

The courts will not hold the provisions of a constitution to be directory or unessential, but will rather hold that wherever it prescribes a mode, that mode is the measure of power.

State v. Rogers, 10 Nev. 253, 21 Am. Rep. 738; *People v. Gunn*, 85 Cal. 247; *People v. Kings County Suprs.* 53 N. Y. 561; *Bourland v. Hildreth*, 26 Cal. 182.

If the money goes in whole or any part in completing or carrying out the work to the benefit of an institution not under state control,

that is in aid of such private institution or corporation, and such disposal of public moneys cannot be otherwise viewed.

The public use implies a possession, occupation, and enjoyment by the public, or public agencies.

Cooley, Const. Lim. § 531.

If the stock is owned by private persons the corporation is private, however public the functions devolved upon it may be.

Swan v. Williams, 2 Mich. 427.

To be public, the use must be compulsory and not optional with the owners; must be a right by the people, not a favor; must be under public regulation as to toll, or owned, or subject to be owned, by the State.

West River Bridge Co. v. Dix, 47 U. S. 6 How. 546, 12 L. ed. 551.

The legal character of an institution, commission, or enterprise is determined by what it does—what it carries out as its object.

People v. Kings County Suprs. 52 N. Y. 561; *Gerke v. Purcell*, 25 Ohio St. 229; *Humphries v. Little Sisters of the Poor*, 29 Ohio St. 205, 206.

An institution required to be of "purely public use" is not such if any portion of its use is not a public use.

Cleveland Library Asso. v. Pelton, 36 Ohio St. 259; *St. Mary's Industrial School v. Brown*, 45 Md. 810.

The fact that like appropriations are made elsewhere is immaterial. Usage cannot make constitutional.

People v. Allen, 42 N. Y. 884.

Taxation can only be for public use.

pay a debt incurred by individuals in erecting and maintaining a public bridge. *Shaw v. Dennis*, 10 Ill. 406.

The improvement of a river, bay and harbor is for a public purpose which will justify the issue of bonds by the county where it is situated. *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238.

A tax on the whole town for water-works or other improvements in an unincorporated village therein is not unconstitutional. *Land L. & L. Co. v. Brown*, 3 L. R. A. 472, 73 Wis. 234.

Water-works, sewers and artificial light plants are internal improvements which a city may be authorized to provide for. *Yesler v. Seattle*, 1 Wash. 308.

So is a breakwater to protect streets against a lake. *Miller v. Milwaukee*, 14 Wis. 642. See also *infra*, as to plank roads, etc.

The question of public improvements for which special assessments may be levied on the property benefited will be treated in a future note.

Celebrations; public entertainments.

The common council of a city cannot furnish free entertainment for citizens and guests of the city on a 4th of July celebration. *Hodges v. Buffalo*, 2 Denio, 110.

A town in Massachusetts has no implied authority to appropriate money for the celebration of the 4th of July. *Hood v. Lynn*, 1 Allen, 103.

Neither has the city of New London any authority to expend money in celebrating the 4th of July. *New London v. Brainard*, 22 Conn. 552.

Towns have no authority to expend money to celebrate the anniversary of the surrender of Cornwallis. *Tash v. Adams*, 10 Cush. 252.

But under Mass. Pub. Stat., chap. 7, § 11, a town is authorized to raise money by taxation for celebrating its centennial anniversary. *Hill v. Easthampton*, 1 New Eng. Rep. 497, 140 Mass. 381.

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The city of Philadelphia under its charter has power to entertain distinguished visitors at the public expense. *Tathan v. Philadelphia*, 11 Phila. 276.

An appropriation by a municipal ordinance to pay the expense of exhibiting the old Liberty Bell or Independence Bell of Philadelphia at a cotton and industrial exposition in New Orleans is not valid. *The Liberty Bell*, 23 Fed. Rep. 842.

Public concerts by a band may be paid for by a town under Massachusetts statutes authorizing towns to expend money for holidays and other public purposes. *Hubbard v. Taunton*, 1 New Eng. Rep. 561, 140 Mass. 467.

In these cases the decisions turn on the question of statutory power rather than on the right of the Legislature to give such power.

Relief or loans to citizens.

The use of the money or bonds of a town or other municipal subdivision to provide destitute farmers with seed grain and grain to feed while putting in crops cannot be authorized by statute because not for a public purpose. *State v. Osawkee Twp.* 14 Kan. 418, 19 Am. Rep. 99. *Contra*, *State v. Nelson County (N. Dak.)* 8 L. R. A. 238; *Re House Roll No. 284 (Neb.)* March 10, 1891.

Issuing bonds the proceeds of which are to be loaned to the owners of land whose buildings have been burned by a great city fire is not the use of public funds for a constitutional purpose. *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39.

An Act requiring towns to support the families of soldiers is valid. *Veazie v. China*, 50 Me. 518.

A town cannot divide among the people money deposited with the State by the United States and apportioned to the towns by a statute prescribing that it shall be used for the same purpose as money accruing from taxation. *Hooper v. Emery*, 14 Me. 375.

Perry v. Washburn, 20 Cal. 350; *Judge Cooley*, in *People v. Salem*, 20 Mich. 453, 4 Am. Rep. 400; *Cooley*, Taxn. 1st ed. p. 79; *Citizens Sav. & L. Assn. v. Topeka*, 87 U. S. 20 Wall. 664, 23 L. ed. 461.

The validity of the appropriation in this case, aside from the constitutional limitations, hinges upon the fact whether the purpose is a public use, and depends upon the power to levy a tax for such object.

Citizens Sav. & L. Assn. v. Topeka, *supra*; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *Hanson v. Vernon*, 27 Iowa, 28; *Allen v. Jay*, 60 Me. 127, 11 Am. Rep. 185; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 89; *Whiting v. Sheboygan & F. du L. R. Co.* 25 Wis. 188, 3 Am. Rep. 30.

It must be a direct public benefit, and an indirect public benefit will not support the tax.

Curtiss v. Whipple, 24 Wis. 350, 1 Am. Rep. 189; *Whiting v. Sheboygan & F. du L. R. Co.* *supra*; *Butler v. Saginaw County Supra*. 26 Mich. 22; *Lowell v. Boston* and *Sharpless v. Philadelphia*, *supra*.

To support a tax, the public benefits must be such as are direct.

People v. Salem, *supra*; *Weeks v. Milwaukee*, 10 Wis. 242.

Every industrial enterprise which gives employment to labor and advances the wealth of the State is a public good, but it is not necessarily a public use for which taxes may be taken.

Hare, Am. Const. Law, p. 283; *Citizens Sav. & L. Assn. v. Topeka*, 87 U. S. 20 Wall. 655,

22 L. ed. 455; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 288; *Olea v. La Grange*, 118 U. S. 4, 28 L. ed. 897; *People v. Parks*, 58 Cal. 689; *Cooley*, Const. Lim. p. 664.

No court has ever held, upon the question of granting public aid, that it could be constitutionally granted to create property in the hands of the citizen, or that such could be "the ultimate purpose of its direct object."

Whiting v. Sheboygan & F. du L. R. Co. 25 Wis. 188, 3 Am. Rep. 37; *Bloodgood v. Mohawk & H. R. Co.* 18 Wend. 48; *Commercial Bank of Cleveland v. Iola*, 2 Dill. 862; *Citizens Sav. & L. Assn. v. Topeka*, *supra*.

After the fire in Boston, in November, 1872, the Legislature of Massachusetts passed an Act authorizing the city of Boston to issue bonds, raising a fund to aid in rebuilding portions of the city destroyed. But it was held unconstitutional.

Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 89; *Hood v. Lynn*, 88 Mass. 105; *St. Mary's Industrial School v. Brown*, 45 Md. 810; *People v. Salem*, 20 Mich. 453, 4 Am. Rep. 400; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 774; *State v. Osaukee Twp.* 14 Kan. 418, 19 Am. Rep. 89; *Commercial Bank of Cleveland v. Iola* and *Whiting v. Sheboygan & F. R. Co.* *supra*; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *Coates v. Campbell*, 37 Minn. 498; *Curtiss v. Whipple*, 24 Wis. 350, 1 Am. Rep. 189; *West River Bridge Co. v. Dir.* 47 U. S. 6 How. 546, 12 L. ed. 551; *Swan v. Williams*, 2 Mich. 487; *Cles v. Sanders*, 74 Mich. 602; *Floyd v. Perrin*, 2 L. R. A. 242, 30 C. C.

A town cannot appropriate the interest of the surplus revenue deposited with it under Mass. Stat. 1837, chap. 86, § 1, to the abatement or deduction of poll taxes. *Cooley v. Granville*, 10 Cush. 66.

Protection against fire or disease.

A town may use money to repair fire engines kept to extinguish fires in the town whether they belong to it or were purchased by private subscription. *Allen v. Taunton*, 19 Pick. 485.

A town having a duly established fire department cannot, under Mass. Gen. Stat., chap. 24, appropriate money to pay members of a private organization who have not been appointed engineers under the statute. *Greenough v. Wakefield*, 137 Mass. 275.

A tax on a foreign corporation for the benefit of exempt firemen is not unconstitutional. *Fire Dept. of New York City v. Noble*, 3 B. D. Smith. 440; *Fire Dept. of New York City v. Wright*, Id. 453; *Trustees of Exempt Firemen's Benev. Fund v. Boome*, 93 N. Y. 813. *Contra*, *Philadelphia Assn. for R. of D. F. v. Wood*, 39 Pa. 73.

An extra tax to prevent the spread of small-pox is lawful. *Solomon v. Tarver*, 52 Ga. 405.

Furnishing soldiers.

A town has no authority to raise money for procuring uniforms for an artillery company. *Clafin v. Hopkinton*, 4 Gray, 502.

The raising and support of soldiers for the defense of the government is a public duty for which the Legislature may authorize taxation. *Grover v. Pembroke*, 11 Allen, 88; *Freeland v. Hastings*, 10 Allen, 570; *Lowell v. Oliver*, 8 Allen, 247; *Fowler v. Danvers*, Id. 80.

Bounties may be voted under statutory authority to fill the quota of a municipal sub-division under a call for troops and in anticipation of a draft. 14 L. R. A.

Speer v. School Directors, 50 Pa. 150; *Cornet v. Folsom*, 13 Minn. 219; *State v. Richland Twp.* 20 Ohio St. 383; *Taylor v. Thompson*, 42 Ill. 1; *Kunkle v. Franklin*, 13 Minn. 127; *Cunningham v. Mitchell*, 67 Pa. 79; *Barbour v. Camden*, 51 Me. 608.

A town may vote money under legislative authority to assess those who may be drafted to obtain substitutes or to pay bounties to those who serve in person. *Booth v. Woodbury*, 32 Conn. 118; *Waldo v. Portland*, 33 Conn. 368; *Bartholomew v. Harwinton*, Id. 408.

A tax by a town under authority of statute to pay the commutation money for such persons as might be drafted from that town is not unconstitutional although it falls on some who are not subject to the draft. *State v. Jackson*, 31 N. J. L. 189.

But in Kentucky it was held that an act authorizing money to be raised for volunteers in anticipation of a draft was constitutional only as to those who participated in the benefits or ratified the act or were estopped from contesting it, but was not constitutional as to others whom a draft would not affect. *Ferguson v. Landram*, 1 Bush, 548, 5 Bush, 230, 96 Am. Dec. 350.

A vote by a town to raise the commutation money which could be paid by drafted persons instead of serving is not lawful unless authorized by statute. *Barbour v. Camden*, 51 Me. 608.

A tax to pay bounties is not for a municipal purpose and therefore the Legislature cannot compel a town to pay such bounties. *State v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622.

Towns have no authority to raise money to give additional wages to the militia and for other purposes of defense in time of war and danger of hostile invasion, unless such power is given by statute. *Stetson v. Kempton*, 13 Mass. 273, 7 Am. Dec. 165.

Money voluntarily contributed by individuals to procure the quota of soldiers for a town is not a

1; *Weightman v. Clark*, 108 U. S. 256, 26 L. ed. 892.

De Haven, J., delivered the opinion of the court:

This is an original application to this court for a writ of mandate to compel the defendant, as comptroller, to draw his warrant on the state treasurer, in payment of a claim contracted and audited by the petitioners, as members of the California World's Fair Commission, in pursuance of the authority given such commission by an Act of the Legislature of this State, approved March 6, 1891. Stat. 1891, p. 24. The Act provides for the appointment by the governor of a commission who "shall have the exclusive charge and control of the expenditure of all moneys appropriated by the State of California for the construction of buildings and maintaining an exhibit of the products of the State of California at the World's Fair Columbian Exposition, to be held in the city of Chicago, State of Illinois, in eighteen hundred and ninety-three." By section 3 of the Act the sum of \$300,000 is appropriated "to meet the expenses of erecting buildings and maintaining an exhibit of the products of the State of California at the World's Columbian Exposition" at Chicago, and the comptroller is directed to draw his warrant on the treasury from time to time in favor of such persons as the majority of the commissioners provided for by the Act shall direct. The defendant demurs to the petition, upon the general ground that the facts therein stated do not entitle petitioners to the writ

demanded, and in support of this demurrer contends:

1. That the Act of the Legislature referred to is in conflict with that provision of section 22 of article 4 of the Constitution, which declares that "no money shall ever be appropriated or drawn from the state treasury for the use or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the State as a state institution, nor shall any grant or donation of property ever be made thereto by the State."

In considering the question thus presented the court will take judicial notice of the fact that the World's Fair Columbian Exposition, referred to in the statute under consideration, is to be held under and by virtue of the provisions of an Act of Congress approved April 25, 1890, (27 U. S. Stat. at L. 62,) and that such exposition will not be conducted under the exclusive management and control of this State as a state institution, but, on the contrary, that the same will be under the general management of the national commission, created by that Act; and that the chief agency relied upon to effect the design of Congress is a private corporation of the State of Illinois, which is authorized by the Act of Congress to charge such entrance and admission fee to such exhibition "as shall be fixed and established by said corporation, subject, however, to such modification, if any, as may be imposed by a majority of said commissioners." But, while conceding these to be the facts, unless the Act under consideration makes an appropriation

consideration for vote of the town to reimburse them. *Estey v. Westminster*, 97 Mass. 324; *Cole v. Bedford*, Id. 323; *Shepard v. Turner*, 13 Allen, 92; *Perkins v. Milford*, 59 Me. 315.

The payment of bounties to persons who have already enlisted in the service of the United States without any contract for bounties is not the use of money for public purposes as there is no consideration therefor. *Fowler v. Danvers*, 8 Allen, 80; *Shackford v. Newington*, 46 N. H. 415. *Contra*, *Brodhead v. Milwaukee*, 19 Wis. 624, 88 Am. Dec. 711.

The repayment by a town of money paid by individuals for substitutes is not a use of public money for public purposes which can be authorized by the Legislature. *Freeland v. Hastings*, 10 Allen, 570; *Kelly v. Marshall*, 69 Pa. 319; *Tyson v. School Directors of Halifax Twp.* 51 Pa. 1; *Thompson v. Pittston*, 59 Me. 545.

But taxes may be authorized by statute to repay advances for bounties made before the municipal subdivision had power to raise money for them. *Fely v. Usher*, 10 Phila. 512; *Tyson v. School Directors of Halifax Twp. supra*.

Or to repay money subscribed by individuals to all out what was needed for bounties, enough not being offered by the local authorities. *Hilbish v. Catherman*, 64 Pa. 154.

The repayment of voluntary subscriptions for bounties to raise the quota was held not authorized under a Minnesota statute without raising the constitutional question. *Cover v. Baytown*, 12 Minn. 124.

So under a Connecticut statute, as to the reimbursement of persons who, though not drafted, had sent substitutes who were credited on the quota of their town. *Usher v. Colchester*, 33 Conn. 587.

And a New Hampshire statute authorizing bounties to enlisted men was held not applicable to past enlistments. *Crowell v. Hopkinton*, 45 N. H. 2, 14 L. R. A.

Expenses relating to the corporate existence.

A town cannot legally raise money by tax to pay expenses of a petition for annexation to a city. *Minot v. West Roxbury*, 112 Mass. 1, 17 Am. Rep. 62.

Nor expenses incurred in opposing before the Legislature the annexation of that town to another. *Coolidge v. Brookline*, 114 Mass. 592.

Nor expenses in opposing a division thereof before the legislative committee. *Westbrook v. Deering*, 63 Me. 231.

A town has no implied power to use its money for the payment of debts or expenses incurred by individuals prior to its incorporation in obtaining such incorporation. *Frost v. Belmont*, 88 Mass. 152.

Payment of moral obligations.

A town may indemnify its officers against liability incurred in the bona fide discharge of their duties although they exceed their powers. *Bancroft v. Lynnfield*, 18 Pick. 558, 29 Am. Dec. 623; *Hadsell v. Hancock*, 3 Gray, 526; *Fuller v. Groton*, 11 Gray, 340; *Pike v. Middleton*, 12 N. H. 278; *Sherman v. Carr*, 8 N. H. 431; *Briggs v. Whipple*, 6 Vt. 95.

Thus to indemnify a surveyor of highways for digging a drain claimed to be in the highway. *Bancroft v. Lynnfield*, 18 Pick. 558, 29 Am. Dec. 623.

Or to indemnify selectmen for carrying out the orders of the town. *Hadsell v. Hancock*, 3 Gray, 526.

Or to indemnify school commissioners for defending an alleged libel in their report. *Fuller v. Groton*, 11 Gray, 340.

Or to refund to assessors an amount paid by them to prevent actions against them by taxpayers to recover taxes irregularly collected so far as it is for town taxes but not for state and county taxes. *Nelson v. Milford*, 7 Pick. 18.

But a town cannot indemnify selectmen for the expense of resisting criminal prosecutions for their

for the use and benefit of the national commission, or in aid of the private corporation, through the instrumentality of which that exposition is in great part to be conducted, and from the success of which that corporation expects to derive a pecuniary profit, it is clear that the provision of the Constitution, above quoted, and relied upon by defendant, can have no application. It is claimed by the defendant that the statute under consideration does in effect make such an appropriation, but we are not able to find anything in its language which would justify the contention of defendant on this point. On the contrary, it appears from the Act itself that the appropriation is to be expended by the State itself, disbursed by its own agents or officers, and is to be used only for the purpose of "erecting buildings and collecting and maintaining an exhibit of the products of the State of California." Even if it could be said with any degree of certainty that the private corporation referred to in the Act of Congress will increase its receipts because of the fact that the State is to place its products on exhibition, or that it may derive a benefit from the rent of its grounds to the State, or realize other profits, still this would not affect the question we are considering, or bring the appropriation within the prohibition of the section of the Constitution above quoted, as it is apparent that the main object of the statute is not to confer such incidental benefit, but rather promote what is assumed to be a matter of public concern, and for the public good. In every public expenditure, individuals derive incidental aid and benefit, in the

sense that they are paid for services rendered or articles furnished to the State in the prosecution of the public improvement or business of the State, and the expenditure contemplated by this Act will not be exceptional in this respect; but there is nothing upon the face of the statute to indicate that the private corporation referred to, or any individual, will or can, if the appropriation is honestly expended, receive one dollar as a gratuity, or by way of assistance, or except in return for something of value which the officers charged with its disbursement shall deem necessary to secure, in order to effect the general purpose and object of the Act.

2. The defendant further contends that the statute is unconstitutional, for the reason that the appropriation thereby made is not for a public use, such as the State is authorized to make; that the maintenance of an exhibition of the products of the State in the manner contemplated does not fall within the legitimate authority of the state government.

In passing upon this proposition it is necessary to bear in mind that what is for the public good and what are public purposes "are questions which the Legislature must decide upon its own judgment, in respect to which it is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive. . . . Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the Constitution imposes; not those implied restrictions, which, resting in theory only, the

refusal to erase names from a check list of voters as the erasure of such names was not a matter affecting the town. *Gove v. Epping*, 41 N. H. 539.

Nor has it any authority to vote a tax for reimbursement of a collector who has improperly taken a note for taxes and after accounting for it as money been unable to collect it. *Thorndike v. Camden*, 7 L. R. A. 468, 82 Me. 39.

The Legislature may authorize a municipality to raise money to pay an additional price to a contractor although the charter did not give the municipality power to do so. *Brewster v. Syracuse*, 19 N. Y. 116.

The fulfillment of a moral obligation by an appropriation for exempt firemen is the use of money for a public purpose. *Trustees of Exempt Firemen's Benev. Fund v. Roome*, 93 N. Y. 313.

See also on this question head note 2 of *Waterloo Woolen Co. v. Shanahan*, the case next following the main case above.

Aid to business corporations or enterprises.

A town cannot give money to a private cemetery corporation. *Luques v. Dresden*, 77 Me. 186.

A town may subscribe in aid of a turnpike company under statutory authority. *Com. v. McWilliams*, 11 Pa. 61.

So may a city issue bonds in aid of a plank road. *Mitchell v. Burlington*, 71 U. S. 4 Wall. 270, 18 L. ed. 355; *Larned v. Burlington*, 71 U. S. 4 Wall. 275, 18 L. ed. 353.

A toll-bridge across a river is also a work of internal improvement which may be thus aided. *Dodge County v. Chandler*, 96 U. S. 205, 24 L. ed. 625.

So is a wagon bridge across a river. *United States v. Dodge County Comrs.* 110 U. S. 156, 38 L. ed. 108.

A city under legislative authority may subscribe 14 L. R. A.

for shares of a corporation in which the State is a large stockholder, and which is engaged in a great state adventure to connect navigable waters by a line of transportation. *Goddin v. Crump*, 8 Leigh, 120.

The aid of private manufacturing is not a public purpose for which a city or local subdivision of the State can issue its bonds. *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 238; *Cole v. LaGrange*, 113 U. S. 1, 28 L. ed. 896; *Citizens Sav. & L. Assn. v. Topeka*, 87 U. S. 20 Wall. 655, 22 L. ed. 445; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *Weismer v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *Opinion of the Judges*, 58 Me. 590; *Mather v. Ottawa*, 2 West. Rep. 49, 114 Ill. 659; *Commercial Nat. Bank of Cleveland v. Iola*, 2 Dill. 353.

Neither is the expenditure of money to make the water in a river available for manufacturing purposes. *Ottawa v. Carey*, 106 U. S. 110, 27 L. ed. 609; *Coates v. Campbell*, 37 Minn. 488.

Nor the construction of a dam in order to lease the water for manufacturing. *Atty-Gen. v. Eau Claire*, 37 Wis. 400.

Neither is aid to a steam grist-mill. *Osborne v. Adams County*, 106 U. S. 181, 27 L. ed. 129; *State v. Adams County*, 15 Neb. 569.

But under statutes authorizing municipal aid for works of internal improvement, including bridge, railroads and water-power, and declaring grist-mills to be public mills, and also regulating their rates and the order of serving customers, the construction of a steam grist-mill was held to be a work of internal improvement. *Burlington v. Beasley*, 94 U. S. 312, 24 L. ed. 163.

A water grist-mill erected for public use, rates of toll to be determined by the county commissioners and being subject to regulation by the Legislature, is a work of "internal improvement" within the meaning of the Nebraska Statutes, for which

people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives." Cooley, Const. Lim. p. 154. It is undoubtedly true that public money can be rightfully expended only for public purposes, but it was well said by that eminent jurist, Judge Cooley, in delivering the opinion of the court in *People v. Salem*, 20 Mich. 452, 4 Am. Rep. 400: "Necessity alone is not the test by which the limits of state authority in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people." In view of these principles of constitutional law, which are so well settled as to be placed beyond discussion or dispute, it is manifest, we think, that the court is not authorized to declare the act under consideration void upon the theory that it can in no manner be considered as tending to promote the public welfare, which it is one great object of government to secure. The question whether the public interests of the State would be at all advanced by an exhibition of its products such as is contemplated by the Act was an appropriate one for discussion in the halls of the Legislature before its enactment, and for the consideration of the governor before approving it, but it is not one for this court to decide, upon the individual views of its members concerning the wisdom or expediency

of such legislation. There is no difference, except in degree, between the appropriation contained in this Act and those which for years have been made, without any question as to their validity, for the support of the state agricultural fairs and the various district agricultural societies throughout the State. The fact that this exhibit of the products of the State is to be made without the limits of the State does not change its essential character, or make it any less an occasion or purpose in which, in an enlarged sense, it may be said that the people of the State have an interest. In fact it would be hard to distinguish this appropriation in principle from those made from time to time for the maintenance of horticultural, viticultural and other similar commissions. None of these, strictly speaking, are required for the proper administration of the government of the State, and possibly, in the opinion of many, call for an unjustifiable and useless expenditure of money. But the power of the Legislature to create such commissions has never been doubted. We know from the express declaration of the Act of Congress authorizing the Columbian Exposition that the purpose of the exposition is to commemorate the four-hundredth anniversary of the discovery of America, "by an exhibition of the resources of the United States of America, their development, and of the progress of civilization in the new world;" and that such exhibition is to be of a "national and international character, so that not only the people of the Union and of this continent, but those of all nations as well, can participate." We have no doubt that

bonds may be voted to aid in its construction, *Traver v. Merrick County*, 14 Neb. 327, 45 Am. Rep. 111; *State v. Clay County*, 20 Neb. 452; *Blair v. Cumming County*, 111 U. S. 363, 28 L. ed. 457.

A beet sugar manufactory run by water, which does not manufacture for toll and is not within legislative control by virtue of any law of the State, is not an "internal improvement" for which bonds may be issued by a city. *Getchell v. Benton*, 1 Neb. L. J. 552.

Aid to railroads.

The doctrine that the construction of a railroad is a public purpose to aid which taxes may be raised or bonds issued is denied in very exhaustive and vigorous opinions by Judges Cooley, Christianity and Campbell of the Supreme Court of Michigan, *Graves, J., dissenting. People v. Salem*, 20 Mich. 452, 4 Am. Rep. 400.

In Iowa the doctrine was first affirmed in *Dubuque County v. Dubuque & P. R. Co.* 4 G. Greene, 1, which case was overruled by *Stokes v. Scott County*, 10 Iowa, 166; *State v. Wapello County*, 13 Iowa, 388; *McClure v. Owen*, 26 Iowa, 243; and in which last case a strong opinion was written by Judge Dillon (*Hanson v. Vernon*, 27 Iowa, 23, 1 Am. Rep. 215), but was again approved and re-established in *Stewart v. Polk County Suprs.* 30 Iowa, 1, 1 Am. Rep. 228, and affirmed also by implication in *Merrill v. Welscher*, 50 Iowa, 61.

In Wisconsin while subscriptions to stock of a railroad company were upheld, it was decided that the donation of public money in aid of a railroad is unconstitutional because not for a public purpose. *Whiting v. Sheboygan & F. Du L. R. Co.* 25 Wis. 167, 3 Am. Rep. 30.

By the overwhelming weight of authority it is settled, however, that the Legislature unless restricted by provisions of the State Constitution

may authorize towns, counties or cities either to subscribe for stock of railroad corporations or make donations to them on the ground that the construction of such roads is for a public purpose. *State v. Whitesides*, 3 L. R. A. 777, 30 S. C. 579; *State v. Neely*, 3 L. R. A. 672, 30 S. C. 587; *State v. Charleston*, 10 Rich. L. 491; *Otoe County v. Baldwin*, 111 U. S. 1, 28 L. ed. 331; *Moultrie v. Fairfield*, 105 U. S. 370, 26 L. ed. 945; *Okcott v. Fond du Lac County Suprs.* 33 U. S. 16 Wall. 678, 21 L. ed. 382; *Thompson v. Lee County*, 70 U. S. 8 Wall. 327, 18 L. ed. 177; *Geispecke v. Dubuque*, 68 U. S. 1 Wall. 175, 17 L. ed. 520; *Myer v. Muscatine*, 68 U. S. 1 Wall. 384, 17 L. ed. 554; *Clark v. Janesville*, 10 Wis. 136; *Bushnell v. Beloit*, 10 Wis. 106; *Phillips v. Albany*, 23 Wis. 344; *Rogan v. Wattertown*, 30 Wis. 259; *Lawson v. Milwaukee & N. W. R. Co.* Id. 597; *Gibbons v. Mobile & G. N. R. Co.* 36 Ala. 410; *Stein v. Mobile*, 24 Ala. 391; *Augusta Bank v. Augusta*, 49 Me. 507; *Dyar v. Farmington*, 70 Me. 515; *Hopple v. Brown Twp.* 13 Ohio St. 311; *State v. Hancock County Comrs.* 12 Ohio St. 593; *Cass v. Dillon*, 2 Ohio St. 607; *Cincinnati, W. & Z. R. Co. v. Clinton County Comrs.* 1 Ohio St. 77; *State v. Clinton County Comrs.* 6 Ohio St. 280; *State v. Van Horne*, 7 Ohio St. 327; *State v. Union Twp.* 8 Ohio St. 364; *St. Louis v. Alexander*, 23 Mo. 433; *St. Joseph & D. C. R. Co. v. Buchanan County Ct.* 39 Mo. 436; *Com. v. Perkins*, 43 Pa. 400; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *Police Jury v. McDonogh*, 8 La. Ann. 341; *Aurora v. West*, 9 Ind. 74, 22 Ind. 88, 85 Am. Dec. 413; *Robinson v. Bidwell*, 22 Cal. 379; *Leavenworth County Comrs. v. Miller*, 7 Kan. 479, 12 Am. Rep. 425; *State v. Nemaha County Comrs.* 7 Kan. 542; *Morris v. Morris County Comrs.* Id. 576; *Society for Savings v. New London*, 29 Conn. 174; *Bridgeport v. Housatonic R. Co.* 15 Conn. 475; *Talbot v. Dent*, 9 B. Mon. 528; *Slack v. Maysville & L. R. Co.* 13 B. Mon. 1; *Maddox v. Graham*, 2 Met. (Ky.) 56; *Butler v. Dunham*, 27 Ill. 474; *Johnson v.*

it was fairly a matter within the power of the Legislature to determine whether this State should join with its sister states, and with the government of the United States, in celebrating in the way suggested the historical event referred to. It has been held in many cases that a municipal corporation has no authority, under the general powers usually given to such corporations, to appropriate money for the celebration of the anniversary of important events in the history of our country, such as the Fourth of July (*Hodges v. Buffalo*, 3 Denio, 110; *Hood v. Lynn*, 1 Allen, 108) and the surrender of Cornwallis (*Tash v. Adams*, 10 Cush. 252). See also *The Liberty Bell*, 23 Fed. Rep. 844. These decisions, however, all rest upon the principle that municipal corporations have no powers except such as are specifically granted by the Act of incorporation, or are necessary for the purpose of carrying into effect the powers expressly granted. But it has never been doubted that the State could confer upon a city or town the authority to celebrate such important events in the history of the country as appeal to the patriotism or higher sentiments of the people, and to tax their citizens to pay the expense thereof. Thus it was held that the city of Philadelphia had the power under its charter to provide for the entertainment of distinguished visitors upon the occasion of the celebration of the Centennial Anniversary of American Independence. *Tatham v. Philadelphia*, 11 Phila. 276. So also in Massachusetts, by general statutes, the power has been conferred upon towns to cele-

brate the centennial anniversary of their incorporation, (*Hill v. Easthampton*, 140 Mass. 381, 1 New Eng. Rep. 497) and also to appropriate money for the celebration of holidays, and for other public purposes (*Hubbard v. Taunton*, 140 Mass. 467, 1 New Eng. Rep. 581). These cases are authority for the proposition that the State itself, unless restrained by its Constitution, has the power to make appropriations for such purposes, because, unless it possesses the power, it could not confer it upon its municipal corporations. In fact such expenditures are justified under the general power which the State has to provide for the public welfare, the limits of which are perhaps not capable of exact definition, and are the same in principle as those for the building of monuments to commemorate great historical events, or for the erection in public places of the statues of those who by common consent are classed among the patriots or benefactors of the nation. Undoubtedly this power may be the subject of great abuse, but this is no argument against its existence. The only protection against reckless and improvident appropriations for public purposes must be found in the character of those intrusted with the power of legislation, and in the integrity and firmness of the chief executive of the State.

The demurrer of defendant is overruled, and a peremptory writ of mandamus ordered in accordance with the prayer of petitioners.

We concur: *Beatty, Ch. J.*; *Garoutte, J.*; *McFarland, J.*; *Sharpstein, J.*; *Harrison, J.*; *Paterson, J.*

Stark County, 24 Ill. 75; *Perkins v. Lewis*, Id. 303; *Prettyman v. Tazewell County*, 19 Ill. 406; *Robertson v. Rockford*, 21 Ill. 451; *Taylor v. Newberne*, 55 N. C. 141; *Caldwell v. Justices of Burke County*, 57 N. C. 323; *Hill v. Forsythe County Comrs.* 67 N. C. 367; *San Antonio v. Jones*, 28 Tex. 19; *Cotton v. Leon County Comrs.* 6 Fla. 610; *Powers v. Inferior Court of Dougherty County*, 23 Ga. 65; *Hallenbeck v. Hahn*, 2 Neb. 377; *Davidson v. Ramsey County Comrs.* 18 Minn. 432; *Bennington v. Park*, 50 Vt. 178; *First Nat. Bank of St. Johnsbury v. Concord*, Id. 257; *Stockton & V. R. Co. v. Stockton*, 41 Cal. 147; *Clarke v. Rochester*, 24 Barb. 446; *Bank of Rome v. Rome*, 18 N. Y. 38; *Starin v. Genoa*, 23 N. Y. 439; *People v. Mitchell*, 35 N. Y. 551; *Nichol v. Nashville*, 9 Humph. 252; *King v. Wilson*, 1 Dill. 555; *People v. Havemeyer*, 4 Thomp. & C. 385.

Railroad machine shops are part of the railroad so that taxation to aid their construction is to be regarded as for a public purpose where such aid can be constitutionally given to railroads. *Jarrott v. Moberly*, 5 Dill. 253.

So are depots and side tracks. *Rock Creek Twp. v. Strong*, 96 U. S. 271, 24 L. ed. 815.
14 L. R. A.

Rewards for criminals.

The right of a town or city to offer a reward for the arrest and conviction of a criminal is affirmed in *Codding v. Mansfield*, 7 Gray, 272; *Crawshaw v. Roxbury*, Id. 374; *Janvria v. Exeter*, 48 N. H. 52; *York v. Forscht*, 23 Pa. 391.

But is denied in *Murphy v. Jacksonville*, 18 Fla. 318, 43 Am. Rep. 323; *Lee v. Flemingsburg Trustees*, 7 Dana, 28.

In Maine, it is held that towns cannot be taxed to pay a reward for the conviction of a murderer as the prosecution of that crime is not a town matter. *Gale v. South Berwick*, 51 Me. 174.

And in Indiana it is held that county commissioners cannot offer such rewards. *Grant County Comrs. v. Bradford*, 73 Ind. 455.

On the kindred subject of public use to justify eminent domain, see *notes to Pittsburg, W. & K. R. Co. v. Benwood Iron Works* (W. Va.) 3 L. R. A. 690; *Barre R. Co. v. Montpelier & W. R. Co.* (Vt.) 4 L. R. A. 785; *Turner v. Nye* (Mass.) post, —.

R. A. R.

NEW YORK COURT OF APPEALS.

WATERLOO WOOLEN MANUFACTURING CO., *Resp't.*,James SHANAHAN *et al.*, *Appts.*

(..... N. Y.)

1. **The purpose of the Legislature to appropriate public money** for the benefit of an individual cannot be determined by the courts on the testimony of witnesses when it has expressed its purpose in the bill itself to be the enlargement or improvement of a public canal.
2. **An appropriation for the payment of a debt or the repair of an injury**, such as the restoration to the original channel of a river, for the benefit of certain riparian owners, of waters diverted by authority of the State for a canal, thus depriving them of its use, is not for a local or special purpose such as requires a two-thirds vote under Const., art. 1, §9, but is for a public purpose.
3. **The exercise of the right to use the surplus waters of a canal**, continued after the State enlarges the canal, cannot ripen into a right to the increased surplus thereby caused, no matter how long the use continues.
4. **If any right could be acquired in the increased surplus** of water caused by the State's enlargement of a canal, it could not prevent the State from otherwise improving navigation whereby the surplus would be reduced to the original amount. The remedy, if any, would be a claim for damages.
5. **No one but the owners can raise an objection** that their private property is taken by the State without compensation.
6. **An appropriation of public money to enlarge a private mill-race** for the extension of river and canal navigation to a public street is not for a private or local purpose.

(October 6, 1891.)

APPPEAL by defendants from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a judgment of an Equity Term for Seneca County enjoining defendants from making certain improvements in the navigation of Seneca River and a mill-race adjoining. *Reversed.*

The facts are fully stated in the opinion.

Mr. Charles F. Tabor, *Atty-Gen.*, for appellant Shanahan:

The propriety or the necessity of taking private property for public use is not a judicial question, but one of political sovereignty, to be determined by the Legislature, either by itself or by delegating the power to public agents in such manner and form as it may prescribe.

People v. Smith, 21 N. Y. 595; *Beekman v. Saratoga & S. R. Co.* 3 Paige, 73, 3 L. ed. 63, 22 Am. Dec. 679; *Varick v. Smith*, 5 Paige, 159, 3 L. ed. 668, 28 Am. Dec. 417; *Bloodgood v. Mohawk & H. R. Co.* 18 Wend. 9, 31 Am. Dec. 818; *Heyward v. New York*, 7 N. Y. 324; *Re Townsend*, 39 N. Y. 174; *Rensselaer & S. R.*

Co. v. Davis, 43 N. Y. 142; *Brooklyn Park Comrs. v. Armstrong*, 45 N. Y. 243, 6 Am. Rep. 70; *Re Fowler*, 53 N. Y. 62; *People v. Budd*, 5 L. R. A. 559, 117 N. Y. 25; *Amy v. Watertown*, 180 U. S. 819, 32 L. ed. 952; *People v. Durston*, 7 L. R. A. 715, 119 N. Y. 578.

Chapter 525 of the Laws of 1888, so far as it provides for the improvement of the channel of the Seneca River, and dredging and excavating Bear race, "so as to admit the passage of canal boats therein from said canal," does not constitute, within the meaning of section 9 of article 1 of the Constitution, a private purpose.

Head v. Amoskeag Mfg. Co. 113 U. S. 19, 28 L. ed. 898; *Re Middletown*, 82 N. Y. 196; *People v. McCann*, 16 N. Y. 58, 69 Am. Dec. 642.

Neither is it a local act, within the meaning of this provision of the Constitution.

People v. Chautauqua County Supra, 43 N. Y. 10; *Healey v. Dudley*, 5 Lans. 115; *Williams v. People*, 24 N. Y. 405; *People v. Squire*, 10 Cent. Rep. 487, 107 N. Y. 598; *People v. Newburgh & S. Pt. Road Co.* 86 N. Y. 7; *Conner v. New York*, 5 N. Y. 297; *People v. Allen*, 42 N. Y. 378.

So far as Bear race is concerned, the court found that the defendants, Sweet, Mongin & Cook, were the owners thereof. Therefore they could and did waive any constitutional objection that the Act of 1888 made no provision for compensation as to them, and the plaintiff here cannot raise that question.

Pierrepont v. Loveless, 72 N. Y. 211; *Sinclair v. Jackson*, 8 Cow. 548; *Baker v. Braman*, 6 Hill, 47, 46 Am. Dec. 387; *Re New York*, 89 N. Y. 569; *People v. Law*, 84 Barb. 518; *Brooklyn v. Copeland*, 9 Cent. Rep. 290, 106 N. Y. 500.

As against this plaintiff, it cannot be said that either Sweet, Mongin & Cook, or the superintendent of public works had done anything or proposed to do anything with the waters of Seneca River which could be held to be an unreasonable use thereof, or which was in violation of any right of the plaintiff in any view of the case.

Gould v. Boston Duck Co. 18 Gray, 443; *Olinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 378; *Bullard v. Saratoga Victory Mfg. Co.* 77 N. Y. 525; *Head v. Amoskeag Mfg. Co.* 113 U. S. 19, 28 L. ed. 898; *Northern Transp. Co. v. Chicago*, 90 U. S. 641, 25 L. ed. 398; *Atwater v. Canandaigua*, 124 N. Y. 609; *People v. Tidd-betts*, 19 N. Y. 528; *People v. Canal Appraisers*, 38 N. Y. 486; *People v. New York & S. I. Ferry Co.* 68 N. Y. 77.

Mr. Charles A. Hawley for appellants Sweet, Mongin & Cook.

Mr. Frederick L. Manning, for respondent:

Silsby Mfg. Co. v. State, 6 Cent. Rep. 809, 104 N. Y. 562, settles the right of the plaintiff as against the State in the waters of the canal, which the defendant Shanahan was proceeding to divert for the benefit of the Sweet, Mongin & Cook mill.

NOTE.—For a note on public purposes for which public money may be appropriated, see the preceding case.

11 L. R. A.

For a note on what a court may consider in determining the constitutionality of a statute, see *Stevenson v. Colgan*, ante, 459.

The constitutional requirement that two thirds of the Legislature shall assent to an appropriation of public moneys for local or private purposes applies to appropriations either local or private.

An appropriation is for a local purpose when the money is to be expended in a particular locality, and the people of that locality are to be directly and mainly benefited thereby, although the public may be incidentally or remotely benefited.

People v. Allen, 42 N. Y. 378; *Prentice v. Weston*, 47 Hun, 121; *People v. Marlborough Highway Comrs.* 54 N. Y. 276.

The effect of the work attempted to be performed by authority of Superintendent Shanahan will be to divert water that has been used unchanged and under claim of right for over fifty years and to which plaintiff has title by deed as well as by prescription.

Corning v. Troy Iron and Nail Factory, 39 Barb. 811; *Holman v. Boiling Spring Bleaching Co.* 14 N. J. Eq. 335; *Magor v. Chadwick*, 11 Ad. & El. 571; *Rickard v. Williams*, 20 U. S. 7 Wheat. 59, 5 L. ed. 598; *Bowman v. Wathen*, 24 U. S. 1 How. 189, 11 L. ed. 97; *White v. Chapin*, 12 Allen, 516; *Miller v. Garlock*, 8 Barb. 153; *Hammond v. Zehner*, 21 N. Y. 118; *Haight v. Price*, 21 N. Y. 241.

Private property cannot be taken for private use.

Cochran v. Van Surlay, 20 Wend. 365, 32 Am. Dec. 570; *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325; *Powers v. Bergen*, 6 N. Y. 368.

Not even when compensation is made.

Varick v. Smith, 5 Paige, 137, 3 L. ed. 659, 19 Am. Dec. 571; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274.

Nor partly for private and partly for public purposes.

Re Albany Street, 11 Wend. 149, 25 Am. Dec. 618.

A public officer who is acting in excess of his authority to the injury of a citizen may be restrained by injunction.

People v. Canal Board, 55 N. Y. 390; *Tribune Assn. v. Sun Print. & Pub. Assn.* 7 Hun, 175; High, Injunctions, § 309.

The question as to whether the improvement is public or private will be determined by the court, even when land is sought to be taken on compensation for alleged public purposes. If it be not in fact so, even though expressly authorized by a statute, the taking is illegal and unconstitutional.

Re Niagara Falls & W. R. Co. 11 Cent. Rep. 272, 108 N. Y. 875; *Rensselaer & S. R. Co. v. Davis*, 48 N. Y. 187; *Tyler v. Beacher*, 44 Vt. 648, 8 Am. Rep. 398.

It is for the court, and not for the Legislature, to determine whether the use for which private property is taken in a given case is or is not public use.

Allen v. Jay, 60 Me. 124, 11 Am. Rep. 185.

The so-called improvement is not a taking for public use, but in fact for a private purpose for the advantage of Sweet, Mongin & Cook only.

Re Deansville Cemetery Assn. 66 N. Y. 569, 23 Am. Rep. 86; *Re Niagara Falls & W. R. Co.* 11 Cent. Rep. 272, 108 N. Y. 375.

The sovereign has no power to take property

from one citizen and transfer it to another, even for a full compensation, when the public interest will not be promoted thereby.

Taylor v. Porter, 4 Hill, 147, 40 Am. Dec. 274; *Hay v. Cohoes Co.* 3 Barb. 47; *Wilkinson v. Leland*, 27 U. S. 2 Pet. 658, 7 L. ed. 558; *Varick v. Smith*, 5 Paige, 159, 3 L. ed. 668, 28 Am. Dec. 417; *Beekman v. Saratoga & S. R. Co.* 3 Paige, 46, 3 L. ed. 45, 22 Am. Dec. 679.

A public convenience is not such a necessity as authorizes the right of eminent domain.

Memphis Freight Co. v. Memphis, 4 Coldw. 424; *West River Bridge Co. v. Dix*, 47 U. S. 6 How. 547, 12 L. ed. 551; *Clack v. White*, 2 Swan, 549; *Harding v. Goodlett*, 3 Yerg. 11, 24 Am. Dec. 548; *Gilmer v. Lime Point*, 18 Cal. 229.

The last diversion of water was in the canal enlargement of 1857. That diversion was permanent and irrevocable, and thirty-three years of adverse holding has run against the taking, and the Statute of Limitations has long since buried all complaint if any were ever made.

Taylor v. Manhattan R. Co. 53 Hun, 305.

O'Brien, J., delivered the opinion of the court:

The defendant James Shanahan, as superintendent of public works in behalf of the State, entered into a contract with the defendants Fuller & Albaugh for the performance of certain work in dredging and otherwise improving the channel of Seneca River and old Bear race at Waterloo. The contractors had entered upon the work when this action was commenced, and both they and the superintendent of public works were enjoined from proceeding therewith; and by the final judgment in the action this injunction against them and all persons acting under them is made perpetual. This appeal involves an examination of the reasons and grounds upon which the operations of the State, acting through one of its officers, and in pursuance of legislative direction, have been arrested at the suit of the plaintiff. The judgment in this case decides that the improvement is not authorized by law, and that the consummation of the work contemplated will injuriously affect certain property rights of the plaintiff. It is necessary, at the outset, to get as clear an idea as possible in regard to the nature, origin and extent of these rights in order to get a more comprehensive view of the questions involved in the controversy. The plaintiff is a domestic manufacturing corporation engaged in the manufacture of woollen goods on an extensive scale at Waterloo, deriving the power for the operation of its machinery from the waters of Seneca River. It was incorporated in the year 1836, but the water rights and privileges which it owns, and which it is claimed are to be affected by the acts of the defendants, existed long prior to that date. In the year 1802 the State conveyed by letters-patent 640 acres of land to John McKinsty on the north shore of the Seneca River, where is now the site of the present village of Waterloo. In December, 1807, he conveyed this land to one Elisha Williams, who erected one or more mills on the site now occupied by the plaintiff's factories, adjoining or near the river. The motive power for these mills was

furnished by a race or canal constructed by Williams from the river, on the north side, and near the upper end, of what is now Big Island, which divides the flow of the water of the river, the main current being south of the island and on the opposite side from the race. The mills so erected by Williams were in operation in the year 1818, when the Legislature, by special Act, incorporated the Seneca Lock Navigation Company. Laws 1818, chap. 144. This company, under the power conferred upon it by law, took the canal or race constructed by Williams as a part of its canal, reserving to him, however, the right to draw water from the canal for the use of the mills, not necessary for navigation purposes. The navigation company, in the prosecution of its business, used the river as a highway, except around the rapid places, where it constructed a canal and locks for the passage of its boats, and the mill-race dug by Williams was utilized for this purpose. While the company carried on its operations the situation was this: It had the right to the use of the race, which was made forty feet wide and between three and four feet deep, supplied with water from the river, for the passage of its boats, and Williams and his grantees were entitled to all the surplus water from the canal or race for the use of their mills. The respective rights of the corporation and the grantees of Williams to the use of the water flowing through the race, thus converted into a canal for public use, are regulated and defined by the statute under which authority was given to acquire the race, and by a recent decision of this court. *Silby Mfg. Co. v. State*, 104 N. Y. 562, 6 Cent. Rep. 809.

With the rights of the parties thus vested and defined, the Legislature, in the year 1825, authorized the construction of the Cayuga and Seneca Canal by the State, and for that purpose authorized the purchase of all the rights and privileges of the navigation company. Laws 1825, chap. 271. The State, under this statute and the proceedings thereunder, acquired such rights to the use of the water as the corporation to which it succeeded then had, and no more, and Williams and his grantees still retained the right to the use of the surplus waters then flowing through the canal from the river, and no more. *Silby Mfg. Co. v. State*, *supra*. Subsequently the State found it necessary to enlarge the capacity of the canal, which occupied the old mill-race, by making it deeper and wider. The last improvement in this respect was authorized and executed under chapter 479, Laws 1887. This enlargement resulted in a canal seventy feet wide and a minimum depth of seven feet, with a maximum depth of nine feet, in place of the original race, and consequently a greatly increased quantity of water was diverted from the channel of the river into the canal. The plaintiff having succeeded, through mesne conveyances, to all the rights of Williams, has enjoyed the benefit of the increased body of water thus supplied by the State, in the additional power which it furnished for the operation of machinery, and the advantage thus gained it now claims as a property right, which it seeks to retain and protect in this action. It has not been found by the court be-

low, nor is it alleged in the complaint, that any right which the plaintiff's grantors had or enjoyed during the occupation of the race as a canal by the navigation company, is threatened or will be injuriously affected by any act of the defendants. But it is alleged and found that since 1857 the plaintiff has used and enjoyed the water-power for its factories as enlarged and increased by the improvement of the canal, made by the State in that and previous years, with the acquiescence of the authorities of the State having charge of the care and management of the canals, and that such use and enjoyment has ripened by the lapse of time into a property right, which is threatened and will be seriously impaired if the contract made by the defendants with the State is carried out.

Thus far our attention has been directed to the origin, nature and extent of the property rights on the north side of the river, as developed since the grant from the State in the beginning of the present century. In order to appreciate and understand the motives which probably inspired or stimulated the legislation which must be hereafter considered, and which is the real point of contention between the parties, it is necessary to notice other, and what, perhaps, might be called rival, interests and rights which, during the same period, were developed on the south or opposite side of the river, and which must have been materially affected by the operations of the State, and of the corporation the rights of which the State acquired on the other shore of the stream. About the year 1798 one Samuel Bear settled on land on the south shore, now the site of South Waterloo, or that part of the village which is south of the river. The Seneca River flows from the outlet of Seneca Lake, at the village of Geneva, easterly through the villages of Waterloo and Seneca Falls, and, finally, empties into the Oswego River. It divides the village of Waterloo, one ward being south of the river and the other north. In the year 1804 the State conveyed 100 acres of land to Bear, lying along and south of the river, with the water-power and privileges connected therewith. He also dug a race and erected a mill on his land. The use by Bear of the waters of the river for manufacturing purposes on the south side, through this race, probably antedated a similar use by Williams on the other side, though this fact is not found, and, in our view, is not very material. It is the channel known in the case as "Bear Race," and entered the river near the easterly end of Big Island, and a considerable distance easterly or below the point where Williams tapped the river with his race on the opposite side. The defendants Sweet, Mongin and Cook are the owners of this race, water-power and mill, having derived title thereto through mesne conveyances from Bear. The channel of the river was originally along and near the south shore, so that when Bear built his mill the facilities for obtaining a proper supply of water were, apparently, as good on his side of the river as on the other. But subsequently, as we have seen, the navigation company and, later, the State itself, diverted the water, at a point above, into the canal on the north shore, and the plaintiff's mills, using the surplus, must

have had a better supply than the mills on the other side. In fact the plaintiff has succeeded in this case, in the courts below, on the ground that the power of the Legislature to appropriate money has been used for the purpose of securing to certain mills on the south side of the river a greater supply of water, which must necessarily diminish the surplus from the canal, and thus take property from the plaintiff for the use of persons on the opposite side of the river. This view of the situation, and this conflict of private interests, will enable us to consider the legislation which the plaintiff has thus far successfully assailed.

By chapter 113 of the Laws of 1887 the superintendent of public works was authorized to expend \$15,000, or so much thereof as might be necessary in necessary improvements on locks Nos. 1 and 2 on the Cayuga and Seneca Canal, and to remove obstructions and *débris* between Seneca Lake outlet and the upper dam, at Waterloo. The money thus appropriated, for some reason not now important to ascertain, was not expended, but remained in the state treasury, and at the next session of the Legislature chapter 325 of the Laws of 1888 disposed of it, and authorized its expenditure, in language somewhat different from that used in the statute passed the year before, as follows: "An Act to provide for the dredging and excavating the channel of Seneca River and the old Bear race, in the village of Waterloo, to facilitate the passage of canal boats. Approved by the governor May 18, 1888. Passed, three fifths being present. The people of the State of New York, represented in senate and assembly, do enact as follows: Section 1. The superintendent of public works is hereby authorized, in his discretion, to expend the fifteen thousand dollars or so much thereof as may be necessary, which was appropriated by chapter one hundred and thirteen of the laws of eighteen hundred and eighty-seven, and directed therein to be applied to improvements on the Cayuga and Seneca Canal, towards dredging and excavating the channel of Seneca River from its intersection with said canal in the village of Waterloo to the old Bear race, and thence towards dredging and excavating said race to Washington Street, in said village, so as to admit the passage of canal boats therein from said canal. Sec. 2. This Act shall take effect immediately." Pursuant to the authority thus given, the defendant Shanahan, as superintendent of public works, advised, as required by law, for proposals to perform the work contemplated by the Legislature in the passage of the Act. This resulted in a contract with the State for the performance of the work by the defendants Fuller and Albaugh, in conformity with a map and plans prepared by the state engineer. After entering upon the performance of the contract, they were enjoined by order granted in this action and Sweet, Mongin & Cook, the parties who own Bear race, were also made parties upon the ground that they were to be the real beneficiaries of the improvement, although there is no allegation that they had done or threatened any act in furtherance of the work. On the trial of the action, at a special term, the court found the following

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facts in addition to those already stated: That the Seneca River is navigable, and a public highway, and that its channel is south of Big Island, that Bear race was private property, and that neither it nor the channel of the river to its intersection with the canal, where the dredging was to be done, and the improvement made, was any part of the canal system; that the race was about twenty feet wide and three and one-half feet deep, and that by the improvement it was to be made wider and deeper; that the plaintiff is entitled to all the surplus water that runs through the canal; that chapter 325 of the Laws of 1888 did not receive the assent of two thirds of the members of either House of the Legislature, and is void; that it appropriated public money for a local or private purpose, and that its effect was to take the plaintiff's property for private use, and was therefore in conflict with the Constitution and, being thus invalid, it furnished no authority or protection to the superintendent or the contractors in deepening the channel of the river and the race, and in this way diverting the waters of the river from the canal. Judgment was directed perpetually restraining them from the further prosecution of the work, and it has been affirmed by the general term.

The case, therefore, involves, among other questions, the validity of an Act of the Legislature, always important. This court has said upon a recent occasion that "only when required by the most cogent reasons, nor, indeed, unless compelled by unanswerable grounds, will an Act of the Legislature be declared void." *People v. Budd*, 117 N. Y. 18, 5 L. R. A. 559. Before proceeding to examine the grounds upon which a statute has been held void in this case, it may be well to observe that there can be no dispute as to the power of the Legislature to take private property for other than a public use without the consent of the owner. That, of course, cannot be done, either with or without compensation. Nor can it be denied that, generally, whether the use to which private property may be devoted by legislative power is in fact public or private is a judicial question, and the courts are not concluded by any declaration of the law-making power as to the nature of the use. *Re Niagara Falls & W. R. Co.* 108 N. Y. 375, 11 Cent. Rep. 272; *Re Deansville Cemetery Assn.* 66 N. Y. 569, 23 Am. Rep. 86. So, too, it has been held that a legislative Act, ostensibly for the protection of the public health, but which deprives the citizen of liberty or property, may be subjected to judicial scrutiny for the purpose of ascertaining whether its provisions really relate to, and are, in fact, convenient and appropriate to promote, the public health. The determination of the Legislature on this point is not final or conclusive. *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 686. It may also be regarded as settled that when the Legislature appropriates public money for some improvement the courts may inquire whether the improvement is for a purpose which is public, or one merely private or local, and whether the bill, if the purpose was private or local, received the assent of two thirds of the members of each House of the Legislature, as required

by the Constitution. *People v. Allen*, 42 N. Y. 378; *People v. Commissioners of Highways*, 54 N. Y. 270, 13 Am. Rep. 581.

But the scrutiny which the courts have exercised in regard to legislation of this character has been confined to matters appearing on the face of the bill itself, and to things that are the subject of judicial notice. In this case the Act has been held void as an appropriation of public money for a local or private purpose, not receiving the assent of two thirds of the members of each House. The private or local character of the expenditure does not appear on the face of the bill, but the trial court, against the defendants' objection and exception, instituted an inquiry in regard to the purpose of the appropriation, upon the testimony of witnesses; and having found as matter of fact, from this testimony, that the improvements could not benefit the canal, but would benefit the property of individuals, the conclusion was reached, in this way, that the purpose of the appropriation was not public, but private or local. Reading the title and the provisions contained in the body of the Act, it provides for an expenditure of \$15,000 for the purpose of dredging and excavating the channel of a navigable river and a private race intersecting the canal, so as to facilitate the passage of canal boats therein from the canal. The purpose thus expressed is not private or local, but public, inasmuch as the general improvement of the public highways of the State, whether canals or rivers that are navigable, is for the benefit of the State at large, though some locality or some individual may be benefited more than others. The expenditure may, in fact, be improvident, and the work may prove to be useless to the public; but the Legislature, as the depositary of the sovereign powers of the people, must necessarily be the judge of the propriety and utility of making it. If it were otherwise, every appropriation of money by the Legislature could be assailed in the courts at the suit of private individuals, on the ground that they are useless, and intended for a purpose other than is plainly expressed in order to evade some provision of the organic law. The judicial department cannot institute an inquiry concerning the motives and purposes of the Legislature, in order to attribute to it a design contrary to that clearly expressed or fairly implied in the bill, without disturbing or impairing, in some measure, the powers and functions assigned by the Constitution to each department of the government. The courts cannot determine, upon the testimony of witnesses, that the purpose of the Legislature was to appropriate public money for the benefit of an individual, when it has expressed its purpose in the bill itself to be the enlargement or improvement of the canal. They must assume that the Legislature acted in good faith, and meant just what it said, though it may be possible to show, outside of the language and terms of the bill, that in fact all or the larger part of the benefits following the expenditure may or will be reaped by a few individuals. The question always is, with respect to such bills, How is the purpose of the Legislature to be ascertained? Must that be determined from the bill itself, and from such considerations as the court can judicially no-

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tice, or is it competent to take proof and determine it as a matter of fact, as was done in this case? Reason and authority, as well as the fitness of things, demand that when an Act of the Legislature appropriating money is assailed, upon the ground that the purpose of such appropriation is local or private, and not public, the question shall be determined by the language and general scope of the Act. This principle was stated with great force and clearness by Judge Denio in *People v. Draper*, 15 N. Y. 545: "If a particular Act of legislation does not conflict with any of the limitations or restraints which have been referred to, it is not in the power of the courts to arrest its execution, however unwise its provisions may be, or whatever the motives may have been which led to its enactment. There is room for much bad legislation and misgovernment within the pale of the Constitution; but, whenever this happens, the remedy which the Constitution provides, by the opportunity for frequent renewals of the legislative bodies, is far more efficacious than any which can be offered by the judiciary. The courts cannot impute to the Legislature any other than public motives for their acts. If a given act of legislation is not forbidden by express words, or by necessary implication, the judges cannot listen to a suggestion that the professed motives for passing it are not the real ones. If the Act can be upheld upon any views of necessity or public expediency, which the Legislature may have entertained, the law cannot be challenged in the courts." The power of the courts to overthrow legislative Acts, by independent inquiries as to facts, outside of the provisions of the statute itself, has been considered and denied in more recent cases. *People v. Alberson*, 55 N. Y. 50, 54; *Re New York Elec. R. Co.* 70 N. Y. 327; *People v. Durston*, 119 N. Y. 569, 7 L. R. A. 715; *Amy v. Watertown*, 130 U. S. 819, 82 L. ed. 952.

But, even upon the theory adopted by the courts below, and upon the facts developed at the trial, and found in the record, it is by no means clear that the Act is invalid, under section 9 of article 1 of the Constitution, which requires a two-thirds vote for the appropriation of money for a local or private purpose. The State had diverted the waters of the river into the canal, and to that extent deprived the riparian owners below, on the south side, of its use. Assuming that the purpose of the Act was, as claimed, to restore a portion of the water thus diverted to its original channel, and to the use of the owners who had been deprived of it by the act and authority of the State, who can say that an expenditure for that purpose is private or local, within the meaning of the Constitution? If the State in carrying out a policy of justice, through its Legislature, appropriates money to pay a debt or to repair an injury inflicted upon an individual or a locality, obligatory upon it in honor and justice, that is but a part of its legitimate functions and duties as a sovereign, and the purpose is public. *Morris v. People*, 8 Denio, 399. So that, whether the statute is tested by reference to its language alone, or by a consideration of the facts established, it was legally enacted.

Moreover, it should also be observed that

the complaint contains no allegation that the statute was not constitutionally enacted, or that it did not receive the requisite vote, or that it is private or local, and the evidence upon which these facts were found, and the finding itself, were excepted to. It has been held that when the objection to the validity of a law arises out of the failure of the Legislature to comply with the procedure pointed out by the provisions of the Constitution, which is not apparent upon the face of the Act itself, the facts must be distinctly pleaded. *People v. Chenango Supra*, 8 N. Y. 817; *Thomas v. Dakin*, 23 Wend. 9; *Hunt v. Van Alstyne*, 25 Wend. 608. But as this point was not specifically raised at the trial, and is not discussed upon the briefs of counsel, we prefer to put our decision on other grounds.

The courts below have also held that the Act is invalid because its effect is to take the plaintiff's property for private purposes. This proposition is based solely upon the fact that the improvement, by deepening the channel of the river and enlarging the race, will divert water from the canal, and restore it to the channel of the river, the use of which the plaintiff has enjoyed without question for more than twenty years. The use by the plaintiff of the surplus water, beyond what it was entitled to during the occupation of the canal by the navigation company, however long continued, and whether adverse or by permission, could not impair the rights of the State. *Durbank v. Fay*, 65 N. Y. 57. The State was at liberty to withdraw the surplus, so far as it came from the enlargement of the canal in 1857 and prior thereto, so long as the plaintiff could use the quantity of water secured to its grantors by the law under which the navigation company acquired the race. It is not claimed that this right was threatened or could be impaired by the improvement. The State could restore water which it diverted from the natural channel without furnishing the plaintiff with any legal ground of complaint, even though it was for the purpose of delivering it to the defendants or any other riparian owner on the south side. So long as the legal rights of the plaintiff, as between it and the State, are respected, it cannot complain if the State is doing something with its own property that may possibly benefit others. If the State has the right to diminish the supply of water in the canal at all, and that right is not denied, then the motives that may underlie the act are not material. The reasons that move the public authorities do not concern the plaintiff. So we conclude that the plaintiff has no property right in the use of the surplus water in the canal, as increased by the enlargement made by the State from 1840 to 1857, that can be impaired by the execution of the work contemplated by the statute. But if the plaintiff could establish any right to the use of the increased supply of water furnished by the State in the process of enlarging the canal from time to time, the most that the plaintiff could then claim would be that the improvement would result in a consequential injury which might form the basis for a claim for damages or compensation before the tribunal which the State has authorized to hear and determine such claims. It would furnish no ground for ar-

resting the work of improving or enlarging the canal in such manner as the Legislature might determine to be for the public good. *Atwater v. Canandaigua*, 124 N. Y. 602; *Sibley Mfg. Co. v. State, supra*; *Reesford v. Knight*, 11 N. Y. 818; Laws 1863, chap. 205, § 18.

The execution of the work authorized by the statute, by the superintendent of public works, or the contractors acting under his authority, does not involve the taking of any of the plaintiff's property for any purpose, public or private.

But Bear race, from its intersection with the river to Washington Street, which the act also provides for dredging and excavating, is the private property of the defendants Sweet, Mongin, and Cook. If that has been or is to be taken, within the meaning of the Constitution, that is a question which the owners alone can raise. It does not in any legal sense concern the plaintiff if the defendants see fit to renounce a constitutional provision intended for their own benefit. *Pierrepoint v. Loeless*, 72 N. Y. 311; *Baker v. Braman*, 6 Hill, 47, 40 Am. Dec. 387; *Be New York*, 99 N. Y. 569, 584. The expenditure of public money for the purpose, in part at least, of enlarging a private mill-race, furnishes the basis for the argument in behalf of the plaintiff to show that the appropriation is for a private or local purpose. But we have no right to assume, as this argument does, that the State will never acquire the title to the race or the right to its use for the purposes of navigation. The title, or the right to its use, can be acquired at any time, and need not be obtained in advance. Property required by the State for canal purposes always has been and may still be taken in a summary way, without the aid of any judicial proceeding. The constitutional provision requiring the compensation to be made to the owner to be ascertained by a jury, or by commissioners appointed by the court, does not apply to such a case. Const. art. 1, § 7. The State may take possession, go on with its work, and await the claim of the owner for a compensation. *Mark v. State*, 97 N. Y. 573; *Heacock v. State*, 105 N. Y. 246, 7 Cent. Rep. 380; *Stewart v. State*, 105 N. Y. 254, 7 Cent. Rep. 383; *Benedict v. State*, 120 N. Y. 228.

In this view we have no right to say that, when the authorities of the State were restrained, they were not proceeding, in good faith, to make an improvement to the canal system. Moreover, it must be noted here that by chapters 461 and 493 of the Laws of 1889 the Legislature reappropriated the money for this very improvement, increasing the amount, and providing for a release to the State of Bear race by the owners for canal purposes. We have already considered the argument of plaintiff's counsel, which, apparently, was successful in the courts below, that the real purpose of the appropriation was to furnish additional power to defendants' mill which is located at the easterly end of Bear race; and, while we consider that this point is sufficiently answered by the remarks of Allen, J., in *People v. Albertson, supra*, that "no motive, purpose, or intent can be imputed to the Legislature in the enactment of a law other than such as are apparent upon the face and to be gathered from the terms of the law itself," yet there is an

additional fact which deserves some notice. The act authorizes no work to be done in Bear race further east than Washington Street, and this would not reach the defendants' mill, as it is located on the other or easterly side of that street. The additional flow of water which would result from deepening and widening the race cannot be utilized by the defendants until the work is carried still further east, and the machinery in the mill is changed in order to permit the use of more power. It is not found or alleged that such a change is

contemplated or threatened. In this view, it is difficult, upon any theory of the case, to say that the State has any other purpose in view than that expressed on the face of the Act, namely, to enlarge the channel of the river and the race, in order to permit navigation by boats from the canal to a public street, on the south side of the river.

The judgment of the general and special terms should be reversed, and a new trial granted, costs to abide the event.

All concur, except Finch, J., absent.

MASSACHUSETTS SUPREME JUDICIAL COURT.

George H. TURNER *et al.*, Appts.,
v.

Francis A. NYE.

(.....Mass.)

A statute authorizing lands to be flowed by raising a pond for the culture of useful fishes is not unconstitutional on the ground that the land is taken for mere private use, although the object of the owner of the pond is merely to secure his own pleasure and profit.

(Field, Ch. J., dissents.)

(November 11, 1891.)

A PPEAL by plaintiffs from a decree of the Superior Court for Barnstable County in favor of defendant in a proceeding brought to enjoin the erection and maintenance of a dam across the bed of Marsh Creek in Barnstable County. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. A. M. Goodspeed, for appellants:

The Legislature has no power to transfer the private property or rights of property of an individual from his possession and control to that

of another, either by general or special act, even for full compensation, except only in those cases in which the public interest will be promoted.

Private property cannot be taken without the consent of the owner for purely private uses or for the benefit of a few individuals.

Declaration of Rights, art. 10; Cooley, Const. Lim. 4th ed. chap. 15, pp. 530, 531, *note 1*; *Talbot v. Hudson*, 16 Gray, 417; *Neponset Meadow Co. v. Tileston*, 133 Mass. 189; *Boston & L. R. Corp. v. Salem & L. R. Co.* 2 Gray, 37.

That the public might derive benefit, however certain and great, from such appropriation of property, is not enough. The benefit to be derived must be actual, tangible, and public in its nature, and the benefit to the individual, if any, incidental.

Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39; *Opinion of Justices*, 8 L. R. A. 487, 150 Mass. 592; *Talbot v. Hudson*, *supra*.

The effect of this statute is to authorize the submerging of large territorial areas, which might be of great value under cultivation, not for manufacturing, agricultural or commercial purposes, and for no public advantage, and the

NOTE.—For what purposes the flowage of lands may be authorized by statute.

The flowage of land of another by a dam to create a water-power for mechanical and manufacturing purposes is for a public use, justifying the exercise of the right of eminent domain. *Hazen v. Essex Co.* 12 Cush. 475; *Boston & R. Mill Corp. v. Newman*, 12 Pick. 407, 23 Am. Dec. 622; *Wolcott Woolen Mfg. Co. v. Upham*, 5 Pick. 232; *Olmstead v. Camp*, 33 Conn. 532, 39 Am. Dec. 221; *Todd v. Austin*, 34 Conn. 73; *Occum Co. v. Sprague Mfg. Co.* 35 Conn. 496; *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444; *Ash v. Cummings*, 50 N. H. 591; *Amoskeag Mfg. Co. v. Head*, 59 N. H. 332; *Amoskeag Mfg. Co. v. Worcester*, 60 N. H. 522; *Jordan v. Woodward*, 40 Me. 317; *Burnham v. Thompson*, 35 Iowa, 421; *Hankins v. Lawrence*, 8 Blackf. 203; *Venard v. Cross*, 8 Kan. 238; *Harding v. Funk*, 8 Kan. 315; *Miller v. Troost*, 14 Minn. 365; *Newcomb v. Smith*, 1 Chand. 71; *Fisher v. Horison I. & Mfg. Co.* 10 Wis. 351.

The right was also upheld in the case of a dam authorized by special statute. *Babb v. Mackey*, 10 Wis. 371.

In Michigan a statute authorizing such flowage is held unconstitutional. *Ryerson v. Brown*, 35 Mich. 33, 24 Am. Rep. 584.

This doctrine, however, is denied in Georgia, even in respect to a grist-mill, which is regulated, both 14 L. R. A.

as to the order of serving customers and as to the rates of toll, by statute. *Loughbridge v. Harris*, 42 Ga. 501.

So in Vermont where mills are not obliged to serve everyone. *Tyler v. Beach*, 44 Vt. 643, 8 Am. Rep. 308.

In Alabama and Tennessee the right is upheld as to grist-mills, which are bound to grind for the public subject to statutory regulations, but not as to other mills. *Bottoms v. Brewer*, 54 Ala. 238; *Sadler v. Langham*, 34 Ala. 311; *Harding v. Goodlett*, 3 Yerg. 41, 24 Am. Dec. 646.

The remarkable fact about the decisions which uphold the right of flowage to create a water-power for ordinary mills is the fact that almost every decision is made practically under protest on the ground that a long-continued acquiescence in the validity of such statutes makes it important to uphold them; and the later decisions are based also on the fact that decisions in other states have upheld such rights. Thus in *Jordan v. Woodward*, 40 Me. 317, the court says that such a statute "pushes the power of eminent domain to the very verge of constitutional inhibition;" and in *Miller v. Troost*, 14 Minn. 365, it is said to go "to the extreme limit of legislative power;" and in *Fisher v. Horison I. & Mfg. Co.* 10 Wis. 351, the court expressly announces the dissent of the judges then on the bench from the doctrine, but sustains it only because of prece-

result of which, as a private enterprise, the report says, depends upon experiment.

In this it differs from the cases of *Talbot v. Hudson*, *supra*, and *Moore v. Sanford*, 7 L. R. A. 151, 151 Mass. 285. In the statutes passed upon in these cases the reclamation of large tracts of land for agricultural and commercial purposes was the end sought.

The construction of a private trout pond is of no greater advantage to the public than the construction of private roads or private parks, and the courts have always declared unconstitutional Acts granting the right to occupy property for such purposes. If ways are laid out under the statutes as private ways the public has the right to use them.

Cooley, Const. Lim. chap. 15, p. 531, note 1; 6 Am. Law Rev. 197; *Flagg v. Flagg*, 16 Gray, 180.

There are only three cases in the Massachusetts reports which refer to the Act for flowing and irrigating cranberry lands (Act 1866, chap. 206, Pub. Stat. chap. 190, §§ 48, 49); they are:

Hinckley v. Nickerson, 117 Mass. 218; *Blackwell v. Phinney*, 126 Mass. 458; *Hovos v. Grush*, 181 Mass. 207.

The benefit derived by the public from the cultivation and sale of the cranberry may well determine the fact that such a use of the land is of great and ever-increasing public utility, in which it differs essentially from the statute under consideration.

Although the cases under the Mill Act hold that the flowing of land under that Act is not, strictly speaking, an exercise of the right of eminent domain, yet in no instance do they lose sight of this fundamental principle, that the real justification of the law is the fact that the public interest is promoted, and that the real question to be determined in all these cases is, as stated in *Angell on Watercourses*, § 487, "whether authorizing the flowing of another's land is sufficiently for the public good to jus-

tify depriving the owner of the use of it even for a just compensation."

The Act of 1869, chap. 388, may well be said to authorize the exercise of the right of eminent domain, at least in a limited sense, as eminent domain does not necessarily imply an appropriation of the property of an individual entirely to the use of another.

If land is taken for a turnpike or highway by the right of eminent domain, yet the use is still a limited one.

Adams v. Emerson, 6 Pick. 57; *Codman v. Evans*, 5 Allen, 308, 81 Am. Dec. 748; *Harbuck v. Boston*, 10 Cush. 297; *Clark v. Worcester*, 125 Mass. 226.

Whether flowing land under the Mill Act is an exercise of the right of eminent domain or not, it rests upon the same considerations of public utility.

The justification of the law rests for its basis upon the public advantage.

8 Kent, Com. 12th ed. 443, note c; *Fiske v. Framingham Mfg. Co.* 12 Pick. 68; *Boston & R. Mill Corp. v. Neuman*, 12 Pick. 467, 23 Am. Dec. 622; *Murdock v. Stickney*, 8 Cush. 113; *Talbot v. Hudson*, 16 Gray, 428.

In the first reported case under the Mill Act (*Spring v. Lowell*, in error, 1 Mass. 422) *Sewall, J.*, on page 428, calls it "this extraordinary mode of process."

Sedgwick, J., on page 430, says: "It may be observed that the sacred rights of private property are never to be invaded but for obvious and important purposes of public utility."

The question to be determined is not whether one individual may make a somewhat better or more profitable use of land belonging to another, but whether his use of it will in some material manner contribute to the benefit of the public, and where the public necessity is obvious and important.

Fiske v. Framingham Mfg. Co. 12 Pick. 70.

The antiquity of the Mill Act and the long

case of eminent domain. *Head v. Amoskeag Mfg. Co.* 113 U. S. 9, 28 L. ed. 689.

A raceway for a water-power is for a public use which will justify the exercise of eminent domain. *Scudder v. Trenton Del. Falls Co.* 1 N. J. Eq. 904, 23 Am. Rep. 756.

Although the right of eminent domain was not involved in the case, the principle is illustrated in a Wisconsin case holding that a statute giving power to a city to maintain a dam for the purpose of leasing water for manufacturing is void even if it included in the alternative the power to make such dam for public water-works. *Atty-Gen. v. Eau Claire*, 37 Wis. 400.

For other cases involving the right of flowage for mill purposes in which the legality of such statutes was assumed but not expressly decided, see *Murdock v. Stickney*, 8 Cush. 113; *Stowell v. Flagg*, 11 Mass. 364; *Cornwell v. Essex Mill Corp.* 6 Pick. 94; *Fiske v. Framingham Mfg. Co.* 12 Pick. 67; *French v. Braintree Mfg. Co.* 23 Pick. 216; *Williams v. Nelson*, 23 Pick. 141, 34 Am. Dec. 45; *Bates v. Weymouth Iron Co.* 8 Cush. 548; *Storm v. Manchaug*, 12 Allen, 10; *Gammell v. Potter*, 6 Iowa, 548; *Babb v. Mackey*, 10 Wis. 371; *Pratt v. Brown*, 3 Wis. 608; *Thien v. Voegtlander*, Id. 461; *Bibb v. Mont Joy*, 2 Bibb, 1; *McAfee v. Kennedy*, 1 Litt. 92; *Smith v. Connelly*, 1 T. B. Mon. 56; *Shackleford v. Coffey*, 4 J. J. Marsh. 40.

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acquiescence of the people in its provisions has had weight with the courts of this and other States in passing upon this Act, as well as the reasons existing for such a law in the necessities of the public in the early days of the Commonwealth, when it had its origin.

Murdock v. Stickney, 8 Cush. 117; *Jordan v. Woodward*, 40 Me. 324.

The Mill Act in Maine, taking its origin from the Massachusetts Provincial Statute of 1713, was considered so inequitable and unjust that its repeal was considered by two Legislatures.

3 Kent, Com. 12th ed. 443, *note c*.

Rice, J., in *Jordan v. Woodward*, 40 Me. 323, says: "The Mill Act as it has existed in this State pushes the power of eminent domain to the very verge of constitutional inhibition."

Messrs. Charles A. Prince and James Milton Hall, for appellee:

In the determination of the constitutionality of the Act in question, decisions and authorities of the United States courts and the courts of the several States are not material, and should have no weight.

First. The provision in the Constitution of the United States, that private property shall not be taken for public use without just compensation, applies only to operations of the federal government, and is not a limitation upon the power of the States.

Barron v. Baltimore, 32 U. S. 7 Pet. 243, 8 L. ed. 672; *Withers v. Buckley*, 31 U. S. 20 How. 84, 15 L. ed. 816; *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166, 176, 20 L. ed. 557, 560.

Secondly. In the several States, influences which determined the origin and development of the legislation on this subject in Massachusetts seem either not to have been of like weight or to have had no existence.

The building of the dam in pursuance of the provisions of the Act in question, whereby plaintiffs' land was overflowed, was not a taking of the plaintiffs' land, and thus an exercise of the right of eminent domain, within the meaning of article 10 of the Declaration of Rights.

The Act of 1889 is a "provision by law for regulating the rights of proprietors on one and the same stream from its rise to its outlet, in a manner best calculated on the whole to promote and secure their common rights in it," and is constitutional, because it involves no other governmental power than that to "make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances" as the general court "shall judge to be for the good and welfare of this Commonwealth and for the government and ordering thereof, and of the subjects of the same."

Mass. Const. art. 4, chap. 1, § 1. See *Williams v. Nelson*, 28 Pick. 143, 34 Am. Dec. 45; *Talbot v. Hudson*, 16 Gray, 417, 426; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39.

The language of the court used *arguendo* has been sometimes such as to imply that the growth and prosperity of manufacturing and other industrial enterprises were of such importance to the public welfare as to justify the exercise of the right of eminent domain in their behalf as a public use.

Boston & R. Mill Corp. v. Newman, 12 Pick. 14 L. R. A.

467, 23 Am. Dec. 622; *Hazen v. Essex Co.* 12 Cush. 475, 478; *Talbot v. Hudson*, *supra*.

One who appropriates the force of the current is in the enjoyment of a common right, in which he is protected, although he may thereby prevent a like use subsequently by the proprietor above.

Hatch v. Dwight, 17 Mass. 289, 296, 9 Am. Dec. 145; *Cary v. Daniels*, 8 Met. 461, 41 Am. Dec. 532; *Gould v. Boston Duck Co.* 13 Gray, 442.

No private property or right in the nature of property is taken by the maintenance of a dam to raise a head of water, although its effect will be to overflow the land of another proprietor. This right of flowage is sometimes inaccurately called an easement.

Hunt v. Whitney, 4 Met. 603; *Talbot v. Hudson*, *supra*.

But it is not so. It confers no right in the land upon the mill-owner and takes none from the land-owner.

Murdock v. Stickney, 8 Cush. 113; *Storm v. Manchaug Co.* 13 Allen, 10.

It is not in any proper sense a taking of the property of an owner of the land flowed, nor is any compensation awarded by the public.

Bates v. Weymouth Iron Co. 8 Cush. 548, 553; *Fiske v. Framingham Mfg. Co.* 12 Pick. 68; *Williams v. Nelson*, 23 Pick. 141, 34 Am. Dec. 45.

The absolute right of the individual must yield to and be modified by corresponding rights in other individuals in the community. The resulting general good of all, or the public welfare, is the foundation upon which the power rests and in behalf of which it is exercised, whether by restricting the use of private property in a manner prejudicial to the public (*Com. v. Alger*, 7 Cush. 53) or by imposing burdens upon it for the protection or convenience in part of the public.

Goddard, Pettitioner, 16 Pick. 504; *Baker v. Boston*, 12 Pick. 184, 193, 22 Am. Dec. 421; *Salem v. Eastern R. Co.* 98 Mass. 431, 96 Am. Dec. 650.

The raising of a dam to secure a pond for fish culture and thus overflowing plaintiffs' land if an appropriation of the plaintiffs' land at all is for public uses.

See *Talbot v. Hudson*, 16 Gray, 417.

The Act of 1889 is of the same nature as the Cranberry Act of 1866. Every reason for upholding the Cranberry Act, which it is submitted has never been held unconstitutional, applies with equal force to the Act of 1889.

See *Hinckley v. Nickerson*, 117 Mass. 215; *Homes v. Crush*, 181 Mass. 211.

There is no prohibition to be found in the Massachusetts Declaration of Rights or Constitution, or the United States Constitution, express or implied, which limits or restrains the power of the Legislature to regulate streams of water or to make a particular law applicable to such streams in a particular county in this State, varying in its provisions from the general laws applicable to such streams generally in Massachusetts.

An act may be a misdemeanor in certain counties of a State only.

Davis v. State, 68 Ala. 58, 44 Am. Rep. 128; *State v. Moore*, 104 N. C. 714.

Liquor sales may be forbidden in the county and permitted in towns and cities.

State v. Berlin, 21 S. C. 293, 53 Am. Rep. 677; *Howell v. State*, 71 Ga. 224, 51 Am. Rep. 259.

They may also be forbidden in certain specified localities in different parts of the State, fixed by distance from a school-house, depot, etc.

State v. Joyner, 81 N. C. 594; *Com. v. Bennett*, 108 Mass. 27; *Missouri v. Lewis*, 101 U. S. 22, 25 L. ed. 989.

Morton, J., delivered the opinion of the court:

The plaintiff does not rely upon the fact that the dam was partially constructed by the defendant before the passage of chapter 383, Stat. 1889. The plaintiff could not avail himself of that fact in this suit. If the dam is maintainable under that statute, the plaintiff would not be entitled to its abatement, although it was partly erected without right (*Ware v. Regents Canal Co.* 3 DeG. & J. 212); and if he is entitled to damages for the technical violation of his rights, his remedy is at law. *Washburn v. Miller*, 117 Mass. 876. Nor does he rely upon the point suggested by the defendant, that the operation of the act is confined, as it clearly may be, to Barnstable County. *Cooley*, Const. Lim. 3d ed. *390. The plaintiff claims that the Statute of 1889, chap. 383, under which the court found that the dam was completed and is maintained by the defendant, is unconstitutional, because (1) it purports to authorize the taking of private property for a use which is not public in its nature; and, (2) if the statute is constitutional, the defendant has not brought himself within it. But in regard to the first point we think the plaintiff misapprehends the constitutional provision which applies to the Act in question. The statute was not an exercise on the part of the Legislature of the right of eminent domain, but was enacted under the provision which gives it power to "make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, . . . so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof and of the subjects of the same." Mass. Const. pt. 2, chap. 1, art. 4. It is upon this provision that the Mill Acts have been placed finally in this State after what appear at times to have been somewhat conflicting views. *Talbot v. Hudson*, 16 Gray, 417; *Boston & R. Mill Corp. v. Newman*, 12 Pick. 467, 23 Am. Dec. 622; *Murdock v. Stickney*, 8 Cush. 113; *Hazen v. Esac Co.* 12 Cush. 475; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 89. It may be doubted whether as new legislation they could be sustained as an exercise of the right of eminent domain. *Murdock v. Stickney* and *Lowell v. Boston*, *supra*; *Cooley*, Const. Lim. 3d ed. 534; *Jordan v. Woodward*, 40 Me. 317. Upon this provision also stand the "Cranberry Act," so called (Stat. 1866, chap. 206); the Act in regard to draining meadows, swamps, marshes, beaches, and lowlands, with its authority to commissioners to open the flood gates of a mill, or erect a temporary dam on the lands of another person, and to assess the damages upon the proprietors (Pub. Stat. 14 L. R. A.

chap. 189); the Act in regard to proprietors of wharves, general fields, and lands lying in common, with the control which it gives to a certain proportion in number and interest over the property of the rest (Pub. Stat. chap. 111); and the Act in regard to partition, by which one co-tenant may be compelled to take money instead of land, or to give up for a time the occupation and enjoyment to another (Pub. Stat. chap. 178). The Mill Act and these and other like statutes—of which various illustrations might be given, (*Wurts v. Heagland*, 114 U. S. 606, 29 L. ed. 229)—rest upon the principle that property may be so situated or of such a character that the absolute right of the individual owner to a certain extent must yield to or be modified by corresponding rights on the part of other owners, or by what is deemed on the whole to be for the public welfare. See *Com. v. Alger*, 7 Cush. 58; *Denham v. Bristol County Comrs.* 103 Mass. 202; *Com. v. Tricobury*, 11 Met. 55. The provision above quoted does not authorize the Legislature to take property from one person and give it to another, nor to take private property for public uses without compensation, nor to wantonly interfere with private rights. These are always to be carefully guarded and protected. But of necessity cases will arise where there will or may be a conflict of interests in the use or disposition of property, and questions may and will come up affecting the public welfare in regard to the use which shall or shall not be permitted of certain property. It is for the Legislature in such instances, under the power thus conferred upon it, and with due regard to private rights, to enact the necessary laws. It is for the public good that swamps and waste lands should be reclaimed and made productive. It is also for the public good that streams should be used to operate mills, to raise cranberries, and to cultivate useful fishes. If private rights appear to some extent to be invaded, that is inseparable from the nature of the use authorized, without which the streams could not be advantageously or profitably used, and compensation is provided for any injury that may be done. The character of the property and the resulting general good are deemed sufficient to justify the action of the Legislature. It is doubtful, however, whether any property of the plaintiff is taken, or any of his rights are invaded.

The statute in question authorizes the erection and maintenance of a dam across any stream for the purpose of creating or raising a pond for the culture of useful fishes. It is to be erected "upon the terms and conditions and subject to the regulations contained in chapter 180 of the Public Statutes, so far as the same are properly applicable in such cases." The chapter referred to is what is known as the "Mill Act." Under that it has been held that the right to erect and maintain a dam to raise water for working a mill does not give to the mill-owner any right in the land flowed, or take away any right from the land-owner. The latter may embank his land, and thus stop any flowage of it, or, if he chooses, he may collect of the mill-owner damages in gross or annually for the flowage. Until the land-owner manifests his election to claim damages he cannot be compelled by the mill-owner to

submit his land to be flowed, and until then the only right which the mill-owner has as between himself and the land-owner is to maintain his dam without liability to the land-owner for damages in an action at law. While the land-owner may protect his land from flowage, he cannot, of course, wantonly interfere with the right which the statute gives to the mill-owner to maintain his dam. *Williams v. Nelson*, 28 Pick. 141, 84 Am. Dec. 45; *Murdock v. Stickney*, *supra*; *Storm v. Manchag Co.*, 18 Allen, 10; *Lowell v. Boston*, *supra*; *Paine v. Woods*, 108 Mass. 163; *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 28 L. ed. 869. There would seem to be nothing in the purpose for which the right is given to erect and maintain a dam to create a pond for the culture of useful fishes that should give to the party erecting or maintaining such a dam any greater rights over the lands flowed by it than a mill-owner would have over lands flowed by the dam maintained by him. Without anything more, we should be slow to infer from a power to maintain a dam to create a pond for the culture of useful fishes any greater rights over lands flowed than from a power to maintain a dam to raise water for working a mill. It appears from the facts found in the present case that the defendant's dam flows about sixty acres, all of which, with the exception of about three fourths of an acre, belonging to the plaintiff, is owned by the defendant. It is also found that the land of the plaintiff was of small market value for any other use to which it could be applied, and that there is "much land in Barnstable County similarly situated, having small market value for any purpose to which it can be applied by its separate owners, which would be enhanced in value if it were shown by successful experiment that such land could be profitably used for the cultivation of useful fishes under the powers conferred by" the Act in question. In view of these facts, and for the reasons above stated, we think that the claim of the plaintiff that the Act is unconstitutional cannot be maintained. We come to this conclusion the more readily because a contrary result would oblige us, we fear, to hold, if the question were directly presented to us, that the Cranberry Act, under which a large and profitable industry has grown up, was also unconstitutional. Although several cases under that Act have been before this court, no doubt as to its constitutionality seems to have been suggested. *Bearse v. Perry*, 117 Mass. 211; *Hinckley v. Nickerson*, Id. 218; *Blackwell v. Phinney*, 126 Mass. 458; *Houes v. Grush*, 131 Mass. 207.

The plaintiff further contends that, if the Act is constitutional, the defendant has not brought himself within its scope, because it does not appear that any direct or positive benefit will be derived by the public from the defendant's acts, and because the dam has been erected and will be maintained by him wholly for his own personal pleasure, profit, and advantage. But the court has found that "the dam was built and is maintained for the purpose of raising and creating a pond for the culture of useful fishes, and that the pond raised by said dam is well stocked with trout." This finding brings the case within the exact words of the statute. It is not necessary that

it should also appear that the object of the defendant was to benefit the public. The Legislature deemed the culture of useful fishes for any purpose beneficial, and passed this statute, as it did the Mill Act, for the purpose of enabling a lessee or owner of lands or flats to raise a dam across a stream so as to engage in that occupation and use the stream without the liability to constant lawsuits from persons whose lands might be flowed. No doubt the defendant's object is his own personal pleasure, profit, and advantage. But if the enterprise is successful, the public will be benefited by the introduction and building up of a new and profitable industry, and lands now of little value, and not available for any other use, will be made valuable. We think this contention must also be overruled. The result is that in the opinion of a majority of the court the decrees appealed from must be affirmed.

Field, Ch. J., dissenting:

My objections to the constitutionality of Stat. 1889, chap. 263, briefly stated, are as follows: The purpose of the statute is not public. Cultivating fish for one's private use no more concerns the public than cultivating corn or other articles of food. The taking, for such a purpose, of the land of another by overflowing it cannot be justified as an exercise of the right of eminent domain. Notwithstanding what has been said in some of our decisions, overflowing a person's land without his consent is a taking of property, while the overflow continues, and is a tort, which would be enjoined unless the statutes authorized it. The Mill Acts were originally sustained on the ground that the erection of water-mills was for the public benefit; and this was strictly true of grist and saw mills, if the public had the right to have their grain ground and their logs sawed at the mills. The acts, however, extended to mills of all kinds, in most of which the interests of the public were less direct. Still the erection of water-mills, when water was the only available source of power, was always of public concern sufficient to justify the damming of streams, if compensation were paid to the persons whose lands were overflowed. Mill Acts were in force long before the adoption of the Constitution, and it could not properly be held that it was the intention of that instrument to render them void. But the damming of the waters of a running stream, so that the lands of the upper proprietors are overflowed, is something more than the reasonable use of the water, which every proprietor is entitled to make, as it runs through his land, without paying any compensation to the upper or lower proprietors. It has never been supposed that the Mill Acts would be sustained if they contained no provision for compensation to the persons whose lands were flowed. As was said in *Isle v. Arlington Five Cent. Sav. Bank*, 135 Mass. 142-144: "The right to flow water back upon the land of another is not the less an easement because such other may lawfully wall or dike against it. Such right on his part diminishes the extent of the easement, but does not alter its character." *Kenson v. Arlington*, 144 Mass. 456, 4 New Eng. Rep. 340. The statute cannot be sustained on the ground that it authorizes the

improvement of property of different owners for the common benefit of the owners, or for the public benefit, or on the ground that it authorizes the improvement of property which otherwise would be practically useless. It is not confined to useless or swappy lands, or to lands of any particular description. The constitutionality of the statute must be determined by its meaning, and not by the special facts of the present case. It is possible, under the statute, that any owner or lessee of lands or flats situated in Barnstable County for the purpose of making a fish-pond for his own private use and pleasure may overflow the greater part of the arable land in the county, with the buildings upon it. None of the precedents cited seem to me to go as far as the opinion of the court in this case, and I am compelled to think the statute unconstitutional.

James MURCHIE *et al.*

v.

Pardon CORNELL *et al.*

(.....Mass.)

1. A merchantable article is called for by a commercial contract for the purchase of a cargo of ice to be shipped to the purchaser.

NOTE.—*Implied warranty of quality in sales by description.*

a. In executory sales.

1. *Vendee's rights.*

In an executory contract for the sale of merchandise it is an implied condition that it shall be of merchantable quality. *Hamilton v. Ganyard*, 34 Barb. 204, affirmed 3 Keyes, 45; *Cleu v. McPherson*, 1 Bosw. 400; *Hargous v. Stone*, 5 N. Y. 86; *Reed v. Randall*, 29 N. Y. 368, 86 Am. Dec. 306; *Misner v. Granger*, 9 Ill. 69; *Fitch v. Archibald*, 29 N. J. L. 160; *Fogel v. Brubaker*, 122 Pa. 7; *Ketchum v. Wells*, 19 Wis. 25; *McClung v. Kelley*, 21 Iowa, 508; *Davis v. Sweeney*, 75 Iowa, 45; *Wood Mower & Reaper Co. v. Thayer*, 50 Hun, 516; *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 500; *Doane v. Dunham*, 65 Ill. 512.

A buyer has a right to an article answering the description in the contract, not on the ground of warranty, but because the seller does not fulfill the contract by furnishing something different. *Bagley v. Cleveland R. Mill Co.* 21 Fed. Rep. 159.

A vendee who knows that a purchaser having no opportunity for inspection has relied upon his judgment to supply hogs fit for market impliedly warrants that they will be marketable. *Best v. Flint*, 2 New Eng. Rep. 604, 58 Vt. 543.

When at the making of a contract the seller is informed of the uses intended to be made of an article contracted for, and the purchaser has no opportunity for inspection, the latter is not bound to accept the article, unless it is reasonably fit for the purposes. *Lee v. Stokes Saddlery Co.* 36 Mo. App. 201.

Under a contract for the purchase of goods in transit, and which the purchaser has no opportunity to inspect, he is not bound to accept them unless merchantable. *Newbery v. Wall*, 3 Jones & S. 106.

Under an executory contract for the sale of ice, the purchaser, while not entitled, without express warranty, to ice of the first quality, is entitled to ice of "fair, merchantable quality." *Warner v. Arctic Ice Co.* 74 Me. 475; *Cullen v. Blinn*, 87 Ohio St. 236.

14 L. R. A.

2. A protest signed and sworn to the day a cargo of ice arrives is not admissible to disprove acceptance of the ice where it is not claimed that the purchaser's objection to the ice was an afterthought.

(November 25, 1891.)

EXCEPTIONS by defendants to rulings of the Superior Court for Bristol County made during the trial of an action brought to recover the contract price of a cargo of ice sold by plaintiffs to defendants, which resulted in a verdict in plaintiffs' favor. *Sustained.*

The facts sufficiently appear in the opinion.

Messrs. Hosea M. Knowlton and Arthur E. Perry, for defendants:

In a contract for the sale of ice at wholesale by a dealer in the article to one to be sold again where there is no opportunity for inspection of the ice and no express warranty is made, there is an implied warranty that the ice sold is merchantable and salable as ice for ordinary retail use.

Wilson v. Lawrence, 139 Mass. 318; *Benjamin, Sales*, 8d Am. ed. §§ 656, 657, and cases cited; *Jones v. Just*, L. R. 3 Q. B. 197.

Messrs. Walter Clifford and Henry H. Crape for plaintiffs.

In *Warren Glass Works Co. v. Keystone Coal Co.* of Somerset, 65 Md. 547, it was held that in an executory contract for the sale of a certain kind of coal no warranty of the quality of the coal called for by the contract can be implied, or of its fitness for any particular purpose.

Where a manufacturer contracts to deliver an article at a distant place, the implied warranty of merchantability does not cover necessary deterioration while in transit. *Bull v. Robinson*, 10 Exch. 342.

A contract for the purchase of a machine from a dealer implies that the machine shall be a new one, and the dealer cannot impose a second-hand one on the purchaser, although it fulfills the terms of the guaranty as to being well made and able to do as good work as any machine of its kind. *Grieb v. Cole*, 60 Mich. 397, 1 Am. St. Rep. 533.

One who sells the crops of his orchard for a certain number of years to come is, within section 1768 of the California Civil Code, which provides that "one who agrees to sell merchandise not then in existence thereby warrants that it shall be sound and merchantable." *Blackwood v. Cutting Packing Co.* 76 Cal. 212.

In a contract for the sale and delivery of a growing crop of wheat, there is no implied warranty that it will be of any particular quality when threshed and ready for delivery. *Davis v. Murphy*, 14 Ind. 158.

But if contracted for while in the stack there is an implied warranty that it shall be merchantable when delivered. *Fish v. Roseberry*, 22 Ill. 228.

In a contract for the sale of oil, no warranty of the quality of the casks containing it is implied. *Gower v. Von Dedalzen*, 3 Bing. N. C. 717.

Where a vendor agrees to fill an order, sent for an article of a particular quality, his liability is the same as when the proposition to sell the article comes from him in the first instance. He is liable if the goods do not correspond to the description. *Dafney v. Green*, 15 Pa. 113.

When a coal dealer, without opportunity for inspection, gives an order to the agent of the mine

Holmes, J., delivered the opinion of the court:

The plaintiffs agreed to sell and the defendants agreed to buy a cargo of ice of 360 tons,

to be shipped from Pembroke, Me. From some of the evidence it would seem that the ice was not identified by the contract, but was to be supplied and appropriated to the con-

for coal to be sent to him from the mine, it is an implied term of contract that the coal shall be merchantable. *Edwards v. Hathaway*, 1 Phila. 543.

A description of lumber in a contract for its sale as "certain lots of boards and dimension stuff now at and about the mill," does not amount to a warranty that the lumber is merchantable. *Whitman v. Freese*, 23 Me. 212.

2. *Vendee's remedies.*

The vendee in an executory contract for sale of an article is entitled to a reasonable time to give it a fair examination; and if defective, to return the article and recover the price paid. *Woodle v. Whitney*, 23 Wis. 55.

When the contract of sale is executory, the remedy of the purchaser to recover damages, on the ground that the article furnished does not correspond with that contracted for, does not survive the retention of the property by the vendee after discovery of defects, unless he notify the vendor. *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305; *Beck v. Sheldon*, 48 N. Y. 865; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 280.

In executory contracts for sale and delivery of personal property, the purchaser must give notice of any defect in the property delivered as soon as discovered, if he wishes to hold the seller for such defect. *Sprague v. Blake*, 20 Wend. 61; *Leavenworth v. Packer*, 52 Barb. 182.

Or refuse to accept it, if the defect is discovered before the property is delivered. *Holden v. Clancy*, 55 Barb. 580.

After the purchaser under an executory contract of sale has had an opportunity to examine the article, and accept it, as fulfilling the contract, he is concluded by such acceptance, and cannot afterwards, in the absence of fraud or express warranty, allege its defective quality. *McCormick v. Sarson*, 45 N. Y. 255, 6 Am. Rep. 80; *Norton v. Dreyfuss*, 7 Cent. Rep. 785, 108 N. Y. 90; *Coplay Iron Co. v. Pope*, 10 Cent. Rep. 711, 108 N. Y. 232.

Where an executory contract for the sale of logs called for "good, smooth, sound" logs, and the logs delivered were accepted after inspection, a warranty of soundness will not be implied which survives the acceptance of the property. *Maxwell v. Lee*, 34 Minn. 511; *Thompson v. Libby*, 35 Minn. 446.

Where there is an express or implied warranty in the sale of goods it is not necessary that the vendee should return them, or offer to return them, to enable him to recover or recoup the damages which he has sustained by a breach of the warranty. *Best v. Flint*, 2 New Eng. Rep. 604, 58 Vt. 543.

While the acceptance of an article purchased under an executory contract with opportunity of inspection at the time of delivery without complaint, may raise a presumption that it was of the quality contemplated by the parties, it will not preclude the party from showing and setting up actual defect and quality in an action for the price. *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 500.

The expression of a warranty in a contract which the law would imply does not change the nature or extent of the obligation of the remedy upon it. *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305.

Under an executory contract for the sale of goods, with an express warranty of certain qualities, the purchaser does not lose his right of action upon the warranty by retaining the goods after discovering the absence of the warranted qualities. *Day v. Pool*, 52 N. Y. 416, 11 Am. Rep. 719; *Parks v. 14 L. R. A.*

Morris Ax & Tool Co. 54 N. Y. 586; *Rust v. Bekler*, 41 N. Y. 489; *Brigg v. Hilton*, 1 Cent. Rep. 307, 90 N. Y. 517; *Kent v. Friedman*, 1 Cent. Rep. 713, 101 N. Y. 618.

Gaylord Mfg. Co. v. Allen, 53 N. Y. 515, seems by the language used in the opinion to conflict with the last-mentioned cases; but in that case the express warranty extended only to qualities which the law implies. The same is true of *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305.

In case of a warranty, express or implied, where the article purchased proved defective or unfit for the use intended, the purchaser may, without offering to return it and without notifying the vendor of its defects, bring his action for the recovery of damages; or, if sued for the price, may set up and have such damages allowed to him by way of recoupment (*Morehouse v. Comstock*, 49 Wis. 626), unless the purchaser has full opportunity for examination, and the defects are patent, and he retains the article with knowledge of such defects. *Locke v. Williamson*, 40 Wis. 377.

Whether the cause of action is for a breach of the contract, or for a breach of the warranty, is a mere matter of nomenclature. *Hastings v. Love-ling*, 2 Pick. 214, 13 Am. Dec. 429.

And the breach of the promise implied by the law works the same consequences and imposes the same obligations, and creates the same rights as the breach of the express promise. *Bagley v. Cleveland R. Mill Co.* 21 Fed. Rep. 169.

See an article entitled, "Remedies for Defective Quality on Executory Contracts of Sale or Manufacture." 80 Alb. L. J. 236.

b. *In executed sales.*

In all jurisdictions when the common law is followed the cases unanimously hold that in executed sales of chattels, ascertained and inspected by the purchaser, no warranty of quality is implied. In the absence of fraud or express warranty, caveat emptor is the rule in such sales.

The doctrine of implied warranty of quality arising from the payment of a "sound price" is not at present recognized except in South Carolina. *Balwinkle v. Cramer*, 27 S. C. 376; *Rose v. Beattie*, 2 Nott & McC. 538.

It was formerly recognized in Connecticut (*Bailey v. Nickols*, 2 Root, 407) but it was repudiated in that State in *Dean v. Mason*, 4 Conn. 428, 10 Am. Dec. 162, and the cases supporting it overruled.

Where goods are sold on inspection, no warranty is implied other than that the identical goods sold, and no others, shall be delivered, even though they do not answer the name given them by the vendor. *Carson v. Baillie*, 19 Pa. 575, 57 Am. Dec. 656; *Lord v. Grow*, 39 Pa. 83, 80 Am. Dec. 504.

A bargain and sale of a chattel of a particular description imports a warranty that the article sold is of that description. *Dounce v. Dow*, 64 N. Y. 413; *Wood Mower & Reaper Co. v. Thayer*, 53 Hun, 516; *White v. Miller*, 71 N. Y. 118, overruling *Seixas v. Wood*, 2 Cal. 48.

In the sale of seeds represented by the vendor to be seeds known by a certain name in the market, a warranty is implied that the seeds accord with the representations, where the purchaser has no opportunity for inspection, and inspection would not disclose the defects. *Van Wyck v. Allen*, 60 N. Y. 51, 25 Am. Rep. 165.

In the sale of vegetable seed a warranty is implied that it is free from any latent defect arising from the mode of cultivation. *White v. Miller*, 71 N. Y. 151, 27 Am. Rep. 13.

tract by the plaintiffs, the sellers. From other parts of the testimony it might be inferred that the ice was identified by the contract, but at a time and under circumstances when the defendants had no opportunity to

inspect it before shipment. The judge instructed the jury generally that there was an implied affirmation that the ice was of such a kind that it could be shipped, transported by sea, and discharged at New Bedford as con-

An implied warranty arising from the fitness of the thing sold for ordinary use does not embrace defects discoverable by ordinary prudence and care. *Hoffman v. Oates*, 77 Ga. 701.

The business of a druggist is such that in the very nature of things he must be held to warrant that he will deliver the drug called for and purchased by the customer. *Jones v. George*, 56 Tex. 149, 42 Am. Rep. 699.

A drover who sells beef cattle to a butcher does not impliedly warrant that they have not been bruised in transit. *Goldrich v. Ryan*, 3 K. D. Smith, 324.

It is only when a party undertakes to supply an article for a particular purpose, that he is held to warrant it fit for that purpose. *Ottawa, B. & F. Glass Co. v. Gunther*, 31 Fed. Rep. 308.

Upon the sale of flour in barrels, there is no implied warranty that it is fit for all the ordinary purposes for which flour is used. *Hart v. Wright*, 17 Wend. 267, affirmed, 18 Wend. 456.

There is no implied warranty by a miller in the sale of bran that it is fit for feeding stock. *Lukens v. Freilund*, 27 Kan. 664, 51 Am. Rep. 429.

In this case plaintiff's cow was poisoned by swallowing two copper clasps that in some unknown way got into the bran at the mill.

Where a specific article of a known, recognized and defined description is ordered from a manufacturer, no warranty will be implied that it is fit for the purpose for which the purchaser intends to use it. *Goulds v. Brophy*, 6 L. R. A. 382, 42 Minn. 120.

When a specific article is ordered and furnished, although the purchaser states the purpose to which he intends to apply it, there is no implied warranty on the part of the vendor that it is suitable for the purpose. *Mason v. Chappell*, 15 Gratt. 572; *Thompson v. Libby*, 35 Minn. 448. *Contra*, *Baumbach Co. v. Gessler* (Wis.) May 5, 1891.

A pork packer, who furnishes a dealer hams for a distant market, impliedly warrants that they are, at the time of sale, fit to be shipped to such market. *Leopold v. Van Kirk*, 37 Wis. 153.

Upon a sale of corn meal for shipment to a particular market, a warranty is implied that it was suitably packed and fit for shipment, but not that it will continue sound for any definite length of time. *Mann v. Everston*, 32 Ind. 355.

The Georgia Code provides: "The seller, however, in all cases (unless expressly or from the nature of the transaction excepted) warrants . . . that the article sold is merchantable and reasonably suited to the use intended." It is there held that an express guaranty that a fertilizer should come up to a certain analysis does not exclude the warranty implied by law that it is merchantable and reasonably suited to the use intended. *Wilcox v. Owens*, 64 Ga. 601.

Nor does the pointing out of defects discoverable by examination exclude the warranty which the law implies. *Cochran v. Jones*, 85 Ga. 678.

Upon the sale of a piano by a manufacturer to a dealer, there is no implied warranty as to the quality of the piano, and the contract is satisfied by an instrument merchantable and salable as such. *Wilson v. Lawrence*, 129 Mass. 313.

Upon the purchase of second-hand machinery from one not a dealer or manufacturer of the same, although a practical machinist, where the purchaser has ample opportunity for inspection, no warranty of quality can be implied. *Rice v. Forsyth*, 41 Md. 389.

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In every sale of goods of a specified description, where the buyer has no opportunity to inspect the commodity, there is an implied warranty that it shall be salable in the market under the designation mentioned in the contract. *Caveat emptor* does not apply. *Gardiner v. Gray*, 4 Campb. 144; *Nichol v. Godts*, 10 Exch. 191; *Laing v. Fildgen*, 4 Campb. 169; *Jennings v. Gratz*, 8 Rawle, 168, 23 Am. Dec. 111; *Jones v. Just*, L. R. 3 Q. B. 197.

The warranty implied, where the purchaser has no opportunity to inspect the goods, requires only salable goods and does not extend to any particular quality or fitness. *Ryan v. Ulmer*, 100 Pa. 232.

In case of a sale without sample or inspection, no implied warranties arise, except that of merchantability. *Gallagher v. Waring*, 9 Wend. 30.

Where goods are purchased which the purchaser has no opportunity to examine, there is an implied warranty, not only that they shall come within the general description of the article for which they are purchased, but also that they shall be merchantable as such. *Merriman v. Field*, 24 Wis. 666; *Hood v. Bloch*, 29 W. Va. 242.

If a person sells an article by a particular and well-known description, which is not examined by the purchaser, a warranty is implied that the article is of a fair merchantable quality and corresponds to the description under which it is sold. *Chicago Packing & Prov. Co. v. Tilton*, 87 Ill. 547.

The case of *Dickson v. Jordan*, 23 N. C. 168, holds that the fact that the purchaser had no opportunity to inspect the goods at the time of the sale does not raise an implied warranty of quality. It is there said: "The only difference it can make, when the purchaser sees the article and when he sends an order, or has not an opportunity to see it, is that, in the former case, he judges for himself, in the latter he constitutes the vendor his agent to select for him. . . . and he has no cause of complaint, unless there be fraud."

The exception to the rule of *caveat emptor*, that there is an implied warranty of quality, where there is no opportunity for inspection, applies only to cases where inspection is impracticable, as where goods have not yet arrived. *Hyatt v. Boyle*, 5 Gill & J. 119, 25 Am. Dec. 276.

No implied warranty of quality in an executed sale of molasses arises from the fact that the purchaser did not open the casks and test it, although he might have done so. *Humphreys v. Combies*, 3 Blackf. 513.

Nor in the case of paint in unopened kegs. *Holden v. Dakin*, 4 Johns. 421.

Nor of crockery in crates. *Thompson v. Ashton*, 14 Johns. 319.

Nor of flour in barrels. *Hart v. Wright*, 17 Wend. 267, affirmed 18 Wend. 456.

Nor of hemp in bales. *Salisbury v. Stainer*, 19 Wend. 159, 25 Am. Dec. 437.

Nor of tobacco in kegs. *Hyatt v. Boyle*, 5 Gill & J. 119, 25 Am. Dec. 276.

Nor of garden seeds. *Moore v. McKinlay*, 5 Cal. 471.

Nor of wool in bales, although there is a local usage to the contrary. *Barnard v. Kellogg*, 77 U. S. 383, 19 L. ed. 967.

A special custom that ordinary words of description are understood as words of warranty, cannot be proved. *Wetherill v. Nelson*, 50 Pa. 443.

See "Notes in the Law of Implied Warranty," 18 Alb. L. J. 324. J. G. G.

templated by the contract, and no other implied affirmation or warranty. If the instruction is wrong in either view which the jury might have taken of the facts, the exceptions must be sustained, and it is unnecessary to consider whether the implication would be more extensive in the former case than in the latter.

In some contracts of the latter kind, when the sale is of specific goods, but the buyer has no chance to inspect them, the name given to the goods in the contract, taken in its commercial sense, may describe all that the purchaser is entitled to demand. So it was held with regard to "Manilla sugar" in *Gossler v. Eagle Sugar Refinery*, 103 Mass. 381.

But in many cases like the present the inference is warranted that the thing to be furnished must be not only a thing of the name mentioned in the contract, but something more. How much more may depend upon circumstances, and at times the whole question may be for the jury. If a very vague, generic word is used, like "ice," which taken literally may be satisfied by a worthless article, and the contract is a commercial contract, the court properly may instruct the jury that the word means more than its bare definition in the dictionary, and calls for a merchantable article of that name. If that is not furnished, the contract is not performed. *Warner v. Arctic Ice Co.* 74 Me. 475; *Sweett v. Shumway*, 102 Mass. 365, 369; *Whitmore v. South Boston Iron Co.* 2 Allen, 52, 58.

In a sale of "Manilla hemp," like that of the sugar in *Gossler v. Eagle Sugar Refinery*, it was held in England that the hemp must be merchantable. *Jones v. Just*, L. R. 3 Q. B. 197; *Gardiner v. Gray*, 4 Campb. 144; *Howard v. Hoey*, 23 Wend. 350, 351, 35 Am. Dec. 572; *Morrian v. Field*, 39 Wis. 578; *Fish v. Roseberry*, 23 Ill. 288, 299; *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560. See *Hight v. Bacon*, 126 Mass. 10, 12, 30 Am. Rep. 689; *Hastings v. Lovering*, 2 Pick. 214, 220, 13 Am. Dec. 420.

2. The plaintiffs put in evidence tending to show that the defendants never notified them of any defect in the quality or condition of the ice until after this suit. To meet this, the defendants offered a protest signed and sworn to by one of them on the day the ice arrived. This protest was no evidence that the statements contained in it were true, or that the defendants' story was not false. So far as the plaintiffs' evidence was introduced for the purpose of showing such an acceptance of the ice as to bar the defendants from alleging that it did not satisfy the contract (*Morse v. Moore*, 88 Me. 473, 13 L. R. A. 224; *Gaylord Mfg. Co. v. Allen*, 58 N. Y. 515, 519) the protest, of course, had no bearing. And, although it did show that the defendants' story was not an afterthought, it was properly excluded, the plaintiffs, so far as appears, not having taken that specific point. *Wallace v. Story*, 139 Mass. 115.

Exceptions sustained.

WISCONSIN SUPREME COURT.

John JOHNSON, *Reopt.*,

v.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R. CO., *Appt.*

(.....Wis.....) 1

Surface water on one's premises, including that which has been thrown thereon from higher levels by embankments, ditches, drains and culverts, may be lawfully turned and diverted from his land to the land of another, and the only remedy of the latter is to pass it on again to other lands.

(December 14, 1891.)

A PPEAL by defendant from a judgment of the Circuit Court for Ashland County in favor of plaintiff in an action brought to recover damages for unlawfully discharging surface water upon plaintiff's premises. *Reversed.*

The facts are stated in the opinion.

Morris Tomkins & Merrill, for appellant:

The obstruction of surface water or an alteration in the flow of it affords no cause of action in behalf of any person who may suffer loss or

detriment therefrom against one who does not act inconsistent with the due exercise of dominion over his own soil.

Gannon v. Hargadon, 10 Allen, 106, 87 Am. Dec. 625; *Waters v. Bay View*, 61 Wis. 642; *Allen v. Chippewa Falls*, 53 Wis. 430, 28 Am. Rep. 748; *Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 478; *Turner v. Dartmouth*, 18 Allen, 291; *Barry v. Lovell*, 8 Allen, 127; *Dickinson v. Worcester*, 7 Allen, 19; *Flagg v. Worcester*, 13 Gray, 601; *Parks v. Newburyport*, 10 Gray, 28; *Leppard v. Stram*, 62 Wis. 112, 51 Am. Rep. 715; *Hankin v. Chicago & N. W. R. Co.* 61 Wis. 515; *O'Connor v. Fon du Lac, A. & P. R. Co.* 52 Wis. 526, 38 Am. Rep. 754; *Eulrich v. Richter*, 87 Wis. 226; *Fryer v. Warner*, 29 Wis. 511; *Ramendale v. Foote*, 55 Wis. 560.

A land-owner has the right, in lawfully improving and using his land, to so raise or lower its surface as to shed more or less water upon the adjoining property, to prevent the surface water from going upon such property, or to shed surface water upon property where it would not otherwise go.

Jordan v. St. Paul, M. & M. R. Co. 6 L. R. A. 578, 42 Minn. 172; *Sowers v. Love* (Pa.) 9 Atl. Rep. 44, and note; *Union v. Burkas*, 38 N. J. L. 21; *Bowlsby v. Spear*, 81 N. J. L. 351, 86 Am. Dec. 216; 2 Dillon, Mun. Corp. 797 et seq.; Gould, *Waters*, 268 et seq.; *O'Connor v. Fon du Lac, A. & P. R. Co.* 52 Wis. 526, 38 Am. Rep. 754; *Hankin v. Chicago & N. W. R. Co.* 61 Wis. 515; *Phillips v. Waterhouse*, 69

NOTE.—As to the rights and remedies in regard to surface water, see notes to *Seymour v. Cummins* (Ind.) 5 L. R. A. 122; *Jordan v. St. Paul, M. & M. R. Co.* (Minn.) 6 L. R. A. 578; *O'Connell v. East Tennessee V. & G. R. Co.* (Ga.) 13 L. R. A. 394.

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Iowa, 199, 58 Am. Rep. 220; *Lessard v. Stram*, 63 Wis. 112, 51 Am. Rep. 715; *Ueth v. Fon du Lac*, 63 Wis. 228, 58 Am. Rep. 279; *Abbott v. Kansas City, St. J. & C. B. R. Co.* 83 Mo. 271, 58 Am. Rep. 581; *Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 473; *Rer v. Pugham*, 8 Barn. & C. 355; *Lee v. Minneapolis*, 22 Minn. 18; *O'Brien v. St. Paul*, 25 Minn. 331; *Henderson v. Minneapolis*, 32 Minn. 819; *Rowe v. St. Paul, M. & M. R. Co.* 41 Minn. 384.

The right to so use and improve one's own land does not, however, include the right to do so merely by transferring from its surface waters naturally resting upon it to the land of another. It is only where such shifting of the burden follows as an incident of using or improving his land, as such land is ordinarily used or improved, that it can be justified.

Kobs v. Minneapolis, 23 Minn. 159; *O'Brien v. St. Paul*, 25 Minn. 331; *Hogenson v. St. Paul, M. & M. R. Co.* 31 Minn. 224; *Blakely Top. v. Devine*, 30 Minn. 53; *Pye v. Mankato*, 33 Minn. 373; *Oleson v. St. Paul, M. & M. R. Co.* 38 Minn. 419.

Messrs. Lamoreux, Gleason, Shea & Wright, for respondent:

It is the duty of every owner of land, if he wishes to carry off the surface water from his own land, to do so without material injury or detriment to the land of his neighbors, and if he cannot he must suffer the inconvenience arising from its presence, and cannot complain that others refuse to allow its passage over their lands.

Pettigrew v. Evansville, 25 Wis. 223, 3 Am. Rep. 50.

Such doctrine will prevent him from using means for the purpose of making it flow there, whenever the same would be materially injurious to the interests of the proprietor thereof.

Pettigrew v. Evansville, *supra*; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519; *Oleson v. St. Paul, M. & M. R. Co.* 38 Minn. 419; *Hogenson v. St. Paul, M. & M. R. Co.* 31 Minn. 224; *Gould, Waters, & S. 271*, 273; *Hicks v. Silliman*, 98 Ill. 265; *Jacksonville, N. W. & S. E. R. Co. v. Cor*, 91 Ill. 500; *Curtis v. Eastern R. Co.* 98 Mass. 428; *McCormick v. Kansas City, St. J. & C. B. R. Co.* 70 Mo. 859, 85 Am. Rep. 431; *Pye v. Mankato*, 36 Minn. 373; *Lessard v. Stram*, 62 Wis. 112, 51 Am. Rep. 715; *Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 473.

Orton, J., delivered the opinion of the court:

This action is brought by the plaintiff to recover damages of the defendant Company for diverting surface water running across its lands to and over the premises of the plaintiff. The railway track of the defendant runs east and west along the center of Fourth Street of the city of Ashland, and the street is between blocks 28 and 29 on the north and blocks 47 and 48 on the south; and the defendant also owns the north half of said last-mentioned blocks, on which it has three side tracks, leaving the main track west of said blocks and running southeast. The premises of the plaintiff are lot 11 in block 28,—the second lot north of Fourth Street; and the brother of the plaintiff owns the intervening lot. These blocks lie between Eleventh and Beaser Avenues on the east and west,—Eleventh Avenue on

the east, and Beaser Avenue on the west. There is a ravine coming down from the south on the land of the defendant, and running to Eleventh Avenue, and thence turning northeast towards the lake, by which surface water, in the time of rains, is carried across the railway track; and just north of the track there is a swale of some depth at the center, which is filled up in the time of rains, and the water runs off in said ravine towards the lake. There is another ravine, or low place, turning towards northeast from or near the upper end of the other ravine last mentioned. The defendant made a culvert under its track for the water in the first-mentioned ravine to run off north towards the lake, and cut a ditch along the south side of its track from near said culvert to a point on Twelfth Avenue, to meet another ditch running through the low ground or ravine second above mentioned; and thence there was constructed a box-drain along the south side of the track to carry the water on towards the west, to a point on Fourth Street, opposite the plaintiff's lot, where a culvert under the track was constructed to carry the water off northwest towards the lake, over and through the plaintiff's lot, after passing the lot of his brother. The track of the Northern Pacific Railway runs east and west along Fifth Street; south of Fourth Street. There is a ravine from the South of Fifth Street and southwest of the southwest corner of block 47, and running northwardly to the last-mentioned culvert, opposite plaintiff's premises, by which surface water is carried through a culvert under the track of the Northern Pacific road, and on through the culvert opposite plaintiff's premises, and across the same towards the lake. These culverts of the defendant under the embankment and track appear to be placed where the surface water formerly passed towards the lake, and there does not appear to have been made very much change in the natural or former running of the surface water towards the lake by the defendant by its ditches, box-drain and culverts. Perhaps some more water than formerly is made to pass across the defendant's track opposite the plaintiff's premises; but this would seem to be on account of the natural descent of the ground. The plaintiff testified that the water naturally ran across his lot, and that the ground slopes from Fourth Street towards his place, and his lot slopes towards his house, and that his house stands in low ground, and that he put in a drain to divert the water from his cellar, and the drain was stopped up when and a week before he brought this action. He testified also that the water ran across his lot and on northwesterly before the track was laid, and that he and his brother made a dam on the south side of his brother's lot to keep the water from running across the lots, but that it was not high enough in times of heavy rains; and that he built his house in the summer of 1883, and the defendant laid its track opposite his house the same summer.

From this description of the locality it would seem that the defendant company took the only proper measures to pass on the surface water towards the lake, consistent with the building and use of its railway. An embankment along Fourth Street was necessary. As that would

dam up the surface waters coming across their grounds from the south, in order to pass them off through these culverts a proper distance apart, the ditches and box-drain were necessary to direct the water to the culverts. The plaintiff complains that the company's works retard the running off of the waters from the swale or deep place near Eleventh Avenue and south of its track; and that, when filled up, it is three or four feet deep. It may take longer time for the water to run off when this swale is filled up, but its depth cannot injure the plaintiff, for, while it stands in the swale, it does not run out from the bottom, and only so much can run from its surface, and when low enough it stops running out, and it has to dry up where it is. There is no more surface water running in the ravines and north towards the lake than before the railway was built, and it is now disposed of by the defendant in the only way consistent with the enjoyment of its property. It is not questioned but that the waters which the defendant has to some extent diverted to the premises of the plaintiff consist of mere surface waters, "flowing in hollows or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from higher to lower levels, but which at other times are destitute of water," according to the definition given in *Lessard v. Stram*, 82 Wis. 112, 51 Am. Rep. 715.

There may be occasionally many small streams or rivulets gathered from the surface, which constitute these surface waters, but none of them are water courses, "which flow in a particular direction, through definite channels, having beds, slopes, or banks, and usually discharge themselves into some other streams or body of water." *Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 478.

The true rule in respect to surface waters, as gathered from the cases is that "the owner of an estate, for the purpose of securing or protecting its reasonable use and enjoyment, may obstruct or divert surface waters thereon, and which have come down from higher levels, by embankments, ditches, drains, and culverts, and other constructions; and in doing so may lawfully hinder the natural flow of such waters and turn the same back upon or off, on, to, or over the lands of other proprietors, without liability for injuries ensuing from such obstruction or diversion." *Lessard v. Stram*, *supra*, is very much in point with this case. "Stram, in order to prevent the water from overflowing his low lands and remaining there to his damage, constructed an embankment or dam from one to three feet in height, at the east end of his land, and such embankment or dam stopped the water near the mouth of the *coulée*, and turned it south along the foot of the bluffs in the direction of the plaintiff's land. Other defendants had lands lying next south of Stram's land, and they also constructed low embankments across the east ends of their tracts of land, so as to continue the flow of the water which, coming out of the *coulée* after any considerable rain, or after the melting of the snow, would and did flow south along the foot of the bluffs, until it reached the plaintiff's land, where on account of the formation of the surface thereof, it accumulated,

and remained stagnant, to his injury." On these facts the circuit court granted a nonsuit, and this court affirmed the judgment. The doctrine here sanctioned is that one proprietor may turn and divert surface water from his own land onto the land of another, and such other proprietor may turn and divert the same waters onto the land of his adjacent neighbor, and so on. Each proprietor may thus pass on surface water, and there is no remedy except in doing so. The cases sanctioning this doctrine are too numerous to be cited. *Waters v. Bay View*, 61 Wis. 642; *Allen v. Chippewa Falls*, 52 Wis. 430, 28 Am. Rep. 748; *Hanlin v. Chicago & N. W. R. Co.* 61 Wis. 515; *O'Connor v. Fon du Lac, A. & P. R. Co.* 52 Wis. 526, 38 Am. Rep. 734; *Eulrich v. Richter*, 37 Wis. 226; *Fryer v. Warne*, 29 Wis. 511; *Gannon v. Hargadon*, 10 Allen, 108, 87 Am. Dec. 625.

In *Jordan v. St. Paul, M. & M. R. Co.*, 6 L. R. A. 573, 42 Minn. 172, the railway company cut and dug two large ditches, one on each side of its roadbed, six miles long, and connected them with five large culverts, which accumulated enormous quantities of water by draining the wet lands in the vicinity and from surface waters thereon, and forced the waters to run in large and destructive currents through the ditches and culverts over the lands of the plaintiff, and overflowed them. It was held that the railway company had the right to do this to protect its own lands and property, and that the plaintiff could not recover any damages caused thereby. Many other cases are cited in appellant's brief to similar effect.

The learned circuit court instructed the jury as follows: "The defendant had no right by embankment, drains, ditches, culverts, or other artificial means to collect surface water upon its lands in large quantities, obstructing the natural flow thereof, and by these means causing it to flow in an unnatural manner and increased quantities upon the land of the plaintiff; and if you believe from the evidence that the defendant has, by means of drains, ditches, culverts, or barriers, so obstructed, collected, and diverted the natural flow of the surface water, as to force an increased quantity upon the plaintiff's land, then the defendant is liable for the injury the plaintiff has sustained on account of such acts of the defendant." This instruction was excepted to by the defendant's counsel. The first part of the instruction is an abstract proposition of law, and not only an improper instruction on that account, but inapplicable to the facts of the case; for the defendant had not "collected large quantities of surface water on its land;" and besides this, it is very bad law in every respect. The last and proper part of the instruction is clearly in violation of the established and uniform doctrine of the books, as we have already shown. If this instruction be the law, then no one can, under any circumstances, divert surface water from his own land for any purpose to the lands of others, to their injury in the least. This instruction was clearly erroneous. There was another instruction excepted to, which is also erroneous, and that is that the plaintiff was entitled to recover as for permanent injury to his land, or as for condemnation of his land to the use of the defendant, by the rule of the difference of its value before and after the

ditches, drains, culverts, and embankments were constructed. They may be changed so as to produce no injury to the plaintiff. The motion of the defendant to set aside the verdict and for a new trial on the ground that the verdict was contrary to the law and the evidence was denied, and exception taken. We have al-

ready seen that the verdict is contrary to the evidence as well as the law. The verdict for the plaintiff was \$500, and judgment was rendered thereon.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

MICHIGAN SUPREME COURT.

CITY OF GRAND RAPIDS

v.

William T. POWERS, *App't.*

(.....Mich.)

1. A dock line on a river front, fixed without notice to riparian owners, is not binding on them where they own to the center of the river, subject only to the public right of navigation.
2. The Legislature has no power to extend dock lines upon the natural shore or bank of a river, or to authorize a municipality

to forbid owners from building on such shore or bank.

3. Where a river is not navigable for any purpose, and riparian proprietors own the soil to the center, the Legislature has no authority to fix an arbitrary line beyond which their structures encroach.
4. A purpresture is not made by occupation of part of a river bed by one who owns the soil to the center of the river, subject to the public right of navigation, where he does not abridge or injure the public use.

(December 21, 1891.)

NOTE.—Establishment of dock lines.

A state statute may require state commissioners, with municipal authorities, and riparian owners, to fix a wharf line, so long as Congress has not acted with reference to the matter. *Savannah v. State*, 4 Ga. 26.

State harbor commissioners need not establish a general harbor line before forbidding a particular encroachment on navigable waters. *State v. Sargent*, 45 Conn. 358.

A city having power under its charter to protect navigation by establishing a water line cannot prevent building on a private wharf which is above high-water mark. *Martin v. Evansville*, 32 Ind. 85.

An Act of the Legislature fixing a line within a harbor beyond which no wharf or permanent structure shall be erected, is held constitutional in Massachusetts, although it to some extent prevents him from building such a structure on flats which he owns in fee, between high and low water mark, even if it would not impede navigation. But such a statute does not apply to wharves already erected. *Com. v. Alger*, 7 Cush. 53.

A statute providing for the fixing of a wharf line beyond which no pier or other obstruction shall extend, is held in Delaware not unconstitutional on the ground that it takes private property without compensation, although the line is so fixed as to deny the riparian owner any access to the navigable portion of the river; but in this case the court refused to restrain the construction of a wharf by such an owner beyond the line so fixed, on the ground that the injury would not be sufficiently great to justify the remedy. *Harlan & H. Co. v. Paschall*, 5 Del. Ch. 435.

On the other hand, it is decided by the Supreme Court of the United States that a city cannot, by creating a mere artificial and imaginary dock line at a distance from navigable water, and without making the channel navigable up to such line, deprive the owners of the right to avail themselves of the privilege of a navigable channel by building wharves and docks to it. *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984.

No right to build wharves beyond high-water mark can be claimed by a riparian owner under Wash. Const., art. 15, providing for the appointment of a commission to establish harbor lines, and the leasing of the right to build wharves, even 14 L. R. A.

if such right would exist at common law. *Eisenbach v. Hatfield*, 12 L. R. A. 622, 2 Wash. —.

The power of the city of Astoria to fix a wharf line does not include power to confer any wharf privileges. *McCann v. Oregon R. & Nav. Co.* 13 Or. 455.

Only riparian owners, and not parties using the river for commercial purposes, can make objections in a proceeding to establish wharf lines on the Schuylkill River, under Pa. Act April 6, 1850. *Re Port Wardens' Line*, 13 Phila. 453.

Effect of establishing line.

Where a dedication has been made of a shore covered by shallow water, the establishment of a dock line which takes in part of the strip dedicated is an acceptance of the dedication *pro tanto*. *Yates v. Judd*, 18 Wis. 118.

A statute charging a city with the duty of fixing wharf lines and keeping the navigable water within the city unobstructed, requires it to keep navigable water outside of wharf lines unobstructed. *Winnepenny v. Philadelphia*, 65 Pa. 125.

The establishment of a harbor line gives the riparian proprietors the privilege of filling out and extending their land to it. *Engs v. Peckham*, 11 R. I. 210; *Bailey v. Burges*, Id. 230; *Miller v. Mondenball*, 8 L. R. A. 39, 43 Minn. 95; *Fitchburg R. Co. v. Boston & M. R. Co.* 3 Cush. 58.

But it does not transfer to riparian owners the fee to land under tide water, and therefore gives them no right to compensation for a portion of such land taken by the State, on which to lay the abutments of a bridge. *Gerhard v. Seekonk River Bridge Comrs.* 2 New Eng. Rep. 619, 15 R. I. 204.

Land made by filling out to the port wardens' line, under the Baltimore ordinance of 1823, belong to the riparian owner who had the prior grant, although the expense was paid by a junior grantee. *Wilson v. Inloes*, 11 Gill & J. 351.

But under the California statutes fixing the San Francisco water front, the owner of land abutting upon it is not a riparian or shore owner, and cannot build out to that line where it is below low-water mark; and subsequently he cannot maintain ejectment for a wharf built by another below low-water mark. *Dana v. Jackson St. Wharf Co.* 81 Cal. 118, 39 Am. Dec. 164.

Nor can he personally complain of an obstruc-

APPEAL by defendant from a decree of the Superior Court of Grand Rapids in favor of complainant in a suit brought to enjoin the building of a wall in the Grand River. *Reversed.*

The facts are stated in the opinion.

Messrs. Blair, Kingsley & Kleinbans, for appellant:

In this State the soil under river water is the property of the upland owner, and the riparian owner has the right to use his land which is covered by the water of a river in any way he likes, which does not seriously injure the public use of the stream or obstruct navigation as it is carried on.

Ryan v. Brown, 18 Mich. 196, 100 Am. Dec. 154; *Bay City Gas-Light Co. v. Industrial Works*, 28 Mich. 182; *Maxwell v. Bay City Bridge Co.* 41 Mich. 466; *Backus v. Detroit*, 49 Mich. 110, 48 Am. Rep. 447; *Fletcher v. Thunder Bay River Boom Co.* 51 Mich. 277; *Webber v. Pere Marquette Boom Co.* 5 West. Rep. 575, 62 Mich. 626; *Clute v. Fisher*, 8 West. Rep. 121, 65 Mich. 48; *Turner v. Holland*, 8 West. Rep. 796, 65 Mich. 453; *Sterling v. Jackson*, 14

West. Rep. 229, 69 Mich. 510; *Atty-Gen. v. Ewart Boom Co.* 34 Mich. 463.

This is also the law in Kentucky, Ohio and Wisconsin.

See *Barre v. Flemings*, 29 W. Va. 314.

So far as the federal government is concerned, the right of riparian owners on such streams must be settled according to the state law.

St. Louis v. Myers, 118 U. S. 566, 28 L. ed. 1181; *Barney v. Keokuk*, 94 U. S. 824, 24 L. ed. 224; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 81 L. ed. 629.

This right of the riparian owner is not a mere license in the soil under the water, but it is property. It is a vested right of which the owner can only be deprived in accordance with established law. He may put his estate under water to any use he may please, not infringing on the paramount rights of the public.

Janessville v. Carpenter, 8 L. R. A. 808, 77 Wis. 288; *Diedrich v. Northwestern U. R. Co.* 42 Wis. 248; *Norfolk v. Cooke*, 27 Gratt. 430; *Norcross v. Griffiths*, 65 Wis. 599.

The Legislature itself has no authority un-

tion to navigation in front of his land. *Eldridge v. Cowell*, 4 Cal. 80.

But building a wharf below a dock line in navigable water may be an actionable injury to the owner of another wharf in front of which it is built. *Walker v. Sheperdson*, 3 Wis. 384, 60 Am. Dec. 423.

Under the Massachusetts Act of 1868, chap. 18, owners of land on Acushnet River are given a possessory title below low-water mark to the channel of the river, for the purpose of building wharves, and can maintain trespass if their rights are invaded. *Hamlin v. Fairpoint Mfg. Co.* 2 New Eng. Rep. 143, 141 Mass. 51; *Haskell v. New Bedford*, 108 Mass. 208.

The Massachusetts Act of 1866, chap. 149, giving harbor commissioners the supervision of all waters and flats, does not affect the rights of adjacent and coterminal riparian owners as between themselves. *Henry v. Newburyport*, 5 L. R. A. 179, 149 Mass. 552.

Dock lines established by the authorities have no bearing upon the determination of the boundaries between riparian owners. *Bay City Gas-Light Co. v. Industrial Works*, 28 Mich. 182.

Under the N. Y. Act of 1857, settling the bulk-head lines for the port of New York, the city has authority to locate wharves upon land of the State under water, with an easement of approach in front and of access from the land, and could fill up and occupy the space between the new line and the land, and could convey its interest and easements therein. *Williams v. New York*, 7 Cent. Rep. 301, 105 N. Y. 419.

Where a riparian owner, by contract with the city, had acquired the right and obligation to build a wharf to the exterior bulk-head line fixed by the Legislature, the city may be restrained from building wharves farther out, so as to cut off his wharf from navigable water. *Crocker v. New York*, 15 Fed. Rep. 405.

City authorities have no power to authorize an erection in navigable waters outside a bulkhead and pier line established by the Legislature. *People v. Vanderbilt*, 23 N. Y. 237.

An unauthorized structure outside the established pier line in navigable waters is a nuisance, liable to be removed, irrespective of the question whether it is or is not a nuisance. *Ibid.*

A building in a harbor beyond the line fixed by 14 L. R. A.

harbor commissioners, upon navigable tide waters, is a public nuisance if it obstructs navigation. *Garey v. Ellis*, 1 Cush. 308.

A pier extending beyond the established bulk-head line is unlawful if it exceeds the width permitted by statute or leaves less water space than is required by statute between it and an older neighboring pier. *People v. New York & S. I. Ferry Co.* 68 N. Y. 71.

By the creation of a new bulk-head line and the filling in of lands under water belonging to the State, whereby a riparian owner's wharf right is destroyed, he becomes entitled to adequate compensation. *Williams v. New York*, 7 Cent. Rep. 301, 105 N. Y. 419.

A floating storehouse moored within a harbor may constitute an illegal erection. *Hart v. Albany*, 9 Wend. 559, 24 Am. Dec. 165, affirming 3 Paige, 213, 3 L. ed. 121.

The State has the reversion in fee in lands adjacent to Jersey City leased by the board of riparian commissioners lying between the original line of high water and the line fixed for the exterior line for piers. *Atty-Gen. v. Hudson Tunnel R. Co.* 27 N. J. Eq. 173.

Filling up flats by municipal authorities under a plan devised by the state harbor commissioners in conjunction with the state board of health is not within Mass. Act 1866, chap. 149, requiring compensation for the tidewater displaced and the approval of the board of harbor commissioners. *Atty-Gen. v. Cambridge*, 119 Mass. 518.

The red line or water front of San Francisco was fixed by the Act of 1851, and subsequent acts of harbor commissioners or other officials, though evidence of its location, cannot change it. *People v. Klumpke*, 41 Cal. 263.

The erection of a wharf beyond the line of permanent water front in the Bay of San Francisco established by the city is an encroachment on the soil of the State which it can remove at pleasure. *Weber v. State Harbor Comrs.* 85 U. S. 18 Wall. 57, 21 L. ed. 798.

The California Act of March 23, 1861, conveying to San Francisco land included in the water front of the city, does not deprive the State of jurisdiction by its harbor commissioners over the navigable waters of the bay. *People v. Williams*, 64 Cal. 496; *Payne v. English*, 79 Cal. 540.

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der our Constitution to take land on a navigable stream for public use, without making just compensation therefor. Interfering with the submerged lands is a taking within the Michigan Constitution.

Grand Rapids Boom Co. v. Jarvis, 30 Mich. 320.

The owner of the upland in this country has the constitutional right of access to deep water and to the line of navigability abreast of his fee, though he may not own the soil under the water at all.

See elaborate article on "The Right to Wharf out," 4 Harvard Law Review, p. 14; Gould, Waters, §§ 167-181.

The State can only limit the construction of wharves at the line of navigability.

Atty-Gen. v. Ewart Boom Co. 34 Mich. 473. *Bay City Gas Light Co. v. Industrial Works*, 28 Mich. 184, says that this kind of lines is "meant to determine at what line the depth of water will be found sufficient to meet all the necessities of navigation."

See also *Stevens Point Boom Co. v. Reilly*, 46 Wis. 237; Gould, Waters, § 181.

In cases where the State owns the soil under the water in rivers erections by riparian owners are unlawful, not because they are a nuisance, but because they are encroachments and trespasses upon the public domain as much as would be the erection of a barn upon any land belonging to the State.

Ryan v. Brown, 18 Mich. 209, 100 Am. Dec. 154; Gould, Waters, § 167.

Wisconsin holds exactly the same rules as Michigan in relation to private ownership in public river beds. The Legislature, acting directly and not through a municipality, undertook to preserve intact the Rock River at Janesville, by passing an Act prohibiting "the driving of piles, building of piers, cribs, or other structures in Rock River," anywhere within the county of Rock.

The court held that such an Act of the Legislature was in violation of the State Constitution.

Janesville v. Carpenter, 8 L. R. A. 808, 77 Wis. 288. See *Evansville v. Martin*, 41 Ind. 145; 1 Dillon, Mun. Corp. § 875.

If a Legislature authorizes a municipality to fix wharf or dock lines which prevent a riparian owner from constructing out beyond such line, when he in no way would interfere with the public right of navigation, he is entitled to be compensated for the right of which he is thus deprived.

If a city draws a wharf line between the banks and the actual line of navigability in the river without making compensation it is void.

Yates v. Milwaukee, 77 U. S. 10 Wall. 497, 19 L. ed. 984; *Walker v. Sheperdson*, 4 Wis. 480, 65 Am. Dec. 324; *Morris Canal & Bkg. Co. v. Jersey City*, 26 N. J. Eq. 294; Gould, Waters, § 213.

In this State the private appropriation of a part of the bed of a stream is neither a purpresture nor a nuisance, nor a public grievance of any sort, unless the public use is thereby unreasonably abridged.

Atty-Gen. v. Ewart Boom Co. 34 Mich. 462; *Ryan v. Brown*, 18 Mich. 196, 100 Am. Dec. 154; *State v. Illinois Cent. R. Co.* 33 Fed. Rep. 14 L. R. A.

730; *Stevens Point Boom Co. v. Reilly*, 46 Wis. 237; Gould, Waters, § 181.

On the subject of obstructing public waters the Minnesota court in two very late cases, after reargument, held concerning the shoal waters of Lake Superior, in the Duluth harbor, that the shore owner could not only wharf out, but if the public interests were not in fact prejudiced, it was immaterial if he reclaimed the submerged lands from the shoal water by filling in with earth so that it becomes dry land.

Miller v. Mendenhall, 8 L. R. A. 89, 43 Minn. 95; *Hanford v. St. Paul & D. R. Co.* 7 L. R. A. 722, 43 Minn. 110. See also *Diedrich v. Northwestern R. Co.* 42 Wis. 248; *Norcross v. Griffiths*, 65 Wis. 599; *Norfolk v. Cooke*, 27 Gratt. 430.

As a matter of history it is well known that most all the leveed rivers of the world occupy a part only of their original bed.

3 Johnson's Cyclopaedia, p. 1655, *Rivers* (ed. 1876); *Benjamin v. Manistee River Imp. Co.* 43 Mich. 633.

The Act makes no provision for the giving of any notice, or for any hearing on the part of the property owners, and the record shows the board did not give the owners any notice nor did they have any hearing, but the lines were fixed *ex parte*. Due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard and to defend and protect his rights.

Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; *Chicago, M. & St. P. R. Co. v. Minnesota*, 184 U. S. 418, 33 L. ed. 970.

Neither the Legislature nor the council can by saying so make that a nuisance which is not so in fact.

Wreford v. People, 14 Mich. 41; *Boerett v. Marquette*, 53 Mich. 450; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984; *Boerett v. Council Bluffs*, 46 Iowa, 66; *Janesville v. Carpenter*, 8 L. R. A. 808, 77 Wis. 288; *Wollman v. Chicago & G. T. R. Co.* 83 Mich. 592; 1 Dillon, Mun. Corp. §§ 827, 828, 374. See especially *Rochester v. Ourties*, Clarke, Ch. 836, 7 L. ed. 135.

Mr. Edwin F. Uhl, for appellee:

In the absence of the legislation of Congress, legislation by the State regulating the use of a navigable river is constitutional.

Pound v. Turk, 95 U. S. 457, 24 L. ed. 565, *Escanaba Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 443.

Grand River is a navigable stream.

The Daniel Ball, 77 U. S. 10 Wall. 557, 19 L. ed. 999.

The Act of the Legislature which conferred upon the board of public works of the city of Grand Rapids power and authority to establish dock and building lines on the shores and margin of the river was a constitutional exercise of legislative power, and the defendant had no right to build a wall in the waters of the river beyond the dock and building line established by the board of public works.

Cooley, Const. Lim. 5th ed. p. 740. *596; 1 Dillon, Mun. Corp. 8d ed. p. 186, *107; *Hart v. Albany*, 3 Paige, 218, 8 L. ed. 121; *Hart v. Albany*, 9 Wend. 571, 24 Am. Dec. 165; *Com. v. Alger*, 7 Cush. 53; *People v. Vanderbilt*, 26

N. Y. 287, 28 N. Y. 396. 84 Am. Dec. 351; *Atty-Gen. v. Woods*, 108 Mass. 436, 11 Am. Rep. 380; *Bay City Gas-Light Co. v. Industrial Works*, 28 Mich. 181; *Atty-Gen. v. Boston & L. R. Co.* 118 Mass. 846; *State v. Sargent*, 45 Conn. 358; *Boston v. Leecraw*, 58 U. S. 17 How. 430, 15 L. ed. 120.

The defendant, on the ground that he is a riparian owner, cannot construct this wall in the waters of Grand River without authority from the State, or the board of public works of the city.

Hart v. Albany, 9 Wend. 571, 24 Am. Dec. 165; *People v. Vanderbilt*, 26 N. Y. 287, 28 N. Y. 396, 64 Am. Dec. 351; *Atlee v. Northwestern U. Packet Co.* 88 U. S. 21 Wall. 389, 22 L. ed. 619.

The State has full authority to regulate the use of the waters in Grand River.

Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435; *Benjamin v. Manistee River Imp. Co.* 42 Mich. 628.

The act of the defendant is what is known in law as a "purpresture."

Atty-Gen. v. Earl Boom. Co. 34 Mich. 462.

The State may interfere whenever a riparian owner begins to erect a structure either in a and highway or a water highway.

Ibid.

The purpose of navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation.

Atty-Gen. v. Woods, 108 Mass. 436, 11 Am. Rep. 380.

The State has conferred upon the city power and authority to enforce its ordinance and regulation in relation to dock and building lines "by bill in equity."

People v. Vanderbilt, 26 N. Y. 287, 28 N. Y. 396, 64 Am. Dec. 351; *Atty-Gen. v. Woods*, 108 Mass. 436, 11 Am. Rep. 380.

The doctrine of the city of *Janesville v. Carpenter*, 8 L. R. A. 808, 77 Wis. 288, that a riparian proprietor may build to the thread of the stream if the river be not navigable in fact and without excavation or improvement, is not the law of the State of Michigan.

Benjamin v. Manistee River Imp. Co. 42 Mich. 628; *Manistee River Imp. Co. v. Lamport*, 49 Mich. 442; *Manistee River Imp. Co. v. Sands*, 53 Mich. 593; *Sands v. Manistee River Imp. Co.* 123 U. S. 288, 81 L. ed. 149.

Mr. William Wisner Taylor, also for appellee:

Admitting that a riparian owner on a public navigable stream owns, *usque ad medium flum aqua*, subject to the paramount right of public navigation, and the rights incident thereto, nevertheless, "it is competent for the state Legislature to establish wharf or harbor lines."

Gould, Waters, par. 183, p. 254; *State v. Sargent*, 45 Conn. 358; *Com. v. Alwer*, 7 Cush. 53; *Com. v. Chapin*, 5 Pick. 199, 16 Am. Dec. 386; *Atty-Gen. v. Woods*, 108 Mass. 436, 11 Am. Rep. 380; *Atty-Gen. v. Boston & L. R. Co.* 118 Mass. 846; *Martin v. Evansville*, 32 Ind. 85; *Bainbridge v. Sherlock*, 29 Ind. 364, 95 Am. Dec. 644; *Diedrich v. Northwestern U. R. Co.* 42 Wis. 248; *Walker v. Shepardson*, 2 Wis. 384, 60 Am. Dec. 423, 4 Wis. 486, 65 Am. Dec. 324; *Dutton v. Strong*, 66 U. S. 1 Black, 23, 17 L. ed. 29; *Atlee v. Northwestern U. Packet Co.* 88 U. S. 21 Wall. 389, 22 L. ed. 14 L. R. A.

619; *Miller v. Milwaukee*, 14 Wis. 642; *Wisconsin River Imp. Co. v. Lyons*, 30 Wis. 61; *Jones v. Pettibone*, 2 Wis. 319.

This power of the Legislature to make such rules and regulations as it may see proper to impose for the protection of the rights of the public was directly recognized and assented to by the Supreme Court of the United States in *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984.

The Supreme Court of Michigan has made no holdings inconsistent with the views above expressed.

Moore v. Sanborne, 2 Mich. 519, 59 Am. Dec. 209, holds the test of a navigable river to be its capacity for valuable floatage, irrespective of the fact of actual public use, or of the extent of such use.

The above doctrine has not been qualified in the case of *Grand Rapids Boom Co. v. Jarvis*, 30 Mich. 308.

Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435, holds that all rivers and streams are subject to the same general rights which the public exercises in highways by land, and which they possess in navigable waters.

Tyler v. People, 8 Mich. 320, simply determined that the term "navigable waters," as used in § 5944 of the Compiled Laws, has the same meaning as in the ordinance of 1787, and is not limited to waters where the tide ebbs and flows.

Rice v. Ruddiman, 10 Mich. 125, holds that the doctrine laid down in *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435, is applicable to Lake Muskegon. All that that case decides is that the riparian proprietor is entitled to all the control of the bed of the river which can be exercised without damage to the public interest.

Ryan v. Brown, 18 Mich. 196, 100 Am. Dec. 154, has no bearing on the matter before this court.

Bay City Gas-Light Co. v. Industrial Works, 28 Mich. 182, though not strictly in point, recognizes the right of the Legislature to establish docking lines.

Thunder Bay River Boom. Co. v. Speechly, 31 Mich. 336, 18 Am. Rep. 184, was a case between private parties.

Lincoln v. Davis, 53 Mich. 375, 51 Am. Rep. 116, recognizes the right of the State to provide for the establishment of a line beyond which private erections cannot be maintained on navigable streams.

Fletcher v. Thunder Bay River Boom. Co., 51 Mich. 277, simply holds that riparian rights, unless expressly limited, extend to the middle of the navigable channel, and cover any shallows or middle ground not shown in the government surveys, but lying between such channel and the shore.

Webber v. Pere Marquette Boom. Co., 5 West. Rep. 575, 62 Mich. 628, has no bearing on the precise point in question.

Benjamin v. Manistee River Imp. Co., 42 Mich. 628, recognizes the right of the State to regulate navigable streams.

Morse, J., delivered the opinion of the court:

Grand River is one of the largest and most important inland streams of the State. It is a

navigable river. It has been a water highway, upon which for many years logs and lumber have been floated from the pineries to the lake at Grand Haven, or to mills at various points upon the river bank. It has never been navigable for boats, except canoes and *bateaux*, above Lyons, and no steamboats have been above the rapids at Grand Rapids for many years. Small steamboats have run between the mouth and the City of Grand Rapids, and, with the aid of government appropriations, the river, below the rapids at that City may be made to be a water-way of great commercial utility; but above the rapids it has nearly served its usefulness as a navigable stream, except for small pleasure boats. The running of logs, lumber and timber upon it is no longer of consequence, on account of the exhaustion of the forest supply of easy access to it and its tributaries. But it will ever be an important public stream, and its navigability for pleasure is as sacred in the eye of the law as its navigability for any other purpose. Its waters empty into Lake Michigan, and from thence flow into the St. Lawrence and to the sea; and under the Ordinance of 1787, as well as the laws of our State, it must be regarded in the main as a public river and a common highway. It passes through the City of Grand Rapids, dividing the place into two parts, known as the "East" and "West" sides. "The Rapids" take up within the city limits about two miles of the river. The fall of the river bed is such that the water, in the natural state of the river, flowed with such velocity at a shallow depth, among numerous rocks and boulders, over these rapids, as to entirely prevent any navigation, except with canoes; and it was always with great difficulty that one of these could be poled up the stream. The character of the underlying soil of the river here is rocky,—ledge rock between the dam and Bridge Street, and below that it is composed of clay boulders and gravel, with ledges of rock occasionally cropping out. There never has been a steamboat up or down these rapids but once, and then it had to be drawn up by oxen, horses, and Indians. Logs could never well be floated down without improvements of the channel. The rapids, in a state of nature, served no useful end in any kind or method of navigation. Upon the east bank of the river, and below the dam, extensive encroachments have been made by property owners, the first beginning of such encroachments dating back many years, and almost from the first settlement of the country; and made lands, and buildings upon them, of the value of millions of dollars, are now located in the old river bed upon that side. The defendant, William T. Powers, in 1866, was the owner of the west bank of the river from a point above the present dam down to a point below the Grand Rapids & Indiana Railroad bridge. The river near by, and within the city limits, is spanned by seven bridges, in the following order, from the north to the south: The Detroit, Grand Haven & Milwaukee Railroad bridge, Leonard-Street bridge, Sixth-Street bridge, Bridge-Street bridge, Pearl-Street bridge, Grand Rapids & Indiana Railroad bridge, Fulton-Street bridge, and Chicago & West Michigan Railroad bridge. Five of these are maintained by the

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City. None of these, except the last, have any draw or openings for the passage of boats, and they are comparatively low bridges, with their supporting piers resting upon the bed of the river. In 1866 and 1867, Powers, in connection with other riparian owners, and with municipal and legislative consent, built a dam across the river. This dam is about 650 feet in length, and about 7 feet in height. A chute was put in to accommodate and facilitate the running of logs over the dam. Powers, at the same time, and in connection with his dam, built a canal along the line of his lands, upon the west side, which is about two thirds of a mile in length. Part of it was built in the natural ground and part encroached upon the shallow waters of the original stream. The water of this canal is about nine feet deep, and varies in width from 50 to 100 feet. This improvement is worth many thousands of dollars. In 1885 the Legislature, by Act No. 292 of the Local Laws of that year, amending the charter of Grand Rapids, conferred power and authority on the board of public works of the said City of Grand Rapids to establish dock and building lines on the shores and margin of Grand River within the corporate limits of said City, and in the waters and in the bed of said river along the said shores and margin, beyond which said lines, when so established, no dock, wharf, building, or structure of any kind, except public bridges, should be constructed in said river, or on or over the bed thereof, nor should the water be in any manner obstructed beyond said established lines; and authorized the common council of said City to enforce the power thus granted, relating to the establishment of such lines, by ordinances duly enacted in that regard, and authorized said common council to impose appropriate penalties for that purpose within the limits prescribed by said charter of said city; and also provided that the ordinances or regulations of said common council, in relation to said dock-lines, might be enforced at the suit of said City by a bill in equity. Afterwards, acting under this authority, the board of public works of said City, on the 3d day of May, 1886, established a dock and building line on the shores and margin of said Grand River within the corporate limits. On the 26th day of July, 1886, the common council of said City passed an ordinance entitled "An ordinance to prohibit and prevent the erection of buildings, docks, and other structures and to prohibit and prevent the filling in of earth or other material, on the shores of Grand River, or obstructing the waters of Grand River, beyond the dock and building lines established by the board of public works," which was afterwards amended on the 30th day of January, 1888. This ordinance prohibited any encroachment upon the river shore or bed of any kind outside of the established dock-lines. These dock-lines were established by the board of public works without notice to Mr. Powers or any of the riparian owners along such lines; nor does it appear that they were consulted in regard to the location of such lines.

After the establishment of these dock-lines, Mr. Powers commenced the building of a wall in the stream. The wall was built of stone, and about four feet wide; and the defendant

admits that he had constructed said wall to about the following dimensions: "Commencing at or near the southerly end of the waste-weir of the West-Side canal, so called, in said City, near the dam across said Grand River; thence extending southeasterly 66 feet, more or less, to a point just about 45 feet east of the said pretended dock and building line so pretended to be established by the board of public works; thence extending southerly on a line which, if extended, would meet the public bridge over said Grand River at East Bridge Street, in said City, at a point about thirty feet east of said pretended dock and building line." He also admits that he intends to build said wall from the dam to Bridge Street, and for his own purposes, and that the same is and will be outside the said dock-lines.

The City of Grand Rapids files its bill of complaint in the Superior Court of Grand Rapids, in chancery, basing its right for relief upon the Legislative Act aforesaid, and the action of the board of public works and the common council, under the authority given these bodies by such Act, and claiming *first*, that the structure was unlawful by reason of such Act and the proceedings under it; *second*, that such wall is of great damage and detriment to the public use of the stream, as it would greatly narrow the natural channel, and impede the flow of the water therein, and in times of high water would cause the waters of the river to be held back, and overflow and flood various portions of the City and its public streets, thereby causing great public and private damage, and occasion sickness to the inhabitants of the City by causing the ground thus overflowed to be damp and foul; *third*, that it will interfere with the public use of the river, and its value for the purposes of commerce, for the floating of vessels, boats, rafts, and logs. The bill prays that the defendant may be temporarily, and also permanently, enjoined from building the wall, or any other wall outside of the said dock-lines, and that he be decreed to remove said stone wall by him constructed.

The defendant, answering, avers that, by virtue of his riparian rights, he owns the soil and bed of Grand River to the center thereof; that he has a right to make such use of the bed of said stream within his said ownership as he sees fit, provided only that he does not interfere with the public use of said stream for the purposes of navigation, or with the rights of other riparian owners upon its banks; and denies that this dam so built, or as it is intended to be constructed, interferes at all with the public use of said river, or with the rights of other riparian owners; and further avers that the same, when completed, will be a benefit rather than a damage to the public and all concerned.

It is admitted that, under the settled law of this State, the defendant is the owner, by virtue of his riparian rights, to the soil of the river bed to the middle of the stream. It must also be conceded that he would have had a right to build this wall, and to reclaim for his own use the land between it and the old west shore of the river, if such building of the wall and reclamation of the land did not interfere with the public right of naviga-

tion, or the private right of other owners of the river bank, had it not been for the Act of the Legislature in question, and the subsequent proceedings of the authorities of the City of Grand Rapids under and by virtue of such Act. The Ordinance of 1787 cuts no particular figure in this case, because, under the decisions of the federal courts, as far as the general government is concerned, the rights of riparian owners on the stream, mentioned or embraced by said ordinance, must be determined according to the law of the State within which they are situated. *St. Louis v. Myers*, 118 U. S. 566, 28 L. ed. 1181; *Barney v. Keokuk*, 94 U. S. 824, 24 L. ed. 224; *Willamette Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. ed. 629. Grand River must be treated the same as any other navigable stream under the law of our State in the solution of this question, having regard, however, to its character as a stream considered at the point towards which this legislation is directed, and where the rights involved are located. In the court below, the City seems to have rested its case entirely upon the validity of this dock-line legislation, and proceedings taken under it, and no particular effort was made to show that the wall was or would be injurious to either public or private rights.

The dock line, as established, cannot be sustained for two reasons: *First*. The persons owning the banks of the river in fee simple, and having absolute property in the river bed, subject only to the public right of navigation, were not notified of the proposed action of the board of public works, and had no hearing upon the establishment of these dock-lines. The fixing of these lines was an *ex parte* and arbitrary proceeding, involving the rights of property owners, upon which they have never had a day in court. Whatever may be held to be the authority of the Legislature in respect to establishing such lines, it cannot certainly be done without notice to property owners, and opportunity of a hearing accorded to them. This would be despotism, and without due process of law no man's rights can be submitted, under a constitutional government, to the discretion of anyone without notice or hearing. *Robinson v. Miner*, 68 Mich. 549; *Frazee's Case*, 68 Mich. 896, 6 West. Rep. 140. *Second*. The dock-line as established encroached upon the shore-line of defendant, and the ordinance of the common council, therefore, prohibits him from building upon and occupying his own land, which has never been covered with water. The testimony of the city engineer, Mr. Collar, a witness for the complainant, shows, on cross-examination, that the dock-line on the west side of the river in many places runs upon and along the east edge of the top surface of Mr. Powers' canal for some distance. At some points it is nine feet, and at others more, west from the water line of the river at ordinary stages, and at the south end of the canal the dock-line cuts off a strip of main-land of some feet in width, and a part of the main-land shore of the river. This dock-line as fixed runs through buildings, and cuts off a part of the Crescent Mills, which have been built more than twenty years, and passes through other buildings. It must be held that the Legislature has no power to extend dock-lines upon the natural shore or bank of the river,

or to authorize the municipality to forbid the owners from building upon such shore or bank. This would be taking private property for public use without compensation, which is forbidden by our Constitution. For these reasons alone the bill in this case must be dismissed, as there is nowhere in the evidence any showing that the building of the wall will be of any damage to the public use of the river for the purposes of navigation, or any injury in any way to the rights of the public or of private persons.

But the question of grave concern remains, to wit, what are the rights of the defendant as a riparian owner in this river, and what control can the municipality under authority of the Legislature lawfully exercise over such rights? And it seems to me desirable that this question be settled, as it is conceded to be an open one, as far as the courts of this State are concerned, and one of great moment to the public as well as to private interests. In examining this question we must remember that the riparian proprietor in this State holds a different and more extended title to the soil under water of a navigable stream than he does in many of the states of the Union. In this State he owns the soil to the middle of the stream, and has the right to use his land which is covered by water in any way he chooses, provided that he does not seriously injure the public use of the stream, or obstruct or impede navigation, or damage other riparian owners along the stream above or below him. "Any erection which can lawfully be made in the water within these lines belongs to the riparian estate; and the complete control of the use of such land covered with water is in the riparian owner, except as it is limited and qualified by such rights as belong to the public at large, to the navigation, and such other use, if any, as appertains to the public over the water. . . . In those waters whose beds are public, and not private, property, erections by riparian owners are unlawful, not because they are nuisances, in the proper sense of the term, but because they are encroachments upon the public domain, and they are as unauthorized as would be the erection of houses or barns upon public lands away from the water, by an adjoining land-holder. But where the ownership is private, and the public rights are simply easements or privileges upon it, the owner may do what he pleases, so long as it does not injuriously affect the public enjoyment. On land, where roads are laid out of a prescribed width, the law or the authorities having determined that width to be desirable, the right to encroach upon the way cannot be very extensive. But where the way exists in a water-course, whose boundaries are variable and laid down without human intervention, the extent to which private improvements are compatible with the public use must depend upon the circumstances, and must always be a question of fact. The owner's use is lawful until shown to be unlawful. It is plain enough that there are streams which cannot safely be encroached upon at all, while there are others so considerable that they could not be appreciably injured by a very extensive system of dockage or other erections in their beds." *Ryan v. Brown*, 18 Mich. 196, 100 Am. Dec. 154. See, 14 L. R. A.

further, as to the ownership and rights of the riparian owner in the bed of streams, *Lornum v. Benson*, 8 Mich. 18, 77 Am. Dec. 435; *Rice v. Eddiman*, 10 Mich. 125; *Watson v. Peters*, 26 Mich. 508; *Richardson v. Prentiss*, 48 Mich. 88; *Bay City Gas-Light Co. v. Industrial Works*, 28 Mich. 182; *Maxwell v. Bay City Bridge Co.* 41 Mich. 466; *Pere Marquette Boom Co. v. Adams*, 44 Mich. 408; *Backus v. Detroit*, 49 Mich. 110, 43 Am. Rep. 447; *Fletcher v. Thunder Bay River Boom Co.* 51 Mich. 277; *Wobber v. Pere Marquette Boom Co.* 62 Mich. 626, 5 West. Rep. 575; *Turner v. Holland*, 65 Mich. 453, 8 West. Rep. 796; *Atty-Gen. v. Beart Boom Co.* 84 Mich. 463.

It is contended by the counsel for the complainant that the Legislature of this State has the constitutional right to confer upon the proper authorities of the City of Grand Rapids the authority to establish dock and building lines on the shores and margin of Grand River, and that the defendant had no right to build a wall in the waters of the river beyond the dock and building line established by the board of public works, and to sustain this contention he cites the following: *Cooley, Const. Lim.* 5th ed. p. 740, *595; 1 *Dillon, Mun. Corp.* 3d ed. p. 136, *107; *Hart v. Albany*, 3 Paige, 213, 8 L. ed. 121, 9 Wend. 571, 24 Am. Dec. 165; *Com. v. Alger*, 7 Cush. 58; *People v. Vanderbilt*, 26 N. Y. 287, 28 N. Y. 396-398, 84 Am. Dec. 351; *Atty-Gen. v. Woods*, 108 Mass. 436, 11 Am. Rep. 380; *Bay City Gas-Light Co. v. Industrial Works*, 28 Mich. 182; *Atty-Gen. v. Boston & L. R. Co.* 118 Mass. 346; *State v. Sargent*, 45 Conn. 358.

Cooley says: "Wharf-lines may also be established for the general good, even though they prevent the owners of water-fronts from building out on the soil which constitutes private property." And in the same connection adds: "And the Legislature may prevent the removal of stones, gravel, or sand from the beach for the protection of harbors. This is said to be a just restraint of an injurious use of property which the Legislature have authority to impose." *Cooley, Const. Lim.* 6th ed. p. 739. This language is plainly used in reference to wharves and harbors upon navigable water, and for the purposes of navigation by boats and vessels. Dillon says: "The right of riparian proprietors in respect to the erection of wharves are subject to such reasonable limitations and restraints as the Legislature may think it necessary and expedient to impose; therefore it is competent for the Legislature to pass acts establishing harbor and dock lines, and to take away the rights of proprietors to build wharves on their own lands beyond the lines, even when such wharves would be no actual injury to navigation." 1 *Dillon, Mun. Corp.* 3d ed. § 107. This language has also evidently the same application. In *State v. Sargent*, 45 Conn. 358, the owner of the land took title only to high-water mark. The fee between high and low water mark was in the State in trust for the public. It was held that the owner of the shore might construct wharves upon the soil below high water mark, but in so doing must conform to the regulations of the State; and it is said that the duty of protecting the paramount right of navigation rests upon the Legislature, and they are to determine

for themselves by what methods and instruments they will discharge it. It is further said that the enactment of laws restraining proprietors of the shore from extending wharves or other structures into navigable waters is not the exercise of eminent domain. The public do not appropriate or use any right of the land-owner in the soil of the shore. This is no doubt good law where the land-owner's possessions stop at high-water mark, but it does not apply to the case before us. The New York cases cited also refer to cases where the land-owner had no fee in the land under water; *Hart v. Albany*, involving rights upon the banks of the Albany Basin, which was a work of the State, and created by it. In *People v. Vanderbilt* the matter in controversy was the construction of a pier in New York harbor. The case of *Com. v. Alger*, 7 Cush. 53, deals with the establishment of harbor lines in Boston Harbor, and where, under the Colonial Ordinance of 1647, the proprietors of uplands bounding on the sea have an estate in fee in the adjoining flats above low-water mark, and within 100 rods of the upland, with full power to erect wharves and other buildings thereon, subject, however, to the reasonable use of other individual proprietors and of the public for the purposes of navigation, and subject, also, to such restraints and limitations of the proprietors' use of them as the Legislature may see fit to impose for the preservation of public and private rights. It was held that "the Legislature of this Commonwealth has power to establish lines in the harbor of Boston, beyond which no wharf shall be extended or maintained, and to declare any wharf extended or maintained beyond such lines a public nuisance; and statutes establishing such lines, and taking away the rights of the proprietors of flats in a harbor beyond the lines to build wharves thereon, even when there would be no actual injury to navigation, although providing no compensation to such proprietors, are not unconstitutional, as taking private property and appropriating it to the public use without compensation, within the meaning of the Declaration of Rights, art. 10, nor as impairing the operation of the grant made by the colonial ordinance, and thus transgressing the prohibition of the Constitution of the United States, art. 1, par. 10, against passing laws impairing the obligations of contracts; but such statutes do not affect the right to maintain wharves erected before their passage." By examining the opinion in this case, it will be seen that the grants of lands, since the adoption of this ordinance, which vested, by virtue of it, an estate in fee in the land lying between high and low water mark, were also subject to the proviso that such estate should be used so as not to stop or hinder the passage of boats and vessels, etc., and subject to all such restraints and limitations of absolute dominion over it in its use and appropriation as other real estate is subject to for the security and benefit of other proprietors, and of the public, in the enjoyment of their rights. The court justifies its opinion under the police power of the Legislature,—the authority vested in that body to establish all manner of wholesome and reasonable laws, rules, and penalties, not repugnant to the Constitution, as they shall judge to be

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for the good of the Commonwealth and the subjects of the same,—and holds that the legislation in question is not an appropriation of property to a public use, "but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain." This case is followed in the other Massachusetts cases cited.

The learned counsel also contends that language has been used in several of the opinions of our own court recognizing the right of the Legislature to establish wharf and dock lines, but admits that the question in this case is still an open one, as far as this court is concerned. The cases in which this matter have been touched upon are: (1) *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435. In the course of the opinion *Mr. Justice Campbell* said: "It is urged that this ruling will interfere with the improvement of rivers, and disturb the title of islands. But these objections are not well taken. The public authorities can regulate water highways, as well as land highways, although the soil of neither belongs to the State." (2) *Rice v. Ruddiman*, 10 Mich. 126. *Mr. Justice Christianity* in his opinion says, at page 140: "These principles, when applied to Muskegon Lake, can no more interfere with the public right of navigation than when applied to rivers. In both cases the ownership is equally qualified by, and subordinate to, the rights of the public. In fact, navigation is much more likely to be benefited than injured by the application of these principles. Wharves and other similar erections are essential to the interests of navigation; and if the bed of the lake to high or low water mark were vested in the State, no private owner could extend a wharf one foot from the water-line without becoming a trespasser, and incurring the risk of losing his improvements, though navigation might be aided, rather than injured, by it; while, by admitting the riparian ownership, as above explained, individual enterprise is stimulated to improvement, and the public interest is subserved. The public through their proper authorities have always the right to restrain any encroachments which may be injurious to the public right, and to compel the removal of any obstruction or impediment, as well as to punish the offender, to the same extent as if the bed of the lake were vested in the State." (3) *Bay City Gas-Light Co. v. Industrial Works*, 28 Mich. 182. In this case *Mr. Justice Campbell* says, at page 184: "The right of docking out, so as to secure the full benefit of the water front, is limited by the rule that it must not seriously impair the right of navigation. In order to prevent any dispute as to what wharfing will be such an encroachment, it has been provided in some of our city charters that the city may fix a dock-line, beyond which such erections shall not extend. In doing this the authorities are supposed to consult the public convenience, and to draw the line in such a manner as to subserve this. It is usual, and practically almost necessary, to make the frontage thus defined follow straight lines of considerable length, avoiding angles as much as possible, and paying no attention to the sinuosities of the shore. Such lines will not necessarily or usually be exactly parallel either

with the shore or with the thread of the stream. They can have no bearing whatever upon the determination of boundaries, and are meant to determine at what line the depth of water will be found sufficient to meet all the necessities of navigation. So far as they are valid, it is as limits reasonably and impartially fixed, beyond which all are forbidden to wharf out, and within which every person may lawfully improve his own property. But with the ownership of property the city authorities have no concern." (4) *Lincoln v. Davis*, 53 Mich. 375, 51 Am. Rep. 116. On page 390, 53 Mich., Mr. Justice Campbell says: "There can be no doubt of the right of the State to forbid any erections within such parts of the water as are strictly navigable, and to regulate the distance beyond which no private erection can be maintained."

Whatever may be the power of the Legislature in waters "strictly navigable" to fix an arbitrary line beyond which riparian owners cannot go, or to delegate to a municipality that power, I am satisfied that no such right exists in the waters of Grand Rapids at the rapids, or certainly in that part of the waters which are not now navigable for any purpose. The right of the riparian owner, under our laws, is subject only to the public use for the purposes of navigation; and there is a manifest difference between public streams that can be used successfully for the running of boats and vessels for the purpose of commerce, and those which are only capable of being used for the floatage of lumber and logs in rafts or single pieces. The riparian owners are entitled to the beneficial and sole use of the latter streams, except for floatage; and when such streams have become unfitted for valuable public use, and have actually ceased to be used for public highways, there is no more reason for holding them to be public than in the case of a land highway which has been abandoned and is useless. See opinion, Campbell, J., *Sterling v. Jackson*, 69 Mich. 510, 14 West. Rep. 229; *Grand Rapids Boom Co. v. Jarvis*, 80 Mich. 308; *Middleton v. Flat River Boom Co.* 27 Mich. 538.

There is no pretense in the proofs in this case that this river in front of the land of defendant has ever been, ever will be, or can be, used for the navigation of commercial boats and vessels; nor that the water between the existing or proposed wall of the defendant and his shore-line has been, will be, or can be used even for the floating of logs or rafts. It has never been "strictly navigable" water. In order to get the logs and lumber that has gone over the chute in the dam down these rapids, it has been necessary for many years to clear out a channel in the center of the stream, and inclose such channel on each side with cribs and timbers, thus making an artificial canal, as it were, in the center of the stream for the purpose of floatage. This wall will have no appreciable effect upon this artificial channel, unless it be to deepen its waters, and thus aid navigation rather than to hinder it. This is the whole tendency of the proofs.

It is claimed by the counsel for complainants that the proposed occupation of the river bed by the defendant will be a purpresture, and therefore a public nuisance, and that, as such, 14 L. R. A.

the Legislature, or the City under authority from the Legislature, may abate it whether it interferes with navigation or not. A "purpresture" is defined by Chief Justice Cooley in *Atty-Gen. v. Ewart Boom Co.*, 34 Mich. at page 472, as "an inclosure by a private person of a part of that which belongs to, and ought to be open and free to, the enjoyment of the public at large;" and he also holds that an unauthorized inclosure of a part of a water highway is as much a public wrong as that of a land highway. But he also, in the same case, defines the character of the Muskegon River as a navigable stream at the point in controversy in that case, and says: "Neither is it a navigable stream, in the more popular sense of the term, for it is only a small stream, whose value to the public consists in the use which can be made of it for the purpose of floating logs and lumber." Such is the navigability of the Grand River at the place in controversy here. He further says: "The right of floatage is unquestionably a right which the State should guard and protect; but is a serious mistake to assume that the private appropriation of a part of the bed of the river would necessarily be either a purpresture or a nuisance. The property taken in such a case is not public, but private, property; and the owner of the bank, who also presumably owns to the center of the stream, may maintain trespass or ejectment against the taker. If the owner makes no complaint, the public can have neither right nor occasion for any, provided the navigable rights are not abridged. If they are, it is not very manifest how this can be a purpresture. The difference between the highway on land with its definite limits to which the public right extends, whether the whole is used or not, and the highway for floatage in our small streams, where the public rights have no definite limitations of space except as practicability for use and the occasion for use may give various limits, as the seasons and the needs of business and traffic may change, is so plain that the difference between an appropriation in the two cases needs only to be mentioned. It requires neither argument nor illustration. The one is a public grievance of some sort; but the other is no public grievance of any sort, unless the public use is unreasonably abridged or inconvenienced."

The police power of the Legislature in this State is not omnipotent. It cannot, under the guise of regulation, destroy property rights arbitrarily and without reason. The Legislature can, without doubt, in public harbors and perhaps in navigable streams, where boats and vessels can be and are used, limit the construction of wharves to the line of navigability; but it is doubtful if such erections could be stopped short of such lines unless some good reason could be shown for such a regulation. *Atty-Gen. v. Ewart Boom Co.* 34 Mich. 472, 473. And "the extent to which private improvements are compatible with the public use must depend upon circumstances, and must always be a question of fact." *Ryan v. Brown*, 18 Mich. 209, 100 Am. Dec. 154. The Legislature of Michigan cannot authorize a municipality to make that a purpresture or nuisance which is not so in fact, if, by so doing, the constitutional rights of any citizen in his per-

son or property is destroyed or infringed. *Worford v. People*, 14 Mich. 41; *Boereli v. Marquette*, 53 Mich. 450; *Fraser's Case*, 63 Mich. 896; *Robison v. Miner*, 68 Mich. 556; *People v. Armstrong*, 78 Mich. 288.

The power of the Legislature in the matter of harbor and dock lines upon streams where the bank owner's title in fee reaches to the bed of the river, subject to the public use for purposes of navigation, came before the Supreme Court of the United States in *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984. Yates built a wharf over the low water in the Milwaukee River the width of his lot, and 196 feet in length to reach navigable water. The Legislature of Wisconsin had authorized the common council of Milwaukee to establish, by ordinance, dock and wharf lines on this river, and to restrain and prevent encroachments and obstructions therein, and to cause it to be dredged. The city by ordinance declared this wharf to be an obstruction to navigation and a nuisance, and ordered it abated. Yates refused to abate it. Thereupon the city contracted with a person to remove it, and Yates filed his bill to restrain such removal. There was no evidence to show that the wharf was an actual obstruction to navigation, or was in any other sense a nuisance. The court, speaking through Mr. Justice Miller, said: "We are of the opinion that the city of Milwaukee cannot, by creating a mere artificial and imaginary dock-line, hundreds of feet away from the navigable part of the river, and without making the river navigable up to that line, deprive riparian owners of the right to avail themselves of the advantages of the navigable channel by building wharves and docks to it for that purpose." It is also further said that the riparian right in the bed of the stream "is property and valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed. It is a right of which, when once vested, the owner can only be deprived in accordance with the established law, and, if necessary that it be taken for the public good, upon due compensation. See also *Norfolk v. Cooke*, 27 Gratt. 430, where it is held that the soil under water of the riparian proprietor is not a mere license or privilege, but is property,—property in the soil up to the line of navigability, though covered with water.

An interesting case, and one in point, is *Janesville v. Carpenter*, 77 Wis. 288, 8 L. R. A. 808. The Legislature of Wisconsin in 1887 passed an Act "that it shall be unlawful and presumptively injurious . . . to person and property to drive piles," etc., "in Rock River within the limits of the county of Rock, and the doing of such act shall be enjoined at the suit of any resident taxpayer, without proof that any injury . . . has been or will be sustained by reason of such Act;" and further provided that such acts might be enjoined at the suit of anyone having the use of the water-power of the river in said county, without other proof than that the Act will cause the river to rise or set back to some extent at the place where the water, used to operate his mill or factory, is discharged into the river. This would seem to have been the exercise of the police power of the Legislature declaring

certain specified things nuisances *per se*. But the Wisconsin Supreme Court holds that such legislation is void, and in violation of the Constitution, in that it deprives the riparian owner of his property in the river without compensation and without due process of law. The court says: "This is the first time that any Legislature of any enlightened country has attempted to create an action without any cause of action; to authorize a complaint to be made to a court to enjoin the lawful use and enjoyment of one's own property, without proof that any injury or danger has been or will be caused by reason of such Act." The court holds as follows in regard to the right of the person sought to be enjoined by the city under this Act: "That Thomas Lappin, the owner in fee of this ground, has the right to use and enjoy it to the center of the river in any manner not injurious to others, and subject to the public right of navigation, has been too often decided by this court and other courts to be questioned. As a riparian owner of the land adjacent to the water, he owns the bed of the river *usque ad flum aqua*, subject to the public easement, if it be navigable in fact, and with due regard to the rights of other riparian proprietors. He may construct docks, landing places, piers, and wharves out to navigable waters if the river is navigable in fact; and, if it is not so navigable, he may construct anything he pleases to the thread of the stream, unless it injures some other riparian proprietor, or those having the superior right to use the waters for hydraulic purposes. *Jones v. Pettibone*, 2 Wis. 308; *Arnold v. Elmore*, 16 Wis. 509; *Yates v. Judd*, 18 Wis. 118; *Walker v. Shepardson*, 4 Wis. 486, 65 Am. Dec. 824; *Wisconsin River Imp. Co. v. Lyons*, 30 Wis. 61; *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 886; *Cohn v. Wausau Boom Co.* 47 Wis. 314; *Sterens Point Boom Co. v. Reilly*, 46 Wis. 237; *Hazeltine v. Case*, 46 Wis. 391, 32 Am. Rep. 715. Subject to these restrictions, he has the right to use his land under water the same as above water. It is his private property under the protection of the Constitution, and it cannot be taken, or its value lessened or impaired, even for public use, "without compensation," or "without due process of law," and it cannot be taken at all for anyone's private use. This, in my opinion, is the title also that the defendant Powers holds in the bed of Grand River, opposite his shore-line, and his rights are co-extensive with those given by the Wisconsin Supreme Court to Lappin; and that the law of this State is in complete accord and harmony with that of our sister State of Wisconsin in respect to riparian rights. See especially *Ryan v. Brown*, 18 Mich. 196, 100 Am. Dec. 154; *Atty-Gen. v. Ewart Boom. Co.* 84 Mich. 462; *Sterling v. Jackson*, 69 Mich. 510-513; 14 West. Rep. 229, opinion, Campbell, J.; *Middleton v. Flat River Boom. Co.* 27 Mich. 538, and notes; *Watson v. Peters*, 26 Mich. 508, and cases cited in note; *Grand Rapids Boom. Co. v. Jarvis*, 80 Mich. 308; *Maxwell v. Bay City Bridge Co.* 41 Mich. 466.

I do not pass upon the right of the Legislature to empower the City of Grand Rapids to establish dock-lines within the limits of the navigable part of the river, if there is such

navigable water, and to prevent any encroachments upon or obstructions within the water so outlined as navigable. It is not necessary to the determination of this case. But outside of the navigable water no dock-line can be drawn, and the property thereby taken for public use, without compensation to or consent of the riparian owners. Nor do I decide that the City may not make and enforce all needful and reasonable rules and regulations as to the public and private use of this river necessary to the public health of said City, or to prohibit any encroachment upon the river bed which will tend to seriously increase the danger of floods and the destruction of property thereby. The City saw fit in its proofs to rest upon the validity of the dock-lines. There is no showing that the building of this wall will be of the least detriment to the public health, or that it will have any tendency to increase the dangers arising from floods. The river is narrower below this wall, and made so by bridges of the City's own construction and maintenance than it will be at any place where the wall will be situated after it has been constructed as proposed by the defendant. The city engineer can see no reason, in his testimony, why the

building of this wall will tend either to the creation of overflows, or to increase the floods that sometimes have existed from various causes in high water. I have not space to discuss the testimony, but it is wholly barren of any showing that this wall, which the defendant is building, and proposes to build, upon his own land, will interfere in the least with the public use of the river, the rights of any other riparian owner in the stream, or damage any public or private interest to any perceptible extent. It may be that such a showing can be made as would entitle the complainant to the relief asked, but it has not seriously been attempted by the proofs, presumably for the reason that the complainant supposed its case was completely made out by the law, by virtue of the legislative Act, and the municipal proceedings under it.

The decree of the court below must be reversed, with costs of both courts, but without prejudice to any further action or proceeding, if cause can be shown for it as heretofore pointed out.

Champlin, Ch. J., did not sit; the other Justices concurred.

WEST VIRGINIA SUPREME COURT OF APPEALS.

James ROCK, Admr., etc., of J. W. Verlander, Deceased, *et al.*, Appts.,

v.
R. A. MATHEWS *et al.*

(.....W. Va.....)

***Equity will not entertain a bill to cancel instruments of indebtedness given under an agreement to compound a felony or stifle its prosecution, as the parties are *in pari delicto*.**

(November 14, 1901.)

APPREAL by complainants from a decree of the Circuit Court for Cabell County in favor of defendants in a suit brought to enjoin the sale of certain property under a trust deed and to obtain cancellation of the deed and compel defendants to deliver up certain notes. *Affirmed.*

The facts are stated in the opinion.

Messrs. Campbell & Holt, for appellants: The correct reading of the maxim is, *in pari delicto melior est conditio possidentis*, instead of *defendentis*.

2 Pom. Eq. Jur. § 939.

In applying the maxim the question is not, Who is the plaintiff and who the defendant?—but, Has the money been paid, or the property conveyed?

While the agreement is executory, courts of equity may relieve the debtor or promising party by ordering the written instrument and other securities to be surrendered and canceled, and granting the ancillary remedies of injunction, discovery, and the like.

*Head note by BRANNON, J.

NOTE.—For note on parties *in pari delicto*, see Kirkpatrick v. Clark (Ill.) 8 L. R. A. 611.
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2 Pom. Eq. Jur. § 940; Adams, Eq. *175; *Skipwith v. Strother*, 8 Rand. 214.

Where the agreement comes short of a technical compounding, but the thing contracted for tends to the same mischief of impeding or discouraging the orderly prosecution of a crime, the policy of the law is violated, rendering the contract void.

Bishop, Cont. § 498.

Contracts which are void at common law, because they are against public policy, like contracts which are prohibited by statute, are illegal as well as void.

Harvey v. Merrill, 5 L. R. A. 200, 150 Mass. 1. See *Fordick v. Van Arsdale*, 74 Mich. 302; *Smith v. Steely*, 80 Iowa, 739.

Messrs. Simms & Enslow, for appellees:

If the bill be true, it was nothing more nor less than the compounding of a felony. The deed was executed, delivered and recorded, the title has passed. The plaintiffs come into a court of equity to seek relief: they are asking to set aside their own deed and cancel it. Do they not come under the ancient maxim, *in pari delicto melior est conditio defendantis*?

See *Allison v. Hess*, 28 Iowa, 839; *Smith v. Rowley*, 66 Barb. 503; *Compton v. Bunker Hill Bank*, 96 Ill. 301, 36 Am. Rep. 147; *St. Louis, J. & C. R. Co. v. Mathers*, 71 Ill. 598; *Haynes v. Rudd*, 8 Cent. Rep. 449, 102 N. Y. 372, 55 Am. Rep. 815.

It is not dures for one who believes that he has been wronged to threaten the wrong-doer with a civil suit. And if the wrong includes a violation of the criminal law, it is not dures to threaten him with a criminal prosecution.

Hilborn v. Bucknam, 78 Me. 483, 57 Am. Rep. 816; *Harmon v. Harmon*, 61 Me. 227; *Higgins v. Brown*, 2 New Eng. Rep. 450, 78 Me. 478; *Reckley v. Union Bank of Winchester*,

79 Va. 459; *Mann v. Lewis*, 3 W. Va. 215; *Mann v. McVey*, 3 W. Va. 232; *Simmons v. Trumbo*, 9 W. Va. 359; *Whittaker v. Southwest Virginia Imp. Co.* 34 W. Va. 217.

When a person has committed a crime, a threat to have him arrested and imprisoned being only a threat of a lawful arrest will not constitute duress in any such sense as will discharge him from liability upon a contract to indemnify the person injured by the commission of the offense.

Nealley v. Greenough, 25 N. H. 325; *Knapp v. Hyde*, 60 Barb. 80; *Taylor v. Board of Health*, 31 Pa. 73, 72 Am. Dec. 724; *Emmons v. Scudder*, 115 Mass. 367.

It must appear that the menace was of unlawful imprisonment to constitute duress.

Alexander v. Pierce, 10 N. H. 494; *Wilcox v. Howland*, 23 Pick. 167; *Waller v. Oralle*, 8 B. Mon. 11; *Landa v. Obert*, 45 Tex. 589; *Plant v. Gunn*, 2 Woods, 372; *Callin v. Henton*, 9 Wis. 476.

Defendants are not liable or responsible for the acts of others, and cannot be made to suffer therefor, unless such others were the agents or attorneys of the defendants.

Compton v. Bunker Hill Bank, 96 Ill. 303, 36 Am. Rep. 147; *Spurgin v. Traub*, 65 Ill. 170; *Marston v. Brittenham*, 76 Ill. 611; *Wright v. Remington*, 41 N. J. L. 48, 32 Am. Rep. 180; *Lefebvre v. Dutruil*, 51 Wis. 326, 36 Am. Rep. 833; *Smith v. Allis*, 52 Wis. 837; *Talley v. Robinson*, 22 Gratt. 888; *Simmons v. Trumbo*, 9 W. Va. 359.

Brannon, J., delivered the opinion of the court:

This is a bill filed in the Circuit Court of Cabell County, by James Rock and others, against R. A. Mathews and others, alleging in effect that J. W. Verlander, as postmaster at Huntington, gave a bond, with Mathews, Harvey, Enslow and Russell as sureties, and that Verlander misappropriated to his own use public moneys, whereby the sureties became liable; and that said sureties, while their liability was unpaid, and while Verlander was in danger of arrest and prosecution for embezzlement, went to James Rock and Mary A. Rock, the father and mother of Mrs. Verlander, and to Mrs. Verlander, who were in no wise liable for such money, and demanded that they and said J. W. Verlander should execute a promissory note, secured by deed of trust, payable to said sureties, for \$3,000, the amount of the defalcation, so that they might not lose by their suretyship, and represented that, on compliance with such demand, they would discharge the amount of the defalcation; and further represented to said Rock and wife, and Verlander and wife, that unless said note and security should be given they would have Verlander arrested and prosecuted for embezzlement and sent to the penitentiary; and that to save Verlander from prosecution, and for no other consideration, they executed a note for \$3,000, payable at the Bank of Huntington, to said sureties, and a deed of trust on certain real estate and personal property to secure it; and that said sureties then settled the defalcation with the United States. That, the trustee having advertised the property for sale, said sureties proposed that if said debtors would

renew the note of \$3,000, and execute certain other notes and a deed of trust to secure them, no sale would be made under the first trust, but it would be released and further time given; and accordingly a new note for said \$3,000, and a deed of trust to secure it, were given by said parties; and that all the property embraced in this deed of trust was the property of Mary A. Rock, and none of it the property J. W. Verlander. That under this second deed of trust the trustee was about to sell property conveyed by it, to satisfy said note for \$3,000. That the renewed note was for the original note of \$3,000, executed in expectation that J. W. Verlander would be relieved from prosecution, which note was for a consideration illegal, and contrary to public policy. And the bill prayed that the sale be enjoined, and the note and deed of trust canceled. An injunction was granted, and a motion to dissolve and a demurrer were overruled; and the defendants having answered, and evidence having been taken, on the final hearing the injunction was dissolved and the bill dismissed; and from this decision the plaintiff's appeal.

The first question arising on the face of the bill is, Does the bill show ground for cancellation of the deed of trust and note? The bill charges that they were made for compounding, or with the expectation of preventing and stifling, a criminal prosecution, and are therefore void as against public policy. According to the bill, the parties who gave the note and deed of trust were as fully aware of the character of the transaction and the illegal purpose as were the beneficiaries under those instruments, and were participants in the transaction. Can they have relief, or are they precluded because equally guilty with their adversaries? Mr. Pomeroy, in his late and elaborate and learned work on Equity Jurisprudence (vol. 1, § 402), says: "Wherever a contract or other transaction is illegal, and the parties thereto are, in contemplation of law, *in pari delicto*, it is a well settled rule, subject only to a few special exceptions depending upon other considerations of policy, that a court of equity will not aid a *particeps criminis*, either by enforcing the contract or obligation while yet it is executory, or by relieving him against it by setting it aside, or by enabling him to recover the title to property which he has parted with by its means. The principle is thus applied in the same manner where the illegality is merely a *malum prohibitum*, being in contravention to some positive statute, and when it is *malum in se*, as being contrary to public policy or good morals." In the latter class he ranks compounding felony. It is a known maxim that he who comes into equity must come with clean hands. *Lord Chief Justice Wilmot* said that "all writers upon our law agree in this: no polluted hand shall touch the pure fountain of Justice; and that those so entering the temple will be expelled with the anathema *Procul, O procul este, profani!*" In the Supreme Court of Massachusetts, in *Atwood v. Fisk*, 101 Mass. 863, 100 Am. Dec. 124, the principle is well stated thus: "The meaning of the familiar maxim *in pari delicto potior est conditio defendentis*, is simply that the law leaves the parties where they stand;

not that it prefers the defendant to the plaintiff, but that it will not recognize a right of action founded on the illegal contract, in favor of either party against the other. They must settle their own questions in such cases without the aid of courts." In *Capehart v. Rankin*, 8 W. Va. 571, it was held that courts will not aid parties to illegal contracts which are executory only, to recover thereon, and, where it is executed, a court will not aid a *particeps criminis* in setting it aside. See *Dodson v. Sean*, 2 W. Va. 511, 98 Am. Dec. 787. In *Helsley v. Fultz*, 76 Va. 671, it was held to be a rule of courts of equity "not to assist one wrongdoer against another;" that if the agreement be executory, it will neither be enforced nor canceled; if executed, it will not be set aside and the property restored; that "in all such cases the parties will be left as they placed themselves." On this principle, in *Atwood v. Fisk*, *supra*, the Supreme Court of Massachusetts held that a bill in equity will not lie to compel the surrender or cancellation of a promissory note and a mortgage to secure it, on the ground that the consideration for them was a promise of the payee to forbear to prosecute for embezzlement. In *Smith v. Rowley*, 66 Barb. 503, a wife sought to annul a deed conveying property to prevent the prosecution of her husband; but she was refused relief because the contract was against public policy and she a participant. In *Allison v. Hess*, 28 Iowa, 889, a conveyance had been made to compound the felony of a son, and the court refused relief, saying: "The rule seems to be well settled that where a contract is illegal, whether because it is *malum in se* or *malum prohibitum*, the law will not afford affirmative relief to either, but leave the parties as it found them." In *St. Louis, J. & C. R. Co. v. Mathers*, 71 Ill. 598, it was held that if a party convey estate in consideration of doing an illegal act, no relief will be given. In *Haynes v. Rudd*, 102 N. Y. 872, 8 Cent. Rep. 449, 55 Am. Rep. 816, it was held: "One cannot maintain an action to recover money paid on a note wholly or partly to compound a felony, though the note was procured by duress and undue influence." There was a threat to accuse a son of crime. The court said that it could not agree with the doctrine that, if the party was influenced by duress, and at the same time both parties intended compounding a felony, they were not *in pari delicto*, and that it was enough that the vice of compounding was part of the contract, operating in the minds of both parties, thus placing them on an equality. Same principle in *Swartz v. Gillett*, 1 Chand. 207, 2 Pinn. 288; *Harrington v. Bigelow*, 11 Paige, 849, 5 L. ed. 158.

But it is argued for appellants that while the doctrine above stated may be true as to contracts completely executed, as where money has been paid on the illegal contract, or property has been actually passed under it, yet it does not apply where the debt has not been paid, as here. It is said that the proper words of the maxim are "*in pari delicto melior est conditio possidentis*," not "*defendentis*," and where the word "*defendentis*" is used, it is to be regarded as equivalent to "*possidentis*," and thus it shields only one who has become the possessor, under a completely executed

contract, of the thing sought to be reclaimed by the suit, and does not apply where the contract has not been executed and the defendant has not possession; that in this case, as the debt has not been paid, the maxim does not apply. It seems to me that the true expression of this great equity maxim is "*in pari delicto potior est conditio defendentis vel possidentis*." But it is differently stated in different books. In 1 Story, Eq. Jur. § 63, the closing words are "*possidentis et defendentis*," while in section 298 they are "*defendentis et possidentis*." In Broom on Legal Maxims, 290, it reads, "*in pari delicto potior est conditio possidentis* (or *defendentis*)," while on page 729 it is "*potior est conditio possidentis*." In Black, Law Dict. it is "*in pari delicto potior est conditio possidentis* (*defendentis*)." In Bouvier, Law Dict. it is "*in pari delicto potior est conditio defendentis* (or *possidentis*)." But, though a critical comparison of these differing expressions of the maxim would suggest distinctions, they would be rather refined. I think the meaning is that, where the maxim applies, it leaves the possessor of the property in possession, or favors a party defending by simply refusing to interfere. But in this case it is immaterial, as I regard the defendant as "possessing" the property sued for. I regard it, so far as the parties to the contract are concerned, as completed. The deed of trust has passed the legal title to the trustee, leaving the grantors only an equity of redemption. If it were not an absolute conveyance of the absolute estate, certainly the maxim would apply. The party could not sue on the note; but the debt is one thing, the deed of trust another. A deed of trust is, in effect, a mortgage, needing, however, no application to a court to foreclose it. It is laid down that though a mortgage upon an illegal consideration is void, so that a court will not aid the mortgagee in its enforcement, yet it "will not aid the mortgagor to obtain a cancellation of the incumbrance. Both parties are left without remedy when the contract is one prohibited as immoral or against public policy." 1 Jones, Mortg. § 619. In this case the plaintiffs ask distinct affirmative relief, and have to plead the illegal contract as a ground of such relief, which fact is generally regarded as a test of the applicability of the maxim. Great stress is laid by counsel for appellant upon the case of *Skipwith v. Strother*, 3 Rand. 214, sustaining a bill to enjoin a judgment for a gaming debt. The statute expressly declared a judgment for a gaming debt void. I do not, however, question, in view of the doctrine laid down in 1 Story, Eq. Jur. § 303, and in *White v. Washington*, 5 Gratt. 649, and *Shields v. McCune*, 6 W. Va. 91, that equity will give relief in gaming contracts, as exceptions to the principle expressed in the maxim above quoted; but this interference in gaming contracts is an exception to the general rule to further a public policy, the courts having concluded that such policy is better subserved by giving active relief. In the United States Supreme Court, in *Sample v. Barnes*, 55 U. S. 14 How. 70, 14 L. ed. 830, where a judgment was sought to be enjoined on the ground that the contract was illegal, the court refused relief "because the complainant was *in pari delicto* with the other

party." Now, this is authority not only for the application of the general principle above stated, but it shows that the fact that the plaintiff had not yet paid over the money, but yet possessed it, as in this case, did not save him from the maxim, and give him a place in court; it shows that the court simply left the parties where it found them, because they were *in pari delicto*. So, the bill itself shows a case calling for the expulsion of the plaintiffs from a court of equity.

Let us now look at the case under the light thrown on it by the answer and evidence. Under this light it falls far short of the case made by the bill, and shows no duress or compulsion on the part of the sureties, no threat of prosecution, no agreement to compound or stifle it, and no culpable act on their part. The post-office inspector ascertained a shortage in the accounts of Verlander as postmaster, and demanded that it be arranged by a given time. Verlander, as a means of raising \$3,000 to meet it, proposed to his sureties to make a note to be signed by Mr. and Mrs. Rock and his own wife, and secured by a deed of trust, and to be indorsed by the sureties, and discounted by the Huntington Bank. This would answer the purpose of meeting the government's debt, and save the sureties. Enslow called at Verlander's house to see him, but did not find him, but, meeting Rock and Verlander's wife, said to them that Verlander was in debt to the post-office, and all that could be done to save him was for Mrs. R. to sign a note, and he would get the money from the bank; and Rock said that neither he nor his wife would do so. This is Rock's statement. Mrs. Rock says only that she heard Enslow say to Mrs. V. that, if she (Mrs. R.) would sign a note, he would get the money. Mrs. V. says that Enslow said the shortage ought to be fixed, and she asked him how it could be fixed, and he replied that the only way he knew was to get her mother to give notes, and she said she was afraid her mother would not do so, and he said he would let them talk it over till morning, and see her again. Thus, by the evidence of the three parties most interested to say so, Enslow made no agreement to compound a felony or stifle a prosecution, or threat to prosecute if it was not settled, or promise or declaration or even opinion that, if settled, there would be no prosecution. It is not claimed that any other surety took any active part in the matter, nor that Enslow on any other occasion made any agreement to stay a prosecution, or threat to prosecute or not according as the matter should or should not be settled. Mr. and Mrs. Rock say that, the next morning, Capt. Gibson, Mr. Stout, a notary, and Russell, one of the sureties, came to their house, and Gibson asked if they would sign those papers, and Mr. Rock replied that neither he nor his wife would do so, and he said then there was no chance but for Verlander to go to the penitentiary. Mrs. Rock then asked him what he was going to do, and he replied she could suit herself; and thereupon Mamie Verlander went to her grandma crying, saying, "Ma, will you let papa go to the penitentiary?" when her grandmother also wept. Capt. Gibson then called Mrs. R. into the music-room, away from Russell, and said:

"Will you let your little grandchildren be disgraced by not signing those notes? We have issued a warrant for him to bring him to Charleston. The train will soon be here, and, if we don't make haste, we will be late." Mrs. R. says she then signed them, and Russell asked to look at the papers, and said: "That is all right. I will pay the money." Mr. Rock says that Gibson said the United States inspector had a warrant of arrest in his pocket; differing from his wife as to who had the warrant. He says they became frightened, and signed the papers to save Verlander from the penitentiary, and his family from disgrace. Mrs. R. does not in her version make Russell present when Gibson said Verlander would go to the penitentiary.

This is the strength of the case as made by the plaintiffs by their own evidence. Russell said nothing in this interview; indeed, was not present when the conversation took place between Capt. Gibson and Mrs. Rock in the music-room. He was the president of the bank, and was there to see that the papers were such as the bank would discount, and that he could be a witness to their execution. Mrs. Verlander had sent for Capt. Gibson, an attorney, to advise with her about the unfortunate state of things, as she says. He was not acting for the sureties, but for the interest of the other parties. Are they responsible for his action? It was held not, in *Compton v. Bunker Hill Bank*, 96 Ill. 801, 36 Am. Rep. 147. These sureties having a just debt, or a right to be indemnified, is a security taken, which inures to their benefit, to be avoided by the advice or influence of one who acted not for them? Taken in the strongest view in favor of plaintiffs, it amounts only to this: that they made the note to raise money to pay the debt under the hope or expectation that it would save Verlander from prosecution, with no agreement on the sureties' side to compound or stifle or prevent it. Is it possible that, when these parties had a just demand or right to indemnity, merely requiring this security vitiates it? It is true, as laid down in *Bishop on Contracts* (section 493), that where the agreement is not technically a compounding, but tends to impede or discourage the orderly prosecution, of crime, public policy is violated. That it is so, for example, of an undertaking to stifle a prosecution, or influence its favorable termination; and it is the same of a promise or security given with a mere expectation that it will have such effect, or prevent a prosecution from being commenced. But in section 494 he says: "This doctrine does not render void a promise or security given as mere amends for the civil wrong involved in the criminal transaction. For example, a thief may make a valid promise to restore or pay for the thing stolen. Even a threat of prosecution will not invalidate the civil adjustment, if in itself fair and correct." And Wharton, *Crim. Law*, § 1559, says: "The bare taking of one's goods back again, or receiving reparation, is no offense, unless some favor is shown, or agreed to be shown, to the thief." These sureties did nothing objectionable. The whole case, to one reading it, makes it clear that they did not induce the giving of the note, anxious though, doubtless, they were to be saved from

loss; for the note was Verlander's effort to raise money for his own use, to pay a debt of his to the government; and it was not the threat of the sureties that induced his father-in-law and his wife to incur the liability. The evidence shows that Mrs. Verlander was anxious to pay, in order to retain the office; and it is likely that the tears of the daughter of Verlander were eloquent with her grandma, and the desire to save her blood from shame and disgrace a potent argument moving them in their action. Verlander himself is dead, and his lips have not spoken in the case.

When we take the evidence of the defense, the weak case made by the plaintiffs is utterly overthrown. The evidence of Enslow and Gibson contradict in every material point the evidence of the Rocks. Enslow says he did say to Mrs. Verlander and Rock that if Verlander was really in default, and failed to pay when the government demanded the money, it would be a criminal act, and he would have to account for the money or be prosecuted; but that he never stated that he had a warrant for Verlander, or that the sureties would arrest him, and never requested Rock to sign a note, and was not present when it was signed. Gibson says he was sent for by Mrs. Verlander in the trouble, and she or her daughter asked him to go to see Rock and his wife, which he did, and they flatly declared they would do nothing to help Verlander; but, after talking awhile, asked his advice, and he told them it was purely a family matter, and he would not advise any course; that, later, he and Rock and Mrs. Verlander and her daughter talked the matter over, and, still later, Rock came to

him to announce to him that they would arrange the matter. He says, when at the house when the papers were executed, he still refused to advise any course, and took Mrs. Rock out of the room in order that Russell might not hear their conversation; that he never said that he or anyone else had a warrant; never mentioned a train, or that it would soon come, and never threatened; that on the first visit, when Russell was not present, he did tell them that he had heard that the commissioner was going to arrest Verlander, if the matter was not arranged, but it was not as a threat, but as counsel and friend of the family. He states: "This is the first time I ever heard that the deed of trust was not made voluntarily, and it is the first time I ever heard that any threats were made." Russell says that, on the occasion when the deed was made, no business was talked of between Gibson and the Rocks in his presence, but they went to another room; and it thus appears that, if Gibson did say that Verlander would go to the penitentiary unless the matter was fixed, Russell was not present, or a party to it by even silence. I think it clear that, after full consideration by Verlander, his wife, his daughter, and Mr. and Mrs. Rock, they voluntarily made this note to retain the post-office or to avoid prosecution, and that there was no unlawful agreement, express or implied, on the part of the sureties. Duress, I think properly, is not relied upon as an element in the case.

I think the Circuit Court of Cabell County passed properly on the evidence and law, and its decree is affirmed.

MINNESOTA SUPREME COURT.

Josiah C. HUNT, *Resp't.*,
v.

W. S. CONRAD, Impleaded, etc., *Appt.*

(.....Minn.....)

*1. A right to recover damages for a personal tort (false imprisonment) is a mere

*Head notes by DICKINSON, J.

personal right, and not assignable even after verdict, but before judgment.

2. After judgment for such a cause, recovered against several defendants, one of them is entitled to have set off against such judgment another judgment which he had recovered against the plaintiff, the latter being insolvent.

(December 22, 1891.)

NOTE.—Assignability of cause of action for personal tort.

The general rule of the common law is *actio personalis moritur cum persona*. Chamberlain v. Williamson, 2 Maule & S. 400.

This rule did not permit a demand arising out of a tort to be assigned, but in consequence of the enactment of statutes and the liberal construction given to them the doctrine was finally established that all demands arising in tort which survived to the personal representatives were assignable. Mackey v. Mackey, 43 Barb. 58.

And it has been held that the assignment is void only as respects third persons but is binding between attorney and client. Patten v. Wilson, 34 Pa. 300.

Test of assignability.

Mere personal torts which die with the party and do not survive to his personal representative are not capable of passing by assignment. Comegys v. Vasse, 26 U. S. 1 Pet. 213, 7 L. ed. 117.
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Any interest to which the personal representatives of a deceased party would not succeed is not the subject of assignment *inter vivos*. Zabrickie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551.

The power to assign and transmit to personal representatives are convertible propositions. Byrle v. Wood, 24 N. Y. 607; Dinniny v. Fay, 30 Barb. 18.

All such rights of action for a tort as would survive to the personal representatives may be assigned. Tyson v. McGuinnis, 26 Wis. 601.

If the cause of action is separable from the person of plaintiff as evidenced by the fact that it would survive to his personal representative it may be assigned. North v. Turner, 9 Serg. & R. 248.

Whatever choses in action are transmissible by operation of law are assignable in equity. Grant v. Ludlow, 6 Ohio 61. 37.

In Robinson v. Weeks, 6 H. & W. Pr. 161, the court states that the whole difficulty in regard to the question of the assignability of actions for tort seems to have arisen from not distinguishing be-

APPPEAL by defendant, W. S. Conrad, from an order of the District Court for Cottonwood County denying his motion to set off against a judgment recovered against him and two others in an action for damages for false imprisonment, a judgment which he individually had recovered against plaintiff in that action. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Rea & Hubachek*, for appellant: Judgments may be set off against each other. *Temple v. Scott*, 3 Minn. 419.

Although the parties to both records are not the same.

Simpson v. Hart, 14 Johns. 63; *Graves v. Woodbury*, 4 Hill, 559, 40 Am. Dec. 296; *Roberts v. Biggs*, Barnes' Notes of Cases, (Eng.) 146; *O'Connor v. Murphy*, 1 H. Bl. 657; *Dennis v. Elliott*, 2 H. Bl. 588; *Hanchett v. Gray*, 7 Tex. 549; *Davidson v. Alfaro*, 80 N. Y. 660; *Crocker v. Cloughley*, 2 Duer, 684; *Russell v. Conway*, 11 Cal. 93.

This should be done where the debtor in one judgment is insolvent, and the other judgment debtor, if he be compelled to pay, cannot obtain contribution from his co-judgment debtors.

Simpson v. Hart and *Hanchett v. Gray*, *supra*; *Hollis v. Morris*, 2 Harr. (Del.) 8; *Davidson v. Alfaro*, *Crocker v. Cloughley*, and *Russell v. Conway*, *supra*; *Duncan v. Bloomstock*, 2 McCord, L. 318, 13 Am. Dec. 738; *Greene v. Hatch*, 12 Mass. 201; *Smith v. Ful-*

ton, 48 N. Y. 419; *Sanders v. Gillett*, 8 Daly, 183; *Chamberlin v. Day*, 3 Cow. 353.

A court of equity will even order a set-off in case of insolvency, where one of the demands has not yet been reduced to judgment. *Pignolet v. Geer*, 19 Abb. Fr. 264; *Barber v. Spencer*, 11 Paige, 517, 5 L. ed. 218; *Bradley v. Angel*, 3 N. Y. 475; *Knapp v. Burnham*, 11 Paige, 380, 5 L. ed. 153; *Gay v. Gay*, 10 Paige, 369, 4 L. ed. 1015.

An assignee of a judgment stands in no better position than his assignor, and set-off will be ordered notwithstanding one of the judgments has been assigned.

Puett v. Beard, 86 Ind. 172, 44 Am. Rep. 280; *Greene v. Hatch*, *supra*.

Even where the assignment has been made after verdict and before the judgment was entered, a set-off will be ordered.

Roberts v. Carter, 24 How. Pr. 44; *Hollis v. Morris*, *Davidson v. Alfaro* and *Crocker v. Cloughley*, *supra*.

A claim for injuries to the person, unlike injuries to property, dies with the person, and it is not the subject of assignment; a verdict rendered upon such a claim is no better than the claim itself; in order to become assignable it must be first reduced to judgment.

Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551; *Comegys v. Vasse*, 26 U. S. 1 Pet. 193, 7 L. ed. 108; *Whitaker v. Gavitt*, 18 Conn. 523; *Butler v. New York & E. R. Co.* 22 Barb. 110; *Hodgman v. Western R. Corp.* 7 How. Pr.

tween cases where the right of action passes to an executor or administrator and mere personal torts, as assault and battery, slander and the like, which die with the person and which cannot be assigned.

The exception to assignability of choses in action is confined to wrongs done to the person, the reputation, or the feelings of the injured party, and to contracts of a purely personal nature like promises of marriage. *Meech v. Stouer*, 19 N. Y. 29.

If upon legal rules injury to the person is the gist of the action, and injury to the property or to pecuniary interests is merely matter of aggravation, the right of action dies with the person. *Fried v. New York Cent. R. Co.* 25 How. Pr. 235.

The action survives where the wrong has inured to the benefit of the wrong-doer or has increased the assets in the hands of his executor. *Re Sibbald's Estate*, 13 Pa. 254; *Penrod v. Morrison*, 2 Penn. & W. 28.

Illustrations of the rule.

Many of the illustrations given below are not actual decisions of the court in the case named but examples used in argument.

It has been held that a cause of action arising out of tort generally is not assignable. *Oliver v. Walsh*, 6 Cal. 453; *Norton v. Tuttle*, 30 Ill. 184.

So action for trespass *quare clausum* has been held not assignable. *Rogers v. Spence*, 13 Mees. & W. 571.

But under the rule as stated above these decisions are too broad. The better opinion is that a claim arising out of a tort which affects the estate of the person may be assigned, though the rule is otherwise when it arises out of an injury to the person. *Dahms v. Sears*, 13 Or. 47.

The weight of authority is that a chose in action for a tort merely personal is not assignable. *People v. Tioga C. P.* 19 Wend. 73; *Gardner v. Adams*, 12 Wend. 247; *Drake v. Beckham*, 11 Mees. & W. 318; *Whitaker v. Gavitt*, 18 Conn. 523.

A cause of action for mere tort is no way affecting property cannot be so assigned that the as-
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signee can sue in his own name. *Hyslop v. Randall*, 11 How. Pr. 97.

Matters of personal tort were not contemplated by the Legislature in enacting the Bankruptcy Law. *Shoemaker v. Keeley*, 1 Yeates, 247.

So an action for malicious abuse of legal process is not assignable. *Sommer v. Wilt*, 4 Serg. & R. 23.

So an action for malicious prosecution will not pass to assignees in bankruptcy. *Noonan v. Orton*, 34 Wis. 269, 17 Am. Rep. 441.

Actions for slander, assault and battery, false imprisonment, criminal conversation, seduction and the like, are not assignable. *Butler v. New York & E. R. Co.* 22 Barb. 110; *Haight v. Hayt*, 19 N. Y. 464; *North v. Turner*, 9 Serg. & R. 248; *Howard v. Crowther*, 8 Mees. & W. 604.

Action for assault and battery is personal to the plaintiff and cannot be assigned. *Pulver v. Harris*, 62 Barb. 500.

Such a cause of action could not be assigned at common law, and cannot under the provisions of the Revised Statutes or Code. *Pulver v. Harris*, 53 N. Y. 75.

A cause of action for injuries to the person caused by negligence is not assignable. *Purple v. Hudson River R. Co.* 4 Duer, 74.

So a right of action for personal injuries received by a collision of cars on a railroad is from its very nature inalienable. *Hodgman v. Western R. Corp.* 7 How. Pr. 492.

And a claim against a railroad corporation for injury to the person does not pass by assignment of his estate under the Insolvent Laws. *Stone v. Boston & M. R. Co.* 7 Gray, 539.

It seems that an action for breach of promise of marriage, for unskillfulness of medical practitioners, or for imprisonment of party for failure of his attorney to keep his engagements, is not assignable. *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551.

The Iowa rule.

A cause of action for a tort to real estate may be

492; *Sibbald's Estate*, 18 Pa. 249; *Jordan v. Gillen*, 44 N. H. 424; Burrill, Assignm. 5th ed. § 103, p. 154; Bliss, Code Pl. § 8844; Minn. Stat. 1878, § 1, p. 825; *Jordan v. Se-combe*, 38 Minn. 220; Pom. Rem. & Rem. Rights, §§ 147-152; *Kellogg v. Schuyler*, 2 Denio. 78.

An assignment of such a claim or verdict cannot defeat a motion for set-off.

Brooks v. Hanford, 15 Abb. Pr. 842; *Lawrence v. Martin*, 22 Cal. 174; *Rice v. Stone*, 1 Allen, 566.

Mr. Lorin Cray for respondent.

Dickinson, J., delivered the opinion of the court:

In November, 1889, in an action in the district court between the parties to this appeal, Conrad recovered a judgment against Hunt for \$325.03 which was docketed in the office of the clerk of the court in Cottonwood County. An execution thereon was returned unsatisfied in August, 1890. On the 21st day of November, 1890, in an action prosecuted by said Hunt against the defendants, Conrad, Hubachek, and Barlow, to recover for false imprisonment, a verdict was rendered in favor of Hunt, and against all of said defendants, for the recovery of the sum of \$150, and on the 5th day of February, 1891, judgment was entered on that verdict. Before the rendition of that judgment, but after the verdict,

sold or transferred so as to give the holder a priority over an attaching creditor of the transferrer. *Weira v. Davenport*, 11 Iowa, 52.

Under the Iowa Code a cause of action based on a personal tort which at common law would have died with the party may be assigned. *Gray v. McCallister*, 50 Iowa, 502; *Vimont v. Chicago & N. W. R. Co.* 64 Iowa, 573.

The assignee of a claim for damages for a personal injury may maintain an action thereon. *Hawley v. Chicago, B. & Q. R. Co.* 71 Iowa, 717.

Where the cause of action for personal injuries arises in Iowa, where it is assignable, the mere fact that it is assigned in a State where such assignment is not permitted will not prevent the assignee from maintaining an action in an Iowa court. *Vimont v. Chicago & N. W. R. Co.* 60 Iowa, 296.

Effect of verdict.

A verdict or report of referees obtained by plaintiff in an action for tort does not change the nature of the demand until judgment is perfected. *Crouch v. Gridley*, 6 Hill, 256; *Thayer v. Southwick*, 8 Gray, 229; *Ex parte Charles*, 14 East, 198, overruling *Longford v. Ellis*, 1 H. Bl. 29, note.

A claim for injuries to the person is not assignable before final judgment thereon. *Rice v. Stone*, 1 Allen, 566.

Actions for injuries to the person which die with him are not assignable before judgment. *Jordan v. Gillen*, 44 N. H. 424.

A verdict in an action for personal injuries is not assignable before entry of judgment. *Stone v. Boston & M. R. Co.* 7 Gray, 539.

A claim of damages for a personal injury is not assignable before judgment. *Linton v. Hurley*, 104 Mass. 353.

No effectual assignment of a sum that may be recovered in an action of trespass for a personal assault can be made before final judgment. *McGlinchy v. Hall*, 56 Me. 152.

A cause of action for malicious prosecution is not assignable even after verdict. *Lawrence v. Martin*, 22 Cal. 173.

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and on the 28th of November, 1890, the plaintiff Hunt executed a formal assignment to one Cray of his right of action, and the verdict thereon, against the defendants, as well as the judgment to be entered thereon. Cray then knew of the existence of the former judgment of Conrad against Hunt, and that it was still unpaid. After judgment was rendered against the three defendants, a motion was made by the defendant Conrad that the same be set off *pro tanto* against the former judgment in his favor against Hunt. This was denied and Conrad appealed.

The assignment to Cray did not affect the right of set-off, for the reason that nothing passed by the assignment. The right of Hunt to recover damages for a merely personal tort was personal to him. His right to recover damages for the unlawful detention of his person, and for his mental suffering or bodily pain, he could not transfer to another, nor upon his death would it have survived to his personal representatives. Such a right has not the ordinary attributes of property, and is not a subject of sale and transfer. *Comagys v. Basse*, 26 U. S. 1 Pet. 193, 7 L. ed. 106; *Rice v. Stone*, 1 Allen, 566; *People v. Tioga C. P.* 19 Wend. 73; *Zabriskie v. Smith*, 18 N. Y. 322, 64 Am. Dec. 551; *Pulver v. Harris*, 52 N. Y. 73; *Lawrence v. Martin*, 22 Cal. 173. Nor does the rendition of a verdict upon such a cause of action make it assignable. *Rice v.*

Under the Georgia Code a verdict for damages for personal injuries is not assignable. *Gamble v. Central R. & Bkg. Co.* 80 Ga. 595.

Conclusiveness of survivability as a test.

An opportunity to determine how far the test of survivability of the action would be held conclusive if all actions for personal torts were made survivable by statute has arisen in the case of verdicts in such actions.

The New York Code has made such verdicts survivable.

An assignment of a verdict for damages for assault and battery was upheld in *Countryman v. Boyer*, 3 How. Pr. 395.

So it was held that an assignment of a verdict of damages for a personal tort may be effectual to prevent a set-off of a judgment between plaintiff and defendant. *Nash v. Hamilton*, 3 Abb. Pr. 35.

On the other hand, it was held that a right of action for assault and battery was not assignable, even after verdict. *Brooks v. Hanford*, 15 Abb. Pr. 342.

When the question again came squarely before the court it was held that since the amendment of the Code, which provides that demands in actions for tort shall survive after verdict, such demands have become assignable as soon as the verdict is rendered. *Zogbaum v. Parker*, 66 Barb. 344, 55 N. Y. 120.

And such may now be considered the settled law in that State. So a verdict for damages for false imprisonment may be assigned. *Mackey v. Mackey*, 43 Barb. 58.

In contrast with the above the court in *Rice v. Stone*, 1 Allen, 566, denied the right to assign a claim for injuries to the person upon the common-law principles of maintenance and the inability of a person to assign things of which he has neither the actual nor potential possession, and stated that the question was not materially affected by the fact that such actions had by recent legislation been made to survive to personal representatives.

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Stone and Lawrence v. Martin, supra; Brooks v. Hanford, 15 Abb. Pr. 342. Only by the rendition of a judgment is such a personal right of action converted into a debt. Nor does the fact that two of these defendants were in no way parties to, nor interested in, the judgment which Conrad had against Hunt, afford a sufficient reason why he should not be allowed to satisfy the judgment of Hunt by setting off against it an equal amount of his judgment against Hunt. He was entitled to enforce his judgment against Hunt. On the other hand, he was liable to Hunt in the full amount of the other judgment, and he had the right to pay it. Hunt is alleged to be insolvent, and that fact is not denied. The other judgment debtors, who are also liable with Conrad, can have no reason to oppose such a motion on the part of Conrad. If the set-off

is allowed, it discharges their obligation to Hunt, and places them under no obligation to Conrad; for there is no right to contribution as between wrong-doers. It makes no difference to them whether Conrad pays the judgment in money, or by offsetting his own judgment. We think that, in view of the fact that the ordinary legal means of enforcing payment of the judgment against Hunt had been resorted to without avail, his judgment creditor was entitled to the simple remedy of having the judgment applied as a set-off in satisfaction of the judgment against himself, notwithstanding the pendency of a suit by a receiver to reach assets alleged to be hidden under a fraudulent trust.

The order is reversed, with directions to the district court to make such further order as may be necessary to effect the set-off.

ALABAMA SUPREME COURT.

KANSAS CITY, MEMPHIS & BIRMINGHAM R. CO., *Appl.*,

v.
E. L. HIGDON.

(.....Ala.....)

1. Sustaining a demurrer to a plea is not prejudicial error if other pleas gave defendant the same advantage that he could have had under the former.

2. The loss of a dog by negligence of a baggage-master will render the carrier liable although a rule of the company provided that it would not be responsible for dogs, where the owner was not notified of such rule or of the company's refusal to be responsible, but put the dog in the baggage-car under instructions of the conductor.

(November 27, 1891.)

NOTE.—Liability of passenger carrier in transporting merchandise intrusted to it by a passenger.

If the carrier is notified that the articles offered by the passenger for transportation are not personal baggage, or if they are carried openly, or so packed that their nature is obvious, and the carrier accepts them for carriage, without objection, the law presumes the undertaking to carry them as baggage, and the liability for their loss is the same as if they were properly baggage. *Thompson, Carr.* 523.

It seems to be the better rule that in order to render a railway company or common carriers liable in such a case, it is necessary to charge them or their servants with actual knowledge that the thing carried was merchandise and not personal luggage. *Wood, Railway Law*, 1523.

In *Stoneman v. Erie R. Co.*, 52 N. Y. 423, a case in which the question was not, however, squarely before the court, *Peckham, J.*, says: "I think it safe to say, that if the carrier knew or had notice of the character of the goods taken as baggage, and still undertook to transport them, he is liable for their loss, although they are not traveler's baggage."

Parke, B., in *Great Northern R. Co. v. Shepherd*, 8 Exch. 30, says: "If the plaintiff had carried these articles exposed, or had packed them in the shape of merchandise, so the company might have known what they were, and they had chosen to treat them as personal luggage, and carried them without demanding any extra remuneration, they would have been responsible for the loss."

A baggage-man having accepted for transportation, along with a passenger's baggage, a box obviously containing merchandise, the carrier is responsible for the transportation and delivery at the passenger's destination. *Waldron v. Chicago & N. W. R. Co.* 1 Dak. 336; *Butler v. Hudson River R. Co.* 3 E. D. Smith, 571.

Where the agent of a carrier, knowing that a

trunk contained a traveling merchant's stock of jewelry, checked it as ordinary baggage, without any concealment by the passenger as to its contents or value, the carrier is liable in case of its loss, as though it were personal baggage. *Jacobs v. Tuttle*, 33 Fed. Rep. 412.

A carrier receiving and checking a trunk containing a stock of jewelry, knowing or having reason to believe that such is its contents, is liable, if the property is destroyed by the carrier's negligence, the same as though the trunk contained wearing apparel. *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 33 Fed. Rep. 417, 40 Am. & Eng. R. R. Cas. 636.

If property offered by the passengers is not represented to be baggage, and is not packed so as to assume that appearance, and it is received for transportation on the passenger train, the carrier assumes the same responsibility for its safe carriage as though it were shipped on a freight train. *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. 12 Wall. 262, 20 L. ed. 423.

In *Chicago, R. I. & P. R. Co. v. Conklin*, 32 Kan. 55, it was held that the carrier's baggage-man having accepted for transportation as baggage certain poles, ropes and canvass, constituting a tent, belonging to an intending passenger, the carrier must account for them as if they were personal baggage.

In *Minter v. Pacific R. Co.*, 41 Mo. 503, the plaintiff delivered to the baggage-man a piece of carpet along with his trunk, which the baggage-man informed him would go safely without checking; it was held that the carrier was liable for loss of the carpet, notwithstanding a rule, of which the plaintiff had no knowledge, prohibited the baggage-man from forwarding any article of merchandise on a passenger train.

When a carrier receives a parcel for transportation as baggage, knowing at the time that its contents are not properly classed as baggage, it will

A PPEAL by defendant from a judgment of the Circuit Court for Jefferson County in favor of plaintiff in an action brought to recover the value of a dog alleged to have been delivered to defendant for transportation and which was never received back again. *Affirmed.*

Defendant in its first two pleas pleaded the general issue and by special pleas set up a rule of defendant regulating the carriage of dogs, which was alleged to relieve it from liability for their loss; averred that defendant was not, and did not hold itself out to be, a carrier of dogs on its passenger trains; that the only compensation provided for their carriage would be personal perquisites to the baggage-master.

Further facts appear in the opinion.

Messrs. Hewitt, Walker & Porter for appellant.

Messrs. Cabaniss & Weakley, for appellee:

A railroad company is liable for the unauthorized, intentional tort of its agent or servant done within the range of his employment.

Gilliam v. South & North Ala. R. Co. 70 Ala. 269, 2 Wood, Railway Law, p. 1194.

He, the traveler, is not presumed to know the rules and regulations of the company, for of necessity they must be many, and to the uninformed intricate.

South & North Ala. R. Co. v. Huffman, 76 Ala. 492, 52 Am. Rep. 349; *Jones v. Cincinnati, S. & M. R. Co.* 89 Ala. 379.

The defendant Company, upon the undisputed evidence, was liable to the plaintiff.

Cantling v. Hannibal & St. J. R. Co. 54 Mo. 885, 14 Am. Rep. 476.

The rule in question, if construed to absolve the Company from liability, and devolve it upon the baggage-master, would be unreasonable and void.

Ibid.; *Mobile & O. R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607; 3 Wood, Railway Law, p. 1525.

If the Company's liability was only that of a bailee for hire or a mandatary, it would be and was liable for the conversion of the bailment, and its refusal to deliver the same to the bailor on demand.

Lay v. Lawson, 23 Ala. 377, 2 Am. & Eng. Encyclop. Law, pp. 56, 58, and notes.

A common carrier may become a private carrier or bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry.

New York Cent. R. Co. v. Lockwood, 84 U. S. 17 Wall. 377, 21 L. ed. 639; *Honeyman v. Oregon & C. R. Co.* 13 Or. 352, 57 Am. Rep. 20, 25 Am. & Eng. R. R. Cas. 380.

Walker, J., delivered the opinion of the court:

The defendant had the benefit under pleas numbered 1 and 2 of the matters set up by the three special pleas, the demurrers to which were sustained. Such being the case, if there was error in sustaining the demurrers, it was error without injury to the defendant, and does not afford ground for a reversal of the judgment. *Louisville & N. R. Co. v. Davis*, 91 Ala. 487.

The appellee was a passenger on the appellant's train from Birmingham to Elliott, a station on the appellant's line of road. When he

be responsible for its transportation as a common carrier, at least to the extent that its agent had notice of the character of the articles. *Texas & P. R. Co. v. Capps* (Tex.) 16 Am. & Eng. R. R. Cas. 118.

But where such a parcel is received by the agent of the carrier, at its destination, and by agreement with the baggage-man there, who had no knowledge of its contents, is allowed to remain in the carrier's baggage-room until the passengers shall re-embark on the carrier's road, the liability, while thus in the possession of the carrier, is only that of a warehouseman. *Ibid.*

A passenger carrier having engaged to transport trunks for a passenger as his baggage, although knowing their contents to be merchandise, is liable therefor, as an insurer, only, for a reasonable time after their arrival at their destination. After such time has elapsed, the liability is only that of a warehouseman. *Hoeger v. Chicago, M. & St. P. R. Co.* 63 Wis. 100, 53 Am. Rep. 271.

A passenger, who, with regular baggage, turns over to the carrier boxes of merchandise, and pays for the excess of weight over the regular baggage allowance, the general character of the shipment being known to the carrier, can recover for the boxes of merchandise in case of loss, although they did not contain strictly "necessary baggage." *Hamburg American Packet Co. v. Gattman*, 127 Ill. 598.

The principle to be extracted from the cases very clearly excludes merchandise, as such, in the idea of baggage for which the carrier is responsible, and therefore, unless it is paid for otherwise than in the price of the passenger's ticket, the carrier is not liable for its loss unless caused by his negligence. *Smith v. Boston & M. R. Co.* 44 N. H. 323.

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If a carrier knowingly receives from a passenger articles as baggage, which are not properly classed as such, either with or without extra charge therefor, it will be liable for their loss, although without its fault. *Oakes v. Northern Pac. R. Co.* 12 L. R. A. 318, 20 Or. 392; *Ross v. Missouri, K. & T. R. Co.* 4 Mo. App. 582.

The same rule is applied where, from the payment for extra weight and other circumstances, the agent had reason to know that the trunk contained valuable merchandise, and yet checked it as ordinary baggage. *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 36 Fed. Rep. 417.

The same liability attaches to the transportation of merchandise of a passenger along with his baggage, for which he pays extra, as though it were properly personal baggage. *Glasco v. New York Cent. R. Co.* 36 Barb. 557.

If the carrier, at the time of checking a trunk, has notice that it contains merchandise other than personal baggage, and charges the passenger extra therefor, the carrier is liable as a carrier of freight. *Sloman v. Great Western R. Co.* 67 N. Y. 208; *Perley v. New York Cent. & H. R. Co.* 65 N. Y. 374; *Millard v. Missouri, K. & T. R. Co.* 86 N. Y. 441.

In the *Millard* Case, *supra*, it was held that separate actions could be maintained for the personal baggage of the passenger, and for the merchandise, for which he paid extra.

If the carrier knows that the parcel offered as baggage by a passenger contains valuable merchandise, and accepts the same upon payment for extra baggage, the carrier is liable for its loss due to negligence of an employé. *Hellman v. Holladay*, 1 Woolw. 365.

In *Belfast & B. R. Co. v. Keys*, 9 H. L. 554, a pas-

boarded the train he went into a second-class car, carrying his dog along with him. When the conductor passed through the train collecting tickets he saw the dog, and then told the appellee that it was against the rules of the Company to carry dogs on its passenger coaches and that he would have to put the dog in the baggage-car. Thereupon the appellee and a brakeman took the dog into the baggage-car, and delivered it to the baggage-master. The appellee testified, without contradiction, that he told the baggage-master to put the dog off at Elliott, and also that he told him that he would not pay him any money for the dog. When the train arrived at Elliott, the baggage-master refused to deliver the dog, unless the appellee would pay him a fee of twenty-five cents. The appellee declining to make this payment, the dog was carried to Memphis, and was lost. The appellee afterwards offered to pay what was due on the dog, but did not renew such offer after he was informed that the dog was lost. There is no evidence to show that when the appellee delivered the dog to the baggage-master he had knowledge or notice of the rule under which the appellant seeks to relieve itself of responsibility. The conductor was acting within the apparent scope of his authority when he gave directions as to the disposition to be made of the dog. When the baggage-master received the dog, there was nothing to indicate that he was acting in his own behalf, rather than as an employé of the appellant and for it. It does not appear that the appellee was in any way made to understand that in reference to the carriage

and custody of the dog he was to look to the baggage-master individually, and not to the Railroad Company. He was not informed that the Company was unwilling to transport the dog or to become responsible for it. He was simply told to leave the dog in another part of the train, and with the person in charge of the baggage. He was not presumed to know the rules of the company as to the kinds of property it would receive for transportation. It does not even appear in this case that the rule relied on was posted in the depot or in any other public place at the station where the appellee was received as a passenger. The rule itself shows that it was the duty of the defendant's employés to give notice to the owners of dogs of the conditions upon which they would be carried by the Railroad Company, and, if the owners were unwilling to accept such conditions, to refer them to the express company. In the present case the conductor permitted the dog to remain on the train, and had it put in the baggage-car, and neither he nor the baggage-master intimated to the appellee that the Company was unwilling to carry the dog or to become responsible therefor. It affirmatively appears that the appellee did not know of the rule in question. He was entitled to rely upon and to follow the instructions given by the conductor. *South & North Ala. R. Co. v. Huffman*, 76 Ala. 492, 52 Am. Rep. 349; *Jones v. Cincinnati, S. & M. R. Co.* 89 Ala. 376; *Lake Shore & M. S. R. Co. v. Rosenzweig*, 113 Pa. 519, 4 Cent. Rep. 712.

A rule of which the passenger has no notice cannot have effect to relieve the railroad

enger, contrary to the rules of carrier, and, in order to avoid the payment of extra toll, took merchandise with him into the carriage, which was afterwards removed by the guard to the luggage van,—held, that in case of its loss, there could be no recovery against the carrier.

Where, after the carrier's ticket-agent had refused to sell a passenger tickets for the transportation of his dogs, the baggage-man on the train, as a matter of accommodation and for a fee, agreed to take charge of them after telling the passenger, "You know the rules about dogs," the carrier is not liable as a common carrier for the loss of one of the dogs. *Honeyman v. Oregon & C. R. Co.* 18 Or. 352, 57 Am. Rep. 20.

In *Cantling v. Hannibal & St. J. R. Co.*, 54 Mo. 385, 14 Am. Rep. 478, a passenger took a dog with him into the coach, but was required by the brakeman to put the dog in the baggage-car, the plaintiff paying the baggage-man for its transportation. A rule of the carrier, of which the plaintiff had no notice, provided: "Live animals are allowed as baggage-men's perquisites." The dog was lost, by being delivered by the baggage-man to the wrong person; it was held that the plaintiff could recover from the carrier the value of the dog.

Goods and samples, constituting a commercial traveler's outfit, are to be considered personal baggage, where the carrier and passenger contracted with a full understanding of the nature of the property, and that it did not consist of ordinary wearing apparel and things carried for use on a journey. *Dixon v. Richelleu Nav. Co.* 15 Out. App. Rep. 647, 30 Am. & Eng. R. R. Cas. 425.

A passenger who, without notice to the carrier, has a trunk containing valuable merchandise checked, about which there is nothing to indicate that it contains other than ordinary baggage, can, 14 L. R. A.

in case of its loss, hold the carrier to no greater liability than that of a gratuitous bailee, that is for gross neglect. *Michigan Cent. R. Co. v. Carrow*, 73 Ill. 348, 24 Am. Rep. 248; *Alving v. Boston & A. R. Co.* 126 Mass. 121, 30 Am. Rep. 607; *Haines v. Chicago, St. P. M. & O. R. Co.* 29 Minn. 160, 43 Am. Rep. 199; *Pennsylvania Co. v. Miller*, 35 Ohio St. 541, 35 Am. Rep. 620; *Smith v. Boston & M. R. Co.* 44 N. H. 325.

A carrier receiving for transportation a trunk of a passenger after he has started, is chargeable with the duties and liabilities of a common carrier with the right to charge a reasonable compensation therefor. *Grafton v. Boston & M. R. Co.* 67 Me. 234; *Wilson v. Grand Trunk R. Co.* 56 Me. 60, 96 Am. Dec. 435.

In *Hudston v. Midland R. Co.*, L. R. 4 Q. B. 366, it was held that the carrier need not carry free for a passenger a spring rocking horse, although weighing less than the limit of "ordinary luggage" allowed, and intended for use in passenger's family.

An agreement to carry a passenger's merchandise as baggage cannot be proved, or the responsibility of a common carrier thereof created, by mere evidence of a custom of passengers to take packages with them, or by evidence that the package was of such form that the baggage-man might infer that it contained merchandise and not personal baggage. *Blumantle v. Fitchburg R. Co.* 127 Mass. 322, 34 Am. Rep. 376; *Alving v. Boston & A. R. Co.* 126 Mass. 121, 30 Am. Rep. 607; *Smith v. Boston & M. R. Co.* 44 N. H. 325.

In *Cahill v. London & N. W. R. Co.*, 10 C. B. N. S. 154, affirmed in 13 C. B. N. S. 818, it was held that the fact that a package bore the semblance of a package of merchandise and was marked "glass" was not sufficient notice to charge the carrier with having undertaken to carry such merchandise as personal luggage.

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company or responsibility for an article accepted for carriage by an employé who is intrusted with the duty of receiving and taking charge of goods for transportation, and who accepts the article in question apparently in the course of his employment and on behalf of the principal. The conductor and the baggage-master could be treated by a person having dealings with the defendant as having all the ordinary powers incident to their respective positions except so far as restrictions are imposed upon their authority which are known or ought to be known, to the person dealing with them. In transacting the business intrusted to them, within the usual and ordinary scope of such business, they act within the extent of their authority; and the principal is bound, provided the party dealing with them acts in good faith, and without notice of any restrictions or limitations upon their authority. (*Wheeler v. McGuire*, 86 Ala. 398, 2 L. R. A. 808; *Louisville Coffin Co. v. Stokes*, 78 Ala. 372;) and the principal is responsible for the act of the agent when done within the apparent scope of his authority, though in violation of a rule or instruction of the principal, which was unknown to the person dealing with the agent. *Gilliam v. South & North Ala. R. Co.* 70 Ala. 268.

In the present case, the baggage-master,

when he received the dog, was engaged in the particular business with which he was intrusted by the defendant. The plaintiff was entitled to suppose that he was dealing with the defendant through its regularly accredited agent in that department of its business. If the defendant was unwilling to receive or to become responsible for the dog, the plaintiff should have been informed to this effect by the agent. No such information having been given, and the rule now set up being unknown to the plaintiff when his dog was received without objection, he was entitled to look to the defendant for its carriage and proper delivery; and as the dog was lost and was not accounted for, the defendant was liable on the undisputed facts shown by the evidence. The plain conclusion from the evidence is that the dog was lost in consequence of the negligence of the baggage-master; and, in the circumstances developed by the proof, the defendant could not shift the liability from itself to the baggage-master individually. *Cantling v. Hannibal & St. J. R. Co.* 54 Mo. 885, 14 Am. Rep. 476; *Minter v. Pacific R. Co.* 41 Mo. 508; *Bishop*, Non-cont. Law, § 1157.

The affirmative charge in favor of the plaintiff was properly given.

Affirmed.

INDIANA SUPREME COURT.

Charles LAMB *et al.*, Appts.,

v.

Milton CAIN *et al.*

(.....Ind.....)

1. The mere adoption by a religious society of a revised confession of faith which is not antagonistic to the old one in force, when property was granted in trust for the maintenance of a meeting house for the society, does not constitute such a conversion or abuse of the trust as to call for the interposition of equity to prevent it.
2. A provision of a church constitution that no change shall be made in it or in the confession of faith unless upon request of two thirds of the whole society means two thirds of the legal votes cast upon the question, and not two thirds of the actual number of members.
3. The decision of the legally constituted ecclesiastical tribunal, having jurisdiction of the matter, that a proposed revised confession of faith and amended constitution, the question of the adoption of which had been submitted to a vote of the society, has become the fundamental belief and constitution of the society is binding upon the civil courts.
4. Members of a religious society who adhere to a revised confession of faith and an amended constitution regularly adopted, which have been declared by the legally constituted ecclesiastical tribunal to be the fundamental belief and constitution of the society,

constitute such society and are entitled to hold property belonging to it; and those who refuse to accept such changes are seceders.

5. A prohibition in the constitution of a religious society of a change in its confession of faith will not prevent the submission to the vote of the society of propositions to make such change and to amend the constitution so as to allow it to be made, at the same time.

(November 6, 1891.)

APPEAL by defendants from a judgment of the Circuit Court for Wayne County in favor of plaintiffs in an action brought to recover possession of, and quiet title to, certain real estate, and to enjoin defendants from exercising control over a meeting house situated thereon. *Affirmed.*

The facts are stated in the opinion.

Messrs. Thomas J. Study and William Lawrence for appellants.

Messrs. John F. Kibbey, John McMahon and Louis B. Grunkle for appellee.

Coffey, Ch. J., delivered the opinion of the court:

This was an action by the appellees, in the Wayne Circuit Court, against the appellants to recover the possession of the real estate described in the complaint, to quiet title thereto, and to enjoin the appellants from exercising any control over the meeting house situated thereon. Upon issues formed the cause was, by agreement, submitted to the court for trial, with a proper request for a special finding of the facts proven, with the court's conclusions of law thereon.

NOTE.—For notes on the relation of civil courts to churches, see *Finley v. Brent* (Va.) 11 L. R. A. 214; *Mt. Zion Baptist Church v. Whitmore* (Iowa) 13 L. R. A. 190, 14 L. R. A.

As the nature of the controversy between the parties fully appears by the special finding of the facts filed by the court, we need not refer to the pleadings in the cause. It appears from the special findings, among other things, that at the time this action was brought, the Church of the United Brethren in Christ was an organized religious society in the United States, having official bodies for the government of the Church, its members, congregations and officers, each being clothed with certain powers as follows.

First. The official board of each congregation, which meets monthly and transacts the business of the congregations. It consists of the recognized preachers, exhorters, leaders, stewards, trustees and Sunday-school superintendents who reside within the bounds of the congregation, or hold membership therein.

Second. The quarterly conference, composed of the presiding elder of the district, and the preacher in charge, and recognized preachers, exhorters, class leaders and stewards, trustees and Sunday-school superintendents, who reside within the district or hold membership therein. It meets quarterly, and among other things appoints trustees of the meeting houses, who hold during the pleasure of the quarterly conference.

Third. The annual conference, which meets yearly, is composed of the elders and licentiate preachers who have been received by the annual conference in each district, and is presided over by a bishop of the church.

Fourth. The general conference, which meets every four years, composed of elders, elected by the church members in every conference district throughout the society.

The official board is subordinate to the quarterly conference, the quarterly conference to the annual conference, and the annual to the general conference, the last being the highest legislative and judicial body of the church.

Some time prior to the year 1800, the Church of the United Brethren in Christ was organized as a religious society. No general conference of the Church was held until 1815, when, on the 6th of June of that year, the first general conference was held at Mt. Pleasant, in Pennsylvania, in pursuance of a call which had before that time been made. This conference formulated a discipline, which contained the rules and doctrine, or confession of faith, of the Church. Some changes in the phraseology of the last clause of this confession of faith were made by the General Conference of the Church of 1819, 1825, 1833, 1837, 1841, and 1857, and in 1885 the confession of faith was as follows:

OLD CONFESSION OF FAITH.

In the name of God we declare and confess before all men, that we believe in the only true God, the Father, the Son and the Holy Ghost; that these three are one—the Father in the Son, the Son in the Father, and the Holy Ghost equal in essence or being with both; that this triune God created the heavens and the earth, and all that in them is, visible as well as invisible; and furthermore sustains, governs, protects and supports the same.

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We believe in Jesus Christ; that he is very God and man; that he became incarnate by the power of the Holy Ghost in the Virgin Mary, and was born of her; that he is the Savior and Mediator of the whole human race, if they with full faith in Him accept the grace proffered in Jesus; that this Jesus suffered and died on the Cross for us, was buried, arose again on the Third day, ascended into Heaven and sitteth on the right hand of God, to intercede for us, and that He shall come again at the last day to judge the quick and the dead.

We believe in the Holy Ghost; that He is equal in being with the Father and the Son, and that He comforts the faithful and guides them unto all truth.

We believe in a holy Christian Church, the communion of saints, the resurrection of the body and life everlasting.

We believe that the Holy Bible, Old and New Testaments, is the Word of God; that it contains the only true way to our salvation; that every true Christian is bound to acknowledge and receive it with the influence of the spirit of God, as the only rule and guide; and that without faith in Jesus Christ, true repentance, forgiveness of sin and following after Christ, no one can be a true Christian.

We also believe that what is contained in the Holy Scriptures, to wit: the fall in Adam and redemption through Jesus Christ, shall be preached throughout the world.

We believe that the ordinances, viz.: baptism and the remembrance of the sufferings and death of our Lord Jesus Christ, are to be in use and practiced by all Christian societies; and that it is incumbent on all the children of God particularly to practice them; but the manner in which ought always to be left to the judgment and understanding of every individual. Also the example of washing feet is left to the judgment of everyone, to practice or not; but it is not becoming of any of our preachers or members to traduce any of their brethren whose judgment and understanding in these respects is different from their own, either in public or private. Whosoever shall make himself guilty in this respect shall be considered a traducer of his brethren, and shall be answerable for the same.

This Confession of Faith was never submitted for ratification or adoption to a vote of the members of the Church, but became the confession of faith and doctrine of the Church by reason of its adoption by the delegates to this general conference, and as such it remained until the meeting of the general conference held in May, 1889.

A general conference met in Pickaway County, Ohio, on the 10th day of May, 1841. This conference did not ratify the constitution adopted by the preceding general conference, but adopted another constitution. A motion was made in the conference that a constitution for the better government of the Church be adopted. On the following day the motion for a constitution was called up, a spirited discussion ensued, the vote was taken and carried in favor of a constitution,

years 15, says '1. On motion a committee of nine, one from each conference district—was appointed to draft a constitution. This committee reported a constitution, which was read twice, and laid upon the table until the following morning, when it was read a third time by sections and adopted. This constitution was as follows:

CONSTITUTION OF 1841.

We, the members of the Church of the United Brethren in Christ, in the name of God do, for the perfecting of the saints for the work of the ministry, for the edifying of the body of Christ, as well as to produce and secure a uniform mode of action, in faith and practice, also, to define the powers and the business of quarterly, annual and general conferences, as recognized by this Church, ordain the following Articles of Constitution:

ARTICLE I.

Sec. 1. All ecclesiastical power herein granted, to make or repeal any rule of discipline, is vested in a general conference, which shall consist of elders, elected by the members in every conference district throughout the society; provided, however, such elders shall have stood in that capacity three years, in the conference district to which they belong.

Sec. 2. General conference is to be held every four years, the bishops to be considered members and presiding officers.

Sec. 3. Each annual conference shall place before the society the names of all the elders eligible to membership in the general conference.

ARTICLE II.

Sec. 1. The general conference shall define the boundaries of the annual conferences.

Sec. 2. The general conferences shall, at every session, elect bishops from among the elders throughout the Church, who have stood six years in that capacity.

Sec. 3. The business of each annual conference shall be done strictly according to discipline; and any annual conference acting contrary thereunto shall, by impeachment, be tried by the general conference.

Sec. 4. No rule or ordinance shall at any time be passed, to change or do away the confession of faith as it now stands, nor to destroy the itinerant plan.

Sec. 5. There shall no rule be adopted that will infringe upon the rights of any as it relates to the mode of baptism, the sacrament of the Lord's supper, or the washing of feet.

Sec. 6. There shall be no rule made that will deprive local preachers of their votes in the annual conferences, to which they severally belong.

Sec. 7. There shall be no connection with secret combinations, not shall involuntary servitude be tolerated in any way.

Sec. 8. The right of appeal shall be inviolate.

ARTICLE III.

The right, title, interest and claim of all property, whether consisting in lots of 14 L. R. A.

ground, meeting houses, legacies, bequests or donations of any kind, obtained by purchase or otherwise, by any person or persons, for the use, benefit, and behoof of the Church of the United Brethren in Christ, is hereby fully recognized, and held to be the property of the Church aforesaid.

ARTICLE IV.

There shall be no alteration of the foregoing constitution, unless by request of two thirds of the whole society.

This constitution, together with the confession of faith, which had before that time been adopted, was printed as the constitution and confession of faith of the Church, in the discipline of that year, and in each succeeding discipline every four years up to the year 1889. This constitution was never submitted to the members of the Church for their approval or disapproval, but went into force immediately by virtue of its adoption by said general conference, and thus became the organic law of the Church, and so remained until May 18, 1889.

General conferences of the church were held every four years from 1841 up to and including the year 1889, when the last one prior to this suit was held. On the 8th day of January, 1849, one John Brown was the owner in fee simple of the land in controversy in this suit, and on that day he executed a deed of conveyance for said real estate, donating, giving and granting to Andrew Nicholson, Elias Lamb, Nathan Wilson and Jesse W. Brooks, trustees, and to their successors in office, in trust for the Church of the United Brethren in Christ, to have and to hold, the west half of said real estate forever, without any exception whatever, and the east half thereof "as long as said society, or the citizens of the neighborhood, may continue to use the meeting house as a house of religious worship for the use of the members of the society of the United Brethren Church in the United States, according to the rules and discipline which from time to time may be agreed upon and adopted by the Church at their general conferences in the United States, and in further trust and confidence that they should at all times forever thereafter permit such ministers and preachers belonging to the said Church as should from time to time be duly authorized by the said general conferences to preach and expound God's holy word therein.

At the date of this deed there was, and ever since has been, a meeting house on said land, used for the purpose of religious worship by a congregation of members of the Church of the United Brethren in Christ. It is known as "Sugar Grove Church" and is under the jurisdiction and control of the general conference of the Church of the United Brethren in Christ. The legal title to said real estate has been held and owned by the trustees mentioned in said deed, and their successors in office duly elected and appointed from the date of said deed to the date of the bringing of this suit.

A regular general conference of the Church was held at Fostoria, Ohio, in May, 1885, composed of delegates duly and regularly

chosen under the rules and regulations of the Church provided therefor. At this conference, on the second day, a committee on revision, consisting of thirteen members, known and designated as "Committee No. 6," was appointed, to whom were referred the confession of faith, constitution and section 3 of chapter 10 of the discipline. At a later day in the conference this committee made a report, in which it was resolved that a church commission, composed of twenty-seven persons, be authorized and established, consisting of the bishops of the Church, and ministers and laymen, appointed and elected by that general conference, an equal number from each bishop's district,—except that the pacific district should have two members besides its bishop; that the duties and powers of this commission should be to consider the present confession of faith and constitution of the Church, and prepare such a form of belief, and such amended fundamental rules, for the government of the Church as will, in their judgment, be best adapted to secure its growth and efficiency in the work of evangelizing the world. Provided, first, that the commission shall preserve unchanged in substance the present confession of faith so far as it is clear. Second, that it shall also retain the present itinerant plan. Third, that it shall keep safe the general usages and distinctive principles of the Church on all great moral reforms as sustained by the Word of God in so far as the province of their work may touch them. The report further provided that a majority vote of the commission should be necessary for the adoption of a confession of faith and constitution for submission to the members of the Church; that the commission should meet at such time and place as the board of bishops might appoint, and was excepted to complete its work by January 1, 1886; that the commission should adopt, and cause to be executed, a plan by which the proposed confession of faith and constitution might receive the largest possible attention and expression of approval or disapproval by the people of the Church, including all necessary regulations for taking, counting, and reporting the vote; and that when the result of the vote of the Church showed that two thirds of all the votes cast had been given in approval of the proposed confession of faith and constitution it should be the duty of the bishops to publish and proclaim said result through the official organs of the Church: whereupon the confession of faith and constitution, thus ratified and adopted, should become the fundamental belief and organic law of the church. And providing further that the adoption of the constitution aforesaid should in no way affect any legislation of that general conference of the quadrennial.

This report was signed by eleven of the thirteen members of the committee, and there was also a report signed by the same members of the committee recommending a law on the subject of secret combinations to take the place of section 3 of chapter 10 of the discipline on that subject. A minority of the committee, consisting of two members, joined in a minority report denying the authority
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of the general conference to alter or amend the constitution of the Church, without first securing the consent of the members of Church by a two-thirds vote. The majority report was adopted by the conference, and on a subsequent day of the conference the members of the church commission were chosen, as provided for in the report.

In pursuance of this action of the general conference, this church commission so chosen met in Dayton, Ohio, on the 17th day of November, 1885, and formulated a confession of faith and amended constitution, to be submitted to the members of the Church for their approval or rejection, said revised confession of faith and constitution being as follows:

REVISED CONFESSION OF FAITH.

In the name of God we declare and confess before all men the following articles of our belief:

ARTICLE I.

Of God and the Holy Trinity.

We believe in the only true God, the Father, the Son and the Holy Ghost; that these three are one—the Father in the Son, the Son in the Father, and the Holy Ghost equal in essence or being with the Father and the Son.

ARTICLE II.

Of Creation and Providence.

We believe this triune God created the heavens and the earth, and all that in them is, visible and invisible; that He sustains, protects and governs these, with gracious regard for the welfare of man, to the glory of His name.

ARTICLE III.

Of Jesus Christ.

We believe in Jesus Christ; that He is very God and man; that He became incarnate by the power of the Holy Ghost and was born of the Virgin Mary; that He is the Savior and Mediator of the whole human race, if they with full faith accept the grace proffered in Jesus; that this Jesus suffered and died on the cross for us, was buried, rose again on the third day, ascended into Heaven, and sitteth on the right hand of God to intercede for us, and that He will come again at the last day to judge the living and the dead.

ARTICLE IV.

Of the Holy Ghost.

We believe in the Holy Ghost; that He is equal in being with the Father and the Son; that He convinces the world of sin, of righteousness, and of judgment; that He comforts the faithful and guides them into all truth.

ARTICLE V.

Of the Holy Scriptures.

We believe that the Holy Bible, Old and New Testaments, is the Word of God; that it reveals the only true way to our salvation; that every true Christian is bound to acknowledge and receive it by the help of the spirit of God as the only rule and guide in faith and practice.

ARTICLE VI.

Of the Church.

We believe in a Holy Christian Church, composed of true believers, in which the word of God is preached by men divinely called, and the ordinances are duly administered; that this divine institution is for the maintenance of worship, for the edification of believers and the conversion of the world to Christ.

ARTICLE VII.

Of the Sacraments.

We believe that the Sacraments, baptism and the Lord's Supper, are to be used in the Church, and should be practiced by all Christians; but the mode of baptism and the manner of observing the Lord's Supper are always to be left to the judgment and understanding of each individual. Also, the baptism of children shall be left to the judgment of believing parents.

The example of the washing of feet is to be left to the judgment of each one, to practice or not.

ARTICLE VIII.

Of Depravity.

We believe that man is fallen from original righteousness, and, apart from the grace of our Lord Jesus Christ, is not only entirely destitute of holiness, but is inclined to evil, and only evil, and that continually; and that except a man be born again he cannot see the Kingdom of Heaven.

ARTICLE IX.

Of Justification.

We believe that penitent sinners are justified before God only by faith in our Lord Jesus Christ, and not by works; yet that good works in Christ are acceptable to God, and spring out of a true and living faith.

ARTICLE X.

Of Regeneration and Adoption.

We believe that regeneration is the renewal of the heart of man after the image of God through the Word, by the act of the Holy Ghost, by which the believer receives the spirit of adoption and is enabled to serve God with the will and the affections.

ARTICLE XI.

Of Sanctification.

We believe that sanctification is the work of God's grace, through the Word and the Spirit, by which those who have been born again are separated in their acts, words and thoughts from sin, and are enabled to live unto God, and to follow holiness without which no man shall see the Lord.

ARTICLE XII.

Of the Christian Sabbath.

We believe that the Christian Sabbath is divinely appointed; that it is commemorative of our Lord's resurrection from the grave and is an emblem of our eternal rest; that it is essential to the welfare of the civil community, and to the permanence and

growth of the Christian Church, and that it should be reverently observed as a day of holy rest and of social and public worship.

ARTICLE XIII.

Of the Future State.

We believe in the resurrection of the dead; the future general judgment, and an eternal state of reward in which the righteous dwell in endless life and the wicked in endless punishment.

AMENDED CONSTITUTION.

In the name of God, we the members of the Church of the United Brethren in Christ, for the work of the ministry, for the edifying of the body of Christ, for the more speedy and effectual spread of the Gospel, and in order to produce and secure uniformity in faith and practice, to define the powers and business of the general conference as recognized by this Church, and to preserve inviolate the popular will of the membership of the Church, do ordain this Constitution:

ARTICLE I.

Sec. 1. All ecclesiastical power herein granted, to enact or repeal any rule or rules of discipline, is vested in a general conference, which shall consist of elders and laymen elected in each annual conference district throughout the Church. The number and ratio of elders and laymen, and the mode of their election, shall be determined by the general conference.

Provided, however, that such elders shall have stood as elders in the conferences which they are to represent for no less time than three years next preceding the meeting of the general conference, to which they are elected, and that such laymen shall be not less than twenty-five years of age, and shall have been members of the Church six years, and members in the conference districts which they are to represent at least three years next preceding the meeting of the general conference to which they are elected.

Sec. 2. The general conference shall convene every four years, and a majority of the whole number of delegates elected shall constitute a quorum.

Sec. 3. The ministerial and lay delegates shall deliberate and vote together as one body; but the general conference shall have power to provide for a vote by separate orders whenever it deems it best to do so; and in such cases the concurrent vote of both orders shall be necessary to complete an action.

Sec. 4. The general conference shall, at each session, elect bishops from among the elders throughout the Church who have stood six years in that capacity.

Sec. 5. The bishops shall be members *ex officio* and presiding officers of the general conference; but in case no bishop be present, the conference shall choose a president *pro tempore*.

Sec. 6. The general conference shall determine the number and boundaries of the annual conferences.

Sec. 7. The general conference shall have power to review the records of the annual

conferences, and see that the business of each annual conference is done strictly in accordance with the discipline, and approve or annul, as the case may require.

Sec. 8. The general conference shall have full control of the United Brethren Printing Establishment, the Home, Frontier, and Foreign Missionary Society, the Church Erection Society, the General Sabbath School Board, the Board of Education and Union Biblical Seminary. It shall also have power to establish and manage any other organization or institution within the Church which it may deem helpful in the work of evangelization.

Sec. 9. The general conference shall have power to establish a court of appeals.

Sec. 10. The general conference may—two thirds of the members elected thereto concurring—propose changes therein or additions to the confession of faith, provided, that the concurrence of three fourths of the annual conferences shall be necessary to their final ratification.

ARTICLE II.

The general conference shall have power, as provided in article 1, section 1, of this Constitution, to make rules and regulations for the Church; nevertheless it shall be subject to the following limitations and restrictions:

Sec. 1. The general conference shall enact no rule or ordinance which will change or destroy the confession of faith, and shall establish no standard of doctrine contrary to the confession of faith.

Sec. 2. The general conference shall enact no rule which will destroy the itinerant plan.

Sec. 3. The general conference shall enact no rule which will deprive local preachers of their votes in the annual conferences to which they severally belong.

Sec. 4. The general conference shall enact no rule which will abolish the right of appeal.

ARTICLE III.

Sec. 1. We declare that all secret combinations which infringe upon the rights of those outside their organization and whose principles and practice are injurious to the Christian character of their members, are contrary to the Word of God, and that Christians ought to have no connection with them.

The general conference shall have power to enact such rules of discipline with respect to such combinations as in its judgment it may deem proper.

Sec. 2. We declare that human slavery is a violation of human rights and contrary to the Word of God. It shall therefore in no wise be tolerated among us.

ARTICLE IV.

The right, title, interest and claim of all property, both real and personal, of whatever name or description, obtained by purchase or otherwise, by any person or persons, for the use, benefit and behoof of the Church of the United Brethren in Christ, are hereby fully recognized and held to vest in the church aforesaid.

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ARTICLE V.

Sec. 1. Amendments to this constitution may be proposed by any general conference,—two thirds of the members elected thereto concurring,—which amendments shall be submitted to a vote of the membership throughout the Church, under regulations authorized by said conference.

A majority of all the votes cast upon any submitted amendment shall be necessary to its final ratification.

Sec. 2. The foregoing amended constitution shall be in force from and after the first Monday after the second Thursday of May, 1889, upon official proclamation thereof by the board of bishops; provided, that the general conference elected for 1889 shall be the lawful legislative body under the amended constitution, with full power, until its final adjournment, to enact such rules as this amended constitution authorizes.

The church commission established a plan of submission of the proposed revised confession and amended constitution to a vote of the members of the Church, in which it was provided:

First. That the confession of faith as a whole should be submitted to a vote of the Church, those favoring its adoption to have written or printed upon their ballots the words, "Confession of Faith, Yes;" those opposed to its adoption to have written or printed upon their ballots the words, "Confession of Faith, No."

Second. That the amended constitution as a whole should be submitted to a vote of the church members, with the following exceptions: article 1, in so far as it related to lay delegation in the general conference, to be voted upon separately; those favoring its adoption to have written or printed on their ballots the words, "Lay Delegation, Yes;" those opposed, the words "Lay Delegation, No;" also section 1 of article 3, to be submitted separately, those favoring its adoption to have written or printed upon their ballots the words, "Section on Secret Combinations, Yes;" those opposed, the words, "Section on Secret Combinations, No;" those favoring the adoption of the remainder of the constitution to have written or printed on their ballots the words, "Amended Constitution, Yes;" those opposed the words, "Amended Constitution, No." It was further provided that the vote should be taken during the month of November, 1888, and that the publishing agent at Dayton, Ohio, should furnish each presiding elder, three months before the time of voting, the necessary number of tickets and return blanks; the presiding elder to distribute them to the pastors in his district, and the pastors to distribute them in proper quantities to their several societies at least ten days before the time of voting. The pastors, leaders and stewards of each society were constituted a local board of tellers, and it was made their duty on the day of voting to enroll the names of all who voted, and to receive no votes except those presented in person by the members on the day fixed for voting by the local board of tellers, except that where a member

was incapacitated by age or sickness to attend, or a minister be absent on his charge, such persons were permitted to send their ballots, with their names signed on the back thereof. The list of voters was required to be preserved for one year, and it was made the duty of each local board of tellers immediately to make a full report of the vote taken, on a blank provided for this purpose, to its annual conference board of tellers, who were to be elected by each annual conference, at the session next preceding the time of voting; and these annual conference boards of tellers were required to receive the returns from the local boards of tellers in the bounds of the conference, and to count and transmit a full and accurate report of the same, on blanks provided, to the general board of tellers on or before January 1, 1889. Provision was also made in cases where the presiding elders or annual conference neglected or refused to comply with instructions. A general board of tellers, consisting of seven persons, was constituted at Dayton, Ohio, whose duty it was to receive the reports from the annual conference boards of tellers, and to count and make a full and accurate report of the same to the board of bishops not later than the 15th day of January, 1889. The board of bishops were directed to prepare a letter addressed to the Church on the work of the commission, to be published through the Religious Telescope—the official organ of the Church—and otherwise, which was done in January, 1886, and the bishop's address, accompanied by the commission act, plan of submission and proposed confession and constitution, were distributed generally throughout the Church immediately thereafter.

During the month of November, 1888, the vote was taken in all respects as provided for in said plan of submission, and the votes were counted and canvassed by the several boards of tellers, as therein provided, and the result of the vote was declared by the general board of tellers on the 15th day of January, 1889, and said result was published in the Religious Telescope on the 23d day of January, 1889, said result being declared to be as follows:

For the Confession of Faith	51,070
Against the Confession of Faith	3,310
For the Amended Constitution	50,685
Against the Amended Constitution	3,659
For Lay Delegation	48,825
Against Lay Delegation	5,634
For Section on Secret Combinations	46,994
Against Section on Secret Combinations	7,298

That the total number of votes cast for and against the several propositions was 54,369.

The enrolled membership of the Church in 1888 was 204,517, said enrollment being made by the preachers of the Church under a disciplinary law, and that at the election held in November, 1888, throughout the Church for delegates to the General Conference of 1889, at which election all the members of the Church, without regard to age or sex, were entitled to vote, the total number of votes cast was 58,839.

The proclamation of the vote as above stated was agreed upon and signed at Chambersburg, Pennsylvania, May 6, 1889, by all the bishops of the Church except one, who was present, but declined to sign; and the same was published in the official organs of the Church, as required in the plan of submission adopted by the general conference.

A general conference of the Church, composed of delegates duly and regularly elected under the laws, rules and regulations of the Church, met at the York Opera House, in York, Pennsylvania, on Thursday, May 9, 1889. On the second day of the conference the church commission, which had been established by the General Conference of 1885, as above stated, submitted to the conference a report of the work done by it in connection with the amended constitution and revised confession of faith, embodying in said report the said constitution and confession of faith, the plan of submission and the action and vote of the members of the Church upon several propositions submitted as stated above. This report was referred to a special committee of seven, with instructions to report to the conference whether the commission had acted in compliance with the instructions of the general conference, and whether the vote had been orderly and regular; and also to recommend to the conference such action as might be deemed proper to be taken in the premises. Five members of this committee, on Saturday, May 11, 1889, submitted to the conference a report commending and approving the work of the commission, and recommending the adoption of the following resolutions:

Resolved, By the General Conference of the Church of the United Brethren in Christ, in quadrennial session assembled in the city of York, Pennsylvania, May 9, 1889, that the recorded proceedings of the commission, including the revised confession of faith and amended constitution, as formulated and submitted to the vote of the Church, together with the methods of submission and all other acts by which the will of the Church was ascertained thereon, are hereby approved and confirmed.

2. That because of the truth that the revised confession of faith and amended constitution as a whole, and all the separate propositions thereof, submitted to the membership of our church, have been adopted by more than the required two thirds of all the votes cast thereon, as required by the general conference of 1885, it is hereby declared and published by this conference, and for itself, that the said revised confession of faith and amended constitution, as framed and submitted by the lawfully constituted commission of the church, are become the fundamental belief and organic law of the church of the United Brethren in Christ, and will be in full force and effect on and after the 18th day of May, A. D. 1889, upon the proclamation of the bishops as provided and ordered in said amended constitution.

A minority report, signed by two members of the committee was also submitted to the conference reciting that the course of the church commission had been irregular in certain particulars therein specified, and suggesting that the general conference sub-

mit such amendments of the constitution to the vote of the people as it might deem wise and prudent, which should be regarded as a petition for such proposed changes. The report of the majority of the committee was adopted upon a roll-call by a vote of 110 for, to 20 against it.

On the 13th day of May, 1889, there was published in the Religious Telescope the proclamation of the board of bishops signed by J. Weaver, J. Dickson, N. Castle, E. B. Kephart and D. K. Flickinger, duly qualified and acting bishops of the Church, publishing and proclaiming the result of the vote of the Church, in accord with the provisions of the General Conference of 1885, said result being as above set forth; and announcing further that the result of said vote being the required two thirds, they did thereby publish and proclaim the document thus voted to be the confession of faith and constitution of the Church of the United Brethren in Christ.

On Monday, May 13, 1889, after the proclamation of the board of bishops had been read to the general conference, fifteen of the twenty members who had voted against the adoption of the report of the committee as above stated, and who had, up to this time, been participating in the deliberations of the body, withdrew from the York Opera House, where the general conference was then being held, and met in a body at the Park Opera House in said city of York, and after organizing, adopted a paper, which stated, in substance, that inasmuch as one hundred and ten of the delegates and members of the general conference did, on May 11, 1889, vote to adopt a new constitution and confession of faith, and did, on the 13th day of May, 1889, through the presiding bishop, declare the same in force, thereby forming a new church, therefore they were declared to have thereby vacated their seats as members of the general conference of the Church of the United Brethren in Christ. Daily sessions of this body were held until the following Saturday, when it adjourned *sine die*.

It transacted business pertaining to the affairs of the Church, claimed to be the true general conference of the Church, and declared its adherence to the old constitution and confession of faith. The persons opposing it, and those acting with them, have since been known and designated as "Radicals."

After the withdrawal of these members, the conference which had been in session at the York Opera House continued its sessions each day until Tuesday, May 21, when it adjourned *sine die*. It adopted a resolution reciting that, whereas, certain delegates—naming them—had actively participated in the proceedings of that body from its organization to the close of its third day's session, and had then vacated their seats and joined in the formation of another church organization, outside and separate and apart from the place properly and officially occupied by the lawfully elected general conference of the Church, therefore resolved, that the aforesaid persons were declared as having irregularly withdrawn from that body and the Church,

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and were, in view of these facts, no longer ministers or members of the Church of the United Brethren in Christ. It also adopted certain rules concerning insubordination of members of the Church, and transacted other business pertaining to the Church. This body and those acting with it have since been known and designated as "Liberals." Those designated as "Radicals" have, since the General Conference of 1889, adhered to the old constitution and confession of faith, and rejected the amended constitution and revised confession of faith; those known and designated as "Liberals" accept the revised confession of faith and amended constitution, and have been since that time acting thereunder and in conformity therewith.

The court further found that since the general conference of 1889, the doctrines and beliefs of the Church, preached from the pulpits and taught in the Sunday-schools of the Church by both "Liberals" and "Radicals" have not been different in any respect from the doctrine preached or taught before said conference was held; and that the new or revised confession of faith is not unscriptural or antagonistic to the doctrines, creed, faith or belief of the Church which existed at the time of the execution of the deed to the land in controversy.

The plaintiffs in this case have been duly elected trustees of said Sugar Grove Church in all respects as required by the rules and regulations of the Church, and were such when this suit was brought, and they and each of them accept the amended constitution and revised confession of faith and claim to be acting thereunder and in harmony therewith.

The defendants have been duly elected trustees of said Church in all respects in conformity to the rules and usages of the Church, but they adhere to the old constitution and confession of faith and reject the amended constitution and revised confession of faith, and that when this suit was brought they were in possession of the property in controversy, and were denying the plaintiffs' right to the possession thereof, or the use of the same, and were excluding the plaintiffs from the possession and use thereof.

It appears by this statement of the facts in the case that there are two church organizations, each claiming to be the church known as the United Brethren in Christ. The central question in the case is this. Which of these organizations is the Church? A proper solution of this question depends upon the correct decision of numerous other legal questions which cluster around it, and upon which its solution depends. In order to understand these questions and properly decide them, in the order in which they are presented, it is necessary to state some of the general principles of law applicable to this class of cases and by which they are governed. The questions which have come before the civil courts concerning the rights to property held by ecclesiastical bodies have been divided into three classes, namely: First, cases where the property which is the subject of controversy has been by deed or will of the donor, or other instrument by

which the property is held, by the express terms of the instrument, devoted to the teaching, support or spread of some specific form of religious doctrine or belief. Second, to property held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and, so far as church government is concerned, owes no fealty or obligation to any higher authority. Third, to cases of property held by a religious congregation or ecclesiastical body which is a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with general ultimate powers of control more or less complete, in some supreme judicatory over the whole membership of that general organization. *Watson v. Jones*, 80 U. S. 18 Wall. 679, 20 L. ed. 666.

As to the first class, it may be said, there is no doubt that a person owning property in his own right may dedicate such property by way of trust to support and propagate any definite doctrines or principles, provided it does not violate any law of morality, and sufficiently expresses in the instrument by which the dedication is made the object of the trust. In such cases, it is the duty of the courts, in a case properly made, to see that the property so dedicated is not divested from the trust attaching to it, and so long as there are persons interested, standing in such a relation to the property as that they have a right to direct its control, they may prevent the diversion of the property to any use different from that intended by the donor. If such trust is confided to a religious denomination or congregation, it is not in the power of a majority of that denomination or congregation, however large the majority may be, by reason of a change of religious views, to carry the property thus dedicated to the support of a new and different doctrine.

Where it is alleged, in a cause properly pending, that property thus dedicated is being diverted from the use intended by the donor, by teaching a doctrine different from that contemplated at the time the donation was made, however delicate and difficult it may be, it is the duty of the court to inquire whether the party accused of violating the trust is teaching a doctrine so far at variance with that intended as to defeat the objects of the trust, and if the charge is found true, to make such orders in the premises as will secure a faithful execution of the trust confided. *Watson v. Jones*, *supra*; *Miller v. Gable*, 2 Denio, 492; *Atty. Gen. v. Pearson*, 3 Meriv. 355; *Watkins v. Wilcox*, 66 N. Y. 654; *Atty. Gen. v. Dublin*, 38 N. H. 460; *Happy v. Morton*, 83 Ill. 398; *Fadness v. Braunborg*, 78 Wis. 257.

But to induce a court of equity to interfere, the case must present a plain and palpable abuse of trust. In the case of *Fadness v. Braunborg*, *supra*, it was said by the court: "It is not the province of courts of equity to determine mere questions of faith, doctrine or schism not necessarily involved in the enforcement of ascertained trusts."

Courts deal with tangible rights, not with spiritual conceptions, unless they are incidentally and necessarily involved in

the determination of legal rights. Such trusts when valid and so ascertained must, of course, be enforced; but to call for equitable interference there must be such a real and substantial departure from the designated faith or doctrine as will be in contravention of such trust."

So, in *Happy v. Morton*, *supra*, it was said: "There must be a real substantial departure for the purposes of the trust, such an one as amounts to a perversion of it, to authorize the exercise of equitable jurisdiction in granting relief."

This language was quoted with approval in the case of *Lawson v. Kolbenson*, 61 Ill. 405.

In the case at bar the land was conveyed to the persons named in the deed as trustees, and to their successors in office, in trust for the Church of the United Brethren in Christ to have and to hold, the west half forever without any exception and the east half thereof "as long as said society, or the citizens of the neighborhood, may continue to use the meeting house as a house of religious worship for the use of the members of the society of the United Brethren Church in the United States, according to the rules and discipline which from time to time may be agreed upon and adopted by the Church at their general conferences in the United States, and in further trust and confidence that they shall at all times forever thereafter permit such ministers and preachers belonging to such church as shall from time to time be duly authorized by the said general conference to preach and expound God's Holy Word therein."

It is quite obvious from the language used in this deed that it was the intention of the donor to place the property in a measure under the control of the general conference, and that the house thereon used for public worship should be used by such minister or preachers as were authorized by such conference to preach. It is but reason, also, to presume that he did not intend that a doctrine antagonistic to that held by the United Brethren in Christ at the time of the donation should be preached in the house of worship situated upon the land. In this case, however, there is an express finding of the circuit court that heard the evidence in the cause to the effect "that since the General Conference of 1889, the doctrines and beliefs of the Church, preached from the pulpits and taught in the Sunday-schools of the Church, by both "Liberals" and "Radicals," have not been different in any respect from the doctrine preached or taught before that conference was held. It is further expressly found by the circuit court "that the new or revised confession of faith is not unscriptural or antagonistic to the doctrine, creed, faith or belief of the Church which existed at the time of the execution of the deed to the land in controversy."

Assuming, without now deciding, that what is termed in these proceedings the new or revised confession of faith, has been legally adopted, and is now the confession of faith of the Church, we are unable to discover such an antagonism between it and the old confession of faith as does, in our opinion amount to a conversion of the trust. It can-

not be said that there is a real, substantial departure from the purposes of the trust, such as would authorize the exercise of the equitable jurisdiction of the courts to grant relief, or that there is a plain and palpable abuse of the trust which calls for the interference of the courts.

There is no claim by either of the parties that this case falls within the rules governing the second class above named, and for that reason such rules need not be examined here.

And this brings us to an examination of the rules of law governing the third class, to which, it is conceded by all the parties to this controversy, the case now under consideration belongs. It may be remarked, at the outset, that the civil courts in this country have no ecclesiastical jurisdiction. There is a complete separation of church and state. Everyone has the legal right to entertain any religious belief, to practice any religious principle and to teach any religious doctrine which does not violate the laws of morality or property, and which does not infringe the personal rights of others, which may seem to him right and proper, without any interference from the courts. The law here knows no heresy and is committed to the support of no dogma. It recognizes the right of the people to organize voluntary religious associations, to assist in the dissemination of any and all religious doctrines, with the exceptions above named, and to create tribunals for the decision of the controverted questions of faith, and for ecclesiastical government of all the individual members, congregations, and officers within the general association. All who unite with such associations, when so organized, impliedly consent to submit to such government. From these considerations the rule in this country has become elementary that when a civil right depends upon some matter pertaining to ecclesiastical affairs, the civil tribunal tries the right and nothing more, taking the ecclesiastical decisions out of which the civil right has arisen as it finds them, and accepts such decisions as matters adjudicated by another legally constituted jurisdiction.

White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends, 89 Ind. 185; *Watson v. Jones*, *supra*; *Dwenger v. Geary*, 113 Ind. 106, 12 West. Rep. 691; *Connitt v. Reformed P. D. Church of New Prospect*, 54 N. Y. 551; *Gaff v. Greer*, 88 Ind. 122; *Harrison v. Hoyle*, 24 Ohio St. 254.

In the case of *White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends*, *supra*, this court said: "The civil courts act upon the theory that the ecclesiastical courts are the best judges of merely ecclesiastical questions, and of all matters which concern the doctrines and discipline of the respective religious denominations to which they belong. When a person becomes a member of a church he becomes so upon the condition of submission to its ecclesiastical jurisdiction, and however much he may be dissatisfied with the exercise of that jurisdiction, he has no right to invoke the super-

visory power of a civil court so long as none of his civil rights are invaded."

In the case of *German Reform Church v. Seibert*, 8 Pa. 291, it was said by the court: "The decisions of ecclesiastical courts, like every other judicial tribunal, are final, as they are the best judges of what constitutes an offense against the Word of God and the discipline of the Church. Any other than those courts must be incompetent judges of matters of faith, discipline and doctrine; and civil courts, if they should be so unwise as to attempt to revise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt, which would do anything but improve either religion or good morals."

In this case it is contended by the appellants that the new constitution and the revised confession of faith were never legally adopted, and that those acting under such constitution and confession of faith have created a new organization, which is not the Church of the United Brethren in Christ, while they, adhering to the old constitution and the old confession of faith, which are still in force and unchanged, constitute the Church, and that they are for that reason entitled to hold and control the property in controversy.

We think it must be true that if the old constitution and the old confession of faith have never been legally changed and are still in force, that those adhering thereto constitute the Church, while, on the other hand, if they have been legally changed and the new constitution and new confession are now the confession of faith and constitution of the Church of the United Brethren in Christ, those who refuse to accept and act under them are to be regarded as seceders, and no longer members of that Church, and have no right to control its property.

In this connection it is contended by the appellants that the constitution could not be changed or amended without a previous request of two thirds of the entire membership of the Church, and that a vote of less than two thirds of the entire membership was not sufficient to authorize such amendment.

While article 4 of the Constitution of 1841 prohibits the general conference from making any alteration in that instrument unless by request of two thirds of the whole society, it is to be observed that it is silent as to the time at which such request shall be made, as well as the manner of making it. It cannot be successfully maintained that the General Conference of 1886 or the commission provided by its action, made any change in the constitution or in the confession of faith. The most that can be said of the action of that conference is that it adopted a plan by which the sense of the society might be taken upon the propriety of making certain amendments to the constitution and of revising the confession of faith. When those proposed changes were submitted to a vote of the members of the society, it is said that less than two thirds voted thereon, and that even if the vote could be treated as a request for such

changes, it did not amount to a request of two thirds of the whole society as provided in the constitution itself. It is undoubtedly true that the organic law cannot be changed in any other manner than that provided by the instrument itself, where it provides for an amendment or change, so the question is fairly presented as to whether the vote in favor of the amended constitution is to be regarded as a compliance with the constitutional requirements relating to amendments. And this involves to some extent the legal mode of ascertaining the number of legal voters at a given election. Upon this subject Mr. McCrary, in his work on Elections, says: "Where a statute requires a question to be decided, or an officer to be chosen, by the votes of a majority of the voters of a county, this does not require that a majority of all persons in the county entitled to vote shall actually vote affirmatively, but only that the result shall be determined by a majority of the votes cast, provided, always, that there is a fair election and an equal opportunity for all to participate. In such a case, the only proper test of the number of persons entitled to vote is the result of the election as determined by the ballot box, and the courts will not go outside of that to inquire whether there were other persons entitled to vote who did not do so. The 'voters of the county' referred to by all such statutes are necessarily the voters who vote at the election, since the result in each case must be determined by a count of the ballots cast, and not by an inquiry as to the number not cast." McCrary, Elections, 3d ed. § 173.

In support of the text are cited *People v. Warfield*, 20 Ill. 163; *People v. Garner*, 47 Ill. 246; *People v. Wiant*, 48 Ill. 263; *Louisville & N. R. Co. v. Davidson County Ct.* 1 Sneed, 692; *Ang. & A. Corp.* 9th ed. §§ 499, 500; *Bridgeport v. Housatonic R. Co.* 15 Conn. 475; *Tulbot v. Dent*, 9 B. Mon. 526; *State v. St. Joseph*, 37 Mo. 270; *St. Joseph Twp. v. Rogers*, 83 U. S. 16 Wall. 644, 21 L. ed. 328; *Cass County v. Johnston*, 95 U. S. 369, 24 L. ed. 417, which fully support it. It is said in some of these authorities that all who absent themselves from the election are presumed to assent to the will of the majority of those voting. Those who refrain from voting must be presumed to know the law and that they will be counted as assenting to the will of those who cast the required number of votes. If we are to take the number of votes cast for and against the amended constitution and revised confession of faith as constituting the whole number of legal votes belonging to the society at the time of the election, these were much more than two thirds of the society expressing themselves in favor of the change; but if we assume, as contended by the appellants, that we are to go beyond the vote cast and inquire into the actual number of voters attached to the church, we have more than two thirds of the votes cast favoring the amendment, and a still larger number acquiescing therein. But we are of the opinion that the number of votes cast at the election is to be considered, for the purposes of this case, as constituting the number of legal voters belonging to the

church. Any other rule would be impracticable and would lead to endless confusion and contention.

As we have already said, the Conference of 1885 did not amend the constitution or revise the confession of faith of the Church, but formulated a plan looking to that end. When the Conference of 1889 met at York, Pennsylvania, the commission on revision reported to it the formulated amended constitution and revised confession of faith, together with the result of the vote thereon. That body, after a consideration of the whole matter, resolved that the revised confession of faith and amended constitution, as framed and submitted by the lawfully constituted commission of the Church, had become the fundamental belief and organic law of the Church of the United Brethren in Christ, and that it would be in full force and effect from and after the 13th day of May, A. D. 1889, upon the proclamation of the Bishops as provided and ordered in the amended constitution.

It is not denied that either the Conference of 1885 or 1889 was in fact the conference of the United Brethren Church, duly elected and organized, but it is asserted that it had no jurisdiction to change the constitution or revise the confession of faith.

As bearing upon this question, it must not be forgotten that the Constitution of 1841 was framed and adopted by a general conference, and went into force without submission to a vote of the members of the Church. It remained the organic law of the society from that date until 1889, a period of more than forty years, and so far as we are able to ascertain from the record before us, the power of the conference to make and adopt such an instrument was not questioned.

In the case of *Chase v. Cheney* (Ill.) 10 Am. L. Reg. N. S. 295, it was decided that the decision of an ecclesiastical court upon an ecclesiastical matter, as to its own jurisdiction, was conclusive upon the civil courts.

It has been held in this State, by repeated decisions, that where a court of limited jurisdiction has jurisdiction to proceed, and does proceed, the same presumptions prevail in favor of its action, and in favor of the verity of its record, as if its powers were general, and that where such a tribunal is required to ascertain and decide upon facts essential to its jurisdiction, its judgment thereon cannot be attacked collaterally. *Stout v. Woods*, 79 Ind. 108; *State v. Wenzel*, 77 Ind. 428; *Featherston v. Small*, 77 Ind. 143; *Stoddard v. Johnson*, 75 Ind. 20; *Ricketts v. Spraker*, 77 Ind. 371.

It will scarcely be denied that the general conference, which is the highest legislative and judicial body in the Church, has power to determine what is the constitution under which it acts, and to determine what is the confession of faith of the Church which it represents. The question as to whether the old confession of faith and the old constitution had been superseded by the new was a question that squarely confronted the Conference of 1889.

Assuming that the action of the commission on revision coupled with the action of

the Conference of 1885, and vote upon the subject of revision and amendment, gave it jurisdiction in the premises, the General Conference of 1889 adjudged and declared that what appears in the record before us as the revised confession of faith and amended constitution was in fact the fundamental belief and constitution of the Church of the United Brethren in Christ in the United States. Who shall question the correctness of its decision or revise it? The civil courts? To do so would be to assume ecclesiastical jurisdiction, a jurisdiction they do not possess. It was clearly an ecclesiastical matter, pertaining to the government of the Church, and the Church, through its legally constituted tribunal, having adjudicated the matter, we think the civil courts are bound by such adjudication. It follows that what appears in the record before us as the amended constitution and revised confession of faith are the constitution and faith of the church known as the United Brethren in Christ, and that those who adhere to them constitute the Church, while those who refuse to do so must be regarded as seceders.

But it is urged that the confession of faith was never legally changed because the Constitution of 1841 forbade any change therein. It is not denied that such confession of faith could be made after a change in the constitution. We know of no reason why the question of revision of confession of faith might not be submitted with a proposition to amend the constitution. The question of construing the Constitution of 1841 was purely for the church authorities. They determined that both questions could be submitted together, and the Conference of 1889 have adjudged that this was legally done. This being a purely ecclesiastical matter, we have no power to review their decision. It is binding upon us as well as the members of the Church, and so we must hold that the confession of faith was legally revised.

It follows from what we have said that the circuit court did not err in its conclusions of law upon the facts, as stated in this record.

Judgment affirmed.

McBride, J., took no part in the decision of this cause.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA

C. F. RAY, *Appt.*

(..... N. C.)

"To sell or deal in tickets issued by a railroad company," which is prohibited by statute unless done by a duly author-

ized agent, does not mean the sale of a single ticket which a person may happen to have that he cannot use, but applies only to the business of selling or buying and selling such tickets.

(December 23, 1891.)

APPPEAL by defendant from a judgment of the Criminal Court for Buncombe County

NOTE.—What constitutes "dealing" or "carrying on business."

Dealing.

The right to deal in bills is not merely a purchase, but includes a taking for collection. *Bank of Alabama v. Knox*, 1 Ala. 118.

The prohibition against dealing in commercial paper by a corporation does not apply to receiving notes on a sale of land and selling them. *Buckley v. Briggs*, 30 Mo. 452.

A taking by a bank of cotton as security for a loan with authority to ship and sell it for the owner at his risk is not a dealing in goods, wares and merchandise within the prohibition of the bank charter. *Bates v. Bank of State*, 3 Ala. 451.

A provision in the charter of a bank that it shall not deal or trade in buying or selling any goods not truly pledged to it for debt is not violated by a single isolated transaction in which the bank for the purpose of raising money takes from another bank a quantity of butter together with a loan of money on an agreement to repay the loan with the market price of the butter. *Sackett's Harbor Bank v. Lewis County Bank*, 11 Barb. 273.

The makers of a note constituting a firm will be considered dealers with the bank which discounts it so as to require actual notice of the dissolution of the firm or its equivalent in order to defeat the liability of all upon a renewal by a part of them although the note was given for the accommodation of a third person, who presented it and procured its discount. *Vernon v. Manhattan Co.*, 17 Wend. 524.

14 L. R. A.

Taking a mortgage to secure the payment of a debt is not within the prohibition against dealing in lands by a foreign corporation. *Blunt v. Walker*, 11 Wis. 349, 78 Am. Dec. 709.

A butcher is not a dealer within the meaning of the North Carolina Act of 1879, § 12, providing for the licensing of occupations. *State v. Yearby*, 82 N. C. 561, 33 Am. Rep. 694.

A miller or manufacturer who buys grain as well as raises it on his own farm, and retails flour elsewhere than at his mill, is subject to a license tax as a "dealer in goods, wares, and merchandise" under a license statute which exempts millers selling at the mill. *Berks County v. Bertolet*, 13 Pa. 522.

Ordinary retail book-sellers are not "dealers in second-hand goods" under an ordinance requiring a license for such dealers because, in connection with their other business and as incidental thereto, they buy and sell second-hand books. *Eastman v. Chicago*, 79 Ill. 178.

One who keeps a store in which intoxicating liquors are kept for sale and are sold by his clerks is a dealer within the meaning of a license law, although he makes no sales with his own hand. *Staté v. Dow*, 21 Vt. 484.

A distiller or rectifier is not a dealer in spirits within the meaning of Stat. 6 Geo. IV., chap. 80, § 124, regulating the strength of spirits. *Wetherell v. Jones*, 3 Barn. & Ad. 221.

The sale of a single lot of spirits which a person has taken for a debt does not make him a dealer within the meaning of U. S. Rev. Stat., § 3242, requiring a special tax. *United States v. Feigelstock*, 14 Blatchf. 321.

convicting him of a violation of the statute regulating the sale of railroad tickets. *Reversed.*

Statement by Merrimon, Ch. J.:

The indictment charges that the defendant "did on the 1st day of September, 1891, and on other days both before and since said date, unlawfully and willfully sell to one A. M. Smith, of the county and State aforesaid, a certain railroad ticket issued by a railroad company, to wit, the Pennsylvania Railroad Company, he, the said C. F. Ray, not being a duly authorized agent of said railroad company, and without having exhibited his authority to sell said ticket, contrary to the form of the statute," etc. The defendant pleaded not guilty, and on the trial the jury rendered a special verdict, the material part of which is as follows: "C. F. Ray, the defendant above named, did on the 1st day of September, 1891, willfully sell to one A. M. Smith a certain railroad ticket issued by a railroad company, to wit, the Pennsylvania Railroad Company, the said Ray not being a duly authorized agent of said railroad company, and not having exhibited his authority to sell said ticket." Thereupon the court adjudged that the defendant was guilty, and gave judgment against him, from which he appealed to this court. The defendant excepted upon the following, as well as other grounds: "(1) It is not alleged or found that the defendant sold or dealt in railroad tickets, but simply that he sold a single railroad ticket; (2) that the defendant is not guilty upon the indictment and special verdict.

Mr. F. A. Sondley, for appellant:

The use of the plural word "tickets" shows that it was the purpose of the Act to prohibit a business and not to prevent a single sale. A man who simply sells a single ticket cannot be said to "sell tickets" or "deal in tickets." A bill of indictment, as well as a special verdict, will never be extended by implication or inference beyond the literal and necessary meaning of its language.

State v. Liles, 78 N. C. 496; *State v. Bus*, 84 N. C. 807; *State v. Bray*, 89 N. C. 430.

The findings of a jury in a special verdict do not add a defective bill of indictment.

State v. Hazell, 100 N. C. 471.

No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.

N. C. Const. art. 1, § 7.

Perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed.

N. C. Const. art. 1, § 31.

No clearer monopoly can be imagined than that which the statute under discussion seeks to create when it says to one man, regardless of his character, capacity and qualifications, "You, and you alone, may deal in railroad tickets. Your neighbor, a man in every way unobjectionable, must not do so." Monopoly is the abuse of free commerce by which one or more individuals have procured the advantage of selling alone all of a particular kind of merchandise, to the detriment of the public.

Bouvier. Law Dict. *ad. verb.* *Monopoly*; *Case of Monopolies*, 11 Coke, 86.

A clerk in a saloon is not a "dealer" within the meaning of a statute as to making sales on Sunday. *Archer v. State*, 10 Tex. App. 482.

A sale by a country merchant of several quarts or gallons of whiskey for domestic purposes on different occasions within twelve months will not make him a wholesale dealer in intoxicating liquors of whom a license is required by a statute which is not aimed at a restriction of the business but merely for revenue. *Rapy v. State*, 47 Ala. 533.

A general dry-goods merchant is not a dealer in tobacco within the meaning of a statute requiring a license of such dealers because he keeps a little plug tobacco for the convenience of customers. *Carter v. State*, 44 Ala. 29.

A single sale of intoxicating liquors is within a license law providing that any person "who shall deal in the selling" of such liquors in certain quantities shall be deemed a retailer. *State v. Paddock*, 24 Vt. 312; *State v. Bugbee*, 22 Vt. 32. But see also *infra*.

A single sale in gross of his whole stock of liquors does not make the seller a wholesale "dealer" within the meaning of the statute requiring such dealers to pay a tax to the State. *Overall v. Bezeau*, 37 Mich. 503.

A single sale of all his stock of tobacco and cigars, made by one whose license had expired, is not made by him as a "dealer" for which a license is necessary. *Goodwin v. Clark*, 65 Me. 280.

The discount of a promissory note or receiving it in payment of a debt due to a bank is not within the provision of its charter that it shall not "deal or trade in buying or selling goods, wares, merchandise or commodities whatsoever;" the prohibition is not against purchases but against buying and selling for the purposes of gain. *Fleckner v. Bank of United States*, 21 U. S. 8 Wheat. 333, 5 L. ed. 14 L. R. A.

631; *Bank of United States v. Waggoner*, 34 U. S. 9 Pet. 375, 9 L. ed. 163.

So the prohibition of unauthorized banking has no application to a single isolated act of loaning money at another place than that at which its charter fixed the place of business. *Potter v. Bank of Ithaca*, 5 Hill, 490; *Suydam v. Morris Canal & Bkg. Co.* 6 Hill, 217.

And a loan of money by a foreign corporation, if it was a single isolated casual transaction not for the purpose of gain but to oblige a customer, is not a violation of a charter provision against using its funds for banking transactions. *Steam Nav. Co. v. Weed*, 17 Barb. 373.

Business.

The word "business" in statutes relating to the observance of Sunday includes the making of contracts. *Bloom v. Richards*, 2 Ohio St. 337.

A contract of hiring for one year, made on Sunday between a farmer and a laborer, is not within a statute against doing business on that day. *Nex v. Whinnash*, 7 Barn. & C. 593.

But a sale of a horse by a horse dealer is. *Fennell v. Ridler*, 5 Barn. & C. 403.

So is loaning money on Sunday "business" within the meaning of a Sunday law. *Troevert v. Decker*, 51 Wis. 46.

So is the procuring and affixing signatures of taxpayers to a petition for the issue of railway bonds. *Deforth v. Wisconsin & M. R. Co.* 33 Wis. 330.

Farming is business for purposes of gain within the meaning of a statute regulating the formation of partnerships, associations, etc. *Harris v. Amery*, L. R. 1 C. P. 143.

Playing upon a musical instrument as a member of a military and quadrille band, by which one earns

No person ought to be deprived of his life, liberty or property, but by the law of the land. N. C. Const. art. 1, § 17.

To demand that the owner of a particular piece of property which he cannot himself actually enjoy with benefit, must either lose it entirely or sell it to a particular person, who, for lack of competition, may buy or not, at his option, and may fix his own price in purchasing, is to deprive such owner of his property otherwise than "by the law of the land."

The term "property" embraces every species of valuable right and interest.

Bouvier, Law Dict. *ad. verb. Property*; *Hoke v. Henderson*, 5 N. C. 17; 1 Bl. Com. * 138; *Slaughter-House Case*, 83 U. S. 16 Wall. 36, 21 L. ed. 394; 2 Kent, Com. * 326.

To demand that a man should relinquish an innocent and honest business in which he is engaged, and for the prosecution of which he has prepared and qualified himself, is to deprive him of his property otherwise than "by the law of the land."

Slaughter-House Cases, 83 U. S. 16 Wall. 127, 21 L. ed. 425; *Hoke v. Henderson*, 15 N. C. 18. See also *Ex parte Garland*, 71 U. S. 4 Wall. 333, 18 L. ed. 366.

It is idle to answer to this that the statute itself, because passed through the Legislature, is "the law of the land."

Taylor v. Potter, 4 Hill, 140; *Cooley*, Const. Lim. * 354; 1 Bouvier, Law Dict. 571; *Davidson v. New Orleans*, 96 U. S. 102, 24 L. ed. 618.

To suppress the business of ticket brokers, except when authorized by railroad companies, is to place an unreasonable restriction upon the liberty of him who would engage in it, to de-

molish his means of earning a livelihood, confiscate his property and obstruct legitimate and beneficial commerce.

See *Yick Wo v. Hopkins*, 118 U. S. 856, 30 L. ed. 220; *Baltimore v. Radecke*, 49 Md. 217; *Dent v. West Virginia*, 129 U. S. 121, 32 L. ed. 625.

It would be idle to assert that, because of the frequency of fraudulent practices among lawyers, the State could abolish the profession and forbid the practice of law. There is no difference in principle between the two cases. The business of ticket brokerage does afford many opportunities for fraud and deceit, and it may on that account be placed under strict police surveillance. But the business serves a useful end, when honestly conducted, and the constitutional liberty of the ticket broker is violated when he is prohibited altogether from carrying on his business.

Tiedeman, Pol. Powers, p. 292.

Messrs. Theodore F. Davidson, Atty-Gen., and F. H. Busbee for the State.

Merrimon, Ch. J., delivered the opinion of the court:

The defendant is indicted for a violation of the statute (Acts 1891, chap. 290, § 1) which prescribes "that it shall be unlawful for any person to sell or deal in tickets issued by any railroad company unless he is a duly authorized agent of said railroad company, and it shall be the duty of said agent to exhibit his authority to sell or deal in said tickets, and the company whose agent he is shall be responsible for his acts as such agent; that any violation of this law shall be a misdemeanor."

his whole support and livelihood, is his business and makes his instrument exempt from attachment under a statute exempting implements of a debtor necessary for carrying on his trade or business. *Goddard v. Chaffee*, 2 Allen, 395, 79 Am. Dec. 736.

The mere renting by a married woman of a few rooms in her homestead occupied by herself and husband is not carrying on business within the meaning of a statute relating to the liability of married women for debt. *Holmes v. Holmes*, 40 Conn. 117.

A wife who buys an engine and machinery to saw lumber on her own land is engaged in "trade or business" within the meaning of a married woman's statute. *Netterville v. Barber*, 52 Miss. 106.

A married woman is engaged in "business on her separate account" within the meaning of a statute requiring her to file a certificate in order to protect her personal property from her husband's creditors where she owns a farm and carries it on for the support of the family. *Snow v. Sheldon*, 123 Mass. 332, 30 Am. Rep. 684.

But a wife was held not to be engaged in "trade or business as a *feme sole*" by reason of carrying on a plantation within the meaning of a statute making married women thus engaged liable on their contract as if unmarried, where it also provided especially as to the liability of the separate estate of a married woman for supplies furnished for her plantation. *Duncan v. Robertson*, 55 Miss. 390.

Keeping a ten-pin alley for the amusement of one's self and family is not "engaging in the business" of keeping such alley under a license statute. *Eubanks v. State*, 17 Ala. 151.

Renting an upper hall or room in one's building for a theatre is not "engaging in or carrying on the

business of keeping a theatre." *Gillman v. State*, 55 Ala. 248.

A person is engaged in the "business of retailing intoxicating liquors" when he sells them for profit or as a means of livelihood, although that is not his sole or exclusive business occupation. *Harris v. State*, 50 Ala. 127.

Selling an occasional drink or bottle of liquor does not necessarily constitute carrying on the business of a retail liquor dealer within the meaning of U. S. Rev. Stat., § 3242. *United States v. Jackson*, 1 Hughes, 531.

A single sale of intoxicating liquors is not "engaging in business" within the meaning of a revenue law which forbids such engaging in business without license, while another statute prohibits "retailing" without license, thereby distinguishing between retailing and engaging in business. *Martin v. State*, 59 Ala. 34; *Well v. State*, 52 Ala. 19; *Moore v. State*, 16 Ala. 411.

But a series of sales for the purpose of profit will constitute engaging in business under such statute. *Well v. State*, *supra*.

A single sale by a manufacturing corporation of another State of an article of its manufacture is "doing business" within the meaning of a provision against doing business before complying with certain conditions. *Boulden v. Estey Organ Co. (Ala.)* May 2, 1891.

Doing a single act of business by a foreign corporation if it be in the exercise of a corporate function is within the prohibition of a statute against "doing business" in the State. *Farrior v. New England Mortg. Secur. Co.* 38 Ala. 275.

But a single purchase of cotton by a corporation of another State is not within a prohibition against "engaging in mercantile business." *Graham v. Hendricks*, 22 La. Ann. 533.

The important words that limit and define the grievance thus prohibited are "to sell or deal in tickets issued by any railroad company." These words imply not simply the sale of a single such ticket as a person may have or obtain not of purpose to sell the same, but the practice or business of selling such tickets for others, or buying and selling them as is ordinarily done by "ticket dealers or ticket brokers." If the purpose had been to forbid the sale of a single ticket that a person might have and could not use himself, the appropriate terms used would have been, "no person shall sell any ticket issued by a railroad company," or "It shall be unlawful for any person to sell any ticket issued," etc., or the like broad and sweeping terms. The phrases, "to sell tickets," "to deal in tickets," imply in business parlance the business of selling or buying and selling such tickets. They imply, not particular sales,—simply a sale,—but a multiplicity of such sales in the sense of a business. The buying and selling of tickets issued by railroad companies to persons traveling over their roads by "ticket dealers" is a common and serious grievance to such companies, and the purpose of the statute is to remedy that evil. It does not extend to the simple sale of a ticket an individual may happen to have that

he cannot use. Such sale does not come within the mischief to be remedied. That the statute (sections 2, 3) requires such companies "to redeem the unused portions" of certain classes of such tickets does not extend or enlarge the meaning and the purpose of the section above interpreted. This requisite is intended simply to provide and facilitate a measure of justice and fair-dealing between such companies and passengers over the respective roads. The scope and purpose of a penal statute cannot be enlarged by mere implication. Such purpose must appear by its terms of necessary implication. In this case the indictment fails to charge the offense prescribed and defined by the statute. It charges the sale of a single ticket, and fails to charge that the defendant sold or bought and sold or dealt in such tickets as a business, as it should have done. The special verdict of the jury is in harmony with the imperfect indictment. The court ought, therefore, to have adjudged that the defendant was not guilty, and that he go without day.

The judgment must be reversed, and judgment entered in favor of the defendant, as indicated. To that end let this opinion be certified to the criminal court according to law.

The making in Colorado of one contract by which an Ohio corporation agreed to build and deliver in Ohio certain machinery and the other party to pay for it did not constitute a "carrying on" of business in Colorado within the meaning of the prohibition of the Constitution and statutes of the State. *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 727, 28 L. ed. 1137.

A life insurance company which is merely collecting premiums and paying losses on old policies is still "doing business" within the meaning of statutes regulating foreign companies. *Price v. St. Louis Mut. L. Ins. Co.* 3 Mo. App. 202.

Such a company must be considered as doing business within the State within the meaning of tax laws also. *Smyth v. International Life Assur. Co.* 35 How. Pr. 126.

A railroad several hundred miles long is "doing business" within a State through which it runs for forty-two miles within the meaning of a statute taxing railroads. *Erie R. Co. v. Pennsylvania*, 88 U. S. 21 Wall. 492, 22 L. ed. 595.

A co-operative association incorporated in Maryland, where its place of business and capital if it has any are, does not "do business" in Pennsylvania within the meaning of statutes requiring certain conditions before foreign corporations can do business in the State, because it makes certain contracts with members who reside in Pennsylvania and a meeting of directors is occasionally held in a town which is partly in each State. *Kilgore v. Smith*, 123 Pa. 43.

Although a single purchase of machinery within the State by a foreign corporation is not "doing business" within the meaning of statutes requiring certain conditions as to appointing an agent, etc., it is sufficient to give a state court jurisdiction in a suit against it on the contract. *Colorado Iron Works v. Sierra Grande Min. Co.* 15 Colo. 499.

A railroad company does not carry on business in a certain place within the meaning of a statute defining the locality of jurisdiction over it merely because it has a station there by which passengers and freight are received and contracts therefor made. *Shiels v. Great Northern R. Co.* 30 L. J. Q. B. 531.

14 L. R. A.

A railroad company is not carrying on business within the meaning of the Bankrupt Act so as to give jurisdiction to a court in bankruptcy proceedings in a district in which no part of its railroad is or is to be constructed and operated, although it has an office in such district where its officers act and its board of directors meet, and where it has contracted debts and made loans, purchases and payments. *Re Alabama & C. R. Co.* 9 Blatchf. 390.

Bringing an action and conducting a litigation is not doing business within the meaning of a statute prescribing certain conditions precedent to the right of a foreign corporation to do business within the State. *Christian v. American Freehold L. & M. Co.* 69 Ala. 198; *Texas Land & Mortg. Co. v. Worsham*, 76 Tex. 556; *Powder River Cattle Co. v. Custer County*, 9 Mont. 145; *Probst v. Board of Domestic Missions*, 3 N. M. 237; *Boulden v. Estey Organ Co.* (Ala.) May 2, 1891; *Scruggs v. Scottish Mortg. Co.* 54 Ark. 566; *Utey v. Clark-Gardner Lode Min. Co.* 4 Colo. 399.

A non-resident manufacturer having a depot and agent in the State for the sale of its manufactures is not doing business within the State within the meaning of a statute taxing sums invested in business by non-residents. *People v. Commissioners of Taxes*, 23 N. Y. 242.

The business of a "slaughterer of cattle" is carried on by parties who furnish a place for the slaughtering, which is done by persons who are hired by the owners of the cattle. *Liverpool New Cattle Co. v. Hodson*, L. R. 2 Q. B. 131.

A hospital to which part of the patients treated pay according to their means is a "business" within the meaning of a covenant in a lease against carrying on "any trade, business, or dealing whatsoever, or anything in the nature thereof." *Bramwell v. Lacy*, L. E. 10 Ch. Div. 691.

A solicitor does not "practice" or "carry on his business" outside of the limits within which he is authorized to practice by his certificate merely by reason of a single isolated transaction outside of such limits. *Re Horton*, 45 L. T. N. S. 541.

B. A. R.

FLORIDA SUPREME COURT:

JACKSONVILLE, TAMPA & KEY WEST
R. CO., *Appl.*,

Charles S. ADAMS.

(.....Fla.....)

- *1. A judgment in ejectment against a body having the power of eminent domain is not a bar to the exercise by such body of such power as to the land recovered in the action of ejectment.
2. Where a body possessing the power of eminent domain has entered upon land without leave of the owner and without complying with the law regulating the exercise of such power, it may condemn the property entered upon, and thereby secure the right to the legal possession and enjoyment thereof; and this, whether it has or has not been ousted from its former or illegal possession.
3. Where a railroad company having the power of eminent domain has entered upon land without the consent of the landowner and without complying with the law regulating the exercise of such power, and has constructed a railroad track thereon, the value of the improvements thus put by the company on the land cannot be included in estimation the damage sustained by the landowner, in proceedings subsequently instituted under such law by the company or its legal successor having similar power to condemn the land, or an easement therein to the company's use; and this, whether the company has been ousted from the former possession or not.
4. Where a railroad company having the power of eminent domain has entered upon land without the consent of the owner and without a certain material requirement of the law regulating the exercise of such power having been complied with, and there has been a judgment in ejectment in favor of the landowner against such company or its legal successor, a lessee for ninety years, and the judgment is affirmed on appeal, the appellate court may, no conduct in bad faith upon the part of the company appearing, withhold its mandate of possession to allow a reasonable time for the institution and consummation of new condemnation proceedings. If the new condemnation proceedings are resisted by the landowner and are dismissed by the trial court on the ground that there is no constitutional law authorizing the same, and this order is appealed from by the company, the appellate court may withhold its mandate for possession until the decision of such appeal, but it should do so only upon the express condition that its action shall not interfere with the landowner's right to sue for mesne profits for the use or retention of the land by the company.

(June Term, 1891.)

*Head notes by RANNEY, CH. J.

MOTION for mandate in an action brought to recover possession of certain real estate in which a judgment of the Circuit Court for Volusia County in favor of plaintiff had been affirmed by the Supreme Court. *Motion denied.*

The facts are stated in the opinion.

Messrs. A. W. Cockrell & Son for the motion.

Messrs. J. R. Parrett and T. M. Day, Jr., contra.

Raney, Ch. J., delivered the opinion of the court:

In the main opinion in this cause, 27 Fla. —, a judgment in ejectment in favor of the appellee, who was plaintiff, was affirmed. Having discovered in our investigations that it was the practice in some appellate courts to withhold the mandate of possession until condemnation proceedings could be prosecuted, we suggested that any motion for such withholding must be made within thirty days. A motion of the character indicated was made by appellant and resisted by appellee, and the mandate for possession was withheld for full consideration of the point.

Pending our consideration of the subject, the appellee moved that the mandate for possession should be sent down, the grounds of this motion being: (1) that sufficient time had elapsed to enable the appellant to institute and consummate the proceedings contemplated in the order of the court withholding the mandate; (2) that proceedings had in fact been instituted and pursued to a final judgment of the Circuit Court of Volusia County, rendered August 10, 1891, refusing to confirm the condemnation of the lands now occupied by the appellant, and sought to be condemned; such refusal being on the ground, urged by the appellee, that since the adoption of the present Constitution of this State there has been no valid constitutional legislation authorizing such condemnation.

As stated in the main opinion, the original condemnation proceedings were instituted in August, 1885, not by the appellant Company, but by the Atlantic Coast, St. Johns & Indian River Railroad Company, of which the appellant Company leased the road in December of the same year for the period of ninety-nine years. It is now shown that on the first day of April of the present year, and within less than thirty days of the filing of the former opinion, it having been filed March 4, the appellant Company filed a petition in the Circuit Court of Volusia County, signed and sworn to by an attorney of the Company, stating that the Company exists under the laws of the State; that the railroad of the Company is now constructed on and across the lands in question, describing them, and that such lands are

NOTE.—For notes on the general question of compensation for lands taken by condemnation, see *Leroy & W. R. Co. v. Ross* (Kan.) 2 L. R. A. 217; *San Diego Land & T. Co. v. Neale* (Cal.) 3 L. R. A. 83; *Schuylkill River East Side R. Co. v. Kersey* (Pa.) 7 L. R. A. 409; *Lake Erie & W. R. Co. v. Scott* (Ill.) 8 L. R. A.

R. A. 339; *Gainesville, H. & W. R. Co. v. Hall* (Tex.) 9 L. R. A. 298.

On the particular questions involved in the above case the opinion is so comprehensive that little is left for annotation.

essential for the use of the corporation, and that the corporation has made its survey and maps thereof by which its road or line is designated, and that it has located its road according to such survey, and has filed certificate of such location, signed by the engineer of the corporation, in the office of the clerk of the Circuit Court of Volusia County; that the use of such lands is necessary for the purpose of operating the railroad, and that the petitioner has not acquired the right to use the same; that petitioner is in possession of the portion of the land actually occupied by the railroad track, and that the appellee, administrator, etc., is in possession of the balance, and that he and Helen Maria Adams, in their own right, own or claim to own the land. The prayer of the petition is for an order for summoning a jury to appraise and value the land and fix the amount of compensation to be paid to the owners, and for such proceedings as are requisite for the petitioner to acquire the right to hold and use the premises for its corporate purposes.

On the day last named the circuit judge made an order directing the sheriff to summon twelve disinterested freeholders, registered voters of Volusia County, as a jury to meet at the court-house on the 7th day of the same month, at an hour stated, to proceed under their oaths, duly administered so to do, to take steps to appraise and value the land described in said petition and order, and to fix the amount of the compensation to be made to the owners of the land by the petitioning corporation. On the 8th of April the jury, who appear to have been sworn, met on the premises, Charles S. Adams appearing for himself in person, and Helen M. Adams appearing by him as her attorney, and the jury then proceeded to view the land and "heard the allegations of the parties," and "appraised, ascertained and determined" the value of the tract of land proposed to be taken, and the damage that would be sustained by the owner by reason of the taking thereof, at \$50, and they fixed the amount of compensation to be made to Charles S. Adams, as administrator, at the same amount, and found that he as such administrator had the sole estate therein; and they state in their report that such "report and verdict are concurred in by ten of the jurors." It is, however, signed by the entire twelve.

To this report Charles S. Adams, as administrator, and individually, and Helen M. Adams, filed objections of which the fifteenth and subsequent are as follows, that since the Constitution of 1885 became operative there are no constitutional legislative proceedings authorizing the condemnation proceedings herein sought to be instituted; (16) that chapter 8595, Acts of 1886, as amended by chapter 8712, Acts of 1887, does not preserve to the landowner whose land is sought to be condemned "the right of trial by jury" secured by section 29 of art. 16 of the Constitution, and is void; (17) that such legislation, so far as it involves jury trials, is offensive to section 20 of art. 3 of the Constitution, which constitutional provision forbids the Legislature from passing special or local laws in regard to summoning and impanneling grand and petit juries; (18) such legislation is offensive to section 3 of the Declaration of Rights: "The right of trial by

jury shall be secured to all, and remain inviolate forever;" (19) the sum of \$50 is wholly inadequate as damages; (20) such legislation is offensive to section 11 of art. 5 of the Constitution, which ordains a separation of the jurisdiction of the circuit court in cases at law and in equity; and for other and further grounds apparent upon the face of the proceedings.

On the 10th day of August, the circuit judge made an order sustaining the exceptions and protests, and refusing a confirmation of the report, and also refusing "to order further proceedings in this matter, on the ground of the unconstitutionality of the law authorizing the same," and dismissing the "case;" to all of which the petitioner excepted.

Upon the entry of the order the Railroad Company entered its appeal to the ensuing term of this court, the judge fixing the penalty of the appeal bond at \$300, which bond has been approved, and the transcript of appeal has been filed in this court, and citation issued and service thereof acknowledged.

It is urged as a reason why the mandate should be issued, or should not be withheld, that the appellee will be entitled to damages on the basis of the value of the land, including the cross-ties and rails, and roadbed or works, put and constructed on the land by the Company. This in our judgment is not the law. It is true that if persons or corporations vested with the power of eminent domain enter upon and appropriate private property to their use, without the consent of the owner, before taking the steps required by law to condemn the same, the owner may resort to trespass for damages, ejectment for possession, or to equity for an injunction against the use of the land. Still where such an illegal entry has been made by a body possessing the power of eminent domain, it may condemn the property entered upon and thus secure a right to the possession and enjoyment thereof. If an entry has been made by the express or implied consent of the landowner, it is clear that he should not have the value of what has been put upon the land; and the better authority is that the same rule also applies in the absence of any consent by the owner. *Lewis, Em. Dom. § 507; Baker v. Chicago, R. I. & P. R. Co. 57 Mo. 265.*

Though, as a general rule, things affixed to the freehold so as to be a part thereof become, as against a trespasser or person entering tortiously, and affixing them, the property of the owner of the soil, this rule is not applicable as against a body having the power of eminent domain and entering without leave and making improvements for the public purpose for which it was created and given such power. The principle controlling the landowner's right to damages in such cases is that he shall have compensation for the damage actually sustained by him, and no more, and that the trespasser's liability shall be likewise limited. This principle is affirmed in *Mississippi, Michigan, Iowa, Illinois, Minnesota, Wisconsin, Oregon, Pennsylvania and Alabama. Louisville N. O. & T. R. Co. v. Dickson, 63 Miss. 380; Morgan's App. 89 Mich. 675; Toledo, A. & G. T. R. Co. v. Dunlap, 47 Mich. 456; Daniels v. C. I. & N. R. Co. 41 Iowa, 52; Chicago & A. R. Co. v. Goodwin, 111 Ill. 273; Grinnell v. First Div. St. Paul & P. R. Co. 26 Minn.*

66; *Lyon v. Green Bay & M. R. Co.* 43 Wis. 588; *Oregon R. & Nav. Co. v. Mosier*, 14 Or. 519; *Western North Carolina R. Co. v. Deal*, 90 N. C. 110; *Texas & St. L. R. Co. v. Matthews*, 60 Tex. 215; *Dietrich v. Murdoch*, 42 Mo. 279; *Indiana, B. & W. R. Co. v. Allen*, 100 Ind. 409, 415, 416; *Lewis*, Em. Dom. § 507.

The Railroad Company, says the Supreme Court of Mississippi, in the case from that State cited above, was a trespasser in constructing its road upon land over which it had not acquired the right of way, but it still had the right to acquire the right of way unaffected by the liability incurred for its trespass; and the trespass is not involved in the determination of the due compensation; the continuing right of the company to secure the right of way, in accordance with its charter, and the nature of its entry on the land and annexing chattels to the soil, distinguish the case from that of a trespasser who affixes chattels to the freehold, and the rule of the common law, established when railroads were unknown, is not applicable. In the latter of the cases cited from Michigan, it being an appeal in a condemnation proceeding, a previous proceeding had been taken by the company, which had thereupon entered and built, and afterwards the condemnation was set aside by the supreme court on appeal, because there had been no notice to Dunlap, the landowner. Afterwards the company instituted the new condemnation proceedings. "The railroad company, whether rightfully or wrongfully," says the opinion, "laid this track while in possession and for the purpose entirely distinct from any use of the land as an isolated parcel. It would be absurd to apply to land so used, and to a railroad track laid on it, the technical rules which apply in some other cases to structures inseparably attached to the freehold. Whatever rule might apply in case of abandonment, it is clear that this superstructure was never designed to be incorporated with the soil except for purposes attending the possession, and in proceeding to obtain a legal and permanent right to occupy the land for this very purpose there would be no sense in compelling them to buy their own property. Whatever right of redress, if any, Dunlap may have for the tortious occupancy previous to these proceedings, or whatever right of property he might have in case the company abandoned the road entirely and left the track untouched, we think that, so long as it is in possession and legal measures are proceeding to secure a right to retain it there, this structure belongs to the company, whether intruders or not." In *Daniels v. C. I. & N. R. Co.*, *supra*, Daniels, without whose permission the company had entered and built, recovered judgment in an action for possession against the company, and the judgment was affirmed on appeal (*Daniels v. Chicago & N. W. R. Co.* 35 Iowa, 129), and then the company instituted condemnation proceedings. "Plaintiff," says the opinion, "has suffered no greater damage than would have occurred to him had the defendants pursued the course pointed out by the statute, which they are not, by this proceeding, pursuing. By these proceedings plaintiff is not deprived of the title to the land; the defendant acquires nothing more than the right to occupy

it for railroad purposes. Had they been instituted prior to, or upon, defendants taking possession of the land, no different right would have been acquired by them than they obtain in the present action. In each case the measure of the plaintiff's damages is the same, namely, the value of the land without regard to benefits resulting from the improvement." In the same State it is held that a railroad company acquires no right to the land until payment of damages. *Henry v. Dubuque & P. R. Co.* 10 Iowa, 540. The just compensation required to be given, observes the Supreme Court of Illinois in *Chicago & A. R. Co. v. Goodwin*, is for that which is taken from the owner, and which is of value to him, and not for something he never owned. In *Justice v. Nesquehoning Valley R. Co.*, 87 Pa. 28, the Pennsylvania case there had also been a judgment in ejectment in favor of the landowners. The court held that the entry was not the case of a mere trespass by one having no authority to enter, but of one representing the State herself, clothed with the power of eminent domain having the right to enter and place the materials on the land taken for public use, materials essential to the very purpose which the State has declared in the grant of the charter; yet a trespass by reason of the omission to do an act required for the security of the citizen, to wit, to make compensation or give security for it; for which injury the citizen is entitled to redress, but not beyond his injury, nor extending to taking the personal chattels of the railroad company laid down for the benefit of the public. The salient features distinguishing the case from that of an ordinary trespass were held to be: the right to enter on the land under the authority of law to build a railroad for public use; the acquisition thereby of a mere easement in the land; the entire absence of an intention to dedicate the chattels entering into its construction to the use of the land; the necessity for their use in the execution of the public purpose; and, lastly, the power to retain and possess the chattels and the structures they compose, by a valid proceeding at law, notwithstanding the original illegality of the entry. The reasoning of the Supreme Court of Alabama in *Jones v. New Orleans & S. R. Co. & Imp. Assn.*, 70 Ala. 227, is substantially the same as that of the Pennsylvania court.

The cases relied upon by the appellee to support his contention do not overcome the conclusions reached by us. In *New York & G. L. R. Co. v. Stanley*, 35 N. J. Eq. 283, the same rule as to damages was enforced, and an injunction granted to restrain an action of ejectment. The original entry had, however, been made under an agreement between a predecessor railroad company and the landowner, of which agreement such railroad company had not, nor had any of its successors, carried out the undertaking to erect a certain depot. It was remarked in this case, as pointed out by appellee's counsel, that on no other hypothesis than this agreement would the appellant have a standing in court to stay the landowner's suit for possession, but of this language it is observed in *Patterson, N. & N. Y. R. Co. v. Kamlah*, 42 N. J. Eq. 93, 98, 4 Cent. Rep. 417, that the court was not laying down the rule to be observed in all cases, but was speaking

merely with reference to the circumstances of that particular case. *Schrader v. DeGraff*, 28 Minn. 299 (*Schrader v. First Dir. St. Paul & P. R. Co.* 5 Am. & Eng. R. R. Cas. 298), was an action of trespass to recover damages against a railroad company for constructing a road across the plaintiff's land without his permission, and it was held that if the ties and rails had increased the value of the farm, the fact of such increase should be considered in estimating the amount of damages, but if the farm was in no way benefited or enhanced in value by the ties and rails being laid across it, no deduction from the damage actually done to the farm should be made on account of the value of the ties and rails. The question of whether the value of the ties and rails should be excluded or be included in valuing the land on a condemnation proceeding was not before the court, nor mentioned. It is true the lower court instructed the jury, in connection with the doctrine just stated, that the ties and rails had become a part of the realty, but the theory of the decision as to the rule of damages was that the landowner could not be made the unwilling purchaser of the ties and rails, or required to pay for them by crediting their value on damages done the land in constructing the road. In *Cohen v. St. Louis, Ft. S. & W. R. Co.* 34 Kan. 158, 22 Am. & Eng. R. R. Cas. 116, the railroad company had entered with the consent of the plaintiff or his agent, and the plaintiff sued in trespass. There was on the land at the time of the entry an old grade which had been constructed by another company and abandoned. It was held that the increased value given to the land by the presence of the old grade should be considered in estimating the damages, but that such increased value was not necessarily what it had cost to build the grade; yet it was also held that no recovery could be had for the increased value given the land by the improvements put on it by the defendant company. In this opinion it is, moreover, said: "It has even been held that where a railroad company enters upon land as a technical trespasser, and afterwards procures the land for its right of way by condemnation proceedings, it is not compelled to pay for the improvements which itself made upon the land while it was technically a trespasser, and before it legally procured its right of way,"—citing *Justice v. Nesquehoning Valley R. Co.* 87 Pa. 28; *Daniels v. C. I. & N. R. Co.* 41 Iowa, 52; *Lyons v. Green Bay & M. R. Co.* 42 Wis. 538; *Greene v. First Dir. of St. Paul & P. R. Co.* 26 Minn. 66. "This," observes the opinion, "seems like justice." The decision in *Hunt v. Missouri Pac. R. Co.*, 76 Mo. 115, is that where a railroad company, having obtained a decree for the condemnation of a tract of land without the knowledge of the owner, erected upon it a building of a permanent character for a depot, and afterwards the decree was held void, the building becomes a part of the realty and could not be removed by the company. The facts in *Price v. Wechauck Ferry Co.*, 81 N. J. Eq. 81, were, that a railroad was built on land on which complainant held a mortgage of prior date duly recorded, and the charter of the company did not permit the building of the road there, but expressly prohibited it. The road was not built under con-

demnation proceedings, but under a grant of right of way from the mortgagor. The question was, whether one having a lien on the railroad for building the same could have the track or improvements reserved from sale under the mortgage. The opinion holds that there was no paramount power of condemnation like that in *North Hudson County R. Co. v. Booraem*, 28 N. J. Eq. 450, (cited *supra*) no power, (the right of eminent domain) to take the property superior to the right of both mortgagor and mortgagee; that where such power exists it confers the power to take the property on making just compensation, which compensation, in so far as the value of the land is concerned, is to be estimated as of the time when possession was taken, and therefore cannot include the value of improvements subsequently put on the property by the party entering under such right, but when the entry is not under that right, the right to take the property on making compensation does not exist, and the party entering and improving does both subject to the right of the prior mortgagee to sell both the land and such improvements. *Meriam v. Brown*, 128 Mass. 391, is to the effect that a railroad corporation which has constructed its track upon a person's land without filing a written location or presenting a plan thereof, or paying or tendering to the landowner any damages for the land so taken, cannot enter upon the land for the purpose of removing the rails laid upon the roadbed, and structures placed upon the land. Such property becomes a part of the realty; and the fact that the original entry and construction were made without objection from the mortgagor in possession cannot avail against the title acquired by the mortgagee by the subsequent foreclosure of the mortgage. The mortgage was of a date prior to the construction of the road. *Lake Erie & W. R. Co. v. Kinney*, 87 Ind. 514, 14 Am. & Eng. R. R. Cas. 309, decides that where a railroad company has entered, as it legally might, under condemnation proceedings, it having deposited the amount assessed by the appraisers, and there is an appeal, and on the appeal the assessment has been increased, but the company has not paid the increased amount, that the owner may recover in ejectment without paying for the improvements placed on the land.

In *Graham v. Connersville & N. C. J. R. Co.*, 36 Ind. 468, the conclusion reached is, that where a railroad company has, without the consent of the owner and without color of title, entered upon land and occupied the same, building a depot and hotel thereon, and afterwards seeks to appropriate the land under the authority of law, the value of the land at the time of the legal appropriation, with the improvements thereon, constitutes the amount for which the company is liable to the owner of the land.

In California, in *California Pac. R. Co. v. Armstrong*, 46 Cal. 85, condemnation proceedings had been commenced against a large number of landowners, but there was no service as to the owners of one tract, yet pending such proceedings it was built upon by the railroad company. There was judgment as to the other lands, but none as to this tract, which the owners sold to Armstrong. Afterwards the proceeding was dismissed as to the particular

tract, and new proceedings of condemnation were begun against Armstrong. There had been an order of court in the former proceeding allowing the railroad company to enter upon and retain possession of the lands pending the proceedings, and bond had been given as required by the statute. Answering the contention that the value of the improvements should be included in estimating damages in the second proceeding, it is said by the court: "Neither the Constitution nor the statute contemplates that a person, whose land is taken in the exercise of the right of eminent domain, shall be entitled to anything beyond a 'just compensation.' He is to be paid the damage he actually suffers, and nothing more. But, to hold that, in addition to the fair value of the land taken, and such other damages as he may suffer by severing it from the remainder of his tract, he shall also recover the value of a railroad track, in the construction of which he never expended a dollar, and which was built by the plaintiffs at their own expense, would be to defeat the obvious intent of the statute by an over-technical construction of it."

In *United States v. Land in Monterey County*, 47 Cal. 515, a condemnation proceeding was begun by the government in 1870 against lands which it had in 1854 entered upon against the will of the owners, erecting thereon a store building which it had ever since occupied as a light-house; and it was held that the value of the improvements should be included in estimating damages. "The law," says the opinion, "did not authorize the United States to take the possession of these lands *manu forti*, and their agents, in entering upon them and ejecting the defendants, were mere tort-feasors. The case is, in this important respect, wholly unlike that of *California Pac. R. Co. v. Armstrong*, 46 Cal. 85. In that case the road track was constructed by the railroad company while its possession of the land of the defendant was rightful, being held at the time in pursuance of pending proceedings for its condemnation; and these proceedings having been dismissed after the construction of the track." The latter of these cases is also cited by the appellee. It does not pretend to overrule the former case, but distinguishes the two by the character of the original entry.

Of the cases cited by the appellee, that of *Graham v. Connersville & N. C. J. R. Co.*, 36 Ind. 463, alone can be claimed to be authority for the contention that in an authorized proceeding for condemnation, the improvements put upon the land by a railroad company, having the right to exercise the power of eminent domain, yet not doing so in a valid manner, should be included in estimating the landowners' compensation or damages. If it be that the rule of the former of the California cases is not more applicable than that of the latter to the facts of the case before us, of which we are not at all satisfied, our views are not shaken by the latter case.

The clear weight of authority, the better reasoning and true right of the matter are against the position of appellee.

II. The authorities at our hands bearing directly or by analogy on the subject of the power and duty of this court to suspend the 14 L. R. A.

warrant are those mentioned in the succeeding paragraph.

In *Pittsburg & S. R. Co. v. Jones*, 59 Pa. 433, the railroad company had entered upon the land under an agreement to purchase, and had built its track thereon. The company failed to pay the purchase money, and there was a decree in favor of the vendors for the sale of the property for the amount due, and the same was sold by the sheriff under the decree, and the purchasers brought ejectment against the company. There had never been any condemnation proceedings against either the former owners or the purchasers at the sheriff's sale. It was said that the sheriff's vendees took the whole title to the land, the legal title of the vendors and the equitable title of the railroad company, and not subject to any easement or right of the company to use any part of it for the track of its road. But it was held by the court that the company under the provisions of its charter had the undoubted right to appropriate the land and to acquire a right to its use upon making compensation to the owners for the damage sustained thereby; and that as the land was indispensably necessary to the company, and the company had the right indicated, it was but just and equitable that, while affirming the judgment in ejectment, all proceedings thereon should be ordered stayed for such reasonable time as might be necessary to enable the company to take proceedings to condemn the land; and that there was no doubt of the court's authority to make the order, or of the propriety of the order, under the circumstances. *O'Hara v. Pennsylvania R. Co.* 2 Grant, Cas. 245. (See also U. S. Dig. vol. 5, first series, p. 300, § 150.)

In *Pittsburg & L. E. R. Co. v. Bruce*, 102 Pa. 28, a canal company had condemned and acquired the easement of a right of way over, and not a fee in, the lands appropriated by it for canal purposes, and afterwards became insolvent and all its properties and franchises were sold to a railroad company, and it was held that the latter company could not construct tracks on such canal right of way without making compensation to the owner of the land, and that the owner of the fee was entitled, where such tracks had been laid without making or tendering compensation, to recover in ejectment against the railroad company; that, the canal having been abandoned as such, its charter as a highway went with it, and the use and occupation of the land reverted to the owner in fee. "We may," says the opinion, "here add, in order to avoid all mistakes and misapprehensions, that the defendants might secure a right of way and secure the work and property which it has put upon the plaintiff's land by having an assessment of damages as provided by law, and if the plaintiff should refuse a stay of execution until that can be accomplished, the court below on application may for that purpose interpose its injunction,"—citing *Justice v. Neaquehoning Valley R. Co.* 87 Pa. 28, in which execution had been stayed in the lower court. The case of *Conger v. Burlington & S. W. R. Co.*, 41 Iowa, 419, is one in which the railroad was built with the knowledge, but without any express permission, of the landowner. The landowner took proceedings to have the dam-

ages assessed and afterwards brought ejectment, the damages not having been paid. The doctrine that the fact that the landowner knowingly permits a railroad company to enter upon his land and build its road, does not estop him from maintaining an injunction restraining the company from using the right of way without making compensation therefor, is fully recognized (*Edbs v. Chicago & S. W. R. Co.* 39 Iowa, 840); and it is asserted that there is no difference in this respect between a proceeding for an injunction and an action of ejectment. The judgment in favor of the landowner was affirmed; but the court said that the action was to be regarded as a mere means of coercing payment of the damages. That if the damages had not been assessed, the defendant might, notwithstanding the action, cause the damages to the landowner to be assessed, and upon payment of them could have the execution, if issued, recalled, and would be entitled to the aid of a court of equity for that purpose; but that in this case, as the damages had been assessed, nothing but payment of them was wanting to entitle the defendant to the continued use of the plaintiff's land, and a suspension of the execution was ordered.

In *Paterson, N. & N. Y. R. Co. v. Kamiah*, 43 N. J. Eq. 98, 4 Cent. Rep. 417, Kamiah claiming that he had never received compensation for land used by the railroad company, brought ejectment to recover the land, and thereupon the company obtained a preliminary injunction to stay the action, on the ground that it had the legal title to the land; but being unable to establish it, prayed a discovery, and also insisted that if it should be unable to establish its legal title, it had an equitable title, which equity ought to protect by decreeing that it retain possession of the premises and consummate its right thereto by awarding just compensation to Kamiah. It was held, after answer, that the injunction should be retained, on the ground that the possession of the premises was originally taken with the knowledge of Kamiah, and continued for about twenty years as part of the complainant's road, with defendant's acquiescence, during which time various negotiations had been between the parties as to compensation, and that the company, the land being indispensable to it, might, by proceeding under its charter, condemn the land, or, if it had not such charter power to condemn, it might make compensation, to be ascertained and awarded in the court of equity. In this case it was said: "Where possession has been taken of land for a public work, and the work has been constructed upon it, but no compensation has been made for the land, if the company in taking possession has acted in good faith under acquiescence of the owner, or by mistake as to the property, or as to the validity of the authority given it so to occupy, and the property is in public use, equity will not permit the company to be disturbed in its possession, provided it make compensation if equity shall so require."

Bartleson v. Minneapolis, 38 Minn. 468, decided June 15, 1885, is a case in which there have been condemnation proceedings and an award of \$400, in August, 1881. The law regulating the subject provided that after the award be-

came final, the city council should cause the amount thereof to be paid, and that in case such payment was not made within one year after the confirmation of the award, or the determination of an appeal, the proceedings should be deemed to be abandoned and that before the payment of the award the owner should furnish an abstract title showing himself to be entitled to the damages allowed, and that in case of neglect to furnish the abstract, or of doubt, the amount awarded should be set apart for whomsoever should be entitled to it and should be paid to any person showing himself to be so entitled. It was admitted on the trial that the plaintiff was the owner except for the condemnation proceedings shown by the defendant. No compensation for the land was ever paid or set apart until July 25, 1884, when the city council set apart in the city treasury the sum of \$400. It was held that the condemnation proceedings were, by the failure to pay or set apart the amount of the award within one year, *ipso facto* abandoned, and that Bartleson was entitled to recover in ejectment. At the close of the opinion is the following observation: To the suggestion that the court may grant to the city equitable relief in the premises, and upon equitable considerations sustained its possession, it is enough to say that if the city could upon any case be relieved from the consequences of the council's failure to comply with the law, no such case is presented by the pleadings or made by the facts found. In the cases of *Harrington v. St. Paul & S. C. R. Co.* 17 Minn. 215, and *Lohman v. St. Paul, S. & T. P. R. Co.* 18 Minn. 174, in the former of which cases no proceedings to condemn had been taken, and in the latter there was, as here, a failure of the commissioners to give notice to the landowners, it was urged that the landowner was entitled to an injunction against the further use of the premises by the railway company, but a stay was allowed, to permit the institution of condemnation proceedings. In the latter of these cases it is remarked: "But it appears that under this appeal, or by some arrangement of the parties, the defendant has constructed and is now operating the road over defendant's land so that great public inconvenience would result if the injunction were to be enforced, and as it further appears from defendant's answer that the proceedings to condemn were taken in good faith and with an honest purpose on the part of the plaintiff to comply with the law, we are of the opinion that the injunction should not be allowed to become operative until suitable opportunity is given to defendant to acquire the right to appropriate plaintiff's land, either by negotiation or by fresh proceedings to condemn."

In *Strong v. Brooklyn*, 12 Hun, 453, the plaintiff recovered judgment for possession of a piece of land which the city was using for public purposes, and the city obtained an order staying the enforcement of the judgment, on the ground that it was about to condemn the land. The order was reversed by two justices, they holding that generally stays of process are granted by reason of something which has taken place pending the litigation or after the rendition of the judgment, and that if no reason of that kind exists the judgment must have its full force and effect, and that no distinction

to be made in the case of a body entitled the right of eminent domain.

a Story v. New York Elev. R. Co., 90 N. Y. 179, 48 Am. Rep. 146, where it was held : the elevated street railroad structure which company was, at the commencement of the , about to erect, and had since been act- erected, constituted a taking and appropri- of plaintiff's property without compen- on, of the seven conclusions reached by court, as summarized in the opinion of y, J., the seventh was: "The injunction ibilitating the continuance of the road in t Street should not be issued until the oad company has had reasonable time : this decision to acquire the plaintiff's prop- by agreement, or by proceedings to con- n the same." In treating of injunctions event the use of property until damages aid, it is said by Lewis on Eminent Do- , § 684, citing *Young v. Harrison*, 6 Ga. 654, *Gammage v. Georgia Southern R. Co.* 65 314; *Lohman v. St. Paul, S. & T. F. R. Co.* inn. 174; *White v. Nashville & N. W. R. Co.* isk. 518, that where the right to relief exists e time of filing the bill, but the defendant he power to acquire the property, and an ction will be prejudicial to the public or efendant, and its postponement no detri- to the plaintiff, the court will withhold njunction until a reasonable opportunity rded to ascertain and pay the compensa-

The authorities sustain the text. See *Harrington v. St. Paul & S. C. R. Co.* 17 215.

Of these cases, except that of *Bartleson neapolis*, 88 Minn. 468, and *Strong v. lyn*, 12 Hun, 488, sustain either expressly analogy the power to withhold the man- or the purpose desired in this cause, and ecepted cases are not, considering the of this case, authority against our power y to do so. The power of courts to tem- ly stay the issuing of executions is exer- says Mr. Freeman, in an almost infinite r of circumstances, in order that the ends tice may be accomplished. In many his power operates almost as a substitute eedings in equity, and enables the de- nt to prevent an inequitable use of the ent or writ. Freeman, Executions, § 82; *U v. Duncan*, 7 Fla. 18; *Robinson v. Fla.* 350; *Granger v. Craig*, 85 N. Y. The withholding of the writ of posses- cases of this kind rests upon the same le that the withholding of an injunction ded on.

There is no such difference between the Con- n of our State and those of the States ch the above decisions were made as these decisions inapplicable here.

The power invoked is one liable to be abused in on Executions, § 82), and should, in gment, be exercised with extreme cau- it we are entirely satisfied that the case is a proper one for its exercise.

The acts of the case are of course such as ated the affirmance of the judgment in nt in favor of the appellee, yet it is it the appellant is a lessee under the

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company by which the original condemnation proceedings were instituted, and that the ap- pellee, whose action was not commenced till March, 1887, knew early in 1885 that the lands were occupied, which occupation must, as the lease was not made till December of that year, have been by the lessor company, although the appellee does not say which company it was. It is also true that there is in the record such evidence of notice having been given to the appellee by the condemnation commis- sioners, by advertisement, as renders the con- test of the title by the appellant one of good faith, as it does his entry under the lease, and there is nothing in the record tending to show that the appellant has acted otherwise than in good faith and with honest purposes in any of these proceedings. Moreover, upon the rendi- tion of our judgment affirming the recovery in ejectment, new condemnation proceedings were promptly instituted, and duly prosecuted, against the resistance of the appellee and the other owner of the land, and the circuit judge dismissed them on the ground that our legisla- tion is invalid and unconstitutional. From this judgment an appeal has been taken to this court, and the appeal transcript has been filed. In view of this decision the railroad company has certainly done all it can do, unless and until the judgment appealed from shall be re- versed. It is also entitled to a decision of the question on the appeal. If that judgment is erroneous, the company should not suffer from it; if it is right, any damage the appellee may sustain by reason of the possession of the land can be compensated in money, and is wholly inconsiderable in comparison with the damage and inconvenience which the appellant and the public will incur should we refuse to with- hold the mandate. To permit the mandate to go now would not only be contrary to the principle and practice announced and estab- lished by the above authorities, but, it seems, would, in view of our affirmance of the judg- ment in ejectment, put it beyond the power of the circuit court to grant any similar relief as to its own writ, unless we should direct the allowance of such relief. Freeman, Execu- tions, § 32; *Marysville v. Buchanan*, 8 Cal. 212; *Dibrell v. Eastland*, 3 Yerg. 306. A judg- ment in ejectment is never a bar to condemna- tion proceedings, nor does it award any recov- ery of mesne profits for occupation of the land after its rendition; nor can the question of such subsequent mesne profits be considered in con- demnation proceedings, they being the subject of an independent action. There has been no obstacle to the collection of the recovery for mesne profits and costs adjudged in the action of ejectment, even if, in view of what has passed at our bar, it could be thought that the same were not paid last spring. The with- holding of the mandate should not interfere with appellee's right to sue for the mesne prof- its accruing subsequently to those recovered in the ejectment action and upon condition that it shall not, the mandate will be withheld till the further order of the court, and the motion of the appellee will be denied. It will be or- dered accordingly.

OREGON SUPREME COURT.

William R. MEGGINSON *et al.*, Appls.,
v.

Julia MEGGINSON *et al.*, Repts.

Re Estate of George R. MEGGINSON, Deceased.

(.....Or.....)

All the presumptions necessary to make a marriage valid attach on proof of a formal ceremony of marriage by a person assuming to act as a minister of the gospel, followed by cohabitation under the belief of the parties that they were lawfully married; and the burden is on those who attack the validity of the marriage to show its invalidity by clear, distinct, positive and satisfactory proof.

(December 14, 1891.)

APPEAL by petitioners from a decree of the Circuit Court for Benton County directing the distribution of the estate of George R. Megginson, deceased, among persons claiming to be his widow and children. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. John Burnett and John Kelsay*, for appellant:

To be a valid marriage in 1860, at the time the respondents claim the (pretended) marriage of George R. Megginson and Julia Megginson,

it was necessary that the marriage should have been solemnized by a minister of the gospel of the State of Oregon,

Oregon Stat. 1854, §§ 4, 6, p. 494; 1855, p. 536.

One of two things to prevent the (pretended) marriage from being null and void must have existed at the time: first, if Newcomb was a minister of the gospel in the State of Oregon at the time of the marriage in 1860, and as such solemnized the marriage; second, if he were not a minister of the Gospel at that time, but professed to be such to said George R. Megginson and said Julia, and they believed he was a minister and as such solemnized the marriage.

Oregon Stat. 1854, § 13, p. 494; *Holmes v. Holmes*, 1 Sawy. 100-116; *Milford v. Worcester*, 7 Mass. 48; *Redgrave v. Redgrave*, 38 Md. 93; *Beverlin v. Beverlin*, 29 W. Va. 733.

As to what is a minister *de facto*, see *Bouvier*, Dict. p. 427; *Plymouth v. Painter*, 44 Am. Dec. 574.

In all cases in which a party alleges that a marriage was celebrated at a particular place and time, he must prove that it was so celebrated at that time and place, and he cannot prove cohabitation and repute to raise a presumption of a marriage at some other time and place.

14 Am. & Eng. Encyclop. Law, p. 590, note 11, p. 529, note 12; *Redgrave v. Redgrave*, 38 Md. 93.

NOTE.—Presumptions flowing from marriage ceremony.

General rules.

When the celebration of a marriage is once shown, the contract of marriage, the capacity of the parties, and in fact everything necessary to the validity of the marriage, in the absence of proof to the contrary, will be presumed. *Curtwright v. McGown*, 10 West. Rep. 589, 121 Ill. 388.

When a marriage has been regularly solemnized it is presumed to be valid until the contrary is shown. *Thomas v. Thomas*, 124 Pa. 646; *Ward v. Dulaney*, 23 Miss. 410.

In a suit for dower, where a marriage has been solemnized according to the forms of law, every presumption must be indulged in favor of its validity. *Hull v. Rawls*, 27 Miss. 471.

Where the parties went to a chapel for the purpose of being married, and a service in the language of the country was read by a person habited like a priest and interpreted into English by the officiating clerk, there is a presumption that the marriage was duly celebrated according to the law of the country. *Rex v. Brampton*, 10 East, 282.

In proving title to real estate which depends on the validity of the marriage if the fact of marriage by a minister of the gospel has been shown the presumption is that it was in accordance with law. *Pratt v. Pierce*, 36 Me. 448, 58 Am. Dec. 754.

Where a marriage is proved to have been solemnized *de facto* one hundred and thirteen years ago by people who intended that it should be a good marriage, and it was done bona fide and openly, the maxim, *omnia rite acta presumuntur*, applies. *The Lauderdale Peccage*, L. R. 10 App. Cas. 662.

Proof that the marriage did not conform to the law will overthrow the presumption. *Lacon v. Higgins*, 3 Stark. 178.

In prosecutions for bigamy, adultery, etc., where 14 L. R. A.

proof of the marriage must be strictly made, courts are not entirely agreed as to the weight to be given to the fact of ceremony, as will appear from the decisions cited below.

Upon an indictment for bigamy evidence of a public ceremony of marriage, and that the parties thereafter regarded themselves as married, will raise the presumption that the ceremony was regular and legal. *People v. Calder*, 30 Mich. 85.

Proof that the marriage service was performed in another State by the settled minister of the place, who was accustomed to officiate in such cases, is sufficient evidence of marriage. *State v. Kean*, 10 N. H. 347, 84 Am. Dec. 162.

Although in an action for criminal conversation actual marriage is necessary, yet it is sufficient to show a ceremony of marriage in a foreign country followed by cohabitation without proving the foreign law of marriage, since the ceremony will be presumed to have been lawful. *Hutchins v. Kimmell*, 31 Mich. 123, 18 Am. Rep. 164.

Upon a prosecution for bigamy proof of marriage celebrated according to the forms of the religious denomination is sufficient prima facie to show the requisite assent of the married parties to take each other as husband and wife without the necessity of proving the language used by them and the officiating clergyman on the occasion of the ceremony. *Fleming v. People*, 27 N. Y. 329.

On the other side, it has been held that in a prosecution for criminal conversation plaintiff is bound to prove a marriage valid in all respects, and it is not sufficient to show that the parties went through a ceremony with a bona fide intention of contracting a valid marriage and afterward lived together as man and wife. *Catherwood v. Caston*, 13 Mees. & W. 220.

Burden of proof.

Where a form of marriage is proven the burden of showing that the form or ceremony did not in-

ackburn v. Crawford, 70 U. S. 3 Wall. L. ed. 186; *McLaughlin v. Barnum*, l. 297; *Denison v. Denison*, 35 Md.

suit to recover the interest of the widow of the deceased, the authority of the person who solemnized the marriage cannot vary by general reputation.

John v. Pettyjohn, 1 Houst. 332; 26 U. S. 168, p. 282; *Goshen v. Stonington*, 4 210, 211, 10 Am. Dec. 121.

respondents must make their case as against the cross-petition; they have the burden of proof all the way through this case. *Enl. Ev. §§ 74, 78.*

v. J. R. Bryson and W. S. Mc-
son, for respondents:

The judge or minister who performed the ceremony were so *de facto*, and the parties entered in good faith, the marriage is good, although they were not minister or judge, etc., *de*

fact, Mar. & Div. § 98, and authorities cited; 14 Am. & Eng. Encyclop. Law, p. 174; *Robbins*, 6 Fred. L. 23, 44 Am. Dec. 61; *Londonderry v. Chester*, 2 N. H. 268, Dec. 61; *Meyers v. Pope*, 110 Mass. 814. *Tharton, Ev. § 1297, note 7.* The celebrant need only take notice that the parties are before him to be married and promulgate their husband and wife.

Mar. & Div. § 99; *Pearson v. 11 N. J. L. 15; State v. Rood*, 12 Vt.

Where a marriage in fact is shown, the law

raises a strong presumption in favor of its legality, and the burden of proof is on the party contesting its validity to show it was not valid.

Browne, Divorce, p. 848.

All the presumptions of law are in favor of marriage and that the celebrant was duly qualified.

Am. & Eng. Encyclop. Law, p. 522, subsecs. 6, 7; *State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 754.

If the celebration of marriage be proved, the contract, the capacity of the parties, in fact the validity of the marriage, is presumed.

Fleming v. People, 27 N. Y. 329-335.

In the interpretation of statutes on the subject of marriage, a common-law marriage is good though not in conformity to the statutory requirements, unless the statutes contain express words of nullity.

See *Stewart, Mar. & Div. § 53*, where the authorities are collated; also 1 Bishop, Mar. & Div. § 283. See cases cited in case of *Dyer v. Brannock*, 66 Mo. 391; *State v. Gonce*, 79 Mo. 600; *State v. Bittick*, 11 L. R. A. 587, 103 Mo. 184; *Meister v. Moore*, 96 U. S. 76, 24 L. ed. 826; *Campbell v. Gullatt*, 48 Ala. 57; 68; *Carmichael v. State*, 12 Ohio St. 553; *Beckerlin v. Beckerlin*, (W. Va.) 27 Am. L. Reg. N. S. 101-106, and notes there cited; *People v. Calder*, 80 Mich. 85; *People v. Griddle*, 8 West. Rep. 181, 65 Mich. 68; *Hutchins v. Kimmell*, 81 Mich. 127, 18 Am. Rep. 164.

Statutes prescribing particular formalities, but not providing that if such formalities are

the necessary elements to constitute marriage upon the party disputing its validity. *Davis*, 7 Daly, 368.

Where a marriage in fact is shown the burden is on the party questioning its validity to show facts and circumstances as will establish its invalidity. *Jones v. Gilbert*, 136 Ill. 27.

Where a marriage *de facto* in another State is shown, the presumption that it is in accordance with the laws thereof, and throws upon the party contesting it the burden of proving its invalidity. *W. v. Canton*, 3 Pick. 263.

Where a marriage was celebrated by a priest, which would make it void, must be shown. *Steadman v. Powell*, 1 Addams, Eccl. 58. Where parties have gone through a form of marriage, thereby shown an intention to be married, and claim by virtue of the marriage are not to be shown that all necessary ceremonies were performed. *Sastry Velaidar Aronegarey v. Vailgalle*, L. R. 6 App. Cas. 364. Where a divorce on the ground that the husband was living at the time he entered into a marriage with plaintiff, where it appears that the marriage was entered into and the relationship between husband and wife between the parties was still subsisting when the second marriage was contracted, the presumption is in favor of the validity of the first marriage and the husband's burden of showing its nullity in defeat the suit for divorce. *Lindsay v. 1 Cent. Rep. 507, 43 N. J. Eq. 150.*

Presumption of license, etc.

A due solemnization of marriage by a minister is sufficient to raise the presumption that the marriage took place was duly licensed and that the registrar was present. *Stobell v. 15 C. B. N. S. 761; Reg. v. Cresswell*, 45 L. Reg. v. Manwaring, 37 Eng. L. & Eq. 609. A.

Where the ceremony is shown the procurement of a license will be presumed. *Murphy v. State*, 50 Ga. 150; *Piers v. Piers*, 2 H. L. Cas. 331.

Presumptions as to authority of celebrant.

The ceremony is presumed to have been performed by a competent person. *Legcy v. O'Brien*, 11 W. 325.

The production of the commission of one performing the marriage ceremony is not necessary. *State v. Robbins*, 6 Fred. L. 23, 44 Am. Dec. 64.

The acts of a clergyman in the celebration of a marriage are prima facie proof of his official character. *Goshen v. Stonington*, 4 Conn. 219, 10 Am. Dec. 121.

If the ceremony is performed by a person habited as a priest, he must be presumed to have been a clergyman. *Patterson v. Gaines*, 47 U. S. 6 How. 550, 12 L. ed. 553.

A marriage solemnized by an acting minister is valid as between the parties and the public although it subjects the minister to a penalty because he was not authorized to perform it. *Londonderry v. Chester*, 2 N. H. 268, 9 Am. Dec. 61.

A case which seems to stand alone holds that in a suit to establish dower rights evidence that the man who performed the marriage ceremony was generally reputed to be a minister is not sufficient to establish the ministerial character. Better and stronger evidence than general reputation is necessary. *Pettyjohn v. Pettyjohn*, 1 Houst. 332.

In a criminal prosecution it is sufficient evidence of marriage that the ceremony was performed without showing that the person by whom it was performed had the requisite qualifications. *State v. Hodgskins*, 19 Me. 155, 66 Am. Dec. 742.

In an indictment for bigamy proof of the official character of the minister or magistrate before whom the marriage was solemnized is prima facie evidence of his authority. *Damon's Case*, 6 Me. 148.

not followed the marriage shall be void, are held to be directory only.

14 Am. & Eng. Encyclop. Law, p. 485, and note 3, 486; *Mathewson v. Phanix Iron Foundry*, 20 Fed. Rep. 281 and cases cited in opinion; 2 Greenl. Ev. § 260; *Patterson v. Gaines*, 47 U. S. 6. How. 550, 582, 12 L. ed. 553, 565; *Port v. Port*, 70 Ill. 484. See Stewart, Mar. & Div. § 91, and authorities there cited.

Evidence of consent and agreement to become husband and wife, and of their cohabiting together has been held sufficient proof of marriage and legitimizes the issue.

Boone v. Purnell, 28 Md. 607, 92 Am. Dec. 713; *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538; *Betsinger v. Chapman*, 88 N. Y. 487, 547.

The fact that parties have publicly acknowledged each other as husband and wife, or have assumed marriage rights, duties and obligations, or have been generally reputed in the place of their residence to be husband and wife are relevant to prove a contract of marriage between them.

Kansas Pac. R. Co. v. Miller, 3 Colo. 461; *Barnum v. Barnum*, 42 Md. 251; *Chamberlain v. Chamberlain*, 71 N. Y. 423; *Jones v. Reddick*, 79 N. C. 290; *Yardley's Estate*, 75 Pa. 207.

When parties live together ostensibly as man and wife, conduct themselves toward each other as such and are received into society and treated by their friends as being entitled to that

status, the law will presume that they have been legally married.

Redgrave v. Redgrave, 38 Md. 93; 14 Am. & Eng. Encyclop. Law, p. 538.

If a marriage is shown to have taken place, then the law presumes regularly until the contrary be proved.

2 Wharton, Ev. § 1297, and authorities there cited; 1 Wharton, Ev. § 224; Stewart, Mar. & Div. § 132; 2 Greenl. Ev. § 462; *Vincent's App.* 60 Pa. 238; *Richard v. Brehm*, 73 Pa. 144, 13 Am. Rep. 733; *Murray v. Murray*, 6 Or. 26.

Bean, J., delivered the opinion of the court:

This is a controversy concerning the final distribution of the personal estate of George R. Megginson, deceased, between his collateral kindred and the respondents, who claim to be his wife and children. The sole question in this case is the validity of the marriage between the deceased and the respondent Julia, at the Siletz Indian reservation, in the spring of 1860. The facts concerning this marriage are these: For some time prior to 1860, the deceased was employed by the government as farmer, at the Siletz Indian Agency, in Benton County, and while so employed became acquainted with an Indian woman belonging to the reservation, known as "Sixes Julia." This acquaintance finally resulted in a formal ceremony of marriage of Megginson and Julia in the spring of 1860, before Daniel Newcomb, the agent of the United States in charge of the

Upon a trial for bigamy evidence that the person by whom the marriage ceremony was performed was reputed to be, and that he acted as, a minister or magistrate, is prima facie proof of his official or ministerial character. *State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 754.

Proof of solemnization of a marriage by one who had been a preacher for twenty-five years, and had previously united persons in marriage, is sufficient to show his official character in a prosecution for adultery. *State v. Winkley*, 14 N. H. 494.

Presumptions as to death of former partner.

Where the presumption of marriage arising from the performance of a ceremony conflicts with the presumption of the continued life of a former husband or wife of one of the parties, if neither is aided by proof of facts or circumstances co-operating with it the presumption of the validity of the second marriage must prevail over the other. *Johnson v. Johnson*, 1 West. Rep. 620, 114 Ill. 611, 55 Am. Rep. 883.

Presumption of life will yield in favor of presumption of innocence. *Lockhart v. White*, 18 Tex. 110; *Spears v. Burton*, 31 Miss. 548.

The presumption of the continuation of the life of a former husband and wife must yield to that of the validity of the marriage. *Greensborough v. Underhill*, 12 Vt. 606; *Kelly v. Drew*, 12 Allen, 107, 90 Am. Dec. 188; *Harris v. Harris*, 3 Ill. App. 57; *Dixon v. People*, 18 Mich. 84; *Rex v. Twynning*, 2 Barn. & Ald. 386.

The presumption of death from long absence is aided by the presumption that the party was innocent in contracting the second marriage. *Canaday v. George*, 6 Rich. Eq. 166; *Chapman v. Cooper*, 5 Rich. L. 452.

The presumption of innocence is not conclusive, but the jury must consider all the evidence in the case and merely give the presumption of innocence 14 L. R. A.

the preference to turn the scale when the evidence is evenly balanced. *Murray v. Murray*, 4 Or. 26.

Death will not be presumed in contravention of the express provisions of the statute. *Harrison v. Lincoln*, 48 Me. 308; *Com. v. Mash*, 7 Met. 472.

The presumption is that prior to the second marriage the first husband had been ascertained to be dead. *Re Williams' Estate*, 13 Phila. 323.

A husband two years absent was presumed dead, in favor of the validity of his wife's marriage, in *Wilkie v. Collins*, 48 Miss. 493.

Where the absence was for two years the presumption of the validity of the marriage prevailed over the presumption of life. *Greensborough v. Underhill*, 12 Vt. 604.

Where the wife was seen within twenty-five days of the second marriage of the husband the presumption of life prevailed over that of the validity of the second marriage. *Rex v. Harborne*, 3 Ad. & El. 540.

In contrast with the above, it has been held that in a suit for divorce, where the marriage must be proved, absence of the woman's former husband for a period of four years at the time of her second marriage is not sufficient to raise a legal presumption of the validity of the second marriage, and the burden is on the wife, who is seeking the divorce, to show that the absent husband was dead at the time when she attempted to contract the second marriage. *McCaffrey v. Benson*, 38 La. Ann. 198.

Upon an indictment for bigamy the presumption that the former wife was alive, which arises from the fact that she was seen within two years of the time of the second marriage, is neutralized by presumptions flowing from the fact of marriage, and unless the State offers further evidence of the fact of her continued life there must be an acquittal. *Squire v. State*, 46 Ind. 459.

But in England on a prosecution for bigamy of one who was alleged to have married while having

reservation, who assumed to act in the capacity of a minister in solemnizing the marriage. They continued to live together as husband and wife on the reservation until 1864, when Megginson was discharged by the then agent, because he had an Indian woman for a wife. They then moved to the Alsea agency, and remained there until 1865, when they settled on a farm at Cape Foulweather, where they continued to reside until Megginson's death, in 1888. During all this time they demeaned themselves towards each other as husband and wife, lived and cohabited together, with a full belief that they were lawfully married; had children born to them; were recognized and treated by their neighbors, friends, and acquaintances as husband and wife. Julia was no longer recognized as a ward of the government, or as belonging to the agency; in fact, no question as to the validity of the marriage seems to have been suggested or thought of until after Megginson's death. It is now claimed that the marriage was invalid because Newcomb, before whom it was solemnized, was not in fact a minister of the gospel authorized to solemnize marriages, and did not profess to act in that capacity at the time. Upon this question the evidence shows Newcomb to have been, both before and during his service as Indian agent, a member of the Methodist Church, and a devoutly religious and pious man, sometimes preaching to the Indians under his charge, as well as occupying the pulpit in other places. He was generally known in and around the agency as Preacher or Rever-

end Newcomb, and was so introduced to some of the witnesses by ministers of that church. There is no evidence that he was ever formally authorized to preach, nor does his name appear upon the records of the conference of the church, which, however, do not antedate April, 1860; but the evidence that he was not a regularly authorized minister is of a negative character, and is not inconsistent with his professions or known reputation as a preacher. The day before the marriage of Megginson and Julia he went from the upper to the lower farm on the reservation, for the purpose, as reported at the time, of solemnizing this marriage, and while there did solemnize the marriage in the presence of witnesses, according to the forms of his church, and, after invoking the divine blessing upon the union, pronounced them man and wife.

Upon this state of facts we confidently assert that no well-considered case can be found in the books where the courts in a civil case have declared such a marriage void, and bastardized the children, without clear, distinct, and satisfactory proof that the person solemnizing the marriage was not authorized to do so. Indeed, such is the estimate in which the law regards the consequences flowing from the marriage relation that it fortifies it with the presumption of validity, which can only be overcome by the most clear and cogent proof. All the presumptions are in favor of matrimony. "The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy. Where there is

another husband living whom she left four years previously, the law makes no presumption either way as to his life or death, but it is a question for the jury on all the facts of the case. *Reg. v. Lumley*, L. R. 1 Crown Cas. Res. 196.

Presumption of divorce.

The existence of a divorce may be presumed in favor of the validity of the marriage. *Blanchard v. Lambert*, 48 Iowa, 238, 23 Am. Rep. 345; *Re Edwards*, 58 Iowa, 437; *Harris v. Harris*, 8 Ill. App. 57.

In a suit to settle property rights depending upon the validity of a marriage, by a man who had a wife living from whom he had been separated eight years, and who had in the meantime married again, the law will presume a divorce between them and that the man's second marriage was valid. *Carroll v. Carroll*, 30 Tex. 740.

Where a woman who entered into a contract of marriage was shown to have had a husband living in Germany prior thereto, the court presumed in favor of the validity of the marriage that the first marriage had been dissolved by divorce. *Klein v. Sandman*, 20 Mo. 259.

The validity of a second marriage is not overcome by proof that the first wife was living and had not obtained a divorce since he might have obtained one. *Coal Run Coal Co. v. Jones*, 6 West. Rep. 500, 127 Ill. 898.

Where a husband abandoned his wife in 1842 and married another woman in 1843, and in 1846 the former wife obtained a divorce on the ground of desertion, it was held that the proof prevented the presumption of the death or divorce of the former wife before the contracting of the second marriage. *Cartwright v. McGown*, 10 West. Rep. 589, 121 Ill. 388.

Where divorce is against the policy of the law it will not be presumed. *McCarty v. McCarty*, 3 Strobb. L. 11, 14 L. R. A.

Proof of former marriage to overthrow second one

One asserting a prior marriage to invalidate a subsequent one has the burden of showing affirmatively that it was in all respects in conformity to law. *Redgrave v. Redgrave*, 38 Md. 94.

The burden of showing that there was a former marriage between the parties is upon the persons denying the validity of the second marriage. *Clayton v. Wardell*, 4 N. Y. 220.

One who attempts to impeach the validity of a marriage because of the existence of a prior marriage of one of the parties has the burden of showing not only that the person with whom the former marriage was contracted is still living but also that no divorce from him had been obtained. *Boulden v. McIntire*, 119 Ind. 574.

Where a woman marries a man having a former wife living, and subsequently without procuring a divorce marries another on the ground of the invalidity of her first marriage, the burden of showing the invalidity of her second marriage because of the binding effect of the first is upon the person alleging it. *Patterson v. Gaines*, 47 U. S. 6 How. 550, 12 L. ed. 553.

Where a former marriage of the husband is pleaded in bar of the interest of an alleged widow, strict proof of it is required. *Taylor v. Taylor*, 1 Lee, 571.

In case a person who has been cohabiting with another of the opposite sex goes through a marriage ceremony with a third person the decisions are widely divergent as to the proper solution of the conflict in the presumptions of marriage, flowing from cohabitation, and of validity of the marriage, flowing from the ceremony.

Thus it has been held that the presumption of marriage arising from cohabitation is rebutted by the subsequent permanent separation of the parties without any apparent cause, followed by mar-

enough to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence." *Hynes v. McDermott*, 91 N. Y. 459, 43 Am. Rep. 677; *Lord Lyndhurst*, in *Morris v. Davies*, 5 Clark & F. 163, speaking of this presumption, says: "The presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive." And *Lord Campbell* said in *Piers v. Piers*, 2 H. L. Cas. 381, it could only be negated "by disproving every reasonable possibility." Where a formal ceremony of marriage is shown between persons competent to enter into that relation, followed by cohabitation, the law raises the presumption of a valid marriage, and that the celebrant was legally authorized to perform the same; and this presumption can only be overcome by clear and convincing evidence to the contrary. Marriage by a person assuming to act as a minister, and being *per verba de presenti*, the person performing the ceremony must be presumed to have been a clergyman. *Patterson v. Gaines*, 47 U. S. 6 How. 550, 12 L. ed. 553; *Rer v. Brampton*, 10 East, 282; *Londonderry v. Chester*, 2 N. H. 268, 9 Am. Dec. 61; *State v. Abbey*, 29 Vt. 60; 67 Am. Dec. 754; *Meyers v. Pope*, 110 Mass. 314; *Redgrave v. Redgrave*, 38 Md. 93.

The policy of the law is strongly opposed to regarding a marriage entered into in good faith,

believed by one or both or the parties to be legal, followed by cohabitation, as void; and, where the legitimacy of children is called in question, both upon authority and general principles of public policy and natural equity, every reasonable presumption is indulged in favor of legitimacy. *Johnson v. Johnson*, 30 Mo. 72, 77 Am. Dec. 598. The burden of proof is on the party objecting to the validity of such a marriage throughout, against the constant pressure of this presumption, to show its illegality, and this he cannot do except by removing every reasonable presumption, both of law and fact, by clear and positive proof. Nor do any provisions of the statute in force at the time of the marriage in this case in any way affect the rule heretofore stated.* In *Hutchins v. Kimmell*, 81 Mich. 130, 18 Am. Rep. 164, *Mr. Justice Cooley*, in passing upon

*Acts 1854, pp. 492-494, provide by section 4, that marriages may be solemnized . . . throughout the territory . . . by ministers of the gospel; by section 6, that "no particular form shall be required, except that the parties shall declare, in the presence of the . . . minister . . . and the attending witnesses, that they take each other as husband and wife, and in every case there shall be at least two witnesses present, besides the person performing the ceremony;" and by section 13, that "no marriage solemnized before any person professing to be a . . . minister, shall be deemed or adjudged to be void, nor shall the legality thereof be in any way affected on account of any want of jurisdiction or authority in such supposed . . . minister; provided, the marriage be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage." [Rep.]

riage of one of the parties in solemn form to a third person: *Weatherford v. Weatherford*, 20 Ala. 556.

The presumption of marriage which arises from the cohabitation of a man with a woman is overthrown if during her life and without any proof of divorce he marries another woman. *Jones v. Jones*, 45 Md. 145.

And the first marriage must then be shown as an actual fact by direct proof. *Jones v. Jones*, 48 Md. 391, 30 Am. Rep. 466.

Proof of a certificate of marriage by a magistrate with proof of cohabitation and reputation but without proof of publication of the bans is sufficient to establish marriage as against evidence of cohabitation and reputation of a prior marriage with another person living at the time of the second one. *Wheeler v. Williams*, 2 U. C. Q. B. 77.

Proof of the general reputation of marriage, and the fact of cohabitation followed by the birth of children, is not sufficient proof of marriage to overthrow a subsequent ceremonial marriage entered into by one of the parties with a third person. *Myatt v. Myatt*, 44 Ill. 473.

In a suit for divorce for adultery with a woman with whom a man had gone through a ceremonial marriage the first marriage cannot be proved by cohabitation and reputation, since it would render defendant liable to prosecution for bigamy. *Case v. Case*, 17 Cal. 503.

To defeat a marriage, where the ceremony has been shown to have taken place, on the ground that one of the parties had contracted a marriage with another person who was still living, there must be actual as distinguished from presumptive proof of the first marriage, and for that purpose proof of cohabitation is not sufficient. *Waddingham v. Waddingham*, 4 West. Rep. 384, 21 Mo. App. 609.

It seems that the jury might find the first cohab-

itation to be meretricious. *Jackson v. Claw*, 13 Johns. 346.

Where a marriage is proved a former one cannot be shown by proof of cohabitation simply. *Poultney v. Fair Haven*, Brayt. 185; *Houpt v. Houpt*, 5 Ohio, 539; *dictum* in *Breakey v. Breakey*, 2 U. C. Q. B. 349.

But proof of an actual first marriage is, of course, admissible. *Jewell v. Jewell*, 42 U. S. 1 How. 229, 11 L. ed. 112.

It seems that the mere presumption from circumstances in favor of a prior marriage is at least neutralized by the presumption against the commission of crime in contracting a subsequent marriage. *Clayton v. Wardell*, 4 N. Y. 230.

On the other side, it has been held that proof of marriage is not sufficient in a civil action to exclude the ordinary circumstantial evidence of the existence of a previous marriage, of one of the parties to a third person still living. *Camden v. Belgrade*, 75 Me. 126, 46 Am. Rep. 264.

And the existence of the first marriage may be found from such evidence. *Archer v. Halthcock*, 51 N. C. 421; *Donnelly v. Donnelly*, 8 B. Mon. 116.

Proof of prior marriage, though not direct, was held sufficient in *Northfield v. Plymouth*, 20 Vt. 532.

Without noticing the question of the binding effect of the second marriage the court, in *Peet v. Peet*, 52 Mich. 464, held it insufficient to overthrow the presumption of marriage flowing from the fact that the woman had lived twenty years with another man and by whom he had had thirteen children; but in *Young's App.* 53 Mich. 588, the court refused to act upon evidence of cohabitation as against a subsequent marriage.

Evidence of cohabitation and repute to show marriage was received and duly weighed, but rejected, in *Chamberlain v. Chamberlain*, 71 N. Y. 423.

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legality of a marriage under a statute local with the one above referred to, held evidence that a ceremony was performed solely in celebration of marriage, with the consent and co-operation of the parties is evidence of a valid marriage, even though it has fallen short of showing that the statutory regulations had been complied with, and affirmatively shown that they were not. ys: "This has become the settled doctrine of American courts; the few cases of dissent, being borne down by the great weight of authority in favor of the view we have stated it;" citing a large number of authorities, with which it is unnecessary to burden this opinion. It is also held in the same case that a marriage *per verba de presenti*, without any form of ceremony, is valid if binding under the statute; but we do not think it necessary to notice that question in this case.

The error into which counsel for appellants have fallen lies in supposing that the burden of proof is on the respondents to show all the essential requisites of a valid marriage, and that they failed to show that Newcomb was a duly authorized minister, or that he openly declared to Megginson and Julia at the time of the marriage that he was such a minister, their case fails. This is not the law. The respondents showed a formal ceremony was performed, at the time and place alleged, by parties competent to contract marriage, a person assuming to act in the capacity of a minister of the gospel, followed by cohabitation under a belief that they were lawfully married, the law immediately attaches thereto the presumptions necessary to make the marriage valid, and the burden is on the appellants to show by clear, distinct, positive, and satisfactory proof its invalidity. Under

the statute in force at the time, this could only be done by showing not simply that Newcomb was not a minister authorized to solemnize marriages, but that he did not profess or pretend to be at the time, or, if he did so pretend, the circumstances were such that the parties did not and could not have reasonably believed that he possessed the authority he assumed, and this appellants have failed to do in every particular. "When a marriage, therefore," says Mr. Bishop, "has once been shown, however celebrated, whether regularly or irregularly, or however proved, whether directly or by circumstantial evidence, the law raises a strong presumption in favor of its legality, so that the burden is with the party objecting throughout, and in every particular to prove, against the constant pressure of this presumption of law, that it is illegal and void. And it has been considered that the validity of a marriage cannot be tried like any other question of fact which is independent of presumption, because the law, besides casting the burden of proof upon the objecting party, will still presume in favor of the marriage, and this presumption increases in strength with the lapse of time through which the parties are cohabiting as husband and wife. It being for the highest good of the parties, of the children, and the community that all intercourse between the sexes in its nature matrimonial should be such in fact, the law, when administered by enlightened judges, seizes upon all presumptions, both of law and of fact, presses into its service all things which can help it in each particular case, to sustain marriage, and repel the conclusion of unlawful commerce," 1 Bishop, Mar. & Div. § 457.

The decree of the court below is therefore affirmed.

MICHIGAN SUPREME COURT.

B. WARREN, by Next Friend, Appt.,
v.

Hugh WARREN *et al.*

(.....Mich.....)

Can a man maintain an action for seducing the affections of her husband where she has by statute the right to her estate and to bring actions in relation thereto as if unmarried.

(December 21, 1891.)

Remanded to the Circuit Court for Van Buren County to review a judgment in favor of the respondents in an action brought to recover damages for the alleged alienation of the affections of the plaintiff's husband. *Reversed.* Facts are stated in the opinion.

Messrs. William N. Cook and Osborn & Mills, for appellant:

In *Mitchell v. Mitchell*, 49 Mich. 68, it appeared that the husband was a minor and that his father was entitled to his services and society, and in that respect this case and that are different upon the facts.

When the *Mitchell Case* was decided its doctrine was in line with *Van Arnam v. Ayers*, 87 Barb. 544.

The courts of New York now view the matter differently.

Jaynes v. Jaynes, 89 Hun, 40; *Bennett v. Bennett*, 6 L. R. A. 553, 116 N. Y. 584. See also *Foot v. Card*, 6 L. R. A. 829, 58 Conn. 1; *Seaver v. Adams* (N. H.) March 14, 1890; *Bassett v. Bassett*, 20 Ill. App. 543; *Jaynes v. Nowlin* (Ind.) Dec. 8, 1891.

In Ohio the action has been maintainable for many years.

The authorities upon this question, pro and con, are practically all gathered in the above opinion. Of the recent cases the following appeared in this series, three with full notes from briefs of counsel, and one with a

note. *Bennett v. Bennett*, 6 L. R. A. 553, 116 N. Y. 584; *Foot v. Card*, 6 L. R. A. 829, 58 Conn. 1; *Duffies v. Duffies*, 8 L. R. A. 420, 76 Wis. 374; *Doe v. Roe*, 8 L. R. A. 633, 82 Me. 503.

Clark v. Harlan, 1 Cinn. Sup. Ct. 418; *Westlake v. Westlake*, 84 Ohio St. 631.

And in the federal courts late decisions are to be found in harmony with these cases.

Mehrhoff v. Mehrhoff, 26 Fed. Rep. 13.

All of which are consistent with *Lynch v. Knight*, 9 H. L. Cas. 577, and *Winsmore v. Greenbank*, Willes, 577.

Under statutes in which married women are given as part of their separate property any right of action growing out of the violation of their "personal rights," it has been held that a married woman may sue for and recover damages sustained in consequence of an assault and battery made upon her.

Stevenson v. Morris, 37 Ohio St. 10.

Similar actions, however, have been permissible in Michigan for years without such legislation.

Bayer v. Jacobs, 21 Mich. 215; *Leonard v. Pope*, 27 Mich. 145.

Mesrs. A. H. Chandler and Heckert & Chandler, for appellee:

A wife has no remedy for being deprived of the society of her husband by slander not amounting to a charge of adultery, causing him to desert her and treat her with cruelty.

1 Addison, Torts, 43; *Lynch v. Knight*, 9 H. L. Cas. 577.

It is generally supposed that the wife can have no right of action against one who should seduce her husband's affections from her or in any manner deprive her of his care and society.

Cooler, Torts, 1st ed. 227; 2 Kent, Com. 182; Reeve, Dom. Rel. 110; *Lynch v. Knight*, *supra*.

Schouler, Dom. Rel. 57, enunciates the doctrine that the husband has a right of action for the enticement of the wife, but nowhere does he intimate that the wife has a like right.

See also 1 Bl. Com. 443.

Our statute has not removed all the common law disabilities of a married woman. She can only sue and be sued in relation to her sole property.

How. Stat. §§ 6295-6297.

In all other respects she is a *feme covert*, and subject to all the restraints and disabilities consequent upon that relation.

Hove v. North, 13 West. Rep. 915, 69 Mich. 272; *Speier v. Opfer*, 2 L. R. A. 345, 73 Mich. 38.

A statute cannot be extended by construction to cases not embraced by its language nor within its design.

De Vries v. Conklin, 22 Mich. 259; *Russell v. People's Sav. Bank*, 39 Mich. 671, 33 Am. Rep. 444; *West v. Laraway*, 28 Mich. 470; *Wales v. Lyon*, 2 Mich. 276; *Shannon v. Leopole*, 5 Mich. 71; *Orane v. Reeder*, 22 Mich. 322; *Whipple v. Baginaw Circuit Judge*, 26 Mich. 342; *Sibley v. Smith*, 2 Mich. 486; *Tannahill v. Tuttle*, 8 Mich. 104; *Maynards v. Cornwell*, Id. 309; *Detroit v. Putnam*, 45 Mich. 263; *Detroit v. Chaffee*, 70 Mich. 80.

Where a statute is remedial, it must be followed with strictness where it gives the remedy against a party who would not otherwise be liable.

Chicago & N. R. Co. v. Sturgis, 44 Mich. 538.

In *Mitchell v. Mitchell*, 49 Mich. 68, this court refused to sustain the action.

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No such right of action existed under the common law by reason of the legal unity of husband and wife.

Mehrhoff v. Mehrhoff, 26 Fed. Rep. 14; *Westlake v. Westlake*, 84 Ohio St. 631; *Logan v. Logan*, 77 Ind. 558.

Doe v. Roe, 8 L. R. A. 833, 82 Me. 503, is with us on all fours, and holds that the right can only be conferred by the law-making power.

The wife has no identity separate from her husband.

Duffies v. Duffies, 8 L. R. A. 420, 76 Wis. 374; *Gibson v. Gibson*, 43 Wis. 33, 28 Am. Rep. 537; *Barnes v. Martin*, 15 Wis. 240, 83 Am. Dec. 670.

The wife has no property in the *consortium* of her husband that is lost, nor any right to it that has been violated at common law.

Duffies v. Duffies, *supra*; 1 Bl. Com. 443. See *Mulford v. Clewell*, 21 Ohio St. 191.

Duffies v. Duffies, *supra*, is the leading case, and must control here.

Morse, J., delivered the opinion of the court:

The plaintiff brings this suit, alleging that the defendants have wrongfully combined together and alienated the affections of her husband, George L. Warren, from her, and caused him to desert and abandon her, and she claims damages therefor. The court below held that a married woman in this State cannot maintain an action of this kind. The correctness of this holding is the only question to be determined. In *Mitchell v. Mitchell*, 49 Mich. 64, by an equal division of this court, the judgment of the court below against the wife was affirmed. In that case it appears that the husband was a minor when married. No opinions were filed in the case, and we are therefore not informed as to the reasons for such affirmation. I shall not consider the case as an adjudication of the important question here presented, but shall examine it as if it were a new question before this court. It seems from the brief of counsel in *Mitchell v. Mitchell*, *supra*, that the question of the minority of the husband, and the right of his father, who was the defendant, to his services and society, was made a prominent point in the defense of the suit, and this may have been the controlling reason of the decision. No such question is in this case. The right of a wife to recover damages for the alienation of her husband's affections, and the consequent loss of his society, assistance, and support, under the law of this State, is the naked issue involved here. I have no hesitation in holding that she has such right. I do not think it material whether or not she had this right under the common law. In the adjudicated cases there is a difference of opinion as to her common-law right, some of the courts holding that, "as the wife had no right of property

in any damages recovered on her account, for any cause, neither could she have any right of action to recover them." *Duffies v. Duffies*, 76 Wis. 374, 8 L. R. A. 420; *Westlake v. Westlake*, 84 Ohio St. 621; *Doe v. Roe*, 82 Me. 503, 8 L. R. A. 833; *Logan v. Logan*, 77 Ind. 558; *Mehrhoff v. Mehrhoff*, 26 Fed. Rep. 13.

New York it is held that it was considered the common law that the damages for personal injuries belonged to her, as the husband did not sue without joining his wife. If the damages were recovered before the death of husband, the money so collected became her property; but, if he died before the suit determined, the right of action survived to the wife, and the damages recovered belonged to her. From this it is deduced that the right of action belonged to her. *Bennett v. Bennett*, 116 N. Y. 584, 6 L. R. A. 553.

Under the statute of this State relative to the rights of married women, and the decisions of our own courts in relation thereto, the right of the wife to bring this action, as well as all suits to redress her personal wrongs, seems to me to be perfectly clear. "That the husband and personal estate of every female, accorded before marriage, and all property, real or personal, to which she may afterwards become entitled by gift, grant, inheritance, devise, or in any other manner, shall be and remain in the estate and property of such female, and shall not be liable for the debts, obligations and engagements of her husband, and shall not be contracted, sold, transferred, mortgaged, conveyed, devised, or bequeathed by him in the same manner and in the like effect as if she were unmarried." How. Stat. § 6295.

Actions may be brought by and against a married woman in relation to her sole property in the same manner as if she were unmarried; and in cases where the property of the husband cannot be sold, mortgaged, or otherwise incumbered without the consent of the wife, to be given in the manner prescribed by law, or when his property is exempt by law from sale on execution or other final process against him, his wife may bring an action in her own name, with the same effect as in cases of actions in relation to sole property as aforesaid." How. Stat. § 6297.

Under these statutes it has been held that a wife is entitled to and may sue for and recover in her own name damages for her personal injuries and suffering from assault and battery, (*Berger v. Jacobs*, 21 Mich. 215; *v. Adams*, 16 Mich. 179-197;) and for damages to her person through the negligence of another, (*Michigan Cent. R. Co. v. Cole*, 8 Mich. 440;) also for slander, (*Leonard v. Leonard*, 27 Mich. 145.) If the damages in such cases are her individual property, as excluded in *Berger v. Jacobs*, I cannot see any reason and on principle, the damages recoverable from the loss of the society and support of her husband are not also her individual property. Surely the support and maintenance she is entitled to from her husband, and the losses by his abandonment, is capable of ready and accurate measurement in dollars and cents, and can be said to be a property right, which she has lost by the wrongful interference of the defendants. The loss of the society of her husband, and her anguish and suffering, is not so easily measured when compensation is sought, and is gauged by a money standard; but damages for such anguish and suffering are as best the jury can, and are permissible, in actions of torts.

The Civil Damage Law, which gives

a right of action to the wife, who has been injured "in her person or property, means of support, or otherwise" by any intoxicated person, it has been held in this State that she might recover damages for being excluded from society by her husband's intoxication, and for her mental suffering on account of such drunkenness. *Friend v. Dunks*, 87 Mich. 25.

There has never been any reason urged against the right of the husband to sue for the loss of the consortium of his wife. And if, as shown, the wife is now, under either the liberal letter or spirit of our marriage laws, entitled, as of her own property, to the damages arising from her personal injuries, the injuries to her body or mind, there can be no good reason why she cannot sue for and recover damages for the loss of the consortium of her husband, that does not equally and as well apply to the suit of the husband on account of the loss of her society. The wife is entitled to the society, protection, and support of her husband as certainly, under the law, and by moral right, as he is to her society and services in his household. "These reciprocal rights may be regarded as the property of the respective parties in the broad sense of the word 'property,' which includes things not tangible and visible, and applies to what is exclusively one's own." *Smith, P. J.*, in *Jones v. Jones*, 89 Hun, 40.

This is given to her by the marriage relation: it is her property. As is well said in *Foot v. Card*, 58 Conn. 1, 6 L. R. A. 829: "The right of the husband to the affections and society of the wife has ever been regarded as a valuable property right, and he has always been permitted to sue for the loss of it. Upon principle, this right is as valuable to her as is that of the husband to him." And in *Seaver v. Adams* (N. H.) 19 Atl. Rep. 776, it is said: "As in natural justice no reason exists why the right of the wife to maintain an action against the seductress of her husband should not be co-extensive with his right of action against her seducer, nothing but imperative necessity would justify a decision that she could not maintain such an action." In further support of her right to maintain suit, see *Westlake v. Westlake*, 84 Ohio St. 683; *Bennett v. Bennett*, 116 N. Y. 584, 6 L. R. A. 553; *Jaynes v. Jaynes*, 80 Hun, 40; *Warner v. Miller*, 17 Abb. N. C. 231; *Churchill v. Lewis*, Id. 226; *Mehrhoff v. Mehrhoff*, 26 Fed. Rep. 18; *Bigelow, Torts*, 158; *Haynes v. Nowlin* (Ind.) Dec. 8, 1891; *Cooley, Torts*, 2d ed. note 2, § 227; *Baker v. Baker*, 16 Abb. N. C. 293; *Breiman v. Puaach*, 7 Abb. N. C. 249; *Bassett v. Bassett*, 20 Ill. App. 543; *Foot v. Card*, 58 Conn. 1, 6 L. R. A. 829; *Seaver v. Adams* (N. H.) 19 Atl. Rep. 776.

The cases holding the contrary doctrine are: *Dee v. Roe*, 82 Me. 503, 8 L. R. A. 883; *Logan v. Logan*, 77 Ind. 553, since overruled by *Haynes v. Nowlin*, *supra*; *Duffles v. Duffles*, 76 Wis. 874, 8 L. R. A. 420. The latter case is principally relied upon in defendant's brief. With all due respect to that court and the learned judge who wrote the opinion, I cannot recognize the reasoning in support of the decision as sound. The argument, in substance, is that the wife is purer and better than the husband, and governed more by principle, and she seldom violates the marriage obligations. That she is more do-

mestic, and is supposed to have the personal care of the household. Her duties require her to be more constantly at home, where the husband may nearly always expect to find her and enjoy her society; while the husband is obliged by his business to be frequently away from home, which deprives his wife of his society. He is exposed to the temptations of the world, to which he easily succumbs, withdrawing him away from her, which condition of things the wife had reason to expect when she married him. And that for these reasons it cannot be said that the "wife's right to the society of her husband is the same in kind, degree, and value as his right to her society." It is also said by the learned judge that, "if permitted, the right of action in the wife would be the most fruitful source of litigation of any that can be thought of," and that the justice and advantages of such an action are at least doubtful. It seems to me that the necessary absence from the home of one more than the other can make no difference in their respective rights. Although the wife may never go outside the threshold of the home, the husband cannot enjoy her society unless he is also in the house; nor can she enjoy his society while he is away from her. Nor is the fact that she is purer and more domestic than her husband, and less likely to abandon the home than he is, any reason why she should be denied the

same redress that he has in such cases. Because the history of the race, and our knowledge of human nature, tell us that the wife is less easily led astray, and her affections alienated, than her husband, is no reason why she should be denied the remedy which for the same wrong is freely given him. And if, as suggested by the learned judge, such actions would be numberless if permitted to the wife, it would still furnish no adequate ground for denying to a deserving woman, foully wronged in her dearest rights, the redress that the law gives without question to her husband under like circumstances. It is an old maxim, and a good one, that the law will never "suffer an injury and a damage without redress." Will the law aid the husband, and not help the wife in a like case? Not under the present enlightened views of the marriage relation and its reciprocal rights and duties. The reasoning that deprives the wife of redress when her husband is taken away from her by the blandishments and unlawful influence of others is a relic of the barbarity of the common law, which, in effect, made the wife the mere servant of her husband, and deprives her of all right to redress her personal wrongs except by his will.

The judgment of the court below is reversed, and a new trial granted, with costs.

The other Justices concurred.

TENNESSEE SUPREME COURT.

LOUISVILLE & NASHVILLE R. CO.,

Appt.

W. L. WALLACE.

(..... Term.....)

1. No interest before judgment can be included in the recovery for personal injuries.
2. Interest improperly included in a judgment may be remitted on appeal to prevent reversal for that reason.

(December 12, 1891.)

APPEAL by defendant from a judgment of the Circuit Court of Sumner County, which included an award of interest in a judgment in favor of plaintiff, in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed upon condition that the amount allowed for interest be remitted.*

The facts are stated in the opinion.

Messrs. S. F. Wilson, R. K. Gillespie and George Boddie for appellant.
Mr. J. J. Turner for appellee.

Snodgrass, J., delivered the opinion of the court:

The defendant in error, while in the service of the Louisville & Nashville Railroad Company as brakeman, sustained severe personal injury, resulting in the loss of a leg, which he alleged was occasioned by the negligence of the Company. He sued for \$15,000 damages and recovered judgment for \$9,940. The Company appealed, and assigned numerous errors. It is not deemed material to notice but one of them, as the others are not well taken, and involve nothing new, so as to make their consideration in a written opinion necessary. The one material to be considered relates to the question of interest. The court told the jury it could assess plaintiff's damages with or without interest, as the jury should see proper, in connection with instructions as to the measure of damages not otherwise complained of. The verdict assessed the damages at \$7,000 with seven years' interest, \$2,940, aggregating \$9,940. It is objected in the assignment of errors that the charge on this question and verdict, with judgment thereon, are erroneous. This involves a consideration of the question, What is the true measure of damages for such

NOTE.—Interest on amount of damages awarded for the negligent infliction of a personal injury.

In addition to the decisions cited in the principal case as to the right to add interest to the amount of damages awarded by the verdict in an action to recover for personal injuries, *Ell v. Northern Pac. R. Co.* (N. Dak.) 12 L. R. A. 97, decides that under the North Dakota Compiled Laws, § 4578, such interest may be allowed in the discretion of the jury, 14 L. R. A.

but that a binding instruction by the court to allow such interest was error.

In some cases the statutes provide for the allowance of interest upon the amount of damages awarded in case of the death of the person injured, but even in such cases to be included in the verdict they must also be included in the *ad damnum* clause of the declaration. *Robostelli v. New York, N. H. & H. E. Co.* 34 Fed. Rep. 712.

H. P. F.

personal injury? The rule for determining damages for injuries not resulting in death (where the statute fixes the measure) and not calling for exemplary punishment, deducible from the decisions of this court since its organization in this State, is that of compensation for mental suffering and physical pain, loss of time, and expenses incident to the injury, and, if it be permanent, the loss resulting from complete or partial disability in health, mind, or person thereby occasioned. And this is the rule most consonant to reason adopted in other states. 3 Sedgw. Dam. 8th ed. § 481 *et seq.*; 5 Am. & Eng. Encyclop. Law, pp. 40-44, and notes; *Illinois Cent. R. Co. v. Read*, 87 Ill. 484, 87 Am. Dec. 260. As this sum in gross includes all the compensation which is requisite to cover pain, suffering, and disability to date of judgment, and prospectively beyond, it is intended to be and is the full measure of recovery, and cannot be supplemented by the new element of damages for the detention of this sum from the date of the injury. The measure of damages being thus fixed, it is expected that in determining it juries and courts will make the sum given in gross a fair and just compensation, and one in full of amount proper to be given when rendered, whether soon or late after the injury; as, if given soon, it looks to continuing suffering and disability, just as, when given late, it includes that of the past. It is obvious that damages could not be given for pain and suffering and disability experienced on the very day of trial, and then interest added for years before. These are items considered to make up the aggregate then due, and the gross sum then for the first time judicially ascertained. The error of the court below was in the assumption that a like measure of damages is applied in this class of cases as in that of injury to property effecting its destruction or conversion or other unlawful or fraudulent misappropriation, or detention of property or money, in which the rule applied by the circuit judge is held to be a proper one; not on the theory, even in this class of cases, that interest as such is due, but that the plaintiff is entitled to the fixed sum of money or definite money value of property converted or destroyed, and the jury may give as damages an amount equal to interest on the value of the property. But such rule applies alone to such cases, and not to that of personal injury, which does not cease when inflicted, and is not susceptible of definite and accurate compensation. It never creates a debt, nor becomes one, until it is judicially ascertained and determined. Only from that time can it draw interest; and interest or damages cannot at any preceding time be added to it without changing and superadding a new element, never given in this State or any other in a similar case, so far as our investigation has discovered. The counsel of plaintiff, who cite many authorities supposed to be in support of the ruling below, were doubtless misled by the generality of terms used in some of them. Under the head of "Interest," after stating that "it was generally allowed by law on two grounds, namely, on contract, express or implied, or by way of damages either for default in payment of a debt or for a use or benefit derived from the

money of another," it is stated in 11 Am. & Eng. Encyclop. Law that, "where it is imposed to punish tortious, negligent, or fraudulent conduct, it is a question within the discretion of the jury." Page 880. For this proposition various authorities are cited, including Mr. Sedgwick on Damages, p. 874, (the reference being to paging of the fifth or earlier edition.) This author uses similar general terms, but neither was speaking of cases of personal injury, but of the class of cases to which we have referred, as fully appears from Mr. Sedgwick's further discussion of this general head, on pages 885, 886, and as most clearly appears from a reference to the authorities cited by both, which relate to cases of trover and trespass and to property controversies only. In neither of these books is the proposition now thought to be sustained by them advanced, —that the measure of damages for a personal injury includes damages for detention of the supposed amount due. The generality of statement indulged in that and former editions of this work is corrected by editors of the last edition. Chapter 10 of the first volume of this edition is devoted to interest allowed in actions where it is by rule of law, or in the discretion of the jury or court trying the case, allowed as part of the measure of damages. In these cases are enumerated and discussed those actions sounding in tort in which interest may be given as damages. The distinction is there taken, as taken here, and actions for personal injuries excluded, because of the existence of a wholly different measure of damages respecting them. In this connection we quote section 320 in the volume and chapter referred to: "It sufficiently appears, from what has already been said, that there is no general principle which prevents the recovery of interest in actions of tort. The fact that the demand is unliquidated has been shown to be insufficient to exclude interest, and there is nothing in the mere form of the action which renders it unreasonable that interest should be given. Nevertheless it is in the region of tort that we find the clearest cases for disallowance of interest. There are many cases which are not brought to recover a sum of money representing a property loss of the plaintiff, and it is frequently said broadly that interest is not allowed in such actions. It is certainly not allowed in such actions as assault and battery, or for personal injury by negligence, libel, slander, seduction," etc. The measure of damage in such case seems nowhere to include this or be based upon this idea. Even in respect to injury or destruction of property, when the Supreme Court of the United States has adopted fully the prevailing rule allowing damages in the form of interest on value of the property, the rule has been limited to such injury of property or property right as had a fixed or certain value; and it is accordingly held in that court that indefinite damages, as that resulting from infringement of a patent, could not bear interest until after the amount had been judicially ascertained. *Tilghman v. Proctor*, 125 U. S. 161, 31 L. ed. 672.

The direct question we are considering also came before the Supreme Judicial Court of Maine, and it was there held that the rule permitting damages equal to interest on value of

property in cases of trespass and trover did not apply, and that interest could not be allowed upon a recovery for personal injury, and that, too, under a statute authorizing a recovery "to the amount of the damage sustained." (This is not material, however, as their statute gave no more nor less right than exists here.) *Sargent v. Hampden*, 38 Me. 581. The cases cited by the editors of the last edition of Sedgwick on Damages sustaining the proposition that interest cannot be included in a recovery of damages for personal injuries are from Georgia and Pennsylvania. *Batteree v. Chapman*, 79 Ga. 574; *Western & A. R. Co. v. Young*, 81 Ga. 397; *Pittsburgh, S. R. Co. v. Tylor*, 104 Pa. 808. These cases have all been examined, and fully sustain the text. One of the cases cited to the proposition in Am. & Eng. Encyclop. Law was a Pennsylvania case, earlier than either of those to which we have referred. The case there cited, (*Fasholt v. Reed*, 16 Serg. & R. 268,) which we have not been able to find in libraries here, was evidently not one of personal injury, or else not consistent with later holdings of that court. Indeed, the Pennsylvania court seems hardly to have gone so far on that question in reference to allowance of interest as damages in other actions *ex delicto* as other courts. In suits for the destruction of property that court has held that, while lapse of time may be looked to, it is error to instruct the jury that plaintiff is entitled to interest on such damage from the time it occurred. *Plymouth Trop. v. Graver*, 125 Pa. 24; *Emerson v. Schoonmaker*, 185 Pa. 437. Of the other cases cited in Am. & Eng. Encyclop. Law, we have examined those in 13 Wis. 81, (*Hinckley v. Beckwith*), 36 N. Y. 689, (*Vandewort v. Gould*), and 30 Tex. 349, (*Wolfe v. Lacy*). They all sustain the text as it is intended to be understood, and as we have herein explained, and doubtless the

other cases do so. To the same effect are the cases of *Lincoln v. Claplin*, 74 U. S. 7 Wall. 132, 19 L. ed. 106; *Dyer v. National Steam Nav. Co.* 118 U. S. 507, 30 L. ed. 158; *United States v. North Carolina*, 136 U. S. 211, 34 L. ed. 836; *Clement v. Spear*, 56 Vt. 401; and cases from American decisions and reports cited in Rapalje's Digest, volume 1, pp. 1089-1041, under heads *Trover* and *When Interest may be Added*, and volume 2, p. 1991, under head of *Interest*. See also 1 Sedgwick on Dam. §§ 482-498, 8th ed. The effect and meaning of statements quoted from Am. & Eng. Encyclop. Law and its reference to Sedgwick on Dam. are made perfectly clear when these cases and authorities herein added are examined, and the generality of expressions limited to the purpose of their use and the class of cases being considered. They were not dealing at all, nor intended to be understood as dealing, with the question of recovery for personal injuries, which is itself a recovery of damages pure and simple, and measured by a rule which needs no supplement that would add damages to damages. The charge and verdict were therefore erroneous on this point, and prejudicial to defendant to the extent and only to the extent of the injury. The circuit judge might have refused to receive the verdict as to interest, and the same effect may now follow a remitting of the interest by plaintiff, if he elects to do so. In that event the plaintiff is entitled to a judgment for \$7,000, with interest from date of its rendition, and costs, and with this modification the judgment will be affirmed. This was the practice adopted in the Maine case on this point, as well as in one of the Pennsylvania cases, (185 Pa. 437,) citing several others, and is clearly the correct rule. In default of such remission, a new trial will be granted.

MISSISSIPPI SUPREME COURT.

ILLINOIS CENTRAL R. CO., *Appt.*,

O. C. PETERSEN.

(.....Miss.....)

There is no obligation on a railroad company to lay out for reloading a

car hired at a certain price for the trip, and partly filled with horses, because one of them has gotten down in the car, when the owner is with them and under the contract is chargeable with their care, and can if he chooses abandon the contract altogether, or make a new one for a longer time.

(April Term, 1891.)

NOTE.—Extraordinary unloading of livestock in transitu.

A provision, in a contract for the transportation of cattle, that the shipper should load and unload them at his own risk, does not deprive the carrier of its just, rational and necessary discretion of determining when the exigencies of transportation require them to be unloaded. *McAlister v. Chicago, R. I. & P. R. Co.* 74 Mo. 351.

Where the contract for the transportation of cattle placed the entire risk of the journey and the duty of loading and unloading upon the shipper, requiring the carrier only to furnish assistance, the train having been delayed by a snow-storm, the carrier is under no obligation to unload the cattle when the shipper had charge of them and might

himself have unloaded them. *Penn v. Buffalo & E. R. Co.* 49 N. Y. 204, 10 Am. Rep. 355.

Where the transit of a consignment of livestock is delayed without justifiable excuse, the carrier is liable for damages resulting from a refusal to allow the shipper to unload and water the stock. *Harris v. Northern Indiana R. Co.* 30 N. Y. 323.

Notwithstanding a contract for transportation of livestock exempted the carrier from any liability for damages resulting from delay, it was the duty of the carrier, upon reasonable request of the shipper, after the train was stopped by a flood, to so place the cars as to be convenient to the usual and accessible means of unloading, if that was practicable, and failure to do so carries with it the liability for resultant damages. *Hills v. New York Cent. R. Co.* 84 N. Y. 5.

REAL by defendant from a judgment of the Circuit Court for Hinds County in favor of plaintiff in an action to recover damages for injuries to certain horses while on defendant's cars for transportation, which resulted in the death of two and serious injury to several others, and which were due to be due to defendant's negligence.

sed. facts are stated in the opinion.

are. W. P. Harris and J. B. Harris appellants.

E. E. Baldwin for appellee.

ords, *Ok. J.*, delivered the opinion of the court:

Under the special contract in evidence, and which the appellee seeks a recovery, the plaintiff corporation let to appellee an entire car to be used by him in the transportation of his denominated "emigrant movables," including, in this instance, of six horses and a miscellaneous property,—corn, feed stuff, wire, etc. The car was under the charge of the care of appellee, was loaded by him in his own discretion, and was held in the defendant's yards at Chicago, to meet appellee's car, for about three days, in order to permit to complete his load; and this while the horses were all on the car, they having been loaded at a point thirty miles north of Chicago. The contract stipulated, for the defendant Company, against liability on its part, for injuries resulting from collisions or accidents in transportation. That the railroad limited its liability for willful injuries or negligence is not contended by its counsel. Under this special contract the appellee was to feed, water and take care of his stock and to load and unload the animals, and exempt the Railroad Company from loss or damage by jumping from the cars, delay, or any damage the stock might suffer, except such as should result from collision or derailment of cars in course of transportation. Suitable provision was made for and watering the stock on the car, and the stock were properly fed and watered by the driver who accompanied the stock, without charge than the price paid for the use of the car. After the stock had been loaded and confined in the car for nearly three days the appellee completed his additional load, and the car was taken in charge by the driver, to be transported on its route to

Jackson, Miss. The next day after leaving Chicago appellee discovered that one of the young stallions was down in the car. He got it up, but before reaching Centralia and about a day after the journey had been begun, the same young animal was found down again and, as was thought by appellee, to be down finally, as he expresses it. On reaching Centralia appellee made application to the Railroad Company's agent to be laid out for twenty-four hours, to the end that he might rearrange his load, (then plainly seen to have been improperly loaded,) and to rest his stock, which application was not accepted and complied with, though the car of appellee was actually taken out of the train in which it was being carried, and was permitted to lie at Centralia for a few hours,—a time too short, however, as appellee thought, to afford him opportunity to unload, rest his stock and rearrange the load.

The question, then, which meets us on the threshold of the case, and whose determination by us may prove conclusive of the entire controversy is, Had the appellee the right to demand that he be laid out at Centralia? If he had this right, how was it acquired? Was it an implied obligation resting upon the railroad? If it finds rest under the contract, it will be found by implication. There is no express obligation of this character appearing on the face of the instrument. If it was an implied obligation on the railroad, how is the implication raised? If it was the custom of the Railroad Company to lay out cars in which a few horses were carried, then there was an implied obligation assumed to comply with such custom on the part of the railroad. But the undisputed evidence perfectly shows that, while it was the custom to lay out carload lots of animals every twenty-four or twenty-eight hours, in order that they might be fed, watered, and cared for, no such custom prevailed or existed in cases where a few animals only were loaded in a car, and where provision was made thereon for watering and feeding the animals. The custom was unknown in cases of the latter character. Nor does the absence of the custom seem unnatural, there being no necessity, apparently, in ordinary cases, for any unloading. The cases referred to by appellee's counsel,—*Illinois Cent. R. Co. v. Adams*, 42 Ill. 454, 87 Am. Dec. 251, and *Toledo, W. & W. R. Co. v. Thompson*, 71 Ill. 424,—raised an implied obligation on the carrier to throw

a case, if the conductor had no reason to believe that he could run the train through the car, of which he had been warned, his refusal to make the request of the shipper to have the stock unloaded at that point, so that the stock could be unloaded at a point before the high water was reached, is a negligence which renders the carrier liable for the damage caused by the train being delayed at a point where the stock could not be unloaded. *Ibid.* 4286 of the United States Revised Statutes, forbidding a carrier from transporting live stock in same cars for more than twenty-eight hours without unloading, does not deprive the carrier the right to confine stock in cars time, whether it would be negligent or not. *Missouri Pac. R. Co. v. Ivy*, 79 Tex.

only for the penalty prescribed thereby, but is negligent per se, and liable for the damages resulting therefrom. *Nashville, C. & St. L. R. Co. v. Haggie* (Ga.) Nov. 21, 1890.

The fact that the stock-yards of the carrier at the regular station for unloading and feeding were on fire when the train passed is no excuse for not unloading the stock at some adjacent point. *Ibid.*

Although by the contract for the transportation of livestock the shipper is to feed, water, and care for them while in transit, if they are detained to such an extent that it is necessary, in order to avoid injury, to unload, water and feed them, the carrier is liable for damages arising from its failure to provide the shipper with suitable facilities for so doing. *Dunn v. Hannibal & St. J. R. Co.* 68 Mo. 288; *Taylor, B. & H. R. Co. v. Montgomery* (Tex. App.) April 20, 1891.

J. G. G.

who violates such statute is liable, not A.

water on hogs crowded in a car, because of the known custom of railroads to so apply water to that particular animal. The other case relied upon by counsel for appellee is that of *Kinnick v. Chicago, R. I. & P. R. Co.*, 69 Iowa, 685. In that case the railroad company received a carload of hogs from plaintiff, and, after loading and starting them on their journey, there was such delay, by reason of the wrecking of another train, that a number of the hogs died; and the court held, as it was a natural propensity of hogs to struggle to get near to or away from the doors of a car, when it is left standing, and to "pile up" on each other in such struggles, and thereby produce injury or death, and as it appeared that the injuries complained of were attributable to the failure of the railroad company to give the animals any attention during the twelve hours during which the train was standing still because of the obstructing wreck, that the company was liable because of its negligence, in this extraordinary danger to the animals, in failing to do what the delay and consequent peril to the animals required should be done. We fail to see any support in any of these cases for the proposition that there was an implied obligation in the case at bar upon the Railroad Company to lay out the car, which appellee had hired, for twenty-four hours at Centralia. The contrary is involved in these decisions, as we understand them.

In the absence of any custom imposing obligation to lay out on the appellee, what is there in the conduct of the parties to the contract before us which will authorize us to say that any purpose to lay out the car, after it had been started on its way to its destination, was in the minds of the Company and the appellee? What is the foundation for implying that the minds of the parties ever dwelt upon or met in any unexpressed agreement that appellee should have such right? We have been unable to find any circumstance, even, which tends to support that proposition. On the other hand, there is much in the evidence of the appellee which strongly shows that he regarded the use of the car as confined to one continuous trip. He placed three horses in each end of the car, and then partitioned both ends in front of the horses, their heads being towards the middle doors of the car. He likewise made stalls for the horses, respectively, within the partitioned spaces, and then he proceeded to fill up the vacant space in the middle of the car with a large quantity of corn and other feed stuff, household goods, etc. The whole arrangement of the carload, as made by the appellee, precluded the unloading of the

car, unless with much labor and considerable time. It is perfectly apparent that neither when the contract was executed nor when the car was loaded was there any thought of having a layout accorded him while on the way, in the mind of appellee himself even. We fail to find any ground for maintaining that there was any implied obligation, under the contract, to give appellee the desired layout.

It is said by counsel for appellee that by section 4386, U. S. Rev. Stat., a definite rule for the transportation of animals is created, and penalties prescribed for disregard of the rule. With this rule and its enforcement the courts of the State are no way concerned. But the Act itself, in a subsequent section, provides for the recovery of the penalty in a civil action in the proper federal court. It is waste of words to say more. Is there an obligation, founded in common humanity, which required the Railroad Company to lay out appellee's car, in order that dumb brutes may have relief from suffering and rescue from death? It is not necessary for us to answer. The evidence satisfies us that the appellee did not himself think the stock in the condition indicated in the foregoing question when he made his request at Centralia to be laid out. Surely it cannot be believed that, if he then knew, or had reason to know, that very valuable stallions (one of which he had paid \$800 for) and valuable mares were in peril of impending death or serious injury, self-interest as well as humanity, would not have constrained him to make a new contract for longer use of his car, or, if necessary, to abandon altogether his then contract with the Railroad Company, and take the chances of the trifling loss of \$60, which he had bound himself to pay the railroad, by then and there unloading his car and leaving the train. It is manifest that by keeping his stock on the car for three days before starting them southward from Chicago, and by so loading the car as to render it impossible to take the stock out without great trouble and delay, the appellee had placed himself in the unfortunate situation which confronted him at Centralia, and from which he could only extricate himself by making a new contract for the use of the car for a longer time than originally thought needful, or by abandoning his contract altogether, and removing his stock from the train. As these views, for the present, appear to cut up by the roots appellee's contention, we find it unnecessary to express any opinion on any other point involved.

Reversed and remanded.

ALABAMA SUPREME COURT.

Harry WARDEN, *Appt.*,

v.

LOUISVILLE & NASHVILLE R. CO.

(.....Ala.....)

1. For a brakeman to sit on the cross-

NOTE.—Contributory negligence of railroad employee in riding on engine.

In harmony with the case of *Missouri Pac. R. Co.* 14 L. R. A.

beam in front of the engine with his legs hanging over in front of the pilot while the train is running between stations on the main line and it is no sense necessary for him to be there, in negligence which will prevent a recovery for injuries sustained as the result of collision with the rail of a intersecting road, which injury he would not

v. McCally, 41 Kan. 639, discussed in the opinion, it is held by a Minnesota case not to be contributory negligence for a switchman to ride on the front in-

- have received if he had been elsewhere on the train.
2. The custom of a class of persons to ride upon a pilot of an engine cannot prevent such an act from being regarded as negligence.
 3. The opinion of a witness that it is not more dangerous to ride on the front of an engine than on the top of the cars is not admissible.
 4. It is a question for the court to say as matter of law that the cross-beam in front of an engine is a more dangerous position than the top of the train while it is in motion.

(November 23, 1891.)

APPPEAL by plaintiff from a judgment of the City Court of Birmingham in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed*.

The facts sufficiently appear in the opinion.

Messrs. Taliaferro & Houghton, for appellant:

A servant may show custom in opposition to rule of master.

Wood, Mast. & Serv. § 401; *Sprong v. Boston & A. R. Co.* 53 N. Y. 56; *Little Rock, M. R. & T. R. Co. v. Leavett*, 48 Ark. 333, 8 Am. St. Rep. 230; *Fay v. Minneapolis & St. L. R. Co.* 30 Minn. 231, 11 Am. & Eng. R. Cas. 193.

Messrs. Hewitt, Walker & Porter for appellee.

McClellan, J., delivered the opinion of the court:

Appellant was plaintiff below. He received personal injuries while in the service of the appellee as head or front brakeman on a freight train, and brought this action to recover damages therefor. The trial was had upon the general issue, and several special pleas, each averring plaintiff's contributory negligence. No evidence was adduced except on the part of the plaintiff, and upon this the court gave the general affirmative charge in favor of the defendant on the theory that his own evidence was free from conflict and all contrary inferences to the proof of negligence on plaintiff's part which proximately contributed to the injury sustained by him. This evidence showed that the train on which plaintiff was employed was a regular cross-country freight train of the defendant company. Its run was over the line between Bessemer and Boyles station, a distance of seventeen miles, between which

points were four other stations from one to seven miles apart. The business of this train was to receive and deliver at these intermediate and terminal stations cars laden with ore, pig-iron, and the like, and also general freight; and in doing the work assigned to it, it was necessary to do more or less switching, and setting in upon and taking out from side tracks loaded cars, at each one of these stations. It was plaintiff's duty, when the train was proceeding along the line, to attend to the brakes on the two or three cars next to the engine,—a duty which could be performed only on the tops of the cars; and, on approaching a station at which cars were to be left or taken on, his duty was to open switches leading into and out of sidings,—a duty which could only be performed on the ground, in front of the engine. It does not appear that he had any duties to perform, or that any of his duties could be performed, on the pilot, cross-beam, or cow-catcher of the engine, or that it was in any sense necessary for him to be on the cross-beam in front of the engine at any time, and certainly at no time while the train was passing from one to another of the stations served by it. Yet it is uncontroverted in this case that he received the injuries of which he now complains while sitting on this cross-beam in front of the engine,—the beam to which the pilot or cow-catcher is attached,—with his legs hanging over in front of the pilot, and this while the train was out on the main line, proceeding from one station to another, and when the only duty he could possibly have had to perform was upon the top of the train. Not only so, but it was equally clear from the testimony that the casualty was directly the result of the pilot's colliding with a rail of a bisecting road; that no other part of the train or engine was injured; that no other of the several persons on the train was hurt; and that he would not have been hurt but for his having taken this position on the pilot. There being thus no doubt that plaintiff's presence on the pilot contributed proximately to the injuries he sustained, the main question in the case is whether his being there at the time of the accident was negligence *in se* on his part, and to be so declared by the court as a matter of law. The authorities are believed to be uniform to the support of the affirmative of this inquiry. The investigations of the court and counsel have failed to disclose a single adjudged case to the contrary, while many

stead of the rear foot board of an engine so as to defeat a recovery for his injury by derailment of the engine. *James v. Northern Pac. R. Co.* 45 Minn. 168.

And to the same effect is a decision of the circuit court of the United States in Tennessee. *Lockhart v. Little Rock & M. R. Co.* 40 Fed. Rep. 631.

The latter case holds also that the improper speed of the switch engine on which a switchman was riding when killed will not prevent recovery for his death on account of negligence in leaving cars standing on the track if the speed did not contribute to his death. *Ibid*.

As distinguished from these cases concerning switchmen, and in harmony with *Baltimore & P. R. Co. v. Jones*, 95 U. S. 430, 24 L. ed. 505; *Glover v. Scotten*, 83 Mich. 389, and *Kresanowski v. Northern Pac. R. Co.* 18 Fed. Rep. 339, which are fully dis-

cussed in the opinion, it was held in an Iowa case that where a brakeman necessarily went to ride on a locomotive and was there scalded to death there could be no recovery for his death. *O'Neill v. Keokuk & D. M. R. Co.* 45 Iowa, 546.

So where a railroad employé not engaged on a train got upon the tender and was killed when the engine broke through a bridge, he was guilty of contributory negligence which defeated a recovery. *Doggett v. Illinois Cent. R. Co.* 34 Iowa, 284.

And the foreman of a crew of wreckers cannot recover for injuries while in the cab of an engine on a "wild" train which he would not have received if he had been in another part of the train, where he was required to be by the regulations of the company. *Abend v. Terre Haute & L. R. Co.* 111 Ill. 203, 36 Am. Rep. 618.

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courts are upon the record as holding, either by analogy or directly, that to ride upon the pilot or cross-beam in front of an engine while proceeding on its way along the line of its track, without justifying necessity therefor, involves *per se* such negligence as will defeat an action counting upon injuries received while so riding, and which would not have been received but for the plaintiff's being there. Even the assumption of less dangerous, but, at the same time, improper, positions on moving trains, voluntarily and unnecessarily, has been many times held to be contributory negligence as a matter of law, neutralizing the negligence of the defendant, and destroying an otherwise good cause of action, as is illustrated in the following cases: *Martin v. Baltimore & O. R. Co.* 41 Fed. Rep. 125; *Judkins v. Maine Cent. R. Co.* 6 New Eng. Rep. 715, 80 Me. 417; *Hickey v. Boston & L. R. Co.* 14 Allen, 429; *Pennsylvania R. Co. v. Langdon*, 93 Pa. 21, 87 Am. Rep. 651, 1 Am. & Eng. R. R. Cas. 87; *Kentucky Cent. R. Co. v. Thomas*, 79 Ky. 160, 42 Am. Rep. 208, 1 Am. & Eng. R. R. Cas. 79; *Lehigh Valley R. Co. v. Greiner*, 113 Pa. 600, 4 Cent. Rep. 898; *Atlanta & U. A. R. Co. v. Ray*, 70 Ga. 674; *Martensen v. Chicago, R. I. & P. R. Co.* 60 Iowa, 705.

And it is laid down as a general proposition that the act of riding, without a necessity so to do, on an engine is contributory negligence *per se* which will defeat recovery for injuries resulting in consequence from collisions, and the like. *Abend v. Terre Haute & I. R. Co.* 111 Ill. 202, 53 Am. Rep. 616, 17 Am. & Eng. R. R. Cas. 614; *Doggett v. Illinois Cent. R. Co.* 34 Iowa, 284; *Robertson v. New York & E. R. Co.* 22 Barb. 91.

As an engine is justly considered the most dangerous place to be on a train moving forward, so, for the same reasons, the pilot is manifestly and obviously the most perilous place on a forward moving engine. Its very name is a proclamation of danger. The sole end it is intended to conserve—the removal of obstructions from the track—is alone sufficient to impress upon it, to the apprehension of every man in his right mind, the character of being the most perilous place capable of occupation on a train while proceeding from station to station on its way. And so, we repeat, the authorities present unanimity to the proposition that to take position there under such circumstances is a fact not only authorizing the inference of negligence to be drawn by the jury, but to which the law itself imputes negligence.

A leading case on the point is that of *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. ed. 606. There the plaintiff was one of a party of men employed by a railroad company in constructing and repairing its roadway. They were usually conveyed to and from their place of labor by the company, and a box-car drawn by an engine was used for this purpose. The plaintiff, although forbidden on several occasions to do so, and warned of the danger, on returning from work one evening rode on the pilot or bumper of the locomotive, and was injured from a collision with some cars standing on the track in a tunnel. There was room for him in the box-car, as there was room for the plaintiff here on the train; and none of those in

the box-car were hurt, as here all who remained on the cars escaped injury. It was held that, as the plaintiff would not have been injured had he used ordinary care, he was not entitled to recover, *Mr. Justice Swayne* observing: "His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit."

In the case of *Kresanowski v. Northern Pac. R. Co.*, 18 Fed. Rep. 229, the facts were that the plaintiff, an employé of the defendant railroad company, while being transported to the place where his services were required, along with other employes on an engine provided by the company, sat, with one or two others, on the front of the engine, with his feet hanging over the pilot, and was injured by a collision with another engine. It was held, on a motion to instruct the jury to find a verdict for the defendant, (1) that the plaintiff himself so far contributed to his injury by his own negligence in placing himself in such a dangerous position that he could not recover; and (2) there being evidence that there was no room for the plaintiff on the tender, and that he had in effect been authorized or invited by the company to ride over the pilot, that, the plaintiff being of age, and able to see and know the risks of the position, even the fact of such invitation and authorization would not justify him in placing himself in a position of obviously great risk and danger. But the strongest support of this doctrine is found in the circumstances of a Michigan case, and the several decisions which were made in different actions which grew out of it. The facts were that a switchman in the employ of a railway company was killed. The engine upon which he was employed, and which was at the time engaged in switching cars about the yard of the company, ran into a truck owned by the defendant, an individual having no connection with the railway company, and driven by his teamster. The result of the collision was the death of the switchman, injury to defendant's teamster, and destruction of the truck and team. The switchman, at the time of the collision, was sitting on the cross-beam of the pilot, with his feet hanging down over the "cow-catcher." He had no duties to perform while on the engine. His duty was to attend to the switching of tracks in front of the engine, getting off and on the cars for that purpose. It is to be noted that, while this case is strikingly like the one at bar in most of its features, it is yet different from it in that the party injured there was a switchman having no duties to perform on the cars, and the engine was being run in the railroad yard, and only for the purposes of switching, while here plaintiff's duties while the train was in motion were all on top of the cars, and at the time of the accident the train was running across country, and not engaged in switching at all, and was in fact engaged in switching at no time except as an incident of its carrying business from station to station; so that in every particular in which there is a difference between the two cases the Michigan case is a much stronger one in favor of the injured party than the present one. Several actions grew out of the transaction. The

teamster sued the railroad company, counting on the personal injuries he sustained. The company was found negligent, the judgment went against it, which was paid. The railroad company also paid the owner for the loss of his truck and team. The personal representative of the dead switchman sued the railroad company in the circuit court of the United States, claiming that the death of his intestate resulted from the negligence of the railroad company in not ringing the bell or blowing the whistle for the crossing, over which the truck was passing when the collision occurred, in not having a flagman there to keep the way clear, in obstructing the switchman's view of the crossing, etc. Judge Brown, now of the Supreme Court of the United States, before whom that case was tried, directed a verdict for the defendant, upon the ground that the switchman was guilty of contributory negligence in being at the time on the cross-beam of the pilot. The administrator of the switchman then sued the owner of the team and truck, and this last case went to the Supreme Court of Michigan, and was there determined against the plaintiff, who had recovered in the *nisi prius* court, on the ground that the trial judge had left it to the jury to say whether the switchman was guilty of contributory negligence, when the court itself should have determined that he was guilty of negligence which contributed to his death as a matter of law, and thus withdrawn that issue from the jury altogether. Grant, *J.*, rendering the opinion of the court, said: "Several questions are raised by the record, but the plaintiff's right to recover is barred by his decedent's contributory negligence, rendering a determination of the other questions unnecessary. There is no dispute about the facts. The judge found as a fact, and so charged the jury, that there was no testimony in the case that the deceased was obliged to ride upon the cow-catcher, and left it to the jury to determine whether or not this constituted negligence on his part. In the absence of proof, we cannot believe that any railroad company requires its switchmen, or any of its employes, to ride in so dangerous a place. There was a safer place for him to ride. He was neither required nor directed to ride in a position which every person of ordinary intelligence and observation knows was the most dangerous he could have chosen. The fact that upon switch-engines switchmen rode standing upon the platform provided for them in front of the engine had no tendency to prove that the deceased was justified in riding in a sitting posture upon the cow-catcher of a road-engine; nor would the fact that switchmen were in the habit of riding upon the cow-catcher excuse the deceased, as between him and defendant. Yet the judge substantially left the jury to determine the question of contributory negligence by the determination of the question as to whether the deceased was riding in the usual and ordinary place upon the engine. If switchmen always rode there, still that fact would not take them without the rule of contributory negligence. When a safer place is provided, and employes choose a more dangerous one, they do it at their own risk. The difference in danger between standing on a platform of a regular switch-engine and sit-

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ting on a cow-catcher, with one's legs hanging over it, is apparent. In the one case the switchman is ready to jump upon the approach of danger; in the other, considerable time must elapse before he could recover his standing position upon the pilot-beam, and put himself in readiness to avoid danger. In the present case deceased was the only one upon the engine who was injured. He chose the only place in which he could have been injured, and chose a sitting posture instead of a standing posture. *Baltimore & P. R. Co. v. Jones*, 95 U. S. 489, 24 L. ed. 506; *Doggett v. Illinois Cent. R. Co.* 84 Iowa. 284; *Kresanowski v. Northern Pac. R. Co.* 18 Fed. Rep. 239. We quote with approval from the language of the court in *Baltimore & P. R. Co. v. Jones*, as applicable in this case: "This [contributory negligence] is shown with as near approach to demonstration as anything short of mathematics will permit." There was no fact in this case for the determination of the jury. The question was therefore one purely of law. It was therefore the clear duty of the court to instruct the jury to find for the defendant. It was as clearly its duty as it would be to determine the legal effect of a contract the terms of which are undisputed." *Glover v. Scotten*, 82 Mich. 369. The exigencies of the case at bar do not require that we should go to the full length of the opinion in *Glover v. Scotten*, and hold that for a switchman to sit upon the pilot or cross-beam of a road engine being moved about in the yards of a railroad while performing the functions of a regular switch-engine would be negligence *per se*. It may be that the true doctrine in such case is that declared by the Supreme Court of Kansas in *Missouri Pac. R. Co. v. McCally*, 41 Kan. 639, where it was held, the company having failed to provide a switch-engine, and having always required switching to be done with an ordinary freight-engine, there being some evidence of a necessity for switchmen to stand on the cross-beam while the engine was being moved about the yard, and to the effect that it was the usual custom of all brakemen in the yard to so ride, that the question as to whether that position was one of danger and voluntarily chosen by the deceased was a question of fact to be determined by the jury under all the circumstances. The position of the Kansas court may be conceded for all the purposes of the case we are considering without affecting the result we have foreshadowed. Here the engine was not a switch-engine, nor being used at the time of the accident as a switch engine. It was an ordinary road-engine, proceeding on its way along the line of the road between two stations, engaged in its regular business of drawing a freight train. The case is thus wholly unlike *McCally's Case*, and upon all fours with *Jones' and Kresanowski's Cases*. The person injured was not standing on the steps of the pilot, and thus in a position to escape a collision with facility by jumping, as in the Kansas case, but sitting down on the beam with his legs hanging over the cow-catcher, as in the *Cases of Jones, Kresanowski, and Glover*, though we are not prepared to say that the particular attitude assumed on the pilot by the person injured could ordinarily be a material consideration. *McCally's Case* is strenuously pressed

upon our attention in connection with the facts that the line over which the train on which plaintiff was injured was running was a short one; that the stations on it were not far apart; that this train had to stop at each one of them, and at each do more or less switching. We do not conceive that these facts can exert any influence on the question. Certain trains on all roads stop at all stations. Usually such trains have switching to do at all stations. The right of the front brakeman on such trains to leave his post of duty—which is on the top of the cars—and take a position of obvious danger on the pilot cannot be made to depend upon the frequent recurrence of stations and a consequent necessity for him to open switches in front of the engine. However frequent the stations are, and whatever the duties of the head brakeman may be at the stations, it is certain that, while the train is passing from one station to another, there are no duties for him to perform on, or even near, the pilot, and no possible necessity for his presence there. We feel entirely safe in the conclusion that plaintiff's conduct in unnecessarily and voluntarily leaving his post of duty, and assuming a position of obviously greater danger, but for which he would not have been injured, involved such negligence on his part as justified the trial court in giving the general affirmative charge against his right to recover.

It is insisted, however, that the case should be reversed because of the exclusion of certain testimony offered by the plaintiff, going to show a custom on the part of himself and other head brakemen on that train to ride between stations on the pilot. The city court did not, in our opinion, err in the exclusion of this testimony. The fact that one is in the habit of doing an obviously dangerous thing does not make his act any the less a dangerous one. The fact that many or all of a limited class of persons customarily ride upon the pilot of an engine does not alter the characteristic of obvious peril which the law imputes to that position. It is negligence *per se* for persons to walk upon the track of railroads. Doubtless many persons are in the habit of using the track in this way. Yet it has never been supposed, and it cannot be the law, that such custom would convert the track, which the law declares to be *per se* a dangerous place, into a safe place. So a person may be in the habit of crossing railway tracks without stopping and looking and listening for approaching trains; yet we have never heard it suggested such person, when he finally reaps the penalty of his lack of care, is, because of such habit, not guilty of contributory negli-

gence as a matter of law. Custom and usage may be relied upon to excuse the violation of a rule when the act involved is not negligent in itself, but only by relation to the rule violated; and so, when an act may be done in two or more ways, a resort to neither of which involves such obvious peril as raises the legal presumption or conclusion of negligence in the doing of it, a custom or usage to do it in a particular way may be looked to as tending to show that it was not negligence to resort to that method in the instance under consideration. But custom can in no case impart the qualities of due care and prudence to an act which involves obvious peril, which is voluntarily and unnecessarily done, and which the law itself declares to be negligent. *Glover v. Scotten*, 82 Mich. 369; *Hickey v. Boston & L. R. Co.* 14 Allen, 429; *Judkins v. Maine Cent. R. Co.* 6 New Eng. Rep. 715, 80 Me. 417; *Chicago, R. I. & P. R. Co. v. Clark*, 106 Ill. 113, 15 Am. & Eng. R. R. Cas. 261; *Southern Kansas R. Co. v. Robbins*, 48 Kan. 145; *Humphreys v. Newport News & M. V. Co.* 33 W. Va. 135; *Hibler v. McCartney*, 31 Ala. 501; *Bryant Central Vermont R. Co.* 56 Vt. 710.

Nor do we conceive that the court committed error in refusing to receive opinion evidence to the effect that it was not more dangerous to ride on the front of the engine than on the top of the cars. The general rule is well established that such evidence is not competent where all the facts upon which the opinion is founded can be ascertained and made intelligible to the court or jury. All the facts upon which the opinion which was offered here proceeded were before the court, either through the ordinary vehicles of evidence or as matter of judicial knowledge; and they presented such a state of case as that it became the court's right and duty to declare, in effect, as a matter of law, that the cross-beam in front of the engine was an obviously more dangerous position on a moving train than the top of the train; and the authorities are uniform in support of the proposition that the mere opinions of witnesses to the contrary can exert no influence upon the conclusion which the court itself is esteemed more competent to reach and declare. *Chicago v. McGiven*, 78 Ill. 847; *Everling Bridge Co. v. Pearl*, 80 Ill. 251; *People v. Morrigan*, 29 Mich. 5; *Muldowney v. Illinois Cent. R. Co.* 36 Iowa, 462; *Hamilton v. Des Moines Valley R. Co.* Id. 31; *Kansas Pac. R. Co. v. Peavey*, 29 Kan. 169, 44 Am. Rep. 630, 11 Am. & Eng. R. R. Cas. 260.

We discover no error in the record, and the judgment of the City Court is affirmed.

NEW YORK COURT OF APPEALS (2d Div.).

Hugh FLYNN, *Rept.*,
v.

J. Monroe TAYLOR, *Appt.*

(.....N. Y.....)

1. It is an unreasonable use or occupa-

NOTE.—Obstruction of street or sidewalk for business or building purposes.

The owner of land may make such reasonable
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tion of a sidewalk where thousands of pedestrians pass daily to have trucks standing across it for several hours each day to be loaded or unloaded at a manufacturing establishment.

2. Special injury giving a right of private action is caused to the proprietor of a

use of a way adjoining his land as is usually made by others similarly situated. *Van O'Linda v. Lothrop*, 21 Pick. 297.

retail store by an habitual obstruction of the neighboring sidewalk whereby travel is diverted to the other side of the street.

(October 6, 1891.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of a Special Term for Kings County, in favor of plaintiff, in a trial by the court without a jury, of an action brought to recover damages for unreasonably using the sidewalk on a certain street so as to block it up and interfere with travel thereon. *Affirmed.*

Statement by **Vann, J.:**

Action to recover damages for creating a nuisance, and to restrain its further continuance. Sackett Street is a public street in the city of Brooklyn, 60 feet in width, and used by

several thousands of pedestrians every day. During and prior to the year 1887 the defendant owned a parcel of land, with a frontage of about 140 feet, on the south side of said street; on which there was a large building covering the whole lot, where he carried on the business of manufacturing saleratus and other articles of domestic consumption. At the same time the plaintiff owned certain premises on the same side of said street, about 80 feet further west, but in the same block, where he kept a retail liquor store. Several years prior to the commencement of this action the defendant, with the consent of the city authorities, erected on the sidewalk in front of said factory a platform 90 feet long, 2 feet 10 inches high, and 4 feet 8 inches wide. Said platform projects its entire width across the sidewalk, and is used by the defendant for loading and unloading trucks, which for that purpose stand several hours each day upon that part of the sidewalk

But if the use is such as to amount to a nuisance the fact that other persons in the neighborhood are accustomed to do the same thing will not justify it. *Judd v. Fargo*, 107 Mass. 264.

So where the storage of goods on a sidewalk is prohibited by the municipal ordinance the fact that storekeepers usually use the walks in front of their shops for such purpose is no justification to one sued for injuries resulting from the obstruction. *McCloughry v. Finney*, 87 La. Ann. 81.

An obstruction of a highway will not be excused on the plea of its being necessary for the carrying on of the party's business though such obstruction be only occasional. *State v. Chicago, M. & St. P. R. Co.* 4 L. R. A. 293, 77 Iowa, 442.

It is no defense that the injury was caused by the fall of an object through the negligence of a third person, if defendant unlawfully maintained the obstruction. *Manger v. Harrison*, 14 N. Y. Week. Dig. 201.

Use for loading and unloading goods, etc.

The ways of a town would be of comparatively little use if the citizens and traders could not deposit their goods in them temporarily in their transit to the storehouse. *Haight v. Keokuk*, 4 Iowa, 214.

When not restrained by ordinance or otherwise an abutter may use the highway in front of his premises for loading and unloading goods but only on condition that he does not interfere with the safety of the traveling public. *Halsey v. Rapid Transit St. R. Co.* 47 N. J. Eq. 380.

A temporary occupation of part of a street in receiving or delivering goods from stores or warehouses is allowed from the necessity of the case, but a systematic and continued encroachment upon a street, though for the purpose of carrying on a lawful business, is unjustifiable. *People v. Cunningham*, 1 Denio, 524, 43 Am. Dec. 709.

A sleigh standing for ten or fifteen minutes for the purpose of unloading goods ought not to be regarded as an obstruction to a village street. *Sikes v. Manchester*, 50 Iowa, 65.

For the purpose of unloading a car loaded with flour a merchant whose store is on the street through which the railroad runs may use skids temporarily elevated above the ground and extending from the car door fifty feet to the sidewalk providing there is ample room between the car and the opposite side of the street to accommodate the travel of the street. *Mathews v. Kelsey*, 58 Me. 55, 4 Am. Rep. 248.

Obstructing a street by loading and unloading 14 L. R. A.

goods is unlawful. *Benjamin v. Storr*, L. R. 9 C. P. 400.

If a wagon occupies one side of a public street in a city before his warehouse in loading and unloading his wagons, for several hours at a time both day and night, and has one wagon at least usually standing before such warehouse so that no carriage can pass on that side of the street, and sometimes even foot passengers are incommoded by cumbrous goods lying on the ground ready for loading, he is indictable for a nuisance although there was room for two carriages to pass on the opposite side of the street. *Rex v. Russell*, 5 East, 427.

Whether a sled containing tubs, which was left in the highway near an outbuilding with the intention of removing the contents of the tubs into the building was a nuisance would depend upon whether they had remained in the highway for an unreasonable time and upon that issue evidence was competent that the highway was little frequented, but not that the state of things at the outbuilding was such as to render it convenient to leave the sled and tubs in the highway, nor that persons in the vicinity were accustomed to do so under similar circumstances. *Judd v. Fargo*, 107 Mass. 264.

For hack stand or storing wagons.

Storing a wagon in a highway in front of plaintiff's place of business is unlawful. *Cohen v. New York*, 4 L. R. A. 400, 118 N. Y. 582.

It is unlawful for stage coaches to stand plying for passengers an unreasonable time in public streets. *Rex v. Cross*, 3 Campb. 230.

A stage-coach cannot lawfully be kept standing in the road in front of the entrance of a camp-meeting ground so as to interfere with the access of other teams. *Turner v. Holtzman*, 54 Md. 148, 39 Am. Rep. 461.

A hackney coach stand in the public street interfering with the private use thereof is a nuisance and is not justified by a city ordinance permitting its establishment. *Brannan v. Cincinnati Hotel Co.* 39 Ohio St. 333, 48 Am. Rep. 457.

But suffering horses and carriages occasionally to stand in the street opposite or near to a house is not unlawful. *Van O'Linda v. Lothrop*, 21 Pick. 267.

So leaving a horse and carriage standing before the door of a house where the owner is visiting is not unlawful. *Norrinstown v. Moyer*, 67 Pa. 367.

It is not clear that under any circumstances a village street would in law be regarded as obstructed by farmers' vehicles occupying one third or one half of it during the greater portion of the

that is not covered by the platform. The sidewalk and street, together with the bridge over the gutter between, are well paved, and on the same level, and there is usually no difficulty in walking around the obstructions on the sidewalk by going out into the street. While the trucks are standing across the sidewalk backed up to the platform for the purpose of receiving or discharging a load, the horses are generally turned around parallel with the building, to enable pedestrians to pass around over the carriage-way through the street. There are two railway tracks in the street, and the nearest rail is about eight feet from said sidewalk. The defendant also has platform scales on the sidewalk at one end of his factory, that he uses for weighing coal in such a manner that the scales, coal-carts, and horses attached sometimes occupy the entire width of the sidewalk. The platform of the scales is on the

same level as the pavement, and forms a part thereof, and when not in use presents no obstacle to passers-by. Sackett Street is a thoroughfare to the Hamilton-Avenue ferry, and is used mainly for business purposes in the neighborhood in question. The defendant has no access to his factory, except from said street and across said sidewalk. The platform is a permanent obstruction, and the other obstructions named occupy the sidewalk on the average about three and a half hours each day. When the horses and trucks are on the sidewalk, pedestrians are compelled either to climb over the platform or walk around through the street. Owing to said obstructions, travel was to a certain extent diverted from the sidewalk in front of plaintiff's premises to the opposite side of the street, where there was a good walk, free from obstacles. The trial court found that the passage of the public along said side-

day while their teams are feeding at adjacent stables. *Sikes v. Manchester*, 59 Iowa, 66.

For fair or market purposes.

A fair cannot lawfully be held in a street. *State v. Laverack*, 34 N. J. L. 201.

An agricultural society cannot appropriate a portion of a highway for use in connection with its exhibition so as to exclude the public from the use of such portion. *Com. v. Ruggles*, 38 Mass. 588.

A fish box nine feet long, three feet wide, and two and one half feet high cannot be lawfully placed in a public street with the intention that it shall permanently remain there. *Laing v. American* (Ga.) March 4, 1891.

Booths and stands cannot ordinarily be placed upon sidewalks of streets adjacent to a public market. *St. John v. Mayor*, 3 Bosw. 494.

But where a market house was out of repair, for the purpose of permitting its being rebuilt and repaired market stalls may properly be built upon and about the adjacent street and sidewalk; but obstructions which are not reasonable under the circumstances are not authorized, nor is their continuance for an unreasonable time. *St. John v. New York*, 6 Duer, 319.

A custom to erect a booth or stall during the period of a fair or market on a part of a public street or highway, sufficient space being left for the public to pass, is a good custom. *Elwood v. Bullock*, 13 L. J. Q. B. 330.

So where a place has been used as a public fair or market for upwards of twenty years persons resorting there for the purposes of exposing articles for sale are not liable to be indicted for a nuisance for obstructing the highway. *King v. Smith*, 4 Esp. 108.

Where injuries are caused by teams in charge of their drivers standing in a public street for market and waiting purchasers, the town or city is not liable as for a defect in a street, but, *semble*, that the owners may be. *Davis v. Bangor*, 42 Me. 522.

But it seems that the occupation for such purpose must obstruct travel to be actionable; thus, keeping for one and one half hours a market cart and mule attached upon the corner of public streets one of which is sixty-six and the other ninety-nine feet wide, which in no way interferes with the passing of travelers, is not a nuisance *per se*. *State v. Edens*, 85 N. C. 523.

Rights of railroad companies.

A railroad company has no right to use a highway as a part of its freight yard. *Gahagan v. Boston & L. R. Co.* 35 Mass. 187, 79 Am. Dec. 724.

A railroad car may be loaded or unloaded while

temporarily standing for that purpose in a street, provided it be done in such a prudent manner as not unreasonably to interfere with the rights of those having occasion to use the street for the purposes of ordinary travel. *Mathews v. Kelsey*, 58 Mo. 59, 4 Am. Rep. 243.

The necessity or convenience of obstructing a highway by a railroad company in making up trains and switching cars are not matters to be considered in determining the question of guilt or innocence on indictment for obstructing a street. *State v. Chicago, M. & St. P. R. Co.* 4 L. R. A. 255, 77 Iowa, 442.

Convenient uses generally.

It is not lawful for an auctioneer to place goods intended for sale in the public street. *Com. v. Passmore*, 1 Serg. & R. 217.

A constable conducting an execution sale in a public street, thereby obstructing the passage, is indictable for nuisance. *Com. v. Milliman*, 13 Serg. & R. 403.

Wood for fuel may be thrown upon the street for the purpose of having it carried into the owner's house, and it may lie there a reasonable time. *Com. v. Passmore*, *supra*.

But leaving wood in a highway for a week or two in consequence of the wagon on which it was being drawn breaking down is unreasonable. *Northrop v. Burrows*, 10 Abb. Pr. 365.

Hay scales cannot be placed in a public street for the purpose of carrying on a private business. *Emerson v. Babcock*, 66 Iowa, 257, 55 Am. Rep. 272.

A timber merchant cannot lawfully use the street in front of his premises to cut timber into shorter lengths, although he cannot otherwise get it into his premises nor carry on his business there. *Rex v. Jones*, 8 Campb. 380.

Causing a crowd to obstruct the street by placing and keeping effigies in the show-window is a nuisance. *Rex v. Carille*, 6 Car. & P. 635.

Where the proprietors of a distillery discharged refuse through pipes to a street opposite their building, where it was received into casks standing in wagons and carts, and people desiring it were accustomed to collect in great numbers in the street near the building in such manner as to obstruct the street and render it inconvenient to those passing thereon, the owners of the distillery were guilty of maintaining a nuisance although the teams did not belong to them. *People v. Cunningham*, 1 Denio, 524, 43 Am. Dec. 703.

Where plaintiff occupied a shop on a passage leading from a public street to a court in which defendant was employed to tear down and rebuild certain buildings, and there were other passages

It was thus unnecessarily and unreasonably interrupted and interfered with by the defendant, and that in consequence thereof the rental value of plaintiff's premises had been diminished, and he had sustained special damages a nominal amount. Judgment was ordered for the damages so found, and for an injunction restraining the defendant "from unnecessarily or unreasonably obstructing the sidewalk" in front of said factory, but a stay of proceedings for three months was directed, to enable him to change the arrangement of his premises, if he so desired.

Mr. Frederick C. Dexter, for appellant:

The plaintiff has failed to show any substantial injury resulting from the acts complained of, or any injury that is not common to the public, and was not entitled to recover.

From the court to public streets, but defendant for his own convenience used the one on which plaintiff's shop was located so as to practically devote it to his exclusive operations and render it unsafe for the use of strangers, the use was held to be unreasonable. *Fritz v. Hobson*, 42 L. T. N. S. 226. Where a property owner for the purpose of strewing his fence used a small barrel mounted on wheels and left the same standing in the road the side of the beaten track over Sunday, whereby plaintiff's horse was frightened, he was not liable for injuries unless the appearance of the barrel was such as to tend to frighten horses of ordinary gentleness or it was left in the road for an unreasonable time. *Piollet v. Simmers*, 106 Pa. 51 Am. Rep. 496.

Private ways.

There is no right to obstruct a private passage. *People v. Brummitt*, L. R. 8 Ch. App. 660. One who erected a cider mill abutting on a private right of way, and carried it on in such manner that the patrons of the mill stationed wagons along and across the way materially obstructing same, he was held liable in damages. *Dennis v. Lippert*, 17 Hun, 69.

Burden of proof: question of fact or law.

Whenever the owner of premises hinders or obstructs travel upon the sidewalk or street in front of premises he has the burden of showing that obstruction was reasonably necessary and temporary. *Jochem v. Robinson*, 66 Wis. 622, 57 Am. Rep. 298.

It is if the alleged obstruction was under permission of a city ordinance, the one responsible for it must show its necessity or temporary nature. *People v. Willer*, 59 Wis. 241.

Whether or not the obstruction is a nuisance is a question for the jury which must depend upon whether or not it did or did not unnecessarily obstruct the free passage of the public over any part of a highway. *Graves v. Shattuck*, 35 N. H. 257, 2 N. Dec. 524.

It is in case of very heavy and ponderous pack-trailers or articles the court may, upon certain facts under certain circumstances, be justified in finding as a matter of law that the necessity existed; or, in case of very small and light articles there was in fact no necessity. *Jochem v. Robinson*, 66 Wis. 622, 57 Am. Rep. 298.

Obstruction of sidewalks.

The term "street" includes sidewalks. *Ely v. Board*, 59 How. Pr. 338.

The public are entitled to the use of the whole street. R. A.

Wood, Nuisances, §§ 619, 622, 654, 678; *High, Inj.* § 762; *Pierce v. Dart*, 7 Cow. 609; *Doolittle v. Broome County Supra*, 18 N. Y. 155; *Jutte v. Hughes*, 67 N. Y. 271; *Bergmann v. Jones*, 94 N. Y. 51.

The walk is intended for the use of pedestrians, but their right to the same is by no means absolute or exclusive. It must be exercised in harmony with the rights of the adjacent occupant. Any unnecessary or wanton occupation of the sidewalk for business by the adjacent proprietor is an invasion of the public right and is unlawful, while it must be an exceptional and extraordinary case in which the court is justified in holding that any necessary use of it required by the exigencies of legitimate trade is unreasonable.

Welsh v. Wilson, 2 Cent. Rep. 749, 101 N. Y. 257, 54 Am. Rep. 698; *Callanan v. Gilman*, 9 Cent. Rep. 900, 107 N. Y. 360.

street, including sidewalks. *State v. Berdett*, 73 Ind. 185, 38 Am. Rep. 117.

And to have the use unobstructed. *Clifford v. Dam*, 81 N. Y. 52.

An abutter is allowed, however, to exercise some privileges on the sidewalk which he may not exercise elsewhere in the street. *Halsey v. Rapid Transit St. R. Co.* 47 N. J. Eq. 380.

One doing business on a street in a populous city has the right to temporarily obstruct the sidewalk in front of his place of business for the purpose of loading merchandise, providing he acts in a reasonable manner so as not to unnecessarily encumber the sidewalk; and he is not bound to furnish those passing upon the walk a safe passage around the obstruction. *Welsh v. Wilson*, 2 Cent. Rep. 749, 101 N. Y. 254, 54 Am. Rep. 698.

No one can rightfully obstruct a sidewalk under any plea, whether of convenience or necessity, except for such time as is actually needful to get his goods in and out of his store. *McCloughry v. Finney*, 37 La. Ann. 81.

The necessity required to justify the use of a sidewalk by placing skids thereover in front of a store for the purpose of unloading heavy barrels from a wagon need only be reasonable; so held where it appeared there was an alley at the back of the store which might have been used for that purpose. *Jochem v. Robinson*, 1 L. R. A. 178, 72 Wis. 199.

It is not sufficient that the obstructions are necessary with reference to the business of one who erects and maintains them; they must also be reasonable with reference to the rights of the public. *Callanan v. Gilman*, 9 Cent. Rep. 900, 107 N. Y. 360.

Maintaining skids across the sidewalk for not to exceed five minutes, for the purpose of removing cases of merchandise, is not unreasonable. *Welsh v. Wilson*, 2 Cent. Rep. 749, 101 N. Y. 254, 54 Am. Rep. 698.

Keeping a person on a sidewalk for a space of four hours or more to deliver printed advertisements to persons passing is not unlawful. *Rex v. Sarmon*, 1 Burr. 616.

It is unlawful to place on the foot-way of a public street a stall for the sale of fruit and confectionery. *Com. v. Wentworth*, Brightly, 318.

It is not reasonable to keep horses and wagons upon the sidewalk the greater portion of the day, and thus make persons having occasion to use the walk turn out on the street in order to get around the obstruction. *Flynn v. Taylor*, 58 Hun, 167.

Where a dealer in loading and unloading goods taken to and from his store placed a bridge across the sidewalk, which entirely obstructed it, which was usually removed when not in use but left in

Mr. Josiah T. Marean, for respondent:
The court will always enjoin a grave public nuisance though the peculiar damage which the plaintiff himself sustains be not proved with such definiteness as to warrant a judgment for any specific sum.

There can be no doubt that plaintiff's use of the sidewalk is unreasonable, and therefore unlawful.

See *Callanan v. Gilman*, 9 Cent. Rep. 900, 107 N. Y. 360.

Vann, J., delivered the opinion of the court:

The owner of land abutting upon a public street is permitted to encroach on the primary right of the public to a limited extent and for a temporary purpose, owing to the necessity of the case. Two facts, however, must exist to render the encroachment lawful: (1) the ob-

struction sometimes for ten or fifteen minutes, and when in use sometimes remained in position from one to two hours, and thereby obstructed the sidewalk from four to five hours of each business day, the obstruction was unreasonable. *Callanan v. Gilman*, *supra*.

The use of the part of the sidewalk in front of a store in such a manner as to make it practically a part of the store for the purpose of displaying goods, there being a permanent awning structure resting on iron columns extending the full width of the sidewalk and having canvass wings to be used on rainy days, which, when down, close in a part of the walk, goods being placed on the walk and suspended from the awning, was held unlawful. *Lavery v. Haunigan*, 30 Jones & S. 464.

Leaving a number of barrels and counters stacked on the sidewalk in a tottering condition so as to occupy a considerable portion of the walk and interfere with safe passage, and permitting them to remain there for several weeks, is unreasonable. *Kerr v. Forgue*, 54 Ill. 432.

Where the owner of a grain and feed store piled sacks filled with grain in front of the store, and one of them fell and injured a passer-by, he was held liable for the injuries. *McCloughry v. Finney*, 37 La. Ann. 81.

Defendant must be responsible for the obstruction to render him liable. *Denby v. Willer*, 59 Wis. 241.

One using a sidewalk in accordance with the provisions of an ordinance permitting the leaving of goods, etc., on the outer edge of the walk for a period not exceeding six hours while receiving or delivering them is not liable for accidents resulting from such use unless guilty of negligence; and the burden is not on him to show the necessity of the use or that the goods were removed within a reasonable time. *Ibid*.

It is properly submitted to the jury to determine whether a temporary placing of skids across a sidewalk for the purpose of unloading barrels of sugar, each weighing three hundred pounds, was reasonable. *Jochem v. Robinson*, 1 L. R. A. 178, 72 Wis. 189.

In the absence of a law prohibiting obstructions, whether or not one who temporarily places articles used in his business on the outer edge of the sidewalk leaving ample room for passage is guilty of negligence is a question for the jury. *Denby v. Willer*, *supra*.

Placing building materials in street.

Every way to which houses adjoin must be considered as set out subject to occasional interruption 14 L. R. A.

struction must be reasonably necessary for the transaction of business; (2) it must not unreasonably interfere with the rights of the public. *Callanan v. Gilman*, 107 N. Y. 360, 9 Cent. Rep. 900; *Welsh v. Wilson*, 101 N. Y. 254, 2 Cent. Rep. 749, 54 Am. Rep. 698. The foundation upon which the exception seems to rest is that it is better for the public to suffer a slight inconvenience than for the adjacent owner to sustain a serious loss. Any unnecessary or unreasonable use of a street, however, is a public nuisance, and is declared by statute to be a crime against the order and economy of the State. Penal Code, § 385. A remedy for the wrong against the public may be found in the indictment of the offender, or in a suit by the proper officer in behalf of the people to compel him to abate the nuisance. *People v. Loehfelm*, 102 N. Y. 1, 2 Cent. Rep. 874; *People v. Horton*, 64 N. Y. 610; *People v. Cunn-*

ington for purposes of building and repairing. *King v. Ward*, 4 Ad. & El. 405.

The public must submit to the inconvenience necessarily occasioned in repairing a house; but if this is continued an unreasonable time the party may be guilty of a nuisance. *Rex v. Jones*, 3 Campb. 230.

Building materials may lawfully be placed in the highway for temporary use so long as the free use thereof is left for vehicles and animals and the use is not negligent or unreasonable. *Mallory v. Grifey*, 85 Pa. 275.

Placing timber and other materials in the street preparatory to building on the land is not unlawful provided the street is not improperly obstructed and the materials are removed within a reasonable time. *Van O'Linda v. Lothrop*, 21 Pick. 397; *Callanan v. Gilman*, 9 Cent. Rep. 900, 107 N. Y. 360.

Stones, brick, lime, sand and other material for building may be placed in the street provided it be done in the most convenient manner. *Chicago v. Robbins*, 67 U. S. 3 Black, 418, 17 L. ed. 298; *Com. v. Passmore*, 1 Serg. & R. 217.

It has been held that the excuse for this is want of room for such material elsewhere so as to render it necessary to deposit it in the street. And that defendant must show a reasonable necessity for placing the material in the street; the court cannot infer such necessity from the fact that the building is being erected in a populous and thriving city. *Wood v. Mears*, 12 Ind. 618, 74 Am. Dec. 222.

In contrast, it has been held that the practice of placing building materials in the street has become a custom of such long standing that it is regarded as lawful, and the right will not be defeated by an investigation into the necessity of so doing in any particular case. *Palmer v. Silverthorn*, 23 Pa. 65.

The right is to be exercised, however, under a responsibility for all injuries arising from an unreasonable or negligent use of it. *Ibid*.

A license is not necessary to authorize the placing of building materials in the street. *Clark v. Fry*, 8 Ohio St. 375, 72 Am. Dec. 590.

The right extends to placing earth excavated from a cellar in the street to be carried away. *Hundhausen v. Bond*, 36 Wis. 38.

But if the earth is unnecessarily or dangerously extended into the street, or raised to an unnecessary or dangerous height or insufficiently guarded or suffered to remain an unnecessary length of time, the owner will be liable. *Ibid*.

It need not be removed as soon and as fast as is absolutely possible, but must be done with reasonable care and diligence. *Ibid*.

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ham, 1 Denio, 524, 43 Am. Dec. 709; *Atty. Gen. v. Cohoes Co.* 6 Paige, 183; 3 L. ed. 928; Wood, Nuis. § 729; Will. Eq. Jur. (Potter's ed.) 389, 401:

Whenever any person sustains a special and peculiar loss in consequence of an unlawful obstruction to a public street, he may maintain an action in equity in his own behalf for damages and an injunction. Such was the case of *Callanan v. Gilman*, *supra*, upon which the court below relied in rendering judgment in this action, and which we also regard as analogous and controlling: In that case, as in this, the obstruction consisted in unloading trucks over a sidewalk, and pedestrians were forced by the inconvenience to take the opposite side of the street. The proof of special damages sustained by that plaintiff was slight, but the court held that direct proof of peculiar damage was not needed if the circumstances showed it, and that he suffered some special damages not common to persons merely using the street for passage was declared to be too obvious for reasonable dispute. The right to maintain the action does not depend on the amount of the special damage, provided the plaintiff suffered some material injury peculiar to himself. *Pierce v. Dart*, 7 Cow. 609. We think that, in a populous city, whatever unlawfully turns the tide of travel from the sidewalk directly in front of a retail store to the opposite side of the street is presumed to cause special damage to the proprietor of that store, because diversion of trade inevitably follows diversion of travel. The nature of this case was such that the amount of damages could not be shown, and hence the remedy at law would not only be inadequate, but would lead to a multiplicity of suits. While the defendant was doubtless careful to interfere with the rights of the public no more than was necessary for the convenient transaction of his business with the facilities that he had, still he could not lawfully supply the defects in his premises by virtually monopolizing the sidewalk for several hours every day. As the court said in *Rex v. Russell*, 6 East, 427, he "could not legally carry on any part of his business in the public street to the annoyance of the public," nor could he "eke out the inconvenience of his own premises by taking in the public highway." *Rex v. Jones*, 3 Campb. 230. Whether a particular use of a street is an unreasonable use or not is a question of fact depending on all the circumstances of the case. *Hudson v. Caryl*, 44 N. Y. 558; *St. John v. New York*, 6 Duer, 815; Wood, Nuisances, § 251.

The trial court found as a fact that the defendant's use of this sidewalk was an unreasonable interference with the passage of the public along the same. Hence he was properly

held guilty of creating a nuisance, for the habitual use of a sidewalk or highway in an unreasonable manner, to the serious inconvenience of the public, is a nuisance *per se*. 16 Am. & Eng. Encyclop. Law, p. 937. The evidence was ample to support the finding, as the use of the sidewalk by the defendant was systematic and exclusive during a substantial part of the business day. The primary purpose of the sidewalk was violated, and the people who wished to use it to walk upon were compelled to walk around through the street, and avoid the passing vehicles as best they could. This is scarcely denied by the learned counsel for the defendant, who contends that no unreasonable use or occupation of the sidewalk was shown so far as the plaintiff is concerned, and that he cannot complain, although the public might. It is true that no direct interference with the plaintiff's premises or business was shown. The pecuniary loss to him was caused by the indirect effect of the obstructions to the sidewalk upon the public; but when an unreasonable use of a public highway is shown, and it also appears that such unreasonable use causes special damages to an individual, he has a personal right of action to compel the abatement of the nuisance. *Doolittle v. Broome County Suprs.* 18 N. Y. 155; *Corning v. Low-erre*, 6 Johns. Ch. 439, 2 L. ed. 178; *Spencer v. London & B. R. Co.* 8 Sim. 193; *Sampson v. Smith*, Id. 272; *Crowder v. Tinkler*, 19 Ves. Jr. 617.

While the general welfare is promoted by manufactories such as the defendant carries on and they should not be interfered with for light or trivial causes, still the right of the public to the use of the sidewalk is paramount, and he must so arrange his business as not unreasonably to interfere with it. The decree against him conforms in every respect to the precedent established by this court in *Callanan v. Gilman*, 107 N. Y. 360, 373, 9 Cent. Rep. 900, when it modified the judgments of the courts below by restraining against an unnecessary or unreasonable obstruction. While the language of the injunction is somewhat indefinite, owing to the care taken not to interfere with important private rights, still a reasonable man will have little difficulty in determining what is a reasonable use of a public street. A prudent man will resolve doubtful questions in favor of the public, and against himself, and the wrong to the public is the basis of the plaintiff's right to relief, although a special injury to himself was also required before he could succeed.

We see no reason for reversing this judgment, which is therefore affirmed with costs.

All concur.

WISCONSIN SUPREME COURT.

Mary L. RENIER, *Appt.*,
v.
Fred HURLBUT *et al.*, *Resp.*

(.....Wk.....)

1. No jurisdiction to render any personal judgment against a nonresident can be acquired by service by mere publication.
2. The situs of an indebtedness on a judgment in favor of a resident against a foreign insurance company for the purpose of garnishment on a claim against the judgment creditor is at the place of his residence, at least when the statute makes it payable there, and the judgment cannot be reached by service on an agent of the company in another State.

(December 15, 1891.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Brown County in favor of defendants in an action brought upon an appeal bond to recover the costs on appeal and the amount of the judgment in the original cause which still remained unpaid. *Reversed.*

Statement by **Cassoday, J.**:

It appears from the record that September 26, 1888, the plaintiff recovered judgment upon a policy of insurance in the Circuit Court for Brown County against the Dwelling-House Insurance Company, a corporation created and organized under the laws of Massachusetts, and having its principal place of business at Boston, by reason of loss by fire of a dwelling-house, barns, and property therein, for \$3,416.76; that the said Boston company appealed from said judgment to this court, and upon such appeal the defendants, Hurlbut and Boaler, executed an undertaking to the plaintiff, wherein and whereby they agreed and undertook, pursuant to the statute, that they would pay all costs which might be awarded against said Boston company on said appeal, not exceeding \$250, and also undertook that, in case said judgment should be affirmed, they would pay the amount thereof; that said judgment was affirmed on said appeal, April 25, 1889, (74 Wis. 89) that the *remittitur* thereon was not filed in the trial court until November, 1889; that August 1, 1890, this action was commenced, upon said undertaking, against said Hurlbut and Boaler; that the defendants herein answered, and admitted all the allegations of the complaint, and in effect, alleged that June 28, 1889, the Saint Paul Fire & Marine Insurance Company created and organized under the laws of Minnesota, commenced an action in the Supreme Court for Cook County, in the State of Illinois, against this plaintiff, on a claim for \$3,256, and in said action served garnishee process upon the said Boston company's agent at Chicago; that the process in said last-named action against this plaintiff was made returnable November 4, 1889, and

was served only by the publication of notice for three successive weeks, commencing October 23, 1889, and ending November 5, 1889, and mailing copies thereof, etc., to the plaintiff in Wisconsin, where she resided during all the times mentioned; that upon the trial of said action the court found, in effect, the facts stated; and also that the said Boston company had not paid the plaintiff anything on said judgment, except \$1,200, paid thereon July 1, 1889; that this plaintiff had not been personally served with summons or other process in the proceedings in the Superior Court of Cook County, and had not appeared in said proceedings; that the judgment so recovered in said Brown County was exempt from seizure on attachment or execution, under the laws of Wisconsin, during all the time mentioned, but was not exempt under the laws of Illinois; and, as a conclusion of law, that the defendants were entitled to judgment against the plaintiff, abating this action. From the judgment entered thereon accordingly the plaintiff brings this appeal.

Mr. George G. Greene, for appellant:

A debt due on a judgment in one State cannot be garnished in another.

Drake, Attachm. § 625; Shinn v. Zimmerman, 28 N. J. L. 150, 55 Am. Dec. 260; *Elizabethtown Soc. Ins. v. Gerber*, 85 N. J. Eq. 153; *Henry v. Gold Park Min. Co.* 15 Fed. Rep. 649; *American Bank v. Snow*, 9 R. I. 11, 50 Am. Dec. 364; *Thomas v. Woodbridge*, 2 Woods, 667; *Franklin v. Ward*, 8 Mason, 136; *American Bank v. Rollins*, 99 Mass. 318; 8 Am. & Eng. Encyclop. Law, 1170, 1171; *Young v. Young*, 2 Hill, L. 426; *Burrill v. Lison*, 2 Speer, L. 373; *Wallace v. McConnel*, 88 U. S. 13 Pet. 186, 10 L. ed. 95; *Wood v. Lake*, 13 Wis. 94; 2 Wade, *Attachm. § 498.*

A debt payable to a creditor in the State of his residence cannot be garnished in another State, at least, unless he is personally served with process or appears in the garnishee action.

It is generally held that property in another State cannot be reached by this process, although within the control of the garnishee.

Bates v. Chicago, M. & St. P. R. Co. 60 Wis. 296, 50 Am. Rep. 869; *Bowen v. Pope*, 14 West. Rep. 673, 135 Ill. 28.

A debt payable to one residing in another State is not within such statutes.

Sawyer v. Thompson, 24 N. H. 510; *Hamilton v. Rogers*, 10 West. Rep. 903, 67 Mich. 135; *Keating v. American Refrigerator Co.* 23 Mo. App. 293; *Alabama G. S. R. Co. v. Chumley*, (Ala.) May 5, 1891.

The situs of a debt is the domicile of the creditor where payable.

Cleveland, P. & A. R. Co. v. Pennsylvania, 82 U. S. 15 Wall. 800, 21 L. ed. 179; *Birdseye v. Baker*, 2 L. R. A. 99, 82 Ga. 142; *Clark v. Connecticut Peat Co.* 35 Conn. 303; *Guillardier v. Howell*, 85 N. Y. 662; *McDougall v. Page*, 55 Vt. 187, 45 Am. Rep. 602; *Brown, Jurisdiction*, § 150; *State v. Gaylord*, 73 Wis. 325.

This principle determines the taxability, assignability and descent of debts, and the ap-

NOTE.—The extensive review of the authorities by the court and counsel in the above case seems to make any annotation of the case unnecessary.

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tion of insolvent and bankrupt laws to

It likewise determines their garnishment. Jurisdiction, § 150; *Hamilton v. Rogers*, 100 U. S. 529, 27 L. ed. 424; *New York L. Ins. Co. v. Bangs*, 108 U. S. 435, 26 L. ed. 580; *Freeman v. Alderson*, 119 U. S. 185, 30 L. ed. 373; *Smith v. Grady*, 68 Wis. 215; *Witt v. Moyer*, 69 Wis. 595; *Eliot v. McCormick*, 3 New Eng. Rep. 871, 144 Mass. 10.

The appellant could not have brought the action to recover her loss in Wisconsin, in Illinois, nor could this Wisconsin judgment have been sued there.

St. Clair v. Cox, *Central R. & Bkg. Co. v. Carr* and *Chicago C. Nat. Bank v. Chicago, M. & St. P. R. Co. supra*.

The Illinois proceeding is no defense to this action, because it did not garnish or attach the debt or undertaking of the defendant.

Bullard v. Gilette, 1 Mont. 509; *Farrell v. Finch*, 40 Ohio St. 337; *Drake*, *Attachm. § 703*; *Oakley v. Van Noppen*, 100 N. C. 287.

Mr. H. W. Chymoweth, for respondents:

A debt due on a judgment in one State can be garnished in another.

There is no reason for any distinction between a judgment and any other debt.

Jones v. St. Ouge, 67 Wis. 520; *Chicago C. Nat. Bank v. Chicago, M. & St. P. R. Co.* 45 Wis. 172; *Luton v. Hochs*, 72 Ill. 81; *Minard v. Lawler*, 26 Ill. 802; *Allen v. Watt*, 79 Ill. 284; *Young v. Cooper*, 59 Ill. 121.

A debt payable to a creditor in the State of his residence can be garnished in another State even though he be not personally served with process, and even though he does not appear in the garnishee action.

The situs of this debt is any place where the debtor may be found, that is, found in the sense of located.

M'Carty v. Emlen, 2 U. S. 2 Dall. 277, 1 L. ed. 340; *Pittman v. New York & E. R. Co.* 31 Pa. 114; *Gager v. Watson*, 11 Conn. 163; *Chicago C. Nat. Bank v. Chicago, M. & St. P. R. Co. supra*; *Blake v. Williams*, 6 Pick. 286, 17 Am. Dec. 372; *Sturtevant v. Robinson*, 18 Pick. 175; *Roche v. Rhode Island Ins. Assn.* 2 Ill. App. 362; *Mitchell v. Shook*, 72 Ill. 492; *Mooney v. Union Pac. R. Co.* 60 Iowa, 343; *Allen v. Watt, supra*; *Morgan v. Neville*, 74 Pa. 53; *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 58; *Burlington & M. R. Co. v. Thompson*, 31 Kan. 180, 47 Am. Rep. 497; *Johnson v. Brant*, 38 Kan. 754; *Plampton v. Bigelow*, 93 N. Y. 596; *Griffith v. Langdale*, 53 Ark. 71; *Carson v. Memphis & O. R. Co.* 8 L. R. A. 412, 38 Tenn. 646; *Newland v. Beilly*, 85 Mich. 151.

We know of no cases that hold to the contrary as to the situs of the debt for the purposes of garnishment or attachment. At all events, we insist if there are such cases, they are against the great weight of authority and are not good law. The rule is to the contrary here.

Chicago C. Nat. Bank v. Chicago, M. & St. P. R. Co. supra.

The Dwelling House Insurance Company, having offices and doing business in Illinois is subject to the jurisdiction of the courts of that State, and as much so as if it had been an individual having his domicile there.

Being a resident of Illinois in contemplation of the law the debt it owed was here.

Roche v. Rhode Island Ins. Assn. 2 Ill. App. 360; *Elizabethtown Soc. Inst. v. Gerber*, 85 N.

J. Eq. 153; *Mineral Point R. Co. v. Barron*, 38 Ill. 367; *Embree v. Hanna*, 5 Johns. 101; *Wheeler v. Raymond*, 8 Cow. 315.

Most of the cases which hold that the *situs* of the debt is governed by the domicile of the creditor are cases involving the taxation of debts. The reason for this rule is that the creditor has the evidence of the debt in his hands, and on the grounds of public policy the creditor might be deemed the person to control the *situs* of the debt for taxation. But such a rule in garnishee proceedings would nullify the laws pertaining to the garnishment of debts of nonresident defendants.

National Bank of Commerce v. Huntington, 129 Mass. 444; *Plimpton v. Bigelow*, 93 N. Y. 596; *Atty. Gen. v. Bay State Min. Co.* 99 Mass. 148, 96 Am. Dec. 717; *Green v. Van Buskirk*, 74 U. S. 7 Wall. 189, 19 L. ed. 109.

The proposition that the principal debtor must be personally served is without force.

Brauer v. New England F. Ins. Co. 21 Wis. 512.

At an early day in Massachusetts it was held, under then existing statutes, that a nonresident could not be garnished.

Tynley v. Bateman, 10 Mass. 848, and other cases in that court.

The statute, however, was amended after these decisions so that a nonresident might be garnished, and the statute was upheld.

National Bank of Commerce v. Huntington, 129 Mass. 444.

The Illinois court could get jurisdiction of principal defendant by publication and did so.

Newland v. Reilly, 85 Mich. 181; *Madden v. Cooper*, 47 Ill. 359.

Cassoday, J., delivered the opinion of the court:

During all the times mentioned in the foregoing statement the plaintiff, Mrs Renier, was domiciled in and a resident of this State. The St. Paul Company mentioned, claiming to be a creditor of hers for a large amount, commenced an action against her, not in any of the courts of Wisconsin, but in the Superior Court for Cook County, Ill., and garnished the Boston company, as a foreign corporation, by serving garnishee process upon its agent located in Chicago. Mrs. Renier did not appear in that action, nor in such garnishee proceedings, and no process or notice of any kind was ever served upon her therein otherwise than by publication, as mentioned. It is claimed that such publication was insufficient, but for the purposes of this appeal it is assumed that the statutes of Illinois were in all respects complied with. Upon the facts stated the law is well settled by the Supreme Court of the United States to the effect that the Chicago court obtained no jurisdiction to render any personal judgment against Mrs. Renier. *St. Clair v. Cor.* 106 U. S. 350, 27 L. ed. 232; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Thompson v. Whitman*, 85 U. S. 18 Wall. 457, 21 L. ed. 897; *Board of Public Works v. Columbia College*, 84 U. S. 17 Wall. 531, 21 L. ed. 687. To the same effect are the decisions of this court. *Witt v. Meyer*, 69 Wis. 595; *Smith v. Grady*, 68 Wis. 215.

This being so, it is very obvious that the most that could be accomplished in the Chicago

court was to reach property, assets, or credits belonging to Mrs Renier, and within the jurisdiction of that court. This is apparent from the authorities cited. If there was, therefore, a want of jurisdiction in that court as to such property, assets, or credits, then the proceedings therein were null and void, and could not operate to abate or defeat the suit at bar. The question recurs whether, at the time of such garnishment, Mrs. Renier was the owner of any property, assets, or credits within such jurisdiction of the Chicago court. There is no pretense that at the time the garnishee papers were served upon the Chicago agent of the Boston company he had in his possession or under his control any tangible property belonging to Mrs. Renier. The extent of the claim is that at that time the Boston company was indebted to Mrs. Renier upon the judgment recovered in the Circuit Court for Brown County, mentioned in the foregoing statement, and hence that such indebtedness was attached or reached by the service of the garnishee papers upon the Boston company's agent in Chicago. If such contention can be maintained, then it is obvious that the St. Paul company might have attached such indebtedness by such garnishee proceedings in any State or city in the Union where the Boston company happened to have an office and an agent. This would necessarily be upon the theory that such indebtedness to Mrs. Renier was ambulatory, following each of the several agents of the Boston company, and, for the purpose of garnishment, having a *situs* with and in the office of each and all of such agents, wherever they happened to be located. If such is the law, it is certainly important that all should know it. As indicated, none of the parties to the proceedings in the Chicago court were residents of Illinois. Proceedings by garnishment are in their nature very much like the old trustee process. In such a case in Massachusetts, at an early day, the court refuses to take jurisdiction, for the reason that all the parties were nonresidents. *Tynley v. Bateman*, 10 Mass. 246. It was there said, in behalf of the court, that "the summoning of a trustee is like a process *in rem*. A chose in action is thereby arrested, and made to answer the debt of the principal. The person entitled by the contract or duty of the supposed trustee is thus summoned by the arrest of this species of effects. These are, however, to be considered, for this purpose, as local, and as remaining at the residence of the debtor or person intrusted for the principal; and his rights, in this respect, are not to be considered as following the person of the debtor to any place where he may be transiently found, to be there taken at the will of a third person, within a jurisdiction where neither the original creditor nor debtor resides." To the same effect are *Sawyer v. Thompson*, 24 N. H. 510; *Bowen v. Pope*, 125 Ill. 28, 14 West. Rep. 673. It has also been repeatedly held in Massachusetts that a trustee residing in another State, though temporarily therein when service is made upon him, is not liable to the trustee process, and especially is this so where the principal defendant is also a nonresident. *Ray v. Underwood*, 3 Pick. 802; *Hart v. Anthony*, 15 Pick. 445; *Nye v. Lecombe*, 21 Pick. 263. To the same

effect are *Lawrence v. Smith*, 45 N. H. 538, 86 Am. Dec. 188; *Green v. Farmers & C. Bank*, 25 Conn. 452; *Lovejoy v. Albee*, 33 Me. 414.

The only exception to this rule seems to be where tangible property belonging to the principal defendant has been actually seized within the State, or the contract or promise is to be performed within the State. *Ibid.*; *Sawyer v. Thompson*, *supra*; *Young v. Ross*, 31 N. H. 201; *Lawrence v. Smith*, *supra*; *Guillander v. Howell*, 35 N. Y. 657; *Lovejoy v. Albee*, *supra*. Some of the authorities cited and the views thus expressed were considered and sustained by *Mr. Justice Orton in Chicago C. Nat. Bank v. Chicago, M. & St. P. R. Co.* 45 Wis. 172.

The courts of Massachusetts have gone to the extent of holding that a resident of that State, having contracted to deliver goods at a place in another State, could not be charged in foreign attachment as the trustee of the person to whom the goods were thus contracted. *Clark v. Brewer*, 6 Gray, 320. In *Danforth v. Penny*, 3 Met. 564, it was held that a foreign corporation, having no specific articles of property in its possession within that State belonging to the principal defendant to whom it was indebted, could not be charged by trustee process, notwithstanding many of its members and officers resided there, and its books and records were kept there. To the same effect is *Gold v. Housatonic R. Co.* 1 Gray, 424, where it was held that a foreign railroad corporation could not be charged by the trustee process, although in possession of a railroad in Massachusetts under leases from the proprietors thereof; and also *Toule v. Wilder*, 57 Vt. 622; *Louisville & M. R. Co. v. Dooley*, 78 Ala. 324; *Alabama & G. S. R. Co. v. Chumbe* (Ala.) 9 So. Rep. 286; *Western R. Co. v. Thornton*, 60 Ga. 300; *Bates v. Chicago, M. & St. P. R. Co.* 60 Wis. 296; *Sutherland v. Second Nat. Bank of Peoria*, 78 Ky. 250. In *Smith v. Mutual L. Ins. Co.*, 14 Allen, 386, it was held that the courts of Massachusetts would not entertain jurisdiction of a bill in equity, brought by a citizen of Alabama against such foreign insurance corporation, to restore him to his rights under a life policy, notwithstanding such foreign corporation transacted business therein, and had a resident agent therein, upon whom all lawful process against the company might be served. The theory upon which foreign attachments and foreign garnishments are sustained is that the principal defendant is beyond the reach of process, but that his property is within the reach of such process, and may, therefore, be seized thereon. *Pennsylvania R. Co. v. Pennock*, 51 Pa. 244. As indicated, the proceedings in the Chicago court were not based upon any cause of action originating in the State of Illinois, nor to enforce any contract or engagement entered into with reference to any subject matter within that State, but merely for the purpose of reaching property belonging to Mrs. Renier, having no tangible existence in that

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State. The authorities cited, as well as others which might be cited, pretty clearly show that the Chicago court obtained no jurisdiction over that property. *Central R. & Bkg. Co. v. Carr*, 76 Ala. 888, 52 Am. Rep. 339; *Brauser v. New England F. Ins. Co.* 21 Wis. 506. Nor was it the purpose of such proceedings to reach property belonging to the Boston company. Its indebtedness to Mrs. Renier was in no sense its property, but rather an indication of the absence of its property. In speaking of the *situs* of choses in action for the purposes of taxation, *Mr. Justice Field* observed that "to call debts property of the debtors is simply to misuse terms. All the property there can be in the nature of things in debts of corporations belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due." *State Tax on Foreign-Held Bonds*, 82 U. S. 15 Wall. 820, 21 L. ed. 179. This principle has received recent sanction in this court. *State v. Guyford*, 78 Wis. 825.

It is obvious from what has been said that, if the indebtedness of the Boston company to Mrs. Renier had any *situs* outside of Wisconsin for the purposes of garnishment, it was at the home office of that company in Massachusetts, certainly not with the respective agents of that company, wherever located in the several states. But, as observed, that indebtedness was in the form of a judgment recovered by Mrs. Renier in a court of her domicile in Wisconsin. The statute of this State required the Boston company to pay that judgment to Mrs. Renier within the time therein specified. Section 1974, Rev. Stat. Such payment, or its equivalent, was absolutely essential to the continuance of business in the State. *Ibid.* Such being the rules of law, and the facts being as stated, we must hold that the *situs* of the indebtedness in question for the purposes of garnishment at the time of the commencement of the proceedings in the Chicago court was only in Wisconsin, where Mrs. Renier resided. This view is sustained by numerous cases cited by counsel for the plaintiff, among which are *Wallace v. M. Connell*, 38 U. S. 13 Pet. 136, 10 L. ed. 95; *Rio Grande R. Co. v. Gomila*, 132 U. S. 485, 33 L. ed. 402; *American Bank v. Rollins*, 99 Mass. 313; *Trowbridge v. Means*, 5 Ark. 135; *Shinn v. Zimmerman*, 23 N. J. L. 150, 55 Am. Dec. 280; *American Bank v. Snow*, 9 R. I. 11; *Wood v. Lake*, 13 Wis. 84.

It follows that the proceedings in the Chicago court did not operate as a bar or abatement of this action.

The judgment of the Circuit Court is reversed, and the cause remanded, with direction to enter judgment in favor of the plaintiff and against the defendants for the proper amount remaining due and unpaid on the former judgment, with interest and costs.

INDIANA SUPREME COURT.

STATE OF INDIANA, *ex rel.* City of TERRE HAUTE, *Appt.*,

v.
Jacob C. KOLSEM *et al.*

(.....Ind.....)

1. Praying an appeal without taking any further steps does not defeat the jurisdiction of the trial court to entertain a bill of review.
2. There is no invasion of the right of a local self government by a statute providing for an appointment of police commissioners by state officers.
3. No vested right of a city is invaded by transferring property and authority from one class of officers to another.
4. Courts cannot inquire into the motives of legislators.
5. The adoption by the Legislature of a standard of classification for cities for the sole purpose of bringing a single municipality under the Act does not make the Act void where the subject is not one upon which special legislation is forbidden.
6. Whether or not a general law can be made applicable to a particular subject on which special laws are not prohibited by the Constitution in case the general laws would be inapplicable is exclusively a legislative question.
7. A general law upon a subject concerning which the Constitution does

not require general legislation may properly be amended by a special one.

8. Whether or not a system of classification prescribed by the Legislature in legislating upon a subject concerning which general laws are not required is good or vicious, will not be determined by the judiciary.
9. If the title of a statute covers a general subject it is sufficient no matter how minutely the statute may go into details germane to that subject.
10. A statute classifying cities according to the enumeration of persons between the ages of six and twenty-one years is not so uncertain as to be incapable of enforcement where such enumeration is provided for by law.

(*McBride and Olds, JJ., dissent from propositions 6, 7 and 8.*)

(December 17, 1891.)

APPEAL by defendant from a judgment of the Superior Court for Vigo County in favor of plaintiffs in a suit brought to review a judgment which had been rendered against them at the suit of relator in quo warranto proceedings instituted by relator to remove them from the office of police commissioners of the City of Terre Haute. *Affirmed.*

The facts are stated in the opinion.

Messrs. Addison C. Harris and Linton Cox, for appellant;

The law is void for uncertainty.

A law is void unless the courts can apply it without extrinsic aid.

NOTE.—Statutes; general, must be enacted where applicable; legislative discretion.

In the following States at least, clauses have been placed in the Constitution forbidding the enactment of special laws when general ones could be made applicable; and such clauses have been construed in the cases cited below in addition to those which appear in the principal case.

Alabama, art. 4, § 23.

In this State it was held in *Clarke v. Daviney*, 60 Ala. 273, that the question of the applicability of a general statute was for the Legislature, but in two later decisions, *McKemie v. Gorman*, 68 Ala. 442, and *Munford v. Pearce*, 70 Ala. 452, the question was regarded as not fully settled, and the court expressly refused in those cases to determine whether or not the legislative discretion was conclusive.

Arkansas, art. 5, § 25.

In addition to the decision cited in the principal case, it has been held that the question was purely for the Legislature, in *Boyd v. Bryant*, 35 Ark. 73, 37 Am. Rep. 6; *Little Rock v. Parish*, 36 Ark. 173.

California, art. 4, § 25, subsec. 33. The legislative determination is conclusive. *People v. McFadden*, 81 Cal. 499.

Colorado, art. 5, § 25.

Florida, art. 5, § 13.

Illinois, art. 4, § 22.

In this State the legislative determination is also conclusive. *Johnson v. Joliet & C. R. Co.* 23 Ill. 207; *Owners of Lands v. People*, 113 Ill. 315.

Iowa, art. 3, § 30.

In this State the question of the applicability of a general law may be reviewed by the judiciary (*Ex parte Fritz*, 9 Iowa, 36; *McGregor v. Baylies*, 9 Iowa, 43; *State v. Squires*, 26 Iowa, 349); but the 14 L. R. A.

court is not justified in disturbing an Act unless the infraction is clear, palpable, and plainly inconsistent. *Richman v. Muscatine County Supra* 4 L. R. A. 445, 77 Iowa, 513.

Kansas, art. 2, § 17.

In addition to the cases holding that the legislative determination is final, cited in the principal case, see also *Wichita v. Burleigh*, 36 Kan. 34.

Missouri, art. 4, § 53.

The doctrine, as stated in the principal case, that the legislative determination was conclusive, was followed in Missouri until the revision of the Constitution (*St. Louis Comrs. v. Shields*, 62 Mo. 247; *Murdock v. Woodson*, 2 Dill. 189), when a clause was inserted that whether or not a general law could have been applicable in any case should be a judicial question and as such shall be judicially decided without regard to any legislative assertion on the subject.

Nebraska, art. 3, § 15.

Nevada, art. 4, § 21.

In this State it is held that it is first for the Legislature, but finally for the courts, to determine whether or not a general law could be made applicable (*State v. Irwin*, 5 Nev. 124; *Hees v. Pegg*, 7 Nev. 23); but the mere fact of the passage of the law is prima facie evidence that a general law could not be made applicable and will be conclusive in the absence of an affirmative showing to the contrary. *Evans v. Job*, 8 Nev. 340.

In New Jersey, art. 4, § 7, subd. 11, and New York, art. 3, § 8, it is provided that the Legislature shall pass general laws for all cases which in its judgment may be provided for in general laws.

Texas, art. 3, § 59.

West Virginia, art. 6, § 30.

Wyoming, art. 3, § 27.

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Sutherland, Stat. Const. §§ 52-182; *Evans v. Browne*, 30 Ind. 519, 95 Am. Dec. 710; *South Ottawa v. Perkins*, 94 U. S. 268, 24 L. ed. 154.

The courts do not know, of common knowledge, that by the enumeration made by the county superintendent, for the year 1890, as shown by his official returns to the superintendent of public instruction, Terre Haute was returned as having an enumeration of school children in excess of 14,000.

1 Greenl. Ev. § 6; Wharton, Ev. § 818.

Now, as no person in this State knows judicially the contents of the report made by the superintendent of public schools in Vigo County, it follows that the governor, secretary, treasurer and auditor of state, or a majority of them, did not know that fact, and as they were not authorized to try that fact, they commissioned the appellees to take control of the police property and force of Terre Haute without any knowledge of the contents of said report, and so the commission, as well as the law, is null and void.

Post v. Kendall County Suprs. 105 U. S. 668, 26 L. ed. 1205.

The Constitution prohibits local and special laws on certain subjects, and then adds, nor in any "other cases where a general law can be made applicable."

Art. 4, §§ 22, 28.

Of course a general law can be made applicable to the subject of state police.

Special laws are those made for individual cases, or for less than a class requiring laws appropriate to its peculiar condition and circumstances; local laws are special as to place.

Sutherland, Stat. Const. § 127.

Section 23 of art. 4 can be taken by the courts as a rule of decision.

In the same instrument the people commanded that "all courts shall be open; and every man, for injury done to him, in his person, property, or reputation, shall have remedy by due course of law."

Art. 1, § 12.

Of all laws, the Constitution is to be construed in the light of the common intent and purpose of the framers and people.

Lafayette, M. & B. R. Co. v. Geiger, 84 Ind. 202; Cooley, Const. Lim. pp. 71, 79.

Within two years after the adoption of the Constitution, in considering the force and effect of sections 22 and 28, it was laid down that "the evil to be remedied by sections 22 and 28

... was the local and special legislation so prevalent under the old system. It had grown into such magnitude that counties, townships, and even school and road districts, had special laws for the management of their local affairs.

To remedy these evils, to restore the State from being a coterie of small independencies with a body of local laws, like so many counties palatine, to what she should be, and was intended to be, a unity governed throughout her borders on all subjects of common-interest by the same laws, general and uniform in their operation, the restrictions in sections 22 and 28 were embodied in the Constitution."

Moses v. State, 4 Ind. 342. See also *Thomas v. Clay County Comrs.* 5 Ind. 4; *Rees v. State*, 6 Ind. 516, 68 Am. Dec. 391; *Madison & I. R. Co. v. Whitbeck*, 8 Ind. 219.

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Out of a gross *obiter* in *Gentile v. State*, 29 Ind. 409, has grown what is now asserted to be the rule that courts are impotent to inquire whether a law violates section 23 of article 4.

If this contention be so, then section twenty-three is wholly nugatory, idle and useless, and serves no purpose, and "there is no reason why it should have a place in the Constitution."

Judge Ray by way of sheer *obiter* said, "In *Gentile v. State*, 29 Ind. 409, we held, overruling *Thomas v. Clay County Comrs.*, 5 Ind. 4, that it is for the Legislature alone to judge whether a law on any given subject, not enumerated in section 23 of the Constitution, should be made applicable to the whole State."

If Ray's rule of construction is the one intended by the people, and therefore the true one, then in so far as it relates to cities,—and it includes every municipal body in the State,—the Legislature has power, by special laws, to put each under special police rules and regulations, and return to the abuses which the people believed they had forever prohibited. It is time this snake was scotched.

Evansville v. Bayard, 39 Ind. 450; *Chamberlain v. Evansville*, 77 Ind. 542; *Eschels v. Evansville St. R. Co.* 78 Ind. 261, 41 Am. Rep. 561; *Warren v. Evansville*, 3 West. Rep. 367, 106 Ind. 104; *Bluffton v. Studabaker*, 3 West. Rep. 877, 106 Ind. 120; *Evansville v. Summers*, 6 West. Rep. 423, 104 Ind. 169; *Wiley v. Bluffton*, 9 West. Rep. 681, 111 Ind. 152,—are similar cases.

In *Marks v. Purdue University Trustees*, 37 Ind. 163, *Judge Worden* was careful not to commit the court to the *obiter* in *Gentile's Case*.

The 14th Amendment, Federal Constitution, declares: "No State shall deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the law."

This expunges any contrary provision in the Constitution of the State.

Neal v. Delaware, 108 U. S. 370, 26 L. ed. 567.

The word "person" includes "corporation."

Santa Clara County v. Southern Pac. R. Co. 118 U. S. 396, 30 L. ed. 118; *Pennbina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 189, 31 L. ed. 653; 1 Bl. Com. p. 123; Rev. Stat. 1881, §§ 1285, 1899; Sedgw. Const. p. 372, note; *Indiana v. Worum*, 6 Hill, 33, 40 Am. Dec. 881, and note.

The Amendment allows "no greater burdens to be laid upon one than others in the same calling and condition."

Barbier v. Connolly, 113 U. S. 31, 28 L. ed. 924.

The discriminations which are open to objections are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions.

Soon Hing v. Crowley, 118 U. S. 709, 28 L. ed. 1147.

No power of the State must be exerted within the limits of these principles, and its exertion cannot be sustained when special, partial, or arbitrary.

Caldwell v. Texas, 137 U. S. 698, 34 L. ed. 818. See also *Minnesota v. Barber*, 136 U. S. 319, 34 L. ed. 457.

The courts of the country have often overthrown statutes, general in form, but which could be applied only to one person or locality. Sutherland, Stat. Const. § 128.

A general law, which in fact could be applied to only three small towns in one county, was for this reason held void.

State v. Gaddis, 44 N. J. L. 363.

Likewise a general law which could be applied only to seaside resorts.

State v. Winsor, 2 Cent. Rep. 259, 48 N. J. L. 95.

So a law, general in form, providing for holding courts in all counties of more than 60,000 "inhabitants, in which there shall be any city incorporated at the time of the passage of this Act, with a population exceeding 8,000 inhabitants, situated at a distance from the county seat of more than twenty-seven miles by the usually traveled road," is void.

Com. v. Patton, 88 Pa. 257.

The Act establishing a police court "in all cities of the second grade and third class, having a population at the last federal census of 16,512," was adjudged void, because it could affect but one city in the State.

State v. Anderson, 3 West. Rep. 605, 44 Ohio St. 247; *State v. Smith*, 48 Ohio St. —; *State v. Pugh*, 1 West. Rep. 36, 43 Ohio St. 98; *Morrison v. Bachert*, 3 Cent. Rep. 117, 112 Pa. 322; *Groesch v. State*, 42 Ind. 561; *Heanley v. State*, 74 Ind. 101; *Elder v. State*, 96 Ind. 164; *Atlantic City Water Works Co. v. Consumers Water Co.* 44 N. J. Eq. 427; *Coutiers v. New Brunswick*, 44 N. J. L. 58; *State v. Trenton*, 42 N. J. L. 486; *State v. Trenton Bd. of License & Excise*, 4 Cent. Rep. 83, 48 N. J. L. 488; *State v. Windsor*, *supra*; *State v. Herrmann*, 75 Mo. 840; *McCarthy v. Com.* 1 Cent. Rep. 111, 110 Pa. 248; *Davis v. Clark*, 106 Pa. 377; *Com. v. Patton*, *supra*; *Frye v. Partridge*, 82 Ill. 267; *State v. Boyd*, 19 Nev. 43; *Montgomery School Directors of Ayr Twp. v. Com.* 91 Pa. 125; *Weinman v. Wilkinsburg & E. L. P. R. Co.* 11 Cent. Rep. 54, 118 Pa. 192. Cite *State v. Judges of Common Pleas*, 21 Ohio St. 17; *State v. Mitchell*, 81 Ohio St. 607; *Bronson v. Oberlin*, 41 Ohio St. 481; *McGill v. State*, 84 Ohio St. 237; *Wheeler v. Philadelphia*, 77 Pa. 338; *Kilgore v. Magee*, 85 Pa. 401; *Devine v. Cook County Comrs.* 84 Ill. 590; *McContho v. State*, 17 Fla. 269 *et seq.*

These cases furnish various illustrations establishing the rule that a law, guised as a general statute, to affect less than the whole of the same class, is void; and that the classification must be on a substantial difference, and not arbitrary, fanciful or illusory.

See also *Mugler v. Kansas*, 123 U. S. 623, 81 L. ed. 205.

Mr. Jacob D. Early for appellee.

Elliott, Ch. J., delivered the opinion of the court:

A preliminary question arising upon the contention of counsel that the appellees are barred from prosecuting this action first requires consideration. The facts upon which counsel plant themselves are, in substance, these:

The relator filed an information, in the nature of a quo warranto, against the appellees, asserting that they had entered into the office in controversy without right. The trial court sus-

tained the relator and gave judgment in its favor. The appellees prayed an appeal, but took no further steps to effect an appeal. Subsequently, the appellees brought this suit to review the judgment, and obtained the relief they sought. If the appellees had perfected their appeal there could be no doubt that the case would have been entirely removed from the jurisdiction of the trial court, and that court could not have entertained a bill to review the judgment pending the appeal. *Allen v. Allen*, 80 Ala. 154; *Boynton v. Foster*, 7 Met. 415; *Mitchel v. United States*, 34 U. S. 9 Pet. 711, 9 L. ed. 238; *Ensminger v. Powers*, 108 U. S. 292, 27 L. ed. 732; *Burgess v. O'Donoghue*, 90 Mo. 299, 7 West. Rep. 110.

But here there was no appeal, for this court never acquired jurisdiction. *Holloran v. Midland R. Co. (Ind.)* 28 N. E. Rep. 549.

As there was no appeal jurisdiction was not vested in this court and the trial court did not err in entertaining jurisdiction of the bill of review.

The controversy grows out of the claim made by the appellees to the office of police commissioner of the City of Terre Haute to which they assert title under the Act of March 4, 1891. Acts of 1891, p. 90.

The relator denies their right to the office, affirming that the Act under which they assert title is invalid because it violates the provisions of the Constitution.

The power of the Legislature to provide for the appointment of members of a municipal board of police has been affirmed in every instance in which it has been so challenged and presented as to require the judgment of the courts. Those courts which hold to the doctrine that control of matters of purely local concern cannot be taken from the people of the locality, place their decisions upon the ground that the selection of peace officers is not a local matter, but is one of state concern, inasmuch as such officers belong to the constabulary of the State. But while the reasoning of the courts is diverse, the ultimate conclusion reached by all the cases is the same. *Indianapolis v. Huegels*, 115 Ind. 581; *State v. Denny*, 118 Ind. 883, 4 L. R. A. 79; *State v. Denny*, 118 Ind. 449, 4 L. R. A. 65; *Boansville v. State*, 118 Ind. 426, 4 L. R. A. 93; *State v. Blend*, 121 Ind. 514; *People v. Draper*, 15 N. Y. 532; *People v. Shepard*, 36 N. Y. 285; *People v. Mahaney*, 13 Mich. 481; *State v. Covington*, 29 Ohio St. 102; *Police Comrs. v. Louisville*, 3 Bush. 597; *State v. Hunter*, 88 Kan. 578; *Baltimore v. State*, 15 Md. 376; *State v. Seavey*, 22 Neb. 454.

In our judgment, the Act here assailed may be upheld upon the ground that it does not trench upon the right of local self government. We put our decision on this point upon the principle that in providing for the appointment of officers connected with the constabulary of the State, there is not an invasion of the right of local self-government, but simply the exercise of the power to provide for the selection of peace officers of the State.

A municipal corporation is not clothed with any vested right in a public office, nor, indeed, does it possess a vested right in public property. It has been long and firmly settled that the charters of public corporations may be repealed or altered as the Legislature, in the exercise of

its constitutional powers, deems proper. *Sloan v. State*, 8 Blackf. 361; *Merrweiler v. Gorrett*, 102 U. S. 472, 26 L. ed. 197; *Coffin v. State*, 7 Ind. 157; 1 Dillon, Mun. Corp. 4th ed. §§ 61, 68, 71.

See also authorities collected in Elliott on Roads and Streets, p. 320.

The rule stated by us fully and effectually disposes of the argument of counsel that the Act is void because it impairs the vested right of the City of Terre Haute, as it is quite clear that in transferring property and authority from one class of officers to another, no vested right of the municipality was invaded. The Act contains this provision:

"That in all cities having an enumeration of children between the ages of six and twenty-one years, of 14,000 and over, as shown by the official returns of such enumeration, made by the several county superintendents of this State to the Superintendent of Public Instruction, for the year 1890, there shall be established within and for said City, a board of metropolitan police, to consist of three commissioners, to be appointed by the governor, secretary, treasurer and auditor of state, or a majority of them."

The appellant's counsel argue with signal ability that the Legislature in selecting the standard of classification have chosen an arbitrary, unreasonable and ineffective one, and that, therefore, the Act must fall because it is a special one, and is of the class of special legislation interdicted by the Constitution. It may possibly be true, as counsel assert, that the standard of classification was adopted for the sole purpose of bringing a single municipality under the Act, and that the motives of the Legislature were not commendable; but granting all this yet no reason is supplied for condemning the law, for the courts cannot inquire into the motives of the legislators; all that the courts can rightfully do is to ascertain and decide whether any constitutional provision is violated. Their power extends only to an investigation and determination of the question whether the law is or is not unconstitutional.

The subject to which the Act under consideration is addressed is not one upon which the Legislature is forbidden to enact special laws. If the subject were one of those enumerated in the section which prohibits the enactment of special laws we should have a very different case from the one before us, but it is not within the classes enumerated; nor can it be brought within the enumeration save by interpolating a provision not written in the Constitution. It is, of course, known to all that where special laws are not forbidden they may be enacted. *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140; *Adams v. Howe*, 14 Mass. 340, 7 Am. Dec. 316; *Sharpless v. Philadelphia*, 21 Pa. 147-161, 59 Am. Dec. 759.

If the enactment of such a law as the one before us is forbidden it must be by virtue of section 23 of article 4 of the Constitution, for the subject embraced in the Act is not included in the enumeration found in the preceding section. But section 23, as has been again and again decided, does not prohibit the enactment of special laws, where general ones cannot be made applicable. It has also been repeatedly held that whether a general law can be made

applicable to a particular subject is exclusively a legislative question, and it necessarily results that if the question is legislative the whole matter, with all its incidents, must be determined by the Legislature. It has been steadily held since the decision in *Gentile v. State*, 29 Ind. 409, that the Legislature is the exclusive judge of whether a general law can be made applicable to a subject not enumerated in section 23 of article 4 of the Constitution. In that case it was said: "As the General Assembly, then, have the power to pass local laws where general ones cannot be made applicable, and as the Constitution does not declare, except in the cases enumerated in section 23, in what particular case general laws can be made applicable, or designate the subject of local legislation, who is to determine when a law may be local or when a general law can be applied to the particular subject. Most unquestionably those who make the law are necessarily required, in its enactment, to judge and determine from the nature of the subject and the facts relating to it, whether it could properly be made general and of uniform operation throughout the State." Among the many cases affirming and enforcing the doctrine so emphatically declared in the case from which we have quoted are these: *Evansville v. State*, 118 Ind. 426, 433, 4 L. R. A. 93; *Wiley v. Bluffton*, 111 Ind. 132, 9 West. Rep. 681; *Johnson v. Wells County Comrs.* 107 Ind. 15-22, 5 West. Rep. 237; *Kelly v. State*, 92 Ind. 236; *Stuttmann v. State*, 57 Ind. 120; *Vickery v. Chase*, 50 Ind. 462; *Marks v. Purdue University Trustees*, 37 Ind. 163; *State v. Tucker*, 46 Ind. 358; *Clem v. State*, 33 Ind. 432; *Longworth v. Evansville*, 32 Ind. 324; *State v. Boone*, 30 Ind. 225; *State v. Hockett*, 29 Ind. 302.

It is simply and absolutely impossible to escape the force of the decision in *Gentile v. State*, *supra*, for the question was there made and there decided. The question was before the court for decision and judgment was given upon it. This has been affirmed in many cases in terms as strong as the pen can frame. In the case of *Evansville v. State*, *supra*, the question came before the court upon an Act relating to precisely the same subject as that covered by the Act now before us. There is no room for doubt as to what was there decided, nor is it possible to doubt that what was there decided is controlling here. What was there said upon the point, and all that was said, is this: "To the objection that the Act is in violation of section 23, article 4, of the Constitution, the answer must be that the question is one for the Legislature and not for the courts." It is not easy to conceive how there could be a stronger or clearer decision that the whole question is legislative than that in the case from which we have quoted; but other cases are equally as strong and clear. The court directly applied the doctrine of *Gentile v. State* to the amendment of a town charter in the case of *Wiley v. Bluffton* and in *Johnson v. Wells County Comrs.* *supra*, applied that doctrine to a legalizing Act, saying: "And hence many local and special laws have been upheld, and the rulings have been that where the case does not fall within the cases enumerated in section 23, it is for the Legislature to determine whether a general law can be passed, and that

the legislative judgment upon that question will not be reviewed by the courts."

In *Vickory v. Chase*, *supra*, Buskirk, J., in delivering the opinion of the court, said: "Besides, it has been repeatedly held by this court that the Legislature is the exclusive judge whether a law on any subject not enumerated in section 22, article 4, of the Constitution can be made general and applicable to the whole State." He also said that the doctrine "is now too firmly established to be changed, and is decisive of the case in judgment so far as it is affected by section 23 of article 4." Earlier cases had, however, declared the question to be unalterably settled. It cannot, therefore, be doubted that the firmly settled rule, as fully understood and directly enforced by a long and unbroken line of decisions, is that whether an Act relating to a subject not embraced in section 22 of article 4 can or cannot be made general, is exclusively a legislative question. But other courts than ours have declared in terms not less decided and explicit than those employed by our own court, that the question must be determined by the Legislature, and that the legislative decision is beyond judicial review. *Brown v. Denver*, 7 Colo. 308; *Carpenter v. People*, 8 Colo. 119; *State v. Boone County Ct.* 50 Mo. 317; *State v. New Madrid County Ct.* 51 Mo. 88; *Hall v. Bray*, 51 Mo. 288; *State v. Hitchcock*, 1 Kan. 178, 81 Am. Dec. 503; *Beach v. Leahy*, 11 Kan. 23; *Davis v. Gaines*, 48 Ark. 871.

All of the cases referred to are influential because the decisions were made upon Constitutions like ours; some of them are especially so because they affirm, as our own court has so often done, that the decision in *Gentile v. State*, *supra*, authoritatively adjudges that the question is purely and exclusively a legislative one.

The Constitution has been authoritatively construed by the courts. The judicial work has been done, and the question here is whether we shall undo that work, not whether we will decline to give the constitutional provision a construction. We abide by the rule established; we adhere to the construction so long held to be correct, and in doing so this leaves no duty unperformed. If we should undo the work that has been done and depart from the long-settled doctrine we should, indeed, turn from the line of duty and take the foundation from scores of curative and legalizing acts, as well as from many other laws that have long passed unchallenged. But it by no means results from our decision here, nor from the decisions in the cases we follow, that special laws may be enacted upon all subjects connected with towns or cities.

The decisions put at rest the question whether or not the Legislature can determine whether a general law upon a subject not enumerated in section 22 of article 4 can or cannot be made applicable by affirming that it is exclusively a legislative question, and the court must and does so adjudge. If the question is legislative, then it is indisputably true that it is excluded absolutely and entirely from the dominion of the judiciary. It is inconceivable that the question can be dissected into fragments and one part assigned to one department of government and another part to a different

department. Under our system of government the departments are distinct and independent; there is no such thing as a power partly judicial and partly legislative. *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 567; *State v. Noble*, 118 Ind. 350, 4 L. R. A. 101; *Wright v. Deffres*, 8 Ind. 298; *State v. Denny*, 118 Ind. 382-386, 4 L. R. A. 79; *State v. Denny*, 118 Ind. 449, 4 L. R. A. 65; *Hovey v. State*, 127 Ind. 588, 11 L. R. A. 768.

As the question whether a general law can be made applicable is exclusively legislative, the incidents of the main question are necessarily and entirely legislative. Where the principal subject belongs, there the incidents belong. Means, methods, and the like belong to the department that is invested with power over the general subject. It is for that department to make choice of modes and means; and, as the Supreme Court of the United States has said: "It is master of its own discretion." *Legal Tender Cases*, 79 U. S. 12 Wall. 457-561, 20 L. ed. 287-315; *Hancock v. Faden*, 121 Ind. 366, 6 L. R. A. 576; *State v. Haworth*, 123 Ind. 462-467, 7 L. R. A. 240.

Where the Legislature has power over a subject it is the sole judge of the means that are necessary and proper to accomplish the object it seeks to attain. *Legal Tender Cases*, 110 U. S. 421, 28 L. ed. 204.

The courts cannot assume control of the general subject or any of its incidents. As Judge Cooley says: "The moment a court ventures to substitute its own judgment for that of the Legislature, in any case, where the Constitution has vested the Legislature with power over the subject, that moment it enters upon a field where it is impossible to set limits to its authority, and where its discretion will alone measure the extent of the interference." Cooley, *Const. Lim.* 4th ed. 129.

The rule is that where a subject lies wholly within the legislative field into that field the judiciary cannot enter. It must therefore be true that where a subject is committed to the legislative judgment, the Legislature is invested with power to determine the mode of enacting statutes. Whether the legislation shall be by original or by amendatory statute is for the Legislature to decide. *Wiley v. Bluffton*, *supra*; *Evansville v. Summers*, 108 Ind. 189, 6 West. Rep. 422; *Warren v. Evansville*, 106 Ind. 104, 8 West. Rep. 867; *Chamberlain v. Evansville*, 77 Ind. 542; *Evansville v. Bayard*, 89 Ind. 450; *Longworth v. Evansville* and *Brown v. Denver*, *supra*.

It is doubtless true that where the Constitution requires the enactment of a general law, the attempt to amend a general law by a special one would be fruitless; but where the subject is one which does not require a general law the question as to what form the legislation shall take is exclusively a legislative one. Here the subject is not one requiring a general law, and hence special amendatory laws may be enacted.

Whether the system of classification adopted by the Legislature is a good or a vicious one is a question with which the courts have nothing to do, inasmuch as the entire subject lies within the legislative dominion and is excluded from that of the judiciary. If the subject were one demanding a classification a discussion of

that adopted in this instance would be proper, but as the subject is exclusively legislative, it is not for the courts to inquire whether the Legislature has acted wisely or unwisely in selecting a standard of classification. Many things may be done by the Legislature that the courts can neither control nor rebuke. Our duty is done and our power exhausted when we adjudge that the general subject with its incidents and appendages is one for legislative consideration and decision. If the Legislature has erred in its judgment, its error must be corrected and rebuked by the electors of the State, not by the courts.

The law-making power cannot be estopped. Within constitutional limits it is sovereign. Irrepealable laws cannot be enacted. *Cooley, Const. Lim.* 146, 148, 348.

It necessarily results from these elementary principles that the Legislature having tried one mode of legislation is not precluded from trying another. *State v. Haworth, supra.*

The discussion comes back at last to the question, Is the subject one for legislative consideration and judgment? For if it is, modes and means must be selected by the Legislature, not by the judiciary.

The argument that the title of the Act of 1891 is insufficient is fully answered by the adjudged cases. It is settled beyond controversy that if the title covers a general subject, the Act is valid, no matter how minutely it may go into details germane to that general subject. *Shoemaker v. Smith*, 37 Ind. 123; *Bitters v. Fulton County Comrs.* 81 Ind. 125; *Oranfordville & S. W. Trop. Co. v. Fletcher*, 104 Ind. 97-99, 1 West. Rep. 247; *Barnett v. Harshbarger*, 105 Ind. 410, 3 West. Rep. 750; *Indianapolis v. Huegels*, 115 Ind. 581.

It is insisted that the Act of 1891 is so uncertain as to be incapable of enforcement. This contention rests upon the ground that it cannot be ascertained to what city the Act will apply. This position is untenable. A public law provides for the enumeration of persons between the ages of six and twenty-one years, and the enumeration is for a great public purpose, affecting high public interests. *Elliott, Supp.* § 1273; *Rev. Stat.* 1881, §§ 4441, 4450, 4472, 4475.

There are, therefore, official acts to which the court may resort for information. *State v. Gramelspacher*, 126 Ind. 398, 403, and authorities cited.

Those acts are required by legislative enactment, and that enactment was, we know, passed in obedience to the Constitutional provision enjoining upon the Legislature the duty of encouraging and providing for a great educational system. We are far within the authorities in holding, as we do, that for the purpose of upholding the statute and giving it effect, we may justly declare that there is here no such uncertainty as requires its overthrow and the defeat of the legislative purpose.

The decision in *State v. Blend*, 121 Ind. 514, fully disposes of the point that immunities are conferred upon a favored class of citizens to the exclusion of others, by declaring, as it does, that such provisions may be eliminated without impairing the validity of the Act in so far as it relates to questions such as those presented by this record.

Judgment affirmed.

McBride, J., dissenting:

The opinion of the majority of the court affirms the validity of the Act of March 4, 1891, which purports to be an amendment to the Act of March 5, 1888, *Elliott's Supplement*, § 705 *et seq.*, known as the "Metropolitan Police Law." As I understand the opinion, it is based mainly upon the assumption that the case of *Gentile v. State*, 29 Ind. 409, together with a long line of cases since decided purporting to follow it, establish the proposition that section 23 of article 4 of the Constitution of the State, which is as follows: "In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform application throughout the State,"—leaves it to the Legislature alone to determine whether a law on any given subject, not enumerated in section 23 can be made applicable to the whole State, and that the determination and judgment of the Legislature in such cases is conclusive, and not subject to review by the courts. This premise being assumed, the court declines to entertain or consider the objection that the Act in question is in violation of the provision above quoted from the Constitution, holding that by the rule of *stare decisis* that question is put at rest.

While entertaining the most profound respect for the learning and ability of my associates, I find myself unable to concur in the conclusion reached by them. I have not considered, nor have we any right to consider, any question as to the wisdom of this legislation or the motives of the Legislature in enacting it. We are bound to assume that they all acted from pure motives, and that none of them so far forgot their duty, as argued by counsel, that they sought to gain a partisan advantage, instead of to advance the public good. We can properly consider but one question: Is the law such a law as the Legislature has the power under the Constitution to enact? If it is, all questions as to its wisdom or its propriety belonged solely to the Legislature. Nor can we legitimately consider whether or not the framers of the Constitution acted wisely in placing the power of construing it where they did. We can only inquire, Where has the Constitution placed the power of construing this one of its provisions? If in the Legislature it is well, and they alone must exercise it. If in the courts, we dare not shrink from discharging the duty.

The Constitution is the supreme law, enacted by the people, and, under federal authority, constitutes the only limitation upon legislative power. It is our duty to support and faithfully to construe it.

The following are the principal grounds upon which I am compelled to dissent from the principal opinion:

1. In so far as the rule which it is assumed has been declared in *Gentile v. State, supra*, is concerned, the question was not necessarily before the court in that case. In my opinion all that was there said upon that subject was *obiter dictum*. I am impelled to this conclusion because the court in deciding that case expressly decided that the law then under consideration was general and not special. It would seem to be clear that if the law was general it presented no question as to the power

of the Legislature to decide upon the necessity for a special law.

2. No case has ever since that time been decided by this court which necessarily involves that question, or necessarily requires the court to decide it. It is true, the case has been frequently cited and quoted, and in many cases that doctrine has been asserted as affording one of the grounds upon which the case could be decided; but a careful examination of all those cases will, I think, show that the court in each case affirms the existence of other grounds, sufficient to lead the court to the same conclusion. Those cases, and, indeed, all of the cases decided by this court since, and including the case of *Gentile v. State*, involving any question as to the power of the Legislature in the enactment of local legislation may be grouped as follows:

1. Those where this court has held that the law assailed is in fact general and not special. *Gentile v. State*, *supra*; *State v. Hockett*, 29 Ind. 302; *State v. Boone*, 80 Ind. 225; *Stuttsman v. State*, 57 Ind. 119; *Hanton v. Floyd County Comrs.* 53 Ind. 123; *Groesch v. State*, 43 Ind. 547; *Indianapolis v. Huegele*, 115 Ind. 581; *State v. Reits*, 62 Ind. 159; *Beansville v. State*, 118 Ind. 426, 4 L. R. A. 93; *State v. Blend*, 121 Ind. 514, and many other cases.

2. Those, where the Constitution expressly authorizes special legislation, as *Longworth v. Beansville*, 82 Ind. 322; *Wiley v. Bluffton*, 111 Ind. 152, 9 West. Rep. 681; *Clem v. State*, 38 Ind. 418; *Vickery v. Chase*, 50 Ind. 461, and other similar cases.

3. Where the subject of the legislation is so obviously local that it is self-evident that the law enacted must of necessity be local, and that a general law cannot be made applicable. *Marks v. Purdue University Trustees*, 37 Ind. 155; *Kelly v. State*, 92 Ind. 236; *Johnson v. Wells County Comrs.* 107 Ind. 15, 5 West. Rep. 237; *Mount v. State*, 90 Ind. 29, and many other cases similar in principle.

In this class would fall all that class of legislation known as "curative statutes;" especially those legalizing the incorporation of towns and the acts of their boards of trustees, where their validity is rendered doubtful by some neglect or informality on the part of some officer or other person. As a rule, in such case, the specific act of negligence or informality and consequent evil to be remedied is so plainly local as to bring it within the rule stated in *Marks v. Purdue University Trustees*, *supra*. In that case Worden, J., while referring to the *Gentile Case*, expressly refrained from following or expressing an opinion upon it, placing the decision upon the ground above stated, thus recognizing as correct that principle that when the subject of the legislation is purely local there is no necessity for invoking that rule. If the foregoing grouping of cases is correct (about which I have no doubt), and it should now be decided that the rule laid down in *Thomas v. Clay County Comrs.*, 5 Ind. 4, and *Maise v. State*, 4 Ind. 842, was the correct rule, and that *Gentile v. State* was not correctly decided, it would not result in overthrowing a single adjudicated case, not even *Gentile v. State* itself, that case being, as the court there holds, correctly decided on other grounds. Indeed, it may be questionable

if the statement in that case has in this State ever been adopted under such circumstances as render it authority, in the true sense of that term. In the original case, it was certainly *obiter dictum*. The maxim of *stare decisis* applies only to points arising and actually decided in causes. *Sutherland*, Stat. Const. § 320.

A *dictum*, as long as it remains a mere *dictum*, does not pass into precedent and is not authority. *Wells*, Res Adjudicata and *Stare Decisis*, § 583.

It is undoubtedly true that a *dictum*, if it be adopted and declared as the law in a case where the question is properly involved and before the court for adjudication, becomes authority. It then ceases to be a *dictum*. But the mere fact of its repetition and recognition, in cases which do not require or authorize an actual adjudication upon the principle involved, cannot change its character or make it authority. As long as it remains an extra judicial utterance it can never raise the bar of *stare decisis*.

For this court to return to the true rule and disapprove of the *Gentile Case*, while it would involve the disapproval of a similar declaration in many cases, would not as I have said, involve the actual overruling of any case, for the reason that the decisions do not rest upon that ground alone. Nor would it unsettle a title or affect the validity or any other Act of the Legislature.

I fully appreciate the value of the rule of *stare decisis*. It is of the utmost importance that there be permanence and stability in the rules of law, and that principles of law, authoritatively announced by courts of last resort and long acquiesced in should not be lightly set aside. When, however, it becomes apparent that there has been error, the consequences of which may be serious and harmful, unless the erroneous rule has become a rule of property, courts seldom hesitate to retrace their steps and correct the wrong. This is especially true where the error consists in a misinterpretation of the fundamental law, as in such cases there is no other available remedy. The Constitution being the measure by which alone we must determine the validity of laws, if we err in interpreting the Constitution the error, while persisted in, can have no remedy short of a change in the Constitution itself by the people. Therefore this court, in the case of *Robinson v. Solenick*, 102 Ind. 807-831, speaking by Elliott, J., said: "The rule of *stare decisis* has been held not to apply with its usual force and vigor to decisions upon constitutional questions." In a case not unlike the present it was decided that the rule of *stare decisis* applies where a decision has been recognized as a law of property, and conflicting demands have been adjusted and contracts made, with reference to and on faith of it; but not to questions involving the construction and interpretation of organic law, the structure of the government and the limitations upon the legislative and executive power. *Wilks v. Owen*, 48 Tex. 41.

Another court announces a similar conclusion and assigns this among the reasons for its conclusions: "That upon a constitutional question as to which we have no doubt, we cannot

follow a former decision against our present conviction, for the reason that to do so would violate our oath to support the Constitution. *Kneeland v. Milwaukee*, 15 Wis. 454, 692."

It is true that the rule of the *Gentile Case* has been recognized by the courts of some of the other states, while it has been repudiated by some. The apparent recognitions in some of the states, however, is due to the fact that in some of the State Constitutions are provisions expressly submitting the question of the applicability of general laws to the judgment of the Legislature. Of course, where that is done, there is no room for controversy.

It is also significant to note in this connection the constant and persistent recurrence of this question and its suggestion to and by this court during all the years from the decision of *Gentile v. State*, down to the present, together with the care taken by the Legislature in framing laws where a question of this character might arise, to give them at least the form of general laws. It indicates a general feeling in the bar, the courts and the Legislature itself that the question was not foreclosed by adjudication. If the law was indeed adjudicated and settled as now claimed, and if the adjudication was so sweeping and conclusive, all questions as to special legislation on subjects not enumerated in section 23, article 4 of the Constitution are mere questions of legislative expediency, to be determined by the exercise of legislative discretion alone, and there has not been, since the *Gentile Case* was decided in 1868, even a possibility of finding room for judicial interpretation or construction relating to the exercise of that legislative discretion.

8. Sections 22 and 28 of article 4 of the Constitution were enacted by the people as restrictions upon the power of the Legislature. A constitutional restriction upon legislative action is utterly without vitality or binding force, unless the Constitution clothes some branch of the state government with the power to enforce it. That power is, by both federal and state constitutions, lodged in the courts. They alone can make the ultimate decision as to the constitutionality of all legislative Acts, whenever these Acts become the subject of judicial controversy.

The force of the foregoing propositions can only be escaped by denying that section 23 is a restriction upon legislative action. If it is not it is a mere surplusage and should be stricken from the Constitution. The Constitution confers no power of any character upon the Legislature. So far as that body is concerned, the only effect of the Constitution is to limit and not to confer or extend power.

The debates in the constitutional convention show that much time was there spent in discussing the evil of special legislation, and that sections 22 and 23 were inserted to remedy that evil.

In *Mates v. State*, 4 Ind. 342, decided at the November Term, 1853, this court said of these sections: "These provisions are all in the nature of restrictions on the legislative authority. . . . The evil to be remedied by sections 22 and 23, above quoted, was the local and special legislation so prevalent under the old system. It had grown into such magnitude that counties, townships, and even school and

road districts, had special laws for the management of their local affairs. . . . To remedy these evils, to restore the State from being a coterie of small independencies, with a body of local laws, like so many counties palatine, to what she should be and was intended to be, a unity, governed throughout her borders on all subjects of common interest, by the same laws, general and uniform in their operation, the restrictions in sections 22 and 23 were embodied in the Constitution."

In *Thomas v. Clay County Comrs.*, 5 Ind. 4, decided at the May Term, 1854, the court said: "It is, however, insisted that the Legislature have decided a general law to be inapplicable to the case under consideration; that from this decision there is no appeal, and that therefore it is not competent for this court to decide upon the validity of the law in question. If that position be correct, the 23d section has no vitality, nor is there any reason why it should have a place in the Constitution. It would impose no restriction upon the action of the Legislature, nor confer any power which that body would not possess in the absence of such a provision. If that section permits the Legislature to enact a special or local law *ad lictum*, in any case not enumerated, the principle involved would deprive this court of all authority to call in question the question of a legislative construction of its own powers under the Constitution. We are not prepared to sanction this doctrine. The maxim "that parliament is omnipotent," has no place in American jurisprudence. "Whether the Legislature have, in the case at bar, acted within the scope of their authority is, in our opinion, a proper subject of judicial inquiry."

These two cases were decided so soon after the adoption of the new Constitution that they may be regarded as practically contemporaneous with its adoption. One of the judges composing the court at that time, and concurring in the opinion in *Thomas v. Clay County Comrs.* (the late Governor Hovey) was also a member of the convention which framed the Constitution. The interpretation thus given to these provisions of the Constitution stood, apparently acquiesced in and unchallenged for fifteen years, until it was questioned, and, it is claimed, overruled by *Gentile v. State*. A writer on this subject says: "A construction of a Constitution, if nearly contemporaneous with its adoption and followed and acquiesced in for a long period of years afterwards, is never to be lightly disregarded and is often conclusive." Sutherland, Stat. Const. § 307. Many eminent authorities are cited in support of the text. In *Gentile v. State*, the court declares that section 23 is a restriction upon legislative power, and "was intended to prohibit the passage" of local laws, where a general law could be made applicable, but holds that the actual restriction and prohibition is to be found in the consciences of the individual legislators. The so-called restriction thus becomes a mere admonition. The evident object sought to be attained by the adoption of this provision of the Constitution was to prevent, or as the court says in that case to prohibit local and special legislation—not simply to advise against it."

The language is mandatory. "Where a

general law can be made applicable, all laws shall be general and of uniform operation throughout the State." To say that the Legislature is the sole judge whether, in a given case, a general statute can be made applicable, makes it merely monitory and not mandatory. Such a rule is a clear and wide departure from the general rule that the courts are the sole final tribunals, authorized under our system of government to pass upon the constitutionality of laws. It can only be sustained, as I have heretofore said, by denying the restrictive character of section 23. There is no escape from the conclusion that if that section is to operate as an actual restriction, the courts must ultimately apply it. *Judge Story* says: "The power to construe the Constitution is a judicial power." 1 *Story, Const.* § 376.

"The universal sense of America has decided that in the last resort, the judiciary must decide upon the Constitutionality of the Acts and laws of the general and state governments, so far as they are capable of being made the subjects of judicial controversy." 2 *Story, Const.* § 1576.

See also, to the same effect, 1 *Kent, Com.* 420-426.

Chief Justice Marshall says: "The judicial power of every well constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the Constitution and laws. If any proposition may be considered as a political axiom, this, we think, may be so considered." *Cohens v. Virginia*, 19 U. S. 6 Wheat. 384, 5 L. ed. 274. See also *Bank of Hamilton v. Dudley*, 27 U. S. 2 Pet. 524, 7 L. ed. 507, where he says: "The judicial department of every government is the rightful expositor of its laws, and emphatically of its supreme law."

Of this power of the courts *Judge Cooley* says: "The right and the duty of the courts to do this is so plain and the duty is so generally, we may say almost universally, conceded, that we should not be justified in wearying the patience of the reader in quoting from the very numerous authorities upon the subject." *Cooley, Const. Lim.* 3d ed. 45.

The Supreme Court of Pennsylvania, per *Gibson, Ch. J.*, says: "It is idle to say that the authority of each branch of the government is defined and limited by the Constitution, if there be not an independent power able and willing to enforce the limitations. Experience proves that the Constitution is thoughtlessly, but habitually, violated, and the sacrifice of individual rights is too remotely connected with the objects and contests of the masses to attract their attention. From its very position it is apparent that the conservative power is lodged in the judiciary, which, in the exercise of its undoubted rights, is bound to meet any emergency." *De Chastellux v. Fairchild*, 15 Pa. 18, 53 Am. Dec. 570.

Daniel Webster says: "The Constitution being the supreme law, it follows, of course, that every Act of the Legislature contrary to that law must be void. But who shall decide this question? Shall the Legislature itself decide it? If so, then the Constitution ceases to be a legal, and becomes only a moral, restraint upon the Legislature. If they, and they only,

are to judge whether their acts be conformable to the Constitution, then the Constitution is admonitory or advisory only, not legally binding; because, if the construction of it rests wholly with them, their discretion in particular cases may be in favor of very erroneous and dangerous constructions. Hence the courts of law necessarily, when the case arises, must decide on the validity of the particular acts. Without this check no certain limitations could exist on the exercise of legislative power." On the Independence of the Judiciary. *Webster's Works*, vol. 3, p. 29.

In view of the contention in this case, the language of Mr. Webster is especially significant and forceful. Quotations of similar tenor, from equally eminent authority, might be greatly extended.

I confess that I do possess profound respect for the sages of the law above quoted, whose eminence as jurists and whose grasp of the principles of statesmanship were leading factors in laying and cementing the foundations of our national stability. When I find them asserting the power and duty of the courts, not only to construe, but to apply and enforce, all constitutional restrictions and limitations upon legislative power, and find as the solitary dissent from that doctrine the rule here asserted, I am constrained to follow their lead. They declare that the courts alone must apply the measure of the Constitution to all laws. They assert the necessity for an independent power, able and willing to enforce the limitations upon legislative power, and that without such check no such limitation can exist. They tell us that that power exists in the courts alone. Section 23 does impose a limitation or restriction upon that power, and I am compelled to choose between their opinion that the courts must enforce the limitation, and the opinion which we are here asked to reaffirm, that the Constitution has provided no tribunal for its enforcement, but the consciences of the individual legislators. On my conscience, I must follow the former.

4. The invalidity of the law in question, as an Act of special legislation (if it is special) is, however, easily determinable upon other grounds, entirely consistent with *Gentile v. State*, and requiring no disapproval of the rule we have been considering.

That rule is, that the Legislature is the sole judge of the necessity for a special law in any given case. Hence, its enactment of a special law is a legislative declaration that a general law cannot in that case be made applicable, and such declaration is final and conclusive. The Act here in question purports to be a general, and not a special law. It is evident that the Legislature purposely gave it that form. If the enactment of a local law is a conclusive legislative determination that a local law is necessary, the enactment of that which purports to be a general law is equally a legislative declaration that a general law can be made applicable, and that a special law is not necessary.

The question does not rest here, however. An author who assumes the existence of the rule laid down in *Gentile v. State*, and gives it as being settled by authority, lays down the following additional rule: "If a general law

exists, which is applicable to a subject, the question whether such a law can be made applicable is resolved. The Legislature has, by the enactment of the law, practically decided the question. Hence, if, while such a general law is in force, a special or local law is passed affecting the same subject and modifying the general law, the question of its validity is judicial; it will be held invalid in the case supposed, for an applicable general law, being in existence, it is no longer a question whether such a law can be made applicable; therefore, the special or local law is prohibited. *Sutherland, Stat. & Const. L. § 118.*

The cases cited by the author fully sustain the text. It is also sustained by *Robinson v. Perry*, 17 Kan. 248; *Darling v. Rodgers*, 7 Kan. 592; *Gray v. Crockett*, 80 Kan. 188.

I believe no case exists conflicting with this principle, nor does it conflict with any established rule of law.

The Act of the Legislature here in question was enacted as an amendment to the Metropolitan Police Law of 1888. While this court has firmly maintained the right of local self-government in municipal corporations, it has recognized as an exception to the exercise of that right the power of the State to prescribe and control the manner of selecting the constabulary, including the police force of a city. The Act of 1888 was enacted in the legitimate exercise of that power. While it only applies to certain cities in the State, those cities being classified according to population, the classification adopted has, as will presently appear, been recognized as legitimate, as applied to such a law, and the law itself is general, and not special or local. Its validity has been several times recognized by this court. *Indianapolis v. Huegels* and *State v. Blend*, *supra*; *State v. Denny*, 118 Ind. 382, 4 L. R. A. 79; *Bonsenville v. State*, 118 Ind. 426, 4 L. R. A. 98.

Therefore, by legislative declaration and by judicial recognition, it is and was when the Act now in controversy was adopted, conclusively settled that a general law could be made applicable to the subject of this particular legislation, the Act in question being a mere amendment to a general law, then in operation, and which had been in successful operation for years.

There was no room for any legislative adjudication as to the applicability, or non-applicability of a general law.

The question remains in either case, Is the law now under consideration general, or is it special and local in its character?

The several subdivisions of the State and its municipalities may be classified and laws enacted which will affect differently the several classes, and thus be in a sense local, and yet such laws are general within the meaning of the Constitution. Thus, in Pennsylvania, where the Constitution prohibited special legislation for regulating the affairs of counties, cities, etc., the supreme court of that State in *McCarthy v. Com.* 110 Pa. 248-246, 1 Cent. Rep. 111, says: "It is admitted that classification, even when not specially recognized by nature, custom, the laws of trade or the Constitution, must in certain cases be adopted *ex necessitate*. . . . General legislation for all the cities of the Commonwealth as a single

class having been regarded as impossible, the Legislature first divided these municipalities into several distinct classes, and then provided laws and regulations adapted to each class. This, as we have seen, was recognized as legitimate and proper.

In *Nichols v. Walter*, 37 Minn. 264-274, it is said: "It must be conceded that when a general law uniform in its operation is required, the law is none the less general and uniform because it divides the subjects of its operation into classes and applies different rules to the different classes. For the purpose of efficient and beneficial legislation it is often necessary to do so." See also *Hanlon v. Floyd County Comrs. supra*.

As we have elsewhere said in recognition of this principle, this court has sustained as general laws classifying counties according to population for the grading of salaries of certain county officers, and the Metropolitan Police Law itself similarly classifies cities. That a law classifying the objects of legislation may, indeed, be general and not within the inhibition of sections 28 and 28 of article 4, it is not enough that the classification be made merely in accordance with certain features common to all, but the classification must bear some definite relation to the purpose sought to be accomplished by the legislation.

A mere arbitrary classification based on features which, although common to all, bear no relation to the subject matter of the legislation, will not suffice.

This question has probably received more thorough consideration from the supreme court of New Jersey than from the courts of any other State. In *State v. Hoagland*, 51 N. J. L. 62-68, it is said, quoting approvingly from an earlier decision of the same court: "A law is to be regarded as general when its provisions apply to all objects of legislation, distinguished alike by qualities and attributes which necessitate the legislation, or to which the enactment has manifest relation. Such law must embrace all, and exclude none, whose condition and wants render such legislation equally necessary or appropriate to them as a class."

In the case of *State v. Hammer*, 42 N. J. L. 437, it was urged upon the court that a certain law did not contravene a constitutional provision prohibiting the enactment of local or special laws to regulate the internal affairs of towns and counties, because it was general in its terms and embraced "all of a group of objects having characteristics sufficiently marked and distinct to make them a class by themselves." In a well considered opinion the court held the law invalid as in fact special. The court says, page 440: "Plainly, a law may be general in its provisions, and may apply to the whole of a group of objects having characteristics sufficiently marked and important to make them a class by themselves, and yet such law may be in contravention of this constitutional prohibition. Thus, a law enacting that in every city in the State in which there are ten churches there should be three commissioners of the water department, with certain prescribed duties, would present a specimen of such a law, for it would sufficiently designate a class of cities, and would embrace the whole of such class, and yet it does not seem to me

it would be sustained by the courts. If it could be so sanctioned, then the constitutional restriction would be of no avail, as there are few objects that cannot be arbitrarily associated, if all that is requisite for the purpose of legislation is to designate them by some quality, no matter what that may be, which will so distinguish them as to mark them as a distinct class. But the true principle requires something more than a mere designation by such characteristics as will seem to classify, for the characteristics which thus serve as the basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring special legislation. There must be substantial distinction, having a reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction upon which the classification is founded must be such in the nature of things as will, in some reasonable degree at least, account for or justify the restriction of the legislation.

The Supreme Court of Minnesota, in *Allen v. Pioneer Press Co.*, 40 Minn. 117, 120, says: "Laws public in their objects may be confined to a particular class of persons, if they be general in their application to the class to which they apply, provided the distinction is not arbitrary, but rests upon some reason of public policy, growing out of the condition or business of such class." In *McCarthy v. Com. supra*, the Supreme Court of Pennsylvania, speaking of arbitrary or illusory classification, says: "If, indeed, such legislation were to be recognized as legitimate, vain would be the constitutional prohibition of local or special laws. But little ingenuity in the way of so-called classification would be necessary in order to isolate every single county, borough, ward, township and school district in the State, and provide for each its own local code." See also *State v. Wood*, 49 N. J. L. 85, 5 Cent. Rep. 345; *State v. Scott*, 60 N. J. L. 585, 1 L. R. A. 86; *State Bd. of Assessors v. Central R. Co.* 48 N. J. L. 146-278, 4 Cent. Rep. 426; *Sutherland*, Stat. Const. §§ 127-129, and cases cited; *State v. Gaddis*, 44 N. J. L. 385; *Brown v. State*, 86 Ga. 108; *Portland v. State*, 52 N. J. L. 521; *State v. Chosen Freeholders of Bergen County*, Id. 502.

In *State v. Boyd*, 19 Nev. 43, the court, in considering a similar question, says: "In order to observe the uniformity required by the Constitution, classification if made must be based upon reasonable and actual differences; the legislation must be appropriate to the classification, and embrace all within the class." See also *Turner v. Fish*, 19 Nev. 296; *State v. Herrmann*, 75 Mo. 340; *Com. v. Patton*, 88 Pa. 258.

In the case last cited the court asserts that there can be no proper classification of cities or counties except by population. *State v. Elliot*, 47 Ohio St. 90.

So far as classification has heretofore been resorted to in the legislation of this State, it has been strictly within the limits recognized as legitimate in the cases above cited, and it has met with judicial approval. It is not difficult to understand how increase of population in a county leads to increase in the duties im-

posed upon its officers, adds to their responsibilities and labor, and demands a higher grade of talent to meet the added duties. Hence, good and sufficient reasons for grading salaries of officers in accordance with population. So, also, it is easy to trace a definite connection between increasing urban population and increase of crime. We are authorized to take judicial notice of the fact that as the population of the city increases, whether the ratio of increase in the criminal element exceeds that of the non-criminal or not, the confederation of criminals thus brought about makes them relatively more powerful and dangerous and more difficult to control. Hence the need of increased police protection, and the especial need of placing the control of the police force beyond the danger of intimidation, corruption or control by that element.

But what possible connection can exist between school children or those of "school age" and crime? Except so far as an increase in the number of school children may seem to indicate in some degree an increase of population, can it be said that such increase affords any index to the growth of the criminal class? Manifestly not. As an indication of the growth of population even it is illusory, for the reason that it does not necessarily indicate the number of resident school children. They are not enumerated according to residence. Parents residing in one school corporation may, on request, be transferred for school purposes to another, and enumerated there regardless of their residence. Rev. Stat. 1881, §§ 4472-4475.

This may, and frequently does, result in giving to a given school corporation an enumeration greatly in excess of, or greatly below, the number actually resident therein. In the same way, and for the same reason, a classification on any such basis lacks the permanency of a classification based on the population as shown by the decennial census, as the enumeration is made each year. In my judgment, a classification of cities according to the enumeration of school children therein for the purpose of determining the necessity of subjecting the police force of such cities to control by the State is arbitrary, illusive and not warranted by the Constitution. Such a classification bears no more relation to the avowed object of the legislation, and no more serves to account for or justify it, than would a classification based on the number of churches in the city or the number of iron pumps or street lamps. We have a law requiring a quadrennial enumeration of the surviving soldiers and sailors of the State, and placing the report on file with the adjutant general. Also, laws requiring the report and registry of marriages, births and deaths; also laws requiring an annual enumeration and registry of the dogs of the State; and a classification based on any of these could be sustained with quite as good reason. The opinion, as I understand it, also holds that we may take judicial notice of the enumeration of school children and their number in the different localities of the State. If the court is right in this, we must judicially know that the law, instead of applying to a class of cities throughout the State, distinguished by certain characteristics relative to or requiring such legislation, in fact applies to but one city, in which, so far as we

know, or so far as the legislative declaration informs us, nothing exists requiring or even remotely suggesting any necessity for it. The decision in this case goes beyond that of *Gentile v. State*, and effectually expunges section 23 from the Constitution.

With the concession of the power to make such an amendment to a general law even the mythical court of "conscience," which *Gentile v. State* assumed existed, disappears.

Olds, J.:

In my judgment, the opinion in the case of *Gentile v. State* enunciates an erroneous doctrine, in holding that it is for the Legislature alone to judge whether a law on any given subject not enumerated in section 23, article 4, of the Constitution can be made applicable to the whole State. It in effect annuls section 23

of article 4 of the Constitution, and permits the Legislature to enact local laws at will, notwithstanding the Constitution declares such laws cannot be passed where a general law can be made applicable; and I am not willing to extend the doctrine or to apply it, except possibly in a case coming clearly within the provisions of that opinion. I think the law under consideration in this case if upheld is an extension of the doctrine, and recognizing an unlimited right to pass local laws singling out any particular town, city, township or county of the State, and pass a law applicable to such town, city, township or county; and I think there are other valid objections to the validity of the law, fully stated in the dissenting opinion of *McBride, J.* I therefore dissent from the opinion of the majority of the court.

OREGON SUPREME COURT.

Re Fred OBERG.

(.....Or.....)

***Section 6 of the Act of 1889, providing that no officer or seaman of a sea-going vessel or ship shall be arrested or imprisoned for debt, etc., is not in conflict with section 20 of the Bill of Rights, which provides that no law shall be enacted granting to any citizen or class of citizens any privilege or immunity which upon the same terms shall not equally belong to all citizens.**

(December 14, 1891.)

APPPEAL by the State from a judgment of the Circuit Court for Clatsop County discharging upon a writ of habeas corpus the petitioner from custody to which he had been committed for having made an alleged unlawful arrest. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. Thomas A. McBride, Dist. Atty., for the State:

The immunity here granted, if any, is immunity from arrest for debt. Any person who is a sailor may enjoy this immunity, and any citizen desiring to enjoy such immunity may have it in the words of the Constitution, "upon the same terms" by becoming a sailor. This belongs to that class of exceptions that are made in all states to certain classes of persons, not so much for the benefit of the persons themselves, as for the benefit of the community which needs their services.

State v. Main, 16 Wis. 398.

The law now on the statute books protects the great and growing commerce of this State. Under these circumstances courts should hesitate to pronounce a law unconstitutional, but should solve every reasonable doubt in favor of its validity, and this is what the authorities require.

Cookey, Const. Lim. 182; Fletcher v. Peck, 10

**Head note by LORD, J.*

NOTE.—For note on constitutional right to equal privileges, immunities, and protection, see the following case.

14 L. R. A.

U. S. 6 Cranch, 128, 8 L. ed. 175; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 270, 6 L. ed. 625; *People v. Orange County Suprs.* 17 N. Y. 241; *Clarke v. Rochester*, 24 Barb. 471.

Messrs. Fulton Bros., for respondent:

The Act is in direct opposition to section 20, art. 1, of the Constitution. It grants to a class of citizens privileges and immunities which upon the same terms do not belong to all citizens; it provides that a class of individuals, namely, officers and seamen of a sea-going vessel are exempt from arrest for debt, and this certainly is extending to a class of citizens a privilege and an immunity which is not and cannot be enjoyed by any other class of citizens.

See Re Delaware Bay & C. M. R. Co. (N. J. Eq.) 9 Cent. Rep. 489; Lassen County v. Coff, 72 Cal. 387; State v. Divine, 98 N. C. 778.

Lord, J., delivered the opinion of the court:

The petitioner was constable of Astoria precinct, and as such constable arrested a sailor on board of a sea-going vessel as an absconding debtor. He was arrested under the provision of section 6 of the Act of 1889, which made such arrests unlawful, and for which he was fined the sum of \$30. Upon default in the payment of such fine, he was committed to jail, and thereupon sued out a writ of habeas corpus. Upon the hearing the trial court held that the Act of 1889 was unconstitutional and void, and discharged the petitioner. While the brief indicates other objections to the Act, the main one, and upon which the invalidity of the Act was put, was that it was class legislation, and prohibited by section 20 of the Bill of Rights. Section 6 of said Act—the one under which the petitioner was prosecuted and convicted—reads as follows: "No officer or seaman of a sea-going vessel or ship shall be arrested or imprisoned for debt; and any officer executing a process of arrest for debt upon such officers or seamen shall, upon conviction thereof before any justice of the peace or circuit court, be fined in a sum not less than \$30, nor more than \$100." *Sees. Laws 1889, p. 80.* This section, it is claimed,

is in contravention of section 20, art. 1, of the Constitution, which provides that "no law shall be passed granting to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." The argument against the validity of the Act is that it grants to a class of citizens privileges and immunities which upon the same terms do not belong to all citizens, in direct opposition to the section of the Constitution cited; that is, says counsel: "It provides that a class of individuals, namely, officers and seamen of a sea-going vessel, are exempt from arrest for debt, which is extending to a class of citizens a privilege and an immunity which is not and cannot be enjoyed by any other class of citizens." It is plain, then, from this statement, that it is the immunity from arrest for debt granted to this class of citizens, and not that any of such class engaged in the same business are subjected to different restrictions, or that they are granted different privileges under the same conditions, which constitutes the ground upon which the invalidity of the section of the Act is predicated. All sailors of a sea-going vessel within the prescribed limits are treated alike, and entitled to enjoy the privileges or immunities granted. The Act prescribes the same rule of exemption to all persons placed in the same circumstances. It does not grant immunity from arrest for debt to a sailor, and refuse it to his neighbor, if they are similarly situated. The same privilege or immunity is extended by the Act to all in the same situation. Any person who is a sailor may enjoy the immunity, and any citizen desiring such immunity may have it, in the words of the Constitution, "upon the same terms," by becoming a sailor. While one may enjoy the benefit of the exemption, and another may not, this results, not because the statute favors one and discriminates against another, but because one brings himself within its terms and the other does not. As Wright, J., said: "It gives the same rule to all persons, placed in the same circumstances. It does not prescribe one rule for one citizen or soldier, and another for his neighbor, if they are in the same situation. We have a statute regulating continuances on account of the absence of witnesses, which gives a uniform rule to all litigants; and yet one may be entitled to a continuance and another not. This results, not because a different rule is prescribed for each, but because one brings himself within its terms, and the other does not. So all persons in the actual military service of the United States, or of this State, can claim the benefit of the statute, and anyone can have the same benefit, if in the same service. Those that are not, are not entitled to the same advantage, (so to speak,) because, in the discretion and wisdom of the Legislature, it was deemed inexpedient; and yet this advantage may be and is extended to all upon the same terms." *McCormick v. Rusch*, 15 Iowa, 120, 88 Am. Dec. 401. To the same effect, and construing a like constitutional provision, see *McAunick v. Mississippi & M. R. Co.* 20 Iowa, 880; *Dalby v. Wolf*, 14 Iowa, 238; *Iowa R. Land Co. v. Soper*, 38 Iowa, 112.

In determining whether an Act of the Legislature prohibiting speculation in witness fees

was in conflict with a provision of the constitution of Tennessee to the effect that "the Legislature shall have no power," etc., "nor to pass any law granting any individual or individuals rights, privileges, immunities, or exemptions other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provision of such law," the court says: "But it is obvious that this clause of the Constitution only prohibits the suspension of a general law, or the grant of privileges, immunities, or exemptions to an 'individual' or 'individuals.' It does not prohibit legislation for the benefit of classes composed of any members of the community who may bring themselves within the class. The lien given to mechanics on the land upon which they have erected a building, the lien of the landlord on the growing crops of his tenant, the exemption of certain articles from legal process in favor of the heads of families, and a portion of his earnings in favor of the laborer, are instances of such legislation, about the constitutionality of which there never has been any doubt." *Davis v. State*, 3 Lea, 379.

"The Legislature may deem it desirable," says Mr. Cooley, "to prescribe peculiar rules for the several occupations, and to establish distinctions in the rights, obligations, duties, and capacities of citizens. The business of common carriers, for instance, or of bankers, may require special statutory regulations for the general benefit; and it may be a matter of public policy to give laborers in one business a specific lien for their wages, when it would be impracticable or impolitic to do the same for persons engaged in some other employment. If the laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the Legislature must judge." Cooley, Const. Lim. 482, 483.

As a general proposition, the doctrine is well established that the State, in the exercise of its police powers, is authorized to subject all occupations to a reasonable regulation, when such regulation is required for the protection of public interests or for the public welfare. *Tiedeman, Lim. Police Powers*, §85. So, too, there is, in all the states, a class of exemptions or immunities granted to certain classes of persons, as an exemption of sailors from trustee process, or militia-men on training day from the service of civil process, or ministers, physicians, and firemen from jury duty; not so much for the benefit of this class of persons themselves, as for the benefit of the community and the protection of the public interests and welfare. This is not class legislation, conferring special privileges upon some and denying them to others, but legislation which has for its object the public welfare, and within the sphere of its operation prescribes the same rule of exemption to all persons placed in the same situation or circumstances. It is not disputed that the object of the Act, as shown by its subject matter, was to aid and extend our foreign commerce by protecting sailors, and preventing such burdens or exactions from being laid upon shipping as would discourage

vessels from frequenting our ports. The persuading of sailors to desert, or harboring them after they had deserted, or demanding from them sums as blood money, or arresting them for small debts, or on frivolous pretenses of debt, are all acts which must affect injuriously our commerce, and as a consequence the prosperity and welfare of our people. In aid of this public purpose, the immunity granted by section 6 of the Act to the officers and sailors of a sea-going vessel may be enjoined by any other class of citizens upon the same terms. Its effect is not to create a privileged class, or invidious discriminations against anyone. All persons who are sailors are treated alike, and enjoy the immunity; and all other persons may enjoy it, or become entitled to it, who bring themselves within its terms. The objection that this is class legislation is without force. As said by Mr. Justice Field: "The discriminations which are open to objection are those where persons engaged in the same business are subject to different

restrictions, or are held entitled to different privileges, under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws." *Soon Hing v. Crowley*, 118 U. S. 709, 28 L. ed. 1147.

And again: "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which in carrying out a public purpose is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." *Barbier v. Connolly*, 118 U. S. 82, 28 L. ed. 925; *Minneapolis & St. L. R. Co. v. Beckwith*, 120 U. S. 26, 32 L. ed. 585.

Legislation which affects alike all persons pursuing the same business, under the same conditions, is not such class legislation as is prohibited by the Constitution of the United States, or of this State.

As there is no other question much relied on, we must reverse the judgment.

KENTUCKY COURT OF APPEALS.

LOUISVILLE SAFETY VAULT & TRUST CO., Admr. of James Schoolcraft, Deceased, *Appt.*,

v.

LOUISVILLE & NASHVILLE R. CO.

(.....Ky.....)

1. The refusal of a court to strike out averments of willful neglect from plain-

tiff's petition after he had elected to proceed under a statutory provision as to ordinary negligence does not make the action one for willful neglect under a different provision of the statute.

2. A railroad company cannot complain that a statute is unconstitutional in discriminating against its employes by giving a right of action against it for negligence causing the death of any person who is not in its employ.

3. A statute giving a right of action

NOTE.—Constitutional equality of privileges, immunities and protection.

1. Equal privileges and immunities.

The privileges and immunities of citizens of the United States under the 14th Amendment are those which arise out of the nature and essential character of the national government, the provisions of the Constitution or its laws and treaties made in pursuance thereof. Privileges and immunities belonging to the citizens of a State as such are not embraced by that amendment. *Butcher's Benev. Assn. v. Crescent City L. S. L. & S. H. Co.* (Slaughter-House Cases) 83 U. S. 16 Wall. 56, 21 L. ed. 394.

The main purpose of the last three amendments to the United States Constitution was to place the colored race in respect to civil rights upon a level with the white. *Ex parte Virginia*, 100 U. S. 313, 25 L. ed. 687; *Butcher's Benev. Assn. v. Crescent City L. S. L. & S. H. Co.* *supra*; *Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 684.

Powers of Congress.

Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress as Congress shall provide. *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563.

The 14th Amendment does not affect the rights of citizens as between themselves but applies only to state action, and does not authorize direct legislation by Congress. *United States v. Harris*, 109 U. S. 680, 27 L. ed. 280; *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 325; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588.

The equal protection of the laws guaranteed by the 13th and 14th Amendments has reference to the denial of such protection by action of the states. 14 L. R. A.

and not by individuals; therefore Congress cannot make it a crime for individuals in a State to conspire to deprive any person of the equal protection of the laws. *United States v. Harris*, *supra*.

Equal accommodations.

Equal accommodation in inns, public conveyances and places of public amusement cannot be compelled by Act of Congress. Congress can enforce the rights guaranteed by corrective legislation only, such as may be necessary or proper for counteracting and redressing the effect of wrongful state laws or acts. *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 325.

Furnishing separate but equal accommodations for white and colored persons on railroads is not a denial of equal privileges and immunities. *Britton v. Atlanta & C. Air Line R. Co.* 88 N. C. 533, 43 Am. Rep. 749.

Who entitled to equal privileges.

Free negroes and mulattoes (prior to the Thirteenth, Fourteenth, and Fifteenth Amendments) could not claim the benefit of the constitutional guaranty of equal privileges and immunities. *Amy v. Smith*, 1 Litt. 355.

A discrimination against nonresidents as such does not violate the constitutional provision as to the equal privileges and immunities of citizens. *Allen v. Wyckoff*, 2 Cent. Rep. 213, 43 N. J. L. 90.

Thus, exacting a greater license fee of nonresidents of a county than of residents for the privilege of purchasing certain kinds of produce in the county to be shipped out of it does not violate the constitutional right of citizens to equal privileges and immunities. *Rothamel v. Meyerle*, 9 L. R. A. 366, 126 Pa. 266.

against railroad companies only, for negligence causing death, is not unconstitutional as denying to such corporations the equal protection of the law.

(November 10, 1891.)

APPEAL by plaintiff from a judgment of the Louisville Law and Equity Court in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Reversed.*

The facts are stated in the opinion.

Messrs. Hargis & Eastin for appellant.
Mr. Lyttleton Cooke for appellee.

On the other hand, a Kentucky case decides that a municipal ordinance discriminating against the residents of other states in respect to a license for commercial privileges is unconstitutional as a discrimination against citizens of other states although the same discrimination is made against the residents of the State outside of such municipality. *Feuchelmer v. Louisville*, 84 Ky. 306. See also *Allen v. Wyckoff*, *infra*, as to equal protection.

A naturalized citizen of the United States or a native citizen of another State is entitled in any State to all the rights and privileges of a citizen of that State. *Hannon v. Hounihan*, 85 Va. 429.

A statute providing that none but citizens or those who have in good faith taken preliminary steps to secure naturalization shall be employed upon public works, is not unconstitutional. *People v. Nelson*, 153 Ill. 565. But see, as to equal protection, *infra*.

Corporations are not citizens within the meaning of U. S. Const., art. 4, § 2, giving citizens of each State all privileges and immunities of citizens in the several states. *Philadelphia Fire Assn. v. New York*, 119 U. S. 110, 30 L. ed. 342; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650; *Singer Mfg. Co. v. Wright*, 33 Fed. Rep. 121; *Moses v. State*, 65 Miss. 58; *Ducat v. Chicago*, 77 U. S. 10 Wall. 410, 19 L. ed. 972, affirming 48 Ill. 172; *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 367; *Liverpool & L. L. & F. Ins. Co. v. Oliver*, 77 U. S. 10 Wall. 566, 19 L. ed. 1029; *People v. Imlay*, 20 Barb. 68; *Fire Dept. of N. Y. v. Noble*, 3 R. D. Smith, 440; *Fire Dept. of N. Y. v. Wright*, *Id.* 458.

But as to equal protection of corporations, see *infra*.

Extent of right generally.

A citizen of one State going into another is entitled, under the Federal Constitution, to no greater privileges and immunities than are possessed by the citizens of that State. *Detroit v. Osborne*, 126 U. S. 492, 34 L. ed. 200.

Therefore a statute providing that every person brought into the State as a slave shall be free applies to a citizen of another State who brings his slaves into the State. *Leamon v. People*, 26 Barb. 370, affirmed, 20 N. Y. 532.

Traveling.

The right of a citizen of the United States to pass through a State is one guaranteed to him by the Constitution. *Crandall v. Nevada*, 73 U. S. 6 Wall. 25, 18 L. ed. 745.

As to sexual relations.

A statute prohibiting the intermarriage of white and colored persons is not a denial of the equal privileges and immunities of citizens. *State v. Gibson*, 36 Ind. 389, 10 Am. Rep. 42; *State v. Hairston*, 63 N. C. 451; *State v. Reinhardt*, 63 N. C. 547. 14 L. R. A.

Holt, Ch. J., delivered the opinion of the court:

James Schoolcraft, while at work for the Standard Oil Company upon a switch belonging to it, but which was connected with the appellee's road, was struck by a car, which was suddenly put in motion by a car being backed by those in charge of it for the appellee from its road onto the switch, and so injured that he died in a short time. The petition avers that the injury was the result of willful neglect upon the part of those in charge of appellee's car. It also sets forth fully the manner of the injury. Section 8, chap. 57, Gen. Stat., gives a right of action to the widow, heir, or personal representative of the deceased,

The same point is assumed in *State v. Kennedy*, 78 N. C. 251, 22 Am. Rep. 683.

An Act of Congress for the District of Columbia making the issue of a marriage of colored persons contracted according to a custom prevailing where it occurred legitimate for purposes of descent and inheritance is not unconstitutional as discriminating between persons of different races and colors. *Thomas v. Holtzman*, 7 Mackey, 62.

A bastardly law relating to "any white woman" giving birth to an illegitimate child, and not embracing in its terms colored women, does not conflict with the 14th Amendment. *Plunkard v. State*, 8 Cent. Rep. 884, 67 Md. 364.

See also *Pace v. Alabama*, *infra*, as to equal protection.

Right to vote and hold office.

The right of suffrage is not one of the necessary privileges of a citizen of a State or of the United States. *Minor v. Happersett*, 88 U. S. 21 Wall. 162, 23 L. ed. 627; *Erfiesleben v. Shallosen* (Del.), 8 L. R. A. 337; *People v. Barber*, 48 Hun. 196.

Although the 15th Amendment to the Constitution of the United States does not directly confer the right of suffrage upon anyone, it does prevent any preference to one citizen over another in this particular, on account of race, color, or previous condition of servitude. *United States v. Reese*, 92 U. S. 214, 23 L. ed. 558; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274.

A woman is not entitled to vote under the 14th Amendment as a citizen of the United States where the State Constitution and laws deny her the right. *Minor v. Happersett*, 88 U. S. 21 Wall. 162, 22 L. ed. 627; *Bradwell v. Illinois*, 83 U. S. 15 Wall. 130, 21 L. ed. 442.

An Idaho statute denying the right of suffrage as well as the right to hold any place of honor, trust, or profit to anyone who is a "bigamist or polygamist, or who teaches, advises, counsels, or encourages any person or persons to become bigamists or polygamists, or to enter into what is known as plural or celestial marriage, or who is a member of any order, organization, or association" which gives such advice or counsel, was held valid by the United States Supreme Court as against an objection that it violates the First Amendment of the United States Constitution by prohibiting the free exercise of religion; but the question of equal privileges or immunities was not discussed. *Davis v. Beason*, 128 U. S. 333, 33 L. ed. 697.

An Act to provide for the purity of elections, which does not prevent the elector from casting his vote fairly, does not interfere with the privileges and immunities of citizens. *Cook v. State* (Tenn.) 12 L. R. A. 183.

Under a constitutional provision giving equal privileges and immunities to all citizens, a res-

if the life be lost by the willful neglect of any person, company, or corporation, their agents or servants, and in such a case punitive damages may be recovered. Section 1 of the same chapter provides: "If the life of any person not in the employment of a railroad company shall be lost in this Commonwealth by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, or by the unfitness or negligence or carelessness of their servants or agents, the personal representative of the person whose life is so lost may institute suit, and recover damages, in the same manner that the person himself might have done for any injury, where death did not ensue." Section 8, as construed by this court, only

gives a right of action if the deceased leaves a widow or child. Because this was not averred, a demurrer was presented to the petition, but overruled. The appellee then asked that the appellant be compelled to elect whether it would prosecute the action under the first or third section of the statute; and, being required over its objection to do so, it elected to proceed under the first, and thereupon the appellee filed its answer. It *inter alia* set up that the deceased left no widow or child; denied that his death resulted from neglect of any character upon its part; and avers that it was caused by his own negligence. A demurrer to the first defense was overruled, notwithstanding the appellant had been compelled to, and had

idence of five years cannot be made a valid qualification for office. *Evansville v. State*, 4 L. R. A. 36, 116 Ind. 426.

Neither can a provision that officers and patrolmen of a fire department be selected equally between the two leading political parties be upheld. *Ibid*.

Right to be jurors and witnesses.

The denial to colored citizens of the right and privilege of being jurors because of their color, although qualified in all other respects, is prohibited by the 14th Amendment. *Straud v. West Virginia*, 100 U. S. 368, 25 L. ed. 664; *Neal v. Delaware*, 108 U. S. 870, 25 L. ed. 697; *Bush v. Kentucky*, 167 U. S. 110, 27 L. ed. 354; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Ex parte Virginia* (*Virginia v. Rives*) 100 U. S. 313, 25 L. ed. 667.

This applies to a grand jury as well as to a petit jury. *Bush v. Kentucky*, *Ex parte Virginia*, and *Neal v. Delaware*, *supra*.

See also, in respect to equal protection, *infra*.

Citizens of a State who have become such by naturalization or by removal from other States cannot be excluded on that account from grand juries as this would deny them equal privileges and immunities. *Om. v. Towles*, 5 Leigh, 743.

A statute exempting from jury duty and poll tax for the following year members enrolled in the state militia who pay into the treasury of the organization not less than \$10 annually is not unconstitutional as class legislation. *Hall v. Burlingame* (Mich.) November 20, 1891.

A state statute making colored persons incompetent as witnesses is repealed by the 18th Amendment. *State v. Underwood*, 63 N. C. 98.

See also, in respect to equal protection, *infra*.

School privileges.

The right of colored children to attend the public schools, and of their parents to send them, is not a privilege or immunity belonging to a citizen of the United States as such. *Lehew v. Brummell*, 11 L. R. A. 828, 103 Mo. 548.

In conflict with the above, is a decision that the exclusion of negroes from public schools is a violation of their rights to equal privileges and immunities. *State v. Duffy*, 7 Nev. 842, 8 Am. Rep. 713.

Also that a statute excluding negro children from any share of the proceeds of the common-school fund set apart by the Constitution, as well as from the annual school tax levied on property of white persons, is unconstitutional. *Dawson v. Lee*, 83 Ky. 49.

So a tax on persons of one color for schools open only to children of that color is unconstitutional as denying equal privileges and immunities. *Pult v. Gaston County Comrs.* 94 N. C. 709; *Markham v. Manning*, 96 N. C. 132.

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But establishing separate schools for white and colored children does not violate the constitutional right to equal privileges and immunities if equal advantages are afforded for each class. *McMillan v. Croatan Dist. No. 4 School Com.* 10 L. R. A. 823, 107 N. C. 609; *People v. Boston*, 13 Abb. Fr. N. S. 156; *State v. McCann*, 21 Ohio St. 198; *State v. Duffy*, 7 Nev. 342, 8 Am. Rep. 713.

The establishment of separate schools for white and colored children does not violate the constitutional rights of the latter to the equal protection of the laws, although a school for colored children is not established in any district unless there are fifteen or more of them, and if there are less than that number they are allowed to attend any district in the county in which such a school is established, although the effect may be to compel them to go farther to reach school than white children have to go. *Lehew v. Brummell*, 11 L. R. A. 828, 103 Mo. 548.

Right to practice professions.

The right to practice law in the courts of a State is not a privilege or immunity of a citizen of the United States under the 14th Amendment. *Bradwell v. Illinois*, 83 U. S. 16 Wall. 130, 21 L. ed. 442.

A statute regulating the right to practice medicine, but leaving the field open to all who possess the prescribed qualifications, does not abridge the privileges or immunities of citizens. *Harding v. People*, 10 Colo. 287; *People v. Phippen*, 14 West. Rep. 247, 70 Mich. 6; *State v. Green*, 11 West. Rep. 852, 112 Ind. 462; *Eastman v. State*, 7 West. Rep. 418, 109 Ind. 278; *Williams v. People*, 9 West. Rep. 461, 121 Ill. 84; *Orr v. Meek*, 9 West. Rep. 341, 111 Ind. 40; *Ex parte McNulty*, 77 Cal. 164; *Brooks v. State*, 88 Ala. 122.

The same rule applies to dentists. *Wilkins v. State*, 13 West. Rep. 354, 113 Ind. 514; *Gosnell v. State*, 52 Ark. 228; *State v. Creditor*, 44 Kan. 565.

No special immunity or franchise is granted by a statute regulating the practice of medicine, which permits those who have been practicing ten years to continue. *Williams v. People*, *supra*.

Neither does an exemption from its provisions of dentists practicing in the State at the time of the passage of an Act violate the constitutional provision as to equal privileges and immunities. *State v. Creditor*, *supra*.

But a statute regulating the practice of medicine, surgery, and dentistry, which excepts from its provisions persons who have been practicing in the place of their present residence for a certain time, and also physicians residing out of the State specially called into it for consultation, or to attend patients, is unconstitutional in discriminating between persons engaged in the same business or profession and also in discriminating against citizens of other States. *State v. Hinman*, 65 N. H. 108; *State v. Pennoyer*, 5 L. R. A. 708, 65 N. H. 113.

elected to, proceed under section 1 of the statute. The appellant then filed its reply. A demurrer was presented to it, the grounds being: *first*, that it did not deny the deceased left no widow or child; and, *second*, that the action could not be maintained under section 1, because it violates both the State and United States Constitutions. At this stage of the proceeding the case was transferred from the court of common pleas to the Louisville Law and Equity Court; and the latter carried the demurrer to the reply back to the petition, and sustained it to it upon the ground that the first section of the statute is unconstitutional. The appellant failing to plead further, the action was dismissed, and it has appealed.

It is urged, first, that the action of the lower court must be sustained because the suit was in fact brought under the third section of the statute. The character of neglect alleged must determine whether a recovery is sought under the one or the other section; that is, if the proceeding be under the third section, the neglect must be averred to have been willful, because it is the creature of the statute; but, if under the first, then it is sufficient to aver the injury resulted from negligence, or, at least, to state facts showing it. *Givens v. Kentucky Cent. R. Co.* 80 Ky. — Here, however, while willful neglect was averred, yet the circumstances of the injury were fully stated, showing negligence, if truly set out; and the appel-

A statute that allows dental students to practice on the teeth and jaws during the period of their enrollment in a dental college and attendance thereon does not unlawfully discriminate between dental students. *State v. Vandensluis*, 6 L. R. A. 119, 43 Minn. 129.

Neither is an unconstitutional discrimination made between persons or classes by a statute requiring a diploma from a dental college in order to be eligible for examination for license as a dentist, with discretion in the board of examiners to dispense with this in the case of one who has practiced for ten years, although some may not be peculiarly able to attend the dental college. *State v. Vandensluis*, 6 L. R. A. 119, 43 Minn. 129.

Commercial and business privileges generally.

State discrimination against citizens of other states in respect to commercial transactions violates their right to equal privileges and immunities. *Ward v. Maryland*, 79 U. S. 12 Wall. 418, 25 L. ed. 449; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 847; *Guy v. Baltimore*, 100 U. S. 434, 25 L. ed. 748. See also *Bothermel v. Meyerle*, 9 L. R. A. 303, 136 Pa. 260, and *Fecheimer v. Louisville*, 84 Ky. 306.

In connection with this it should be noted that state restrictions on foreign or interstate commerce are unconstitutional without regard to discrimination between citizens.

The right to sell intoxicating liquors is not one of the privileges and immunities of citizens guaranteed by the 14th Amendment. *Bartemeyer v. Iowa*, 86 U. S. 18 Wall. 129, 21 L. ed. 929; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205; *Trageser v. Gray*, 9 L. R. A. 780, 73 Md. 250; *Welsh v. State*, 9 L. R. A. 664, 126 Ind. 71.

A discrimination between citizens of a State and of other states in respect to the right to obtain licenses for the sale of intoxicating liquors is not unconstitutional. *Welsh v. State*, 9 L. R. A. 664, 126 Ind. 71.

A tax on the privilege of selling consigned goods which by statute are made to include all goods brought into the State which are owned by non-residents does not violate the equal privileges or immunities of citizens. *People v. Coleman*, 4 Cal. 46, 60 Am. Dec. 581.

The tax of one occupation more than another or the requirement of payment in advance of the annual tax for one occupation only, does not violate the 14th Amendment. *Fahey v. State*, 27 Tex. App. 146.

A statute requiring a license to vend foreign merchandise or to exhibit a circus or similar show does not violate equal privileges and immunities of citizens. *Sears v. Warren County Comrs.* 36 Ind. 297.

A state regulation of local freight only does not violate equal privileges or immunities of citizens of other states. *Shipper v. Pennsylvania R. Co.* 47 Pa. 338.

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A statute applicable only to those engaged in mining or manufacturing, which in substance prohibits contracts with employes for payment in anything but lawful money, is an unconstitutional discrimination against those engaged in such business. *State v. Goodwill*, 6 L. R. A. 621, 33 W. Va. 179. *Contra*, *Hancock v. Yaden*, 6 L. R. A. 574, 121 Ind. 366.

On the same grounds a statute prohibiting those engaged in such business from selling merchandise to their employes at a greater per cent profit than they sell to others is unconstitutional. *State v. Fire Creek Coal & C. Co.* 6 L. R. A. 359, 38 W. Va. 138.

A statute providing that a railroad company whose road at a seaside resort is less than four miles in length shall be exempt from a law to enforce the duty of railroad companies to run trains is in violation of a constitutional provision against granting any exclusive privilege, immunity or franchise. *Re Delaware Bay & C. M. R. Co.* (N. J. Eq.) 9 Cent. Rep. 499.

A statute giving any railroad company that owns landing places the right to own water-craft for transportation across a navigable river at its terminus, but denies any right to condemn real estate, and applies only to such companies as own landings, violates the constitutional provision against local or special laws for granting any special or exclusive privilege, immunity or franchise. *Thomas v. Wabash, St. L. & P. R. Co.* 7 L. R. A. 144, 40 Fed. Rep. 126.

A statute prohibiting speculation in witness fees is not unconstitutional because it allows them to be traded for merchandise or hotel bills. *Davis v. State*, 3 Lea, 376.

Property rights.

The right of citizens of a State to take fish and oysters from waters within the territorial limits of the State is not one of the privileges and immunities in which citizens of the other States are entitled to share. *Corfield v. Coryell*, 4 Wash. C. C. 371; *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248; *State v. Medbury*, 3 R. 1. 138.

A statute giving discretion to grant or refuse a license to mine phosphate rock in the beds of navigable streams held by the State in trust for the public does not deny equal privileges or immunities under the 14th Amendment, as the license is not a right common to all, but is in the nature of a special privilege. *Port Royal Min. Co. v. Hagood*, 3 L. R. A. 841, 30 S. C. 519.

Marital rights such as community of gains attached to the contract of marriage by the law of Louisiana are not included within the privileges secured by the last clause of the United States Constitution, art. 4, § 2, which applies only to such privileges which belong to citizenship. *Cousser v. Elliott*, 59 U. S. 18 How. 591, 15 L. ed. 497.

A statute allowing the dower of a woman who has never become a resident of the State to be cut

lee, by its own motion, compelled the appellant to elect to proceed under the first section of the statute. Moreover, the appellee in its answer denied that the injury resulted from neglect of any character upon its part, and pleaded the negligence of the deceased as the cause of it, which is not available in a case where death results from the willful neglect of the defendant. The issue was therefore fully made up as an action under the first section. The fact that the court, after the election had been made, refused to strike out of the petition the averments relating to willful neglect, cannot cause the party to be regarded as prosecuting an action of a character different from that fixed by the election, and which could be

maintained upon the petition, as it fully set forth the manner of the injury, and showed, according to the facts stated, that it was the result of negligence. It is urged with great ingenuity and ability, however, that the first section of the statute is unconstitutional; that it is in violation of the 14th Amendment to the Constitution of the United States, which forbids a State denying to "any person" within its jurisdiction the equal protection of the laws; and that it also contravenes those provisions of our State Bill of Rights which guarantee equal rights to all persons under the law, and the impartial administration of justice. It is said that it makes two discriminations: *first*, that it authorizes an action against railroads alone,

off by a conveyance from her husband during his life is not an unconstitutional discrimination against nonresident widows. *Buffington v. Grosvenor* (Kan.) 44 Alb. L. J. 213.

An ordinance is not unequal and unjust because it permits the owner of a small parcel of ground to cultivate a larger portion of it than the owner of a larger tract can do where the same maximum limit is fixed for all. *Summerville v. Presley*, 8 L. R. A. 854, 33 S. C. 56.

A statute requiring domestic corporations to reserve and pay into the state treasury a certain portion of all dividends declared on shares of non-resident owners violates the constitutional right of the citizens of each State to all the privileges and immunities of the citizens of the several States. *Oliver v. Washington Mills*, 11 Allen, 268.

The right to the equal privileges and immunities includes a privilege or capacity of taking, holding and transmitting lands within any of the United States. *Ward v. Morris*, 4 Harr. & McH. 330.

No privileges or immunities of citizens are affected by a state statute making owners of Texas cattle liable for allowing them to run at large and spread Texas fever. *Kimmish v. Ball*, 129 U. S. 217, 32 L. ed. 696.

Taxation.

The taxation of slaves of nonresidents at a higher rate than those of resident citizens violates the constitutional right to equal privileges and immunities. *Wiley v. Parmer*, 14 Ala. 627.

An ordinance of a board of supervisors levying a license tax upon all sheep pastured in the county except those which are listed as taxable property in the county, violates a provision of the State Constitution against granting privileges or immunities to any class of citizens which are not granted to all citizens. *Lassen County v. Cone*, 72 Cal. 387. See also *People v. Coleman*, 4 Cal. 46, 60 Am. Dec. 581; *Fabey v. State*, 27 Tex. App. 146; *Rothermel v. Meyerle*, 9 L. R. A. 366, 136 Pa. 230, and *Fecheimer v. Louisville*, 84 Ky. 306.

As to litigation.

The right of citizens of other states to bring suits in a state court where a citizen of that State may, is guaranteed and protected by U. S. Const. art 4, § 2. *Cofrude v. Gartner*, 7 L. R. A. 511, 79 Mich. 333; *Cole v. Cunningham*, 138 U. S. 107, 33 L. ed. 538.

But this does not prevent a discrimination in favor of residents as to the right to bring suits. *Central R. & Bkg. Co. v. Georgia Constr. & Invest. Co.* 32 S. C. 319; *Robinson v. Ocean Steam Nav. Co.* 2 L. R. A. 636, 112 N. Y. 315.

No discrimination can be made by statute between resident citizens and others in respect to the right of action for wrongfully causing death. *Jeffersonville, M. & I. R. Co. v. Hendricks*, 41 Ind. 48.

A right to trial by jury is not a privilege or immunity. *L. R. A.*

munty protected by the 14th Amendment. *Walker v. Sauvinet*, 32 U. S. 90, 23 L. ed. 678.

A discrimination by a Statute of Limitations against a nonresident plaintiff by allowing the statute to run against him while out of the State, but not against a resident plaintiff while out of the State, does not invalidate the constitutional right of nonresidents to equal privileges and immunities. *Chemung Canal Bank v. Lowery*, 93 U. S. 72, 23 L. ed. 806.

Discrimination against nonresidents in respect to attachments is not a denial of the equal privileges and immunities of citizens. *Campbell v. Morris*, 3 Harr. & McH. 535.

A statute dispensing with an undertaking in attachment proceedings where the defendants are all nonresidents does not make an unconstitutional discrimination against nonresidents. *Head v. Daniels*, 38 Kan. 1.

A statute requiring security for costs from nonresidents does not deny to them equal privileges and immunities. *Haney v. Marshall*, 9 Md. 194.

But a statute discriminating in favor of citizens in respect to the issuing of a writ of *capias ad respondendum* is unconstitutional. *Black v. Seal*, 6 Houst. (Del.) 541.

2. Equal protection.

General rules.

Equal protection cannot be said to be denied whenever the law operates alike upon all persons and property similarly situated. *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544; *State v. Schlemmer*, 10 L. R. A. 135, 42 La. Ann. 1166; *Vermont Loan & T. Co. v. Whitted* (N. Dak.) July 14, 1891; *State v. Moore*, 104 N. C. 714; *Ex parte Swann*, 96 Mo. 44; *Barbler v. Connolly*, 113 U. S. 82, 28 L. ed. 925; *Soon Hing v. Crowley*, 118 U. S. 709, 28 L. ed. 1147; *Re Dolphie* (Colo.) Dec. 21, 1891.

Legislation limited as to objects or territory does not infringe on the constitutional right of equal protection where all persons subject to it are treated alike under like circumstances and conditions. *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578.

Special legislation is not obnoxious to this provision if all persons subject to it are treated alike. *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107; *Minneapolis & St. L. R. Co. v. Herriek*, 127 U. S. 210, 32 L. ed. 109.

But denial of right to indictment and of grand jury in criminal courts of certain counties only is a denial of the equal protection of the laws. *Re Lowrie*, 8 Colo. 499.

Rights of aliens.

Aliens who are subjects of the emperor of China while within this country are entitled under the Constitution to the equal protection of the laws. The provisions of the 14th Amendment are universal in their application to all persons within the

instead of against all persons; and, *second*, that it gives a right of action as against a railroad to all persons, save those in its employ. The appellee will not, however, be heard to complain upon the latter ground. It has no interest in that question. Indeed, the exception is for its benefit. *Cooley, Const. Lim.* *163.

It is well settled that a corporation is "a person" within the meaning of the 14th Amendment to the United States Constitution; that it is entitled to the equal protection of the laws; and that no State can to any extent deny it. *Santa Clara County v. Southern Pac. R. Co.* 113 U. S. 896, 30 L. ed. 118; *Pembina, C. S. Min. & M. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650. But this constitutional provision

does not affect the police power of the State, which is to be exercised for the protection and safety of its citizens. It was not the purpose of the Constitution to disarm the State of the power to guard the public safety. It is true, also, that corporations are embraced by the provisions of our state Bill of Rights to which we have alluded. It will be noticed, however, that the statute in question does not give a right of action merely against railroad corporations, but it applies to each proprietor of a railroad, whether operated by an individual, partnership, or corporation. It applies not merely to corporations operating railroads, but to all persons operating them. It is therefore unlike the case of

territorial jurisdiction without regard to any difference of race, color, or of nationality. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220.

A State's denial to persons who are not citizens of the United States of the right to obtain licenses to sell intoxicating liquors is not an unconstitutional discrimination against them. *Tragesser v. Gray*, 9 L. R. A. 780, 73 Md. 250.

Police power.

An ordinance which confers naked arbitrary power upon a board to give or withhold consent to engage in a lawful business, and makes all engaged in that business practically tenants at will as to their means of living under the board, is in violation of the constitutional right to the equal protection of the laws. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220.

An ordinance requiring all Chinese inhabitants to remove outside the city and county or to some other part of the city and county from the portion of the city theretofore occupied by them violates their constitutional rights. *Re Lee Sing*, 43 Fed. Rep. 339.

A tax of Mongolians was held unconstitutional under the provisions as to imports and commerce in 1882 prior to the adoption of the 14th Amendment. *Lin Sing v. Washburn*, 20 Cal. 534.

The rule that the 14th Amendment does not interfere with the police power of the states so far as it affects alike all who are similarly situated, although it may be limited in its application, applies to ordinances against washing in public laundries within certain portions of a city, during certain hours of the night or on Sunday. *Barber v. Connolly*, 113 U. S. 27, 28 L. ed. 823; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145.

Also to an ordinance prohibiting any person from visiting any gambling place within certain prescribed limits in a city, although those limits are known as the Chinese quarters. *Re Ah Kit*, 45 Fed. Rep. 793.

Likewise an ordinance prohibiting the alteration or repair of any wooden building within designated fire limits without approval of the authorities does not violate the 14th Amendment. *Ex parte Fiske*, 72 Cal. 125.

A provision may be condemned as a denial of equal justice, though fair on its face and impartial in appearance, if it is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220.

A city ordinance prohibiting the use of the engines of a certain railroad company upon a certain street, where no other company has any right to use the street, does not deny it the equal protection of the laws. *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, 24 L. ed. 734.
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As to jurors and witnesses.

A person is not entitled to a jury of his own race under the constitutional right to the equal protection of the laws, in the absence of any discrimination against qualified persons of that race. *Jugro v. Brush*, 140 U. S. 291, 35 L. ed. 516; *Ex parte Virginia*, 100 U. S. 813, 25 L. ed. 667; *Wood v. Brush*, 140 U. S. 278, 35 L. ed. 505.

An exclusion of Chinamen as witnesses in favor of or against a white man does not deny to any person the equal protection of the laws. *People v. Brady*, 40 Cal. 198.

As to property.

The imposition of street assessments upon abutting owners does not deny to them the equal protection of the laws. *Walston v. Nevin*, 128 U. S. 573, 32 L. ed. 544.

The same is true of drainage assessments which are applicable to all land of the same kind. *Wurts v. Hoagland*, 114 U. S. 606, 29 L. ed. 229.

A statute giving miners and owners of land interested in royalties a lien on the mines paramount to other liens except state tax liens does not deny the equal protection of the laws. *Warren v. Sohn*, 11 West. Rep. 361, 112 Ind. 213.

As to punishments and liabilities.

A statute providing for a more severe punishment of ex-convicts for the same offense than of those not previously convicted does not deny to them the equal protection of the laws. *Re Boggs*, 45 Fed. Rep. 475.

A statute making a discrimination in punishment between a laborer and landholder in case of a violation of a contract of service is unconstitutional. *State v. Williams*, 32 S. C. 123.

A statute imposing heavier penalties upon non-residents than upon residents for violation of game laws does not deny them the equal protection of the laws. *Allen v. Wyckoff*, 2 Cent. Rep. 213, 48 N. J. L. 90.

A state law imposing a greater punishment for sexual crime committed by a white person with a colored one, than by persons of the same race or color, does not deny to colored persons the equal protection of the laws if it gives the white offender the same punishment as the colored one. *Pace v. Alabama*, 106 U. S. 583, 27 L. ed. 307.

Nor does it conflict with the Civil Rights Bill. *Ellis v. State*, 42 Ala. 535.

See *supra*, as to sexual relations, on the question of equal privileges and immunities.

A statute subjecting railroad officers to indictment if they refuse to pay for or refer to arbitration a claim for compensation for cattle killed upon the railroad, and making the fact of killing prima facie evidence of their negligence, is unconstitutional as denying them the equal protection of the laws. *State v. Divine*, 98 N. C. 773.

But a statute making a railroad company liable

Gordon v. Winchester Bldg. & A. F. Assn., 19 Bush, 110, where it was attempted to give to one corporation the right to charge a greater rate of interest than the general law allowed; or *Smith v. Warden*, 80 Ky. 608, where one officer was given time to distrain for his fees, regardless of the general limitation law, which applied to all other officers; or *Kentucky Trust Co. v. Lewis*, 82 Ky. 579, where a legislative Act sought to confer upon one particular corporation the right to sell land mortgaged to it, or held by it in trust, without the intervention of a court. Upon the other hand, the case of *Board of Int. Imp. Co. v. Seearce*, 3 Duvall, 576, is not, as is claimed by the appellant, decisive of this case. It involved the constitu-

tionality of the third section of the statute. It was urged that the charter of the company was a contract, and that the third section of the statute impaired its obligation by making the corporation liable, where it was not so by its charter and the contemporaneous law; but this claim was denied. It has been so often said that the law should always aim at equal rights and privileges; that it should afford the same rule for the rich and the poor, the high and the low,—that it would not bear repetition, but for the importance of its being always observed. Undoubtedly partial legislation is inimical to justice and free government. The same burden should be imposed upon all under the like circumstances. The Legislature

for double the value of stock killed or of the damages for injury thereto does not deny to such companies the equal protection of the laws. *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 535; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463.

See also, as to unjust discrimination, *infra*.

Neither does a statute making a railroad company liable to an employé for the negligence of a co-employé. *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109; *Pierce v. Central I. R. Co.* 73 Iowa, 140; *Rayburn v. Central I. R. Co.* 74 Iowa, 687.

In this connection note the main case above.

As to courts and proceedings.

The establishment of different courts of appeal for different portions of a State does not deny to its citizens the equal protection of the laws. *Bowman v. Lewis*, 101 U. S. 22, 25 L. ed. 939.

The failure to provide for an appeal from the decision of commissioners valuing railroad property for taxation, although such right is accorded to the owners of other property, does not violate the constitutional right to equal protection of the laws. *St. Louis, I. M. & S. R. Co. v. Worthen*, 7 L. R. A. 374, 32 Ark. 529.

The denial of the right of appeal from a conviction in a city police court, which is allowed in other portions of the State on conviction of similar offenses, does not violate the constitutional right to equal protection of the laws if the act operates equally on all persons within the jurisdiction to which it applies. *Sullivan v. Haug*, 10 L. R. A. 263, 32 Mich. 543.

Giving the State fifteen peremptory challenges in a capital case in cities of over 100,000 inhabitants without allowing them in other parts of the State does not deny to any person the equal protection of the laws. *Hayes v. Missouri*, 120 U. S. 58, 30 L. ed. 573.

A provision giving a prosecuting attorney the right to prevent a continuance by admitting that absent witnesses would testify as alleged in an affidavit therefor denies the defendant the equal protection of the laws. *State v. Berkley*, 10 West. Rep. 47, 22 Mo. 41.

Corporations.

Corporations are persons within the meaning of U. S. Const. Amend. 14, which prohibits a State to deny to any person within its jurisdiction the equal protection of the laws. *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 535; *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109; *Santa Clara County v. Southern Pac. R. Co.* 118 U. S. 394, 30 L. ed. 113; *Phoenix Ins. Co. v. Com.* 5 Bush, 63, 86 Am. Dec. 831; *Warren Mfg. Co. v. Etna Ins. Co.* 2 Paine, 501; *Slaughter v. Com.* 13 14 L. R. A.

Gratt. 787; *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 45.

But a foreign corporation doing business within a State under an annual license is subject to the power of the State to change the conditions of the license, and on failure to pay an increased license tax established as a pre-requisite to doing business in any subsequent year it is not within the jurisdiction of the State so as to be within the "equal protection of the laws" under the 14th Amendment. *Philadelphia Fire Assn. v. New York*, 119 U. S. 110, 30 L. ed. 342.

3. Unjust discrimination.

Various decisions as to the constitutionality of statutes under State Constitutions which in various phrases guarantee equality and prohibit unjust discrimination, although they may not in terms guarantee equal privileges, immunities, and protection, must be considered in this connection.

A statute making a fire caused by the operation of a railroad prima facie evidence of negligence is not an unconstitutional discrimination against railroad companies. *Missouri Pac. R. Co. v. Merrill*, 40 Kan. 404; *Augusta & S. R. Co. v. Randall*, 79 Ga. 304.

But a statute giving a justice jurisdiction of an action against a railroad company for tort in actions where a sum is in controversy which would be beyond his jurisdiction in case of other parties is an unconstitutional discrimination against railroad companies. *Brown v. Alabama G. & S. R. Co.* 37 Ala. 370.

A statute making a railroad company liable for damages for failure to give signals when trains approach highway crossings, if this neglect contributes to an injury, is not unconstitutional as special legislation discriminating against such companies. *Kamanitsky v. Northeastern R. Co.* 25 S. C. 53.

An Act allowing the owner of land through which a right of way has been given to a railroad to compel the company to fence it on each side at its own cost, leaving it with him not only to enforce the requirement but to determine its necessity, is unconstitutional. *Owensboro & N. R. Co. v. Todd* (Ky.) 11 L. R. A. 285.

An Act prohibiting an action on insurance policies within ninety days after notice and proof of loss is not unconstitutional as granting a special exemption to one class of persons. *Christie v. Life Indemnity & I. Co.* (Iowa) Feb. 10, 1891.

A statute allowing plaintiff to put a case on the short-cause calendar, but denying the same right to defendant, is not unconstitutional as being unequal, partial or special legislation, under a constitutional prohibition of "special legislation regulating the practice in courts." *Louisville, N. A. & C. R. Co. v. Wallace* (Ill.) 11 L. R. A. 787.

Prohibiting certain kinds of business on Sunday is not an illegal discrimination if such business is

cannot, for instance, impose a different or additional penalty upon one litigant, in case of failure, from what it does upon all other litigants. It cannot select a particular individual from a class or a locality, and subject him to special burdens or peculiar rules different from those imposed upon others of the same class or same locality. If, however, legislation like that now in question cannot be upheld as constitutional, then much necessary legislation, and which is vital to the interests and safety of the public, must fail. The police power of a State certainly extends to all matters necessary to the protection of the health, morals, and safety of the public. The conduct of railroads is a highly dangerous business. More people are brought in contact with it than with any other dangerous agency.

While necessary to the business of the country, and entitled to a proper protection under the law, yet its control by the law is highly essential to the safety and protection of the public, because so many persons come within reach of injury from it. In fact, this control is at this time, when railroad transportation is almost the wonder of the day, absolutely necessary to the safety and well being of the public; and, if those operating railroads cannot be made subject to laws relating specially to them, then the safety and rights of others will be largely at their mercy. If, however, a law like this one, which meets a particular and public necessity, cannot be upheld as falling within the exercise of the police power, yet there is another ground upon which, to our minds, it can clearly rest. As already

not a public necessity. *Lieberman v. State*, 26 Neb. 464.

A statute prohibiting a barber to keep bathrooms open on Sunday, but not prohibiting other persons to do so, is unconstitutional as "class legislation." *Raplo v. State*, 86 Tenn. 272.

A statute discriminating between lotteries of a class made by the Legislature is unconstitutional. *Com. v. Mansir (Ky.)* 18 Crim. L. Mag. 249.

A statute exempting persons under seventeen years of age from the death penalty for murder is not unconstitutional as class legislation. *Ex parte Walker*, 28 Tex. App. 248.

A statute providing that railroad employees shall be punished for burning, mutilating, hauling off or buying off stock killed by trains, does not violate a constitutional guaranty of the equality of all persons before the law. *Bannon v. State*, 49 Ark. 167.

A statute which permits evidence of good faith coupled with full retraction to defeat liability for libel except as to special damages does not violate a constitutional provision giving to every person a certain remedy in the laws for all injuries or wrongs. *Allen v. Pioneer Press Co.* 3 L. R. A. 582, 40 Minn. 117.

But, on the other hand, in Michigan it is held that a similar statute allowing proof of mistake, good faith, and correction to prevent recovering of anything but actual damages unless a criminal charge has been made is unconstitutional as depriving a party injured of the right to damages for injury to his private reputation and as giving to a special class of citizens an exemption from liability for wrongs not granted to others. *Park v. Detroit Free Press Co.* 1 L. R. A. 599, 72 Mich. 560.

A statute providing for a division of damages between a railroad company and the owner of adjoining lands, who has not received compensation for fencing along the track, if his cattle are killed or injured by locomotives, is not unconstitutional as depriving one person of his property by fixing a grade of liability not imposed on other citizens under like circumstances. *Louisville & N. R. Co. v. Belcher (Ky.)* 11 Ky. L. Rep. 963.

A statute for the protection of a municipal corporation relating to the exercise of governmental power is not unconstitutional as conferring a special privilege because it does not apply to natural persons or private corporations or even to other municipal corporations. *Preston v. Louisville*, 84 Ky. 118.

A statute giving double damages for stock killed on a railroad in consequence of a failure to erect fences does not violate a constitutional provision against local or special laws granting any exclusive right, privilege or immunity. *Humes v. Missouri Pac. R. Co.* 82 Mo. 221, 52 Am. Rep. 386; *Owning* 14 L. R. A.

v. St. Louis, L. M. & S. R. Co. 70 Mo. 575; *Barnett v. Atlantic & Pac. R. Co.* 68 Mo. 53, 30 Am. Rep. 773; *Speelman v. Missouri Pac. R. Co.* 71 Mo. 434.

As to attorney's fees.

A statute authorizing an attorney's fee to be taxed by a justice in entering judgment for personal services in favor of the plaintiff only violates a constitutional prohibition against class legislation. *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104.

A statute allowing plaintiff if successful to tax an attorney's fee as part of his costs in an action against a railroad company to recover damages for killing cattle is, in Michigan, held to be an unconstitutional discrimination between suitors, where no such appeal is allowed to the defendant if successful. *Wilder v. Chicago & W. M. R. Co.* 14 West. Rep. 627, 70 Mich. 382; *Schut v. Chicago & W. M. R. Co.* 14 West. Rep. 650, 70 Mich. 438; *Rinear v. Grand Rapids & I. R. Co.* 14 West. Rep. 908, 70 Mich. 630; *Lafferty v. Chicago & W. M. R. Co.* 71 Mich. 251.

On the other hand, such a statute is held constitutional in Illinois on the ground that such attorney's fees may be upheld as a penalty for failure to fence. *Peoria, D. & E. R. Co. v. Duggan*, 109 Ill. 587, 50 Am. Rep. 619.

Perhaps it should be noted that in Michigan a statutory penalty of \$35 per day was imposed upon a railroad corporation for neglect to construct and maintain fences, and therefore the attorney's fee if upheld as a penalty would have made a double penalty.

Allowing attorney's fees in certain actions against railroads is held in Kansas also not to be an unconstitutional discrimination against railroad companies. *Missouri Pac. R. Co. v. Merrill*, 40 Kan. 404.

So in Arkansas an attorney's fee provided for by statute as part of the penalty for an overcharge by a carrier does not violate a constitutional provision against a partial and unequal legislation. *Dow v. Beidelman*, 49 Ark. 455.

And in Iowa permitting the recovery of attorney's fees on recovery against a railroad company for violation of a statute regulating rates does not violate the constitutional provision as to equality. *Burlington, C. R. & N. R. Co. v. Dey (Iowa)* 12 L. R. A. 436.

In Missouri the same rule is applied to an allowance of an attorney's fee on recovery against a railroad company for injury to livestock because of a defective fence. *Perkins v. St. Louis, L. M. & S. R. Co.* 11 L. R. A. 423, 103 Mo. 62.

The kindred subject as to what is the "law of the land," "standing laws," etc., within the meaning of constitutional guarantees of personal and property rights will be treated hereafter. B. A. B.

said, this statute does not single out a particular individual or corporation, and subject him or it to special burdens or peculiar rules; nor does it do so as to some of those engaged in a particular business, as, for instance, the Chinese in the laundry business, and which the Supreme Court of the United States condemned in the case of *Soon Hing v. Crowley*, 113 U. S. 708, 28 L. ed. 1145, but it subjects all in a particular business to its provisions, just as a law relative to banks, and the conduct of banking, would subject all in that particular business to its terms. Legislation of like character is to be found upon the statute books of every State.

It is said, however, that railroads are but a single kind of common carriers, and that this statute does not include those operating lines of stage-coaches, canals, etc. If this argument is to prevail, then legislative power to require railroads to fence their tracks, making them liable for the value, or double value, of all stock injured by their trains, and a variety of kindred legislation, which has been upheld by the courts upon the ground that it is necessary to the public safety, cannot be maintained. If it be said, however, that this legislation is by virtue of the police power, as is that requiring railroads to post their rates, number their cars, disuse steam in cities, ring their bells and blow their whistles at public crossings or in centers of population, under pain of a penalty or liability for injury to persons, yet here we have a business or agency possessing some rights not generally enjoyed by others; one peculiar to itself, and more largely affecting the public than another; one extremely hazardous, and attended by dangers peculiar to it; from the necessity of the case, if for no other reason, it should be regarded as *sui generis*; that those engaged in it should in law be held to be a separate and distinct class, like bankers; and that a law may be therefore made to apply to them generally. Such a statute affects all similarly situated; it imposes the same burden upon all in the like business; and therefore affords equal protection. While, in the broad sense of the term, it is special legislation, yet it is not of such a character as to fall within the constitutional inhibition. This view, it seems to us, is fully sustained by the case of *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, and is also supported by the reasoning in *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 27, 33 L. ed. 585. The first case relates to a Kansas statute, which provides: "Every railroad company organized or doing business in this State shall be liable for all damages done to any employé of such company in consequence of any negligence of its agents, or by any mismanagement

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of its engineers or other employé, to any person sustaining such damage." It was held that it did not deprive the railroad company of its property without due process of law; that it did not deny to it the equal protection of the law; and was not in violation of the 14th Amendment to the Constitution of the United States. The court in its opinion uses this language: "The objection that the Law of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the object sought to be attained by it, or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees, and the bridging of navigable rivers, are instances of this kind. Such legislation does not infringe upon the clause of the 14th Amendment requiring equal protection of the laws, because it is special in its character. If in conflict at all with that clause, it must be on other grounds. And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. A law giving to mechanics a lien on buildings, constructed or repaired by them, for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors so as to keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the 14th Amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed." It seems to us this reasoning is not only correct, but the rule laid down a just one. It is certainly vital to a vast amount of existing necessary legislation, which now not only affords public safety and protects individual right, but some of which protects and advances the interests of the appellee and those similarly interested. Tested by it, the statute in question is constitutional.

The judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

MONTANA SUPREME COURT.

BANK OF COMMERCE of Owensboro,
Respt.,
v.

J. A. FUQUA *et al.*, and G. W. Crutcher,
Appt.

(.....Mont.....)

1. An appeal lies from so much of a judgment as allows a recovery of attorney's fees in an action upon a bill of exchange, under a statute allowing an appeal from a judgment or any part thereof.
2. An order sustaining a motion to strike out a portion of an answer is reviewable on appeal from the judgment, under Code Civ. Proc., § 260, which designates the orders which shall be deemed to have been excepted to, and section 308 providing that the judgment roll shall contain all pleadings and copies of orders overruling or sustaining demurrers.
3. Attorney's fees provided for in a bill of exchange are earned when an action on the bill is prosecuted to judgment, and if lawful to be charged, may properly be included therein without the necessity of a separate action.
4. If defendant in an action on a bill of exchange seeks the benefit of provisions of the law of a foreign State where the bill was drawn and is payable, which limit the amount of attorney's fees to be allowed, he must substantially set out such law in his answer; alleging his conclusions as to its provisions is insufficient.
5. A provision in a bill or note for the payment of an attorney's fee in case of a suit is not invalid as being oppressive, usurious, or opposed to public policy, nor does it affect the negotiability of the instrument; but, being in the nature of costs, the stipulation should leave the reasonableness of the amount within the supervision and control of the court.

(December 14, 1901.)

APPEAL by defendant Crutcher from a judgment of the District Court for Lewis and Clarke County in favor of plaintiff in an action brought to recover the amount alleged to be due on a bill of exchange including a stipulation for attorney's fees. *Affirmed.*

The facts are stated in the opinion.

Mr. T. E. Crutcher, for appellant:

Stipulations for attorney's fees in case of suit in notes or bills are void, as being stipulations for a penalty, against public policy and as attempts to evade the Usury Laws.

Bullock v. Taylor, 39 Mich. 137, 33 Am. Rep. 356; *Myer v. Hart*, 40 Mich. 517; *Shelton v. Gill*, 11 Ohio, 417; *State v. Taylor*, 10 Ohio, 378; *Dow v. Updike*, 11 Neb. 95; *Booser v. Anderson*, 42 Ark. 167; *Merchants' Nat. Bank v.*

Sevier, 14 Fed. Rep. 669; *Thomasson v. Townsend*, 10 Bush, 115; *Witherspoon v. Musselman*, 14 Bush, 214, 29 Am. Rep. 404; *Gaar v. Louisville Bkg. Co.* 11 Bush, 180; *Billing v. Thompson*, 12 Bush, 810.

Although the court may find that the stipulation for an attorney's fee is legal and binding in this State, such fees cannot be recovered in the suit on the note. This is a separate and independent contract, the promising of a certain sum upon the happening of a contingency, and until that contingency happens and the attorney's fee is earned there is nothing to pay.

Easter v. Boyd, 79 Ill. 325; *Penny v. Jorgensen*, 27 Minn. 26.

Appellant, G. W. Crutcher, can be held only as indorser.

This being true he is not liable for the attorney's fees stipulated for in the note or bill.

Short v. Coffeen, 76 Ill. 215; *Ware v. City Bank of Macon*, 59 Ga. 840; *Van Fleet v. Sledge*, 45 Fed. Rep. 753; *Bullock v. Taylor*, 39 Mich. 137, 33 Am. Rep. 356.

The bill sued on in this case is an inland bill of exchange drawn in the State of Kentucky, indorsed in Kentucky and payable in that State, therefore as to its validity, legality, etc., it is governed by the laws of Kentucky.

1 Randolph, Com. Paper, para. 20, 32, and authorities there cited; *United States v. North Carolina*, 136 U. S. 211, 34 L. ed. 836; *Walker v. Whitehead*, 83 U. S. 16 Wall. 314, 31 L. ed. 857; *Pritchard v. Norton*, 106 U. S. 134, 27 L. ed. 104; *Teal v. Walker*, 111 U. S. 242, 28 L. ed. 415; *Scudder v. Union Nat. Bank of Chicago*, 91 U. S. 406, 23 L. ed. 245; *Wilcox v. Hunt*, 38 U. S. 13 Pet. 378, 10 L. ed. 209; *Wilson v. Davis*, 1 Mont. 195.

The stipulation for an attorney's fee in this case is void in the State of Kentucky.

Thomasson v. Townsend, 10 Bush, 115; *Gaar v. Louisville Bkg. Co.* 11 Bush, 180; *Witherspoon v. Musselman*, 14 Bush, 214, 29 Am. Rep. 404.

A defense or discharge good by the law of the place where the contract is made or to be performed is to be held of equal validity in every other place where the question may come to be litigated.

Story, Conf. L. § 531; 3 Parsons, Cont. *570.

A contract made and to be performed in another State should be construed in accordance with the laws and decisions of that State.

Knox v. Gerhauser, 8 Mont. 275; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 872.

Mr. H. G. McIntire, for respondent:

If the appeal is from the attorney's fees alone, then it will not lie in this action.

Barkley v. Logan, 2 Mont. 296; *Plained v. Nookan*, 2 Mont. 359.

If there is any such law as is attempted to be set up in the State of Kentucky, it should

NOTE.—This case was selected for the excellent discussion which the opinion contains, of the rules which have been formulated in respect to the effect of the insertion in a bill or note of a stipulation for payment of attorney's fees, rather than for the purpose of annotation, in view of the fact that 14 L. R. A.

authorities upon the question have been collected in notes to the cases of *Bowie v. Hall* (Md.) 1 L. R. A. 546, 69 Md. 433; *Wright v. Traver* (Mich.) 3 L. R. A. 50; *Exchange Bank of Dallas v. Tuttle* (N. M.) 7 L. R. A. 445.

have been pleaded as a fact, so that, if necessary, issue might have been joined thereon.

Swank v. Hufnagle, 9 West. Rep. 629, 111 Ind. 458, and cases cited; *Temple v. Brittan* (Ky.), 11 Ky. L. Rep. 467; *Central Trust Co. v. Burton*, 74 Wis. 829; *Sells v. Haggard*, 21 Neb. 357; *Leatherwood v. Sullivan*, 81 Ala. 458; *McLeod v. Connecticut & P. R. Co.* 58 Vt. 727.

An attorney's fee "is not a cause of action, but like costs a mere incident to it."

Carriere v. Minturn, 5 Cal. 435; *Kern Valley Bank v. Chester*, 55 Cal. 49.

Crutcher's name was put upon the bill of exchange on the day of its date, prior to its acceptance by the drawees, of whom he was one, and at a time when he was neither a holder nor payee. Crutcher's liability is therefore, by the weight of authority, that of a co-maker or promisor.

4 Lawson, Rights, Rem. & Pr. § 1575, p. 2783, and note 1.

Stipulations for attorney's fees are not void.

Clark v. Nichols, 3 Mont. 372; *Maryland F. & M. Co. v. Newman*, 60 Md. 584, 45 Am. Rep. 753; *Bowie v. Hall*, 1 L. R. A. 546, 69 Md. 433; *Wilson Sewing Mach. Co. v. Moreno*, 7 Fed. Rep. 806, and cases cited; *Peyser v. Cole*, 11 Or. 89, 50 Am. Rep. 457; *Exchange Bank v. Tuttle* (N. M.) 7 L. R. A. 445; 1 Dan. Neg. Inst. 4th ed. §§ 62, 62a; 1 Randolph, Com. Paper, § 205. See note to *Merchants Nat. Bank v. Sevier*, 14 Fed. Rep. 667.

The maker of a note or bill of exchange with such a stipulation is liable upon the same. And so is also any indorser or acceptor.

See *Smith v. Muncie Nat. Bank*, 29 Ind. 158; *Hubbard v. Harrison*, 38 Ind. 823; 1 Randolph, Com. Paper, § 205; 1 Dan. Neg. Inst. 4th ed. § 62a; *Bank of British North America v. Ellis*, 6 Sawy. 97, 2 Fed. Rep. 44.

Harwood, J., delivered the opinion of the court:

The bill of exchange sued on in this action was drawn for the principal sum of \$4,000, and provided for interest at 6 per centum per annum after maturity until paid, and that "the parties hereto agree to pay all attorney's fees in case of suit on this paper." The defendants, one of whom is appellant, were, according to the allegations of the complaint, both acceptors and indorsers of said bill of exchange. Judgment was rendered against appellant, G. W. Crutcher, one of the alleged acceptors and indorsers, for the said principal sum of \$4,000, together with \$400 for attorney's fees for services in prosecuting the action, and costs of suit. This appeal is from that portion of the judgment relating to attorney's fees allowed in said action. Respondent contends that an appeal from part of a judgment is not proper practice, and cites in support of his position the case of *Barkley v. Logan*, 2 Mont. 296, determined at the August Term, 1875, and the case of *Plaisted v. Nowlan*, 2 Mont. 359, determined at the January Term, 1876, of the Supreme Court of Montana, in which latter case the former was again considered on motion for rehearing, and affirmed. These cases would support respondent's position but for the fact that since the determination of them the statute under which they were determined has been so amended as to provide

for an appeal from the judgment, "or any part thereof." The sections of the Statute (369 and 380) referred to in the cases cited are as found in the Civil Practice Act, enacted by the seventh session of the Legislative Assembly, convened in 1871. Now, in 1877, about one year following the announcement of the decisions cited *supra*, the Code of Civil Procedure was revised by the Legislative Assembly at the tenth session thereof, and the same sections again appear in the Code as sections 408 and 431, (10th Sess. Laws.) and in the latter section appear the additional words, "or any part thereof," making the section read: "An appeal may be taken to the supreme court in the following cases: First, from a final judgment, or any part thereof, entered in an action or special proceeding commenced in those courts or brought into those courts from other courts." The statute has since remained in that form. We therefore hold that an appeal may be prosecuted from part of a judgment. See *Re Davis' Estate*, 11 Mont. —. In California, under statutes very similar, the practice is to entertain an appeal from part of a judgment. Hayne, New Trial & App. § 180, p. 562.

Appellant G. W. Crutcher, as a defendant in said action, appeared, and answered said complaint, and, among other averments, set forth two paragraphs as follows: "(4) This defendant, for answer to the seventh paragraph of said plaintiff's complaint, alleges that said attorney's fees in said suit provided for were not due at the time this suit was filed. (5) And for further answer to said seventh paragraph he alleges that the bill herein sued on was, as alleged in said complaint, made in the State of Kentucky, and payable in that State, and said contract was to be wholly performed in that State, and that by the laws of the State of Kentucky the sum of two dollars and fifty cents, and no more, is provided for by the statutes of the said State of Kentucky in such cases, and that any contract for a greater sum as attorney's fees is by the laws of said State of Kentucky illegal and void, and that no greater sum than two dollars and fifty cents can be recovered in said State under the contract set out in the complaint herein." These paragraphs plaintiff's counsel moved the court to strike out of said answer, on the ground that the averments therein contained were sham and irrelevant allegations, and constituted no defense to plaintiff's complaint. The court sustained said motion, and struck from the answer said paragraphs 4 and 5. The said motion and order appear in the record, and the appellant complains that the court erred in said proceedings; but respondent interposes the objection that said proceedings of the court below are not properly before this court for review on appeal from the judgment, because, as he contends, said motion and the order of the court thereon are not part of the judgment roll. This objection leads into a region of practice much debated by the profession and bench in this jurisdiction, commencing with the case of *Adey v. Sterns*, 1 Mont. 314, and running through a number of decisions, which discussion, perhaps, as intimated by the learned judge in *Barber v. Brice*, 8 Mont. 214, has tended rather to entangle and obscure the region than to trace plain paths through it.

If this be true, it warns us to look well to our bearings from the stand-point of statute and principle when we enter here. It may have so appeared, with much reason for it, to *Justice* Liddell, in treating that case; but with the opinion in that case and the statute we do not view the point with so much embarrassment, nor need we dwell long upon it. In the opinion just cited, section 290 of the Code, which prescribed what matters shall be deemed excepted to,—*i. e.*, what proceedings of the court the law reserves an exception to in favor of the party desiring to have the same reviewed,—was first considered. It is then observed: "When we come to examine the matters which are deemed excepted to it will be seen that there are two kinds,—those orders, decrees, and rulings which appear upon the face of the pleadings; and the other is of that class where the decision, order, or ruling is based upon evidence *dehors* the pleadings." And again: "The mere fact that the law has reserved an exception will not avail a party any more than if he had not excepted, unless the grounds and reasons, with so much of the evidence as is necessary to explain the point, be embodied in a bill of exceptions properly settled and signed, as is required by the Code of Civil Procedure. . . . We have two lines of authorities . . . founded upon the distinction above stated, perfectly in accord with the strict letter of the statute, and in conformity with the California authorities on the same subject. The second paragraph of section 806 of the Code of Civil Procedure defines what shall constitute the judgment roll, specifying the summons, pleadings, verdict, or findings of the court, commissioner, or referee, all bills of exceptions taken and filed in said action, and copies of orders sustaining or overruling demurrers." The Montana cases are then reviewed, and it is further said: "From these cases it appears that when the order, decision, ruling or other matter deemed excepted to by law is apparent upon the face of the pleadings, no formal bill of exception is necessary in order to have the ruling reviewed on appeal based upon the judgment roll." The correct distinction upon this point of practice appears to be there expressed, and, in our view, that case goes far towards reconciling the two lines of Montana cases which are mentioned as being wholly at variance. In the case at bar the judgment roll is brought here on appeal from the judgment, and we are asked to review an order striking out a portion of appellant's answer. This order is deemed excepted to by the provisions of section 290, Code Civil Proc. It is provided by section 306 of the Code that the judgment roll shall include, among other papers, all pleadings and copies of orders sustaining or overruling demurrers. Now, a motion to strike out a portion of a pleading is in fact and in substance a demurrer to that portion attacked. This motion is used to trim off and cast out improper matter inserted in a pleading which contains proper averments; while the demurrer is made use of to root up and cast out the whole pleading at which it is directed. Bliss, Code Pl. 2d ed. § 423. Such a motion being of the nature of a demurrer, which is part of the judgment roll, and the order sustaining the same being deemed excepted to, it

is held reviewable on appeal from the judgment. In the case of *Dodson v. Nevitt*, 5 Mont. 518, a motion was made to strike out a counter-claim set up in the answer, and sustained. This proceeding was held reviewable on an appeal from the judgment, on the ground that such motion was in the nature of a demurrer.

Was the action of the court in striking out said paragraphs 4 and 5 erroneous? As to paragraph No. 4, we unhesitatingly deem it sham, and without force as a defense. The language of the clause in the bill of exchange as to attorney's fees is: "The parties hereto agree to pay all attorney's fees in case of suit on this paper." Appellant reasons that this is a promise of a certain sum upon the happening of a contingency, and until that contingency happens, and the attorney's fee is earned, by prosecuting the action to judgment, there is nothing to pay, and that such fee cannot be recovered in the same action. It seems to us that the contingency for the employment of an attorney arose when default was made in the payment of said bill, at the time and place of payment expressed therein; and that the attorney's fee, if lawful to be charged, was earned when judgment was obtained, and was proper to be allowed therein. It was incidental to the enforcement of said debt by suit, and was a proper part of the collection to be made in the same suit, if lawful at all.

Paragraph No. 5 of the answer is an attempt to plead the statute of the State of Kentucky, and also, as we are informed by appellant's counsel, the construction of such statute by the courts of that State. Does that paragraph accomplish the purpose intended? It is a rule of the law relating to contracts, with but few exceptions, not applicable in this case, that, if a contract is void by reason of the laws of the place where the same is made and is performable, the same rule will be applied by the courts of another State where such contract is sought to be enforced, although such contract is not obnoxious to the laws of the latter jurisdiction. 2 Parsons, Cont. 523; 2 Parsons, Bills & Notes, 317; Story, Bills, § 129; 1 Story, Cont. § 809; Bishop, Cont. (Enlarged ed.) § 1890. But in order to have such foreign law applied in another jurisdiction it must be brought to the attention of the court by setting out so much thereof as is applicable, and proving the same. This is the rule at common law (1 Chitty, Pl. 269); and it does not appear to have been changed by the Codes. Bliss, Code Pl. 183, 184, 304. The case of *Throop v. Hatch*, 8 Abb. Pr. 23, being directly in point, and the language so appropriate to this subject, we quote a few observations therefrom. The court, by Allen, J., says: "If the plaintiff is driven to the Statute Laws of the States of Ohio and Michigan to maintain this action, and bound to show that by the statutes of those States the trusts which he seeks to enforce are valid, he should have set out, at least substantially, the statutes upon which he relies. The laws themselves are to be averred and proved in the same manner as other facts, and their existence is to be proved by copies of the statutes, properly exemplified, as other documents are. The averment that the trusts are, by the laws of the states in which the lands

are situated, valid and subsisting trusts, is therefore nothing more than an averment of the conclusion of the pleader, based (1) upon his knowledge of the existence of certain statutes, and (2) upon his construction of those statutes." The following cases hold to the same effect: *Phinney v. Phinney*, 17 How. Pr. 197; *Cary v. Cincinnati & C. R. Co.* 5 Iowa, 357; *De Voss v. Gray*, 23 Ohio St. 159; *Swank v. Hufnagle*, 111 Ind. 458, 9 West. Rep. 629; *Central Trust Co. v. Burton*, 74 Wis. 829; *Sells v. Haggard*, 21 Neb. 857; *McLeod v. Connecticut & P. R. Co.* 58 Vt. 727.

In the case at bar the pleader alleged that by the statute of Kentucky \$2.50 only is allowed as fee to an attorney in such a case, and "that a contract for a greater sum as attorney's fees is by the laws of said State of Kentucky illegal and void." This is an allegation of the pleader's conclusion as to what the statute of Kentucky provides in this respect, but what that law is in terms is not set forth. The court, therefore, properly granted the motion to eliminate from the answer that averment. And the party, having failed to avail himself of the opportunity offered by the court to amend his pleading, has lost the benefit of the provision of the law of Kentucky (if there is such a law) applicable to the bill of exchange, which it appears was made there, and was by its terms payable there.

Independently of the question as to what the law of Kentucky is, and its effect upon the stipulation in said bill for the payment of attorney's fees, appellant contends that said provision ought to be held invalid here, on the ground that such a stipulation in a contract is obnoxious to sound public policy; and in support of this position cites cases from certain states, and also the case of *Merchants Nat. Bank v. Sevier*, 14 Fed. Rep. 662, decided in the United States District Court for the Eastern District of Arkansas, by Judge Caldwell, and concurred in by Mr. Justice McCrary. Respondent meets this proposition by the citation of a line of cases from the courts of last resort in other states of the Union and also finds support for his side of the proposition in the federal courts, in the case of *Wilson Sewing Mach. Co. v. Moreno*, 7 Fed. Rep. 806, decided by the Circuit Court for the District of Oregon, per Deady, Judge; and also the case of *Howenstein v. Barnes*, decided in United States Circuit Court, Kansas District, in 1879, per Foster, J., cited and commented on in *note* to 29 Am. Rep. 406. Also the case of *Bank of British North America v. Ellis*, 6 Sawy. 96, decided by Judge Deady, in the Circuit Court District of Oregon. We are also cited to 1 Randolph, Com. Paper, § 206; 1 Dan. Neg. Inst. § 62; the able *notes* by Mr. Hamilton, appended to the case of *Merchants Nat. Bank v. Sevier*, *supra*, and also the valuable *note* by Mr. Brown, reporter, appended to the case of *Witherspoon v. Musselman*, 29 Am. Rep. 406. We deem it unnecessary to cite the cases which can be collected in support of the different views of this subject, because this has been ably done by the commentators, editors, and annotators referred to, which are readily accessible to those desiring to investigate the subject. It will be seen by a study of the cases that during the past twenty years a vigorous examination of

this interesting question relating to commercial law has been going on in the courts of this country, which has resulted in no harmony of conclusions. The subject has been so critically and thoroughly treated from every point of view there remains very little original to be said thereon. In the fourth edition of Daniel, on Negotiable Instruments, published this year, the author divides the cases upon this subject into four classes, as follows: First, those which sustain the validity of the stipulation and the negotiability of the instrument. The second class of cases enforces the stipulation, but denies the negotiability of the instrument. The third class maintains the negotiability of the instrument, but denies the validity of the stipulation, because, as those cases hold, it amounts to a penalty, tends to encourage litigation, is oppressive to debtors, and is against the policy of the law, and therefore void. The fourth class of cases holds that the stipulation renders the transaction usurious, and subjects the instrument to the operation of the statutes against usury. Under each of these heads, a group of cases will be found noted by the author. We will briefly refer to the grounds upon which the stipulation in the bill before us would, under any group of such decisions, be held void, or held to otherwise affect the instrument as negotiable paper; and herein we commence with the fourth class, and follow in order back to the first, where it would be held valid, and in no way vitiate the character of the obligation as a negotiable instrument.

The fourth class treats the stipulation as a condition which renders the transaction usurious. While in this State there is at present no law which would be infringed on that particular ground, we do not subscribe to the reasoning whereby it is assumed that the stipulation is a device to evade the law against usurious interest. We are inclined rather to adopt the reasoning of Mr. Justice Deady, upon this point. He says: "The ruling that such stipulation makes the note usurious is founded upon the unauthorized assumption of fact that the sum agreed to be paid as an attorney's fee in case the note is not paid at maturity is not what it purports to be, but illegal interest in the disguise thereof. Of course, where it appears that such is the real nature of the transaction, it should be treated accordingly. But the fact cannot be assumed, any more than that a like sum of the alleged principal is illegal interest in disguise. Accordingly the tendency of the decisions hostile to this stipulation is to leave these untenable grounds, and hold it void upon the ground that it is a convenient device for usury, and tends to the oppression of the debtor." In the case at bar, the stipulation is to pay attorney's fees in the event of suit "on this paper," and from that point of view we are considering the objection that a court where usury laws prevail might assume that the provision was a device to evade such laws. Now, how would a creditor obtain, through such stipulation, a greater sum for the use of money than the law permits? The debtor in such a case may pay the amount of the principal and the lawful interest, and then the stipulation would be null, for no suit could be maintained on the obligation, and of

course no sum collected from the debtor by way of attorney's fee. But, in order to carry out the scheme to evade the law against usury, and enable the holder of the paper to collect more than the law allows for the use of money, the debtor must collude against his own interest in a case where he is in no way bound so to do, and default of payment of the obligation, so as to give effect to the stipulation for attorney's fees, and suffer such fees and other costs of suit to be enforced against him. Moreover, the creditor, in order to profit from this proceeding, must obtain from the attorney a portion of the fee allotted to him for his services, at the end of the suit; and, where the stipulation is such that reasonable compensation only is allowable, this method to avoid the law against usury involves the further proposition that the attorney will divide the reasonable fee allowed for his services with the would-be usurer. If that would be the practical working of this method to evade the laws against usury, the assumption that the stipulation is made for that purpose, or could be used for that purpose, involves the assumption that human nature is so changed that men will connive against their own interests, and aid and abet the perpetration of wrongs against themselves, without the slightest coercion, and voluntarily use the law which was made for their protection to work to their injury. It has been a maxim sanctioned by the experience of men from olden time that the presumption is that when a man acts voluntarily he will not act against what he knows to be his own interest. If the stipulation was for a certain sum or per centum for attorney's fees, which was grossly out of proportion to the value of the services, it might well be looked upon with suspicion in connection with laws forbidding usurious charges for loan of money. But where a reasonable attorney's fee is provided for, dependent on the event of suit for collection of the debt, and such fee is allowed for such services actually performed, where judgment is recovered, we cannot perceive how the usurer could profit by it. So in cases where the stipulation is that the debtor will pay expenses of collection, without making it dependent on the event of a suit, the whole proposition is changed. Under such a condition demands might be put forth which a court might look upon as incompatible with the provisions of law against usury. But in such cases, as remarked by *Mr. Justice Deady*, is it not an authorized assumption for a court to presume that the stipulation is made to evade the law against usury, without any showing to that effect? As he says, it would be as proper to presume that part of the principal is usury in disguise, without any showing to that effect. *Wilson Sewing Mach. Co. v. Moreno, supra.*

The third class of cases on this subject as classified by *Mr. Daniel* maintains the negotiability of the instrument, but holds that the stipulation is penal and void. This group of cases is closely allied to those cited under the fourth class, and the reasons in both are very much alike, except that some cases of the third class do not proceed upon the ground that statutes against usury are infringed by the stipulation, but without the aid or supposed aid of

statutes declare it void on the ground that it encourages litigation, is oppressive to the debtor, and is therefore against the policy of the law. These, with other considerations, were summarized in the case of *Merchants' Nat. Bank v. Sevier, supra*, as ground for holding the stipulation on general principles, without reference to statute, void. In considering the question from this point of view, it should be borne in mind that it is a stipulation of contract between parties which the court is asked to declare void, and, as one ground therefor, the obligor urges that it is oppressive. Now, courts of equity, even, do not declare a contract void merely because it is inexpedient or improvident. 2 Pom. Eq. Jur. § 928. Nor do we find this provision of the instrument bearing a likeness to those contracts which the law generally condemns as against public policy.—*Bishop, Cont. (Enlarged ed.)* §§ 467-549,—unless it be considered champertous, and we have not seen that view seriously urged. If this stipulation could be referred to any class of contracts which have been held contrary to public policy by a long line of decisions, and fit to the principle carried out in such cases, there would be more support to that view. It is not against public policy nor against the spirit of the law in these times that attorneys should receive just and reasonable compensation for services. Nor is it in principle unlawful for one to contract with another to reimburse the latter for a lawful expenditure caused by the default or wrong committed by the promisor. If the main obligation is valid, and the obligor can pay it, without question he should do so at maturity; and it would seem merely stubborn denial of another's right to compel the obligee to go into court to enforce payment, and suffer the delay, inconvenience, and expense of such proceeding. Now, the parties have provided for this condition of things in part by a stipulation in the instrument that in such event, if the obligee is driven into court by the default of the obligor, the latter shall pay a reasonable attorney's fee for the prosecution of the action. This has been held void as against public policy, because it is oppressive to the debtor. We cannot see on what principle it should be so held. In such a case as just stated the oppression is the other way,—it proceeds from the party who has borrowed the other's money or got his goods, and refuses to pay for the same when he is able so to do. But it may be said that, in the event the debtor's circumstances are such that he cannot repay the debt when due, it would be oppressive to have judgment recorded against him for the amount and attorney's fees. In such a case a judgment against one, which cannot be enforced, will be poor satisfaction for what the obligor received in consideration for the note; and in such case he may offer to confess judgment without action, at the maturity of the note, and then it is not at all likely judgment would be given for attorney's fees, if that was shown. It is not uncommon to allow reasonable attorney's fees in case of foreclosure of mortgage. See cases cited in note to *Merchants' Nat. Bank v. Sevier, supra*, to which we add the case of *Clark v. Nichols*, 3 Mont. 372. And such a condition does not appear to have received the

attacks upon it which have been aimed at the same condition in a negotiable obligation without mortgage. It is hard to see why, viewed from the stand-point of public policy, the stipulation is not as obnoxious in one kind of an obligation as another. Besides, the mortgage is only collateral to the obligation to insure the payment thereof; and its enforcement is sometimes more oppressive to the debtor than a naked promise to pay, because the mortgage often takes property otherwise exempt from execution. But will the stipulation encourage litigation? Viewed from one side it will not. The debtor will not do anything to encourage the bringing of an action against himself, which involves his payment of a greater sum than would be called for without action. He will discourage that result, and to do so he will see that his obligation is satisfied or extended. Is there any real motive for the creditor to unduly hasten into court with his note or bill of exchange, simply because his debtor would be required to pay the attorney's fee,—a matter from which he could personally gain nothing? Would he decline to grant reasonable extension to a solvent debtor, who was at the time unprepared to meet his obligation, and hurry into court for the sole purpose of wrenching from the debtor an attorney's fee? We do not believe that experience shows that these results follow. The bill before us found its way into court several months after its maturity, and the complaint avers that the payees had often been requested to pay the same, and this is not denied.

We come now to the second class of cases, which enforces the stipulation, but denies negotiability to the instrument. See cases cited under this head by 1 Daniel, Neg. Inst. § 62. It is already perceived that those opposed to the stipulation are much divided among themselves in their views of its effect. The cases in this second class proceed upon the ground that, although the stipulation is valid as a condition, it is a condition incompatible with the nature of negotiable instruments, because it introduces an element of uncertainty as to the amount to be called for thereon. It has been pointed out by the commentators cited *supra* that, where the stipulation for an attorney's fee is dependent on the event of an action to enforce payment, the amount demandable at maturity is not at all affected thereby; and that, when suit is brought, and it is sought to enforce the stipulation along with the principal and interest of the note or bill, it is past due, and has ceased to be a negotiable instrument, in the full meaning of that term. This is readily perceived by every jurist, and this suggestion seems to take away much of the force of the idea that the stipulation introduces an element of uncertainty into the instrument, which, as a negotiable instrument, it is unable to carry. In the case of *Merchants' Nat. Bank v. Sevier*, *supra*, Mr. Justice Caldwell, in touching upon this view of the stipulation, says: "If a stipulation for an attorney's fee

can be upheld upon the ground that it is a valid agreement upon sufficient consideration for the payment of a liquidated sum, it is not perceived why a stipulation to pay the taxes of the payee, or his office-rent, or the salary of his collector, or all of these and as many more as the genius of a rapacious creditor may devise, should not be upheld and enforced by the same mode of reasoning. Mr. Justice Sharswood, in *Woods v. North*, 84 Pa. 407, 24 Am. Rep. 201, following Chief Justice Gibson, characterizes such a provision as 'luggage,' which negotiable paper is unable to carry, and pertinently inquires: 'If this collateral agreement may be introduced with impunity, what may not be?' In Daniel, on Negotiable Instruments, 49, it is said that this inquiry is answered by the assertion that such provisions facilitate, rather than incumber, the circulation of such instruments. They are not 'luggage,' but ballast. Mr. Daniel's assertion is in the teeth of many adjudged cases, among which are well considered judgments of such eminent jurists as Chief Justice Gibson, Mr. Justice Sharswood, and Mr. Justice Cooley."

With great deference to these able jurists, for whose opinion we entertain profound respect, we think there is a difference between the stipulation for attorney's fee in the event of suit and a stipulation to pay taxes, office-rent, collector's salary, horse-hire, etc. The first stipulation depends upon the event of a suit after default of payment, and after the paper has ceased to be currently negotiable. While the paper is negotiable, and up to the very moment of instituting suit, the amount demandable thereon is exact and certain, the other class of demands mentioned would be of a character which in their nature would render uncertain the sum to be demanded by the holder at maturity, and therefore an instrument containing such stipulations, by reason of the uncertainty of the sum to be called for at maturity, may well be held not to be a negotiable instrument. But no such stipulations are in the instrument before us, nor did the instrument sued on in the case last cited contain them.

We think, on the whole consideration, that the cases cited in the first class by Mr. Daniel, which sustain the validity of a stipulation for attorney's fee in the event of a suit and the negotiability of the instrument, are the most consistent with the principles of law in general and with those special rules governing negotiable instruments. And we approve the view of Mr. Justice Deady, in *Wilson Sewing Mach. Co. v. Moreno*, *supra*, that the attorney's fee, under such stipulation, in the event of suit, is incidental thereto, in the nature of costs, and as such is just and proper; and that the stipulation should be such as to leave the question of the reasonableness of the demand for services actually rendered within the supervision and control of the court.

Judgment is affirmed, with costs.

Blake, Ch. J., and De Witt, J., concur.

PENNSYLVANIA SUPREME COURT.

Frank SWEENEY

v.

W. W. HUNTER, *Appt.*

(.....Pa.....)

The Act of May 23, 1887, forbidding the assignment of a claim against a resident by a citizen of the State to a citizen of another State, with the intent to deprive the debtor of the right to have his personal earnings or property exempt from application to the payment of his debts, is not unconstitutional.

(October 5, 1891.)

APPEAL by defendant from a judgment of the Court of Common Pleas, No. 2, for Allegheny County, in favor of plaintiff in an action brought to recover the statutory penalty provided in case of the assignment by a creditor of his claim to a nonresident for the purpose of depriving his debtor of the benefit of the Exemption Laws. *Affirmed.*

The facts are stated in the opinion.

Mr. William Yost, with Messrs. T. C. Jones and A. Y. Smith, for appellant.

Messrs. John McCleave and A. E. Anderson, for appellee:

The exemption cannot be waived by the laborer, and aldermen and justices of the peace have no jurisdiction in attachment of wages even upon such voluntary waiver by the laborer inasmuch as it would be against public policy to permit such waiver.

Hirmstone v. Mack, 49 Pa. 387, 88 Am. Dec. 507.

If the Pennsylvania creditor went into West Virginia and commenced, in his own name, proceedings which he could not maintain in Pennsylvania, for the purpose of evading our law, the Pennsylvania debtor would have an equitable right at common law to an injunction to restrain said creditor from prosecuting such a suit. This is done by enjoining the creditor by the courts of Pennsylvania, not by an order to the courts of West Virginia.

Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, and cases quoted and approved in opinion.

The Act of May 23, 1887, simply provided a means of enforcing respect to the proviso exempting laborers' wages, by, in effect, attaching a penalty to the evasion thereof, and is constitutional.

The Legislature has power to legislate upon all subjects not prohibited by the Constitution.

Com. v. Hartman, 17 Pa. 119; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *Weister v. Hade*, 52 Pa. 474; *Pennsylvania R. Co. v. Riblet*, 66 Pa. 164.

A state may pass laws in regard to its own citizens which will be binding and obligatory on them when they are without its territorial

limits, and for the violation of which they may be punished in its courts whenever the State can find them within its jurisdiction.

State v. Main, 16 Wis. 423; *Story, Conf. L.* §§ 21, 540; *Wheaton, Int. Law*, 182, 169, 176; *People v. Tyler*, 7 Mich. 221, 74 Am. Dec. 708; *Adams v. People*, 1 N. Y. 178.

This Act of May 23, 1887, provides a legal remedy for the evasion of our laws, and thus supplements the equitable remedy established by *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, and other cases above cited.

A judgment rendered in one State against a resident of another State, who was not served with process, and did not appear in the action either personally or by authorized attorney, is not binding out of the State where rendered, although the acquisition of jurisdiction may have been by a mode, (e. g., publication,) recognized as valid by the laws of that State; and such absence of jurisdiction will bar an action on such judgment in any other State.

Rogers v. Burns, 27 Pa. 537; *Colvin v. Reed*, 55 Pa. 875; *Reel v. Elder*, 62 Pa. 808; *Scott v. Noble*, 72 Pa. 115, 13 Am. Rep. 663; *Reber v. Wright*, 68 Pa. 471; *Empire v. Darlington*, 101 U. S. 87, 25 L. ed. 878; *Bischoff v. Wetlied*, 76 U. S. 9 Wall. 812, 19 L. ed. 829; *Phelps v. Brewer*, 9 Cush. 390, 57 Am. Dec. 56; *Carlton v. Bickford*, 18 Gray, 591, 74 Am. Dec. 652.

The proceeding in the court of West Virginia, whatever validity it may have in West Virginia, by virtue of the statute law against the property of a defendant there situate, can have no validity here, even of a prima facie character. It is simply null.

How, then, are we attacking its full faith and credit by simply using it as evidence in an entirely distinct proceeding, and involving another matter altogether?

How can this present proceeding be said to be an attack upon such judgment, when such judgment, under the circumstances, could not be the foundation of another judgment here.

D'Arcy v. Ketchum, 52 U. S. 11 How. 165, 13 L. ed. 648; *Bissell v. Wheelock*, 11 Cush. 277; *Pollard v. Baldwin*, 22 Iowa, 339; *Dunbar v. Hallenell*, 34 Ill. 168.

Said Act does not violate the constitutional provision that "all citizens of each State shall be entitled to all the privileges and immunities of citizens of the several states."

United States v. Cruikshank, 93 U. S. 542, 23 L. ed. 588. See *Bacon v. Horne*, 2 L. R. A. 855, 123 Pa. 452.

Sterrett, J., delivered the opinion of the court:

The Act of May 23, 1887, under which this suit was brought, declares: "It shall be unlawful for any person or persons, being a citizen or citizens of this Commonwealth, to assign or transfer any claim for debt against a resident of this Commonwealth for the purpose of having the same collected by proceedings in attachment in courts outside of this Commonwealth, or to send out of this Commonwealth by assignment, transfer, or other manner whatsoever, either for or without value, any claim for debt against any resident thereof

NOTE.—For note on constitutional right of citizens to equal privileges and immunities, see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) ante, 579 14 L. R. A.

for the purpose or with the intent to deprive such person of the right to have his personal earnings or property exempt from application to the payment of his debts according to the laws of this Commonwealth, where the creditor and debtor and the person or corporation owing the money intended to be reached by such proceedings are within the jurisdiction of the courts of this Commonwealth; and the person or persons assigning or transferring any such claims, for the purpose or with the intent aforesaid, shall be liable in an action of debt to the person or persons from whom any such claim shall have been collected, by attachment or otherwise, outside of the courts of this Commonwealth, for the full amount of debt, interest and costs so collected, and the defendant or defendants therein shall not be entitled to the benefit of the Exemption Laws of this Commonwealth upon any execution process issued upon any judgment recovered in any such action."

The purpose of the Act, as expressed in its title, is "to secure to laborers, within this Commonwealth, the benefit of the Exemption Laws for this Commonwealth, and to prevent assignment of claims for the purpose of securing their collection against laborers outside of this Commonwealth." Pub. Laws, 164. The Act was doubtless passed to prevent evasions of the proviso to the 6th section of our Act of 1845, which declares "that the wages of any laborer or the salary of any person in public or private employment shall not be liable to attachment in the hands of the employer." This proviso is a general law, applicable to all judgments, whether entered in the common pleas or before a justice of the peace. *Catlin v. Ernst*, 29 Pa. 264. It has been held that the exemption given by it cannot be waived, and that aldermen and justices of the peace have no jurisdiction in attachment of wages, even upon a voluntary waiver by the party entitled to such exemption, because it would be against public policy to permit such waiver. *Firmstone v. Mack*, 49 Pa. 387, 88 Am. Dec. 507.

The exemption must therefore be regarded as grounded on public policy, looking to the protection of laborers and their families, even against their own voluntary acts.

It is claimed that the case at bar is an illustration of the evil intended to be remedied.

Plaintiff and defendant are both citizens of this State. The former was employed as baggage-master on the Baltimore & Ohio Railroad, the lines of which extend into this State, Maryland and West Virginia; and the latter was engaged in the business of an undertaker, etc. Plaintiff became indebted to the defendant in the sum of about \$50, which the latter, under the laws of this State, was unable to collect.

It was alleged by plaintiff, and testimony was introduced to prove, that defendant, in violation of the Act of 1887, above quoted, assigned his account to G. O. Smith, a citizen of West Virginia, for the purpose and with the intention of having the amount thereof collected by attaching plaintiff's wages in the hands of his employer, the Baltimore and Ohio Railroad Company, but in that State, the laws of which authorize such proceeding, but without the benefit of exemption; that in September, 1887, Mr. Smith, the assignee of the claim, attached plaintiff's wages in the hands of the

railroad company, under the West Virginia Law; and the matter was so proceeded in that, on October 25 following the money bound by the attachment was paid to the justice, before whom the proceeding was had, by the garnishee company, and the judgment was satisfied. The plaintiff had no notice of the attachment other than that given him by the garnishee, and did not appear either in person or by attorney. This suit was afterwards brought by him to recover the penalty specified in the Act above quoted.

The evidence, tending to prove that defendant in assigning his claim violated the provisions of the Act, etc., was submitted to the jury, under proper instructions, and a verdict in favor of plaintiff, for \$48.16, was rendered. On that verdict judgment was afterwards entered, and this appeal was taken by defendant.

By necessary implication, the verdict establishes all the facts necessary to constitute a violation of the provisions of the Act of 1887, and the only question presented for our consideration is the constitutionality of the Act.

It is difficult to understand why an Act, such as that in question, grounded on considerations of public policy and intended to protect laborers in the use and enjoyment of their earnings, by forbidding violations of evasions of an Exemption Law by our own citizens, can be regarded as obnoxious to the provisions of the Constitution, either State or Federal.

If the defendant, Hunter, for the purpose of evading the Exemption Law of his own State, had gone in person into a West Virginia court and there, in his own name, commenced proceedings by attachment, for the purpose of thus enforcing payments of his claim (which he could not have done here), the plaintiff, independently of the Act of 1887, would have had a remedy in equity to restrain him from prosecuting such attachment against the wages of the defendant in the hands of his employers. That remedy would have been in the courts of this State by injunction against the attaching creditor, not by an order directed to the West Virginia court. This principle appears to be recognized in *Cole v. Cunningham*, 138 U. S. 107, 33 L. ed. 538, where the subject is fully and ably discussed by the present chief justice of the Supreme Court of the United States. It is there held that in proper cases (such we think as that under consideration), the Constitution of the United States permits the equity courts of one State to control persons within their jurisdiction from prosecuting suits in another State; and that the exercise of that power is no violation of the constitutional provision which requires that full faith and credit be given in each State to the judicial proceedings of every other State. In *Story on Equity Jurisprudence*, §§ 899, 900, the principle is thus stated: "But, although the courts of one country have no authority to stay proceedings in the courts of another, they have an undoubted authority to control all persons within their own territorial limits. When, therefore, both parties to a suit in a foreign country are resident within the territorial limits of another country, the courts of equity of the latter may act *in personam* upon those parties, and direct them by injunction to proceed no further in such suit. In such a

case these courts act upon the acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court, but without regard to the situation of the subject matter of the dispute, they consider the equities between the parties, and decree *in personam* according to those equities. . . . It is now held that whenever the parties are resident within a country, the courts of that country have full authority to act upon them personally with respect to the subject of suits in a foreign country as the ends of justice may require; and, with that view, order them to take, or omit to take, any steps and proceedings in any other court of justice, whether in the same country, or in any foreign country."

If a state court has the power to thus restrain its citizens and prevent the evasion or nullification of its laws, what is there to prevent the Legislature, which can enlarge or limit such jurisdiction, from enacting laws the effect of which will be similar to that of proceedings by injunction? It is the province of the Legislature to provide a remedy for any and every existing evil; and it is certainly competent for it to say what that remedy shall be, whether by injunction, or by the imposition of fine or penalty, or both concurrently. It may, therefore, provide a cumulative statutory remedy in the shape of a penalty for the infraction or evasion of any law, and especially laws grounded on public policy. In a public point of view, it is particularly important that such laws should be obeyed and respected in spirit

as well as in letter. The Act of 1887 was doubtless passed with that view.

We are unable to see wherein it can be obnoxious to the constitutional provision that "all citizens of each State shall be entitled to all the privileges and immunities of citizens of the several states." U. S. Const. art. 4, § 2. As a citizen of this Commonwealth the defendant owed allegiance to her laws, one of which forbade him to take by any legal process the plaintiff's earnings and apply them to his own claim, and thus perhaps leave plaintiff and his family without the necessary means of subsistence. If he did do so, no matter how or where, he violated, both in letter and spirit, a law of his own State which he was in duty bound to obey, and there appears to be no reason why he should be permitted, under the claim that he is a citizen of the United States, to thus ignore his obligation to his own State and the laws thereof not in conflict with the Constitution and laws of the United States.

The defendant, a resident of this State, assigned his claim to a resident of West Virginia for the purpose of gaining an advantage which he could not enjoy under the law of this State. In doing this he committed, as the verdict establishes, acts which are forbidden by the law under consideration. That law, in effect, compels him to make restitution, by way of penalty, to his aggrieved debtor.

We think the court was right in holding that the Act of 1887 is constitutional; and we discover no error in any of the rulings.

Judgment affirmed.

NORTH CAROLINA SUPREME COURT.

H. A. BAGG, *Appt.*,

v.

WILMINGTON, COLUMBIA & AUGUSTA
R. CO.

(.....N. C.....)

A state statute compelling the shipment of freight within a certain time after receiving it under a penalty for default is not an unconstitutional regulation of interstate commerce as to freight for shipment out of the State as it tends not to trammel or obstruct, but to expedite, such commerce.

(December 23, 1891.)

A PPEAL by plaintiff from a judgment of the Superior Court for New Hanover County in favor of defendant in an action brought to recover the statutory penalty for neglect of defendant to ship plaintiff's goods within five days after they were delivered to it for shipment. *Reversed.*

NOTE.—For note on state power to regulate freights and fares, see *Cleveland, C. C. & I. R. Co. v. Cloesser* (Ind.) 9 L. R. A. 784.

For note on power of states to regulate their internal commerce generally, see *People v. Budd* (N. Y.) 5 L. R. A. 559.

For note on power of Congress to regulate commerce, see *State v. Indiana & O. O. Gas & Mtn. Co.* (Ind.) 6 L. R. A. 579.

14 L. R. A.

Statement by **Avery, J.:**

This was a civil action, brought to recover a penalty imposed by section 1967 of the Code for detention of freight more than five days after delivery for shipment without the consent of the consignor, tried before Armfield, J., at September Term, 1890, of the Superior Court of New Hanover County. The termini of the defendant's road are one in North Carolina and the other in South Carolina. The goods were consigned by a shipper in Wilmington, N. C., to a person at a station on defendant's line in South Carolina. The court intimated an opinion that the statute was unconstitutional as to freight shipped beyond the limits of the State of North Carolina, and that the plaintiff could not recover. Plaintiff thereupon submitted to a judgment of nonsuit, and appealed.

Mr. George Rountree for appellant.
Mr. Junius Davis for appellee.

Avery, J., delivered the opinion of the court:

The power to regulate commerce among the several states, as well as with foreign nations, was delegated to the federal government, in pursuance of a preconceived purpose on the part of the leading representatives of public opinion to provide for and promote the free and unrestricted sale and interchange of com-

modities between the states. It appears from contemporaneous history of the condition of the country, especially from the journals of the General Assemblies of the states and of the federal conventions, that there was a deep-seated desire in all parts of the Union to establish a uniform system of commercial regulation, such as would prohibit one State from imposing burdens upon the business of citizens of other states, whether by a tax upon their persons or property *in transitu*, or their goods when offered for sale, or by an impost tax. 1 Elliott, Deb. 146; 5 Elliott, Deb. 540. The earlier cases that gave rise to the construction of this clause of the Constitution were chiefly controversies as to the right of a State to levy a tax upon passengers or products passing through and along its highways to a market beyond its borders. The test of constitutionality to which every doubtful state statute was subjected was involved in the inquiry whether its enforcement would tend to trammel the trade between citizens of different states or embarrass them in passing from one to another. The idea was crystallized by *Justice Strong* in the definition of "regulating commerce," given by him in *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 470, 24 L. ed. 529, to wit: "Transportation is essential to commerce, or, rather, it is commerce itself; and every obstacle to it, or burden laid upon it, by legislative authority, is regulation." *Ward v. Maryland*, 79 U. S. 13 Wall. 418, 20 L. ed. 449; *Case of State Freight Tax*, 82 U. S. 15 Wall. 232, 21 L. ed. 146; *Wells v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543; *Chy Lung v. Freeman*, 93 U. S. 275, 23 L. ed. 550.

"Commerce," said *Chief Justice Marshall*, "undoubtedly is traffic, but it is something more, it is intercourse." The police power is the authority to establish such rules and regulations for the conduct of all persons as may be conducive to the public interest, and, under our system of government, is vested in the Legislatures of the several states of the Union; the only limit to its exercise being that the statute shall not conflict with any provision of the State Constitution or with the Federal Constitution, or laws made under its delegated power. *Martin v. Hunter*, 14 U. S. 1 Wheat. 326, 4 L. ed. 102; *State v. Moore*, 104 N. C. 714; *State Tax on Railroad Gross Receipts*, 82 U. S. 15 Wall. 284, 21 L. ed. 164.

So long as the state legislation is not in conflict with any law passed by Congress in pursuance of its powers, and is merely intended and operates in fact to aid commerce, and to expedite, instead of hindering, the safe transportation of persons or property from one commonwealth to another, it is not repugnant to the Constitution of the United States, and will be enforced either as supplementary to partial federal statutes relating to the same subject, or in lieu of such legislation, where Congress has not exercised its powers at all. *Morgan's L. & T. R. & S. S. Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. ed. 237; *Train v. Boston Disinfecting Co.* 144 Mass. 523, 4 New Eng. Rep. 437, 59 Am. Rep. 113; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352; *Wells v. Missouri*, 91 U. S. 14 L. R. A.

275, 23 L. ed. 347; *Chicago & N. W. R. Co. v. Fuller*, 84 U. S. 17 Wall. 560, 21 L. ed. 710.

The power of Congress over commerce between the states is, as a general rule, exclusive, and its inaction is equivalent to a declaration that it shall be free from any restraint which it has the right to impose, except by such statutes as are passed by the states for the purpose of facilitating the safe transmission of goods and carriage of passengers, and are not in conflict with any valid federal legislation. *Cooley*, Const. Lim. 595; *Mobile County v. Kimball*, 103 U. S. 697, 26 L. ed. 238; *Wilson v. McNamee*, 103 U. S. 572, 26 L. ed. 284; *Wilson v. Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245, 7 L. ed. 412; *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 525; *Turner v. Maryland*, 107 U. S. 88, 27 L. ed. 370; *Morgan's L. & T. R. & S. S. Co. v. Louisiana Board of Health*, *supra*. Familiar instances of statutes falling within the foregoing exception are found in those relating to harbor pilotage, beacons, buoys, the improvement of navigable waters, the examination as to fitness of engineers and other railroad employes, and which are discussed by the courts in the cases cited above. The validity of these and other state laws, which relate directly to, or indirectly affect, commerce between the states, has been sustained upon the ground, either that the particular statute upon its face appeared to have been passed for the purpose of expediting the safe transportation of persons and property, or in the exercise of police powers, which it is more convenient to leave subject to local legislation, such as the building of bridges over inland navigable streams.

Where the manifest tendency of enforcing such laws has been, as far as could be foreseen from their terms, to impede the free and expeditious conduct of commerce over interstate lines by land or water, they have been declared repugnant to the organic law, and void, even where Congress had failed to legislate on the branch of the subject to which they relate. The futile attempts by State Legislatures either to give exclusive privileges to a particular telegraph company, or to subject telegraph companies generally to such license tax or tax on messages as would imply the right to destroy their business by burdening them with such imposts, illustrates the view which we have submitted, that, where Congress has not exercised a police power comprehended under the general authority to regulate commerce, the states may exercise the power to aid, but not to impede or obstruct, it. *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Western U. Teleg. Co. v. Texas*, 105 U. S. 400, 26 L. ed. 1057; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311.

The Supreme Court of the United States has also, in a long line of cases, passed upon the power assumed by some of the states to impose a tax on persons or goods *in transitu* to another State,—a license tax upon travelling salesmen, who might offer to sell within their borders merchandise manufactured in or commodities shipped from another State, before such articles of commerce should become intermingled with its own products. These adjudications within the last decade marked

much more clearly the line to which Congress may rightfully claim exclusive authority to legislate, and have also indicated more definitely the limit to which the states may still cross that boundary in the exercise of permissive police power. The controlling principle which pervades all of them is that only such legislation by the states is inhibited as impedes, obstructs or controls commerce, or comes in conflict with some statute passed by Congress to regulate it. *Robbins v. Shelby County Tax Dist.* 120 U. S. 489, 30 L. ed. 694; *McCall v. California*, 186 U. S. 104, 34 L. ed. 392; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368; *Lyng v. Michigan*, 135 U. S. 166, 34 L. ed. 153; *Walling v. People*, 116 U. S. 448, 29 L. ed. 691; *Inman S. S. Co. v. Tinker*, 94 U. S. 288, 24 L. ed. 118; *Re Rahrer*, 140 U. S. 545, 35 L. ed. 572; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700; *Philadelphia & S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200.

In *Hannibal & St. J. R. Co. v. Euse, supra*, Justice Strong, delivering the opinion, said: "Many acts of a State may, indeed, affect commerce, without amounting to a regulation of it, in the constitutional sense of the term; and it is sometimes difficult to distinguish between that which merely affects or influences and that which regulates or furnishes a rule of conduct. . . . While we unhesitatingly admit that a State may pass sanitary laws and laws for the protection of life, liberty, health or property within its borders; while it may prevent animals suffering from contagious or infectious diseases, or convicts from entering the State; while, for the purpose of self-protection, it may establish quarantine and reasonable inspection laws,—it may not interfere with transportation into or through the State beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police power, substantially prohibit or burden either foreign or interstate commerce." In *Welton v. Missouri*, 91 U. S. 282, 23 L. ed. 347, it is said: "The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered in reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled." In *Western U. Tele. Co. v. Pendleton*, 122 U. S. 358, 30 L. ed. 1180, Justice Field says: "In these cases the supreme authority of Congress over the subject of commerce by the telegraph with foreign countries or among the states is affirmed, whenever that body chooses to exert its power; and it is also held that the State can impose no impediments to the freedom of that commerce." In *Walling v. People*, 116 U. S. 448, 29 L. ed. 691, Justice Bradley, speaking for the court, says: "We have repeatedly held that so long as Congress does not pass any law to regulate commerce among the several states it thereby indicates that such commerce shall be free and untrammelled." *Brown v. Houston*, 114 U. S. 631, 29 L. ed. 260. When we come, therefore, to the application of the authorities to the case at bar, the question arises at the threshold of the inquiry whether the statute which is drawn in question would, in its en-

forcement, tend to trammel or obstruct the trade carried on between the states, and not whether it might remotely influence it. The statute (Code, § 1967) which was declared to be repugnant to the Constitution of the United States in the court below is as follows: "It shall be unlawful for any railroad company operating in this State to allow any freight they may receive for shipment to remain unshipped for more than five days, unless otherwise agreed between the railroad company and the shipper, and any company violating this section shall forfeit and pay the sum of twenty-five dollars for each day said freight remains unshipped to any person suing for the same." Neither the Act of Congress passed in 1887 to regulate commerce, nor the amendatory Act of 1889, prescribes the time or the manner in which freight received for shipment to another State shall be forwarded, nor do these statutes clothe the commission with power to regulate the time of shipment. Therefore if the defendant Company, whose line extends into the section of our State where many farmers are engaged in raising vegetables for sale in northern cities, should, for the purpose of stimulating production in a State further south, and more remote from the markets, fail to furnish transportation to this class of persons known as "truckers" for more than five days, and thereby give to the planters of South Carolina the exclusive benefits of the markets till vegetables of the same kind then mature here should ripen in Virginia, the producers would suffer loss without adequate remedy, because no provision is made in any national law for preventing such secret preference. It would be almost impossible in the very nature of things to prove the existence of such a purpose, though in fact entertained and acted upon by some agent in control of the through line, or in any way to show that in a system so extensive and complicated the injury was due to any cause other than undesigned and unavoidable accident. In the same way, in the absence of a state statute imposing a penalty or any other local legislation on the subject, facilities for shipment may be furnished more promptly to one town or station than to another neighboring one, and thereby its business may be injured and its improvement retarded. No other compulsory law could be conceived of that is calculated to operate so uniformly in insuring the shipment of both local and interstate products without preference to one class of shippers over another, or to one station over a neighboring one. If the evil to be remedied were the habit of giving the preference to through freight consigned to another State over local shipments to points within the State, where is the power to compel fairness lodged? The power delegated to Congress to control through shipments would not warrant the enactment of a law going further than to prohibit unfairness and insure promptness in transporting goods shipped to another State. If, then, the authority of the State is confined to such legislation as will apply to and insure uniformity and dispatch in forwarding freight to points within its own territory, how could the evil of giving advantage either to the through or local shipper be corrected? Surely, as between the federal Legislature acting under well-defined and

delegated powers, and the states that have retained and may exercise all the residuary authority to provide by statute for the protection of its citizens, subject only to the restraints of their own organic law, the right should be conceded to the latter without question.

It is settled that the statute under consideration is valid, as to the transportation of freight to points within the State, and so far may be enforced in the state courts, just as the license taxes could be collected from persons selling the products of the State that imposed them, and within its limits. If we concede, then, that each power, state and national, is sovereign and exclusive within its own domain in dealing with the problem of expediting shipments, we have located the authority to regulate the conduct of each class of consignments *inter se*, and it might be exercised, if the statutes so provided, by two railroad commissions supplementing each other. But when the interests of State and interstate traders conflict, and such regulation is needed as will prevent corporations from giving undue preference to either over the other, under this theory it would seem that the states have neither delegated nor reserved the right to afford such relief by appropriate legislation, but that, in the transfer of delegated authority to the federal Union, this power, so conducive, if not essential, to the public weal, has been lodged *in nullo*, beyond the reach of either. There is nothing upon the face of the statute, as in that discussed in *Robbins v. Shelby County Tax Dist.*, *supra*, to show that it was intended to operate, or does operate, as a restriction upon the interstate commerce. On the contrary, the enforcement of the penalty is at once a stimulus and a compensation placed within the reach of everyone who consigns his freight to another State, and he may avail himself of its aid as an incentive to promptness, to the same extent as the local shipper may do. In fact, the controversy before us has its origin in a failure to ship goods to another State and we are asked to declare the law invalid when its aid has been invoked to expedite interstate commerce, and to thereby leave the defendant at liberty to embarrass such traffic, not by legislation, but by inaction or unfair conduct.

It was contended on the argument that a State could not compel railroad companies doing business between states to provide cars for removing freight within a given period without risk of impairing the facilities for shipment from the adjacent State by withdrawal of the companies' cars from it. That is an evil that may be met and provided against by the enactment of a similar statute in the adjacent State, and thus forcing the company to provide an adequate supply of cars to remove its freight without delay. Besides, the same result would as naturally follow if the statute were limited in its operations to compelling the removal of freights consigned to points within the State; and, if the argument were allowed to influence us at all, we would be driven to the conclusion that the penalty cannot be recovered, even where the agreement is to ship the freight to a station in North Carolina. Cars cannot be provided for the shipment of local freight, if they are moved to particular points, not to fulfill a duty to

persons who have been induced by the invitation of the carriers to intrust goods to their care, but to avoid the consequences of disregarding a penal statute, without influencing to some extent the business of the whole line. Where these arteries of trade have termini in different states, or where they are entirely within a single State, but constitute a part of a long through line formed for the purpose of competing for business with other similar lines, it would be as certainly impossible to interfere in any way with any branch of the system, whether located entirely within one or situate in two states, without to some extent affecting the whole line, as it would be to check the flow of blood in a vein of one's arm, or to temporarily open the vein without influencing the action of the main artery of that arm.

This case illustrates the distinction drawn by Justice Strong in *Hannibal & St. J. R. Co. v. Husen*, *supra*, between a state statute that affects or influences incidentally, even to the slightest extent, the transportation of commodities from one State to another, and one that is palpably intended to embarrass such commerce, and trammel it by restrictions, especially where, in addition, there is a plain discrimination in favor of the local trade or production. Neither the clause of the Constitution which we have considered, nor any other, has been construed to interfere with "the power of the State, sometimes termed its 'police power', to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity." *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205. The palpable purpose of the Legislature in enacting our statute was to stimulate trade, and develop the resources of its people. It throws the *agis* of state protection alike over freight consigned under the care of the State and that of which the general government has the right of supervision. The requirements of a state law that locomotive engineers be examined as to the condition of their eyes, to determine whether they were color blind, and as to fitness generally, and requiring them to have a license, have been declared valid under the general authority to protect life, health and property; yet such statutes interfere with and affect, but do not obstruct, commerce between the states. *Smith v. Alabama*, *supra*; *Nashville, C. & St. L. R. Co. v. Alabama*, 123 U. S. 98, 32 L. ed. 852. In *Smith v. Alabama* the court said: "If the State has power to secure to passengers conveyed by common carriers in their vehicles of transportation a right of action for the recovery of damages occasioned by the negligence of the carrier in not providing safe and suitable vehicles or employees of sufficient skill and knowledge, or in not properly conducting or managing the act of transportation, why may not the State also impose, on behalf of the public, as an additional means of prevention, penalties for the non-observance of these precautions?" Justice Field, in delivering the opinion of the court in *Nashville, C. & St. L. R. Co. v. Alabama*, *supra*, said: "It is conceded that the power of Congress to regulate interstate com-

merce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employes and others on railway trains engaged in that commerce; that such legislation will supersede any state action on the subject. But until such legislation is had it is clearly within the competency of the States to provide against accidents on trains while within their limits." It is not only the right, but the duty, of State Legislatures to provide for the safety of the persons alike of its own citizens and those of other states passing across its territory on trains, by such legislation as Congress had plenary power to pass, if it had chosen to exercise that power. It would seem doubly due to all persons interested in the traffic conducted along the railway lines which cross it, that their property intrusted to the corporations owning them should be protected by proper legislation, especially if the power of Congress in the premises is not plenary, and there is no authority lodged anywhere except in the states to pass a statute that will operate uniformly and on all classes of freight. It is true that section 1967 has been modified so as to give persons injured by failure to ship within five days the right to recover double the amount of damage actually sustained. Laws 1891, chap. 520. But by its terms the statute does not apply to actions pending in the courts, so as to affect the right to recover the prescribed penalty. We might add that though Congress has plenary authority over whiskey stored in a government distillery, and in the custody of a gauger, it is nevertheless larceny to steal such whiskey. *State v. Harmon*, 104 N. C. 792; *State v. Cross*, 101 N. C. 770; *State v. Bishop*, 98 N. C. 778. In like manner, national banks are the creatures of the general government, and subject to such supervision and regulation as Congress may provide for; yet the State may protect the

property of such banks by punishing the forgery of a note to defraud it. *Cross v. North Carolina*, 182 U. S. 133, 83 L. ed. 268. Where, therefore, the State Legislature, without discrimination, passes a law which operates uniformly in aid of domestic and interstate trade alike, and Congress has not acted, or has not the authority to afford so complete a remedy for the evil as the State Legislature, there can be no question about the validity of such legislation or the duty of the state courts to enforce it. *McGuigan's Case*, 95 N. C. 433, presented a question widely different from that raised by this appeal. That case involved a construction of section 1966 of the Code, which was an Act, by its terms, prohibiting the exaction of a greater charge for hauling freight a shorter distance over a given line than is charged by the same carrier for transporting freight of the same class to a greater distance in the same direction. If the statute had been enforced as to shipments beyond the limits of the State, it would have been clearly an invasion of the exclusive domain of Congress, and would have provided for one of the most flagrant abuses on the part of carriers of goods shipped from one State to another that has been remedied by the more recent Act of Congress. The court there conceded that the regulation of charges was operative within, though not beyond, the boundaries of the State. The passage of that statute was, as to its operation beyond our lines, an undisguised attempt to interfere with commerce by regulating charges, and not an effort to aid such traffic by speeding shipments to their appointed destination.

We think that there was error in the ruling of the court below that the plaintiff could not recover because the goods were consigned to a point beyond the limits of the State, and a new trial must therefore be granted.

WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE OF WEST VIRGINIA

Erastus WORKMAN, *Plff. in Err.*

(.....W. Va.....)

*1. The 7th section of chapter 148 of our Code provides as follows: "If a

*Head notes by LUCAS, P.

person carry about his person any revolver or other pistol, dirk, bowie-knife, razor, slung-shot, billy, metallic or other false knuckles, or any other dangerous or deadly weapon of like kind or character, he shall be guilty of a misdemeanor, and fined not less than twenty-five nor more than two hundred dollars, and may, at the discretion of the court, be confined in jail not less than one nor more than twelve months; and if any person shall sell or furnish any such

NOTE.—Constitutionality of laws restricting right to carry weapons.

In Kentucky it is decided that any restraint on the right of citizens to "bear arms in defense of themselves and the State" is unconstitutional, and this right is violated by an Act to prevent carrying concealed weapons such as a pocket pistol, dirk, large knife or sword in a cane. *Bliss v. Com.* 2 Litt. 90, 13 Am. Dec. 251.

This decision stands alone as against those of every other State in which the question has been decided. These all decide in substance that a statute prohibiting the carrying or wearing of concealed weapons such as a bowie-knife, dirk, dagger, Arkansas tooth pick, sword in a cane, pistol, etc., is not in violation of the constitutional provisions 14 L. R. A.

(which vary but slightly in the different states) guaranteeing to citizens the right to keep and bear arms in defense of themselves and of the state. *State v. Held*, 1 Ala. 612, 35 Am. Dec. 44; *State v. Buxard*, 4 Ark. 18; *Carroll v. State*, 28 Ark. 99, 18 Am. Rep. 538; *Halle v. State*, 38 Ark. 504, 42 Am. Rep. 8; *Fife v. State*, 31 Ark. 455, 25 Am. Rep. 556; *Aymette v. State*, 2 Humph. 154; *Nunn v. State*, 1 Ga. 243; *State v. Mitchell*, 3 Blackf. 229; *State v. Chandler*, 5 La. Ann. 490, 52 Am. Dec. 599; *State v. Jumel*, 13 La. Ann. 399; *State v. Wilforth*, 74 Mo. 523, 41 Am. Rep. 330; *State v. Speller*, 35 N. C. 697; *Wright v. Com.* 77 Pa. 470; *Andrews v. State*, 3 Heisk. 165, 8 Am. Rep. 8; *State v. Wilburn*, 7 Bart. 57, 32 Am. Rep. 551; *English v. State*, 35 Tex. 472, 14 Am. Rep. 374.

weapon as is hereinbefore mentioned to a person whom he knows, or has reason, from his appearance or otherwise, to believe, to be under the age of twenty-one years, he shall be punished as hereinbefore provided. But nothing herein contained shall be so construed as to prevent any person from keeping or carrying about his dwelling-house or premises any such revolver or other pistol, or from carrying the same from the place of purchase to his dwelling-house, or from his dwelling-house to any place where repairing is done, to have it repaired, and back again. And if upon the trial of an indictment for carrying any such pistol, dirk, razor, or bowie-knife, the defendant shall prove to the satisfaction of the jury that he is a quiet and peaceable citizen, of good character and standing in the community in which he lives, and at the time he was found

with such pistol, dirk, razor, or bowie-knife, as charged in the indictment, he had good cause to believe, and did believe, that he was in danger of death or great bodily harm at the hands of another person, and that he was in good faith carrying such weapon for self-defense and for no other purpose, the jury shall find him not guilty." These provisions are not in conflict with the Constitution of the United States, nor that of West Virginia.

2. Whenever an Act of the Legislature can be so construed as to avoid conflict with the Constitution, such construction will be adopted by the courts.

3. This section requires a statutory acquittal as mandatory in favor of persons who prove good character and standing in the

The constitutional right to bear arms in defense of person and property does not prohibit the Legislature from making police regulations for the good of society as to the manner in which such arms shall be borne. *Carroll v. State, supra.*

Thus it may prohibit carrying an army or navy pistol elsewhere than in public except uncovered and in the hand. *Haile v. State, supra.*

Or may prohibit any person from carrying an "army pistol" except openly in his hands. *State v. Wilburn, supra.*

The constitutional right to keep and bear arms does not apply to dirks, bowie-knives, and other such weapons. *English v. State, supra.*

But in Georgia it is held, in conflict with the great weight of authority, that a statute against carrying weapons is valid only as to concealed weapons, and therefore that a prohibition against carrying bowie-knives, dirks, etc., is not valid as to persons by whom they are carried openly. *Nunn v. State, supra.*

The doctrine most generally accepted is illustrated by a decision that a statute which prohibits citizens "either publicly or privately to carry a dirk, sword, cane, Spanish stiletto, belt or pocket pistol or revolver" is valid under a constitutional provision giving citizens the right to bear arms for their common defense except as to the revolver, and is valid as to that except so far as it includes weapons adapted to the equipment of a soldier. *Andrews v. State, supra.*

So an act prohibiting the carrying of "any pistol of any kind whatever or any dirk, butcher or bowie-knife or sword or spear in a cane, brass or metal knucks or razor as a weapon" is not in violation of a constitutional right "to keep and bear arms for the common defense;" the "pistol" prohibited does not include such fire arms as are used as weapons of war and are useful and necessary for the common defense. *Fife v. State, supra.*

But to prohibit carrying war weapons except upon one's own premises, or when on a journey traveling through the country with baggage, or when acting in aid of an officer, is an unwarranted restriction upon the constitutional right of citizens to keep and bear arms for the defense of themselves and of the State. *Watson v. State, 33 Ark. 557.*

A large army size six shooter revolving pistol is an army weapon within this rule. *Ibid.*

A statute against carrying any deadly weapon to any court of justice or any election ground or precinct or any place of public worship or any other public gathering except militia muster grounds does not violate a constitutional right to keep and bear arms, especially where express power is given "to prescribe the manner in which arms may be borne." *Hill v. State, 53 Ga. 472.*

A statute making it murder to commit a homicide with a bowie-knife or dagger under circumstances which would otherwise constitute manslaughter is not a violation of the constitutional right to keep and bear arms in lawful defense. *Cockrum v. State, 24 Tex. 394.*

An Act requiring a license for a free person of color before he can carry or keep any gun, pistol, sword or bowie-knife was held during the period of slavery and before the last three amendments to the Constitution of the United States not to be a violation of a constitutional provision giving citizens the right to bear arms for defense of the State. *State v. Newsom, 27 N. C. 250.*

Under Cal. Const., art. 11, § 11, empowering cities to make local police regulations not in conflict with general laws, an ordinance forbidding the carrying of concealed weapons, providing for proper exceptions, is not invalid, when there is no general law on the subject. *Re Cheney, 90 Cal. 617.*

A text-writer, following the views of some of the state courts in very early decisions, says that the Second Amendment of the United States Constitution guaranteeing the right of the people to keep and bear arms "seems to be of a nature to bind both the state and national Legislatures, and doubtless it does." *Bishop, Stat. Crimes, § 792.*

But the Supreme Court of the United States has twice expressly decided that this Second Amendment to the Constitution of the United States is a limitation only upon the power of Congress and the national government, and not upon that of the states. *Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615; United States v. Cruikshank, 92 U. S. 542, 33 L. ed. 588.*

The same court has said further, "that the first ten articles of amendment were not intended to limit the powers of the state government in respect to their own people, but to operate on the national government alone, was decided more than a half century ago, and that decision has been steadily adhered to since." *Ex parte Spies, 123 U. S. 131, 31 L. ed. 80, citing Barron v. Baltimore, 32 U. S. 7 Pet. 243, 8 L. ed. 672, 674; Livingston v. Moore, 32 U. S. 7 Pet. 469, 552, 8 L. ed. 751, 751; Fox v. Ohio, 46 U. S. 5 How. 410, 434, 12 L. ed. 213, 223; Smith v. Maryland, 59 U. S. 18 How. 71, 76, 15 L. ed. 269, 271; Withers v. Buckley, 61 U. S. 20 How. 84, 91, 15 L. ed. 816, 819; Perreay v. Com. 72 U. S. 5 Wall. 475, 479, 18 L. ed. 608, 609; Twitchell v. Com. 74 U. S. 7 Wall. 321, 325, 19 L. ed. 223, 224; The Justices v. Murray, 76 U. S. 9 Wall. 274, 278, 19 L. ed. 658, 660; Edwards v. Elliott, 88 U. S. 21 Wall. 583, 587, 22 L. ed. 487, 492; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; United States v. Cruikshank, supra; Pearson v. Yewdall, 95 U. S. 294, 298, 24 L. ed. 436, 437; Davidson v. New Orleans, 96 U. S. 97, 101, 24 L. ed. 616, 618; Kelly v. Pittsburgh, 104 U. S. 79, 26 L. ed. 658; Presser v. Illinois, 116 U. S. 252, 265, 29 L. ed. 615, 619.*

The question therefore, so far as it concerns state laws, is to be decided with reference to the State Constitution alone. B. A. R.

community, and that they were in good faith armed only for self-defense; but, though not mandatory as to persons who fail to prove such good character, it nevertheless does not in terms deprive them of any right or guaranty to which they may be entitled under the Constitution, nor should such deprivation be constructively implied.

4. **A mere indefinite threat of violence,** the nature and extent of which is not given in evidence, unaccompanied by any act or conduct on the part of the party making such threat evincing a design to do violence to the prisoner, will not justify the carrying of a pistol, under section 7, chap. 148, of the Code.

(November 21, 1891.)

ERROR to the Circuit Court for Boone County to review a judgment convicting defendant of violating the statute against carrying concealed weapons. *Affirmed.*

The facts are stated in the opinion.

Mr. W. E. Chilton, for plaintiff in error:

The statute, if pursued to the extent it has been in this case, deprives the citizen of his right to obtain "safety," and is in violation of our Bill of Rights, art. 3, § 1.

Cooley, Const. Law, 427; Bishop, Stat. Crimes, §§ 792, 793; *Bliss v. Com.* 2 Litt. 90, 13 Am. Dec. 251; *State v. Reid*, 1 Ala. 612, 35 Am. Dec. 44; *Stockdale v. State*, 32 Ga. 225; *State v. Buzzard*, 4 Ark. 18; *Andrews v. State*, 3 Heisk. 165, 8 Am. Rep. 8; *Ely v. Thompson*, 3 A. K. Marsh. 72.

The defendant proved everything required by the statute to compel the court to acquit him except that he was "a quiet and peaceable citizen, of good character and standing in the community in which he lives."

State v. Barnett, 34 W. Va. 74.

The State cannot enforce a penal statute which gives a right of defense thereto to one class of citizens which it does not give to another class.

U. S. Const. art. 14, § 1; Bill of Rights, art. 3, § 1.

This statute, so far as it requires a defendant to prove "his good character, etc.," as an element of defense, violates both of the above constitutional guaranties.

State v. Goodwill, 6 L. R. A. 621, 33 W. Va. 185.

The State cannot under the police power shield from a penal statute a man of good repute and punish the man of bad repute any more than it can shield Bill Jones by name because he is of good repute and attach the penalty to everyone else.

Lewis v. Webb, 3 Me. 326.

To be the "law of the land" and to guarantee to all the "equal protection of the laws," a statute must deal alike with the strong and the weak, the old and the young, (except as to those under disability), the intelligent and the ignorant, the large and the small, the believer and the disbeliever, the man of good repute and the man of bad repute. And any distinction which makes the doing of an act an offense as to one man, and not an offense as to another, similarly situated, is unreasonable and void.

Brown v. Haywood, 4 Heisk. 357; *Ho Ah Kow v. Nunan*, 5 Sawy. 552; *Shreeport v.* 14 L. R. A.

Levy, 26 La. Ann. 671, 21 Am. Rep. 555; *Kuhn v. Detroit*, 14 West. Rep. 478, 70 Mich. 534; *Holden v. James*, 11 Mass. 386, 6 Am. Dec. 174; *Ball v. Conroe*, 18 Wis. 233; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 513; *Bank of State v. Cooper*, 2 Yerg. 599, 24 Am. Dec. 517. And see the exhaustive notes on pp. 538, 543; *State v. H. C. Coal & C. Co.* 6 L. R. A. 359, 33 W. Va. 188; *State v. Goodwill*, 6 L. R. A. 621, 33 W. Va. 179.

Mr. Alfred Caldwell, Atty. Gen., for the State:

The statute does not stop with requiring good cause for the belief, but it distinctly and expressly requires the direct, affirmative, positive belief to be shown. The belief is not that the defendant is in danger of a rumour, beating or row, but a belief of danger of death or great bodily harm. The belief must be an honest, bona fide one, founded upon good cause, and it must be of danger of death or great bodily harm.

State v. Barnett, 34 W. Va. 74.

The right to bear arms is not granted by the Federal Constitution; neither is it in any way dependent upon that instrument for its existence. The Second Amendment to the Constitution of the United States means no more than that it shall not be infringed by Congress and has no other effect than to restrict the powers of the national government.

United States v. Cruikshank, 32 U. S. 549, 23 L. ed. 588; *Presser v. Illinois*, 116 U. S. 265, 29 L. ed. 619; *Spies v. Illinois*, 123 U. S. 181, 31 L. ed. 80; *Fife v. State*, 31 Ark. 455, 25 Am. Rep. 556; *Eilenbecker v. Plymouth County*, 134 U. S. 31, 33 L. ed. 801.

In many of the States, statutes against carrying dangerous weapons have been held to be constitutional.

State v. Shelby, 7 West. Rep. 139, 90 Mo. 302; *State v. Wilburn*, 7 Baxt. 57, 32 Am. Rep. 551; *Hill v. State*, 53 Ga. 472; *Wright v. Com.* 77 Pa. 470; *Andrews v. State*, 3 Heisk. 165, 8 Am. Rep. 8; *State v. Speller*, 36 N. C. 697; 3 Wharton, Crim. Law, 8th ed. § 1557, and other cases cited in the notes.

The statutes prohibiting the carrying of weapons, save very few, contain exceptions to their operation. Such exceptions must be affirmatively shown to exist by the defendant, as matter of defense.

Wiley v. State, 52 Ind. 516; Wharton, Crim. Ev. § 128; Wharton, Crim. Law, 8th ed. note 9.

The law under consideration in that part of the exception relating to good character does not infringe the Fourteenth Amendment to the Federal Constitution, or anything in our State Constitution.

The statute is an exercise of police power for the preservation of the public safety, and in the construction of constitutional limitations such statutes are, as a rule, impliedly excepted from the operation of the limitations.

Mugler v. Kansas, 123 U. S. 684, 31 L. ed. 211.

Police regulations always operate upon classes of people in one sense, and yet they are constantly sustained by the courts for the good of society.

Davis v. Beason, 133 U. S. 333, 33 L. ed. 637.

The statute is not arbitrary or special and

does not deprive any person of the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Missouri Pac. R. Co. v. Mackey, 137 U. S. 309, 32 L. ed. 109; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585; *Dow v. Beidelman*, 125 U. S. 691, 31 L. ed. 844; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 325; *Kemmler's Case*, 136 U. S. 436, 34 L. ed. 519; *Caldwell v. Texas*, 137 U. S. 692, 34 L. ed. 816; *Wurts v. Hoagland*, 114 U. S. 615, 29 L. ed. 232.

Lucas, P., delivered the opinion of the court:

This was an indictment in the Circuit Court of Boone County under section 7, chap. 148, of the Code, against carrying concealed weapons. A jury was waived, and the case submitted to the court, which upon the evidence found the defendant guilty, and imposed a fine of \$25, and a *capias pro fine* was issued. The evidence of the defense was as follows: "The defendant, Erastus Workman, to maintain the issue on his part, put on the stand one Elsworth Workman, who stated that he had heard one George Ball threaten to take the life of the said defendant, Erastus Workman; that he (the witness) had communicated said threats to the defendant, Erastus Workman; that the general reputation of the said George Ball was that he was a dangerous man, and that he (the witness) considered him so; that he (the witness) communicated said threats to the defendant, Erastus Workman, prior to the time spoken of by the witness for the State. Ester A. Ball, another witness for the defendant, stated that she was the sister of the defendant, and was at the time of the finding of the indictment against the said defendant the wife of one George Ball; that she (the witness) had heard the said George Ball threaten to take the life of the defendant, Erastus Workman, repeatedly, during the winter of 1888 and 1889, and during the spring of 1889; that she had heard said threats, and communicated them to the said defendant, Erastus Workman, before the time spoken of by the witness for the State; and that the said George Ball was a very dangerous man. The defendant, Erastus Workman, testified that he was informed more than once during the spring of 1889 that one George Ball had threatened to take his (the defendant's) life; that those threats were communicated to him, the said defendant, before he ever carried a pistol; that he never carried a pistol before the threats were made against him; that he was afraid of the said George Ball; that the said George Ball was a dangerous man; and that he carried the pistol for no other purpose than to defend himself against the said George Ball."

Without going into the evidence on the part of the State in detail, I may say that the offense of carrying a pistol on his person by the defendant was fully proved, and also admitted by the prisoner himself in his own testimony. The only question was whether the evidence of the defendant brought him within the defense proposed by the statute itself, when it declares that under certain circumstances the jury shall find the prisoner not guilty. It is 14 L. R. A.

contended in the very able brief of defendant's counsel that every element of this defense was made out, except that the defendant failed to prove that he was "a quiet and peaceable citizen, of good character and standing in the community." It is argued that this clause, viewed as a proviso, or condition precedent to the admission of evidence which otherwise would establish a good defense under the statute, is in violation of the 14th article of the Constitution of the United States, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Also, that it is in derogation of article 3, § 1, of our Bill of Rights, which guarantees to everyone "the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety." If the circuit court had put such a construction on this clause of the statute as to exclude the other exculpatory testimony because good character and standing had not been proved the question here raised would have presented itself for our decision. But the circuit court has made no such exclusion. From aught that appears in the record the circuit court excluded no testimony offered by the prisoner, and gave to that adduced all the weight to which it was entitled. There is a well-recognized canon of construction which may be applied to the clause in question, and that is that such an interpretation, where possible, should be given to a law as will avoid apparent conflict with the Constitution. In other words, as was said by this court in *Osburn v. Staley*, "whenever an Act of the Legislature can be so construed as to avoid conflict with the Constitution, and give it force of law, such construction will be adopted by the courts." 5 W. Va. 85, 18 Am. Rep. 640. The clause in question, as well as the whole Act, might be so construed, by the exercise of ingenuity to that end, as to diminish materially the right of self-defense, as guaranteed by the Constitution, not only to persons of good repute, but also to those of evil reputation. But such a construction will not be adopted when it may be avoided. The clause which we are now considering may be construed simply as a rule of evidence established by the Legislature for the better enforcement of the prohibitory feature of the Act. Without it, there might have been a doubt whether proof of character could be introduced under an indictment for carrying concealed weapons. The Legislature has removed that doubt, and has, moreover, said, in effect, that when a man is found going around with a revolver, razor, billy, or brass knuckles upon his person, he shall be presumed to be a burglar, duelist, gambler, thief, or other criminal of the like violent and dangerous class; but when he removes this presumption, as he may by proving that he is a quiet and peaceable citizen, of good character and standing in the community in which he lives, and further proves that he was so armed because he had good cause to believe, and did believe, that he was in danger of death or great bodily harm at the hands of

another person, and that he was, in good faith, carrying such weapons in self-defense, and for no other purpose, the jury shall find him not guilty. If the statute had gone on to provide that in case of not proving good standing, etc., the jury should find the prisoner guilty, there would have been more doubt about the constitutional question; but the law does not say so, and, so far as this Act goes, the prisoner who fails to prove his good reputation is left in the hands of the jury, under full protection of the common law and the Constitution. In other words, a statutory acquittal is mandatory in favor of persons who prove good character, and that they were in good faith armed only for self-defense; but, though not mandatory as to persons who fail to prove such good character, it nevertheless does not in terms deprive them of any right or guaranty to which they may be entitled under the Constitution, nor should such deprivation be constructively implied. The presumption which the law establishes, that every man who goes armed in the midst of a peaceable community is of vile character, and a criminal, is in consonance with the common law, and is a perfectly just and proper presumption, and one which ought to prevail in every community which aspires to be called civilized. Neither would there be any constitutional objection to enacting that any person who proves good character should be acquitted by the jury upon lighter evidence as to his good faith in his plea of self-defense than should a person who tacitly admits himself to be of evil fame by failing to introduce evidence to the contrary. This is a discrimination, it is true, between classes, but it is only a discrimination in favor of the virtuous class against the dangerous and vicious.

But it is argued that even if the clause just considered be not unconstitutional, or be not involved in the present case, yet the whole Act is in derogation of the Second Amendment to the Constitution of the United States, which provides that "a well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." Supposing this to be a restriction upon legislation by the several states, as well as by the Congress, (a question upon which authorities differ,) we may still conclude that by law to regulate a conceded right is not necessarily to infringe the same. Thus, a prohibition against passing any law abridging the freedom of speech or of the press would scarcely be so construed as to prohibit all statutes defining and punishing slander or criminal libel; and the inhibition against passing any law restricting the free exercise of religion would not prevent the passage of an Act prohibiting immorality when practiced as a religious tenet. *Late Corporation of Church of Jesus Christ v. United States*, 136 U. S. 2, 49, 67, 34 L. ed. 481, 493, 499.

The Second Amendment of our Federal Constitution should be construed with reference to the provisions of the common law upon this subject as they then existed, and in consonance with the reason and spirit of the amendment itself, as defined in what may be called its "preamble." As early as the second year of Edward III., a statute was passed prohibiting all persons, whatever their condition,

"to go or ride armed by night or by day," And so also at common law the "going around with unusual and dangerous weapons to the terror of the people" was a criminal offense. *Bishop, Stat. Crimes, § 784; State v. Huntley*, 25 N. C. 418, 40 Am. Dec. 416; *State v. Rolen*, 86 N. C. 701. The keeping and bearing of arms, therefore, which at the date of the amendment was intended to be protected as a popular right, was not such as the common law condemned, but was such a keeping and bearing as the public liberty and its preservation commended as lawful, and worthy of protection. So, also, in regard to the kind of arms referred to in the amendment, it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets,—arms to be used in defending the state and civil liberty,—and not to pistols, bowie-knives, brass knuckles, billies, and such other weapons as are usually employed in brawls, street fights, duels, and affrays, and are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the State. *Bishop, Stat. Crimes, § 792.*

Although this question of constitutionality has never been expressly passed upon by this court, or the Court of Appeals of Virginia before the separation, yet both courts have administered the law, and consequently, by implication at least, affirmed its constitutionality. So far as I have been able to ascertain, the court of appeals of but one State of the Union has unqualifiedly held such laws unconstitutional, and in that State the decision was based upon the peculiar language of the State Constitution. The same court has also held that "if a man feel sure that his life is in continual danger, and that to take the life of his menacing enemy is his only security, he may kill that enemy whenever and wherever he gives him a chance, and there is no sign of relenting." *Carico v. Com.* 7 Bush, 124. It would thus seem that the State cannot constitutionally prohibit the carrying of deadly weapons; and, secondly, that upon a mere threat to kill, made by your enemy, you may hunt him down, and, without waiting for any hostile demonstration on his part, may take his life. We have but to put these two alleged principles of law together, in order to destroy that security of life and that social order which are absolutely essential to civilization. In the State where they have been announced, a prolific harvest of murders, street fights, and family feuds has been their natural fruition, to the degradation and terror of society, and the abasement of justice and civil order. In this State, just the reverse has been held as to both the principles alluded to. *Cain's Case*, 20 W. Va. 679; *State v. Eason*, 83 W. Va. 418.

In *State v. Barnett*, 34 W. Va. 74, it was held that "a mere conditional threat of violence by one person towards another, unaccompanied by any act or conduct on the part of the party making such threat evincing a design to do violence to the other person, will not justify the carrying of a revolver, under section 7, chap. 148, Code 1887." In the opinion of the court in the same case, it is further said: "A mere threat, standing isolated and alone, while admissible in defense as an item of evi

dence, does not establish sufficient ground for the defendant to fear death or harm, especially a conditional or idle threat, wholly unattended by any act or conduct of the threatener, manifesting a design to do the defendant harm, or carry the threat into execution, within the true meaning of section 7, chap. 148, Code 1887. If such were the ruling of the courts, it would largely rob this useful statute of the beneficial effect it was intended to accomplish in the preservation of life and the public peace. We cannot reverse the finding and judgment of the court below, unless it plainly appear that the finding is erroneous. Something, too, must be accorded to the opinion of the judge who saw the witnesses face to face and could, better than we can, judge of their credibility. *Dudleys v. Dudleys*, 3 Leigh, 486; *Mitchell v. Baratta*, 17 Gratt. 452. But, admitting all that the defendant's presentation of the case tends to show, it shows an insufficient defense." This language is exactly applicable to the present case, which is not as strong a one in favor of the prisoner as was the *Case of Barnett*.

Where nothing further appears in evidence for the defense than a mere threat of violence which has been communicated to the prisoner, I doubt whether it ought in any case to be considered sufficient to compel an acquittal under the statute, especially where sufficient length of time has elapsed to have enabled the prisoner to seek the protection of the law, as prescribed in chapter 153 of the Code, by having his adversary arrested and bound over. If he has neglected this precaution and safeguard provided by law, I doubted whether this fact ought not of itself to be considered such an impugnement of his "good faith" as to render it improper to acquit. In cases where there are aggravating circumstances the full penalty of the law should be inflicted, while a lighter penalty should be imposed if there are circumstances of a mitigating character. In the present case the penalty imposed was the least which the statute prescribes.

The judgment of the Circuit Court is affirmed.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA

J. LINGERFELT et al., Appts.

(.....N. C.....)

Sureties on the bail bond of an indicted person who has fled into another State may follow and arrest him there, either in person or by agent, and the fact that the bond has been conditionally forfeited and a *scire facias* issued is immaterial.

NOTE.—Right of sureties on bail bond to pursue their principal into another State for the purpose of arresting him.

The authorities on this subject do not appear to be numerous, but so far as they go they seem to fully sustain the opinion of the court in the principal case.

In addition to the authorities there cited, it has been held that a person who had become bail in Vermont might pursue and take his principal in Massachusetts. *Com. v. Brickett*, 8 Pick. 182. See also *Pease v. Burt*, 3 Day, 485.

In *Harp v. Osgood*, 2 Hill, 216, a surety residing in New York arrested in Virginia the principal, who had gone to the latter State, apparently without question.

In *Johnson v. Tompkins, Baldwin*, 578, the court compared the right of a master to pursue his slave into another State and reclaim him there to the right of a bail to pursue his principal into another State, arrest, and bring him back, seeming to take it for granted that the latter right was unquestionable.

So the bail of defendant in a bastardy proceeding may after judgment take his principal in any county, State, or Territory. *Turner v. Wilson*, 49 Ind. 581.

The rights of the surety are equal in criminal and in civil cases. *Harp v. Osgood*, 2 Hill, 216.

The authority arises more from the contract than from the law, and, as between the parties, neither the jurisdiction of the court nor of the State controls.

(December 3, 1891.)

A PPEAL by defendants from a judgment of the Superior Court for Cherokee County convicting them of murder. *Reversed.*

Statement by Shepherd, J.:

The defendants were charged with the murder of Marion Cole, in the County of Cherokee, in July, 1891. It appeared in evidence that the deceased was indicted for violation of the United States Revenue Laws in the Circuit Court of the United States for the Eastern

districts and the bail may take the principal in another jurisdiction or another State on the ground that a valid contract made in one State is enforceable in another according to the law there. *Warthen v. Prescott*, 5 New Eng. Rep. 368, 60 Vt. 68.

The principal may be arrested if he comes into the State for the purpose of attending court. *Broome v. Hurst*, 4 Yeates, 123.

It has been said that the bail has his principal always on the string, and though it extends to the remotest corner of the earth he may pull it when he pleases. *Ruggles v. Corey*, 3 Conn. 421.

But there is a strong intimation that the bail cannot exercise his rights outside of the jurisdiction of the sovereign ruling where the rights of the parties arose. *Reese v. United States*, 76 U. S. 9 Wall. 13, 19 L. ed. 541.

Bail who have suffered their principal to go into another State, where he has been put under arrest for the purpose of being tried by a court-martial, cannot take him out of that State until after the sentence imposed on him by that court has been executed. *United States v. Bishop*, 3 Yeates, 37.

The discharge in bankruptcy of the principal under the laws of the State in which he is found will prevent his arrest by his bail coming from another State upon a debt due before the discharge; at least where both debtor and creditor are citizens of the State where the discharge was obtained and the debt was contracted there. *Com. v. Riddle*, 1 Serg. & R. 311.

H. P. F.

District of Tennessee, and had given a bond, with the usual condition in such case, with one of the defendants as surety thereto, to make his personal appearance before said court in Knoxville, Tenn., at the time mentioned therein. He failed to appear, and thereupon it was considered by the court that said deceased and his sureties forfeit and pay to the United States the sum of \$1,000, according to the tenor of their bond, unless they appear and show cause to the contrary; and it was ordered that a *scire facias* issue. There was much evidence upon the trial in the court below, but it is not necessary to the understanding of the opinion of this court to report it.

The prisoners asked the court to charge the jury as follows: "(1) That if Lingerfelt, while acting under the belief that he had the right to arrest the deceased, went to the field of the deceased, and notified him that he had come for the purpose of arresting him, and the deceased made a violent attack on him with a hoe, which was a deadly weapon, and the assault was so violent that prisoner believed that he was in imminent danger of losing his life or suffering great bodily harm, the right of self-preservation asserted itself, and he had the right to shoot the deceased. (2) If he went to the deceased, and told him he had come to arrest him, as the agent of his bondsmen, the deceased had no right to slay the defendant, no demonstration to coerce the deceased having been made by the defendant; and if the jury should find that deceased made a deadly assault with a hoe, the defendant had a right to shoot him to save his own life or prevent great bodily harm. (3) That Swanson was one of the bail of the deceased, and had a right to pursue him into this State and capture him, and that that right continued until final judgment was rendered against him, and that he and his co-surety had the right to appoint Lingerfelt as their agent to capture or aid in capturing the deceased. (4) That defendants had the right to use so much force as was necessary to capture deceased, and, if the jury find that Lingerfelt used no more force than was necessary to repel the assault made upon him by the deceased with the hoe, the defendants would not be guilty. (5) That Swanson, not being present, was not guilty. (6) That if the jury find that defendants attempted to arrest deceased under a belief that they had authority to do so as bail, and in making the arrest the deceased attempted to kill Lingerfelt, and Lingerfelt, to save his own life, or prevent great bodily harm to himself, shot and killed the deceased, there was no malice, and they should find the defendants not guilty. (7) That Lingerfelt had a right to make the arrest, and was clothed with the same power for doing so as an officer. That he had a right to arrest him, peaceably if he could, and forcibly if he must; and if, in making the arrest, he used no more force than was necessary to do so, he was not guilty." His honor refused to give the said instructions to the jury, and the prisoners excepted. His honor then charged the jury as follows: "(1) That there was no evidence in the case to show that the prisoners had authority or the right to arrest the deceased. (2) That if Lingerfelt undertook to arrest the deceased, the deceased had the right

to resist to the extent necessary to protect himself from such arrest; and if the deceased resisted, using no more force than was necessary under the circumstances, and for such resistance was shot and killed by Lingerfelt, Lingerfelt was guilty of murder; but if deceased used more force than was necessary under the circumstances, and said prisoner gave back, and was followed by deceased, and had reason to believe and did believe that deceased was about to kill him or do him great bodily harm, and shot and killed the deceased to protect himself, and not because he refused to submit to arrest, the prisoner was guilty of manslaughter, the jury being the judges of the reasonableness of the apprehension, and not the prisoner. (3) That if Lingerfelt undertook or approached deceased to arrest him, and deceased, to avoid arrest, fled, and the said prisoner, under these circumstances, shot and killed deceased, he was guilty of murder. (4) That if the prisoners combined to arrest the deceased, and, in pursuance of a common plan to arrest him, he was killed by Lingerfelt, and the prisoner Swanson was present aiding and abetting Lingerfelt to execute their common purpose, Swanson was liable in the same manner and to the same extent as Lingerfelt. (5) That if Lingerfelt did not undertake to arrest the deceased, and did nothing more than to go into the field to him and tell him that by authority of Swanson and the other surety who were on his bond for his appearance at Knoxville, Tennessee, he (Lingerfelt) had a right to arrest him; that they had given him authority to arrest him,—and thereupon the deceased assaulted him with a hoe, and prisoner had reason to believe, and did believe, that the deceased was about to kill him or do him great bodily harm, and to protect himself he killed the deceased, he was not guilty, and Swanson would not be guilty of any offense." The prisoners excepted. There was a verdict of guilty as to both defendants, and they appealed from the judgment pronounced.

The prisoners' counsel moved for a new trial in the court below upon the following grounds: "(1) For the reason that the court misdirected the jury in charging them that the record of the United States court of Tennessee gave the prisoners no authority whatever to go to the deceased and attempt to arrest him; that it was no more authority than if there had not been a word or figure written upon it. (2) The court erred in charging the jury that, in any view of the case, if Lingerfelt was guilty, Swanson was also guilty; there being no evidence that Swanson was present, or in such position as to give aid and assistance to Lingerfelt at the time of the killing of the deceased. (3) That the court erred in charging the jury that the purpose of the prisoners to arrest the deceased was unlawful, there being evidence tending to show that their purpose was lawful, and that they had a right to make the arrest. (4) That the court erred in not giving the special instructions asked for by the prisoners." The motion for new trial was overruled. The court arrayed the evidence applicable to the several instructions upon the law given to the jury, directing their attention to all the evidence in behalf of the prisoners as well as to that in behalf of the State.

Messrs. W. W. Jones and Ben Posey, for appellants:

The Statutes of North Carolina and Tennessee authorized the arrest of the principal at any time before final judgment against the sureties.

See N. C. Code Civ. Proc. pars. 301, 1230; Tenn. Code, 1884, pars. 6010-6014.

In a criminal case the forfeiture of a recognizance does not discharge the defendant nor relieve him from punishment, there being a difference in that particular from a forfeiture in a civil case.

Ex parte Milburn, 34 U. S. 9 Pet. 704, 9 L. ed. 280; *Reese v. United States*, 76 U. S. 9 Wall. 13, 19 L. ed. 541; *Taylor v. Taintor*, 88 U. S. 16 Wall. 366, 21 L. ed. 287.

The sureties had a right to pursue and rearrest the principal in any part of the United States, and they had a right to deputize the defendant, Lingerfelt, as their agent to aid them in making the arrest.

See *Nicolls v. Ingersoll*, 7 Johns. 152; *Taylor v. Taintor*, 88 U. S. 16 Wall. 371, 21 L. ed. 290; Wharton, Crim. Proc. par. 62; *State v. Mahon*, 3 Harr. (Del.) 568.

This right is in the nature of subrogation, and the government will lend its aid to the sureties and their agents in every proper way by process and without process to seize the person of their principal and compel his appearance.

United States v. Ryder, 110 U. S. 736, 737, 28 L. ed. 310, 311; Bishop, Crim. Proc. par. 889; *Schwambe v. Sheriff*, 22 Pa. 18.

The right to rearrest the principal in this case is likened to that of the sheriff arresting an escaping prisoner.

3 Bl. Com. 290; *Buggles v. Corey*, 8 Conn. 419; *Respublica v. Gaoler of Phila.*, 2 Yeates, 263; *Com. v. Brickett*, 8 Pick. 140; *Com. v. Riddle*, 1 Serg. & R. 311; *Wheeler v. Wheeler*, 7 Mass. 169.

The principal in this case, that is the deceased, was committed to the custody of his sureties as to jailers of his own choosing.

Reese v. United States, 76 U. S. 9 Wall. 21, 19 L. ed. 544.

The defendant, having the right, as an officer, to rearrest the deceased, it was their duty to do so.

State v. Garrett, 1 Winst. L. 144.

The defendants, having authority to arrest, were where they had a right to be, and the defendant, Lingerfelt, when assaulted by the deceased with a deadly weapon, if he had reason to believe and did believe that his life would be taken or that he would receive some great bodily harm unless he shot the deceased, and he shot and killed him, would not be guilty.

State v. Dixon, 75 N. C. 279; *State v. Nash*, 88 N. C. 618.

The defendant Lingerfelt was not compelled to flee from the deceased.

1 East, P. C. 271; 2 Bishop, Crim. Law, 633-644; *State v. Roane*, 13 N. C. 58.

It was not necessary that he should retreat to the wall.

State v. Hill, 20 N. C. 491; *State v. Hensley*, 94 N. C. 1021.

Mr. Theodore F. Davidson, Atty-Gen., for the State.

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Shepherd, J., delivered the opinion of the court:

The only exception necessary to be considered is addressed to the charge "that there was no evidence in the case to show that the prisoners had authority or the right to arrest the deceased." Our first impression was in favor of the view taken by the court below, but upon an examination of the authorities (which were probably inaccessible to his honor) we are of the opinion that the sureties on the bail bond of the deceased had the right to arrest him in this State, and that they could appoint an agent to make such arrest or to assist them in doing so. It is insisted that the "bail only represents the court from which his authority emanates, and, where the court has no power to arrest, the bail has no power to arrest." Such, indeed, is the language of Mr. Wharton (3 Crim. Law, § 2976), but the only authority he cites is from Canada, where it was held that the bail could not follow his principal from New York, and arrest him in the British dominions. This is what was said would be dangerous to the national independence of Canada. As between the states, however, a different rule applies, and the distinction is sustained by the highest authority. In *Nicolls v. Ingersoll*, 7 Johns. 145, the point was elaborately discussed, and the court said that "the power of taking and surrendering is not exercised under any judicial process, but results from the nature of the undertaking by the bail. The bail-piece is not process, nor anything in the nature of it, but is merely a record or memorial of the delivery of the principal to his bail on security given. It cannot be questioned but that bail in the common pleas would have a right to go into any other county in the State to take his principal. This shows that the jurisdiction of the court in no way controls the authority of the bail, and as little can the jurisdiction of the State affect this right as between the bail and his principal." It was also decided that the bail might "depute to another to take and surrender their principal." In *Parker v. Bidwell*, 3 Conn. 84, it was decided that "bail or a person deputed by him for that purpose may take the principal in another State, or wherever he may be, and detain him, or surrender him into the custody of the sheriff." See also *State v. Mahon*, 3 Harr. (Del.) 568. In *Respublica v. Gaoler of Phila.*, 2 Yeates, 263, the court said: "The passage from Vattel [quoted on the argument] applies merely to nations entirely independent of each other. . . . In the relation in which the several states composing the Union stand to each other, the bail in a suit entered in another State have a right to seize and take the principal in a sister State, provided it does not interfere with the interests of other persons, who have arrested such principal. But where actions have been brought against the party previous to such seizure the same right does not exist. Nevertheless, if they have originated by collusion with the defendant, and merely to protect him from being surrendered by his bail, the court on good grounds would interfere, and prevent such improper practice." The principle asserted is not restricted to bail in civil cases, but applies equally to recognizances in criminal

prosecutions. Its application to such cases is explicitly recognized in *Reese v. United States*, 76 U. S. 9 Wall. 13, 19 L. ed. 541, and in *Taylor v. Taintor*, 88 U. S. 16 Wall. 871, 21 L. ed. 290, and other cases. Upon the general principle the court in the case last cited says: "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him, and deliver him up in their discharge; and, if that cannot be done at once, they may imprison him until it can be done. They may exercise their right in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. In *Anon.*, 6 Mod. 231, it is said: 'The bail have their principal on a string, and may pull the string whenever they please, and surrender him in their discharge.' The rights of the bail in civil and criminal cases are the same." It is urged by the attorney-general that the right, when exercised in another State, may be attended with inconvenience and trouble; but, with the qualifications stated in *Respublica v. Gaoler of Phila. supra*, it is not plainly apparent how any evil may result. Be that as it may, the principle is firmly established by a uniform course of judicial decisions, both state and federal; and, until the Legislature sees fit to regulate the manner in which the bail from another State is to exercise his rights, we do not feel at liberty (especially in a case of life and death) to assume the exceptional position that the common-law method as generally recognized in the United States does not apply in North Carolina. It is urged, however, that, the recognizance having been forfeited by the default of the principal to appear in the Tennessee court, the right of the bail to take his principal was extinguished. It will be observed that the judgment was only
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conditional, and that a *scire facias* was ordered to be issued. It has never been understood in this State, nor do we so understand the common law, that such a judgment has the effect contended for. The right of the bail to take his principal in a criminal case before final judgment, and to produce him in court in mitigation of the penalty, is generally recognized in North Carolina, and we have been referred to no authority where the contrary has been held. It is entirely clear that payment by the bail in criminal cases does not discharge the principal from his obligation to appear in court; and it is intimated, even in that case, that the government by way of subrogation will lend the sureties its aid "in every proper way, by process and without process, to seize the person of the principal, and compel his appearance." However this may be, we are clearly of the opinion that a mere conditional judgment, like the one before us, does not deprive the sureties of the remedies which previously existed in their favor. In view of the ruling of the court that the prisoners (one of whom was a surety and the other his alleged agent) had no authority to arrest the deceased, it became immaterial to instruct the jury as to the manner in which the alleged authority was made known to the deceased, and whether such authority, in the absence of its denial or a demand, should have been exhibited after the deceased was fully informed by the agent of its character, and so objection being made to its validity. *State v. Garrett*, 1 Winst. L. 144.

These and other points bearing upon the phase of the case were not, for this reason, we presume, explained to the jury, nor discussed before us on the part of the State.

It is entirely clear from the record as well as the argument of the attorney-general that the ruling in question was based upon the principle we have considered, and, there being error in this, it must necessarily follow that the prisoners are entitled to a new trial.

WASHINGTON SUPREME COURT.

STATE OF WASHINGTON, *Rept.*,George STOWE, *Appt.*

(.....Wash.....)

1. If substantial justice has been denied by refusal of a new trial in a criminal case, the appellate court will not hesitate to reverse the ruling.
2. A new trial on the ground of newly discovered evidence in a homicide case will not be denied for lack of diligence where defendant is a poor ignorant, obscure tramp tinker without money, standing, friends or even acquaintances, and who was shut up in jail obliged to rely on the efforts of counsel appointed to defend him, and some diligence is shown although an important part of the newly discovered evidence which is to show an *alibi* is that of a person at whose house the defendant called on the day of the homicide.
3. The rule denying a new trial for merely cumulative evidence does not apply where the evidence is to prove an *alibi*.

(November 25, 1891.)

NOTE.—Cumulative evidence as ground for new trial.

A multitude of cases have decided that merely cumulative evidence is not sufficient to warrant granting a new trial; among these are the following: Fuller v. Harris, 29 Fed. Rep. 814; Brown v. St. Louis, I. M. & S. R. Co. 52 Ark. 120; McCormick v. Central R. Co. 75 Cal. 506; Crystal Lake Ice Co. v. McAnuly, Id. 681; Byrne v. Reed, Id. 277; People v. Goldenson, 76 Cal. 323; People v. Wong Ah Foo, 69 Cal. 180; Von Glahn v. Brennan, 81 Cal. 251; People v. O'Brien, 78 Cal. 41; Mowry v. Raabe, 89 Cal. 606; Milton v. Blackheath, 8 Fla. 151; Simpson v. Daniels, 16 Fla. 677; Coker v. Merritt, Id. 416; Erskine v. Duffy, 76 Ga. 602; Russell v. Hubbard, Id. 618; Hart v. Jackson, 77 Ga. 493; Etheridge v. Hobbs, Id. 531; Munro v. Moody, 78 Ga. 137; Poullain v. Poullain, 79 Ga. 11; Carter v. State, 75 Ga. 747; Hines v. Beers, 74 Ga. 539; Blalock v. Denham, 85 Ga. 646; Verdery v. Savannah, E. & W. R. Co. 82 Ga. 675; Neill v. State, 79 Ga. 779; Cobb v. State, 78 Ga. 801; Fogarty v. State, 80 Ga. 450; Baker v. Moor, 84 Ga. 186; Harrison v. State, 83 Ga. 129; Johnson v. State, Id. 553; Brinson v. Faircloth, 82 Ga. 135; Monroe v. Snow, 131 Ill. 120; Burns v. People, 126 Ill. 232; Chicago, R. I. & P. R. Co. v. Clough, 134 Ill. 586; Hints v. Graupner (Ill.) June 15, 1891; Spahn v. People (Ill.) May 13, 1891; Plumb v. Campbell, 129 Ill. 101; Langdon v. People, 133 Ill. 382; Fletcher v. People, 5 West. Rep. 153, 117 Ill. 184; Gilmore v. People, 13 West. Rep. 509, 124 Ill. 380; Sterling v. Merrill, 14 West. Rep. 390, 124 Ill. 522; Bean v. People, 14 West. Rep. 688, 124 Ill. 572; Dyk v. DeYoung, 133 Ill. 82; Elgin v. Hoag, 25 Ill. App. 650; Sterling v. Merrill, Id. 598; Jacobson v. Gunzburg, Id. 223; Fay v. Richards, 30 Ill. App. 477; Cleary v. Cummings, 23 Ill. App. 237; Beece v. Sawyer, Id. 248; Chicago, B. & Q. R. Co. v. Sullivan, 21 Ill. App. 590; Classen v. Cuddigan, Id. 591; Pennsylvania Co. v. Nations, 9 West. Rep. 640, 111 Ind. 203; Sutherland v. State, 7 West. Rep. 60, 108 Ind. 339; Marshall v. Mathers, 1 West. Rep. 479, 108 Ind. 458; Auds v. Richle, 120 Ind. 135; State v. Johnson, 72 Iowa, 333; State v. Gleason, 66 Iowa, 618; State v. Nadal, 69 Iowa, 478; Donnelly v. Burkett, 75 Iowa, 612; Blair v. Madison County, 81 Iowa, 313; State v. Whitmer, 77 Iowa, 557; Taylor v. Chicago, M. & St. P. R. Co. 80 Iowa, 431; State v. Watson, 81 Iowa, 380; State v. Oeder, 80 Iowa, 72; Olathe v. Horner, 38 14 L. R. A.

APPPEAL by defendant from a judgment of the Superior Court for Pierce County which convicted him of murder. *Reversed.*

The facts are stated in the opinion.

Messrs. F. L. Kuhn and Heilig & Heuston for appellant.

Messrs. W. H. Snell, *Pro. Atty.*, and Charles Bedford for the State.

Dunbar, J., delivered the opinion of the court:

Between 10 and 11 o'clock, on the evening of the 5th of October, 1889, Enoch Crosby, an inoffensive and respected citizen of the city of Tacoma, was shot down in cold blood in the public streets of that city. The victim of this murderous and fatal assault lived long enough to give a brief account of the murder. His statement was that he had been down to the depot to see some friends, and on returning home, while walking quietly along C street, two men started out from the side of the barn which fronted on the street, and when within five or six feet from him, without making any demands, or giving any warning, shot him through the body with a

Kan. 312; Beachley v. McCormick, 41 Kan. 485; Houston v. Kidwell, 12 Ky. L. Rep. 336; Oakley v. Sears, 7 Robt. 111; State v. Hanks, 39 La. Ann. 234; State v. Harris, Id. 228; Ham v. Ham, 39 Mo. 263; Handy v. Call, 30 Me. 9; Snowman v. Wardwell, 33 Me. 275; Gilmore v. Brost, 39 Minn. 190; Brazil v. Peterson, 44 Minn. 212; Vanderburg v. Campbell, 64 Miss. 89; State v. Griffin, 3 West. Rep. 820, 37 Mo. 606; Dollman v. Munson, 7 West. Rep. 310, 90 Mo. 85; Culbertson v. Hill, 2 West. Rep. 477, 37 Mo. 558; State v. Woodward, 14 West. Rep. 498, 95 Mo. 123; Johnston v. Shortridge, 12 West. Rep. 103, 33 Mo. 227; Corrigan v. Brady, 38 Mo. App. 649; Mercantile Bank v. Howe, 38 Mo. App. 214; Gardfield M. & M. Co. v. Hammer, 6 Mont. 63; Territory v. Bryson, 9 Mont. 32; Territory v. Clayton, 6 Mont. 1; Bell v. York (Neb.) May 6, 1891; Livesey v. Festner, 29 Neb. 383; Flanagan v. Heath (Neb.) May 6, 1891; Campbell v. Holland, 22 Neb. 587; Brooks v. Dutcher, 22 Neb. 644; Tomlin v. Den, 19 N. J. L. 76; Den v. Wintermute, 13 N. J. L. 177; Sheldon v. Stryker, 27 How. Pr. 397, 43 Barb. 284; Hooker v. Terpening, 39 N. Y. S. R. 818; Gale v. New York Cent. & H. R. Co. 63 How. Pr. 385; Albert v. Sweet, 20 N. Y. S. R. 644; Roberts v. Johnstown Bank, 36 N. Y. S. R. 568; Geneva, I. & S. R. Co. v. Sage, 35 Hun. 95; Powell v. Jones, 42 Barb. 24; Cole v. Van Keuren, 51 How. Pr. 431; Myers v. Riley, 36 Hun. 30; Flemming v. Hollenback, 7 Barb. 271; People v. New York Super. Ct. 10 Wend. 238; Cole v. Cole, 50 How. Pr. 59; Barteau v. Phoenix Mut. L. Ins. Co. 67 Barb. 354; Peck v. Hiller, 30 Barb. 655; State v. Starnea, 97 N. C. 423; Chandler v. Thompson, 30 Fed. Rep. 38; Com. v. Moss, 6 Kulp, 81; Com. v. Flanagan, 7 Watts & S. 415; Com. v. Murray, 2 Ashm. 41, 69; Sabine & E. T. R. Co. v. Wood, 69 Tex. 679; Blackwell v. State, 29 Tex. App. 194; Johnson v. Flint, 75 Tex. 379; Walker v. Brown, 66 Tex. 556; United States v. Eldredge, 5 Utah, 131; People v. Peacock, Id. 237; Booth v. McJilton, 38 Va. 327; Smith v. Watson, Id. 712; Bond v. Com. 63 Va. 531; Tate v. Tate, 85 Va. 205; Carder v. Bank of West Virginia, 84 W. Va. 38; Wieting v. Milston, 77 Wis. 533; Thrasher v. Postel, 79 Wis. 503.

What is cumulative evidence.

Cumulative evidence is additional evidence to support the same point and which is of the same character with evidence already produced. People

revolver; that one of them then went in one direction and the other in an opposite direction. The motive for this dastardly crime was never disclosed, as the victim, when asked if they had robbed him, had become so exhausted that he could not answer. This crime was committed on Saturday. On the next Wednesday, the 9th of October, the appellant was arrested on suspicion of having committed the crime, and a day or two later one Hoyt was also arrested, and there was a joint information filed against them, charging them in due form of law with Crosby's murder. We have no record of the trial of Hoyt, but appellant was convicted of murder in the second degree, and sentenced to imprisonment in the state penitentiary for twenty years, and appeals to this court, assigning as error: *first*, that the information laws were not applicable to this case, and that the defendant was entitled to an indictment by the grand jury, the crime having been alleged to have been committed before the admission of Washington into the union of states, and before the State Constitution went into force and effect; *second*, that the evidence does not warrant the verdict; and,

third, that a new trial should have been granted on the ground of newly discovered evidence.

The first assignment, though urged at length in the brief, was not relied upon at the trial, as that question had lately been settled adversely to appellant's contention in *Lybarger v. State* (Wash.) 27 Pac. Rep. 449. With the view this court entertains as to the third assignment of error, it will not be necessary to discuss the second.

It was claimed by the appellant that he was in the town of Tumwater, a village between thirty and forty miles from Tacoma, on the day on which Crosby was murdered, pursuing the vocation of an itinerant tinker or mender of tinware; that he was there from Saturday to Sunday morning; and different citizens of Tumwater swore that they saw him there during the day; and witness Tice, who was keeping the hotel at Tumwater, swore that he stayed at his house on that Saturday night, October 5th; that he woke him up to breakfast the next morning, (Sunday); that he ate breakfast there. It seems there was no register kept at Tice's hotel. After the trial, and within the time

v. New York Super. Ct. 10 Wend. 235; *Flemming v. Hollenback*, 7 Barb. 271; *Parshall v. Klinck*, 43 Barb. 203; *Waller v. Graves*, 20 Conn. 305; *Wilcox Silver Plate Co. v. Barclay*, 48 Hun. 54.

Evidence which merely multiplies witnesses to any one or more of those facts before investigated, or only adds other circumstances of the same general character, is cumulative and not ground for new trial. *Aholtz v. Durfee*, 25 Ill. App. 43, affirmed in 11 West. Rep. 410, 122 Ill. 238.

Evidence tending merely to corroborate and strengthen is cumulative. *Wimpy v. Gaskill*, 79 Ga. 620.

Evidence of new facts not proved on the former trial is not cumulative. *Parshall v. Klinck*, 43 Barb. 203.

Evidence bringing to light some new truth of a different character is not cumulative, although proving the same propositions before insisted on. *State v. Bailey*, 18 West. Rep. 620, 94 Mo. 311.

One court states the rule to be that evidence is cumulative when it goes to the fact principally controverted on a former trial and respecting which the party asking for a new trial produced testimony on such trial; but in this case the newly discovered evidence was merely that of additional witnesses, on a question of payment. *Grubb v. Kalb*, 27 Ga. 459.

And this perhaps is not intended to contradict the better stated rule that evidence is not cumulative merely because it tends to prove the same ultimate or principally controverted point. *Able v. Frazier*, 43 Iowa, 175; *Wayt v. Burlington*, C. R. & M. R. Co. 45 Iowa, 317; *German v. Maquoketa Sav. Bank*, 33 Iowa, 368.

Or that evidence dissimilar in kind, although it approves the same point, is not cumulative. *Wynne v. Newman*, 75 Va. 311; 86; *John v. Alderson*, 32 Gratt. 140.

Or that testimony is not merely cumulative within the rules as to a new trial, where it tends to prove a distinct fact not testified to at the trial, although other evidence may have been introduced by the moving party tending to support the same ground of claim or defense to which such fact is pertinent. *Goldsworthy v. Linden*, 75 Wis. 24; *Higelow v. Sickles*, 75 Wis. 427; *Howland v. Reeves*, 25 Mo. App. 453; *Waller v. Graves*, 20 Conn. 305; 14 L. R. A.

Houston & T.C. R. Co. v. Forsyth, 49 Tex. 171; *Cole v. Cole*, 50 How. Pr. 59; *Parshall v. Klinck*, 43 Barb. 203.

Evidence of a new fact, such as giving a check to establish an inference in aid of the main fact, is not cumulative. *German v. Maquoketa Sav. Bank*, 33 Iowa, 368.

Modifications and limitations of the rule.

Courts have sometimes disapproved of the rule and declared that it does not rest upon any just or solid foundation. *Wilcox Silver Plate Co. v. Barclay*, 48 Hun. 54.

So they have sometimes held that evidence which makes a doubtful case clear, although cumulative, may be ground for new trial. *Barker v. French*, 12 Vr. 460; *Clegg v. New York Newspaper Union*, 51 Hun. 232.

Also that merely cumulative evidence, if it has the effect to render clear and positive that which was before equivocal and uncertain, will justify a new trial, especially in a capital case. *Andersen v. State*, 43 Conn. 514, 21 Am. Rep. 693.

So the rule is weakened by saying that cumulative evidence will not be sufficient unless it is decisive of the case and conclusively leads to a changed result. *Petafish v. Watkins*, 13 West. Rep. 335, 134 Ill. 384.

Cases of ejectments for military lots were in several early New York cases held to be exceptional and peculiar in respect to new trials because of their obscurity and the ease with which fraud could be perpetrated concerning them, and in such cases cumulative evidence was held sufficient for a new trial. *Jackson v. Hooker*, 5 Cow. 207; *Jackson v. Crosby*, 12 Johns. 354.

As held in the main case above, new evidence to prove an alibi is not sufficient ground for new trial merely because it is cumulative. *Smythe v. State*, 17 Tex. App. 244; *Pinckord v. State*, 13 Tex. App. 463.

The cases of *Tyler v. State*, 13 Tex. App. 205 and *Lawson v. State*, id. 204, perhaps furnish some support to the same proposition.

Proof of an alibi as ground for a new trial in a suit for seduction is not cumulative where defendant gave no evidence on that point at the trial because he was surprised in respect to the time testified to by the plaintiff and so was unprepared to meet it. *Sargent v. —*, 5 Cow. 106.

allowed by law, appellant moved the court for a new trial on the ground of newly discovered evidence, which motion was overruled. The newly discovered evidence on which appellant based his application for a new trial was the affidavit of Martha E. Eddy, who swore that the defendant came to her house in Tumwater, between the hours of 11 o'clock A. M. and 3 P. M. on a certain Saturday in October, 1889, after the commencement of the district school in Tumwater; that he requested work at mending tinware, and indicated that he was deaf and dumb. This was followed by the affidavit of George Gelbach, clerk of the Tumwater school district, who swore that the term of school for that year began September 30; and inasmuch as the defendant was arrested on the 9th of October, and was confined in jail at Tacoma during the rest of the month of October, it must necessarily follow that if Mrs. Eddy saw him on Saturday, in October, it must have been the first Saturday, or October 5. There is also the affidavit of Clark Biles, a resident of Tumwater, who swore that he was a resident of Tumwater school district, and that on the first Saturday of the school term for the year 1889 he saw the defendant, a deaf and dumb tinker, or mender of tin-

ware, in the town of Tumwater, between 2 and 3 o'clock of said day. It may be stated in this connection that the affidavits show that the defendant was in the habit of imposing himself upon the communities where he plied his trade as a deaf and dumb man, claiming that he could get more work by reason of such supposed afflictions. Respondent stoutly insists that this showing was not sufficient, and cites many cases which announce the doctrine that applications for a new trial on the ground of newly discovered evidence are regarded with distrust and disfavor, and that courts require the very strictest showing of diligence, and all the other facts necessary to give effect to the claim. The rule laid down by Hayne on New Trial and Appeal (section 88) is as follows: "first, that the evidence, and not merely its materiality, be newly discovered; second, that the evidence be not cumulative merely; third, that it be such as to render a different result probable on a retrial of the cause; fourth, that the party could not with reasonable diligence have discovered and produced it at the trial; and, fifth, that these facts be shown by the best evidence of which the case admits." The Code, however, (sec. 1105,) simplifies the requirement, and makes

Evidence as to the meaning of the words "usual rules and regulations" in a contract was held to be ground for new trial although there had been given on the trial evidence of the meaning of the phrase. *Clegg v. New York Newspaper Union*, 51 Hun, 232.

Admissions and declarations of party.

Evidence of an admission to prove a fact of which evidence had been previously given is not cumulative. *Parker v. Hardy*, 24 Pick. 246; *Gardner v. Mitchell*, 6 Pick. 114, 17 Am. Dec. 349; *Humphreys v. Klick*, 49 Ind. 189; *Houston & T. C. R. Co. v. Forsyth*, 49 Tex. 171; *Wayte v. Burlington*, C. R. & M. R. Co. 45 Iowa, 217; *Rains v. Ballow*, 54 Ind. 79; *Wilson v. Plank*, 41 Wia. 94; *Goldsworthy v. Linden*, 75 Wia. 24; *Flannagan v. Newberg*, 1 Idaho, 82.

But if admissions have been proved on the trial testimony of other admissions is cumulative. *Cox v. Harvey*, 53 Ind. 174; *Manson v. Ware*, 63 Iowa, 345; *McGavock v. Brown*, 4 Humph. 251; *Wynne v. Newman*, 75 Va. 611; *Wall v. Trainor*, 16 Nev. 131; *Gray v. Harrison*, 1 Nev. 508; *Glidden v. Dunlap*, 28 Me. 323; *Hawkins v. Kermode*, 55 Ga. 115.

Admissions or declarations to contradict the testimony of a party are not cumulative. *Chatfield v. Lathrop*, 6 Pick. 417.

Where no admission of plaintiff was proved on the trial except by way of acquiescing in the statements made by his wife, newly discovered evidence of his admissions by his own direct statements is not cumulative. *Goldsworthy v. Linden*, 75 Wia. 24.

Similar acts and declarations of a witness to those proved on the trial to contradict his testimony are cumulative. *Brisbane v. Adams*, 1 Sandf. 195.

Proof of conversations to show a promise of marriage is not cumulative because of prior disputed evidence as to a promise. *Kochel v. Bartlett*, 55 Ind. 237.

Other instances.

Proof that the alleged signer of an instrument was at the date of the instrument in a distant State and could not have signed it is not cumulative merely because evidence had been given that the signature was forged. *Knowles v. Northrop*, 1 New Eng. Rep. 327, 55 Conn. 380.
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New evidence to rebut plaintiff's evidence that defendant was personally served with summons on a certain day, and that this was the same day on which certain mules were attached, by showing that the attachment was prior to the day of alleged service, is not cumulative where defendant's claim is that he was not in the State on that day. *Huwland v. Reeves*, 25 Mo. App. 458.

Evidence that on the day of an auction sale a party claimed title to the property and forbade the sale, and of an admission of such title, is not cumulative in relation to prior evidence on the disputed question of title. *Irwin v. Morell*, *Dudley* (Ga.) 72.

Newly discovered evidence for plaintiff that a book of accounts will show a sale to defendant, and testimony of witnesses that the goods were in fact sold to him and not to his father as he claims, do not constitute merely cumulative evidence because of testimony on the trial that the goods were delivered under defendant's authority and upon his promise to pay. *Wilcox Silver Plate Co. v. Barclay*, 48 Hun, 54.

Evidence of a new defense is not cumulative. *Hughes v. Coursey*, 46 Ga. 115.

Evidence of a witness that he saw a payment made is not merely cumulative in relation to evidence of admissions of payment. *St. John v. Alderson*, 32 Gratt. 140.

The testimony of a witness that he heard the principal give authority to the agent is not merely cumulative in relation to evidence of the agent that he had such authority. *Smith v. Grover*, 74 Wia. 171.

Newly discovered evidence of a sworn statement of one of the prosecuting witnesses which is favorable to the accused is not cumulative. *Fletcher v. People*, 5 West. Rep. 153, 117 Ill. 184.

Newly discovered evidence of a witness that he saw a third person strike the fatal blow is not merely cumulative in a murder case, although there had been other evidence tending somewhat to show that fact. *Casey v. State*, 20 Neb. 138.

A new witness to deny that defendant fired a shot, which was a contested point on the trial, is merely cumulative. *O'Shields v. State*, 74 Ga. 400.
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the new trial admissible for "newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial." But, after all is said and done, any attempt to lay down rules of construction for this section is simply an enlargement in words of the idea so compactly expressed in the statute. If it is material testimony, it can only be material because it would tend to strengthen the applicant's case, and probably lead to different results; and if it is material, and applicant could not have discovered it with reasonable diligence, common justice demands that he should have the benefit of it. It is true that applications of this kind are directed largely to the discretion of the court, and great weight must be given to the judgment of the court with reference to them. Still, if this court thinks that, under all the circumstances of the case, substantial justice has been denied to the applicant, as we think it has in this case, we will not hesitate to reverse the ruling. No fixed standard can be established for the measurement of every case, no iron-bound rule prescribed, but each case must be governed by the circumstances surrounding it.

An examination of the cases cited by respondent shows that none of them are in point here. *Baker v. Joseph*, 16 Cal. 173, was decided expressly on the ground that the affidavit did not show that the applicant could not, by due diligence, have obtained the testimony at the former trial. In *Hobler v. Cole*, 49 Cal. 250, after stating the presumption that the discretion has been properly exercised, the court refuses to disturb the ruling because it had no knowledge of the case from the record. The court says: "In this cause there is nothing before us but the affidavits and the order of the court. The evidence is not in the records, and the pleadings have not been sent up. We are uninformed as to what evidence had been given at the trial, or even as to what was the issue tried between the parties. Certainly, upon a record so barren as this one, we cannot be expected to disturb the decision arrived at below." Such a conclusion, under the circumstances of that case, seems to us to be entirely warrantable. In *People v. Sutton*, 73 Cal. 248, it was held that the affidavit used on the motion failed to clearly show that the moving party could not, with reasonable diligence, have discovered and produced the evidence claimed to be newly discovered on the trial. In *Moran v. Abbey*, 63 Cal. 56, all that is decided is that the new trial will not be granted on the ground of newly discovered evidence, if the evidence might have been produced at the trial by the exercise of reasonable diligence, and this rule was held to be applicable to evidence of a conversation between plaintiff and one of defendants previous to the trial, the plaintiff being the moving party, and giving as a reason for not producing the evidence that he had forgotten the conversation. No other proposition was discussed in this case. In *Hendy v. Deemond*, 62 Cal. 360, the court decided again the same proposition, and decided nothing more. In that case the court says: "The affidavit

discloses but mere want of recollection." But an entirely different state of facts surround this case. In the first place the affidavit alleges diligence, and the circumstances of the case bear out the allegation. Again, there are none of the suspicious circumstances which are sometimes apparent in cases of this kind. There is no intimation or suspicion that any improper influence has been brought to bear upon these proposed witnesses. The defendant was a poor, ignorant, obscure tramp tinker, without money, or standing, or friends, or even acquaintances, charged with committing a crime which aroused the popular indignation and horror of the whole country. He was shut up in jail, without an opportunity to obtain testimony, and without means to employ counsel, and had to depend on the efforts of counsel appointed to defend him. The witnesses proposed to be introduced here are acknowledged on all sides to be respectable citizens, above suspicion or reproach, and the circumstances of the case render it impossible that they could have been prompted to give this testimony in behalf of defendant by any other motive than a commendable and humane desire to prevent the punishment of an innocent man.

Inasmuch as other testimony had been introduced to prove this *alibi*, it is urged that the newly discovered testimony is cumulative, and therefore not sufficient to command a new trial; but this rule governing cumulative evidence must be received with some modification, and given a common-sense construction, and, whatever may be its application to other character of testimony, we do not think it applies where the object of the evidence is to prove an *alibi*. In *Pinckard v. State*, 13 Tex. App. 468 the court says: "That evidence is cumulative, where the object sought is to prove an *alibi*, is no reason for its exclusion; on the contrary, the greater the number of witnesses to the facts establishing it, the stronger, ordinarily, would be our reliance upon and conviction of its truth." The same doctrine was laid down in *Smythe v. State*, 17 Tex. App. 244 also *Lawson v. State*, 13 Tex. App. 264; *Tyler v. State*, 13 Tex. App. 205. In this case the jury must have concluded, not that the witnesses who testified at the trial had not seen the defendant in Tumwater, because the testimony on that point was too overwhelming and convincing, but that they were mistaken as to date. Hence the materiality of this testimony to defendant. If he stayed all night at Tice's hotel, in Tumwater on the 5th of October, he could not have committed this murder in Tacoma. Was Tice mistaken as to the date? It can be gathered from the testimony that he only worked in Tumwater one day. The appearance of such a person in a small village like Tumwater would be very likely to be noticed by the inhabitants, and all the testimony pointed to the first Saturday of October. It was either on that day, or the witnesses were mistaken, and this additional proof is offered to show that the witnesses were not mistaken. In cases where the fixing of dates depends upon memory, the memory of two

men can be better relied upon than that of one; and every additional witness, if the jury believe in their integrity, would tend to establish in their minds the correctness of the date sworn to. It then becomes a question, not of whether one or two witnesses can be mistaken, but whether a large number of witnesses, testifying independently, and from different standpoints, can be mistaken. Every witness and every independent circumstance of which he testifies, when his testimony tallies with the testimony of other witnesses, certainly renders more probable the correct establishment of the date, which,

under the peculiar circumstances of this case, was the defendant's main reliance. And taking into consideration the indirect and meager character of the testimony upon which this conviction was based, and the character of the newly discovered evidence, as shown by the accompanying affidavits, we cannot with justice refuse to reverse the order of the court overruling the motion for a new trial.

The judgment is reversed, and the cause remanded.

Anders, Ch. J., and Stiles and Hoyt, JJ., concur.

MISSOURI SUPREME COURT.

Anna M. KLEIBER, *Resp't.*,

v.

PEOPLE'S R. CO. *et al.*, *Appls.*

(.....Mo.....)

(November 9, 1891.)

A PPEAL by defendants from a judgment of the Circuit Court for St. Louis County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Reversed as to one company. Affirmed as to the other.*

Statement by Sherwood, Ch. J.:

Plaintiff, who is a widow, some fifty-six years of age, and a dress-maker by occupation, brings her suit for damages against both the Street-Car Company and the Missouri Pacific Railway Company for injuries received by her in consequence of jumping from a car of the former, on which she was a passenger. Omitting formal portions, the petition is the following: "That on or about the 15th day of June, 1887, the defendant the People's Railway Company received the plaintiff in one of its cars as a passenger. That said car was proceeding along Fourth Street, a public street of said city, at a point near Poplar Street. That at Poplar Street said defendant's track crosses the track of the other defendant, the Missouri Pacific Railway Company. That at the place where said tracks cross each other, and on said public street, the defendant the Missouri Pacific Railway Company has erected certain movable barriers, which it is its duty to close in a careful manner, and sufficiently in advance of the approach of its trains to give timely warning to vehicles and persons traveling upon said Fourth Street of the approach of its trains. That when said car on which the defendant the People's Railway Company was transporting plaintiff approached said Poplar Street, a locomotive and train of defendant the Missouri Pacific Railway Company was approaching Fourth Street in such a manner as could have been perceived by the employé of the said People's Railway Company, and it became the duty of said defendant to exercise great care in approaching said Poplar Street, and to

- 1. To jump from a street-car which is about to cross a railroad track is not contributory negligence** as matter of law sufficient to defeat an action for injuries thereby received, although such action proved to be wrong, where the view of the track was entirely cut off until the crossing was reached, when an engine was seen approaching only a short distance away and the gate-keeper, who appeared greatly confused, was lowering the gates so as to stop the street-car directly on the track, while the actions of passengers and by-standers indicated an apprehension of imminent peril.
- 2. A street-car company is not liable for an injury to a passenger in jumping from the car** under a reasonable apprehension of danger, where there was no real danger and the apparent danger was caused by the negligence of the gate-man at the railway crossing and his confusing and contradictory warnings and signals without any negligence of the driver of the street-car.
- 3. The negligence of a gate-man at a railway crossing in allowing a street-car to get almost if not entirely upon the track** before giving any warning when an engine was approaching, and then in giving contradictory signals as to stopping or going ahead, may render the railway company liable for an injury to a passenger in the street-car in jumping from the car under a reasonable apprehension of danger, although there was no real danger because the engine was under perfect control.
- 4. Evidence of the acts of other passengers and of the outcries made by them and by by-standers at the time when a passenger jumped from a street-car and was injured** is admissible in an action for the damages thereby sustained as descriptive of the occurrence and as part of the *res gestæ*, and also to show reasonable apprehension of danger.

(*Sherwood, Ch. J., and Bruce, J., dissent from proposition 5.*)

NOTE.—The doctrine that a person is not liable for contributory negligence in attempting to escape from a peril caused by the negligence of another, although the attempt was unwise, is abundantly sustained by the authorities, many of which are cited in the above opinions and briefs. The 14 L. R. A.

same is true of the proposition that the apprehension of danger must be reasonable; but on the question presented in this case whether there must be a real danger and not merely an apparent one there seem to be no direct authorities.

avoid collision between its car and the locomotive of said defendant the Missouri Pacific Railway Company; but defendant the People's Railway Company, in utter disregard of its duty towards its passengers, did by its agents and servants carelessly drive said car on until it reached said railway crossing, and placed said car carelessly in close proximity to the moving locomotive of said other defendant as it approached said car, and subjected the limbs and lives of its passengers to great peril. That by reason thereof a collision seemed inevitable, and plaintiff, being thus exposed to great danger, and believing her life to be in peril, and deeming it unsafe to longer remain upon said car, jumped from the same in order to free herself from said danger, and in so doing broke her leg, and otherwise greatly wounded and bruised her person, and received a severe mental shock from being put in such great peril. That at the time when said defendant the People's Railway Company thus carelessly and negligently drove said car in such close proximity to the moving locomotive of defendant the Missouri Pacific Railway Company, the latter defendant, with great negligence in the management of its said barriers and locomotive after the peril of plaintiff was discovered, not having closed its barriers in a timely manner began and continued to shut down said barriers upon the horses of the car and upon the car in which plaintiff was being carried, causing said barriers to inclose said car and horses carelessly between them and in front of said locomotive, which continued to move on towards said car and cause one of said barriers to become entangled in said car, and render it seemingly impossible to prevent a collision between said car and said locomotive, thereby adding to the peril and anguish of plaintiff." Damages in the sum of \$10,000 were asked. The answer of the People's Railway Company or Street-Car Company, after interposing a general denial, is as follows: "That any injuries which plaintiff may have sustained on the occasion described in the petition were caused by her own conduct in needlessly and carelessly jumping from said car while the same was in motion, at the time and place alleged; and defendant says that plaintiff would not have been injured in any manner had she retained her seat upon this defendant's car; and this defendant further says that the alleged injuries, if any, were not caused by the negligence of this defendant, or any of its agents or servants, as charged in the petition. . . . That any injuries which plaintiff may have sustained on the occasion referred to in the petition were caused by the concurring negligence and improper conduct of plaintiff and of defendant the Missouri Pacific Railway Company, in this: that upon the occasion aforesaid the agent and servant of the Missouri Pacific Railway Company, whose duty it was to display a signal, or close the movable gates on the approach of locomotives or trains of cars at the intersection of Fourth and Poplar streets, failed to give any signal on the occasion referred to in the petition, and also delayed the closing

ing of said gates until this defendant's horse-car had already reached near the intersection of Poplar Street, and was about to cross the same, when he began to lower said gates, and ordered this defendant's driver to go on and cross over the railroad tracks, so that he might proceed with the closing thereof, which this defendant's driver did; but in the meantime plaintiff unnecessarily and negligently jumped from said car while said car was still in motion, although there was no danger in fact." The answer of the Missouri Pacific Railway Company was in effect a general denial, and also a plea that plaintiff's injuries were caused by her own carelessness and negligence, directly contributing to produce the same.

At the time the accident in question occurred the People's Railway Company operated a line of horse-cars on a double track running north and south on Fourth Street in the city of St. Louis. The Missouri Pacific Railway Company operated a steam railroad along a single track on Poplar Street, running east and west. The tracks of the respective companies intersect each other at Poplar Street, and there the Missouri Pacific Railway maintains certain movable gates or barriers, which it lowers across Fourth Street at the approach of its trains, and raises after they have crossed said street. Fourth Street is a much-traveled thoroughfare. Owing to intervening buildings, approaching trains on Poplar Street cannot be seen from Fourth Street, except near the intersection of the two streets. The gates operated by the Missouri Pacific Railway Company are in the shape of long poles or barriers, standing upright on the east side of Fourth Street when the track is clear, and which are lowered westwardly, to a horizontal position across Fourth Street, when a train is about to cross. They can be thus raised or lowered in one or two seconds. They are in charge of a gatekeeper, employed by the Missouri Pacific Railway Company, and under its sole control. There was one such pole on the north and one on the south side of the Missouri Pacific Railway track. These gates or barriers have been in position and were habitually operated by the Missouri Pacific Railway Company for a long time prior to the accident here in controversy, and were relied upon by those operating street-cars and the public generally in approaching the track of the steam railway as a warning and protection against approaching trains.

Poplar Street, at the point mentioned, is 21 feet from curb to curb, and Fourth Street 49 feet and 8 inches at that point between curbs. At the time of the occurrence in controversy there were some 45 passengers on the street-car, which was an open one, used in the summer-time. In addition to the facts already stated, the following, it is believed, will furnish the other salient facts necessary to a proper understanding and determination of the cause: The driver of the horse-car on which plaintiff was riding began drawing the brake and "slowed up" as usual about midway of the block as he approached Poplar Street going south. He saw no signal, and the gates were up. The

car then moved on slowly; so slowly the driver testifies that he could have stopped it within a space of five feet if he had wanted to. At this time he could not see the Poplar-Street track west of Fourth Street, but he kept his eye on the gate-keeper and the barriers. When the team reached the Poplar-Street track, and the front platform of the car was about on a line with the northern gate, and not until then, the gate-keeper began to lower the gate over the car, at the same time hallooing to the driver to go ahead, or hurry up, or words to that effect. At the same time the driver saw a locomotive coming east on Poplar Street from the direction of Fifth Street, and ringing its bell. It was then over half a block away, and was approaching very slowly,—as the engineer testifies, could have been stopped within a few feet. Indeed, its motion was so slow as scarcely to be perceptible; so that some of the witnesses testify it stood still. There was no train attached to the locomotive, and it is undisputed that it was under complete control. When the gate-keeper began to lower the north gate over the passing horse-car and sang out to the driver to "go on! go on!" the latter threw off the brake, started up his team, crossed the railway track, and came to a full stop when he had passed, and when the rear of the car was about twenty feet south of Poplar Street. After the horse-car had crossed, and the track was clear, both gates were let down, and the locomotive slowly passed along, crossing Fourth Street on its way towards the river. In the meantime, as the street-car was about to cross the Poplar Street railway track, a cry of alarm was heard. This, it seems, came from one of the passengers, who, when that point was reached, according to plaintiff's own testimony raised up and screamed out, "My God, we will all be killed!" when she turned, saw the engine coming, and jumped from the car, falling in between the tracks of the railroad, and receiving the injuries complained of. She was the only passenger injured. Some of the passengers—about ten in number—got off or jumped off the car; the others remaining in their seats, among them a lady, Mrs. Peck, who testifies that, as the car got on the railroad track on Poplar Street, some one halloosed "Get out of there!" that this sound proceeded from the direction where the flagman stood,—i. e., on the north-east corner of the intersection of the two streets; that she sat on the right-hand side of the car, on the third seat from the front and did not notice anyone in front of her jump off the car; that the driver was cool and collected and had his team and the brakes of the car well in hand, and under perfect control, until after they had passed over the railroad track; that she "did not hear any screams until they got onto the track; that she did not jump off the car, because she did not see any reason for doing so;" that after the driver stopped or nearly stopped his car at the northern barrier or gate he did not stop again until he had driven across the railroad track,—some twenty feet,—and some twenty feet south of it, and when he stopped the car she looked up and

saw the engine which was half a block away, or about 150 feet. There was a diversity of opinion as to the distance the engine was away at the time the street-car crossed the track, some witnesses giving the distance at 40 or 50 feet, some 100 feet, some 30 to 50 yards; but the majority, it seems, place the distance at half a block, and two witnesses, who took note of where the engine came to a full stop at the time the street-car crossed the railroad track, and afterwards measured the distance, state that it was 135 feet. This testimony should certainly have far greater weight than mere hasty surmises or guesses as to the distance of a coming engine. There was a difference of opinion among the witnesses as to whether the car, after starting south from the north barrier or gate, stopped before it reached a point 20 feet south of the railroad track; but the preponderance of the testimony is to the effect it did not stop until said last point was reached. During the examination of witnesses, objections were taken by defendant's counsel to evidence as to how other passengers acted, and as to what they said at the time of the accident.

The above is believed to be a substantial summary of the testimony in the cause.

Messrs. Hitchcock, Madill & Finkelnburg, for People's Railway Co., appellant:

There was absolutely no evidence of negligence on the part of this defendant or any of its employés. Under the facts as shown by the testimony the case should not have been submitted to the jury.

Maschek v. St. Louis, I. M. & S. R. Co. 71 Mo. 276; *Jackson v. Hardin*, 83 Mo. 175; *Hunt v. Missouri Pac. R. Co.* 6 West. Rep. 203, 89 Mo. 607; *Holman v. Chicago, R. I. & P. R. Co.* 62 Mo. 562; *Gulf, C. & S. F. R. Co. v. Wallen*, 65 Tex. 568.

Everyone driving a vehicle along a public street has a right, when approaching a railroad crossing, to rely on the signals which the railway has provided as a warning to the public of the approach of trains.

Whelan v. New York, L. E. & W. R. Co. 38 Fed. Rep. 15; *Shankenberry v. Metropolitan St. R. Co.* 46 Fed. Rep. 177; *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; *Palmer v. New York Cent. & H. R. Co.* 112 N. Y. 284; *Oldenburg v. New York Cent. & H. R. Co.* 124 N. Y. 414; *Lunt v. London & N. W. R. Co.* L. R. 1 Q. B. 277; *Beach*, Contrib. Neg. p. 199; *Wharton*, Neg. § 387; *Pierce*, Railroads, 327; *Kennayde v. Pacific R. Co.* 45 Mo. 255; *Petty v. Hannibal & St. J. R. Co.* 8 West. Rep. 297, 88 Mo. 306.

Mr. Bennett Pike, with **Mr. H. S. Priest**, for Missouri Pacific R. Co., appellant:

There was no negligence shown on the part of the gate-keeper or watchman of defendant, at the crossing or upon the part of the engineer in charge of the locomotive that was approaching the crossing.

Gulf, C. & S. F. R. Co. v. Wallen, 65 Tex. 568; *Chicago, R. I. & P. R. Co. v. Felton*, 125 Ill. 458, 38 Am. & Eng. R. R. Cas. 533; *Peck v. New York, N. H. & H. R. Co.* 50 Conn. 879.

Messrs. Rasseleur & Schnurmacher, for respondent:

When one is placed in a situation of peril by the negligence of another, his attempt to escape danger, even by doing an act which is also dangerous, and from which injury results, will not prevent a recovery, if the attempt was one such as an ordinarily prudent person might make under the like circumstances.

Beach, Contrib. Neg. p. 43; Whittaker's Smith, Neg. p. 392, and note; *Nelson v. Atlantic & P. R. Co.* 68 Mo. 593; *Troomley v. Central Park N. & E. R. Co.* 69 N. Y. 158, 25 Am. Rep. 162; *Buel v. New York Cent. R. Co.* 81 N. Y. 314, 87 Am. Dec. 271; *Wilson v. Northern Pac. R. Co.* 26 Minn. 278; *Stokes v. Saltonstall*, 38 U. S. 13 Pet. 181, 10 L. ed. 115; *Wesley City Coal Co. v. Healer*, 84 Ill. 126; *Frink v. Potter*, 17 Ill. 406; *Karr v. Parks*, 40 Cal. 188; *Lund v. Tyngsboro*, 11 Cush. 563, 59 Am. Dec. 159; *Cook v. Parkham*, 24 Ala. 21.

The foregoing is the rule, even though the person would not have been injured at all had he not made the attempt to escape the threatened danger.

Troomley v. Central Park N. & E. R. Co. and *Buel v. New York Cent. R. Co.* supra; *Iron R. Co. v. Mowery*, 36 Ohio St. 418, 38 Am. Rep. 597; *Wilson v. Northern Pac. R. Co.* supra; *Smith v. St. Paul, M. & M. R. Co.* 30 Minn. 169; *Schultz v. Chicago & N. W. R. Co.* 44 Wis. 638; *Gumz v. Chicago, St. P. & M. R. Co.* 52 Wis. 672; *Georgia R. & Bkg. Co. v. Rhodes*, 56 Ga. 645.

The question in such case is not what a prudent person under ordinary circumstances would have done, for the shock, the suddenness of the emergency, the excitement and the influence of fear and terror should all be taken into account; cool presence of mind cannot be expected.

Beach, Contrib. Neg. p. 44, and cases cited: *Stepriat v. Arnot*, 86 Mo. 200, 56 Am. Rep. 424; *Adams v. Hannibal & St. J. R. Co.* 74 Mo. 553, 41 Am. Rep. 333.

Therefore, what other persons did, or what they said by way of exclamation, may be given in evidence to show what may have been reasonably prudent under the circumstances.

Troomley v. Central Park N. & E. R. Co. supra; *Galena & C. U. R. Co. v. Fay*, 16 Ill. 558, 63 Am. Dec. 323; *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 15.

Where an injury is occasioned by the concurring negligence of two persons, the negligence of the one will be no defense to the other. The injured party may hold either, or both, liable.

Whittaker's Smith, Neg. p. 81, and cases there cited.

Macfarlane, J., delivered the opinion of the court:

Plaintiff sued the defendants, the People's Railway Company and the Missouri Pacific Railway Company, jointly, for \$10,000 damages on account of personal injuries alleged to have been sustained by her by reason of their negligence. In June, 1887, the date of plaintiff's injuries, the defendant Street Railway Company operated a horse-car line of street railroad along Fourth Street, in the city of St. Louis, and defendant the Missouri Pacific Railroad Company operated a steam railroad along Poplar Street, and across Fourth

Street. At the Poplar-Street crossing of Fourth Street the steam-railway company maintained gates or barriers for the purpose of closing the way along Fourth Street to prevent persons from crossing the railroad when dangerous to do so on account of passing trains. It also had a watchman in charge of these gates, whose duty it was to raise and lower them when necessary, and to give warning on the approach of a train. On the day in question plaintiff was a passenger on an open, summer car of the street railway, going south. On this car there were forty-six passengers. When the car reached Poplar Street, being alarmed on account of apparent danger from a collision with an engine on the railroad, plaintiff jumped from the car, and was injured. The charge in the petition against the People's Railway was that, in disregard of its duty to its passengers, its agents and servants carelessly drove the car on until it reached the railroad crossing, negligently placed the car in such close proximity to a moving locomotive that a collision seemed inevitable, and plaintiff, thus being exposed to great danger, and believing her life to be in peril, jumped therefrom in order to free herself from danger. As to the Missouri Pacific Railway Company, the charge was that it was negligent in the management of its gates and locomotive after the peril of plaintiff was discovered, "not having closed its barriers in a timely manner, began and continued to shut down said barriers upon the horses and car in which plaintiff was being carried, causing said barriers to inclose said car and horses carelessly between them and in front of said locomotive," so as to render it seemingly impossible to avoid a collision between the car and the locomotive. The answer of each defendant was a general denial and a plea of contributory negligence. Judgment was rendered by the circuit court against both defendants, and both have appealed. Each defendant asked an instruction in the nature of a demurrer to the evidence, which was refused, and the principal contention by defendants here is that the evidence was insufficient to justify the verdict, and the demurrers to the evidence should have been given.

1. It is as well settled as any other principle of the law of negligence that if one, by the negligence of another, has been placed in a situation of apparent imminent peril, he is not required, in attempting to escape therefrom, to use the judgment and discretion that are required of him when not dominated by terror of impending danger; and if, without having time to deliberate, and acting upon the instinct of self-preservation, and as a prudent person might be expected to act in the circumstances, he is injured by adopting a dangerous alternative, he may still recover from the one by whose negligence he has been impelled to act. This is true though no injury would have resulted had no attempt to escape been made. Beach, Contrib. Neg. 43, and cases cited; Whittaker's Smith, Neg. 392; *Jones v. Boyce*, 1 Starkie, 493; *Stokes v. Saltonstall*, 38 U. S. 13 Pet. 181, 10 L. ed. 115; 2 Shearm. & Redf. Neg. § 477.

These are the leading cases in England, and this country, and have generally been followed, as will be seen by reference to cases cited by Beach and Smith, *supra*. The principle is well illustrated by numerous adjudged cases. In *Twomley v. Central Park N. & E. R. Co.*, 69 N. Y. 160, 25 Am. Rep. 102, plaintiff jumped from a moving street-car to avoid the apparent danger of a train of cars running on an intersecting railroad. She fell, and was injured, but the car passed over the railroad track without a collision. The suit was against the street-car company for negligence in crossing the railroad track in such near proximity to an approaching train. In delivering the opinion the court says: "The peril of remaining in the car was properly judged by the circumstances as they there appeared to the passengers and not by the result. The fact that the car did pass over safely cannot reflect upon the action of plaintiff, and does not prove that she was imprudent or negligent in jumping from the car. She was compelled to act, and chose the hazard which appeared to be the least,—that is, to act upon the probabilities as they appeared to her." A traveler, to avoid impending danger from a defective street, leaped from his carriage, and was thereby injured. In a suit for damages against the town the court says: "Plaintiff not having come in actual contact with the defect in the highway, it is said that the liability has not attached to the town. But this we think is too limited a construction of the statute. The injury to be compensated for by the town is one that has been occasioned by reason of any defect or want of repair in any highway. Such injury to the person may be occasioned by reason of defect of the highway, when the traveler, being brought suddenly into imminent peril by his near approach to it, in the exercise of ordinary care and prudence, voluntarily leaps from his carriage, and suffers injury thereby. The circumstances must be such as to justify his conduct, and the defect in the highway must have been the cause of his voluntary act of throwing himself from the carriage." *Lund v. Tynsgboro*, 11 Cush. 566, 59 Am. Dec. 159. In the case of *Wesley City Coal Co. v. Healer*, 84 Ill. 129, plaintiff sued the coal company for negligently causing the death of her husband. Defendant was operating certain coal mines, in which it had neglected to provide more than one shaft, as required by the statute. Plaintiff's husband was a laborer in the mine. A fire occurred in the shaft. Smoke was filling the mine, and a cry of "Fire!" was given. Plaintiff and the other operatives rushed to the shaft, which was the only means of escape. In the rush deceased fell through a shaft into a second mine, and was killed. The fire was extinguished, and the alarm was unnecessary. The negligence charged was the failure to provide additional shafts for the safety of the operatives. In his opinion, Dickey, J., said: "Had there been a second mode of escape, no such cause of alarm would have existed. Men of ordinary prudence would have felt safe, and been left to exercise their caution in avoiding accidents."

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on the way to a sure mode of escape. It has long been settled that a party having given another reasonable cause for alarm cannot complain that the person so alarmed has not exercised cool presence of mind, and thereby found protection from dangers resulting from the alarm." From these decisions the following rules essential to liability may be deduced: *first*, the peril of alarm must have been caused by the negligence of the one against whom indemnity is sought; *second*, the apprehension of peril, from the standpoint of the injured person, must have been reasonable; and, *third*, the appearance of danger must have been imminent, leaving no time for deliberation. On the other hand, the danger must be judged by the circumstances as they appear, and not by the result.

2. Applying these principles to the evidence in this case, was the court justified in submitting the issues to the jury as to whether these defendants, or either of them, were guilty of negligence which exposed plaintiff to apparent impending danger, and whether the apprehension of danger on the part of plaintiff, from her stand point, was reasonable? The following facts were undisputed: The railroad track—its place of danger—passed along a very narrow street. Where the street-car line crossed the railroad the view of the track of the railroad to the west was wholly obstructed by buildings until the street-car reached Poplar Street, within fifteen feet of the track. Gates or barriers were maintained on each side of Poplar Street, to be lowered in order to prevent persons on foot or in vehicles from crossing the railroad track when dangerous to do so on account of passing engines and trains. A watchman was in charge of the gates, whose duty it was to close the crossing on the approach of a train, and to direct and warn persons crossing the railroad. The position of the watchman was on the north side of Poplar Street, and from his position he could operate both gates. Poplar Street was twenty-one feet in width from curb to curb, and about twenty-five feet between the gates. The street-car, with the team in front, was about twenty-five feet in length also having barely room for them to stand between the gates. The evidence then tends to prove (which satisfies the inquiry) that the street-car was driven slowly and carefully down to Poplar Street without warning or signal from the watchman. When the front of the car had reached a point about opposite the gate, the horses being probably on the railroad track, the watchman "yelled" to the driver to stop, and commenced lowering the gates. The car came nearly or quite to a stop. The gate on the opposite side of the street in front of the car was half way down. At this juncture, when there was clearly apparent danger of a collision with the horses, and when signals of danger had been given in the most emphatic manner, the watchman called out, or "yelled," as one or more witnesses expressed it, "Go on! Go on!" It appeared then that the horses and car would be inclosed between the gates and across the railroad. The excited language of the guard, and the confusion of his orders,

taken with the lowering of the gates and the position of the car, would have created in the mind of the most self-possessed apprehensions and alarm. At this moment someone screamed, "My God, we will all be killed!" and plaintiff turned her eyes to the west, and saw an engine approaching on a down grade, and within 100 feet of the car. Immediately cries arose from persons on the street, and from passengers on the car, such as "Look out! Look out!" "Drive on quick!" "Stop; locomotive is coming!" All became confusion, excitement, and terror, and plaintiff, with many other passengers, jumped from the car. In fact the engine was barely moving, and was under complete control of the engineer, and no actual danger of a collision existed. This state of facts, from the stand-point of the passengers, certainly tended to prove reasonable cause to apprehend imminent danger of a collision, and that no time or opportunity was afforded plaintiff to deliberate. In adopting the dangerous alternative, plaintiff could not, as a matter of law, be declared guilty of contributory negligence. *Siegrist v. Arnot*, 86 Mo. 200, 58 Am. Rep. 424; *Adams v. Hannibal & St. J. R. Co.* 74 Mo. 554, 41 Am. Rep. 833. It is true, plaintiff testified that the gateman commenced raising the gate, and the car had started forward, before she jumped, and that her attention was first called to the engine by the outcry of one of the passengers. Yet she does not testify at all in reference to additional facts, which were detailed by other witnesses, and which should properly be considered. In view of the fact that the whole occurrence transpired in a few seconds, and in view of her serious injury, her memory would necessarily be confused and indistinct. But, taking her own testimony as conclusive against her in determining the cause of her alarm, we do not think it can be declared as a matter of law that the fact of lowering the gates, at the time and in the manner shown by her evidence alone,—itself a most emphatic declaration of danger, made by one charged with the duty of watching, and to whom plaintiff had the right to look for warning,—did not create in her mind reasonable ground for apprehending a collision, which apprehension culminated in terror on seeing the approaching engine.

3. Such ground of apprehension may have existed, however, without the fault of defendants or either of them. The inquiry then arises, By whose negligence was plaintiff caused to apprehend danger? While it is true that the street-car company was a carrier of passengers, and owed to plaintiff, as a passenger, the highest degree of care practicable in the circumstances, it was not an insurer of her safety, and, unless guilty of some negligence, would not be liable for her injury. After a careful examination of the testimony, we are unable to discover any evidence tending to prove the driver of the street-car in any respect wanting in the high degree of care imposed upon him as a carrier of passengers. He drove, as all the evidence shows, slowly and carefully down to Poplar Street, checked his speed almost or entirely

to a stop at a signal from the guard, and, no real danger appearing to him, and none in fact existing, he drove across the track. He manifested no excitement or loss of self-possession which could have been communicated to the passengers. It is true, one or possibly more witnesses testified that he stopped his car on the railroad track. The weight of the evidence was to the contrary, but the evidence of one witness to this fact would have required the submission of the issue to the jury, but for the fact that it appeared also from all the evidence that plaintiff had jumped, and her injuries had been received, before the car stopped; and the act of stopping the car on the track, if it was done, could not therefore have controlled or induced her action. To properly measure the duty of the street-car driver, the fact must also be kept in view that there was no real danger, nor, from this stand-point, appearance of danger. If there had been in fact real danger of a collision, the case might have been different. The negligence of the watchman would not, in that case, probably have excused the driver from the high degree of care exacted of carriers of passengers to know and avoid the danger of crossing. *Philadelphia & R. R. Co. v. Boyer*, 97 Pa. 91. Besides this, the gateman was the agent of the railroad company, placed there for the express purpose of warning and directing those using the street, and of preventing collisions with passing trains, and the driver of the car, seeing him at his post of duty, had the right to rely and act upon his warnings, signals, and directions in the absence of opportunity, as in this case, to know for himself the situation. *Beach*, Contrib. Neg. 190; 2 Wood, *Railway Law*, 1328; *Whelan v. New York, L. E. & W. R. Co.* 38 Fed. Rep. 15; *Pennsylvania R. Co. v. Stegemeier*, 118 Ind. 305; *Chicago, R. I. & P. R. Co. v. Clough*, 134 Ill. 586; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 27 Fed. Rep. 159.

4. On the other hand, while the railroad company only owed to plaintiff the duty of ordinary care in the circumstances, we think it very clear that there was evidence tending to prove a want of such care. It must be kept in mind that there was no collision, and that the injury was caused by a voluntary leap by plaintiff from the car to avoid the supposed danger. The inquiry is whether the evidence tended to prove that the negligence of the gateman caused the condition of terror under which plaintiff was induced to adopt the dangerous alternative. As has been said, the view of the railroad was wholly obstructed until the car came within the limits of the narrow street upon which the track was laid. The driver and passengers on the car had no means of knowing that the crossing was clear and safe before getting in very close proximity to the track, except from the warnings of the watchman. Much reliance must have been placed upon his watchfulness, judgment, and discretion. Not until the horses drawing the car were almost, if not entirely, upon the railroad track, was a word or sign of warning given. At that moment a cry came from him, "Stop!"

Stop!" and the gates commenced lowering, apparently inclosing the car and horses on the track. Almost immediately he yelled, "Go on! Go on!" implying that a desperate alternative of trying to cross the track should be made. Now, when we consider the dangerous locality, we can but say that the manifest excitement and confusion of the watchman in managing the barriers, and the contradictory warnings implied by lowering and raising them when apparently too late for protection, were matters well calculated to excite consternation among the passengers, and to create the panic which resulted.

5. Objection was made to the admission of the acts of other passengers, and of outcries made by them and by-standers on the occasion. We think this evidence was admissible as descriptive of the occurrence, and, as part of the *res gestæ*, and also as evidence that plaintiff was actuated by reasonable apprehension of danger, and not by rashness and imprudence. *Twomey v. Central Park N. & E. R. Co.* 69 N. Y. 158, 25 Am. Rep. 162; *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 15; *Galena & C. U. R. Co. v. Fay*, 16 Ill. 558, 63 Am. Dec. 323.

6. Objections were made to the rulings of the court in giving and refusing instructions. The instructions have been carefully examined, and the action of the court in its rulings thereon is found to be in conformity to the conclusions reached in the consideration of the principles governing the case. These questions need not be further discussed.

Judgment as to the People's Railway Company reversed, and affirmed as to the Missouri Pacific Railway Company.

All concur, except *Sherwood, Ch. J.*, and *Brace, J.*, who concur in reversing as to the People's Railway Company, but dissent in affirming as to the Missouri Pacific Railway Company.

Sherwood, Ch. J., dissenting.

1. The claim of the People's Railway Company that its instruction in the nature of a demurrer to the evidence should have been given is the first point to be considered. Was that company guilty of negligence warranting a recovery? Certainly the facts in evidence do not seem to disclose any negligence whatever on the part of the driver of the street-car. He seems, on the contrary to have exercised, in the circumstances disclosed, a degree of care commensurate with the exigency of the situation, and with the duty which a carrier of passengers owes to them. Flagmen or watchmen or gate-men, by whatever name designated, are the agents of the company employing them, and a person approaching a railroad crossing has a right to rely upon either the acts, indications, or words of such agents, when attempting or about to cross a railroad track, and is not guilty of any degree of negligence in placing such reliance upon the words or verbal acts of such servants of railroad corporations. *Beach, Contrib. Neg.* 199; *Wharton, Neg.* 2d ed. § 887; *Lunt v. London & N. W. R. Co.* 1 R. 1 Q. B. 277; *Warren v. Fitchburg R. Co.* 8 Allen, 227, 85 Am. Dec. 700; *Pierce, Railroads*, 829, and cases cited.

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But, of course, any invitation, either express or by signals, on the part of the servants of a railroad company would not authorize an ordinary traveler to recklessly expose himself to patent danger. *Pierce, Railroads*, 829, and cases cited. The same principle obviously must apply even to carriers of passengers, who with equal necessity, must rely upon the vigilance and faithfulness of those servants of railroad companies on whom is cast the duty in our large cities of guarding crossings of the character now under discussion. The case of *Philadelphia & R. R. Co. v. Boyer*, 87 Pa. 91, 2 Am. & Eng. R. R. Cas. 172, does not at all militate against this view, for there the driver of the street-car though beckoned by the flagman of the railroad company to "come on," yet at the same time he was expressly warned of the danger by a passer-by, but, in spite of this warning and of an unobstructed view of the railroad track, which he might have had, ventured to attempt to cross the same, in which case it was properly held that his act was one of gross negligence. See note to that case. The facts heretofore stated bring this case fully within the operation of the principle already asserted, since the driver of the street-car had no opportunity of seeing the whereabouts of the engine, and therefore had the right to rely in all confidence upon the acts and commands of the flagman at the time they were given and to continue his car in motion even after he saw the slowly approaching engine; for assuredly there was nothing either in the appearance or nearness of that engine to give any token whatever to his practiced eye of impending danger. Moreover, he had the right to presume that the engineer would so operate his engine that the street-car would not be struck by it. *Peck v. New York, N. H. & H. R. Co.* 50 Conn. 879. Taking this view of the point it must be ruled that the evidence in this cause establishes no liability whatever against the People's Railway Company and that, in consequence of this, the instruction asked by that Company in the nature of a demurrer to the evidence should have been given.

2. The next point for consideration is the duty the Missouri Pacific Railway Company owed to the plaintiff. This duty obviously was not of such a high nature and extraordinary character as that owed by a carrier to its passengers, but only a duty measured by the term "ordinary care." *Beach, Contrib. Neg.* pp. 153, 190, 191, 195; *Doss v. Missouri, K. & T. R. Co.* 59 Mo. 27, 21 Am. Rep. 371; *Dougherty v. Missouri R. Co.* 97 Mo. 647. That care of this sort was exercised by the Missouri Pacific Railway Company, so far as concerned the management of its engine, is conceded by the instructions asked by the plaintiff and given by the court. It stands confessed, then, upon this record, that no negligence is imputable to that company by reason of its engine pursuing its accustomed course on that occasion.

8. The only question then left remaining is whether the Missouri Pacific Railway Company was guilty of actionable negligence in respect of the management of its gates by

its watchman. In order for the plaintiff to recover against that company it must appear not only that that company was guilty of negligence in relation to its gates, but that such negligence directly occasioned the injury complained of. Now, if the engineer was guilty of no negligence in the management of his engine, keeping it, as he did, almost stationary, and under perfect control, it would seem that the gate-keeper was not negligent in ordering the driver of the street-car to do that which he might do, and did do, in perfect safety. But, granting that the gate-keeper was negligent, by what standard shall his negligence be measured? Was anything more due from him than as the representative of his employer,—i. e., ordinary care? But granting, further, that the same high degree of care was due to the plaintiff from the gate-keeper in his representative capacity that is due by a common carrier to its passengers, upon what sound or rational basis can the liability of the Missouri Pacific Railway Company be placed? In order to ascertain this it is proper to consult and to consider the authorities, and this will be presently done. Meanwhile it will be conceded that the exclamations made by the fellow-passengers of plaintiff at the time she jumped off the street-car and fell upon the railroad track were competent evidence, being part of the *res geste*; for this is shown by abundant authority cited by her counsel. It will be conceded also—for so are all the authorities—that, if a person is placed in a situation of peril by the negligent act of another, and in order to avoid that peril he adopts a perilous alternative in endeavoring to escape imminent peril, then such endeavor will not constitute contributory negligence, if the danger be brought about by the defendant's negligence, provided that the act done was such as ordinarily prudent persons might have been expected to do in like circumstances, even though the injury would not have happened if the attempt to escape had not been made. Beach, *Contrib. Neg.* 43, 44, and cases cited; Whitaker's *Smith*, *Neg.* 392, and cases cited; Story, *Bailm.* 9th ed. § 598, and cases cited. But it must be borne in mind that, in order to justify such incurring of a new peril in the endeavor to avoid a former one there are two essentials to a recovery: (1) The position from which escape is sought must be one of imminent or apparently imminent danger, such as admits of no delay in taking action, and such as would, in like circumstances, naturally arouse the fears of a person of ordinary prudence and self-possession; (2) the fault of placing the party injured in such perilous position must rest with the defendant, and be directly occasioned by his negligence. This view is very well illustrated by an early case on the subject, where Lord Ellenborough, in charging the jury, said: "To enable the plaintiff to sustain the action it is not necessary that he should have been thrown off the coach; it is sufficient if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap or to remain at certain peril. If that position

was occasioned by the default of the defendant, the action may be supported. On the other hand, if the plaintiff's act resulted from a rash apprehension of danger, which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover. . . . A coach proprietor certainly is not to be responsible for the rashness and imprudence of a passenger. It must appear that there existed a reasonable cause for alarm." *Jones v. Boyce*, 1 Starkie, 493. That case was approvingly followed in that of *Stokes v. Saltonstall*, 38 U. S. 13 Pet. 181, 10 L. ed. 115; which presented similar features of fact for adjudication. *Jones v. Boyce*, *supra*, was followed in *Ingalls v. Bills*, 9 Met. 1, 43 Am. Dec. 346, and the point ruled the same way. There the words "reasonable precaution" and "prudent precaution" were applied to the act of leaping from a stage-coach, where an axle-tree had broken and hind wheel came off, causing the coach to settle down on one side, as if about to be overset.

These early cases in England and this country are generally followed, and the substance of the rulings in them is given in the formula above stated. Occasionally, perhaps, there may be found departures from that formula; but the great current of authority flows in the direction heretofore indicated. Thus, in *Coulter v. American M. U. Exp. Co.*, 56 N. Y. 585, the plaintiff was walking upon the sidewalk when an express wagon of the defendant company, driven rapidly upon the sidewalk, came so quickly up behind her that she had no time to look around, but instinctively sprang aside to escape the impending danger, and in so doing struck her head against a wall, receiving injuries; and it was ruled in affirmance of the judgment that if she had time to look around before jumping in order to discover the cause of her sudden alarm it was her duty to do so; otherwise her instinctive effort to avoid the danger would not defeat her right to a recovery, nor diminish the defendant's previously incurred responsibility arising from his negligent act.

The case of *Troomley v. Central Park N. & E. R. Co.*, 69 N. Y. 158, 25 Am. Rep. 162, much relied on by plaintiff, was of this nature: The plaintiff was a passenger on a street-car, the route of which crossed a railroad track. Just as the street-car approached that track, upon which an express train was approaching with the speed customary to such trains, the driver stopped to allow a passenger to alight. Had he remained stationary, the train could have passed; but he recklessly whipped up his horses, and drove on the railroad track in front of the fast moving train. All of the passengers in the car, with one exception, perceiving the danger, rushed out, and jumped from the car. The plaintiff, in doing so, fell, and was injured, and the car passed over the track just in time to escape the engine, the engineer, by promptly reversing and by putting on brakes, having barely succeeded in preventing a collision with the car; and the plaintiff was held en-

titled to recover,—the propriety of which decision cannot be doubted, since all the elements of a great and impending peril were present; a peril produced by the recklessly negligent act of the street-car driver; a peril, too, well calculated to disconcert the highest self-possession, and appall the stoutest heart.

The case of *Buel v. New York Cent. R. Co.*, 31 N. Y. 314, 87 Am. Dec. 271, is one of similar sort. There a passenger on a train, which was proceeding west, saw another train coming on the same track towards the one on which he was at an unusual rate of speed,—i. e., about 25 miles an hour. Strenuous efforts were made, by reversing the engine attached to the plaintiff's train, to avert a collision, but without avail, for the collision occurred, driving the cars of one of the trains from 40 to 60 rods over the ties, killing one man on the eastward bound train, jamming up the westward bound train, and breaking off some of the platforms of the cars. Upon seeing the approaching train, and men jumping from other cars to avoid the impending danger, the plaintiff left his seat, rushed to the forward door of the car, and stepped one foot upon the platform at the instant of the collision and of his injury. And it was held that the railway company was guilty of the grossest negligence in allowing the collision to occur in the circumstances there stated, and of the plaintiff it was aptly said: "His act was not the result of a rash apprehension of danger that did not exist."

Other cases instanced for plaintiff announce the same principle. But it is believed that those cases do not parallel the present one in its salient facts and features. Here, according to the plaintiff's own statement, which is an admission as well as testimony, neither the acts of the gate-keeper in raising or lowering his gates, nor his words to the driver to "go on! go on!" excited any alarm in her breast; and she only became alarmed "when the driver got to the Poplar-Street track, or about there, [and] someone raised up and screamed out, 'My God, we will all be killed!' when she turned, looked, saw the engine coming, and jumped from the car." But the engine and its management, as already indicated, have been entirely eliminated from this case as factors of negligence. There was no mismanagement in any respect about it. It is evident beyond dispute from plaintiff's own testimony that she made that engine the main element of her hasty action, and, but for its presence on that occasion, she would not have jumped from the car. The question then arises, Do the facts in this case resemble those from which quotations have already been approvingly made, or do they not indicate on the part of the plaintiff, not a "reasonable precaution" in acting as she did, but rather "a rash apprehension of danger which did not exist?" *Jones v. Boyce*, *supra*. It would seem from both authority and reason that the answer to this question must be one unfavorable to the plaintiff, for it cannot be claimed that any real or any apparently imminent danger existed such as would, under

the authorities quoted, authorize or justify the plaintiff's inconsiderate and imprudent action. Certainly even a common carrier is not responsible in damages for the consequences growing out of a sudden senseless and unfounded panic; and by the stronger reason the Missouri Pacific Railway Company, owing only to plaintiff the duty of ordinary care, would not be responsible for such consequences. In some respects this case resembles that of *Peck v. New York, N. H. & H. R. Co.*, *supra*, where a husband drove out with his wife in a phaeton on a street that crossed a railroad track. In endeavoring to go through the gate which protected that track the wheel of the phaeton was momentarily caught in the gate as it swung to be closed, just as the husband attempted to drive through, but the wife, becoming alarmed at the sight of the engine and the attempted closing of the gates sprang out and was injured. The husband drove safely across the track, and it was held that the act of the wife in jumping out was needless, Culver, J., remarking: "If Mrs. Peck had remained in the carriage, she would have passed safely across, as did her husband. She misjudged. She was in no real danger, and there was no more reason for her jumping out of the carriage than there was for her husband. She could see the locomotive, and might have known as well as her husband that the engineer would not start his train so long as the team was in danger of being struck by it."

Other cases may be instanced where, upon facts substantially similar in their bearing and effect, similar judicial conclusions have been reached. Thus in *Guff, C. & S. F. R. Co. v. Wallen*, 65 Tex. 568, the "plaintiff and his wife were passengers on a train of defendant's road, which stopped between two stations, and remained standing for about an hour. While the train was so standing another passenger called out, 'Here comes a train right on us!' Other passengers jumped to their feet, and scrambled to get out of the car-door. Plaintiff looked through the rear door, and saw a freight train coming towards the passenger train, and about 300 or 400 yards off. He called to his wife, and both ran to the car platform and jumped to the ground, when he saw the freight train 100 yards in the rear, having stopped. There was evidence to show that nearly all the passengers were frightened. There seemed to be a general panic, and many of the passengers jumped to the ground. The conductors of the two trains testified that there was no danger whatever of a collision, as the freight train had been properly signaled as soon as it came in sight. Three of the passengers testified that they saw the freight train coming, and apprehended no danger; that it seemed to be under control, and was running slowly. In an action by the plaintiff to recover damages for the injuries received by his wife in jumping off the train it was held that the evidence would not sustain a verdict for the plaintiff, and the defendant could not be held guilty of any act of negligence contributing to the injury of plaintiff's wife." *Robinson, J.*, in deliver-

ing the opinion of the court, says: "The defendant neither caused nor contributed to the injury of plaintiff's wife unless it allowed the freight train to come so near to or so rapidly towards the passenger-coach as to frighten the passengers. It does not appear from the testimony that a single one of those who leaped from the train, except the plaintiff, saw the freight train coming. When the plaintiff saw it, it was 300 or 400 yards distant, and, he says, appeared to be moving rapidly. He does not state that he supposed from what he saw there would be a collision. No one left the train upon his own preception of danger. On the contrary, those who used their senses felt no alarm, and remained in the car. Whatever may have been the speed of the train when 300 or 400 yards distant, it was slowed to a full stop at least fifty yards from the passenger-coach. There was

no actual danger." Of a similar import is the case of *Chicago, R. I. & P. R. Co. v. Felton*, 125 Ill. 458. From the premises of the fact and of law aforesaid these conclusions must be drawn: That the plaintiff has established no cause of action against the Missouri Pacific Railway Company; that there was no real danger, and no such imminent danger as would, under the authorities quoted, justify her rash act, and cast the responsibility for it on that Company. It follows from this that it is unnecessary to discuss the instructions in detail, and that the judgment as to that company also should be reversed. The foregoing statement and opinion, which were filed by me in Division No. 1, I refile as a dissenting opinion to the opinion of the court in *banc*, in so far as that opinion differs from this one.

MISSOURI SUPREME COURT (3d Div.).

Henry J. DEAL, *Appt.*,

v.

MISSISSIPPI COUNTY, *Reapt.*

(.....Mo.....)

A statute giving bounties for planting trees, to be paid by the county in which they are planted, is void not only under Const., art. 4, § 47, prohibiting a grant of public money or thing of value in aid of or to any individual, association or corporation, but also because the giving of such bounties is an abuse of the power of taxation without regard to any particular constitutional provisions.

(December 22, 1891.)

APPEAL by complainant from a judgment of the Circuit Court for Madison County in favor of defendant in an action brought to recover the statutory bounty provided for the planting and cultivation of forest trees. *Affirmed.*

The facts are stated in the opinion.

Mr. E. J. Deal, for appellant:

The law was intended to check the rapid destruction of forests, and to furnish a supply of timber in the future, and it is a verbatim copy of the Kansas Law passed February 16, 1866. Nevada, by a similar law, pays \$10 per acre for twenty years. See Act approved March 5, 1877. See also Act of Congress, approved June 14, 1878, entitled "An Act to Encourage the Growth of Timber on Western Prairies."

Mr. J. J. Russell, with **Mr. George S. Elliott**, for respondent.

Thomas, J., delivered the opinion of the court:

This cause originated in the County Court of Mississippi County, Mo., February, 1888, by appellant filing demand for \$404, as a third annual bounty for planting 202 acres of forest trees, wherein appellant states, in

substance, that, in order to avail himself of the benefits of chapter 107, Rev. Stat. 1879, entitled "Of Forest Trees," about the month of February, 1882, and within ten years after the passage of an Act of the Legislature entitled "An Act to Amend an Act entitled 'An Act to Encourage the Growth of Forest Trees,'" approved February 4, 1875, he planted, and has ever since successfully grown and cultivated, "forest trees," viz., catalpa trees, in groves, on 202 acres of prairie land owned by him in Mississippi County, Mo. The evidence tended to show that plaintiff set out, in 1882, 202 acres of prairie land belonging to him in catalpa trees, and that he had fully complied with the provisions of the above-mentioned Act, which is as follows: "Sec. 5697. Every person planting one acre or more of prairie and within ten years after the passage of this Act with any kind of forest trees except black locust, and successfully growing and cultivating the same for three years, and every person planting, protecting, and cultivating for three years one quarter of a mile or more of forest trees upon his own land, to be set not more than one rod apart, shall be entitled to receive for fifteen years, commencing three years after said grove or line has been planted, an annual bounty of two dollars per acre for each acre so planted, and two dollars for each quarter of mile so planted, to be paid by the county. Said bounty shall not be paid any longer than said grove or line of trees is kept alive and in a growing condition. Sec. 5698. Any person wishing to avail himself of the provisions of the preceding section shall, within three years after planting said grove or line of trees file with the clerk of the county court a correct plat of said grove or line of trees, showing on what section said grove or line of trees is situated, attested by his own oath and the affidavit of at least two householders of the vicinity, setting forth all the facts in relation to the growth and cultivation of said grove or line of trees. Sec. 5699. The county clerk shall present said plat and

NOTE.—For note on public purposes for which public money may be used, see *Daggett v. Colgan*, ante, 474.

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affidavit before the county court, and if the court find from all the facts derived from the plat, affidavits, and other sources that section five thousand six hundred and ninety-seven has been fully complied with, they shall issue a warrant on the county treasurer for the amount found due. Sec. 5700. Such certificate shall be received and taken by the collector of revenue of the county in which the same was given, for county taxes, and such collector shall be allowed credit to the amount of such certificate on behalf of the county."

The evidence tended to show further that the County Court of Mississippi County paid plaintiff two installments under this Act, of \$404 each, in 1885 and 1886; but when he presented the demand involved in this suit in 1887, that court refused to audit and pay it, and hence this appeal.

The defendant County contends that the statute under which plaintiff claims this bounty is in direct conflict with section 47, art. 4, of the Constitution of this State, which is as follows: "The General Assembly shall have no power to authorize any county, city, town, or township, or other political corporation or subdivision of the State, now existing, or that may be hereafter established, to lend its credit or to grant public money or thing of value in aid of or to any individual, association, or corporation whatsoever, or to become a stockholder in such corporation, association, or company." Every statute will be presumed to be constitutional till the contrary plainly appears, and it is only when it manifestly infringes some provision of the Constitution that it can be declared void. *State v. Burdorfer* (Mo.) 17 S. W. Rep. 648 (decided at the present term), and cases cited. But the statute in question so clearly and manifestly infringes the constitutional provision quoted above that we have no hesitancy in declaring it void. It seems to be too plain for argument. It is self-evident. This statute, it is true, was first enacted in 1870, and was therefore in force at the time of the adoption of the present Constitution in 1875; but by section 1 of the schedule to the Constitution it is declared that "the provisions of all laws which are inconsistent with this Constitution shall cease upon its adoption."

2. This statute is in conflict also with section 8, art. 10, of the Constitution, which declares "that taxes may be levied and collected for public purposes only." It is not always easy to determine what a public purpose is, but here no difficulty arises. The land on which plaintiff set out the catalpa trees belonged to him, was his private property, and there is nothing in the statute to prevent him from collecting the bounty from the county, and then cutting the trees down and selling them for his private gain; and to take money collected by taxation from the people for such a purpose cannot be tolerated for a moment without a surrender of all property to the power of confiscation for private uses. That an enterprise may indirectly inure to the public benefit is not the sole criterion by which to determine a public purpose. Every improvement and every

business enterprise benefits the public to some extent. "The general benefit to the community resulting from every description of well-directed labor is of the same character, whatever may be the branch of industry upon which it is expended. All useful laborers, no matter what the field of labor, serve the State by increasing the aggregate of its products,—its wealth. . . . Our government is based upon equality of rights. All honest employments are honorable. The State cannot rightfully discriminate among occupations, for a discrimination in favor of one branch of industry is a discrimination adverse to all other branches. The State is equally to protect all, giving no undue advantages or special or exclusive preferences to any." *Opinions of Justices*, 58 Me. 590. In *Citizens Sav. & L. Assn. v. Topeka*, 87 U. S. 20 Wall. 655, 22 L. ed. 455, the city of Topeka, under a statute of Kansas, had issued its bonds for \$100,000 as a donation to the King Wrought-Iron Bridge Manufacturing & Iron-Works Company, to aid and encourage that company in establishing and operating bridge shops in said city. Justice Miller, speaking for the Supreme Court of the United States, in reference to the power of the State to authorize the city to make this donation, said: "Of all the powers conferred upon government that of taxation is the most liable to abuse. Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited. It is true, the express limitation on the amount of the tax to be levied or the things to be taxed may be imposed by Constitution or statute, but in most instances for which taxes are levied—as the support of government, the prosecution of war, the national defense—any limitation is unsafe. The entire resources of the people should, in some instances, be at the disposal of the government. The power to tax is therefore the strongest—the most pervading—of all the powers of the government, reaching directly or indirectly to all classes of the people."

It was said by Chief Justice Marshall, in the case of *M'Culloch v. Maryland*, 17 U. S. 4 Wheat. 316, 4 L. ed. 579, that the power to tax is the power to destroy. . . . This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised. To lay with one hand the power of the government on the property of the citizen, and with the other bestow it upon favored individuals to aid private enterprises and build up private fortunes is none the less a robbery because it is done under the forms of the law and is called 'taxation.' This is not legislation. It is a decree under legislative forms." And this donation was held to be for a purpose not public, and therefore void. Justice Dickerson, in his opinion, 58 Me. 590, characterized taxation for private enterprises as taxation "to load the tables of the few with bounty, that the many may partake of the crumbs that fall therefrom." "Taxes are burdens or charges imposed by the Legisla-

ture upon persons or property to raise money for public purposes." Cooley, Const. Lim. 479. The true principle is stated by the Supreme Court of Pennsylvania in the case of *Sharpless v. Philadelphia*, 21 Pa. 168: "The Legislature has no constitutional right to levy a tax, or to authorize any municipal corporation to do it, in order to raise funds for private purposes. No such authority passed to the Assembly by any grant of legislative power. This would not be legislative. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interest or welfare, it ceases to be taxation, and becomes plunder. Transferring money from the owners of it into the possession of those having no title to it, though it be done under the name and form of a tax, is unconstitutional, for all the reasons which forbid the Legislature to usurp any other power not granted."

The principle announced by these authorities is not founded on or deduced from positive, affirmative, constitutional provisions, but on and from the limitation of the taxing power itself. Our Constitution, therefore, on this subject is simply declaratory of the common law, and of general principles well recognized and almost of universal application. The Legislature of Missouri had no power to authorize county courts to raise money by taxation, to be appropriated to the planting of trees upon private property for private gain, no right to the trees or the use or control of the trees being reserved to the public. We do not deem it necessary to answer the other questions presented by this record.

The judgment is affirmed.

All concur.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *ex rel.*
John A. NICHOLS, *Resp't.*,
v.

BOARD OF COUNTY CANVASSERS OF
ONONDAGA COUNTY *et al.*, *Resp'ts.*,
and Rufus T. PECK, *Appt.*

PEOPLE of the State of New York, *ex rel.*
Patrick J. RYAN, *Resp't.*,
v.

BOARD OF COUNTY CANVASSERS OF
ONONDAGA COUNTY *et al.*, *Resp'ts.*,
and David A. MUNRO, Jr., *Appt.*

(.....N. Y.)

1. **Ballots which are distributed to and cast at a polling place different from the one for which they were indorsed cannot be counted** under a law to enforce secrecy of the ballot and provide for the printing and distribution of ballots at public expense, which requires each ballot to be indorsed as an official ballot for the polling place at which it is to be used, and prohibits the counting of ballots which have not the printed official indorsement, —when the wrong indorsement appears upon the tickets of one party only, thereby rendering them easily distinguishable from all other ballots.
2. **Statutory permission to use unofficial ballots in the absence of the official ones** required by law to be prepared and furnished at public expense for the use of voters at public elections and to contain a certain official indorsement, will not justify the counting, as unofficial, of ballots purporting to be official but which are defective because bearing the wrong indorsement.
3. **Where the return of a county canvassing board shows that it has counted a certain number of ballots which are shown to be illegal by a sample ballot**

attached to the return it may be compelled by mandamus to correct its statement of the result by omitting from the count ballots like the sample.

4. **Where all the ballots of one political party cast at a particular polling place bear a wrong indorsement** by which they may be distinguished from other ballots cast at the same place in contravention of the provisions of an Act providing for the secrecy of the ballot, a count of them will not be justified by the facts that the indorsement was wrong because of a mistake of the county clerk in distributing ballots to the polling places, that they have been cast by the voters and received by the inspectors in good faith and that their rejection will result in disfranchising many voters and altering an honest expression of the popular will.
(*Andrews, Peckham and Finch, JJ., dissent.*)

(December 22, 1891.)

APPEALS by the intervening defendants from orders of the General Term of the Supreme Court, Third Department, affirming orders of an extraordinary special term for Onondaga County, granting peremptory writs of mandamus directing the Board of County Canvassers for Onondaga County to reconvene and recanvass the votes cast in certain election districts in said county and to leave out in their computation certain votes which had been cast for state senator and member of assembly.
Affirmed.

The facts are stated in the opinions.

Mr. William Nottingham, for appellants:

The duty of the Board of Canvassers was merely to estimate from the face of the returns of the inspectors of election the number of votes cast for the state officers and for state senator, and to certify and file such statement with the county clerk.

Election Code, §§ 260-268; *People v. Cook*, 8 N. Y. 87, 59 Am. Dec. 451; *Korts v. Greene County Bd. of Canvassers*, 13 Abb.

NOTE.—For note on marks or devices to distinguish ballots, see *Rutledge v. Crawford* (Cal.) 13 L. R. A. 761.

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N. C. 88; *Felt's Case*, 11 Abb. N. S. 206; *People v. Wayne County Bd. of Canvassers*, 64 How. Pr. 886; Brightly, Elections, -503; *Lewis v. Marshall County Comrs.* 16 Kan. 102, 22 Am. Rep. 275; *People v. Ohemung County Bd. of Canvassers*, 126 N. Y. 892; *People v. Bell*, 119 N. Y. 175; *Brown v. Rush County Comrs.* 88 Kan. 486; *Stie v. Wilson*, 24 Neb. 139.

The ballots sought to be here questioned and declared illegal were destroyed by the inspectors upon the completion of the canvass upon election day. The county canvassers have nothing before them but the returns of the inspectors of election and the sample ballots attached; these returns state in the body thereof the number of votes cast for Rufus T. Peck for senator; the previous canvass and estimate of the board was made in accordance with such statements; how, then, is the character of the ballots cast to be impugned or investigated in this proceeding?

See *People v. Ohemung County Bd. of Canvassers*, 126 N. Y. 892; *People v. Albany County Bd. of Canvassers*, 46 Hun, 892; *People v. Reardon*, 49 Hun, 425; *People v. Rensselaer County Bd. of Canvassers*, 54 Hun, 595.

The Board of County Canvassers cannot use the sample ballot attached to overrule the result of the canvass as stated in the body of the return.

People v. Ohemung County Bd. of Canvassers, 126 N. Y. 892; *People v. Pease*, 27 N. Y. 45.

Suffrage in this State is a constitutional privilege conferred by the provisions of our fundamental law.

Ballot Reform Acts, Registration Laws and like statutes are but remedial legislation regulating the method and prescribing the manner in which the constitutional right to vote shall be exercised. From these premises we draw the following necessary and reasonable conclusions:

1. The form should be subordinate to the substance; the practice to the law; the remedy to the right. If such legislative enactments add new qualifications or abridge, impair, or so impede or hamper the exercise of the constitutional privilege as to amount to serious interference, or if from their provisions a contingency may likely arise whereby a qualified elector would without his fault be denied the right to vote, then they are plainly unconstitutional.

2. Therefore these remedial statutes should be so construed as to carefully and clearly avoid any result which may in the above view bring them in conflict with the Constitution of the State.

Cooley, Const. Lim. p. 758; *Monroe v. Collins*, 17 Ohio St. 665; *People v. Bell*, 119 N. Y. 175; *Page v. Allen*, 58 Pa. 325, 98 Am. Dec. 272; *DeLoe v. Kennedy*, 49 Wis. 555, 35 Am. Rep. 786, cited in 23 Am. Dec. 645, note.

If these ballots are declared void by not being counted it would place it within the power of the county clerk or some subordinate in his employ, by carelessness or intention, to disfranchise the voters of an entire county by transposing the properly printed official ballots in the act of placing them in the sealed packages for delivery at the polls. This would be an evil much greater than the public announcement of the manner in which every elector voted. It is more important that the citizen

should vote in any event, than that he should vote secretly.

People v. Bell, 119 N. Y. 178.

In seeking to exclude these ballots, it is incumbent upon the other side to bring them within the prohibition of the statute, and to negative every exception; that is, to prove that the ballots had not the "printed official indorsement" and also could not be voted under article 21 above quoted.

People v. Pease, 27 N. Y. 45.

They have signally failed in both. In any event a peremptory writ would not be proper, but an alternative writ should have been granted that such facts might be shown:

People v. Stupp, 49 Hun, 544; *People v. Greene County Suprs.* 64 N. Y. 600; *People v. Cromwell*, 3 Cent. Rep. 431, 102 N. Y. 477; *People v. New York Police Comrs.* 9 Cent. Rep. 727, 107 N. Y. 235.

Messrs. Louis Marshall, O. U. Kellogg and David McClure, for respondents:

The Republican ballots cast in the several election districts in question, which did not bear the indorsement required by § 17 of chap. 262 of the Laws of 1890, as amended by § 6 of chap. 296 of the Laws of 1891, were void, and could not, therefore, be legally counted or canvassed for the candidates whose names appeared thereon.

When an Act is conceived in clear and precise terms, when the sense is manifest and leads to nothing absurd, there can be no reason to refuse the sense which it naturally presents.

Jackson v. Lewis, 17 Johns 475; *People v. New York Cent. R. Co.* 13 N. Y. 78.

The language of this Act has, however, been in fact, passed upon in various cases involving kindred statutes.

Com. v. Woolper, 8 Serg. & R. 29, 8 Am. Dec. 628; *West v. Ross*, 53 Mo. 350; *Ledbetter v. Hall*, 62 Mo. 422; *Oglesby v. Sigman*, 58 Miss. 502; *Perkins v. Carraway*, 59 Miss. 222; *Steele v. Calhoun*, 61 Miss. 556; *State v. McKinnon*, 8 Or. 498. See also *Reynolds v. Snow*, 67 Cal. 495; *Talcott v. Philbrick*, 59 Conn. 478; *Fields v. Osborne*, 13 L. R. A. 551, 60 Conn. 544; *Re Marks* (R. I.) Oct. 28, 1890; *People v. McManus*, 84 Barb. 630.

The ballots thus improperly indorsed being void, the board of county canvassers, by counting them in violation of the provisions of the Ballot Reform Act, made an erroneous determination which should be corrected pursuant to chapter 460 of the Laws of 1890.

People v. Erie County Bd. of Canvassers, 18 N. Y. 3 R. 797; *Oglesby v. Sigman*, 58 Miss. 502.

O'Brien, J., delivered the following opinion:

The supreme court has awarded a peremptory writ of mandamus directed to the Board of Supervisors of Onondaga County as a board of county canvassers, commanding them to reject and exclude from their statement and computation of the votes cast for Rufus T. Peck in that county, for the office of senator for the twenty-fifth senatorial district, composed of the counties of Onondaga and Cortland, at the last general election held on the 8d of November last, certain ballots cast in the nine election districts hereafter mentioned. This appeal is brought

for the purpose of a review in this court of the order granting the writ. It was made upon the application of the relator on a state of facts as to which there is no dispute, and the question is one of law regarding the power of the court. It appears from the record that certain ballots were cast at the election for Rufus T. Peck for the office of senator in the first election district of the town of Camillus, upon which was the following indorsement, "Official ballot for second district poll, town of Camillus. November 3, 1891;" followed by a *fac simile* of the signature of the county clerk of Onondaga County. In the second election district of that town ballots were cast for him, indorsed in like manner with the designation or number of the first district. In the first district of the town of Clay, ballots were cast for him indorsed for the second district, and, in the second district indorsed for the first. In the first election district of the town of Tully ballots were cast for him indorsed for the second district, and in the second district indorsed for the first. In the first election district of the town of Elbridge ballots were cast for him bearing the indorsement for the third district. In the second election district of that town ballots were cast for him indorsed for the first district, and in the third election district indorsed for the second. In the first and second districts of Camillus and the first and second districts of Clay the same facts existed in regard to the indorsement of the ballots for member of assembly for the first assembly district of Onondaga County. The ballots were prepared and printed by the county clerk, whose duty it was, under the statute, to deliver to the town clerk of each town the ballots for the several election districts in such town; but how they became transposed, in the manner above described, does not appear. Four different official ballots, containing the names of the candidates of the four different parties that had made nominations and filed certificates thereof in compliance with the law, were delivered to the inspectors of election in all these districts, and were in use at the several polling places on the day of the election. What was known as the "Republican Official Ballot," containing the names of the candidates of that party for state, county, and legislative offices was the only ballot used and voted that did not contain in the indorsement the proper number and designation of the polling place or election district where it was voted.

On the hearing of the relator's application at special term, Rufus T. Peck, upon his own application, was permitted to intervene, and was made a party to the record on the ground that he had an interest in the subject-matter of the proceeding, and a right to intervene as a party defendant, and that a complete determination of the questions involved could not be had without his presence on the record. In order to facilitate a speedy hearing, the attorneys of record entered into a stipulation providing that all questions involved in the case be presented to and determined by the court upon the facts as they appear in the papers. In this condition of the record we are not embarrassed by any

technical questions, such as the power of the county canvassers under the statute to exercise any functions of a judicial nature; but we are to meet the broader and more important question whether, upon the facts, the ballots in question can lawfully be counted for the candidate for whom they were cast. The ground upon which the canvassers were directed to exclude the ballots from their estimate and statement of the vote for senator was that they were not indorsed with the number of the election district in which they were used by the electors, as required by the statute, but were, in fact, indorsed with the number of another district. Under the laws in force governing the conduct of elections and the manner of voting, prior to the recent legislation commonly known as the "Ballot Reform Act," it is quite clear that ballots could be counted for the candidate for whom they were cast, though they did not in all respects correspond with the directions of the statute, and after deposited in the box could not, probably, be rejected, in any case, by the canvassers or the courts, if the intention of the voter was sufficiently expressed. The right to vote, secured to the citizen by the Constitution, must be exercised in the manner and subject to the regulations lawfully prescribed by the Legislature in respect to the time when and the method by which his will is expressed; and, in order to make his will and intention effectual at the election, he must comply with, at least, all the substantial requirements of law.

The question now before us is whether those citizens of Onondaga County who used the ballots which the canvassers in this case have been ordered by the supreme court to reject, have so far neglected to observe the forms and regulations prescribed by law for voting at elections that their votes so cast must be held to be void. In the absence of some clear and positive prohibition in the statute against counting such ballots, the tendency of courts would, undoubtedly, be in the direction of effectuating, as far as possible, the intent of the voter. But it is the duty of this court, above all, to declare the law as it finds it; and if a fair consideration of the language used in the statute, and its general policy, should result in the exclusion of the ballots in question, it may be said that it was not the first time that a citizen attempted to exercise a right, and, either through neglect, mistake, or ignorance, failed in the accomplishment of his object. We are confronted with certain clear and positive statutory provisions which must now be referred to in order to ascertain whether the court, in ordering the mandamus to issue, simply obeyed the mandate of the Legislature or misapprehended its meaning. What is known as the "Ballot Reform Act" is chapter 263 of the Laws of 1890, as amended by chapter 296 of the Laws of 1891. It is matter of recent history that this law was for years the subject of agitation and earnest debate, both in the Legislature and before the people, through the public press and otherwise. No statute has been passed in recent years, at least, that received such

full consideration, or after so much deliberation and careful scrutiny on the part of the executive and the Legislature. It was so apparent to everyone that it worked such radical changes in the conduct of elections and in the manner of voting, from the regulations previously existing, that its final passage was secured only after the most exhaustive and careful scrutiny on the part of the law-makers and the public. Great care was used in the selection of words and language appropriate to express clearly what was intended; and every detail, both of composition and arrangement, was the subject of study and deliberation. In dealing with a statute, originating as this did, we may well assume that every word and phrase was weighed and scanned, and that courts can safely follow the plain language of its provisions as the expression of the legislative intent. The general policy and scope of the Act was well expressed in the title, "An Act to Promote the Independence of Voters at Public Elections, Enforce the Secrecy of the Ballot, and Provide for the Printing and Distribution of Ballots at Public Expense." We know that the principal mischief which the statute was intended to suppress was the bribery of voters at elections, which had become an intolerable evil; and this was to be accomplished by so framing the law as to enable, if not compel, the voter to exercise his privilege in absolute secrecy. The primary aim and object was to enable the voter to cast a ballot for the candidates of his choice without the possibility of revealing, by the act of voting the identity or political complexion of the candidates voted for. When it was made impossible for the briber to know how his needy neighbor voted, the law-makers reasoned that bribery would cease. It is reasonable, therefore, to assume that any construction of this statute which would permit ballots to be cast and counted that contained any caption or word that would reveal the way the voter using them voted, should be avoided, as contrary to the true policy and intent of the law. The idea at the very foundation of the law was secrecy. To this end it was provided that ballots, uniform in size, in type, in color and quality of paper, and in the words and appearance of the indorsement, should be printed and distributed by the county clerk at the public expense. This is called in the law the "official ballot," and is the only instrument by means of which the elector can legally express his will at election, save in the exceptional case provided for in section 21. These are cases where the official ballots have not been delivered at the time provided in the statute to the town or city clerk, or shall be destroyed or stolen, after such delivery, or a candidate for any office, whose name is printed on the official ballot, shall have died, shall be or become ineligible, or shall have withdrawn before election day. In such cases, unofficial ballots, to be prepared and furnished under the conditions and restrictions prescribed in the section, may be used by the voter. It is obvious that this section has no application to this

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case, as none of the events provided for therein have happened.

So careful was the Legislature in providing for secrecy in voting that it prohibited the voter from in any way marking his ballot, or showing it to anyone, after it was prepared for voting, in such a way as to reveal its contents; and everyone was prohibited from soliciting the voter to show the same, and no person but an inspector of election is permitted to receive a ballot prepared for voting from a voter. Section 35. It is, moreover, expressly provided that any election officer or watcher who shall reveal to another person the name of any candidate for whom a person has voted, or who shall communicate to another his opinion, belief, or impression as to how, or for whom, a voter has voted, or shall place a mark upon a ballot, or do any other act by which one ballot can be distinguished from another, shall be guilty of a misdemeanor punishable by imprisonment. Section 34. It is also provided that a ballot, deposited by a voter in the ballot-box, upon which or upon any paster affixed thereto, a writing or mark of any kind has been placed by the voter, or by any other person to his knowledge, with the intent that such ballot shall afterwards be identified as the one voted by him, shall be void and of no effect. Most of these stringent provisions would be little short of absurd if it can be supposed that ballots, bearing an indorsement which distinguishes them from all others in use at the polls, can be lawfully put into the ballot-box. The indorsement upon the official ballot was an essential part of the machinery of elections by means of which the secrecy of voting was to be secured and enforced. That was to be printed in large letters, and was to be uniform as to all the ballots at the same polling places. As it was the only part of the ballot to be exposed to the observation of the election officers or the bystanders, at the moment when the vote is offered, it was important to provide that it should contain nothing that could reveal to anyone the elector's choice. The indorsement was therefore to be precisely the same on all the ballots used at the same polling place or election district. A different, distinct, or peculiar indorsement upon the ballots, or any of them, used by any party or candidate, or set of candidates, would, of course, remove all secrecy from the act of voting, as to the electors using a ballot with such an indorsement, and thus the fundamental purpose of the law would be defeated. This was so apparent, and was regarded as of so much importance, in the successful operation of the law, that the Legislature carefully prescribed the form of the indorsement to be used upon all ballots at the same polling place in the following language: "On the back of each ballot shall be printed in type known as 'great primer Roman condensed capitals' the indorsement 'Official Ballot for ———'; and after the word 'for' shall follow the designation of the polling place for which the ballot was prepared, the date of the election, and a *fac simile* of the signature of the county

clerk. The ballot shall contain no caption or other indorsement except as in this section provided."

This provision plainly requires that upon all the official ballots used at any polling place there shall be printed, in the manner therein described, the same indorsement, and consequently that the designation or number of the election district in the indorsement shall be precisely the same, and, in all cases that designation or number shall be that of the polling place or election district where the vote is offered, and no other. The ballots in question were cast in utter disregard of this important provision of the statute, as the indorsement did not in any case contain the designation or number of the election district where they were voted, but did contain the designation or number of another district where they were not used. The indorsement upon them differed from the regular indorsement on all other ballots used or voted at the same polling place, and, as they were used or voted by but one of the parties that had made nominations, or, in other words, in behalf of but one candidate or set of candidates, the voters who used them necessarily disclosed to the election officers, watchers, and such of the by-standers as could or desired to observe, the candidates voted for, and thus not only the letter of the statute was disregarded, but its very purpose and intent were defeated. It cannot be denied that anyone who saw the indorsement on the ballots before they were put into the box was informed at the same time as to their contents, by means of the word in the indorsement designating the wrong polling place or district. While there is nothing in the record to show that the ballots were intentionally, or by any preconcerted arrangement, diverted from the election district for which they were prepared, and sent to districts for which they were not prepared nor intended, it is scarcely possible that the means of distinguishing them from all the other ballots used were not known to the election officers who received, and many of the voters who used them. But, however that may be, the important fact remains that every elector who voted one of the ballots thereby revealed his choice and the contents as fully and completely as if the party designation, or the political complexion of the candidates whose names appeared upon its face, had been made a part of the indorsement, or was stamped in some other place on the outside of the ballot. If this can be held to be a legal exercise of the right of suffrage, and that the ballots thus cast are on the same footing as all the other ballots, then it is manifest that the Legislature has utterly failed to secure secrecy in voting. The legal consequences that follow this disregard of both the letter and spirit of the statute have been, as it seems to us, very clearly pointed out by the Legislature. The twenty-ninth section, as amended, provides that "no inspector of election shall deposit in a ballot-box, or permit any other person to deposit in a ballot-box, on election day, any ballot which is not properly indorsed and numbered except in the cases provided for in section

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twenty-one of this Act; nor shall any inspector of election deposit in a ballot-box, or permit any other person to deposit therein, on election day, any ballot that is torn or has any other distinguishing mark on the outside thereof."

It will scarcely be claimed that these ballots were "properly indorsed," or that they came within the provisions of section 21, and, consequently the election officers were commanded by the statute not to deposit them in the ballot-box when offered by the voter. Moreover, they had what the statute calls a "distinguishing mark on the outside;" that is to say, they had, when placed among the other ballots at the polling places where they were used, a special and peculiar indorsement, by means of which they could readily be distinguished from all others, and thus the improper indorsement constituted, at the same time, a distinguishing mark. It will be seen, upon a careful reading of the statute, that the Legislature has carefully provided for the exclusion of marked ballots from the ballot-box and from the final count and estimate of the actual legal vote, in two cases: *First*. Where the mark or writing is affixed or placed upon the face or inside of the ballot or upon any paper attached, by the voter or any other person, for the purpose and with the intent of subsequently identifying the ballot, and tracing it to the voter. In this case the ballot is not to be rejected or excluded from the count and estimate until the intent is ascertained and determined. *Secondly*. Where there is a distinguishing mark on the outside, open and visible to all, which may not only be used to identify the voter who cast it, but also serves to inform others at the time of voting of the contents of the ballot, and thus defeat the object of the law in securing secrecy. In this case the election officers are forbidden to put the ballot into the box, no matter with what intent the distinguishing mark was placed upon it. To allow it to go into the box might defeat the policy of the law, though the distinguishing mark was the result of accident or mistake. The plain words of the statute, therefore, made it the duty of the election officers, when offered one of these ballots, prepared for and indorsed with the designation or number of another district, to refuse it. This would not defeat the right of the elector to vote, because he could still prepare and tender a ballot with the proper indorsement.

But the inspectors did receive the ballots, and put them into the ballot-box; and the remaining question is whether they could lawfully count ballots found in the box which it was their duty to refuse when offered by the elector. Upon this point the statute seems to be clear and imperative. The thirty-first section provides for the canvass of the votes by the inspectors in these terms: "The votes for the several candidates shall be canvassed in the order in which they appear upon the several ballots. No ballot that has not the printed official indorsement shall be counted, except such as are voted in accordance with the provisions of section twenty-one of this Act." We are

unable to construe this language, when applied to the facts of this case in any other way than as the clear and positive mandate of the Legislature to the canvassers to reject and treat as void all ballots found in the box prepared for and bearing the designation and number of another and a different polling place or election district than the one where the ballot was cast. The Legislature has forbidden the elector to cast such a ballot. It has prohibited the inspectors from placing it in the box, and the canvassers from counting it. The case could be no stronger had it in terms declared such a ballot absolutely void for all purposes. But it is said that this result will disfranchise the electors who cast these ballots in good faith, believing that they were the proper official ballots. The answer is that when an elector attempts to express his will at an election by the use, through either design or accident, of ballots which the law declares shall not be counted, the courts have no power to help him. Had these ballots been misplaced by design or some preconceived arrangement between the county clerk and the candidates whose names appear thereon, or some of them, the voters using them might be as innocent then as they appear to be in the case at bar; but to hold, under such circumstances, that the votes must nevertheless be counted would be to suggest an easy method of defeating the fundamental purpose of the statute. The law contemplates that the elector will not blindly rely upon anyone, not even the election officers, in the preparation of the ballot. If he is handed an official ballot with a distinguishing mark upon it, or an improper indorsement, he is not obliged to vote it, but may procure a proper ballot. In this case it cannot be said that the electors were obliged to use these ballots or omit to vote at all. It was their duty to see to it that so important a part of the ballot as the indorsement was in conformity with the statute. They must have known, or, at least, could easily have ascertained, that the ballot was prepared for and indorsed with the number of another polling place; and then they could have used paster ballots, containing the names of the candidates of their choice, upon some one of the other three official ballots in the hands of the inspectors, and which all concede contained the proper indorsement, and the ballots in question could then be returned to the inspectors. That the use of these ballots was, at best, a wholly unnecessary and thoughtless act on the part of the voters who cast them is entirely evident. But, even if it could be said that those electors had no knowledge or means of knowledge in regard to the improper indorsement, and that they could not without some inconvenience provide themselves with ballots such as the law required, we would still be obliged to hold that it would be far better that their votes should be deemed ineffectual than that the fundamental purpose of an important public statute should be subverted, and, in the struggle to save these votes by judicial construction, the door should be thrown open for evasions of the statute which might revive

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evils far more dangerous to the public welfare than can possibly, under any circumstances, follow the exclusion of a few hundred votes in a single county, cast by voters who, at least, as all must admit, neglected to observe important requirements of the law. It may be freely admitted that no statute regulating the conduct of elections should be so construed as to place arbitrary or unreasonable obstructions in the way of the citizens in the exercise of his right to vote, and, further, that any law fairly open to such an objection would be in conflict with the Constitution. But when we keep in mind the fact that the statute now under consideration was intended to prevent corruption, and the consequent debasement of the franchise, it was not unreasonable to provide that if an elector attempts to exercise his right in such a way as to reveal the contents of his ballot, or to make subsequent identification possible, the inspectors shall not receive it, and, if received, it shall not be counted.

There is a view of the case which was not suggested in the argument, and does not appear in the briefs of counsel, but originated with members of the court, that we have carefully considered. It is suggested that when section 29 speaks of certain ballots that the inspectors are not to receive, and section 31 of certain ballots that the canvassers are not to count, reference is made only to unofficial ballots, other than those provided for in section 21. This is not the natural and obvious meaning of the language used, and such a conclusion cannot be reached without supplying words that the Legislature has not used. The ballot which the inspector must refuse, under section 29, is there described as one "which is not properly indorsed and numbered;" and the ballot which the canvassers shall not count, under section 31, is there described as one "that has not the printed official indorsement." So far as these two sections require inspectors to refuse votes offered and canvassers to exclude votes found in the box, not regular by reason of neglect to comply with the statute in respect to the indorsement, they obviously refer to the same or similar defects, and apply to the ballots in question. The Legislature could not and did not anticipate that any other unofficial ballots than those provided for by section 21 would be offered or could get into the box, and was not providing against such an impossible, or very remote, contingency. The prohibitions of these two sections were clearly aimed at evasions or abuses liable to arise in the use of the official ballots, and such as did actually arise at the election in question. As no question of this kind could possibly arise under the laws relating to elections in force prior to 1890, there are no adjudged cases by the courts to be found in this State that furnish any aid in the solution of the question before us; but enactments similar in their provisions, and identical in policy, have been before the courts of many of our sister states for construction. One of the earliest cases on the subject was that of *Com v. Woelper*, 8 Serg. & R. 29, 8 Am.

Dec. 628. In that case the election was one for officers in a religious corporation, but the principle decided applies to public elections. What was known in that case as the "German Party" succeeded at the election, having cast 531 ballots. The tickets voted by them were marked with the figure of an eagle. The elections were regulated by a corporate by-law, which provided that "if, besides the names, there are other things on the ticket, or if two or more votes are found together, such tickets shall not be read off or votes counted." The defeated party claimed that the tickets marked with the eagle ought not to have been counted, though the voters who cast them were members of the congregation entitled in all other respects to vote, and to have their votes counted, at elections. On a trial at *not prius* the jury were so instructed, and the election was held invalid. On appeal, this instruction was held to be correct. The court (Tilghman, Ch. J.) said: "The fifth and last point turns on the construction of the by-law before mentioned. The tickets in favor of those persons who succeeded in the election had on them the engraving of an eagle. The judge who tried the case charged the jury that those tickets ought not to have been counted. The case is certainly within the words of the law. The tickets had something more than the names on them. But is it within the meaning of the law? I think it is. This engraving might have several ill effects. In the first place, it might be perceived by the inspector, even when the ticket was folded. This knowledge might possibly influence him in receiving or rejecting the vote. But, in the next place, it deprived those persons who did not vote the German tickets of that secrecy which the election by ballot was intended to secure for them. A man who gave in a ticket without an eagle was set down as an anti-German, and exposed to the animosity of that party."

In *West v. Ross*, 53 Mo. 350, the statute provided that "no ballot not numbered shall be counted," and the question arose as to whether ballots cast for a successful candidate for county clerk, not numbered, should be excluded from the count. It was conceded that no fraud was intended by the inspectors in failing to number the ballots, but it was occasioned by an inadvertence on their part. It further appeared that the number of ballots counted corresponded with the number of voters appearing on the poll-list. The court, however, held that these votes were void. In the opinion the court said: "This case may be a hard case, and doubtless is; but the legislative enactment is clear, and, although it may deprive a portion of the citizens of the county of their right to be heard in the election of a clerk at one election, it is better that they should suffer this temporary privation than that the courts should habituate themselves to disregard or ignore the plain law of the land in order to provide for hard cases." "In the present case the Legislature has provided and required that the ballots should be numbered, and then provides, in express terms, that no ballot not numbered shall be counted. Can we

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say that such ballots shall be counted without an attempt at judicial legislation? I think not; and it would be a misapplication of terms to say that such a statute is only directory."

In *Ogleby v. Sigman*, 58 Minn. 502, an application was made for a mandamus to compel canvassers to reassemble and recanvass votes cast for member of congress, and to reject ballots claimed to be illegal, by reason of the fact that they contained certain marks and devices prohibited by statute. The statute provided that the ticket should not contain any "device or mark by which one ticket may be known or distinguished from another;" and that a "ticket different from that herein prescribed shall not be received or counted." The court held that ballots marked in violation of the statute were void, and in the opinion it is said: "We think the effect of section 187 of the Code of 1880 is to condemn as illegal, and not to be received or counted, every ballot which has on its back or face any device or mark, other than the names of persons by which one ballot may be distinguished from another. This statute does not condemn devices or marks on the outside of a ballot merely, but clearly embraces the face of the ballot as well. That is apparent from the exception contained in it, and a device or mark on the face of the ballot is as much within what we suppose to have been the object of this provision as one on the outside or back of it. It is apparent from the provision that its object is not only to preserve secrecy as to what ballot an elector casts,—which is the leading idea of statutes in some other states which prohibit any device or mark on a ballot folded, which betrays the secret of the voter,—but also to secure absolute uniformity as to the appearance of ballots, in order that intelligence may guide the electors in their selection, and not a mere device or mark by which ignorance may be captivated. The Legislature was trying to prevent multitudes from 'being voted,' and being guided by a mere device or mark by which they should distinguish the ballots they were to use in the process, without a knowledge of the names of persons for whom their ballots were being cast. Elections are a contrivance of government, which prescribes who are electors and how they may express their will, and it is a legitimate exercise of power to prescribe the description of the ballot which shall be used." It has been held, upon similar grounds, that a ballot printed upon colored paper, in violation of a statute requiring them to be printed upon white paper, was void (*State v. McKinnon*, 8 Or. 498;) and that a ballot was properly rejected which did not conform in length and in other minor respects to a statute prescribing the form of ballots to be used. *Reynolds v. Snow*, 67 Cal. 497.

In Connecticut, under a recent statute in many respects similar to ours, the official ballot contains the name of the political party using it. At a municipal election 86 ballots were cast, containing the caption "Citizens" at their head; but were in all other respects the same as the Republican

ballots, including the candidates' names. But, as there was no party in the city known as the "Citizens' Party," it was held that these ballots were void, and could not be counted. In that case the statute prescribed the form of the ballot, which is to contain, among other things, "the name of the political party issuing the same;" and then provided that "all ballots cast in violation of the foregoing provisions, or which do not conform to the foregoing requirements, shall be void, and not counted." The reasoning of the court by which that conclusion was reached is applicable here. *Talcott v. Philbrick*, 59 Conn. 472. Other cases could be cited which hold the principle that ballots cast by electors, not conforming to the provisions of a statute intended for the purpose of securing secrecy, and which reveal the contents of the ballot, or render it capable of subsequent identification, are void by force of prohibitions in the statute against receiving and counting them, in substance, the same as is to be found in the statute under consideration. *Fields v. Osborne*, 60 Conn. 544, 12 L. R. A. 551; *Re Marks*, (R. I.) 21 Atl. Rep. 962; *Leadbetter v. Hall*, 62 Mo. 422; *Perrins v. Carraway*, 59 Miss. 232; *Steele v. Calhoun*, 61 Miss. 556. We think that these ballots cannot be counted without weakening or breaking down provisions of the statute which, in view of its general purpose, must be regarded as vital. For these reasons the orders appealed from should be affirmed.

Ruger, Ch. J., and Gray and Earl, JJ., concur; **Andrews and Peckham, JJ.,** read dissenting opinions; **Finch, J.,** concurs.

Gray, J., concurring:

In these proceedings, which have reference to the correctness of orders of the supreme court in directing, by a writ of mandamus, that the Board of Canvassers of Onondaga County correct their returns or statements, and that they exclude in their computation of votes those cast for Rufus T. Peck for senator, and for Patrick J. Ryan for assemblyman, in certain election districts, I propose to state, as briefly as possible, the reasons which influence my vote in affirmance of the orders below.

The question is whether certain ballots cast in the several election districts in question, which did not bear the official indorsement required by section 17 of chapter 262 of the Laws of 1890, as amended by section 6 of chapter 296 of the Laws of 1891, commonly referred to as the "Ballot Reform Law," could be legally counted and canvassed for the candidates whose names appeared thereon. The respect in which the indorsement of the ballots failed to comply with the statute was in bearing the designation of a polling place other than that where the ballots were given out and used. In every instance where this occurred it was solely upon the ballots prepared for Republican votes. It is argued, however, and it may be conceded, that the occurrence was the result of some mistake in the county clerk's office, in the arrangement or distribution of the various sets of ballots for the different

polling places. These ballots, as counted by the board of canvassers, contributed to the result of a majority of votes for Republican candidates. The question whether such ballots, so indorsed, should be counted is one to be answered upon the law which at present regulates the preparation, casting, counting, and canvassing of ballots at elections. The statutes which contain that law bear as their title these words: "An Act to promote the independence of voters at public elections, enforce the secrecy of the ballot, and provide for the printing and distribution of ballots at public expense." The adoption of this law by the Legislature was only after debates prolonged over years. Its extraordinary plan, its objects, and its features were subjected to the closest scrutiny and to much adverse criticism. The discussions reached beyond the legislative halls, and it was only after the aims and methods of the proposed law had been debated with as much earnestness as thoroughness, and had been critically analyzed and variously changed, that it finally passed into our statute books. The plan embodied in the law was to have a uniform ballot. That essential feature was secured by provisions requiring all ballots to be prepared by a public officer, and to be exactly alike in every possible respect, externally, in the official indorsement, and differing internally only in the names of the candidates for office upon the ballots prepared for the different political parties. It is perfectly evident that by strict compliance with these provisions of the law the contents of a ballot cast by a voter are absolutely secret to all but himself, and thus the object of the statute is readily effected. The statute, in its thirty-first section, provides that "no inspector of election shall deposit in a ballot-box, or permit any other person to deposit in a ballot-box, on election day, any ballot which is not properly indorsed and numbered, except in the cases provided for in section 21 of this Act." The words of section 31 of the Ballot Reform Law are explicit enough to remove the possibility of misapprehension upon the subject of what shall be counted. It reads: "The votes for the several candidates shall be canvassed in the order in which they appear upon the several ballots. No ballot that has not the printed official indorsement shall be counted, except such as are voted in accordance with the provisions of section 21 of this Act." The reference here is to unofficial ballots, which may be printed or written, where the official ballots have been lost, destroyed, are not ready, or have been exhausted; or whenever a candidate for office shall have died, or withdrawn, or shall be ineligible; in which cases such an unofficial ballot may be used. When later in section 31 it is provided that "said ballots shall be counted in estimating the result," etc., but may be contested in a mandamus proceeding, in the section provided for, the ballots referred to unmistakably mean, as the context plainly shows, those which have been marked in any way for identification, and therefore have been written upon by the inspectors of election for the purpose of raising the question of

their legality. This later provision which I have mentioned was added in the amendment of the Law in 1891, and was aimed at marked ballots. The original law prohibiting the counting of ballots not bearing the proper official indorsement was not altered nor affected.

The official indorsement, so strictly required to exist, is prescribed in section 17 of the Act, and by its terms each ballot's indorsement must be printed with a certain type, and shall read, "Official ballot for ——" ; and after the word 'for' shall follow the description of the polling place for which the ballot is prepared, the date of the election, and a *fac simile* of the signature of the county clerk. The ballot shall contain no caption or other indorsement." The argument that, for the lack of ballots properly indorsed as required by the law, those not properly indorsed may be voted as unofficial ballots, as provided in cases mentioned in section 21, and which I have mentioned, is not, to my mind, at all satisfactory, and I consider it an answer to say that these ballots, which were used and which were the subject of consideration below, purported to be official ballots, and bore an official indorsement, and that the conditions for the use of unofficial ballots did not exist. So scrupulously has this law endeavored to preserve absolute secrecy as to the ballot deposited that it provides for the nullification of a ballot which is so marked as to be capable of identification in any way. The reading of sections 25, 34, and 35 exhibits the safeguards established about the depositing of the voter's ballot. All of the provisions of this law, when considered in connection with the purpose, as declared in its title, are indicative of the legislative intent that the independence and freedom of the voter are promoted, and are best guarded through the casting of a ballot absolutely indistinguishable in any of its features from all other ballots. Now, it is perfectly plain, and it is not disputed, that, by the variance in the numbering of the polling place in the official indorsement, these ballots in question were distinguishable from those ballots which were prepared for, given out, and cast by the supporters of other political parties, and every ballot deposited was marked, or could be identified, as a Republican vote. The argument that the official indorsement was correct, because prepared for the election district indicated by its number, and that a misdelivery to a different district does not affect the correctness of the indorsement required by statute, I consider quite unsound. A right construction of the language of the statute calls for a ballot bearing an official indorsement which designates the polling place at which the ballot is to be used, and, where that is not so, both the object and the provisions of the statute may be violated, and the law rendered ineffectual for the accomplishment of its avowed purpose. So is the argument unsound which denies the right to compel the Board of County Canvassers to correct its statements of the result by estimating it without including that number of illegal ballots which is indicated by and upon the

sample ballot attached. If there is a discrepancy between the body of the paper containing the statement and the writing upon the sample ballot, as to the number of votes cast, then the figures in the body of the statement control, and that is the result of our decision in the *Noyes Case*, 126 N. Y. 392. But here the sample ballot exhibits the kind of ballots which the statement certifies to have been deposited to a certain number. Thus we have a case where ballots were furnished at polling places which were not, as to those intended for Republican votes, indorsed uniformly with other ballots. To count such, in estimating the results of the election, in my judgment, is against the letter and the spirit of the Ballot Reform Law. It was an error, for the correction of which, through the intervention of the supreme court, by mandamus proceedings, provision has adequately been made. *Laws 1890, chap. 460.* The Ballot Reform Law was modeled after what was known generally as the "Australian Ballot Law," and its enactment was a long step forward in the promotion of the purity of popular elections. The difficulty in this case, if the result of a mistake, as we assume it to have been, was enabled to occur by the requirement of our law that there shall be as many separate kinds of ballots as there are different political parties represented. Had there been but one ballot required, this occurrence would not have been possible. It may be, and I assume it to be, a hardship that the result should operate to render null so many votes, and to alter what may have been an honest expression of the popular will; but it would be an evil, in comparison with which the hardship complained of is as nothing if a law, which the people of this State through their Legislature so deliberately framed and have solemnly adopted, should be so construed as to render fraudulent evasion possible. In my judgment, unless this law is upheld and given the effect intended for it, and, in my judgment, adequately secured by all of its provisions, then technical construction, or the ingenuity of minds, can impair its efficacy. This is not a case for the court to strain after explanation in order to remedy an apparent hardship, when to do so simply results in emasculating a provision of the law, the existence of which is calculated to exclude all attempts at fraudulent or corrupt practices at the polls. It will not do to break down any of the provisions of this law framed against a possible corrupt vote, lest in so doing the way be left open for a more radical destruction. The people are supremely interested in protecting the citizen voter against the prostitution of his character in the casting of a venal ballot. The system devised by the Legislature to enforce the secrecy of the ballot seems a total failure, unless we give effect to the provisions enacted to sustain it. Genuine ballot reform, as the people have chosen to have it, in this and many other states, means the purity of the ballot, and that is best attained by the plan of a uniform or secret ballot. If we destroy any of the safeguards erected and intended to be

maintained about the voter, for his protection against improper influences and intimidation, we at once do an act in encouragement of the very evil sought to be prevented. If the law providing for a uniform ballot, to originate from an official source, and a plan to render the vote of him who casts it absolutely indistinguishable, and therefore absolutely secret, may be construed one way, in the case of a mistake, as here, then is it always open to such construction; for the proof of a fraudulent intent in the preparation and distribution of ballots to be used at a polling place is, very obviously, difficult, if ever possible. Nor ought the burden of that proof, in my opinion, to be thrown upon the candidate whom it has served to defeat. He has the right, as have the people generally, to rely upon a strict compliance with the terms of the Election Law, and to an election held according to its requirements. If the law is not to be nullified in an indirect manner, then its material directions must be heeded and the consequences it attaches to a disregard of its provisions must be allowed. The decisions of the courts in Missouri, Rhode Island, and Connecticut which are referred to and which I need not quote from here, are all in accord with these views, and to the effect that it is not competent to inquire into the intent or the consequences of a violation of the legislative requirements as to the ballot to be cast at an election. I am for maintaining the integrity of this law, and for construing it as it is written. The orders appealed from should be affirmed.

Ruger, Ch. J., and Earl and O'Brien, JJ., concur.

Ruger, Ch. J., concurring:

While I concur in the opinion delivered by my associate, *Judge O'Brien*, I have thought it proper to state in my own language the line of thought which has led me to the conclusions reached by a majority of the court. I regard this case as one of primary importance, not so much, perhaps, from the effect that its decision may have upon the interest of the individuals engaged in the controversy, or the temporary prospects of political parties, but from the permanent influence which it will exercise upon the cause of ballot reform, which has in recent years shown itself so strong in the regard of the people, and vindicated that favor by the success which has attended the enforcement of the reform legislation of 1890 and 1891. It cannot be disputed but that, in the initiation of the movement for ballot reform, there was much difference of opinion in regard to the propriety of the laws proposed, and much fear expressed in respect to their operation, and I must confess that I was among those who regarded the result as doubtful and uncertain, and feared that their enforcement would be likely to impose a serious and dangerous restraint upon the exercise of the right of elective franchise by the citizen. We have, however, now had two years of experience under these statutes, and it seems to me that many of those who originally opposed the law have become reconciled to

its operations, and a great change has come over the popular mind in regard to its beneficial effects. I think that it will now be generally conceded that the influence of these laws, if fully and impartially enforced, will practically prevent bribery at elections, and restrain the power of extraneous influence over the mind and conduct of the voter in the exercise of his political rights, within healthy limits. Any decision, therefore, of this court which would tend to materially hamper the beneficial operation of these laws, and relegate the question of ballot reform to its original position, will, I think, prove a serious misfortune to the country, and the source of great regret to every thoughtful and conscientious citizen. I think that but few will dissent from these views, or from the further proposition that any determination of the question before us which will prove an embarrassment to the cause of ballot reform should be most earnestly deprecated and avoided, if the language of the statutes will permit of another result.

The issue involved in the present controversy, as it was presented on the argument, is the claim made on one side that these proceedings were on the part of the relator to change the political complexion of the senate of the State by forcing a candidate into an office to which he was not legally elected, and the assertion on the other that the candidate opposed to the relator, although having an apparent majority of the votes cast, secured that majority only by counting in his favor illegal ballots procured through intimidation, and the exercise of unlawful influence over the minds and conduct of the voters at the polls. The question, therefore, which lies at the foundation of the controversy, is, Who had a plurality of the legal ballots cast at the election in question? And as that question shall be determined by this court will depend the ultimate decision of this appeal.

The facts, having been agreed upon by the parties, are simple and undisputed. The twenty-fifth senatorial district consists of the counties of Onondaga and Cortland, and contains a voting population of about 40,000. The canvass of votes showed that Peck, the Republican candidate for senator, received in the county of Cortland a plurality of 770 over Nichols, his Democratic competitor; and in Onondaga County Nichols received a plurality of 348 over Peck,—thus showing an apparent plurality for Peck of 892 votes; the total vote for Nichols in Onondaga County being 15,759, and for Peck 15,381. Among the ballots thus counted for Peck were 1,252, which were, when voted, indorsed with a number which did not correspond with the number of the district in which they were cast, or with the number which was indorsed upon all other ballots cast in the same district at that election. These obviously illegal indorsements were found only upon Republican ballots, and were made upon all of the ballots cast for Peck in the several districts named. These were the first and second of the towns of Clay, Camillus, and Tully, respectively, and the first, second, and third of the town

of Eldridge; and being, as I infer, all of the election districts in the several towns named. These facts appeared upon the face of the returns made to the county canvassers, and these votes were allowed to Peck by that board under the only canvass permitted to be made by it pursuant to the express requirement of an order of a special term of the supreme court. No explanation is furnished by the papers as to how the transposition of ballots occurred, nor are any facts stated from which it can be conclusively inferred that it was innocently produced. On the contrary, in my judgment, there is the strongest evidence in the case tending to show that they were designedly transposed. It is plainly inferable from the manner in which votes were required by statute to be prepared, printed, and distributed by the county clerks to the several town clerks that the transpositions occurred in the office of the county clerk. Thus, he is required to prepare all ballots intended to be used in his county, to cause them to be printed, and, when printed, to be placed in separate packages, properly marked for the respective towns and districts in which they are intended to be used, and to transmit them to the respective town clerks as early as the Saturday preceding the day of election, for distribution to the inspectors. The distribution by the town clerk is required to be made of unopened packages, as they are directed, among the inspectors of the various districts in the town, before the polls open on the morning of the election. It is quite obvious, therefore, that the respective packages were put up in the county clerk's office, and addressed not only to the respective districts for which they were intended by the county clerk, but all those intended for a particular town were embraced in a single package addressed to the town clerk. These packages were all sent out duly addressed, and reached their respective intended destinations. In the several election districts referred to, however, the inspectors of election, upon opening the packages addressed to them on the morning of election, discovered that the Republican ballots inclosed in the packages were all indorsed with an erroneous district number, while all other tickets contained in the same packages were properly indorsed. No effort appears to have been made by the inspectors to correct this palpable violation of law, although within the limits of a small town it could apparently have been accomplished in a comparatively short period of time, by an exchange with the districts whose ballots had also been erroneously distributed, but the election was deliberately proceeded with, and the ballots cast in all of the towns and districts named were taken under circumstances which obviously exposed the political character of every Republican vote as notoriously as though it had been openly proclaimed by a herald at the polls.

It is strenuously urged by the appellants' counsel that these transpositions were inadvertently made. This contention is obviously immaterial, but I think there is little in the circumstances to render such a claim either

plausible or probable. In preparing the packages the persons superintending the operations must have selected with care and accuracy the ballots prepared for the candidates of the Democratic, Prohibition, and Socialistic parties, and correctly assigned them to the proper district. They must also then have selected the Republican ballots designed for the several towns having two districts, and put those prepared for the first district into the package sent to the second, and those designed for the second district into the package sent to the first district. This could only have occurred by rejecting the package properly marked, and selecting another package, obviously designed for another district. This was done in six districts, and involves the happening of twelve simultaneous mistakes of a similar character, to produce the alleged inadvertent transposition of votes. The work of transposing the votes of the town of Elbridge was a more complicated transaction, and required some calculation to make it successful, as there were several districts to be affected. This, however, was done by sending to the first district those ballots designed for the third, to the second those designed for the first and to the third those prepared for the second; and thus each district secured its full complement of votes, but they were each marked so as to advertise, when cast, the contents of the ballot. It is quite significant, also, that this is the only county of the State in which such mistakes occurred, and that it occurred only with the ballots of a single one of the four parties whose ballots were handled by the officers charged with the duty of making the distribution of ballots. No explanation is made by the county clerk of the manner in which this result was effected, except by the affidavit of a subordinate in his office, who testifies substantially that he superintended the distribution of the ballots in the county clerk's office, and that, if any mistakes were made, they were inadvertently committed, and not with any intent to evade the provisions of the Ballot Reform Law. This is the statement of a mere opinion, and can have no legal effect upon the character of the transaction, except to show by the testimony of an implicated party that he did not intend to commit a criminal offense. Such is the only explanation offered by the officers implicated to account for the apparent perpetration of a great crime, through which one political party was in nine election districts of the county enabled to disregard the wholesome restraints of the Ballot Reform Law, and reap the advantage to be derived therefrom.

That a crime was committed by someone having in charge the distribution of the ballots for the several towns referred to cannot be the subject of reasonable doubt. Among those officers the duty of the county clerk is the most important. He is charged with the whole duty of preparing the ballots for printing, overseeing their publication, assigning the towns and districts to which they are to be sent, and effecting their proper distribution. The importance of a strict and conscientious performance of his duties cannot

be overestimated, as any mistake or carelessness on his part is sure to involve the most serious consequences to the cause of good government and the administration of its laws. It is therefore that all of the duties to be performed by him are most carefully and minutely defined by the law, and it is especially provided by the Act that "every public officer upon whom any duty is imposed by this Act, who violates his said duty, or who neglects or omits to perform the same, shall be deemed guilty of a misdemeanor," and subject to fine or imprisonment, (§ 84, chap. 262, Laws 1890, as amended;) and any person who shall forge or falsely make the official indorsement of any ballot shall be deemed guilty of a felony, (§ 32, chap. 262, Laws 1890.) That these sections have been glaringly violated is made apparent by the conceded facts, and, while the actual offender may not now be certainly pointed out, it will be desired by every candid and law-abiding citizen that the incoming Legislature may by a thorough investigation ascertain the facts and detect and expose the guilty party. It is claimed by the appellants that the political party whose ballots were thus transposed could have had no improper motive in effecting such transposition. It would seem to be a sufficient answer to this suggestion to say that the Act does not regard the motives of those who violate the law by improperly indorsing ballots, but condemns the act and prescribes the punishment for its commission, whatever may have been the cause or motive for its perpetration. It imperatively requires that every ballot cast (with an unimportant exception) shall be of the same shape, size, and color, and have the same indorsement. The purpose of the Act seems to require that these provisions should be held to be mandatory, and that a disregard of them upon any pretense whatever should constitute a violation of the law, and cause a forfeiture of any benefits sought to be derived from such illegal ballots. The vigorous enforcement of these penalties constitutes the principal mode by which obedience to the law was expected to be secured. But let us look further at the motives which may reasonably be supposed to have actuated the minds of the parties charged with the duty of handling these ballots by their unlawful manipulation. It appears from the votes cast that Mr. Nichols received a large Republican vote in Onondaga County. The court can take judicial notice of the facts appearing in the public records of the State. They show that Onondaga is a Republican county, and for a long series of years has given a plurality of votes for that party, varying from two to four thousand votes at each election. At this election, however, it gave a considerable plurality for the Democratic candidate. It is therefore obvious that for some weeks preceding the election there must have been evidence of a popular current which threatened a defection from that party, and consequent accessions of strength to the ranks of its opponent. What more efficient agency could have been adopted to arrest such a movement than the publication of

the fact that every person who deserted from his party in such an emergency would be watched and exposed to the various consequences which inevitably follow those who throw off their fealty to party obligations, and incur the hostility of their former political associates. Not only were the voters exposed to these influences, but the fact that their ballots were improperly indorsed exposed them to the approaches of vicious and corrupt partisans, who might, either by bribery or intimidation, seek to influence their conduct. It is evident that, if such practices are permitted under the law, the purpose of the Act to shield the voter from obnoxious supervision and observation while exercising the right of elective franchise is practically defeated.

We are now brought to the crucial question presented by the situation, which is as to the disposition to be made by the canvassers, under the law, of the votes thus illegally cast. The language of the Act on this subject is plain and unambiguous and furnishes a full and conclusive answer to the inquiry, which no ingenuity can obscure or evade. The statute says that "no inspector of election shall deposit in a ballot box, or permit any other person to deposit in a ballot-box, on election day, any ballot which is not properly indorsed and numbered, except in the cases provided for in section twenty-one of this Act; nor shall any inspector of election deposit in a ballot-box, or permit any other person to deposit therein, on election day, any ballot that is torn, or has any other distinguishing mark on the outside thereof." Section 29, chap. 262, Laws 1890, as amended by Laws 1891. And further, that "no ballot that has not the printed official indorsement shall be counted, except such as are voted in accordance with section twenty-one of this Act." Section 31 of the amended Act. No claim can be seriously made that the ballots in question were cast in accordance with section 21 of the Act, and they therefore necessarily fall under the absolute and unqualified prohibition which is directed against the receiving or counting of such ballots, imposed by the quoted provisions. The Act provides that no ballots not properly indorsed shall be received, or, if received, shall be counted. This result must necessarily follow the commission of the prohibited act, whatever may have been the ignorance or intention of the voter or any other person connected with the act of voting, for the canvassing officers are imperatively directed not to receive or count the improperly indorsed ballot. No investigation is required or permitted by the inspector into the motives of the voter, or those who prepared the ballots for him; but without inquiry, upon the mere inspection of the ballot, the inspectors are required to take affirmative action rejecting it, and if for any reason that duty has been omitted at the polls, they are required to refrain thereafter from canvassing or counting such ballots. It cannot, of course, be successfully contended that under the language of this statute any board of canvassers before whom the facts lawfully come, and vested with the

duty of canvassing votes, had any authority in law to count these illegal ballots, and it was therefore practically decided in our deliberations by an unanimous court that, unless some change was made in the language of the statute, these votes must be rejected. Some of the members of the court are of the opinion that the statute may properly be read as though the word "unofficial" had been inserted in the quoted sentences before the word "ballot" wherever it occurs, so that the words of exclusion shall apply to unofficial ballots alone. This interpolation of a word is claimed to be justified by the alleged injustice which would otherwise be inflicted in this case by the disfranchisement of upwards of 1,200 voters. The conclusive answer to this claim is the fact that such interpolation defeats the plainly implied intention of the law-makers, and destroys the sole beneficial purpose of the Act. It is among the most familiar rules of construction that the office of interpretation is to carry out the intention of the law-makers, and facilitate the accomplishment of their object. Any change, therefore, in the language of a statute which contravenes principles is prohibited by the elementary rules of construction. What was the obvious purpose of this statute? It is expressed in language that permits of no doubt as to its meaning, and is revealed not only by its title, but breathes in every line and word of its 46 sections. The title declares it to be "An Act to Promote the Independence of Voters at Public Elections, Enforce the Secrecy of the Ballot, and Provide for the Printing and Distribution of Ballots at Public Expense." The body of the Act shows by manifold provisions that this purpose is to be accomplished only by the inviolability with which the conscience and intention of the voter is guarded while exercising the right of suffrage, from the observation and scrutiny of others. It cannot, therefore, be reasonably claimed that it was within the purpose of the law-makers to permit a voter, whether casting an official or an unofficial ballot, to reveal at the polls in any manner or on any pretense whatever the character of the ballot, which he proposes to cast. Let us therefore consider the effect of the suggested construction of this statute. It plainly assumes to limit its application to unofficial ballots, and thereby to exempt from its operation all official ballots. Ballots, by the law, are designated as "official" and "unofficial," and are expressly defined by various sections of the Act. Those designated "unofficial" are described by section 21 of the Act and are ballots authorized to be printed by a town or city clerk only when the ballots required to be furnished by the county clerk have not been delivered, or, after their delivery, have been lost or destroyed. In case such ballots are not furnished by the town or city clerk in time, or the supply of ballots becomes exhausted before the polls are closed, each elector may furnish his own ballot. These ballots, however, are required to be without indorsement. All other ballots are official. It is apparent, then, that the ballots in controversy were not in any sense unofficial bal-

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lots, and were not attempted to be voted in accordance with the provisions of section 21. It is obvious that the use of unofficial ballots must be exceptional in any case, and was allowed only to guard against an improbable, yet possible, contingency, but was not intended by the law-makers to play an important or even usual part in the conduct of an election. In fact I think that it must be assumed that the occasion has never arisen in this State when the use of an unofficial ballot has been required. If it had, that fact would undoubtedly have become notorious. Is it reasonable, therefore, to suppose that the Legislature intended its elaborate and carefully considered scheme of ballot reform to apply to a mere incident of an election, rarely, if ever, liable to occur, and to leave the great evil, which dominated the entire country, and infested every polling place throughout the State, to rage without regulation, restriction, or control? It would amount to saying that the leading and most effective provision of the statute, containing its only operative clauses, should be emasculated, and turned into a provision having no practical effect or operation whatever. A most unjust and mischievous construction would be thus given to the law, for it would apparently authorize the improper indorsement of official ballots, and, although so marked and distinguished as to reveal their contents, would nevertheless permit them to be counted. The law, so construed, leaves the candidate, confessedly elected by illegal ballots, to avail himself of their aid in entrenching his position, so that, if he can ever be dislodged therefrom, it can only be when the lawfully elected candidate is in the remote future enabled to prove the agency whereby the illegal transposition of ballots was accomplished, and the secret intent with which it was done. An Act leading to such results might, we believe, be more appropriately termed a statute to encourage the violation of the right of elective franchise than one to protect and purify it.

A further answer to the construction contended for is found in the provision which prohibits any indorsement whatever from being made upon unofficial ballots. Is it not, therefore, the height of absurdity to suppose that all of the numerous and carefully worded provisions in respect to the disposition of improperly indorsed ballots should be held to apply only to ballots which were never required by the law to be indorsed at all? A construction of a statute which changes its language so as to exclude the only subject upon which it can operate, and confines its provisions to one which will never probably occur, is without a parallel in the history of jurisprudence. No words can sufficiently express the surprise with which an original ballot reformer will learn that the only object sought by him in his struggle for ballot reform was the exclusion from the ballot-box of a ballot which could never get there except by an improbable accident. A few words more upon a point to which I have already adverted,—the claim that a literal construction of this Act would result in the

disfranchisement of many voters. Those voters are termed innocent, well-meaning, and apparently unconscious instruments in the proceedings which resulted in placing in the ballot-boxes of Onondaga County upwards of 1,200 illegal votes. Why they are thought to be entitled to these descriptive appellations I am unable to understand. The law expressly forbids every voter from revealing to anyone in the polling place the name of any candidate for whom he intends to vote, or to show his ballot, after it has been prepared, in such manner as to reveal its contents, and, in case of a violation of these provisions, he is deemed guilty of a misdemeanor. Section 85, Laws 1890, amended 1891. Can a voter who deposits a ballot revealing plainly and conspicuously the names of the candidates for whom he intends to vote claim to be innocent of a violation of these requirements? These voters most certainly cannot be said to be ignorant of the provisions of the law under which they are exercising their franchise, for the law itself requires that they shall inform themselves of its requirements respecting the form and character of the indorsements made upon their ballots, and refrain from using such ballots. It is elementary that every citizen is presumed to know the law. This is the settled theory of the law. How, then, can it be supposed that these voters were either in law or fact unconscious of the character of the ballot they were using? It was known before the polls opened at each of these districts that the Republican ballots were improperly indorsed, and this was presumably the subject of public discussion around the polls. Yet these voters deliberately determined (for they are not permitted to vote without deliberation) to use them, notwithstanding their nonconformity with the law. The inspectors of election were required under serious penalties to examine the indorsement upon each ballot as it was voted, and to determine as to its conformity with the law, and the voter was also required to see that no mark on his ballot revealed the character of its contents. How, then, can it be consistently asserted that any ballot was deposited in ignorance, either by the voter or the inspectors, of the fact that it was improperly indorsed? The voter when preparing his ballot had before him three ballots properly indorsed and one improperly indorsed. Who should be responsible for the selection of the improperly indorsed ballots, and the consequences of a disobedience of the law, but the offending voter? But it is urged that a strict construction of the law must result in disfranchisement. This is true, but the law plainly contemplates such a result, and who can complain except those who are opposed to any restrictions whatsoever upon the action of an elector? No advocate of the Reform Ballot Law can justly criticise a result which was in the minds of its authors when the law was drafted and enacted. They clearly contemplated this effect, and determined that the injustice which a few might suffer through ignorance, willful blindness, or inattention to the requirements of law, should not be

permitted to defeat the great good to be secured to the whole people by the adoption of an effectual scheme for the purification of elections. Can it, then, be seriously contended that voters may knowingly refuse obedience to the conditions imposed by the law, and still claim that their votes shall be counted as lawful ballots? Such a result would transform the elaborate scheme adopted as a reform measure into an elaborate farce, calculated only to embarrass and hamper the citizen, without adding a line or word to the statute looking to the disqualification of illegal or fraudulent voters or the purification of elections. It was an argument strenuously urged against the adoption of the law that its numerous provisions, complicated, novel, and technical as they were, would necessarily result in the disfranchisement of voters, but the advocates of the law contended that these results were the necessary concomitant of any efficient ballot reform law, and the Legislature deliberately and intentionally approved the adoption of such restrictions and disqualifications. It is now too late to discuss the wisdom or policy of the law, and it is certainly not permissible to attempt its reform by judicial legislation. Such a course would not only destroy the effect of the present law, but would render any future legislation, however phrased, subject to the same power of construction, and liable to be rendered again ineffectual through the force of judicial interpretation. In accordance with these views, I think the orders appealed from should be affirmed, and the illegal ballots excluded from the computation of votes cast for senator.

Andrews, J., dissenting:

I dissent from the judgment in this case. At the November election there were cast in nine election districts, embraced within the towns of Camillus, Tully, Elbridge, and Clay, in the county of Onondaga, 1,252 official ballots for Rufus T. Peck, the Republican candidate for senator in the twenty-fifth senatorial district. It is conceded that these ballots were cast by qualified electors, entitled to vote in the election districts in which they respectively voted; that the ballots were delivered to the electors by the inspectors of election of the election district in which the ballots were cast, and were voted in the usual way, and regularly deposited in the box by the inspectors, without challenge or objection. The proofs leave no room for doubt that these ballots were used by the inspectors and the voters in good faith, in ignorance of any imperfection. By the judgment in this case the 1,252 votes mentioned are declared to be void, and the board of county canvassers are required to reject them in making their returns. The judgment proceeds on the sole ground that the printed indorsement on the ballots did not state the true number of the election district in which they were voted. The exact imperfection will more clearly appear by referring to a single case. The town of Camillus is divided into two election districts. In the first election district 148 bal-

lots were cast for Rufus T. Peck for senator, with the printed indorsement "Official Ballot for Second District Poll, Town of Camillus, November 3, 1891," followed by a *fac simile* of the signature of the county clerk of Onondaga County. In the second election district a similar number of ballots were cast for Rufus T. Peck for senator, indorsed "Official Ballot for First District Poll, Town of Camillus, November 3, 1891," followed by the signature of the county clerk, as in the other case. The substance of the matter is that the ballots prepared and intended to be used in the second election districts of Camillus were used in the first election district, and conversely, the ballots prepared and intended for the first election district were used and voted in the second district. The ballots in both districts were identical in all respects except in the number of the election district indorsed thereon. It does not appear that the fact that the ballots were indorsed with the wrong number of the election district was discovered by the inspectors, the voters, or by-standers, or was in any way called to their attention on the day of election. The facts in regard to the ballots cast in the other towns are the same as those in respect to the ballots in the town of Camillus. Counting the 1,252 ballots for Rufus T. Peck, he was elected senator. Rejecting them, John A. Nichols, the Democratic candidate for the same office, will receive the certificate. The judgment of the court results in this: The candidate who received a minority of the votes of the qualified electors in the twenty-fifth senatorial district is declared elected, and the candidate who received a majority of such votes is deprived of his office.

The explanation of the mistake which has produced the present complication is simple. The Ballot Law imposes upon the county clerk of each county the duty, after nominations by political parties or by the requisite number of citizens have been made and certified, to prepare and print ballots for each election district in the county, in number twice as many of each kind as there were persons who voted or were registered in the district at the last preceding election. It is also directed that on the back of each ballot shall be printed the words "Official Ballot," and also the number of the polling district for which it was prepared, the date of the election, and a *fac simile* of the signature of the county clerk. The ballots for the county of Onondaga were prepared by the county clerk, and printed and indorsed in exact conformity with the statute, and for each election district were printed the proper number, indorsed with the number of the election district for which they were intended. The duty of distributing the ballots so that the proper ballots shall reach the inspectors of the several election districts is placed upon the clerk of the county and the clerks of towns and cities, each performing a separate part of the service. It is the duty of the county clerk to place the ballots of each kind in separate sealed packages, and mark on the outside of each package the polling place for which it is intended, and

the number of ballots inclosed. He is to cause these packages to be delivered to the clerks of the proper towns and cities within his county, on Saturday before election, and take receipts therefor. The clerk to whom they are delivered is required to retain the packages unopened, until the morning of election day, and at the opening of the polls in each election district to deliver the sealed packages to the inspectors of election of the district for which the packages are marked, and take their receipts. By mistake or inadvertence of the county clerk of Onondaga County or of his subordinates the packages of Republican ballots, prepared for one election district, were marked on the outside with the number of another district in the same town. For example, in the case of the town of Camillus, the ballots indorsed "First District Poll" were marked, on the outside of the package, "Second District Poll," and those prepared for the second election district were wrongly marked on the outside of the package "First District Poll." I have characterized the action of the county clerk or of his subordinates as a mistake or inadvertence. The moving papers contain, it is true, some general allegations that this misplacing of the ballots was designed and done with a fraudulent intent. This is denied in the opposing affidavits, and there is nothing in the circumstances to justify a suspicion that the ballots were intentionally misplaced. But it is sufficient to say that by the express written stipulation of the parties the charge of fraud or collusion in the moving affidavits is waived. If this issue had been insisted upon, and the fact was material, the peremptory writ could not be upheld, and the proceedings would necessarily fail, since it is settled that a peremptory mandamus cannot issue in the first instance where a material fact is put in issue, but in that case the moving party will be put to his alternative writ, so that the other party may have an opportunity to try the issue presented. It is said that there are nearly 200 election districts in the county of Onondaga. There were four tickets in nomination, and for 200 election districts 800 separate packages would be required. The fault committed in the county clerk's office was not in the preparation or indorsement of the ballots, but in their distribution only.

The judgment of the court that the 1,253 ballots are void, and cannot be reckoned in canvassing the vote for senator, is placed upon that clause in section 81 of the Ballot Law, which declares that "no ballot that has not the printed official indorsement shall be counted, except such as are voted in accordance with section twenty-one of this Act." Section 81 regulates and defines the duties of inspectors of election in canvassing votes, and the question is whether the clause quoted applies to the votes now in controversy. In my judgment the construction placed upon this clause by the majority of the court proceeds upon a plain misconception of its meaning. It was a leading purpose of the Ballot Law to prevent the use by voters at election of unofficial ballots. The whole machinery of the statute has this object in

view. The statute prescribes in great detail how nominations for office shall be made and authenticated. It does not seek to control the free action of political parties in nominating candidates for public office; nor does it prevent any voter from voting for any person he may choose to vote for, whether he has been regularly put in nomination or not. The statute does require, however, that in all cases except those mentioned in section 21 the voter shall use the official ballot in exercising the right of suffrage. He may vote for any or none of the candidates whose names are on the official ballot, or substitute other names, in whole or in part, for those printed thereon. But when he desires to vote for persons not on the printed list, his purpose can only be made effectual through the use of the official ballot. He may write or paste upon the official ballot the name of any person for whom he desires to vote. If pasters are used, they must be used on the official ballot, and not otherwise. The voter is not permitted to prepare his own ballot upon a paper other than the official ballot, except in the cases mentioned in section 21. The intent of the Legislature to prevent the use of any other than official ballots is plainly apparent from the whole scheme of the Ballot Law. Bearing this in view, the meaning and application of the clause in section 81, above quoted, are very plain. In an election conducted in accordance with law only two descriptions of ballots could lawfully get into the ballot-box, viz., official ballots and such unofficial ballots as are permitted in the contingencies specified in section 21. If in canvassing the votes unofficial ballots are found, not coming within the class of unofficial ballots specified in that section, the conclusion is inevitable that they came there by fraud or mistake. It was to meet this situation that the clause in section 81 was inserted: "No ballot that has not the printed official indorsement shall be counted, except such as are voted in accordance with section twenty-one of this Act." The meaning is the same as if the section read: "No unofficial ballot shall be counted, except such as are voted in accordance with section twenty-one of this Act." That the 1,252 ballots in question were official ballots cannot, in my judgment, be successfully controverted. They were prepared and printed as official ballots, indorsed as official ballots, distributed as official ballots, and voted as official ballots. No one could mistake their identity as official ballots. The most that can be said is that, as they were not the ballots designed to be used in the particular election district in which they were voted, and had on them the number of another election district, they were, as to the poll where used, imperfect ballots. But this did not take from them the character of official ballots. The thirty-first section only excludes the counting of ballots that have not the "printed official indorsement." Those ballots had the "printed official indorsement" of the proper officer. By mistake in distribution the ballots went to the wrong district. The statute does not put it in the power of inspectors to reject

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from the count ballots authenticated as official ballots, because they have been voted in another district than that for which they are prepared. There is no distinction in the character of the ballots prepared for one district from those prepared for another. The unsubstantial character of the objection to the ballots in question strikingly appears when the object of requiring the number of the election district to be printed on the ballot is considered. The law, in order to secure the preparation and distribution of an adequate number of ballots for the use of electors, requires the county clerk to prepare and print for each election district a number of ballots measured by the number of persons who voted or were registered in the district at the last preceding election. The provision that the number of the election district be indorsed on the ballots was inserted as a safeguard against a mistake by the county clerk in preparing the requisite number of ballots, or in their distribution. The provision that the ballots should have indorsed thereon the number of the election district was not intended as a means of identifying them as official ballots. This was provided for by other indications, which were certain and unequivocal.

The conclusion I have reached as to the construction of section 81 is reinforced by other considerations. By the Ballot Law the State assumes the duty of providing official ballots. The voter has no right to interfere either in their printing or distribution. In distributing the ballots, the State, through designated officials, commits an error, and ballots designed for one district are sent to another. By reason of this error it is held that the voter who uses the ballot furnished by the State is deprived of the right to have his vote counted. If the construction of section 81, adopted by the majority of the court, is correct, it would deserve serious consideration whether the provision in question can stand consistently with the Constitution, which secures to every qualified voter the right of suffrage. But, passing this point, it is to be observed that under the Ballot Law the voter is practically compelled to use the official ballot furnished at the polls. The twenty-fourth section, after directing that at the opening of the polls the inspectors shall open the packages containing the ballots, and place them in charge of the ballot clerks, proceeds: "The ballot clerks shall thereupon deliver to the voter and the voter shall receive and take with him into the booth or compartment, one of each kind of ballots, which shall have been furnished for use at such polling place." The twenty-fifth section declares that, "on receiving his ballots the voter shall forthwith, and without leaving the inclosed space, retire alone to one of the voting booths or compartments so provided, and shall prepare his ballots." He may attach a paster ballot to the official ballot, or write thereon the name of any person for whom he desires to vote. But whatever change he makes must be indicated on the official ballot. Upon the question of legislative intent, is it conceivable that it was the intention of the Legislature in en-

acting section 31 to place upon the voter the responsibility of ascertaining whether an official ballot delivered to him corresponds in every particular, in form, size, and indorsement, with the description in the statute, at the peril, in case of misjudgment, of a forfeiture of his vote? The Legislature must be supposed to have known that the great majority of voters are plain men, who would not be familiar with the details of a complicated statute. They come to the polls without any vote prepared. The law obliges them to receive the ballot furnished them by the election officers, and upon that to indicate the changes desired. The mistating on the ballot of the proper number of the election district would not be likely to attract their attention, and in the case in question it was known neither to the inspectors nor the voters. Assuming that section 31 is capable of two constructions,—one preserving the right of the voter, and the other forfeiting it,—can it be doubtful which construction ought to prevail? Shall the right be sacrificed, or shall the statute be construed so as to uphold and maintain the right? The question suggests its answer. The conditions under which, by section 21, the voter is authorized to use an unofficial ballot, did not exist. This is insisted upon at length in the brief of the counsel for the relator. It emphasizes the helplessness of the voter, and the moral coercion under which he was placed, to use, if he voted at all, the official ballot furnished.

The point upon which the most stress is laid in the prevailing opinion is that the wrong number of the election district indorsed on the ballots deprived them of the character of official ballots, and also afforded inspectors and by-standers a means of ascertaining how the voter voted. That the ballots were official ballots has already been shown. If they were not official ballots, then the consequence would necessarily follow that, if all the ballots voted in any election district had been of the same character, the whole vote would have to be rejected, irrespective of the question of identification. In the case supposed of ballots all of which were affected with the same imperfection, there could be no identification of a particular vote. The misnumbering of the election district happened to be on the Republican ballots only. If this fact had been known, then the use by a voter of that ballot would be some indication how he voted. The uncertainty would arise from the fact that the voter might have attached a paster ballot, or written upon the ballot the names of persons other than those printed thereon. It is doubtless true that it was one of the purposes of the election law to secure more perfectly than theretofore the secrecy of the ballot. To attain this end, the Ballot Law contains special provisions. By the twenty-ninth section inspectors of election are prohibited from depositing in the ballot-box "any ballot that is torn or has any other distinguishing mark on the outside thereof." The wrong number of the election district printed on those ballots, it is said, was a distinguishing mark, within this prohibition, and that they ought not for that reason to have been received or deposited in

the ballot-box by the inspectors. But they were in fact received and deposited. If these ballots could have been treated by the inspectors of election as marked ballots, they were not so treated, and that subject, under the arrangements of the statute, has passed beyond the power of the courts to review. Section 31 makes special provisions for raising and investigating the question of marked ballots. If during the canvass of the votes or immediately after its completion, any inspector or watcher declares his belief that any particular ballot has been written upon or marked "with intent that the same may be identified" it is made the duty of the inspectors to write their names on the back thereof, and attach it to their certificate, with a specific statement of the grounds upon which its validity is questioned. Thereafter, and within thirty days after the filing of a certificate declaring the result of the election, the matter may be inquired into by a writ of mandamus issued out of the supreme court, against the board of canvassers or officers "by whom the ballots were counted;" and the section then provides for the trial and determination of the question of their validity. The 1,252 ballots in question were not challenged as marked ballots, were not returned as marked ballots and they were burned by the inspectors, after the completion of the canvass, on the night of election. The present proceeding is not taken, and could not have been taken, under the provisions of section 31, relating to marked ballots, and this is admitted by the counsel for the relator. The whole question comes back to the one point,—of the meaning of the clause in section 31, which declares that "no ballot that has not the printed official indorsement shall be counted, except such as are voted in accordance with the provisions of section 21 of this Act." The conclusion of the majority of this court as to the construction of this clause is sought to be strengthened by reference to section 29, which provides that "no inspector shall deposit in a ballot-box, or permit any other person to deposit in a ballot-box, on election day, any ballot which is not properly indorsed and numbered, except in the cases provided in section twenty-one of this Act; nor shall any inspector of election deposit in a ballot-box, or permit any other person to deposit therein, on election day, any ballot that is torn, or has any other distinguishing mark on the outside thereof." It is said that the ballots in question were not properly indorsed, and that inspectors should have refused to receive or deposit them, and that they come within the description of ballots which the statute in section 31 declares "shall not be counted." This argument leads to most incongruous and absurd results. It will be noticed that the prohibition, in section 29, against depositing certain ballots, applies to ballots not properly indorsed, and also to marked ballots. But, if marked ballots are received and deposited in the box, they are nevertheless to be counted. The declaration is (section 31), "Such ballots shall be counted in estimating the result of an election." The court, under section 31, may pass upon the

validity of such ballots in a judicial proceeding authorized by the section. But the court on such inquiry, cannot hold them invalid, unless it finds as a matter of fact that the mark was placed on the ballot by the voter, or by any other person to his knowledge, "with intent that such ballot shall afterwards be identified as the one voted by him." But by the construction placed by the majority of the court on the above-quoted clause in section 31, if official ballots, not indorsed in exact conformity with the statute are found in the box, they are to be rejected peremptorily, although the ballots were furnished by the public officials, and were voted without knowledge of any imperfection therein, and without any intent to violate the statute. It may be safely assumed that the Legislature never intended to make such a distinction between the two cases.

Cases have been cited from the courts of other states holding that where election laws prescribe that ballots of a certain description shall not be counted, the statute must be followed. In the view I take of the meaning of our statute, these decisions are irrelevant to the discussion. The statute, in my opinion, does not prohibit the counting of the ballots in question. The mistake in the number of the election district indorsed on the ballots may, to a limited extent, have enabled bystanders to judge how the elector voted. But this was the result of an accidental and unforeseen error in the distribution of the ballots, for which the elector was in no way responsible. To reject these votes on the ground that the policy of a secret ballot was thereby invaded, would be subordinating the right of suffrage to an unanticipated incident, not contemplated or provided for by the Legislature. It does not mitigate the injustice of the judgment in this case to say that it is the majority of votes, as ascertained in the manner provided by law, by which elections are to be determined. This rule, which no one disputes, does not absolve courts from the duty to seek a construction of the statute which will prevent a forfeiture of the highest political right possessed by the citizen under the Constitution, when, as in this case, he has been guilty of no wrong, and the fault was committed by the officers of the State. This decision disregards the rule, hoary with age, that penal provisions in statutes are to be strictly construed against the State and in favor of the citizen. Statutes in derogation of liberty or property are subject alike to the operation of this benignant principle. Is it less important to protect the right of the citizen in the exercise of the suffrage? This decision defeats the will of the majority, and subverts, in the particular case the foundation principle of republican government; and this, upon a narrow, technical, harsh, and unnecessary construction of the law. In place of protecting the right of suffrage, it destroys it. It takes hold of an unforeseen and accidental incident, and builds upon that a forfeiture by inference and construction. This decision opens the way for frauds upon the suffrage, wide-reaching in their effects. In 1884 the electoral vote of this State was cast by elect-

ors who received a plurality of votes less than the number rejected by this decision. Corrupt officials can with reasonable safety tamper with the distribution of ballots, and allege mistake, which it will be hard to disprove. Having a firm conviction that this judgment is wrong, I cannot do otherwise than record my dissent.

Peckham, J., dissenting:

I dissent from the conclusions arrived at by the majority of my brethren in this case, but do not desire to express my views at any great length. The question, though, is of so much public importance that it seems incumbent upon me to give some of the reasons which compel my dissent. The facts are undisputed. Mr. Rufus T. Peck received more votes than any other candidate for senator in the twenty-fifth senatorial district, and a plurality of 380 votes over the next highest candidate for that office. By the judgment of this court this plurality is stricken out, and one of 870 is given to the relator. The ballots of 1,252 electors of that senatorial district, which were deposited on the day of election for Mr. Peck without the slightest objection in any of the election districts, are to be cast aside in one mass. The reason alleged is that a mistake was made in the distribution of the Republican official ballots, by which those bearing the indorsement of one election district were sent to another election district in the same town, and *vice versa*, so that, for instance, the indorsement on the ballots actually voted in the first election district of the town of Camillus bore the number of the second election district in the same town, while those for the second bore that of the first. The indorsement complied in all respects with the law, unless this error made the ballot worthless, and rendered it the duty of the inspectors of election to refuse to permit it to be deposited in the box, or, if deposited, to be counted. The ballots were voted in fact without any objection or challenge in a single instance by any human being, and were counted by the inspectors of election without a protest from any source. No one then supposed they were illegal or unofficial ballots. The county canvassers are now, by the judgment of this court, to be directed to disregard every one of them, and the result will be to reverse the action of the electors in that senatorial district, so far as this court can do it, and to cause a certificate of election to issue to one who in fact never was elected by a plurality of votes. It is not claimed that any but qualified voters voted at the election in this senatorial district, and it was conducted quietly, honestly, and fairly, so far as these papers disclose, without a thought of the danger impending over such election by a slight mistake in the distribution of these ballots, in regard to the commission of which not one of the men who voted them, so far as appears by the record, was in the least degree responsible. The mere statement of the proposition to reverse the result of an election under such circumstances and for such a cause is calculated to create in most minds a feeling that,

if actually consummated, gross injustice would thereby be done, and that no fair reading of any ballot law would permit its consummation. To utterly disfranchise hundreds of innocent legal voters because the employé or messenger of some public officer made a mistake like the one in question, seems to me to work a burlesque on the Ballot Act and its construction. Where any particular construction which is given to an Act leads to gross injustice or absurdity, it may generally be said that there is fault in the construction, and that such an end was never intended or suspected by the framers of the Act. A construction of the kind placed upon the Act here under discussion certainly tends to bring the law itself into contempt. This, I think, is a misfortune, for I believe the purpose of the Act to be most commendable, and, if it received a reasonable interpretation, its operation would be beneficent. The construction of this Act by the majority of the court is, as I believe, wholly unnecessary and (I say it with great respect) unreasonable. As to the proper meaning to be given these particular sections of the Ballot Act I concur substantially in the views expressed by Andrews, J. The general object and purpose of the Act may be learned from its title, being to promote the independence of voters at public elections, enforce the secrecy of the ballot, and provide for the printing and distribution of ballots at public expense. To these ends official ballots are to be provided by a public officer, with whom the names of all parties nominated for office are to be filed, and this officer is to see to the printing of such ballots. For the purpose of identifying the ballots as official, they are to be printed in a uniform way, upon the same kind of paper, and on the back of each ballot is to be printed in prescribed type the words, "Official ballot for ——" and after the word "for" shall follow the designation of the polling place for which the ballot is prepared, the date of the election, and a *fac simile* of the signature of the county clerk; and there is to be no caption for indorsement upon the ballot other than as above. These official ballots are to be distributed by the county clerk to the town and city clerks, and by them, on the day of election, to the various election polls in the town and city. If they are not furnished, then, under the provisions of the Act, unofficial ballots may be used. If the official ballots are furnished, they alone can be used, and no unofficial ballot can be deposited in the box or counted by the inspectors.

It seems to me plain that official ballots were furnished the various election districts in question here, and that they did not cease to be such official ballots because of the mistake described. The argument for the respondent is that these ballots were "not properly indorsed," and hence should not be received or counted within section 29. That section does not, in my judgment, embrace such a case. The ballot was "properly indorsed" when printed, for it had on it nothing but the words and figures provided for by statute. It had been printed at the pub-

lic expense by the proper public officer, or under his direction, and had been sent out for distribution according to the provisions of the statute, and had been brought to the polls by or under the direction of the town clerks respectively. Hence, when they were thus delivered, they still bore the characteristics of the official ballot, and were such ballots. The statute means that when official ballots are thus provided no unofficial ballot can be cast, and if cast shall not be counted. These official ballots did not become unofficial by this accident. It is said that, if this be the correct interpretation of the Act, then a way has been found by which to positively identify the kind of ballot each voter casts, and the law is in this way rendered wholly nugatory. This, however, is not, I think, the inevitable result. In the first place, we are bound to assume that public officers will, as a usual thing, honestly perform their official duties. Government could not be carried on were we to proceed on the assumption that every public officer is a criminal in disguise, and ready at the first opportunity to cheat, steal, or otherwise violate the law. Some reliance must necessarily be placed on average official integrity and intelligence. It would be highly improbable that any official would intentionally and corruptly perform the act which forms the mistake in this case. It would be a crime on the part of such official, and one of so highly hazardous a nature that few men who had been elected to responsible public offices could be found to run the risk of punishment, especially when the purpose to be subserved would be in most cases of so purely impersonal a nature. The officer also acts under the responsibility of his official oath, and with a knowledge that a willful violation of the statute subjects him to the danger of conviction for a felony. But, if all these safeguards are insufficient, not alone to prevent a mistake, but are even insufficient to prevent a willful violation of the Act, when the object is to so mark an otherwise official ballot that it may be known whenever such ballot is voted, yet the Act in such case provides for the proper proceeding. Under section 31 an inspector of election or watcher, during the canvass or immediately thereafter, may declare his belief that any ballot has been written upon or marked in any way, with the intent that it may be identified, and then the inspectors are to write their names on it, and it must be attached to the original certificate, and go to the county canvassers, where a means is provided for ascertaining the facts judicially. But the ballots are in the meantime counted. The only possible ground for giving any importance to the mistake in the distribution of ballots which occurred here is that, as a result of the mistake, every voter who voted one of these ballots was known, and he was known by reason of this distinguishing mark on his ballot. Those who voted these ballots might very well have had the opportunity of placing pasters inside them, and have in fact voted in a way opposite to that in which the outside of their ballots indicated, and in this way the mark

on the ballot would not necessarily show the way in which the elector voted. However, the mark on the ballot in this case was important for this purpose, or it was important for nothing. It was only important as a marked ballot, by which it might be determined what kind of a ballot an elector voted. The consequence of voting a marked ballot is provided for under the section (31) above spoken of. And, if it were marked pursuant to any scheme of the officials who were concerned in its distribution, such fact could be made to appear upon the judicial investigation. But a mere inadvertent mistake of an officer ought not to work such an extreme penalty as disfranchisement on innocent electors. There is no reason or justification, as it seems to me, to be found in the object or purpose of this Act for throwing out ballots voted as were these ballots. There is another view in which the Act may be considered. The directions not to count the ballots or permit them to be deposited in the box are given to the inspectors of election alone. If they violate the provisions of the Act, they lay themselves open to prosecution criminally. If they do count ballots which they ought not to, and so return a result which includes their counting, the board of county canvassers must canvass them, for such board is only a ministerial body, and simply foots up the aggregate result of the whole vote and declares the same. The state board is of the same nature. In this case the court compels the board of county canvassers to throw out votes actually received and counted by the inspectors without challenge or protest, and thus a different result is arrived at than the facts warrant. This the board has no right to do. It should be left for judicial inquiry, where facts and motive may be dealt with. I have read this statute with all the care and attention I could bestow upon it, with a desire to construe it in the light of its declared purposes, and with an earnest wish to effect and carry them out, but I am utterly unable to see how this can be done by the construction put upon it by a majority of my brethren. On the contrary, it seems plain to me that those purposes are endangered, if not frustrated, by a construction which, in my judgment, is unreasonable and unnecessary, and by which thousands of perfectly innocent electors may annually be disfranchised without fault on their part, and the will of the majority be thus set at naught. For these reasons I am compelled to dissent from the judgment directed by the court in this case.

Finch, J., concurs.

PEOPLE of The State of New York, *ex rel.*
William O. DALEY *et al.*, *Resps.*,

Frank RICE *et al.*, Composing the State
Board of Canvassers, *Appts.*

(.....N. Y.....)

1. Illegal acts of a board of county

NOTE.—The interesting and novel question as to the functions of a county clerk in respect to election returns, as well as the question of the right to mandamus to compel the canvassing board to dis-

canvassers in counting and rejecting votes will not justify a refusal by the county clerk to certify its returns where he is made by statute simply *ex officio* secretary of the board and charged with the duty of attesting its action.

2. A county canvassing board is not deprived of its power to make, certify, and return its canvass by the absence or refusal to act of the county clerk, who is by statute made *ex officio* secretary of the board and charged with the duty of attesting its action and transmitting copies of its statements to members of the state board; but in case of such absence or refusal the board may designate one of its own members secretary *pro tempore*, and he may lawfully certify and transmit statements, upon which the state board may legally act.

3. Mandamus will lie to compel the state canvassing board to disregard in its canvass a return which, although proper and valid on its face, is alleged without contradiction to contain the result of an illegal and erroneous canvass by a board of county canvassers in excess of its jurisdiction and in violation of its ministerial duties, and which if acted on will alter the result of the election.

4. Only qualified electors of a senatorial district may, although not themselves candidates for office, institute proceedings in the general term branch of the supreme court to compel by mandamus the Board of State Canvassers to disregard in its canvass an illegal return which has been sent up from such senatorial district.

(December 20, 1891.)

APPEAL by defendants from an order of the General Term of the Supreme Court, Third Department, affirming an order of a Special Term for Albany County directing the Board of State Canvassers to refrain from considering a return of the Board of County Canvassers for Dutchess County in making its canvass of the vote at a recent election for state senator. *Modified and affirmed.*

The proceedings were instituted at a special term of the supreme court upon affidavits showing among other things that the complaining parties were residents and electors of the Fifteenth Senatorial District, and alleging that they were entitled to have the votes cast for the office of senator in each and all of the counties composing that district correctly and lawfully estimated and stated by all boards and officers in and of the said several counties and of the State who are by law charged with the duty of estimating and stating said votes.

The further facts sufficiently appear in the opinion.

Meers. Isaac H. Maynard and Delos McCurdy for appellants.

Meers. William A. Sutherland, Matthew Hale and Joseph H. Choate for respondents.

Peckham, J., delivered the opinion of the court:

We are of the opinion that the relators had a sufficient interest in the matter before us to make the application, if it had been

made to the general term as the proper tribunal. It is a matter in which the public has an interest quite as great, perhaps, as the individual, and in such event any citizen has the right to invoke the proper judicial tribunal to compel the performance by a public officer of a public duty. It is alleged in the moving papers in this case that the paper on file in the secretary of state's office, purporting to be a certificate of the county canvassers of the county of Dutchess, of the result of the election for senator in that county, is erroneous, defective, and invalid. Several grounds are alleged in proof of such statement. The first is that the certificate is not signed or certified to by the county clerk of Dutchess County, acting as secretary of the board of county canvassers, nor was it certified and transmitted by such county clerk by mail to the governor, the secretary of state, or to the comptroller, or any or either of them. Hence the relators claim the paper was not a valid statement, certified to as required by law, and sent to the officers above named, and that the board of state canvassers had no authority in law to canvass the paper on that ground.

But other allegations are made in the papers attacking the correctness of the return. In the relators' papers it is alleged that the board of county canvassers threw out votes that had been counted for Mr. Deane for senator by the inspectors of election, and that they had also transposed votes canvassed by such inspectors, so that votes counted by inspectors for Mr. Deane were given to Mr. Osborn, and those counted for Mr. Osborn were given to Mr. Deane; and as a result of their improper and illegal acts it was charged that they had enlarged the plurality for Mr. Osborn from 92, which appeared upon the face and as a result of the certificates of the inspectors of election from all the county, to 194, and such result would elect Mr. Osborn senator by 14 plurality, instead of Mr. Deane.

In regard to the first objection to the certificate on file with the secretary of state, I do not think it valid. The county clerk, acting as the secretary of the board of county canvassers, of which board he is not a member, assumed to sit in judgment upon the action of that body. His duty is purely ministerial. If the statement correctly sets forth the action of the board, such statement is to be certified as correct and attested by the chairman and secretary of the board, and a copy thus certified and attached is to be delivered to the county clerk to be recorded in his office. It is wholly immaterial to the secretary whether the board has done its duty in a valid way or not. The board takes that responsibility, and the secretary is simply to attest the action which the board has in fact taken. In this case it is alleged by the

relators that the board threw out votes it ought not to have thrown out, and counted votes it had no right to count, and hence the county clerk was justified in his refusal to certify. This is a great mistake. The statute does not call for the views of the county clerk acting as secretary of the board as to the validity or invalidity of its action. The statements which the board actually makes it is the duty of the secretary to attest, and the law casts upon him neither the obligation nor the responsibility of seeing that the board has discharged its duty in a manner consistent with his views of the law.

The question arises as to what course may be validly taken in case a secretary of the board refuses to perform his duty. Is the only remedy by mandamus to compel him so to do? And until he does so sign the statement, can nothing further be done in the way of completing the canvass in the county where such secretary resides? In a word, does the secretary *ex officio* control the situation, and has he the power to prevent the further execution of the election scheme as provided by law? Suppose he and his deputy both absent themselves from the meetings of the board, is the board powerless to proceed, or, having proceeded as far as counting the votes and writing out the statements, are they then stricken with paralysis, which nothing can cure but the appearance or the signature of one or the other of these officials? I have no doubt as to the answer to be given each of these questions. The remedy is not confined to mandamus to compel the secretary to sign. If his signature be absolutely necessary, his refusal to sign, and a temporary absence from the State, so that process could not be served upon him, would paralyze the whole election machinery from that time. Upon the contention of the relators, such an outcome is by no means fanciful. The secretary assumes a supervision over the action of the board of canvassers, and, if in any respect it be in his opinion illegal or improper, he refuses to attest the statement of the result of such action, and, in order to be entirely safe, absents himself from the office, or goes where he cannot be found, or steps into another State, and the result would be that nothing further can be done. I am quite clear nothing of this kind results from the wording of the statute providing that the county clerk shall act as secretary of the board, and that the statements shall be certified as correct and attested by the chairman and secretary, and a copy, thus certified and attested, shall be delivered to the county clerk to be recorded. The statute, so far as concerns this part, must be complied with as far as it can be, under the facts. If the county clerk do not appear, and if his deputy be also absent, I have no doubt of the power of the board to appoint a secretary in

regard returns which on their face are proper and valid, make this a desirable companion case to the one preceding.

For prior cases in this series about mandamus in election contests, see *Fleming v. Gutarie*, 3 L. R. A. 53, and *note*, 32 W. Va. 1; *Goff v. Wilson*, 3 L. R. A. 58, 32 W. Va. 363; *Biggs v. McBride*, 5 L. R. A. 115, 17 Or. 640; *Lawrence v. Ingersoll*, 6 L. R. A. 808, 88 14 L. R. A.

Tenn. 52; State v. Atlantic City, 8 L. R. A. 607, 22 N. J. L. 332; *People v. New York Inf. Asylum*, 10 L. R. A. 381, 122 N. Y. 180; *Maynard v. Kent County Bd. of Canvassers*, 11 L. R. A. 332, 84 Mich. 228.

See also *notes* on mandamus with cases of *Ex parte Hurn* (Ala.) 13 L. R. A. 120; *People v. Bloomington Twp. Comrs. of Highways* (Ill.) 6 L. R. A. 161; *United States v. Hall (Mackey)* 1 L. R. A. 733.

their place to perform the duties which appertain to that office. And if the secretary appear, but refuse to perform his legal duty as secretary, (a mere clerk of the body for which he is appointed,) I think the body has power to designate one of its own members as a proper officer to attest, under its direction, the correctness of the statements it has caused to be made. It is for purposes of identification that these signatures are required. The object is to secure incontestable evidence that the paper to be acted upon officially by any public body thereafter is the paper, or a true copy of the paper, which was actually before the board, and that it truly embodies the result of the action of such board. Ordinarily this purpose is accomplished by the signature of the chairman and of the secretary *ex officio*, but, if the latter unlawfully refuse to certify, the certificate may be made by the secretary appointed by the board *pro tem*. The unlawful refusal stands as an abdication of the functions of secretary, the result of which should not be the necessary resort to the dilatory process of mandamus to compel the performance of a simple ministerial, yet at the same time public and important, duty. The delays incident to legal proceedings might rob the remedy of all possible efficiency, and thereby cause a failure of justice. Even a summary removal of the incumbent would have to be preceded by service of some kind of notice upon him, giving him an opportunity to be heard, and, if his whereabouts were unknown, the same could not be made. An immediate appointment of one of its own body to attest the correctness should be regarded as within the power of the board, and the attestation of such a secretary should be regarded as sufficient, because the best that could under the circumstances be done. In such cases the power to appoint exists as an inherent power of the board to canvass and certify its work. To be effective, the statute would have to use explicit language taking such power away.

The same reasoning applies to the subsequent steps. The secretary appointed by the board attested the statements, together with the chairman, and sent one each to the secretary of state, the comptroller, and the governor. A further statement certified by the chairman was delivered to the county clerk to be by him recorded as commanded by statute. This statement was not certified by the secretary *pro tem*, but it was attested by the chairman, and delivered by the secretary *pro tem*, to the county clerk. It was the duty of the latter, as we have seen, to attest and certify to it; and, if he did not, this might defer the right to demand its record in his office until it was certified or attested by the secretary *pro tem*. The statute makes it the duty of the county clerk, within five days of the adjournment of the board of county canvassers, to deposit in the nearest post-office, directed to the governor, the secretary of state, and the comptroller, each, one of the certified copies of the statement and certificate of votes prepared by him. It is further made the duty of the secretary of state to file in his office the certified state-

ments received by him from a county clerk, and to obtain from the governor and comptroller every such certified statement. It is the duty of the secretary of state to send for this certified statement, if it have not been forwarded within the time prescribed by statute, and the county clerk is directed to deliver such statement to the messenger on demand. The secretary of state sent such a messenger to the clerk of Dutchess County, and demanded a return, but it was refused, or, at any rate, not delivered. The state board is directed by the statute to proceed to make a statement and canvass the result upon the certified copies of the statements made by the boards of county canvassers. Thus the whole scheme of the statute clearly shows that it was enacted so as to secure before the Board of State Canvassers the physical presence of accurate copies of the papers which were in truth acted on by the boards of county canvassers, and to this end is directed all the machinery of certificates and attestations by chairmen, secretaries, and county clerks, and the forwarding of duplicate certified statements to the state officers named in the statute. If these various attesting officers do their duty as provided for by law, doubtless their certificates and signatures are the only proper evidence of the verity of the papers they certify to.

The question in this case is whether the refusal of the county clerk to sign as secretary of the board of county canvassers, and his refusal to send to the state officers properly certified statements as required by law, shall prevent the state board from making any canvass. Upon the refusal of the county clerk, the proper statements, attested as stated, were sent by the secretary *pro tem*, to the state officials. There is no question that this statement in the office of the secretary of state is one that was certified by the chairman and secretary *pro tem*, and there is none that it truly embodies the action of the board of canvassers; but it is further urged that, inasmuch as the county clerk has not sent the return to the office here as county clerk, no action can be taken upon it and no canvass can be made. This is, as we think, an erroneous view. When these officials refuse to perform their duty, they cannot thereby prevent the further proceeding towards a completion of the canvass. This is a question where time is of the utmost importance, and any delay which might last for thirty days might have the most disastrous result upon the whole administration of the state government. In truth, it might actually paralyze it, or it might change the *personnel* of every state office. The county clerks have by law until the last day of November in which to send their certified statements. If not then received, the secretary of state sends for them. If then refused, and legal proceedings alone can be resorted to, delays naturally occurring and lasting for thirty days bring the time to the commencement of the new year, and the canvass may perhaps have gone on without the particular statement, and an entirely different result secured than otherwise would have been; or if the canvassers are to await the arrival of all the

returns, their own term of office may expire by the first of the year, and their successors be unable to take possession or do an official act without a certificate, or, at least, without questions and complications that ought not to exist. The real statements or the actual and honest copies thereof sent to the state officers are the important thing to be considered, and, when these ministerial officials refuse the performance of their duties, the next best way to authenticate and prove the truth and genuineness of the statements can, in our judgment, be taken; and in this case we think that, under all the facts, the steps taken to certify and authenticate the statements were valid, and the proceedings by which they were sent to and received by the secretary of state and the other state officers were sufficient to entitle them to be filed and considered by the Board of State Canvassers as the properly certified result of the canvass of the board of county canvassers.

The other ground for directing the State Canvassers to omit to canvass this return remains to be considered. The papers, in substance, allege that the board of county canvassers illegally canvassed the result of the returns from the inspectors of election in the whole county, and made up its own canvass in opposition to such returns, and as a result gave 92 more plurality to Osborn than by the returns of the inspectors he was entitled to; and resulting in an apparent plurality of 14 votes in the senatorial district in favor of Mr. Osborn. These allegations are nowhere denied in the papers used in opposition to the application for a mandamus. Mr. Mylod simply gives a history of the events as to the refusal of the secretary to sign and what then took place. The statement of the canvass, as actually made, is attached to the papers in opposition; but there is no explanation or contradiction as to the manner of arriving at the actual result, as alleged in the moving papers. The whole case stands on that return as a legal and valid one. Treating the paper on file in the office of the secretary of state in the same way as if it were certified by the county clerk, and sent from his office and duly received and filed in the office of the secretary of state, the question presents itself as to the proper course in such case. We would then have a return which was on its face proper and valid, but in regard to which allegations were made that it was the result of an illegal action on the part of the county canvassing board, by which that board departed from its appropriate sphere as a ministerial body, and, in excess of its jurisdiction, proceeded to make an invalid canvass, and the return on file embodied the result of such illegal canvass. Upon these facts, standing uncontradicted, we think the court below, in its proper branch, would have the power to command the State Canvassers to canvass without regard to such a return. As it contained the result of an illegal and erroneous canvass by the board of county canvassers in excess of its jurisdiction, and which thereby would alter the result of an election, the court should not permit it to be canvassed. As to the allegations of the manner of the making

of the return by the county board, the State Board could not itself inquire into them. If another return should be duly sent to the board, properly authenticated, and containing the result of the legal action of the board of county canvassers, the State Board could canvass it. We think, as a result, that the order for the writ, and the writ itself, should be modified by striking out the provisions requiring a return to be certified by, and to come from, the county clerk of Dutchess County, and issued under his seal, and, *as so modified, the order is affirmed.*

All concur.

PEOPLE of the State of New York, *as*
rel. Franklin D. SHERWOOD, *Resp't.*,

v.

STATE BOARD OF CANVASSERS, *App't.*

(.....N. Y.)

1. Park commissioners are officers under a city government, within the meaning of a constitutional provision that such officers shall be ineligible to the Legislature, where the power to appoint, suspend, or remove them is vested in the mayor and common council by an Act authorizing a public park in the city, and they are required to take the constitutional oath of office and to give bond, are prohibited from holding

NOTE.—Who are city officers.

The commissioners of the department of public instruction of the city of New York, under the Act of 1871, although appointed by the mayor, are not servants or agents of the corporation, but public or state officers for whose acts or negligence the city is not responsible, as they are not amenable to the corporation in any respect. Though formally constituted a department of the municipal government, their duties were not local or corporate but related and belonged to an important branch of the administrative department of the state government. *Ham v. New York*, 70 N. Y. 459.

Commissioners of public charities and corrections in the city of New York act as public officers rather than as agents of the city for its profit or advantage as a corporation, and therefore the negligence of their employes does not create a liability against the city. *Maximilian v. New York*, 62 N. Y. 160.

Park commissioners having, under N. Y. Laws of 1873, chap. 613, as amended by Laws of 1874, chap. 829, exclusive control of all public parks, streets, etc., within certain territory annexed to the city of New York, and who are appointed by the mayor and may be removed by him, represent the city as much as a department of public works would if charged with the same duties; and the city is therefore responsible for the condition of the streets under their control. *Ehrgott v. New York*, 86 N. Y. 364.

Commissioners appointed by statute to improve the Gowanus Canal in the city of Brooklyn, the expense to be assessed on the property benefited, are not officers of the city for whose acts the city is responsible. *New York & B. S. Mill & L. Co. v. Brooklyn*, 71 N. Y. 560.

The board of trustees of Brooklyn bridge under the New York Act of 1875, which made the bridge the property of the cities of New York and Brooklyn, represented and acted for the two cities as their agents and were entitled to all the immunities of public agents in respect to the negligence of

any other city office, and are given the power of eminent domain and to pass necessary ordinances for the government of the park.

2. That the powers and duties of park commissioners are regulated by general law and that consequently they do not act under the direction or control of the city government or of any of its officers, does not deprive them of the character of city officers.

3. One who is by the Constitution rendered ineligible to hold an office will not be granted a writ of mandamus to compel the canvassing board to issue him a certificate of election although it is their plain ministerial duty to do so.

4. A court is not precluded by a constitutional provision making each branch of the Legislature the judge of the "elections, returns, and qualifications of its own members," from declaring as a basis for refusing its aid to an applicant for a writ of mandamus to compel a canvassing board to give him a certificate of election to that body, that he is ineligible for the office, when the facts showing the ineligibility are undisputed.

5. The rights of relator alone, and not those of the public, will be considered upon an application for a writ of mandamus in the name of the people at the relation

of a candidate for office to compel the issuance of a certificate of his election; the people are in such case merely formal parties.

6. The power of the state canvassing board is confined solely to ascertaining the result of the figures in the returns, and its duty is to declare such result according to law. It cannot inquire into the eligibility of candidates or declare a minority candidate elected because of his competitor's ineligibility; nor can it consider or act upon any extraneous papers or information beyond that contained in the returns themselves.

(*Finch and Andrews, JJ., dissent from propositions 3-5.*)

(December 22, 1891.)

APPEAL by defendant from an order of the General Term of the Supreme Court, Third Department, affirming an order of a special term held in Albany County commanding defendant to issue a certificate of election to relator as state senator without considering certain papers and statements relating to the eligibility of relator to hold such office, which had been forwarded to defendant for the purpose of influencing its action. *Reversed.* The facts are stated in the opinion.

laborers employed by them. *Walsh v. New York & B. Bridge Trustees*, 96 N. Y. 427.

Water commissioners of the city of New York appointed under the New York Act of 1884, though appointed by the State, were held to be the agents of the city for whose careless and unskillful construction of a dam the city was liable to a person whose land was thereby injured. *Bailey v. New York*, 3 Hill, 538, affirmed 2 Denio, 433.

Commissioners for building the new Croton Aqueduct for New York city, appointed by the Act of 1883, chap. 490, are city officers, and therefore their employes are included within the civil service of the city and not of the State. *People v. Civil Service B. & E. Bds.* 41 Hun, 287.

The members of a board of public works who have general charge of city buildings and property and of contracts for public works and many things of a legislative character generally belonging to the common council of cities are city officers who cannot be appointed by the Legislature itself under a constitutional provision that city officers shall be elected or appointed as the Legislature shall direct. *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 108.

The board of public works of the District of Columbia, although subject to the legislative assembly and also Congress, and although the members composing it are nominated by the president and cannot be removed except by him, constitute a part of and an agency of that municipal corporation, which is liable for the acts or omissions of the board. *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440.

The fact that city assessors also act in the capacity of county assessors, and receive pay as such, does not prevent the city from paying them additional compensation under a charter providing for compensation "to be paid to officers required by the charter, by-laws, or ordinances." *Fisher v. Wilkesbarre*, 6 Kulp, 201.

An assessor elected, under Iowa Code, § 390, for that portion of a township which constitutes a city is a township and not a city officer although his duties are confined to the city limits. *Kinnie v. Waverly*, 42 Iowa, 486.

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A subpoena server to the district attorney of New York is an officer of the city and county within the meaning of N. Y. Laws 1871, chap. 583, authorizing the board of apportionment to fix the salaries of such officers. *Reilly v. New York*, 22 N. Y. S. R. 861.

Whether or not the terms "officers and employes of the city and county government" within the meaning of a statute authorizing a board of apportionment to regulate salaries, include judicial officers, was said to be doubtful in *Quin v. New York*, 44 How. Pr. 206, affirmed 53 N. Y. 627.

Any doubt on this question was settled by a decision that clerks of the district courts of the city of New York are not within the provisions of such a statute which was declared to apply only to officers connected with the political organization of the city government, and not to judicial officers embraced within the judiciary system of the State. *Whitmore v. New York*, 97 N. Y. 21, affirming 5 Hun, 195.

The same rule applies to the clerks and deputy clerks of the courts of common pleas. *Landon v. New York*, 7 Jones & S. 467.

But the clerk of the grand juries of the courts of oyer and terminer and general sessions in the county of New York is an officer of the county government if he is an officer at all within the meaning of such an Act. *Dolan v. New York*, 6 Hun, 508.

So an interpreter of the district court of the city of New York is an officer of the court and not of the city government, and therefore a prohibition in the city charter against holding two offices at the same time does not prevent him from holding the office of inspector of elections. *Goettman v. New York*, 6 Hun, 123.

In conflict with some of the above decisions as to court officers is a decision that a police justice, although a judicial officer, is also a municipal officer and not one of those judicial officers mentioned in Cal. Const., art. 22, § 10, who must be elected at the time and in the manner in which state officers are elected. *People v. Henry*, 62 Cal. 557.

For other interesting cases on elections under the New York laws, see *State v. Canvassers ante*, 624, and *People v. Rice ante*, 643.

R. A. R.

Messrs. Isaac H. Maynard and Delos McCurdy, for appellant:

The Constitution, art. 3, § 8, provides that no person shall be eligible to the Legislature who, at the time of his election, is, or within one hundred days previous thereto has been, an officer under any city government.

An office is a public charge or employment, and the term seems to comprehend every charge or employment in which the public are interested.

Re Wood, 2 Cow. 29, note; *People v. Comptroller*, 20 Wend. 598; *Rouland v. New York*, 88 N. Y. 876.

The commissioners were authorized to exercise a portion of the functions of government; they were intrusted with the power of taking private property for public use by right of eminent domain and authorized to receive and expend a large amount of money in the construction of a public improvement.

People v. Nostrand, 46 N. Y. 881; *People v. New York*, 77 N. Y. 503; *People v. Lee*, 28 Hun, 471. See also *Ham v. New York*, 70 N. Y. 459; *Dannat v. New York*, 6 Hun, 88, affirmed 66 N. Y. 585; *Maximilian v. New York*, 62 N. Y. 160.

Where the officer is appointed by, and may be removed by, the city government, and his duties relate to city purposes as distinguished from the functions of general state government, he is a city officer.

People v. Kelly, 76 N. Y. 487; *Walsh v. New York & B. Bridge Trustees*, 96 N. Y. 487; *Elrigott v. New York*, 96 N. Y. 274; *New York v. Bailey*, 2 Denio, 433; *People v. Civil Service, S. & E. Boards*, 41 Hun, 287.

If the relator is ineligible to the office of senator, every vote given for him at the election is absolutely void.

Gulick v. New, 14 Ind. 103, 77 Am. Dec. 49, citing *Grant, Corp.* 107; *Biddle v. Willard*, 10 Ind. 62.

The term "eligible," relates to capacity of holding as well as capacity of being elected to an office.

Carson v. McPhetridge, 15 Ind. 331; *Price v. Baker*, 41 Ind. 572, 13 Am. Rep. 346.

If a majority of the electors, having notice that a candidate is ineligible to an office, vote for such ineligible candidate, the candidate having the next highest number of votes who is eligible shall be declared elected.

Stewart v. Hayes, 8 Chicago Leg. News, 117; *Cushing, Law & Practice of Legislative Assemblies*, pp. 66, 67; *Saunders v. Haynes*, 13 Cal. 145; *Gulick v. New*, 14 Ind. 97, 77 Am. Dec. 49; *People v. Clute*, 50 N. Y. 461; *Gosling v. Veley*, 7 Q. B. 406.

The State Board of Canvassers may be legally informed of the fact that the candidate is ineligible.

It is for the Board, when the arithmetical computations have been completed, to ascertain whether any of those voted for are constitutionally disqualified, and if they find such to be the fact, to disregard such unconstitutional votes just as if they had not been cast.

State v. Newman, 8 West. Rep. 727, 91 Mo. 445; *People v. Straight*, 128 N. Y. 545.

A writ of mandamus cannot properly be issued to compel the delivery of a certificate of election to an office if it appears upon an 14 L. R. A.

application therefor that the person to whom it is sought to compel a delivery of the certificate was not duly elected to the office or could not lawfully be voted for at the election.

Magee v. Calaveras County Supra, 10 Cal. 876; *Peters v. Board of State Canvassers*, 17 Kan. 865; *Rose v. Knox County Comrs.* 50 Me. 248; *Sherburne v. Horn*, 45 Mich. 150; *State v. Albin*, 44 Mo. 348; *State v. Robinson*, 1 Kan. 17; *State v. Whittemore*, 11 Neb. 175.

Mr. Eugene Burlingame, for respondent:

The Board of State Canvassers acts ministerially, and cannot act on any evidence outside of the certified statements.

People v. Cook, 8 N. Y. 80, 59 Am. Dec. 451; *People v. Chemung County Bd. of Canvassers*, 126 N. Y. 392.

The Constitution provides that "each House shall . . . be judge of the elections, returns, and qualification of its own members."

N. Y. Const. art. 3, § 10.

No statute of the State can or has attempted to give the State Board of Canvassers, or any court, judicial power to determine that question.

6 Am. & Eng. Encyclop. Law, 283, note 1; *People v. Hall*, 80 N. Y. 117.

The threat and purpose to make a wrong determination, with no power in the courts or elsewhere to correct it after final adjournment of the board, was sufficient to warrant the issuance of the writs, and the orders appealed from should be affirmed.

People v. Chemung County Bd. of Canvassers, supra; *People v. Greene Supra*, 12 Barb. 317; *People v. Contracting Board*, 27 N. Y. 378; 6 Am. & Eng. Encyclop. Law, 370.

Mr. William A. Sutherland, also for respondent:

The Board of State Canvassers being about to consider other papers bearing upon the election than the statutory returns, were properly stayed by preliminary order; and the writs of mandamus were afterwards properly issued; unless their claim of a right to adjudicate upon these extraneous papers be sound.

State v. State Canvassers, 36 Wis. 498; *People v. Board of State Canvassers*, 16 Fla. 1; *State v. Lawrence*, 8 Kan. 95; *State v. Hayne*, 8 S. C. 367; 14 Am. & Eng. Encyclop. Law, p. 198, note 1, p. 200, note 1.

The Board of State Canvassers is a ministerial body not invested with judicial functions. It must tabulate and declare the result of an election from, and only from, the certified statements of the county canvassers.

People v. Cook, 8 N. Y. 67, 59 Am. Dec. 451; *Gatling v. Boone*, 98 N. C. 573; *Peoples v. Davie County Comrs.* 82 N. C. 385; 14 Am. & Eng. Encyclop. Law, pp. 198, 199; *State v. State Canvassers* and *People v. Board of State Canvassers, supra*.

The courts have no authority in any proceeding to inquire into the eligibility of a person elected to the Legislature.

People v. Hall, 80 N. Y. 117; Const. art. 3, § 10.

A park commissioner does not discharge the duties of any office.

Astor v. New York, 62 N. Y. 567; *People v. McDonald*, 69 N. Y. 362.

The Legislature has frequently said that a

park commissioner may be constitutionally appointed by the Legislature, which appointment would be in violation of art. 10, § 2, if he were "an officer under any city government."

Messrs. Matthew Hale, Joseph H. Choate and J. F. Parkhurst also for respondent.

Earl, J., delivered the opinion of the court: In 1891 the Legislature passed the Act (chap. 308) entitled "An Act to Authorize the Selection, Location, and Acquiring of Certain Grounds for a Public Park in and near the City of Hornellsville, and to Provide for the Maintenance and Embellishment thereof." That Act provides for the appointment of a board of park commissioners, to consist of six persons; and in the month of May the relator, Franklin D. Sherwood, was duly appointed one of such commissioners. He duly qualified by taking the official oath and giving the official bond therein required, and has ever since acted as such commissioner. At the last election he became a candidate for senator in the twenty-seventh senatorial district of the State, and he claims to have received a majority of the votes cast for senator in that district, and that he was eligible to the office, notwithstanding the provision of section 8 of article 3 of the Constitution, which provides that "no person shall be eligible to the Legislature who at the time of his election is, or within one hundred days previous thereto has been, a member of Congress, a civil or military officer under the United States, or an officer under any city government. And if any person shall, after his election as a member of the Legislature, be elected to Congress, or be appointed to any office, civil or military, under the government of the United States or under any city government, his acceptance thereof shall vacate his seat." The appellants claim that he was ineligible under this constitutional provision, and whether he was or not is the important question now to be determined. The question has attracted much public attention. It is fairly involved in this case, and the interests of the public require that we should meet and determine it, if it is within our judicial competency to do so. It is a pure legal question, depending upon undisputed facts, and it would be quite unfortunate to have this case go through all the courts, and to leave the most important and vital matter in it undecided.

There can be no doubt, it seems to me, that the relator holds a public office. He was required to discharge duties, not for his own benefit, not for the benefit of private individuals, but for the public. He was required to take the constitutional oath of office, and to give a bond for the faithful discharge of his duties, and he and his associates were clothed with the power of eminent domain. That, under such circumstances, he was a public officer, has never been questioned anywhere, so far as I can find. *Case of Wood*, 2 Cow. 29; *People v. Comptroller*, 20 Wend. 598; *People v. Nostrand*, 46 N. Y. 381; *People v. New York*, 77 N. Y. 503; *Rowland v. New York*, 89 N. Y. 376. Being a public officer, it is next to be determined whether he was an officer under the city government, within the meaning of the

Constitution. The Act provides in section 1 that there shall be "in and for the city of Hornellsville" a board of park commissioners, to consist of six competent persons. The board is thus constituted for the city; and the Act further provides that the members thereof shall be appointed by the mayor of the city, by and with the consent of three fourths of the members of the common council; and the mayor may suspend and may also remove any member of the board, by and with the approval of the common council. It is further provided that no person who holds "any other city office" shall hold the office of park commissioner, and that upon the appointment of a park commissioner to "any other city office" his office of park commissioner shall be vacated. Every park commissioner is required to give a bond to the city for the faithful discharge of his duties, which is to be approved by the mayor, and the official oath and bond are to be filed with the city clerk. By section 2 the park commissioners are required to appoint a treasurer, who is to give a bond to the city, to be approved by the common council. They are authorized to select and locate lands for a city park, and to take them by purchase, gift, or condemnation; and all such lands are to be taken in the name of the city, and to be paid for out of the city funds, and to be part of the city territory. They are clothed with the exclusive power to govern, manage, direct, lay out, and regulate the park, to appoint engineers, clerks, police, and other necessary officers, and prescribe their duties and fix their compensations, and generally in regard to the park they are clothed with all the power and authority possessed by the common council of the city. They are also clothed with power to pass such ordinances as they may deem necessary for the government of the park, not inconsistent with the ordinances of the city which ordinances are required to be published in the official paper of the city; and all persons offending against such ordinances may be punished before any magistrate of the city by fine or imprisonment. It is provided further that a special election shall be held in the city for the purpose of determining whether it shall issue the bonds and acquire the park as provided in the Act.

It seems to me too clear for dispute, in view of these provisions, that the park commissioners are officers under the city government. They hold their offices by appointment of the city government, and therefore under the city government. All their duties relate to its interest and welfare, and they are actually set in motion by a vote of the tax-payers of the city. They are certainly not state officers, and, if they are not city officers, what are they? I believe it was never doubted that the park commissioners of the city of New York and of the city of Brooklyn are city officers of those cities, and so we held as to the park commissioners of the former city in *Ehrpott v. New York*, 96 N. Y. 274. Would anyone seriously contend that a New York or Brooklyn park commissioner would be eligible under the Constitution to the Legislature? There could be no reason for holding one of them eligible which would not be equally applicable to the commissioner or deputy commissioner of public works or the

chamberlain of the city of New York. It is no answer to these views that the powers and duties of these commissioners are regulated by law, and thus that they do not act under the direction or control of the city government or of any of its officers, and that, therefore, they are, in a certain sense, independent officers. This is generally true of all public officers, from the mayor of a city to the supervisor of a town, through all the grades to a town constable. Their powers and duties are regulated by law. The route in which they shall travel is prescribed by law, and, unless they are specially subjected to the control of a superior officer, they act independently, subject to no control except the rules of law and the commands and judgments of the courts. And nevertheless the mayor of a city is a city officer, and the supervisor and constable of a town are town officers. Because the duties of municipal officers are regulated by statute, the municipality of which they are officers is not responsible for their misfeasance or nonfeasance, except in cases where they act as the agents of the municipality in the discharge of duties imposed by law upon it. And so we hold in *Maximilian v. New York*, 62 N. Y. 160, and *Ham v. New York*, 70 N. Y. 459. Although the officers mentioned in those cases were undoubtedly officers under the city government, the city was held not to be responsible for the misfeasance of their subordinates, because the doctrine of *respondent superior* did not apply to those cases. In them the court followed the case of *Lorillard v. Monroe*, 11 N. Y. 392, 62 Am. Dec. 120, where it was held that the assessors and collectors are not in a legal sense the agents of a town in its corporate capacity in the assessment and collection of taxes, and the town is not responsible for any mistake or misfeasance by them in the performance of their duties. And the assessors and collectors are town officers, and are so described in the Revised Statutes. It certainly cannot be doubted that the Legislature was competent to make these park commissioners city officers, and whether or not it intended so to do must be determined by the language and provisions of the Act. Here the legislative intention is manifested by the circumstance—which must usually be controlling—that the commissioners are required to be appointed by the mayor and common council, and the provision in the Act that no person holding “any other city office” shall be eligible to the office of park commissioner, and that, if a park commissioner be “elected or appointed” “to any other city office,” his position as park commissioner shall thereby become vacant. It is, of course, possible that park commissioners could be so constituted by the Legislature as not to become city officers, but such is plainly not the effect of this Act. So we reach the conclusion that the relator was not eligible, under the Constitution, to the Senate. The term “eligible” relates to the capacity of holding as well as to the capacity of being elected to the office. *Carson v. McPhetridge*, 15 Ind. 327. Therefore he could not be elected to hold the office of senator. He violated the constitutional provision in seeking the votes of the electors, and they violated it in voting for him. As matter of constitutional law, any certificate

the appellants could issue to him would be an absolute nullity, and the only use he could make of it would be to violate the Constitution and do a wrong by intrusion into an office which he has no right for one moment to hold.

So we come to the important question underlying this case,—ought the court to grant a mandamus to compel the issuing of a certificate of election to one who has no right under the Constitution to the office? Can the relator come into a court of law, and ask its aid in his violation of the Constitution and his proposed intrusion into the office of senator? Suppose he came into court a confessed alien or nonresident of the State; would the court looking merely at the duty of the state canvassers under the law, stretch out his strong arm to help him? Well-established principles of law and a strong current of authority require these questions to be answered in the negative. A party can demand a mandamus only to secure or protect a clear legal right, never to accomplish a wrong. In High's Extraordinary Legal Remedies, § 40, it is said: “The writ of mandamus is never granted for the purpose of compelling the performance of an unlawful act, or of aiding in carrying out an unlawful proceeding;” and in section 14: “It is a fundamental principle of the law of mandamus that the writ will never be granted in cases where, if issued, it would prove unavailing;” and in section 26: “It is important that a person seeking the aid of a mandamus for the enforcement of his rights should come into court with clean hands.” I do not attribute to the relator any actual wrong motive or intent in anything he has heretofore done. I simply mean to characterize his acts as they are measured by the Constitution and the laws. In *Peters v. State Board of Canvassers*, 17 Kan. 385, it was held that a mandamus would not be issued against the board of state canvassers to compel it to canvass the votes and to issue to the relator a certificate of election where he had been elected a judge at a time when no election could properly be held. See also *Rose v. Knox County Comrs.* 50 Me. 243; *Sherburne v. Horn*, 45 Mich. 160, and *State v. Whittemore*, 11 Neb. 175. In *State v. Albin*, 44 Mo. 348, an election for judge was held, which was not preceded by a registration of voters, as required by law; and it was held that the election was invalid, and that the court would not by mandamus compel the county court to issue a commission to a judge who claimed to be elected although the functions of the county court were purely ministerial. The court said: “This court will not issue a peremptory writ of mandamus unless the relator shows that he has a good title or a perfect right to the remedy he demands. He can derive no right from an illegal or invalid election.” In *State v. Stevens*, 28 Kan. 456, it appeared that at an election held in the County of Harper for county officers and for the location of the county seat the returns made to the canvassing board showed a vote of 2,947, while there were in fact only about 800 legal voters in the county. An application was made for a mandamus to compel the board to canvass these returns and declare the result, and it was held that, notwithstanding the fact that the duties of the board were mainly ministerial, and that it

was not charged with the duty of inquiring into the reception of illegal or the rejection of legal votes, or fraudulent practices at the election, the court would, in the exercise of a sound discretion, not even apparently sanction so gross an outrage on the purity of the ballot-box by issuing a mandamus to compel, in the name of a technical compliance with duty, the canvass of the returns under such circumstances. In *State v. Newman*, 91 Mo. 445, 8 West. Rep. 727, the relator was a candidate for mayor of Pierce City at the April election of 1886, and the respondents were the aldermen of that city. An ordinance of the city made it the duty of the aldermen, on a designated day after each election, to canvass the returns, to determine who had been elected to the various offices, and to direct the clerk to issue certificates of election to the persons declared elected. In that case the aldermen determined that the relator had received the highest number of votes, but declined to direct the clerk to issue a certificate of election to him, and he sought by the writ of mandamus to compel them to do so. The law declared that no person should be mayor of a city of the fourth class unless he was an inhabitant of the city for one year next before his election. On the pleadings it was admitted that the relator did not possess that qualification, and the court said: "A peremptory writ of mandamus will not be issued unless the relator shows a clear right to the remedy which he asks. The election of a person to an office who does not possess the requisite qualifications, gives him no right to hold the office. As, by reason of his disqualifications, the relator was not entitled to hold the office, surely he has no right, at the hand of the court, to be armed with a certificate of election,—evidence of title to that to which he has no right." And the writ of mandamus was denied.

Inspectors of election are mere ministerial officers, and, if an applicant to be registered makes the proper statement and the oath or affirmation, his name must be added to the list of voters, and the inspectors have no discretion or right to refuse to add it. The law makes it their duty to do so; and yet, if a person who has been refused should apply to the court for a mandamus against the inspectors, and it should there appear that he had no right to be registered, and was not in fact a qualified voter, would the court compel the inspectors to register him, and thus place him in a position where he might cast an illegal vote? Would it listen to his claim that he ought to be registered, and thus clothed with the apparent right to vote, so that he could present his vote on the day of election, and thus test his right to vote. So, when a voter at an election offers his vote to the inspectors, and, if challenged, takes the preliminary oath, and, after answering fully the questions touching his right to vote, offers to take the general oath, it is the absolute duty of the inspectors to receive his vote. *People v. Pease*, 27 N. Y. 45; *Goettehus v. Mathewson*, 61 N. Y. 420; *People v. Bell*, 119 N. Y. 175. If, in such a case, the inspectors refused to take his vote, and he is a legal voter, he can compel them to take it by mandamus. But suppose,

upon his application for a mandamus, it should appear, upon facts not disputed, that he was not a qualified voter; would the court still compel the inspectors to take his vote, and thus permit the voter to commit a crime, for the sole reason that the law made it their duty to take the vote?

But it is claimed that we have no jurisdiction to determine that the relator was ineligible to the office of senator, because the Constitution, in section 10 of article 8, provides that each House of the Legislature "shall be the judge of the elections, returns, and qualifications of its own members." The courts cannot interfere with this jurisdiction of the Senate. Whatever may be determined here or elsewhere as to the election or qualifications of the relator, or the result of the election in the twenty-seventh senatorial district, when the Senate convenes, and not until then, it will have absolute jurisdiction of the whole subject, and may determine which of the two persons claiming suits therein was duly elected and qualified to sit therein; and it may determine that one was ineligible and that the other was not elected, and that thus there is a vacancy in that district calling for a new election. It is undoubtedly true that the courts cannot by quo warranto try the title to a legislative office; but this is not such a case. Here the relator comes into court, and asks its aid to clothe him with apparent title to an office, and by its affirmative action to remove obstacles which stand in his pathway in his proposed intrusion into the office; and upon the undisputed facts the court is able to see that he is ineligible, and it simply determines that it will not aid him; and in making such determination it in no way infringes upon the jurisdiction confided to the Senate. It simply exercises a jurisdiction which he has invoked. We would have substantially the same question before us if some elector in the twenty-seventh senatorial district had been the relator in this case instead of Sherwood. The same line of reasoning which I have used would answer his application for a mandamus.

This cannot be treated as in any sense a proceeding on behalf of the people. Nor can it, by amendment, be turned into such a proceeding. A writ of mandamus on behalf of the people in their sovereign capacity can be awarded only upon the application of the attorney general, or some district attorney, and the indorsement upon the writ must show that it was issued upon such application. Code, § 1993. And in such a case the name of no person need appear as relator in the proceeding. Here the writ was awarded upon the application of Sherwood, a private person, and he appears as relator. Code, § 1994. In such a case the proceeding is purely one to enforce a civil remedy, and the people are present merely as a formal party, and their presence is due to the survival of a form which has long since ceased to have any significance or utility. The real party in interest is the relator in such a case, and if he should die the proceeding would abate. High. Extr. Legal Rem. § 430 *et seq.* We need not, therefore, now determine what this court would do if the mandamus in this proceeding had been

awarded upon the application of the people through some officer authorized to represent them.

We agree that the Board of State Canvassers act ministerially, and that they have no power or jurisdiction to go outside of the returns of the county canvassers, or to institute an inquiry as to the eligibility of the candidates who were voted for by the electors. The question of eligibility is to be answered by reference to the law as well as the facts; and very wisely, as I think, they are not clothed with authority to determine that question. Much less have they authority to determine whether the minority candidate was elected. In the solution of that question is involved, not only the eligibility of the majority candidate, but the further question whether the voters voted for him knowing of his ineligibility, within the rules laid down in *People v. Clute*, 50 N. Y. 451. None of the officers clothed with the duty to canvass votes derive any power in a case like this to pass upon the eligibility of candidates, and to disregard votes cast for an ineligible candidate, from the following provision of section 21 of the Ballot Law of 1890: "Whenever a candidate for any office, whose name is printed on the official ballots, shall have died, shall be or become ineligible, or shall have withdrawn before election day, voters may use unofficial ballots in voting to fill the office for which such deceased, ineligible, or withdrawn candidate was nominated, and the name of the deceased, ineligible, or withdrawn candidate shall be considered as having been erased from the official ballot; but such unofficial ballot shall contain only the name of the person voted for in lieu of the deceased, ineligible, or withdrawn candidate, and under the designation of the office for which such person is a candidate." That provision was intended merely to enable voters, in the cases mentioned, to vote unofficial ballots, and it is only in case some candidate is voted for by an unofficial ballot that the name of the candidate on the official ballot is to be considered as having been erased. Here there were no unofficial ballots, and no candidates were voted for except those whose names were upon the official ballots. Nor does the Board of State Canvassers obtain power to make inquiry as to the eligibility of the relator by virtue of the following provision in section 843 of the Code: "Where an officer, person, board, or committee, to whom or to which application is made to do an act in an official capacity, requires information or proof to enable him or it to decide upon the propriety of doing the act, he or it may receive an affidavit for that purpose." As the State Canvassers have no jurisdiction to inquire as to the eligibility of the relator, they can have no official act to perform in reference thereto, and they can require no information or proof to enable them to enter upon that inquiry. If they are confined, as we hold they are, to canvassing the returns, and in the discharge of that duty to what lawfully appears in or upon the returns, then they can have no need of proof which will enable them to go back of or outside of the returns. I can imagine cases in which this provision would have application

to the State Board of Canvassers, one of which is where it is claimed that the returns are spurious or forged, or have been altered; and in that case they might take proof by affidavit to inform themselves as to the facts.

While, therefore, the State Canvassers were bound to canvass the returns from the twenty-seventh senatorial district, and to declare the result in compliance with the law, yet, for reasons which we have given, the court will not aid the relator. The action or non-action of the Canvassers may be an obstacle in his way, but the court will not by mandamus, in a case like this, when the facts showing his ineligibility are undisputed, assist him in removing the obstacle. He and his competitor may both present their cases to the Senate without either of them having a certificate of election, and that body will have jurisdiction to determine all the questions of fact and law involved in the matter. If it shall agree with this court that the relator was ineligible, and also find that his competitor was not elected, the result will be that a new election will have to be ordered in that district, and the electors there can then choose a person qualified to hold the office, and then they can be properly represented in the Senate. It is far better that they should be called upon to vote again than that the Constitution should be violated. The safety of our government and the success of our republican institutions depend upon obedience to the Constitution and observance of the laws. Liberty, regulated by law, is the foundation upon which the people of this country must build; and it would be quite unfortunate for this court, by any decision it may make, to encourage lawlessness anywhere. It is quite true that a majority of the electors in the twenty-seventh senatorial district have, through the ballot-box, expressed their will that the relator should represent them in the Senate, and it is unfortunate that that will should, for the present, be defeated, but, under our system of government, founded upon the majority rule, majorities must express their preferences in the forms prescribed by the Constitution and the laws. It is better that an election of a senator should fail than that the Constitution or laws should be nullified or violated. In *Gulick v. New*, 14 Ind. 93, 77 Am. Dec. 49, it was well said: "We are reminded that in our form of government the majority should rule, and that, if the course indicated is not followed, a majority of the voters may be disfranchised, their voice disregarded, and their rights trampled under foot, and the voice of a minority listened to. True, by the Constitution and laws of this State, the voice of a majority controls our elections; but that voice must be constitutionally and legally expressed. Even a majority should not nullify a provision of the Constitution, or be permitted, at will, to disregard the law. In this is the strength and beauty of our institutions." In the same case it was held that, where one of the candidates was ineligible, and that was known to the electors, or the facts were such that they were bound to know it, votes cast for him would be ineffectual, and would have to be disregarded, and the candidate receiving a majority of the legal votes declared elected.

Our conclusion therefore is that *the orders of the general and special terms should be reversed, and the application for a mandamus denied.*

All concur, except **Finch, J.**, who reads dissenting opinion, and **Andrews, J.**, who concurs.

Finch, J., dissenting:

I agree entirely that the Board of State Canvassers have only ministerial and not judicial powers; that their sole duty is to make certain computations from the figures of the county canvassers, returned to them for that purpose according to law, and, having made them to declare the result by the proper certificates; that in the performance of this duty they are not at liberty to consider or act upon any extraneous papers or information beyond that contained in the canvasses themselves, considered and treated wholly as such; and that no question beyond the result of the figures can lawfully receive their attention or solution. To this extent, as I understand it, we are all agreed, and there exists among us no difference of opinion; and so we may regard the proposition stated as fully and definitely settled; in accordance with the unvarying current of authority, and the usage which has been uniform and without a break. It secures for us, at least, so much of solid ground upon which we can all stand in harmony and concord, and without any distressing diversities of opinion. As we apply that doctrine in the case of Sherwood, the inevitable result is that the state board are required to count the votes in his district, to ascertain who has received the plurality of such votes, and to give to that individual a due certificate of the fact ascertained. That is all which Sherwood has at any time asked. Our decision entitles him to his relief, even though his mandamus be quashed; for it is not to be assumed that the State Canvassers will violate the settled law of the State as expounded to them by its court of last resort. Indeed, they themselves, in and by the terms of the stipulation upon which all these cases have been heard, have promised and agreed to act in accordance with the conclusions of the court. We have interpreted the law for them. We have declared that whether Sherwood was or was not eligible is a subject with which they have no concern, a question which they cannot consider, and which, however decided, can have no influence or effect upon the one distinct and definite duty which they have to perform. They are men of character and reputation, and it is not to be imagined that the strong and specific force of a mandamus is necessary to make them do their duty, as that duty has been defined by this court, and as they themselves have formally promised to perform it. The question, therefore, whether the present writ should be sustained or quashed, is, in and of itself, not very important. If the immediate result to the relator was alone to be considered, the discussion might end here. I think it should have ended here; but the technical question of the continuance and operation of the writ has been used to put upon us the abstract question of Sherwood's eligibility, and serve as a justification for a judicial expression

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of opinion on that subject. What just or useful purpose may be thus subserved, I have been unable to discover. Whatever we may think or say about it cannot alter or affect the purely ministerial duty which the State Canvassers must perform. Nor can our opinion have any legitimate effect upon the ultimate determination of the question by the Senate. As to them, it may possibly be regarded as an interference with their duty, and an attempt to hamper their independent action. That body may very easily construe our judgment as an invasion of their jurisdiction, an unwarrantable trespass upon a co-ordinate branch of the government; and it would not be strange if they should repel it with indignation, and, while not rudely bidding us to keep to our jurisdiction, should find some polite paraphrase to convey that idea. I am afraid we should deserve the rebuke, for three reasons, which I shall seek to develop and explain; and these are that the question of Sherwood's eligibility is immaterial to the relief asked; that it furnishes no answer to or defense against the writ; and that we have no jurisdiction to determine the question in any event.

The ground upon which the majority proceed is said to be that the relator, on an application for a mandamus, must show a clear legal right to the relief which he seeks; that this relator, to establish such right, must show that he was duly elected to the office of senator; that he did not and could not do that, because he was ineligible; and so the writ ought not to have been issued. Now, is it a sound method of judicial reasoning to say that a man must show that he was duly elected to an office before he can require the state canvassers to count the votes so as to know whether he was elected or not? He comes to this court and demands its aid to ascertain from the proper authority if he was elected, and the court says he has no right to have the votes counted unless he can prove the precise fact which he seeks to ascertain. One can imagine such a candidate telling his experience after all was over, and complaining with a somewhat dazed expression that he went to the court to compel a count of the votes, and the judges told him that he could not have it because he was ineligible; and then he went to the Senate for his seat, and the members of that body told him he was eligible, but could not have his seat because the votes had not been counted. Such a possible result shows us where the probable fallacy of the reasoning relied on may be found. It lies in the substitution for the relief actually asked and sought of another and different relief, not asked and not sought; in treating what is a step in or stage of a process as the exact equivalent of the ultimate result of that process; and in a declared inability to see the difference under its clothing of ambiguous phrases. Sherwood's right to his office is one thing; his right to know how many votes were cast in his favor, and who received the most, is quite another. He has not asked this court to adjudge him his office, or to decide that he was duly elected to it. He is therefore not called upon to show that he is entitled to it, or was duly elected to it. The relief he does ask is that the votes for senator cast in his district shall be counted, and the result

properly certified. He shows a clear legal right to that relief, for the law awards it; and, as we have held this day, it is immaterial to that relief at the hands of the canvassers whether he is eligible or not. To obtain that it is enough for him to show that there has been an election; that votes were cast for him as a candidate; that a statement of them has been sent to the state canvassers, and they refuse to count them for a reason which is no reason and does not excuse. That makes his case; that shows his clear legal right to the relief which he asks, and which is only one step or stage in a process leading to a wider ultimate result, and one which depends not only upon that step, but upon very many others. I think it possible to uncover what I deem the fallacy of the prevailing opinion in another way. Let us suppose that there has been a very close election, so close that it turns on a question how two or three ballots are to be treated, and the State Canvassers refuse to count. One of the candidates applies, as Sherwood did, for a mandamus to compel their performance of that duty. This court says to him: "No; we will not order a count until you satisfy us that you have been duly elected to the office which we see you are trying to obtain." Could anything be more unreasonable or absurd? Does not the illustration demonstrate that the candidate who seeks to compel a count need not show that he was elected at all in order to entitle him to the precise measure of relief which Sherwood has asked in this case? It is of no consequence whether the latter has or has not been duly elected, so far as the present application is concerned; and the issue thrust upon the court is wholly immaterial, and only made to seem material by substituting for one step in a process its complete and ultimate result. If it be objected to my illustration that I put a case in which it was possible that the relator might have been duly elected, while here there was no such possibility, I answer that the objection begs the question. It is possible that Sherwood was duly elected. Neither this court nor any other can forestall the judgment of the Senate. We do ourselves honor overmuch when we assume to act as prophets for the constitutional tribunal, and to handicap the rights of the relator before that body. It was precisely such a state of affairs as that which I have described which this court had in *People v. Canal Appraisers*, 78 N. Y. 446, where it was said: "When the act, the doing of which is sought to be compelled by mandamus, is the final thing and, if done, gives to the relator all that he seeks proximately or ultimately, then the question whether he is entitled to have that done may be inquired into by the officer or person to whom the mandamus is sought, and is also to be considered by the tribunal which is moved to grant the mandamus; but where the act to be done is but a step towards the final result, and is but the means of settling in motion a tribunal which is to decide upon the right to the final relief claimed, then the inferior officer or tribunal may not inquire whether there exists the right to that final relief, and can only ask whether the relator shows a right to have the act done which is sought from him or it." In the present case Sherwood's final and ultimate relief is

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the judgment of the competent constitutional tribunal that he is duly elected senator, and entitled to hold the office, and that final relief involves, not only his plurality of votes, but his qualifications as well; and he is here, not asking that final relief, but seeking to take one step necessary as a preliminary to it, which involves only the count, but not the qualifications; and neither the canvassers nor the court, in considering his right to that step, can inquire into his right to a different and further and ultimate relief.

It follows within the rule established that the relator was not bound to prove what he was not required to assert to entitle himself to the relief which he demanded, and that the issue of his qualification was immaterial. But that issue is not merely immaterial. Beyond that, it is utterly inadequate and ineffectual as a defense to the mandamus. I decline to express any opinion upon the question whether Sherwood was or was not eligible, for a reason which will later appear, and yet, for the purpose of the argument, I may concede him to be ineligible, and still it may be demonstrated that there is no defense to the writ, and that its command should be affirmed. The whole theory on which this issue is presented is that it destroys the relator's right to relief. Suppose that it does. But has it also destroyed the right of the people? They are the real plaintiffs; the relator is only their informant. He is not the plaintiff, except in his character as citizen, as one of the people,—the source of all power and authority. They are the plaintiffs. It is the sovereign who comes to our bar,—to this court, which it created and can destroy—with hat in hand, but with a gravity we had better not overlook, and demands of us that we command five public servants who hold a public office upon a public trust to perform a clear public duty in respect to a matter of vital importance to the safety and purity of our institutions, which they threaten not to perform in a lawful way; and we answer that the informant who set the people in motion claimed to have a private interest of his own, and, since we are satisfied that he had none, we deem it our duty to tear up the people's writ, and turn the people out of court, and leave unfaithful servants to violate the public law with impunity. In substance we say to the people: "We think you are right and the canvassers are wrong, but we cannot approve of your relator, and, in order to defeat him, we quash your writ, and turn you out of court." We have not so been in the habit of treating the people coming before us for justice. Even in actions of quo warranto, where the people, on the relation of a claimant to an office, brought their suit to remove a usurper holding it without right, and where it was decided that the relator had no title, and could have no relief, it was yet ruled that the court could not quash the writ, but proceed to judgment of ouster against the intruder. *People v. Thatcher*, 55 N. Y. 580. The principle is well described by Judge Folger in *People v. Hall*, 80 N. Y. 117, where he says, (and I quote both his language and his authorities): "Besides, in the *Duchess of Kingston's Case*, all of the judges were of opinion that the decision of a question raised between her and Mr. Harvey could not be conclusive between

ber and the crown. 20 How. St. Tr. 355; *Barrs v. Jackson*, 1 Phil. Ch. 582, 586. The people are not barred by it. They may still inquire by what right the defendant claims the office. The principle stated in *People v. Thacher*, *supra*, applies here: "That the sovereign may proceed and inquire where like movement on the part of a private person will not be entertained because of his own acts. See *King v. Clarke*, 1 East, 88, and the cases there cited and quoted from in the argument of counsel for the defendant. And there may be judgment in favor of the people against the defendant of ouster of him without giving judgment in favor of the relator that he is entitled. *People v. Phillips*, 1 Denio, 388. See also *Com. v. Sparks*, 6 Whart. 416." In the foregoing quotation the doctrine is clearly established that the defeat of the relator does not defeat the people, and the court must still go on, and ascertain the right of the latter. The authority is decisive and there are none to the contrary, so far as I have been able to ascertain. It should be obeyed. If it is, the order appealed from will be affirmed, for, however Sherwood's right as a candidate may be disregarded, his right as a citizen and elector and the right of the people must be sustained. As to them, the only question is whether the state canvassers have threatened to travel outside of the returns, and a few words are to be said on that subject.

The complication began with the action of the board of county canvassers of the county of Steuben. To that body was presented by Charles E. Walker, who was the candidate opposed to Sherwood, and defeated at the polls by a majority of about 1,500, a protest against the issue of any certificate to the latter, accompanied by affidavits showing that at the date of the election Sherwood was in fact a park commissioner of the Hornellsville park in said county. The county canvassers, on the 10th of November, after making a correct and truthful statement of the votes actually cast, passed a series of resolutions to the effect that they believed Sherwood to be ineligible to the office of senator; that they themselves had no lawful authority to act upon the fact, but that they accompanied their returns with a statement of the proofs presented, and of their belief, and that they transmitted copies of the protest and proofs to the state board "for their consideration, and for such action thereon as they may deem lawful and proper." The moving papers show that Charles F. Tabor, attorney-general, and one of the state board, had given an opinion in his official capacity before the election that Sherwood was ineligible, and had also declared, so publicly that the newspapers repeated it, that the action of the county canvassers was a virtual refusal to count any votes for Sherwood; that Walker, after a consultation with "prominent state officers" at Albany, openly declared that he expected to receive the certificate of election from the state board of canvassers; and that persons intimate with the members of such board, and likely to know their purposes, had so declared. Mr. Tabor makes no denial. Mr. Rice, who is secretary of state, makes none but says in significant general terms that the board in its collective capacity intends to do what is right. Disturbed by the menace involved in the action of the county

board and the threatened procedure of the state board, Sherwood appealed to the court. Under the order of the special term the county canvassers rescinded their resolution of November 10th, adding: "And the said resolution, together with the protest, certificates, affidavits, and proof therein referred to, (other than the certified statement required by statute,) be, and they are hereby, withdrawn from the consideration of the state board of canvassers." These papers had been received and filed in the office of the secretary of state, who had no lawful authority to receive or file them. After the county canvassers had directed their withdrawal, the deputy county clerk, by authority of the county clerk as secretary of the board and of the resolution of withdrawal, demanded of the deputy secretary of state a return of the protest and papers. That official refused, saying that demand must be made of the Board of State Canvassers. When it is remembered that the papers were not in possession of the State Board, and never had been, because the count of Sherwood's district has not been entered upon; that they remained solely in possession of the secretary, filed, and held, and for no possible lawful purpose,—the answer becomes a distinct admission of persistence in the unlawful purpose of their use. Added to all the rest, we find the ineligibility of Sherwood formally set up as an answer to the writ, and the deputy attorney-general appearing before us and distinctly claiming in behalf of the board which he represents that they could and should consider and determine that question. The fact, therefore, is quite beyond contradiction that the secretary of state, as such, and the State Board of Canvassers, have either actually transcended or threatened to transcend their power and authority; and that fact is established, although it was not necessary to establish it, since it was held in *Virginia v. Rives*, 100 U. S. 813, 25 L. ed. 667, that, where the duty is a public one, there is no need of a demand and refusal. The law stands in lieu of a demand, and the bare omission to perform the duty in place of a refusal. Since, then, the duty of the state board is a public duty, and one in which the people are interested, the people's writ commanding them to do that duty cannot be answered or quashed by showing that the private personal right of the relator may not succeed.

But, even as against him, there is no defense to the writ. Grant that his right as a candidate for the office of senator is answered, and yet there remains his right as a citizen and elector, which is fully set out in and shown by the moving papers,—a right which we have just recognized in the *Duchess of Kingston's Case*—and the right of the people to compel by mandamus the performance of a public duty. In *People v. Collins*, 19 Wend. 56, it was decided that in a matter of public right any citizen of the State may be a relator in an application for a mandamus, and the doctrine was repeated in *People v. Sullivan County Supra*, 56 N. Y. 253; and even more explicit, and, I think, quite decisive, is the case of *People v. Haley*, 87 N. Y. 844. In that case the relator failed utterly to show any private or personal right to the relief demanded, and the writ was not sued out by the attorney-general.

and yet the order of the writ was affirmed, because it required the performance of a public duty. The court said, in answer to the objection taken: "Inasmuch as the people themselves are the plaintiffs in a proceeding by mandamus, it is not of vital importance who the relator should be so long as he does not officiously intermeddle in a matter with which he has no concern. The office which a relator performs is merely the instituting a proceeding in the name of the people and for the general benefit. The rule, therefore, as it is sometimes stated, that a relator in a writ of mandamus must show an individual right to the thing asked, must be taken to apply to cases where an individual interest is alone involved, and not to cases in which the interest is common to the whole community." The court referred to cases holding a different doctrine in some other states, and then added: "But the practice which has so long prevailed here, though never, so far as I can discover, passed upon directly by the court of last resort, where the objection was raised, seems to be a reasonable and convenient one, and ought now to be considered as settled." The court was unanimous in affirming the present order, whatever our opinion as to Sherwood's eligibility, for we cannot defeat the right that he has as citizen and elector because he also claimed another right which he has not; and least of all can we defeat the clear right of the people, which stands wholly undefended.

And that brings me to my third proposition—that we have no jurisdiction to consider or determine Sherwood's qualification for office, because that jurisdiction has been explicitly taken away from us, and this court has so deliberately decided. The Constitution provides (art. 3, § 10): "Each house shall determine the rules of its own proceedings, and be the judge of the elections, returns and qualification of its own members." The meaning and the force of this provision have been carefully decided by this court. *People v. Hall*, 80 N. Y. 121. We there said that "it is conceded by the text-writers that each of these Houses has the sole power to judge thereof, exclusive of every other tribunal;" and we cited 1 Kent, Com. 235; 1 Story, Const. § 883; Cooley, Const. Lim. 138. In further elucidation of the doctrine we asserted and showed that it rested not merely upon the constitutional language, but upon the exigencies of free institutions, and respect for the independence of legislative bodies whose authority emanates directly from the people. Kent says: "There is no other body known to the Constitution to which such a power might be safely trusted." Coming down to the precise question involved, we said: "Though the Constitution confers upon specified courts general judicial power, there are certain powers of a judicial nature which, by the express terms of the same instrument, are given to the legislative body, and among them this which we are considering. All powers are then in the hold of the people. They are about to distribute these powers among the bodies which they at the same time create. When it is said on such occasion to either House of the Legislature, 'You are to be the judge of the election of members to your body,' there is a specific conferment of this particular

power; and when it is said at the same time to the judicial body, 'You are to have general jurisdiction in law and equity,' though the conferment of power is general, there is, by force of the concurrent action, excepted from the general grant the specific authority definitely bestowed with the same breath upon another body." And the court added: "The power thus given to the Houses of the Legislature is a judicial power, and each House acts in a judicial capacity when it exerts it. The express vesting of the judicial power in a particular case so closely and vitally affecting the body to whom that power is given takes it out of the general judicial power, which is at the same time in pursuance of a general plan that has regard in each part to every other part bestowed upon another body." I have quoted thus liberally from the opinion in the case cited because it settled the law on that subject. I do not understand that any body disputes the doctrine, or claims that we can directly adjudicate upon Sherwood's qualifications. I do understand the claim to be that we may do so indirectly, on the road to a judgment which we have jurisdiction to make; in other words that we may transcend our jurisdiction on the way, when and as far and as often as we please, provided that in the end we render a judgment which we have right to make; that we may exceed our jurisdiction and usurp that of another tribunal, to obtain an unlawful reason for a judgment which we have a right to render; and that, because the jurisdiction we really have is invoked, we may assume in its aid a jurisdiction which we have not. I distrust the proposition, and especially in a case where, as in this, the final judgment sought rests wholly and entirely upon the transcended jurisdiction, and where that judgment, however innocent in its form, is in truth in its entire substance and intended effect a direct and positive adjudication upon a subject matter of which we have no jurisdiction. Where the difficulty lies in a want of jurisdiction over the subject matter, no consent will give it, and no invocation break down the constitutional barriers. I cite for the present purpose but two authorities, because I deem them ample and sufficient: *People v. Mahaney*, 13 Mich. 481, and *Opinion of the Justices*, 56 N. H. 577. In the first of these cases the Legislature had passed a Police Act for the city of Detroit, giving it immediate effect, which required a two-thirds vote. A quo warranto was issued to the newly appointed marshal, which challenged his right to his office. The court had undoubted jurisdiction to issue the writ, and to render judgment of ouster upon it, and that jurisdiction was duly and regularly invoked; and on the theory adopted here, that invocation authorized the court on the road to a judgment of ouster to rest upon reasons in excess of their jurisdiction, and in violation of the constitutional provisions. Just that they were asked to do, and just that they deliberately refused to do, upon the ground that it would transcend their jurisdiction. It was conceded that the journals and records of the Legislature were regularly before the court and could properly be examined and considered. They showed that nine persons, necessary to make up the two thirds, had voted for

the bill, who held their seats in spite of the proven fact that they had not been elected at all, except by the soldier vote cast outside of the State under a law which had been decided to be unconstitutional. There was a claimed necessity to unseat legislators, and establish the doctrine of invocation. But the court, led by an able constitutional lawyer, declined to do the wrong, although duly "invoked." Judge Cooley said, after pointing out the same distribution of powers between the courts and the Legislature which exists in this State: "It is sufficient for us to say that the Constitution has not conferred upon us this jurisdiction, and, whether the decision made is right or wrong, we shall leave it where it has been left by the fundamental law of the State." The New Hampshire case was quite peculiar. A law of that State permits the Legislature to apply to the court for an opinion and advice upon legal questions submitted. The Legislature made such application. They invoked the existing jurisdiction. The court had authority to receive and act upon the request, and to give an answer. But the question put was whether certain senators had been lawfully summoned by the governor and council, and properly admitted to their seats. If ever there was an "invocation" in the exercise of an admitted jurisdiction to go beyond it and usurp the rights of another tribunal on the road to an answer, it was this. But the court resisted the temptation and refused to answer, on the ground that they were not at liberty so to do, and added: "If a precedent of interference by one department with the discharge of its duties by another should be established by the form of a judicial decision, a dangerous blow would, in our judgment, be struck at one of the most vital principles of our system of government." Undoubtedly there is enough astuteness among us to suggest that these were cases where the Legislature had acted. But what of that? If, on the road to a lawful decision, jurisdiction may be transcended at all, it may as well be done by an unlawful review as by an unlawful opinion in advance. I have found no cases to the contrary of those cited. The industry of the deputy attorney-general, ranging over every State in the Union, has found none except those which beg the entire

question; since in every one cited by him I think there was some existing law authorizing the court to adjudge upon the official title, or the election itself was a nullity, and there was not, as here, a constitutional prohibition against it. And so I deny the asserted doctrine of "invocation," of a "right to do evil that good may come," of excusable judicial usurpation; and, if the doctrine has anywhere got its dangerous and destructive hold upon our law, which I do not believe, it should be resolutely shaken off. But let us not deceive ourselves. The excess of jurisdiction is not even excusable, for it has neither occasion nor necessity. I have discussed that somewhat already, but may be permitted to add a few words more. The order to show cause and the affidavits of the petitioner raise no issue beyond that of the right of the state board to do anything more than count the votes and certify the result. He did not invoke either the consideration or decision of the question whether he was or was not duly elected to the office of senator; and, if the defendants had made no answer except to assert a right to consider extraneous papers, the issue of eligibility would not have been before the court or involved in the jurisdiction invoked. It is clear that the petitioner on his part invoked no action or jurisdiction to which a ruling on his eligibility was essential or necessary. It made its first appearance in the answer of the State Board. But it was no defense to them. It was no justification for their threatened action, and no answer to the demand upon them to perform their public duty. And so the issue of eligibility was not necessary, and not even pertinent, to the jurisdiction invoked, on either hand, and has no excuse that I can discover, for its presence in the case. But here this discussion must end. If what I have said does not convince the majority of the court, nothing that I can say will do so. I have tried faithfully, and, I hope, with proper respect, for certainly I have not meant to be wanting in that, to point out the mistake which it seems to me that they are about to make. Theirs, however, must be both the responsibility and its consequences. I think the order and judgment should be affirmed.

Andrews, J., concurs.

CONNECTICUT SUPREME COURT OF ERRORS.

STATE, *ex rel.*, Luzon B. MORRIS,
v.

Morgan G. BULKELEY.

(.....Conn.....)

1. A governor whose term extends until his successor is duly qualified is *de jure* as well as *de facto* governor until the declaration of his successor's election has been made in the manner provided by the Constitution.
2. The choice of a governor by the As-

NOTE.—The peculiar situation shown in the above important case, and the unusual constitutional provisions involved, make a case without any closely applicable precedents which can be supplied by annotation.

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sembly which is required by the Constitution to be made on "the second day of their session" if there has been no election by the people, cannot be made at any later day of the session.

3. The superior court as a court of general jurisdiction in Connecticut may take jurisdiction in quo warranto to establish the right of a person to the office of governor where he has received a majority of all the votes cast and the General Assembly refuses to act or has lost the power to do so, so that he is remediless unless the court may intervene.
4. An information in quo warranto which alleges only that the relator appears by the returns to have a majority of all the votes, is insufficient without alleging that he had a majority of all the votes.
(Carpenter, J., dissents from proposition 3.)

(January 5, 1892.)

CASE reserved for the opinion of the Supreme Court of Errors by the Supreme Court for New Haven County, in a proceeding brought to determine the right of defendant to retain the office of governor of the State. *Dismissal of information advised.*

The facts are stated in the opinion.

Messrs. Charles R. Ingersoll, Tilton E. Doolittle and Henry Stoddard, for relator:

In quo warranto the right and title to an elective office depends upon the election; such right and title are not contingent in any degree or manner upon the existence or non-existence of a certificate or declaration of election.

Cooley, Const. Lim. 782, 785, 787; Paine, Elections, §§ 625, 626, 684; High, Extr. Legal Rem. §§ 638, 639, 639a; 6 Am. & Eng. Encyclop. Law, 422, 423; *Hartt v. Harvey*, 19 How. Pr. 245; *People v. Kilduff*, 15 Ill. 492, 60 Am. Dec. 769; *Com. v. Emminger*, 74 Pa. 479; *Atty. Gen. v. Elderkin*, 5 Wis. 800; *Rex v. Vice Chancellor of Cambridge*, 8 Burr. 1647; *Marbury v. Madison*, 5 U. S. 1 Cranch, 187, 2 L. ed. 60; *State v. Barbour*, 53 Conn. 76.

The courts by quo warranto adjudicate the "very right" and title to every elective office unless exclusive jurisdiction is vested in some other tribunal.

High, Extr. Legal Rem. § 634; 6 Am. & Eng. Encyclop. Law, 387, 389, 390; Paine, Elections, §§ 856, 865, 878; Cooley, Const. Lim. 786, 787; *Cohens v. Virginia*, 19 U. S. 6 Wheat. 264, 404, 5 L. ed. 257, 291.

A person usurping the office of governor is amenable to that jurisdiction.

See cases cited above.

McCrary on Elections, § 389, says: "It matters not how high and important an office may be, an election to it must be by the majority or plurality of the legal votes cast, and if anyone, without having received such majority or plurality, intrudes himself into an office, whether with or without a certificate of election, the courts have jurisdiction to oust him unless some other tribunal has been clothed with this power to the exclusion of the courts."

Cooley, Const. Lim. pp. 786, 787.

It is of no importance that the body charged with the duty of declaring the result of the election is so constituted that mandamus will not lie to enforce its duty, but the true rule is, if the duty is imposed by law and the act is ministerial, a refusal to act, or an action contrary to the truth, cannot affect the title to the office in quo warranto proceedings.

See McCrary, Elections, §§ 331, 333, 378.

From the documents before it the House found that the democratic vote for governor "as returned" was 67,662, for other candidates "as returned" was 67,686, leaving a democratic majority of twenty-six for governor "as returned."

The force and efficacy of this finding, and promulgation thereof to the world by resolution cannot be lessened or impaired by the further and additional statement of the House, that certain other facts appeared by inspection of other documents. All such statements of the House were and are simply void and of no 14 L. R. A.

effect, being made without jurisdiction and in violation of the Constitution.

Cooley, Const. Lim. p. 788; *Ex parte Heath*, 3 Hill, 42.

If they have shown an election on the whole return, that gives the right. In the words of Lord Coke "the election is the foundation, not the return."

4 Co. Inst. 49.

Opinions and decisions of the courts of last resort in Maine, New Hampshire, and Massachusetts, and the opinion of this court in *Opinions of Justices*, 80 Conn. 501, state in most emphatic terms that the freemen or electors elect, that the return of votes is to control, and that the persons or body having the duty to declare cannot look beyond those returns of votes.

Opinions of Justices, 70 Me. 561; *Prince v. Skillin*, 71 Me. 361, 86 Am. Rep. 325; *Opinions of Justices*, 68 Me. 587; *Opinions of Justices*, 64 Me. 588; *Opinions of Justices*, 1d. 596; *Opinions of Justices*, 54 Me. 602; *Opinions of Justices*, 35 Me. 567; *Osgood v. Jones*, 60 N. H. 282; *Opinion of the Court*, 58 N. H. 621; *Bell v. Pike*, 58 N. H. 478; *Opinion of Justices*, 53 N. H. 640; *Opinion of Justices*, 136 Mass. 583; *Clark v. Hampden County Board of Examiners*, 126 Mass. 283; *People v. Chemung County Board of Canvassers*, 126 N. Y. 392; *State v. Boone*, 98 N. C. 573; *State v. Calvert*, 98 N. C. 580; *State v. Stinson*, 98 N. C. 591; *State v. Elder* (Neb.) Jan. 14, 1891.

Messrs. Henry C. Robinson, William C. Case, and Charles J. Cole, for defendant:

A judge of the superior court has no power to depose a governor of the State.

State v. Marlow, 15 Ohio St. 185; *Baxter v. Brooks*, 29 Ark. 173.

The nature of the information in the nature of quo warranto, considered historically, and in the light of decided cases, excludes the idea that it can be made use of in this State to try the title of the supreme executive officer of the State.

See 4 Bl. Com. 312; 3 Bl. Com. 263, cl. 5.

The theory of the process originally was that it issued from a superior power or authority to an inferior one, and not otherwise.

All jurisdiction implies superiority of power.

1 Bl. Com. 242; *Mauran v. Smith*, 8 R. I. 192, 5 Am. Rep. 504.

The provisions of the Constitution relating to the office of governor indicate conclusively that he was to be dealt with by his equals in the other departments, and show that the Legislature could not have intended to subject his title to inquiry by a judge of the superior court.

See *Baxter v. Brooks*, 29 Ark. 179; *State v. Marlow*, 15 Ohio St. 114; *People v. Goodwin*, 22 Mich. 497; *State v. Harmon*, 31 Ohio St. 250; *Collin v. Knoblock*, 35 La. Ann. 263; *Rogers v. Johns*, 42 Tex. 839; *Batman v. Megowan*, 1 Met. (Ky.) 533; *State v. Mason*, 77 Mo. 189; *State v. Baxter*, 28 Ark. 129; *Goff v. Wilson*, 3 L. R. A. 68, 32 W. Va. 398; *Carri v. Wilson*, 3 L. R. A. 64, 32 W. Va. 419; *Robertson v. State*, 7 West. Rep. 481, 109 Ind. 81.

The position which we take is further strengthened by the numerous decisions of the highest courts of many of the States, that

mandamus does not lie to compel the governor to perform his duties.

See High, Extr. Legal Rem. §§ 119, 124; *Hawkins v. Governor*, 1 Ark. 571, 31 Am. Dec. 346; *State v. Warmouth*, 22 La. Ann. 1, 2 Am. Rep. 712; *State v. Governor*, 39 Mo. 388, 399; *Re Dennett*, 32 Me. 508, 54 Am. Dec. 602; *State v. Governor*, 25 N. J. L. 331; *Mauran v. Smith*, 8 R. I. 192, 5 Am. Rep. 564; *People v. Bissell*, 19 Ill. 229, 68 Am. Dec. 591; *People v. Yates*, 40 Ill. 126; *People v. Governor*, 29 Mich. 320, 18 Am. Rep. 89. See also Wood, Mandamus, pp. 86-88.

The jurisdiction of the General Assembly is full, final, complete, and exclusive, and no judicial process will lie to test or determine a title to the governorship of Connecticut.

Const. art. 4, § 2.

The Constitution provides that the governor shall hold his office for a fixed term, and until his successor be duly qualified.

Const. art. 4, § 1; Const. Amend. art. 27, § 2.

In the beginning the power over this matter was in the Legislature, for the Legislature was practically supreme from the Charter of Charles to the Constitution of 1318.

1 Swift's System, p. 72.

The Constitution of this State is a limitation of powers already existing.

Pratt v. Allen, 13 Conn. 125. See *Starr v. Penae*, 8 Conn. 547.

Nothing should be regarded as prohibited which is not so either expressly or by fair and reasonable implication.

Lowrey v. Gridley, 30 Conn. 458.

It will hardly be contended that the Constitution anywhere expressly prohibits the Legislature to fully examine the proceedings at general elections and declare the results in accordance with such examination, and there is nothing which so prohibits it by fair and reasonable implication.

See Const. art. 6, § 6, art. 4, § 2, art. 3, § 6.

It is not an answer to say that an examination conducted on the principles we have indicated is an exercise of judicial functions, and as such prohibited, for it is long past argument in this court that the General Assembly can and does exercise judicial functions.

Wheeler's App. 45 Conn. 806.

While it is true, doubtless, that this power has some of the elements of a judicial character, it is essentially a political power, and with the exercise of its political power by the Legislature the courts cannot legally interfere.

Rogers v. Johns, 42 Tex. 339; *Collin v. Knoblock*, 25 La. Ann. 263; *State v. Harmon*, 31 Ohio St. 250; *People v. La Salle County Suprs.* 100 Ill. 495; *Goff v. Wilson*, 3 L. R. A. 63, 32 W. Va. 403; *Carr v. Wilson*, 3 L. R. A. 64, 32 W. Va. 426; *Luther v. Borden*, 48 U. S. 7 How. 1, 12 L. ed. 581; *Georgia v. Stanton*, 73 U. S. 6 Wall. 50, 18 L. ed. 721, and cases there cited.

The claim of Mr. Morris to the office of governor stands solely upon the evidence of returns of the votes counted and not returns of the votes given. By the evidence of these unconstitutional and defective returns he had twenty-six majority of all the votes cast.

Whenever and however it is apparent that returns are unreliable their value as evidence

is gone, and other evidence may and must be resorted to.

McCrary, Elections, 3d ed. §§ 540-544, and authorities there cited; High, Extr. Legal Rem. § 638, and authorities there cited; Paine, Elections, § 596 *et seq.*, and cases there cited; Cooley, Const. Lim. 6th ed. chap. 17, pp. 788, 789.

The limitation of this power of examination is the ascertained will of the qualified electors of the State legally expressed, and it has no other limitation.

On two occasions the General Assembly has exercised this power without question and without interference: (1) in *Jewell's Case*, 1871; (2) in *Waller's Case*, 1878.

This power of examination which the General Assembly has exercised, it has never abdicated and can never abdicate; it has never delegated it to any other tribunal and it cannot delegate it.

Brown v. O'Connell, 36 Conn. 447.

That the General Assembly possesses the power for which we contend is not only evidenced by the fact that the Constitution requires it, and it alone, to find out who is legally chosen, but it is conclusively established by the consideration that the Constitution has invested it with the sole power of declaring who is chosen governor, and by the further consideration that no man can be governor until he is so declared.

Goff v. Wilson, 3 L. R. A. 63, 32 W. Va. 393; *Carr v. Wilson*, 3 L. R. A. 64, 32 W. Va. 419; McCrary, Elections, §§ 215, 274; *People v. North*, 72 N. Y. 124; *People v. Crissey*, 91 N. Y. 616.

If the tenure of an office be fixed for a prescribed term, and until a successor shall be elected or appointed and qualified, neither a resignation, nor the expiration of the term, nor the election or appointment of a successor will vacate the office or impair the power of the incumbent until the successor is duly qualified.

Paine, Elections, § 199. See also *People v. Barnett Troup Suprs.* 100 Ill. 336; *Badger v. United States*, 93 U. S. 599, 23 L. ed. 991; *People v. McKinney*, 52 N. Y. 374; *State v. Jarrett*, 17 Md. 809-824; *State v. Seay*, 64 Mo. 89-105, 27 Am. Rep. 206; *People v. Lord*, 9 Mich. 227; *Com. v. Hanley*, 9 Pa. 513, 517.

It is said that the Constitution contemplates a declaration upon the first day of the session, and, if there is no majority candidate, then a choice by the Assembly upon the second day of the session.

We submit that this assignment of dates is but a direction.

Ex parte Heath, 8 Hill. 42; *People v. Allen*, 6 Wend. 486, and cases there cited; *Cott v. Eves*, 12 Conn. 248, 253, 255, and cases cited; McCrary, Elections, 2d ed. § 88, p. 107.

Andrews, Ch. J., delivered the opinion of the court:

This is an information in the nature of a quo warranto. It alleges that the respondent, since the ——— day of January last, has used and exercised the office of governor of this State, and threatens and intends to continue to use said office, its dignities, liberties, and franchises, and prays that he may be required to

show by what warrant he claims to use and exercise said office. The respondent demurred to the information. The superior court made a finding of certain facts other than such as are set forth in the information, which includes the senate house journals, to which the parties agreed and reserved the case for the advice of this court. The questions reserved are attended with serious difficulties. These, as well as the novelty of the circumstances recited in the information, the condition of legislation as applicable to those circumstances, the public interests involved, and the delacy which the court cannot but feel less it be thought to infringe upon the authority belonging to the other co-ordinate branches of the government, have led us to hold the case under deliberation for a somewhat longer time than is usual, and require a careful exposition of the principles upon which the advice to be given is founded. The case was argued at the bar with great force and ability. The view taken by the courts departs considerably, in form, from the claims made by either side in their briefs. It is believed, however, that in essential principles there will be found no real difference between counsel and the court. The case finds that the respondent, Morgan G. Bulkeley, was legally elected governor by the General Assembly on the 10th day of January, 1889 (there having been no election by the people), and entered at once upon the duties of that office. The term for which he was elected was till the Wednesday following the first Monday of January, 1891, and until his successor was duly qualified. If, then, no successor to him has been chosen, or, being chosen, has not become duly qualified, the respondent still holds the office of governor. He holds that office since the said Wednesday in January, 1891, by the same warrant that he held it prior to that date, and continues to be the *de jure* governor of the State. It is admitted that no person has been chosen to be the successor of the respondent, unless the facts set forth in the case show that the relator has been so chosen; and there is no claim but that, if so chosen, he is duly qualified. The inquiry, then, is, Has the relator been chosen governor according to the Constitution and the Laws? The election of a governor is the selection of some person to fill that office. The selection must be of one who possesses the required qualifications, and must be made by those who possess the right to vote, and at a time, place, and in the manner prescribed by law. The election of state officers in this State is a process. It includes the preliminary registration by which those persons who have the right to vote are determined; the time when, the place where, and the manner in which the votes are to be given in; and also the manner in which the votes are to be counted and the result made known. Each of these steps must be taken in pursuance of the law existing at the time the election is had. That part of the election process which consists of the exercise by the voters of their choice is wholly performed by the electors themselves in the electors' meetings. That part of it is often spoken of as the election. But it is not the whole of the election. The declaration of the result is an indispensable adjunct to that choice, because the declaration

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furnishes the only authentic evidence of what the choice is.

The right to choose any state officer, unless the result of the choice can be published in some way so as to be obligatory on the whole State, would be no better than a mockery; it would be to give the form of a choice without the reality. The declaration is the only evidence by which the person elected can know that he is entitled to the office, or the previous incumbent know that his term has expired. The courts can take judicial notice of the fact of an election, but never of the result of an election, or of who is elected, until some declaration is made. The declaration is the only evidence by which the other departments of the government and the citizens generally can know whom to respect as such officer. And, in order that a declaration shall be made of the result of an election for governor in a way to be obligatory upon everybody, the Constitution has fixed the time and manner in which the General Assembly shall make that declaration. [Article 4, § 2.] Unless the declaration is made in the way so provided, the process of the election is not complete. No other authority than the General Assembly is empowered to make such declaration. It is found in the case that there had been no declaration by the General Assembly that the relator had been elected governor, and it is not claimed that there has been any equivalent act by any other authority. It follows that the relator—whatever any future inquiry may show—cannot now be said to have been elected to the office of governor; and that the respondent remains the *de jure* as well as the *de facto* governor of the State. It is therefore the duty of all citizens, of the courts, of all departments of the state government, and of both Houses of the General Assembly to respect and obey him accordingly.

This, however, is far from deciding the real question that is reserved for consideration. The real question is this: The relator claims to have received a majority of all the legal votes cast for governor at the electors' meetings held on the 4th day of November, 1890, and that he is entitled to be declared elected to that office. Is there any way known to the law by which he can now establish the fact of such majority, and secure his right to the office? In considering this question, the attention of the court has been fixed on a subordinate one: Is the present General Assembly without the power to make any declaration as to the election of a governor? It is conceived that the present Assembly may be without such power, either because it has become impossible for it to do so by reason of the attitude of the two Houses towards each other on that matter, so that as to such a declaration the Assembly is in the same condition that it would be if an adjournment without day had been taken, or because the time within which the General Assembly may declare a governor to be elected is limited by the Constitution, and that limit is passed as to the present Assembly. And, if the General Assembly is without the power to make such a declaration, may the superior court make an investigation, and, on finding that the relator did in fact receive a majority of all the legal votes cast for governor, give

him a title to that office? The grounds upon which the power of the Assembly to make any declaration respecting the election of a governor are supposed to be lost, will be examined separately, although at the risk of some little repetition.

That part of the Constitution which must be kept in mind is section 2, art. 4: "At the meetings of the electors in the respective towns in the month of April [now November] immediately after the election of senators, the presiding officers shall call upon the electors to bring in their ballots for him whom they would elect to be governor, with his name fairly written. When such ballots shall have been received and counted in the presence of the electors, duplicate lists of the persons voted for and of the number of votes given for each shall be made and certified by the presiding officer, one of which lists shall be deposited in the office of the town-clerk within three days, and the other within ten days, after said election shall be transmitted to the secretary, or to the sheriff of the county in which such election shall have been held. The sheriff receiving said votes shall deliver or cause them to be delivered to the secretary within fifteen days next after said election. The votes so returned shall be counted by the treasurer, secretary, and comptroller within the month of April [now November.] A fair list of the persons and of the number of votes given for each, together with the returns of the presiding officers, shall be by the treasurer, secretary, and comptroller made and laid before the General Assembly, then next to be holden, on the first day of the session thereof. And said Assembly shall, after examination of the same, declare the person whom they shall find to be legally chosen, and give him notice accordingly. If no person shall have a majority of the whole number of said votes, or if two or more shall have an equal and the greatest number of said votes, then said Assembly, on the second day of their session, by joint ballot of both Houses, shall proceed, without debate, to choose a governor from a list of the names of the two persons having the greatest number of votes, or of the names of the persons having an equal and highest number of votes, so returned as aforesaid. The General Assembly shall by law prescribe the manner in which all questions concerning the election of governor or lieutenant governor shall be determined."

It is undoubtedly true that the Constitution contemplates that the declaration of the election of a governor, and, perhaps, of all the state officers, shall be made in all cases by the General Assembly, and that the declaration, when made in accordance with the provisions of the Constitution, shall be final and conclusive. The declaration is that the person declared is legally elected governor. When the people, speaking in their sovereign capacity by the Constitution, appoint a single tribunal to ascertain and declare a certain result, and that tribunal does so ascertain and declare, there is no other authority that can interfere with or revise such declaration and change the result. The declaration of the result of an election is to be made by the General Assembly, and must be made by both Houses acting jointly or concurrently. A declaration by one House with-

out the other would have no effect. The Constitution, by its own terms, provides no evidence of the election of a governor from the examination of which the General Assembly is to make the finding and declaration except the fair list prepared by the treasurer, secretary, and comptroller, and the returns of the presiding officers. In the absence of all legislation on the subject, and in all ordinary cases, the intent of the Constitution would seem to be that the General Assembly should declare that result of the election which is shown by the fair list and those returns. The Constitution commands the General Assembly to prescribe by law the manner in which all questions concerning the election of governor and lieutenant governor should be determined. If there already has or hereafter there shall be legislation pursuant to that command, and other evidence thereby made admissible, the intent of the Constitution seems to be equally clear that the General Assembly shall also examine that evidence in making its finding and declaration as to the result of an election.

The word "return" is a word known in the law, and had the same meaning seventy years ago that it has now. 3 Bl. Com. 278. When a command has been issued from some superior authority to an officer, the "return" is the official statement by the officer of what he has done in obedience to the command, or why he has done nothing. Whatever thing the superior authority may require the officer to do, of the doing of that thing it may require him to make return. The return made by the presiding officer of an electors' meeting is his official statement of what was done at that meeting. If the General Assembly can require of the presiding officers no return of things other than such as were required by the Constitution itself, then it must follow that the General Assembly can require the presiding officer to do no other thing than such as he was required to do at the time the Constitution was adopted. If this is so, then every election law that has been passed since that time is unconstitutional, for there has been hardly one of them that has not in some way changed the method of the choice, or the duties, or the power of the presiding officers. A construction so narrow and literal as this cannot be successfully maintained.

Section 239 of the General Statutes repeats the duties required by the Constitution to be performed by the presiding officer of the electors' meetings, and adds certain others, as follows: "The presiding officer of each electors' meeting in every town . . . shall make out triplicate lists of the votes given in their respective towns for each of the following officers, viz., governor, lieutenant governor, treasurer, secretary, comptroller, senator, judge of probate, sheriff, and representatives in Congress, . . . two of which lists he shall seal and deposit in the post-office in said town, the postage being paid thereon, directed to the secretary of the state at Hartford, one within two days, the other within not less than five nor more than ten days after said meeting, and the third he shall deliver to the town clerk of said town within two days after said meeting." Section 240 of the Statutes is: "The presiding officers shall, with the certificates upon the

result of the electors' meetings which he is required to send by mail to the secretary of the State, send to the secretary his certificate of the whole number of names on the registry lists, the whole number checked as having voted at such election, the whole number of names not checked, the number of ballots found in each box, viz., 'general' and 'representative,' and the number of ballots in each box not counted as in the wrong box, and the number not counted for being double, and the number rejected for other causes, which other causes shall be stated specifically in the certificate. The secretary shall enter said returns in tabular form in books kept by him for that purpose, and present a printed report of the same to the General Assembly at its next session." These sections are thought to have been enacted in obedience to the commands of the Constitution.

It appears from the information that certificates conformable to the requirements of both these sections were sent the General Assembly, and were laid before it on the first day of the session; that the Senate has examined the fair lists made by the treasurer, secretary, and comptroller, and the certificates sent by the presiding officers from all the towns, so far as they fall within the requirements of section 289 of the Statutes, and has declared those persons to be elected to the several offices who appear to be elected by that examination; but that the Senate has refused to examine said certificates so far as they are required by section 240 of the Statutes, and declares that it has no constitutional power so to do; indeed, declares that it is forbidden by the Constitution to do it. The House of Representatives, on the other hand, has examined said certificates,—as well that part which is required by section 240 as that part required by section 239,—and declares that it is unable to find that the relator is elected governor, or that any other of the officers named therein, except the comptroller, is elected. The fourth section of a resolution of the House is "that the House will take no action declaratory of the result of the late election for state officers until the Senate shall have taken action in the matter of an examination of all the returns from the presiding officers, including those made under section 240 of the Revised Statutes of 1888 by a joint select committee on canvass of votes."

The attitude of the two Houses of the Assembly is that of complete and total opposition, on the one side the Senate declaring that it is forbidden by the Constitution to examine the certificates made under section 240, and on the other side the House declaring that it will take no action till the Senate shall have recognized those certificates. Their positions seem to be wholly irreconcilable. The unpleasant suggestion contained in the briefs that either House of the Assembly is acting from partisan motives can find no place in the mind of this court. Every presumption is that the Legislature is solicitous to obey the Constitution in its true spirit, and that neither House will intentionally violate it. So when each House has spread upon its journal a conclusion radically antagonistic to the conclusion of the other upon the same subject, it can only be regarded as an announcement that they are unable to agree.

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In the process of the election of governor, the Constitution intended that the General Assembly should perform the closing part. That the present General Assembly seems to be unable to perform that part in respect to the last election this court is compelled reluctantly to admit. But as the Assembly has not adjourned, and as it is possible for either or both the Houses to recede from the position it has taken, the court is not now prepared to hold that it has lost the power on this ground from acting further in the matter of the declaration of the election of a governor. Prior to the adoption of the Constitution under the operation of the charter of 1662, the General Assembly possessed all the power, legislative, executive, and judicial, which it is possible for any civilized government to possess. As expressed at the time, it was king and parliament. Its acts and decrees bound the people as fully as though every person was present within the four walls where its deliberations were carried on, and had expressly consented to them. Such power could hardly fail at times to operate harshly. Many motives may have contributed to the formation and adoption of the Constitution, but they all centered in, or rather sprang out of, the one idea to limit the power of the General Assembly. The Constitution of this State is such a limitation, in all cases covered by its provisions, leaving the power of the Assembly unimpaired in other respects. Whatever limitation there is upon the Assembly in respect to the time within which it must make the declaration of the election of governor is to be found in the language of the Constitution above quoted. That language is to be read, in order to get its true meaning, in the light of the conditions and circumstances existing at the time the Constitution was formed. Up to that time the governor had in all cases been elected or declared to be elected by the General Assembly on the first day of its session. The sessions were then short, rarely exceeding ten days. There was no reason then apparent why the sessions should become longer. Under the Constitution there was necessity to have a governor at the very beginning of the session, in order that he might approve the Act of the Assembly and the business of legislation go on. And so the instrument provided that the fair list made by the treasurer, secretary, and comptroller, together with the returns of the presiding officers, should be laid before the General Assembly on the first day of its session holden next after the electors' meetings, and that the Assembly should examine the same, find who, if anyone, was elected, and make the declaration accordingly. Immediately following, it provides that the Assembly, on the second day of the session, shall, in case no person has a majority of the whole number of said votes, proceed to elect a governor. Here the time is fixed by affirmative words, "the second day." Affirmative words are often in their operation negative of other things than those affirmed. Thus a statute which provides that a thing shall be done in a certain way carries with it an implied prohibition against doing that thing in any other way. An enumeration of powers in a statute is uniformly held to forbid the things not enumerated. When Congress gave the

Supreme Court of the United States appellate jurisdiction in certain specific cases, it was held to forbid that court from exercising appellate powers in all other cases than those specified. When national banks were empowered to make loans on personal security, it was holden that such a bank could not make loans on the security of a mortgage on real estate.

In an instrument which is a limitation of power, this rule of interpretation applies with more force than in a statute that confers power. To what end did the Constitution command the General Assembly to proceed to elect a governor on the second day of its session, if, notwithstanding such command, the Assembly is at liberty to proceed to elect any other day? If the command to proceed to elect on the second day is not prohibition to elect on any other day of the session, then the command has no force, and the instrument which was intended to be a limitation of power, in one of its most important particulars, fails to be a limitation at all. When the Constitution commands a certain course to be pursued, that course must be pursued strictly. It is not a proceeding which may be varied for another deemed to be equally eligible, except by disregarding the Constitution itself. And when the Constitution directs the General Assembly to proceed to choose a governor on the second day of its session, it, in effect, forbids any choice of a governor by the Assembly at any later day of the session. But the Assembly can never proceed to the choice of a governor unless there has been a previous determination that no person has a majority of all the votes. The power of the Assembly to choose a governor depends upon a previous examination, finding, and declaration that no person has received such majority. And as this finding and declaration must precede the right of the Assembly to choose the governor, it cannot be later than the second day of the session. The Constitution provides that the fair list made by the treasurer, secretary, and comptroller, and the returns from the presiding officers, shall be laid before the General Assembly on the first day of its session, and that said Assembly shall, after an examination of the same, find and declare. When examine, and when declare? It would seem that it must be done at once, and that the direction so to do is included in the very words used. It is obvious that the declaration of the result cannot be delayed so long as to prevent the Assembly, in case no person is chosen, from proceeding on the second day to choose a governor. The power to declare that no one is elected governor implies necessarily the power to declare that someone is elected. If the former is cut off by the words of the Constitution after the second day of the session, the latter is also cut off after that day.

This opinion is not now for the first time advanced. In 1831 there was no choice by the people of a lieutenant governor. The two Houses of the General Assembly were unable to unite in a joint ballot on the second day of its session, and there was no lieutenant governor chosen that year. It seems to have been taken for granted that any choice at a later day would be invalid. In 1871 the General Assembly, both Houses concurring, upon information

that a fraud had been committed in one of the cities of the State sufficient to change the result in the choice for governor as it appeared by the returns of the presiding officers, by its committee investigated the matter, and found that a great fraud had been committed, and thereupon declared that person to be elected who was found to be rightfully elected, although it was contrary to the result which appeared by the returns of the presiding officers. The Assembly that year contained many members who were lawyers of distinction and ability. It is known that the opinion of almost every other eminent lawyer in the State was obtained, and while there was a great difference in their opinions as to the power of the General Assembly to make the investigation, there was no difference in their opinions as to the time when the result of the investigation, if one was made, must be declared, and the result in that case was declared on the second day of the session. In 1883 a somewhat similar case happened in the General Assembly. In each of these cases the opinion prevailed that the declaration in respect to the election of governor could not be made so late in the session as to prevent the Assembly, in case there was no choice, from proceeding on the second day to choose a governor. So far as usage can be relied upon to afford a correct interpretation of the Constitution in this particular, it is uniform in one direction.

It may be urged that the necessity resting upon the General Assembly to examine the fair lists and the returns of the presiding officers is inconsistent with the duty to make the declaration so early in the session. The words of the Constitution on which this argument rests are found in the section already quoted, as follows: "And said Assembly shall, after examination of the same, declare the person whom they shall find to be legally chosen, and give him notice accordingly." An examination may be very general, or it may be very particular. Whether it is to be the one or the other in a given instance must be largely determined by the purpose for which the examination is made. The examination which the Assembly is directed to make is for the purpose of finding who, if anyone, is chosen governor; and not only that, but who is legally chosen. To "find," in the meaning of the law, is to ascertain by judicial inquiry. And the command to find and declare who is legally chosen means that the examination shall be sufficiently full and careful to determine the title, so that the person declared to be chosen shall have unimpeachable title to the office. It is doubtless highly desirable that there should be a governor at the very beginning of the session. But it is still more desirable that there shall be no question about the title of the governor. To induct a person into the office of governor whose title was open to dispute, and who might be adjudged not to have been elected, would be to invite discord and delay. Those who are dissatisfied with his title would refuse to go on with legislation, animosities might be provoked, the public business would be neglected, and a condition of things alike discreditably to the participants and the State would be likely to be produced. Such a course would bring about the very evils which the

examination that the General Assembly is directed to make was intended to prevent.

The time and manner of the performance by the General Assembly of the duty to examine and find must be construed in connection with the means provided, or which may be provided, for its performance and as applicable to that condition of things which will exist when the General Assembly shall have prescribed suitable laws for its performance. That condition of things which now exists solely because of the neglect of the General Assembly to prescribe suitable laws in this respect cannot properly be urged as a reason for holding that the General Assembly should have a wider authority or a longer time for the examination, finding and declaration. The concluding sentence of that section of the Constitution above quoted is that "the General Assembly shall by law prescribe the manner in which all questions concerning the election of governor and lieutenant governor shall be determined." By this direction the wisdom of the Assembly is left unfettered as to the laws by which it shall prescribe a manner for the determination of questions concerning the election of a governor and lieutenant governor. It may require other and more complete returns from the presiding officers of the electors' meetings or from the other officers of the election, as the registrars, counters and the like, or it may empower existing tribunals or create other tribunals to hear and report upon or decide all matters and questions which may arise at any electors' meeting in any voting district, only it would seem to be necessary that all such returns or reports or decisions must be laid before the General Assembly on the first day of its session, to the end that it might itself make the final examination, finding and declaration as required by the Constitution. When the Assembly shall have performed this duty, and shall have prescribed adequate laws for the determination of these questions, then the examination, the finding and the declaration will be a matter of no intricacy or doubt, and can readily be done on or before the second day of the session.

It is a high tribute to the sobriety and to the respect for law which pervades the people of this State that for almost a century no disputed election has happened which imperatively called on the General Assembly to enact laws for the determination of the questions that arise in election contests. Such a disputed election has now come. It is perhaps not too much to hope that the General Assembly will make haste to put an end to this anomalous condition of our election laws. The "certificates" or "returns," for both words are used, prescribed by section 240 of the Statutes to be sent to the secretary by the several presiding officers, appear to be a compliance by the General Assembly with the direction of the Constitution in this behalf. No argument can be needed to prove that what the General Assembly was commanded by the Constitution to prescribe it was its duty to examine. The uncertainty attending these certificates is that the secretary is not directed to lay them before the Assembly on the first day of its session, nor is it by any specific words made the duty of the General Assembly to examine them, or to act on them

if examined, and so it is claimed that either House is at liberty to disregard them if it chooses to do so.

This topic, and some of the others considered, have, perhaps, received more attention than importance demanded. Every occasion for their application will doubtless be speedily removed by further legislation. It has seemed to some of the members of this court that the General Assembly has no power subsequent to the second day of its session to make a declaration that any person is elected governor, or that no person has received a majority of all the votes, and so that no person is elected; and that, therefore, the present Assembly has no power to declare the relator to be elected governor. But as this point was not fully argued at the hearing, and as a decision upon it might affect other persons than those who are parties to this proceeding, the court does not now attempt to decide it.

From the facts spread out in the information it appears not only that the election process has broken down so that there is a failure to elect a governor, but that all legislation has ceased. Owing to the difference between the branches of the Assembly, an entire collapse in the legislative department has ensued. Whether this condition has resulted from one or the other of the causes we have mentioned it is not necessary to decide. In these circumstances it is not possible that the superior court may make an investigation, and, on finding that the relator received a majority of all the votes lawfully cast for governor on the 4th day of November, 1890,—whatever the returns of the presiding officers may show,—establish his title to that office by some judgment that shall be legally equivalent to the declaration which should have been made by the General Assembly? It must be carefully kept in mind that the courts have no function to perform in the process of an election. They disclaim any such power. The superior court cannot make the declaration which the Constitution says shall be made by the Assembly. The utmost that the court can do in a case like this is, by some judgment which it can lawfully make, to supply an omission or heal a defect. In the life of a State it may often happen that an occasion arises calling for the application of remedies which in the ordinary current of affairs would not have been thought to exist.

Whatever view of the workings of the Constitution may be taken, no one can suppose that it intends to afford opportunities for any state officer to hold office longer than the term for which he has been specifically elected. The Constitution provides for regular biennial elections for governor. There is a provision that the governor shall hold office until his successor is qualified. This was designed to cover exigencies always supposed to be brief. Until the present instance, it was never imagined that the practical operation of that provision would be to require or permit any governor to hold over for a large part of a term intended for a successor. It is only because of a singular omission on the part of the General Assembly to prescribe suitable laws by which all questions concerning the election of governor shall be determined that the present instance has been made possible. On the 4th day of

November, 1890, the voters of this State expressed their choice for him whom they would elect to be governor. They intended to choose a governor to hold office from the Wednesday following the first Monday of January, 1891, to the corresponding Wednesday in January, 1893. The respondent was not one of the persons voted for. At the same election they also chose members of the General Assembly, to whom they committed the duty of examining the results of their choice for governor, and declaring the person who was elected, and of choosing a governor in case they had made no choice themselves. By the defects in legislation already mentioned the will of the people in this respect has failed to be accomplished. A very great wrong is being done to them. The relator claims to have received a majority of all the votes cast for governor at said election. If his claim is correct, a great wrong is being done to him. He has come into a court seeking to establish his right to that office, and to obtain redress for that wrong.

It might be argued that it would bring deserved obliquy on the jurisprudence of this State, if there was no way in which the relator could establish the right which he claims. It is of the very essence of civil liberty that every individual shall have the protection of the laws whenever he receives an injury. At page 23 of the third volume of Blackstone's Commentaries, two cases are mentioned in which remedy is afforded by the mere operation of the law. "In all other cases," says that author, "it is a general and indisputable rule that where there is a legal right there is a legal remedy by suit or action at law whenever the right is invaded." As a general proposition, this rule is not denied. But it is urged that the General Assembly is the exclusive tribunal which has cognizance of the election of a governor. If, however, the General Assembly refuses to act, or if it be so that the General Assembly has jurisdiction of the election of a governor only in the manner and at the time pointed out by the Constitution, then the relator is remediless, unless the court may intervene. When the time is passed within which the General Assembly may act, its jurisdiction is gone. To hold that the Assembly has such exclusive jurisdiction, and that the court in no case can have the right to act, would be to afford an instance where a flagrant wrong was without a remedy. That such a result might follow is a powerful reason why that construction ought not to be adopted. Blackstone, at page 109 of the same volume cited above, speaking of what injuries are cognizable by the courts of the common law, adds: "And herein I shall for the present only remark that all possible injuries whatsoever that do not fall within the exclusive cognizance of either the ecclesiastical, military or maritime tribunals are for that very reason within the cognizance of the common-law courts of justice; for it is a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress." The superior court of this State, as a court of law, is a court of general jurisdiction. It has jurisdiction of all matters expressly committed

to it, and of all others cognizable by any court of law of which the exclusive jurisdiction is not given to some other court. The fact that no other court has exclusive jurisdiction in any matter is sufficient to give the superior court jurisdiction over that matter. A trial by the superior court of the questions presented in the information would not be an infringement upon the powers of the co-ordinate branches of the government. Not of the legislative, if it has been made to appear that the present Legislature is wholly unable to act in the case. It is no infringement upon the executive powers to decide who is chosen governor. To decide what person is lawfully elected to any office is a judicial process, and, where there is no tribunal specially authorized to make such decision, the courts must decide. And the courts always have jurisdiction, unless the decision of the special tribunal is final and conclusive. And where such special tribunal exists, if it refuses to act or from any cause fails to act, then the courts upon general principles and to prevent the failure of justice, and perhaps to prevent anarchy and misrule, would seem to be authorized to make a decision.

The contention made in this case in behalf of the respondent is that his right to hold the office of governor continues till the title of a successor to that office is established. The converse of this is admitted: that, if the title of the relator of the office of governor is established, his right to hold that office would cease. It seems, then, that there can be no interference with the executive power in this case. Such arguments would come with great force, and present a very strong case. But if the court was fully convinced of them, and even if it should decide that the present Assembly was without power to make any declaration of election for governor for either of the reasons discussed, still judgment could not be rendered on this information. It does not contain the necessary averments.

In point of form in the present action, it is the right of the respondent to exercise the office of governor that is in question. But, as the right of the respondent depends upon the election of the relator to that office, it is really the title of the relator that is on trial. If the relator has been completely elected, then the right of the respondent to hold the office is ended. If the relator has not been elected, then the right of the respondent continues. The claim made in behalf of the relator is that he ought to have been declared elected by the General Assembly, because it appears by the returns from the presiding officers that he received a majority of all the votes cast for governor; and, if the Assembly did not do so, the court ought now to declare him elected, or to regard him as having been elected, by such apparent majority. This claim admits that if the General Assembly had declared the relator elected upon the returns the declaration would give him only a *prima facie* title to the office, and that, if inducted into it upon such declaration, he might be ousted therefrom upon its being shown that he did not in fact have the real majority of the votes cast for governor. If the court should declare the relator elected upon the same returns, it could give him no stronger title to the office than a declaration

by the General Assembly. He could still be ousted upon a proper proceeding. It would be most unseemly for the court to occupy itself in putting the relator into the office of governor, if by any possibility it might happen that the court would be required to remove him from that office as soon as he began to exercise it. The writ of quo warranto is the form of action specially adapted to try the right to an office. But it tries only the real title. It can never be used to try an apparent title. It gives judgment on that title alone which cannot be afterwards called in question. The information does not allege that the relator had the majority of all the votes, but only the majority as it appears by the returns of the presiding officers, while other parts of the information show that such apparent majority is in dispute. Nor does the information contain any allegation that the General Assembly had become unable to decide upon the relator's right to the office he claims.

If the relator shall hereafter, by an amendment of the present information, or by a new one, allege that he received a majority of all the votes lawfully cast for governor on the 4th day of November, 1890, and it shall also appear from the facts therein stated that the General Assembly is without the power to make any declaration in respect to the election for governor, a case would be presented of which the superior court might take jurisdiction.

The superior court is advised that the information is insufficient, and to sustain the demurrer.

Carpenter, J., dissenting:

I agree that the demurrer should be sustained, and mainly for the reasons expressed in the foregoing opinion, but I cannot concur in all the views expressed on other matters; especially those relating to the power of the General Assembly to examine the returns and declare the result after the second day of the session. Neither do I wish to be understood

as wholly dissenting. I think it wiser to say nothing, as the court is not called upon to express any opinion on that subject for several reasons: (1) The case lays no foundation for it. The record does not present that question. (2) It has not been discussed by counsel on either side. (3) The question relates to the constitutional power of the General Assembly in a matter within its jurisdiction. As a co-ordinate branch of the government, it has the power, and it is its privilege, to determine that question for itself, subject, possibly, to the power of the court to declare the legislative action void, if it clearly violates the Constitution, and does injustice. (4) If at any time the Legislature should ask our advice, then the question will properly arise.

I did hope that the court would consider more fully and decide whether the Legislature had the right to consider the statutory returns in determining the result of the election, as that question is in the case, was fully discussed, and could not have been considered as *obiter*. Moreover, that is the rock on which the Legislature split. Another important point might, and I think ought to, have been considered; that is this: should or should not the returns as they stand, inasmuch as the Legislature has not corrected or changed them (assuming that it has the power to do so,) be regarded as final and conclusive, and as indicating the legal result of the election? I am aware that the opinion intimates, perhaps was intended to decide, that the superior court would have the power to determine for itself the result. I am not prepared to concur in that view. As I remember, that question was not argued. I should prefer to hear it fully argued before deciding it. If the question as to the conclusive character of the returns had been decided one way, perhaps the court might have retained jurisdiction and have disposed of the case. I think, on the whole, that it is well to let the Legislature have another opportunity to settle the matter.

PENNSYLVANIA SUPREME COURT.

Samuel T. EWING and Wife, *Appts.*,

PITTSBURGH, CINCINNATI, CHICAGO
& ST. LOUIS R. CO.

(.....Pa.....)

More fright, unaccompanied with bodily injury,
cannot constitute a cause of action.

(January 4, 1892.)

NOTE.—Fright as a basis for a cause of action.

In a few cases a recovery of damages for fright alone has been sustained without proof of any physical injury except that which resulted from the fright.

Thus a miscarriage and serious impairment to the health of a woman occupying leased premises, caused by fright produced by a boisterous and violent assault upon some negroes on the premises and in her presence, by the landlord, who knew her pregnant condition, gives a cause of action

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A PPEAL by plaintiffs from a judgment of the Court of Common Pleas for Allegheny County in favor of defendant in an action brought to recover damages for injuries alleged to have been sustained by the female plaintiff because of a fright which she received through defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. John D. Brown and A. M. Brown, for appellants:

A negligent act is deemed the proximate

against him. *Hill v. Kimbell*, 7 L. R. A. 618, 76 Tex. 210.

This is perhaps the only case in which such a recovery was allowed in which there was not involved some wrongful act or at least negligence, toward the person frightened, as in the cases next following.

Thus the fright and exertion of a woman in escaping from an intoxicated person who comes into her house threatening to shoot her, which result in a miscarriage, will sustain an action for damages. *Barbee v. Reese*, 60 Miss. 808.

cause of an injury where the result is produced without any other cause intervening.

Oil Creek & A. R. Co. v. Keighron, 74 Pa. 316.

The test is not the peculiar result of a particular accident—it is not essential to liability for negligence that the particular result may reasonably have been foreseen. It is a question simply of the defendant's negligence, and its proximity and directness as a cause and result of the act.

Bishop, Non cont. Law, par. 457; Beach, Contrib. Neg. p. 7.

Where one negligently and wrongfully puts or seemingly puts another in danger of his life, or of serious bodily harm and injury, and under the influence of extreme alarm and terror and the excitement of the moment and situation he acts wildly and suffers an injury in consequence of his own actions, he is not guilty of, nor does his conduct in such a situation amount to, contributory negligence, and he may recover damages for the injury, whether that injury consists of sickness or disease excited, or produced by force and violence to the person, or by fright, mental excitement and nervous prostration; and mental pain and suf-

fering is universally recognized as a distinct element of damages.

Beach, Contrib. Neg. pp. 42-45 inclusive, and foot notes; Bishop, Non-cont. Law, pars. 445, 1108; 2 Wood, Railway Law, p. 1261; *Pittsburgh v. Grier*, 23 Pa. 54; *Johnson v. West Chester & P. R. Co.* 70 Pa. 357, 366; Pollock, Torts, *387, 388 *et seq.*; Bigelow, Torts, pp. 311, 316.

The plaintiff was frightened and suffered from consequent nervous troubles and sickness. A recovery for such injuries can be sustained. It is "damage" arising from the defendant's negligence.

Baltimore & O. R. Co. v. Bambrey (Pa.) Nov. 5, 1888; *Schneider v. Pennsylvania Co.* (Pa.) 2 Cent. Rep. 74; *Scott Twp. v. Montgomery*, 95 Pa. 444; *Crutcher v. Chicago & N. W. R. Co.* 36 Wis. 657; *Fitzpatrick v. Great Western R. Co.* 12 U. C. Q. B. 645; *Barbee v. Reese*, 60 Miss. 906; *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 Am. Rep. 41; *Stewart v. Ripon*, 38 Wis. 591; *Oliver v. La Valle*, 36 Wis. 592; *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 74; *Jeffersonville, M. & I. R. Co. v. Riley*, 39 Ind. 568; *Houston & T. C. R. Co. v. Leslie*, 57 Tex. 83; *Allison v. Chicago & N. W. R. Co.* 42 Iowa, 274.

So damages for the fright to which a woman was subjected by the approach of cars on a side track when improperly compelled to leave a car in which she had ridden at a place several hundred feet from the depot platform, and who fell into a culvert and was injured while going along the side track to the platform, may be included in the recovery for her injuries. *Stutz v. Chicago & N. W. R. Co.* 78 Wis. 147.

And a verdict for \$2,000 was held not excessive for putting a little girl six years old off from a train, in violation of a statute, 240 feet from a depot, where there was evidence of functional derangement of the heart caused by fright at being thus left alone on the track. *Illinois Cent. R. Co. v. Latimer*, 23 Ill. App. 532, affirmed in 128 Ill. 163.

A defect in a bridge which breaks through while a woman is riding over it is the proximate cause of a miscarriage which results from her fright thereby occasioned, or from her jumping out of the vehicle, or from her subsequent exertion in trying to extricate the horse, or from all these causes combined. *Oliver v. La Valle*, 36 Wis. 596.

A declaration alleging that plaintiff while a passenger in a railway carriage was by means of a collision "much affrighted, terrified and alarmed, whereby she became sick, sore, and disordered, and so continued from thence hitherto, during which time she suffered great pain and much anguish in so much that her life was endangered, and thereby also, by reason of the terror and alarm occasioned to her by the said collision and of such sickness occasioned thereby, she had a premature labour and bore a still-born child," was held good on demurrer. The court said the fright and the commencement of her sickness might be considered as simultaneous and that as the declaration would be good without stating the fright but stating only the sickness as the result of negligence, the statement as to the fright did not render it demurrable. *Fitzpatrick v. Great Western R. Co.* 12 U. C. Q. B. 645.

But it will be seen by the cases following that the courts have generally denied the right to recover for damages due to fright alone.

Injury to a pregnant woman from fright caused by a runaway horse which did not touch her will not sustain an action. *Lehman v. Brooklyn City R. Co.* 47 Hun, 355.

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Miscarriage from a nervous shock caused by the fall of a bundle of laths which did not strike the person is too remote to sustain a recovery of damages for negligence in respect to the fall. *Rook v. Denis*, 4 Mont. L. Rep. 356.

Shooting at a dog from a highway is not the proximate cause of injury by fright to a woman standing near by who is not the owner of the dog and of whose presence the one who shoots is not aware, even if the shooting was wrongful, at least where it was not in any such proximity to a dwelling that injury to the inmates might be naturally and reasonably anticipated from fright or otherwise. *Renner v. Canfield*, 36 Minn. 90.

Mental anxiety or fears as to personal safety caused by blasting near one's residence is not alone a ground for damages where no physical injury or disease results therefrom. *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 308.

Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot be considered under any circumstances ordinary consequence of the negligence of a gate keeper in allowing persons to be placed in great peril at a railway crossing. So held by the House of Lords, reversing the decision of the supreme court. *Victorian R. Comrs. v. Coultas*, L. R. 13 App. Cas. 222.

Fright and mental suffering alone caused by mere risk and peril, without bodily injury, will not sustain an action although a very small bodily injury will justify damages for mental suffering. *Canning v. Williamstown*, 1 Cush. 451.

Damages are not recoverable for peril and fright in addition to pain and mental anguish. *Atchison, T. & S. F. R. Co. v. McGinnis* (Kan.) April 11, 1891.

The allowance of damages to seamen for being thrown into the water by a collision, without proof of substantial harm to them, is declared by the court to be "specially impolitic and dangerous." *The Queen*, 40 Fed. Rep. 604.

In the report of an early case it is stated that evidence that a woman was so terrified by a breaking into the house that she was immediately taken ill was admitted in an action for trespass only to show how outrageous and violent the breaking was, and not as a substantive ground of damage. *Huxley v. Berg*, 1 Stark. 96.

B. A. K.

Messrs. William Scott and George B. Gordon, for appellees:

Ex damno sine injuria non oritur actio.

Waterer v. Freeman, Hob. 266a.

This maxim applies to those cases where the party aggrieved has no remedy, because no right has, in contemplation of law, been invaded.

Broom Legal Maxims, p. 200.

At common law the present action must have been either trespass or case. It could not be trespass, for that action could be brought only for "immediate injuries to the person accompanied with force."

Train & H. Pr. § 1572; Chitty, Pl. 140.

In the long list of illustrations given by *Chitty on Pleading*, pp. 142, 148, of cases where trespass in the case will lie, there is none, the foundation of which is not a forcible injury to the person or else a wrong caused by the commission of an illegal act (e. g. nuisance or libel), or the failure to perform a legal duty.

Negligence constitutes no cause of action unless it expresses or establishes some breach of duty.

Addison, Torts, § 1838.

We owed the plaintiff no duty to keep our cars on the track, and consequently we were guilty of no actionable negligence.

Fox v. Borkey, 126 Pa. 164.

The damages were too remote. The injury, to be actionable, must be the natural and probable consequence of the negligent act.

Pittsburgh S. R. Co. v. Taylor, 104 Pa. 306, 49 Am. Rep. 580; *West Mahanoy Twp. v. Watson*, 3 Cent. Rep. 243, 112 Pa. 574, 56 Am. Rep. 386; *Pennsylvania R. Co. v. Kerr*, 62 Pa. 353, 1 Am. Rep. 431; *Pennsylvania R. Co. v. Hope*, 80 Pa. 373, 21 Am. Rep. 100; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 653.

The frightening of a woman is also "a thing that cannot be anticipated, and is governed by no known rules."

Huxley v. Berg, 1 Stark. 98; *Victorian R. Conrs. v. Coultas*, L. R. 13 App. Cas. 222.

In no case has it ever been held that mental anguish alone, unaccompanied by an injury to the person, afforded a ground of action.

Mayne, Damages, p. 74, note; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303. See *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 313; *Canning v. Williamstown*, 1 Cush. 451; *Johnson v. Wells, Fargo & Co.* 6 Nev. 224, 3 N. M. Rep. 245; *Lynch v. Knight*, 9 H. L. Cas. 577.

Per Curiam:

The wrong of which the plaintiff Eva Ewing complains was a collision of cars upon the railway of the defendant Company, in consequence of which the cars were broken, overturned, and thrown from the track, and fell upon the lot and premises of the plaintiffs, and against and upon the dwelling-house of plaintiffs, and thereby and by reason thereof greatly endangered the life of the said Eva Ewing, then being in said dwelling house, and subjected her to great fright, alarm, fear, and nervous excitement and distress, whereby she then and there became sick and disabled, and continued to be sick and disabled from attending to her usual work and duties, and suffered and continues to suffer great mental and

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physical pain and anguish, and is thereby permanently weakened and disabled," etc. To this statement the defendant demurred, and the court below entered judgment for defendant upon such demurrer. This ruling is assigned as error. It is plain from the plaintiff's statement of her case that her only injury proceeded from fright, alarm, fear, and nervous excitement and distress. There was no allegation that she had received any bodily injury. If mere fright, unaccompanied with bodily injury, is a cause of action, the scope of what are known as "accident cases" will be very greatly enlarged; for in every case of a collision on a railroad the passengers, although they may have sustained no bodily harm, will have a cause of action against the company for the "fright" to which they have been subjected. This is a step beyond any decision of any legal tribunal of which we have knowledge.

Negligence constitutes no cause of action unless it expresses or establishes some breach of duty. *Addison, Torts, § 1838.* What duty did the Company owe this plaintiff? It owed her the duty not to injure her person by force or violence; in other words, not to do that which, if committed by an individual, would amount to an assault upon her person. But it owed her no duty to protect her from fright, nor had it any reason to anticipate that the result of a collision on its road would so operate on the mind of a person who witnessed it, but who sustained no bodily injury thereby, as to produce such nervous excitement and distress as to result in permanent injury; and, if the injury was one not likely to result from the collision, and one which the Company could not have reasonably foreseen, then the accident was not the proximate cause. The rule on this subject is as follows: "In determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been seen by the wrong-doer as likely to flow from his act." *Pittsburgh S. R. Co. v. Taylor*, 104 Pa. 306, 49 Am. Rep. 580; *West Mahanoy Twp. v. Watson*, 112 Pa. 574, 3 Cent. Rep. 243, 56 Am. Rep. 386.

Tested by this rule, we regard the injury as too remote. We know of no well-considered case in which it has been held that mere fright, when unaccompanied by some injury to the person, has been held actionable. On the contrary, the authorities, so far as they exist, are the other way. Mr. Wood fairly states the rule in his *note* to Mayne on Damages at page 74: "So far as I have been able to ascertain, the force of the rule is that the mental suffering referred to is that which grows out of the sense of peril or the mental agony at the time of the happening of the accident, and that which is incident to and blended with the bodily pain incident to the injury, and the apprehension and anxiety thereby induced. In no case has it ever been held that mental anguish alone, unaccompanied by an injury to the person, afforded a ground of action." In *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303, a contractor of a railroad was blasting rocks within the right of way of the road. The blast blew rocks upon the plaintiff's land, and,

in addition to the damage to the land, plaintiff claimed damages for fright, caused by apprehension of personal injury. Held, that he could not recover. Our own recent case of *For v. Borkey*, 126 Pa. 164, was a case of fright from blasting, and it was said by our Brother Mitchell: "The injury was not the natural or proximate result of the act complained of." In *Lynch v. Knight*, 9 H. L. Cas. 577, Lord Wensleydale said: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act

complained of causes that alone." To the same point are *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 818; *Cunning v. Williamstown*, 1 Cush. 451; *Johnson v. Wells, Fargo & Co.* 6 Nev. 234, 8 Am. Rep. 245.

We need not discuss the authorities cited by the appellant. They are nearly all cases in which the fright was the result of, or accompanied by, a personal injury, and have no application to the case in hand.

Judgment affirmed.

WASHINGTON SUPREME COURT.

TACOMA HOTEL CO., *Resp't.*,

v.

TACOMA LIGHT & WATER CO., *App't.*

(.....Wash.....)

The rule of a water company to require payment at a stated period of the amount due from the consumer as a condition precedent to continuing his water supply is reasonable and lawful.

(December 10, 1891.)

A PPEAL by defendant from a judgment of the Superior Court for Pierce County in favor of plaintiff in a suit brought to enjoin defendant from shutting off the water supply from plaintiff's premises. *Reversed.*

The facts are stated in the opinion.

Mr. Galusha Parsons, for appellant:

In all of the cases in which it has been held that some particular rule of a water or gas

company was unreasonable, and therefore void, the principle has been recognized that such companies have a right to adopt all such rules as are reasonably necessary as between them and the public for carrying on their business. *Shepard v. Milwaukee G. L. Co.* 6 Wis. 539, 70 Am. Dec. 479.

The Company has the right to fix the rate to be paid.

Parker v. Boston, 1 Allen, 363; *Spring Valley Water Works v. San Francisco*, 6 L. R. A. 756, 82 Cal. 286; *Stons v. Farmers L. & T. Co.* 116 U. S. 807, 29 L. ed. 636.

A company may refuse to continue to furnish one who has not paid for water or gas already supplied.

People v. Manhattan G. L. Co. 45 Barb. 136; *Girard L. Ins. Co. v. Philadelphia*, 88 Pa. 393; *Williams v. Mutual Gas Co.* 52 Mich. 499, 50 Am. Rep. 266; *Gas Light Co. of Baltimore v. Colliday*, 25 Md. 1; *Morey v. Metropolitan G. L. Co.* 6 Jones & S. 185.

NOTE.—Right to stop supply of water or gas for default of payment.

A city may cut off a water supply for default of payment. *Harrisburg's App.* 107 Pa. 102.

Under an ordinance authorizing the supply to be cut off for default of payment mortgagees who purchase on foreclosure cannot compel the supply of water without paying arrears of water rents. *Girard L. Ins. Co. v. Philadelphia*, 88 Pa. 393.

And they may be compelled to pay the arrears for several years although the city officials have allowed them to accumulate while they might have cut off the supply on the first year's default. *Ibid.*

After payment of water rates for a year in advance, a city cannot during that year cut off the water for failure of a predecessor in title to pay the water rates for the preceding year. *Merrimac River Sav. Bank v. Lowell*, 10 L. R. A. 122, 152 Mass. 556.

But the supply of water to certain premises may be cut off for arrearages due by the previous owner where the charter of the water company provides that real estate to which the water is supplied shall be bound and liable for the use of it. *Brumm v. Pottsville Water Co. (Pa.)* 11 Cent. Rep. 702.

An ordinance providing that on default of payment for gas consumed, within ten days after a bill is rendered, the supply may be stopped until the bill is paid, is a reasonable regulation. *Com. v. Philadelphia*, 132 Pa. 238.

A gas company has no right to stop the supply of gas for refusal to pay a disputed charge for a special service, although it has power by statute to stop the supply for default of payment of regular 14 L. R. A.

charges. *Re Commercial Bank of Canada*, 20 U. C. Q. B. 233.

A consumer may have an injunction to prevent cutting off the supply of gas on a claim of arrearage when there is a controversy as to the indebtedness and at least something of an overcharge. *Sickles v. Manhattan G. L. Co.* 66 How. Pr. 314.

Furnishing gas on an application therefor without objecting on account of a former indebtedness for gas will not waive the right to shut off the gas for such prior indebtedness. *People v. Manhattan G. L. Co.* 45 Barb. 136.

The right to shut off the supply of gas to premises of any person who shall neglect or refuse to pay under N. Y. *Seas. Laws* 1856, chap. 311, § 9, does not extend to arrears of former occupants. *Morey v. Metropolitan G. L. Co.* 6 Jones & S. 185.

Nonpayment of a bill for gas at one house will not justify cutting off the supply for another house where the contracts for the houses are separate and authorize the stopping of the supply on default of payment for "gas consumed on said premises." *Gas Light Co. of Baltimore v. Colliday*, 25 Md. 1.

Nonpayment of a gas bill for premises formerly occupied by a person will not justify cutting off his supply of gas at another place where the company after the default has signed a contract to furnish him gas upon condition that it may refuse to continue it "to any premises, the owner or occupant of which shall be indebted to the company for gas or fittings used upon such premises or elsewhere," the contract must be construed to refer only to a future default. *Lloyd v. Washington G. L. Co.* 1 Mackey, 381.

B. A. R.

The defendant had a right, in case of plaintiff's failure to pay its bills as rendered, to make the additional charge of 5 per cent.

Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420, 13 Am. Dec. 188; *Pullman P. Car Co. v. Reed*, 75 Ill. 125, 20 Am. Rep. 232; *Jeffersonville R. Co. v. Rogers*, 28 Ind. 1, 92 Am. Dec. 276; *Indianapolis, P. & O. R. Co. v. Rinard*, 46 Ind. 298; 2 Rorer, Railroads, 227, pp. 982-983; Morawetz, Priv. Corp. § 501; Waterman, Corp. p. 245.

Messrs. W. Lair Hill and Thaddeus Huston for respondent.

Scott, J., delivered the opinion of the court:

The appellant is the owner by assignment of a grant and franchise by ordinance of the City of Tacoma, granting to John W. Sprague, his associates and assigns, "the right and privilege of supplying the city of Tacoma and the inhabitants thereof with pure and fresh water, for which they shall be and are hereby authorized to charge the consumers thereof reasonable rates." The appellant, operating under said grant, supplied to the premises of the respondent water for and during the three months ending October 1, 1890, for which supply it demanded the sum of \$478.10, which the respondent refused to pay. The appellant added a penalty to said sum, increasing the same to \$502, and again demanded payment, and, upon the continued refusal of the respondent to pay appellant, threatened to shut off and stop supplying the water for respondent's premises; whereupon respondent brought this suit to enjoin the appellant from so doing.

The complaint sets forth the corporate character of the parties to the action; the plaintiff's ownership of the premises described; that the building thereon is a large and expensive hotel, and "that the use of the water furnished by the defendant is absolutely necessary to the use and occupancy of said hotel for the purposes for which it was constructed;" the demand of the sum of \$502 claimed; an allegation that said charge is unreasonable, excessive and unlawful; an allegation that the plaintiff is and at all times was ready and willing to pay a reasonable sum; and alleging the purpose of the defendant to shut off the water, and deprive plaintiff of its use, thereby causing the plaintiff great and irreparable injury, etc. The answer denies that the charge is unreasonable, excessive or unlawful; denies the readiness of the plaintiff to pay a reasonable sum; admits that it was and is defendant's purpose to deprive the plaintiff of the use of its water for said hotel and premises until it should pay the reasonable charges of defendant for the water furnished it for the quarter ending on the 1st day of October, 1890; denies that it would cause plaintiff great and irreparable injury, etc.; and contains an affirmative defense, wherein the corporate capacity of the defendant is fully set forth; also its ownership of the water franchise, and its rights and authority thereunder. It also contains the following allegations: "(4) That for the transaction of the business for which it was incorporated, and to enable it to furnish water as in said ordinance provided to the said city of Tacoma and its inhabitants, at reasonable rates, it adopted, 14 L. R. A.

among others, a rule in the words following, to wit: 'Sec. 19. Water rents will be due and payable quarterly on the first days of January, April, July, and October. In case of nonpayment of rents within ten days after they are due, five per cent additional will be added, and, if the rents are not paid within fifteen days after they are due, the water will be shut off from the premises, as provided for in sections 20 and 21.' (5) That to secure compliance with said rules, without which the proper management of the business of said company would have been wholly impracticable, it adopted a further rule, as follows: 'Sec. 20. On failure to comply with the rules and regulations established as a condition to the use of water, or to pay the water-rents in the time and manner hereinbefore provided, the water may be shut off until payment is made of the amount due, with fifty cents in addition for the expense of turning the water off and on.' (6) That said rules were made a part of the contract with all persons applying to be furnished with water by this defendant. (7) That prior to the 6th day of May, 1890, this defendant established the following rates as the rates to be paid by persons desiring that they should be supplied with water by meter, to wit: Meter rates from 1,000 to 50,000 gallons per month, per 1,000 gallons, \$.25; meter rates, from 50,000 to 100,000 gallons per month, per 1,000 gallons, \$.20; meter rates, all over 100,000 gallons per month, per 1,000 gallons, \$.15. That said rates were reasonable and far below the rates usually charged by water companies in the United States. That the said rates so charged were well known to the directors and managing officers of this plaintiff. That, well knowing the rates of charges of this defendant for water furnished by measurement to the inhabitants of said city, plaintiff applied in writing to this defendant to furnish water for the use of the said hotel, and thereupon agreed to comply with the rules and regulations of this defendant in respect thereto; and that, in default thereof, or of prompt payment at the rates so established, or of a failure to comply with the said rules and regulations, the water might be turned off from the premises so supplied, and discontinued until the bills for water furnished previously thereto should have been paid. (8) That in pursuance of said request, and in accordance with its rules and regulations, defendant furnished water for the use of said hotel for the months of July, August, and September, 1890, to the amount of 4,780,500 gallons. That at the established rate when said water was so furnished, to wit, at the rate of fifteen cents for 1,000 gallons, it would have amounted to the sum of seven hundred and seventeen and 12-100 dollars (\$717.12) which sum would have been a reasonable and just charge therefor. (9) That, nevertheless, said defendant having, after the making of said application, reduced its charges below the established rates therefor, as they then existed, to consumers whose consumption should exceed 200,000 gallons per month, to wit, to the sum of ten cents per thousand gallons, it voluntarily, and without having agreed so to do, reduced the rate of charges to this plaintiff from fifteen cents to ten cents per thousand gallons. (10) The defendant presented to

plaintiff its said bill for four hundred and seventy-eight dollars and 10-100, (\$478.10,) and, plaintiff having wholly neglected and refused for fifteen days after the same became due to pay for the water so consumed by it, and as provided by the said rules, this defendant, in accordance with its rules and regulations, to wit, with said rule nineteen, added to the said bill the sum of five per cent (5) of the amount thereof, and presented to this plaintiff a bill therefor, to wit, for the sum of five hundred and two dollars, (\$502.00,) as stated in said complaint, which sum still remains wholly unpaid. (11) And this defendant further says that it has at all times been, and is now, ready and willing to furnish to the said plaintiff all the water that it may require or demand for its use, at reasonable rates, and below the rates usually charged by water companies elsewhere for the like service, to wit: If the same exceed 200,000 gallons per month, at the rate of ten cents per thousand gallons, upon condition that the plaintiff pay for the same as provided by the established and published rules of this defendant, and that it conform to such rules, all of which the said plaintiff, in writing, at the time of its application to be supplied with water, agreed to do." The plaintiff demurred to the answer on the ground that it did not state facts sufficient to constitute a defense. The court sustained the demurrer, and, upon the refusal of the defendant to plead further, rendered a judgment and decree for the plaintiff.

The controversy is over the reasonableness of the rules and the rate charged, and as to whether appellant had a right to estop supplying the water upon the refusal of respondent to pay the sum in arrears. It is contended by appellant that the demurrer admits not only that the rules were reasonable, but that it was impracticable for appellant to carry on its business without the rules which the answer alleges it had adopted, and that the defendant at the time of its application knew what the rules were, and agreed to be bound by them, and that it is likewise admitted that the rate charged was reasonable. The respondent claims there is no admission that it agreed to comply with the rules and regulations of the appellant; and, quoting from paragraph 7 aforesaid of the answer, says: "This is really the only attempt at an affirmative allegation in the answer, and is very ingeniously pleaded. Much stress is laid upon it by counsel for appellant. It is argued that, because respondent made an application in writing to be furnished with water on its premises, it 'thereupon,' by inference or implication, agreed to comply with the rules and regulations of appellant, whatever they might be, reasonable or unreasonable; and that therefore appellant has the right to shut the water off, and deprive respondent of the use thereof, regardless of consequences, simply to enforce the payment of a disputed claim and penalty. This pretended right respondent disputes, and the demurrer does not admit it." It contends that the actual issue raised by the pleadings is whether the appellant has a legal right to enforce or attempt to enforce the payment of a sum claimed by it to be due, which includes a penalty of 5 per cent for nonpayment for water

furnished by it to respondent, by shutting off the water connections with respondent's premises, and depriving it of the use of water furnished by appellant under its franchise. That said franchise confers upon appellant valuable rights and privileges, and, while it is not an exclusive grant by the terms of its charter, that it is so practically. That these rights and privileges are granted by the public, and in consideration thereof it owes something to the public, viz.: The "supplying the city of Tacoma and the inhabitants thereof with pure and fresh water, for which they shall be and are hereby authorized to charge the consumers thereof reasonable rates." That no power is conferred in any way upon appellants to arbitrarily establish a rate or charge which the public should be compelled to accept as reasonable, nor is the appellant in any way given any power, right, or privilege to proceed to the enforcement of the payment of any sum it may claim to be due it in any other way than that possessed by any other individual or corporation,—that is, through the courts, under the forms of law. The respondent further contends that the rules as well as the rate charged are unreasonable; that the pleadings disclose a dispute between the parties thereupon, and that the respondent has a right to have these matters determined by the courts in the usual way; and contends further that the answer of appellant is bad on demurrer because it admits the purpose of appellant to shut off and deprive the respondent of the use of said water on its said hotel premises, which use the complaint alleges is absolutely necessary to enable it to conduct its hotel business.

Some of the matters so contended for by respondent, it seems to us, are not involved in the case in its present aspect. The appellant corporation has been expressly granted the right to supply the city of Tacoma and its inhabitants with pure and fresh water, with the right to lay pipes, etc., in the public streets and alleys, for the purpose of carrying the same into effect. Its business is such as is usually carried on by the public or associated capital, and it is dependent upon the needs of the people in its immediate vicinity for its profit. Its relations to the people, and the rights and privileges it must from the very nature of its business necessarily exercise, give it a public character, and to some extent a monopoly, which, it is true, can only be tolerated upon the ground of a reciprocal duty to meet the public want. Its duty is to supply the inhabitants of Tacoma within the extent of its business, who may apply to it therefor, with water, for a reasonable price, and upon reasonable conditions. This it can be compelled to do, and respondent is right in its contention that appellant cannot arbitrarily establish prices which must be paid, and conditions which must be submitted to, by the inhabitants of that city, without any regard as to whether such prices and conditions are reasonable or necessary. But, as we view the case, this question is not now before us. It does not appear that the city has undertaken in any way to fix prices or lay down rules to govern appellant's business, and whatever rights the city may have in this respect we are not called upon to consider; but cer-

tainly, in the absence of any such attempt upon the part of the city, appellant has a right to establish prices to be paid, reasonable in amount, and to make all needful rules for the management and regulation of its business, and under such circumstances, at least, whenever a contest arises over them, these will be questions for the courts to determine. But the answer in this case alleges that the rate of prices established is a reasonable one, and, under the familiar rule of pleading that a demurrer admits everything which is well pleaded, this fact, under the present aspect of the case is settled. So also is the fact of the indebtedness for the water previously furnished likewise admitted. We wish this understood as limited to the sum first demanded. The power of the water company to impose an additional sum by way of penalty in case of non-payment stands upon a different footing from that of the power to establish the price in the first instance, not being dependent upon any facts as to the cost and expenses of supplying the water and carrying on its business, and a reasonable profit thereon. As to whether the penalty could be sustained, might be regarded as a question of law for us to determine, as to its being authorized, or a reasonable charge, did we find it necessary for us to pass upon it in the disposition of the case, unless it should be sustained upon the ground that it was a part of the original price which the respondent contracted and agreed to pay in case of the contingency arising. But, in any event, it stands admitted that the rate fixed is reasonable; that the respondent used the water for a time specified; and that it is indebted to the appellant therefor in the sum first demanded; and there is no claim that it has ever tendered any sum. The allegation in the complaint of a readiness and willingness to pay does not amount to this, even if it could be considered.

Now, then, could the Water Company refuse to supply the Hotel Company with water any longer unless it would pay the sum already due? Whether the contract between the parties was for a specified time not yet expired, or was a continuing one, is not apparent, and it does not matter, for it is admitted that the sum stated was due under the contract, whatever it was. There was no new application for water subsequent to the one under which the water up to October 1, 1890, had been furnished, and we are of the opinion that the Water Company had the right to require the payment of the sum so due as a condition precedent to its continuing to supply the Hotel Company with water under the general rule it had previously established, and it is not necessary to discuss the question whether the reasonableness or necessity of this rule is admitted by the pleadings, for we find as a matter of law that it is reasonable. Nor are we required to find whether it stands admitted by the pleadings that the Hotel Company contracted in writing in its application for water to be bound by the Water Company's rules, for it was bound in any event by the reasonable rules of the Water Company, of which it had actual notice; and it did have notice of this rule, at least when payment was demanded, and it is not claimed that the Hotel Company made any attempt to comply therewith,

nor that it was not given a reasonable time therefor. We do not decide that the Water Company could not refuse to furnish water until the sum due had been paid, whatever the facts may have been as to the contract, or in case of a new application, unless, perchance, the contract provided otherwise, or a new contract should be entered into ignoring the sum due.

In *Williams v. Mutual G. Co.*, 52 Mich. 499, 50 Am. Rep. 266, it is held that the gas company had the right to demand a deposit of money in advance, by way of security, before it could be compelled to furnish gas. In that case the applicant had been using about \$60 worth of gas per week, and its requirements were increasing, and the court sustained a demand for a deposit of \$100. Seventy-five dollars had been tendered therefor. In *Shepard v. Milwaukee G. L. Co.*, 6 Wis. 539, 70 Am. Dec. 479, the court says: "The third rule of the company, allowing the company to demand security for the gas consumed, or a deposit of money to secure payment thereof, appears to be just and necessary to guard against loss. As the delivery of the gas is necessarily its consumption, and as the amount delivered is ascertained by the amount consumed, it would seem to be just and right that the company should not be compelled to furnish it without reasonable security for payment in convenient amounts, and at proper periods." In *People v. Manhattan G. L. Co.*, 45 Barb. 136, it is held that the company may shut off the supply of gas until it has been paid the amount due for gas previously furnished. And the authorities apply as well to a water company as to a gas company, although water is a necessary of life. So far as its use is required as a necessity of life, if a case could possibly arise where an applicant could not get water, otherwise there, or go elsewhere to get it, it would be the duty of the public authorities to furnish it to him at the public expense. In *Girard L. Ins. Co. v. Philadelphia*, 88 Pa. 394, it is said that the supplying of water and gas is not a municipal duty. "Hence, when the city undertakes to do so, it acts, not by virtue of any rights of sovereignty, but exercises merely the functions of a private corporation." *Western Sav. Fund Soc. v. Philadelphia*, 81 Pa. 175, 72 Am. Dec. 730; *Wheeler v. Philadelphia*, 77 Pa. 338. The introduction of water by the city into private houses is not on the footing of a contract, but of a license, which is paid for. *Smith v. Philadelphia*, 81 Pa. 38, 22 Am. Rep. 731. It may very well be that when a license has been given by the city to the owner of a house to use the water such license may not be withdrawn arbitrarily, or from mere caprice. But it is equally clear that the city may adopt such rules in regard to the use of the water and the payment therefor as the municipal authorities shall deem expedient." And it was held in that case, where the ownership of the premises had changed, and where payment for the water furnished for one year immediately preceding the purchase had been tendered by the new owner, it being conceded that this was a proper charge under the city ordinance, that the city could not be compelled to furnish water for the premises aforesaid unless the applicant would pay the sum in arrears for water

furnished during three years preceding the change of ownership, with certain penalties thereunto added, although the city had neglected to take any steps according to the terms of the ordinance to collect the sums so due for the previous years. As to the authority of such companies to establish reasonable rules, see 1 *Morawetz, Priv. Corp.* § 501; 1 *Waterman, Corp.* § 77; 2 *Rorer, Railroads*, § 18. A condition imposed that the Company might refuse to furnish water to an applicant refusing to pay it a sum due for water furnished thereunder is in one sense a security for the payment thereof. Instead of forming an estimate of the water that would likely be used, and requiring a deposit in advance of a sufficient sum of money to cover the same, or requiring other security for the payment thereof, the Water Company provides that at stated periods payments shall be made in order that a large sum may not accumulate, it being willing to take its chances for a stated time without other security. Surely this is more lenient than either to demand a bond or other security, or a deposit of a sum of money in advance large enough to be reasonably certain of covering the sum that should become due.

Under the view we have taken of the state of the case, the authorities cited by respondent,

going to cases where an issue has been raised over the amount due, are not applicable. Of course, the respondent has the right to contest the fact of the indebtedness, and of the reasonableness of the rate, unless it has agreed to pay according to such rate, and even in that case, should it appear that it was compelled to make such an agreement in order to obtain the immediate necessary use of the water. Appellant makes the point that the demurrer to the answer could not be sustained in any event, whatever the court might hold upon the other questions, because the demurrer goes to the whole answer, and, as the first part of it only denies and tenders an issue upon the allegations of the complaint, it is unquestionably good. Consequently the demurrer should only have been directed to the new matter; otherwise, the answer raising an issue as to the allegations contained in the complaint, the demurrer must be overruled. While we think this point is well taken, we have considered the real merits in the other questions raised as they appeared to us.

Reversed and remanded.

Anders, Ch. J., and Hoyt and Stiles, JJ., concur.

Dunbar, J.: I concur in the result.

NEW YORK COURT OF APPEALS (2d Div.).

James P. KERNOCHAN *et al.*, *Respts.*,
v.
NEW YORK ELEVATED R. CO. *et al.*,
Appts.

(.....N. Y.....)

An opinion of a witness as to what the rental value of property would have been several years after a railroad was built in front of it if the road had not been built is not competent evidence.

(December 1, 1891.)

APPEAL by defendants from a judgment of the General Term of the Superior Court of the City of New York affirming a judgment of a special term in favor of plaintiffs in a suit brought to enjoin the operation of defendants' road until compensation should be made to plaintiffs for the injuries caused to their property by the road. *Reversed.*

Statement by **Potter, J.:**

The action was commenced April 3, 1888, and was tried June 28, 1889. The premises in question is No. 160 Pearl Street, in the city of New York, consisting of a lot and brick building, in front of which defendants constructed and operated an elevated railroad. The complaint contains the usual allegations which

characterize the numerous cases of this class of actions against defendants, and asks for judgment for the depreciation of the rental and fee values of the premises, and for an injunction as incidental to the latter, from the 7th day of November, 1888, since which time plaintiffs have owned and possessed said premises, to the time of the trial of this action, in consequence of the maintenance and operation of the railroad by defendants. The plaintiffs were awarded judgments accordingly.

Messrs. Julien T. Davies, Samuel Blythe Rogers and J. C. Thomson, for appellants:

It was error to permit witnesses for plaintiff to state what, in their opinion, would have been the fee and rental values of this property had the railway not been built.

This evidence was incompetent, as being the conclusion of a witness upon a matter which it was the sole province of the court to determine.

McGeen v. Manhattan R. Co. 117 N. Y. 219; *Acory v. New York Cent. & H. R. R. Co.* 121 N. Y. 31.

Mr. G. Willett Van Nest, for respondents:

Conceding for the purpose of argument that the *McGeen Case*, 117 N. Y. 219, decides that it is not proper to ask a witness the value of property "if there were no elevated road in front thereof," yet it was clearly proper to ask as to the value of the property as it stood. To raise the *McGeen* question the defendants should have objected to the latter part of the question.

Hochrieter v. People, 2 Abb. App. Dec. 363;

NOTE.—This case is published as illustrating the application of the rule laid down in *Roberts v. New York Elev. R. Co.*, 13 L. R. A. 499, 128 N. Y. 455, the opinions and briefs in which contain an exhaustive discussion of the subject.

14 L. R. A.

New York v. Second Ave. R. Co. 8 Cent. Rep. 822, 102 N. Y. 582.

A motion to strike out is in the discretion of the court. A party cannot wait to hear whether evidence is favorable to him or not and if not then move to strike out.

Platner v. Platner, 78 N. Y. 90; *Marks v. King*, 64 N. Y. 628; *Hatch v. Attrill*, 118 N. Y. 887.

Potter, J., delivered the opinion of the court:

It will not be necessary to consider all the questions sought to be raised upon this appeal, for we think a new trial must be ordered for the errors to be found in the record in relation to the evidence of value received by the learned trial court. The question was, What was the rental value with and without the railroad in the years 1883 to 1884, 1885 to 1886, 1886 to 1887, and from that year to the year 1888? This was objected to upon the ground that it was incompetent, irrelevant, and immaterial, and not within the issues in this action, and not a proper method of proof. The objections were overruled, and the witness answered the question in both respects. The defendants excepted. After answering that question, the case discloses that the witness proceeded to testify in relation to the selling value of this property with and without the road. He testified that the selling value of this property in 1879 was \$22,000 the selling value of the property to-day (upon the day of the trial, I suppose) is \$35,000; and that the selling value at the last-mentioned time, if there was no railroad there, would be \$47,500. It will be observed that the witness was not in terms asked what, in his opinion, was the rental value with and without the railroad, and it does not appear from the record whether the witness was asked any question in respect to the selling value of the property with or without the railroad, nor that there was any distinct renewal of the former objections made to this kind of evidence. All the testimony seems from the record to have been given by the witness in response to the question put to him as to the rental value, and that question was not in terms to obtain the opinion of the witness as to such value. But it is quite apparent that the court, counsel, and witness understood that the question called for the opinion of the witness. This is shown from the nature of one branch of the inquiry, which was as to what would the rental value of the premises have been several years after the railroad was built, if it had not been built. The answer to this question, in the condition of the case on trial at which it was asked, seems to me to involve far more objectionable evidence than that which may be given by an expert; for, in order to be an expert, the witness must have some knowledge or experience in relation to facts of the same or of a similar nature to those on which the opinion is to be based, and there is no pretense that this railroad has ever been removed, or

has ceased to be operated for any length of time, since it was constructed, and there is no suggestion that the witness had ever known or heard of a railroad of any kind that had been removed, or its operation suspended, at any time or at any place. Hence his answer could not be that of an expert, who must have some knowledge of the effects from similar causes, and must be wholly speculative, or without the knowledge essential to constitute an expert. The character of two of the objections that were made to the question, viz., that it was "incompetent and not a proper method of proof," in order to ascertain the damages, plainly indicate that the answer must be, to an essential degree, the opinion or speculation of the witness. Moreover, the answer of the witness to a material part of the inquiry conclusively shows that he was giving opinion evidence, for he says: "In my opinion the rental value from May, 1882, to May, 1888, had there been no such elevated railroad in front of the property, would have been over \$2,500." The defendants' counsel, in addition to the objection made at the outset of the introduction of this species of evidence, made a motion at the close of it to strike it out upon the same grounds that the objections had been made, and specifically that such evidence "did not bear upon the proper measure of damages." The court denied the motion, and defendants duly excepted. Immediately after the denial of the motion to strike out the evidence the witness distinctly stated: "I form my opinion that the fee value of that property to-day is \$47,000, if there were no railroad there, by taking the way that other property in other streets has advanced without the elevated railroad." This is abundantly sufficient to bring the evidence of the witness within the rule of condemnation laid down in the recent decision of this court in *Roberts v. New York Elec. R. Co.*, 128 N. Y. 455, 18 L. R. A. 499, even if there were any serious doubts whether the evidence given by the witness in respect to the fee or selling value of the property, without the railroad, was objected to upon the same grounds. In the *Roberts Case*, *supra*, the court held these questions, viz., "What do you estimate the rental value of the property to be, the railroad not being there?" and "That is, you think that the four houses fronting on Third Avenue are worth \$30,000 now, and that they would be worth \$110,000 if the structure and railroad were not there?"—(that is, upon the street in front of the premises,)—to be improper and incompetent, and ordered the case to be sent back for a new trial by reason of such error. In support of such ruling Judge Peckham delivered a conclusive and exhaustive opinion, in which five of the seven members of the court concurred, and there is no occasion or room for any further discussion or elaboration upon that point.

The judgment should be reversed, and a new trial granted, with costs to abide the event. All concur.

14 L. R. A.

MICHIGAN SUPREME COURT.

John N. CHADDOCK, *Appt.*,v.
Alonzo PLUMMER.

(.....Mich.....)

A toy gun is not such a dangerous instrument that a man can be held negligent in giving it to his boy nine years old with caution to be careful with it and not to lend it, and he is not liable for the damages where in his absence his wife permits it to be taken by a visiting boy, who puts out the eye of a man in the street with a shot from it.

(October 30, 1891.)

ERROR to the Circuit Court for Berrien County to review a judgment in favor of defendant in an action brought to recover damages for the loss of plaintiff's eye through the alleged negligence of defendant. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. N. A. Hamilton, for appellant:

A man who places in the hands of a child

an article of a dangerous character, and one likely to cause injury to the child itself or to others, is guilty of an actionable wrong.

Binford v. Johnson, 82 Ind. 427.

If persons chargeable with a duty of care and caution towards them leave exposed to the observation of children anything which would be tempting to them, and which they in their immature judgment might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken.

Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 9 West. Rep. 438, 45 Ohio St. 11; *Lane v. Atlantic Works*, 111 Mass. 136.

The law requires of persons having in their custody instruments of danger that they should keep them with the utmost care.

Dixon v. Bell, 5 Maule & S. 198.

If one is guilty of negligence in leaving anything dangerous in a place where it is extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought

NOTE.—*Negligence in respect to guns and similar dangerous agencies.*

The law requires of those who use dangerous agencies the greatest care in the custody and use of them. *Pittsburgh, C. & St. L. R. Co. v. Shields*, 8 L. R. A. 444, 47 Ohio St. 387.

As fire-arms are more than ordinarily dangerous when loaded, those who handle them are bound to use more than ordinary care to prevent injury to others. *Moebus v. Becker*, 48 N. J. L. 41.

But the ground of liability for accidental injury from the discharge of a gun is negligence. *Weaver v. Ward*, Hob. 134; *Lynch v. Nardin*, 1 Q. B. 29, 2 Steph. N. P. 1017; *Res. v. Salomon*, 48 L. T. N. S. 573; *Underwood v. Hewson*, *Strange*, 596; *Welch v. Durand*, 35 Conn. 182, 4 Am. Rep. 55; *Cole v. Fisher*, 11 Mass. 137; *Moody v. Ward*, 13 Mass. 239; *Morgan v. Cox*, 22 Mo. 373, 35 Am. Dec. 623; *Castle v. Duryee*, 2 Keyes, 169; *Dalton v. Favour*, 8 N. H. 466; *Tally v. Ayres*, 3 Sneed, 677.

Quite similar to the main case is a decision that the sale of cartridges loaded with powder and ball for a toy pistol with instructions as to their use to boys ten and twelve years of age respectively, one of whom left the pistol on the floor where his brother six years of age picked it up and discharged it, inflicting on one of the older boys a wound which caused his death, renders the dealer liable to an action for negligence. *Binford v. Johnston*, 82 Ind. 428.

So selling and delivering gun powder to a child eight years old with knowledge that he is an unfit person to be intrusted with it will make one liable for injuries which he receives by its explosion. *Carter v. Towne*, 35 Mass. 567, 36 Am. Dec. 623.

Allowing a loaded gun to be given to a mulatto girl thirteen or fourteen years of age, although the priming was first removed, is negligence which will create a liability for an injury to a third person by discharge of the gun on her playfully aiming it at him and pulling the trigger, without supposing that it would go off. *Dixon v. Bell*, 5 Maule & S. 198.

Leaving a dynamite cartridge among the sawdust in a common packing box on the ground under a rude shed and marked "powder" is negligence which will create a liability for injuries sustained by a small boy who cannot read, and who, while rightfully on the premises, obtains the cart-

ridge and cracks it upon a stone. *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154.

A personal injury received by the negligent discharge of a cannon on a pleasure yacht during the absence of the owner, by one of the crew not in the course of any employment or duty of the master, but merely as a salute to another yacht in passing, does not render the owner liable to the person injured. *Haack v. Fearing*, 35 How. Pr. 469.

One hunting in a wilderness is not bound to anticipate the presence within range of his shot of another man, and is not liable for injury unintentionally caused to the latter by shooting. *Bissell v. Booker*, 16 Ark. 308.

For firing a pistol through the front door of a restaurant when told by a companion who is inside to fire a salute after the latter has obtained entrance at midnight through a side door makes the person firing and the one advising it both responsible for injury by the shot to the restaurant keeper, who had refused them admission, where there is an ordinance prohibiting the discharge of fire-arms in the street. *Daingerfield v. Thompson*, 33 Gratt. 138, 35 Am. Rep. 738.

Taking a loaded gun into town and leaving it in a store without any necessity or cause for doing so is an uncalled for and reckless act which will make one liable for an injury by its accidental discharge while taking it away. *Tally v. Ayres*, 3 Sneed, 677.

The discharge of a gun carried by one of two persons who were quarrelling while he was stooping down to pick up a stick makes him liable to the other, who is thereby hurt, for gross negligence in handling it. *Chataigne v. Bergenon*, 10 La. Ann. 699.

Presenting a loaded pistol in a room among many persons while engaged in a quarrel renders one liable for accidental injury to a third person by its discharge. *Chiles v. Drake*, 3 Met. (Ky.) 146, 74 Am. Dec. 406.

Shooting a dog while aiming at a fox under cover creates a liability to the owner of the dog for the loss. *Wright v. Clark*, 50 Vt. 130, 38 Am. Rep. 496.

A boy about twelve years of age is liable for gross negligence in shooting an arrow at another boy, putting out one of his eyes. *Bullock v. Babcock*, 3 Wend. 391.

B. A. R.

about, the sufferer may have redress by action against both or either of the two, but unquestionably against the first.

Lynch v. Nurdin, 1 Q. B. 29; *Tally v. Ayres*, 8 Sneed, 677; *Morgan v. Cox*, 22 Mo. 378, 66 Am. Dec. 623.

The boy Tabor is probably liable to the plaintiff.

Bullock v. Babcock, 3 Wend. 391.

Suppose the defendant himself were the party whose eye was shot out by Tabor, and suppose he had brought an action against Tabor,—wouldn't the law say to him you cannot recover; by your own act in leaving the gun where the boy found it or allowing it to be so left you contributed to the injury. Does it not follow that because he thus contributed to the plaintiff's injury he is liable?

Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154; *Binford v. Johnson*, 82 Ind. 426; *Harriman v. Pittsburgh, C. & St. L. R. Co.*, 9 West. Rep. 438, 45 Ohio St. 11; *Clark v. Chambers*, L. R. 3 Q. B. Div. 327; *Tally v. Ayres*, 3 Sneed, 677; *Castle v. Duryee*, 2 Keyes, 169; *Cole v. Fisher*, 11 Mass. 187; *Curter v. Towne*, 98 Mass. 567, 96 Am. Dec. 682; *McDonald v. Snelling*, 14 Allen, 296, 92 Am. Dec. 768; *Vincent v. Stinehour*, 7 Vt. 61, 29 Am. Dec. 145; *Vanderburg v. Truax*, 4 Denio, 564, 47 Am. Dec. 268; *Guille v. Swan*, 19 Johns. 381; *Audige v. Gaillard*, 8 La. Ann. 71; *Wright v. Clark*, 50 Vt. 135, 28 Am. Rep. 496; *Knott v. Wagner*, 16 Lea, 481.

Mr. George S. Clapp, for appellee:

Plaintiff sues Mr. Plummer to recover for damages sustained through an accident. Inevitable accident is not a ground of liability.

Pollock, Torts, *118; *Brown v. Kendall*, 6 Cush. 292; *Nitro Glycerine Case*, 82 U. S. 15 Wall. 524, 21 L. ed. 206; *Harvey v. Dunlop*, Hill & L. Supp. 193; *Morris v. Platt*, 32 Conn. 85; *Alderson v. Waistell*, 1 Car. & K. 358.

The happening of, an accident in extraordinary circumstances in a manner that could not have been prevented by any ordinary measures of precaution is not itself any evidence of negligence.

Blyth v. Birmingham Waterworks Co. 11 Exch. 781; *Orafter v. Metropolitan R. Co. L. R.* 1 C. P. 300; *Glover v. London & S. W. R. Co. L. R.* 8 Q. B. 25; *Cox v. Barbridge*, 13 C. B. N. S. 480; *Lee v. Riley*, 18 C. B. N. S. 722, cited by *Pollock, Torts*, p. 40; *Metropolitan R. Co. v. Jackson*, L. R. 8 App. Cas. 193; *Sharp v. Powell*, L. R. 7 C. P. 253; *Chasemore v. Richards*, 7 H. L. Cas. 849.

If it be said that Mr. Plummer did not prevent the accident and was therefore liable, what ground is there for the charge? To so become liable he must have failed to act with due foresight. There must have been the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

Blyth v. Birmingham Waterworks Co. supra; *Pollock, Torts*, *38, 39.

Mr. George M. Valentine also for appellee.

Morse, J., delivered the opinion of the court:

14 L. R. A.

Plaintiff brought this suit in the Berrien Circuit Court to recover damages for the loss of his right eye, which was destroyed by a shot from an air-gun in the hands of a boy named Roscoe Tabor. The circuit judge directed a verdict for the defendant. The facts proven are substantially as follows: During the last of July or first of August, 1890, the defendant bought an air-gun, and gave it to his son, Harry Plummer, a lad aged about nine years. Defendant also bought at the same time some shot, such as are used in air-guns. Defendant cautioned his son to be careful in using the gun. The shot were all used in about two days, and some time later defendant bought his son more shot, which were used in half a day. No other shot were bought or furnished by the defendant, or by his order, or with his knowledge. Mrs. Plummer, the wife of the defendant, bought her son Harry some shot, which he also fired, except four shot, by one of which plaintiff was injured. On the morning of the accident, September 3, 1890, Harry fired the shot bought by his mother, except the four shot, and put the gun in the storm-house, which was a part of the dwelling, and put the four shot on a table-cloth, and went to school. Mr. Plummer was not at home. The Tabor boy came there with some rutabagas, and then began looking and traveling about the premises, and found the gun in the storm-house, and then asked Mrs. Plummer for some shot, and she handed him the four shot which Harry had left on the table. She directed him to shoot at the hen-coop in the rear of the house. The boy fired one shot at the hen-coop, one at an apple tree, and then he went around to the north side of a new house, which Mr. Plummer was building, to a point about a rod east of the front of the new house, and eight or ten feet north of it. The boy was facing the west, and the street was to the west of him, and the street runs northwest and southeast. He put a grape on a plank, and looked to see if anyone was in the street, and, seeing no one, he held the muzzle of the gun about two and one half feet from the grape, and the gun was pointed down, and fired. The distance west to the street from where the boy was, when he shot, is from 70 to 100 feet. Mr. Chaddock at the time the shot was fired was standing in the street, looking at this new house of the defendant. The shot glanced from the board, and struck him in the eye, destroying it. The street was a frequently traveled highway in the village of Benton Harbor, then containing about 3,700 inhabitants, and at a point where defendant had long resided. Defendant's boy Harry was nine years of age when the gun was purchased, and the Tabor boy was ten years old when the shot was fired. The gun was the common make of toy air-gun for children, breaking in the middle for the insertion of the shot, and, when closed again, operating with a spring, compressing the air and expelling the shot. The shot used were "BB," or "double B." Harry was told by his father not to lend the gun to other boys, as they might break it. The Tabor boy lived out in the country, and occasionally visited at defendant's. It does not appear that the defendant knew of the purchase of shot by his wife,

or that his boy had used all the shot purchased for him by defendant.

The contention of the plaintiff is that the air-gun in question is a dangerous weapon, and that plaintiff did not use sufficient care in the keeping of it upon his premises; that, at any rate, the question whether he did use such care or not should have been submitted to the jury. But, as the facts are, the defendant cannot be held responsible for the injury to plaintiff, unless it was negligence, sufficient to support this action, in buying the gun and allowing his son to use it. He cannot be considered negligent in any other respect. He cautioned his boy to be careful in its use, and no carelessness of his own son was shown at any time in his use of it. The defendant and his son were neither of them responsible in any way, except owning the gun, for the use of it by the Tabor boy. It was kept inside the house, for the storm-door was an inclosure. If it came into the hands of Tabor through the negligence of anyone, it was the negligence of the wife, for which the defendant is not liable. This air-gun may be a dangerous weapon in a certain sense. The shot fired from it will not penetrate clothing, but it will put out the eye of a person, and will kill small birds and some small animals. These guns are in common and every-day use by children; over 400 of them were sold in one season by one dealer at Benton Harbor. But it is not more dangerous in the hands of children than a bow and arrow and many other toys. It would hardly be good sense to hold that this air-gun is so obviously and intrinsically dangerous that it is negligence to put it in the hands of a child nine years of age; and that such negligence would make the person, so putting it in the hands of the child, responsible for the act of another child, getting possession of it without defendant's consent or knowledge. Even if the gun had been left lying on the ground in the yard of the defendant, and the Tabor boy had picked it up outside the house, and used it, the defendant would not have been

responsible for the damage done by the boy. An axe is considered a dangerous weapon, but if one leaves an axe by his wood-pile, and a child comes into the yard, picks it up, and injures another with it, is the owner of the axe liable for damage because he has not put this deadly weapon under lock and key? And if it be granted that this air-gun loaded is a dangerous weapon, as is a gun loaded with powder and ball, would this fact make the defendant liable? I think not. Suppose a person, owning a shotgun, should put the same unloaded within the storm-door of his house, and a neighbor's boy, ten years of age, without the knowledge or consent of the owner, should pick up the gun, and obtain from the wife or some other member of the household a loaded cartridge, and take the gun out and discharge it, accidentally wounding someone, would the owner of the gun be responsible for the damage resulting to the injured person? To so hold him responsible would necessitate the keeping of unloaded fire-arms under lock and key, with the key in the possession at all times of the owner. This is not a case of leaving a torpedo or dynamite where it may be expected that children will find and play with it. An unloaded gun is harmless; a torpedo or dynamite is not, but is dangerous anywhere, and under all circumstances, to those not acquainted with the proper method of handling it, and liable to explode even in the hands of those who are expert in using it. In my opinion, it was not negligence *per se* for the defendant to buy this toy gun, and place it in the hands of his boy nine years of age; and there were too many intervening causes without the act or knowledge of the defendant, between the buying of the gun and the injury, to hold the defendant liable for its use in this case. If his own son had, in any manner, contributed to the accident, a different question would arise, upon which I express no opinion.

The judgment must be affirmed with costs.

The other Justices concurred.

KENTUCKY COURT OF APPEALS.

STANDARD OIL CO., *Appt.*,

v.
M. J. TIERNEY,

(.....Ky.....)

1. A shipper of naphtha described as "carbon oil" in the freight bill in barrels marked "unsafe for illuminating purposes" is liable to the conductor of the train who was injured by an explosion while in the car where the naphtha was, with a lamp, if he did not know what was in the barrels, although the carrier had been informed of their contents, unless the jury find that he had sufficient notice of the dangerous character of the substance.

NOTE.—*Excessive verdicts in suits for damages for personal injuries.*

While there is no fixed rule in the absence of statute, by which the maximum amount of damages to be allowed in a suit to recover for personal injuries can be determined, it may be interesting and helpful to collect the cases in which the courts have sustained or refused to sustain verdicts for amounts as large or larger than the limit of \$10,000, suggested in the opinion in the principal case.

Thirty thousand dollars is not excessive for injuries to a strong and well man forty years old resulting in concussion of the spine causing chronic inflammation and an impairment of the faculties with the probability of paralysis and premature death. *Harrold v. New York Elev. R. Co.* 24 Hun. 184.

Twenty-five thousand dollars for injuries to an engineer young and earning good wages is not excessive where the injuries render him an almost helpless cripple and invalid for life. *Hall v. Chicago, B. & N. R. Co.* 46 Minn. 439.

Twenty-five thousand dollars is not excessive where plaintiff, formerly a healthy man, became almost a total wreck both physically and mentally. *Chicago & E. R. Co. v. Holland*, 18 Ill. App. 418.

Twenty-five thousand dollars was not excessive for injuries to a person thirty years old in good

2. Evidence that plaintiff has a wife and child is not admissible in an action for personal injuries.
3. Evidence that wooden barrels are safe for shipping naphtha, and that it is ordinarily so shipped is admissible in an action for negligence in thus shipping it.
4. A subsequent change in the manner of branding naphtha cannot be proved in an action for negligence in shipping it improperly branded.
5. A verdict for \$25,000 is excessive in an action for personal injuries by which a railroad conductor thirty years old was badly burned about the face so as to disfigure him for life and also lost the use of his left arm besides receiving some injury to his right hand and both feet.

(December 10, 1891.)

A PPEAL by defendant from a judgment of the Louisville Law and Equity Court in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Humphrey & Davis for appellant.

Messrs. Willson & Thum, for appellee:

The shipment of such dangerous substance as naphtha exposed to all the incidents of transportation is of itself gross negligence as matter of law.

Louisville Gas Co. v. Gutenkuntz, 89 Ky. 489; *Central Pass. R. Co. v. Kuhn*, 86 Ky. 588; *Louisville & N. R. Co. v. Mitchell*, 87 Ky. 387; *Delaware, L. & W. R. Co. v. Concorse*, 189 U. S. 469, 35 L. ed. 218.

health, well educated, married, and whose family depended upon him for support, where after his injury he could do nothing and though he might live some years in suffering he would never improve physically. *Alberti v. New York, L. E. & W. R. Co.* 43 Hun. 421.

Twenty-five thousand dollars for the loss of a leg by a child three years and six months of age is not excessive. *Ehrman v. Brooklyn City R. Co.* 38 N. Y. S. R. 900.

Twenty-two thousand two hundred and fifty dollars are not so excessive as to cause the court to set aside the verdict in an action for damages by a woman who was struck by a locomotive engine which resulted in her losing one arm and in bruising and injuring the other one so as to greatly impair her health and memory. *Shaw v. Boston & W. R. Corp.* 8 Gray, 45.

Twenty thousand dollars is not excessive where the injuries were exceedingly painful, serious, and of a permanent nature, and the plaintiff was in his early manhood and engaged in an extensive and lucrative business, his share of the profits of which were \$18,500 a year, which was impaired by his inability to give it requisite attention, and he was afflicted with bodily derangements which might measurably unfit him for the duties of his profession. *Walker v. Erie R. Co.* 63 Barb. 260.

Twenty thousand dollars is not excessive where there was evidence that the injured person, who before the accident was an industrious and able-bodied mechanic, is a wreck both in body and mind subject to epileptic fits, and his physical and mental condition render him unfit to labor, while it is probable that his sufferings will be permanent. *International & G. N. R. Co. v. Brazil*, 78 Tex. 814.

Nineteen thousand dollars is not excessive where a married woman of twenty-eight was injured by falling into an excavation negligently left unguarded thereby inflicting great suffering and in 14 L. R. A.

The evidence as to plaintiff's having a wife and child was properly admissible.

Louisville, O. & L. R. Co. v. Mahony, 7 Bush, 288.

At least the admission was not reversible error in case of gross negligence.

Chicago v. O'Brien, 66 Ill. 163; *Coal R. Co. v. Tipton*, 5 Ky. L. Rep. 774.

The instructions as to the items of damages which might be considered cured any error in the admission of such evidence.

Civil Code, § 134; *Baltimore & O. R. Co. v. Shipley*, 81 Md. 368; *Chesapeake & O. R. Co. v. Reeves* (Ky.) 11 Ky. L. Rep. 14; *Gilbert v. Burtenshaw*, Cowp. 880.

The following authorities favor the admission of evidence as to the wife and child:

Winters v. Hannibal & St. J. R. Co. 89 Mo. 468; *Laing v. Colder*, 8 Pa. 479; 2 Rorer, Railroads, 1499; *Central Pass. R. Co. v. Kuhn*, 86 Ky. 578. *Contra*, *Pittsburg, Ft. W. & C. R. Co. v. Posters*, 74 Ill. 841; *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141; *Chesapeake & O. R. Co. v. Reeves* (Ky.) 11 Ky. L. Rep. 14.

The damages were not excessive, as appears from the following authorities:

Gilbert v. Burtenshaw, Cowp. 230; 2 Sedgw. Damages, 658; *Becker v. Cross*, 7 Bush, 200; *Varble v. Bigley*, 14 Bush, 608; *Com. v. Springfield, M. & T. P. Co.* 10 Bush, 256; *Patrick v. Marshall*, 2 Bibb, 42; *Hickman v. Southerland*, 4 Bibb, 194; *Berg v. Chicago, M. & St. P. R. Co.* 50 Wis. 419 (\$11,000); *Louisville & N. R. Co. v. Fox*, 11 Bush, 495 (\$35,000, compromised, \$14,999); *Houston & G. N. R. Co. v. Randall*, 50 Tex. 255 (\$12,000); *Schultz v.*

all probability materially shortening her life. *Groves v. Rochester*, 20 Hun. 5.

Eighteen thousand five hundred dollars is not excessive for injuries to a boy seven years old by which both legs were so badly crushed that amputation was necessary and he required a constant attendant and was left in a state, both physically and mentally, such as to render his life a burden hard to bear. *Heddlis v. Chicago & N. W. R. Co.* 77 Wis. 223.

Sixteen thousand six hundred and sixty-six dollars will not be set aside where the injured man was disabled for life and suffered in an hospital 145 days, and twenty months after the accident dead bone was still working out of the wound which was still open, and his leg was partially stiffened and somewhat shorter than the other. *Galveston, H. & S. A. R. Co. v. Porfert*, 72 Tex. 344.

Fifteen thousand six hundred and ninety-five dollars and sixteen cents is not excessive for severe injuries followed by pain, deformity, and inability to work. *Schultz v. Third Ave. R. Co.* 14 Jones & S. 211.

Fifteen thousand dollars is not excessive for injuries to a miner thirty-four years old who had no means of support except his occupation in a mine, where by the accident his right shoulder and some ribs were broken, his right arm disabled, a leg had to be amputated, and he was confined to his bed six weeks. *Solen v. Virginia & T. R. Co.* 13 Nev. 103.

Fifteen thousand dollars is not excessive for injuries to a physician which compelled him to abandon his practice, which had amounted to \$2,500 a year and the injuries to his leg, back, and nervous system were of a permanent character. *Woodbury v. District of Columbia*, 3 Cent. Rep. 788, 5 Mackey, 127.

Fifteen thousand dollars is not excessive where a person is caught between railroad cars and has his pelvic bone crushed and his thigh broken in two places, his leg broken so that it is two inches shorter on recovery, and is otherwise seriously and per-

Third Ave. R. Co. 14 Jones & S. 211 (\$15,000); *Choppin v. New Orleans & C. R. Co.* 17 La. Ann. 19 (\$25,000); *Campbell v. Portland S. Co.* 63 Me. 552, 16 Am. Rep. 503 (\$9,500); *Walker v. Erie R. Co.* 68 Barb. 260 (\$20,000); *Barksdull v. New Orleans & C. R. Co.* 23 La. Ann. 180 (\$15,000); *Boyce v. California S. Co.* 25 Cal. 460 (\$16,500); *Belair v. Chicago & N. W. R. Co.* 43 Iowa, 662 (\$11,000); *Porter v. Hannibal & St. J. R. Co.* 71 Mo. 66 (\$10,000); *Harrold v. New York Elev. R. Co.* 84 Hun, 184 (\$30,000); *Atchison, T. & S. F. R. Co. v. Morris*, 31 Kan. 197 (\$10,000); *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492 (\$18,000); *Shaw v. Boston & W. R. Corp.* 8 Gray, 45 (\$22,500); *Fair v. London & N. W. R. Co.* 21 L. T. 836 (\$26,250); *Louisville & N. R. Co. v. Mitchell*, 87 Ky. 827 (\$10,000 for crushing a foot and ankle); *Central Pass. R. Co. v. Kuhn*, 86 Ky. 579 (injury to skull, likely to last through life, general result in such cases epilepsy or weakness of mind, \$5,000, sustained); *Louisville & N. R. Co. v. Sheets* (Ky.) 11 Ky. L. Rep. 781 (\$4,000—loss of hand); *Louisville C. R. Co. v. Mercer* (Ky.) 11 Ky. L. Rep. 810 (\$1,325—expulsion from street-car, affirmed); *Crosby v. Bradley* (Ky.) 11 Ky. L. Rep. 954 (\$2,750—assault and battery, no great bodily injury, by boy on woman); *Louisville & N. R. Co. v. Brooks*, 83 Ky. 129 (\$10,000—life of brakeman); *Sherley v. Billings*, 8 Bush, 155, 8 Am. Rep. 451 (\$4,500 compensatory damages—assault and battery and loss of one eye); *Danville, L. & T. P. R. Co. v. Stewart*, 2 Met. (Ky.) 123 (\$4,000—fractured thigh); *Maysville & L. R. Co. v. Herrick*, 13 Bush, 127

(\$5,000—broken leg, suffering and probable permanent injury); *Van Zant v. Jones*, 3 Dana, 465 ("must be so enormous as to indicate passion, etc."); *Louisville & P. R. Co. v. Smith*, 3 Duvall, 556 (\$4,750—cut and bruised right arm); *Treanor v. Donahoe*, 9 Cush, 228 (\$1,800—libel); *Letton v. Young*, 2 Met. 553 (\$4,000—slander); *Blanchard v. Morris*, 15 Ill. 85 (\$700—assault, etc.); *Goddard v. Grand Trunk R. Co.* 57 Me. 202, 2 Am. Rep. 39 (\$4,850—for brutal misconduct of brakeman in threatening sick passenger); *Crusoe v. Butler*, 36 Miss. 160 (\$4,500 for carrying plaintiff 400 yards beyond station and refusing to carry him back); *Kentucky M. R. Co. v. Stump* (Ky.) 19 Ky. L. Rep. 316; *Louisville S. R. Co. v. Minogus* (Ky.) 12 Ky. L. Rep. 378; *Albert v. New York, L. E. & W. R. Co.* 6 L. R. A. 765, 118 N. Y. 77 (verdict \$25,000, affirmed, question not made).

Mr. William Lindsay also for appellee.

Fryer, J., delivered the opinion of the court:

In April of the year 1888 the Standard Oil Company, at its place of business in the city of Louisville, loaded two cars belonging to the Louisville & Nashville Railroad Company with oil. One of the cars contained 65 barrels; 35 of those barrels being naphtha oil, and the remainder the ordinary illuminating oil. This car was loaded by the company, the car being on a side track near its warehouse, belonging to the Louisville & Nashville Railroad, and was intended to be shipped south. The testimony shows that the cars were known as "cattle cars," with open lattices; and that offered by the defense shows that the oil was in bar-

manently injured. *Louisville, N. O. & T. R. Co. v. Thompson*, 64 Miss. 584.

Fifteen thousand dollars is not excessive for injuries to a man thirty-six years of age who had always been well and healthy, where the injury was to the nerves of the back and to the spinal column and was permanent and had continued to be very painful and necessitated constant care and attendance and his lower limbs were so paralyzed that he had little use of them. *Reddon v. Union Pac. R. Co.* 5 Utah, 344.

Fifteen thousand dollars is not excessive in favor of a person of good health and vigorous constitution earning from \$165 to \$195 per month, who, by the injuries, was incapacitated to perform any useful or profitable labor and had become a physical wreck. *Texas Pac. R. Co. v. Johnson*, 76 Tex. 421; *Texas Pac. R. Co. v. Overholser*, Id. 437.

Fifteen thousand dollars is not excessive for injuries totally disabling for work a robust young man twenty-seven years of age. *Chicago, B. & Q. R. Co. v. Sullivan*, 21 Ill. App. 580.

Fifteen thousand dollars is not excessive for injuries to a physician whose expectation of life was twenty-three years, and whose income was from \$1,200 to \$1,500 per year, and who, by his injuries, was almost totally disabled, incurring much expense and suffering great pain leaving him unable to earn more than \$200 or \$300 per year. *Pence v. Chicago, R. I. & P. R. Co.* 79 Iowa, 389.

Fifteen thousand dollars for the loss of a leg by a boy sixteen years old is not excessive. *Chicago City R. Co. v. Wilcox*, 83 Ill. App. 460.

Fifteen thousand dollars is not excessive where the injuries prevent the person from standing erect, creating a physical deformity for life and incapacitating him for labor, besides causing more or less pain. *Schneider v. Second Ave. R. Co.* 39 N. Y. S. R. 370.

Fourteen thousand dollars is not excessive where the injured person before the injury was full of life 14 L. R. A.

and vigor and has been made a physical wreck and will spend the remainder of his life in suffering and without comfort, and has expended a large sum for medical aid. *Wallace v. Vacuum Oil Co.* 35 N. Y. S. R. 607.

Fourteen thousand dollars is not excessive in favor of a conductor and acting brakeman earning \$100 a month who was injured so seriously that the flesh on one leg was shoved up so that the bone stuck out and the foot was crushed while he was also crushed in the chest and his ribs were torn loose from the breast bone and he suffered amputation four different times causing him great pain and making him a perfect wreck, permanently incapacitated for any labor. *Joliet, A. & N. R. Co. v. Velle*, 36 Ill. App. 450.

Thirteen thousand dollars is not excessive in the case of a healthy man of thirty-nine able to earn \$100 or more per month, resulting in the loss of both legs in such a manner that artificial limbs cannot be adjusted and he must drag himself along upon his knees. *Colorado M. R. Co. v. O'Brien* (Colo.) 10 Ry. & Corp. L. J. 351.

Twelve thousand dollars is not excessive for personal injuries which made a man a cripple for life and compelled him to suffer great mental and physical pain. *Texas M. R. Co. v. Douglas*, 73 Tex. 325.

Twelve thousand dollars is not excessive for injuries to a telegraph operator which caused suffering and expenses amounting to \$2,000 when his compensation had been about \$200 a month and his arm was amputated below the elbow impairing his usefulness as an operator to the extent of one half, although he suffered no loss of income while undergoing treatment and the nature of the case allowed only compensatory damages. *Dougherty v. Missouri R. Co.* 97 Mo. 647.

Twelve thousand dollars is not excessive for the loss of a leg by a boy of five years. *Akersloot v. Second Ave. R. Co.* 40 N. Y. S. R. 231.

rels that had been carefully inspected, and such barrels as were generally used in shipping naphtha or other products of petroleum, and the barrels containing naphtha branded, as they maintain, as required by the statute, "Unsafe for illuminating purposes." The head of the barrel was painted white, with this brand in black letters in the center. The cars were taken from this switch by the Louisville & Nashville Railroad by its freight engine or train in charge of the appellee, who was the conductor. After leaving Louisville, when some twenty or thirty miles from the city, the appellee discovered that oil was leaking from some one of the barrels, and after passing one or two depots, he directed one of the employes to ascertain where the leak was. There is a window about two feet square at the end of the car, to which the employe climbed with his lantern, and, passing through this window into the car, discovered the barrel that was leaking. The appellee being informed by the employe of the condition of the barrel, the two with a lamp each, passed through this window into the car, and finding that they could not handle the barrel, the appellee called for another employe, who passed through this window with his lamp. They set their lamps on the heads of the barrels, and proceeded to raise the leaking barrel from the floor, when by the motion of the barrel, or its peculiar position when being moved, the naphtha spouted out in a stream as large as a pencil, took fire from the burning lamp, and seriously injured the ap-

pellee. Whether the liquid was thrown on the lamp or the explosion took place from the vapor produced by the naphtha is a mooted question. The appellee was badly burned, and instituted this action against the appellant to recover damages for the injury, alleging that this naphtha was shipped as carbon oil and that he had no notice whatever of the inflammable character of the fluid. He claimed damages to the amount of \$25,000, and that sum the jury awarded him. He was badly burned about the face, so much so as to disfigure him for life; suffered much pain and anguish for several months; lost the use of his left arm, and his right hand is to some extent injured; his feet were also badly burned; but the principal injury after his recovery consists in the loss of the use of his left arm, and the disfigurement of his face.

The defense relies upon various grounds for a reversal: (1) That it took all the necessary care and precaution in shipping the oil; that it marked it "Unsafe for illuminating purposes;" that the carrier knew the car contained barrels of naphtha; and that the entire product of petroleum had been shipped and was being shipped as carbon oil under an agreement to that effect with the railroad company; and that it was the duty of that company to have notified its employes of the danger. (2) That the court erred in admitting incompetent testimony, and in denying to the defendant the right to introduce testimony that was competent. (3) In giving erroneous instructions to the

Eleven thousand five hundred dollars is not excessive in case of a person eighty years old where he was thrown down by the negligence of a street-car driver and injured so that he could not attend to business and suffered great pain having to undergo expensive surgical treatment and have a large portion of one of his feet amputated. *Jordon v. New York, H. & H. R. Co.* 30 N. Y. S. R. 670.

Eleven thousand dollars is not excessive for injuries to a young man thirty years old engaged in an employment having a regular system of promotions and earning \$540 a year, which permanently disabled him. *Blclair v. Chicago & N. W. R. Co.* 43 Iowa, 662.

Eleven thousand dollars is not excessive in case of injuries to a strong, healthy laboring man having a wife and four children which necessitated the amputation of one leg above the knee, and who a year after the accident was unable to work, and testified that if he walked, stood, sat or kept his leg down for any length of time he became dizzy. *Berg v. Chicago, M. & St. P. R. Co.* 60 Wis. 419.

Ten thousand one hundred and seventy-five dollars to a physician sixty years of age having an annual income of \$2,500 from his profession for injuries which made him a physical wreck is not excessive. *Gratiot v. Missouri Pac. R. Co.* (Mo.) May 19, 1901.

Ten thousand dollars is not excessive for severe injuries followed by pain, deformity, and inability to work. *Porter v. Hannibal & St. J. R. Co.* 71 Mo. 60, 36 Am. Rep. 454.

Ten thousand dollars is not excessive for loss of a leg by an accident which caused very severe pain and suffering. *Atchison, T. & S. F. R. Co. v. Moore*, 81 Kan. 197.

Ten thousand dollars is not excessive for injuries to a physician earning \$2,000 a year which was by the accident out of. *Carthage Turnp. Co. v. Andrews*, 108 Ind. 138, 52 Am. Rep. 653.

Ten thousand dollars is not excessive where a woman was injured in a collision by which both legs were broken, one in several places and the lower part of the bone crushed and she was otherwise se-

verely bruised and the injuries were permanent. *The George Washington v. Cavan*, 76 U. S. 9 Wall. 513, 19 L. ed. 787.

Ten thousand dollars is not excessive where a person was struck down in the noon of life and made a paralytic with little or no hope according to medical testimony of amendment in the future. *United States v. Juniata*, 93 U. S. 337, 23 L. ed. 930.

Ten thousand dollars is not excessive for the loss of an arm by a boy belonging to a laboring family. *Ketchum v. Texas & Pac. R. Co.* 38 La. Ann. 777.

Ten thousand dollars is not excessive for personal injuries causing permanent loss of health and ability to labor. *Columbia & P. R. Co. v. Hawthorne*, 3 Wash. Ter. 353; *Gulf, C. & S. F. R. Co. v. Silliphant*, 70 Tex. 623.

Ten thousand dollars is not excessive where the injured person is a young man and the injury unfits him for pursuing his calling, and his wages about equal the interest on that sum. *Bowers v. Union Pac. R. Co.* 4 Utah, 215.

Ten thousand dollars is not excessive where the injured person was lamed and deformed in one leg for life, his shoulder disabled, and he was rendered wholly unable to perform manual labor. *Daniels v. Union Pac. R. Co.* (Utah) March 1, 1930.

Ten thousand dollars is not excessive for incurable injuries which deprive a person of power to earn a livelihood and which have necessitated medical treatment for several years. *Ketter v. Manhattan Elev. R. Co.* 38 N. Y. S. R. 611.

Ten thousand dollars is not excessive in favor of a boy of seven years for the loss of one leg and the permanent weakening of the other. *Et. Worth & D. C. R. Co. v. Robertson* (Tex.) June 16, 1891.

Verdicts held excessive.

In contrast with the above cases are the following, in which the court has either set aside or reduced a verdict for excessiveness. In this list have been placed verdicts less than \$10,000 in amount for the obvious reason that if the smaller amount

jury, and in refusing to give defendant's instructions. (4) The damages are excessive.

There were numerous instructions asked by the plaintiff and the defendant, all of which were refused, and the instructions prepared and given by the trial judge. In determining the questions raised by the instructions it will be necessary to notice the testimony for the defense that was excluded, as this testimony, if admitted, must have an important bearing on the issue in establishing at least its good faith on the part of the appellant in delivering this naphtha to the carrier. It was offered by way of defense on the part of the appellant that the railroad company, whose agent and employé the conductor was at the time of the injury, knew that this car contained naphtha, and, if not, that under an agreement with the company through its officials it had been shipping on its cars barrels of naphtha for a long period, branded in the manner specified, with bills of lading under the general designation of "carbon oil," the railroad company knowing that the term embraced naphtha, and taking it with that understanding, charging the same freight, and shipping it as any other oil. The court refused to permit this testimony to go to the jury, and this is one of the errors complained of. It is evident that if the owner, when shipping explosive or combustible substances, fails to notify the carrier or his agent of the danger attending its use when transporting it, and an injury results to the employés of the carrier, the owner is liable for

the injury sustained; but when the carrier is notified of the dangerous article or product, (and there is none more so than naphtha when coming in contact with a burning lamp or with fire,) and there is marked on the head of the barrel that which must necessarily apprise the carrier of its dangerous nature, and the carrier in his ordinary line of business undertakes to transport it, and an injury occurs to one of its employés, the question then arises, Is the shipper liable because knowledge was not brought home to its employé? We think not. This, however, is not the question arising in this case. It is the mode of shipping and branding this naphtha, adopted by both parties under an agreement, or implied understanding at least, between them, from which this liability to the employé springs, if any exists. The railroad company had been in the habit of receiving and shipping this naphtha as carbon oil under an arrangement with the appellant, with a brand placed on the head of each barrel. "Unsafe for illuminating purposes." There was an implied, if not a positive, duty on the part of both corporations to notify those who handled this substance of its dangerous character, and no arrangement between them, although made in the heat of faith, by which dynamite was to be shipped as powder or naphtha as carbon oil, should protect the appellant from a violation of this duty it owed to the hands or employés whose duty it was to keep it secure, and to handle it when necessary. The freight bill or paper by which this plaintiff was guided showed that it was oil, or

is regarded as excessive, the fate of a larger verdict in similar cases is clearly indicated.

Thirty thousand dollars for injuries resulting in the amputation of a boy's legs, one at the ankle and the other at the knee, is excessive. *Heddlies v. Chicago & N. W. R. Co.* 74 Wis. 239.

Twenty-five thousand dollars as actual damages and \$16,927.40 exemplary damages, was held excessive in *Gulf, C. & S. F. R. Co. v. Gordon*, 70 Tex. 80, although a remittitur was entered for exemplary damages.

Twenty-five thousand dollars was reduced to \$5,000 where the injury resulted in inflammation of the hip joint which caused great pain and subjected the injured person to loss of time and business and required large expenses for medical assistance, but left him able to go about without crutches fully able to earn his livelihood and well disposed to enjoy life, needing only proper treatment for a complete cure. *Peyton v. Texas Pac. R. Co.* 41 La. Ann. 861.

Twenty thousand seven hundred and fifty dollars is excessive for injuries to the ankle joint of a man fifty-four years old which required amputation of the foot and resulted in inability to walk without crutches attended by much pain and inconvenience, where he was able to attend to his business as a merchant except where manual labor was required, and there was no proof of injury to his business; the court, however, consented to let the verdict stand for \$10,750. *Kennon v. Gilmer*, 5 Mont. 257, 51 Am. Rep. 45.

Eighteen thousand dollars is excessive for injury to a brakeman which almost wholly unfit him for business where interest thereon at the legal rate would amount to \$1,800, which is three times as much as he would have earned in his business. *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 497.

Fifteen thousand dollars was reduced to \$2,000 where the injury was to the hand of a person earning \$30 a month and about the age of forty-three, 14 L. R. A.

and the usefulness of the hand was not entirely impaired. *Bomar v. Louisiana, M. & S. R. Co.* 42 La. Ann. 883.

Fifteen thousand dollars was reduced to \$5,000 where the injury was to a woman fifty-three years old and probably crippled her for life owing to injury to the spinal cord, causing intermittent suffering and an inability to walk. *Furnish v. Missouri Pac. R. Co.* 102 Mo. 438.

A verdict of \$15,000 was set aside where the evidence of actual damage did not justify it. *International & G. N. R. Co. v. Underwood*, 64 Tex. 465.

Fourteen thousand eight hundred and thirty-three dollars for injuries to a man twenty-one years old, thus depriving him of the employment from which he realized over \$50 per month, was excessive. *Southwestern R. Co. v. Singleton*, 66 Ga. 252.

Ten thousand dollars for injuries to a man seventy years old, by which he was confined to his house for several months, and which caused a shortening of the leg two inches, was excessive. *Chicago West. Div. R. Co. v. Haviland*, 12 Ill. App. 561.

Ten thousand dollars is excessive for a compound fracture of a leg. *Union Pac. R. Co. v. Hause*, 1 Wyo. Ter. 27.

Ten thousand dollars in favor of a married woman for pain and suffering resulting from injuries causing nervous prostration and the reappearance of a certain internal inclination from which she had been free for about three years is excessive. *Lockwood v. Twenty-third St. R. Co.* 15 Daly, 374.

Ten thousand dollars for injuries to a stout healthy woman by which her leg was broken, her arm dislocated, her back, shoulder and side injured so that she had not recovered and was able to do little work at the end of two years, and was unable to walk for four months after the accident, was reduced to \$5,000. *Missouri Pac. R. Co. v. Texas Pac. R. Co.* 41 Fed. Rep. 311.

Ten thousand dollars is excessive where the proof shows that defendant's negligence was but slight

carbon oil; and it seems to us the only question for the jury to decide is, "Was the brand on these barrels sufficient notice to the appellant of the dangerous substance within them?" The dangerous quality of naphtha requires more vigilance and care in shipping and handling it than almost any other explosive substance, and as a means of great precaution it would be prudent to give other warning than the mere name of the substance. As an explosive, it is said, the danger is ten times greater than that of gunpowder. It ignites as soon as the blaze is applied to it, and becomes explosive when the vapor from it mingles with the atmosphere in which there happens to be a burning lamp or other light. The conductor might not have known the danger if the word "naphtha" had been placed on these barrels; still it would doubtless have put him on inquiry, and shown that it was not carbon oil, and at the same time removed all question of negligence from the door of the appellant. The contention by counsel is, that the brand, "Unsafe for illuminating purposes," was intended by the statute as the warning to be given those who handled naphtha. Whether this provision of the statute applies to naphtha, or to the production from petroleum less danger-

ous and known as "oil," is uncertain, and it is manifest that the car purporting to be loaded with carbon oil from the freight bill did not apprise the appellee of the danger. While the testimony of the agreement between the two corporations as to the manner of shipping should have gone to the jury to show an absence of bad faith on the part of the appellant, still it was its duty, looking to the very great danger connected with the movement of such a substance on trains, to have so branded the barrels as to have informed the conductor of the inflammable character of the substance they contained, and, unless they were so marked as that one exercising ordinary care and prudence with reference to his own personal safety, and whose duty it was to handle the barrels, should have ascertained the danger, the appellant is liable; the converse of the proposition being that, if so branded as that one of ordinary care and prudence should have discovered the danger, the verdict should be for the defendant. While the instructions given by the court below embrace this view of the case, this is the issue to be tried. The appellee had to deal with and deliver this naphtha, and he should have been informed in some way that the barrels contained it.

and plaintiff's was greater. *Central R. Co. v. Smith*, 76 Ga. 200.

Ten thousand dollars is excessive for injuries to a brakeman, which resulted in the amputation of his leg about ten inches below the knee, where there was no evidence as to what he was earning at the time of the injury or what he had paid or had contracted to pay out by reason of the injury, or that he lost any time, or that his ability to earn money was impaired. *Missouri Pac. R. Co. v. Dwyer*, 36 Kan. 58.

Ten thousand dollars for compensatory and punitive damages is excessive although the injuries were caused by gross negligence and are serious causing several months' confinement, a severe nervous shock, and partial paralysis of one leg, where it is not clearly shown that the injuries are permanent. *Louisville S. R. Co. v. Minogue* (Ky.), 12 Ky. L. Rep. 378.

Eight thousand dollars were held excessive and reduced to \$6,000 for loss of a hand by a cooper who was at the time of the accident employed as a teamster where his own negligence contributed to the injury and there was little evidence of his former or present capacity for labor, and none as to the amount of his ordinary earnings. *Murray v. Hudson River R. Co.*, 47 Barb. 196.

Nine thousand two hundred and fifty dollars was held excessive for injuries to an engineer which resulted in concussion of the spinal cord producing a diseased condition of the nervous system where he was most of the time free from pain and able to engage in business, though not as an engineer. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 49 Am. Rep. 724.

Seven thousand five hundred dollars was reduced to \$4,500 where the injuries resulted in the loss of a leg by a negro who would probably earn \$200 a year and was twenty-four years of age. *Lampkins v. Vicksburg S. & P. R. Co.*, 42 La. Ann. 997.

Six thousand six hundred dollars was reduced to \$3,000 for the fracture of the arm of a child five years old which remained permanently disfigured. *Ryder v. New York*, 18 Jones & S. 220.

Six thousand five hundred dollars for the loss of a thumb and forefinger is excessive. *Kansas Pac. R. Co. v. Peavey*, 34 Kan. 472.

Six thousand dollars for injuries to a woman not permanent in their nature, which deprived her temporarily of the opportunity of earning \$9 a week, is excessive where no reasonable estimate of

the pain and suffering could justify it. *Langley v. Sixth Ave. R. Co.*, 16 Jones & S. 542.

Six thousand dollars for injuries to a common laborer employed in digging clay, which permitted him to resume lighter work in a short time and to continue it at intervals, although suffering from the hurt, is excessive. *Chicago Anderson P. & Co. v. Sodkowiak*, 34 Ill. App. 312.

Six thousand dollars was held excessive and reduced to \$4,000 where a passenger on a railroad had his leg broken and received some flesh wounds in the head and was restored to sound health after ten months, the only permanent result being that one leg was somewhat shorter than the other. *Clapp v. Hudson River R. Co.*, 19 Barb. 461.

Five thousand dollars is excessive where the injury was a temporary loss of the sight of one eye. *Tinney v. New Jersey S. R. Co.*, 5 Lana. 507.

Five thousand dollars was reduced to \$3,000 where the injury was caused by falling into an excavation and consisted of a laceration of the right arm whereby the hand became somewhat smaller and flexed the wrist joint, the circulation being impaired and a slight use of the hand being possible, and the evidence showed that the hand and arm might be restored to a great extent. *Orleans v. Perry*, 24 Neb. 381.

Four thousand five hundred dollars is excessive for injuries resulting in the fracture of an arm where the only evidence of permanence of the injury is the testimony of plaintiff and a fellow laborer that he could not do the work of an able-bodied man in his occupation as grain stower in an elevator. *Chicago West. Div. R. Co. v. Hughea*, 87 Ill. 94.

Four thousand dollars is excessive for a mere broken leg where the fracture had perfectly united and would never again cause trouble. *South Covington & C. St. R. Co. v. Ware*, 84 Ky. 287.

Three thousand six hundred and thirty-eight dollars in favor of a seaman who fell through an open hatchway was reduced to \$1,200, where although seriously wounded he was discharged from the hospital in three months with his wounds healed; although four years later he swore that he still felt the effects of his fall but was uncorroborated by his own medical experts, and it was shown that he exhibited no signs of existing or permanent injury. *The Grecian Monarch*, 38 Fed. Rep. 635. *H. P. F.*

There are other questions raised as to the admission and rejection of testimony. It was shown that the appellee had a wife and child, over the objections of the appellant. While this fact may not have influenced the finding, it should not have been admitted. The defense offered to prove that the Louisville & Nashville Railroad Company, whose conductor the plaintiff was, had been informed that the words "carbon oil," contained in the bill of lading, meant naphtha. This was refused, and properly, because an employé of even more than ordinary intelligence would not have attached such a meaning to this bill of lading. The court, however, should have admitted the testimony showing that wooden barrels were safe, and that naphtha was ordinarily shipped in that way by prudent business men.

Another error complained of by the appellant is in the trial court permitting the appellee to prove that after this accident both corporations changed the manner of branding the barrels and labeling the cars. There seems to be some diversity of opinion on this point, the weight of authority being opposed to the admission of this character of testimony as a means of showing neglect on the part of the defendant. The Minnesota court, in *Morse v. Minneapolis & St. L. R. Co.*, 30 Minn. 465, said: "We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence." In *Lang v. Sanger*, 76 Wis. 71, in an action for an injury sustained by reason of defective machinery, the court held that it was erroneous to show that the defects were repaired after the accident. In *Terre Haute & I. R. Co. v. Clem*, 123 Ind. 15, 7 L. R. A. 588, it is said: "To declare such evidence competent is to offer an inducement to omit the use of such care as new information may suggest, and to deter persons from doing what the new experience informs them may be done to prevent the possibility of future accidents." Other cases determine that such evidence is open to the objection that it raises distinct and independent issues for the consideration of the jury. *Nalley v. Hartford Carpet Co.* 51 Conn. 524, 50 Am. Rep. 47; *Payne v. Troy & B. R. Co.* 9 Hun, 526; *Ely v. St. Louis, K. C. & N. R. Co.* 77 Mo. 34; *Reed v. New York Cent. R. Co.* 45 N. Y. 574.

There is still another question in this case that every case of final resort approaches with reluctance, and that is the one of excessive damages. The verdict in this case is for \$25,000,—the entire sum claimed in the petition. As said by Mr. Sedgwick in his work on the Measure of Damages: "It is one thing for a court to administer its own measure of damages in a case properly before it, and quite another thing to set aside the verdict of a jury merely because it exceeds that measure." "There must," says he, "be some mistake of the principles upon which the damages have been estimated, or some improper motives or feelings or bias influencing the jury." Section 1320. It is not for this court to determine the amount the plaintiff is entitled to recover in this character of action, and the verdict in every case for an injury to the person must depend upon the facts and circumstances connected with the commission of the wrong in the particular case, the verdict and judgment in no one case

being a criterion by which the court and jury are to be controlled in all cases of a similar character. It was the province of the jury to fix the compensation to which the appellee was entitled, and the court in the instructions given placed properly before them the mode of ascertaining the damages if, from the evidence, the appellee was entitled to recover. The jury reached the conclusion that the appellant was guilty of such an omission of duty as entitled the appellee to a verdict, but was not authorized to increase the amount of recovery by reason of any willful design on the part of the appellant to injure the appellee. The mode of ascertaining the compensation to which the plaintiff was entitled is found in instruction No. 11, given by the court. The jury was told that, "if they find for the plaintiff, they will give him such damages as they believe from the evidence will fairly compensate him for any suffering, mental or physical, heretofore experienced by him, directly resulting from the injuries complained of, and for any suffering or disability that they may believe from the testimony is reasonably certain he will experience in the future as the direct and necessary result of said injuries, and for any reduction in his power to earn money in the future, if such reduction there be directly resulting from the injury, not exceeding twenty-five thousand dollars, claimed in the petition." The appellee at the time of the injury was about thirty years of age; was a vigorous man, and a laborious and useful conductor. His conduct at the time of the burning, as described by the witnesses, deserved admiration and created a sympathy with both judge and jury. His appearance before the jury after the injury, with a disfigured face and limbs as described in the testimony, doubtless excited a feeling with every juror, however honest, that drove them to fix the verdict beyond the proper limit of compensation. We are to judge of this question by the light of the cases before us involving verdicts where compensation was the measure of damages, or even verdicts based upon the willful neglect of the defendant, and where punitive damages were sought and recovered. It is by comparison with verdict after verdict in this State where more flagrant wrongs were committed and punitive damages claimed, in which juries composed of men, as we have the right to assume, of like intelligence, passion and feeling, have made their findings for a much less amount; and without enumerating the cases it will be found that \$10,000 is the extent to which a verdict has been sustained by this court. Besides, in the case of *Louisville & N. R. Co. v. Fox*, reported in 11 Bush, 495, where the verdict was for \$80,000, and set aside as excessive, most of the cases are referred to. While we do not pretend to adjudicate that no verdict would or ought to be sustained for a larger amount than \$10,000, we do say that some moderation should be indulged in when arriving at verdicts in this class of cases. As said by the court in *Heddes v. Chicago & N. W. R. Co.*, 74 Wis. 289, where the injury resulted in the amputation of both legs of the plaintiff, and a verdict for \$80,000 was set aside: "No rational being would change places with the injured man for an amount of gold that would fill the rooms of the court, yet no lawyer would contend that such is the legal

measure of damages. Courts and juries must deal with such questions in a deliberate and practical sense."

In our opinion, the verdict in this case is ex-

cessive, and it is therefore *reversed and remanded*, with directions to set it aside, and for proceedings consistent with this opinion.

MARYLAND COURT OF APPEALS.

PHILIP STONE, Admr., etc., of Thomas E. Herrick, Deceased, *Appt.*,

MUTUAL FIRE INSURANCE CO., of Montgomery County.

(.....Md.....)

After the election of an insurer to build under a policy giving it an option so to do, and the letting of a contract for the work, although the premises were already advertised for sale under a mortgage, the insurer is not liable to garnishment for the amount of the insurance by creditors of the insured.

(November 12, 1891.)

APPPEAL by complainant from a judgment of the Circuit Court for Montgomery County in favor of defendant in a garnishment proceeding to reach money which defendant was alleged to have in its possession belonging to Harvey C. Fawcett, against whom complainant had recovered a judgment. *Affirmed.*

The facts are stated in the opinion.

Argued before Alvey, *Ch. J.*, and Irving, Miller, Bryan, McSherry and Fowler, *JJ.*

Messrs. Philip D. Laird, H. W. Talbott and Peter & Henderson for appellant.

Messrs. Albert & Warner and Anderson & Bouie for appellee.

Fowler, *J.*, delivered the opinion of the court:

On the 1st of August, 1868, Harvey C. Fawcett was insured against loss by fire by a policy issued by the Mutual Fire Insurance Company of Montgomery County. The policy contained a clause providing that all the property and securities of said company should be forever subject and liable to pay said Fawcett, his heirs and assigns, the loss which might happen by reason of fire to the property insured, "unless the said Company shall within ninety days after proof of such damage or loss, proceed to repair, rebuild, or replace the same in as good order, condition, and quality as it was before it was so injured by fire." The policy further provided that whatever the said Company had paid the amount mentioned therein, or had rebuilt or replaced any buildings destroyed by fire as herein provided, said policy should be utterly "null and void, and of none effect, either in law or equity." About fifteen years after the date of this policy, Mr. Fawcett, together with his wife, mortgaged his farm and the insured buildings thereon to Mrs. E. H. Riggs to secure the payment of a considerable sum of money, in which mortgage there was

contained the usual power of sale in case of default; and some years after the execution of said mortgage the appellant recovered his judgment against Fawcett in the Circuit Court for Montgomery County. On the 14th of April, 1890, the dwelling house, one of the buildings covered by the policy of insurance, was totally destroyed by fire; and the Insurance Company, the appellee here, on the 15th of May following, by a resolution of its board of directors, determined to adjust the claim of Fawcett by rebuilding in accordance with the provisions of the policy before referred to. Subsequent to the passage of this resolution, the appellant had an attachment issued on his judgment, and directed it to be laid in the hands of the appellee to effect the insurance money claimed by the appellant to be due to Fawcett by reason of the burning of his dwelling-house. It appears, therefore, that the policy of insurance on which the appellee Company bases its contentions long antedated both the mortgage under which the land was sold and the judgment on which the appellant issued his attachment. It also appears that the proof of loss was returned on the 29th of April, 1890, and that within ninety days, the time limited by the policy, the appellee had determined to rebuild; and finally that, in pursuance of this resolution, a valid contract had been made by the appellee with a builder to erect the new building on the site of the old one.

The statement of the foregoing facts, it seems to us, is sufficient to show that the appellant, claiming here under his attachment, has no standing, for it is apparent that, under the rebuilding clause contained in the insurance policy, there never was a debt due by the appellee to Fawcett, nor any sum of money in his hands which he could legally claim, or which could be reached by his creditors by means of an attachment or otherwise. The Insurance Company having duly exercised its election to rebuild, it is clear neither Fawcett nor his creditors can, under the terms of the policy, claim the insurance money. It would certainly be a great hardship and an apparent injustice to subject the Insurance Company, being guilty of no fraud, to a suit on the part of the insured to recover on the policy, on the theory that the rebuilding clause is void, and at the same time render it liable to an action by the builder to recover damages for breach of the building contract, which it must be admitted it had the right to make, under the circumstances of this case. For it is not contended that the title to the land on which the new building was to be erected had ceased to be in Fawcett when the Insurance Company made the contract with the builder, but it is said the property was then advertised under the mortgage already mentioned. But it does not follow that the land would be sold or cease to be owned by Fawcett because it was advertised; and if the

NOTE.—For note on election of insurer to rebuild. See *Quarles v. Clayton* (Tenn.) 3 L. R. A. 170.

14 L. R. A.

appellee had waited until the mortgage sale had been finally ratified, before exercising its election to rebuild, it might have then been too late to avail itself of that valuable right under the policy. There being nothing in the hands of the Insurance Company which Fawcett could legally claim, it follows, of course, that the attachment must fail. *Myer v. Liverpool, L. & G. Ins. Co.* 40 Md. 600. Cases may, no doubt, arise in which the insured, either from peculiar circumstances or fraud in the exercise of the right to rebuild, should have some remedy. And this is well illustrated by the case of *Anderson v. Commercial Union Assur. Co.*, 55 L. J. Q. B. 146, so much relied on by the appellant both in his brief and oral argument. But, so far from being an authority sustaining the contention of the appellant, it is directly to the contrary. In the case just mentioned, the policy contained a clause similar to the one in question, giving the insurers the discretion to repair and replace the machinery insured. The building in which the machinery was located and used, when insured, as well as the machinery itself, was damaged by fire; and the former ceased to be occupied, or in the possession of the assured, because he failed to pay the stipulated rent. Against the protest of the insured the insurer persisted in reinstating and repairing the machinery in the said building. An action on the policy was brought, under these circumstances, by the insured to recover the amount of loss by fire; and it was held that both parties were wrong,—the defendant, that is, the insurance company, be-

cause, although it had not lost its right to reinstate the machinery, it should not have been reinstated in the same place, but in the same State, in which it was before the fire; and the plaintiff, that is, the insured, was wrong because he did not remove the machinery to some reasonable place, to be reinstated and repaired by the insurer. But all the judges held that, whatever rights the insured might have, he could not recover, in his action on the policy, the amount of the loss. And we think there is as little reason as there is authority to sustain the contention of the appellant in this case, namely that he is entitled to recover the amount which it had been ascertained the new building would cost. Where there is a failure to rebuild after an election so to do, it has been held the proper remedy of the assured is, not an action *ex contractu* on the policy, for the amount of loss by fire, but an action to recover damages for not rebuilding, and that the amount of the insurance mentioned in the policy ceases to be the measure of damages. *Brown v. Metropolitan C. L. Ins. Soc.* 1 El. & El. 853; *Morrell v. Irving F. Ins. Co.* 33 N. Y. 429, 88 Am. Dec. 396.

It will be unnecessary to pass upon the various exceptions taken to the rulings of the court below on the admissibility of testimony, for they are all involved in the action of the court upon the prayers; and it follows, from what we have said, that the appellant's prayers were properly rejected, and those of the appellee were properly granted.

Judgment affirmed.

ILLINOIS SUPREME COURT.

John FRITTS, *Appt.*,

Elizabeth FRITTS.

(.....Dl.....)

1. A wife's refusal to have sexual intercourse with her husband is not willful

desertion within the meaning of a statute authorizing a divorce in case a husband or wife has "willfully deserted or abstained himself or herself" from the other for two years.

2. One act of force and violence preceded by deliberate insult and abuse, even though committed wantonly and without provocation, does not constitute "extreme and

NOTE.—*Refusal of marital intercourse as ground for divorce.*

A wife's refusal to allow her husband to have unrestrained carnal intercourse with her, and her declarations that she will never bear children to him, will not justify a divorce on the ground of cruel and barbarous treatment. *Magill v. Magill*, 3 Pittsb. 25.

Her refusal of sexual intercourse does not constitute cruelty which will justify granting him a divorce. *Holyoke v. Holyoke*, 3 New Eng. Rep. 169, 78 Me. 404; *Cowles v. Cowles*, 112 Mass. 238.

Neither is it ground for annulling the marriage. *Cowles v. Cowles*, *supra*.

Nor is it desertion. *Southwick v. Southwick*, 97 Mass. 327; *Steele v. Steele*, 1 McArth. 506; *Segelbaum v. Segelbaum*, 39 Minn. 258.

At least not "utter desertion." *Stewart v. Stewart*, 3 New Eng. Rep. 387, 78 Me. 543, 57 Am. Rep. 822.

And such refusal does not justify him in deserting her. *Reid v. Reid*, 21 N. J. Eq. 331.

The same rule applies to such a refusal on the part of the husband; the fact that he occupies a separate bed will not give the wife a divorce on the 14 L. R. A.

ground of cruelty. *Gordon v. Gordon*, 48 Pa. 226; *Eshbach v. Eshbach*, 23 Pa. 343; *D'Aguiar v. D'Aguiar*, 1 Hagg. Eccl. 778.

But when, in addition to refusal of sexual intercourse, a husband denies to his wife his companionship and refuses to live with her, she is entitled to a divorce for desertion, although he has continued to contribute to her support. *Magrath v. Magrath*, 108 Mass. 577, 4 Am. Rep. 579.

Also a husband's rejection of his wife from his bed with refusal to recognize her as his wife, and charging her with infidelity to her marriage vow, was held to be "such indignities offered to her person as to render her condition intolerable or life burdensome." *Coble v. Coble*, 56 N. C. 332.

So where the husband after a certain date and for some time before deserting the family residence ceased to occupy the bedroom of his wife and slept on a lounge in the kitchen, and had no matrimonial intercourse, companionship or communication with his wife whatever, it was held that his desertion began at that date. *Stein v. Stein*, 5 Colo. 65.

A husband's withdrawal, without cause, from cohabitation with his wife, although he continues to support her, is held in England to justify a judicial separation on the ground of his "desertion" under

repeated cruelty" which will justify a divorce under the Illinois statute.

(November 4, 1891.)

A PPEAL by complainant from a judgment of the Appellate Court, Fourth District, affirming a judgment of the Circuit Court for Pope County in favor of defendant in an action brought to obtain a divorce for the alleged causes of desertion and extreme cruelty. *Affirmed.*

The facts are stated in the opinion.

Messrs. James C. Courtney and Sheridan & Moore, for appellant:

A wife, who, from motives of dislike, and for no other cause, persistently refuses to permit the husband to have sexual intercourse with her for nine years is guilty of desertion or abandonment.

1 Bishop, Mar. & Div. § 779; *Heermance v. James*, 47 Barb. 120.

At common law there were four causes only for divorce *a vinculo matrimonii*, viz., pre-contract, consanguinity, affinity and impotency; adultery and cruelty were causes for divorce *a mensa et thoro*, from bed and board.

Harman v. Harman, 16 Ill. 88; 6 Bacon, Abr. 466; 1 Bl. Com. 146.

The remedy for withdrawal from intercourse was ample and complete, and consisted of a suit for the restitution of conjugal right, by which the party injured could compel the other

by imprisonment to return to cohabitation. The offense was called subtraction or desertion.

2 Bouvier, Law Dict. 473; 1 Bishop, Mar. & Div. § 771; Stephen, Common Law, 2; 3 Bl. Com. 94.

This remedy provided by the common law has never been adopted in this State. Bishop says that it is a relic of the dark ages, and that no State has adopted it.

1 Bishop, Mar. & Div. § 20; *Coverdill v. Coverdill*, 3 Harr. (Del.) 13.

One malicious blow struck with a deadly weapon, preceded and followed for many years by frequent threats to poison, and all other imaginable cruelty that can be devised, is a sufficient cause for divorce.

Ward v. Ward, 103 Ill. 488; *Harman v. Harman*, 16 Ill. 88; *Evans v. Evans*, 1 Hag. Constat. 35; *Turbitt v. Turbitt*, 21 Ill. 488; *Von Glahn v. Von Glahn*, 46 Ill. 183; *Embree v. Embree*, 53 Ill. 895; *Courcy v. Courcy*, 60 Ill. 188; *Farnham v. Farnham*, 73 Ill. 499; *Henderson v. Henderson*, 88 Ill. 248; *Sharp v. Sharp*, 116 Ill. 509. See 1 Bishop, Mar. & Div. 6th ed. § 730.

Mr. James C. Courtney, also filed a separate brief for appellant:

The refusal of the wife to have sexual intercourse with the husband, without reasonable cause, for the space of two years is desertion under the statute.

the Divorce Act, 20 & 21 Vict. chap. 85, § 18. *Yeatman v. Yeatman*, 1 Prob. & Div. 489.

In this case the husband took the wife to Germany and left her there with a relative and the court says: "A wife is entitled to her husband's society and the protection of his name and home in cohabitation." Evidently this was more than a case of mere refusal of sexual intercourse. It must be remembered also that this is a not a case of absolute divorce but of mere judicial separation.

A statute making the joining of a religious society which teaches that the relation of husband and wife is unlawful with refusal of cohabitation a ground of divorce, applies where a husband or wife joins the Shakers, who teach that the contract of marriage is lawful but that cohabitation is not. *Dyer v. Dyer*, 5 N. H. 271; *Fitta v. Fitta*, 46 N. H. 184.

Mr. Joel Prentiss Bishop in his work on Marriage, Divorce and Separation, persists in the doctrine advocated in his earlier work on the same subject, which is in conflict with the decisions of the courts. After criticising the decisions of Maine and Massachusetts, which are among those above referred to, he says in § 1682 that in accord with just principle "the courts of numbers of our states, hold the conduct we are considering to be desertion;" and he cites in support of his statement *Steele v. Steele*, 1 McArthur. 506; *Heermance v. James*, 47 Barb. 120, 123, 62 Am. Rep. 888, note; *Sisemore v. Sisemore*, 17 Or. 542, and *Magill v. Magill*, 3 Pittsb. 25.

But of these cases *Magill v. Magill* and *Steele v. Steele* decide exactly the contrary of what he alleges, while *Heermance v. James* is not in any sense a decision on the question, but is concerning the right to sue a third person for alienation of affections. In the remaining case of *Sisemore v. Sisemore* the decision was that a wife had deserted her husband where she by acts, although not by express words, persistently refused to return to his home with him.

In the case of *Magill v. Magill*, *supra*, the court not only explicitly denied a divorce, which was not 14 L. R. A.

asked on the ground of desertion at all, but said, in reference to the alleged grounds of divorce: "In what respect the refusal by the wife to allow the husband access to her bed can be termed cruel and barbarous I cannot conceive; nor having a reference to the proper meaning of terms can I see how such treatment will render his life burdensome or condition intolerable."

It thus appears that the cases which he cites to support his text utterly fail to do so, and that several of them flatly contradict it.

He further cites *Fishli v. Fishli*, 2 Litt. 337, 341, and *Moss v. Moss*, 24 N. C. 55, "in addition to the more direct rulings," as he says.

In the case of *Moss v. Moss*, 24 N. C. 55, there is nothing to justify the claim that denial of marital intercourse constitutes desertion. A divorce was there denied the husband for the wife's adultery because it was committed after he had practically driven her from his house, and explicitly declared that he would from thenceforth never receive her as his wife because, as he falsely alleged, the child of which she was pregnant at the time of the marriage was not his.

In *Fishli v. Fishli*, 2 Litt. 337, the decision was that the right to a divorce for abandonment by the husband was not defeated by his offer to support her in his own house or elsewhere, which offer was accompanied with groundless insinuations against her chastity and was made under circumstances which showed that it was a mere artifice to defeat her right to a divorce. The court said: "The offer was not to live with her in the relation of husband and wife, and she was not bound to accept of an offer to stand in any other relation." This which is the only case that even apparently supports his text manifestly falls far short of saying that mere refusal of sexual intercourse would constitute desertion; and yet Mr. Bishop says: "The court's refusal to admit this as ending the desertion is a direct affirmation by solemn adjudication of what we have seen to be better doctrine." B. A. R.

1 Bishop, Mar. & Div. §§ 779, 782; *Heermance v. James*, 47 Barb. 120; *Fishli v. Fishli*, 3 Litt. 337.

One wanton blow inflicted, preceded and followed by threats to kill, coupled with conduct which may raise a reasonable apprehension of bodily hurt rendering cohabitation unsafe, is extreme and repeated cruelty.

Harman v. Harman, 16 Ill. 85; *Ward v. Ward*, 108 Ill. 484; *Kennedy v. Kennedy*, 78 N. Y. 872; *Beebe v. Beebe*, 10 Iowa, 183; *Briggs v. Briggs*, 20 Mich. 84; *Butler v. Butler*, 1 Pars. Eq. Cas. 329; *Moyler v. Moyler*, 11 Ala. 620.

Mr. W. S. Morris, with *Mr. W. B. Morris*, for appellee:

Marriage is not a means to sexual commerce.

1 Blackstone's Commentaries, bk. 1, p. 455, bottom page 362, says: "The main end and design of marriage is the ascertainment and fixing upon some one certain person to whom the care, the protection, the maintenance and the education of children may belong." And again at the same page, "The main end of marriage is the protection of infants."

See also 1 Bouvier, Law Dict. p. 101.

Counsel for complainant are in error when they agree with Bishop that the point in this case has never been decided.

A withdrawal of the person for the statutory period and refusing sexual intercourse during that time do not amount to desertion.

Southwick v. Southwick, 97 Mass. 327; *Eckbach v. Eckbach*, 23 Pa. 353; Pritchard, Dig. Desertion, note 4; 2 Kent, Com. Holmes' ed. part IV. *127, note 2.

The statutes under which these decisions were had are identical with our own except upon the one single question of time, which is required in them to be of greater duration than with us.

2 Kent, Com. Holmes' ed. part IV. *97, note a.

The request to instruct that whenever force and violence, preceded by deliberate insult and abuse, have been once or twice wantonly and without provocation used by the wife to her husband, then the wife would be guilty in law of extreme and repeated cruelty does not comport with the latest expression of the views of the supreme court of this State on this point.

Ward v. Ward, 108 Ill. 483; *Poor v. Poor*, 8 N. H. 307, 29 Am. Dec. 664; *Kennedy v. Kennedy*, 78 N. Y. 269; *Harman v. Harman*, 16 Ill. 90.

This expression of the court in *Harman v. Harman*, *supra*, from *Evans v. Evans*, 1 Hagg. Consist. 35, is to be taken with reference to the fact that in that case (*Evans v. Evans*, *supra*), all that was prayed was a decree of divorce *a mensa et thoro*.

2 Kent, Com. *125.

Verbal threats are not sufficient to establish extreme and repeated cruelty.

Birkby v. Birkby, 15 Ill. 121; *Vignoe v. Vignoe*, Id. 187; *Embree v. Embree*, 53 Ill. 805.

When the Legislature has said that the cruelty must be extreme and repeated to constitute grounds of divorce, the court cannot say that a single act will suffice.

De La Hay v. De La Hay, 21 Ill. 254; *Henderson v. Henderson*, 38 Ill. 250.

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Magruder, Ch. J., delivered the opinion of the court:

This is a bill filed in the Circuit Court of Pope County on April 17, 1889, by the appellant against the appellee, his wife, praying for a divorce from her upon the alleged grounds that she "has willfully absented herself from your orator, without any reasonable cause, for the space of two years, and has been guilty of extreme and repeated cruelty." The defendant answered, denying the allegations of the bill, and replication was filed to the answer. The verdict of the jury and the judgment of the trial court were in favor of the defendant. The present appeal is from the judgment of the appellate court affirming the judgment of the circuit court.

The first question in the case arises out of the refusal of the trial court to give the 3d, 4th, 5th, 6th, and 7th instructions asked by the complainant below. These instructions, in substance, announce the doctrine that, where a wife refuses, without good cause, to have sexual intercourse with her husband for a period of two years or more, such conduct amounts to willful desertion. Mr. Bishop, in his very able work upon Marriage and Divorce, gives this doctrine his support. 1 Bishop, Mar. & Div. 6th ed. §§ 778, 778a, 779. It is not, however, sustained by well-considered authorities. The cases favoring it, to which we have been referred, are *Heermance v. James*, 47 Barb. 120; *Fishli v. Fishli*, 2 Litt. 337; *Sisemore v. Sisemore*, 17 Or. 542. In no one of these cases did the question fairly arise whether the neglect of this one of the marital duties, without the neglect of any other of such duties, by itself constituted willful desertion. The *Heermance Case* was an action for damages for depriving the plaintiff of the affections, comfort, fellowship, society and aid and assistance of his wife in his domestic affairs, and arose upon demurrer to the complaint filed in the action. In the *Fishli Case* the husband had abandoned his wife for the space of two years, and sought to meet the charge of such abandonment by setting up that, a few weeks before the expiration of the two years, he had made an offer to support his wife in his own house, or in lodgings, as she might prefer. In the *Sisemore Case* it appeared that the offense of the wife was not so much the one now under consideration as her refusal to remove to a new home selected by her husband in another county. The doctrine contended for rests mainly on the idea that sexual intercourse is "the central element of marriage, to which the rest is but ancillary," and while it may be urged with no little force that the refusal of such intercourse by one of the parties to the marriage contract is such a violation of marital duty that it ought to be regarded as a good ground of divorce, yet the question before us is simply as to the meaning of our statute. The Divorce Act provides that a divorce may be granted where either party "has willfully deserted or absented himself or herself from the husband or wife, without any reasonable cause, for the space of two years." Rev. Stat. chap. 40, § 1. We think that the willful desertion here referred to was intended to mean the abnegation of all

the duties of the marital relation, and not of one alone.

In *Carter v. Carter*, 62 Ill. 499, "desertion" is treated as synonymous with absence," and absence involves the neglect of other duties than the one in question. The Supreme Court of Maine, in speaking upon this subject, says: "Sexual intercourse is only one marital right or duty. There are many. There are many other important rights and duties. The obligations the parties assume to each other, and to society, are not dependent on this single one. Many of these obligations, fidelity, sobriety, kind treatment, etc., have legal sanctions, and can be enforced, or their breach remedied by legal process." *Stewart v. Stewart*, 78 Me. 548, 3 New Eng. Rep. 387, 57 Am. Rep. 822. The view of this subject which commends itself to our approval is that announced by the Supreme Court of Massachusetts in *Southwick v. Southwick*, 97 Mass. 327, where Chief Justice Bigelow says: "The word 'desertion' in the statute does not signify merely a refusal of matrimonial intercourse, which would be a breach or violation of a single conjugal or marital duty or obligation only, but it imports a cessation of cohabitation, a refusal to live together, which involves an abnegation of all the duties and obligations resulting from the marriage contract." The latter case of *Magrath v. Magrath*, 103 Mass. 577, 4 Am. Rep. 679, does not overrule the *Southwick Case*, in so far as the latter holds that the refusal of matrimonial intercourse is not of itself sufficient to justify a divorce on the ground of desertion. The divorce for desertion was allowed in the *Magrath Case*, because, in addition to the husband's intentional and permanent abandonment of all matrimonial intercourse with his wife, he withdrew from her his companionship and the protection of his home.

It is there said, after referring to the *Southwick Case*: "The case at bar goes much further. Here there has been, for the time required by the statute, an abnegation on the part of the husband of all the chief duties and obligations which result from the marriage contract and distinguish it from others. There is no more important right of the wife than that which secures to her in the marriage relation the companionship of her husband and the protection of his home." The same view has been adopted in Maine. In *Stewart v. Stewart*, *supra*, it is said: "This case therefore presents the question whether the Legislature, by that statute, intended to authorize a divorce where one party, without good cause, denies the other sexual intercourse for three consecutive years. . . . It has been expressly held that such refusal is not the desertion contemplated by the statutes authorizing divorces for desertion. *Southwick v. Southwick*, 97 Mass. 327; *Steele v. Steele*, 1 MacArthur. 505. . . . We do not think our Legislature intended to call the denial of this one obligation an 'utter desertion,' while the party might be faithfully, and perhaps meritoriously, fulfilling all the other marital obligations." Some importance is attached in the *Stewart Case* to the fact that the Maine statute uses the word, "utter" before "desertion." But we do not think that the absence of that word from our statute affects the construction of its language with reference

to the point now under consideration. It is a mistake to say, as it is stated in *Stewart v. Stewart*, *supra*, and in Bishop, Mar. Div. & Sep. § 1680, that the *Southwick Case* is based upon a statute providing for "utter" desertion. The *Southwick Case* was decided in 1867, before the Massachusetts Statute of 1862, referred to in *Stewart v. Stewart*, was passed, and the statute in force in Massachusetts in 1867 did not use the word "utter," as is shown by the remarks of the court in *Southwick v. Southwick*, *supra*. In our opinion, refusal of sexual intercourse alone cannot be construed to mean willful desertion without reasonable cause, under the Illinois statute, any more than it can be construed to mean utter desertion under the Maine statute. In harmony with the Massachusetts and Maine cases is the case of *Steele v. Steele*, *supra*, where it was the opinion of the court that a husband could not maintain a suit for divorce solely on the ground that his wife had denied matrimonial intercourse to him.

In 2 Kent, Com. 12th ed. § 27, *128, note 1, it is said: "Keeping a separate bed-chamber in the same house, and refusing to have sexual intercourse for the statutory time, is not desertion. *Southwick v. Southwick*, 97 Mass. 327; *Eshbach v. Eshbach*, 23 Pa. 343. See Pritchard, Dig. Desertion, note 4." At common law, whenever either the husband or wife was guilty of the injury of subtraction, or lived separate from the other without any sufficient reason, a suit could be brought in the ecclesiastical courts for a restitution of conjugal rights. But those courts made a distinction between "marital intercourse," or sexual intercourse, and "marital cohabitation," or living together. They enforced the latter, but not the former. They merely require the offending party to return and live with the libellant. In such proceedings, the cessation of cohabitation warranted a decree, but the suit for restitution of conjugal rights could not be maintained on the ground of a refusal of marital intercourse. Desertion, in such suits, was held to signify a refusal to live together; and, in this country, the action for divorce on the ground of desertion is a substitute for the English proceeding for the restitution of conjugal rights. Bl. Com. bk. 8, *94; 1 Bishop, Mar. & Div. 6th ed. § 778; *Orme v. Orme*, 2 Addams, Eccl. 383; *Forster v. Forster*, 1 Hag. Const. 144, 154; *Stewart v. Stewart*, *supra*; *Southwick v. Southwick*, *supra*.

It will be noted that under our statute the desertion or absence which will justify a divorce must be "without any reasonable cause." It has been held that the "reasonable cause" which justifies a wife's desertion and abandonment of her husband must be such as would entitle her to a divorce." *Eshbach v. Eshbach*, *supra*. It has also been held that the refusal of marital intercourse without sufficient reason will not justify desertion. *Reid v. Reid*, 21 N. J. Eq. 381; *Stewart v. Stewart*, *supra*; *Browne*, Com. Div. & Ali. p. 153.

It follows that the denial of marital intercourse will not entitle a husband or wife to a divorce, and therefore cannot be regarded as such desertion as is contemplated by the statute. In this State, courts derive their power to decree divorces solely from the statute, and

for such causes only as have been designated by the Legislature. For the reason thus stated, we are of the opinion that the court below committed no error in refusing to give the instructions numbered 3, 4, 5, 6 and 7, which were asked by the complainant.

The appellant assigns as error that the trial court refused to give the second instruction asked by the complainant, and gave the eighteenth instruction asked by defendant. The second and last clause of said second instruction is as follows: "Wherever force and violence, preceded by deliberate insult and abuse, have been once or twice, wantonly and without provocation, used by the wife to her husband, then the wife would be guilty in law of extreme and repeated cruelty." This clause announces the proposition that one act of force and violence, preceded by insult and abuse, constitutes extreme and repeated cruelty. The eighteenth instruction given for the defendant announced the contrary of such proposition. We do not think that the error thus complained of is well assigned. In the late work of Bishop on Marriage, Divorce and Separation, (vol. 1, § 1608), it is said: "The words in Illinois are 'extreme and repeated cruelty'; and it is plain that a single act, though it may be 'extreme' in point of cruelty, is not therefore 'repeated.' The consequence of which is that there can be no one act of violence which alone will bring a case within this statute." In *Vignos v. Vignos*, 15 Ill. 186, one act of violence, together with unkind treatment and the use of harsh language, was held to come far short of what the statute means by "extreme and repeated cruelty." In *Harman v. Harman*, 16 Ill. 85, we said: "This court in *Birkby v. Birkby*, 15 Ill. 120, and in *Vignos v. Vignos*, 15 Ill. 186, has held that one instance of personal violence did not constitute a statutory cause, although coupled with abusive and derogatory language." In *De La Hay v. De La Hay*, 21 Ill. 252, we said: "And when the Legislature has said that cruelty must be extreme and repeated, to constitute a ground, the courts cannot say that a single act will suffice." See also *Turbitt v. Turbitt*, 21 Ill. 438. In *Embree v. Embree*, 53 Ill. 394, this court, speaking through Mr. Justice Walker, said: "It is a positive requirement of the statute that there shall be extreme and repeated cruelty to authorize the courts to dissolve the marriage tie. One act has not, in this State, been held to answer the requirements of the statute; and the uniform construction given to the Act by this court is that the cruelty must consist in physical violence, and not in angry or abusive epithets, or even profane language." In *Farnham v. Farnham*, 73 Ill. 497, although abusive language, used by a husband towards his wife in private, and in the presence of strangers, which consisted of false charges against her virtue and fidelity to her marriage vows, was allowed to be considered by the jury as characterizing his acts of physical cruelty, yet two distinct acts of personal

violence to the wife were clearly proven. In *Henderson v. Henderson*, 88 Ill. 245, we again said: "This court has held that it [extreme and repeated cruelty] must be bodily harm, in contradistinction to mere harsh, or even opprobrious, language, or mere mental suffering; that the cruelty must be grave, and endanger life or limb, or, at any rate, subject the person to danger of great bodily harm." See also *Coursey v. Coursey*, 60 Ill. 186. In *Ward v. Ward*, 103 Ill. 477, although it was said that extreme and protracted suffering might be produced primarily by operating on the mind alone, and that threats of physical violence and false charges of adultery, maliciously made, were competent evidence to prove cruelty, yet it is at the same time the plain doctrine of that case that the threats must be such as raise a reasonable apprehension of bodily hurt, and must be accompanied or followed by acts of actual, malicious, physical violence, and must serve to magnify the atrocity of such acts. It is also there said that any willful misconduct of the husband which endangers the life or health of the wife, which exposes her to bodily hazard and intolerable hardship, and renders cohabitation unsafe, is extreme cruelty, and that "many acts" are not necessary to constitute such extreme cruelty; yet it is nowhere intimated that there can be repeated cruelty without more than one act of violence. On the contrary, the *Furnham Case* is quoted with approval in the *Ward Case*, and the proof in the latter case showed that the husband had committed four or five distinct assaults and batteries upon his wife, apparently without provocation, and, in addition thereto, had insulted and abused her constantly for three years. Even in *Sharp v. Sharp*, 116 Ill. 509, where the circumstances were peculiar and of an unusual character, it was shown that the husband had been guilty of at least two acts of physical violence, although they were separated from each other by a considerable period of time. In the case at bar the husband is charging the wife with extreme and repeated cruelty, and, in such case, "it is not sufficient to show acts of violence on her part towards him, so long as there is no reason to suppose he will not be able to protect himself by a proper exercise of his marital powers." *De La Hay v. De La Hay*, *supra*.

We do not think that the court erred in refusing to instruct the jury that one act of force and violence, preceded by deliberate insult and abuse, even though committed wantonly and without provocation, was sufficient to constitute extreme and repeated cruelty. Several other objections are made by the appellant, based upon the giving or refusal of instructions. After a careful examination of all the instructions in connection with the evidence, we find no sufficient reason for disturbing the result reached by the lower courts.

The judgment of the Appellate Court is affirmed.

PENNSYLVANIA SUPREME COURT.

LAFLIN & RAND POWDER CO.

v.

J. J. STEYTLER *et al.*, Doing Business as the Youghiogheny Coal Co., Limited, *Appts.*

(.....Pa.....)

1. The "full name" of a member of a limited partnership is signed to the statement as required by the Act of 1874 when signed in the form habitually used by him in business and by which he is known in the community, although it consists only of a surname and initials.
2. A description of several tracts of land acquired by different titles but merged together for coal works with a valuation as one tract constitutes a sufficient description and valuation in a schedule of property subscribed to a limited partnership.
3. A description of buildings, engines and other property belonging to coal works is sufficient in a schedule of property subscribed to a limited partnership if it identifies the property so far that a creditor or sheriff could go upon the land and identify or levy upon it.

(January 4, 1882.)

NOTE.—The acquisition and use by an individual of a name.

The law in regard to names is perhaps as good an illustration as may be found of the elasticity of the common law and its capacity to meet the requirements of increasing population and civilization and the demands of business.

Formerly the Christian name was the more important of the two. *Re Snook*, 2 Hilt. 558.

Coke states that in grants it was requisite that the purchaser be designated by his name of baptism and his surname, and that special heed be taken to the name of baptism, for that a man cannot have two names of baptism as he may have diverse surnames. But if the grant was to one by description he might take although his Christian name was mistaken. And he might receive a new name at confirmation which could be lawfully used instead of the Christian name. *Co. Litt.* 8a.

And that seems to have been the limit of his power to change his Christian name. The rigor with which a person was held to the use of the name received at baptism is illustrated by the following decisions:

An indictment against Elizabeth Newman *alias* Judith Hancock was quashed because a person could not have two Christian names. *Rex v. Newman*, 1 Raym. 552.

A process against Evanum *alias* Ievanum Loyd is void because he cannot have two Christian names. *Loyd's Case*, Noy. 135. See also *East Skidmore v. Vaudstevan*, Cro. Eliz. 56.

A bond entered into by Edmund Leusage under the name of Edward Leusage is void. *Kent v. Wichall, Owen*, 48.

And where Edward Watkins was obligated and Edmund Watkins sued, there could be no recovery. *Watkins v. Oliver*, Cro. Jac. 558.

One signing a bond must be sued by the name which he signed. *Ryckman v. Shotbolt*, 3 Dyer, 279.

Chief Justice Popham in *Button v. Wrightman*, Poph. 56, in speaking of grants, said: "The law is not precise in the case of surnames but for the Christian name this ought always to be perfect."

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APPEAL by defendants from a judgment of the Court of Common Pleas, No. 1, for Allegheny County, in favor of plaintiff in an action brought to render defendants personally liable for debts due by a firm which they alleged to be a limited partnership. *Reversed.*

The schedule of the property contributed to the capital stock of the concern set out several tracts of land described separately, but valued together in a lump as a coal mine, and also buildings, tools, vehicles, machinery, etc., and was signed by all but one of the partners with initials, followed by the surname, without giving the Christian and middle names in full.

Further facts are stated in the opinion.

Messrs. W. F. McCook and James C. Doty, for appellants:

At common law, a man may adopt any name he pleases. He may change it from time to time, and may accept and make conveyances, "contract, sue and be sued by his reputed or his adopted name."

Linton v. First Nat. Bank of Kittanning, 10 Fed. Rep. 894; *Bell v. Sun Print. & Pub. Co.* 10 Jones & S. 567.

We have been unable to find any case growing out of the partnership (limited) statutes in New York, Virginia or England, where such

A person might have different surnames and he would be held to be estopped to deny that a surname which he used in a deed is his. *Bacon, Abr. Minomer A*, citing 3 Henry VI. 25; 2 Rolle, Abr. 146.

Form of the Christian name.

The doctrine that there could be but one Christian name seems to have been broadened so as to exclude the acquisition of a name consisting of two words or of a word and a letter or initial.

By the common law a full name consists of one Christian or given name and one surname or patronymic, and the two constitute the legal name of the person. The middle names or initials do not affect the legal name and they may be inserted or not, or a wrong initial may be inserted in a deed or contract without affecting its validity. *Schofield v. Jennings*, 68 Ind. 232.

The law knows of only one Christian name. *Franklin v. Talmadge*, 5 Johns. 54; *Roosevelt v. Gardiner*, 2 Cow. 468.

The Christian or first name is in law denominated the proper name; and a person can have but one, for middle or added names are not regarded. *Re Snook*, 2 Hilt. 558.

The middle name of a person is no part of his name. *State v. Martin*, 10 Mo. 301.

An initial letter between the Christian and surname is no part of either. *Bratton v. Seymour*, 4 Watts, 339; *Isaacs v. Wile*, 12 Vt. 674; *Hart v. Lindsey*, 17 N. H. 235, 43 Am. Dec. 597; *Allen v. Taylor*, 26 Vt. 589; *Bleeth v. Johnson*, 40 Ill. 116; *Thompson v. Lee*, 21 Ill. 242.

Of course if the middle initial is no part of the name its use or omission, or even a mistake in regard to it, is immaterial, and so it has been held.

The omission or insertion of the middle name or of the initial letter of that name in a deed is immaterial. *Games v. Stiles*, 39 U. S. 14 Pet. 377, 10 L. ed. 478; *Fink v. Manhattan R. Co.* 29 N. Y. S. R. 153.

That one described as Margaret A. Giddings in a deed signed it as Margaret S. Giddings is immaterial. *Erakine v. Davis*, 36 Ill. 255.

Where it was doubtful whether the middle letter

associations exist, covering the question in controversy in this case. A statute of Georgia requires that the names of the panel of jurors shall be delivered to the defendant in capital cases before the trial. Upon the question being raised before trial that the name of a jurymen called to serve in the trial was not given the prisoner, but only his initials, the objection was overruled and the defendant convicted, with the jurymen sitting who had been objected to.

Minor v. State, 63 Ga. 318. See also *Fields v. State*, 52 Ala. 348.

The statutes of New York require that elections for public offices shall be by ballot, "which ballot shall contain the name" of the candidate, and that "the inspectors shall set down in writing the 'names' of the persons voted for." Henry F. Yates was a candidate, and votes were cast for H. F. Yates, and were received by the court upon proof that he was so known in the community.

People v. Ferguson, 8 Cow. 102.

In the following cases, where statutes required a true bill to be returned, "signed by" or "under the hand" of the foreman, initials were sustained as equivalent to the Christian name of the foreman.

Com. v. Hamilton, 15 Gray, 480; *Easterling v. State*, 85 Miss. 210; *State v. Taggart*, 38

of the name under which plaintiff contracted was "W" or "H" the court held that it was immaterial since the letter was no part of his name. *Milk v. Christie*, 1 Hill, 102.

A service of notice by publication is not void because of the insertion of the wrong initial between plaintiff's Christian and surnames. *Morgan v. Woods*, 33 Ind. 24.

The omission of the initial letter of the middle name in the appointment of a justice of the peace is immaterial and he may officiate under such appointment. *Alexander v. Wilmorth*, 2 Ark. 413.

The omission of the middle letter from the name of a witness is immaterial. *Sullivan v. State*, 6 Tex. App. 333.

A man's name may be forged by a signature which leaves out the middle letter of it. *Gotobed's Case*, 6 City Hall Recorder, 25.

Where one enrolled in a militia company as J. F. appeared and answered to his name, the claim that his true name was J. A. F. is no defense to a prosecution for not being duly equipped. *Wood v. Fletcher*, 3 N. H. 61.

The rule that a Christian name must consist of but one word has not, however, been universally adopted. It has been held that a man may be known by two or more names which taken together constitute his Christian name. But it cannot be claimed that he is commonly known by a name composed of an 'appellate' word preceded or followed by a letter only. *King v. Hutchins*, 23 N. H. 560.

In Massachusetts the middle name or initial is a part of a person's name and cannot be disregarded. *Parker v. Parker*, 6 New Eng. Rep. 114, 146 Mass. 320.

Where Charles Jones was the Christian name given to a person by the name of Hall he cannot be lawfully enrolled in a militia company by the name of Charles Hall. *Com. v. Hall*, 3 Pick. 262.

The right to use a letter singly or in combination with another letter or with a word as a Christian name has been recognized although courts are not yet agreed that it may be done, and as appears from the cases cited above the weight of authority may be said to be against it.

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Me. 298; Anderson v. State, 26 Ind. 89; *State v. Groome*, 10 Iowa, 308.

Messrs. J. S. Ferguson and E. G. Ferguson, for appellee:

If parties seek to have all the advantages of a partnership, and yet limit their liability as to creditors, they must comply strictly with the Act.

Maloney v. Bruce, 94 Pa. 252; *Eliot v. Himrod*, 108 Pa. 569; *Hite Nat. Gas Co's App.* 10 Cent. Rep. 805, 118 Pa. 436; *Hill v. Steller*, 127 Pa. 145.

When the Legislature said that they should set out their full names, it is no answer to admit that they have not set out their full names and then say that they have set out the names as they usually wrote them. A full name consists of one Christian or given name and one surname or patronymic; the two, using the Christian name first and the surname last, constitutes the legal name of the person.

Schofield v. Jennings, 68 Ind. 283; *Vanter v. Gilliland*, 55 Ind. 278; *Frank v. Lewis*, 5 Robt. 599.

The plain object of the provision in the supplementary Act was to enable the creditors to ascertain precisely of what the property consisted, and to judge of its value. It is no defense that the creditors had actual knowl-

It has been held that I. Shakspeare may be assumed by the court to be a man's Christian name. *Lomax v. Landells*, 6 C. B. 577.

So it was held that a consonant cannot be taken to be the Christian name of a person; hence a declaration against John M. Knott is demurrable. *Kinnersley v. Knott*, 7 C. B. 960.

But in *Reg. v. Dale*, 5 Eng. L. & Eq. 380, 15 Jur. 637, Lord Campbell said he could not agree that a consonant could not be a Christian name while a vowel could be, and held that Lee B. & I. H. might be Christian names.

In this country a man may take the letters A. W. for his first name; for there is no union between church and state and no obligation on parents to baptise their children; the first name may be as often changed as the patronymic. *City Council v. King*, 4 McCoord, L. 437.

So J. W. may constitute the Christian name of a person. *Twedy v. Jarvis*, 27 Conn. 42.

"Junior" and "senior."

It has been held that if father and son have the same name a mention of *ex prima facie* refers to the father. *Lepiot v. Browne*, 1 Salt. 7; *Sweeting v. Fowler*, 1 Stark. 105; *Hussey v. Hussey*, 1 Comyn, 261; *Wilson v. Stubbs*, Hob. 380a.

In consequence of this doctrine some early cases held that if it is desired to designate the son "Jr." must be added. *State v. Vitum*, 9 N. H. 333.

So where father and son of the same name reside in the same town it seems that the omission of "Jr." in a writ against the son is good cause of abatement. *Zuill v. Bradley*, Quinoy, 6.

Although the elder of two persons of the same name need not be designated specially as such when referred to. *Rex v. Bailey*, 7 Car. & P. 364.

And the weight of authority is that "Junior" is no part of a man's name. *Jameson v. Isaac*, 15 Vt. 611; *State v. Grant*, 21 Me. 171; *Brainard v. Balphain*, 6 Vt. 12; *Cott v. Starkweather*, 8 Conn. 290.

So a daughter of the same name as her mother may be designated by the name without the word "Junior." *Ging v. Pease*, 3 Barn. & Ald. 579.

One to whom a note is assigned without the addition of the word "Junior" to his name may give a

edge of the facts required to be set out on the recorded statement.

Sheble v. Strong, 128 Pa. 815.

A general description of the extent of the property, or a lumping valuation, is not such a schedule as the Act requires.

Maloney v. Bruce, 94 Pa. 249.

The law contemplates property available for the business of the company and the payment of its debts.

Vanhorne v. Corcoran, 4 L. R. A. 886, 127 Pa. 265.

The question of what constitutes the full name is further developed in a brief filed by Messrs. John S. Ferguson, E. G. Ferguson and James H. Porte, in the case of *Carroll v. Gearing*, argued at the same term with this one.

The effect of designating a candidate for election by his initials has been variously decided.

People v. Cicott, 16 Mich. 283, 97 Am. Dec. 141; *People v. Ferguson*, 8 Cow. 103.

On examination, however, it will be found that where the initials were held to be sufficient such ruling was based upon the proposition that, the identity of the person being established, the citizen voting should not be disfranchised by reason of the informality.

Men sue and are sued every day by their initials. After judgment no advantage can be

taken of this fact. But in the case of the plaintiff, the defendant at the beginning of the suit could compel him to amend by setting out his Christian name.

Walgamood v. Randolph, 22 Neb. 498; *Fisher v. Northrup*, 7 L. R. A. 629, 79 Mich. 287.

In this State it was said that an initial letter interposed betwixt the Christian and surname is no part of either.

Bratton v. Seymour, 4 Watts, 329.

On the other hand, it is held in Massachusetts that the middle name is part of the name.

Com. v. Shearman, 11 Cush. 546.

Even in Pennsylvania the omission of the middle letter in a name in the judgment index is fatal to a lien.

Hutchinson's App. 92 Pa. 186.

A man may have divers names at divers times, but not divers Christian names.

Co. Litt. 8a.

Mitchell, J., delivered the opinion of the court:

The Limited Association Act of 2d June, 1874, was a wide departure from the principles of the common law governing partnerships and the liability of the individual partners to the firm creditors. It was not the first, nor has it been the last, of such changes. On the contrary, it is but one step in a line of concessions to the business views and habits of a commer-

good title by assigning it with the word added to his name. *Johnson v. Ellison*, 4 Munroe, 527.

The younger of two persons bearing the same name may properly be enrolled in a militia company under his name with the word "Second" added as well as with the name "Junior," as neither word is a part of his name. *Cobb v. Lucas*, 15 Pick. 7.

A road commissioner elected under his name with the appellation "Jr.," added, may lawfully sign his returns with that word omitted. *People v. Collins*, 7 Johns. 549.

One who has brought an action without adding "Jr.," to his name upon a written promise to him as "Jr.," may lawfully amend so as to show that he was the payee. *Kincaid v. Howe*, 10 Mass. 308.

There is no variance between a declaration on a note made to Samuel Headley and proof of one made to Samuel Headley, Jr. *Headley v. Shaw*, 39 Ill. 354.

Right to change name.

There is an early case which tended to relax the strict rule of the common law as stated above. An action was brought against Benjamin Walden and he pleaded that he was baptized John and was never known as Benjamin. The court held that a traverse of the allegation that he was never called Benjamin was good, and stated that it was not sufficient to show a baptism by a name without also showing that he had always been called and known by it. *Holman v. Walden*, 1 Saik. 6, 6 Mod. 115.

That case is, however, also reported in 2 Ld. Raym. 1015, where it seems to turn on the principle that the plea was bad in that it would have been sufficient to have pleaded the matter of baptism, and that it was made bad by showing that he was never called or known by any other name, such allegation making it merely dilatory and not being to the merits.

And it seems that now a man may change either his Christian or surname radically and as often as he desires, if for an honest purpose, and it does not result in injury to third persons.

A person may legally name himself, change his 14 L. R. A.

name, or acquire a name by reputation or general usage, or habit. *England v. New York Pub. Co.* 8 Daly, 375.

Even at common law a man might lawfully change his surname and was bound by any contract into which he might enter under an adopted or reputed name. *Linton v. First Nat. Bank of Kintanning*, 10 Fed. Rep. 897.

There is nothing to prevent a man from changing his name if he so desires. *Re Snook*, 3 Hilt. 588.

The name which a man "always went by," which he declared to be his name in his dying declaration, and by which his mother had always known him, will be deemed to be his right name although one witness testified that he was baptized by another name. *Birfield v. State*, 15 Neb. 455.

Where a person is rightly described by the name of Edward in the body of a deed his mistake in executing it by the name of Edmund is immaterial. *Middleton v. Findlay*, 25 Cal. 81.

A person must be sued upon a bond by the Christian name which he has attached to it. If objection is made that such is not his name it may be replied that he is known as well by one name as the other and the bond will be evidence of it. *Gould v. Barnes*, 3 Taunt. 504.

To a plea of misnomer it is sufficient to reply that the party is known as well by one name as by the other. *Selman v. Shackelford*, 17 Ga. 615.

Where a person had signed a contract with the initials of his Christian names and his surname, and had been arrested in an action growing out of such contract by a wrong middle name, the court said that if he had led the other party to know him by a name which was not his Christian name he could not complain if he was sued by such wrong name. *Newton v. Maxwell*, 2 Crump. & J. 218.

One may lawfully take upon himself a surname for the purpose of bringing himself within the terms of a will which provides that no person can take the estate unless he takes such name. The court said a name assumed by the voluntary act of a young man, at the outset of his life, and adopted by all who know him, and by which he is constantly called, becomes as much, and as effectually, his

cial age and community, and it should be construed in the spirit of its enactment. A review of the course of legislation may help us towards the true intent of the statute. The Act of the 21st of March, 1886, (Pub. Laws, 143,) was an elaborate scheme for the introduction of a new kind of partnership, not previously known to the law. One or more general partners were required, and they alone were authorized to transact the business or sign the firm name, and their names alone, without the word "company" or other general term, could appear in the firm title. The special partners must contribute actual cash as part of the capital, could not withdraw any part of it during the term, nor receive profits, or even interest, which lessened its amount, and any violation of these provisions, or any participation in the transaction of the business with the public, or the appearance of their names in the firm title, subjected them to be treated as general partners. A certificate of the facts had to be sworn to, acknowledged in the manner of acknowledgment of deeds, and recorded, before the partnership was legally constituted; and any change as to any fact set forth in the certificate must be again certified in like manner on penalty of liability of all parties as general partners. The influence of common-law ideas of partnership is apparent throughout the Act. It was manifestly re-

garded as an experiment, to be entered upon cautiously and hedged about with restrictions. But the Act met the needs of the community, and, in the language of the present hour, it had come to stay. After more than half a century, it is still on our statute book as the basis of the system, and every change since has been a step forward in the same direction, and not backward. By joint resolution of the 16th of April, 1888, (Pub. Laws, 691,) a partner, general or special, or his executor, in case of his death, could, with the assent in writing of the others, sell and assign his interest without causing a dissolution, such alterations being certified, etc., as before. By the Act of the 21st of April, 1888, (Pub. Laws, 883,) the sale of a partner's interest, or an increase of the capital, either by increased contributions from the original partners, or by taking in new special partners, could be provided for in advance in the articles of partnership or in a separate instrument, such changes being required to be certified and recorded as before; but, most notable of all, the omission to record was not to work a dissolution as before, or subject the special partners to general liability. The spirit of progressive legislation had discovered that changes which left the business intact, or even increased in capital, did not demand the punishment of special partners by imposing general liability for neglect of

name, as though he had obtained an Act of Parliament to confer it on him. *Doe v. Yates, 5 Barn. & Ald. 544.*

In *King v. Billingshurst, 3 Maule & S. 250*, Abraham Langley was held to have properly changed his name to George Smith.

In *Gulliver v. Ashby, 4 Burr. 19 40*, Lord Mansfield seems to have thought that the king's license or an Act of Parliament was essential to entitle a man to assume a new name.

But it has been decided otherwise. *Davies v. Lowndes, 1 Bing. N. C. 618.*

Business name.

In business matters a contract or obligation may be entered into by a person by any name he may choose to assume. *Bell v. Sun Print. Pub. Co. 10 Jones & S. 570; Re Snook, 2 Hilt. 568.*

One may carry on business in the name of his agent. *Chandler v. Coe, 54 N. H. 561.*

Julia Graham may lawfully carry on business under the name of Freeman Graham, Agent. *Graham v. Elszner, 28 Ill. App. 239.*

An individual may do business under a corporate name. *Bryant v. Eastman, 7 Cush. 111; Fuller v. Hooper, 3 Gray, 334.*

A business name can consist of a combination of initials with the surname. *Oakley v. Pegler, 30 Neb. 623.*

Whether or not a re-arrangement of a person's Christian names or the substitution of one for another will make a fictitious or assumed name, within the meaning of a clause of a fire insurance policy vacating it if obtained under a fictitious or assumed name, is a question for the jury. *Pollard v. Fidelity F. Ins. Co. (S. Dak.) Feb. 11, 1891.*

In New York there is a statute making it a penal offense for a person to obtain credit by carrying on his business under an assumed name. *Barron v. Yost, 35 N. Y. S. R. 380.*

Signatures and indorsements on commercial paper.

Initials are enough to charge one as indorser of a check. *Merchants Bank v. Spicer, 6 Wend. 443.*

The indorsement of the initials of three names of 14 L. R. A.

the holder on due-bills is sufficient to transfer title to them. *Weston v. Myers, 33 Ill. 432.*

A bill may be lawfully signed by initials. *Palmer v. Stevens, 1 Davies, 471.*

An indorsement may be made simply by figures. *Brown v. Butchers & D. Bank, 6 Hill, 443.*

A person may bind himself by signing an assumed name to commercial paper. *Grafton Bank v. Flanders, 4 N. H. 239.*

A note assigned to C. R. Rogers may be sued by Charles R. Rogers. *Birch v. Rogers, 3 Mo. 227.*

One who has placed a fictitious name on commercial paper, which is taken by a third person in ignorance of the fact that he signed it and without relying upon him as security, is not liable on the bill if the name is not one under which he transacted or held himself out as transacting business. *Bartlett v. Tucker, 104 Mass. 242, 6 Am. Rep. 240.*

Name for carrying on suit.

Simply stating the initials of the Christian name of plaintiff is not sufficient and will not withstand a plea in abatement. *Norris v. Graves, 4 Strob. L. 32.*

A suit cannot be carried on by the initial merely of the Christian or first name of the plaintiff against the objection of defendant although the one commencing the action does not know the correct name. *Fisher v. Northrup, 7 L. R. A. 623, 79 Mich. 287.*

It is immaterial if plaintiff leave the middle letter out of the name by which he brings suit. *Dilts v. Kinney, 15 N. J. L. 130.*

The entire omission of the Christian name of plaintiff in the statement of a claim against a decedent's estate is only a matter of abatement and the objection may be obviated by amendment. *Peden v. King, 30 Ind. 181.*

Where plaintiff sued by his surname preceded by Monsieur, and defendant pleaded in abatement a replication that he was known as well by that name as by his Christian name, this was held bad. *Labat v. Ellis, 1 N. C. 62.*

Where the Christian name of plaintiff is given as J. M., and there is nothing in the petition to show

mere formalities. The Act of March 30, 1865, (Pub. Laws, 48,) made two important further changes: The firm title, where there were more than two general partners, may contain the words "and company," (previously forbidden,) the names in full of all the partners, special as well as general, being put upon a sign; and the special partners were allowed to contribute their share of the capital in goods, the value, however, being first appraised under oath by an appraiser appointed by the court of common pleas. By the Act of the 21st of February, 1868, (Pub. Laws, 42,) the firm name may consist of the name of any one general partner, with the addition "and company," notwithstanding the name may be common to such general partner, but the sign must be

put up as required by the Act of 1865. This was the state of the law when the Legislature passed the Act of the 2d of June, 1874, (Pub. Laws, 271,) for the formation of partnership associations with limited liabilities, under which the present defendants were organized. By this Act no general partners are required, nor is any restriction put upon the firm name or title, except that the word "limited" must be the concluding word. The persons desiring to form the association must sign and acknowledge a statement, setting forth, *inter alia*, "the full names of such persons." The Act speaks only of "subscribing and contributing capital," total amount, "and when and how to be paid," etc. But this being held to mean money capital only, a supplement was passed

that such is not his Christian name, a demurrer on the ground that the petition does not state his name cannot be sustained. *Perkins v. McDowell* (Wyo.) Jan. 31, 1890.

A suit brought and judgment rendered in the name of plaintiff by initials only for his given name is not open to objection on that ground in the absence of a showing that he had another name. It will not be presumed that he had any other name than the initials used in bringing suit. *Fewless v. Abbott*, 28 Mich. 370.

The objection that plaintiff in instituting an action has used simply the initials of his Christian names instead of the names in full must be taken by motion to require the full names to be set out or it will be regarded as waived. *Wilganood v. Randolph*, 22 Neb. 493.

After judgment it is too late to object that plaintiff sued by the initials of his Christian names rather than by setting out the names in full, since he may have had no Christian name but simply distinguished himself by initials from other persons of the same surname. *Breedlove v. Nicolet*, 32 U. S. 7 Pet. 413, 8 L. ed. 731.

Effect on criminal prosecutions.

Where the indictment alleged that J. B. R. was robbed, and the proof showed that J. B. R. was robbed, there was no variance. *Miller v. People*, 39 Ill. 458.

On the trial of an indictment for larceny, the name of the owner of the property may be amended from James Marshall to James Cicero Marshall. *Haywood v. State*, 47 Miss. 1.

So D. W. Humphries may be amended to D. G. Humphries. *Unger v. State*, 42 Miss. 649.

But it has been held in Ohio that if the middle letter of one against whom burglary was committed is set out, it must be proved as laid. *Price v. State*, 19 Ohio, 423.

Although the name given to one at his baptism is to be taken as original, and presumed to continue his name, yet if after his baptism he adopts and uses another, by which he is subsequently well known in the community where he resides, it is sufficient to describe him by that name in a prosecution for illegally selling liquor to him. *Com. v. Trainor*, 123 Mass. 414.

An information charging the illegal sale of liquors need not set out the middle name or initial of the one to whom they were sold, and proof of the middle name at the trial will not constitute a variance. *State v. Feeny*, 13 R. I. 627.

A complaint by Charles J. Rock alleging that defendant unlawfully did sell intoxicating liquors to Charles Rock aforesaid is sufficient. *Com. v. O'Hearn*, 132 Mass. 531.

Upon an information for offering a bribe to an officer named Thomas Babbs there is no variance, though the proof shows his name to be Thomas

Tyrral Babbs, where the evidence further shows that he is best known by the name appearing in the information. *Atty-Gen. v. Hawkes*, 1 Crompt. & J. 120.

It seems that if a person has but one Christian name it will not do to use the initial letter of it merely, but the whole name must be stated. *Choen v. State*, 52 Ind. 847, 21 Am. Rep. 179.

Abbreviations, etc.

The court may take judicial notice of the abbreviations of a man's given name, but as to his surname, query. *Fenton v. Perkins*, 8 Mo. 144.

A notice concerning a pauper whose Christian name was Sally, calling her Sarah or Sally is sufficient. *Shelburne v. Rochester*, 1 Pick. 470.

A court may take judicial notice that the name Christy or Christ McElhenon, signed to a note, was intended for Christopher McElhenon. *Wilkerson v. State*, 18 Mo. 90.

An allegation of sale of intoxicating liquors to Jack Murphy is sustained by proof of a sale to John Murphy. *Walter v. State*, 2 West. Rep. 758, 105 Ind. 539.

Signature of Christian names by their initials.

The reason of the rule which required the Christian name to be written in full in England is held not to exist in Kansas, and in that State no written instrument can be regarded as a nullity because the Christian name is not written in full. *Ferguson v. Smith*, 10 Kan. 402.

It has grown into such universal practice to sign one's given name by initial that it has had the effect to relax the common-law rule. *Cummings v. Rice*, 9 Tex. 529.

A person may execute an instrument and bind himself as effectually by his initials as by writing his name in full. *Palmer v. Stephens*, 1 Denio, 473.

Corporators may sign the articles of association by their usual signatures, and the use of initials to designate the Christian names is not objectionable. *State v. Beck*, 81 Ind. 501.

Where a statute required the voting papers at an election of borough councilors to be signed with the names of the burgesses voting, the parties' usual signatures are sufficient, and it is no valid objection that the Christian names, denoted only by the initials. *Reg. v. Avery*, 18 Q. B. 578.

Where a form for notice of claims showed the Christian names in full it was held that a notice was sufficient if the Christian names were represented by initials only. *Reg. v. Hartlepool*, 2 Lowndes, M. & P. 666.

Whether the name R. P. O'Neil signed to a power of attorney to convey land was meant for Rev. Patrick O'Neil, the owner of the land, cannot without other proof be submitted to the jury. *Burford v. McCue*, 53 Pa. 431.

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the 1st of May, 1876, (Pub. Laws, 89.) authorizing contribution "in real or personal estate, mines, or other property, at a valuation to be approved by all the members." The Act of 1874, it will be seen, was not a mere amendment or supplement to anything that went before, but like the Act of 1836, a new scheme, carefully and elaborately drawn, creating a new kind of artificial person, standing between a limited partnership as previously known and a corporation, and partaking of the attributes of each. It was, however, a step forward in the same line of legislative recognition of business demands uniformly pursued since the start, in 1836.

With this review, we may now turn to the two points especially involved in the present case. And, first, we are to inquire what is meant by the full names of the members. This phrase first made its appearance in the Act of 1865, in connection with the requirement that there should be "put up in some conspicuous place on the outside, add in front of the building," a sign on which should be painted, in legible English characters, "all the names in full, of all the members of said partnership, stating who are general and who are special partners." Previously to this Act only the names of the general partners could appear in the firm title, and "without the addition of the word 'company' or any other general word." This Act required the use of the names of all the general partners, except when there might be more than two, in which case the names of any two could be used with the addition of the words "and company," and the sign, as already noted, "stating who are general and who are special partners." This last requirement is the key note of the intent; it was to give information to the public as to the persons who composed the firm, and the capacity in which they stood connected with it, as generally or only specially responsible. The object aimed at was the identification of the person, and the requirement of his full name had nothing further in view. A man's name is the designation by which he is distinctively known in the community. Custom gives him the family name of his father, and such *prænomena* as his parents choose to put before it, and appropriate circumstances may require "Sr." or "Jr." as a further constituent part. But all this is only a general rule, from which the individual may depart if he chooses. The Legislature in 1852 provided a mode of changing the name, but that act was in affirmance and aid of the common law, to make a definite point of time at which a change shall take effect. But without the aid of that act a man may change his name or names, first or last, and, when his neighbors and the community have acquiesced and recognized him by his new designation, that becomes his name. Two noted examples are at hand for illustration. The blunder of the friendly congressman who nominated him to West Point transposed and altered the names by which General Grant has gone into history, and considerations of taste or convenience have induced President Cleveland to omit one of the names his parents bestowed upon him. A name, therefore, is the title used for the identification of an individual, and the intent of its requirement in full is certainty of

such identification. The full name, therefore, is no more than the whole of such title, as it is used by himself and his neighbors for such purpose. To construe the statute to require the literal and absolute following of the entire list of names which the person may have had bestowed upon him would be giving it not only a very narrow and technical construction, which serves no purpose of the Act, but even one which might tend to defeat its real intent. A statement signed "Stephen Grover Cleveland" would not create certainty, but doubt, as to its author.

The Act of 1874, as already said, made no restrictions upon the firm title, except the compulsory termination "limited," and omitted the requirement of the sign, but in lieu thereof substituted the statement containing the "full names" of the persons composing the association. This phrase was borrowed from the Act of 1865, and its intent was the same in both,—to secure the identification of the individual by having his name plainly set forth in the full form by which the community would recognize him. The appellants gave evidence that the names as signed to the statement were in the form habitually used by them in business, and by which they were generally known in the community. This, if proved, was a sufficient compliance with the statute.

The Act of 1836 required the special partners to contribute actual cash, and for nearly thirty years this requirement was absolute and unyielding. The Act of 1865 for the first time permitted goods to be put in as capital, but required their value to be fixed by a sworn appraiser appointed by the court. The Act of 1874, as amended in 1876, did away with all these restrictions, and allowed the capital to be contributed in "real or personal estate, mines, or other property," without any other check as to the valuation than the agreement of all the subscribers. The statement is to certify the kind of capital contributed, whether money or property, and, in the latter case, a schedule with a description and valuation. By the plain terms of the Act the valuation is in the discretion of the parties, and (assuming, of course, good faith) may be sanguine or cautious. *Rehfsuss v. Moore*, 134 Pa. 462, 7 L. R. A. 668. The description, therefore, is plainly for the information of parties interested, so that they may, if they desire, have the data for their own judgment of value. Accordingly it has been uniformly held by this court that a vague or general or lumping description is not sufficient. *Maloney v. Bruce*, 94 Pa. 249; *Vanhorn v. Coreoran*, 127 Pa. 255, 4 L. R. A. 896. It is not intended, however, nor would it be practicable in many cases where an existing business is the basis of the new firm, to require minute specification of details that may change from day to day. Certainty to a fair business intent is the safe, practical criterion, as was indicated in *Rehfsuss v. Moore*, 134 Pa. 462, 7 L. R. A. 668, where a lumping valuation of six distinct patent rights, at a very high figure, was sustained on the ground that they were all expected to be used in the operation of a single device, embodying the principle of all, and were considered valuable only in combination. The schedule in the present case described several tracts of land which it appears were re-

quired by different titles, but which had been merged together, and formed into a coal-works called the "Buffalo Mines." The schedule valued them as one tract. It also set out certain buildings, tenement-houses, engines, etc., in considerable, but not minute, detail, valuing each item separately, but as a part of one entire plant, for the operation of coal mining. It is claimed that the various items of property are sufficiently specified and described for a credi-

tor or the sheriff to go upon the land and identify or levy upon them. This was sufficient. The Act expressly mentions "mines" as the subject of contribution as capital, and it cannot be intended that every pick and shovel or mule and harness should be specified and valued separately. A fair business description of the mine and its equipment is all that the statute requires.

Judgment reversed, and venire de novo awarded.

RHODE ISLAND SUPREME COURT.

Charles W. LYNCH *et al.*

v.

George E. WEBSTER.

(..... R. I.)

An administrator should be personally charged with costs by the judgment against him where he fails in an action brought by him under a statute providing that "in all civil causes at law the party prevailing shall recover costs."

(October 13, 1891.)

PETITION for a writ of mandamus to compel the clerk of the Court of Common

Pleas for Providence County to issue an execution against an administrator *de bonis propriis* for costs recovered by the petitioners in an action against them by the administrator, in which they prevailed. *Granted.*

The facts are stated in the opinion.

Mr. Henry J. Dubois for petitioners.

Mr. George E. Webster defendant *is propria persona.*

Matteson, Ch. J., delivered the opinion of the court:

This is a petition for a writ of mandamus to require the clerk of the court of common pleas to issue an execution for costs against an ad-

NOTE.—*Personal liability of executors and administrators for costs.*

English rules.

Independently of Statute 3 and 4 Wm. IV., chap. 42, § 31, the court has the power to punish an administrator or executor for misbehavior in the conduct of the suit brought by him, by imposing costs. *Comber v. Hardcastle*, 3 Bos. & P. 115.

An unsuccessful plaintiff executor cannot be exempted from costs, under 3 and 4 Wm. IV., chap. 42, § 31, by his good faith in suing, if by caution he might have discovered that the claim was groundless. *Engler v. Twisden*, 2 Bing. N. C. 263.

An administrator suing upon a contract made with the intestate, but broken after his death, necessarily sues in a representative capacity, and is not liable for costs, if defeated. *Tattersall v. Groote*, 2 Bos. & P. 253; *Cooke v. Lucas*, 2 East, 385.

Where an executor has blended his testator's estate with his own, so that his own executor cannot distinguish whether there are any assets of the first estate, the latter should not be made to pay the costs to a successful plaintiff suing for a debt of the first testator. *Sandys v. Watson*, 2 Atk. 80.

Under Statute 3 and 4 Wm. IV., chap. 42, § 31, an executor cannot be relieved from the payment of costs, when consulted, in an action upon a promise to him, of which the consideration was partly an account stated with him as executor and partly a demand due his testator. *Spence v. Albert*, 2 Ad. & El. 785.

Nor can an executor be relieved from the payment of costs, although suing in good faith, unless there be improper conduct on the part of the defendant. *Birkhead v. North*, 4 Dowl. & L. 732; *Farley v. Briant*, 3 Ad. & El. 699; *Southgate v. Crowley*, 1 Bing. N. C. 518.

Under the English statute executors and administrators, when defendants, have no privileges as to costs. If the plaintiff obtains a verdict, he is entitled to judgment for the whole in the first instance *de bonis testatoris*; and if there are not assets, then to the costs *de bonis propriis*. *Marshall v. Willder*, 9 Barn. & C. 656.

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American rules.

The question is largely controlled by statute in America, the principal statutory provisions being indicated below.

Alabama.

In a contest between an administrator and distributees as to whether certain property belongs to the estate or to the administrator personally, upon a decision adverse to the administrator he is personally chargeable with costs. *Jones v. Deyer*, 16 Ala. 221.

In an action by an administrator *de bonis non* upon a note given to the administrator in chief, the plaintiff, if defeated, is not chargeable personally with costs. *Stewart v. Hood*, 10 Ala. 600.

Where the avails of an action prosecuted by an administrator would, if successful, be assets of the estate he represents, he is not chargeable personally with costs of the action if he is defeated therein. *Hutchinson v. Gamble*, 12 Ala. 36; *Chandler v. Shehan*, 7 Ala. 251.

Costs may be awarded against an executor when a judgment is revived against him by *scire facias*. *Hanson v. Jacks*, 22 Ala. 649.

Georgia.

A verdict having been rendered against an administrator who had been brought in as a party defendant after the death of his intestate that "defendant pay the costs of said suit," a judgment for costs against the administrator individually is erroneous. *Clements v. Maloney*, 17 Ga. 290.

An administrator is not personally liable for costs of a suit brought by him to recover for a wrong done to his intestate in his lifetime, although the estate is insolvent. *Clark County Justices v. Haygood*, 20 Ga. 847.

Missouri.

An administrator plaintiff suing upon a cause of action which accrued to his intestate in his lifetime, is not personally liable for costs. *Ross v. Alleman*, 60 Mo. 206; *Woodridge v. Draper*, 15 Mo. 470.

ministrator, running against his own goods, chattels, and estate, instead of the goods and chattels of the intestate in the hands of the administrator. The petitioners recovered a judgment in the court of common pleas for their costs of suit in an action in which an administrator and another were plaintiffs and they were defendants. The respondent, upon application of the petitioners for execution, declined to issue it, except against the goods and chattels of the intestate in the hands of the administrator, and he now contends that it can properly issue only in that form. The petitioners applied to the court of common pleas for an order to the clerk to issue execution against the goods, chattels, and estate of the administrator, but the court declined to make the order. Of course the execution should conform to the judgment. The allegation of the petition is simply that the petitioners recovered judgment for their costs, without stating whether the judgment was against the administrator personally or only against the goods and chattels of the intestate in the hands of the administrator. We assume, however, that the judgment was against the administrator personally; and that the question which the parties desire to raise for our determination is whether a judgment against an administrator personally is a proper judgment. If so, it necessarily follows that the execution

should issue against his own goods, chattels, and estate. The subject of costs in proceedings by and against executors and administrators is one concerning which there has been a diversity of opinion and practice, and which is largely regulated by statute. In England, in the early practice, an executor or administrator might recover costs if successful in a suit brought by him, but if the decision was against him he was not liable for costs, the reason being that the Statute (23 Hen. VIII. chap. 15, § 1) by which costs were first given to defendants was confined to cases of wrongs done to and contracts made with the plaintiff. Now, however, under the Statute of 3 and 4 Wm. IV., chap. 42, § 81, an executor or administrator, with respect to costs, is put on the same footing as other suitors, except that, if the action be in the right of the testator or intestate, the court in which the action is pending, or the judge of a superior court, may otherwise order. But, independently of the latter statute, and by virtue of the former, if an executor or administrator brought an action on a wrong done in his own time, or upon a contract, express or implied, made with himself, and failed in the action, he was liable to the defendant for costs, even though he sued as executor or administrator. *Nichols v. Killigrew*, 1 Ld. Raym. 436; *Jenkins v. Plume*, 1 Salc. 207; *Goldthwaite v. Petrie*, 5 T. R. 234; *Bol-*

Otherwise where he sues upon a cause of action accruing to himself. *Ibid.*

One who assumes to sue as administrator without legal authority is personally liable for defendant's costs. *Lewis v. McCabe*, 16 Mo. App. 308.

Illinois.

In Illinois defendants cannot recover costs in actions prosecuted by executors or administrators. *Rev. Stat. Cothran's Anno. ed. chap. 33, § 8.*

Costs should not be adjudged against an administrator personally for instituting in good faith a proceeding to sell lands of a stranger, which he believed belonged to the estate, for the payment of debts of the estate. *MacKay v. Riley* (Ill.) Jan. 22, 1891.

New Hampshire.

In *Folsom v. Blaisdell*, 38 N. H. 100, it is said: "The only statutory provision of this State which recognizes any personal liability of an executor or administrator for costs, in a suit founded upon a cause of action in favor of or against the testator or intestate, is contained in *Rev. Stat., chap. 161, § 18*, which provides that, upon return of 'no goods' or 'waste' made by the sheriff on an execution in a suit where the cause of action was against the person deceased, an execution may be awarded on *scire facias* against the goods or estate of the administrator as for his own debt, to the amount of such 'waste,' if it can be ascertained; otherwise for the whole debt."

The same case holds that such execution can only be issued where the administrator fails to appear, or fails to show cause why execution should not be issued. It is not to be awarded as a matter of course upon *scire facias*.

An executor or administrator suing, as such, upon a cause of action alleged to have arisen since the death of the testator or intestate, is personally liable for the costs awarded to the defendant. *Keniston v. Little*, 30 N. H. 313, 64 Am. Dec. 297; *Moulton v. Wendell*, 37 N. H. 403.

Pennsylvania.

An administrator plaintiff is not personally liable 14 L. R. A.

for costs on a verdict and general judgment for the defendant. *Callender v. Keystone Mut. L. Ins. Co.* 23 Pa. 471, overruling *Ewing v. Furness*, 13 Pa. 531, and *Muntorf v. Muntorf*, 2 Rawle, 180. (This case must have escaped the attention of the learned chief judge, who wrote the opinion in the principal case, in his examination of the law in Pennsylvania.)

An administrator plaintiff defeated in a wanton and vexatious suit is personally liable to the defendant for costs. *Show v. Conway*, 7 Pa. 138.

An executor plaintiff is liable for costs in an action for a conversion of goods of the estate after his appointment. *Gebhart v. Shindle*, 15 Serg. & R. 235.

In *Penrose v. Pawling*, 8 Watts & S. 370, the plaintiff, as administrator, succeeded before the arbitrators. The defendant appealed and paid the costs of the appeal. On the trial the plaintiff became nonsuited. It was held that the plaintiff was personally liable for the costs paid to him by the defendant. This case is declared in *Callender v. Keystone Mut. L. Ins. Co.* 23 Pa. 471, not to support the doctrine that an administrator is personally liable for costs.

Texas.

Execution should not issue for costs against an administrator personally, but should be certified to the probate court to be allowed and settled in due course of administration. *Davis v. Thomas*, 5 Tex. 390.

Indiana.

Every executor or administrator shall have full power to maintain any suit in any court of competent jurisdiction, in his name as such executor or administrator, for any demand, of whatever nature, due the decedent, in his lifetime, for the recovery of the possession of any property of the estate, and for trespass or waste committed on the estate of the decedent in his lifetime; but he shall not be liable, in his individual capacity, for any costs in such suit. *Ind. Rev. Stat. 1881, § 2291.*

Where a plaintiff executor necessarily brings an action in his representative capacity, and no de-

Lord v. Spencer, 7 T. R. 358; *Tattersall v. Groot*, 2 Bos. & P. 253; *Cooke v. Lucas*, 2 East, 895; *Doubiggin v. Harrison*, 9 Barn. & C. 666; *Jobson v. Forster*, 1 Barn. & Ad. 6; *Slater v. Lawson*, Id. 898.

Some of the courts in this country, in the absence of statutes regulating the subject, have held that where the cause of action accrued wholly after the death of the testator or intestate, the executor or administrator, if he falls in an action brought by him, must pay the costs, but that he is not to be held liable when the cause of action accrued wholly or partly within the lifetime of his testator or intestate. The reason assigned for the distinction is that in the former case, being a party to the transaction, he is presumed to know all about it, and to act upon his own responsibility, and therefore ought not to be permitted to saddle the estate with the costs in case of failure; whereas, in the latter case, not being privy to the original transaction, he cannot be presumed to know exactly what the case may turn out to be upon investigation, and therefore ought not to be required to pay the costs himself. *Ketchum v. Ketchum*, 4 Cow. 87; *Chamberlin v. Spencer*, Id. 550; *Barker v. Barker*, 5 Cow. 267; *Buckland v. Gallup*, 40 Hun, 61; *Potts v. Smith*, 3 Rawle, 861, 24 Am. Dec.

359; *Pillsbury v. Hubbard*, 10 N. H. 234; *Keniston v. Little*, 30 N. H. 818, 64 Am. Dec. 207; *Folsom v. Blaisdell*, 38 N. H. 100; *Hutchcraft v. Gentry*, 2 J. J. Marsh. 499; *Frink v. Layten*, 2 Bay, 166.

On the other hand, it has been held in Pennsylvania that an executor or administrator who is plaintiff is bound to pay costs to the defendant in cases of nonsuit or a verdict for the defendant, not only when the cause of action accrued after the death of the testator or intestate, but also upon a cause of action which accrued within the lifetime of the testator or intestate, for the reason, as it was said, that it is obvious justice that one against whom a vexatious suit has been brought should recover his costs, and that it is nothing to him on whom the costs fall, whether on the estate or the executor or administrator personally. *Muntorf v. Muntorf*, 2 Rawle, 180; *Pease v. Pawling*, 8 Watts & S. 879; *Show v. Conway*, 7 Pa. 128.

The petition before us does not show whether the cause of action in the suit in which costs were recovered by the petitioners accrued during the lifetime of the intestate or subsequent to his death. We do not, however, deem this a material consideration. Pub. Stat. R. I., chap. 217, § 1, provides that "in all civil causes at law the party prevailing shall recov-

fault, negligence, or improper conduct is alleged against him, he cannot be charged with costs *de bonis propriis*. *Harrison v. Warner*, 1 Blackf. 385; *Cooper v. Thatcher*, 3 Blackf. 59; *Pollard v. Buttery*, 3 Blackf. 239.

Iowa.

If judgment be rendered against an executor for costs in any suit prosecuted or defended by him in that capacity, execution shall be awarded against him as for his own debt, if it appear to the court that such suit was prosecuted or defended without reasonable cause. In other cases the execution shall be awarded against him in his representative capacity only. McClain, Anno. Iowa Code, 1888, § 2682.

Kentucky.

A personal representative, plaintiff or defendant, in any action, shall, if unsuccessful, be adjudged to pay costs as other litigants. The judgment for costs, in such cases, shall only be against the assets which have or may come to his hands. Ky. Gen. Stat. 1888, p. 380, § 17.

Maine.

Executions for costs shall run against the goods and estate, and, for want thereof, against the bodies of executors and administrators in actions commenced by or against them, and in actions commenced by or against the deceased, in which they have appeared, for costs accrued after they assumed the prosecution or defense, to be allowed to them in their administration account, unless the judge of probate decides that the suit was prosecuted or defended without reasonable cause. Me. Rev. Stat. 1871, p. 689, chap. 87, § 2.

Mississippi.

Executors and administrators shall be entitled to, or be answerable for, costs, in the same manner as the testator or intestate would have been, and shall be allowed for the same in their accounts, if the court awarding costs against them shall certify that there were probable grounds for instituting, prosecuting, or defending the action on which the judgment or decree shall have been given against them. Miss. Rev. Code 1880, chap. 64, § 2377.

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When costs are adjudged against an executor or administrator, in any suit at law or in equity, and he shall obtain the certificate of the court before which the suit was tried that there was probable cause for bringing or defending the same, he shall not be individually liable for costs, although the estate may be insufficient to pay them. Miss. Rev. Code 1880, chap. 64, § 2378.

Ohio.

In any suit or proceeding upon any claim presented to an executor or administrator, the referees or court before whom the same shall be tried may direct such costs to be awarded against the creditor or against the executor or administrator personally, or to be paid out of the assets of the estate, as a part of the costs of administration, as shall be just, having reference to the facts that appeared upon the trial. Ohio Rev. Stat. (Glaue) § 6106, 6242.

Under a general judgment in a cause, defendant having died, and action having been revived against his administrator, no costs can be recovered against the latter. *Farrier v. Cairns*, 5 Ohio, 45.

West Virginia.

When a court enters of record that if he (the personal representative) had prudently discharged his duty, the suit or motion would not have been brought or made, the judgment or decree, so far as it is for costs, shall be ordered to be paid out of his own estate. W. Va. Code 1891, chap. 121, p. 688, § 21.

Virginia Code 1891, § 2877, is same as the West Virginia Statute.

California.

In an action, prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs may be recovered, as in an action by and against a person prosecuting in his own right; but such costs must by the judgment be made chargeable only upon the estate, fund or party represented, unless the court directs the same to be paid by the plaintiff, or defendant, personally, for mismanagement or bad faith in the action or defense. Cal. Code Civ. Proc. § 1081.

Statutory provisions substantially the same as

er costs, except where otherwise specially provided." There is no provision of statute which exempts an administrator from liability for costs out of his own estate in case he brings a suit which he fails to maintain. The statute does not say from whom the party prevailing shall recover. It is manifest, however, that it is from the party against whom he prevails. It may be argued that, if an executor or administrator be that party, and he is suing in his representative character, the judgment should be against him in that character, or against the estate in his hands. We think, however, that, in the absence of any provision of the statute directing a special judgment or exempting an executor or administrator who has failed to maintain his suit from liability, it is a more natural construction of the statute that the judgment for costs should be against him personally. This, we understand, is in accordance with the practice which has prevailed in this court. We think, too, that such a judgment is better calculated to secure the interests of all parties. The same question was before the Supreme Judicial Court of Massachusetts in *Hardy v. Call*, 16 Mass. 580, under a statute which provided that, "when any party shall in any stage of his action become

nonsuit, or discontinue his suit, the defendant shall recover costs against him; and in all actions, as well those of *quædam* as others, the party prevailing shall be entitled to his legal costs against the other." Stat. Oct. 30, 1784, § 9. It was held that, when an administrator commences an action and fails to support it, judgment for costs is to be entered against him *de bonis propriis*. The court after disposing of the question as to the construction of the judgment which had been entered against the administrator, goes on to say: "This leads us to consider what ought to have been the form of the judgment in the original action, and we are clearly of the opinion that it ought to have been entered against the present defendant *de bonis propriis*. He was the party prosecuting, and is personally responsible to the adverse party by the statute respecting costs, and such form of judgment best comports also with the rights of executors and administrators and all concerned in the settlement of the estates of deceased persons, for, if judgment for costs could be legally recovered against the goods and estates of testators and intestates, all such goods and estates might go for the payment of costs in frivolous and groundless suits. Judgment, therefore, in every case commenced by

that of California exist in the following named states and territories:

Dakota. Dakota Code [Levisse, 1886] p. 116, § 391.
Florida. Bush's Digest of Laws of Florida [1872] p. 527, § 261.

Idaho. Rev. Stat. 1897, § 4910.

Minnesota. Minn. Stat. 1878, § 12, p. 765.

North Carolina. N. C. Code, §§ 536, 1429.

New York. N. Y. Code Civ. Proc. §§ 1835, 1836, 2846.

South Carolina. S. C. Code Civ. Proc. § 330.

Wisconsin. 2 Sanborn & Berryman, Anno. Stat. § 2382, p. 1665.

In *Knox v. Bigelow*, 15 Wis. 415, it was held that this statute abolished the old distinction between causes of action that accrued before and those accruing after the death of the decedent, and that in neither case is the executor or administrator personally liable, unless the court specially directs.

But under N. Y. Code Civ. Proc., § 3246, it is held that if an executor fails to recover on a cause of action accruing after the testator's death, he is personally liable for the costs as a matter of course. *Boetwick v. Brown*, 15 Hun. 808; *Buckland v. Gallup*, 20 Hun. 61; *Bruckett v. Bush*, 18 Abb. Pr. 337; *Holdridge v. Scott*, 1 Lans. 308; *Lyon v. Marshall*, 11 Barb. 241.

An action by an administrator with will annexed, for money in the hands of the executor in chief at the time of his death, is necessarily brought in the plaintiff's representative capacity, and no costs are recoverable against him personally in case he is defeated. *Spencer v. Strait*, 40 Hun. 468.

An action by an executor on a claim arising out of transactions between his testatrix and the defendant's testator while both were alive is necessarily brought in his representative capacity, and he cannot be charged personally with costs. *Hone v. DePeyster*, 9 Cent. Rep. 475, 106 N. Y. 645.

Where plaintiff declared in trover for a conversion in the lifetime of his intestate, and in a second count for a conversion after his death upon a verdict for defendant, plaintiff was held liable for costs personally upon the second count. *Farley v. Farley*, 2 Ball. L. 319.

In *Clark v. Wright*, 28 S. C. 196, it was held error to charge an administrator, personally, under Code Civ. Proc., § 330, with costs of a suit instituted for 14 L. R. A.

the benefit of the estate, under the advice of counsel, which was dismissed, both upon the trial and upon appeal, in the absence of bad faith or mismanagement in the prosecution.

Massachusetts.

As to pending actions which survive the death of a party, it is provided, in Massachusetts, as follows: "When an executor is nonsuited or defaulted without having taken upon himself the prosecution or defense of the action, he shall not be personally liable for costs in the action; but the estate of the deceased in his hands shall be liable for costs as well as for the debt or damages, if any are recovered." Mass. Pub. Stat. chap. 165, § 11.

If judgment is recovered against an executor or administrator, for costs, in a suit commenced or prosecuted by him in that capacity, the estate in his hands shall not be taken on execution therefor, but execution shall be awarded against him as for his own debt, and the amount paid by him thereupon shall be allowed in his administration account, unless it appears to the probate court that the suit was commenced or prosecuted unnecessarily or without reasonable cause. Mass. Pub. Stat. 1882, chap. 144, § 10, chap. 165, § 9.

This was the rule followed in Massachusetts prior to these statutes. Look v. Luce, 128 Mass. 249.

When a judgment is entered against an executor for debt and costs, although the execution for the debt may be stayed on account of proceedings in insolvency, the execution against the executor, personally, for the costs, may be enforced in any event. *Greenwood v. McGilvray*, 150 Mass. 516.

Statutes substantially the same as those of Massachusetts, with the exception that they cover costs, in actions resisted as well as prosecuted by executors and administrators, exist in the following named states and territories:

Arizona. Rev. Stat. 1887, § 1126, § 162.

Michigan. Howell's Antio. Stat. 1882, § 5661.

Nebraska. Compiled Stat. 1891, § 288, p. 437.

Vermont. Rev. Laws 1890, §§ 2108, 2145, 2156.

The intention of the statute was to put executors and administrators on the same footing as other suitors regarding costs. *O'Hear v. Skeels*, 23 Vt. 152.

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an executor or administrator, in which the defendant becomes entitled to costs, ought to be entered against such executor or administrator personally. After payment he may charge the amount in his account of administration, to be allowed or not, as it may appear to the judge of probate that the suit was discreet or otherwise; and thus justice may be done to all parties interested, and the discretion of executors and administrators may be subjected to a wholesome restraint." The doctrine of *Hardy v. Call* was affirmed and approved in *Brooke v. Stevens*, 2 Pick. 68; *Burns v. Ray*, 14 Pick. 8; *Pierce v. Saxton*, Id. 274; *Blake v. Dennis*, 15 Pick. 885; and appears to have continued to be the law in Massachusetts until a further regulation of the subject by statute in the revision of the Statutes in 1836. It may, perhaps, be urged that this rule might operate to deter an executor or administrator who has no assets in his hands from prosecuting a just claim in favor of an estate, and, therefore, that the inter-

ests of estates would suffer. To this it may be answered that the rule would not be likely to so operate unless it was doubtful whether the claim could be maintained. In such case, if a creditor or the next of kin desired the claim prosecuted, the executor or administrator might properly require indemnity against costs; and, in case of a failure to sustain the claim, obvious justice requires, as was said in the Pennsylvania case of *Muntorf v. Muntorf*, cited, that a defendant who is compelled to defend against an unfounded claim should be reimbursed, to the extent at least of his taxable costs, for the expenses he has incurred, and which he would otherwise be without the means of recovering. For the reasons stated in *Hardy v. Call* we are of the opinion that judgment for costs against an administrator who has failed to maintain his suit should be entered against him personally.

Petition granted.

NEW YORK COURT OF APPEALS (2d Div.).

Peter LAWYER, *Resp't.*,

v.

Peter G. FRITCHER, *Appt.*

(.....N. Y.....)

1. Fraud in obtaining the consent of parents to the marriage of an infant

NOTE.—Loss of service as an element in actions by father for seduction of child.

This note will be confined to the consideration of actions brought in case and not in trespass, since, although loss of service may be an element in each, yet in trespass the illegal entry is the gist of the action. *Sargent v. —*, 5 Cow. 108.

General rules.

In the absence of statutory provisions a father cannot maintain an action as such for the seduction of his child. The right to sue is supported wholly by his character of master and the ground of his recovery was originally in fact, and is at present in theory, the loss of services which his servant was under obligation to render to him and of which he was deprived by the act of the seducer. Thus it is laid down in the books that no action will lie for debauching a daughter unless on the ground of loss of service. *Satterthwaite v. Dewhurst*, 4 Dougl. 315; *Grinnell v. Wells*, 7 Mann. & G. 1033; *Russell v. Corne*, 2 Ld. Raym. 1031.

While the child is under age and a member of the father's family all the authorities agree that the action may be maintained although but little if any actual loss of service is shown. In such cases the father has the right to receive the services if he desires them, and the mere fact that he has not been in the habit of exacting them is regarded as quite immaterial. A very slight service is sufficient. *Fores v. Wilson*, Peake, N. P. 55.

It is not necessary to show any acts of service. It is enough if she lives in the father's family under such circumstances that he has a right to her services. *Maunder v. Venn*, Mood. & M. 323.

Plaintiff might recover if he had not parted with his right to claim his daughter's service, or proved any act of service, however slight. *Blagoe v. Daley*, 127 Mass. 199, 34 Am. Rep. 361.

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daughter to a man who has a lawful wife living will vitiate the consent so as to make him liable for seduction.

2. There is a loss of service which will sustain an action where an infant daughter is taken away as a wife by one who fraudulently obtains the consent of her parents to a void marriage.

The law is different in the United States from that in England in cases where the child is a minor at the time of seduction, but living with or working for a stranger. In England the relation of master and servant is held to be dissolved in such cases and no recovery is allowed, while in the United States the doctrine of constructive service has been developed under which a recovery is permitted.

The law as administered in England.

An action cannot be maintained by a father for the seduction of his daughter while she was in the domestic service of another person although she was under age and intended to return to her father's house whenever she quitted such service. *Blaymire v. Haley*, 6 Mees. & W. 55.

The action will not lie where the daughter is residing with a stranger, although the father receives a portion of the wages. *Carr v. Clarke*, 2 Chitry, 390.

Where the daughter was living at the house of her brother-in-law with no purpose of returning to her father's house, although there was no contract of service and she might have left at any time she chose, there was held to be no proof of loss of service by the father which will sustain the action, although after she found herself pregnant she returned to his house where she was confined. *Dean v. Peel*, 5 East, 45.

Where the daughter was a domestic servant living in the house of her master, the mere fact that by his permission she was in the habit during leisure time of assisting her parent in gaining a livelihood is not sufficient to sustain the action. *Thompson v. Boes*, 5 Hurlst. & N. 18.

Where the daughter was in service as a governess and was seduced while on a three days' visit with her employer's permission to her home, during which she gave some assistance in the household

3. Punitive damages are allowable in the case of seduction.

(December 1, 1891.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Third Department, affirming a judgment of the Schoharie County Circuit in favor of plaintiff in an action brought to recover damages for the alleged abduction and seduction of plaintiff's daughter. *Affirmed.*

Statement by Potter, J.:

This action was brought by plaintiff against defendant to recover damages, as alleged in the complaint, for the abduction of plaintiff's infant daughter from the service of the plaintiff, her father, and also for seduction while she was absent from her father's house. It appears that the defendant, who is a man sixty years of age, and has a wife from whom he is not legally divorced, and who is living absent from him, on the 6th of May, 1886, came to the plaintiff's house and had an interview with the plaintiff as well as his daughter. On the 16th day of May following he again came to the plaintiff's house, and had an interview with him and plaintiff's wife upon the subject of marrying Edith, plaintiff's daughter. During the interview with the plaintiff upon the latter day, upon the subject of the marriage of defendant to plaintiff's daughter, there was a conversation between them in regard to his legal right to contract marriage, and whether the conditions of separation from defendant and his wife were such as to allow of

a valid marriage between defendant and plaintiff's daughter. The defendant represented that he had a legal right to marry, and the defendant drew a consent, or contract to carry out such design, and induced the plaintiff and his wife to sign it. The consent or contract was in these words: "To Home it may Concern: We, the undersigned, are the father and mother of the bearer, Edith Lawyer. Whereas, Edith and P. J. Fritcher, of Sharon, wish to be united, we give our consent to their contracts. Richmondville, May 16, 1886. Peter Lawyer. Catherine Lawyer." Said Catherine Lawyer was not able to write her name, and Edith was requested to sign her name for her, and did so. After these representations were made, and this instrument signed, the defendant carried Edith to Portlandville, in Otsego County, a distance of about thirty miles from her home and residence of plaintiff; stayed at a public house at that place, and said to the lady who kept the house that he was married; occupied the same bed with Edith on the night of the 17th. The next day the defendant carried Edith to Sharon, Schoharie County, where the defendant resided, and stated to his housekeeper, who was a sister of Edith, that she was his wife. On the night of the 18th of May the defendant and Edith occupied the same room and the same bed. After Edith arrived there, and during the 18th and 19th days of May, there was a conversation between Edith and Julia, her sister, defendant's housekeeper, in which Julia told Edith that the defendant could not marry; that he had a wife living, and was not divorced

duties, it was held that no proof of the relation of master and servant was shown, and it appearing that the confinement took place while she was performing her duties of governess away from home it was held there was no damage which would entitle the parent to sue. *Hedges v. Tarr, L. R. 7 Exch. 238.*

But where the seduction took place while the daughter was on her way home after leaving the place where she had been at work the action will lie. *Terry v. Hutchinson, L. R. 3 Q. B. 598.*

So the fact that the seduction takes place while the daughter is away from home on a visit will not defeat the action. *Griffiths v. Teetgen, 28 Eng. L. & Eq. 371.*

So the fact that the daughter does not sleep in the father's house is immaterial if she performs all the duties of a servant. *Mann v. Barrett, 6 Esp. 32.*

So where the daughter was married, but had separated from her husband and returned to her father's house and was rendering services to him, he was held entitled to maintain the action. *Harper v. Luffkin, 7 Barn. & C. 387.*

Where the father owned two farms seven miles apart, and the daughter managed the household affairs upon one of them, she was sufficiently his servant to entitle him to maintain the action. *Holloway v. Abell, 7 Car. & P. 528.*

A daughter who works by the day is sufficiently in the service of the father to permit him to maintain the action if she renders services to the family mornings and evenings. *Ogden v. Lancashire, 15 Week. Rep. 158.*

So where the daughter was engaged to work each day from seven in the morning to six in the evening, and spent the remaining hours of the day and night at home assisting in the work of the house, there was sufficient evidence of service to sustain a verdict. *Rist v. Faux, 4 Best & S. 408.*

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If the defendant procured the daughter to enter his service for the purpose of getting her out from under her father's protection so as to seduce her the action may be maintained. *Speight v. Oliveira, 2 Stark. 493.*

The American rule of constructive service.

As long as the father retains his right to control the services of his infant daughter he can sue for her seduction although he has allowed her to receive her earnings in the service of one by whom she had been seduced. *Simpson v. Grayson, 54 Ark. 404.*

It is sufficient that the father has the right to the control of the daughter's services although she is at the time living away from home. *Greenwood v. Greenwood, 28 Md. 376.*

Where the daughter is a minor there is a constructive service. *Bolton v. Miller, 6 Ind. 282.*

The fact that the daughter has left home under a parol agreement by the father to permit her to reside in the family of a stranger for a number of years is immaterial. *Mohry v. Hoffman, 89 Pa. 358.*

Where the daughter was temporarily away from home living with her uncle, with whom there was no agreement as to the duration of her service, the father was held entitled to recover, the court stating that she was his servant *de jure* though not *de facto* at the time of the injury. *Martin v. Payne, 9 Johns. 367, 6 Am. Dec. 288.*

The father was held entitled to maintain the action although the daughter was at the time living in the family of his sister in another city, because of the unpleasant relations between herself and her stepmother. *Hornketh v. Barr, 8 Serg. & R. 38, 11 Am. Dec. 568.*

Where the daughter was absent from the father's house during the whole time covering the period of her seduction and confinement, and there was

from her. Edith, the plaintiff's daughter, was about seventeen years of age, generally lived in her father's family, and performed service for him, though she did work out occasionally, but her father had received her wages. Among the declarations made at the interview of the 16th between plaintiff and defendant, the plaintiff testifies that the defendant said: "I am just as clear from my wife as though I never had married her." The plaintiff also testified that he believed such statement to be true. This statement and belief preceded signing the paper above set forth. On the 17th or 18th day of May, and after defendant had arrived at his home and made the statement above to Julia, she procured from a drug-store in the vicinity of defendant's residence some poison. Edith partook of that poison, and died of it on the 20th day of May.

The principal question involved in this case is whether the plaintiff proved a loss of service and damage in consequence thereof sufficient to maintain the action. The trial judge charged the jury that the plaintiff was not entitled to recover damages for any loss of service by reason of the taking of the poison and the death of Edith in consequence. Nevertheless the jury, under the charge of the court, found a verdict in favor of the plaintiff of \$800, besides costs. The general term was not unanimous in affirming the judgment on the verdict of the jury. One of the learned judges of the general term, as shown by his dissenting opinion, uses the following language, which indicates the view taken by him and the grounds for his dissent from the affirmance of

the judgment: "The defendant, a married man over sixty years of age, took plaintiff's daughter Edith, about seventeen years old, from her father's house on Monday, May 17th. He did this with the consent of the parents. But the verdict of the jury establishes that he obtained this consent by fraud. That night he stayed with her at an hotel, and occupied the same bed with her, saying to the landlady that Edith was his wife. . . . The next day, after dinner, Edith became sick. She had taken poison. The day following, Thursday, the 20th, she died from the effects of the poison. Before death she told her sister that she took poison because she did not want to live, and that she did not want to see anybody. There was evidence that Edith had recovered from her usual monthly courses a week before she went away with the defendant, and that before her death her underclothes were spotted with blood, which a physician supposed to be the menstrual flow. The important point in this case is whether on these facts the court could properly submit to the jury the question whether the plaintiff sustained damage, other than that of death, for loss of service by reason of the seduction. It will be seen that there is no evidence of seduction before Monday night; no evidence of Edith's condition from Monday night till Wednesday noon, when she took the poison; and, of course, no evidence of pregnancy."

Mr. A. B. Coons, for appellant:

A father cannot maintain an action for debauching his daughter if he consented to or

no proof that the father took care of her or expended anything on her account during her sickness, he was held entitled to recover upon the ground that she was constructively in his service. *Mulvehall v. Millward*, 11 N. Y. 344.

The facts that the father had given the daughter her time absolutely, and she had left home with the understanding that she was to provide for herself, will not defeat the action. *Clark v. Fitch*, 2 Wend. 440, 30 Am. Dec. 630.

The fact that the seduction was accomplished while the daughter was away from home on a visit will not defeat the father's right of action if he had retained the right to receive her services if he should demand them. *Lavery v. Crooke*, 38 Wis. 612, 38 Am. Rep. 703.

The father may maintain the action although the daughter had one year previously left her father's house with no intention of returning with his consent to her departure and his license that she may appropriate her time and services to her own use. *Boyd v. Byrd*, 8 Blackf. 112, 44 Am. Dec. 740.

In an action by a father for the seduction of his daughter the relation of master and servant is presumed, if she is under age and under his control. *Barbour v. Stephenson*, 38 Fed. Rep. 68.

In *Howland v. Howland*, 114 Mass. 517, 19 Am. Rep. 381, evidence was admitted to show that the father was not legally married to the mother of the daughter for the purpose of rebutting a presumption of service by showing that plaintiff had no legal right to it although the court stated that if actual service was proved a recovery might be had.

Actual service.

The rule as to what facts are sufficient to show an actual service is somewhat more liberal in the United States than in England.

Thus, where a widowed mother sent for her 14 L. R. A.

daughter, who was out at service, to come home for a few days to assist in taking care of sick persons in the family, and while she was engaged in such duties she became pregnant, she was in the actual service of the mother in such sense that the action could be maintained although a day or two afterwards she returned to the service of her employer. *Gray v. Durland*, 61 N. Y. 424.

So where the daughter was employed by a third person but the father required her to spend a part of every Sunday at home, during which time she did work for him, he was held entitled to maintain the action. *Kennedy v. Shea*, 110 Mass. 147, 14 Am. Rep. 684.

So the facts that the daughter owns the house and that the mother lives with her will not defeat the action if the mother was the head of the house and the daughter rendered services for her. *Villepigue v. Shular*, 3 Strobb. L. 464.

Relinquishment of right to services.

If the father has by contract devoted himself of the right to control the daughter's services he cannot recover. *White v. Murland*, 71 Ill. 232, 23 Am. Rep. 100.

So where the seduction is accomplished while the daughter is living with one to whom she has been legally indentured as a servant and the father has thus lost control over her he cannot maintain an action. *Dain v. Wycoff*, 7 N. Y. 191.

But where, prior to the seduction the father had indentured the daughter to a third person whose services she had gone, but soon afterward it was ascertained that they could not get along together and she had left with the consent of such person and had afterward with her father's consent worked out for different persons, during which time the seduction was accomplished the father

connived at her intercourse with the defendant.

Seagar v. Stigerland, 2 Cal. 219; *Travis v. Barger*, 24 Barb. 614; *Smith v. Masten*, 15 Wend. 270; *Bunnell v. Groathead*, 49 Barb. 106; 2 Greenl. Ev. § 578.

Where the father consents, or where the child is bound out, he is not entitled to her services, and cannot recover damages for her seduction.

Dain v. Wyteff, 7 N. Y. 191.

The relation of master and servant is the foundation of the action for the loss of service.

Ibid.; *Bartley v. Richtmyer*, 4 N. Y. 38, 53 Am. Dec. 338; *Mulvehall v. Millward*, 11 N. Y. 343.

There was no proof that plaintiff's daughter had been seduced. The most that could be said was, there was a possibility that defendant might have seduced her. That is not sufficient to go to the jury with.

Morrison v. New York, N. H. & H. R. Co. 33 Barb. 568.

The defendant is unimpeached and uncontradicted upon this point; he swears positively he did not have sexual intercourse with her.

Where a fact not improbable is positively testified to by unimpeached and uncontradicted witnesses, it is error if the court submit it to decision of a jury.

Robinson v. McManus, 4 Lans. 380; *Storey v. Brennan*, 15 N. Y. 524, 69 Am. Dec. 629; *Algar v. Gardner*, 54 N. Y. 360; *Raymond v. Richmond*, 14 N. Y. Week. Dig. 396; *Murray*

was held entitled to recover. *Emery v. Gowen*, 4 Me. 33, 16 Am. Dec. 233.

The action cannot be maintained, although the daughter is under age, if the father has abandoned her and removed to another State, leaving her to provide for herself. *Ogden v. Francis*, 44 N. J. L. 441.

So where the daughter left the home of her mother at the age of eight or nine years with the intention of remaining away because her mother was a common prostitute, and was seduced at the age of seventeen or eighteen, never after her departure having had any intercourse with the mother whatever, the latter could not maintain an action for the seduction. *Roberts v. Connelly*, 14 Ala. 235.

7. Relation must exist at time of seduction.

There is no doubt that in England the relation of master and servant must subsist at the time of the seduction. *Davies v. Williams*, 10 Q. B. 723.

In this country the rule cannot be said to be uniform although some of the earlier cases which departed from the English rule have been since overruled.

In *Sargent v. —*, 5 Cow. 103, a mother who had bound her daughter out as an apprentice was permitted to maintain an action for her seduction while she was out where the articles of indenture were afterwards canceled and the daughter returned to her mother's house, where the confinement took place, the court remarking that "it cannot be necessary, according to the theory or just principles by which this action is regulated, that the parent in order to sustain it should be entitled to the services of the daughter at the very instant when the act is committed which subsequently results in loss of service or necessary pecuniary disbursements."

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v. Troy & W. T. Bridge Co. 15 N. Y. Week. Dig. 16.

There must be a loss of service, not speculative or guess work, but an actual loss, flowing from the seduction, or the direct consequence of it.

Knight v. Wilcox, 14 N. Y. 415.

Mere seduction, without pregnancy, consequent ill health or injury to the servant will not give the right of action. This action is not maintainable upon the mere relation of parent and child.

Ingerson v. Miller, 47 Barb. 47.

To constitute seduction as a cause of action for the parent of the female, it must appear that defendant used insinuating arts to overcome her opposition, and by his wiles and persuasions, without force, debauched her. The bare fact of criminal connection does not constitute it.

Hogan v. Oregon, 6 Robt. 138.

Mr. William C. Lamont, with *Mr. Albert Baker*, for respondent:

If the paper consenting to the marriage of Edith with defendant was procured by false and fraudulent representations, then it was no consent and entirely unavailing. It left defendant in the same situation as if he had, secretly and by force, in the night-time, taken plaintiff's daughter from her home.

People v. DeLeon, 11 Cent. Rep. 833, 109 N. Y. 226; *Reg. v. Hopkins*, Car. & M. 254.

She was taken wrongfully by defendant on the 16th of May, 1886. She died on the 20th, four days after. During this time plaintiff

The doctrine there announced is sustained by at least two other cases.

Thus an action may be maintained by a mother for the seduction of her minor child although it took place in the lifetime of the father and the loss of service happened after his death. *Ooon v. Moffitt*, 3 N. J. L. 169, 4 Am. Dec. 332.

So if the daughter lives with the mother before and at the time the child was born, performing service for her, the action may be maintained by her although the father was living at the time of the seduction and had died before the birth of the child. *Parker v. Meek*, 3 Sneed, 30.

But in *Bartley v. Richtmyer*, 4 N. Y. 38, 53 Am. Dec. 338, a case which involved the right of a step-father to sue for the seduction of his step-daughter, who was not in his service at the time of the seduction but returned to his house in order to be confined there, the court says that it is quite clear that the reasoning in *Sargent v. —*, 5 Cow. 103, cannot be supported.

And in *Logan v. Murray*, 6 Serg. & R. 175, 9 Am. Dec. 423, in which the action was trespass, the court treats the question as immaterial whether the action was trespass or case, and states that a mother cannot recover damages for the seduction of her daughter accomplished in the lifetime of the father, with whom the daughter resided, though after the father's death she remained with the mother, who bore the expense of her lying-in and supported her and her child.

So where the seduction took place while the daughter was in the service of a stranger the facts that she returned to her mother's house and became her servant before the confinement, and that the mother bore her lying-in expenses, will not give her a right of action. *South v. Dunkiston*, 2 Watts, 476.

So an action for seduction cannot be brought by the mother after the father's death if at the time

was entitled to the services of his daughter and servant. Of these services by the wrongful, villainous, and fraudulent conduct of defendant, plaintiff was deprived. This made out a cause of action.

Lipe v. Eisenlerd, 33 N. Y. 229; *Lawrence v. Spence*, 99 N. Y. 669.

This action can be maintained without pregnancy or disease.

White v. Nellis, 81 N. Y. 405, 88 Am. Dec. 282, affirming 31 Barb. 279; *Ingerson v. Miller*, 47 Barb. 47; *Lipe v. Eisenlerd*, *supra*; 2 Sedgw. Dam. 7th ed. 312.

The English rule requiring proof of actual service has been relaxed, and it is only necessary to show that the parent has the legal right to command the services of the child and very slight evidence of loss of service will suffice.

See *Badgley v. Decker*, 44 Barb. 589; *LeCoup v. Eschense*, N. Y. Daily Reg. June 11, 1884; *Manrell v. Thomson*, 2 Carr. & P. 308; *White v. Nellis*, 31 N. Y. 408, 88 Am. Dec. 282. See also *Lipe v. Eisenlerd*, 32 N. Y. 234.

To sustain the recovery in this case, it is not necessary to go to the extent of reasoning as to a fiction.

Hewitt v. Prime, 21 Wend. 79.

A father can sustain an action for the seduction of his daughter without proving any actual loss of service. It is enough that the daughter be a minor residing with her father, and that he has the right to claim her services.

See also *Furman v. Van Sise*, 56 N. Y. 441, 15 Am. Rep. 441; *Hewitt v. Prime*, *supra*.

It took place the father was alive. *Vossel v. Cole*, 10 Mo. 634, 47 Am. Dec. 136.

In *George v. VanHorn*, 9 Barb. 523, the court says that so far, as principles can be deduced from adjudged cases they hold that the relation of master and servant must exist between the plaintiff and the seduced at the time of the seduction, and that there must be a loss of service to the plaintiff or a charge brought upon him in consequence of the seduction.

Where the child is of full age.

If the daughter is over twenty-one years of age, but is still living in her father's house in such a way that he enjoys and can command her services, he may maintain the action. *Wert v. Strouse*, 38 N. J. L. 185.

It is immaterial that the daughter was of full age. It is sufficient that she was the father's servant. *Applegate v. Ruble*, 2 A. K. Marsh. 563.

Where the daughter was twenty-five years of age, but lived in her mother's family and rendered services there, the action was held maintainable although no contract for services was shown. *Badgley v. Decker*, 44 Barb. 577.

In New Jersey, where the attaining of the age of twenty-one is not *ipso facto* emancipation of the child, service done by one, although over twenty-one years of age, for her parents is regarded as done because due to them in such sense that the father can maintain an action for loss of it through her seduction. *Sutton v. Huffman*, 32 N. J. L. 58.

Postlethwaite v. Parkes, 8 Burr. 1878, is reported as saying that where the daughter was of full age, and away from her father's house at service when the seduction was accomplished, he had no right of action. And that is the present rule. *Nickleson v. Stryker*, 10 Johns. 115, 6 Am. Dec. 318; *Mercer v. Walmaley*, 5 Harr. & J. 27, 9 Am. Dec. 486.

Where the daughter is of full age and the seduction

Potter, J., delivered the opinion of the court:

I should not feel justified, in departing from my rule in this court, not to write an opinion upon the affirmance of a judgment in a common and ordinary case, except to reconcile differences of opinions by the judges of the court below, and to remove any resort to strained or doubtful reasoning to sustain the judgment appealed from, by a brief presentation of a feature of the case that was not distinctly brought out in that court. This action was brought to recover damages which the plaintiff alleged he has sustained by the unwarranted interference of the defendant with plaintiff's right to service. It is as well settled that he who unlawfully interferes with another's right to service, whether it be the service of a male or female, a minor or an adult, is liable for actual or compensatory damages in the same manner, and upon the same grounds, that he would be liable for an unlawful interference with any other property right of another. The plaintiff alleges that he is the father of Edith Lawyer; that at the time of the acts of the defendant complained of by the plaintiff she was 17 years of age, and was residing with the plaintiff, and that he was entitled to her services; and that without the consent of the plaintiff, the defendant, on or about the 16th day of May, 1886, enticed and persuaded the said Edith Lawyer to leave the residence and service of the plaintiff, and to accompany him (the defendant) to Portlandville, in the county of Otsego, etc. The

tion occurred while she was in the employment of a third person the father cannot recover although the contract for her services was made with him and he was receiving her wages. *McDaniel v. Edwards*, 20 N. C. 408, 47 Am. Dec. 331.

Where at the time of the seduction the daughter was over twenty-one years of age, was residing with her brother, and her father was alive, the mother was held not entitled to maintain the action where after the father's death the daughter came home to her and was confined there. *George v. VanHorn*, 9 Barb. 523.

Where the daughter was of full age and at service in the family of a stranger the action cannot be maintained although the seduction took place while she was on her way home on a visit of eight or ten days and returned to his home to live four or five months before the birth of the child. *Phipps v. Garland*, 20 N. C. 44.

Where at the time of the daughter's impregnation she was over twenty-one years of age and was living with her sister, and before the child was born she was married, and it did not appear that the father had been to any expense on her account or had lost any service, the action would not lie. *Patterson v. Thompson*, 24 Ark. 70.

The action could not be maintained where at the time of seduction the daughter, who was twenty-three years of age, was at work for a third person under a twelve months' contract for a price to be paid her for her own use. *Lee v. Hodges*, 13 Gratt. 729.

Where the female was twenty-six years of age at the time of her seduction and had lived with a third person as his housekeeper for a period of about three years, it was held that no action would lie. *Millar v. Thompson*, 1 Wend. 447.

What service is sufficient in case child is of age.

A contract of service is not necessary in case the

plaintiff also alleges that on the 17th day of May, 1886, the defendant debauched the said Edith, etc. The evidence in this case establishes beyond question that on and previous to the 16th day of May, 1886, Edith was the servant of plaintiff both in law and fact. It follows from that relation that plaintiff was entitled to command and to have her services wholly and without interruption, save such time as was necessary for her rest, health and preservation, until the plaintiff should give a valid consent to dispense with the service or the law should terminate the relation. The defendant came to plaintiff's house, where she was in fact performing, and was in law bound to perform, services for the plaintiff, and took her from and deprived the plaintiff of such service. If this was done, as plaintiff alleges, without his consent, the defendant is liable to make plaintiff compensation for the loss of service. If the plaintiff's consent was obtained by defendant through fraud it was void, for fraud vitiates all contracts and all consents. Consent or no consent was one of the issues to be tried by the jury; and the jury has found, upon competent evidence for that purpose, that any consent given by plaintiff was given through fraud, and so was no consent. With this finding by the jury the court cannot interfere. Edith was taken away from the plaintiff by the defendant, and remained with him at an hotel, and on the way to defendant's home, and at his home, for the space of four days; and the plaintiff was in the mean time deprived of her services, and his right to them was unlawfully interfered with.

The gravamen of the action, and of all actions of this nature, is the loss of service; and both pleadings and the proofs in this case make out a cause of action in entire harmony with the fullest requirements of such actions, and entirely dispenses with any necessity or occasion to resort to fiction, as is said to be done in some instances to maintain the recovery of damages in these cases. In the aspect we have been considering this case, it presents an actual and measurable pecuniary damage to the plaintiff. The loss of service constitutes the cause of action, and it can make no difference as to the right of action whether that has been accomplished by an unlawful persuasion of the servant to leave the master's employment or through fraud upon the master, or force upon the servant, or by both such fraud and force. The loss of service is the cause of action, and when that is established, a basis for damages to some extent exists; and whether that loss is caused or attended by or followed by sexual intercourse, defilement or pregnancy, loss of health or disability to serve, or for the purpose or with an intention of obtaining those results through a formal, but criminal, marriage, has relation more especially to the damages the plaintiff may recover than to his cause of action.

It is true the complaint charged debauchment and ill health as a consequence, as well as the taking of the servant from the master. Whether the debauchment was proven or not, the taking away by the defendant was proven without any contradiction, and this gave plaintiff a cause of action and a right to damages.

daughter is of age. *Briggs v. Evans*, 27 N. C. 20; *Bennett v. Allcott*, 2 T. R. 166; *Kendrick v. McCrary*, 11 Ga. 603.

Any accustomed service due to the father will be sufficient provided it be service due and not merely voluntary, although it consists of slight acts done out of the time which is devoted to the service of a third person. *Sutton v. Huffman*, 32 N. J. L. 58.

Where the daughter was over twenty-one years of age, but had always lived with her parents while working during the daytime at a mill, and in the evening daily performing some ordinary woman's work about the house, the service was held sufficient to sustain the action. *Lamb v. Taylor*, 67 Md. 85.

The relation of mistress and servant was held to be established in case of a daughter over twenty-one years of age where she was living in a family with her mother and brother and sister, and the children earned wages and supported the establishment which the mother conducted with the money furnished her by the children, and the daughter at times made garments for the mother and assisted her in the household affairs. *Moran v. Dawes*, 4 Cow. 412.

But where the daughter carried on the business of a milliner and furnished part of the support for her mother and younger sisters, it was held this was not sufficient service to the father to entitle him to maintain the action. *Manley v. Field*, 7 C. B. N. S. 96.

Although the daughter was upwards of twenty-one years of age and the seduction occurred while she was rendering services to a neighbor in assisting him in preparing for and placing his house in order after a party and ball, which took place during the midwinter holidays, the father was held entitled to recover, it appearing that she usually rendered services in her father's household where

she lived and was supported. *Lipe v. Eisenlerd*, 32 N. Y. 229.

Where the seduction took place on the night before the daughter, who was twenty-four years of age, was to emigrate to a foreign country and soon after she reached such country, upon discovering that she was pregnant she left her service and returned to her own country and went to live with her sister until after her confinement, when she returned to her mother's house, the court, upon the authority of *Joseph v. Corvander*, cited in *Roscoe's N.P.* 878, 13th ed., held that there was sufficient evidence of loss of service to maintain the action. *Long v. Keightley*, 11 Irish, L. T. 77.

What impairment of serving power must be shown.

In the absence of a statute authorizing it, proof of seduction merely will not sustain the action. *White v. Nellis*, 31 N. Y. 405, 38 Am. Dec. 232; *Kager v. Grimwood*, 1 Exch. 61.

There are some *dicta* which show a tendency on the part of the courts to break through the legal fiction and permit the father to maintain the action for the seduction pure and simple. Thus *Ellington v. Ellington*, 47 Miss. 329, is a strong case in favor of the maintenance of the action by the parent as such for the defilement of the daughter, although the facts of the case did not call for such an extension of the doctrine. So *Hewitt v. Prime*, 21 Wend. 79, has been thought to favor such an extension and has been the subject of considerable attack, but when properly limited it is in line with the authorities. In that case it appeared that the daughter became pregnant and was delivered of a child, which within all the cases is a sufficient loss of service upon which to found the action; but the chief justice goes on to remark that "the old idea of loss of mental services which lay at the foundation of the action has gradually given way to more en-

In such cases the jury have the right to impose punitive damages, in their discretion, in addition to compensatory damages. I think these views are abundantly supported by numerous decided cases, to a few of which I make reference and extracts. Judge Andrews, in *People v. De Leon*, 109 N. Y. 229, 11 Cent. Rep. 782, says: "In *Reg. v. Hopkins*, Car. & M. 254, the case of an indictment for the abduction of an unmarried girl under sixteen years of age, 'against the will' of her father, it appearing that the consent of the parents was induced by fraud, the indictment was sustained; and Gurney, B., said, (in that case,) 'I mention these cases to show that the law has long considered fraud and violence to be the same.'"

In *Lipe v. Eisenlerd*, 32 N. Y. 238, (which was an action by the father to recover damages for the seduction of his daughter, who was twenty-nine years of age, but living in her father's family,) this language is used: "And any illegal act by which the right of the father, such as it was, to her services, was interfered with, to his detriment, was a legal wrong, for which the law affords redress." On page 238 of the same case the judge uses this language: "Finally, it is urged by defendant's counsel that only compensatory damages should have been allowed. The judge refused so to direct the jury, and I think he was right. The object of the action, in theory, is to recover compensation for the loss of the services of the person seduced. This is so far adhered

to that there must be a loss of that kind or the action will fail; but when that point is established the rule of damages is a departure from the system upon which the action is allowed. The loss of service is often merely nominal, though the damages which are recovered are very large. It is too late to complain of this as a departure from principle, for it has been the law of this State and of the English courts for a great many years." The same judge further on in the opinion uses this language: "The true rule, [this being an action brought by plaintiff for the seduction of his daughter,] I think, is that the plaintiff's right to the services may be made out in either way, and that, when established so that the action is technically maintainable, the court and jury are to consider whether the plaintiff, on the record, is so connected with the party seduced as to be capable of receiving injury through her dishonor. A mere master, having no capacity to be injured beyond the pecuniary worth of the services lost, should undoubtedly be limited in his recovery to the value of these services. But the case of this plaintiff, as has been mentioned, is quite different." In *Hewitt v. Prime*, 21 Wend. 79-82, Judge Nelson, in delivering the opinion of the court in an action like the one under consideration, uses this language: "It is now fully settled, both in England and here, [citing several authorities in both countries,] that acts of service by the daughter are not necessary. It is enough if the parent has a right to command them, to sustain the ac-

lightened and refined views of the domestic relation. As one of the fruits of this the loss sustained by the parent from the corruption of the daughter's mind and the defilement of her person is considered ground for damages," and the judge continued that "the action was sustained in his judgment by proof of the act of seduction," but this argument on his part goes beyond what the cases either before or afterward will justify.

If pregnancy results the action may be sustained, and the action need not be delayed until after the birth of the child. *Briegs v. Evans*, 27 N. C. 20; *Stiles v. Tilford*, 10 Wend. 338.

Lord Denman said in *Joseph v. Corvander*, cited in *Roscoe's N. P.* 13th ed. p. 873, that the action would lie though the daughter had not been actually confined before action brought, and though the plaintiff had voluntarily turned her out of his house upon discovering her pregnancy.

The editor of the *Irish Law Times* in a note to the case of *Long v. Keightley*, 11 Irish, L. T. 77, states that the action has been more than once sustained in Ireland before actual confinement had taken place.

In *Ingerson v. Miller*, 47 Barb. 47, in which the daughter became pregnant and died suddenly about four months after conception from congestion of the brain caused by a physician's refusal to perform an abortion, the court held that there was sufficient proof of loss of service and intimated that the mere fact of pregnancy is sufficient to disqualify a woman for service, and that in that case the daughter must have been in po condition for ordinary physical exercise for some weeks prior to her death.

But in *Humble v. Shoemaker*, 70 Iowa, 223, it is held that if the daughter marries after her seduction and prior to her confinement, no action lies on the part of the father, and this would tend to show that, in that State the mere fact of pregnancy will not sustain the action.

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For marriage of the daughter to the seducer after the birth of the child is not a bar to the action. *Eichar v. Kistler*, 14 Pa. 232.

The communication of a venereal disease by which she was made sick and unable to labor is sufficient to sustain the action. *White v. Nellis*, 31 N. Y. 405, 38 Am. Dec. 232.

Loss of service caused by nervousness and excitability followed by an impairment of health is sufficient to sustain the action though there is no pregnancy or sexual disease. *Blagge v. Halsey*, 137 Mass. 199, 34 Am. Rep. 351. The court says in that case that there is no sound distinction between the loss of service as the result of physical disability produced by physical causes alone and loss of service the result of mental suffering and disturbance.

So an instruction that an action for seduction cannot be maintained unless it is followed by pregnancy or sexual disease is erroneous, the court stating that it may be accomplished under such circumstances that its proximate effect would be mental distress or disease, impairment of health and destruction of capacity to labor, in which case the action might be maintained. *Abrahams v. Kidney*, 104 Mass. 222, 6 Am. Rep. 230.

The court in *Vanhorn v. Freeman*, 6 N. J. L. 333, intimates that in its opinion if incapacity to perform her accustomed duties results immediately from the mental suffering of the daughter, which is caused proximately by the seduction, there is no case or principle of law which will defeat the action, although in that case there was sufficient physical injury to sustain an action independently of the mental suffering.

Proof that after the seduction the girl was in a state of very great agitation and continued so for some time receiving medical attendance and requiring watching to prevent her from doing herself injury, is sufficient to raise the presumption of loss of service. *Manvell v. Thomson*, 2 Car. & P. 303.

tion. . . . The ground of the action has often been considered technical, and the loss of service spoken of as a fiction, even before the courts ventured to place the action upon the mere right to claim the services; they frequently admitted the most trifling and valueless act as sufficient." Further on in the opinion the judge uses this language: "The action, then, being fully sustained, in my judgment, by proof of the act of seduction in the particular case, all the complicated circumstances that followed come in by way of aggravating the damages."

In *White v. Nellis*, 81 N. Y. 405-409, 88 Am. Dec. 282, (which was an action for debauching plaintiff's minor daughter, and communicating to her a venereal disease, by which she was made sick and unable to labor,) the judge uses the following language: "Whenever the wrongful act, by immediate and direct consequence, deprives the master of the service of his servant, or injuriously affects his legal right to such service, the law gives a remedy." "It is not sufficient to sustain the action to prove the seduction merely. That is the wrongful act from which it must appear that a direct injury to the relative rights of the master has followed. The right of the master, as recognized by the law, is to have the services of the servant undisturbed by the wrongful act of another. . . . In cases of debauchery, the ordinary consequences that affect the master are the pregnancy and lying-in of the servant, during which she is unable to render him service. Hence the precedents of plead-

ings in this form of action have perhaps invariably alleged a loss of service through those consequences. But it by no means follows that there is no remedy where the loss of service is the direct effect of the wrongful act, although produced by some other consequence. All that the law can require is *damnum et injuria*; for these constitute, when directly connected, the proper and complete elements of an action on the case; and, whenever they combine as an immediate cause and effect, the law cannot deny a remedy without a departure from principle. It is maintainable because a wrongful act has caused a direct injury to a lawful right. In such case, the right of the master to a remedy for an enjoyment of the services of his servant is equally clear, whether it be produced by beating and wounding the servant, or enticing him from employment, or forcibly abducting him, or wrongfully debauching and impregnating with child, or with disease. Nor, in my judgment, does the remedy depend upon the sex of the servant.

. . . . We have now to determine the abstract right to maintain any action at all; and that is something quite independent of the question what damages may be recovered if the action be allowed."

In the case of *Ingerson v. Miller*, 47 Barb. 47-50, the general term use this language: "It is no objection to the maintenance of the action that no expense or actual loss of service is proved. It is sufficient that the father was at the time entitled to the services of the daughter, and might have required them had he

Whether a loss of service caused by illness resulting from the daughter's abandonment by the seducer will sustain the action,—*quære*. *Boyle v. Brandon* 13 Mees. & W. 728.

In New York, a case which was several times before the court is instructive upon this question. When the case was first before the general term the court held that if sickness is produced by shame for the defilement an action may be sustained. *Knight v. Wilcox*, 15 Barb. 279.

When it came again before the general term the court said that the exposure and the loss to the plaintiff proceeding from it must be regarded as incidents of the wrong as legitimately and directly connected with it. *Knight v. Wilcox*, 18 Barb. 220.

But when the case reached the court of appeals that court ruled that where there was no loss by sickness until three months after the seduction, when the daughter suffered some illness in consequence of being threatened with exposure because the facts had been made public, the seduction was not the proximate cause of the loss of service so as to sustain an action on the part of the father. *Knight v. Wilcox*, 14 N. Y. 418.

Construction of statutes.

For the purpose of relieving this action of its anomalous character statutes have been passed in many states the scope and effectiveness of which may be seen from the following illustrations:

Under the Indiana statute it is not necessary, to justify a recovery, that the daughter should have been in the service of the parent or that any loss of service shall be shown. *Felkner v. Scarlet*, 29 Ind. 154.

Under the Iowa statutes the father may recover though the minor daughter is not living with him and there is no actual loss of service. *Updegraff v. Bennett*, 8 Iowa, 72.

If the seduction is accomplished before the
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daughter attains her majority the father may maintain the action although she is not confined until after she becomes of age. *Stevenson v. Belknap*, 6 Iowa, 97, 71 Am. Dec. 382.

Since the statutes give the daughter the right to sue for her own seduction if she is of age, the father cannot sue unless at the time of the seduction she was a minor. *Dodd v. Focht*, 72 Iowa, 579.

The Kentucky statute permitting the parent to bring an action for the seduction is cumulative and does not take away the common-law right. And the father may maintain the action for seduction of his daughter of full age, who is living with and rendering service for him at the time. *Wilhoit v. Hancock*, 5 Bush, 583.

In Michigan the statutes have abolished the legal action and furnished adequate redress for the substantial wrong, the ground of damages being in no respect the alleged loss of service. *Stoudt v. Shepherd*, 78 Mich. 583.

Under the Tennessee statute the father may recover although the daughter was not living with him nor in his service, and he need not show any loss of service. *Franklin v. McCorkle*, 16 Lea, 609, 57 Am. Rep. 244.

In Virginia an action may be maintained without any allegation or proof of the loss of service. *Fry v. Leslie*, 37 Va. 220.

The statute which dispenses with proof of loss of service, if intending to give an action for the seduction merely, is at all events merely cumulative and the father may still maintain the common-law action for loss of service and expenses. *Clem v. Holmes*, 78 Gratt. 725.

In West Virginia the statute has done away with the necessity of showing loss of service, but it is still necessary to show that the relation of master and servant exists. *Riddle v. McGinnis*, 22 W. Va. 263.

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chosen to do so." "The master has a property in the labor of his servant, and any wrongful act creating or producing a disability in the servant to perform what the master has a right to require operates as a disturbance or infringement of such right, to which the law will attach at least nominal damages as a result of the injury." "But proof of the slightest loss of service, or the most trifling injury, if the direct result of the wrongful act is sufficient to uphold the action." In *Badgley v. Decker*, 44 Barb. 588, the opinion of the court at general term holds this language: "There was evi-

dence in this case sufficient to go to the jury upon the question of the relation of master and servant existing between the plaintiff and her daughter. The slightest degree of service has been holden sufficient to maintain the action, and to allow a recovery for the heaviest damages; . . . but, to accommodate the action to cases where the daughter rendered no service, a presumed or a fictitious service is resorted to as the gravamen."

The judgment should be affirmed, with costs. All concur, except *Parker, J.*, not sitting.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *ex rel.*
BRUSH ELECTRIC ILLUMINATING
CO., *Appt.*,

v.
Edward WEMPLE, *Recept.*

(.....N. Y.)

1. The provision for an appeal from the comptroller to a board composed of the secretary of state, attorney-general and state treasurer, in the matter of a corporation tax under the last clauses of section 1 of the Act of 1881 does not apply where a corporation has neglected or refused to make any report, but only to cases where the comptroller, not being satisfied with the report, may proceed to make a valuation of his own and settle an account against the company upon the basis of it.

2. An electric-light company is included within a general exemption of manufacturing companies from taxation in the absence of a statute expressly taking it out of the exemption clause.

(January 20, 1892.)

APPEAL by relator from a judgment of the General Term of the Supreme Court, Third Department, confirming the action of the state comptroller in refusing to correct a tax account so as to credit relator with the amount of taxes which it had paid under compulsion and protest for certain years when it claimed to be exempt from taxation as a manufacturing company. *Reversed.*

The facts are stated in the opinion.

Mr. John W. Houston, for appellant:

The operations of companies engaged in the business of the relator are essentially manufacturing operations, the result is a manufacture, and consequently the relator is a manufacturing corporation within the meaning of the statute exempting such corporations from the payment of a tax to the State.

Electricity is produced in various ways, may be measured, stored, and transported like gas, and its effects are visible. A gas company is a manufacturing corporation within the meaning of the statute.

Nassau Gas-Light Co. v. Brooklyn, 89 N. Y. 409.

The Supreme Judicial Court of Maine speaks of the business of furnishing electric light as identical with that of furnishing gas.

Edison United Mfg. Co. v. Farmington Electric L. & P. Co. 83 Me. 464.

The Supreme Court of South Carolina speaks of the manufacturer of electricity.

Mauldin v. Greenville, 8 L. R. A. 291, 33 S. C. 1.

The Massachusetts court used the expression "to manufacture gas or electricity."

Opinion of the Justices, 8 L. R. A. 487, 150 Mass. 592.

If gas is furnished it must be manufactured; if light or heat is furnished it also must be manufactured.

Emerson v. Com. 108 Pa. 111.

The executive officers of the government have themselves construed the word "manufacturing" to include electric lighting companies. This construction is entitled to great weight.

United States v. Moore, 95 U. S. 768, 24 L. ed. 589; *United States v. The Recorder*, 1 Blatchf. 218; *Sedgwick Stat.* 216; *People v. Beach*, 19 Hun. 259.

Mr. Charles F. Tabor, Atty-Gen., for respondent:

Exemptions of property from taxation are not favored, and must be clearly established. They cannot be established by doubtful implication; taxation being the rule and exemption the exception.

People v. Commissioners of Taxes, 76 N. Y. 64; *Burroughs, Taxn.* p. 132, § 70; *Delaware Railroad Tax*, 85 U. S. 18 Wall. 206, 21 L. ed. 888; *North Missouri R. Co. v. Maguire*, 87 U. S. 20 Wall. 46, 22 L. ed. 287; *Eric R. Co. v. Pennsylvania*, 88 U. S. 21 Wall. 492, 22 L. ed. 595.

Relator is not a manufacturing corporation in the sense in which that term is used in the Act of 1881.

It does not manufacture electricity; nor does it manufacture light.

Com. v. United States Electric Lighting Co. (Pa. C. P.) June, 1888; *Nassau Gas-Light Co. v. Brooklyn*, 89 N. Y. 409.

Courts have uniformly refused to apply the term to cases where a natural product, substance, or element was simply rendered by artificial processes or by manipulation more suit-

NOTE.—For note on what constitutes manufacture, see *Com. v. Northern Electric L. & P. Co.* (Pa.) ante, 107.

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able for use by or adaptation to the wants of man.

People v. Knickerbocker Ice Co. 99 N. Y. 181; *People v. New York F. D. D. Co.* 92 N. Y. 487; *Byers v. Franklin Coal Co.* 106 Mass. 181; *Dudley v. Jamaica Pond Aqueduct Corp.* 100 Mass. 183; *Phases v. Moffitt*, 20 Blatchf. 267.

O'Brien, J., delivered the opinion of the court:

This appeal brings here for review a judgment entered upon the return to a writ of certiorari, sued out by the relator, for the purpose of reviewing a decision or determination of the defendant as comptroller of the State, whereby the relator was adjudged liable to pay certain taxes and penalties to the State under chapter 361 of the Laws of 1881 and the laws supplementary thereto and amendatory thereof, providing for the assessment and payment of taxes to the State by certain corporations. The relator is a domestic corporation, organized by filing a certificate February 17, 1881, under the Act of 1848, providing for the formation of corporations for manufacturing and other purposes. Since its organization it has been engaged in the business of producing electricity, and supplying the same to its customers in the city of New York for the purpose of lighting public and private places in that city. The relator contended that it was a manufacturing corporation, and as such exempt from paying the tax to the State upon its business, and made no reports and paid no taxes till July, 1889, and then only by force of chapter 358 of the Laws of 1889, which took electric light companies, by name, out of the exemption clause in favor of manufacturing corporations. The relator is beyond all controversy liable for the tax since the passage of the Act last mentioned, but denies that it is liable for anything before, as the exemption clause covering manufacturing corporations then applied to it. In the year 1889, the comptroller caused an examination of the affairs of the relator to be made by a commissioner appointed by him, and upon his report made a statement of the account between the relator and the State, and determine the amount of the tax and penalty due to the State at \$10,752.50. The comptroller then issued his warrant to the sheriff, under the statute, directing the collection of the tax out of the relator's property, and it was thus compelled to pay, in order to protect its property from sale, and it did pay under protest. By chapter 468 of the Laws of 1889 power is given to the comptroller at any time to revise and readjust any account for taxes settled against any corporation by him or any of his predecessors in office for taxes arising under the statute, when it is made to appear by evidence submitted to him that the same has been illegally paid, or when it includes taxes that could not have been lawfully demanded; and he was required to resettle the account according to law and the facts, and to charge or credit, as the case might be, the difference, if any, resulting from such revision and resettlement, upon the current account of such corporation. The relator, claiming the benefits of this statute, filed with the comptroller, August 4, 1890, an application in writing in the form of a petition for a

revision and re-adjustment of the taxes previously levied and paid. This application was verified, and accompanied by proofs to show that the relator was a manufacturing corporation, and for that reason the taxes paid by it could not have been lawfully demanded by the State. The comptroller denied this application, and from his order, refusing the revision asked for, the relators sought relief before the court by means of the writ of certiorari. The relator did not complain of the amount determined by the comptroller, and the only question which was the subject of controversy on the application for a revision was whether the relator was or was not exempt from payment of taxes as a manufacturing corporation.

A question of practice is presented by a point made by the attorney general to the effect that the relator was not entitled to the writ of certiorari in this case, which renders it necessary to notice the various statutory provisions prescribing the methods of reviewing the determination of the comptroller in these cases. The account against the relator, which established the assessment, so far as it was within the power of the comptroller to do so, was settled July 8, 1889. Immediate notice of the assessment was given to the relator, and, after the expiration of thirty days, no proceedings having been taken to review the same under section 17 of the Act of 1881, as amended by chapter 501 of the Laws of 1885, the comptroller issued his warrant for the collection of the tax. The learned attorney-general contends that the relator, by delay, lost the right of review by certiorari. This would probably be so except for subsequent legislation, which must be presently noticed. The Code (§ 2122) provides that, except as otherwise prescribed by statute, a writ of certiorari cannot be issued to review any determination which can be adequately reviewed by an appeal to a court, or to some other body or officer; and it is urged by the attorney-general that the relator could have appealed from the determination of the comptroller to a board composed of the secretary of state, attorney-general, and state treasurer under the last clauses of section 1 of the Act of 1881, and for that reason was not entitled to the writ. The provision for an appeal to this board does not seem to apply to a case like this, where the officers of the corporation, taking the position that the Company was not subject to any taxation whatever under the Act, neglect or refuse to make any report, but to cases where reports are made by the proper officers of the corporation, and the comptroller, not being satisfied with such report, proceeds to make a valuation of his own, and to settle an account against the Company upon the basis of such valuation. Then the Company may appeal to the board above mentioned, and the question presented by the appeal would seem to be whether the valuation made by the corporate officers, or by the comptroller in disregard of it, is the correct and just one. Here the valuation and determination were not made under section 1, but under section 12, of the Act of 1881, as amended by chapter 151 of the Laws of 1882, and, chapter 501 of the Laws of 1885. But the Act of 1889, above referred to, which gives to the relator the right to apply for a revision and resettlement of the tax, also

prescribes a method for reviewing the action of the comptroller upon such application, which brings up all questions involved in the application. The Act provides that "the action of the comptroller upon any application made to him by any person or corporation for a revision and a settlement of accounts, as provided in this Act, may be reviewed, both upon the law and the facts, upon certiorari by the supreme court at the instance either of the party making such application, or of the attorney-general in the name and in behalf of the People of this State, and for that purpose the comptroller shall return to such certiorari the accounts and all the evidence submitted to him on such application; and, if the original or resettled accounts shall be found erroneous or illegal by that court, either in point of law or of fact, the said accounts shall be there corrected and restated by the said supreme court, and from any such determination of the supreme court an appeal may be taken by either party to the court of appeals, as in other cases." Whatever may be said against the policy of requiring the comptroller to revise and change accounts for taxes, years after the settlement of such accounts, and perhaps after the payment of the tax, this statute is broad enough in its language, and was, we think, intended to reach such a case as this.

The right of the State to receive the tax assessed upon the relator depends upon the question whether it was or was not a manufacturing corporation. In the original Act providing for the payment of taxes to the State by certain corporations, "manufacturing corporations carrying on manufactures within this State" were exempted from its operation. Laws 1880, chap. 542, § 3. In the practical operation of the law it was soon discovered that these broad, general words of exemption covered and protected from the payment of the tax a class of corporations which the Legislature probably did not intend to relieve when inserting the words of exemption in the statute. Accordingly it was found necessary from time to time, as the cases arose, to take out of this general exemption certain corporations by name which the Legislature thought were not within its policy. The courts held that gas companies were manufacturing companies (*Nassau Gas-Light Co. v. Brooklyn*, 89 N. Y. 409), and the Legislature, in 1881, proceeded to amend the law by providing that gas companies should not be taken to be within the exemption. So electric lighting and power companies were taken out of the exemption by the use of similar language. Laws 1889, chap. 353. These amendments, it is contended in behalf of the relator, show a construction by the Legislature of the term "manufacturing corporations" in harmony with its claims in this case. In so far as the action of the Legislature has any bearing on the question at all, it is, no doubt, in that direction. But the circumstances under which the Amendment of 1889 was made deprive it of much of the weight that courts are accustomed to give to what is known as "legislative construction." A controversy then existed, as it had existed for some time before, between the State on the one hand, and the companies on the other. The companies claimed that they were ex-

empt, as manufacturing companies, from liability to pay taxes to the State under the Act; while the comptroller representing the State, asserted the contrary. In this condition of things, the Legislature stepped in, and enacted that thereafter the companies should not be deemed within the exemption clause, and this settled the controversy, so far as the future was concerned, but as to the years that had elapsed when no report was made or any taxes paid the question was left substantially where it was before. When a material change in phraseology is made many years after the passage of the Act, and after controversies and differences in regard to its construction have arisen, there is sometimes a presumption that the Legislature intended by the amendment to add a new provision to the original Act, and to make it apply to a case to which it did not apply before. When the Legislature takes certain property, for purposes of taxation, out of an exemption clause by name the question arises whether there is not a presumption in such a case that it was within it before. *People v. New York Board of Suprs.* 16 N. Y. 481; *People v. Knickerbocker Ice Co.* 99 N. Y. 184. As the statute now reads, certain manufacturing companies are by name taken out of the exemption, and subjected to the payment of the tax. Whether, without this special exception, they would still be exempt, under the general words of the exemption clause, is substantially the question involved here. Electric light and power companies are not now manufacturing companies within the statute under consideration, because the Legislature, in 1889, so enacted. But it does not follow, because the Legislature then declared that they should not be deemed manufacturing corporations, and thus not exempt from payment of the tax, that they were not such and so exempt before. In determining whether a given case is within a clause in a statute exempting certain property or interests from taxation, the policy of the law in making the exemption must be considered, and should have great weight. If the question whether a corporation engaged in the business of furnishing electricity for lighting public and private places or for power is a manufacturing company was made to depend upon the meaning of these words as found in dictionaries, or upon the technical language of science in describing electricity as a power or as an agent in nature, it would doubtless be difficult, and perhaps impossible, to show that the process which the relator calls "manufacturing" produces anything that in a certain sense and in some form did not exist before. That, however, is true of most, if not all, manufacturing operations. The application of labor and skill to materials that exist in a natural state gives to them a new quality or characteristic, and adapts them to new uses; and the process by which this result is brought about is called "manufacturing," whether the change is accomplished by manual labor or by means of machinery. But we think that these considerations are by no means conclusive in determining the true scope and meaning of the term "manufacturing corporations," as it is used in the statute. The true inquiry would seem to be whether a corporation, organized as this is, and carrying on the business that this does, and in the manner

shown, would not be considered, in common language, as engaged in some manufacturing process, or carrying on some manufacturing business, though granting all that is said by experts and others about electricity as a natural element or force. To say that electricity exists in a state of nature, and that a corporation engaged in the business that the relator is, collects or gathers it, does not fully or accurately express the process by means of which it is enabled to sell and deliver something useful and valuable to its customers. The business in which this corporation is engaged renders it necessary, in the first place, to invest a large amount of capital in a plant which may appropriately enough be called a "factory." Then it must purchase and consume a vast amount of coal to produce steam, and to furnish power for the operation of machinery. Then it supplies and operates a complicated system of machinery, such as boilers, engines, dynamos, shafting, belting, and such other things as are commonly used in manufacturing establishments, and then, by means of wires, cables, and lamps, it lights streets and private houses by electricity for a compensation. But the electricity or electric currents that produce this result cannot properly be said to be the free gift of nature, gathered from the air or the clouds. It is the product of capital and labor, and in this respect cannot be distinguished from ordinary manufacturing operations. According to the common understanding, the electricity or thing which produces the results from which the corporation derives its income is generated or produced by the application of power to machinery, and thus, by means of a process wholly artificial, the relator is enabled to sell the product of its operations to its customers.

Passing by the refinements of scientific discussion as to the nature of electricity, it would seem to be common sense to hold that a corporation that does all this is in every just sense of the term a manufacturing corporation. The mere appropriation or use of an article or thing which is furnished by nature is not a manufacturing operation. The liberation of natural gas from its hiding place in the earth, and its transportation through pipes to consumers, would not properly be called a manufacturing operation; but the production of illuminating gas, and its distribution to customers by means similar to the operation which the relator carries on, has been held by this court to constitute manufacturing, and a corporation organized for that purpose is a manufacturing corporation. *Nassau Gas-Light Co. v. Brooklyn*, *supra*. So, too, we have held that the collection, storage, preparation for market, and transportation of ice is not a manufacture, but the production of ice by artificial means, *People v. Knickerbocker Ice Co.* 99 N. Y. 181. When we attempt to establish the proposition that the gas which lights one room is a manufactured product, and the electricity which lights another is not, we are obliged to rely more upon the definition of terms and the distinctions of scientists than the actual practical processes and operations by means of which results in all respects, or at least substantially, the same are produced. If due weight is given to the fact that electricity, as now used

and applied to the business of life, such as the lighting of streets and buildings, the propulsion of cars and machinery, and like operations, is essentially the product of the skill and labor of man, there is no difficulty in reaching the conclusion that a corporation engaged in the business of generating, storing, transmitting and selling it is what was commonly known at the time of the passage of the Corporation Tax Law in 1880, a "manufacturing corporation." The learned judge who gave the opinion in one of these cases at the general term has extracted from the proofs before the comptroller on the application of the relator a concise and accurate description of the mechanical process used in the business of electrical illumination, which, on account of its clearness and brevity, conveys the idea better than any language we could employ: "A steam engine is used as a motive power for the propulsion of machinery which is attached to a driving wheel, which, by means of a belt connected with another wheel or pulley of the dynamo, turns or revolves the armature. The armature is a coil of wire, wound on a metal core, and mounted on a shaft, and is revolved by the power communicated from the engine through the means of the belt. The armature is revolved within or between the ends of a large horseshoe magnet, the opening of which is downward. The magnet is made by winding a soft, iron horseshoe, or soft, curved horseshoe-shaped iron, with a coil of conducting wire, and sending through the coil a current of electricity. When once vitalized by such current, the magnet never loses this magnetic property, even after the current stops, but is ever afterwards available for the purpose of electric currents, upon the armature being revolved between the poles of this magnet. By the rapid revolution of the armature within what is termed the 'field of force' between the poles of the magnet, this mysterious force or energy is accumulated, known as 'electricity,' and is thence conducted over copper bars or mains throughout the territory or city in which it is used, and is distributed on smaller wires or mains to the houses or places which are to be lighted." The material from which all manufactured things originate exists in a natural state; but the manufacturer, by the application to these materials of labor and skill, gives to them a new and useful property. The electricity which is generated and transmitted by the operation of the relator, and which, under its manipulation, illuminates houses and streets, is a very different thing from that mysterious element that is said to pervade nature.

The attorney-general has attached to his brief in this case a very elaborate and able opinion by the court of common pleas in Pennsylvania in the case of *Com. v. United States Electric Lighting Co.*, in which the learned judge arrives at the conclusion that companies of this kind are not manufacturing corporations. It is proper to say, however, that the highest court of that State, while affirming the judgment rendered by the learned judge on other grounds, did not assent to his views that electric light companies are not manufacturing corporations. *Com. v. Northern Electric L. & P. Co.* (Pa.) 23 Atl. Rep. 889. The case is

not yet officially reported, but the following passage from the opinion of the court by Williams, J., expresses views upon this question which are applicable to the case at bar: "This Company whose character we are considering sells the electricity it makes, or 'brings into being,' as a commodity. It provides the lamps or appliances for the use of its customers by means of which the light is produced. It sells them the electricity, measures it as it is delivered, and is paid according to the quantity furnished. Whatever electricity may be, it seems absolutely within the power and under the control of the company that brings it into being. It is compelled, by the process employed, to come into being. It is secured, stored, poured out, or liberated at will. Its manifestations are both seen and felt. It moves with incredible velocity and power. It carries the tones and inflections of the human voice or moves loaded cars, depending on the volume of the current and the manner of its application. It may be in the hands of a physician, a soothing, remedial agent, and in the hands of the law, an instrument of execution, swifter and surer than the headsmen's axe. It may be too early to show just what it is. The scientists, whose views the learned judge adopted may be right or wrong. We have no need to decide that question. The laws are written ordinarily, in the language of the People, and not in that of science; and, if this case depended on the question on which it turned in the court below, we should be led by the findings of fact to a different conclusion from that which was there reached, and hold that this company was a manufacturing company." The facts that are before us in this case, touching the manner of generating and using electricity are the same in substance as were before the Supreme Court of Pennsylvania in the case above referred to. One of the experts whose testimony was submitted to the comptroller by the relator on the application to revise and resettle the tax, thus described the process: "The electrical energy which is manufactured and sold by electric lighting corporations originally resides in and is extracted from the coal which is burned, or more correctly speaking, from the heat which is produced by the combustion of coal. Electrical energy is produced at the central station. It may be stored up in cells of definite capacity, known as 'accumulators.' It may be, and in fact is, measured, and sold in determinate quantities at a fixed price, precisely as are coal, kerosene oil and gas. It may be conveyed to the premises of the consumer upon a wagon, boxed up in an accumulator; or it may be sent through a wire just as gas or oil may be transported either in a close tank or forced through a pipe. Having reached the premises of the consumer, it may be used in any way he may desire, being like illuminating gas, capable of being transformed either into heat, light or power, at the option of the purchaser." The Legislature has in various acts, passed since the Corporation Tax Law was enacted, described the process of general electricity as a manufacturing process, and recently, in a revision of the statutes providing for the incorporation of such companies, they are described as corporations for "manufacturing and using electricity."

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Laws 1890, chap. 566, art. 6, § 60; Laws 1892, chap. 78, § 1; Laws 1897, chap. 716. This is also true with respect to the statutes passed for the incorporation and regulation of such companies in England, and in many of our sister states. 45 & 46 Vict. chap. 56; Rev. Stat. Ohio, 1890, § 8035, p. 238.

We think that until the Amendment of 1899 the relator was exempt from payment of taxes to the State under the exception in the statute in favor of "manufacturing companies" generally.

The judgment of the General Term and determination of the comptroller should be reversed, and the comptroller directed to resettle the account, and to credit the relator in its account the amount of the tax and penalties paid, with interest from the date of payment, and costs in all courts to the relator.

All concur.

Isaac ROMAINE, Receiver, etc., for Maria L. Chauncey, *Appt.*,

v.

Michael CHAUNCEY *et al.*, *Receipts.*

(.....N. Y.....)

Alimony awarded to an innocent wife by a court of equity as incidental to a decree of divorce in her favor cannot be appropriated by her creditor for a debt existing prior to the decree of divorce.

(January 20, 1892.)

APPEAL by plaintiff from a judgment of the General Term of the Supreme Court, First Department, reversing a judgment of a special term for New York County in his favor in a proceeding brought by him as receiver, appointed in supplementary proceedings in aid of an execution against Maria L. Chauncey, to recover possession of alimony which had been awarded to her in divorce proceedings. *Affirmed.*

The facts are stated in the opinion.

Mr. George V. N. Baldwin, for appellant:

A provision made in a judgment for divorce for a wife's support is liable to be reached and seized by her creditors.

Stevenson v. Stevenson, 34 Hun, 157; 2 Bishop, Mar. & Div. ed. 1891, § 997.

The courts of this State can exercise no power on the subject of divorce except what is expressly specified in the statute.

Peugnet v. Phelps, 48 Barb. 566; *Galusha v. Galusha*, 48 Hun, 181; *Erkenbrack v. Erkenbrack*, 96 N. Y. 456.

If the powers of the courts are so strictly circumscribed, where does the general term find the authority to say that the provision made for the wife in the present case is free from the claims of creditors?

Authorities holding that policies of life insurance in favor of the wife are non-assignable place the non-assignability upon the provision

NOTE.—On the particular question presented by the above case there seem to be no authorities, and no opportunity for direct annotation.

of the Laws of 1840, chap. 86, as amended by the Laws of 1858, 1862, 1866.

Eadie v. Shimmer, 26 N. Y. 2, 82 Am. Dec. 395.

It is essential to the very peculiar and sacred character which the court below in this case desires to attach to alimony, that it should be in its entirety a provision for the support and maintenance only of the wife, and it is vital to the theory that it should not in any case extend beyond that limit; but we find that throughout the cases in this State it is recognized as settled that the provision need not be so circumscribed.

Forrest v. Forrest, 8 Bosw. 640, affirmed 25 N. Y. 501; *Burr v. Burr*, 10 Paige, 20, 4 L. ed. 870, affirmed 7 Hill, 207; *Galusha v. Galusha*, 48 Hun, 181.

In Indiana, by an express clause of the statute, it is provided that the decree for alimony to the wife shall be for a gross sum and not for annual payments, and in that State it has been held that the sum so given to the wife should become her absolute property as upon an equitable partition between the parties; and that upon the provision being made by the court a debt was created from the husband to the wife.

Miller v. Clark, 28 Ind. 370; 2 Bishop, Mar. & Div. 1061.

Mears, Cowen, Dickerson, Nicoll & Brown, for respondents:

Alimony is a provision or allowance for the support and maintenance of the wife; it is required for this purpose alone.

Code Civ. Proc. § 1759, subsec. 2.

It is no more than the judicial declaration and enforcement of the obligation assumed by the husband at marriage, which by reason of the subsequent dissolution of the marriage contract, and the living apart of the parties, must be thus defined and secured to the wife.

2 Bishop, Mar. & Div. 6th ed. §§ 368, 374.

Alimony is the maintenance or support which a husband is bound to give his wife upon a separation from her.

Burr v. Burr, 7 Hill, 207.

Alimony is a maintenance afforded to the wife where the husband refuses to give it, or where from his improper conduct he compels her to separate from him.

Wallingsford v. Wallingsford, 6 Harr. & J. 485. See *Keert v. Keert*, 34 Md. 21.

The claim of the wife for alimony is not in the nature of a debt.

Daniels v. Lindley, 44 Iowa, 567.

It is an allowance for the nourishment of the wife, variable and revocable.

Guenther v. Jacobs, 44 Wis. 854.

The object of the allowance is support merely, having no reference whatever to a distribution of the property of the husband.

Orain v. Cavana, 62 Barb. 109. See also *Clark v. Clark*, 6 Watts & S. 35; *Pain v. Pain*, 30 N. C. 322; *Menzie v. Anderson*, 65 Ind. 239.

The appropriation of the alimony to the satisfaction of the wife's debts contracted before the divorce is not an application of it to her support.

What is paid to her creditors is not used for her support.

Slattery v. Wason 7 L. R. A. 393, 151 Mass. 266.

24 L. R. A.

The language of section 1769 of the Code of Civil Procedure, relating to temporary alimony, is identical with that of section 1759, relating to permanent alimony, so far as relates to the purpose of the allowance. But it would be a startling proposition that these payments pending the suit could be appropriated by a third person to any other end than that of the wife's support.

See *Jordan v. Westerman*, 63 Mich. 170.

No specific statutory exemption is necessary to preserve the fund from the attacks of creditors.

Strong support to the doctrine we contend for is afforded by the cases laying down the rule which forbids the assignment of policies of life insurance in favor of the wife.

Eadie v. Shimmer, 26 N. Y. 2, 82 Am. Dec. 395; *Barry v. Equitable L. Assur. Soc.* 59 N. Y. 587; *Barry v. Brune*, 71 N. Y. 261; *Brick v. Campbell*, 10 L. R. A. 259, 123 N. Y. 337; *Bliss v. Lawrence*, 58 N. Y. 442, 17 Am. Rep. 278; *Bowery Nat. Bank v. Wilson*, 9 L. R. A. 706, 123 N. Y. 478, 19 Am. St. Rep. 507. See *Pope v. Elliott*, 8 B. Mon. 56.

Sums contributed by friends for the support and maintenance of an insolvent and his family are not liable to the claims of his creditors.

Holdship v. Patterson, 7 Watts, 547.

A woman cannot assign a portion of her temporary alimony to her solicitor as compensation for his services, as this would be a misappropriation of a fund allowed for a special purpose.

Jordan v. Westerman, 62 Mich. 170; *Hackley v. Muskegon Circuit Judge*, 58 Mich. 454.

It is no violation of the policy of the law to hold that alimony cannot be subjected to the payment of prior debts.

Nichols v. Eaton, 91 U. S. 716, 23 L. ed. 254.

Finch, J., delivered the opinion of the court:

This case presents an interesting question which we are called upon for the first time to decide. There are no direct and conclusive precedents to be followed, no explicit and specific statutes coming with an appropriate direction, but only a broad general rule on the one side, and a just and strong necessity for an exception to it on the other. The question is whether alimony awarded to an innocent wife by a court of equity as incidental to a decree of divorce in her favor can be appropriated by her creditor to the discharge of a debt contracted by her and actually subsisting prior to the date of the decree. The question was different in *Stevenson v. Stevenson*, 34 Hun, 157, cited as a pertinent authority; for in that case the decree of divorce was granted in 1855, and the creditor's judgments obtained in 1880. A debt contracted by the wife after the decree, presumably for her support, and with natural reliance upon the alimony by the creditor as the means of payment, stands upon a very different footing from a debt of the wife contracted prior to or during the marriage, and before its judicial dissolution. In the latter case two new elements enter into the question,—one the imposition of an unfounded duty on the husband; and the other, a perversion of the decree from its definite and intended purpose, and from that authorized by the

law. Alimony, as we all understand, is an allowance for support and maintenance, having no other purpose and provided for no other object. Like the *alimentum* of the civil law, from which the word was evidently derived, it respects a provision for food, clothing and a habitation, or the necessary support of the wife after the marriage bond has been severed, and since what is thus necessary has more or less of relation to the condition, habit of life, and social position of the individual, it is graded in the judgment of a court of equity somewhat by regard for these circumstances, but never loses its distinctive character. If sometimes, as the appellant claims, regard is had to the brutal and inhuman conduct of the husband, (*Burr v. Burr*, 10 Paige, 20, 4 L. ed. 870,) it serves only to make the court less considerate of his situation, and more liberal in its view of the necessities of the wife. Thus the prevailing rule in this country is said to be that where the wife has sufficient means to support herself in the rank of life to which she belongs, no alimony will be allowed, (1 Am. & Eng. Encyclop. Law, 485;) and where the parties are living apart under an agreement of separation, by the terms of which the husband has provided adequate means of support, no temporary alimony will be given, (*Collins v. Collins*, 80 N. Y. 1;) and, when awarded, it is not so much in the nature of a payment of a debt as in that of the performance of a duty. During the marriage the husband owes to the wife the duty of support and maintenance, although owing her no debt in the legal sense of the word; but, under the modern statutes, he does not owe to her the duty of paying her debts contracted before the marriage or thereafter, if they are solely hers, and not at all his. The divorce, with its incidental allowance of alimony, simply continues his duty beyond the decree, and compels him to perform it, but does not change its nature. The divorce and consequent separation are wholly his own fault, and do not relieve him from the continued performance of the marital obligation of support. The form and measure of the duty are, indeed, changed; but its substance remains unchanged. The allowance becomes a debt only in the sense that the general duty over which the husband had a discretionary control has been changed into a specific duty, over which, not he, but the court, presides. The authorities, therefore, cited to the effect that alimony is not strictly a debt due to the wife, but rather a general duty of support made specific and measured by the court, seem to me to be well founded. *Wallingsford v. Wallingsford*, 6 Harr. & J. 485; *Daniels v. Lindley*, 44 Iowa, 567; *Burr v. Burr*, 7 Hill, 207; *Guenther v. Jacobs*, 44 Wis. 354; *Crain v. Cavana*, 62 Barb. 109; *Jordan v. Westerman*, 62 Mich. 170.

And so it follows that as, during the marriage, the husband, while bound to support the wife, was not bound to pay her pre-existing or separate debts; so, after the divorce, he must continue the support, but is not required to pay out of his means furnished for that purpose the wife's antecedent debt. The decree cannot logically work the miracle of transforming the duty which he does owe into one which he does not and never did owe; and yet that result is inevitable if the antecedent cred-

itor is at liberty to swoop down upon the provision, and carry it away for his own use.

That result accomplishes another thing. It perverts and nullifies the decree of the court, and leaves the judgment specifically made for one purpose to operate wholly for another, and so obstruct and destroy the humane intent of the law. There is no doubt, of course, that the wife's right to alimony comes from the statute, and not from the common law. If that proposition needed the aid of a full and historical argument in its support, such has already been furnished by this court. *Erkenbrach v. Erkenbrach*, 96 N. Y. 456. We must look, then, to the provisions of the Code of Civil Procedure, which has recast and reproduced the terms of the previous statutes, to see when and for what purpose alimony may be allowed. Section 1769 regulates the temporary alimony which may be awarded *pendente lite*. The terms of the provision are that in an action for an absolute divorce or for a separation the court may, in its discretion, make orders requiring the husband to pay any sum or sums of money necessary to enable the wife to defend the action, or to provide suitably for the education and maintenance of the children of the marriage, or for the support of the wife, having regard to the circumstances of the respective parties. It seems to me impossible to misunderstand the force or meaning of that provision. Its palpable purpose is to enable the wife to prosecute her suit, and save her from starvation or beggary during the process. Is it conceivable that the court making such order is bound to stand silent and submissive while the whole scope and purpose of its provision is perverted and nullified? If that be so, the law of divorce has no help or remedy for the injured wife who happens to be in debt. She cannot hire counsel or feed herself and her children pending the litigation, because her pre-existing creditor seizes the humane provision at the moment it is made. The court might as well not make it at all, and simply say there is no divorce or defense for an indebted wife. Undoubtedly, in such a known state of the law, the court would find some way of making its order effective, as, perhaps, by interposing a trustee in behalf of the wife; but no one has ever yet supposed that such a safeguard was needed. And why should it be? The antecedent creditor has no equity against the fund. The husband is not bound to furnish it for such creditor's benefit, nor the wife to accept it under a rule which gives her a stone when she asks for bread. And of such character has the allowance of temporary alimony been considered that an assignment of it by the wife to her solicitor as compensation for his services has been disregarded and set aside as being a misappropriation of a fund awarded for a special purpose. *Jordan v. Westerman*, *supra*. Similar considerations pertain to section 1759 of the Code, which regulates permanent alimony. The second subdivision is this: "The court may, in the final judgment dissolving the marriage, require the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of the plaintiff, as justice requires, having regard to the circumstances of the respective parties." Thus the court may

require the husband to provide for the support of the wife, but may not require him to furnish a fund for the payment of her debts. He never stood under that obligation, and the decree of divorce cannot impose it. He has a right to insist that his allowance shall not be diverted to a use for which he did not in fact supply it, and was under no obligation to supply it, and to resist, as he stands here resisting, a claim upon it which, as against him, is wholly unauthorized, and a complete perversion both of the decree and of his duty. The plaintiff, in his character of receiver for the judgment creditor, comes into a court of equity in pursuit of equitable relief,—into the same court which devoted the fund to the support of the wife, and should decently respect its own authority,—and asks the aid of that tribunal to practically nullify its decree; to abandon its humane purpose; to join in an indirect robbery of the husband; to pervert his allowance to an end which he never sanctioned, and was not bound to sanction; and to disregard the public policy which seeks to protect wife and children from the pauper's necessity and fate; and he asks this without pretense of special equity against the fund, and solely on the basis of a hard legal right. I have only to say that I think equity ought not to give him that aid, but that, having both the power and the opportunity to prevent the perversion of its purpose, and to make effective and protect its own decree, it should avail itself of that opportunity and exercise that power by the simple process of refusing its assistance. Under some circumstances the court might be troubled to compel respect for its purpose, and prevent a perversion of its order, but there is no such difficulty where the wrong cannot be done except by the consent and with the active participation of the court. We have a right to refuse our assistance, not merely because the equities are balanced, but because those of the defendant are superior, and ought to prevail.

I can see the possibility and realize the plausible force of one criticism upon this view of the subject; and that is that there is a legal judgment which cannot be satisfied by execution, and the creditor has a right to pursue in equity the debtor's equitable assets, and the court has no right, upon some sentimental view of the subject, to withhold its aid. Exactly. All that is true. But it assumes the precise point of the dispute, that the wife's alimony is an equitable asset liable generally as property to the payment of her debts. It is property in one sense, but not in the broad, general sense of the term. It is a specific fund provided for a specific purpose, with restraint and limitation written all over its face by the very law and decree which brought it into existence. And here I think we may wisely avail ourselves of one of the analogies which the general term opinion has furnished for our use. Policies of life insurance in favor of the wife on the life of the husband we have persistently held to be non-assignable. *Kudie v. Sliman*, 28 N. Y. 9, 82 Am. Dec. 395. We determined that their peculiar character and purpose necessarily took from them the chief and most important characteristic of property in general. As I read the later case of *Baron v. Brummer*, 100 N. Y. 372, 1 Cent. Rep. 708, 14 L. R. A.

we distinctly held "that such policies should not be subjected to the lien of creditors either of husband or wife,—as to the former, by the express words of the statute; and as to the latter, by the determination of the courts." We took from them the transferable characteristic of property, as such and tied them closely to their lawful object and purpose. The argument made now would convict us of error then. Alimony allowed by an order is in one sense a debt due and to become due to the wife and her property. In the same sense a life policy is a debt to become due or due, as to its dividends, and is property in the hands of the assured. The whole force of the argument lies in steadily ignoring the quality and character of the property, and treating it as ordinary and general assets. The appellant's criticism upon this analogy is that the doctrine as to life insurance policies was dictated by the Act of 1840, and rested specially upon the provisions of that Act. So much is undoubtedly true, but does not at all disturb the analogy; for in the present case the similar construction is dictated by the statutes of divorce, and is derived from the character of their provisions. In both cases a thing which might have had the general and ordinary characteristics of property transferable by sale, and liable to creditors, is taken out of that broad category by the terms of the statutes, whose obvious purpose and aim require a restriction and limitation to which property in general is not subjected. This class of cases indicates that the question is not one of exemptions, but of the right of creditors to a particular fund, which fund, created by equity, should have the protection of equity. It does not, therefore, answer the view we have taken of the duty of the court in this case, to appeal to the general law of property, and the general duty of the court in respect thereto. The question concerns a species of property of a peculiar and specific character, created and existing for one purpose only, and whose express limitations take it out of the general rule.

The doctrine which I have here invoked, that a court of equity, when applied to for its active assistance in the enforcement of a claim founded upon a bare legal right, will refuse its aid, where granting it would work injustice, or impose conditions calculated to mitigate or remove the injustice, has been repeatedly asserted under the old law, which permitted the husband to reduce to his possession, and become the owner of the wife's personal property. In such cases equity, not denying the legal right, has yet invariably limited and qualified it by recognizing and protecting the wife's equity, not only against the husband, but against his assignee or judgment creditor. In *Smith v. Kane*, 2 Paige, 303, 2 L. ed. 918, the chancellor did not hesitate, where the wife's property was less than was needed for her support, to refuse relief entirely and dissolve the injunction. This class of cases is pertinent only upon the right of the court to withhold its aid where the legal claim, however valid, is wielded to effect a wrong. The equity of the husband in the present case to prevent a perversion of his allowance to an unlawful purpose is entirely clear. That of the wife to receive it under the decree for the specific purpose which led to its award, I think, also,

should prevail over the creditor's claim. During the marriage, he had no right, legal or equitable, against her support furnished by the husband; and after its dissolution, without her fault, she ought not to be put in a worse condition. When to these equities are added the duty of the court to control and make effectual its own decree, and the public policy in which

its provision is founded, it seems to me that no doubt is left as to the right of the court to dismiss the creditor, and refuse him the relief he asks.

The judgment of the General Term should be affirmed, with costs.

All concur.

INDIANA SUPREME COURT.

George O. CLARK, Exr., etc., of Jefferson Helm, Deceased, et al., Appts.,

v.
Nannie HELM et al.

(.....Ind.....)

Interest on the shares of other distributees from the time of testator's death should be allowed before paying anything more to one who has received a larger advancement than they have during testator's life, where his will requires an equalization of the shares of the distributees.

(January 5, 1902.)

NOTE.—Interest on advancements or to equalize advancements.

An advancement as such never draws interest. *Black v. Whitall*, 9 N. J. Eq. 572, 50 Am. Dec. 423; *Nelson v. Wyan*, 21 Mo. 347; *Osgood v. Breed*, 17 Mass. 356; *Towles v. Roundtree*, 10 Fla. 299; *Kyle v. Conrad*, 26 W. Va. 760; *Beckwith v. Butler*, 1 Wash. (Va.) 225; *Yundt's App.* 13 Pa. 575, 58 Am. Dec. 496; *Harris v. Allen*, 18 Ga. 177.

Interest on advancements, or increase of slaves given as an advancement, need not be brought into hotch-pot with the advancement. *Jackson v. Jackson*, 28 Miss. 674, 64 Am. Dec. 114.

But by will a testator may provide for interest on advancements. *Patterson's App.* 128 Pa. 269; *Stewart v. Stewart*, L. R. 15 Ch. Div. 539.

Interest is not chargeable on advancements before testator's death without a clear expression of his intention that they shall bear interest. *Porter's App.* 94 Pa. 332; *Miller's App.* 31 Pa. 337.

This rule applies to a debt to the testator from his child which he has turned into an advancement by his will. It is then to be valued as of the date on which the child received the money. *Porter's App. supra*.

Also to a son-in-law's debt, which is turned by will into an advancement to testator's daughter. *Patterson's App. supra*.

The intent of the testator as shown by the language of his will is to govern in determining whether debts are to be regarded as turned into advancements which will not bear interest. *Taylor v. Taylor*, 145 Mass. 239; *Cummings v. Bramhall*, 120 Mass. 552; *Manning v. Thurston*, 59 Md. 218.

An advancement recorded in testator's book of accounts with a statement that it "is to carry interest from the day it was got" was held chargeable with interest from that date under a will which directed the book accounts against his children to be charged to them. *Fickes v. Wireman*, 2 Watts, 314.

Under a will directing that advancements to sons shall not draw interest "except on what shall exceed or be over the sum of \$30,000," interest is chargeable on the excess of any advancement over that sum. *Treadwell v. Cordis*, 5 Gray, 341.

14 L. R. A.

A PPEAL by defendants from a judgment of the Circuit Court for Rush County directing the payment of interest upon certain sums awarded defendants for the equalization of advancements from the estate of Jefferson Helm, deceased, before the payment of further sums to the distributees. *Affirmed*.

The facts are stated in the opinion.

Messrs. William J. Henley and Lot D. Guffin, for appellants:

In order for appellees to have claimed interest on these differences in advancements, even after one year, their complaint should have alleged some wrongful act on the part of the administrator or executor in not settling said estate at the proper time and paying into court

Under a will providing that the amount of all debts due from testator's sons shall be deducted from their shares without anything more to indicate a change in the character of the debts which are interest bearing, interest will be reckoned thereon. *Cummings v. Bramhall*, 120 Mass. 552.

But a will directing the deduction from certain shares of all claims and demands against the donees, so that all advanced for them shall be considered as part of testator's estate, and as a part of the legacies and devises, turns the debts into advancements, and interest will not run upon them. *Hall v. Davis*, 8 Pick. 460.

Interest is not chargeable on a debt to the testator's estate for money paid by him or his executors, which the will directs to be deducted from a portion given thereby. *Moale v. Cutting*, 59 Md. 511; *Manning v. Thurston*, Id. 218.

A will forgiving "all advancements, loans of money and debts" "except the capital" in the hands of a certain son whom testator has aided in business, requires only the principal to be charged against him. *Hutchinson's App.* 47 Pa. 84.

A will directing the deduction of advancements from a daughter's share, and also that any indebtedness due from her to her brothers or sisters shall be deducted and paid over to them, does not allow a charge of interest on such advancements. *Poole v. Poole*, L. R. 7 Ch. App. 17.

Under a will directing that unless a son should pay a certain loan of \$2,000 which testator had borrowed for him, together with a certain note for \$400 with lawful interest, the same should be taken in full of all legacies and bequests to the amount of \$2,500, interest is not chargeable against him on either of the sums mentioned, but he is to be charged with \$2,500 only. *Wilkins v. Wilkins*, 43 N. J. Eq. 598.

In case of legacies under a will directing the deduction of any indebtedness that might be due to testator from the legacies with the discharge and release of any balance of such indebtedness, no interest runs thereon until after testator's death as such debts are made substantially advancements by the will. *Taylor v. Taylor*, 5 New Eng. Rep. 221, 145 Mass. 239.

the surplus, so that the advancements could be equalized.

Legacies begin to bear interest after one year from the death of the testator.

Case v. Case, 51 Ind. 277.

A very few cases, notably *Kyle v. Conrad*, 25 W. Va. 760, and *Roberson v. Nail*, 85 Tenn. 124, decide that interest should be charged on advancements from the date of the death of the parent. But they do not decide that interest should be charged against one heir and the benefit of it given to another heir who has also been advanced, and no interest charged him, as the lower court has done in this cause.

On the other hand, recent cases of other states decide that interest on advancements cannot be charged before final distribution.

Davies v. Hughes, 86 Va. 909; *Patterson's App.* 128 Pa. 269; *Yundt's App.* 13 Pa. 575, 53 Am. Dec. 496; *Jackson v. Jackson*, 28 Miss. 674, 64 Am. Dec. 114; *Black v. Whitall*, 9 N. J. Eq. 572, 59 Am. Dec. 423.

The death of an ancestor evens any inequality in the advancements to the heirs, and the law presumes this inequality to have been settled, and the court must presume the same, as soon as the moneys of the estate have been collected sufficient for this purpose by the administrator or executor.

Receipts showing that certain amounts credited on the purchase price of land conveyed to testator's married daughters or their husbands are to be accounted for as advancements with interest from a certain date do not justify a charge of interest before testator's death; the advancement is to be charged, not upon the theory of a contract which the married women were incompetent to make, but of a gift with the intention that it should be taken as an advancement. *Roberson v. Nail*, 85 Tenn. 124.

Although notes bearing interest are turned into an advancement by will, the interest is not to be computed before testator's death. *Krebs v. Krebs*, 35 Ala. 298; *Green v. Howell*, 6 Watts & S. 203.

Thus a direction by will that notes against testator's children be taken as advancements and be "valued and appraised at their full amounts" will not warrant the addition of interest to the face value, although the notes bear interest. *Porter's App.* 94 Pa. 382.

After donor's death.

The authorities for the most part hold that advancements bear interest from the date of donor's death. *Moore v. Burrow*, 89 Tenn. 101; *Steele v. Frierson*, 85 Tenn. 430; *Roberson v. Nail*, 124; *Knight v. Oliver*, 12 Gratt. 33; *Kyle v. Conrad*, 25 W. Va. 760.

If in some cases the rule that advancements bear interest from testator's death would not reach equality it can be applied so as to produce that result. *Johnson v. Patterson*, 13 Lea. 657.

A Pennsylvania case holds that interest is rightly chargeable on advancements from the time of filing an executor's account up to the time of final distribution. *Ford's Estate*, 11 Phila. 97.

This rule was modified in a Virginia case by making advancements chargeable with interest from the death of a life tenant, which was made by the will the time when those who had received a part of the estate should "account for it upon a division." *Cabella v. Puryear*, 27 Gratt. 902.

And in a later case, where suits for large and uncertain amounts made distribution improper until a certain date, it was held under a will providing for equality of shares after debts, devisees, etc., 14 L. R. A.

Bemis v. Stearns, 16 Mass. 200.

Where it appears to have been the intention of the testator to equalize the distribution of his estate by taking into consideration advancements made by him in his lifetime, and he fixes in his will the amount of an advancement or the value of specific advancements, such value is conclusive in the distribution.

See *Nelson v. Nelson*, 7 B. Mon. 872.

And the amounts as stated in the will must be taken as the basis of distribution.

See *Richelberger's App.* 185 Pa. 160.

When a debtor is prevented by law from the payment of a debt, he is not chargeable with interest.

The very nature of an advancement precludes it from bearing interest or from being a debt.

An obligation to pay interest is created only when the debtor is put in default for the payment of the principal.

Beardslee v. Horton, 8 Mich. 560; *Hubbard v. Charlestown B. R. Co.* 11 Met. 124; *Gay v. Gardiner*, 54 Me. 477.

Mearns, Ben. L. Smith and Claude Cambern, for appellees:

It is the general rule of law in the distribution of estates that advancements shall not bear interest, nor is increase to be charged to the

were paid that interest should not be computed on the advancements until that date. *Barrett v. Morris*, 33 Gratt. 273.

The court said in this case that if one who had received an advancement would be liable at all for interest it could only be from the time the estate was ready for a final distribution.

And in a recent Virginia case it is laid down as a well-settled rule that interest should not be charged upon an advancement until final distribution. *Davies v. Hughes*, 86 Va. 909.

Unless the court means by this the time when final distribution ought to be made this would make the present rule in Virginia an exception to that held by most courts, and which was followed in that State in *Knight v. Oliver*, *supra*.

The principle is that the distributees to whom advancements have been made are regarded as having received the amounts thereof at testator's death, and therefore should be charged interest thereon from that time until distribution. *McDougald v. King*, 1 Bail. Eq. 154.

But under a will directing distribution when a son reaches eighteen years of age, and in the meantime the use of the property was given to such of the family as should remain with testator's wife, such use off-sets the use of advancements made in testator's lifetime, and they should bear no interest until the date of distribution. *Id.*

Adding interest on an advancement was upheld where by the mode of computation it amounted to the same thing as introducing the advancement without interest at the date when distribution ought to have been made. *Yundt's App.* 13 Pa. 575, 53 Am. Dec. 496.

Interest is not to be charged in distributing the estate on the excess of the value of some devisees over others, although the will directs that each devisee shall receive an equal portion. *Nelson v. Wyam*, 21 Mo. 347.

The equality of portions under a will directing portions including advancements to be equalized out of testator's estate, is to be made first from the principal alone and then the interest or increase of each portion follows the principal thereof. *Barclay v. Hendrick*, 3 Dana, 374. B. A. R.

party to whom the advancement was made. Children last paid are, however, entitled to interest from the time when the other children received their shares.

1 Wait, Act. & Def. p. 212, § 11; *Yundt's App.* 18 Pa. 575, 58 Am. Dec. 496; *McDougald v. King*, 1 Bail. Eq. 154; 2 Woerner, Am. Law of Administration, p. 1222; *Kyle v. Conrad*, 25 W. Va. 760; *Stewart v. Stewart*, L. R. 15 Ch. Div. 539; *Steele v. Frierson*, 85 Tenn. 430.

As between the children and the estate, the legacies unquestionably bore interest from the death of the testator.

King v. Talbot, 40 N. Y. 92; *Johnson v. Patterson*, 13 Lea, 657; *Williams v. Williams*, 15 Lea, 438; *Kyle v. Conrad*, 25 W. Va. 760.

Case v. Case, 51 Ind. 277, held that a widow was entitled to interest on a legacy from the death of the testator, notwithstanding the settlement of the estate and the payment of the legacy was delayed by an unsuccessful contest by her of the will.

Elliott, Ch. J., delivered the opinion of the court:

The ancestor of the appellees and the testator of the appellant Clark died on the 15th day of January, 1888, leaving a large estate. The testator in his will directed that the executor should convert the notes and accounts held by the testator, at the time of his death, into money, with which, with other money, he should equalize the shares of the respective heirs. During his lifetime the testator made the following advancements to his children: To William Helm, \$28,000; to Florence Cutter, \$24,490; to Elizabeth Pattison, \$24,300; and to his grandchildren the following advancements: To Nannie, George and Bertha Helm, \$20,050. The court adjudged that the shares of the distributees should be equalized, and that Florence Cutter was entitled to receive \$3,510 in addition to the sum advanced to her; that Elizabeth Pattison was entitled to the additional sum of \$3,700, and Nannie, George and Bertha Helm were jointly entitled to the additional sum of \$7,950, and that they are also entitled to interest on the sums to which they are respectively entitled from the 15th day of January, 1888, to be paid before any more money is distributed to William Helm.

The contest in this case is as to the allowance of interest to the distributees who had received a less sum than that advanced to William Helm.

It is very doubtful whether the question argued by counsel is presented. It certainly does not arise on the pleadings, for the complaint is unquestionably good in so far as it asks that the shares be equalized, and if good to that extent it will repel a demurrer, even if it should be conceded that it claims too much in claiming interest. *Bayless v. Glenn*, 72 Ind. 5.

Nor does the motion for a new trial properly present the question, inasmuch as there is no specification properly challenging the allowance of interest. Neither do the exceptions to the finding properly present the question, for there is no special finding in the record. But, as the appellee's counsel interpose no objection to the mode of presenting the question, and as the case is a peculiar one, we have thought it best to decide the main question.

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Upon the general question whether a distributee can be allowed interest after the death of the ancestor there is stubborn conflict of authority. *Davies v. Hughes*, 86 Va. 909; *Patterson's App.* 128 Pa. 269; *Yundt's App.* 13 Pa. 575, 58 Am. Dec. 496; *Jackson v. Jackson*, 28 Miss. 674, 64 Am. Dec. 114; *Black v. Whitall*, 9 N. J. Eq. 572; *Kyle v. Conrad*, 25 W. Va. 760; *Roberson v. Nail*, 85 Tenn. 124; *McDougald v. King*, 1 Bail. Eq. 154; *Stewart v. Stewart*, L. R. 15 Ch. Div. 539-545; *Steele v. Frierson*, 85 Tenn. 430; *King v. Talbot*, 40 N. Y. 92; *Johnson v. Patterson*, 13 Lea, 657; *Williams v. Williams*, 15 Lea, 438.

Our own court has given its sanction in a general way to the doctrine that interest may be allowed after the death of the ancestor, although the question was not expressly decided. *Case v. Case*, 51 Ind. 277.

Judge Woerner asserts that interest should be allowed. 2 Woerner, Law of Administration, p. 1222.

But in this instance we are not required to enter the field of conflict, for we think that the will of the testator so influences the case as to make it our duty to hold that the distributees are entitled to interest. Our opinion is that the testator intended that all the heirs should receive an equal share of his estate, and that it was his purpose to impose upon the executor the duty of equalizing the distribution. The will expresses the purpose of the testator to divide his estate into four shares and to allot to the persons respectively entitled to distribution an equal share. This intention will be defeated unless the appellees are allowed interest from the time of the testator's death. The use of money is valuable and the right to interest is property, so that William Helm has had more than his share of the estate, inasmuch as he has had the use of the excess advanced to him. It is therefore equitable and just, under the terms of the will, that the other distributees be put upon equality with him by being allowed interest from the time of the testator's death. The appellees cannot, of course, recover anything directly from William Helm, for our statute precludes such a recovery. Rev. Stat. § 2407.

Nor do they ask a recovery of that kind. What they asked and the court awarded is, that before distributing anything more to William Helm interest shall be added to their respective claims. This we think they had a right to ask and receive.

We may add, to prevent misunderstanding, that we do not hold, nor mean to hold, that they can be allowed interest unless there is money remaining for distribution. They cannot have interest at the expense of creditors of their ancestor, but they may have interest added to their claims if there is money to be distributed; and, while nothing can be recovered from William Helm, he may nevertheless be put off as to further payments to him in order to enable the executor to equalize the shares of the appellees by allowing them interest from the time of the testator's death. This is nothing more than an equitable distribution under the will of the testator, and the conclusion asserted does not violate any rule of law.

Judgment affirmed.

UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF MISSOURI

Re HOUSTON.

Re GERYE.

(47 Fed. Rep. 539.)

Offering to sell his sample at one house, followed by a sale and delivery of it at the next one, will not bring an agent employed in soliciting orders for his principal in another State within the provisions of a state statute imposing a license tax upon persons who shall "deal in the selling" of goods, wares or merchandise.

(September 28, 1891.)

PETITIONS for writs of habeas corpus to release petitioners from custody to which they have been committed for an alleged violation of a Missouri statute defining and regulating the rights and duties of peddlers. *Granted.*

The facts are stated in the opinion.

Mr. E. D. McKeever for petitioners.

Phillips, J., delivered the opinion of the court:

This is an application for a writ of habeas corpus. The parties make separate applications; but, as the cases involve the same questions of law, and arise out of substantially the same state of facts, they will be considered together.

Petitioners were arrested and imprisoned under proceedings instituted against them in a justice's court at the city of Nevada, Vernon County, in this State. The prosecution is predicated of an alleged violation of the state statute defining and regulating the rights and duties of peddlers. The charge is that the defendants were engaged in the act of peddling wares and merchandise in said city and county without having first taken out therefor a peddler's license. The facts, as developed on this hearing, are substantially as follows: The petitioners are citizens of the State of Kansas, and at the time of their arrest they were acting as agents for Price & Buck, merchants of the city of Topeka, State of Kansas, a firm engaged in a general mercantile business at Topeka, making a specialty, however, of the sale of clocks, silver ware and lace curtains. In the prosecution of their business this firm employed a large number of canvassers, throughout the country, extending into other states. These canvassers were furnished with samples of the goods to be sold, which they carried around with them from house to house, soliciting custom. The terms of sale were one sixth in cash, the remainder to be paid in five equal monthly installments. The first payment was made to the solicitor, which represented the amount of his commission. An order was then sent in by the agent, or drummer, to the house at Topeka for the article contracted for, upon which the firm shipped to the agent, who delivered to the purchaser, and

the remaining payments were collected by a collecting agent of the firm. In the case of the petitioner Houston, the evidence does not show that he ever made a sale otherwise than according to the custom above indicated. In the case of the petitioner Gerye, the evidence shows that, while he pursued a like course, there was one exception, when he offered to sell to a lady the sample clock carried around by him. She declining to take it, he went to a neighboring house, and made sale to the lady of the house, delivered the clock immediately to her, receiving from her the first payment of one sixth of the purchase price. The right of a nonresident merchant to thus employ agents to go beyond the limits of the State in which the merchant resides to solicit purchases, by taking orders on the house, to be filled, and the goods shipped into another State for delivery, without the goods being subject to a license tax of the State, or to an occupation tax on the solicitor, has been established, beyond further controversy, by decisions of the Supreme Court of the United States. *Robbins v. Shelby County Tax. Dist.* 120 U. S. 489, 30 L. ed. 694; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 811; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368.

The method of sending solicitors into another State for orders of sale, employing samples for exhibition, is one of the recognized lawful methods of carrying on trade between the different states; and if the local community where the solicitor thus goes may subject him to an occupation tax or a license fee, no matter by what name or under what disguise, whether as peddler or merchant, who shall limit the amount of such tax, to prevent actual prohibition? As said by the court in *Robbins v. Shelby County Tax. Dist.*, *supra*: "To say that such a tax is not a burden upon interstate commerce is to speak at least unadvisedly, and without due attention to the truth of things."

There was no question made by respondent at the hearing of this case that, if the conduct of the petitioners was strictly limited or confined to the mere solicitation of orders, in the manner stated, the acts of petitioners are within the protection of the commerce clause of the Federal Constitution. But the principal contention was and is that the act of Gerye, in making sale of one clock without taking an order therefor on the house, according to the instruction of the house and the custom of the agents, brings his case within the definition of a peddler, and subjects him to the operation of the state law. The state statute thus defines a peddler: Whoever shall deal in the selling of patents, patent-rights, patent or other medicine, lightning-rods, goods, wares, or merchandise, except books, charts, maps, and stationery, by going from place to place to sell the same, is declared to be a peddler.

It is to be observed that it is essential under this statute to constitute a peddler that he should "deal in the selling" of the given article. The question, therefore, presents itself, whether the single instance of Gerye delivering the clock which he carried as a sample, without first sending in an order to the Topeka house,

NOTE.—For note on what constitutes "dealing," see *State v. Ray* (N. C.) *ante*, 529, 14 L. R. A.

and awaiting the shipment of its counterpart, constituted him a peddler under this statute, so as to deprive him of the protection which the Constitution gives to interstate commerce. At first impression it seems plausible that one offer to sell and deliver, and then one sale, followed by delivery, would constitute a dealer. As applied to the statute regulating the sale of liquors under the Federal Revenue Law, such acts would be sufficient to constitute the vendor a retail liquor dealer. But the rule of construction, under like state statutes, is quite different. The language of *Edicott, J.*, in *Com. v. Farnum*, 114 Mass. 267-271, in construing a like provision, and discussing a like state of facts, may well be applied here: "He was an agent soliciting orders, and a carrier delivering machines ordered. He made no direct sales himself. He did not carry and expose goods for sale, within the mischief the statute is intended to prevent. The article he carried was a sample of that which he proposed the purchaser should buy of the company. The fact that he occasionally delivered the sample machine to a purchaser desirous of obtaining one immediately cannot so change the character of his business as to bring it within the statute, nor did the fact that he sold one attachment, and one tuck-marker, capable of being attached, make him liable; it distinctly appearing that it was not his practice to make such sales. The question is to be determined on the general character and scope of his business. If this does not bring him within the statute, he is not liable for single sales of particular articles, such sales being exceptional, and not in the course of his ordinary employment." See also *Kansas v. Collins*, 34 Kan. 434-437, and cases cited.

Such seems to be the well-settled rule of construction of similar statutes. To hold that such sporadic, casual sale fixes upon the party the office of a dealer does not obtain outside of his practice under the Revenue Laws, which are designedly rigid, and controlled by the letter of the Act. The cases of *State v. Emert*, 11 L. R. A. 219, 103 Mo. 241, and *Hynes v. Briggs*, 41 Fed. Rep. 468, are not in conflict with the views above expressed, when properly distinguished. The agreed statement of facts on which the former case was submitted is not as clear as it ought to have been to present an exact point for decision. While it is true the facts stated indicate that the agent was soliciting orders for the nonresident manufacturer, and that in traveling around from house to house he did sell out of his wagon one sewing-machine, it perhaps, in justice to the opinion of the court, ought not to be said that it held such single sale constituted the vendor a peddler under the state statute. The holding would be singular in that aspect, as it would be in conflict with the current of state authorities construing similar statutes. The third

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paragraph of the agreed statement of facts recites that the property "was forwarded to this State by said company, and delivered to defendant, as its agent, for sale on its account," from which it is inferable that it was not being used merely as a sample, but was sent by the manufacturer to be sold, and, therefore, was sold in the usual course of defendant's trade. It is not necessary that all that is said in that opinion should receive assent or any part disapproved to warrant the conclusion reached on the facts at bar. In the case of *Hynes v. Briggs*, the facts were that the nonresident merchant and manufacturer, while employing agents as canvassers, shipped into the State of Arkansas large consignments of said goods, which were stored in a warehouse, and sales made by its solicitors were filled from this store-house, and were not completed by shipments from without on orders sent in by the solicitor. Such goods were held to have become so far mingled with the common property of the *aitus* as to become liable to state regulation and police, and subject to the license tax, if otherwise constitutional as a state enactment. Whether it will be maintained by the supreme court that a solicitor for a nonresident merchant or manufacturer, who limits his operations to merely taking orders on such nonresident, who supplies the goods from a provisional store house established within the State where such orders are taken, would thereby become liable to a license fee imposed by the State, is yet an open question. It is sufficient for the purpose of the case at hand to say that *Mr. Justice Bradley*, in *Robbins v. Shelby County Tax Dist.*, *supra*, suggested that it could not be entertained that the nonresident merchant or manufacturer, in order to avail himself of the right of free interstate commerce guaranteed by the Constitution, should be given to the "silly and ruinous proceeding" of procuring a store-room, and shipping in his goods, before he could reasonably anticipate a demand for them; and, that, therefore, the means of effecting such sales through the agency of "drummers" taking orders in advance are permissible, and the right is not to be interfered with nor hampered by subjecting the solicitor to the imposition of a state license fee, or tax in other form. This view was sustained by the majority opinion, and reaffirmed in *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368. The latest holding must be the law for the government of this court, until reversed by the court of last resort.

It results that, the petitioners being restrained of their liberty in contravention of the third clause of section 8, art. 1, of the Federal Constitution, which gives to Congress alone the power to regulate commerce among the several states, they are entitled to be discharged therefrom.

It is accordingly so ordered.

GEORGIA SUPREME COURT.

George B. PRITCHARD, Admr., etc., of
William R. Pritchard, Deceased, *Plf. in Err.*,

v.
SAVANNAH STREET & RURAL RESORT
R. CO.

(.....Ga.....)

***An action against a railroad company for personal injuries** pending when the Act of November 12, 1889, amending section 2967 of the Code, was passed, was not abated by the death of the plaintiff; nor is that Act, as applicable to actions pending at the time of its passage, unconstitutional.

(May 27, 1891.)

ERROR to the Superior Court for Chatham County to review a judgment refusing to allow the administrator of William R. Pritchard, deceased, to become a party to and prosecute an action brought by the latter before his death to recover damages for injuries al-

*Head note by LUMPKIN, J.

NOTE.—*Effect of statutes to defeat or preserve pending civil actions.*

The only limit imposed by the Federal Constitution on the power of the states to pass retrospective laws is that they shall not be *ex post facto* and shall not impair the obligation of contracts. With these limitations a state Legislature may pass retrospective laws unless limited by the state Constitution, although they divest vested rights. *Baltimore & S. R. Co. v. Nesbit*, 51 U. S. 10 How. 385, 13 L. ed. 406; *Satterlee v. Matthewson*, 27 U. S. 2 Pet. 380, 7 L. ed. 458; *Watson v. Mercer*, 33 U. S. 8 Pet. 68, 8 L. ed. 576; *Charles River Bridge v. Warren Bridge*, 36 U. S. 11 Pet. 420, 9 L. ed. 773; *Drehman v. Stifle*, 75 U. S. 8 Wall. 595, 19 L. ed. 508; *Randall v. Kreiser*, 90 U. S. 23 Wall. 137, 23 L. ed. 124.

A statute giving a remedy does not apply to a pending suit unauthorized when brought unless the statute so provides. *Wetzler v. Kelly*, 83 Ala. 440.

A statute relating to an allowance to a tenant for improvements where he has no title applies to pending actions as well as those subsequently brought. *Bacon v. Callender*, 6 Mass. 303.

A statute giving an illegitimate child the right to inherit will not be construed to aid a pending action of ejectment based on such right of inheritance. *McCool v. Smith*, 66 U. S. 1 Black, 459, 17 L. ed. 259.

But a statute passed after the reversal of a judgment in ejectment for invalidity of plaintiff's title, by which the relation of landlord and tenant existing between him and the defendant is made lawful and his title therefore made valid on the second trial as against the defendant on the ground of estoppel, does not violate the Constitution of the United States as it merely gives effect to the parties' own contract. *Satterlee v. Matthewson*, *supra*.

A statute authorizing a suit by one firm against another having a common member may be made applicable to pending suits. *Hepburn v. Curtis*, 7 Watts, 300, 32 Am. Dec. 780.

A statute allowing an action of covenant against an assignee of a lessee for years is not invalid as applied to a pending action. *Taggart v. McGinnis*, 14 Pa. 155.

A statute confirming levies of executions on real estate except where the title attempted to be acquired thereby "has been finally decided against 14 L. R. A.

leged to have resulted from defendant's negligence. *Reversed.*

On October 25, 1889, William R. Pritchard filed his action in the Superior Court of Chatham County against defendant to recover damages alleged to have been sustained by him through the negligence of the defendant in running its cars on March 14, 1889. At the time of filing this suit the common-law rule, *actio personalis moritur cum persona*, was in force in Georgia. Pending the said action and before any trial was had thereon, the Legislature passed an Act, which was approved on the 12th of November, 1889, providing that "no action for the recovery of damages for homicide or for injury to person or to property shall abate by the death of either party; but such cause of action in the case of the death of the plaintiff shall, in the event there is no right of survivorship in any other person, survive to the personal representatives of the deceased plaintiff; and in case of the death of the defendant shall survive against said defendant's personal representatives."

the creditor" applies to a levy in a case wherein judgment has been rendered but a motion for new trial reserved with stay of execution for advice of all the judges of a higher court. *Mather v. Chapman*, 6 Conn. 54.

A statute confirming entries of judgments made on the first instead of on the third day of a term of court may validate such a judgment from which a writ of error is then pending. *Underwood v. Lilly*, 10 Serg. & R. 97.

Pending drainage proceedings may be made valid by a statute, even as to errors which go to the jurisdiction. *Miller v. Graham*, 17 Ohio St. 1.

Errors in proceeding to discontinue a road may be cured by a statute passed pending a certiorari to review the proceedings. *People v. Ingham County Suprs.*, 20 Mich. 95.

The same is true of proceedings to lay out and improve a street. *Newark v. State*, 32 N. J. L. 453.

To defeat actions.

It must clearly appear that the Legislature so intended before a statute will be construed to bar a pending action. *Chalker v. Ives*, 55 Pa. 81.

After a judgment has been rendered declaring the invalidity of a tax a statute cannot heal the defects so as to overthrow the judgment. *Moser v. White*, 29 Mich. 59.

The right to an appeal or writ of error may be taken away by statute after the decision is rendered. *Leavenworth Coal Co. v. Barber* (Kan.) July 9, 1891.

Even after an appeal has been taken and a motion to dismiss denied after argument, the jurisdiction of the court may be taken away by statute. *Ex parte McCordle*, 74 U. S. 7 Wall. 506, 19 L. ed. 264.

An Act taking away the jurisdiction of the court will apply to pending appeals to that court. *Baltimore & P. R. Co. v. Grant*, 98 U. S. 398, 25 L. ed. 231.

A pending action by a creditor against a sheriff for the escape of an imprisoned debtor is not defeated by a statute allowing the sheriff in such cases to plead the prisoner's recapture or return before suit. *Dash v. Van Kleeck*, 7 Johns. 477, 5 Am. Dec. 291.

A statute allowing payment of a stamp duty upon an indenture of apprenticeship within a certain specified time in discharge of any penalty for

At the time of the passage of this Act W. R. Pritchard was in life; subsequently, on the 27th day of July of the next year, the said suit still pending, he died. After his death, George B. Pritchard was duly appointed and duly qualified as administrator upon his estate. On the 20th of January, 1891, George B. Pritchard, administrator, (the death of William R. having been duly suggested of record,) made application to the court to be made a party to said case in the stead of his intestate. This application was denied by the court and upon motion of defendant's counsel the case was dismissed.

Messrs. Jackson & Whatley and A. C. Wright, for plaintiff in error:

The right to have the suit abate upon the death of the plaintiff is not a vested right.

The conditions necessary to give the Act application to this case having arisen after the Act was passed, is it not flying in the face of the plain meaning of the word to say that its operation is "retroactive?" The Act is purely preservative.

See *Kring v. Missouri*, 107 U. S. 248, 27 L.

prior neglect does not apply to a pending action for such a penalty, as that would defeat plaintiff's vested right and punish him with costs for pursuing a remedy which he had a right to when brought. *Couch v. Jeffries*, 4 Burr. 2460.

A statute providing that entry upon private premises within the limits of a jail-yard shall not be regarded as an escape, although changing the law, will defeat a pending action for an escape brought on the prisoner's bond. *Patterson v. Philbrook*, 9 Mass. 151.

An Act of Congress to legalize a bridge across a navigable river will defeat a pending suit to remove the bridge as a nuisance. *Gray v. Chicago, I. & N. R. Co.* (The Clinton Bridge) 77 U. S. 10 Wall. 454, 19 L. ed. 909.

The Legislature may cure defects in voting and charging a school-tax upon a suit to restrain its collection. *Cowgill v. Long*, 15 Ill. 202.

Effect of repeals.

If a law conferring jurisdiction is repealed without any reservation as to pending cases all such cases fall with the law. *Gurnee v. Patrick County*, 137 U. S. 141, 34 L. ed. 601; *Butler v. Palmer*, 1 Hill, 324; *Merchants Ins. Co. v. Ritchie*, 72 U. S. 5 Wall. 541, 18 L. ed. 540; *United States v. Boisdore*, 49 U. S. 8 How. 113, 12 L. ed. 1009; *McNulty v. Batty*, 51 U. S. 10 How. 27, 13 L. ed. 338; *Ex parte McCordle*, 74 U. S. 7 Wall. 508, 19 L. ed. 264; *Gates v. Osborne* (The Assessor v. Osborne) 78 U. S. 9 Wall. 567, 19 L. ed. 748; *United States v. Tynen*, 75 U. S. 11 Wall. 88, 20 L. ed. 153; *Baltimore & P. R. Co. v. Grant*, 98 U. S. 388, 25 L. ed. 231.

The Legislature may repeal a law imposing a penalty pending an action therefor and thus defeat the action. *Oriental Bank v. Freeze*, 18 Me. 106, 36 Am. Dec. 701; *Mix v. Illinois Cent. R. Co.* 3 West. Rep. 428, 116 Ill. 502; *Pope v. Lewis*, 4 Ala. 499; *Norris v. Crocker*, 54 U. S. 18 How. 429, 14 L. ed. 210; *United States v. The Reform*, 70 U. S. 8 Wall. 617, 18 L. ed. 105; *Maryland v. Baltimore & O. R. Co.* 44 U. S. 8 How. 584, 11 L. ed. 714.

Or pending an appeal from a judgment therefor, and thus defeat the judgment. *Denver & R. G. R. Co. v. Crawford*, 11 Colo. 586; *Specker v. Louisville*, 78 Ky. 287.

Or after judgment and before execution. *Lewis v. Foster*, 1 N. H. 61.

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ed. 516; *Merrill v. Sherburne*, 1 N. H. 213, 8 Am. Dec. 52.

Matters of possible defense, which accrue under provisions of positive law which are arbitrary and technical, introduced for public convenience or from motives of policy, which do not affect the substance of the accusation or defense, and form no part of the *res gestae*, are continually subject to the legislative will, unless in the meantime, by an actual application to the particular case, the legal condition of the accused has been actually changed.

Kring v. Missouri, 107 U. S. 248, 27 L. ed. 516.

Remedial statutes are not inoperative, although of a retrospective nature.

Searcy v. Stubbs, 12 Ga. 439; *Johnston v. Bradstreet Co.* (Ga.) March 23, 1891.

Messrs. Lawton & Cunningham for defendant in error.

Lumpkin, J., delivered the opinion of the court:

The first proposition stated in the above head-note was settled by this court in the case of *Johnson v. Bradstreet Co.* (Ga.) 13 S. E.

But a statute abolishing distress for rent, even if construed to repeal provisions as to a penalty for aiding the tenant to remove his property from the premises to avoid payment of rent, will not affect the landlord's right to recover such a penalty in a case then pending on appeal as his right to it became vested the instant the wrongful act was done. *Palmer v. Couly*, 4 Denio, 374.

This case is apparently in conflict with those preceding which relate to penalties.

The repeal of an Act giving a forfeiture defeats a pending suit therefor. *Governor v. Howard*, 5 N. C. 465.

The expiration pending an appeal of a statute under which the forfeiture of a vessel accrued will prevent an affirmance of the sentence of condemnation. *The Rachel*, 10 U. S. 6 Cranch, 329, 3 L. ed. 239; *Yeaton v. United States*, 9 U. S. 5 Cranch, 281, 3 L. ed. 101.

Road proceedings fall with the repeal of a statute on which they are based. *Re Road in Hatfield Twp.* 4 Yeates, 382; *Menard County v. Kincaid*, 71 Ill. 587.

So do insolvency proceedings. *Miller's Case*, 1 W. Bl. 451; *Stoeve v. Immell*, 1 Watts, 258.

So do proceedings to sell an intestate's real estate for debts. *Bank of Hamilton v. Dudley*, 27 U. S. 2 Pet. 492, 7 L. ed. 496.

The repeal of a statute authorizing an auditor of public accounts to assess a tax for payment of bonds terminates all proceedings to compel him to make the assessment. *Musgrove v. Vicksburg & N. R. Co.* 50 Miss. 677.

But the repeal of an Act giving half pilotage fees to a pilot for speaking a vessel which declines his services does not defeat a pending action for such fees, as his right is vested under a transaction in the nature of a contract. *Pacific Mail S. S. Co. v. Joliffe*, 68 U. S. 2 Wall. 450, 17 L. ed. 805.

The mere repeal by an amendment of a statute of a provision giving an action for damages against a county for negligence in respect to a highway does not defeat a pending action, unless there is an evident intent of the Legislature to do so; and it seems that an attempt to give it such effect would violate a constitutional provision for a "remedy by the course of law for injury." *Eastman v. Clackamas County*, 33 Fed. Rep. 24.

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Rep. 250 (decided at the present term). In that case, however, the main question was whether or not the above-mentioned section of the Code applied to actions for libel, and no question was raised in the argument as to the applicability of the amending Act to pending suits, or its constitutionality as to them, if held applicable. This court, in the case just mentioned, considered the first of these questions, and decided that the Act did apply to actions pending at the time of its passage, but did not discuss it *in extenso* in the opinion. The constitutional question was not considered or decided in that case. We will now examine both of them.

As stated in the case above cited, the language of the Act seems sufficiently broad and comprehensive to include pending actions. The law, as amended, reads: "Nor shall any action of tort for the recovery," etc., "abate by the death of either party." The words "any action" may as well mean any action now in existence as any action hereafter commenced, and it is not straining to give them this interpretation. In *Bailey v. State*, 20 Ga. 742, very similar reasoning is used. The Legislature had passed an Act declaring "who are qualified to serve as jurors in criminal cases," and its first section enacted that certain described persons shall be "liable to serve as jurors upon the trial of all criminal cases." The second section began: "When any person stands indicted," etc., *Judge Benning* said: "'Criminal cases' is an expression that includes criminal cases of every sort." "'All criminal cases' includes criminal cases of every kind." "'Any person' is a universal term." The Act in question was accordingly held applicable to cases happening before its passage. A Vermont Act, providing that in case of the removal of sheriff or high bailiff from the State an action of *actio facias* may be brought directly upon the recognizance of such officer, was held to apply to all causes of action, whether existing at the time it took effect or accruing thereafter, although the Act contained no provision expressly applying it to pending actions. *Hine v. Pomeroy*, 39 Vt. 211. In *Kimbray v. Draper*, L. R. 8 Q. B. 160, it was held that a statute requiring plaintiffs to give security for costs in certain cases applied to such cases then pending (citing *Wright v. Hale*, 6 Hurlst. & N. 227), in which it was held that when the plaintiff in any action recovers less than five pounds, he shall not be entitled to any costs if the judge certifies to deprive him of them, and the judge may so certify in an action commenced before the passage of the Act. In *Hepburn v. Curtis*, 7 Watts, 800, 83 Am. Dec. 760, it was held that the Legislature may pass laws affecting "suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of recovering redress by legal proceedings." An action of assumpsit was proceeding in the name of a firm, which included among its members one Samuel Hepburn, against another firm of which the same man was also a member. Defendants insisted that the suit could not be maintained, because the same person was among both the plaintiffs and the defendants. The objection was sustained, and a bill of ex-

ceptions taken. While these proceedings were pending, the Legislature passed an Act providing in effect that an action brought by one firm against another should not abate by reason of one individual being a member of both firms, and it was held that this Act applied to the case then pending. A married woman sued alone for personal injuries to herself, when she had no right to bring such action without being joined therein by her husband. While her case was pending, the Legislature of Wisconsin passed an Act authorizing married women to bring such suits alone, and it was held that this Act applied to her pending suit, and made it good, even though it must have been abated if a motion to that effect had been made before the passage of the Act. *McLimans v. Lancaster*, 63 Wis. 596. This Act was also distinctly held not to be unconstitutional, although retroactive as to the case pending, because it affected only the remedy. In *Weldon v. Winslow*, L. R. 13 Q. B. Div. 784, it was held that a married woman might, by virtue of the Married Woman's Property Act of 1882, sue alone for a tort committed before the Act came into operation, the law before the passage of that Act being that she could not sue without joining her husband with her in the action.

Being satisfied that our Act of 1889, now under consideration, was intended to, and does, apply to pending actions, we will now inquire into its constitutionality. It will be noticed that some of the following authorities are also applicable to the question just disposed of. Section 6 of the Code provides that "laws looking only to the remedy or mode of trial, may apply to contracts, rights, and offenses entered into, or accrued or committed prior to their passage." The Constitution of 1865 forbade the passage of "retroactive laws, injuriously affecting any right of the citizen." No provision against retroactive legislation appears in the Constitution of 1868. That of 1877 forbids the passage of a "retroactive law." Construing together the above constitutional provisions in connection with the section of the Code cited, we take it that they all amount to substantially the same thing, and mean that retroactive laws, which do not injuriously affect any right of the citizen, that is to say, laws curing defects in the remedy, or confirming rights already existing, or adding to the means of securing and enforcing the same, may be passed. In *Boston v. Cummins*, 16 Ga. 102, it was held that "retrospective laws often operate for the benefit of society, and to repudiate them altogether would be to obliterate a large portion of the statute law of the State;" and accordingly it was ruled that a Registry Act, requiring deeds to be recorded within a limited time, applied to deeds executed before the passage of the Act. In the same volume, in *Knight v. Laumeter*, 151, it was held that an Act operating only on the remedy, though retrospective, was not unconstitutional. The Legislature of Mississippi passed an Act authorizing a court of chancery to refuse confirmation of a sale, provided the party objecting to the confirmation would make a certain bond, and it was held that the provisions of this Act applied to a sale made under a mortgage executed prior to the passage of the Act, and that as the Act affected the remedy only

and not the mortgagee's contract rights, it was not, therefore, unconstitutional. Before the passage of this Act the power of a chancery court to set aside a sale was much more limited. *Chaffe v. Aaron*, 62 Miss. 29. It is not unconstitutional for the Legislature to take away a right which is not vested, but contingent upon some event subsequent to the date of the statute. Before the occurrence transpires upon which an inchoate right is to become vested and unalterable, a law may be passed providing, in effect, that the happening of such occurrence shall not make that right complete. Thus, a joint tenancy may be converted into a tenancy in common, thereby destroying the right of survivorship, and the statute will apply to estates already vested at the time of its enactment. *Burghardt v. Turner*, 12 Pick. 538; *Bambaugh v. Bambaugh*, 11 Serg. & R. 191. So an estate tail may be changed into a fee-simple, and thereby destroy a remainder limited upon the fee-tail. *De Mill v. Lockwood*, 8 Blatchf. 56. It has been often held that the right of dower, before it becomes consummated by the death of the husband, may be taken away or changed at the pleasure of the Legislature. *Lucas v. Sawyer*, 17 Iowa, 517; *Noel v. Ewing*, 9 Ind. 37; *Hamilton v. Hirsch*, 2 Wash. T. 223; *Morrison v. Rice*, 35 Minn. 436; *Henson v. Moore*, 104 Ill. 403; *Barbour v. Barbour*, 46 Me. 9; 7 Lawton, Rights, Rem. & Pr. § 3867; 1 Sharswood & B. Lead. Cas. Real Prop. 800, and cases cited; 2 Hare, Const. Law, 824, Cooley, Const. Lim. 6th ed. 440 *et seq.* In *Wilbur v. Gilmore*, 21 Pick. 250, it was held that an Act allowing an action to be brought by an executor for an injury in the lifetime of his testator was not unconstitutional, even when applied to a trespass committed before this Act went into operation, inasmuch as it affected the remedy only. "The presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the courts, even where the alteration which the statutes make has been disadvantageous to one of the parties. . . . A law which merely alters the procedure may, with perfect propriety, be made applicable to past as well as future transactions. . . . No person has a vested right in any course of procedure, nor in the power of delaying justice, nor of deriving benefit from technical and formal matters of pleading. He has only the right of prosecution or defense in the manner prescribed, for the time being, by or for the court in which he sues; and if a statute alters that mode of procedure, he has no other right than to proceed according to the altered mode. The remedy does not alter the contract or the tort. It takes away no vested right, for the defaulter can have no vested right in a state of the law which left the injured party without, or with only a defective remedy." Endlich, Interpretation of Statutes, § 285, and cases cited. See also sections 286, 287. "No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. . . . A remedy may be provided for existing rights, and new remedies added to or substituted for those which exist." See Suth. Stat. Const. § 482, and cases there cited. 14 L. R. A.

Judge Cooley lays it down as a rule that "a party has no vested right in a defense based upon an informality not affecting his substantial equities." Cooley, Const. Lim. 454. In *New Orleans v. Clarke*, 95 U. S. 644, 24 L. ed. 521, the court held: "It is competent for the Legislature to impose upon a city the payment of claims just in themselves, for which an equivalent has been received; but which from some irregularity or omission in the proceedings creating them, cannot be enforced at law." This legislation was held not to be within the provision of the Constitution of Louisiana, inhibiting the passage of a retroactive law. The Constitution of Louisiana contains a provision similar, in effect, to that of our own. "The best general rule laid down touching the validity of such statutes is given in 1 Kent, Com. 456, where it is stated that statutes which go to confirm existing rights, and in furtherance of the remedy by curing defects, and adding to the means of enforcing existing obligations, are clearly valid." See notes to *Gooken v. Stonington* (Conn.) 10 Am. Dec., beginning on page 181. "Any statute which changes or affects the remedy merely, and does not destroy or impair vested rights, is not unconstitutional, though it be retrospective, and although, in changing or affecting the remedy, the rights of parties may be incidentally affected." *Rich v. Flanders*, 89 N. H. 804. The decision in this case was made in construing a statute making competent as witnesses persons who were not so before, and it was held applicable to pending suits, the Act expressly so declaring. Sargent, J., who delivered the opinion, quotes and adopts the following language of Daniel Webster in his argument in the case of *Forster v. Essex Bank*, 16 Mass. 245, 8 Am. Dec. 185: "A distinction must be made between acts which affect existing rights, or impose new obligations, and acts which give new remedies for existing rights, and enforce the performance of previous obligations." See also cases cited in *Rich v. Flanders*, *supra*.

In California it was held that an Act requiring a purchaser of property sold for delinquent taxes to give notice of the expiration of the time of redemption was constitutional, and applied to sales previously made. *Oullahan v. Sweeney*, 79 Cal. 537. "A statute altering the mode of proceeding in point of form, in a suit pending when the Act passed, so as to prevent a delay and hasten the time of trial, is not unconstitutional. Such an Act will be construed liberally, and general words, not expressly prospective, will be applied to a pending proceeding. The rule that a statute should not be so construed as to affect vested rights does not apply to a statute which alters the form of the remedy merely." *People v. Tibbets*, 4 Cow. 384.

We have quoted copiously from the numerous authorities above cited, making little comment thereon, because they seem to be strongly in point, and sustain the doctrine sought to be established more forcibly than would perhaps any language of our own. The case of *Wilder v. Lumpkin*, 4 Ga. 208, cited by counsel for the defendant in error, is not in conflict with our conclusions in the case at bar, either as to the applicability of the Act of

1889 to pending actions, or to its constitutionality. That case was ruled mainly upon the ground that the Act of 1847, providing "it shall not be necessary to make securities on appeal and injunction bonds parties to writs of error," was not intended to apply to cases pending at the time of its passage. Judge Nisbet, says, in effect, that the Legislature did not contemplate that the Act should have retrospective operation, because, by its own terms, it is made to take effect from and after its passage. No such language appears in the Act of 1889. This great and learned judge then proceeds to discuss the question of the constitutionality of the Act of 1847 as to its applicability to pending cases, and concluded that, so applied, it would not be constitutional. It appears that the rights of Lumpkin, the defendant in error, had been fixed by a judgment, and a subsequent statute affecting the manner in which that judgment might be set aside affected, not merely the remedy, but the right itself. Judge Nisbet lays great stress upon this idea, and, after referring to Lumpkin's rights under the judgment in his favor, remarks that "to give the law a retrospective operation would be to divest rights which had already vested in the defendant in error." We will not follow him further through the opinion delivered in this case. It evidences considerable research, great ability, and much learning, and has become celebrated. Of the correctness of the decision, in so far as it holds that the Act was not intended to be applicable to pending cases, there can be no doubt; and

if a distinction between that case and the one at bar, on the constitutional question, cannot be soundly rested on the fact that Lumpkin's rights were vested because fixed by a judgment, we will only add that we do not feel constrained to adopt every assertion made in the splendid argument of our illustrious predecessor.

The Act of the Legislature of Tennessee, construed in the case of *Chicago, St. L. & N. R. Co. v. Pounds*, which case was relied on by counsel for the defendant in error, as will be seen by an examination of the same, not only affected the remedy, but gave a new, distinct, and additional cause of action, which, of course, could not constitutionally be done. 11 Lea, 127, 15 Am. & Eng. R. R. Cas. 510. The same criticism is applicable to the case of *Osborne v. Detroit*, 82 Fed. Rep. 36. In the latter case an Act limiting the amount of recovery to be had for injuries occasioned by a defective sidewalk was held not applicable to pending suits. So it appears in that case that not only was the plaintiff's remedy affected, but also the measure of his damages a substantial matter.

After a careful consideration of the questions involved in this case, and in view of the authorities cited, we affirm the ruling made by this court in the case *Johnson v. Bradstreet Co.*, that the Act of 1889 is applicable to actions pending at the time of its passage; and we rule in the present case that this Act, when so applied, is not unconstitutional.

Judgment reversed.

NORTH DAKOTA SUPREME COURT.

Arthur EDMUNDS *et al.*, Appts.,

v.

Peter HERBRANDSON *et al.*, Resp'ts.

(.....N. Dak.)

- *1. Chapter 56 of the Laws of 1890, regulating the relocation of county-seats, is unconstitutional, as being repugnant to section 80 of article 2 of the State Constitution, prohibiting special legislation locating or changing county-seats, because it arbitrarily classifies counties, putting into one class all counties wherein at the date of the Act the courthouse and jail were worth the sum of \$35,000, and forever excluding from this class all counties coming within its description in the future, placing all such counties permanently in a separate class.
2. The constitutional inhibition against special legislation does not prevent classification, but such classification must be natural, not arbitrary; it must stand upon some reason, having regard to the character of the legislation of which it is a feature.
3. It is not the form, but the effect, of a statute which determines its special character.
4. An Act relating to all the objects to

*Head notes by COLLINS, Ch. J.

which it should relate, except one, is as much special legislation as if it had embraced only the object excluded.

5. It is purely a legislative question, subject to no review by the courts, whether in a given case a general or special law should be enacted under section 70 of article 2 of the State Constitution, which provides that "in all other cases where a general law can be made applicable no special law shall be enacted."

(December 5, 1891.)

APPEAL by plaintiffs from an order of the District Court passed at Chambers in Cass County and entered in the office of the clerk of the District Court for Traill County in favor of defendants in a suit brought to enjoin the removal of the county records and the offices of the county officers of Traill County from Caledonia to Hillsboro. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. A. B. Levisse and Ball & Smith, for appellants:

Unless the law clearly has a uniform operation it cannot be considered as a law of a general nature. The fact that there is a lack of uniform operation, the courts hold, makes the law special or local.

Seranton School Districts' App. 4 Cent. Rep.

NOTE.—For note on rendering statute constitutional by classification, see *Re Washington St. (Pa.)* 7 L. R. A. 193.

14 L. R. A.

For note on legislative discretion as to applicability of general statute, see *State v. Terre Haute (Ind.) ante*, 568.

311, 118 Pa. 176; *State v. Covington*, 29 Ohio St. 102-111; *Kelley v. State*, 6 Ohio St. 269-274; *Nichols v. Walter*, 87 Minn. 264; *State v. Somers Point*, 6 L. R. A. 57, 52 N. J. L. 82; *State v. Hudson County Bd. of Chosen Freeholders*, 9 Cent. Rep. 501, 50 N. J. L. 82; *McCarthy v. Com.* 1 Cent. Rep. 111, 110 Pa. 248.

The counties excepted, by reason of their having a court-house and jail exceeding in value the sum of \$35,000, are only such counties as have buildings of that value now erected. Any number of counties not having, at the time of the passage and approval of the Act, a court-house and jail exceeding in value the sum of \$35,000, might afterwards construct a court house and jail exceeding that value, and still all of the provisions of the Act in question would apply to them, and under that Act the county seats in those counties might be removed. The exception of one county from the operation of an Act makes it local and special.

State v. Hudson County Bd. of Chosen Freeholders, *supra*; *Davis v. Clark*, 106 Pa. 384.

The question as to whether or not the classification is authorized by the Constitution is for the courts to determine.

Agars' App. 122 Pa. 266.

The law could not have a uniform operation. It would result in a classification which is not based on any reason, and in counties in which precisely the same condition of affairs existed, being subject to different laws as to the re-location of county seats.

Marmet v. State, 9 West. Rep. 449, 45 Ohio St. 63; *Com. v. Patton*, 88 Pa. 258; *Morrison v. Bachert*, 3 Cent. Rep. 117, 112 Pa. 322; *State v. Mitchell*, 81 Ohio St. 592.

The basis of classification in the Act in question is unreasonable and no necessity therefor exists.

Agars' App. 2 L. R. A. 577, 122 Pa. 266; *State v. Somers Point*, 6 L. R. A. 57, 52 N. J. L. 82; *State v. Sloan*, 6 Cent. Rep. 346, 49 N. J. L. 856; *State v. Bloomfield* (N. J. L.) Nov. 1885. See *Clark v. Cape May*, 50 N. J. L. 558; *McCarthy v. Com.* (Pa.) Oct. 5, 1885; *Nichols v. Walter*, 87 Minn. 264; *State v. Hammer*, 43 N. J. L. 439.

If local results are or may be produced by a piece of legislation it offends against the constitutional prohibition of special legislation and is void.

Seranton School District's App. 4 Cent. Rep. 311, 118 Pa. 176.

Messrs. F. W. Ames and J. F. Selby, for respondents:

The Legislature may classify persons and subjects, for the purpose of legislation, and enact laws applicable specially to such classes, and while the laws thus enacted operate uniformly upon all members of the class, they are not vulnerable to the constitutional inhibition under consideration.

Vermont L. & T. Co. v. Whithed (N. Dak.) July 14, 1891.

It is not fatal to the classification, that the individuals of the class were, are and ever will be the only ones composing that class.

State v. Spaude (Minn.) July 28, 1887; *Nichols v. Walter*, 87 Minn. 264.

An Act applying the like rule to all counties under the like circumstances is general and not local.

74 L. R. A.

State Bd. of Freeholders of Somerset County v. Board of Chosen Freeholders of Hunterdon County, 52 N. J. L. 512.

Under the Constitution of New York state, it has been held by the court of appeals that an Act applying only to fifty-eight counties out of sixty counties in the State was general and not local or special legislation, and was constitutional.

People v. Newburgh & S. P. Road Co. 86 N. Y. 1.

The Act of 1890 is general in its form, operating upon classes of counties therein designated and stands with the general Act regulating the removal of county seats *in pari materia*, and must be so construed.

See *Vermont L. & T. Co. v. Whithed* (N. Dak.) July 14, 1891.

Messrs. Joslin & Ryan and Carmody & Leslie also for respondents.

Corliss, Ch. J., delivered the opinion of the court:

The plaintiffs, as taxpayers of Traill County, in this State, instituted this action against the members of the board of county commissioners and the other officers of that county to secure an injunction perpetually restraining them, their successors in office, clerks, deputies, agents, and servants, from removing, or attempting to remove, the books, papers, records, etc., belonging at the county-seat of such county, from such county-seat at Caledonia to the city of Hillsboro, in said county, and from locating or establishing, or attempting to locate or establish, the respective offices of such county, or any of the same, at such city of Hillsboro, under and in pursuance of the votes cast at a certain election held for that purpose under the provisions of chapter 56 of the Laws of 1890. It is undisputed that at this election all the requirements of this statute were fully complied with. In fact no question upon this appeal is presented, except the single one of the constitutionality of this Act. By it a radical change in the manner of relocating county-seats was made. Before its enactment, section 565, Comp. Laws, gave the rule. It required a petition of two thirds of the qualified voters of the county as a condition precedent to the ordering and holding of an election, and two thirds of the votes actually cast at such election were essential to choice. The Act of 1890 requires a petition signed by only one third of the qualified voters of such county, as shown by the vote cast at the last preceding election for state officers holden in such county, to compel the ordering of an election to relocate the county-seat, and three fifths of the votes actually cast will transfer the county-seat to the place having such three fifths vote. The county-seat in Traill County before the election under this statute was located at Caledonia. The proceedings taken under the Act were regular, and the vote in favor of a relocation at Hillsboro was sufficient to work a relocation of the county-seat at that place, if the law in question is valid. It is undisputed that the proceedings were not efficacious to transfer the county-seat, under section 565, Comp. Laws; the petition,

not being signed by two thirds of the qualified voters, and the vote in favor of Hilleboro not being equal to two thirds of the votes cast. The sole inquiry in this appeal, therefore, is respecting the constitutionality of chapter 56 of the Laws of 1890. It is challenged as unconstitutional because of its alleged conflict with section 69 of article 2 of the State Constitution, which provides that "the Legislative Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: . . .

(8) Locating or changing county-seats." The provision of chapter 56 which it is claimed renders that Act obnoxious to this constitutional inhibition is the proviso which reads as follows: "Provided, that nothing in this Act shall permit the removal to or locating of the county-seat of any county at a place not located upon a line of railroad, nor wherein the court-house and jail now erected exceed in value the sum of \$35,000." It is undisputed that some of the counties of the State fall within the proviso, and that some of them fall without it, and within the regulation of the Act. It is therefore apparent that by this proviso the Legislature has classified counties for the purpose of determining under what law a relocation of the county-seat can be obtained. The proviso excepts from the provision of chapter 56, counties with respect to which the circumstances are peculiar. These counties are either left under the provisions of section 565 of the Compiled Laws, or there is no statutory rule regulating or permitting the relocation of county-seats therein. Whichever of these two views we take, these counties are placed in a separate class by themselves; and the question which naturally suggests itself is whether this particular classification can be sustained under the authorities and the spirit of the constitutional prohibition against special legislation. This section of the Constitution must have a reasonable construction. To say that no classification can be made under such an article would make it one of the most pernicious provisions ever embodied in the fundamental law of a State. It would paralyze the legislative will. It would beget a worse evil than unlimited special legislation,—the grouping together without homogeneity of the most incongruous objects under the scope of an all-embracing law. On the other hand, the classification may not be arbitrary. The Legislature cannot finally settle the boundaries to be drawn. Such a view of the organic law would bring upon this court the just reproach that it had suffered the Legislature to disregard a constitutional barrier by relegating to it the question where that barrier should be set up. See *State v. Newark*, 40 N. J. L. 71-80; *Agars' App.* 2 L. R. A. 577, 122 Pa. 266. Where shall the line properly be traced? We believe that in testing this question these inquiries should be made: Would it be unjust to include the classes of objects or persons excluded? Would it be unnatural? Would such legislation be appropriate to them? Could it properly be made applicable? Is there any reasonable ground for excluding them? It is impossi-

ble, from the very nature of the case, to state with precision the true doctrine. But it is our opinion that every law is special which does not embrace every class of objects or persons within the reach of statutory law, with the single exception that the Legislature may exclude from the provisions of a statute such classes of objects or persons as are not similarly situated with those included therein, in respect to the nature of the legislation. The classification must be natural, not artificial. It must stand upon some reason, having regard to the character of the legislation.

We find in the adjudications no more felicitous statement of the true doctrine than that of *Chief Justice Beasley* in *State v. Hammer*, 42 N. J. L. 439: "But the true principle requires something more than a mere designation by such characteristics as will serve to classify; for the characteristics which thus serve as a basis for classification must be of such a nature as to mark the object so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will in some reasonable degree, at least, account for or justify the restriction of the legislation." The whole trend of the authorities is in this line. See *Nichols v. Walter*, 37 Minn. 264; *Agars' App.* 2 L. R. A. 577, 122 Pa. 266; *People v. Central Pac. R. Co.* 83 Cal. 933; *Re Washington St.* 182 Pa. 257, 7 L. R. A. 193; *State v. Boyd*, 19 Nev. 43; *Closson v. Trenton*, 48 N. J. L. 438, 4 Cent. Rep. 63; *State v. Hudson County Bd. of Chosen Freeholders*, 50 N. J. L. 82, 9 Cent. Rep. 501; *Lodi Twp. v. State*, 51 N. J. L. 402, 6 L. R. A. 56; *Uley v. Elliott*, 30 S. C. 380; *State v. Somers' Point*, 52 N. J. L. 32, 6 L. R. A. 57; *Clark v. Cape May* (N. J. Sup.) 14 Atl. Rep. 581; *Vermont L. T. Co. v. Whitted* (N. Dak.) 49 N. W. Rep. 318. This list might be greatly enlarged.

We are inclined to the view that under the authorities, had the Legislature not closed the door against accessions to the class of counties having a court-house and jail exceeding \$35,000 in value, the classification would have been proper. But an arbitrary time is fixed after which no county coming within the same conditions which characterize the class can gain admittance to such class. "Provided, that nothing in this Act shall permit the removal to or relocation of the county-seat of any county . . . wherein the court-house and jail now erected exceed in value the sum of \$35,000." This classification is not based upon natural reason, but upon the arbitrary fiat of the Legislature. While it may be true that the county-seat ought not to be so easily relocated in a county wherein the loss to the tax-payer will be greater by reason of the erection at the existing county-seat of expensive buildings as in the county where such loss will be comparatively trifling in amount, it is not reasonable that the mere time when such expensive buildings are constructed should at all

enter into the consideration of the matter. This law was approved March 7, 1890. So far as the value of improvements is concerned, it excepts only those counties wherein the court-house and jail now erected exceed in value the sum of \$35,000. If the word "now" refers to the date of approval of the Act, all counties having a court-house and jail exceeding \$35,000 in value on the 8th of March of that year, but not on the 7th; or if the word "now" refers to the date when the Act took effect *i. e.*, July 1st, all counties in which the court-house and jail worth more than \$35,000 should be completely erected on July 2d instead of July 1st,—would nevertheless be subject to the provisions of the new law, although the natural reason can suggest no justification of such a distinction. If the danger of serious loss to the tax-payer by the removal of a county-seat from a place at which expensive buildings have been constructed affords reason for placing counties in which such a condition exists in a separate class, to be governed by more stringent legislation in this respect, there is no reason why a county in which for the first time such a condition exists on a later day should be excluded from this separate class, any more than a county in which this condition existed the day before. There is no natural reason for a classification of counties in which the same conditions exist based solely on and arbitrarily upon the period of time before or after which such conditions existed for the first time. Such a doctrine would lead inevitably to unlimited special legislation under the mere guise of classification. It would nullify the Constitution so far as it prohibited special legislation. The authorities are unanimous on the point. In *Com. v. Patton*, 88 Pa. 258, the court says: "Said Act makes no provision for the future, in which respect it differs from the Act of 1874, which in express terms provides for the future cities and the expanding growth of those now in existence. That is not classification which merely designates one county in the Commonwealth, and contains no provision by which any other county may, by reason of its increase of population in the future come within the class." In *State v. Donovan*, 20 Nev. 75, the court says: "All Acts or parts of Acts attempting to create a classification of counties or cities by a voting population which are confined in their operation to the existing state of facts at the time of their passage, or to any fixed date prior thereto, or which by any device or subterfuge exclude the other counties or cities from ever coming within their provisions, or based upon any classification which in relation to the subject embraced in the Act is purely illusory, or founded upon unreasonable, odious, or absurd distinctions, have always been held unconstitutional and void."

Nichols v. Walter, 37 Minn. 264, is peculiarly in point. The court said: "Recurring to the law in question we find it divides the counties in two classes, the classification based upon an event in the past so that no county in one class can ever pass into the other class; and to those in one

class is applied what we may call the majority rule, and to those in the other the three-fifths rule. Had the Act specified by name those counties in which one rule should apply, and those in which the other should apply, it would hardly be questioned that the legislation was special and not general and uniform, in its operation throughout the State. But the counties were, at the date of the Act, identified, and their status fixed for all time, by reference to the specified event, as fully as though the counties were named. There is nothing in the event which is the basis of classification which suggests any necessity or propriety for a different rule to be applied to the counties to be placed in the two classes. Why one county which had located its county-seat by a vote of its electors, twenty-five years or six months before the Act passed, should require a vote of three fifths of its electors to remove it, and the county which should so locate it three or six months after the Act passed, may again remove or locate it upon a mere majority vote is impossible to conceive, except that the Legislature has arbitrarily so provided. But in such matters the Legislature cannot arbitrarily so provide. The Act is unconstitutional and void." In *Marmel v. State*, 45 Ohio St. 63, 9 West. Rep. 449, the same doctrine is clearly stated and recognized: "The law is not a special Act. It is local and special as to the ends to be accomplished, but general in its terms and operations, applying to all cities of the first grade of the first class. It is not limited to such cities as may have been in that class and grade at the date of its enactment. At that time Cincinnati was the only city in the State answering to the description, but there is a possibility, not to say certainty, that other cities in the State will increase in population so that they will pass into this grade, and when that happens they will come within the provisions of this law. In this respect the law differs essentially from that in review in the case of *State v. Mitchell*, 31 Ohio St. 592. That law was made applicable only to cities of the second class having a population of 31,000 at the last federal census, and inasmuch as Columbus was the only city in the State having that population, and as the Act could apply only to that city and never to any other, and as it undertook to confer corporate powers, this court held it to be in conflict with section 1 of article 13, and therefore void. A like objection was found to exist against the Act under consideration in the case of *State v. Pugh*, 43 Ohio St. 98, 1 West. Rep. 38, and the distinction above indicated is made apparent with great clearness and force in the opinion rendered by the present chief justice." Without further quotation from opinions, we cite, as sustaining the same view, the following cases: *State v. Boyd*, 19 Nev. 43; *Woodard v. Brien*, 14 Lea, 520; *Morrison v. Bachert*, 112 Pa. 322, 3 Cent. Rep. 117; *State v. Corington*, 29 Ohio St. 102; *Devine v. Cook County Comrs.* 84 Ill. 593; *State v. Herrmann*, 75 Mo. 340; *State v. Mitchell*, 31 Ohio St. 607; *State v. Hunter*, 88 Kan. 578; *State Gaddis*, 44 N. J. L. 365; *State v. Hammer*, 42 N. J. L. 440.

It was urged that the mere fact that those counties in which there were such expensive buildings could never come within the law was insufficient to render the Act void; that they, under ordinary circumstances, would never descend into that class; and that the fact that destruction of such expensive improvements might possibly in the future bring them within the description of the class having inexpensive public buildings should not be considered, it being only a remote contingency. But the difficulty with this reasoning is that it ignores the fact that the counties having inexpensive buildings at the date of the passage of the Act can never, by the erection of expensive buildings or in any other manner, ascend into the expensive building class. They are kept forever within the particular class in which the Act finds them, notwithstanding the fact that in the future change of condition may bring them within the description of the other class. The boundary between these two classes was as permanently fixed when the Act was passed as if the counties had by name been placed within these two classes respectively. The line drawn by the Legislature is therefore purely arbitrary. It is one thing to assert that all except a single object will be forever kept from the class by circumstances, and another and entirely different thing to attempt to exclude all others by the very terms of the law. A law applicable to all the cities of the State of New York having not less than a million population may never embrace any other city. But, the classification being reasonable, it ought not to be prohibited because no other city may ever enter the class. But, when the Act in express terms prevents any further accession to the class it is apparent that the classification stands, not upon a reasonable ground based on difference in population, but is purely arbitrary. The Act might as well have expressly named the particular objects included, to the exclusion of all others. So far as this particular provision of the Constitution against special legislation is concerned it is immaterial that the Act is general in form. The question is always as to its effect. Any other doctrine would render nugatory the prohibition of the fundamental law against special legislation. Under the guise of statutes general in terms, special legislation, in effect, could be adopted with no inconvenience, and the evil to be extirpated would flourish unchecked. Statutes general in terms have been adjudged void as special legislation, because they could operate only upon a part of a class. The authorities are explicit upon this question: *People v. Central Pac. R. Co.* 83 Cal. 393; *Dundee Mortg. & T. Invest. Co. v. School Dist. No. 1*, 21 Fed. Rep. 151; *Miller v. Kister*, 68 Cal. 142; *Nichols v. Walter*, 37 Minn. 264; *Com. v. Patton*, 88 Pa. 258; *Derive v. Cook County Comrs.* 84 Ill. 592; *State v. Mitchell*, 31 Ohio St. 607.

Said the court in *Nichols v. Walter*: "These cases cited from many on the subject are sufficient to show that, in determining whether a law is general or special, courts will look not to its form or phraseology

merely, but to its substance and necessary operation." In *Com. v. Patton*, 88 Pa. 258, an act general in form, but so worded that it could apply to only one county in the State, was before the court. It characterized this attempted evasion as "classification run mad." In *State v. Pugh*, 43 Ohio St. 98, 1 West. Rep. 96, the court says, at page 103, 43 Ohio St.: "It is not the form the statute is made to assume, but its operation and effect, which is to determine its constitutionality." It is no answer to the contention that an act is special legislation, to insist that only a single class is excluded. The exclusion of a single person or object which should be affected by a statute is fatal. All must be included or the law is not general. If one may be omitted, where shall this line be drawn? Here authority is in accord with principle. *Davis v. Clark*, 106 Pa. 385; *State v. Hudson County Bd. of Chosen Freeholders*, 50 N. J. L. 82, 9 Cent. Rep. 501; *State v. Camden City Council*, 50 N. J. L. 87, 9 Cent. Rep. 497; *Manning v. Klippel*, 9 Or. 367; *Miller v. Kister*, 68 Cal. 142, *Lodi Trop. v. State*, 51 N. J. L. 403, 6 L. R. A. 56. In this last case the court said: "The rule is that in any classification for the purpose of a general law all must be included and made subject to it, and none omitted that stand upon the same footing regarding the subject of legislation. To omit one so circumstanced is as fatal a defect as to include but one of a number." In *Davis v. Clark*, 106 Pa. 384, the court said: "It was not then a general Act applicable to every part of the Commonwealth. It did apply to a great number of counties, but there is no dividing line between a local and a general statute. It must be one or the other. If it apply to the whole State, it is general. If to a part only, it is local. As a legal principle, it is as effectually local when it applies to sixty-five counties out of the sixty-seven as if it applied to one county only. The exclusion of a single county from the operation of the Act makes it local." To same effect is *State v. Mullica Trop.* 51 N. J. L. 413. The case of *People v. Newburgh & S. Pl. Road Co.*, 86 N. Y. 1, is cited as holding a contrary doctrine. We do not so construe that decision. But we would have no hesitation in declaring that doctrine unsound if it adjudged an act to be not special, so far as the constitutional inhibition against special legislation is concerned, because it related to all except two counties in the State, where there was no reason for classification. If an Act is not special because it relates to all except a single county in a State, without any reason for the classification, then the Legislature can accomplish indirectly what it is beyond their power to bring about by direct steps. Whenever it is desired to introduce a new rule as to a single county, a general law can be passed establishing that rule in all the counties, and then another law can be enacted re-establishing the old rule in all counties except the one singled out to be governed by the new rule. The first law would be clearly general, and, under what it is claimed is the New York doctrine, the second Act could not be assailed

as special legislation. This would, indeed, be an ingenious mode of neutralizing the constitutional prohibition against special legislation. We would not give it our sanction, however it might be buttressed by authority.

Can the proviso be stricken out and the Act sustained without it? If, in striking out the proviso, the effect is to extend the provisions of the law over counties having expensive buildings, the legislative will is disregarded. If, on the other hand, it is said that the law will reach no further after the provision is eliminated than with the proviso undisturbed, then the Act is special legislation, because it is too restricted in its operation. To include such counties is to defy the will of the Legislature as expressed in their statute; to exclude them is to defy the will of the people as expressed in their fundamental law. Here again the voice of reason and the voice of authority are one. *Nichols v. Walter*, 37 Minn. 264; *Delaware Bay & C. M. R. Co. v. Markley* (N. J. Err. & App.) 16 Atl. Rep. 436; *State v. Sauk County Suprs.* 63 Wis. 376-379. Said the court in the last case: "It was argued by the counsel for the appellant that although the proviso in the Act of 1881 is invalid it does not vitiate the whole Act, and that the residue may be upheld as a valid law. The rule is in such cases that unless the void part was the compensation for or inducement to the valid portion, so that the whole Act, taken together, warrants the belief that the Legislature would not have enacted the valid portions alone, such portions will be operative; otherwise not. . . . In the present case there is no room for the application of this rule, for the reason that the Legislature has not enacted that the statute should extend to Grant County, but has expressed a contrary intention. By no possible construction can the statute be held to be operative in Grant County, and it is essential to its validity that it be operative in that as well as in every other county of the State."

It was urged in the appellants' brief that the Act was repugnant to section 70 of article 2 of the State Constitution, providing that "in all other cases where a general law can be made applicable, no special law shall be enacted." The point appears to have been abandoned on the oral argument, but we will notice it. There are two conclusive answers to this position. In the first place it applies only to cases other than those previously enumerated in section 69, and this section embraces all laws locating or changing county-seats. The second answer is that the question whether a general law can be made applicable is purely a legislative question, and the decision of the law-making

power in this respect is subject to no review. *Evansville v. State*, 118 Ind. 426, 4 L. R. A. 93; *Wiley v. Bluffton*, 111 Ind. 152, 9 West. Rep. 681; *Brown v. Denver*, 7 Colo. 305; *People v. McFadden*, 81 Cal. 499; *Richman v. Muscatine County Suprs.* 77 Iowa, 513; *Owners of Lands v. People*, 118 Ill. 296; *State v. Boone County Ct.* 50 Mo. 317; *McGill v. State*, 34 Ohio St. 247; *State v. Hitchcock*, 1 Kan. 178.

There is much force in the position that the Act in question is a law of a general nature, within the meaning of section 11 of article 1 of the Constitution, providing that all laws of a general nature shall have a uniform operation. *Vermont L. & T. Co. v. Whithed* (N. Dak.) 49 N. W. Rep. 318; *People v. Central Pac. R. Co.* 43 Cal. 398-432. But see *State v. Shearer*, 46 Ohio St. 275. That the law is not uniform in its operation, within the meaning of the Constitution, naturally follows from the arbitrary nature of the classification it attempts to make. See cases cited in *Vermont L. & T. Co. v. Whithed* (N. Dak.) 49 N. W. Rep. 318-320.

The judgment and order of the District Court are reversed, and that court is directed to enter judgment in favor of the plaintiffs upon the demurrer for the relief demanded in the complaint.

All concur.

ON REHEARING.

Per Curiam:

This is a motion to modify the order for judgment heretofore entered in the above-entitled action. The motion came on for a hearing at a regular term of this court held at the city of Fargo, on the 12th day of January, A. D. 1892, and before the *remittitur* herein is transmitted to the court below. After hearing counsel for the respective parties, and upon consideration, it is adjudged that the original order for judgment herein be and the same is modified so as to read as follows: *first*, the order of the district court sustaining defendants' demurrer to the complaint and the order of the district court dissolving the temporary injunction herein are respectively and in all things reversed; *second*, the defendants and respondents herein are permitted to make application to the district court for leave to plead over and make answer to the complaint, and the district court, in the exercise of its discretion, will permit an answer to be interposed, if it shall appear to the satisfaction of said court that the application is made in good faith, and not for the purpose of delay, and that a verified answer can be served which will embody a good defense on the merits.

NEW YORK COURT OF APPEALS (3d Div.).

Eliza Jane MOORE, *Appt.*,

v.

NEW YORK ELEVATED R. CO. *et al.*,
Repts.

(.....N. Y.)

1. The loss of privacy of premises used as a dwelling, caused by the construction in a street in front of them of an elevated railroad and station, whereby employes and passengers can look into the windows, is an element of damages so far as it depreciates the rental value of the premises.
2. A judgment for defendant will be reversed for excluding from the consideration of the jury an element which might have entitled plaintiff to nominal damages at least, although it is difficult to say how the jury could, under the evidence, have determined the amount of damages attributable thereto.

(January 26, 1892.)

APPEAL by plaintiff from a judgment of the General Term of the Court of Common Pleas for the City and County of New York affirming a judgment of a trial term in favor of defendants in an action brought to recover damages for reduction of the rental value of premises in which plaintiff had a life estate because of the alleged wrongful construction and operation of defendants' railroad in the street in front of them. *Reversed.*

The facts are stated in the opinion.

Messrs. Charles E. Whitehead and Stanley W. Dexter, for appellant:

All of the annoyances from the railroad—as noise, vibration, and loss of privacy—should have been considered.

Drucker v. Manhattan R. Co. 8 Cent. Rep. 66, 106 N. Y. 162; *Lahr v. Metropolitan Elev. R. Co.* 6 Cent. Rep. 871, 104 N. Y. 295; *Kane v. New York Elevated R. Co.* 11 L. R. A. 640, 125 N. Y. 186.

Loss of privacy is material in this class of suits.

Buckleigh v. Metropolitan Board of Works, L. R. 5 H. L. Cas. 418; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739.

Interference with privacy by the collection of crowds is a nuisance.

Bostock v. North Staffordshire R. Co. 5 De G. & S. 584; *Walker v. Brewster*, L. R. 5 Eq. 25; *Inchbald v. Robinson*, L. R. 4 Ch. App. 388; *Rex v. Moore*, 3 Barn. & Ad. 184.

In cases of misdirection by the court the inquiry is not whether the jury were actually misled by the instructions given, but whether the instructions were calculated to mislead them.

Thompson, Charging the Jury, p. 168; *Benham v. Cary*, 11 Wend. 83; *Erben v. Lorrillard*, 19 N. Y. 299.

Under any aspect of the case the plaintiff

was entitled to nominal damages; and the right to the street easements being in question a new trial will be granted, as a property right is affected.

Hyatt v. Wood, 8 Johns. 289; *Herriot v. Stover*, 5 Wend. 580; *McConike v. New York & E. R. Co.* 20 N. Y. 495; *Dean v. Metropolitan R. Co.* 119 N. Y. 540; *Mortimer v. Manhattan R. Co.* 29 N. Y. S. R. 262.

The invasion in this case of plaintiff's life estate in the premises and the impairment of her easements in Greenwich and Franklin streets, is a trespass upon her freehold, and she is entitled, on the uncontradicted evidence, to at least nominal damages, which would carry costs.

Kelly v. New York & M. E. R. Co. 91 N. Y. 283; *Bruen v. Manhattan R. Co.* 39 N. Y. S. R. 86; *Jones v. Metropolitan Elev. R. Co.* 39 N. Y. S. R. 177; *Dinehart v. Wells*, 2 Barb. 483; *Horton v. Jordan*, 32 N. Y. S. R. 920; *Crowell v. Smith*, 35 Hun, 182.

Messrs. Julien T. Davies and Brainard Tolles, for respondents:

A verdict for defendant will not be set aside as against evidence, merely because plaintiff was entitled to nominal damages.

Rundell v. Butler, 10 Wend. 119; *Ellsler v. Brooks*, 22 Jones & S. 73; *Reading v. Gray*, 5 Jones & S. 79; *Brantingham v. Fay*, 1 Johns. Cas. 255; *Hyatt v. Wood*, 8 Johns. 289; *Devendorf v. Wert*, 42 Barb. 290; *Jennings v. Loring*, 5 Ind. 250.

Bradley, J., delivered the opinion of the court:

The plaintiff, life-tenant of a house and lot at the northeast corner of Greenwich and Franklin streets, in the city of New York, brought this action to recover damages alleged to have been suffered by her by the maintenance and operation of the New York Elevated Railroad (of which the Manhattan Railway Company was the lessee) in Greenwich Street in front of her premises, and the erection and maintenance of a station for passengers to go onto and depart from the cars, which station was near to the plaintiff's house in front on Greenwich Street, and on Franklin Street, into which it extended. The plaintiff gave evidence tending to prove some disturbance of her easements of light, air, and access by the railroad and its use. She also gave some evidence of noise produced by it, and of the loss of privacy in the use of the third story of the building. It appeared that the rental value of the plaintiff's premises had depreciated since the railroad was constructed; and evidence on the part of the defendant was to the effect that in that neighborhood the depreciation of rents was occasioned by the removal of the business stand of the Long Island farmers from there to Gansvoort market, thus diverting the trade incident to that traffic from the former to the latter place. The court submitted to the jury the question whether the rental value of the plaintiff's premises had been diminished by deprivation of light, air, and access through the maintenance and operation of the road, and directed them to exclude from their con-

NOTE.—The novelty of the point presented in the above case concerning the loss of privacy, while rendering it interesting and valuable, gives small opportunity for annotation.

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sideration the elements of noise, vibration, and the loss of privacy, for which they could allow no damages. The plaintiff's exceptions were: *first*, to the portion of the charge directing the jury to exclude noise and vibration from consideration; and, *second*, to the like instruction as to the loss of privacy. As there was no evidence of any vibration, the first exception was too broad to raise the question in its application to the noise resulting from the operation of the road. *Haggart v. Morgan*, 5 N. Y. 422, 55 Am. Dec. 350; *Groat v. Gile*, 51 N. Y. 481. And the question arises upon the exclusion of the subject of the loss of privacy from the consideration of the jury. It seems well established that the theory upon which an action at law may be supported by an abutting owner against the defendants is that they are in such sense trespassers or wrong-doers as to be liable to such owners for all the injuries resulting proximately from the wrongful act of maintaining and operating their elevated road. *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 269, 6 Cent. Rep. 371; *Drucker v. Manhattan R. Co.* 106 N. Y. 157, 8 Cent. Rep. 66; *Kane v. New York Elev. R. Co.* 125 N. Y. 164, 186, 11 L. R. A. 640. In the latter case, and in the more recent one of *American Bank Note Co. v. New York Elev. R. Co.*, 129 N. Y. 252, it was held that, while such relation of trespasser continued, the defendants were liable to the abutting owner for the damages occasioned to him by the noise of operating the road. This liability of the defendants is not that for which the remedy is by action in the nature of that formerly known as "trespass *quare clausum*," but rather in the nature of that known at common law as an "action on the case." *Kernochan v. New York Elev. R. Co.* 128 N. Y. 559. The continued invasion of the privacy of the occupant of a building very likely would have the effect to reduce the rental value of it for some purposes. The first floor of the plaintiff's building was occupied as a grocery or liquor store, and the two above were occupied by persons as places of abode. But, so far as appears, only two rooms are exposed or subject to the loss of privacy. Those rooms are on the third floor, and have one window in front on Greenwich Street and two on the Franklin Street side. The opportunity, by means of the windows, to look into the rooms, is from the station platform on both streets. The evidence on the subject was mainly given by a person who had occupied those rooms, and was to the effect that the looking in the windows by the passengers and employes was very annoying; that they did it from the station platform; and that they interfered with the privacy of the rooms, by looking in when standing on the platform and when coming down the stairs along the building. It may be seen that this exposure of the rooms, and the occupants within them, to the observation of persons at all times of the day, would be detrimental to them as dwelling-places. While it

is true that the observation taken by the patrons and employes of the defendants is not the act of the latter, the defendants have furnished the means and opportunity for those persons to invade the privacy of these rooms by looking into them through the windows, and it is by the invitation and procurement of the defendants, for the purpose of the business of the road, that people are at the station and on its platform. No reason appears why the defendants should not be responsible for the consequences of the loss of privacy thus occasioned so far as it depreciated the rental value of the rooms in the plaintiff's building. Those consequences detrimental to the rooms are the rational result of the maintenance of the road and the station, and are reasonably attributable to that cause.

In *Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418, the plaintiff, under lease from the crown, occupied certain premises known as the "Marlagh House," the garden of which extended to the Thames, where it was protected from the river by a wall, through which was a door and a causeway leading to the water. The defendants, under the Thames Embankment Act, constructed a roadway in front of the premises, and higher than the garden. It was there held that the loss of the use of the river frontage, and the consequent loss of privacy, increase of dust, and noise occasioned by the erection of the embankment roadway, were subjects to be considered in estimating the damages to be awarded to the plaintiff. In the present case, although the loss of privacy was properly an element for the consideration of the jury, the question arises whether the plaintiff was prejudiced by the exclusion of it from their attention. There was no evidence specifically applicable to damages resulting from loss of privacy, but the diminished rental upon which the plaintiff sought to recover mainly had relation to the entire building, and was charged to have been produced by the causes which the maintenance and operation of the road furnished. This included the interference with the easements of light, air and access, as well as the consequences of noise and loss of privacy. But the latter, so far as appears, was applicable only to a couple of rooms on the third floor. It is difficult to see how the jury could, by any rule of apportionment, have determined upon the evidence the loss of rental for that cause, if they had been disposed to have given damages for the loss of privacy. They may however, have given the plaintiff nominal damages for that cause, if it had not been excluded from their consideration; and, as the plaintiff may have been prejudiced by the misdirection of the court, the error cannot be disregarded on review. *Herrick v. Storer*, 5 Wend. 580.

These views lead to the conclusion that the judgment should be reversed, and a new trial granted, costs to abide event.

All concur.

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INDIANA SUPREME COURT.

LOUISVILLE, NEW ALBANY & CHICAGO R. CO., *Appl.*,

Moses CREEK, Admr., etc., of Matilda E. McClintic, Deceased.

(.....Ind.....)

1. A motion for judgment, which says, "The defendant files motion for judgment on the answers to interrogatories notwithstanding the general verdict for plaintiff," is sufficient in form to present the question.

2. The negligence of a husband will not, merely because of the marital relation, be imputed to his wife, who is injured while riding with him.

(January 7, 1892.)

APPEAL by defendant from a judgment of the Circuit Court for Carroll County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. E. C. Field and C. C. Matson, for appellant:

If an adult, in full possession of his facul-

ties, is injured in broad daylight by a collision with a train at a public crossing with which he is familiar, the fault is prima facie his own, regardless of whether any signals are sounded, or the speed fast or slow. And unless he proves that he was free from fault himself, the action fails.

Cincinnati, H. & I. R. Co. v. Butler, 1 West. Rep. 110, 103 Ind. 81; *Indiana, B. & W. R. Co. v. Greene*, 3 West. Rep. 883, 106 Ind. 279; *Bellevue R. Co. v. Hunter*, 83 Ind. 833; *Toledo, W. & W. R. Co. v. Shuckman*, 50 Ind. 42; *St. Louis & S. E. R. Co. v. Mathias*, 50 Ind. 65; *Louisville & N. R. Co. v. Orr*, 84 Ind. 50; *Indiana, B. & W. R. Co. v. Hammock*, 12 West. Rep. 298, 118 Ind. 1.

Such a person must always approach a railway crossing under the apprehension that a train is liable to come at any moment; and carefully and diligently use his senses of sight and hearing to ascertain whether a train is coming before going on the track; and injury, when the use of either of said faculties would have given sufficient warning to enable the party to avoid the danger, conclusively proves negligence.

Bellevue R. Co. v. Hunter, 83 Ind. 867; *Indiana, B. & W. R. Co. v. Hammock*, *supra*; *Terre Haute & I. R. Co. v. Clark*, 73 Ind. 168; *Cincinnati, H. & I. R. Co. v. Butler*, 1 West.

NOTE.—Imputing contributory negligence of driver of private vehicle to his wife, who is injured while riding with him.

In a New York decision to the effect that the negligence of the driver of a carriage is not imputable to his wife, who is injured by the overthrow of the carriage while riding with him, caused by a heap of dirt in the street, the court, after quoting from another case in which one person has been riding with another on invitation, said the same reasoning applied and made no attempt to distinguish between a wife and any other person injured in such circumstances. *Platz v. Cohoes*, 24 Hun, 101.

So a decision of the circuit court of the United States in Ohio denied that contributory negligence of a husband can be imputed to his wife while riding with him, who is injured by the upsetting of their buggy caused by dogs chasing their horse. *Shaw v. Craft*, 87 Fed. Rep. 317.

The same was held where she was injured by running against a pole located in the highway while riding with her husband. *Sheffield v. Central U. Telegraph Co.* 36 Fed. Rep. 164.

And a Texas case decides that, although the negligence of a driver in attempting to cross a railway track is not imputable to his wife while riding with him, she will be held to the duty of exercising ordinary care. *Galveston, H. & S. A. R. Co. v. Kutao*, 73 Tex. 643.

No reference is made in this case to a prior decision, that a wife is chargeable with the negligence of her husband, with whom she is riding behind an ox team approaching a railroad crossing. *Gulf C. & S. F. R. Co. v. Greenlee*, 62 Tex. 344. In this earlier case the court did not discuss the relation of the parties, or base the decision upon it.

Again, in a Wisconsin case which held that a wife injured because of a defective street while riding with her husband is chargeable with his contributory negligence, no distinction was made between a wife and other persons riding with the driver. 14 L. R. A.

Prideaux v. Mineral Point, 43 Wis. 513, 28 Am. Rep. 558.

In a similar case in Vermont the decision was the same, and the court says: "She was under the care of her husband, who had the custody of her person and was responsible for her safety; and any want of ordinary care on his part is attributable to her in the same degree as if she were wholly acting for herself." But the court also says: "There is nothing in the marital relation which will change the situation of the wife in respect to her husband's negligence under such circumstances," and declares that the same consequences would have followed if the relation had been that of parent and child, master and servant, or if she had been an entire stranger carried as a passenger gratuitously. *Carlisle v. Sheldon*, 33 Vt. 440.

A husband's knowledge of the vicious character of a horse driven by him, and which became frightened and ran away, is the knowledge of his wife, who is injured thereby while riding with him. *Huntton v. Trumbull*, 2 McCrary, 314.

This declaration was made without any discussion of the point in a charge to a jury, and would seem to be about the same as an imputation to her of the husband's negligence; but the relationship was not mentioned as an element in the case; and the court also said that the viciousness of the horse, whether known to either of them or not, if it actually contributed to the runaway, would defeat any liability for leaving machinery in the street by which the horse was frightened. *Ibid.*

A case very similar in facts, but clearly distinguishable and not fairly to be regarded as in conflict with the main case, decides that where the right to damages for injury to the wife while riding with her husband is community property, and she cannot sue alone for such injuries, the contributory negligence of the husband will bar their joint right of action for negligence of a third person. *McFadden v. Santa Ana, O. & T. St. R. Co.* 11 L. R. A. 252, 37 Cal. 464.

B. A. R.

Rep. 110, 108 Ind. 81; *Indiana, B. & W. R. Co. v. Greene*, 8 West. Rep. 888, 106 Ind. 279; *St. Louis & S. E. R. Co. v. Mathias*, 50 Ind. 65; *Toledo, W. & W. R. Co. v. Shuckman*, 50 Ind. 42; *Pittsburgh, C. & St. L. R. Co. v. Martin*, 83 Ind. 485; *Indianapolis & C. R. Co. v. McClure*, 26 Ind. 870.

If anything at the time obstructs the sight or sound, making it peculiarly dangerous, such a person must approach the crossing with a degree of caution much above that which would be required if there were no intervening obstacles to the view or hearing, using "the most rigid prudence and extraordinary caution" before going on the track where a train may come.

Cincinnati, H. & I. R. Co. v. Butler, 1 West. Rep. 110, 108 Ind. 85; *Indiana, B. & W. R. Co. v. Greene*, 8 West. Rep. 888, 106 Ind. 282, 283, and cases cited *infra*.

When it appears on the undisputed facts, as matter of common knowledge and experience, that such a person was not in the exercise of such care at the time he was struck on such a crossing by a passing train, as matter of law the verdict must fall.

Wheelwright v. Boston & A. R. Co. 135 Mass. 220; *Tully v. Fitchburg R.* 134 Mass. 500; *Woodard v. New York, L. & W. R. Co.* 9 Cent. Rep. 293, 106 N. Y. 869; *Pennsylvania R. Co. v. Righter*, 42 N. J. L. 180; *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615, 20 L. ed. 224; *Poella v. Michigan Cent. R. Co.* 54 Mich. 273.

The question of imputed negligence on the precise facts of this case has not been adjudicated in Indiana, so far as we have been able to find. Adjudications upon the analogous relation of parent and child and guardian and ward have been passed upon, and the doctrine of imputed negligence ably declared, and we see no logic or reason for declaring a different doctrine between husband and wife.

See *Indianapolis v. Emmelman*, 6 West. Rep. 566, 108 Ind. 583; *Pittsburgh, Ft. W. & C. R. Co. v. Vining*, 27 Ind. 514.

The precise question was directly presented and passed upon in the case of *Joliet v. Seward*, 86 Ill. 402, 29 Am. Rep. 35. In this case the city requested the trial court to instruct the jury as follows: "If the injury to plaintiff was caused by the negligence of her husband, in whose care she was, she could not recover."

The instruction was refused.

On appeal, the Supreme Court says: "The instruction contains a correct principle of law, and if there was sufficient evidence on which to base it, and we are inclined to think there was, it ought to have been given. Plaintiff had placed herself in the care of her husband and submitted her personal safety to his keeping."

See also *Hunton v. Trumbull*, 2 McCrary, 315; *Pock v. New York & N. H. & H. R. Co.* 50 Conn. 379; *Carlisle v. Sheldon*, 38 Vt. 440; *Shearm. & Redf. Neg.* 46; *Yahn v. Ottumwa*, 60 Iowa, 429; *Tufree v. State Center*, 57 Iowa, 588.

It is therefore urged first, that the Supreme Court of Indiana has wisely declared the doctrine of imputable negligence where the rela-

tion of parents and child or guardian and ward prevails.

It is the only legitimate outgrowth of that relationship. The relationship makes the father and guardian the protector of the child and ward. The obligation of the husband to care for and protect his wife is even stronger than the obligation which compels him, both in morals and law, to care for and protect his child. The decisions of sister states are in accord with each other and with the rule, so far as announced in Indiana.

There is a class of cases adjudicated in Indiana, which are not in point on the facts of this case, which hold that the negligence of a driver, who is a mere third party, will not be imputed to the passenger.

Brannen v. Kokomo G. & J. Gravel R. Co. 14 West. Rep. 837, 115 Ind. 115; *Albion v. Hetrick*, 90 Ind. 545; *Knightstown v. Mugrove*, 116 Ind. 121.

There is only one case which, at first blush, seems to declare a different rule.

Hoag v. New York Cent. & H. R. R. Co. 111 N. Y. 199.

Mr. John H. Gould, for appellee:

The paper filed was no motion at all. It merely announces that the appellant "files motion;" but where is it? And for whom is judgment asked? No question was presented by such a paper.

Toledo, W. & W. R. Co. v. Craft, 62 Ind. 395;

Salander v. Lockwood, 66 Ind. 285.

The appellant contends that if the deceased was free from fault, the husband was not, and that his negligence must be imputed to the deceased. Such is not the law in this State.

Terre Haute & I. R. Co. v. McMurray, 98 Ind. 358; *Michigan City v. Boeckling*, 122 Ind. 39.

The doctrine of *Thorogood v. Bryan*, 8 C. B. 115, is completely exploded both in England and America.

The Bernina, L. R. 12 Prob. Div. 58.

The courts of Wisconsin, Iowa, Vermont, and Connecticut still adhere to the exploded doctrine of *Thorogood v. Bryan*, 8 C. B. 115.

30 Cent. L. J. 50.

In all the other States, where the question has been considered, the principle has been pronounced wholly indefensible.

Counsel for the appellant urge that there is some mysterious element in the marriage relation that requires the court to impute the assumed negligence of the husband to the wife. This is not true. The appellant's position is without foundation, without following *Thorogood v. Bryan*, 8 C. B. 115, and the rule urged by the appellant has never been held to be the law except where that case is followed.

Platz v. Cohoes, 89 N. Y. 219; *Hoag v. New York Cent. & H. R. R. Co.* 111 N. Y. 199; *Davis v. Guarnieri*, 13 West. Rep. 438, 45 Ohio St. 470.

McBride, J., delivered the opinion of the court:

Suit by the appellee, as administrator of the estate of Matilda McChintic, who was killed on a highway crossing by one of the appellant's locomotive engines.

The complaint charges, in substance, that

the decedent's death was caused by the actionable negligence of the appellant in this,—that appellant had allowed a hedge, together with trees, bushes, and weeds to grow along the line of its track and adjacent to said crossing, to such height and so densely that for a long distance all view of the track was cut off from persons on the highway; that the same obstructions, together with buildings erected along and near its track, tended to deaden and cut off the sound of approaching trains; that employés of appellant, in charge of and operating said locomotive engine and drawing a train of cars, ran the same upon and over said crossing at a speed of thirty miles an hour, without having given the signals required by statute; that the decedent, with her husband was traveling along said highway in a buggy; that they were at the time passing over said crossing, using due care and guilty of no negligence, and were struck by said locomotive, and decedent was killed. Verdict for the appellee. With the verdict the jury returned answers to forty-six interrogatories propounded by the appellant. The appellant moved for a judgment on the answers to interrogatories notwithstanding the general verdict. This motion was overruled and this ruling presents the only question in the record. The appellee contends that the motion was fatally defective and does not raise the question argued. The record entry of the motion is as follows:

Comes now the defendant, and moves the court for a judgment upon the answers of the jury to the interrogatories submitted notwithstanding the general verdict, which motion is in these words:

State of Indiana }
Carroll County, } ss.

In the Carroll Circuit Court, May Term, 1889.

Creek, Admr. *McClintic*.

vs.

L. N. A. & C. Ry. Co.

The defendant files motion for judgment on the answers to interrogatories, notwithstanding the general verdict for plaintiff.

This motion was in writing and was signed by counsel for the appellant. Counsel for the appellee say: "We submit that it is no motion at all. It merely announces that the appellee files motion, but where is it? And for whom is judgment asked? No question was presented by such a paper. Besides, as the appellant did not move for a judgment in its favor, it is not injured by the court's ruling."

The motion is certainly lacking in formality and in certainty. Rules of practice and procedure are necessary for the orderly conduct of litigation, and as aids in the administration of justice. It is no hardship to require of litigants substantial conformity to reasonable rules. It is possible, however, by an over rigid and strict enforcement of the rules of practice, to make them hindrances to the doing of justice, rather than aids. When a substantial controversy in fact exists between parties, which is so presented that the court can apply the law and adjust their rights, it would not be in accordance with the spirit of an enlightened jurisprudence to refuse to do so

merely because of some slight informality, or a failure by one party to comply strictly with the rules of practice, in matters where the informality or omission will not work injustice or impose any hardship upon the opposite party. Thus applied, most beneficent rules might often serve as intrenchments for injustice.

In our opinion, notwithstanding the informality and lack of precision and certainty in the motion, it is sufficient as a motion by the appellee for a judgment in its favor, and it is our duty to consider the questions thus presented.

The motion for a judgment *non obstanti* is based upon the grounds: (1) that the answers to interrogatories show that the appellee's decedent was guilty of contributory negligence; (2) that if this is not true, they do show that the husband of the decedent, with whom she was riding at the time she was killed, was guilty of negligence, and that his negligence should be imputed to her, and precludes a recovery by her administrator.

A motion for a judgment on special findings, notwithstanding the general verdict, should only be sustained when the special findings and the general verdict cannot be reconciled with each other, under any supposable state of facts provable under the issues. *Stevens v. Loganport*, 76 Ind. 492; *Pittsburgh, C. & St. L. R. Co. v. Martin*, 82 Ind. 476; *Higgins v. Kendall*, 78 Ind. 522; *Louthain v. Miller*, 85 Ind. 161; *Amidon v. Gaff*, 24 Ind. 128; *Shoner v. Pennsylvania Co. (Ind.)* 28 N. E. Rep. 616; *Poseyville v. Lewis*, 126 Ind. 81; *Cincinnati, H. & I. R. Co. v. Clifford*, 113 Ind. 460, 13 West. Rep. 384.

The court will not presume anything in aid of the special findings, but will make every reasonable presumption in favor of the general verdict. *Pittsburgh, C. & St. L. R. Co. v. Martin*, *supra*; *Shoner v. Pennsylvania Co. supra*; *Poseyville v. Lewis*, *supra*, and cases cited.

As above stated, the special findings were forty-six in number. They were also long, and no good purpose would be subserved by incorporating them into this opinion. After a careful examination, we are of the opinion that no specific fact is found which would justify us in disregarding the general finding that she was free from contributory negligence, necessarily embraced in the general verdict.

The principal argument of appellant's counsel is directed to the question of imputed negligence. Their position is, that because of the relations existing between husband and wife, and because of his duty to care for and protect her, if a wife places herself in her husband's care, by riding in a conveyance driven or controlled by him, and he is guilty of negligence in the control or management of the conveyance, his negligence is her negligence. If she is at the same time hurt by the negligence of another, being herself entirely free from fault, yet if the husband's negligence contributes to her injury, his negligence will be imputed to her, and she cannot recover.

We cannot sanction this doctrine. It was expressly repudiated by this court in the case of *Miller v. Louisville, N. A. & C. R. Co.* 128 Ind. 97.

There are cases where the negligence of one person will be imputed to another; but, as stated in the case last cited, the extreme doctrine has never been sanctioned by this court. See also *Michigan City v. Boeckling*, 122 Ind. 39.

The extent to which the doctrine of imputable negligence is recognized in this State is thus stated by Mitchell, J., in *Knightstown v. Musgrove*, 116 Ind. 121, 124: "Before the concurrent negligence of a third person can be interposed to shield another, whose neglect of duty has occasioned an injury to one who was without personal fault, it must appear that the person injured and the one whose negligence contributed to the injury sustained such a relation to each other, in respect to the matter then in progress, as that in contemplation of law the negligent act of the third person was, upon the principles of agency or co-operation in a common or joint enterprise, the act of the person injured. Until such agency or identity of interest or purpose appears, there is no sound principle upon which it can be held that one who is himself blameless, and is yet injured by the concurrent wrong of two persons, shall not have his remedy against one who neglected a positive duty which the law imposed upon him."

The court in the same case further says: "When one accepts the invitation of another to ride in his carriage, thereby becoming" in effect his comparatively passive guest, without any authority to direct or control the conduct or movements of the driver, or without reason to suspect his prudence or competency to drive in a careful and skillful manner, there is no reason why the want of care of the latter should be imputed to the former, so as to

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deprive him of the right to compensation from one whose neglect of duty has resulted in his injury."

We can see no good reason why the foregoing statement does not apply to a wife riding with her husband, with as much reason as to a stranger riding with him; nor why she may not be in such case a mere passive guest, without authority to direct or control his movements, and without reason to suspect his prudence or his skill. A husband and wife may undoubtedly sustain such relations to each other in a given case that the negligence of one will be imputed to the other. The mere existence of the marital relation, however, will not have that effect. In our opinion, there would no more reason or justice in a rule that would in cases of this character inflict upon a wife the consequences of her husband's negligence, solely and alone because of that relationship, than to hold her accountable at the bar of Eternal Justice for his sins because she was his wife.

In the case at bar the complaint contains the following averment: " . . . her said husband driving said horse and managing and controlling said horse and buggy, the said Matilda having no control of her said husband, and no control or management of said horse and buggy."

In aid of the general verdict it will be presumed that this averment was sustained by the evidence. It is unnecessary to express any opinion as to the effect of the special findings in showing negligence on the part of the husband. As the case comes to us, it is not material whether he was negligent or not.

Judgment affirmed, with costs.

NEBRASKA SUPREME COURT.

Nettie E. DAVIS, Admx., etc., of Daniel
C. Davis, Deceased, *Ptff. in Err.*,
v.
Alanson E. HOUGHTELIN *et al.*

(.....Neb.....)

***A master is liable to third persons for damages resulting from the negligence of his servants, only when the latter is acting within the scope of his employment.**

(December 18, 1891.)

ERROR to the District Court for Jefferson County to review a judgment in favor of defendant in an action brought to recover damages for wrongfully causing the death of plaintiff's decedent. *Affirmed.*

*Head note by NORVAL, J.

The facts are stated in the opinion.
Mr. John Saxon for plaintiff in error.
Messrs. W. O. Hambel and Marquett,
Deweese & Hall for defendants in error.

Norval, J., delivered the opinion of the court:

This is a proceeding in error to reverse the judgment of the District Court of Jefferson County, sustaining a general demurrer to the petition of the plaintiff, and dismissing the action. The petition alleges: "(1) That she is administratrix of the estate of Daniel C. Davis, deceased, duly appointed according to law. (2) That the defendants are partners in trade, doing business as such at Fairbury, in said county, under the firm name and style of Houghtelin & McDowell. (3) That on or

NOTE.—Liability of master for assaults by servants.

The doctrine of the earlier cases was that the master was not liable for the willful wrongful act of his servant, "but the better and more modern rule clearly is that the mere nature of the act is not the only criterion, but that the most important test is whether the act was done in the course of the employment." *Mechem, Agency*, § 741, p. 580; *Isaacs v. Third Ave. R. Co.* 47 N. Y. 122, 7 Am. Rep. 418.

Where a servant willfully whipped up his master's horses as he saw a small boy about to climb into the wagon, throwing the latter down and injuring him, the master cannot be held liable. *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507.

For a willful and malicious assault by defendant's overseer upon the plaintiff's slave temporarily employed by the defendant, which was not necessary in executing defendant's orders, the latter is not liable. *McCoy v. McKowen*, 28 Miss. 487, 59 Am. Dec. 264.

A railroad company is not liable for an assault committed by its flagman stationed at a highway crossing, where he went outside of the limits of the highway and indulged in an altercation upon the company's right of way from which the assault resulted. *Illinois Cent. R. Co. v. Roess*, 31 Ill. App. 170.

A master sending his servant to take possession of furniture forfeited to him by nonpayment of the price is liable for a willful assault by the servant committed in getting the property. *Levi v. Brooks*, 121 Mass. 501.

Instructions to an employé not to commit an assault when sending him to get an organ which is in the possession of another, knowing that the errand is likely to excite indignation and resistance, will not relieve the employer from liability for a wrongful assault by the employé while engaged in the business of seizing and carrying away the organ. *McClung v. Dearborne*, 8 L. R. A. 304, 134 Pa. 203.

A railroad company which by force took possession of a line of road in the peaceable possession and control of another company is liable to an employé of the latter company for an assault upon him by its servants in thus taking possession. *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 30 L. ed. 1146.

Where a trespasser, with the assistance of his servant, was maintaining his entry and possession by force, he is liable for an assault by the servant upon the owner committed in effecting their common purpose, notwithstanding previous directions to the servant not to commit an assault. *Barden v. Felch*, 109 Mass. 154.

A landlord, who places a writ for the removal of

a tenant in the hands of an officer, is not liable for an assault committed by the officer in executing the writ. *Sutherland v. Ingalls*, 6 West. Rep. 389, 63 Mich. 620.

A drayman sent by a purchaser to get some goods from defendants' warehouse objected to receiving certain damaged packages and was assaulted by an employé of the defendants sent to superintend the delivery of the goods. It was held that the defendants were not liable for such assault, as the employé was acting outside of the scope of his authority. *Meehan v. Morewood*, 52 Hun. 568.

Plaintiff went into defendant's store to purchase an ulster, and having tried on one, defendant's floor-walker approached and accused him of being a spy from a rival store, and directed the saleswoman to take the garment off the plaintiff. Held, that an assault was committed for which the defendant was liable. *Geraty v. Stern*, 30 Hun. 423.

A canal company is not liable for an assault by its lock keeper upon a boatman passing through the lock, committed under the pretext that he had not paid his toll, none having been demanded of him. *Ware v. Barataria & L. Canal Co.* 15 La. 169.

The mate of a steamer suspecting plaintiff, who was a roustabout on that boat, of tampering with some whiskey on board, threw a missile and struck plaintiff in the eye. Held, that as it was no part of the mate's duty to act as watchman of the merchandise, the owners of the boat were not liable. *Dyer v. Riley*, 28 La. Ann. 6.

A packet company is not liable to a "rouster" employed to assist in unloading freight under the direction of the mate of a boat, for the blows struck by the mate, arising out of a dispute, because the mate required the "rouster" to work faster. *Smith v. Memphis & A. C. Packet Co.* (Tenn.) June 5, 1893.

Where the conductor of a railway train stops his train and pursues a boy with a pistol into his father's house, seizes the boy and carries him off on the train, the railway company is not liable, unless it authorizes or ratifies such acts. *Gilliam v. South & N. A. R. Co.* 70 Ala. 268.

A railway company is not liable for injuries received by a bystander, whom the engineer by threats of personal violence has compelled to uncouple cars. *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 Miss. 112.

By carrier's servants upon passengers.

Assaults committed by the carrier's servants while ejecting either passengers or trespassers from its carriages and premises are not included in this note. The liability for such assaults will be treated in a future note.

about the 28th day of March, A. D. 1888, said defendants were in the possession of certain premises at Fairbury, in said county, whereon they were engaged in the business of feeding cattle and hogs, and had, upon said premises, a quantity of feed and provender for said cattle and hogs; and plaintiff says defendants also kept and employed, in and about their said business, a certain servant and agent, one Allen Ireland, by name, for the purpose of guarding said feed, and whose business it was, in the due course of his employment by said defendants, to seize and detain persons who might be found disturbing such feed so provided by defendants. (4) That on said day the said Daniel C. Davis, then in full health and life, had occasion to go and be upon said premises of said defendants, and she says that while so there the said defendants, by their

servant and agent, Ireland, who was then and there present, and acting for said defendants in the due course of his employment as aforesaid, and pursuant to his instructions and orders, attempted to seize and detain, without any lawful process or warrant, the said Daniel C. Davis, deceased; and plaintiff avers that said defendants and their said servant so negligently, carelessly, and unlawfully managed their said business and attempt that the said Daniel C. Davis was then and there shot through his heart with a bullet from a pistol then and there negligently, carelessly, and unlawfully had and held in the hands of defendants' said servant, said Ireland, and said Daniel C. Davis was then and thereby instantly killed. (5) Plaintiff avers that the death of said Daniel C. Davis, as aforesaid, was caused by the wrongful and unlawful act, neglect,

1. During transportation.

a. Generally.

Because of the contractual relation between a carrier and its passengers the former is liable for every unjustifiable assault upon the latter by its servants in charge of their transportation. *Louisville & N. R. Co. v. Whitman*, 79 Ala. 323; *Sherley v. Billings*, 8 Bush, 147, 8 Am. Rep. 451; *Wabash R. Co. v. Savage*, 6 West. Rep. 298, 110 Ind. 156; *St. Louis, A. & C. R. Co. v. Dalby*, 19 Ill. 353; *Goddard v. Grand Trunk R. Co.* 57 Me. 202, 2 Am. Rep. 39; *Conger v. St. Paul, M. & M. R. Co.* 45 Minn. 207; *Ricketts v. Chesapeake & O. R. Co.* 7 L. R. A. 354, 33 W. Va. 43; *Stewart v. Brooklyn C. R. Co.* 90 N. Y. 588, 43 Am. Rep. 185.

The last case practically overrules *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122, 7 Am. Rep. 418, which held that the street-car company was not liable for the act of the conductor in pushing from the platform while the car was in motion a passenger who wished to alight on the ground; that it was without the scope of his authority.

In *Stewart v. Brooklyn C. R. Co.*, *supra*, the court says that it was not called to the mind of the court in the *Isaacs* case that the liability of the master is different where the master owes a duty to the person wronged by the servant.

A brakeman who kicks a person as the latter is attempting to board a moving train renders the company liable for the injuries resulting from his act. *Molloy v. New York Cent. R. Co.* 10 Daly, 463.

A railroad company cannot be made liable for an assault upon a passenger by mere evidence that the assailant carried a lettered lantern and wore a badge and a lettered cap, it not appearing that he was in any way connected with the operation of the train. *Sachrowitz v. Atchison, T. & S. F. R. Co.* 37 Kan. 212.

The drenching of a passenger with water, either negligently or willfully, is a breach of the carrier's duty to carry safely, and it is immaterial, upon the question of the company's liability, whether it resulted from the fault of the brakeman or conductor, or of both of them. *Terre Haute & L. R. Co. v. Jackson*, 81 Ind. 19.

A person desiring to become a passenger upon a freight train, entered the caboose and the conductor or insolently refused to carry him, and struck him with his lantern. Held, that the railroad company was liable. *Western & A. R. Co. v. Turner*, 72 Ga. 292, 53 Am. Rep. 842.

A railroad company is liable for wanton conduct of its conductor in embracing and kissing a female passenger against her will. *Oraker v. Chicago & N. W. R. Co.* 10 Wis. 697.

A street-railway company is liable for an assault by a driver upon a passenger, committed for the 14 L. R. A.

purpose of procuring him to pay his fare, which the latter claimed to have once paid. *Malecek v. Tower Grove R. Co.* 57 Mo. 17.

Where a railway conductor, to enforce the payment of fare, wrecks from a passenger her parasol, the company is liable for assault and battery. *Ramsden v. Boston & A. R. Co.* 104 Mass. 117, 6 Am. Rep. 200.

Where a passenger on a street-car by mistake put too much fare in the box and was reimbursing himself by collecting fares from incoming passengers, and the driver removed him from the car for so doing, the driver is guilty of an assault for which the railroad company is liable. *Corbett v. Twenty-Third St. R. Co.* 42 Hun, 567.

Carriers of passengers by water are under the same liability as those by land for assaults by their servants. *Block v. Bannerman*, 10 La. Ann. 1; *R. R. Springer Transp. Co. v. Smith*, 16 Lea, 493.

In *Nieto v. Clark*, 1 Cliff. 145, Clifford, J., says, that passengers on shipboard contract "for protection against personal rudeness from all those in charge of the vessel and every wanton interference with their persons." This case was, however, an action by a steward for being discharged in a foreign port, on account of a charge against him by a lady passenger of attempting to commit a rape upon her.

In *Pendleton v. Kinsley*, 3 Cliff. 416, the plaintiff offered to purchase a ticket for his passage upon defendant's steamboat when he embarked, but the clerk refused to change the bill which he offered in payment, and later, upon refusal to pay his fare, the clerk assaulted plaintiff and removed him to another part of the boat. It was held that, although the plaintiff could have been removed from the boat for his refusal to pay, yet the carrier was liable for the assault upon him while he was permitted to remain.

b. Effect of passenger's misbehavior.

Where a passenger by his own misbehavior, while being transported, provokes a personal encounter between himself and one of the carrier's employees, the carrier is not liable. *Scott v. Central Park, N. & E. R. Co.* 58 Hun, 414.

Where the steward and waiters of a steamboat were treating with rudeness a relative of a passenger, and the latter interfered by a proper remark, and was assaulted by them, their employer is liable. *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 301.

A railway passenger, having lost his watch, accused a brakeman of having taken it, and thereupon the brakeman struck him. Held, that the railroad company was liable for the assault. *Chicago, & E. R. Co. v. Flexman*, 106 Ill. 548, 43 Am. Rep. 38.

Where, a passenger and a brakeman having had

and default of said defendants, and without any just or sufficient cause, provocation, or fault on the part of the said decedent; that they, said defendants, knowingly and intentionally employed said Ireland for the purpose of assaulting and attempting to detain, without process or warrant, persons who might go upon their said premises as aforesaid; and that they well knew that their said servant, Ireland, was so armed with said pistol in their said employment, and was likely to so negligently, carelessly, and unlawfully use the same in and about their said business and employment, and that great personal injury and damage, or loss of life, was liable to ensue thereby and therefrom, yet they, said defendants, notwithstanding, did not and would not prevent and forbid their said servant, but did carelessly, negligently, and unlawfully permit him in the premises,

contrary to their duty in that case. (6) Plaintiff further states that said Daniel C. Davis, deceased, left surviving him his widow, this plaintiff, and the following named children, his next of kin and heirs, to wit: Albert L. Davis, aged 17 years; Georgie Davis, aged 14 years; May Davis, aged 12 years; Ella Davis, aged 10 years; Stella Davis, aged 8 years; and Emory Davis, aged 2 years,—all residents of the same county; and she says that they have sustained damages by reason of the wrongful act, neglect, and default of defendants, as aforesaid, in the sum of five thousand (\$5,000) dollars."

This is an action to recover damages for the killing of plaintiff's intestate by one Allen Ireland, who, it is alleged, was at the time in the defendants' employ. The general principle that a master is liable for injuries to third per-

an altercation and a personal encounter over the removal of the passenger's dog from the car, the brakeman afterwards assaulted the passenger with a poker, the railroad company is liable for the injuries so inflicted. *Hanson v. European & N. A. R. Co.* 62 Me. 84, 16 Am. Rep. 404.

A railroad company is liable for an assault by its conductor upon a passenger on its train, notwithstanding opprobrious language was used by the passenger to the conductor (*Coggins v. Chicago & A. R. Co.* 18 Ill. App. 620); and for an assault by one of its employees upon a person who has entered a car to become a passenger, although without a ticket. *Illinois Cent. R. Co. v. Sheehan*, 29 Ill. App. 90.

A street-railway company is liable for the act of a driver of a car in wrongfully throwing a passenger off from the front platform, the former having been angered because the passenger rang up the conductor. *Lyons v. Broadway & S. A. R. Co.* 32 N. Y. S. R. 232.

c. Insults, threats, obscene language.

A street railway company is liable to a passenger for insults and defamation inflicted upon him by the driver of the car. *Lafitte v. New Orleans City & L. R. Co. (La.)* 12 L. R. A. 387.

A railroad company is not liable to a passenger because the conductor used insulting language to him in a dispute arising between them over the failure of the train to stop at the station for which the conductor had taken the passenger's ticket. *Parker v. Erie R. Co.* 5 Hun, 57.

A railroad company is liable for the abusive language used by its servant in the scope of his employment to a passenger whom he has falsely caused to be imprisoned. *Fahner v. Manhattan Elev. R. Co.* 39 N. Y. S. R. 23.

A ship-owner is liable to a female passenger for ill treatment by the master, consisting of habitual obscenity, immodest conduct and confinement to her cabin by threats of personal injury and of refusal to give her proper food. *Chamberlain v. Chandler*, 3 Mason, 242; *Keene v. Lizardi*, 5 La. 431, 6 La. 315.

Where a brakeman refused to allow a passenger to pass out of one car into the next while the train was in motion, there being no rule of the company forbidding such passing, the railroad company is liable for opprobrious language and an assault by the brakeman during an altercation arising out of such refusal. *Atlanta & W. P. R. Co. v. Condon*, 75 Ga. 51.

2. At stations; before and after transportation.

A carrier is not responsible for a personal assault by its servant upon a passenger after the latter's removal from the carriage has been effected. *Eads v. Metropolitan R. Co.* 43 Mo. App. 536.
14 L. R. A.

A street-railway company is liable to a passenger for a battery by a conductor committed first on the car and repeated shortly afterwards at the office of the superintendent, whether the passenger had gone to make complaint to the superintendent. *Savannah St. & R. R. Co. v. Bryan (Ga.)* Nov. 21, 1890.

A passenger on a street-car, having been insulted by the driver, replied that he should report him, and left the car, to proceed a short distance forward to the company's office and stables, where the car would stop to change horses, but without telling the driver of his intention to resume his journey on the car. The driver before reaching the stables, left his car and assaulted the plaintiff. Held, that the plaintiff had ceased to occupy the relation of a passenger, and that the company was not liable. *Central R. Co. v. Peacock*, 69 Md. 257.

A street-railway company is liable for an assault by its driver upon a passenger after the latter had left the car, on account of insults by the driver, where the assault was a direct continuance of the abuse begun on the car. *Wise v. Covington & C. St. R. Co. (Ky.)* 13 Ky. L. Rep. 110.

Where the conductor of a train called a passenger outside the car at an intermediate station and assaulted him, the railroad company was held liable. *Peebles v. Brunswick & A. R. Co.* 60 Ga. 281.

A railroad company is liable for assaults by its employees upon persons upon its premises for the purpose of getting baggage checked, as well as upon passengers on its cars. *Gasway v. Atlanta & W. P. R. Co.* 58 Ga. 216.

Where an intending passenger, by importuning a baggageman to check his baggage, and by violent language, provoked a personal quarrel, during which the baggageman struck him, the carrier is not liable for such assault. *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110.

Where the ticket agent of a carrier failed and refused to return the proper change to the purchaser of a ticket, and when the latter importuned him for the same came out and assaulted him, the carrier is liable. *Fiek v. Chicago & N. W. R. Co.* 63 Wis. 460.

For an assault committed by its servants at a station upon an intending passenger, arising out of the production of his ticket, after which it was the duty of the servant to look, the company is liable. *Smith v. South Eastern R. Co.* 39 L. J. C. P. 349.

A railroad company is liable for the act of its porter in pulling a passenger out of a carriage under the erroneous impression that he was embarking on the wrong train, it being part of the porter's duty to see that the passengers take the right trains. *Bayley v. Manchester, S. & L. R. Co. (L. R. 7 C. P. 415, affirmed L. R. 8 C. P. 148).*

Where a brakeman stationed to prevent passen-

sons resulting from the negligence of the servant while in the line of his employment is familiar. It is equally well settled that a master is not responsible for the willful and tortious act of his servant committed outside of the scope of his employment. *Miller v. Burlington & M. R. Co.* 8 Neb. 219; *Tuller v. Voght*, 18 Ill. 277; *Oxford v. Peter*, 28 Ill. 434; *Moir v. Hopkins*, 16 Ill. 318, 63 Am. Dec. 812; *De Camp v. Mississippi & M. R. Co.* 12 Iowa, 348; *Cooke v. Illinois Cent. R. Co.* 30 Iowa, 203; *Carter v. Louisville, N. A. & C. R. Co.* 98 Ind. 552; *Noblesville & E. Gravel Road Co. v. Gause*, 76 Ind. 142; *Meehan v. Morewood*, 52 Hun, 566; *Laffitte v. New Orleans City & L. R. Co. (La.)* 12 L. R. A. 337; *Fraser v. Freeman*, 43 N. Y. 566; *Cooley, Torts*, 533 *et seq.*

The sufficiency of the petition, therefore, depends upon whether it charges that the act of killing Davis was done in the prosecution of the defendant's business, and within the

range of the servant's employment. The third paragraph of the petition charges that Allen Ireland was employed by the defendants to guard certain feed belonging to them upon their premises, and to seize and detain persons who might be found disturbing such feed. This is the only allegation of fact in the entire pleading relating to the nature and scope of Ireland's employment. As to the act of killing, it is averred, in effect, that the deceased had occasion to be upon defendants' premises, and while so there said Ireland, in attempting to seize and detain said Davis, negligently, carelessly, and unlawfully shot and killed him. There is no allegation that Davis was molesting the feed, or attempting so to do, or that it was any part of Ireland's duty to seize and arrest persons who happened to be upon the premises, except those who were there for a specified purpose. It is obvious that the averment in the fourth paragraph of the petition,

gers from entering the cars without tickets, seized, struck and thrust from the car one attempting to enter without a ticket, the brakeman and the company are jointly or severally liable for the assault. *Priest v. Hudson River R. Co.* 40 How. Pr. 456.

In *McKinley v. Chicago & N. W. R. Co.*, 44 Iowa, 314, a brakeman stationed at the door of a car to prevent gentlemen unaccompanied by ladies to enter, willfully and criminally assaulted a gentleman who attempted to enter alone. It was held that the company was liable.

The carrier is liable for a willful assault by its servant upon a person, who having been refused a ticket for alleged intoxication is leaving the station, it being a question for the jury whether the servant was acting within the scope of his employment. *McKernan v. Manhattan R. Co.* 22 Jones & S. 364.

By servants of sleeping and palace car companies.

A railway company is liable to a passenger for an assault upon him by a porter of a sleeping car of the train, committed by the porter while in the discharge of his duties. *Dwinelle v. New York Cent. & H. R. R. Co.* 8 L. R. A. 224, 120 N. Y. 117.

The railway company is liable for a willful assault by the porter of a palace car upon a passenger of one of the common coaches, who entered the palace car and asked permission to use the wash basin therein. *Williams v. Pullman P. Car Co.* 40 La. Ann. 417.

But the palace-car company is not liable for such assault. *Williams v. Pullman P. Car Co.* 40 La. Ann. 67.

A sleeping-car company is liable for an indecent assault by the porter of its car upon a female passenger occupying a berth therein. *Campbell v. Pullman P. Car Co.* 49 Fed. Rep. 484.

A passenger on a palace car has no right of action against the palace-car company for rudeness of its porter toward him which resulted from his own unreasonable and angry demands. *Pullman Palace Car Co. v. Ehrman*, 65 Miss. 383.

Where assault results in death.

A person engaged in stealing a ride on a freight train, and having been suspected of breaking into a car, was shot and killed by a brakeman. It was held that the railway company was not liable to his personal representative for such killing, whether the shooting was willfully or maliciously done, as the one killed was running away and refused to stop when halted. *Candiff v. Louisville, N. O. & T. R. Co.* 43 La. Ann. 477.

A railway company is civilly liable under § 3063 of 14 L. R. A.

the Code for a homicide committed by its station agent in a fit of mania, where it employed him with knowledge that he was subject to homicidal mania at intervals. *Christian v. Columbus & R. R. Co.* 79 Ga. 400.

Where a passenger was assaulted by a servant of the carrier and received injuries from which he died, his administrator can recover from the carrier for the physical and mental suffering of his intestate from the time of the assault up to his death. *Winnegar v. Central Pass. R. Co.* 85 Ky. 547.

Where the landlord and his servant unlawfully attempted to enter the demised premises against the resistance of the tenant, and the servant of his own motion shot the tenant, in a civil action for damages for the death so caused, it is error to refuse to charge the jury that the master is not liable if the servant fired the shot with the premeditated design to effect the death of the tenant. *Fraser v. Freeman*, 43 N. Y. 566.

Allen, J., in the last case says: "By the refusal to charge as requested, the judge held the defendant liable for the willful and malicious, as well as criminal, act of M. (the servant). There was no qualification or limitation of the responsibility of the defendant for the acts of his agents; but he was declared chargeable for everything that was done by them, whether in the course of the employment and at the instigation of the defendant, or of their own volition, to effect their own purpose, or to gratify their own malice. The law does not charge a master for the malicious act of the servant." See *Vanderbilt v. Richmond T. Co.* 3 N. Y. 63, 51 Am. Dec. 315; *Croft v. Alison*, 4 Barn. & Ald. 563.

Remedy in rem.

Under the Illinois Act of Feb. 16, 1867, providing that steamboats navigating the rivers within and bordering upon that State are liable in an action *in rem* "for any damage or injury done by the captain or mate or other officer thereof, or by any person under the order or sanction of either of them to any person who may be a passenger or hand on such steamboat," it was held that an action of trespass could be maintained against the steamboat for an assault and battery by the mate of the boat upon the passenger while such boat was navigating a river within or bordering upon that State. *Loy v. The F. X. Aubury*, 26 Ill. 412, 51 Am. Dec. 323.

Under a similar Ohio statute it is held that an action cannot be maintained against the boat for an assault committed thereon without the State of Ohio. *The Champion v. Jantsen*, 16 Ohio, 81.

— J. G. G.

that Ireland "was acting for said defendants in the due course of his employment as aforesaid, and, pursuant to his instructions and orders, attempted to seize and detain," is a mere conclusion, and not a statement of any fact, showing that the attempted seizure and detention of Davis was within the range and authority of Ireland's duties. Likewise the allegation in the fifth paragraph, that Davis' death "was caused by the wrongful and unlawful act, neglect, and default of said defendants," is the statement of a conclusion of law, which the demurrer does not admit. It is only facts that are well pleaded which are confessed by general demurrer. So far as the allegations in the petition are concerned, or the legitimate inferences to be drawn therefrom, Ireland's employment was exclusively in guarding and protecting the feed, and the wrong charged was something which his agency did not contemplate, and which he could not lawfully do in the name of the defendants. His business no more contemplated the seizure of a person who was upon the defendants' premises for a lawful purpose than it did the arrest and detention of a person lawfully passing along the public highway near the property, and in neither case would the defendants be liable for the act. The test of a master's liability is not whether a given act was done during the existence of the servant's employment, but whether it was committed in the prosecution of the master's business. As was well said by Mitchell, J., in the course of his opinion in *Morier v. St. Paul, M. & M. R. Co.*, 31 Minn. 351: "Beyond the scope of his employment, the servant is as much a stranger to his master as any third person. The master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is

guilty of negligence, in the course of his employment. A master is not responsible for any act or omission of his servant which is not connected with the business in which he serves him, and does not happen in the course of his employment; and in determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself, and his own master *pro tempore*, the master is not liable. If the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all authorities." *Golden v. Newbrand*, 52 Iowa, 59, was where a servant employed to guard a brewery shot and killed a person who had been damaging the property, but was retreating when shot. It was decided that the killing was not done in the line of the servant's duty, and that the master was not liable therefor. To the same effect is *Candiff v. Louisville, N. O. & T. R. Co.* 42 La. Ann. 477.

The fair construction of the language of the petition shows that the killing of Davis was the willful and intentional act of Ireland, committed outside of the course of his employment, and for which the defendants are not responsible. We are of the opinion that the petition fails to state a cause of action, and the demurrer was properly sustained.

The judgment is affirmed.
The other Judges concur.

PENNSYLVANIA SUPREME COURT.

Thomas L. LONG, *Appt.*,

v.

PENNSYLVANIA R. CO.

(.....Pa.....)

- 1. Negligence is not presumed in case of loss of property in the hands of a carrier**, by a flood which is so unprecedented as to be properly considered an act of God or inevitable accident.
- 2. The Johnstown flood of 1889, which was of such extraordinary character that a party was not bound to anticipate or provide against it**, and which came with such suddenness and power that escape from it was impossible, was an inevitable accident or act of God in respect to the loss of baggage on a railroad train, where the utmost care was exercised by the agents and employees of the carrier to escape the dangers of which they had knowledge or reasonable ground of apprehension.

(February 1, 1892.)

NOTE.—For note on act of God as an excuse for a carrier's failure to perform its contract, see *Elythe v. Denver & R. G. R. Co.* (Colo.) 11 L. R. A. 615.
14 L. R. A.

APPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 4, for Philadelphia County, in favor of defendant in an action brought to recover the value of certain trunks and their contents which were delivered to defendant for transportation but never received back from it. *Affirmed.*

The facts are stated in the opinion.

Mr. D. Webster Dougherty, for appellant:

The train remained in the place where the flood struck it for five hours and a half before the flood came.

It was developed by the cross-examination of defendant's own witnesses that the dam seventy or eighty feet high, 400 feet wide at the narrowest point, a half a mile at the widest and two miles in length, was known to the defendant's officials to be breaking nearly four hours before the train was destroyed. That the train was in the direct course of the flood when the final break would take place, and that it could have been moved beyond Johnstown to a place of safety, and, further, that all these facts were known to the yard-master at Conemaugh, in whose care the train then was,

for over two hours before [the destruction of the train.

Defendant's testimony failed to establish that the breaking of the dam and the consequent flood was the "act of God."

A common carrier is a virtual insurer against all risks of loss or injury, save those by the act of God and the public enemy.

Schouler, Bailm. 8-6.

Even if the breaking of the dam was the "act of God," the defendant cannot be released from responsibility if it failed to exercise the care and skill required under the extraordinary circumstances with which it was confronted.

When a common carrier discovers itself in peril by inevitable accident, the law requires it to exercise extraordinary care, skill and foresight. In great danger, great care is the ordinary care of prudent men.

Morrison v. Davis, 20 Pa. 177, 57 Am. Dec. 695.

If the carrier show cause which the law admits to be sufficiently serious to be called inevitable, the law demands that he shall complete his excuse by showing that in the midst of the danger he exerted all the skill and care he could to avoid it.

Hays v. Kennedy, 41 Pa. 884, 80 Am. Dec. 627.

It was purely a question for the jury to say whether the defendant had established the necessary facts to its satisfaction.

Pennsylvania R. Co. v. Miller, 87 Pa. 399; *Pennsylvania R. Co. v. Weiss*, 87 Pa. 447; *Spear v. Philadelphia, W. & B. R. Co.* 11 Cent. Rep. 643, 119 Pa. 61; *Kelly v. McGhee*, 187 Pa. 443.

Mr. David W. Sellers, for appellee:

The carrier is not liable for loss or damage caused by the act of God. The act of God is natural necessity. Accidents produced by physical causes which are irresistible, as, for example, winds and storms or a sudden gust of wind, by lightning, inundations, or earthquake, sudden death or illness, are occasioned by the act of God, and the carrier is excused.

Chitty, Common Carriers, p. 36; *Coggs v. Bernard*, 2 Ld. Raym. 909, 1 Smith, Lead. Cas. 5th Am. ed. pp. 315-318, note.

Williams, J., delivered the opinion of the court:

This is what, under the practice prior to 1887, would have been called an "action of trover." It is brought to recover the value of two trunks and their contents, delivered to the defendant Company in Cincinnati for transportation to Washington. When the plaintiff presented his baggage checks at the defendant's station in Washington, and asked for his trunks, they were not delivered. This action was then brought. The course of the trial is shown by the opening paragraph in the printed argument of the appellant. It is as follows: "It was conceded by the defendant that plaintiff's goods were duly received by it, to be forwarded from Cincinnati to Washington; and it was conceded by the plaintiff that the goods were on the day express, which was destroyed by the flood from the South Fork dam, at Conemaugh, on May 31st, 1889." It only remained for the plaintiff

to show the value of his goods in order to complete his case. For the defendant it was necessary to supplement the admission by proof showing that the flood was of such extraordinary character that it was not bound to anticipate or provide against it; and that it came with such suddenness and power that escape from it was impossible. Several witnesses were called by the defendant for this purpose. They repeated the story of the great rain-storm that preceded the bursting of the South Fork dam; of the rapidly rising river, spreading beyond its banks, and inundating portions of the city of Johnstown; of landslides and other difficulties that beset the movement of trains; of the running of the ill-fated day express into the yard at Conemaugh for safety, and to await orders; and then of the appalling wall of water that came moving down the narrow valley, sweeping away whatever was in its path, trees and dwellings, mills and factories, engines and cars, with a fury that was absolutely resistless. The officers and agents of the defendant at Pittsburgh and at Johnstown and Conemaugh, on whom the movement of trains depended, were called, and testified to the precautions taken to guard against accident to the trains under their control. They told of the information that came to them, of the dangers they knew to exist, and those they apprehended as probable, and what efforts they made to escape them and secure safety for their passengers, their employes, and the freight with which their cars were laden. It was not denied on the trial, and it could not be upon the evidence before us, that these officers and agents did what they fully believed was the best thing to do, as they understood the situation. Not a witness was called by the plaintiff to testify to any act or omission by the defendant's agents or employes from which want of care could be incurred, but the case was left where the testimony of the defendant's witnesses left it. There was, then, no question of credibility to be settled, and no conflict in the evidence. The case depended on the effect of the admissions and the uncontroverted testimony. The defendant admitted the contract to carry, and the receipt of the goods, and excused the non-delivery by showing their destruction in a flood of such unprecedented character as it could neither be expected to foresee nor provide against. This made a complete defense, and it was proper for the judge to say so; and, as no single fact in the series was controverted, it was right for him to direct the verdict.

But the able counsel for the plaintiff insists that in this case there was a legal presumption of negligence in the carrier that took the question to the jury under the authority of *Spear v. Philadelphia, W. & B. R. Co.*, 119 Pa. 61, 11 Cent. Rep. 643, and kindred cases. We do not think so. *Spear* was a passenger on board the defendant's boat. After the carriage actually began, an explosion took place on the boat, by which he was injured. The plaintiff proved the happening of the accident to the boat, and the injury to *Spear* in consequence of it, and rested. This raised a legal presumption of negligence that entitled the plaintiff to recover. The *onus* was then on the defendant to show affirmatively that the explosion was

not due to its want of care in any particular. The case fell within the rule laid down in *Laing v. Colder*, 8 Pa. 482, 49 Am. Dec. 538, which is as follows: "The mere happening of an injurious accident to a passenger while in the hands of a carrier will raise a presumption, *prima facie*, of negligence, and cast the *onus* of showing that it did not exist on the carrier." This presumption, it will be noticed, arises not out of the character of the carrier, but out of the nature of the accident. The injurious accident must be connected with the appliances for transportation, which are provided by the carrier, are under its exclusive care and control, and whose condition it is bound to know. If, therefore, the accident complained of happens before the plaintiff has committed himself into the hands of the carrier, the rule does not apply, but the negligence alleged must be proved as in ordinary cases. *Hayman v. Pennsylvania R. Co.* 118 Pa. 508, 10 Cent. Rep. 835. Nor will the fact that the plaintiff has put himself into the hands of the carrier be sufficient to raise the legal presumption of negligence, unless the accident from which he suffers is connected with the appliances of transportation. *Pennsylvania R. Co. v. MacKinney*, 124 Pa. 462, 2 L. R. A. 820. In the case just cited MacKinney was a passenger on board one of defendant's trains, which was moving at a high rate of speed. A piece of coal came through the open window of the car near which he sat, and struck him in the face. There was no failure of, or accident to, any of the appliances of transportation, but an injury to an individual passenger from an independent and unrelated cause; and we held that the rule of *Laing v. Colder* did not apply.

The same principle controls this case. The accident by which plaintiff's baggage was lost was not due to the failure of any of the appliances of transportation, but to an independent cause—the flood,—which involved the car and the baggage it contained in a common ruin. The flood was, as to the defendant, an inevitable accident, properly described as "*actus Dei*." In such a case, negligence is not presumed, but must be proved, as any other fact necessary to the plaintiff's recovery. In this case, when the contract to carry was shown, it became the duty of the carrier to excuse its non-performance. The loss of the trunks by the flood from the South Fork dam was admitted. This accounted for their non-delivery, and it was only necessary to show the character of the flood, and that the loss of the train was not due to want of care on its part in the management of its business, in order to make a complete defense. Let us see what the defendant's evidence does show. It shows, first, that the damages apprehended by the servants and employes of the defendant were those naturally resulting from the continued and heavy rainfall. It shows, next, constant telegraphic communication between those charged with directing the movement of trains and local agents and trainmen along the line, and the exercise of great care in the management and movement of trains in the valley of the Conemaugh, in order to avoid the damages known to exist or likely to be encountered. In the third place, it shows the care exercised

over this particular train, and that it was moved into the yard at Conemaugh because that was a place of absolute safety from any flood that there was reason to anticipate, and was a convenient place at which to reach it with orders. Finally, it shows that while the train was thus carefully disposed of, and safe from any known danger, it was suddenly overwhelmed by the deluge from the broken dam, and destroyed so utterly that no vestige of the car or the baggage has since been found. This made a defense that meets the requirement of the rule as to the burden of proof resting on a carrier in every particular. It shows the loss, by inevitable accident, of the trunks sued for; and it shows that the loss was not made possible by the negligence of the defendant, but happened in spite of the utmost care exercised by agents and employes to escape the dangers it knew to exist or had reasonable ground to apprehend. It may be possible for us, looking back coolly and in the clear light of history on that terrible catastrophe, to see how property and life might have been saved if men on the ground had realized the awful magnitude of the impending calamity. It was not realized. The inhabitants of the populous valley sat in their homes, or went about their business, while the deluge was approaching. So swift was its approach that the horseman running to warn the city was overtaken and swallowed up; and the flood fell unannounced, and swept the day express and the city of Johnstown before it. What was done on that day must be considered in the light of what was then known, and what, from such knowledge, it was reasonable to apprehend. So considered, the defense was complete. There was no question of fact for a jury to decide, and it was exactly right for the learned judge to tell them so, and to direct their verdict. *Moore v. Philadelphia, W. & B. R. Co.* 108 Pa. 849; *Delaware, L. & W. R. Co. v. Cadono*, 120 Pa. 559, 12 Cent. Rep. 725; *Pennsylvania R. Co. v. Bell*, 123 Pa. 58.

The assignments of error are not sustained, and the judgment is affirmed.

William A. VALLO

v.

UNITED STATES EXPRESS CO., Appt.

(.....Pa.....)

1. The negligent throwing of a trunk from an express delivery wagon in a highway which so suddenly puts a passer-by in peril that he falls over another small trunk lying on the sidewalk and is injured, is the proximate cause of his injury.
2. Peril so suddenly precipitated upon a person as to leave no time for voluntary action precludes the question of his

NOTE.—For notes on "proximate cause," see *Smethurst v. Independent Cong. Church Proprs. (Mass.)* 2 L. R. A. 695; *Erickson v. St. Paul & D. R. Co. (Minn.)* 5 L. R. A. 736; *Louisville, N. A. & C. R. Co. v. Lucas (Ind.)* 6 L. R. A. 194; *Read v. Nichols (N. Y.)* 7 L. R. A. 130; *Smith v. Kanawha County Ct. (W. Va.)* 8 L. R. A. 88; *Hunnell v. Duxbury (Mass.)* 13 L. R. A. 733. See also note to *Smithwick v. Hall & U. Co. (Conn.)* 12 L. R. A. 379.

contributory negligence, although he did not choose the best way of escape from the danger.

(Paxson, Ch. J., dissent.)

(February 15, 1892.)

APPEAL by defendant from a judgment of the Court of Common Pleas, No. 2, for Philadelphia County, in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

Plaintiff, a man about sixty-five years of age and blind in one eye, while passing along Chestnut Street in Philadelphia between 8 and 10 P. M. of July 6, 1889, arrived in front of defendant's office at a time when a wagon was being loaded or unloaded in front of it. An iron express safe stood upon the sidewalk and plaintiff by stumbling over it received the injuries complained of.

The facts further appear in the opinion.

Mr. John F. Keator, for appellant:

The negligence complained of was not the proximate cause of the injury.

West Mahanoy Twp. v. Watson, 8 Cent. Rep. 543, 116 Pa. 344; *South Side Pass. R. Co. v. Trich*, 10 Cent. Rep. 367, 117 Pa. 390.

The plaintiff's injury was solely the result of his own negligence.

Plaintiff, in attempting to fasten a responsibility upon the defendants, says: "There were five or six trunks scattered all over the pavement and a dozen piled up at the curb." If this were actually the case it was the grossest carelessness for him not to observe such a patent obstruction and pass around.

Barnes v. Shotton, 11 Cent. Rep. 635, 119 Pa. 56; *Crescent Twp. v. Anderson*, 114 Pa. 643; *Pittsburgh S. R. Co. v. Taylor*, 104 Pa. 306.

The injury resulted from plaintiff's defective sight.

The incapacity of the person injured imposes on him the duty of exercising, for his own protection, that degree of care for his own safety that will, as far as possible, compensate for his impaired sense of hearing, or of sight, or other disability.

Patterson, Railway Acc. Law, 78; *Thomp. Neg.* 430; *Puri v. St. Louis, K. C. & N. R. Co.* 72 Mo. 168; *Zimmerman v. Hannibal & St. J. R. Co.* 71 Mo. 476, 2 Am. & Eng. R. Cas. 191; 4 Am. & Eng. Encyclop. Law, 80, title *Contributory Negligence*, pl. 35; *Delaware, L. & W. R. Co. v. Cadow*, 12 Cent. Rep. 725, 120 Pa. 559.

The defendant used the sidewalk only a reasonable time.

When the facts are undisputed, what is reasonable time is for the court.

Leaming v. Wise, 73 Pa. 173; *Morgan v. McKee*, 77 Pa. 228; *Davis v. Stuart*, 99 Pa. 295.

The use of the sidewalk was reasonable.

Palmer v. Silverthorn, 32 Pa. 65; *Wood, Nuisances*, § 259; *Welsh v. Wilson*, 2 Cent. Rep. 749, 101 N. Y. 254, 54 Am. Rep. 698.

The plaintiff was bound to engage medical aid and attention for such a length of time as his injuries made necessary, and cannot recover damages for injuries which he might have avoided by the use of reasonable diligence in effecting a cure.

Owens v. Baltimore & O. R. Co. 1 L. R. A. 75, 35 Fed. Rep. 715, 14 L. R. A.

Messrs. Francis C. Adler and John F. Lewis, for appellee:

The streets and sidewalks were for the use and benefit of all conditions of people; a person may walk or drive in the darkness of the night relying upon the belief that the street or the walk is in a safe condition. He walks by a faith justified by law and if his faith is unfounded and he suffers an injury, the party in fault must respond in damages. So one whose sight is dimmed by age, or is impaired from other causes, or a nearsighted person, is entitled to the same rights, and may act upon the same assumption.

Davenport v. Ruckman, 37 N. Y. 573.

Negligence is not imputed to persons who are blind.

Shearm. & Redf. Neg. § 88; *Sleeper v. Sandown*, 52 N. H. 244.

Whether the plaintiff was guilty of contributory negligence, by reason of defective eyesight, was properly left to the jury.

Pennsylvania R. Co. v. Werner, 89 Pa. 61.

Heydrick, J., delivered the opinion of the court:

The right of occupants of places of business upon a public street to use the sidewalk in front of their premises in receiving and sending out merchandise is not questioned. But the law imposes upon such persons, as it does upon all others using the sidewalk for any other lawful purpose, the duty to exercise their right with a due regard to the safety of pedestrians, or, as was in substance said by the learned trial judge, in a reasonable manner. *Com. v. Passmore*, 1 Serg. & R. 219; *Welsh v. Wilson*, 101 N. Y. 254, 2 Cent. Rep. 749, 54 Am. Rep. 698. What is a reasonable manner must always depend upon the circumstances. It might and doubtless would be unsafe to leave such an obstruction as was described in this case unguarded for a single moment upon a sidewalk near a railway station, thronged by people rushing to and from trains, while no inconvenience might be apprehended from leaving the same obstruction several hours upon a less frequented street. Hence it is impossible to lay down any precise rule as to the length of time a person may allow his property to remain upon a highway without incurring the charge of negligence. But the negligence of the defendant, if any existed, consisted not alone in leaving a trunk or small iron safe upon the sidewalk five minutes, more or less. If the plaintiff be believed, he was passing along one of the principal thoroughfares of the city of Philadelphia, in the evening of July 6, 1889, between the center of the sidewalk and the curb; and when he came opposite the defendant's premises its servants suddenly pitched a trunk out of its delivery wagon towards him. To avoid being struck by the flying trunk, he moved towards the center of the sidewalk, "keeping his eye upon the trunk while it was coming," and in so doing fell over another trunk, and thereby sustained the injuries for which he seeks compensation. Whether the trunk was suddenly and without warning thrown out of the delivery wagon, at such time and in such manner as to imperil the plaintiff was a controverted question of fact, which could be determined only

by the jury. If it was so thrown, the defendant was clearly guilty of negligence, for no man may innocently hurl a projectile across a highway upon which people are constantly passing. It is, however, contended that, inasmuch as the plaintiff escaped injury from the trunk thus recklessly thrown from the wagon, the negligence of the defendant is at most only the remote cause of the injury. This contention raises the question whether the plaintiff was so suddenly put in peril as to leave no time for consideration of the way of escape, and whether, under the circumstances, it was natural and probable that he would instinctively retreat in the direction of the obstruction placed by the defendant upon the sidewalk, and, having his eye fixed upon the danger from which he was fleeing, fall over that obstruction. If such was the natural and probable course of events, the negligent throwing of the trunk was the proximate cause of the injury. *Pittsburgh S. R. Co. v. Taylor*, 104 Pa. 306. But whether that natural and continuous sequence of events which is necessary to fix responsibility for an injury upon the author of a negligent act has been proved, is ordinarily a question for a jury (*Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Ehrigott v. New York*, 96 N. Y. 264, 48 Am. Rep. 622), and there is nothing in this case to make it an exception to the general rule. Assuming, as we must, that the jury found that by reason of the sequence of events already mentioned the negligent throwing of the trunk was the proximate cause of the plaintiff's injury, the question of contributory negligence is necessarily eliminated. That finding involves not only the negligence of the defendant, but a consequent peril so suddenly precipitated upon the plaintiff as to leave no time for voluntary action. Under such circumstances, it is believed, no person has ever been held guilty of contributory negligence because he did not choose the best way of escape from the impending danger. On the contrary, the principle to be extracted from numerous cases in this and other States is that when a person has been put in sudden peril by the negligent act of another, and in an instinctive effort to escape from that peril falls upon another, it is immaterial whether, under different circumstances, he might and ought to have seen and avoided the latter danger. This

being the settled law; it is difficult to understand why greater circumspection in the presence of a danger that could not be anticipated should be required of a man having but one eye than from the less unfortunate.

By its sixth point the defendant requested the court below to charge the jury that the plaintiff was unqualifiedly bound to engage medical aid and attention for such length of time as his injuries made necessary. To have so charged would have been manifest error. It would have required the plaintiff to have exercised greater care in mitigating the consequences of an injury already inflicted than the law requires in the first instance to avoid the injury. The utmost the defendant could with propriety have asked was that, if a man of ordinary prudence would, under the like circumstances, have engaged medical aid and attention more promptly than the plaintiff did, his delay in that regard should be taken into consideration, and no compensation allowed for any damages that might have been so averted. But, as no such instruction was asked, we are not called upon to express an opinion as to whether it ought to have been given. The fifth assignment of error was not pressed. As to the sixth and seventh assignments, it is enough to say that the only remedy for an excessive verdict is a motion for a new trial, and that the refusal of such trial is not assignable as error.

The judgment is affirmed.

Paxson, Ch. J., dissenting:

I am of opinion that the plaintiff was negligent, and that the defendant was not. The case was this: The defendant's employes were unloading an express wagon in front of its office on Chestnut Street. The plaintiff alleges that one of the men was about to throw a trunk upon the pavement, but there is no allegation that he was struck or in danger of being struck by it. While watching this operation he stumbled over a small express safe, lying on the pavement. This occurred in the full blaze of an electric light. This accident was, in my opinion, plainly the result of his own negligence, and fully justified the remark of a person who was passing at the time, "That man would fall over a house." For the reasons thus briefly stated I dissent from this judgment.

OREGON SUPREME COURT.

L. D. BROWN, *Respt.*,

v.

John BIGNE *et al.*, *Appts.*

(.....Or.....)

A fair bona fide agreement by a layman to supply funds to carry on a

pending suit in consideration of a share in the property if recovered, is not *per se* void either on the ground of champerty or public policy.

(November 17, 1891.)

A PPEAL, by defendants from a decree of the Circuit Court for Multnomah County

NOTE—Champtorous contracts of laymen.

In view of the marked tendency of the courts and Legislatures of the various States to curtail the doctrine of champerty, caution may well be used in relying upon decisions as authoritative, especially earlier English and American decisions.

14 L. R. A.

For the prosecution of suits.

In an article on "champerty" in 19 Alb. L. J. 460, it is said: "There seems to be a difference between a layman and a lawyer as the champertor. To constitute the offense on the part of a layman, he must contribute in money to the expenses; but

in favor of plaintiff in an action brought to enforce specific performance of a contract to give plaintiff a share of certain property recovered in a law-suit in consideration of his advancing funds to carry on the suit. *Affirmed.*

Statement by Bean, J.:

This is a suit to specifically enforce a written contract entered into between plaintiff and defendant Bigne in April, 1887. The facts are these: In April, 1881, one Pierre Manciet died in the city of Portland, largely indebted, but possessed of a large estate, consisting chiefly of real property, the legal title of which stood in his name, but of which Bigne claimed a one-half interest as a partner of Manciet. By his will he appointed his widow and Bigne executors thereof. They undertook the management of the estate, but shortly thereafter the widow died, leaving Bigne sole executor. He continued to act as such executor for five or six years, but no attempt was made to adjust his alleged partnership interest until February, 1887, when he presented to the county court for allowance a claim against the estate for \$27,373.02 for money alleged to

have been overdrawn by Manciet, and also a claim to be the owner of an undivided one half of all the property mentioned in the inventory, except certain furniture belonging to the widow. The Manciet heirs contested this claim, claiming that he was not and never had been, a partner of their ancestor, and was not entitled to any interest whatever in the estate. In this state of affairs, Bigne being heavily indebted, and without means, except his interest in the partnership estate, sought the assistance of plaintiff to enable him to prosecute his claims, and, if possible, realize something from the partnership estate. After considerable negotiation, the contract in suit was finally entered into, whereby, in consideration of the sum of \$6,000 to be advanced by plaintiff as might be required to carry on the litigation with the Manciet heirs, and establish Bigne's interest in the estate, Bigne sold, assigned and transferred to plaintiff an undivided one-half interest in and to all his right, title and interest in the property, real, personal or mixed, as fully and particularly set forth and described in the inventory of the estate, and also an undivided half of any claim he might be able to establish

the lawyer is held to contribute by his services."

To make out champerty by a layman, the alleged champertor must have undertaken to bear the expense of carrying on the suit. *Vimont v. Chicago & N. W. R. Co.* 69 Iowa, 296.

In *Gilman v. Jones*, 4 L. R. A. 113, 37 Ala. 691, it is said: "We may safely say that the whole doctrine of maintenance has been modified in recent times so as to confine it to strangers who, having no valuable interest in a suit, pragmatically interfere in it for the improper purpose of stirring up litigation and strife, and champerty, which is a species of maintenance attended with a bargain for a part or the whole of the thing in dispute, does not exist in the absence of this characteristic of maintenance."

Where a party has no interest, legal or equitable, and no claim or expectancy, remote or contingent, in a suit, an agreement to carry it on at his own expense, in consideration of some bargain to have part of the thing in dispute, or some profit out of it, is champertous and illegal. *Williams v. Fowle*, 132 Mass. 385; *Belding v. Smythe*, 138 Mass. 530; *Lancy v. Harvender*, 6 New Eng. Rep. 267, 146 Mass. 615.

An agreement by an agent to prosecute suits and to accept for his services a percentage of the amount recovered, but to receive only his expenses if unsuccessful, is void for champerty. *Lathrop v. Amherst Bank*, 9 Met. 490; *Ackert v. Barker*, 181 Mass. 436.

An agreement by a layman to render services to a litigant in his suit, in consideration of receiving a part of the recovery in a suit is void for champerty. *Munday v. Whisenhunt*, 90 N. C. 454.

An agreement by which a party is to have a portion of the avails of a suit, in consideration of furnishing evidence to sustain it, is void for champerty. *Stanley v. Jones*, 7 Bing. 360.

A contract by which distributees, pending a contest of the decedent's will, convey their interest, in consideration of money received, and of being indemnified against the expenses of the contest, to a stranger, is champertous and void. *Poe v. Davis*, 29 Ala. 676.

An assignment of a claim, in consideration that the assignee, who was not a lawyer, shall prosecute and collect it at his own expense and reimburse himself out of the proceeds and receive a portion thereof as compensation, is champertous, and a re-
14 L. R. A.

lease from the assignor after notice to the debtor of the assignment will bar a recovery thereon. *Weakly v. Hall*, 13 Ohio, 167, 42 Am. Dec. 184.

There is no champerty in an agreement to allow the bona fide purchaser of an estate to recover for rent due, or injuries done to it previously to the purchase. *Williams v. Protheroe*, 5 Bing. 309.

An agreement by the owner that a bailee of his horse, who has settled with him for the injuries to the horse while in his possession, may, for the latter's benefit, prosecute an action in the former's name against the persons responsible for causing such injuries, is not champertous. *Rindge v. Coleraine*, 11 Gray, 157.

Where the purchaser of a horse claimed damages from his vendor for fraud in the trade, sold the horse and agreed with his vendee to prosecute an action at the latter's expense for such damages for the latter's benefit, if upon being defeated he pays the costs, he cannot recover them from his vendee under the agreement, because it is champertous. *Wheeler v. Pounds*, 24 Ala. 472.

A promise to indemnify a nominal plaintiff against costs, if he will allow an action to be brought in his name cannot be avoided on the ground of champerty. *Knight v. Sawin*, 6 Me. 361.

A court of equity will not give effect to an agreement by which a layman, with no interest or relationship, is to receive a share of the proceeds of a suit, in consideration of carrying on its prosecution. *Gilbert v. Holmes*, 64 Ill. 543.

For the defense of suits.

A contract by a layman to attend to the defense of a suit for which he is to receive, in case of success, a sum of money and part of the land in controversy, is void for champerty. *Brown v. Beauchamp*, 5 T. B. Mon. 413, 17 Am. Dec. 81.

An agreement between a mortgagor and his vendee to resist the foreclosure of the mortgage, and share the expenses and the fruits, if successful, is not champertous. *Allen v. Frazier*, 35 Ind. 283.

Contemplated litigation as an element.

An agreement is not void for champerty, unless litigation is pending or contemplated. *Stotsenburg v. Marks*, 79 Ind. 193.

A purchase of chattels in possession of the vendor, with knowledge of an outstanding claim against them, does not amount to champerty. *Dunbar v. McFall*, 9 Humph. 505.

against the estate of Manciet. After this contract was made, Bigne's claim was vigorously litigated, finally resulting in a decree of this court, establishing his right as a partner to one half of certain real estate in and near Portland, and his claim against the private estate of Manciet for \$9,580.87, and against the partnership estate for \$7,890.81. The individual and partnership estates then proceeded rapidly to a final settlement, and the real estate having appreciated largely in value, and exceeding greatly the partnership debts, Bigne sought to repudiate his agreement, and hence this suit. The defendants Bigne and Clossett, who are appellants here, claim as a defense that the agreement sued on is champertous and void.

Mr. James Gleason for appellants.

Mr. Thomas N. Strong for respondent.

Bean, J., delivered the opinion of the court:

The only question in this case is whether the contract between plaintiff and Bigne is champertous and void. The solution of this question depends upon how far the ancient

doctrine of champerty and maintenance is to be recognized in this State. It is conceded at the outset that the contract in suit was honestly and fairly made, and that Brown acted in entire good faith in the matter. No advantage was sought or taken of Bigne. He was fully informed as to the extent, amount and value of the property claimed by him, and it was at his earnest solicitation that Brown made the contract. When he was without means or credit to prosecute his claims, and sore pressed by the Manciet heirs, who sought to exclude him from his share in the estate, he applied to Brown for aid in the struggle, who thereupon in good faith entered into the contract, and advanced the money to enable him to prosecute his claim, upon no other security for its repayment than the assignment of a one-half interest in the property in litigation. Under these circumstances, the defense of Bigne may be considered anything but meritorious. Under the ancient doctrine of champerty, the contract in suit is clearly void, for that offense was defined to be a bargain with a plaintiff or defendant to divide the land or other matter in suit between them, if they prevailed, whereupon the champertor was to carry on the suit

Where an overdue promissory note and the accrued interest are sold for the face of the note, an understanding that the amount paid shall be refunded in case the note prove uncollectible, is not champertous. *Taylor v. Gilman*, 58 N. H. 417.

A bona fide assignee of a judgment is not affected by the champertous purchase of the judgment by his immediate assignor. *Cooke v. Poole*, 25 S. C. 563.

A contract between a physician and a patient who has a claim for injuries against a railroad company, by which the former is to negotiate with the company and have for his services a proportionate share of the amount received from the company, is void. *Thomas v. Caulkett*, 57 Mich. 392, 58 Am. Rep. 369.

In *Coquillard v. Bearss*, 21 Ind. 479, it was held that although a layman by agreeing to prosecute a claim before a legislative body at his own expense for a share thereof was not criminally guilty of champerty, the contract was nevertheless void as against public policy.

In *Jones v. Blackledge*, 9 Kan. 562, it was said that a contract to prosecute and collect a claim against the United States for a percentage of the amount is champertous, but the principal ground upon which the contract was held void in that case was that it was in contravention of the federal statute.

Effect of interest; relationship.

Where the alleged champertor has an interest in the subject matter of the litigation, any contract for the prosecution of the same is valid. *Call v. Calof*, 13 Met. 362.

Where several creditors, having levied executions on their debtors' land, agreed that one should prosecute a suit for the benefit of all to obtain possession, the agreement is not champertous. *Frost v. Paine*, 12 Me. 111.

It seems that an agreement between two to purchase assignable property on joint account, one of them to pay for it and the other to bear the expenses of needful litigation, and both to share equally in the net proceeds, is not champertous. *Reed v. Janes*, 84 Ga. 880.

An agreement by the surety on a note to foreclose a mortgage given to indemnify him and to

deed the premises to the holder of the note, upon its surrender, is not champertous. *Cooley v. Osborne*, 50 Iowa, 523.

In *Williams v. Fowle*, 132 Mass. 385, defendants accepted a deed of land, subject to a mortgage, which they agreed to pay, and an action was brought against them on the note secured by the mortgage in the name of their grantees, for the benefit of the holder of the mortgage, under an agreement by which the plaintiffs, who were the makers of the mortgage, were to receive a portion of the recovery without being liable for the expenses. It was held that the plaintiffs had an interest in the suit, and that the agreement was not champertous.

A contract between a father and his son, made during the pendency of a suit against the father, whereby the son agrees to defend the suit for the father, in consideration of receiving a part of the property in controversy, is void for champerty. *Barnes v. Strong*, 54 N. C. 100.

An agreement between a person and his brother-in-law by which the former is to pay a portion of the expenses of certain suits to be brought by the latter, in consideration of a share of the recovery, is not champertous. *Phalshimer v. Bruckerhoff*, 3 Cow. 623, 15 Am. Dec. 300.

In *Hutley v. Hutley*, L. R. 8 Q. B. 112, plaintiff and defendant made a contract by which the plaintiff was to take steps to set aside the will of defendant's brother, who was also plaintiff's cousin, in consideration that the plaintiff should receive the share of the property received by the defendant, in case of success. It was held that the contract was not purged of its champertous quality by the relationship of the parties.

Where a person claiming title to land held adversely, executed a power of attorney to her son-in-law to bring suits for the land, in her name, but for his own benefit, the agreement is valid. *Gilliland v. Failing*, 5 Denio, 308.

A bond executed by a stepson of one lessor of the plaintiff in an ejectment suit to another lessor to indemnify the latter against the costs of such suit, is not champertous, it appearing that the obligee refused to allow his name to be used without such indemnity. *Campbell v. Jones*, 4 Wend. 308.

J. G. G.

at his own expense. 4 Bl. Com. 135. Some of the authorities omit from their definition the statement that the champertor is to carry on the suit at his own expense, and confine it simply to an agreement to aid a suit, and then divide the thing recovered. 1 Hawk. P. C. chap. 84, § 1; Co. Litt. 868b.

The doctrine of champerty and maintenance, the gist of which is the same, differing only in the mode of compensation, arose from causes peculiar to the state of society in which it was established. The most potent reason for their suppression was an apprehension that justice itself would be endangered by these practices. The doctrine was established "to repress the practices of many who, when they thought they had title or right to any land, for the furtherance of their pretended right conveyed their interest, or some part thereof, to great persons, and with their countenance did oppress the possessors. The power of great men, to whom rights of action were transferred in order to obtain support and favor in suits brought to assert these rights, the confederacies which were thus formed, and the oppression which followed from the influence of great men in such cases, are themes of complaint in the early books of English law." *Skywright v. Pages*, 1 Leon. 167. Blackstone speaks of these offenses as perverting the process of the law into an engine of oppression. 4 Bl. Com. 135.

So great was the evil of rich and powerful barons buying up claims, and, by means of their exalted and influential positions, overawing the courts, and thus securing unjust and unmerited judgments, and oppressing those against whom their anger was directed, that it became necessary, in an early day in England, to enact statutes to prevent such practices, and to invoke in all its rigor the doctrine against champerty and maintenance. The common-law rule prohibiting the assignment of choses in action, and the sale and transfer of land held adversely, was a branch of this same doctrine, and arose from the same causes. Lord Coke says: "Nothing in action, entry or re-entry can be granted over, for so, under color thereof, pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed." And Buller, J., in *Master v. Miller*, 4 T. R. 820, says: "It is laid down in our old books that, for avoiding maintenance, a chose in action cannot be assigned." But he adds: "The good sense of that rule seems to me very questionable, and in early as well as modern times it has been so explained away that it remains at most only an objection to the form of the action." Under the circumstances above indicated, to allow rich and powerful persons to buy up claims, or to assist in the litigation with money to enable the plaintiff or defendant to prosecute or defend his cause of action or defense, was undoubtedly dangerous to the liberty of the subject, and sound public policy forbade it. With the advance of time came the change of circumstances, and in modern times, since England has enjoyed a pure and firm administration of justice, even in that country the rigor of the common law against champerty and maintenance has been very much softened; so that now not only the assignability of choses

in action is generally recognized in that country, but it is said there is no rule of law which prohibits the purchase of the subject matter of a pending lawsuit, although accompanied with an agreement to indemnify the vendor against costs and expenses. *Knight v. Bowyer*, 2 De G. & J. 421. Nor is a contract to support a pending litigation, in consideration of having a stipulated part of the money or thing recovered, *per se* void, as against public policy. *Coondoo v. Mookerjee*, L. R. 2 App. Cas. 186. In this country, where no aristocracy or privileged class elevated above the mass of the people has ever existed, and the administration of justice has been alike impartial to all without regard to rank or station, the reason for the ancient doctrine of champerty and maintenance does not exist, and hence has not found favor in the United States. *Roberts v. Cooper*, 61 U. S. 20 How. 467, 15 L. ed. 969; *Thalhimer v. Brinckerhoff*, 3 Cow. 643, 15 Am. Dec. 309. In some of the states the whole doctrine is regarded as entirely obsolete. *Mathewson v. Pitch*, 22 Cal. 86; *Bentline v. Franklin & G. C. Co.* 38 Tex. 458. But the doctrine, in a more or less modified form, is generally recognized in a great majority of the states of the Union, and contracts which come within the mischief to be guarded against in the administration of justice are held to come within the rule. *Lathrop v. Amherst Bank*, 9 Met. 489; *Gilbert v. Holmes*, 64 Ill. 548; *Barker v. Barker*, 14 Wis. 142; *Lafferty v. Jelley*, 22 Ind. 471; *Holloway v. Lowe*, 7 Port. (Ala.) 488; *Weakly v. Hall*, 13 Ohio, 167, 42 Am. Dec. 194; *Backus v. Byron*, 4 Mich. 536; *note to Thalhimer v. Brinckerhoff*, 15 Am. Dec. 319.

To meet the changed condition of society and administration of justice, the rule has been much modified, so that, upon modern construction, the doctrine of champerty and maintenance, as regards a layman, is confined to cases where a man, for the purpose of stirring up strife and litigation, encourages others either to bring actions or to make defenses which they have no right to make, or otherwise would not make; such interference is considered as having a tendency to pervert the course of justice. *Dorwin v. Smith*, 35 Vt. 60; *Pindon v. Parker*, 11 Mea. & W. 675; *Stanley v. Jones*, 7 Bing. 369. The gist of the offense consists in the officious intermeddling in another suit, and contracts not within the mischief to be guarded against should not be held to come within the rule. It may now be stated as a general rule that a man may sell the whole or part of a thing in action, as well as the whole or part of a thing in possession. The right of disposition is involved in the very idea of property. With few exceptions, not material here, whatever a man may own he may sell; and whatever a man may lawfully sell another man may lawfully buy; and, whenever a man has bought anything in the nature of property, he is entitled to all the remedies the law may afford, to enable him to possess and enjoy it. It follows that there is now no rule of law which prohibits the purchase of anything otherwise capable of assignment, merely because it may become the subject of a lawsuit. From this it logically follows that the purchase of a right, which is the subject matter of a pending

lawsuit by one standing in no fiduciary relation, is not unlawful, unless it is made for the mere purpose or desire of perpetuating strife and litigation; nor can it make any difference, on principle or authority, that the consideration for the purchase is to be used in conducting the litigation and paying the expenses thereof. A fair bona fide agreement, by a layman, to supply funds to carry on a pending suit, in consideration of having a share in the property if recovered, it seems to us, ought not to be regarded as *per se* void, either on the grounds of champerty, as now understood, or of public policy. Indeed, it may sometimes be in furtherance of justice and right that a suitor who has a just title to property, and no means except the property itself, should be assisted in that way. The doctrine of champerty is directed against speculation in lawsuits, and to repress the gambling propensity of buying up doubtful claims. It is not, nor never was intended, to prevent persons from charging the subject matter of the suit in order to obtain the means of prosecuting it. 1 Addison, Cont. 392; *Stotsenburg v. Marks*, 79 Ind. 193. But agreements of the kind above suggested should be carefully watched and closely scrutinized, when called in question, and if found to have been made, not with a bona fide object of assisting a claim believed to be just, but for the purpose of injuring and oppressing others by aiding in unrighteous suits, or for the purpose of gambling in litigation, or to be so extortionate or unconscionable as to be inequitable against the party, effect ought not to be given to them. Courts administering justice according to the broad principles of equity and good conscience, as they are bound to do, will consider whether the transaction is merely the bona fide acquisition of an interest in the subject of litigation, or whether it is an unfair or

illegitimate transaction, gotten up for the purpose merely of spoil or speculation. The doctrine of champerty, to the extent that furnishing aid in a suit under an agreement to divide the thing recovered is *per se* void, we think ought not to prevail, when such aid is furnished by a layman; but when such contracts are made for the purpose of stirring up strife and litigation, harassing others, inducing suits to be begun which otherwise would not be commenced, or for speculation, they come within the analogy and principles of that doctrine, and should not be enforced. *Gilbert v. Holmes*, 64 Ill. 548; *The Mohawk*, 75 U. S. 8 Wall. 153, 19 L. ed. 406; *Boardman v. Thompson*, 25 Iowa, 487.

Applying these principles to the case in hand, we find that the contract between plaintiff and defendants was entered into in entire good faith, and with no intention on the part of plaintiff of officially intermeddling in the controversy between Bigne and the Manciet heirs, but only at Bigne's earnest solicitation, to enable him to obtain means to prosecute his claim. The contract was not unconscionable or unjust, but fairly entered into. Bigne had no means except the property in litigation, and the taking by plaintiff of an assignment of a one-half interest therein, as a consideration for the money advanced by him, violated no principle of law or public policy, so far as we can see from this record. What was said by Thayer, J., in relation to the doctrine of champerty, in *Dahms v. Sears*, 18 Or. 47, is in regard to contracts between attorney and client, and has no application here. The relation of attorney and client between Brown and Bigne did not exist, and this opinion is confined to the case before us.

The decrees of the court below is therefore affirmed.

NORTH CAROLINA SUPREME COURT.

O. Elizabeth CLARK, Admx., etc., of James M. Clark, Deceased,

WILMINGTON & WELDON R. CO., *Appt.*

(.....N. C.)

1. **Reckless exposure to danger in getting upon a railroad trestle in advance of a train will not relieve the railroad company from liability** for running the person down on the trestle if the train could have been stopped or the speed diminished in time to prevent it after discovering his peril, although the engineer by a miscalculation judged that the man would be able to get across the trestle before he was overtaken.
2. **Negligence in getting into perils not the proximate cause of an injury** which could still have been avoided by proper care of the other party.

(Clark and Davis, JJ., dissent.)

(December 15, 1891.)

APPEAL by defendant from a judgment of the Supreme Court for Johnston County in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Aycock & Daniels and W. C. Munroe, for appellant:

In *McAdoo v. Richmond & D. R. Co.*, 105 N. C. 140, this court says: "A railroad has a right to the use of its track, and its servants are justified in assuming that a human being who has the use of all his senses will step off the track before a train reaches him."

In the absence of knowledge the engineer might assume that the plaintiff was a man of ordinary intelligence.

Baily v. Richmond & D. R. Co. 106 N. C. 307.

NOTE.—In addition to the discussion of the question of a railroad company's duty to trespassers on its track, which appears in the above opinions, 14 L. R. A.

see also *notes to Cincinnati, I. St. L. & C. R. Co. v. Cooper* (Ind.) 6 L. R. A. 241, and *Toomey v. Southern Pac. R. Co.* (Cal.) 10 L. R. A. 139.

It is not negligence in an engineer to act, in the absence of specific information, on the presumption that a man who is apparently awake, and is moving, is in full possession of all his senses and faculties.

Deans v. Wilmington & W. R. Co. 107 N. C. 691.

The plaintiff cannot recover if he is guilty of contributory negligence, that is concurring negligence, notwithstanding the accident may have been avoided by the exercise of ordinary care.

Gunter v. Wicker, 85 N. C. 310; *Doggett v. Richmond & D. R. Co.* 78 N. C. 305; *Troy v. Cape Fear & Y. V. R. Co.* 99 N. C. 298.

When the injury arises neither from malice, design, nor wanton and gross neglect, but simply the neglect of ordinary care, and the parties are mutually in fault, the negligence of both being the immediate and proximate cause of the injury, a recovery is denied.

Ryder v. Charlotte, C. & A. R. Co. 94 N. C. 604.

In that case plaintiff attempted to drive across the track in front of an oncoming train, and the court said: "The attempt to cross the road under the circumstances not only showed a want of due care on the part of the plaintiff, but reckless conduct, that amounted to gross negligence; and though he was in no fault in the backing of the horse on the track, if he had not attempted to cross in the face of the impending danger, the accident would not have happened, so we are of the opinion his contributory negligence was the cause of his injury, and that being so, it can make no difference whether negligence is imputable to the defendant or not."

See also *Forbes v. Atlantic & N. C. R. Co.* 76 N. C. 454; *Farmer v. Wilmington & W. R. Co.* 88 N. C. 564; *McAdoo v. Richmond & D. R. Co.* 105 N. C. 140; *Deans v. Wilmington & W. R. Co.* 107 N. C. 686.

Plaintiff might have by the exercise of ordinary care avoided the accident, and therefore he cannot recover.

Turrentine v. Richmond & D. R. Co. 92 N. C. 638; *Walker v. Reidsville*, 96 N. C. 382; *Meredith v. Cranberry Coal & I. Co.* 99 N. C. 576.

Messrs. Pou & Pou for appellee.

Avery, J., delivered the opinion of the court:

The main question presented by the statement of the case on appeal and ably and elaborately argued by the counsel on both sides was whether in any phase of the testimony the court should have permitted the jury to pass upon the issues involving the question of defendant's negligence. The plaintiff contends that there was ample evidence to warrant the findings of the jury, in response to the first issue, that his intestate was killed by the negligent running of the defendant's train; and, in response to the third issue, that, notwithstanding the negligence of his intestate, the injury might have been avoided by the exercise of proper care and prudence on the part of the defendant Company's engineer. The defendant assigned as error the failure of the court to instruct the jury that there was not sufficient evidence to justify an affirmative response to 14 L. R. A.

said issues. So that, if a collocation of detached portions of the testimony would prima facie tend to show that the engineer was negligent, and that by such precaution as a man of ordinary prudence would have taken he could have prevented the collision, it was the duty of the court to submit the issues to the jury, and they were justified, in the exercise of their exercise of their exclusive right, in responding to them as they did. *Sheridan v. Brooklyn City & N. R. Co.* 36 N. Y. 39, 98 Am. Dec. 490; *Kenyon v. New York Cent. & H. R. R. Co.* 5 Hun, 481. The engineer, according to the testimony of all the witnesses, could see the trestle on which the intestate was killed for a mile before he reached it. George Ricks, a witness for the defendant, deposed that the train approached from the north. Jackson Lassiter, a witness for the plaintiff, testified that there was a mile-post at the north end of the trestle, and that the engineer going south could tell that a man was on the trestle when his engine was four or five hundred yards distant from it; that the plaintiff's intestate was stricken by the engine near the south end of the trestle, which was 125 feet long, and thrown about 25 yards south of it, and down an embankment; that the train could have been stopped within 150 yards; and that the witness looked when the danger signal was given, and the train was then 450 yards from the trestle; but the witness, looking at it, could see no diminution of its speed when it reached the trestle, just as the witness Moore stated that he could see no "alack up" of the train till it reached the trestle. Ervin Ricks, deposing in behalf of the defendant, could not say that the train "slowed up" any before it struck him, though he could see its approach distinctly, and that the plaintiff's intestate was running in the middle of the track when he first saw him, just after the whistle blew. The defendant's engineer testified that when the signal was given, at a distance of 100 yards, the plaintiff's intestate acknowledged it by stopping and looking back at the engine; that he was still north of the trestle, had not reached it, but turned, and went towards the trestle, still on the outside of the track, and when the engine was 50 yards north of the trestle he stepped upon the track at or near the north end of it for the first time; that he then applied the brakes, but struck deceased 10 or 12 feet from the north end. The defendant's fireman thought the train was not stopped for 200 to 250 yards beyond where Clark was stricken, while he thought the alarm was given 100 yards north of the trestle. The intestate began to run, according to Rick's statement, along the middle of the track on the trestle when the signal was blown. There was testimony to the effect that the frame of the trestle was from 8 to 11 feet above the ground, and that a very active man might have escaped injury by jumping upon a cap.

The jury were not bound to find that the whole of the testimony of any witness was true; and it is immaterial whether they thought any given one was mistaken as to his recollection or observation of some matters and accurate as to other facts, or was false in part and credible as to other statements. Any one of several theories arising out of the evidence may

have been adopted by the jury. They may have concluded that Lassiter was to be believed when he stated that Clark was killed at the south end of the trestle, after the engine had traversed its whole length, and not near the north end, as the engineer stated; and that theory may have been strengthened by finding it to be true that the intestate was thrown up into the air, and at the same time received such an impetus forward as to land his body 25 yards further at the side of the embankment. They had a right to conclude from the evidence, which we have stated, that deceased was on the trestle in the middle of the track when the whistle blew and the bell rang, and they had testimony sufficient to warrant the belief that at that very moment the engine was 450 yards from the trestle, and could have been stopped in 150 yards. The jury were justified in concluding as a fact that the engineer did not, as a witness testified, perceptibly slacken his speed in the least till he struck Clark; and this theory would be sustained by defendant's own testimony (that of the fireman Jones), that the train ran on 200 to 250 yards after striking him before it was fully stopped, while it could have been brought to a stand-still within 150 yards (according to the evidence of Lassiter, which the jury had a right certainly to believe), as they had a right to fix a lower estimate as the true one. If the foregoing is a fair summary of the facts that the jury might have found as a part of a special verdict, then we may assume for our present purpose that any theory arising out of it is a true embodiment of their findings. Suppose the engineer saw the plaintiff's intestate, after looking back in acknowledgment of the danger signal, rushing along the middle of a trestle 125 feet long, with no means of escape till he should reach the south end of it, except by jumping 11 feet (the height on the south side), to the ground, or the display of unusual activity by jumping upon a cap, and that he ran his engine 300 yards while Clark was still running along the center of the track on the trestle. He could have stopped it within the remaining 150 yards, if not sooner, before even reaching the north end of the trestle; but, when there was no longer any doubt that intestate was fully committed to risking his life in the effort to cross because of his persistent movement south on the track, while the engine advanced 300 yards after the signal was given, the engineer rushed recklessly onward without the slightest diminution of speed. But if, by any calculation as to the relative progress of two bodies in motion on the same road, the jury concluded that the train was nearer to the trestle when the alarm was given, there is no possible method by which we can legitimately tell whether they fixed that distance at 450, 150, 100, or 50 yards. If it was 150 yards, and Lassiter was to be believed, then the engineer could (after the deceased made his purpose apparent by looking at the engine and then moving forward), have stopped at the very northern extremity; or if they thought 100 yards was the distance, as the engineer testified, the engine would have been brought down to a slow pace, and within nine yards of a full stop, when it came in contact with intestate, so that the force of the collision might not have been sufficient to

do him serious injury, if he was stricken at the south end of the trestle. Suppose the jury believed that the estimate of the distance by the engineer, who thought he blew 100 yards and put on the brakes 50 yards from the north end was correct, then he could have stopped in 150 yards, the force of the engine would have been greatly reduced after the use of all appliances for 100 yards, and it might have been considered by them but a fair inference that the blow would not have been fatal, if harmful at all, when the collision should come, had the engineer used every effort to stop consistent with safety, immediately on giving the alarm. If he could have stopped the engine in less than 100 yards, he might have saved intestate's life, whether he put on brakes at 50 or 100 yards. For we must bear in mind also that it was decided in *Deans v. Wilmington & W. R. Co.*, 107 N. C. 686, that the jury were not bound to adopt the estimate of the witnesses or to hear expert testimony as to the distance within which an engine might be stopped, but could determine that question, as one addressed to their common sense, for themselves. By fixing that distance at more or less than 150 yards,—the estimate of the conductor being that it would require 400 to 500 yards,—and varying the finding as to speed from 30 to 50 miles per hour, according to the conflicting testimony, an infinite number of combinations might have been made by the jury as to the different questions of distance and speed and force, giving rise to endless inferences from them.

It was in evidence that deceased was lame, but was running in the middle of the track on the trestle. It was the province of the jury to say where he was, whether entirely north of the trestle, on the trestle, or at what point on it, when the whistle blew. We are not justified in conjecturing as to their findings of evidential facts, when the witnesses left a margin in distances between 150 and 450, and the jury were at liberty to go even below the minimum mentioned by Lassiter. The jury were justified in concluding that the speed of the engine had not been abated in the least, though a frightened human being had been chased by an engine along a trestle from which the engineer ought to have known he could not escape without peril to life or limb, until he was tossed like a ball into the air, and thrown forward for 25 yards, where his mangled corpse tumbled off the embankment. The evidence of the fireman that the train was not stopped till it had gone 200 to 250 yards south of the trestle may have been considered by the jury as corroborative of the other witness, who said that the speed was not perceptibly diminished. That would depend upon their estimate of the time and distance requisite for stopping the train; and in settling that question the jury very probably first determined what the speed was, whether 30, 35, 40, or 50 miles per hour, according to the varying opinions of witnesses, and possibly whether it was true that the train was running down grade, as stated by a witness. They could believe or discredit the whole or a part of the testimony of any witness, and we have no right to assume what their finding was. If there was no conceivable view of the testimony

in which the defendant's servants might have saved the life that was lost (despite the admitted negligence of the plaintiff, and after it was apparent to the servant, sitting upon his engine, that the plaintiff had carelessly put his person in jeopardy) by simply using the appliances at his command, and without peril to the persons and property in his charge, the court would have been justified in withdrawing the case from the jury, but not otherwise. The engineer knew or ought to have known that the mile-post marked the end of the trestle, and when he saw that the plaintiff's intestate, after turning and looking at the approaching train, was still persisting in his perilous purpose of crossing the trestle in its front, he should have resolved all doubt in favor of human life, and forthwith have reversed his engine, and put on the brakes. We may assume that he did neither, as there is abundant testimony to have warranted the jury in so believing. At this supreme moment the law and the common instincts of humanity would condemn his rushing recklessly onward for no better reason than that the deceased might jump 11 feet to the ground without injury, or by a display of unusual agility might place himself upon a cap.

It is settled law in this State that where an engineer sees that a human being is on the track at a point where he can stop off at his pleasure, and without delay, he can assume that he is in full possession of his senses and faculties, without information to the contrary, and will step aside before the engine can overtake him. But where it is apparent to an engineer, who is keeping a proper outlook, that a man is lying prone upon the track, or his team is delayed in moving a wagon over a crossing, it has been declared that the engineer, having reason to believe that life or property will be imperiled by going on without diminishing his speed, is negligent if he fails to use all the means at his command, consistent with the safety of the passengers and property in his charge, to stop his train and avoid coming in contact with the person so exposed. *Deans v. Wilmington & W. R. Co.* 107 N. C. 686; *Bullock v. Wilmington & W. R. Co.* 105 N. C. 180. The same rule prevails where the engineer knows or ought to know that a human being has passed a mile-post which marks the end of a trestle nearest to him, and can see that the person, despite his signal, persists in running along the track, from which he cannot step aside, and from which he can escape instantly only by a perilous jump or unusual activity. The law expects him, when he sees a man still lying motionless, after he has given the alarm signal, to take precaution against the possibility of his being drunk; or, where one does not move his team at a crossing under similar circumstances, to act upon the idea that the wagon is fastened in some way. While as a general rule the engineer "would have a right to assume that a person walking upon the track was in possession of ordinary sight and hearing, yet, where the conduct of the traveler is such as to excite a doubt of this, the engineer is bound to use greater caution," and to stop the train, if necessary to secure his safety. 2 Shearm. & Redf. Neg. §§ 483, 484; Wharton, 14 J. R. A.

Neg. § 301; *Pennsylvania R. Co. v. Weber*, 76 Pa. 157, 18 Am. Rep. 407.

In *Cook v. Central R. & Bkg. Co.*, 67 Ala. 533, it was held error to refuse to charge that if defendant's agents did see, or by the exercise of proper care could have seen, plaintiff's intestate upon said bridge or trestle in time to have stopped said train before it reached him, and that they failed to stop, the defendant was liable. We may add to this rule, as applicable to our case, that the defendant was also liable, if its servants, under such circumstances, could have so diminished the speed of the engine before the collision occurred as possibly to have saved the life of intestate. The plaintiff was unquestionably negligent, but his negligence was not the proximate cause of his death, if the defendant's servant could have prevented it, after the latter had reason to know of the peril, without danger to persons or property in his charge. 2 Shearm. & Redf. Neg. § 484, (p. 298,) note 1. The principle laid down in the Alabama case which we have cited must necessarily prevail in every State where the doctrine of *Gunter v. Wicker*, 85 N. C. 512, is established. Where the courts hold, as in Kansas, that one who walks upon a bridge constituting a part of the track of a railway is a trespasser, and that the engineer is not bound to keep a lookout for such an intruder, and if he is killed while on a bridge or trestle, the company is only liable for willful negligence, it follows that they always refuse to sanction the doctrine so fully settled by this court. Hence it was found necessary to overrule *Herring v. Wilmington & R. R. Co.* 32 N. C. 402, in *Deans v. Wilmington & W. R. Co.* 107 N. C. 686.

The true test of the engineer's duty is involved in the question whether he has reasonable ground to believe, with all the knowledge of the surroundings which due diligence requires of him, that the life of a fellow man is in peril, and that the danger to his person can only be averted by stopping or reducing the speed of the train. When an engineer sees a man persistently putting himself in peril on a trestle or bridge, so that he can no more get off the track than one who is lying on it in an apparent stupor, except by exposing himself to danger, why is it not reasonable in him to act instantly on the natural inference that one whose conduct is so extraordinary is either drunk or bereft of reason from sudden terror? *Cook v. Central R. & Bkg. Co. supra*; Wharton, Neg. § 301. Greater caution is expected of a company in all cases where for any cause it is apparent that one is not apprised of his danger. *Tanner v. Louisville & N. R. Co.* 60 Ala. 621, 640. Though plaintiff's intestate was negligent in going upon the trestle when he knew, or might have known, before the alarm was given, that a train was approaching, his admitted fault would not excuse the subsequent carelessness of the engineer in inflicting an injury upon him that could have been avoided. One wrong no more justifies another in law than in morals. *Needham v. San Francisco & S. J. R. Co.* 37 Cal. 409. Because one carelessly exposes his life on account either of drunkenness or deliberate folly, he does not thereby become an outlaw, so as

to give railroad companies the right to run their through trains in reckless disregard of his safety. There is no presumption that a child or a man apparently drunk will get out of the way. When intestate acted like a drunken man, and made no effort to leave the trestle, the engineer should have stopped the train. 2 Wood, Railway Law, 1268, and note 1; *Kenyon v. New York Cent. & H. R. Co.* 5 Hun, 481; *Sheridan v. Brooklyn City & N. R. Co.* 36 N. Y. 39, 93 Am. Dec. 490. Persons in great peril are not expected to exercise the presence of mind and care that would ordinarily be characteristic of a prudent man. The law makes allowance for their excitement and leaves the circumstances of their conduct to the jury. *Buel v. New York Cent. R. Co.* 81 N. Y. 814, 88 Am. Dec. 271; *Galena & C. U. R. Co. v. Yarwood*, 17 Ill. 509; Wharton, Neg. § 304.

The jury doubtless thought that the conduct of the deceased, after the engineer saw him on the track, was such that the latter had reason to believe that he was drunk. In corroboration of this theory he had, according to the testimony, two bottles of spirituous liquor upon his person, just as Deans was found with a bottle and a broken glass at his side. According to the views of the testimony which we have presented as the possible and legitimate theories adopted by the jury, there was almost, if not quite, as cogent reason for the conclusion on the part of the jury in our case as in *Deans' Case* that a person who acted so unnaturally and carelessly must have been drunk. It was unquestionably negligence to get drunk and lie down upon the track, as it was to go upon it in full view of an approaching train. But in the one case, as in the other, it was the province of the jury, not of the court, to determine whether the engineer had reason to believe that a man was so situated that he could not, without peril, get off the track in time to escape the train, moving as it was, or was so much intoxicated that he could not or would not attempt to escape, and, whether, after he could have discovered the situation, the engineer might, by exercising ordinary care, have avoided the fatal injury. *Cook v. Central R. & Bkg. Co.* *supra*. Instinct would prompt a man under such circumstances to try to save his life, and in the absence of all evidence, the presumption is that he has exercised due care. *Pennsylvania R. Co. v. Weber*, 76 Pa. 157, 18 Am. Rep. 407. In the case of *Deans v. Wilmington & W. R. Co.*, it was declared to be the province of the jury to determine which of two natural inferences should be drawn from an admitted state of facts. In our case there are not only different inferences directly deducible from the evidence, but there is contradictory testimony, giving rise necessarily to different conclusions of law, according to the possible findings of the jury. *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99. We cannot follow counsel in the line of argument adopted, and say that, because the court held in the case referred to, that without expert testimony the jury could exercise their own common sense, and determine within what space an engineer might stop his train, we can go a bow-shot further here, and declare that the court may judicially determine what would be the rela-

tive progress of the two bodies moving upon the same track,—the train, whose speed was estimated by various witnesses at 80 to 50 miles per hour, and a man, who was said to be lame, but whose velocity was not even guessed at by any witness. The difficulty would be enhanced by the fact, to which we have adverted, that the jury had the exclusive right to say within what distance the train could be stopped; and an essential factor would be wanting, if anyone outside of the jury should undertake the problem. If, moreover, the case at bar does not present a number both of conflicts in evidence of the various witnesses and of diverse inferences deducible from different views of the evidence, leading to conclusions of law modified according to the inference drawn, it would seem difficult to conceive of one that does. The court cannot, for the want of ascertained data, work out the problem so as to reach a special verdict. The engineer, when his train was rushing on at such a speed, and a human being was placing himself in imminent peril of life, was not warranted in making a calculation in his head of this intricate problem. It is now manifest that, if he refused to slacken his speed in the least, (as we must assume on the demurrer to the evidence he did,) and acted upon a hurried calculation as to the rapidity with which the intestate was moving, he made a fatal mistake. The man is dead, and the engine killed him. So that the figures, contrary to the maxim, were false. If the jury believed that the engineer could by ordinary care, after seeing the situation of deceased, have diminished the force of the collision so as to bruise instead of killing him, their verdict ought not to be disturbed.

It is due to the counsel who discussed the doctrine of proximate and remote cause with so much subtlety to state briefly the reason why a court, where the principle announced in *Davies v. Mann*, 10 Mees. & W. 546, and first adopted by this court in *Gunter v. Wicker*, prevails, cannot concur in his line of reasoning. It has been generally conceded that from the stand-point which is occupied by this court the rule of *causa causans* has been more happily and succinctly stated by Judge Cooley in his work on Torts than by any other writer. He says, (pages 70, 71:) "If the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." 4 Am. & Eng. Encyclop. Law, p. 25, note 3, with authorities cited; *Isbell v. New York & N. H. R. Co.* 27 Conn. 404.

Applying the principle to the facts of our case, it is manifest that, though plaintiff's intestate was negligent in going upon a trestle when he ought to have known that a train was approaching, he would not have been killed if the engineer had stopped the train before it came in contact with him. If, then, there was any evidence that warranted the finding of the jury in response to the third issue,—which meant that the death was due to the negligence of the engineer in failing to stop or diminish the speed of the train,—it would follow that the court must hold as law that the negligence of the defendant was the proximate

cause of the injury. The authorities do not sustain the position assumed by counsel. It makes no difference how short an interval occurs between the negligent act of the plaintiff and that of the defendant, if the latter had time to discover the danger and avert it by the exercise of ordinary care. 4 Am. & Eng. Encyclop. Law, p. 27; *Needham v. San Francisco & St. J. R. Co. supra*; *Trow v. Vermont Cent. R. Co.* 24 Vt. 494.

The illustration of concurrent negligence given by *Judge Cooley* outlines still more clearly the distinction which we have attempted to draw. It is the case of two persons, who in concert block up a street. "Neither of the culpable parties can excuse himself by showing the wrong of the other, for the injury is a natural and proximate result of his own act." There are two divergent lines of authority upon this subject, but the position assumed by counsel for the defendant finds no support in the decisions of those courts that have, like this, adhered closely to the doctrine of *Davies v. Mann*, 10 Mees. & W. 545. The negligence of the plaintiff in our case consisted in going upon the trestle when an approaching train was in sight, as it could have been seen a mile. But if, after he went upon the track, the defendant company's servant could have discovered his danger in time to avert it without jeopardy to the persons or property on defendant's train, and neglected to do so, the negligence of the two was not concurrent nor contemporaneous. That of the defendant was so far subsequent to the plaintiff's act—wrongful act—as to give time to the servant of the former to have discovered the danger, and averted the injury by the proper use of the means at his command. 2 *Thomp. Neg.* 1157; *Wharton, Neg.* §§ 343, 346, 388.

It was not error in the court to recapitulate fairly such contentions of counsel as illustrated the bearing of the evidence upon the issues. It is often helpful, if not necessary, for the court to do so, in order that they may understand how to apply the law to the testimony.

There is no error.

Clark, J., dissenting:

In this case there can be no question that the plaintiff was guilty of negligence. The exception taken by the defendant below is, in purport and effect, that there was no evidence sufficient to go to the jury that, notwithstanding plaintiff's negligence, the injury "might have been avoided by the exercise of reasonable care and prudence on the part of the defendant." Taking the plaintiff's evidence in every respect to be true, this exception of defendant should be sustained. By that evidence the plaintiff was walking on a trestle a little after the regular schedule time of the passenger train, and at a point where he could see the train for a mile. The trestle was 125 feet long. The engineer sounded the whistle 450 or 500 yards from the north end of the trestle going south, and about 2 P. M. in the day-time, the train moving at the rate of 80 to 85 miles an hour. When the engineer sees a man, not known by him to be deaf, drunk, or insane, walking on the track, he has ground to believe that on sounding the whistle the man will get off the track in time. He is not compelled to

slacken the speed of the train on that account. This has been often decided, and lately in *McAdoo v. Richmond & D. E. Co.* 105 N. C. 140, and *Meredith v. Richmond & D. R. Co.* 108 N. C. 616. It cannot with reason be contended that in this case this short trestle should have caused the engineer to slacken his speed; for, aside from the difficulty of an engineer moving at that speed being able to locate a man on any specified 125 feet of the track, there was but 125 feet—i. e., 41½ yards—of the trestle, and by plaintiff's evidence the deceased was 5 or 6 yards on the trestle when the whistle blew. If the engineer did not know the man was on the trestle, he had reasonable ground to believe he would not go on it after the signal. If he is held responsible for the knowledge that the man was on the trestle, he had reasonable ground to believe that the man would turn back the 6 yards he had traversed; and he must also be credited with the knowledge that, if the man persisted in attempting to cross while the engine, moving 30 or 35 miles an hour, was running more than a quarter of a mile, (456 yards,) a man could traverse the remaining 36 yards of the trestle who was walking at one thirtieth of that speed, or under 3 miles an hour. It was not unreasonable in the engineer to suppose that a man who would attempt to cross a trestle in front of a passenger train would at least move as rapidly as three miles an hour, when an ordinary walk is more rapid. This is not like *Burton v. Wilmington & W. R. Co.*, 82 N. C. 504, 84 N. C. 193, where the deceased was a deaf man, and the engineer knew him; nor like *Deans' Case, supra*, where the man was drunk and helpless on the track; nor like *Manly's Case*, 74 N. C. 655, where the injured parties were children; nor like *Troy's Case*, 99 N. C. 298, where the accident was in the night-time, in a populous town, and the train moving at an unusual hour, no head-light used, and no signal being given; nor like those cases where the train was passing out of regular time, and no signal was sounded; nor like live-stock cases, — *Carlton v. Wilmington & W. R. Co.* 104 N. C. 885, and the like; nor those in which stress is laid on the fact that stock, unlike human beings, have not intelligence enough to get off the track. Here the train was on nearly regular schedule time. There was no evidence that the man was drunk, or that the engineer had reason to think he was. It was in broad day-light (2 P. M.). The signal was sounded in ample time, and the engineer was not wanting in due care in supposing that after the signal the man would not go on the trestle, or, if there, he would get off, as he had time to do. We do not advert to plaintiff's evidence that he might have escaped by getting on the end of one of the several large sills in the trestle, nor that the deceased could have let himself down to the ground,—only some eight feet below. Still less do we advert to the evidence offered for the defendant. But, taking the plaintiff's evidence alone, the shortness of the trestle, and the signal given in such ample time, it is clear there was no evidence to go to the jury that there was negligence in not stopping or slackening up a train under these circumstances. If the trestle had been a long one, or very high, a different case entirely would be presented. But here it was only a

little over 40 yards long and 8 feet high. With the slightest regard to prudence the man might and should have gotten off in ample time. If, as is probable from plaintiff's evidence, the plaintiff deliberately walked or recklessly rushed on the trestle after the signal sounded, or walked slower than a man ordinarily does, that was a piece of folly or fool-hardiness that the engineer might well be excused for not anticipating. Railroads are expected to guard against every avoidable injury, and even to prevent injury to a plaintiff from the consequences of his own negligence, if by reasonable care they can avoid it; but the traveling public and the railroads have rights also, and the latter should not be held liable for damages in presuming, under the circumstances of this case, that the plaintiff, after the signal given, either would not go on the trestle, or, if there, would get off, as he had full time to do. There is no evidence tending to show that the engineer knew or had any reason to suppose that the man was drunk, nor is it shown even that in fact he was drunk. It is almost certain that the deceased ran upon the trestle after the whistle sounded, (for, if on it at that time, he would have cleared it at an ordinary walk before the engine could have reached it at the speed stated by plaintiff's witness, of 80 or 85 miles an hour;) and, if this is so, it is not shown how close the engine then was to him, and that the engineer could then have stopped his train in time to avoid striking him. Yet the burden of showing this was on the plaintiff. If deceased was on the trestle when the whistle blew, the engineer knew he had ample time to cross so short a trestle before the engine could reach it. If he went on it after the whistle blew, it is not shown when, nor that the engineer could then have stopped the train in time. In *Deans v. Wilmington & W. R. Co.*, *supra*, it is said: "We have reiterated the principle that where an engineer sees a human being walking along or across the track in front of his engine he has a right to assume without further information that he is a reasonable person, and will step out of the way of harm before the engine reaches him. *McAdoo v. Rich-*

mond & D. R. Co. 105 N. C. 158; *Daily v. Richmond & D. R. Co.* 106 N. C. 301; *Parker v. Wilmington & W. R. Co.* 86 N. C. 221." The same rule is again laid down in *Meredith v. Richmond & D. R. Co.* 108 N. C. 616.

These cases should be decisive of the one before us. Here, from the shortness of the trestle, the distance at which the train could be seen, and the length of time the signal was given, "the engineer had the right to assume that the person would step out of harm's way before the engine reached him." To lay down the principle that where an engineer sees a man apparently sober on a short and low trestle, the full length of which he knows the man at an ordinary gait can cross after the signal is sounded, he must nevertheless stop or slacken his speed, or that, if he sees a man walking near such trestle, he must do likewise for fear that he may rush upon the trestle, and try to beat the train across, is a rule that is hardly consistent with the decisions above cited nor consonant with the right of way of the railroad to the use of its own track. Should the man nevertheless be so fool-hardy—as was probably the case here—as to run upon the trestle after the signal was given, the engineer, in the interest of human life, should stop the train if time is given him to do so; but the burden of showing that he could do so is on the plaintiff. Upon the plaintiff's evidence in this case his intestate was guilty of gross negligence, and there was no evidence sufficient to go to the jury that the defendant by the exercise of reasonable care and prudence could have avoided the unfortunate consequences of the intestate's recklessness. The engineer knew that the intestate, if on the trestle, had ample time to get off after the whistle sounded, and reason to suppose that he would do so; and he was not called on to anticipate that the intestate would rush upon the trestle when the engine was so close at hand that it does not appear it could have been stopped in time to avoid the accident.

Davis, J., concurred in the foregoing dissenting opinion.

Rehearing denied.

CALIFORNIA SUPREME COURT.

Re BONDS OF THE MADERA IRRIGATION DISTRICT.

APPEAL OF Henry MILLER *et al.*

APPEAL OF James B. HAGGIN.

APPEAL OF George D. BLISS.

APPEAL OF CALIFORNIA PASTORAL & AGRICULTURAL CO.

APPEAL OF SIERRA VISTA VINEYARD CO.

(.....Cal.....)

1. A state legislature has power to provide for the irrigation of arid lands

NOTE.—Necessity of special benefit to sustain assessments for local improvements.

The doctrine declared in the main case, following 14 L. R. A.

in a particular section of the State in the absence of a constitutional provision depriving it thereof.

2. Neither the fact that some of the property within a district formed for the irrigation, by means of taxation, of arid lands within its borders will receive no benefit therefrom, nor that all the property which will be benefited is not included within the taxing district, will render proceedings for the formation of the district unlawful.

3. A constitutional prohibition against special laws creating municipal corporations will not prevent a general law for municipal corporations of a particular species or character, even if in the nature of things such corporations can find occasion for their organization in a portion of the State only.

4. It is not an unconstitutional delega-

Lent v. Tillson, 72 Cal. 428, that the expenses for a local improvement may be assessed without regard to benefits, or at least that the benefit is not

tion of legislative power to create a municipal corporation to provide that such a corporation shall not be created under a general law without an affirmative vote of those who are to be affected by its creation.

5. A constitutional provision for the incorporation, organization and classification of cities and towns does not apply to other municipal corporations where the Constitution provides for "county, city, town or other public municipal corporations."

6. No provision for a hearing of the landowners is necessary prior to the organization of an irrigation district which is a public corporation created by vote of the electors at an election called by the board of supervisors on a petition of freeholders.

7. Due process of law does not entitle a landowner to a hearing before creation of an irrigation district including his property, although it is for the purpose of making public improvements for which his land will be assessed. It is sufficient that he be allowed a hearing at any time before the assessment becomes final.

8. Assessments according to the value of the land, and not according to the amount of benefits received by each parcel to pay for a public improvement in an irrigation district, are not unconstitutional unless by force of an express constitutional provision, as such assessments are included in the inherent power of taxation, which is not limited to the benefits received.

9. Land not at all benefited by the public improvement of an irrigation district in which it

is included does not have on that account a constitutional exemption from assessment.

10. The determination by a board of supervisors as to the sufficiency of an informal but not invalid bond presented with a petition for the creation of an irrigation district is conclusive.

11. The description of the boundaries in a petition for establishment of an irrigation district is not insufficient because the course of the boundary which is given has not actually been surveyed on the ground, or because a part of the description is made by reference to an official map or a land-mark designated upon such map.

12. The fact that those who have no interest in the lands affected may by their votes make the necessary majority in favor of creating an irrigation district, or even that the owners of the land may be non-residents and have no voice in the matter, does not make invalid a statute which authorizes the creation of such a district by a two-thirds vote of the electors at an election ordered by the board of supervisors on a petition of fifty freeholders or a majority of those owning lands in the proposed district.

13. Recitals in proceedings of the board of supervisors are not competent evidence that a petition for the establishment of an irrigation district was presented to the board, where the question arises in a direct proceeding to establish the validity of the organization of such district.

14. Where a statute prescribes the form for the issuance of bonds by an irriga-

the source of the power, is supported by very few authorities.

Most cases on the subject declare that local assessments for public improvements can be constitutional only when the improvements clearly confer special benefits on the properties assessed, and only to the extent of those benefits. *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Lee v. Rugles*, 62 Ill. 427; *Chicago v. Larned*, 34 Ill. 279; *Excelsior Planting & Mfg. Co. v. Green*, 39 La. Ann. 456; *Tide Water Co. v. Coaster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *Re Drainage of Lands*, 35 N. J. L. 497; *Illinois Cent. R. Co. v. Bloomington*, 76 Ill. 447; *Crawford v. People*, 82 Ill. 567; *Re Fourth Ave.*, 3 Wend. 452; *Re Albany Street*, 11 Wend. 149, 25 Am. Dec. 618; *Gilmore v. Hentig*, 33 Kan. 174; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535; *Allegheny City v. Western Pennsylvania R. Co.* 138 Pa. 375; *Washington Ave.*, 69 Pa. 352, 8 Am. Rep. 255.

Such an assessment is imposed and collected as an equivalent for the benefit. *Bridgeport v. New York & N. H. R. Co.* 36 Conn. 255, 4 Am. Rep. 63.

When an assessment for a sewer is levied by an arbitrary standard which requires the burden to be laid upon lands far from the sewer and only slightly benefited equally with those fronting upon it and greatly benefited, it is not legally possible that the apportionment can be just or equal or in proportion to benefits, and it must therefore be held unconstitutional. *Thomas v. Gain*, *supra*.

When the court can declare as matter of law that no benefit to certain property can arise from a public improvement, the Legislature is powerless to impose such a burden. *Allegheny City v. Western Pennsylvania R. Co.* 138 Pa. 375.

The potentiality of receiving a benefit from a sewer is the thing to be charged with the tax for the sewer. *Wright v. Boston*, 9 Cush. 233.

A lotowner cannot be compelled to pay the cost of a street improvement by a change of grade 14 L. R. A.

which will greatly impair the value of his property, and which ought not to be made at all without compensating him for the damage. *Louisville v. Louisville Rolling Mill Co.* 3 Bush, 416, 36 Am. Dec. 243.

The assessment of property located on a street which is already well paved with cobble stones in the style universally in use in the city, to improve the street for a public drive or carriage-way, is unconstitutional because the improvement is not for the benefit of the abutting property but for the benefit of the public. *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615.

The expense of grading, macadamizing and improving a public highway, which will constitute an improvement for the general public benefit, cannot be charged by the Legislature on the owners of farm lands lying within one mile of the highway. *Re Washington Ave.*, 69 Pa. 352, 8 Am. Rep. 255.

But in Iowa it is declared that local assessments are not based on benefits, but on the simple ground that the object is public, and that the system of taxing abutting lots secures such a just and fair distribution of the burden as to be within the rule requiring uniformity of taxation. *Warren v. Henry*, 31 Iowa, 31; *Morrison v. Hershire*, 22 Iowa, 271.

In Wisconsin also the theory of benefits is denied, and the power to impose such burdens placed on a constitutional recognition of the power to make assessments as distinguished from taxation. *Weeks v. Milwaukee*, 10 Wis. 262.

Benefit to property is not the only consideration to be regarded in apportioning among cities and towns the expense of a system of sewage disposal; but there are many elements to be considered, some of which are the exigencies or special need of such improvements; the area to be accommodated; the present or probable population and wealth; the value of the land and its adaptability for homes and other uses. *Re Kingman (Mass.)* 12 L. R. A. 417.

tion district the court should confine its confirmation of an order of the board of supervisors for the issuance of bonds to the portion thereof which designates the amount to be issued and leave the form to be governed by the statute.

15. A judgment confirming the proceedings for establishing an irrigation district cannot include an order that all persons shall be forever debarred and precluded from denying the validity of the proceedings.

On Rehearing.

16. Constitution, art. 11, § 18, which prohibits certain specified public corporations from incurring indebtedness without the assent of two thirds of the qualified electors thereof, does not apply to an irrigation district.

17. An incorporated town may lawfully be included within the boundaries of an irrigation district.

(December 12, 1891.)

APPEAL by landowners from a judgment of the Superior Court for Fresno County in favor of complainants in a proceeding brought to procure the confirmation of the organization of an irrigation district and of the proceedings for the issuance and sale of certain bonds to raise money for the purposes of the district. *Reversed.*

The facts are fully stated in the opinion.

Mr. E. W. McKinstry, with Messrs. R. E. Houghton and E. W. Magraw, for appellants, Henry Miller *et al.*:

This is a case quite different from that of an ordinary assessment; and even in this case it is not clear that benefits direct and indirect either to property or property owners should not be regarded as the basis of the power to impose the burden.

A statute authorizing an assessment upon lands reclaimed of a just proportion of the contract price for reclaiming them by drainage is unconstitutional because the expense to be levied on the land is not limited to the extent of benefits conferred. *Tide Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634.

A tax on a railroad company for altering or widening a street used by its track cannot be sustained on the ground of special benefits, but is a clear exercise of the taxing power for a public purpose, and is therefore void where the charter of the company exempts its property from taxation. *State v. Newark*, 87 N. J. L. 185.

An assessment on lots abutting on one side of a street of all or part of the expense of widening the street by taking a strip off from lands on the other side was held unconstitutional in South Carolina, but the decision is apparently based on an entire denial of the power, which is now thoroughly established to assess property specially benefited for local improvements. *State v. Charleston City Council*, 12 Rich. L. 708.

The Legislature cannot authorize a municipal corporation to tax for its own local purposes lands which lie beyond the corporate limits. *Wells v. Weston*, 22 Mo. 384.

Legislative discretion as to rule of apportionment.

If no direct and invidious discrimination in favor of certain persons to the prejudice of others be made, it is not a valid objection to a mode of charging the expense of a public improvement upon the property benefited that to some extent in- 14 L. R. A.

I. No evidence was given herein in the court below that the petition to the board of supervisors was signed by "fifty or a majority of the freeholders within the proposed district."

The second section of the Act of 1887 provides, that "whenever" a certain petition (accompanied by a bond), signed by fifty or a majority of the freeholders, shall be presented to the board of supervisors, the board shall hear the same, and may make such changes in the proposed boundaries as they may deem proper, and "establish and define such boundaries, etc."

The fact that the petition was or was not sufficient in form; that it was or was not signed by those required by the statute to sign it, each was an independent fact, which the supervisors could not determine, except for their own guidance.

Mulligan v. Smith, 59 Cal. 239.

Prior to the Codes, every Act necessary to the exercise of the authority had to be averred, as well as proved.

Davis v. Nese, 6 Car. & P. 167; 2 Cowen & Hill's notes, 207.

The rule remains that no intendments or presumptions will be made in favor of the authority or jurisdiction of inferior courts or officers proceeding under statutory powers, but every fact necessary to justify the exercise of the jurisdiction or authority must be proved.

Note 231, of Cowen & Hill's Notes on Phillips; *People v. Recorder of Albany*, 6 Hill, 429; *Hill v. Stocking*, Id. 314; *Doughty v. Hope*, 1 N. Y. 79; *Kennedy v. Newman*, 1 Sandf. 187;

equalities may arise. All that is required is that the charges shall be apportioned in some just and reasonable mode according to the benefit received. *Hagar v. Reclamation Dist.* 111 U. S. 701, 28 L. ed. 509.

The mode in which assessments are made by the Legislature is subject to review in the courts only when it is made in excess of legislative authority. *Sheley v. Detroit*, 45 Mich. 431.

The Legislature is the exclusive judge of the question whether or not premises situated in a district charged with the expense of a public improvement will be benefited thereby. *Litchfield v. Vernon*, 41 N. Y. 123. Compare *Thomas v. Lain*, 35 Mich. 155, 24 Am. Rep. 535; *Allegheny City v. Western Pennsylvania R. Co.* 138 Pa. 375, and other cases *supra*.

So under authority of the Legislature to make "all manner of wholesome laws" a statute providing for the apportionment of the expense of making a public highway of a township and bridges between towns and counties is not unconstitutional because no rule of apportionment is adopted as to the share of the counties. *Hingham & Q. B. & Turnp. Corp. v. Norfolk County*, 6 Allen, 353, as explained in *Re Kingman* (Mass.) 12 L. R. A. 417.

A statute authorizing the expense of drains to be "equitably and ratably assessed" on property within a territory benefited is not invalid because it does not require them to be assessed according to the benefits which each estate may receive. *Springfield v. Gay*, 12 Allen, 612.

Where assessments for public improvements have been levied in a constitutional way an individual is not entitled as a matter of right to have the question of the degree of benefit to his property decided by a court. *Workmen v. Worcester*, 118 Mass. 168; *Keith v. Boston*, 120 Mass. 108.

The assessment of benefits for a sewer which is based on the value of the land alone without

Bennett v. New York, Id. 485; *Bailey v. Delaplaine*, Id. 11; *Varick v. Tallman*, 2 Barb. 113; *Dike v. Lewis*, Id. 844; *Fullon v. Heaton*, 1 Barb. 552; *Sharpe v. Speir*, 4 Hill, 76; *Re Faulkner*, Id. 598; *Ex parte Robinson*, 21 Wend. 672; *Ex parte Haynes*, 18 Wend. 611; *Dyckman v. New York (Croton Water Case)*, 5 N. Y. 484; *Wooster v. Parsons*, 1 Kirby, 27; *Maples v. Wightman*, 4 Conn. 378, 10 Am. Dec. 149.

The board of supervisors had no power to determine that the petition to them was signed by "fifty or a majority of the freeholders," so that their determination should bind anyone.

Sharpe v. Speir and *Mulligan v. Smith*, *supra*; *Kahn v. San Francisco Board of Suprs.* 79 Cal. 888.

II. The orders or records of the board of supervisors (or other alleged officers), were not prima facie evidence that the petition to the supervisors was signed by fifty or a majority of the freeholders, as required by the Act of 1887.

At page 465 of his work on Taxation, Judge Cooley says: "A common requirement is that the improvements shall be asked for or assented to by a majority or some other proportion of those who would be taxed. The want of a compliance with this requirement is fatal in any stage of the proceedings. And any decision or certificate of the proper authorities that the required consent or application had been made would not be conclusive, but might be disproved."

This is very far from a statement that such a decision or certificate would be prima facie evidence, nor does any one of the cases cited by Cooley so hold.

buildings must be based on their value at the time of making the improvement, and an ordinance allowing the assessment of each lot at the time when a drain therefrom enters the sewer is void because unreasonable and unequal. *Boston v. Shaw*, 1 Met 1.0.

A sewer assessment is not invalid as to a lot on which a large portion is lower than the bottom of the sewer where there is a probability that the time may come when the sewer will be needed for that lot and the lot may be graded so as to derive as much advantage from the sewer as others. *Downer v. Boston*, 7 Cush. 277.

The relative benefit which each estate on the line of a sewer may receive cannot be considered in determining the assessment which must be made under a statute requiring the assessments to be made according to the value of the land exclusive of buildings. *Snow v. Fitchburg*, 136 Mass. 183.

A classification of lands for drainage assessments into three classes, placing those lands most benefited in the first class and those least benefited in the third class, with a maximum rate of taxation in each class, making an arbitrary difference of ten cents per acre between each class and the one next to it, is unconstitutional because a tax assessed upon such a basis would not be in accordance with the special benefits to each tract. *Lee v. Ruggles*, 62 Ill. 427.

Charging burden of street improvement on abutting lot directly.

The whole burden of a street improvement in front of a lot cannot be constitutionally charged on that lot because this is not basing the expense on the basis of benefits. *Illinois Cent. R. Co. v.*

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Henderson v. Baltimore, 8 Md. 360; *Mulligan v. Smith*, 59 Cal. 239; *Barber v. Winslow*, 12 Wend. 102; *Hubbell v. Ames*, 15 Wend. 372; *Jenks v. Stebbins*, 11 Johns. 224; *Sharpe v. Speir*, 4 Hill, 76.

The rule, applicable to this class of cases, is laid down in *Blackwell on Tax Titles*, p. 39: "When a special power is delegated by statute to particular persons, or to an inferior tribunal, affecting the property of individuals against their will, the course prescribed by law must be strictly pursued. If the law has not been strictly complied with the proceeding is a nullity, and the adjudication gives it no additional authority."

In an action brought to collect an assessment, or, in an action like the present, to obtain a decree that all the proceedings, connected with the formation of a district and the issuing of bonds, were regular and valid, it becomes necessary for the plaintiffs to prove, step by step, that the statute was complied with.

Keane v. Cannovan, 21 Cal. 299, 83 Am. Dec. 738; *Williams v. Peyton*, 17 U. S. 4 Wheat. 78, 4 L. ed. 518; *Varick v. Tallman*, 2 Barb. 113; *Los Angeles v. Los Angeles City W. W. Co.* 49 Cal. 642; *Blanchard v. Beideman*, 18 Cal. 281; *Gately v. Leviston*, 63 Cal. 365.

All statutory modes of divesting titles must be strictly pursued. He who relies for a title upon an extraordinary mode of acquisition, given him, not by the will of the owner, express or implied, but against his will, and by mandate of the law, must show a strict compliance with the statutory rules from which his title accrues.

Bloomington, 76 Ill. 447; *St. John v. East St. Louis*, 50 Ill. 92.

On this question the judges of the Supreme Court of Michigan were equally divided. *Woodbridge v. Detroit*, 8 Mich. 274.

Thus an assessment upon every lot for the expense of grading in front of it, whatever may be the depth or kind of excavation or the height of the filling, is invalid because it totally disregards the well established doctrine that the assessment shall not exceed the benefits. *State v. Jersey City*, 37 N. J. L. 123.

So in a Territory it is held that charging the cost of grading a street in front of each lot upon that particular lot is in violation of U. S. Rev. Stat., § 1924, providing that taxes shall be equal and uniform, and that the assessments shall be according to the value of the property. *Seattle v. Yealer*, 1 Wash. Ter. 572.

But in Iowa, where the courts deny that assessments for such improvements are based on benefits, a statute compelling lotowners to pay the cost of street improvements in front of their lots is held not to be unconstitutional. *Warren v. Hanly*, 31 Iowa, 31.

In Wisconsin also every lotowner may be made to improve the street in front of his lot, not on the theory of benefits or under a constitutional rule of uniformity of taxation, but under a constitutional recognition of the power of assessments as distinguished from regular taxation. *Weeks v. Milwaukee*, 10 Wis. 242.

But that the expense of maintaining a sidewalk may be charged on the premises in front of which it is constructed has been decided in many cases, some of which do not expressly declare the reason for their decision but many of which put it on the

Curran v. Shattuck, 24 Cal. 427; *Stanford v. Worn*, 27 Cal. 171; *Stockton v. Whitmore*, 50 Cal. 556; *Chicago & A. R. Co. v. Smith*, 78 Ill. 97; *Mitchell v. Illinois & St. L. R. Co.* 68 Ill. 288; *Chicago v. Rock Island R. Co.* 20 Ill. 290; *Wells*, Jurisd. 155.

The plaintiffs failed to prove their case and a new trial should have been granted.

Sharpe v. Sprir, *supra*; *Litchfield v. Vernon*, 41 N. Y. 135; *Pittsburg v. Waller*, 69 Pa. 365.

It is for the plaintiffs to prove that the events had occurred which authorized officers clothed with conditional powers to exercise them.

Damp v. Dane, 29 Wis. 419; *Litchfield v. Vernon*, *supra*.

III. Even if the rule would be otherwise in an action by a bondholder (which we deny), it would still be necessary for the plaintiffs, in this extraordinary and special proceeding, to prove that the petition to the supervisors was actually signed by fifty or a majority of the freeholders, within the proposed district.

When in a special proceeding the power of an officer, board or tribunal depends on a petition or writing of a certain form, or containing certain statements, and there is no petition, or it does not comply with the prescribed form or contain the statements required, the officer, board or tribunal gets no power to proceed.

Harrington v. People, 6 Barb. 607; *People v. Spencer*, 55 N. Y. 1; *People v. Smith*, Id. 135; *Craig v. Andes*, 93 N. Y. 405; *Jolley v. Foltz*, 34 Cal. 321.

VII. The petition contains no sufficient description of the boundaries of the proposed

district. The description must be certain of itself, and not such as to require evidence *abunde* to render it certain.

Kean v. Cannonan, 21 Cal. 302, 82 Am. Dec. 788.

A description sufficient between man and man will not answer in proceedings to collect a tax.

Blackwell, Tax Titles, 152. See also *People v. Mahoney*, 55 Cal. 286; *People v. De La Guerra*, 24 Cal. 78; *Crosby v. Dorod*, 61 Cal. 557.

Where the law requires jurisdictional conditions to appear in the record of an inferior board or tribunal, they must appear in the record.

Latham v. Edgerton, 9 Cow. 229; *White v. Hawn*, 5 Johns. 851.

If the law requires a petition showing certain facts, and the petition does not state facts as required, the board, officers or tribunal has no jurisdiction, and its attempted action is void.

People v. Spencer, *People v. Smith*, *Harrington v. People* and *Jolley v. Foltz*, *supra*; *Levy v. Yolo Co. Super. Ct.* 66 Cal. 292; *Craig v. Andes*, *Litchfield v. Vernon*, *Pittsburg v. Waller* and *Damp v. Dane*, *supra*; *Rex v. Croke*, 1 Cowp. 26.

XIV. The Act of 1887 is unconstitutional and void. It violates the Constitution of the United States and of the State.

(a.) The statute attempts to authorize the assessment and taking of private property for a private purpose.

(b.) If a district formed under the Act of 1887 is a corporation, it is a private and not a public corporation.

ground that the improvement may be ordered as a police regulation. *State v. Newark*, 37 N. J. L. 416; *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *Sands v. Richmond*, 31 Gratt. 571, 31 Am. Rep. 742; *Lowell v. Hadley*, 8 Met. 180; *Paxson v. Sweet*, 18 N. J. L. 196; *Hudler v. Golden*, 36 N. Y. 446; *Buffalo City Cement Co. v. Buffalo*, 48 N. Y. 603; *Franklin v. Maberry*, 6 Hump. 368; *Whyte v. Nashville*, 2 Swan. 364; *Washington v. Nashville*, 1 Swan. 177; *Bonsall v. Labanon*, 19 Ohio, 418; *Palmer v. Way*, 6 Colo. 108; *O'Leary v. Sloo*, 7 La. Ann. 25; *Hydes v. Joyes*, 4 Bush, 464, 96 Am. Dec. 811.

On the other hand, in Illinois the court has so far repudiated the doctrine that the police power authorizes the charge to lotowners of the expense of sidewalks in front of their lots that, in conflict with decisions elsewhere, it denies the validity of an ordinance to compel owners to remove the snow from sidewalks in front of their premises. *Gridley v. Bloomington*, 38 Ill. 554, 30 Am. Rep. 563.

Under a constitutional provision that the General Assembly may vest in the corporate authority of cities power to make local improvements by special assessment or by special taxation of contiguous property or otherwise, the cost of a sidewalk ordered to be built in front of one lot only may be charged upon it. *White v. People*, 94 Ill. 604.

In such a case whether or not the special tax exceeds the actual benefit to the lot is immaterial. It may be supposed to be based on a presumed equivalent. *White v. People*, 94 Ill. 604.

Owners of property cannot be made personally liable for special assessments for local improvements as these must be based on the benefits to the property. *Craw v. Tolono*, 96 Ill. 255, 36 Am. Rep. 148; *Gaffney v. Gough*, 36 Cal. 104; *Taylor v. Palmer*, 31 Cal. 240.

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The same rule as to personal liability applies to sidewalks. *Virginia v. Hall*, 96 Ill. 378.

This note does not purport to include questions as to the various modes of assessment of benefits, such as by frontage or valuation, but only the question of the true basis of assessments.

Courts have repeatedly declared that taking a man's property under the guise of taxation may constitute confiscation. There is much reason in holding that the true basis of all taxation is the benefit to the tax-payer. In the case of ordinary taxation the expenditure of the money is made in so many ways and for so many purposes that no direct connection can be traced between the payment and the benefit. The rules for apportionment of such burdens must necessarily be imperfect and work unequally in many particular cases, but when it can be seen that the rule established by the Legislature is necessarily unjust in principle, as for instance, an imposition upon one county of the whole tax for the expenses of another county or of a city in a distant part of the State, it would seem to be a clear case of unconstitutional legislation. So in the case of special assessments it would seem that the true rule of decision for the courts is to uphold any rule of assessments made by the Legislature, although it may, as a matter of fact, impose a burden in some cases upon property not benefited, except when it is clear that the rule does not attempt to make a just division of the burden according to benefits, and does not approximately secure that result, but to condemn a rule of assessment which is on its face or necessarily unjust in principle because it imposes a burden for the public benefit upon those not benefited, or, on the other hand, imposes the whole of such a burden on a limited portion of those equally benefited.

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(c.) The statute is unconstitutional because it attempts to authorize the assessment and taking of private property without reference to actual benefits.

(d.) Because the apportionment provided for is unequal and unjust.

(e.) The statute is unconstitutional because it authorizes the taking of private property without due process of law.

(f.) Because it attempts to authorize the assessment and sale of private property to pay for a future, uncertain and contingent improvement.

(g.) Because it attempts to delegate judicial powers to the board of supervisors.

(h.) Because it attempts to delegate to the supervisors, directors and electors legislative powers, including the power to levy taxes.

(i.) It grants special privileges to a certain class, and discriminates in favor of a particular industry.

(j.) The proceedings for the levy and collection of the assessments are repugnant to the Constitution.

(k.) The Act is violative of the Constitution of the State, in that it is special legislation.

XVII. This proceeding is not *in rem*. If the statute provides for any judgment, it is purely a judgment *in personam* and not *in rem*. But no court can enter such a judgment without personal service of process.

Cooley, Const. Lim. 6th ed. 496, 497; *Pennyroyer v. Neff*, 95 U. S. 722, 24 L. ed. 568; *Belcher v. Chambers*, 58 Cal. 635; *Denny v. Ashley*, 12 Colo. 165; *Webster v. Reid*, 52 U. S. 11 How. 437, 13 L. ed. 761; *Pana v. Bowler*, 107 U. S. 529, 27 L. ed. 424.

Mr. Octave G. Du Py for appellant James B. Haggin.

Messrs. Pillsbury & Blanding for appellant Sierra Vista Vineyard Co.

Messrs. Page & Ellis for appellant California Pastoral and Agricultural Co.

Messrs. Mesick, Maxwell & Phelan for appellant George D. Bliss.

Messrs. Hinds & Merriam, Craig & Meredith and C. C. Wright, for respondent:

The appellants contend that the Act is unconstitutional. In *Turlock Irrigation Dist. v. Williams*, 76 Cal. 860, it will be seen that counsel there raised all the points, and the court disposed of all those worthy of consideration.

In this arid country, that must remain a desert without the use of water for irrigation, if anything is a rightful subject of legislation it is the ownership of water, and use and appropriation of the waters of the running streams for irrigation and domestic use.

Stowell v. Johnson (Utah) April 2, 1891.

The Legislature is the sole judge of the necessity for the exercise of the power of appropriation to public use.

Talbot v. Hudson, 16 Gray, 417; Cooley, Const. Law, 386.

It is not necessary that their determination of the necessity be directly expressed. The courts will infer that determination from the act itself.

Re Wellington, 16 Pick. 87, 26 Am. Dec. 631.

A State Constitution is not a grant, but a restriction of power, and the Legislature has all power not expressly and clearly forbidden. 14 L. R. A.

Thorpe v. Rutland & B. R. Co. 37 Vt. 140, 62 Am. Dec. 625; *Hagar v. Yolo County Supra*, 47 Cal. 223; *People v. Rogers*, 13 Cal. 160.

Section 18 of art. 11, which prohibits the incurring of indebtedness in certain cases beyond certain limits, cannot be made to apply to a quasi public corporation, organized for the benefit of all the lands and of all the inhabitants of the district, and whose money is raised by assessments upon the lands of the district, benefited and to be benefited by the waters to be carried upon such lands by the use of the moneys derived from such assessments.

Cooley, Taxn. 2d ed. 307, 606; Dillon, Mun. Corp. §§ 755, 758, 778.

The proceeding is *in rem*, and its object is to establish the validity of the bonds as against the irrigation district, and all persons interested in the district.

Modesto Irrigation Dist. v. Trego, 88 Cal. 334.

Harrison, J., delivered the opinion of the court:

The board of directors of the Madera Irrigation District, on the 25th of May, 1889, filed in the Superior Court of the County of Fresno, in pursuance of the Act of March 16, 1889, (Stat. 1889, p. 212,) a petition for the confirmation by that court of their proceedings for the issue and sale of certain bonds of said district, amounting to \$850,000. In their petition they alleged that "said Madera Irrigation District was duly organized under the laws of the State of California, and especially under the provisions of the Act approved March 7, 1887," (Stat. 1887, p. 29;) and set forth the various steps taken by them in reference to the issue and sale of the bonds, and prayed "that the proceedings aforesaid for the issue and sale of the bonds of said District may be examined, approved, and confirmed by said court, and for all and any legal and equitable relief which may be provided by law, and which the court shall deem meet." Notice was thereupon given by order of the court that the hearing of said petition would be had July 5, 1889; and prior to that day the appellants herein filed answers thereto, showing that they were owners of lands within the district to be affected by said bonds, and specifically denying the allegations in said petition. At the hearing upon the issues presented by the answers of the appellants the court rendered its judgment in favor of the petitioners, and approved and confirmed "the legality and the validity of each and all of the proceedings for the organization of said Madera Irrigation District," and further adjudged and decreed that "each and all of the proceedings taken to secure and provide for and authorizing the issue and sale of bonds of said District in the sum of \$850,000, and affecting the legality and validity of said bonds, up to and including the resolution and orders of the board of directors of said District, made March 13, 1889, authorizing the issuance and sale of said bonds, be, and the same are hereby, approved and confirmed." From this judgment an appeal has been taken directly upon the judgment roll, bringing here the proceedings at the trial of the issues by a bill of exceptions.

In presenting their appeal, the appellants have contended that the Act of March 7, 1887, under which the proceedings for the organization of the district were had, is unconstitutional, for the reason that it is in its nature beyond the power of the Legislature to enact, and also by reason of the provisions therein contained for the organization of the district, and the mode provided for assessments upon the lands in said district, with which to meet the bonds authorized by the Act. It is also contended by them that, at the hearing of the proceedings in the court below, the petitioners did not establish by competent evidence that there had been such compliance with the requirements of the Act as would constitute a district, or give any authority to provide for the issuance of the bonds in question, and that the evidence upon which the court made its findings was improperly admitted and considered by it. The constitutionality of the Act in question was passed upon by this court and affirmed in the case of *Turlock Irrigation Dist. v. Williams*, 76 Cal. 360, and also in the case of *Central Irrigation Dist. v. De Lappe*, 79 Cal. 351; but, inasmuch as counsel have made elaborate arguments herein in review of the conclusion reached in those cases, we have again examined the question in the light of these arguments, and in affirming those decisions we present the reasons upon which we again hold the Act to be constitutional more at length than was presented in the former opinions.

1. That the Legislature is vested with the whole of the legislative power of the State, and that it has authority to deal with any subject within the scope of civil government, except in so far as it is restrained by the provisions of the Constitution, and that it is the sole tribunal to determine as well the expediency as the details of all legislation within its power, are principles so familiar as hardly to need mention. The declaration in article 4, § 1, of the Constitution, "The legislative power of this State shall be vested in a senate and assembly, which shall be designated the Legislature of the State of California," comprehends the exercise of all the sovereign authority of the State in matters which are properly the subject of legislation; and it is incumbent upon anyone who will challenge an Act of the Legislature as being invalid to show either that such Act is without the province of legislation, or that the particular subject-matter of that Act has been by the Constitution either by express provision or by necessary implication, withdrawn by the people from the consideration of the Legislature. The presumption which attends every Act of the Legislature is that it is within its power, and he who would except it from the power must point out the particular provision of the Constitution by which the exception is made, or demonstrate that it is palpably excluded from any consideration whatever by that body.

In providing for the welfare of the State and its several parts, the Legislature may pass laws affecting the people of the entire State, or, when not restrained by constitutional provisions, affecting only limited por-

tions of the State. It may make special laws relating only to special districts, or it may legislate directly upon local districts, or it may intrust such legislation to subordinate bodies of a public character. It may create municipal organizations or agencies within the several counties, or it may avail itself of the county or other municipal organizations for the purposes of such legislation, or it may create new districts embracing more than one county, or parts of several counties, and may delegate to such organizations a part of its legislative power to be exercised within the boundaries of said organized districts, and may vest them with certain powers of local legislation, in respect to which the parties interested may be supposed more competent to judge of their needs than the central authority. "The members of the two houses are the constitutional agents of the public will in every district or locality of the State, and they may therefore so arrange the powers to be given and executed therein as convenience, the efficiency of administration, and the public good may seem to require, by committing some functions to local jurisdictions already established, or by establishing local jurisdictions for that express purpose." *People v. Salomon*, 51 Ill. 50.

"If from exceptional causes the public good requires that legislation, either permanent or temporary, be directed towards any particular locality, whether consisting of one county or several counties, it is within the discretion of the Legislature to apply such legislation as in its judgment the exigency of the case may require, and it is the sole judge of the existence of such causes. The representatives of the whole people, convened in the two branches of the Legislature, are, subject to the exceptions which have been mentioned, the organs of the public will in every district or locality of the State. It follows that it falls to the Legislature to arrange and distribute the administrative functions, committing such portions as it may deem suitable to local jurisdictions, and retaining other portions to be exercised by officers appointed by the central power, and changing the arrangement from time to time, as convenience, the efficacy of administration, and the public good may seem to require." *People v. Draper*, 15 N. Y. 544.

In providing for the public welfare, or in enacting laws which in the judgment of the Legislature may be expedient or necessary, that body must determine whether or not the measure proposed is for some public purpose. We do not mean by this that the declaration of the Legislature that an Act proposed by it will be for the public good will of necessity preclude an investigation therein, or that such declaration will be conclusive when the Act itself is palpably otherwise. *Consolidated C. Co. v. Central Pac. R. Co.* 51 Cal. 269. Acts may be passed by that body which will, by their very terms, or the nature of their provisions, show that their purpose is private, rather than public. Such are the acts that were involved in the cases of *Citizens Sav. & L. Assn. v. Topeka*, 87 U. S. 20 Wall. 664, 22 L. ed. 461; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *Lowell v.*

Boston, 111 Mass. 454, 15 Am. Rep. 39; *State v. Osawkee Twp.* 14 Kan. 419, 19 Am. Rep. 99; *People v. Parks*, 58 Cal. 624. But if the subject matter of the legislation be of such a nature that there is any doubt of its character, or if by any possibility the legislation may be for the welfare of the public, the will of the Legislature must prevail over the doubts of the court. *Stockton & V. R. Co. v. Stockton*, 41 Cal. 147. It may be more difficult to define in advance the line of separation between a purpose which is private and one which is public than to determine whether in the individual case the Act is for a public or a private purpose, and as was said by Mr. Justice Miller in *Davidson v. New Orleans*, 96 U. S. 104, 24 L. ed. 619, it is wiser to proceed "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require." Whenever it is apparent from the scope of the Act that its object is for the benefit of the public, and that the means by which the benefit is to be attained are of a public character, the Act will be upheld, even though incidental advantages may accrue to individuals beyond those enjoyed by the general public. We have recently held that an appropriation by the Legislature of \$300,000 for the World's Fair Columbian Exposition at Chicago (*Daggett v. Colgan* (Cal.) ante, 474.) is to be sustained as a legitimate appropriation of the public moneys of the State, upon the ground that it is one of the objects of government to promote the public welfare of the State, and to provide for the material prosperity of its people, and that it is for the Legislature to determine the manner and the extent to which it will exercise this function of government, and that its determination upon that point is limited by its own discretion and beyond the interference of courts. The same rules of construction must be applied to the exercise of legislative authority in authorizing an expenditure for a local improvement. Such authorization is a legislative declaration that the expenditure is for a public purpose, and for the welfare of the public, and its action is not to be disregarded by the courts upon an assumption by them that such legislation is unwise, or that it may be injurious to some of the individuals who are affected by it. In determining whether any particular measure is for the public advantage it is not necessary to show that the entire body of the State is directly affected thereby, but it is sufficient that that portion of the State within the district provided for by the Act shall be benefited thereby. The State is made up of its parts, and those parts have such a reciprocal influence upon each other that any advantage which accrues to one of them is felt more or less by all of the others. A Legislature that should refrain from all legislation that did not equally affect all parts of the State would signally fail in providing for the welfare of the public. In a State as diversified in character as is California, it is impossible that the same legislation should be applicable to each of its parts. Different provisions are as essential for those portions whose physical characteristics are different as are needed in the pro-

visions which are made for the government of town and country. Those portions of the State which are subject to overflow, and those which require drainage, as well as those which for the purpose of development require irrigation, fall equally within the purview of the Legislature, and its authority to legislate for the benefit of the entire State, or for the individual district. The power of the Legislature to adapt its laws to the peculiar wants of each of these districts rests upon the same principle, viz., that it is acting for the public good in its capacity as the representative of the entire State. Under this principle levee districts have been organized directly by the Legislature itself, and their organization has been authorized by the Legislature through the board of supervisors of the county in which the district is situated. *Stat. 1867-68*, p. 316. Such legislation was upheld in *Dean v. Davis*, 51 Cal. 406. Under the same principle reclamation districts have been organized and their creation upheld as a legitimate exercise of legislative power. In passing upon this question in *Hagar v. Yolo County Supra.*, 47 Cal. 338, the supreme court said: "The power of the Legislature to compel local improvements which in its judgment will promote the health of the people and advance the public good is unquestionable. In the exercise of this power it may abate nuisances, construct and repair highways, open canals for irrigating arid districts, and perform many other similar acts for the public good, and all at the expense of those who are to be chiefly and more immediately benefited by the improvements;" and, in answer to the suggestion that such was merely a local improvement, the court said: "But we need not rest our decision upon the narrow ground that this is strictly a local improvement. On the contrary, the reclamation of the vast bodies of swamp and overflowed land in this State may justly be regarded as a public improvement of great magnitude and of the utmost importance to the community. If left wholly to individual enterprise, it probably would never be accomplished, and in inaugurating so great a work the Legislature has pursued substantially the same system adopted in other states for the reclamation of similar lands, to wit, by dividing the territory to be reclaimed into districts, and assessing the cost of the improvement on the lands to be benefited;" and refer in support of the opinion to the acts of different states in which similar improvements had been authorized.

The reasons given in that case are fully as potent in support of the authority exercised in the matter of an irrigation district; and, notwithstanding it is urged by counsel for appellants that the authority for reclaiming overflowed lands is to be upheld only as a sanitary measure, it will be seen that that is not the only ground upon which the court based its decision. Nor do we think that it rests upon that ground alone. In our opinion, a more liberal construction should be given to the authority under which such a district is established. Certainly these grounds are not the basis of the authority

for the creation of a levee district; that rests, not upon any sanitary ground but upon the ground of protection to the parties who would be affected by the overflow. *Williams v. Cammack*, 27 Miss. 222, 61 Am. Dec. 508; *Wallace v. Shelton*, 14 La. Ann. 508. Upon this subject Mr. Cooley says: "But where any considerable tract of land owned by different persons is in a condition precluding cultivation by reason of excessive moisture which drains would relieve, it may well be said that the public have such an interest in the improvement and the consequent advancement of the general interest of the locality as will justify the levy of assessments upon the owners for drainage purposes. Such a case would seem to stand upon the same solid ground with assessments for levee purposes, which have for their object to protect lands from falling into a like condition of uselessness." Cooley, *Taxn.* p. 617.

We have not been cited to the statute of any other State which provides for irrigating arid lands, or to any authority in which the power of the Legislature over the subject is discussed, but we have no hesitation in saying that the principles upon which the decisions to which we have referred were made are applicable to sustain the legislative authority in making provision for such irrigation. Whether the reclamation of the land be from excessive moisture to a condition suitable for cultivation, or from excessive aridity to the same condition, the right of the Legislature to authorize such reclamation must be upheld upon the same principle, viz., the welfare of the public, and particularly of that portion of the public within the district affected by the means adopted for such reclamation. Whatever tends to an increased prosperity of one portion of the State, or to promote its material development is for the advantage of the entire State; and the right of the Legislature to make provision for developing the productive capacity of the State, or for increasing facilities for the cultivation of its soil according to the requirements of the different portions thereof, is upheld by its power to act for the benefit of the people in affording them the right of "acquiring, possessing, and protecting the property" which is guaranteed to them by the Constitution. The local improvement contemplated by such legislation is for the benefit and general welfare of all persons interested in the lands within the district, and is a local public improvement. This principle is not contravened by the fact that it may even operate injuriously upon some of the individuals or proprietors of land within the district, or by the fact that there may be some who for personal motives may wish to resist the improvement. Such result is only a sacrifice which the individual makes to the general good in compensation for the advantages enjoyed by virtue of the social compact. All laws of this character are upheld upon the same principle as is the creation of a district for the purpose of any other local improvement, such as the opening of a highway, or of a street, or of a public park. The Legis-

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lature, to which has been confided the matter, has determined that it will be for the public good that such street or park be opened, and it has imposed the burden of such opening upon the property within a limited district. In each of such instances the land taxed for the improvement may not be the only land that will be benefited. Although land adjacent to the district may be incidentally benefited, that is no reason for taxing such land, nor is it any objection to the proceeding that some of the property within the district will not receive any benefit, or that the improvement will more specifically benefit those who have procured its creation. "It has never been deemed essential that the entire community, or any considerable portion of it, should directly enjoy or participate in an improvement or enterprise, in order to constitute a public use, within the meaning of these words as used in the Constitution. Such an interpretation would greatly narrow and cripple the authority of the Legislature, so as to deprive it of the power of exerting a material and beneficial influence on the welfare and prosperity of the State. In a broad and comprehensive view, such as has been heretofore taken of the construction of this clause of the Declaration of Rights, everything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the State, or which leads to the growth of towns and the creation of new sources for the employment of private capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community." *Talbot v. Hudson*, 16 Gray, 425.

The means by which the Legislature may exercise this power are left to its own discretion, except as it may be limited by the Constitution. If in the exercise of its care for the public welfare, it finds that a specific district of the State needs legislation that is inapplicable to other parts of the State, it may, in the absence of constitutional restrictions, legislate directly for that district, or, if it be the case that similar legislation be required for other portions of the State, it may provide for adapting such legislation to those portions at the will of the people in such districts, as was done in the reclamation and levee laws already referred to. It may, too, by general laws authorize the inhabitants of any district, under such restrictions, and with such preliminary steps as it may deem proper, to organize themselves into a public corporation for the purpose of exercising those governmental duties, upon the same principle as it authorizes the incorporation of any municipal corporation under general laws. The Constitution of California has been framed with the principle of investing separate subdivisions of the State with local government, and especially authorizes the Legislature to confer the power of local legislation upon such subdivisions within the State as may be organized under its authority. The Legislature is itself forbidden to interfere in any manner, except by general laws, with the power of local legislation intrusted to such organizations,

nor can it delegate to any but public corporations the power to perform any municipal functions whatever, or vest in any but the corporate authority of a municipal corporation the power to assess and collect taxes for any municipal purpose. But, although the Legislature is prevented from passing any special or local law which shall be applicable to only a particular portion or district of the State its power of legislation for the public good in that portion of the State has not been destroyed. It still retains the full power of legislation conferred upon it in the Constitution, but is required to exercise such power in the mode prescribed in that instrument. It may pass general laws which from their nature will be capable of enforcement in only particular portions of the State; or it may by other general laws authorize the organization of municipal corporations, which, from the nature of the functions intrusted to them, can find occasion for organization only in certain portions of the State, and it may by such general laws provide for the organization of such and as many species of municipal corporations as in its judgment are demanded by the welfare of the State, and the "protection, security, and benefit of the people," for which government is instituted, and which has been by the people confided to it. Const. art. 1, § 2. The provision in article 11, § 6, of the Constitution, "Corporations for municipal purposes shall not be created by special laws," does not imply that the Legislature must by any general law provide a plan in which shall be prescribed the mode under which all municipal corporations must be organized, and the powers that they can exercise. The provision in article 12, § 1, that private corporations "may be formed under general laws, but shall not be created by special act," although more explicit, and under the declaration of the Constitution itself, (art. 1, § 22,) "mandatory" rather than permissive, requiring that they must be formed under general laws, has never been construed as requiring that all private corporations must be formed under the same general law, or limited to the exercise of the same powers. On the contrary, the form of organization, as well as the powers to be exercised, have been by legislation adapted to the character of the corporation to be organized. All corporations of the same class are required to be organized in the same manner, but the nature of the organization does not permit, nor does the Constitution require, that corporations of different classes shall be organized in the same manner, or provided with the same powers. Hence the provisions that have been made by the Legislature for the organization and powers of railroad, insurance, religious, mining, and other business corporations have been adapted to their respective character and needs. With greater propriety has it been left to the Legislature to provide the mode of organization and the powers to be exercised by different species of municipal corporations. Such corporations are but the agents or representatives of the State in the particular locality in which

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they exist. They are organized for the purpose of carrying out the purposes of the Legislature in its desire to provide for the general welfare of the State and in the accomplishment of which legislative convenience or constitutional requirements have made them essential. Although in this State the Legislature is required to provide such agencies under general laws, it is authorized, under its general power of legislation, to invest such corporations, when created, with the same powers which without such restriction it could itself have exercised; and in providing for such organizations it need confer upon them only such powers as in its judgment are proper to be exercised by them in the discharge of the particular functions of government which may be conferred upon them. Being the representatives of the Legislature in the various localities of the State, the requirements for organization, as well as the powers to be exercised, vary with the character of the purpose for which they may be created. Hence the general laws which the Legislature may enact for the organization of public corporations may be as numerous as the objects for which such corporations may be created. For each of these objects the law is the same but there would be a manifest impropriety in requiring that the organization of a levee district or an irrigation district should be conducted in the same manner as the organization of a corporation for the management of a public park, or the control of the school department. Whether the districts to which such general laws are applicable, or in which the people thereof may avail themselves of the privilege conferred, be many or few, is immaterial. Even if there be but a single district to which the law is applicable at the time of its enactment, the Legislature would be justified under its legislative power to pass general laws in making such provision for that district. Whenever a special district of the State requires special legislation therefor, it is competent for the Legislature by general law to authorize the organization of such district into a public corporation, with such powers of government as it may choose to confer upon it. It is not necessary that such public corporation should be vested with all governmental powers, but the Legislature may clothe it with such as in its judgment are proper to be exercised within and for the benefit of such district. Being created for the purpose of discharging only one public purpose, it is not requisite that it have power not necessary therefor, or which would be appropriate to a corporation organized for some other purpose. Neither is it requisite that such corporation should have legislative or judicial powers conferred upon it. It may be organized for the mere purpose of exercising executive and administrative functions, with the added power of making such prudential rules and regulations as may be necessary for the exercise of the particular functions intrusted to its charge. The powers committed to a public corporation organized for the administration of a public park, or for the government of a levee district, or for

the control of the police department, need be only such as are peculiarly appropriate to such organizations.

It is contended that the Act is unconstitutional for the reason that it is a delegation of the legislative power to create a corporation. If by this is meant that only the Legislature can create such corporation, the answer is that the Constitution prohibits such action. If it is meant that because the corporation is not "created" until the voters of the district have accepted the terms of the Act the answer is that such proceeding is in direct accord with the principles of the Constitution. Having the power to create municipal corporations, but being prohibited from creating them by special laws, the only mode in which such corporations could be created under a general law would be by some act on the part of the district or community seeking incorporation, indicative of its determination to accept its terms. As the Constitution has not limited or prescribed the character of such general law, its character and details are within the discretionary power of the Legislature. We know of no more appropriate mode of such indication than the affirmative vote of those who are to be affected by the acceptance of the terms of the Act. The municipal corporations which may be thus created are not limited to cities and towns. The Constitution makes provision in various places for municipal corporations other than cities and towns. Article 11, §§ 9, 10, 12, 16. In each of these sections provision is made with reference to the government or officers of "county, city, town, or other public or municipal corporation;" thus clearly indicating that there may be municipal corporations other than those of a town or city, and, consequently, that the provisions with reference to the incorporation of cities and towns found in section 6 of the same article are not controlling in the organization of other municipal corporations, and that while the Constitution carefully provides for the "incorporation, organization and classification" of cities and towns, it makes no similar provision for other municipal corporations but very properly leaves such action to the discretion of the Legislature. Inasmuch as there is no restriction upon the power of the Legislature to authorize the formation of such corporations for any public purpose whatever, and as when organized they are but mere agencies of the state in local government, without any powers except such as the Legislature may confer upon them, and are at all times subject to a revocation of such power. It was evidently the purpose of the framers of the Constitution to leave in the hands of the Legislature full discretion in reference to their organization.

In the present case the Legislature has chosen to authorize the creation of a public corporation, in the manner and with the forms specified in the Act under discussion. For this purpose it has provided that a petition of fifty freeholders, or a majority of the freeholders owning lands within a proposed district susceptible of one mode of irrigation, shall be presented to the board of

supervisors of the county within which such lands are situate; and that the board of supervisors shall, upon the hearing of such petition, after notice thereof, determine whether or not it will take steps to organize an irrigation district; and that upon such determination an election shall be ordered, at which, if two thirds of the electors within the district shall vote in favor of such organization, the district shall thereupon be organized, and its management confided to a board of directors chosen by the electors of that district. It is objected to this that it is placing in the hands of those not interested the power of imposing a burden upon the owners of the land, who may be a small minority of the electors within that district, or who may even be nonresidents of the district. This, however, is a matter which was addressed purely to the discretion of the Legislature. Whether such a petition should be made by the owners of a fixed proportion of the land, as was required in the reclamation law, or whether there should be any qualification to the petitioners, or whether there should be any limit to the expenses which they were authorized to incur for the purposes of the improvement, are questions which were solely for the consideration of the Legislature. It is not for this department of the government to question the policy or the prudence of a co-ordinate branch. If those who are affected by its proceedings feel that it has not given them sufficient protection or placed sufficient safeguards around the institution of the corporation, they must seek redress from that body. We can only act upon the law as it has been enacted. It must be observed, however, that this petition has no binding operation, but is merely the initiatory step which gives to the board of supervisors a jurisdiction to act upon the expediency or policy of authorizing the creation of the district. That body is the representative of the county, and has been chosen by its electors for the express purpose of legislation upon local subjects, and may naturally be supposed to have the interests of the entire county, as well as of each of its parts, in charge, and to be acquainted with its needs and requirements. The Legislature has not, however, intrusted that body with the final determination of the question, but has authorized it to submit the question to a vote of the electors of the district, and it is only when these electors have determined by a vote of two thirds of their number in favor thereof that the district can be created as a political body. The objection that this vote may be carried by a majority of those who have no interest in the lands affected thereby is but an incident, and not of the essence of the matter. It is no more than exists in every popular vote which involves the creation of a municipal debt or the adoption of a municipal organization. The fact that the owners of the lands are non-residents within the district, and not allowed a voice in the proceedings, is of the same character. Property qualification for voting, either in amount or character, is expressly forbidden by article 1, § 24, of the Constitution, which declares: "No property quali-

fication shall ever be required for any person to vote or hold office;" and, however much nonresidents may be affected by the acts and vote of the community, only those who are inhabitants of the district can, by the Constitution, be permitted to vote at any election. Art. 2, § 1.

That an irrigation district organized under the Act in question becomes a public corporation, is evident from an examination of the mode of its organization, the purpose for which it is organized, and the powers conferred upon it. It can be organized only at the instance of the board of supervisors of the county,—the legislative body of one of the constitutional subdivisions of the State; its organization can be affected only upon the vote of the qualified electors within its boundaries; its officers are chosen under the sanction and with the formalities required at all public elections in the State,—the officers of such election being required to act under the sanction of an oath, and being authorized to administer oaths when required for the purpose of conducting the election; and the officers when elected being required to execute official bonds to the State of California approved by a judge of the superior court. The district officers thus become public officers of the State. When organized, the district can acquire, either by purchase or condemnation, all property necessary for the construction of its works, and may construct thereon canals, and other irrigation improvements; and all the property so acquired is to be held by the district in trust, and is dedicated for the use and purposes set forth in the Act, and is declared to be a public use, subject to the regulation and control of the State. For the purpose of meeting the cost of acquiring this property, the district is authorized, upon the vote of a majority of its electors, to issue its bonds; and these bonds, and the interest thereon, are to be paid by revenues derived under the power of taxation, and for which all the real property in the district is to be assessed. Under this power of taxation, one of the highest attributes of sovereignty, the title of the delinquent owner to the real estate assessed may be divested by sale, and power is conferred upon the board of directors to establish equitable by-laws, rules, and regulations for the distribution and use of water among the owners of said lands, and generally to perform all such acts as shall be necessary to fully carry out the purpose of the act. Here are found the essential elements of a public corporation, none of which pertain to a private corporation. The property held by the corporation is in trust for the public, and subject to the control of the State. Its officers are public officers chosen by the electors of the district, and invested with public duties. Its object is for the good of the public and to promote the prosperity and welfare of the public. "Where a corporation is composed exclusively of officers of the government, having no personal interest in it, or with its concerns, and only acting as organs of the State in effecting a great public improvement it is a public corporation." Ang. & A. Corp. § 32. "A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality of its people. The primary idea is an agency to regulate and administer the interior concerns of the locality in matters peculiar to the place incorporated, and not common to the State or people at large." 15 Am. & Eng. Encyclop. Law, p. 954. "Public corporations are such as are created for the discharge of public duties in the administration of civil government." Lawson, Rights, Rem. & Pr. 332.

The constitutionality of the Act in question is further assailed upon the ground that it makes no provision for a hearing from the owners of the land prior to the organization of the district. But the steps provided for the organization of the district are only for the creation of a public corporation, to be invested with certain political duties which it is to exercise in behalf of the State. *Dean v. Davis*, 51 Cal. 406. It has never been held that the inhabitants of a district are entitled to notice and hearing upon a proposition to submit such question to a popular vote. In the absence of constitutional restriction, it would be competent for the Legislature to create such public corporation, even against the will of the inhabitants. It has as much power to create the district in accordance with the will of a majority of such inhabitants. It must be observed that such proceeding does not affect the property of anyone within the district, and that he is not by virtue thereof deprived of any property. Such result does not arise until after delinquency on his part in the payment of an assessment that may be levied upon his property, and before that time he has opportunity to be heard as to the correctness of the valuation which is placed upon his property, and made the basis of his assessment. He does not, it is true, have any opportunity to be heard, otherwise than by his vote, in determining the amount of bonds to be issued, or the rate of assessment with which they are to be paid; but in this particular he is in the same condition as is the inhabitant of any municipal organization which incurs a bonded indebtedness or levies a tax for its payment. His property is not taken from him without due process of law, if he is allowed a hearing at any time before the lien of the assessment thereon becomes final. *People v. Smith*, 21 N. Y. 595; *Gilmore v. Hentig*, 33 Kan. 170; *Hagar v. Reclamation Dist.* 111 U. S. 701, 28 L. ed. 569; *Davis v. Los Angeles*, 86 Cal. 46.

It is also objected that the mode provided for the payment of the bonds is unconstitutional, in that it provides for an assessment upon the real property within the district according to its value, and not according to the benefit which each particular parcel of land may derive from the improvement. The power of the Legislature in matters of taxation is unlimited except as restricted by constitutional provisions. This is one of the attributes of sovereignty which the people have placed in its hands; and they have intrusted its exercise to its discretion, either in the manner or to the extent to which it is to be applied. All taxation has its source in

the necessities of organized society, and, is limited by such necessity and can be exercised only by some demand for the public use or welfare. And whether the tax be by direct imposition for revenue or by assessment for a local improvement, it is based upon the theory that it is in return for the benefit received by the person who pays the tax, or by the property which is assessed. For the purpose of apportioning this benefit, the Legislature may determine in advance what property will be benefited, by designating the district within which it is to be collected, as well as the property upon which it is to be imposed, or it may appoint a commission or delegate to a subordinate agency the power to ascertain the extent of this benefit. It may itself declare that the entire State is benefited, and authorize the burden to be borne by a public tax, or it may declare that all or a portion of the property within a limited region is benefited, either according to its value or in proportion to its actual benefit, to be specifically ascertained by actual determination of officers appointed therefor. Upon the power of the Legislature over the subject of taxation, as well as the modes in which and the objects upon which it may be exercised, we know of nothing that has been written in any opinion since that of *Judge Ruggles in People v. Brooklyn*, 4 N. Y. 419, which is not either an amplification of the views therein expressed, or an adaptation of them to the particular subject under discussion. In the exhaustive opinion of *Mr. Justice Sawyer in Emery v. San Francisco Gas Co.*, 28 Cal. 345, the principles declared in that opinion were applied to the case then before the court wherein this power of taxation was shown to be the foundation for upholding the right of assessment in a manner different from the *ad valorem* principle. The controversy upon this subject has almost invariably been against the "front-foot" rule, and in favor of the *ad valorem* principle; and in nearly every State, unless it be New Jersey, the principle has been maintained that it is within the power of the Legislature to adopt whichever rule it may select. In *Burnett v. Sacramento*, 12 Cal. 76, the charter of Sacramento provided that the expense of a local improvement should be assessed upon the adjacent property according to its value, and upon this point the supreme court, speaking through *Judge Field*, said: "The law in question avoids the injustice of general taxation for local purposes, and lays the burden upon the recipients of the benefit. It apportions the tax according to the assessed cash value of the adjacent property which is as near an approximation to an equitable rule as can well be established. No rule could be adopted which would work absolute equality. An approximation to it is all that can be attained. The power of apportionment, like the power of taxation, is exclusively in the Legislature. The Constitution contains no inhibition to the tax, and prescribes no rule of apportionment. Security against the abuse of the power rests in the wisdom and justice of the members of the Legislature, and they are responsible to their constituents."

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Assessments for local improvements according to the value of the property assessed have been upheld in *Downer v. Boston*, 7 Cush. 277; *Snow v. Fitchburg*, 136 Mass. 183; *Gillmore v. Hentig*, 83 Kan. 174; *Strombridge v. Portland*, 8 Or. 82; *Creighton v. Scott*, 14 Ohio St. 488; *Lockwood v. St. Louis*, 24 Mo. 20.

It is, however, for the Legislature to determine how the apportionment shall be made, and, while it is held that an apportionment of the expenses for a local improvement is to be made according to the benefits received by the property assessed, yet the power to make such apportionment rests upon the general power of taxation, and the apportionment itself does not depend upon the fact of local benefit in any other sense than that all taxes are supposed to be based upon the benefit received by the tax-payer. As was said by *Mr. Justice Temple*, in *Lent v. Tilton*, 73 Cal. 428: "The main practical difference between assessment for a local improvement and general taxation seems to be that in general taxation it is difficult and generally impossible for the court to say that the purpose of the tax is not a public purpose, or that no benefit will result to the tax-payer, while in local assessments it is more often easy to see that the improvement will not be a special benefit. Still, the benefit is not the source of the power. That is inherent in the government, and is only limited by express or implied limitations found in the Constitution, or by its own nature and purposes, and within these limits the Legislature is the sole judge of when and to what extent the power shall be used;" and again: "The power being in the Legislature, the limitations upon it must be found in the Constitution, either in express provisions or by implication, and there exists the same presumption that the law is within legislative power that applies to any other statute; that is, the law will not be declared unconstitutional unless it plainly appears to be so." 72 Cal. 480. *Mr. Cooley* says, in his treatise on Taxation (page 622): "The power to determine when a special assessment shall be made, and on what basis it shall be apportioned, is wisely confined to the Legislature and could not, without the introduction of some new principle in representative government, be placed elsewhere." And in *Hagar v. Yolo County*, *Supra.*, *supra*, the court said: "It is equally clear that those clauses which provide that taxation shall be equal and uniform throughout the State and which prescribe the mode of assessment, and the persons by whom it shall be made, and that all property shall be taxed, have no application to assessments levied for local improvements." In accordance with this principle, various modes of apportionment for the expenses of local improvements have been upheld. We have already seen that they have been upheld when made in accordance with the value of the property, as well as when made in proportion to the frontage of the lots. The Legislature has also itself designated the district which will be benefited by the improvement, as was done in the Dupont-Street Improvement, (Stat.

1875-76, p. 488,) and as has been provided in the general Act for street improvements, where the entire frontage of the block is the district upon which the assessment is to be made. *Diggins v. Bruen*, 76 Cal. 318. Assessments have also been upheld when made by commissioners appointed to make specific assessments upon the several parcels of land, (*Pacific Bridge Co. v. Kirkham*, 64 Cal. 519), or when made according to the area of the land affected by the improvement (*Keese v. Denver*, 10 Colo. 123). The Legislature has itself levied a specific tax upon each acre of land within a district created by itself, (*Egyptian Levee Co. v. Hardin*, 37 Mo. 495; *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508; *Alcorn v. Hamer*, 38 Miss. 652,) and has authorized such tax to be levied by the district, (*Wallace v. Shelton*, 14 La. Ann. 503;) and has authorized a fixed uniform rate for each sewer upon the estimated cost of all the sewers within the district (*Leominster v. Conant*, 193 Mass. 384).

It is not necessary to show that property within the district may be actually benefited by the local improvement, and, even if it positively appear that no benefit is received, such property is not thereby exempted from bearing its portion of the assessment, nor is the Act unconstitutional because it provides that such property shall be assessed. Property that is exempt from taxation has always been held subject to the burdens of assessment for local improvements, and property within a district that is not susceptible of receiving any immediate benefit from the improvement is nevertheless so indirectly benefited thereby that it must bear a portion of the burden. If within the limits of a levee district a parcel of land should be so situated as not to require the protection of the levee, that would be no reason for excluding it from its share of the expense, or, if within the limits of a drainage district there should chance to be found a cliff, that would be no reason for exempting it from assessment. The objection that the Legislature has no authority to confer upon the supervisors of a county the right to create a corporation whose district shall embrace a portion of the territory of another county does not arise in the present case.

It is not contended that any portion of the Madera Irrigation District lies outside of the County of Fresno.

2. One of the objections to the sufficiency of the proceedings taken by the supervisors in authorizing a vote by the electors for the purpose of determining whether the district should be organized is that the bond which accompanied the petition was so defective as to deprive the board of jurisdiction to authorize such election.

If it be conceded that the presentation to the board of a bond with the petition is a jurisdictional prerequisite to their consideration of the petition, we do not think that such element of jurisdiction was wanting in the present case. The bond which was presented, although informal, was not invalid, and was of binding obligation upon whose who had signed it. In such a case the determination of its sufficiency by the board of

supervisors was as conclusive as their determination respecting the pecuniary responsibility of its signers, or the amount for which the bond should be given.

3. Other objections to the constitutionality of the Act, and the sufficiency of the proceedings in the organization of the District, have been presented by the appellants, but we think that they are covered by the views presented in the foregoing opinion. We do not think that the boundaries of the District, or of the election precincts, are so imperfectly described as to prevent the supervisors from acquiring jurisdiction for authorizing the organization of the District. The provision in the statute that the petition shall particularly set forth and describe the boundaries does not mean that they shall be set forth and described with more particularity than would be necessary in an Act of the Legislature creating a political district or a municipal corporation. If the course of a boundary is given, it is not necessary that such course shall have been actually surveyed upon the ground before the boundary can be said to be particularly described; and a reference to an official map, or to a landmark designated upon such map, is as definite as would be a reference to the land-mark itself. We cannot, from their description, say that the boundaries given in the petition are so indefinite that the District cannot be definitely located, or that they fail to embrace a distinct and definite territory. As illustrations of similar descriptions in Acts of the Legislature, we refer to the Act incorporating the city of Sacramento, (Stat. 1850, p. 70,) and the Act incorporating the city and county of San Francisco, (Stat. 1856, p. 146;) also the Act setting forth the boundaries of the county of San Benito, (Stat. 1873-74, p. 95). The case of *Crosby v. Dowd*, 61 Cal. 557, referred to by appellants, was expressly overruled in *De Sepulveda v. Baugh*, 74 Cal. 468. The boundaries of a municipal corporation are not construed with any more strictness than is required in the case of a private grant. This subject was fully considered in *Central Irrig. Dist. v. De Lappe*, *supra*.

4. By the Act of March 16, 1889, (Stat. 1889, p. 212,) under which these proceedings were instituted, it is provided in section 5 that, "upon the hearing of such special proceedings, the court shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm each and all of, the proceedings for the organization of said district, under the provisions of said Act, from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds, and the order for the sale and the sale thereof." It is also provided in section 3 that "the petition shall state the facts showing the proceedings had for the issue and sale of said bonds, and shall state generally that the irrigation district was duly organized, and that the first board of directors was duly elected, but the petition need not state the facts showing such organization, or the election of said first board of directors."

Section 4 of the Act provides: "The provisions of the Code of Civil Procedure respecting the answer to a verified complaint shall be applicable to an answer to said petition. . . . The rules of pleading and practice provided by the Code of Civil Procedure, which are not inconsistent with the provisions of this Act, are applicable to the special proceeding herein provided for." The petition in the present case states "that said Madera Irrigation District was duly organized under the laws of the State of California, and especially under the provisions" of the Act of March 7, 1887. The answers deny this allegation, and deny specifically that any of the steps required by the statute for the organization of the District were taken in reference thereto. In order that the court might determine the legality and validity of the proceedings, it was required by the Act in question to "examine" them. The Act provides that it "shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm, each and all of the proceedings for the organization of said district;" and, unless it shall "examine" the proceedings, it would not have the power to "determine" their legality and validity. One step in the proceedings, and that which was the foundation of all others, and without which the whole superstructure of the corporation and its acts, culminating in the bonds sought to be validated, would have fallen, was that a petition should have been presented to the board of supervisors, signed by fifty or a majority of freeholders owning lands within the boundaries of the proposed district. It was necessary, therefore, for the petitioners herein to make proof to the court that such a petition had been presented to the board of supervisors. Instead, however, of making such proof, they introduced in evidence the record of the proceedings of the board of supervisors, which contained recitals that a petition had been presented to said board, and that, before hearing said petition, evidence to the satisfaction of the board was adduced by petitioners upon the question whether or not there were fifty petitioners whose genuine signatures appeared affixed to said petition, who were bona fide freeholders of lands within the proposed boundaries of said proposed irrigation district; whereupon the board, having announced that they are satisfied that there were fifty such freeholders, whose signatures appeared affixed to said petition, proceeded to hear said petition. The defendants objected to the introduction of this evidence upon the ground that no foundation had been laid therefor, and that it was irrelevant, immaterial, and incompetent to establish any issue before the court. The objections were overruled, and an exception taken by the defendants. The petitioners then offered in evidence a document purporting to be a petition, with the signatures of upwards of fifty names attached thereto. To the introduction of this document the defendants objected, upon the ground that its execution had not been shown, and that there was no evidence that the parties whose names appeared attached thereto

were freeholders owning lands within the District. The court overruled the objection, to which the defendants excepted. In these rulings the court erred. There was no proof that the petition had been signed by either of the persons whose names were attached thereto, or that either of said persons was a freeholder, owning lands within the boundaries designated in the petition. Whether a petition had been presented to the board of supervisors of such a character as to give to that board jurisdiction to act in accordance with the provisions of the law in question was an issue before the court, to be determined by competent evidence. A declaration by the board of supervisors that such a petition had been presented, even though such declaration was spread upon their records, was not competent evidence in this proceeding, as it was only hearsay. No board or tribunal can obtain jurisdiction by its own recital that it has jurisdiction. It may be held that, when the question of such jurisdiction arises in some collateral proceeding, the act of the board in recognition of the sufficiency of the petition would be presumptive of such sufficiency, yet, when the very issue to be determined by the court is whether the petition was sufficient to give jurisdiction, such issue must be established by evidence as competent as that which is required to establish an issue in any other proceeding. In the absence of any statutory declaration respecting the character of the proof by which any fact may be established in a court of justice, it must be established in accordance with the common-law rules of evidence. It is sometimes provided by statute that in proceedings of this nature the act of the board of supervisors shall be prima facie evidence of the regularity of all proceedings prior to the making of the order, as was the case in *Damp v. Dane*, 29 Wis. 426; and also in *Re Kiernan*, 62 N. Y. 459. The effect of such provision is to throw the burden of proof upon those who would challenge the sufficiency of the petition. In all cases it is essential that there be proof of a sufficient petition, inasmuch as without it the board could acquire no jurisdiction to act, and its proceedings would be absolutely void. In the absence of such statutory provision, however, the burden of proving any affirmative allegation is upon him who makes it (Code Civ. Proc. § 1869,) and it must be established under the ordinary rules of evidence. The statute in the present case is silent with reference to the effect as evidence of the action of the board of supervisors upon the petition. We are not aware of any statute which gives to their action any effect as evidence, or which makes their records evidence of any fact other than the corporate act therein recorded. Their records can be competent evidence of only such matters as they are by statute authorized to make matters of record. The statute herein does not authorize the board of supervisors to enter upon their records the facts which give them jurisdiction to hear the petition, or any evidence of such facts; and the entry in their record of such facts, or of such evidence, does not give thereto any official sanction or right of recog-

nition more than any other memorandum that may have been made by their clerk. In *People v. Hagar*, 49 Cal. 232, when the question arose in a collateral proceeding, and it was contended that the certificate by the commissioners of a compliance by them with the requirements of the statute was evidence thereof, the court held otherwise, saying: "Whatever may have been the rule, if the statute had required the commissioners to state in their certificate to the assessment roll that they had jointly viewed and assessed the land, it is clear that the certificate can have no such conclusive effect, unless it was incumbent on the commissioners to certify that they acted jointly in viewing and assessing the land. But, as the statute does not require them to state that fact in the certificate, their having voluntarily done so was a superfluous act, and, instead of being conclusive of the fact that they acted jointly, was not even prima facie evidence of it."

It was held in *Dean v. Davis*, 51 Cal. 406, that in a collateral proceeding the regularity of the proceedings under which the district had been organized could not be questioned, under the rule that, being a *de facto* corporation, only the State could take advantage of any irregularity in its organization. In *Lent v. Tillson*, 72 Cal. 422, the court, however, questioned the power of the county court in that case to pass upon the questions upon which its jurisdiction depended, so as to conclude an inquiry, even upon a collateral attack; and in *Kahn v. San Francisco Board of Suprs.*, 79 Cal. 400, the court said: "Nor should this jurisdiction be held to attach, whatever court may have ruled that the petition was signed by a majority, when in fact it was signed only by a minority, of the owners designated by the statute." The cases cited on behalf of the respondent in support of the action of the court below are all cases in which the question was presented in a collateral proceeding. In *Humboldt Co. v. Dinmore*, 75 Cal. 604, it was admitted that the persons who signed the petition were freeholders. After jurisdiction has once been obtained, other proceedings subsequent thereto are movements within the jurisdiction, and can be questioned only by direct attack; but the fact of jurisdiction must be affirmatively shown whenever that is the issue to be determined. It is unnecessary, however, in the present case, to determine what would be the rule if the question should arise in a proceeding where the jurisdiction would be collaterally attacked. The question does not arise collaterally here. The corporation has itself come into court and challenged an examination into the regularity of its organization, and asks the court to examine "each and all of the proceedings for the organization of said district." Upon such a proceeding it becomes as necessary for it to establish such regularity, and to give evidence of each step therein, as fully as if its acts were under investigation upon a writ of review, or as if the State were by quo warranto questioning its right to exercise the franchise of a corporation. In such a case it is incumbent upon it to make proof of every step required by statute for

assuming corporate powers. High, Extr. Legal Rem. 712, 716; *People v. Crawford*, 88 Mich. 88. Upon certiorari, though the inferior tribunal is required to certify only matters of record, yet, if the jurisdictional facts do not appear of record, it must certify "not only what is technically denominated the record, but such facts, or the evidence of them, as may be necessary to determine whatever question, as to the jurisdiction of the tribunal, may be involved." *Blair v. Hamilton*, 32 Cal. 52; *People v. San Francisco Fire Dept.*, 14 Cal. 479; *Lowe v. Alexander*, 15 Cal. 300. The object of the Act in question, as was said in *Modesto Irrig. Dist. v. Tregoe*, 88 Cal. 334, is for the purpose of affording to investors in the bonds the security of a judicial determination of their validity, and, in order that this may have the effect intended by the Legislature, it is not sufficient for the court to perform the mere perfunctory office of recording the determination of the board of supervisors that its proceedings in the organization of the district were regular. The court is not a *lit de justice* for the mere purpose of entering of record the rescripts of the board of supervisors, and giving to them the dignity of its own judgment. When the defendants controverted the allegations of the petition that the irrigation district was duly organized, it became necessary for the petitioners to establish at the trial the facts showing that it had been duly organized.

Section 456, Code Civil Proc., provides: "In pleading a judgment or other determination of a court, officer, or board it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction." The provision in the Act in question that the rules of pleading and practice provided by the Code of Civil Procedure should be applicable to this proceeding made it incumbent upon the petitioner to establish the due organization of the district by evidence competent therefor. We are not aware of any decision in this State in which it has been held that the decision of an inferior board upon the question of its own jurisdiction was conclusive on a collateral attack, or even prima facie evidence of the fact in a direct proceeding. In *Litchfield v. Vernon*, 41 N. Y. 123, the Legislature had authorized a local improvement to be made "upon application of a majority of the owners of land in the district proposed to be assessed, and the sufficiency of an assessment therefor was afterwards contested in the courts. Upon the hearing in the court of appeals, that court used the following language: "This brings us to the only remaining question in the case, and that is whether there was any competent evidence authorizing a finding that a majority of the owners of land within the territory made subject to assessment made application to the common council, requesting them to make application to the supreme court for the appointment of three commissioners, as provided by the first section of

the Act of 1859. The Act itself is wholly silent as to how this essential fact shall be proved. The right of the common council to apply for the appointment of the commissioners lies at the foundation of the whole proceeding. Unless this right existed, all the proceedings in appointing the commissioners and subsequent thereto are void. This right depends upon the question whether a majority of the landowners petitioned the common council to proceed under the Act. In the absence of such petition the common council had no authority in the premises, and nothing could be done under the Act. The Act does not provide for the determination of this fact by the common council, nor by the special term upon the presentation of the petition for the appointment of the commissioners. The Act being silent as to what should be deemed proof of the fact that a majority of the landowners petitioned the common council, the plaintiff was bound to prove such fact by competent, common-law evidence. This could be done by proof showing who were the owners of the land at the time of the passage of the Act, and that a majority of such persons petitioned the common council, as required by the first section of the Act. Neither the application of the council to the court, nor the affidavit of the mayor accompanying such application, was evidence of this fact against the defendant. *Sharpe v. Speir*, 4 Hill, 76. There was no competent evidence of this fact given upon the trial, and the exception to the finding of this fact by the judge was well taken." In *Thorne v. West Chicago Park Comrs.*, 130 Ill. 594, the same question was presented. The statutes of Illinois provided that the board of park commissioners might take jurisdiction over certain streets, upon first obtaining the consent, in writing, of the owners of a majority of the frontage of the lots and lands abutting thereon; and also provided for a confirmation of any assessment made therefor by the circuit court, upon the application of the commissioners, after notice therefor to the lotowners. At the hearing of the application for confirmation of the assessment roll, returned by the commissioners in the above case, the commissioners offered a paper, purporting to be the petition, and consent of the abutting lotowners, and showed that such paper came from the files kept by the board of commissioners, and was the written consent acted upon by the board in adding the streets for the purpose contemplated. The court below, upon the objection to the competency of this evidence, held that this document made a prima facie case for the commissioners, and cast the burden upon the objectors, to show that it was not the written consent of the property owners, as it purported to be. Upon appeal, however, the supreme court reversed the action of the court below, saying: "We cannot concur in the holding of the trial court. As we have seen, the burden was on the park commissioners to show affirmatively the jurisdictional fact of consent by the owners of the required amount of frontage. The evidence in respect thereto was, we think, wholly insufficient. Waiving the matter of

proving ownership by the persons purporting to sign the paper admitted in evidence, it is not shown that a sufficient number of such persons signed the consent to constitute consent by the owners of a majority of the abutting property. The only person introduced who testified generally to the execution of the writing testifies that he procured the signatures of most of the signers, but not all, and he does not testify, except in a few instances, either as to those he did or did not procure. The writing here offered is not signed by the objectors, and we are aware of no rule by which it was admissible in evidence against them, without proof of its execution, nor is the consent at all aided by the fact that the park commissioners acted upon the paper introduced in evidence. While the park commissioners must, in the first instance, pass upon the fact of consent by the owners of abutting property, and determine for themselves whether those owning a majority of the frontage of the property had consented to their appropriation of the street for the purposes contemplated by the Act, such determination can have no effect, when their jurisdiction is challenged in endeavoring to carry out the powers conferred by the statute. The power conferred upon the park board affects and impairs the right of the citizen, and may incur his property without his consent, and may arbitrarily impose onerous burdens for which there is no relief or redress. The Legislature has interposed the safeguard of requiring the consent of the owners of more than one half of the property to be affected, upon the presumption, no doubt, that what will be of benefit to the greater portion will not unduly prejudice the lesser part; and, when the commissioners sought confirmation of their assessment upon appellant's property, under the power conferred by the statute, it was incumbent upon them to show compliance with the law by which alone they obtained jurisdiction to impose the burden. This they have not done." See also *Pittsburg v. Walter*, 69 Pa. 365.

5. The order for the issuance of the bonds is that \$850,000 be issued, and that the said bonds shall be payable in installments, as follows: "At the expiration of eleven years, not less than five per cent of said bonds; at the expiration of twelve years, not less than six per cent of said bonds," etc. Section 15 of the Statute provides: "Said bonds shall be payable in gold coin of the United States, in installments, as follows, to wit: At the expiration of eleven years, not less than five per cent of said bonds; at the expiration of twelve years, not less than six per cent," etc. In *Central Irrigation Dist. v. De Lappe*, 79 Cal. 851, the form of the bond in connection with this provision of the statute was discussed. It was there held that the bonds to be issued should be in such form that each bond would be payable in installments of such percentage in each year as is designated in the statute, and that an order making that percentage of the entire issue of the bonds payable in the designated years would not be a compliance with the statute. In the present case, if 5 per cent of the \$850,000 should be

payable at the expiration of eleven years, and the board of directors should not sell or dispose of more than that percentage of the entire issue of bonds, it would make the entire amount of outstanding bonds payable at the expiration of eleven years; whereas, the board of directors, under section 22 of the Act in question, are authorized, at the expiration of ten years after the issuing of said bonds, to levy an assessment for only 5 per cent of the principal of the whole amount of bonds then outstanding. This provision in the order does not, however, affect the substance of the order for the issuance of the bonds, but merely the form in which the bonds are to be issued, and does not itself invalidate the proceedings had by the district for the issuance of the bonds. The district voted for the issuance of bonds to the amount of \$850,000, to be issued in accordance with the provisions of the statute. The manner in which those bonds were to be issued is prescribed by the statute, and can be followed by the board whenever their issuance becomes necessary. The court, however, instead of approving and confirming this order, should have limited its order of confirmation to that portion thereof which designated the amount of the bonds to be issued, leaving to the board itself the duty of preparing the bonds in the form required by the statute.

6. In its decree the court, after determining the legality and validity of the proceedings, added thereto the following: "And it is further ordered, adjudged, and decreed that all persons, and each and every person interested in the organization of said irrigation district, save and except the appellants herein, be forever debarred and precluded from disputing, denying, or disclaiming any fact or facts relating to the organization of the said district, or providing for and authorizing the issue and sale of the bonds of said district, which might by them have been denied, questioned, or disputed in this proceeding." This portion of its judgment was unauthorized. The statute does not confer upon the court any power or jurisdiction to do more than "examine and determine the legality and validity of, and approve and confirm," the proceedings had under said Act. What the effect of its determination and judgment may be is to be determined by the court in which it shall at any time hereafter be offered in evidence. The statute makes no provision for including therein an injunction against those who may not have seen fit to question its action in this proceeding, and against whom there has been no service, except by the publication of the notice directed by the court. If by virtue of such inaction on their part they should be hereafter precluded or estopped from questioning the sufficiency of the action of the court in this proceeding, that question must be determined by the court in which any attempt may be made to avoid the effect of the judgment herein.

For the error committed by the court in admitting evidence as hereinbefore stated the judgment is reversed.

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We concur: *McFarland, J.; Garoutte, J.; Sharpstein, J.; Paterson, J.; De Haven, J.*

Beatty, Ch. J.:

Until the filing of the supplemental briefs in this case I had supposed that the constitutionality of the statute commonly known as the "Wright Act" had been definitely settled by the decision of this court in the case of *Turlock Irrigation Dist. v. Williams*, 76 Cal. 360, in which I was one of the counsel employed to defend the validity of the Act. I therefore sat at the hearing of this case with the expectation of participating in its decision, but on becoming aware of the fact that the constitutionality of the law was again seriously drawn in question upon all the grounds formerly taken, and upon several others, I concluded that, although I might not be disqualified in a strict sense in this particular case, I could not with perfect propriety take part in deciding it, and for that reason express no opinion.

A petition for rehearing was subsequently filed in response to which, on January 13, 1892, the following opinion was handed down:

Per Curiam:

In their petition for a rehearing appellants have called attention to the fact that in the opinion heretofore rendered the court has failed to pass upon two propositions urged by them in their appeal, and request that, if in the opinion of the court these propositions are untenable, it be so stated, in order that there may be no occasion for another appeal in which to present them for consideration. It does not follow from the fact that the propositions were not discussed in the former opinion that they were not fully considered. Because each proposition urged in the briefs of an appellant is not taken up and discussed *seriatim*, it does not follow that they have not all received due consideration. A due regard for the amount of business before the court and the time allowed for its disposition compels us to limit the opinions in the several cases to such principles and rules of law as will be a guide to the courts below in disposing of the case upon its return, and a rule of action for the citizens of the State in their subsequent transactions. The proposition again called to our notice by the appellants in their petition for a rehearing, that the Act in question is in violation of the provision of article 11, § 18, of the Constitution, prohibiting certain public corporations from incurring indebtedness "without the assent of two thirds of the qualified electors thereof, voting at an election to be held for that purpose," cannot be maintained. This prohibition in the Constitution is limited to the public corporations enumerated in that section, viz., "county, city, town, township, board of education, or school-district," and, under familiar rules of construction, cannot be extended to any other public corporation. Many of the sections of this article of the Constitu-

tion include in their provisions "any public or municipal corporation," (sections 10, 12, 16,) while the provisions, of section 19 are limited to a "city," and of section 11 to a "county, city, town, or township." In view of the fact that different provisions are made in the Constitution for different classes of public corporations, it must be held that the prohibition in section 19 is limited to the corporations which are therein designated. For such other corporations for municipal purposes as under the provisions of section 6 the Legislature might, by general laws, authorize to be incorporated, the Constitution has left to the Legislature power to provide the terms and conditions upon which an indebtedness may be created, as well as its amount. At the time that the Constitution was framed and adopted there were many other public corporations in the State, such as reclamation and irrigation districts, that had been organized for many years, and, if it had been the intention to subject all such corporations to the prohibition, we must conclude that express language therefor would have been inserted in the Constitution. The case of *Harshman v. Bates County*, 92 U. S. 569, 23 L. ed. 747, cited by the appellants, is inapplicable. The Constitution of Missouri had required the assent of two thirds of the qualified electors of a "county, city, or town" as a prerequisite to a subscription for building a railroad, and it was held that the Legislature could not confer authority upon a "township" to vote a credit for such subscription; that while counties, cities, and towns had a corporate character and organization, a township was only a geographical division of the county, and that the provision of the Constitution prohibiting a county from voting such credit could not be evaded by authorizing the several geographical subdivisions of the county to vote such credit.

The fact that the Town of Madera is included within the boundaries of the Madera Irrigation District neither renders the Act unconstitutional nor invalidates the organization of the District. This principle was discussed and was sustained in *Modesta Irrig. Dist. v. Tregoe*, 88 Cal. 384. The objection

that the land within a town or city cannot be benefited by a system of irrigation, and therefore cannot be taxed for such improvement, proceeds upon an erroneous view of the power of taxation. While the benefit to the land is assumed as the basis of the assessment, still, as was said in *Lent v. Tillsen*, 73 Cal. 428, such benefit is not the source of the power. Even though the land is not susceptible of irrigation, yet it may be benefited by the improvement, and should bear its proportion of the burden upon the same principle that land in a city which can make no use of a sewer or other street improvement is nevertheless deemed to receive a benefit from its construction, and is required to pay a portion of its cost. The object of the Act is the improvement of the District as an entirety, and the extent of the District, as well as the lands to be included therein, has been left to be determined by the discretion of the board of supervisors. Whether they have properly or improperly exercised such discretion cannot be investigated by the courts. The Act cannot be declared unconstitutional by reason of any improper exercise of such discretion. Neither is it in violation of the Constitution to incorporate into such district a town or city that has been incorporated for other municipal purposes. A system of irrigation contemplated by the Act in question cannot be considered as a "municipal purpose," within the scope of the organization of a city or town, and there can be no conflict between a corporation organized under the Act to produce a system of irrigation with the district and the municipal incorporation of the town of Madera. A water supply for the two corporations is distinct and for different purposes. The liability of the inhabitants of the town of Madera for the bonded indebtedness of the Madera Irrigation District, as well as for that of their own municipality, does not impair the validity of the organization of the District. It is a liability of the same character as rests upon the inhabitants of any town for its proportion of all the indebtedness of the county within which it is situated.

Rehearing denied.

FLORIDA SUPREME COURT.

S. H. RAY, County Treasurer of Brevard County, *Appt.*,
v.

Thomas E. WILSON.

(.....Fla.....)

*1. Where a clerk of the circuit court is ex officio auditor of his county, and it

*Head notes by RANNEY, Ch. J.

is his official duty to audit all accounts against the county in the manner prescribed by the statute, and to keep on file in his office the vouchers for all claims audited by him, and the law also provides that all accounts against a county shall be approved by the county commissioners before they should be audited by the clerk, warrants or orders in favor of third parties issued by the clerk under his seal of office directed to the county treasurer, and expressed upon their face to be "chargeable under head of county expenditures" or to be payable "out of

NOTE.—*Mandamus to compel payment of municipal debt by custodian of municipal funds.*

The rules for determining whether or not mandamus will lie to compel payment of money out of a municipal treasury are no different from those 14 L. R. A.

applicable in other cases. One of the rules most rigidly adhered to at common law was that the writ would never be issued if there was a plain, adequate, legal remedy. In all states where mandamus still retains its common-law form, unaltered

any money in the treasury appropriated for county purposes," are prima facie valid claims against the county.

2. **Mandamus lies against a county treasurer to compel the payment of a valid warrant or order drawn on him as such treasurer, and for the payment of which he has the necessary funds applicable thereto.**
3. **Where an alternative writ of mandamus brought to compel the payment by a county treasurer of county warrants shows that warrants, regular upon their face, were issued by the proper officer, and for value received, and that the treasurer has the funds for their payment, it is not demurrable.**
4. **The fact that an ordinary action at law obtains against a county on a county warrant, does not constitute a specific and adequate remedy avoiding a mandamus for its payment in favor of the holder of such warrant against a county treasurer having the necessary funds for its payment.**
5. **A return to a sufficient alternative writ of mandamus must state all the facts relied upon by the respondent with such precision and certainty that the court may be fully advised of all the particulars necessary to enable it to pass upon the sufficiency of the return; and its statements cannot be supplemented by inference or intendment. A return that the warrants whose payment is sought are spurious, illegal and void is, being a mere conclusion of law, insufficient, as likewise is a return that the warrants were issued and are held without valuable consideration, such statement being made not as a positive averment of such fact, but as an inference or argument drawn from or based**

upon allegations which do not support the inference or argument.

6. **Assuming an order by a board of county commissioners, duly entered upon its records, authorizing the issue of county warrants, to be necessary to the validity of warrants of which payment out of the county treasury is sought by mandamus, a return stating that no such order appears upon the records of the board is insufficient. It is not incompatible with the fact that such an order was duly made and entered upon the records, nor tantamount to an allegation that no such order was ever passed and entered.**
7. **An order of a board of county commissioners requiring that county warrants previously issued shall be presented for re-examination by the board, and providing that all such scrip not presented by a stated day shall be of no effect, or "repudiated," is, though published according to the terms of the order, no defense to the payment of warrants not presented.**
8. **The statement of a return to an alternative writ of mandamus should be positive, and not on information and belief.**
9. **The delay of the relator in instituting proceedings by mandamus should be taken advantage of by proper pleading in the trial court. It cannot be urged primarily in the appellate court.**

(January Term, 1892.)

A PPEAL by defendant from a judgment of the Circuit Court for Brevard County in favor of plaintiff in an action brought to compel

by statutes either of their own or of sister states, a treasurer cannot be compelled to pay money if there is another adequate and specific remedy.

It has usually been held that if a suit would lie against the municipality on the warrant, or on the claim represented by the warrant, the treasurer would not be compelled by mandamus to pay it.

Thus a mandamus will not be granted to compel the town treasurer to pay the amount of an order drawn upon him by the selectmen in payment of a debt due for work done in altering a highway. If the debt for building the road is justly due from the town the creditor has a plain, adequate, and complete remedy at law by the ordinary process to enforce and collect his claim. *Lexington v. Mulliken*, 7 Gray, 280.

A claim for salary by an officer of the municipality may be enforced by suit like any other debt, and payment of it cannot be compelled by mandamus. *People v. Thompson*, 25 Barb. 73.

The practice of the federal courts is to require a judgment on the warrants as a foundation for a writ of mandamus. *Jerome v. Rio Grande County Comrs.* 18 Fed. Rep. 873.

Where a city charter provided that the clerk of the police court might pay persons entitled to costs in a criminal prosecution such costs as have of right accrued to them, the statute was held to be permissive and it was held that the city was liable for such fees and not the clerk, and that a mandamus would not issue to compel him to pay them. *Colley v. Webster*, 59 Conn. 331.

The tendency of the English courts has been to hold claimants to their remedy of attachment or indictment where the treasurer has refused to perform his legal duty of paying an order for money. *Rex v. Surrey*, 1 Chitty, 650; *Rex v. Bristow*, 6 T. R. 168.

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In some American courts the remedy of suit on the official bond of the treasurer has been held to be adequate, and it has been held that for that reason mandamus will not lie to compel the treasurer to pay county warrants out of funds in his hands for that purpose. *State v. Bridgman*, 8 Kan. 438.

In Alabama it has been intimated that where a warrant though drawn by the proper officers is payable out of the general funds of the county a mandamus will not lie to compel its payment; but the party will be left to his remedy on the official bond of the officer or to his action on the case. *Sessions v. Boykin*, 78 Ala. 323.

There has been a tendency, however, in America, to hold that a personal remedy against the officer is not sufficient to defeat mandamus.

A right of action against the officer who ought to perform the duty can never be an answer to a motion for a mandamus to compel its performance. *People v. Mead*, 24 N. Y. 114.

The fact that an execution may be issued against the individual property of school trustees will not prevent the issuance of a mandamus to compel them to pay from the school funds in their possession a judgment which has been recovered against the district for teachers' salary. *People v. Abbott*, 45 Hun, 233.

In New York it was held that the claim that relator has a right of action against the town will not defeat an application for a writ of mandamus to compel payment of money which has been raised under a special statutory proceeding for the payment of interest on town bonds and placed at the disposal of commissioners appointed to pay it over to the bondholders.

The creditor cannot be compelled to undertake a suit against the town by the perversity of public officers. *People v. Mead*, 24 N. Y. 114.

But the decision in the principal case appears to

defendant as Treasurer of Brevard County to pay certain county warrants. *Affirmed.*

The facts are stated in the opinion.

Mr. Minor S. Jones for appellant.

Mr. Thomas E. Wilson appellee in *propria persona*.

Raney, Ch. J., delivered the opinion of the court:

This is an appeal from a judgment awarding a peremptory writ of mandamus requiring the appellant, the County Treasurer of Brevard County, to pay certain county scrip or warrants.

The warrants consist of two pieces, each of the denomination of \$10, dated October 26, 1878, and purporting to have been issued in the office of the clerk of Brevard County, at Lake View, by John M. Lee, clerk of the circuit court of that county, and *ex officio* auditor, and sealed with the official seal of such clerk, and in favor of one William Shiver or order, and "chargeable under head of County Expenditures," and indorsed by Shiver; and of seven other pieces, six of which are for \$20, and one for \$10, drawn in favor of the relator, and dated May 2, 1878, at Lake View, in the above county, signed by John M. Lee, clerk of such court, and sealed as above indicated, and payable "out of any moneys in the treasury appropriated for county purposes." They are all drawn on the County Treasurer, and numbered as indicated in the alternative writ. The alternative writ alleges that these warrants were regularly issued for value received, and that the defendant has in

his hands as such County Treasurer the necessary funds to pay them, and that they have been presented to him, as such treasurer, for payment, but have never been paid, and that defendant is such treasurer.

By the Constitution of 1868, as by the present revision thereof, the clerk of the circuit court was made clerk of the boards of county commissioners and *ex officio* auditor of the county. Section 19, art. 6, Const. 1868, and sec. 15, art. 5, Const. 1885. The Act of June 6, 1870, § 81 (p. 179, McClellan's Digest), provides that the clerks of the different counties shall audit all accounts against their respective counties in the same manner as prescribed for the comptroller to audit accounts against the State, and that they shall require the same evidence of the legality of claims against counties as is required to establish claims against the State; and he shall keep on file in his office vouchers for all claims audited by him. By the Act of February 16, 1872 (p. 316, McClellan's Digest), the county commissioners were given power to approve all accounts against the counties before the same should be audited by the clerk. The Legislature of 1877, §§ 12, 18 (pp. 317, 318, McClellan's Digest), being subsequent to the issue of these warrants, need not be considered.

The alternative writ was demurred to on four grounds, one of which was, that the relator had filed no cause of action; which ground was sustained and the others overruled; and the relator filing the cause of action, the defendant answered as required.

The writ states, in our judgment, a prima

be the first to announce the sensible rule that a suit against the county, with the consequent delay and expense, is insufficient in case of a claimant who has an immediate right to money actually in the treasury of which he is deprived simply because of the officer's refusal to do his duty.

Rule where audit is conclusive.

In some states the board of supervisors of a county has been clothed by statute with the power of examining and allowing accounts chargeable to the county, and that method of collecting an account has been made exclusive. *Martin v. Greene County Suprs.* 29 N. Y. 647; *Brady v. New York City & County Suprs.* 10 N. Y. 280.

In Mississippi the boards of county commissioners are the tribunals in which claims against the county are passed upon, and no suit lies against the county. *Carroll v. Tishamingo County Bd. of Police*, 28 Miss. 33.

Where the claim is for a certain and ascertained amount the auditing and allowance of it by the town council is equivalent to a judgment at law. *Kelly v. Wimberly*, 61 Miss. 550.

In such states mandamus is the appropriate remedy to compel the county treasurer to pay when he refuses to pay a demand which the board of supervisors have legally audited and allowed or directed to be paid. *People v. Edmonds*, 19 Barb. 468.

The treasurer has no power to suspend or refuse payment of warrants properly drawn on him by the clerk in obedience to the orders of the board of supervisors, unless it is expressly given him by statute. *Hendricks v. Johnson*, 45 Miss. 644.

Under statutes which make every claim which is a county charge the subject of the jurisdiction of the board of supervisors and render that mode of enforcing it exclusive, mandamus will issue to 14 L. R. A.,

compel the payment. *People v. Haws*, 21 How. Pr. 178.

Statutory changes permitting enforcement of ministerial duty.

Many of the states have enacted statutes which have changed the common-law rules in regard to mandamus to a greater or less extent so that in those states the question has resolved itself into little more than a mere inquiry as to whether or not the officer against whom the issuance of a writ is desired has a plain legal duty to perform which he may conveniently be compelled to do by mandamus. As illustrating those changes the Revised Statutes of Illinois, chap. 87, § 9, provide that the writ shall not be denied because the petitioner may have another specific legal remedy where such writ will afford a proper and sufficient remedy.

The Indiana statute authorizes the issuance of writs of mandamus to any "person to compel the performance of a duty resulting from any office, trust, or station." *Ex parte Loy*, 59 Ind. 235.

In states where such statutory changes have occurred, and in some others where the decisions of those states have been followed, the question of ministerial duty appears to be made the prominent one, and the writ is issued or withheld as such duty is made clearly to appear or otherwise.

As all duties of a statutory disbursing officer are generally if not universally specifically defined by statute, so that there can be no just ground for controversy as to when he will be bound to honor orders and when he will not, mandamus will generally issue to compel him to pay an order legally drawn on funds in his hands subject to the payment of such order. *People v. Johnson*, 100 Ill. 542, 39 Am. Rep. 63.

The court may issue a writ of mandamus to com-

facie case of pecuniary liability on the part of the county; or, in other words, sets up a sufficiently valid claim against the county to call for a defense. Under the above constitutional provision and the legislation of 1870, it is clearly an official duty of the clerk of the circuit court to audit all claims against the county, and these warrants issued by him under his hand and official seal are the usual and proper evidence then given a creditor of the auditing of his claims against the county, the vouchers for which are presumed to have been duly required by the clerk or auditor, and to have been filed by him in his office. County and city orders issued by the proper officers are prima facie binding and legal; such officers are presumed to have done their duty, and the orders constitute a prima facie cause of action, the impeachment of which must come from the defendant. *Dillon, Mun. Corp.* § 502; *Floyd County Comrs. v. Day*, 19 Ind. 450; *Leavenworth County Comrs. v. Keller*, 6 Kan. 510; *Clark v. Des Moines*, 19 Iowa, 199, 211; *Cherney v. Brookfield*, 60 Mo. 53; *Connersville v. Connersville Hydraulic Co.* 86 Ind. 184. It is, in the absence of any showing to the contrary, to be presumed that the accounts upon which the warrants were issued were approved by the county commissioners under the Act of 1872 before the clerk audited them

and issued the warrants sued on. It was not necessary to specify the consideration of the warrant in the writ. *Floyd County Comrs. v. Day, supra*. An alternative writ is not demurrable, if it states a prima facie case. *State v. Jacksonville*, 22 Fla. 21. This writ shows that the script was issued by the proper officer, and for value received, and that the treasurer has funds to pay it; and the judgment must be affirmed unless we find either that the relator has another specific and adequate remedy, or that the matters set up in the return are sufficient to bar a recovery in this proceeding. To these questions, in the order stated, we shall address ourselves.

In *Com. v. Johnson*, 2 Binn. 275, the decision was that mandamus lay to compel road supervisors to pay orders drawn on them in favor of surveyors by justices of the peace, under the provisions of a statute. "It is said," observes the opinion, "that the supervisors may be indicted for neglect of duty. But if they were indicted and convicted the orders might still be unpaid. It is said also that if they withhold payment without just cause they are liable to an action. Granting that they are, it must be brought against them in their private capacity, and there is no form of action against them, which, being carried to judgment, will authorize an execution to be levied

upon a treasurer to perform his plain ministerial duty and pay a properly drawn county warrant, although there are other methods of procedure which could be taken for the collection of the demand. *State v. Callaway County*, 45 Mo. 228.

In *Johnson v. Campbell*, 30 Tex. 83, the court issued a mandate to compel the county treasurer to pay a voucher proved in the way provided by law on the ground that it was a mere ministerial duty the performance of which could be compelled by mandamus.

In *Connersville v. Connersville Hydraulic Co.*, 86 Ind. 184, where the objection was taken to the maintenance of a suit on a city warrant that the remedy should be by mandamus, the court apparently admitted that mandamus would lie, but it held that resort need not be had to the extraordinary remedy, but that a suit would lie.

The remedy of mandamus against the treasurer rests upon the idea that he has control of the money and is charged with the ministerial duty of paying it out as directed by law. *People v. Fogg*, 11 Cal. 358.

Mandamus, and not assumpsit, is the proper remedy to compel payment of a valid order given by the highway commissioners on the township treasurer. *Just v. Wise Twp.* 42 Mich. 573.

Cases in which the writ may issue.

It is not always easy to determine the grounds upon which a writ has been allowed. The weight of authority favors the rule that if a suit will not lie against the municipality the mandamus may be awarded. Thus where the orders are drawn on a special fund the county cannot be sued in an ordinary action and so that remedy is unavailable. *State v. Bollinger County Ct.* 48 Mo. 475.

In *Apgar v. School Dist. No. 4 of Chester Twp.* 34 N. J. L. 310, the court says that none of the cases in which courts have refused to issue the writ present the case of money raised by taxation for a specific class of creditors, and in the hands of the officer charged with its payment, where the only step remaining to satisfy the creditor is the payment of money to him out of such fund.

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Where a special fund is provided for by statute for the improvement of streets the treasurer in whose hands the fund is may be compelled by mandamus to pay warrants drawn upon the fund by the proper officers. *Portland Stone-Ware Co. v. Taylor*, 17 R. I. —.

Where a statute authorized the supervisors of the county to raise by a tax and pay to the judges of the court an additional compensation when the supervisors have fixed the amount and allowed an account presented by a justice for the compensation due him and directed the treasurer to pay the amount thereof, it is his duty to pay, and he may be compelled to do so by mandamus. In such case the claim does not create a debt against the county which can be recovered in an ordinary action. *People v. Edmonds*, 15 Barb. 529.

Where the Legislature directs the levying of a tax to pay a claim which the courts have adjudged to be uncollectible, and the municipality has levied the tax and received the money into its treasury, the comptroller may be compelled to apply the fund in satisfaction of the claim since an action against the city would prove unavailing. *People v. Haws*, 36 Barb. 59.

Where the law imposes the duty of taxing the fees of court officers on the court and gives no action against the county for them, nor any action on the treasurer's bond, if the treasurer refuses to pay an order of the court he may be compelled to do so by mandamus. *Baker v. Johnson*, 41 Me. 15.

There is also a class of cases in which a duty has been imposed by statute upon the officer in which the writ has been issued partly because the statute intended that remedy to be exclusive and partly on the ground of ministerial duty.

Where a particular method of raising money for a local public purpose is proscribed by statute, the party entitled to receive it has a right to the full and perfect execution of the power conferred which may be enforced by mandamus. *People v. Mead*, 24 N. Y. 114.

Where the statute requires the county treasurer holding money collected upon a tax levied to pay a judgment against the county to pay it over to the creditor on demand, if he refuses to perform his

on the treasury of the Northern Liberties. Now it was to this treasury that the surveyors had a right to look, when they acted under their commission from the governor." In *Baker v. Johnson*, 41 Me. 15, mandamus was granted to compel a county treasurer to pay the account of a sheriff for his services and those of his subordinates in attending court. His bills were audited and allowed by the presiding judge. Some objection was made that the judge did not in terms order the bills to be paid, yet it was conceded that they were allowed in the same manner as had ever been the practice in the county. In *Potts v. State*, 75 Ind. 336, a supervisor of highways had allowed a laborer for work done and given him an order on the trustee of the township for its payment, but the trustee, on demand of payment, refused to pay the order out of the moneys in his hand applicable to its payment, and a peremptory mandamus was granted on relation of the supervisor. In *State v. Gandy*, 12 Neb. 232, the writ, after describing the warrants and their assignment to the relator, stated in substance that the warrants were legally issued by the board of county commissioners, duly presented to, and audited and allowed by, the board when in session, and that they had been presented for payment and payment refused, and that there were, at the institution

of the proceeding, sufficient funds in the treasury to pay the same after paying all prior warrants on that fund. These facts being conceded by the failure of the defendant to answer, a peremptory writ was awarded. See also *Johnson v. Campbell*, 39 Tex. 83; *Hendricks v. Johnson*, 45 Miss. 644; *Clayton v. McWilliams*, 49 Miss. 311; *State v. Calaway County*, 43 Mo. 228; *People v. Edmonds*, 15 Barb. 529, 19 Barb. 468; *People v. Haus*, 86 Barb. 59.

In *People v. Wendell*, 71 N. Y. 171, there was an application, primarily, for a peremptory mandamus requiring a county treasurer to pay a claim of the relator, which had been audited by the board of supervisors of the county. The papers used in opposing the motion showed quite clearly that a fraud had been perpetrated upon the board of supervisors in reference to a considerable portion of the claim, and it was also apparent that another portion of it was allowed without any authority or sanction of law. The order denying the application was affirmed. Recognizing it as a settled principle that a remedy by peremptory mandamus cannot be invoked unless there is a clear and unquestioned legal right, (*People v. Greene County Suprs.* 64 N. Y. 600,) it is yet observed by the court, subject, however, to the fact that in this case an alternative writ did not seem to be desired, that it is the duty

duty he may be compelled to do so by mandamus. *Brown v. Crego*, 32 Iowa, 498.

Where the charter of a city makes it the duty of the treasurer to pay the interest of certain bonds when it falls due out of a fund provided for that purpose such payment is a duty specially enjoined by law upon the officer and may be enforced by mandamus. *Meyer v. Porter*, 65 Cal. 67.

Where a statute provided for the raising of a tax to pay interest on bonds and directed that the money should be received and paid to the bondholders by commissioners appointed for that purpose, the commissioners may be compelled by mandamus to pay over the money after it has been raised by levy of the tax. *People v. Mead*, 24 N. Y. 114.

Where a statute makes it the duty of the county treasurer to pay certain claims out of the fine and forfeiture fund, whenever it becomes sufficiently large, he may be compelled by mandamus to perform such duty. An action against him personally or on his official bond, while they might afford pecuniary compensation, would not compel the performance of such duty. *Sessions v. Boykin*, 78 Ala. 323.

Where a ditch commissioner has collected assessments for the construction of the ditch he may be compelled by mandamus to distribute to a contractor the amount due him for construction, since that is a duty imposed upon him by the law which provided for the construction of the ditch. *Ingerman v. State*, 128 Ind. 225.

Where a special fund is provided for the payment of a certain class of claims and a claim is duly audited and allowed by the proper tribunal and an order drawn upon the treasurer for its payment, the duty of the treasurer, unless he can show some error or fraud on account of which the court would withhold its order, is a ministerial duty to pay to the extent of the fund; to hold otherwise would enable the treasurer of his own motion to put the creditor to the delay and the district to the expense of a suit, and that, too, against its will and order. *Portland Stone-Ware Co. v. Taylor*, 17 R. L. —.

Where the statute authorizes justices of the peace 14 L. R. A.

to draw orders on the supervisors of roads to pay for work done on the highways the court held that mandamus is proper to compel the payment of orders, since there was no other way in which the money might be collected. An indictment of supervisors for neglect of duty would be ineffectual and no action could be brought which would authorize the levying of an execution on the township treasury. *Com. v. Johnson*, 2 Binn. 275.

But in Kansas it has been held that although the law directs the county commissioners to raise money by taxation to pay county bonds and the treasurer to pay it over to the bondholders, mandamus will not lie to compel the treasurer to pay over the money, since a suit on his official bond will afford an adequate remedy, and afford an opportunity to test the validity of the bonds. *State v. McCrillus*, 4 Kan. 200.

If a judgment has been recovered on the claim there would seem to be no doubt in regard to the right to the writ, for although mandamus will lie against a city to compel payment of a judgment against it (*Chicago v. Sansum*, 87 Ill. 182; *Olney v. Harvey*, 50 Ill. 454, 99 Am. Dec. 530), yet if the money is actually in the treasury the simplest proceeding would seem to be to compel the treasurer to pay it over.

A school trustee may be compelled to apply funds of the district in his hands to the payment of a judgment recovered against the district for services as teacher. *State v. Coopridge*, 96 Ind. 279.

Mandamus will issue to compel payment from the treasury of interest on a judgment. *Jerome v. Rio Grande County Comrs.* 18 Fed. Rep. 873.

Mandamus will issue to compel payment of an order drawn for satisfaction of a judgment against a city. *Bank of California v. Shaber*, 55 Cal. 322.

In the following cases the writ has been held to be proper:

Mandamus may issue to compel a school assessor to pay a school order. *Martin v. Tripp*, 51 Mich. 184.

Mandamus may issue to compel payment of county warrants legally issued and for which there are funds in the treasurer's hands. *State v. Gandy*, 12 Neb. 232.

of the court in such cases to see that the rights of the relator are fully protected, and it is authorized to direct the issue of an alternative writ in cases where the facts relied upon by the relator are in dispute, or where the parties wish to review the case on appeal, or upon the suggestion of either party.

The above authorities hold that where the claim of the relator is one of a character whose payment the law imposes on the county or municipality, and it has been audited, and ordered to be paid by officers having the authority to audit it and order its payment, a county treasurer, or other paying officer, should not refuse to pay, if he has the money to pay it with, unless the claim is for some reason fraudulent. The duty to pay, where the paying officer has the funds to pay with, and the officers auditing and ordering payment have acted within the scope of their powers and there is no fraud attached to the claim, is merely ministerial, and mandamus will lie to compel its payment. It is true the right to this remedy was doubted, though not decided, in *People v. Lawrence*, 6 Hill, 244, but such right is affirmed in the later New York cases. If the claim is not one of a character payable by the county or municipality, or if the board auditing it and ordering its payment had no authority to

do so, or if there is fraud, (or, it may be mistake, *Shirk v. Pulaski County*, 4 Dill, 209), neither of which conditions is pretended to exist here, the paying officer should refuse to pay it. It is true that in some cases the right to the writ is put on the ground that an ordinary action at law will not lie against the county or municipality on the claim. We fail to see that such an action against the county is a sufficient remedy. If the claim is lawful and has been audited and ordered paid by the proper authority, and the officer whose function it is to pay has been furnished with and has the public money for its payment, there is a palpable insufficiency in a remedy which would give him a personal judgment against the county or municipality, to be followed it may be by a mandamus to compel the levy of a tax to pay the same in case the money in the treasury should have been used, or there was not enough to pay the accrued interest, and all this too, simply because an officer whose duty it is to pay lawful claims sees fit to refuse to do his duty. The holder of such a claim has an immediate right to the money provided and held for his payment, and a remedy which imposes any of the delay indicated and its attendant expense, is entirely inadequate. A remedy which will avoid mandamus must be both specific and

A township trustee cannot refuse to pay an order drawn on him by a supervisor of highways to pay for work done thereon where he has money in his hands applicable to its payment. *Potts v. State*, 75 Ind. 336.

Mandamus is the proper remedy to compel the treasurer to pay warrants surrendered for redemption as provided by law. *Day v. Callow*, 39 Cal. 593.

Where the law provides that court officers may present certificates of the clerk to the county treasurer, and receive pay for their services in case of the refusal of the treasurer to recognize and pay the amount called for by a certificate, he may be compelled to do so by mandamus. *Huff v. Knapp*, 5 N. Y. 65.

Where the treasurer has funds sufficient to pay warrants that have been duly drawn on him by the proper officers, which are applicable to the payment thereof, and such warrants were legal claims against the county, mandamus will issue to compel him to pay them. *Bush v. Gelsy*, 16 Or. 355.

Where the common council had the right to appropriate a certain amount of the taxes to the erection of new schoolhouses in the municipality, until that amount was expended, the treasurer could not question its right to draw upon the funds in his hands. *Pierce, B. & P. Mfg. Co. v. Bleckwenn*, 16 N. Y. Supp. 768.

Where the treasurer of a school district having funds in his hands for that purpose refuses to pay an order issued in full compliance with the provisions of the law to contractors in satisfaction of claims for the erection of a schoolhouse, mandamus will lie to compel him to do so. *Maher v. Allen* (Neb.) July 1, 1891.

Defenses; irregular or insufficient audit or warrant.

To warrant the issuance of mandamus the claim must have been audited in the manner prescribed by law. *People v. Board of Apportionment*, 52 N. Y. 224.

Payment of warrants for school money cannot be compelled unless they are drawn in the manner required by law. *State v. Bloom*, 19 Neb. 532.

Mandamus will not issue to compel payment of warrants which have not been drawn in compliance with the requirements of law. *People v.*

Klokke, 92 Ill. 134.

Where the law requires a claimant to procure an order from the board of supervisors allowing the claim before its payment by the treasurer, mandamus will not lie to compel the treasurer to pay in the absence of such order. *Honea v. Monroe County Suprs.*, 63 Miss. 171.

Where payment is to be made by warrants drawn by other officers the treasurer cannot be compelled to pay without a warrant. *People v. Fogg*, 11 Cal. 358.

A treasurer cannot be compelled to pay precept bonds except upon warrants issued by the county commissioners. *State v. Thorne*, 9 Neb. 458.

Where the judgment of the auditing board is the foundation for the payment of the claim, and the law prescribes the manner in which such judgment shall be reached and recorded, payment of a warrant based upon a judgment which was a flagrant violation of the statutory provisions cannot be compelled. *Honea v. Monroe County Suprs.*, 63 Miss. 171.

A treasurer cannot be compelled by mandate to pay a claim where any duty is devolved on him except the mere ministerial act of making the payment. The validity of the claim and the amount due must have been definitely ascertained by a competent officer or tribunal whose decision while unappealed from is final and conclusive before payment can be enforced by mandate. *State v. Snodgrass*, 96 Ind. 550.

Where the amount to be paid is not definitely ascertained because of the difference in value between the current funds and the funds in which the order is payable the mandamus will not issue. *Clayton v. McWilliams*, 49 Miss. 319.

Payment in gold coin cannot be compelled where the only funds applicable to the payment of the claim consist of legal tender notes. *People v. Cook*, 39 Cal. 658.

Mandamus against the treasurer is not the proper remedy in the first instance to compel payment of a school teacher's wages. *Woodbridge v. Gage*, 66 Ill. 157.

Payment of a claim cannot be compelled unless it is presented in the form required by law. *Honea,*

adequate. *Baker v. Johnson*, *supra*; Tapping, Mandamus, 18, 19; High, Extr. Legal Rem. §§ 9, 15-17.

The contention that the relator has another sufficient legal remedy is answered by the authorities and observations set out above. This case is of course clearly distinguishable from those holding that a mandamus will not issue to compel the levy of a tax to pay a warrant or order of this character without putting it in judgment. *State v. Clay County*, 46 Mo. 231; *State v. Bollinger County Ct. Justices*, 48 Mo. 475; *State v. Pacific*, 61 Mo. 155; *Coy v. Lyons City Council*, 17 Iowa, 1; *Chase v. Morrison*, 40 Iowa, 620.

We are not called upon to notice the distinction made between cases where a warrant is payable expressly out of a particular fund, and those where it is not.

The return "charges" that the scrip is spurious, illegal and void, and was issued, and is held by relator without valuable consideration, such charge being made upon the basis of an allegation that "no order or resolution appears upon the records ordering or authorizing the clerk to issue or sign said scrip to relator," and of another allegation that on the first Monday in January, 1880, the board of county commissioners passed an order "that all Brev-

ard County scrip issued between January 1, 1870, and January 1, 1880, be called in, and handed to the clerk of the board for the purpose of being examined by the board, and that all scrip found to be good should be re-stamped, and that all scrip not in, or before the board, by the first Monday of March, A. D. 1880, would be repudiated; and that such order should be published up to March 1, 1880, in the "Orange County Reporter," and also be posted at the several voting precincts of Brevard County. The cause of the adoption of this order is stated by the respondent, upon information and belief, to be that prior to the year 1880, a large amount of spurious scrip or orders upon the Treasurer of Brevard County had been placed in circulation, and had been and was being circulated and transferred by mere delivery, "that is to say, it appeared that scrip to a large amount had been issued without the sanction or order of the board of county commissioners of Brevard County, that this fact appears from the records of said county, the records of said county showing that no accounts for said scrip are filed, and no account is filed, and no account for said scrip was acted upon or approved by the board of county commissioners for said county, and that no such accounts were audited by the

where the law requires the claim to be passed on by the board of county commissioners no writ can be issued until this has been done. *State v. Fuller*, 18 S. C. 250.

The fact that the persons ordering payment of the claim are *de facto* officers merely is not sufficient to justify the treasurer in refusing to comply with their order. *State v. Philbrick*, 6 Cent. Rep. 344, 49 N. J. L. 874.

The fact that the title to office of the *de facto* officer who signs a highway warrant is disputed will not prevent the issuance of a mandamus to compel payment of the order. *School Dist. No. 8, of Tallmadge Twp. v. Root*, 61 Mich. 873.

An order drawn by the acting board of directors of a school district must be honored by the treasurer. He cannot refuse payment by claiming that they were not the *de jure* officers and had no right to hire the teacher for the payment of whose salary the order was drawn. *Case v. Wrealer*, 4 Ohio St. 561.

The mere fact that two commissioners out of a board of five had ceased to act will not justify the treasurer in refusing to pay orders drawn by the other three where the statute creating the board contained no provision for the filling of vacancies. *People v. Palmer*, 52 N. Y. 58.

Absence of funds.

Want of funds is a complete answer to an application for a mandamus to require the assessor of a school district to pay a warrant drawn on him in favor of a school teacher. *People v. Frink*, 32 Mich. 96.

The mandate will not compel payment of a larger amount than is in the treasurer's hands applicable to the claim. *Day v. Callow*, 39 Cal. 593.

Where the treasurer is by law directed to pay warrants in the order of their date mandamus will not issue to compel him to pay an order where he answers that there are older orders on the books which will more than exhaust the money in his hands. *Mitchell v. Speer*, 39 Ga. 56.

Where the money to the credit of the special fund out of which payment is desired was not legally placed there the mandamus will not issue. *People v. East Saginaw*, 40 Mich. 386.

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Where the charter of the city authorizes a fund to be raised by an annual tax for the payment of the current expenses of administration not including payments on account of city bonds, a court cannot by mandamus require such fund to be appropriated to the payment of the bond. *East St. Louis v. United States*, 110 U. S. 831, 26 L. ed. 162.

Where a statute provides for the formation of a fund by the money paid for redemption from tax sales which shall be held in trust for the holders of the certificates, if the claim under a particular certificate is by mistake paid to the wrong person, who claims it as matter of right, mandamus will not issue in favor of the rightful claimant to compel the officer to pay him the amount, since the fund has been depleted by the prior payment. *People v. O'Keefe*, 1 Cent. Rep. 720, 100 N. Y. 572.

Mandamus should not issue to compel the treasurer to pay a claim where the funds out of which it was payable have been expended, although the expenditure may have been wrongful. *Rice v. Walker*, 44 Iowa, 458.

But in *Williamsport v. Com.* 90 Pa. 486, the court granted a mandamus to compel the city treasurer to pay over-due interest on city bonds, although the money in his hands for that purpose had been appropriated by the city council to other uses, it not appearing that the amount thus withdrawn from the treasury was absolutely needed for the ordinary expenses of the city.

So it has been held that the fact that the treasurer has through inadvertence or misapprehension of duty paid the fund to another, who has no claim upon or right to the fund, will not be a defense to an application for the writ. *People v. Johnson*, 100 Ill. 543, 39 Am. Rep. 63.

Fraud; illegality of claim.

If the subject matter of an account be within the jurisdiction of a board of supervisors, and they allow it, the county treasurer has no right to refuse payment on the ground that the allowance was too much or was made upon insufficient evidence. *People v. Earle*, 47 How. Pr. 458; *People v. Lawrence*, 6 Hill, 244.

But where supervisors exceed their jurisdiction by allowing a claim by a judge for expenses in

auditor of said board of county commissioners, and that said board of county commissioners never issued said scrip, or authorized the same to be issued;" and the purpose of the order is charged to have been "to protect the county from being defrauded by the payment of such fraudulent, spurious and illegal scrip."

The charge that the scrip is spurious, illegal and void, is a mere conclusion of law, and insufficient as a return (High, Extr. Legal Rem. § 472); and the charge that it was issued and is held without valuable consideration is also insufficient in law, it being made, not as an independent or positive averment of such fact, but as an inference, argument, or conclusion of law drawn from or based upon allegations which, as appears in the preceding paragraph of this opinion, in no wise support the inference, argument or conclusion; and for this reason the charge or averment is insufficient. High, Extr. Legal Rem. § 472. Unwarrantable inferences do not constitute of themselves a defense, whether the facts from which they are drawn be a defense or not. It is of course altogether immaterial that the relator may not hold these warrants for a valuable consideration, if it be that they were issued for one, and are otherwise legal. It is not properly denied

that they were so issued, nor that they are so held.

The allegation that no order or resolution appears upon the records, meaning of course the records of the board of county commissioners, ordering or authorizing the clerk to issue or sign this scrip, "to relator," is an entirely insufficient defense to a recovery on the scrip issued to the relator directly, as it is to that issued to Shiver if we may ignore the words quoted, which confine the averment to that issued to the relator individually. If before the issue of the scrip the county commissioners by an order or resolution duly entered upon their records, if such entry was necessary (*Johnson v. Wakulla County*, 28 Fla. —), or otherwise (if the entry was unnecessary), duly approved the accounts upon which it was issued, the fact that no such order or resolution appeared at the time of the application for the writ of mandamus, or at the time of the signing or filing of the return, is not fatal to the validity of the scrip. Its averment is not incompatible with the fact that such an order or resolution was legally passed and duly entered upon the records; nor is it tantamount to an allegation that no such order was ever passed or entered. The facts necessary to make it so

defending himself in impeachment proceedings, which claim was not a county charge, the treasurer could not be compelled by mandamus to pay the warrant. *People v. Lawrence*, 6 Hill, 244.

Where the board of supervisors, in violation of its powers, increases the salary of a judge and then draws an order on the county treasurer for the payment of the increased salary, the treasurer may properly refuse to pay it. *People v. Edmonds*, 19 Barb. 468.

If the demand was not legally chargeable against the county it is a good defense. *Keller v. Hyde*, 20 Cal. 594.

So the treasurer will not be compelled to pay the warrant where the papers show on their face that a fraud was perpetrated upon the board of supervisors in reference to a considerable portion of the claim, and that another portion was allowed without any authority or sanction of law. *People v. Wendell*, 71 N. Y. 171.

Mere allegations of fraud and misrepresentations and lack of authority will not prevent the issuance of the writ. To have that effect facts must be stated from which such conclusions clearly appear. *Hendricks v. Johnson*, 45 Miss. 644.

Payment of claim for lighting the streets of a borough will not be compelled where there was no ordinance authorizing the expenditure and the chief executive had directed the treasurer not to pay the order because it was illegal and void and the validity of the claim was denied under oath. *Com. v. Buchanan*, 6 Kulp, 217.

Where, by reason of complication or of extraneous circumstances not specifically provided for by statute, a well-defined doubt arises either as to the right of the applicant to receive the fund or the duty of the officer to pay it out, mandamus is not the proper remedy. The right in such case being doubtful, the claimant must resort to his own appropriate remedies to determine it. *People v. Johnson*, 100 Ill. 543, 39 Am. Rep. 63.

The order is sufficiently doubtful to prevent the issuance of the writ where the commissioners were sued individually and drew the order to have the fees for defending the suit paid out of the county funds. *Crawley v. Mershon*, 61 Ga. 284.

Where a statute ordering a compulsory arbitration is of doubtful construction, and the legal

right under it is not clear, and an award is made to which proper objections are stated, the party claiming its enforcement against the city must use the ordinary remedy of action on the award and is not entitled to a mandamus. *State v. Jersey City Board of F. & T.* 39 N. J. L. 629.

So where, for the purpose of determining the validity of claims for extra work done on the highways, the statute provides for the appointment of a referee and an examination of a claim by him, and directs that in case his report in favor of the claim is confirmed by the court the city shall pay it, the payment will not be enforced by mandamus, but the proper course is action upon the report of the referee. *State v. Jersey City Board of Finance*, 41 N. J. L. 135.

Wrong claimant.

The writ can only issue in favor of the one to whom the claim is payable. Hence where a justice of the peace drew an order for fees due to the prosecuting attorney, sheriff, witnesses, etc., he could not compel payment of them to himself. *Cook v. Peacham*, 50 Vt. 231.

The proper relator in mandamus to compel an officer to pay an order drawn on him is the holder of the order and not the person who drew it. *State v. Haben*, 22 Wis. 101.

Other defenses.

The treasurer cannot be compelled to pay a warrant not yet drawn. *State v. Mound*, 21 Ia. Ann. 352.

An unauthorized order of the county commissioners not to pay the warrant is not an answer to an application for the writ. *Thomas v. Smith*, 1 Mont. 21.

Mandamus will not issue to enable one creditor to get a preference over another by directing the treasurer to pay a claim out of funds not yet received by him. *State v. Burbank*, 22 La. Ann. 296.

Where the judgment of the auditing board is the foundation for the payment of the claim, and not the warrant, the absence of a seal from the warrant will not justify a refusal to pay it. *Honea v. Monroe County Suprs.* 63 Miss. 171.

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should have been stated in the return. The rules governing returns in mandamus do not permit us to supplement their statement, by either inference, intendment, or otherwise; all of the facts relied upon by the respondent must be stated with such precision and certainty that the court may be fully advised of all the particulars necessary to enable it to pass upon the sufficiency of the return. *Polk County Comrs. v. Johnson*, 21 Fla. 578; *State v. Jacksonville*, 22 Fla. 21; High, Extr. Legal Rem. §§ 470, 472, 474.

An order or resolution like that passed by the board of county commissioners in January, 1880, is not a defense to the payment of an obligation of a county, nor will its publication, in accordance with directions contained in it, render it so. It is to be observed, however, that neither the return nor the entire record informs us that there was any publication of the order, or even that the relator had notice of it. County commissioners cannot impose on the holders of prior claims of this character against a county the presentation thereof for the mere purpose of an examination and indorsement, nor make it a condition of their validity or recognition. Their non-presentation under the resolution is of itself no bar to their recovery, nor to the proceedings now before us, and this, too, no matter how much other scrip may have been issued during the same period without being duly audited, or without the order, sanction or approval of the board of county commissioners or of other legal authority, and had been, and was being, circulated in the manner alleged, nor that the fact of such unauthorized issue appears from the records of the county. The statement made in the return, of the causes leading to the adoption of the resolution in question, fails to

show that the particular scrip now sued upon was issued in the manner stated, and this scrip is consequently not affected by such statement. The infirmities of any other warrants or claims, whatever such infirmities may be, or however great is the quantity of such warrants or claims, cannot be extended by argument, inference, or intendment to these.

The return also charges, upon information and belief, that the scrip is not shown by the records of the county of Brevard to be genuine, and based in accordance with law and for a full and valuable consideration inuring to the county, and that hence it is spurious and fraudulent, and issued in total disregard of law and without valuable consideration. What has been said above upon practically similar allegations of this return is, upon the authorities there cited, applicable to this attempted defense and conclusive of its insufficiency.

Certain charges or allegations of the return are made on information and belief. We do not think this the proper form of averments in such pleadings (*State v. Sumter County Comrs.*, 22 Fla. 1); but, as in the case just cited, do not hold the return insufficient merely on that ground.

The point, as to delay in instituting this proceeding, should have been made by the pleadings in the lower court. It, if apparently good, might have been satisfactorily answered there, had this course been pursued. *Logan v. Slade* (Fla.) 10 So. Rep. 25.

The peremptory writ commands the payment of the warrants, identifying them, and stating their aggregate amount, \$150, as it is stated in the alternative writ. A reference to a master was neither necessary nor proper.

The judgment is affirmed.

TEXAS SUPREME COURT.

FORT WORTH & DENVER CITY R.
CO., *Appl.*,
v.

John ROBERTSON, by Next Friend.

(.....Tex.....)

1. Leaving unfastened and insecure against accidents a turn-table which

is situated in an open and accessible place where children are in the habit of going for amusement with the knowledge, actual or constructive, of defendant's servants is negligence which will render a railroad company liable for injuries received in consequence of it by a boy seven years old, while playing upon the turn-table.

2. Diminished capacity to perform

NOTE.—*Liability of railways for injuries to children trespassing on turn-table.*

When recognized.

The principle underlying liability in these cases is well stated by Ray in his work, "Negligence of Imposed Duties, Personal," p. 88. "If an act you are contemplating, right in itself, will likely cause someone to expose himself to danger, which he does not anticipate, it is your duty to take care that such exposure does not prove injurious to him. In determining the question whether the act will induce such exposure, it is your duty to consider the motives and impulses that induce action by others, who are likely to be influenced by your act. If men may be misled in their judgment by your act, you must take measures to warn them, or to avoid injuring them, by proper care. If children from their own childish instincts and

curiosity may be led into danger, such care is due them also."

As a further reason why railroad companies should be held liable in these cases, it is suggested, in "Wood's Railway Law," p. 1292, that "railway companies do not hold their property by precisely the same tenure as an individual does; they are quasi public corporations and by a species of common consent which may be said to amount to a usage, people enter upon their tracks and grounds with nearly the same freedom that they do upon public grounds, and without feeling that they are trespassers. While this may not be done as a strict matter of legal right, yet it is idle to say that permitting such use, knowingly, and without objection, they nevertheless have the right to expose such quasi licensees to any species of danger they may choose to, particularly those not competent to judge of the danger, without incurring liability for the consequences."

manual labor, as distinguished from loss of earning power by any labor, manual or otherwise, may properly be considered by the jury in determining the damages to be awarded for a personal injury to a boy who has adopted no particular calling or trade for his life work.

3. Ten thousand dollars is not an excessive amount to be awarded as damages to a boy who by reason of defendant's negligence was compelled to remain in bed for five months suffering much pain, and lost one leg entirely, while the other was much weakened and rendered less useful.

(June 16, 1891.)

APPEAL by defendant from a judgment of the District Court for Wichita County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the commissioners' opinion.

Mr. J. M. O'Neill for appellant.

Messrs. G. G. Randell and W. W. Wilkins for appellee.

Garrett, J., filed the following opinion:

This suit was brought by John Robertson, a minor, by next friend, against the Ft. Worth & Denver City Railway Company, to recover damages for personal injuries sustained by the plaintiff while playing on the turn-table of the defendant. Appellee was a boy seven years of age at the time of the accident, which

occurred July 24, 1887, and is represented in this suit by G. G. Randall, as next friend. Upon trial by a jury, a verdict was returned in favor of the plaintiff for damages assessed at \$10,000, and judgment was rendered by the court for that amount. Appellant relies upon three assignments of error for a reversal of the judgment below.

1. "The court erred in the third paragraph of its charge by submitting to them the question whether the defendant's agents and servants knew, or by the use of reasonable diligence might have known, that defendant's turn-table was situated in a public place where children were likely to go, and were in the habit of going, for the purpose of amusement, because there was no evidence that the turn-table was situated where children were likely to go; no evidence that children were in the habit of going there, and no evidence, if children were likely to go there, or were in the habit of going there, that defendant, its agents or servants, knew it." The charge complained of was as follows: "(8) If you find that defendant's turn-table was located in a public place where children were likely to go, and where they were in the habit of going, for the purpose of amusement; and if such turn-table was left unfastened and unguarded, was a dangerous piece of machinery; and if defendant's agents or servants knew, or by the use of reasonable diligence might have known, such facts; and if defendant's agents and servants left said turn-table unfastened and unguarded; and if the evidence shows that in so leaving

The pioneer "turn-table case" was an action in the United States Circuit Court, District of Nebraska, to recover for personal injuries received by a child six years of age while playing upon the defendant's turn-table. Upon the first trial, which resulted in a disagreement of the jury, Dundy, J., charged the jury that "if the turn-table was a heavy and dangerous machine, and in a public place where children were in the habit of going to play upon it with the knowledge of defendant or its servants, then it would seem to me to be necessary to protect it in some way, either by fastening it or by enclosing the same; but if it was remote from places of public resort, or if the defendant or its servants had no knowledge of the boys going there to play upon it, so that no danger could be reasonably apprehended from it, even though it may have been in the open prairie, I do not think such diligence should be required of the defendant. So the degree of diligence in such a case would greatly depend upon the locality in which the turn-table might be found." *Stout v. Sioux City & P. R. Co.* 2 Dill. 294, 11 Am. L. Reg. N. S. 228.

Upon the second trial, Dillon, J., in charging the jury followed practically the charge given in the previous trial emphasizing *scienter* as an element of defendant's liability. He said, "If the defendant did know, or had reason to believe, under the circumstances of the case [that] the children of the place would resort to the turn-table to play; and if they did they would or might be injured, then, if it took no means to keep the children away, and no means to prevent accidents, it would be guilty of negligence, and would be answerable for damages caused to children by such negligence." *Stout v. Sioux City & P. R. Co.* 3 Dill. 294.

The submission of the question of defendant's negligence to the jury although there was no dispute as to the facts, and the charge given by the trial court, was approved by the Supreme Court 14 L. R. A.

of the United States on appeal (*Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745); and it was held that the company was liable, notwithstanding the child was technically a trespasser. There was an express disclaimer of any claim of contributory negligence in this case.

A railroad company, knowing that its turn-table was attractive, and when in motion dangerous to young children, and that many children resorted to it to play, was negligent in leaving the same unfastened and unguarded, so that it could be easily revolved, and is liable for injuries resulting from its neglect. *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 297, 18 Am. Rep. 385.

The case of *Nagel v. Missouri Pac. R. Co.*, 75 Mo. 653, involved almost the identical facts as the *Stout* Case, and the company was held liable, notwithstanding the fact that the turn-table was being revolved by other children, who were playing upon it at the time the injury occurred. So, too, *Barrett v. Southern Pac. R. Co.* 91 Cal. 204.

The *Stout*, *Keffe* and *Nagel* Cases were approved in *Harriman v. Pittsburgh, C. & St. L. R. Co.*, 9 West. Rep. 428, 445, 45 Ohio St. 11, a case of injury to a child by a torpedo left exposed in its station yard. It is there said: "It will be found by an examination of the cases in which consideration is given to this subject that there is in reality no invitation; and it is implied from slight circumstances and generally from the fact that children following their inclinations go upon and into exposed and frequented objects and places."

The doctrine of *Keffe v. Milwaukee & St. P. R. Co.*, is approved by the Supreme Court of Louisiana in *Westerfield v. Levis*, 48 La. Ann. —, not, however, a turn-table case.

A railroad company is liable for injuries received by a boy while playing upon its turn-table left without locks or fastenings or guards, situated less than half a mile from a populous city in an

the same unfastened and unguarded they were guilty of that want of care which a reasonably prudent person would have exercised under the same circumstances to prevent injury,—then they are guilty of negligence," etc. There was evidence showing that the turn-table was in the town of Wichita, near the railroad, and not far from the business portion of the town. It was in an open and uninclosed place, where people were in the habit of passing. There was nothing to prevent free access to the place. It was shown that children had frequently resorted there to play upon the turn-table, and that accidents had happened there before the plaintiff was injured. "The entry on such a place was not a trespass in a child which would deprive it of the right to recover for an injury resulting from the attempted use of a dangerous machine to which children would be attracted for sport or pastime, for it is the duty of every person to use due care to prevent injury to such persons, even from dangerous machinery upon the premises of the owner, if its character be such as to attract children to it for amusement." *Houston & T. C. R. Co. v. Simpson*, 60 Tex. 106. The turn-table was exposed and left unfastened, and was in a place convenient to the inhabited and business portions of the town, where children as well as others would be likely to go. It is not so much a matter of negligence that the place was public, as that the table was in a open and accessible place, and was left unfastened and insecure against accidents. The charge was more favorable to the defendant than it might have

been, and was fully warranted by the evidence adduced at the trial.

2. It is further assigned as error that "the court erred in the fifth paragraph of his charge by instructing the jury that in estimating the damages they should take into consideration the plaintiff's diminished capacity to perform manual labor, thereby misleading them." In the paragraph of the charge complained of, the court instructed the jury as to the measure of damages, and informed them that they might take into consideration "the plaintiff's diminished capacity for performing manual labor after the age of twenty-one years, and the mental and physical pain and suffering caused by such injury." The complaint is that the jury should have been instructed to take into consideration the plaintiff's loss of future earning power, without distinguishing between manual and other labor. In this case, where the injuries were sustained by a boy seven years of age, who had adopted no pursuit in life or calling or trade, and seeks to recover for the loss of a leg, his diminished capacity to perform manual labor would naturally suggest itself as the principal element of damages. He is certainly entitled to recover for a diminished capacity to perform ordinary labor. People ordinarily earn their support by some avocation that requires the performance of manual labor. The ability to do manual labor is something within the common knowledge of everyone. It would have been more speculative for the jury to have taken into estimation what the plaintiff might be

open prairie, where persons frequently pass and repass, and boys are accustomed to play. *Kansas Cent. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203. The court said: "Now, everybody knowing the nature and instincts common to all boys must act accordingly. No person has a right to leave, even on his own land, dangerous machinery calculated to attract and entice boys to it, there to be injured, unless he first takes proper steps to guard against all danger, and any person who thus does leave dangerous machinery exposed, without first providing against all danger, is guilty of negligence. It is a violation of that beneficent maxim, *sic utere tuo ut alienum non laedas*. It is true that the boys in such cases are technically trespassers. But even trespassers have rights which cannot be ignored."

To the same effect are *Evansich v. Gulf, C. & S. F. R. Co.*, 57 Tex. 123; *Ferguson v. Columbus & R. R. Co.*, 77 Ga. 102, 75 Ga. 637; *Ft. Worth & D. C. R. Co. v. Robertson* (Tex.), June 16, 1891; *Bridger v. Asheville & S. R. Co.*, 25 S. C. 24; *Houston & T. C. R. Co. v. Simpson*, 60 Tex. 106; *Gulf, C. & S. F. R. Co. v. Styron*, 66 Tex. 421; *Atchison & N. R. Co. v. Bailey*, 11 Neb. 333; *Barrett v. Southern Pac. Co.*, 91 Cal. 296; *Callahan v. Eel River & E. B. Co.* (Cal.) Nov. 27, 1891.

It is not necessary to prove willful intention to inflict injury. *Gulf, C. & S. F. R. Co. v. Styron*, *supra*.

A railroad company leaving a turn-table unfastened is not relieved from liability for such want of care by the fact that the person who put it in motion causing an injury to a child was *sui juris*, and therefore also liable. *Gulf, C. & S. F. R. Co. v. McWhirter*, 77 Tex. 356.

Where repudiated.

In *Frost v. Eastern R. Co.*, 4 New Eng. Rep. 527, 64 N. H. 220, it was held that a railroad company 14 L. R. A.

was not liable for the injury received by a boy seven years of age while playing upon its turn-table, on the ground that he was a trespasser to whom it owed no duty.

A railroad company owes a child trespassing on its premises no duty in respect to the condition of its turn-table; nor can any inducement or invitation to go upon its premises be implied from the fact that the situation and nature of the turn-table was conspicuous and therefore likely to attract children. *Daniels v. New York & N. E. R. Co.* (Mass.) 13 L. R. A. 248. The last two cases expressly repudiated the doctrine of the *Stout* and other preceding cases.

In *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555, which was not a turn-table case, in commenting upon the *Stout* and *Keffe* Cases, the court said: "We are not now called to express an opinion as to the soundness of these decisions in such a case, and, while we are not prepared to uphold them, it is enough to say that the facts (of the case at bar) are by no means analogous."

Degree of security required.

A railroad company is not liable for injuries received by a boy while riding upon a turn-table turned round by his companions, which was situated in an isolated place, not near any public street, nor where the public were in the habit of passing, and which was fastened by a latch which prevented it being turned by accident, but was not locked, so as to render it impracticable for the boys to open or withdraw the latch and move the table. *St. Louis, V. & T. H. R. Co. v. Bell*, 81 Ill. 76.

In *Kolsti v. Minneapolis & St. L. R. Co.*, 22 Minn. 133, it was held no error to charge that "the defendant was not required so to fasten or secure the turn-table in question that boys like the injured boy could not displace such fastenings and put the table in motion."

able to do in some mental pursuit, or clerical or sedentary avocation. The damages were to be ascertained by the jury as best they could from the exercise of their own judgment, common sense, and sound discretion and the evidence before them. Plaintiff had lost a leg; he was mutilated for life; and it was the duty of the jury to compensate him by a verdict for such damages as it might appear to them, under all the circumstances, he was entitled to. We consider the charge objected to as likely to have benefited the defendant rather than otherwise. It is a direct application of the evidence as to the injuries sustained to common life, with no room for speculation as to what the plaintiff might have been able to become and earn, but for the injuries he had received. If the defendant desired to have the additional element of damages suggested, submitted for the consideration of the jury, it might have requested a charge to that effect. We do not think there was error, if any, in the charge that was prejudicial to the defense.

3. It now remains for us to consider whether or not the verdict was excessive. Plaintiff's legs were both caught in between the irons and badly injured. His right leg was so lacerated and broken that it had to be amputated. The left leg was also badly lacerated as to the muscles, sinews, and flesh. It seemed to have been struck, and the bone scraped, and the muscles and ligaments around above the ankle lacerated. At one time there were symptoms of erysipelas in this leg, and at another time blood poisoning was threatened in the one that had been amputated. It was shown that the amputated leg would always be sensitive to the

touch or any foreign substance. It was difficult to dress the wound, and the injuries were a severe shock to the boy's system. For a long time his physician thought he would not survive at all. His foot was swollen somewhat at the time of the trial. The left leg would be weaker by reason of the injury to it. It was probable that there would be neuralgic pains, rheumatism, and other ills, as the effects of the injury to the left leg, in after life, as these ills would attack the weaker part. It would be weaker and less useful. The injury to it was permanent, though he could use it. Plaintiff was hurt July 24, and remained in bed nearly all the time until Christmas, and suffered a great deal; in short, one leg was off, and the other weakened and impaired. In actions for personal injuries, and in cases, generally, where there is no fixed legal rule of compensation, the theory of the law is that the decision of the jury is conclusive, unless they have been misled, or their verdict has been influenced by corruption, passion, or prejudice. 3 *Suth. Dam.* 289.

It is not possible to measure with money the damages sustained by the plaintiff by reason of the pain and injury inflicted on him. He languished for five months in bed. He has lost one leg entirely, and the other is left in such a condition as to make it doubtful whether it will ever become sound and strong. The verdict was large, but not excessive. There was nothing whatever to show that the jury was actuated by passion, prejudice, or any other improper motive. *Galeston, H. & S. A. R. Co. v. Porfert*, 72 Tex. 353; *St. Louis & S. F. R. Co. v. McLain* (Tex.) 15 S. W. Rep. 793; *How-*

A railroad company is not liable for personal injuries to a boy who, with his companions, was moving a turn-table which was sufficiently secured to hold it in place, if the fastening had remained undisturbed by them. *Bates v. Nashville, C. & St. L. R. Co.* (Tenn.) March 1, 1891.

A railroad company is not relieved from liability for its negligence in not adopting more secure means to prevent a turn-table from being revolved by children likely to be attracted to it by the fact that its managing agent before the accident tied the table with a rope, so that it could not be revolved, unless it was cut or untied. The question whether it was negligent so to fasten it is for the jury. *Illaco R. & Nav. Co. v. Hedrick*, 1 Wash. 446.

That the defendant maintained its turn-table in the same way as other railroads is no defense. *Bridger v. Asheville & S. R. Co.* 25 S. C. 24.

While in the case of turn-tables, by playing with which children are injured, it is competent for a railroad company, in order to show that it exercised due care, to prove that it secured the turn-table in the way customary with all railroad companies, such proof is not conclusive that due care was exercised. If the means of fastening are so simple and easy of removal as to furnish no obstacle to children seeking to unfasten and move the turn-table the company does not fulfill the measure of care required of it. *O'Malley v. St. Paul, M. & M. R. Co.* 43 Minn. 289.

To the same effect is *Barrett v. Southern Pac. Co.* 91 Cal. 296.

Contributory negligence.

If parents of a child negligently permitted it to wander from home and go upon a turn-table, they cannot recover for his death caused by the negli-

gence of the railroad company in not properly guarding it. *Koons v. St. Louis & I. M. R. Co.* 65 Mo. 592.

The plain inference from the opinion in this case is that the company would be liable in the absence of such contributory negligence. In this case it is said that the custom of other railroads in the management of turn-tables is immaterial.

A boy ten and one half years of age, who went upon a turn-table after having been repeatedly warned of the danger and knowing that he had no right to go there, is guilty of contributory negligence that will defeat a recovery for injuries received while playing upon it. *Twiet v. Winona & St. P. R. Co.* 39 Minn. 164, 37 Am. & Eng. R. R. Cas. 334.

If a minor killed while playing upon a turn-table had no knowledge that playing upon the table was unsafe or dangerous, he is not guilty of contributory negligence, although he had sufficient intelligence to know that it was wrong to trespass upon the table. *Union Pac. R. Co. v. Dunden*, 37 Kan. 1.

In *Union Pac. R. Co. v. Dunden*, *supra*, recovery was had for the death of a boy eleven years old which resulted from the deceased playing with the defendant's unlocked and unguarded turn-table. The court said: "As to the question whether the deceased knew it was wrong to play upon a turn-table, an answer either way would not have affected the case. He might have known that it was wrong to trespass upon the property of the railroad company, and yet have had no knowledge that the use of the turn-table was dangerous. If the company had presented the question, whether the deceased knew that it was dangerous or unsafe to play upon the turn-table, a wholly different question would be before us for determination."

J. G. G.

ard Oil Co. v. Davis, 76 Tex. 630; *Texas Pac. R. Co. v. Overheiser*, 76 Tex. 440; *Texas M. R. Co. v. Douglas*, 73 Tex. 833; *Gulf, C. & S. F. R. Co. v. Styron*, 66 Tex. 421, and other cases cited in 73 Tex. 353.

We conclude that there is no error for which the case ought to be reversed, and we recommend that the judgment of the court below be affirmed.

Adopted by Supreme Court, June 16, 1891.

OHIO SUPREME COURT.

PENNSYLVANIA CO., *Plff. in Err.*,
v.

Antonla LOMBARDO.

(.....Ohio.....)

*While a champertous agreement be-

*Head note by the Court.

tween a plaintiff and his attorney for the prosecution of a certain suit is against public policy and void, it does not affect the right of the plaintiff to prosecute his action against the defendant in the suit for the prosecution of which the champertous agreement was made.

(January 19, 1892.)

NOTE.—*Collateral champerty as a defense.*

A champertous contract for the prosecution of a cause of action is no defense, and the champerty can only be set up by a party thereto, when the champertous agreement is sought to be enforced. *Boone v. Chiles*, 35 U. S. 10 Pet. 219, 9 L. ed. 403; *Burnes v. Scott*, 117 U. S. 532, 29 L. ed. 992; *Court-right v. Burnes*, 13 Fed. Rep. 317, 8 McCrary, 60; *Reed v. Janes*, 84 Ga. 380; *Robinson v. Beall*, 26 Ga. 17; *Torrence v. Shedd*, 112 Ill. 466; *Small v. Chicago*, R. I. & P. R. Co. 55 Iowa, 582; *Vimont v. Chicago & N. W. R. Co.* 69 Iowa, 236; *Allison v. Chicago & N. W. R. Co.* 42 Iowa, 274; *Fogerty v. Jordan*, 2 Robt. 319; *Hovey v. Hobson*, 51 Me. 62; *Brinley v. Whiting*, 5 Pick. 343; *Bent v. Priest*, 1 West. Rep. 749, 86 Mo. 475; *Pike v. Martindale*, 6 West. Rep. 838, 91 Mo. 268; *Million v. Ohnsorg*, 10 Mo. App. 432; *Taylor v. Gilman*, 58 N. H. 417; *Whitney v. Kirtland*, 27 N. J. Eq. 338; *Hart v. State*, 120 Ind. 83; *Hall v. Gird*, 7 Hill, 586; *Cooke v. Pool*, 26 S. C. 538; *McMullen v. Guest*, 6 Tex. 275; *Hilton v. Woods*, L. R. 4 Eq. 482.

A plaintiff cannot reply that the defendant is making his defense under a champertous agreement to share the benefits of success with another. *Allen v. Frasee*, 85 Ind. 233.

Where a suit, which was being prosecuted under a champertous arrangement between the plaintiff and his attorney, was settled, the defendant agreeing to pay the plaintiff's attorney fee, the defendant admitting such promise, cannot escape payment of a reasonable fee, on account of such champertous contract. *Hyatt v. Burlington, C. R. & N. R. Co.* 68 Iowa, 662.

It is said in *Atchison, T. & S. F. R. Co. v. Johnson*, 29 Kan. 218, that no champertous contract between the plaintiff and her attorneys could have the effect to destroy her right to prosecute the action to judgment and to enforce such judgment against the defendant.

In this case plaintiff having prosecuted her action to judgment under a champertous agreement with her attorneys, assigned to them a part of the judgment. The defendant, after the assignment and with notice thereof, settled with the plaintiff and procured a release of the entire judgment. In a proceeding by the attorneys to enforce their share of the judgment against the defendant, it was held that the defendant could take advantage of the champertous consideration for the assignment to defeat the attorneys' claim. *Contra*, *Ross v. Chicago, R. I. & P. R. Co.* 55 Iowa, 691.

In *Rindge v. Inhabitants of Coleraine*, 11 Gray, 157, it was objected by the defendants that the nominal plaintiff was prosecuting the action under a champertous agreement with the beneficial plaintiff. The court held the agreement not champertous, but did not question or affirm the right of the defendants to avail themselves of such an agreement, if it had actually been champertous.

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This is also true of *Williams v. Fowle*, 132 Mass. 385.

The rule in Tennessee, Wisconsin, Indiana.

The rule in Tennessee established by statute is *sui generis*.

Section 1783 of the Statutes of Tennessee (1871, Thompson & Steger ed.) provides that "upon the fact of the champerty or other unlawful contract being satisfactorily disclosed to the court, where the suit may be depending, in either of the ways hereinafter mentioned, the suit shall be by the court dismissed." Act 1821, chap. 66, § 2.

In *Webb v. Armstrong*, 5 Humph. 379, it is said: "Before the statute, and since the statute, if it satisfactorily appear to the court in proof that the suit in its origin and progress is affected by champerty, it is a duty of the court not to permit itself to become the organ and instrument to consummate such agreements, but to repel the plaintiff and his suit."

A champertous agreement made by one of several joint plaintiffs, with authority to act for all, although made without the knowledge of the others, requires the suit of all to be dismissed. *Vincent v. Ashley*, 5 Humph. 593.

A vendor in a deed void for champerty may recover in ejectment, but if his vendee join with him in the suit, it must be dismissed. *Saylor v. Stewart*, 2 Heisk. 510.

Under the Tennessee statute the suit must be dismissed, whether the champertous contract is made by the plaintiff with an attorney or a layman. *Weedon v. Wallace*, Meigs (Tenn.) 236.

If there is champerty in the prosecution of a suit, it must be availed of before judgment. It is no ground for equity to restrain the collection of the judgment. *Hunt v. Lyle*, 8 Yerg. 142.

The cases of *Barker v. Barker*, 14 Wis. 131, and *Allard v. Lamirande*, 29 Wis. 502, observing only the Tennessee decisions, approved the rule of that State, evidently overlooking the peculiar statute under which they were rendered.

In *Greenman v. Cohce*, 61 Ind. 201, the objection was made for the first time on appeal that the action was being prosecuted under a champertous agreement between the plaintiff and his attorney. The court said: "This is not a matter of which a third party could take advantage." Upon a rehearing, the court said: "When such fact did appear, if it did clearly appear to the court, the court, perhaps, of its own motion, might have dismissed the action on the ground of public policy,"—citing *Barker v. Barker*, 14 Wis. 131; *Webb v. Armstrong*, 5 Humph. 379; *Hunt v. Lyle*, 8 Yerg. 142, the Wisconsin and Tennessee cases.

But it was held that the non-action of the court was not error, and that the question whether it would have been error to deny the motion to dismiss was not before the court. J. G. G.

ERROR to the Circuit Court for Mahoning County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs J. R. Carey and W. C. Boyle, for plaintiff in error:

The punishment meted out to the champertor is the denial of relief under the illegal contract.

Key v. Vattier, 1 Ohio, 182; *Weakly v. Hall*, 18 Ohio, 167, 42 Am. Dec. 194; *Stewart v. Welch*, 41 Ohio St. 483.

We here raise a different, and, so far as this State is concerned, a new question.

Champerty is proved.

Champerty is a bargain with plaintiff or defendant to have part of the land or other thing sued for, if the party that undertakes it prevail therein, whereupon the champertor is to carry on the party's suit at his own expense.

4 Bl. Com. 135; *Key v. Vattier*, 1 Ohio, 182; *Weakly v. Hall*, 18 Ohio, 167, 42 Am. Dec. 194.

Plaintiff testifies that he came to see Jacobs about his law-suit; that the agreement made between them was that they were to divide equally what was recovered, and that Jacobs was to pay all expenses.

There are many authorities which hold that maintenance is not a necessary ingredient of the offense of champerty.

Scobey v. Ross, 18 Ind. 117; *Quigley v. Thompson*, 53 Ind. 317; *Thurston v. Percival*, 1 Pick. 415; *Byrd v. Odem*, 9 Ala. 755; *Lathrop v. Amherst Bank*, 9 Met. 489; *Backus v. Byro...*, 4 Mich. 535; *Martin v. Clarke*, 3 R. L. 889, 5 Am. Rep. 586.

It was the duty of the court to dismiss the action.

Purity in the administration of justice requires that such acts be punished, whenever and however discovered.

Stewart v. Welch, 41 Ohio St. 483.

Where, in the course of the trial of an action, not founded upon a champertous contract, it incidentally appears that the action is being prosecuted by the plaintiff's attorney under a champertous contract, the court may at once dismiss the action.

Greenman v. Cohee, 61 Ind. 201; *Barker v. Barker*, 14 Wis. 142; *Allard v. Lamirande*, 29 Wis. 502; *Hunt v. Lyle*, 8 Yerg. 142. See also *Webb v. Armstrong*, 5 Humph. 379; *Morrison v. Deaderick*, 10 Humph. 342.

Messrs. Frank Jacobs, W. S. Anderson and George F. Arrel for defendant in error.

Minshall, J., delivered the opinion of the court:

The action in the common pleas was brought by the plaintiff, Lombardo an employé of the Pennsylvania Company, to recover damages for an injury caused, as alleged, by the negligence of the company in operating its road. The defendant denied negligence on its part, and, for a further defense, set up a compromise and settlement of the claim made by it with the plaintiff. To the latter defense the plaintiff replied that it had been obtained by fraud, setting out the facts claimed to consti-

tute the fraud. A trial was had, which resulted in a verdict and judgment for the plaintiff, which was reversed on error by the circuit court, and the case remanded for a new trial. At the second trial the defendant made no contest on the averments of the petition, but relied upon its plea of a settlement. The jury again found for the plaintiff, and assessed his damages at \$1,500. A motion for a new trial was overruled, and judgment entered on the verdict, which, on error was affirmed by the circuit court. It appears from a bill of exceptions taken at the trial that during its progress it was developed by an examination of the plaintiff that the cause was being prosecuted by him under an agreement with his attorney whereby the latter was to have one half of the recovery as a compensation for his services, and that evidence was also offered by the defendant tending to prove that the attorney was to pay all costs and expenses, and that no settlement or compromise should be made by the plaintiff without his consent. Thereupon the defendant moved the court to dismiss the action on the ground that it was being prosecuted under a champertous agreement between the plaintiff and his attorney. The motion was overruled, and exception taken. Exceptions were also taken to the rulings of the court on the admission and rejection of testimony, and to certain parts of its charge, and its refusal to charge as requested; but, as the assignments based on these rulings are not relied on in argument, no further notice need be taken of them than to say they show no grounds for a reversal of the judgment.

The principal question argued to the court, and the one we propose to notice, is that raised by the motion to dismiss the action, on the ground that the evidence disclosed that the action was being prosecuted under a champertous contract between the plaintiff and his attorney. It seems well settled, by the previous decisions of this court, that a contract between the attorney and client, by which the former is to prosecute the action at his own expense, and receive for his compensation a part of the recovery, is against public policy, and cannot be enforced; and it seems that this would be the case in a contract by which the attorney is simply to receive a part, coupled with a stipulation that no compromise or settlement is to be made without his consent. *Key v. Vattier*, 1 Ohio, 182; *Weakly v. Hall*, 18 Ohio, 167, 42 Am. Dec. 194; and *Stewart v. Welch*, 41 Ohio St. 483. In all the cases in which the question has heretofore arisen in this State, an illegal or champertous agreement was sought to be enforced or relied on for relief. Thus in *Key v. Vattier* a recovery was sought for a breach of the covenants of a champertous agreement; in *Weakly v. Hall*, to a plea of release since the last continuance, the terms of such an agreement were interposed by a reply in avoidance of the plea; and in *Stewart v. Welch* the plaintiff's title to the chose and his right to maintain the action rested upon his agreement with the assignor, which the court found and held to be champertous. The plaintiff, Welch, was to prosecute the suit in his own name and at his own expense, and to account to the assignor for a definite part of the recovery. But, in the case under review.

the facts are wholly different in this regard. It is not based upon any agreement between the attorney and the client in regard to compensation of the attorney for his services. It was a suit to recover damages resulting to the plaintiff from the tort of the company, and the agreement between the plaintiff and his attorney was wholly extraneous to its prosecution and was in no way relied upon for relief. The question as now presented is a new one in this State, as counsel for the plaintiff in error is frank enough to admit. It is whether the courts should not merely defeat any claim based upon the illegal agreement, but should go further, and, by way of punishment, also defeat the right of the plaintiff to recover in the action touching the prosecution of which he has made a champertous agreement with his attorney. Some cases are cited in support of this view; but they are contrary to the greater weight of authority, and seem unsupported by satisfactory reasons. It would seem that the law, on grounds of public policy, goes quite far enough when it defeats any advantages that may be sought by an enforcement of the agreement, without visiting upon the plaintiff a forfeiture of his right of action in the suit for the prosecution of which the attorney was employed. This is in analogy to our law in regard to usurious contracts, which simply defeats the usurious agreement, without affecting the right of the usurer to recover the principal loaned, with interest at the legal rate; champerty, like usury, not being an offense punishable by indictment in this State. It is stated by the author of a well-written article on the subject, contained in 3 Am. & Eng. Encyclop. Law, 68, 86, that, "the better opin-

ion would appear to be that the defense of champerty can only be set up when the champertous contract itself is sought to be enforced, and that the existence of a champertous agreement between the plaintiff and his attorney, or the fact that the plaintiff is prosecuting the case upon a contingent interest in the subject matter of the litigation dependent upon success, is no defense to the action against the defendant." An examination of the citations fully sustains the statement. In one of the cases cited (*Hilton v. Woods*, L. R. 4 Eq. 432), Malins, V. C., said: "I have carefully examined all the authorities referred to in support of this argument (that the agreement between the plaintiff and his attorney, being champertous, required the suit to be dismissed), and they clearly establish that whenever the right of the plaintiff, in respect of which he sues, is derived under a title founded on champerty or maintenance, his suit will, on that account, necessarily fail. But no authority was cited, nor have I met with any, which goes the length of deciding that, where a plaintiff has an original and good title to property, he becomes disqualified to sue for it by having entered into an improper bargain with his solicitor, as to the mode of remunerating him for his professional services in the suit, or otherwise." So that it is immaterial whether a champertous contract was shown by the evidence or not; for, admitting the agreement between Lombardo and his attorney to have been as claimed by counsel for the defendant, it was not sought in the action against the company to enforce it, or derive any benefit from it.

Judgment affirmed.

INDIANA SUPREME COURT.

Leab HAYNES, Appt.,

v.

Flora B. NOWLIN.

(.....Ind.....)

A married woman can maintain an action against one who wrongfully entices her husband from her and alienates his affections.

(December 8, 1891.)

APPEAL by plaintiff from a judgment of the Circuit Court for Dearborn County in favor of defendant in an action brought to recover damages for the enticement away of plaintiff's husband and the alienation of his affections from plaintiff. *Reversed.*

The facts are sufficiently stated in the opinion.

Messrs. Holman & Holman and McMullen & Johnson for appellant.

Messrs. George M. Roberts, Charles W. Stapp, John K. Thompson and Givan & Givan, for appellee:

The Kansas statute under which *Mehrhoff v.*

Mehrhoff, 26 Fed. Rep. 18, was decided, provides that "a married woman may, while married, sue and be sued in the same manner as if she were unmarried."

The provisions of the Ohio statute under which *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397, was decided are that a married woman's "personal property growing out of any violation of her personal rights shall be her separate property, and under her sole control," and enables her to sue alone if the action concerns her separate property. These are both broader than our statute, which goes no further than to allow her, in her own name, to maintain an action for damages "for any injury to her person or character." A former statute of Ohio, under which the case of *Mulford v. Cleveland*, 21 Ohio St. 191, holding that an action like the one at bar could not be maintained, was decided, allowed the wife to sue for "injury to her property or person."

The enticing away or seduction of the husband by acts directly operating upon him, if affording grounds for an action by the wife, does so, not by reason of a direct injury to the wife, but by reason of the effect produced, viz.: the deprivation of the wife of the support and *consortium*, which the "institution of marriage" compels him to accord her.

NOTE.—For recent authorities on this question, see Warren v. Warren, *ante*, 545, and *note*.
14 L. R. A.

If this is true, it is equally true that any wrongful act towards the husband, such as unlawfully disabling him, or unlawfully or negligently taking his life, whereby the wife is deprived of his *consortium* and support, would furnish her the right to maintain an action, independent of section 281, which gives a right of action in case of death, in the cases there mentioned. Yet that such an action by a married woman can be maintained, independent of such statutory provision, has never been claimed.

Mobile L. Ins. Co. v. Brame, 95 U. S. 754, 24 L. ed. 580.

The Married Woman's Acts do not so far destroy the unity of husband and wife as that either can be convicted of the larceny of the other's separate goods.

Thomas v. Thomas, 51 Ill. 163.

Nor can a husband be guilty of arson in burning his wife's house.

Snyder v. People, 28 Mich. 106, 12 Am. Rep. 302.

Nor can a wife sue her husband for slander.

Freethy v. Freethy, 42 Barb. 461.

Nor in replevin.

Hobbs v. Hobbs, 70 Me. 381.

Nor in trover.

Owen v. Owen, 22 Iowa, 270.

That the unity of husband and wife still exists, is well shown in the cases of—

Barnett v. Harshbarger, 3 West. Rep. 750, 105 Ind. 410; *Harrell v. Harrell*, 117 Ind. 94; *Corcoran v. Corcoran*, 119 Ind. 138; *Simons v. Scott*, 53 Cal. 76.

The force and effect of a statute giving a right of action to a married woman for any "injury to person or character," has been considered in other states, and no such ideal construction has ever been given to the phrase quoted as is contended for here.

Van Arnam v. Ayers, 67 Barb. 544; *Calloway v. Laydon*, 47 Iowa, 456, 29 Am. Rep. 489; *Mulford v. Cleveland*, 21 Ohio St. 191; *Duffles v. Duffles*, 8 L. R. A. 420, 76 Wis. 374; *Logan v. Logan*, 77 Ind. 558.

Mr. John K. Thompson, in a separate brief for appellee, argued:

In *Bennett v. Bennett*, 6 L. R. A. 553, 116 N. Y. 584, the court argues that "the cause of action for a personal injury to a married woman, whether committed before or after marriage, belonged to her at common law, or else it would not survive to her upon the death of her husband. If it was his it would either abate or pass to his personal representatives. On the other hand, if she dies as *Lord Bacon* said, the 'action dies with her.'

"*Bacon*, Abr. *Baron & Feme*, K.

"Unless the right was hers, subject only to the disability to sue without her husband joined, why should it cease upon her death? Why should it not survive to the husband, if the right itself is his? So, in the case of an absolute divorce, such rights of action remain the property of the wife.

"*Legg v. Legg*, 8 Mass. 99; *Lodge v. Hamilton*, 2 Serg. & R. 491.

"If the injury was to the wife only, the action was brought in the name of both husband and wife, and was, in effect, her action. If the injury was in part to her and in part to him, for the former both joined, for the latter he sued alone.

14 L. R. A.

"*Johnson v. Dicken*, 25 Mo. 580; *Hooper v. Haskell*, 56 Me. 251; *Laughlin v. Eaton*, 54 Me. 156."

In which it seems to us are contained latent assumptions the equivalent of assuming the proposition sought to be established, which proposition is "that at common law the wife held a right of action for enticement of her husband."

The first proposition in the quotation assumes that enticement of the husband is a direct personal injury to the wife resting on the same basis with slander of the wife or assault and battery, etc., of the wife. If this is not so the authorities on which it is predicated are not applicable, for all of them are cases where the wrong was to the wife direct, and not resulting.

The husband's right of action for enticement of the wife or other wrong to the wife personally counted "*per quod*," and such action if it did exist to the wife for enticement or other wrong to her husband personally, necessarily counted "*per quod*," and in either case the action would not be maintained by the one sustaining the personal wrong and injury, but by the one sustaining special damage, resulting from a personal wrong to another. For the resulting special damage to him the husband sued alone and the wife could not be joined; for the direct wrong and injury to the wife personally the husband joined with her in the suit, and no suit was maintained by both husband and wife counting "*per quod*," for special damages resulting from injury to either from a wrong to the other. In all cases in which the husband joined with the wife in a suit for damages it was necessary to allege that the injury was done to the wife, and these are the cases where the action survived to the wife.

14 Am. & Eng. Encyclop. Law, p. 659, § 8, note 9; p. 650, and notes.

In suits for his special damages the husband sues alone.

1 Starkie, Slander & Libel, *348-354; 3 Starkie, Ev. *536; 2 Kent, Com. *180; 1 Tidd, Pr. *9; *Hyatt v. Cochran*, 85 Ind. 281.

In these relative injuries, notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself or at least the advantages accruing therefrom; while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this: that the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband, for she hath no separate interest in anything during her coverture.

8 Chitty's Bl. Com. *142, 143.

No action for injury to the person survived the death of the person injured, at common law.

Kearney v. Boston & W. R. Corp. 9 Cush. 108; *Mann v. Boston & W. R. Corp.* 9 Cush. 108; *Hollenbeck v. Berkshire R. Co.* 9 Cush. 478.

The wife could not sue for special damages resulting from the loss of her husband's society and services.

Schouler, Dom. Rel. 110.

It was not allowed to the husband to join

his wife in suit for a personal wrong to himself or for special resulting damages.

1 Starkie, Slander & Libel, *348; *Ebersoll v. Krug*, 3 Binn. 555; *Beach v. Ranney*, 2 Hill, 309; *Beach v. Beach*, Id. 260, 89 Am. Dec. 584; *Hart v. Crow*, 7 Blackf. 351; *Long v. Morrison*, 14 Ind. 595, 77 Am. Dec. 72; 9 Am. & Eng. Encyclop. Law, p. 832, § 20, and notes, p. 836, § 23, and notes; *Southworth v. Packard*, 7 Mass. 95; 2 Hilliard, Torts, pp. 500-505, 511-517, 519, § 13.

It is manifest, therefore, that reasoning from these well-sustained rules, the argument quoted assumes one at least of these two propositions, viz.: that the action "*per quod*" etc., for damages resulting from a wrong against another personally survived to the one immediately receiving the injury, or that no distinction existed between the former action and the class of actions in the prosecution of which the husband joined the wife, alleging her to be the meritorious cause, which survived to the wife. But the former position is "*felo de se*," for in the action "*per quod*" etc., the immediately wronged party had no interest and held only an interest in another and different right of action, which also shows an existing distinction and the latter proposition untrue. This the last proposition quoted from the opinion fully affirms on authority, as do all of the authorities.

But one right of action could arise from a personal injury to a married man and that right was to him. Enticement of a married man without his consent or by fraud and deception is a personal injury to him. Therefore the wife could have no right of action therefor. Only one right of action arose to recover damages resulting from an injury to a third person, which right was to the superior of that person.

Because for direct wrongs to the wife she held the right of action which during coverture could be prosecuted, the husband joining her, and that on becoming discover she could sue alone, it will not do to say *ergo* the wife held a right of action for an alleged resulting injury; for in that is contained the latent assumption that her right was the same as though the wrong was against her personally.

At the common law the husband was the superior and had the right to the services and society of the wife, esteemed valuable property rights, but the wife being inferior never had such recognized right to the service and society of the husband.

See *Logan v. Logan*, 77 Ind. 558.

Elliott, Ch. J., delivered the opinion of the court:

The question which this record presents arises upon the ruling of the trial court sustaining a demurrer to the appellant's complaint. The question which requires our consideration and judgment is this: Can a married woman maintain an action against one who wrongfully entices her husband from her, and alienates his affections? It was the boast of the common law that "there is no right without a remedy," and in the main this boast was not an idle one, but was made good by the vindication of legal rights in almost all instances where the right was appropriately presented for judicial con-

sideration and determination. Some of the courts, however, sacrificed the principle outlined in the maxim to the demands of fancied consistency, and surrendered a clear and strong right to a barren technical rule, for they held that a wife could not maintain an action for the loss of the society, support, and affections of her husband. The fiction that the *baron* and *feme* were one person so far swayed the judgments of some of the courts as to carry them from a sound fundamental principle, and cause them to declare a doctrine revolting to every right-thinking person's sense of justice, and contrary to the foundation principles of natural right. We say that some of the cases did this, for not all gave the doctrine we refer to support; but, on the contrary, denied it, by holding that the wife might have a right of action against the wrong-doer who took her husband from her. To those cases we shall presently refer. The principle outlined in the maxim quoted requires that, even where the common law as it now exists prevails, it should be held that a wife may have an action against the wrong-doer who deprives her of the society, support, and affections of her husband. If there is any such thing as legal truth and legal right, a wronged wife may have her action in such a case as this, for in all the long category of human rights there is no clearer right than that of the wife to her husband's support, society, and affection. An invasion of that right is a flagrant wrong, and it would be a stinging and bitter reproach to the law if there were no remedy. The virtue of elasticity which has been so often ascribed to the common law (and generally very justly) is nowhere more clearly or beneficially manifested than it is in relation to the rights of married women. Long since the doctrine of feudal times, which gave so many, and such comprehensive rights to the *baron*, and so few, and such narrow ones, to the *feme*, has given way before the enlightened thought of better ages and less barbarous times. One who should now, either in England, or America, attempt to secure an enforcement of the old rules which placed the wife in such abject subjection to the husband, and stripped her of so many rights which belong, in natural justice, to a rational human being, would find a stern denial. It is beyond controversy that without the aid of statutory enactments the harsh, unreasonable rules of the old common law have fallen before the spirit of enlightened reason and true progress. The doctrine that the wife could not maintain an action against one who deprived her of her husband violates the old maxim that "reason is the life of the law," for there can be no reason in a rule which gives the stronger a right of action for an injury and denies it to the weaker. If the stronger may maintain an action, the greater the reason why the weak may do so. If the *baron* may recover from one who entices away the *feme*, surely the same reason that supports the rule giving the former a right of action must give a like right to the latter. The reason is the same, but the degree is not, for the reason intensifies in power when invoked by the

injured wife. The decisions which denied the wronged wife a right of action broke the line of consistency and marred the symmetry of the law. We have spoken of the decisions under the common law, but we do not feel called upon to discuss them at length; that has been ably done by the courts which have given the subject consideration. *Bennett v. Bennett*, 116 N. Y. 584, 6 L. R. A. 553; *Lynch v. Knight*, 9 H. L. Cas. 577; *Breiman v. Paasch*, 7 Abb. N. C. 249; *Baker v. Baker*, 16 Abb. N. C. 298; *Jaynes v. Jaynes*, 39 Hun, 40; *Warner v. Miller*, 17 Abb. N. C. 221; *Churchill v. Lewis*, Id. 226; *Foot v. Card*, 58 Conn. 1, 6 L. R. A. 829.

The decisions to which we have referred, and the authorities they adduce, prove beyond debate that even at common law the right of action for a personal wrong was in the wife. We assume, therefore, that the right of action for a wrong suffered by the wife was in her, and not in the husband. Any other conclusion is, indeed, logically inconceivable.

As the right of action for a personal injury was always in the wife, she is, of necessity, the real party in interest; and upon reason and principle she ought always to have been held to be the party entitled to prosecute the action for the invasion of that right. That it was not so held was owing to the power of the legal fiction that she and her husband were one, for from this fiction comes the stiff, unreasonable rule that in all actions she must join her husband. Equity however, never gave full recognition to this technical doctrine. Our statute, years ago, gave the wife a right to sue alone, and thus—adopting the chancery doctrine and abrogating that of the common law—broke down the only position upon which it could with the slightest plausibility be asserted that she could not sue one who wrongfully took her husband from her, since upon the ground that she could not sue alone was rested the doctrine denying her a right to sue one who enticed away her husband. It was never asserted by the better-considered cases nor by the abler text-writers that she did not herself possess the substantive right upon which the cause of action was founded. The reason that she could not maintain such an action was not that she was not the source of the substantive right, but that there was no remedy available to her for the vindication of the right. When the statute supplied the remedy by breaking down the barrier which stood between her and a recovery, it clothed her with full right to enforce her just and meritorious cause of action. We know that in the case of *Logan v. Logan*, 77 Ind. 558, a different doctrine was declared, but that decision was by a divided court, and the question was not fully considered; not a single authority was there adduced, nor is there any consistent line of reasoning. We should be strongly inclined to deny the soundness of that decision if it were necessary to do so, but it is not necessary that we should overrule it, for, since the cause of action there declared invalid arose, radical changes have been made by statute. The rights as well as the obligations of married women have been greatly en-

larged. In many cases it has been affirmed of married women that under the present statute "ability is the rule and disability the exception." *Rosa v. Prather*, 103 Ind. 191, 1 West. Rep. 367; *Arnold v. Engleman*, 103 Ind. 512-514, 1 West. Rep. 482; *McLead v. Aetna L. Ins. Co.* 107 Ind. 394, 3 West. Rep. 633; *Indianapolis v. Patterson*, 113 Ind. 344, 11 West. Rep. 839; *Bennett v. Mattingly*, 110 Ind. 197, 9 West. Rep. 282; *Strong v. Makee*, 102 Ind. 578, 3 West. Rep. 346, and 103 Ind. 587, 3 West. Rep. 351; *Lane v. Schlemmer*, 114 Ind. 296-301, 12 West. Rep. 922; *Phelps v. Smith*, 116 Ind. 387-402; *Young v. McFadden*, 125 Ind. 254; *Miller v. Shields*, 124 Ind. 166, 8 L. R. A. 406. It seems to us very clear that, in view of the fact that true principle requires that a married woman should have a remedy for the vindication of a violated right, and that her rights and obligations have been so greatly increased and enlarged by the enabling statutes, she may have redress against one who wrongfully takes her husband from her. Every radical, express change in the law carries with it corresponding and incidental changes. These incidental changes are inseparable from the essential express changes, and are wrought by the Legislature. No part of the law can be expressly changed without causing incidental changes. To hold otherwise would be to frustrate the legislative purpose and break the law into isolated parts and disjointed fragments. It must follow from this doctrine that, when the statutes gave a married woman the right to sue alone, and changed her status so as to invest her with the general property rights of a citizen and impose upon her almost the same obligations as those resting upon all citizens free from disability, they clothed her with the right to appeal to the courts to redress the wrong inflicted by one who tortiously wrested from her the support, society, and affections of the husband. In adjudging, as we do, that this action can be maintained, we believe that we build on solid principle, and we know that we are sustained by able courts. The authorities already adduced give our conclusion support, and to them we add: *Seaver v. Adams* (N. H.) 19 Atl. Rep. 776; *Mehrhoff v. Mehrhoff*, 26 Fed. Rep. 13; *Westlake v. Westlake*, 84 Ohio St. 621, 32 Am. Rep. 897; *Postlewaite v. Postlewaite*, 1 Ind. App. 478. See also *Duffie v. Duffie*, 76 Wis. 374, 8 L. R. A. 420.

The views of the text-writers are in harmony with our conclusion. Mr. Bigelow says: "To entice away or corrupt the mind and affections of one's consort is a civil wrong, for which the offender is liable to the injured husband or wife." Bigelow, Torts, 153. Judge Cooley says: "We see no reason why such an action should not be supported where, by statute, the wife is allowed for her own benefit to sue for personal wrongs suffered by her." Cooley, Torts, 228, note. Mr. Bishop clearly and strongly states the rule. He says: "Within the principles which constitute the law of seduction, one who wrongfully entices away a husband, whereby the wife is deprived of his society,

and especially also of his protection and support, inflicts on her a wrong in its nature actionable. We have seen that by the common-law rules, which forbid the wife to sue for a tort except by joining the husband as co-plaintiff, she is practically without an available remedy. But under the modern statutes, as they are shaped in many of our states, she can hold property at law, bring

suits to secure it, and maintain actions for tort in her own name, without any interference from her husband, so that, where a statute of this sort prevails, she has her action against the seducer of her husband, who has thus wrongfully deprived her of his society and care." 1 Bishop, Mar. & Div. § 1358.

Judgment reversed.

NEW YORK COURT OF APPEALS.

John J. MULLIGAN, *Resp.*,

v.

NEW YORK & ROCKAWAY BEACH
R. CO. *et al.*, *Appts.*

(.....N. Y.)

1. A railroad ticket agent who takes a bill believing it to be counterfeit in payment for tickets, and immediately procures the arrest of the person from whom he takes it, is not acting within the scope of his business so as to make the railroad company liable for false imprisonment although the arrest was wrongful and the bill proves to be a good one.

2. An agent whose sole duty is to sell tickets from the window of the ticket office of a railway station is not charged with the protection of passengers waiting for trains nor intrusted with

the execution of the transportation contract within the rule which renders the carrier liable for willful misconduct of its servants engaged in performing a duty which the carrier owes the passenger, so as to charge the carrier with liability for the wrongful arrest of a waiting passenger by direction of the agent.

(Earl and Finch, JJ., dissent.)

(January 20, 1892.)

APPEAL by defendants from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Kings County Circuit in favor of plaintiff in an action brought to recover damages for a false imprisonment alleged to have been caused by defendant's servant. *Reversed.*

Statement by O'Brien, J.:

The material facts of this case are substantially as follows: On the afternoon of the 10th

NOTE.—*Liability of master for false arrest, imprisonment, or malicious prosecution by servant.*

General rule.

Although there are conflicting decisions, the better rule seems to be that if the action is instituted or prosecuted by the agent, while engaged in the course of his employment, and within the scope of his authority, the principal is liable, even though it were done without his knowledge or consent, or contrary to his instructions. *Mechem, Agency*, § 741, p. 582.

Can corporations be liable for malicious prosecution?

Corporations must act by agents. There seems to have been some hesitation in some of the earlier cases to impute the malice of the agents to the corporations.

In *McLellan v. Cumberland Bank*, 24 Me. 506, it was said: "It may well be doubted if such corporations can be implicated, by the acts of their servants, in transactions in which malice would have to be found, in order to sustain an action against them therefor. But this case does not render it necessary that we should enter further into the consideration of this point."

It was decided that corporations could not be liable in an action for malicious prosecution, in *Childs v. Bank of Missouri*, 17 Mo. 213; *Gillett v. Missouri Valley R. Co.* 55 Mo. 315, and *Owsley v. Montgomery & W. P. R. Co.* 37 Ala. 500. The two Missouri cases are overruled by *Boogher v. Life Assn. of America*, 75 Mo. 318, 42 Am. Rep. 413, which expressly overruled the *Gillett Case* as being in conflict with the overwhelming weight of authority.

It is also said in the *Boogher Case* that the case of *Owsley v. Montgomery & W. P. R. Co.* 37 Ala. 500, 14 L. R. A.

is in effect overruled by the case of *South & North Ala. R. Co. v. Chappell*, 61 Ala. 529.

In *Copley v. Grover & B. Sewing Mach. Co.*, 2 Woods, 494, *Bruce, J.*, in the southern district of Alabama refused to follow *Owsley v. Montgomery & W. P. R. Co.*, 37 Ala. 500, and held that the better and modern doctrine is that a corporation is liable for malicious prosecution and other wrongful and tortious conduct of its agents and employes the same as natural persons.

A corporation is liable for the malicious prosecution conducted by its agents, the same as if it was a natural person. *Williams v. Planters Ins. Co.* 57 Miss. 759, 34 Am. Rep. 494; *Vance v. Erie R. Co.* 32 N. J. L. 384; *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. App. 506.

In civil cases.

A client is liable for an improper arrest on a *ca. sa.* procured by his attorney or the latter's managing clerk, although no order was given to that effect. *Shattuck v. Bill*, 2 New Eng. Rep. 159, 142 Mass. 56; *Collett v. Foster*, 2 Hurlst. & N. 364.

A judgment creditor is not liable for false imprisonment by reason of the debtor's arrest by an officer on account of his refusal to pay the illegal fees demanded by the officer for service of a *capias* execution. *Small v. Bransfield* (N. H.) July 20, 1890.

The malice of an agent in suing out an attachment in his principal's name will not be imputed to his principal so as to render the latter liable. *Wallace v. Finberg*, 40 Tex. 35.

If in the progress of a cause, the complainants' counsel without probable cause and through malice procured a writ of *ne exeat* under which the defendant was imprisoned, the complainants are not liable to the defendant in an action for false imprisonment, unless they authorized or ratified their

of July, 1888, the plaintiff, accompanied by a friend, went to defendant's station at East New York and purchased tickets for passage to Rockaway Beach and back. He gave the station agent a five-dollar bill, and received back the tickets and his change, with which he passed out to the platform, and he waited there for the train. In about ten minutes the ticket agent, accompanied by two policemen, came out on the platform and pointed out to the policemen the plaintiff and his friend, and said, in substance, that they had passed a counterfeit five-dollar bill upon him, and he directed the police officer to arrest the two men. The policeman told the ticket agent that he believed that there must be some mistake, as he knew the plaintiff and his friend to be reputable business men, and could not believe that they had committed the crime. The agent, however, said that they had passed the counterfeit bill upon him, and that he could not be mistaken and he ended by insisting that the policeman should arrest the plaintiff and his friend, which was accordingly done. The plaintiff and his friend were taken through the street to the police station, in custody, a distance of a mile. On arriving at the police station the five-dollar bill which the plaintiff had given to the ticket agent was sent to a neighboring bank, and was there pronounced good. The police sergeant sent for the ticket agent, and after he came, the facts were explained to him, and he said he was sorry for what he had done, and wanted plaintiff and his friend to excuse him, after which plaintiff and his friend were discharged. They had been detained an hour or

so at the police station. Subsequently plaintiff commenced this action to recover damages for the assault upon him, and his arrest and he recovered a verdict.

Mr. E. B. Hinsdale for appellants.

Mr. Charles J. Patterson, for respondent:

The plaintiff having purchased a ticket and passed upon the defendant's platform to wait for the train had become a passenger and as such was entitled to be protected against unlawful injuries from defendant's employes.

Carpenter v. Boston & A. R. Co. 97 N. Y. 494, 49 Am. Rep. 540.

Defendant's employes were bound to protect the plaintiff as far as practicable from unlawful injuries from any source, and *a fortiori* were obliged to refrain from inflicting such injuries themselves.

Stewart v. Brooklyn & C. R. Co. 90 N. Y. 588, 43 Am. Rep. 185. See also *Mollack v. Ridley*, 6 N. Y. S. R. 651, overruling in effect 43 Hun, 336.

Where an employe of a railroad causes an unlawful arrest and detention of a passenger the company is liable.

Lynch v. Metropolitan Elev. R. Co. 90 N. Y. 75, 43 Am. Rep. 141; *White v. Twenty-Third St. R. Co.* 20 N. Y. Week. Dig. 510; *Hamel v. New York & N. Y. Ferry Co.* 25 N. Y. S. R. 153. See 125 N. Y. 707.

The evidence shows that under some circumstances the agent could direct an arrest, and if he violated his instructions in doing so in a particular case this would afford no defense.

counsel's action. *Burnap v. Albert, Taney's C. C. Dec. 244.*

Fire Asso. of Phila. v. Fleming, 78 Ga. 733, was an action for malicious arrest and false imprisonment. It was held error to refuse to charge "that the act of a servant in the line of his duty alone binds a principal. Directions of an attorney to stop a witness about to leave the city do not justify an arrest, and such action, if had, was not in the line of duty of such servant or attorney so as to bind his client."

A corporation is liable for wrongfully, maliciously, and without just cause suing out an attachment. *Western News Co. v. Wilmarth*, 33 Kan. 510.

An action on the case will lie against a bank for an attachment procured for it by its cashier without sufficient cause and maliciously. *Whelless v. Second Nat. Bank*, 1 Baxt. 463.

Goodspeed v. East Haddam Bank, 23 Conn. 530, 58 Am. Dec. 499, was an action brought under "an act to prevent vexatious" suits, but which the court says is subject to the same general principles as are actions on the case for malicious prosecution at common law. It was there held that a corporation was liable for a malicious suit commenced by attachment without probable cause by the authority of the board of directors.

Municipal corporations.

A municipal corporation cannot be made liable for the malicious prosecution of a civil suit to collect a valid tax. *Brown v. Cape Girardeau*, 7 West. Rep. 152, 90 Mo. 377.

A town is not liable for an arrest and imprisonment procured by its collector for nonpayment of a tax illegally included in his warrant but abated before the collector caused the arrest; nor does it ratify his action by paying his fees for commitment. *L. R. A.*

ment and the jailor's charges. *Perley v. Georgetown*, 7 Gray, 404.

A municipal corporation is not liable for an unlawful arrest and imprisonment by its officers in an attempt to enforce a void ordinance, although done *colore officii*. *Warley v. Columbia*, 4 West. Rep. 340, 88 Mo. 106.

By servants employed for police duty.

A depot company is liable for an improper arrest made by one in its employ, performing private police duty. *Union Depot & R. Co. v. Smith (Colo.)* July 3, 1891.

A principal who selects an agent to detect and arrest offenders is responsible for the acts of the agent committed within the general scope of his employment, although the agent may have violated instructions and arrested an innocent person. *Pennsylvania Co. v. Weddle*, 100 Ind. 128; *Harris v. Louisville, N. O. & T. R. Co.* 35 Fed. Rep. 116.

A railroad company is liable for an unlawful arrest and imprisonment by one employed by it to detect, arrest and prosecute persons unlawfully obstructing its tracks. *Evansville & T. H. R. Co. v. McKee*, 99 Ind. 519, 50 Am. Rep. 102.

An express company's agent employed to pursue and cause the arrest of a person who has stolen its property, will render the company liable for the unlawful arrest made by him. *American Exp. Co. v. Patterson*, 73 Ind. 430.

A market company is not liable for a false arrest of a person on its premises, made by its employe, who had no authority from the company to make the arrest, but who made it in his capacity as a special officer of the metropolitan police force, although paid only by the company. *Wells v. Washington Market Co.* 19 Wash. Law. Rep. 62.

In *Clark v. Starin*, 47 Hun, 345, defendant's son acting as general manager of defendant's pleasure

Rounds v. Delaware, L. & W. R. Co. 64 N. Y. 120, 21 Am. Rep. 597.

O'Brien, J., delivered the opinion of the court:

The plaintiff recovered damages in this case upon an allegation that he was unlawfully arrested and imprisoned by the defendant. The legal question involved relates to the responsibility of the defendant for the conduct of a ticket agent under the following circumstances: On the 10th of July, 1888, the plaintiff and a companion went to the defendant's station at the corner of Atlantic Avenue and Vesta Street, Brooklyn, and procured from the ticket agent there two excursion tickets to Rockaway Beach. The plaintiff handed to the agent a new five-dollar bill in payment for the tickets, and received from him the tickets and the change. A very short time before the plaintiff and his friend appeared at the station and purchased the ticket, a detective connected with the Brooklyn police force, came to the station, and left with the agent the following paper: "Look out for three men passing \$5.00 counterfeit bills. Garfield's picture. One thirty-five years, blue coat, black slouch hat, small dark mustache; one forty years, dark alpaca coat, black pants, slouch hat; the other thirty-five years, blue suit, black slouch hat, full red whiskers, looks like Italian." When the plaintiff and his companion came to the station the ticket agent supposed they were two of the persons described in the notice left with him by the detective. The agent's statement as to what took place between himself and the detective before

the plaintiff appeared at the station, and his action in consequence down to the time of the arrest, is not contradicted. The agent was told by the detective that, if any of these men referred to in the paper put in an appearance, to have the officers arrest them. He says that the two men walked up to the window of the ticket office, and the plaintiff took a brand new five-dollar bill from his pocket and asked for two tickets for Rockaway Beach and return. What the agent then did is perhaps best expressed in his own language. He says: "I took the money from him, and gave him the two tickets. Didn't let on anything at the time. Took the bill, and left it one side, because it looked 'queer.' After the two went outside a messenger boy came in. I took the bill up before the messenger came. Took a pin and pulled to find the two parallel silk threads that run through the bill; it appears in all these kind of bills that are made with the distributor fibre through, it is like a pencil mark, red and blue; and when I picked at it I could not see anything in it, and, as I have no instructions to arrest anybody, I took the bill, and when the messenger boy came in I told him to take the bill, go up to the Howard House and see if he could find Detective McNeany. If he did, to give him the bill, and tell him that the men who had the bill were here at the station. I told him that if he didn't find him to give it to the ticket agent at the Howard House. The detective said something about giving him the bill, and to ask him if that was the bill. I sent the bill away by this boy,—the same bill that I received. After-

resort, and a policeman employed by the defendant unlawfully arrested the plaintiff on suspicion of having stolen defendant's property. The defendant was held liable, and Pratt, J., says: "The question is not whether the particular act was authorized, but whether the servant was engaged in his master's business, and acting within the general scope of his authority. The test is whether the act complained of is in the course of the employment or outside of it."

Under the Mississippi Act of February 22, 1890, empowering station agents to arrest and deliver to the sheriff any person guilty of disorderly conduct about railroad stations, such station agents are not officers of the State so as to relieve their employers from liability for false arrests made by them. *King v. Illinois Cent. R. Co.* (Miss.) Oct. Term, 1891.

Where the plaintiff was constantly guarded by detectives employed by the defendant and subjected to such examination and surveillance as clearly to imply that he was regarded as a criminal, and that force would be used to detain him if he attempted to assert his liberty, the defendant is liable for false imprisonment. *Fotheringham v. Adams Exp. Co.* 36 Fed. Rep. 232.

In *Fitzpatrick v. New York & M. B. R. Co.* 15 N. Y. Week. Dig. 508, the plaintiff was wrongfully arrested without express authority of the defendant on the defendant's premises for a supposed theft committed elsewhere, by a public policeman not employed by the defendant, although having his headquarters and a lookout on defendant's premises furnished by it. It was held that the defendant was not liable.

A railroad company is liable for malicious prosecution instituted by a detective policeman in its employ. *Edwards v. Midland R. Co.* L. R. 6 Q. B. Div. 287.

14 L. R. A.

Implied authority of other servants to arrest, etc.

A corporation is liable for a false imprisonment procured by its agent, acting in the course of his employment, although it neither authorized nor ratified his wrongful act. *Wheeler & W. Mfg. Co. v. Boyce*, 36 Kan. 350.

In *Edwards v. London & N. W. R. Co.*, L. R. 5 C. P. 445, the defendant's agent in charge of its station, without express authority, caused the unlawful arrest of the plaintiff on suspicion of his having stolen the defendant's property. The defendant was held not liable.

A corporation is not liable for a false arrest ordered by its superintendent, for the alleged assault upon himself while in charge of its property, unless authorized or ratified by it. *Tolchester Beach Imp. Co. v. Steinmeier*, 8 L. R. A. 846, 73 Ind. 313.

A railroad company is liable for a false imprisonment if committed by its authority. *Goff v. Great Northern R. Co.* 3 El. & El. 672.

In this case it was held that evidence that the imprisonment was by the direction of the superintendent, to whom all the employees of the company referred as the superior authority, was sufficient evidence to go to the jury on the question whether the arrest was authorized by the company.

In *McSorley v. St. John*, 6 Sup. C. R. 532, the learned chief justice of Canada said: "A corporation cannot be made liable for false imprisonment unless the party complaining gives evidence justifying the jury in finding that the persons actually imprisoning him had authority from the corporation."

Where train employes, upon discovering a person near an obstruction on the railroad track, unlawfully took him into custody, without other authority than that arising from their employment, the company is not liable for false imprisonment.

wards Officer Kenney and the messenger boy came in. The bill was not returned to me. I never had the bill after I gave it to the messenger boy." It seems that in consequence of the action of the agent the police arrived in a short time after the tickets had been purchased and while the plaintiff and his companion were sitting on a bench outside; and, as the plaintiff claims, the agent pointed him out to the police, and directed them to arrest him. He was arrested and brought to the police court, when, it appearing that the bill was good, he was discharged. The transaction immediately preceding the arrest is thus described by the plaintiff: "I went in and handed in a five dollar bill to the ticket agent. Asked him for two return tickets for Rockaway. He took the bill and looked at me. I thought it was some young man that might have known me, he was going so slow, going to make the change and give me the tickets, and walked back in the rear of the office. There was an operator—a lady—sitting there. He had some conversation with her; and in another corner was a boy,—in another corner of the room. He came back to me and looked at me again. I says, 'You ought to be in a little more hurry than that.' He didn't say a word, but handed me out the change and my return tickets,—the change of the five-dollar bill, which I think was four thirty, or whatever it was. Then we walked out on the platform, down on the Atlantic Avenue side, and sat on the bench of the station platform for ten or fifteen minutes, waiting for the train to come up. It is a regular platform. I think there is a porch over it. I did not have to pass through

a gate to go to it." After the plaintiff was pointed out to the police by the agent he was brought into the ticket office, and the agent then charged him with having passed to him a five-dollar counterfeit bill, which the plaintiff denied, but gave to the agent another bill in its place. The agent denied that he gave any direction to the police to make the arrest, and there was some question on the trial as to whether the bill that was actually passed by the plaintiff was the bill produced before the police magistrate and found by him to be good, but these questions must be regarded as settled in the plaintiff's favor by the verdict of the jury.

Assuming, as we must, that the agent directed the arrest, and that the plaintiff had committed no offense that justified it, the question still remains whether the agent was acting in the line of his duty, so as to make the defendant responsible for his acts. It is quite clear from the evidence that the agent was first put upon his guard, and in fact, set in motion not by any direction from the defendant, but by the police. When he took the bill he knew, or at least believed, it to be a counterfeit; but, notwithstanding this, he gave the plaintiff defendant's property for it, whereas it was his duty, considering him merely as the agent of the defendant, to refuse it. He did not take the bill in the course of his business as agent, but for the purpose of entrapping persons that he believed to be engaged in the commission of crimes. This may have been laudable enough on his part as a citizen or as a person aiding the police, but he was not acting in the line of his duty as defendant's agent. If he

ment. *Porter v. Chicago, R. I. & P. R. Co.* 41 Iowa, 358.

A railroad ticket agent has no implied authority to cause the arrest of one suspected of having attempted to rob the till under his charge after the attempt had ceased, nor is the company liable for such act of its servant in an action for false imprisonment. *Allen v. London & S. W. R. Co.* L. R. 6 Q. B. 65.

The manager of a bar in a public house has no implied authority, by reason of his position, to give into custody a person on a charge of having attempted to pass bad money, so as to make his employer liable for false arrest. *Abrahams v. Deakin* (1891) 1 Q. B. 516.

In *Mali v. Lord*, 39 N. Y. 381, 100 Am. Dec. 448, defendant's clerk and superintendent, having suspected the plaintiff of stealing goods while in defendant's store, called in a policeman, arrested and searched her. Nothing was found. It was held that defendant's employes had no implied authority for such proceedings, so as to make the defendant liable.

In an action for false imprisonment procured by the defendant's servants upon suspicion that plaintiff had stolen articles, the defendant is not liable unless he authorized the arrest, and there being a conflict of testimony on that question, it should be submitted to the jury. *Mallach v. Ridley*, 18 N. Y. Week. Dig. 16. This was the first appeal in this case. On the second appeal it was held that authority to a floor-walker in a store to cause the arrest of a person suspected of having stolen goods of his employer cannot be presumed from the floor-walker being charged with the duty of protecting the goods so as to render his employer liable in an action for false arrest, although the floor-walker supposed that he was doing his duty.

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43 Hun. 338. On the third appeal it was held that it should be left to the jury to say whether the duty of looking after thieves did not imply instructions as to suspected persons. 6 N. Y. S. R. 351. On the fourth appeal the court advanced to the position that a store keeper invites the public to enter his premises and submit themselves to the care of his employes, and is liable for a false arrest made on such premises by the latter, even where not within the strict line of their employment. 15 N. Y. S. R. 4.

This case, so prolific of appeals on this one question, furnished still another from an order refusing to set aside the verdict for improper conduct of the jury and negligence of counsel on the second trial. See 22 N. Y. Week. Dig. 159.

For a malicious prosecution instituted by the general manager of a corporation, for its benefit and in its interest, the corporation is liable. *Fenton v. Wilson Sewing Mach. Co.* 9 Phila. 189.

The acting manager of a bank has no implied authority to institute a criminal prosecution on behalf of the bank so as to render the bank liable for a malicious prosecution. Evidence must be given that such a power was within the scope of the duties he was authorized to perform. *Bank of New South Wales v. Owston*, L. R. 4 App. Cas. 270.

An agent employed to collect a note does not render his employer liable for a malicious criminal prosecution instituted by him against the maker for a forged alteration of a promise of a rebate from the face of the note which affected only the agent's individual interests. *Springfield, E. & T. Co. v. Green*, 25 Ill. App. 106.

Where an agent institutes a malicious prosecution out of his own head, and without the instigation of his principal, the latter will not be liable for the same unless he adopts and continues the

had been cheated or imposed upon by the plaintiff, or if he honestly believed he had been, and then attempted to recover what he had or supposed he had lost by the arrest of the plaintiff, it might then be said that he was engaged in the protection of the property and interests of the defendant, and therefore acting within the line of his duty. But here a ticket agent of a railroad deliberately takes from a person applying to purchase a ticket what he believes to be a counterfeit five-dollar bill,—not, of course, in good faith, or in the regular and ordinary course of his business, but for the purpose of aiding the police in the detection of criminals,—and then immediately directs the arrest of the person from whom he took the bill. Such an act on his part is not binding on his principal. If he was in fact acting within the scope and in the line of his duty, he would have refused to receive what he believed to be counterfeit money for the property of his principal, and would have refused to part with such property, except upon receipt of what at least he believed to be good money. The defendant's agent, as a citizen, might with perfect propriety render to the police such services as he could in procuring the detection and arrest of persons engaged in passing counterfeit money, but it does not follow that all his acts in that respect are binding on the defendant. The charge, therefore, that the defendant procured the plaintiff to be arrested without cause was not made out, as the act of the ticket agent in this respect cannot be attributed to them.

The remaining question is whether it was shown that the defendant is liable for a breach of its contract with the plaintiff as a passenger or for neglect of any duty it owed to him growing out of the relation of passenger and carrier. The law is settled that a common carrier, by its contract of transportation, undertakes to protect the passenger against any injury arising from the negligence or willful misconduct of its servants while engaged in performing a duty which the carrier owes to him. *Stewart v. Brooklyn & C. R. Co.* 90 N. Y. 588, 48 Am. Rep. 185. Upon the facts disclosed by the record it is very difficult to bring this case within that principle. All we know with respect to the duties of the agent is that he sold tickets at the station from a place behind a window in the waiting-room. It does not appear that he had any charge of the place where the plaintiff was when arrested, or that the plaintiff was, within the meaning of the decisions, in his custody, or under his protection, or that the ticket agent was intrusted by the defendant with any powers or duties with respect to the execution of contracts for the transportation of passengers. Upon the facts disclosed at the trial it would be quite difficult, if not impossible, to classify the act of the agent in pointing out the plaintiff to the police and directing his arrest as negligence or willful misconduct. There can be no doubt that a conductor or like agent of a carrier of passengers, who has them in his charge and under his care, may violate the duty which he owes to them by directing an arrest without cause,

same with knowledge of all the circumstances. *Dally v. Young*, 3 Ill. App. 39.

To make a corporation liable for a malicious criminal prosecution instituted by its agents, it must be shown that there was express precedent authority, or adoption and ratification by the corporation. *Carter v. Howe Mach. Co.* 51 Md. 290, 34 Am. Rep. 311.

A railroad company is liable for a malicious prosecution instituted by its attorneys and officers against one on a charge of having stolen its property. *Ricord v. Central Pac. R. Co.* 15 Nev. 167.

A corporation is not liable for a malicious prosecution instituted by its manager without express authority, where the by-laws, by which the manager's duties were prescribed, did provide for his taking such proceedings. *Miller v. Manitoba Lumber & F. Co.* 6 Manitoba Law Rep. 487.

A railroad company is not liable for a malicious prosecution instituted by its superintendent without special direction for the supposed theft of its property, there being no evidence that he was acting otherwise than on his own account. *Stevens v. Midland Counties R. Co.* 10 Exch. 352.

In *Walker v. South Eastern R. Co.*, L. R. 5 C. P. 640, the plaintiff was given into custody by an officer of the defendant, after an alleged assault had been committed by the plaintiff and he was walking away. The officer had authority from the defendant to arrest persons for the purpose of putting an end to an affray. It was held that the defendant was not liable in an action for malicious prosecution.

As to arrest and prosecution of passengers by carrier's servants, see *Gillingham v. Ohio River R. Co.*, post, 798.

For a false arrest of a passenger by the servants of a railroad company, the company is not liable unless it authorized or ratified it. *Roe v. Birkenhead, L. & C. J. R. Co.* 7 Exch. 36.

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A railroad company is not liable for the false arrest, by its detective, of an intending passenger in its station, where the appearance and behavior of the latter justified the belief that he had committed or was about to commit a felony. *Newman v. New York, L. E. & W. R. Co.* 54 Hun. 335.

Nor is it liable for the detention of the person by the magistrate to whom the detective delivered him, unless such detention was requested by the detective. *Ibid.*

Malice and want of probable cause on the part of a railway conductor, in causing the arrest of a passenger on a charge of fraudulently evading payment of fare, if established, may be imputed to the company. *Krulevitz v. Eastern R. Co.* 2 New Eng. Rep. 37, 140 Mass. 573.

The ticket collector of a railroad, with authority to arrest persons attempting to avoid payment of fare, renders the company liable for a mistake in erroneously giving a passenger into custody who had already paid his fare. *Moore v. Metropolitan R. Co.* L. R. 8 Q. B. 38.

In *Poulton v. London & S. W. R. Co.*, L. R. 2 Q. B. 534, the plaintiff was arrested by the defendant's station master for refusing to pay fare for his horse, for which he was entitled to free transportation. It was held that the defendant was not liable for such unlawful arrest, it being an act which the defendant was not authorized to do and beyond the scope of the agent's authority.

Where a railway conductor, instead of arresting a passenger for refusing to pay his fare, as he might do in his capacity as a police officer under the statute, directed his arrest by officers at the end of the passenger's journey, the company is liable for the arrest, if unlawful. *Krulevitz v. Eastern R. Co.* 3 New Eng. Rep. 510, 143 Mass. 228.

Where the rules of the carrier require passengers to deliver up their tickets before leaving its boat, its officers may lawfully detain for a reasonable

for which his principal may be held liable, but sufficient was not shown in this case to bring it within that rule.

The judgment should be reversed, and a new trial granted, costs to abide the event.

Andrews, Peckham and Gray, JJ.,
concur.

Earl, J., dissenting:

The plaintiff purchased of the defendant's agent at East New York two tickets for himself and friend to Rockaway Beach and back over its railway, and immediately passed out of the depot building onto the platform outside, where he took a seat under an awning, upon a bench provided for passengers who were awaiting trains. By the purchase of these tickets the relation of carrier and passenger was created between him and it; its agreement, implied from the facts, being that it would, upon its first train stopping at that station, carry him to his destination. The train was soon expected, and while he was there waiting for it he was entitled to a safe place to stand or sit, and it was under obligation to him that he should not be injured by the careless or willful misconduct of any of its employes or agents. *Carpenter v. Boston & A. R. Co.* 97 N. Y. 494, 49 Am. Rep. 540. In that case, after the plaintiff had purchased his ticket for a passage on the defendant's road, and while he was standing on the platform at the depot, a postal clerk threw a mail-bag from the train, which struck and injured him; and Danforth, J., writing the opinion, said: "The plaintiff was injured before the actual commencement of his journey, but he was lawfully on the platform, because he was a

passenger." And it was held that it is the duty of a railroad corporation to provide for a passenger a safe passage to the train he desires to take, and to take reasonable care that he shall not, while on its premises, be exposed to any unnecessary danger, or to one of which it is aware; that it is bound to exercise the utmost vigilance, not only in guarding its passengers against careless interference by others, but even against violence; and if, in consequence of neglecting this duty, a passenger receives injury, which, in view of all the circumstances, might have been reasonably anticipated, it is liable. No one will question that, if the plaintiff, while sitting upon the bench waiting for the train, had been injured by the carelessness of one of the defendant's employes, it would have been liable; and it is now well settled that where a railroad company would be liable for the careless act of its employe it would also be liable for his willful or malicious act, causing injury to a passenger, whom it was bound to keep and carry safely. In *White v. Twenty-Third St. R. Co.*, 20 N. Y. Week. Dig. 510, it was held that, if a passenger on a street railway is ejected from the car and assaulted by the driver, when the fare has been put in the box, the company is liable, and also for causing the arrest of the passenger. In *Hamel v. New York & N. Y. Ferry Co.* 25 N. Y. S. R. 153, affirmed in this court, 125 N. Y. 707, the action was for assault and battery and false imprisonment, and it was held that the court correctly charged that, if the defendant's employe unjustifiably assaulted the plaintiff while and because plaintiff attempted to pass through a gate which the employe was in charge of, and as part of the same transaction, and assuming to act under

time a passenger attempting to leave without delivering up his ticket, for the purpose of investigating its alleged loss, and to make provision for the carrier's security against the outstanding ticket. *Standish v. Narragansett S. S. Co.* 111 Mass. 512, 15 Am. Rep. 66.

In *Lyfich v. Metropolitan Elev. R. Co.* 90 N. Y. 77, 43 Am. Rep. 141, plaintiff having once paid his fare, lost his ticket during his journey, and was detained and his arrest caused at the station where he alighted by the gate-keeper who was acting under instructions to collect tickets or fares. It was held that the company was liable in an action for false imprisonment.

The removal of a disorderly passenger by the railway officers to the baggage-car, where he rode without objection to his destination, will render the company liable neither for assault nor imprisonment. *Sullivan v. Old Colony R. Co.* 1 L. R. A. 513, 148 Mass. 119.

As a matter of law it cannot be said that it is within the scope of the duties of a railroad conductor to procure the arrest of a passenger on a charge of passing counterfeit money. *Galveston, H. & S. A. R. Co. v. Donahoe*, 56 Tex. 162.

A driver of a street-car has no implied authority to procure the arrest of a passenger on the charge of offering counterfeit money, so as to render the company liable to the passenger for a false arrest procured by the driver. *Lafitte v. New Orleans City & L. R. Co.* (La.) 12 L. R. A. 337.

A street-railroad company is liable for a false arrest of a passenger procured by the driver in charge of the car and assumed by its inspector on a charge of not paying his fare. *White v. Twenty-Third St. R. Co.* 20 N. Y. Week. Dig. 510, 14 L. R. A.

Under chapter 186, New York Laws of 1880, the driver of a street-car has authority to cause the arrest of a disorderly passenger, and for an abuse of that authority the company is liable. *Rown v. Christopher & Tenth St. R. Co.* 34 Hun. 471.

For a false imprisonment of a passenger on his car, procured by the driver of a street-car, the company is liable. *Corbett v. Twenty-Third St. R. Co.* 42 Hun. 587.

For a false imprisonment of a passenger, procured by the platform man at an elevated railroad station, the company is liable. *Shea v. Manhattan R. Co.* 29 N. Y. S. R. 313.

This decision was an affirmation by the general term of the New York common pleas of the decision of the general term of the city court of New York in the same case. 27 N. Y. S. R. 32.

An elevated railroad company is liable in an action for false imprisonment by reason of the detention by its ticket agent of an intending passenger who had purchased a ticket and passed to the platform, on the charge of having passed a counterfeit coin. *Palmeri v. Manhattan Elev. R. Co.* 39 N. Y. S. R. 23.

This decision was rendered at the same general term as that reversed by the principal case, and the opinion written by the same judge, relying upon the same authorities. Its authority seems doubtful in view of the decision in the principal case, but may, perhaps, be distinguished on the ground that the action of the agent in the *Palmeri* case was taken for the express purpose of compelling the plaintiff to deliver another coin in place of the alleged counterfeit, while in the principal case the purpose of the agent was to procure the arrest of a supposed criminal.

J. G. G.

the defendant's authority, called in a police officer and had the plaintiff arrested, defendant was liable, and that it was immaterial whether it authorized the arrest or not. In *Stewart v. Brooklyn & C. R. Co.*, 90 N. Y. 588, 48 Am. Rep. 185, where the plaintiff was a passenger on one of the defendant's street-cars, and was unjustifiably assaulted and beaten by the driver, it was held in an action to recover damages therefor that it was liable; that the rule relieving a master from liability for a malicious injury inflicted by his servant when not acting within the scope of his employment does not apply as between a common carrier of passengers and a passenger; that such a carrier undertakes to protect the passenger against any injury arising from the negligence or willful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger. In that case Judge Tracy, writing the opinion of the court, cited many authorities, and, among other things, said: "In the present case the defendant had intrusted the execution of the contract to the driver of the car, and the plaintiff was under his protection. Any breach of the contract committed by the driver was a breach committed by the defendant. It is conceded that any injury arising from the mere negligence of the servant constitutes a breach of the contract. Had the driver, while executing the contract, carelessly and negligently injured the plaintiff, the defendant's liability would not have been doubted. Can it be less a breach of the contract that the injury was intentionally inflicted? An act which would amount to a breach of the carrier's contract if negligently done, would be equally a breach if done willfully and maliciously. It is immaterial whether a breach of contract results from the negligence or willfulness of the defendant's agent. It is the injury that was suffered by the plaintiff while in the defendant's car, and not the motive which induced it, that constitutes the gist of the action. No reason exists for holding a master liable for the negligence of servants in his employment which does not with equal force preclude him from alleging intentional default of the servant as an excuse for not performing a duty which he has undertaken. In the former case the negligence of the servant is that of the master, and that is the ground of the master's liability; in the latter, the act of the servant is the act of the master, the motive of the servant making no difference in regard to the legal character of the master's default in doing his duty. . . . A rule which should make the carrier liable when the act resulting in the injury was carelessly but unintentionally done, and exonerate him when the injury was the result of the intentional act of the servant, would lead to most absurd results." In *Duineille v. New York Cent. & H. R. R. Co.*, 120 N. Y. 123, 8 L. R. A. 224, it was held that a railroad company, by the sale of a ticket for passage on its road, assumes the obligation and undertakes absolutely to protect the passenger against any injury from negligence or willful misconduct of its servants while performing its contract; and that, whatever may be the motive which incites the servant to commit an unlawful or improper act towards the passen-

ger during the existence of the relation of carrier and passenger, the carrier is liable for the act and its natural and legitimate consequences. In such a case, too, it has been held that it is wholly immaterial upon the question of the defendant's liability that the servants acted in good faith. *Hamilton v. Third Ave. R. Co.* 53 N. Y. 25.

In this case, the relation of carrier and passenger having been created by the purchase of the tickets, the plaintiff was just as much entitled to protection against the wrongful acts of the defendant's servants as if at the time of the assault upon him and his arrest he had been in one of its cars. He was in a place where he had a right to be, and where, under the rules of law announced in the cases cited, he was entitled to protection against injury from the negligent or willful acts of its servants. It is immaterial what the ticket agent's motive may have been. He may have been prompted by the desire to do a public service by the arrest of criminals, or by a malicious motive, simply to do the plaintiff an injury, and still, under the authorities cited, the defendant was liable for his acts. Suppose, instead of directing the police officer to arrest the plaintiff, he himself had seized and confined him in the depot, would anyone then contend that the defendant would not be liable? And can it be said that that case would have been any different in principle from this? Suppose, instead of directing the police officer to arrest him, he himself had made the arrest, and dragged the plaintiff through the streets to the police station, can it be doubted that the defendant would have been liable? The law makes it liable in such cases simply because of the unlawful interference with the person of the plaintiff, a passenger, by one of its employees; and the motive of the employé is entirely immaterial upon the question of its liability. The motive may operate upon the question of damages, but cannot wholly shield the defendant against liability. The agent not only caused the arrest, but, in violation of the duty which the defendant owed the plaintiff, growing out of the sale of the tickets, and the contract thus made to carry him to his destination, he broke the contract by rendering it impossible that the plaintiff could be carried. Instead of going upon the train, as he had the right to do under his contract, by the act of its agent he was taken to a police station, and kept under arrest for an hour or more. Can a ticket agent sell tickets to a passenger and then arrest him, or cause him to be arrested, so that he cannot take passage upon the train for which he has purchased a ticket, and the railroad company escape all responsibility for his acts? If the plaintiff had been a mere loungeur in or about the defendant's depot, having no relations with it,—not a passenger,—different rules of law would apply, and it may well be that, upon the facts as they appear, it would not have been liable for the assault upon him and his arrest. Its liability to him grows out of the fact that he was a passenger, entitled to its protection. No question was made upon the trial as to the extent of the ticket agent's authority. It was there assumed that he was the agent having the charge of the depot at East New York. It does not appear that there was

any other agent at that point. He is spoken of in the evidence as "the agent." The general superintendent of the defendant's road testified that he was "the agent" of the defendant at East New York, and in the motion by the defendant's counsel for a nonsuit he was spoken of as "the agent" of the defendant. The judge in his charge to the jury spoke of him as "the ticket agent in charge of this station," and no

exception whatever was taken to this remark, and no claim whatever was there made by the defendant that he was not its agent in charge of that depot. We therefore see no reason to doubt that the judgment in favor of the plaintiff is right, and should be affirmed, with costs.

Finch, J., concurs.

WEST VIRGINIA SUPREME COURT OF APPEALS.

Elmer E. GILLINGHAM

OHIO RIVER R. CO., *Ptf. in Err.*

(.....W. Va.....)

- *1. A common carrier of passengers is one who undertakes for hire to carry all persons indifferently who may apply for passage, so long as there is room, and there is no legal excuse for refusing.
2. Everyone riding in a railroad car is presumed *prima facie* to be there lawfully, as a passenger having paid, or being liable when called on to pay his fare.
3. It is the duty of the carrier to treat the passenger properly, and carry him safely, to protect the passenger against any injury from the negligence or willful misconduct of its servants while performing the contract, and of his fellow passengers and strangers, so far as practicable.
4. The common carrier of passengers is not an insurer of their safety or of their proper treatment, but is liable for their injury or improper treatment, due to the negligence or willful misconduct of its servants while engaged in executing the contract.
5. The common carrier of passengers is liable for the false imprisonment of a passenger, made or caused to be made by its conductor in charge of the train, during his execution of the carrier's contract to treat properly and convey safely.
6. Section 31, chap. 145, of the Code, which enacts, among other things, that "the conductor of every train of railroad cars shall have all the powers of a conservator of the peace while in charge of the train," does not relieve the carrier of passengers from such liability.
7. A case of false imprisonment of a passenger by the conductor in which these principles are applied.

(December 12, 1891.)

ERROR to the Circuit Court for Cabell County to review a judgment in favor of plaintiff in an action brought to recover damages for false imprisonment alleged to have been caused by defendant's servant. *Affirmed.*

The facts are stated in the opinion.

Mr. Z. T. Vinson, for plaintiff in error:

In no phase of this case would the defendant be liable for any injury to the plaintiff after he

had been taken charge of by a regularly constituted officer of the law, for when a policeman arrests a party for misconduct and carries him before a police court it will be presumed that he acted in his own official capacity and not as agent of the company although his aid had originally been rendered as special agent of the company and accordingly the company would not be liable.

Beach, Railways, § 889.

If the company were liable for anything at all it would be for a violation of the contract of carriage and in that event plaintiff could only recover for actual damages, and that in an action for the breach of the contract and not in an action of tort.

See *Snow v. Alley*, 144 Mass. 546, 4 New Eng. Rep. 808.

There is no cause of action shown by the testimony. There is no breach of any duty of the company, as a common carrier of passengers, to the plaintiff as a passenger shown. Ebert was acting for his own protection or to gratify his own personal malice or hatred.

All that was claimed by said conductor at the time was that plaintiff had made a personal assault on him while off duty and while his train was on the side track and before he had entered upon his duties for the trip. This act was clearly not within the scope of his authority and did not and could not bind the company.

See *Rorer, Railroads*, pp. 842, 1192; *Evansville & C. R. Co. v. Baum*, 26 Ind. 70, 72; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110, 3 Am. Rep. 818; *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 136, 21 Am. Rep. 597; *Cohen v. Dry Dock E. B. & B. R. Co.* 69 N. Y. 170; *Hughes v. New York & N. H. R. Co.* 4 Jones & S. 222; *Pennsylvania Co. v. Toney*, 91 Pa. 256; *Chicago & N. W. R. Co. v. Bayfield*, 87 Mich. 205; *Snyder v. Hannibal & St. J. R. Co.* 60 Mo. 418; *Stevens v. Woodward*, L. R. 6 Q. B. Div. 318; *Sheridan v. Charlück*, 4 Daly, 888; *Cousins v. Hannibal & St. J. R. Co.* 66 Mo. 572; *Way v. Powers*, 57 Vt. 185; *Stone v. Hills*, 45 Conn. 44, 29 Am. Rep. 635; *Walton v. New York Cent. & C. O. Co.* 139 Mass. 556; *Chicago, B. & Q. R. Co. v. Casey*, 9 Ill. App. 682, 689; *Mali v. Lord*, 89 N. Y. 381, 100 Am. Dec. 448; *Mallach v. Ridley*, 36 Hun. 643. Also *Mechem, Agency*, §§ 732, 734, 737, 740; *Isaacs v. Third Ave. R. Co.* 47 N. Y. 122, 7 Am. Rep. 418.

Morris, Gibson & Michie, for defendant in error:

The honorable trial court permitted the only witness for the defendant, the conductor Ebert,

*Head notes by HOLZ, J.

NOTE.—For note on question of master's liability for false arrest by agent, see preceding case.

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to testify that his act in pointing out the plaintiff to the policeman as the man to be arrested was a personal one. This was going as far as the law could possibly permit. It was for the jury to determine from the statement of facts whether the conductor was acting within the scope of his employment.

See *Donoan v. Texas & P. R. Co.* 64 Tex. 519, 29 Am. & Eng. R. R. Cas. 320; *Western & A. R. Co. v. Turner*, 73 Ga. 292, 28 Am. & Eng. R. R. Cas. 455; *Winnegar v. Central Pass. R. Co.* 85 Ky. 547, 34 Am. & Eng. R. R. Cas. 462; *Williams v. Pullman Palace Car Co.* 40 La. Ann. 87, 33 Am. & Eng. R. R. Cas. 407; *Fick v. Chicago & N. W. R. Co.* 68 Wis. 469, 34 Am. & Eng. R. R. Cas. 378, 60 Am. Rep. 878; *Wabash, St. L. & P. R. Co. v. Rector*, 104 Ill. 298, 9 Am. & Eng. R. R. Cas. 264.

In *Goff v. Great Northern R. Co.*, 30 L. J. Q. B. 148, a railway company was held liable for the act of its station master in wrongfully arresting a man, under a mistake and for the benefit of the company.

In *Dean v. Union Depot Co.*, 5 L. R. A. 442, 41 Minn. 360, defendant was held liable for willful assault of servant of defendant's tenant.

The rule relieving the master from liability for malicious injury inflicted upon a passenger by its servant not acting within scope of his employment, does not apply as between carrier and passenger.

Stewart v. Brooklyn & C. R. Co. 90 N. Y. 588, 12 Am. & Eng. R. R. Cas. 127; *Chicago & E. R. Co. v. Flerman*, 103 Ill. 546, 8 Am. & Eng. R. R. Cas. 354; *Wabash R. Co. v. Savage*, 110 Ind. 156, 23 Am. & Eng. R. R. Cas. 288; *Schultz v. Third Ave. R. Co.* 89 N. Y. 242, 9 Am. & Eng. R. R. Cas. 412; *Louisville & N. R. Co. v. Kelly*, 92 Ind. 371, 18 Am. & Eng. R. R. Cas. 1, 47 Am. Rep. 149.

A carrier of passengers is liable for the willful and malicious acts of its servants towards or upon a passenger.

Duinnelle v. New York Cent. & H. R. R. Co. 8 L. R. A. 224, 120 N. Y. 117, 44 Am. & Eng. R. R. Cas. 284; *Harris v. Louisville, N. O. & T. R. Co.* 35 Fed. Rep. 116; *Corbett v. Twenty-Third St. R. Co.* 43 Hun. 587; *Snow v. Fitchburg R. Co.* 136 Mass. 552, 49 Am. Rep. 40; *Cooley*, Torts, p. 685.

Holt, J., delivered the opinion of the court:

This was an action of trespass on the case, brought on the 15th day of October, 1889, in the Circuit Court of Cabell County by Elmer Gillingham against the Ohio River Railroad Company averring, in substance, that at the station in the town of Huntington he was on defendant's passenger train, with the proper ticket for Ben Lomond, a station on defendant's line, and that defendant, through its agent, the conductor, unlawfully, falsely, maliciously, and without reasonably probable cause, caused plaintiff to be arrested, handcuffed, and led and driven, in the day-time, through the principal street of Huntington, a long distance to the office of a justice, on an unfounded charge, before whom he was tried on the merits, found innocent, and discharged; all of which was done by defendant to plaintiff's great mental anguish, humiliation, and distress, loss of time, inconvenience, and expense, to his damage, etc. Defendant ap-

peared, and demurred to the amended declaration, and the court overruled the demurrer, and thereupon defendant pleaded not guilty. The cause was tried by a jury. The jury brought in a verdict for \$1,000 damages. Defendant moved the court to set the same aside, and award a new trial, and made various other motions, all of which the court overruled, and rendered judgment, and defendant brings it here on writ of error.

On behalf of plaintiff four witnesses were examined,—himself, the officer who made the arrest, and W. A. Thornley and William Bell, who were present at the arrest and during the transactions which led to it. On behalf of defendant, one witness was examined, viz., the conductor of the passenger train, who caused the arrest to be made. The record sets out in full the evidence, not the facts proved. As to a large part of it, however, there is no substantial conflict, so that it can be safely said, for the present purpose, that the facts are as follows: The plaintiff, twenty-four years old, was a farmer, living in Ohio, nine miles from Gallipolis, but for a short time preceding September 17, 1889, had been working for Thornley, at a saw-mill, in Cabell County, W. Va. On that day he came into Huntington, bought a railway ticket from defendant for Greenbottom depot. He had an uncle living in Huntington, and before starting received a letter from home stating that his mother was sick. He thereupon decided to go on up to Ben Lomond station, and bought from defendant a ticket for that place. He then went back to the depot, some forty minutes before the scheduled time for his train to start, Thornley being with him. The train was standing on the side track, about thirty-five yards above the depot. It was raining very hard, and they walked across the track, and got on the coach; but, finding it locked, they stood on the platform until it was unlocked, when they went in and sat down in the smoking car, as Thornley was smoking. The conductor and brakeman were on the train when plaintiff got on. When Gillingham, the plaintiff, and Thornley got on the platform, they were followed onto it by one Coffey, a young man, very perceptibly intoxicated at the time. Plaintiff was entirely sober, not having drank anything intoxicating that day, being orderly and well behaved as well as sober, making no disturbance of any kind during the whole transaction. But Coffey commenced kicking or pounding on the door, when the conductor went to the door, saw Coffey standing at the far side. Coffey looked and acted as if very drunk. Thereupon the conductor put his hand on Coffey's shoulder, and said: "Young man, you ought not to go on the cars this way. You might get hurt or killed and then I would be responsible for it." Coffey then put his hand down into his pocket, and drew out an open knife with a blade three or four inches long. The conductor stepped back into the car, picked up a coupling-pin, went to shut the door, when Coffey raised the knife a second time. The conductor hit him on the knuckles with the pin, and he (Coffey) threw the knife "down like." The conductor told him to get off the train or he would throw the pin at him, and picked it up for that purpose, but refrained, but at the depot sent the baggage-master for a

police officer. Witness Beatty, the policeman, came, when the conductor told him to arrest a man who was in the smoking car, who he was afraid would do him some harm. The policeman, conductor and another passed out of the baggage-car into the smoking-car and there they found plaintiff, Gillingham, seated; Thornley, smoking, sitting behind him on the same seat with Coffey; Coffey having his head leaning on the back of plaintiff's seat. The conductor pointed out plaintiff and directed the policeman to arrest him. The policeman asked the conductor, "Are you sure that is the man?" The conductor said he was and that he had a knife. The policeman then ordered plaintiff to stand up and take out his knife, and the conductor came up and said he recognized the knife and plaintiff handed it to the policeman, and pointing to Coffey on the next seat behind, said: "It was not me, but that man." The policeman, raising Coffey's head off the seat, asked Coffey what was the matter with him. Thornley also then said Coffey was the man; and Beatty, the officer, thinking there must be something wrong, and that the conductor was mistaken, again asked him if plaintiff was the man and the conductor told him he was sure he was the man and to take him and hold him until he came back. Then the policeman put handcuffs on plaintiff and started with him. Thornley went out on the platform and again told them plaintiff was not the man. The policeman led plaintiff through the street with the handcuffs on, first to his uncle's James Gillingham, and then to the office of the justice; and the conductor moved out with the train. The justice tried the case on the merits, acquitted the prisoner and discharged him. Plaintiff did not look like Coffey in dress, size or otherwise. Plaintiff was sober, quiet and well-behaved. Defendant asked the conductor as its witness, "Was the act of your pointing out the man as the one who had committed the assault upon you a personal one?" He answered, "It was personally done." He further said: "Plaintiff had done nothing that he knew of in violation of the rules of the defendant Company, had done nothing against its property, and that he himself was off duty as conductor when the arrest was made; he thought, and that he honestly believed that plaintiff was the man who cut at him with the knife."

The defendant, as a common carrier of passengers, was bound to treat the plaintiff, as one of its passengers, respectfully, and carry him safely to Ben Lomond—the point his ticket called for. "Among the obligations which such a contract imposes are to protect the passenger against any injury from negligence or willful misconduct of its servants while performing the contract, and of his fellow passengers and strangers, so far as practicable; to treat him respectfully, and to provide him with the usual accommodations, and any information and facilities necessary for the full performance of the contract on the part of the carrier. And these obligations continue to rest upon the carrier, its servants and employés, while such contract continues and is in process of performance." *Druinelle v. New York Cent. & H. R. R. Co.*, 190 N. Y. 117, 8 L. R. A. 224, 44 Am. & Eng. R. R. Cas. 384 14 L. R. A.

—386, (1890) and cases cited on page 386. In *Harris v. Nicholas*, 5 Munf. 483, (decided in 1817,) it is stated that "an employer or master is, in general, not responsible for a willful and unauthorized trespass, committed by his agent, overseer or servant." But in *Crump v. United States Min. Co.*, 7 Gratt. 353, 56 Am. Dec. 116, (decided in 1851,) it was held that the principals are bound by the false representations of the agent, though they neither authorized them nor were informed of them. In *Tracy v. Cloyd*, 10 W. Va. 19, Haymond, J., in delivering the opinion of the court, refers to the case of *Harris v. Nicholas*, cited above, and also to *Judge Story's* work on Agency. But the point was not involved and not decided. And in *Harris v. Nicholas* it was only held that where the act of the servant or agent was neither authorized by his principal nor committed in the usual course of his duty as such, the master was not liable. "The general maxim of the law, subject to only a few exceptions, is that whatever a man *sui juris* may himself do he may do by another, which is expressed by the maxim *qui facit per alium facit per se*." 1 Minor, Inst. 225; 1 Bl. Com. 429, (see editor's notes on this); 1 Hammond's Bl. Com. 719. See note 1 to section 451 of Greenough's Edition of *Story on Agency*, who contends that it is service, and not agency, which makes the master liable for his servant's torts. However this may be, the modern doctrine is well settled that "that which the superior has put the inferior in motion to do must be regarded as done by the superior himself, and his responsibility is the same as if he had done it in person. The maxim covers acts of omission as well as of commission, and embraces all cases in which the failure of the servant to observe the rights of others in the conduct of the master's business has been injurious," (Cooley, Torts, 534,) as well as those cases in which the servant has failed to perform, refused to perform, or has negligently performed, the duties due from the master to others in the conduct of such business; and the master is primarily liable to others for his own negligence in employing servants who are wanting in the requisite care, skill, or prudence for the business intrusted to them, when, by the exercise of ordinary care, it would have been known; and in regard to passengers whom the carrier has bound itself to carry safely, whether such want of care, skill, and prudence could have been ascertained or not; for, between the two, the carrier, who has made the wrong possible, though innocent in other respects, must pay the damage or suffer the loss. But what the servant thus does without authority must be done in the master's service; must be in the line or within the scope of his employment. Masters "are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them." *Lord Kenyon, Ch. J.*, in *Ellis v. Turner*, 8 T. R. 531-533, as quoted in *Bishop on Non-contract Law*, § 613. "So, when a railway company puts a conductor in charge of its train, and he purposely and wrongfully ejects the passenger from the cars, the railway company must bear the blame and pay the damages. As between the company and the passenger,

the right of the latter to compensation is unquestionable." Cooley, Torts, 2d ed. p. 626, and cases cited. Why? Not because the company authorized it expressly or impliedly, but because it was the duty of the company to treat him properly, and carry him safely; and it makes no difference what was the conductor's motive for doing the act, how exclusively personal it may have been, or how foreign to the master's business then in hand, of transporting the passenger, if the act was in violation of the master's duty to the passenger, which it was the conductor's duty to discharge and perform as the master's servant and in the master's place. And the same principle applies to other acts in the same circumstances, such as assault and battery. *Stewart v. Brooklyn & C. R. Co.* 90 N. Y. 588, 43 Am. Rep. 185; *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311; *Chicago & E. R. Co. v. Flezman*, 103 Ill. 546, 8 Am. & Eng. R. R. Cas. 854; *Wabash R. Co. v. Savage*, 110 Ind. 156, 6 West. Rep. 298. See Thomp. Carr. p. 363, notes to *Pendleton v. Kinsley*, 8 Cliff. 416. *Harris v. Louisville, N. O. & T. R. Co.* 35 Fed. Rep. 116, was a case of false imprisonment. See case of *Corbett v. Twenty-third St. R. Co.* 42 Hun, 587 (1886),—also a case of assault and false imprisonment. Mech. in his work on Agency, § 740, gives the general rule as follows: "While, as has been seen, it is well settled that the principal is liable for the negligent act of his agent committed in the course of his employment, it has been held in many cases that he is not liable for the agent's willful or malicious act. In the language of Judge Cowen, which fairly states the doctrine of these cases, 'the dividing line is the willfulness of the act.' *Wright v. Wilcox*, 19 Wend. 345, 32 Am. Dec. 507. The tendency of modern cases, however, is to attach less importance to the intention of the agent, and more to the question whether the act was done within the scope of the agent's employment; and it is believed that the true rule may be said to be that the principal is responsible for the willful or malicious acts of the agent if they are done in the course of his employment, and within the scope of his authority; but that the principal is not liable for such acts, unless previously expressly authorized or subsequently ratified, when they are done outside of the course of the agent's employment, and beyond the scope of his authority,—as, where the agent steps aside from his employment to gratify some personal animosity, or to give vent to some private feeling of his own." See cases cited. Such seems to be the present modern doctrine as to passenger carriers, and founded upon public policy, if not upon the principle already stated.

"False imprisonment is any unlawful physical restraint by one of another's liberty, whether in prison or elsewhere." Bishop, Non-cont. Law, § 206, and cases cited. "False imprisonment is a wrong akin to the wrongs of assault and battery, and consists in imposing by force or threats an unlawful restraint upon a man's freedom of locomotion. Prima facie, any restraint put by fear or force upon the actions of another is unlawful, and constitutes false imprisonment, unless a showing of justification makes it a true or legal imprisonment." Cooley, Torts, 196. "An abuse of a

lawful arrest is also false imprisonment; as cruelly treating the arrested person, insulting him, imposing on him undue hardships." Bishop, Non-cont. Law, § 210. "In false imprisonment proper, as distinguished from malicious prosecution, malice is not required" (Id. § 212); but want of reasonable and probable cause is sufficient. "When the officer, acting however honestly, arrests the wrong person, not being misled thereto by the person himself, it is a case of false imprisonment." Id. § 213. The mistake may be shown in mitigation of damages. See cases in note.

We have seen that it is the duty of the common carrier of passengers to treat his passengers properly and respectfully, and to carry them safely, and, though not an insurer, yet the law, based upon principles of public policy, is strict and exacting in requiring their performance; and surely in this day, when all the world is carried to and fro daily by instrumentalities vast in power and force, and without constant vigilance and great care and skill, almost as dangerous as forceful, owned by mere corporate entities, public policy is not likely to exact any less stringent rule. The carrier is not only bound to safely carry and properly treat the passenger, but, as far as may be, to keep an orderly and well-regulated house, for such in fact it is in these days, "protecting the passengers from the assaults of fellow-passengers or trespassers during the subsistence of the contract of transportation." *Pittsburgh, Ft. W. & C. R. Co. v. Fenda*, 53 Pa. 512; Thomp. Carr. 295, and notes. See also opinion of Shaw, Ch. J., in *Com. v. Power*, 7 Met. 596-601, 41 Am. Dec. 485, citing *Markham v. Brown*, 8 N. H. 533, 31 Am. Dec. 209. And to enable the company to discharge these duties the more efficiently through its conductor, put as a living, intelligent person to act as its representative in the flesh for that purpose, our statute has enacted that "the conductor of every train of railroad cars shall have all the powers of a conservator of the peace while in charge of such train."—Section 31, chap. 145, Code, p. 806 (ed. 1891),—thus giving him as conductor the shield and protection as well as the authority and power of the State in keeping and enforcing law and order, and protecting persons and property. This is a great thing for him, for his company, for his passengers, for the public at large. For him, not only because he can, in the discharge of his various and often perplexing duties, now speak and act with more confidence with the State at his back, but, as such conservator of the peace, may properly be treated with more indulgence, because he is specially charged with a duty in the enforcement of the laws. If by him an arrest is made with reasonably probable cause for belief, he will be excused, even though it appear afterwards that in fact no offense had been committed. See Cooley, Torts, 202. For the corporate master and owner, not only for these reasons, but for the superadded one that its duties to its passengers, its servants, and the public can now be more efficiently performed through its living representative, put in charge for the purpose, as well as making more safe and secure its widely extended property. For the passengers, because their safety and well-being can be better guarded. And for the

State, as interested in the preservation of law and order, as well as in all these things. But there is nothing to indicate that it was the intent of the law-making power to slacken the vigilance, or diminish the responsibility of the common carrier, or render it less liable for failure to discharge its duties than before.

Now, returning to the facts, there is little or no conflict in the evidence, and I have given them with some minuteness, and, so far as the conductor details them, pretty much in his own language. We find that, as matter of fact, he had taken charge of the train as such conductor, whether the thirty minutes had fully run out or not. He was on the train, acted and spoke as the one in charge, chided and cautioned Coffey for his drunkenness, had the doors opened, received passengers, and made ready to start, in the mean time sending a subordinate for the police officer to make the arrest. In truth it is said for his defendant Company, if not by himself, as matter of complete exculpation of the master, that he was acting as a conservator of the peace under the statute, and therefore could not be acting in any other capacity. He could only be such conservator, as a superadded function to that of "conductor of a railroad train, while in charge of such train." He ceased to be arrested and handcuffed, and led through the streets of Huntington, in the open light of day, without any reasonable or probable cause, a sober and orderly and well-behaved young man, on the train as a passenger, who, as he now says, as another ground of defense for his principal, had in his own language done nothing in violation of the rules of the Ohio Railroad Company; done nothing against the property of the Company, but had bought his ticket, was quietly seated on the train waiting for it to carry him to Ben Lomond; and it was the duty of the defendant to cause that to be done safely and properly, as it had contracted to do, and it cannot escape liability by laying the fault on its servant. In *Oraker v. Chicago & N. W. R. Co.*, 86 Wis. 657,—a suit for an assault committed by the conductor on a lady passenger,—the same defense was made as is set up here,—that it was the unauthorized and purely personal act of the conductor, and not within the scope of his employment. Ryan, *Ch. J.*, in delivering the opinion, among other things, said: "And is the appellant here to contend that it has no responsibility for the flagrant violation of the contract which the respondent paid it to make and to keep by its sole representative appointed to keep it on its behalf? Like the English crown, it lays its sins upon its servants, and claims that it can do no wrong. We cannot bend down the law to such a convenience. The appellant tortiously broke this contract as surely as it made it, committed this tort as surely as it made the contract." The willfulness of the servant's act is no excuse so long as it amounts to a breach of the contract (*Weed v. Panama R. Co.*, 17 N. Y. 362, 73 Am. Dec. 474); nor the fact that the act is wholly disconnected from his duties, and a purely wanton assault. In *Milwaukee & M. R. Co. v. Finney*, 10 Wis. 389, the court held "that the proper rule was that, where the misconduct of the agent caused a breach of the obligation or contract of the principal,

the principal would be liable, whether such conduct be willful or malicious or merely negligent." There are many other cases to the same effect, which need not be here cited, for here the wrong complained of was clearly in the line of service. It was done by the servant in those things that related to his duty under the master, and was not the "servant's independent tort, committed outside the sphere of his employment." See Bishop, *Non cont. Law*, § 685. Personal liberty is a natural right. "And, prima facie, any restraint put by fear or force upon the actions of another is unlawful, and constitutes false imprisonment, unless a showing of justification makes it a true or legal imprisonment." Cooley, *Torts*, 196.

In this case the innocence of the plaintiff is shown beyond all question, not only by a trial and acquittal, but by the same evidence given under oath by Thornley and others which was given by him and others without oath to and in the presence of the conductor and police officer before and at the time they were making the arrest, now reinforced by the evidence of the conductor himself; and it must be remembered that Thornley had long known and knew well both plaintiff and Coffey, and was present with the two from the beginning of the difficulty between the conductor and Coffey down to the time plaintiff was led away out of the car under arrest. The conductor says he was so much excited that he could not use his ordinary prudence and carefulness, and thus made the mistake. That he did it by mistake, I think there can be no question. What motive could he have had to treat his passenger, Gillingham, in that way? None whatever, so far as this record discloses. But if he had listened at the time to those who knew, or had used ordinary care to examine for himself, or had taken the hint given him by the officer that he was acting rashly, and making a grave mistake, none would have been made; he would soon have come to his senses. But from some cause he failed to do this, and his mistake was not innocent in the eyes of the law, and the arrest was made without any reasonable or probable cause, of a passenger, whom it was the Company's contract duty to carry safely to the destination mentioned in his ticket, for which very purpose, among others, he was put in charge of the train, so that the act, although in violation of his duty to the carrier as well as to the passenger, was clearly within the scope of his employment, and therefore the master is liable.

The jury fixed the damages at \$1,000, and the trial court refused to disturb the finding. But defendant, by its counsel, claims that the damages estimated should have been limited to the actual money loss sustained by plaintiff for loss of time and actual expenses incurred by him in consequence of his having been put off the train, and that the jury should have been told that they could not give exemplary, vindictive, or punitive damages,—terms often used indifferently in describing these damages. The exigencies of the case in hand do not call for any critical examination of the subject. For that I refer to the full and able discussion of the subject by the late Judge Green in *Pegram v. Stortz*, 31 W. Va. 220, also published in 7 Am. & Eng. Encyclop. Law,

448, under the head of "Exemplary Damages:" "Exemplary damages is the money given to the plaintiff by the jury as compensation for the injury inflicted by the defendant on the mental feelings of the injured person, such as his shame, degradation, loss of social position, and the like, resulting from the tort for which the action is brought." 7 Am. & Eng. Encyclop. Law, 448. And in actions of tort, when gross fraud, malice, or oppression, or any wanton, willful, and deliberate disregard of the injured person's rights, appears, the jury are not bound to adhere, in computing it, to the determinable money loss or damages, but may give such damages as will be exemplary in keeping others from so doing, and the defendant from repeating like conduct. It may be smart-money as to the defendant, provided it be not an excessive or unreasonable *solatium* to the plaintiff. See 1 Sedgw. Dam. 8th ed. chap. 11.

In this case the plaintiff passenger, entitled to proper and respectful treatment, was surely entitled to exemplary damages for the great indignity and humiliation to which he was subjected in being arrested, handcuffed, and led away without the slightest pretext or cause for it whatever, except that the conductor persisted in closing his eyes and shutting his ears to those who knew, and both showed him and told him, the real offender.

These were the main questions. Others, however, were raised and discussed, which should not be passed by. I need not give the amended declaration. It was in tort for false imprisonment and malicious prosecution, with the usual inducement of the circumstances, including the contract for transportation, and the demurrer was properly overruled.

The court, at the request of defendant, directed the jury to find in writing upon three particular questions of fact submitted to them under section 5, chap. 181, of the Code: (1) "Was the arrest of Gillingham the result of an assault with a knife in the hands of one Coffey made upon Ebert (the conductor) while the train was upon the side track, before backing down to the depot for departure?" To this the jury answered, "Yes." This question was immaterial. If true, it was no bar. It constituted no complete defense; and therefore, not being inconsistent with the general verdict of guilty, it could not control the latter, and the court could not accordingly give a judgment on it. (2) Question No. 2 was the same in substance, under a slightly different form, and was answered in the same way, and was properly disregarded by the court in giving judgment, and for the same reason. (3) "Did Ebert (the conductor) have any authority from the defendant company to cause Gillingham's (the plaintiff's) arrest, and, if so, how, when, and by what official of said company was Ebert authorized to cause said arrest?" The jury answered, "Yes; from the Ohio River Railroad Company;" not giving the name of any special official, or the manner or the time of conferring such special authority. As we have already seen, no special authority from any official was needed. The liability of the company grew out of its obligation to answer for any injury inflicted upon the passenger by the willful misconduct or

negligence of its servant, who was put in charge of the train for the purpose and with the duty of carrying the passenger safely. This special question also was, therefore, immaterial, and, if it had been answered as to the special official with a "No" instead of a "Yes," it would still have been the duty of the court not to permit it to control the general verdict. *Kerr v. Lunford*, 81 W. Va. 659; *Wheeling Bridge Co. v. Wheeling & B. Bridge Co.* 84 W. Va. 155, and the discussion of the subject and authorities cited by Lucas, J., in delivering the opinion of the court; and *Peninsular Land Transp. & Mfg. Co. v. Franklin Ins. Co.* (W. Va.) 14 S. E. Rep. 287, (decided at this term).

Various exceptions were taken by defendant during the progress of the trial. One was permitting testimony to go to the jury of what occurred to the plaintiff after he was arrested and removed from the car. Plaintiff, as a witness, states in substance that the officer, Beatty, took plaintiff by way of Beatty's house to the office of Squire Taylor, where he was tried and acquitted. To that evidence I see no objection. When the conductor was on the stand as a witness for defendant counsel for defendant several times asked the witness for whom he was acting when he pointed plaintiff out to the police officer as the one to arrest, and whether or not this was a personal matter between the witness and the plaintiff; whether he was acting in his own behalf or in his official capacity; and if any, what, authority he had for arresting or causing plaintiff to be arrested; or whether he was then acting within the scope of his authority as conductor of that Ohio River train; all of which the court for awhile steadily refused to permit to be answered. But the court, during the trial, did permit the witness to answer that there was no solicitation from anyone to make the arrest, "only himself;" that his pointing out plaintiff, etc., "was personally done;" that he "was off duty at the time the arrest was made;" "that he honestly believed that Gillingham was the man that cut at him with the knife when he pointed him out to the policeman." These questions and answers were permitted to go to the jury, being substantial answers to the questions before ruled out, so that we need not, at this point at least, consider these exceptions further.

Two instructions were given on motion of plaintiff.—No. 1 and No. 2. Seven were asked for by defendant. Nos. 1, 2, and 4 were given, and Nos. 3, 5, 6, and 7 were refused. Instructions given on motion of plaintiff were as follows: "No. 1. The court instructs the jury that if they believe from the evidence that the plaintiff without just cause was arrested after he became a passenger on one of the defendant's trains, and during the time that he was on such train, either by the conductor in charge of said train or by the policeman, Beatty, by order of the said conductor, that the act of the conductor, or of the said policeman acting under the orders of the said conductor, was the act of the defendant. No. 2. The court instructs the jury that, if they find the defendant guilty, they are, in estimating the plaintiff's damages, at liberty to consider the expense and loss of time, if any, incurred by

the plaintiff; also the bodily and mental pain and anguish resulting from the defendant's acts as proved; and for the outrage and indignity and humiliation put upon the plaintiff to allow such damages as, in the opinion of the jury, will be a fair and just compensation for the injuries sustained, not exceeding the amount sued for." Instructions on behalf of defendant, granted by the court, are as follows: "No. 1. The court instructs the jury that the plaintiff cannot recover in this case unless the acts done by Ebert in causing the arrest of the plaintiff were within the scope of his employment by the defendant Railroad Company; and such acts, to be within the scope of his employment, must be such as he would be usually and naturally called upon to do while discharging his duties as a railroad conductor in and about the business of the defendant Railroad Company. No. 2. The court further instructs the jury that it is not sufficient that the acts complained of were done during the time of the conductor's employment by the Railroad Company, or at the place where his duties called him to be. There must be something more, something which he was authorized by the defendant Company to do, or which he did do while acting as such conductor, in the scope of his duties and employment." "No. 4. That, unless the act done by the conductor in causing the arrest of the plaintiff was authorized by the Railroad Company, or was properly and legitimately within the scope of his employment, you must find for the defendant." Instructions asked for by defendant, but refused by the court, were as follows: "No. 3. The fact that Ebert was employed by the defendant as a conductor of the passenger train upon which the plaintiff intended traveling is not sufficient evidence that he was authorized or employed to do the acts complained of, nor is that fact of itself sufficient to make the defendant liable for the acts complained of." "No. 5. That, if you believe from the evidence in this case that Ebert caused the arrest of the plaintiff while acting for himself, and upon his own authority, for his own personal safety, without any direction or authority from the Railroad Company for so doing, you must find for the defendant. No. 6. The court instructs the jury that it was not lawful for the policeman to make the arrest without a warrant therefor, and that the defendant Railroad Company could not have legally procured the plaintiff's arrest in the manner in which said arrest was made, and that the defendant is not liable for the acts of Ebert which said Company itself could not have lawfully done. No. 7.

The court instructs the jury that, if they believe from the evidence in this case that the plaintiff is entitled to recover anything, then, in estimating the damages, you are limited to the actual damage sustained by the plaintiff for loss of time and actual expenses incurred by him in consequence of his having been put off of the train, and you cannot, in this case, give exemplary, vindictive, or punitive damages." I can see no objection to the instructions No. 1 and No. 2, given on behalf of plaintiff, if read in connection with No. 1, No. 2, and No. 4, given on behalf of defendant, of which there is no complaint. They are in harmony with, and substantially propound, the law, as we think, correctly. Plaintiff's No. 2 was approved in *Ricketts v. Chesapeake & O. R. Co.*, 33 W. Va. 433, 7 L. R. A. 354. They mean that, if plaintiff was a passenger on defendant's train, and during the time he was on the train to be carried to his proper station on the road he was arrested or caused to be arrested without just cause by the conductor in charge of the train, and that such act was within the scope of the conductor's employment, then such arrest would be the act of the defendant; that is, an act for which it might be liable. No serious objection can be made to instruction No. 2, given for plaintiff. It is drawn on the theory of exemplary damages as a *solatium*,—damages restricted to what would, in the opinion of the jury, be a fair and just compensation for the injuries sustained or inflicted. *Pegram v. Stortz*, 81 W. Va. 220. Instruction No. 3 of defendant was virtually given in giving defendant's instructions No. 1, No. 2, and No. 4, so that, whether right or wrong, defendant has no ground of complaint in its refusal. The same may be said of instruction No. 5, asked by defendant. It had already been given, and no complaint in this court is made by plaintiff. Defendant's instruction No. 5, taken as a whole, is not correct, for, if the arrest could not lawfully be made or caused to be made by the conductor without a warrant, that might add to the wrong, but would not relieve the defendant from liability for the false and groundless imprisonment of a passenger by the conductor in charge of the train, acting within the scope of his employment. The refusal of defendant's instruction No. 7 has already been disposed of by what has been said on the subject of damages and in discussing plaintiff's instruction No. 2. In conclusion, we see no reason why we should set aside the judgment and verdict and award a new trial.

The judgment complained of is affirmed.

INDIANA SUPREME COURT.

FORT WAYNE ELECTRIC LIGHT CO.,
Appl.,

James MILLER et al.

(.....Ind.....)

1. A guarantee by the owners of a

NOTE.—For note on forfeiture of gifts made to secure location of public buildings, etc., see *Ayres v. Dutton* (Mich.) 13 L. R. A. 663.
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manufacturing plant that an invoice will show a certain surplus of assets over liabilities at the beginning of the next month, which is made during the negotiation of a contract for the removal of the plant to, and operation of it in, a certain town, if acted upon, imposes upon the owners of the plant the obligation of making the invoice, the failure to do which within a reasonable time will constitute a breach of their contract.

2. Building shops on donated land with

money given for that purpose to secure the removal by a manufacturing company of its business to a certain place is not a part performance of its contract to make such removal of its business so as to prevent the subscribers from recovering back their money on the ground that the entire consideration had failed, if the business is not removed.

3. Money subscribed and paid as a donation to a manufacturing company in order to be used in buildings on lands donated to it in consideration of the removal of a manufacturing business to that place, can be recovered back by the subscriber for failure of consideration if the company fails to move the business to that place as agreed, although the money has been expended in the erection of the contemplated buildings.

4. The amount of recovery on failure of the consideration for which money is donated to a manufacturing company in order to secure the removal of the business to a certain place is the amount paid with interest.

5. Evidence of what the obligors said at the time of contracting to make an invoice within a reasonable time, about the time when it would be practicable and convenient for them to make it, is admissible upon the question of what is a reasonable time.

(February 4, 1892.)

A PPEAL by defendant from a judgment of the Circuit Court for Adams County in favor of plaintiffs in an action brought to recover damages for the alleged breach by defendant of a contract to remove its manufacturing plant to and operate it in the city of Plymouth. *Affirmed.*

The facts are stated in the opinion.

Messrs. Morris & Barrett and Robert S. Taylor, for appellant:

Assuming the contract to have been broken by the appellant, and that the appellees had the right to elect whether they would treat it as still in force, or as rescinded and at an end, they, by commencing this suit, irrevocably treated it as still in force and unrescinded.

Mullaly v. Austin, 97 Mass. 30; *Bulkley v. Morgan*, 46 Conn. 394; *Bailey v. Hervey*, 135 Mass. 172; *Moller v. Traska*, 87 N. Y. 166; *Nield v. Burton*, 49 Mich. 53; *Butler v. Hildreth*, 5 Met. 49; *Gray v. St. John*, 35 Ill. 222; *Nowling v. McIntosh*, 89 Ind. 593.

These cases, applied to the facts stated in the complaint, require the appellees to recover such damages, if any, as the evidence shows they have sustained by the alleged breach of the contract. They have no title, claim or right to the money paid. The evidence does not show that any of them have been damaged a dollar. There is not a word of evidence tending to show that, had the contract been fully performed by the appellant, notwithstanding the failure of the stock subscribers to pay as agreed, any benefit would have resulted to the appellees, or any of them.

See also *Ellison v. Dove*, 8 Blackf. 571; *Jones v. Van Patten*, 3 Ind. 107; *Herbert v. Stanford*, 12 Ind. 503; *Weddle v. Stone*, 12 Ind. 625; *Cincinnati & O. A. L. R. v. Rodgers*, 24 Ind. 108; *Strutt v. Farler*, 16 Mees. & W. 249, 8 Cobb, 71.

It was alleged in the complaint as one of 14 L. R. A.

the stipulations entered into by the Company that it would "within a reasonable time after April 1, 1888, produce to said persons a true and correct invoice, showing the ownership and possession by said Company on April 1, 1888, of a surplus of \$300,000 of good assets over and above liabilities, patents and good-will being counted at \$100,000."

No such agreement appeared in any of the written correspondence or contracts, and it was not permissible to prove it by parol.

Kieth v. Kerr, 17 Ind. 284; *Irwin v. Lee*, 34 Ind. 319; *Low v. Studsbaker*, 8 West. Rep. 37, 110 Ind. 57; *Davis v. Liberty & C. G. Road Co.* 84 Ind. 36; *Hostetter v. Auman*, 119 Ind. 7; *Diven v. Johnson*, 3 L. R. A. 308, 117 Ind. 512.

Messrs. Charles Kellison and Butler, Snow & Butler, for appellees:

The complaint was to recover back money paid upon a contract that was virtually at an end, by reason of breaches made by appellant, and having received nothing, and having nothing to restore to appellant, the commencement of the action was all the rescission that was necessary.

Jewett v. Lawrenceburgh & U. M. R. Co. 10 Ind. 539; *Reagan v. Fox*, 45 Ind. 8; *Keesling v. Frazier*, 119 Ind. 185; *Gossard v. Woods*, 98 Ind. 195-199; *Wharton*, Cont. § 285.

If the complaint was, as appellant contends, a complaint to recover damages on the contract, the case of *Mullaly v. Austin*, 97 Mass. 30, cited by appellant, is square against the proposition contended for by appellant's attorneys.

The only damages that the appellees would have been permitted to prove in this case under any form of the pleadings, would be the amount of money paid by them respectively.

All other damages which it would have been possible for them to suffer by reason of the industry not being brought to Plymouth would have been remote and speculative.

Western G. R. Co. v. Cox, 39 Ind. 260; *Glass v. Garber*, 55 Ind. 336.

When a contract is silent as to the time for the performance of a condition therein named, parol evidence is admissible to prove when the parties agreed the stipulation should be performed.

Leggett v. Harding, 10 Ind. 414; *Kieth v. Kerr*, 17 Ind. 284-287; 2 Parsons, Cont. p. 65.

Where money has been paid on the faith of the contract, and where the damages naturally and proximately resulting from the rescission or breach of the contract would be the return of the money paid, with interest thereon, the contract itself, with proof of the payment of money under it, furnishes the measure of damages.

Indiana, B. & W. R. Co. v. Adamson, 12 West. Rep. 708, 114 Ind. 286; *Nash v. Towne*, 72 U. S. 5 Wall. 690, 702, 704, 18 L. ed. 528-531; *Sedgw. Damages*, *202; *Jewett v. Lawrenceburgh & U. M. R. Co.* 10 Ind. 359; *Reagan v. Fox*, 45 Ind. 8; *Keesling v. Frazier*, 119 Ind. 185; *Gossard v. Woods*, 98 Ind. 195, 199; *Mullaly v. Austin*, 97 Mass. 32, 33.

McBride, J., delivered the opinion of the court:

The appellant is a corporation, engaged in the manufacture of electric lighting apparatus.

tus at Fort Wayne. In the spring of 1888 negotiations were entered into, looking to the removal of all or a part of its business to Plymouth, Marshall County. The negotiations were conducted on the part of the appellant by its directors, and on the other part by a committee, representing certain of the citizens of Plymouth. As the result of an interview between the citizens' committee and the directors, the following was delivered to the committee:

Fort Wayne, Ind. 8-24-1888.

Mr. E. R. Wheeler, H. G. Thayer, J. W. Parks, Ira. D. Buck and C. T. Mattingly, Committee; Plymouth, Ind.

Gentlemen:—On consideration of your proposition we have decided that it will not be expedient to move from Fort Wayne any part of our business of manufacturing incandescent lights. We, however, feel that we are under obligations to recognize your efforts and we will, however, move all the manufacture of the Jenney Arc Lamps and Dynamos from Fort Wayne to Plymouth on consideration of you giving our Company ten acres of ground suitably located for our works, and \$15,000 in cash to be invested in buildings and machinery on said grounds, and will take \$115,000 of the capital stock of our Company, paying therefor in the following manner:—25 per cent cash on April 15, 1888; 25 per cent July 15, 1888; 25 per cent October 15, 1888, and 25 per cent January 15, 1889.

Very Truly Yours,

H. G. Olds,
J. H. Bass,
P. A. Randall,
R. T. McDonald,
M. W. Simons,

Directors of the Fort Wayne Jenney Electric Light Co.

Three days later the committee, having conferred with their constituents, returned to Fort Wayne for the purpose of investigating the financial condition and standing of the company, preliminary to closing a contract with it. After another conference with three of the directors of the Company, a paper was executed and delivered to them in the following terms:

Fort Wayne, Ind. March 27, 1888.

Mr. E. R. Wheeler and others, members of Plymouth Committee:

Gentlemen:—We will guarantee that our invoice will show a surplus of \$300,000 of good assets over and above our liabilities, counting patents and good-will at \$100,000, on April 1, 1888.

This guarantee is made because the Company has not invoiced this year, and to satisfy you that we will not declare any dividend that will impair the assets below the sum as shown on the invoice, of which we give you a copy, dated January, 1887, and that we will in addition change our letter of March 24 to conform to your subscription to stock \$115,000 and bonus of \$15,000, which is that the \$15,000 is to be paid within ten days and 25 per cent of stock so soon as we shall commence moving machinery to
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Plymouth, and 25 per cent every three months thereafter until paid.

Respectfully,

Fort Wayne Jenney Electric Light Co.

By R. T. McDonald, Treas.

R. T. McDonald,

P. A. Randall,

M. W. Simons.

April 7 the following was sent by the committee to the Company:

Plymouth, Ind. April 7, 1888.

To the Fort Wayne Jenney Electric Light Co., Fort Wayne, Indiana:

Gentlemen:—You are hereby notified that at a regular called meeting of the Executive Committee of the citizens of Plymouth the undersigned chairman was delegated to inform you that we, the citizens of Plymouth, do hereby accept your written offer of date March 24, 1888, and your letter of March 27, 1888, making certain changes in your original proposition. The said citizens of Plymouth having raised the proper amounts accept your said offer, and will fully comply with the terms of said proposition.

Joseph Swindel, Pres't of Com.

Attest: Ira D. Buck, Sec'y.

Later, a subscription paper was circulated and executed in the following words:

"We, the undersigned, do hereby agree to pay to the Fort Wayne Jenney Electric Light Company of Fort Wayne, Indiana, the sums we have heretofore subscribed for the purpose of inducing them to bring the factory to Plymouth, Indiana. This subscription is to be paid for the purpose of inducing the said Company to remove the arc light department of its factory to Plymouth, and it is to be paid by the 10th of April, 1888, and shall not be binding upon any subscriber hereto unless the entire bonus required shall be subscribed."

On this \$15,000 was subscribed and paid in cash, which was turned over to and accepted by the Company. A stock subscription, to the capital stock of the Company, amounting in the aggregate to \$115,000 was made, the subscription paper being in the following words:

"We, the undersigned, do hereby agree to pay to the Fort Wayne Jenney Electric Light Company of Fort Wayne, Indiana, the several sums set opposite our respective names for the number of shares by us subscribed and set opposite our respective names. Said sums to be paid in installments of 25 per cent every three months, the first installment to be paid when said Company shall commence removing the machinery of their arc light manufacturing plant to the city of Plymouth, Indiana."

This was also turned over to, and accepted by, the Company. In addition to this, a tract containing ten acres of land was conveyed to it by an unconditional warranty deed and accepted by it. It erected a building or shop on the land at a cost of about \$11,000, placed a boiler, an engine and some other machinery in the building and then called upon the stock subscribers for the payment of 25 per cent of their subscriptions,

but payment was refused, the subscribers claiming that the Company had not complied with the terms of the contract.

This suit was commenced September, 1889, by certain of the cash subscribers who aided in raising the \$15,000 which was paid to the Company, for themselves and such others of the subscribers to that fund as might elect to join with them, to recover back the money thus paid.

The complaint recites the making of the contract, and avers, of the writing executed March 27, that when the committee called to investigate the financial condition and standing of the Company, they were informed by Simons, who was a director in the Company, and McDonald and Randall, who were respectively its treasurer and secretary, that it would be impracticable because of a rush of business in the manufacturing department, to shut down the factory at that time for the purpose of taking an invoice, and to allow the committee to examine into the condition of its assets, but that they would make such invoice and allow such examination as soon as practicable, and that to satisfy the committee for the time being they executed that writing. It is averred that the promise and guaranty contained in said writing was one of the principal inducements causing them to take the course they did thereafter without making a thorough examination as to the appellant's financial standing. The complaint avers full performance of the contract on the part of the appellees and those associated with them, alleges the delivery to the appellants of stock subscriptions for \$115,000, which were retained and are still retained by the appellant, the payment to it of the \$15,000 in cash and conveyance to it of the ten acres of land, and that both money and land were received by the Company and appropriated to its own use, and also alleges entire failure to perform on the part of the appellants. It is particularly averred that the appellants had failed and refused to make or furnish to appellees, or to the stock subscribers the invoice mentioned in the writing of March 27. The complaint also avers that said Company has "never used or occupied said grounds and buildings for manufacturing Jenney Arc Lamps, lights or dynamos, nor has said Company ever moved all or any part of the manufacture of Jenney Arc Lamps and Dynamos from Fort Wayne to said city of Plymouth, nor did said Company ever begin the removal thereof, etc."

While there are several assignments of error, only three propositions are properly before us for decision: (1) the sufficiency of the complaint; (2) the measure of damages, and (3) the admissibility of certain testimony.

It is conceded that the facts averred show the execution of a valid contract. Counsel, however, do not agree in the construction of the contract. Counsel for the appellant construe it as one entire and single contract between the Electric Light Company on one hand and the citizens of Plymouth on the other, upon an entire consideration, but insist that the complaint avers a contract differing in some respects from that made by

the papers. Counsel for the appellees style it "an entire quadripartite contract." We do not regard the discussion of this question as calculated to throw any light on the real controversy.

While it is true that the undertaking of the subscribers to the cash fund was in one sense distinct from that of the parties to the stock subscription or the donors of the land, and while their undertakings were not only collectively different, but that of each individual subscriber was several, and his own several personal obligation, yet all were acting together in a common enterprise, for the accomplishment of a common purpose. The cash subscriptions, stock subscriptions and land donations together constituted the consideration for the promise of the appellant to remove its manufacture from Fort Wayne to Plymouth. On the other hand, the sole and only consideration moving from the appellant to the other party, as expressed in the contract, was its promise in its proposition of March 24, that it would "move all the manufacture of the Jenney Arc Lamps and Dynamos from Fort Wayne to Plymouth."

The particular in which the appellant insists that the complaint avers a contract differing from that made by the papers is in relation to the invoice. Appellant treats this as an attempt to inject a parol modification into the written contract. We do not view it in that light. We think the guaranty of March 27, fairly construed, imposes upon the appellant the duty of making an invoice that would show the condition of the Company on the 1st day of April, 1888, and while no time is fixed within which it is to be made, the law would imply a promise to make it within a reasonable time. The averments in the complaint relating to the invoice are, therefore, in our opinion, fairly within the terms of the contract, and the allegation of failure to make it is an allegation of a breach of one of the Company's material undertakings.

It is also argued by the appellants that the averments of the complaint taken together do not show performance by the appellees or nonperformance by the appellant, but, on the contrary show only partial performance by both. It is said that there is no showing of the payment or tender of 25 per cent or any other part of the stock subscription, and that there is no averment that the Company never commenced moving machinery to Plymouth. It is true that there are no averments of the payment or tender of any portion of the stock subscriptions. We think, however, that sufficient excuse is shown for not making such payment or tender. Counsel argue that the obligation of the stock subscribers to pay 25 per cent of their subscriptions became absolute when the Company commenced to move machinery from Fort Wayne to Plymouth, and that there is no averment that they had not thus commenced to move machinery; that the averment that they had never "moved all or any part of the manufacture of Jenney Arc Lamps and Dynamos from Fort Wayne to said city of Plymouth, nor did said Company ever begin the removal

thereof," is not sufficient. They say the "removal of the manufacture and the removal of machinery to manufacture with, are two different things." In this we agree with them. They are, however, measuring their obligation entirely by the language of the guaranty of March 27. The terms of the contract and the full measure of the obligations assumed by the parties can only be determined by construing all of the writings together. The paper of March 27, aside from the guaranty and agreement to make an invoice, was a mere modification of the proposition of March 24. As will be seen by reference to it, that proposition was that they would, upon certain terms, "move all the manufacture of the Jenney Arc Lamps, etc., and definite dates were fixed for the payment of the stock subscriptions. No definite time was fixed for the payment of the \$15,000. The modification made the \$15,000 due and payable within ten days, and the first installment of stock subscription, instead of being payable April 15, was to be paid as soon as the Company should commence moving machinery to Plymouth. What machinery? Would the moving of any machinery meet the condition? It is evident that the machinery intended by the parties was that referred to in the original proposition,—the machinery of the manufactory at Fort Wayne. The citizens of Plymouth were endeavoring to secure the transfer to their city of a manufacturing concern which they were assured had assets exceeding its liabilities in the sum of \$300,000. The proposition made to and accepted by them was, that this established and productive industry in its entirety should be moved from Fort Wayne to Plymouth. The condition could only be complied with by a bona fide commencement of the removal of the machinery actually belonging to and used in said business at Fort Wayne. Until a commencement or a beginning of this character was made, there was nothing due on the stock subscriptions.

We think the complaint states a good cause of action. The question as to the measure of damages is sought to be presented in several different ways, and is, we think, properly and fairly in the record by the ruling of the court on instructions asked by the appellant and refused, and on an instruction given by the court. The instructions asked were long, and we will not copy them. In substance the court was asked to instruct the jury as follows: That the burden was on the plaintiff to show all the facts necessary to fix the damages which the jury were required to ascertain and fix separately as to each plaintiff; that while their verdict should be for a gross sum it should be a sum made up of the separate damages suffered by each plaintiff; that if the contract was broken the plaintiff had the option of demanding a rescission or of affirming the contract and suing for the breach; that if the plaintiff had elected to rescind, they would have been entitled to a return of their money upon placing the other party *in statu quo*, but that by bringing this suit they had elected to affirm the contract and claim damages for its

breach; that the damages they were entitled to recover were compensatory and might be much more or much less than the amount paid; that from the averments of the complaint it must be taken that the benefits which the plaintiffs expected to gain by the performance of the contract consisted in the growth and prosperity of the city of Plymouth, the increase of its population, the enhancement of the value of property in said city and the various advantages which would accrue to them from the location and maintenance of an electric light manufacturing industry in their city; that if the Company had broken the contract the measure of damages would be the loss which they suffered of gains, profits, or advantages which would have accrued to them if the contract had been kept; that unless the plaintiffs had proven that they had suffered loss or damage by reason of the breach of the contract, other than the subscription of the \$15,000 they could recover no more than nominal damages; that unless there was evidence of loss suffered the verdict for damages should be limited to nominal damages; that while it is the law that one who has paid his money upon a consideration which has wholly failed may recover back the money paid, the rule does not apply where any part of the consideration has been received by him or parted with by the other party; that the building of the shops on the donated land, with part of the donated money, was, to the extent of money invested part performance by the appellant of the contract, and that the appellees had thereby received a part of the consideration on which they had parted with their money, and were not entitled in this suit to recover back their money.

The court refused all of the instructions asked, and, over appellant's objection, gave the following:

6. It is well-settled law that a party who agrees to perform an act and fails to perform his agreement must pay compensation for all injuries that naturally and proximately result from the breach. So far as the plaintiffs in this suit and those they represent are concerned, it does not appear and is not claimed by the defendant Company, that there is any other consideration for the payment of the money subscribed by them to the donation fund than the agreement for the removal of that part of the manufactory of the defendant Company for the manufacture of the Jenney Arc Lamp and Dynamo from Fort Wayne to Plymouth; and a failure to perform that stipulation operates as a failure of consideration for the money so paid. In cases of that kind, where the defendant has received money of the plaintiff upon a consideration which has failed, or where the defendant has money of the plaintiff which, in equity and good conscience, he ought to refund in the absence of any allegation of special damages and proof thereof, the plaintiff in general is entitled to receive the money back and lawful interest thereon from the time of payment up to the time of recovery. Therefore, in this case, if the jury believe from the evidence that the consideration upon which the plaintiffs and those they represent

in this suit paid their money and upon which the defendant Company received it has failed, there being no allegation of special damages, the measure of damages would be the several amounts paid, with interest thereon from the time of payment up to this date, at the rate of six per cent per annum.

In our opinion, the instruction given is a correct statement of the law, and is clearly applicable to the case made by the pleadings and by the evidence. We also think the court did not err in refusing the instructions asked. As we have already said, as we construe the contract, the sole and only consideration for the payment of the money was the promise to remove the manufactory—the particular manufacturing enterprise named—to Plymouth. It is not only averred, but is found as a fact by the jury this was never done or commenced. It cannot be said that the erection of the buildings was in any sense or in any degree the rendition of any part of the consideration. Both land and the money which paid for buildings and machinery were given to the appellants as a part of the consideration for what they promised to do. Counsel say that to allow the appellants to invest the money in the buildings and then compel them to refund it is to make them involuntary purchasers of the property. The money was paid to them to be used in that specific way, it is true, but only upon conditions. Without compliance with the conditions they had no right to either retain or invest it. The investment in buildings was, under the circumstances, wholly unau-

thorized, and they cannot complain because they are required to refund it. In our opinion, upon the facts as they are found by the jury, there was an entire failure of consideration, and in such case, as the appellant concedes, the measure of recovery is the money paid, with interest.

The only remaining question is on the admissibility of certain testimony. The court, over the objection of the appellant, allowed the appellees to prove by certain witnesses what was said by the directors of the appellant, at the time of making the written guaranty of March 27, as to when it would be practicable and convenient for them to make the invoice mentioned in that writing. It was objected that this was an attempt to "contradict, vary, or explain a written contract by evidence of preceding and contemporaneous conversation and verbal statements, and evidence of intentions and understandings, all of which were merged in the written contract finally executed."

We have already construed the contract as imposing upon the appellant the duty of making and furnishing an invoice within a reasonable time. What would be a reasonable time must be determined from the evidence. We think it was competent and proper to show in that connection, as bearing upon that question, what the directors said when they gave the guaranty, about the time when it would be practicable and convenient for them to make the invoice.

Judgment affirmed, with costs.

MICHIGAN SUPREME COURT.

PEOPLE of the State of Michigan

Thomas MURRAY.

(.....Mich.....)

1. The constitutional right to a "public trial" in a criminal case is violated by an order of the court to a police officer stationed at the door of the court-room to "see that the room is not overcrowded but that all respectable citizens be admitted and have an opportunity to get in whenever they shall apply," where it is shown that citizens and taxpayers were excluded by such officer while the seats provided for spectators were not all occupied.
2. Certiorari is the proper remedy

where a person is denied a public trial in a criminal case by exclusion of citizens while seats for spectators were vacant, as those facts could not be presented by a bill of exceptions.

3. The fact that people might obtain admission to a court-room by a private entrance through the clerk's office is no answer to the charge that the constitutional right to a public trial was denied by an order of the court in pursuance of which they were refused admittance at the public entrance.
4. The plea of former jeopardy cannot prevail where a judgment of conviction is set aside on the application of the convict because he had been denied a public trial.

(Grant, J., dissents from proposition 2.)

NOTE.—Right to public trial in criminal case.

In many, if not most, of the States the Constitution guarantees to a person accused of crime the right to a public trial. Very few decisions have ever been made concerning this right, and textbooks on criminal procedure are nearly if not quite barren of authority upon it. In addition to these cases cited in the opinion of the court in the main case, are the following:

The right to a public trial is not violated by clearing the court-room of spectators, but allowing attorneys and officers of the court to remain during the cross-examination of one witness whose evidence was of an indecent nature, where persons in the audience whom it was impossible to distinguish persisted in laughing aloud to the embarrassment of the witness. *Grimmett v. State*, 22 Tex. App. 86, 58 Am. Rep. 850.

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The right to a public trial is not infringed by causing the doors to be locked in case of noise and disturbance, at least where this was after verdict and pending a motion for arrest of judgment. *Stone v. People*, 3 Ill. 828.

An order excluding all persons from the court-room except the judge, jurors, witnesses and persons connected with the case was held without discussion in the opinion not to be a denial of a public trial, but in this case the decision was sustained also on the ground that it was presumed on appeal, in the absence of anything to show the contrary, that defendant assented to the order. *People v. Swafford*, 65 Cal. 226.

See, in connection with this case, the later California case of *People v. Kerrigan*, which is discussed in the principal case above. B. A. R.

(December 22, 1891.)

CERTIORARI to the Recorder's Court of Detroit to bring up proceedings occurring during the trial of defendant upon an indictment for murder upon which he was found guilty and sentenced to life imprisonment. *Reversed.*

The facts are stated in the opinion.

Mr. Oscar M. Springer for plaintiff in certiorari.

Messrs. A. A. Ellis, Atty. Gen., and S. Burroughs, Pros. Atty., for the People.

Chaplin, Ch. J., delivered the opinion of the court:

The respondent was convicted, upon an information charging him with the murder of Edward Shoemaker, in the Recorder's Court for the City of Detroit, presided over by the *Hon. F. H. Chambers*, associate judge. The respondent was sentenced to be imprisoned in solitary confinement, at hard labor, for life, in the state's prison at Jackson, and is now undergoing sentence. He sued out a writ of error, and also a writ of certiorari. No bill of exceptions was settled or signed, and the return thereto brings up merely the record of the case, to and including the judgment, in which there appears to be no error. The writ of certiorari was based upon the petition of *Oscar M. Springer*, the attorney for respondent, made and sworn to in his behalf, and sets forth that the respondent was not accorded a public trial; that the public were excluded from day to day from the court-room during the progress of defendant's trial, as appears by the affidavits of *Charles Flowers*, *William May*, *John B. Stadler*, *Michael McKeogh*, *Henry S. Self*, *Joseph Boushey*, *William Nash*, and *Thomas M. Donnelly*, filed with said petition and made a part thereof. *Thomas M. Donnelly's* affidavit shows that he is an attorney-at-law; that during the progress of the trial of *Thomas Murray*, charged with the murder of *Officer Shoemaker*, he went to the Recorder's Court of the City of Detroit, where said case was on trial, and attempted to enter the court-room; that he was stopped in a peremptory manner by the officer at the door, who asked him this question, "Have you any business here?" To which deponent replied that "he had no particular business, except that he wanted to hear what was going on at the trial;" that thereupon the officer said to him, "The judge doesn't want to see you;" and shoved him away from the door, and closed the door in his face; he afterwards gained admission to the court-room through the clerk's office; that on entering the court-room he looked around, and saw how many persons were in the court-room, and according to his judgment there were not to exceed, outside of the officers of the court, the police commissioners, and policemen, a dozen persons in the court-room. The affidavit of *Charles Flowers* shows that he is an attorney-at-law practicing in Detroit; that he was of counsel for *David McCormick*, who was charged, with *Thomas Murray*, with the killing of *Officer Shoemaker*, and was present at the greater part

of the trial of said *Murray*, which continued about two weeks, that after the jury were sworn, and during the continuance of the said trial, the public were excluded from the court-room, an officer being placed at the door of the court-room, who refused admission to the general public; that he on several occasions interceded with the said officer, and sought to gain admission for the friends of deponent and others, known by deponent to be reputable and orderly citizens, and such permission was invariably refused, the said officer informing *Flowers* that he had been instructed by the court to admit no one who had not business in the court. On each of such occasions he noticed that the court-room was comparatively empty, the only persons present being about a dozen policemen, three or four detectives, several police commissioners, and others apparently interested in the conviction of defendant; that on one occasion he protested against the secret trial which was going on, and asked the court to permit the public to enter; that the court replied that he did not propose to have the court-room crowded with people; that at the time this protest was made deponent counted the number of persons outside the bar of the court, and that there were five persons only present, and at the same time there were in the hall at least twenty persons, many of whom he knew to be reputable citizens, asking to be admitted; and he says that the seating capacity of the court-room is at least two hundred, and that at no time during the trial were there more than twenty persons in the court-room, outside of the officers and policemen before mentioned; that he can positively say that he saw at least fifty persons refused admission; that he was applied to by several citizens, and went with them to the officer at the door, and asked said officer to admit them; that they were friends of deponent, and had a right to witness the trial; and that on each occasion admission was peremptorily refused. The affidavit of *William C. May* shows that he is a citizen of the United States, and a resident of the city of Detroit, county of Wayne, and state of Michigan; that he is a deputy-clerk in the office of the county clerk for the county of Wayne; that during the progress of the trial of *Thomas Murray*, charged with the murder of *Officer Shoemaker*, he endeavored to secure admittance to the recorder's court where said *Thomas Murray* was on trial on the charge aforesaid, but was stopped at the door by a policeman; that he had considerable difficulty in gaining admission to said court; that he met in the corridor leading to the court-room two jurymen of the Wayne Circuit Court, who stated that they were desirous of attending said trial, and had been refused admission to said court-room; that before they could get into said court he had to obtain permission of the judge, although the benches in the court-room provided for the public were practically vacant; that the officer at the door of said court informed him that the general public was not allowed admission to the court; that he saw a number of persons standing around the corridor

leading to the court who had apparently been denied admission. John B. Stadler in his affidavit says that he is a resident of the city of Detroit; that he attended the trial of Thomas Murray charged with the killing of Officer Shoemaker; that he had difficulty in getting into the court-room, and would not have been admitted had it not been for the intervention of the prosecuting attorney; that during the trial, which lasted for nearly two weeks, he knows that the public generally was excluded from the court-room; that he has seen a number of persons from day to day trying to gain admission to the court-room, and who were not admitted by the officer, although there was plenty of seating capacity in the court-room for spectators and the public; that on one occasion he remembers having seen persons trying to gain admission, and they were refused by the officer at the door, and knows that there were not to exceed five or six persons sitting in the benches provided for the public; that he has seen the hall leading to the court full of people who were excluded from the court-room, although the benches provided for the public inside were practically vacant. Michael McKeogh's affidavit shows that he is a citizen of the United States, and a resident of the city of Detroit; that he attempted to gain admission to the court-room for the purpose of witnessing and hearing the trial; that he was stopped in a peremptory manner by a police officer stationed at the door, and informed that he could not go in; that he had an opportunity of seeing into the court-room, and can positively say that the benches provided for the public were practically vacant. Henry S. Self says that during the progress of the trial he made application on two different occasions for admission to the court, on both of which there was an officer stationed at the door of the court-room where Murray was on trial, and he was refused admission by the officer at the door; that on both occasions he saw a number of persons trying to gain admission, who were refused in a peremptory manner by the officer at the door, notwithstanding the fact that the benches in the court-room provided for the public were practically vacant. Joseph Boushey swears that he is a resident of the city of Detroit, and a citizen of the United States, and has lived in the city of Detroit for a number of years; that on the 22d and 23d of April, during the trial of Thomas Murray, he applied for admission to the court, and was peremptorily refused, although there were very few people in the court-room; that on the 23d day of April he stood around the corridor leading to the court-room from 9 o'clock in the morning until 12 at noon, and that during that time he saw at least fifty persons try to gain admission, who were refused admission, to said court-room; that he is able to say positively that there were not on that day to exceed a half dozen persons sitting in the benches of said court-room on the north side thereof; and again, on the 23d of April, he was in the corridor leading to said court-room and saw at least fifty persons who were peremptorily refused admission by the police officer stationed at

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the door, there being not to exceed a half dozen persons sitting upon the benches in the court-room. W. C. Nash swears that he is a resident of the city of Detroit, and that he made application for admission to the court-room during the progress of the trial of Thomas Murray, charged with the murder of Officer Shoemaker; that he was peremptorily refused admission by the police officer stationed at the door of said court; that he had an opportunity to see into the court-room, and knows that the benches on the north side of said court-room provided for the public were practically vacant, and that at the time he made application for admission to said court he saw a number of persons in the corridor leading to said court who apparently desired to get in, but were not permitted to do so by the officer at the door.

To the writ of certiorari the presiding judge returns as follows: "I hereby certify and return that the following statement of what occurred is a true and correct statement of all that occurred, within my knowledge, during the said trial, while court was in regular session, in reference to the exclusion of the public from the court-room, as appears from the stenographic minutes: 'Mr. Springer: My attention has been called to the fact that a large number of respectable citizens and tax-payers have been excluded from the court-room by the officer, who does not seem to be able to exercise any discretion whatever in that respect, and the talk around town is that this trial is a sort of star-chamber proceeding. The Court: You don't think so? Mr. Springer: I don't know, your honor. I don't know who has been excluded or who has not, but, for the sake of saving the point, I desire an exception to be entered on the record. The Court: I cannot give you an exception to that. That is not in the order of trial. That is not the way to get it. There is nothing before the court on that subject. I want to say this: The orders to the officer were that he should stand at the door, and see that the room is not overcrowded, but that all respectable citizens be admitted, and have an opportunity to get in when they shall apply. Mr. Springer: If your honor please, I understand.—The Court: If you can make any capital out of that, you can make it. Mr. Springer: I am not trying to make any capital out of it. The Court: It looks like that. Mr. Springer: In order to determine whether or not these things have been done, I think it would be well to call the officer to the stand to testify to what he has done. The Court: You propose to stop the trial now, and introduce extraneous matter. I do not propose to. Mr. Springer: Your honor, then I will take an exception to that. The Court: The officer has got his orders, and they are in accordance with the law, as I take it, and, if you have any objection, you will have to take it in some other way than by exception. Proceed with the trial.' And I hereby further certify and return that no order was ever made by me at or during the trial excluding any person or persons from the court-room during the said trial;

that the said trial was at all times during the same a public trial, within the meaning of the Constitution; that the said court was every morning, while the same was had, regularly opened by an officer thereof, duly authorized, and declared open for the hearing and trial of causes, and there were several places of ingress and egress accessible to persons wishing to visit the said court at all times, and there were always present during said trial several persons, and at most times a very large assembly of persons, apparently listening to the trial."

We cannot accept the conclusion of the judge; "that the trial was at all times during the same a public trial, within the meaning of the Constitution." The first clause of section 28 of article 6 of the Constitution reads as follows: "In every criminal prosecution the accused shall have the right to a speedy and public trial by an impartial jury." The right to a public trial is one of the most important safeguards in the prosecution of persons accused of crime. In this case, when the accused is upon trial for a crime, and if convicted his punishment is that he must suffer a life imprisonment,—a civil death,—an order is made by the court which violates the constitutional right of the accused and the statute enacted to protect the rights of parties in both civil and criminal cases. This right of a public trial is included in the same section of the Constitution as the right to a trial by an impartial jury of twelve men; to be informed of the nature of the accusation: to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense. It is not necessary to review the history of the administration of the criminal law in England, or to call attention to the abuses in its administration, to show the reason why these important provisions were inserted in our Constitution, which, in this respect, is but a reflection of similar provisions contained in all of the constitutions of the American states and of the United States. They are each and all enacted for the protection of rights of persons accused of criminal offenses, and each is a constant memorial of the great abuses practiced in England at one time and another prior to the American Revolution, in conducting criminal prosecutions. In *Hill v. People*, 16 Mich. 351, it was held that the accused person could not waive his constitutional right to a trial by a jury of twelve men, guaranteed to him under this section of the Constitution, and it was said by the court that "it is the duty of courts to see that the constitutional rights of the defendant in a criminal case shall not be violated."

In this case it is apparent that the constitutional rights of Murray were violated in the order of the court to the police officer stationed at the door of the court-room "that he should stand at the door, and see that the room is not overcrowded, but that all respectable citizens be admitted and have an opportunity to get in whenever they shall apply." It is shown beyond question that during the whole trial the court-room was

not overcrowded, nor were the seats provided for spectators occupied to any great extent. This officer was under the control of the court, and when the court was informed that he was excluding citizens and tax-payers he refused to take any notice of the complaint, and left the officer to exercise his discretion as to what respectable citizens he should admit. Is respectability of the citizen who desires to witness a trial to be made a test of the right of access to a public trial, and is that test to be left to the knowledge or discretion of a police officer? Must a citizen who wishes to witness a trial of a person accused, whether he be a friend, an acquaintance, or a stranger to the accused, present to the police officer stationed at the door of the Temple of Justice a certificate of his respectability? If so, by whom shall it be certified? By the mayor, the chief of police, or police commissioners, or by his pastor or clergyman? Neither the Constitution nor the law requires any such preposterous condition to the admission of a citizen to attend and witness a trial, either civil or criminal. The order of the court stationing the policeman at the door, with directions to admit none but respectable citizens, was not only a violation of the Constitution, but it was a direct violation of the public statutes of this State. Section 7244 of Howell's Statutes enacts: "The sittings of every court within this State shall be public, and every citizen may freely attend the same." This statute has been in force since 1846. It voices the sentiment of the people at the time the Constitution of 1850 was adopted. It gives expression to what is there meant by a public trial. Courts have no dispensing power when the Legislature has spoken. The judge who presided at the trial of this case was as much bound by this provision of law as the humblest citizen. The trial may have been an impartial one; the respondent may have been justly convicted; but it still remains that it was accomplished in violation of his constitutional and statutory right to a public trial. Edmund Burke never expressed a more important truth, when speaking respecting the suspension of *habeas corpus* at the time of the American Revolution, when he said: "It is the obnoxious and suspected who want the protection of the law." Courts of final resort cannot consider the question whether the respondent was justly convicted or not in passing upon questions of law presented for their consideration. It is for the protection of all persons accused of crime—the innocently accused that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair trial—that one rule must be observed and applied to all.

Since the case was submitted we have been furnished with a brief by Allan H. Fraser, in behalf of the people, who is the prosecuting attorney who secured the conviction of Murray. The position taken by the learned prosecutor in support of the conviction of Murray is: *first*, that the fact that Murray was not awarded a public trial cannot be raised or adjudicated upon *certiorari*; and, *second*, that he did have a public trial,

within the meaning of section 23, art. 4, of the Constitution.

We do not think that the errors brought up by the writ of certiorari could have been reached by a writ of error. Many facts which are shown in the affidavits and petition for the writ would not appear in the return to a writ of error or in a bill of exceptions. The bill of exceptions only brings up such facts as appear in the course of the trial in the presence of the court. And during the trial in this case the court plainly told the counsel for the accused that he could not raise the question in the way in which he was seeking to do it, and charged him with an effort to make capital out of his objections. The bill of exceptions would not have shown that the court-room was not crowded; that most of the seats provided for spectators were vacant; that many different persons, and the particular persons showing them to be citizens of the State, had applied for admission, and had been refused; none of these things could have appeared in the bill of exceptions. We think that they were properly raised and brought before the court by the writ of certiorari.

Three authorities are cited in support of the action of the judge. One is the case of *State v. Brooks*, 92 Mo. 573, 10 West. Rep. 679. In that case in the opinion handed down by the supreme court it was said that an objection was taken that the defendant did not have a public trial, and the court said: "This claim was based on the fact that during the early stages of impaneling the jury two men were stationed, on the afternoon of one day and the forenoon of the next day, at the door of the court-room, who refused to admit anyone into the court-room except jurors, witnesses, or officers of the court, or those having business in court. It appears that when this matter was brought to the attention of the court, the court stated that no order had been made stationing men at said door, and announced that anyone who wished to come into the court-room could do so, and made an order that all persons be admitted until the seats were full. Had the court either refused to make such an order, or if, after making it, had refused a request on the part of the defendant that jurors examined touching their qualifications while the men were stationed at the door should be re-examined, this might have afforded some ground for the complaint made; but no such request was made." This is not in any respect a parallel case to the one under consideration. In the *Brooks Case* the exclusion of the public only continued through the afternoon of one day and the forenoon of the next. In *Murray's Case* it lasted during the entire trial of two weeks. In the *Brooks Case* when the matter was called to the attention of the court, the court stated that no order had been made stationing a man at the door, and announced that anyone who wished to come into the court-room could do so, and made an order that all persons be admitted until the seats were filled. In *Murray's Case* the court made the order stationing the policeman at the door to see that all respectable citizens be admitted; that his attention was

called to the fact that respectable citizens and taxpayers were refused admission, and, instead of making an order that all citizens be admitted until the room was filled, he said that "the officer has got his orders, and they are in accordance with the law, as I take it, and if you have any objection you will have to take it in some other way than by exception. Proceed with the trial." The judge's position in *Murray's Case* finds no support whatever in the *Brooks Case*. We are also cited to the case of *People v. Kerrigan*, 73 Cal. 223. In that case the defendant was convicted of an assault with intent to commit murder. The defenses interposed at the trial were, "not guilty," and "insanity." During the progress of the trial in the court below the defendant became greatly excited, and indulged in profane and abusive language, addressed to the court and other officers of the court. Her conduct created so much commotion among the spectators that the trial was seriously interrupted, and the court found it necessary to make an order excluding spectators from the court-room. In deciding the case the court said: "The appellant claims that she was deprived of the constitutional right of a public trial, by the making and enforcement of this order. There is some controversy as to the scope of the order,—which was not entered in the minutes,—but the judge certifies that the order was 'that the lobby outside of the court-room should be cleared of spectators as their presence tended to irritate and excite the defendant, and that no persons except officers of the court, reporters of the public press, friends of the defendant, and persons necessary for her to have on said trial should be allowed to remain.' It appears, further, from the statement of the judge, that no order was made requiring the doors to be closed, and that in fact the friends of the defendant and reporters were permitted to come and go at will: that the order was made by the court on behalf of the defendant, as well as to preserve order, because the attendance and conduct of a large crowd of spectators evidently tended to excite the defendant, and it is apparent from the affidavits showing the conduct of the defendant and many of the spectators that such was the fact. In our opinion, the order and action of the court, as shown by the bill of exceptions, were not a violation of the defendant's right to a public trial. It was proper, we think, under the circumstances, to exclude from the court-room those who were excluded, not only because of the vulgar and profane language of the defendant herself, but such action was evidently necessary to protect the court from indignity and indecorum. No actual injury to the defendant is shown. It is not shown that any person who could have been of any service to the defendant on her trial was excluded. While it is very important that all the rights guaranteed by the Constitution to a person charged with crime should be fully and fairly awarded to him; it is also important that courts of justice should be upheld in the enforcement of all necessary and reasonable rules for the orderly, speedy, and effective discharge of their duties." Neither is this case an authority for what was done

in *Murray's Case*. The court did not order the court-room to be cleared of spectators, but the lobby outside. There is nothing in the facts of that case which assimilate in any degree to the trial of Murray. Here no violence is shown, no disorderly conduct, no violent or disgraceful action on the part of Murray, which tended to lessen the dignity of the court, or bring the administration of justice into disrepute.

I cannot accede to the correctness of the proposition intimated in that case that, if a public trial has not been accorded to the accused, the burden is upon him to show that actual injury has been suffered by a deprivation of his constitutional right. On the contrary, when he shows that his constitutional right has been violated, the law conclusively presumes that he has suffered an actual injury. I go further, and say that the whole body politic suffers an actual injury when a constitutional safeguard erected to protect the rights of citizens has been violated in the person of the humblest or meanest citizen of the State. The Constitution does not stop to inquire of what the person has been accused or what crime he has perpetrated; but it accords to all, without question, a fair, impartial, and public trial. There is no such limitation in the Constitution nor in our statute above quoted, from which it can be inferred "that the requirement is fairly met with, if without partiality or favoritism a reasonable proportion of the public is suffered to attend, notwithstanding that those whose presence would be of no service to the accused, and who would only be drawn hither by a puerile curiosity, would be excluded altogether." Who is to decide who are the friends of the accused? The law makes no such test, but allows all citizens freely to attend upon any trial, whether civil or criminal. Instances have been referred to by Judge Cooley in his work upon Constitutional Limitations, at page 380, (*812,) where, under certain circumstances, it might be proper to exclude a certain portion of the community from attending trials which would tend to degrade public morals, or would shock public decency, in which he says that at least the young should be excluded. There can be no objection to this so long as citizens of the State who have arrived at the years of discretion and manhood are permitted to freely enter. The learned commentator lays it down that "the requirement of a public trial is for the benefit of the accused, that the public may see he is fairly dealt with, and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions."

It is also urged that in this case the prisoner was accorded a public trial for the reason that there were several other ways of obtaining ingress to the court-room than that in which the public generally entered. The learned judge returns to the writ of certiorari "that there were several doors for ingress and egress accessible to persons wishing to visit the said court at all times." But this is a mere subterfuge. There was a public entrance, at

which the public applied for admission and were refused, and it is shown by the affidavits, or one of them, that one of the persons, knowing of the private entrance through the clerk's office, entered in that manner after being refused admission at the public entrance. It is not usual for the public to pass through these private entrances into the court-room, and it is no answer for the court to say that, although he stationed a policeman at the door of the public entrance there were other ways of ingress to persons who wished to gain admission. We have no hesitation in saying that the prisoner was denied the right of a public trial, and the proceedings in consequence must be declared a mistrial, and his conviction must be set aside and a new trial must be had. We are asked to discharge the prisoner, on the ground that he has been once in jeopardy, and cannot, therefore, be tried again. The question is a serious one, and we have considered it with care. The judgment and conviction are set aside in this case on a proceeding instituted by the prisoner, who is to be treated as if the judgment had been arrested on his own motion, and the judgment and verdict set aside. In such cases the plea of former jeopardy cannot avail. *State v. Hays*, 2 Lea, 156; *State v. Walters*, 16 La. Ann. 400; *State v. Redman*, 17 Iowa, 329; *People v. Casborus*, 13 Johns. 351; *State v. Norrell*, 2 Yerg. 24, 24 Am. Dec. 458; *Com. v. Hatton*, 3 Gratt. 623; *State v. Clark*, 69 Iowa, 196; *Gerard v. People*, 4 Ill. 362; *People v. Barrie*, 49 Cal. 342; *People v. Otwell*, 28 Cal. 456; *Morrisette v. State*, 71 Ala. 71; *People v. Helbing*, 61 Cal. 620; *Johnson v. State*, 29 Ark. 31; *People v. White*, 68 Mich. 648, 18 West. Rep. 763; *People v. Price*, 74 Mich. 37, 44; Bish. Crim. Law, §§ 1004, 1016. In *Hill v. People*, above referred to, one of the jury who convicted the prisoner was an alien, and therefore disqualified, and it was held that his conviction was a violation of section 28, art. 6, of the Constitution. The respondent in that case moved for a new trial upon that ground. This court in reversing the judgment ordered a new trial.

The judgment must be reversed, the prisoner must be remanded to the custody of the sheriff for the county of Wayne, and a new trial is ordered.

Morse, Long, and McGrath, JJ., concurred with Champlin, Ch. J.

Grant, J.:

I concur with my Brother Champlin in his opinion that the respondent was not accorded a public trial within the meaning of the Constitution and the laws of this State, but I cannot concur with him in holding that the writ of certiorari was the proper way to bring the case to this court. I think the writ was improvidently issued. The respondent offered testimony tending to show that persons had been excluded from the court-room during the trial by an officer in charge of the principal entrance to the court-room. The court refused to admit it. Respondent's counsel excepted. He should have settled a bill of exceptions, and brought the case to this court by a writ of error. It

is no answer to this to say that the trial court refused an exception. This no court could prevent. Counsel announced his exception, which was minuted by the stenographer, as shown by the return. No order was made by the court and entered upon the minutes. The judge had given instructions to the officer not to permit the court-room to be overcrowded. This instruction was proper, but he had no right to commit to the officer the determination as to who were respectable citizens to be admitted. It is apparent that the court could make no return to many of the statements made in the affidavits, for the facts they stated did not occur in his presence. The exclusion of citizens was a fact to be proven, like any other fact, and the truth should be elicited by examination and cross-examination. It does not seem to me to be the proper practice that so important a question should be determined in the court of last resort upon *ex parte* affidavits which contain many hearsay statements. To illustrate, several of the affiants say that the benches were practically vacant, without giving any statement or opinion as to how many were there. What is meant by "practically vacant?" How many, in the opinion of this witness, or how few, should be present in order to constitute such practical vacancy? Counsel for respondent recognized this as the proper practice, in raising the point upon

the trial, for, in a reply to a question by the court, he said: "I do not know who has been excluded or who has not, but, for the sake of saving the point, I desire an exception to be entered upon the record." Respondent was convicted May 8, 1890. August 28, 1890, he presented to one of the justices of this court a petition for a writ of certiorari which was allowed, and no steps appear to have been taken to bring the case to a hearing in this court until the October Term, 1891. The record contains less than ten pages. All the facts were known to the respondent and his counsel at the trial. All the papers could have been prepared in a few hours. The case could, and should, if presented at all, have been presented to this court at the June Term, 1890. Instead, however, the case rests for three and one-half months, until the time to settle a bill of exceptions has expired, and then, after obtaining an allowance of the writ, rests for thirteen months longer. Meanwhile it is probable that the people's testimony is scattered and lost. Such delays, if attributable to the respondent, do not comport with innocence, especially when he is in prison serving out his sentence. These delays cannot be too severely condemned. They are, in my judgment, a disgrace to the administration of the criminal law. For these reasons I think the writ should be dismissed.

FLORIDA SUPREME COURT.

Mary M. SUMMER, *Appt.*,

v.

Reuben S. MITCHELL.

(.....Fla.....)

*1. In 1865 the Laws of this State did not authorize the admission to record

*Head notes by RANNEY, CH. J.

NOTE.—Sufficiency of abbreviation to show official character of individual signing or attesting a document.

In McDonald v. Morgan, 27 Tex. 506, the court states that from the very foundation of our government it has been, and it continues to be, the general habit and custom with officers to use parts of words or letters to indicate the official capacity in which they are acting. Their use in this way has become a matter of general notoriety and information, and the courts are not bound to be ignorant of their meaning especially when the body of the instrument in connection with the law and purpose for which it was given clearly point out and indicate their significance.

In Stinson v. Russell, 2 Overt. 40, the court made a distinction between local and foreign deeds and between civil and criminal proceedings and stated that the courts are presumed to know the officers appointed under the laws of their State, and that if a deed was certified by one who appended to his signature the letters "C. G. C." and another who appended the letters "C. R.," it might properly be admitted as having been certified by the clerk of Green County, and by the county register. The court further said that the certificate of an indi-

of a deed acknowledged out of this State, but in another State of the United States, before a clerk or deputy-clerk of any court, or before a judge of any court not a court of record, and having a seal and clerk or prothonotary.

2. A Legislature has power, in the absence of any inhibiting constitutional limitation, and except as against prior vested rights, to cure by retroactive legislation defective acknowledgments of

vidual that he is an officer is not conclusive that he is such but that the court may inquire into his character and if he appears not to be an officer the deed might be rejected.

Where a power of attorney acknowledged before one who appended to his signature "J. P. and *Ex Officio* Notary Public," was objected to on the ground that it did not appear to have been acknowledged before an officer authorized to take acknowledgments of power of attorney, the court said that a certificate when made by a notary public and attested by his official seal is self-proving, for the law has made no provision for authenticating it; and that his acts must be accepted as competent and sufficient proof of the facts certified to until impeached in the proper manner. Goree v. Wadsworth, 91 Ala. 416.

In accordance with the doctrine of the above cases it has been held that:

The letters "J. P." affixed to a signature to the approval of a recognizance sufficiently show that the bond was approved by a justice of the peace. Shattuck v. People, 5 Ill. 477.

The letters "J. P." affixed to the signature of an officer to the certificate of acknowledgment of a feme covert to a deed is a sufficient designation

deeds in all cases where the purpose of the acknowledgment is the admission of the instrument acknowledged to record, or its use in evidence.

3. An effect of the "Act Providing for the Acknowledgment of Deeds and Other Conveyances," approved February 24, 1873, (§§ 16-19, pp. 218, 219, McClell. Dig.) is to authorize the acknowledgment of the execution of a deed for the record here, to be taken out of this State and according to the laws of the State where it may be taken, at least if the execution of the deed, as distinguished from its acknowledgment, is, as in the case at bar, in compliance with the laws both of Florida and of the State of its execution and acknowledgment.

4. The 4th section of the Act of February 25, 1873, (§ 19, p. 219, McClell. Dig.) which provides that any deed of conveyance heretofore executed and acknowledged in compliance with the previous provisions of the Act, should have the same force and effect and be as valid as if the same had been executed after its passage, was to validate, at least from the approval of such Act, any prior acknowledgment made out of this State of a deed conveying lands located here, if the acknowledgment conformed to its provisions, and certainly where, as in the case at bar, the execution of the deed, as distinguished from its acknowledgment, conformed both to the law of this State and that of the State of its execution and acknowledgment.

5. It is the established policy of the law to uphold certificates of acknowledgment of deeds, and, wherever substance is found, obvious clerical errors and all technical omissions will be disregarded. Inartificialness in their execution will not be permitted to defeat them, if looking at them as a whole, either alone or in connection with the deed, we find that they reasonably and fairly indicate a compliance with the law. Clerical errors will not be permitted to defeat acknowledgments when they, considered either alone or in connection with the instrument acknowledged, and viewed in the light of the statute controlling them, fairly show a substantial compliance with the statute.

6. The instrument acknowledged may be resorted to for support to the ac-

knowledge; and where the same name appears as a witness to the execution of the deed, and to the certificate of acknowledgment as the officer taking it, it may be presumed, in support of the certificate, that these names represent the same person.

7. Where the title of an officer taking an acknowledgment of a deed is written out in full in the body of the certificate, its omission from the signature is immaterial, and affixing it to the signature is itself sufficient. Initials may, however, be used, and are sufficient to designate such title.

8. The certificate of acknowledgment, either of itself or aided by the instrument, must show that the officer taking the acknowledgment is one authorized by law to do so; but initials are sufficient to show this, and if they, viewed in connection with the statute, reasonably indicate an officer designated by it as competent to take the acknowledgment, the certificate should be sustained.

9. Where the title of office stated in the body of the certificate of acknowledgment is one which the law did not authorize to take the acknowledgment, and the suffix to the signature, read in connection with the deed, if not alone, indicates an officer having such authority, the suffix will control.

10. A deputy may take an acknowledgment of a deed in his own name.

11. Where an instrument has been acknowledged in another State before a deputy-clerk of a court, signing himself as such, and affixing the seal of office, it will be presumed, in support of the certificate, that the clerk had authority to appoint a deputy.

12. The ordinary provisions of recording statutes do not contemplate that recording officers shall record official seals of public officers; and hence, where the acknowledgment of a deed, as recorded, indicates by its language that the official seal of the officer taking it was affixed to such acknowledgment, the absence of the seal, or of anything representing it, from the record, or from a transcript

that the officer is a justice of the peace and it is unnecessary that his official character be more fully set out in the body of the certificate. *Russ v. Wingate*, 30 Miss. 440.

So the letters "N. P." affixed to the signature to the jurat to an affidavit for the issuance of an attachment sufficiently show that the officer who signed the jurat was a notary public. *Rowley v. Berrian*, 12 Ill. 300.

So where the acknowledging officer is described in the body of a certificate as a commissioner of deeds it seems that it is sufficient to attach the abbreviation "Com." to the signature. *Sparrow v. Hovey*, 41 Mich. 708.

And an acknowledgment signed by one who appended the abbreviation "Commr" to his name was held sufficient in *Duval v. Covenhoven*, 4 Wend. 563.

The Illinois court has held that since the trial court may as a matter of convenience take notice of who are the justices of the peace for the county in which it is held without strict proof of their official character, a certificate of acknowledgment to a mortgage deed which describes the officer as an acting justice of the peace, and which has appended to the signature the letters "J. P." is sufficient to admit the deed in evidence if the officer was actually a justice of the peace. *Livingston v. Kettelle*, 6 Ill. 118, 44 Am. Dec. 186.

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So the letters "J. P." affixed to the signature of a *mittimus* are sufficient to show that the officer who signed it was a justice of the peace. *State v. Manley*, 1 Over. 423.

The principal case seems to carry the doctrine farther than it had before advanced. The *Stinson* and *Livingston* Cases tend towards the conclusion that the deeds were regarded as properly admissible in those cases because the courts could with reasonable effort ascertain whether or not the official was entitled to make the certificates without relying on the abbreviations.

In Michigan, where a deed executed in a foreign State was acknowledged before one who affixed the letters "J. P." to his signature, and the certificate of the county clerk attested to the character of the officer as a justice of the peace, the acknowledgment was held sufficient. *Final v. Backus*, 18 Mich. 218.

In the principal case, on the other hand, there was nothing to show that the attesting officer was what he pretended to be beyond his own statement, which the *Stinson* Case held to be not conclusive. He was not a notary public so as to be within the rule announced in the *Goree* Case. And the abbreviations were not as plain as they were in the cases which had preceded it.

H. P. F.

thereof, is not sufficient to overcome the presumption created by such language, that the officer's official seal was affixed to the original.

13. The Act of February 24, 1873, (pp. 218, 219, McClell., Dig.,) in relation to the acknowledgment of deeds, does not require other evidence of the official character of an officer taking an acknowledgment when he affixes his official seal to such acknowledgment.

14. If it does not appear that the introduction of a certified copy of the record of a deed was objected to in the trial court on the ground that it was not shown that the original was not within the custody or control of the party offering the copy, the appellate court will conclude that this requirement of the Constitution (§ 23, art. 16) was complied with or waived.

15. The effect of the Act of February 24, 1873, in relation to the acknowledgment of deeds, is to validate, at least from the approval of such act, a record made prior thereto of any deed cured thereby.

16. In 1863 the Laws of Georgia authorized the conveyance there of land located there by a writing signed by the maker and attested by two witnesses, and the record of the deed there upon an acknowledgment made there before a clerk of the superior court, or a justice of peace, but, unlike our statute as to the acknowledgment of deeds out of the State, did not require the certificate of acknowledgment to state that the officer taking it knew, or had satisfactory proof, that the person making it was the individual described in, and who executed, the deed. A deed purported to have been signed, sealed, and delivered in Thomas County, Ga., by H. L. H. and M. E. H., his wife, in the presence of two witnesses, one of whom signed his name, "T. C. Bracewell, J. P.," and the certificate of acknowledgment represented that it was acknowledged in the same county by H. L. H. and M. E. H. before (according to the body of the certificate) "the undersigned, deputy-clerk of circuit court" of the county; the conclusion of the certificate being: "In witness whereof, I herewith set my hand and seal of office the day and year above mentioned. T. C. Bracewell, Deputy-Clerk S. & J. C." Held, that the acknowledgment, whether deemed, as might be, to have been made before a deputy-clerk of the superior court, or a justice of the peace, was in accordance with the Law of Georgia, and validated by the Florida Act of February 24, 1873, as was the record made of the deed here in 1863 on such acknowledgment, and that a transcript of the record is admissible in evidence under section 21, art. 16, Const. 1885, though no representation of the seal of the officer taking the acknowledgment appeared on such record or transcript.

17. The statutes of another State of the Union must be proved by being introduced as evidence. Our courts do not take judicial notice of them.

(January 20, 1892.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Marion County in favor of defendant in an action brought to recover possession of certain real estate and the mesne profits thereof. *Reversed.*

Statement by Raney, *Ch. J.*:

The action is ejectionment for the recovery of an undivided half of lot 2, block 35, old 14 L. R. A.

survey of Ocala, and mesne profits, and was commenced in June, 1887, by the plaintiff, then a minor, through her next friend, she being the only surviving child of Adam G. Summer, who died in the spring or summer of 1866. To further sustain her action, she put in evidence a certified copy of the record of a deed in the office of the clerk of the Circuit Court of Marion County; such deed bearing date September 1, 1858, and purporting to have been made by Martha Baker, Robert Bullock, and Amanda Bullock, his wife, and to convey to H. L. Hart, in fee, the lot in question. She also offered in evidence a certified copy of the record in Marion County clerk's office of a deed bearing date July 9, 1868, and purporting to have been executed in Thomas County, State of Georgia, to be a conveyance in fee of the same property by Hart and wife to Adam G. Summer and Henry Smith; but, its admission in evidence having been objected to by defendant on the ground that the deed "had not been duly proven and acknowledged and recorded as required by law," the objection was sustained, the plaintiff excepting to the ruling, and having, in support of the admissibility of the deed, read in evidence sections 2690, 2705-2707, of the Code of the State of Georgia, (second edition, of date 1873, revised, corrected, and annotated by David Irwin, George N. Lester, and W. B. Hill).

Plaintiff then offered as a witness Robert Bullock, who testified that he was in possession of the lot in 1854, claiming title, had the lot under fence, built a livery stable, and operated and ran it, dug a well on the southwest corner of the lot, and so remained in possession until some time in 1858, when he sold it to H. L. Hart, and placed him in possession thereof; that Hart continued in the same business on said lot, running a livery stable, for a number of years thereafter. The following questions were asked the witness by plaintiff, and each of them was objected to, and the objection sustained; the plaintiff excepting to the rulings:

"(1) How long did H. L. Hart remain in actual possession of said lot after you put him in possession thereof? And state whether or not he was in possession, claiming title exclusive of any other right. (2) Were you in possession of said lot at that time, claiming title thereto exclusive of any other right? (3) State the character of the possession of H. L. Hart." This question being preceded by an offer to prove by the witness the character of Hart's possession, and being asked for such purpose. "(4) Who was in possession of said lot immediately after H. L. Hart?" This question being preceded by an offer to prove that Hart placed Summer in possession when he sold to him, and being asked for that purpose.

The plaintiff also introduced as a witness W. P. Trantham, who testified that he was acquainted with the premises in controversy, and knew Adam G. Summer; and then plaintiff asked him the following questions, each of which was ruled out on objection of defendant, and the ruling excepted to by plaintiff:

"(1) State how long Adam G. Summer

was in possession of said lot, and what was the character of the possession. (2) Was Adam G. Summer, prior to his death, in 1866, in actual possession of said lot?"

The plaintiff here offered to prove by the witness Robert Bullock that the possession of Bullock, Hart, and Summer followed in immediate succession, and was turned over from one to the other, and was continuous and adverse from 1854 to Summer's death, in 1866, each claiming title from the other in the order of succession, and for this purpose asked him the following question: "State whether or not the possession of said lot by Robert Bullock, H. L. Hart, and Adam G. Summer, from 1854 to 1866, immediately succeeded each other, and each claiming title from the other." The question was excluded on objection by defendant, and plaintiff excepted.

The plaintiff having rested, the defendant put in evidence a deed of conveyance in fee of the above property, dated May 1, 1866, from William E. Schoeffin and wife to H. E. Miller and Edwin Spencer.

Schoeffin, a witness for defendant, testified that he took possession of the lot in 1878; that he built a new fence around it, and built a house on it, and lived in it with his family until he sold it to Miller and Spencer; that it is the same house Mr. Hicks now lives in. On cross-examination he said that he built a new fence, and did not repair an old one; took away some old pieces of boards, and built a new fence. The house he built is the same one Hicks now lives in,—the same house that Wallace Dawkins put there; and witness put a new story on, and fixed it up the same as building a new one. The house that Mr. Hicks lives in is on lot 26, west of this one, but "I had all fenced up,—both lots." The house was partly in the street that runs between the two lots. At this time that street was not opened. "I told you that the house I built and lived in is the same one in which Mr. Hicks now lives, and had the whole thing under fence."

Defendant then introduced a deed from Miller and Spencer to the defendant, bearing date December 7, 1866, and purporting to convey to Mitchell and his heirs the lot in question.

The defendant having rested, the plaintiff introduced one Wallace Dawkins, who testifies that he lives in Ocala, and has seen the lot every day for the last twelve years. That he took possession of the lot in 1877, and put a fence around it. That he took possession by mistake, intending to locate on another lot, and got on this one by mistake. (Witness locates the lot on a map of Ocala handed to him.) That, when he found out his mistake, he moved off. That he built a house on the lot across the street from this one on the west. That he built it. That Schoeffin moved in the same house; moved in the same day, witness thinks, that witness moved out of the house. That the fence witness put around it was the same one that was there when Schoeffin went there. When witness went there, no fence was around the lot, and no houses. That no house was ever built on the lot, since witness knew it, un-

til after the big fire in 1884, when old man John Eliza put up his little stand, in December, 1884. It is the same place he now uses.

Mrs. Margaret Summer, mother of plaintiff, testified that her husband, Adam G. Summer, was seized and possessed of the lot. That it has been vacant for a number of years; not occupied until defendant took possession of it, something over a year ago. Does not know of plaintiff's possession within seven years. That Mr. Summer was engaged in some business upon the lot, but she does not know what the business was.

Plaintiff testified she had never had possession since her father's death.

Messrs. Fleming & Daniel, Bullock & Burford and E. L. Anderson for appellant.

No appearance for appellee.

Raney, Ch. J., delivered the opinion of the court.

Appellant sued appellee in ejectment, and the result was a judgment in favor of defendant.

The first error assigned is the refusal of the judge to admit in evidence a certified copy of the record of a deed of the land in controversy, a lot in Ocala, from Hubbard L. Hart, and Mary Elizabeth Hart, his wife, to A. G. Summer and Henry Smith. The deed purports to have been executed for and in consideration of \$600, in Thomas County, State of Georgia, July 9, 1863. Its conclusion is as follows:

"In testimony whereof, we, the said party of the first part, have hereunto set our hands and seals this, the day and year first above written. Hubbard L. Hart. [Seal.] M. E. Hart. [Seal.] Signed, sealed, and delivered in presence: Jacob Kubitskik. T. C. Bracewell, J. P."

The certificate of the acknowledgment made by the grantors of the execution of this deed is as follows:

"State of Georgia, Thomas County. Be it remembered that on this 22nd day of July, A. D. 1868, personally came before me, the undersigned deputy-clerk of the circuit court in and for the county and State aforesaid, Hubbard L. Hart and Mary Elizabeth Hart, who respectively acknowledged, each for himself and herself, and the said Mary Elizabeth Hart, being absent from her husband, the said Hubbard L. Hart, acknowledged voluntarily, without fear or compulsion of or from her said husband, that they signed, sealed, and delivered the foregoing instrument for the purposes therein mentioned. In witness whereof, I herewith set my hand and seal of office the day and year above mentioned. T. C. Bracewell, Deputy-Clerk S. & J. C."

The deed thus executed and acknowledged was admitted to record in the office of the clerk of the Circuit Court of Marion County on the 30th day of July, 1863, by the clerk of that court. His certificate of the record need not be set out. A copy of this record, duly certified March 19, 1868, by the then clerk, being offered in evidence, was objected

to by defendant on the general ground that the deed had not been duly proven, acknowledged, and recorded as required by law; and, the objection having been sustained, the ruling was excepted to.

The particulars wherein the acknowledgment or the copy of the record was objected to as being deficient are not stated in the bill of exceptions. Still, whatever objection might have been taken here to the generality of the objection below has been waived by the specifications of the particular grounds of objection in the brief of counsel for appellant, upon whose behalf alone the cause has been argued before us. *Carpenter v. Dexter*, 75 U. S. 8 Wall. 524, 19 L. ed. 429.

These grounds of objection are: (1) That it does not appear that the parties making the acknowledgment were known to the officer taking the acknowledgment; (2) a deputy cannot take an acknowledgment; (3) it does not appear that the officer acted within his jurisdiction; (4) the acknowledgment was taken before an officer who had no authority to take acknowledgment of deeds in this State.

At the time of the execution and acknowledgment of the deed in question, viz., July, 1868, the statute regulating the acknowledgment or proof, made out of the State, of deeds conveying any interest in real estate within the State for the purpose of being used or of entitling such deeds to be recorded here, was that of February 8, 1884, entitled "An Act Concerning the Authentication of Conveyances," as amended by Act of February 27, 1840. The first section of the Act of 1884 provided that the deed should be acknowledged by the party or parties executing the same, or that the execution thereof by such party or parties should be proved by a subscribing witness thereto, "before the officers hereinafter named, and in the manner and form hereinafter mentioned;" and its second section enacted that no acknowledgment or proof of any such deed "executed or acknowledged out of the State should be taken by an officer or officers aforesaid unless the officer taking the same shall know or have satisfactory proof that the person making such acknowledgment is the individual described in, and who executed, the deed or instrument under seal." Its third section provides, "in addition to the requisites contained in the preceding sections," for the privy examination of married women (residing out of the territory) executing such an instrument; and the fourth section made provisions as to the acknowledgments made out of the territory, but within the United States, and was supplanted and expressly repealed by the above-mentioned Act of 1840. This statute, entitled "An Act in Amendment of" the former Act, enacted that all such instruments acknowledged out of the territory, but within the United States or its territories, with the intent to be used or recorded here, should be acknowledged or proved before one of the commissioners appointed under the Act of January 24, 1881, and in those cities or counties wherein no commissioner "is or shall be appointed

under said law, or in case of his sickness, death, or inability to perform the duties of his office where he may have been appointed," that such acknowledgment and proof might be taken before the chief justice, judge, presiding justice, or president of any court of record of the United States, or of any State or Territory thereof, having a seal and a clerk or prothonotary; but that no proof or acknowledgment taken by any such chief justice, judge, presiding justice, or president should entitle such instrument to be recorded, unless taken within some place or district to which the jurisdiction of the court to which he belongs should extend, and that the place of taking such acknowledgment should be set forth in the certificate, and also that the court of which he was such officer was a court of record; and that such certificate of acknowledgment should be accompanied by a certificate of the clerk or prothonotary of the court, under its seal, to the effect that the former officer was duly appointed or authorized as such judge, justice, or president. The fifth section of the Act of 1884 relates to acknowledgments or proofs taken out of the United States, but in North or South America or in Europe; and the sixth or remaining section is that the certificate of such acknowledgment, as aforesaid, by the officer before whom the same shall be taken, shall contain and set forth substantially the matter required to be done or proved to make such acknowledgment effectual by this Act.

The above legislation is to be found in Thompson's Digest, pp. 181, 182, and McClellan's Digest, pp. 216, 217, the word "State" being properly substituted for that of "Territory," when applicable to Florida.

Thus the law as to such acknowledgment or proof stood in 1873; and we may further observe that, up to this time, acknowledgments or proof made in the State had to be made before the officer authorized by law to record the instrument, or before some judicial officer, (Act Nov. 15, 1828; McClell. Dig. § 6, p. 215,) or before a notary public, (Act Feb. 8, 1861; McClell. Dig. § 8, p. 792).

It is entirely clear that there was in 1868 no law in this State authorizing the admission to record of a deed acknowledged out of the State, and in another State of the United States, before a deputy-clerk or the clerk of any court, nor before even a judge of any such court, not a court of record and having a seal and clerk or prothonotary; and unless legislation, subsequent to that in force at the time this record was made, has legalized the record, there was no error in the ruling of the judge excluding the transcript as evidence, under section 21 of article 16 of the Constitution, which section is as follows: "Deeds and mortgages which have been proved for record, and recorded according to law, shall be taken as prima facie evidence in the courts of this State without requiring proof of the execution. A certified copy of the record of any deed or mortgage that has been or shall be duly recorded according to law shall be admitted as prima facie evidence thereof, and of its due execution, with like effect as the original, duly proved: Pro-

vided, it be made to appear that the original is not within the custody or control of the party offering such copy."

There was approved by the governor on the 24th day of February, 1873, a statute entitled "An Act Providing for the Acknowledgment of Deeds and Other Conveyances," whose first section, after providing that deeds, executed in this State, of any interest in lands herein, shall be executed in the presence of two witnesses, who shall subscribe their names as such, and that the persons executing such deeds may acknowledge the execution thereof before any judge, clerk of the circuit court, notary public, or justice of the peace within the State, enacts that if any such deed or conveyance of land shall be executed in any other State, Territory, or district of the United States, such deed may be executed according to the laws of such State, Territory or district, and the execution thereof may be acknowledged before any judge or clerk of a court of record, notary public, justice of the peace, or other officer authorized by the laws of such State, Territory, or district to take the acknowledgment of deeds therein, or before any commissioner appointed by the governor of this State for such purpose. Its second section provides that, if such deed be executed in a foreign country, it may be executed according to the laws of such country, and that any execution thereof may be acknowledged before certain officers designated therein; they being some of those designated in the fifth section of the Act of 1834, and others besides. The third section is to the effect that if any such deed or other conveyance shall be executed and acknowledged in any other State or country, before any officer not having an official seal, he shall have attached thereto a certificate of the clerk or other proper certifying officer of a court of record, or certificate of the secretary of state, minister extraordinary, minister resident, *charge d'affaires*, commissioner, or consul, as the case may be, that the person whose name is subscribed to the certificate of acknowledgment was at the date thereof such officer as he is therein represented to be, that he believes the signature of such person subscribed thereto to be genuine, and that the deed is executed and acknowledged according to the laws of such State, Territory, district, or foreign country. The fourth section of this statute is as follows: Any deed or conveyance heretofore executed and acknowledged in compliance with the provisions of this Act shall have the same force and effect, and be as valid, as if the same had been executed after the passage of this Act." The fifth or remaining section, providing that future conveyances, not recorded within six months after their execution, shall be void as against subsequent purchasers, was held void, on account of not being within the expression of the title of the Act, in *Carr v. Thomas*, 18 Fla. 736.

A purpose of this Act, as applicable to conveyances made in any other State of lands located here, was the adoption of the laws of that State regulating the acknowledgment of conveyances of any interest in real estate 14 L. R. A.

located there. This is made entirely clear by the provision of the third section, which requires that the certificate therein provided for, in cases where the officer taking the acknowledgment has no official seal, shall state that the deed "is executed and acknowledged according to the laws of such State, Territory, district, or foreign county." This provision implies, beyond doubt, that, wherever an acknowledgment shall be in accordance with the laws of the State where it was executed and acknowledged, it will be sufficient, however wanting it may be in any requisite prescribed by previous laws of our own State, as to acknowledging deeds executed beyond its limits. It is unnecessary to stop to inquire if the second section of the Act of 1834 is repealed; for, even if it is not, and a deed acknowledged in accordance with its provisions, as amended by the Act of 1840, will still be entitled to record, it is entirely clear that the Act of 1873 has established at least an additional rule, which renders any acknowledgment made in accordance with the laws of the State where it is executed sufficient, though its certificate does not state, in compliance with former legislation, that the officer taking the acknowledgment knew or had satisfactory proof that the person making it was the individual described in, and who executed, the deed. Had the deed in question been executed, acknowledged, and recorded subsequent to the Act of 1873, there would certainly have been nothing in the first objection made to the introduction of the copy of the record thereof; nor is there anything in this objection, if the fourth section, *supra*, of the Act of 1873, is not ineffectual, in so far as applicable to the circumstances of the case before us.

The power of a legislature, in the absence of any inhibiting constitutional limitation, to cure by retroactive legislation defective acknowledgments in all cases where the purpose of the acknowledgment is admission of the instrument acknowledged to record, or its use as evidence, is, except as against prior vested rights, unquestionable. The Legislature, when enacting the Statutes of 1834 and 1840, could have dispensed with any requirement as to acknowledgments to be found in them; and, this being so, it has the authority, as least in all cases of mere irregularity, or where no vested rights are affected, the power to do the same by subsequent legislation. *Cooley, Const. Lim.* 5th ed. 458, 471; *Jackman v. Barnett*, 20 Fla. 525; *Webb, Record Title*, § 97; *Gordon v. Collett*, 107 N. C. 362; *Barlow v. Morris*, 15 Ohio, 408; *Watson v. Mercer*, 33 U. S. 8 Pet. 88, 8 L. ed. 876; *Buckley v. Early*, 72 Iowa, 289; *Green v. Abraham*, 43 Ark. 420; *Johnson v. Richardson*, 44 Ark. 365.

The intention of the Legislature in enacting the fourth section of the Act of 1873 was at least to render valid any irregularity in the acknowledgment of a deed of conveyance of land which had been previously executed in another State, if the execution of the deed and of the acknowledgment were in compliance with the laws of the State where the execution took place. This intention extended to making the acknowledgment as

valid, at least, from the approval of the statute, as if at the time of the execution of the acknowledgment the law of this State had provided that deeds of conveyance executed according to the law of the State of their execution might be acknowledged according to the laws of the State regulating the acknowledgment there of deeds of lands located there.

Upon the trial of the cause, the plaintiff, to support the introduction of the above deed as testimony, read in evidence sections 2690, 2705-2707 of the Code of Georgia of 1878. The substance of these sections, so far as material here, is as follows:

Sec. 2690. A deed to lands in Georgia must be in writing, signed by the maker, attested by at least two witnesses, and delivered to the purchaser or someone for him, and be made on a valuable or good consideration.

Sec. 2705. Every deed conveying lands shall be recorded in the office of the clerk of the superior court of the county where the lands lie.

Sec. 2706. To authorize the record of a deed to realty, it must, if executed in Georgia, be attested by a judge of a court of record of that State, or a justice of the peace, or notary public, or the clerk of the superior court in the county in which the three last-mentioned officers, respectively, hold their appointments; or if, subsequent to its execution, the deed is acknowledged in the presence of either of the above-named officers, that fact certified on the deed by such officer shall entitle it to be recorded.

Section 2707 relates to proof by a subscribing witness.

These sections are shown by the Code to be legislation of prior date to the execution and acknowledgment of the deed under discussion.

It is apparent from the first of these sections that the deed, considered as separate from the acknowledgment, was executed in accordance with the law of Georgia; and as it was signed, sealed and delivered in the presence of two subscribing witnesses, such execution was also, we may state, in compliance with our own laws in force at that time, controlling the mere transfer of the title from Hart; and hence the deed is one which, in so far as the conveyance of Hart's fee is concerned, is valid and effectual under the laws of both states.

There was in the Georgia law nothing requiring the certificate to state that the officer taking the acknowledgment knew or had satisfactory proof that a person making an acknowledgment was the individual described in, and who executed, the deed; and, this being so, the first objection made to the acknowledgment and copy of the record offered in evidence fails. *Brunswick-Balke Collender Co. v. Brackett*, 37 Minn. 58; *Sandford v. Bulkley*, 80 Conn. 344.

The second and fourth objections will be considered together. Reversing the order of their statement, they are, in effect, that the acknowledgment was taken before an officer who had no authority to take it, according to (such being our understanding of the use

made of the word "in" by counsel in stating their fourth objection) the laws of this State, and was, moreover, taken before a deputy of such officer, and that a deputy could not take such an acknowledgment.

To decide whether the acknowledgment was made before or taken by an officer recognized by the Act of 1878 as competent to take it, we must first ascertain what officer took it. According to the body of the certificate, it was taken before a deputy-clerk of the Circuit Court of Thomas County, Ga.; but, when we look at the signature to the certificate, we find that he does not sign as acting in that capacity, and, moreover, we are not informed that there was any "circuit court" in Georgia. Counsel for appellant contends that the words and initials, "Deputy-Clerk S. & J. O.," stand for and mean, "Deputy-Clerk of Superior Court and Justice of Peace." To reach this conclusion they invoke the aid of the attestation of the deed, in which it will be found that a person of the same name, "T. O. Bracewell," is one of the attesting witnesses; he affixing to his signature there the initials "J. P." There is no doubt that the instrument acknowledged may be resorted to for support to the acknowledgment. *Einstein v. Shouse*, 24 Fla. 490; *Brunswick-Balke Collender Co. v. Brackett*, 37 Minn. 58; *Owen v. Baker*, 101 Mo. 407; *Wells v. Atkinson*, 24 Minn. 161; *Samuels v. Shelton*, 48 Mo. 444; *Sharpe v. Orme*, 61 Ala. 263; *Carpenter v. Dexter*, 75 U. S. 8 Wall. 513, 19 L. ed. 426; *Luffborough v. Parker*, 12 Serg. & R. 48.

In *Carpenter v. Dexter*, 75 U. S. 8 Wall. 513, 19 L. ed. 426, the deed purported to have been signed, sealed, and delivered in the presence of two witnesses, one of whom signed his name as "H. Wendell, Jr." The certificate of acknowledgment purported to have been taken before and signed by "H. Wendell, Jr., Justice of the Peace," and stated that "the above-named Walter T. Davenport, who has signed and sealed and delivered the above instrument of writing, personally appeared before" such undersigned justice of the peace, and acknowledged the same; but it omitted to state, in the language of the statute, that the person making the acknowledgment was personally known to the officer to be the person who executed the deed, or had been proved by credible witnesses to be such. The court, after observing that "one of the subscribing witnesses was the justice of the peace before whom the acknowledgment was taken," and referring to the above statement of the certificate as following immediately the attestation clause, remarks: "Read thus, with the deed, the certificate amounts to this: that the grantor personally appeared before the officer, and in his presence signed, sealed, and delivered the instrument, and then acknowledged the same before him. An affirmation in the words of the statute could not more clearly express the identity of the grantor with the party making the acknowledgment." In *Luffborough v. Parker*, 12 Serg. & R. 48, the statute required that deeds should be proved by a subscribing witness, and A. B. made the proof, which did not

state that he was a subscribing witness, yet by reference to the deed it appeared from his name that he was one, and the proof was held sufficient. It is apparent that in the former of these cases the identity of the witness and of the person taking the acknowledgment is presumed from identity of name, and that a similar presumption is made in the second case as to the person subscribing the deed as a witness and the one proving its execution; yet the court does not make this presumption supply of itself, in the former case, the express statement as to identity of the grantor and person acknowledging required by the statute to be made. In the other case no corresponding statement as to identity was exacted by the law controlling the certificate of proof of execution. Where a deed is referred to in a certificate in such manner as to connect the former with the latter, or make it substantially a part thereof, as is the case here, and, reading them together, there can be found a substantial compliance with the demands of the statute, the certificate should be sustained; but we cannot supply the statutory requirement of an express statement of a fact in a certificate by the mere presumption of such fact, and for the reason that the officer's statement, and not the presumption, is the evidence expressly called for by the statute to prove the particular fact. This rule is not violated in either of the above cases, nor by our concluding here, as we do, that the witness and deputy-clerk Bracewell were one and the same person. *Mott v. Smith*, 16 Cal. 534; *Hogans v. Carruth*, 18 Fla. 588. This conclusion or presumption does not, however, render the certificate of Bracewell sufficient under the second section of the Act of 1834; there being absent from it the substantial affirmative statement as to the identity of parties to be found in *Carpenter v. Dexter*.

The certificate of itself, or aided by the instrument acknowledged, must (unless parol evidence be admissible for such purpose,—a point not presented) show the character of the officer taking the acknowledgment; and, when we have learned this much, we must ascertain whether he was authorized to take it. The title of the officer may be written out fully in the body of the certificate, and when this is done its omission from the signature is immaterial, (*Colby v. McOmber*, 71 Iowa, 469; *Brown v. Farran*, 8 Ohio, 140); or it may be affixed to the signature, and, if so this is, of itself, sufficient, (*Devlin, Deeds*, § 501; *Russ v. Wingate*, 30 Miss. 440). The use of initials generally understood to stand for the title of an office will answer. In *Rouley v. Berrian*, 12 Ill. 198, where an officer affixed to his signature, "N. P. for the City of Quincy, in Adams County, Illinois" the initials were held to mean "Notary Public;" and "J. P." was decided to signify "Justice of the Peace" in *Shattuck v. People*, 5 Ill. 477. In *Russ v. Wingate*, 30 Miss. 440, the certificate began, "State of Mississippi, Hancock County," and concluded: "Given under my hand and seal this day and year above written. Lewis Y. Folsom, J. P. H. C. [Seal.]" There was no other des-

ignation of the officer, yet it was held to be a sufficient designation of the officer as a justice of the peace. See also *Final v. Backus*, 18 Mich. 218; *Sparrow v. Hovey*, 41 Mich. 708; *State v. Manley*, 1 Overt. 428; *Stinson v. Russell*, 2 Overt. 40; *Major v. State*, 2 Sneed, 15; *Burton v. Pettibone*, 5 Yerg. 442. In *McDonald v. Morgan*, 27 Tex. 508, the affidavit of a subscribing witness to a deed executed in Liberty County, Tex., was made March 13, 1838, before a person signing himself, "George W. Miles, R. L. C.," which was followed by a certificate of the record on May 4, 1838, of the deed "in my office," headed "Republic of Texas, Liberty County," and signed as above. A statute in 1841 validated all records of deeds acknowledged before certain officers, among whom was "the clerk of the county court in whose office such record is proposed to be made." The law in force at the time of the record made clerks of the county courts recorders for their respective counties; and it was held that the official character of the officer as clerk of the county court and *ex officio* recorder was sufficiently indicated. Somewhat on the same line is *Owen v. Baker*, 101 Mo. 407, where there was a certificate giving at the outset the State and county, and signed, "James C. Jackson, Recorder," and stating in the body that the grantor appeared "in open court" and acknowledged the deed; such certificate being followed by a statement similarly signed, twenty days subsequently, to the effect that the subscriber had duly recorded the instrument. The statutes required the acknowledgment to be made before the circuit court of the county wherein the estate was situated, and that the clerk of the court should indorse upon the deed a certificate thereof, "under the seal of the court;" and it also made the clerk of the designated court recorder of deeds. "Jackson, who signed the certificate," says the opinion, "was recorder only by virtue of his office as circuit clerk. His description of himself, therefore, as recorder, indicated likewise that he was circuit clerk, and, with the recitals in the acknowledgment made it clear that it was taken by him as clerk. As circuit clerk, he was authorized to take the acknowledgment, but as recorder he had no such authority. . . . In this case the acts of the sheriff [the grantor] and court, described in the certificate of Jackson, were valid if performed before him as clerk, but not as recorder."

Not only do the courts hold initials sufficient to indicate the character of the officer taking an acknowledgment, but they do not permit clerical errors to defeat or render acknowledgments ineffectual, when they, considered alone, or read in connection with the instrument acknowledged, fairly show a substantial compliance with the statute. In *Blythe v. Houston*, 46 Tex. 65, 79, there was offered in evidence a certified copy of the record of a deed, which was objected to on the ground that the certificate of acknowledgment did not show of what county the officer giving the certificate was notary public, nor that he was a notary public when the acknowledgment was taken. The certificate

commenced, "The State of Texas, County of Hopkins," and recited the appearance of the parties before the "undersigned authority," and concluded, "Witness my hand and official seal at Douglass, this 6th day of October, A. D. 1854," being signed, "John R. Clute, Notary Public N. C." "The objection" says the Supreme Court of Texas, "was, we think, properly overruled. . . . The discrepancy between the county named in the outset, and the letters designating his county, appended to the signatures, might easily be accounted for and certainly was not of sufficient importance to invalidate the record." In reaching this conclusion the court remarks that *McDonald v. Morgan, supra*, "is nearly in point as to the sufficiency of the signature, which, it must be assumed, was authenticated with the official seal of the notary, showing the words, 'Notary Public County of — Texas,' " *Merchants' Bank of St. Louis v. Harrison*, 39 Mo. 483, is a case in which the notary public who took the acknowledgment of a deed offered in evidence described himself in the body of the acknowledgment as a notary public within and for the county of Livingston, but appended to his signature his official character in the following words: "Notary Public Howard County;" and the supreme court said they were inclined to think that the deed should have been admitted, but, being excluded, there was still evidence enough to show a prima facie right to recover. In *Agan v. Shannan*, 103 Mo. 661, the certificate of acknowledgment, after stating that W. L. H. Frazier appeared in the probate court, in open court, and acknowledged the deed, concluded, including the signature, as follows: In testimony whereof, I, W. L. H. Frazier, judge of said court, have hereunto set my hand and affixing my private seal. . . . M. L. Wyrick, Probate Judge." A private seal was affixed, and there was also a statement that no seal of office had yet been provided. It was held, overruling *Lincoln v. Thompson*, 75 Mo. 623, that the certificate was good.

Viewing the certificate of acknowledgment in the light of the Georgia law, it must be held sufficient if we can learn from the certificate, either alone or aided by the instrument acknowledged, that the acknowledgment was made before or taken by any officer authorized by such law to do so. From the Georgia law, as proved, it appears that, among other officers, either a clerk of a superior court or a justice of the peace could take in that State an acknowledgment of a conveyance of land situate therein; and hence, if the description following and constituting a part of the signature fairly indicates either of these officers, the acknowledgment must be sustained. Invoking, as we lawfully may and properly should do, the aid of the attestation of the deed, our conclusion is that each of the above official capacities is sufficiently indicated. The final "C." may, in the light of the authorities, be regarded as a clerical error, and intended for a "P.;" and, so treating it, the quotation would read, "Deputy-Clerk of the Superior, and Justice of the Peace." The omis-

sion of the word "Court," or the letter "C," as standing for "Court," after the letter "S," cannot be regarded as material; but its absence, in view of the liberal principles of law always obtaining and to be applied in support of these instruments, will be supplied. The letter "S" can, in view of the Georgia law, be given no other signification than as standing for "Superior;" and informed as we are, by this law, that a clerk of the superior court may perform the official functions in question, we must elect between ignoring the clear indication of the words "Deputy-Clerk Superior," and defeating the acknowledgment, or of regarding them in the light of the statute and supplying the word "Court" as a clerical omission, and sustaining the certificate. Instruments like these, say the authorities, must be construed *ut res magis valeat, quam pereat*, and in dealing with them it should be the aim of the courts to preserve and not to destroy. *Einstein v. Shouse*, 24 Fla. 490; *Kelly v. Calhoun*, 95 U. S. 710, 24 L. ed. 544; *Carpenter v. Dexter, supra*; *Toucheard v. Crow*, 20 Cal. 150, 160, 81 Am. Dec. 108. It is the policy of the law, observes the Supreme Court of Minnesota in *Brunswick-Balke Collender Co. v. Brackett, supra*, to uphold certificates of this character; and, wherever substance is found, obvious clerical errors and all technical omissions or defects will be disregarded. Again, should we read, as it might be said we should, the final "C" as standing for or intended to indicate the word "Court," so that the entire suffix to the signature should read, "Deputy-Clerk of Superior and Justice Court," it seems to us entirely clear and reasonable to hold that thus read, in connection with the attestation, it was intended by the officer to indicate his dual official capacity of clerk and justice. If nothing followed the signature but "J. C." or "Justice Court," we would be obliged, in view of the attestation and the law, to hold that it was a clerical error or an inaccuracy, and intended to indicate the official character of justice of the peace; and it is nothing more than reasonable to hold that the last two initials, if to be read, the former as "Justice," and the latter as "Court" or "Courts," were used, the former as standing for "Justice," and the latter as applying, not only to it, but also to "Superior" as indicated by the letter "S." Again, if it is to be assumed that "J." does not stand for "Justice," but for some other word, there is still enough to signify the office of clerk of the superior court.

Inartificialness in the execution of these instruments cannot be permitted to defeat them, if, looking at them as a whole, we find that they reasonably and fairly indicate a compliance with the law.

In reaching this conclusion, we have not overlooked the use of the word "circuit" in the body of the certificate. Our judgment as to this is that, in the absence of evidence that there is any such court in Georgia, the suffix to the signature must control, as showing that the person taking the acknowledgment was acting in the authorized official capacity indicated by it, and that the word "circuit" was written at least unadvisedly.

even if by the officer himself, and is to be controlled by the designation following his signature, which is to be presumed to have been made by him, and to have been a subsequent, if not the last, act in the matter. *Carlisle v. Carlisle*, 78 Ala. 542.

In what has been said, the fact that the acknowledgment was taken by a deputy, if taken in the capacity of clerk of the superior court, instead of that of a justice of the peace, has not been noticed. In *Hope v. Sawyer*, 14 Ill. 254, a question arose upon the legality of the record in Illinois of a deed acknowledged in Missouri; the certificate of acknowledgment being signed in the name of the clerk of the circuit court, "by E. Baker, Deputy-Clerk." It was objected that the acknowledgment should have been made before, and certified to by, the clerk, in person. "The objection," says the opinion, "is not well founded. The acknowledgment purports to have been taken by the clerk, and it is certified in his name and under the seal of the court. Prima facie, this is sufficient. The seal of the court proves itself, and we must presume that it was affixed by the proper officer. The presumption is that the clerk was authorized by the laws of Missouri to act through a deputy, and that Baker was regularly appointed as such. The deputy had the power to use the name of the clerk, and attach the seal of the court. . . . The certificate in question was none the less the act of the clerk because made by his authorized deputy." Devlin, Deeds, § 475; Webb, Record Title, § 62. In *Small v. Field*, 102 Mo. 104, where an acknowledgment of a deed to land in Missouri, taken before a deputy-clerk of a territorial district court in Washington Territory, was held sufficient, notwithstanding the statutes of the United States providing for the appointment of the clerk of such court made no provision for a deputy, though deputy-clerks of territorial courts are expressly spoken of elsewhere in the statutes, the Supreme Court of Missouri observed: "If necessary to uphold this certificate, we would presume that a law of the territorial legislature was in existence authorizing the appointment of a deputy-clerk. . . . Moreover, the seal of the court, being affixed to the certificate, carries with it prima facie evidence that it was rightfully affixed, and throws the burden of overcoming the prima facie case thus made on the objectors to the sufficiency of the certificate." *Musser v. Johnson*, 42 Mo. 74, 97 Am. Dec. 816.

In the case before us, it is to be presumed, from the words of the certificate to such effect, that the seal of office of the clerk of the superior court was impressed upon the original certificate. The absence from the record or from the transcript of such seal or anything as representing it, is not sufficient to overcome the presumption created by such words. The ordinary provisions of statutes regulating the recording of instruments do not contemplate the inscription of public official seals upon the record. Devlin, Deeds, § 700; Webb, Record Title, § 74; *Geary v. Kansas*, 61 Mo. 378; *Hammoid v. Gordon*, 93 Mo. 223, 11 West. Rep. 904; *In-*

goldaby v. Juan, 12 Cal. 564; *Smith v. Dall*, 13 Cal. 510; *Jones v. Martin*, 16 Cal. 166; *Griffin v. Sheffield*, 38 Miss. 359, 77 Am. Dec. 646; *Hedden v. Overton*, 4 Bibb, 406; *Sneed v. Ward*, 5 Dana, 187; *Ballard v. Perry*, 28 Tex. 347; *Witt v. Harlan*, 86 Tex. 660; *Coffey v. Hendricks*, 68 Tex. 676; *Gale v. Shillock* (Dak.) 29 N. W. Rep. 666. In *Jones v. Martin*, *supra*, where, as here, the body of the certificate indicated a seal by apt words, the words "No seal" appeared in the certified copy, where the notarial seal should have been; and it was held that these words did not imply that no seal was affixed to the instrument by the notary who took the acknowledgment, but was a mere note of the recorder of the place of the notarial seal, which he probably had no means of recording, and which it was not necessary that he should record.

As it is to be presumed from these words of the certificate that a seal was impressed upon the original, the only distinction between the case at bar and those cited from Illinois and Missouri is that here the certificate is signed by the deputy simply in his own name, without using that of the clerk. There is conflict of authority as to how such certificates of acknowledgment should be executed when they are made by deputies. In Tennessee it was held (*Beaumont v. Yeatman*, 8 Humph. 542) that such certificates should be in the name of the deputy; and likewise in a late case in Georgia, where an acknowledgment was taken out of the State, (*MacKenzie v. Jackson*, 82 Ga. 80,) and in California a certificate was held valid which stated that "before me, the undersigned, county clerk of Sonoma County, personally appeared . . ." and was signed "John A. Brewster, Deputy County-Clerk of Sonoma County," the principal's name not appearing (*Touchard v. Crou*, 20 Cal. 130, 81 Am. Dec. 108). See also *Rose v. Newman*, 26 Tex. 181, 80 Am. Dec. 646; *Cook v. Knott*, 28 Tex. 85. In *Talbott v. Hooper*, 12 Bush, 408, where the acknowledgment was in fact taken by the deputy-clerk but the name of the clerk alone was signed by such deputy to the certificate, the acknowledgment was decided by the Supreme Court of Kentucky to be valid, and this, too, although the deputy was a minor; the statute not prescribing the qualifications of a deputy. The doctrine of this case is that all official acts should be done in the name of the clerk, and not in that of the deputy. The view expressed in Devlin on Deeds (§ 474) is that the signature of the deputy alone does not invalidate the acknowledgment, but that the better practice is for the deputy to sign the name of the principal, by himself as deputy. That this is the better rule in all cases where a deputy acts, we will not deny; but in view of the conflict of authority, and the liberal views governing, in cases of these acknowledgments, we cannot hold this certificate invalid on account of the manner in which the deputy has signed, but must regard it as sufficient in this respect; and this being so, and the presumption being that the official seal of the clerk of the Superior Court of Thomas County, Ga., was

affixed to the original certificate of acknowledgment, and rightfully so, (*Touchard v. Crowe, Small v. Field, supra.*) the certificate must be sustained, though executed by a deputy and in another State. That the act is one which in its nature may be performed by a deputy cannot be denied (*Devlin, Deeds, § 478; Webb, Record Title, § 63;*) and there is in view of the authorities cited above as to deputies, and the manner in which they may sign, in the fact that the name of the clerk does not appear, nothing to except this certificate from the rule which presumes prima facie that the appointment of Bracewell as the deputy-clerk was valid. *Hope v. Sawyer and Small v. Field, supra.*

If we refer the taking of the acknowledgment to Bracewell's capacity as justice of the peace, then the certificate shows that he had an official seal, as such officer; and no other evidence of such capacity is required by the Act of 1878, *supra.*

In *Carpenter v. Dexter, supra.* it is announced as law that where one State recognizes acts done in pursuance of the laws of another State the courts of the former will take judicial cognizance of those laws, so far as may be necessary to determine the validity of the acts alleged to be in conformity with them. We find no other decision to this effect, the general rule being that the statute law of another State is to be proved according to the law of the former, in which the trial is had. *Tuten v. Gasan, 18 Fla. 751; Session v. Doe, 7 Smedes & M. 190; Whart. Ev. § 302; Greenl. Ev. §§ 486, 489.* We may remark, however, that we are not advised that the application of the rule announced by the Supreme Court of the United States would have led to a conclusion against the validity of the acknowledgment in question.

A further question, suggesting itself, is what effect is to be given the fact that the record in Marion County was made before the Act of 1873? Does this fact except such record, or a transcript thereof, from the effect of the provision of our Constitution set out

above? The Act of 1873 was, in effect, an amendment of the existing prior legislation referred to in this opinion. As has been shown in the statement of that legislation, a purpose of it was the regulation of the acknowledgment and proof, made out of the State, of deeds of lands here, for the purpose of their being used or recorded here. Upon the approval of the Act of 1878 the acknowledgment of the deed became as valid as it would have been, from the date of its execution, had it been acknowledged after the approval of the Act; and a record of this deed, made upon the originally defective acknowledgment, immediately after the statute became operative, would have been as valid, for all purposes involved in this cause, as if the deed had been acknowledged subsequent to the approval of the statute. This deed, as acknowledged, standing upon the record, as it did at the time the Act became effective, we see no good reason why the record was not, from that time, as valid as if it had been made immediately after the approval of the statute; or, in other words, why it was not duly recorded from that time. Such, we think, was the logical and necessary effect of the statute upon the existing record. The deed was duly recorded from that time, and the record or a certified copy was admissible, under the section of the Constitution set out above. *East v. Pugh, 71 Iowa, 162; Fowler v. Merrill, 52 U. S. 11 How. 375, 18 L. ed. 736.*

No objection that the original was not within the custody or control of the party offering the copy appears to have been made, and hence we conclude that this requirement was complied with or waived.

That the officer acted within his jurisdiction appears sufficiently upon the face of the certificate. *Devlin, Deeds, §§ 482, 486.*

Other assignments of error need not be noticed.

The judgment must be reversed, and remanded for proceedings not inconsistent with this opinion. It will be so ordered.

SOUTH CAROLINA SUPREME COURT.

J. T. WILLIAMS *et al.*, Receivers of the Georgia Construction & Investment Co.,
v.

W. C. BENET.

(.....S. C.....)

1. There is a quorum of the supreme court under a constitutional provision that the court "shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum" where the two associate justices or one of them and a person "learned in the law," commissioned by the governor in place of the other associate justice who is disqualified to sit, are present in the case although there is a vacancy in the office of the chief justice.

NOTE.—For note on the general subject of a quorum, see *Lawrence v. Ingersoll* (Tenn.) 6 L. R. A. 308.

14 L. R. A.

2. A person learned in the law commissioned by the governor under Const., art. 4, § 6, to take the place of an associate justice of the supreme court, who is disqualified to sit in a particular case, becomes *pro hac vice* the associate justice of that court so far as that case is concerned.

(January 12, 1892.)

MOTION to set aside a judgment rendered by the Court on April 28, 1891, for the alleged reason that the court was at the time of rendering such decision not a constitutional court and that for that reason the decision was null and void. *Motion denied.*

The facts upon which the motion was based are fully set out in the opinion.

Messrs. Parker & McGowan and S. C. Cason in support of the motion.

Messrs. Westmoreland & Haynsworth, contra.

McIver, Ch. J., delivered the opinion of the court:

This is a motion to set aside the judgment heretofore rendered in this case, upon the ground that the court, as organized at the time of the hearing, as well as at the time of the rendition of said judgment, was not a constitutional tribunal, invested with power to hear and determine said cause. The facts out of which this contention arises are undisputed, and are as follows: The late *Chief Justice Simpson* having died on the 26th day of December, 1890, and the vacancy in that office thereby occasioned not having been filled, the supreme court was left with only two members, the two surviving associate judges; and, one of them being disqualified from hearing this case by relationship to one of the parties, his honor *Judge Wallace* was duly commissioned by his excellency, the governor, in place of the associate justice thus disqualified, under the provisions of section 6 of article 4 of the Constitution; and the court, being thus constituted, heard this case in January, 1891, and rendered the judgment now in question. Under this state of facts it is contended on behalf of the appellant (1) that a chief justice is an essential constituent of the supreme court, and consequently when, as in this case, that office has become vacant by the death of the incumbent, the two surviving associate justices cannot, under the provisions of the Constitution of this State, constitute a valid constitutional supreme court; (2) that, if this position cannot be sustained, then a supreme court composed of one associate justice and a person "learned in the law," commissioned by the governor, in place of the other associate justice, disqualified as above stated, to hear and determine a given case, is not a valid constitutional tribunal.

Although we think that the first question has already been concluded by the principles laid down in the case of *Sullivan v. Speight*, 14 S. C. 355, yet, in deference to the earnestness and ability with which the view now contended for by the appellant has been presented by his counsel, we are not unwilling to reconsider the whole question. It seems to us that the express terms of the Constitution in section 2 of its fourth article leave no room for doubt as to its true construction. That section reads as follows: "The supreme court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum. They shall be elected by a joint vote of the General Assembly for the term of six years, and shall continue in office until their successors shall be elected and qualified. They shall be so classified that one of the justices shall go out of office every two years." It will be observed that this section provides (1) for the number and titles of the officers who are to constitute the court; (2) what portion of the whole number shall constitute a quorum; (3) the mode of election and term of office of these officers; (4) such a classification of these officers as shall insure an election for one of these officers every two years. It is also manifest that the first provision, fixing the number of members of the supreme court, is qualified by the second provision, prescribing that a portion less than the whole number shall constitute a quorum, 14 L. R. A.

which unquestionably means such a proportion as will be competent to transact the business committed to the body or tribunal to which the term is applied. So, also, the third provision, as to the term of office, is likewise qualified by the fourth, at least so far as the first election was concerned, in order to insure the classification, which was more distinctly provided for in the next succeeding section, which provision, it has been held in *Simpson v. Willard*, 14 S. C. 191, applies as well to the chief justice as to the associate justices. While, therefore, the section under consideration does declare in general terms that the supreme court "shall consist of a chief justice and two associate justices," this general declaration is qualified by the words immediately following in the same sentence, "any two of whom shall constitute a quorum;" the plain meaning of which is that, while the number composing a full court is three, yet any two of the three named shall constitute a quorum for the transaction of any business committed to such tribunal. The language being "any two" of the three officials just named, we are unable to conceive by what authority a court could construe such language as confining the provision to some particular two of the three, for that would entirely destroy the force of the word "any," and render necessary the interpolation of some other words, not found in the section. The fact that there is a difference in official title between the chief and his associates, and that the General Assembly has, by statute, provided a different salary and a higher rank for the chief justice, and has invested him with certain powers not conferred upon the associate justices, cannot affect the question as to whether the Constitution has made the chief justice one of the essential elements of the supreme court, for that must be determined by the provisions of the Constitution itself; and, as we have seen, those provisions do not, either in express terms, or by necessary implication, constitute the chief justice an essential element of the supreme court in such a sense as, without that officer, there can be no such court competent to transact the business appertaining to such a tribunal. On the contrary, as it seems to us, the terms of the Constitution necessarily imply that any two of the three officers composing a full court are competent to transact such business, whether such two consist of the chief justice and one of the associate justices, or of the two associate justices only.

It is contended, however, that there cannot be a constitutional quorum without there is in existence the full number of members provided for by the Constitution. If this proposition be true as applied to the supreme court, we see no reason why it should not be true of every other body of which a number less than the whole is legally declared to be a quorum; and we think we may safely venture to say that such a proposition as to any other body has never been accepted, and never could be accepted, as correct, without paralyzing, to some extent at least, the arm of at least two of the great departments of the government. Such a proposition rests upon a fundamental misconception of the term "quorum," and the purposes for which it is used. The very purpose

providing for the transaction of business of given body or tribunal by a quorum is to prevent the stoppage of the public business if a portion of the whole membership may, for any cause, fail to attend at the time appointed; and whether such failure results from some temporary cause cannot affect the question. The mischief intended to be remedied against is the failure of the whole body to attend, and we do not see how it possibly make any difference whether the failure results from one cause or another. Notwithstanding the criticism which has been indulged in of the illustration used in *Sullivan v. Speights*, *supra*, drawn from the constitutional quorum of the House of Representatives, we still think the analogy is striking. The Constitution, in section 4 of article I declares that "the House of Representatives consist of one hundred and twenty-four members;" and, in section 8 of the same article "the Senate shall be composed of one member from each county" except Charleston, shall be allowed two senators; and then, in section 14 of the same article, it is declared a majority of each House shall constitute a quorum to do business." Now, confining attention to the House of Representatives it is not perfectly apparent that the language found in these constitutional provisions is practically identical with a declaration that the House of Representatives shall consist of one hundred and twenty-four members, any three of whom shall constitute a quorum; and, if such was the language, the analogy would be perfect. If the House consists of one hundred and twenty-four members, and a majority of the House is required to be a quorum, it is practically the same as saying that any 63 members of the House shall constitute a quorum; and this has been said in the case of *State v. Williams*, 8 S. C. 367.

A similar illustration may be drawn from the established practice of the highest tribunal in this country. In the Act of Congress (Rev.

S. § 678) providing for the organization of the Supreme Court of the United States the language used is practically identical with that found in our Constitution establishing the Supreme Court of this State, viz., that "the Supreme Court of the United States shall consist of a chief justice of the United States and five associate justices, any six of whom shall constitute a quorum;" and although, upon two very recent occasions, that tribunal was deprived by death of its chief justice, the necessity of the court has been proceeded without question, so far as we are informed by the surviving associate justices.

It is urged that the court in rendering its opinion in *Sullivan v. Speights*, *supra*, distinguished between the simple absence of one of the constituent members of the Court and a vacancy in the office of one of the members of the court, and did not distinguish between the effect of a resignation and the effect of a death of one of the members of the court. And in this connection it is contended that the court overlooked the provision in section 6 and section 11 of article 4 of the Constitution, as well as that portion of section 12 which declares that the chief justice and associate justices "shall continue in

office until their successors shall be elected and qualified." While it is quite true that these sections, thus claimed to have been overlooked, are not specially referred to in the opinion prepared by the late chief justice in *Sullivan v. Speights*, yet it by no means follows that such sections were overlooked. On the contrary, it is well known to the surviving members of the court as it was then constituted that the whole subject was carefully examined and thoroughly discussed before the opinion was prepared, which expressed the deliberate opinion of every member of the court; but this fact is not mentioned with a view to forestall further discussion of the sections just referred to, but simply for the purpose of removing or preventing any impression which might possibly arise that so grave a question as the court was then called upon to decide received but slight consideration. Recurring to these provisions which are supposed to have been overlooked, let us inquire how they affect the question under consideration. Section 6 reads as follows: "No judge shall preside on the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by affinity or consanguinity" etc.; and then proceeds to provide for supplying the place of any judge thus disqualified. Now, from the very terms of this section it is very manifest that its purpose was, not to declare or provide anything in regard to the necessary elements constituting the supreme court, but simply to prevent an interested judge from sitting at the trial of a case in which he was thus disqualified. We do not see, therefore, that this section throws any light whatever upon the question under consideration. Section 11 is in these words: "All vacancies in the supreme court . . . shall be filled by election, as herein prescribed: provided, that if the unexpired term does not exceed one year, such vacancy may be filled by executive appointment." Upon this section, in connection with the provision in section 2, that the justices of the supreme court "shall continue in office until their successors shall be elected and qualified," it is argued that there can be no vacancy in the office of a justice of the supreme court except by death or by expiration of the term for which he was elected, and, as a consequence, that a resignation does not create a vacancy, because the language used in section 2—"shall continue in office until their successors shall be elected and qualified"—is imperative, and prevents any vacancy until the successor has not only been elected, but has qualified. This is a decidedly novel proposition, and one which cannot readily be accepted. If well founded, then it seems to us that it would be impossible to fill the office of a justice who resigns during his term, or who accepts some incompatible office, or removes from the State; for the only provision is that "all vacancies" shall be filled either by election or appointment, accordingly as the unexpired term may be for a year or more; and, if resignation, acceptance of an incompatible office, or permanent removal from the state creates no vacancy, then we see no authority for holding an election or making an appointment to fill the office which had thus been deserted. A construction

leading to such results would not readily be accepted, even if the express terms of the Constitution pointed more clearly to such a conclusion than they do. The view contended for rests largely upon the assumption that the words, "shall continue in office until their successors shall be elected and qualified," must be construed as imperative, and that the effect of these words is to forbid a justice of the supreme court from vacating his office by resignation or otherwise before the expiration of the term for which he has been elected. But this view ignores the well-settled rule that in the construction of a statute or a constitution the word "shall" may receive a permissive, rather than an imperative, interpretation, when necessary to carry out the true intent of the provision in which such word is found. Endl. Interp. Stat. § 816; *Cairo & F. R. Co. v. Hecht*, 95 U. S. 168, 24 L. ed. 423. See also *Potter's Dwar. Stat.* 220; *Sedg. Stat. & Const. Law*, 483, 489.

It seems to us that the manifest object of the section of the Constitution in which the words relied upon occur was not to require imperatively that a justice of the supreme court should, under all or any circumstances, hold his office until his successor might be elected and qualified, but simply to permit him to do so. The purpose was not to compel an officer to remain in office until his successor should be elected, but only to permit him to do so.

The framers of the Constitution must be regarded as having contemplated the contingency that at some time all of the members of the supreme court would not be in attendance, and, therefore, to provide for such a contingency, after declaring who should constitute the supreme court, they immediately afterwards, and in the same sentence, qualified this general declaration by providing that any two of the constituent members of the court should constitute a quorum, so that the court might proceed with its business just as if the court were full. Any other view would, it seems to us, completely nullify the provision for a quorum. There is nothing whatever in the Constitution indicating an intention that the provision for a quorum should only apply in case of a temporary absence of one of the members of the court; and, on the contrary, the language used is equally applicable where the failure of such member to attend is occasioned by death, as where it results from some temporary cause.

Such, as we have seen, is the accepted view in relation to the highest judicial tribunal in this country, where the language constituting it is practically identical with that which we are called upon to construe, and such, so far as we are informed, is the universally accepted view in relation to all bodies where provision is made for a quorum. We are at a loss to perceive how the provision in section 11 of article 4 for filling all vacancies in the office of a justice of the supreme court can affect or in any way qualify the distinct declaration that any two of the justices shall constitute a quorum, for the framers of the Constitution must be regarded as knowing that some time would necessarily elapse before a vacancy could be filled; and the very purpose of the provision for a quorum was to enable the tribunal to proceed with its business during such time as might elapse before the vacancy could be filled, so as to prevent delay in the transaction of the public business. We are entirely satisfied, therefore, that, in any view of the question, where the office of chief justice has been vacated by death, the two surviving associate justices, constituting a quorum of the court, are fully competent to exercise all the powers conferred upon the supreme court.

The second question does not seem to have been seriously pressed in the argument, and we have no doubt as to its solution. When his honor *Judge Wallace* was commissioned by the governor, under the provisions of section 6 of article 4 of the Constitution, to take the place of *Mr. Justice McGowan*, disqualified, "for the trial and determination" of this case, he thereby became *pro hac vice* an associate justice of the supreme court, and, as such, invested with all the powers incident to that office so far as the trial and determination of this case was concerned; and hence we are of opinion that the supreme court, composed of the senior associate justice and *Judge Wallace*, commissioned to preside in this case as above stated, constituted a legal and competent tribunal, fully authorized to render the judgment in question in this case.

In accordance with these views the order refusing the motion to set aside the judgment in this case because rendered by an illegal and incompetent tribunal has heretofore been entered.

Pope and Wallace, JJ., concur.

OHIO SUPREME COURT.

Lloyd HAWVER, *Pf. in Err.*,

v.

William WHALEN *et al.*

(.....Ohio.....)

*1. Where the owners of a city lot, in the course of constructing thereon a building abutting on a street, make, by their

own employes, an excavation in the adjacent sidewalk for coal vaults, and an area to be used in connection with the building, a duty devolves upon them to guard it with ordinary care; and this duty is not shifted from them by letting the work of building the area walls and constructing the coal vaults to an independent contractor, who is to furnish all the material as well as perform the labor necessary therefor.

NOTE.—Exceptions to the rule that an employer is not liable for acts of an independent contractor.

An employer cannot relieve himself from liability by contracting with another for the performance of work, the necessary or probable effect of
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which will be to injure third persons. *Ohio E. R. Co. v. Morey*, 7 L. R. A. 701, 47 Ohio St. 257.

Or in other words if an injury might be anticipated as a direct or probable consequence of the performance of work contracted for, unless re-

2. In such case if the excavation is not guarded or covered with ordinary care, one who, without fault on his part, falls into it, and is injured, may maintain an action against the owner of the premises to recover damages therefor, although the defective covering had been put over it by the contractor or his servants.

(February 2, 1892.)

ERROR to the Circuit Court for Cuyahoga County to review a judgment reversing a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

Statement by **Bradbury, J.:**

Plaintiff averred in his petition "that said defendants took up and removed said sidewalk in front of said premises, and built therein coal vaults and a private passageway, and then re-laid said walk in part, leaving openings therein some twelve feet long and four feet wide and some nine or ten feet deep," and "covered said openings over with old and loose boards entirely insufficient to protect and make safe public travel upon said sidewalk, and said places were left by said defendants without proper protection, and without any light or signal to indicate danger;" and "that as the plaintiff . . .

was lawfully traveling on and along said sidewalk, . . . without fault or negligence on his part, he stepped upon one of said boards, . . . when the same gave way and

precipitated him into said excavation, whereby his ankle was dislocated and his leg broken," etc. These averments were all put in issue by the answer interposed by the defendants. The plaintiff in error prevailed in the court of common pleas. Thereupon the defendants in error instituted in the circuit court proceedings in error, which resulted in the reversal of the judgment of the court of common pleas on the ground that the latter court erred in the instructions which it gave to the jury upon the trial. To reverse the judgment of the circuit court, and reinstate that of the court of common pleas, is the object of the proceedings in this court.

Mr. E. J. Blandin, with Messrs. Samuel M. Eddy and H. J. Caldwell, for plaintiff in error:

Where a right is possessed, and a duty is attached to the exercise of that right, such duty must be performed, and the person possessing the right cannot relieve himself from the liability through the intervention of an independent contractor. A person owning property abutting on a street, with his lot gets the right at law of placing coal vaults and area-ways under the street. Attached to this right is this duty of keeping the street safe for those using it. Hence he cannot relieve himself from this duty.

Carman v. Steubenville & I. R. Co. 4 Ohio St. 899.

In the case on trial the defendants in error could have made their contract obliging their contractor to have kept a protection around

sonable care is used the negligence of the contractor or his employes will be chargeable to the person for whom the work is done. *Ibid.*; *Woodman v. Metropolitan E. Co.* 4 L. E. A. 213, 149 Mass. 336.

Or, in slightly different expression, one cannot by employing an independent contractor, relieve himself from liability for the doing of work from which injury will naturally result to another unless means are adopted to prevent it. He must see that such means are employed although the contractor stipulates to take the risk and responsibility. *Bower v. Peate*, L. R. 1 Q. B. Div. 321; *Dalton v. Angus*, L. R. 6 App. Cas. 829, 831, affirming L. R. 4 Q. B. Div. 162, reversing L. R. 3 Q. B. Div. 85.

This rule applies to the employment of a contractor to make excavations near the foundation of a house which has a right to support. *Ibid.* See also *Dorrity v. Rapp*, *infra*.

The negligence of a contractor in taking down a house connected with another by a party-wall is not chargeable to the proprietor. *Butler v. Hunter*, 7 Hurlst. & N. 828.

The fall of the wall of a building because of the contractor's negligence will not make the owner liable. *Robinson v. Webb*, 11 Bush, 464.

But see *infra* as to nuisance.

The negligence of a contractor in failing to guard properly an excavation lawfully made for a building will not charge the proprietor with liability. *Clark v. Fry*, 8 Ohio St. 358, 73 Am. Dec. 590.

The negligence of a contractor for the building of a house, to whom possession is surrendered for that purpose, in failing to guard a cellar extending into the street, is not chargeable to the owner. *Pfau v. Williamson*, 63 Ill. 16; *Scammon v. Chicago*, 25 Ill. 424, 19 Am. Dec. 384; *Allen v. Willard*, 57 Pa. 374.

Building a house adjacent to a public street with
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the usual and necessary excavations and the consequent obstructions to sidewalks and streets is not necessarily dangerous or hazardous, nor does it constitute a nuisance so as to make the owner liable for the negligence of an independent contractor. *Moline v. McKinnie*, 30 Ill. App. 412.

On the other hand, it has been decided that negligence of a contractor in leaving open and unguarded an area in a public street which he is employed to construct in the course of preparations for building is chargeable to the proprietor. *Robbins v. Chicago*, 71 U. S. 4 Wall. 467, 18 L. ed. 427.

And again that an excavation six or eight feet deep running to the edge of the pavement in a populous city, if left at night without sufficient lights and guards, is a nuisance for which the owner is liable no matter what may have been his contract for doing the work. *Matheny v. Wolffe*, 2 Duvall, 137.

The owner of premises is liable for leaving unguarded a cellar dug thereon close to the curbstone for the purposes of a vault where he had the digging, mason work and building done by separate contractors he himself furnishing the stone and lime. *Homan v. Stanley*, 55 Pa. 464, 5 Am. Rep. 380.

But in this case the owner was apparently the party who had direct control.

For negligence of a teamster who is employed by a contractor in depositing boards in a highway in front of buildings to be repaired, the owner is not liable. *Hilliard v. Richardson*, 3 Gray, 349, 63 Am. Dec. 748. See also *Blake v. Ferrie*, *Darmstadter v. Moynahan* and *Matthews v. West London Water Works Co.* *infra*.

The owner of a building is not liable for damages by flooding premises with water on account of the obstructions of a gutter and water spout on the building while in process of construction by a con-

this unsafe place. They did not do this. Having made the contract without providing for protection, they are responsible for this cheap method.

Cincinnati v. Stone, 5 Ohio St. 88; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408; *Hughes v. Cincinnati & S. R. Co.* 39 Ohio St. 461; *Circleville v. Neuding*, 41 Ohio St. 465; *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590; *Cincinnati, H. & D. R. Co. v. Van Dorn*, 15 Week. L. Bull. 292; *Kuhn v. Reninder*, 16 Week. L. Bull. 366.

Where the danger was one necessarily inherent in the work the general rule does not apply.

Canal E. & W. Co. v. Cincinnati, 17 Week. L. Bull. 117; *Hundhausen v. Bond*, 36 Wis. 29; *Deford v. State*, 30 Md. 179; *Rowell v. Williams*, 29 Iowa, 210; *Joliet v. Harwood*, 86 Ill. 110, 29 Am. Rep. 17; *Matheny v. Wolfe*, 2 Duval, 137; *St. Paul Water Co. v. Ware*, 88 U. S. 16 Wall. 566, 21 L. ed. 485; *Wolf v. Banning*, 3 Minn. 205; *Baltimore v. O'Donnell*, 53 Md. 110; *Harper v. Milwaukee*, 30 Wis. 374; *Palmer v. Lincoln*, 5 Neb. 186, 25 Am. Rep. 470; *McAmus v. Citizens Gas L. Co.* 40 Barb. 380; *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Buffalo v. Holloway*, 7 N. Y. 493, 57 Am. Dec. 550; *Lowell v. Boston & L. R. Corp.* 23 Pick. 24, 34 Am. Dec. 33; *Sturges v. Cambridge Soc. for P. of T. E.* 130 Mass. 415; *Shipley v. Fifty Associates*, 106 Mass. 194, 8 Am. Rep. 318; *Robbins v. Chicago*, 71 U. S. 4 Wall. 657, 18 L. ed. 427; *Chicago v. Robbins*, 67 U. S. 2 Black, 418, 17 L. ed. 296; *Lockwood v. New York*, 2 Hilt. 66; *Detroit v. Corey*, 9 Mich.

185, 80 Am. Dec. 78; *Darmastatter v. Moynahan*, 27 Mich. 188; 2 Dillon, Mun. Corp. § 1080; *Homan v. Stanley*, 66 Pa. 464, 5 Am. Rep. 389; *McCleary v. Dougherty*, 3 Duer, 27; *Wright v. Holbrook*, 52 N. H. 120, 18 Am. Rep. 12; *Stone v. Cheshire R. Corp.* 19 N. H. 437, 51 Am. Dec. 200, note; *Dacey, Parties*, p. 469, § 451; *Thomp. Neg. p.* 901, § 24; *Wood, Mast. & Serv. p.* 624; *Burgess v. Gray*, 1 C. B. 578; *Ellis v. Sheffield Gas C. Co.* 2 El. & Bl. 767; *Pickard v. Smith*, 10 C. B. N. S. 470; *Hole v. Sittingbourne & S. R. Co.* 6 Hurlst. & N. 488; *Gray v. Pullen*, 5 Best & S. 970; *Tarry v. Ashton*, L. R. 1 Q. B. Div. 314; *Bower v. Peate*, L. R. 1 Q. B. Div. 321.

Meers, Estep, Dickey, Carr & Goff, for defendants in error:

The rule of *respondent superior* does not apply in case of an injury sustained by reason of negligence in the manner of conducting the execution of a job of work in building a house, where the house builder, by a contract with the owner of the lot, has taken upon himself the responsibility of the employment of his own hands, and the control and direction of the work in conformity with the terms of the contract.

Clark v. Fry, 8 Ohio St. 358, 72 Am. Dec. 590; *Gwathney v. Little Miami R. Co.* 13 Ohio St. 93; *Shindelbeck v. Moon*, 32 Ohio St. 264, 30 Am. Rep. 584; *King v. New York Cent. & H. R. Co.* 66 N. Y. 181, 38 Am. Rep. 87; *Hezamer v. Webb*, 2 Cent. Rep. 439, 101 N. Y. 877; *Smith v. Simmons*, 103 Pa. 32, 49 Am. Rep. 113; *Kepperly v. Ramsden*, 65 Ill. 354; *Bennett v. Truebody*, 66 Cal. 609; *Connors v.*

tractor who failed to follow the agreed specifications in respect to such gutter and spout. *Gilbert v. Beach*, 4 Duer, 423.

Contractors with parish authorities to pave a certain district are not responsible for the neglect of a sub-contractor in leaving stones unguarded at night obstructing a public way. *Overton v. Freeman*, 11 C. B. 572.

The duty of a person keeping a lamp suspended over a sidewalk to keep it safe for those passing under it is not avoided by employing an experienced workman to put it in repair, and the owner is liable for injury caused by its fall due to the negligence of the repairer. *Tarry v. Ashton*, L. R. 1 Q. B. Div. 314.

The owner of a building, who has employed a contractor to raise the roof, in which work a derrick is employed extending over a sidewalk on which people are constantly passing, is not required to place a barricade across the sidewalk or station a person there to give warning in order to relieve him from liability for injury to such travelers occasioned by negligence of the contractor. *Vanderpool v. Huson*, 28 Barb. 196.

A tenant is liable for the negligence of the servants of a coal dealer while delivering coal in leaving open a trap door in the platform of a railroad depot through which the coal is delivered because the act of opening the trap door was that of the tenant, who should have taken reasonable means to prevent mischief. *Pickard v. Smith*, 10 C. B. N. S. 470.

But a modern case in this country decides that for negligence of teamsters unloading coal in leaving a coal hole in a sidewalk uncovered the occupants of the premises are liable only in case they had the right to direct or control the mode or manner of the delivery. *Olapp v. Kemp*, 122 Mass. 481.

For negligence of a contractor in building a dam, 14 L. R. A.

which bursts before its completion and acceptance, the proprietor is not liable. *Boswell v. Laird*, 5 Cal. 469, 66 Am. Dec. 345.

A natural gas company is not liable for an explosion caused by the negligence of a contractor who in laying its pipes has caused a break in the mains of another gas company which results in an explosion. *Chartier's Valley G. Co. v. Waters*, 123 Pa. 220; *Chartier's Valley G. Co. v. Lynch*, 10 Cent. Rep. 623, 118 Pa. 363.

For the neglect of a contractor to block up shafts of a disused mine in making a reservoir on land over it for a millowner, whereby an adjoining mine is flooded by water breaking into and passing through these shafts, the millowner is liable. *Rylands v. Fletcher*, L. R. 3 H. L. 330.

A town committee is not liable for negligence of a contractor in setting fire for clearing land. *Wright v. Holbrook*, 52 N. H. 120, 18 Am. Rep. 12.

Blasting.

On the ground that the work is intrinsically dangerous, a city is liable for damages caused by blasting in a street, done by a contractor in constructing a sewer. *Joliet v. Harwood*, 86 Ill. 110, 29 Am. Rep. 17; *Buddin v. Fortunato*, 31 N. Y. S. R. 278; *Logansport v. Dick*, 70 Ind. 73, 35 Am. Rep. 163.

But in conflict with these cases are decisions that negligence in blasting under a contract to grade streets, which does not give to the city control over the manner of conducting the blasting, will not render the city liable for resulting injuries. *Paek v. New York*, 3 N. Y. 222; *Kelly v. New York*, 11 N. Y. 432.

And that a village is not liable for damages caused by the negligence of a contractor in blasting for a sewer on account of which a traveler's team is frightened. *Herrington v. Lansingsburgh*, 110 N. Y. 145.

Hennessey, 119 Mass. 96; *Hailey v. Troy & B. R. Co.* 57 Vt. 262, 53 Am. Rep. 199; *Carter v. Berlin Mills*, 58 N. H. 52, 42 Am. Rep. 572; *McCarthy v. Second Parish of Portland*, 71 Me. 818; *Cuff v. Newark & N. Y. R. Co.* 85 N. J. L. 17, 10 Am. Rep. 205; *Wabash, St. L. & P. R. Co. v. Farmer*, 9 West. Rep. 691, 111 Ind. 195, 60 Am. Rep. 696; *Overton v. Freeman*, 11 C. B. 867.

Bradbury, J., delivered the opinion of the court:

The defendants in error, who were also defendants in the court of common pleas, admitted in their answer to the petition of the plaintiff that they were the owners of a leasehold estate in the premises on which the building was being constructed, and that the street and sidewalks upon which it was situated constituted a thoroughfare on which there was "a large amount of travel;" but they denied every other allegation of the petition. Notwithstanding this, however, there is no real controversy in the evidence over any material fact in the case, except as to the kind and quality of the boards that were laid over the hole into which plaintiff fell, and extent of the injury he sustained thereby; the main contention of the defendants being that the work was being done by an independent contractor, and that the negligence, if there was any, was that of the servants of the latter, over whom defendants had no control, and for whose acts they were not responsible. Upon this theory of the case the defendants, on the trial in the court of common pleas, requested that court to in-

struct the jury as follows: "(8) If 'the jury find from the evidence that the defendants had let the work of constructing the building and area in question to contractors, who were to do all the work and furnish all the materials on their own credit, with their own means, and that the defendants, while the work was in progress, had no possession or occupancy of the premises, and had no control of the mode or manner in which said contractors should do the work, other than to accept or reject the work as being in compliance or non-compliance with the contract, then the defendants are not responsible for any injury resulting to the plaintiff in consequence of the negligence of said contractors or any of their employes in not guarding the said area with proper protections or coverings.'" This instruction the court refused to give to the jury, and the defendants exerted. The doctrine contained in the instruction thus requested and refused is in strict accord with the holding of this court in *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590, from which we are not inclined to recede, where the facts make it applicable, but on the other hand are not disposed to extend it to other states of fact, not strictly analogous to those of that case. The instruction thus asked and refused assumes that evidence had been submitted to the jury from which they could find a state of facts in all essential respects like that in *Clark v. Fry*, *supra*; that is, that the defendants had let the work of constructing the building to independent contractors, and had given to them the entire control and occupancy of the premises while the work was in progress. If the

And that a city is not liable for injuries from blasting done by a contractor in improving a street. *Blumb v. Kansas City*, 84 Mo. 112, 54 Am. Rep. 87.

Again, the owner of premises is not liable for the negligence of a contractor in blasting thereon. *Gourder v. Cormack*, 2 E. D. Smith, 254.

On the other hand, the Supreme Court of the United States decides that the negligence of a contractor in blasting in a street to make trenches for the pipes of a water company is chargeable to the company. *Ware v. St. Paul Water Co.* 2 Abb. U. S. 261, affirmed *St. Paul Water Co. v. Ware*, 88 U. S. 16 Wall. 566, 21 L. ed. 485.

An early Ohio case decides that the employment by a railroad company of a contractor to remove rock, where blasting is contemplated, renders the company liable for injuries caused by the blasting. *Carman v. Steubenville & I. R. Co.* 4 Ohio St. 399.

And an early New Hampshire case also decided that the acts of a railroad contractor in blasting, whereby a traveler in a public highway was injured, are the acts of the company employing him. *Stone v. Cheshire R. Corp.* 19 N. H. 427, 51 Am. Dec. 200.

But this case was questioned in *Wright v. Holbrook*, 52 N. H. 120, 18 Am. Rep. 12, and so far as it supports the above doctrine was overruled in *Carter v. Berlin Mills*, 58 N. H. 52, 42 Am. Rep. 572, which sustains the case only on the ground that there was no independent employment.

A recent decision of the New York Supreme Court, General Term, decides that for injuries by blasting done by a contractor employed for the particular work of excavating and blasting on premises of a railroad company in constructing the road, the company is liable. *Booth v. Rome, W. & O. T. R. Co.* 17 N. Y. Supp. 336.

But this case seems difficult to distinguish from a prior decision of the court of appeals of that 14 L. R. A.

State to the effect that for negligence in blasting on the part of those employed in constructing a railroad for a contractor who has a contract for the entire work of construction, and has agreed to be responsible for all damages done by blasting, the railroad company is not liable. *McCafferty v. Spuyten Duyvil & P. M. R. Co.* 61 N. Y. 178, 19 Am. Rep. 267.

So in Maine the carelessness of contractors in blasting for a railroad bed does not render the company liable although the blasting was contemplated and a stipulation made that any damages therefrom should be paid by the contractor. *Tibbetts v. Knox & L. R. Co.* 62 Me. 437.

And in Pennsylvania a railroad company is not liable for the negligence of a contractor in blasting rock while constructing its road. *Edmundson v. Pittsburgh, M. & Y. E. Co.* 1 Cent. Rep. 868, 111 Pa. 316.

The balance of authorities therefore seems to be against the liability of a railroad company for negligence of an independent contractor in blasting, although such work was contemplated by the contract.

For negligence in respect to nitro-glycerine clandestinely stored by a sub-contractor engaged in the construction of a railroad in a magazine made for storing the oil necessary for the work of blasting, in consequence of which an explosion occurs while an employe is attempting to fill an order sent by the owner of such nitro-glycerine, the railroad company is not liable. *Cuff v. Newark & N. Y. R. Co.* 85 N. J. L. 17, 10 Am. Rep. 205.

In unlawful work.

One who employs a contractor to dig up a street unlawfully is liable for injury resulting although it was caused by negligence of an independent

evidence did not tend to prove such a state of facts as the instruction assumed, the proposition of law which it embraced was an abstract one, and the refusal to give it to the jury was not error. It becomes necessary, therefore, to ascertain whether or not evidence had been introduced tending to prove the state of facts thus assumed. It is true that the circuit court did not reverse the judgment of the court of common pleas because of the refusal to give this instruction, but did so on the ground that certain instructions that were given were erroneous. Nevertheless, it becomes necessary to determine whether the rule declared by this rejected instruction was applicable to the facts or not; for, if so applicable, its rejection was error requiring a reversal of the judgment, and the judgment of reversal should be affirmed, although placed upon some other ground, which, in the opinion of this court, was not sufficient to warrant it. In such case the judgment would be the proper one, whatever may have been the reason assigned for its rendition.

The plaintiff placed his right of action upon this state of facts: That the defendants were constructing a large brick building, and had left a number of openings for areas along the

front end of it, each of which extended along the end about 12 feet and out into the sidewalk 3 or 4 feet, over which it was their intention to place iron gratings, and that, by reason of their neglecting to sufficiently guard these holes, he fell into one of them, and was injured. This the defendants denied. They did not, however, attempt to controvert the fact that the openings had been left, into which plaintiff had fallen, but, without pleading that the building was being constructed by an independent contractor, sought to ground their defense upon that circumstance, by requesting the instruction now under consideration. The only contract respecting the building or its construction disclosed by the record is one put in evidence by the plaintiff, and which reads as follows: "The agreement between Wm. Whalen & Chas. Stegkemper, first party, and John Gawne & Sons, second party, witnesseth: That the specification and plans signed by parties, and every clause thereof, is made a part of this agreement, and said second party hereby agrees to begin as soon as possible after July 1, 1888, and to do, perform, finish, and complete, in the manner therein stated, all the work set forth and referred to in said specifica-

contractor. *Ellis v. Sheffield Gas Con. Co.* 2 El. & Bl. 707.

One who employs a contractor to make an excavation in a public street without any right to do so is liable for injuries resulting to a person who falls into it, whether the workmen are guilty of negligence or not. *Creed v. Hartmann*, 29 N. Y. 501, 86 Am. Dec. 341; *Congreve v. Smith*, 18 N. Y. 79, 72 Am. Dec. 495.

For direct result of contract.

Where an obstruction or defect which occasions an injury results directly from acts which a contractor agrees and is authorized to do, the person who employs him and authorizes him to do those acts is equally liable to the injured party. *Robbins v. Chicago*, 71 U. S. 4 Wall. 657, 18 L. ed. 427.

An obstruction to a street by a contractor, if purely collateral, will not render the employer liable; but it is otherwise if this is the direct result of the work contracted for. *Palmer v. Lincoln*, 5 Neb. 136, 26 Am. Rep. 470.

If a contract with a boom company obliges the contractor to so run and manage the logs and water as to damage riparian owners, such damage is legally attributable to the company. *McDonnell v. Rifle Boom Co.* 71 Mich. 61.

But the unreasonable use of a stream by an independent contractor for driving logs will not render the employer liable. *Carter v. Berlin Mills*, 58 N. H. 52, 42 Am. Rep. 572.

For negligence of a contractor in constructing a drain into a sewer through a plank barrier which surrounds the block of buildings underneath the surface of the street, whereby after the work is finished tide water flows through the opening made in the barrier to the damage of an adjoining cellar, the person who employed the contractor is liable. *Sturges v. Cambridge Soc. for P. of T. E.* 180 Mass. 414.

A city is liable for damages to a house from the settling of the earth over a sewer built by a contractor where this was the result of withdrawing the sheath piling from the sewer as provided by contract. *Lockwood v. New York*, 2 Hilt. 86.

The fall of a building while being remodeled by a contractor, which is due to a defect in an old wall which he was ordered to use, renders the owner liable. *Horner v. Nicholson*, 56 Mo. 220, 14 L. R. A.

The owner, and not the contractor, is liable for the falling of a wall, which is due to improper plans and specifications. *Lancaster v. Connecticut Mut. L. Ins. Co.* 10 West. Rep. 409, 92 Mo. 460.

Effect of duty imposed upon principal in respect to the work.

The omission to perform a statutory duty is not excused by contracting with another to do it. *Gray v. Pullen*, 84 L. J. Q. B. 265; *West Riding & G. R. Co. v. Wakefield Local Bd.* 31 L. J. M. C. 174; *Houston & G. T. N. O. R. Co. v. Meador*, 50 Tex. 77.

This applies to the failure of a contractor properly to fill up a drain dug by him. *Gray v. Pullen*, *supra*.

The "person causing" an excavation to be made near a wall on adjoining land, who is by statute required to preserve the wall from injury, cannot escape liability for failure to do so by employing an independent contractor. *Dorrity v. Rapp*, 72 N. Y. 307.

This principle also applies to the duty of a railroad company as to fences and stock guards. *Houston & G. T. N. O. R. Co. v. Meador*, 50 Tex. 77; *Rockford, R. I. & St. L. R. Co. v. Heflin*, 65 Ill. 306; *Chicago, St. P. & F. D. L. R. Co. v. McCarthy*, 20 Ill. 385; *Gardner v. Smith*, 7 Mich. 416, 74 Am. Dec. 722.

Also to the failure of a railroad company to make good the damage to a road in the construction of a railway, although the damage was done by a contractor. *West Riding & G. R. Co. v. Wakefield Local Bd.* 31 L. J. M. C. 174.

For negligence in respect to keeping up certain barriers across a highway for the protection of travelers, on the part of workmen employed by a contractor to build a portion of a railroad under direction of the corporation, the corporation is liable. *Lowell v. Boston & A. R. Corp.* 22 Pick. 24, 34 Am. Dec. 38.

The lessee of a side track is responsible to the railroad company for a collision of a train with cars on the side track which is due to the negligence of a third person, who is unloading the cars under a contract. *Montgomery Gas L. Co. v. Montgomery & B. R. Co.* 68 Ala. 572.

The duty of a landlord to protect the goods of tenants while putting a new roof on the building is not avoided by employing a contractor to do the work, although the damage results from the neg-

tc., in ninety days from commencement. Second party further agrees to furnish all material necessary to the completion of said work as set forth in said specification, etc. First party agrees to pay said second party said work at the rate of seventy-five per cent on the work progresses; six thousand hundred and fifty dollars being paid by said second party when said work is finished, and the balance, one thousand two hundred and fifty dollars, to be paid in monthly installments, and in not more than ten months from the completion of work. If any alteration of or addition to said specification, or any part thereof, should be made by said first party, such alteration or addition shall be estimated at the rate of (\$10) ten dollars per thousand for brick-work, and three dollars and twenty-five cents per thousand for stone-work, both laid and completed or to be used. All other parts at the same rate. This contract price, \$9,000, is based on the work as specified. If by such alteration or addition any work is added in said specification, etc., is not done, the cost of such work shall be deducted from the amount agreed to be paid for the whole, and in like manner as last mentioned. Second party shall dismiss any hands em-

ployed by him in said work whenever said first party shall so direct, and give a substantial reason for. In witness whereof the said parties have hereunto set their hands and seals this fifteenth day of February, A. D. 1888. (Insertion made before signing.) William Whalen. C. Stegkemper. John Gawne & Sons."

Under the specifications referred to in the contract, it was the duty of the contractors to furnish materials for and perform only that part of the work of construction that is usually done by masons and plasterers. With the excavation, the wood-work, painting, plumbing, etc., they had nothing to do. There is some evidence tending to prove that the wood-work was also under contract, but to whom, and upon what terms, the record is silent. As respects the balance of the work, including the making of the excavations for cellars, areas, and coal vaults, there is no evidence tending to show that it was performed under the direction or control of anyone except the defendants themselves. It is true that the contractors, Gawne & Sons, took a portion of the earth from the excavation and used it in making mortar for their work on the building, it appearing to contain a sufficient proportion of sand for that

of the latter. *Sulzbacher v. Dickie*, 51 How.

Application of this principle as to duty to municipalities.

A municipal corporation is not relieved from its duty to perform a duty specifically upon it because the work is neglected by a contractor. *New York v. Furze*, 3 Hill, 612.

The duty of a city to keep streets safe for travel is not avoided by making a contract for improvements. It is charged with the negligence of contractors in leaving a pile of sand on a sidewalk. *Shelbyville v. Brown*, 9 Heisk. 1.

The duty of a municipal corporation to keep its streets in safe condition for travel by proper lights is not avoided by making a contract for improvements. It is charged with the negligence of contractors in leaving a pile of sand on a sidewalk. *Shelbyville v. Brown*, 9 Heisk. 1.

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A mere contract to grade a street does not of itself imply an agreement by the contractor to construct barriers around excavations so as to relieve the city from liability to keep the street safe. *Buffalo v. Hallway*, 7 N. Y. 493, 57 Am. Dec. 550; *St. Paul v. Seltz*, 3 Minn. 297, 74 Am. Dec. 753. These two cases seem to be the only ones on the point. Their correctness is questioned by Dillon in his work on Municipal Corporations.

A city is liable for the negligence of its contractor in failing to guard an excavation in a street made for a cistern. *Circleville v. Neuding*, 41 Ohio St. 465.

The act of one who has taken a contract from a city to grade a street in throwing dirt, etc., on an adjoining lot will not render the city liable. *Reed v. Allegheny*, 79 Pa. 300.

But the element of duty to the public is not here involved.

An arrangement between a city and another party, by which the latter is bound to keep a street in good condition, does not relieve the city from liability. *Blake v. St. Louis*, 40 Mo. 560.

A municipal corporation is not liable for the negligence of the owner of premises in leaving an excavation unguarded while constructing a sidewalk which he is ordered to make, as the duty is charged upon him by law and he is not an agent selected by the municipality. *Dooley v. Sullivan*, 11 West. Rep. 516, 112 Ind. 451.

So, for negligence of a contractor while changing sidewalks to conform to an established grade, in leaving over night a step about fifteen inches between the portion changed and the adjoining walk, a village is not liable where he was engaged by the abutting owner. *Sweet v. Gloversville*, 12 Hun, 302.

For allowing the continuance of a defective condition of a street left unfinished on the discharge of a contractor a city is liable. *Houston v. Isaacks*, 68 Tex. 116.

For excavations made by a contractor in grading streets, and which are left for a series of years after he abandons the work before the city completes it, the city is liable. *Vogel v. New York*, 22 N. Y. 10, 44 Am. Rep. 349.

Work constituting a nuisance.

The two cases last cited above may perhaps be

purpose; but this was done for their own convenience, by consent of defendants, and without any contractual obligation on the part of Gawne & Sons to do so. An examination of the contract between Gawne & Sons and the defendants will disclose that it contains no stipulation giving to those contractors the occupancy, possession, or control of the premises; nor does the record disclose any other evidence tending to show they had, or were entitled to have, such occupancy, possession, and control. On the contrary, the undisputed testimony on both sides shows that in fact they did not have such occupancy, possession, and control; for the work of making the excavation, as well as the carpenter's work, was in progress contemporaneously with that of Gawne & Sons, under their contract,—every part of the work of construction being pressed forward simultaneously, or as nearly so as was practicable. There was, therefore, no evidence tending to prove the state of facts assumed in the rejected instruction, and it was

properly rejected. It was an abstract proposition of law, and, however sound, should not have been given to the jury. *Lewis v. State*, 4 Ohio, 889; *Lexington F. L. & M. Ins. Co. v. Piser*, 16 Ohio, 824; *Steward v. Southard*, 17 Ohio, 406; *Tracy v. Card*, 2 Ohio St. 431; *Cleveland, C. & C. R. Co. v. Crawford*, 24 Ohio St. 681; *Carlisle v. Foster*, 10 Ohio St. 196; *Callahan v. State*, 21 Ohio St. 306.

2. The defendants in the court of common pleas excepted to the following portion of the charge of that court: "I mean to be understood by the jury to say that if these defendants, for the purpose of constructing this block of buildings, removed, either by themselves or by anybody else,—if they caused to be removed—this sidewalk, and made this excavation and opened this hole into which the plaintiff fell, it is the duty of the defendants, doing that by themselves or by their agents, by their independent contractors, or in any other way,—it is their enterprise; they are doing it for their benefit,—it is their duty to use ordinary

sustained equally well under the doctrine of municipal duty as to streets or that as to nuisance.

One who accepts work which, although not in its nature a nuisance, has become so by reason of the manner in which it is done, becomes at once responsible for it although it was done by a contractor. *Vogel v. New York*, 92 N. Y. 10, 44 Am. Rep. 349.

Whoever directs the doing of an act which when done will be the creation of a nuisance will be personally responsible for a special injury resulting therefrom to a third person, even if the act is performed by an independent contractor. *King v. New York Cent. & H. R. R. Co.* 66 N. Y. 185, 23 Am. Rep. 37; *Bensen v. Suarez*, 28 How. Pr. 511.

A city being liable for nuisances and obstructions in streets is liable for damages to a person from water which in time of rain flows back into his building on account of a pile of stones and materials negligently left by a contractor in a street gutter while engaged in paving the street. *Cincinnati v. Stone*, 5 Ohio St. 38.

The owner of a dangerous building cannot escape liability for injuries caused by its fall by contracting with another person to remove it where it falls while the latter is attempting by ordinary and careful methods to perform the work. *Engel v. Eureka Club*, 59 Hun, 593.

Liability of the owner for injury done by the falling of a roof from a building adjoining a highway because it was not well built cannot be avoided on the ground that he employed an independent contractor to furnish the material and perform the work. *Wilkinson v. Detroit Steel & Spring Works*, 73 Mich. 405.

Although the owner of a building is not liable for the negligence of a contractor in erecting it, yet if a wall in the course of erection is so dangerous as to constitute a nuisance he is liable for the consequences. *DeFord v. State*, 31 Md. 179.

For injury caused by the fall of a defective and unsafe wall after it has been completed and accepted, the owner is liable even if it was caused by the negligence of an independent contractor who built the wall. *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 234.

For a nuisance created by railroad contractors by permitting filth from a camp of convicts employed as laborers to accumulate near a dwelling and the formation of a pond near by by damming up a stream without a sufficient outlet, the railroad company is not liable. *Atlanta & F. R. Co. v. Kimberly* (Ga.) April 24, 1891.

14 L. R. A.

For damages to a third person from fire caused by a defect in a mill used by a contractor in doing work for the owner, which defect existed when the contractor took possession, the owner is liable. *Whitney v. Clifford*, 46 Wis. 133, 32 Am. Rep. 708. See also, as to nuisance, *Moline v. McKinnie*, and *Matheny v. Wolff*, *supra*.

Work done under franchise, permit or license.

A mill company which under a license from a city has built a railroad track for the sole purpose of removing its own freight is liable for the negligence of a railroad company's servants while moving cars on such track. *McWilliams v. Detroit Cent. Mills Co.* 31 Mich. 375.

A street railway company, for which an excavation is made in a street in constructing the road under a permit to the company, is liable for damages to a person falling into the excavation because of the contractor's negligence in failing properly to guard it. *Woodman v. Metropolitan R. Co.* 4 L. R. A. 213, 149 Mass. 335.

One having a license to incumber a street for the purpose of filling an ice-house cannot escape liability for unlawfully obstructing the street by leaving a pile of ice covered with snow in the street without lights or signals, whereby a traveler is injured in the evening, on the ground that it was so left by an independent contractor. *Darnstaetter v. Moynahan*, 37 Mich. 188.

But persons having a right to excavate a street for a sewer are not liable for the negligence of contractors employed to do the work in failing to guard the excavation properly at night. *Blake v. Ferris*, 5 N. Y. 43, 55 Am. Dec. 304.

A water-works company is liable for the negligence of workmen employed by contractors in laying pipes through the streets of a city. *Matthews v. West London Water Works Co.* 3 Campb. 403.

The report of this case is said, in *Overton v. Freeman*, 11 C. B. 672, to be unsatisfactory. The decision may perhaps rest on the special privilege of the water-works company, but it can hardly be reconciled with *Blake v. Ferris*, *supra*.

A corporation authorized to bridge a river is liable for the act of a contractor in detaining a vessel longer than the law allows. *Hole v. Sittingbourne & S. R. Co.* 6 Hurst. & N. 48.

This case, like a great many later ones, distinguishes between mischief collateral to and that which results directly from the act which a contractor is employed to do, and so perhaps in prin-

to see that it is guarded and protected by use of such ordinary care as men of ordinary prudence are accustomed to employ in that kind of enterprise. It is no defense for them to say that the work was being done by independent contractor." This instruction is down the rule, that if the defendants, "by independent contractors," removed the sidewalk, and made the excavation into which plaintiff fell, it was their duty to use ordinary care to see that it was guarded and protected. If a construction as broad as the language used will warrant should be given this instruction, it must be held to lay down the rule that if the plan of the building made necessary an excavation in the adjoining sidewalk the defendants could not have exonerated themselves from the duty of exercising ordinary care in guarding the excavation after it was made, even by an agreement with an independent contractor, providing that the latter should furnish all of the material and perform all the work, including the excavation, necessary to its construction, and have the sole occupancy and control of the premises while

performing the contract. The rule thus broadly stated directly contravenes the doctrine of *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590, and cannot be maintained without overruling that case. If, however, this language of the learned judge should be taken in a more restricted sense, and as designed to declare that one intending to construct a building on a plan that requires an excavation to be made in the adjacent public sidewalk cannot divide the work of construction, and let to an independent contractor the work of excavating only, and thereby shift from himself to such contractor the duty of guarding the excavation while it was being made, or afterwards, then the principle underlying the instruction does not necessarily conflict with the doctrine of *Clark v. Fry*, *supra*, provided the doctrine of that case is to be strictly limited to the facts upon which it was announced; and the tendency of this court in that direction is perhaps to be fairly indicated from the decision in the case of *Ohio S. R. Co. v. Morey*, 47 Ohio St. 207, 7 L. R. A. 710. There is much innate justice in a rule of law that declines to permit one who causes work

to be done to belong with the cases *supra* as to direct result of contract.

The contractor of a railroad company is regarded as its servant so far as he exercises a chartered privilege or power of the company. *West v. St. Louis, V. & T. H. R. Co.* 68 Ill. 546.

For trespasses by railroad contractors on land which they enter for the purpose of building the road thereon the railroad company is liable. *Rockford, R. I. & St. L. R. Co. v. Wells*, 66 Ill. 321.

Thus for trespasses in entering upon land and cutting ditches and throwing up embankments thereon in the construction of a railroad under the franchise of a railroad company, the company is liable although the work is done by contractors. *St. Louis & C. R. Co. v. Drennan*, 26 Ill. App. 263.

And a railroad company is liable for the acts of a contractor in taking stone and drawing them across a person's premises in the exercise of the right of eminent domain on the ground that such acts are those of an agent. *Vermont Cent. R. Co. v. Baxter*, 27 Vt. 365.

But for trespasses by sub-contractors in constructing a railroad, which were not the natural result of the work contracted to be done, a railroad company is not liable. *Eaton v. European & N. R. Co.* 59 Me. 530, 8 Am. Rep. 430.

Thus for acts of sub-contractors in throwing down fences on and off the right of way while engaged in constructing a railroad, the railroad company is not liable, unless the acts were done by its direction. *St. Louis, A. & T. R. Co. v. Knott*, 54 Ark. 424.

A railroad company is not liable for the acts of a contractor in piling waste dirt upon arable lands which the road has built. *Hughes v. Cincinnati & S. R. Co.* 39 Ohio St. 461.

Injury to the employé of a contractor while working on a railroad freight-house, caused by the use of a poisonous mixture on the timbers to preserve them, does not render the railroad company liable. *West v. St. Louis, V. & T. H. R. Co.* 68 Ill. 546.

For damages to adjoining land, caused by cutting down a street in grading a railroad therein, the company cannot escape liability on the ground that the work was done by a sub-contractor. *Alabama M. R. Co. v. Williams* (Ala.) April 15, 1891.

A railroad company permitted to interfere with a highway in building its road cannot avoid liability to protect travelers thereon by placing proper

barriers at an excavation by employing a contractor to do the work. *Veazie v. Penobscot R. Co.* 49 Me. 119.

A railroad company is not liable for the negligence of a contractor in operating a portable steam engine near a highway to pump water out of the way of an excavation. *Wabash, St. L. & P. R. Co. v. Farver*, 9 West. Rep. 621, 111 Ind. 195, 60 Am. Rep. 604.

A wrongful appropriation of land by an independent contractor will render a railroad company liable if it has adopted his acts. *Bloomfield R. Co. v. Grace*, 11 West. Rep. 368, 112 Ind. 123. This is clearly an act done in exercise of the special power or franchise of the company.

For the same reason an appropriation by railroad contractors of timber from an adjoining land to build a railroad renders the company liable. *Hinde v. Wabash Nav. Co.* 15 Ill. 72; *Leaher v. Wabash Nav. Co.* 14 Ill. 65, 56 Am. Dec. 494.

For negligence in the running of a construction train by a contractor building a railroad, whereby one of his employés is killed or injured, the railroad company is not liable. *Miller v. Minnesota & N. W. R. Co.* 76 Iowa, 665; *Rome & D. R. Co. v. Chasteen*, 88 Ala. 591; *Powell v. Construction Co.* 88 Tenn. 602.

But it would be otherwise in respect to third persons injured by negligence of the contractor if he was carrying freight or passengers even without the consent of the company. *Rome & D. R. Co. v. Chasteen*, 88 Ala. 591.

A railroad company is liable for the negligence of parties operating a train on its road for their own benefit. *Illinois Cent. R. Co. v. Finnigan*, 21 Ill. 646.

For damages by contractors building a railroad in negligently running a train over cattle, the company from which the right to run the train was derived is liable. *Chicago, R. I. & P. R. Co. v. Whipple*, 22 Ill. 105.

So under a statute which makes it liable for trains run by "other persons." *Huey v. Indianapolis & V. R. Co.* 45 Ind. 322.

In apparent conflict with these cases is a Nebraska decision that a railroad company is not liable for injury to a child on the track caused by a train owned and operated by a contractor in building the road. *Meyer v. Midland Pac. R. Co.* 2 Neb. 819.

R. A. R. J

to be done, the performance of which though not necessarily injurious to the persons or property of others, yet necessarily creates conditions inimical to their safety, to exonerate himself from all duty towards those whom he has thus exposed to danger. As already shown in this opinion, however, there is no evidence in the record tending to prove that a contract was made, letting to an independent contractor or either the entire work of constructing the building, or that of making the excavation only. So the propositions of the charge, if they are fairly inferable from the language used, denying the sufficiency of such contracts to exonerate the defendants from liability, are abstract, and, if erroneous, would not warrant a reversal of the judgment of the court of common pleas, unless clearly misleading in their character. *French v. Millard*, 2 Ohio St. 44; *Schneider v. Hoser*, 21 Ohio St. 98. It is not easy to perceive how the jury in this case could have been misled by a statement to them that the defendant could not exonerate himself from liability to the plaintiff by letting the excavation alone, or the entire work, to an independent contractor, when no such contract had been either pleaded or proved. If this charge is to be construed as laying down the rule that if the defendants themselves had made the excavation, and thus made a hole in the public street into which travelers in passing would probably fall if it was not properly guarded, they could not turn it over to a contractor to build the vaults and walls which the excavation was made to accommodate by a contract giving a temporary occupancy and control of the excavation to the contractor, and thus relieve themselves of further care in guarding the hole, then we hold the proposition to be sound, as well as fairly applicable to the facts of the case.

As already mentioned, the undisputed facts are that the excavation was made by the defendants, and was in the sidewalk of a public street. It was dangerous, unless carefully guarded. The defendants, having created the danger, were bound to exercise reasonable care to protect the public against injury on account of it, unless they could shift that duty from themselves to others. If the plaintiff fell into the hole and was injured by reason of the omission of such care, the defendants were liable, unless they had in fact escaped that duty. The only evidence from which it could be claimed they had accomplished this result was the fact that the construction of the coal vaults and area walls in the excavation was let to independent contractors, who had a right to occupy the excavation for that purpose only, and that the contractors were using the holes into one of which the plaintiff fell, for the purpose of mixing and handling mortar for their own convenience, to be used on other parts of the building. We do not think this was sufficient to shift from the defendants the duty to guard an excavation made by themselves. The danger was of their own creation, and they should be held bound to provide against it, and not allowed to abandon this duty to the contractor or his servants; or, if they did so, it was at their peril, and therefore the instruction of the court, now under consideration, which under such circumstances imposed upon the defendants the obligation of using ordinary care in guarding the excavation, was a correct exposition of the law upon the subject.

Judgment of the Circuit Court reversed, and that of the common pleas affirmed.

NEW YORK COURT OF APPEALS.

Re ESTATE OF Cornelia M. STEWART,
Deceased.

(.....N. Y.....)

1. Money received under a power of appointment created by will passes "by will" within the meaning of a statute taxing collateral inheritances.
2. Contingent interests under a power of appointment created by will, although not capable of valuation at testator's death, may after they have become vested by the appointment be appraised under the Collateral Inheritance Act of 1885, § 13, which authorizes the appointment of an appraiser "as often and whenever occasion requires."
3. Interest at 6 per cent. instead of at 10 per cent. is properly decreed from the death of the testatrix to the close of the litigation, on a collateral inheritance tax under the Act of 1885, § 5, where before the ex-

piration of eighteen months after the death of the testatrix proceedings to revoke the probate of the will were begun.

(March 1, 1892.)

CROSS-APPEALS from an order of the General Term of the Supreme Court, First Department, reversing in part and affirming in part an order of the surrogate of the County of New York fixing the amount of collateral inheritance tax to be paid by Charles J. Clinch upon property received under the will of Cornelia M. Stewart; the executors of the Stewart will and Charles J. Clinch appealing from so much of the order of the General Term as adjudged that the tax on the share coming to said Clinch directly under the will should bear interest after the expiration of eighteen months from the death of the testatrix and the People appealing from so much of the order as adjudged that the interest which Clinch acquired by the transfer from the trustee was not liable to the tax. *Affirmed on the executor's appeal. Reversed on the People's appeal.*

The facts are stated in the opinion.

Messrs. Horace Russell and Jahish

NOTE.—For notes as to the validity and scope of statutes imposing a collateral inheritance tax, see *Re Howe* (N. Y.) 2 L. R. A. 625; *Re Romaine* (N. Y.) 12 L. R. A. 401.
14 L. R. A.

Holmes, Jr., for Charles J. Clinch and the Stewart executors:

Unless there is "clear warrant of the law" for imposing the tax on Clinch's possibility, and a clear method provided by the Act for ascertaining its value at decedent's death, the tax cannot be imposed. Clinch is entitled to the benefit of every doubt, because the tax is a special and not a general one.

Re Enston, 113 N. Y. 174.

Under the provisions of the law it is clear:

(1) That the tax is not imposed upon the estate of Mrs. Stewart, but only on the "estate" received under the will by the beneficiary Clinch.

Re Howe, 2 L. R. A. 825, 112 N. Y. 108; *Re Cager*, 111 N. Y. 348; *Re Vassar*, 127 N. Y. 1.

(2) That the tax is imposed only on a beneficiary who receives an estate in possession, which can be appraised immediately upon the death of the decedent, and which has a clear market value at that time of at least \$500.

(3) That the tax is imposed only on a beneficiary who receives an expectant or contingent estate which has a value at decedent's death, such value being ascertainable at that time by the superintendent of insurance by the use of the insurance tables.

(4) That the tax thus imposed is due and payable at decedent's death, and is imposed upon the value at that time of the particular estate received by each beneficiary.

The surrogate had no power to postpone the valuation of Clinch's interest till the power was exercised, January 16, 1890, and to then impose a tax payable on that day, upon the value on that day of the property received by him, when the Act only imposes the tax on the valuation of the interest at decedent's death, at which time Clinch's interest had no value.

Re Vassar, *supra*.

Clinch's interest had no market value at Mrs. Stewart's death, and could not be valued in the method pointed out by the Act.

Re Cager, 111 N. Y. 348.

The tax is payable on the value of the interest received at the time of the death of the decedent, and not on its value at the time the appraisement is finally made.

Laws 1887, chap. 713, §§ 1, 2, 18; *Re Leavitt's Estate*, 22 N. Y. S. R. 81; Dos Passos, Collateral Inheritance, p. 119; *Atty-Gen. v. Earl of Sefton*, 11 H. L. Cas. 257.

Clinch's power to take may have come from the will, but his estate, right, or interest did not accrue or become of any value until the exercise of the power on January 16, 1890.

Sugden, Powers, 8th ed. chap. 9, § 3, subd. 3; *Mariborough v. Godolphin*, 2 Ves. Sr. 61; *Southby v. Stonehouse*, Id. 612; *Jackson v. Davenport*, 20 Johns. 537.

The Acts only apply so as to tax such persons as receive either (1) an estate in possession, which has a clear market value at decedent's death, or (2) a vested expectant estate the clear market value of which at decedent's death can be ascertained at that time by the methods pointed out by §§ 2 and 18; and they have no application in cases of other expectant and contingent estates, such as that received by Clinch, because the Legislature has failed to provide

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any method for valuing the estates and fixing the tax.

Re Cager, 111 N. Y. 348; *Re McPherson*, 6 Cent. Rep. 781, 104 N. Y. 306; *Re Hopkins*, 6 Dem. 1; Redfield, Surrogate's Practice, 4th ed. pp. 562, 563; *Re Lefever*, 5 Dem. 184.

Interest should be charged only from June 29, 1890.

Re Hughes' Estate, N. Y. Law Jour. July 27, 1889.

The effect of the service of this citation, under the provisions of § 2850 of the Code, was to absolutely stay the executors from continuing the proceedings for the payment of the tax.

Interest on taxes is allowed only as a penalty for nonpayment when due (*People v. Prout*, 58 Hun, 541, affirmed, 117 N. Y. 650), and surely a penalty should not be imposed upon a person for the nonpayment of a tax which another provision of law, equally binding upon him, makes it impossible for him to pay without defying the law.

When the law imposes an obligation to do an act within a certain time, and another provision of law prevents the person from doing that act during a portion of the time, the period during which the performance of the act is thus prevented is not counted as part of the time limited.

Ansonia Brass & C. Co. v. Conner, 5 Cent. Rep. 408, 108 N. Y. 502; *The Protector*, 76 U. S. 9 Wall. 687, 19 L. ed. 812; *Brown v. Hiatt*, 82 U. S. 15 Wall. 177, 21 L. ed. 128; 13 Am. & Eng. Encyclop. Law, p. 788, and cases cited, note 1; 3 Bacon, Abr. *Executions*.

Where a person is prevented from paying the principal by any provision of law, interest should not be allowed during the period that the payment of the principal sum is prohibited.

Brown v. Hiatt, 82 U. S. 15 Wall. 177, 21 L. ed. 128; *Hoare v. Allen*, 2 U. S. 2 Dall. 102, 1 L. ed. 307; *Forcraft v. Nagle*, 2 U. S. 2 Dall. 182, 1 L. ed. 319; 1 Sedgw. Damages, p. 491, § 340; *Stevens v. Barringer*, 13 Wend. 639.

Mr. Simon W. Rosendale, Atty-Gen., for the People:

The property passing to the trustee, and through him to Charles J. Clinch, is liable to taxation under chapter 483 of the Laws of 1885, for the reason that it was property which passed by the will of the testatrix, who was a resident of the State, to the person named, who did not occupy such relationship to the testatrix as to exempt the transfer from the payment of the tax.

Whatever title appellant acquired by virtue of the distribution made by the trustee, under the power of appointment vested in him by the will, he took under and by virtue of the will itself.

2 Sugd. Powers, 7th ed. pp. 19, 22; *Middleton v. Crafts*, 2 Atk. 661; *Lady Gresham's Case*, F. Moore, 261, 9 Co. 106 b.; *Smith v. Carey*, 22 N. C. 42.

This collateral inheritance tax is not a tax upon either persons or property; but is a tax upon the privilege of acquiring property by will or by inheritance, or by gift *causa mortis*. *Wallace v. Myers*, 38 Fed. Rep. 184; *Mager v. Grima*, 49 U. S. 8 How. 490, 12 L. ed. 1168; *Scholey v. Rev.*, 90 U. S. 28 Wall. 331, 23 L. ed. 99; *Eyre v. Jacob*, 14 Gratt. 422, 73 Am. Dec. 887; *Miller v. Com.* 27 Gratt. 110; *Strode v.*

Com. 52 Pa. 181; Re Howe, 2 L. R. A. 825, 112 N. Y. 108.

The action of the surrogate in this case was in conformity to the decisions of the Pennsylvania courts under the inheritance tax laws of that State first enacted in 1826, and after which the New York statute was modeled.

Com. v. Williams, 13 Pa. 29; Com. v. Sharpless, 2 Chest. (Pa.) 216; Com. v. Schumacher, 9 L. Bar. (Pa.) 199.

An estate created by the execution of a power takes effect in the same manner as if it had been created by the deed which raised the power. The party who takes under the execution of the power takes under the authority and under the grantor of the power, whether it applies to real or personal property, in like manner as if the power and the instrument executing the power had been incorporated in one instrument.

4 Kent, Com. 13th ed. p. 838; *Bradish v. Gidds, 3 Johns. Ch. 549, 1 L. ed. 713; Doolittle v. Lewis, 7 Johns. Ch. 44, 2 L. ed. 215.*

The liability to pay interest is not affected by § 2650 of the Code of Civil Procedure.

Even where a debtor is restrained by injunction from paying his debt, the running of interest is not suspended.

McKnight v. Chauncey, Selden's Notes, 2d ed. 97.

Mr. Benjamin F. Dos Passos, for Theo. W. Myers, Comptroller of the city of New York:

There being a clearly defined intention in the Act of 1885 to tax estates or property passing by will to collateral heirs through powers of appointment, the rule of strict construction relied on by respondents does not apply.

A consideration of the general language of § 1 shows that it plainly meant to include every testamentary disposition of property in whatever form it may appear.

Re Enston, 113 N. Y. 184; Re Romaine, 12 L. R. A. 401, 127 N. Y. 88.

There may and doubtless should be a distinction taken in the construction of those provisions of revenue laws which point out the subjects to be taxed, and indicate the time, circumstances and manner of assessment and collection, and those which impose penalties for instructions and evasions.

There is no reason for peculiar strictness in construing the former.

1 Cooley, Taxn. p. 205.

No interpretation will be adopted which must defeat the purpose of the law, provided the language of the statute admits fairly and rationally of an interpretation which sustains that purpose.

3 Parsons, Contracts, p. 297; *Stief v. Hart, 1 N. Y. 80; Re Enston, supra.*

If the estate was not as matter of law possible of appraisement at the time of decedent's death, it became appraisable when Hilton exercised the power of appointment on January 16, 1890.

Com. v. Duffield, 12 Pa. 279; Com. v. Williams 13 Pa. 29; Com. v. Sharpless, 2 Chest. (Pa.) 246; Com. v. Schumacher, 9 L. Bar. (Pa.) 199; Nieman's App. 181 Pa. 851; Com. v. Freedley, 21 Pa. 38; Re Brewer's Estate, 15 Pittsb. L. J. N. S. 435; Dos Passos, Collateral Inheritance Tax, 143, note 4, 14 L. R. A.

Andrews, J., delivered the opinion of the court:

This appeal involves a question under the law for the taxation of collateral inheritances, passed June 10, 1885. By the will of Cornelia M. Stewart, who died October 26, 1886, the testatrix gave one half of her residuary estate to Henry Hilton in trust, to apply in his discretion such portion thereof as he might deem expedient to the erection and endowment of a seminary of learning for women, and the erection of buildings and institutions connected with the Memorial Cathedral Church of Garden City, Long Island, with power to appoint any part of the trust estate which, in his opinion, would not be needed or required for the purposes of the trust, among any of the legatees named in the will. The will was admitted to probate November 18, 1886. The surrogate, on motion of the executors, April 25, 1887, assessed and fixed the collateral inheritance tax upon the legacies given in Mrs. Stewart's will, which tax was paid, and on like motion, appointed an appraiser "to appraise for the purpose of said tax the clear market value at the time of the death of the decedent of the property which passed by the residuary clause of the will." No appraisal was made under the clause in the order until after the exercise of the power of appointment by the trustee.

This power was exercised for the first time on the 16th day of January, 1890, three years and more after the death of the testatrix. There were nineteen legatees in the will, including three half sisters of the testatrix. The other legatees were nephews, nieces and grand-nieces. The trustee, after applying a portion of the trust estate to the purposes of the cathedral, on the day mentioned, January 16, 1890, appointed the balance of the trust fund, amounting to more than two million dollars, among ten of the nineteen legatees, one tenth of which (being the sum of \$248,540.16) was appointed to Charles J. Clinch, a nephew of the testatrix. On the 19th of February, 1890, the appraiser appointed under the order of April 25, 1887, filed his report, by which he appraised the value of a portion of the trust fund received by Charles J. Clinch at the sum named, and decided that it was subject to a tax of \$12,427. The question is whether the sum so received by Charles J. Clinch, under the power of appointment, is taxable under the Law of 1885. The law was amended in 1887, and again in 1889. The question is the same as if these amendments had not been made, and it will avoid complication to treat the subject as if the Statute of 1885 was alone applicable to the case and had remained unaltered.

The contention that the sum received by Chas. J. Clinch under the power of appointment is not taxable, is placed upon two propositions; first, that until the power of appointment was actually exercised, Chas. J. Clinch had, at most, a mere possibility that he might share in the distribution, and had no estate vested or contingent in the fund, and that this possibility or chance was incapable of any valuation at the decedent's death, as he might receive something or nothing.

ing, depending on the will of the donee of the power; and second, that the statute contemplates the taxation of such interests only as are capable of valuation at the death of the decedent, and provides no method for taxing an uncertain and contingent interest which may never vest in possession. It is doubtless true that Chas. J. Clinch, at the death of Mrs. Stewart, took no legal interest in the trust fund given to Hilton. The will, while it designated the class of persons for whose benefit the power of appointment should be exercised, nevertheless, conferred upon the trustee the power to select any one or more of the class as the objects of the power. The trustee could appoint the whole property to one or more of the sisters or to one or more of the nephews. He could exclude any one or more of the legatees from any share in the distribution. When he had appropriated such part of the fund as he deemed requisite for the purposes of the school and the cathedral, he was bound to appoint the remainder among individuals of the class, and the performance of this duty might be compelled if he had refused to exercise the power; but the court could not control his discretion in the selection of the beneficiaries (*Delaney v. McCormack*, 88 N. Y. 174). Unless the power had been exercised, no one of the class could maintain that he was entitled to any part of the fund. It is very clear, then, that there was no basis for fixing a tax at the death of Mrs. Stewart on the mere possibility which Chas. J. Clinch had, that the power of appointment might be exercised in his favor. If authority were needed for so plain a proposition, the case of *Re Cager*, 111 N. Y. 344, is ample to sustain it. The possibility, however, became a certainty when, on the 16th day of January, 1890, the donee of the power of appointment exercised it in favor of the members of the class mentioned in the will, and set apart to Clinch the tenth part of the trust fund. To the extent of such application Clinch became vested as of that date with an interest in the estate of Mrs. Stewart. If the \$248,540.16 received by him under the power had been given to him directly by the will, it would unquestionably have been subject to taxation. It is claimed to be exempt in the actual situation, because the Legislature failed to provide a method for the taxation of interests acquired under the circumstances of this case. The subjects of taxation under the Act of 1885 are declared and defined in the first section. They include "all property which shall pass by will or by the Intestate Law of this State from any person who may die seised or possessed of the same . . . to any person or persons, or to a body politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled in possession or expectancy to any property, or to the income thereof, other than to and for the use of father, mother, husband, wife, children, brother and sister and lineal descendants born in lawful wedlock, and the wife and widow of a son and husband of a daughter, and the societies, corporations and institutions now exempted by law from tax-

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ation." The tax imposed is \$5 on every hundred dollars "of the clear market value of such property." Looking at this section alone it would seem to be clear that the property which passed to Clinch under the power of appointment was taxable. The tax imposed by the Act is in form a tax on property passing by a will or under the Statutes of Descent or Distribution. The tax is imposed on all such property, except such as passes to persons or corporations within the clause of exception. Estates in possession or expectancy, gifts of the *corpus* or of the income, and estates in trust are alike embraced within the comprehensive words of the section; the obvious intent of the Legislature was to impose a tax on every interest, immediate or future, derived under a testator or intestate, not embraced in the exception. No collateral inheritance was excepted in terms, and the object and spirit of the Act are alike opposed to any exemption of such interest from the operation of the section. Whether the section embraces in its scope property transferred to collateral relatives of the testatrix under the power of appointment, depends upon the consideration whether within the language the property so appointed passed "by will" of the testatrix to the appointees, or whether they became entitled thereto "by reason of the will." If the will was the source of their title, then they took under the will or by reason of the will, and their interests are brought within the words of the section.

The nature of estates passing under powers of appointment is well settled. "An estate (says *Chancellor Kent*, 4 *Kent's Com.* 338), created by the execution of a power, takes effect in the same manner as if it had been created by the deed which raised the power. The party who takes under the execution of a power takes under the authority and under the grantor of the power, whether it applies to real or personal property, in like manner as if the power and the instrument creating the power had been incorporated in one instrument." Where the donee of the power has the right of selection, the interest appointed vests in the appointee at the time of the appointment, but his title relates to and is acquired under the instrument creating the power (*Jackson v. Davenport*, 20 *Johns.* 587; 2 *Sugd. Powers*, p. 22).

We think there can be no reasonable doubt that the appointees, under the power of appointment, took the interests under and by virtue of the will, and not in a legal sense under the instrument of January 16, 1890, in execution of the power.

But it is insisted that assuming that the interest which was vested in Clinch by the exercise of a power of appointment is taxable within the true meaning of section 1 of the Act of 1885, nevertheless the Legislature, in its scheme for assessing and collecting taxes imposed by the Act, has failed to provide any method for valuing or taxing contingent or uncertain interests not capable of valuation and assessment immediately on the death of the decedent.

Before considering this contention the rule by which the court should be guided in the

construction of the statute may properly be adverted to. Where the question is whether a certain subject of taxation is embraced within the Act, and brought within the power of taxation, it was held in *Re Enston*, 118 N. Y. 174, that the statute should be strictly construed in favor of the citizen since it assumed to impose a special burden upon particular property and persons, and was not in any proper sense a general tax. The question there was whether a certain subject was taxable under the provisions of the first section. Where a particular subject is within the scope of that section and exemption from taxation is claimed on the ground that the Legislature has not provided proper machinery for accomplishing the legislative purpose in the particular instance, a liberal rather than a strict construction should be applied, and if by fair and reasonable construction of its provisions the purpose of the statute can be carried out, that interpretation ought to be given to effectuate the legislative intent.

There are two sections in the Act of 1885 which prescribe the procedure for fixing the valuation and assessing property subject to taxation. These are sections 2 and 18. Section 2 relates to a special class of cases, viz., cases where property is devised or bequeathed for life or a term of years to a person whose interest is exempted from the payment of any tax with remainder over to collaterals or strangers in blood. In these cases the section prescribes that the (entire) property passing under such a devise or bequest shall be appraised "immediately after the death of the decedent at what was the fair market value thereof at the time of the death of the decedent," and after deducting the value of the estate for life or years, that the tax prescribed by the Act on the remainder "shall be immediately due and payable." Provision is made that the party beneficially interested in the property chargeable with the tax may give a bond to pay the tax when he may come into the actual possession and enjoyment. This section contains the only provision to be found in the Act prescribing in terms the time when an appraisal shall be made or which directs that the value of the subject of the tax shall relate to "the death of the decedent." This section obviously has no relation to the case now in question.

Hilton was not an exempt person within the first section. He took, under the will of Mrs. Stewart, no estate for life or years, nor was there any bequest or devise of any remainder in the trust property. Section 2 has reference to a specified class of cases only, in which the case now in question is not included. The section primarily relates to certain legal vested estates for life or years, and remainders limited thereon, when the value of both estates can be determined at the death of the testator. We must look elsewhere to ascertain how the property is to be valued and the tax determined in the numerous other cases arising on wills not embraced in the class specified in section 2.

Section 18 is a general section prescribing the method of appraising and valuing property subject to the payment of a tax under

the Act. By that section the surrogate is authorized to appoint an appraiser of such property "as often and whenever occasion requires," who at a time and place appointed, of which notice is to be given, shall "appraise the same at its fair market value," and make his report from which the surrogate shall forthwith assess and fix the then cash value of all estates, annuities and life estates or terms of years growing out of said estates and the tax to which the same is liable." It is to be noticed that this section does not, as does the second section, require the valuation to be made immediately upon the death of the decedent; on the contrary, it contains the significant words that an appraiser may be appointed "as often as and whenever occasion may require."

Nor does section 18 prescribe that the property appraised thereunder shall be appraised "at what was the fair market value thereof at the time of the death of the decedent," as is required in the cases falling under the second section. Under section 18 the appraiser is to appraise the property "at its fair market value," and the surrogate, on the coming in of the report, is to assess and fix the "then cash value" of all estates, etc., upon which the tax is chargeable. There are no limiting words such as are found in section 2. Section 18 is the section which in the great majority of cases governs, since the cases arising under section 2 form but a small proportion of the cases within the provisions of wills.

The contention on the part of the appointees under the power is that the scheme of the statute only contemplates cases where the interests created are capable of valuation at the death of the testator. This would exclude all further contingent interests in real or personal property, created by will. Such an intention certainly was not in the mind of the Legislature, and we are asked to exclude this large number of cases from the operation of the Act upon a construction which imports into the 18th section the limitation contained in section 2. The claim of the appointees under the power must be allowed if the statute provides no scheme for the taxation of contingent and uncertain interests, although such interests may be within the purview of the first section. It is not enough for the Legislature to declare that such interests are taxable. If no mode is provided for assessing and collecting the tax, the law is imperfect and cannot, as to such interests, be executed. But we think that the 18th section does include cases like the present, and that contingent interests given by a will, which after the death of the testator are converted by the happening of the event upon which they are limited, into actual vested estates, may then be appraised and taxed under the provisions of section 18. It is true that section 4 seems to contemplate that all taxes are ascertainable at the death of the decedent since it declares that "they shall be due and payable" at that time, and provides for charging interest thereon from "the time the tax accrued." We think the implication from this section ought not to overbear the intention of the Legislature

indicated in section 1 to subject all interests derived under wills to taxation, except those within the exception, nor prevent such a construction of section 18 as will bring the present case within its purview. We are, therefore, of opinion that the interest in question was taxable.

Another question is made. The respondent, Clinch, received under the will of Mrs. Stewart a legacy of \$1,498,388.82, upon which was imposed a tax of \$74,914.42, which tax was, by the decree of the surrogate, made to bear interest, at six per cent, from April 25, 1890, a date eighteen months after the death of the testatrix.⁴ Intermediate the death of the testatrix and the expiration of the eighteen months proceedings were instituted for the revocation of the probate of the will, which were not terminated until January 16, 1890. Section 2650 of the Code

suspends action by an executor after he has been served with a citation upon a petition to revoke probate, until a decree is made in the proceeding, except for the preservation of the property, the collection and payment of debts, and acts expressly authorized by the surrogate upon notice to the petitioner. It is claimed that interest should not be charged during this period. But we think the 5th section of the Act is an answer to this claim. It was the later statute, and it enacts that a modified rate of interest shall be charged where, "by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, the estate of the decedent" cannot be settled, etc. The delay in this case was in consequence of litigation. The Legislature provided for cases like this by reducing the rate of interest during such delay. The courts cannot interfere. There is no room for construction.

The conclusion is that the order of the *General Term*, so far as it reverses the decree of the surrogate, should be reversed, and that the decree of the surrogate should in all things be affirmed.

All concur, *Maynard, J.*, not sitting.

⁴Section 4 of the Act provides that all taxes imposed by this Act unless otherwise herein provided for, shall be deemed payable at the death of the decedent, and if the same are paid within one year, interest at the rate of 6 per cent per annum shall be charged and collected thereon, but if not so paid, interest at the rate of 10 per cent per annum shall be charged and collected from the time said tax accrued. [Rep.]

OREGON SUPREME COURT.

Lindley MEEKER, *Recept.*,

v.

NORTHERN PACIFIC R. CO., *Appt.*

(.....Or.....)

An injury to a horse "is caused by any moving train or engine," within the mean-

ing of Hill's Code Or., § 404, making a railroad company liable for animals killed or injured "upon or near any unfenced track of any railroad" where the horse was frightened by the train and ran ahead of it and fell into an open trestle and was injured, although the animal was not touched by the train.

(January 11, 1892.)

NOTE.—When injury to live-stock is done "by" or "caused by" a railroad train or engine within the meaning of statutes on that subject.

An injury to an animal on account of fright caused by a train without any actual collision is not done "by the locomotives and cars" within the meaning of Tex. Rev. Stat., § 4215, making the railroad company liable for such injuries but limiting liability to cases of negligence where the company fences the road. *International & G. N. R. Co. v. Hughes*, 68 Tex. 280; *St. Louis, A. & T. R. Co. v. Felton* (Tex. App.) Dec. 12, 1890.

To the same effect are Indiana decisions under a statute of that State relating to injuries "by the cars or locomotives or other carriages," where the railroad is not fenced. *Peru & I. R. Co. v. Hasket*, 10 Ind. 409, 71 Am. Dec. 385; *Ohio & M. R. Co. v. Cole*, 41 Ind. 332; *Indianapolis, B. & W. R. Co. v. McBrown*, 46 Ind. 229; *Louisville, N. A. & C. R. Co. v. Smith*, 58 Ind. 576; *Baltimore, P. & C. R. Co. v. Thomas*, 60 Ind. 107; *Croy v. Louisville, N. A. & C. R. Co.* 97 Ind. 126.

Actual collision is necessary to create a liability under this statute. *Ibid.*

There is no liability under it, for instance, in the case of a colt injured while trying to jump a cow-pit on a railroad when frightened by the cars. *Ohio & M. R. Co. v. Cole*, *supra*.

Or in case of a horse injured in jumping from a trestle when frightened by a train behind him. *Indianapolis, B. & W. R. Co. v. McBrown*, *supra*.

Although in such case the railroad company may be liable, irrespective of the statute for negligence. *L. R. A.*

ligence, in failing to stop the train after the danger of the horse has become manifest. *Ibid.* See *New Orleans & N. E. R. Co. v. Thornton*, *infra*.

So the railroad company is not liable under this statute for injury to a horse by running into a railroad bridge when frightened by a train. *Baltimore, P. & C. R. Co. v. Thomas*, *supra*.

Likewise, under the Missouri statute creating a liability for double damages when damages are "done by the agents, engines or cars" of a railroad company to live-stock on the railroad in the absence of a lawful fence, the company is liable only for damages from direct or actual collision with the animals and not for an injury to a horse in jumping off the track when frightened by a train. *Lafferty v. Hannibal & St. J. R. Co.* 44 Mo. 291.

Nor under this statute is the company liable for a horse negligently killed by the servants of the company while trying to remove it from a trestle into which it had jumped while running ahead of a train. *Selbert v. Missouri, K. & T. R. Co.* 72 Mo. 506.

So a statutory liability for damages "done by the engines or agents" of a railway company to cattle, horses, etc., in the absence of a sufficient railway fence, does not apply to damages to a colt which escaped through a gap in the railway fence and broke his legs in a railway bridge while his owner was trying to recapture him. *Knight v. New York, L. E. & W. R. Co.* 99 N. Y. 28.

And a liability under a statute for all damages done by "agents, engines, or cars" of a railroad company to live-stock in case of the want of prop-

APPEAL by defendant from a judgment of the Circuit Court for Columbia County in favor of plaintiff in an action brought to recover the value of a horse which was alleged to have been killed under such circumstances that the statute imposed a liability upon defendant for its death. *Affirmed.*

The facts are stated in the opinion.

Messrs. Dolph, Bellinger, Mallory & Simon, for appellant:

The cause of the injury as claimed by the plaintiff was not the absence of the fence but the failure of the defendant's agents to slack the speed of the train sufficiently, to permit the animal to leave the track.

Here is a new agency with which the absence of the fence had no connection, and therefore unless the immediate cause of the injury was an act for which the defendant would be liable at common law, no recovery can be had.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 490, 475, 24 L. ed. 256-259.

The injury which the plaintiff's evidence tended to show the animal received was not caused by a moving train, or engine or cars upon a railroad track within the meaning of section 4044, of Hill's Code. Neither the train, engine nor any car touched the animal, and none of them came nearer to it than fifty feet. If the train had anything whatever to do in producing the injury, it must have been that the animal was frightened by it.

If an animal becomes alarmed at a train run in a lawful manner it is no fault of the company and it is not liable for any damages resulting therefrom.

Atchison & N. R. Co. v. Loree, 4 Neb. 448; *Philadelphia, W. & B. R. Co. v. Stinger*, 78 Pa. 219; *Whitney v. Maine Cent. R. Co.* 69 Me. 208, 210; *Fiint v. Norwich & W. R. Co.* 110 Mass. 222.

er fences does not extend to the injury of a horse by jumping or running into a wire fence when frightened by a train with which he did not actually come in contact. *Schertz v. Indianapolis, B. & W. R. Co.* 107 Ill. 577.

A liability for damages from "any accident or collision that may occur" in case of failure to take certain precautions specified by statute when any person, animal or other obstruction appears upon the roadway of a railroad company, does not extend to the loss of a mule which ran in front of a train upon a trestle and was killed by jumping off. *Holder v. Chicago, St. L. & N. O. R. Co.* 11 Lea. 178.

An injury to a horse in running away from a railroad track when terrified by a passing train will not make the railroad company liable because the train was not stopped or checked when nearing him, although this may have involved the risk of his getting on the track and being injured. *New Orleans & N. E. R. Co. v. Thornton*, 65 Miss. 256.

This decision seems to turn merely on the question of negligence. See *Indianapolis, B. & W. R. Co. v. McBrown*, *supra*.

Under a statute providing that a railway company shall be liable to a person aggrieved for a certain penalty for violation of an ordinance as to excessive speed of trains, and also for the damages done the person or property "by such train" running at excessive speed, one injured by the upsetting of his carriage occasioned by the frightening of his team by a railway train can recover the penalty. (No claim for damages was made in this case.) 14 L. R. A.

The "killing" or "injuring" mentioned in the statute has reference to only such results, when caused by actual contact of the moving train or engine or cars with the animal killed or injured.

Peru & I. R. Co. v. Hasket, 10 Ind. 409, 71 Am. Dec. 385; *Ohio & M. R. Co. v. Cole*, 41 Ind. 831.

At common law, as has already been shown by authorities cited, damages resulting to stock from fright caused by the noise of a train of cars or a whistle or bells if there was no negligence in producing them, could not be collected from a railroad company. The statute of this State has not changed that rule.

No statute is to be construed as altering the common law, farther than its words import.

Show v. Merchants Nat. Bank of St. Louis, 101 U. S. 557, 25 L. ed. 392; *Burnside v. Whitney*, 21 N. Y. 148; *Lord v. Parker*, 3 Allen, 127.

Lord, J., delivered the opinion of the court:

This was an action brought under section 4044, Hill's Code, to recover damages for the alleged value of a mare, which had entered upon the railroad track of the defendant company, where the same was unfenced, and while there was driven by a moving train into an open trestle, and so crippled and injured as to be rendered valueless. The facts tended to show that there were some three or four horses, including the mare, running at large upon a range that entered upon the unfenced track of the defendant's railroad; that not far behind where the horses entered upon the track was an engine and train coming along, and that as soon as the engineer discovered them he sounded the alarm whistle of the engine, as is usually given when stock is on the track; and that the horses

Chicago & E. I. R. Co. v. People, 9 West. Rep. 749, 120 Ill. 667.

Under a statute making a railroad company liable for animals killed or wounded "by the engines or cars on such railway or in any other manner whatever in operating such railway" unless the road is lawfully fenced, actual collision is not necessary to create the liability, but this may extend to an injury to an animal in falling into an open railway bridge when frightened by a train. *Atchison, T. & S. F. R. Co. v. Jones*, 20 Kan. 327.

Also to an injury to animals by servants of the company in removing them from such a situation, into which they had come by reason of the lack of a railroad fence. *Atchison, T. & S. F. R. Co. v. Edwards*, 20 Kan. 531.

Under a statute making a railway company liable for damages to live-stock "by reason of the want of" a railway fence, actual contact of the train with the animal is not necessary to create a liability. *Young v. St. Louis, K. C. & N. R. Co.* 44 Iowa, 172; *Kraus v. Burlington, C. R. & N. R. Co.* 55 Iowa, 338; *Liston v. Central Iowa R. Co.* 70 Iowa, 716; *Van Slyke v. Chicago, St. P. & K. C. R. Co.* 39 Iowa, 620.

Thus it may apply to an injury to an animal caused by falling through a railway bridge. *Young v. St. Louis, K. C. & N. R. Co.*, *Kraus v. Burlington, C. R. & N. R. Co.* and *Liston v. Central Iowa R. Co.* *supra*.

Or by falling into a ditch. *Van Slyke v. Chicago, St. P. & K. C. R. Co.* *supra*. B. A. R.

becoming frightened at the approaching train, or the sound of the whistle, or both combined, commenced running along the track, followed by the engine and train, until they reached an open trestle on the track, where the mare fell and broke her foreleg just below the knee-joint, while the others passed over without injury; that neither the engine nor any part of the train came in actual contact or collision with any of the horses or mare, but was stopped more than 100 feet before reaching the trestle where the mare fell; that the track along which the horses were running was graded part of the way on the side of a hill, the banks on both sides being steep, and there being not to exceed two places where they could leave the track, without great difficulty or danger, from the place of their entry upon the track to the trestle or place where the mare was injured. Substantially upon this state of facts the counsel for the defendant moved for a nonsuit, upon the ground that the evidence for the plaintiff disclosed no liability, in that the animal was not "touched by any train, car, or engine of the defendant," and that the company is "not liable for frightening the animal." Upon the motion being overruled, the defendant excepted, and the error assigned in this regard constitutes the important question to be determined. That question involves the proper construction of section 4044, Hill's Code, which provides that "any person . . . or corporation, owning or operating any railroad, shall be liable for the value of any horses," etc., "killed, and for reasonable damages for any injury to any such live-stock upon or near any unfenced track of any railroad in this State, whenever such killing or injury is caused by any moving train or engine or cars upon such track." The contention for the defendant is that the "killing" or "injury" mentioned in the section has reference to only such as results from or is caused by actual contact of the moving train or engine or cars with the animal killed or injured. If it was intended by the statute that the "killing or injury" must have been caused by actual collision, that is, the stock must have been killed or injured by actual contact or collision with a "moving train or engine," upon such track, then the defendant is not liable, and the plaintiff cannot recover upon the evidence; for, while it is clear that the railroad was not fenced, where the duty to fence existed, by reason of which the horses got upon the track, it is equally clear that none of them were struck by the engine, and thereby killed or injured; but that while thus on the track the mare, and the other horses, becoming frightened, either at the noise of the approaching train, or the repeated sounding of the stock-alarm whistle, or both combined, fled down the track followed by the engine and cars, and ran into the open trestle, and was permanently injured, without any actual collision with the engine or cars of the train, or any negligence (as we shall assume) or willful misconduct of the agents in charge of it. Under such circumstances, the defendant claims that the statute does not contemplate any

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liability; that damages resulting from fright to animals, and not from actual collision, where there is no imputation of negligence or willful misconduct on the part of the agents of the corporation, are consequential, and not within the purview of the statute.

In support of this construction of the statute, namely, that the death or injury of the animal must be caused by actual collision with the engine or cars of the train, we are referred to *Peru & I. R. Co. v. Hasket*, 10 Ind. 409, 71 Am. Dec. 835, and *Ohio & M. R. Co. v. Cole*, 41 Ind. 331. In the first case, at the sound of the whistle of the approaching train, the mare ran on the track before the train until she came to a culvert, and then jumped so as to clear the culvert, and fell on the side of the track and broke her left leg, but she was not touched by the engine or any of the cars of the train. Upon this state of facts, the court held that the statute contemplated a direct injury; that the language, "shall be killed or injured by the cars or locomotive, or other carriage," etc., involved the idea of actual collision; and that it would not be consistent with the intent of the Act to give the language such an exposition as would cover a case of consequential damages. The court says: "No doubt the train caused the animal to take fright, and the injury was the result of such fright. But suppose the mare, at the sound of the whistle, instead of running upon the road, had run from the road, and while thus running had received an injury, would the company be liable? It seems to us it would not. The principle of the case hypothetically stated would be alike applicable to the case at bar." In the other case a colt was frightened by a train, and ran from an adjoining field upon the railroad track, which was not properly fenced, and broke its leg between the bars of a cow-pit; and as the facts showed that the colt was not injured by the locomotive or cars, or touched by them, it was held that the company was not liable under the statute. In *Lafferty v. Hannibal & St. J. R. Co.*, 44 Mo. 291, the horses got on the track of the railroad where it was not fenced, and while on the track they were frightened by the train, and, in running, hurt themselves while jumping off the track; but there was no collision, nor were the animals injured by any actual contact. The words of the statute are that the company shall be "liable in double the amount of all damages which shall be done by its agents, engines, or cars, to horses, cattle, mules, or other animals on said road." Although the phraseology of the statute differed somewhat from the Indiana statute on this subject, the court thought, in substance and effect, it was identically the same, and held that it contemplated a direct or actual collision between the train and the animal injured. In *Schertz v. Indianapolis, B. & W. R. Co.*, 107 Ill. 377, the language of the statute of Illinois is identical with the statute of Missouri on the same subject; that is, in case of a failure to comply with the provisions of the statute, the railroad corporations should be liable for all damages that might be done by its "agents, engines, or cars." In this case there

was no collision, and the horse was not injured by any actual contact, but, becoming frightened at the approaching train, ran down the track, and in its flight was injured by jumping a cattle-guard, without any negligence or willful misconduct on the part of the servants of the corporation. Upon these facts the court thought the statute admitted of the same construction as was given to the Missouri statute, and held that, where the stock is not killed or injured by any actual collision, there is no liability on the railroad corporation, saying: "Consequential damages resulting from fright to animals, not caused by any negligence or willful misconduct of the agents of the corporation, are not embraced within the statute." See also *Louisville, N. A. & O. R. Co. v. Smith*, 58 Ind. 575; *Baltimore, P. & O. R. Co. v. Thomas*, 60 Ind. 107; *Croy v. Louisville N. A. & O. R. Co.* 97 Ind. 126; *Knight v. New York, L. E. & W. R. Co.* 99 N. Y. 25; *Holder v. Chicago, St. L. & N. O. R. Co.* 11 Lea, 176; *Seibert v. Missouri, K. & T. R. Co.* 72 Mo. 565. Under statutes of this character, it is essential to the liability of a railroad company for the death or injury of an animal that it should be actually touched by the engine or cars of the train.

The decisions turn upon the language of the enactment which import the idea of actual collision or contact with the animal injured or killed. In such cases, whenever the owner of stock founds his claim for damages upon statutes of this sort, he is required to bring his case substantially within its terms, by alleging and proving that the stock was "killed or injured by the locomotives," etc., or the damage was done by "an engine" or "agent," according to its provisions. Hence, under statutes of this kind, railroad companies are not liable for frightening stock by their engines or cars, even though the fright causes the animals to kill themselves. They exclude by their language any injury not occurring from actual collision with the locomotives or cars. But the inquiry is raised whether the language of the statute is not broad enough in its terms to include, not only injuries which are caused by direct collision, but such as might result from a moving train to any live-stock upon or near its unfenced track. Our statute says, in brief, that a railroad company shall be liable for any stock killed or injured upon or near any unfenced track, whenever such killing or injury is caused by a moving train upon such track. In construing this statute, it must be constantly borne in mind that there must be a want of a fence along the railroad track, which would have prevented the injury; and that where the want of a fence sustains no relation to or connection with the injury, when caused by a moving train, the statute has no application. Hence the case suggested intended to illustrate that, if any construction is given to the statute for the death or injury of stock other than occurs by actual collision, it might be contended, "if a horse running in the pasture of his owner, through which the railroad passes, and is unfenced, should take fright at a passing train, run half a mile across the

field in an opposite direction to the railroad, then run into a pit dug by the owner, or against a fence built by him, or against a tree which nature put there, broke his neck, and died, the railroad company would be liable for the value of the horse, because the track of its railroad was unfenced," is not well taken. In such case, or cases of that sort, the want of a fence sustains no relation to, or connection with the injury, and the statute has no application. When a statute imposes liability for the killing or injury of stock, caused by a moving train, upon or near its unfenced track, it includes all such causes as are produced by a moving train that directly contribute to that result, whether caused by actual collision or not, when the injury occurs upon or near its unfenced track. The words, "whenever such killing or injury is caused by a moving train," etc., relate to injuries directly caused by it to stock upon or near its unfenced track, and are broad enough to include all injuries, thus occurring, which are the direct result of such moving train, upon such track. This would include injuries occurring upon its track from other causes than actual collision. The "killing or injury" must be caused by a moving train, but it is immaterial whether such "killing or injury" is the result of actual collision or not, so that it is caused, for the want of a fence, by a moving train, upon or near its track. It is enough if the injury which results is caused by a moving train, when the lack of a fence permitted the animal to get on the track. This construction is further sustained by the use of the words, "near any unfenced track," which indicate a place where the death or injury to the animal may happen without actual contact with the engine, yet be caused by it. Hence a moving train may be the cause of the injury or death of an animal without actual collision. To illustrate: For the want of a fence along the track of a railroad where it ought to be fenced, an animal enters upon the track, and while there takes fright at an approaching or moving train, and, to escape the danger, runs along the track and falls into a trestle, or jumps into a ditch near the track, and is injured. Is not the injury caused by a moving train? It caused the animal to take fright, and in its flight to run into the trestle or jump into the ditch and injure itself. From the cause of the fright to the injury there is no break nor intervening agency. The moving train was the cause of the injury, and without it the injury would not have occurred. Under our statute, then, it is sufficient if the moving train caused the injury, in connection with an omission to fence, whether there was actual collision or not.

Under statutes of other states, when the language of the enactment did not necessarily import that there must be actual collision to give a right of recovery, their courts have held that it is not necessary that there shall be a collision to entitle the owner of the injured animal to recover. In *Young v. St. Louis, K. C. & N. R. Co.*, 44 Iowa, 173, a horse went upon defendant's track, which was not fenced, before a train, and ran ahead

of the train until it fell into a bridge, and received injuries from which it died. There was but a single narrow passage down the fill of the road affording an avenue of escape between the point where the horse went upon the track and the bridge; the train was stopped before it reached the horse. The statute of Iowa imposes upon railroad companies liability for stock injured upon their roads when unfenced at points where the duty to fence exists, when the injury results by reason of a want of a fence, and is not occasioned by the willful act of the owner. Under this statute, and upon the facts as stated, the railroad company was held liable. The court said: "When, then, may it be said that an animal is injured by reason of a want of a fence, within the meaning of the statute?" The answer was: "It is when the want of a fence, in connection with the acts of the defendant, is the proximate cause of the injury." In *Kraus v. Burlington, C. R. & N. R. Co.*, 55 Iowa, 388, the mare got on the track by reason of a want of a fence, and, being frightened by a train, ran along the track in front of it until she came to a bridge forming a part of the road, in attempting to cross which she was greatly injured, without having been struck by the train, and the court held that it was not necessary that the mare should have been struck by the train to authorize a recovery under the statute. In this case the defendant asked the court to instruct the jury that, "if the railroad run through a plat of country from the point where the mare in question came upon the track, and could have escaped from the track just as well as not, but instead of doing so she ran along upon the track, jumped into the bridge, and was injured without collision with the railroad train or locomotive drawn by it, then there can be no recovery in this action." The court says: "We are not prepared to say the defendant can escape a result caused by its negligence in failing to fence, by setting up a want of intelligence, or the negligence of the animal injured; nor are we prepared to say, as a matter of law, that the plaintiff cannot recover if the facts were as stated in the instruction refused." In *Liston v. Central Iowa R. Co.*, 70 Iowa, 714, it was claimed that the horse was not killed by reason of the absence of a fence at the place of accident, because there was nothing to prevent him from leaving the track; but the court held, although a horse may be "crazy," if he gets upon the track of a railroad on account of a want of a fence where the duty to fence exists, and, for want of intelligence runs ahead of the engine on the track, when he might escape on either side, and runs into a bridge and is killed, without being struck by the engine, the company is liable, notwithstanding the horse's want of intelligence, and the manner of his death. In *Atchison, T. & S. F. R. Co. v. Jones*, 20 Kan. 529, a mare got on the track at a place where it ought to have been but was not fenced, and, being frightened at an approaching train, fled along the track until she reached a tie bridge, when she either jumped forward, or was thrown forward by the engine,

onto the bridge, and was fatally injured. The statute of Kansas imposes liability for every animal killed or wounded "by the engine or cars on such railway, or in any other manner whatever in operating such railway," etc., where there is an omission to fence. The court held that under the statute no actual collision between the engine and the animal injured is essential to liability. Brewer, J., speaking for the court, said: "This last clause is very broad, and clearly covers a case like the present. Whether the engine struck the mare or not, the injury resulted directly from the operating of the railway. Of course, the mere fact that she was injured on the track would not be conclusive. . . . But where the injury occurs in the actual operating of the railway, and as the direct result of such operating, then the statute applies. Here the company was running one of its trains. An animal is on the track, permitted to come on through the lack of a fence along the track at a place where it ought to be fenced. The approaching train frightens it, and it flees along the track to avoid danger, and in that flight either falls or is thrown by the engine into the open space of a tie bridge, and is injured. Clearly, the train, acting upon the animal's sense of fear, and the open space of the bridge, are the direct causes of the injury. It results from and occurs in operating the road." In all these cases the fact that the train did not strike the animal does not relieve the railroad company from liability. But in all of them the fence bears a relation to the injury, in connection with the operation of the train as the proximate cause. Sections 4044, and 4048, when taken together, provide, in effect, that a railroad company shall be liable for the value of stock killed, and for reasonable damages when injured, upon or near any unfenced track of its road, whenever such killing or injury is caused by any moving train, engine, or cars upon such track; and (4048) that in every action for the recovery of such value for stock so killed, or for damages for such injury to the same, the proof of the killing or injury shall, of itself, be deemed and held conclusive evidence of negligence on the part of the company; but contributory negligence on the part of the plaintiff in such action may be set up as a defense. "The statute," says Thayer Ch. J., "makes the killing or injury of stock in such case conclusive evidence of negligence upon the part of the railroad company, and I do not see that it is necessary for the plaintiff to allege negligence in any form." *Hindman v. Oregon R. & Nav. Co.* 17 Or. 620.

We do not understand, then, in actions brought under the statute, that it is material whether the servants of the company operated the train carefully when there is an omission to fence, by reason of which stock get on the track, and the injuries to them which result therefrom, upon or near its track, are caused by a moving train. For this reason we have assumed that there was no negligence of the servants of the defendants in the operation of the train, although the evidence indicates that there were but two places

where the animals could have left the track without some difficulty or danger. So that, under our statute, when the killing or injury to stock is caused by a moving train at a place where the company has failed to fence, where the duty to fence existed, and the facts are so alleged and proved, a case of negligence is made out, unless the defendant can show contributory negligence or misconduct. In the case at bar the mare got on the track for the want of a fence, where the duty to fence existed, and, frightened at an approaching train, fled down the track to escape the danger, and in that flight ran into an open

trestle and was injured. It was the want of a fence along the track at a place where it ought to have been fenced that permitted the mare to get on the track, and the injury which resulted to her therefrom was directly caused by a moving train. The want of a fence, therefore, in connection with the moving train was the proximate cause of the injury, and rendered the Company liable under the terms of the statute without actual collision.

In this view we do not think there was any error, and the judgment of the court below must be affirmed.

MISSOURI SUPREME COURT.

STATE of Missouri, *Plff. in Err.*,

v.

Frederick C. BURGOERFER.

(..... Mo.)

1. A writ of error lies on behalf of the State to review an order quashing an indictment on the ground of the unconstitutionality of the statute under which it was drawn under a statute allowing the State an appeal or writ of error "when any indictment is quashed or judged insufficient on demurrer or when judgment thereon is arrested;" and the right to review is not limited to cases where the indictment is held insufficient for matters of form, by a subsequent clause in the statute which authorizes the trial court to hold the defendant if it has reason to believe that he can be convicted of an offense if properly charged.
2. Mere failure to include the whole of a class of evils in a statute prohibiting, and providing punishment for indulging in, part of the class, does not sanction by implication indulgence in the omitted portion.
3. The subject of an Act cannot be held to be not clearly expressed by the title "to prohibit book-making and pool-selling" on the ground that it is to regulate and not to prohibit, simply because it forbids book-making and pool-selling on events occurring beyond the borders of the State without alluding to those which might occur within its borders, since such business is not sanctioned by failure to prohibit it.
4. An Act to which the only objection is that its title is broader than its subject matter will not be set aside on the ground that its subject is not clearly expressed in its title unless the inference is irresistible that the title misled those who voted for it.

NOTE.—Implied sanction of evil by statutory regulations.

Little authority has been found on the question of implied sanction of evil by statutory regulations, but there is a Tennessee decision to the effect that mere taxation of an unlawful business does not legalize it. *Palmer v. State*, 8 L. R. A. 230, 88 Tenn. 553.

Thus a statute placing a license tax on the business of selling pools upon horse-races "in this or any other State," does not legalize the sale of pools upon a race run outside the State where other statutory provisions make betting a misdemeanor but exempt therefrom bets upon a horse-race run upon a licensed track within the State. *Palmer v.* 14 L. R. A.

5. An exercise of police power will not be declared void for the reason that it is partial and does not exterminate the evil with which it undertakes to deal.

6. One engaged in selling pools or making books on events to occur beyond the limits of the State is not deprived of the equal protection of the laws by a statute which prohibits making books or selling pools on such events, but does not prohibit it on events within the State. Such Act is uniform in its operation upon all coming within its provisions; all are alike prohibited from engaging in one class of transactions and have equal rights as to the other class.

(November 16, 1891.)

ERROR to the St. Louis Court of Criminal Correction to review a judgment quashing, on motion of defendant, an indictment charging him with book-making and pool-selling contrary to the provisions of the statute, on the ground that the statute under which the indictment was drawn was unconstitutional and void. *Reversed.*

The facts are stated in the opinion.

Meers. Charles P. Johnson, John D. Johnson and Thomas B. Harvey, with Mr. Bernard Dierkes, for plaintiff in error:

Upon him who attacks the life of a law rests the burden of showing its nullity and invalidity beyond a reasonable doubt.

State v. Pond, 12 West. Rep. 363, 93 Mo. 618; *State v. Addington*, 71 Mo. 110; *State v. Laughlin*, 75 Mo. 147; *State v. Ransen*, 73 Mo. 78; *St. Louis County Ct. v. Grimseld*, 58 Mo. 175.

Courts cannot declare an Act of the Legis-

State, 8 L. R. A. 230, 88 Tenn. 553; *Brown v. State*, 88 Tenn. 568.

A very recent and as yet unreported decision of the Supreme Court of Indiana holds that license laws permitting the sale of intoxicating liquors are not unconstitutional as being intended to promote an illegal business. *Haggart v. Stebbin* (Ind.) Jan. 26, 1892.

For notes on the sufficiency of titles to statutes, see *Titusville Iron Works v. Keystone Oil Co. (Pa.)* 1 L. R. A. 383; *People v. McElroy* (Mich.) 2 L. R. A. 609; *Evansville v. State* (Ind.) 4 L. R. A. 98.

For note on constitutional right to equal protection and privileges, see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) ante*, 573.

lature void, however unjust or impolitic it may be, unless it clearly conflicts with specific provisions of the Constitution, and unless its unconstitutionality appears beyond a reasonable doubt.

Re Burris, 66 Mo. 442; *State v. Able*, 65 Mo. 357; *Evins v. Hobitzelle*, 85 Mo. 64; *Kelly v. Meeks*, 2 West. Rep. 507, 87 Mo. 396.

Power to prohibit or regulate includes partial regulation or prohibition.

Chicago P. & P. Co. v. Chicago, 88 Ill. 221; *Keokuk v. Dressell*, 47 Iowa, 599; *Atty-Gen. v. Boston*, 2 New Eng. Rep. 669, 142 Mass. 203; *Williams v. State*, 48 Ind. 303; *Kleiser v. State*, 15 Ind. 449; *Hingle v. State*, 24 Ind. 28; *Gunnarsohn v. Sterling*, 92 Ill. 569.

The solution of such a question (constitutionality of a law) should not be made by a resort to mere verbal criticism, subtle distinction, abstract reasoning, or nice differences in the meaning of words.

State v. Laughlin, 75 Mo. 147.

The constitutional provision in question should have a liberal construction.

State v. Pond, 12 West. Rep. 368, 98 Mo. 618; *State v. Ranson*, 78 Mo. 78; *State v. Laughlin*, 75 Mo. 369. See also Cooley, Const. Lim. pp. 172, 173; Sedgwick, Stat. & Const. L. 520.

The title is required to indicate clearly only the subject of the bill, and not the extent of the treatment of that subject.

Luther v. Saylor, 8 Mo. App. 424; *Re Burris*, 66 Mo. 446; *State v. Brassfield*, 81 Mo. 163, 51 Am. Rep. 234; *State v. Miller*, 100 Mo. 445; *St. Louis v. Green*, 70 Mo. 562; Cooley, Const. Lim. 172, 173. See also Sedgwick, Stat. & Const. L. 520.

Wagering of all kinds is clearly within the sphere of the police power of the State.

St. Louis v. Fitz, 53 Mo. 585; *State v. Addington*, 12 Mo. App. 221; *State v. Addington*, 77 Mo. 117.

The policy or wisdom of the law is a matter for the Legislature; with that the court has no concern.

State v. Pond, 12 West. Rep. 368, 98 Mo. 635; *State v. Addington*, 12 Mo. App. 221; *State v. Addington*, 77 Mo. 117; *Brown v. State*, 88 Tenn. 572.

It is possible that the Legislature may have been of the opinion that to permit betting upon racing done in this State was conducive to the raising of fine stock therein.

Early in the seventeenth century, during the reign of James I., horse-racing began to be marked as a general and distinct sport in England, and was encouraged by Parliament and the Crown as being conducive to the improvement of the stock. Subsequently it began to be used too greatly for betting, and statutes were enacted to restrain excessive betting thereon.

See Oliphant, Horse-racing, pp. 153-156.

Good stock and good marksmen are useful in defense of the government, and wagering on horse-racing and target-shooting have been adjudged not to be punishable as gaming devices.

State v. Hayden, 81 Mo. 85; *State v. Lemon*, 46 Mo. 376; *State v. Bryant*, 7 West. Rep. 748, 90 Mo. 564.

Our legislatures have not seen fit to make horse-racing in this State and betting thereon 14 L. R. A.

penal, although their attention has been called to the matter, as evidenced by section 3768, prohibiting horse-racing on the public highways, and by section 3854, prohibiting racing on Sunday.

Palmer v. State, 8 L. R. A. 290, 86 Tenn. 557; *Daly v. State*, 13 Lea, 228; *Kirkland v. Randon*, 8 Tex. 10, 58 Am. Dec. 94.

Mr. Charles T. Noland, also for plaintiff in error:

The Legislature had the authority, under the police power of the State, to enact laws against any particular form of gambling; because any and all gambling, in every form, is destructive of good morals, and against the general welfare of the public.

St. Louis v. Fitz, 53 Mo. 582; Cooley, Const. Lim. 6th ed. 704.

The legislative power of the people of Missouri is vested in the General Assembly, and it can pass any law it chooses, that is not in conflict with the Constitution of Missouri, or the Constitution of the United States.

Cooley, Const. Lim. 104; Mo Const. art. 4, § 1; *Cass County v. Jack*, 49 Mo. 196.

Whether a law is wise, proper or expedient or not is a question with which courts have nothing to do.

State v. Clarke, 54 Mo. 36; *State v. Addington*, 12 Mo. App. 214, aff'd 77 Mo. 110; *St. Louis County Ct. v. Griswold*, 58 Mo. 192; *St. Louis v. Fitz*, 53 Mo. 583; *Hamilton v. St. Louis County Ct.* 15 Mo. 3; Cooley, Const. Lim. 6th ed. 197-87.

The Act now being discussed is almost a literal copy of the law in force in Tennessee, and the Supreme Court of that State sustained the law.

Brown v. State, 88 Tenn. 572; *Palmer v. State*, 8 L. R. A. 290, 86 Tenn. 557; *Daly v. State*, 13 Lea, 228.

In determining whether a title clearly expresses the subject of an Act of the Legislature, the court should be guided by several well-settled rules of law, to wit:

(1) The Act is presumed to be constitutional, and that presumption continues until the court is convinced beyond a reasonable doubt that it violates some mandatory provision of the Constitution.

State v. Laughlin, 75 Mo. 147; *State v. Missouri Pac. R. Co.* 5 West. Rep. 845, 92 Mo. 187; *State v. Able*, 65 Mo. 362; *State v. Hope*, 8 L. R. A. 608, 100 Mo. 347; *State v. Pond*, 12 West. Rep. 368, 98 Mo. 606; *Kelly v. Meeks*, 87 Mo. 396; Cooley, Const. Lim. 6th ed. 216; *State v. Cape Girardeau & S. L. R. Co.* 48 Mo. 463; *Re Burris*, 66 Mo. 442.

(2) Words are to be construed according to their usual and ordinary meaning, and if two constructions are permissible, one of which will sustain the law and the other render it invalid, courts will always adopt that construction which will uphold the law.

State v. Finn, 8 Mo. App. 341; *State v. New Madrid County Ct.* 51 Mo. 82; *Phillips v. Missouri Pac. R. Co.* 2 West. Rep. 476, 86 Mo. 540; *State v. Leffingwell*, 54 Mo. 458; *Henry & C. Co. v. Evans*, 8 L. R. A. 332, 97 Mo. 47; Cooley, Const. Lim. 218.

(3) The title of a bill is sufficient if it fairly embraces the subject matter covered by the Act; mere matters of detail need not be stated.

Re Purris, 66 Mo. 442; *State v. Miller*, 100 Mo. 444; *St. Louis v. Tiefel*, 43 Mo. 538; *Ehring v. Hobkiss*, 85 Mo. 64; *State v. Ransom*, 73 Mo. 78; *State v. Mead*, 71 Mo. 266; *St. Louis v. Green*, 7 Mo. App. 468, affirmed in 70 Mo. 562; *Luther v. Saylor*, 8 Mo. App. 424; *Jonesboro v. Carro & St. L. R. Co.* 110 U. S. 199, 28 L. ed. 118; *Cooley*, Const. Lim. 6th ed. 172.

(4) That construction must be placed on it which will carry out the intention of the law-makers, but when there is a doubt, then the object to be accomplished or the mischief designed to be remedied or guarded against may be considered.

Cooley, Const. Lim. 79, 80; *State v. Herrmann*, 75 Mo. 346.

(5) Courts will not infer or imply the existence of a fact which is in direct conflict with a presumption of law. Thus in this case the court will not infer that book-making and pool-selling, on events occurring within this State, was or is indulged in.

State v. Rich, 20 Mo. 398.

(6) An Act cannot be declared void merely because qualifying phrases might have been used in the title which would more exactly have shown the limitations of the Act.

Luther v. Saylor, 8 Mo. App. 430.

To whatever extent this law hinders or forbids book-making and pool-selling, either partially or entirely, to that extent it prohibits, and there is no regulation in the law of the subject of book-making and pool-selling, because every line is prohibitive, and not a word permissive.

Keokuk v. Dressell, 47 Iowa, 599; *Miller v. Jones*, 80 Ala. 96; *Re Hauck*, 70 Mich. 396; *Chicago P. & P. Co. v. Chicago*, 88 Ill. 221.

Gambling and the keeping of a gambling house, in the form of book-making, are not among the rights, privileges and immunities which the Federal Constitution says shall not be abridged. And the Act, being uniform in its application, operating upon all alike who come within its provisions, does not deny defendant the equal protection of the laws.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923; *Missouri v. Lewis*, 101 U. S. 22, 25 L. ed. 989; *State v. Fisher*, 52 Mo. 174; *Cooley*, Const. Lim. 14, 439; *Slaughter House Cases*, 83 U. S. 16 Wall. 86, 21 L. ed. 394; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578.

Mr. Valle Rebyburn, also for plaintiff in error:

Class legislation is not of necessity repugnant either to state or federal constitutions, if all against whom the legislation applies are subjected to the same treatment under similar conditions and circumstances in the benefits conferred or the penalties imposed.

Hayes v. Missouri, 120 U. S. 72, 30 L. ed. 580; *Humes v. Missouri Pac. R. Co.* 82 Mo. 221; *Phillips v. Missouri Pac. R. Co.* 2 West. Rep. 479, 86 Mo. 544. See also *Missouri Pac. R. Co. v. Humes*, 115 U. S. 523, 29 L. ed. 496; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 33 L. ed. 585; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253; *Barbier v. Connolly*, 113 U. S. 81, 28 L. ed. 924.

Mr. John M. Wood, *Atty-Gen.*, also for plaintiff in error.

Mr. Chester H. Krum for defendant in error.

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Thomas, J., delivered the opinion of the court:

The assistant prosecuting attorney of the St. Louis Court of Criminal Correction filed an information in that court on the 26th day of June, 1891, by which defendant was charged with keeping a pool-room and registering bets, in violation of the Act of the General Assembly of this State approved April 1, 1891, entitled "An Act to Prohibit Book-making and Pool-selling." *Sess. Acts* 1891, p. 122. Defendant, being taken before the court on proper process, filed a motion to quash the information upon the grounds: *first*, because the Act upon which the information is based is unconstitutional, in that it violates section 28 of article 4 of the Constitution of Missouri; *second*, because the Act is unconstitutional, in that it violates section 4 of the Bill of Rights of the Constitution of Missouri, and is against the law of the land. The motion to quash was sustained by the court on the ground first above indicated, and the State sued out the present writ of error. Defendant filed a motion in this court to dismiss the writ of error on the following grounds: (1) That, under the statute creating the court of criminal correction of the city of St. Louis, a writ of error will not lie in behalf of the State to review any judgment against the State in any case cognizable by said court of criminal correction. (2) That under the Code of Criminal Procedure a writ of error will not lie in behalf of the State to review a judgment against the State rendered upon a motion to quash an indictment or information, except where, upon such motion, the indictment or information has been held to be insufficient in substance or in form. (3) That the motion to quash preserved in the record and sustained by the court below was not based upon any insufficiency of the information in substance or in form, but solely upon the ground of the unconstitutionality of the law under which said information was made, and the judgment of the court below, in quashing the information, was entered, not because of any insufficiency in form or substance of said information, but because of the invalidity of said law under the Constitution of this State. This motion was overruled by this court on the 21st day of —, 1891, and before proceeding to dispose of the case on its merits, we deem it appropriate to briefly state our reasons for this action of the court in respect of this motion.

The Act creating the St. Louis Court of Criminal Correction provides that it shall be a court of record, and that the proceedings therein shall be governed by the laws regulating practice in criminal cases so far as the same may be applicable, and that "an appeal shall be allowed the defendant from any final judgment of said court to the supreme court (St. Louis Court of Appeals) if applied for within ten days after the rendition of such judgment, but not otherwise. The manner of taking such appeals shall be the same, as near as may be, as is prescribed by law for taking appeals from circuit courts in criminal cases. Writs of error shall be allowed from the supreme court (St. Louis

Court of Appeals) in like manner and with similar effect as writs of error to the St. Louis Criminal Court." 2 Rev. Stat. 1889, p. 2156. Section 4303, Rev. Stat. 1889, provides that "the provisions of this Code applicable to the circuit court and the judges thereof shall also be applicable to any other court of record exercising criminal jurisdiction and the judges thereof, in all cases when no other or different provision is made by law for the government and control of such courts and judges." The statute creating the St. Louis Criminal Court provides as follows: "Sec. 6. Appeals and writs of error, in case of final judgment or decision of said criminal court, may be allowed and prosecuted directly to the supreme court in the manner and with the effect, in all respects, as is prescribed by law in cases of such appeal or writ of error from the circuit to the supreme court in criminal cases." 2 Rev. Stat. 1889, p. 2150. Rev. Stat. 1889, on the subject of appeals and writs of error in criminal cases, has the following provisions: "Sec. 4289. The State, in any criminal prosecution, shall be allowed an appeal only in the cases and under the circumstances mentioned in the next succeeding section. Sec. 4290. When any indictment is quashed or adjudged insufficient upon demurrer, or when judgment thereon is arrested, the court in which the proceedings were had, either from its own knowledge or from information given by the prosecuting attorney that there is reasonable ground to believe that the defendant can be convicted of an offense, if properly charged, may cause the defendant to be committed or recognized to answer a new indictment; or, if the prosecuting attorney prays an appeal to the supreme court, the court may, in its discretion, grant an appeal." "Sec. 4292. If no appeal be taken by or allowed to the State in any case in which an appeal would lie on behalf of the State, the prosecuting attorney may apply for and prosecute a writ of error in the supreme court, in like manner and with like effect as such writ may be prosecuted by the defendant."

The question is whether the State is entitled to the writ of error sued out in this case by virtue of the sections of the several statutes above quoted. It is not necessary for us to decide, and we do not decide, but we will assume for the purpose of this case, that a writ of error is not allowable under these sections where an appeal cannot be taken by the State. Defendant's contention is that the above-quoted sections of the statute, when properly construed, limit the State's right to an appeal or writ of error to those cases where the indictment or information is held insufficient in form or substance, and when the court has reason to believe the defendant may be convicted if properly charged, and that the information in this case was not quashed for any insufficiency of statement in form or substance, but solely on the ground that the Act under which it was drawn is unconstitutional. In the first place, the defendant in his argument in support of his construction of these sections transposes the language used. The language of section 4290

is: "When any indictment is quashed or adjudged insufficient upon demurrer, or when judgment thereon is arrested." The defendant insists that this language "clearly indicates the intention of the Legislature to limit the discretion of the trial court to situations where, upon motion to quash, demurrer, or motion in arrest, an indictment has been held insufficient." In the second place, in order to maintain his construction, he interpolates two words, "form" or "substance," after the word "insufficient." The case of *State v. Bollinger*, 69 Mo. 577, is cited with apparent confidence in support of defendant's contention, both as to the transposition of the language and the interpolation of the two words "form" and "substance." In that case the defendant filed what was termed a "motion in arrest of judgment," for the reasons that, defendant being a slave, and the party alleged to have been killed being a slave also, the alleged act of defendant was not punishable under the law. The bill of exceptions recited that "said motion was taken up, and, upon a hearing of the facts found by the court and the facts in the cases admitted and agreed upon by the prosecuting attorney and defendant," the court sustained the same. The court held that no appeal on behalf of the State would lie in such a case. In commenting upon the sections of the Statute now under review, Judge Norton, speaking for the court in that case, said: "We think it clear that under the above sections the right of the State to prosecute an appeal is limited to those cases where the indictment has been adjudged to be insufficient either on motion to quash or demurrer, or motion in arrest of judgment, because of defective indictment. It does not appear, nor is it claimed, that the indictment on which the State asks judgment is insufficient either in form or substance, but on the contrary, its sufficiency to support a judgment is admitted." And it was held that the State was not entitled to appeal, not because there was no such crime as murder, nor because the indictment failed to properly charge defendant with a crime, but because the court heard evidence, and found from that evidence that defendant being a slave, and the party alleged to have been killed being also a slave, was not a person who could commit the crime charged, i. e., he was excluded from the operation of the law defining murder. Though the motion in that case was called a "motion in arrest of judgment," it was not in fact such a motion. A motion in arrest of judgment is founded solely on matters apparent on the face of the record which vitiate the proceedings. It raises a question of law only, and in its determination the court looks alone to the record. A question of fact must be raised by other pleas. The motion in the *Bollinger Case* was not founded on the record alone, but presented an issue of fact, and for that reason ought to have been rejected by the court; but the court tried the issue of fact thus raised, and decided it in favor of defendant, and discharged him. The facts presented by the motion could have been, and ought to have been, introduced on the trial before the traverse jury, when the

court could have instructed as to the legal effect of such facts. If this had been done, and the court had declared by instruction that, if these facts were proved, the defendant could not be convicted of murder, it is manifest the State would have had no right to appeal; and these facts being proved on the motion in arrest of judgment, and the court, upon them, having discharged defendant, the same result as to the State's right of appeal would follow. The judgment had not been arrested on the record alone or on the record at all, and therefore the statute had not provided for an appeal on behalf of the State. We quote further from the opinion in that case as follows: "The judgment of the trial court was that these reasons [that is, the fact that the defendant and the party slain were both slaves] were sufficient to authorize the judgment to be set aside. . . . From the action of the trial court in that respect the State cannot appeal, any more than it could if on the trial of the cause the court had given a wrong instruction, or instructed the jury that under the evidence they should acquit the defendant. Although such instructions might be erroneous, and ultimate in the discharge of a criminal, no appeal could be taken by the State because the law so declares." Taking the grounds of the decision and the facts, we do not regard that case as decisive of the question on the record now before us. It is true the opinion there gives color to the transposition of the language of the statute, and the interpolation in it of the words "form" and "substance." What the court meant by such transposition and interpolation it is difficult to tell. It seems this was done in that case, as is often done in judicial decisions, by the use of expressions the far-reaching effects of which are not appreciated at the time. But the language of the judge must be construed in connection with the facts of the case in which it is uttered.

There are three cases where the State has a right to appeal: (1) Where the indictment is quashed; (2) where the indictment is adjudged insufficient on demurrer; (3) where the judgment thereon is arrested. The plain grammatical construction of this language would limit the word "insufficient," as a qualifying term, to the second phrase only. We do not see how it can be extended so as to qualify the first and third phrases, and yet, if the language is to be taken literally, that is what this court did in the *Bollinger Case*. The transposition made by the court has that effect. The language of Judge Norton is, "The right of the State to prosecute an appeal is limited to those cases where the indictment has been adjudged insufficient, either on motion to quash, or demurrer, or motion in arrest of judgment." We can accept this language as a correct exposition of the statute, if the word "insufficient" be held to mean any insufficiency for which a demurrer will lie. The first clause is a general statement that an appeal will lie "when an indictment is quashed." There is no qualifying term used in connection with this declaration. Hence, if that stood alone,

no one would question, we presume, that an appeal would lie in behalf of the State if any indictment be quashed for any of the reasons for which a motion to quash can be interposed. The next provision is that an appeal will lie if the indictment be "adjudged insufficient on demurrer." Here we find a qualifying term, and the question is how far it was intended to limit, not only the words used in immediate connection therewith, but also the preceding and subsequent clauses. And here the interpolation mentioned comes in. With this interpolation the phrase would read that an appeal would lie if the indictment be adjudged insufficient on demurrer, in "form or substance." And here we have introduced another term, "substance," for definition. We can readily determine the meaning of "form" in its connection; but what is the meaning of the word "substance" in that same connection? Defendant evidently uses the terms "form" and "substance" as synonymous. He says: "No attack is made upon the information on the ground of insufficiency in form or substance." If he does not mean to convey the idea here that the failure of an indictment to charge a crime is not an insufficiency in substance, then he conveys no meaning at all, except that a failure to charge a crime is simply an insufficiency in form. Mr. Bouvier defines "substance" as follows: "That which is essential: it is used in opposition to 'form.'" That definition meets our approbation so fully, and seems so clear and concise, that any further quotation in support of it or elaboration of it would be superfluous. Hence, when an indictment is adjudged insufficient in substance, it is because it lacks something essential to make a legal charge of crime. Certain portions of an indictment are formal and some substantial. The statement or body of the indictment must set forth all the ingredients of the offense, and charge the defendant directly and positively with the commission of it. This is the substance of the charge, because essential to it. But the most substantial part of the whole indictment is the charge of an "offense." But the argument is that, if the indictment charges no "offense," it is not insufficient, within the meaning of that word as used in the statute under review. Let us illustrate this. An indictment for grand larceny fails to charge that the taking and conversion were done feloniously. Here an essential ingredient of the crime is omitted, and hence the indictment is insufficient in substance to put the party charged on his defense for that crime. Suppose the indictment in that case should charge that the taking was done feloniously, but omitted to set out the venue of the crime. In such case the indictment would not be defective in substance, but in form only; for the party was charged with a crime, no matter where committed. Suppose, again, an indictment should charge, in a formal way, that a man, being the owner of a horse, feloniously took it to town with intent to sell it. It is no crime for an owner to take his horse to town to sell it. Now, could it be said that such an indictment was not insufficient in substance? We clearly

think not. In such case the defendant would demur, and say: "I concede I did what the indictment charges I did, but I challenge the sufficiency of the facts charged to constitute a crime in law." The court sustains the demurrer, and very clearly, in our opinion, adjudges the indictment insufficient. If an indictment is insufficient for the failure to make one essential averment to constitute a crime punishable by law, *a fortiori* would it be insufficient if it charged facts which, if true, constitute no crime known to the law. It seems to us, therefore, that, granting the right to interpolate the words "form" and "substance" in the statute, the State would have the right of appeal when the indictment is adjudged insufficient for failure to charge facts constituting a crime.

That the word "insufficient" has not the restricted meaning contended for by defendant appears from another consideration. The word "demurrer" is used in its generic sense, and, when it is affirmed that an appeal will lie when an indictment is adjudged insufficient on demurrer, it must mean any insufficiency that can be presented by demurrer, and the failure to state facts constituting an offense is one ground of demurrer. This is elementary law. 4 Bl. Com. 833.

Another very cogent reason why defendant's construction is not correct may be found upon a consideration of the context. We have said enough in regard to the extent and limit of the qualifying word "insufficient." The fact that the Legislature did not see proper to put that qualifying word in all the phrases of the section proves conclusively that an appeal could be taken upon sustaining a motion to quash, demurrer, or motion in arrest of judgment for any of the grounds on which either could be interposed, for it is inconceivable that the Legislature intended to allow an appeal when an indictment is quashed for any reason, and not give it when a demurrer is sustained for any reason. We cannot and ought not to attribute to the Legislature an intent to make a distinction between a motion to quash and a demurrer when there is no reason or common sense in such distinction. Under our statute, (§ 4112, Rev. Stat. 1889,) a demurrer to and a motion to quash an indictment perform identically the same office and have identically the same effect upon the indictment and the status of the case, when either is sustained, is the same. To allow an appeal when a motion to quash is sustained for any reason, and not allow an appeal when a demurrer is sustained for any reason, would manifestly be absurd; and again, it would be manifestly absurd to hold that the State may appeal when the court quashes an indictment or sustains a demurrer or motion in arrest for some informality, which could be corrected so as to make a legal charge, but deny the right of appeal if the trial court sustain a motion to quash, demurrer, or motion in arrest, for the reason the law under which the indictment is found is unconstitutional, and therefore no law at all. In the one case the error, if any, is limited; in the other, it is co-extensive with the Commonwealth. The St. Louis Court of Criminal Correction, as 14 L. R. A.

well as all other courts of the State exercising criminal jurisdiction, can declare a law unconstitutional and void, and hence non-enforceable; so can all the trial courts in the State; and, if no error of such courts in that respect can be corrected by the appellate courts, the most wholesome law may be made nugatory by one court and there be no remedy. The logic of defendant's argument is that the State can have the action of the trial court, in holding an indictment defective because it fails to use the word "feloniously" in its proper place and as often as required, reviewed by the higher courts; but when the trial court sets at naught a law enacted and approved by co-ordinate branches of the government, the State is without remedy. This is grasping at the shadow and letting go the substance. "The presumption," says Endlich in his work on Interpretation of Statutes, (section 264,) "against absurdity in the provision of a legislative enactment is probably a more powerful guide to its construction than even the presumption against unreason, inconvenience, or injustice. The Legislature may be supposed to intend all of these but it can scarcely be supposed to intend its own stultification."

Our conclusion on this question is that the State has the right of appeal or writ of error when a motion to quash, demurrer, or motion in arrest is sustained on any of the grounds for which either will be. We do not think the subsequent clause of section 4290, *supra*, that, upon sustaining a motion to quash, demurrer, or motion in arrest, the court may hold the defendant, if it has reason to believe that he "can be convicted of an offense, if properly charged," was intended to limit the State's right of appeal. The object of this provision was simply to bind defendant to appear and answer further, if the court should hold there was reasonable cause for it.

Having disposed of the question raised by the motion to dismiss the writ of error, we will now inquire whether the court below committed error in sustaining defendant's motion to quash the information on the ground that the Act under which it was drawn is unconstitutional.

1. The first contention of defendant is that the title of the Act under which this information is drawn, in its relation to the body of the enactment itself, fails to conform to section 28, art. 4, of the Constitution of Missouri, which provides that "no bill . . . shall contain more than one subject, which shall be clearly expressed in its title," and the Act is therefore inoperative and void. The title of the Act is "An Act to Prohibit Book-making and Pool-selling." The Act itself provides that everyone shall be guilty of a misdemeanor who keeps rooms for book-making or pool-selling upon the result of any trial or contest of skill, speed, or power of endurance of man or beast, which is to take place beyond the limits of this State; or who makes books or sells pools on such events; or who makes book or sells pools on the result of any political nomination, appointment, or election, wherever made or held; or who makes books with or sells pools to minors on such events. It is claimed that the title

of this Act, in its relation to the Act itself, fails to come up to the constitutional requirement quoted, in that the title does not express the subject of the Act at all; but, if it should be held that the subject is expressed, it is not clearly expressed. The contention is that the title of the Act is to "prohibit," while the body of the Act regulates, book-making and pool-selling, and therefore the title does not contain the subject, within the meaning of this constitutional inhibition. It is settled in this State that this provision of the Constitution is mandatory; and it is equally well settled that it should be liberally construed. *State v. Jackson County Ct.* 102 Mo. 581.

The main question argued, and the main question, in our view, involved in the case, is, Does this Act prohibit or regulate book-making and pool-selling? If it is one of prohibition, and this is clearly expressed in the title, the Act is valid. On the other hand, if it is one of regulation, it is invalid. The provision of the nature of the one under review was first introduced in this State in the Constitution of 1865, as follows: "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title; but, if any subject embraced in an Act be not expressed in the title, such Act shall be void as to so much thereof as is not expressed." Four apparently important changes were made by the Constitution of 1875: (1) The word "bill" is substituted for "law enacted by the General Assembly;" (2) the words in the Constitution of 1865 we have italicized are omitted; (3) the word "clearly" is inserted before the word "expressed;" (4) the word "contain" is substituted for the words "relate to."

There is, of course, a marked difference between "bill" and "a law enacted by the General Assembly." We do not deem it necessary in this case to enter into a discussion of the object of this change. It may or may not have been intended to affect the general intent of the provision, but whether it did or not we leave for future consideration when a more doubtful case than the one in hand arises. The omission of the words we have italicized was intended probably to emphasize the general object of the provision, that a bill shall contain but one subject. The word "clearly" may have been intended to require greater precision in the title than was indicated by the use of the word "expressed," without a qualifying term. We do not deem it necessary, however, to elaborately discuss the effect these changes were intended to have upon the meaning and scope of this provision, and we will proceed at once to determine whether the Act in question, entitled as it is, conforms to the inhibition as it exists in the present Constitution. This court has the undoubted right and authority to declare an Act of the General Assembly void on the ground that it fails to conform to or is in conflict with the Constitution.

The constitutional provision under review has two distinct aspects in its relation to the power of the court to nullify an Act for non-conformity to it: (1) If the title of an Act clearly fails to contain the subject, or

the Act clearly contains two incongruous subjects, whether expressed in the title or not, the Act is void *per se*, without regard to whether legislators or people were misled or not. In such case, the only question for the courts to determine is, Does the title clearly fail to contain the subject, or does the Act contain two or more incongruous subjects? If the courts can answer this question in the affirmative, the Act will be declared unconstitutional; if in the negative, it will be held valid. Here the courts can find some solid ground on which to stand. The main object of this inhibition was to require the title to contain the subject of the Act, and to prevent the insertion in the same bill of two or more incongruous subjects, not because legislators and people might be misled, but to prevent log-rolling and cross-lifting, by which different interests might combine and succeed in enacting an omnibus statute that could never be passed if each subject had to stand or fall on its own merits or demerits. This principle finds many illustrations in the adjudged cases of this and other states. *State v. Jackson County Court*, 103 Mo. 581; *Cooley*, Const. Lim. 170 *et seq.*, and cases cited in notes. In the case at bar it is claimed that the subject of the Act as contained in its title is the prohibition, while the subject of the Act itself is the regulation of book-making and pool-selling, and hence that the title does not contain the subject of the Act. The argument is that a law which prohibits certain acts of a given class inferentially permits the other acts of that class, and is therefore a law to regulate the whole class. The attorney for defendant cites in support of this contention the cases of *People v. Gadsday*, 61 Mich. 285; *Cantril v. Sainer*, 50 Iowa, 26; *Re Hawck*, 70 Mich. 896; *State v. Jones*, (N. J.) 12 Cent. Rep. 3802, and *Miller v. Jones*, 60 Ala. 89.

Before examining these authorities, we will advert to a fundamental error counsel has fallen into in the discussion of the question. In order that we may present the position taken fairly, we quote from the brief and argument of defendant's attorney as follows: "The court has before it an Act to prohibit book-making and pool-selling. The title is clear, positive, and unequivocal. It declares that the subject of the Act is the prohibition of book-making and pool-selling. It does not suggest that pool-selling or book-making of any description may be carried on at any place within this State. It declares that the subject of the Act is absolute prohibition of book-making and pool-selling of every description. It does not advise the legislator who reads the Act by its title that pool-selling and book-making upon events which occur within this State is made a lawful occupation by the subject matter of the Act." There is in this extract an erroneous assumption of fact, and a false conclusion of law upon the fact assumed. The title does not declare "that the subject of the Act is the absolute prohibition of book-making and pool-selling of every description." If it did, there would be much plausibility in the argument that the title does not contain the subject. We must construe the title

and the Act as written. We have no right to interpolate words into the title or Act, or both unless such words are necessarily understood; and we do not think the words "absolute" and "every description" are necessarily understood in the title of the Act before us. The most serious error, however, in the quoted extract is the legal deduction the attorney makes. The assumption is that the Act makes pool-selling and book-making on events to occur in Missouri a lawful occupation. If that assumption were true, there would be some force in the argument that an Act which prohibits some things, and affirmatively sanctions others of the same class, is a regulative, and not prohibitive, Act. But does this Act do that? It is not pretended that it does in terms, but it is insisted it does inferentially. The contention is that, when the State prohibits some things of a given class, it sanctions others of the same general class. There is a far-reaching fallacy underlying this contention. The State does not, in fact or in contemplation of law, sanction all acts it does not prohibit, or for which it provides no punishment. It may see proper to leave some wrongful acts of its citizens to be regulated by the usages of society, by public opinion, and by the social and natural forces inherent in man's nature. There is a radical and fundamental distinction between a failure to provide punishment for an act and the sanction of it. Many illustrations of this distinction can be drawn from the civil and criminal laws, not only of our State, but all states and countries. One will suffice for our present purpose. It is made a capital crime for a man to have illicit sexual intercourse once with a female under fourteen years old, whether with or without her consent; but, if the female be one day over the age of fourteen years, one single act of such intercourse with her, with her consent, is no crime at all. *State v. Crowner*, 56 Mo. 147; *State v. West*, 84 Mo. 440. Can it be said the State, by not providing a punishment for the latter act, sanctions it? The statement of the question contains its own answer. This phase of the subject is well illustrated by the agitation that grew out of the ordinances of the city of St. Louis a few years ago authorizing the licensing of bawdy-houses. The distinction between the State failing to punish an act, and its sanction of the act by granting a license to do it, was sharply made in that controversy, and the ordinances in question soon went down under the indignation of an outraged people. When the mothers and fathers, husbands and wives, brothers and sisters, of the State came to realize that they, in law, gave affirmative sanction to prostitution, by authorizing its existence for a consideration by way of a license fee, they withdrew such sanction, emphatically and irrevocably. The Louisiana lottery is another forcible illustration. This gigantic organization has become a national evil, intensified by state sanction, authority, and license. Octopus-like, it has laid its blighting hands upon every city and hamlet from ocean to ocean, corrupting the morals of the nation, and drawing money from the

people by the million. National sentiment, which this great wrong outrages, will no doubt ultimately compel the withdrawal from it of state authority to carry on its nefarious business.

The State, it is said, can do no wrong; but whether this be true or false, it cannot be affirmed that the State in any case sanctions a wrong, in law or fact, for which it provides no punishment. On the other hand, we believe we can safely affirm that the State sanctions nothing by implication. Our Bill of Rights guarantees life, liberty, and the fruits of industry. Personal and property rights find their sanction in the common law of our State, and of all states. These are imbedded in the fundamental laws of the land. They form a part of the affirmative jurisprudence of the State, sanctified by time and experience. But when the State provides a punishment for a part of a class of evils, it does not inferentially sanction the remainder of such class, for which it does not see proper to provide a punishment. It does not by prohibiting one wrong, sanction another. No positive law exists for the protection of transactions growing out of and founded upon bets and wagers. Book-making and pool-selling on "the result of any trial or contest of skill, speed, or power of endurance of man or beast" on events to occur anywhere, are not within the protection of the laws of Missouri. They are *contra bonos mores*, and the courts will refuse to enforce contracts growing out of them. *Hayden v. Little*, 85 Mo. 418.

Prize-fighting, which is a contest of skill and power of endurance of man, is positively prohibited as criminal in this State. Section 8757. Betting on the result of elections is made a misdemeanor by section 5215. Betting on horse-races, while not made criminal, is not recognized by our courts as a lawful business. A contract growing out of it will not be enforced. But this argument on our part is a work of supererogation. The attorney for defendant supports our views of the law on this subject in the following language in his brief: "As horse-racing is a game, it may safely be assumed that any trial of speed or endurance between man and man, or beast and beast, or between man and beast, is likewise a game. A foot-race has been held to fall within the category of games (*Swaggard v. Hancock*, 25 Mo. App. 605); and dog fights, prize-fights, chicken fights, base-ball contests, foot-races, regattas, and all trials of skill, speed, and endurance of the kind, must necessarily fall within the same category. . . . It has always been the policy of the law to discourage bets and wagers as being *contra bonos mores*."

Some of the events mentioned in the Act also being criminal, and bets on some being also criminal, and bets on the others being unlawful, not in the sense of being criminal, but being unlawful because contrary to good morals, and hence contracts growing out of them being non-enforceable, the State in failing to provide a punishment for book-making and pool-selling, or events to occur in the State, does not thereby sanction or

regulate them. Especially does it seem clear to us that it should not be held that the State sanctions an evil by implication or inference. If it has power to sanction and regulate evil at all, it would require an unequivocal, affirmative declaration by the State to that effect, to accomplish it. It appearing that the State in the Act before the court has not sanctioned and regulated anything that ought to be the end of the discussion; but defendant's attorney claims to have the support of the courts of other states in the cases cited, *supra*, for the position he assumes. We will examine them and see if they do give countenance to the doctrine contended for. In *People v. Godway*, 61 Mich. 285, the situation was that in 1881 the Legislature passed an Act entitled "An Act to Regulate the Sale of Spirituous, Malt, Brewed, Fermented, and Vinous Liquors; to Prohibit the Sale of Such Liquors to Minors, Intoxicated Persons, and to Persons in the Habit of Getting Intoxicated; to Provide a Remedy against Persons Selling Liquors to Husbands or Children in Certain Cases." In 1883 this law was amended by adding a new section, as follows: "It shall not be lawful for any person including druggists, by himself, his clerk, agent, or servant, directly or indirectly, to sell or offer for sale, furnish or give away, any spirituous, malt, brewed, fermented, or vinous liquors, or any beverages, liquors, or liquors containing any spirituous, malt, brewed, fermented, or vinous liquors, or suffer the same to be done at any time within a radius of two miles from the grounds or premises of the Michigan Military Academy, an institution of learning located near Orchard Lake, in the county of Oakland, in this State." The Supreme Court of Michigan held this amendment unconstitutional, because not germane to the original law, which was one of regulation of the liquor traffic. The court says: "The peculiar characteristic of the section added by the amendment is the *restricted and local* application of the prohibition. It segregates from the general territory over which the body of the Act extends a certain circle around the premises of the military academy, and *in that circle entirely prohibits the traffic. In all other points of the State it regulates; here it prohibits.*" The italics are ours. In *Miller v. Jones*, 80 Ala. 89, the title of the Act assailed was "An Act to Regulate the Sale, Giving Away, or Otherwise Disposing of Spirituous, Vinous, or Malt Liquors, or Intoxicating Bitters, or Patent Medicines Having Alcohol as a Base, in Talladega County." The body of the Act provided for a vote on the question in the county named, and, if a majority of those entitled to vote were in favor of prohibition, then it should be illegal to sell liquor, etc. The Supreme Court of Alabama says: "But one subject is expressed in the title,—the regulation of the sale, giving away, or otherwise disposing of liquors; and the inquiry is, Does the title express the subject contained in the enactment? In other words, are regulation and prohibition the same or distinct subjects? 'Regulate' and 'prohibit' have different and distinct mean-

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ings. . . . To regulate the sale of liquors implies, *ex terminis*, that the business may be enjoyed in or carried on subject to established rules or methods. Prohibition is to prevent the business being engaged in or carried on entirely or partially." And the Act was held unconstitutional because the subject was not expressed in the title. The enactment was held to be prohibitory, though the prohibition was conditional. If a majority was against the sale of liquor, no liquor could be sold; if a majority was not against such sale, then liquor might be sold. Hence the prohibition provided by the law was conditional, and not absolute, and yet it was held to be a law to prohibit the sale of liquor. In *Re Hauck* this question came again before the supreme court of Michigan, and was decided May 18, 1888, 70 Mich. 396. In 1887 the Legislature passed an Act entitled "An Act to Regulate the Manufacture and Sale of Malt, Brewed, or Fermented, Spirituous, or Vinous Liquors in the Several Counties of This State." The body of the Act provided that the question of the sale of liquors might be submitted to a vote of the people of the respective counties, and if a majority of those entitled to vote were against the manufacture and sale of liquor in any county, then it should be unlawful to manufacture or sell liquor in such county, and the general law on the subject should be suspended therein. The court says: "When it [the law] was enacted there was a general law in force regulating the sale of spirituous, malt, brewed, fermented, and vinous liquors, under certain restrictions and limitations; upon complying with which, and paying the taxes prescribed by another general law, it was lawful for any person to engage in the manufacture and sale of such liquors in any county in this State. These general laws were not repealed by the passage of the Act in question. In reviewing these various sections, it is apparent that the object of the Act is to prohibit the manufacture and sale of liquors to be used as a beverage. There is no attempt by the Legislature to disguise this object in the body of the Act;" and the court held that the Act was unconstitutional, because its title was to regulate, and the enactment itself was to prohibit the liquor traffic, on certain conditions. Here again, as in the Alabama case, this Act was construed to be one of prohibition, though such prohibition was partial and conditional. The case of *Cantrel v. Sainer*, 59 Iowa, 26, is to the same effect. The Supreme Court of New Jersey in *State v. Jones* (N. J.) 12 Cent. Rep. 803, held that partial prohibition of the liquor traffic was regulation of that traffic, in support of the constitutionality of an Act. This ruling is in direct conflict with the Iowa, Michigan, and Alabama cases cited. But the New Jersey court proceeded upon the theory that a general law made the traffic lawful, and regulated it, and the Act assailed was upon the same subject, and provided for further regulation, on certain conditions.

The principle of the Iowa, Michigan and Alabama cases is that, where there is a general law providing for the licensing of the

liquor traffic, the conditional prohibition of it in a prescribed territory is prohibition, and not regulation within that territory. That principle has no application to the Act in the case at bar. In the case of the liquor traffic a positive law sanctioned it. In the case of book making and pool-selling, there is no positive law sanctioning them. In the former case it is held that it is not the use, but the abuse, of liquor that is hurtful, and that the sale of it for legitimate purposes is not immoral. In the latter case book-making and pool-selling are held to be contrary to good morals, and the courts refuse to enforce contracts growing out of them. But the Act before the court is prohibitory in its entire scope and purpose. It does not prohibit all book-making and pool-selling on the events named, but, as far as it attempts to deal with the subject, it prohibits them. The Act is not, it is true, as broad as the title, but it is germane to and included in it. Logically, some prohibition is included in all prohibition. Logically, the title does contain the subject of the Act. The title does not give notice how the prohibition is to be effected, or to what extent, whether partially or wholly, whether by making the Act prohibited a felony or a misdemeanor, but it does give the information that the Act is for the prohibition of book-making and pool selling. In *Re Burris*, 66 Mo. 446, this court, speaking of an Act entitled, "An Act in Relation to County Clerks," used this language: "It is not intended that the substance of the Act shall be embraced in the title, but that the subject should be stated in general terms, and not specifically. For instance, an Act was passed by the General Assembly in 1877, entitled 'An Act for the Protection of Married Women.' The title does not indicate in what that protection was to consist. By the title alone, one would not know whether it was to protect married women in their rights of property, or in their persons, or in what manner the protection was to be afforded, whether by conferring upon them rights of suffrage, etc. ; . . . but it does apprise one that it is a law for their protection." This reference to the Married Woman's Act well illustrates the principle that the title of an act may contain a generic term, and the body of the enactment be specific, and the act be upheld, provided the enactment itself is germane to and included in the subject of the title. Cooley, Const. Lim. pp. 172, 173, says: "The generality of a title is therefore no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection." In *Luther v. Saylor*, 8 Mo. App. 424, the Act in question was an Act entitled "An Act to Better Secure the Wages of Laborers and Operatives." The enactment itself provided that all employes and operatives of railroad and other corporations should have priority of payment of their wages over other creditors. This law was assailed on the ground that the title indicated that all wages of all employes and operatives, by whomsoever employed, were to be secured, while the bene-

fits of the Act in its body were extended to the employes and operatives of railroad and other corporations only, and therefore that the body of the Act was not co-extensive with its title. The court held that the Act was not violative of the constitutional provision under discussion. Judge Hayden, speaking for the court, said: "Here are no incongruous and unconnected matters joined. The title fairly expresses the subject of the Act. Though it is too broad, the title is not adapted to deceive. An Act cannot be declared void merely because qualifying phrases might have been used in the title which would more exactly have shown the limitations of the Act. The title must be a title which implies generality. Here the general subject is clearly expressed in the title, and what might properly have been added would have been only a limitation upon the scope of the Act. It is sufficient if it fairly gives notice of the subject so as reasonably to lead to inquiry into the body of the bill. *Allegheny County Home's App.* 77 Pa. 80."

Having discussed one phase of the constitutional provision in its relation to the case at bar, and in its relation to the power of the judiciary to set aside an Act of the Legislative and executive departments of the state government, and having determined that the Act in question contains but one subject, which is expressed in its title, let us proceed to a consideration of the other phase of this provision in its relation to the case in hand, and in its relation to the judicial power mentioned above. The other phase of this provision is the requirement that the title of the bill shall clearly express its subject. When it comes to this phase of the provision, the duty of the court is not so plain as in the other case. Here we find no solid ground on which to stand. We enter here a region of doubt, a debatable land, whose boundaries have not been fixed, cannot be fixed, and are not plainly perceived. What appears clear to one mind may not appear clear to another. The whole provision should be liberally construed, but especially should the courts hesitate to declare a law unconstitutional because its title does not clearly express the subject of the Act. We feel satisfied of one thing, and that is the words "clearly expressed" are not used in the sense of exact definition. It was intended the title should be a fair, though general, index of the subject matter of the Act. The general rule is succinctly stated in *State v. Miller*, 100 Mo. 445, as follows: "In adopting a title, the Legislature may select its own language, and may use few or many words. It is sufficient that the title fairly embraces the subject matter covered by the Act; mere matter of detail need not be stated in the title." If the title must contain an exact definition of the subject of the Act, no safe course would be left for the legislator except to make the title co-extensive, not only in meaning but phraseology, with the body of the enactment. If the courts are justified in setting aside an act of the Legislature on the ground that the title fails to give the exact scope of the enactment, it is

probable not a single statute in our State could stand the test of judicial scrutiny. But this was not the intent of this requirement. The title must express the subject of the Act in such terms that the members of the General Assembly and the people may not be left in doubt as to what matter is treated of. The terms of the title must be such as to unequivocally put everyone upon inquiry into the contents of the bill.

The inhibition under review must be construed in the light of the other provisions of the Constitution *in pari materia*. These provisions are: (1) "No bill shall be considered for final passage unless the same has been reported upon by a committee and printed for the use of the members." (2) All amendments adopted by either House shall be incorporated with the bill by engrossment, and the bill thus engrossed shall be printed for the use of the members before final passage. The engrossment and printing shall be reported by a committee to be correct. (3) Every bill shall be read on three different days in each House. (4) No bill shall become a law until signed by the presiding officer of each House, who shall suspend all business, and cause the bill to be read at length in open session. (5) It then goes to the governor for his action. Take these provisions, in connection with the fact that the halls of legislation are flooded with the daily papers of our large cities containing accounts of the proceedings of the General Assembly, with copious comments *pro* and *con.*, and it seems to us it would be a difficult task to pass a bill, by a trick, through all committees of both Houses, and have it approved by the governor. A legislator sees the Act entitled "An Act to Prohibit Book-making and Pool-selling" lying printed on the table before him. It has but one section. Will he vote for it on its title alone? Will he not inquire how these are to be prohibited? What punishment is to be inflicted? Indeed, what book-making and pool-selling are to be prohibited? By devoting three minutes' time to a perusal of the bill he can learn its scope and object. But this bill in its original form did prohibit all book-making and pool-selling on the events named in it, and it was amended by striking out all after the title, and inserting the enactment as it finally passed. The amended bill was printed and laid before the members. Is it possible any member would still fail to read either the original or amended bill, or make inquiry as to its scope, or the extent and intent of the amendment? The argument is that some member might vote for the bill upon the supposition that it prohibited every variety of book-making and pool-selling, and that he would not have voted for it if he had known it only partially prohibited them. Is not such a supposition preposterous? This Act comes to us with the sanction and approval of two co-ordinate branches of the government. It was introduced in the Senate on the 9th day of January, 1891, and was finally approved by the governor, April 1. In the meantime it had gone through the committee on criminal jurisprudence and of the whole in both Houses, had been amended, and numerous amendments had been defeated.

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It passed the Senate by a vote of twenty-five to ten, and it was read and approved. It passed the House by a vote of seventy-seven to nineteen, and its title was again there read and approved. Among the members of the General Assembly are to be found some of the ablest lawyers in the State. The senators and representatives come from city and country, and from every department of business and commerce, and this court should not set aside this law unless the inference is irresistible that the title did in fact mislead those who voted for it. "No question," says Norton, J., in *State v. Pond*, 93 Mo. 618, 12 West. Rep. 368, "of more delicacy or importance, ever comes before a court of last resort, than one which involves the constitutionality of an Act passed in due form by the legislative department of the government." And he adds that the courts should "approach the question with great caution, and never declare a statute void unless, in their judgment, its nullity and invalidity are placed beyond a reasonable doubt. No rule of construction is better established, both on principle and authority, than that acts of the Legislature are presumed to be constitutional until the contrary is clearly shown. The solution of such a question ought not to be made by a resort to mere verbal criticism, subtle distortions, abstract reasoning, or differences in the meaning of words." See other authorities cited in the *Pond Case*, *supra*.

Would it not be presumptuous in us to declare, as a matter of law, that the members of the General Assembly and the governor did not know the contents of the bill? It is possible that, during the three months this bill was pending, not a single member undertook to ventilate it? Can we fairly assume that the 10 senators and 19 representatives who voted against this measure sat silently by, and permitted a fraud to pass both Houses of the General Assembly, and be approved by the governor? And if we could imagine that the members of the Legislature took so little interest in this measure as to make no inquiry about its scope, but voted for it blindly, on its title, supposing that the Act itself would exterminate book-making and pool-selling by the most effectual means, where was this defendant, who was engaged in the business, and others probably, and their friends, that they took no steps to prevent the contemplated fraud? Or did they assume also, from a perusal of the title, the Act was intended to dig up book-making and pool-selling root and branch, and to utterly destroy them, and they were happy in the contemplation of the passage of such a law? There is no reason, in any view that may be taken of the subject, to hold that the title of this Act was intended to deceive, was calculated to deceive, or did deceive, anyone. Our conclusion on this point is that the Act did contain but one subject, which was clearly expressed in the title, within the meaning of the constitutional provision.

2. The second contention of defendant is that the "Act in question is in no proper sense a legitimate exercise of the police power of the State." His argument on this

point proceeds upon the theory that if the State undertakes to eradicate an evil, it must utterly exterminate it in all its ramifications; and if it fails to do this, and deals with the evil in a partial way, its action is void. Defendant concedes that all betting and wagering is immoral and an evil, and he comes to the court, and, by his motion to quash the information, admits that he has done wrong in one direction, and then asks to escape punishment on the extraordinary ground that the Legislature failed to prohibit him from doing wrong in another direction. Wagering of all kinds is clearly within the police power of the State. *St. Louis v. Fitz*, 53 Mo. 584; *State v. Addington*, 77 Mo. 117. If every Act should be set aside because it failed to prohibit all of the evils of the class to which the legislation is directed, probably not a single criminal statute could stand a close scrutiny. The Legislature has a discretion, not only in what it will prohibit, but also in the method of the prohibition within the domain of its power. An evil may exist in such a form that the State may not choose to attempt its suppression by law, and again the same evil, by the centralized form it takes, may imperatively demand state interference in the interest of public morality and the good order of society. The Louisiana lottery is a good illustration of a centralized evil. So here we may fairly assume that our Legislature intended to strike the business of book-making and pool-selling in its nerve center, and thus prevent rendezvous from being established as temptations and snares for the unwary and the young. We know of no law or reason requiring legislatures to punish the same act under any and all circumstances. They often distinguish between the same acts, holding some harmless, while punishing others according to time, place, and circumstances. Lotteries are prohibited only when carried on as a business or a vocation. Selling liquor is permitted, but the sale of it on Sunday, or in a prescribed territory, may be prohibited. Keeping a bawdy-house becomes a felony only when it is done within 100 yards of a public building. Discharging a pistol is penal if done in the vicinity of a court-house or along a public road. The playing of musical instruments in a saloon is made a misdemeanor. The Legislature was the sole judge of how the evil of book-making and pool-selling should be reached, and when and where. This Act may not accomplish all its originators hoped for. It may be evaded. It may not have gone as far as it ought. It may be a temporizing expedient. It may have been intended as an experiment only. These are all outside of the question in hand. "Much of the argument made by counsel for relator is addressed to the impolicy of the Act. That line of the argument is proper for the legislative ear, but not for ours. With its policy we have nothing to do." *Pond's Case*, *supra*. "But from its very nature the police power of the State is a power to be exercised within wide limits of legislative discretion, and, if a statute appears to be within the scope of this power, it would be a usurpation of jurisdiction for the judicial court to inquire into

its wisdom and policy, or to substitute their discretion for that of the Legislature." *State v. Addington*, *supra*.

3. The concluding point of objection to the Act is that it violates the Fourteenth Amendment to the Constitution of the United States, in denying defendant the equal protection of the laws: That it does not deny defendant the equal protection of the laws is settled by a long line of decisions of the Supreme Court of the United States. In *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, the construction of an ordinance of the city of San Francisco prohibiting the washing and ironing of clothes in public laundries and wash-houses within certain prescribed limits of the city and county, from 10 o'clock at night until 6 o'clock in the morning, was involved. Judge Field, delivering the opinion of the court, says: "But neither the amendment,—broad and comprehensive as it is,—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education, and good order of the people and to legislate so as to increase the industries for the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits,—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than another, but they are designed, not to impose equal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though in many respects necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discrimination against some, and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." *Missouri v. Lewis*, 101 U. S. 22, 25 L. ed. 989; *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 21 L. ed. 394. The Act under review is uniform in its application, operating upon all alike who come within its provisions. The defendant has the same opportunity to make books and sell pools upon events occurring in Missouri that any other citizen has, and all others are prohibited from doing what he is forbidden to do. Hence he has no reason to complain on the ground that he is denied the equal protection of the laws.

Our conclusion is, the court of criminal correction erred in sustaining defendant's motion to quash the information, and its judgment is reversed, and the cause remanded to that court for trial.

All concur.

INDIANA SUPREME COURT.

Hugh L. KIMBERLAIN, *Appt.*,

v.

STATE of Indiana, *ex rel.* William H. TOW.

(.....Ind.....)

1. The death of a person elected to an office before he qualifies does not create a vacancy where the Constitution provides that the incumbent shall hold office for his term and until the election and qualification of his successor.
2. The period between the expiration of his term and the qualification of his successor is as much a part of the incumbent's term of office as the fixed statutory period, where the law provides that he shall hold over until his successor qualifies.
3. The vacancy provided for by Rev. Stat. § 5527, by the failure of an officer to give bond within ten days after receipt of his certificate does not apply where he dies before the certificate is issued.

(January 6, 1892.)

A PPEAL by defendant from a judgment of the Circuit Court for Lawrence County in favor of relator in a proceeding brought to enjoin defendant from exercising the office of trustee for Marion Township. *Affirmed.*

The facts are stated in the opinion.

Messrs. Dunn & Dunn and William E. Marshall for appellant.
Mr. James H. Willard for appellee.

Coffey, J., delivered the opinion of the court:

The appellee, William H. Tow, was duly elected trustee of Marion Township, in Lawrence County, at the regular township election in the year 1888, duly qualified and entered upon the discharge of his duties as such, and is yet in the possession of the office, claiming title thereto.

At the April election in the year 1890, James H. Brown and Henry Murray were opposing candidates for the office of township trustee in Marion Township, and after the votes had all been cast and the polls closed and while the election officers were engaged in counting the ballots, but before the result of the election had been ascertained or declared, Brown suddenly and instantly fell dead. When the count was completed it was ascertained that Brown had received a majority of the votes cast for township trustee of Marion Township. At the November election in the year 1890, the appellant Hugh L. Kimberlain, and the appellee were opposing candidates for the office of township trustee of Marion Township; each took a part in the election and each voted for him-

NOTE.—*Vacancy in office by death of person elected thereto before the beginning of his term.*

The principal case is supported by several earlier decisions in holding that the death of a person elected to an office before the beginning of his term and before qualifying does not create a vacancy where there is a constitutional or statutory provision that an incumbent shall hold over after the expiration of his term until the qualification of his successor. *Com. v. Hanley*, 9 Pa. 513; *State v. Benedict*, 15 Minn. 198.

In the latter case the provision was statutory and not constitutional.

But the death of a person elected to office after he has qualified by taking the oath of office, but before his term begins, will create a vacancy under such a provision as to the holding over of an incumbent until the qualification of his successor. *State v. Bemenderfer*, 98 Ind. 374; *State v. Seay*, 64 Mo. 89, 27 Am. Rep. 206.

The death of a person elected chancellor before receiving his commission from the governor creates a vacancy within the meaning of a constitutional provision which gives the governor the power of appointment to fill vacancies. *Gold v. Fite*, 2 Bart. 237.

The death of a newly elected county treasurer after his commission was issued by the governor, but before he received it and before qualifying, makes a vacancy under a statute providing that the office shall be vacant in case of failure to give bond and take oath within a specified time, especially where the prior incumbent was ineligible under the Constitution to hold office for another term. *State v. Hopkins*, 10 Ohio St. 508. In this case nothing was said about any constitutional or statutory provision as to holding over.

The death of a candidate for office on the morning of the election before the polls were open, at 14 L. R. A.

though known to the voters and judges of election, if he receives the majority of the votes cast will not give the election to a minority candidate. *States v. Walsh*, 7 Mo. App. 142.

It is proper to say that this decision is not in harmony with a portion of the decisions on the general question of the effect of voting for a person who cannot be elected, but which do not relate to the death of a candidate. See, in this connection, the case of *People v. Board of Canvassers*, ante, 646, as one of the most recent cases presenting this question.

But the death of a successful candidate before the votes are counted authorizes the court to declare the office vacant under a statute which authorizes such a declaration when a person chosen to office "declines to accept, removes from the county, resigns, dies or becomes insane, or when there is a manifest hazard to the public interest." *State v. Hunt*, 54 N. H. 431.

The death of an officer before the expiration of his term, but after he has been elected and qualified for a succeeding term, such qualification being nugatory because premature, creates a vacancy only for the unexpired portion of the former term, and an appointment to fill the vacancy does not extend into the new term. *People v. Smith*, 31 N. C. 304.

But in Michigan, where an officer who has been re-elected dies before his new term has begun, an appointment by the governor to fill the vacancy does not expire at the end of the first term, so as to authorize another appointment for the new term, but under Mich. Comp. Laws, § 23, a special election for the new term is authorized as in a case in which "the right of office of a person elected . . . shall cease before the commencement of the term." *People v. Lord*, 9 Mich. 237.

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self. The appellant was by the proper election officers declared duly elected and, receiving his certificate of election, he qualified and filed his bond as such trustee, to the approval of the county auditor, on the 13th day of November of that year. On the 17th day of December, 1890, the board of commissioners of Lawrence County, being in special session, entered an order reciting that there was a dispute as to who was elected township trustee of Marion Township, and thereupon appointed the appellant as such trustee, but it does not appear that he filed any new bond or took any steps to qualify under this appointment. On the day of this appointment the auditor of Lawrence County issued to the appellant a warrant for the township funds belonging to Marion Township, upon which he drew the funds from the county treasury, whereupon the appellee instituted proceedings in the Lawrence circuit court to enjoin him from acting as such trustee, in which he was successful. The appellant acted as such trustee for the period of five days before he was thus enjoined. Each of the parties to this suit claims to be the legal trustee of Marion Township, the appellant basing his claim upon the election held in November, 1890, and his subsequent appointment by the board of commissioners of Lawrence County; while the appellee bases his claim upon the alleged fact that his successor has never been elected and qualified and that he has the right to such office until that event takes place.

The questions presented for consideration involve the construction of § 3, art. 15, of the State Constitution, and some consideration of the provisions of section 5527, Rev. Stat. 1881. Section 3, article 15, *supra*, provides that, "whenever it is provided in this Constitution, or in any law which may be hereafter passed, that any officer other than a member of the General Assembly, shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term, and until his successor shall have been elected and qualified."

Section 5527, *supra*, provides that, "if any officer of whom an official bond is required shall fail, within ten days after the commencement of his term of office and the receipt of his commission or certificate, to give bond in the manner prescribed by law the office shall be vacant."

It is contended by the appellant, first, that the word "election," as used in the Constitution and statutes, is not used in its restricted sense as meaning only an election by the people, but it should be construed as signifying chosen or designated, and when so construed the appellant is entitled to the office in question by reason of his appointment by the board of commissioners of Lawrence County. Second, that Brown was duly elected township trustee of Marion Township at the April election in the year 1890, and having failed to give bond and qualify within ten days after his term of office began, the office, under the provisions of section 5527, *supra*, became vacant, and

the board of commissioners had the legal right to fill such vacancy by appointment.

No authority is cited by the appellant which supports his first position, and we have no knowledge of any such authority; while, on the contrary, the adjudicated cases seem to be harmonious in holding that where one is lawfully in the possession of an office under a constitutional or statutory provision to the effect that he shall hold until his successor is elected and qualified, his right to hold over continues until a qualified successor has been elected by the same electoral body as that to which such incumbent owes his election, or which by law is entitled to elect a successor. *Goeman v. State*, 106 Ind. 203, 3 West. Rep. 886; *State v. Lusk*, 18 Mo. 338; *People v. Tilton*, 37 Cal. 614; *Ex parte Lauchorne*, 18 Gratt. 85; *Johnson v. Mann*, 77 Va. 265; *State v. Jenkins*, 43 Mo. 261; *State v. Harrison*, 113 Ind. 484, 13 West. Rep. 370.

In view of these authorities we are not at liberty to adopt the construction contended for by the appellant in this case. We have no doubt that Brown was duly elected township trustee of Marion Township. When the last vote was cast and the polls closed the electors had made their choice and the court could do nothing more than ascertain the result. The election officers had no power to elect anyone after the polls were closed, their duty being confined to ascertaining the result of the balloting and furnishing the necessary evidence of such result.

But does it follow that because Brown was elected and failed to qualify, the office of township trustee became vacant and the board of commissioners acquired the right to appoint? The rule is, that where a person is in the possession of an office under a constitutional or statutory provision like that found in our Constitution, and a successor is duly elected, but dies before he qualifies, no vacancy occurs, since one of the contingencies upon which the incumbent's term of office is to expire has not taken place, namely, the qualification of a successor.

McCrary, Elections, § 314; *Com. v. Hanley*, 9 Pa. 518.

Com. v. Hanley, *supra*, is in its facts similar to the case before us. In that case Hanley was duly elected clerk of the orphan's court in October, 1845, and was duly commissioned and qualified to serve for the period of three years from the 1st day of December of that year; and until his successor should be duly qualified. On the second Tuesday of October, 1848, Oliver Brooks was duly elected as his successor, but died before qualifying. The governor, assuming that Hanley's office became vacant at the expiration of three years, appointed a successor. In discussing the questions arising under these facts the Supreme Court of Pennsylvania said: "Being duly qualified in the constitutional sense, and in the ordinary acceptation of the words unquestionably means that he, the successor, shall possess every qualification; that he shall in all respects comply with every requisite be-

more entering on the duties of the office; that, in addition to being elected by the qualified electors, he shall be commissioned by the governor, give bond as required by law, and that he shall be bound by oath or affirmation to support the Constitution of the Commonwealth and to perform the duties of the office with fidelity. Until all these prerequisites are complied with by his successor the respondent is *de jure* as well as *de facto* the clerk of the orphan's court."

So, too, this court held in the case of *State v. Berg*, 50 Ind. 496, that where a township trustee was elected his own successor, and did not qualify under his second election that his office did not become vacant, and that he was entitled to hold under his first election until a successor was elected and qualified.

The weight of authority is that where there exists a constitutional provision such as we are now considering, that a term of office fixed by statute runs not only for the period fixed, but for an additional period between the date fixed for its termination and the date at which a successor shall be qualified to take the office, the period between the expiration of the term fixed by statute and the time at which a successor shall be qualified to take the office is as much a part of the incumbent's term as the fixed statutory period. *Tuley v. State*, 1 Ind. 500; *Miller v. Burger*, 2 Ind. 837; *Baker v. Kirk*, 33 Ind. 517; *State v. Berg* and *Gosman v. State*, *supra*; *Elam v. State*, 75 Ind. 518; *People*

v. Whitman, 10 Cal. 38; *Com. v. Hanley* and *State v. Harrison*, *supra*.

It follows from what we have said that the appellee is entitled to the office in dispute, unless the appellant has been legally chosen and qualified as his successor. As we understand the brief of the appellant it is not seriously contended that the election held in November, 1890, conferred any rights upon the appellant. As the election of a township trustee at that time was wholly unauthorized by law, such election was void and conferred no right to the office. Nor did the board of commissioners possess the legal authority to appoint the appellant to the office for the reason, as we have seen, that there was no vacancy, and there being no vacancy the appellee's successor could be chosen only by the constituency which elected him.

As to the construction to be placed upon section 5537, *supra*, or as to what provisions of that section, if any, conflict with the section of the Constitution above set out, we think it unnecessary to inquire in this case for the reason that the state of facts to which it is applicable does not arise. As Brown died before any certificate of election was issued to him, and as he did not intentionally abandon the office, this statute is not applicable to the case before us.

As we have reached the conclusion that the law is with appellee upon the facts above stated, the judgment of the circuit court should be affirmed.

Judgment affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Paul K. L. E. KRELL *et al.*

v.

Robert CODMAN.

(.....Mass.....)

A voluntary covenant that the obligor's executors shall pay within a certain time

after her death a certain sum to the obligee is not void on grounds of public policy.

(October 24, 1891.)

REPORT by the Supreme Judicial Court for Suffolk County for the opinion of the full bench, of an action to enforce a voluntary covenant. *Judgment for plaintiffs.*

NOTE.—*Agreement to pay money or give property after the death of the promisor.*

Making a note payable a certain number of days after the death of the maker does not render it invalid or affect its character. *Carnwright v. Gray*, 12 L. R. A. 845, 127 N. Y. 92.

A contract for conveyance by an executor immediately after the vendor's death, at an agreed price then to be paid, is valid and is not affected by the vendor's subsequent will. *Meek's App.* 97 Pa. 303.

A valid agreement may be made to pay the balance of the purchase price of land at the death of the purchaser. *Parker v. Coburn*, 10 Allen, 82.

A gift by a written instrument saying that it is "to be paid as soon as my financial condition will allow and if I do not live to pay it, I wish it paid out of my estate," is a mere promise to make a gift and will not sustain an action. *Johnston v. Griest* 85 Ind. 503.

The surrender of a note by the payee to the father of the deceased maker, whose estate was insolvent and fully settled, is a sufficient consideration for an agreement by the father to pay the amount thereof out of his own estate at his death. *Judy v. Louverman* (Ohio) Nov. 17, 1891. 14 L. R. A.

Agreement for bequest or devise.

A valid agreement may be made on a good consideration to give property by will. *Martin v. Wright*, 13 Wend. 460, 28 Am. Dec. 468; *Patterson v. Patterson*, 13 Johns. 379; *Robinson v. Raynor*, 23 N. Y. 494; *Dana v. Wright*, 38 Hun. 29; *Parrell v. Stryker*, 41 N. Y. 430; *Little v. Dawson*, 4 U. S. 4 Dall. 111, 1 L. ed. 763; *Jacobson v. La Grange*, 3 Johns. 199; *Jenkins v. Stetson*, 9 Allen, 128; *Wellington v. Apthorp*, 4 New Eng. Rep. 883, 145 Mass. 66; *Davison v. Davison*, 18 N. J. Eq. 246; *Van Duyn v. Vreeland*, 12 N. J. Eq. 143; *DeMoss v. Robinson*, 46 Mich. 62, 41 Am. Rep. 144; *Caviness v. Rushton*, 101 Ind. 500, 51 Am. Rep. 769; *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773; *Uplike v. Ten Broeck*, 32 N. J. L. 105; *Spearman v. Wilson*, 44 Ga. 473; *Bell v. Hewitt*, 24 Ind. 330; *Lee v. Carter*, 52 Ind. 342; *Frost v. Tarr*, 53 Ind. 390; *McGuire v. McGuire*, 11 Bush, 142; *Wright v. Tinsley*, 30 Mo. 340; *Gupton v. Gupton*, 47 Mo. 37; *McKeegan v. O'Neill*, 228. C. 454; *East v. Doherty*, 73 N. C. 563; *McLae v. McLae*, 3 Bradf. 199; *Bagan v. Kergill*, 1 Dem. 464; *Snyder v. Castor*, 4 Yeates, 353; *Fitzgerald v. Fitzgerald*, 20 Grant, Ch. 410.

A contract by an aged person to dispose of his estate in a certain way by will in consideration of

† The facts sufficiently appear in the opinion.
Mr. C. K. Codman for plaintiffs.
Mr. R. Codman, Jr., for defendant.

Holmes, J., delivered the opinion of the court:

This is an action on a voluntary covenant executed by the defendant's testatrix, in England, that her executors within six months after her death should pay to the plaintiffs upon certain trusts the sum of £2,500, with interest at 4 per cent from the day of her death.

It is agreed that by the law of England such

a covenant constitutes a debt of the covenantor legally chargeable upon his or her estate, ranking after debts for value, but before legacies; but it is contended by the defendant that a similar instrument executed here would be void. The testatrix died domiciled in Massachusetts, and the only question is whether the covenant can be enforced here. If a similar covenant made here would be enforced in our courts, the plaintiffs are entitled to recover; and, in the view which we take on that question, it is needless to examine with nicety how far the case is to be governed by the English law as

life support, is not against public policy. *Logan v. McGinnis*, 12 Pa. 27.

So a valid covenant may be made to leave a share of one's property at death to persons specified. *Fortescue v. Hennah*, 19 Ves. Jr. 67; *Cochran v. Graham*, Id. 68; *Jones v. Martin*, 3 Anst. 822; *Lewis v. Madocks*, 8 Ves. Jr. 150; *Re Brookman's Trust*, L.R. 5 Ch. App. 182.

Such a covenant creates a specialty debt which has precedence over simple-contract debts. *Eyre v. Monro*, 26 L. J. Ch. N. S. 757.

A covenant on a valid consideration not to convey, devise or inumber real estate, but that it shall be divided between the covenantor's legal heirs, is valid and is sufficient to sustain an ejectment by one of the heirs for his portion after the death of the covenantor. *Taylor v. Michell*, 87 Pa. 513, 30 Am. Rep. 283.

The donee of a power given by will having no reversionary interest, but who is required to execute it by his own will, cannot fetter the exercise of his own judgment in respect to such execution by a contract to execute it in a specified way, as this would be in effect an execution by contract and not by will. *Wilks v. Burns*, 60 Md. 64.

Illicit intercourse with a married woman will not support a subsequent promise to leave her property by will. *Drennan v. Douglas*, 102 Ill. 341, 40 Am. Rep. 595.

A sealed grant or lease for the life of the grantor to her son-in-law with an agreement to devise the land to her daughter in consideration of support during life is not within N. Y. Const. 1844, art. 1, § 14, prohibiting leases or grants of agricultural lands for more than twelve years with a reservation of rent or service. *Stephens v. Reynolds*, 6 N. Y. 454.

Right to change will as affected by contract.

A will based on a valuable consideration giving the whole of the property of the testatrix to certain beneficiaries to whom it is delivered, is irrevocable. *Bolman v. Overall*, 80 Ala. 451.

A covenant not to alter one's will made in favor of another is valid. *McCormick v. McRae*, 11 U. C. Q. B. 187.

An agreement to devise land, founded on a good consideration, may be enforced in equity by holding a will made pursuant thereto to be irrevocable and by declaring a subsequent and inconsistent will void as a cloud on title. *Mutual L. Ins. Co. v. Holladay*, 13 Abb. N. C. 16.

A will may include some provisions which constitute a contract *inter vivos*. *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150.

A mutual agreement as to wills of both real and personal property was held binding on the other party after the death of one who left a will in accordance with the contract. (No question was raised as to the Statute of Frauds.) *McGuire v. McGuire*, 11 Bush, 142.

A mere will not made as part of a contract devising land charged with certain payments on which

credit shall be given for any sums paid to the testator during his life does not prevent the testator from making alterations in his will and cutting down the devise to a life estate, although he has received money to be thus credited. *Rowan's App.* 25 Pa. 232. See also *Caton v. Caton*, *infra*.

Effect on right to transfer property during life.

A man is not prevented from transferring his property by an agreement to leave all his property at death to a certain person, unless the transfer is made for the purpose of defrauding the latter. *Austin v. Davis*, 12 L. R. A. 120, 128 Ind. 472.

A covenant to give all one's property to certain persons by will does not prevent the covenantor from making valid conveyances of his property during his life, and is not broken by such conveyance. *Needham v. Kirkman*, 3 Barn. & Ald. 531, affirmed by *Needham v. Smith*, 4 Russ. 318.

But a covenant to dispose of one's property by will in a specified manner, although it does not prevent him from disposing of it otherwise during his lifetime at his own pleasure except when done in fraud of a covenant, will render invalid a disposition which is in effect testamentary simply to evade the covenant, and by which he retains the benefit of the property during his life. *Logan v. Wienholt*, 7 Bligh, N. R. 1.

And the disposition of property in fraud of an agreement to make a different disposition by will may be set aside although the owner is not restrained from disposing of it in any way he likes except where the design is to evade his agreement. *Gregor v. Kemp*, 8 Swanst. 404.

What constitutes agreement to give property by will.

A written instrument promising to give a person \$2,000 at the death of the promisor "to take care of her children with, which she claims of my estate," saying that she has been a faithful servant in his family; "and it is my will to her," is not a promissory note, but is a valid agreement to give property by will. *Caviness v. Rushton*, 101 Ind. 500, 51 Am. Rep. 759.

An instrument under seal which is in form a deed of gift to a grandson in consideration of natural love and affection and of the present payment of \$5, which in terms does "give and grant" a slave, and "\$1,500 in cash" to be paid to him out of the grantor's estate at his death, although a valid gift of the slave, is a purely voluntary executory trust as to the money which is not enforceable as an instrument *inter vivos*, but which is valid as a will. *Kinnebrew v. Kinnebrew*, 36 Ala. 623.

The mere promise without consideration to devise certain land to a son is not made valid by his expenditure of money in improvements if this is done without the father's request or in execution of a contract. *McClure v. McClure*, 1 Pa. 374.

Mere expectation of a legacy on account of friendly services will not sustain a claim against a

to domestic covenants, and how far by that of Massachusetts.

In our opinion, such a covenant as the present is not contrary to the policy of our laws, and could be enforced here if made in this State. If it were a contract upon valuable consideration, there is no doubt it would be binding. *Parker v. Coburn*, 10 Allen, 82. We presume that, in the absence of fraud, oppression, or unconscionableness, the courts would not inquire into the amount of such consider-

ation. *Parish v. Stone*, 14 Pick. 198, 207. This being so, consideration is as much a form as a seal. It would be anomalous to say that a covenant, in all other respects unquestionably valid and binding,—*Comstock v. So.* (Mass.) 28 N. E. Rep. 296; *Mather v. Corliss*, 103 Mass. 568, 571,—was void as contravening the policy of our Statute of Wills, but that a parol contract to do the same thing in consideration of a bushel of wheat was good. So, again, until lately an oral contract founded on a suffi-

decendent's estate. *Osborn v. Governors*, 2 Strange, 728.

A person who makes a gratuitous promise to devise land to another is not estopped to dispose of it to a third person because on the faith of the promise the promisee has devised other land to such third person. *East v. Dolhite*, 72 N. C. 562.

The terms of a contract to give property by will must be definite and certain and clearly proved. *Wall's App.* 2 Cent. Rep. 830, 111 Pa. 480, 56 Am. Rep. 288; *Graham v. Graham*, 84 Pa. 475; *Shakespeare v. Markham*, 10 Hun. 311; *Bowen v. Bowen*, 3 Bradf. 386; *Neal v. Gilmore*, 79 Pa. 421; *Thompson v. Stevens*, 71 Pa. 161; *Wallace v. Rappleye*, 103 Ill. 229; *Semmes v. Worthington*, 38 Md. 298; *Segars v. Segars*, 71 Me. 530; *Mundorff v. Kilbourn*, 4 Md. 459; *Walpole v. Oxford*, 3 Ves. Jr. 402; *Moorhouse v. Colvin*, 9 Enr. L. & Eq. 136.

An agreement to give a person a home as long as the promisor lives, and at his death to provide for her, is too indefinite. *Wall's App. supra*.

So is the mere promise that one's daughter "shall be noticed" in his will. *Moorhouse v. Colvin, supra*.

An agreement made by a man about to marry to give his intended wife a "competent and sufficient maintenance" during her life by his will in case she survived him in consideration of her renouncing all claims to his estate, is valid and is sufficiently definite. *Rivers v. Rivers*, 3 Desaus. Eq. 190, 4 Am. Dec. 609.

A contract that if a person will stay with the promisor as long as he lives he will "provide and give her full and plenty after he is gone so that she need not work" is sufficiently definite. *Thompson v. Stevens*, 71 Pa. 161.

An agreement to leave a woman in comfortable circumstances after the promisor's death, so she should not be under the necessity of keeping boarders or of doing any work for a livelihood, if she would take care of him during his life, is sufficiently definite. *Cottrell's Estate*, 11 Phila. 93.

A statement in a letter to a nephew making him an offer of property at a certain price, "but you get all I am worth at my death," does not amount to a contract. *McKeegan v. O'Neill*, 22 S. C. 454.

A paper signed but unattested, by which one agrees as a mark of his esteem and friendship to allow another a certain sum annually and make him a certain bequest, does not bind his estate on his death without a will, although on the faith of it the other person secured consent to his marriage on the part of the wife's family. *Dashwood v. Jermyn*, L. R. 12 Ch. Div. 776.

A letter assuring a nephew that a certain estate will come to him at the writer's death "unless some unforeseen occurrence should take place," but refusing to make any settlement during the owner's life, does not bind the uncle or prevent his devising the property to others, although it was written to enable the nephew to get consent to his marriage from his wife's family. *Maunsell v. White*, 4 H. L. Cas. 1039.

Enforcement of contract against estate of decedent.

A valid agreement to make a particular disposition of property by will may be specifically enforced after the death of the promisor against a person who has received the property without any consideration. *Johnson v. Hubbell*, 10 N. J. Eq. 322, 66 Am. Dec. 773. See also *infra* as to Statute of Frauds.

An agreement, in settlement of a claim of title to land to give to the other party a certain sum of money or leave him the land in case the promisor dies without issue, may be enforced after the latter's death. *Gilmere v. Battison*, 1 Vern. 45.

A specific performance may be made of an agreement to devise land on a good consideration, where a will attempting to make such devise is void for lack of proper execution. *Maddox v. Rowe*, 23 Ga. 431, 65 Am. Dec. 585.

But an agreement to convey or devise certain premises to such member of a certain family as the promisor shall choose cannot be specifically enforced in the absence of any such appointment or designation. *Stanton v. Miller*, 33 N. Y. 132.

Damages may be given for a breach of an agreement to devise land if specific performance has become impossible. *Spearman v. Wilson*, 44 Ga. 473.

If a devise is actually made in accordance with an oral promise as payment for services, no claim for the value of the services can be made against the estate of the promisor. *Eaton v. Benton*, 2 Hill, 576.

A contract to pay by will for services defeats a recovery therefor during the life of the promisor. *Patterson v. Patterson*, 13 Johns. 379.

But it is otherwise in case of an agreement to devise certain lands where performance has become impossible by conveyance thereof to a third person. *Canada v. Canada*, 6 Cosh. 15.

Effect of Statute of Frauds.

An oral agreement to devise real estate to another is within the Statute of Frauds. *Austin v. Davis*, 12 L. R. A. 120, 128 Ind. 472; *DeMoss v. Robinson*, 46 Mich. 62, 41 Am. Rep. 144; *Lak v. Sherman*, 25 Barb. 436; *Wallace v. Long*, 3 West. Rep. 870, 105 Ind. 523, 55 Am. Rep. 222; *Gould v. Mansfield*, 103 Mass. 409, 4 Am. Rep. 573; *Van Tine v. Van Tine* (N. J.) 1 L. R. A. 155; *Sharkey v. McDermott*, 8 West. Rep. 737, 91 Mo. 647, 60 Am. Rep. 270; *Roehl v. Haumesser*, 12 West. Rep. 301, 114 Ind. 311; *Pond v. Sheehan*, 8 L. R. A. 414, 132 Ill. 312; *Gorham v. Dodge*, 1 West. Rep. 716, 122 Ill. 328; *Pfugar v. Puits*, 9 Cent. Rep. 456, 43 N. J. Eq. 440; *Carney v. Carney*, 14 West. Rep. 783, 95 Mo. 363; *Harder v. Harder*, 2 Sandf. Ch. 17, 7 L. ed. 490; *Smith v. Smith*, 28 N. J. L. 308; *Shahen v. Swan* (Ohio) 25 Ohio, L. J. 66; *Wallace v. Rappleye*, 103 Ill. 229; *Benge v. Hiatt*, 82 Ky. 606; *Campbell v. Taul*, 3 Yerg. 548; *Maddison v. Alderson*, L. R. 8 App. Cas. 467, affirming L. R. 7 Q. B. Div. 174.

So of an agreement for reciprocal wills of both real and personal property. *Gould v. Mansfield*, 103 Mass. 409, 4 Am. Rep. 573.

So of an executory agreement to bequeath personal property of an amount large enough to bring a sale thereof within the Statute of Frauds. *Roehl v. Haumesser* 12 West. Rep. 301, 114 Ind. 311.

cient consideration to make a certain provision by will for a particular person was valid. *Wellington v. Aphorp*, 145 Mass. 69, 4 New Eng. Rep. 883. Now, by statute, no agreement of that sort shall be binding unless such agreement is in writing, signed by the party whose executor is sought to be charged, or by an authorized agent. Stat. 1888, chap. 873. Again, it would be going a good way to say, by construction, that a covenant did not satisfy this statute.

The truth is that the policy of the law re-

quiring three witnesses to a will has little application to a contract. A will is an ambulatory instrument, the contents of which are not necessarily communicated to anyone before the testator's death. It is this fact which makes witnesses peculiarly necessary to establish that the document offered for probate was executed by the testator as a final disposition of his property. But a contract which is put into the hands of the adverse party, and from which the contractor cannot withdraw, stands differently. See *Perry v. Cross*, 183 Mass. 454,

But an oral agreement to pay for services by a provision in a will is not void as not to be performed within a year. *Kent v. Kent*, 63 N. Y. 560; *Bell v. Hewitt*, 24 Ind. 280; *Wallace v. Long*, 3 West. Rep. 870, 105 Ind. 522, 55 Am. Rep. 222; *Udike v. Ten Broeck*, 82 N. J. L. 105; *Jilson v. Gilbert*, 26 Wis. 637, 7 Am. Rep. 100; *Bayless v. Prieture*, 24 Wis. 661; *Frost v. Tarr*, 53 Ind. 360; *Fenton v. Embler*, 8 Burr. 1273; *Ridley v. Ridley*, 34 Beav. 478. *Contra*, *Izard v. Middleton*, 1 Desaus. Eq. 116.

Effect of part performance.

Some cases decide that part performance of the consideration of an oral contract to give property by will by rendering services or otherwise will take the contract out of the Statute of Frauds and make it enforceable. *Davison v. Davison*, 13 N. J. Eq. 248; *Vanduyne v. Vreeland*, 12 N. J. Eq. 142; *Johnson v. Hubbell*, 10 N. J. Eq. 382, 66 Am. Dec. 773; *Rhodes v. Rhodes*, 3 Sandf. Ch. 279, 7 L. ed. 652; *Pflugar v. Pultz*, 9 Cent. Rep. 438, 43 N. J. Eq. 440; *Sharkey v. McDermott*, 3 West. Rep. 737, 91 Mo. 647, 60 Am. Rep. 270; *Carney v. Carney*, 14 West. Rep. 783, 95 Mo. 363; *Sutton v. Hayden*, 62 Mo. 101; *Wright v. Tinsley*, 30 Mo. 390.

But these are contradicted by decisions in other jurisdictions, holding that the performance of the consideration of a parol agreement to devise land will not authorize a specific performance, but that there is a remedy at law for compensation. *Carlisle v. Fleming*, 1 Harr. (Del.) 421; *Frost v. Tarr*, 53 Ind. 360.

So performance of the consideration of a promisee devised by living with a person during his life will not take an oral agreement therefor out of the Statute of Frauds, but will give a right to compensation for the services out of the estate. *Austin v. Davis*, 12 L. R. A. 120, 128 Ind. 472; *Wallace v. Long*, 3 West. Rep. 870, 105 Ind. 522, 55 Am. Rep. 222; *Pond v. Sheean*, 8 L. R. A. 414, 132 Ill. 312.

Likewise a parol contract to devise land, which is performed on the part of the prospective devisee by supporting the other party and by paying money, cannot entitle him to specific performance, but gives him a right to full compensation for what he has done. *Bender v. Bender*, 37 Pa. 419.

An English authority decides that the performance of services by a house-keeper without wages under a promise to make her a devise of a life estate is not sufficient to take the promise out of the Statute of Frauds, and appears to deny any right to compensation. *Maddison v. Alderson*, L. R. 8 App. Cas. 467, affirming L. R. 7 Q. B. Div. 174.

That a daughter goes to live with her mother does not give her such possession of the mother's premises as will take a contract for a devise of the land to the daughter in consideration of her staying there as long as the mother lives out of the Statute of Frauds. *Gorham v. Dodge*, 11 West. Rep. 716, 122 Ill. 523.

Going upon a farm to work it for the owner under an agreement for one half the profits, and in further consideration of a parol promise for a 14 L. R. A.

devise thereof at the owner's death does not constitute such a part performance as to take the agreement out of the Statute of Frauds. *Sommes v. Worthington*, 38 Md. 208.

The surrender of the possession of a farm to a person, who takes care of the owner under an agreement to devise it to the latter in consideration of such care, and the execution of a will to that effect, makes a valid contract. *Gupton v. Gupton*, 47 Mo. 37.

Such change of possession does not seem under the other Missouri cases above cited to be necessary to sustain the contract in that State, but this seems to be in harmony with those that repudiate the doctrine of the other Missouri cases noted above.

Where a person took possession and made improvements under an agreement to devise the premises in consideration of taking care of the owner until his death, which consideration was executed, the contract may be specifically enforced. *Watson v. Mahan*, 20 Ind. 223; *Mauck v. Melton*, 64 Ind. 414.

A parol agreement by a wife to give her husband a life lease of land which he should convey to her, and devise it to him in case he should survive her, may be specifically enforced in case of her death after conveyance of the land to her without making any will. *Sherman v. Scott*, 27 Hun, 331.

It was said in an early Indiana case that a contract to devise land in consideration of money advanced cannot be specifically enforced against the heirs of the promisor. *Stafford v. Bartholomew*, 2 Ind. 153.

In this case, which is briefly reported, it does not appear that the promisee was in writing or that any possession of the land was given.

Will as part performance.

An English case holds that an unattested will is not sufficient to take a verbal promise to devise land out of the Statute of Frauds. *Maddison v. Alderson*, L. R. 8 App. Cas. 467, affirming L. R. 7 Q. B. Div. 174.

And another, to similar effect, decides that the mere preparation and execution of a will in accordance with a verbal promise will not prevent the alteration or revocation of the will. *Caton v. Caton*, L. R. 1 Ch. App. 137.

But the American cases are to the contrary. Thus the Statute of Frauds will not defeat a contract to give land by will where a will is made in pursuance thereof, although it is subsequently lost. *Brinker v. Brinker*, 7 Pa. 53.

Also a will not sufficiently witnessed may be sufficient to take a verbal agreement for a devise out of the Statute of Frauds. *Maddox v. Rowe*, 23 Ga. 431, 66 Am. Dec. 535.

And an antenuptial contract to give a wife by will all the property which she brings to her husband is taken out of the Statute of Frauds by the execution of a will, and is not thereafter subject to revocation. *Lowe v. Bryant*, 30 Ga. 523, 76 Am. Dec. 673.

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456, 457. The moment it is admitted that some contracts which are to be performed after the testator's death are valid without three witnesses, a distinction based on the presence or absence of a valuable consideration becomes impossible, with reference to the objection which we are considering. A formal instrument like the present, drawn up by lawyers, and executed in the most solemn form known to the law, is less likely to be a vehicle for fraud than a parol contract based on a technical detriment to the promisee. Of course, we are not now speaking of the rank of such contracts *inter se*. *Stone v. Gerrish*, 1 Allen, 175, cited by the defendant, contains some ambiguous expressions, but was decided on the ground that the instrument declared on did not purport to be, and was not a contract. *Cover v. Stem*, 67 Md. 449, was to like effect. The present instrument indisputably is a contract. It was drawn in English form by English lawyers, and must be construed by English law. So construed, it created a debt on a contingency from the covenantor herself, which, if

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she had gone into bankruptcy, would have been provable against her. *Ex parte Tindal*, 8 Bing. 402, 1 Deac. & C. 291; *Montague, Bankr. Laws*, 375, 462; *Robson, Bankr. Pr.* 5th ed. 274. The cases of *Parish v. Stone*, 14 Pick. 198, and *Warren v. Durfee*, 126 Mass. 338, were actions on promissory notes, and were decided on the grounds of a total or partial want of consideration.

There is no question here of any attempt to evade or defeat rights of third persons which would have been paramount had the covenantor left the sum in question as a legacy by will. There is no ground for suggesting an intent to evade the provisions of our law regulating the execution of last wills, if such intent could be material when an otherwise binding contract was made. See *Stone v. Hackett*, 13 Gray, 227, 232, 233. There was simply an intent to make a more binding and irrevocable provision than a legacy could be, and we see no reason why it should not succeed.

Judgment for the plaintiffs.

END OF CASES IN BOOK XIV.

L. R. A.

EXTRA ANNOTATIONS

INCLUDING THE CITATIONS OF EACH CASE AS A PRECEDENT: (1) BY ANY COURT OF LAST RESORT IN ANY JURISDICTION OF THIS COUNTRY; (2) BY THE EXTENSIVE AND THOROUGH ANNOTATIONS OF THE LAWYERS REPORTS ANNOTATED, THE AMERICAN STATE REPORTS, THE ENGLISH RULING CASES, THE BRITISH RULING CASES, AND THE UNITED STATES SUPREME COURT REPORTS (LAW. ED. 1.

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L. R. A. CASES AS AUTHORITIES.

CASES IN 14 L. R. A.

14 L. R. A. 33, *TILDEN v. GREEN*, 130 N. Y. 29, 27 Am. St. Rep. 487, 28 N. E. 880.

Indefiniteness as affecting gifts.

Followed as *res judicata* in *Bigelow v. Tilden*, 52 App. Div. 398, 65 N. Y. Supp. 140, and *Bigelow v. Tilden*, 18 Misc. 691, 43 N. Y. Supp. 858, holding devise in trust for "charitable and educational objects, as executors deem most beneficial to mankind," void.

Approved in *Gross v. Moore*, 68 Hun, 414, 22 N. Y. Supp. 1019, holding will giving estate to executor to be distributed "according to instructions given him by me" void for indefiniteness.

Cited in *Beecher v. Yale*, 45 N. Y. Supp. 624, holding will bequeathing money for erection of soldiers' monument, no one being named to execute trust, void; *Re Jackson*, 47 N. Y. S. R. 444, 20 N. Y. Supp. 380, holding legacies to executors for "promotion of Christianity and welfare of mankind" void; *Fairchild v. Edson*, 154 N. Y. 212, 61 Am. St. Rep. 609, 48 N. E. 541, holding will bequeathing estate to "such religious societies and in such amounts as executors and friend of testatrix may designate" void; *Wilcox v. Gilchrist*, 85 Hun, 12, 32 N. Y. Supp. 608, holding clear intention and ascertained beneficiary elements of valid trust; *Allen v. Stevens*, 161 N. Y. 137, 55 N. E. 568, Reversing 33 App. Div. 485, 54 N. Y. Supp. 8, holding enactment of Laws 1893, chap. 701, makes valid, devises previously void for indefiniteness of beneficiary; *Re Mullen*, 25 Misc. 254, 55 N. Y. Supp. 432, holding alternative bequest to Sister Superior of Home sufficient designation of beneficiary; *Hull v. Pearson*, 36 App. Div. 235, 55 N. Y. Supp. 324, upholding gift to orphanage not existing at testator's death, under provision of Laws 1893, chap. 701; *Jessup v. Pringle Memorial Home*, 27 Misc. 430, 59 N. Y. Supp. 207, upholding remainder over to home for invalids to be formed after testator's death; *Darmert v. Osborn*, 140 N. Y. 43, 35 N. E. 407, holding Laws 1893, chap. 101, regulating charitable gifts, indicate intention of legislature to uphold gifts, previously void; *Mount v. Tuttle*, 40 Misc. 460, 82 N. Y. Supp. 655, holding bequest to Bishop of Utah and successor in office, to be used within his Episcopal jurisdiction, void; *Murray v. Miller*, 178 N. Y. 321, 70 N. E. 870, Affirming 85 App. Div. 421, 83 N. Y. Supp. 591, holding devise to treasurer of unincorporated religious association for its benefit void; *Re Compton*, 72 Misc. 293, 131 N. Y. Supp. 183, holding that bequest to individual to be used "for the Lord's work" does not sufficiently indicate charitable purpose to authorize court to administer it; *Re Mullen*, 2 Gibbons, Sur. Rep. 585, holding that it is sufficient if beneficiary is so described that he can be ascertained and known when right to legacy accrues; *Filkins v. Severn*, 127 Iowa, 739, 104 N. W. 346, holding devise in trust which designates no beneficiary of trust void; *Re Shattuck*, 193 N. Y. 449, 86 N. E. 455, holding

devise to executor in trust to collect rents and profits and pay same to "religious, eleemosynary or educational" institutions as in his judgment shall be advisable, void; *Mount v. Tuttle*, 99 App. Div. 435, 91 N. Y. Supp. 195, holding prior to act of 1893 to regulate gifts for charitable purposes in order to constitute a valid trust provision for charity there must be a beneficiary capable of being designated and who could enforce the trust provision; *Loch v. Mayer*, 50 Misc. 446, 100 N. Y. Supp. 837, as to doctrine of cy pres having on place in law of New York; *Re Jackson*, 1 Power, 243, holding a bequest of residuary real and personal estate to executors, "to be expended by them for benevolent and charitable purposes as they, or survivor of them, shall, in their or his good judgment, deem wise and best for the promotion of Christianity and the welfare of mankind in the world," is void, there being no certain designated beneficiary; *St. James v. Bagley*, 138 N. C. 397, 70 L.R.A. 166, 50 S. E. 841, as to courts endeavoring to sustain charitable trusts although uncertain and attempting to prevent a failure of benevolent intention of donor.

Cited in footnotes to *Re John*, 36 L. R. A. 242, which sustains bequest for maintenance of free public schools; *Harrington v. Pier*, 50 L. R. A. 307, which holds bequest for promotion of temperance work in certain city not fatally indefinite; *Woman's Foreign Missionary Soc. v. Mitchell*, 53 L. R. A. 711, which holds legacy to Board of Managers of Foreign Missionary Society of M. E. Church properly paid to Woman's Foreign Missionary Society; *Thompson v. Brown*, 62 L.R.A. 398, which upholds devise of fund to be distributed by executor "to the poor" in his discretion.

Cited in notes (14 L.R.A.(N.S.) 65, 73, 74, 83, 86, 87, 117, 119, 131, 138, 140, 142) on enforcement of general bequest for charity or religion; (64 Am. St. Rep. 758, 760, 772) on certainty and unity required in charitable trusts; (5 Eng. Rul. Cas. 577) on invalidity of charitable bequest for indefiniteness.

Distinguished in *Atwater v. Russell*, 49 Minn. 85, 51 N. W. 629, sustaining provision in trust deed for maintenance of hospital; *Keith v. Scales*, 124 N. C. 516, 32 S. E. 809, upholding devise for erection of church and school and maintenance of same; *Auten v. City Electric Street R. Co.* 104 Fed. 399, denying that statute of uses renders conveyance from equitable owner necessary to pass title, when legal title in another as trustee; *Ross v. Ross*, Rap. Jud. Quebec 2 C. S. 21, holding a bequest in following words "I hereby will and bequeath all my property, assets or means of any kind to my brother Frank who will use one half of them for public Protestant charities in Quebec and Carluke, say Protestant Hospital Home, French Canadian Mission and amongst poor relatives as he may judge best," is not void for uncertainty.

Disapproved in effect in *Harrington v. Pier*, 105 Wis. 519, 50 L. R. A. 321, 76 Am. St. Rep. 922, 82 N. W. 345, upholding bequest to trustees to expend proceeds in temperance work; *Hoeffer v. Clogan*, 171 Ill. 471, 40 L. R. A. 732, 63 Am. St. Rep. 241, 49 N. E. 527, upholding devise to church in trust. proceeds to be expended for masses.

Gifts as affected by discretion of trustee.

Cited in *Spalding v. St. Joseph's Industrial School*, 107 Ky. 403, 54 S. W. 200, holding devise to brother for charitable objects, to be "expended according to his discretion," void; *Wheelock v. American Tract Soc.* 109 Mich. 144, 63 Am. St. Rep. 578, 66 N. W. 955, holding devise to executors in trust for benefit of such "worthy poor girls as they select" void; *Butler v. Parochial Fund*, 92 Hun, 99, 36 N. Y. Supp. 562, holding bequest in trust for "support of clergyman, and such other church purposes as trustee thinks advisable," void; *People v. Powers*, 147 N. Y. 109, 35 L. R. A. 504, 41 N. E. 432, holding trust to be disposed among "charitable institutions as trustee may select" void; *Johnson v. Johnson*, 92

Tenn. 569, 22 L. R. A. 181, footnote p. 179, 36 Am. St. Rep. 104, 23 S. W. 114, holding devise to trustees for charity, "preference to those of educational nature," too indefinite; *Kemp v. Kemp*, 36 Misc. 88, 72 N. Y. Supp. 617, holding power of appointment, left to discretion of donee, unenforceable.

Cited in footnotes to *Crerar v. Williams*, 21 L. R. A. 454, which holds arbitrary powers not given trustees of charity by authority to set aside amount of income to pay expenses; *People v. Powers*, 35 L. R. A. 502, which holds void for indefiniteness, trust to dispose of property among charitable and benevolent institutions as trustee shall choose; *Thompson v. Brown*, 62 L. R. A. 398, holding devise of fund to be distributed by executor "to poor," in his discretion, valid.

Distinguished in *Re Perkins*, 68 Misc. 258, 124 N. Y. Supp. 998, holding that bequest of remainder of personalty to be disposed of by two persons named therein, "as they think best, we having advised with them thereof" passed remainder to legatees absolutely.

Disapproved in effect in *St. James Orphan Asylum v. Shelby*, 60 Neb. 809, 83 Am. St. Rep. 553, 84 N. W. 273, upholding devise of property to trustee in trust, to apply income "to some charity according to his judgment."

Method of construing will.

Cited in *Eldred v. Meek*, 183 Ill. 38, 75 Am. St. Rep. 86, 55 N. E. 536, holding testator's intention determined by considering will in entirety, not portion by portion; *Re Hammond*, 74 App. Div. 550, 77 N. Y. Supp. 783; *Herzog v. Title Guarantee & T. Co.* 177 N. Y. 92, 69 N. E. 283; *Karstens v. Karstens*, 29 App. Div. 235, 51 N. Y. Supp. 795,—holding court will reconstruct will to determine testator's intention, not to devise new scheme; *Re Van Horne*, 25 Misc. 392, 55 N. Y. Supp. 651, and *Starr v. Starr*, 132 N. Y. 158, 30 N. E. 384, upholding authority of courts to transport or reject words to determine testator's intention; *Re Whiting*, 33 Misc. 277, 68 N. Y. Supp. 733, holding failure to dispose of residue no bar to taking by general legatee, will disclosing such intention; *Marks v. Halligan*, 61 App. Div. 181, 70 N. Y. Supp. 444, holding void and valid parts of will may be considered to determine character of estate given to child; *Chilcott v. Hart*, 23 Colo. 48, 35 L. R. A. 47, 45 Pac. 391, holding valid provisions of will upheld, if separable from void directions as to distribution of income; *Tilley v. Ellis*, 119 N. C. 246, 26 S. E. 29 (dissenting opinion), majority holding refusal to submit to jury question as to which church testator intended to devise property, error; *Eidt v. Eidt*, 142 App. Div. 737, 127 N. Y. Supp. 680, holding that rule permitting moulding of words to ascertain testator's intent does not permit construction of disposition in way not reasonably justified by will; *Starr v. Starr*, 132 N. Y. 158, 30 N. E. 384, holding in construing will courts may transpose, reject or supply words, so that it will express intention of testator; *Leggett v. Stevens*, 185 N. Y. 77, 77 N. E. 874; *Simpson v. Trust Co. of America*, 129 App. Div. 203, 113 N. Y. Supp. 370; *Stebbens v. Turner*, 55 Misc. 591, 105 N. Y. Supp. 945; *Re Pearce*, 53 Misc. 220, 104 N. Y. Supp. 469,—holding duty of court is to interpret and not to construct a will; *Catt v. Catt*, 118 App. Div. 750, 103 N. Y. Supp. 740, as to invalid provisions of will being resorted to in order to determine intention of testator; *Re McCoy*, 51 Misc. 445, 101 N. Y. Supp. 539; *Re Gilman*, 65 Misc. 411, 121 N. Y. Supp. 909; *Re Poppleton*, 34 Utah, 295, 131 Am. St. Rep. 842, 97 Pac. 138; *Schell v. Carpenter*, 50 Misc. 406, 100 N. Y. Supp. 554,—holding intention paramount rule of construction; *Re Pilsbury*, 50 Misc. 379, 99 N. Y. Supp. 62, as to construction to be given will.

Cited in note (106 Am. St. Rep. 509) on necessity for all parts of will to be considered.

Void parts of will as affecting valid.

Cited in *Becker v. Becker*, 13 App. Div. 345, 43 N. Y. Supp. 17, upholding part of trust as to support of children as separable from part contravening power of alienation; *Re Fair*, 132 Cal. 541, 84 Am. St. Rep. 70, 60 Pac. 442, holding invalid trust to convey vitiates valid trust for children; *Dresser v. Travis*, 39 Misc. 362, 79 N. Y. Supp. 924, holding trust to divide income among children for life, inseparable from illegal provision for accumulation, void; *Lawrence v. Smith*, 163 Ill. 164, 45 N. E. 259, and *Brandt v. Brandt*, 13 Misc. 434, 34 N. Y. Supp. 684, holding failure of main provision of will under statute against perpetuities invalidates dependent portions; *Lyons v. Bradley*, 168 Ala. 522, 53 So. 244, to the point that where several trusts are created which are independent of each other, the illegal may be cut off and legal ones permitted to stand; *Reid v. Voorhees*, 216 Ill. 247, 74 N. E. 804, 3 A. & E. Ann. Cas. 946, holding where a general scheme for the division of testator's property was set aside because part thereof offended the rule against perpetuities the rejection of the provisions of the will constituting such scheme did not require other valid, independent requests to be set aside; *White v. Allen*, 76 Conn. 190, 56 Atl. 519; *Phillips v. Heldt*, 33 Ind. App. 399, 71 N. E. 520; *Sheppard v. Fisher*, 206 Mo. 247, 103 S. W. 989; *Walter v. Walter*, 60 Misc. 390, 113 N. Y. Supp. 465; *Re Dewitt*, 113 App. Div. 792, 99 N. Y. Supp. 415; *Rong v. Haller*, 109 Minn. 198, 26 L.R.A.(N.S.) 829, 123 N. W. 471,—holding where a legal and illegal trust are created by will, and so connected as to constitute one general scheme, so that it must fail if the one be retained and other rejected, the legal trust falls with illegal one.

Cited in notes (64 Am. St. Rep. 640) on severability of perpetuities and forbidden trusts; (120 Am. St. Rep. 740) on entire invalidity of will partially void.

Distinguished in *Brown v. Richter*, 76 Hun, 472, 27 N. Y. Supp. 1094, upholding trust during lives of children, although remainder over void.

Suspension of power of alienation.

Cited in *Re Williams*, 1 Misc. 444, 1 Power, 418, 23 N. Y. Supp. 150, holding will bequeathing property to church conference in trust to pay income for support of church void as suspending power of alienation; *Danforth v. Oshkosh*, 119 Wis. 305, 97 N. W. 258 (dissenting opinion), majority sustaining grant of land to city to be perpetually used for library site, subject to revert when not so used; *Casgrain v. Parkinson*, 134 Mich. 433, 104 Am. St. Rep. 610, 96 N. W. 510, holding real estate conveyed to a trustee under a trust void as to perpetuity on death of grantor was subject to disposition as intestate estate; *St. John v. Andrews Institute*, 191 N. Y. 267, 83 N. E. 981, 14 A. & E. Ann. Cas. 708, holding property may be given by a will to a corporation to be formed after testator's death, if it is there provided that the corporation be formed and the property not within the lives of two persons, or life of survivor in being when will was executed; *Gueutal v. Gueutal*, 113 App. Div. 313, 98 N. Y. Supp. 1002, holding trust having no fixed limit of duration void; *St. John v. Andrews Institute*, 117 App. Div. 715, 102 N. Y. Supp. 808, as to rule of perpetuities under laws of 1893 as regards gifts to charitable uses.

Penitentiary as charitable institution.

Cited in *State v. Laramie County*, 8 Wyo. 130, 55 Pac. 451, holding penitentiary included among "charitable institutions" exempt from special taxation.

Action in equity to construe will.

Cited in *Endress v. Willey*, 52 Misc. 393, 102 N. Y. Supp. 71, as to who may bring equitable action to construe will.

Conveyance by trustee.

Cited in *Davidson v. Mantor*, 45 Wash. 662, 89 Pac. 167, holding where trustee is clothed with legal title and not restrained by terms of trust a conveyance by him carries the legal title.

Trust or personal gift.

Cited in *Appleby v. Appleby*, 100 Minn. 433, 10 L.R.A.(N.S.) 601, 117 Am. St. Rep. 709, 111 N. W. 305, 10 A. & E. Ann. Cas. 563, holding gift for manifest purpose of keeping up a homestead for surviving husband who was to be life tenant could not be treated as personal gift to him.

Charitable trust.

Cited in *Re Kavanaugh*, 143 Wis. 106, 28 L.R.A.(N.S.) 477, 126 N. W. 672 (dissenting opinion), as to charitable trust incapable of being enforced being void.

14 L. R. A. 52, *Re THOMPSON*, 127 N. Y. 463, 28 N. E. 389.

Proof of measure of damages.

Cited in *Latimer v. Burrows*, 163 N. Y. 9, 57 N. E. 95, holding evidence that defaulting vendor resold undelivered lumber at contract price inadmissible; *Bull v. Bath Iron Works*, 75 App. Div. 386, 78 N. Y. Supp. 181, holding proof that vessel failed to obtain time charter objectionable as involving comparison in value with others; *The Oceanica*, 156 Fed. 308, holding purchase price of an article is incompetent to prove value of another article although other article is similar.

— For property condemned.

Cited in *San Luis Obispo v. Brizzolara*, 100 Cal. 436, 34 Pac. 1083, holding report of commissioners showing payments for other land taken inadmissible as to value of property condemned; *Re New York*, 142 App. Div. 667, 127 N. Y. Supp. 379, holding that in condemnation proceedings one may not establish value of his land by showing what was paid for another parcel similarly situated; *Simons v. Mason City & Ft. D. R. Co.* 128 Iowa, 161, 103 N. W. 129; *Manhattan R. Co. v. Stuyvesant*, 126 App. Div. 850, 111 N. Y. Supp. 222; *Oregon R. & Nav. Co. v. Eastlack*, 54 Or. 202, 102 Pac. 1011,—holding evidence of what party seeking condemnation paid for other property for use in same enterprise, incompetent.

Distinguished in *Langdon v. New York*, 133 N. Y. 639, 4 Silv. St. App. 283, 31 N. E. 98, holding evidence admissible as to price paid by city for other property of same character.

Disapproved in effect in *Markowitz v. Kansas City*, 125 Mo. 490, 46 Am. St. Rep. 498, 28 S. W. 642, admitting evidence as to sales of similar property in vicinity, showing value of lots prior to grading street.

— For construction of railroads.

Followed in *Colton v. New York Elev. R. Co.* 7 Misc. 627, 28 N. Y. Supp. 149, denying admissibility of evidence as to rentals and sales of other property than that in suit.

Cited in *Lyons v. New York Elev. R. Co.* 26 App. Div. 59, 49 N. Y. Supp. 610, and *Douglas v. New York Elev. R. Co.* 14 App. Div. 472, 43 N. Y. Supp. 847, denying admissibility of evidence as to sums paid for other property as showing measure of damages for erection of elevated line; *Hart v. Brooklyn Elev. R. Co.* 89 Hun, 83, 35 N. Y. Supp. 41, and *Jamieson v. Kings County Elev. R. Co.* 147 N. Y. 325, 41 N. E. 693, holding difference in rental value improper measure of damages for construction of elevated road; *Robinson v. New York Elev. R. Co.* 175 N. Y. 222, 67 N. E. 431, holding evidence of sales and rentals of

other pieces of property inadmissible in trial for damages; *Odell v. Metropolitan Elev. R. Co.* 3 Misc. 337, 22 N. Y. Supp. 737, raising, without deciding, admissibility of evidence as to difference in rental value before and after erection of road; *Rourke v. Holmes Street R. Co.* 221 Mo. 63, 133 Am. St. Rep. 468, 119 S. W. 1094, holding in action for damages for construction of an elevated street railroad, evidence of rentals of other property situate on another street a block from that of plaintiff's, inadmissible.

Cited in footnotes to *Hine v. Manhattan R. Co.* 15 L. R. A. 591, which holds private offers of third persons inadmissible to show value; *Peoria Gaslight & Coke Co. v. Peoria Terminal R. Co.* 21 L. R. A. 373, which holds prices paid to other owners for right of way incompetent to show value.

Cited in note (26 L. R. A. 385) on power of appellate court to interfere with verdict for excessive damages.

Right of commissioners to rely on their own views.

Cited in *Syracuse v. Stacey*, 45 App. Div. 260, 61 N. Y. Supp. 165, upholding right of commissioners to rely on their own judgment as to value of property, disregarding opinions of experts.

14 L. R. A. 55, *BOIES v. BENHAM*, 127 N. Y. 620, 40 N. Y. S. R. 421, 28 N. E. 657.

Priority of liens.

Cited in *Kennedy v. Babcock*, 19 Misc. 91, 43 N. Y. Supp. 832, holding equitable lien created by execution of deed continues, till mortgage taken back, superior to lien of prior mortgage executed after deed; *Schmertz v. Hammond*, 47 W. Va. 547, 35 S. E. 945, holding defective trust deed given as security creates equitable lien; *Collier v. Miller*, 62 Hun, 107, 16 N. Y. Supp. 633 (dissenting opinion), majority upholding agreement as to priority of synchronous mortgages; *Kimble v. Wotring*, 48 W. Va. 423, 37 S. E. 606, subrogating vendee to rights of lienor, having paid lien as part consideration for fraudulent deed, subsequently set aside.

Cited in note (40 L.R.A.(N.S.) 277) on priority as between mortgage to vendor and simultaneous or prior mortgage to third person.

14 L. R. A. 59, *HULBERT v. CLARK*, 128 N. Y. 295, 28 N. E. 638.

Statute of limitations as affecting obligation.

Cited in *Spicer v. Raplee*, 4 App. Div. 478, 38 N. Y. Supp. 806, holding statute of limitations acts upon remedy, leaving obligation unimpaired; *Maxwell v. Cottle*, 72 Hun, 533, 25 N. Y. Supp. 635, holding attorney's lien on client's funds in his hands not barred by statute of limitations; *Drake v. Wetmore*, 67 Hun, 80, 21 N. Y. Supp. 1117, upholding right of holder of matured note to enforce claim against dividend applicable thereto, though action on note barred by statute; *Brackenbridge v. Cummings*, 18 Pa. Super. Ct. 70, and *Dinniny v. Gavin*, 4 App. Div. 300, 39 N. Y. Supp. 485, upholding statute as defense to action upon covenant in mortgage to pay balance of debt, although remedy on note barred; *Simonson v. Nafis*, 36 App. Div. 474, 55 N. Y. Supp. 449, denying that statute operates against right to foreclose mortgage during absence of mortgagor from state; *Adams v. Fassett*, 73 Hun, 432, 26 N. Y. Supp. 447, holding statute of limitations began to operate at last payment of interest on notes; *Nehasane Park Asso. v. Lloyd*, 167 N. Y. 438, 60 N. E. 741, holding *Laws 1885*, chap. 448, as to conclusiveness of tax sales, must be pleaded when relied on as statute of limitations; *Re Moench*, 39 Misc. 483, 80 N. Y. Supp. 222, holding that *Laws 1899*, chap. 737, against limitations as defense to transfer tax applies to claim for tax arising in 1893 and enforced in 1903; *Re Gutofff*, 39 Misc.

484, 80 N. Y. Supp. 219, holding that judgment barred by statute cannot be revived by amendment; *Gmaehle v. Rosenberg*, 83 App. Div. 342, 82 N. Y. Supp. 366, holding right of action for injuries from defective appliances dependent upon service of notice of accident; *Piper v. Hayward*, 71 Misc. 43, 127 N. Y. Supp. 240, holding that lien on property as security for debt, is not impaired by fact that remedy at law for recovery of debt is barred; *Green v. Frick*, 25 S. D. 344, 126 N. W. 579, holding that foreclosure of mortgage is not barred by running of statute against indebtedness; *Heburn v. Reynolds*, 73 Misc. 77, 132 N. Y. Supp. 460, to the point that mortgage may be foreclosed although notes representing debt are outlawed; *Brooklyn Bank v. Barnaby*, 197 N. Y. 226, 27 L.R.A. (N.S.) 852, 90 N. E. 834, as to effect of statute of limitations on debt on security; *People ex rel. Eckerson v. Board of Edu.* 126 App. Div. 421, 110 N. Y. Supp. 769, holding removal of bar of statute not taking property without due process of law; *Leask v. Hoagland*, 64 Misc. 158, 118 N. Y. Supp. 1055, holding statute of limitations bars remedy only and affords no presumption of payment of demand; *Lightfoot v. Davis*, 198 N. Y. 264, 29 L.R.A. (N.S.) 122, 139 Am. St. Rep. 817, 91 N. E. 582, 19 Ann. Cas. 747, as to statute of limitations merely acting upon remedy; *House v. Car*, 185 N. Y. 458, 6 L.R.A. (N.S.) 513, 113 Am. St. Rep. 936, 78 N. E. 171, 7 A. & E. Ann. Cas. 185, holding equity will not restrain a sale under a power of sale in a mortgage although limitations have run against the mortgage; *Greenley v. Greenley*, 114 App. Div. 643, 100 N. Y. Supp. 114, holding where as consideration for a deed, the grantee promised to pay certain notes of grantor, an action by the holder of the notes against grantee was not barred merely because statute of limitations had run against notes; *People ex rel. Atty. Gen. v. Michigan C. R. Co.* 145 Mich. 148, 108 N. W. 772, holding where contract between railroad company and state provided for a lien for taxes an action might be brought to collect taxes within time which an action could be brought to foreclose mortgage although action on contract was barred; *Burstein v. Levy*, 49 Misc. 470, 98 N. Y. Supp. 853, holding twenty year limitation applies to action on instrument under seal; *Re Pirie*, 198 N. Y. 216, 91 N. E. 587, holding mere attachment of a seal to a promissory note does not make it a sealed instrument and the six years statute of limitations applies thereto.

Cited in notes (21 L. R. A. 553) on effect of statutory bar of principal debt on right to foreclose mortgage or deed of trust concerning same; (45 L. R. A. 613) on vested right in defense of statute of limitations; (95 Am. St. Rep. 664) on effect of bar of statute of limitations.

Distinguished in *Re Stalker*, 123 Fed. 965, holding decision against preference for local assessments not affected by subsequent statute against limitations as defense.

Presumption of payment.

Cited in *People v. Freeman*, 110 App. Div. 608, 97 N. Y. Supp. 343, holding the presumption of payment arising from lapse of time is rebuttable.

14 L. R. A. 62, *STATE, NORTH ORANGE BAPTIST CHURCH, PROSECUTOR, v. ORANGE*, 54 N. J. L. 111, 22 Atl. 1004.

Bribery by gift to public.

Cited in *Barr v. New Brunswick*, 67 Fed. 403, denying that promise of railroad company to pay expense for opening street without repayment, invalidates action of council in proceedings to open such street; *Illinois C. R. Co. v. Swalm*, 83 Miss. 639, 36 So. 147, holding a judgment of a county board of supervisors for laying out a public road is not rendered void by a proviso therein that the petitioners pay all expenses of laying out road and maintaining it for three years; *Electric Plaster Co. v. Blue Rapids City Twp.* 77 Kan. 586, 96 Pac.

68, holding agreement between owners of mills operated by water power and officers of a township that if township bonds should be voted by the electors and proceeds thereof used in rebuilding an important highway, convenient for public, and which would restore water power to mill owners, the mill dam owners would pay an amount equal to interest on bonds for ten years, not against public policy.

Cited in footnotes to *Ayres v. Moan*, 15 L. R. A. 501, which holds donation to secure location of county seat, bribery; *Lund v. Chippewa County*, 34 L. R. A. 131, which sustains donation by county to secure site for state institution for feeble-minded; *Doane v. Chicago City R. Co.* 35 L. R. A. 588, which holds purchase for special consideration of abutter's consent to laying of street railway illegal.

Distinguished in *Black v. Atlantic County*, 80 N. J. L. 33, 76 Atl. 339, holding that board of chosen free-holders, appointed under statute have no power to contract for improvement of highway upon which trolley line is operated provided trolley line will bear part of expense.

Requirements as to use of English.

Approved in *Rasmussen v. Baker*, 7 Wyo. 144, 38 L. R. A. 780, footnote p. 773, 50 Pac. 819, holding provision requiring ability to read Constitution as qualification of elector means to read in English.

Cited in *State, City Publishing Co., Prosecutor, v. Jersey City*, 54 N. J. L. 438, 24 Atl. 571, holding that where statute directs publication of notice it will be presumed that language generally spoken in state is to be used; *Connors v. Lowell*, 209 Mass. 119, 95 N. E. 412, Ann. Cas. 1912 B, 627, holding that publication of tax sale required by statute, in English language in newspaper in that language renders sale invalid.

Cited in footnote to *State ex rel. Goebel v. Chamberlain*, 40 L. R. A. 843, which denies validity of publication of delinquent tax list in English in newspaper otherwise printed in German.

Distinguished in *Tappan v. Dayton*, 51 N. J. Eq. 262, 28 Atl. 1, holding notice of administrator's sale, published in German paper, must be in English.

Judicial power over eminent domain.

Cited in note (22 L.R.A.(N.S.) 13, 82, 88, 89) on judicial power over eminent domain.

14 L. R. A. 65, *FERGUSON v. McBEAN*, 91 Cal. 63, 27 Pac. 518.

Contract as affecting license.

Cited in footnote to *Bruley v. Garvin*, 48 L. R. A. 839, which holds license to cut timber revoked *pro tanto* by written contract for sale of undivided interest to another.

Privileged communications.

Cited in *Phillips v. Chase*, 201 Mass. 449, 131 Am. St. Rep. 406, 87 N. E. 755, holding objection that communication to attorney is privileged may be impliedly waived by client.

Cited in footnote to *Koeber v. Somers*, 52 L. R. A. 512, which holds conversation authorizing attorney to compromise action not privileged.

Cited in notes (67 L.R.A. 924) on admissibility of communications to persons serving in judicial capacity; (66 Am. St. Rep. 226) on attorneys as witnesses.

Liability of undisclosed principal.

Cited in *McKee v. Cunningham*, 2 Cal. App. 688, 84 Pac. 260; *Bergtholdt v.*

Porter Bros. Co. 114 Cal. 689, 46 Pac. 738,—holding where one sells goods to agent supposing him to be principal he may, upon discovering him to be agent, resort to principal for payment.

14 L. R. A. 69, DAILEY v. NEW HAVEN, 60 Conn. 314, 22 Atl. 945.

Powers of municipal corporation.

Cited in Crofut v. Danbury, 65 Conn. 300, 32 Atl. 365, holding city without power to appropriate funds as rewards for conviction of incendiaries; Fair Haven & W. R. Co. v. New Haven, 77 Conn. 497, 59 Atl. 737, holding they are only such powers as have been conferred upon it expressly or by necessary implication.

— To act as trustee.

Cited in New Haven v. New Haven & D. R. Co. 62 Conn. 258, 18 L. R. A. 259, footnote p. 256, 25 Atl. 316, denying city's authority to enter into contract with railroad company for protection of private owners; Burr v. Boston, 208 Mass. 538, 34 L.R.A.(N.S.) 144, 95 N. E. 208, holding that devise of property to municipal corporation in trust to devote income to maintenance of parks is valid charitable gift.

Cited in footnotes to Maysville v. Wood, 39 L. R. A. 93, which denies right of city to hold title as trustee of land dedicated for church lot; Clayton v. Hallett, 59 L. R. A. 407, which sustains city's power to take property in trust for education of poor white male orphans.

Cited in note (16 L. R. A. 695) on authority of legislature to remove municipality from trusteeship.

Injunction against passage of ordinance.

Cited in Smith v. Buffalo, 51 Misc. 218, 99 N. Y. Supp. 986, holding injunction should not issue to prevent mayor of a city from approving a franchise alleged to have been granted by common council without complying with certain formalities required by law, there being no showing that he intended to approve it.

Cited in notes (13 L. R. A. 845) on injunction to prevent passage of municipal ordinance.

Effect of refusal to accept trust.

Cited in State v. Blake, 69 Conn. 70, 36 Atl. 1019, holding refusal of state to accept trust bars injunction against payment to substituted legatees.

Jurisdiction of equity and superior courts.

Cited in Union Transp. Co. v. Bassett, 118 Cal. 610, 50 Pac. 754, holding equity cannot interfere with harbor commissioners as to regulation of vessels in dock; Hall v. Pierson, 63 Conn. 350, 28 Atl. 544, holding probate court has concurrent equitable jurisdiction with superior court over dower; Lackland v. Walker, 151 Mo. 249, 52 S. W. 414, holding equity will remedy defects in administration of charitable trusts, following purpose of donor as nearly as possible; Woodruff v. Marsh, 63 Conn. 136, 38 Am. St. Rep. 346, 26 Atl. 846, raising, without deciding, as to power of superior court to deal with charitable trusts.

— To appoint trustee.

Cited in Mack's Appeal, 71 Conn. 135, 41 Atl. 242, upholding power of probate court to appoint another trustee, one named in will refusing to act; Conklin v. Davis, 63 Conn. 383, 28 Atl. 537, holding equity will appoint trustee, if church deacons without power to accept gift to poor; *Re John*, 30 Or. 523, 36 L. R. A. 253, 47 Pac. 341, holding equity will preserve trust, person authorized to name trustee failing to act.

Distinguished in *Yale College's Appeal*, 67 Conn. 243, 34 Atl. 1036, denying that refusal of state to accept trust allows probate court to appoint trustee, will otherwise disposing of unaccepted bequests; *Eliot's Appeal*, 74 Conn. 598, 51 Atl. 558, sustaining gift to society made competent by statute to act as trustee.

Validity of gifts.

Cited in *Re John*, 30 Or. 520, 36 L. R. A. 251, 47 Pac. 341, denying that provision by law for support of schools invalidates bequest in trust for same purpose; *Strong's Appeal*, 68 Conn. 531, 37 Atl. 395, holding bequest for relief of poor, although benefiting taxpayers, works no change in its charitable nature; *Duggan v. Slocum*, 83 Fed. 246, denying that failure of testator to provide another trustee to act upon death of one named invalidates gift.

Cited in note (14 L.R.A.(N.S.) 109, 112) on enforcement of general bequest for charity or religion.

14 L. R. A. 75, *WESTERN MARYLAND R. CO. v. HEROLD*, 74 Md. 510, 22 Atl. 323.

Contributory negligence as question of law.

Cited in *Jones v. Baltimore & O. R. Co.* 21 D. C. 359, holding act of jumping from car moving at low speed not contributory negligence, as matter of law; *United R. & Electric Co. v. Weir*, 102 Md. 290, 62 Atl. 588; *United R. & Electric Co. v. Rosik*, 107 Md. 145, 68 Atl. 511,—holding same.

Cited in notes (22 L.R.A.(N.S.) 756) on negligence of passenger in getting on or off moving train; (33 L.R.A.(N.S.) 585) on contributory negligence of intending passenger entering car prematurely; (37 L.R.A.(N.S.) 45) on care required in sudden emergency.

Liability of carrier for act of stranger.

Cited in notes (22 L.R.A. 306) on liability of railroad for accidents caused by wrongful act of stranger; (3 L.R.A.(N.S.) 320) on liability for injury to passenger by wrongful act of stranger directed against cars or passengers therein.

14 L. R. A. 78, *UNITED STATES v. SIMMONS*, 47 Fed. 575.

Public policy as affecting indemnities.

Cited in *Leary v. United States*, 107 C. C. A. 27, 184 Fed. 437, to the point that contract to indemnify bail in criminal case is unenforceable; *Essig v. Turner*, 60 Wash. 176, 110 Pac. 998, to the point that persons who have been indemnified by accused, should not be accepted as bail for one convicted of embezzlement, pending appeal; *United States v. Greene*, 163 Fed. 443, holding the law will not imply an agreement or obligation on the part of the principal in a bail bond in a criminal case to indemnify his surety; *United States v. Lee*, 170 Fed. 614, holding it is within the discretion of a court or magistrate to refuse to accept a proffered criminal recognizance signed by a surety who has been fully indemnified against loss by third parties.

Cited in footnote to *Harrington v. Crawford*, 35 L. R. A. 477, which holds invalid, bond to indemnify sheriff against liability for failure to execute final process.

Cited in note (20 L.R.A.(N.S.) 58) on validity of agreement to indemnity bail in criminal case.

Distinguished in *Belond v. Guy*, 20 Wash. 161, 54 Pac. 995, sustaining action for contribution against cosurety on penal bond; *Carr v. Davis*, 64 W. Va. 526, 20 L.R.A.(N.S.) 64, 63 S. E. 326, 16 A. & E. Ann. Cas. 1031, holding a bond

of indemnity given by a person under charge of felony to indemnify his bail in a recognizance for his appearance to answer the charge, is not void as against public policy.

Criticized in *Maloney v. Nelson*, 12 App. Div. 548, 42 N. Y. Supp. 418, Affirming 16 Misc. 480, 39 N. Y. Supp. 930, holding bond and mortgage executed by one indicted for felony, to indemnify surety, not void as against public policy.

14 L. R. A. 80, *DROWN v. FORREST*, 63 Vt. 557, 22 Atl. 612.

Amount of damages as affecting jurisdiction.

Cited in *Bickford v. Travelers Ins. Co.* 67 Vt. 426, 32 Atl. 230, holding motion for dismissal for lack of jurisdiction of amount involved properly denied, when suit brought in good faith; *Mellen v. United States Health & Acci. Ins. Co.* 83 Vt. 249, 75 Atl. 273, holding that county court is not ousted of jurisdiction because of smallness of amount in controversy, unless it is shown that plaintiff did not act in good faith in bringing action in that court.

Contracts in restraint of business.

Cited in footnotes to *Dills v. Doebler*, 20 L. R. A. 432, which denies injunction to prevent resumption of dentistry practice without paying sum agreed on; *Oakdale Mfg. Co. v. Garst*, 23 L. R. A. 639, which holds contract preventing manufacturer of oleomargarine engaging in business for five years not unreasonable; *Wilkinson v. Colley*, 26 L. R. A. 114, which holds injunction against violating agreement against practising medicine not prevented by naming penalty.

14 L. R. A. 82, *THOMAS v. CARTER*, 63 Vt. 609, 22 Atl. 720.

Right of creditor to sue insolvent.

Cited in *Barton Nat. Bank v. Atkins*, 72 Vt. 44, 47 Atl. 176, upholding right of creditor to maintain action during insolvency proceedings to ascertain liability; *Smith v. St. Paul German F. Ins. Co.* 56 Minn. 208, 57 N. W. 475, holding creditor filing claim with assignee not precluded from suing insolvent upon same claim.

14 L. R. A. 85, *LARSON v. CHASE*, 47 Minn. 307, 28 Am. St. Rep. 370, 50 N. W. 238.

Rights as to disposition of corpse.

Cited in *Enos v. Snyder*, 131 Cal. 70, 53 L.R.A. 222, 82 Am. St. Rep. 330, 63 Pac. 170, holding personal representative not entitled to custody of body; *Burney v. Children's Hospital*, 169 Mass. 60, 38 L.R.A. 415, 61 Am. St. Rep. 273, 47 N. E. 401, holding father entitled to possession of child's body for burial; *Keyes v. Konkell*, 119 Mich. 551, 44 L.R.A. 243, 75 Am. St. Rep. 423, 78 N. W. 649, holding action in replevin not maintainable for corpse, under statute for taking chattels; *Lindh v. Great Northern R. Co.* 99 Minn. 408, 7 L.R.A.(N.S.) 1019, 109 N. W. 823, holding action ex delicto for damages may be maintained for mutilation of corpse.

Cited in footnotes to *Choppin v. Dauphin*, 33 L. R. A. 133, which denies right of owner of tomb to require removal of remains of dead; *Thompson v. State*, 51 L. R. A. 83, which holds attempt to make unauthorized sale of dead body of human being a misdemeanor; *Wright v. Hollywood Cemetery Corp.* 52 L. R. A. 621, which sustains right of grandmother of orphan child living with her, to determine place of burial; *McEntee v. Bonacum*, 60 L. R. A. 440, which holds next of kin of unmarried person entitled to custody of body, and to decide on place of burial; *Koerber v. Patek*, 68 L.R.A. 956, which holds that legal right to

bury corpse vests in nearest relative of decedent so situated as to be able and willing to perform the duty.

Cited in notes (31 L. R. A. 540) on power of coroner to order post-mortem examination; (42 L. R. A. 721, 723) on liability for disinterment of dead bodies, and acts relating thereto; (75 Am. St. Rep. 425, 428) on rights in and to dead bodies and remedies for their enforcement.

— Of surviving spouse.

Cited in *Re Richardson*, 29 Misc. 369, 60 N. Y. Supp. 539; *Neighbors v. Neighbors*, 112 Ky. 163, 65 S. W. 607,—upholding widow's right to choose husband's burial place; *Foley v. Phelps*, 1 App. Div. 556, 37 N. Y. Supp. 471, holding widow may recover damages for unauthorized dissection of husband's remains; *O'Donnell v. Slack*, 123 Cal. 290, 43 L.R.A. 390, 55 Pac. 906, and *Foley v. Phelps*, 1 App. Div. 554, 37 N. Y. Supp. 471, upholding widow's right to possession of husband's body before interment; *Doxtator v. Chicago & W. M. R. Co.* 120 Mich. 597, 45 L.R.A. 536, 79 N. W. 922, holding railroad company not liable for failure to deliver to widow parts of husband's limbs amputated by surgeon; *Wilson v. St. Louis & S. F. R. Co.* 160 Mo. App. 656, 142 S. W. 775; *Darcy v. Presbyterian Hospital*, 202 N. Y. 262, 95 N. E. 695,—holding that right to possession of dead body for purpose of burial belongs to surviving husband or wife or next of kin; *Butterworth & Sons v. Teale*, 54 Wash. 18, 102 Pac. 768, to the point that right of wife to body of deceased husband is same as right of husband to that of his wife; *Philipps v. Montreal General Hospital*, Rap. Jud. Quebec, 33 C. S. 488, holding that unauthorized autopsy of deceased person is tort to widow and action lies for damages therefor; *Pettigrew v. Pettigrew*, 207 Pa. 316, 64 L.R.A. 181, 99 Am. St. Rep. 795, 56 Atl. 878, holding right is in surviving spouse and then in next of kin in order of relationship; *Mutual L. Ins. Co. v. Griesa*, 156 Fed. 401, holding widow has control of body of deceased husband; *Litteral v. Litteral*, 131 Mo. App. 312, 111 S. W. 872, holding widow, if present, has right to bury body of deceased husband, in preference of right of husband's kinsmen; *Louisville & N. R. Co. v. Wilson*, 123 Ga. 66, 51 S. E. 24, 3 A. & E. Ann. Cas. 128, holding widow has right of possession of remains of husband; *Medical College v. Rushing*, 1 Ga. App. 469, 57 S. E. 1083, holding husband has right of possession of remains of deceased wife, and right of action for their mutilation.

Cited in footnotes to *Hackett v. Hackett*, 19 L. R. A. 558, which holds widow entitled to control husband's burial; *Thompson v. Deeds*, 35 L. R. A. 56, which denies widow's right to remove husband's body from lot owned by daughter, though sustaining right to erect monument thereon; *Pettigrew v. Pettigrew*, 64 L.R.A. 179, which sustains widow's right to control interment of intestate husband's corpse.

— Right of action for disinterring remains.

Cited in *Anderson v. Acheson*, 132 Iowa, 748, 9 L.R.A.(N.S.) 219, 110 N. W. 335, holding right of action exists for unnecessary disturbance or wanton violation of burial place; *Wilson v. Read*, 74 N. H. 326, 16 L.R.A.(N.S.) 335, 122 Am. St. Rep. 973, 68 Atl. 37, holding next of kin have right of action for wilful disturbance of remains; *Cohen v. Congregation Shearith Israel*, 85 App. Div. 67, 82 N. Y. Supp. 918, on right of action for disintering remains.

Lot owners' interest in cemetery.

Cited in *Brown v. Maplewood Cemetery Asso.* 85 Minn. 513, 89 N. W. 872, holding that private owners of cemetery lots may compel trustees to apply, on improvements, money from sales.

Mental suffering as element of damages.

Cited in *Hickey v. Welch*, 91 Mo. App. 12, holding mental suffering due to violent conduct properly considered in aggravation of damages for trespass; *Watson v. Dilts*, 116 Iowa, 252, 57 L. R. A. 561, 93 Am. St. Rep. 239, 89 N. W. 1068, holding one liable for causing nervous prostration by trespassing in nighttime; *Bucknam v. Great Northern R. Co.* 76 Minn. 377, 79 N. W. 98, holding abusive language used by agent to husband gives wife no right of action against company for mental pain; *Sanderson v. Northern P. R. Co.* 88 Minn. 166, 60 L. R. A. 405, 97 Am. St. Rep. 509, 92 N. W. 542, denying recovery for fright resulting in physical injury in absence of contemporaneous injury; *Gibney v. Lewis*, 68 Conn. 396, 36 Atl. 799, holding admission of evidence of mental anguish on account of arrest not error; *Loneragan v. Small*, 81 Kan. 54, 25 L.R.A.(N.S.) 979, 105 Pac. 27, holding damages for mental suffering recoverable for assault without battery; *Bouillon v. Laclede Gaslight Co.* 148 Mo. App. 469, 129 S. W. 401, holding that in negligence actions no recovery can be had for mental suffering not resulting from physical injury, unless under circumstances of malice, insult or inhumanity directed against plaintiff.

Cited in footnotes to *Hale v. Bonner*, 14 L. R. A. 336, which allows for mental distress for delay in transporting corpse of husband; *Louisville & N. R. Co. v. Hull*, 57 L. R. A. 771, which authorizes consideration of mental anguish in assessing damages for breach of contract to transport corpse.

Cited in note (30 Am. St. Rep. 712) on damages for mental anguish.

Distinguished in *Nelson v. Crawford*, 122 Mich. 470, 80 Am. St. Rep. 577, 81 N. W. 336, holding fright, unaccompanied by immediate physical injury, no basis for damages.

— For negligent delivery of telegram.

Cited in *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 765, 28 L. R. A. 76, 57 Am. St. Rep. 294, 62 N. W. 1, upholding right to damages for mental suffering for nondelivery of message announcing funeral of mother; *Cowan v. Western U. Teleg. Co.* 122 Iowa, 386, 64 L. R. A. 551, 101 Am. St. Rep. 268, 98 N. W. 281, holding mental anguish element of damages in action for negligent transmission of telegram; *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 83, 54 L. R. A. 852, 60 N. E. 1080 (dissenting opinion), majority holding no recovery for mental suffering due to nondelivery of telegram; *Francis v. Western U. Teleg. Co.* 58 Minn. 262, 25 L. R. A. 412, 49 Am. St. Rep. 507, 59 N. W. 1078, denying recovery for mental pain alone, for failure to deliver message; *Rowan v. Western U. Teleg. Co.* 149 Fed. 553, holding damages for mental suffering, unaccompanied by physical injury, cannot be recovered against telegraph company for mere neglect in delivering death message preventing attendance at funeral.

— For wrong in respect to corpse or burial.

Cited in *Beaulieu v. Great Northern R. Co.* 103 Minn. 51, 19 L.R.A.(N.S.) 568, 114 N. W. 353, 14 A. & E. Ann. Cas. 462, on right of action against carrier for mental anguish caused by delay in transporting corpse causing delay in funeral; *Kyles v. Southern R. Co.* 147 N. C. 398, 16 L.R.A.(N.S.) 407, 61 S. E. 278, holding damages for mental anguish from mutilation of dead body recoverable; *Wright v. Beardsley*, 46 Wash. 19, 89 Pac. 172, holding damages for mental anguish from failure to properly bury deceased child recoverable; *Koerber v. Patek*, 123 Wis. 459, 68 L.R.A. 959, 102 N. W. 40, holding mental anguish element of damage for wilful mutilation of corpse.

14 L. R. A. 89, *COM. v. McMANUS*, 143 Pa. 64, 21 Atl. 1018, 22 Atl. 761
Specific charge to jury.

Cited in *Walbert v. Trexler*, 156 Pa. 118, 32 W. N. C. 489, 27 Atl. 65, and *Kroegher v. McConway & T. Co.* 149 Pa. 456, 23 Atl. 341, holding court not bound to charge in exact language requested; *Gallagher v. Philadelphia*, 4 Pa. Super. Ct. 69, and *Com. v. Clark*, 3 Pa. Super. Ct. 148, upholding court's right to charge jury in own words, clearly stating law; *Hand v. Central Pennsylvania Teleph. & Supply Co.* 1 Lack. Legal News, 362, holding specific charge properly denied, question of duty to repair being covered by general charge; *Brubaker v. Lebanon*, 14 Pa. Dist. R. 586, 22 Lanc. L. Rev. 70, holding a court is not bound to affirm a point in the exact phrase asked for even if the legal proposition is correct.

Jurors as judges of law and fact.

Followed in *Com. v. Costello*, 1 Pa. Dist. R. 747, holding jurors no longer judges of law separately from facts in criminal cases.

Cited in *State v. Dickey*, 48 W. Va. 330, 37 S. E. 695; *Sparf v. United States*, 156 U. S. 85, 39 L. ed. 355, 15 Sup. Ct. Rep. 273, holding it duty of jury to receive law from court, applying it as instructed; *Com. v. Goldberg*, 4 Pa. Super. Ct. 148, holding charge that jurors may disregard instructions of court as to law, error; *State v. Heacock*, 106 Iowa, 201, 76 N. W. 654, holding it duty of court to instruct jury as to law in libel suit; *Com. v. McMurray*, 198 Pa. 61, 82 Am. St. Rep. 787, 47 Atl. 952, holding charge of prisoner's guilt of murder in second degree no error, such conclusion being undisputed; *Com. v. Brown*, 17 Pa. Dist. R. 94, holding same; *Oakes v. State*, 98 Miss. 93, 33 L.R.A.(N.S.) 215, 54 So. 79, holding that court may require jury to consider only the law given in its charge in libel suit; *Com. v. Ellis*, 46 Pa. Super. Ct. 78, holding that it is duty of jury to take judge's instructions as best evidence of law; *Com. v. Havrilla*, 38 Pa. Super. Ct. 298, holding court cannot direct a verdict of guilty in criminal case; *Com. v. Devine*, 31 Pa. Co. Ct. 112, 14 Pa. Dist. R. 4, holding jury are not judges of the law in any case, civil or criminal; *State v. Daley*, 54 Or. 519, 103 Pac. 502, holding under statute jury have power to disregard instructions and acquit accused.

Cited in footnotes to *State v. Burbee*, 19 L. R. A. 145, which holds jury in criminal case not judges of law; *State v. Main*, 36 L. R. A. 623, which upholds power to limit by statute right of court to instruct jury as to constitutionality of a statute.

Cited in notes (33 L.R.A.(N.S.) 208) on effect of provision that jury shall determine law and facts in libel cases; (42 Am. St. Rep. 294) on jury as judges of law and fact.

14 L. R. A. 95, *GRAY v. WESTERN U. TELEG. CO.* 87 Ga. 350, 27 Am. St. Rep. 259, 13 S. E. 562.

Damages for violation of public duty or contract.

Cited in *Conyers v. Postal Teleg. Cable Co.* 92 Ga. 620, 44 Am. St. Rep. 100, 19 S. E. 253, upholding sender's right to sue connecting company for penalty for delay in delivering telegram; *Southern Bell Teleph. & Teleg. Co. v. Beach*, 8 Ga. App. 722, 70 S. E. 137, holding that telephone company is liable for refusal to render service to member of community, without lawful excuse; *Glenn v. Western U. Teleg. Co.* 1 Ga. App. 831, 58 S. E. 83, holding it error to sustain a general demurrer to, and dismiss a petition setting forth a breach of contract implied from a public duty on the part of the defendant telegraph company and which if proved would entitle the plaintiff to recover at least nominal

damages; *Stewart, M. & Co. v. Postal Telegr. Cable Co.* 131 Ga. 35, 18 L.R.A. (N.S.) 694, 127 Am. St. Rep. 205, 61 S. E. 1045, holding a sendee of a telegram who acts on the faith of a message negligently altered by servants of the telegraph company in its transmission, and thereby sustains damage, may maintain an action in tort against telegraph company for breach of public duty; *Louisville v. Wehmhoff*, 116 Ky. 843, 79 S. W. 201, as to duty of company in sending illegal or immoral message; *Cordell v. Western U. Telegr. Co.* 149 N. C. 409, 22 L.R.A. (N.S.) 543, 63 S. E. 71, holding if a message is tendered to a telegraph company with the requisite lawful charges, it is obligated to receive the same for the transmission; *Western U. Telegr. Co. v. Greer*, 115 Tenn. 373, 1 L.R.A. (N.S.) 527, 89 S. W. 327, holding clause in contract exempting telegraph company from damages or statutory penalties unless the claim is presented within a certain time after transmission of message applies to actions for statutory penalties as well as action for damages.

Cited in note (17 L.R.A. (N.S.) 837) on right to refuse telegraph message because of its character.

When acts illegal.

Cited in *Gist v. Western U. Telegr. Co.* 45 S. C. 367, 55 Am. St. Rep. 763, 23 S. E. 143, holding complaint failing to state facts required by Rev. Stat. § 1859, insufficient to sustain recovery for nondelivery of telegram relating to "cotton futures;" *Crystal Ice Co. v. Wylie*, 65 Kan. 109, 68 Pac. 1086, holding use of ice by persons selling liquors illegally, no defense to action for breach of contract to deliver.

Cited in footnote to *Waters v. Richmond & D. R. Co.* 16 L. R. A. 834, which holds breach of contract to transport cattle not excused because shipper intended to offer for sale on Sunday.

14 L. R. A. 97, *Re SPAIN*, 3 Inters. Com. Rep. 738, 47 Fed. 208.

Exercise of police power.

Cited in footnote to *Burrows v. Delta Transp. Co.* 29 L. R. A. 468, which sustains validity of state statute requiring fire screens on vessels burning wood.

— Regulating trade with residents.

Cited in footnotes to *Brownback v. North Wales*, 49 L. R. A. 446, which holds valid, as to residents, ordinance requiring license for sale of goods on street or by soliciting orders from house to house; *Smith v. Jackson*, 47 L. R. A. 416, which holds agent collecting garments and sending them to laundry outside of state, and redelivering to owners, not engaged in commerce; *Racine Iron Co. v. McCommons*, 51 L. R. A. 134, which holds traveling agent taking orders and distributing contents of original package among customers not engaged in interstate commerce; *Croy v. Epperson*, 51 L. R. A. 254, which holds one taking orders in own name for articles manufactured in other state, and delivering separate articles to customers, not engaged in interstate commerce; *Singer Mfg. Co. v. Wright*, 35 L. R. A. 497, which sustains state statute requiring every company selling sewing machines in state to pay license tax; *Rosenbloom v. State*, 57 L. R. A. 923, which sustains license tax on peddlers, though vendors of own products exempt; *Com. v. Harmel*, 27 L. R. A. 388, which authorizes regulation of peddling separate articles after original package broken; *Williams v. Fears*, 50 L. R. A. 685, which sustains license tax on emigrant agent; *South Bend v. Martin*, 29 L. R. A. 531, which holds ordinance imposing license on peddlers not interference with commerce as to peddling of chairs imported before employment begun.

Cited in notes (18 L.R.A. (N.S.) 135) on sale by foreign corporation of goods
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stored in state as intrastate business; (19 L.R.A.(N.S.) 311) on license or occupation tax on hawkers, peddlers, and persons engaged in soliciting orders by sample or otherwise as violating the commerce clause; (46 L. ed. U. S. 785) on peddlers and drummers as related to interstate commerce.

— **Regulating trade with nonresidents.**

Cited in *State v. Lichtenstein*, 44 W. Va. 102, 28 S. E. 753, holding statute requiring license to solicit orders for liquors unconstitutional as to agents of nonresidents; *Re Tinsman*, 95 Fed. 651, holding ordinance prohibiting persons from soliciting orders for manufacturers in another state, without license, void; *Huntington v. Mahan*, 142 Ind. 697, 51 Am. St. Rep. 200, 42 N. E. 463, holding ordinance prohibiting peddling without license unlawful as to agent of non-resident publisher distributing books to fill orders previously taken; *Re Tyerman*, 48 Fed. 167, and *Re Nichols*, 46 Fed. 166, 48 Phila. Leg. Int. 474, holding ordinance requiring license fee void as to agent soliciting orders for books to be sent from another state; *Havens & G. Co. v. Diamond*, 93 Ill. App. 567, holding foreign manufacturers sending drummers into Illinois to solicit orders for clothing, and shipping goods to purchasers, not within statute regulating trade; *State v. Eckenrode*, 148 Iowa, 192, 127 N. W. 56, holding that agent opening box and delivering packages contained therein to customers is not liable for violation of pure food law of state, where original was set into state for distribution by him; *Kinsley v. Dyerly*, 79 Kan. 5, 19 L.R.A.(N.S.) 407, 98 Pac. 228; *State v. Trotman*, 142 N. C. 665, 55 S. E. 599,—holding foreign dealer who solicits orders through agent and ships to agent for delivery to purchaser is engaged in interstate commerce and not subject to local license ordinance.

Cited in footnotes to *Gunn v. White Sewing Mach. Co.* 18 L. R. A. 206, which holds as interstate commerce, contract by resident for sale of machines of foreign corporation; *Re Sanders*, 18 L. R. A. 549, which holds void as to original packages, act requiring marking on package of year in which seed grown; *Stuart v. Cunningham*, 20 L. R. A. 430, which holds one delivering goods previously sold not a peddler; *Hewson v. Englewood*, 21 L. R. A. 736, which holds agent delivering from wagon goods previously ordered, and taking other orders, not a peddler; *Com. v. Myers*, 31 L. R. A. 379, which holds void, license tax on peddlers which exempts manufacturers who have paid tax on capital; *Carrollton v. Bazzette*, 31 L. R. A. 522, which holds ordinance requiring license from itinerant merchants purchasing bankrupt stocks wherever possible not regulation of commerce; *State v. Scott*, 36 L. R. A. 461, which holds soliciting of pictures to be enlarged outside of state, interstate commerce preventing imposition of privilege tax; *Re Wilson*, 48 L. R. A. 417, which holds void, as applied to sale of original packages, territorial statute requiring license for sale of coal oil; *French v. State*, 52 L. R. A. 160, which holds agent of nonresident company selling organ taken with him, or taking orders for others to be delivered by him, engaged in interstate commerce; *State v. Willingham*, 52 L. R. A. 108, which holds interstate commerce, delivery of portraits and frames by agent previously taking order for nonresident manufacturer.

Cited in note (24 L. R. A. 313, 314) on exclusion of foreign corporations as interference with interstate commerce.

Annotation in 14 L. R. A. 97, referred to particularly in *State v. Coop*, 52 S. C. 513, 41 L. R. A. 503, footnote p. 501. 30 S. E. 609 (dissenting opinion), majority holding purchase of picture frame in accordance with option in order for making portrait in another state not within statute against peddling.

Distinguished in *State v. Gorham*, 115 N. C. 728, 25 L. R. A. 812, footnote p. 810, 44 Am. St. Rep. 494, 20 S. E. 179, holding license tax on business of

erecting lightning rods not tax an interstate commerce as to one putting up rods sold by himself only.

Federal control of interstate commerce.

Cited in *Ex parte Martin*, 180 Fed. 213, to the point that Federal court is vested with discretion to entertain jurisdiction of alleged violation of state regulations for licensing peddlers; *Wilcox v. People*, 46 Colo. 383, 104 Pac. 408; *Smith v. Farr*, 46 Colo. 370, 104 Pac. 401,—holding Congress has sole power to regulate commerce between states and interstate commerce cannot be taxed by state.

14 L. R. A. 100, *TITUSVILLE v. BRENNAN*, 143 Pa. 642, 3 Inters. Com. Rep. 735, 24 Am. St. Rep. 580, 22 Atl. 893.

Reversed in 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829.

Regulations affecting trade.

Cited in *Lowry v. Tile, Mantel & Grate Asso.* 106 Fed. 44, holding combination of dealers in fire-place fixtures, providing no dealer should purchase except from member, in restraint of trade.

License for right to do business.

Cited in *North Wales v. Brownback*, 10 Pa. Super. Ct. 230, 44 W. N. C. 260, 49 L. R. A. 447, footnote p. 446, Reversing 7 Pa. Dist. R. 326, 16 Lanc. L. Rev. 151, 14 Montg. Co. L. Rep. 81, holding valid as to residents, ordinance requiring license for sale of goods on street or soliciting orders from house to house; *Mechanicsburg v. Koons*, 18 Pa. Super. Ct. 135, holding borough has power to require agents selling teas from house to house to procure license; *Com. v. Harmel*, 166 Pa. 95, 27 L. R. A. 389, 5 Inters. Com. Rep. 89, 30 Atl. 1036, holding peddling separate articles after packages in which sent from another state are broken subject to police regulation; *South Bethlehem v. Hackett, C. & Co.* 12 Lanc. L. Rev. 200, holding statute authorizing city to impose license fee on transient retail dealers, but excepting permanent dealers does not allow tax upon nonresidents having permanent business place out of state; *Lancaster ex rel. Board of Health v. Reese*, 22 Lanc. L. Rev. 38, 14 Pa. Dist. R. 447, holding a city ordinance requiring all milk dealers to take out a license and pay a registration fee and imposing a limited penalty for failure to comply therewith, a valid exercise of police power.

Cited in footnote to *Singer Mfg. Co. v. Wright*, 35 L. R. A. 497, which sustains state statute requiring every company selling sewing machines in state to pay license tax.

Cited in note (129 Am. St. Rep. 278) on constitutional limitations on power to impose license or occupation taxes.

Interference with interstate commerce.

Cited in footnote to *Re Sanders*, 18 L. R. A. 549, which holds void as to original packages, act requiring marking on package of year in which seed grown.

Cited in note (46 L. ed. U. S. 785) on peddlers and drummers as related to interstate commerce.

Disapproved in *Altoona City v. Patterson*, 33 Pa. Co. Ct. 130, 16 Pa. Dist. R. 557; *State v. Glashy*, 50 Wash. 603, 21 L.R.A.(N.S.) 799, 97 Pac. 734,—holding license tax on persons taking orders for goods by sample applying to persons taking orders for goods without state to be shipped in original packages, void.

— License matters.

Cited in *Sayre v. Phillips*, 148 Pa. 488, 30 W. N. C. 197, 16 L. R. A. 50, 33

Am. St. Rep. 842, 24 Atl. 76, holding ordinance fixing nonresident peddler's license at price intended as prohibitive, void; *State ex rel. Selliger v. O'Connor*, 5 N. D. 632, 67 N. W. 824, holding arrest for violating ordinance taxing persons selling, by samples, goods to be shipped from another state illegal; *Densmore v. Erie*, 20 Pa. Co. Ct. 519, 7 Pa. Dist. R. 359, holding ordinance requiring bicycle riders to display license tag not proper exercise of police power; *Com. ex rel. Overfield v. Walker*, 14 Pa. Co. Ct. 587, 3 Pa. Dist. R. 535, 12 Lanc. L. Rev. 211, and *Re Tinsman*, 95 Fed. 651, holding ordinance prohibiting persons from soliciting orders for manufacturers in another state, without license, void.

Cited in footnotes to *State v. Scott*, 36 L. R. A. 461, which holds soliciting of pictures to be enlarged outside of the state, interstate commerce preventing imposition of privilege tax; *State v. Coop*, 41 L. R. A. 501, which holds purchase of frame in accordance with option included in order for making portrait in other state not within statute against peddling; *Re Wilson*, 48 L. R. A. 417, which holds void, as applied to sale of original packages, territorial statute requiring license for sale of coal oil; *State v. Gorham*, 25 L. R. A. 810, which holds license tax on business of putting up lightning rods not tax on interstate commerce as to one putting up rods sold by himself only; *Raeine Iron Co. v. McCommons*, 51 L. R. A. 134, which holds traveling agent taking orders and distributing contents of original package among customers not engaged in interstate commerce; *Stuart v. Cunningham*, 20 L. R. A. 430, which holds one delivering goods previously sold not a peddler; *Hewson v. Englewood*, 21 L. R. A. 736, which holds agent delivering from wagon goods previously ordered, and taking other orders, not a peddler.

(Cited in note (19 L.R.A.(N.S.) 304) on license or occupation tax on hawkers, peddlers, and persons engaged in soliciting orders by sample, or otherwise, as violating the commerce clause.

14 L. R. A. 103, LAW'S ESTATE, 144 Pa. 499, 22 Atl. 831.

Liability for trust funds — Of executor or trustee.

Cited in *Stong's Estate*, 160 Pa. 16, 28 Atl. 480, holding executor liable for neglect to reduce bonds to judgment before failure of obligor; *Evans's Estate*, 7 Pa. Super. Ct. 144, 9 Kulp, 224, holding trustee liable for loss from bank's failure, when funds left on deposit four years; *Seager's Estate*, 6 Pa. Dist. R. 108, charging administrator with funds deposited to his own credit, and lost by bank's failure; *Re Kohler*, 15 Wash. 617, 55 Am. St. Rep. 904, 47 Pac. 30, holding executor depositing trust funds in solvent bank not liable for loss by bank's failure; *Re Seamans*, 2 Lack. Legal News, 273, holding executor continuing deposit made by testator in bank not liable for loss by bank's failure; *Re Wood*, 159 Cal. 470, 36 L.R.A.(N.S.) 253, 114 Pac. 992, holding that measure of care in regard to funds, required of trustee in such as would be exercised by man of ordinary prudence and skill in management of his own business; *Re Clark*, 39 Pittsb. L. J. N. S. 194, holding that accountant is liable for loss of funds when it appears that he kept them in bank of which he was director for over eight months, or until it failed.

Cited in notes (7 L.R.A.(N.S.) 618) on liability of executor or administrator for loss of bank deposit; (89 Am. St. Rep. 293, 297, 298; 21 L.R.A.(N.S.) 400) on liability of guardian for loss of bank deposit; (98 Am. St. Rep. 372) on deposit in trust fund in bank by executors or administrators.

— Of public officer.

Cited in *School District v. Stoner*, 16 Montg. Co. L. Rep. 108, holding collector not liable for loss of school funds deposited in solvent bank; *State v. Gramm*, 7

Wyo. 345, 40 L. R. A. 695, 52 Pac. 533, holding state treasurer not insurer of public funds, and not liable for moneys deposited in banks and lost by failure.

Distinguished in *Fairchild v. Hedges*, 14 Wash. 124, 31 L. R. A. 354, 44 Pac. 125, holding treasurer accountable by statute for public funds deposited in banks and lost by failure.

— **Affected by nature of deposit.**

Approved in *State v. McPetridge*, 84 Wis. 515, 20 L. R. A. 237, 54 N. W. 1, holding deposit of state funds in banks not investments prohibited by statute.

Cited in *Bardaley v. Sternberg*, 18 Wash. 625, 52 Pac. 251, holding deposit of public funds by city treasurer in bank for safe keeping not loan; *State v. Hill*, 47 Neb. 532, 66 N. W. 541, holding deposit of public funds in bank for safe keeping, treasurer retaining control, not loan within Crim. Code, § 124; *Allibone v. Ames*, 9 S. D. 79, 33 L. R. A. 588, 58 N. W. 165, and *Nebraska v. First Nat. Bank*, 88 Fed. 950, holding money left with bank subject to check, security given and interest paid, constitutes deposit; *Officer v. Officer*, 120 Iowa, 391, 98 Am. St. Rep. 365, 94 N. W. 947, holding general deposit by executor not entitle him or *cestui que trust* to preference; *Hunt v. Hopley*, 120 Iowa, 699, 95 N. W. 205, holding general deposit of funds of school district by treasurer in representative capacity not a loan; *Re Curtis*, 20 R. I. 582, 60 Atl. 240, as to temporary deposit subject to call although some interest is received not being investment of money; *Corcoran v. Kostrometinoff*, 21 L.R.A.(N.S.) 402, 91 C. C. A. 619, 164 Fed. 688, holding guardian personally liable for loss of funds deposited with a bank for a fixed period of time on a certificate of deposit without security; *Clark's Estate*, 39 Pa. Super. Ct. 448, 39 Pittsb. L. J. N. S. 193, holding guardian who opens a bank account for wards, in a bank in which he is a director, and where he has his own and his firm's accounts, such amount bearing interest at four per cent and subject to check without notice, cannot be surcharged because he kept his ward's money in bank for eight months without investing it.

Cited in note (16 L. R. A. 517) as to when deposit in bank is special so that title remains in depositor.

Distinguished in *Glassburner's Estate*, 40 Pa. Super. Ct. 136, holding testamentary guardian authorized by will to invest such money as comes into his hands, in such manner as will, in his opinion, be for the interest of the ward, and guardian in good faith deposits the money in a bank on an open account at four per cent interest, cannot be held liable for loss resulting from failure of bank.

Interest on public funds.

Cited in *Baker v. Williams*, Bkg. Co. 42 Or. 223, 70 Pac. 711, denying public officer's right to interest on public funds, lost by deposit in insolvent bank, until he has reimbursed treasury.

Parol evidence to show nature of deposit.

Cited in *State ex rel. Carroll v. Corning State Sav. Bank*, 136 Iowa, 81, 113 N. W. 500, holding where a certificate of deposit is given parol evidence is admissible to show transaction a loan.

"Deposit."

Cited in *Com. ex rel. Atty. Gen. v. State Bank*, 32 Pa. Co. Ct. 55, holding the word "deposit" should be given its popular rather than technical meaning; *Warren v. Nix*, 97 Ark. 382, 135 S. W. 896, to the point that deposit is where sum of money is left with banker for safe keeping, subject to order and payable not in specific money deposited, but in equal sum.

Cited in note (33 Am. St. Rep. 226) on general and special deposits.

14 L. R. A. 107, *COM. v. NORTHERN ELECTRIC LIGHT & P. CO.* 145 Pa. 105, 22 Atl. 839.

What constitutes manufacturing corporation.

Cited in *Com. v. National Oil Co.* 157 Pa. 518, 33 W. N. C. 138, 27 Atl. 374, holding part of capital used in mining and transporting raw petroleum taxable, part used in refining exempt; *Com. v. Juniata Coke Co.* 157 Pa. 508, 33 W. N. C. 133, 27 Atl. 373 (finding of court below), holding company manufacturer as to coke produced, taxable as to coal mined; *Com. v. American Car & Foundry Co.* 203 Pa. 304, 52 Atl. 326, Affirming 26 Pa. Co. Ct. 607, holding exempt so much of capital stock of foreign corporation manufacturing cars as is used in Pennsylvania; *Perkins v. Coffin*, 84 Conn. 309, 79 Atl. 1070, Ann. Cas. 1912 C, 1188 (dissenting opinion), as to what constitutes "manufacturing corporation" under statutes; *Re Charles Town Light & Power Co.* 183 Fed. 164, to the point that business of impounding and supplying of natural gas for fuel is not manufacturing business; *Re Hudson River Electric Power Co.* 173 Fed. 941, holding gas company not principally engaged in manufacturing within meaning of bankruptcy act; *Re Rutland Realty Co.* 157 Fed. 297, holding corporation engaged in building houses a manufacturing corporation; *Com. v. Cover*, 29 Pa. Super. Ct. 414, holding fact that leather is cut in store into various sizes and pieces, but not manufactured into any complete article, does not exempt from taxation the leather thus treated, on the ground that it was manufactured into articles for sale.

Cited in footnotes to *Com. v. Pottsville Iron & Steel Co.* 22 L. R. A. 228, which holds exemption of manufacturing company not lost by possessing power of mining; *Com. v. Juniata Coke Co.* 22 L. R. A. 232, which holds exemption of manufacturing company not lost by possessing power to mine its own coal; *Cowling v. Zenith Iron Co.* 33 L. R. A. 508, which holds stockholders of iron ore mining corporation exempt from double liability; *People ex rel. New England Dressed Meat & Wool Co. v. Roberts*, 41 L. R. A. 228, which denies exemption as manufacturing company to corporation buying, slaughtering, and selling sheep and lambs; *Columbia Ironworks v. National Lead Co.* 64 L. R. A. 645, holding building, sale, and repairing of vessels within statute permitting involuntary bankruptcy proceedings against manufacturing company.

Cited in notes (57 L. R. A. 44) on taxation of corporate franchises; (58 L. R. A. 604) on taxation of capital stock of corporations in United States; (64 L. R. A. 34, 35, 40, 42, 58, 60) on taxation of manufacturing corporations in United States.

Distinguished in *Com. v. Keystone Bridge Co.* 156 Pa. 503, 32 W. N. C. 480, 27 Atl. 1, holding company buying raw materials and finishing them for use, manufacturing company within act of June 1, 1889.

— Companies producing electricity.

Followed in *Com. v. Edison Electric Light Co.* 145 Pa. 139, 27 Am. St. Rep. 683, 22 Atl. 845, and *Com. v. Edison Electric Light & P. Co.* 170 Pa. 232, 32 Atl. 419, Affirming 1 Dauphin Co. Rep. 128, holding corporation producing and selling electricity not exempt from taxation as manufacturing company.

Cited in *Frederick Electric Light & P. Co. v. Frederick City*, 84 Md. 604, 36 L. R. A. 132, footnote p. 130, 136 Atl. 362; *Com. ex rel. McCormick v. Keystone Electric Light, H. & P. Co.* 2 Dauphin Co. Rep. 7, 4 Lack. Legal News, 359, holding electric corporation supplying light, heat, and power not manufacturing corporation; *Williams v. Park* (*Williams v. Warren*) 72 N. H. 314, 64 L. R. A. 49, 56 Atl. 463, holding plant for collection and distribution of electricity for power and light not exempt from taxation; *State v. New Orleans R. & Light Co.* 116 La.

150, 40 So. 597, 7 A. E. Ann. Cas. 724, holding electric light company is not a "manufacturer" in the sense of the exemption clause of the constitution authorizing legislature to impose license taxes.

Distinguished in *Com. ex rel. McCormick v. Keystone Electric Light, H. & P. Co.* 193 Pa. 249, 44 Atl. 326, holding purchasers at sheriff's sale of electric light company's rights authorized by act of May 25, 1878, P. L. 145, to reorganize; *Bates Mach. Co. v. Trenton, & N. B. R. Co.* 70 N. J. L. 688, 103 Am. St. Rep. 811, 58 Atl. 935, holding production and control of electric power by mechanical means and its adaptation for use upon a trolley system is a "manufacturing purpose," with mechanics' lien law.

Disapproved in effect in *People ex rel. Brush Electric Mfg. Co. v. Wemple*, 129 N. Y. 555, 14 L. R. A. 711, footnote p. 708, 29 N. E. 808, including electric light company among manufacturing corporations exempt from state tax.

Classification for taxation.

Cited in *Knisely use of Com. v. Cotterel*, 3 Dauphin Co. Rep. 124, holding dealers in goods, wares, and merchandise may be classified as wholesalers and retailers, and taxed at different rates.

Construction of statutes.

Cited in *Likins's Petition*, 223 Pa. 465, 72 Atl. 858, 37 Pa. Super. Ct. 635, holding a general and comprehensive, rather than a strained, technical, or specific meaning is ordinarily to be adopted.

14 L. R. A. 114, **BOARD OF HEALTH v. VAN HOESSEN**, 87 Mich. 533, 49 N. W. 894.

Right to condemn property.

Cited in *Fallsburg Power & Mfg. Co. v. Alexander*, 101 Va. 106, 61 L. R. A. 133, 99 Am. St. Rep. 855, 43 S. E. 194, holding corporation authorized to develop and use water power to generate electricity for general use not entitled to condemn private property; *St. James African M. E. Church v. Baltimore & O. R. Co.* 114 Md. 448, 79 Atl. 35, holding that railroad company has right to condemn for its use unoccupied part of private cemetery owned by religious corporation; *Shasta Power Co. v. Walker*, 149 Fed. 570; *Minnesota Canal & Power Co. v. Koochiching*, 97 Minn. 449, 5 L.R.A.(N.S.) 649, 107 N. W. 405, 7 A. & E. Ann. Cas. 1182,—holding a use is not public unless under proper regulations the public has the right to resort to the property for the use for which it was acquired independently of the will or caprice of the corporation in which the title of the property vests upon condemnation; *Howard Mills Co. v. Schwartz Lumber & Coal Co.* 77 Kan. 609, 18 L.R.A.(N.S.) 362, 95 Pac. 559, holding a private corporation, owning a mill operated by steam power and having for its purpose the manufacture and sale of feed and flour cannot exercise right of eminent domain for purpose of improving and enlarging its business; *Brown v. Gerald*, 100 Me. 376, 70 L.R.A. 484, 109 Am. St. Rep. 526, 61 Atl. 785, holding manufacturing generating, selling, distributing and supplying electricity for power for manufacturing or mechanical purposes, is not a public use for which private property may be taken against will of owner; *State ex rel. Tacoma Industrial Co. v. White River Power Co.* 39 Wash. 668, 2 L.R.A.(N.S.) 849, 82 Pac. 150, 4 A. & E. Ann. Cas. 987; *Berrien Springs Water Power Co. v. Berrien Circuit Judge*, 133 Mich. 53, 103 Am. St. Rep. 438, 94 N. W. 379,—holding land cannot be taken by a corporation under eminent domain, unless, after it is taken it is to be devoted to the use of the public independent of the will of the corporation; *Cozard v. Kanawha Hardwood Co.* 139 N. C. 292, 1 L.R.A.(N.S.) 975, 111 Am. St. Rep. 779, 51 S. E. 932, holding right of eminent domain

cannot be conferred to secure a right of way for private railway to transport timber to market; *Alfred Phosphate Co. v. Duck River Phosphate Co.* 120 Tenn. 273, 22 L.R.A.(N.S.) 705, 113 S. W. 410, holding if condemnation is not for a public use the right of eminent domain cannot be conferred upon either private or public corporation.

Judicial power over eminent domain.

Cited in *United States Gypsum Co. v. Kent* Circuit Judge, 150 Mich. 672, 114 N. W. 666, holding if preliminary objections in condemnation proceedings are overruled and an order appointing commissioners or jury is made jurisdictional questions are reviewable by certiorari.

Cited in notes (22 L.R.A.(N.S.) 7, 24, 25, 28, 39, 40, 41, 42, 45, 51, 55, 89, 171) on judicial power over eminent domain; (88 Am. St. Rep. 929, 935) on existence of public use as question for courts.

14 L. R. A. 117, *EVANS v. FOSTER*, 80 Wis. 509, 50 N. W. 410.

Liability for legacy and debts.

Cited in *Merton v. O'Brien*, 117 Wis. 442, 94 N. W. 340, holding that action to enforce legacy against devise chargeable with payment may be barred by limitations; *Pym v. Pym*, 118 Wis. 669, 96 N. W. 429, holding part of estate not exempt chargeable with payment of testator's debts; *Painter v. Kaiser*, 27 Nev. 431, 65 L.R.A. 675, 103 Am. St. Rep. 772, 76 Pac. 747, 1 A. & E. Ann. Cas. 765, as to personal liability of executors for payment of legacies upon their implied promise to pay same; *Re Bouck*, 133 Wis. 174, 113 N. W. 452, as to liability of one accepting bequest charged with a debt.

Cited in footnote to *Case v. Hall*, 25 L. R. A. 766, which holds acceptance of devise, with direction to pay legacies, renders devisee personally liable.

14 L. R. A. 120, *BROWN v. VAILLES*, 16 Colo. 462, 27 Pac. 945.

Limitation upon right to contest election.

Cited in *Gillespie v. Dion*, 18 Mont. 194, 33 L. R. A. 707, 44 Pac. 954, holding election contest statement failing to allege contestant's qualifications cannot be amended after lapse of time to begin proceedings; *Lowry v. Stotts*, 138 Ky. 254, 127 S. W. 789, holding that petition to contest election is not valid if filed on following Monday, where last day for filing falls on Sunday.

Computation of time.

Cited in footnote to *People use of Chaddock v. Barry*, 18 L. R. A. 337, which requires exclusion of day of service and return day in computing time for appearance.

Cited in notes (15 L.R.A.(N.S.) 687) on first and last days in computation of time; (38 L.R.A.(N.S.) 1162) on limitation of actions: rule as to first and last days in computation of time; (78 Am. St. Rep. 377, 380), on computation of time.

— When Sunday or holiday included.

Cited in *American Tobacco Co. v. Strickling*, 88 Md. 510, 41 Atl. 1083, holding statute providing for performance of act within seven days includes Sunday; *Johnston v. New Omaha Thompson-Houston Electric Light Co.* 86 Neb. 173, 125 N. W. 153, 20 Ann. Cas. 1314, holding that under section 895 of code where act is to be done within specified time and last day falls on Sunday, act may be done on following day; *Geneva Cooperage Co. v. Brown*, 124 Ky. 24, 124 Am. St. Rep. 388, 98 S. W. 279, holding statute providing that if any proceeding is directed by law to take place on a particular day of the month if the day happen to be Sunday, the proceeding shall take place the next day does not ex-

tend to the provisions of the statute of limitations; *Johnston v. New Omaha Thompson-Houston Electric Light Co.* 86 Neb. 169, 125 N. W. 153, holding where an act is to be done or permitted to be done within a specified time and the last day is Sunday it shall be excluded.

Cited in footnotes to *Hirahfield v. Ft. Worth Nat. Bank*, 15 L. R. A. 639, which holds note falling due on Sunday payable on Monday; *Hanover F. Ins. Co. v. Shrader*, 30 L. R. A. 498, which denies right to exclude Sunday, although last of thirty days for filing application for writ of error; *Merritt v. Gate City Nat. Bank*, 38 L. R. A. 749, which holds Sunday before term of court beginning on Monday not excluded in determining whether action triable; *Morris v. Union Nat. Bank*, 50 L. R. A. 182, which denies bank's liability for failure to protest in due season note falling due on holiday, under honest mistake as to proper time; *Occumpaugh v. Norton*, 68 L.R.A. 272, which holds that aggregate of half holidays shall be added in computing time for taking appeals under statute excluding holidays from number of days specified; *American Tobacco Co. v. Strickling*, 69 L.R.A. 909, which holds that Sundays cannot be excluded in computing time for signing bills of exception.

Cited in notes (49 L. R. A. 204, 248) on rule as to computing time when Sunday or holiday is first or last day; (23 L.R.A.(N.S.) 760) on day of grace for payment of insurance premium or assessment, where date of payment or expiration of such period falls on Sunday or holiday.

Distinguished in *Denver v. Londoner*, 33 Colo. 111, 80 Pac. 117, holding under city charter requiring the board of public works before ordering an improvement to publish notice for twenty days, Sunday was to be included though it was the last day of the publication.

14 L. R. A. 123, *DONAHUE v. HUBBARD*, 154 Mass. 537, 26 Am. St. Rep. 271, 28 N. E. 909.

Tenancy by entirety.

Cited in *Morris v. McCarty*, 158 Mass. 12, 32 N. E. 938, holding deed creates no estate in entirety when grantees not husband and wife; *Phelps v. Simons*, 159 Mass. 417, 38 Am. St. Rep. 430, 34 N. E. 657, holding husband may assign gift of bank stock made to husband and wife, subject to wife's survivorship; *Pease v. Whitman*, 182 Mass. 364, 65 N. E. 795, holding, before enactment of Stat. 1885, chap. 237, husband could not deed whole estate conveyed to husband and wife; *McLaughlin v. Rice*, 185 Mass. 214, 102 Am. St. Rep. 339, 70 N. E. 52, holding conveyance to husband and wife created an estate by entireties; *Mardt v. Scharmach*, 65 Misc. 126, 119 N. Y. Supp. 449, holding a conveyance by a husband to his wife of his interest in land as tenant by entirety is valid.

Cited in footnote to *Re Albrecht*, 18 L. R. A. 329, which denies tenancy by entirety in bond and mortgage to husband and wife.

Cited in note (30 L. R. A. 329) on tenancy by entireties.

14 L. R. A. 125, *BALCH v. PICKERING*, 154 Mass. 363, 28 N. E. 293.

Interpretation of will.

Cited in *Niles v. Almy*, 161 Mass. 31, 36 N. E. 582, holding will dividing among "others" property left by life tenants without issue means surviving children of testator.

Distinguished in *Lawrence v. Phillips*, 186 Mass. 322, 71 N. E. 541, holding under will providing that share of child dying without issue shall go to surviving children issue of deceased child surviving at death of one of the children without issue cannot share in estate.

14 L. R. A. 126, *SANDWICH MFG. CO. v. ROBINSON*, 83 Iowa, 567, 49 N. W. 1031.

Property subject of mortgage.

Cited in *Thompson v. Anderson*, 94 Iowa, 558, 63 N. W. 355, holding chattel mortgage covering increase of hogs valid as to increase; *Riddle v. Dow*, 98 Iowa, 17, 32 L. R. A. 814, 66 N. W. 1066, holding mortgage by lessor upon undivided interest in crop raised by tenant paramount to garnishment of tenant; *Davis v. Pitcher*, 97 Iowa, 15, 59 Am. St. Rep. 392, 65 N. W. 1005; *Consolidated Tank Line Co. v. Collier*, 148 Ill. 262, 39 Am. St. Rep. 181, 35 N. E. 756; *Lawrence v. McKenzie*, 88 Iowa, 440, 55 N. W. 505,—holding book accounts subject of mortgage; *Dyer v. Schneider*, 106 Minn. 275, 20 L.R.A.(N.S.) 507, 130 Am. St. Rep. 615, 118 N. W. 1011, holding chattel mortgage void, at least as to creditors without notice, which purports to assign, to secure a specific debt, all future earnings of a threshing machine, therein described, also of any other threshing machine operated by mortgagor and crew which may accrue for threshing during ensuing two years within three designated townships.

Cited in notes (18 L. R. A. 303) on efficacy of mortgage on chattels to be manufactured or acquired as independent articles, and not as articles or fruits of existing property; (20 L.R.A.(N.S.) 506) on chattel mortgage of future earnings of threshing outfit.

Book accounts as personal property.

Cited in *Lawrence v. McKenzie*, 88 Iowa, 437, 55 N. W. 505, holding book accounts not personal property within Code, § 1923, requiring record of mortgages, when property retained by mortgagor.

What is assignable.

Cited in footnotes to *Erickson v. Brookings County*, 18 L. R. A. 347, which holds assignable, right of purchaser at unlawful tax sale to have money refunded; *Dolan v. Hughes*, 40 L. R. A. 735, which holds valid, assignment of wages for year by person then working under contract; *Graham Paper Co. v. Pembroke*, 44 L. R. A. 632, which sustains assignment of accounts; *Mallin v. Wenham*, 65 L.R.A. 602, which upholds assignment of wages to be earned in future under existing contract; *O'Neil v. Helmke*, 70 L.R.A. 338, which holds neither legal transfer of nor lien on proceeds of milk to be delivered by producer to cheese manufacturer effected by order directing latter to direct to third person proceeds of all milk delivered by producer at factory in future.

Cited in note (18 L.R.A.(N.S.) 194) on assignability of insurance agent's right to commissions on renewal premiums.

Mortgagor's right to mortgaged property before default.

Cited in *Swan v. Thurman*, 112 Mich. 417, 70 N. W. 1023, holding chattel mortgagor may sue before default, on account covered, when mortgage allows use of property till default.

Creditors' rights in debtor's personal services.

Cited in note (21 L. R. A. 624) on rights of creditors in personal services of debtor.

Description as affecting mortgage.

Cited in *Funk v. Mercantile Trust Co.* 89 Iowa, 268, 56 N. W. 496, holding mortgage upon "income, issue, and profits" of coal mine valid as against attaching creditor; *Reynolds v. Strong*, 10 N. D. 83, 88 Am. St. Rep. 680, 85 N. W. 987, holding mortgage covering future earnings of threshing outfit, giving description, owner, and place of operation, omitting names of future debtors, valid; *Davis v. Pitcher*, 97 Iowa, 16, 59 Am. St. Rep. 392, 65 N. W. 1005, holding mortgage con-

veying stock of goods and "book accounts and notes kept in above building" sufficiently describes property to protect mortgage; *Lawrence v. McKenzie*, 88 Iowa, 440, 55 N. W. 505, holding chattel mortgage on "book accounts for goods sold" insufficient description; *Taylor v. Gilbert*, 92 Iowa, 592, 61 N. W. 203, holding recital in mortgage naming cattle as those "recorded in American Hereford Herd Book" insufficient as to subsequent mortgagee.

14 L. R. A. 128, *Ex parte McKnight*, 48 Ohio St. 588, 28 N. E. 1034.

Habeas corpus as remedy to obtain discharge.

Cited in *Ex parte McKnight*, 3 Ohio N. P. 255, dismissing petition for writ of habeas corpus for retention beyond two terms without trial; *Re Betts*, 36 Neb. 285, denying writ of habeas corpus to correct errors in drawing grand jury which indicted prisoner; *Com. v. Wright*, 158 Mass. 152, 19 L. R. A. 208, 35 Am. St. Rep. 475, 33 N. E. 82, holding question of prisoner's right to return to state surrendering him may be raised by petition; *McGorry v. Sutter*, 80 Ohio St. 408, 24 L.R.A.(N.S.) 171, 131 Am. St. Rep. 715, 89 N. E. 10, holding a resort to habeas corpus by a witness who has been committed to jail by order of trial court for refusing to testify is a collateral attack upon the order of commitment, and plaintiff assumes burden of showing it void.

Trial for crime other than one on which extradition was obtained.

Cited in note (15 L. R. A. 177) on abduction or wrongful bringing of criminal into jurisdiction as defense to prosecution.

Distinguished in *Re Donahue*, 4 Ohio N. P. 296, denying that dismissal upon charge of illegal voting precludes prosecution for fraudulent registration at same election; *Lascelles v. State*, 90 Ga. 368, 35 Am. St. Rep. 216, 16 S. E. 945, holding fugitive surrendered by foreign country under treaty stipulation may be tried for offenses not embraced in application.

Disapproved in effect in *Com. v. Wright*, 158 Mass. 152, 19 L. R. A. 208, footnote p. 206, 35 Am. St. Rep. 475, 33 N. E. 82, and *People ex rel. Post v. Cross*, 64 Hun, 352, 19 N. Y. Supp. 271, holding one surrendered by foreign state on charge of larceny may be subsequently indicted for robbery; *Knox v. State*, 164 Ind. 230, 108 Am. St. Rep. 291, 73 N. E. 255, 3 Ann. Cas. 539, holding a fugitive from justice, extradited on a charge of a specific crime, may be tried on another and different criminal charge without being afforded an opportunity to return to state from which he was extradited; *Re Brophy*, 2 Ohio N. P. 231, 4 Ohio S. & C. P. Dec. 392, holding under decision of United States Supreme Court fugitive who has been returned by interstate rendition may be tried for other offenses than that for which his extradition was demanded.

14 L. R. A. 133, *REINING v. NEW YORK*, L. & W. R. CO. 128 N. Y. 157, 28 N. E. 640.

Injury to abutter's rights in highway.

Cited in *Brown v. San Francisco*, 124 Cal. 281, 57 Pac. 82, denying that constitutional provision forbidding damage to property without compensation applies to diminution in value by closing end of street; *Culver v. Yonkers*, 80 App. Div. 311, 80 N. Y. Supp. 1034, holding city liable for improvements in private road partially destroying abutter's access to property; *Re Grade Crossing*, 6 App. Div. 339, 40 N. Y. Supp. 520, and *Re Grade Crossing*, 154 N. Y. 560, 49 N. E. 127, Affirming 17 App. Div. 59, 44 N. Y. Supp. 844, upholding abutter's right to damages under city charter for injury to property by construction of grade crossing; *Brewster v. J. & J. Rogers Co.* 169 N. Y. 80, 58 L. R. A. 498, 62 N. E. 164, holding riparian owner entitled to damages for injury to saw mill by discharge of water

from dam into river used as highway; *Potter v. Interborough Rapid Transit Co.* 54 Misc. 430, 105 N. Y. Supp. 1071, as to easements of abutting owners in street; *Champlain Stone & Sand Co. v. State*, 66 Misc. 467, 123 N. Y. Supp. 546 (dissenting opinion), as to easements of light, air and access to abutting lots bring property; *McMillan v. Klaw & E. Constr. Co.* 107 App. Div. 413, 95 N. Y. Supp. 365, holding a municipal ordinance authorizing, on the payment of a specified fee, the issuance of permits for the construction of ornamental projections beyond building line is unconstitutional as depriving other owners abutting on street of property without due process of law; *Warner v. State*, 132 App. Div. 612, 117 N. Y. S. 108, holding owner of lot abutting highway has no remedy for injury to his property caused by lawful change of grade of street.

Cited in note (15 L.R.A.(N.S.) 55) on cutting off access to highway as a taking.

Distinguished in *Manhattan R. Co. v. New York*, 89 Hun, 435, 35 N. Y. Supp. 505, holding city chargeable with expense of altering elevated road by constructing intersecting viaduct; *Sauer v. New York*, 206 U. S. 553, 51 L. ed. 1184, 27 Sup. Ct. Rep. 686, holding an abutting owner is not deprived of his property without due process of law by the erection by a municipality in a city street under authority of statute which makes no provision for compensation of an elevated iron viaduct for public use.

— Injury by railroad.

Followed in *Strasser v. New York, L. & W. R. Co.* 128 N. Y. 623, 28 N. E. 640, holding abutters entitled to compensation for closing street for ordinary traffic by erection of railroad embankment under municipal authority.

Cited in *Egerer v. New York C. & H. R. R. Co.* 130 N. Y. 115, 14 L. R. A. 385, 29 N. E. 95, affirming 70 App. Div. 422, 75 N. Y. Supp. 476, holding abutting owner deprived of light, air, and access to premises by erection of railroad embankment entitled to damages; *Willamette Iron Works v. Oregon R. & Nav. Co.* 26 Or. 229, 29 L. R. A. 91, 46 Am. St. Rep. 620, 37 Pac. 1016, holding erection of approach to toll bridge owned by private corporation, cutting off access, entitles abutter to damages; *Peck v. Schenectady R. Co.* 170 N. Y. 306, 63 N. E. 357, affirming 67 App. Div. 360, 73 N. Y. Supp. 794, holding occupation of street by electric railway imposes additional burden upon fee entitling abutters to damages; *Fulton Light, Heat & P. Co. v. State*, 65 Misc. 289, 121 N. Y. Supp. 536, as to easements of light, air and access appurtenant to abutting lots constituting property rights protected by constitution, where state has authorized the construction of an elevated railroad in a public highway; *Foster Lumber Co. v. Arkansas Valley & W. R. Co.* 20 Okla. 592, 30 L.R.A.(N.S.) 237, 95 Pac. 224, 100 Pac. 1110, holding an abutting owner whose means of access to his property has been cut off or materially interrupted by the building of a railway upon the street in front of said property may recover damages therefor; *Bernhard v. Rochester*, 127 App. Div. 879, 112 N. Y. Supp. 229, holding under statute if common council merely permitted a railroad to change grade of street without making compensation to abutting owners and did not supervise the change if the change was permitted for benefit of railroad, the city would be liable for damages to abutting owner; *Blackwell, E. & S. W. R. Co. v. Gist*, 18 Okla. 524, 90 Pac. 889, holding where a railroad company, after an ordinance had been passed vacating a street in a city, enters upon the strip of land formerly embraced in the street and appropriates the same or a portion thereof for its right of way without consent of adjacent owner, such company is liable for damages for any depreciation of the property of owner; *Sauer v. New York*, 180 N. Y. 35, 70 L.R.A. 721, 72 N. E. 579 (dissenting opinion), as to right of abutting owner to recover.

Cited in footnote to *Memphis & C. R. Co. v. Birmingham, S. & T. River R. Co.* 18 L. R. A. 166, which holds compensation required from railroad crossing other railroad.

Cited in notes (14 L. R. A. 382) on injury to abutter's easement by railroad in street; (36 L.R.A.(N.S.) 774, 801) on abutter's right to compensation for railroads in streets; (31 Am. St. Rep. 733) on occupation of city streets by railroads.

Distinguished in *Rauenstein v. New York, L. & W. R. Co.* 136 N. Y. 531, 18 L. R. A. 769, footnote p. 768, 32 N. E. 1047, Reversing 47 N. Y. S. R. 140, 19 N. Y. Supp. 833, denying liability to abutter for embankment changing grade, necessitated by railroad embankment intersecting street; *Pratt v. New York C. & H. R. R. Co.* 90 Hun, 86, 35 N. Y. Supp. 557, denying abutter's right to enjoin railroad company's excavation in street under direction of police power; *Talbot v. New York & H. R. Co.* 151 N. Y. 161, 45 N. E. 382, Affirming 78 Hun, 477, 29 N. Y. Supp. 187, denying liability to abutting owner for change in street grade by bridge erected under legislative authority; *Conabeer v. New York C. & H. R. R. Co.* 156 N. Y. 488, 51 N. E. 402, denying liability for construction of railroad at place never opened or used as street; *Dolan v. New York & H. R. Co.* 74 App. Div. 437, 77 N. Y. Supp. 815; *Fries v. New York & H. R. Co.* 169 N. Y. 284, 62 N. E. 358, denying liability of railroad company to abutting owner for erection of viaduct under statutory order; *Smith v. Boston & A. R. Co.* 181 N. Y. 137, 73 N. E. 679, holding statute providing that a municipal corporation may acquire or condemn land necessary to abolish grade crossings does not impose upon the town liability to pay an abutter damages resulting from change of grade of highway.

— **Injury by telephone.**

Cited in *Eels v. American Teleph. & Teleg. Co.* 143 N. Y. 140, 25 L. R. A. 644, 38 N. E. 202, denying that public easement in rural highway entitles telephone company to exclusive appropriation of portion for poles; *Castle v. Bell Teleph. Co.* 49 App. Div. 445, 63 N. Y. Supp. 482 (dissenting opinion), majority denying that maintenance of conduit for telephone wires beneath street imposes additional burden entitling abutters to damages.

— **Injury by electric light company.**

Cited in *Brown v. Asheville Electric Co.* 138 N. C. 536, 69 L.R.A. 633, 107 Am. St. Rep. 554, 51 S. E. 62, holding electric light company appropriating any of rights of abutting owner must compensate him therefor.

14 L. R. A. 138, *AUSTIN v. VROOMAN*, 128 N. Y. 229, 28 N. E. 477.

Liability of public officers.

Cited in *Noyes v. Edgerly*, 71 N. H. 502, 53 Atl. 311, holding imprisonment by sheriff on process issued by court without jurisdiction of subject-matter, presumptively unlawful.

Cited in footnote to *Lowe v. Conroy*, 66 L.R.A. 907, which holds health officer individually liable for destruction of private property by mistake in attempt to preserve public health.

— **Of judicial officers generally.**

Cited in *Brunner v. Downs*, 43 N. Y. S. R. 827, 17 N. Y. Supp. 633, holding recorder not liable for false imprisonment in granting warrant for violation of building ordinance; *Bryan v. Stewart*, 123 N. C. 98, 31 S. E. 280, dismissing complaint for false imprisonment, because clerk issuing warrant acting in judicial capacity; *Wright v. Jones*, 14 Tex. Civ. App. 430, 38 S. W. 249, holding members

of commissioners' court not liable for property taken by collector upon tax levied under misconstruction of law.

Cited in note (39 L. R. A. 459) on decision against constitutional right as nullity subject to collateral attack.

— Of presiding municipal officer.

Cited in footnotes to *Boutte v. Emmer*, 15 L. R. A. 63, which holds mayor not liable for brief imprisonment unless action arbitrary; *Guild v. Goodwin*, 27 L. R. A. 660, which holds mayor not liable for malicious prosecution in attempting to enforce void ordinance; *Scott v. Fishplate*, 30 L. R. A. 696, which denies liability of mayor to civil action for imprisonment for contempt; *Tillman v. Beard*, 46 L. R. A. 215, which denies liability of village president for procuring arrest for violating void ordinance.

— Of judge.

Cited in *Calhoun v. Little*, 106 Ga. 341, 43 L. R. A. 632, footnote p. 630, 71 Am. St. Rep. 254, 32 S. E. 86, holding municipal judge convicting one for violating ordinance passed without authority not liable for false imprisonment; *Root v. Rose*, 6 N. D. 583, 72 N. W. 1022, holding judge not liable for malicious prosecution on ground that evidence did not warrant conviction; *Robertson v. Parker*, 99 Wis. 659, 67 Am. St. Rep. 889, 75 N. W. 423, holding complaint alleging municipal judge without authority to commit persons charged with neglect to support family states cause of action.

Cited in footnotes to *Williamson v. Lacey*, 25 L. R. A. 506, which holds justice not personally liable for excluding spectators; *Glazer v. Hubbard*, 39 L. R. A. 210, which holds police judge guilty of false imprisonment in committing person, without other warrant for his arrest than telegram from chief of police; *Webb v. Fisher*, 60 L. R. A. 791, which holds judge not subject to private action for corruptly entering decree disbaring attorney; *Rush v. Buckley*, 70 L.R.A. 464, which holds magistrate not liable to civil action for erroneously deciding that he has jurisdiction over particular offense of which complaint is made to him and issuing warrant for arrest of accused.

Cited in notes (62 L.R.A. 721) on effect of bad motive to make actionable what would otherwise not be; (15 Eng. Rul. Cas. 53) on civic liability of judges.

— Justice of the peace.

Approved in *Handshaw v. Arthur*, 9 App. Div. 178, 41 N. Y. Supp. 61, dismissing complaint against justice for granting plaintiff judgment and execution after adjournment on failure of parties to appear.

Cited in *People ex rel. Devery v. Jerome*, 36 Misc. 257, 73 N. Y. Supp. 306, denying writ prohibiting justice from proceeding on criminal complaint when application made on ground of bias; *Jones v. Foster*, 43 App. Div. 38, 59 N. Y. Supp. 738, holding justice acting in good faith not liable for arrest upon incomplete information, offender having plead guilty; *Steinert v. Sobey*, 14 App. Div. 510, 44 N. Y. Supp. 146, raising, without deciding question as to immunity from suit in case justice without jurisdiction; *People v. Mackenzie*, 69 Misc. 543, 125 N. Y. Supp. 1020, to the point that it was duty of justice to try person charged with section 24 of Forest, Fish and Game Law, though demand was made for bail to appear before grand jury; *McIntosh v. Bullard*, 95 Ark. 232, 129 S. W. 85, holding that justice of peace is not liable for erroneous decisions made in good faith in exercise of jurisdiction; *McVeigh v. Ripley*, 77 Conn. 141, 58 Atl. 701, holding if justice of peace in exercising a jurisdiction which does belong to him issues an illegal order, it is not to be treated as so absolutely void as to afford him no protection for what he has done under it; *Kraft v. de Verneuil*,

105 App. Div. 45, 94 N. Y. Supp. 230, as to the liability of justices of the peace.

Cited in footnotes to *Banister v. Wakeman*, 15 L. R. A. 201, which holds justice of the peace liable for issuing mittimus after appeal; *Marks v. Sullivan*, 20 L. R. A. 590, which holds magistrate issuing warrant within jurisdiction not liable for false imprisonment; *Thompson v. Jackson*, 27 L. R. A. 92, which denies justice of the peace jurisdiction over nonresidents without service in township where suit brought.

Distinguished in *McCarg v. Burr*, 106 App. Div. 280, 94 N. Y. Supp. 675, holding where warrant was in excess of the justices jurisdiction to issue and was void, the act of the justice in trying, sentencing and imprisoning the accused upon such warrant, over the latter's objection to justice's want of jurisdiction, constituted false imprisonment for which justice was civilly liable.

False imprisonment.

Cited in *Noyes v. Edgerly*, 71 N. H. 502, 53 Atl. 311, as to false imprisonment upon process without jurisdiction.

14 L. R. A. 147, *CROWN POINT IRON CO. v. ÆTNA INS. CO.* 127 N. Y. 608, 28 N. E. 653.

Cancellation of policy.

Cited in *Birnstein v. Stuyvesant Ins. Co.* 83 App. Div. 442, 82 N. Y. Supp. 140, and *Ikeller v. Hartford F. Ins. Co.* 24 Misc. 138, 53 N. Y. Supp. 323, holding return of policy and receipt by agent works cancellation; *Insurance Commissioner v. People's F. Ins. Co.* 68 N. H. 53, 44 Atl. 82, holding insurance may be terminated without previous notice, under terms of policy; *Knowles v. American Ins. Co.* 66 Hun, 224, 21 N. Y. Supp. 50, holding company issuing prior insurance may cancel policy without notice, as to property not owned by assignee; *Farmers' Mut. Ins. Co. v. Phoenix Ins. Co.* 65 Neb. 16, 90 N. W. 1000, holding that demand for cancellation of policy takes effect at time of receipt by company; *Wells v. Vermont L. Ins. Co.* 28 Ind. App. 625, 63 N. E. 578, holding one paying three annual premiums in advance entitled to cancellation of policy and issuance of paid-up policy; *Parsons v. Northwestern Nat. Ins. Co.* 133 Iowa, 535, 110 N. W. 907, holding under terms of policy the return of the unearned premium was not a condition precedent to cancellation of policy; *Ohio Farmers Ins. Co. v. Hunter*, 38 Ind. App. 13, 77 N. E. 951, holding whether return of policy to agent by assured was a cancellation depended upon intent with which it was returned; *Boutwell v. Globe & Rutgers F. Ins. Co.* 117 App. Div. 906, 102 N. Y. Supp. 1127 (dissenting opinion), as to right of insured to cancel policy; *Boutwell v. Globe & Rutgers F. Ins. Co.* 193 N. Y. 326, 85 N. E. 1087, holding upon request of assured no formal action necessary on part of company to cancel policy; *Ætna Ins. Co. v. Stambaugh-Thompson Co.* 76 Ohio St. 156, 118 Am. St. Rep. 834, 81 N. E. 173, holding act of surrendering one policy and accepting another in its stead implied both a request and a direction that the first should be cancelled.

Cited in notes (13 L.R.A.(N.S.) 807) on cancellation of insurance by return of policy; (39 L.R.A.(N.S.) 831) on time from which notice of cancellation of fire insurance becomes effective.

Distinguished in *Hickey v. Hartford F. Ins. Co.* 92 Hun, 193, 36 N. Y. Supp. 329, holding delivery of policy to agent to issue corrected one, no cancellation of former till new one issued; *Martin v. Manufacturers' Acci. Indemnity Co.* 60 Hun, 541, 15 N. Y. Supp. 309, holding wife, as beneficiary, has vested interest in insurance certificate making her consent necessary to surrender.

Effect of depositing matter in mail.

Cited in *Peabody v. Satterlee*, 166 N. Y. 177, 52 L. R. A. 958, 59 N. E. 818, hold-

ing deposit of proofs of loss in mail on sixtieth day, reaching agents on sixty-second, not compliance with policy; *Fink v. Fink*, 171 N. Y. 623, 64 N. E. 506, holding letters mailed before, but received after, death of insured, insufficient to authorize change in beneficiary; *Zeltner v. Irwin*, 21 Misc. 14, 46 N. Y. Supp. 852, holding contract for purchase of "futures" completed where letters containing proposition received and acceptance mailed; *Wester v. Casein Co.* 140 App. Div. 445, 125 N. Y. Supp. 335, holding that where termination of contract depends upon notice, it is receipt of notice and not mailing of it which operates to terminate contract; *Kavanaugh v. Security Trust & L. Ins. Co.* 117 Tenn. 44, 7 L.R.A. (N. S.) 260, 96 S. W. 499, 10 A. & E. Ann. Cas. 680, holding in absence of statute or express terms of policy making mailing of notice of maturity of a premium sufficient it must be received before it can operate as notice and work a forfeiture of policy; *Skillings v. Royal Ins. Co.* 6 Ont. L. Rep. 405, Affirming 4 Ont. L. Rep. 129, holding notice of cancelation, if given by mail, must be received before loss by the party entitled thereto or by his agent authorized to receive the same, otherwise there is no cancelation.

Cited in footnote to *Dailey v. Preferred Masonic Mut. Acci. Asso.* 26 L. R. A. 171, which holds mailing accident insurance policy a delivery.

What law governs.

Cited in *Wilson v. Lewiston Mill Co.* 150 N. Y. 322, 55 Am. St. Rep. 680, 44 N. E. 959, holding contract for sale of cotton by New York broker to Maine manufacturer controlled by Maine statute of frauds.

When notice complete.

Cited in *McCord v. Masonic Casualty Co.* 201 Mass. 475, 88 N. E. 6, holding policy required delivery of notice at the office within specified time.

Insurance broker.

Cited in *Marrian v. Robbins*, 102 App. Div. 216, 92 N. Y. Supp. 654, holding insurance broker agent of assured and not company.

14 L. R. A. 151, *BONETTI v. TREAT*, 91 Cal. 223, 27 Pac. 612.

Covenants as affecting assignee of lease.

Approved in *Edmonds v. Mounsey*, 15 Ind. App. 401, 44 N. E. 196, 18 Mor. Min. Rep. 38, holding the assignee is answerable for rent during his ownership of the term under the assignment without reference to any obligation assumed by him in contract of assignment.

Cited in *Baker v. J. Maier & Z. Brewery*, 140 Cal. 534, 74 Pac. 22, holding new tenant attorning to lessor with first tenant's consent liable for rent as assignee of lease; *Northern P. R. Co. v. McClure*, 9 N. D. 78, 47 L. R. A. 151, 81 N. W. 52, holding covenant to save lessor harmless from loss by fire enforceable by lessor's assignee; *Jordan v. Indianapolis Water Co.* 159 Ind. 350, 64 N. E. 680, holding lessee not relieved from express covenant to pay rent by lessor's consent to assignment of lease; *Summerville v. Kelliher*, 144 Cal. 160, 77 Pac. 889, holding purchaser of leasehold interest bound on covenants for payment of rent; *Chancey v. Ohio & I. Oil Co.* 32 Ind. App. 198, 69 N. E. 477, holding assignee of lessee not liable to lessor, there being no privity of estate.

Cited in footnotes to *St. Joseph & St. L. R. Co. v. St. Louis, I. M. & S. R. Co.* 33 L. R. A. 607, which holds railroad company operating other company's road under agreement to pay certain charges out of revenue, and any surplus, not bound by covenants in lease to such other company; *Consolidated Coal Co. v. Peers*, 38 L. R. A. 624, which holds personal obligation not imposed on assignee of lease taking it subject to agreements in lease; *Louisville Trust Co. v. Gaertner*, 45 L. R. A. 513, which upholds statutory lien for rent on property of assignee of

lease; *Springer v. De Wolf*, 56 L. R. A. 465, which denies assignee's power to absolve himself from liability to lessor for rent by assigning lease to third person.

Cited in notes (34 L. R. A. 62) on effect of assignment of oil and gas lease; (15 L.R.A. 755) on assignment of lease.

What constitutes surrender of leased premises.

Cited in footnote to *Gray v. Kaufman Dairy & Ice Cream Co.* 49 L. R. A. 580, which denies right to recover rent of landlord reletting after tenant's abandonment, notwithstanding unanswered letter that premises will be leased at tenant's risk.

Cited in notes (13 L.R.A.(N.S.) 408) on remedy of landlord upon abandonment of premises; (114 Am. St. Rep. 717) on rights of landlord on abandonment of premises by tenant.

14 L. R. A. 157, *MORSE v. UNION STOCK YARDS*, 21 Or. 289, 28 Pac. 2.

Implied warranty.

Cited in *Wadhams v. Balfour*, 32 Or. 326, 51 Pac. 642, holding warranty implied that wheat, when delivered, will correspond with sample; *Stanford v. National Drill & Mfg. Co.* 28 Okla. 444, 114 Pac. 734, holding that there was no implied warranty that well-drilling outfit would bore in specified area to a certain depth; *Puritan Mfg. Co. v. Westermire*, 47 Or. 562, 84 Pac. 797, holding where goods are sold by description there is an implied warranty that the articles delivered shall substantially correspond in their entirety to representations of vendor in respect to their quality.

Cited in note (102 Am. St. Rep. 609) on implied warranty of quality.

Distinguished in *Wilkinson v. Stettler*, 46 Pa. Super. Ct. 409, holding that statement by vendor of horse, that horse is "solid, sound, all right and would work any place," does not constitute warranty, although vendor knew horse was to be used on delivery wagon.

— As to fitness.

Cited in *Coyle v. Baum*, 3 Okla. 715, 41 Pac. 389, holding warranty implied that oats sold for feeding purposes contain no poisonous substance; *McCormick Harvesting Mach. Co. v. Nicholson*, 17 Pa. Super. Ct. 193, holding purchase of rope upon representation of cables "as good as any" implies warranty of fitness; *McCrays Refrigerator & Cold Storage Co. v. Woods*, 99 Mich. 279, 41 Am. St. Rep. 599, 68 N. W. 320 (dissenting opinion), majority holding warranty not implied that refrigerator constructed for butchers would preserve meats; *Davis Calyx Drill Co. v. Mallory*, 69 L.R.A. 976, 69 C. C. A. 662, 137 Fed. 335, holding no implied warranty that a machine tool or article is suitable to accomplish a particular purpose or do a specific work arises where vendor orders of manufacturer or purchases of the dealer a specific described or definite machine, tool or article; *Bunch v. Weil*, 72 Ark. 347, 65 L.R.A. 82, 80 S. W. 582, holding implied warranty that goods sold to be delivered, bought for purpose of resale are merchantable and reasonably fit for the purpose of trade for which they are purchased; *Conkling v. Standard Oil Co.* 138 Iowa, 606, 116 N. W. 822, as to implied warranty of fitness by manufacturer; *Mine Supply Co. v. Columbia Min. Co.* 48 Or. 394, 86 Pac. 789; *Lenz v. Blake*, 44 Or. 573, 76 Pac. 256,—holding where goods are sold by description for a particular purpose known to the seller there is an implied warranty that they are as represented, and suitable for the intended purpose.

Cited in notes (17 L. R. A. 210) on promise to give full satisfaction subject to judgment of promisee; (22 L. R. A. 187, 18) on implied warranty of fitness of

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property bought for special purpose; (35 L.R.A.(N.S.) 267, 273) on effect of sale with particular description of kind or quality.

14 L. R. A. 160, *BROOKS v. WOODSON*, 87 Ga. 379, 13 S. E. 712.

Attestation of will.

Followed in *Smith v. Ryan*, 136 Iowa, 339, 112 N. W. 8; *Lane v. Lane*, 125 Ga. 387, 114 Am. St. Rep. 207, 54 S. E. 90, 5 A. & E. Ann. Cas. 462,—holding witnesses to a will must subscribe their names as witnesses after the will is signed by testator.

Cited in *Marshall v. Mason*, 176 Mass. 217, 79 Am. St. Rep. 305, 57 N. E. 340, holding witnesses must attest after signature of testator; *Lacey v. Dobbs*, 63 N. J. Eq. 338, 55 L. R. A. 586, footnote p. 580, 92 Am. St. Rep. 667, 50 Atl. 497, Reversing 61 N. J. Eq. 583, 47 Atl. 481, denying probate of will signed by testatrix immediately after attestation by witnesses.

Cited in notes (114 Am. St. Rep. 234) on attestation and witnessing of wills; (26 L.R.A.(N.S.) 1126) on signature of witness to will before testator signs; (38 L.R.A.(N.S.) 161) on wills; necessity that witnesses see testator sign, or that they see his signature.

14 L. R. A. 161, *WILLIAMS v. FARRAND*, 88 Mich. 473, 50 N. W. 446.

Use of similar name or mark.

Cited in *Supreme Lodge, K. of P. v. Improved Order, K. of P.* 113 Mich. 136, 38 L. R. A. 661, 71 N. W. 470, holding name "Improved Order, Knights of Pythias" may be taken by members withdrawing from Knights of Pythias; *Kyle v. Perfection Mattress Co.* 127 Ala. 48, 50 L. R. A. 631, 85 Am. St. Rep. 78, 28 So. 545, sustaining injunction against sale of goods named "Kyle's Perfection Mattress" by one previously making "Perfection Mattress;" *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 82 Wis. 563, 16 L. R. A. 459, 33 Am. St. Rep. 72, 52 N. W. 595, holding words "Fish Bros. & Co." may be used by firm withdrawing from corporation employing same terms, when no agreement to contrary; *Lamb Knit-Goods Co. v. Lamb Glove & Mitten Co.* 120 Mich. 163, 44 L. R. A. 844, 78 N. W. 1072, sustaining injunction against use of word "Lamb" by company doing like business under similar corporate name; *Supreme Lodge, K. of P. v. Improved Order, K. of P.* 113 Mich. 137, 38 L. R. A. 662, 71 N. W. 470, holding motive and circumstances surrounding choice of new name determine duty of court to interfere.

Cited in note (85 Am. St. Rep. 106) on what words or phrases may constitute a valid trademark.

— By transferee.

Cited in *Bagby & R. Co. v. Rivers*, 87 Md. 423, 40 L. R. A. 635, 67 Am. St. Rep. 357, 40 Atl. 171, sustaining injunction against use of retiring partner's name by corporation as transferee of rights of remaining partner; *Allegretti v. Allegretti Chocolate Cream Co.* 177 Ill. 132, 52 N. E. 487, Affirming 76 Ill. App. 587, holding transfer of business carries exclusive right to trade-marks and name; *Mills-paugh Laundry v. First Nat. Bank*, 120 Iowa, 5, 94 N. W. 262, holding that mortgagee purchasing plant named "Mills-paugh Laundry" may use name "National Laundry, formerly conducted by Mills-paugh;" *Falk v. American West Indies Trading Co.* 180 N. Y. 450, 1 L.R.A.(N.S.) 712, 105 Am. St. Rep. 778, 73 N. E. 239, 2 A. & E. Ann. Cas. 216, holding where trade mark is transferred detached from the business in which it has been used the transferee cannot join its use or sue for damages for its use.

Cited in footnote to *Slater v. Slater*, 61 L. R. A. 796, holding partnership name an asset to be sold by executor.

Cited in note (1 L.R.A.(N.S.) 709, 716) on sale of trademark.

Partnership "good will."

Cited in *Webster v. Webster*, 180 Mass. 315, 62 N. E. 383, holding that expiration of partnership by limitation entitles each partner to solicit trade from former customers; *Vonderbank v. Schmidt*, 44 La. Ann. 268, 15 L. R. A. 466, 32 Am. St. Rep. 336, 10 So. 616, defining good will as favor won from public, and probability of return of former customers; *Moyer v. Elzey*, 25 Mortg. Co. L. Rep. 68, holding that vendor of good will of business cannot hold himself out as continuing former business; *Vinall v. Hendricks*, 33 Ind. App. 420, 71 N. E. 682, holding although mortgage foreclosed included good will of business the mortgagee could not prevent mortgagor's wife from carrying on business in her own name through her husband as agent; *White v. Trowbridge*, 216 Pa. 20, 64 Atl. 662, holding mere transfer by one partner of his interest in the good will of the business to his copartners, does not preclude him from entering into a similar business in same town; *Rowell v. Rowell*, 122 Wis. 20, 99 N. W. 473, holding so far as firm name consists merely of the names of existing individuals, there is no such property in it as to prevent surviving or out going partners, after a sale of the business and good will from using their names in a similar business, so long as they do not convey idea of their identity with or succession to the old concern; *Read v. Mackay*, 47 Misc. 437, 95 N. Y. Supp. 935, holding firm name not necessarily part of good will.

Cited in notes (19 L.R.A.(N.S.) 767) on sale of business and good will as limitation upon right of vendor to compete; (40 Am. St. Rep. 570) on rights of partners as to good will after dissolution; (96 Am. St. Rep. 614) on good will of partnership as means of making it productive on dissolution; (19 Eng. Rul. Cas. 681) on rights of vendors of partnership good will.

Contract in restraint of trade.

Cited in *Palmer v. Toms*, 96 Wis. 369, 71 N. W. 654, holding agreement by vendors of funeral business not to engage in similar trade for five years valid; *Kyle v. Perfection Mattress Co.* 127 Ala. 48, 85 Am. St. Rep. 78, 28 So. 545, holding vendor of business may re-engage in same trade, subject to rights of vendee.

Distinguished in *Reber v. Pearson*, 155 Mich. 597, 119 N. W. 897, holding under contract between partners one of partners could not enter competing business.

14 L. R. A. 184, *STEPHENS v. ST. LOUIS & S. F. R. CO.* 47 Fed. 530.

Residence of corporation for purpose of jurisdiction.

Cited in *Goodwin v. New York, N. H. & H. R. Co.* 124 Fed. 368, denying jurisdiction of Massachusetts circuit court over action by resident alleging defendant to be resident of Connecticut.

Cited in footnotes to *East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co.* 15 L. R. A. 109, which authorizes suit for appointment of railroad receiver in either Federal district in which road extends; *Gilbert v. New Zealand Ins. Co.* 15 L. R. A. 125, which holds foreign corporation within term "inhabitant" in § 1 of judiciary act; *Missouri P. R. Co. v. Meeh*, 30 L. R. A. 250, which denies Federal jurisdiction of action by citizen against consolidated railway organized under statutes of state where suit brought, and adjoining states.

Cited in notes (15 L. R. A. 82) on consolidated interstate corporation as domestic corporation of one of states; (23 L. R. A. 501) on who may be served with process in suit against foreign corporation; (69 L.R.A. 432) on situs, for taxing

purposes, of tangible personalty of domestic corporations; (24 L.R.A.(N.S.) 769) on state authority over consolidated interstate corporation.

Removal of causes.

Cited in *Chicago, R. I. & P. R. Co. v. Stone*, 70 Kan. 710, 79 Pac. 655, holding party cannot defeat removal to federal court by amendment of pleading after bond and petition for removal have been filed.

Cited in footnote to *Debnam v. Southern Bell Teleph. & Teleg. Co.* 65 L.R.A. 915, which holds that foreign corporation complying with statutory requirements as to doing business in state becomes a domestic corporation so as not to be able to remove into Federal court action against it by a citizen of the state.

14 L. R. A. 188, *LEVENS v. BRIGGS*, 21 Or. 333, 28 Pac. 15.

Conditions affecting negotiability.

Cited in footnote to *Dorsey v. Wolff*, 18 L. R. A. 428, which holds negotiability not destroyed by stipulation for 10 per cent attorney's fees.

Validity of agreement to pay interest on interest.

Cited in note (33 L.R.A.(N.S.) 297, 301) on validity of agreement before interest due to pay interest on interest.

Validity of stipulations for attorney's fees.

Cited in footnote to *Dorr v. Camden*, 65 L.R.A. 348, which holds that contract for contingent fee must, in order to be sustained be shown to have been entered into by the client after full knowledge of the facts and circumstances justifying such contract.

Cited in note (55 Am. St. Rep. 445) on validity of stipulations for attorneys' fees.

14 L. R. A. 190, *MARKS v. MILLER*, 21 Or. 317, 28 Pac. 14.

Effect of failure to file lien.

Followed in *Davis v. Bowman*, 25 Or. 199, 35 Pac. 264, and *Marguam v. Sengfelder*, 24 Or. 12, 32 Pac. 676, holding unrecorded lien created by lease raises presumption of fraud.

Approved in *Meier v. Hess*, 23 Or. 603, 32 Pac. 755, holding unrecorded mortgage without change of possession creates rebuttable presumption of fraud.

Cited in *Fisher v. Kelly*, 30 Or. 15, 46 Pac. 146, holding secret chattel mortgage, executed with intent to defraud creditors, void; *Pierce v. Kelly*, 25 Or. 101, 34 Pac. 963, holding instruction that mortgage as to creditors without notice void, unless filed, harmless when creditor has notice.

Cited in footnote to *Ruggles v. Cannedy*, 46 L. R. A. 371, which holds chattel mortgage not promptly filed void as against subsequent creditors.

Cited in note (23 L. R. A. 477) on sale or mortgage of future crops.

Attaching creditor as bona fide purchaser.

Cited in *Jennings v. Lentz*, 50 Or. 487, 29 L.R.A. (N.S.) 585, 93 Pac. 327, holding under statute an attaching creditor in order to obtain rights of bona fide purchaser is bound to prove that he in fact acquired his lien in good faith and without notice of outstanding equities.

14 L. R. A. 192, *QUARLES v. STATE*, 55 Ark. 10, 17 S. W. 269.

Sunday labor.

Cited in *Hill v. Hite*, 29 C. C. A. 551, 56 U. S. App. 403, 85 Fed. 270, holding notes and chattel mortgage executed on Sunday, acknowledged on another day, void; *State v. Nesbit*, 8 Kan. App. 109, 54 Pac. 326, affirming conviction of barber shaving on Sunday in violation of statute; *Lyric Theater v. State* (*Carrell v.*

State) 98 Ark. 440, 33 L.R.A.(N.S.) 327, 136 S. W. 174, holding that theatrical performances on Sunday are criminal and may become public nuisance; *Topeka v. Crawford*, 78 Kan. 591, 17 L.R.A.(N.S.) 1160, 96 Pac. 862, 16 A. & E. Ann. Cas. 403, holding keeping open theater is violation of ordinance prohibiting Sunday labor; *Moore v. Owen*, 58 Misc. 339, 109 N. Y. Supp. 585, holding statute prohibiting Sunday labor prohibits entertainments in theaters on Sunday.

Cited in footnotes to *Cortesy v. Territory*, 19 L. R. A. 349, which holds selling liquor on Sunday, unlawfully engaging in "labor;" *People v. Bellet*, 22 L. R. A. 696, which upholds prohibition of business of barber on Sunday under greater penalties than those imposed on other business; *Van Winkle v. Satterfield*, 23 L. R. A. 853, which denies right to discharge clerk employed for definite time, for refusal to tend store on Sunday; *State v. Collect*, 64 L.R.A. 204, which holds repairing of belt in factory on Sunday so as to prevent two hundred hands from losing work on the following day.

Cited in notes (22 L. R. A. 723) on constitutionality of Sunday laws; (17 L.R.A.(N.S.) 1157) on open theater as violation of Sunday laws; (48 L. ed. U. S. 153) on validity of legislation regulating hours of labor on Sunday.

— **Work of necessity or charity.**

Cited in footnotes to *Com. v. Matthews*, 18 L. R. A. 761, which holds selling Sunday newspapers not work of necessity or charity; *First M. E. Church v. Donnell*, 46 L. R. A. 858, which sustains subscription to church indebtedness made on Sunday; *Ex parte Kennedy*, 51 L. R. A. 270, which holds work of barber on Sunday not a work of necessity; *Arnheiter v. State*, 58 L. R. A. 392, which holds sale of meat by butcher to customers on Sunday not work of necessity or charity.

Cited in note (18 L.R.A.(N.S.) 618) on sale and delivery of food stuffs on Sunday as work of necessity.

14 L. R. A. 196, *CONWAY v. GRANT*, 88 Ga. 40, 30 Am. St. Rep. 145, 13 S. E. 803.

Liability for injuries by vicious animals.

Cited in *Harvey v. Buchanan*, 121 Ga. 385, 49 S. E. 281, holding owner of mule not liable for value of kid which it killed, where unaware of mule's vicious propensities.

Cited in footnotes to *Bormann v. Milwaukee*, 33 L. R. A. 652, which holds risk of injury by animals *feræ naturæ* assumed by employee; *Morgan v. Hudnell*, 27 L. R. A. 862, which holds owner liable for injuries committed by vicious animal while trespassing, without regard to owner's knowledge of propensity.

Cited in notes (3 Eng. Rul. Cas. 119) on validity for injury inflicted by mischievous animal; (2 Brit. Rul. Cas. 27) on liability of keeper of dangerous animal in absence of negligence on his part.

— **Dogs.**

Cited in *Speckmann v. Kreig*, 79 Mo. App. 381, holding knowledge of vicious propensity of dog renders owner liable for injury to boy; *Sanders v. O'Callaghan*, 111 Iowa, 579, 82 N. W. 969, holding owner's knowledge of vicious character of dog, element in common-law action for injuries.

Cited in footnotes to *Delisle v. Bourriague*, 54 L.R.A. 420, which holds owner liable for injury by savage dogs to one invited on premises; *Martinez v. Bernhard*, 55 L. R. A. 671, which denies liability for bite by dog not known to bite before; *Crowley v. Groonell*, 55 L. R. A. 876, which holds owner liable for assault by dog, due to known playful propensity; *Shultz v. Griffith*, 40 L. R. A. 117, which holds traveler bitten by dog while going to livery yard to get articles from buggy not precluded as trespasser from recovery; *Peck v. Williams*, 61 L. R. A. 351, which holds owner

liable to one bitten by dog while attempting to climb on owner's cart without leave.

Cited in note (24 L.R.A.(N.S.) 460) on scienter necessary to owner's liability for injury by dog.

14 L. R. A. 198, *MANNING v. BECK*, 129 N. Y. 1, 29 N. E. 90.

Fraudulent motive as affecting transfers.

Cited in *Manning v. Beck*, 155 N. Y. 580, 50 N. E. 278, upholding creditor's action to set aside bill of sale, with proof of actual fraud; *White v. Benjamin*, 3 Misc. 504, 23 N. Y. Supp. 981, affirming decree setting aside judgment and transfer to wife, made with knowledge of insolvency and with intent to defraud; *Spelman v. Freedman*, 130 N. Y. 429, 29 N. E. 765, holding complaint sufficient which alleges confession of judgment by debtor and issuing of execution in fraud of assignment; *Galle v. Tode*, 148 N. Y. 280, 42 N. E. 673, holding transfer by insolvent to corporation organized to receive property in violation of creditors' rights void; *Shotwell v. Dixon*, 163 N. Y. 49, 57 N. E. 178, Affirming 22 App. Div. 261, 48 N. Y. Supp. 984, holding evidence must show creditor's knowledge of contemplated assignment and purpose of transfer to invalidate preference; *Delaney v. Valentine*, 154 N. Y. 699, 49 N. E. 65, upholding chattel mortgage by insolvent debtor, executed and received in good faith for valid claims; *Groetzinger v. Wyman*, 105 Iowa, 587, 75 N. W. 512, holding mortgage, which it was agreed would not be filed unless mortgagor unable to secure extensions, not invalidated as to creditors extending payment; *New York County Nat. Bank v. American Surety Co.* 69 App. Div. 158, 74 N. Y. Supp. 692, upholding bona fide creditor's right to damages for conversion of property covered by chattel mortgage executed by insolvent to defraud creditors; *New York C. & H. R. R. Co. v. Reeves*, 41 Misc. 499, 85 N. Y. Supp. 28, holding mere allegations of malicious conspiracy among ticket brokers to buy and resell nontransferable passenger tickets, insufficient where only lawful acts are shown to have been committed.

Cited in note (58 Am. St. Rep. 87, 99) on fraudulent assignments for creditors.

Criticized in *Abegg v. Bishop*, 66 Hun, 9, 20 N. Y. Supp. 810, holding fraudulent intent on part of insolvent invalidates transfer of book accounts to creditor.

Preferential transfers.

Followed without discussion in *Otis v. Bertholf*, 129 N. Y. 675, 30 N. E. 66; *Thalheimer v. Klapetzky*, 129 N. Y. 647, 29 N. E. 1031; *Maass v. Falk*, 146 N. Y. 42, 65 N. Y. S. R. 765, 40 N. E. 504, Affirming 54 N. Y. S. R. 160, 24 N. Y. Supp. 448,—upholding transfer to bank by insolvent of stock and fixtures as security for notes not yet due.

Cited in *Blair State Bank v. Stewart*, 57 Neb. 66, 77 N. W. 372, upholding mortgage, void in inception, executed by insolvent less than thirty days prior to assignment; *Cutter v. Pollock*, 4 N. D. 213, 25 L. R. A. 381, 50 Am. St. Rep. 644, 59 N. W. 1062, holding execution of chattel mortgages on entire stock, preventing continuance of business, not void as assignment under Comp. Laws, § 4660; *Beall v. Cowan*, 21 C. C. A. 271, 44 U. S. App. 505, 75 Fed. 139, denying that Hill's Laws, chap. 28, § 3173, invalidates trust deed to secure certain creditors, effecting distribution of whole estate as under assignment; *Smith v. Baker*, 5 Okla. 335, 49 Pac. 61, upholding bill of sale executed by insolvents in payment of a bona fide loan used in conducting business; *Sandwich Mfg. Co. v. Max*, 5 S. D. 139, 24 L. R. A. 530, 58 N. W. 14, sustaining bill of sale and deed executed by insolvent merchants in payment of bona fide debt; *Jones v. Cullen*, 100 Tenn. 16, 42 S. W. 873, denying that fictitious character of one claim secured by trust deed invalidates deed as to bona fide claims; *Lassiter v. Hoes*, 11 Misc. 2, 31 N. Y. Supp.

850, upholding transfer by insolvent husband to wife made in good faith in payment of honest debt; *Central Nat. Bank v. Seligman*, 138 N. Y. 442, 34 N. E. 196, upholding judgments by confession of valid debts made before, but entered after, assignment; *Tompkins v. Hunter*, 149 N. Y. 124, 43 N. E. 532, Affirming 65 Hun, 445, 20 N. Y. Supp. 355, holding transfer to one debtor, by insolvent, of property at full value in payment of honest claim, not preference; *Dintruff v. Tuthill*, 62 Hun, 595, 17 N. Y. Supp. 556, holding affidavit in attachment not alleging transfer by insolvent to pay invalid debt, or for less than market value, insufficient; *Colt v. Sears Commercial Co.* 20 R. I. 325, 38 Atl. 1056, holding sale of goods by assignee subject to mortgage given by insolvent, election to ratify transfer; *Johnson v. Rapalyea*, 1 App. Div. 477, 37 N. Y. Supp. 540 (dissenting opinion), majority holding preferred creditors entitled to share with general creditors as to portion of claims unpaid; *H. B. Claflin Co. v. Arnheim*, 87 Hun, 239, 33 N. Y. Supp. 1037, sustaining injunction against sheriff's paying to another, proceeds of execution in violation of insolvent's agreement to give prior lien; *Vietor v. Levy*, 72 Hun, 265, 25 N. Y. Supp. 644, holding judgments by confession in favor of preferred creditors properly set aside as part of fraudulent scheme; *Young v. Stone*, 61 App. Div. 371, 70 N. Y. Supp. 558, holding transfer by insolvent of entire assets to one creditor in trust for all constitutes assignment and must be executed according to statute.

Cited in footnotes to *Re Fixen*, 50 L.R.A. 605, which holds payment of money by insolvent to unsecured creditor in ordinary course of business an unlawful preference; *Tatman v. Humphrey*, 63 L. R. A. 738, which holds insolvent mortgagor's permitting mortgagee to take possession of mortgaged chattels under unrecorded mortgage an act of bankruptcy; *George M. Hill Co.* 66 L.R.A. 68, which holds forbidden transfer not affected by bank's appropriation of balance of bankrupt's deposit account in payment of his indebtedness to it after knowledge of bankruptcy.

Cited in notes (37 L. R. A. 481) on effect of insolvency statutes on mortgage or sale of preferring creditors; (34 Am. St. Rep. 857) on preferences in assignments for creditors.

14 L. R. A. 203, *STREET v. JOHNSON*, 80 Wis. 455, 27 Am. St. Rep. 42, 50 N. W. 395.

Statement libelous per se.

Cited in *Robinson v. Eau Claire Book & Stationery Co.* 110 Wis. 372, 85 N. W. 983, holding letters containing warning to "beware of these untruthful adventurers" libelous per se; *Scofield v. Milwaukee Free Press Co.* 126 Wis. 85, 2 L.R.A.(N.S.) 694, 105 N. W. 227, holding editorial charging participation in use of money by candidate for United States senate to promote his candidacy libelous.

Liability of vendor of newspapers.

Cited in note (9 Eng. Rul. Cas. 38) on liability of innocent seller of libelous newspaper.

Libel of class of persons.

Cited in notes (70 Am. St. Rep. 757) on libel or slander of a class or number of persons; (23 L.R.A.(N.S.) 731), on right of one not specially named to maintain action for defamation based on charges against a class or group.

14 L. R. A. 205, *STATE v. BLACK*, 109 N. C. 856, 13 S. E. 877.

Errors reviewable on appeal.

Cited in *Hinson v. Powell*, 109 N. C. 538, 14 S. E. 301, holding general assign-

ment of error not considered on appeal; *Cameron-Barkley Co. v. Thornton Light & P. Co.* 137 N. C. 102, 49 S. E. 76, holding plaintiff entitled to writ of certiorari to have exceptions, and assignment of errors relating to exceptions, given or refused, made part of case, judge to consider case again with reference to assignment.

Officer's right to detain prisoner illegally arrested.

Distinguished in *State v. Rollins*, 113 N. C. 733, 18 S. E. 394, holding officer making illegal arrest guilty of affray by holding prisoner against rescuers.

Rights and duties of officer as respects property in his custody.

Cited in *State v. Scott*, 142 N. C. 583, 9 L.R.A.(N.S.) 1149, 55 S. E. 69, on rights and duties of sheriff with respect to property in his custody by virtue of levy under attachment.

Right to use force to recover possession of personality.

Cited in note in (3 L.R.A.(N.S.) 254) on right to use force to recover possession of personality.

14 L. R. A. 206, STATE v. DAVIS, 109 N. C. 809, 13 S. E. 883.

Act constituting forcible entry or trespass.

Followed in *State v. Lawson*, 123 N. C. 742, 68 Am. St. Rep. 844, 31 S. E. 667, defining forcible trespass as referring to realty, forcible entry to personality.

Cited in *State v. Lawson*, 123 N. C. 743, 68 Am. St. Rep. 844, 31 S. E. 667, holding demonstration of force creating apprehension of fear sufficient to constitute offense; *State v. Woodward*, 119 N. C. 838, 25 S. E. 868, holding one guilty of forcible entry by using force in demolishing mill, exciting fear of owner; *State v. Webster*, 121 N. C. 587, 28 S. E. 254, Affirming conviction of one committing assault while removing machinery of another.

Distinguished in *State v. Leary*, 136 N. C. 580, 48 S. E. 570, holding one who merely unlocks lock on premises, takes it off and puts his own lock on, doing no violence, is not guilty of forcible entry, where adverse party was in possession only by sufferance.

14 L. R. A. 208, SANBORN v. COLE, 63 Vt. 590, 22 Atl. 716.

Proof of attested instruments.

Cited in notes (35 L. R. A. 326, 334, 350) on necessity of calling subscribing witness to prove attested instruments; (44 L. R. A. 146) on proof of signature when attesting witnesses are dead, or cannot remember transaction.

Proof of agency.

Cited in *Cooledge v. Continental Ins. Co.* 67 Vt. 26, 30 Atl. 798, raising, without deciding, question of competency of husband to prove agency by own testimony; *Hawkins v. Windhorst*, 77 Kan. 676, 17 L.R.A.(N.S.) 222, 127 Am. St. Rep. 445, 96 Pac. 48, holding where issue is whether husband is general agent of wife for purpose of signing checks, proof that husband had signed his wife's name to checks drawn on her account, with her knowledge and consent, is admissible.

Payments barring operation of limitations.

Cited in *Rowell v. Lewis*, 72 Vt. 167, 47 Atl. 783, holding payments on note by sale of coal to creditor operate to remove bar of limitations; *McDowell v. McDowell*, 75 Vt. 405, 98 Am. St. Rep. 831, 56 Atl. 98, holding that creditor may apply payments upon claim whether barred by statute or not.

Cited in notes (96 Am. St. Rep. 51) on application of payments; (16 Eng. Rul. Cas. 205) on running of limitations against open account.

Disapproved in *Wilden v. McAllister*, 91 Mo. App. 453, holding creditor's ap-

appropriations of payments by debtor do not revive debt; *McBride v. Noble*, 40 Colo. 375, 90 Pac. 1037, 13 A. & E. Ann. Cas. 1202, holding creditor's application of general undirected payment by debtor, to barred debt does not take unpaid portion thereof out of statute of limitations.

Proof of handwriting.

Cited in *State v. Kent*, 83 Vt. 31, 26 L.R.A.(N.S.) 991, 74 Atl. 389, 20 Ann. Cas. 1334, on proof of handwriting by comparison with other writings or characters.

14 L. R. A. 211, *WALDEN NAT. BANK v. BIRCH*, 130 N. Y. 221, 29 N. E. 127. **Ultra vires as defense.**

Cited in *Anderson v. First Nat. Bank*, 5 N. D. 456, 67 N. W. 821, holding national bank cannot plead *ultra vires* as justification for violation of trust.

Liability of surety for acts of bank employees.

Cited in *Westervelt v. Mohrenstecher*, 34 L. R. A. 481, footnote p. 477, 22 C. C. A. 99, 40 U. S. App. 221, 76 Fed. 124, holding judgments upon notes taken by cashier for misappropriations no bar to action on bond.

Cited in footnote to *Lieberman v. First Nat. Bank*, 48 L. R. A. 514, which denies release of surety on bank teller's bond for unauthorized statements by cashier.

Res judicata.

Cited in *Crompton & K. Loom Works v. Brown*, 27 Misc. 321, 57 N. Y. Supp. 823, holding judgment upon first of series of notes, adjudication precluding maker setting up against second, defense existing against first; *Lampkin v. Peoples' Nat. Bank*, 98 Mo. App. 242, 71 S. W. 715, holding compromise of suit by trustee in bankruptcy to disaffirm sale no bar to action to recover money paid as preference.

Acquisition of its own stock by corporation.

Cited in *Dacovich v. Canizas*, 152 Ala. 293, 44 So. 473, holding title to its own stock passes to corporation by purchase thereof, with funds of company; *Morse v. United States*, 98 C. C. A. 321, 174 Fed. 551, holding unlawful acquisition of shares of its own stock by bank is not a nullity absolving bank from reporting fact to Comptroller; *Meholin v. Carlson*, 17 Idaho, 761, 134 Am. St. Rep. 286, 107 Pac. 755, holding foreclosure of pledge of its own stock to bank cannot be defeated by pledgor by pleading statute prohibiting bank to accept its own stock as collateral or purchase the same, where bank insolvent and in receiver's hands.

14 L. R. A. 215, *STEWART v. STONE*, 127 N. Y. 500, 28 N. E. 595.

Onus as to proof of negligence.

Cited in *Liberty Ins. Co. v. Central Vermont R. Co.* 19 App. Div. 516, 46 N. Y. Supp. 576, holding burden of proof of negligence in destruction of warehouse by fire upon one alleging it; *Spencer v. Citizens' Mut. L. Ins. Assn.* 3 Misc. 461, 23 N. Y. Supp. 179, holding onus of showing breach of application for renewal of lapsed policy remains upon company during trial; *Kaiser v. Latimer*, 9 App. Div. 38, 41 N. Y. Supp. 94, holding onus on bailor to prove collapse of warehouse due to negligence of warehouseman; *Ballston Refrigerating Storage Co. v. Eastern States Refrigerating Co.* 142 App. Div. 139, 126 N. Y. Supp. 857 (dissenting opinion), on burden of proof as upon bailor to show negligence of bailee; *O'Rourke v. Bates*, 70 Misc. 416, 133 N. Y. Supp. 392, holding that burden of proving bailee's negligence is on bailor; *Campbell v. Klein*, 52 Misc. 124, 101 N. Y. Supp. 577, holding one engaged in dying business, who received gown and waist to be dyed, not liable for loss thereof by theft, in absence of proof of

negligence; *Polack v. O'Brien*, 114 App. Div. 369, 100 N. Y. Supp. 385, holding bailor of bristle upon which bailee brush manufacturer was to perform work, has burden of proof of negligence, where goods are lost or unaccounted for by carrier to whom bailee delivers them for transportation to bailor; *Clarke v. Koepfel*, 119 App. Div. 459, 104 N. Y. Supp. 65, holding building contractor seeking to recover for part performance of contract on ground he is excused from performance by destruction of building by fire while in possession of owner because of owner's negligence has burden of showing fire was due to owner's negligence.

— **Creating presumption.**

Cited in *Waterman v. American Pin Co.* 19 Misc. 639, 44 N. Y. Supp. 410, and *Trimble v. New York C. & H. R. R. Co.* 39 App. Div. 412, 57 N. Y. Supp. 437, holding failure to deliver sample trunk in good condition renders carrier prima facie liable; *Kafka v. Levensohn*, 18 Misc. 207, 41 N. Y. Supp. 368, holding prima facie negligence overcome by showing loss occasioned by accident beyond control of bailee; *Rowan v. Wells, F. & Co.* 80 App. Div. 34, 80 N. Y. Supp. 226, holding destruction of package by burning of car raises no presumption of carrier's negligence; *Hoffmann v. Coughlin*, 26 Misc. 26, 55 N. Y. Supp. 600, holding evidence showing lack of care in preventing burglary creates question for jury; *Simpson v. New York, N. H. & H. R. Co.* 16 Misc. 614, 38 N. Y. Supp. 341, holding carrier liable for failure to deliver trunk; *Aaronson v. Pennsylvania R. Co.* 23 Misc. 669, 52 N. Y. Supp. 95, holding carrier liable as warehouseman for nondelivery of valise; *Pennsylvania Co. v. Liveright*, 14 Ind. App. 524, 43 N. E. 162, holding jury may infer loss of trunk from failure of carrier to explain nondelivery; *Dobson v. Central R. Co.* 38 Misc. 586, 78 N. Y. Supp. 82, holding delivery by carrier of goods in wet condition insufficient to prove negligence; *Clarke v. Koepfel*, 119 App. Div. 459, 104 N. Y. Supp. 65, holding mere occurrence of fire does not permit presumption it was due to negligence; *Yazoo & M. Valley R. Co. v. Hughes*, 94 Miss. 251, 22 L.R.A.(N.S.) 982, 47 So. 662, holding defendant railroad company not prima facie negligent, where baggage stored in its station was destroyed by fire; *Cramer v. Klein*, 127 App. Div. 147, 111 N. Y. Supp. 469, holding presumption of negligence arising from proof of delivery of scarf to defendant to be cleaned and failure to return it on demand, might be rebutted by showing loss occurred by reason of fire.

Performance of contract; when nonperformance excusable.

Cited in *Hayes v. Gross*, 9 App. Div. 15, 40 N. Y. Supp. 1098, holding owner liable for work done and materials furnished when further performance impossible by burning of building; *Rhodes v. Hinds*, 79 App. Div. 382, 79 N. Y. Supp. 437, upholding right of sawyer to recover for services in sawing and piling lumber burned before direction for delivery by owner; *Kafka v. Levensohn*, 18 Misc. 208, 41 N. Y. Supp. 368, upholding right to recover for services in making coats from material furnished, when garments stolen after work completed; *Herter v. Mullen*, 159 N. Y. 44, 44 L. R. A. 709, 70 Am. St. Rep. 517, 53 N. E. 700, denying that failure to surrender premises at expiration of term on account of sickness permits landlord to continue lease for another year; *Dixon v. Breon*, 22 Pa. Super. Ct. 348, holding performance of contract to cut and manufacture certain kind of timber excused by destruction of timber by forest fires; *Pearson v. McKinney*, 160 Cal. 655, 117 Pac. 919, holding that when contract is to sell specified article when it grows to specified size, sale and delivery depends upon happening of precedent condition; *Pacific Sheet Metal Works v. Californian Canneries Co.* 91 C. C. A. 108, 164 Fed. 985, on release from performance of contract by damage by elements, or unavoidable casualty.

Cited in footnotes to *Genet v. Delaware & H. Canal Co.* 19 L. R. A. 127, which holds agreement implied that lessee will not wilfully incapacitate itself to take out more than minimum quantity of coal per year; *Remy v. Olds*, 21 L. R. A. 645, which denies right to recover on contract, performance of which prevented by act of God; *Pengra v. Wheeler*, 21 L. R. A. 726, which holds lessor released from covenant to repair leased dams within specified time, by impossibility of making repair; *Lorillard v. Clyde*, 24 L. R. A. 113, which holds dissolution of corporation a defense to guaranty of dividends for term of years; *Pinkham v. Libby*, 49 L. R. A. 693, which denies right to recover amount paid for fruitless service of stallion under agreement for return, prevented by its death; *Ontario Deciduous Fruit Growers' Asso. v. Cutting Fruit Packing Co.* 53 L. R. A. 681, which denies liability for failure to deliver specified quantity of fruit contracted for, from failure of crop due to unusual climatic conditions; *Floyd v. Cook*, 63 L.R.A. 450, which holds claimant giving forthcoming bond and retaining possession of property not liable for failure to produce same, where same officer has ceded and sold the property under a special lien; *Krause v. Crothersville School Trustees*, 65 L.R.A. 111, which holds covenant to repair building and construct annex thereto discharged by destruction by lightning of main building when work is practically completed.

Cited in notes (16 L. R. A. 858) on recovery for services on contract interrupted by sickness or death; (15 L.R.A.(N.S.) 833) on liability of contractor to replace bridge destroyed by unprecedented flood; (33 L.R.A.(N.S.) 701) on effect upon contract obligation of failure of third person to take action essential to performance; (40 L. ed. U. S. 517) on act of God as excuse for nonperformance of obligation; (1 Eng. Rul. Cas. 348) on inevitable accident as excuse for nonperformance of express contract; (6 Eng. Rul. Cas. 613) on impossibility as excuse for nonperformance of contract.

Distinguished in *R. J. Menz Lumber Co. v. E. J. McNeeley & Co.* 58 Wash. 234, 28 L.R.A.(N.S.) 1013, 108 Pac. 621, holding where contract is to deliver lumber and shingles within reasonable time, inability to ship within reasonable time owing to lack of cars, does not relieve from duty to ship.

— When not excusable.

Cited in *Pregenzer v. Burleigh*, 6 Misc. 142, 26 N. Y. Supp. 35, affirming liability of one failing to perform unconditional contract to furnish cargo for boat; *Stiles v. Benjamin*, 92 Hun, 106, 36 N. Y. Supp. 910, denying that agreement of mortgagee to assign bond and mortgage to another is defense for breach of contract to assign to one making advances; *Buffalo & L. Land Co. v. Bellevue Land & Improv. Co.* 165 N. Y. 254, 61 L. R. A. 955, footnote p. 951, 59 N. E. 5, Affirming 32 App. Div. 542, 53 N. Y. Supp. 17, denying right to rescind land contract for vendor's breach of agreement to operate street cars "as usually run," due to unusual snow drifts; *Rapid Safety Fire Extinguisher Co. v. Hay-Budden Mfg. Co.* 37 Misc. 557, 75 N. Y. Supp. 1008, sustaining liability of one leasing fire extinguishers and agreeing to reimburse lessor in case of loss, for destruction of property without negligence; *Rowe v. Peabody*, 207 Mass. 232, 93 N. E. 604, holding that one who contracts to do certain thing which is lawful is not to be excused for non-performance merely because performance original was or has become impossible.

Cited in footnotes to *Anderson v. May*, 17 L. R. A. 555, which holds partial destruction of crop by early frosts no excuse for nonperformance of contract to sell specified quantity; *Fisher v. Walsh*, 43 L. R. A. 810, which holds employee quitting service in breach of contract because of strikers' threats liable for resulting injury to employer; *Smith v. North American Transp. & Trading Co.* 44 L. R. A. 557, which holds steamer company abandoning trip to Dawson re-

quired to bring passenger back without charge; *Angus v. Scully*, 49 L. R. A. 562, which sustains right to recover under contract to move building destroyed by fire before work completed; *Eppens, S. & W. Co. v. Littlejohn*, 52 L. R. A. 811, which holds unreasonable delay in delivering goods not excused by vendor's inability to procure them from personal disadvantages peculiar to him; *Board of Education v. Townsend*, 52 L. R. A. 868, which holds blowing down of school-house does not excuse from contract to remove and rebuild.

Rights as to bailment.

Cited in *Sattler v. Hallock*, 160 N. Y. 298, 46 L. R. A. 681, 73 Am. St. Rep. 686, 54 N. E. 667, Affirming 15 App. Div. 500, 44 N. Y. Supp. 543, holding delivery of farm produce to another, to be made into pickles, and profits divided, bailment, entitling bailor to property as against manufacturer's assignee; *Labowitz v. Frankfort*, 4 Misc. 278, 23 N. Y. Supp. 1038, denying liability of tailor for loss by fire of goods left to be made into garments; *Jaminit v. American Storage & Moving Co.* 109 Mo. App. 265, 84 S. W. 128, holding private carrier for hire not liable for injury to portrait, by mischievous act of boy who passed while portrait was being prepared for carriage in van; *Wilson v. Wyckoff*, 133 App. Div. 95, 117 N. Y. Supp. 783 (dissenting opinion), on liability of bailee guilty of negligence in respect to property in his custody.

Cited in footnote to *Seevera v. Gabel*, 27 L. R. A. 733, which holds hirer of personal property not liable for loss by fire without his fault.

Cited in note (94 Am. St. Rep. 217) on bailments.

Implied conditions.

Cited in *Clough v. Stillwell Meat Co.* 112 Mo. App. 191, 86 S. W. 580, holding warehouse company entitled to remuneration upon quantum meruit for insuring property destroyed by fire while in storage and for collecting insurance money and turning it over to bailor.

14 L. R. A. 220, *WILLIAMS v. WILLIAMS*, 130 N. Y. 193, 27 Am. St. Rep. 517, 29 N. E. 98.

Grounds for limited divorce.

Approved in *Simon v. Simon*, 6 App. Div. 470, 39 N. Y. Supp. 573, Affirming 15 Misc. 518, 37 N. Y. Supp. 1121, denying separation in absence of voluntary abandonment with intention not to return.

Cited in *Deisler v. Deisler*, 59 App. Div. 208, 69 N. Y. Supp. 326, holding refusal of wife to cease association with alleged paramour justified husband's neglect to support; *People ex rel. Public Charities & C. Comrs. v. Cullen*, 153 N. Y. 639, 44 L. R. A. 424, 47 N. E. 894, holding judicial separation at suit of wife exempts husband from liability for desertion; *Tirrell v. Tirrell*, 72 Conn. 570, 47 L. R. A. 752, footnote p. 750, 45 Atl. 153, holding mere payment of allowance to abandoned wife under order of court no bar to divorce for desertion; *Dignan v. Dignan*, 17 Misc. 269, 40 N. Y. Supp. 320, denying tender of cohabitation by wife upon one condition sufficient to convict husband of abandonment if rejected.

Cited in footnotes to *Hardie v. Hardie*, 25 L. R. A. 697, which holds divorce for desertion not authorized by wife receiving blow from husband leaving house without intent to remain away permanently; *Danforth v. Danforth*, 31 L. R. A. 608, which authorizes divorce for wife's desertion, though husband visited and slept in same bed with her for a few days during statutory period.

Cited in notes (13 L.R.A.(N.S.) 223) on relations between one spouse and relatives of other as affecting question of desertion or cruelty; (86 Am. St. Rep.

341; 119 Am. St. Rep. 618; 138 Am. St. Rep. 147, 151) on desertion as ground for divorce.

Proof of desertion.

Cited in *Brokaw v. Brokaw*, 66 Misc. 315, 123 N. Y. Supp. 17, holding closing of house by husband and referring wife to attorney and other acts constituted abandonment, though husband continued to make wife weekly allowances; *Heyman v. Heyman*, 119 App. Div. 183, 104 N. Y. Supp. 227, holding action for separation based wholly on charge of wilful abandonment not maintainable by wife who left home because husband absent one night on business where rent of home for current month was paid, home furnished and wife and child supported therein; *Dennison v. Dennison*, 52 Misc. 40, 102 N. Y. Supp. 621, holding charge of abandonment not sustained, where parties expected to live separately at time of marriage and pre-nuptial agreement was made releasing man from all claims upon him as husband by woman; *Kupka v. Kupka*, 132 Iowa, 193, 109 N. W. 610, holding evidence insufficient to establish charge of desertion.

Distinguished in *People v. Crouse*, 86 App. Div. 354, 83 N. Y. Supp. 812, holding husband's settlement in New York, where he was followed by wife who offered to live with him, not proof of desertion within statute rendering husband liable for arrest.

Effect of foreign divorce.

Cited in *Atherton v. Atherton*, 155 N. Y. 134, 40 L. R. A. 294, 63 Am. St. Rep. 650, 49 N. E. 933, Affirming 82 Hun, 179, 31 N. Y. Supp. 977, denying that wife's action for limited divorce in New York is barred by husband's absolute divorce in state without jurisdiction over wife; *Bell v. Bell*, 4 App. Div. 531, 40 N. Y. Supp. 443, denying judgment of Pennsylvania court binding on wife, barring action for divorce; *People v. Karlsioe*, 1 App. Div. 573, 37 N. Y. Supp. 481, and *Re Kimball*, 155 N. Y. 72, 49 N. E. 331, holding judgment of divorce entered in sister state, against resident of New York, without personal service or appearance, void; *Strong v. New York, L. E. & W. R. Co.* 86 Hun, 394, 33 N. Y. Supp. 502, denying that judgment of divorce in another state, without appearance, changes status of husband as to distribution of wife's estate; *Re Swales*, 60 App. Div. 601, 70 N. Y. Supp. 220, denying right to administer estate as widow after obtaining divorce in another state against husband in New York; *McCreery v. Davis*, 44 S. C. 223, 28 L. R. A. 665, 61 Am. St. Rep. 794, 22 S. E. 178, denying that divorce granted wife without jurisdiction of husband destroys her dower in his property.

Cited in notes (16 L. R. A. 498) on domicil of wife for purpose of divorce suit; (19 L. R. A. 814) on validity of decree of divorce obtained on publication service out of state, where defendant did not appear; (59 L. R. A. 170) on conflict of laws on subject of divorce; (2 L.R.A.(N.S.) 326) on effect, in third state, of decree upholding foreign divorce; (5 Eng. Rul. Cas. 724) on validity of judgment dissolving marriage by court of country where husband is domiciled; (53 Am. St. Rep. 183; 8 Eng. Rul. Cas. 50) on effect of foreign divorce.

Distinguished in *Campbell v. Campbell*, 90 Hun. 236, 35 N. Y. Supp. 230, upholding judgment annulling marriage at suit of wife in state having jurisdiction of both parties.

Criticized in *Davis v. Davis*, 2 Misc. 550, 22 N. Y. Supp. 191, annulling marriage contracted after divorce at suit of former wife in state without jurisdiction over husband.

Disapproved in effect in *Felt v. Felt*, 59 N. J. Eq. 613, 83 Am. St. Rep. 612, 49 Atl. 1071 (dissenting opinion), majority sustaining decree of divorce granted by foreign court, service being made on wife according to rule of such court

Decree of divorce as evidence.

Cited in *Munson v. Munson*, 60 Hun, 196, 14 N. Y. Supp. 692, holding record of husband's divorce in California not conclusive on courts of this state as to jurisdiction.

Distinguished in *Starbuck v. Starbuck*, 173 N. Y. 508, 93 Am. St. Rep. 631, 66 N. E. 193, Reversing 62 App. Div. 440, 71 N. Y. Supp. 104, holding decree of divorce obtained by wife in another state, on grounds not recognized here, admissible in action for dower in subsequently acquired property.

14 L. R. A. 223, *EVANS v. LAKE SHORE & M. S. R. CO.* 88 Mich. 442, 50 N. W. 386.

Reliance on observation of rules.

Cited in *Shufelt v. Flint & P. M. R. Co.* 96 Mich. 343, 55 N. W. 1013 (dissenting opinion), majority holding failure to stop, look, and listen before crossing tracks, bars recovery; *Dawe v. Flint & P. M. R. Co.* 102 Mich. 308, 60 N. W. 838, denying that failure to close gates allows recovery to one failing to look and listen; *Rohde v. Chicago & N. W. R. Co.* 86 Wis. 312, 56 N. W. 872, holding complaint alleging injury at crossing from failure of company to lower gates as usual sufficient; *Baltimore & O. R. Co. v. Stumpf*, 97 Md. 94, 54 Atl. 978, sustaining recovery by traveler who entered through open safety gates without stopping to look or listen, and was struck by train; *Montgomery v. Missouri P. R. Co.* 181 Mo. 501, 79 S. W. 930, holding that it is duty of flagman to warn travelers about to cross of approach of train, and if he is present and gives no signal, traveler may conclude that it is safe to cross; *Chicago, R. I. & P. R. Co. v. Hamilton*, 92 Ark. 403, 123 S. W. 379, holding failure to look and listen before attempting to cross tracks where gates raised, not negligence as matter of law; *Koch v. Southern C. R. Co.* 148 Cal. 688, 4 L.R.A.(N.S.) 527, 113 Am. St. Rep. 332, 84 Pac. 176, 7 A. & E. Ann. Cas. 795 (dissenting opinion), on right to rely on absence of such warnings of danger as it is customary for railroad company to give; *Sights v. Louisville & N. R. Co.* 117 Ky. 442, 78 S. W. 172, on reliance upon flagman's performance of his duties; *Northern C. R. Co. v. State*, 100 Md. 413, 108 Am. St. Rep. 439, 60 Atl. 19, 3 A. & E. Ann. Cas. 445, holding jury entitled to believe defendant guilty of negligence where there was evidence that boy waited until gate was raised and gateman beckoned him to come across tracks, took horse by head, started across, and was struck by engine.

Cited in footnotes to *Van Auken v. Chicago & W. M. R. Co.* 22 L. R. A. 33, which holds failure to look and listen on dark night not prevent recovery for injury by engine running backward; *Betts v. Lehigh Valley R. Co.* 45 L. R. A. 261, which sustains right of person approaching crossing where train is receiving or discharging passengers to rely on rule requiring other train to stop; *Woehrle v. Minnesota Transfer R. Co.* 52 L. R. A. 349, which sustains traveler's right to rely on watchman's absence from crossing.

Cited in note (33 L.R.A.(N.S.) 990) on railroads: duty as to operation of safety gates at crossings.

Distinguished in *Poulin v. Canadian P. R. Co.* 17 L. R. A. 803, 3 C. C. A. 23, 6 U. S. App. 298, 152 Fed. 197, holding passenger knowingly boarding train with void ticket guilty of negligence barring recovery for expulsion, though person in charge of office said he thought it was all right.

Question for jury.

Cited in *Grand Trunk R. Co. v. Ives*, 144 U. S. 432, 36 L. ed. 494, 12 Sup. Ct. Rep. 679, holding question for jury as to decedent's negligence in driving onto track after failing to look and listen; *Baltimore & O. R. Co. v. Connell*, 69 C. C.

A. 570, 137 Fed. 13, holding question whether person killed at crossing guilty of contributory negligence properly left to jury, where safety gates on both sides of crossing were standing up and flagman was asleep in signal tower at time of accident.

14 L. R. A. 226, *VOSBURG v. PUTNEY*, 80 Wis. 523, 27 Am. St. Rep. 47, 50 N. W. 403.

Acts constituting assault.

Cited in *Vosburg v. Putney*, 86 Wis. 279, 56 N. W. 480, holding one liable for damages resulting from kick upon leg; *Degenhardt v. Heller*, 93 Wis. 664, 57 Am. St. Rep. 945, 68 N. W. 411, denying recovery for assault when revolver discharged to cause fright, without intending to harm.

Cited in footnotes to *Markley v. Whitman*, 20 L. R. A. 55, which holds student liable for assault made in sport; *Perkins v. Stein*, 20 L. R. A. 862, which holds negligently driving over person not assault; *Carr v. State*, 20 L. R. A. 863, which holds assault involved in administering poison; *Laidlaw v. Sage*, 44 L. R. A. 216, which holds one drawing another in front of him as shield against threatened explosion not liable for injuries from explosion.

Cited in notes (57 L. R. A. 675) on liability of infant for torts; (45 L. R. A. 695) on self-defense set up by accused who began conflict.

Hypothetical questions.

Cited in *Selleck v. Janesville*, 100 Wis. 163, 41 L. R. A. 565, 69 Am. St. Rep. 906, 75 N. W. 975, holding hypothetical questions, partly based on physician's examination, proper; *Nichols v. Oregon Short Line R. Co.* 25 Utah, 246, 70 Pac. 996, holding that hypothetical question as to cause of miscarriage must include every proven fact.

Distinguished in *Zoldoske v. State*, 82 Wis. 607, 52 N. W. 778, holding hypothetical question not omitting any facts absolutely essential to enable expert to form intelligent opinion not improper.

Measure of damages in actions for tort.

Cited in *Chicago, B. & Q. R. Co. v. Spirk*, 51 Neb. 178, 70 N. W. 926, holding compensation for direct result of act, measure of damages in actions *ex delicto*.

Intent as element of assault.

Cited in *Walbridge v. Walbridge*, 80 Kan. 569, 103 Pac. 89, holding person guilty of assault answerable for all injuries which are natural or probable consequences of his act without regard to his intent; *Mohr v. Williams*, 95 Minn. 271, 1 L.R.A.(N.S.) 445, 111 Am. St. Rep. 462, 104 N. W. 12, 5 A. & E. Ann. Cas. 303, holding physician who performed operation on ear of patient other than that to which patient had consented while patient was under influence of anaesthetics, liable in civil action for assault and battery; *Donner v. Graap*, 134 Wis. 526, 115 N. W. 125, holding definition of assault and battery adopted by Wisconsin court implies wrongful intent; *Luttermann v. Romey*, 143 Iowa, 235, 121 N. W. 1040, holding instruction erroneous which made finding of intent to obtain sexual intercourse with woman essential to right of recovery for assault and battery upon her.

Cited in note (67 L.R.A. 566) on mistaken identity as justification for assault.

Liability of infant for torts.

Cited in *Briese v. Maechtle*, 146 Wis. 90, 35 L.R.A.(N.S.) 576, 130 N. W. 893, Ann. Cas. 1912 C, 176, holding that infant is liable in compensatory damages for his tortious acts.

14 L. R. A. 230, *FLYNN v. DOUGHERTY*, 91 Cal. 669, 27 Pac. 1080.

Specifying points for nonsuit.

Cited in *White v. Rio Grande Western R. Co.* 22 Utah, 141, 61 Pac. 568, and *Idaho Mercantile Co. v. Kalanquin*, 7 Idaho, 298, 62 Pac. 925, holding party moving for nonsuit must call attention of court and adversary to particular points; *Ferguson v. Ingle*, 38 Or. 44, 62 Pac. 760, holding appellate courts refuse to review motion for nonsuit, not naming grounds.

Statute of frauds as affecting contracts.

Cited in *Lewis v. Evans*, 108 Iowa, 299, 79 N. W. 81, holding contract for sale of corn to be shelled, within statute of frauds; *Williams-Hayward Shoe Co. v. Brooks*, 9 Wyo. 437, 64 Pac. 342, holding contract with vendor and manufacturer for shoes to be made and delivered, within statute of frauds.

Cited in footnotes to *Mighell v. Dougherty*, 17 L. R. A. 755, which holds oral sale of growing grain, to be delivered, within statute of frauds; *Greenwood v. Law*, 19 L. R. A. 688, which holds parol agreement to assign mortgage void; *Heintz v. Burkhard*, 31 L. R. A. 508, which holds oral contract to make and furnish ironwork for particular brick building not within statute of frauds; *Forsyth v. Mann Bros.* 32 L. R. A. 788, which holds oral contract to manufacture monument not within statute of frauds.

Cited in note (30 L.R.A.(N.S.) 319, 323) on purchase of property to be manufactured, adapted, or grown, as within Statute of Frauds.

Contract for labor.

Cited in note (94 Am. St. Rep. 234) on contract for labor.

14 L. R. A. 234, *GERARD v. McCORMICK*, 130 N. Y. 261, 29 N. E. 115.

Payment of agent's debt with principal's funds.

Cited in *Huie v. Allen*, 87 Hun, 519, 34 N. Y. Supp. 577, holding brokers receiving corporate check in payment of manager's losses in speculation must repay corporation; *Lamson v. Beard*, 45 L. R. A. 827, 36 C. C. A. 64, 94 Fed. 37, denying that payees are bona fide holders of drafts drawn by president on corporate deposit for margins in "futures;" *James Reynolds Elevator Co. v. Merchants' Nat. Bank*, 55 App. Div. 4, 67 N. Y. Supp. 397, holding bank liable to reimburse corporation for checks drawn by president in payment of individual debts; *Empire State Surety Co. v. Nelson*, 141 App. Div. 851, 126 N. Y. Supp. 453, holding that ward may recover from person receiving money paid out of estate by guardian in payment of guardian's individual debt; *Hathaway v. Delaware County*, 185 N. Y. 373, 13 L.R.A.(N.S.) 277, 113 Am. St. Rep. 909, 78 N. E. 153, on absence of authority in trustee to dispose of trust property in payment of his own debt; *Winslow Bros. & Co. v. Station*, 150 N. C. 268, 63 S. E. 950, on set-off of debt due from agent to purchaser in purchase of property of principal through agent, also citing annotation on this point.

Cited in footnotes to *Commercial Bank v. Hurt*, 19 L. R. A. 701, which holds factor has no implied authority to pledge goods for own use; *Milton v. Johnson*, 47 L. R. A. 529, which denies power of subagent to apply proceeds of debt collected, to payment of claim due him from principal agent; *Tomasecek v. Travelers' Ins. Co.* 57 L. R. A. 455, which denies insurance agent's implied authority to accept as payment of premium, agreement to give him credit on account, to be traded out with insured.

Cited in note (52 L. R. A. 792) on liability of bank or other depository, or of drawee for taking deposit of agent, fiduciary, or other representative to pay his own debt.

Annotation in 14 L. R. A. 234, referred to with approval in *Dorrah v. Hill*, 73

Miss. 801, 32 L. R. A. 635, 19 So. 961 (dissenting opinion), majority upholding principal's right to be subrogated to trust deed to agent paid by money procured by loan of principal's funds, to debtor, and discharged by agent.

Distinguished in *Loeb v. Selig*, 120 La. 199, 45 So. 100, where facts were not sufficient to put defendants upon inquiry in dealing with agents; *Interstate Nat. Bank v. Claxton*, 97 Tex. 578, 65 L.R.A. 826, 104 Am. St. Rep. 885, 80 S. W. 604, holding bank paying checks drawn by factors on deposit consisting of funds realized from sale of live stock for their principal not liable for amount of such checks to principal, though it knew factors were insolvent when deposit was made.

Notice of incapacity.

Followed in *Rochester & C. Turnp. Road Co. v. Paviour*, 164 N. Y. 286, 52 L. R. A. 797, 58 N. E. 114, holding payee receiving corporate checks for debt not owed by corporated chargeable with notice of treasurer's lack of authority.

Cited in *Geyser-Marion Gold-Min. Co. v. Stark*, 53 L. R. A. 688, 45 C. C. A. 470, 106 Fed. 503, holding actionable negligence for corporation to transfer stock upon signature of trustee, without inquiry as to assent of beneficiary; *American Preserves Co. v. Columbia Invest. Co.* 7 Misc. 510, 28 N. Y. Supp. 782, holding failure to make inquiries upon receipt of corporate check in payment of manager's stock charges investment company with constructive notice; *First Nat. Bank v. National Broadway Bank*, 156 N. Y. 468, 42 L. R. A. 145, 51 N. E. 398, holding pledgee receiving stock certificates of trust estate chargeable with notice of trust conditions; *Marshall v. de Cordova*, 26 App. Div. 619, 50 N. Y. Supp. 294, holding receipt by brokers of check signed by drawer as trustee, and repayment to trustee, who immediately redeposited proceeds with brokers, sufficient evidence of notice; *Kelsey v. Bank of Mansfield*, 85 App. Div. 336, 83 N. Y. Supp. 281, sustaining receiver's right to recover proceeds of check wrongfully appropriated with knowledge of bank; *Cohnfeld v. Tanenbaum*, 176 N. Y. 130, 98 Am. St. Rep. 653, 68 N. E. 141, holding check drawn by guardian, notice to payee that funds belong to ward; *Re Troy & C. Shirt Co.* 136 Fed. 431, on notice of incapacity of officer or agent to issue paper given by fact it is obligation of corporation made payable to himself; *Squire v. Ordemann*, 194 N. Y. 397, 87 N. E. 435, holding check signed "Estate of A———" with signatures of executors underneath notice it was payable from trust funds; *Ward v. City Trust Co.* 192 N. Y. 69, 84 N. E. 585, reversing 117 App. Div. 148, 102 N. Y. Supp. 50, holding payment of personal debt by check made out to corporation and indorsed for it by debtor as president is notice of apparent misuse of corporate funds; *Havana C. R. Co. v. Knickerbocker Trust Co.* 135 App. Div. 317, 119 N. Y. Supp. 1035, holding trust company which received checks of plaintiff corporation payable to treasurer thereof and signed by such treasurer, and placed amount of checks to credit of treasurer individually, who afterwards checked same out for his own purposes, liable to plaintiff for amount of checks drawn by treasurer upon plaintiff's account; *Manhattan Web Co. v. Aquidneck Nat. Bank*, 133 Fed. 77, holding where treasurer of corporation draws and uses its funds for private purposes in absence of circumstances giving rise to inference of authority to do so, bank is put upon inquiry; *Hazeltine v. Keenan*, 54 W. Va. 603, 102 Am. St. Rep. 953, 46 S. E. 609, holding purchaser put on inquiry by fact note is payable to person as attorney.

Cited in footnote to *Baldwin v. Tucker*, 57 L. R. A. 451, which holds purchaser from agent bound to know latter's lack of authority to take purchase money note payable to himself.

Cited in notes (18 L.R.A. 667) on extent of authority conferred on traveling L.R.A. Au. Vol. II.—73.

salesmen; (20 L.R.A.(N.S.) 355, 367) on circumstances sufficient to put purchaser of negotiable paper on inquiry.

Distinguished in *Cheever v. Pittsburgh, S. & L. E. R. Co.* 150 N. Y. 68, 34 L. R. A. 73, 55 Am. St. Rep. 646, 44 N. E. 701, denying corporate note bearing signature of maker, as president, sufficient to charge bona fide holder with notice of invalidity; *Shaffer v. Bacon*, 35 App. Div. 250, 54 N. Y. Supp. 796, holding executor's knowledge of invalidity of will tendered for probate by attorney insufficient to justify recovery back from attorney money paid for legal services.

Defective service by publication.

Cited in *Farmers' Loan & T. Co. v. Essex*, 66 Kan. 106, 71 Pac. 268, holding judgment rendered upon service by publication against "Farmers' Loan and Trust Company" not binding on such company as trustee.

14 L. R. A. 238, *DOLLARD v. ROBERTS*, 130 N. Y. 269, 29 N. E. 104.

Landlord's liability for injuries.

Cited in *Harris v. Boardman*, 68 App. Div. 439, 73 N. Y. Supp. 963, holding landlord liable to lessee of store for damage caused by bursting of closet used by tenants.

Cited in footnote to *Hart v. Cole*, 16 L. R. A. 557, which holds risk of unsafe outside steps in tenement building assumed by one attending wake.

Distinguished in *Harkin v. Crumby*, 20 Misc. 571, 46 N. Y. Supp. 453, denying recovery from landlord for injury to tenant's caller from slipping on ice; *Schwartz v. Apple*, 21 Misc. 514, 48 N. Y. Supp. 253, denying liability of landlord for injury to tenant from fall of plastering in room under control of tenant.

— From defects of building in his control.

Cited in *Lewin v. Pauli*, 19 Pa. Super. Ct. 450, upholding tenant's right to recover for injuries resulting from defective stairway used in common; *Wilber v. Follansbee*, 97 Wis. 581, 72 N. W. 741, upholding tenant's recovery against landlord for injuries caused by stumbling over rubbish left in hallway by one repairing stairs; *McGinley v. Alliance Trust Co.* 168 Mo. 265, 56 L. R. A. 337, footnote p. 334, 66 S. W. 153, holding lessor of apartment house, retaining control of stairway, liable for injury to tenants from lack of repair of railing; *Muller v. Minken*, 5 Misc. 445, 26 N. Y. Supp. 801, holding failure of landlord to light hall lamp insufficient to create liability to child from falling down stairs; *Canavan v. Stuyvesant*, 7 Misc. 118, 27 N. Y. Supp. 413, holding landlord liable for injury to child falling in open air shaft while playing in yard; *Golob v. Pasinsky*, 72 App. Div. 178, 76 N. Y. Supp. 388, holding that complaint alleging landlord reserved control of ceilings implies no duty to repair; *Capen v. Hall*, 21 R. I. 366, 43 Atl. 847, sustaining demurrer to complaint of tenant's caller for injuries received in hallway, due to insufficient lighting; *Lenz v. Aldrich*, 6 App. Div. 184, 39 N. Y. Supp. 1022 (dissenting opinion), majority denying landlord's liability for injury to tenant's child from falling of decayed clothespole; *Levine v. Baldwin*, 87 App. Div. 154, 84 N. Y. Supp. 92, holding landlord liable for damages due to leak in water pipe; *Golob v. Pasinsky*, 178 N. Y. 461, 70 N. E. 973, holding complaint alleging injuries to tenant from fall of plastering from part of premises under landlord's control not demurrable; *Weingartner v. Pomp*, 10 North. Co. Rep. 147, holding that owner of business building leased to different tenants is liable to one of them for negligence in failing to repair portion of building not demised to him; *Herdts v. Koenig*, 137 Mo. App. 595, 119 S. W. 56, holding landlord under duty of exercising ordinary care to maintain fence reasonably safe for purpose of protection of tenants and their guests from danger of falling into quarry adjacent to yard used in common by tenants; *Whitcomb v.*

Mason, 102 Md. 282, 4 L.R.A.(N.S.) 567, 62 Atl. 749, holding landlord not bound to keep entrances to office building open on Sunday so as to permit removal of desk and large articles of furniture in case of fire threatening building; Schwartz v. Monday, 49 Misc. 528, 97 N. Y. Supp. 978, holding testimony that witness saw slats on roof loose and notified landlord of the fact insufficient to charge landlord with knowledge of particular defective slat which caused injury; landlord's duty to keep roof in reasonably safe condition discharged by having premises including roof and wash deck examined monthly by carpenter; Peters v. Kelly, 129 App. Div. 292, 113 N. Y. Supp. 357, holding landlord retaining control of stairway and landing under duty to exercise reasonable care to keep them in suitable repair for use; Burner v. Higman & S. Co. 127 Iowa, 590, 103 N. W. 802, holding landlord and tenant both liable for injury of person on premises by invitation of tenant through negligence in guarding elevator over which both had partial control.

Annotation cited in *Marcheck v. Klute*, 133 Mo. App. 286, 113 S. W. 654, on duty of landlord to keep in reasonably safe condition for use, parts of premises he retains control of intending them for use by tenants to whom other parts are let.

Cited in footnotes to *Fellows v. Gilhuber*, 17 L. R. A. 578, which holds lessor of hotel not liable for injury to guest by defective awning; *Gleason v. Boehm*, 32 L. R. A. 645, which holds landlord not required to furnish light at night in common halls and stairways of rented buildings; *Railton v. Taylor*, 39 L. R. A. 246, which holds landlord not exempt from liability for damage resulting from negligence in use of heating apparatus remaining under his own control; *Kuhn v. Sol Heavenrich Co.* 60 L. R. A. 585, which denies implied contract obligation of one leasing building in sections, to keep in repair part remaining in his possession.

Cited in notes (15 L. R. A. 162) on liability for injuries caused by absence of fire escapes on buildings; (23 L. R. A. 158) on liability of landlord as to condition of part of premises not controlled by tenant; (34 L. R. A. 832) on landlord's liability for injury to tenant from defect in premises; (1 Brit. Rul. Cas. 110) on landlord's duty to light common hall or stairway; (9 Eng. Rul. Cas. 458; 3 L.R.A.(N.S.) 317) on liability of landlord for injury in common passageway.

Distinguished in *Walsh v. Frey*, 116 App. Div. 528, 101 N. Y. Supp. 774, where tenant while making use of balcony without consent of landlord, was injured by reason of rail giving way; *Rogers v. Sorell*, 14 Manitoba L. Rep. 455, holding landlord not liable to tenant of ground floor for injury to tenant's property caused by rain entering open fanlight at head of stairway where defect existed at time of lease; *Cooper v. Lawson*, 139 Mich. 632, 103 N. W. 168, where damage to tenant's property was caused by fire resulting from explosion of coal gas generated from burning soft-coal soot in inside of chimney which tenant could clean without becoming trespasser.

Notice imputable to principal.

Cited in footnote to *Birmingham Trust & Sav. Co. v. Louisiana Nat. Bank*, 20 L. R. A. 600, which holds cashier's notice imputable to savings company.

Contributory negligence.

Cited in *Kaiser v. Washburn*, 55 App. Div. 162, 66 N. Y. Supp. 764, holding previous knowledge of defective chimney not contributory negligence, as matter of law; *Morrissey v. Smith*, 67 App. Div. 190, 73 N. Y. Supp. 673, holding child injured by falling into hole in street not guilty of negligence, as matter of law; *Wesener v. Smith*, 89 App. Div. 213, 85 N. Y. Supp. 837, holding tenant's previous knowledge of existence of rubbish in yard not proof of negligence barring re-

covery for injuries due to falling over it; *Keating v. Mott*, 92 App. Div. 158, 86 N. Y. Supp. 1041, holding tenant falling by catching foot in holes in oilcloth in dark hallway not guilty of negligence in not remembering location of holes; *Rashkoff v. Erie R. Co.* 141 App. Div. 629, 126 N. Y. Supp. 489, to the point that person is not guilty of contributory negligence in going upon dangerous premises in performance of duty, unless he knew or ought to have known of danger; *Schell v. German Flats*, 54 Misc. 453, 104 N. Y. Supp. 116, holding it a jury question whether wheelman was guilty of contributory negligence who, as result of collision, was thrown over side of bridge where bridge rail was absent; *Bartley v. New York*, 102 App. Div. 27, 92 N. Y. Supp. 82, holding plaintiff not guilty of contributory negligence as matter of law, where upon bidding good bye to friend with whom she was chatting, she turned to go and fell into hole in sidewalk directly behind her; *Wood v. New York C. & H. R. R. Co.* 184 N. Y. 298, 77 N. E. 27 (dissenting opinion), as to what is contributory negligence as matter of law.

Question for jury.

Cited in *Collier v. Collins*, 58 App. Div. 553, 69 N. Y. Supp. 94, holding liability of landlord for injury to tenant from tilting of grating at entrance to yard, question for jury.

14 L. R. A. 243, *WICKS v. MONIHAN*, 130 N. Y. 232, 29 N. E. 139.

Limitation of rights.

Cited in *Sanford v. Commercial Travelers' Mut. Acci. Asso.* 86 Hun, 381, 33 N. Y. Supp. 512, holding provision in insurance certificate for settlement of disputes before referee void, as denying jury trial; *Wells v. Monihan*, 33 N. Y. S. R. 495, 13 N. Y. Supp. 150, denying that revocation of charter affects right to sue on note for money loaned; *State Council J. O. U. A. M. v. Emery*, 219 Pa. 467, 15 L.R.A. (N.S.) 340, 68 Atl. 1023, 12 A. & E. Ann. Cas. 810, holding state council of unincorporated beneficial association which revoked charter of local council is not entitled to fund raised by and for benefit of sick members of local body and for burial expenses, where the state council had nothing to do with control and administration of such fund; *State Council, J. O. U. A. M. v. Enterprise Council No. 6*, 75 N. J. Eq. 252, 72 Atl. 19, holding that state council of beneficiary order cannot by its own act work forfeiture of property of subordinate council's which had remained faithful to national council, from which state council had separated.

Cited in footnote to *Reno Lodge No. 99, I. O. O. F. v. Grand Lodge I. O. O. F.* 26 L. R. A. 98, which denies right to enjoin assessments on subordinate lodges before exercise of right of appeal to grand lodge.

Cited in note (15 L.R.A.(N.S.) 336) on right, upon dissolution of benefit association, or local branch, to funds accumulated by branch solely for benefit of its members.

14 L. R. A. 245, *MUNRO v. TOUSEY*, 129 N. Y. 38, 29 N. E. 9.

Infringement by similarity of name.

Followed without discussion in *Munroe v. Tousey*, 129 N. Y. 619, 29 N. E. 10.

Cited in *Charles S. Higgins Co. v. Higgins Soap Co.* 71 Hun, 104, 24 N. Y. Supp. 801, holding use of word "Higgins" on label of soap manufacturer no bar to use of same word on different label; *Cooke & C. Co. v. Miller*, 169 N. Y. 478, 62 N. E. 582, holding "Favorite Letter and Invoice File" no infringement on label "Improved Favorite Letter and Invoice File, Best;" *Outcault v. Lamar*, 135 App. Div. 118, 119 N. Y. Supp. 930, holding state courts have jurisdiction to protect

trade names and trade marks notwithstanding fact they are used in connection with copyright or patent; *Frohman v. Morris*, 68 Misc. 465, 123 N. Y. Supp. 1090, holding that word "Chantecler" as applied to play will be protected as trade-name.

Cited in footnotes to *Schmidt v. Brieg*, 22 L. R. A. 790, which holds words "Sarsaparilla and Iron" not claimable as trade-mark; *P. C. Wiest Co. v. Weeks*, 34 L. R. A. 172, which holds trade-mark in letters "P. C. W." not infringed by letters "W. H. W."

Cited in note (85 Am. St. Rep. 114) on what words or phrases may constitute a valid trademark.

14 L. R. A. 248, *UNION BLDG. ASSO. v. ROCKFORD INS. CO.* 83 Iowa, 647, 32 Am. St. Rep. 323, 49 N. W. 1032.

Forfeiture of policy.

Cited in *Moore v. Rockford Ins. Co.* 90 Iowa, 638, 57 N. W. 597, holding company not liable on policy when premium unpaid.

Cited in footnotes to *Stewart v. Union Mut. L. Ins. Co.* 42 L. R. A. 147, which holds provision against policy taking effect till first premium paid ineffectual, where premium note given, though unpaid; *McQuillan v. Mutual Reserve Fund Life Asso.* 56 L. R. A. 233, which holds forfeiture of policy waived by retaining payment made after default, without notice of any condition affixed.

Cited in note (18 L.R.A.(N.S.) 204) on effect of breach of insurance policy by mortgagor on rights of mortgagee.

Distinguished in *Trundle v. Providence-Washington Ins. Co.* 54 Mo. App. 195, denying that failure to remit vitiates policy, when insured credited with unearned premium, and no demand made for balance.

Sufficiency of assignment of error.

Cited in *Manatt v. Scott*, 106 Iowa, 209, 68 Am. St. Rep. 293, 76 N. W. 717, holding assignment of error showing wherein court erred in overruling objection sufficient; *Hamilton Buggy Co. v. Iowa Buggy Co.* 88 Iowa, 368, 55 N. W. 496, holding assignments of error failing to suggest wherein verdict contrary to law insufficient.

14 L. R. A. 261, *McKENZIE v. MOORE*, 92 Ky. 216, 17 S. W. 483.

Effect of withdrawal of bill from governor.

Cited in *State ex rel. Dawson v. Sessions*, 84 Kan. 866, 115 Pac. 641, Ann. Cas. 1912 A, 1796, holding that governor has full period of three days to consider bill that has been withdrawn from his hands and again presented to him for approval.

Mandamus as to enactment of statute.

Cited in note (22 L.R.A.(N.S.) 1090) on mandamus to compel delivery of copy or to require promulgation of statute.

14 L. R. A. 253, *STATE ex rel. FLEMING v. CRAWFORD*, 28 Fla. 441, 10 So. 118.

Mandamus.

Cited in *State ex rel. Atty. Gen. v. Johnson*, 30 Fla. 498, 18 L. R. A. 419, 11 So. 845, holding mandamus proper remedy to compel suspended tax collector to deliver tax rolls to successor; *Florida C. & P. R. Co. v. State*, 31 Fla. 504, 20 L. R. A. 421, 34 Am. St. Rep. 30, 13 So. 103, holding mandamus not remedy to compel railroad company to construct station; *Norris v. Cross*, 25 Okla. 311, 105 Pac. 1000, holding that mandamus lies to compel secretary of state to file ref-

erendum petition when presented; *State ex rel. Sunday v. Richards*, 50 Fla. 288, 39 So. 152, denying writ of mandamus to compel tax assessor to assess lands alleged to have been sold to state by illegal tax sales.

Cited in footnote to *State ex rel. Miller v. Barber*, 27 L. R. A. 45, which holds secretary subject to mandamus to compel affixing of great seal to commission used by governor.

Cited in notes (58 L.R.A. 853) on original jurisdiction of court of last resort in mandamus case; (125 Am. St. Rep. 498, 499) on duties, performance of which may be compelled by mandamus; (16 Eng. Rul. Cas. 787) on right to mandamus against a public officer.

Distinguished in *State ex rel. Walker v. Stewart*, 49 Fla. 262, 38 So. 600, holding mandamus will not lie to compel clerk of board of county commissioners to carry out provisions of resolution which board had no authority to pass.

Right of governor to sue in name of state.

Cited in *State ex rel. Haskell v. Huston*, 21 Okla. 789, 97 Pac. 982, holding governor may sue in name of state for writ of prohibition forbidding judge to entertain jurisdiction of suit against foreign corporation and forbidding attorney general to further prosecute same.

14 L. R. A. 264, *CHILDS v. MERRILL*, 63 Vt. 463, 22 Atl. 626.

Actionable fraud.

Cited in *Shanks v. Whitney*, 66 Vt. 410, 29 Atl. 367, holding misrepresentation as to existence of claim and assignment of mortgage actionable; *Phillips v. Hebden*, 28 R. I. 1, 65 Atl. 266, as to whether deceit will lie for obtaining credit by fraudulent representations as to solvency or pecuniary responsibility; *Rowell v. Ricker*, 79 Vt. 555, 66 Atl. 569, holding discharge in bankruptcy no bar to action for obtaining property by fraudulent representations.

Cited in footnotes to *Morrow Shoe Mfg. Co. v. New England Shoe Co.* 24 L. R. A. 417, which holds sale rendered fraudulent by concealment of insolvency without reasonable expectation of paying; *Swift v. Rounds*, 33 L. R. A. 561, which holds purchase of goods on credit with intent not to pay therefor, ground for action of deceit.

14 L. R. A. 268, *CRAWFORDSVILLE v. BRADEN*, 130 Ind. 149, 30 Am. St. Rep. 214, 28 N. E. 849.

Powers of municipal corporation.

Cited in *Champer v. Greencastle*, 138 Ind. 351, 24 L. R. A. 773, 46 Am. St. Rep. 390, 35 N. E. 14, holding ordinance forbidding maintenance of obstruction obscuring view into interior of saloon void; *Adams v. Shelbyville*, 154 Ind. 495, 49 L. R. A. 808, 77 Am. St. Rep. 484, 57 N. E. 114, holding ordinance assessing abutters for improvements purely ornamental unauthorized by statute; *Rosedale v. Hanner*, 157 Ind. 392, 61 N. E. 792, sustaining ordinance prohibiting use of gates swinging outward upon walk; *Rushville v. Rushville Natural Gas Co.* 132 Ind. 581, 15 L. R. A. 324, 28 N. E. 853, upholding right of municipality to regulate gas rate; *Westfield Gas & Mill. Co. v. Mendenhall*, 142 Ind. 543, 41 N. E. 1033, sustaining injunction against gas company which uses streets for pipes, from charging consumer higher rate; *State ex rel. Indianapolis v. Indianapolis Union R. Co.* 160 Ind. 57, 60 L. R. A. 836, 66 N. E. 163, denying power of city of Indianapolis, under charter, to require elevation of railroad tracks; *Asher v. Hutchinson Water, Light & P. Co.* 66 Kan. 500, 61 L. R. A. 58, 71 Pac. 813, holding that city and water company may modify contract by ordinance so as to require removal of water mains from certain streets; *Jack v. Grangeville*, 9 Idaho, 315, 74 Pac. 969, holding contract for water supply for village within powers of village au-

thorities; *Glucose Sugar Ref. Co. v. Marshalltown*, 153 Fed. 624, holding city expressly empowered to construct sewers may borrow money to construct sewerage plant; *Indianapolis v. Consumers' Gas Trust Co.* 75 C. C. A. 442, 144 Fed. 646, holding city authorized to construct and establish gas works impliedly authorized to purchase natural gas plant; *Scott v. Laporte*, 162 Ind. 47, 68 N. E. 278, holding statute giving city power to furnish city with water and to authorize private corporation to construct works, taken in connection with general grants of power, authorizes city to obtain water for its inhabitants.

Cited in footnote to *Rippe v. Becker*, 22 L. R. A. 857, which denies power of state to own and operate grain elevator.

— To operate electric light and water plants.

Cited in *Ellinwood v. Reedsburg*, 91 Wis. 134, 64 N. W. 885, upholding city's right to issue bonds to construct waterworks and electric light plant; *Mitchell v. Negaunee*, 113 Mich. 367, 38 L. R. A. 160, footnote p. 157, 67 Am. St. Rep. 468, 71 N. W. 646, and *State v. Hiawatha*, 53 Kan. 479, 36 Pac. 1119, upholding city's power to purchase electric light plant; *Christensen v. Fremont*, 45 Neb. 164, 63 N. W. 364, and *Rockebrandt v. Madison*, 9 Ind. App. 229, 53 Am. St. Rep. 348, 36 N. E. 444, upholding power of city to contract for materials used in erection of lighting plant; *Seward v. Liberty*, 142 Ind. 552, 42 N. E. 39, denying injunction restraining town from making lighting contract because of high price; *Gosport v. Pritchard*, 156 Ind. 401, 59 N. E. 1058, holding it unnecessary to allege facts showing power of town to make electric light contract, to recover for lighting streets; *Lake County Water & Light Co. v. Walsh*, 160 Ind. 43, 98 Am. St. Rep. 264, 65 N. E. 530, holding purchase of electric light and water plants for public and private use, a public purpose; *Fawcett v. Mt. Airy*, 134 N. C. 129, 63 L. R. A. 872, 101 Am. St. Rep. 825, 45 S. E. 1029, sustaining power of municipal corporation to incur expense of erecting and operating water and electric light plants for public and private use; *Overall v. Madisonville*, 125 Ky. 691, 12 L.R.A. (N.S.) 436, 102 S. W. 278, holding if city is empowered to light its streets and precise method is not expressly provided, it may either hire another to furnish lights, or furnish them itself.

Cited in footnote to *Fawcett v. Mt. Airy*, 63 L.R.A. 870, which upholds power of municipality to procure a plant for lighting its streets.

Cited in note (15 L.R.A.(N.S.) 711) on power of municipality to own electric light plant.

Distinguished in *Mayo v. Washington*, 122 N. C. 11, 40 L. R. A. 165, footnote p. 163, 29 S. E. 343, holding municipality without power to create debt for purchase of electric light plant; *Parker, W. & Co. v. Austin*, 156 Mich. 580, 23 L.R.A. (N.S.) 269, 121 N. W. 322, holding city not authorized to adopt ordinance requiring sealer of weights and measures to test computing devices on scales for determining cost of article weighed.

— To supply private persons.

Cited in *Jacksonville Electric Light Co. v. Jacksonville*, 36 Fla. 267, 30 L. R. A. 544, footnote p. 540, 51 Am. St. Rep. 24, 18 So. 677, upholding city's power to manufacture electric light for private residences and business places; *Mealey v. Hagerstown*, 92 Md. 754, 48 Atl. 746, raising, without deciding, question as to power of city to supply light to private citizens; *Baker v. Cartersville*, 127 Ga. 225, 56 S. E. 249, on right of city to supply its inhabitants with light; *Cary v. Blodgett*, 10 Cal. App. 467, 102 Pac. 668, sustaining right of city to sell electric light to its inhabitants; *Overall v. Madisonville*, 125 Ky. 690, 12 L.R.A. (N.S.) 436, 102 S. W. 278, holding city has power to install light plant to furnish public lighting, and incidentally, to furnish light to its inhabitants.

Cited in footnotes to Opinion of Justices, 15 L. R. A. 809, which holds purchase of fuel by municipality and resale to inhabitants not a public purpose; *Linn v. Chambersburg*, 25 L. R. A. 217, which upholds borough's right to supply electricity for borough and its inhabitants.

Criticized in *Christensen v. Fremont*, 45 Neb. 165, 63 N. W. 364, holding power to provide lights for streets gives city no authority to supply private buildings.

Resolution and ordinance distinguished.

Cited in *McGavock v. Omaha*, 40 Neb. 82, 58 N. W. 543, holding council may act by resolution as to change of street grade, charter not directing course; *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 527, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 286, holding city may contract by resolution for construction of water plant, statute not requiring ordinance.

Cited in footnotes to *Mullan v. State*, 34 L. R. A. 262, which holds concurrent resolution of legislature ratifying appointment by governor not "express authority of law;" *Swindell v. State*, 35 L. R. A. 50, which denies power to repeal by mere majority vote, rule being fixed by ordinance as to requirements in passage of ordinance.

Judicial notice.

Cited in note (124 Am. St. Rep. 32) on facts of which courts will take judicial notice.

14 L. R. A. 273, *LOMBARD v. MORSE*, 155 Mass. 136, 29 N. E. 205.

Parties plaintiff.

Cited in *Burke v. Burke*, 170 Mass. 501, 49 N. E. 753, holding suit to recover possession of land maintainable by infant; *Taylor v. Lovering*, 171 Mass. 305, 50 N. E. 612, holding petition by guardian for writ of error to reverse judgment should be brought in name of ward; *Frankel v. Frankel*, 173 Mass. 216, 73 Am. St. Rep. 266, 53 N. E. 398, holding wife may maintain bill in equity against husband to recover property obtained by fraud; *Brock v. Rogers*, 184 Mass. 546, 69 N. E. 334, denying power of guardian to maintain in own name suit for false representations whereby he was induced to exchange property; *Campbell v. Fichter*, 168 Ind. 652, 81 N. E. 661, 11 A. & E. Ann. Cas. 1089, holding guardian of minor without power to maintain action to contest will; *Mee v. Fay*, 190 Mass. 40, 76 N. E. 229, holding ward alone can maintain action to recover possession of part of ward's estate, held by another; *Nolin v. Pearson*, 191 Mass. 288, 4 L.R.A.(N.S.) 648, 114 Am. St. Rep. 605, 77 N. E. 890, 6 A. & E. Ann. Cas. 658, holding married woman may maintain action for persuading her husband to commit adultery, refuse performance of his marital obligations, and abandon home and wife.

Infant legatee's right to compel transfer.

Cited in *Wirth v. Wirth*, 183 Mass. 532, 67 N. E. 657, dismissing bill to compel trustee to transfer business to infant legatees to be conducted by them or their guardians.

Amendment of pleadings.

Cited in *Bigelow v. Draper*, 6 N. D. 160, 69 N. W. 570, holding action by receiver to condemn property may be amended by inserting name of corporation; *Benson v. San Diego*, 100 Fed. 160, holding substitution of mortgage trustees for bondholders of water company in action to enjoin reduction in rates, no error.

Equitable remedy against spouse.

Cited in *Patterson v. Patterson*, 197 Mass. 117, 83 N. E. 364, holding where husband holds property of wife against her will, equity will grant wife relief on bill brought by her against husband; *Cogswell v. Hall*, 185 Mass. 457, 70 N.

E. 461, holding wife advancing money to husband to purchase real estate, such money not being a gift, may establish resulting trust in her favor by bill in equity against him; *Heckman v. Heckman*, 215 Pa. 207, 114 Am. St. Rep. 953, 64 Atl. 425, holding wife may maintain bill in equity against her husband to cancel deed and for reconveyance where husband wrongfully procures conveyance of her separate property to him through third person; *James v. Gray*, 1 L.R.A.(N.S.) 326, 65 C. C. A. 385, 131 Fed. 405, holding wife who loans to partnership of which her husband is member, money vesting in her in accordance with statute, may prove her claim therefor against partnership estate in bankruptcy.

Cited in notes (73 Am. St. Rep. 271, 276) on suit in equity between husband and wife; (134 Am. St. Rep. 928) on suits in equity against married women.

Distinguished in *Atkins v. Atkins*, 195 Mass. 129, 11 L.R.A.(N.S.) 276, 122 Am. St. Rep. 221, 80 N. E. 806, where husband sought to compel wife to pay money to him or convey, under executory contract which was nullity because between husband and wife.

14 L. R. A. 276, *REDIGAN v. BOSTON & M. R. CO.* 155 Mass. 44, 31 Am. St. Rep. 520, 28 N. E. 1133.

Duty to licensee.

Cited in *Moffatt v. Kenny*, 174 Mass. 316, 54 N. E. 850, denying liability of owner of premises on private way for injuries to one falling into pit; *Pelton v. Schmidt*, 97 Mich. 237, 56 N. W. 689, denying liability to truckman falling through trap door behind desk; *Kennedy v. Chase*, 119 Cal. 642, 63 Am. St. Rep. 153, 52 Pac. 33, denying recovery to one leaving work on lighter, and injured by falling into hatchway while on deck to hang up coat; *Grundel v. Union Iron Works*, 141 Cal. 567, 75 Pac. 184, denying liability for death of one "having business on vessel," and killed by slipping of insecure gang plank; *Stevens v. Nichols*, 155 Mass. 474, 15 L. R. A. 461, 29 N. E. 1150, denying recovery to one injured by driving over curbstone while going through private way; *Cowen v. Kirby*, 180 Mass. 506, 62 N. E. 968, denying liveryman's liability for falling of carriage hoist upon one leaving horse and wagon in stable; *Fairplay Hydraulic Min. Co. v. Weston*, 29 Colo. 128, 67 Pac. 160, holding that bare licensee enters upon premises at his own risk; *Foster v. Portland Gold Min. Co.* 52 C. C. A. 394, 114 Fed. 614, holding mining company erecting dwellings and inviting public to enter liable to one falling down unguarded shaft; *Chavez v. Torlina*, 15 N. M. 67, 99 Pac. 690, holding that owner is not liable to trespasser or licensee for negligence of himself or servants; *New Omaha Thomson-Houston Electric Light Co. v. Anderson*, 78 Neb. 92, 102 N. W. 89, holding firemen had no right to rely on insulation of electric wires near premises where fire occurred; *Monroe v. Atlantic Coast Line R. Co.* 151 N. C. 376, 27 L.R.A.(N.S.) 194, 66 S. E. 315, holding owner of vacant lot not liable to person injured by fall into pit therein, while crossing lot for his own convenience; *Krause v. Lewis*, 144 Mich. 556, 108 N. W. 417, holding verdict for defendant properly instructed in action to recover for injuries received by falling into open area way opening upon platform in alleyway adjoining defendant's premises, where no invitation extended to plaintiff to use platform; *Glaser v. Rothschild*, 106 Mo. App. 428, 80 S. W. 332, holding plaintiff was mere licensee, where in going to toilet in basement of defendant's premises, he fell into open elevator pit, permission to use toilet having been given him at his own request and that defendant owed him no duty to keep premises reasonably safe.

Cited in footnotes to *Gibson v. Leonard*, 17 L. R. A. 588, which holds fire insurance patrolman entering burning building to save property a mere licensee; *Ryer-*

son v. Bathgate, 57 L. R. A. 308, which denies liability of owner for injury to one using premises for purpose not authorized by invitation.

Cited in notes (26 L.R.A. 689) on liability for dangerous condition of private grounds lying open beside highway or frequented path; (17 L.R.A.(N.S.) 921) on duty of owner of premises to protect licensee against hidden dangers; (31 Am. St. Rep. 525) on owner's liability to persons coming on his premises; (31 Am. St. Rep. 713) on nature and revocation of parol licenses.

Distinguished in Herzog v. Hemphill, 7 Cal. App. 119, 93 Pac. 899, holding no cause of action exists against one in possession of premises for death of licensee caused by his falling over unprotected precipice, while undertaking to guide friend to urinal on premises.

— Of railroad company.

Cited in Leonard v. Boston & A. R. Co. 170 Mass. 319, 49 N. E. 621, denying company's liability to one stealing ride, and injured by brakeman's uncoupling cars; Schreiner v. Great Northern R. Co. 86 Minn. 247, 58 L. R. A. 77, 90 N. W. 400, denying company's liability to one walking on track, and injured by being pushed against train by cattle trespassing through failure to build fence; Illinois C. R. Co. v. Arnola, 78 Miss. 788, 84 Am. St. Rep. 645, 29 So. 768, holding that one taking short cut and injured by one painting water tank assumes risk; Manlove v. Cleveland C. C. & St. L. R. Co. 29 Ind. App. 699, 65 N. E. 212, denying railroad company's liability to licensee injured while walking on track used as footway; Lingenfelter v. Baltimore & O. S. W. R. Co. 154 Ind. 53, 55 N. E. 1021, denying company's liability to one falling into pit while crossing right of way; Sullivan v. Boston & A. R. Co. 156 Mass. 379, 31 N. E. 128, denying company's liability for death of boy by contact with electric wires while on roof looking for ball; Matthews v. Seaboard Air Line R. Co. 67 S. C. 510, 65 L. R. A. 292, 46 S. E. 335, holding railroad liable for death of one killed by falling into cut along footpath; Hillman v. Boston Elev. R. Co. 207 Mass. 484, 32 L.R.A.(N.S.) 200, 93 N. E. 653, to the point that mere licensee on tracks of railroad cannot recover simply because servants tolerate practice of public walking on tracks; Baltimore & O. R. Co. v. Miller, 37 App. D. C. 228, holding that person using railroad station platform, which is frequently used by public as pathway is licensee and is entitled to care as such; Means v. Southern California R. Co. 144 Cal. 481, 77 Pac. 1001, 1 A. & E. Ann. Cas. 206, holding no recovery can be had by licensee for personal injuries sustained through bursting of tank of sulphuric acid in freight house of railroad company and citing annotation also on this point; Chicago & W. I. R. Co. v. Gardanier, 116 Ill. App. 623, holding railroad company, lessor of building, not liable to plaintiff injured by having bucket drop upon her from building, where declaration showed no duty owed by company to plaintiff; Creeden v. Boston & M. R. Co. 193 Mass. 284, 79 N. E. 344, 9 A. & E. Ann. Cas. 1121, holding railroad company not liable for causing death of officer, who boarded train for purpose of apprehending persons suspected of being criminals, and, upon leaving train, walked upon defective bridge, whence he was thrown to street below and killed; Burke v. Boston & M. R. Co. 195 Mass. 183, 80 N. E. 695, holding workman engaged in repair of building of lessee of railroad company, who stood on staging near track, whence he was thrown by moving car and injured, mere licensee of company at best; Quantz v. Southern R. Co. 137 N. C. 139, 49 S. E. 79, holding person, who in passing over open space near depot on railroad company's right of way, used by public with company's permission, steps aside and falls through door, cannot recover from railroad company.

Cited in footnotes to Manning v. Chesapeake & O. R. Co. 16 L. R. A. 271, which holds one making friendly call on telegraph operator a mere voluntary licensee;

Benson v. Baltimore Traction Co. 20 L. R. A. 714, which denies recovery to student falling into uncovered vat, while class inspecting power house under permission; *Herrman v. Great Northern R. Co.* 57 L. R. A. 390, which holds railroad liable for injury to passenger from unsafe condition of depot premises leased of union depot company or its receiver.

— **Of manufacturer.**

Cited in *Buch v. Amory Mfg. Co.* 69 N. H. 260, 76 Am. St. Rep. 163, 44 Atl. 809, holding manufacturer owes no duty to child injured by machinery while in mill at request of workman; *Berlin Mills Co. v. Croteau*, 32 C. C. A. 129, 50 U. S. App. 419, 88 Fed. 862, denying recovery to one entering mill to collect debt and crushed between lumber trucks; *Blackstone v. Chelmsford Foundry Co.* 170 Mass. 322, 49 N. E. 635, denying builder's liability for injury to servant of owner slipping on uncompleted stairway; *Bowler v. Pacific Mills*, 200 Mass. 366, 21 L.R.A.(N.S.) 978, 128 Am. St. Rep. 432, 86 N. E. 767, holding members of public, while on private way, much used by public, have only rights of licensees; *Hutchinson v. Cleveland-Cliffs Iron Co.* 141 Mich. 349, 104 N. W. 698, holding workman engaged in covering pipes in one part of mill, not justified in going to find foreman in another part, where he fell through open hatchway and was injured.

Question for jury.

Cited in *Keene v. New England Mut. Acci. Asso.* 161 Mass. 150, 36 N. E. 891, holding it question for jury whether crossing railroad at point used by public without opposition, "voluntary exposure to unnecessary danger," defeating policy.

Trespasser.

Cited in *Driscoll v. Clark*, 32 Mont. 189, 80 Pac. 1, holding one operating unguarded endless chain not liable for injury of child trespasser sustained by being caught therein; *Wheeling & L. E. R. Co. v. Harvey*, 77 Ohio St. 253, 19 L.R.A.(N.S.) 1150, 122 Am. St. Rep. 503, 83 N. E. 66, 11 A. & E. Ann. Cas. 981, holding railroad company not liable for injury of boy sustained while playing at turntable with companions; *Davis v. Joslin Mfg. Co.* 29 R. I. 108, 59 Atl. 65, denying recovery for death of child trespasser drowned in open trench near defendant's mill, crossed by bridge, led up to by path used by defendant's employees and others in connection with defendant's business.

View by jury.

Approved in *Davis v. Joslin Mfg. Co.* 29 R. I. 109, 59 Atl. 65 holding question of defendant's negligence may be raised though jury viewed premises.

14 L. R. A. 278, *NEW YORK L. INS. CO. v. IRELAND (Tex.)* 17 S. W. 617.

Interest of beneficiary in insurance policy.

Cited in *Perry v. Tweedy*, 128 Ga. 403, 119 Am. St. Rep. 393, 57 S. E. 782, 11 A. & E. Ann. Cas. 46, holding where wife is beneficiary of ordinary life policy on life of husband, and dies before husband, her interest constitutes part of her estate; *Haerther v. Mohr*, 114 Iowa, 638, 87 N. W. 692, holding beneficiary's interest in endowment policy is vested and does not cease at beneficiary's death before that of assured where latter's death occurs before policy becomes payable under endowment clause.

— **Distribution.**

Cited in *Re Crane*, 47 La. Ann. 903, 17 So. 431, holding where policy is payable to wife and children, all take equal shares of proceeds; *United States Casualty Co. v. Kacer*, 169 Mo. 312, 58 L.R.A. 440, 92 Am. St. Rep. 461, 69 S. W. 370, on distribution of property where persons entitled thereto in alternative perish in common disaster.

14 L. R. A. 281, *EAST TENNESSEE, V. & G. R. CO. v. MARKENS*, 88 Ga. 60, 13 S. E. 855.

Imputing negligence.

Cited in *Roach v. Western & A. R. Co.* 93 Ga. 788, 21 S. E. 67, holding negligence of driver of vehicle causing collision with locomotive not imputable to one riding by invitation; *Atlanta & C. Air-Line R. Co. v. Gravitt*, 93 Ga. 389, 26 L. R. A. 560, 44 Am. St. Rep. 145, 20 S. E. 550, holding husband's negligence in intrusting child to care of incompetent servant not imputable to wife, by virtue of conjugal relation; *Field v. Spokane, P. & S. R. Co.* 64 Wash. 450, 117 Pac. 228, holding that negligence of stage driver in failing to stop, look and listen at railroad crossing cannot be imputed to passengers; *Sluder v. St. Louis Transit Co.* 189 Mo. 143, 5 L.R.A.(N.S.) 210, 88 S. W. 648, holding in action for personal injuries caused by collision of street car with livery carriage in which plaintiff was riding, in absence of evidence tending to show contributory negligence, tender of such issue to jury in any other way than by instruction driver's negligence not imputable to plaintiff was properly declined.

Cited in footnotes to *Illinois C. R. Co. v. McLeod*, 52 L. R. A. 954, which holds hired of team and driver bound to check latter's attempt to cross track without stopping and listening for train; *Western & A. R. Co. v. Ferguson*, 54 L. R. A. 803, which holds failure to look when within 30 feet of track not prevent recovery.

Cited in notes (8 L.R.A.(N.S.) 624) on imputed negligence of driver to passenger; (110 Am. St. Rep. 279, 290, 294) on imputed negligence.

Duty of railroad company upon approaching crossing.

Cited in *Central R. Co. v. Hall*, 109 Ga. 369, 34 S. E. 605, holding charge that railroad company bound to check speed of train when near crossing, no error; *Atlantic Coast Line R. Co. v. Locklear*, 9 Ga. App. 345, 71 S. E. 683, holding that railroad was negligent as matter of law if speed of train was not checked upon approaching city street so that train might be stopped if person was on crossing; *Bryson v. Southern R. Co.* 3 Ga. App. 409, 59 S. E. 1124, on application of crossing statute.

Question for jury.

Cited in footnote to *Howe v. Minneapolis, St. P. & S. Ste. M. R. Co.* 30 L. R. A. 684, which holds negligence of one riding with another when injured at railroad crossing, question for jury.

Necessary legal conclusions as questions of law.

Cited in *Western U. Teleg. Co. v. Harris*, 6 Ga. App. 269, 64 S. E. 1123, holding statement of necessary legal conclusion arising from undisputed facts not erroneous; *Southern R. Co. v. Chitwood*, 119 Ga. 29, 45 So. 706, holding where only issue was as to whether stock were killed at night or in morning, jury were properly instructed plaintiff was entitled to recover if killing took place in morning, such statement being one of necessary legal conclusion; *Shields v. Georgia R. & Electric Co.* 1 Ga. App. 175, 57 S. E. 980, holding consideration of amendment alleging acts of negligence other than those set up in declaration properly withdrawn from jury, where amendment was entirely unsupported by evidence, and negligence charged therein had nothing to do with causing injuries.

14 L. R. A. 283, *WRIGHT v. SUPREME COMMANDERY, K. G. R.* 87 Ga. 426, 13 S. E. 564.

Reinstatement of policy.

Cited in *Beatty v. Mutual Reserve Fund Life Asso.* 21 C. C. A. 235, 44 U. S.

App. 527, 75 Fed. 73, holding levy of assessment with knowledge of prior delinquency waives forfeiture of policy.

Cited in footnotes to *Carlson v. Supreme Council, A. L. of H.* 35 L. R. A. 643, which holds right to reinstatement after forfeiture by nonpayment lost by member's death without payment, during time allowed for reinstatement; *John Hancock Mut. L. Ins. Co. v. Dick*, 43 L. R. A. 56d, which holds suit for cancelation of receipt renewing lapsed life policy, obtained by fraud, within jurisdiction of equity.

Cited in notes (52 Am. St. Rep. 573) on preservation of validity of benefit certificate by payment of assessment after death of member; (2 Brit. Rul. Cas. 193) on validity of payment of premium or assessment during agreed extension but after insured's death.

14 L. R. A. 285, *PEOPLE v. CUMMINGS*, 88 Mich. 249, 50 N. W. 310.

Statutes limiting governor's powers.

Cited in *Rich v. Chamberlain*, 104 Mich. 441, 27 L. R. A. 575, footnote p. 573, 62 N. W. 584, holding power of governor over pardons not infringed by statute creating board to investigate facts stated in petitions; *State v. Page*, 80 Kan. 667, 57 Pac. 514, holding statute conferring on prison board right to grant paroles and absolute releases to offenders serving indefinite terms constitutional; *Miller v. State*, 149 Ind. 629, 40 L. R. A. 115, footnote p. 109, 49 N. E. 894 (dissenting opinion), majority upholding statute for indiscriminate sentences of criminals; *Re Convicts*, 73 Vt. 425, 56 L. R. A. 661, footnote p. 658, 51 Atl. 10, holding statute empowering board to grant parole after expiration of minimum sentence unconstitutional; *Ellis v. Daboll*, 90 Mich. 273, 51 N. W. 280, holding order in habeas corpus proceedings to discharge prisoner not reviewable when judge has jurisdiction; *Re Pikulik*, 81 Wis. 159, 51 N. W. 261, raising, without deciding, question as to validity of statute conferring judicial powers upon state board; *Re Ridley*, 3 Okla. Crim. Rep. 356, 26 L.R.A.(N.S.) 112, 106 Pac. 549, holding act creating board of pardons unconstitutional as being an attempt to confer pardoning power on state officers other than governor.

Cited in footnotes to *Senate of Happy Home Club v. Alpena County*, 23 L. R. A. 144, which holds "jag cure act" unconstitutional; *Territory v. Richardson*, 49 L. R. A. 440, which holds invalid, statutory limitations on pardoning power of governor.

Cited in note (34 L. R. A. 254) on legislative power to grant pardon or amnesty.

Criticized in *Fuller v. State*, 122 Ala. 41, 45 L. R. A. 502, footnote p. 502, 82 Am. St. Rep. 17, 26 So. 146, upholding statute authorizing summary arrest and remandment to prison, of convict violating parole.

Disapproved in effect in *Murphy v. Com.* 172 Mass. 275, 43 L. R. A. 159, 70 Am. St. Rep. 266, 52 N. E. 505, holding determination of term of imprisonment not taken from courts, or uncertain, when left to prison board.

Modification of sentence.

Cited in *Re Prout*, 12 Idaho, 501, 5 L.R.A.(N.S.) 1067, 86 Pac. 275, 10 A. & E. Ann. Cas. 199, holding prisoner not detainable after expiration of sentence, though he has violated his parole during time of his release thereon; *State ex rel. Davis v. Hunter*, 124 Iowa, 572, 104 Am. St. Rep. 361, 100 N. W. 510, on course to be pursued when prisoner conditionally pardoned is guilty of breach of conditions imposed; *Fite v. State*, 114 Tenn. 653, 1 L.R.A.(N.S.) 523, 88 S. W. 941, 4 A. & E. Ann. Cas. 1108, holding law authorizing workhouse commissioners to deduct for good behavior portion of time of sentence imposed or portion of

fine, unconstitutional because providing no specific credits and therefore being delegation of legislative power; Opinion of the Justices, 201 Mass. 812, 24 L.R.A. (N.S.) 802, 89 N. E. 174, holding governor cannot, by warrant issued in response to demand from another state, take prisoner upon whom sentence is being executed in state prison, out of custody of law of state and send him away to another state; *Re Kenney*, 147 Mich. 680, 111 N. W. 189, on imposition of sentence for longer time than court is authorized to impose.

Cited in footnotes to *State ex rel. O'Connor v. Wolfer*, 19 L. R. A. 783, which denies right to rearrest convict conditionally pardoned; *People ex rel. Bradley v. Illinois State Reformatory*, 23 L. R. A. 139, which holds lawful, committal of infants to reformatory with maximum sentence, subject to reduction; *People ex rel. Forsyth v. Monroe County Court*, 23 L. R. A. 856, which holds valid, act authorizing court to suspend sentence; *Re Webb*, 27 L. R. A. 356, which denies authority to suspend sentence already pronounced; *State v. Crook*, 29 L. R. A. 260, which holds power of court after suspension of sentence not lost by committing for refusal to pay costs as ordered; *Ex parte Hawkins*, 30 L. R. A. 736, which holds pardon on condition of convict leaving state forever not prohibited by provision against exile; *Weber v. State*, 41 L. R. A. 472, which sustains power of court to suspend sentence and set aside suspension at any time during term; *Neal v. State*, 42 L. R. A. 190, which holds void, attempt to suspend execution of sentence after pronouncing it; *Miller v. Evans*, 56 L. R. A. 101, which denies defendant's right to relief for failure to execute mittimus under judgment sentencing to imprisonment in failure to pay fine, until lapse of time of imprisonment; *People ex rel. Boenert v. Barrett*, 63 L.R.A. 82, which denies power of court indefinitely to suspend sentence after conviction or to release on a parol.

Cited in notes (34 L.R.A. 510) on reduction of prisoner's term by allowance for good behavior; (1 L.R.A.(N.S.) 522) on constitutionality of statutory credits for good behavior.

Indeterminate sentence.

Cited in *Re Lambrecht*, 137 Mich. 456, 100 N. W. 606, affirming, in habeas corpus proceedings, sentence for minimum term, though trial court erroneously imposed sentence under indeterminate sentence law taking effect subsequent to commission of offense; *Re Campbell*, 138 Mich. 600, 101 N. W. 826, holding that under indeterminate sentence law of 1903, court is not required to fix maximum sentence where statute fixes maximum term; *People v. Cook*, 147 Mich. 131, 110 N. W. 514, on constitutionality of indeterminate sentence law.

Distinguished in *Re Manaca*, 146 Mich. 702, 110 N. W. 75, holding indeterminate sentence law constitutional under provision authorizing passage of such law; *Ughbanks v. Armstrong*, 208 U. S. 485, 52 L. ed. 583, 28 Sup. Ct. Rep. 372, holding Michigan indeterminate sentence law of 1903 not to violate Federal constitution.

Disapproved in *People ex rel. Bettram v. Flynn*, 55 Misc. 24, 105 N. Y. Supp. 551; *People v. Madden*, 120 App. Div. 344, 105 N. Y. Supp. 554,—holding statute authorizing sentence of prisoner without fixing term of imprisonment constitutional.

14 L. R. A. 293, *JONES v. KNAPPEN*, 63 Vt. 391, 22 Atl. 630.

Vested remainder.

Cited in *Burton v. Provost*, 75 Vt. 201, 54 Atl. 189, holding vested remainder created under devise to widow for life, then "reversionary interest" to be divided among daughters; *Warner v. Bronson*, 81 Vt. 130, 69 Atl. 656, holding title to

estate vested in devisee upon death of testator where devised upon condition subsequent.

Cited in notes (33 L.R.A.(N.S.) 18, 28) on time for ascertaining who take under gift over to testator's "heirs," "next of kin," etc.; (10 Eng. Rul. Cas. 820) as to when remainder is vested.

Effect of widow's election to take against will.

Cited in *Latta v. Brown*, 96 Tenn. 348, 31 L. R. A. 842, footnote p. 840, 34 S. W. 417, upholding right of disappointed devisee to take life estate devised to widow, who elected to take dower instead; *Shreve v. Shreve*, 176 Mass. 459, 57 N. E. 686, holding equity will sequester portion of income refused by widow, for benefit of disappointed legatee; *Pittman v. Pittman*, 81 Kan. 648, 27 L.R.A.(N.S.) 607, 107 Pac. 235, on carrying out intention of testator as nearly as possible notwithstanding widow's election to take under law of descents and distributions, also referring to annotation on this point.

Cited in notes (18 L.R.A.(N.S.) 276, 277) on acceleration of gift over by widow's election against will giving life estate; (27 L.R.A.(N.S.) 603) on effect of spouse's election to take against, upon rest of, will.

Early vesting of estates.

Cited in *Harris v. Harris*, 82 Vt. 205, 72 Atl. 912, holding rule that law favors early vesting of estates is subordinate only to rule that intention of testator is to govern.

14 L. R. A. 297, WILHELM v. EAVES, 21 Or. 194, 27 Pac. 1053.

Liquidated damages or penalty.

Cited in *Kelly v. Fejervary*, 111 Iowa, 697, 83 N. W. 791, holding burden on contractor to show penalty intended in contract providing for daily forfeit as liquidated damages for noncompletion of building; *Sun Printing & Pub. Asso. v. Moore*, 183 U. S. 667, 46 L. ed. 380, 22 Sup. Ct. Rep. 240, holding stipulation of sum to be paid for nonperformance of covenant to return boat conclusive on parties; *Chicago House-Wrecking Co. v. United States*, 53 L. R. A. 127, footnote, p. 122, 45 C. C. A. 351, 106 Fed. 393, holding stipulation for sum as damages for failure to remove building, penalty, when actual damages easily assessable; *Bilz v. Powell*, 50 Colo. 488, 38 L.R.A.(N.S.) 851, 117 Pac. 344, holding that sum to be reserved from commissions of sales agent and retained by principal on default of agent will be regarded as liquidated damages; *Saunders v. McKim*, 138 Iowa, 124, 115 N. W. 917, holding recital in bond that sum therein named is agreed upon as liquidated damages is not necessarily controlling as to its legal effect; *Mercia v. Burget*, 36 Ind. App. 463, 75 N. E. 1083, holding whether sum named is liquidated damages or penalty may be decided by determining intention of partner from whole case and tenor of contract, aided by principles by which such intention is inferred; *Brunswick v. Aetna Indemnity Co.* 4 Ga. App. 726, 62 S. E. 475, holding bond whereby makers stand bound in sum named unless principal therein shall perform each and every covenant assumed, provides penalty.

Cited in footnotes to *Wallis Iron Works v. Monmouth Park Asso.* 19 L. R. A. 456, which holds as liquidated damages amount expressly fixed as damages for default in completing grand stand; *Kilbourne v. Burt & B. Lumber Co.* 55 L. R. A. 275, which holds provision for retaining 15 cents per hundred feet for logs not delivered by specified date, one for liquidated damages; *Salem v. Anson*, 56 L. R. A. 169, which holds stipulated amount to be paid to city for failure to complete electric light plant within specified time, liquidated damages; *Krutz v. Robbins*, 28 L. R. A. 676, which holds agreement for greater rate of interest on default

in paying principal, interest, etc., a penalty; *Meyer v. Estes*, 32 L. R. A. 233, which holds penalty provided for by contract that purchaser wrongfully using electrotype plates shall pay fine of ten times their price; *State v. Larson*, 54 L. R. A. 487, which holds amount of liquor license bond, a penalty.

Cited in notes (108 Am. St. Rep. 57) on agreements purporting to liquidate damages; (6 Eng. Rul. Cas. 561) as to when stipulation in contract is for a penalty and when for liquidated damages.

14 L. R. A. 300, *CADWALADER v. BAILEY*, 17 R. I. 495, 23 Atl. 20.

Interest in land.

Cited in *McCotter v. New Shoreham*, 21 R. I. 47, 41 Atl. 572, holding assignee of grant conveying right to operate mines entitled to be heard on question of laying out highway; *Detroit Citizens' Street R. Co. v. Detroit*, 124 Mich. 453, 83 N. W. 104, holding right to operate street railway in highway, interest in land; *Moline Water Power Co. v. Cox*, 252 Ill. 356, 96 N. E. 1044, to the point that profit prendre in interest is land itself; *Whittelsey v. Porter*, 82 Conn. 104, 72 Atl. 593, holding no interest in land carried by attempted assignments of water-privilege; *Blanchard v. Maxson*, 84 Conn. 433, 80 Atl. 206, holding that right of way will never be presumed to be personal when it can fairly be construed to be appurtenant to land; *Smith v. Garbe*, 86 Neb. 96, 124 N. W. 921, holding easement in grass is not presumed where grantor and grantee both know lands are to be used as necessary appurtenance to land and mill to which it is contiguous.

Cited in footnote to *Mitchell v. D'Olier*, 59 L. R. A. 949, which holds rights and privileges in waters of lake pass under deed as appurtenant to upland, and not in gross.

Cited in notes (136 Am. St. Rep. 683, 685) on creation and conveyance of easements appurtenant; (10 Eng. Rul. Cas. 15) on right to claim easement only as accessory to, and for benefit of, a tenant.

Extinguishment of easement.

Cited in *Baker v. Kenney*, 145 Iowa, 643, 139 Am. St. Rep. 456, 124 N. W. 901, to the point that restriction on building to obstruct view of sea from certain premises is extinguished if severed from premises for benefit of which it was made.

14 L. R. A. 305, *WIMBERLEY v. MAYBERRY*, 94 Ala. 240, 10 So. 157.

Priority of liens.

Cited in *Christian & C. Grocery Co. v. Kling*, 121 Ala. 295, 25 So. 629, upholding right of material man to subject to lien, improvements upon property after mortgage; *Church v. Smithea*, 4 Colo. App. 177, 35 Pac. 267, holding lien for construction of building on unimproved property superior, as to structure, to prior trust deed; *Raisin Fertilizer Co. v. Bell*, 107 Ala. 264, 18 So. 168, holding creditor with judgment subsequent to mortgage entitled to decree of sale, applying surplus on judgment; *Threefoot Bros. v. Hillman*, 130 Ala. 256, 89 Am. St. Rep. 39, 30 So. 513, holding junior mortgagor cannot enforce senior mortgage to pay lien with surplus, till maturity of debt; *De La Vergne Refrigerating Mach. Co. v. Montgomery Brewing Co.* 6 C. C. A. 275, 13 U. S. App. 465, 57 Fed. 114, holding failure to make all lienors parties to foreclosure of mechanic's lien leaves question of priority undetermined; *Real Estate Invest. Co. v. Haseltine*, 53 Mo. App. 318, holding failure to make prior mortgagee party to foreclosure of mechanic's lien makes judgment prima facie evidence as to priority; *Climax Lumber Co. v. Bay City Mach. Works*, 163 Ala. 656, 50 So. 935, holding where increased value of property as result of materials furnished and work done by lienor exceeds

amount due lienor, his lien is, to that extent, prior to encumbrance of mortgage outstanding when lien was created; *Graham v. Magann Fawke Lumber Co.* 118 Ky. 195, 80 S. W. 799, 4 A. & E. Ann. Cas. 1026, on validity of statute securing to employes of manufacturing establishments liens for wages superior to prior mortgage liens, when such liens are created subsequent to enactment of statute.

Cited in footnotes to *Miller v. Stoddard*, 16 L. R. A. 288, which holds mechanic's lien inferior to prior unrecorded mortgage; *Green v. Williams*, 19 L. R. A. 478, which holds that purchaser takes premises subject to lien subsequently filed within time allowed; *Bell v. Cassem*, 29 L. R. A. 571, which holds lien of judgment under dramsshop act inferior to pre-existing mortgage; *Oriental Hotel Co. v. Griffiths*, 30 L. R. A. 765, which holds inception of liens is time to which they relate in giving them effect as against mortgage; *Fisher v. Wineman*, 52 L. R. A. 192, which holds void, judgment giving preference to labor debt over pre-existing lien without making lienor party; *Kirkman v. Bird*, 58 L. R. A. 670, which sustains, as to prior obligations, statute exempting wages for sixty days preceding levy; *St. Mary's Mach. Co. v. National Supply Co.* 64 L.R.A. 845, which holds that claims for labor do not take precedence of lien of chattel mortgage on appointment of receiver who took possession after condition broken.

Distinguished in *Spengler v. Stiles-Tull Lumber Co.* 94 Miss. 812, 48 So. 966, holding where no lien is given materialman by statute right of assignee of building contractor under assignment by latter of amount due him from owner of building is superior to that of materialman acquired after the assignment.

Disapproved in effect in *James River Lumber Co. v. Danner*, 3 N. D. 475, 57 N. W. 343, holding mechanic's lien for repairs subject to prior recorded mortgage.

Adjustment of priorities and equities.

Cited in *Anniston Pipe Works v. Williams*, 106 Ala. 335, 54 Am. St. Rep. 51, 18 So. 111, holding equity will annul deed and restore property to owner, after void sale by sheriff; *Enslin v. Wheeler*, 98 Ala. 206, 13 So. 473, holding equity will enforce lien of judgment when court of law without power; *Birmingham Bldg. & L. Asso. v. May & T. Hardware Co.* 99 Ala. 278, 13 So. 612, holding material man and mortgagee may come into equity to determine priority of claims; *Sheffield City Co. v. Tradesmans Nat. Bank*, 131 Ala. 188, 32 So. 598, holding lien conferred by statute upon purchaser at tax sale exists only for taxes of year property assessed; *Randolph v. Builders & Painters Supply Co.* 106 Ala. 507, 17 So. 721, holding unconstitutional, law conferring rights in body of act not suggested by title; *Birmingham Bldg. & L. Asso. v. Boggs*, 116 Ala. 590, 67 Am. St. Rep. 147, 22 So. 852, raising, without deciding, question as to right to equitable relief.

Cited in footnotes to *International Bldg. & L. Asso. v. Hardy*, 24 L. R. A. 284, which denies legislative power to change remedy for enforcing trust deed; *Jones v. German Ins. Co.* 46 L. R. A. 860, which sustains statute shortening time of insurance company's immunity from suit, without extending period of limitations.

"Improvements."

Cited in *Douglaston Realty Co. v. Hess*, 124 App. Div. 509, 108 N. Y. Supp. 1036, construing word "improvements" in lease as meaning changes or betterments in existing building or structure demised.

Statutory liens.

Cited in *Leahart v. Deedmeyer*, 158 Ala. 299, 48 So. 371, holding attorney's lien on cause given by statute inapplicable to causes of action in progress when statute became effective; *Ward v. Yarnelle*, 173 Ind. 551, 91 N. E. 7, holding that object of mechanics' lien statutes is to place all claimants to property on equal basis.

Cited in footnote to *Miners' & Merchants' Bank v. Snyder*, 68 L.R.A. 312, which holds corporate creditor's contract rights not impaired by statute requiring all creditors to unite in one suit against all stockholders for equitable distribution of liability fund among creditors.

14 L. R. A. 317, *KIRBY v. FOSTER*, 17 R. I. 437, 22 Atl. 1111.

Right to retake property.

Cited in *Stone v. Corcoran*, 17 R. I. 759, 24 Atl. 781, holding wrongful taking and fresh pursuit necessary to warrant recapture of horse by force; *Miller-Brent Lumber Co. v. Stewart*, 166 Ala. 665, 51 So. 943, 21 Ann. Cas. 1149, holding that one entitled to right of way across another's is not authorized to enforce right by assault and battery; *Birmingham R. Light & P. Co. v. Norris*, 2 Ala. App. 613, 56 So. 739, holding that assault upon street car conductor by superior officer is not justified by fact that conductor failed to ring up fares; *Stanley v. Payne*, 78 Vt. 240, 3 L.R.A.(N.S.) 255, 112 Am. St. Rep. 911, 62 Atl. 495, 6 A. & E. Ann. Cas. 501, holding owner of property not justified in using force to obtain it from one holding it because of doubt as to who is real owner.

Cited in footnote to *State v. Black*, 14 L. R. A. 205, which holds assault on pound keeper not justified by his retaining animals taken under illegal ordinance.

Cited in note (3 L.R.A.(N.S.) 254) on right to use force to recover possession of personalty.

14 L. R. A. 320, *JANIN v. LONDON & S. F. BANK*, 92 Cal. 14, 27 Am. St. Rep. 82, 27 Pac. 1100.

Relation of bank to depositor.

Cited in *Smith's Cash Store v. First Nat. Bank*, 149 Cal. 34, 5 L.R.A.(N.S.) 872, 84 Pac. 663, holding relation between general depositor and bank in which deposit is made is that of debtor and creditor.

Cited in notes (33 Am. St. Rep. 226) on relation of bank to depositor; (86 Am. St. Rep. 777) on title of bank to money deposited with or collected by it.

Duty as to checks.

Cited in *People v. Wilson*, 117 Cal. 243, 49 Pac. 135, and *State v. Franklin County Sav. Bank & T. Co.* 74 Vt. 255, 52 Atl. 1069, holding deposit of money in bank implies promise to repay as demanded by depositor's checks; *Garthwaite v. Bank of Tulare*, 134 Cal. 241, 66 Pac. 326, holding that payment of check upon forged indorsement gives drawee no right to retain same or demand reimbursement from purchaser; *Pratt v. Union Nat. Bank*, 79 N. J. L. 122, 75 Atl. 313, holding that depositor's delay in giving notice to bank of forged indorsement of check will not be defense, unless bank was injured by delay; *Pullen v. Placer County Bank*, 138 Cal. 178, 94 Am. St. Rep. 19, 71 Pac. 83 (dissenting opinion), on rights and duties of bank as to checks by its depositor; *Heaton v. Holmes*, 97 Cal. 213, 31 Pac. 1131, holding bank which pays check upon forged indorsement of payee has no right to charge depositor's account with amount thereof; *First Nat. Bank v. Bremer*, 7 Ind. App. 688, 52 Am. St. Rep. 461, 34 N. E. 1012, holding bank paying its certificates of deposit upon forged indorsements of depositor, from whom they were stolen, is still liable to depositor for its debt to him though certificates pass through hands of other banks before reaching issuing bank; *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 164, 114 Am. St. Rep. 595, 77 N. E. 693, holding depositor not bound to investigate to see whether indorsements are forgeries upon return of pass books with checks; also that delay in giving notice of forgery after its discovery cannot be used as estoppel against depositor by bank, without proof of injury by delay; *Jordan Marsh Co. v.*

National Shawmut Bank, 201 Mass. 408, 22 L.R.A.(N.S.) 254, 87 N. E. 740, holding only negligence of depositor which is effectual as defence of unauthorized payment of check by banker is negligence which is direct and proximate cause of such payment; also discussing duty of depositor as to examination of account when checks are returned to him with account stated; **Devine v. Bank of Baldwin**, 91 Wis. 74, 64 N. W. 589, holding whether holder of certificate of deposit upon which bank makes unauthorized payment is negligent in not making such payment known to bank is mixed question of law and fact.

Cited in footnote to **Iron City Nat. Bank v. Ft. Pitt Nat. Bank**, 23 L. R. A. 615, which denies right of recovery by payer of forged check.

Cited in notes (27 L.R.A. 427) on duty of depositor as to forged checks charged to him by bank; (20 L.R.A.(N.S.) 80) on loss or prejudice from negligent failure to give prompt notice of forgery of check as condition of bank's exoneration from liability.

Sufficiency of evidence.

Cited in **Re Nelson**, 132 Cal. 194, 64 Pac. 294, holding instruction as to undue influence properly refused when evidence insufficient; **Goldstone v. Merchants' Ice & Cold Storage Co.** 123 Cal. 627, 56 Pac. 776, holding nonsuit error, when evidence creates presumption sufficient to prove case; **Davis v. Pacific Teleph. & Teleg. Co.** 127 Cal. 320, 57 Pac. 764, holding discharge of prisoner in police court for wilfully cutting telegraph wires insufficient to establish want of probable cause; **Gwin v. Gwin**, 5 Idaho, 291, 48 Pac. 295, holding instruction that testator labored under delusion, error, when no evidence to that effect; **Re Daly**, 15 Cal. App. 331, 114 Pac. 789, holding that if plaintiff's evidence makes out prima facie case, motion for nonsuit at close of his evidence should be denied; **Hercules Oil Ref. Co. v. Hocknell**, 5 Cal. App. 707, 91 Pac. 341, holding evidence insufficient to show misappropriation by president of corporation of moneys belonging to it; **Re Calkins**, 112 Cal. 306, 44 Pac. 577, holding instruction erroneous which was inapplicable to the evidence and which in effect, told jury they might find will was executed by reason of undue influence, though there was no direct evidence of the fact and positive evidence to contrary; **Devine v. Bank of Baldwin**, 91 Wis. 75, 64 N. W. 589, holding bank relying upon negligence of holder of certificate of deposit in not notifying it of improper payment thereon as defence to such payment cannot make out its case by mere possibility, conjecture or surmise that it was prejudiced by such failure to notify; **Non-Refillable Bottle Co. v. Robertson**, 8 Cal. App. 105, 96 Pac. 324; **Union Ice Co. v. Doyle**, 6 Cal. App. 294, 92 Pac. 112,—holding nonsuit properly denied where prima facie case in support of material allegations of complaint made out; **Archibald Estate v. Matteson**, 5 Cal. App. 445, 90 Pac. 723, holding nonsuit will be sustained unless evidence establishes prima facie case; **Bush v. Wood**, 8 Cal. App. 651, 97 Pac. 709, holding nonsuit properly ordered in action for personal injuries sustained through defendant's negligence, where plaintiff's testimony showed injuries would not have been sustained but for his own negligence.

Estoppel.

Distinguished in **Shade v. Sisson Mill & Lumber Co.** 115 Cal. 366, 47 Pac. 135, applying principle of estoppel as to account stated to case of employer and employee between whom salary account was stated.

14 L. R. A. 325, **COM. v. PERRY**, 155 Mass. 117, 31 Am. St. Rep. 533, 28 N. E. 1126.

Constitutionality of statutes affecting contracts or liberty.

Followed in **Com. v. Potomska Mills Corp.** 155 Mass. 123 note, 28 N. E. 1128, without discussion.

Cited in *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 534, 58 L. R. A. 751, 91 Am. St. Rep. 934, 90 N. W. 1098, declaring unconstitutional, statute prohibiting discharge of employee for membership in union; *State v. Julow*, 129 Mo. 175, 29 L. R. A. 259, footnote p. 257, 50 Am. St. Rep. 443, 31 S. W. 781, holding unlawful, statute prohibiting employer requiring as condition of employment that employee shall not join union; *Ruhrstrat v. People*, 185 Ill. 140, 49 L. R. A. 183, 76 Am. St. Rep. 30, 57 N. E. 41, denying police power extends to prohibition of national flag for advertising purposes; *Waters v. Wolf*, 162 Pa. 169, 34 W. N. C. 416, 42 Am. St. Rep. 815, 29 Atl. 646, declaring unconstitutional, statute providing contractor may bind owner, as agent, for materials, contrary to contract; *Dennis v. Moses*, 18 Wash. 592, 40 L. R. A. 314, 52 Pac. 333 (dissenting opinion), majority declaring void, statute prohibiting deficiency judgments; *Johnson v. Goodyear Min. Co.*, 127 Cal. 14, 47 L. R. A. 342, 78 Am. St. Rep. 17, 59 Pac. 304, declaring void statute making wages lien on property of domestic corporations; *State v. Smiley*, 65 Kan. 284, 69 Pac. 199 (dissenting opinion), majority holding anti-competitive trade agreements, void; *Com. v. Brown*, 8 Pa. Super. Ct. 355, 43 W. N. C. 75, declaring act requiring weighing of bituminous coal before screening, unconstitutional; *Toney v. State*, 141 Ala. 124, 67 L.R.A. 287, 109 Am. St. Rep. 23, 37 So. 332, 3 A. & E. Ann. Cas. 319, holding act purporting to prohibit employee and renter to make contract of the kind he may have abandoned, except under certain conditions and making such act misdemeanor unconstitutional; *Wyeth v. Board of Health (Wyeth v. Thomas)*, 200 Mass. 478, 25 L.R.A.(N.S.) 150, 128 Am. St. Rep. 439, 86 N. E. 925, holding refusal to grant license as undertaker, because applicant unlicensed as embalmer, illegal; *Mutual Loan Co. v. Martell*, 200 Mass. 484, — L.R.A.(N.S.) —, 128 Am. St. Rep. 446, 86 N. E. 916, on balancing constitutional right of individual to personal liberty, against right of state to legislate in exercise of police power; *State v. Ramseyer*, 73 N. H. 36, 58 Atl. 958, 6 A. & E. Ann. Cas. 445, holding statute prohibiting use of trading stamps by merchants invalid as not within police power of state; *House v. Mayes*, 227 Mo. 654 (dissenting opinion), on interference by state with private contracts; *State v. Feingold*, 77 Conn. 331, 59 Atl. 211, on violation of equality in rights and right of protection to property by legislation restrictive of right to contract.

Cited in footnotes to *Griswold v. Illinois C. R. Co.* 24 L. R. A. 647, which holds prohibition against carriers exempting themselves from liability inapplicable to contract relieving it from liability for loss by fire of warehouse placed on its property; *Harding v. People*, 32 L. R. A. 445, which holds act requiring weighing of coal hoisted from mines, whose product is shipped by rail or water, invalid; *Third Nat. Bank v. Divine Grocery Co.* 34 L. R. A. 445, which denies right to prevent transfer of property in payment of debt while solvent; *State v. Wilson*, 47 L. R. A. 71, which sustains statute against screening coal mined at quantity rates before weighing and crediting to employees; *Re Preston*, 52 L. R. A. 523, which holds void, statute against screening coal before weighing and crediting to miner; *Toney v. State*, 67 L.R.A. 286, which holds void, statute making it a misdemeanor for one under contract to labor to enter into new contract with third person without former employer's consent and a sufficient excuse.

Cited in notes (21 L.R.A. 789) on constitutionality of statutes restricting contracts and business; (37 Am. St. Rep. 213) on statute regulating relations of master and servant; (62 Am. St. Rep. 179) on protection of corporations from special and hostile legislation respecting employees; (78 Am. St. Rep. 244) on acts as to employment which legislature may declare criminal.

— Of hours of employment.

Cited in *Ritchie v. People*, 155 Ill. 104, 29 L. R. A. 82, 46 Am. St. Rep. 315, 40

N. E. 454, declaring unconstitutional, act prohibiting employment of females in factory, exceeding eight hours daily; *Low v. Rees Printing Co.* 41 Neb. 139, 24 L. R. A. 707, footnote p. 702, 43 Am. St. Rep. 670, 59 N. W. 362, holding exception of farm and domestic labor from eight-hour law, unconstitutional; *Cleveland v. Clements Bros. Constr. Co.* 67 Ohio St. 222, 59 L. R. A. 782, 93 Am. St. Rep. 670, 65 N. E. 885, declaring void, act limiting hours of daily service of workmen employed upon public work; *Re Morgan*, 26 Colo. 433, 47 L. R. A. 60, 77 Am. St. Rep. 269, 58 Pac. 1071, holding unlawful, statute regulating hours of employment in mines and smelting works.

Cited in note (19 L. R. A. 143) on statutory limitation of hours of labor.

Distinguished in *State v. Cantwell*, 179 Mo. 274, 78 S. W. 569, sustaining validity of law establishing eight hour day for mine workers.

— Of payment of wages.

Cited in *Braceville Coal Co. v. People*, 147 Ill. 71, 22 L. R. A. 342, footnote p. 340, 37 Am. St. Rep. 206, 35 N. E. 62, holding statute requiring certain corporations to pay weekly, unconstitutional; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 423, 23 L. R. A. 270, footnote p. 264, 41 Am. St. Rep. 109, 25 S. W. 75, upholding statute requiring payment of wages, without discount, on discharge of employee by corporation; *Opinion of Justices*, 163 Mass. 594, 28 L. R. A. 346, 40 N. E. 713, upholding statute requiring manufacturers to pay wages weekly; *People ex rel. Rodgers v. Coler*, 166 N. Y. 18, 52 L. R. A. 822, 82 Am. St. Rep. 605, 59 N. E. 716, denying right of legislature to fix rate of wages for city labor; *Frorer v. People*, 141 Ill. 183, 16 L. R. A. 496, footnote p. 492, 31 N. E. 395, holding statute prohibiting employers in certain kinds of business selling goods to workmen, void; *State v. Loomis*, 115 Mo. 316, 21 L. R. A. 792, 22 S. W. 350, holding void, statute forbidding, under penalty, persons engaged in manufacturing or mining to pay wages with non-negotiable paper or unredeemable orders; *Luman v. Hitchens Bros. Co.* 90 Md. 27, 46 L. R. A. 396, 44 Atl. 1051, declaring void, statute forbidding railroad and mining corporations from bartering goods to employees; *Street v. Varney Electrical Supply Co.* 160 Ind. 346, 61 L. R. A. 160, 98 Am. St. Rep. 325, 66 N. E. 895, holding statute fixing minimum wage to be paid unskilled laborers employed on public works, void; *State v. Peel Splint Coal Co.* 36 W. Va. 857, 17 L. R. A. 401, footnote p. 385, 15 S. E. 1000 (dissenting opinion), majority holding regulation of payment of wages to employees valid exercise of police power; *State v. Missouri Tie & Lumber Co.* 181 Mo. 563, 65 L.R.A. 594, 103 Am. St. Rep. 614, 80 S. W. 933, 2 A. & E. Ann. Cas. 119, holding act prohibiting issue of paper or other evidence of indebtedness in payment for wages not negotiable and redeemable at its face value in lawful money of the United States invalid; *Jordan v. State*, 51 Tex. Crim. Rep. 535, 11 L.R.A.(N.S.) 606, 103 S. W. 633, 14 A. & E. Ann. Cas. 616, holding statute making it unlawful to issue in payment for labor tickets, checks or writings obligatory redeemable or payable in goods or merchandise invalid.

Cited in footnote to *Ramsey v. People*, 17 L. R. A. 853, which holds statute as to computing wages of coal miners unconstitutional.

Cited in notes (28 L. R. A. 274) on validity and effect of statutes requiring wages to be paid in lawful money; (28 L. R. A. 344) on validity and effect of statutes regulating time and payment of wages; (139 Am. St. Rep. 874) on constitutionality of statutes relating to wages.

Strikers' interference with employees.

Cited in *Temple Iron Co. v. Carmanoskie*, 10 Kulp, 39, 7 Northampton Co. Rep. 260, granting injunction against strikers interfering with miners; *Vegetahn v. Guntner*, 167 Mass. 97, 35 L. R. A. 723, 57 Am. St. Rep. 443, 44 N. E. 1077,

granting injunctive relief against strikers intimidating those seeking employment; *L. D. Willcutt & Sons Co. v. Driacoll*, 200 Mass. 121, 23 L.R.A.(N.S.) 1244, 85 N. E. 897, enjoining imposition or threat of fine to prevent persons entering employ of plaintiff, or remaining therein.

14 L. R. A. 329, *ROBB v. CARNEGIE BROS. & CO.* 145 Pa. 324, 27 Am. St. Rep. 694, 22 Atl. 649.

Liability for nuisance.

Followed in *Lentz v. Carnegie Bros.* 145 Pa. 625, 27 Am. St. Rep. 717, 23 Atl. 219, holding one engaged in manufacturing coke from coal mined elsewhere, responsible to riparian owner for pollution of stream by washing slack.

Cited in *Weston Paper Co. v. Pope*, 155 Ind. 401, 56 L. R. A. 902, 57 N. E. 719, upholding right to damages for pollution of stream by discharge of waste matter from paper mill; *Neal v. Atlantic Ref. Co.* 16 Pa. Co. Ct. 243, 4 Pa. Dist. R. 50, denying refining company's liability for destruction of tug by coming into contact with inflammable mass in river, mingled with oil from refinery; *Austin v. Augusta Terminal R. Co.* 108 Ga. 712, 47 L. R. A. 772, 34 S. E. 852 (dissenting opinion), majority denying damages for diminution in value of property due to operation of railroad; *Gavigan v. Atlantic Ref. Co.* 3 Lack. Legal News, 374, same case on prior appeal, 2 Lack. Legal News, 241, upholding right to damages for injury to property by operation of refining plant; *Hauck v. Tidewater Pipe Line Co.* 153 Pa. 374, 20 L. R. A. 644, footnote p. 642, 32 W. N. C. 47, 34 Am. St. Rep. 710, 26 Atl. 644, holding company liable for nuisance due to escape of oil; *Campbell v. Bessemer Coke Co.* 23 Pa. Super. Ct. 379, sustaining right to damages for injury to property from acid fumes from coke ovens; *Vautier v. Atlantic Ref. Co.* 231 Pa. 13, 79 Atl. 814, holding that in action for injury to growing crops alleged to have been caused by noxious products from oil refinery, plaintiff need not prove negligence; *Farver v. American Car & Foundry Co.* 24 Pa. Super. Ct. 583, holding investment of large amount of money does not secure right to injure one having comparatively small estate nor does erection of extensive works justify violation of another's right; *Rieker v. Harrisburg Consumer's Brewing Co.* 10 Pa. Dist. R. 409, enjoining brewery company from allowing water used in washing kegs to escape upon adjoining lots and assessing damages for injury caused thereby; *Welliver v. Irondale Electric Light, Heat & P. Co.* 38 Pa. Super. Ct. 33, holding damages recoverable for injury to land, caused by seepage and percolation of water through embankment of mill-race not maintained to develop natural resources of defendant's land; *McNary v. Southwest Pennsylvania Pipe Line*, 38 Pittab. L. J. N. S. 234, 17 Pa. Dist. R. 849, 34 Pa. Co. Ct. 445, holding question of negligence does not necessarily arise in nuisance cases.

Cited in footnotes to *Fogarty v. Junction City Pressed Brick Co.* 18 L. R. A. 756, which holds generation of gas destroying growing crops on adjacent land a nuisance; *Rowland v. Miller*, 22 L. R. A. 182, which holds undertaking establishment within restrictive agreement against business "injurious or offensive to neighboring inhabitants;" *Frost v. Berkeley Phosphate Co.* 26 L. R. A. 693, which holds owner of factory liable for damage by fumes; *Wade v. Miller*, 69 L.R.A. 820, which holds characteristic noises and odors from chicken house and yard maintained in cleanly manner not a nuisance.

Distinguished in *Czarnecki v. Bolen-Darnell Coal Co.* 91 Ark. 62, 120 S. W. 376, holding distinction between mine and manufacturing plant as to disposition of waste inapplicable to case of burning dump-pile of mine, where burning of waste not customary or necessary and fire extinguishable.

Measure of damages for nuisance.

Approved in *Eshleman v. Martie Twp.* 152 Pa. 75, 31 W. N. C. 184, 25 Atl. 178, holding cost of repair measure of damages for injury from water overflowing from highway.

Cited in *Hoffman v. Mill Creek Coal Co.* 16 Pa. Super. Ct. 638, holding cost of removal measure of damages for deposit of coal dirt upon land of another; *McCartney v. Philadelphia*, 22 Pa. Super. Ct. 260, holding difference in value before and after injury not measure of damages for injury to property by overflow of water from defective highway; *Welliver v. Pennsylvania Canal Co.* 23 Pa. Super. Ct. 84, holding evidence of value of land admissible in action for damages for failure to repair canal banks; *Helbling v. Allegheny Cemetery Co.* 201 Pa. 174, 50 Atl. 970, holding cost of repair measure of damages for injuries to house by clogging of sewer; *Drake v. Lady Ensley Coal, Iron & R. Co.* 102 Ala. 507, 24 L. R. A. 66, 48 Am. St. Rep. 77, 14 So. 749, holding difference in value before and after injury measure of damages for pollution of stream; *Fischer v. Sanford*, 12 Pa. Super. Ct. 440, holding extent of injury measure of damages for negligent maintenance of livery stable; *McGettigan v. Potts*, 149 Pa. 158, 24 Atl. 198, holding actual amount of injury measure of damages for removal of lateral support to land; *Ehrgood v. Moscow Water Co.* 4 Lack. Legal News, 152, holding net loss sustained by interference with water power of mill proper measure of damages; *Wood v. Roxborough, C. H. & N. Pass. R. Co.* 12 Montg. Co. L. Rep. 157, holding it duty of court to modify damages awarded under erroneous theory; *McGill v. Pintach Compressing Co.* 140 Iowa, 435, 20 L.R.A. (N.S.) 472, 118 N. W. 786, holding only nominal damages recoverable in case of nuisance caused by smoke, soot, fumes and noises from compressed gas plant, where no evidence adduced showing diminution in rental value of plaintiff's premises due to conduct of defendant's business; *McClelland v. Schwerd*, 32 Pa. Super. Ct. 321, on depreciation in market value as measure of damages for injury to realty.

Abatement of nuisance.

Cited in *Strobel v. Kerr Salt Co.* 164 N. Y. 319, 51 L. R. A. 694, 79 Am. St. Rep. 643, 58 N. E. 142, holding equity will enjoin pollution of stream by discharge of water from salt mines; *Rarick v. Smith*, 17 Pa. Co. Ct. 631, 5 Pa. Dist. R. 532, sustaining injunction against pollution of stream by percolation of ingredients from dynamite factory; *Evans v. Reading Chemical Fertilizing Co.* 160 Pa. 219, 28 Atl. 702, holding equity will enjoin operation of bone-boiling establishment which renders vicinity unhealthful; *Scott v. Houpt*, 8 Kulp, 50, denying injunction restraining operation of planing mill; *Lyons v. Harrisburg Consumers' Brewing Co.* 25 Pa. Co. Ct. 206, 4 Dauphin Co. Rep. 103, holding engagement in lawful business no excuse for liability for injury from water flowing upon neighbor's lot; *Keiser v. Mahoney City Gas Co.* 143 Pa. 290, 22 Atl. 759, holding injuries to hotel business, due to gas company's allowing waste to flow into stream, must be substantial; *Rainey v. Herbert*, 5 C. C. A. 189, 3 U. S. App. 592, 55 Fed. 445, raising, without deciding, question as to enjoining annoyances affecting comforts of life; *Morey v. Black*, 21 Montg. Co. L. Rep. 107, enjoining operation, during night, of bowling alley in residential district; *Tull v. Lanning*, 24 Montg. Co. L. Rep. 109, holding that injunction will not be issued when it will inflict greater injury than it will prevent; *Good v. Queens Run Fire Brick Co.* 224 Pa. 503, 73 Atl. 906, on denial of injunction and leaving injured party to his remedy at law where injury inflicted will be greater than that prevented.

Distinguished in *Sullivan v. Jones & L. Steel Co.* 208 Pa. 553, 57 Atl. 1065, *Reversing* 33 Pittsb. L. J. N. S. 231, holding one living at top of bluff entitled to

enjoin operation of furnaces, located at foot; *Sullivan v. Jones & L. Steel Co.* 208 Pa. 553, 66 L.R.A. 716, 57 Atl. 1065, enjoining operation of furnaces so as to cause emission therefrom of clouds of ore dust causing injury to nearby property.

New trial for excessive damages.

Cited in *Stauffer v. Reading*, 208 Pa. 437, 57 Atl. 829, denying new trial in absence of abuse of discretion for excessive allowance for taking property; *Carpenter v. Lancaster*, 22 Lanc. L. Rev. 33, holding that court will not reduce verdict because excessive where there is testimony that justifies verdict; *Levan v. Dalton*, 26 Lanc. L. Rev. 263, to the point that when trial judge believes that verdict has been arrived at by adoption of erroneous measure of damages, he should set it aside; *Reddig v. Eberly*, 27 Lanc. L. Rev. 123, holding that new trial for insufficiency of verdict will not be granted where there is nothing to show that jury were improperly influenced or wrong in their compilations or measure of damages.

Measure of damages for injury to realty.

Cited in *Hoenning v. School Dist.* 23 Lanc. L. Rev. 202, holding that in action for damages for causing water to run into another's cellar items of damage must be specified; *Funk v. Kerbaugh*, 24 Lanc. L. Rev. 292, holding that measure of damages from heavy blasting is cost of restoring property together with compensation for loss of use, unless such cost would exceed value of property; *Byrne v. Cambria & C. R. Co.* 219 Pa. 220, 68 Atl. 672, holding testimony as to amount of damage done to mill property by filling up of dam with mud, sand, sediment and alluvial deposits and necessity for cleaning race and injury to mill inadmissible because of questions being in bulk without specifying items of cost or damage.

Distinguished in *Hunter v. Pennsylvania R. Co.* 45 Pa. Super. Ct. 473, holding that measure of damages where wood lot is burned over by railroad fire is difference between value of land immediately before and value after fire.

Explained in *Rabe v. Shoenberger Coal Co.* 213 Pa. 258, 3 L.R.A.(N.S.) 784, 62 Atl. 854, 5 A. & E. Ann. Cas. 216, holding where there is permanent injury to real estate, extent of damage caused thereby is measured by resulting depreciation in value of the property.

14 L. R. A. 333, FISHER v. FAIR, 34 S. C. 203, 13 S. E. 470.

Easements appurtenant to, or in gross.

Cited in footnotes to *Smith v. Furbish*, 47 L. R. A. 226, which holds easements appurtenant to, and not in gross, created by reservation in deed; *Mitchell v. D'Olier*, 59 L. R. A. 949, which holds rights and privileges in waters of lake passed under deed as appurtenant to upland, and not in gross; *Houston v. Zahn*, 65 L.R.A. 799, which holds that easement of way cannot be imposed on land by one who has not at the time acquired title thereto, although he undertakes to do so as part of the consideration of another tract conveyed to him.

Cited in notes (20 L.R.A. 635) on exception and reservation of easements; (3 L.R.A.(N.S.) 984) on way appurtenant to close separated by intervening lands; (10 Eng. Rul. Cas. 14) on right to claim easement, only as accessory to, and for benefit of, a tenant.

14 L. R. A. 336, HALE v. BONNER, 82 Tex. 33, 27 Am. St. Rep. 850, 17 S. W. 605.

Damages for mental suffering.

Cited in *Western U. Teleg. Co. v. Carter*, 2 Tex. Civ. App. 626, 21 S. W. 668, upholding right to damages for mental pain due to delay in transmission of

telegram ordering coffin; *Pacific Exp. Co. v. Black*, 8 Tex. Civ. App. 366, 27 S. W. 830, upholding right to damages against express company for mental pain caused by delay in delivery of medicine; *Pullman Palace Car Co. v. Trimble*, 8 Tex. Civ. App. 337, 28 S. W. 96, denying damages for mental anguish resulting from fright of child; *Louisville & N. R. Co. v. Hull*, 113 Ky. 569, 57 L. R. A. 773, footnote p. 771, 68 S. W. 433, authorizing consideration of mental anguish in assessing damages for breach of contract to transport corpse; *Wilson v. St. Louis & S. F. R. Co.* 160 Mo. App. 658, 142 S. W. 775, to the point that recovery of damages for mental suffering caused by handling of corpse, may be had; *Western U. Teleg. Co. v. Rowell*, 153 Ala. 320, 45 So. 73, holding damages recoverable for mental suffering due to failure to deliver message; *Kyles v. Southern R. Co.* 147 N. C. 399, 16 L.R.A.(N.S.) 407, 61 S. E. 278, holding damages recoverable by wife for mental anguish due to mutilation of husband's body which lay upon railroad track for considerable time after life extinct and was repeatedly run over.

Cited in note (19 L.R.A.(N.S.) 566) on mental anguish as element of damages in action for breach of contract relative to corpse.

Disapproved in *Beaulin v. Great Northern R. Co.* 103 Minn. 53, 19 L.R.A.(N.S.) 569, 114 N. W. 353, 14 A. & E. Ann. Cas. 462, holding damages for mental anguish not recoverable in action for breach of contract to transport and deliver dead body; *Long v. Chicago, R. I. & P. R. Co.* 15 Okla. 516, 6 L.R.A.(N.S.) 885, 86 Pac. 289, 6 A. & E. Ann. Cas. 1005, holding parents cannot recover damages for mental anguish due to mutilation of body of deceased child.

Rights as to dead body.

Cited in *Louisville & N. R. Co. v. Wilson*, 123 Ga. 68, 51 S. E. 24, 3 A. & E. Ann. Cas. 128, holding cause of action set out by declaration in action by wife for damages against carrier for negligence in care of body of husband which it accepted for transportation.

14 L. R. A. 337, *BURDETT v. ALLEN*, 85 W. Va. 347, 13 S. E. 1012.

Validity of acts within police power.

Cited in *Paris v. Hale*, 13 Tex. Civ. App. 389, 35 S. W. 333, sustaining ordinance as to sale of stock running at large, upon notice to owner; *Haigh v. Bell*, 41 W. Va. 24, 31 L. R. A. 132, 23 S. E. 666, upholding act prohibiting hogs from running at large; *Newman v. People*, 23 Colo. 307, 47 Pac. 278, raising without deciding question as to constitutionality of act authorizing destruction of gambling devices; *Greer v. Downey (Ariz.)* 61 L. R. A. 410, footnote p. 408, 71 Pac. 900, holding statute authorizing, without judicial proceedings, sale at auction of trespassing animals after specified notice, void; *Clapp v. Houg*, 12 N. D. 608, 65 L.R.A. 761, 102 Am. St. Rep. 589, 98 N. W. 710, 1 A. & E. Ann. Cas. 110, holding statute providing for appointment of special administrator of property of person believed to be dead, invalid.

Cited in footnote to *Branson v. Gee*, 24 L. R. A. 355, which holds act authorizing taking of gravel from private lands without notice for highway repairs, valid.

Cited in note (90 Am. St. Rep. 217) on summary proceedings to impound and sell animals.

14 L. R. A. 342, *BENNETT v. VAN RIPER*, 47 N. J. Eq. 563, 24 Am. St. Rep. 416, 22 Atl. 1055.

Who are relatives.

Cited in *Tepper v. Supreme Council*, R. A. 61 N. J. Eq. 640, 88 Am. St. Rep. 449, 47 Atl. 460, Reversing 59 N. J. Eq. 334, 45 Atl. 111, holding stepchildren

relatives entitled to take under certificate of benefit society; *Faxon v. Grand Lodge* B. L. F. 87 Ill. App. 268, holding stepmother may be named as beneficiary in certificate; *Mattison v. Sovereign Camp* W. W. 25 Tex. Civ. App. 216, 60 S. W. 897, holding wife "relative" within meaning of benefit certificate; *Wolfstern v. Pennsylvania R. Voluntary Relief* Dept. 76 N. J. Eq. 81, 74 Atl. 533, to the point that words "related to" in benefit society by-laws, refer to relation by affinity as well as by blood; *Tolson v. National Provident Union*, 60 Misc. 463, 115 N. Y. Supp. 534, holding word "relatives," as used in by-laws of mutual benefit association, broad enough to cover persons connected by affinity.

Cited in footnotes to *Simcoke v. Grand Lodge*, A. O. U. W. 15 L. R. A. 114, which holds stepfather may be beneficiary; *Hurd v. Doty*, 21 L. R. A. 746, which denies right of trustee receiving proceeds of insurance policy to refuse payment to beneficiaries as having no insurable interest; *Marshall v. Macon Sash, Door & Lumber Co.* 41 L. R. A. 211, which denies child's right of action for homicide of its stepfather; *Smith v. Supreme Tent K. of M.* 69 L.R.A. 174, which holds niece of former wife not relative of child by subsequent wife within meaning of statute relating to benefit certificates.

Cited in note (52 Am. St. Rep. 561, 569) on relation of beneficiary of mutual or membership life or accident insurance.

14 L. R. A. 344, *SOMERS v. METROPOLITAN ELEV. R. CO.* 129 N. Y. 576, 29 N. E. 802.

Damages for injuries to property — Abutter's easement in street.

Cited in *Chicago G. W. R. Co. v. First M. E. Church*, 50 L. R. A. 492, 42 C. C. A. 184, 102 Fed. 91, holding interference with church services by smoke and noise constitutes taking of property; *Re Grade Crossing*, 154 N. Y. 557, 49 N. E. 127, holding change of street grade, cutting off light and air, subject of award under grade crossing act; *Torge v. Salamanca*, 176 N. Y. 331, 68 N. E. 626, sustaining right of abutter, whose property is injured by change of railroad grade crossing, to proceed against village for damages under village law; *Hadden v. Metropolitan Elev. R. Co.* 75 Hun, 66, 26 N. Y. Supp. 995; *Bookman v. New York Elev. R. Co.* 137 N. Y. 305, 33 N. E. 333; *Lazarus v. Metropolitan Elev. R. Co.* 69 Hun, 194, 23 N. Y. Supp. 515,—holding refusal to find easements appurtenant to land taken for railroad, apart from damages to land, have only nominal value, error; *McGrane v. New York Elev. R. Co.* 67 App. Div. 39, 73 N. Y. Supp. 498, denying injunction restraining operation of elevated road in absence of substantial damages; *Smith v. New York Elev. R. Co.* 44 N. Y. S. R. 877, 18 N. Y. Supp. 132, holding injuries from running of trains properly considered in ascertaining compensation; *Less v. Butte*, 28 Mont. 32, 61 L. R. A. 602, 98 Am. St. Rep. 545, 72 Pac. 140, holding city liable for injury to property by improvement of street; *Bramlett v. Greenville*, 88 S. C. 116, 70 S. E. 450, holding that under charter abutter is not entitled to damages because sidewalk was lowered where benefits accruing therefrom overcome injury; *Donahue v. Keystone Gas Co.* 181 N. Y. 319, 70 L.R.A. 764, 106 Am. St. Rep. 549, 73 N. E. 1108, holding abutting owner has such property in trees in street, but not on his land that he can maintain action for killing of them by gas escaping from pipes; *Rourke v. Holmes Street R. Co.* 221 Mo. 61, 133 Am. St. Rep. 468, 119 S. W. 1094, holding owner of property abutting on street whose easement of light, air and access to and from his property is interfered with or taken by elevated street railway is entitled to damages; *Re Board of Rapid Transit R. Comrs.* 197 N. Y. 103, 36 L.R.A. (N. S.) 657, 90 N. E. 450, 18 Ann. Cas. 366, modifying 128 App. Div. 114, 112 N. Y. Supp. 619, holding real ground upon which abutter is entitled to damages for

physical impairment of his property by subway is that he owns land abutting on street, not that he owns fee of street.

Cited in footnotes to *Memphis & C. R. Co. v. Birmingham, S. & T. River R. Co.* 18 L. R. A. 166, which holds compensation required from railroad crossing other railroad; *Aldrich v. Metropolitan West Side Elev. R. Co.* 57 L. R. A. 237, which denies right to recover for injury to apartment house from elevated road crossing highway 19 feet away; (64 L. R. A. 959) holding abutter entitled to damages for erection of track on pillars from 15 to 25 feet above surface of street.

Cited in notes (14 L.R.A. 383) on injury to abutter's easements by railroad in street; (36 L.R.A.(N.S.) 677) on abutter's right to compensation for railroads in streets; (31 Am. St. Rep. 733) on occupation of city streets by railroads; (106 Am. St. Rep. 247) on what are additional servitudes in highways.

Distinguished in *Mattlage v. New York Elev. R. Co.* 14 Misc. 294, 35 N. Y. Supp. 704, holding incumbent upon railroad to show owner of fee in street not damaged by erection of road, to defeat injunction; *Betjeman v. New York Elev. R. Co.* 1 Misc. 141, 84 N. Y. S. R. 723, 20 N. Y. Supp. 628, and *Gerber v. Metropolitan Elev. R. Co.* 3 Misc. 430, 23 N. Y. Supp. 166, holding refusal to find easements of light and air taken by railroad have only nominal value aside from land, no error; *Adler v. Metropolitan Elev. R. Co.* 138 N. Y. 178, 33 N. E. 935, holding refusal of court to find evidentiary facts as to damages for operation of elevated road, no error; *Rasch v. Nassau Electric R. Co.* 198 N. Y. 388, 36 L.R.A. (N.S.) 646, 91 N. E. 785, holding abutting owner, also owner of fee in street, entitled to damages on account of noise and vibration resulting from operation of trolley cars on his property in the street.

— Damages for land not taken.

Cited in *Rome, W. & O. R. Co. v. Gleason*, 42 App. Div. 533, 59 N. Y. Supp. 647, and *South Buffalo R. Co. v. Kirkover*, 176 N. Y. 305, 68 N. E. 366, Affirming 86 App. Div. 61, 83 N. Y. Supp. 613, holding consequential damages to land not taken should be awarded, as for land condemned for railroad; *Re Grade Crossing*, 6 App. Div. 335, 40 N. Y. Supp. 520, and *Re Grade Crossing*, 59 App. Div. 502, 69 N. Y. Supp. 152, holding commissioners may award damages for injury to parcel remaining; *Cunard v. Manhattan R. Co.* 1 Misc. 153, 48 N. Y. S. R. 756, 20 N. Y. Supp. 724, holding refusal to limit award to mere value of easement taken, excluding remaining property, no error; *Re New York Elev. R. Co.* 76 Hun. 387, 28 N. Y. Supp. 110, holding no past benefit allowable in assessing damages for property condemned; *Re Tuthill*, 36 App. Div. 507, 55 N. Y. Supp. 657, holding state may exercise power of taxation to reclaim land on ground of public utility; *Re Board of Public Improvement*, 99 App. Div. 580, 91 N. Y. Supp. 161, holding term "consequential damages" does not necessarily and only refer to use of property taken in its effect upon the residue; *Louisville & N. Terminal Co. v. Lellyett*, 114 Tenn. 397, 1 L.R.A.(N.S.) 85, 85 S. W. 881, holding legislative authority to take private property for station houses, round-houses, coal chutes and other necessary conveniences, does not carry with it authority to injure property not so taken in locating such works; *Re New York*, 193 N. Y. 124, 85 N. E. 1064, holding railroad company surrendering to lessor its leases of bulkhead and wharf and adjacent property, reserving claim for injury to its property or fixtures other than bulkhead, entitled to damages for injury to such property or fixtures, when city took bulkhead for water front improvements.

— Benefits as affecting right to damages.

Followed in *Bookman v. New York Elev. R. Co.* 147 N. Y. 301, 49 Am. St. Rep. 664, 41 N. E. 705, holding increase in value of property caused by construction of

elevated road in unimproved district bars damages for erection; *Nette v. New York Elev. R. Co.* 1 Misc. 342, 48 N. Y. S. R. 724, 20 N. Y. Supp. 627; *Odell v. New York Elev. R. Co.* 130 N. Y. 691, 29 N. E. 998; *Malcolm v. New York Elev. R. Co.* 147 N. Y. 312, 41 N. E. 790,—holding refusal of court to find increase of value since building of elevated road according to undisputed evidence, error.

Cited in *Cookman v. New York Elev. R. Co.* 69 N. Y. S. R. 660; *Mattlage v. New York Elev. R. Co.* 1 Misc. 341, 48 N. Y. S. R. 694, 20 N. Y. Supp. 624; *Sperb v. Metropolitan Elev. R. Co.* 137 N. Y. 598, 33 N. E. 319; *Sutro v. Manhattan R. Co.* 137 N. Y. 593, 33 N. E. 334,—holding award of damages to abutter, when erection of elevated line increases values, error; *Brush v. Manhattan R. Co.* 44 N. Y. S. R. 114, 17 N. Y. Supp. 540; *Rich v. Manhattan R. Co.* 46 N. Y. S. R. 674, 19 N. Y. Supp. 543; *Hoffman v. Manhattan Elev. R. Co.* 1 Misc. 156, 48 N. Y. S. R. 713, 20 N. Y. Supp. 625,—denying injunctive relief in absence of finding that greater increase in rental value was prevented by road; *Marsh v. Kings County Elev. R. Co.* 29 C. C. A. 657, 57 U. S. App. 724, 86 Fed. 191, holding owner failing to show operation of road caused decrease in rental value, bars injunction; *Stewart v. Ohio River R. Co.* 38 W. Va. 451, 18 S. E. 604, and *Sillcocks v. Manhattan R. Co.* 10 Misc. 261, 31 N. Y. Supp. 428, holding abutter must show diminution in rental value, for damages against elevated road; *Bauman v. Ross*, 167 U. S. 578, 42 L. ed. 284, 17 Sup. Ct. Rep. 966, holding benefits created by establishment of highway should be considered in making estimate of damages; *Huggins v. Manhattan R. Co.* 1 Misc. 111, 48 N. Y. S. R. 680, 20 N. Y. Supp. 648, holding instruction that abutters entitled to damages for road's interference with easement, regardless of benefit, error; *Fahnestock v. Peoria*, 171 Ill. 457, 49 N. E. 496, defining "special benefit," used in city and village act, as increase in value occasioned by improvement; *Otten v. Manhattan R. Co.* 2 App. Div. 402, 37 N. Y. Supp. 982 (dissenting opinion), majority holding present value of premises affected by elevated road to be considered, irrespective of prior conditions; *Skelly v. New York Elev. R. Co.* 7 Misc. 92, 27 N. Y. Supp. 304, holding refusal to find special benefit resulting from road should be set off against damages, no error, benefit lacking; *Struthers v. New York Elev. R. Co.* 5 Misc. 244, 25 N. Y. Supp. 81, sustaining finding of diminution in benefits after construction of elevated road; *Re Brooklyn Elev. R. Co.* 87 Hun, 105, 33 N. Y. Supp. 974, denying right to set off against lots increased in value, depreciation of one, caused by construction of road; *Maclean v. Westchester Electric R. Co.* 25 Misc. 384, 55 N. Y. Supp. 556, granting injunction against erection of electric line without proof of probable benefits offsetting injury; *Elias v. Manhattan R. Co.* 85 Hun, 384, 32 N. Y. Supp. 1053, holding greater increase in value of neighboring property insufficient to sustain allowance of damages for construction of elevated road; *Re New York, W. & B. R. Co.* 73 Misc. 223, 130 N. Y. Supp. 1005, holding that in condemnation of land by railroad benefits to land may be off-set against consequential damages to that part of land not taken; *Manhattan R. Co. v. Stuyvesant*, 126 App. Div. 850, 111 N. Y. Supp. 222, holding where easements of light, air and access are condemned for purpose of stairway to elevated railway station benefits to the realty may be considered in making award; *Re New York*, 64 Misc. 269, 118 N. Y. Supp. 580, on allowance for full value of land actually taken without deduction for benefits; *Lehigh Valley R. Co. v. State*, 66 Misc. 434, 123 N. Y. Supp. 378, on offsetting benefits against damages to balance of property.

Cited in note (9 L.R.A.(N.S.) 812, 843) on right to set off benefits against damages on condemnation.

Distinguished in *Becker v. Metropolitan Elev. R. Co.* 131 N. Y. 510, 30 N. E.

499, upholding abutter's right to damages for construction of elevated road in locality built up independent of road; *Storck v. Metropolitan Elev. R. Co.* 131 N. Y. 520, 30 N. E. 497, affirming right to damages for construction of road, decreasing rental values and causing influx of undesirable tenants; *Roberts v. New York Elev. R. Co.* 155 N. Y. 37, 49 N. E. 262, holding construction of switches, tank, and coal platform, diminishing rental values and drawing inferior class of tenants, gives abutter right to damages; *Lewiston & Y. F. R. Co. v. Ayer*, 27 App. Div. 575, 50 N. Y. Supp. 502, denying right to ride or transport property on railroad, benefit to be set off against injury for land condemned; *Mantorville R. & Transfer Co. v. Slingerland*, 101 Minn. 498, 11 L.R.A.(N.S.) 783, 118 Am. St. Rep. 647, 112 N. W. 1033, holding mere increase of transportation facilities and prospective feasibility of connecting industrial works upon tract with railroad are not ordinarily sufficient to constitute special benefits at least where land owner cannot by law compel railroad company to furnish him with particular facilities; *Re New York*, 190 N. Y. 356, 16 L.R.A.(N.S.) 338, 83 N. E. 299, 13 A. & E. Ann. Cas. 598, modifying 120 App. Div. 854, 105 N. Y. Supp. 750, holding provisions of city charter authorizing benefits to be set off against award for land taken for improvement of water front unconstitutional.

— Measure of damages.

Followed in *Buek v. Metropolitan R. Co.* 73 Hun, 252, 25 N. Y. Supp. 1048, holding refusal to charge difference between advantage and disadvantage as measure of damage for construction of road, error.

Cited in *Pecksport Connecting R. Co. v. West*, 79 N. Y. S. R. 648, 45 N. Y. Supp. 644, holding market value of land taken and depreciation of remainder, measure of damages for land condemned; *Lewis v. New York & H. R. Co.* 162 N. Y. 228, 56 N. E. 540, holding abutter may recover difference between effect of old viaduct and new steel bridge, deducting benefits for increased space; *Bischoff v. New York Elev. R. Co.* 138 N. Y. 263, 33 N. E. 1073, holding balance of injury over benefit measure of damages for cutting off light and air by erection of elevated road; *Metropolitan West Side Elev. R. Co. v. White*, 166 Ill. 381, 46 N. E. 978, and *Metropolitan West Side Elev. R. Co. v. Stickney*, 150 Ill. 382, 26 L. R. A. 778, 37 N. E. 1098, holding difference in value of land before construction of railroad and afterwards, measure of damages for land not taken; *Moore v. New York Elev. R. Co.* 4 Misc. 135, 23 N. Y. Supp. 863, holding abutter entitled to nominal damages, evidence failing to show excess of injury over benefit; *Struthers v. New York Elev. R. Co.* 5 Misc. 240, 25 N. Y. Supp. 81, and *Pratt v. New York C. & H. R. R. Co.* 90 Hun, 87, 35 N. Y. Supp. 557, holding value of abutter's easement in street, measure of damage for conducting railroad through open excavation; *Cook v. New York Elev. R. Co.* 144 N. Y. 118, 39 N. E. 2, and *Sixth Ave. R. Co. v. Metropolitan Elev. R. Co.* 138 N. Y. 551, 34 N. E. 400, denying that adoption of correct rule for measure of damages requires reversal for refusal to find value of easement nominal, aside from land; *Blair v. Charleston*, 43 W. Va. 73, 35 L. R. A. 858, 64 Am. St. Rep. 837, 26 S. E. 341, holding evidence admissible as to value before and after change in grade; *Pecksport Connecting R. Co. v. West*, 79 N. Y. S. R. 647, 45 N. Y. Supp. 644, holding risk of injury to cattle should be considered in estimating damages for construction of railroad; *Root v. Butte, A. & P. R. Co.* 20 Mont. 358, 51 Pac. 155, holding owner entitled to special damages for injury to property by smoke, in excess of injury to community; *Syracuse v. Stacey*, 45 App. Div. 254, 61 N. Y. Supp. 165, holding riparian owners not entitled to damages for appropriation of lake to supply city; *Rosenheimer v. Standard Gaslight Co.* 36 App. Div. 10, 55 N. Y. Supp. 192, holding diminution in rental value measure of damages for nuisance injuring property in possession of tenant; *Blackwell, E. & S. W. R. Co. v. Gist*, 18 Okla. 524 90

Pac. 889, holding whether fee of street is in public or in abutting owner measure of damages for taking street for public purpose is injury to abutting owner as evidenced by depreciation in reasonable salable value of his property; *People ex rel. New York v. Lyon*, 114 App. Div. 586, 100 N. Y. Supp. 62, holding measure of damages in proceeding to condemn land for bridge purposes is value of land actually taken, and consequential damages to balance arising from use to which land taken is to be put; *Eutaw v. Botnick*, 150 Ala. 434, 43 So. 739, holding question as to market value of abutting property immediately after grading for which damages claimed admissible.

14 L. R. A. 352, *JAFFEE v. JACOBSON*, 1 C. C. A. 11, 4 U. S. App. 4, 48 Fed. 21. **Specific performance of contract.**

Cited in *McKinnon v. McKinnon*, 5 C. C. A. 533, 56 Fed. 412, holding enforcement of partnership agreement of uncle to leave property to nephew at death, does not violate statute of wills; *Svanburg v. Fosseen*, 75 Minn. 361, 43 L. R. A. 431, 74 Am. St. Rep. 490, 78 N. W. 4, holding performance of services entitles vendee to specific performance of oral contract to convey.

— **To pay after death.**

Cited in *Kofka v. Rosicky*, 41 Neb. 350, 25 L. R. A. 214, 43 Am. St. Rep. 685, 59 N. W. 788, holding equity will enforce agreement of uncle to leave property to niece leaving home and taking his name; *Burns v. Smith*, 21 Mont. 267, 69 Am. St. Rep. 653, 53 Pac. 742, enforcing against estate, promise of decedent to leave portion of property in payment for services; *Healey v. Simpson*, 113 Mo. 346, 20 S. W. 881, holding equity will enforce as contract of adoption, instrument inoperative as deed; *Owens v. McNally*, 113 Cal. 449, 33 L. R. A. 372, 45 Pac. 710, holding that equity will not enforce vague contract of uncle to leave property to niece; *McCabe v. Healy*, 138 Cal. 86, 70 Pac. 1008, impressing intestate's property with trust in favor of nephew to whom former had agreed to give property at death; *Wilson v. Heath*, 23 Misc. 718, 53 N. Y. Supp. 166, denying specific performance for failure to establish proof of agreement to provide in will; *Hood v. McGehee*, 189 Fed. 208, holding that ineffective adoption may amount to contract in behalf of child, where definite promise to leave property to child is shown and full performance on part of child is made; *Flood v. Templeton*, 148 Cal. 379, 83 Pac. 148, holding specific performance of contract to devise realty not decreed where right to relief based upon forbearance in matter of money demand; *Starnes v. Hatcher*, 121 Tenn. 340, 117 S. W. 219, holding where person agrees to adopt children and leave them his property and takes them into his custody and rears them, but does not adopt them, agreement to leave them his property is specifically enforced after his death.

Cited in footnotes to *Bryson v. McShane*, 49 L. R. A. 527, which holds specifically enforceable executed oral contract to give entire property for support during life, and burial after death; *Clancy v. Flusky*, 52 L. R. A. 277, which authorizes specific performance of executed oral contract to convey land to son for taking care of father for life, though father left son before death.

Cited in note (9 L.R.A.(N.S.) 158) on specific performance of contract to compensate services to continue during promisor's lifetime, as affected by brevity of period elapsing before his death.

14 L. R. A. 356, *WAIT v. NASHUA ARMORY ASSO.* 66 N. H. 581, 49 Am. St. Rep. 630, 23 Atl. 77.

Powers of corporate officers.

Cited in *Holland v. Laconia Bldg. & L. Asso.* 68 N. H. 481, 41 Atl. 178, holding

action not maintainable upon unauthorized promise of corporate officers to pay mortgage deficiency; *Dallas Ice Factory & Cold Storage Co. v. Crawford*, 18 Tex. Civ. App. 180, 44 S. W. 875, holding general manager of corporation has power to employ counsel; *Mathias v. White Sulphur Springs Asso.* 19 Mont. 363, 48 Pac. 624, holding president of corporation organized to acquire land and erect buildings no implied power to contract with architect; *City Electric Street R. Co. v. First Nat. Exch. Bank*, 62 Ark. 37, 31 L. R. A. 536, footnote p. 535, 54 Am. St. Rep. 282, 34 S. W. 89, denying inherent power of corporate president and secretary to execute negotiable paper; *Ferguson v. Venice Transp. Co.* 79 Mo. App. 359, holding corporate president without authority *in virtute officii* to assign asset in payment of debt; *Murphy v. W. H. & F. W. Cane*, 80 N. J. L. 165, 76 Atl. 323, holding that president of building company has no implied power to award subcontracts on construction work for which his company has main contract; *Harding v. Oregon-Idaho Co.* 57 Or. 41, 110 Pac. 412, holding that office of president of corporation does not confer authority to bind corporation or control its property; *Kline Bros. & Co. v. Royal Ins. Co.* 192 Fed. 386, holding that president of corporation has no authority as such to make contract for insurance in its behalf, in absence of some incidental powers express or implied; *Elkhart Hydraulic Co. v. Turner*, 170 Ind. 460, 84 N. E. 812, holding authority of president of private corporation to execute promissory note in its name when specifically denied cannot be inferred from his official station and doing of the act; *Model Clothing House v. Hirsch*, 42 Ind. App. 273, 85 N. E. 719, holding president having power to hire employees to conduct corporation's business has power to increase their salaries to retain them in its employ; *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 481, 3 L.R.A. (N.S.) 558, 111 Am. St. Rep. 637, 62 Atl. 971, holding there is no presumption of law that official relation to bank of its vice-president and director furnishes or proves his authority to bind bank by an admission; *Kidd v. New Hampshire Traction Co.* 74 N. H. 168, 66 Atl. 127, holding by-laws of corporation regarding exercise of power to make contracts by directors in accordance with law as to powers of directors; *Campbell v. Pittsburg Bridge Co.* 23 Pa. Super. Ct. 141, holding president of corporation has power to employ counsel to defend suit against it.

Cited in footnotes to *Citizens' Nat. Bank v. Berry*, 24 L. R. A. 719, which upholds bank president's power to employ counsel; *Cheever v. Pittsburg, C. & L. E. R. Co.* 34 L. R. A. 69, which holds one taking note for his own debt from corporate president executing same a bona fide holder; *Grow v. Cockrill*, 36 L. R. A. 89, which holds bank receiver not liable for president's loan of depositor's money; *Wells, F. & Co. v. Enright*, 49 L. R. A. 647, which holds bank bound by agreement executed by president and general manager with vice president's approval; *Franklin Sav. Bank v. Cochrane*, 61 L. R. A. 760, which holds corporation bound by treasurer's agreement to pay mortgage on property transferred to corporation.

Admission of harmless evidence.

Cited in *State v. Saldell*, 70 N. H. 176, 85 Am. St. Rep. 504, 46 Atl. 1063, refusing to disturb verdict for erroneous admission of newspaper item unconnected with dispute; *Marsh v. Concord Mut. F. Ins. Co.* 71 N. H. 256, 51 Atl. 898, denying incompetent evidence, admitted without prejudicial effect, sufficient to set aside verdict; *Mechanicks Nat. Bank v. Comins*, 72 N. H. 22, 101 Am. St. Rep. 650, 55 Atl. 191, holding admission of indorsements proving facts shown by records, no error.

Harmless error.

Cited in *Beckman v. Hampton*, 74 N. H. 49, 65 Atl. 254, holding remarks of counsel in closing argument, where not prejudicial, are not ground for setting aside verdict.

14 L. R. A. 361, *ALLEN v. WEBER*, 80 Wis. 531, 27 Am. St. Rep. 51, 50 N. W. 514.

Water as boundary line.

Cited in *Brophy v. Richeson*, 137 Ind. 121, 36 N. E. 424, holding grant "to stake at low-water mark" excludes bed of lake.

Cited in footnote to *Boardman v. Scott*, 51 L. R. A. 180, which denies grant bounding land by artificial pond, extends to thread of stream forming same.

Cited in notes (42 L.R.A. 506) on effect of bounding grant on river or tide water; (127 Am. St. Rep. 41) on relative rights of state and riparian owner in navigable waters; (21 Eng. Rul. Cas. 605) on presumption of ownership to middle of stream; (23 Eng. Rul. Cas. 189) on ownership of riparian owner to thread of stream.

Declaring stream navigable by statute.

Cited in *Miller v. State*, — Tenn. —, 35 L.R.A.(N.S.) 410, 137 S. W. 760, holding that legislature cannot declare stream navigable which is not so in fact without making compensation to riparian owner.

14 L. R. A. 364, *COLLINS v. VOORHEES*, 47 N. J. Eq. 555, 22 Atl. 1054.

What constitutes valid marriage.

Cited in *Re Wallace*, 49 L. J. Eq. 535, 25 Atl. 260, holding occasional cohabitation does not establish marriage; *Barker v. Valentine*, 125 Mich. 336, 51 L. R. A. 787, footnote p. 787, 84 Am. St. Rep. 578, 84 N. W. 297; holding cohabitation after removal of impediment to marriage constitutes lawful marriage; *Stevens v. Stevens*, 56 N. J. Eq. 497, 38 Atl. 460, holding marriage presumed from long cohabitation and acknowledgment of matrimonial relation; *Atlantic City R. Co. v. Goodin*, 62 N. J. L. 400, 45 L. R. A. 674, 72 Am. St. Rep. 652, 42 Atl. 333, upholding marriage contracted *per verba de presenti*, without ceremony or witnesses; *Clark v. Barney*, 24 Okla. 458, 103 Pac. 598, to the point that presumption arises that valid marriage was intended where parties continue to cohabit in good faith after time when marriage ceremony might have been performed; *O'Neil v. Davis*, 88 Ark. 200, 113 S. W. 1027, holding marriage not proved by continuance of cohabitation, illicit in the beginning, after legal impediment to marriage was removed, also citing annotation on this point; *Stevens v. Stevens*, 56 N. J. Eq. 497, 38 Atl. 460, on disposition of court to hold in favor of marriage where there is issue which may be bastardized by contrary ruling; *Chamberlain v. Chamberlain*, 68 N. J. Eq. 739, 3 L.R.A.(N.S.) 247, 111 Am. St. Rep. 658, 62 Atl. 680, 6 A. & E. Ann. Cas. 483, affirming 68 N. J. Eq. 421, 59 Atl. 813, holding marriage established where, after entrance into matrimonial relations, woman procured divorce from lawful husband, and, after such divorce, man assured woman, in presence of witnesses, she was his legal wife; *McCombs v. State*, 50 Tex. Crim. Rep. 494, 9 L.R.A.(N.S.) 1039, 123 Am. St. Rep. 855, 99 S. W. 1017, 14 A. & E. Ann. Cas. 72, holding where man who has wife living marries woman and after death of first wife, while second woman is alive, marries third woman marriage to second woman is nullity and marriage to third not bigamous; *Travers v. Reinhardt*, 205 U. S. 444, 51 L. ed. 874, 27 Sup. Ct. Rep. 563 (dissenting opinion), as to what constitutes evidence of valid marriage in New Jersey.

Cited in footnotes to *Re McLaughlin*, 16 L. R. A. 699, which holds common-law marriage invalid under statute; *Nims v. Thompson*, 17 L. R. A. 847, which holds marriage shown by evidence; *Schuchart v. Schuchart*, 50 L. R. A. 180, which holds common-law marriage formed by persons living together as husband and wife after removal of disability under belief that no new marriage necessary; *University of Michigan v. McGuckin*, 57 L. R. A. 917, which holds lawful marriage shown between persons whose cohabitation originally meretricious, by continued cohabitation after disability removed and birth of children baptized as legitimate; *Eaton v. Eaton*, 60 L. R. A. 605, which holds marriage consummated by cohabitation with intent to sustain relation of husband and wife after removal of impediment existing when marriage first contracted.

Cited in notes (3 L.R.A.(N.S.) 246) on effect of removal of impediment to marriage after cohabitation begun; (17 Eng. Rul. Cas. 171) on what constitutes a valid marriage.

Distinguished in *Keavey v. Barrett*, 62 N. J. Eq. 466, 49 Atl. 1073, holding marriage of child's father and mother previous to child's birth is, after death of both parties, presumed in favor of legitimacy of child.

14 L. R. A. 370, *SELDEN v. JACKSONVILLE*, 28 Fla. 558, 29 Am. St. Rep. 278, 10 So. 457.

Injury to abutter's easement in street.

Cited in *Brand v. Multnomah County*, 38 Or. 96, 50 L. R. A. 396, footnote p. 389, 84 Am. St. Rep. 772, 62 Pac. 209, holding bridge approach, elevating street to established grade, not additional servitude; *Willis v. Winona City*, 59 Minn. 34, 26 L. R. A. 144, footnote p. 142, 60 N. W. 814, holding elevated approach to bridge in street not additional servitude; *Pueblo v. Strait*, 20 Colo. 21, 24 L. R. A. 395, footnote p. 392, 46 Am. St. Rep. 273, 36 Pac. 789, holding abutter entitled to damages for building viaduct over railroad partially closing street; *Blair v. Charleston*, 43 W. Va. 67, 35 L. R. A. 856, 64 Am. St. Rep. 837, 26 S. E. 341, denying purchase after establishment of grade line, and before actual change, defeats abutter's right to damages; *Sauer v. New York*, 40 Misc. 588, 83 N. Y. Supp. 27, denying abutter's right to damages for city's erection of viaduct by statutory authority over street of which latter owned fee; *Long v. Wilson*, 119 Iowa, 272, 60 L. R. A. 722, footnote p. 720, 97 Am. St. Rep. 315, 93 N. W. 282, holding judgment establishing boundary of highway in suit against owner on one side not conclusive on opposite owner; *Bowden v. Jacksonville*, 52 Fla. 224, 42 So. 394, holding damages not recoverable by abutting owner from city for alleged injury to his property from change of grade in reconstruction of viaduct in street, and from other causes in connection with such viaduct; *Borghart v. Cedar Rapids*, 126 Iowa, 315, 68 L.R.A. 307, 101 N. W. 1120, holding city vacating portion of public square abutting on lot without other means of access liable in damages to lot owner; *Butt v. Iffert*, 171 Ind. 556, 86 N. E. 961, on vacation of highway, annotation also cited on this point; *De Lucca v. North Little Rock*, 142 Fed. 603, denying abutting owner an injunction to restrain city from constructing viaduct in street for public travel, such viaduct not being additional servitude; *Sauer v. New York*, 206 U. S. 544, 51 L. ed. 1180, 27 Sup. Ct. Rep. 686, on nonrecovery of damages for impairment of access to abutting land and interference with light and air by erection of elevated viaduct over street for public travel.

Cited in footnotes to *Levee Dist. No. 9 v. Farmer*, 23 L. R. A. 388, which holds discontinuance of road, not taking or damaging of abutter's property; *Cram v. Laconia*, 57 L. R. A. 282, which denies right to recover for injury by discontinuing part of street on which property abuts; *Re Melon Street*, 38 L. R. A. 275, which holds abutting owners entitled to recover for vacating other portion of street leaving

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ing remaining portion a *cul de sac*; *Stanwood v. Malden*, 16 L. R. A. 591, which holds that discontinuance of street does not entitle landowner, whose access is substantially unimpaired, to damages; *Anderton v. Milwaukee*, 15 L. R. A. 830, which holds discrimination between lot owners as to compensation for change of street grade void; *Brown v. Seattle*, 18 L. R. A. 161, which holds abutting owner entitled to compensation for change of street grade; *First Nat. Bank v. Tyson*, 59 L. R. A. 399, which sustains right of injunction against pillars in street in front of adjoining lot, obstructing light and air from street; *De Geofroy v. Merchants' Bridge Terminal R. Co.* 64 L. R. A. 959, sustaining abutter's right to damages for erection of track on pillars 15 to 25 feet above street; *Townsend v. Epstein*, 52 L. R. A. 409, which sustains abutter's right to relief against diminution of light and air by bridge over street; *Van Witsen v. Gutman*, 24 L. R. A. 403, which denies right to take away for private use abutter's easement in public alley; *Clemens v. Connecticut Mut. L. Ins. Co.* 67 L.R.A. 302, which denies right to injunction to stay improvement of public street according to adopted grade until payment of damages; *Borghart v. Cedar Rapids*, 68 L.R.A. 306, which sustains property owner's right of action for vacation of public square cutting off only means of access to his property; *Sauer v. New York*, 70 L.R.A. 717, which denies right of abutting owner at point where street is depressed below grade of other property to enjoin use of viaduct by city to facilitate travel though it is fifty feet above street level in front of his place and impairs free circulation of light and air and decreases the value of his property.

Cited in notes (18 L. R. A. 544) on protection of private rights from interference by public; (23 L. R. A. 658) on damage to abutting owner by first grading and improvement of street; (26 L. R. A. 659) on effect of abandonment of highway; (26 L. R. A. 821) on discontinuance or vacation of highway by acts of public authorities; (67 L.R.A. 257) on municipal liability for defective plan of street construction; (36 L.R.A.(N.S.) 1115) on right of abutter to compensation for vacation of highway; (36 L.R.A.(N.S.) 1195) on liability of municipality for injury to abutting property from changing street grade under constitutional provision against "damaging" private property for public use without compensation; (30 Am. St. Rep. 836) on municipal liability for change of street grade; (106 Am. St. Rep. 238, 266) on what are additional servitudes in highways.

Distinguished in *Blincoe v. Choctaw O. & W. R. Co.* 16 Okla. 293, 4 L.R.A. (N.S.) 893, 83 Pac. 903, 8 A. & E. Ann. Cas. 689, holding "damages" as used in constitutional provision for assessment of damages in condemnation proceedings includes injury to real or personal property by the taking.

— **By railroad.**

Cited in *Garrett v. Lake Roland Elev. R. Co.* 79 Md. 283, 24 L. R. A. 398, footnote p. 396, 29 Atl. 830, holding erection in street of abutment 9 feet high for elevated road not taking of abutter's property.

Cited in footnotes to *Nichols v. Ann Arbor & Y. Street R. Co.* 16 L. R. A. 371, which requires compensation to owner of fee before construction of railway along highway; *Jones v. Erie & W. Valley R. Co.* 17 L. R. A. 758, which holds exclusion of light and air from abutting property by erecting bridge to carry railroad tracks diagonally across street, proper element of damage; *Memphis & C. R. Co. v. Birmingham*, S. & T. River R. Co. 18 L. R. A. 166, which holds compensation required from railroad crossing other railroad; *Rauenstein v. New York*, L. & W. R. Co. 18 L. R. A. 768, which denies liability to abutter for embankment to change grade necessitated by railroad embankment in intersecting street; *Buhl v. Ft. Street Union Depot Co.* 23 L. R. A. 392, which denies recovery for inconvenience to abutter by discontinuing other portions of street; *Freiday v. Sioux*

City Rapid Transit Co. 26 L. R. A. 246, which holds elevated railroad a "railway;" *Willamette Iron Works v. Oregon R. & Nav. Co.* 29 L. R. A. 88, which denies right to make approach to bridge without compensation to abutting owner; *Aldrich v. Metropolitan West Side Elev. R. Co.* 57 L. R. A. 237, which denies right to recover for injury to apartment house from elevated road crossing highway 19 feet away.

Cited in notes (19 L. R. A. 510) on change of street grade as affecting railroad tracks, gas and water pipes, etc.; (26 L. R. A. 95) on liability for cost of changing grade of street to prevent crossing of railroad at grade.

14 L. R. A. 381, *EGERER v. NEW YORK C. & H. R. R. CO.* 130 N. Y. 108, 29 N. E. 95.

Injury to abutter's easement.

Cited in *Re Rochester*, 24 App. Div. 389, 48 N. Y. Supp. 764, upholding right to damages for injury to land, abutting condemned property in cutting off drainage and access to highway; *Lazzell v. Garlow*, 44 W. Va. 482, 30 S. E. 171, holding right to remove obstruction fencing in highway not discontinued by authorities; *Brown v. San Francisco*, 124 Cal. 281, 57 Pac. 82, denying that constitutional provision forbidding damage to property without compensation applies to diminution in value by closing end of street; *De Geofroy v. Merchants Bridge Terminal R. Co.* 179 Mo. 706, 64 L. R. A. 963, 101 Am. St. Rep. 524, 79 S. W. 386, holding abutter entitled to damages for erection of track on pillars from 15 to 25 feet above surface of street; *Re Rutland*, 70 Misc. 86, 128 N. Y. Supp. 94, to the point that legislature has power to discontinue highway and also to delegate power to others; *Reis v. New York*, 188 N. Y. 68, 80 N. E. 573, affirming 113 App. Div. 465, 99 N. Y. Supp. 291, holding abutting owner suffers no actionable wrong by closing of street where another means of access by public ways is left open; *Kline v. State*, 61 Misc. 22, 114 N. Y. Supp. 318, holding same but that state which neglects to repair bridge and keeps it closed for purpose of making repairs without making them, becomes liable for damages to adjacent owner; *Johnston v. Lonstorf*, 128 Wis. 27, 107 N. W. 459, holding city council cannot vacate alley without compensation to protesting owners of lands abutting thereon.

Cited in footnotes to *Pueblo v. Strait*, 24 L. R. A. 392, which holds abutter entitled to damages on building of viaduct over railroad in practically closing street; *Townsend v. Epstein*, 52 L. R. A. 409, which sustains abutter's right to relief against diminution of light and air by bridge over street; *First Nat. Bank v. Tyson*, 59 L. R. A. 399, which sustains right of injunction against pillars in street in front of adjoining lot, obstructing light and air from street.

Cited in notes (18 L.R.A. 544) on protection of private rights from interference by public; (15 L.R.A.(N.S.) 55) on cutting off access to highway as a taking.

— By railroad.

Cited in *Egerer v. New York C. & H. R. R. Co.* 70 App. Div. 422, 75 N. Y. Supp. 476, denying right of railroad company to deprive abutter of light and air by erection of embankment under legislative authority; *Re Grade Crossing*, 166 N. Y. 75, 59 N. E. 706, denying compensation for closing street, when another and safer passage provided; *Foster Lumber Co. v. Arkansas Valley & W. R. Co.* 20 Okla. 600, 30 L.R.A.(N.S.) 240, 100 Pac. 1110, holding where abutting property owners' means of ingress and egress to and from lot is destroyed or materially interfered with by construction of steam railroad tracks in street, he is entitled to damages; *South Bound R. Co. v. Burton*, 67 S. C. 524, 46 S. E. 340, holding jarring of building, noise, smoke, vapors, loss of light and air, increased risk of fire, material interference with egress and ingress, may enter

into estimate of damages to abutting property by construction of steam railroad in street, so far as they depreciate value of such property, also citing annotation on this point.

Cited in footnotes to *Nichols v. Ann Arbor & Y. Street R. Co.* 16 L. R. A. 371, which requires compensation to owner of fee before construction of railway along highway; *Jones v. Erie & W. Valley R. Co.* 17 L. R. A. 758, which holds exclusion of light and air from abutting property by erecting bridge to carry railroad tracks diagonally across street proper element of damage; *Memphis & C. R. Co. v. Birmingham, S. & T. River R. Co.* 18 L. R. A. 166, which holds compensation required from railroad crossing other railroad; *Rauenstein v. New York, L. & W. R. Co.* 18 L. R. A. 768, which denies liability to abutter for embankment to change grade necessitated by railroad embankment in intersecting street; *Spencer v. Metropolitan Street R. Co.* 22 L. R. A. 668, which denies right to construct viaduct in street without compensating abutters; *Garrett v. Lake Roland Elev. R. Co.* 24 L. R. A. 396, which holds erection for elevated railroad of abutment 9 feet high in street not taking of abutter's property; *Lockwood v. Wabash R. Co.* 24 L. R. A. 516, which denies city's power to authorize steam railroad in narrow highway devoted to wholesale business; *Block v. Salt Lake Rapid Transit Co.* 24 L. R. A. 610, which authorizes injunction against laying additional street-car track unnecessarily interfering with travel; *Freiday v. Sioux City Rapid Transit Co.* 26 L. R. A. 246, which holds elevated railroad a "railway;" *Home Bldg. & Conveyance Co. v. Roanoke*, 27 L. R. A. 551, which holds elevated approach to bridge over railroad tracks not additional burden; *O'Reilly v. New York Elev. R. Co.* 31 L. R. A. 407, which denies right of abutter to enjoin maintenance of elevated railroad in street; *Austin v. Augusta Terminal R. Co.* 47 L. R. A. 755, which denies recovery for depreciation in value of property by noise, smoke, and cinders from railroad; *Aldrich v. Metropolitan West Side Elev. R. Co.* 57 L. R. A. 237, which denies right to recover for injury to apartment house from elevated road crossing highway 19 feet away; *McKeon v. New York, N. H. & H. R. Co.* 61 L. R. A. 730, which holds abutter entitled to compensation for interference with access to property by temporary occupation of street with rails while elevating roadbed; *Suffolk & C. R. Co. v. West End L. & I. Co.* 68 L.R.A. 333, which holds value of land taken together with damage to abutting lots measure of compensation on condemnation by railroad company of street for right of way.

Cited in notes (15 L. R. A. 377) on right to construct elevated railroad in street; (17 L. R. A. 481) on what use of street or highway constitutes an additional burden; (36 L.R.A.(N.S.) 691, 764) on abutter's right to compensation for railroads in streets.

Distinguished in *Fries v. New York & H. R. Co.* 169 N. Y. 284, 62 N. E. 358, denying liability of railroad company to abutter for erection of viaduct under statutory order; *Conabeer v. New York C. & H. R. R. Co.* 156 N. Y. 488, 51 N. E. 402, denying liability for construction of railroad in place never opened or used as street; *Pratt v. New York C. & H. R. R. Co.* 90 Hun, 86, 35 N. Y. Supp. 557, denying abutter's right to enjoin railroad company's excavation in street under direction of police power.

14 L. R. A. 386, *TURNER v. HEBRON*, 61 Conn. 175, 22 Atl. 951.

Right to fish.

Cited in *Lee v. Mallard*, 116 Ga. 18, 42 S. E. 372, holding conveyance of land on bank of unnavigable stream across which is mill dam not pass right to fish below high-water mark.

Annotation in *Hampton v. Columbia Canning Co.* 3 Alaska, 102, holding right to fish in tidal waters is not dependent upon ownership of abutting land; such right, being public, is incapable of acquisition by prescription, and cannot be exclusive in any individual.

Cited in footnotes to *Sollers v. Sollers*, 20 L. R. A. 94, which denies power to hold adverse possession of land covered by water within ebb and flow of tide; *Albright v. Cortright*, 48 L. R. A. 616, which denies right to fish in private pond by prescription or long usage by public.

Cited in notes (14 L. R. A. 334) on right to assign or transmit easement in gross; (41 L. R. A. 269) on public right of access to water; (60 L. R. A. 497, 498, 523) on right to fish; (131 Am. St. Rep. 755, 761) on law of fishing; (8 Eng. Rul. Cas. 348) on acquisition by prescription of right of fishery in private waters.

Distinguished in *Percy Summer Club v. Astle*, 90 C. C. A. 527, 163 Fed. 13, holding that right to fish in considerable lakes and ponds in New Hampshire is free in the public.

14 L. R. A. 389, *SNEEDEN v. HARRISS*, 109 N. C. 349, 13 S. E. 920.

Abuse of legal process.

Cited in *Lockhart v. Bear*, 117 N. C. 304, 23 S. E. 484, holding creditor liable for arrest of debtor to force payment out of exempt property; *Dishaw v. Wadleigh*, 15 App. Div. 209, 44 N. Y. Supp. 207, holding abuse of legal process to use subpoena to compel payment rather than travel long distance; *Marlatte v. Weickgenant*, 147 Mich. 271, 110 N. W. 1061 (dissenting opinion), on abuse of process; *Pittsburgh, J. E. & E. R. Co. v. Wakefield Hardware Co.* 138 N. C. 177, 50 S. E. 571, 3 A. & E. Ann. Cas. 720, holding complaint for alleged unlawful seizure of cars need not allege termination of proceedings.

Cited in footnotes to *LeClear v. Perkins*, 26 L. R. A. 627, which holds advice of counsel admissible as defense to malicious prosecution of civil suit; *McCormick Harvesting Mach. Co. v. Willan*, 56 L. R. A. 338, which authorizes suit for malicious prosecution of civil action without restraint of person or seizure of property; *Abbott v. Thorne*, 65 L.R.A. 826, which denies right of action for malicious prosecution of civil action in which there was no arrest or attachment of property and no special injuries inflicted.

Cited in note (86 Am. St. Rep. 399, 407, 408, 409) on abuse of lawful process and liability therefor.

Accrual of action for malicious prosecution.

Cited in *Dishaw v. Wadleigh*, 15 App. Div. 211, 44 N. Y. Supp. 207, and *Lockhart v. Bear*, 117 N. C. 304, 23 S. E. 484, upholding right to maintain action for malicious prosecution without proof of termination of malicious suit; *Harr v. Ward*, 73 Ark. 440, 84 S. W. 496, holding signing bond for attachment as surety not sufficient to subject person to penalties of malicious prosecution.

Cited in footnote to *Luby v. Bennett*, 56 L. R. A. 261, which holds suit for malicious prosecution maintainable of material issues of prosecution decided in defendant's favor before suit commenced.

14 L. R. A. 393, *DEWEY v. SUGG*, 109 N. C. 328, 13 S. E. 923.

Index to records.

Cited in *Valentine v. Britton*, 127 N. C. 59, 37 S. E. 74, holding one cross-index insufficient for two judgments; *Darden v. Blount*, 126 N. C. 249, 35 S. E. 479, denying that failure to index supplementary judgment impairs lien of original judgment, rendering clerk liable; *Western Sav. Co. v. Currey*, 39 Or. 412,

87 Am. St. Rep. 660, 65 Pac. 360, holding insufficient entry of judgment in book "Judgment Lien Docket, B County;" *Redmond v. Staton*, 116 N. C. 141, 21 S. E. 186, denying that assignment of judgment includes action against clerk for failure to index judgment; *Hahn v. Mosely*, 119 N. C. 75, 25 S. E. 713, holding judgments indexed as to one of several plaintiffs sufficient notice; *Blum v. Keyser*, 8 Tex. Civ. App. 677, 28 S. W. 561, holding judgment indexed under name of one of two defendants creates lien against such one; *Wilkes v. Miller*, 156 N. C. 431, 72 S. E. 482, holding that judgments docketed but not cross-indexed do not constitute lien on land as against mortgage subsequently registered.

Cited in footnotes to *Davis v. Steeps*, 23 L. R. A. 818, which holds docket entry of judgment against Edward Davis not constructive notice of encumbrance against Edward A. Davis; *Armstrong v. Austin*, 29 L. R. A. 772, which holds failure to index mortgage on records not fatal to validity; *State v. Higgins*, 27 L. R. A. 74, which holds second initial material part of name where only initial of first name given; *Johnson v. Schlosser*, 36 L. R. A. 59, which upholds lien of judgment against bona fide purchaser, although clerk failed to enter same in docket; *Hilpiper v. Claude*, 46 L. R. A. 171, which holds sufficient, indexing adopting instrument under child's original, and also under adopted, name; *Stuyvesant v. Weil*, 53 L. R. A. 562, which holds mistake in Christian name of defendant duly served and notified that he is person intended, not prevent jurisdiction.

Cited in notes (17 L. R. A. 825) on presumption of identity of person from identity of name; (26 L. R. A. 633) on what entry or record is necessary to complete a judgment or order; (38 L. R. A. 247) on priority of judgment over conveyance made after beginning of term.

Distinguished in *Davis v. Whitaker*, 114 N. C. 281, 41 Am. St. Rep. 793, 19 S. E. 699, denying that failure of register of deeds to index deed impairs efficacy of conveyance.

14 L. R. A. 398, *BABBAGE v. POWERS*, 130 N. Y. 281, 29 N. E. 132.

Liability for holes and obstructions in street.

Cited in *Canandaigua v. Foster*, 156 N. Y. 359, 41 L. R. A. 556, footnote p. 554, 66 Am. St. Rep. 575, 50 N. E. 971, Affirming 81 Hun, 150, 30 N. Y. Supp. 686, holding lessor required to keep sidewalk in repair, though tenant has exclusive use of same; *Curran v. Flammer*, 49 App. Div. 295, 62 N. Y. Supp. 1061, denying landlord's liability for injury to subtenant's customer falling through grate of store rented by month; *Jacobs v. O'Gorman*, 13 Misc. 173, 34 N. Y. Supp. 106, denying owner, authorized to repair walk, liable as trespasser to one falling over obstruction; *Maltbie v. Bolting*, 6 Misc. 345, 26 N. Y. Supp. 903, denying liability of owner to one injured by heating barrel placed as guard over open coal hole by contractor; *Brown v. Metropolitan Street R. Co.* 60 App. Div. 187, 70 N. Y. Supp. 40, holding cable slot 2 inches wide, into which bicycle fell, nuisance rendering company liable; *Tinker v. New York, O. & W. R. Co.* 71 Hun, 435, 24 N. Y. Supp. 977, same case on later appeal in 157 N. Y. 319, 51 N. E. 1031, holding railroad company liable for fright of horse caused by deposit of timbers in highway on land owned by company; *Sautter v. Utica City Nat. Bank*, 119 App. Div. 905, 104 N. Y. Supp. 1139, affirming 45 Misc. 21, 90 N. Y. Supp. 838 (dissenting opinion) on authority of municipalities to permit encroachments upon public streets; *People ex rel. Mark Cross Co. v. Ahearn*, 124 App. Div. 844, 109 N. Y. Supp. 249, holding construction and maintenance of portico or stoop or steps within stoop line, as approach to building, and of areaway are uses of public street which may be properly made under legislative authority; *Sanford v. White*, 80 C. C. A. 390, 150 Fed. 728, Affirming, on rehearing, a decision overruling 132 Fed. 534, holding trespass will not lie for injury caused by running

into a guy rope, placed across street by contractor authorized thereto by city; *Mixer v. Herrick*, 78 Vt. 351, 62 Atl. 1019, holding where obstruction or excavation is made with consent of municipal authorities liability rests on principles of negligence; *McKim v. Philadelphia*, 217 Pa. 249, 19 L.R.A.(N.S.) 515, 66 Atl. 340, holding city granting electric company permission to erect trolley poles in street is under duty of seeing permission is not so used as to render street unsafe; *Devine v. National Wall Paper Co.* 95 App. Div. 197, 88 N. Y. Supp. 704, holding one maintaining areaway in street by permission of municipal officers bound to use reasonable care to make highway safe for those lawfully using same; *Oppen v. Hellinger*, 116 App. Div. 266, 101 N. Y. Supp. 616, holding cellarway permitted by municipal authorities and provided with doors completely covering and protecting it does not constitute nuisance; owner liable only for negligence in connection therewith; *Friedman v. New York*, 63 Misc. 311, 116 N. Y. Supp. 750, holding boards placed on sidewalk under permit from city to place building materials in street is obstruction governed by law of negligence and not law of nuisance; *O'Hara v. Laclede Gaslight Co.* 131 Mo. App. 452, 110 S. W. 642, on non-delegation to independent contractor of responsibility for condition of street by one occupying street for private use under license; *New York Steam Co. v. Foundation Co.* 123 App. Div. 263, 108 N. Y. Supp. 84, holding permit for construction of vault in public highway, for use of abutting owner, is in nature of private revocable easement; *Mullins v. Siegel-Cooper Co.* 95 App. Div. 238, 88 N. Y. Supp. 737, holding one who while making unauthorized use of sidewalk renders it unsafe by causing stone therein to project above level of sidewalk is liable for injury resulting from such unsafe condition; *New York v. Knickerbocker Trust Co.* 104 App. Div. 228, 93 N. Y. Supp. 937, holding steps, coping and areaway in street without authority constitute nuisance; *Casey v. Wrought Iron Bridge Co.* 114 Mo. App. 61, 89 S. W. 330, holding in cause of action based on nuisance negligence is not essential element.

Cited in footnotes to *Terry v. Richmond*, 38 L. R. A. 834, which denies city's liability for injury to adjacent buildings through caving in of excavation under street made by railroad company under authority from state; *West Chicago Masonic Asso. v. Cohn*, 55 L. R. A. 235, which denies landlord's liability for injury by defective condition of coal hole in sidewalk; *Perry v. Castner*, 66 L.R.A. 160, which denies right of abutting owner even with city's consent to construct area to reach basement on sidewalk so that approach to and from it is in front of neighbor's property; *O'Hanlin v. Carter Oil Co.* 66 L.R.A. 893, which holds person maintaining steam pipe beneath highway liable for injury to child precipitated into opening on giving away of earth over such pipe and burned by steam escaping from break in pipe, although the city permitted its placing in highway.

Cited in notes (39 L.R.A. 654) on municipal power over nuisances affecting highways and waters; (16 L.R.A.(N.S.) 1038) on right of abutter to change conditions in surface of street or highway; (92 Am. St. Rep. 543) on liability of lessor for injury from vault in sidewalk constructed under license from municipality.

Distinguished in *Lane v. Syracuse*, 12 App. Div. 121, 42 N. Y. Supp. 219, holding liability of company in leaving trench open in street, question for jury; *McMillan v. Klaw & E. Constr. Co.* 107 App. Div. 411, 95 N. Y. Supp. 365, enjoining at suit of abutting owners, erection, as part of building, of structure forty-five feet high and extending into street four feet beyond building line, though authorized by ordinance.

Permission presumed by acquiescence.

Followed in *Sandmann v. Baylies*, 26 Misc. 694, 56 N. Y. Supp. 1070, holding use for many years of iron doors in walk, without complaint presumes sanction of authorities.

Cited in *Canandaigua v. Foster*, 156 N. Y. 358, 41 L. R. A. 556, footnote p. 554, 66 Am. St. Rep. 575, 50 N. E. 971, Affirming 81 Hun, 149, 30 N. Y. Supp. 686, holding acquiescence in maintenance of grate for seventeen years raises presumption of consent; *Korte v. St. Paul Trust Co.* 54 Minn. 534, 56 N. W. 246, and *Kuechenmeister v. Brown*, 13 Misc. 141, 34 N. Y. Supp. 180, holding continued use of trap door in walk to cover coal hole infers permission; *Jorgensen v. Squires*, 144 N. Y. 285, 39 N. E. 373, holding long user, without objection, presumptive evidence of authorities' consent to maintain cellar doors, without regard to ordinance; *Campion v. Rollwagen*, 43 App. Div. 121, 59 N. Y. Supp. 308, holding refusal to charge that opening in walk used for four years as coal hole charged owner with injury for maintaining nuisance, no error; *Schubkegel v. Butler*, 76 App. Div. 13, 78 N. Y. Supp. 644, holding consent to construction of ash pit under walk presumed from three years' user without objection; *Chicago v. Union Stock Yards & Transit Co.* 164 Ill. 232, 35 L. R. A. 285, 45 N. E. 430, holding acquiescence for twenty years estops city to deny right of railroad company to cross highways within city limits; *Tubering v. Buffalo*, 51 App. Div. 17, 64 N. Y. Supp. 399, holding (*obiter*) use for six years of trap door to vault under walk raises presumption of municipal permission; *Mahoney v. New York*, 145 App. Div. 886, 130 N. Y. Supp. 602, holding that presumption that owner had permit for vault in street because of its existence there for fourteen years is overcome, if records do not show grant of permit; *Opper v. Hellinger*, 116 App. Div. 266, 101 N. Y. Supp. 616, on inference of permission of municipal authorities to maintain areaway opening from street where it has existed for long time.

Distinguished in *Deshong v. New York*, 176 N. Y. 482, 68 N. E. 880, Affirming 74 App. Div. 237, 77 N. Y. Supp. 563, denying recovery of money paid for permit to remodel vault constructed under walk before enactment of law necessitating permit.

Licensing nuisance.

Cited in *Indiana R. Co. v. Calvert*, 168 Ind. 328, 10 L.R.A.(N.S.) 783, 80 N. E. 961, 11 A. & E. Ann. Cas. 635, holding rule that council cannot license nuisance so as to prevent recovery by person specially damaged thereby inapplicable where council possesses legislative authority to determine rights of parties.

14 L. R. A. 403, *SMITH v. PROCTOR*, 130 N. Y. 319, 29 N. E. 312.

What constitutes majority.

Cited in *Scott v. Twombly*, 20 Misc. 654, 46 N. Y. Supp. 1084, requiring majority of taxable inhabitants to adopt proposition to issue park bonds; *Re Denny*, 156 Ind. 122, 51 L. R. A. 729, footnote p. 722, 59 N. E. 359, requiring majority of all votes cast at election for any purpose to adopt constitutional amendment; *May v. Bermel*, 20 App. Div. 58, 46 N. Y. Supp. 622, Affirming 20 Misc. 517, 45 N. Y. Supp. 913, holding majority of votes cast on town bonding proposition sufficient; *Tinkel v. Griffin*, 26 Mont. 432, 68 Pac. 859, holding favorable majority on proposition as to loan, sufficient, though less than majority voting at election; *Montgomery County Fiscal Court v. Trimble*, 104 Ky. 638, 42 L. R. A. 742, 47 S. W. 773, holding two-thirds majority voting on proposition to aid turnpikes, sufficient; *Citizens & Taxpayers v. Williams*, 49 La. Ann. 439, 37 L. R. A. 769,

21 So. 647, defining "by vote of majority" on question tax rate, as "majority of those actually voting;" *Miller v. School Dist. No. 3*, 5 Wyo. 223, 39 Pac. 879, holding voters absent from election on bond proposition, presumed to assent to action of majority voting; *Spitzer v. Fulton*, 33 Misc. 266, 68 N. Y. Supp. 600, holding legislature may limit right of suffrage by property qualification on proposition to create debt; *State v. Fabrick*, 18 N. D. 406, 121 N. W. 65, holding that words "majority vote" mean majority of all votes cast on proposition, and not majority of all votes cast at election; *Rice v. Palmer*, 78 Ark. 453, 96 S. W. 396, as to what constitutes majority; *State ex rel. Granvold v. Porter*, 11 N. D. 319, 91 N. W. 944, holding majority of those present at political party convention competent to transact business; *Murdock v. Strange*, 99 Md. 110, 57 Atl. 628, 3 A. & E. Ann. Cas. 66, holding where city council consisting of eight members gave four votes in favor of one person for market master and three votes for another person, and there was one blank ballot, person receiving four votes was elected; *Myers v. Union League*, 17 Pa. Dist. R. 306, holding majority means majority of those voting upon question before meeting, quorum being present.

Cited in footnotes to *State ex rel. Childs v. Kiichli*, 19 L. R. A. 779, which holds president of city council removable at pleasure; *Pollasky v. Schmid*, 55 L. R. A. 614, which requires two-thirds majority of all members elected to council to pass ordinance over veto though some seats vacant.

14 L. R. A. 405, *GRIFFITH v. SHIPLEY*, 74 Md. 591, 22 Atl. 1107.

Burden of proof as to bona fides.

Cited in *McCosker v. Banks*, 84 Md. 297, 35 Atl. 935, holding it incumbent upon holder to show preceding indorser took note in good faith, upon proof of fraudulent inception; *Banks v. McCosker*, 82 Md. 524, 51 Am. St. Rep. 478, 34 Atl. 539, and *Cover v. Myers*, 75 Md. 418, 32 Am. St. Rep. 394, 23 Atl. 850, holding note, fraudulent in inception, requires holder to show bona fide title; *Hazard v. Spencer*, 17 R. I. 564, 23 Atl. 729, denying recovery, holder failing to show bona fides after proof of note obtained by fraud; *Arnd v. Heckert*, 108 Md. 306, 70 Atl. 416, holding evidence that holder took note with knowledge of fraud in its obtaining and of failure of consideration sufficient to take defense of fraud to jury.

Cited in note (3 Eng. Rul. Cas. 679) on notice to banker of equitable rights.

Distinguished in *Hutchins v. Langley*, 27 App. D. C. 240, where evidence fell short of showing note obtained by fraud, or fraudulently negotiated.

Evidence of fraud as to notes.

Cited in *Stouffer v. Alford*, 114 Md. 116, 78 Atl. 387, holding that evidence of fraud in procuring acceptance of draft on which action is founded is admissible under general issue.

Cited in notes (37 Am. St. Rep. 458) on fraud in procuring delivery of negotiable instruments; (4 Eng. Rul. Cas. 435) on notice of fraud in issuance of accommodation paper by insolvent persons.

14 L. R. A. 407, *Re BUSKETT*, 106 Mo. 602, 27 Am. St. Rep. 378, 17 S. W. 753.

Exemption from self-incrimination.

Cited in *People ex rel. Lewisohn v. O'Brien*, 81 App. Div. 60, 80 N. Y. Supp. 816, holding witness not compelled to answer question whether he has been in gambling house, in criminal investigation against keeper; *Re Briggs*, 135 N. C. 121, 47 S. E. 403, sustaining statute requiring witness to testify as to unlawful gaming by himself or another.

Cited in footnotes to *State ex rel. Wood v. Hardware*, 15 L. R. A. 676, which holds individual protected from being compelled to furnish link in chain securing his conviction; *Re Carter*, 57 L. R. A. 654, which holds mere exemption from liability to have testimony used against witness in case of subsequent prosecution insufficient to prevent claim of privilege.

Cited in notes (26 L. R. A. 418) on statutory exemption from prosecution as substitute for constitutional exemption from self-incriminating evidence; (1 L.R.A.(N.S.) 167) on constitutional guaranty against self-incrimination equivalent exemption to witness; (75 Am. St. Rep. 345) on privilege of witness as to incriminating testimony; (48 L. ed. U. S. 861) on sufficiency of statutory immunity to satisfy constitutional guaranty against self-incrimination.

14 L. R. A. 410, *LOUGHEED v. DYKEMAN'S BAPTIST CHURCH & SOC.* 129 N. Y. 211, 29 N. E. 249.

Validity of gift.

Cited in *Connor v. Sheridan*, 116 Wis. 672, 93 N. W. 835, sustaining devise to son and if he is not heard from in ten years then to nephews.

— To unincorporated society.

Cited in *Wait v. Society for Political Study*, 68 Misc. 249, 123 N. Y. Supp. 637, holding that association unincorporated at time of death of testator cannot take under will although it afterward becomes incorporated.

Cited in footnotes to *Crerar v. Williams*, 21 L. R. A. 454, which holds that gift for free library not made conditional by provision for organizing corporation to administer charity; *Re Winchester*, 54 L. R. A. 281, which authorizes reception of bequest to unincorporated educational society by corporation subsequently formed by its members.

Cited in notes (32 L.R.A. 630) on validity of gift to unincorporated charity; (63 Am. St. Rep. 264) on what are charitable uses or trusts.

14 L. R. A. 414, *PARKER v. PROVIDENCE & S. S. CO.* 17 R. I. 376, 33 Am. St. Rep. 869, 22 Atl. 284, 23 Atl. 102.

Sufficiency of general allegation.

Cited in *Goldrick v. Union R. Co.* 20 R. I. 129, 37 Atl. 635, holding declaration alleging improper management of cars to injury of plaintiff, sufficient; *Ellis v. Waldron*, 19 R. I. 370, 33 Atl. 869, holding allegation that lessor owed lessee duty to maintain safe elevator, of which he had entire control, sufficient; *Miller v. Coffin*, 19 R. I. 166, 36 Atl. 6, holding declaration failing to connect company with negligent storage of acids, defective; *Wilson v. New York, N. H. & H. R. Co.* 18 R. I. 492, 29 Atl. 258, holding complaint charging negligence without setting out particular act or omission, demurrable; *Goldrick v. Union R. Co.* 20 R. I. 129, 37 Atl. 635, holding occurrence, of accident, without fault of one injured, creates presumption of company's negligence; *Bucci v. Waterman*, 25 R. I. 126, 54 Atl. 1059, holding negligence in ejecting child from a low gear vehicle not set out with sufficient definiteness; *Dalton v. Rhode Island Co.* 25 R. I. 577, 57 Atl. 383, holding in action by servant against master for negligence plaintiff should negative assumption of known risk or give excuse for continuing to work if it was known.

Cited in notes (59 L. R. A. 218, 274) on sufficiency of general allegations of negligence.

Administrator's power to compromise claim.

Cited in *Foot v. Great Northern R. Co.* 81 Minn. 495, 52 L. R. 355, footnote p. 354, 83 Am. St. Rep. 395, 84 N. W. 342, sustaining administrator's power to

compromise cause of action for death; Pittsburgh, C. C. & St. L. R. Co. v. Gipe, 160 Ind. 365, 65 N. E. 1034, sustaining power of administrator to compromise claim against railroad company for death of decedent; Shambach v. Middlecreek Electric Co. 45 Pa. Super. Ct. 303, holding that widow with minor children, who has brought action for benefit of self and children, has right to compromise and settle case; Olston v. Oregon Water Power & R. Co. 52 Or. 348, 20 L.R.A.(N.S.) 921, 96 Pac. 1095, holding administrator may liquidate and accept settlement of claim for unliquidated damages.

Cited in notes (70 Am. St. Rep. 685) on power of personal representative to compromise right of action for death of decedent; (78 Am. St. Rep. 187, 188) on common-law power of executor or administrator to compromise claims.

Res ipsa loquitur.

Distinguished in Wilbur v. Rhode Island Co. 27 R. I. 206, 61 Atl. 601, holding no presumption of negligence raised by fact that person catches shoe on running board of car, heel is torn off and person thrown.

14 L. R. A. 418, DAKOTA SYNOD v. STATE, 2 S. D. 366, 50 N. W. 632.

Appropriation of public funds.

Cited in footnotes to Cutting v. Taylor, 15 L. R. A. 691, which holds appropriation to reward fire companies complying with specified conditions not a donation; Wasson v. Wayne County, 17 L. R. A. 795, which holds county not taxable for site and construction of state building; Institution for Education of Mute & Blind v. Henderson, 18 L. R. A. 398, which holds invalid, act for paying bounties by county treasurer; Conlin v. San Francisco, 21 L. R. A. 474, which holds void act for relief of street contractor; Ingram v. Colgan, 28 L. R. A. 187, which upholds bounty for killing coyotes.

Cited in notes (14 L. R. A. 474) on public purposes for which money may be appropriated or raised by taxation; (42 L. R. A. 38, 55) on what claims constitute valid demands against a state.

— **For sectarian purposes.**

Cited in Hysong v. School District, 164 Pa. 644, 26 L. R. A. 207, footnote p. 203, 44 Am. St. Rep. 632, 30 Atl. 482, upholding employment, as public school teachers, of Roman Catholic sisters wearing distinctive garb; Roberts v. Bradfield, 12 App. D. C. 474, denying that erection of building by commissioner on sectarian property, for poor patients, violates Constitution.

Cited in footnotes to Board of Education v. State, 25 L. R. A. 770, which holds unconstitutional act authorizing board of education to levy tax to pay claim for which no obligation exists; Farmer v. St. Paul, 33 L. R. A. 199, which denies right to select as workhouse institution under control of religious society; Pfeiffer v. Board of Education, 42 L. R. A. 536, which sustains use as supplemental reading book of extracts from Bible consisting mostly of moral precepts.

Cited in notes (15 L. R. A.) 826) on power to use public school moneys in support of other educational institutions; 105 Am. St. Rep. 152, 156; 16 L.R.A. (N. S.) 863) on religious exercises or instruction in public schools; (19 L.R.A. (N. S.) 172) on right to recover back public money appropriated to sectarian institution.

Self-executing constitutional provisions.

Cited in Ex parte Show, 4 Okla. Crim. Rep. 429, 113 Pac. 1062, to the point that constitutional provisions prohibitive in character, are self-executing; Ex parte McNaught, 23 Okla. 292, 1 Okla. Crim. Rep. 267, 100 Pac. 27, holding constitutional provisions prohibiting criminal prosecution of person otherwise

than by presentment or indictment or by information and requiring preliminary examination in case of prosecution for felony by information self executing.

Effect of adoption of constitution on existing laws.

Cited in *Mannie v. Hatfield*, 22 S. D. 477, 118 N. W. 817, holding that laws in force at time of adoption of constitution, not inconsistent therewith remain in force until changed by legislature.

14 L. R. A. 424, *HANGEN v. ALBINA LIGHT & WATER CO.* 21 Or. 411, 28 Pac. 244.

Compulsory service to public.

Approved in *Gordon v. Doran*, 100 Minn. 351, 8 L.R.A.(N.S.) 1053, 111 N. W. 272, enjoining water commissioners from shutting off consumer's water connection to enforce unreasonable rule.

Cited in *State ex rel. Grinsfelder v. Spokane Street R. Co.* 19 Wash. 529, 41 L. R. A. 519, 67 Am. St. Rep. 739, 53 Pac. 719, holding one improving property, relying upon operation of street car line, may compel company to resume operation; *Potwin Place v. Topeka R. Co.* 51 Kan. 613, 37 Am. St. Rep. 312, 33 Pac. 309, sustaining city's right to compel street railway company to operate line in accordance with ordinance; *Rockingham County Light & P. Co. v. Hobbs*, 72 N. H. 538, 66 L. R. A. 586, 58 Atl. 46, holding electric light company using streets for wires bound to supply electricity without discrimination; *Minnesota Canal & Power Co. v. Pratt*, 101 Minn. 214, 11 L.R.A.(N.S.) 111, 112 N. W. 395, holding company incorporated to generate and supply electricity to public is public service corporation.

Cited in (7 Eng. Rul. Cas. 463) on right to compel public service corporation to perform its obligations and to refrain from exceeding its powers.

— **By water company.**

Cited in *Watanga Water Co. v. Wolfe*, 99 Tenn. 431, 63 Am. St. Rep. 841, 41 S. W. 1060; *Wiemer v. Louisville Water Co.* 130 Fed. 252, holding water company bound to supply city and inhabitants without discrimination; *Rogers Park Water Co. v. Fergus*, 178 Ill. 577, 49 L. R. A. 654, 53 N. E. 363, upholding right of consumer to compel company to furnish water at rate reduced by council; *State ex rel. Milsted v. Butte City Water Co.* 18 Mont. 206, 32 L. R. A. 699, 56 Am. St. Rep. 574, 44 Pac. 966, holding rule of water company not to supply rented premises except upon responsibility of owner, unreasonable; *Weatherly v. Capital City Water Co.* 115 Ala. 175, 22 So. 140, holding water company may be compelled to furnish water, pending settlement of its affairs; *Gorrell v. Greensboro Water Supply Co.* 124 N. C. 334, 46 L. R. A. 516, 70 Am. St. Rep. 598, 32 S. E. 720, holding breach of contract to supply water sufficient for protection against fire, gives one damaged right to sue; *Seaton Mountain Electric Light, H. & P. Co. v. Idaho Springs Invest Co.* 49 Colo. 127, 33 L.R.A.(N.S.) 1081, 111 Pac. 834; *Leavitt v. Lassen Irrig. Co.* 157 Cal. 90, 29 L.R.A.(N.S.) 216, 106 Pac. 404,—to the point that when company undertakes to supply demand which is affected by public interest, it must supply all alike who are like situated; *State ex rel. Ferguson v. Birmingham Waterworks Co.* 164 Ala. 590, 27 L.R.A.(N.S.) 676, 137 Am. St. Rep. 69, 51 So. 354, 20 Ann. Cas. 951, holding business of furnishing water to public affected with public use; *Woodbury v. Tampa Water Works Co.* 57 Fla. 260, 21 L.R.A.(N.S.) 1041, 49 So. 559, holding duties of company undertaking service of furnishing water for fire protection are expressed or implied by law and not merely defined by contract; *Hatch v. Consumers Co.* 17 Idaho. 214, 104 Pac. 670, holding it is duty of water company to lay pipes in street up to line of abutting property; *Independent School Dist.*

v. Le Mars City Water & Light Co. 131 Iowa, 19, 10 L.R.A.(N.S.) 863, 107 N. W. 944, holding statute granting city power to authorize private persons or corporations to construct waterworks and giving city power to fix rates by contract, impliedly makes every consumer of water thereunder privy to contract to such extent as to enable him to enforce his rights under such contract.

Cited in notes (15 L. R. A. 322) on compulsory service by party whose business it is to serve public; (61 L. R. A. 90, 108) on establishment and regulation of municipal water supply; (81 Am. St. Rep. 479, 480) on liability of water companies.

— By gas company.

Cited in *State ex rel. Wood v. Consumers Gas Trust Co.* 157 Ind. 352, 55 L. R. A. 248, 61 N. E. 674, holding gas company, licensed to use street, cannot refuse to furnish applicant because of insufficiency of supply; *Indiana Natural & Illuminating Gas Co. v. State*, 158 Ind. 519, 57 L. R. A. 762, footnote p. 761, 63 N. E. E. 220, denying right of gas company to discriminate against single consumer by enforcing meter rate instead of flat rate; *Richmond Natural Gas Co. v. Clawson*, 155 Ind. 669, 51 L. R. A. 747, 58 N. E. 1049, holding rule charging users of gas for fuel and light to pay higher rate than for light alone, unreasonable; *Phelan v. Boone Gas Co.* 147 Iowa, 628, 31 L.R.A.(N.S.) 320, 125 N. W. 208, holding that gas company cannot require security before serving consumer merely because accounts were in good faith disputed; *State ex rel. Deeney v. Butte Electric & Power Co.* 43 Mont. 123, 115 Pac. 44, holding that corporation authorized to furnish electricity to inhabitants of city may be compelled to furnish it to all persons along its lines; *Vanderberg v. Kansas City Missouri Gas Co.* 126 Mo. App. 606, 105 S. W. 17, holding while gas company may refuse to supply gas for premises without contract executed by tenant in possession, it cannot refuse to furnish gas for wife because she declines to pay her husband's gas bill.

Remedy to compel service to public.

Followed in *Mackin v. Portland Gas Co.* 38 Or. 120, 49 L. R. A. 598, 61 Pac. 134, holding mandamus remedy to compel gas company to supply persons along line.

Cited in *Crumley v. Watauga Water Co.* 99 Tenn. 425, 41 S. W. 1058, holding mandamus appropriate remedy to compel water company to supply applicant; *Atty. Gen. ex rel. Moore v. American Exp. Co.* 118 Mich. 688, 77 N. W. 317, holding mandamus will lie to compel express company to transport packages; *State ex rel. Marion v. Marion Light & Heating Co.* 174 Ind. 626, 92 N. E. 731, holding that public service corporation may be compelled by mandamus to perform franchise duties; *State ex rel. Ferguson v. Birmingham Waterworks Co.* 164 Ala. 590, 27 L.R.A. (N.S.) 676, 51 So. 354, on remedy for discrimination between customers of water company; *Camilla v. Norris*, 134 Ga. 351, 67 S. E. 940, holding petition for mandamus to compel municipality to furnish water to petitioner, a resident, is not subject to dismissal on ground plaintiff had specific legal remedy.

Cited in notes (37 Am. St. Rep. 319) on mandamus to compel private corporation to perform duty; (125 Am. St. Rep. 513) on duties, performance of which may be compelled by mandamus.

14 L. R. A. 429, *DU BOIS v. DECKER*, 130 N. Y. 325, 27 Am. St. Rep. 529, 29 N. E. 313.

Liability for malpractice.

Cited in *Elebach v. Weed*, 29 Misc. 757, 60 N. Y. Supp. 1136, holding surgeon

responsible for negligent treatment of broken elbow; *Gerken v. Plimpton*, 62 App. Div. 38, 70 N. Y. Supp. 793, holding surgeon liable for neglect to attend patient with broken arm, resulting in union causing deformity; *Staloch v. Holm*, 100 Minn. 282, 9 L.R.A.(N.S.) 715, 111 N. W. 264, holding if surgeon waits too long before undertaking necessary amputation he may be held liable for resulting damage; *Johnson v. Winston*, 68 Neb. 431, 94 N. W. 607, holding belief as to whether operation is proper which will excuse from consequences of operation must be well founded belief acquired in exercise of due professional care and skill; *Sauers v. Smits*, 49 Wash. 561, 17 L.R.A.(N.S.) 1247, 95 Pac. 1097, holding patient not prevented from recovering for malpractice because subsequent or independent act of negligence on patient's part increases or augments injury caused by negligence or incompetency of physician.

Cited in footnotes to *Myers v. Holburn*, 30 L. R. A. 345, which denies liability of physician for negligence or unskilfulness of other physician sent in former's place; *Maguire v. Sheehan*, 59 L. R. A. 496, which sustains liability for entire injury through negligence, though shock brought on delirium tremens retarding recovery; *Texas & P. R. Co. v. White*, 62 L.R.A. 90, which denies liability for aggravation of personal injuries due to failure to obtain needed medical or surgical assistance.

Cited in notes (23 L. R. A. 201) on liability of charitable institution for negligence; (37 L. R. A. 832) on degree of care and skill which physicians or surgeons must exercise; (49 L. R. A. 829) on obeying or disobeying physician as affecting remedy of injured person against one who injured him; (17 L.R.A.(N.S.) 1245) on patient's negligence or failure to follow instructions as affecting liability for malpractice; (93 Am. St. Rep. 659, 663) on liability of physicians and surgeons for negligence and malpractice.

Tort in connection with contract.

Distinguished in *German Alliance Ins. Co. v. Home Water Supply Co.* 99 C. C. A. 258, 174 Fed. 769, holding water company not liable in contract or tort to property owner whose property is burned by reason of company's failure to supply sufficient water at pressure great enough to extinguish fire.

14 L. R. A. 431, **BLACKWELL v. MIAMI VALLEY INS. CO.** 48 Ohio St. 533, 29 Am. St. Rep. 574, 29 N. E. 278.

Sale of part interest as affecting policy.

Cited in *Queen Ins. Co. v. Leonard*, 9 Ohio C. C. 53, holding violation of warranty in policy of transfer of interest, renders policy voidable; *Mitchell v. Aetna Ins. Co.* 4 Ohio N. P. 389, holding right of mortgagees to recover on policy, issued to mortgagor by mistake, who conveyed after delivery of policy; *Webster v. Dwelling House Ins. Co.* 53 Ohio St. 563, 30 L. R. A. 720, 53 Am. St. Rep. 658, 42 N. E. 546, holding warranties in policy issued to husband and wife on farm implements of former and house of latter, construed in popular, not technical, sense; *Sun Fire Office v. Fraser*, 5 Kan. App. 66, 47 Pac. 327, holding policy not avoided by delivery on transferring note and mortgage; *Phenix Ins. Co. v. Omaha Loan & T. Co.* 41 Neb. 848, 25 L. R. A. 686, 60 N. W. 133, holding trust company, assigning mortgage securing debt which it guaranteed, retains insurable interest; *Ohio Farmers' Ins. Co. v. Black*, 6 Ohio C. C. N. S. 133, 27 Ohio C. C. 87, holding trust deed to pay off incumbrances, residue to be returned to insured, a conveyance in violation of policy.

Cited in footnote to *Clinton v. Norfolk Mutual F. Ins. Co.* 50 L. R. A. 833, which holds insurance on house not forfeited by conveyance of all interest of insured except life estate in house.

Cited in notes (18 L. R. A. 483) on how far undivided interest in property is a complete or full ownership for purposes of insurance; (21 L.R.A.(N.S.) 445) on formation of partnership or change in personnel of firm as affecting change of title or ownership within provision of policy.

Acts or omissions generally working forfeiture of insurance policy.

Cited in *Swander v. Northern Cent. L. Ins. Co.* 1 Ohio C. C. N. S. 238, 25 Ohio C. C. 7, holding where there is no clause of forfeiture in policy failure to pay premiums will only work suspension until such length of time has passed as shows absence of intention of party to pay practical withdrawal.

14 L. R. A. 433, *BALLOU v. EARLE*, 17 R. I. 441, 33 Am. St. Rep. 81, 22 Atl. 1113.

Limitation of carrier's liability.

Cited in *Kellerman v. Kansas City, St. J. & C. B. R. Co.* 136 Mo. 191, 34 S. W. 41, Affirming 68 Mo. App. 272, holding stipulation limiting carrier's liability to sum stated, not construed as exempting from damages for negligence; *Calderon v. Atlas S. S. Co.* 170 U. S. 279, 42 L. ed. 1035, 18 Sup. Ct. Rep. 588, holding receipt freeing carrier from liability above stated sum for loss of goods, prohibited by Harter Act; *Graves v. Adams Exp. Co.* 176 Mass. 282, 57 N. E. 462, denying company's liability for full value of paintings, receipt accepted limiting liability, stamped "value asked and not given;" *Smith v. American Exp. Co.* 108 Mich. 577, 66 N. W. 479, holding receipt limiting express company's liability for article of undisclosed value, fixes limit of recovery; *Ullman v. Chicago & N. W. R. Co.* 112 Wis. 158, 56 L. R. A. 249, footnote, p. 246, 88 Am. St. Rep. 949, 88 N. W. 41, sustaining carrier's right to secure entire exemption from liability as insurer for loss, not due to negligence; *Western U. Teleg. Co. v. Beals*, 56 Neb. 418, 71 Am. St. Rep. 682, 76 N. W. 903, holding company liable for failure to transmit message correctly, regardless of agreement on back; *Adams Exp. Co. v. Carnahan*, 29 Ind. App. 610, 94 Am. St. Rep. 279, 63 N. E. 245, holding acceptance of unsigned receipt from express company limiting liability, binding; *George N. Pierce Co. v. Wells Fargo & Co.* 110 C. C. A. 645, 189 Fed. 564, holding that carrier may stipulate for limitation of amount he will be liable for in case of loss, in consideration of reduced rates; *M. M. Stone & Co. v. Postal Teleg. Co.* 31 R. I. 182, 29 L.R.A.(N.S.) 798, 76 Atl. 762, holding that telegraph company may contract for limitation of liability for delay in transmission of message.

Cited in footnotes to *Coupland v. Housatonic R. Co.* 15 L. R. A. 534, which holds statement as to value inserted in bill of lading conclusive; *Zouch v. Chesapeake & O. R. Co.* 17 L. R. A. 116, which holds carrier entitled to limit liability to value of horse as fixed; *Alair v. Northern P. R. Co.* 19 L. R. A. 764, which upholds carrier's right to fix value of live stock lost by negligence; *Willock v. Pennsylvania R. Co.* 27 L. R. A. 228, which holds carrier not protected against own negligence by requirement that shipper shall insure for carrier's benefit; *Shackt v. Illinois C. R. Co.* 28 L. R. A. 176, which holds carrier relieved from liability by fraud in shipping valuable goods as "household goods;" *J. J. Douglass Co. v. Minnesota Transfer R. Co.* 30 L. R. A. 860, which sustains stipulation as condition of making lower freight rate for adjusting loss at specified valuation; *United States Exp. Co. v. Koerner*, 33 L. R. A. 600, which denies right of express company to additional compensation because value of package carried exceeded amount represented; *Ohio & M. R. Co. v. Taber*, 34 L. R. A. 685, which holds invalid, stipulation limiting value of animals carried, and as to time of notice of injury; *Mears v. New York, N. H. & H. R. Co.* 56 L. R. A. 884, which authorizes carrier to stipulate for exemption from liability for wet; *Rosenthal*

v. Weir, 57 L. R. A. 527, which holds failure to comply with agreement for stoppage *in transitu* not within contract limiting liability to specified amount; Parker v. Atlantic Coast Line R. Co. 63 L.R.A. 827, which denies right of carrier to contract for exemption from liability for injury by delay due to its own negligence; Bosley v. Baltimore & O. R. Co. 66 L.R.A. 871, which denies right of carrier of live stock to exempt itself from liability for loss by delay in transportation occasioned by its negligence or misfeasance by contract providing that shipper shall accept as full compensation in case of unusual detention amount actually expended in purchase of food and water while so detained.

Cited in notes (18 L. R. A. 528) on right of common carrier to limit common-law liability by contract in absence of negligence; (1 L.R.A.(N.S.) 986) on limiting valuation of property as affecting amount of recovery for loss by carrier's negligence; (88 Am. St. Rep. 82, 86, 97, 107, 110) on limitation of carrier's liability in bills of lading; (5 Eng. Rul. Cas. 347) on special limitations of liability of carrier.

Failure to read contract as defense.

Cited in Rozen v. Dry Dock, E. B. & B. R. Co. 7 Misc. 132, 27 N. Y. Supp. 337, holding failure of conductor to read contract of employment, no defense against provisions.

14 L. R. A. 438, WESTERN & A. R. CO. v. STATE (Ga.)

Liability of state for interest.

Cited in Flint & P. M. R. Co. v. State Auditors, 102 Mich. 502, 60 N. W. 773, holding state not liable for interest on bill of costs.

Cited in note (42 L. R. A. 38, 40, 62) on what constitutes valid claims against state.

14 L. R. A. 459, STEVENSON v. COLGAN, 91 Cal. 649, 25 Am. St. Rep. 230, 27 Pac. 1089.

Extrinsic evidence as to validity of act.

Cited in Yolo County v. Colgan, 132 Cal. 270, 84 Am. St. Rep. 41, 64 Pac. 403, denying right to impeach validity of statute by resort to legislative journal; Fragley v. Phelan, 126 Cal. 403, 58 Pac. 923, holding adoption by legislature of city charter as law, conclusive as to existence of requisite facts; Conlin v. San Francisco, 99 Cal. 20, 21 L. R. A. 476, 37 Am. St. Rep. 17, 33 Pac. 753, sustaining demurrer to answer setting forth matters as basis for legislative action; State *ex rel.* Cheyenne v. Swan, 7 Wyo. 177, 40 L. R. A. 198, 75 Am. St. Rep. 889, 51 Pac. 209, holding court has authority to examine legislative journals to determine validity of passage of disputed act; Lee v. Tucker, 130 Ga. 48, 60 S. E. 164; Smith v. Mathews, 155 Cal. 756, 103 Pac. 199,—on presumption that governor and legislature have ascertained existence of fact before passing statute right to pass which depends on existence of fact; People *ex rel.* Chapman v. Sacramento Drainage Dist. 155 Cal. 386, 103 Pac. 207, holding where legislature itself creates reclamation district and its decision is dependent on question of fact it is conclusively presumed legislature took evidence in the determination.

Cited in footnotes to Waterloo Woolen Mfg. Co. v. Shanahan, 14 L. R. A. 481, which holds legislative statement as to purpose of appropriation bill conclusive on court; Stockton v. Powell, 15 L. R. A. 42, which holds courts without power to inquire as to notice of application to legislature for local legislation; State v. Womble, 19 L. R. A. 827, which holds exemption of railroad employees from road duty not special privilege; People v. Dettenthaler, 44 L. R. A. 164, which

holds bill in which enacting clause added without authority by clerk of one branch of legislature, void.

Cited in notes (23 L. R. A. 347) on conclusiveness of enrolled bill; (47 L. R. A. 519) on unconstitutionality of statute as defense against mandamus to compel its enforcement.

Legislative control of public property.

Cited in *Crockett v. Mathews*, 157 Cal. 157, 106 Pac. 575, holding that courts have no right to review determination of legislature to change from fee to salary system of compensation for officers, where it is not disclosed whether increase in compensation is produced; *Patty v. Colgan*, 97 Cal. 252, 18 L.R.A. 745, 31 Pac. 1133, holding appropriation for benefit of flood sufferers violates constitutional provision against making gift of public property to individual.

Distinguished in *Conlin v. San Francisco*, 114 Cal. 407, 33 L.R.A. 753, 46 Pac. 279, where question was as to power of legislature to deal with moneys in treasury of municipal corporation.

14 L. R. A. 462, *HIGHLAND AVE. & BELT R. CO. v. MATTHEWS*, 99 Ala. 24, 10 So. 267.

Action at law for injury to property.

Cited in *Dennis v. Mobile & M. R. Co.* 137 Ala. 657, 97 Am. St. Rep. 69, 35 So. 30, holding that action at law affords adequate remedy for injury to property for hotel purposes from construction of depot.

Continuing injury.

Cited in *Williams v. Southern P. R. Co.* 150 Cal. 627, 89 Pac. 599, holding injury due to construction and operation of steam railroad is continuing and action must be commenced within statutory period after original infliction of injury; *Virginia Hot Springs Co. v. McCray*, 106 Va. 472, 10 L.R.A.(N.S.) 470, 56 S. E. 216, 10 A. & E. Ann. Cas. 179, on remedies for continuing injuries.

Cited in note (128 Am. St. Rep. 960, 962, as to when nuisance will support only one recovery and when it may support several.

Injunction against injury to easement.

Cited in *Western R. Co. v. Alabama G. T. R. Co.* 96 Ala. 282, 17 L. R. A. 482, 11 So. 483, holding equity will not enjoin construction of railroad in highway in favor of another; *Mobile & M. R. Co. v. Alabama Midland R. Co.* 116 Ala. 61, 23 So. 57, denying injunction restraining construction of railroad working no injury to abutter; *Birmingham Traction Co. v. Birmingham R. & Electric Co.* 119 Ala. 135, 24 So. 368, denying right of railway company to cross another's right of way without compensation; *Birmingham Traction Co. v. Birmingham R. & Electric Co.* 119 Ala. 140, 43 L.R.A. 234, 24 So. 502, denying injunctive relief against trespass by railway company, without authority to extend line; *Birmingham Traction Co. v. Southern Bell Teleph. & Teleg. Co.* 119 Ala. 152, 24 So. 731, sustaining injunction against injury to telephone system by erection of trolley wires so as to touch; *Southern R. Co. v. Hood*, 126 Ala. 316, 85 Am. St. Rep. 32, 28 So. 662, denying railroad company's right to enjoin ejectment without making compensation for land taken; *Montgomery Light & Water P. Co. v. Citizen's Light, Heat & P. Co.* 147 Ala. 364, 40 So. 981, dissolving preliminary injunction to restrain light company from stringing wires on pole of another company where compensation due latter was fixed by city electrician under ordinance and refused by company.

Cited in footnote to *Austin v. Augusta Terminal R. Co.* 47 L. R. A. 755, which denies recovery for depreciation in value of property by noise, smoke, and cinders from railroad.

Demurrer for remoteness of damages.

Cited in *Treadwell v. Tillis*, 108 Ala. 263, 18 So. 886, denying objection to remoteness of damages raised by demurrer, when complaint states cause of action. **Action in trespass passing with grant.**

Cited in *Huntsville v. Ewing*, 116 Ala. 582, 22 So. 984, denying that action against city for digging ditch passes to subsequent grantee.

Damages recoverable for injury to or taking of realty.

Cited in *Meighan v. Birmingham Terminal Co.* 165 Ala. 603, 51 So. 775, holding that measure of damages for closing street is difference between market value of property before and after obstruction; *Gloss-Sheffield Steel & I. Co. v. Mitchell*, 161 Ala. 287, 49 So. 851, holding damages for depreciation in market value of premises not recoverable where nuisance complained of is abatable and remediable.

Cited in footnote to *Suffolk & C. R. Co. v. West End L. & I. Co.* 68 L.R.A. 333, which holds value of land taken together with damage to abutting lots measure of compensation on condemnation by railroad company of street for right of way.

Cited in notes (28 L.R.A.(N.S.) 969) on right of one whose property taken for public use without consent or condemnation, to maintain action for compensation or permanent damages; (36 L.R.A.(N.S.) 764, 785) on abutter's right to compensation for railroads in streets.

Distinguished in *Enterprise Lumber Co. v. Porter*, 155 Ala. 429, 46 So. 773, holding abutting owner entitled to damages for injury to his property by changing grade, whether he owns fee in street or not; also that in assessing damages to property not taken, measure is difference between actual market value before and after work is done.

14 L. R. A. 466, *McQUIGAN v. DELAWARE, L. & W. R. CO.* 129 N. Y. 50, 41 N. Y. S. R. 382, 21 N. Y. Civ. Proc. Rep. 396, 26 Am. St. Rep. 507, 29 N. E. 235.

Compelling submission to inspection.

Cited in *Syracuse v. Glenside Woolen Mills*, 73 Hun, 424, 26 N. Y. Supp. 429, denying courts power to grant right to inspect buildings not condemned to acquire evidence on assessment of damages; *Auerbach v. Delaware, L. & W. R. Co.* 66 App. Div. 202, 73 N. Y. Supp. 118, denying power of court to compel production of parts of boiler alleged as causing injury.

Cited in note (41 Am. St. Rep. 388, 389, 394) on power to compel party to produce boxes and papers as evidence on examination of adversary.

— Physical examination.

Followed in *Cole v. Fall Brook Coal Co.* 159 N. Y. 69, 53 N. E. 670, Affirming 87 Hun, 590, 34 N. Y. Supp. 572, holding prior to amendment to Civ. Code, § 873, courts could not compel submission to physical examination.

Cited in *Lyon v. Manhattan R. Co.* 142 N. Y. 302, 25 L. R. A. 404, footnote p. 402, 37 N. E. 113, denying power to authorize official examination of plaintiff as independent proceeding; *Peoria, D. & E. R. Co. v. Rice*, 144 Ill. 232, 33 N. E. 951, and *Stack v. New York, N. H. & H. R. Co.* 177 Mass. 157, 52 L. R. A. 329, footnote p. 328, 83 Am. St. Rep. 269, 58 N. E. 686, denying power of court to compel plaintiff to submit to physical examination; *Neill v. Brooklyn Elev. R. Co.* 13 Misc. 404, 34 N. Y. Supp. 1144, holding plaintiff in action for personal injuries cannot be compelled to exhibit injuries to jury; *People ex rel. Mosher v. Roosa*, 43 App. Div. 612, 60 N. Y. Supp. 244, denying policeman required to submit to physical examination in mandamus proceedings to determine right to

position; *Sewell v. Butler*, 16 App. Div. 79, 44 N. Y. Supp. 1074, compelling plaintiff under Civ. Code, § 873, to submit to physical examination in action for personal injuries; *Anonymous*, 34 Misc. 110, 69 N. Y. Supp. 547, holding court may compel husband to submit to physical examination in suit to annul marriage to enable wife to establish existence of disease; *Cahn v. Cahn*, 21 Misc. 507, 48 N. Y. Supp. 173, holding court may compel husband to submit to examination as to physical ability; *Ottawa v. Gilliland*, 63 Kan. 167, 88 Am. St. Rep. 232, 65 Pac. 252; *McGovern v. Hope*, 63 N. J. L. 79, 42 Atl. 830; *Lane v. Spokane Falls & N. R. Co.* 21 Wash. 135, 46 L. R. A. 159, footnote p. 153, 75 Am. St. Rep. 821, 57 Pac. 367,—sustaining power of court to order physical examination of woman, in action for personal injuries; *Green v. Middlesex R. Co.* 10 Misc. 475, 32 N. Y. Supp. 177, holding affidavit stating nature of action, ignorance of nature and extent if injury, sufficient to obtain order for examination; *Austin & N. W. R. Co. v. Cluck*, 97 Tex. 177, 64 L.R.A. 497, footnote p. 494, 77 S. W. 403, denying court's power, in absence of statute, to compel physical examination of plaintiff in negligence case; *Chicago, R. I. & T. R. Co. v. Langston*, 19 Tex. Civ. App. 579, 47 S. W. 1027 (dissenting opinion), majority upholding right of company to examine plaintiff, who exhibited wounded limbs to jury; *Hall v. Manson*, 99 Iowa, 715, 34 L. R. A. 214, 68 N. W. 922 (dissenting opinion), majority holding refusal of court to take disputed measurement in presence of jury, plaintiff not objecting, error; *Joliet Street R. Co. v. Call*, 143 Ill. 182, 32 N. E. 389, holding court without power to require plaintiff to submit to physical examination; *Mutual L. Ins. Co. v. Griesa*, 156 Fed. 403, on power of court to order physical examination of person; *Cedartown v. Brooks*, 2 Ga. App. 691, 59 S. E. 836 (dissenting opinion), on compelling plaintiff in action for personal injuries to submit to physical examination; *May v. Northern P. R. Co.* 32 Mont. 528, 70 L.R.A. 114, 81 Pac. 328, 4 A. & E. Ann. Cas. 605, holding court cannot, in absence of legislation, compel plaintiff in action for personal injuries to submit to physical examination; *Goldenberg v. Zirinsky*, 114 App. Div. 828, 100 N. Y. Supp. 251, holding power of court to direct physical examination is derived wholly from statute; *People ex rel. Gow v. Bingham*, 57 Misc. 69, 107 N. Y. Supp. 1011, holding it unlawful for police to compel person charged with crime by grand jury to submit to having his photograph taken and measurements and imprints made under Bertillon system; *Moore v. Reinhardt*, 136 App. Div. 619, 121 N. Y. Supp. 205, reversing order directing appointment of physician to examine defendant and report upon his physical ability to be present at examination before trial.

Cited in footnotes to *Bagwell v. Atlanta Consol. Street R. Co.* 47 L. R. A. 486, which holds action for injury to minor daughter should not be dismissed for her refusal after attaining majority to submit to physical examination; *Wittenberg v. Onsgard*, 47 L. R. A. 141, which denied application to compel plaintiff to submit his neck to be photographed by X-Ray; *O'Brien v. La Crosse*, 40 L. R. A. 831, which denies power of court to order examination as to condition of plaintiff's bladder under evidence that it might be dangerous; *Graves v. Battle Creek*, 19 L. R. A. 641, which holds court may compel exhibition of injured arm to physician during trial; *Wanek v. Winona*, 46 L. R. A. 448, which sustains court's power to order physical examination of plaintiff under penalty of dismissal of action; *Cleveland, C. C. & St. L. R. Co. v. Huddleston*, 36 L. R. A. 681, which holds production of plaintiff's urine for examination should be required where claim of disease of urine made; *State v. Height*, 59 L. R. A. 437, which holds unlawful, disclosure by physicians of knowledge as to venereal disease obtained by examination against his will of one accused of rape; *Atchison, T. & S. F. R. Co. v. Palmore*, 64 L. R. A. 90, which holds that physical examination of eye involving use of

drugs should be granted in action for physical injury; *Austin & N. W. R. Co. v. Cluck*, 64 L.R.A. 494, which denies power of court in absence of statute to require the plaintiff in an action for personal injuries to submit to an examination of his person; *May v. Northern P. R. Co.* 70 L.R.A. 111, which denies judicial power at common law to compel plaintiff to submit to physical examination.

Cited in notes (2 L.R.A.(N.S.) 387) on waiver of right to object to physical examination or exhibition of person; (23 L.R.A.(N.S.) 463, 465) on power to compel physical examination; (68 Am. St. Rep. 242, 246) on physical examination of parties by order of court.

— **Voluntary exhibition.**

Cited in *Arkansas River Packet Co. v. Hobbs*, 105 Tenn. 37, 58 S. W. 278, holding plaintiff may exhibit injured limb to jury in action for injuries.

Distinguished in *Winner v. Lathrop*, 67 Hun, 514, 22 N. Y. Supp. 516, holding one submitting injured wrist to examination of jury must allow defendant's inspection of same.

Right of action to vacate assessment.

Cited in *J. & A. McKechnie Brewing Co. v. Canandaigua*, 15 App. Div. 153, 78 N. Y. S. R. 326, 44 N. Y. Supp. 317 (dissenting opinion), majority holding property owner may sue to vacate assessment for sewer construction.

Judicial discretion.

Cited in *Re Ingalls Bros.* 70 C. C. A. 101, 137 Fed. 520, on judicial discretion.

14 L. R. A. 470, *CARTIER v. TROY LUMBER CO.* 138 Ill. 533, 28 N. E. 932.

Presumption from failure to produce evidence.

Cited in *Prineville v. Hitchcock*, 101 Ill. App. 591, holding refusal of defendant to testify in own behalf raises no inference of unfavorable evidence; *Rossiter v. Boley*, 13 S. D. 375, 83 N. W. 428, holding instruction that jury may infer damaging evidence from failure to produce receipts in action for debt, error, when notice to produce not served; *Western & A. R. Co. v. Morrison*, 102 Ga. 331, 40 L. R. A. 88, 66 Am. St. Rep. 173, 29 S. E. 104 (dissenting opinion), majority holding inference of prejudicial testimony drawn from failure of company to examine as witness, employee who saw disputed occurrence; *Lowe v. Donnelly*, 38 Colo. 296, 85 Pac. 318, holding instruction in action of replevin for mare that if jury believed mare was removed from jurisdiction of court so as to make her identification impossible they might infer that her production would be unfavorable to defendants erroneous where there was no evidence to show such purpose in her removal; *St. Louis v. R.* 25 Can. S. C. 682, holding litigant who had destroyed books and papers not to be deemed spoliator under circumstances of case.

Cited in note (34 L. R. A. 582) on presumption against destroyer of evidence.

Charge indicating court's views.

Cited in *Preston v. Moline Wagon Co.* 44 Ill. App. 343, holding instruction indicating views of court constitutes reversible error; *Miller v. People*, 229 Ill. 383, 82 N. E. 391, disapproving an instruction on possession of recently stolen goods which assumed the fact of such possession and the inadequacy of explanation.

14 L. R. A. 474, *DAGGETT v. COLGAN*, 92 Cal. 53, 27 Am. St. Rep. 95, 28 Pac. 51.

Appropriation of public funds.

Cited in footnotes to *Conlin v. San Francisco*, 33 L. R. A. 752, which denies legislative right to direct use of city money to pay claim based on merely moral obligation; *Edgerton v. Goldsboro Water Co.* 48 L. R. A. 444, which holds cost of pro-

viding water for city authorized by charter not a "necessary expense;" *Cutting v. Taylor*, 15 L. R. A. 691, which holds appropriation to reward fire companies complying with specified conditions not a donation; *Knowlton v. Williams*, 47 L. R. A. 314, which holds statutory restriction of height of buildings adjacent to public square for promotion of its beauty and attractiveness to be for a public purpose; *Carter v. Thorson*, 24 L. R. A. 734, which upholds legislative power to incur indebtedness for public printing without prior appropriation; *People ex rel. Einsfeld v. Murray*, 32 L. R. A. 344, which holds valid excise law graduating according to population of cities excise taxes which are divided between cities and state; *Baltimore & E. S. R. Co. v. Spring*, 27 L. R. A. 72, which denies right to issue county bonds in aid of railroad in receivers' hands, with provision for first paying claims due residents of county; *Re Stanford*, 45 L. R. A. 788, which holds statute exempting certain persons from liability for inheritance tax invalid; *Wasson v. Wayne County*, 17 L. R. A. 795, which holds county not taxable for site and construction of state building; *State ex rel. Crow v. St. Louis*, 61 L. R. A. 593, which sustains city's right to reimburse policeman amount of judgment collected from him for shooting bystander while attempting to shoot mad steer on street; *Chapman v. New York*, 56 L. R. A. 846, which denies city's power to issue necessary expenses previously incurred by city officer in defending charge of official misconduct; *State ex rel. Custer County Agri. Soc. v. Robinson*, 17 L. R. A. 383, which holds legislature empowered to determine purposes authorizing taxation; *Owensboro v. Com.* 44 L. R. A. 202, which holds public parks and fire department buildings and appliances exempt from taxation; *Manning v. Devil's Lake*, 65 L.R.A. 187, which holds that city cannot impose taxes to raise funds to pay for a bridge outside the city boundaries; *Moorhead v. Murphy*, 68 L.R.A. 400, which sustains power of municipality to reimburse police officer for expenses and attorneys' fees in defending action for false imprisonment.

Cited in notes (18 L. R. A. 544) on protection of private rights from interference by public; (42 L. R. A. 36, 72) on what claims constitute valid demands against a state.

— For educational and charitable purposes.

Cited in *Shelby County v. Tennessee Centennial Exposition Co.* 96 Tenn. 662, 33 L. R. A. 719, footnote p. 717, 36 S. W. 694, holding exhibition of county resources at state exposition, county purpose; *State ex rel. Douglas County v. Cornell*, 53 Neb. 563, 39 L. R. A. 516, footnote p. 513, 68 Am. St. Rep. 629, 74 N. W. 59, sustaining as for public purpose, county exhibit at interstate fair; *Melvin v. State*, 121 Cal. 22, 53 Pac. 416, holding authority implied to charge admission fee to state fair, under statute providing for annual fair; *Minneapolis v. Janney*, 86 Minn. 119, 90 N. W. 312, holding taxation, resulting from donation of land for exposition purposes, not used for private enterprise; *Leatherwood v. Hill*, 10 Ariz. 247, 89 Pac. 521, sustaining appropriation for historical society; *Board of Directors v. Nye*, 8 Cal. App. 544, 97 Pac. 208, sustaining appropriation for Woman's Relief Corps Home Association; *Hager v. Kentucky Children's Home Soc.* 119 Ky. 245, 67 L.R.A. 818, 83 S. W. 605, sustaining appropriation for society to seek out destitute children and provide homes for them; *Kentucky Live Stock Breeders' Asso. v. Hager*, 120 Ky. 133, 85 S. W. 738, 9 A. & E. Ann. Cas. 50, holding state fair is public purpose for which legislature may appropriate money of state.

Cited in footnotes to *Bourn v. Hart*, 15 L. R. A. 431, which holds payment of claim for injuries to person in employ of state for which it is not liable a "gift;" *Norman v. Kentucky Bd. of Managers*, 18 L. R. A. 556, which holds for public purpose appropriation for exhibit at Columbian Exposition; *Patty v. Colgan*, 18 L. R. A. 744, which holds appropriation for sufferers from flood illegal; *Conlin*

v. San Francisco, 21 L. R. A. 474, which holds void act for relief of street contractor; Marion Twp. v. State, 25 L. R. A. 770, which holds unconstitutional act authorizing board of education to levy tax to pay claim for which no obligation exists; Baltimore v. Keeley Institute, 27 L. R. A. 646, which holds valid act authorizing treatment of habitual drunkard at expense of county or city of residence; *Re House*, 33 L. R. A. 832, which sustains right to use county funds to pay for cure of indigent inebriates in private establishment; Lund v. Chippewa County, 34 L. R. A. 131, which sustains donation by county to secure site for state institution for feeble minded; Wisconsin Keeley Institute Co. v. Milwaukee County, 36 L. R. A. 55, which holds invalid, statute for treatment of habitual drunkards at private institution at county expense; Bush v. Orange County, 45 L. R. A. 556, which holds void, statute authorizing counties to raise by taxation money to pay drafted men or their heirs; Allen v. State Auditors, 47 L. R. A. 117, which denies right to appropriate public money to pay pardoned convict for alleged wrongful imprisonment; Opinion of Justices, 49 L. R. A. 564, which holds legislative right to appropriate money for widow, heirs, etc., of deceased officer dependent on whether public good will be served; *State ex rel.* New Richmond v. Davidson, 58 L. R. A. 739, which sustains appropriation by legislature to pay city debt for burying dead, removing debris, and caring for injured and homeless; Hager v. Kentucky Childrens' Home Soc. 67 L.R.A. 815, which upholds appropriation of public money for care of destitute children.

Cited in note (7 L.R.A.(N.S.) 1193) on validity of statute providing for assistance of individual members of certain classes of unfortunate or afflicted persons.

— To conduct or promote business.

Cited in *Denning v. State*, 123 Cal. 322, 55 Pac. 1000, denying that collection of tolls by government harbor commissioners converts same into business enterprise.

Cited in footnotes to *Waterloo Woolen Mfg. Co. v. Shanahan*, 14 L. R. A. 481, which authorizes appropriation to enlarge private mill race for extension of navigation; *Stockton v. Powell*, 15 L. R. A. 42, which holds improvement of navigation within county a county purpose; Opinion of Justices, 15 L. R. A. 809, which holds purchase of fuel by municipality and resold to inhabitants not a public purpose; *Re Clark*, 19 L. R. A. 138, which holds suit maintainable to compel investment of taxes from railroads in sinking fund to pay railroad aid bonds; *Rippe v. Becker*, 22 L. R. A. 857, which denies power of state to own and operate grain elevator; *Lancey v. King County*, 34 L. R. A. 817, which authorizes county indebtedness for public canal through county to connect large public waterways with ocean; *Sun Print. & Pub. Asso. v. New York*, 37 L. R. A. 788, which holds rapid-transit railway in city streets a highway for which indebtedness may be incurred; *Pritchard v. Magoun*, 46 L. R. A. 381, which authorizes taxes to aid in building for highway and railway purposes toll bridge owned by private corporation; *Oren ex rel. Barbour v. Pingree*, 46 L. R. A. 407, which holds void, statute empowering city to purchase and operate street railways; *Dodge v. Mission Twp.* 54 L. R. A. 242, which holds promotion of construction and operation of sugar mills a private purpose not authorizing taxation.

Cited in note (31 L.R.A.(N.S.) 117) on right of municipality to engage in enterprises of private character.

— For bounties.

Cited in footnotes to *Deal v. Mississippi County*, 14 L. R. A. 622, which holds tree-planting bounties valid; *Institution for Education of Mute & Blind v. Henderson*, 18 L. R. A. 398, which holds invalid, act for paying bounties by coun-

ty treasurer; *Ingram v. Colgan*, 28 L. R. A. 187, which upholds bounty for killing coyotes; *Michigan Sugar Co. v. Dix*, 56 L. R. A. 329, which holds beet sugar bounty unconstitutional.

What is public purpose or use.

Cited in *Sisson v. Buena Vista County*, 128 Iowa, 454, 70 L.R.A. 445, 104 N. W. 454, holding drainage of surface waters from agricultural lands is public use; *McGlone v. Womack*, 129 Ky. 288, 17 L.R.A.(N.S.) 860, 111 S. W. 688, suggesting that act imposing tax on dogs to provide fund to pay for sheep killed by dogs may be sustained as levying tax for public purpose.

14 L. R. A. 481, *WATERLOO WOOLEN MFG. CO. v. SHANAHAN*, 128 N. Y. 345, 40 N. Y. S. R. 95, 28 N. E. 358.

Extrinsic evidence as to constitutionality of statute or ordinance.

Cited in *Kittinger v. Buffalo Traction Co.* 160 N. Y. 389, 54 N. E. 1081, refusing to inquire into motives inducing common council to grant rights to traction company; *State ex rel. Rose v. Superior Court*, 105 Wis. 677, 48 L. R.*A. 829, 81 N. W. 1046, refusing to supervise passage of ordinance creating contract between city and street railway company; *Stevenson v. Colgan*, 91 Cal. 653, 14 L. R. A. 462, 25 Am. St. Rep. 230, 27 Pac. 1089, holding courts must confine attention to facts appearing on face of act when assailing same; *Lehigh Valley R. Co. v. Canal Board*, 69 Misc. 264, 125 N. Y. Supp. 227, to the point that court cannot determine upon testimony of witnesses that purpose of legislature was to appropriate money for individual, when it has expressed its purpose in bill to be for improvement of canal; *Metz v. Maddox*, 121 App. Div. 158, 105 N. Y. Supp. 702, on limiting investigation to statute itself, circumstances leading to its passage and its purpose in determining whether it is local; *Rochester v. Gray*, 60 Misc. 594, 112 N. Y. Supp. 774, on not going behind language of act to seek out purpose not disclosed on its face; *Henderson v. Lexington*, 132 Ky. 407, 22 L.R.A.(N.S.) 36, 111 S. W. 318, refusing to inquire into motives of city council in closing alley.

Statutes assailed as local.

Cited in *People ex rel. Mitchell v. Sturges*, 156 N. Y. 584, 51 N. E. 295, Affirming 27 App. Div. 390, 50 N. Y. Supp. 5, upholding abridgment of term of president of village as incident of abolition of office by amendment of charter; *People ex rel. Burby v. Howland*, 155 N. Y. 290, 41 L. R. A. 845, 49 N. E. 775 (dissenting opinion), majority declaring unconstitutional, act excluding justices of the peace of single town from criminal jurisdiction; *Re Henneberger*, 155 N. Y. 435, 42 L. R. A. 137, 50 N. E. 61 (dissenting opinion), majority holding laws providing for widening highways outside of certain incorporated villages, violate constitution; *Swikehard v. Michels*, 81 Hun. 329, 8 Misc. 571, 29 N. Y. Supp. 777, holding legislature may provide for drainage of thickly settled land partly outside of city; *Smithsonian Institution v. St. John*, 214 U. S. 31, 53 L. ed. 899, 29 Sup. Ct. Rep. 601. (Dismissing writ of error to 191 N. Y. 270, 83 N. E. 981, 14 Ann. Cas. 708, 192 N. Y. 382, 583, 85 N. E. 143, 1115, on what constitutes special legislation.

Who may question validity of statute.

Cited in *Board of Education v. Board of Education*, 76 App. Div. 358, 78 N. Y. Supp. 522, denying right of board of education to maintain action to have statute dividing district declared void.

Purposes for which public funds may be raised.

Cited in footnotes to *Board of Education v. State*, 25 L. R. A. 770, which holds unconstitutional act authorizing board of education to levy tax to pay

claim for which no obligation exists; *Institution for Education of Mute & Blind v. Henderson*, 18 L. R. A. 398, which holds invalid, act for paying bounties by county treasurer; *Conlin v. San Francisco*, 21 L. R. A. 474, which holds void, act for relief of street contractor; *Dodge v. Mission Twp.* 54 L. R. A. 242, which holds promotion of construction and operation of sugar mills a private purpose not authorizing taxation; *Wasson v. Wayne County*, 17 L. R. A. 795, which holds county not taxable for site and construction of state building; *Cutting v. Taylor*, 15 L. R. A. 691, which holds appropriation to reward fire companies complying with specified conditions not a donation; *Ingram v. Colgan*, 28 L. R. A. 187, which upholds bounty for killing coyotes; *Pritchard v. Magoun*, 46 L. R. A. 381, which authorizes taxes to aid in building for highway and railway purposes toll bridge owned by private corporation; *People ex rel. Einsfeld v. Murray*, 32 L. R. A. 344, which holds valid, excise law graduating according to population of cities excise taxes which are divided between cities and state.

Adverse possession against state.

Followed in *Fulton Light, Heat & P. Co. v. New York*, 200 N. Y. 422, 37 L.R.A. (N.S.) 322, 94 N. E. 199, holding that, as against state, no title to river can be obtained through private use, whether adverse or by permission, however long continued, or by prescriptive right.

Right to improve navigability of stream.

Cited in note (67 L.R.A. 823) on right to improve navigability of stream.

Injunction against acts of public officers.

Cited in note (8 L.R.A.(N.S.) 127) on injunction to restrain actions of public boards under void statutes.

Taking private property for public use.

Cited in *Ontario Knitting Co. v. State*, 69 Misc. 160, 125 N. Y. Supp. 57, to the point that question as to whether use to which property is to be put is public use or otherwise, is reviewable by courts; *George Sweet Mfg. Co. v. Van Der Hoof*, 137 App. Div. 495, 121 N. Y. Supp. 842, holding that private corporation cannot condemn land for switch under section 20 of Railroad Law; *Litchfield v. Bond*, 186 N. Y. 87, 78 N. E. 719, reversing 105 App. Div. 234, 93 N. Y. Supp. 1016 (dissenting opinion), on insufficiency of consequential damages to private property as ground for arresting work upon which legislature has determined in interest of state government; *People v. Fisher*, 116 App. Div. 684, 101 N. Y. Supp. 1047, holding owner's fee of lands taken by state for canal purposes may be divested without making, filing and serving map.

Judicial power over eminent domain.

Cited in note (22 L.R.A.(N.S.) 17, 26, 51, 53) on judicial power over eminent domain.

Practice in condemnation proceedings.

Cited in *Moroney v. State*, 67 Misc. 66, 124 N. Y. Supp. 824, to the point that damages for appropriation of lands for canal, are, when there are liens or incumbrances, deposited by comptroller to account of such award, to be paid to person entitled on supreme court orders.

14 L. R. A. 487, *TURNER v. NYE*, 154 Mass. 579, 28 N. E. 1048.

Condemnation for pipe-line purposes.

Cited in *Great Western Natural Gas & Oil Co. v. Hawkins*, 30 Ind. App. 569, 66 N. E. 765, holding proof that company furnishes gas for public use necessary before exercise of right to condemn property.

Purposes for which public funds may be used.

Cited in *Sweet v. Rechal*, 159 U. S. 400, 40 L. ed. 196, 16 Sup. Ct. Rep. 45, upholding act authorizing city to abate nuisance by taking lands and completing system of drainage.

Cited in footnotes to *Bradley v. Pharr*, 19 L. R. A. 647, which denies power to construct private railroad on public road; *Bell v. Lamborn*, 20 L. R. A. 241, which authorizes taking by eminent domain of right of way to carry water to electric light plant; *Wisconsin Water Co. v. Winans*, 20 L. R. A. 662, which denies water-supply company's right to condemn land for pipe line; *Paxton & H. Irrigating Canal & Land Co. v. Farmers' & M. Irrig. & Land Co.* 29 L. R. A. 853, which holds condemnation of land for irrigating ditches to be "for public purpose;" *Leitzsey v. Columbia Water Power Co.* 34 L. R. A. 215, which holds damages by flooding lands by dam recoverable under eminent-domain law, not by suit for nuisance.

Cited in note (14 L. R. A. 480) on public purposes for which money may be appropriated or raised by taxation.

Mill dam acts.

Cited in *Blackstone Mfg. Co. v. Blackstone*, 200 Mass. 88, 18 L.R.A.(N.S.) 757, 85 N. E. 880, on legislation relative to mills; *Minnesota Canal & Power Co. v. Koochiching Co.* 97 Minn. 448, 5 L.R.A.(N.S.) 647, 107 N. W. 405, 7 A. & E. Ann. Cas. 1182, on resting validity of mill acts upon general welfare clause of constitution; *Nye v. Swift*, 190 Mass. 147, 76 N. E. 652, holding general statutory provisions with reference to mills and mill dams applicable, as far as may be, to dams erected for cranberry culture; *Otis Co. v. Ludlow Mfg. Co.* 186 Mass. 95, 104 Am. St. Rep. 563, 70 N. E. 1009, holding interference with use of neighboring property by appropriation of mill site is not taking under right of eminent domain.

Cited in footnote to *Gaylord v. Chicago Sanitary Dist.* 63 L.R.A. 582, which denies power of legislature to authorize condemnation of private property for erection of public mills and machinery without anything to give the public an interest in the mill after its erection.

Cited in notes (59 L.R.A. 824) on validity of mill acts; (102 Am. St. Rep. 838) on creation of dams as public use for which power of eminent domain can be exercised.

Distinguished in *Brown v. Gerald*, 100 Me. 365, 70 L.R.A. 479, 109 Am. St. Rep. 526, 61 Atl. 785, holding manufacturing, generating, selling, distributing and supplying electricity for manufacturing or mechanical purposes is not public use, also referring to annotation on this point.

14 L. R. A. 492, *MURCHIE v. CORNELL*, 155 Mass. 60, 31 Am. St. Rep. 526, 29 N. E. 207.

Implied warranty of quality.

Approved in *Alden v. Hart*, 161 Mass. 580, 37 N. E. 742, holding warranty of merchantable quality implied in contract for sale of coal.

Cited in *Carleton v. Lombard, A. & Co.* 149 N. Y. 150, 43 N. E. 422, holding warranty of freedom from latent defects implied in sale of refined petroleum by manufacturer; *Hardy v. American Exp. Co.* 182 Mass. 328, 59 L. R. A. 732, 65 N. E. 375, holding carrier must repay price of books sent C. O. D. collected knowing goods to be damaged; *Union Selling Co. v. Jones*, 63 C. C. A. 229, 128 Fed. 677, holding warranty of fitness implied in contract for sale of binder twine to retail dealer "quality guaranteed;" *St. Louis Union Packing Co. v. Mertens*, 150 Mo. App. 585, 131 S. W. 354, holding that upon sale of all surplus

ice to be manufactured by party, there was implied warranty that it would be merchantable; *Leavitt v. Fiberloid Co.* 196 Mass. 451, 15 L.R.A.(N.S.) 875, 82 N. E. 682, holding in case of goods commonly known in trade as ordered by description, without inspection, there is an implied warranty of merchantable quality; *Atkins Bros. Co. v. Southern Grain Co.* 119 Mo. App. 123, 95 S. W. 949, holding in an executory contract of sale of corn there exists an implied warranty that the corn will be sound and merchantable at place of delivery where sale is to be completed; *Oil-Well Supply Co. v. Watson*, 168 Ind. 611, 15 L.R.A.(N.S.) 867, 80 N. E. 157, holding a commercial contract for the delivery of "one cargo of ice" implies the condition that ice shall be of merchantable quality; *Bunch v. Weil*, 72 Ark. 347, 65 L.R.A. 82, 80 S. W. 582, holding same of an order of a quantity of flour of a certain grade; *Farrell v. Manhattan Market Co.* 198 Mass. 281, 15 L.R.A.(N.S.) 891, 126 Am. St. Rep. 436, 84 N. E. 481, 15 A. & E. Ann. Cas. 1076, holding cases of implied warranty and implied condition that thing sold was merchantable, rest on the same principal.

Cited in footnotes to *Columbian Ironworks & D. D. Co. v. Douglas*, 33 L. R. A. 103, which holds sale of scrap from steel plates of cruisers not satisfied by delivery of something other than cruiser steel; *Talbot Paving Co. v. Gorman*, 27 L. R. A. 96, which holds no warranty implied in contract for paving stones according to certain specifications; *Hodges v. Wilkinson*, 17 L. R. A. 545, which holds action for breach of implied warranty of title of personalty sold, after its taking by third person, not premature; *Bunch v. Weil*, 65 L.R.A. 80, which holds that purchaser of flour by the barrel for resale may, on discovering that quality is not as represented, tender back amount undisposed of and recover proportionate part of purchase price.

Cited in notes (15 L. R. A. 795) on effect of representing things sold to be "good;" (18 L. R. A. 386) on measure of damages for breach of implied warranty; (22 L. R. A. 187) on implied warranty of fitness of property bought for special purpose; (35 L.R.A.(N.S.) 286) on effect of sale with particular description of kind or quality; (102 Am. St. Rep. 612) on implied warranty of quality; (23 Eng. Rul. Cas. 492) on implied warranty of fitness for purpose for which goods are sold.

Distinguished in *Gage v. Carpenter*, 47 C. C. A. 43, 107 Fed. 890, holding warranty of merchantable quality not implied in sale of ice to subvendee, not stored or seen by vendor.

Sale of ice.

Cited in footnotes to *Mansfield v. Place*, 18 L. R. A. 39, which holds prescriptive right to entire ice on pond acquired by cutting from any points desired; *Marsh v. McNider*, 20 L. R. A. 334, which authorizes sale by tenant of right to cut ice on running stream.

Written statement as evidence.

Approved in *Loomis v. New York, N. H. & H. R. Co.* 159 Mass. 43, 34 N. E. 82, holding affidavits of facts shown in former trial, incompetent upon motion for new trial.

Cited in *Gray v. Boston & M. R. Co.* 168 Mass. 20, 46 N. E. 397, holding license for dog issued prior to suit, inadmissible to corroborate statement that dog owned differed from one inflicting injury.

14 L. R. A. 495, *JOHNSON v. CHICAGO, ST. P. M. & O. R. CO.* 80 Wis. 641, 27 Am. St. Rep. 76, 50 N. W. 771.

Rights as to flow of surface water.

Cited in *Connell v. Stark*, 108 Wis. 98, 83 N. W. 1092, upholding right to

conduct surface water through ditches to adjoining land; *Champion v. Crandon*, 84 Wis. 409, 19 L. R. A. 857, 54 N. W. 775, denying damages to one injured by diversion of surface water by change of grade; *Harp v. Baraboo*, 101 Wis. 370, 77 N. W. 744, denying liability of city for damages due to stoppage of surface water by grading street; *Franklin v. Durgee*, 71 N. H. 188, 58 L. R. A. 113, 51 Atl. 911, holding complaint sufficient alleging injury to highway by abutters filling depression causing surface water to flow back; *Manteufel v. Wetzel*, 133 Wis. 622, 19 L.R.A.(N.S.) 170, 114 N. W. 91, holding no liability results from collecting surface water in a ditch following course of usual flow of surface water; *Shaw v. Ward*, 131 Wis. 655, 111 N. W. 671, 11 A. & E. Ann. Cas. 1139, holding mere change of the surface of one's premises where reasonably necessary to cause surface water to flow therefrom by the natural course of drainage is not such accumulation of water as creates a liability; *Peck v. Baraboo*, 141 Wis. 54, 122 N. W. 740, on liability for damming against surface water.

Cited in notes (21 L. R. A. 595, 600) on rights as to flow of surface water; (20 L.R.A.(N.S.) 157) on obstruction of surface water in city; (41 L. ed. U. S. 840) on drainage of surface waters.

— **Of railroad company.**

Cited in *Clauson v. Chicago & N. W. R. Co.* 106 Wis. 311, 82 N. W. 146, denying damages for injury from surface water diverted from natural course by change of railroad grade; *Borchsenius v. Chicago*, St. P. M. & O. R. Co. 96 Wis. 451, 71 N. W. 884, holding complaint insufficient, alleging injury by overflow of surface water, collected by construction of embankment; *Morrissey v. Chicago*, B. & Q. R. Co. 38 Neb. 430, 56 N. W. 946; *Egener v. New York & R. B. R. Co.* 3 App. Div. 161, 38 N. Y. Supp. 319; *Edwards v. Charlotte, C. & A. R. Co.* 39 S. C. 475, 22 L. R. A. 248, 39 Am. St. Rep. 746, 18 S. E. 58; *Chicago, K. & N. R. Co. v. Steck*, 51 Kan. 741, 33 Pac. 601; *Cleveland, C. C. & St. L. R. Co. v. Huddleston*, 21 Ind. App. 625, 69 Am. St. Rep. 385, 52 N. E. 1008 — denying railroad company's duty to provide outlet for surface water collected behind embankment; *Missouri P. R. Co. v. Renfro*, 52 Kan. 243, 39 Am. St. Rep. 344, 34 Pac. 802, holding railroad company not liable for damage from surface water due to leaving ditch on either side of roadbed.

Cited in note (12 L.R.A.(N.S.) 683) on liability of railroad conducting surface water through embankments onto adjoining property.

14 L. R. A. 498, **GRAND RAPIDS v. POWERS**, 89 Mich. 94, 28 Am. St. Rep. 276, 50 N. W. 661.

Grant bounded by stream.

Cited in *Grand Rapids & I. R. Co. v. Butler*, 159 U. S. 94, 40 L. ed. 97, 15 Sup. Ct. Rep. 991, holding grant of land in Michigan includes bed to center of navigable or unnavigable stream; *Hobart v. Hall*, 174 Fed. 474, holding the grantee of land in Minnesota bounded by a navigable stream takes an absolute title in fee to high-water mark, and has a qualified title of the bed of the stream to the middle thread thereof.

Rights of riparian owner.

Cited in *Priewe v. Wisconsin State Land & Improv. Co.* 93 Wis. 548, 33 L. R. A. 652, 67 N. W. 918, denying power of legislature to authorize destruction of lake to injury of riparian owner without compensation; *Hall v. Alford*, 114 Mich. 168, 38 L. R. A. 207, 72 N. W. 137, holding one hunting from boat anchored outside navigable part of stream guilty of trespass; *Toledo Liberal Shooting Club v. Erie Shooting Club*, 33 C. C. A. 236, 62 U. S. App. 644, 90 Fed. 682, and *Baldwin v. Erie Shooting Club*, 127 Mich. 662, 87 N. W. 59, denying right of

passage over shallow bay conveyed to private parties by state; *United States v. Chandler-Dunbar Water Power Co.* 81 C. C. A. 221, 152 Fed. 39, holding the land under a boundary river is in the adjacent riparian owner; *People ex rel. Bird v. Grand Rapids-Muskegon Power Co.* 164 Mich. 125, 129 N. W. 211, holding that riparian owner may do what he pleases with land under water so long as he does not interfere with public easement; *Chicago, M. & St. P. R. Co. v. Minneapolis*, 115 Minn. 405, — L.R.A.(N.S.) —, 133 N. W. 169, Ann. Cas. 1912 D, 1029, to the point that stream navigable for pleasure is navigable in law.

Cited in note (42 L. R. A. 320) on what waters are navigable.

Rights of travelers in public streams.

Cited in *Smart v. Aroostook Lumber Co.* 103 Me. 49, 14 L.R.A.(N.S.) 1086, 68 Atl. 527, holding the travel of summer residents and transportation of their merchandise is as fully entitled to protection in use of a public water way as travelers for business.

Cited in note (70 L.R.A. 277) on use of navigable stream.

Validity of statute as to building lines and wharves.

Cited in *St. Louis v. Hill*, 116 Mo. 536, 21 L. R. A. 228, 22 S. W. 861, declaring unconstitutional act empowering cities to establish building line without notice to owner.

Cited in note (40 L. R. A. 644, 645) on right to erect wharves.

Power of legislature as to nuisances.

Cited in notes (47 Am. St. Rep. 545; 107 Am. St. Rep. 202) on power of legislature to declare certain acts to be public nuisances.

Purprestures.

Cited in notes (60 Am. St. Rep. 272, 275) on what are purprestures; (69 Am. St. Rep. 276) on authority to erect purprestures.

14 L. R. A. 506, *ROCK v. MATHEWS*, 35 W. Va. 531, 14 S. E. 137.

Enforcement of contracts tainted with illegality.

Cited in *Burton v. McMillan*, 52 Fla. 244, 11 L.R.A.(N.S.) 165, 42 So. 879, holding where parties to a contract are "in pari delicto" good policy requires that the court leave them as it finds them.

Cited in footnotes to *Jones v. Dannenberg Co.* 52 L. R. A. 271, which holds void, in hands of bona fide purchaser, note given to stop criminal prosecution; *William Deering & Co. v. Cunningham*, 54 L. R. A. 410, which holds void, contract to withdraw opposition to granting of pardon.

Cited in note (48 L. R. A. 849) on allowing injunction in favor of party *in pari delicto* against enforcing or otherwise proceeding with illegal contract.

Distinguished in *Burton v. McMillan*, 52 Fla. 476, 8 L.R.A.(N.S.) 993, 120 Am. St. Rep. 220, 42 So. 849, 11 A. & E. Ann. Cas. 380, holding maxim "in pari delicto melior est conditio defendentis," has no application to a suit by married woman to set aside deed of her separate property, given by her to save her husband from threatened prosecution.

14 L. R. A. 512, *HUNT v. CONRAD*, 47 Minn. 557, 50 N. W. 614.

Assignability of cause of action.

Cited in *Billingsley v. Clelland*, 41 W. Va. 259, 23 S. E. 812 (dissenting opinion), majority holding note given to compromise bastardy proceedings assignable, carrying remedies of assignor; *Williams v. West Chicago Street R. Co.* 199 Ill. 61, 64 N. E. 1024, upholding assignment of judgment for personal injuries executed before final judgment; *Hammons v. Great Northern R. Co.* 53 Minn. 252, 54 N. W. 1108, holding that attorney's lien cannot be created upon right of action for as

sault; *Boogren v. St. Paul City R. Co.* 97 Minn. 54, 3 L.R.A.(N.S.) 381, 114 Am. St. Rep. 691, 106 N. W. 104, holding cause of action for personal tort is not assignable and does not pass to party's representatives.

Cited in footnotes to *Erickson v. Brookings County*, 18 L. R. A. 347, which holds assignable, right of purchaser at unlawful tax sale to have money refunded; *John V. Farwell Co. v. Josephson*, 37 L. R. A. 138, which holds claim for damages from conspiracy to defraud not assignable; *Lehmann v. Deuster*, 37 L. R. A. 333, which holds cause of action which will survive, assignable.

Cited in note (44 L. R. A. 178, 179, 183) on assignability of cause of action for personal injury.

Distinguished in *Kent v. Chapel*, 67 Minn. 422, 70 N. W. 2, holding verdict in action for personal injury assignable under statute.

Counterclaims to actions.

Cited in *Laybourn v. Seymour*, 53 Minn. 109, 39 Am. St. Rep. 579, 54 N. W. 941, upholding counterclaim for nondelivery of goods against claim of assignee of insolvent corporations; *Nichols & S. Co. v. Soderquist*, 77 Minn. 510, 80 N. W. 630, holding breach of warranty may be interposed as defense to note given for grain elevator; *Lindholm v. Itasca Lumber Co.* 64 Minn. 48, 65 N. W. 931, refusing to set off unliquidated claim against judgment; *Martin County Nat. Bank v. Bird*, 92 Minn. 112, 99 N. W. 780, holding court has power to order that one judgment be set off against another, when adverse judgments are between same parties.

Cited in note (109 Am. St. Rep. 146) on setting off one judgment against another.

14 L. R. A. 515, *KANSAS CITY, M. & B. R. CO. v. HIGDON*, 94 Ala. 286, 33 Am. St. Rep. 119, 10 So. 282.

Demurrer for misjoinder of causes.

Cited in *Richmond & D. R. Co. v. Weems*, 97 Ala. 273, 12 So. 186, holding refusal to sustain demurrer for misjoinder of causes in one court, error.

Liability for act of agent.

Cited in *Postal Teleg. Cable Co. v. Brantley*, 107 Ala. 668, 18 So. 321, holding telegraph company liable for trees cut by servants in constructing line.

Cited in note (41 L. R. A. 651) on criminal and penal liability for act of co-partner, servant, or agent.

Distinguished in *Williams v. Hendricks*, 115 Ala. 283, 41 L. R. A. 651, 67 Am. St. Rep. 32, 22 So. 439, denying penal liability for trees wilfully cut by co-partner without consent.

Carrier's liability for baggage.

Cited in footnotes to *Bullock v. Delaware, L. & W. R. Co.* 37 L. R. A. 417, which denies right to carry packages of groceries on trains as "personal baggage;" *Kansas City, P. & G. R. Co. v. State*, 41 L. R. A. 333, which holds samples of merchandise carried by traveling salesman not baggage; *Trimble v. New York C. & H. R. R. Co.* 48 L. R. A. 115, which sustains recovery for loss of sample trunk checked as baggage on payment of charge for excess baggage; *Illinois C. R. Co. v. Matthews*, 60 L. R. A. 846, which holds carrier liable for loss of, or damage to, samples in possession of traveling salesman checked as baggage.

Cited in notes (40 L.R.A. 508) on liability of carriers for injuries to dogs; (67 Am. St. Rep. 296) on same point; (99 Am. St. Rep. 352) on liability for loss of baggage.

Disapproved in *Fleischman v. Southern R. Co.* 76 S. C. 240, 9 L.R.A.(N.S.) 520, 56 S. E. 974, holding a carrier receiving sample trunks is liable as for personal baggage.

14 L. R. A. 518, *LAMB v. CAIN*, 129 Ind. 486, 29 N. E. 13.

Revision of creed as affecting rights to church property.

Cited in *Franke v. Mann*, 106 Wis. 132, 48 L. R. A. 861, 81 N. W. 1014, denying right of majority of church members to defeat trust by employing pastor teaching different doctrine; *Cape v. Plymouth Cong. Church*, 117 Wis. 155, 93 N. W. 449, holding minority adhering to original church entitled to use of church property, as against seceding majority; *Brundage v. Deardorf*, 92 Fed. 230, holding that minority members, dissenting from adoption of amended creed, have no claim to church property; *Horsman v. Allen*, 129 Cal. 135, 61 Pac. 796, denying rights to church property of minority seceding from general conference after adoption of new constitution and revised confession of faith; *Bear v. Heasley*, 98 Mich. 294, 24 L. R. A. 627, footnote p. 615, 57 N. W. 270, holding unauthorized change in church constitution by general conference, illegal.

Cited in footnote to *Philomath College v. Wyatt*, 26 L. R. A. 68, which holds incorporation into confession of faith of doctrines previously contained in discipline not vital change destroying identity of church.

Cited in note (5 Eng. Rul. Cas. 702) on property rights on division in religious society.

Distinguished in *Smith v. Pedigo*, 145 Ind. 406, 32 L. R. A. 843, 44 N. E. 363, Affirming on rehearing 145 Ind. 377, 19 L. R. A. 437, 33 N. E. 777, denying that expulsion of minority members of church who still adhere to original faith, affects rights to church property.

Relation of civil courts to churches.

Approved in *Landrith v. Hudgins*, 121 Tenn. 660, 120 S. W. 783, holding the power of two churches to form a union must be exercised in accordance with their constitutions.

Cited in *Kuns v. Robertson*, 154 Ill. 413, 40 N. E. 343, holding decision of church judicial body that new constitution superseded former, conclusive upon civil courts; *Bear v. Heasley*, 98 Mich. 289, 24 L. R. A. 627, 57 N. W. 270, and *Russie v. Brazzell*, 128 Mo. 116, 49 Am. St. Rep. 542, 30 S. W. 526, holding judgment of general conference that enlarged confession works no change in creed binds courts; *State ex rel. Hatfield v. Cummins*, 171 Ind. 116, 36 L.R.A.(N.S.) 950, 85 N. E. 359, holding the civil courts act upon the theory that the ecclesiastical courts are the best judges of merely ecclesiastical questions; *Ramsey v. Hicks*, 174 Ind. 443, 30 L.R.A.(N.S.) 672, 91 N. E. 344, holding that court has no jurisdiction to examine into regularity and validity of church tribunal concerning only spiritual or ecclesiastical rights; *Yanthis v. Kemp*, 43 Ind. App. 206, 86 N. E. 451, holding doctrine, discipline and creed, are not matters with which courts concern themselves, except as they come incidentally in question in the adjudication of property rights; *Wallace v. Hughes*, 131 Ky. 480, 115 S. W. 684, holding where the supreme ecclesiastical power is exercised to reunite a divided church such union must be held binding so far as the civil courts are concerned; *First Presby. Church v. First Cumberland Presby. Church*, 245 Ill. 93, 91 N. E. 761, holding in the adjudication of civil and property rights civil courts are bound by adjudications of the ecclesiastical court as to which of the contending factions in the church is the true representative of the church; *Mack v. Kline*, 129 Ga. 19, 24 L.R.A.(N.S.) 686, 58 S. E. 184, holding where a right of property turns upon decision of ecclesiastical court as to creed, doctrine or teaching civil courts will allow property to go in that direction in which decision of church tribunal carries it; *Fussell v. Hail*, 134 Ill. App. 630, holding question whether confession of faith of the two churches are identical, or in substance the same, is a question solely for the ecclesiastical courts to determine; *Paynter*

v. Phelps, 129 Ky. 393, 24 L.R.A.(N.S.) 735, 111 S. W. 699, holding property of a denominational church, like the Presbyterian or Methodist, in case of controversy or division must be given by the civil courts to those recognized by the highest ecclesiastical court of the denomination; *Boyles v. Roberts*, 222 Mo. 729, 121 S. W. 805 (dissenting opinion), on decision of ecclesiastical tribunal as being binding upon the courts in matters purely within their jurisdiction.

Cited in footnote to *Philomath College v. Wyatt*, 26 L. R. A. 68, which holds construction of legislative acts of ecclesiastical body should be adopted by courts.

Cited in notes (49 L.R.A. 386, 398) on conclusiveness of decisions of tribunals of associations or corporations; (3 L.R.A.(N.S.) 870, 873) on enjoining control, use of, or interference with, church property; (24 L.R.A.(N.S.) 694, 701, 722) on litigation growing out of schism in religious society; (68 Am. St. Rep. 865) on jurisdiction of equity over voluntary unincorporated associations.

Vote sufficient to carry motion.

Cited in *Re Denny*, 156 Ind. 151, 51 L. R. A. 739, 59 N. E. 359 (dissenting opinion), majority holding vote by majority means majority of those actually voting; *Russie v. Brazzell*, 128 Mo. 111, 49 Am. St. Rep. 542, 30 S. W. 526, holding two thirds of society requesting amendment to constitution means two thirds voting; *Fabro v. Gallup*, 15 N. M. 114, 103 Pac. 271, holding that two-thirds of those actually voting and not two-thirds of all voters of municipality are required to authorize issue of municipal bonds, under statute; *Ramsey v. Hicks*, 44 Ind. App. 505, 87 N. E. 1091, to the point that it may be provided that direct vote of members of each congregation shall be taken upon questions of general concern.

Trust for religious purposes.

Cited in *Kelly v. Nichols*, 18 R. I. 83, 19 L. R. A. 432, 25 Atl. 840 (dissenting opinion), majority holding trust providing entertainment for traveling ministers and circulation of religious books, invalid.

Collateral attack upon order of commissioner's courts.

Cited in *Ryder v. Horsting*, 130 Ind. 106, 16 L. R. A. 187, 29 N. E. 567, sustaining demurrer to complaint collaterally assailing order of highway commissioner's court.

Implied agreement of member to obey rules of church.

Cited in *Committee of Missions v. Pacific Synod*, 157 Cal. 122, 106 Pac. 395, holding that agreement to abide by rules of church is always implied from membership.

14 L. R. A. 529, *STATE v. RAY*, 109 N. C. 736, 14 S. E. 83.

Sale of tickets or passes.

Cited in *Allardt v. People*, 197 Ill. 508, 64 N. E. 533, sustaining act of 1897, against selling passes; *Re O'Neill*, 41 Wash. 181, 3 L.R.A.(N.S.) 562, 83 Pac. 104, 6 A. & E. Ann. Cas. 869, holding the sale of railway transportation is a proper subject for police regulation.

Cited in notes (24 L.R.A. 152) on statutes against ticket "scalping;" (61 Am. St. Rep. 79) on sale of ticket as creating relation of passenger; (96 Am. St. Rep. 834) on power of state to control sale and use of passenger tickets.

What constitutes "carrying on business."

Cited in *Kimmel v. Americus*, 105 Ga. 697, 31 S. E. 623, denying that sale of one sample renders agent liable to pay for peddler's license; *Theus v. State*, 114 Ga. 53, 39 S. E. 913, holding one employing laborers to work outside of state not "emigrant agent" requiring license; *Rotschild v. Schneider*, 167 Mich. 506, 133

N. W. 530, on what constitutes sale of liquor in violation of statute requiring license; *State use of Gemundt v. Shipley*, 98 Md. 662, 57 Atl. 12, holding occasional performance of isolated acts in collecting rents on party's own property does not constitute "carrying on business."

Cited in footnotes to *Re Houston*, 14 L. R. A. 719, which holds offer to sell sample to one person and sale and delivery to another not dealing in goods; *Thibaut v. Kearney*, 18 L. R. A. 596, which requires license from planter keeping store on plantation and selling goods to employees; *State v. Morehead*, 26 L. R. A. 585, which holds sale and delivery of sample sewing-machine not sale by peddler; *Delaware & H. Canal Co. v. Mahlenbrock*, 45 L. R. A. 538, which holds single transaction involving purchase of coal on credit, not transaction of business.

Cited in note (24 L. R. A. 297) on what constitutes "doing business" prohibited by statute.

14 L. R. A. 533, *JACKSONVILLE, T. & K. W. R. CO. v. ADAMS*, 28 Fla. 631, 10 So. 465.

Appeal in condemnation proceedings.

Cited in *Jacksonville, T. & K. W. R. Co. v. Adams*, 29 Fla. 276, 11 So. 169, upholding appeal from circuit court dismissing condemnation proceedings.

Compensation for improvement made before condemnation.

Cited in *Charleston & W. C. R. Co. v. Hughes*, 105 Ga. 18, 70 Am. St. Rep. 17, 30 S. E. 972, holding improvements by company after end of life estate should not be considered in assessing damages for remainderman's interest; *Seattle & M. R. Co. v. Corbett*, 22 Wash. 191, 60 Pac. 127; *Illinois C. R. Co. v. Le Blanc*, 74 Miss. 674, 21 So. 748; *St. Louis, K. & S. W. R. Co. v. Nyce*, 61 Kan. 414, 48 L.R.A. 250, 59 Pac. 1040,—denying recovery of value of improvements placed on land by railroad company before condemnation; *Aldridge v. Board of Education*, 15 Okla. 357, 82 Pac. 827, holding the owner cannot recover for the improvements placed upon the land during the unauthorized occupancy; *McClarren v. Jefferson School Twp.* 169 Ind. 144, 13 L.R.A.(N.S.) 419, 82 N. E. 73, 13 A. & E. Ann. Cas. 978, holding upon condemnation owner, though originally a trespass was committed, is not entitled to the value of improvements made.

Cited in note (66 L.R.A. 48) on structures on lands of another before condemnation.

Right to condemn property after unlawful possession has been taken.

Cited in *Blackwell, E. & S. W. R. Co. v. Bebout*, 19 Okla. 72, 91 Pac. 877, 14 A. & E. Ann. Cas. 1145, holding entry upon and appropriation of land prior to initiation of condemnation proceedings, will not defeat right of either owner or railway company to institute proceedings to condemn; *Ingleside Mfg. Co. v. Charleston Light & Water Co.* 76 S. C. 100, 56 S. E. 664, holding right of owner to damages for the illegal trespass, is subject to right of corporation to institute condemnation proceedings to obtain easement and have future damages ascertained; *Spratt v. Helena Power Transmission Co.* 37 Mont. 93, 94 Pac. 631, holding right to condemn is not lost by reason of trespass committed or wrongful possession taken.

Consent as defense to ejectment.

• Cited in *Griffin v. Jacksonville, T. & K. W. R. Co.* 33 Fla. 607, 16 So. 338, refusing to disturb judgment for defendant where proof shows company's occupation of street with abutter's consent.

Conclusiveness of judgment.

Cited in footnote in *Moore v. Snowball*, 66 L.R.A. 745, which holds judgment for defendants in trespass to try title to land sold under judgment foreclosing tax

lien and to set aside the judgment not bar to subsequent suit to set aside sheriff's sale for irregularities on equitable terms in which title is admitted to be in purchaser.

14 L. R. A. 540, *MEGGINSON v. MEGGINSON*, 21 Or. 387, 28 Pac. 388.

Presumption as to validity of marriage.

Cited in *Lancetot v. State*, 98 Wis. 138, 67 Am. St. Rep. 800, 73 N. W. 575, holding proof of formal marriage by one authorized to perform ceremony, followed by cohabitation, raises presumption of valid marriage; *Jackson v. Phalen*, 237 Mo. 150, 140 S. W. 879, holding that presumption that first marriage was dissolved arises where second marriage ceremony is shown; *Huff v. Huff*, '20 Idaho, 459, 118 Pac. 1080, holding that reasonable presumption is indulged in favor of legitimacy of child where parents cohabited; *Lyon v. Lash*, 79 Kan. 344, 99 Pac. 598, holding undisputed testimony of a subsequent marriage would create a presumption of a preceding valid divorce; *Re Sloan*, 50 Wash. 89, 17 L.R.A.(N.S.) 963, 96 Pac. 684, holding uncontradicted testimony of both parties that they were married at a certain date and lived together as husband and wife is ample to establish validity of a marriage.

Cited in footnotes to *Nims v. Thompson*, 17 L. R. A. 847, which holds marriage shown by evidence; *Hunter v. Hunter*, 31 L. R. A. 411, which holds presumption of illegality of marriage regularly solemnized prevails over presumption of continuance of former husband's life; *Norman v. Norman*, 42 L. R. A. 343, which holds burden of proving law on high seas upholding marriage, on person married on high seas.

Cited in notes (17 Eng. Rul. Cas. 176; 16 L.R.A.(N.S.) 98) on presumptions flowing from marriage ceremony.

Burden of proof of invalidity of marriage.

Cited in *Ollschlager v. Widmer*, 55 Or. 149, 105 Pac. 717, holding that burden of proof is upon party objecting to validity of marriage however celebrated; *Murchison v. Green*, 128 Ga. 342, 11 L.R.A.(N.S.) 704, 57 S. E. 709, holding burden is upon one attacking validity of a marriage to show invalidity, by clear, distinct, positive and satisfactory proof.

Cited in note (89 Am. St. Rep. 198) on burden of proving and sufficiency of evidence of termination of former marriage.

14 L. R. A. 545, *WARREN v. WARREN*, 89 Mich. 123, 50 N. W. 842.

Wife's right to sue for alienation of husband's affections.

Cited in *Beach v. Brown*, 20 Wash. 268, 43 L. R. A. 116, 72 Am. St. Rep. 98, 55 Pac. 46, holding wife's right under statute to damages for enticing husband away; *Wolf v. Frank*, 92 Md. 143, 52 L. R. A. 105, footnote, p. 102, 48 Atl. 132, and *Humphrey v. Pope*, 122 Cal. 258, 54 Pac. 847, upholding wife's right to maintain action in own name for alienation of husband's affections; *Sims v. Sims*, 79 N. J. L. 580, 29 L.R.A.(N.S.) 845, 76 Atl. 1063, holding that under statutes married woman may maintain action in her own name for alienation of husband's affections; *Nolin v. Pearson*, 191 Mass. 290, 4 L.R.A.(N.S.) 647, 114 Am. St. Rep. 605, 77 N. E. 890, 6 A. & E. Ann. Cas. 658, holding a cause of action for criminal conversation with the husband lies in favor of wife; *King v. Hanson*, 13 N. D. 97, 99 N. W. 1085, holding a married woman can maintain action for alienation of husband's affection by reason of statutory removal of disabilities at the common law; *Quick v. Church*, 23 Ont. Rep. 272, holding wife may maintain action in her own name against a woman who procures abandonment by husband with loss of means of support, where such woman lives

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by such procurement in adultery with the husband; *Dodge v. Rush*, 28 App. D. C. 152, 8 A. & E. Ann. Cas. 671, holding the conjugal rights of a wife are the same in principle as the husband's, and violation of those rights results from acts of same nature; *Lonstorf v. Lonstorf*, 118 Wis. 167, 95 N. W. 961 (dissenting opinion), on right of action in wife for loss of consortium of husband.

Cited in footnotes to *Haynes v. Nowlin*, 14 L. R. A. 787, *Dietzman v. Mullin*, 50 L. R. A. 808; *Betser v. Betser*, 52 L. R. A. 630; *Clow v. Chapman*, 26 L. R. A. 412,—which uphold wife's right of action for alienating husband's affections; *Sanborn v. Gale*, 26 L. R. A. 864, which holds running of limitation against action for alienation of wife's affections not prevented by agreement of parties to adultery known to husband to deny same; *Houghton v. Rice*, 47 L. R. A. 310, which denies right of action against other woman for alienating husband's affections unaccompanied by adultery.

Cited in notes (28 Am. St. Rep. 218; 46 Am. St. Rep. 473) on wife's action for alienation of husband's affections.

Distinguished in *Kroessin v. Keller*, 60 Minn. 375, 27 L. R. A. 686, 51 Am. St. Rep. 533, 62 N. W. 438, denying wife's right of action against another woman in nature of criminal conversation.

— By parent.

Cited in *Williams v. Williams*, 20 Colo. 56, 37 Pac. 614, sustaining recovery for alienation of husband's affections by father's threat to disinherit; *Hodgkinson v. Hodgkinson*, 43 Neb. 271, 27 L. R. A. 121, footnote, p. 120, 47 Am. St. Rep. 759, 61 N. W. 577, holding one effecting husband's desertion liable to suit by wife; *Gerner v. Gerner*, 185 Pa. 236, 40 L. R. A. 550, 42 W. N. C. 51, 64 Am. St. Rep. 646, 39 Atl. 884; *Railsback v. Railsback*, 12 Ind. App. 662, 40 N. E. 276; *Price v. Price*, 91 Iowa, 698, 29 L. R. A. 152, footnote p. 150, 51 Am. St. Rep. 360, 60 N. W. 202; *Lockwood v. Lockwood*, 67 Minn. 481, 70 N. W. 784,—upholding wife's action against father and mother for alienation of husband's affections; *Lonstorf v. Lonstorf*, 118 Wis. 167, 95 N. W. 961 (dissenting opinion), majority denying wife's right to maintain suit against mother-in-law for alienation of husband's affections.

Cited in footnote to *Tucker v. Tucker*, 32 L. R. A. 623, which holds parent not liable for advising son to separate from wife.

14 L. R. A. 548, *LOUISVILLE & N. R. CO. v. WALLACE*, 91 Tenn. 35, 17 S. W. 882.

Interest on damages.

Cited in *Jacobson v. United States Gypsum Co.* 150 Iowa, 339, 130 N. W. 122, holding that interest should not be allowed in action for personal injury, on verdict for damages which had not fully accrued at time of trial; *Louisville & N. R. Co. v. Fort*, 112 Tenn. 456, 80 S. W. 429, holding where owner is deprived of value, possession and use of property through wrongful act of another, damages with interest until paid should be assessed.

Cited in notes (18 L.R.A. 449) on interest on sum allowed as damages; (28 L.R.A.(N.S.) 73) on interest on unliquidated damages.

Distinguished in *Western U. Teleg. Co. v. Carver*, 15 Tex. Civ. App. 550, 39 S. W. 1021, holding interest recoverable from time of institution of suit for neglect to deliver message.

Reduction of verdict.

Cited in *Young v. Cowden*, 98 Tenn. 589, 40 S. W. 1088, holding court may, as condition of denying motion for new trial, require remittitur of part of verdict; *Alabama G. S. R. Co. v. Roberts*, 113 Tenn. 492, 67 L.R.A. 497, 82 S. W. 314,

3 A. & E. Ann. Cas. 937, holding in case of an apparent error of calculation in an action of debt, this court will not reverse and remand, but will remit the erroneous part.

14 L. R. A. 560, ILLINOIS C. R. CO. v. PETERSEN, 68 Miss. 454, 10 So. 43.

Carrier's duty toward livestock.

Cited in footnotes to *Coupland v. Housatonic R. Co.* 15 L. R. A. 534, which holds it carrier's duty to obey request to set on side track car containing frightened horse; *Betts v. Chicago, R. I. & P. R. Co.* 26 L. R. A. 248, which holds carrier liable for injuries to live stock by breaking of slats; *Chesapeake & O. R. Co. v. American Exch. Bank*, 44 L. R. A. 452, denying carrier's right to release itself by contract from providing safe facilities for caring for stock; *Atchison, T. & S. F. R. Co. v. Campbell*, 48 L. R. A. 251, which holds void, statute for free transportation of shippers of stock.

Cited in notes (44 L. R. A. 452) on statutory duties of carriers of live stock with reference to care of stock during transportation; (39 L.R.A.(N.S.) 641) on duty of carrier to take precaution to prevent loss threatened without its antecedent fault; (63 Am. St. Rep. 558, 562) on respective duties of carriers and shippers of livestock.

14 L. R. A. 552, WARDEN v. LOUISVILLE & N. R. CO. 94 Ala. 277, 10 So. 276.

Contributory negligence of employee.

Cited in *Louisville & N. R. Co. v. Stutts*, 105 Ala. 378, 53 Am. St. Rep. 127, 17 So. 29, holding careless management of engine bars recovery for death of engineer; *Southern R. Co. v. Arnold*, 114 Ala. 190, 21 So. 954, denying recovery to one unnecessarily coupling cars at night; *Chattanooga Southern R. Co. v. Myers*, 112 Ga. 240, 37 S. E. 439, denying company's liability for one killed while riding on engine in violation of duty; *Kansas City, M. & B. R. Co. v. Williford*, 115 Tenn. 115, 88 S. W. 178, holding where one injured was occupying the most exposed position on most dangerous part of train at time of collision without invitation and without necessity of being there he is guilty of gross contributory negligence; *Williams v. Monongahela Connecting R. Co.* 223 Pa. 485, 72 Atl. 811, 16 A. & E. Ann. Cas. 271, holding one guilty of contributory negligence in standing on pilot of moving engine without necessity for so doing.

Distinguished in *Biles v. Seaboard Air Line R. Co.* 143 N. C. 83, 55 S. E. 512, holding to render act negligent per se in taking a position on the pilot of an engine, such position must have been taken voluntarily; *Milbourne v. Arnold Electric Power Station Co.* 140 Mich. 323, 70 L.R.A. 605, 103 N. W. 821, holding an employee electing to ride on outside of a horse car while returning from work, in order to watch tools and with acquiescence of assistant superintendent of road, is not guilty of contributory negligence as matter of law.

Effect of custom.

Cited in *Pennsylvania R. Co. v. Naive*, 112 Tenn. 255, 64 L.R.A. 447, 79 S. W. 124, holding custom of suspending business on Fourth of July not unreasonable; *Missouri, K. & T. R. Co. v. Kennedy*, 51 Tex. Civ. App. 472, 112 S. W. 339, holding that evidence of custom of conductors to alight from moving train as it passed station to register train was admissible on question of contributory negligence of injured conductor.

— As excuse for negligence.

Cited in *Andrews v. Birmingham Mineral R. Co.* 99 Ala. 440, 12 So. 432, holding evidence of custom of riding on engine pilot and leaning to open switch when train in motion, incompetent; *Richmond & D. R. Co. v. Hissong*, 97 Ala. 192, 13 So.

209, holding evidence of custom of going between cars to drop coupling, inadmissible to vary rules; *Louisville & N. R. Co. v. Mothershed*, 110 Ala. 159, 20 So. 67, holding evidence of custom to disregard rule to slacken trains near depots, no excuse for contributory negligence; *Standard Life & Acci. Ins. Co. v. Jones*, 94 Ala. 439, 10 So. 530, holding complaint alleging "injury received in discharge of customary duty as switchman," demurrable; *Hill v. Birmingham Union R. Co.* 100 Ala. 451, 14 So. 211, denying practice of passengers to go from car to car by means of running board and steps, excuse for contributory negligence; *George v. Mobile & O. R. Co.* 109 Ala. 256, 19 So. 784; and *Alabama G. S. R. Co. v. Richie*, 111 Ala. 301, 20 So. 49, holding republication alleging custom, acquiesced in by company, of going between cars to draw coupling, defective; *Martin v. Kansas City, M. & B. R. Co.* 77 Miss. 727, 27 So. 646, holding trainmen's habit of riding on engine no ground for recovery for company's negligence; *Douglas v. Chicago, M. & St. P. R. Co.* 100 Wis. 408, 69 Am. St. Rep. 930, 76 N. W. 356, denying practice of crossing tracks without looking for trains excuses contributory negligence; *Alabama G. S. R. Co. v. Roach*, 110 Ala. 272, 20 So. 132, holding evidence of company's consent to practice of disregarding rules to display signal must be convincing; *El Dorado & B. R. Co. v. Whatley*, 88 Ark. 27, 129 Am. St. Rep. 93, 114 S. W. 234, holding custom cannot impart qualities of due care and prudence to an act which involves obvious peril; *Kansas City S. R. Co. v. Prunty*, 86 C. C. A. 163, 133 Fed. 23, holding no amount of usage justifies an employee, without superior orders and in the absence of extraordinary emergency, in taking a dangerous way to perform a duty when a safe one is at hand.

Negligence as matter of law.

Cited in *Louisville & N. R. Co. v. Richards*, 100 Ala. 366, 13 So. 944, holding that undisputed facts showing plaintiff's negligence raise question of law for court; *Barley v. Southern Indiana R. Co.* 30 Ind. App. 410, 66 N. E. 72, holding it not negligence as matter of law for one employed in construction gang to ride home on flat car.

Cited in footnotes to *Neeley v. Southwestern Cotton Seed Oil Co.* 64 L. R. A. 146, holding question as to servant's negligence in using defective ladder to adjust belt, for jury; *Neeley v. Southwestern Cotton Seed Oil Co.* 64 L.R.A. 146, which holds employee's contributory negligence in using defective ladder to adjust belt upon moving machinery after complaining of the risk, one for the jury; *Milbourne v. Arnold Electric P. Station Co.* 70 L.R.A. 600, which holds railroad employee not negligent *per se* in taking exposed position on flat car unless risk of injury is so great that no person of ordinary prudence would assume it.

Variance between pleading and proof.

Cited in *Alabama G. S. R. Co. v. Hall*, 105 Ala. 607, 17 So. 176, holding complaint alleging injury when engaged as brakeman defective, proof showing performance of fireman's duties.

14 L. R. A. 556, *FLYNN v. TAYLOR*, 127 N. Y. 596, 28 N. E. 418.

Use of highway.

Cited in *Kelly v. Otterstedt*, 80 App. Div. 399, 80 N. Y. Supp. 1606, denying damages to pedestrian slipping on green vegetables in front of street stand; *Spier v. Brooklyn*, 45 N. Y. S. R. 262, 18 N. Y. Supp. 170, holding city liable for injury to house by exhibition of fireworks, licensed by mayor; *Donovan v. Pennsylvania Co.* 61 L. R. A. 144, 57 C. C. A. 366, 120 Fed. 219, enjoining hackmen and hotel runners from congregating on sidewalk in front of depot; *Willard Hotel Co. v. District of Columbia*, 23 App. D. C. 282, holding owner of land

abutting upon a street has a right to encroach to a reasonable extent upon the public right, whenever reasonably necessary for transaction of his business; *Brauer v. Baltimore Refrigerating & Heating Co.* 99 Md. 376, 66 L.R.A. 405, 105 Am. St. Rep. 304, 58 Atl. 21, holding right of abutter on street to occupy it for other than public purposes is a permissive, and subordinate one to public purposes of travel and transportation; *John A. Tolman & Co. v. Chicago*, 240 Ill. 276, 24 L.R.A.(N.S.) 102, 88 N. E. 488, holding interference with the public's free enjoyment of the use of the sidewalk depends upon the necessity of the case so far as the individual is concerned, and the reasonableness of the use against the public; *Sanford v. White*, 132 Fed. 534, holding in repairing a street, or in constructing a line of street railway along it, the street may be temporarily obstructed, provided it does not unreasonably interfere with rights of the public; *Sweet v. Perkins*, 115 App. Div. 789, 101 N. Y. Supp. 163 (dissenting opinion) on right of adjacent owner to appropriation of highway.

Cited in footnotes to *Smith v. Milwaukee Builders' & Traders' Exchange*, 30 L. R. A. 504, which upholds requirement on constructing building abutting on sidewalk to build roofed passageway over sidewalk; *Pittsburgh, Ft. W. & C. R. Co. v. Cheevers*, 24 L. R. A. 156, which denies right of company to enjoin congregating of hotel runners, etc., in front of station; *Kessler v. Berger*, 61 L. R. A. 611, which holds boy injured by fall of lumber pile not lousager by stopping in street to cool after playing game in vacant lot; *Garibaldi v. O'Connor*, 66 L.R.A. 73, which holds merchants using portion of sidewalk adjoining place of business for receiving and shipping goods so that travelers are limited to narrow passageway during most of day liable for injury caused by permitting straw and loose bananas in such passageway; *Friedman v. Snare & Triest Co.* 70 L. R. A. 147, which sustains abutting owner's right to deposit in street building materials required for improvement of his property subject to regulation in public interest such right to be reasonably exercised in view of rights of public.

Cited in notes (39 L. R. A. 667) on municipal power over nuisances affecting highways and waters; (13 L.R.A.(N.S.) 254) on loss of customers as element of damages from obstruction of highway; (19 L.R.A.(N.S.) 509) on liability of municipality for permitting obstruction in street; (24 L.R.A.(N.S.) 97, 99) on temporary obstructions in street for purpose of loading or unloading.

— By railroads.

Cited in *Buchholz v. New York, L. E. & W. R. Co.* 148 N. Y. 644, 43 N. E. 76, upholding abutter's right to damages for erection of bridge diverting travel from hotel; *Old Forge Co. v. Webb*, 31 Misc. 321, 65 N. Y. Supp. 503, denying injunction to hotel keeper against construction of railroad over Forest Preserve likely to divert travel from his hotel; *Tinker v. New York, O. & W. R. Co.* 157 N. Y. 321, 51 N. E. 1031, holding deposit of timbers near highway, frightening horses, unreasonable interference with public travel; *Central Crostown R. Co. v. Metropolitan Street R. Co.* 17 Misc. 716, 40 N. Y. Supp. 1090, sustaining injunction restraining construction of parallel trolley line; *Rauenstein v. New York, L. & W. R. Co.* 47 N. Y. S. R. 142, 19 N. Y. Supp. 833, holding railroad company liable for unauthorized obstruction of street by erection of embankment; *Dunn v. Wilmington & W. R. Co.* 124 N. C. 260, 32 S. E. 711, Subsequent Appeal in 131 N. C. 452, 42 S. E. 862 (dissenting opinion), holding unnecessarily keeping engine with steam escaping close to highway, negligence; *Nette v. New York Elev. R. Co.* 2 Misc. 62, 20 N. Y. Supp. 844, holding refusal to consider benefits accruing to abutter, in assessing damages for construction of elevated road, error.

Cited in footnotes to *Lund v. St. Paul, M. & M. R. Co.* 61 L. R. A. 506, which denies contractor's liability for damage from obstruction of street because of

delay in constructing bridge due to strikes; *Brunswick & W. R. Co. v. Hardy*, 52 L. R. A. 396, which authorizes recovery by merchant specially damaged by wilful obstruction of street.

— Question of fact.

Cited in *Tinker v. New York, O. & W. R. Co.* 71 Hun, 435, 24 N. Y. Supp. 977, holding question of fact whether weather-beaten timbers lying partly hidden in ditch by highway calculated to frighten horses; *Lewis v. Ballston Terminal R. Co.* 45 App. Div. 131, 60 N. Y. Supp. 1035, holding question for jury whether use of steam roller in highway unreasonable; *Gassenheimer v. District of Columbia*, 25 App. D. C. 181, holding whether a particular use of a street is a reasonable use or otherwise is a question of fact depending on all the facts of the case.

Private action for special injury.

Cited in *Hatfield v. Straus*, 189 N. Y. 213, 82 N. E. 172, holding damages incident to the construction and operation of a private railway by a department store in front of a residence, are special and peculiar within the rule which allows private actions.

Cited in footnotes to *Jacksonville, T. & K. W. R. Co. v. Thompson*, 26 L. R. A. 410, which denies right to maintain private action for inconvenience from obstruction of highway in common with others; *O'Brien v. Central Iron & Steel Co.* 57 L. R. A. 508, which authorizes private action for permanent obstruction of street within 200 feet of abutter; *Brauer v. Baltimore R. & H. Co.* 66 L.R.A. 403, which sustains right of owner of building devoted to retail trade to enjoin adjoining owner from erecting platform along front of ice-plant in process of erection on portion of sidewalk space, and from removing curbs so that wagons can load from platform where pedestrian travel will be rendered inconvenient and entirely interrupted part of the time.

Question for jury.

Cited in *Overhouser v. American Cereal Co.* 118 Iowa, 421, 92 N. W. 74, holding for jury to decide whether it is negligence to scatter stones and dirt along street in conveying same from excavation.

14 L. R. A. 562, *RENIER v. HURLBUT*, 81 Wis. 24, 29 Am. St. Rep. 850, 50 N. W. 783.

Service of process.

Cited in *Cox v. North Wisconsin Lumber Co.* 82 Wis. 145, 51 N. W. 1130, denying that service of summons upon nonresident by publication gives jurisdiction to render judgment; *Everett v. Connecticut Mut. L. Ins. Co.* 4 Colo. App. 514, 36 Pac. 616, holding service of process upon agent of garnishee ineffectual to confer jurisdiction; *St. Sure v. Landsfelt*, 82 Wis. 349, 19 L. R. A. 517, 33 Am. St. Rep. 50, 52 N. W. 308, holding courts of Sweden no jurisdiction to dissolve marriage between residents of this state.

Cited in notes (16 L. R. A. 231) on validity of personal judgments rendered on constructive service of process; (53 Am. St. Rep. 181) on jurisdiction over absent citizens with respect to judgments in personam.

Situs of debt for purpose of suit or garnishment.

Cited in *Morawetz v. Sun Ins. Office*, 96 Wis. 179, 65 Am. St. Rep. 43, 71 N. W. 109, denying garnishment of foreign insurance company doing business in forum for debt due nonresident for loss in other state; *National Bank v. Furtick*, 2 Marv. (Del.) 60, 44 L. R. A. 118, 69 Am. St. Rep. 99, 42 Atl. 479, holding demand against insurance company has no situs in state of agency, when debt due nonresident for property insured in foreign state; *Reimers v. Seaton*

Mfg. Co. 30 L. R. A. 367, 17 C. C. A. 232, 37 U. S. App. 426, 70 Fed. 577, denying court's power to give judgment in favor of nonresident against foreign corporation, of debt due from another foreign corporation, payable elsewhere; Swedish-American Nat. Bank v. Bleecker, 72 Minn. 390, 42 L. R. A. 287, 71 Am. St. Rep. 492, 75 N. W. 740, holding situs of debt not in state, parties not residing or transaction taking place in state; Strause Bros. v. Ætna F. Ins. Co. 126 N. C. 229, 48 L. R. A. 454, 35 S. E. 471, holding debt due from insurance company for loss in one state, no situs in third to sustain garnishment by insured's creditor; Louisville & N. R. Co. v. Nash, 118 Ala. 487, 41 L. R. A. 333, 72 Am. St. Rep. 181, 23 So. 825, holding courts of Alabama no jurisdiction in garnishment proceedings over debt due nonresident, payable elsewhere; Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co. 127 Mo. 246, 27 L. R. A. 653, 48 Am. St. Rep. 626, 29 S. W. 1010, Affirming 54 Mo. App. 153, upholding right to garnish debt wherever creditor may sue on claim; Bragg v. Gaynor, 85 Wis. 488, 21 L. R. A. 168, 55 N. W. 919, holding debts due nonresidents, represented by notes and mortgages, have situs in state in favor of resident creditors of holders; Eingartner v. Illinois Steel Co. 94 Wis. 85, 34 L. R. A. 508, 59 Am. St. Rep. 859, 68 N. W. 664, holding citizen of foreign state may sue fellow citizen found in state, on cause arising in former state; Lancashire Ins. Co. v. Corbetts, 165 Ill. 596, 36 L. R. A. 642, 56 Am. St. Rep. 275, 46 N. E. 631, holding foreign corporation having property and agents in Illinois may be garnished for debt due nonresident; Atchison, T. & S. F. R. Co. v. Maggard, 6 Colo. App. 96, 39 Pac. 985, holding state where employee resides and services rendered, situs of debt; McBee v. Purcell Nat. Bank, 1 Ind. Terr. 293, 37 S. W. 55, holding place of deposit situs of debt for purpose of garnishment; Fond Du Lac Cheese & Butter Co. v. Henningser Produce Co. 141 Wis. 72, 123 N. W. 640, holding the courts cannot, by reason of statutes declaring such power, acquire jurisdiction over persons not present in the state, except for purpose of adjudicating with reference to property or status within state; Jordan v. Chicago & N. W. R. Co. 125 Wis. 592, 1 L.R.A.(N.S.) 891, 110 Am. St. Rep. 865, 104 N. W. 803, 4 A. & E. Ann. Cas. 1113 (dissenting opinion) on existence of jurisdictional facts necessary to decision.

Cited in notes (19 L. R. A. 578) on protection of nonresident creditor against garnishment; (3 L.R.A.(N.S.) 611) on place of payment as affecting jurisdiction to garnish debt; (69 Am. St. Rep. 117) on situs of debts for purposes of garnishment and of property in transit in hands of carriers.

14 L. R. A. 566, *STATE ex rel. TERRE HAUTE v. KOLSEM*, 130 Ind. 434, 29 N. E. 595.

Legislative interference with local government.

Cited in *State ex rel. White v. Barker*, 116 Iowa, 104, 57 L. R. A. 250, 93 Am. St. Rep. 222, 89 N. W. 204, denying right of legislature to name appointees to control municipal water system; *State ex rel. Geake v. Fox*, 158 Ind. 129, 56 L. R. A. 895, 63 N. E. 19, and *State ex rel. Smyth v. Moores*, 55 Neb. 530, 41 L. R. A. 640, 76 N. W. 175 (dissenting opinion), majority declaring unconstitutional, act conferring authority upon governor to appoint fire and police commissioners; *Terre Haute v. Evansville & T. H. R. Co.* 149 Ind. 184, 37 L. R. A. 194, 46 N. E. 77, holding act giving circuit judges power to appoint city commissioners, unconstitutional; *State ex rel. Harrison v. Menaugh*, 151 Ind. 268, 43 L. R. A. 412, 51 N. E. 117, holding law changing time of election of town trustees valid exercise of legislative power; *Mannie v. Hatfield*, 22 S. D. 478, 118 N. W. 817, holding that municipal corporations have only such powers as legislature grants them, which power is subject to legislative control; *Smith*

v. Indianapolis Street R. Co. 158 Ind. 437, 63 N. E. 849, upholding act regulating the granting of franchises to railroads in cities of 100,000 inhabitants; State ex rel. Dreibelbiss v. Berghoff, 158 Ind. 358, 63 N. E. 717, holding the motives of the legislative body in enacting that office of municipal judge shall come into existence a certain date and that elections shall take place upon certain dates are not proper subjects of judicial examination; Ex parte Lewis, 45 Tex. Crim. Rep. 40, 108 Am. St. Rep. 929, 73 S. W. 811 (dissenting opinion), on the extent of local self-government by a city; Ex parte Corliss, 16 N. D. 534, 114 N. W. 962 (dissenting opinion), on extent there exists a local right to act independently of the state.

Cited in footnotes to State ex rel. McCausland v. Freeman, 47 L.R.A. 67, which sustains statute arbitrarily establishing high school and requiring its maintenance by people of county; Rathbone v. Wirth, 34 L. R. A. 408, which holds void, statute for bipartisan police board of four members to be selected by all members of common council voting for two members of board only; Davock v. Moore, 28 L. R. A. 783, which sustains legislative power to provide for city board of health with power to incur expenses without city's consent.

Cited in notes (48 L.R.A. 481) on power of legislature to impose burdens upon municipalities and to control their local administration and property; (1 L.R.A.(N.S.) 513) on right of local self-government; legislative regulation of municipal officers.

Local or general laws.

Cited in Pennsylvania Co. v. State, 142 Ind. 440, 41 N. E. 937, holding determination as to application of general laws, not specially enumerated, legislative question; Young v. Tipton County, 137 Ind. 325, 36 N. E. 1118, declaring constitutional, act authorizing counties to issue bonds to complete construction of courthouses; Bell v. Maish, 137 Ind. 231, 36 N. E. 1118, holding act authorizing aid to construction of railroads, constitutional; Harmon v. Madison County, 153 Ind. 77, 54 N. E. 105, holding law prohibiting payment of compensation to any officer exceeding sum paid in, valid; Pittsburgh, C. C. & St. L. R. Co. v. Montgomery, 152 Ind. 8, 71 Am. St. Rep. 301, 49 N. E. 582, holding act "regulating railroad and other corporations" within § 9, art. 4, constitutional; Indianapolis v. Navin, 151 Ind. 155, 41 L. R. A. 343, 47 N. E. 525, holding constitutional, law regulating fares charged by existing street railway company; Indianapolis Street R. Co. v. Robinson, 157 Ind. 234, 61 N. E. 197, holding act requiring plaintiff to prove freedom from contributory negligence constitutional; Woods v. McCay, 144 Ind. 323, 33 L. R. A. 99, 43 N. E. 269, holding creation of local courts of concurrent jurisdiction with circuit courts not prohibited by Constitution; State v. Lewis, 134 Ind. 254, 20 L. R. A. 54, 33 N. E. 1024, holding act making possession of gill net misdemeanor, constitutional; Jackson County v. State, 147 Ind. 487, 46 N. E. 908, upholding statute providing remedy to force public officer to perform duty; Forsyth v. Hammond, 18 C. C. A. 179, 34 U. S. App. 552, 71 Fed. 446, declaring unconstitutional, statute allowing appeal from decision of county commissioners as to annexation of territory to city; Mode v. Beasley, 143 Ind. 315, 42 N. E. 727, holding relocation of county seat not within constitutional prohibition against local legislation regulating county business; State v. Hammond, 66 S. C. 224, 44 S. E. 797, holding it to be judicial question whether act making it crime to fail to remove dam after notice, is special legislation; Buist v. Charleston, 77 S. C. 270, 57 S. E. 862, holding the question whether an act conflicts with provision of state constitution which prohibits passage of special laws where general laws can apply, is one for the legislature to pass upon.

Cited in footnotes to *Com. ex rel. Jones v. Blackley*, 52 L. R. A. 367, which sustains classification of townships by density of population; *State, Alexander, Prosecutor, v. Elizabeth*, 23 L. R. A. 525, which holds invalid special statute discriminating between municipalities already having and those not having race course; *Hamilton County v. Rasche Bros.* 19 L. R. A. 584, which holds statute as to taxes not applying to all parts of state unconstitutional; *Edmunds v. Herbrandson*, 14 L. R. A. 725, which holds necessity of special law a legislative question; *Re Henneberger*, 42 L.R.A. 132, which holds local, statute general in terms, but enumerating restrictions constituting identification rather than classification; *Milwaukee County v. Isenring*, 53 L. R. A. 635, which holds act regulating sheriff's fees for particular county, local; *Stockton v. Powell*, 15 L. R. A. 42, which holds courts without power to inquire as to notice of application to legislature for local legislation; *Sutton v. State*, 33 L. R. A. 589, which holds classification of counties according to previous census without respect to actual population void; *Longview v. Crawfordsville*, 68 L.R.A. 623, which holds void classification of cities for purpose of legislation so as to make particular law conferring power to annex territory applicable to those having population between six and seven thousand.

Cited in note (93 Am. St. Rep. 108) on constitutional inhibition against special legislation where general law can be made applicable.

Sufficiency of title to statute.

Cited in *Maule Coal Co. v. Partenheimer*, 155 Ind. 107, 55 N. E. 751, holding act regulating operation of mines and right to recover for death of employee not invalid for failure to express subject in title; *Clarke v. Darr*, 156 Ind. 697, 60 N. E. 688, holding solvent domestic corporation and insolvent foreign corporation related within meaning of Constitution; *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 8, 71 Am. St. Rep. 301, 49 N. E. 582, holding statute prohibiting contracts releasing corporations from liability to employees need not be expressed in title to employers liability act.

Legislative discretion.

Cited in *Arnett v. State*, 168 Ind. 184, 8 L.R.A.(N.S.) 1194, 80 N. E. 153, holding the legislature cannot delegate to others the power to make laws, but it may give discretion to others in the enforcement of laws made.

14 L. R. A. 577, *Re OBERG*, 21 Or. 406, 28 Pac. 130.

Validity of class legislation.

Followed in *State ex rel. Bell v. Frazier*, 36 Or. 188, 59 Pac. 5, upholding law for assessment of tax to pay certain fees to certain officers.

Cited in *State v. Loomis*, 115 Mo. 324, 21 L. R. A. 807, 22 S. W. 350, declaring unconstitutional, law prohibiting persons engaged in manufacturing or mining from issuing to employees non-negotiable instrument or unredeemable order; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 440, 23 L. R. A. 276, 41 Am. St. Rep. 109, 25 S. W. 75, upholding law requiring payment of wages "without abatement or discount;" *State v. Baker*, 50 Or. 385, 13 L.R.A.(N.S.) 1042, 92 Pac. 1076, holding so long as the law operates alike upon all persons similarly situated, it is not objectionable as class or special legislation; *State v. Thompson*, 47 Or. 498, 4 L.R.A.(N.S.) 484, 84 Pac. 476, 8 A. & E. Ann. Cas. 646, holding a law restricting sale of railroad tickets to railroad agents holding certificates of authority to sell, is not objectionable as special legislation; *State v. Fraternal K. & L.* 35 Wash. 345, 77 Pac. 500, holding equal protection of the laws does not mean equality of operation on persons merely as such, but on persons according to their relations; *State v. Muller*, 48 Or. 258, 120 Am. St. Rep. 805, 85

Pac. 855, 11 A. & E. Ann. Cas. 88, holding same where all persons subject to such legislation are treated alike under like circumstances and conditions.

Cited in note (60 L. R. A. 341, 345) on constitutional equality in the United States in relation to corporate taxation.

14 L. R. A. 579, *LOUISVILLE SAFETY VAULT & T. CO. v. LOUISVILLE & N. R. CO.* 92 Ky. 233, 17 S. W. 567.

Regulation of rights, privileges, and contracts.

Cited in *Enterprise Lumber Co. v. Mundy*, 62 N. J. L. 21, 55 L. R. A. 201, 42 Atl. 1063, upholding stipulation in policy that "no action shall be brought except against attorneys in facts," and referring particularly to annotation in 14 L. R. A. 579.

Cited in footnotes to *Sprague v. Fletcher*, 37 L. R. A. 840, which holds statute allowing deduction of debts to resident taxpayers only, void; *State v. Travelers' Ins. Co.* 57 L. R. A. 481, which sustains statute imposing tax on market value of nonresident shareholders' stock without deduction of capital invested in land, as in case of resident shareholders; *Van Harlingen v. Doyle*, 54 L. R. A. 771, which holds void, statute prohibiting letting of public printing to papers established less than year; *Consumers Gas Trust Co. v. Harless*, 15 L. R. A. 505, which holds constitutional act limiting to corporations within state grant of right of eminent domain; *Williams v. Crabb*, 59 L. R. A. 425, which sustains Federal jurisdiction, in case of diverse citizenship, of suit to set aside probate of will in state extending equity jurisdiction to such suits; *Eingartner v. Illinois Steel Co.* 34 L. R. A. 503, which sustains action between nonresidents for injuries received in other state; *State v. Hogan*, 52 L. R. A. 864, which sustains statute making it a crime for male tramp not blind, outside county of residence, to threaten injury to another; *People ex rel. Cisco v. School Board*, 48 L. R. A. 113, which denies right of colored children to attend same schools as white children when separate schools with equal accommodations provided; *People ex rel. Bibb v. Alton*, 56 L. R. A. 95, which denies right of city to send colored children out of district to separate school established for them; *Brown v. Russell*, 32 L. R. A. 253, which holds act requiring appointment of veterans on sworn statement of qualifications void; *Anderton v. Milwaukee*, 15 L. R. A. 830, which holds discrimination between lot owners as to compensation for change of street grade void; *Roby v. Smith*, 15 L. R. A. 792, which holds act prohibiting appointment of nonresident as trustee unconstitutional; *Sweeney v. Hunter*, 14 L. R. A. 594, which holds prohibition against assigning claim against resident to nonresident valid; *Williams v. Donough*, 56 L. R. A. 766, which holds void, statute exempting proceeds of fraternal benefit certificate from liability for debts; *Leep v. St. Louis, I. M. & S. R. Co.* 23 L. R. A. 264, which upholds statute requiring payment of wages earned without discount on discharge of employees by corporations; *Re Oberg*, 14 L. R. A. 577, which holds valid act prohibiting arrest of officer or seaman of sea-going vessel; *Middleton v. Middleton*, 36 L. R. A. 221, which holds act permitting limited divorce with special consequences to person holding conscientious scruples against absolute divorce unconstitutional; *State ex rel. Curtis v. Brown & S. Mfg. Co.* 17 L. R. A. 856, which holds corporation not a person within protection of 14th Amendment; *Hammond Beef & Provision Co. v. Best*, 42 L. R. A. 528, which holds foreign corporation a "person" protected against discharge of debtor by state insolvency proceedings; *Mathews v. People*, 63 L.R.A. 73, which holds void provision in statute establishing free employment agencies at public expense for bidding furnishing of help to persons whose employees are on strike or locked out; *Nathan v. Spokane County*, 65 L.R.A. 337, which holds property liable to taxation under

general laws of state not exempt because returned for taxation for same years in another state.

Cited in notes (60 L. R. A. 321, 331) on constitutional equality in the United States in relation to corporate taxation; (24 L. R. A. 292) on recognition or exclusion of foreign corporations; (19 L. R. A. 225) on who or what is included in term "persons;" (18 L. R. A. 641) on rights of colored passengers; (16 L. R. A. 277) on treaty guaranties to aliens; (14 L. R. A. 846) on implied sanction of evil by statutory regulations; (21 L. R. A. 790) on constitutionality of statutes restricting contracts and business; (34 L.R.A.(N.S.) 264) on constitutionality of statute imposing liability for injury to servant, irrespective of negligence; (62 Am. St. Rep. 169) on protection of corporations from special and hostile legislation; (45 L. ed. U. S. 245) on separate coach acts.

— Practice of dentistry and medicine.

Cited in *People v. Reetz*, 127 Mich. 87, 86 N. W. 396, upholding right of legislature to regulate examinations for physicians; *Com. v. Gibson*, 21 Pa. Co. Ct. 239, 7 Pa. Dist. R. 389, holding legislature may regulate practice of dentistry; *State v. Knowles*, 90 Md. 658, 49 L. R. A. 698, footnote p. 695, 45 Atl. 877, sustaining discrimination between regular dental colleges and others authorized to grant diplomas to dentists; *Gothard v. People*, 32 Colo. 15, 74 Pac. 890, upholding act restricting practice of dentistry to persons holding a diploma from a dental school.

Cited in footnotes to *Overshiner v. State*, 51 L. R. A. 748, which upholds act authorizing appointment by state dental association of some of members of board of dental examiners; *Mathews v. Murphy*, 54 L. R. A. 415, which holds void, statute authorizing state health board to revoke physician's license for unprofessional conduct without fixing standard; *State v. Randolph*, 17 L. R. A. 470, which holds valid act exempting present practitioners of medicine from requirements as to diploma or certificate; *State ex rel. Kellogg v. Currans*, 56 L. R. A. 253, which sustains requirement of examination of graduate of foreign medical college not required of graduates of college in state; *State v. Wilson*, 52 L. R. A. 679, which holds one prosecuted for unlawful practice of medicine required to prove compliance with statute; *State ex rel. Burroughs v. Webster*, 41 L. R. A. 212, which holds valid act requiring all physicians to obtain new certificate and license; *State v. Bair*, 51 L. R. A. 776, which sustains statute requiring examination before state board of examiners, practice for five years, or certificate from medical school, before practising medicine; *Scholle v. State*, 50 L. R. A. 411, which sustains statute requiring license for physicians excepting certain classes of persons; *Parks v. State*, 59 L. R. A. 190, which sustains requirement that magnetic healer procure license; *State v. Biggs*, 64 L. R. A. 140, which holds statute conferring upon licensed doctors exclusive right to treat all diseases void; *State v. Buswell*, 24 L. R. A. 68, which holds certificate necessary to practise as Christian scientist; *State v. Liffing*, 46 L. R. A. 334, which denies necessity of certificate from medical board for practice of osteopathy; *Ex parte Gerino*, 66 L.R.A. 249, which sustains validity of statute fixing standard of preparation required of applicants for license to practice medicine, though under provisions of law such standard may vary from time to time and may be fixed by requirements which schools teaching particular system of medicine require of their pupils; *Territory v. Newman*, 68 L.R.A. 783, which upholds statute defining practice of medicine so as to include every method of treating disease for gain and requiring practitioners to obtain a license; *State v. Brown*, 68 L.R.A. 889, which denies right to require license to own, run, or manage a dental office from one having no intention of engaging in actual practice of dentistry.

— **Taking oysters or fish.**

Cited in footnotes to *State v. Dow*, 53 L. R. A. 314, which sustains statute against fishing for trout with intent to sell or trade; *Tyler v. State*, 52 L. R. A. 100, which holds oysters taken from waters outside of state not within statutory prohibition of possession of; *Com. v. Hilton*, 45 L. R. A. 475, which sustains town regulation limiting to residents, right to dig clams for sale; *Gustafson v. State*, 43 L. R. A. 615, which holds void, act limiting to taxpayers right to take oysters in public waters.

— **Other trades and occupations.**

Cited in *Youngblood v. Birmingham Trust & Sav. Co.* 95 Ala. 526, 20 L. R. A. 61, footnote p. 58, 36 Am. St. Rep. 245, 12 So. 579, holding valid, act prohibiting banker discounting paper at more than specified rate; *Noble State Bank v. Haskell*, 22 Okla. 79, 97 Pac. 590, holding that regulation of Banking is within police power of legislature; *Louisville & N. R. Co. v. Melton*, 218 U. S. 48, 54 L. ed. 926, — L.R.A.(N.S.) —, 30 Sup. Ct. Rep. 676, holding that act regulating railroads violates no constitutional provision because it is made to apply only to railroads; *Louisville & N. R. Co. v. Melton*, 127 Ky. 286, 105 S. W. 366, holding an act regulating railroads violates no constitutional provision because it is made to apply to railroads only; *Com. v. Remington Typewriter Co.* 127 Ky. 191, 105 S. W. 399, holding a requirement that all corporations shall place beneath name on all-printed matter the word "incorporated" is a proper police regulation.

Cited in footnotes to *Bessette v. People*, 56 L. R. A. 558, which sustains classification of municipalities for licensing of horseshoers; *People v. Bellet*, 22 L. R. A. 696, which upholds prohibition of business of barber on Sunday under greater penalties than those imposed on other business; *People ex rel. Nechamcus v. Warden of City Prison*, 27 L. R. A. 718, which upholds act requiring examination and certificate from employing or master plumbers; *State v. Gardner*, 41 L. R. A. 689, which holds void, statute allowing all members of plumbing firm to pursue business when one has license, or all members of corporation to do so when manager has license; *Bailey v. People*, 54 L. R. A. 839, which holds void, restriction on number lodging-house keepers may permit to occupy one room; *State v. Walah*, 35 L. R. A. 231, which holds void, statute against book making, etc., containing proviso exempting persons within limits of regular race course; *Juniata Limestone Co. v. Fagley*, 42 L. R. A. 442, which holds void, *per diem* tax on employers for each unnaturalized employee; *State v. Cadigan*, 57 L. R. A. 666, which holds void, imposition of penalty on agents for foreign partnerships not complying with conditions not required of local firms; *State v. Garbroski*, 56 L. R. A. 570, which holds void, statute exempting veterans from requirement of peddling license; *People v. Bray*, 27 L. R. A. 158, which holds valid, prohibition against selling or giving liquor to Indians; *Broadfoot v. Fayetteville*, 39 L. R. A. 245, which sustains statute discriminating in favor of nonresidents of city as to allowing stock to run at large; *Brim v. Jones*, 29 L. R. A. 97, which upholds act making driver of live stock over highway on hillside liable for injury to banks, or by rolling rocks into highway; *McCandless v. Richmond & D. R. Co.* 18 L. R. A. 440, which holds equal protection not denied by act making railroad companies liable for fires; *Luman v. Hitchins Bros. Co.* 46 L. R. A. 393, which holds void, statute prohibiting officer of railroad and mining corporation only being interested in mercantile business; *State v. Loomis* (Mo.) 21 L. R. A. 795, footnote p. 790, 20 S. W. 332, Reversed in 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350, sustaining statute prohibiting mining or manufacturing concerns issuing to employees orders, unless negotiable and redeemable in cash or supplies.

Cited in notes (25 L. R. A. 238) on restrictions on insurance by unincorporated associations or individuals; Lloyds' associations; (24 L. R. A. 152) on statutes against brokerage or "scalping;" (15 L. R. A. 478) on constitutionality of statutes prohibiting private banking.

— Allowance of attorney's fees.

Cited in *Pyramid Land & Stock Co. v. Pierce*, 30 Nev. 252, 95 Pac. 210, holding enactment providing for attorney's fees in favor of one recovering damages for unlawful use of land is a proper police regulation.

Cited in footnotes to *Vogel v. Pekoc*, 30 L. R. A. 491, which sustains act allowing attorneys' fees to employees in actions for wages; *Cameron v. Chicago, M. & St. P. R. Co.* 31 L. R. A. 553, which holds valid, act allowing attorneys' fees in actions against railroad companies for taking land without making compensation; *Turner v. Boger*, 49 L. R. A. 590, which holds provision for attorneys' fees in trust deed, void; *Dell v. Marvin*, 45 L. R. A. 201, which sustains statute allowing attorney's fees to successful plaintiff, but not to defendant, in mechanic's lien case; *Gulf, C. & S. F. R. Co. v. Ellis*, 17 L. R. A. 286, which holds valid, act authorizing attorneys' fees against railroad corporations in suits on claims; *Union Cent. L. Ins. Co. v. Chowning*, 24 L. R. A. 504, which holds equal protection not denied by requiring damages and attorneys' fees from insurance company not paying loss within time fixed; *Hocking Valley Coal Co. v. Rosser*, 29 L. R. A. 386, which holds void, act allowing attorney's fees in action for wages not paid within three days after written demand; *Gano v. Minneapolis & St. L. R. Co.* 55 L. R. A. 263, which sustains requirement for payment of attorney's fee on successful appeal by landowner from award in eminent domain; *Atkinson v. Woodmansee*, 64 L.R.A. 325, which holds void, provision for taxation as costs of attorney's fee in successful action by labor or artisan to enforce mechanic's lien; *Hartford Fire Ins. Co. v. Redding*, 67 L.R.A. 518, which upholds provision for recovery of attorney's fees in certain cases against insurance companies; *L'Engle v. Scottish Union & N. Ins. Co.* 67 L.R.A. 581, which upholds provision for recovery of attorneys' fees in certain cases against fire and life insurance companies.

Joinder of claims of ordinary and gross negligence.

Cited in note (31 L.R.A.(N.S.) 160) on right to join claims of ordinary and gross negligence arising out of the state of facts.

Who may object to void discrimination in statute.

Cited in note (32 L.R.A.(N.S.) 955, 958) as to who may object to statute as containing unconstitutional discrimination.

14 L. R. A. 588, *BANK OF COMMERCE v. FUQUA*, 11 Mont. 285, 28 Am. St. Rep. 461, 28 Pac. 291.

Effect on issues of reversal of entire judgment.

Cited in *Mattock v. Goughnour*, 13 Mont. 301, 34 Pac. 36, holding reversal on appeal from entire judgment and order, requires new trial of all issues; *Mattingly v. Lewisohn*, 13 Mont. 517, 35 Pac. 111, refusing to strike out amended complaint filed after reversal of entire judgment for refusal to sustain demurrer.

Review of instructions.

Cited in *Missoula Electric Light Co. v. Morgan*, 13 Mont. 397, 34 Pac. 488, and *Kleinschmidt v. McDermott*, 12 Mont. 313, 30 Pac. 393, refusing to review instructions on appeal unless incorporated in bill of exceptions.

Nature of demurrer.

Cited in *Plymouth Gold Min. Co. v. United States Fidelity & G. Co.* 35 Mont. 27, 88 Pac. 565, 10 A. & E. Ann. Cas. 951, holding the aim of a demurrer is to uproot and cast out the whole pleading.

Pleading of foreign statute.

Cited in *Lowry v. Moore*, 16 Wash. 479, 58 Am. St. Rep. 49, 48 Pac. 238, holding foreign statute must be pleaded; *McKnight v. Oregon Short Line R. Co.* 33 Mont. 42, 82 Pac. 661, holding where one relies upon a statute of a sister state such statute must be pleaded and proved as a fact; *Baird v. Vines*, 18 S. D. 54, 99 N. W. 89, on necessity of pleading and proving law of a sister state.

Effect of provision for attorneys' fees.

Cited in *Morrison v. Ornbaun*, 30 Mont. 113, 75 Pac. 953, holding where note is made payable with reasonable attorney's fees such fees are collectible where payment is not made at maturity though collection is made by attorneys without suit; *Green v. Spires*, 71 S. C. 112, 50 S. E. 554, 4 A. & E. Ann. Cas. 261 (dissenting opinion), on effect on negotiability of the words, "costs" and "expenses."

Cited in note (55 Am. St. Rep. 438, 443) on validity of stipulations for attorneys' fees.

Distinguished in *Lang v. Cadwell*, 13 Mont. 462, 34 Pac. 957, denying contribution from cotenant for attorneys' fees stipulated in mortgage, paid by one to avoid foreclosure.

— On negotiability of note.

Cited in *Benn v. Kutzschan*, 24 Or. 30, 32 Pac. 763; *Salisbury v. Stewart*, 15 Utah, 313, 62 Am. St. Rep. 934, 49 Pac. 777; *Farmers' Nat. Bank v. Sutton Mfg. Co.* 17 L. R. A. 598, 3 C. C. A. 20, 6 U. S. App. 312, 52 Fed. 195; *Stapleton v. Louisville Bkg. Co.* 95 Ga. 804, 23 S. E. 81; *Shenandoah Nat Bank v. Marsh*, 89 Iowa, 276, 48 Am. St. Rep. 381, 56 N. W. 458,—denying that provision for attorney's fees for nonpayment renders note non-negotiable; *Bullard v. Smith*, 28 Mont. 395, 72 Pac. 761, holding note with provision for attorney's fee, negotiable before passage of § 3992 of Code.

Cited in footnote to *Pattillo v. Alexander*, 29 L. R. A. 616, which sustains payee's guaranty of attorney's fees if note has to be collected by law.

Cited in note (125 Am. St. Rep. 209) on agreements and conditions destroying negotiability.

Distinguished in *Cornish v. Woolverton*, 32 Mont. 467, 108 Am. St. Rep. 593, 81 Pac. 4, holding where rule of negotiability is fixed by legislative enactment, stipulation for attorney's fees destroys negotiability.

Disapproved in effect in *Sylvester Bleckley Co. v. Alewine*, 48 S. C. 311, 37 L. R. A. 88, 26 S. E. 609, holding provision in note requiring makers to pay attorneys' fees if collected by suit, renders note non-negotiable.

What transactions are usurious.

Cited in note (46 Am. St. Rep. 193) on what transactions are usurious.
Sham pleadings.

Cited in note (113 Am. St. Rep. 640) on sham pleadings.

14 L. R. A. 594, **SWEENEY v. HUNTER**, 145 Pa. 363, 22 Atl. 653.

Restriction of contract between debtor and creditor.

Cited in *Dennis v. Moses*, 18 Wash. 597, 40 L. R. A. 315, 52 Pac. 333, declaring unconstitutional, statute prohibiting deficiency judgments; *Re Flukes*, 157 Mo. 129, 51 L. R. A. 177, 80 Am. St. Rep. 619, 57 S. W. 545, declaring void, statute forbidding assignment of claim for wages to nonresident; *State v. Loomis*, 115 Mo. 334, 21 L. R. A. 810, 22 S. W. 350 (dissenting opinion) majority declaring void, statute prohibiting mining and manufacturing concerns issuing to employees, order unredeemable in cash or supplies; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 419, 23 L. R. A. 269, 41 Am. St. Rep. 109, 25 S. W. 75, upholding act prohibiting

retention of part of employee's wages by corporation; *Workingman v. Merchant*, 26 Pa. Co. Ct. 472 (opinion by attorney general), holding creditors liable to penalty at suit of debtor for assignment of claims to foreign collection agency; *Little v. Balliette*, 9 Pa. Super. Ct. 413, holding wages of laborer not liable to foreign attachment; *Re Larocco*, 32 Pittsb. L. J. N. S. 40, denying exemption of nonresident widow of foreigner, who died in Pennsylvania; *Galbraith v. Rutter*, 20 Pa. Super. Ct. 556, denying right of creditor to maintain suit in foreign court under Act of May 23, 1887, for collection of claim against wage-earner; *Com. v. Stambaugh*, 22 Pa. Super. Ct. 389, Affirming 27 Pa. Co. Ct. 179, refusing to quash indictment for conspiracy to violate statute forbidding assignment of claims against wage-earner; *Com. v. Miller*, 12 Pa. Dist. R. 75, holding an indictment will lie against assignor and assignee of a claim exempt from debt, under a state law forbidding such assignment; *Assignment of Claims of Creditors*, 11 Pa. Dist. R. 310, upholding act imposing a penalty for the assignment of exempt claims against residents of the state to nonresidents.

Cited in footnotes to *Illinois C. R. Co. v. Smith*, 19 L. R. A. 580, denying that garnishment in another state defeats exemption of wages earned elsewhere; *Stewart v. Thompson*, 36 L. R. A. 583, holding nonresident creditor liable to debtor by attaching property found in another state.

Cited in notes (19 L. R. A. 580) on protection of nonresident creditor against garnishment; (36 L. R. A. 583) on debtor's right of action against his creditor for collecting debt in another jurisdiction in evasion of exemption laws of their domicil.

Distinguished in *McGuire v. Chicago, B. & Q. R. Co.* 131 Iowa, 374, 33 L.R.A. (N.S.) 722, 108 N. W. 902, holding it within police power of state to declare invalid any private contract limiting the liability of a railway company for negligence of a fellow servant.

Effect of voluntary act of debtor on his right to exemption.

Cited in *Telike v. Matievith*, 13 Luzerne L. Reg. Rep. 212, holding that wages of coal miner are exempt by statute and exemption cannot be waived; *Morris Box Board Co. v. Rossiter*, 30 Pa. Super. Ct. 25, holding the right to exempt wages or salary is not lost by a general appearance in a foreign attachment; *Malloy v. McCollum*, 36 Pa. Co. Ct. 229, 18 Pa. Dist. R. 674, holding fact that judgment is substituted for a wage claim by voluntary act of the plaintiff in the judgment, is of no avail against claim that wages were exempt from debt; *O'Neill v. Beasley*, 17 Pa. Dist. R. 154, holding the exemption is regarded as founded on public policy, looking to protection as against voluntary acts.

Distinguished in *Larocco's Estate*, 10 Pa. Dist. R. 568, holding the widow's exemption given by statute has no application to a nonresident widow.

14 L. R. A. 596, *BAGG v. WILMINGTON, C. & A. R. CO.* 109 N. C. 279, 3 Inters. Com. Rep. 803, 26 Am. St. Rep. 569, 14 S. E. 79.

Statutes affecting interstate commerce.

Cited in *State v. Womble*, 112 N. C. 867, 19 L. R. A. 829, 17 S. E. 491, holding act exempting officers and employees of certain railroad from working on public roads, valid; *State v. Southern R. Co.* 119 N. C. 820, 56 Am. St. Rep. 689, 25 S. E. 862, holding valid, a statute prohibiting running freight trains on Sunday; *Currie v. Raleigh & A. A. L. R. Co.* 135 N. C. 537, 47 S. E. 654, holding carrier liable for penalty for refusal to receive car of lumber, properly loaded, for interstate shipment; *Hutton v. Webb*, 124 N. C. 753, 59 L. R. A. 39, 33 S. E. 169 (dissenting opinion), majority denying legislature's right to impose duties upon commerce of navigable stream to build forts and bridges; *McCann v. Eddy*, 133 Mo. 70, 35 L. R. A. 113, 33 S. W. 71, sustaining statute imposing liability for

negligence of connecting carrier; *Yazoo & M. R. Co. v. Greenwood Grocery Co.* 96 Miss. 417, 51 So. 450, holding that state railroad commission may fix reciprocal demurrage rules, making carrier liable for delays in delivery of interstate shipments after arrival at point of consignment; *Reid v. Southern R. Co.* 153 N. C. 492, 69 S. E. 618, holding that section 2831 of Revisal, imposing penalty on carrier refusing freight for shipment, is constitutional in its application to interstate shipments; *St. Louis, I. M. & S. R. Co. v. Edwards*, 94 Ark. 398, 127 S. W. 713, holding that demurrage is not invalid, so far as it applies to interstate commerce; *Garrison v. Southern R. Co.* 150 N. C. 592, 64 S. E. 578; *Reid v. Southern R. Co.* 150 N. C. 758, 64 S. E. 874, 17 A. & E. Ann. Cas. 247,—holding statutes imposing a penalty for refusal to receive freight are upheld as a just and reasonable exercise of police power, both as to inter and intrastate commerce; *Reid v. Southern R. Co.* 149 N. C. 425, 63 S. E. 112; *Burlington Lumber Co. v. Southern R. Co.* 152 N. C. 72, 67 S. E. 167,—holding act of refusing to receive for shipment is not a part of the act of transportation and state penalty statutes apply; *Morris-Scarboro-Moffitt Co. v. Southern Exp. Co.* 146 N. C. 172, 15 L.R.A.(N.S.) 986, 59 S. E. 667, upholding statute imposing a penalty on common carriers for failure to adjust and pay claims for damages to goods within three months after demand; *Walker v. Southern R. Co.* 137 N. C. 168, 49 S. E. 84, holding statutes imposing a penalty for failure to ship goods within four days of time they are received does not contravene commerce clause; *State v. Seaboard Air Line R. Co.* 56 Fla. 662, 32 L.R.A.(N.S.) 668, 47 So. 969, holding state regulation of interstate transportation, if it only indirectly and incidentally affects interstate commerce, is not in conflict with commerce clause; *Harrill Bros. v. Southern R. Co.* 144 N. C. 538, 57 S. E. 383, holding statute imposing a penalty for refusal to deliver freight upon lawful tender of charges by consignee is not unconstitutional as a burden upon interstate commerce.

Cited in footnotes to *Lafarier v. Grand Trunk R. Co.* 17 L.R.A. 111, which holds state statute giving ticket holder stopover rights not applicable outside of state; *Central Stockyards Co. v. Louisville & N. R. Co.* 63 L.R.A. 213, which holds that state cannot require delivery of interstate freight by one carrier to another within its borders in order that it may reach a particular depot.

Cited in notes (24 L. R. A. 152) on statutes against ticket brokerage or "scalping;" (20 L.R.A.(N.S.) 126) on constitutionality of legislation affecting amount of liability or penalty for delay in delivery, or for destruction, of freight; (27 Am. St. Rep. 548, 559) on state regulation of interstate commerce.

Distinguished in *Southern R. Co. v. Greensboro Ice & Coal Co.* 134 Fed. 92, holding a state commission may be enjoined from enforcing an order compelling carriers to deliver carloads of coal to consignee shipped into the state on certain tracks for unloading; *Murphy Hardware Co. v. Southern R. Co.* 150 N. C. 706, 22 L.R.A.(N.S.) 1202, 64 S. E. 873, 17 A. & E. Ann. Cas. 481, holding carrier may show, as defense to action for refusal to receive stock, that a strike and conditions over which it had no control make shipment impossible if stock were accepted.

14 L. R. A. 600, *STATE v. WORKMAN*, 35 W. Va. 367, 14 S. E. 9.

Statutes regulating rights and privileges.

Approved in *State v. Peel Splint Coal Co.* 36 W. Va. 815, 17 L. R. A. 389, 15 S. E. 1000, sustaining act regulating manner of paying employees of certain corporations.

Cited in *State v. Hunter*, 37 W. Va. 745, 17 S. E. 307, sustaining conviction of one carrying revolver, not for self-protection; *State v. Bingham*, 42 W. Va. 238, 24 S. E. 883, sustaining provision that jury may find conspiracy from pres-

ence of others aiding commission of act; *Strickland v. State*, 137 Ga. 5, 36 L.R.A. (N.S.) 117, 72 S. E. 260, holding valid, act prohibiting carrying of revolver without license.

Cited in footnotes to *Com. v. Murphy*, 32 L. R. A. 606, which upholds statute prohibiting drills and parades by unauthorized parties of men; *State v. Hogan*, 52 L. R. A. 864, which sustains statute making it a crime for male tramp not blind, outside county of residence, to threaten injury to another.

Cited in notes (3 L.R.A.(N.S.) 169; 115 Am. St. Rep. 200, 201, 203) on constitutional right to keep and bear arms; (78 Am. St. Rep. 263) on acts which legislature may declare criminal.

Construction of statutes.

Cited in *Underwood Typewriter Co. v. Piggott*, 60 W. Va. 536, 55 S. E. 664, holding where certain construction is in effect violative of a constitutional right it is an admonition to the court that such construction is wrong, if statute is susceptible of a construction that will make it valid; *Coal & Coke R. Co. v. Conley*, 67 W. Va. 166, 67 S. E. 613, holding that every reasonable construction must be resorted to, in order to save statute from unconstitutionality.

14 L. R. A. 605, *STATE v. LINGERFELT*, 109 N. C. 775, 14 S. E. 75.

Rights and liabilities of sureties on bail bond.

Cited in *State v. Schenck*, 138 N. C. 564, 49 S. E. 917, 3 A. & E. Ann. Cas. 928, holding the conviction does not have the effect of putting the defendant into the custody of the court or relieve sureties for his appearance from liability.

14 L. R. A. 609, *STATE v. STOWE*, 3 Wash. 206, 28 Pac. 337.

Cumulative evidence as ground for new trial.

Cited in *State v. Townsend*, 7 Wash. 467, 35 Pac. 367, granting new trial for newly discovered white witness, although evidence is cumulative; *Kreiselheimer v. Nelson*, 31 Wash. 406, 72 Pac. 72, refusing to disturb order for new trial when discretion not abused.

Jurisdiction where offense is committed before admission of state in Union.

Cited in *Higgins v. Brown*, 20 Okla. 386, 1 Okla. Crim. Rep. 62, 94 Pac. 703; *Ex parte Bailey*, 20 Okla. 500, 1 Okla. Crim. Rep. 118, 94 Pac. 553,—holding where crime is committed prior to admission of state into the union and no prosecution is had before statehood offense is triable in district court of state in county where crime was committed.

14 L. R. A. 613, *KLEIBER v. PEOPLE'S R. CO.* 107 Mo. 240, 17 S. W. 946.

Fear affecting contributory negligence.

Cited in *Ephland v. Missouri P. R. Co.* 57 Mo. App. 159, holding instruction disregarding question as to negligence of trainman in giving false alarm, error; *Edwards v. Chicago & A. R. Co.* 94 Mo. App. 40, 67 S. W. 950, holding flagman failing to warn traveler in time renders company liable; *Bischoff v. People's R. Co.* 121 Mo. 225, 25 S. W. 908, sustaining recovery of one jumping from street car at warning cry of flagman; *De Bolt v. Kansas City, Ft. S. & M. R. Co.* 123 Mo. 521, 27 S. W. 575 (dissenting opinion), majority denying recovery for death of superintendent jumping, with knowledge of surroundings, to avoid collision; *McPeak v. Missouri P. R. Co.* 128 Mo. 651, 30 S. W. 170, holding company liable for injuries to passengers, jumping at warning of brakeman; *Denver & R. G. R. Co. v. Roller*, 49 L. R. A. 89, 41 C. C. A. 40, 100 Fed. 756, holding passenger escaping from wrecked car need not close eyes and ears to everything trans-

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piring, to recover for nervous shock; *Blyston-Spencer v. United R. Co.* 162 Mo. App. 139, 132 S. W. 1175, to the point that person who adopts dangerous alternative in emergency is not necessarily guilty of contributory negligence; *Twelkemeyer v. St. Louis Transit Co.* 102 Mo. App. 196, 76 S. W. 682, holding question whether, in view of grave perils confronting him, the injured one adopted course of a man of ordinary prudence, was properly for the jury; *Palmer v. Chicago & A. R. Co.* 142 Mo. App. 646, 121 S. W. 1087, holding court had no right to tell jury it was contributory negligence as emergency of the peril may have been so imminent, and terrifying as to excuse failure to adopt very best expedient possible under the circumstances; *Feddeck v. St. Louis Car Co.* 125 Mo. App. 36, 102 S. W. 675, holding one placed in a position of imminent danger by negligence of another, is not negligent in running toward instead of away from falling timbers when he heard crash and warning to "look out;" *McManus v. Metropolitan Street R. Co.* 116 Mo. App. 113, 92 S. W. 176, holding a case for the jury is shown where injuries result from a panic on car, when gripman took no heed to warning cries but ran car nearer to a wreck than necessary under circumstances; *Cooper v. Century Realty Co.* 224 Mo. 729, 123 S. W. 848, holding an attempt to escape from elevator in motion, where appearance of imminent danger gave no time for deliberation is not contributory negligence where there was reasonable cause to apprehend danger.

Cited in footnotes to *St. Louis & S. F. R. Co. v. Murray*, 16 L. R. A. 787, which requires passenger's prudence in attempting to escape to be judged by apparent circumstances; *Gannon v. New York, N. H. & H. R. Co.* 43 L. R. A. 833, which holds carrier liable for injury to passenger while impulsively trying to escape from car in which oil lamp caught fire.

Cited in note (37 L.R.A.(N.S.) 45, 47) on care required in sudden emergency.
Question for jury.

Cited in *Anna v. Missouri P. R. Co.* 96 Mo. App. 549, 70 S. W. 398, holding for jury to determine whether child used due care in crawling from ditch under cars, before train passed; *Twelkemeyer v. St. Louis Transit Co.* 102 Mo. App. 196, 76 S. W. 682, holding it to be question for jury as to negligence in whipping horses to cross tracks when trains approaching from both directions.

Admissibility of evidence.

Cited in *O'Rourke v. Citizens' Street R. Co.* 103 Tenn. 129, 46 L. R. A. 615, 76 Am. St. Rep. 639, 52 S. W. 872, holding alarm of children at time of father's expulsion from car admissible as part of *res gestae*; *Cromeenes v. San Pedro, L. A. & S. L. R. Co.* 37 Utah, 491, 109 Pac. 10, Ann. Cas. 1912 C, 307, holding that instinctiveness is requisite to make declarations part *res gestae*; *Louisville R. Co. v. Johnson*, 131 Ky. 286, 20 L.R.A.(N.S.) 144, 115 S. W. 207, holding in actions for damages where injuries result from jumping off cars in anticipation of a collision, outcries of others are properly admitted to show danger confronting the passengers; *Tretter v. St. Louis & Suburban R. Co.* 122 Mo. App. 416, 99 S. W. 508, holding an unusual explosion cannot be inferred from fact of a panic of the passengers, but must receive direct proof.

Cited in notes (20 L.R.A.(N.S.) 142) on nonparticipation in accident or affray as rendering one's statements or exclamations inadmissible as *res gestae*; (11 Eng. Rul. Cas. 291) on admissibility of declarations as part of the *res gestae*.

Reversal of judgment.

Cited in *Davis v. Cohn*, 85 Mo. App. 534, reversing judgment for failure to show judgment valid as to all defendants; *State ex rel. Ozark County v. Tate*, 109 Mo. 269, 32 Am. St. Rep. 664, 18 S. W. 1088, denying right of surviving sureties to set aside as to them, judgment against all; *Bates-Smith Invest. Co. v.*

Scott, 56 Neb. 479, 76 N. W. 1063, affirming judgment as to party of whom court had jurisdiction; *Stotler v. Chicago & A. R. Co.* 200 Mo. 150, 98 S. W. 509, holding where interests of parties to an appeal may be rightfully served, judgment as to one tortfeasor may be reversed and affirmed as to the other; *Shree-der v. Davis*, 43 Wash. 136, 86 Pac. 198, 10 A. & E. Ann. Cas. 77, holding where judgment is against two defendants, one of whom was not served with process, the court will reverse the judgment as to one not served and affirm as to the other; *Blackmer & P. Pipe Co. v. Mobile & O. R. Co.* 137 Mo. App. 512, 119 S. W. 1, holding a judgment is not reversed as to one party and affirmed as to another, except when the judgment on appeal settles the litigation as to all parties.

Duty as to operation of safety gates at crossings.

Cited in note (33 L.R.A.(N.S.) 994) on railroads: duty as to operation of safety gates at crossings.

14 L. R. A. 622, *DEAL v. MISSISSIPPI COUNTY*, 107 Mo. 464, 18 S. W. 24

Presumption as to statute's validity.

Cited in *State ex rel. McCaffery v. Aioe*, 152 Mo. 477, 47 L. R. A. 397, 54 S. W. 494, holding presumption of validity attaches to act until contrary appears; *McCully v. Chicago, B. & Q. R. Co.* 212 Mo. 52, 110 S. W. 711, holding every statute must be presumed to be constitutional and valid until the contrary plainly appears.

Purposes for which public funds may be used.

Cited in *State ex rel. Garth v. Switzler*, 143 Mo. 319, 40 L. R. A. 286, 65 Am. St. Rep. 653, 45 S. W. 245, declaring unconstitutional, collateral-inheritance tax law for defraying expenses of poor students at state college; *Institute for Education of Mute & Blind v. Henderson*, 18 Colo. 106, 18 L. R. A. 401, 31 Pac. 714, declaring void, statute providing bounties for destruction of wild animals and poisonous weeds; *United States ex rel. Miles Planting & Mfg. Co. v. Carlisle*, 5 App. D. C. 151, holding no vested rights to bounty acquired, entitling licensed sugar producer to compel payment of bounty after repeal of act; *Dodge v. Mission Twp.* 54 L. R. A. 247, 46 C. C. A. 667, 107 Fed. 833, declaring void, issue of town bonds to promote sugar industry; *Opinion of the Justices*, 204 Mass. 612, 27 L.R.A.(N.S.) 485, 91 N. E. 405, holding legislature cannot authorize the exercise of right of eminent domain by a city for promotion of private interests.

Cited in footnote to *Michigan Sugar Co. v. Dix*, 56 L. R. A. 329, which holds beet sugar bounty unconstitutional.

Limitations upon legislative power.

Cited in *First Nat. Bank v. Shallenberger*, 172 Fed. 1003, as an example of legislative excess of authority.

14 L. R. A. 624, *PEOPLE ex rel. NICHOLS v. ONONDAGA COUNTY*, 129 N. Y. 395, 29 N. E. 327.

Marking official ballots.

Cited in *Re McDade*, 29 Misc. 217, 60 N. Y. Supp. 105, holding use of paster ballots violates election law by tending to identify ballot; *Pennington v. Hare*, 60 Minn. 156, 62 N. W. 116 (dissenting opinion), majority holding any mark intended for cross must be given effect; *People ex rel. Sherman v. Person*, 64 Hun, 331, 19 N. Y. Supp. 297, holding count of ballot for supervisor not authorized by indorsement of ballot for excise commissioner by affixing paster for former; *People ex rel. Bradley v. Shaw*, 64 Hun, 361, 19 N. Y. Supp. 302, hold-

ing canvassers must count paster ballots, leaving courts to decide upon defects, *Montgomery v. O'Dell*, 67 Hun, 178, 22 N. Y. Supp. 412, holding valid, paster on only ballot cast for excise commissioner; *People ex rel. Bradshaw v. Bidelman*, 69 Hun, 598, 23 N. Y. Supp. 954, holding ballots not vitiated by use of some not consecutively numbered; *People ex rel. Wells v. Collin*, 19 App. Div. 465, 46 N. Y. Supp. 701, holding "X" placed before name outside of voting space renders ballot void; *People ex rel. White v. Buffalo*, 31 App. Div. 447, 52 N. Y. Supp. 643, raising without deciding question as to proof of voter's intention to mark ballot; *New York & R. Cement Co. v. Keator*, 62 App. Div. 583, 71 N. Y. Supp. 185, holding rejection of evidence as to how witness voted on water-bond question, no error; *Tebbe v. Smith*, 108 Cal. 108, 29 L. R. A. 676, 49 Am. St. Rep. 68, 41 Pac. 454, holding ballot not invalidated by placing cross after name instead of in square; *Cook v. Fisher*, 100 Iowa, 32, 69 N. W. 264, denying rejection of ballots containing name of candidate slightly misspelled; *Dial v. Hollandsworth*, 39 W. Va. 11, 19 S. E. 557 (dissenting opinion), majority denying poll invalidated because ballot-clerks all of same party; *Miller v. Schallern*, 8 N. D. 403, 79 N. W. 865, and *Slaymaker v. Phillips*, 5 Wyo. 494, 47 L. R. A. 857, 42 Pac. 1049 (dissenting opinion) majority holding absence of official stamp on exterior of ballot renders ballot void; *Morris v. Board of Canvassers*, 49 W. Va. 255, 38 S. E. 500, holding voter using two ballots on election sheet invalidates both; *Re Hearst*, 48 Misc. 455, 96 N. Y. Supp. 119, holding if there be a substantial compliance, without a manifest intent to evade or violate the law, the ballot is valid.

Cited in footnotes to *People ex rel. Daley v. Rice*, 14 L. R. A. 644, which holds county clerk's refusal to certify returns not justified by county canvassers' illegal counting and rejection of votes; *State ex rel. Mize v. McElroy*, 16 L. R. A. 279, which holds name written on ballot in place of printed name erased cannot be counted; *State ex rel. Phelan v. Walsh*, 17 L. R. A. 364, in which various decisions as to validity of ballots are made; *State ex rel. Law v. Saxon*, 18 L. R. A. 721, which holds ballots marked with name of ticket not illegal; *Sego v. Stoddard*, 22 L. R. A. 468, as to what constitutes a distinguishing mark on ballot.

Cited in notes (25 L. R. A. 481) on how far right to vote is absolute; (47 L.R.A. 811, 812) on marking official ballot; (49 Am. St. Rep. 243, 248) on distinguishing marks invalidating ballot.

Distinguished in *Bowers v. Smith*, 111 Mo. 59, 16 L. R. A. 760, footnote p. 755, 33 Am. St. Rep. 491, 20 S. W. 101, holding election not defeated by clerk's error in printing additional candidates on official ballots; *Boyd v. Mills*, 53 Kan. 606, 25 L. R. A. 490, 42 Am. St. Rep. 306, 37 Pac. 16, sustaining count of colored ballots voted by mistake; *Esquibel v. Chaves*, 12 N. M. 505, 78 Pac. 505, holding ballot is not void as a matter of law where emblem adopted by a political party is at head of ticket but all the names of candidates adopting it are not given; *People ex rel. Deister v. Wintermute*, 194 N. Y. 109, 86 N. E. 818, holding attempts to vote on a voting machine clearly showing choice of elector should be counted as votes though machine failed to record votes cast.

— **Directory or mandatory provisions.**

Cited in *State ex rel. Waggoner v. Russell*, 34 Neb. 123, 15 L. R. A. 742, footnote p. 740, 33 Am. St. Rep. 625, 51 N. W. 465, holding provision for marking ballots with ink directory only; *Horning v. Board of Canvassers*, 119 Mich. 53, 77 N. W. 446, holding provision as to place on ballot, of inspector's initials, directory only; *Van Winkle v. Crabtree*, 34 Or. 471, 55 Pac. 831, construing as mandatory act relating to space for voting marks; *Ellis ex rel. Reynolds v.*

May, 99 Mich. 545, 25 L. R. A. 328, 58 N. W. 483, holding mandatory statute requiring voters to be sworn as to ability to read English; *State ex rel. Bennett v. Barber*, 4 Wyo. 84, 32 Pac. 14, and *Stackpole v. Hallahan*, 16 Mont. 61, 28 L. R. A. 509, 40 Pac. 80, holding election, otherwise legal, not invalidated by defective nomination certificate; *Rampendahl v. Crump*, 24 Okla. 888, 105 Pac. 201, holding that statute which provides that "on leaving booth voter shall deliver ballots to inspector etc.," is mandatory; *Westville v. Stillwell*, 24 Okla. 897, 105 Pac. 664, holding that statute providing that every person desiring to vote at special election shall subscribe and swear to affidavit is mandatory; *Newhouse v. Alexander*, 27 Okla. 64, 30 L.R.A.(N.S.) 615, 110 Pac. 1121, Ann. Cas. 1912 B, 674; *Board v. Dill*, 26 Okla. 113, 29 L.R.A.(N.S.) 1175, 110 Pac. 1107, Ann. Cas. 1912 B, 101,—holding that statutes designed to secure secrecy in voting are mandatory; *Re Houligan*, 55 Misc. 9, 106 N. Y. Supp. 205, holding question of voter's intent is not involved where statute provides clear and explicit rules regulating where and how the ballots shall be marked; *Re Jerome Ballots*, 48 Misc. 448, 96 N. Y. Supp. 122, holding failure of voter to comply with advisory directions of statute as to marking of ballot does not invalidate it.

Mandamus to correct returns.

Cited in *People ex rel. Ranton v. Syracuse*, 88 Hun, 205, 34 N. Y. Supp. 661, holding mandamus will lie to compel inspectors to correct returns; *Re Stewart*, 24 App. Div. 205, 48 N. Y. Supp. 957, holding inspectors may be required to amend returns by inserting results shown by tally sheet; *People ex rel. Brink v. Way*, 92 App. Div. 88, 86 N. Y. Supp. 892, holding that mandamus will lie to compel election officers to canvass vote correctly; *People ex rel. Munro v. Board of Canvassers*, 129 N. Y. 473, 29 N. E. 361, holding candidate whose name misspelled in return may compel inspectors to send it back for correction; *People ex rel. March v. Beam*, 117 App. Div. 377, 103 N. Y. Supp. 818, holding court has power to make order directing the inspectors to reconvene and make correct statement of the result of the canvass.

Cited in footnote to *Rosenthal v. State Canvassers*, 19 L. R. A. 157, which denies mandamus to compel recanvass of votes after final adjournment of canvassing board.

Review of order as to recount of ballots.

Cited in *People ex rel. Feeny v. Board of Canvassers*, 156 N. Y. 47, 50 N. E. 425, holding court of appeals may review appellate-division order determining recount of marked ballots.

Intention controlling construction of act.

Cited in *Bowers v. Smith*, 111 Mo. 65, 16 L. R. A. 761, 33 Am. St. Rep. 491, 20 S. W. 101, and *Opinion of the Justices*, 66 N. H. 659, 33 Atl. 1076, holding intention of legislature must control construction of act; *Hicks v. Krigbaum*, 13 Ariz. 240, 108 Pac. 482, holding that courts should construe statutes so as to effectuate legislative intent.

Cited in note (45 L. ed. U. S. 216) on validity of registration laws.

14 L. R. A. 643, *PEOPLE ex rel. DALEY v. RICE*, 129 N. Y. 449, 41 N. Y. S. R. 939, 29 N. E. 345.

Contempt of court by canvassing board.

Cited in *People ex rel. Platt v. Rice*, 144 N. Y. 261, 39 N. E. 88, Affirming 80 Hun, 443, 30 N. Y. Supp. 457, and *People ex rel. Platt v. State Canvassers*, 74 Hun, 181, 26 N. Y. Supp. 345, holding board of canvassers guilty of contempt of court by canvassing returns in violation of injunction.

Power of board of canvassers to select secretary.

Cited in *Re Noble*, 34 App. Div. 60, 54 N. Y. Supp. 42, holding board of canvassers may select secretary, when county clerk's office is vacant.

Mandamus as to election matters.

Cited in *People ex rel. Pond v. Monroe County*, 65 Hun, 265, 19 N. Y. Supp. 978, denying mandamus to compel board of supervisors to divide county into assembly districts; *Stearns v. State*, 23 Okla. 471, 100 Pac. 909, holding that court may by mandamus require board of canvassers after it has made partial canvass to reassemble and make canvass of all returns if it appears upon first canvass board improperly rejected returns from one precinct.

Cited in footnote to *Rosenthal v. State Board*, 19 L. R. A. 158, which denies mandamus to compel recanvass of votes after final adjournment of canvassing board.

Distinguished in *People ex rel. Ward v. Roosevelt*, 9 App. Div. 626, 41 N. Y. Supp. 572, holding duty of secretary of state to place both nominees upon official ballot; *Stearns v. State*, 23 Okla. 471, 100 Pac. 909, holding where the undisputed facts disclose frauds committed which have changed the result of the election a petitioner has a legal right to the writ of mandamus to compel canvassers to reassemble and make a canvass.

Certifying as to ballots.

Cited in footnote to *State ex rel. Phelan v. Walsh*, 17 L. R. A. 364, which holds mere certification that ballots were double, insufficient on rejection of ballots for different candidates for same office for being double.

Ministerial duties of officers.

Cited in *Re Hilton Bridge Constr. Co.* 13 App. Div. 33, 43 N. Y. Supp. 99, by Herrick, J., dissenting, who holds process of determining highest bidder for public contract, ministerial only.

14 L. R. A. 646, *PEOPLE ex rel. SHERWOOD v. STATE CANVASSERS*, 129 N. Y. 360, 41 N. Y. S. R. 912, 29 N. E. 345.

Who are public officers.

Cited in *People ex rel. White v. York*, 35 App. Div. 395, 55 N. Y. Supp. 10, holding captain in village before annexation to Brooklyn, afterwards patrolman, not entitled to be made captain upon consolidation of Greater New York; *Opinion of the Justices*, 95 Me. 386, 51 Atl. 224, holding fish and game commissioner and trustees of state institutions, state officers; *People ex rel. Borgia v. Doe*, 109 App. Div. 673, 96 N. Y. Supp. 389, holding inspectors of elections act only ministerially; *Metz v. Maddox*, 121 App. Div. 170, 105 N. Y. Supp. 702 (dissenting opinion), on character of acts of election officers.

Cited in footnotes to *Com. ex rel. Hensel v. Fittler*, 15 L. R. A. 206, which holds medical staff of city hospital not subject as officers, clerks or employees, to competitive examination; *State ex rel. Walker v. Bus*, 33 L. R. A. 616, which holds deputy sheriff not state officer within prohibition against holding county or municipal office; *Bishop v. State*, 39 L. R. A. 278, which holds postmaster of local postoffice a "deputy postmaster" within provision as to right to hold other office; *Baltimore v. Lyman*, 52 L. R. A. 406, which holds superintendent of public instruction not a municipal officer.

Distinguished in *People ex rel. Court House v. Oneida County*, 36 Misc. 606, 73 N. Y. Supp. 1098, holding commissioners appointed to build courthouse not county officers.

Jurisdiction over qualification of candidates.

Cited in *Montgomery v. O'Dell*, 67 Hun, 174, 22 N. Y. Supp. 412, holding inop-

erative, ballot containing more names than number limited to office of excise commissioner; *State v. South Kingstown*, 18 R. I. 267, 22 L. R. A. 68, 27 Atl. 599 (dissenting opinion), majority holding legislature's rights relating to qualifications of members not defeated by courts' power to order another election; *Covington v. Buffett*, 90 Md. 578, 47 L. R. A. 623, 45 Atl. 204, denying court's jurisdiction to determine qualifications of legislator; *Sherrill v. O'Brien*, 188 N. Y. 214, 117 Am. St. Rep. 841, 81 N. E. 124, holding courts have no jurisdiction to determine the title of any member of the legislature; *Re Independent Nomination*, 186 N. Y. 279, 79 N. E. 708, holding the question whether a nominee if elected to the legislature would be disqualified is for the assembly to determine; *State ex rel. Sullivan v. Schnitger*, 16 Wyo. 514, 95 Pac. 698, holding the court cannot question qualification or right to any one to his seat in the legislature though legislature was elected under an inequitable apportionment act; *State ex rel. Hathorn v. United States Exp. Co.* 95 Minn. 445, 104 N. W. 556, holding even that sound judicial discretion should not be exercised unless some sufficient legal purpose is to be subserved.

Cited in footnote to *State ex rel. Phelan v. Walsh*, 17 L. R. A. 364, in which various decisions as to validity of ballots are made.

Distinguished in *People v. Purdy*, 21 App. Div. 68, 47 N. Y. Supp. 601, holding "eligible" as used in town law relates to time of election.

Mandamus.

Cited in *People ex rel. Jones v. New York Homeopathic Medical College*, 47 N. Y. S. R. 395, 20 N. Y. Supp. 379, denying mandamus to compel medical college to issue diploma to one failing in examinations; *State ex rel. Matheny v. County Court*, 47 W. Va. 679, 35 S. E. 959, denying mandamus to compel county court to build new courthouse pending removal of county seat; *People ex rel. Lehmaier v. Interurban Street R. Co.* 85 App. Div. 412, 83 N. Y. Supp. 622, denying writ of mandamus to compel street railway company to carry passenger over connecting lines for one fare, when company has not refused; *People ex rel. Wood v. Board of Assessors*, 137 N. Y. 204, 33 N. E. 145, denying mandamus to cancel tax apportioned by mistake and paid with knowledge of error; *Re Wheeler*, 62 Misc. 51, 115 N. Y. Supp. 605, holding applicant for writ of mandamus must not only show a clear legal right to it but must convince the court that considerations of justice require it to act; *People ex rel. Dillon v. Moir*, 62 Misc. 36, 115 N. Y. Supp. 1029, holding writ of mandamus to compel president of village to sign certain bonds should not be granted if bonds when signed would be void because of defect in their issuance; *Re Long Acre Electric Light & P. Co.* 117 App. Div. 92, 102 N. Y. Supp. 242 (dissenting opinion), on what must appear to entitle one to writ of mandamus.

— Relating to political matters.

Cited in *People ex rel. Pond v. Monroe County*, 65 Hun. 266, 19 N. Y. Supp. 978, denying mandamus to compel revision of assembly districts under unconstitutional provision; *People ex rel. Thomson v. Hinsdale*, 43 Misc. 185, 88 N. Y. Supp. 206, denying writ of mandamus to compel clerk to file applicant's oath as mayor when latter's title to office not clear; *Rice v. Coffey County*, 50 Kan. 154, 32 Pac. 134, denying mandamus for canvass of votes, when writ fruitless if granted; *State ex rel. Bennett v. Barber*, 4 Wyo. 94, 32 Pac. 14 (dissenting opinion), majority holding that mandamus will lie to compel board of canvassers to canvass certain returns; *State ex rel. Bancroft v. Frear*, 144 Wis. 89, 140 Am. St. Rep. 992, 128 N. W. 1068, holding that vote cast for deceased person by voters who know of his decease cannot be considered as votes for or against any person; *State ex rel. Kustermann v. State Canvassers*, 145 Wis. 323, 130 N. W. 489, holding that

canvassing board can be compelled by judicial proceedings to exercise its jurisdiction properly; *People v. Acritelli*, 57 Misc. 593, 110 N. Y. Supp. 430, on mandamus to compel election officers to register disqualified voter.

Cited in footnote to *Rosenthal v. State Board*, 19 L. R. A. 158, which denies mandamus to compel recanvass of votes after final adjournment of canvassing board.

Cited in note (36 L.R.A.(N.S.) 971) on duty of election officer to accept sworn vote.

Distinguished in *State ex rel. Butler v. Callahan*, 4 N. D. 492, 61 N. W. 1025, sustaining mandamus compelling superintendent of schools to deliver official property; *Stearns v. State*, 23 Okla. 470, 100 Pac. 909, holding mandamus lies to compel canvass of election returns and it is not competent for court to inquire into and investigate alleged fraud of election officers.

Interference with local government.

Cited in *Rathbone v. Wirth*, 150 N. Y. 521, 34 L. R. A. 429, 45 N. E. 15 (dissenting opinion) majority holding provision that each member of council shall elect but two of four police commissioners, unconstitutional.

Right of public officer to question validity of statute.

Cited in *Com. ex rel. Atty. Gen. v. Mathues*, 210 Pa. 385, 59 Atl. 961, holding state treasurer may question constitutionality of act relative to salaries by refusing to pay warrants drawn on him; *Com. ex rel. Atty. Gen. v. State Treasurer*, 29 Pa. Co. Ct. 556, 13 Pa. Dist. R. 237, holding a state treasurer may refuse to pay warrants under provisions of state law on the ground of unconstitutionality of the statute.

Municipal corporation's liability for negligence of fire department.

Cited in *Workman v. New York*, 63 Fed. 304, holding municipal corporation liable for collision of fire boat with barkentine.

14 L. R. A. 657, *STATE EX REL. MORRIS v. BULKELEY*, 61 Conn. 287, 23 Atl. 186.

Acts of de facto officers.

Cited in *Re Moore*, 4 Wyo. 114, 31 Pac. 980, holding acts of governor performed prior to canvass of vote, void.

Cited in footnote to *State, Clifford, Prosecutor, v. Heller*, 57 L. R. A. 312, which denies right of president of senate to act, after resignation, as governor in place of governor resigning office.

Jurisdiction of superior court.

Cited in *Cocking v. Greenslit*, 71 Conn. 651, 42 Atl. 1000, sustaining action in superior court, record not showing lack of jurisdiction; *Ansonia v. Studley*, 67 Conn. 177, 34 Atl. 1030, holding superior court has power to issue mandamus to court of common pleas.

Sufficiency of certificate.

Cited in *State ex rel. Phelan v. Walsh*, 62 Conn. 305, 17 L. R. A. 373, 25 Atl. 1 (dissenting opinion), majority holding mere certifying that ballots are double, insufficient; *Rowe v. Hardy*, 97 Va. 677, 78 Am. St. Rep. 811, 34 S. E. 625, holding sufficient any proceeding indorsed on mandate by sheriff.

Quo warranto remedy to oust officer.

Cited in *State ex rel. Onkey v. Fowler*, 66 Conn. 300, 32 Atl. 162, holding quo warranto proper means to oust collector of taxes.

Advice upon reserved question.

Approved in *Hart v. Roberts*, 80 Conn. 79, 66 Atl. 1026 (dissenting opinion), as an instance of the court giving advice upon a reserved question.

14 L. R. A. 666, *EWING v. PITTSBURGH, C. C. & ST. L. R. CO.* 147 Pa. 40, 30 Am. St. Rep. 709, 23 Atl. 340.

Mental suffering or fright as element of damages.

Followed in *Morris v. Lacka. & W. Valley R. Co.* 14 Luzerne Leg. Reg. Rep. 435, holding there can be no recovery of damages for bodily or mental suffering unconnected with physical injuries.

Cited in *Linn v. Duquesne*, 204 Pa. 554, 93 Am. St. Rep. 800, 54 Atl. 341, holding mental suffering not element of damages for injury to hands; *Haas v. Metz*, 78 Ill. App. 51, denying recovery for mental disturbance caused by harsh words; *Watson v. Diltz*, 116 Iowa, 251, 57 L. R. A. 561, footnote p. 559, 93 Am. St. Rep. 239, 89 N. W. 1068, affirming liability for frightening woman, causing nervous prostration, by stealthily entering home at night; *Nelson v. Crawford*, 122 Mich. 470, 80 Am. St. Rep. 577, 81 N. W. 335, denying recovery for miscarriage due to fright at man wearing woman's clothes; *Braun v. Craven*, 175 Ill. 412, 42 L. R. A. 203, 51 N. E. 657, denying liability for negligent acts causing fright unaccompanied by physical injury; *Lee v. Burlington*, 113 Iowa, 357, 86 Am. St. Rep. 379, 85 N. W. 618, denying right to recover for death of horse by rupture of blood vessel due to fright caused by negligent operation of steam roller; *Watkins v. Kaolin Mfg. Co.* 131 N. C. 543, 60 L. R. A. 620, footnote p. 617, 42 S. E. 933, sustaining right of action for physical injury or disease from fright or nervous shock from negligent acts; *Haile v. Texas & P. R. Co.* 23 L. R. A. 777, footnote p. 774, 9 C. C. A. 137, 23 U. S. App. 80, 60 Fed. 559, denying liability for insanity resulting from shock and excitement without bodily injury; *Gulf, C. & S. F. R. Co. v. Trott*, 86 Tex. 414, 40 Am. St. Rep. 866, 25 S. W. 419, and *Spade v. Lynn & B. R. Co.* 168 Mass. 290, 38 L. R. A. 514, footnote p. 512, 60 Am. St. Rep. 393, 47 N. E. 88, denying recovery for fright alone; *Cleveland, C. C. & St. L. R. Co. v. Stewart*, 24 Ind. App. 381, 56 N. E. 917, denying damages for impairment to health resulting from fright at peril of another; *Kalen v. Terre Haute & I. R. Co.* 18 Ind. App. 206, 63 Am. St. Rep. 343, 47 N. E. 694, denying recovery for mental anguish resulting from fright of horse at negligent closing of railroad gate; *Ward v. West Jersey & S. R. Co.* 65 N. J. L. 384, 47 Atl. 561, denying damages for shock received from negligent operation of railroad gates; *Mitchell v. Rochester R. Co.* 151 N. Y. 109, 34 L. R. A. 783, footnote p. 781, 56 Am. St. Rep. 604, 45 N. E. 354, Reversing 4 Misc. 577, 25 N. Y. Supp. 744, denying recovery for miscarriage resulting from fright caused by negligence; *Mack v. South Bound R. Co.* 52 S. C. 334, 40 L. R. A. 684, footnote p. 679, 68 Am. St. Rep. 913, 29 S. E. 905, sustaining liability for personal injuries from fright without physical injury; *Gulf, C. & S. F. R. Co. v. Hayter*, 93 Tex. 243, 37 L. R. A. 326, 77 Am. St. Rep. 856, 54 S. W. 944, holding physical injuries resulting from mental emotion entitles one to recover; *Lehigh & H. River R. Co. v. Marchant*, 28 C. C. A. 546, 55 U. S. App. 427, 84 Fed. 873, affirming recovery for injuries resulting from ejection from berth causing nervous complications; *North German Lloyd S. S. Co. v. Wood*, 18 Pa. Super. Ct. 493, holding mental suffering properly considered in action for physical injury; *Tiller v. St. Louis & S. F. R. Co.* 189 Fed. 1001, holding that damages are not recoverable for mere fright unconnected with physical injury; *Reardon v. Philadelphia Rapid Transit Co.* 43 Pa. Super. Ct. 350, holding that recovery of damages for fright unconnected with physical injury cannot be had in action by passenger against street railway; *Morris v. Lackawanna & M. V. R. Co.* 228 Pa. 200, 77 Atl. 445, holding that passenger cannot recover damages resulting from fright unconnected

with physical injury; *Hack v. Dady*, 142 App. Div. 514, 127 N. Y. Supp. 22, holding that there may be recovery where bodily injury and fright concur in producing shock giving rise to damage; *Simone v. Rhode Island Co.* 28 R. I. 195, 9 L.R.A.(N.S.) 743, 66 Atl. 202, holding there can be no recovery for physical injuries resulting from fright, terror, anxiety, or distress of mind where there is no injury to the person from without; *Miller v. Baltimore & O. S. W. R. Co.* 78 Ohio St. 316, 18 L.R.A.(N.S.) 951, 125 Am. St. Rep. 699, 85 N. E. 499; *Hess v. American Pipe Mfg. Co.* 221 Pa. 68, 70 Atl. 294,—holding mere fright unaccompanied by physical injury is not sufficient to sustain an action for negligence; *Huston v. Freemansburg*, 212 Pa. 550, 3 L.R.A.(N.S.) 51, 61 Atl. 1022, 9 North Co. Rep. 360, holding in such case there can be no recovery for the suffering produced unconnected with physical injury; *St. Louis, I. M. & S. R. Co. v. Taylor*, 84 Ark. 47, 13 L.R.A.(N.S.) 163, 104 S. W. 551, holding reason for the denial of a recovery in such cases is that it is deemed to be too remote, uncertain and difficult of ascertainment; *Shellabarger v. Morris*, 115 Mo. App. 571, 91 S. W. 1005, on mental suffering unaccompanied by bodily injury as element in estimating damage.

Cited in footnotes to *Kline v. Kline*, 58 L.R.A. 397, which sustains right to damages for mental suffering for assault by pointing gun with threat to shoot unless house abandoned; *Purcell v. St. Paul City R. Co.* 16 L.R.A. 203, which holds carrier's negligence in placing passenger in position of apparent danger proximate cause of convulsions and illness from fright; *Sloane v. Southern California R. Co.* 32 L. R. A. 193, which sustains right to recover for paroxysms of the nervous system from wrongful ejection from train; *Homans v. Boston Elev. R. Co.* 57 L. R. A. 291, which holds carrier liable for nervous shock to passenger from jar to nervous system accompanying blow; *Sanderson v. Northern P. R. Co.* 60 L. R. A. 403, which denies right to recover for fright resulting in physical injury, but without contemporaneous injury, unless fright proximate result of legal wrong; *Reed v. Maley*, 62 L.R.A. 900, which holds no right of action given by merely soliciting a woman to sexual intercourse.

Cited in notes (53 L.R.A. 634, 635) on extent of trespasser's liability for consequential injuries to person from fright and its consequences; (3 L.R.A.(N.S.) 58; 22 L.R.A.(N.S.) 1073) on right to recover for physical injury resulting from fright; (68 Am. St. Rep. 826) on damages for mental suffering; (77 Am. St. Rep. 860, 862, 864, 870) on fright as element of recoverable damages.

Distinguished in *Sandy v. Swift & Co.* 159 Fed. 273, holding defendant's negligence in turning team suddenly in front of lady and not her fright in trying to escape being tramped upon was direct cause of injury; *Gillam v. Hogue*, 39 Pa. Super. Ct. 549, holding the rule that no recovery can be had for the results of fright unaccompanied by physical injury has no application to case of a horse rendered unfit for use by reason of fright.

— For nondelivery or negligent transmission of telegram.

Cited in *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 77, 54 L. R. A. 850, 60 N. E. 674, Affirming 26 Ind. App. 219, 54 L. R. A. 850, 59 N. E. 416; *Chapman v. Western U. Teleg.* 88 Ga. 771, 17 L. R. A. 433, 30 Am. St. Rep. 183, 15 S. E. 901; *Butner v. Western U. Teleg. Co.* 2 Okla. 239, 4 Inters. Com. Rep. 772, 37 Pac. 1087; *Newman v. Western U. Teleg. Co.* 54 Mo. App. 442,—denying damage for mental suffering due to nondelivery of telegram; *Cowan v. Western U. Teleg. Co.* 122 Iowa, 382, 64 L. R. A. 549, 101 Am. St. Rep. 268, 98 N. W. 281, sustaining right to damages for mental suffering due to negligent transmission of death message; *Thomas v. Western U. Teleg. Co.* 12 Pa. Dist. R. 683, holding there can be no recovery for "mental pain" due to negligence of telegraph company in failing

to deliver telegram; *Kagy v. Western U. Teleg. Co.* 37 Ind. App. 83, 117 Am. St. Rep. 278, 76 N. E. 792, holding there can be no recovery for a physical injury resulting from mental suffering caused by delay in delivery of a telegram.

Cited in footnote to *Smith v. Postal Teleg. Cable Co.* 47 L. R. A. 323, which denies recovery for sickness due to fright caused by grossly negligent act of one knowing result would follow.

— **Proximate cause.**

Cited in *Chittick v. Philadelphia Rapid Transit Co.* 224 Pa. 16, 22 L.R.A. (N.S.) 1076, 73 Atl. 4, holding the injury must be such a natural and probable consequence of the alleged negligent act as might and ought to have been foreseen by the wrongdoer; *Pankopf v. Hinkley*, 141 Wis. 149, 24 L.R.A. (N.S.) 1161, 123 N. W. 625, holding when physical injury flows directly from extreme fright or shock, caused by the ordinary negligence of one who owes the duty of care to the injured party, such fright or shock is as efficient link in chain of causation as physical impact.

Cited in notes (31 L.R.A. (N.S.) 981) on liability for injuries from negligent operation of trains to persons on adjoining property or highway; (8 Eng. Rul. Cas. 414, 417) on remoteness of damages.

14 L. R. A. 669, *TACOMA HOTEL CO. v. TACOMA LIGHT & WATER CO.* 3 Wash. 316, 28 Am. St. Rep. 35, 28 Pac. 516.

Right to compel water or other public service.

Cited in *Mackin v. Portland Gas Co.* 38 Or. 125, 49 L. R. A. 598, footnote p. 596, 61 Pac. 134, sustaining right to discontinue gas supply on one set of premises till payment of bill on another; *American Waterworks Co. v. State*, 46 Neb. 200, 30 L. R. A. 449, 50 Am. St. Rep. 610, 64 N. W. 711, declaring void, rule of water company charging \$1 for turning water off or on; *Jones v. Nashville*, 109 Tenn. 561, 72 S. W. 985, sustaining ordinance prohibiting supply of water until payment of past-due rates; *Hieronymous Bros. v. Bienville Water Supply Co.* 131 Ala. 454, 31 So. 31, holding that water company may require payment in advance; *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 144 Iowa, 440, 138 Am. St. Rep. 299, 120 N. W. 966, holding that gas company may adopt rules and regulations for transaction of its business, such as requiring security or payment in advance; *State ex rel. Deeney v. Butte Electric & P. Co.* 43 Mont. 123, 115 Pac. 44, holding that rule of electric light company, that one who fails to pay price of electricity furnished when due may be refused further service, is reasonable; *State ex rel. McMahon v. Independent Teleph. Co.* 59 Wash. 160, 31 L.R.A. (N.S.) 331, 109 Pac. 366, holding that establishment of maximum monthly rental for telephone service in charter does not prevent its requiring fees in advance and making additional charge if not so paid; *State ex rel. Latschaw v. Board of Water & Light Comrs.* 105 Minn. 476, 127 Am. St. Rep. 581, 117 N. W. 827, upholding regulation of gas company fixing a net price for gas as furnished with an additional charge when payment was made afterward, with right to refuse further service until payment; *Poole v. Paris Mountain Water Co.* 81 S. C. 443, 128 Am. St. Rep. 923, 62 S. E. 874, holding as to a customer under contract to pay rent, it is reasonable to allow company to protect itself by cutting off supply of water until water rent due by him is paid.

Cited in footnote to *Gardner v. Providence Teleph. Co.* 55 L. R. A. 113, which sustains right to deprive customer of telephone service on refusal to discontinue use of extension instrument not furnished by it.

Cited in notes (61 L.R.A. 106) on establishment and regulation of municipal

water supply; (31 L.R.A.(N.S.) 330) on right of public service corporation to exact charge in addition to maximum rental for delay in payment.

Distinguished in *Hatch v. Consumers Co.* 17 Idaho, 216, 104 Pac. 670, holding company cannot deprive one of a right to water by reason of an alleged claim for water consumed during a period of two years by carrying water from residences of other consumers; *Linne v. Bredes*, 43 Wash. 543, 6 L.R.A.(N.S.) 708, 117 Am. St. Rep. 1068, 86 Pac. 858, 11 A. & E. Ann. Cas. 238, holding city cannot refuse water to an occupant of property because a delinquent water charge incurred by a prior occupant, stands against the property.

City's power to contract.

Cited in *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 625, 22 C. C. A. 182, 40 U. S. App. 257, 76 Fed. 282, holding city has power to contract with private party for construction and operation of waterworks; *Pikes Peak Power Co. v. Colorado Springs*, 44 C. C. A. 343, 105 Fed. 11, holding city has authority to contract to increase water supply and furnish electricity to inhabitants; *Tahlequah v. Guinn*, 5 Ind. Terr. 516, 82 S. W. 886; *Odgen City v. Bear Lake & River Waterworks & Irrig. Co.* 28 Utah, 42, 76 Pac. 1069,—holding the exercise of powers conferred upon a city for the private advantage of the inhabitants, is to be governed by the same rules that governs private individuals or corporations.

Sufficiency of answer.

Cited in *Bennett v. Tacoma Light & Water Co.* 3 Wash. 337, 28 Pac. 520, holding answer raising material issues, not demurrable.

14 L. R. A. 673, *KERNOCHAN v. NEW YORK ELEV. R. CO.* 130 N. Y. 651, 3 Silv. Ct. App. 581, 29 N. E. 245.

Opinion as to valuation.

Cited in *Suydam v. New York Elev. R. Co.* 46 N. Y. S. R. 361, 19 N. Y. Supp. 49, and *Jefferson v. New York Elev. R. Co.* 132 N. Y. 486, 30 N. E. 981, holding opinions as to value of premises had elevated road not been constructed, incompetent; *Jefferson v. New York Elev. R. Co.* 132 N. Y. 486, 30 N. E. 981, holding opinions of witnesses as to what premises in question would have been worth if they were not affected by road and its operation, were incompetent.

14 L. R. A. 675, *CHADDOCK v. PLUMMER*, 88 Mich. 225, 26 Am. St. Rep. 283, 50 N. W. 135.

Use of dangerous agencies.

Cited in footnotes to *Stephenson v. Southern P. Co.* 15 L. R. A. 476, which holds railroad company not liable for engineer's moving engine to frighten street car passenger at crossing; *Schubert v. J. R. Clark Co.* 15 L. R. A. 818, which holds manufacturer of stepladder from decayed lumber liable for injury to anyone using; *Knottnerus v. North Park Street R. Co.* 17 L. R. A. 726, which holds roller coaster not dangerous agency making owner of pleasure resort liable for owner's negligence; *Koelsch v. Philadelphia Co.* 18 L. R. A. 759, which requires system of inspection by gas companies insuring reasonable promptness in detecting leaks; *State use of Hartlove v. M. Fox & Son*, 24 L. R. A. 679, which holds seller of horse with contagious disease liable for death of one contracting disease while in charge of horse.

Cited in note (10 L.R.A.(N.S.) 373) on liability for injury by servant to third person in use of dangerous agency.

— Firearms.

Cited in *Chaddock v. Tabor*, 115 Mich. 29, 72 N. W. 1093, affirming recovery for injuries inflicted by boy firing gun loaned by friend; *Harris v. Cameron*, 81 Wis.

246, 29 Am. St. Rep. 891, 51 N. W. 437, holding not culpable negligence to give toy air-gun to child eleven years old; *Meers v. McDowell*, 110 Ky. 929, 53 L. R. A. 790, footnote p. 789, 96 Am. St. Rep. 475, 62 S. W. 1013, holding parent liable for injuries inflicted with deadly weapon entrusted by him to incompetent child.

Cited in footnotes to *Bahel v. Manning*, 36 L. R. A. 523, which holds pointing gun believed to be unloaded at another and pulling trigger negligence; *Chesterfield v. Ratliff*, 41 L. R. A. 503, which holds reasonableness of excuse for shooting firearms within city limits question for jury.

Liability of parent.

Cited in *Palm v. Iverson*, 117 Ill. App. 537, holding mere fact of being father of infant does not render him liable for tort of infant; *Dick v. Swenson*, 137 Ill. App. 75, holding a father is not liable for injuries inflicted upon another by his infant son resulting from use of an air gun without knowledge or consent of father.

Cited in notes (10 L.R.A.(N.S.) 944) on parent's liability for torts of minor; (74 Am. St. Rep. 807) on liability of parent for acts of children.

14 L. R. A. 677, *STANDARD OIL CO. v. TIERNEY*, 92 Ky. 367, 36 Am. St. Rep. 595, 17 S. W. 1025.

Notice as to dangerous article.

Cited in *Gibson v. Torbert*, 115 Iowa, 167, 56 L. R. A. 100, 91 Am. St. Rep. 147, 88 N. W. 443, denying druggist's liability for failure to warn one delivering phosphorus, properly packed and labeled; *Standard Oil Co. v. Wakefield*, 102 Va. 829, 66 L.R.A. 795, 47 S. E. 830, holding it a matter of common knowledge that naphtha is a dangerous substance; *O'Hara v. Nelson*, 71 N. J. Eq. 170, 63 Atl. 836, enjoining storing of automobiles in garage with tanks filled with gasoline.

Cited in footnotes to *Koelsch v. Philadelphia Co.* 18 L.R.A.: 759, sustaining recovery for injuries caused by negligent explosion of gas; *Standard Oil Co. v. Wakefield's Admr.* 66 L.R.A. 792, which holds one delivering gas naphtha to consignee in tank car provided by himself liable for death of servant of consignee while unloading car by explosion due to fact that car could not be unloaded with safety in ordinary way because of defective condition.

Cited in notes (36 L. R. A. 649) on limitation of carrier's duty and liability in case of dangerous articles; (46 L. R. A. 49) on knowledge as element of defendant's liability to servants of another person; (100 Am. St. Rep. 194) on right to recover for negligence in absence of privity in case of inherently dangerous articles.

Distinguished in *Berger v. Standard Oil Co.* 126 Ky. 161, 11 L.R.A.(N.S.) 240, 103 S. W. 245, holding lubricating oil is not of the class of articles that duty rests upon one furnishing it to take care to protect the public from its dangers. **Shipper's liability for negligence.**

Cited in footnotes to *Goodlander Mill Co. v. Standard Oil Co.* 27 L. R. A. 583, which holds burning mill by oil escaping from tank car not proximate result of shipper's negligence in not having valve in tank outlet; *Fowles v. Briggs*, 40 L. R. A. 528, which denies shipper's liability for injury to brakeman by shunting of lumber negligently loaded.

Distinguished in *Hanna v. Pitt*, 121 App. Div. 423, 106 N. Y. Supp. 145, holding shipper is not bound to state true weight of article shipped where carrier may readily ascertain true weight for himself.

Evidence as to family of person injured.

Cited in *Louisville & N. R. Co. v. Eakin*, 108 Ky. 478, 45 S. W. 529, holding evidence of number and condition of decedent's family incompetent in action for per-

sonal injuries; *Louisville & N. R. Co. v. Schumaker*, 112 Ky. 436, 53 S. W. 12, holding instruction that jury should compensate "wife and child" for loss of brakeman's life, error.

Evidence of precautions after injury.

Cited in *Baran v. Reading Iron Co.* 202 Pa. 286, 51 Atl. 979, holding evidence of different support and operation of boiler after explosion, incompetent; *Georgia Southern & F. R. Co. v. Cartledge*, 116 Ga. 166, 59 L. R. A. 120, 42 S. E. 405, holding incompetent, evidence of additional precautions after injury; *Louisville & N. R. Co. v. Morton*, 121 Ky. 401, 89 S. W. 243; *Pribbeno v. Chicago, B. & Q. R. Co.* 81 Neb. 659, 116 N. W. 494,—holding evidence of repairs made subsequent to injury inadmissible to show negligence; *Plunkett v. Clearwater Bleachery & Mfg. Co.* 80 S. C. 318, 61 S. E. 431 (dissenting opinion), on evidence of repairs to show negligence at time of injury.

Cited in footnote to *Georgia Southern & F. R. Co. v. Cartledge*, 59 L. R. A. 118, denying admissibility of proof of removal of semaphore post after injury due to its striking mail grab.

Cited in note (32 L.R.A.(N.S.) 1130) on admissibility of evidence of condition before and after accident of property whose defects alleged to have caused injury.

Excessive damages.

Cited in *Standard Oil Co. v. Tierney*, 96 Ky. 92, 27 S. W. 983, setting aside verdict of \$20,000 for personal injuries, as excessive; *Ribich v. Lake Superior Smelting Co.* 123 Mich. 410, 48 L. R. A. 652, 81 Am. St. Rep. 216, 82 N. W. 279 (dissenting opinion) majority holding verdict of \$15,000 for injuries from explosion, excessive; *Louisville & N. R. Co. v. Brown*, 127 Ky. 749, 13 L.R.A.(N.S.) 1140, 106 S. W. 795, holding in case verdict appears to have been given under influence of passion or prejudice, a new trial will be granted; *Seaboard Air-Line R. Co. v. Miller*, 5 Ga. App. 406, 63 S. E. 299, holding courts in testing verdicts for excessiveness have compared them with verdicts rendered by juries in similar cases.

Cited in footnote to *Johnson v. St. Paul City R. Co.* 36 L. R. A. 586, which holds verdict of \$4,000 for injury to aged woman's ankle preventing walking again without crutch excessive.

Cited in notes (26 L.R.A. 393) on power of appellate court to interfere with verdict for excessive damages; (8 Eng. Rul. Cas. 461) on excessive damages as ground for new trial.

Measure of damages for personal injury.

Cited in *Louisville & N. R. Co. v. Logsdon*, 114 Ky. 752, 71 S. W. 905; *Louisville Gas Co. v. Fuller*, 122 Ky. 620, 92 S. W. 566,—holding measure of damages for personal injuries should include expense of cure, value of time lost, reasonable compensation for physical and mental suffering and permanent reduction of earning capacity.

14 L. R. A. 684, *STONE v. MUTUAL F. INS. CO.* 74 Md. 579, 22 Atl. 1051.

Garnishment of amount due on policy.

Cited in *Reid v. Mercurio*, 91 Mo. App. 684, holding insurance company may show failure to file proofs of loss to defeat garnishment proceedings.

Cited in footnote to *Boisseau v. Penn.* 57 L. R. A. 380, which holds execution not lien on interest of debtor in twenty-year distribution policy on his life which ceases on failure to pay premiums.

14 L. R. A. 685, *FRITTS v. FRITTS*, 138 Ill. 436, 32 Am. St. Rep. 156, 28 N. E. 1058.

Grounds for divorce.

Approved in *Schoessow v. Schoessow*, 83 Wis. 554, 53 N. W. 856, holding refusal of husband to have sexual intercourse with wife not desertion.

Cited in *Severns v. Severns*, 107 Ill. App. 145, holding refusal of wife to cohabit with husband not ground for divorce; *Fizette v. Fizette*, 146 Ill. 335, 34 N. E. 799, holding mere abusive words not cruelty within meaning of statute; *Duberstein v. Duberstein*, 171 Ill. 139, 49 N. E. 316, and *Aurand v. Aurand*, 157 Ill. 323, 41 N. E. 859, holding husband seeking divorce must show inability to protect himself by exercise of marital powers; *Elzas v. Elzas*, 171 Ill. 639, 49 N. E. 717, holding abandonment of wife without intention to return, though continuing to support, constitutes desertion; *Berger v. Berger*, 23 Pa. Co. Ct. 234, holding voluntary castration after marriage insufficient ground for divorce at suit of wife; *Reynolds v. Reynolds*, 68 W. Va. 22, 69 S. E. 381, Ann. Cas. 1912 A, 889, holding that refusal of sexual intercourse will not constitute good grounds for desertion; *Prall v. Prall*, 58 Fla. 509, 26 L.R.A.(N.S.) 584, 50 So. 867, holding mere refusal of wife to accord to the husband the marital privileges is not desertion such as gives cause for divorce; *Williams v. Williams*, 121 Mo. App. 356, 99 S. W. 42, holding mere withdrawal from the marital bed is not sufficient offense to give cause for a divorce; *Pfannebecker v. Pfannebecker*, 133 Iowa, 427, 119 Am. St. Rep. 608, 110 N. W. 618, 12 A. & E. Ann. Cas. 543, holding there must be a complete separation of the parties by the one absenting himself or herself from the other to constitute desertion; *Walton v. Walton*, 114 Ill. App. 118, holding the ill-conduct which excuses a wife from living with her husband must be such as would justify a decree of divorce; *Kupka v. Kupka*, 132 Iowa, 193, 109 N. W. 610, holding there must be not only a separation, but an intent to cease to live together as husband and wife.

Cited in footnotes to *Hardie v. Hardie*, 25 L. R. A. 697, which holds divorce for desertion not authorized by wife on receiving blow from husband leaving house without intent to remain away permanently; *Danforth v. Danforth*, 31 L. R. A. 608, which authorizes divorce for wife's desertion though husband visited her for a few days during statutory period; *Tirrell v. Tirrell*, 47 L. R. A. 750, which holds mere payment of allowance to abandoned wife under order of court not prevent divorce for desertion; *Bucknam v. Bucknam*, 49 L. R. A. 735, which maintains wife's right to sue for separate maintenance for husband's failure to furnish support, though living in same house; *Maddox v. Maddox*, 52 L. R. A. 628, which denies right to divorce for cruelty from failure to provide suitable dwelling house, clothing, and food; *Ring v. Ring*, 62 L. R. A. 878, holding habitual intoxication from excessive use of morphine not "cruel treatment."

Cited in notes (65 Am. St. Rep. 74) on cruelty as ground for divorce; (119 Am. St. Rep. 632) on desertion as ground for divorce.

14 L. R. A. 690, *LAFLIN & R. POWDER CO. v. STEYTLER*, 146 Pa. 434, 23 Atl. 215.

Acquisition and use of name.

Cited in *Butts v. Cruftenden*, 14 Pa. Super. Ct. 455, holding subsequent encumbrancer not misled, having notice of docketed judgment omitting middle letter; *Com. v. Scouton*, 20 Pa. Super. Ct. 516, holding description of jurors by initials instead of full names not grounds for quashing array; *Brayton v. Bean*, 73 S. C. 311, 53 S. E. 641, holding that statute providing mode of changing

name, is an affirmation of common law that person may change name or by general use acquire another; *Re Burstein*, 69 Misc. 50, 124 N. Y. Supp. 989, to the point that man's name is designation by which he is distinctly known in community; *Loser v. Plainfield Sav. Bank*, 149 Iowa, 677, 31 L.R.A.(N.S.) 1115, 128 N. W. 1101, holding that name by which one is known and called in community where he lives is for all legal purposes his name; *Smith v. United States Casualty Co.* 197 N. Y. 429, 26 L.R.A.(N.S.) 1170, 90 N. E. 947, holding mode provided by legislature of changing the name is but an act in affirmation of common law by giving additional method of affecting change; *State v. Smith*, 129 Iowa, 717, 4 L.R.A.(N.S.) 543, 106 N. W. 187, 6 A. & E. Ann. Cas. 1023 (dissenting opinion), on meaning attaching to a name.

Cited in footnotes to *Illinois Watch Case Co. v. Pearson*, 16 L. R. A. 429, which holds license to form corporation under one name not affected by other corporation calling meeting to vote on change to similar name; *Le Page Co. v. Russia Cement Co.* 17 L. R. A. 354, which holds transfer of trademark including surname prevents subsequent use by transferrer; *Brass & Iron Works Co. v. Payne*, 19 L. R. A. 82, which holds good will of partnership transferred on dissolution by one partner's transfer of interest to other partners; *Enewold v. Olsen*, 22 L. R. A. 573, which holds name of person consists of one given name and one surname; *Davis v. Steeps*, 23 L. R. A. 818, which holds docket entry of judgment against Edward Davis not constructive notice of encumbrance against Edward A. Davis; *Moseley v. Reily*, 26 L. R. A. 721, which holds initials of given name of delinquent taxpayers sufficient description; *State v. Higgins*, 27 L. R. A. 74, which holds second initial material part of name where only initial of first name given; *Beattie v. National Bank*, 43 L. R. A. 654, which holds forgery not committed by fraudulently indorsing own name on paper belonging to other person with same name; *Kansas Nat. Bank v. Bay*, 54 L. R. A. 408, which denies liability of one refusing to sign own name, on note signed by him in third person's name without authority, to knowledge of indorsee and payee.

Cited in notes (17 L. R. A. 825) on presumption of identity of person from identity of name; (24 L. R. A. 543) on form of Christian name required by recording acts; (37 L.R.A. 184) on delivery to impostor by carrier; (26 L.R.A. (N.S.) 1167) on effect upon common-law right of statutory provision for change of name by judicial proceedings.

Sufficiency of schedule of assets of limited partnership.

Cited in *Haslet v. Kent*, 160 Pa. 88, 34 W. N. C. 58, 28 Atl. 501, holding insufficient, item of "bills receivable \$2,206.17," in schedule of limited partnership; *Robbins Electric Co. v. Weber*, 172 Pa. 645, 37 W. N. C. 466, 34 Atl. 116, holding schedule disclosing names, amount contributed, itemized unsigned statement of property, sufficient; *Blumenthal Bros. v. Whitaker*, 170 Pa. 314, 33 Atl. 103, holding certificate setting forth general statement as to capital stock, insufficient; *Blumenthal v. Whitaker*, 70 Pa. 314, 37 W. N. C. 83, 33 Atl. 103, holding certificate reciting merchandise constitutes contribution of special partner, insufficient.

Limited partnership's rights in court.

Cited in *Andrews Bros. Co. v. Youngstown Coke Co.* 30 C. C. A. 294, 58 U. S. App. 444, 86 Fed. 586, and *Youngstown Coke Co. v. Andrews Bros. Co.* 79 Fed. 670, holding limited partnerships may sue and be sued as corporations.

14 L. R. A. 696, *LYNCH v. WEBSTER*, 17 R. L. 513, 23 Atl. 27.

Individual liability of executor for costs of suit.

Cited in *McCarthy v. Speed*, 16 S. D. 591, 94 N. W. 411, holding executor

liable for costs of action but he may charge same in his accounts against the estate; *Meyer v. O'Rourke*, 150 Cal. 180, 88 Pac. 706, holding in absence of statute costs should be assessed against the executor individually, leaving him to seek an allowance from the estate in a proper case.

Effect of qualifying words.

Cited in note (15 L. R. A. 852) on effect of qualifying words "as executor" and "as administrator."

14 L. R. A. 700, *LAWYER v. FRITCHER*, 130 N. Y. 239, 27 Am. St. Rep. 521, 29 N. E. 267.

Right of action for seduction.

Cited in *Larocque v. Conheim*, 42 Misc. 615, 87 N. Y. Supp. 625; *Disler v. McCauley*, 66 App. Div. 44, 73 N. Y. Supp. 270, denying female's right to sue for seduction.

Cited in note (17 Eng. Rul. Cas. 363) on right to maintain action for seduction.

Parents' damages from injury to child.

Cited in *Westbrook v. Miller*, 98 App. Div. 593, 90 N. Y. Supp. 558, holding loss of services to which a parent is entitled from a child is the basis of a cause of action at the common law.

Cited in note (17 Eng. Rul. Cas. 356) on liability for inducing breach of contract or service.

Master's liability for servant's negligence.

Cited in *Higgins v. Western U. Teleg. Co.* 8 Misc. 436, 28 N. Y. Supp. 676, holding master loaning servant to operate elevator, liable to employee of contractor injured by former's negligence.

Cited in note (21 L.R.A.(N.S.) 1049) on liability of principal on negotiable paper executed by agent.

Right to punitive damages.

Cited in note (8 Eng. Rul. Cas. 375) on right to punitive damages.

14 L. R. A. 708, *PEOPLE ex rel. BRUSH ELECTRIC ILLUMINATING CO. v. WEMPLE*, 129 N. Y. 543, 29 N. E. 808.

What constitutes manufacturing.

Cited in *People ex rel. Standard Wood Co. v. Roberts*, 20 App. Div. 516, 47 N. Y. Supp. 122, holding foreign corporation producing in state kiln-dried wood from slabs shipped from another state, engaged in manufacturing; *People ex rel. F. W. Devoe & C. T. Reynolds Co. v. Roberts*, 51 App. Div. 79, 64 N. Y. Supp. 494, holding corporation making mixed paints, engaged in manufacturing business; *People ex rel. Eastern Bermudez Asphalt Paving Co. v. Morgan*, 61 App. Div. 376, 70 N. Y. Supp. 516, holding production of paving compound, manufacturing business; *People ex rel. John A. Roebling's Sons' Co. v. Wemple*, 138 N. Y. 587, 34 N. E. 386, Affirming 63 Hun, 455, 18 N. Y. Supp. 504, holding corporation not exempt from taxation by completing articles manufactured in foreign state; *Cuyler v. City Power Co.* 74 Minn. 27, 76 N. W. 948, holding production of motive power for transmission and use manufacturing business.

Cited in footnotes to *Com. v. Pottsville Iron & Steel Co.* 22 L. R. A. 228, which holds exemption of manufacturing company not lost by possessing power of mining its own raw material; *Com. v. Juniata Coke Co.* 22 L. R. A. 232, which holds exemption of manufacturing company not lost by possessing power to mine own coal; *Cowling v. Zenith Iron Co.* 33 L. R. A. 508, which holds stockholders

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of iron-ore mining corporation exempt from double liability; *People ex rel. New England Dressed Meat & Wool Co. v. Roberts*, 41 L. R. A. 228, which denies exemption as manufacturing company to corporation buying, slaughtering, and selling sheep and lambs; *Columbia Ironworks v. National Lead Co.* 64 L. R. A. 645, holding building, sale and repairing of vessels within statute permitting involuntary bankruptcy proceedings against manufacturing corporations.

Cited in notes (57 L. R. A. 43) on taxation of corporate franchise in the United States; (58 L. R. A. 548, 604) on taxation of capital stock of corporations in the United States; (64 L. R. A. 36, 40, 43, 59, 67) on taxation of manufacturing corporations in the United States.

— **Production of electricity.**

Cited in *People ex rel. Edison Electric Light Co. v. Wemple*, 63 Hun, 452, 18 N. Y. Supp. 511, holding investment of capital in patents and stock of foreign corporation not "employing" capital within state; *People ex rel. Edison Electric Illuminating Co. v. Wemple*, 129 N. Y. 665, 29 N. E. 812; *Beggs v. Edison Electric Illuminating Co.* 96 Ala. 301, 38 Am. St. Rep. 94, 11 So. 381; *People ex rel. Edison Electric Light Co. v. Campbell*, 88 Hun, 529, 34 N. Y. Supp. 711,—holding production of electricity "manufacturing" within statute; *People ex rel. Edison Electric Illuminating Co. v. Wemple*, 141 N. Y. 474, 36 N. E. 506, holding taxes collected from electric light company, prior to passage of chap. 353, Laws 1889, illegal; *Re Charles Town Light & Power Co.* 183 Fed. 163, holding that electricity generated for purpose of furnishing light, heat and power is product of "manufacture;" *Perkins v. Coffin*, 84 Conn. 309, 79 Atl. 1070, Ann. Cas. 1912 C, 1188 (dissenting opinion), on corporation engaged in generation of electricity as "manufacturing" corporation; *Bates Mach. Co. v. Trenton & N. B. R. Co.* 70 N. J. L. 687, 103 Am. St. Rep. 811, 58 Atl. 935, holding mechanical generation of electric current to propel cars was manufacturing, *Re Rutland Realty Co.* 157 Fed. 297, holding the production and distribution of electricity, although the generation of electric current, is but the guiding into a new channel of a natural element or force.

Disapproved in effect in *Frederick Electric Light & P. Co. v. Frederick City*, 84 Md. 604, 36 L. R. A. 132, footnote p. 130, 36 Atl. 362; *Williams v. Park* (*Williams v. Warren*), 72 N. H. 314, 64 L. R. A. 48, 56 Atl. 463, holding electric light company not "manufacturing" industry; *Re Hudson River Electric Power Co.* 173 Fed. 942, holding the generating of electricity by a company does not make it a "manufacturing company" within meaning of the bankruptcy act. **Court's power to review comptroller's account.**

Cited in *People ex rel. American Contracting & Dredging Co. v. Wemple*, 129 N. Y. 562, 29 N. E. 812, holding § 20, chap. 463, Laws 1889, confers upon supreme court power to review comptroller's settlement of accounts.

Exemption from tax of building used for benevolent purposes.

Cited in *People ex rel. Young Men's Asso. v. Sayles*, 32 App. Div. 201, 53 N. Y. Supp. 67, holding corporation organized for benevolent purposes taxable as to part of building used for public hall; *Re Moses*, 138 App. Div. 526, 123 N. Y. Supp. 443, holding that Young Women's Christian Association is exempt from taxation under Transfer Tax Law as educational corporation; *Shreveport Creosoting Co. v. Shreveport*, 119 La. 642, 44 So. 325, holding even in cases where an express grant of exemption is claimed, every presumption must be in favor of a continuance of the taxing power and against any surrender thereof.

14 L. R. A. 712, *ROMAINE v. CHAUNCEY*, 129 N. Y. 566, 26 Am. St. Rep. 544, 29 N. E. 826.

Alimony and proceeds under policy as exempt property.

Followed in *Andrews v. Whitney*, 82 Hun, 123, 31 N. Y. Supp. 164, holding alimony not subject to payment of debts contracted before decree entered.

Cited in *Locke v. Locke*, 71 Hun, 366, 24 N. Y. Supp. 1129, denying husband's right to offset judgment upon note against wife's claim for alimony; *Amberg v. Manhattan L. Ins. Co.* 56 App. Div. 348, 67 N. Y. Supp. 872, holding wife's interest under matured policy on husband's life exempt from her creditors; *Livingston v. Livingston*, 173 N. Y. 393, 61 L. R. A. 806, 66 N. E. 123 (dissenting opinion), Affirming 74 App. Div. 264, 77 N. Y. Supp. 476, majority holding that alimony awarded by judgment of divorce constitutes property which cannot be impaired by subsequent statute; *Wetmore v. Wetmore*, 149 N. Y. 527, 33 L. R. A. 710, 52 Am. St. Rep. 752, 44 N. E. 169, Modifying 79 Hun, 271, 29 N. Y. Supp. 440, holding judgment awarding alimony in divorce action makes wife husband's creditor within statute of uses and trusts; *Kingman v. Carter*, 8 Kan. App. 49, 54 Pac. 13, holding alimony exempt from debts created prior to divorce; *Fickel v. Granger*, 83 Ohio St. 107, 32 L.R.A.(N.S.) 274, 93 N. E. 527, 21 Ann. Cas. 1347, holding that alimony cannot be subjected to payment of debts of wife which existed prior to allowance thereof; *Re Smith*, 30 N. Y. Civ. Proc. Rep. 104, holding alimony a natural duty judicially reduced to dollars and cents.

Cited in note (32 L.R.A.(N.S.) 271, 273) on liability of alimony for debts.

Subjection of choses in action to judgment.

Cited in note (63 L. R. A. 705) on equitable remedy to subject choses in action to judgment after return of no property found.

What interests assignable.

Cited in *Re Tompkins*, 28 Misc. 355, 59 N. Y. Supp. 902, declaring invalid, assignment of trust income to wife in payment of alimony; *McCord v. McCord*, 40 App. Div. 279, 57 N. Y. Supp. 1049, denying wife's right to assign interest in gratuity fund established by produce exchange; *Spencer v. Myers*, 150 N. Y. 272, 34 L. R. A. 176, 55 Am. St. Rep. 675, 44 N. E. 942, upholding wife's right to assign policy on husband's life issued to her by foreign company.

Cited in footnote to *Kempster v. Evans*, 15 L. R. A. 391, which holds future instalment of alimony not assignable.

Continuation of Alimony.

Cited in *Wilson v. Hinman*, 182 N. Y. 411, 2 L.R.A.(N.S.) 236, 108 Am. St. Rep. 820, 75 N. E. 236, holding the obligation to pay alimony to an innocent wife does not survive the death of the husband.

Change in decree as to alimony.

Cited in *Tonjes v. Tonjes*, 14 App. Div. 544, 43 N. Y. Supp. 941, sustaining court's power to change alimony awarded in separation actions.

Distinguished in *Walker v. Walker*, 155 N. Y. 80, 49 N. E. 663, Reversing 21 App. Div. 223, 47 N. Y. Supp. 513, holding prior judgment not affected by amendments to Code authorizing change in alimony.

Divorce as affecting liability for support.

Cited in *Re Thrall*, 12 App. Div. 238, 42 N. Y. Supp. 439 (dissenting opinion), majority denying liability of husband's assignee for alimony *pendente lite* in unsuccessful separation suit; *Allen v. Farmers' Loan & T. Co.* 18 App. Div. 35, 79 N. Y. S. R. 398, 45 N. Y. Supp. 398, holding rights in trust fund for support of husband and wife not destroyed by decree of divorce against husband; *People ex rel. Public Charities & Correction v. Cullen*, 153 N. Y. 636, 44 L. R.

A. 423, 47 N. E. 894, denying wife's right to enforce support by husband after entry of judgment of separation; *Shepard v. Shepard*, 99 App. Div. 311, 90 N. Y. Supp. 982, holding alimony awarded is founded upon the marital obligation to support and maintain, and is awarded by the court in enforcement of this obligation and duty.

Effect on alimony of discharge in bankruptcy.

Cited in *Maisner v. Maisner*, 62 App. Div. 288, 70 N. Y. Supp. 1107, holding arrears of alimony not provable in bankruptcy; *Audubon v. Shufeldt*, 181 U. S. 579, 45 L. ed. 1011, 21 Sup. Ct. Rep. 735, holding alimony not provable in bankruptcy or barred by discharge; *Wetmore v. Markoe*, 196 U. S. 74, 49 L. ed. 393, 25 Sup. Ct. Rep. 172, 2 A. & E. Ann. Cas. 265, holding prior instalments of alimony evidenced by a judgment are not a provable debt barred by discharge in bankruptcy; *Tisdale v. Rider*, 119 App. Div. 598, 104 N. Y. Supp. 77, holding this does not mean that it is not a property asset capable of constituting a valuable consideration.

Cited in footnote to *Noyes v. Hubbard*, 15 L. R. A. 394, which holds decree for alimony not affected by discharge in insolvency.

14 L. R. A. 716, *CLARK v. HELM*, 130 Ind. 117, 29 N. E. 568.

Estate's liability for interest.

Cited in *Brown v. Bernhamer*, 159 Ind. 540, 65 N. E. 580, holding widow entitled to interest on her allowance from time of administrator's refusal to pay; *Lupton v. Coffel*, 47 Ind. App. 453, 94 N. E. 799, holding that judgment in action for legacy should include interest thereon after one year from death of testator.

Cited in footnotes to *Rhea v. Bagley*, 36 L. R. A. 86, which holds father accountable for rents collected on property paid for by him, but conveyed to minor children; *Wysong v. Rambo*, 49 L. R. A. 766, which holds interest on advancements to some heirs to equalize share of other heir should only be allowed during reasonable time for settling estate.

14 L. R. A. 719, *Re HOUSTON*, 47 Fed. 539.

Necessity of taking out license.

Cited in *Theus v. State*, 114 Ga. 53, 39 S. E. 913, holding nonresident soliciting laborers to work in another state not "emigrant agent" subject to license tax.

— For peddling.

Cited in *Kimmel v. Americus*, 105 Ga. 697, 31 S. E. 623, holding agent not liable for license fee by single sale of sample; *State v. Hoffman*, 50 Mo. App. 588, denying that shipments, for delivery, to agent who took orders by sample makes agent "peddler;" *Re Tinsman*, 95 Fed. 651, declaring void, ordinance requiring solicitors for nonresident picture manufacturer to procure license.

Cited in footnotes to *Stuart v. Cunningham*, 20 L. R. A. 430, which holds one delivering goods previously sold not a peddler; *Hewson v. Englewood*, 21 L. R. A. 736, which holds agent, delivering from wagon, goods previously ordered, and taking other orders, not a peddler; *State v. Morehead*, 26 L. R. A. 585, which holds sale and delivery of sample sewing machine not sale by peddler.

Cited in note (19 L.R.A.(N.S.) 305) on license or occupation tax on hawkers, peddlers, and persons engaged in soliciting orders by sample or otherwise, as violating the commerce clause.

14 L. R. A. 721, PRITCHARD v. SAVANNAH STREET & RURAL RESORT R. CO. 87 Ga. 294, 13 S. E. 493.

Retrospective laws.

Followed in *Baker v. Smith*, 91 Ga. 142, 16 S. E. 967, holding repealing act as to amendment of executions applies to those pending and subsequent.

Cited in *Bacon v. Savannah*, 105 Ga. 64, 31 S. E. 127, sustaining city's right to amend ordinance as to apportionment of paving tax after completion of work; *Moore v. Ripley*, 106 Ga. 561, 32 S. E. 647, sustaining receiver's power to enforce stockholder's individual liability under act subsequent to incorporation; *Mills v. Geer*, 111 Ga. 280, 52 L. R. A. 943, 36 S. E. 673, upholding act authorizing purchaser in good faith to set off improvements erected before its passage, against rents and profits; *Lears v. Seaboard Air-Line R. Co.* 3 Ga. App. 623, 60 S. E. 343, holding a statute which merely affects or alters the remedy for the collection of a debt is not objectionable as retroactive.

Cited in footnotes to *Tufts v. Tufts*, 16 L. R. A. 482, which holds cause of action for divorce not taken away by repeal of statute; *Cleveland, C. C. & St. L. R. Co. v. Wells*, 58 L. R. A. 651, which sustains statute repealing act allowing penalties, made applicable to pending actions.

Abatement of action for personal injuries.

Followed in *Marshall v. McAllister*, 22 Tex. Civ. App. 214, 54 S. W. 1968, holding action for personal injuries does not abate at death.

14 L. R. A. 725, EDMUNDS v. HERBRANDSON, 2 N. D. 270, 50 N. W. 970.

Local and special statutes.

Cited in *Plummer v. Borsheim*, 8 N. D. 568, 80 N. W. 690, declaring unconstitutional, law applying only to school townships which include cities of specified population; *Minneapolis & N. Elevator Co. v. Traill County*, 9 N. D. 223, 50 L. R. A. 272, 82 N. W. 727, sustaining law relating to taxation of grain in elevators; *Murnane v. St. Louis*, 123 Mo. 495, 27 S. W. 711, holding act requiring cost of street improvements to be collected as provided in charters, void as applying to existing charters only; *Weaver v. Davidson County*, 104 Tenn. 329, 59 S. W. 1105, holding void, statute not limiting number of deputies given to certain county officials in counties of particular class; *Henderson v. Koenig*, 168 Mo. 372, 57 L. R. A. 662, 68 S. W. 72, declaring void, statute providing salaries for judges in certain cities, fees in other places; *Groves v. County Court*, 42 W. Va. 594, 26 S. E. 460, declaring unconstitutional, act providing for relocation of county seats in specified instances; *Codlin v. Kohlhausen*, 9 N. M. 578, 58 Pac. 499, denying invalidity of act providing for relocation of courthouse and jail in certain counties; *Standard Cattle Co. v. Baird*, 8 Wyo. 157, 56 Pac. 598, denying invalidity of statute relating to taxation of live stock on open range; *Ladd v. Holmes*, 40 Or. 172, 91 Am. St. Rep. 457, 66 Pac. 714, sustaining act providing method of holding elections in certain cities, applicable to but one at time of enactment; *Groves v. County Court*, 42 W. Va. 594, 26 S. E. 460, holding effect of statute determines special character; *Sasser v. Martin*, 101 Ga. 455, 29 S. E. 278, holding legislative classification of counties as to sale of liquor must be natural, not arbitrary; *De Hay v. Berkeley County*, 66 S. C. 242, 44 S. E. 790, holding act providing salary for school commissioners of certain county, void; *Re Connolly*, 17 N. D. 550, 117 N. W. 946, holding the classification of objects or places for the purpose of legislation must be natural, not artificial; *McGarvey v. Swan*, 17 Wyo. 139, 96 Pac. 697, holding a reasonable classification of objects of legislation or localities may be resorted to without rendering an act objectionable as a local or special law; *Beleal v. Northern P.*

R. Co. 15 N. D. 325, 108 N. W. 33, holding property classification is permitted, but arbitrary and unreasonable discrimination is forbidden; *Angell v. Cass County*, 11 N. D. 270, 91 N. W. 72, holding an arbitrary classification for purposes of taxation which includes some counties and excludes others from certain privileges is unconstitutional; *Powers Elevator Co. v. Pottner*, 16 N. D. 363, 113 N. W. 703, holding to grant liens on buildings erected on government lands only is not an unconstitutional classification; *State ex rel. Mitchell v. Mayo*, 15 N. D. 332, 108 N. W. 36, holding unconstitutional a law requiring the county treasurer to pay the interest and penalties on city and city school taxes of cities organized under a general law to such cities; *Kraus v. Lehman*, 170 Ind. 419, 83 N. E. 714, 15 A. & E. Ann. Cas. 849, holding the question whether the classification comes within rule as to objectionable class legislation would be one reviewable by the courts; *Oklahoma City v. Shields*, 22 Okla. 305, 100 Pac. 559, holding the determination under a state constitution, of what can be accomplished by general or special legislation, is a question solely for the legislature.

Cited in footnotes to *State, Alexander, Prosecutor, v. Elizabeth*, 23 L. R. A. 525, which holds invalid, special statute discriminating between municipalities already having and those not having race course; *Sutton v. State*, 33 L. R. A. 589, which holds classification of counties according to previous census, without respect to actual population, void; *Com. ex rel. Jones v. Blackley*, 52 L. R. A. 367, which sustains classification of townships by density of population; *Milwaukee County v. Isenring*, 53 L. R. A. 635, which holds act regulating sheriff's fees for particular county, local; *Riccio v. Hoboken*, 63 L.R.A. 485, which upholds classification of school districts within due limits of generality; *McDonald v. Doust*, 69 L.R.A. 220, which holds void, statute abolishing existing county and creating two new counties from same territory with new county seat for each.

Cited in note (93 Am. St. Rep. 108) on constitutional inhibition against special legislation where general law can be made applicable.

Mandamus to determine legality of removal of county seat.

Cited in *State ex rel. Little v. Lanaglie*, 5 N. D. 665, 32 L. R. A. 729, 67 N. W. 958, denying mandamus to determine legal location of county seat.

14 L. R. A. 731, *MOORE v. NEW YORK ELEV. R. CO.* 130 N. Y. 523, 29 N. E. 997.

Damages for operation of elevated road.

Cited in *Golden v. Metropolitan Elev. R. Co.* 1 Misc. 144, 48 N. Y. S. R. 725, 20 N. Y. Supp. 630, holding noise not element of fee damage.

Cited in footnotes to *Aldrich v. Metropolitan West Side Elev. R. Co.* 57 L. R. A. 237, which denies right to recover for injury to apartment house from elevated road crossing highway 19 feet away; *De Geofroy v. Merchants' Bridge Terminal R. Co.* 64 L. R. A. 959, holding abutter entitled to damages for erection of track on pillars from 15 to 25 feet above surface of street.

Cited in notes (31 L.R.A. 283) on law of privacy; (36 L.R.A.(N.S.) 762) on abutter's right to compensation for railroads in streets; (85 Am. St. Rep. 311) on elements of damages allowable in eminent domain proceedings.

Damage necessary for injunction.

Cited in *Kornder v. Kings County Elev. R. Co.* 61 App. Div. 440, 70 N. Y. Supp. 708, denying injunction in absence of proof of money damage.

Interest on unliquidated damages.

Cited in *Kerr v. New York Elev. R. Co.* 49 Misc. 333, 96 N. Y. Supp. 1021, holding interest may be computed upon an award of damages for injuries in-

flicted upon property by an elevated railway, from date of trial to time judgment is entered.

Effect of misdirection of court.

Cited in *Huggins v. Manhattan R. Co.* 1 Misc. 111, 48 N. Y. S. R. 679, 20 N. Y. Supp. 648, holding instruction that abutter entitled to damages regardless of benefits from construction of road, error; *Jacobs v. Sire*, 4 Misc. 400, 23 N. Y. Supp. 1063, reversing for misdirection of court to possible prejudice of party.

14 L. R. A. 733, *LOUISVILLE, N. A. & C. R. CO. v. CREEK*, 130 Ind. 139, 29 N. E. 481.

Conflict between general and special verdict.

Cited in *Indianapolis Union R. Co. v. Neubacher*, 16 Ind. App. 53, 44 N. E. 669, refusing to interfere with general verdict when evidence fails to disclose answers to interrogatories; *Louisville & N. R. Co. v. Cronbach*, 12 Ind. App. 675, 41 N. E. 15, and *Rogers v. Bloomington*, 22 Ind. App. 604, 52 N. E. 242, holding dismissal, when answers to interrogatories conflict with verdict for plaintiff in negligence suit, no error; *Lake Erie & W. R. Co. v. Graver*, 23 Ind. App. 684, 55 N. E. 968, holding that answers showing knowledge of dangerous crossing, that train was due, and failure to look and listen, irreconcilably in conflict with general verdict for plaintiff; *Rhodius v. Johnson*, 24 Ind. App. 406, 56 N. E. 942, holding answers to interrogatories failing to show negligence in passing through dimly lighted hallway not irreconcilable with recovery; *Warner v. Mier Carriage Co.* 26 Ind. App. 358, 58 N. E. 554, holding answers showing elevator shaft unguarded, decedent's ignorance of its existence, and failure of manager to give warning not inconsistent with recovery; *Cleveland C. C. & St. L. R. Co. v. Griffin*, 26 Ind. App. 372, 58 N. E. 503, holding answers showing failure to look and listen before crossing tracks defeat recovery; *South Bend v. Turner*, 156 Ind. 423, 54 L. R. A. 399, 83 Am. St. Rep. 200, 60 N. E. 271, holding contributory negligence not proved by answers showing that six-year-old child, while playing in sand pile, fell into manhole left open for two weeks; *Indianapolis Abattoir Co. v. Temperly*, 159 Ind. 658, 95 Am. St. Rep. 330, 64 N. E. 906, holding that answer to interrogatories which would prevent recovery if standing alone does not affect general verdict with which it is inconsistent, if it is also inconsistent with answer to other interrogatory; *Anderson v. Citizens Nat. Bank*, 38 Ind. App. 193, 76 N. E. 811, holding special answers cannot control and overthrow the general verdict unless they are in irreconcilable conflict with it; *McCoy v. Kokomo R. & Light Co.* 158 Ind. 664, 64 N. E. 92, holding motion for judgment non obstanti should be refused, where antagonism between verdict and answers to questions is not such, on face of record, as to be beyond possibility of being removed by any legitimate evidence under the issues.

Presumption in aid of verdict.

Cited in *Lindley v. Kemp*, 38 Ind. App. 368, 76 N. E. 798, holding the pleadings upon review are to be considered as presenting the issues tried by the jury, and jury's conclusion is presumed to be supported by evidence legitimately admissible under such issues.

Imputing negligence.

Cited in *Vincennes v. Thuis*, 28 Ind. App. 529, 63 N. E. 315, holding reckless driving bars recovery for death of guest when both intoxicated; *Boone County v. Mutchler*, 137 Ind. 149, 36 N. E. 534, holding county not relieved of liability for defective bridge by fact that plaintiff's daughter drove horse at time of injury; *Lake Shore & M. S. R. Co. v. Boyts*, 16 Ind. App. 647, 45 N. E. 812, holding one riding as another's guest, failing to look and listen on approaching crossing, see-

ing train at station, guilty of contributory negligence; *Wilson v. Puget Sound Electric R. Co.* 52 Wash. 531, 132 Am. St. Rep. 1044, 101 Pac. 50, holding a passenger in an automobile is not guilty of contributory negligence in not attempting to control acts of paid driver in case of apparent danger; *Burleigh v. St. Louis Transit Co.* 124 Mo. App. 732, 102 S. W. 621, holding one is not precluded from recovering damages if he exercises ordinary care for his safety, because driver's imprudence contributed to the collision; *Shultz v. Old Colony Street R. Co.* 193 Mass. 317, 8 L.R.A.(N.S.) 607, 118 Am. St. Rep. 502, 79 N. E. 873, 9 A. & E. Ann. Cas. 402, holding one riding as guest with another may recover from negligent third person for injuries received though one he is riding with is negligent; *Contos v. Jamison*, 81 S. C. 490, 19 L.R.A.(N.S.) 499, 62 S. E. 867, holding there is no such privity between lessor and lessee as can excuse negligence of another resulting in injury to the lease, whether combined with lessor or not.

Cited in notes (37 L.R.A. 74) as to which of two or more persons is master of another, who is conceded to be the servant of one of them; (8 L.R.A.(N.S.) 646, 659, 660) on imputed negligence of driver to passenger; (110 Am. St. Rep. 296) on imputed negligence.

— To husband or wife.

Cited in *Chicago, B. & Q. R. Co. v. Honey*, 26 L. R. A. 44, footnote p. 42, 12 C. A. 193, 27 U. S. App. 196, 63 Fed. 42, holding wife's contributory negligence prevents recovery by husband for her injury; *Junger v. Sedalia*, 66 Mo. App. 633; *Reading Twp. v. Telfer*, 67 Kan. 801, 57 Am. St. Rep. 355, 48 Pac. 134; *Lake Shore & M. S. R. Co. v. McIntosh*, 140 Ind. 272, 38 N. E. 476; *Chicago, St. L. & P. R. Co. v. Spilker*, 134 Ind. 403, 33 N. E. 280,—holding negligence of husband in driving team not imputable to wife defeating recovery; *Atlanta & C. Air-Line R. Co. v. Gravitt*, 93 Ga. 387, 26 L. R. A. 559, 44 Am. St. Rep. 145, 20 S. E. 550, holding negligence of husband in intrusting child to incompetent person, not chargeable to wife by virtue of conjugal relation; *Pittsburgh, C. C. & St. L. R. Co. v. Burton*, 139 Ind. 361, 37 N. E. 150, holding wife need not allege her freedom from fault to recover for carrier's negligence in causing husband's death; *Moon v. St. Louis Transit Co.* 237 Mo. 435, 141 S. W. 870, holding that negligence of master's servant is not imputable to master's wife; *New York, C. & St. L. R. Co. v. Robbins*, 38 Ind. App. 183, 76 N. E. 804, holding existence of marriage relation only, cannot have the effect of imputing negligence of one spouse to the other; *Southern R. Co. v. King*, 128 Ga. 386, 11 L.R.A.(N.S.) 830, 57 S. E. 687, 119 Am. St. Rep. 390; *Louisville R. Co. v. McCarthy*, 129 Ky. 820, 19 L.R.A.(N.S.) 232, 130 Am. St. Rep. 494, 112 S. W. 925, holding mere fact of the marital relation does not render wife chargeable with husband's negligence so as to preclude her recovery from negligent third party for injuries sustained; *Macdonald v. O'Reilly*, 45 Or. 596, 78 Pac. 753, holding mere fact of expressing a desire for medicine by reason of which husband obtains it, does not make him wife's agent in such sense that his contributory negligence could be imputed to her.

Cited in note (22 L. R. A. 460) on husband's negligence as bar to recovery for wife's personal injuries.

14 L. R. A. 737, *DAVIS v. HOUGHTELIN*, 33 Neb. 582, 50 N. W. 765.

Master's responsibility for acts of servant.

Cited in *McPeak v. Missouri P. R. Co.* 128 Mo. 637, 30 S. W. 170 (dissenting

opinion), majority holding carrier liable for injuries to passengers caused by jumping at warning cry of brakeman; *Bowler v. O'Connell*, 162 Mass. 321, 27 L. R. A. 177, 44 Am. St. Rep. 359, 38 N. E. 498, denying master's liability to boy injured by being thrown from colt servant leading to water.

Cited in footnotes to *Stephenson v. Southern P. Co.* 15 L. R. A. 476, which holds railroad company not liable for engineer's moving engine to frighten street-car passengers at crossing; *Guille v. Campbell*, 55 L. R. A. 111, which denies master's liability for injury to bystander by slipping of hook from servant's hand while pretending to throw at boys playing on cotton bales; *Kohner v. Capital Traction Co.* 62 L.R.A. 875, which holds carrier not liable as matter of law for injury to passenger by conductor who claims that the accident occurred while attempting to save himself from falling.

Cited in notes (27 L. R. A. 163, 187, 196, 197) on master's civil responsibility for wrongful or negligent act of his servant or agent towards one who has no claim on master by reason of contract incipient or perfected; (59 L. R. A. 213) on sufficiency of general allegations of negligence; (10 L.R.A.(N.S.) 397) on liability for injury by servant to third person in use of dangerous agency; (34 L.R.A.(N.S.) 110) on liability of master for injuries inflicted by coemployee; (54 Am. St. Rep. 72, 73, 87) on acts of servant for which master is not responsible.

— For assault.

Cited in *St. Louis & S. F. R. Co. v. Kilpatrick*, 67 Ark. 55, 54 S. W. 971, upholding recovery by passenger wilfully expelled from train by brakeman whether act within scope of authority or not; *Cincinnati, N. O. & T. P. R. Co. v. Rue*, 142 Ky. 700, 34 L.R.A.(N.S.) 204, 134 S. W. 1144, holding railroad not liable for assault by freight train crew upon one who had been trespasser but had left train; *Savannah Electric Co. v. Hodges*, 6 Ga. App. 477, 65 S. E. 322; *Sullivan v. Louisville & N. R. Co.* 115 Ky. 450, 103 Am. St. Rep. 330, 74 S. W. 171,—holding where servant steps aside from his employment and acts solely on his own account, his act does not bind the master; *Peter Anderson & Co v. Diaz*, 77 Ark. 608, 4 L.R.A.(N.S.) 651, 113 Am. St. Rep. 180, 92 S. W. 861, holding employer is not liable for an unauthorized assault by his bartender upon a patron where the act is without scope of his employment; *Klugman v. Sanitary Laundry Co.* 141 Ill. App. 426, holding declaration insufficient to hold master liable which alleges an assault by the servant but fails to allege it was committed by the servant while acting within scope of his employment in prosecution of master's business.

Cited in footnotes to *Gabrielson v. Waydell*, 17 L. R. A. 228, which holds wilful attack by captain on seamen not within scope of authority; *Farber v. Missouri P. R. Co.* 20 L. R. A. 350, which holds driving of trespasser from freight train by brakeman not within scope of employment; *Smith v. Louisville & N. R. Co.* 22 L. R. A. 72, which holds brakeman within scope of employment in kicking boy off moving train for failure to pay fare; *Dickson v. Waldron*, 24 L. R. A. 483, which holds proprietor of theater liable for wrongful assault by janitor and ticket taker; *Baltimore & O. R. Co. v. Barger*, 26 L. R. A. 220, which holds passenger's profane and abusive language not excuse carrier's liability for assault by conductor; *Goodloe v. Memphis & C. R. Co.* 29 L. R. A. 729, which denies carrier's liability for injuries to passenger by accidental blow from employee playfully attempting to strike other employee; *Atchison, T. & S. F. R. Co. v. Henry*, 29 L. R. A. 465, which holds carrier liable for illegal arrest of passenger, without warrant, caused by conductor; *Krantz v. Rio Grande Western R. Co.* 30 L. R. A. 297, which denies carrier's liability for unprovoked assault on passenger after alighting at station without effort by ticket agent to prevent same; *Richberger v. American*

Exp. Co. 31 L. R. A. 390, which holds express company not liable for assault by agent on person to whom he had just refunded overcharge; *Lucy v. Chicago G. W. R. Co.* 31 L. R. A. 551, which holds carrier liable for abuse and insult to passenger by drunken fellow passenger without conductor's interference; *Ball v. Chesapeake & O. R. Co.* 32 L. R. A. 792, which denies liability of carrier for murder of passenger while asleep; *West Memphis Packet Co. v. White*, 38 L. R. A. 427, which holds carrier liable for injury to passenger on excursion boat by careless discharge of gun by other passenger; *St. Louis S. W. R. Co. v. Jones*, 39 L. R. A. 784, which holds carrier liable for conductor's unreasonably beating passenger, slapping his face; *Savannah, F. & W. R. Co. v. Quo*, 40 L. R. A. 483, which holds carrier liable for baggage master's assault with intent to rape passenger; *Haver v. Central R. Co.* 43 L. R. A. 84, which holds carrier liable for malicious assault by employee on passenger; *McDermott v. American Brewing Co.* 52 L. R. A. 684, which denies master's liability for assault by servant to protect his own interest; *Lamb v. Littman*, 53 L. R. A. 852, which holds employer liable for assault by cruel overseer on minor employee; *Birmingham R. & Electric Co. v. Baird*, 54 L. R. A. 752, which holds carrier liable for conductor's assault on passenger; *Lipscomb v. Houston & T. C. R. Co.* 55 L. R. A. 869, which sustains liability for act of railroad company's employee in shooting, through want of proper care, co-employee mistaken for burglar; *Holler v. Ross*, 59 L. R. A. 943, which denies liability for shooting trespasser on land refusing to leave, by one employed to watch personalty; *Southern R. Co. v. James*, 63 L.R.A. 257, which holds master liable for act of nightwatchman in shooting trespasser while running away after having escaped from him while taking to town calaboose; *McNamara v. St. Louis Transit Co.* 66 L.R.A. 486, which holds exemplary damages against street car company justified by conductor's intentional and unjustified kicking of boy attempting to board car.

Cited in notes (55 L.R.A. 719) on carrier's liability for assault on passenger by strikers, mob, or third persons; (32 L.R.A.(N.S.) 1201) on liability for assault by servant on passenger while on train.

Distinguished in *Chicago, R. I. & P. R. Co. v. Kerr*, 74 Neb. 18, 104 N. W. 49, holding railroad company liable for act of conductor of train in throwing a trespasser from one of defendant's moving freight trains.

14 L. R. A. 741, *LONG v. PENNSYLVANIA R. CO.* 147 Pa. 343, 30 Am. St. Rep. 732, 23 Atl. 459.

Inevitable accident as affecting liability.

Cited in *Dixon v. Breon*, 22 Pa. Super. Ct. 346, holding performance of contract to cut and manufacture certain kind of timber excused by destruction by forest fires; *Uhl v. Ohio River R. Co.* 56 W. Va. 508, 68 L.R.A. 145, 107 Am. St. Rep. 968, 49 S. E. 378, 3 A. & E. Ann. Cas. 201, holding where evidence shows variable-ness and irregularity in the raises to which river is subject, one of which was much higher than one complained of, it cannot be said to be an extraordinary flood.

— Of carrier.

Cited in *Norfolk & W. R. Co. v. Marshall*, 90 Va. 837, 20 S. E. 823, denying carrier's liability for death of passenger caused by running into washout; *Wald v. Pittsburg, C. C. & St. L. R. Co.* 162 Ill. 551, 35 L. R. A. 358, footnote p. 356, 53 Am. St. Rep. 332, 44 N. E. 888, holding carrier liable for baggage lost by unprecedented flood when due to negligent delay.

Cited in footnotes to *Libby v. Maine C. R. Co.* 20 L. R. A. 812, which holds unprecedented flood causing washout of railroad culvert an act of God; *Long v.*

Pennsylvania R. Co. 20 L. R. A. 360, which holds theft or destruction of whisky after train wrecked by flood not due to inevitable accident; *Faucher v. Wilson*, 39 L. R. A. 431, which denies carrier's liability for bursting of hogshead of molasses from fermentation; *Smith v. North American Transp. & Trading Co.* 44 L. R. A. 557, which holds steamer company abandoning trip to Dawson because of low water, required to bring passenger back without charge; *Terre Haute & I. R. Co. v. Fowler*, 48 L. R. A. 531, which holds railroad company liable for injury to employee by breaking of railroad trestle by flood and drift.

Cited in notes (29 L.R.A.(N.S.) 664) on burden of proof where defense in action for loss or injury to goods during carriage in act of God or vis major; (1 Eng. Rul. Cas. 233, 234) on losses to goods for which common carrier is liable.

Distinguished in *Grier v. St. Louis Merchants Bridge Terminal R. Co.* 108 Mo. App. 570, 84 S.W. 158, holding where negligence of carrier in leaving property exposed was proximate cause of destruction by a flood the carrier is liable.

Presumption of negligence.

Cited in *St. Louis & S. F. R. Co. v. Brosius*, 47 Tex. Civ. App. 656, 105 S. W. 1131, holding mere fact that an animal apparently sound when delivered for shipment arrives at its destination sick with a disorder such as pneumonia should not raise presumption of negligence on part of carrier; *Colsch v. Chicago, M. & St. P. R. Co.* 149 Iowa, 182, 34 L.R.A.(N.S.) 1017, 127 N. W. 198, Ann. Cas. 1912 C, 915, holding that fact that animal apparently sound when delivered for shipment arrives at destination sick with pneumonia should not raise presumption of carrier's negligence.

Sufficiency of reserved question of law.

Cited in *Suter v. Findlay*, 19 Pa. Co. Ct. 11, 6 Pa. Dist. R. 254, 27 Pittsb. L. J. N. S. 351, 13 Montg. Co. L. Rep. 74, holding proper, reserved question as to sufficiency of evidence to entitle plaintiff to recover.

14 L. R. A. 743, *VALLO v. UNITED STATES EXP. CO.* 147 Pa. 404, 30 Am. St. Rep. 741, 23 Atl. 594.

Proximate cause of injury.

Cited in *Butterman v. McClintic-Marshall Constr. Co.* 206 Pa. 85, 55 Atl. 839, holding steel company's negligence in letting car get beyond control proximate cause of injury to servant of construction gang; *Louisville & N. R. Co. v. Morgan*, 165 Ala. 421, 51 So. 827, holding that railroad was liable to licensee for failure to provide railing upon platform, where its absence was proximate cause of injury; *Wadesz v. Peoples Bros.* 30 Pa. Co. Ct. 21, 13 Pa. Dist. R. 335, holding if accident be caused by an intervening and independent cause, for which the defendant was not responsible, there can be no recovery; *Stahle v. Poth*, 220 Pa. 342, 69 Atl. 864, holding it a question for the jury whether brewery exercised its right of receiving and sending commodities from their building with due regard to the safety of pedestrians on sidewalk; *Cohn v. May*, 210 Pa. 619, 69 L.R.A. 802, 105 Am. St. Rep. 840, 60 Atl. 301, holding a cause is not too remote merely because it produces the damages by means of an intermediate agency.

Cited in note (36 Am. St. Rep. 847) on proximate and remote cause.

Injuries from attempt to avoid sudden danger.

Cited in *Hookey v. Oakdale*, 5 Pa. Super. Ct. 409, 44 W. N. C. 374, holding traveler upon unfinished highway not negligent by making instinctive effort to avoid fire-plug, thereby falling into peril; *Shuart v. Consolidated Traction Co.* 15 Pa. Super. Ct. 28, affirming liability for starting car before passenger had fully

boarded; *Sprowls v. Morris Twp.* 179 Pa. 225, 39 W. N. C. 555, 36 Atl. 242, holding driver of horse and buggy suddenly placed in danger by approach of train not responsible for error in judgment; *Crampton v. Ivie Bros.* 124 N. C. 597, 32 S. E. 968, holding sudden precipitation into peril under reasonable apprehension of collision, proximate cause of driver's negligence.

Cited in footnotes to *Western R. Co. v. Mutch*, 21 L. R. A. 316, which holds excessive speed not proximate cause of death of boy attempting to catch on train; *Tuttle v. Atlantic City R. Co.* 54 L. R. A. 582, which authorizes recovery for fall while trying to escape from derailed car; *Palmer v. Warren Street R. Co.* 63 L.R.A. 507, which holds passenger not negligent in jumping from moving car to avoid impending collision.

Cited in note (37 L.R.A.(N.S.) 53) on care required in sudden emergency.

Interference with verdict for excessive damages.

Cited in *Smith v. Times Pub. Co.* 178 Pa. 524, 35 L. R. A. 827, 39 W. N. C. 347, 36 Atl. 296 (dissenting opinion), majority holding right to jury trial not violated by reversal of judgment for excessive damages; *Boggess v. Metropolitan Street R. Co.* 118 Mo. 341, 24 S. W. 210 (dissenting opinion), majority expressing opinion that findings of fact as to amount of damages in actions for personal injuries may be reviewed on appeal; *Burdiet v. Missouri P. R. Co.* 123 Mo. 252, 26 L. R. A. 401, 45 Am. St. Rep. 528, 27 S. W. 453 (dissenting opinion), majority holding appellate court should designate excess of damages and affirm judgment for remainder.

Use of street by abutter.

Cited in *Linderman v. Hershberger*, 47 Pa. Super. Ct. 311, holding that occupants of places of business on street when using sidewalk for receiving and sending merchandise, must exercise rights with due regard to safety of pedestrians; *Rech v. South Bethlehem*, 10 North Co. Rep. 233, to the point that as to what constitutes reasonable care in use of street if evidence is disputed and sufficient, must be submitted to jury.

Cited in note (125 Am. St. Rep. 349) on grant by city of right to use streets and sidewalks for private purpose.

14 L. R. A. 745, BROWN v. BIGNE, 21 Or. 260, 28 Am. St. Rep. 752, 28 Pac. 11. Champertous or otherwise illegal agreements.

Cited in *Johnson v. Van Wyck*, 4 App. D. C. 319, 41 L. R. A. 526, holding attorney's agreement to prosecute ejectment suit for half of recovery, champertous; *Casserleigh v. Wood*, 56 C. C. A. 218, 119 Fed. 314, denying specific performance of contract to furnish evidence establishing interest in mine and to pay costs in consideration of specified part of recovery; *Casserleigh v. Wood*, 14 Colo. App. 271, 59 Pac. 1024, holding to the contrary; *Young v. Thomson*, 14 Colo. App. 315, 59 Pac. 1030, denying validity of contract to suppress evidence material to codefendant's defense; *Jahn v. Champagne Lumber Co.* 157 Fed. 418, holding in absence of agreement to share in recovery, it is not violative of law or public policy to aid a poor suitor in maintaining a meritorious cause of action; *Roller v. Murray*, 107 Va. 546, 59 S. E. 421, holding void a contract between a litigant and attorney whereby the attorney carries on the litigation at his own expense for a share of amount to be recovered.

Cited in note (6 Eng. Rul. Cas. 390) on invalidity of champertous agreement or one for compounding a felony.

Distinguished in *Holland v. Sheehan*, 108 Minn. 367, 23 L.R.A.(N.S.) 512, 122 N. W. 1, 17 A. & E. Ann. Cas. 687, holding champertous a contract between a

layman and a lawyer whereby the former agrees to drum up business for a share in the returns from the litigation.

14 L. R. A. 749, **CLARK v. WILMINGTON & W. R. CO.** 109 N. C. 430, 14 S. E. 43.
Duty towards one guilty of contributory negligence.

Cited in *Emry v. Roanoke Nav. & Water Power Co.* 111 N. C. 102, 17 L. R. A. 702, 16 S. E. 18, denying landlord's liability to tenant for accidental destruction of tenant's buildings which latter refused to remove.

Cited in note (69 L.R.A. 517, 526, 538, 549, 550, 552, 553, 554, 555, 556) on care due to sick, infirm, or helpless persons, with whom no contract relation is sustained.

— **Of railroad company.**

Approved in *Little v. Carolina C. R. Co.* 118 N. C. 1075, 24 S. E. 514, denying liability for injury to one on trestle where engineer believed he had reached safe place on cap sill before allowing train to proceed; *Strickland v. Atlantic Coast Line R. Co.* 150 N. C. 8, 63 S. E. 161, holding where whistle was sounded before train went upon bridge engineer was not bound to stop train as he had right to suppose one walking on tracks would not go upon bridge before an approaching train.

Cited in *Norwood v. Raleigh & G. R. Co.* 111 N. C. 240, 16 S. E. 4, holding neglect of trespasser to avoid train, when possible, bars recovery; *Little v. Caroline C. R. Co.* 119 N. C. 776, 26 S. E. 106, upholding dismissal of action for damages to one injured by crossing trestle knowing train due; *Smith v. Norfolk & S. R. Co.* 114 N. C. 754, 25 L. R. A. 298, 19 S. E. 863, holding failure of engineer to use ordinary care to discover drunken person, not gross negligence barring defense of contributory negligence; *Pickett v. Wilmington & W. R. Co.* 117 N. C. 631, 30 L. R. A. 258, 53 Am. St. Rep. 611, 23 S. E. 264, holding failure of engineer to keep vigilant outlook makes company liable for death of one lying on track; *Lloyd v. Albemarle & R. R. Co.* 118 N. C. 1012, 54 Am. St. Rep. 764, 24 S. E. 805, sustaining liability for running over person on trestle, resulting from neglect to provide headlight; *Baker v. Wilmington & W. R. Co.* 118 N. C. 1020, 24 S. E. 415, and *Lea v. Durham & N. R. Co.* 129 N. C. 463, 40 S. E. 212, denying liability when company and decedent were both negligent; *Purcell v. Chicago & N. W. R. Co.* 109 Iowa, 631, 77 Am. St. Rep. 557, 80 N. W. 682, holding failure to stop train when possible, saving collision with trespasser on bridge, renders company liable; *Chesapeake & O. R. Co. v. Hawkins*, 109 C. C. A. 258, 187 Fed. 573, holding that person who made honest effort to escape in reasonably prudent way, performed legal duty imposed upon him; *Duncan v. St. Louis & S. F. R. Co.* 152 Ala. 125, 44 So. 418, holding railroad company was not bound to keep a lookout for trespassers, and were not negligent in failing to discover one on the track; *Snipes v. Camp Mfg. Co.* 152 N. C. 46, 67 S. E. 27, holding an engineer knowing that injuries to workmen on track is not improbable unless warning is given should under the circumstances resolve doubts in favor of the safer course.

Cited in footnotes to *Becker v. Louisville & N. R. Co.* 53 L. R. A. 268, which requires stopping to enable trespasser discovered on railroad bridge to escape; *Neal v. Carolina C. R. Co.* 49 L. R. A. 684, which denies liability for death of person on track by train running at excessive speed without ringing bell; *Cleveland, C. C. & St. L. R. Co. v. Tartt*, 49 L. R. A. 99, which denies duty towards trespassers on track before discovery; *Raines v. Chesapeake & O. R. Co.* 24 L. R. A. 226, which holds railroad employees have right to presume, on giving signals, that person on track will step aside.

Cited in notes (25 L. R. A. 289) on duty to maintain lookout on railroad train;

of irrigation district not authorized to incur debts for construction of canal without "construction fund;" *Herring v. Modes to Irrig. District*, 95 Fed. 717; *People ex rel. Brady v. Brown's Valley Irrig. District*, 119 Fed. 538, affirming legislature's power to create irrigation district for irrigation of arid lands; *Herring v. Modes to Irrig. District*, 95 Fed. 716, holding that exclusion of lands from irrigation district after organization does not affect validity of bonds; *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 13, 46 L. ed. 779, 22 Sup. Ct. Rep. 531, denying to irrigation district, defense of nonexistence of corporation in action to collect municipal bonds; *People ex rel. Sels v. Reclamation Dist. No. 551*, 117 Cal. 123, 48 Pac. 1016, holding reclamation district not municipal corporation rendering void, property qualification of voters; *Belknap Sav. Bank v. Lamar Land & Canal Co.* 28 Colo. 339, 64 Pac. 212, holding irrigation canal company, not quasi-public corporation making receiver's certificates lien co-ordinate with mortgage; *Prescott Irrig. Co. v. Flathers*, 20 Wash. 459, 55 Pac. 635, upholding right to create corporation for irrigation of crops in sage-brush soil; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 159, 41 L. ed. 389, 17 Sup. Ct. Rep. 56; *Tulare Irrig. Dist. v. Shepard*, 185 U. S. 13, 46 L. ed. 779, 22 Sup. Ct. Rep. 531,—holding irrigation districts public municipal corporations; *People v. Selma Irrig. Dist.* 98 Cal. 208, 32 Pac. 1047; *Boehmer v. Big Rock Irrig. Dist.* 117 Cal. 28, 48 Pac. 908,—holding an irrigation district organized under a general law of the state a public corporation; *Augusta v. Augusta Water Dist.* 101 Me. 152, 63 Atl. 663, holding a water district to be regarded as a public municipal corporation; *Herring v. Modesto Irrig. Dist.* 95 Fed. 717, holding a district organized under legislative act providing for the organization and government of irrigation districts, is at least a de facto municipal corporation; *Whipple v. Tuxworth*, 81 Ark. 402, 99 S. W. 86, holding improvement districts of the state endowed by law with perpetual succession until their object is accomplished are corporations; *Hertle v. Ball*, 9 Idaho, 199, 72 Pac. 963, holding directors of an irrigation district are public officers within meaning of statutes governing elections; *Healey v. Anglo-California Bank*, 5 Cal. App. 282, 90 Pac. 54, on an irrigation district as a public municipal corporation and its officers public officers.

Irrigation or drainage as public utility.

Cited in *Rico v. Snider*, 134 Fed. 957, holding reclamation of swamp lands is a public work, control over which is vested in the legislature of the state; *Albuquerque Land & Irrig. Co. v. Gutierrez*, 10 N. M. 237, 61 Pac. 357, holding in arid regions the construction of reservoirs, canals, and ditches for the use of the public in irrigating lands is certainly as much for a public purpose as railroads or public roads; *Lindsay Irrig. Co. v. Mehrtens*, 97 Cal. 679, 32 Pac. 802, holding a legislative declaration that the right of eminent domain may be exercised in supplying water by canals to a farming neighborhood is expressive of a public use; *Prescott Irrig. Co. v. Flathers*, 20 Wash. 459, 55 Pac. 635, holding value of land is enhanced by the use of water, and the public interests benefited; *Laguna Drainage Dist. v. Charles Martin Co.* 144 Cal. 211, 77 Pac. 933, holding it sufficient to constitute a public use, that all within the district will be in common benefited by it.

Cited in note (102 Am. St. Rep. 828, 832) on uses for which power of eminent domain cannot be exercised.

Disapproved in *Bradley v. Fallbrook Irrig. Dist.* 68 Fed. 956, holding the taking of private property by an irrigation district is not such a public use as legally justifies exercise of the right of eminent domain.

Organisation of irrigation district.

Cited in *Rothchild Bros. v. Rollinger*, 32 Wash. 310, 73 Pac. 367, holding stat-

ute requiring petition of "fifty or majority of freeholders" complied with by petition signed by forty-two; *Anderson v. Grand Valley Irrig. Dist.* 35 Colo. 533, 85 Pac. 313, upholding law providing for organization and government of irrigation districts; *State ex rel. Harris v. Hanson*, 80 Neb. 731, 115 N. W. 294, holding the formation of a reclamation district, the boundaries of which are fixed by the county commissioners, upon a majority vote of property owners of the district, does not contravene any constitutional provision.

Validity of special laws.

Cited in *Escondido High School District v. Escondido Seminary*, 130 Cal. 134, 62 Pac. 401, holding valid act providing sales of land for nonpayment of irrigation assessment not invalidated by misnomer; *Van Harlingen v. Doyle*, 134 Cal. 57, 54 L. R. A. 773, 66 Pac. 44, declaring void, law prohibiting public printing contracts with papers established less than one year; *Skinner v. Garnett Gold Min. Co.* 96 Fed. 743, holding valid, act requiring corporations to pay employees monthly; *Woodward v. Fruitvale Sanitary District*, 99 Cal. 562, 34 Pac. 239, holding act authorizing organization of sanitary districts not void for interference with municipal rights; *People ex rel. Post v. San Joaquin Valley Agri. Asso.* 151 Cal. 802, 91 Pac. 740, holding it within power of state to organize and carry on district agricultural associations; *Nevada Nat. Bank v. Kern County*, 5 Cal. App. 650, 91 Pac. 122, holding statute providing for assessment and levy sufficient to provide for interest on bonds of an irrigation district is not obnoxious to the constitution as to imposition of taxes; *Cullen v. Clendora Water Co.* 113 Cal. 516, 39 Pac. 769, upholding legislation providing for judicial examination and confirmation of bonds of irrigation districts, in advance of any controversy as to rights under them; *Jenison v. Redfield*, 149 Cal. 503, 87 Pac. 62, holding it for the public welfare that protection be afforded certain lands by irrigation district legislation; *Little Walla Walla Irrig. Dist. v. Preston*, 46 Or. 6, 78 Pac. 982, upholding legislation determining the extent of water rights and regulating and controlling the use of water; *Billings Sugar Co. v. Fish*, 40 Mont. 270, 26 L.R.A.(N.S.) 972, 106 Pac. 565, holding legislation providing for improvement and reclamation of agricultural lands is not invalid by reason of its affecting only a portion of the state.

Cited in footnote to *Sutton v. State*, 33 L. R. A. 589, which holds classification of counties according to previous census without respect to actual population void.

Cited in note (114 Am. St. Rep. 321) on constitutionality of local option laws. Distinguished in *State ex rel. Patterson v. Douglass County*, 47 Neb. 450, 66 N. W. 434, holding unconstitutional a statute providing for appointment of trustees who shall be a "body corporate and politic" for purpose of construction and operation of a canal for supplying power and light.

Notice of proceedings to take or burden property.

Cited in *Stumpf v. San Luis Obispo County*, 131 Cal. 368, 82 Am. St. Rep. 350, 63 Pac. 663, holding declaration of supervisors as to organization of sanitary districts nullity, record containing no recital of notice.

Cited in footnotes to *Branson v. Gee*, 24 L. R. A. 355, which holds act authorizing taking of gravel from private lands without notice for highway repairs valid; *Brown v. Markham*, 30 L. R. A. 84, which holds valid, statute authorizing logger's lien without notice to owner, but giving subsequent opportunity to intervene

Conclusiveness of decision as to petition.

Cited in *Wilcox v. Engebretsen*, 160 Cal. 293, 116 Pac. 750, holding that in absence of statute provisions, issuance of bonds for street imprisonments shall be conclusive evidence of fact that sufficient petition has been filed; *Alfalfa Irrig. Dist. v. Collins*, 46 Neb. 418, 64 N. W. 1086, holding a proceeding to establish

validity of bonds voted by an irrigation district, is an action in rem, and a decree entered is a bar to a subsequent action to enjoin issue of bonds on account of irregularity in organization of district; *Borchard v. Ventura County*, 144 Cal. 14, 77 Pac. 708, holding where jurisdiction of an inferior tribunal turns upon a disputed question of fact and evidence of that tribunal is not made part of returns, reviewing court may require inferior tribunal to certify evidence upon which it acted; *Murray v. Nixon*, 10 Idaho, 617, 79 Pac. 643, holding fact that certain plats and maps showing description of property are not incorporated as part of findings or judgment is not ground for reversal, where maps are brought up as part of record by stipulation of counsel.

Cited in notes (22 L.R.A.(N.S.) 49, 51, 53, 81, 86) on judicial power over eminent domain; (23 Am. St. Rep. 112) on collateral attack upon judgment; (88 Am. St. Rep. 932, 934; 102 Am. St. Rep. 821) on existence of public use as question for courts.

Distinguished in *People ex rel. Skelton v. Los Angeles*, 133 Cal. 343, 65 Pac. 749, holding conclusive, in absence of fraud, adjudication by city council that petition for annexation was signed by requisite number of electors.

Benefit as basis for assessment.

Cited in *McDonald v. Conniff*, 99 Cal. 391, 34 Pac. 71, holding valid, act for improvement of part of street and assessing cost upon abutters according to frontage; *Rolph v. Fargo*, 7 N. D. 658, 42 L. R. A. 653, 76 N. W. 242, holding legislature may assess paving tax upon abutting property in proportion to frontage; *Arnold v. Knoxville*, 115 Tenn. 219, 3 L. R. A.(N.S.) 845, 90 S. W. 409, 5 A. & E. Ann. Cas. 881, upholding a local assessment tax authorized by statute for improvement of districts within a city; *Duncan v. Ramish*, 142 Cal. 691, 76 Pac. 661, holding validity of an assessment for benefits cannot be attached collaterally by showing land of a particular individual was not benefited to extent of costs apportioned; *Roby v. Shunganunga Drainage Dist.* 77 Kan. 757, 95 Pac. 399, holding the benefits of a highway, levee or a drain may be so peculiar that justice would require cost to be levied upon a part of a township, county or other subdivisions of the state; *Tregea v. Owens*, 94 Cal. 319, 29 Pac. 643, holding assessment may be levied upon all real property within the district without deducting from value of property, amount of any mortgages existing thereon.

Cited in footnotes to *Reinken v. Fuehring*, 15 L. R. A. 624, which holds street-sweeping assessments sustainable only on ground of special benefit to property; *Denver v. Knowles*, 17 L. R. A. 135, which upholds local assessments on basis of frontage; *Oregon & C. R. Co. v. Portland*, 22 L. R. A. 713, which denies right to enforce local assessment on property not benefited; *Asberry v. Roanoke*, 42 L. R. A. 636, which denies right to impose on abutters liability for cost of street improvements in front of their property; *Webster v. Fargo*, 56 L. R. A. 156, which sustains statute charging entire cost of paving on abutters according to frontage; *Ramsey County v. Robert P. Lewis Co.* 53 L. R. A. 421, which sustains annual frontage tax on land in front of which water pipes laid; *Reelfoot Lake Levee District v. Dawson*, 34 L. R. A. 725, which holds tax on land alone in levee district void; *Cincinnati, L. & N. R. Co. v. Cincinnati*, 49 L. R. A. 566, which denies right to assess entire cost of land taken for highway on remaining land of same owner; *Crane v. West Chicago Park*, 26 L. R. A. 311, which holds maintenance and repair of boulevards by annual assessments not local improvement; *Schenectady v. Union College*, 26 L. R. A. 614, which holds bed of street not a lot lying on street for paving-assessment purposes; *Hawes v. Chicago*, 30 L. R. A. 225, which holds unjust, ordinance compelling substitution of cement for new plank sidewalk in front of vacant lot; *Rogers v. St. Paul*, 47 L. R. A. 537, which denies right to recover

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back money paid on assessment for uncompleted street improvement; *Smith v. Worcester*, 59 L. R. A. 728, which holds conclusive, decision of legislature that landowners within assessment district benefited by sewer; *Sears v. Board of Street Comrs.* 62 L.R.A. 144, which holds that cost and benefit of entire improvement should be considered in assessing property on two streets for cost of building a union passenger station and the extension of such streets; *Iowa Pipe & Tile Co. v. Callanan*, 67 L.R.A. 408, which holds void, assessment for sewer on abutting property only eight feet deep at same front foot rate as full sized lots.

Cited in notes (18 L. R. A. 544) on protection of private rights from interference by public; (24 L. R. A. 412) on right to impose on abutting owners duty or expense of sweeping, sprinkling, or cleaning streets or sidewalks; (28 L. R. A. 499) on charging expense of grading for sidewalk on abutting owner; (34 L. R. A. 200) on municipal taxation of rural lands within limits of corporation.

Alienation of tide lands.

Cited in *Oakland v. Oakland Water Front Co.* 118 Cal. 213, 50 Pac. 277 (dissenting opinion), majority holding state has power to alienate tide lands, subject to navigation rights.

Powers of legislature.

Cited in *Hilborn v. Nye*, 15 Cal. App. 303, 114 Pac. 801, holding that power of legislature is unlimited except as circumscribed by constitution; *Re Sanitary Board*, 158 Cal. 457, 111 Pac. 368, holding that in absence of constitutional restriction legislature has absolute power over organization, dissolution, extent and powers of municipal and other public corporations; *Potter v. Santa Barbara County*, 160 Cal. 356, 116 Pac. 1101, holding that formation of road district is function pertaining purely to legislative branch of government; *Mode v. Beasley*, 143 Ind. 320, 42 N. E. 727, holding the legislature could have authorized board to relocate county seat without any petition whatever authorizing ascertainment of the popular will; *Jackson County v. State*, 147 Ind. 490, 46 N. E. 908, holding the legislature has the right and power to provide for the levy of a tax upon a township in which the county seat was to be relocated; *Robinson v. Linscott*, 12 Cal. App. 433, 107 Pac. 703, on power of the legislature in matters of taxation.

Legislative discretion.

Cited in *People v. Ontario*, 148 Cal. 631, 84 Pac. 205, holding in absence of constitutional provision intimating power to fix boundaries can be conferred only on legislative bodies, question is one purely of policy, upon which determination by the legislature is conclusive; *Re Spencer*, 149 Cal. 400, 117 Am. St. Rep. 137, 86 Pac. 896, 9 A. & E. Ann. Cas. 1105, holding when presumption as to validity of a legislative act depends upon existence or nonexistence of some fact, the determination thereof is primarily for the legislature; *Sisson v. Buena Vista County*, 128 Iowa, 453, 70 L.R.A. 445, 104 N. W. 454; *Paxton & H. Irrigation Canal & Land Co. v. Farmers & M. Irrig. & Land Co.* 45 Neb. 896, 29 L.R.A. 857, 50 Am. St. Rep. 585, 64 N. W. 343,—holding if by any reasonable construction a designed use may be held to be public in a constitutional sense, the will of the legislature should prevail over any mere doubt of the court; *State ex rel. McCue v. Northern P. R. Co.* (N.D.) 25 L.R.A. (N.S.) 1006, 120 N. W. 869; *Shasta Power Co. v. Walker*, 149 Fed. 570,—holding in such case the courts will not disturb the judgment of the legislature; *Ex parte Dietrich*, 149 Cal. 107, 5 L.R.A. (N.S.) 874, 84 Pac. 770 (dissenting opinion), on legislative judgment as conclusive on courts.

Construction of statutes.

Cited in *Re Finley*, 1 Cal. App. 200, 81 Pac. 1041, holding power of construction should be exercised with extreme caution when the validity of a statute is

questioned; *Walker v. Shasta Power Co.* 19 L.R.A. (N.S.) 731, 87 C. C. A. 660, 160 Fed. 859, holding where it is uncertain and doubtful whether the use to which property is proposed to be devoted is of a public or private character, the legislative determination of question is of persuasive force; *People ex rel. Mattison v. Nye*, 9 Cal. App. 160, 98 Pac. 241, holding the presumption which attends every act of the legislature is that it is within its power and it rests upon the one drawing it in question to show wherein it is obnoxious.

Construction of statutory powers.

Cited in *Lincoln & D. County Irrig. Dist. v. McNeal*, 60 Neb. 619, 83 N. W. 847, holding resort must be had to statutes providing for irrigation district to determine power of board of directors to incur liability for work done on canal; *Ahern v. Board of Directors*, 39 Colo. 418, 89 Pac. 963, holding where a corporation itself comes into court for examination of regularity of its organization court should require proof of every act which the statute has made requisite; *Re Central Irrig. Dist.* 117 Cal. 389, 49 Pac. 354, holding where confirmation act expressly provides for a review of determination of board of supervisors, claim that decision of board is final, falls.

Statutory debt limit.

Cited in *Robertson v. Alameda Free Public Library*, 136 Cal. 405, 69 Pac. 88, holding a free library of a city does not fall within constitutional provision, as to power of creating indebtedness as it is not a city, county or town, or district, or other body therein described.

Due process of law.

Cited in *Ross v. Wright County*, 128 Iowa, 441, 1 L.R.A. (N.S.) 439, 104 N. W. 506, holding "due process of law" does not necessarily imply judicial procedure in a court of record or right of trial by jury.

14 L. R. A. 773, *RAY v. WILSON*, 29 Fla. 342, 10 So. 613.

Use of official seal on bonds.

Cited in *Stockton v. Powell*, 29 Fla. 78, 15 L. R. A. 55, 10 So. 688, holding seal of circuit court may be used on county bonds.

Mandamus.

Cited in *State ex rel. Atty. Gen. v. Johnson*, 30 Fla. 497, 18 L. R. A. 419, 11 So. 845, holding mandamus will lie to compel suspended tax collector to surrender official property; *Cameron v. Parker*, 2 Okla. 316, 38 Pac. 14, holding mandamus remedy to compel superintendent of public instruction to vacate office; *State ex rel. Concord v. Young*, 31 Fla. 603, 10 L. R. A. 639, 34 Am. St. Rep. 41, 12 So. 673, holding that right to appeal from judge's decision that he is disqualified, does not bar mandamus to compel him to hear case, if qualified; *State ex rel. Lamar v. Jacksonville Terminal Co.* 41 Fla. 405, 27 So. 225, holding statutory action for penalty for neglect to obey commissioner's order not bar to mandamus; *State ex rel. Ellis v. Atlantic Coast Line R. Co.* 53 Fla. 668, 13 L.R.A. (N.S.) 326, 40 So. 213, 12 A. & E. Ann. Cas. 359, holding the writ may be issued to specifically enforce performance of a duty imposed by law upon a railroad corporation where no other adequate remedy is provided by law.

— To compel payment.

Cited in *Walker v. Barnard*, 8 Tex. Civ. App. 17, 27 S. W. 726; *Thomas v. Mason*, 39 W. Va. 531, 26 L. R. A. 732, footnote p. 727, 20 S. E. 580; *Wyker v. Francis*, 120 Ala. 521, 24 So. 895,— holding owner of warrant drawn on municipal treasurer may compel payment by mandamus; *State ex rel. Exchange Bank v. Allison*, 155 Mo. 335, 56 S. W. 467 (dissenting opinion), majority holding de-

nial in return to alternative writ of mandamus to compel treasurer to pay warrants must be specific; *State v. Badnelley*, 31 R. I. 383, 79 Atl. 834, holding that mandamus lies to compel town treasurer to pay undisputed claim, where there remains only ministerial duty to pay it.

Cited in footnote to *State ex rel. Badger v. New Orleans*, 37 L. R. A. 540, which denies right to enforce by mandamus disputed claims against city.

Annotation in 14 L. R. A. 773, referred to particularly in *Chatters v. Coahoma County*, 73 Miss. 354, 19 So. 107, holding mandamus to compel supervisors to allow account properly refused as to portion not presented in form required by law.

Distinguished in *Appel v. State*, 9 Wyo. 197, 61 Pac. 1015, holding *prima facie* right to mandamus shown by allegations that board allowed claim and ordered it paid.

Return to an alternative writ.

Cited in *State ex rel. Kittel v. Jennings*, 47 Fla. 316, 35 So. 989, holding the return to an alternative writ should set up positive denial of facts stated or should so state facts in confession and avoidance as will advise court of all particulars necessary to pass upon return.

14 L. R. A. 781, *FT. WORTH & D. C. R. CO. v. ROBERTSON* (Tex.) 16 S. W. 1093.

Liability for dangerous premises or agencies.

Cited in *Ryan v. Towar*, 128 Mich. 472, 55 L.R.A. 313, 92 Am. St. Rep. 481, 87 N. W. 644, holding owner of an unused pump house is not liable for injuries to a girl of thirteen caused by her efforts to extricate a younger child from the water-wheel though children habitually crossed the premises with consent of owner; *Riedel v. West Jersey & S. R. Co.* 170 Fed. 817, holding railroad companies not liable for injuries to a child falling upon its unboxed third rail where child was attracted by flowers growing upon right of way and not to the character of the track itself.

Cited in footnotes to *Koelsch v. Philadelphia Co.* 18 L. R. A. 759, which requires system of inspection by gas companies insuring reasonable promptness in detecting leaks; *Biggs v. Consolidated Barb-Wire Co.* 44 L. R. A. 655, which holds owner liable for maintaining dangerous machinery on private grounds unprotected from visits of trespassing children; *Kopplekom v. Colorado Cement Pipe Co.* 54 L. R. A. 284, which holds owner of unclosed city lot liable for injury to young child by toppling over of large cement pipe used by children as plaything.

Cited in note (26 L. R. A. 687) on liability for dangerous condition of private grounds lying open beside highway or frequented path.

— **Of carrier.**

Cited in footnotes to *Knottnerus v. North Park Street R. Co.* 17 L. R. A. 726, which holds roller coaster not dangerous agency so as to make owner of pleasure resort liable for negligence of its owner; *Gay v. Essex Electric Street R. Co.* 21 L. R. A. 448, which holds leaving street car in street not invitation to children to play on same; *Barney v. Hannibal & St. J. R. Co.* 26 L. R. A. 847, which denies duty of railroad company to fence switch yards for protection of children; *Missouri, K. & T. R. Co. v. Edwards*, 32 L. R. A. 825, which denies liability of railroad company for injuries to child playing on bridge ties in fenced railroad yard; *Savannah, F. & W. R. Co. v. Waller*, 34 L. R. A. 459, which denies liability of railroad company for injury to seven-year-old boy running under freight car to get ball on request of employee; *George v. Los Angeles R. Co.* 46 L. R. A. 829, which denies company's liability to boys hurt while playing with trolley car left in street after

loosening brake; *Delaware, L. & W. R. Co. v. Reich*, 41 L. R. A. 831, which denies liability for injury to child playing on turntable on owner's private property; *Walsh v. Fitchburg R. Co.* 27 L. R. A. 724, which holds active vigilance not required to keep children from playing with turntable; *Edgington v. Burlington, C. R. & N. R. Co.* 57 L. R. A. 561, which holds railroad company liable for injuries to young children by unfastened turntable in unfenced lot near public way; *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 59 L. R. A. 920, which holds railroad company liable for injury to child on turntable not guarded or properly fastened.

Cited in notes (22 L.R.A. 306) on liability of railroad for accidents caused by wrongful acts of stranger; (4 L.R.A.(N.S.) 81) on liability of railroad for injury to children playing on turntable; (17 L.R.A.(N.S.) 921) on duty of owner of premises to protect licensee against hidden dangers.

Contributory negligence.

Cited in footnote to *Springer v. Byram*, 23 L. R. A. 244, which holds newsboy riding in passenger elevator in violation of known rule, a trespasser.

14 L. R. A. 785, *PENNSYLVANIA CO. v. LOMBARDO*, 49 Ohio St. 1, 29 N. E. 573.

Champerous contracts.

Cited in *Reece v. Kyle*, 49 Ohio St. 488, 16 L. R. A. 728, 31 N. E. 747, holding valid, agreement to collect assigned judgment for half obtained, paying all expenses if successful; *Brown v. Ginn*, 66 Ohio St. 325, 64 N. E. 123, holding assignment of accounts for collection, assignee having contingent fee and paying costs, champertous; *Galusha v. Wendt*, 114 Iowa, 615, 87 N. W. 512, holding champertous contract between county and attorney no defense to action for back taxes; *Wehmhoff v. Rutherford*, 98 Ky. 97, 32 S. W. 288, denying invalidity of agreement between attorney and client defense to action for money lost in gaming; *Prosky v. Clark*, 32 Nev. 446, 35 L.R.A.(N.S.) 517, 109 Pac. 793, holding that action to recover possession of contract interest in mining claim is maintainable although owner of interest made champertous assignment of portion of such interest to one who joined in action; *Seaton Mountain Electric Light, Heat & Power Co. v. Idaho Springs Invest. Co.* 49 Colo. 131, 33 L.R.A.(N.S.) 1078, 111 Pac. 834, holding that champertous contract cannot be interposed as defense to action, but only set up between parties on enforcement of contract; *Cumberland Teleph. & Teleg. Co. v. Maxberry*, 134 Ky. 647, 121 S. W. 447, holding champerty can only be set up by a party thereto when the champertous agreement is sought to be enforced; *Davy v. Fidelity & C. Ins. Co.* 78 Ohio St. 270, 17 L.R.A.(N.S.) 443, 125 Am. St. Rep. 694, 85 N. E. 504, on attitude of the court toward champertous contracts; *Emslie v. Ford Plate Glass Co.* 1 Ohio C. C. N. S. 606, 25 Ohio C. C. 551, holding that agreement to pay attorney share of recovery as compensation for his services and that no settlement shall be made without his consent is champertous.

Cited in footnote to *Croco v. Oregon Short-Line Ry.* 44 L.R.A. 285, which authorizes agreement that attorney's compensation shall depend on successes and be payable out of proceeds of litigation.

Cited in notes (83 Am. St. Rep. 168, 173) on champertous contracts between attorneys and clients; (35 L.R.A.(N.S.) 513) on right of third persons to take advantage of champerty.

14 L. R. A. 787, *HAYNES v. NOWLIN*, 129 Ind. 581, 28 Am. St. Rep. 213, 29 N. E. 389.

Right of action for alienating husband's affections — Against other woman.

Cited in *Adams v. Main*, 3 Ind. App. 236, 50 Am. St. Rep. 266, 29 N. E. 792, holding loss of consortium basis of action for alienation of affections; *Deitzman v. Mullin*, 108 Ky. 614, 50 L. R. A. 810, footnote p. 808, 94 Am. St. Rep. 390, 57 S. W. 247; *Beach v. Brown*, 20 Wash. 269, 43 L. R. A. 116, 72 Am. St. Rep. 98, 55 Pac. 46; *Wolf v. Frank*, 92 Md. 140, 52 L. R. A. 104, footnote p. 102, 48 Atl. 132, —upholding wife's right of action against another woman for alienating husband's affections; *Sims v. Sims*, 79 N. J. L. 580, 29 L.R.A.(N.S.) 845, 76 Atl. 1063, holding that wife may maintain action for alienation of husband's affection in her own name under statute; *Hamilton v. McNeill*, 150 Iowa, 487, 129 N. W. 480, to the point that guilty party to divorce cannot maintain action for alienation of affections; *Nolin v. Pearson*, 191 Mass. 290, 4 L.R.A.(N.S.) 649, 114 Am. St. Rep. 605, 77 N. E. 800, 6 A. & E. Ann. Cas. 658, holding such statutes enable the wife to maintain a cause of action for a criminal conversation with the husband; *Quick v. Church*, 23 Ont. Rep. 273, holding an action for alienation of husband affections lies against a woman who procures abandonment of wife that husband may live in adultery with her.

Cited in footnotes to *Clow v. Chapman*, 26 L. R. A. 412, which upholds wife's right of action against other woman for alienating husband's affections; *Houghton v. Rice*, 47 L. R. A. 310, which denies right of action against other woman for alienating husband's affections unaccompanied by adultery.

Cited in note (46 Am. St. Rep. 474) on wife's action for alienation of husband's affections.

Distinguished in *Kroessin v. Keller*, 60 Minn. 375, 27 L. R. A. 686, 51 Am. St. Rep. 533, 62 N. W. 438, denying wife's right to maintain action against another woman in nature of criminal conversation.

Disapproved in *Lellis v. Lambert*, 24 Ont. App. Rep. 657, holding action will not lie in favor of wife against another woman for alienation of husband's affections and criminal conversation with him.

— Against relative.

Followed in *Wolf v. Wolf*, 130 Ind. 599, 30 N. E. 306, without discussion.

Cited in *Holmes v. Holmes*, 133 Ind. 387, 32 N. E. 932, sustaining married woman's right to maintain action in her own name for alienation of husband's affections; *Williams v. Williams*, 20 Colo. 55, 37 Pac. 614, sustaining recovery for alienation of husband's affections by father's threat to disinherit; *Railsback v. Railsback*, 12 Ind. App. 662, 40 N. E. 276; *Gerner v. Gerner*, 185 Pa. 236, 40 L. R. A. 550, 42 W. N. C. 51, 64 Am. St. Rep. 646, 39 Atl. 884; *Warren v. Warren*, 89 Mich. 123, 14 L. R. A. 547, 50 N. W. 842; *Price v. Price*, 91 Iowa, 698, 29 L. R. A. 152, 51 Am. St. Rep. 360, 60 N. W. 202; *Lockwood v. Lockwood*, 67 Minn. 484, 70 N. W. 784, —sustaining wife's right of action against father and mother for alienation of husband's affection; *Reed v. Reed*, 6 Ind. App. 317, 51 Am. St. Rep. 310, 33 N. E. 636, holding wife must allege malice in action against mother for alienation of husband's affections; *Workman v. Workman*, 43 Ind. App. 386, 85 N. E. 997; *Smith v. Gillapp*, 123 Ill. App. 123, —holding an action for alienation of husband's affections is maintainable by the wife; *Gregg v. Gregg*, 37 Ind. App. 215, 75 N. E. 674, holding such action is maintainable although the wife becomes divorced from the husband; *Hodge v. Wetzler*, 69 N. J. L. 492, 55 Atl. 49, holding at common law a married woman had no right of action for the alienation of her husband's affections; *King v. Hanson*, 13 N. D. 97, 99

N. W. 1085, holding statutes giving her the same rights and liabilities as before marriage removes the disability which caused a denial of the remedy at common law; *Keen v. Keen*, 49 Or. 365, 10 L.R.A.(N.S.) 505, 90 Pac. 147, 14 A. & E. Ann. Cas. 45, holding by reason of statute removing from wife such civil disabilities as do not affect the husband, a wife may maintain an action for alienation of her husband's affections in her own name.

Cited in footnotes to *Hodgkinson v. Hodgkinson*, 27 L. R. A. 120, which holds one bringing about husband's desertion liable to suit by wife; *Tucker v. Tucker*, 32 L. R. A. 623, which holds parent not liable for advising son to separate from wife; *Betser v. Betser*, 52 L. R. A. 630, which sustains wife's right of action against brother-in-law for alienating husband's affection.

Married woman's rights and liabilities on contract.

Cited in *Worth v. Patton*, 5 Ind. App. 276, 31 N. E. 1130, sustaining agreement by husband to convey land in fee to wife in consideration of joining him in deed; *Dickey v. Kalfsbeck*, 20 Ind. App. 293, 50 N. E. 590, holding married woman liable upon covenants of warranty in conveyances of separate estate; *Lackey v. Boruff*, 152 Ind. 377, 53 N. E. 412, holding note and mortgage executed by husband and wife before act of 1881, subsequently renewed, to secure loan to wife for husband's benefit, voidable as to wife.

14 L. R. A. 791, *MULLIGAN v. NEW YORK & R. B. R. CO.* 129 N. Y. 506, 42 N. Y. S. R. 83, 26 Am. St. Rep. 539, 29 N. E. 952.

Master's liability for acts of servant.

Cited in *Smith v. New York C. & H. R. R. Co.* 78 Hun, 526, 29 N. Y. Supp. 540, denying company's liability for injury to bystander caused by employee's explosion of torpedoes for amusement; *Finley v. Hudson Electric R. Co.* 64 Hun, 374, 19 N. Y. Supp. 621, holding assent of company not implied by motorman's invitation to boy to ride in return for opening switch; *Willis v. Metropolitan Street R. Co.* 76 App. Div. 345, 78 N. Y. Supp. 478, holding street car company liable for conductor's striking one who boarded car after being told it was full; *Gardner v. Interborough Rapid Transit Co.* 45 Misc. 425, 90 N. Y. Supp. 373, holding a passenger cannot recover for injuries received through his voluntary and unexcusable interference in a quarrel between porter on train and strangers; *Schmidt v. New Orleans R. Co.* 116 La. 322, 7 L.R.A.(N.S.) 168, 40 So. 714, on liability of master for malicious acts of his servant.

Cited in footnotes to *Stephenson v. Southern P. Co.* 15 L. R. A. 476, which holds railroad company not liable for engineer's moving engine to frighten street car passengers at crossing; *Farber v. Missouri P. R. Co.* 20 L. R. A. 350, which holds driving of trespasser from freight train by brakeman not to be within scope of employment.

Cited in notes (27 L.R.A. 163, 195) on master's civil responsibility for wrongful or negligent act of his servant or agent towards one who has no claim on master by reason of contract incipient or perfected; (4 L.R.A.(N.S.) 500) on liability for malicious act of servant when master owes special duty to party injured; (40 L.R.A.(N.S.) 1036, 1050) on liability of carrier for wilful torts of servants to passengers; (26 Am. St. Rep. 134) on liability of principal acting by agent for malicious prosecution of criminal charge; (32 Am. St. Rep. 96, 101) on carrier's duty to protect passengers from assault; (88 Am. St. Rep. 793) on liability of principal for unauthorized acts of agent; (54 Am. St. Rep. 79; 17 Eng. Rul. Cas. 277, 278, 280) on master's liability for acts of servant.

Distinguished in *Tinker v. New York, O. & W. R. Co.* 71 Hun, 434, 24 N. Y.

senger by servant; (4 L.R.A.(N.S.) 284) on liability for arrest or false imprisonment by servant employed as detective, policeman or watchman.

Distinguished in *Palmeri v. Manhattan R. Co.* 133 N. Y. 264, 16 L. R. A. 137, footnote p. 136, 28 Am. St. Rep. 632, 30 N. E. 1001, holding carrier liable for agent's charging purchaser of ticket with passing counterfeit money and detaining her till arrival of officer.

14 L. R. A. 798, *GILLINGHAM v. OHIO RIVER R. CO.* 35 W. Va. 588, 29 Am. St. Rep. 827, 14 S. E. 243.

Liability for act of agent.

Cited in *Hall v. Norfolk & W. R. Co.* 44 W. Va. 37, 41 L. R. A. 672, 67 Am. St. Rep. 757, 28 S. E. 754, denying carrier's responsibility for unauthorized act of agent in overcharging for ticket; *Smith v. Norfolk & W. R. Co.* 48 W. Va. 70, 35 S. E. 834, sustaining recovery for wilful assault upon passenger by conductor; *McDonald v. Cole*, 46 W. Va. 188, 32 S. E. 1032, holding that false statement of agent that he acts for partnership, when in fact he acts for corporation, does not bind corporation or its members as partners; *Teel v. Coal & Coke R. Co.* 66 W. Va. 316, 66 S. E. 470, holding that carrier is liable for wilful injury to passenger by servant, under provocation, unless justified under law of self-defense; *Layne v. Chesapeake & O. R. Co.* 66 W. Va. 618, 67 S. E. 1103, holding that carrier of passenger is under absolute contractual duty to protect them from unlawful injury at hands of servants; *Taillon v. Mears*, 29 Mont. 174, 74 Pac. 413, 1 A. & E. Ann. Cas. 613, holding as between carrier and passengers the carrier is liable for negligent acts of his servants though outside scope of employment.

Cited in footnote to *Farber v. Missouri P. R. Co.* 20 L. R. A. 350, which holds driving of trespasser from freight train by brakeman not to be within scope of employment.

Cited in notes (4 L.R.A.(N.S.) 504) on liability for malicious act of servant when master owes special duty to party injured; (40 L.R.A.(N.S.) 1046, 1051, 1053, 1072, 1073) on liability of carrier for wilful torts of servants to passengers; (32 Am. St. Rep. 90, 96) on carrier's duty to protect passengers from assault; (88 Am. St. Rep. 797) on liability of principal for unauthorized acts of agent; (17 Eng. Rul. Cas. 280) on master's liability for acts of servant.

— For causing arrest.

Cited in *Claiborne v. Chesapeake & O. R. Co.* 46 W. Va. 366, 33 S. E. 262, holding probable cause in passenger's intention to use knife relieves company from punitive damages for conductor's causing arrest; *Atchison, T. & S. F. R. Co. v. Henry*, 55 Kan. 723, 29 L. R. A. 467, footnote p. 465, 41 Pac. 952, holding carrier liable for arrest of passenger without warrant at instance of conductor; *Missouri, K. & T. R. Co. v. Warner*, 19 Tex. Civ. App. 470, 49 S. W. 254, affirming liability for arrest without warrant of one attempting to sell railroad ticket; *Tyson v. Joseph H. Bauland Co.* 68 App. Div. 315, 74 N. Y. Supp. 59, denying damages, when evidence insufficient to show recovery for false imprisonment or malicious prosecution for arrest of customer by special officer; *Mayfield v. St. Louis, I. M. & S. R. Co.* 97 Ark. 28, 32 L.R.A.(N.S.) 528, 133 S. W. 168, holding railroad not liable to one arrested by police officer while passenger on its train because conductor pointed him out to officer with apparent authority; *Rand v. Butte Electric R. Co.* 40 Mont. 415, 107 Pac. 87, holding if wrong was done by the officer during course of his duty as employee, the employer is liable even if act is done in excess of authority.

Cited in footnotes to *Staples v. Schmid*, 19 L. R. A. 824, which holds salesman

within scope of employment in causing arrest and search of person for stolen property; *Central R. Co. v. Brewer*, 27 L. R. A. 63, which denies implied authority of street railway superintendent to cause arrest for giving counterfeit money; *Eichengreen v. Louisville & N. R. Co.* 31 L. R. A. 702, which holds carrier liable for false imprisonment procured by railroad detective; *Little Rock Traction & Electric Co. v. Walker*, 40 L. R. A. 473, which denies carrier's liability for arrest for nonpayment of fare of street car passenger by policeman called by conductor, who was only authorized to put delinquent passengers off car; *Palmer v. Maine C. R. Co.* 44 L. R. A. 673, which holds passenger's unreasonable refusal to tell whether name on mileage ticket is own no justification for procuring his arrest; *Brunswick & W. R. Co. v. Ponder*, 60 L. R. A. 714, which denies carrier's liability for failure to prevent illegal arrest by officer or for stopping train to permit removal; *Markley v. Snow*, 64 L. R. A. 685, denying liability of master for arrest, long after alleged burning, by employees charged with care of property; *Daniel v. Atlantic C. L. R. Co.* 67 L.R.A. 455, which holds railroad company not liable for arrest by cashier with power to collect money, give receipts, sell tickets, care for money received and forward it to treasurer, of innocent person whom he suspects of having stolen money which has come into his possession; *Texas Midland Railroad v. Dean*, 70 L.R.A. 943, which holds railroad company liable for act of baggage master in assisting in wrongful arrest at instance of city authorities of passenger awaiting at station for train.

Cited in notes (14 L.R.A. 795) on master's liability for false arrest, imprisonment, or malicious prosecution by servant; (7 L.R.A.(N.S.) 167) on liability of carrier for arrest of passenger by servant.

Distinguished in *Owens v. Wilmington & W. R. Co.* 126 N. C. 141, 78 Am. St. Rep. 642, 35 S. E. 259, denying company's liability for act of conductor indicating passenger mentioned in telegram to sheriff.

Relation between railroad and police officer protecting its property.

Cited in *McKain v. Baltimore & O. R. Co.* 65 W. Va. 238, 23 L.R.A.(N.S.) 295, 131 Am. St. Rep. 964, 64 S. E. 18, 17 A. & E. Ann. Cas. 634, holding the relation of master and servant may exist between a special police officer and a railroad, where such officer is engaged in special services in protecting railroad property.

Presumption from being in passenger coach.

Cited in *Anderson v. Missouri P. R. Co.* 196 Mo. 459, 113 Am. St. Rep. 748, 93 S. W. 394, holding the presumption is indulged that one in the coach for carriage of passengers at time of collision was lawfully in such coach.

Cited in note (61 Am. St. Rep. 78) on presumption that person on train is passenger.

"Just" or "probable" cause.

Cited in *Davis v. Chesapeake & O. R. Co.* 61 W. Va. 249, 9 L.R.A.(N.S.) 995, 56 S. E. 400, holding an instruction that uses the words, "just cause" instead of the words, "probable cause" is misleading and erroneous.

Liability of corporation for tort.

Cited in *West Virginia Transp. Co. v. Standard Oil Co.* 50 W. Va. 615, 56 L. R. A. 807, 88 Am. St. Rep. 895, 40 S. E. 591, holding corporation liable for torts committed in pursuance of conspiracy to ruin business of another; *Standard Oil Co. v. State*, 117 Tenn. 666, 10 L.R.A.(N.S.) 1028, 100 S. W. 705, holding a corporation liable for tortuous act of its agents and officers.

Definition of false imprisonment.

Cited in *Whitman v. Atchison, T. & S. F. R. Co.* 85 Kan. 158, 34 L.R.A.(N.S.) 1033, 116 Pac. 234, to the point that false imprisonment is unlawful physical restraint by one person of another's liberty.

Exemplary damages.

Cited in note (28 Am. St. Rep. 871) on exemplary or punitive damages.

14 L. R. A. 804, *FT. WAYNE ELECTRIC LIGHT CO. v. MILLER*, 131 Ind. 499, 30 N. E. 23.

Forfeiture of subscription for improvement.

Cited in *McClanahan v. Payne*, 86 Mo. App. 294, holding establishment, without maintenance, of railroad at agreed point insufficient to enforce payment of subscription.

Distinguished in *Hudson v. Archer*, 9 S. D. 245, 68 N. W. 541, denying recovery of bonus paid for erection and operation of mill, after breach of contract to run same for five years; *Coos Bay R. Co. v. Nosler*, 30 Or. 557, 48 Pac. 361, holding mere failure to complete railroad within specified time, not total failure of consideration entitling subscriber to repayment.

Nature of a subscription to a joint enterprise.

Cited in *McCleary v. Chipman*, 32 Ind. App. 499, 68 N. E. 320, on nature of contract of a subscriber to a joint enterprise.

14 L. R. A. 809, *PEOPLE v. MURRAY*, 89 Mich. 276, 28 Am. St. Rep. 294, 50 N. W. 995.

Right to public trial by jury.

Cited in *People v. Yeager*, 113 Mich. 229, 71 N. W. 491, declaring void, statute authorizing exclusion of spectators from court room during specified criminal cases; *People v. Warren*, 122 Mich. 509, 80 Am. St. Rep. 582, 81 N. W. 360, holding direction of verdict of conviction reversible error; *People v. Hartman*, 103 Cal. 245, 42 Am. St. Rep. 108, 37 Pac. 153, reversing conviction for violation of accused's right to public trial; *People v. Hall*, 23 Misc. 484, 49 N. Y. Supp. 158, granting certificate of reasonable doubt for exclusion of public from court room during trial for extortion; *State v. Dreany*, 65 Kan. 296, 69 Pac. 182, upholding right of one on trial for conspiracy, to have private stenographer present to assist counsel; *State v. Osborne*, 54 Or. 293, 103 Pac. 62, 20 Ann. Cas. 627, holding that in prosecution with intent to commit rape court may exclude from court room all persons except defendant, attorneys and court officers; *Tilton v. State*, 5 Ga. App. 64, 62 S. E. 651, holding an order clearing the court of all persons not connected with the case, over defendant's objection, is objectionable though indecent matters are being considered and also citing annotation on this point.

Cited in notes (9 L.R.A.(N.S.) 279) on right to exclude public during criminal trial; (85 Am. St. Rep. 188) on right to public trial.

Distinguished in *Jackson v. Com.* 100 Ky. 254, 66 Am. St. Rep. 330, 38 S. W. 422, holding accused's rights not prejudiced by use of ticket system for admittance to court room; *State v. Callahan*, 100 Minn. 68, 110 N. W. 342, holding where court room is crowded with obtrusive spectators much to the embarrassment of the prosecuting witness court may temporarily clear the room to aid in eliciting the required testimony.

Plea of former jeopardy.

Cited in footnote to *Com. v. Murphy*, 48 L. R. A. 393, which holds sentence imposed after reversal of former sentence on prisoner's application not double jeopardy.

Discretionary power in issuing writ of certiorari.

Cited in *People v. James*, 155 Mich. 549, 119 N. W. 1073, holding where another

inquiry into the subject of the act; *Platt v. Rowand*, 54 Fla. 244, 45 So. 32, holding merely technical omissions will not vitiate.

Necessity of objection for review on appeal.

Cited in *Sullivan v. Richardson*, 33 Fla. 112, 14 So. 692, holding failure to object to absence of proper execution of deed prevents consideration on appeal; *Hoodless v. Jernigan*, 46 Fla. 218, 35 So. 656, holding reviewing court cannot consider objections to admissibility of evidence, not made in the court below.

Validity of statutes affecting contracts.

Cited in *Burget v. Merritt*, 155 Ind. 149, 57 N. E. 714, holding contract not impaired by statute enacted subsequent to grant, by binding children of former marriage, conveying subject to childless second wife's interest; *Evans-Snyder-Buel Co. v. McFadden*, 58 L. R. A. 911, 44 C. C. A. 512, 105 Fed. 312 (dissenting opinion), majority holding judgment by default against debtor in attachment suit establishes no lien superior to mortgagee, preventing subsequent statute validating mortgages, defeating attachment.

Cited in note (22 L. R. A. 383) on constitutionality of statute legalizing invalid contract.

Judicial notice.

Cited in note (113 Am. St. Rep. 869, 870) on judicial notice of foreign laws.

14 L. R. A. 825, *WILLIAMS v. BENET*, 35 S. C. 160, 14 S. E. 288, 311.

What constitutes a quorum.

Cited in *Aultman v. Utsey*, 35 S. C. 597, 14 S. E. 351, holding two associate justices may determine case without chief justice; *Schuylkill Haven Nominations*, 20 Pa. Co. Ct. 420, holding two members of borough committee no authority to change meeting place.

Cited in footnotes to *Butts v. Armor*, 26 L. R. A. 213, which requires consultation of all judges of court of common pleas upon entering judgment or order after adjournment; *Cowan v. Murch*, 34 L. R. A. 538, which sustains right of two of three members of court to decide cases; *Harroun v. Brush Electric Light Co.* 38 L. R. A. 615, which holds unanimous decision requiring leave to appeal therefrom made when all judges sitting agree.

14 L. R. A. 828, *HAWVER v. WHALEN*, 49 Ohio St. 69, 29 N. E. 1049.

Liability for negligence — Of independent contractor.

Cited in *Fisher v. Tryon*, 15 Ohio C. C. 558, holding owner liable for injuries sustained by one falling into excavation made by plumber in repairing water pipes; *Covington & C. Bridge Co. v. Patrick*, 5 Ohio N. P. 375, affirming owner's liability for injury resulting from contractor's carelessness in razing walls; *Wright v. Big Rapids Door & Blind Mfg. Co.* 124 Mich. 95, 50 L. R. A. 496, footnote p. 495, 82 N. W. 829, denying liability of owner of premises for negligent pilng of lumber taken from car by independent contractor; *Thomas v. Harrington*, 72 N. H. 48, 65 L. R. A. 750, 54 Atl. 285, holding owner not relieved from liability for injury to traveler by independent contractor's failure to guard trench; *Laffery v. United States Gypsum Co.* 83 Kan. 354, — L.R.A.(N.S.) —, 111 Pac. 498, Ann. Cas. 1912 A, 590, holding that owner is liable to third person for injuries caused by work done by independent contractor where contract requires performance of work intrinsically dangerous; *McHarge v. Newcomer*, 117 Tenn. 611, 9 L.R.A.(N.S.) 298, 100 S. W. 700, holding owner of building in populous part of city liable for injuries caused by falling of an awning while repairs were being made by an independent contractor; *Hollis v. Kansas City M. Retail Merchants' Asso.* 205 Mo. 519, 14 L.R.A.(N.S.) 284, 103 S. W. 32, holding

a merchants association of a city is not relieved from liability from fact that an exhibition is provided and conducted by an amusement company, in absence of due precautions to avert injuries; *Hunter v. Southern R. Co.* 152 N. C. 688, 29 L.R.A.(N.S.) 851, 136 Am. St. Rep. 854, 68 S. E. 237, holding railroad liable for negligent blasting by construction contractor; *Coney Island Co. v. Mitsch*, 3 Ohio N. P. N. S. 83, 15 Ohio S. & C. P. Dec. 657, holding owner of summer resort liable for injury to boy thrown from pony through negligence of contractors operating pony track; *Covington & C. Bridge Co. v. Patrick*, 5 Ohio N. P. 375, 7 Ohio S. & C. P. Dec. 401, holding owner liable for negligence of contractor in tearing down wall left in dangerous condition by fire; *Strong v. Pickering Hardware Co.* 9 Ohio C. C. 252, 6 Ohio C. D. 213, on liability of owner for injury to pedestrian falling over fence along outer edge of sidewalk erected by contractors for repair of building; *Gable v. Toledo*, 16 Ohio C. C. 523, 9 Ohio C. D. 68, holding city liable for injury from falling into excavation in street left unguarded by independent contractor; *Lytle v. Conover Bldg. Co.* 12 Ohio S. & C. P. Dec. 350, holding owner not liable for negligence of builder in dropping brick on head of pedestrian on sidewalk; *Vickers v. Kanawha & W. Valley R. Co.* 64 W. Va. 481, 20 L.R.A.(N.S.) 798, 131 Am. St. Rep. 929, 63 S. E. 367, holding that railroad is liable to laborer injured on work train by negligence of independent contractor as to guy-ropes of derrick over tracks.

Cited in footnotes to *Colgrove v. Smith*, 27 L. R. A. 590, which holds persons having franchises to lay water pipes in streets liable for independent contractor's negligence in doing so; *Negus v. Becker*, 25 L. R. A. 667, which holds employer not liable for independent contractor's negligence in raising party wall; *Boomer v. Wilbur*, 53 L. R. A. 172, which denies owner's liability for injury by fall of bricks through negligence of independent contractor repairing chimney; *Hoff v. Shockley*, 64 L. R. A. 538, denying owner's liability for injuries to traveler due to independent contractor's leaving obstructions in street; *Smith v. Milwaukee Builders' & T. Exchange*, 30 L. R. A. 504, which denies liability of employer retaining right of inspection for negligence of independent contractor; *Ketcham v. Newman*, 24 L. R. A. 102, which holds owner of premises contracting for excavations not liable for entry by contractor on adjoining premises; *Bonaparte v. Wiseman*, 44 L. R. A. 482, which requires one employing independent contractor to excavate near neighbor's house to notify neighbor or see that contractor exercises due care; *Berg v. Parsons*, 41 L. R. A. 391, which denies liability for independent contractor's negligence in blasting.

Cited in notes (76 Am. St. Rep. 406; 40 L.R.A. 345) on liability for negligence and torts of independent contractors; (65 L.R.A. 503) as to who are independent contractors; (65 L.R.A. 843) on liability for injuries caused by performance of work by independent contractor which is dangerous unless certain precautions are observed; (16 L.R.A.(N.S.) 255) on liability for torts of independent logging contractor.

Distinguished in *Strong v. Pickering Hardware Co.* 9 Ohio C. C. 252, holding instruction that plaintiff must show contractor's negligence in erecting obstruction, and absence of contributory negligence, error.

— Of landlord.

Cited in *Wertheimer v. Saunders*, 95 Wis. 589, 37 L. R. A. 148, footnote n. 146, 70 N. W. 824, holding landlord liable for carelessness of independent contractor in replacing roof; *Nahm v. Register Newspaper Co.* 120 Ky. 491, 87 S. W. 296, 9 Ann. Cas. 209, holding a landlord cannot relieve himself from liability in interfering with tenant's right to quiet enjoyment by employing an independent contractor.

Cited in footnotes to *Peerless Mill Co. v. Bagley*, 53 L. R. A. 285, which holds

landlord liable for independent contractor's negligence in putting in automatic fire extinguisher; *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.* 60 L. R. A. 116, which holds landlord liable to tenants of lower floor for injury from freezing of automatic fire extinguisher in portion retained by former though building heated by independent contractor; *Collins v. Lewis*, 19 L. R. A. 822, which holds excavation by adjoining owner breach of landlord's covenant for quiet enjoyment.

— Of railway company.

Cited in *Thompson v. Lowell, L. & H. Street R. Co.* 170 Mass. 582, 40 L. R. A. 347, footnote p. 345, 64 Am. St. Rep. 323, 49 N. E. 913, holding street railway company liable for injury to spectator at exhibition of shooting given by independent contractor on company's grounds; *Reilly v. Chicago & N. W. R. Co.* 122 Iowa, 528, 98 N. W. 464, denying company's liability for injury to servant of independent contractor due to train's throwing stone from track against former; *Brady v. Jay*, 111 La. 1073, 36 So. 132, holding owner of a logging road liable for destruction of property by fire, where locomotives were not equipped with spark arresters, though trains were operated by an independent contractor.

Cited in footnotes to *Leavitt v. Bangor & A. R. Co.* 36 L. R. A. 382, which denies liability of railroad company for contractor's negligence in communicating fire from cooking car while cutting wood for railroad company; *Larson v. Metropolitan Street R. Co.* 16 L. R. A. 330, which holds one employing contractor to excavate under supervision of employer's engineer liable for fall of adjoining building; *Erie R. Co. v. Salisbury*, 55 L. R. A. 578, which holds company liable to one injured at crossing by negligent operation of push car by one to whom loaned by foreman of gang of men in company's employ; *Carrico v. West Virginia C. & P. Ry.* 24 L.R.A. 50, which holds carrier liable for injury by obstruction resulting from independent contractor's work; *Sandford v. Pawtucket Street Ry.* 33 L.R.A. 564, which denies liability of street railway company for negligence of contractor building road; *Baltimore & O. & C. Ry. v. Paul*, 28 L. R. A. 216, which holds railroad company not liable for injury to brakeman of other company due to fellow servant's negligence; *Norfolk & W. Ry. v. Stevens*, 46 L. R. A. 367, which denies railroad company's liability for death of brakeman by fall of bridge constructed by independent contractor.

Disapproved in *Vickers v. Kanawha & W. Va. R. Co.* 64 W. Va. 481, 20 L.R.A. (N.S.) 793, 131 Am. St. Rep. 929, 63 S. E. 367 (as referred to in *Norfolk & Weston R. Co. v. Stevens*, 46 L.R.A. 367), holding the positive duties of a railroad company to its employees cannot be discharged by delegation of duties to others, however competent.

Dangerous agencies.

Cited in footnote to *Koelsch v. Philadelphia Co.* 18 L. R. A. 759, which requires system of inspection by gas company insuring reasonable promptness in detecting leaks.

Liability for injuries in blasting.

Cited in *Hunter v. Southern R. Co.* 152 N. C. 688, 29 L.R.A.(N.S.) 855, 136 Am. St. Rep. 854, 68 S. E. 237, holding that railroad is not relieved from liability for injury from blasting done by independent contractor where such work was inherently dangerous.

Cited in footnotes to *Wadsworth v. Marshall*, 32 L. R. A. 588, which sustains liability for failure to give notice of blast for injuries resulting from frightening horse which has passed place of blast; *Emry v. Roanoke Nav. & Water Power Co.* 17 L. R. A. 699, which holds one blasting on own land not liable for accidental destruction of unremoved buildings of former tenant; *Smith v. Day*, 49 L. R. A.

108, which holds assumption of risk from blasting near by, assumed by one going to sleep on boat at wharf; *Booth v. Rome, W. & O. Terminal Ry.* 24 L.R.A. 105, which holds no liability created by blasting, for injury by mere concussion to another's building.

Cited in notes (17 L. R. A. 729) on duty of those engaged in blasting as to safety of others; (17 L. R. A. 220) on injuries to land and buildings from blasting.

Liability of abutting owner for injury by defects in highway.

Cited in *Monypeny v. Metz*, 32 Ohio L. J. 316, holding owner liable for failure of contractor to guard cellar area; *Fisher v. Tryon*, 15 Ohio C. C. 556, 8 Ohio C. D. 565, holding that charge, in action for injury from falling in unguarded trench within curbstone made by independent contractor, that owner is liable if he had reason to anticipate injury from performance of work, is not error.

Cited in footnote to *Lincoln v. First Nat. Bank*, 60 L. R. A. 923, which holds purchaser at sheriff's sale not liable to city for amount of judgment against it, for injury, three weeks after sheriff's deed issued, from negligently constructed coal hole.

Cited in note (11 L.R.A.(N.S.) 994) on liability for failure to guard opening in sidewalk for commercial purposes, while in use by third person.

Distinguished in *Sammins v. Wilhelm*, 6 Ohio C. C. 568, 3 Ohio C. D. 588, holding abutting owner not liable for injury to person falling through sidewalk out of repair.

14 L. R. A. 836, *Re STEWART*, 131 N. Y. 274, 43 N. Y. S. R. 171, 30 N. E. 184. **Estates subject to collateral-inheritance tax.**

Cited in *Re Swift*, 137 N. Y. 83, 18 L. R. A. 711, footnote p. 709, 32 N. E. 1096, holding personal property of resident decedent out of this state subject to tax; *Re Embury*, 19 App. Div. 216, 79 N. Y. S. R. 881, 45 N. Y. Supp. 881, Reversing 20 Misc. 78, 45 N. Y. Supp. 821, holding property of nonresident in this state at time of decease, subsequently removed, not subject to inheritance tax; *Re Walworth*, 66 App. Div. 175, 72 N. Y. Supp. 984 (dissenting opinion), majority holding for purpose of tax, property considered as passing from person exercising power of appointment; *Emmons v. Shaw*, 171 Mass. 413, 50 N. E. 1033, holding donor of power of appointment decedent whose estate subject to tax; *Hoffman's Estate*, 5 Misc. 441, 26 N. Y. Supp. 888, holding collateral-tax law should be strictly construed in favor of legatee; *Fidelity Trust Co. v. McClain*, 113 Fed. 156, holding legacies passing under father's will, not subject to revenue tax enacted during mother's intervening estate; *Re Eldridge*, 29 Misc. 738, 62 N. Y. Supp. 1026, holding interests not determinable not subject to transfer tax; *Hoffman's Estate*, 5 Misc. 443, 26 N. Y. Supp. 888, holding expectant estates taxable upon death of testator; *Re Sloane*, 154 N. Y. 114, 47 N. E. 978, holding transfer tax measured by value of property at death of testator; *Re Wolfe*, 89 App. Div. 351, 85 N. Y. Supp. 949, holding tax upon rejected legacy assessed at same rate as though originally given residuary legatee; *People v. McCormick*, 208 Ill. 445, 64 L. R. A. 779, footnote p. 775, 70 N. E. 350, holding that tax cannot be imposed at testator's death upon corpus of estate when property devised in trust for twenty years.

Cited in footnotes to *Howe v. Howe*, 55 L. R. A. 626, which authorizes transfer on contingent interests not vesting within fixed time for paying tax; *Re Pell*, 57 L. R. A. 540, which holds void, tax on all remainders vesting prior to certain date but not coming into possession till after passage of act; *Re Dows*, 52 L. R. A. 433, which holds real property subject to power of appointment, converted into personalty, subject to transfer tax on personalty; *People v. McCormick*, 64

L.R.A. 775, which holds that a present succession tax cannot be assessed upon a remainder when it cannot be determined who will ultimately be entitled thereto.

Cited in notes (41 Am. St. Rep. 584, 585) on property subject to collateral inheritance tax; (127 Am. St. Rep. 1072; 33 L.R.A.(N.S.) 249) on inheritance or succession tax on property covered by power of appointment.

Distinguished in *Re Curtis*, 142 N. Y. 223, 36 N. E. 887, affirming 73 Hun, 189, 25 N. Y. Supp. 909, holding remainders not subject to collateral tax before termination of life estates.

— **Effect of statutes on estates created prior to enactment.**

Cited in *Re Vanderbilt*, 50 App. Div. 251, 63 N. Y. Supp. 1079, holding property subject to tax, which passed under power of appointment created by will taking effect before passage of transfer-tax act; *Re Langdon*, 153 N. Y. 9, 46 N. E. 1034; *Re Brooks*, 65 N. Y. S. R. 256, 32 N. Y. Supp. 176; *Re Harbeck*, 161 N. Y. 218, 55 N. E. 850, reversing 43 App. Div. 191, 59 N. Y. Supp. 362,—holding bequests, taking effect before passage of transfer-tax act, not subject to inheritance tax; *Re Hitchins*, 43 Misc. 493, 89 N. Y. Supp. 472, holding interest vesting prior to enactment of act not taxable; *Farmer's Loan & T. Co. v. Shaw*, 127 App. Div. 662, 56 Misc. 207, 107 N. Y. Supp. 337, holding that person exercising power acts by virtue of the will unaffected by statute restricting his personal right of disposition of property; *Hoyt v. Hancock*, 65 N. J. Eq. 690, 55 Atl. 1004, holding where fund is created by will with income payable to a person named with a power of appointment by will, the interest of one taking by such appointment is taxable.

Cited in footnote to *Re Delano*, 64 L. R. A. 279, holding power to tax exercise of power of appointment not destroyed because power created prior to act.

Distinguished in *Re Buckingham*, 106 App. Div. 18, 94 N. Y. Supp. 130, holding a transfer by power of appointment is a taxable transfer in same manner as though transfer came directly from the donee by will.

Construction of inheritance tax laws.

Cited in *State ex rel. Gage v. Probate Ct.* 112 Minn. 285, 128 N. W. 18, holding that inheritance tax becoming due when beneficiary takes possession must be computed upon value at time of decedent's death; *State ex rel. Foot v. Bazille*, 97 Minn. 14, 6 L.R.A.(N.S.) 737, 106 N. W. 93, 7 A. & E. Ann. Cas. 1056, holding a statute imposing a tax upon a class of citizens, must be given a fair and reasonable construction; *Beers v. Glynn*, 211 U. S. 483, 53 L. ed. 293, 29 Sup. Ct. Rep. 186, holding a tax is not legally imposed by declaring property taxable but failing to provide for its assessment.

Cited in note (127 Am. St. Rep. 1052, 1055) on construction of inheritance tax laws.

Surrogate's jurisdiction as to validity of devises.

Cited in *Re Ullmann*, 137 N. Y. 408, 33 N. E. 480, holding surrogate has jurisdiction to determine validity of disposition of residuary estate.

14 L. R. A. 841, *MEEKER v. NORTHERN P. R. CO.* 21 Or. 513, 28 Am. St. Rep. 758, 28 Pac. 639.

Proximate cause.

Followed in *Chicago, B. & Q. R. Co. v. Cox*, 51 Neb. 483, 71 N. W. 37, affirming company's liability for injuries to live stock although no actual collision.

Cited in *Mikesell v. Wabash R. Co.* 134 Iowa, 739, 112 N. W. 201, holding where legislature has made it the duty of railroads to fence their right of way, the matter of negligence of its employees in its operation is immaterial; *Meier v. Northern P. R. Co.* 51 Or. 74, 93 Pac. 691, holding a *prima facie* case made out

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in showing injury to a horse was caused either by striking and throwing it upon the fence, or in frightening it so it jumped upon the fence in its efforts to get away.

Cited in footnote to *Western R. Co. v. Mutch*, 21 L. R. A. 316, which holds excessive speed not proximate cause of death of boy attempting to catch on train.

Cited in notes (9 L.R.A.(N.S.) 361) on duty to fence right of way; (37 L.R.A.(N.S.) 1184) on railroads: liability for injury to stock other than by trains, because of breach of statutory duty to fence.

14 L. R. A. 846, *STATE v. BURGDOERFER*, 107 Mo. 1, 17 S. W. 646.

State's right to appeal.

Cited in *State v. Carr*, 142 Mo. 611, 44 S. W. 776, holding state not entitled to appeal from order quashing information for insufficiency.

Cited in note (19 L. R. A. 347) on right of state to appeal in criminal cases.

Sufficiency of title to act.

Cited in *State ex rel. Wolfe v. Bronson*, 115 Mo. 276, 21 S. W. 1125, sustaining act entitled "act to establish uniform course of books used in public schools, and to reduce price thereof;" *State ex rel. Keshlear v. Slover*, 134 Mo. 18, 31 S. W. 1054, sustaining constitutionality of act entitled "act establishing office of county marshal, defining duties and powers;" *State v. Kingsley*, 108 Mo. 139, 18 S. W. 994, holding "act to protect hotel and innkeepers" not void for lack of reference to liability of one obtaining board by false representations; *State v. Great Western Coffee & Tea Co.* 171 Mo. 643, 94 Am. St. Rep. 802, 71 S. W. 1011, holding body of act forbidding sale of baking powder containing alum not comprehended within title "to prevent use of chemicals in manufacture of foods;" *Williams v. Atchison, T. & S. F. R. Co.* 233 Mo. 677, 136 S. W. 304, to the point that title of act must express subject of act in such terms that members of legislature and people may not be left in doubt as to matter treated of; *State v. Ames*, 47 Wash. 331, 92 Pac. 137, holding the title "to establish pilot regulations" is broad enough to include a penalty for violation of the statute set forth in the act; *State ex rel. Equitable Life Assur. Soc. v. Vandiver*, 222 Mo. 251, 121 S. W. 45 (dissenting opinion), on sufficiency of the title to support act.

Cited in note (64 Am. St. Rep. 97) on sufficiency of title of statute.

Sufficiency of information.

Cited in *State v. Townsend*, 50 Mo. App. 694, sustaining conviction on information charging one with unlawfully recording and keeping devices for betting on races.

Special legislation.

Cited in *State v. Loomis* (Mo.) 21 L. R. A. 795, 20 S. W. 332, upholding act prohibiting mining and manufacturing corporations from issuing in payment of wages, non-negotiable order, payable otherwise than in lawful money.

Cited in note (78 Am. St. Rep. 250) on power of legislature to declare horse-racing criminal.

Distinguished in *State v. Walsh*, 136 Mo. 407, 35 L. R. A. 233, 37 S. W. 1112, holding void, act prohibiting book making except within limits of race course.

Duty of state to individual.

Cited in *State v. Thornton*, 108 Mo. 649, 18 S. W. 841, holding duty of state to pass laws protecting one against his own weakness.

Purposes for which public funds may be used.

Cited in *Deal v. Mississippi County*, 107 Mo. 468, 14 L. R. A. 623, 18 S. W. 24, declaring unconstitutional, act providing bounty for planting forest trees.

Construction of statutes.

Cited in *State v. Squibb*, 170 Ind. 492, 84 N. E. 969, holding the court cannot read into a statute a word which the court may think the legislature ought to have supplied.

14 L. R. A. 858, *KIMBERLAIN v. STATE*, 130 Ind. 120, 30 Am. St. Rep. 208, 29 N. E. 773.

Agreement that decision should control in other cause held not enforceable in *Kimberlin v. Tow*, 133 Ind. 698, 33 N. E. 770.

Vacancy in office.

Cited in *Koerner v. State*, 148 Ind. 167, 47 N. E. 323, holding office of trustee not vacated by failure to file bond as president of school board; *State ex rel. Cook v. Meares*, 116 N. C. 592, 21 S. E. 973, declaring void, election on March 9th to office of judge, created by act not ratified till March 12th; *State ex rel. Richardson v. Henderson*, 4 Wyo. 550, 22 L. R. A. 756, 35 Pac. 517, holding appointment to fill vacancy of state examiner until next meeting of legislature not terminated by meeting of legislature without taking action on governor's nomination; *Chadduck v. Burke*, 103 Va. 699, 49 S. E. 976, holding wherever the law provides for an incumbent holding over until his successor has been appointed and qualified, there is no vacancy in the office at the expiration of the fixed term; *State v. Fabrick*, 16 N. D. 98, 112 N. W. 74, holding the holding over pending the election and qualification of a successor is as much a part of term of office to which superintendent is elected as the two years stated term; *Balantyne v. Bower*, 17 Wyo. 365, 99 Pac. 869, 17 A. & E. Ann. Cas. 82, holding a vacancy is not created, where person elected dies before being qualified, but the incumbent will be entitled to hold over; *State ex rel. Doolittle v. Hays*, 91 Miss. 766, 45 So. 728, holding same where person voted for was not qualified to hold the office; *State ex rel. Hoyt v. Metcalfe*, 80 Ohio St. 265, 88 N. E. 738, holding the resignation of a judge embraced the authority to hold over until a successor should be elected and qualified; *Featherngill v. State*, 33 Ind. App. 686, 72 N. E. 181, holding a truant officer, duly appointed, entitled to the office until his successor was appointed and qualified; *State ex rel. Chenoweth v. Action*, 31 Mont. 41, 77 Pac. 299, holding the incumbent holds over in case of a tie vote until such time as the office is regularly filled.

Criticized in *Maddox v. York*, 21 Tex. Civ. App. 624, 54 S. W. 24, holding death of sheriff elect after expiration of predecessor's term creates vacancy which commissioner's court may fill by appointment.

Right of an officer in the office.

Cited in *Parsons v. United States*, 30 Ct. Cl. 244, holding a district attorney commissioned for a term of four years has no vested right in the office but holds subject to the right of removal.

Meaning of word "elected."

Cited in *State v. Gormley*, 53 Wash. 551, 102 Pac. 435, holding the word "elected" means elected by the same electoral body which elected the incumbent whose terms of office is described in statute.

Effect on bond of officer holding over.

Cited in *Baker City v. Murphy*, 30 Or. 416, 35 L. R. A. 95, 42 Pac. 133, holding sureties responsible for defalcation of city treasurer while holding over; *Grand Haven v. United States Fidelity & Guaranty Co.* 128 Mich. 108, 92 Am. St. Rep. 446, 87 N. W. 104, denying liability of sureties for shortage of city treasurer prior to approval of bond.

Validity of statute extending term of office.

Cited in *State ex rel. Harrison v. Menaugh*, 151 Ind. 273, 43 L. A. 413, 51 N. E. 117, sustaining statute extending town trustee's term of office by change in time of election.

Distinguished in *State ex rel. Cummings v. Trew hitt*, 113 Tenn. 568, 82 S. W. 480, holding legislature cannot extend term of office of a county officer where a constitutional restriction provides "that no county office created by the legislature shall be filled otherwise than by the people."

14 L. R. A. 860, *KRELL v. CODMAN*, 154 Mass. 454, 26 Am. St. Rep. 260, 28 N. E. 578.

Agreement to give property after death.

Cited in *Earle v. Angell*, 157 Mass. 296, 32 N. E. 164, sustaining parol agreement to pay money conditioned upon attendance at promisor's funeral; *Bromley v. Mitchell*, 155 Mass. 511, 30 N. E. 83, sustaining validity of deed executed just before death, of personalty in trust to apply income according to oral instructions; *Sheppey v. Stevens*, 185 Fed. 153, to the point that contracts which give to one party an interest in death of other party, as where benefit is to accrue to one upon death of other are not void as against public policy; *Oswald v. Nehls*, 233 Ill. 443, 84 N. E. 619, holding equity will enforce contract to dispose of property by will in a particular way, when a sufficient consideration supports it; *Jordan v. Abney*, 97 Tex. 303, 78 S. W. 486, on specific enforcement of a verbal contract to adopt.

Cited in footnotes to *Miller v. Western College*, 42 L. R. A. 797, which holds note given to college not invalidated by provision for payment before date fixed therein in case of donor's death; *Svanburg v. Fosseen*, 43 L. R. A. 427, which holds oral agreement to leave entire property at death to members of promisor's family taken out of statute of frauds by services rendered and sale of land at sacrifice by them for his benefit; *Bryson v. McShane*, 49 L. R. A. 527, which holds specifically enforceable, executed oral contract to give entire property for support during life and burial after death; *Owens v. McNally*, 33 L. R. A. 369, which holds oral contract by uncle to give niece property at death after performance of consideration by her enforceable after his death; *Swash v. Sharpsstein*, 32 L. R. A. 796, which holds parol agreement to convey land by will, void; *Wright v. Wright*, 23 L. R. A. 196, which holds contract to leave property to adopted child, taken out of statute of frauds by child's complete performance; *Jaffee v. Jacobson*, 14 L. R. A. 352, which holds unenforceable agreement to will property made by one dying before consideration completed; *Kofka v. Rosicky*, 25 L. R. A. 207, which holds oral contract to make adopted child heir valid by continuing parental relation until parent's death; *King v. King*, 52 L. R. A. 157, which authorizes recovery on fully executed promise to care for person for life though accompanied by void promise not to marry; *Clancy v. Flusky*, 52 L. R. A. 277, which authorizes specific performance of executed oral contract to convey land to son for taking care of father for life, though father left son before his death; *Nowack v. Berger*, 31 L. R. A. 810, which holds enforceable after performance of consideration, oral contract to adopt child as heir; *Emery v. Burbank*, 28 L. R. A. 57, which holds unenforceable in Massachusetts oral contract to make will valid in state where made; *Sumner v. Crane*, 15 L. R. A. 447, which authorizes probate of will attempting to dispose of property in violation of valid contract.

Cited in note (52 Am. St. Rep. 126) on liabilities of estates of decedents on contracts.

Annotation in 14 L. R. A. 860, referred to particularly in *Whiten v. Whiten*.

76 Ill. App. 570, holding contract based upon good consideration, relating to disposition of property by will, valid.

Consideration necessary to support contract.

Cited in *Hudson v. Miles*, 185 Mass. 586, 102 Am. St. Rep. 370, 71 N. E. 63, on consideration necessary to support bond under seal.

